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ABSTRACT

This document consists of the first 16 volumes (47 issues) of a serial devoted to law-related education (LRE) that offers background information on a wide range of legal issues as well as teaching strategies for LRE. Issues of the magazine focus on the law as it affects schools and young people, with articles on school discipline, juvenile justice, the legal rights of students, youth at risk, and drugs in the schools. Many themes in constitutional law with special emphasis on the First and Fourth Amendments, the Civil Rights Amendments, the separation of powers, the constitutional framework for declaring war, and the Rehnquist Court are featured. Some issues take a global perspective with articles on law in world cultures and international law. Special areas of the law including intellectual property, family law, privacy rights, and corrections are outlined in other issues. The material covers themes as they relate to the law such as sports, religion, discrimination, justice, ethics, and democracy. Each issue proposes teaching methods that involve class discussions, collaborative learning, mock trials, map exercises, and resource people. Many of the lesson plans include student handouts such as background sheets, cartoons, puzzles, and worksheets. (JD)

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Update on Law-Related Education, 1977-1992

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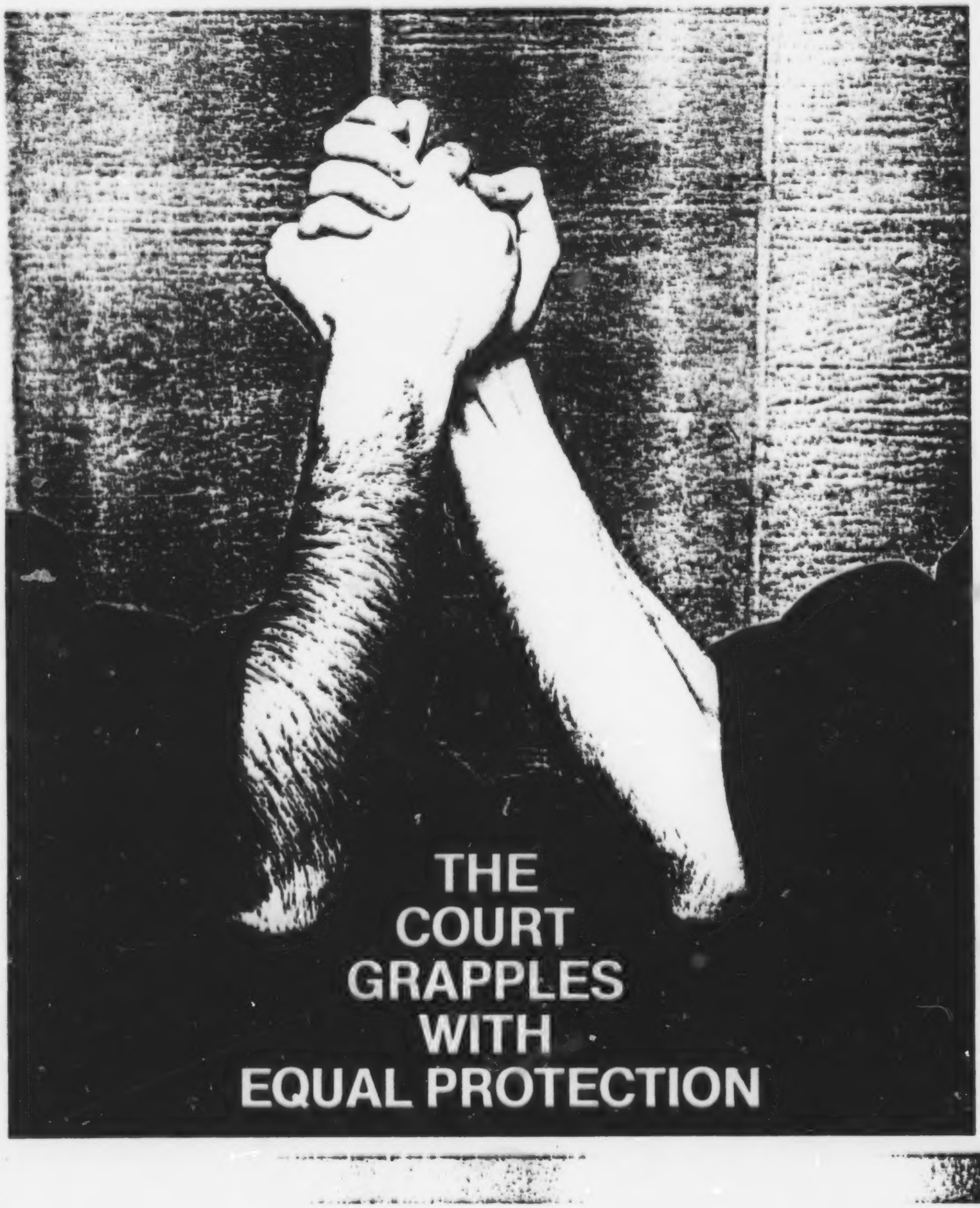
ON LAW-RELATED EDUCATION · SPRING 1977



THE COURT GRAPPLES WITH EQUAL PROTECTION

ABA Special Committee on Youth Education for Citizenship

OPENING STATEMENT

Law-related education, like the law itself, is dynamic and constantly evolving. Since the early '70s alone, there has been dramatic growth in law-related programs and materials, reflecting a rich variety of topics and approaches. These activities are continually being refined while new and expanded efforts are being instituted.

To keep you informed of these developments, YEFC has published directories, curriculum catalogues, guides to program development, listings of summer teacher education institutes, and other materials. Oftentimes, however, developments in the field outran our ability to publish revised and up-to-date editions of these publications.

In addition, many of you have expressed your desire for a ready source of information about the latest developments in the law, particularly court decisions in areas commonly covered in your courses.

Update is designed to fill these needs by providing—three times each school year—recent information about legal cases, curriculum materials, funding opportunities, project activities, program ideas, coming events, and other news and views in the field. Special features such as innovative instructional approaches and guest commentaries on critical legal and educational issues will also be included. We will, of course, also continue to publish our *Working Notes* series on a regular basis.

To a significant degree, you the reader will be the contributors and editors of *Update*. We urge you to send us materials and information for subsequent issues, to share ideas for new sections and discussion topics, and to offer your candid reactions to this and subsequent issues. To assist you in this regard, a questionnaire is included in this issue.

The first several issues of *Update* will be distributed on a complimentary basis and serve as pilots for more comprehensive issues which will be available by subscription. We hope you enjoy *Update* and find it a useful adjunct to your law-related education program.

—Norman Gross

American Bar Association
Special Committee on Youth Education for Citizenship

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contents

Volume 1, Number 1 Spring 1977

2

Supreme Court Report
The Court Grapples with Equal Protection

5
Court Briefs
From Pregnancy Benefits to Undercover Agents

8
Project News
Being Ripped Off? Call a Kid

11
Newsclips

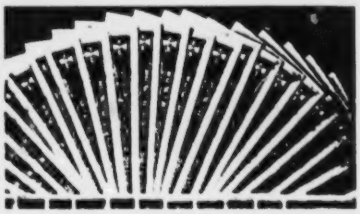
12
Update Looks Back
A Plea for Equality

14
Family Lawyer
Cases on. . .Animals and Accidents

16
Project News
Oregon Project Thrives on Hard Money

17
Curriculum Update
Focus on Audio-Visual Materials

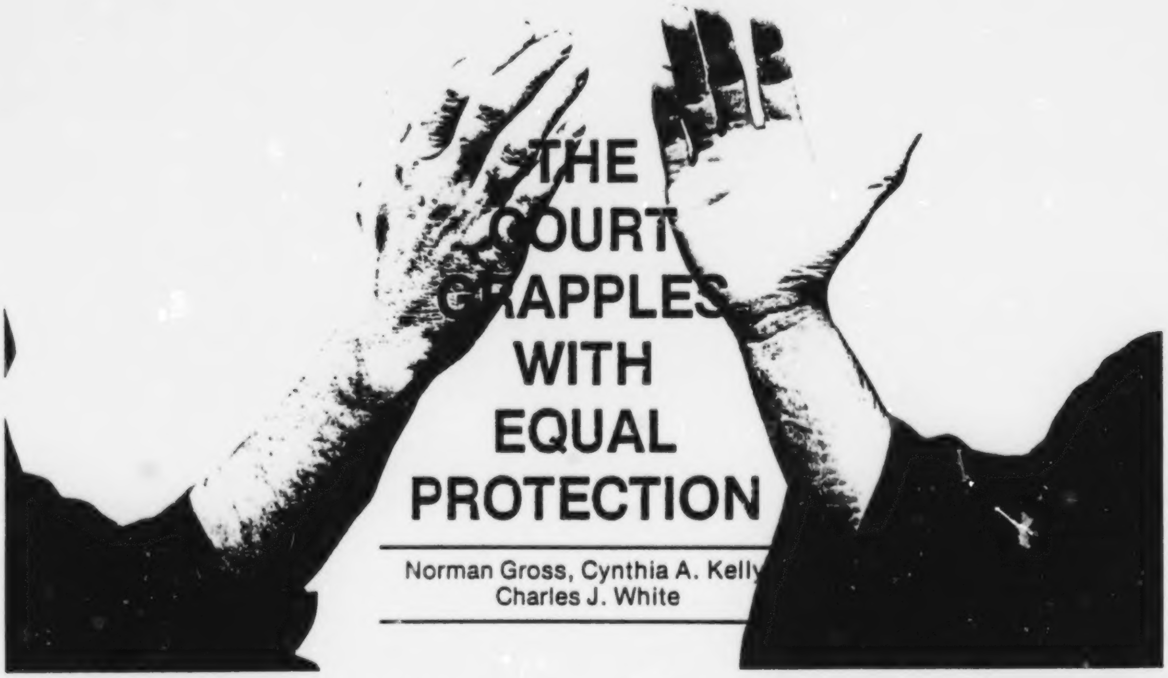
20
The $$ Game
Federal Funds Available



25
Project News
New Statewide Projects

31
Up and Coming
Summer Programs for Teachers

Credits
PHOTOS: cover and page 2, Ted Lacey; page 8, Alfred Gescheidt; page 12 Jacob Riis / The Bettman Archive; page 20 Dennis Brack / Black Star. CARTOONS: page 6, Nick Hobart; page 10, Levin (reprinted by permission of New Yorker Magazine); page 15, Herb Brammeier, Jr.; page 19, Joseph Farris; page 28, James Estes; page 32, *The Wizard of Id* by permission of Johnny Hart and Field Enterprises, Inc.



THE COURT GRAPPLES WITH EQUAL PROTECTION

Norman Gross, Cynthia A. Kelly
Charles J. White

What does a would-be beer drinker in Oklahoma have in common with prospective black residents of an Illinois suburb, a group of Orthodox Jews in Brooklyn, and a disappointed white applicant to a California medical school? All of them have felt that they have been treated unfairly under the law and have filed suits charging that they've been deprived of their constitutional right to equal protection. In addition, each of their cases has reached the U.S. Supreme Court, providing us with some notion of the Court's interpretation of this constitutional guarantee and its impact on our daily lives.

The Craig Case: Discrimination on the Basis of Sex

The Fourteenth Amendment provides that no state shall deny to any person "the equal protection of the laws." This standard is easy to meet when a particular law affects everyone equally. What happens, however, when individuals in similar situations are treated differently under the law?

In the recent case of *Craig v. Boren* (45 U.S.L.W. 4057, December 20, 1976), an Oklahoma law prohibited the sale of "non-intoxicating" 3.2% beer to males aged 18-20 years old. Nineteen year old Curtis Craig felt that he should have the same rights as females his age, so he filed suit asking that the law be declared unconstitutional under the Fourteenth Amendment's Equal Protection Clause. He contended that there was not sufficient reason for the legislature to make such a distinction based upon sex.

In defending itself, the state of Oklahoma argued that the distinction between the sexes was reasonable and was rationally related to the purpose of the law—reducing traffic accidents caused by drunken drivers. To support this claim, Oklahoma introduced statistics showing that drunken driving accidents could be effectively reduced by restricting the sale of 3.2% beer to a single group of drivers: males aged 18-20. The evidence included statistics demonstrating that many more males than females that age were arrested for "driving under the influence" and "drunkeness," that more males than females that age were injured in traffic accidents, and that more males than females that age were inclined to drink beer.

Though the rights of beer drinkers may seem like a trivial matter, the case raises the very fundamental question of whether laws can distinguish between the sexes, and, if so, what standards are there to help determine when such laws are constitutional and when they are not.

The Traditional Standard of Reasonableness

Many would argue that the Oklahoma law was clearly unconstitutional under the Fourteenth Amendment: aren't males and females of the same ages being treated differently under the law? The Supreme Court has long recognized, however, that classification is an inevitable part of law-making and that the Equal Protection Clause permits legislators to pass laws that reasonably classify people into different groups.

Thus, the state can require that non-residents pay higher tuition than state residents to attend a state university; or they can treat juveniles and adults differently although each committed a similar crime; or they may tax some kinds of property at one rate, and others at another, and exempt others altogether.

The Court's reasoning is that the Constitution has granted states powers to provide for the health, safety, morals, and general welfare of the people. Since legislators are closer to these problems than the courts, and presumably speak on behalf of the people, courts should be reluctant to declare their actions unconstitutional. For example, it isn't enough to allege that the state's actions result in inequality. As the courts have explained, "inequality" is an unavoidable result of classification. In fact, under the traditional standard of reasonableness, as long as the classification is reasonable and "rationally related to the object of the legislation," it will be upheld. This traditional test gives the states wide discretion in enacting laws which treat some groups differently from others.

In the *Craig* case, two members of the Court—Chief Justice Burger and Justice Rehnquist—argued that the Oklahoma law should be upheld because it met the traditional equal protection test of reasonableness. In Chief Justice Burger's words, "the means employed by the Oklahoma legislature to achieve the objectives sought may not be agreeable to some judges, but since . . . the means are not irrational, I see no basis for striking down the statute as violative of the Constitution simply because we find it unwise, or possibly even a bit foolish."

Sex-Based Classifications: The "Substantially Related" Standard

A majority of the Court did not agree with this reasoning. It wasn't that they found the law unreasonable. Rather, they applied another test which required that the law be more than reasonable if it were to be constitutional.

Writing for the majority, Justice Brennan pointed out that this case involved classification on the basis of sex, a distinction which had in the past resulted in numerous instances of discrimination. Relying on previous Court decisions in this area, he declared that sex-based classifications must be "substantially" related to the legislative goal.

What is the difference between "rationally related" and "substantially related"? In general, to be rationally related the classification must have a reasonable connection to the law's purpose (in this case, improving traffic safety). This standard places a substantial burden on the complaining party, who must show that the classification is irrational or arbitrary; and, as Chief Justice Burger suggests, the Court will under this standard often uphold unwise and imperfect laws. On the other hand, to be substantially related there has to be a close, intimate connection between the classification and what the law seeks to accomplish. This standard shifts the burden of proof to the law-making body, which must show that the classification is not only rational but also a necessary element in achieving an important legislative objective.

Applying this tougher standard to the Oklahoma law, the majority concluded that these statistics did not justify treating males and females differently in the purchase of 3.2% beer. The Court noted, for example, that while many more males than females aged 18-20 were arrested for alcohol-related driving offenses, only a very small percentage of either group—.18% of females and 2.0% of males—was involved in such offenses, a difference too small to justify a distinction based on sex.

Also, the statistics failed to show whether those arrested had been drinking 3.2% beer or other alcoholic beverages; for example, they might have been drinking hard liquor. Finally, while Oklahoma law prohibited 18-20 year-old males from buying beer, it did not prohibit them from drinking it, even when it had been purchased by their 18-20 year-old girlfriends. The unpersuasive statistics and inconsistencies in the law's application, the majority said, made the relationship between gender and traffic safety "far too tenuous" to satisfy the "substantially related" test. As a

45 U.S.L.W. 4057?!?

Are you unsure about the meaning of 45 U.S.L.W. 4057? You are not alone. Legal citations are unfamiliar to most Americans. However, they're easy to understand and will help you find cases cited in this issue and in other publications.

First, a look at Supreme Court citations. The most recent Supreme Court decisions appear weekly in a loose leaf volume called *United States Law Week*. A citation in this publication looks like the following:

Craig v. Boren, 45 U.S.L.W. 4057,
December 20, 1976.

Broken down, the citation gives the following information:

(1) the name of the case, with the party appealing to the Supreme Court listed first, and the party against whom the appeal is being brought listed second:

Craig v. Boren

(2) the volume and page it can be found in *United States Law Week*:

45 (volume) U.S.L.W. 4057 (page)

(3) the date the case was decided:

December 20, 1976.

Supreme Court cases which are not so recent appear in a publication called the *United States Reports*. A citation for the case of *Kahn v. Shevin* 416 U.S. 351 (1974), for example, tells us the following:

(1) the name of the case, with the party appealing to the Supreme Court listed first, and the party against whom the appeal is being brought listed second:

Kahn v. Shevin

(2) the volume and page it can be found in *United States Reports:*

416 (volume) U.S. 351 (page)

(3) the year the case was decided: 1974.

Citations for decisions of other federal as well as state courts are similarly structured, the only difference being the reporter system in which the case appears.

Of course, a law school library is often the best place to research a case, but most bar associations, county or city governments, and law firms have at least the Supreme Court reporters. Establishing contacts with law librarians, practicing attorneys, and others who have ready access to such resources can thus be especially valuable for you and your students.

result, the Court found the Oklahoma law to be unconstitutional under the Equal Protection Clause.

"Suspect" Classifications: The "Compelling Interest" Standard

Interestingly enough, the Court could have applied an even more stringent standard in the *Craig* case. In prior decisions, the Court has ruled that laws which single out certain special groups are "inherently suspect" if they are based on characteristics determined "solely by the accident of birth" or if they discriminate against groups of people who have been victims of "a history of purposeful unequal treatment," or who have been "relegated to a position of political powerlessness." The Court has stated, for example, that laws involving classifications based upon race, national origin, or alien status are all "suspect" and must be subjected to a "most rigid scrutiny" if they are to be upheld. In cases involving laws with these suspect classifications, the Court requires more than even a "substantial" relationship between the law and its purpose; instead, the state must show that it had a "compelling interest" in drafting the law the way it did.

Considering these guidelines, one might well question why sex is not one of the "suspect" classifications. It is, after all, an "accident of birth" and many would argue that women have been subjected to "a history of purposeful unequal treatment."

Are the courts promoting a form of equality never contemplated by the Fourteenth Amendment?

Craig v. Boren presented the Court with the opportunity to rule that sex should join the other personal traits listed above as a "suspect" classification but, as we have seen, the Court rejected this option, though it did employ a tougher standard than the traditional test of reasonableness.

Equality At All Costs?

Many questions remain unanswered by the *Craig* case. Isn't it possible that one outcome of decisions like this might be that legislators will try to avoid distinguishing between groups whenever possible and pass very restrictive laws which will meet any equal protection objections? What could be done, for example, if Oklahoma passed a law prohibiting *all* persons under 21 from purchasing 3.2% beer? Would not the law then treat everyone equally?

Many warn that court decisions such as *Craig* promote a form of equality never contemplated when the Fourteenth Amendment was enacted. Others are concerned that the courts in cases such as *Craig* are in effect substituting their judgment for the judgment of law-makers, thus upsetting the traditional separation of powers between the legislative and judicial branches. Thus, while Curtis Craig may have won the right of 18-20 year-old males to drink "non-intoxicating" beer, he raised at the same time troubling issues regarding fundamental guarantees of our constitutional system.

The Arlington Heights Case: Legislative Intent vs. Legislative Effect

Craig v. Boren is a case where a law on its face differentiated on the basis of sex. However, what about laws which don't mention sex—or race, national origin, or alien status—but whose effect may well be discriminatory? The Court faced this issue—whether it must examine the intent of legislators or the effect of their laws—in the case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (45 U.S.L.W. 4073, January 11, 1977).

The case arose when the Metropolitan Housing Development Corporation (MHDC), a non-profit land developer, instituted plans to build 190 low and moderate income racially integrated townhouse units on a 15-acre parcel of property in Arlington Heights, a Chicago suburb located 26 miles northwest of the downtown area. Most of the land in the Village is occupied by single-family homes, and the racial composition of the community is almost entirely white (the 1970 census found only 27 blacks in the 64,000 member community). The development could not be built under the Village's existing zoning laws, however, so MHDC filed a petition for rezoning which would allow multiple family dwellings to be built.

The Village held three public meetings to consider whether or not the rezoning should be permitted. Each meeting drew large and vocal crowds, mostly composed of opponents of the rezoning plan. The opponents stressed two major arguments: 1) that the area had always been zoned for single family residences and current residents had purchased their homes in reliance on that fact, and 2) that this project was not consistent with a Village policy adopted nine years before which called for new multiple-family units to be built in areas where they would serve as a buffer between single-family homes and industrial complexes. Some of the opponents also argued directly against building racially integrated housing in the community.

After the third meeting, the Village Plan Commission passed a motion stating that "While the need for low and moderate income housing may exist in Arlington Heights and its environs, the Plan Commission would be derelict in recommending it at the proposed location."

One prospective resident, a black man named Ransom, was very disappointed in this decision. A worker at the Arlington Heights Honeywell factory, Ransom had to commute daily from 20 miles away in Evanston where he lived in a five-room house with his mother and son. Ransom had looked forward to the housing development since he hoped to move there and be closer to his job. With MHDC and two other prospective black residents, he sued the Village, claiming that the denial of the rezoning request was a violation of the Fourteenth Amendment's Equal Protection Clause.

The District Court ruled for the Village. After examining the actions of the Village, the court found that it did not intend to discriminate against any race, but rather acted to "protect property values and the integrity of the Village's zoning plan."

(continued on page 26)

COURT BRIEFS

FROM PREGNANCY BENEFITS TO UNDERCOVER AGENTS

Equal Protection and Pregnancy Benefits

General Electric's disability plan provided sickness and accident benefits to all its employees, but did not cover disabilities arising from pregnancy. In an action filed on behalf of all female employees who had been denied pregnancy benefits, Martha Gilbert brought suit asking that the District Court declare the plan in violation of Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating on the basis of sex in compensating an employee. Both the District Court and Court of Appeals found the plan violated Title VII.

In *General Electric Company v. Gilbert* (45 U.S.L.W. 4031, December 7, 1976), the Supreme Court by a 6-3 vote held that disability plans which exclude pregnancy do not violate federal sex-discrimination law. In an opinion delivered by Justice Rehnquist, the majority stated that the General Electric plan was "nothing more than an insurance package, which covers some risks but excludes others." The majority found no evidence of specific intent to discriminate against women, nor did it agree that the plan had a discriminatory effect merely because it was less than all inclusive. Because there was no risk from which men were protected and women were not, and there was likewise no risk from which women were protected and men were not, the Court found that the plan was essentially neutral in what it did cover, and thus did not violate Title VII.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined. He stated that the Court's analysis of the case was "simplistic and misleading," and felt that it was impossible to fairly examine the discrimination issue without looking at the prior history of General Electric's employment practices to see whether or not they treated the sexes differently. He found that the Court had disregarded General Electric's history of using practices which served to undercut the opportunities of women who became pregnant while employed, practices which led the District Court to conclude that General Electric's "discriminatory attitude" toward women was "a motivating factor in its policy." He also pointed out that the plan covered risks relating to the male reproductive system, such as vasectomies and circumcisions, as well as "voluntary" disabilities, such as sports injuries and cosmetic surgery. Given General Electric's history of employment practices and the fact that pregnancy was the only disability, sex-specific or otherwise, which was not covered by the plan, he concluded that the evidence supported a finding of intent to discriminate on the basis of sex in violation of Title VII.

Justice Stevens also dissented, arguing that "by definition" the exclusion of pregnancy discriminates on the basis of sex. He therefore found the policy in violation of Title VII without having to examine the questions of whether the policy had a discriminatory intent or effect.

Equal Protection: Preference in Hiring

Many people believe, especially in time of high unemployment, that their state government should give preference to state residents in hiring workers for government-sponsored jobs. A New York state law sought to do this by requiring private contractors on government jobs to give preference to citizens who had resided in the state for a year.

The law stated that contractors performing work for state and local governments in periods of high unemployment could not hire aliens or those who had resided in the state for less than a year until state residents were unavailable for employment. Two painting firms performing work for the New York City Board of Education were threatened with loss of their contracts when they employed legally admitted aliens. They then filed suit in federal court, claiming that this law violated their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In a 2-1 decision, the District Court agreed. The majority stated that because the law's discrimination against aliens involved a "suspect" class, New York was required to prove that the law was necessary to serve a "compelling interest." The court concluded that the stated goal of protecting New York citizens during times of high unemployment did not meet this test and found the law to be unconstitutional.

When unemployment is high, can the state give special hiring preference to its own citizens?

Without hearing oral arguments or issuing a formal opinion, the Supreme Court upheld the District Court decision in the case of *Lefkowitz v. C. D. R. Enterprises, Ltd.* (45 U.S.L.W. 3462, January 10, 1977). Justices White and Rehnquist dissented, however, on the ground that the Court should have heard arguments on the case before reaching a decision.

Equal Protection and the Social Security Act

In *California v. Goldfarb* (45 U.S.L.W. 4237, March 2, 1977) the Supreme Court ruled that a provision of the Social Security Act which treated widows and widowers differently was in violation of the Fifth Amendment equal protection guarantee. Under this challenged provision, a widow received benefits automatically upon her husband's death, while a widower was only eligible for these benefits if he could prove that he was receiving "at least one-half of his support" from his deceased wife.

Writing an opinion in which three other justices joined, Justice Brennan found that the difference in treatment between the sexes was not based on any deliberate congressional finding that widows were in greater need of these benefits. Instead, he determined from examining the history of the passage of this Act that this sex-based distinction was merely a result of "archaic and overbroad" generalizations and "old notions" which presumed that all women are dependent. The opinion stated that the only conceivable justification for writing the presumption of female dependency into the law would be to save the Government the time, money, and effort which would be necessary if it required proof of dependency by both sexes. The opinion concluded that this administrative consideration was not sufficient to make the law constitutional under the Court's previously stated rule requiring that laws treating the sexes differently "serve important governmental objectives and . . . be substantially related to the achievement of those objectives." In a concurring opinion, Justice Stevens stated that "more than accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses."

Justice Rehnquist dissented in an opinion in which Chief Justice Burger, Justice Blackmun, and Justice Stewart joined. He argued that it was constitutional to treat the sexes differently in this situation for two reasons: (1) the alleged discrimination in this case was clearly giving benefit to widows instead of harming them economically, and thus could be supported under the Equal Protection Clause as long as it was reasonable; (2) the great administrative inconvenience involved in determining dependency status in every case made it reasonable for Congress to rely on the presumption that females were generally dependent.

"Where did you get that chair?"

Right to Counsel and Lawyer-Client Confidentiality

Can an undercover agent be present at discussions between a defendant and his attorney without violating the Sixth Amendment's guarantee of the effective assistance of counsel? In the case of *Weatherford and Strom v. Bursey* (45 U.S.L.W. 4154, February 22, 1977), the Court found by a vote of 7-2 that the informer's presence at these discussions and his subsequent trial testimony did not constitute a violation of the Sixth Amendment.

The case arose when Brett Allen Bursey was arrested for destroying property during a draft protest action against a Selective Service office in Columbia, South Carolina. Under directions from his superior Pete Strom, Jack Weatherford, an undercover agent for the South Carolina State Law Enforcement Division, joined Bursey in damaging the draft board's property. Still serving as an undercover agent, Weatherford was also arrested and jailed. During the period before trial, Weatherford deliberately represented himself as another defendent in the case and was present at two meetings between Bursey and his lawyer. With Strom's approval, Weatherford then testified against Bursey at the trial where Bursey was convicted. Bursey then sued both Weatherford and Strom, claiming a violation of his constitutional rights.

In an opinion written by Justice White, a majority of the Supreme Court disagreed. The Court noted that Bursey and his lawyer had asked Weatherford to join him in their discussions of trial tactics, and that Bursey's defense in the case was not prejudiced by the informer's presence. The majority concluded that "there being no tainted evidence in this case, no communication of defense strategy to the prosecution and no purposeful intrusion by Weatherford," there was no violation of the Sixth Amendment. Justice White did imply, however, that Sixth Amendment rights might be violated in a situation where the defense could prove that the undercover agent advised his superiors of planned trial tactics or obtained information directly damaging to the defendent's case during the discussions with lawyers.

Justice Marshall, joined by Justice Brennan, dissented, arguing that the Court's decision would threaten the safety of the lawyer-client relationship from government intrusion and would risk infringing upon the integrity of the entire criminal justice system.

Freedom of Speech: The Rights of Non-Union Teachers

In a case involving teachers in Madison, Wisconsin, the Supreme Court was faced with the issue of whether a nonunion teacher could be prohibited from speaking about a topic concerning the teachers' union at a public meeting of the Board of Education. The case, *City of Madison v. Wisconsin Employment Relations Commission* (45 U.S.L.W. 4043, December 8, 1976), involved a teacher who asked the Board of Education to postpone consideration of a union proposal requiring all teachers (whether union members or not) to pay union dues. Because this issue was a topic of pending negotiation between the union and the Board, the union brought a complaint before the Wisconsin Employment Relations Committee contending that the nonunion teacher had, by addressing this issue at the meeting, engaged in bargaining activities in violation of labor laws. The Committee upheld the union's contention and the Wisconsin Supreme Court approved their decision.

The Supreme Court reversed, stating that even assuming that such comments could ever be prohibited on the ground that they were a danger to union-management relations, this was surely not such a case. The Court asserted that the teacher's statements at a public meeting did not constitute any type of labor negotiations. Moreover, since the Board meeting was open to the public, the nonunion teacher was also addressing the Board as a concerned citizen, seeking to express his views on an important decision of his government. The Court concluded that "the participation in public discussion of public issues cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."

The Miranda Warnings and Custodial Interrogation

In a 6-3 ruling, the Supreme Court held that a suspect who is not under arrest but who voluntarily goes to a police station can be questioned without being given any "Miranda warnings." The Court's decision in *Oregon v. Mathiason* (45 U.S.L.W. 3505, January 25, 1977), appears to narrow the rule announced in the 1966 *Miranda* case that statements made by a defendant while under "custodial interrogation" could not be used against him at trial unless he had first been warned that: 1) he had the right to remain silent, 2) whatever he said could be used against him, 3) he had a right to a lawyer, and 4) a lawyer would be appointed if he could not afford one.

In this case, Carl Ray Mathiason, who was on parole, went to the police station voluntarily after a police investigator left a card at his home inviting him to the station to talk about a recent burglary. Mathiason was questioned at the station behind closed doors. After the investigator falsely told Mathiason that his fingerprints had been found at the scene of the crime, Mathiason confessed to the burglary. He was then allowed to return home, but was later arrested and charged with the crime.

In a 6 to 3 decision, the Court seemed to cut back on its ruling in the 1966 Miranda case

In an unsigned opinion issued without hearing any oral argument on the issues presented, the Court stated that an individual was under "custodial interrogation" only after being taken into custody or "otherwise deprived of his freedom of action in any significant way." Since Mathiason had voluntarily submitted to questioning, the Court concluded his constitutional rights under the Fifth Amendment were not violated by his failure to receive the Miranda warnings.

Justices Marshall, Brennan, and Stevens dissented. Justice Marshall stated that since Mathiason was questioned in private at a police station, told he was a suspect, and lied to about the fingerprints, he could reasonably believe that he was not free to leave. He concluded that the majority's decision was at least contrary to the "rationale" of the *Miranda* case, if not contrary to its exact holding. Justices Brennan and Stevens also dissented, mainly on grounds that the case should not have been decided without full oral argument by attorneys on both sides.

Search and Seizure: IRS and Back-Taxes

In *G.M. Leasing Corporation v. United States* (45 U.S.L.W. 4098, January 12, 1977), a unanimous Supreme Court ruled that the Fourth Amendment protection against unreasonable searches and seizures prohibited Internal Revenue Service officials from seizing private property in payment of past-due tax debts without first obtaining a search warrant. The case involved a taxpayer, George Norman, who owed more than $400,000 in back taxes. Under a federal law allowing the IRS to seize property in cases of a taxpayer's failure to pay the debt, IRS agents got a locksmith to help them enter Mr. Norman's office at the car leasing firm where he was employed as general manager. The agents also seized automobiles registered in the name of Mr. Norman's company which were located on public streets and parking lots. The company, controlled by Mr. Norman, sued the IRS claiming a violation of its Fourth Amendment rights.

The Supreme Court agreed with this contention. In an opinion written by Justice Blackmun, the Court noted that one of the principal purposes of the Fourth Amendment was to prevent "the massive intrusion on privacy undertaken in the collection of taxes." Although the Court found that the IRS agents had the legal right to seize autos left in public lots and other public areas, the Court held that it was unconstitutional for the agents to enter a private office to seize property without a warrant. In Justice Blackmun's words, "[i]t is one thing to seize without a warrant property resting in an open area . . . , and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available to the seizing officer." —CAK

BEING RIPPED OFF? CALL A KID

by Joe Nathan and Karen Branan

Question: What stalks down missing radios . . . eliminates bad odors . . . takes landlords to court . . . receives ire and acclaim from public officials . . . teaches readin', 'ritin' and 'rithmetic . . . makes dozens of kids feel like a million while making adults reassess some of their blinkered ideas about adolescents?

Answer: Consumer Action Service, a project of the Protect Your Rights and Money class at the St. Paul Open School, an alternative public school with 500 students ranging in age from 5 to 18. The 11- to 17-year-olds who run the show laughingly refer to themselves as "Nathan's Raiders." Joe Nathan is their teacher.

The whole thing started six years ago when a group of St. Paul Open School students, who were studying ecology with Nathan, began to notice "a stinky stench" in their heavily industrialized school neighborhood. They traced the smells to four sources: a paper plant and three food processing and packing plants. An investigation and action project ensued.

Students talked with people at the Minnesota Public Interest Research Group. Spent hours at the Environmental Library studying odor pollution standards for every state. Consulted lawyers. Called for plant inspections by

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the city's Pollution Control Agency. Worked with that agency to write official complaints. Petitioned residents and other businesses affected by the odors. Testified at a public PCA hearing. Got the runaround from company and public officials. Persisted, persisted, persisted.

And won.

The PCA found the plants in violation of pollution ordinances and ordered schedules of compliance from each of the plants.

This project planted the seeds of the Consumer Action Service. Nathan believed that the youthful idealism, enthusiasm and intensity displayed in the pollution project could be directed toward solving a variety of relatively small problems that Twin City consumers encountered. At the same time, students would develop important skills in such diverse areas as writing business letters, using telephones and telephone directories, dealing with government and business organizations, and knowing their own rights and responsibilities.

Thriving in its second year, Consumer Action Service (CAS) deals in diversity: Dobermans and rental deposits, automobiles and insurance, shampooers and busted water pipes. The group (30 students currently are in the class) has worked on more than 50 cases and boasts a successful resolution rate of over 75 percent.

Students have used several methods to get the word out: brochures, news media, and a booth in a heavily travelled business area. Through these means, they learn of complaints and explain how their class may be able to help.

Dealing With Consumer Complaints

Generally, the class reviews each case, talks strategy, and decides how to proceed. The class works as a group in this stage, but specific tasks (writing a letter, researching the law) are handled by individuals or small groups. Sometimes, the class is assisted by a lawyer, Richard Nadler.

What sort of cases do they handle? Just about anything, from an automobile radio that was promised and not delivered, to a tenant with a complaint against his landlord, to a breach of warranty on a bike sale.

How do they help the people who come to them? Sometimes it's as simple as calling a businessman to bring the consumer's complaint to his attention. Other times, it can involve consulting law books, calling a variety of city and state offices, and seeking help from a newspaper consumer columnist.

A case involving a St. Paul woman and a Wisconsin insurance company provides a good example of the range of possible activities. Ms. Brady's husband had taken out a life insurance policy covering their two daughters, and she had continued paying premiums on it since his death in 1971. She found out, however, that the policy had a clause stating that if her husband died before either daughter were 21, the policy would remain in force without payment of further premiums. Company officials refused to refund the money she had paid, however, claiming that it was too late to do anything.

Students researched pollution standards, consulted lawyers, testified at a public hearing, persisted, persisted, persisted—and won.

The class began by sending a letter to the company. At the same time, they also wrote to the state insurance commissioner in Minnesota, asking about the deadline for filing a claim. He said the deadline was five years, and since more than five years had elapsed since her husband's death, it appeared that Ms. Brady was too late to file.

After a lively discussion of alternatives, the class decided that the next step was to reread the policy to find out just what the agreement was, and to go to a law library and find out what Wisconsin law was on the statute of limitations. Perhaps Wisconsin law allowed more time for filing a claim.

This research showed there was some question about when the five year period began. Did it begin when Mr. Brady died, or did it begin when his estate was finally probated? If the latter, then five years hadn't elapsed and Ms. Brady could file the claim.

With this new information, the class decided to write another letter to the Minnesota insurance commissioner, asking his help in convincing the company to refund the money. He complied by sending a letter to the company.

The net result of all this activity? A letter from the insurance company saying that it would refund the money "although it is not required of us . . . " and a check for $200 for Ms. Brady.

The class isn't always as successful, but Joe Nathan believes that even its failures can teach students a lot. In one case, for example, a woman who had moved from her apartment was having trouble getting her $100 security deposit from the landlord. She had had a dog in the apartment, in violation of one of the clauses of her lease, but she said that the dog had done no damage and therefore she was entitled to her money back.

However, when the class looked at the lease, they found out that there was a provision saying that if any clause was violated, the landlord can retain all of the security deposit, even if no damage has taken place. Therefore, they couldn't do anything for her.

As Joe Nathan says, this is a powerful lesson for the kids. "They learn that it is important to read a lease or contract carefully before they sign. I hope they learn that each of us has the responsibility of protecting his own rights."

What the Program Teaches

Nathan believes it is vital for kids to see why an ability to read, write and compute is so important. "It no longer works just to say these things are important," Nathan explains. "Kids have to see it. Working on the insurance case, they saw how misreading the policy resulted in major problems for Ms. Brady. And another woman thought she lost $200. When she added it up carefully, however, it came to more than $1,000."

Here's what the kids say they've learned. Andrea: "I am learning the different ways people are cheated and ways to protect myself." David: "I've learned how laws and courts can be used to help me and my friends." Ellen: "A case is more than just helping somebody get their money or whatever. It's learning how to analyze, understanding larger meanings, being aware of the process."

How To Do It

A consumer action service doesn't require anything you don't already have or can't get easily. The basic equipment is a telephone and consumer problems, plus information on consumer rights and responsibilities. Here are some specific suggestions on setting up a consumer action service in your class:

1. Think about your role as a teacher. Nathan sees himself as an organizer, stimulator and encourager. He provides the framework students use in working on each problem. He's pulled together a curriculum that helps students learn their rights and responsibilities as juveniles and consumers, while becoming knowledgeable about agencies available to assist consumers. The curriculum includes readings, guest speakers and field trips, as well as work on cases. It's not an organized, day-by-day guide, because Nathan varies some of the activities with the different cases. The students have written a 20-page booklet describing how they work on cases, listing the curriculum resources they've used and their evaluation of those resources, analyzing seven or eight of their most interesting cases, and offering suggestions to others. The booklet is available from the class for $1.00.

Nathan encourages students with various skills to work together so they can teach one another. He has a list of skills each student in the class should develop, and he tests the students periodically to see how they're doing.

2. Before looking for cases, the teacher should develop students' interest in the subject and encourage their belief that they can help people with consumer problems. Students can read or hear about the work other students have done. They can read or watch filmstrips or movies about consumer rights. They can simulate a small claims court by breaking into groups of three (one student being the plaintiff, a second the defendant, and a third the judge). Each group deals with a stated problem in its own way and then the whole class discusses the different decisions made.

3. Visit or bring in people from radio, television and newspaper consumer services, and from local and state consumer protection agencies and Better Business Bureaus. If possible, visit small claims courts. Try to arrange for students to spend a day with someone at the Better Business Bureau or Consumer Protection Agency, as St. Paul Open School students have done.

4. Students should put together a simple brochure stating what their service can and cannot do. Ask people with consumer problems to contact you by mail only; otherwise, your school's secretary may be bringing the class a case about overloaded telephones. Distribute the brochure to libraries, laundromats, grocery stores. Once you've handled a few cases successfully, you can arrange for newspaper publicity or an appearance on a radio or television show.

"Oyez, oyez, hey bop a rebop, oo bop shebam."

Drawing by Levin;
© 1976 The New Yorker Magazine, Inc.

5. Make a list of skills you want students to develop or improve upon. Nathan's list contains more than 30 items, including being able to use a telephone directory, being able to write a concise business letter, understanding what's required in a contract, knowing the differences in funding, power and authority among various consumer service agencies, knowing how to read a lease, and so on. Nathan devotes time in class to development of all the skills on his list.

6. Work out a clear framework for problem solving. The Consumer Action Service follows these problem-solving steps: Determine the problem according to the complainant. Determine the problem as the class sees it. Determine the problem according to the people about whom the complaint is being made. If the three are different, review the differences with the complainant. List potential strategies. Discuss pros and cons of each. Decide on one. Call for volunteers. Discuss exactly how to do what is necessary, and work on and practice requisite skills. (Kids carry out the strategies, but Nathan checks all letters before they go out and listens in on the first few telephone calls a student makes until he's satisfied the student can handle it alone.) Listen to the follow-up report. Discuss how to proceed. Change goals or tactics, if necessary. (In most cases CAS has worked on, strategies have changed several times.) Discuss cases after they are resolved. What worked? What didn't?

In CAS's files, along with many letters of appreciation from satisfied clients, is one from Sherry Chenoweth, director of the Minnesota Office of Consumer Services. She wrote: "Your program speaks for itself as a model of the best way to help young people discover that there are some hard knocks dealt to people out in the marketplace. Knowing this and developing skills with which to cope effectively are just as important as development of intellectual skills and preparation for the world of work."

For further information about CAS, contact Joe Nathan, St. Paul Open School, 97 East Central, St. Paul, Minnesota 55101, 612/224-9421.

NEWSCLIPS

Presidential Priorities

A recent *Associated Press* dispatch lists those presidential duties which a group of first grade children in Oregon think are most important. The children believe the President should: "help ducks; sign papers; tell people where to go; give poor people money; give people clothes; keep people from stealing; feed birds; help a lost puppy; help us not die; help plants to live; keep bees safe; help boaters not crash into rocks." Considering the President's concerted attempts to be responsive to the concerns of the people, one wonders whether the anticipated governmental re-organization should include a merger of the Audobon Society, Sierra Club and SPCA into a cabinet-level department.

Report Explores School Violence

The Senate Subcommittee to Investigate Juvenile Delinquency has released its final report on school violence and vandalism entitled, "Challenge for the Third Century: Education in a Safe Environment." The 102-page report emphasizes that "approaches that advocate the quick cure and the easy remedy will often fail because they ignore the complex and diverse causes of these problems. Meaningful progress in this area can only be achieved by engaging in sober assessment, not hysterical reaction, and instituting thoughtful measures rather than glib promises." Law-related education, notes the report, deserves particular attention for its efforts in acquainting students "with the positive role the law plays in our society and the benefits of using its principles to settle disputes."

According to a National Education Association study submitted to the Senate Subcommittee, the number of assaults occurring in schools increased 58% in the years from 1970-74. During that same period, sex offenses increased by 62%, drug related crimes went up by 81% and robberies escalated by 117%.

Indiana's Senator Birch Bayh, Chairman of the Subcommittee, said, "it has been estimated that on a national scale we are currently spending almost $600,000,000 each year as a result of vandalism in our schools ... even more shocking, however, is the 70,000 serious physical assaults on teachers and literally hundreds of thousands of assaults on students perpetuated in our schools annually." Bayh emphasized that the Subcommittee found the upsurge in school violence not confined to inner city schools or to schools in low-income areas, but a growing problem in schools of affluent suburbs and rural areas as well.

The report discusses the extent of the problem, its underlying causes and strategies for improvement. It also offers recommendations and a bibliography of suggested readings. Copies are available for $1.25 from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

"Youth" Vote a Dismal 38%

In last fall's general election, newly enfranchised voters, the 18-20 year olds, were once again the least likely group of eligible voters to cast their ballots. According to the Census Bureau, only 38% of eligible voters in this age group went to the polls last November 2. This percentage was a full 10% below their 1972 turnout, when the 18-20 year-old age group also held the same dubious distinction.

Overall, 60% of the 146.5 million voting-age Americans went to the polls, down four percentage points from 1972 and ten percentage points lower than 1964, when the bureau first measured voter participation.

Student Social Attitudes Up, Political Knowledge Down

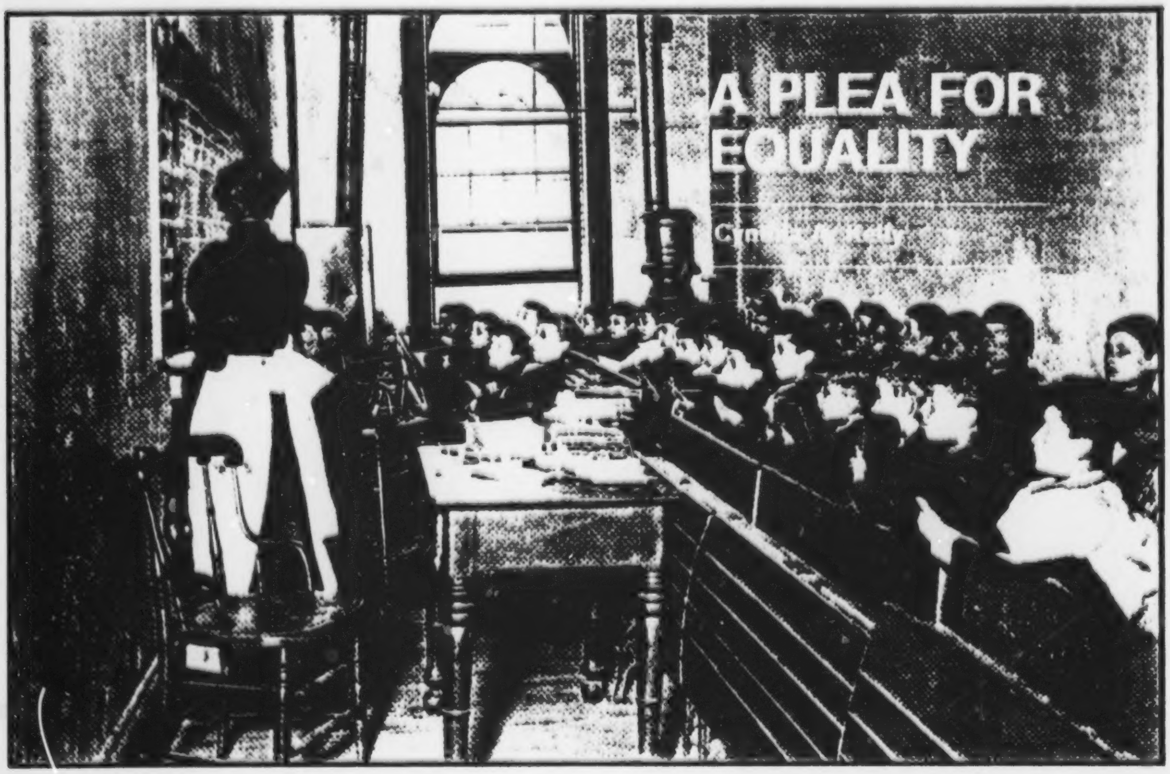
In the National Assessment of Educational Progress survey on education for citizenship, students scored very well in the area of social attitudes and quite poorly in the area of political knowledge. In response to questions whether sex, race, political beliefs or religion should be determining factors for getting a job, nearly all students agree that one's abilities and skills should be of primary importance. Nine out of ten support equal housing opportunities and an overwhelming number—over 95%—believe a person should be able to vote whether rich, poor, male or female. In contrast, the tests show that only slightly more than half the seventeen year-olds know that each state has two U.S. Senators and that the number of U.S. Representatives from each state depends on that state's population. In addition, 35% think the President can appoint people to Congress.

Questions which the students handled best concerned criminal rights: 98% knew an accused has a right to a lawyer and to be informed of the charges against him or her; 91% knew of their right to remain silent under police questionning. While it would be encouraging if law-related education were identified as the major reason for such knowledge, it is far more likely that TV police shows account for the high student marks on these questions.

The survey was administered nationally by the Education Commission of the States to 5,000 thirteen and seventeen year-olds during the 1976 spring school semester. *Education for Citizenship*, the report of the survey, is available from the National Assessment of Educational Progress, The Education Commission of the States, Suite 700, 1860 Lincoln Street, Denver, Colorado 80295.

Interested in Freedom of the Press?

A free report on high school and college cases affecting student journalists and journalism teachers is available from the Student Press Law Center, 1750 Pennsylvania Avenue, N.W., Room 1112, Washington, D.C. 20006. A manual which outlines the First Amendment rights of high school journalists and suggests a set of model guidelines to govern student publications costs $1.00. The Center also provides legal assistance and advice to students and journalism teachers, and their attorneys. —NG



A PLEA FOR EQUALITY

Cynthia A. Kelly

Like most first graders, Sarah Roberts was eager to start school. She felt lucky that there was an elementary school so close to her home. It would only take her a few minutes to walk there.

Unfortunately for Sarah, the School Committee decided that she was not to attend this school. Instead, she was assigned to a school almost half a mile away. The reason? Sarah was black and the school nearest her home was for white children only.

Sarah's father wanted his daughter to attend a neighborhood school. He therefore sued the city, arguing that his daughter had been unlawfully denied her right under state law to attend public school. In Sarah's case, however, the lawyers didn't talk about busing, although the incident did take place in Boston. And none of them mentioned *Brown v. Board of Education*, the landmark 1954 school desegregation case. As a matter of fact, not one lawyer even referred to the Equal Protection Clause of the Fourteenth Amendment!

Surprising? Not at all. Sarah's case was decided in 1849, 19 years before the Fourteenth Amendment was added to the Constitution and over 100 years before the *Brown* decision outlawing racially segregated schools.

Even though Sarah did not have the benefit of the Equal Protection Clause, she did have something almost as good: the services of Senator Charles Sumner as her lawyer. Sumner was active in the abolitionist movement, and felt that slavery as well as all other forms of racial discrimination should be abolished. He agreed with the American Anti-slavery Society that slavery was immoral because it deprived men of their natural and inalienable right to liberty and equality under the law. He maintained that it was the duty of every government to provide laws to protect men in these natural rights. For Sumner, Sarah's case presented the opportunity to translate these philosophical beliefs, stated so forcefully in such documents as the Magna Charta and the Declaration of Independence, into a legal theory.

Sumner Presents His Arguments

Sumner began by examining the Massachusetts constitution to find a general statement from which he could build his case that racially segregated schools were unlawful. He seized upon a passage stating that "all men are born free and equal," and argued that this phrase affirmed the American political tradition that every man, without distinction of color or race, is equal before the law. "He may be poor, weak, humble, or black . . . but before the Constitution of Massachusetts all these distinctions disappear," Sumner argued. ". . . .He is a *Man*, the equal of all his fellow-men. He is one of the children of the State, which . . . regards all its offspring with an equal care."

To support his theory, Sumner traced the origins of the democratic concept of equality from Herodotus, Seneca, and Milton, and then described its evolution through the

French Revolution. He reasoned that this principle of equality was the real meaning of the constitutional provision, and argued that its language prohibited distinctions drawn on the basis of race. Quoting Rousseau, Sumner asserted, "'It is precisely because the force of things tends always to destroy equality, that the force of legislation ought always to maintain it.' In a similar spirit, the courts should tend to maintain it."

After articulating this theory of "equality before the law," Sumner outlined its application to public schools in language that the United States Supreme Court would echo over 100 years later in *Brown v. Board of Education*. He maintained that the racial segregation of black children was a violation of equality for two reasons: (1) it inconvenienced black children by making them travel further than white children to attend school, and (2) it established a "caste system" which made blacks feel degraded and made whites feel uncharitable and prejudiced. "The words Caste and Equality are contradictory," Sumner maintained. "They mutually exclude each other. Where Caste is, there cannot be Equality; where Equality is, there cannot be Caste. . ."

He didn't have sociological data relied on by the Court to support its *Brown* decision, but he made essentially the same argument, contending that racially separate schools could never be equal. He reasoned that even if they had similar resources and equally competent teachers, schools limited to one racial group had a different spirit from schools where all members of the community met together in equality. "It is a mockery to call [them] equivalent," he emphasized.

Sumner also asked the court to consider the consequences of acknowledging that school committees could create separate schools for whites and blacks. Why would they stop there? "They may establish a separate school for Irish or Germans . . . .They may establish a separate school for the rich, that the delicate taste of this favored class may not be offended by the humble garments of the poor . . . . All this, and much more, can be done in the exercise of that high-handed power which makes a discrimination on account of race or color."

He concluded by asserting that the school committee's policy of creating racially segregated schools was contrary to the Constitution and laws of Massachusetts. Addressing the judges directly, he said, "Already you have banished Slavery from this Commonwealth. I call upon you now to obliterate the last of its footprints, and to banish the last of the hateful spirits in its train . . . . "

The Court Rules Otherwise. . .

The Massachusetts court agreed with Sumner's agruments that under Massachusetts law, "all persons without distinction of age or sex, birth or color, origin and conditon, are equal before the law." But, Chief Justice Lemuel Shaw explained, "when this great principle comes to be applied," it does not mean that every person enjoys the same civil and political rights. What those rights are, he said, depends upon how the law deals with particular individuals in a variety of circumstances.

In this case, the court implied that Sarah might have a valid claim if she were excluded entirely from the public school system, but in fact she had not been denied this opportunity. Offering an argument that would become the law of the land fifty years later as a result of the Supreme Court's decision in the case of *Plessy v. Ferguson*, the court said that schools for "colored" students were equal to white schools and as well suited to advance students' education. Since Sarah had access to an acceptable school for children of her own race, she could not claim that she was "unlawfully excluded from public school instruction."

The court then turned to Sumner's argument that racially separate schools created a discriminatory caste system. In the court's opinion, it hadn't been shown that racially separate schools created discrimination. As Chief Justice Shaw put it, "this prejudice, if it exists, is not created by law, and probably cannot be changed by law."

Already you have banished slavery . . . I call upon you now to obliterate the last of its footprints . . .

Finally, the court found that the increased distance which Sarah was required to travel to attend school did not make the regulation unreasonable, still less illegal. It noted that in towns covering a large territory, laws requiring pupils to travel long distances might be overturned by the courts. "But in Boston," the court stated, "where more than 100,000 inhabitants live within a space so small that it would be scarcely an inconvenience to require a boy of good health to traverse daily the whole extent of it," a system of classification "may be useful and beneficial."

But the Legislature Agrees

Six years later, however, the Massachusetts legislature enacted Sumner's arguments into a law which provided that blacks be admitted without separation into all public schools. Sumner's theory of equality before the law was also distributed as a pamphlet by the abolitionists. This legal theory became the center of the campaign against slavery, and the theme that dominated the great slavery debates of 1854-1861. More significantly for us today, the concept that a constitutional democracy could not deny basic human rights on such an arbitrary basis as race was translated into the Fourteenth Amendment's provision that no state shall "deny to any person . . . the equal protection of the laws."

In effect, Sarah Roberts' desire to attend school in her own neighborhood provided the spark for what has been described as a "constitutionalization" of the general ideas of natural law. Before this case, people thought of rights as noble and philosophical concepts, not necessarily as realities in everyday life. "Equality," for example, was a general, abstract, hypothetical term, fine for Fourth of July speeches but unenforceable in law. After this case, however, natural rights began to become, in the words of a modern commentator, "specific, concrete, and enforceable." It was a shift from rhetoric to reality, "from moral rights to rights defined judicially."

By Will Bernard

CASES ON . . . ANIMALS AND ACCIDENTS

NOBODY'S FAULT

Harvey saw two Airedales fighting on the sidewalk. Snatching up a stick, he raised it over his head to drive them apart. But as he did so, the stick struck another helpful citizen who had come up behind him.

As a result, Harvey wound up in court facing a damage claim. The other man reasoned as follows:

"I don't blame Harvey for trying to break up the dog fight. But the fact is, he did put a gash in my scalp that took seven stitches to close. Since this was certainly not my fault, I am entitled to be compensated for my injury."

But the court turned him down, since it wasn't Harvey's fault either. The court said the incident fell in the category of "inevitable accident," for which the law imposes no liability on anybody.[1]

Most courts will apply this principle in a wide variety of situations. Another case involved a motorist who was sued for knocking down a four-year-old boy. The youngster had dashed out suddenly from behind a parked car.

Admittedly, the child was too young to be blamed for the accident. But the court saw no reason to make the equally blameless motorist foot the bill.[2]

Of course, the mere fact that an accident happens suddenly does not mean it was "inevitable." Thus:

A motorist caused a collision when he fell asleep at the wheel. Defending himself later in court, he said:

"One moment I was awake, the next moment I was asleep."

But the court found him negligent for not paying more attention to the telltale symptoms of drowsiness.

"Sleep," said the court, "does not ordinarily come upon one unawares."[3]

1. *Brown* v. *Kendall*, 60 Mass. 292 (1850)
2. *Geren* v. *Lowthian*, 152 Cal. App. 2d 230 (1957)
3. *Bushnell* v. *Bushnell*, 103 Conn. 583 (1925)

ANIMAL TESTIMONY

Part of the case against Harris, on trial for manslaughter, was the fact that two bloodhounds had followed a trail to his house. But Harris raised an objection to this kind of evidence.

"According to the Constitution," he said, "an accused person has the right to cross-examine his accusers. Obviously I cannot cross-examine a couple of dogs. Therefore, I am not getting my constitutional rights."

However, the court pointed out that Harris did have a right to cross-examine the dogs' trainer. Overruling the objection, the court said this was as good as cross-examining the operator of a drunkometer or a radar speedometer.[1]

Most courts are willing to accept, under proper safeguards, information gleaned from animals. Nor does this apply only to bloodhounds.

Consider the case of a disputed cow, allegedly stolen from Farmer Griggs. Griggs had the animal brought to his barnyard. There, according to witnesses, she showed familiarity with both the barn and the watering mechanism.

In court, the judge found this evidence persuasive.

"It is characteristic of practically all domestic animals," he said, "to show familiarity with the places where they have been sheltered and fed."[2]

Still, animal "testimony" is usually not strong enough by itself to send a person to jail.

In a burglary case a bloodhound had led detectives to the defendant's shack. But there was no other evidence to connect him with the crime.

"Alone and unsupported," said the court, dismissing the charge, "such evidence is insufficient; there must be other testimony to convict."[3]

1. *State* v. *Davis*, 154 La. 295 (1923)
2. *State* v. *McAteer*, 227 Iowa 320 (1939)
3. *Carter* v. *State*, 106 Miss. 507 (1914)

STRAY BULLET

Irked by a neighbor's barking dog, Phil took a pot shot at it with his pistol. The bullet missed the dog, passed through a hedge, and injured a boy on the sidewalk.

Was Phil legally liable to the victim? In a court hearing, he denied responsibility.

"The boy was completely hidden by that hedge," he said. "Obviously I had no intention of hurting him, since I was not even aware he was there."[1]

But the court held Phil liable anyhow, pointing out that he had no right to fire at the dog in the first place. As for the "no intention" argument, the court ruled that—as one judge put it—"the intention follows the bullet."[2]

The case illustrates how sternly the law looks upon the handling of firearms. Due care is demanded, and "due" is measured by the extraordinary risks that guns involve.

In another case the trigger was pulled by accident. An off-duty watchman was twirling his gun on his forefinger when it discharged. He had forgotten it was loaded.

A companion was wounded in the leg, and later filed suit for damages. Here too the court found liability, declaring that absentmindedness was no excuse.

"Guns thought to be unloaded," said the court, "are the most dangerous. The tragic story of death and injury . . . is all too familiar in this country."[3]

Still, the law recognizes that pure accidents can and do occur. For example:

A hunter fired at a wild turkey. The bullet hit a tree and ricocheted into another hunter who was hiding in the bushes. But a court said the first hunter, having fired his gun lawfully, could not be blamed for what happened.

He would have needed "necromancy," said the court, to foresee such an outcome.[4]

1. *Corn* v. *Sheppard*, 179 Minn. 490 (1930)
2. *State* v. *Batson*, 339 Mo. 298 (1936)
3. *Rives* v. *Bolling*, 180 Va. 124 (1942)
4. *Seabolt* v. *Cheesborough*, 127 Ga. App. 254 (1972)

WAYWARD CANARY

Myrtle's pet canary escaped from its cage one morning and fluttered into a neighbor's back yard. The neighbor captured the bird but refused to give it back. Finally Myrtle filed suit.

When the case came to trial, the neighbor argued as follows:

"The canary may have been her property while it was in the cage. But once it escaped into the open air, it was 'fair game'. So now it's mine."

However, the court ruled in favor of Myrtle, primarily on the ground that the canary had been domesticated. It was no more "fair game," said the court, than an organ grinder's monkey would be if it slipped out of its collar.[1]

Generally speaking, an animal that is wild by nature belongs to no one. But once captured and domesticated, it may become as much private property as an automobile or a suit of clothes. From then on, even if it escapes, most courts will continue to recognize the original owner's rights.

A more extreme case involved a rare species of parrot. This time, the bird escaped and remained at large for almost three weeks. When finally captured, it had made its way to the next county.

But again, when the owner proved that the bird had been trained, the court upheld his property rights in the parrot and ordered it returned.[2]

On the other hand, consider the saga of a sea lion which escaped from a holding tank into the Atlantic Ocean and was later recaptured by a fisherman.

Here, the creature had not been domesticated in any way. The court thereupon decided in favor of the fisherman, pointing out that the sea lion had "regained its natural liberty."

"There was no intention on its part," said the court, "of returning to its place of captivity, or of again submitting itself to the domination of the (original owner)."[3]

1. *Manning* v. *Mitcherson*, 69 Ga. 447 (1882)
2. *Conti* v. *ASPCA*, 353 N.Y.S. 288 (1974)
3. *Mullet* v. *Bradley*, 53 N.Y.S. 781 (1898)

"Can't you just ask whether I'd like white or whole wheat?"

OREGON PROJECT THRIVES ON HARD MONEY

Most education innovations these days are supported by "soft" money: special grants from private foundations, the state or federal government, or other sources outside of local school systems. It's called soft money for a good reason—eventually the grants will run out, the money will go away, and the program will have to sink or swim with the money it can get from local school districts.

Oregon's Tri-County Law-Related Project has gone a different route. The key to the project's funding is that it doesn't rely on outside sources, but rather on contributions from school districts in the Tri-County area. The result is a project fully supported by participating districts themselves, through a sum equal to $ .23 per student contributed by each district.

Can you get something significant started without outside money? In just four years time, law-related education has grown in the Tri-County area from a few fragmentary efforts to a major component of K-12 education. Many school districts in the Tri-County area are involved in various stages of introducing law-related education to their staffs and students, and in the Portland Public School system, the largest system in the area, law-related education will soon be implemented in all elementary and secondary schools. In Portland, full-scale implementation will naturally raise the cost per student, but the central factor remains the same: the program is being supported by hard money contributed by the local school system itself.

Lawyers a Key

How did the project get this kind of support from school systems? There were many factors, but none was more important than the strong cooperation they received from the legal community. Lawyers were particularly crucial in building support for the project within the school system and in the general community. One key has been that two lawyers who are vitally interested in law-related education—Jonathan Newman and Robert Ridgely—serve both on the project's Steering Committee and on the Portland School Board. They and other lawyers committed to the program have fostered the involvement of school and civic leaders in law-related education, with the result that school systems in the area have seen the need for these programs and have been willing to commit their own funds to law-related education.

Though there was some lawyer-educator cooperation back in the 60's, and even some curriculum development, the current push began in 1973 with some awareness workshops offered by the Multnomah County Intermediate Education District. An ABA Regional Conference on Law-Related Education, and a leadership meeting sponsored by the Law in a Free Society project, served as catalysts to bring together some key people from the state board of education, the Oregon State Bar, and other groups. They eventually formed a statewide committee, and decided to make the Tri-County area a pilot for law-related education in the state.

Lawyers and educators have worked together on everything. The Steering Committee which runs the program is divided 50/50 between lawyers and educators. This group makes policy for all project activities.

Getting Started

Can one individual begin the process of cooperation? According to Lynda Falkenstein, the coordinator of the Tri-County project, one person can do a lot. The key, she says, is identifying and gathering together people who care about the subject matter. Educators and lawyers are essential, but additional key people will be different in each community. In some communities, they may be parents, business people, and state department of education specialists; in others, law enforcement officers and university professors.

Ms. Falkenstein advises that lawyers may be your entree to many people and organizations who can provide assistance. For example, they are often past or present members of school boards, serve as university trustees, and have links to the business and political communities. And remember that judges can be particularly important, since they are well known and respected in the community.

Ms. Falkenstein offers one last bit of advice: if law-related education is truly a joint venture among lawyers and educators, it must be a two-way street, with each group helping the other. While it is easy to see how lawyers can contribute, educators shouldn't forget that they have many skills that they can share with lawyers. Educators can help lawyers by sharing a wide variety of instructional tools; by their knowledge of the capabilities of students at various levels, by their experience with the curriculum, including the many subjects that can be enriched with law studies, and by their general familiarity with the whole educational process. That's why the Oregon project will make it a practice to hold orientation meetings for the lawyers who will be involved in its program, working particularly hard on problems of tone and methodology, so that lawyer-volunteers are relaxed in the educational setting and able to relate effectively to students and teachers.

For further information, contact Lynda Falkenstein, Project Co-ordinator, Tri-County Law-Related Education Project, P. O. Box 166657, Portland, Oregon 97237, 503/255-1841. —CJW

By Joanna Banthin, Susan E. Davison

FOCUS ON AUDIO-VISUAL MATERIALS

ELEMENTARY

- ***Citizenship Adventures of the Lollipop Dragon.*** Series of color sound filmstrips, 8-13 minutes each. Society for Visual Education (1976). Grades K-6. Six stories from the Kingdom of Tum Tum which emphasize law-related concepts. Many segments have "stops" to encourage discussion and conclude with open-ended questions for young viewers. In *Freedom of Choice: Make Mine Purple* prince Hubert discovers that individuals have their own preferences and don't want him to determine the color of their homes. In *Choosing a Leader: Charley the Great?* the children of Tum Tum decide to select a club president and learn some things about authority, fairness, and prudent methods of choosing leaders. In *Rules Are Important: A Mixed-Up Mess* Prince Hubert thinks he'd like to do without rules for a while—until he participates in a chaotic pie eating contest. In *The Majority Rules: A Secret that Grew* the people of Tum Tum find a way to solve disagreements about how to surprise the Queen on her birthday. In *Changing Rules: It's Different Now* Princess Gwendolyn helps the roadbuilder and learns many things about rules, including how they originate and how to change them when necessary. In *Civic Responsibility: Living Dreams* the Lollipop Dragon and the people of Tum Tum help the King and Queen make the Kingdom a better place.
- ***Crime: Everybody's Problem.*** Let's Find Out Series. Color sound filmstrip, 7 minutes. Teacher's guide provided. Pathescope Educational Films (1975). Grades 3-6. This film uses words and images that children will easily understand to explain what crime is and how it affects people. The opening scene shows a "bully" stealing a bike, and the narrator explains that he is a "criminal." Kit includes masters for student worksheets.
- ***First Things: Social Reasoning Series.*** Color sound filmstrips, 6-10 minutes. Teachers' Guides provided. Guidance Associates (1974). Grades K-4. Each of the four student kits contains two open-ended filmstrip stories which encourage critical thinking. In *How Do You Know What Others Will Do?* children analyze the actions of others in two situations. The stories in *How Would You Feel?* ask children to put themselves in the place of others and understand different points of view. In *How Can You Work Things Out?* children must deal with actions that affect other people's feelings. The stories in *How Do You Know What's Fair?* encourage students to analyze what fairness means in everyday life. A special filmstrip for teachers—*A Strategy for Teaching Social Reasoning*—provides theoretical background on developing social reasoning skills, as well as some strategies for teachers to use in organizing discussions and activities. Teaching guides for all segments offer concrete suggestions for teachers.
- ***The Hideout.*** 16mm color film, 15 minutes. Churchill Films (1976). Grades K-4. A sensitive film in which two children, helped by a third younger boy, build a secret fort. The youngest one contributes some boards he has taken without permission. The older children quarrel over whether to give them back (the boards have been slightly damaged) and suddenly the fort doesn't seem like so much fun. A painful lie is told and many issues relating to responsibility and moral judgement are raised.
- ***Law: The Rules of the Game are Changing.*** Color sound filmstrips, 9-12 minutes. Doubleday Multimedia (1974). Grades 4-9. Five filmstrips which can give students an understanding of law and the concepts underlying our legal system. *What Are Laws?* provides an overview of the origins and functions of rules, laws, and social organization. *What Is a Good Law?* explains how reasonable laws and rules are evolved, and discusses some criteria for "good" laws. In *Who Makes the Laws?* the nature of legislative and judicial lawmaking is discussed. *How Laws Are Interpreted and Enforced* deals with the separation between the duties of law enforcement officers and the responsibility of the courts. *The Court Is Now in Session* presents a mock trial involving a juvenile accused of theft, and covers arrest, legal aid, jury selection, trial procedure and other aspects of the criminal justice system.
- ***The Police and the Community.*** Let's Find Out Series. Color sound filmstrip, 6 minutes. Teachers' guide provided. Pathescope Educational Films (1975). Grades 3-6. This filmstrip emphasizes the importance of police-community cooperation in public safety. It shows the various duties police perform and explains the meaning of "arrest," "witness," "trial," and "jury." It explains how citizens can help police by keeping their eyes open and reporting any trouble they see. Kit includes spirit masters and student work sheets.
- ***Soopergoop.*** 16mm color film, 13 minutes. Churchill Films (1976). Grades K-6. Rodney, an animated cat on t.v. commercials, shows kids how he can make them want to buy things, in this case a very sugary cereal called "Soopergoop." A good discussion starter for lessons on advertising and consumer law.
- ***The Super Duper Rumors: Lessons in Values.*** Color sound filmstrips, 5 minutes each. Salenger Educational Media (1974). Grades K-2. Two sound filmstrips, with picture cards for each, provide children with enjoyable stories through which they can explore how rumors develop. In *The Substitute Teacher* a class imagines what their new teacher will look like and starts rumors describing a frightful person. Finally they meet him, and are quite delighted that he is not as the rumors described. In *The Aminal* a rumor about "the green 'aminal' Patrick caught" causes some children to envision a monster. They are quite surprised to discover that the "aminal" is a friendly turtle. Useful in helping young children understand the importance of "getting the facts." Also suitable for preschoolers.
- ***Why We Take Care of Property: The Planet of the Ticklebops.*** Basic Concept Series. 16mm color film, 16 minutes. Learning Corporation of America (1976). Grades K-3. The people of the planet Nice always took good care of their property. One day two children decide to start breaking things. This eventually causes life to deteriorate seriously. The film ends optimistically as everyone works together to rebuild their society. Also available in Spanish.

SECONDARY

- ***Capital Punishment.*** The Bill of Rights in Action Series. 16mm color film, 23 minutes. BFA Educational Media (1975). Grades 9-12. An open-ended film in which a man, hired to kill a young woman, sets off a bomb in a football stadium. He is convicted and sentenced to death. He argues that this sentence is unconstitutional under the 8th Amendment, while the state argues that deterrence and retribution make capital punishment necessary. The film poses many critical questions about the constitutionality and effectiveness of the death penalty.

- ***Constitutional Crises and Confrontations.*** Five color sound filmstrips, about 30 minutes each. Teacher's guide and student work sheets provided. Teaching Resources Films (1974). Grades 9-12, teacher. Series explores periods of institutional and political crisis in U.S. history, emphasizing the basic strengths of American institutions and the Constitution. Makes events and thoughts of earlier eras contemporary, and shows how constitutional issues are real, not abstract. *Crises of the Courts* presents the trial of Aaron Burr for treason, Franklin Delano Roosevelt's attempt to "pack" the Supreme Court, and Richard Nixon's attempt to keep the Watergate tapes under his personal control. Notes the power of public opinion. *Crises of the Presidency* focuses attention on the efforts of three presidents to expand the powers of the office: Jackson's battle with Congress over the national bank, Truman's dismissal of MacArthur, and Nixon's apparent use of public funds and campaign contributions for personal purposes and his attempts to limit investigations of his administration. *Crises of Civil Liberties* shows how laws affecting individual rights have been tested by the Alien and Sedition Acts, the case of Sacco and Vanzetti, the actions of Sen. Joseph McCarthy, and the Pentagon Papers affair. Emphasizes the strength of law, but shows how legal institutions are vulnerable to public opinion. *Crises of National Unity* presents the Dred Scott case, the impeachment of Andrew Jackson, and the domestic impact of the war in Indochina. Describes the divisions these issues created along lines of race, partisan affiliation, age, and economic status. *The End of the Story: The Fall of the Nixon Administration* traces the events that led to Nixon's resignation. Also brings together concepts developed in the filmstrips.

- ***Constitutional Law in Action.*** Four color sound filmstrips, 10-12 minutes each. Teacher's guide provided. Teaching Resources Films (1975). Grades 9-12. Four separate strips that involve students in legal decision-making concerning issues which have been decided by the Supreme Court. *Search and Seizure* presents an incident in which a young man is stopped for careless driving, searched, and found to have marijuana in his cigarette box. Students are exposed to the arguments in the case and opposing majority and minority opinions of the Supreme Court are presented. *Due Process* shows how the Due Process Clause of the Fourteenth Amendment and the Freedom of Speech Clause of the First Amendment are applied to a case in which a young man has an American flag sewn to the seat of his pants. Presents Supreme Court decision on a similar case and illustrates the form of legal argument. *Right to Counsel* explores the dimensions of the decision that an indigent sentenced to "only ninety days" was denied his right to counsel. Asks students to consider such issues as the seriousness of the crime, length of sentence, and character of the defendent. Presents the Supreme Court decision. *State Action* focuses attention on the State Action Clause and the Equal Protection Clause of the Fourteenth Amendment. The issue concerns a city granting a segregated club permission to use a public recreation facility.

- ***The Emerging Woman.*** 16mm color film, 40 minutes. Film Images, Inc. (1974). Grades 7-12. A 1975 American Film Festival award winner. Using newsreels, photos and other original sources, it documents the discrimination black and white women have been subjected to throughout history, especially in America. Describes the background of women's rights movements, including early labor efforts, the abolitionists, the women's rights convention at Seneca Falls, the suffragettes, and efforts for birth control, and raises many contemporary issues as well.

- ***In Search of Justice.*** Law in American Society Foundation. Charles E. Merrill Publishing Company (1975). Kit. Grades 7-12. This inquiry-oriented program uses case studies in eight color sound filmstrips to explore the legal system and some basic concepts of law. *Law: A Need for Rules?* deals with police power and the balance between individual rights and the need to protect society. *Youth: Too Young for Justice?* shows the difference between adult and juvenile criminal procedures. *Free Expression: A Right to Disagree?* raises questions about the nature of "speech" and the scope and limits of the right to free speech. *Discrimination: Created Equal?* focuses on discrimination against blacks and women. *Consumer Law: Cash or Court?* examines the rights and responsibilities of buyers and sellers in a credit economy. *The Accused: Too Many Rights?* examines the rights of the accused in a hypothetical investigation of a man suspected of selling drugs. *Landlord/Tenant: Who Is Responsible?* examines the landlord/tenant relationship. *Welfare: A Right to Survive?* asks who should be eligible for aid and whether rights of welfare recipients differ from rights of those not receiving welfare. The student activity book offers a number of strategies, including mock trials, value clarification exercises, case studies, and vocabulary exercises.

- ***Juvenile Justice: Society's Dilemma.*** Color sound filmstrip, 15 minutes. Current Affairs Films (1976). Grades 7-12. Provides some background information about the development of the juvenile justice system and raises issues relating to the increase in juvenile crime, alternative means of rehabilitation, and the problem of treating youths who have committed crimes as well as those who are simply "status offenders" (juveniles who commit offenses such as truancy which are not crimes under the adult justice system).

- ***Juvenile Law.*** The Bill of Rights in Action Series. 16mm color film, 23 minutes. BFA Educational Media (1975). Grades 7-12. Contrasts due process for adults with the special procedures for juveniles and raises open-ended questions about the constitutionality of such differing treatment. Scenario involves two brothers, aged 15 and 18, who are arrested for armed robbery. The older brother is treated as an adult and released on bail. The younger one, a juvenile, is detained in a juvenile facility on the recommendation of his probation officer. Is this denial of bail constitutional? The case is taken to court, where arguments are presented on both sides. The decision is left to the audience.

Law in the Schools. 16mm color film, 30 minutes. AIMS Instructional Media Services, Inc. (1976). Grades 10-12, teacher. Dramatization of violence in an urban school. The school's administrator is under immense pressure from some teachers and faculty who want more security on campus, especially police involvement. He opts for handling incidents of campus violence without using outside help. The film concludes with the shooting of an innocent student. Raises questions as to how to handle violence, the role of police, and the legal rights and responsibilities of administrators and teachers.

- ***Modern Morality: Old Values in New Settings?*** Color sound filmstrip, 14 minutes. Teacher's guide provided. Current Affairs Films (1976). Grades 7-12. This filmstrip examines some of the personal and social manifestations of the "new morality"—such as sex and violence in media, gambling sponsored by state and local government, increases in juvenile delinquency, venereal disease and

JOSEPH FARRIS

"We find the defendent guilty but very entertaining."

"rip-offs." Considers the relationship between morality and law and notes that society is always testing value systems. Can be used to introduce discussions of "What is law?" or "What do we expect laws to do?"

- ***Our Courts: The Cost of Justice.*** Two color sound filmstrips, 15 minutes each. Prentice-Hall Media, Inc. (1974). Grades 8-12. These filmstrips are a plea for court reform. The ideals of the Constitution and Bill of Rights are juxtaposed with the realities of crowded dockets, uneven representation by counsel, delay, inefficient court administration, and capricious trial detention. "Two systems of justice"—one for the poor and one for the middle and upper classes—are discussed. Could be used to examine issues of equal protection in our justice system.
- ***Take This Woman.*** 16mm color film, 25 minutes. Films, Inc. (1973). Grades 9-12. Focuses on women's struggle for equal employment opportunity. Includes interviews with women in management positions and comments by a woman judge. Shows complaints of discrimination, mentions affirmative action plans and includes cases in which women have sued employers for discrimination. Also points out discrimination in labor unions and in other professions.
- ***Understanding Law.*** Four color sound filmstrips, 10 minutes each. Educational Activities, Inc. (1976). Grades 6-12. In *When Kids Break the Law,* three young people are caught stealing a car. The film shows how Family Court treats children differently on the basis of their records and their parents' concern. Also defines probation, detention, and Persons in Need of Supervision (PINS). *You Have Rights. . . & Responsibilities Too* defines the legal position of minors vis-a-vis their parents, the state, the school, and society in general. Explains the *Goss* and *Tinker* decisions clearly, shows how the First and Fourteenth Amendments are relevant to students today. Can be used to introduce a unit on the Bill of Rights. *So, You've Been Arrested* presents a drug case step-by-step from arrest through booking, arraignment, plea bargaining, and trial. Procedures are explained clearly, and the trial evidence is presented. The decision is left for class determination. *What Shall We Do About Crime and Criminals?* shows how contemporary prisons were a reform of earlier practices of humiliation, mutilation, and beating. Presents information about recidivism and prison conditions that can be used as the basis for class discussion on prison reform.
- ***The U.S. Constitution Confronts the Test of Time.*** Color sound filmstrip, 15 minutes. Current Affairs Films (1975). Grades 8-12. Illustrates the flexibility and broad applicability of the U.S. Constitution. Notes influence of particular Chief Justices, discusses judicial review, and asks if the Constitution is still flexible enough to meet rapidly changing needs.
- ***The Un-Making of a President.*** Two color sound filmstrips, 12 minutes each. Teacher's guide provided. Prentice-Hall Media, Inc. (1974). Grades 7-12. Filmstrips discuss both high and low points of Richard Nixon's life and presidency, with emphasis on "the system" and its constitutional foundation. Asks students to consider how well the system really worked, suggesting that the Nixon-made tapes, not "checks and balances," were the key to Congressional and Supreme Court actions.

FEDERAL FUNDS AVAILABLE

Charles J. White

Don't Overlook Money for Innovative Programs. . .

Title IV-C of the Federal Elementary and Secondary Education Act (ESEA) is the lynchpin of several programs that have provided support for law-related education. Basically, Title IV-C supports innovative and exemplary programs of all kinds in elementary and secondary school. This Title replaced the old Title III of ESEA; it supports similar programs and functions in much the same way. Three types of programs are eligible for Title IV-C funding: innovative programs, adopter/adapter programs, and programs seeking help from successful out-of-state innovators.

Innovative Programs

In a number of states—New York, Pennsylvania, New Jersey, Florida, Texas, Rhode Island, Oklahoma, and New Hampshire, to name a few—Title IV-C has supported innovative programs of law-related education. Title IV-C is a particularly good source of funds for small programs—those within one school or within one school system—since it is designed to promote local innovation. At the same time, however, there is the possibility of statewide funding under Title IV-C. As long as one local school system acts as the fiscal agent, a consortium can be set up to carry an innovation forward statewide. Size of grants can vary from as little as a few thousands dollars for local programs to as much as $100,000 for a statewide consortium. Among the areas that can be funded for both local and statewide efforts are curriculum development, teacher education, field testing, and evaluation.

These federal funds are administered by the states, so the application and funding process may differ somewhat from state to state, but here is the general procedure. In each state there is a special Title IV-C council which has the final responsibility for making Title IV-C grants. The composition of these councils varies from state to state, but generally they include teachers and administrators representing both public and private schools. Often, teachers of the arts, special education, and other special programs are represented on the councils.

Preliminary proposals must be submitted by January 1. These preliminary proposals are reviewed by a team of readers brought in by the state department of education. On the basis of their recommendations, some programs are asked to prepare more detailed proposals, generally by the end of April. The Title IV-C council then awards grants which are to start by July 1.

Grants are for one year only, but it is often assumed that projects will have three years of at least partial funding. In some states, projects may be funded for the first year at 100%, for the second year at 75%, and for the third year at 50%; in others, the same level of funding may be maintained in subsequent years and, in some instances, it may even be possible to get an increase to cover the cost of inflation. One thing that is constant from state to state, however, is that Title IV-C grants are made for just one year at a time. Programs must reapply if they wish to be refunded.

An official of the state department of education generally serves as liaison to the Title IV-C council. To find out more information about Title IV-C in your state, write your state department of education. (In many states, the federal programming office handles Title IV-C.) Many state departments of education have prepared manuals which are very extensive, containing the necessary forms and guidelines, and the priorities of the state Title IV-C council. Often state departments of education offer help to teachers and adminstrators trying to put together a Title IV-C proposal. In some states, Georgia and New Jersey for example, the place to go for help is the nearest regional office of the state department of education. In other states, seek such help from the central office.

State Facilitator Programs

These programs are a spin-off of the Title IV-C program. The U.S. Office of Education has established a National Diffusion Network, designed to spread innovations which have proved particularly successful in a state or locality.

Many states have established state facilitator programs which are responsible for spreading these innovations. The key to these programs are facilitators who are provided funds to bring in successful programs. These funds enable programs to conduct workshops, provide materials, and otherwise aid local educators.

Since at least one law-related project —the New Jersey-based Institute for Political/Legal Education (IPLE)—is nationally validated, your state facilitator should be able to help you bring a law-related resource to your state.

In most states, the state facilitator is affiliated with the state department of education; in others, the facilitator is independent. However, in both cases the state department of education should be able to provide information about the facilitator program.

Adopter/Adapter Programs

There is one more opportunity for Title IV-C funds for law-related programs. Each state reserves a portion of its Title IV-C funds for programs within the state which seek to adopt/adapt a nationally validated program in a slightly different manner than is permitted under the facilitator program. The facilitator program does not provide monies directly to programs in the state, but rather funds nationally validated programs to come into the state and conduct workshops, provide materials, etc. The adopter/adapter program, on the other hand, does provide funds to school programs within the state, so that they may successfully implement an innovation.

The guidelines for the adopter/adapter programs differ from state to state, but in some states they also permit school programs to adopt/adapt other innovations besides those nationally validated and available through the National Diffusion Network. If that were the case in your state, you would have a potentially large range of law-related programs to adopt/adapt. Check with the guidelines of your state Title IV-C council to see what the possibilities are.

. . .or Your LEAA Agency

Got an idea for law-related teacher education or curriculum development, but stymied for lack of money? The Law Enforcement Assistance Administration (LEAA), created in the late 60's as part of the war on crime, may be the answer. LEAA is one of the best sources of funds for law-related projects in the schools, but many people may not be aware of it, or may not know how to go about applying for LEAA support. We'll try to answer some of the questions you might have about LEAA in this article.

First of all, **why does LEAA fund law-related education?** The Omnibus Crime Control and Safe Streets Act authorizes LEAA to make grants in support of "public education programs concerned with the administration of justice" (Part C, Section 301 (b) of Title I). This basic provision makes school programs in law and the legal process eligible for LEAA funding. In the past seven years, LEAA agencies in at least thirty-five states have funded law-related education projects, contributing a total of more than $10 million. Some grants have been very large, encompassing city school systems or statewide programs; many others have been small, in the range of a few thousand dollars and targeted to programs in a specific school or group of schools. LEAA has funded this diverse group of programs because it believes that law-related education in the schools can be a way of increasing respect for and understanding of law, and thus lessening the possibility of anti-social behavior.

Where do you apply for LEAA funds? There are four levels of LEAA: The national office, ten multi-state offices around the country, fifty state and five territorial agencies, and many regional agencies within each state. The vast majority of school programs will make application either to their state LEAA agency or to one of the regional agencies within the state. Fortunately, these levels of LEAA control most of the funds available for projects. Eighty-five percent of LEAA grant monies are reserved for activities within the states.

How do you locate your state or regional agency? We have listed the addresses and phone numbers for each state LEAA agency at the end of this article. Through the state agency, you can locate the regional agency closest to you. In rural areas, a regional agency may encompass six or seven counties. In urban areas, it would probably encompass just the metropolitan area itself.

How are these agencies structured? All LEAA agencies are under the direction of a commission (or council) which usually includes elected officials, representatives of the criminal justice system (such as judges, juvenile officers, and prosecuting attorneys), and law enforcement officials. Generally, this governing group is divided into committees which consider various aspects of LEAA's work. The day-to-day operation of the agency is under the direction of a professional staff. Most regional agencies have at least a one-person full-time staff.

How do the agencies operate? The governing body periodically holds meetings at which it receives and reviews applications for funding. Probably the professional staff will have previously reviewed applications and have made recommendations as to which should be funded and at what level. Generally, recipients are identified nine to twelve months before the starting date of the project.

How can you get LEAA funding? The first step is to determine your state's funding policy. Each state has prepared an annual plan indicating multi-year objectives that are priority areas for funding. This plan will help you determine the areas that provide the most likely sources of funds for your proposal. Many LEAA agencies have prepared handbooks containing guidelines for applicants. These usually provide all of the necessary information. Also, it is a good idea to get in touch with the staff of the agency, since it may well be able to help you by offering suggestions that will bring your proposal more in line with agency policy.

What if education isn't a priority? Many LEAA agencies may feel that education is not their responsibility, but don't let this deter you. Use your meetings with the professional staff to point out the relationship between law-related education and LEAA objectives. Also, find out which committees of the governing body will be reviewing your proposal. Some LEAA agencies may have a committee on education, but most probably do not. The committee on courts—which exists in one form or another in every agency—may review education proposals, and,

STATE LEAA AGENCIES

Alabama
Alabama Law Enforcement Planning
Agency
2863 Fairland Drive
Building F, Suite 49
Executive Park
Montgomery, AL 36111
205/277-5440

Alaska
Alaska Criminal Justice Planning Agency
Pouch AJ
Juneau, AK 99801
907/465-3535

Arizona
Arizona State Justice Planning Agency
Continental Plaza Building, Suite M
5119 North 19th Avenue
Phoenix, AZ 85051
602/271-5466

Arkansas
Governor's Commission on Crime and
Law Enforcement
1000 University Tower
12th at University
Little Rock, AR 72204
501/371-1350

California
Office of Criminal Justice Planning
7171 Bowling Drive
Sacramento, CA 95823
916/445-9156

Colorado
Division of Criminal Justice
Department of Local Affairs
1313 Sherman Street, Room 419
Denver, CO 80203
303/892-3331

Connecticut
Connecticut Justice Commission
75 Elm Street
Hartford, CT 06115
203/566-3020

Delaware
Delaware Agency to Reduce Crime
1228 Scott Street
Wilmington, DL 19806
203/571-3431

District of Columbia
Office of Criminal Justice Plans
and Analysis
Munsey Building, Room 200
1329 E Street, NW
Washington, DC 20004
202/629-5063

Florida
Bureau of Criminal Justice Planning
and Assistance
620 S. Meridian
Tallahassee, FL 32304
904/488-6001

Georgia
Office of the State Crime Commission
1430 West Peachtree Street, NW,
Suite 306
Atlanta, GA 30309
404/656-3825

Hawaii
State Law Enforcement and Juvenile
Delinquency Planning Agency
1010 Richards Street
Kamamalu Building, Room 412
Honolulu, HI 96800
808/548-3800

Idaho
Bureau of Law Enforcement Planning
Commission
700 West State Street
Boise, ID 83707
208/964-2364

Illinois
Illinois Law Enforcement Commission
120 South Riverside Plaza, 10th Floor
Chicago, IL 60606
312/454-1560

Indiana
Indiana Criminal Justice Planning
Agency
215 North Senate
Indianapolis, IN 46202
317/633-4773

Iowa
Iowa Crime Commission
3125 Douglas Avenue
Des Moines, IA 50310
515/281-3241

Kansas
Governor's Committee on Criminal
Administration
503 Kansas Avenue, 2nd Floor

since judges come into daily contact with individuals who have gotten into trouble because of lack of knowledge of the law, they may be receptive to such proposals. If you have already worked with persons in the criminal justice system or if you contemplate working with such persons, get them involved at this stage. They can help you in your dealings with professional staff, but even more important, they may be able to meet with some of the attorneys, judges, and law-enforcement officials on the appropriate committee of the governing body. All of these contacts should serve the important function of educating the agency on the need for law-related education and its importance to the work of LEAA.

What can you do to improve your chances? One good tip is that applicants for LEAA funding should try to be present at the regional or state council meeting at which their application will be reviewed, so that they can answer the questions of council members. This is particularly important since council members are often unfamiliar with law-related education and may well misunderstand the purposes of the program. If no one is there to explain what the program proposes and to address these concerns, the proposal may not be funded.

In some states, the state and regional council meeting is open to the public by virtue of sunshine (open meeting) laws. Even without such laws, however, councils may allow applicants to appear at the meetings to make brief presentations and answer questions. You may have to take the initiative in finding out when such a meeting is going to be held, and in seeing that you're invited to attend, but this initiative could well make the difference between success and failure.

What should you propose? That, of course, will depend greatly on your sense of what your students need and what a sound educational program requires. In general, LEAA might be more sympathetic to proposals which involve people associated with the criminal justice system—lawyers, judges, police,

Topeka, KS 66603
913/296-3066

Kentucky
Kentucky Department of Justice
Executive Office of Staff Services
209 St. Clair Street, 3rd Floor
Frankfort, KY 40601
502/564-3253

Louisiana
Louisiana Commission on Law Enforcement and Administration of Criminal Justice
1885 Wooddale Boulevard, Room 615
Baton Rouge, LA 70806
504/389-7515

Maine
Maine Criminal Justice Planning and Assistance Agency
11 Parkwood Drive
Augusta, ME 04330
207/289-3361

Maryland
Governor's Commission on Law Enforcement and Administration of Justice
Executive Plaza One, Suite 302
Cockeysville, MD 21030
301/666-9610

Massachusetts
Committee on Criminal Justice
110 Tremont Street, 4th Floor
Boston, MA 02108
617/727-5497

Michigan
Office of Criminal Justice Programs
Lewis Cass Building, 2nd Floor
Lansing, MI 48913
517/373-3992

Minnesota
Governor's Commission on Crime Prevention and Control
444 Lafayette Road, 6th Floor
St. Paul, MN 555101
612/296-3133

Mississippi
Mississippi Criminal Justice Planning Division
Office of the Governor
723 North President Street
Suite 400
Jackson, MS 39202
601/354-4111

Missouri
Missouri Council on Criminal Justice
P.O. Box 1041
Jefferson City, MO 65101
314/751-3432

Montana
Board of Crime Control
1336 Helena Avenue
Helena, MT 59601
406/499-3604

Nebraska
Nebraska Commission on Law Enforcement and Criminal Justice
State Capitol Building
Lincoln, NE 68509
402/471-2194

Nevada
Commission on Crime, Delinquency and Corrections
430 Jeanell - Capitol Complex
Carson City, NV 89710
702/885-4404

New Hampshire
Governor's Commission on Crime and Delinquency
169 Manchester Sreet
Concord, NH 03301
603/271-3601

New Jersey
State Law Enforcement Planning Agency
3535 Quaker Bridge Road
Trenton, NJ 08625
609/477-3741

New Mexico
Governor's Council on Criminal Justice Planning
425 Old Santa Fe Trail
Santa Fe, NM 87501
505/827-5222

New York
NYS Division of Criminal Justice Services
270 Broadway, Rm. 807
New York, NY 10007
212/488-4868

probation officers, prosecutors, etc.—rather than school people alone. That suggests, then, that these people be prominently involved on advisory committees and in teacher education, curriculum development, classroom presentations or other aspects of your program.

What about the paperwork? There's some good news here. Most LEAA agencies prefer to consider first a brief summary of the proposal focusing on the need for your program, what you propose to do, how much money will be required, who will be involved, and what outcomes you expect. This can be as brief as two or three typewritten pages. Should this initial proposal be encouraged, you would, of course, be required to submit a more detailed proposal, but even so, most small projects would probably not be burdened by paperwork.

Are there any other opportunities under LEAA? Schools are eligible for special new LEAA funds which may be particularly appropriate for law-related programs. For example, a grants program to prevent juvenile delinquency has a small amount of money available to support projects which increase or expand social, cultural, educational, and other services to youth in order to prevent juvenile delinquency. For information, contact an LEAA agency in your state or Prevention Initiative, Office of Juvenile Justice, LEAA, 633 Indiana Avenue, N.W. Washington, D. C. 20531, (202) 376-3776. Another program, still in the planning stages, will involve a discretionary grants program between LEAA and the Office of Education focusing on problems of school violence. For information, contact Serious Crime Program, Discretionary Grants, Office of Juvenile Justice, at the address above.

Where can you turn for further help? Two books provide a lot of useful information. *Law-Related Education in America: Guidelines for the Future* is a report commissioned by LEAA and designed to help both applicants and agencies which consider law-related education applications. *The $$ Game: A Guidebook on the Funding of Law-Related Educational Programs* contains articles by many persons who have successfully secured funding for law-related programs. Many of these concentrate of LEAA.

Both of these publications are available from YEFC, 1155 E. 60th Street, Chicago, Illinois 60637. Of course, we are also available to answer questions and to provide whatever assistance we can. Please don't hesitate to call on us.

STATE LEAA AGENCIES

North Carolina
Law and Order Section
N.C. Department of Natural and
Economic Resources
P.O. Box 27687
Raleigh, NC 27611
919/829-7974

North Dakota
North Dakota Combined Law
Enforcement Council
Box B
Bismark, ND 58501
701/224-2594

Ohio
Ohio Dept. of Economic and
Community Development
Administration of Justice
30 East Broad Street, 26th Floor
Columbus, OH 43215
612/466-7610

Oklahoma
Oklahoma Crime Commission
3033 North Walnut
Oklahoma City, OK 73105
405/521-2821

Oregon
Law Enforcement Council
2001 Front Street, NE
Salem, OR 97303
503/378-4347

Pennsylvania
Governor's Justice Commission
Department of Justice
P.O. Box 1167
Federal Square Station
Harrisburg, PA 17108
717/787-2042

Rhode Island
Governor's Justice Commission
197 Taunton Avenue
E. Providence, RI 02914
401/277-2620

South Carolina
Office of Criminal Justice Programs
Edgar A. Brown State Office Building
1205 Pendleton Street
Columbia, SC 29201
803/758-3573

South Dakota
Division of Law Enforcement Assistance
200 West Pleasant Drive
Pierre, SD 57501
605/224-3665

Tennessee
Tennessee Law Enforcement Planning
Agency
4950 Linbar Drive
The Browing-Scott Building
Nashville, TN 37211
615/741-3521

Texas
Criminal Justice Division
Office of the Governor
411 West 13th Street
Austin, TX 78701
512/475-4444

Utah
Utah Council on Criminal Justice
Administration
255 South 3rd Street - East
Salt Lake City, UT 84111
801/533-5731

Vermont
Governor's Commission on the Administration of Justice
149 State Street
Montpelier, VT 05602
802/828-2351

Virginia
Division of Justice and Crime Prevention
8501 Mayland Drive
Parham Park
Richmond, VA 23229
804/786-7421

Washington
Law and Justice Planning Office
Office of Community Development
Insurance Building, Room 107
Olympia, WA 98504
206/753-2235

West Virginia
Governor's Committee on Crime,
Delinquency and Corrections
Morris Square, Suite 321
1212 Lewis Street
Charleston, WV 25301
304/345-8814

Wisconsin
Wisconsin Council on Criminal Justice
122 West Washington
Madison, WI 53702
602/266-3323

Wyoming
Governor's Planning Committee on
Criminal Administration
State Office Building East
Cheyenne, WY 82002
307/777-7716

PROJECT NEWS

NEW STATEWIDE PROJECTS

Wisconsin

The Wisconsin Bar Foundation and the Wisconsin Department of Public Instruction this winter received a grant from the state LEAA agency to support the development of law-related curriculum models for Wisconsin schools. The new Law-Related Education Project has already established ten pilot programs, building upon expressed teacher interest and existing teacher-attorney teams established through Project Inquiry, the Wisconsin Bar Foundation's extensive lawyer-in-the-classroom program. Most of the programs are at secondary level, with one group focusing on the elementary grades.

These pilot programs will develop models which reflect a variety of approaches and subject emphases. The models will range from single units on criminal and consumer law to a K-12 curriculum encompassing both conceptual and practically-oriented approaches to the legal system, lawmaking, and government.

Project staff is providing materials and assistance to participating teachers and attorneys, and helping the pilots exchange information and ideas. Additional ideas and expertise come from the community teams created to support the local projects, each consisting of teachers, attorneys, and representatives of law enforcement, social services, the juvenile justice system, business, and student groups.

The developmental work that has been done during the spring semester will reach its culmination in a summer workshop emphasizing curriculum writing and teaching strategies. In this workshop the materials from the various local projects will be revised and readied for implementation during the fall semester. This period of field-testing is expected to produce models suitable for dissemination to other interested Wisconsin schools, and the final period of the statewide project's first year will be devoted to making these materials available to an increasing number of schools, hopefully for a second and expanded phase of the project.

For further information, contact Kathleen Cruikshank, Project Director, Law-Related Education Project, Room 530, 126 Langdon Street, Madison, Wisconsin 53702, 608/266-8249.

South Dakota

South Dakota is now winding up the first year of a projected three-year statewide law-related education program. This year, the program has trained over 100 teachers in Rapid City and Hot Springs, with the major emphasis on introducing them to law-related materials and concepts, integrating legal concepts into their courses of study, and field-testing law-related materials. Approximately $30,000 has already been earmarked for the purchase and field-testing of such materials.

The program's total budget this year was approximately $70,000, most of it contributed by the state LEAA agency, with matching funds from local districts, the state department of education, and the South Dakota State Bar. Project leaders report that the State Bar is very committed to the project and has provided strong support to the program in many ways beyond their financial contribution.

This summer, the project plans to offer a one-week workshop on law-related education as part of the state department of education's two-week Current Trends workshops. The Current Trends workshops are offered simultaneously (from Aug. 1-12) at Black Hills State College in Spearfish, and at South Dakota State University in Brookings. At Spearfish the law-related education workshop will be offered August 1-5; it will be repeated at Brookings August 8-12.

For further information, contact Beth Taylor, Director, In-Service Education and Staff Development, Department of Elementary and Secondary Education, Office Building 3, Pierre, South Dakota 57501, 605/224-3139; or Dr. Marvin Scholten, Director, Law-Related Education Project, South Dakota State University, Education Department, Brookings, South Dakota 57006, 605/692-4498.

Connecticut

The Connecticut Consortium for Law-Related Education, a broad-based group of educators, lawyers, and community representatives has accomplished a great deal in its first year of existence. The Consortium, which was founded as a result of interest generated at an ABA Regional Conference in New England last May, has (1) provided centralized resource centers for law-related education materials; (2) begun putting together a curriculum guide on national and state materials that will be available by school year 77-78; (3) established a file of available community resources; (4) conducted a one-day conference in November that attracted more than 150 teachers and lawyers from around the state; (5) run a series of afternoon workshops at the state's six regional education service centers for elementary (and especially K-3) teachers; and (6) planned a three-week teacher institute this summer for thirty elementary and secondary teachers. The summer workshop will feature instruction in both substantive law and teaching methodology. It will be conducted in late June and early July, in the capitol region.

Funding thus far has come from the Connecticut State Department of Education. The Consortium is currently seeking additional sources of funds.

For further information, contact Jackie Danzberger, Chairman, Consortium for Law-Related Education, Hartford Graduate Center, 275 Windsor Street, Hartford, Connecticut 06120, 203/525-9886; or Roberta Kurlantzick, Coordinator, Consortium for Law-Related Education, Connecticut State Department of Education, P. O. Box 2219, Hartford, Connecticut 06115, 203/566-3873.

—CJW

SUPREME COURT (continued from page 4)

Looking at the case from a different point of view, the Court of Appeals reversed. This court felt that the Fourteenth Amendment required an examination of not only the Village's *intent* in denying the request, but also the *effect* of the denial. Since the Village was nearly all white and had no other plans for building racially integrated housing, the court ruled that the denial of the MHDC proposal had a racially discriminatory effect and could be tolerated only if it served compelling interests. The court concluded that neither the buffer policy nor the desire to protect property values met this "compelling" standard, and ruled that the denial of MHDC's request violated the Equal Protection Clause.

When the case reached the Supreme Court, however, Justice Powell, writing on behalf of the majority, held that it is necessary to prove discriminatory *intent* in order to establish a violation of the Equal Protection Clause. In essence, the majority applied the same test as the District Court, and ruled in favor of the Village.

Proving Discriminatory Intent

Under this ruling the actions of policy-makers become crucial, so the majority provided some guidelines that would help determine if there is in fact an intent to discriminate. Sometimes a "clear pattern" of discrimination can be seen, Powell explained, in legislation which at first glance appears racially neutral. He illustrated this point by referring to a classic equal protection case in which a San Francisco ordinance requiring licenses for laundries in wooden buildings was alleged to discriminate against Chinese. The ordinance did not mention race, and on its face appeared racially neutral, but in fact Chinese were far more likely than whites to operate laundries in wooden buildings. Furthermore, the ordinance was not enforced against the whites who operated laundries in wooden buildings, while it was enforced against the Chinese laundries (*Yick Wo v. Hopkins,* 118 U.S. 356 [1886]).

The Court also suggested other important factors. What is the historical background of the law's passage? Were there any departures from normal legislative procedures? Had others in similar circumstances been treated more favorably? In answering these questions, the Court said that it is appropriate to examine statements by members of the decision-making body, minutes of meetings, and committee reports, all of which may shed light on intent.

Reviewing the evidence in this case, the majority agreed that the Village's decision to prohibit construction of the project fell more heavily on members of minority groups, but it found no other evidence of discriminatory intent. The Court indicated that this would be a far different case had the Village changed the zoning code when it learned of the planned development, or if the Village had granted similar requests to others on previous occasions. The facts clearly showed, however, that the fifteen-acre area in question had been zoned solely for single-family dwellings since 1959, the year when Arlington Heights first adopted its zoning map, and that the Village was "undeniably committed to single-family homes as its dominant residential land use." The Court also found that the rezoning request had been handled according to the usual procedures, and the denial was based on criteria which had been established and applied for many years. Therefore, the Court found no equal protection violation in the Village's refusal to rezone.

A Change of Standards?

Some observers were surprised by the Court's finding that a racially discriminatory effect was not sufficient to prove an Equal Protection Clause violation. They pointed to statements in other Court decisions which, they felt, suggested the opposite conclusion. In *Palmer v. Thompson,* for example, a case involving a challenge to a Jackson, Mississippi plan to desegregate its recreational facilities, the Court stressed the need to examine the objective effects of legislation rather than trying to second-guess underlying intent in Equal Protection cases: ". . . there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for

PRIOR EQUAL PROTECTION DECISIONS

For those interested in learning more about the Supreme Court's interpretation of the Equal Protection Clause, here is a brief list of some important cases:

Railway Express v. New York, 336 U.S. 106 (1949)—Court found no equal protection violation in a state law prohibiting all advertising on delivery trucks other than advertising of the owner's products. "It is no requirement of equal protection that all evils of the same [kind] be eradicated or none at all," the Court said.

Brown v. Board of Education, 347 U.S. 483 (1954)—Court found racially segregated public school systems to be unconstitutional under the Equal Protection Clause. According to the Court, "Separate educational facilities are inherently unequal."

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)—Court found unconstitutional a state law which required citizens to pay a poll tax before being able to vote. "Wealth or fee paying," the Court noted, "has no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."

Levy v. Louisiana, 391 U.S. 68 (1968)—Court found unconstitutional a state law which allowed legitimate but not illegitimate children to recover money damages as a result of their mother's wrongful death. "Why should the illegitimate child be denied rights merely because of his birth out of wedlock?" the Court asked.

Dandridge v. Williams, 397 U.S. 471 (1970)—Court upheld state law which denied additional welfare payments for any fifth or succeeding child in a family on welfare. "In the area of economics and social welfare," the Court noted, ". . . the Constitution does not empower this Court to second-guess officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

Stanley v. Illinois, 405 U.S. 645 (1972)—Court held unconstitutional a state law which required, in cases of child custody when one parent dies, a hearing to determine parental fitness for unmarried fathers, but not for married or divorced parents or unmarried mothers. "A father, no less than a mother, has a this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons" (403 U.S. 217, 225 [1971]). In the school desegregation case of *Wright v. Council of City of Emporia*, the Court reiterated this theme, explaining that its Equal Protection analysis "... focused upon the effect—not the purpose or motivation" of the school board's action in determining whether their method of dismantling a dual school system was permissible: "The existence of a permissible purpose cannot sustain an action that has an impermissible effect" (407 U.S. 451, 462 [1972]).

While Justice Stevens did not take part in the *Arlington Heights* case, his concurrence in an earlier court case, *Washington v. Davis*, provides an interesting perspective on the complex problems addressed here. In *Washington v. Davis*, Stevens pointed out that "[i]t is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual objective intent of the decision-maker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process." He went on to suggest that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."

The Williamsburgh Case: Redistricting on the Basis of Race

The *Arlington Heights* case is typical of most race-related equal protection cases in that it involves members of a minority group who claim that they have been denied their rights under the law. However, as a result of many new laws which seek to remedy past discrimination by according minorities special treatment, more and more members of the majority are protesting the law unfairly discriminates against *them*. These claims of "reverse discrimination" confront courts with the troublesome question of whether legislation passed for very noble reasons violates the Equal Protection Clause if it thereby places members of the majority in a disadvantaged position. One such case, *United Jewish Organizations of Williamsburgh, Inc. v Carey* (45 U.S.L.W. 4221, March 1, 1977), concerned a group of Hasidic Jews in Brooklyn who claimed that they were discriminated against when New York State used racial considerations in redrawing legislative district lines under the requirements of the federal Voting Rights Act.

The case arose when three New York counties were found to have violated the federal Voting Rights Act, which had been passed in 1965 to assure that minority group members were fairly represented in the electoral process. As a result, New York was required to submit its 1972 reapportionment plan for these counties to the United States Attorney General for his approval, in order to make certain that the plan "had neither the purpose or effect of abridging the right to vote by reason of race or color."

The Attorney General rejected the 1972 plan because it diluted minority (black and Puerto Rican) voting strength by created a few heavily minority districts while dividing the remaining minority voting strength among a number of other districts. As a result of consultations with the Justice Department, New York then submitted a new plan which created fewer heavily minority districts and more districts in which minorities constituted at least 65% of the voting-age adults. This new plan was approved and put into effect in 1974.

Williamsburgh, a Brooklyn neighborhood, was one of the communities affected by the reapportionment plan. The community was previously located in one assembly and one senate district, but the revised plan split it between two senate and two assembly districts. Williamsburgh is also the home of about 30,000 Hasidic Jews, a group which adheres strictly to the traditions of the Jewish faith.

Considering the distinctiveness of the Hasidim, and the long history of discrimination against them and other Jews, one would think that they are a minority as deserving of special protection as blacks and Puerto Ricans. However, the Voting Rights Act was motivated explicitly by a desire to

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constitutionally protected right to the companionship, care, custody, and management of the children he has sired and raised," the Court held.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)—Court upheld a private club's constitutional right to refuse to serve liquor to a white member's black guest in the dining room or bar. Discussing the requirement of state action in violation of the Fourteenth Amendment, the Court held that "where the impetus for the discrimination is private, the state must have significantly involved itself with [the] invidious discrimination" to make it unconstitutional.

Frontiero v. Richardson, 411 U.S. 677 (1973)—Court found unconstitutional a federal law which provided that wives of servicemen were dependents for purposes of obtaining certain benefits, but that husbands of servicewomen were not dependents unless they could prove that they received over one-half of their support from their wife. Referring to the government's claim of "administrative convenience" the Court stated, "the Constitution recognizes higher values than speed and efficiency."

Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974)—Court found unconstitutional a public school board rule which required a pregnant teacher to take unpaid maternity leave five months before the expected childbirth. The "arbitrary cutoff dates embodied in the mandatory leave rules," the Court held, "have no rational relationship to the valid state interest of preserving continuity of instruction" or the "necessity of keeping physically unfit teachers out of the classroom."

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)—Court upheld state law requiring uniformed state police to retire at age 50. According to the Court, "that the state chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum age limitation . . . a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."

"FRANKLY, I EXPECTED SOMETHING A LITTLE MORE ELOQUENT FROM THESE GUYS!"

protect the rights of groups which had a history of being victims of a special kind of discrimination—the abridgment of their right to vote. In addition, the Hasidim could offer no evidence to demonstrate that New York had any intent to discriminate against them.

As a result, the Hasidim argued in their appeal to the Supreme Court that the Act discriminated against whites generally, rather than against them specifically. They contended that "no reason other than race" could be used to justify the reapportionment and that the use of such a racial quota was an unconstitutional violation of the Equal Protection Clause.

Writing an opinion in which six other justices concurred, at least in part, Justice White argued that the plan was justified under the Voting Rights Act. He first reviewed the history of the Act, noting that it had been passed as a broad measure which Congress felt was required in order to prevent states from continually "contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination." Given this intent, it was necessary for states to think in racial terms in taking corrective action. In the words of the Court of Appeals which had earlier heard the case, because the Act "necessarily deals with race or color, corrective action under it must do the same."

"No Racial Slur"

Justice White then went one step beyond this, considering the more difficult question of whether the plan would be justified *even if it were not authorized by the Voting Rights Act.* Only two other members of the Court, Justices Stevens and Rehnquist, were willing to join him in concluding that even if such plans were not required by federal law, there was still a constitutional justification for them. In support of this position, Justice White explained that "there is no doubt that the state deliberately used race in a purposeful manner." But, he argued, "its plan represented no racial slur or stigma with respect to whites or any other race." He also noted that in the deliberate reliance on race to increase the size of nonwhite majorities there was no "fencing out of the white population from participation in the political process of the county, and the plan did not minimize or unfairly cancel out white voting strength." Admitting that whites in certain districts might not be represented by a member of their own race, he concluded that "as long as whites in Kings County, as a group, were provided with fair representation," they had no claim of either racial discrimination or of the abridgement of their right to vote on grounds of race.

"Sensitive" Issues

Justice Brennan had his own way of looking at the problem. In a separate concurring opinion, he agreed with Justice White that the New York plan was a reasonable method of securing compliance with the Voting Rights Act, and could be sustained on that basis alone. However, he wasn't certain that the plan would have been constitutional had it not been required by the Voting Rights Act. He was, in fact, troubled by "the serious questions of fairness" raised by the "overt racial number" employed in drawing voting districts.

He noted that if the plan had downgraded minority representation in the electoral process or had been motivated by racial discrimination, the Court would have promptly labeled the state's reliance on race as "suspect" and would have prohibited its use. He then asked how the Court could approve of the overt use of race when the majority was thereby disadvantaged.

He reasoned that the constitutionality of such measures would have to rest on the "general propriety of so-called 'benign discrimination'," the state's right to discriminate in favor of disadvantaged groups. He pointed out, however, that the Court has not directly confronted the question of whether benign discrimination was constitutional, an issue which he said raised "sensitive" moral and political questions. For example, a policy favoring minorities might suggest that they are inferior because they need special protection, or it might be a device to segregate the races, stimulate race consciousness, and pit the races against each other.

Moreover, such preferential policy might well work real injustices against the majority, and particularly against the most discreet and insular of whites (such as the Hasidic community in this case). Given these misgivings, he said that he was "wholly content to leave this thorny question until another day" when the Court would be forced to treat the reverse discrimination issue directly.

A Vigorous Dissent

Though they could not all agree on every portion of Justice White's decision, seven of the eight members of the Court who considered the case (Justice Marshall did not take part) concurred in the holding. The one exception was Chief Justice Warren Burger, who issued a vigorous dissent.

Beginning his opinion by calling the districting plan "a strict quota approach," Justice Burger went on to say that the "drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result" was clearly an example of racial discrimination which denied equal protection of the laws under the Fourteenth Amendment. Furthermore, the fact that New York created the plan in compliance with the Voting Rights Act did not make it constitutional. He recognized that prior cases had upheld the constitutionality of the Voting Rights Act itself, but argued that the present case involved a constitutional violation when New York mechanically used a racial quota to comply with the Act.

Justice Burger further contended that there was no evidence to show that establishing a minimum percentage of minority voting strength within a district was a "reasoned response" to the problem of past discrimination. He pointed out that four of the five allegedly "safe" non-white districts established by the plan had since elected white representatives, demonstrating that groups do not automatically vote in convenient blocks. Rather, the "white" category in this county, he noted, is composed of a galaxy of ethnic and religious groups, while the "non-whites" contained many divergent groups as well.

In a final comment, the Chief Justice declared:

> The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshalling particular racial, ethnic or religious groups in enclaves. . . . The device employed by the State of New York, and endorsed by the Court today, moves us one step farther away from a truly homogeneous society.

The Bakke Case: Reverse Discrimination Revisited

The concerns which Chief Justice Burger raised in his dissent, and which Justice Brennan was so anxious to avoid discussing, will be faced directly this fall when the Supreme Court hears the case of *Bakke v. The Regents of the University of California*. The case involves a charge that the medical school of the University of California violated the Fourteenth Amendment when it denied admission to a white applicant while admitting less qualified minority students under a special admissions program. The case will mark the first time the Court has had to take a stand on the so-called "reverse discrimination" or "benign discrimination" issue.

The case arose when Allan Bakke, a white person, applied in 1973 and 1974 for admission to the medical school of the University of California at Davis. Bakke was denied admission both years, and was not admitted to any other medical school. He filed a complaint against the University, alleging that he was qualified for admission and that his application was rejected only because he was white. He claimed that the University's discrimination on the basis of race violated the Fourteenth Amendment's Equal Protection Clause.

The University responded not only by defending itself against the charge but also by asking the courts to declare once and for all that its admission program was constitutional. Under that program, most students were evaluated by a regular admission committee which considered an applicant's grades, test scores, and letters of recommendation as well as such subjective criteria as motivation, character and imagination in its admission decision. However, those students who were determined to be "educationally or economically disadvantaged" were evaluated by a special admission committee, which was made up of students and faculty who were predominantly minority group members. These students were evaluated under different standards, and the special admission committee recommended admission for some students who would have been disqualified by the regular committee.

Four of the five allegedly "safe" non-white districts had since elected white representatives.

In 1973 and 1974, 16 of the 100 total places available in each medical school class were set aside for students admitted under the special admission program. In both of these years, all students admitted under this program were members of minority groups.

A 6 to 1 Decision

The California Supreme Court decided by a 6 to 1 margin that Bakke had been deprived of his rights under the Equal Protection Clause. The Court held that the admission procedure, although established to assist minority group members, violated the constitutional rights of the majority when qualified applicants were denied admission solely because of their race.

In reaching its decision, the court first discussed the proper constitutional test to be applied. In this regard, the court was faced with the difficult problem avoided in the *Williamsburgh* case: should race be regarded as a "suspect" trait when it is used to benefit minorities instead of to discriminate against them? The majority reasoned that since the Fourteenth Amendment was designed to protect "any person," racial classifications which discriminated against the majority were just as suspect under the Equal Protection Clause as those which discriminated against a minority. The court therefore imposed the most stringent standard of proof on the University, requiring it to show that the special admission program was necessary to serve a "compelling interest," and that the objectives of the program could not be achieved by some other means which would impose a lesser burden on the rights of the majority.

After examining the goals of the program, the court found that the University had not met this standard. It decided the goals of the admission program—integrating the medical profession and providing better medical care for minorities—could be achieved by other means. It suggested, for example, that the medical school use different criteria for admission, that it institute aggressive programs to identify, recruit and provide remedial schooling for disadvantaged students of all races, and/or that it increase the number of places available in each medical school class.

Judge Tobriner dissented. He argued that racial classifications should not be regarded as "suspect" when they were used to promote integration or to overcome the effects of past discrimination. Instead, these type of remedial or "benign" racial classifications should be upheld if justified under the traditional "rational relationship" test. Applying this test, he concluded that the racial classification used in the special admission program was directly and reasonably related to promoting the goal of integration, and found that it should therefore be upheld as constitutional under the Fourteenth Amendment.

Since the United State Supreme Court has not yet decided this case, these important equal protection questions are at this time unresolved. When it does decide this case, though, the Court will have to wrestle with many difficult issues which will have implications far beyond who can attend medical school at the University of California.

"Thorny Questions"

Clearly, we are no longer in an age where the Equal Protection Clause is, in the words of Justice Oliver Wendell Holmes, the "usual last resort of constitutional arguments." The "thorny questions" which Justice Brennan would prefer left for another day are increasingly before the courts, affecting us all in such vital areas as voting, housing, education, employment, marriage, privacy, and criminal procedure.

The fundamental question thus arises as to whether or not the courts have already gone too far in their interpretation and application of the Equal Protection Clause. Do court decisions reflect, for example, very subjective judgments regarding which test to apply and when equality is required under the Constitution? If so, are the courts becoming "super-legislatures," substituting their judgment for the judgment of legislatures, school boards, and other decision-making bodies? Might it not be preferable if the courts once again applied the basic test of "reasonableness"—and uphold all laws which are neither arbitrary nor invidious—thereby providing ample opportunity for public debate on these troublesome questions and leaving their solution to the good-faith efforts of appropriate decision-making bodies throughout the country?

Or are the many instances of past discrimination in the enactment and application of the law compelling reasons to question the effectiveness of other means of dealing with these matters? Are not subjective judgments a traditional part of judicial decision-making? And, considering the singular complexity of these issues, should we not expect the courts to initially provide somewhat indefinite standards as they seek to develop more definitive constitutional guidelines?

About the only thing which seems certain is that these questions won't suddenly disappear. The Court will be grappling with equal protection issues for some time to come.

EQUAL PROTECTION RESOURCES

PRINT

Congressional Research Service, Library of Congress, *The Constitution of the United States of America, Analysis and Interpretation.* Washington, D.C.: U.S. Government Printing Service, 1973.

Detailed analysis of the Constitution, including an explanation of the judicial interpretation of each provision and a discussion of the significant Supreme Court cases in each area.

Laughlin McDonald, *Racial Equality.* Skokie, Illinois: National Textbook Company, 1977.

Textbook tracing the development of the concept of racial equality in our legal system through an examination of landmark Supreme Court cases and related historical events.

Nathan Lewin, "Trivializing Discrimination," *The New Republic*, (April 2, 1977), pp. 19-21.

Article by lawyer in the *Williamsburgh* case which critically examines the Supreme Court's approach in deciding recent equal protection cases.

Robert M. O'Neil, *Discriminating Against Discrimination: Preferential Admissions and the DeFunis Case.* Bloomington, Indiana: Indiana University Press, 1975.

An attorney-educator's analysis of the constitutional, social, and moral issues raised by preferential admissions policies based on race.

Bernard Schwartz, ed., *The Fourteenth Amendment.* New York: New York University Press, 1970.

A collection of articles discussing the historical background and contemporary constitutional issues of the Fourteenth Amendment.

FILM

Isidore Starr, *Equality Under Law: The Lost Generation of Prince Edward County.* Our Living Bill of Rights Series. Chicago: Encyclopaedia Britannica Educational Corporation, 1967.

Documents the results and implications of the Prince Edward County School Board's decision to close down their schools rather than comply with a court desegregation order.

Bernard Willets. *Equal Opportunity.* The Bill of Rights in Action Series. Los Angeles: BFA Educational Media, 1970.

Following the promotion of a black factory worker over a white who has seniority, the white files a complaint with the union and the matter is brought before a labor arbitration board.

UP AND COMING

SUMMER PROGRAMS FOR TEACHERS

Numerous law-related teacher education institutes and workshops will be offered this summer. Brief descriptions of some of these institutes appear below; others are noted in the description of new statewide programs on page 25. For a free copy of our complete listing of 1977 Summer Teacher Education Programs, please contact us at the American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.

In **Illinois**, the Chicago Bar Foundation will be sponsoring the "Law in American Society Foundation's 12th Annual Summer Institute in Law-Focused Education." The institute will be held in Chicago, and will include two three-week introductory sessions (June 14-July 1 and July 5-July 22) and two one-and-one half week advanced sessions (June 22-July 1 and July 5-July 15). Participants can receive eight quarter hours of graduate credit; some partial scholarships are available. For further information: contact: Richard O'Connor, Assistant Director, LIASF, 33 North LaSalle Street, Suite 1700, Chicago, Illinois 60602 (312-346-0963).

Two workshops will be held at the University of Notre Dame, Notre Dame, **Indiana**. The "Workshop on Individual Rights and Criminal Justice" is scheduled for June 13-17; the "Workshop on Consumer Rights and Landlord-Tenant Relations" will run from June 20-24. Both workshops are sponsored by The University of Notre Dame, Indiana Project for Law-Focused Education, and the Law in American Society Foundation. Both elementary and secondary school teachers are eligible to attend; two semester hours of graduate credit from the University of Notre Dame are available. For further information, contact: Dr. William Eagen, Regional Director, Law-Focused Education, Box 86, Notre Dame, Indiana 46556 (219-283-6349).

An 11 state sampling of what's available this summer

In **Louisiana**, the Louisiana State University Division of Extra-Mural Teaching and the East Baton Rouge School Board will be sponsoring the "Law Studies Institute" on June 6 through June 24. The institute will be held at Baton Rouge Senior High School, in Baton Rouge, and will focus on ways to teach about the criminal justice system in senior high school. Participants are eligible to receive three hours of extension credit in political science from Louisiana State University; tuition is $60.00. For further information, contact: Mr. Ed Simon, Division of Extra-Mural Teaching, Louisiana State University, Baton Rouge, Louisiana 70803 (504-388-3202).

The University of Maine School of Law will be sponsoring the "Institute of Law and Education" in Portland, **Maine**, from July 5 through July 22. Any secondary school teacher, administrator, or youth aid officer who works with students in grades seven through twelve is eligible to attend. Six graduate credits are offered from the University of Maine at Orano or the College of Education at the University of Maine at Portland-Gorham. The program also qualifies for recertification requirements. For further information, contact: William Julavits, University of Maine School of Law, 246 Deering Avenue, Portland, Maine 04102 (207-773-2981 X367).

In **Maryland**, the Governor's Commission on Law Enforcement and the Administration of Justice, the Maryland State Bar Association, and the Maryland State Department of Education are co-sponsoring the "Law-Related Education Program for the Schools of Maryland Workshops." Workshops will be held from July 5 through July 22, and again from August 8 through August 26. The programs will cover both elementary and secondary school materials and methods for teaching about law, and participants are able to choose from the following options: a $200.00 stipend; three credits from Western Maryland College, Towson University, or University of Maryland at the normal graduate school rate; or three credits from the Maryland State Department of Education at no cost. Materials and texts will be supplied free of charge to participants. For further information, contact: Jerry Paradis or Rick Miller, 2644 Riva Road, Annapolis, Maryland 21401 (301-224-7584).

"Project ELEMENTARY: Elementary Law Education Meeting Expanding Needs of Teachers and Advancing Responsibility in Youth" will be held from June 27-July 1 in Syracuse, **New York**. Sponsored by the New York State Education Department and the New

JOB OPPORTUNITY

Law-Related Education Program Coordinator

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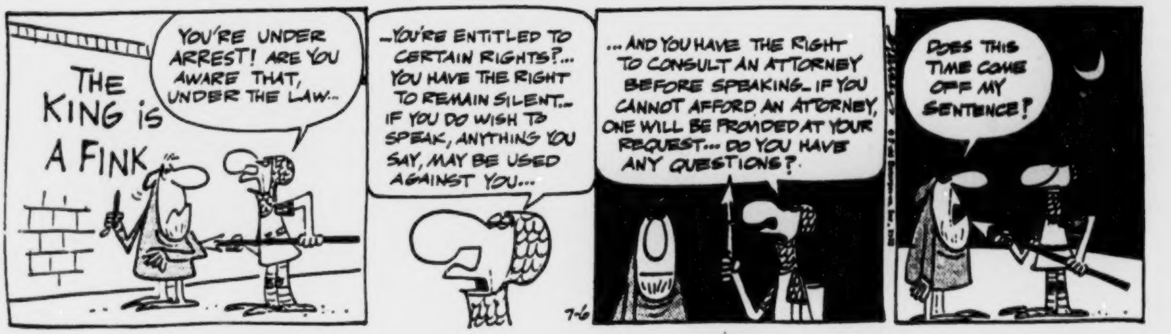
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7-6
...AND YOU HAVE THE RIGHT TO CONSULT AN ATTORNEY BEFORE SPEAKING... IF YOU CANNOT AFFORD AN ATTORNEY, ONE WILL BE PROVIDED AT YOUR REQUEST... DO YOU HAVE ANY QUESTIONS?
DOES THIS TIME COME OFF MY SENTENCE?

York State Bar Association, the workshop will be offered for fifth and sixth grade teachers who have not received any previous training in law-related education. Participants will receive in-service credit as well as a small stipend. For further information, contact: James Carroll, Executive Director, Law-Related Activities for Regional Needs, 8032 Trina Circle, Clay, New York 13041 (315-475-1621).

In **Ohio**, "Teaching About Law and Social Studies Programs" will be offered at the University of Cincinnati from June 20-July 15. The institute will be sponsored by the Center for Law-Related Education, University of Cincinnati, Cincinnati Bar Association, Cincinnati-Hamilton County Criminal Justice Regional Planning Unit, the Greater Cincinnati Foundation, and the Proctor & Gamble Foundation. Elementary and secondary school teachers are eligible to attend, and participants will receive eight quarter hours of graduate credit from the University of Cincinnati's College of Education and Home Economics. The in-state tuition is rate is $35.00 per quarter hour; the out-of-state tuition rate is $50.00 per quarter hour. All participants receive free books and materials; tuition scholarships are available for residents of Hamilton County. For further information, contact: David T. Naylor, Executive Director, Center for Law-Related Education, University of Cincinnati, Cincinnati, Ohio 45221 (513-475-3982).

In **Pennsylvania**, "The Law-Related Education Summer Institute" will be held from June 20-July 1 on the campus of Penn State at University Park. The workshop will be sponsored by the Pennsylvania State Department of Education, the Pennsylvania State University College of Education, and the Pennsylvania State University Division of Continuing Education. Elementary and secondary school teachers from Pennsylvania are eligible to attend. Pennsylvania State University will offer two credits for participants; the tuition rate of $100.00 includes free materials. For further information, contact: Dr. Murphy Nelson, 154 Chambers College of Education, Penn State University, University Park, Pennsylvania 16802 (814-865-2430).

In **Rhode Island**, the "Law-Focused Education Workshop for Teachers," sponsored by the Cranston School Department and the Title IV Office of the Rhode Island Department of Education, will be held from June 20-July 1 at Cranston High School East. Secondary school teachers (grades 7-12) are eligible to attend, and three credit hours from the University of Rhode Island may be available. Tuition scholarships are available and free materials will be provided for all participants. For further information, contact: William J. Piacentini, Cranston High School East, 899 Park Avenue, Cranston, Rhode Island 02910 (401-785-0400).

The Virginia State Bar and the Virginia State Department of Education will be sponsoring the "George Mason Institute on Law-Related Education" from June 25 through July 10, in Alexandria, **Virginia**. Elementary school teachers in grades K-6 are eligible to attend, and three to six hours of graduate credit will be available through the George Mason University. State scholarships to attend are available through the Virginia State Department of Education. For further information, contact: Jack Henes, Alexandria City Schools, 1108 Jefferson Street, Alexandria, Virginia 22314 (703-750-6268).

In **Washington**, the "Law-Focused Teacher Education Workshop" will be held from June 20-July 29 at Western Washington State College in Bellingham. Sponsored by Western Washington State College, the Washington State Committee for Law-Related Education, and the Washington Center for Law-Focused Teaching, the workshop will be open to both elementary and secondary school teachers and will offer graduate credits through the Department of Social Studies Education. Participants must pay the required tuition for Western Washington State College's six-week summer session (rates not available as yet). For further information, contact: Dr. Peter Hovenier, Washington Center for Law-Focused Teaching, Miller Hall 304, Western Washington State College, Bellingham, WA 98225 (206-676-3327). —CAK

OPINIONS: CONCURRING & DISSENTING

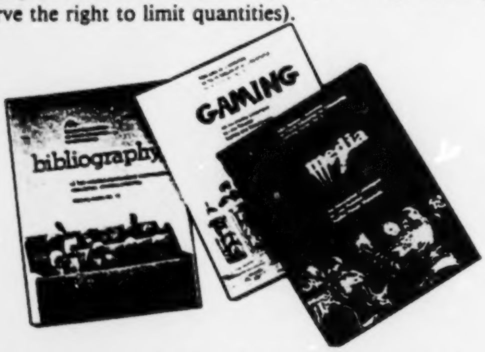
Awaiting your correspondence

YEFC PUBLICATIONS ON LAW-RELATED EDUCATION

The American Bar Association Special Committee on Youth Education for Citizenship (YEFC) publishes a number of books and booklets on law-related education for elementary and secondary schools.

Reflections on Law-Related Education (1973, 16 pp.) A collection of articles on the rationale and objectives of law-related education. **FREE** (we reserve the right to limit quantities).

Directory of Law-Related Educational Activities (1974, 82 pp.) Information on more than 250 projects throughout the country (NOTE: some entries may be outdated). **FREE** (we reserve the right to limit quantities).



PUBLICATIONS ON PROGRAM DEVELOPMENT

Law-Related Education in America: Guidelines for the Future (1975, 240 pp.) Guidelines for the administration, funding, and pedagogy of law-related education projects. $2.00

The $$ Game: A Guidebook on the Funding of Law-Related Educational Programs (1975, 68 pp.) Articles on identifying funding sources, writing funding proposals, securing community support, and institutionalizing programs. $1.00

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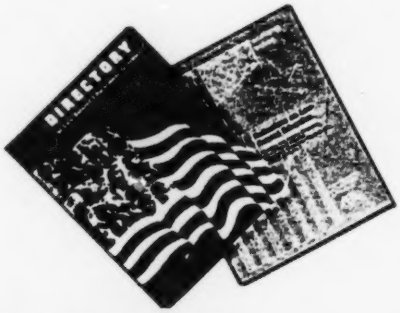

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Bibliography of Law-Related Curriculum Materials: Annotated (1976, 116 pp.) Descriptions of more than 1,000 books and pamphlets for classrooms, K-12, and teacher reference. **$1.00**

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Discipline and due process in the schools

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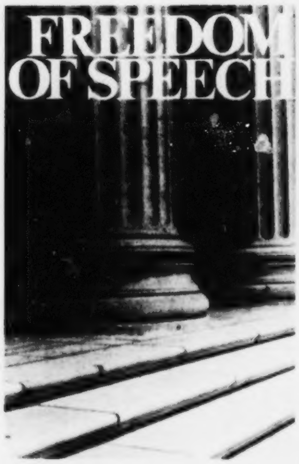

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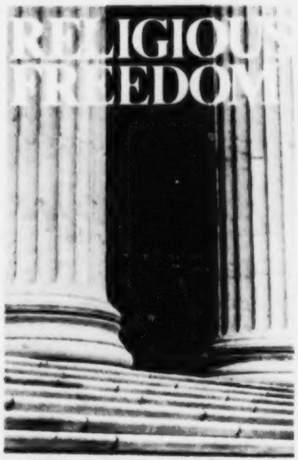

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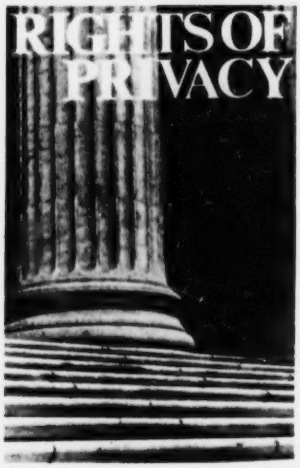

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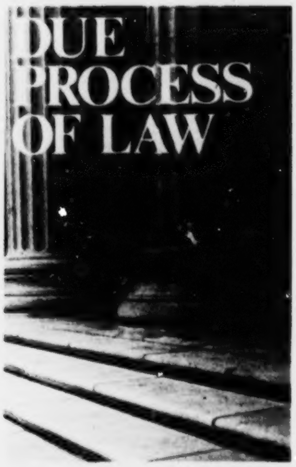

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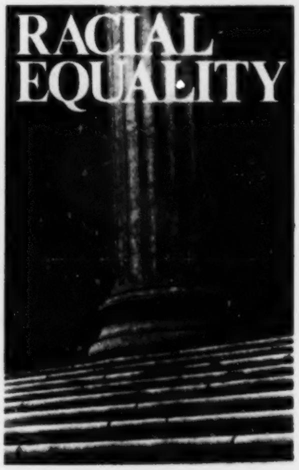

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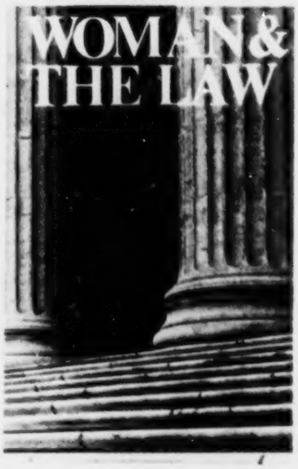

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OPENING STATEMENT

Over 4,000 cases filed, 176 arguments heard, and 136 written opinions handed down on such issues as corporal and capital punishment, abortion, rights of the accused, obscenity, integration, discrimination, and presidential papers. These facts and figures reflect the extremely full term recently concluded by the Supreme Court, and this, the second issue of *Update*, reviews the substantive and educational import of these decisions.

The Court's controversial and greatly misunderstood rulings on school discipline are the topic of our lead article. The article's authors not only place the decisions in context, but suggest how you might use the decisions in the classroom. The landmark decision of *Tinker v. Des Moines Independent School District*, perhaps the best known Court decision on school practices and policies, later serves as the focal point for an examination of the case study method in a new *Update* section on *Classroom Strategies*.

Throughout the issue, information is also provided regarding other Court decisions, curriculum materials, and resources which will aid you in teaching about school-related legal issues. Other highlights include suggestions by classroom teachers on instituting law-related education programs, reflections of co-editor Charles White as a result of his experiences in small claims court, new curriculum materials in the area of juvenile law, and a look at corporal punishment in the 1800's.

Finally, let me express our appreciation to the many of you who completed and mailed us the questionnaire included in the first issue (a summary of your responses appears in *Opinions: Concurring and Dissenting*). You will notice that we have already instituted a number of new sections and approaches. Many of them are a direct result of your recommendations. Please continue to share your ideas with us so that we may make *Update* as responsive as possible to your needs and interests.

—Norman Gross

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contents

Volume 1, Number 2 Fall 1977

4

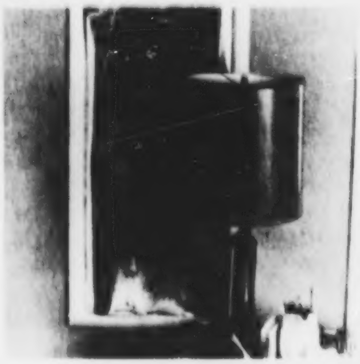
Supreme Court Report
Discipline and Due Process in the Schools

7
Court Briefs
From License Plate Mottos to Nixon's Papers and Tapes

11
Classroom Strategies
The Case for the Case Study Approach

16
Update Looks Back
Spare the rod and. . .

18
In the Field
Why I Went to Small Claims Court



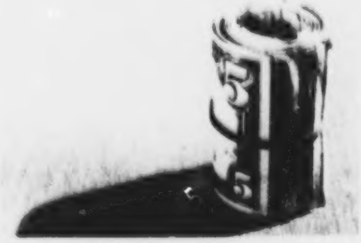
21
Newsclips

23
Curriculum Update
Focus on Juvenile Law

26
Family Lawyer
Cases on the Parent-Child Relationship

29
Interview
Getting Started

32



The $$ Game
How to Find Money for Your Program

47
Project News
New York Project Offers Help Across State

48
Opinions: Concurring & Dissenting

Credits: cover and page 4, Bettmann Archives; pages 9, 12, 13, and 38, United Press International; pages 16-17, Historical Picture Service—Chicago; page 32, H. Armstrong Roberts; page 45, *Funky Winkerbean* by Tom Batiuk. © Field Enterprises, Inc. 1977. Courtesy of Field Newspaper Syndicate.

Discipline and Due Process in the Schools

Few cases of the Supreme Court have been so widely reported and badly distorted as its decisions on corporal punishment and due process.

David Schimmel and Louis Fischer

An April 19 headline in *The New York Times* was typical of the way many newspapers incorrectly summarized the recent corporal punishment decision: "High Court Upholds Spanking in School Even if Excessive." A few days later, a syndicated columnist for the *Boston Globe* used more extreme language in commenting on the decision: "Last week the Supreme Court upheld child abuse." Neither of these descriptions accurately reflects what the Court said, but they did contribute to the popular myths and misunderstandings that surround this decision.

News reports of the 1975 landmark case on due process, *Goss v. Lopez,* fared no better. Two years after the decision, the *Newsweek* of January 10, 1977 incorrectly reported that "if the parents of only a fraction of suspended children were to demand due process hearings, the schools could fall into serious disarray."

Yet these decisions are of critical importance to teachers, administrators, parents, and students. They go to the heart of what we expect of our schools, what rights we provide and what obligations we demand of students, and what philosophy we hold about education. A closer look at these decisions, therefore, will not only help us dispel popular misconceptions nurtured by the media, but also provide us with the opportunity to explore the broader implications of the Court's rulings.

David Schimmel and Louis Fischer are lawyers and Professors of Education at the University of Massachusetts. They have written many books and articles on the rights of students, teachers, and parents.

The *Ingraham Case*: Corporal Punishment in Public Schools

This case began when James Ingraham and Roosevelt Andrews, 8th and 9th grade students in Miami, were paddled during the 1970-71 school year. Andrews was paddled for some minor infractions of the rules, Ingraham because he was slow to answer a teacher's questions. At the time of the paddling, many of the schools of Dade County used corporal punishment as one means of maintaining discipline. A Florida statute prohibited punishment that was "degrading or unduly severe" or which took place without prior consultation with the principal or the teacher in charge of the school. And the county school board policies even prescribed the dimensions of the wooden paddle to be used on students' "buttocks."

While the normal punishment was limited to one to five blows with the paddle, Ingraham received more than twenty, while being held over a table in the principal's office. The severity of the beating caused hematoma requiring medical attention, and he missed 11 days of school. The paddling Andrews received included being struck on his arms, depriving him of the use of an arm for a week.

The students filed suit in the District Court against several school administrators, charging that the severe paddling they received in school constituted cruel and unusual punishment in violation of the Eighth Amendment, as well as a deprivation of liberty without due process of law in violation of the Fourteenth Amendment. The District Court, while assuming the accuracy of this evidence, ruled that the boys' constitutional rights were not violated. The Court of Appeals affirmed this judgment, and the students appealed their case to the Supreme Court in *Ingraham v. Wright*, 45 U.S.L.W. 4364 (April 19, 1977).

Is corporal punishment cruel and unusual? In order to answer this question the Court first examined "the way in which our tradition and our laws have responded to the use of corporal punishment in public schools." It accepted the common law rule that "teachers may impose reasonable but not excessive force to discipline the child." According to the Court, this is the prevalent rule today, and if "the force is excessive and unreasonable, the educator in virtually all states is subject to possible civil and criminal liability."

Forty-eight states authorize the use of corporal punishment today, 21 by statute and 27 by court preservation of the common law rule. Only New Jersey and Massachusetts have prohibited it in the public schools.

When is the punishment reasonable and when excessive? All the circumstances must be considered before this question can be answered, including the nature and "seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of punishment."

After examining common law traditions, current state laws, and school practices, the Court considered the history of the Eighth Amendment and concluded that it does not apply to questions of discipline in public schools. The five-judge majority was satisfied that the original intent behind the Cruel and Unusual Punishment Clause was to control the punishment of criminals. Furthermore, Justice Powell asserted in the majority opinion, school children need no such protection because in addition to the possibility of civil and criminal suits which may be brought against those who exceed their authority, the very "openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuse from which the Eighth Amendment protects the prisoner."

The Court next examined the question of whether due process must precede corporal punishment. The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law, and Powell acknowledged that corporal punishment falls under one of these protected categories. Punishing a student or inflicting appreciable physical pain implicates the 'liberty' interest protected by the Amendment, he said.

Granting that a protected interest is involved, the question still remained as to "What process is due?" To answer that question, the Court analyzed the individual interests involved, and the interests of the state in terms of the costs and burdens of additional safeguards.

As to the individual's interests, the Court argued that an ordinary paddling does not threaten any serious right, nor cause any grievous loss. The majority then argued that the requirement of additional procedural safeguards would add a significant burden without corresponding benefits.

According to the majority, due process prior to corporal punishment would require "time, personnel and the diversion of attention from normal school pursuits," and educators might well abandon the use of such punishment to avoid the burden of complying with procedural requirements. The question of whether or not to continue corporal punishment in the schools is for legislatures and school boards to decide, they argued, and it should not be the by-product of a court decision.

"The infliction of pain is final and irreparable; it cannot be undone. . ." the minority argued.

Thus the majority acknowledged that the additional procedural safeguards might marginally reduce the risks of violating a student's rights, "but would also entail a significant intrusion into an area of primary educational responsibility." It therefore ruled that common law remedies will suffice and that the Due Process Clause does not require notice and a hearing prior to the administration of corporal punishment.

Four Justices Disagree

In a powerful dissenting opinion, Justice White, joined by Justices Brennan, Marshall, and Stevens, expressed his disagreement with the majority on both major issues: the applicability of the Cruel and Unusual Punishment Clause and the Due Process Clause.

White first considered the Eighth Amendment issue. An examination of the wording of the Amendment, as well as its history, led him to conclude that it was meant to apply to all punishment, not only to criminal cases. To illustrate this point, Justice White used an extreme example, often quoted by critics of the decision: "If it is constitutionally impermissible to cut off someone's ear for the commission of murder, it must be unconstitutional to cut off a child's ear for being late to class."

Justice White and his fellow dissenters were not satisfied that the "openness" of public schools is sufficient protection against excessive punishment. Furthermore, they were convinced that if a punishment is barbaric and inhumane, openness to the public and the availability of other remedies doesn't make it constitutional. White emphasized that he wasn't suggesting that corporal punishment in the public schools is always a violation of the Eighth Amendment. Rather, he took issue with the view that "corporal punishment in the public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment."

Justice White and the other dissenters also argued the need for due process before corporal punishment. According to them, a key purpose of the due process provision is to protect an individual from erroneous or mistaken punishment that society would not have inflicted had the facts been examined in a more reliable way.

The majority was satisfied that a misuse of corporal punishment could be cured by a subsequent suit for damages, or by criminal action. The dissenters, however, contended that "the infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding." They also noted that state laws (including those of Florida) are often inadequate to help students wrongfully punished. Furthermore, they argued that the *Goss* case (discussed more fully below) provides for fairly simple due process requirements which would not be unduly burdensome and time-consuming to administer.

In short, the dissent argued that although ordinary corporal punishment does not violate a student's "liberty" interests, excessive or unreasonable punishment does and therefore is protected by the Cruel and Unusual Punishment Clause of the Eighth Amendment. Moreover, the dissenters would require at least some modicum of due process before the administering of any corporal punishment in public schools.

The *Goss* Case: Due Process in Public Schools

In 1975 the Supreme Court handed down another decision that was as important and as widely misunderstood as *Ingraham*. The case was *Goss v. Lopez* (419 U.S. 565) in which the Court required due process in all student suspension cases. Many educators interpreted this to mean that every student was now entitled to counsel, witnesses, cross-examination, appeals, and other judicial safeguards before being suspended. Some concluded that schools would have to give up suspensions or turn the classroom into a courtroom, and education into an adversary process.

The case began in 1971, when many students from the Columbus, Ohio schools were suspended without first receiving a hearing. Some were punished for documented acts of violence. Others, like Dwight Lopez, were suspended although they claimed to be innocent bystanders of demonstrations or disturbances, no evidence was presented against them, and they were never told what they were accused of doing. A group of students who were suspended for up to 10 days without a hearing claimed that this violated their right to due process of law. A federal court agreed, and the school administrators appealed to the U.S. Supreme Court. In a 5-4 opinion, the Court confronted a number of issues that are important to all students and teachers.

Case Citations

Throughout *Update*, citations such as 545 F. 2d 30 (1976) appear so that you can, if you wish, read an entire decision and also learn of other cases and resources on the topic. For those of you who are unfamiliar with such citations, here is a brief explanation.

The first number (545) refers to the volume in which the case appears; the abbreviation which follows (F. 2d) indicates which reporter system to go to—in this instance the Federal Reporter, Second Series; the next number (30) tells you the page number; and the date of the decision (1976) is the last piece of information.

Citations for decisions of other federal as well as state courts use the same format, the only difference being the reporter system in which the case appears.

Of course, a law school library is often the best place to research a case, but most bar associations, county or city governments, and law firms have at least the Supreme Court reporters. Establishing contacts with law librarians, practicing attorneys, and others who have ready access to such resources can thus be especially valuable for you and your students.

The majority first held that the Constitution protects students in cases of expulsion from public schools. On behalf of the Court, Justice White extended the holding of the *Tinker* case (see pp. 11-15) when he wrote without qualification that "young people do not 'shed their constitutional rights' at the schoolhouse door." The Constitution may not require states to establish public schools; but once they do, students have a "property" right which may not be withdrawn on grounds of misconduct without "fundamentally fair procedures."

The majority opinion further held that the Due Process Clause applies to cases of short suspensions. A suspension for up to 10 days is not so minor a punishment that it may be imposed "in complete disregard of the Due Process Clause," Justice White wrote. "The total exclusion from the educational process for more than a trivial period is a serious event in the life of the suspended child." The students in this case were suspended based on charges of misconduct which, if recorded, could damage their standing with their teachers and "interfere with later opportunities for higher education and employment."

The majority then turned to the question of what process is due. The Court noted that due process is a flexible and practical concept—it does not require a rigid set of procedures to be applied in all situations. However, due process requires at least that no one should be deprived of life, liberty, or property without being informed of the charges against him and given an opportunity to be heard. "At the very minimum, therefore, students facing suspension . . . must be given *some* kind of notice and afforded *some* kind of hearing."

The Court then explained the kind of informal notice and hearing that is required in connection with a suspension of 10 days or less: "that the student is given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." Due process, concluded the Court, "requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary expulsion from school."

The Court recognized, however, that there are school emergencies in which prior notice and hearing would not be required, particularly when there are dangers to persons or property. In such cases, the Court only required that fair procedures be followed "as soon as practicable" after removal of the danger or disruption.

The Court did not directly address the issue of what procedures are required in cases of suspensions for more than 10 days or for expulsions. However, it has in prior cases often explained that due process is a flexible concept which must

(Continued on page 34)

COURT BRIEFS

From License Plate Mottos to Nixon's Papers and Tapes

Norman Gross

As noted in the *Opening Statement*, the Court's recently completed term was both full and comprehensive. Particularly during the last several months of the term, many of the more controversial decisions—on capital punishment, abortion, obscenity, and school integration, to name a few—were handed down. This issue's *Court Briefs* summarizes those rulings and the reasoning behind them.

Two new features also appear in this section. *Other Decisions of Note* (pp. 40-41) provides capsule summaries of additional important recent cases of the Court, and *On the Docket* (p. 43) alerts you to cases the Court will be deciding during the coming term.

Live Free or Die

George and Maxine Maynard, both Jehovah's Witnesses, considered the New Hampshire license plate motto "Live Free or Die" to be repugnant to their moral, religious, and political beliefs. In an act which might be regarded as an affirmation of the motto's message, they covered this part of their license plates in order to avoid becoming advertisers of the slogan.

New Hampshire law, however, made it a misdemeanor to knowingly obscure the figures, letters, or motto on the plates. As a result, Mr. Maynard was on several occasions convicted and fined for violating the law. Upon his refusal to pay the fines, he was sentenced to and served fifteen days in jail. Upon his release, however, he sought an injunction against further arrests and prosecutions. The district court granted his request and the state appealed to the Supreme Court.

In the case of *Wooley v. Maynard*, 45 U.S.L.W. 4379 (April 20, 1977) the Court by a seven to two margin supported Maynard's First Amendment claims. "The right to freedom of thought protected by the First Amendment against state action," wrote Chief Justice Burger on behalf of the majority, "includes both the right to speak freely and the right to refrain from speaking at all." The Court determined that two interests advanced by the state in support of the law—making it easier to identify passenger vehicles and promoting appreciation of the state's history, individualism, and pride—were insufficient. The plates are readily distinguishable without the motto, Burger observed, and the state's interest in communicating an official view cannot outweigh an individual's First Amendment right to avoid becoming a courier for the message.

License plates cannot be used as 'mobile billboards' for the state's ideological message

"The New Hampshire statute in effect requires that [the Maynards] use their private property as a 'mobile billboard' for the state's ideological message—or suffer a penalty, as Maynard already has," Burger emphasized. The law, he concluded, is therefore constitutionally invalid.

Justices Rehnquist and Blackmun disagreed. The Maynards "have not been forced to affirm or reject the motto," Rehnquist argued. Everyone knows that the motto is a required part of the state's license plates and no one would consider the Maynards as advocates of the motto simply because it appears on their plates.

Rehnquist also contended that the case didn't even involve "speech." The Maynards could have displayed their disagreement through bumper stickers, Rehnquist noted. Finally, Rehnquist raised questions about the consequences of the decision. "Does this mean that atheists can constantly deface the 'In God We Trust' motto on U.S. currency in violation of federal law proscribing such conduct?" he asked.

For Sale or Not for Sale

Is a town acting in violation of the First Amendment's freedom of speech guarantee when it prohibits the posting of "For Sale" or "Sold" signs in order to stem what it perceives as white flight from a racially integrated community? A unanimous Court (Justice Rehnquist not participating) held such action unconstitutional in the case of *Linmark Associates v. Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977).

Willingboro is a southern New Jersey town located near several military bases and national corporations. During the 1960's, the town grew rapidly. The white population increased from under 9,000 to about 39,000, and the non-white population rose from 60 to 5,000. From 1970 to 1973, however, growth slowed to 3%. More significantly, the white population declined by 5% and the non-white population increased by 60% during this period.

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With this change, panic selling occurred. As one realtor explained, " ... the whole town was for sale and [people] didn't want to be caught in any bind." In order to reduce panic selling and promote a stable, integrated community, the town council enacted an ordinance which forbid posting of "For Sale" or "Sold" signs on all but model homes. A firm wishing to sell its property brought suit against the town asserting that the ordinance unconstitutionally restricted its freedom of speech.

Justice Marshall, writing for the Court, agreed with this contention. He first noted that serious questions exist as to whether the ordinance gave sellers effective alternative means of communication. The alternatives—newspaper ads and listings with realtors—are more costly, are less likely to reach persons not deliberately seeking sales information, and lack the effect of being in front of the property to be sold, Marshall pointed out. Moreover, the ban was not primarily concerned with the place or manner of the speech, but rather its primary effect—that it would cause those receiving the information to act upon it.

Marshall explained that although this case involves "commercial speech"—the courts have held that speech serving commercial purposes is less deserving of First Amendment protection than speech concerning social and political ideas—this does not mean that the Court may "escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the legislation." While recognizing the importance of promoting stable, racially integrated housing, the Court emphasized that the First Amendment prevents governments from achieving this goal by restricting the free flow of truthful information. "If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipient of the information to act 'irrationally.' " The best means of dealing with the situation, Marshall emphasized, "is to open the channels of communication rather than to close them." People who were staying could put up "Not For Sale" signs, inducements to stay could be offered to those considering selling their homes, and the town could continue the process of education it had already begun, Marshall suggested.

Lawyers May Advertise

In recent years, advertising has become as American as motherhood and apple pie. Ours is a consumer-oriented society, and advertising is the best way to inform, entice, cajole, and ultimately convince the public of the need or value of a particular product, service, or idea.

Dating back to 1808, however, the legal profession has maintained that advertising would downgrade the profession by commercializing it, and, since the late 1800's, has banned lawyer advertising. In *Bates v. State Bar of*

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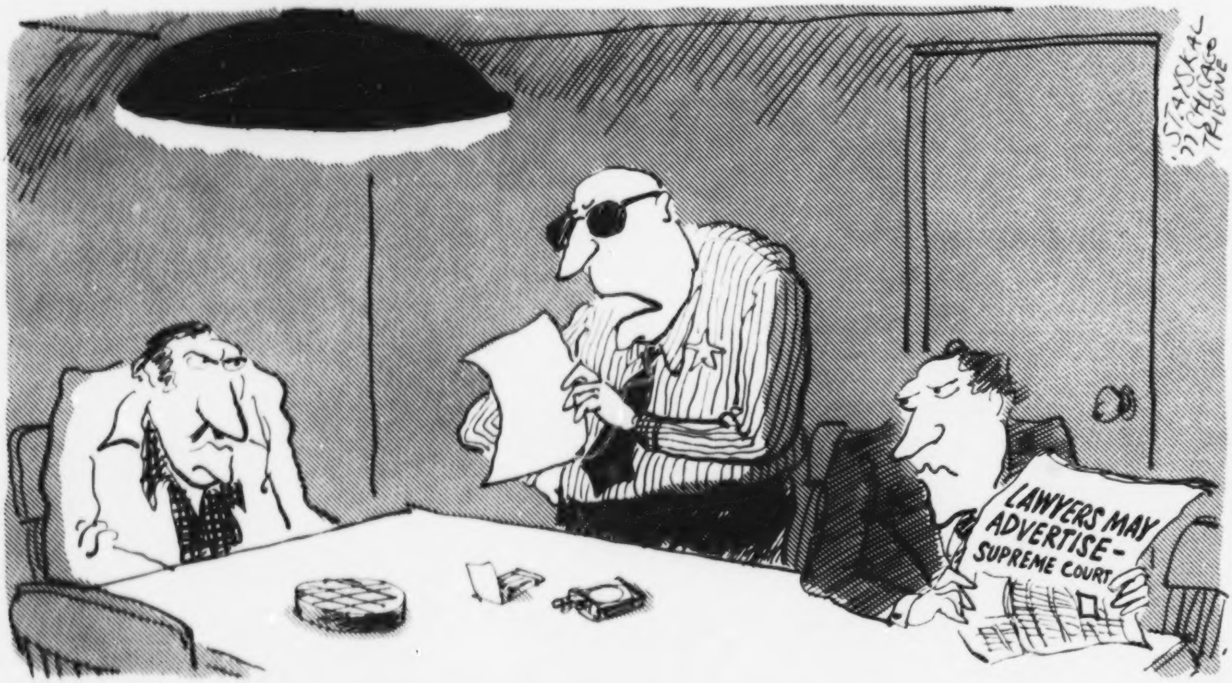

STAYSKAL '77 CHICAGO TRIBUNE
LAWYERS MAY ADVERTISE - SUPREME COURT

" YOU HAVE THE RIGHT TO REMAIN SILENT... YOU HAVE THE RIGHT TO COUNSEL... YOU HAVE THE RIGHT TO READ THE CLASSIFIED ADS... "

Arizona, 45 U.S.L.W. 4895 (June 27, 1977), a sharply divided Court ruled that such prohibitions violate lawyers' First Amendment rights to freedom of speech. The Court held that lawyers can advertise, but only the cost of such routine services as uncontested divorces and simple adoptions.

The case arose when the legal clinic of Bates and O'Steen placed a newspaper ad in the *Arizona Republic* which offered "legal services at very reasonable fees" and listed their fees for certain services. Since the ad clearly violated a Supreme Court of Arizona rule against lawyer advertising, Bates and O'Steen were given one-week suspensions from the practice of law. On appeal, the lower courts affirmed their suspension.

Writing on behalf of the five-judge majority, Justice Blackmun declared that the ban "serves to inhibit the free flow of commercial information and to keep the public in ignorance," thereby violating the First Amendment freedom of speech guarantee. Blackmun was not persuaded by the state bar's arguments against lifting the ban—that it would commercialize the profession, stir up litigation, increase the cost of legal services, diminish the quality of service, be misleading, and create enforcement problems. He emphasized, however, that the ruling was limited to brief, factual statements regarding fees charged for specific, routine legal services. "Advertising that is false, deceptive or misleading is, of course, subject to restraint," Blackmun held. "It follows as well that there may be reasonable restrictions on the time, place and manner of advertising."

In one of three dissents, Justice Powell, joined by Justice Stewart, contended that the decision has weakened the power of the courts and the states to regulate the legal profession, and has vastly increased the potential for deception. Justice Rehnquist reiterated his dismay that the Court was extending the First Amendment to cover commercial speech—" . . . the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interests, is demeaned by invocation to protect advertisements of goods and services"—and Chief Justice Burger concurred in Justice Powell's observation that "today's decision will effect profound changes in the practice of law."

While many agree that the decision will undoubtedly have a significant impact on the legal profession and the practice of law, few can predict what that impact will be. Moreover, there remains the question of whether lawyer advertising will be in the best interest of the public and our system of justice. We can anticipate, however, additional cases which will further define not only the parameters of lawyer advertising but also advertising for other professions such as medicine and architecture which do not now allow their members to advertise fees and services.

What Is Obscene?

Faced with the task of determining whether a film could be considered hardcore pornography, Justice Stewart in the 1964 case of *Jacobellis v. Ohio*, 378 U.S. 184, declared, " ... I know it when I see it, and the motion picture in this case is not that." While not particularly illuminating, perhaps no other judicial declaration more vividly underscores the difficulties confronting the Court whenever questions of obscenity arise. For example, what is "obscene"? Is obscenity ever protected under the First Amendment guarantees of speech and press? And if so, what types of obscenity, under what circumstances, and by whose standard?

> **". . . I know it when I see it, and the motion picture in this case is not that."**

Recent obscenity cases provide little additional guidance in resolving these issues although they do indicate a clear division on the part of the current Court Justices toward judicial handling of obscenity cases. In each of the three cases recently decided by the Court—*Smith v. United States*, 45 U.S.L.W. 4495 (May 23, 1977), *Splawn v. California*, 45 U.S.L.W. 4574 (June 6, 1977), and *Ward v. Illinois* 45 U.S.L.W. 4623 (June 9, 1977)—the Court handed down five to four decisions in which Justices Blackmun, Burger, Powell, Rehnquist, and White voted with the majority, and Justices Brennan, Marshall, Stevens, and Stewart cast dissenting votes.

The facts of each case are as follows: In *Smith v. U.S.*, Jerry Lee Smith mailed a magazine and two films which depicted various sexual acts from Des Moines, Iowa to two southern Iowa communities, Mount Ayr and Guthrie Center, at the written request of postal inspectors using fictitious names. He was subsequently indicted and found guilty of violating federal law which prohibits transmitting obscene materials through the mails, even though his conduct did not violate the then existing state obscenity laws.

In the second case, *Splawn v. California*, the defendant challenged his conviction for selling an obscene film in violation of California law. Splawn contended that the instructions to the jury, which permitted them to consider the circumstances of the sale and distribution of the film in determining whether it was obscene, violated his First and Fourteenth Amendment rights to freedom of speech.

In *Ward v. Illinois*, Ward challenged an Illinois obscenity statute as unconstitutionally vague and also claimed that the publications in question—which dealt with sadomasochistic activities—were not obscene.

Among the many cases decided by the Supreme Court, two serve as recent landmarks in the area of obscenity. In *Roth v. United States*, 354 U.S. 476 (1957), the Court held that in order to declare a work obscene, it must be considered in its entirety, not merely on the basis of selected excerpts which might be considered obscene. Subsequently, the Court enlarged upon this definition in *Miller v. California*, 413 U.S. 15 (1973). Miller established a three-part test of (a) "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, political, or scientific value." *Miller* constituted the prevailing standard as the Court considered this series of cases. While not overruling *Miller*, the Court offered some interpretations of the ruling which surprised many observers.

Speaking for the majority in *Smith*, Justice Blackmun declared that juries must determine what constitutes contemporary community standards even if such decisions may be contrary to community standards suggested in existing state law. "Contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community," Blackmun said.

In *Splawn*, Justice Rehnquist's majority opinion held that in determining whether a film is legally obscene, juries could consider the way it was promoted and distributed, even by persons other than the accused. Quoting the 1966 case of *Ginzburg v. United States,* 383 U.S. 470, Rehnquist declared, " ...the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom [is], in the circumstances, pretense or reality."

Finally, in *Ward,* Justice White justified Ward's conviction under an Illinois statute which did not specifically mention sado-masochism (see second part of *Miller* test discussed above), arguing that prior Illinois Supreme Court decisions provided ample notice for the accused.

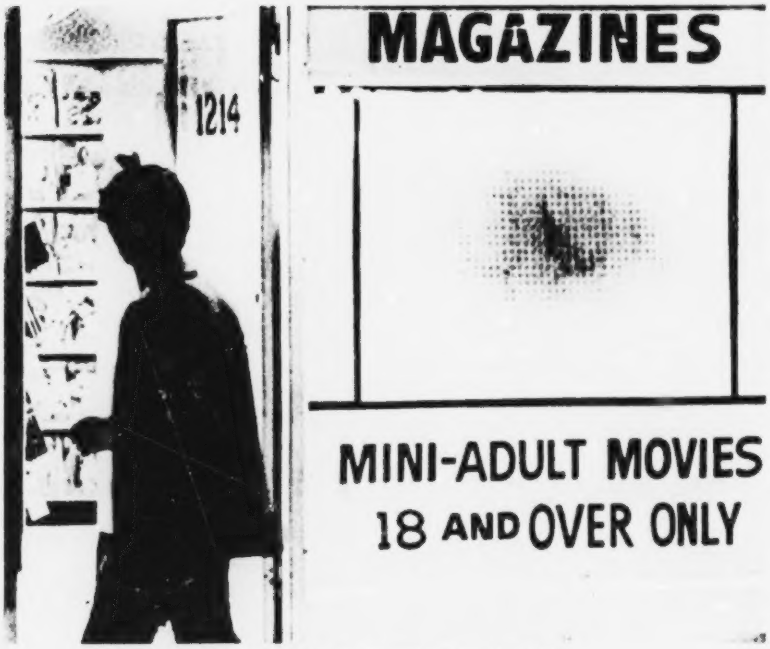
Justice Brennan wrote very short dissents in each of the cases, declaring that the statutes involved were "clearly overbroad and unconstitutional" for reasons stated in his dissenting opinions in previous obscenity cases. The newest Supreme Court Justice, John Paul Stevens, wrote more detailed dissents in each case, one of which (in the *Smith* case) a commentator described as "the most thoughtful opinion heard recently on the subject of controlling obscenity."

In *Smith*, Stevens first called for a reexamination of the premises of court guidelines in this area: " ... the diversity within the nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities.... Indeed, in some ways, the community concept is even more objectionable than a national standard." He also noted the problems in having jurors determine what offends community standards. "The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context," Stevens said. "The guilt or innocence of a criminal defendant in an obscenity trial is [thus] determined primarily by individual jurors' subjective reactions ... rather than by the predictable application of rules of law. In the end," he concluded, "I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless."

Stevens offered further insight into his position in *Splawn* and *Ward.* Noting that Splawn could have been found guilty because of the film's promotion rather than its content, Stevens said, "Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose ...The statements did make it clear that the films were 'sexually provocative,' but that is hardly a confession that they were obscene." Only such an accurate description, Stevens noted, "can enable a potential viewer to decide whether or not he wants to see them.... I would not send Mr. Splawn to jail for telling the truth about his shabby business."

Finally, in the *Ward* case, Stevens noted that while many state courts had responded to the specificity requirement of *Miller*, others, like Illinois, "did little more than pay lip service" to it. "One of the strongest arguments against regulating obscenity through criminal law," Stevens argued, "is the inherent vagueness of the obscenity concept" which the Court now fosters.

While many people may agree with Stevens' last statement, it is clear that these recent rulings can only strengthen governmental enforcement efforts in the obscenity area. It is equally certain that we can anticipate the debate about obscenity—in and out of the courtroom —to increase also.



Moral Blight or Constitutional Right?

Search of International Mail O.K.'d

A long-standing exception to the Fourth Amendment's probable cause and warrant requirements concerns so-called border searches. Since the earliest years of our nation, customs and other governmental officials have had the right to examine persons and property crossing into the United States when they have reason to suspect such passage may involve a violation of our laws. In *United States v. Ramsey*, 45 U.S.L.W. 4577 (June 7, 1977), the Court was faced with the issue of whether the border search exception includes the inspection of incoming international mail. By a six to three margin, they held that it did.

The case involved inspector George Kallnischkies, a U.S. customs officer in New York City, who spotted eight bulky envelopes in a sack of mail from Thailand. Knowing that Thailand is often a source of narcotics, that the envelopes were three to six times heavier than the normal air mail letter, and that something other than paper was inside, Kallnischkies opened the envelopes and

(Continued on page 38)

The Case for the Case Study Approach

Isidore Starr

Things haven't changed much since Alexis de Tocqueville wrote, "Scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question."

Even as early as the mid 1800's, de Toqueville was able to observe one of the most salient characteristics of the American people, our habit of "constitutionalizing" our conflicts, of resolving them through judicial interpretation of the Constitution. With the passage of time, de Toqueville's observation has become truer than ever. Every great issue of our time, from A (abortion) to Z (zoning), comes before our courts, and landmark cases often offer an illuminating picture of the clash of values and the resolution of difficult issues.

Important case decisions are readily accessible (see box on pp. 14-15) and can easily be adapted to excellent classroom exercises, since the opinions contain everything you need to present an issue fully. Case studies also offer an introduction to ways of thinking. To observe well-trained minds grappling with some of the perplexing issues of the day can be an object lesson in decision-making and conflict resolution.

Below is a case that may well be of special interest to teachers and students, *Tinker v. Des Moines Independent Community School District*, 399 U.S. 503 (1969). In recent years the Supreme Court has entered the schoolhouse to decide matters of concern to school officials and to students and their parents. Among these confrontations are the issues of corporal punishment, the subject of the major article in this issue, suspension and expulsion of students, and freedom of expression. *Tinker* is the most important ruling of the Court in this latter area.

The Facts

A good way to begin is by presenting students the facts of the case. The facts are sometimes set forth clearly in the text of the Court's ruling and can be reproduced easily. More often, however, the instructor will have to edit the facts to meet the maturity level and the reading skills of the students. The following statement of facts is an edited version and includes the facts as presented in the majority and dissenting opinions.

In December, 1965, a group of adults and students decided to publicize their opposition to the Vietnam conflict by wearing black armbands during the holiday season and by fasting December 16 and New Year's Eve. Several of the students present had engaged in similar activities in the past, and they decided to participate in this activity.

The principals of the Des Moines schools heard about the plan and, on December 14, adopted a policy that forbade the wearing of an armband to school. Students who refused to remove such armbands would be suspended until they complied.

On December 16, several students who knew about the regulation wore armbands to school: Paul Tinker, 8 years old and in the second grade, Hope Tinker, 11 years old and in the fifth grade, Mary Beth Tinker, 13 years old and in junior high school, and Christopher Eckhardt, a 16-year old high school student. The following day, John Tinker, a 15-year old high school student, wore his armband to school.

The students were suspended and were told not to return to school unless they removed their armbands. They stayed away from school until after New Year's Day, when the planned period for wearing the armbands had expired.

Several incidents took place on the day the students wore their bands. There were comments and warnings by other students, some poking fun at them, and an older football player warned other students they had better let the protestors alone. A math teacher had his lesson practically "wrecked" by disputes with Beth Tinker.

The suspended students, through their fathers, filed a complaint with the United States District Court, asking for

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Fortas: "State-operated schools may not be enclaves of totalitarianism."

an injunction ordering the school officials not to punish them. In addition, they sought nominal damages—a small or token sum of money, usually $1.00, to show that legal injury has been suffered.

The Issues

With the facts in the hands of the students, the next step is to ask them to identify the basic issues as perceived by the opposing parties. One way to do this is to organize the students into small groups in which they place themselves in the position of the students or the school administrators.

In this case, the facts suggest a wide variety of issues. Students new to law studies and the case study method will probably perceive these issues in moral or practical terms: is it fair that students be deprived of their opportunity to express their political opinion? Will wearing the armbands disrupt the learning process? What about the responsibility of the school to maintain order?

By examining the Constitution and Bill of Rights to determine which provisions are relevant, however, students can begin to translate these general concerns into legal/constitutional issues. Does the First and Fourteenth Amendment protection of free speech apply to students in the school? If it does, is wearing a black armband considered speech which is protected by these Amendments? Is the free speech protection absolute, or can it be limited in certain circumstances? If so, what are those circumstances, and do they apply here?

The Arguments

Once the issues have been identified, have the students convert these into persuasive arguments for presentation to the Court. This exercise should help students see new dimensions to the issues and gain further insight into how these issues can be framed under our Constitution. The following summary of the actual arguments may provide a model.

In a criminal case, proof is necessary beyond a reasonable doubt, but since this was a civil proceeding, the attorneys for the Tinker children only had to prove by a fair preponderance of the evidence that their side was right.

It was argued, in the first place, that the wearing of armbands was the equivalent of speech and was thus protected by the First and Fourteenth Amendments. The First Amendment prohibits Congress from abridging freedom of speech, and the Supreme Court has expanded this prohibition to states under the Due Process Clause of the Fourteenth Amendment ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ") by interpreting 'liberty' to encompass the fundamental rights guaranteed by the First Amendment.

The second line of argument was that the action of the school authorities was capricious, arbitrary, and unreasonable because it simply singled out one form of expression—the black armband—rather than prohibiting the wearing of all controversial insignia. Furthermore, the administrators had permitted the wearing of political campaign buttons, and even the Iron Cross, in the schools.

The action of the school authorities would have been understandable if they could show that trouble might ensue in the school. However, the school system did not have a history of disruptions and, in any event, a few armbands in a school system of 18,000 students, the plaintiffs argued, did not warrant the action of the school administrators.

The attorneys for the School District responded with equally effective arguments. Amendment X of the Constitution vests the states with power over the educational system. Acting in the name of the state and with the powers vested in them, school authorities have the responsibility to take measures to protect the health, welfare, and safety of the students under their supervision.

The school regulation against black armbands was necessary to preserve discipline in the school. The Vietnam War was a divisive conflict marked by public protest meetings, draft card burnings, and a march on Washington. A former student of one of the high schools had been killed in Vietnam and some of his friends might have reacted strongly to the wearers of armbands. Students at one of the schools had been heard to say that if black armbands were permitted, they would wear armbands of another color. The situation seemed rife with rumors of trouble and the school administrators were best qualified to judge the situation. The regulation against the black armbands had been necessary to maintain discipline in the school and to prevent any interference with learning.

The Decision

The United States District Court, the lowest federal court, dismissed the complaint and ruled in favor of the school authorities. The case was carried to the United States Court of Appeals, where the judges were divided equally on the issue. This meant that the lower court decision was affirmed. The plaintiffs then carried their case to the Supreme Court of the United States. The decision was 7 to 2. For whom?

At this point the students can be told how the case was decided, but this means that they will know the answer without additional thinking. To continue the suspense, present the class with excerpts from the majority and dissenting opinions, without identifying which they are. Students then have the opportunity to choose the line of reasoning which appeals to their minds or feelings. This gives the instructor an opportunity to examine with students cogency of reasoning, tangential commentary, the nature of judicial decision-making, and the personal philosophies and emotional reactions of the judges.

The Opinions

Justice Fortas wrote the opinion for the majority. The following excerpts indicate how he approached the issues.

> . . . the wearing of armbands in the circumstances of this case . . . was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment . . . First Amendment rights, in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakeable holding of this Court for almost 50 years.
>
> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.
>
> . . . Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained . . . the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. . . . Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

Justices Stewart and White wrote concurring opinions. Justice Stewart did not agree that the First Amendment rights to students are "coextensive" with those of adults, but he nonetheless supported the majority decision. Justice White also supported the majority but pointed out that there is still a distinction "between communicating by words and communicating by acts or conduct." Exposing students to concurring opinions such as these can suggest new perspectives on the majority opinion and open up new topics for discussion.

Black: "The beginning of a new revolutionary era of permissiveness"

Justice Black's sweeping dissenting opinion was surprising to those who associated him with some of the landmark freedom of expression rulings of the past. The following excerpts convey the flavor of his thoughts and feelings on the subject of school discipline.

> While I have always believed that under the First and Fourteenth Amendment neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases . . . Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.
>
> (And) if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.
>
> . . . The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders . . . One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders . . .
>
> This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,300 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school

officials to surrender control of the American public school system to public school students. I dissent.

Justice Harlan also dissented. His argument was based on the proposition that "school officials should be accorded the widest authority in maintaining discipline and good order in their institutions." Therefore, in cases of this type the burden of proof rests on the complainants to show that the board's action was motivated by other than "legitimate school concerns." There was no proof here that the school officials intended to prohibit the expression of an unpopular point of view, while at the same time permitting the expression of the majority opinion.

Critique

The *Tinker* case is the law of the land, but that does not mean that it is above criticism. The case study method should include an opportunity to criticize the opinions of the Court on the measuring rod of desirable public policy. This stage allows students to take the concerns that they discovered in the issues and arguments phase and apply them to the actual decision.

Students should be encouraged to react freely to the interplay of the Fortas-Black confrontation. For example, Justices Fortas and Black express very different conceptions of education. Which one's views are more desirable for turning out good citizens? Is Fortas's opinion realistic and desirable, or will it place burdens on school administrators? Does Black's opinion reflect what is truly going on in schools? What consequences would it have for teaching and learning?

Application

An essential part of the case study method is speculating on how a constitutional principle would be applied in other cases. Other fact situations permit students to deepen their understanding of the issues and more closely analyze the conflicting values. How would they decide them in the light of the Court's general standard, established in *Tinker,* that school officials can restrict freedom of speech only if they can reasonably predict that the speech will materially and substantially disrupt discipline in the school. Consider the following:

Case I. A student named Guzick came to his high school wearing a button announcing a Vietnam moratorium demonstration and carrying pamphlets urging students to participate in that event. The school has a rule, oral but not written, against the wearing of insignia not related to school activities. This forty-year-old rule had resulted from rivalries of fraternities and sororities. The principal ordered Guzick to remove the button. He refused and was suspended. The school had once been all-white, but it was now 30% white and 70% black. Racial tensions had been evoked in the past by the wearing of such buttons as "White is Right," "Black Power," and "Happy Easter, Dr. King." On a number of occasions, fights had occured. Does the *Tinker* case rule apply here? What are the similarities and differences between the two cases?

Case II. Dallas school authorities knew that some students in the schools would wear black armbands to show their opposition to the war in Vietnam during the Vietnam Moratorium on October 15, 1969. Anticipating disruptions in the schools, the superintendent of schools prohibited the wearing of black armbands on that day. A number of students wearing such armbands were suspended. Those who wore white armbands were not suspended. On previous occasions students had worn peace symbols and had not been punished. Does the Tinker rule apply here? What differences and similarities do you see?

Case III. Charles James, an English teacher in the eleventh grade of an upstate New York high school, wore a black armband to class on November 14, 1969 to show his sympathy with the Vietnam Moratorium. When his principal asked him to remove it, he refused, stating that as a Quaker, he was opposed to killing. James was suspended on the ground that his act was political and his conduct was unethical. James was later reinstated, but after once again wearing the armband, was eventually fired. Upon losing an appeal to the state

Materials on the Bill of Rights

Many excellent materials provide you with information on important cases which have arisen under the Bill of Rights. In addition to those listed below, you will find information on cases in this month's *Curriculum Update* (pp. 23-25), and the boxes on pp. 30-31.

Print

Isidore Starr, *The Supreme Court and Contemporary Issues* (1969). This paperback discusses Supreme Court decisions through excerpts from important cases, providing case backgrounds and decisions, and noting the significance of decisions. The book costs $4.00. Order from Encyclopedia Britannica Educational Corporation, Customer Service, 10th floor, 425 N. Michigan, Chicago, Ill. 60611.

William Cohen, Murray Schwartz, and DeAnne Sobul, *The Bill of Rights, A Source Book* (1976). This paperback source book on constitutional law covers judicial review, freedom of religion, criminal due process, equal protection of the law, the Fourteenth Amendment and federalism. The cost is $4.96, $4.40 for the teacher's handbook; schools get a 25% discount on both books. Address orders to Glencoe Publishing Co., Front and Brown Sts., Riverside, N.J. 08075.

Donald Parker, Robert and Karen O'Neil, and Nicholas Econopouly, *Civil Liberties Today: Case Studies and the Law* (1974). This paperback presents the legal bases for the rights of the accused, equal opportunity under law, property rights, and freedom of religion, speech, press, and assembly. The cost is $4.32, $3.24 for school people. Address orders to Houghton Mifflin Co., Dept. M, One Beacon Street, Boston, Mass. 02107.

Franklyn S. Haiman (ed.), *To Protect These Rights* (1976). This series of books, published in conjunction with the American Civil Liberties Union, includes six books: *Due Process of Law, Freedom of Speech, Racial Equality, Religious Freedom, Rights of Privacy,* and *Woman and the Law.* Each book includes discussions of and excerpts from dozens of cases which show the evolution of constitutionally protected rights. Each book costs $5.75, $4.31 in classroom sets; the complete series is available for $29.50. Address orders to National Textbook Co., 8259 Niles Center Road, Skokie, Ill. 60076.

commissioner of education, he sued to be reinstated in his job, asking for $25,000 in damages. Would the *Tinker* rule apply here?

Here's what each court decided:

Case I. In *Guzick v. Debrus*, 431 F. 2d 594 (1970), the United States Court of Appeals upheld the school authorities. The existence of a long-standing rule against the wearing of non-school related buttons or insignia, the racial composition of the school, the atmosphere of tension, and the racial confrontations of the past justified the actions of the school officials. As for the issue of freedom of expression, the Court said that "America's classrooms will lose their usefulness as places in which to educate our young people if pupils come to school wearing the badges of their respective disagreements and provoke confrontations with their fellows and their teachers." The Supreme Court refused to review this case, letting the decision stand against Guzick.

Case II. In *Butts v. Dallas Independent School District*, 436 F. 2d 728 (1971), the United States Court of Appeals overruled the trial court's decision in favor of the school authorities. The appeals court concluded that the regulation "was improvised . . . for the occasion." Although disruption was a possibility, this did not justify suspending "the exercise of what we are taught by *Tinker* is a consitutional right." In the words of the court, " . . . we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative."

Case III. James lost in the United States District Court, but won in the United States Court of Appeals. *James v. Board of Education*, 461 F. 2d 566 (1972). The District Court decided that James had ignored the New York State Education Department ruling relating to neutrality and objectivity in presenting controversial issues, such as the Vietnam Moratorium. The Appeals Court, however, decided unanimously in favor of James on the basis of the *Tinker* case. They concluded that James had exercised his right to freedom of speech—symbolic speech—in a school atmosphere where there had been no disruptions. The court pointed out that school officials had permitted other signs such as "Peace with Honor," indicating that the school board's regulation against political activity in the classroom may be no more than "the fulcrum to censor only that expression with which it disagrees." The Supreme Court refused to review, thus upholding the decision in favor of James.

Alternative Approaches

There are, of course, other approaches to the case study method. An entire case, properly edited for maturity level and reading skills, can be distributed with instructions that the students discover the facts, arguments, issues, and the opinion or opinions of the judges. An alternative method is to assign to small groups the task of dissecting the case.

On a more sophisticated level, where there are majority and dissenting opinions, the students can be presented with two sets of facts drawn from the opinions. Their assignment is to note the differences in tone and detail of the statements. Then, two sets of opinions are handed out, without disclosing which are the majority and dissenting opinions. The assignment at this point is to match the facts with the opinions.

Films and film strips can be easily used in the case study format. Stopping the media at the proper point to examine the facts and the issues sets the stage for evoking the opposing arguments from the students before resuming the film. Even better, students can be asked to role play appropriate parties to the case and even to act as judge and jurors prior to the disclosure of the decision.

Creative intelligence and imagination can do wonders with the case study method. It adds a dimension to learning, provided the instructor does not fall into the routine of presenting "one damned case after another." Rigid routines can be the bane of a student's life in the classroom—and a teacher's, too. ☐

Milton R. Konvitz (ed.), *Bill of Rights Reader: Leading Constitutional Cases* (5th rev. ed., 1973). This compendium of important Bill of Rights cases is another good teacher resource. It contains explanatory essays and excerpts from trials and decisions. The cost is $19.50; address orders to Cornell University Press, 124 Roberts Place, Ithaca, N.Y. 14850.

Films

Our Living Bill of Rights Series (1967-69). This series of six color, sound 16mm. films, some with teacher's guides, explores basic Bill of Rights concepts by recreating actual cases and incidents and exploring the various issues presented. The films, which often include individuals who were actually involved in the cases, are open-ended and are designed to encourage discussion. They vary in length from 20 to 35 minutes. The first figure following the title indicates their purchase price, the second the short-time rental fee. *Freedom to Speak: People of New York v. Irving Feiner* ($325, $17); *Justice Under Law: The Gideon Case* ($290, $17); *Free Press v. Fair Trial by Jury: The Sheppard Case* ($360,$21); *Equality Under Law: The California Fair Housing Cases* ($255, $14); *Equality Under Law: The Lost Generation of Prince Edward County* ($245, $14); *Liberty Under Law—the Schempp Case: Bible Reading in Public Schools* ($460, $24). The films may be ordered from Encyclopaedia Britannica Films, 425 N. Michigan, Chicago, Ill. 60611.

Bill of Rights in Action (1969-1976). This series of twelve color, sound 16mm. films, each about 20 minutes long, explores key Bill of Rights issues. In each case, the incident is presented and arguments on each side made. The judgment is left to the audience. The first figure following the film's title is its sale price, the second its rental fee. *Capital Punishment* ($315, $25); *De Facto Segregation* ($320, $18); *Equal Opportunity* ($295, $18); *Freedom of the Press* ($310, $18); *Freedom of Religion* ($285, $18); *Freedom of Speech* ($285, $18); *Juvenile Law* ($335, $22); *Privilege Against Self-Incrimination* ($335, $18); *Trial* ($295, $18); *Women's Rights* ($330, $22); *Due Process of Law* ($325, $18). Order from BFA Educational Media, 2211 Michigan Avenue, P.O. Box 1795, Santa Monica, Calif. 90406.

UPDATE LOOKS BACK

Spare the rod and . . .

In the nineteenth century, students toed the line—or else.

Cynthia A. Kelly

"We observe with pain an increasing spirit of insubordination in some of our schools, cherished, as we believe, by many parents who advocate the doctrine that corporal punishment ought to be totally discarded."

Does this sound like something from an editorial you read recently? It might have been written last week, but it was actually part of an 1836 report by the Massachusetts Teachers Association. The debate about using corporal punishment in schools is clearly nothing new.

In colonial times and the early 1800's, corporal punishment was widely accepted. Flogging was a standard practice under the civil law of Egypt, Rome, and England, and was also countenanced by certain religious sects. In the United States, corporal punishment was common in military discipline.

In schools, corporal punishment was the cornerstone of discipline. Scenes such as the following were typical:

> A new teacher seized a long rod by both ends, and lifting it high over his head, said fiercely, as his first words to his class: "Do you see that rod? Would you like to *feel* it? If you would, just break any of the 49 rules I'm going to read to you!"

Flogging became such a routine way of handling discipline problems that in one Massachusetts school (with 250 students) there were 328 floggings in one week, or an average of more than 65 each day.

What about a teacher who didn't want to strike students? One teacher was confronted with the problem on her first day, when another teacher recommended "sound and summary chastisement" of her students. She told her that she'd never struck a child in her life and didn't think she could do it. Her colleague told her "It is the only way and you must."

If teachers didn't get this kind of advice from co-workers, they would get it from teachers' manuals. One of them argued that corporal punishment should not "be regarded as a last resort. When it may be inflicted at all, it is the first resort and the true remedy."

The teacher who wouldn't administer corporal punishment was also likely to find himself unemployed. As one commentator warned in the 1850's, "no man can long satisfy the demand of the school, or satisfy the public around him, whatever else his qualifications may be, if he is not able to govern his school."

As these quotes suggest, school governance was most explicitly not democratic. One commentator wrote that the school should be run like "a monarchy—an absolute, unlimited monarchy, the teacher possessing exclusive power as far as the pupils are concerned." Or, as a teachers' manual put it, "when questions of authority are involved, the teacher must be as uncompromising as the Deacon who said to his neighbor with whom he had a dispute: 'I have prayed earnestly over this matter, and I have come to the conclusion that you must give in, for I cannot.'"

With the teacher in this position of unquestioned authority, there were bound to be abuses. The teacher who gave his

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student the 49 rules could not remember his own list of rules, and as a result, adopted the policy of punishing students for anything he found irritating that day. This type of inconsistent and arbitrary punishment was unfortunately common.

By the mid-1800's, educational reformers who were appalled by the all too frequent instances of cruelty in the schools began to campaign against corporal punishment. Reformers like Horace Mann, Secretary of the Massachusetts Board of Education, proposed to limit the teacher's power to inflict such punishments.

As a result of pressure for reform, school committees in cities across the country passed regulations limiting the use of corporal punishment in schools. These regulations didn't outlaw corporal punishment, but rather set up guidelines designed to limit abuses. For example, a Brooklyn regulation in 1867 specified that "corporal punishment shall be resorted to only in cases of persistent misconduct, after failure of all other reasonable means of persuasion."

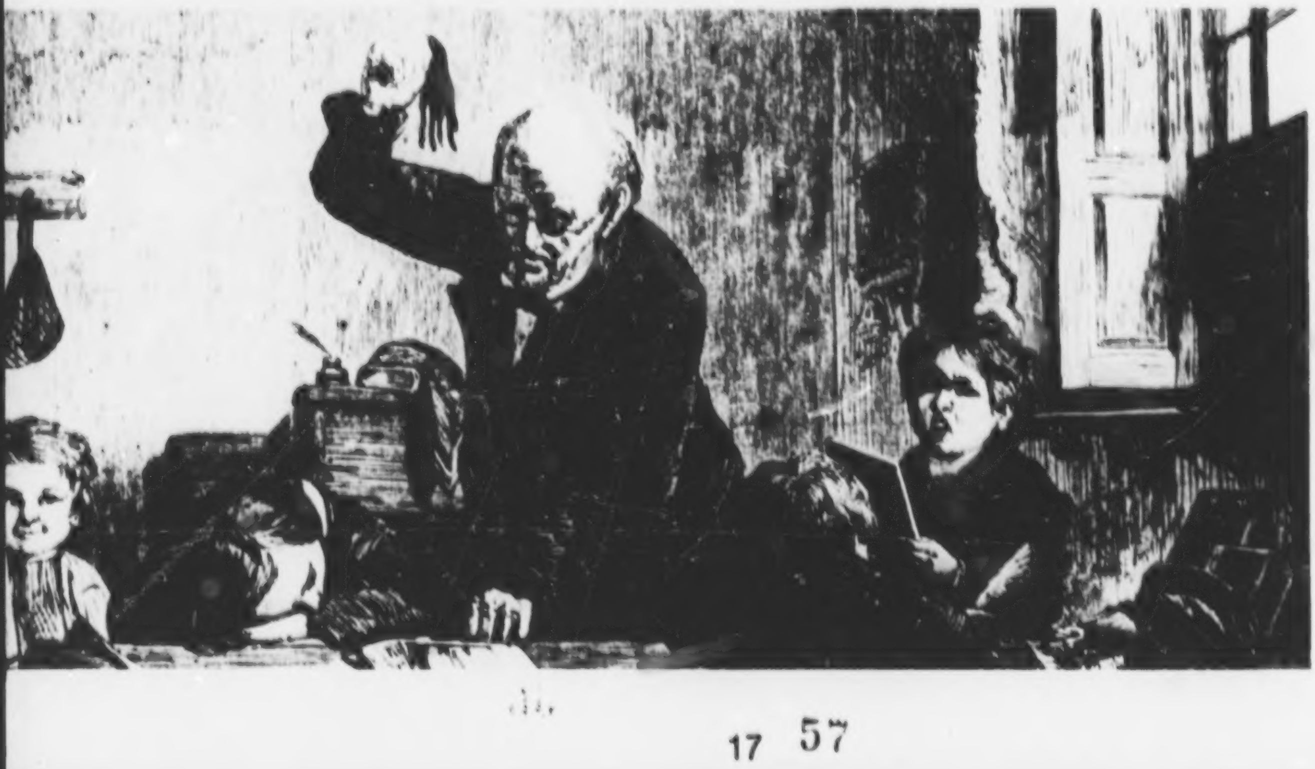
Sometimes teachers were forbidden to inflict corporal punishment and only the principal had that responsibility. In another approach to preventing abuses, school committees often required teachers to be able to justify every instance of corporal punishment. For example, an 1867 regulation for Manchester (New Hampshire) said that "teachers must keep a record of each case of corporal punishment, giving the name of every scholar so punished, the nature and extent of the offense, and the punishment inflicted, to be preserved for the inspection of the committee."

The extent to which attitudes shifted can be seen in an 1866 regulation in St. Louis, which suggested a fundamental change in the criteria used to evaluate teachers: "Those teachers who are most successful in controlling pupils without corporal punishment, other qualifications being equal, shall be awarded by the board a higher degree of appreciation, and retain a preference in promotions and appointments."

Teachers' manuals also reflected the changes in attitude and law by recommending that corporal punishment never be administered in anger or in front of other pupils, that an adult witness should be present, that the parents' consent be attained beforehand if possible, and that a record be made listing the offense, type of punishment, and the time and manner of its infliction.

One might have supposed that this reform would ultimately result in the abolition of corporal punishment. After all, a similar reform movement did result in the elimination of military floggings. In many schools, however, corporal punishment has remained, generally with safeguards like those promulgated 100 years ago. The reason seems to be that the "in loco parentis" status of schools has allowed educators to administer whatever punishments parents in that community might administer. Since adults in many communities apparently believe that parents have a duty to discipline children and that physical punishment is an acceptable and often necessary means of doing so, many school systems have retained corporal punishment. Apparently, only in localities where a majority of parents shared the same philosophy about child-rearing (i.e., physical punishment serves no useful purpose), could school boards be persuaded to prohibit corporal punishment.

Today, school discipline still ranks as a major concern of not only teachers and administrators, but increasingly of students who are victims of disruptive and violent acts in the school. The debates about the necessity of corporal punishment which raged in the middle of the last century thus continue to the present day, and we still seem very close to the position set forth in a treatise on school government written over 100 years ago: "This is corporal punishment. Now is this desirable, or admissible, or necessary? We answer that it is not desirable. But it is admissible and necessary in a system of school government." □



IN THE FIELD

Why I Went to Small Claims Court

Our intrepid reporter handles his own case, sees justice triumph, and finds a good educational resource.

Charles White

Court is to convene at 9:30 in the morning, and at about 9:25 the courtroom begins to fill up with about as mixed a group as you're likely to find in a city like Chicago. It looks like a city bus has emptied into the courtroom. There are the young and old, men and women, blacks and whites, people dressed to kill (I later found out that these were the lawyers) and folks who look like they've slept in a clothes dryer. Among them are my wife and I, writers with no formal legal background who, like most of the people there, are representing ourselves. The name of the court is "pro se," a Latin phrase meaning "for oneself."

I'm a little nervous about our case—we're suing some ace wallpaper hangers whose paper began to peel off the walls three weeks after the job—but I've got plenty to occupy my mind until our case is called. Like how was the court going to maintain reasonable decorum given this menagerie, and how could it ever hear all these cases in one morning, to say nothing of resolving disputes fairly and serving justice?

All it cost to bring suit in Chicago's small claims court is $9.00 for filing and a few dollars to serve a summons on the other party. If one side doesn't show up, the other automatically wins.

The courtroom is small (room for no more than 50 people, the vast majority of whom are plaintiffs or defendants) and the scene is similar to what you might expect from watching Perry Mason: a judge in black robes, a clerk, two bailiffs, and a judge's bench. The resemblance ends there, though. There's no jury box, no witness stand, no reporters, and no formality. All the people involved in a case, including witnesses, come up to the bench together, are sworn in together, and then, standing side by side a few feet from the judge, have a chance to tell their stories. The judge questions them, gives them a chance to respond to what the other side said, and makes his decision. It takes no more than ten minutes for each trial.

In the first case one of the oldest men I've ever seen is suing someone only slightly younger than himself. It turns out that the "younger" man is a dentist who has made the older man's false teeth. The older man complains that the plates have hurt from the minute they were put in, that his bite is so bad that he can't eat many kinds of food, and that he's been unable to get satisfaction because the dentist went off on a three week vacation. He's suing to get his money back.

Then it's the defendant's turn. He says that he's adjusted the plates, and he's brought in his records which show how many times he's worked on the patient. He says that sometimes it's just hard for old people to adjust to something new. Then he pauses a little and says, "I think the real reason he's teed-off, judge, is that the wife and I didn't send him a postcard from our vacation."

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The judge looks at the records, asks the old man if he's had some adjustments (he says he has, but the plates still "aren't up to standard"), and finally decides in favor of the dentist.

The next case involves one of the classic landlord/tenant hassles—a dispute over the security deposit. The plaintiffs are a nice looking young couple, so blond and clean-cut that they could have stepped out of a Wheaties ad. They've brought along their infant son, equally blond and good-looking. They look as though they've thought a lot about how to make a good appearance before the judge. (My wife and I exchange glances; maybe we should have gotten a prop from Rent-A-Kid.)

Their story is that they moved out of an apartment when their lease expired but never received their security deposit back, since their landlady claims that they left the apartment in such bad repair that she's been forced to use the whole deposit for fixing it up.

Their landlady is a rather severe middle-aged woman who's accompanied by a lawyer. (In this court, defendants can have lawyers but plaintiffs can't.) The other lawyers here are young, well coiffed, and generally pretty natty. This lawyer, though, is middle-aged and a little shabby.

He and the landlady base their defense on the lease. They say that the couple violated the lease by not giving a 90-day notice before vacating the premises, and by not getting permission in writing before keeping animals in the apartment. The landlady claims that the young couple's two cats caused all the damage, and that she hadn't known they had cats until she saw what a mess they'd left.

The judge doesn't buy this argument. He points out that tenants have to give notice only if they move out before the termination date of the lease. They have the right not to renew their lease and therefore are free to leave when it expires. He then asks the landlady and her lawyer if, within 30 days of the end of the lease, she had given the tenants notice in writing of the damages to the apartment and the cost to repair them. She says she hadn't, and he reads her a provision from a statute specifying that landlords can keep the security deposit for repairs only if they provide an itemized list of damages, within 30 days of the end of the lease. He rules that she'll have to return the deposit.

Her lawyer seems dumbfounded.

"What's the name of that section, judge?" Then, "we still maintain that this lease spells out the tenants' obligations, and these tenants violated the lease."

"I have no choice, counsel. I must apply the law. The law is very clear on what it requires."

The lawyer fumes, asks if this means that leases aren't worth the paper they're written on anymore, and then announces that he'll appeal.

The judge is unruffled. He explains the appeal procedure to the lawyer, and then turns to the young couple and advises them to get a lawyer to handle the appeal. He gives them the address of a legal services clinic, in case they don't have enough money to pay for a lawyer.

My wife and I exchanged glances; maybe we should have gotten a prop from Rent-A-Kid.

The next case starts off merely complicated and then moves on to obscurity and impenetrability. It's like something thought up by a sadistic law school professor.

The defendant is a small young man with a moustache who sold someone a car but never got the money because the check he accepted (for $300) was stopped. He is suing to get his money.

The confusion starts with the defendant, who claims that he in fact is not the defendant but a third party. He's a tall guy in his 30's, with shaggy hair, a moustache, and a pretty good sized belly hanging over his belt. His story is that he owns a garage where the plaintiff and another man worked. One day the plaintiff sold an old car to the other man, and, since the other man didn't have $300 to pay for it, he asked the boss (the guy in court) to advance him the money. The boss did so, writing the seller of the car a check for $300.

"The very next day, your honor, the fellow who bought the car tries to drive it out to Mundelein, and damn near kills himself. The thing's driving funny, so he pulls into a gas station and has them look at it. The tell him that the whole front end's gone—it will cost him $500 to fix it, and he can't drive the car unless he wants to kill himself. So he asked me to stop the check, and I do. It's him who should be in court, not me."

The next stage of confusion has to do with the car. The self-proclaimed third party claims that it was in reality an old taxi that had been driven 250,000 miles. He says the seller didn't tell the buyer that it had been a taxi, or that it had so many miles on it. He claims he's got four witnesses who saw the sale take place at the garage. The seller pipes up that the sale did not take place in the garage. It took place four days earlier at his apartment, and his wife—who is there beside him—is a witness.

The next stage of complication is that the plaintiff (the guy who sold the car; sometimes you can't tell the parties without a score card) had already approached the state's attorney's office with a request that the defendant (the guy who stopped payment on the check) be prosecuted. Since the state's attorney had told them that there was no case, the defendant assumed that he was off the hook, and so didn't bring any witnesses to court this time.

It's the judge's sad job to tell him that he's wrong. "This is a civil court. The state's attorney didn't see reason to prosecute the matter criminally, but that still leaves the plaintiff his rights in a civil court. You should have brought witnesses today. It's only your word against his."

The big guy again claims that he's not the real defendant, but only the third party, but again the judge reminds him that, like it or not, it was he who wrote the check and stopped it, so he's the defendant.

"You should have brought the other man along so that he could have testified."

This is the only case where the judge looks a little uncomfortable. He seems sadly resigned as he decides for the plaintiff (for some reason not quite the full amount but $275), and, when the defendant says he'll appeal, he advises him to bring his witnesses to the next trial.

Then it is our turn. We go to the bench and are sworn in together: my wife and I on one side, the wallpaper hanger and his son on the other. I tell our side of it first. We fulfilled our part of the bargain by paying them for their work, but they didn't fulfill theirs because, when the paper began to fall off, they refused on three separate occasions to come out and fix it. We wrote them a registered letter, giving them one more chance to fix it and saying that a lawsuit would be our only alternative, but they still didn't repair it.

They reply that they warned us that paper on our walls might develop a few air bubbles. They add that the paper itself was inferior and that they put seven hours on the job, more than can be reasonably expected for the amount of money they were paid.

The judge asks us to respond, and we say that they told us the paper would hang "tight as a drum," that they themselves selected the paper, and that they put in nothing like seven hours.

What seems to sway the judge, though, more than any of the arguments pro or con is the photographs we've brought of the paper peeling off the walls. And what pictures! The paper is curling off the walls like bark off a dead tree, crumpling, buckling, bubbling, rippling, writhing—everything but lying flat. The judge takes one look at these and his eyes light up. He says to the wallpaper hanger, "You said that the paper was separating from the backing, but it looks to me like everything is coming off the wall."

The wallpaper hanger stares at the pictures, clears his throat, and finally says, "I can't explain it, your honor."

The judge decides in our favor, reasoning that we wouldn't have gone ahead with the job if we had been warned that it might come out looking like that. We get back what we paid them, the cost of the paper, and even court costs. Another triumph for justice.

I didn't think about the educational value of the experience until later, but it came to me that I and the other people in the courtroom had learned a lot about the law in a short time. That there's a statute that spells out the obligations of landlords who claim damages; that a statute has precedence over a lease when the two are in conflict; that you may fail to get a criminal indictment against someone but still have a civil case against him.

Law-related classes don't seem to visit small claims courts very often, but if these courts are like the one I was in, they offer a lot for students. The judge explains everything clearly and simply, and there are so many trials that in a typical session students probably would be exposed to at least six or eight areas of law.

In addition to picking up some points of law, students might also learn something about the art of persuasion. None of us sounded remotely like Clarence Darrow or Louis Nizer, but I think that those who won were the ones who told the most credible story and produced the most evidence. Letters, records, photos, witnesses—anything to back up your case and give the judge something to go on besides one person's word against another's.

The most important lesson, though, is that the system can work, that ordinary men and women can go in, tell their stories, and get a fair hearing.

People behaved reasonably and civilly, even though most of them had worked up a pretty good grudge against their opponents. Instead of yelling, swearing, threatening mayhem, or all the other accepted means of persuasion in Chicago, people told their stories calmly and in a level tone of voice. Oddly enough, the only exception was the lawyer on the losing side of the landlord/tenant case, and he was probably not so much mad at the judge's decision as embarrassed that he had been shown up for not knowing the law.

So all in all here's part of the system that seems to be working like it's supposed to. A little charmed circle where decorum prevails and disputes are resolved reasonably. Not at all a bad thing to expose students to. □

J.E.
+
M.H.
2-9-69
LEFTY
James Estes

"I'D BE OUT BY NOW—EXCEPT THAT THE ONE PHONE CALL I MADE WAS OBSCENE."

Minor Disputes Comments Spur Major Headlines

Lawyers' and judges' "preoccupation with legal theory and formalism" has led to the "smug assumption that conflicts can be solved only by law-trained people." Unless new ways are found to settle disputes, "the country might be overrun by hordes of lawyers hungry as locusts."

While statements such as this might seem commonplace when delivered by a Ralph Nader, they resulted in headlines and raised heads when spoken by Chief Justice Warren Burger at an ABA-sponsored conference on the resolution of minor disputes. Burger emphasized that this situation is "aided and abetted by the inherently litigious nature of Americans."

Burger also made it clear that his comments should not be interpreted as an endorsement of Shakespeare's oft-quoted line in *King Henry VI*, "The first thing we do, let's kill all the lawyers." Lawyers and judges have made great contributions to achieving a fair and humane society, Burger said. But the problem may be the profession's belief "that the more complex the process, the more refined and deliberate the procedure, the better the quality of justice which results."

Burger suggested that "people with problems, like people with pains, want relief, and they want it as quickly and as inexpensively as possible. The role of law, in terms of formal litigation, with the full panoply of time-consuming and expensive procedural niceties, can be overdone."

The ABA conference is but one of many recent efforts to identify and develop effective means of resolving minor disputes. At the federal level, the Justice Department is about to pilot several "neighborhood justice centers." Also, legislation is pending in Congress (S. 957, H.R. 2482, H.R. 2965) that would provide financial support to state efforts to improve their minor dispute programs. The next issue of *Update* will explore the problems, alternatives and implications of new methods designed to resolve minor disputes.

Equal Justice Series Debuts

Remember those boring descriptions in American history texts of *Marbury v. Madison* and *McCulloch v. Maryland*? The Judicial Conference of the United States does, and so it's developed, in cooperation with WQED-TV of Pittsburgh, a lively film series called *Equal Justice Under Law*. The series dramatizes the incidents and Supreme Court deliberations in *Marbury*, *McCulloch*, *Gibbons v. Ogden*, and *U.S. v. Burr*.

The series will be broadcast three times over the Public Broadcasting Service. During the week of September 12, there will be daytime broadcasts of the films; consecutive Saturday evening presentations will occur on September 24 and October 1; and schooltime broadcasts will be offered on successive Mondays beginning November 21. Check local listings for exact time in your area.

Best of all, everything is being done to encourage you to use these films. Unlike most TV programs, the series may be videotaped for future classroom use. For those without videotaping capabilities, the films are available on a free loan basis through August, 1978 from Steve Mahon, Association Films, Inc., 1815 Ft. Myer Drive, Arlington, Virginia 22209 (703-525-4475). If you wish to purchase the films (or rent them as of September, 1978), contact the National Audiovisual Center, General Services Administration, Order Section, Washington, D.C. 20409 (301-763-1896).

Teaching guides are also available—just contact your local Public Broadcasting station. The guides may also be copied for classroom use.

Greasy Tacos Stir Up More Than Indigestion

According to an Associated Press report out of Fort Scott, Kansas, greasy tacos have stirred up indigestion, an editorial, First Amendment charges, and a restaurant career.

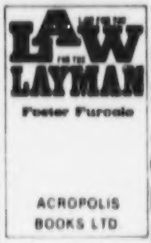
It all began seven months ago when Mark Brillhart, editor of the student newspaper at Fort Scott High School, complained in an editorial about greasy tacos in the school cafeteria. Partly as a result of his editorial, his journalism adviser, Lily Kober, was assigned other duties by the school principal, William Weatherbie. The principal explained that even though his wife is a cook in the cafeteria, that had nothing to do with the reassignment.

Now, the Kansas-National Education Association as well as the Student Press Law Center (see Spring, 1977 issue of *Update*) are looking into the incident. Brillhart, meanwhile, has abandoned journalism and, perhaps in an effort to have more control over the quality of tacos, plan to pursue a career in restaurant management.

Copyright and You

Effective January 1, 1978, a new federal copyright law affecting authors, educators and librarians, among others, goes into effect. Depending upon which side of the fence you're on, you might cheer or jeer the new law, for it limits the number of copies that may be made of articles, essays, charts, and other staples of classroom instruction.

First, some general notions of what educators are allowed to do. For class-



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room use and research purposes, you may make a *single* copy of such copyrighted material as a chapter from a book, a short story, an essay, or a poem, as well as a chart, graph, diagram, drawing, cartoon, or picture. You may make multiple copies for your class, but no more than one per pupil, and only one item can be reproduced from each book or periodical.

The prohibitions and restrictions prevent teachers from copying "consumable" materials such as workbooks and test booklets, a work which has already been copied for another class in the same building, or more than one work by the same author during the same term. Certain word and percent limitations are also prescribed by the Act. In all cases, copied material must carry a notice of copyright.

The Act includes a separate section on copying by libraries and archives. Among the section's more interesting guidelines: an authorization for copying a published work in order to replace it as long as an unused replacement cannot be obtained at a fair price; and exemptions from liability for library employees in cases of unsupervised use of copying equipment, as long as a notice indicating that reproductions are subject to copyright law is displayed on the equipment.

The Copyright Office will be happy to send you, at no cost, more information than you'd ever want to know about the new copyright law. Write to the Copyright Office, Library of Congress, Washington, D.C. 20559. Since the *Report* (No. 94-1476) contains the information of primary interest to most educators and librarians (see particularly pp. 65-79), you may want to order only this publication.

ACLU Faces Moral Dilemmas

"Civil liberties don't mean anything if everyone is not defended—including the most despised," says Aryeh Neier, ACLU Executive Director. The ACLU put those words into practice in two recent cases, and is drawing the ire of long-time supporters as a result.

The first case is particularly interesting since it pits two ACLU groups against each other. It involves a group of blacks who attacked white marines, believing them to be Ku Klux Klansmen who had been harrassing blacks. The blacks, represented in part by Los Angeles ACLU lawyers, have contended that their acts were in self-defense, while the Klansmen, represented by a San Diego ACLU volunteer, claim denial of free speech and assembly.

Shortly thereafter, the ACLU found itself enmeshed in a second controversial case, this time defending a group of Nazis who were denied the right to march in Skokie, a heavily Jewish suburb of Chicago.

Many long-time ACLU supporters are very troubled by the ACLU's defense of groups dedicated to the destruction of civil liberties, and are expressing their displeasure publicly and financially. The President of the National Lawyers Guild, for example, described the ACLU's defense of the KKK as "poisonous even-handedness," and over 12% of the Illinois ACLU membership have withdrawn their support in protest against the Nazi case.

Newspaper Course on Crime and Justice

"Youthful criminals and corporate crooks who break the law—again and again? Laws that are outdated and unenforceable? Law enforcement officials who can't control crime in their own ranks?

These are but a few of the questions addressed in a 15-part series on "Crime and Justice in America" which is now appearing in newspapers throughout the country. Divided into six major themes—Understanding Crime, Institutionalized Crime, Street Crime, Criminal Law, The Administration of Criminal Justice, and Punishment—the series includes articles by fourteen scholars representing law, education, sociology, criminology, history and other disciplines. Spanish translations of the series are also available.

An added dimension of the series is its use in community education programs. Courses by Newspaper helps colleges, universities and community groups establish programs on the series topic. Among its services are the provision of credit, the anthology *Crime and Justice in America* ($6.25), a *Study Guide* ($2.95), and a *Source Book* ($2.50). The publications are available from Publishers, Inc., 243 12th Street, Drawer P, Del Mar, California 92014.

For more information about Courses by Newspaper, contract George A. Colburn, Project Director, University of California, San Diego, Q-056, La Jolla, California 92093, 714-452-3405. —NG

CURRICULUM UPDATE

Joanna Banthin

Focus on Juvenile Law

Print and audio-visual materials about young people's rights and responsibilities.

One of the findings of YEFC's recent national study of law-related education is that students are most interested in themselves, and building on that interest is one of the easiest ways to develop a law-related program. Thus this issue's *Curriculum Update* focuses on materials that deal with the rights and responsibilities of juveniles in civil and criminal settings, particularly as they relate to parents, schools, employers, and other individuals.

Entries have been grouped under four general headings: general issues, the school, working and consuming, and crime and delinquency.

General Issues

- ***Your Legal Rights as a Minor*** (1974). Robert H. Loeb. Hardback. Grades 9-12. An overview of laws that affect minors in the school, in the family, at work, and in the community at large. Covers driving, drinking, drugs, commercial rights and restrictions, sex, marriage, and criminal proceedings. Includes tables that present state-by-state differences in age restrictions. Question and answer format. The cost is $6.90. Address orders to Franklin Watts, Inc., Attention: Order Department, 730 Fifth Avenue, New York, N.Y. 10019.

- ***When I Get to Be 18! Juvenile Law*** (1976). The Usable Law Program. Sound filmstrip, 10 minutes. Teacher's guide and classroom set of student study books provided. Grades 8-12. An excellent review of some aspects of juvenile law that are most relevant to young peoples' day-to-day lives. Notes parents' obligations to their children and the legal requirement that children obey their parents. Explains who owns a minor's paycheck and describes the restrictions on minors' ability to contract and resulting liabilities. Describes other limits on minors' right to marry, vote, and drink alcoholic beverages. Tells how a minor may become "emancipated." The purchase price is $43.00 with cassette, $40.00 with record. Address orders to BFA Educational Media, 2211 Michigan Avenue, P.O. Box 1795, Santa Monica, Cal. 90406.

- ***Youth and Society, Rights and Responsibilities*** (student booklet, 1977); ***Strategies for Teaching Rights and Responsibilities*** (teacher's guide, 1977). Carolyn Pereira (ed.). Paperback. Grades 9-12. Student booklet also available in Spanish. A basic text on the legal rights and responsibilities of young people in their relationships with their families, their employers, police, and government. Topics include marriage, annulment, divorce, medical care, working conditions, contracts, landlord-tenant relationships, status offenses, criminal proceedings, and torts. Cites relevant statutes and court decisions. Teacher's guide presents suggested instructional strategies, including those involving role-playing, field trips and speakers. The student book is free except for postage and handling. The teacher's guide costs $2.00, plus postage and handling. Address orders to Constitutional Rights Foundation/Chicago Project, 122 South Michigan Avenue, Suite 1854, Chicago, Ill. 60603.

- ***Justice Without a Jury: Administrative Law*** (1976). Sound filmstrip, 10 minutes. Teacher's guide and classroom set of student study books provided. Grades 9-12. One of the few pieces of material to deal with this often-overlooked area of the law. Discusses the legitimacy of rule-making and rule-enforcing agencies such as school boards, the Internal Revenue Service, state agencies that oversee employment and unemployment, and motor vehicle bureaus. Includes advice on finding legal services. The purchase price is $43.00 with cassette, $40.00 with record; address orders to BFA Educational Media, 2211 Michigan Avenue, P.O. Box 1795, Santa Monica, Cal. 90406.

The School

Recent changes in laws affecting schools have had a significant impact on our educational system. These materials focus on some of the court decisions and legislation. The strip *Justice Without a Jury* (discussed under "General Issues") might also be used to introduce a discussion of the power of school boards.

- ***At Issue: Youth and the Constitution*** (1976). 3 sound filmstrips, 1 audio cassette. Filmstrips 15 minutes each, cassette 40 minutes. Teacher's guide provided. Grades 8-12. An excellent overview of major issues in student and teacher rights in the 1960s and 1970s, describing the conflicts and the legal procedures that were used to resolve the conflicts. *Students in Court* focuses on *Tinker v. Des Moines Independent Community School District*, a landmark case on the constitutional rights of students. Briefly describes restrictions schools have historically placed on student expression, introduces the plaintiffs in the case and explains their reasons for wearing black armbands that symbolized their opposition to the war in Vietnam. Traces their case through the federal courts, explaining critical phrases in the Supreme Court decision such as "symbolic expression." *Rights and Responsibilities* examines students' right to express their opinions in print. Reviews a 1908 case in which two girls were suspended for "ridiculing their elders" by giving a friend's satiric poem to a local newspaper. Contrasts the attitude toward these girls with three more recent court decisions on underground newspapers. In these cases, federal courts have ruled that schools cannot put "prior restraints" on the content of student publications or prevent the distribution of these publications. The final filmstrip, *Rights and Individuality*, looks at issues involving personal appearance, noting the lack of consensus in U.S. district courts and appeals courts on cases involving hair length and dress codes. Reviews several decisions on both sides of the issue, and examines how the Freedom of Expression, Due Process, and Equal Protection Clauses have been interpreted. Also discusses the use of the Equal Protection Clause in cases involving woman athletes who want to play on men's teams. *Teacher Rights: The Case of Charles James*, the audio cassette, features an interview with Charles James, a teacher who was dismissed for wearing a black armband to protest the Vietnam war. He and his wife recount their motivations, official and unofficial reactions from employers and neighbors, and the

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Joanna Banthin holds a doctorate in political science. A Managing Director of Capitol Research Associates, Inc., Chicago, Illinois, she has taught political socialization at the university level and is the immediate past-president of the New York State Political Science Association.

effect of the events on their family. Traces the case from the local school and school district to the state education department and the state and federal court systems. The purchase price is $79.00. Address orders to Prentice-Hall Media, Inc., 150 White Plains Road, Tarrytown, N.Y. 10591.

- ***Busing: A Rough Ride in Southie*** (1976). 16mm. film, 28 minutes. Teacher's guide provided. Grades 9-12. Documentary film examining the effects of court ordered busing in South Boston. Includes interviews that give the reactions of three families affected by busing: a white Irish Catholic family living in South Boston and supporting busing, a white family in South Boston opposing busing, and a black family from Roxbury whose children are bused to South Boston. In addition to the interviews, the film presents the reactions of the general community and depicts anti-busing demonstrations and rallies. The purchase price is $350.00, the rental fee $40.00. Address orders to Kauffman and Boyce Productions, P. O. Box 283, Allston, Mass. 02134.

- ***Dealing with Authority*** (1976). Relationships and Values series. 2 sound filmstrips, 6-7 minutes each. Teacher's guide provided. Grades 6-9. Two situations are presented. In one, Harriet is harassed by various authority figures—her mother, teachers, the bus driver, her coach, the student council president. At the end of the day, she is the authority figure in the Kiddie Kraft Workshop—and she faces the question of whether she should exert authority or try to be "likeable." In the second vignette, a basketball player who has transferred from one school to another in the middle of the season is asked to give his new coach his old school's plays. Should he or shouldn't he? Good introduction to a discussion about what makes authority legitimate. The purchase price is $29.50. Address orders to Guidance Associates, 757 Third Ave., New York, N.Y. 10017.

- ***Your School Newspaper*** (1975). Part 6 of Freedom and Responsibility series. Sound filmstrip, 10 minutes. Teacher's guide. Grades 9-12. A discussion of freedom of the press as it applies to high school newspapers. Emphasis on responsible behavior. Explains that student editors and writers are minors, which defines the roles advisors and school adminstrators play. Defines libel, invasion of privacy. Condemns suppression of controversial stories, but supports the right of teacher-advisors to enforce reasonable guidelines. This filmstrip is part of a series, but can be purchased separately for $25.00. Order from Pathescope Educational Media, Inc., 71 Weyman, New Rochelle, N.Y. 10802.

Working and Consuming

Many young people work. Almost all of them are active consumers. Thus they have an interest in laws that affect credit, contracts, warrantees, working conditions, wages, and hiring and firing.

- ***Girls and Boys—Rights and Roles*** (1976). Relationships and Values series. 2 sound filmstrips, 10 minutes each. Teacher's guide provided. Grades 5-8. The filmstrips portray dilemmas created by stereotyped "men's roles" and "women's roles." In one, committee members argue about a parade float. Questions about the committee structure, the theme of the float, and division of labor all seem to divide the group on gender lines. In the second strip, a girl and her boyfriend both apply for the same summer job. She is offered it, but can't decide whether to accept. Both strips are open-ended in order to encourage discussion. The second strip is an excellent springboard for such questions as do women themselves foster unequal opportunity? The purchase price is $29.50. Address orders to Guidance Associates, 757 Third Ave., New York, N.Y. 10017.

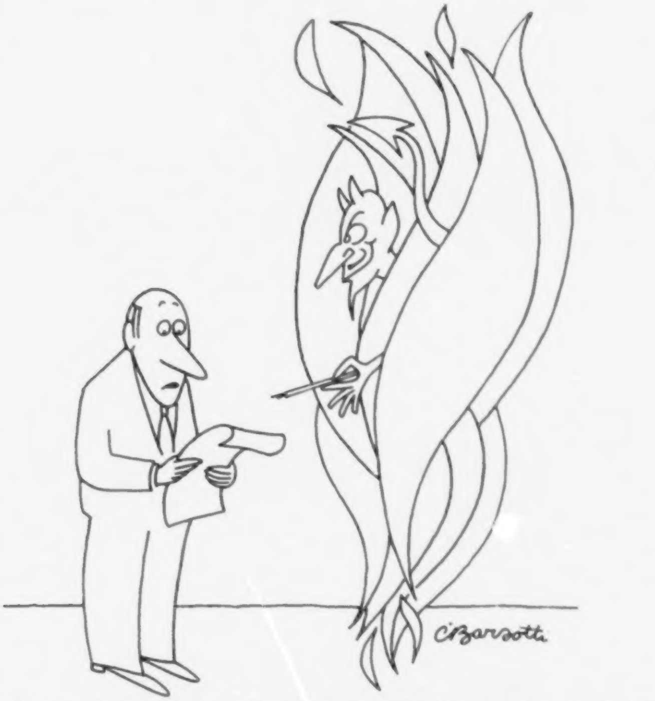
- ***Job-Related Issues: What's Right?*** (1976). Values in a Democracy series. 2 sound filmstrips, 7 minutes each. Teacher's guide, spirit masters for student work sheets. Like other filmstrips in this series, these raise questions that teenagers might raise themselves. The first situation involves a girl who has a job as a waitress. Should she report her tips accurately because that is the law? Or should she underreport them because "everyone" does? The second situation involves community health and safety. Some boys have been hired to fix a settling pool in which chemically contaminated waste water is treated before it goes back into a creek. While the pool was broken, however, contaminated water entered the town's drinking water. The problem has not been reported because it might mean closing down the plant and putting people out of work. Should the boys report it? The purchase price is $29.50. Address orders to Guidance Associates, 757 Third Avenue, New York, N.Y. 10017.

- ***The Law and Your Work: Employment Law*** (Pix Productions, 1976). The Usable Law Program. Sound filmstrip, 12 minutes. Teacher's guide, classroom set of student study guides provided. Grades 9-12. Explains how federal and state laws affect working. Tells what questions can and cannot be asked in job applications. Briefly discusses workmen's compensation, union, closed, and open shops, "just cause" for dismissal, and unemployment compensation. Describes ways of presenting grievances to an employer. Tells how the legal system can be used by the worker. The cost is $43.00 with cassette and $40.00 with record. Address orders to BFA Educational Media, 2211 Michigan Avenue, P.O. Box 1795, Santa Monica, Cal. 90406.

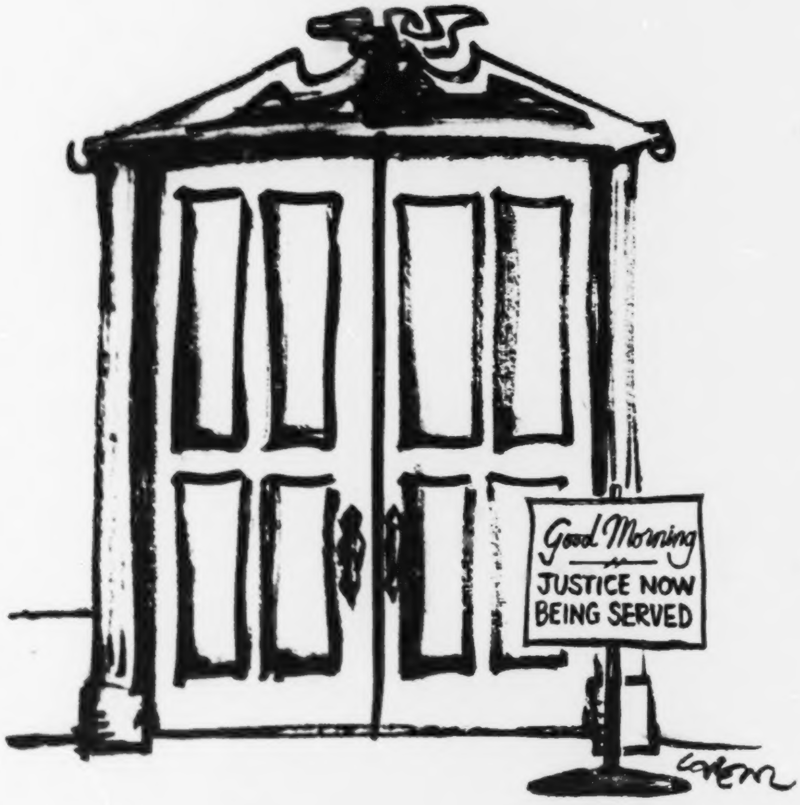
Crime and Delinquency

The thrust of the materials listed here concerns crimes usually associated with young people. The materials emphasize legal rights and responsibilities, punishment, and in some cases, breakdowns in the family structure.

- ***The Clubhouse*** (1974). 16mm. film, 10 minutes. Brief teacher's guide provided. Grades 2-6. A simple, poignant illustration of what vandalism means. Four



"But everything you're promising me is already guaranteed in the Constitution."



Drawing by Lorenz; 1977
The New Yorker Magazine, Inc.

young boys show their pride in their clubhouse by polishing windows and raising their flag. Because they are bored, they walk around town, and finally begin to throw rocks at the windows in the school building. They run back to their clubhouse when the police come and find someone has broken their windows and knocked down the walls. The expression on the boys' faces tells the story. An excellent introduction to discussions of peer pressure, responsibility, and what is right and what is wrong. The purchase price is $150.00, the rental fee $25.00. Address orders to Motorola Television Programs, Inc., 4825 North Scott St., Schiller Park, Ill. 60176.

- ***If the Police Stop You . . . Stop, Search, Arrest Law!*** (Pix Productions, 1976). Sound filmstrip, 10 minutes. Teacher's guide and classroom set of student study guides provided. Grades 9-12. A straightforward presentation of the rights and responsibilities of citizens and police. Explains circumstances in which police can stop and or search an individual. Recommends cooperation and defines citizen safeguards, "reasonable suspicion," "probable cause," and "Miranda rights." Describes arrest procedures for adults and juveniles and tells how a person can file a complaint if he feels police have treated him unfairly. The cost is $43.00 with cassette $40.00 with record. Address orders to BFA Educational Media, 2211 Michigan Avenue, P.O. Box 1795, Santa Monica, Cal. 90406.

- ***America's Runaways*** (1976). Christine Chapman. Hardback. Teacher's guide provided. Grades 11-12. A well-written, readable examination of the problem of runaways. Includes interviews with young people who have run, letting the rebellious, the frightened, the cunning, the proud, and the uncertain speak for themselves. Examines attitudes of police, judges, parents, psychiatrists, and social workers. Excellent discussion of laws that define children as the property of their parents and as individuals who cannot speak for themselves. Good examples. The cost is $8.95. Address orders to William Morrow & Company, Order Department, 105 Madison Avenue, New York, N.Y. 10016.

- ***The Child and the Law: Helping the Status Offender*** (1976). Kathryn W. Burkhart. Public Affairs Pamphlet series. Teacher's guide provided. Grades 9-12. Discusses the backgrounds of young people who get in trouble or for other reasons are put in the custody of the court. Gives many examples while exploring the problems of institutional care, punishment, and the need for legal reform. The cost is 50c for a single copy, 28c per copy for classroom sets. Address orders to Public Affairs Committee, Inc., 381 Park Avenue South, New York, N.Y. 10016.

- ***Requiem for Tina Sanchez*** (WNBC-TV, 1976). 16mm. film, 25 minutes. Teacher's guide provided. Grades 9-12. A picture of life and death on the "Minnesota Strip" in New York City, where young runaway girls work as prostitutes. Pimps, police, and girls themselves tell about why the girls run away from small towns and what keeps them on the Strip. Includes profiles of two girls: Tina, who left Dobbs Ferry, New York, at 11, became a prostitute at 13, and was murdered at 15, and Tammy, a young girl from Canton, Ohio, whose "adventures" took the same path. Notes absence of resources for dealing with the runaway problem. The rental fee is $15.50, plus shipping and handling. Address orders to Correctional Service of Minnesota, 1427 Washington Avenue South, Minneapolis, Minn. 55404.

- ***The Youngest Outlaws: Runaways in America*** (1976). Arnold P. Aubin. Hardback. Grades 8-12. An informally written presentation of the problem of young people who run away from home. The author offers a number of case studies in his attempt to present some of the runaways' reasons for leaving home. Includes a discussion of the legal status of runaways, typical police practices in dealing with runaways, alternatives to institutionalization, and help for runaways on the road. The cost is $7.29. Address orders to Julian Messner, Order Department, 1230 Avenue of the Americas, New York, N.Y. 10020.

- ***Legal Issues: What's Right?*** (1976). Values in Democracy series. 2 sound filmstrips, 5-7 minutes each. Teacher's guide and spirit masters for student work sheets provided. Grades 9-12. Two filmstrips focus on real problems areas—cars and shoplifting. In one, a boy hits another car in a parking lot. Should he report it or drive away? In the other, a girl is detained after her friend has stolen a blouse from a boutique. She is asked to identify her friend or "be considered an accomplice." What should she do? The "right solution" is not presented, and student discussion is encouraged. The purchase price is $29.50. Order from Guidance Associates, 757 Third Avenue, New York, N.Y. 10017.

- ***Shoplifting*** (Associated Press, 1977). 2 sound filmstrips, 12 minutes each. Teacher's guide provided. Grades 6-12. Merchants, law enforcement officers, and teens themselves discuss shoplifting. Emphasizes that shoplifting is a crime, not a game. Shows how retailers are fighting the problem by using electronic tags, cameras, and security guards and by prosecuting those who are caught. Explains the impact an arrest and conviction record can have on a person's future. The cost is $53.00. Address orders to Prentice-Hall Media, Inc., 150 White Plains Road, Tarrytown, N.Y. 10591.

FAMILY LAWYER

Will Bernard

Cases on the Parent-Child Relationship

UNWILLING ADOPTION

Unmarried and pregnant, Charlotte asked her doctor to arrange for an adoption. After the baby was born she completed all the legal formalities.

Then, months later, she decided she had made a mistake. In a court hearing Charlotte tried to have the adoption cancelled. Grounds: duress.

"I was weak and depressed at the time I signed those papers," she explained. "Giving your consent in that mood should not count."

However, the court ruled that the adoption was valid. Calling Charlotte's mood normal under the circumstances, the court said people would become leery of adopting children if the procedure was too easy to revoke.[1]

It is true that an adoption may be cancelled because of duress. But, out of concern for the adopting parents, courts are cautious about recognizing such a plea.

In another adoption case the mother claimed duress on the ground that her doctor, her clergyman, and her own mother had all urged her to give the baby up.

But again, the court said this was not enough to constitute duress in the eyes of the law. The court pointed out that at the time of the adoption, in juvenile court, the mother had been clearly informed that the decision was hers alone to make.[2]

On the other hand the court did find duress in another case involving a young married couple. Here, a few days after the birth of their baby, the father told the mother that he had lost his job and was walking out on her.

In desperation, she decided on an immediate adoption. But this time a court decided later that these pressures—along with technical irregularities—were too serious to disregard. Revoking the adoption, the court said: "The circumstances prevented her from exercising her own free will."[3]

1. *Anonymous v. Anonymous*, 23 Ariz. App. 50, 530 P. 2d 896 (1975)
2. *Re Adoption of Gambione*, 262 S. 2d 566 (1972)
3. *Huebert v. Marshall*, 132 Ill. App. 2d 793, 270 N.E. 2d 464 (1971)

(For this and other *Family Lawyer* articles, descriptions are sometimes adapted from cited cases).

WRONGFUL BIRTH

"My father scarred me for life."

So said a young woman when she filed a lawsuit against her father for damages. She charged that by refusing to marry her mother he had caused her to be born illegitimately and to go through life in disgrace.

But the court ruled against her. Allowing this type of claim, said the court, would open the floodgates to countless lawsuits by disgruntled children.

"One might seek damages for being born of a certain race, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent had an unsavory reputation."[1]

Courts have generally rejected these "wrongful birth" suits brought by children against their parents. As a rule they have also frowned on such claims when brought against a third party.

Two children sued a doctor for performing an unsuccessful vasectomy on their father. Their unexpected baby sister, they said, had reduced their share of 1) his estate, and 2) his affections.

But again the court turned thumbs down. Regarding the father's estate, the court said children have no fixed right to a particular share anyhow. Regarding the father's affections, the court said they had no legal right to that either.

"The law cannot require a parent to love a child," said the judge. "It forbids abuse but does not compel devotion."[2]

Occasionally, however, a third party may be held liable to the parent if not to the child. Thus, one court said a mother could hold her doctor liable if he neglected to warn her of the danger of a defective birth. At least, said the court, she could collect the extra expenses arising out of the child's impaired condition.[3]

1. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963)
2. *Cox v. stretton*, 352 N.Y.S. 2d 834 (1974)
3. *Jacobs v. Thiemer*, 519 S.W. 2d 846 (1975)

DEPRIVED CHILD

Little Nancy's mother, injured in a bus accident, was left permanently disabled. In due course the bus company was sued not only by the mother but by Nancy as well.

"The child," argued her lawyer in court, "has been deprived of the care and companionship of her mother, all because of the negligence of the bus driver. His company ought to pay for her loss of these services."

But the court rejected Nancy's suit, saying that a child has only a moral—not a legal—right to the "services" of a parent. The court noted that the jury, in awarding damages to the mother, would probably add something anyhow for the hardship imposed upon the child.[1]

Generally speaking, the child deprived of a parent's attentions through a third party's negligence cannot collect damages. In fact, most courts take that view even if the harm to the parent-child relationship was inflicted deliberately.

Consider: A lawsuit was filed on behalf of a small boy against the "other woman" for having induced his father to abandon his family.

"If for no other reason," said the boy's attorney in court, "we want to hold her liable as a warning to other home-wreckers."

But the judge rejected the suit, saying he doubted that a fear of damages would have any deterrent effect. Such philandering, said the judge, "springs from motives that seldom if ever count the cost."[2]

However, in a few of these alienation-of-affections cases, courts have ruled in favor of the deprived child. Thus, two youngsters were awarded damages against a man who had lured away their mother. Said the court:

"Children, the same as parents, have rights as well as duties. Enticement of a mother is a grievous, outrageous, and tragic wrong to her child."[3]

1. *Halberg v. Young*, 41 Hawaii 634 (1957)
2. *Morrow v. Yannantuono*, 273 N.Y.S. 912 (1934)
3. *Miller v. Monsen*, 288 Minn. 400, 37 N.W. 2d 543 (1949)

MEDDLESOME PARENTS

After six stormy years of matrimony, Edna and George came to the parting of the ways. Edna, blaming George's parents for the breakup, filed a lawsuit against them for damages.

"Ever since our wedding," she told the court, "they have been meddling in our affairs. They had no right to do that. Once we were married, it was up to them to leave us alone."

But the court dismissed Edna's claim, saying parents have special privileges in dealing with their children.

"The law is tender of the parental relationship," said the court. "The parent has the liberty of extreme solicitude for the child even after marriage, and may advise freely and frequently and even foolishly."[1]

This is the usual attitude of the courts, so long as the interference does not go beyond reasonable bounds. Of course, parents have even clearer rights before a child's marriage.

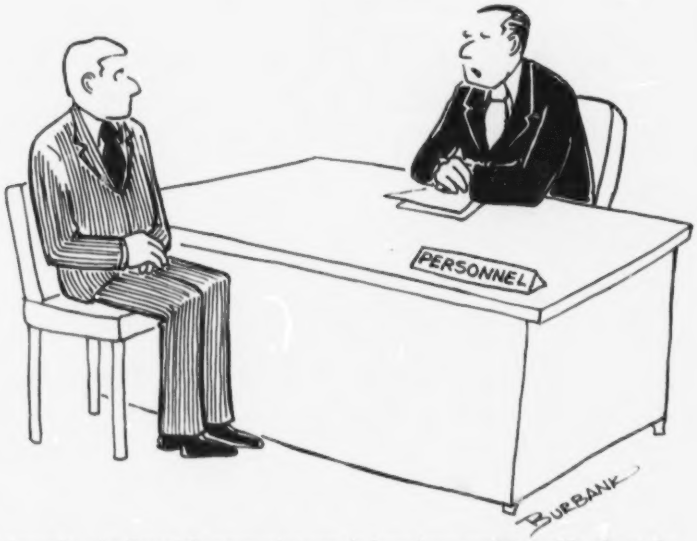
Another case involved a father's right to exclude from the family home an unwanted boy friend of his daughter. The court said:

"A father is under no obligations whatsoever to allow one of whom he does not approve as a prospective husband to enter his home."[2]

On the other hand, the law condemns excess at all stages of the parent-child relationship. One father was arrested on a charge of assault and battery after he administered a brutal beating to his young daughter. Although he claimed "parental privilege," the court found him guilty. The judge commented:

"Where the punishment is so cruel as to show that the parent was not acting for the benefit of the child but to satisfy his own evil passion, he is no longer to be considered as a judge administering the law of the household but as a malefactor guilty of an unlawful assault on a helpless person entrusted to his care."[3]

1. *Monen v. Monen*, 64 S.D. 581, 269 N.W. 85 (1936)
2. *Smith v. Kiger*, 5 Cal. App. 2d 608, 43 P.2d 565 (1935)
3. *People v. Green*, 155 Mich. 524, 119 N.W. 1087 (1909)



"Actually, the Equal Opportunity people have been quite specific about the qualifications for this job: you have to be a Black woman named Gonzales."

K-12 Multimedia Materials
are available on
the concepts

Authority & Privacy

A limited number of
preview copies are available

law in a free society

For further information regarding materials, programs or consulting services, contact
Charles N. Quigley or Jack N. Hoar, Law in a Free Society, 606 Wilshire Blvd., Suite 610, Santa Monica, Ca. 90401; (213) 393-0523

Getting Started

Classroom teachers provide tips on how to make law part of your teaching.

Charles White

Last year an ABA survey of high school social studies teachers in five states found that a considerable number of those teaching about the law began without special teacher training and without the help of a law-related project. We wanted to know more about how teachers do it on their own and what tips they have for others interested in teaching about the law, so we conducted in-depth interviews with classroom teachers.

This is the first in a series of articles based upon those discussions. It explores how secondary teachers in the Chicago area overcame what we've found to be one of the biggest obstacles to instituting law-related programs—teachers' sense that they don't have an adequate command of this subject area—and it focuses on curriculum materials and community resource people, two critical components of law-related education that helped them gain the needed confidence. In later issues we'll look at such topics as what methods teachers use, how they put together programs that meet the needs and interests of their particular students, and how elementary teachers have introduced law in their classrooms.

The teachers in this article are about evenly divided between the inner-city and the suburbs, and represent a wide variety of schools and students. None of them is a lawyer or a law student. A few have taken criminology or political science courses, giving them some background in the field, but most began with no particular expertise in the area. Though the courses/units they've developed differ in many respects—running from four weeks to a full 20-week semester, and covering such varied approaches as literature and law, criminology, and practical law—these teachers took pretty much the same steps in putting their programs together and making them work.

The teachers we talked to began teaching about law for all sorts of reasons. A couple inherited a law course when another teacher left, a couple began because of their dissatisfaction with the civics or history classes they were teaching, but most seem to have begun because law was a subject that interested them and their students and seemed important to know about.

Edie Sauter, a teacher at Ridgewood High School in suburban Norridge, began when Watergate dominated the news: "With crime in all the papers, and cop shows on TV, and Watergate everywhere, there was just no getting away from law."

For Marion Cobb, a teacher at Westwood Junior High in suburban Park Forest, the process began when she taught a short unit on trials in a seventh grade social studies class. "The kids showed so much interest that I proposed a separate course on law in the eighth grade. I passed out questionnaires to my students to find out what they were interested in, and built the course around what they already knew a little about, mostly from TV—crime, arrest, and trial procedure."

For Chuck Thomason of Chicago's Whitney Young High School, law-related education was an outgrowth of volunteer work in human relations in his community, a chance to help his students explore their feelings about crime and a host of related issues. And for Charles Kuner of Farragut High in Chicago, law was a chance to give his inner-city youngsters some of the crucial skills that they'll need to survive.

The reasons differ in specifics, but are pretty much the same in substance—law is important, interesting, and fun to learn about.

Finding Materials

One of the first things our teachers did was to look for law-related materials. Even as recently as five years ago, teachers could legitimately complain of the scarcity of law-related curriculum materials. That's not so any longer. According to Chuck Thomason, teachers today "are flooded with materials about the law."

The problem is finding materials that are right for the course you want to teach. Our teachers agreed that there didn't seem to be one curriculum package that answered all their needs. Perhaps because the field is new, there aren't yet definitive texts in the field. Some of our teachers used no text, and even those who did, relied heavily on handouts, a-v, and other supplementary materials.

The key, then, for teachers is to be aware of the range of possible materials. Here are some tips that the teachers had on how you can find materials for your class.

1. Publishers' catalogues are a good place to start. Charlie Hart, a teacher at Elgin High School in Elgin, was one of many teachers who found materials through this source. He points out that most publishers have been active in this area, and since the field is new, most books have come out within the last few years and are relatively up to date.

2. Look into source books that are specifically law-related. More than half of our teachers found out about

materials in one or another of the sources that are listed in the box below. And find out if your system has law-related curriculum guides listing materials and strategies. Teachers in Chicago used curriculum guides on law put out by their school system, and one teacher made use of an Illinois Office of Education curriculum guide on consumer law.

3. Tap the resources of your school. Diane Farwick of Chicago's Waller High found a good resource, the Grolier Consumer Education Kit, in the reading lab of her school; three other teachers got invaluable help from their school librarians, who prepared special bibliographies of law-related books in the school library. These lists were a good resource for students' research papers and general reading about law, lawyers, and trials.

4. Don't forget that other libraries are a resource too. Several of our teachers directed students to the resources of a nearby public library, and a couple reported renting or borrowing films from the a-v service of the public library or a nearby college. Besides the savings in cost, renting films from public or college libraries is often quicker and less tricky for scheduling than getting them from a commercial source.

5. Don't overlook magazines and newspapers. Edie Sauter believes "there is something about the law in almost everything you read. It's just a question of looking for it." Teachers kept up with recent development in law through the law sections of *Time* and *Newsweek*, through newspapers, and through such other magazines as *The Saturday Review*. Much of the time they duplicated the articles for students, or else adapted them for student exercises.

Most of them encouraged students to bring in articles that they had run across. Chuck Thomason builds this into his class by requiring every student to keep a folder of newspaper and magazine articles, with articles filed in the order of the topics in the course syllabus. He adds that almost every topic in his course—for example, why are "victimless" activities considered criminal, can morality be legislated—are reflected in newspaper stories. He gets a classroom set of newspapers once a week, so that exploring law-related news becomes a project for the entire class.

6. Be on the lookout for freebies. Our teachers were able to get a lot of free or inexpensive material from community groups. For example, the League of Women Voters or your state or local bar association may have pamphlets on the judicial system of your state, as well as glossaries of legal terms, pamphlets on the role of lawyers, and examinations of various legal problems.

7. TV is a resource too. Television these days is filled with programs on various law-related topics. Some schools have video tape facilities, so shows can be taped and used as a classroom resource, at least for a time. Other teachers keep their eye out for specials on such subjects as violence, the correctional system, juvenile crime, and other law-related topics. They ask students to watch these and then use them for class-

Teacher-Recommended Resources

What materials did this group of Chicago-area teachers find useful? Here's what they said.

Source Materials

More than half of the teachers we interviewed reported using a law-related source book to gain information about curriculum materials and other resources in the field. *Teaching About the Law* by Ron Gerlach and Lynn Lamprech steered teachers to curriculum materials, showed them some teaching strategies, and helped them find community resources. The book is available for $9.95 from W. H. Anderson Company, 646 Main Street, Cincinnati, Ohio 45201, 513-421-4393.

Several teachers used the curriculum catalogues put out by the ABA's Special Committee on Youth Education for Citizenship. The *Bibliography of Law-Related Curriculum Materials: Annotated*, *Media: An Annotated Catalogue of Law-Related Audio-Visual Materials*, and *Gaming: An Annotated Catalogue of Law-Related Games and Simulations* describe more than 1,500 curriculum materials in the field and tell you where to order them. The catalogues are available for $1.00 each (or $2.00 for the complete set) from YEFC, 1155 East 60th Street, Chicago, Illinois 60637, 312-947-3960.

A couple of teachers said that the catalogues put out by the Social Studies School Service were helpful. There is a general catalogue, a 4th-8th grade catalogue, and a catalogue specifically on law and justice. The materials described in the catalogues can be ordered directly from the Service. Catalogues are free; write to Social Studies School Service, 10,000 Culver Boulevard, P.O. Box 802, Culver City, California 90230, 213-839-2436.

Texts

Teachers of practical law tend to use either *Street Law* or some of the pamphlets in the *Justice in America* series. *Street Law* is a text featuring nitty-gritty information on criminal law, landlord-tenant law, and four other areas of everyday law. The book is $5.95 a copy for one to nine copies, $5.50 apiece for ten to 99 copies. Contact West Publishing Company, 170 Old Country Road, Mineola, New York 11501, 516-248-1900.

The *Justice in America* series consists of pamphlets on landlord-tenant law, consumer law, youth law, and three other areas of everyday law. The pamphlets are available for $2.76 apiece from Houghton Mifflin Company, Dept. M, One Beacon Street, Boston, Massachusetts 02107, 617-725-5000.

Teachers of courses on the landmark cases of the Supreme Court had praise for the *High School Law Program Attorney's Source Book* and the *Trailmarks of Liberty* series.

The *High School Law Program Attorney's Source Book* is a teacher resource featuring case studies and background readings on freedom of expression, freedom of religion, and many other constitutional areas. The case studies can be reproduced for students. The book is available from the American Bar Association's Young Lawyers Section, 1155 East 60th Street, Chicago, Illinois 60637, 312-947-3854. The price is $7.50.

The *Trailmarks of Liberty* series includes a book for junior high (*Great Cases of the Supreme Court*) and a book for senior high (*Vital Issues of the Constitution*). Both books feature discussions of major constitutional cases and room discussions and exercises. Some teachers report success with having kids watch and then analyze TV police and detective shows, examining their legal accuracy and considering the law-related issues that they raise.

8. Be on the lookout for unusual sources for materials. Diane Farwick, a teacher offering a unit on consumer education, recommends that you not only look to such sources as *Consumer Reports Magazine*, which has a section on law and the consumer, but seek such out of the way sources as insurance companies and other corporations which put out consumer materials. She also recommends firing off letters to the consumer column of a local newspaper (include a self-addressed, stamped envelope for the reply), and using the resources of student newspapers to explore various consumer questions.

Community Resources

In preparing themselves to teach about law, the teachers we talked to relied heavily on lawyers, judges, law enforcement people, and a host of other community resources. In fact, these professionals were probably the most important source of assistance and encouragement for the teachers.

How did they help? John McKinnon, a teacher at Thornwood High in the Chicago suburb of South Holland, provides a good example of what community resources can do for a teacher.

He began teaching about law 10 years ago when he was asked to take over a business law course. As a brand-new teacher with no background in law, he says the first thing he tried to do was "surround myself with lawyers and judges." They helped him understand many areas of law, provided background materials such as a partial set of the Illinois statutes, made many classroom presentations, and were a vital entree to off-campus activities such as visits to courtrooms, police stations, and prisons. Other teachers have worked closely with lawyers and judges on curriculum development and evaluating classroom materials; some have set up hot-lines to lawyers, so they can get the answers to questions that come up in class within 24 hours.

The teachers suggested many tips on how to reach such people and how to make sure that your presentations work in the classroom.

"You have to look for them," one teacher told us. "There are a lot of them out there, but they won't fall out of the sky." A good time to start this search is Law Day. Get to know the lawyers and judges who come to your school on Law Day, and ask them to help. If they can't do it, ask them to recommend others.

Bar associations are another logical place to start Phone the bar association in your area and ask for the names of lawyers who may be willing to help. The Law Day and youth education committees will be a good source of interested lawyers, but many other members of the association will probably be willing to help out.

You'll find that the police are almost always eager to help. In suburbs and

(Continued on page 44)

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have mock trial scripts and glossaries. The faculty editions of *Great Cases* and *Vital Issues* cost $2.43 apiece; the student edition of *Great Cases* costs $3.24 and the student edition of *Vital Issues* is $3.60. Order from Houghton Mifflin Company at the address given above.

Supplementary Materials

It's hard to pinpoint supplementary materials, since so many of the teachers we talked to create home-grown materials, use articles from newspapers or magazines, and rely on other nonformal sources. However, several teachers told us that they found Xerox's *Public Issues* series helpful. There are more than 20 of these 48-page pamphlets, and several of them focus on law-related topics, including *The Lawsuit: Legal Reasoning and Civil Procedure* ($ .55), *Community Change: Law, Politics, and Social Attitudes* ($ .55), and *Rights of the Accused* ($ .60). You can get information about them from Xerox Education Publications, Attn: Miland Snyder, 2150 Sairwood Avenue, Columbus, Ohio 43216, 614-253-0892.

Another supplementary material that teachers told us about was the *Bill of Rights in Action* (formerly the *Bill of Rights Newsletter*). This publication comes out four times yearly and offers classroom activities and other resources for teachers and students. It often focuses on particular topics such as school integration, women's rights, and moral education. Subscriptions are $4.00 a year, $40.00 a year for classroom sets of 35, and $10.00 for classroom sets of one issue. Contact the Constitutional Rights Foundation, 6310 San Vicente Boulevard, Los Angeles, California 90048, 213-930-1510.

As for a-v, most of the teachers had praise for the Correctional Service of Minnesota. This private agency has a wide variety of posters and a-v materials covering prisons, crime, the courts, and many other aspects of the justice system. Several teachers singled out "Voices Inside," a 16mm film using interviews with prisoners to indicate the deplorable conditions in many prisons. This 28-minute film can be rented for $15.00. If you wish to receive information about this film and the 300 others available from the Correctional Service of Minnesota, write: 1427 Washington Avenue South, Minneapolis, Minnesota 55404, or phone 612-339-7227.

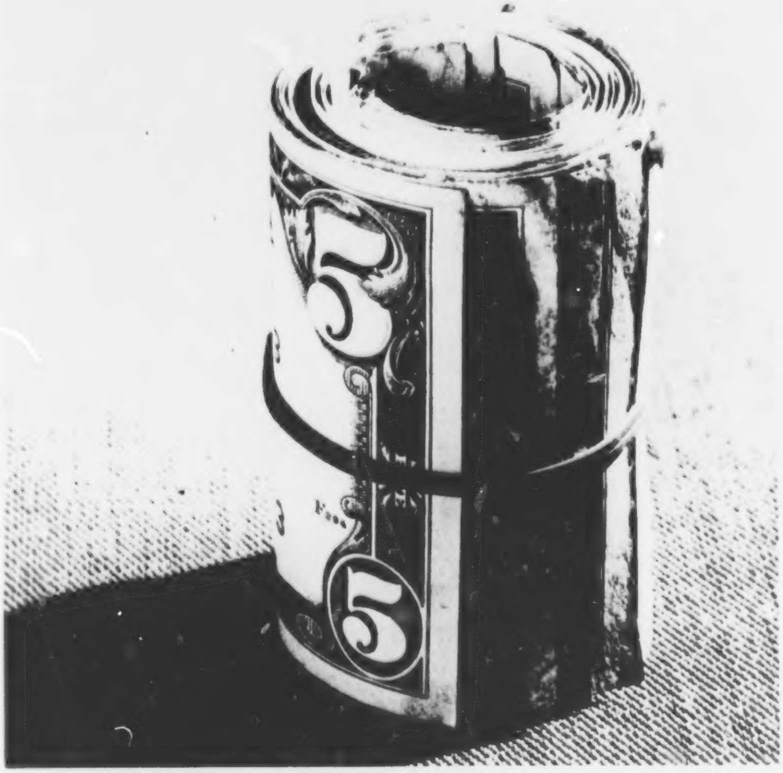
Another a-v resource that some of the teachers use is *Television, Police, and the Law*, a booklet created by Prime Time School TV, and built around commercial TV programs. It provides, for example, suggested questions and charts on how to analyze TV cop shows and other prime time law-related programs. The booklet will be published this fall by Argus Communications. Contact Argus at 7440 Natchez Avenue, Niles, Illinois 60648, 312-647-7800.

More than half of the teachers use mock trials, games, and other simulations. Often, they develop their own mock trial scripts and simulations, but several reported good luck with ***Plea Bargaining***, a game of criminal justice, and ***Police Patrol***, a simulation designed to give kids insight into a policeman's task. Both games are available from Simile II, 218 Twelfth Street, P.O. Box 910, Del Mar, California 92014, 714-755-0272. *Police Patrol* is $12.50. *Plea Bargaining* can only be purchased in classroom sets. It costs $17.50 for 18 student kits, $25.00 for 35 student kits.

How to Find Money for Your Program

Some federal sources you may not have thought of

Charles White



The federal government's Office of Education (OE) has many programs that could support law-related curriculum development and teacher education. Some, like Title IV-C (described in the Spring, 1977 issue of *Update*) aren't tied to any particular curriculum focus; others do specify a curriculum area.

What is most important is that you don't have to be a powerhouse project to apply for these grants. None of the programs is large by the standards of the Federal Government (only one may have a budget as large as $10 million) and each makes grants to local school districts and institutions of higher education. Every one has its own requirements for funding and its own application deadlines, so contact their directors at the addresses given below.

Consumer Education

To encourage the spread of consumer education for both adults and children, OE has federal grants available to support (1) the development, evaluation, and dissemination of new curricula, (2) the initiation and expansion of consumer education programs in schools and communities, and (3) the training of teachers and other personnel. In each of the last two years, $3.1 million was available under this program, with grants averaging about $45,000. OE's definition of consumer education clearly includes law-related education, since one of the areas explicitly recognized is legal rights, redress, and consumer laws.

Of the 66 grants awarded in fiscal 1976, 28 went to institutions of higher education, 5 went to state education agencies, 5 to local education agencies, and 29 to public and private nonprofit agencies.

For more information, contact Myrtle Bonn, Consumer Education, R.O.B. #3 Room 5624, 7th and D Streets, S.W., Washington, D.C. 20201 (202-245-0636).

Environmental Education

Last year, OE had $3.5 million available to support environmental education programs. Most of these funds went toward general projects, with priority given to (1) curriculum development projects (particularly interdisciplinary ones) intended for one or more grades at the junior and senior high school level, (2) projects by state and local education agencies supporting environmental education in elementary and secondary schools, particularly projects introducing issues in environmental education into the existing curriculum, (3) educational personnel development projects, training teachers from grades 7 through 12, and (4) community education programs on environmental quality, including special programs for adults.

Also available are short-term mini-grants for workshops, seminars, symposiums, and conferences. These grants, none of which have exceeded $10,000, assist communities in acquiring an understanding of the causes, effects, and options surrounding local environmental problems.

The whole environmental area is inextricably linked to law. Environmental guidelines and standards are embodied in a multitude of state and federal laws and, more often than not, the recurring issues relating to the environment are before the courts. As a result, law-related education programs in this area would seem like strong candidates for funding.

For further information, contact Walter Bogan, Bureau of School Systems, Office of Environmental Education, F.O.B. #6, 400 Maryland Avenue, S.W., Washington, D.C. 20202 (202-245-9231).

Women's Educational Equity

This program makes grants to promote the equity of women in education. Last year, its $7.2 million made it one of the larger OE programs. State and local education agencies are eligible to apply, as are other public agencies and nonprofit organizations.

Grants have the general purpose of ending sex discrimination and sexual stereotyping. They support projects to (1) develop, evaluate, or disseminate curricula, textbooks, or other education materials, and (2) conduct pre-service or in-service training for educational personnel.

An increasing number of local, state, and federal laws (as well as state and federal constitutional provisions) bear on this area, and the spate of recent equal protection decisions and the controversy over ERA suggest that the law will be more and more important to women's rights. As a result, it seems likely that these monies could support law-related education programs with a special interest in the area.

Last year the program's grants ranged from $35,000 to $175,000, averaging $95,000. In addition, the program provides about 25 small grants, no larger than $15,000 each, to support developing or implementing "innovative approaches to the attainment of equity in education for women."

For further information, please contact Women's Staff, Room 3121, Office of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202 (202-245-2181).

Teacher Centers

This is a new OE program that is expected to be funded in fiscal year 1978. It recognizes that schools are hiring few new teachers and thus need to improve the quality of in-service training. Teacher centers will serve teachers from both public and nonpublic schools and will undertake developing and producing curricula and providing training to improve teachers' skills. The tentative regulations specify that most of the funds be earmarked for local education agencies, but 10% would go to institutions of higher education for operating teacher centers. Fiscal 1978 funding is expected to be from $5 to $12.5 million.

The tentative regulations of the teacher centers program also indicate that the schools themselves must be a major focus and locale of teacher training, and that the schools—and particularly classroom teachers in those schools—must have the major responsibility for determining the kinds of training and other experiences needed by teachers. In addition, training and curriculum activities must be responsive to the varying needs of state and local areas.

It now appears that most grants will be small. This means that this program may well be ideal for beginning law-related education programs, which often need seed money to develop curricula and train a cadre of teachers. In the tentative regulations, grants may be for as long as three years.

For further information, please contact Allen Schmieder, Room 5652, R.O.B. #3, 7th and D Streets, S.W., Washington, D.C. 20201 (202-245-2235).

Gifted and Talented

OE's Program for the Gifted and Talented funds a wide variety of programs for pre-school, elementary, and secondary students possessing exceptional ability.

The program supports grants to state and local educational agencies for teacher training and the planning, development, operation, and improvement of programs designed to meet the needs of the gifted and talented, including children in non-public schools. It also makes grants to institutions of higher education for leadership personnel training, and supports model projects for the identification and education of specially identified groups of gifted and talented children and youth. In general, the program supports the development of curriculum that goes beyond what is normally provided, instructional strategies to accommodate the unique learning styles of the gifted and talented, and flexible administrative arrangements for instruction both in and out of school, such as independent study, student internships, and field trips.

Law-related education programs could provide a wealth of stimulating and challenging courses for the gifted and talented. In addition, the pervasive impact of the law on all facets of our society suggests that law-related education can foster some especially critical skills for this unique group.

In the next fiscal year, the program expects to have $2.56 million available to fund grant applications. For further information please contact Dorothy Sisk, Director, Gifted and Talented Staff, Office of Education, Room 2006, R.O.B. #3, 7th and D Streets, S.W., Washington, D.C. 20201 (202-245-2482).

Community Education

A lot of law-related programs report that they have begun to offer courses and units for adults in response to adults' interest in learning about law and the legal process. The Community Education program of OE has funds that might support such efforts. In its first year, this new program had $3.5 million to distribute. About $400,000 was available to higher education institutions, with the rest equally divided between local and state education agencies.

The federal government will award grants to support 80% of the cost of a new community education program, 65% of the incremental cost to expand or improve an existing program, and 40% of the cost of maintaining an existing program.

There is no attempt to specify the content of these programs, since the federal government is seeking to fund local efforts which best meet the varying needs of a wide range of communities. However, community education programs must involve a public school in their administration and operation, and must extend the scope and nature of activities, the people served, and the hours of service beyond what is normally offered by the school.

For further information, contact Julie Englund, Community Education Program, R.O.B. #3, Room 5622, 7th and D Streets, S.W., Washington, D.C. 20201 (202-245-0691). □

DISCIPLINE

(Continued from page 6)

be tailored to the severity of the possible punishment. Thus is seems fair to suggest that in cases of long suspensions or expulsions, students will be entitled to more extensive procedural protections. These might include the right to call and cross-examine witnesses and have representation by counsel, requirements which lower courts have in fact already imposed in cases of this sort (see box which appears below).

The Dissent

On behalf of the minority, Justice Powell wrote a strong dissenting opinion challenging the assumptions and conclusions of the Court. He argued that judges should not interfere with the daily operation of the schools except to protect important constitutional values. "It cannot be seriously claimed," wrote Justice Powell, "that a school principal's decision to suspend a pupil for a single day" directly threatens basic constitutional rights. On the contrary, suspensions are one of the traditional means used to maintain discipline. Therefore, requiring suspensions to be subjected "to the formalities and judicial oversight of due process" would extensively interfere with the functioning of the schools.

Maintaining school discipline and teaching students to understand and obey rules is an essential part of education, Powell continued. Therefore, when a student misbehaves, "he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so authority."

Because educators and students have common interests, the dissenters felt it unnecessary and unwise to think of minor school discipline in judicial terms or as an adversary situation. Although innocent pupils might be occasionally suspended, "common sense suggests that they will not be numerous in relation to the total number, and that mistakes or injustices will usually be righted by informal means." In view of the "experience, good faith, and dedication" of our public school staff, the nonadversary means of resolving differences "that always have been available to pupils and their parents" are better for all concerned "than resort to any constitutionalized procedure."

Powell then examined the probable consequence of this decision. Students and parents will increasingly rely on "the judiciary and the adversary process" to resolve many routine school problems, he argued. Courts might now require due process whenever decisions related to grading, promotion, or classroom assignment are challenged. And if hearings are required for a substantial percentage of short-term suspensions, "school authorities would have time to do little else." Justice Powell concluded that the decision will unwisely and unnecessarily substitute the judgment of the federal courts "for that of the 50 state legislatures, the 14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system."

According to Justice White and the majority, however, the decision does not call for elaborate or time-consuming for-

Prior School Discipline Decisions

Since the Supreme Court has dealt with very few school discipline cases, this issue's *Prior Decisions* includes mainly the rulings of federal district and appellate courts, and of state appellate courts.

***West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)**—The case in which compulsory flag salutes in schools were ruled unconstitutional, *Barnette* is a landmark decision in the Court's review of school policy and practices. Teachers and students alike will especially appreciate the substance and eloquence of Justice Jackson's majority and Justice Frankfurter's dissenting opinions.

Consider, for example, these statements by Jackson: "The case is made difficult . . . because the flag involved is our own. Nevertheless, we apply the limitations of the Constition with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds;" as contrasted with Frankfurter's call for judicial self-restraint: "Particularly in legislation affecting freedom of thought and freedom of speech, much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit."

Dixon v. Alabama, 294 F. 2d 150 (1961)—In one of the important early cases establishing due process rights for students, the Court of Appeals set out procedural guidelines for the expulsion of students from a state college, noting that the college's power to expel "is not unlimited and cannot be arbitrarily exercised."

People v. Overton, 24 N.Y. 2d 522 (1969)—New York's highest court upheld the right of a high school vice-principal to search student lockers. "Not only have the school authorities a right to inspect," the court held, "but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there."

Tibbs v. Board of Education, 276 A. 2d 165 (1971)—Tanya Tibbs was one of several high school students who were expelled on charges of assaulting other students. A New York court ruled that "the expulsions . . . are reversed and set aside for failure to produce the accusing witnesses for testimony and cross-examination" despite threats and other risks involved.

*Ouimette v. **Bobbie***, 405 F. Supp. 525 (1975)—A Vermont district court upheld the suspension of a seventh grade girl who, with the support of her father, refused to attend physical education classes mainly because of her lack of interest in athletics. "As long as the prescribed courses of study do not trench on fundamental rights," the court explained, "the plaintiff's personal con-

malities. For example, there need be no delay between the time notice is given and the time of the hearing. "In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred," White maintained.

In cases of short suspension, the ruling does not require that students be given an opportunity to secure counsel or to call and cross-examine witnesses. But it will reduce the risk of error by alerting the disciplinarian to disputed facts which might lead him to investigate further and perhaps call the accuser and witnesses. Indeed, the procedures required by the Court are "less than a fair-minded school principal would impose upon himself," Justice White noted.

In short, the minimum procedures required by *Goss* can guard against error without prohibitive cost or interference with the educational process. "It would be a strange disciplinary system," observed Justice White, if an educational institution did not try to inform a student of his misconduct and "let him tell his side of the story in order to make sure that an injustice is not done."

To recapitulate, then, *Ingraham* didn't authorize the beating of school children, but it did deny students the protection of the Constitution's Eighth Amendment. Students and their parents will have to rely on criminal laws and civil suits if they feel that corporal punishment is excessive. In *Goss*, however, the Court extended the protection of the Fourteenth Amendment's Due Process Clause to students faced with suspension from school, requiring, under normal circumstances, an explanation of the charges and evidence, and a chance to reply to those charges. But it did not demand full-dress hearings, cross examinations, representation by counsel or many other elements of due process accorded to the criminally accused.

Can anything be done if school officials violate a student's rights? Yes. In another 5-4 decision, the Supreme Court ruled that school officials may be held liable "if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate the constitutional rights of the students affected." The case was *Wood v. Strickland*, 420 U.S. 308 (1975), and involved two Arkansas students who were expelled without due process for "spiking" the punch at a meeting of a high school extracurricular organization.

What if school officials were simply not aware of the student's rights? The Court responded that an act violating a student's constitutional rights cannot be justified "by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives."

The further question of the circumstances under which monetary damages can be awarded will be considered by the Supreme Court this fall in the case of *Piphus v. Carey*, 545 F. 2d 30 (1976). The case involves two Illinois students who were suspended without due process. Although the trial judge found that their constitutional rights had been violated, he refused to award damages because the students failed to prove that the suspension caused them any monetary loss. The court of appeals reversed. It ruled that

flict with the [school authorities] is beyond the court's reach."

Picha v. Wieglos, 410 F. Supp. 1214 (1976)—Renee Picha, a thirteen year-old Chicago student, and several of her classmates were suspected of possessing drugs. After the arrival of police, they were searched by the school nurse and school psychologist. In a suit against school officials and the police for violation of their civil rights, the district court upheld her "constitutional right not to be searched" under the circumstances of this case and ruled that public officials have no immunity from civil rights liability "when they disregard such settled rights, regardless of [their] knowledge or intent."

Albach v. Odle, 531 F.2d 983 (1976)—The rules of the New Mexico Activities Association impose a one-year ban from interscholastic high school athletic competition for any student who transfers from his home district to a boarding school or from a boarding school to his home district. Albach unsuccessfully challenged the regulation, the district court ruling that "participation in interscholastic athletics is not a constitutionally protected civil right."

Graham v. Board of Education, 419 F. Supp. 1214 (1976)—A seventeen year-old high school student who had an unexcused absence was suspended after he refused to submit either to paddling or serving detention for double the time he was absent from school. In rejecting his due process arguments, the Oklahoma district court noted that "he has had more than ample opportunity to present his views . . . two hearings and one appeal are enough."

Wisch v. Sanford School, 420 F. Supp. 1310 (1976)—Private high school student Cindy Wisch was expelled for smoking marijuana and challenged the school's action in a suit alleging violations of the Fourteenth Amendment's Due Process and Equal Protection Clauses. In rejecting her arguments, the Delaware District Court held that she failed to prove the "state action" necessary to invoke protection of the Fourteenth Amendment, a prerequisite in any case involving private schools.

Sims v. Waln, 536 F. 2d 686 (1976)—As a result of an incident during her detention for violating school rules, Leatha Sims, a sixteen year-old black junior high school student, filed suit charging a violation of her civil rights and discrimination against black students in the application of corporal punishment, and challenging the constitutionality of corporal punishment. The Court of Appeals rejected all of her arguments, holding that the Ohio school's policy of imposing three blows on the buttocks was not constitutionally excessive and finding no violation of the Equal Protection Clause.

Hiel v. Trustees of Indiana University, 537 F. 2d 248 (1976)—A graduate student claimed denial of his Fourteenth Amendment due process rights when he received failing grades in two courses because of alleged plagiarism. "In order to inject the judiciary into what is essentially an intra-university dispute," the court held, "plaintiff must first exhaust his available administrative remedies," which he has not done.

even though no personal injury was shown, the students are entitled to an award which "should be neither so small as to trivialize the right nor so large as to provide a windfall." Whether this becomes the "law of the land" will soon be decided by the Supreme Court.

Issues and Implications

In his article "Reflections on Law Studies in the Schools Today," Isidore Starr comments that "our students, and I suppose many of us too, feel that when the Supreme Court hands down an opinion—that ends the case. I would like to suggest that more often than not, that begins another case." *Ingraham* and *Goss* underscore the validity of his observation. We have already noted the *Carey* case which the Court will decide next term. Many other issues also await resolution.

For example, as a result of *Goss*, should courts or schools require due process for all decisions affecting students? Should students be entitled to a hearing if they fail a course, if they aren't promoted, if they are excluded from athletic activities, or if they are assigned to a school they don't like? What criteria should judges use to make such decisions?

As a result of *Ingraham*, will we see a plethora of civil and/or criminal suits against educators? What standards will courts apply? Are such suits, as Justice Powell suggests, effective deterrents to excessive corporal punishment?

In addition to these legal questions, there are more general issues which won't be directly decided by the courts. For example, the Court seems to be saying that paddling is more serious than suspension. Is a one day suspension more serious than five or more "licks" on the buttocks? What would your students say? Is the controversy stirred up by the *Ingraham* decision related to implicit disagreements as to which of these punishments is more severe or inhumane? For example, many parents who don't spank their children still "suspend" them by sending them to their rooms or otherwise excluding them from activities they are disrupting.

As the Court noted, most of our states allow corporal punishment and most school boards and parents support its use. However, very few educational theorists or psychologists condone this method of discipline. What accounts for these differences? Does corporal punishment, as some psychologists contend, contribute to the formation of docile, dependent, or authoritarian personalities, undermine one's self-concept, and diminish the ability to learn?[*] Or is it an effective means of maintaining order and instilling respect, obedience, and character, which has been sanctioned by the experiences of generations of parents and children?

We must also explore whether there are constructive alternatives to suspension and corporal punishment that will contribute to students' personal and educational growth. In this regard, it is important to remember the difference be-

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[*] See *Discipline for Today's Children and Youth*, George V. Sheviakov and Fritz Redl, revised by Sybil K. Richardson, Association for Supervision and Curriculum Development, N.E.A. 1201 - 16th Str. N.W., Washington, D.C.; and "Disruptive Behavior in the Classroom", Fritz Redl, *School Review*, Aug., 1975.

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tween legal and educational issues. The Supreme Court and the law of 48 states say that it is permissible to use corporal punishment. But what does this tell us about the educational wisdom of such punishment. Very little. The fact that the law says educators *can* do certain things may not tell us anything about whether we *should* do them. In fact, local school districts in the 48 states authorizing corporal punishment can prohibit it if they wish.

A Classroom Resource

Goss and *Ingraham* also exemplify the kinds of judicial decisions that can be effectively used in the classroom. Through the use of such cases, law studies can start where students are, with lively debates about topics of current interest, and about constitutional issues that are relevant to every public school curriculum. In addition to due process issues, a Bill of Rights unit might include Supreme Court opinions concerning freedom of expression, religion, or association in the schools. Teachers could then examine parallel cases applying the First Amendment to adults in the community. Through this process, students may come to understand why there are legitimate differences in the application of these rights in the public schools and on the public streets.

These cases can also make us conscious of the way schools teach about law through the "hidden" curriculum, that is, through the way schools develop and implement their own policies and regulations. Schools, for example, teach as much about the letter and spirit of the law by the way they administer their disciplinary system as by what they teach in the classroom about due process. If schools preach respect for law, and at the same time violate constitutional rights, they are likely to teach legal cynicism. But when the hidden curriculum complements and reinforces the formal curriculum, students tend to develop a deeper understanding of and commitment to our constitutional system.

Before teachers can instruct about court cases, they have to have reliable information about them. As the publicity surrounding *Goss* and *Ingraham* illustrates, what we read about court decisions in the popular press is often exaggerated, oversimplified, or untrue. Judges are skeptical of hearsay in court. Perhaps educators should be similarly skeptical of hearsay concerning judicial opinions.

Fortunately for teachers, there is a good alternative to the popular press. Supreme Court opinions are written to be read by concerned citizens as well as lawyers, and the full decisions are easy to find in any law library. There are also literally dozens of books which provide excerpts from and reliable discussions of court decisions (see pp. 14 and 15). These cases can constitute a vital resource for the classroom teacher as well as a key tool in the eradication of legal illiteracy in America's schools.

Materials on Student Rights and Responsibilities

The following includes both resource and classroom materials which focus on the legal status of students. This month's *Curriculum Update* (pp. 23-25) also includes some materials on this topic, and the box on p. 14 notes some general materials which contain helpful information.

David Schimmel and Louis Fischer, *The Civil Rights of Students* (1975). This paperback uses the case study approach to investigate the civil rights of students in a variety of areas from freedom of speech to due process. The cost is $5.95; faculty members get a 10% discount. Order from Harper and Row, 10 East 53rd Street, New York, N.Y. 10022.

Richard S. Knight, *Students' Rights: Issues in Constitutional Freedoms* (1974). This paperback, a part of the Analysis of Public Issues Series, focuses on dress codes, freedom of expression, privacy, and due process. The cost is $2.88, $2.16 for educators. Order from Houghton Mifflin, One Beacon Street, Boston, Mass. 02107.

Alan H. Levine, Eve Carey, and Diane Divoky, *The Rights of Students: The Basic ACLU Guide to a Public School Student's Rights* (1973). This paperback, a part of the American Civil Liberties Handbook Series, uses a question and answer format to present information about the rights of students, including First Amendment rights, marriage and pregnancy, school records, and many other areas. The cost is $1.50. Order from Avon Books, 959 Eighth Avenue, New York, N.Y. 10019

Phi Delta Kappan, *The Changing Concept of Student Rights* (1974). This issue of the magazine *Phi Delta Kappan* contains several articles on student rights and includes a sample student code covering discipline, student records, corporal punishment, and many other areas. The cost is $1.00, with a 20% discount for classroom sets. Order from *Phi Delta Kappan*, Box 789, Bloomington, Ind. 47401.

James H. Wise (ed.), *Proceedings—Conference on Corporal Punishment in the Schools: A National Debate* (1977). The theoretical, practical, and legal dimensions of corporal punishment are explored in this pre-*Ingraham* conference booklet. Copies are free. Order from Oliver C. Moles, Educational Equity Group, National Institute of Education, Washington, D.C. 20208.

Charles L. Cutler and Howard J. Schwach, with Michael E. Geltner, *Juveniles and the Law* (1975). This pamphlet, part of the Backgrounds Series, is aimed at upper elementary and junior high students. It discusses juvenile law both within and outside of school. A teacher's guide is provided. The cost is $ .60 (minimum order is 10 copies). Order from Xerox Education Publications, Order Dept., 1250 Fairwood Avenue, Columbus, Ohio 43216.

P. M. Lines (ed.), *The Constitutional Rights of Students: Analysis and Litigation Materials for the Students' Lawyer* (1976). As the title indicates, this manual on the legal rights of students is more appropriate as a teacher resource than as classroom material. It covers First Amendment rights, disciplinary cases, and problems arising under the Equal Protection Clause. The cost is $7.00. Order from the Harvard Center for Law and Education, 6 Appian Way, 3rd floor, Cambridge, Mass 02138.

Ron Anson and Peter Kuriloff (eds.), *Students' Rights to Due Process Under Goss and Wood* (1975). A paperback that contains articles and panel discussions raising many questions about the implications of the Supreme Court decisions. Several lawyers who participated in the cases offer their positions in the book. The cost is $9.95. Order from Capitol Publications, Inc., 2430 Pennsylvania Avenue, N.W., Washington, D.C. 20037.

BRIEFS *(Continued from page 10)*

found a substance which was later determined to be heroin. The envelopes were then resealed and delivered under surveillance to their original destination, Washington, D.C. As a result, Charles Ramsey and James Kelly were arrested, tried, and convicted to a term of ten to thirty years. They appealed their convictions on the basis that the evidence against them was secured in violation of the Fourth Amendment's protection against unreasonable searches and seizures.

". . . the door will be open to the wholesale, secret examination of all incoming international mail," Stevens warned.

Justice Rehnquist delivered the Court's opinion. He first noted that federal regulations, based upon an 1866 statute, explicitly authorize inspection of envelopes (although it forbids reading of any correspondence) and that the Court has traditionally recognized the border search exception to the Fourth Amendment. He failed to see any distinction based upon the mode of transportation across our borders and felt that the inspection hardly chills the exercise of free speech. "Any chill that might exist under these circumstances," he said, "may fairly be considered not only 'minimal,' but also wholly subjective."

Justice Stevens, with Justices Brennan and Marshall, dissented. Pointing out that only since 1971 had the Department of the Treasury and the Post Office Department asserted their right to inspect international mail—"under the earlier practice which had been consistently followed for 105 years, customs officials were not allowed to open foreign mail except in the presence, and with the consent, of the addressees, unless of course, a warrant supported by probable cause had first been obtained"—he offered a number of reasons why Congress did not authorize the type of search conducted in this case.

He first argued that throughout our history Congress has respected the individual's interest in private communication. The legislative history unambiguously demonstrates, he contended, that examination of the mails was not authorized by the 1866 Act and the word "envelope" in the statute was not intended to include ordinary letters. He pointed to the 105 years during which the statute had operated under a probable cause interpretation and indicated that the Court should not suggest a different doctrine without a clear mandate from Congress: "If the government is allowed to exercise the power it claims, the door will be open to the wholesale, secret examination of all incoming international letter mail. No notice would be necessary either before or after the search. Until Congress has made an unambiguous policy decision that such an unprecedented intrusion upon a vital method of personal communication is in the Nation's interest, this Court should not address the serious Constitutional question it decides today."

Footlocker Search Held Illegal

The suspicion of Amtrak officials in San Diego was aroused when Gregory Machado and Bridget Leary loaded a brown footlocker onto a Boston-bound train. The trunk was unusually heavy for its size and was leaking talcum powder, a substance often used to mask the odor of marihuana or hashish. Because Machado also matched a profile used to spot drug traffickers, the officials informed San Diego federal agents of these events; they in turn contacted their counterparts in Boston.

When Machado and Leary arrived in Boston, narcotic agents and a police dog trained to detect marihuana were waiting for them. Without arousing attention, the dog was released near the footlocker and signaled the presence of marihuana. Machado and Leary were subsequently joined by Joseph Chadwick and they were all arrested, and the footlocker seized, just before they were about to drive away. An hour and a half later, without securing a search warrant, the agents opened the footlocker.

At their trial, the defendants argued that the evidence from the footlocker was secured in violation of the Fourth Amendment's warrant requirement and could not be introduced into evidence. The District Court and Court of Appeals upheld their contention, and the government appealed to the Supreme Court.

In the case of *U.S. v. Chadwick*, 45 U.S.L.W. 4787 (June 21, 1977), the Court affirmed the lower courts' rulings. Rejecting the government's argument that personal effects seized outside the home could be searched without a warrant if probable cause existed, Chief Justice Burger reminded the government that the Fourth Amendment "protects people, not places."

Burger also rejected the government's argument that this was a search incident to an arrest, a well-known exception to the warrant requirement. "When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless search of the arrestee's person in the area within his immediate control," Burger explained. "Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after the respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency."

Justice Blackmun, whom Justice Rehnquist joined in dissent, chided the government for seeking a reversal "primarily to vindicate an extreme view of the Fourth Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other high privacy areas." Blackmun believed, however, that a warrant should not be required "to seize and search any movable property in the possession of a person properly arrested in a public place." He doubted whether such a holding would seriously diminish the values protected by the Fourth Amendment, and concluded, "it is decisions of the kind made by the Court today that make criminal law a trap for the unwary policeman and distract from the important activities of detecting criminal activity and protecting the public safety."

Death Penalty Laws Overruled

While *Furman v. Georgia*, 408 U.S. 238 (1972), may not be a familiar case name to most Americans, its ruling was one of the most controversial of the recent past, for it held that the imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. What many people did not realize, however, was that the case did not outlaw capital punishment per se. Only Marshall and Brennan, two of the five Justices who constituted the five-judge majority, argued that the Eighth Amendment prohibits the death penalty under all circumstances. The other members of the majority, Justices Douglas, Stewart, and White, seemed more concerned that the manner of its imposition contravened equal protection principles—that the states had employed it randomly, and all too often against poor and minority defendants. The dissenting justices, each of whom wrote separate opinions, argued that whatever their personal view of the morality and effectiveness of the death penalty, it was not contrary to the Constitution.

In light of these factors, states subsequently began drafting new laws that might overcome the constitutional objections set forth in *Furman*. In June, the Court handed down rulings on several such laws in the cases of *Roberts v. Louisiana*, 45 U.S.L.W. 4584 (June 6, 1977) and *Coker v. Georgia*, 45 U.S.L.W. 4961 (June 29, 1977), which limited, but did not outlaw, the imposition of the death penalty.

Roberts involved a Louisiana statute which imposed a mandatory death sentence on those convicted of the first degree murder of a police officer engaged in the performance of his lawful duties. The Court, in a Per Curiam decision, invalidated the Louisiana statue, saying, "Consideration of the character and record of the individual offender and the circumstances of a particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death." While noting the special need to protect police officers, the Court pointed out that one could not assume that there were no mitigating circumstances in every case in which a police officer was killed.

Chief Justice Burger and Justices Blackmun, White, and Rehnquist dissented. In his dissent, Rehnquist noted that even assuming the character of the accused must be considered under the Eighth Amendment, he could not believe that a state is constitutionally forbidden to determine that the premeditated murder of a peace officer conclusively establishes the propriety of the death penalty for those convicted of such a crime.

In *Coker*, the Court held that the death penalty could not be imposed for the crime of rape when the victim is an adult. The case involved Ehrlich Coker, who, while serving time for murder, rape, kidnapping, and aggravated assault, escaped from prison and subsequently committed rape as well as kidnapping and theft during the course of an armed robbery. Under Georgia law, the death penalty could be imposed in a capital case if one of the following aggravated circumstances were present: (1) that the accused had been previously convicted of a capital offense; (2) that the rape was committed during the course of another capital felony; or (3) the rape was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." The jury found the first two circumstances to exist and imposed the death sentence on Coker.

Speaking for the six-judge majority, Justice White held that the Eighth Amendment not only prohibits "barbaric" punishments, but also those which are excessive in relation to the crime committed. In determining whether the punishment could be considered excessive, White referred to the fact that Georgia is the only state authorizing the death sentence for the rape of an adult victim, and that since 1973 Georgia juries did not impose the death penalty in nine out of ten rape convictions. Although "we do not discount the seriousness of rape as a crime" or its serious impact upon the victim, White contended, "we have the abiding contention that the death penalty which is 'unique in its severity and revocability' is an excessive penalty for the rapist who . . . does not take human life."

Brennan and Marshall filed concurring opinions in which they reiterated their contention that the death penalty is in all circumstances constitutionally prohibited cruel and unusual punishment.

Chief Justice Burger, joined in dissent by Justice Rehnquist, questioned the breadth of the Court's decision which, Burger argued, "appears to be that the death penalty may be properly imposed only as to crimes resulting in the death of the victim." Noting that the majority decision acknowledged that other than homicide, rape is the "ultimate violation of self," Burger could not understand, no matter what the individual Justices may think of the wisdom of capital punishment, how the Court could deprive state legislatures from making the "solemn judgement" to impose such a penalty for the crime of rape.

Burger also noted the severe impact of rape on a woman. "A rape not only violates a victim's privacy and personal integrity," he maintained, "but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results."

An interesting, unwritten dimension of the case is its relation to sex and racial discrimination. Several women's groups filed briefs against the imposition of the death penalty in this case, arguing that in many cases the death penalty inhibited jurors from convicting those accused of rape. They also contended that the death penalty reflected the view of women as property of men, and of rape as a crime against the man's property rather than against the woman. Other briefs filed in *Coker* contended that blacks constituded the overwhelming number of those executed for rape and that few, if any, persons have been executed for the rape of a black woman.

Desegregation: Court Rules Yes and No

Does the mere existence of all-white or all-minority student populations constitute a violation of the Fourteenth Amendment? No, said a unanimous Court (Justice Marshall not participating) in *Dayton Board of Education v. Brinkman*, 45 U.S.L.W. 4910 (June 27, 1977). Racial segregation must be proven to have resulted from intentional actions by boards of education to be declared unconstitutional. Moreover, evidence of particular instances of discrimination does not justify sweeping desegregation plans.

The case, which reached the Court after five years and two round trips through the lower federal courts, involved a plan requiring the racial distribution of each school in Dayton to be brought within 15% of the 48%-52% black-white population of the city. The plan employed such desegregation techniques as pairing schools, redefining

Other Decisions of Note

Abood v. Detroit Board of Education, 45 U.S.L.W. 4473 (May 23, 1977)—A unanimous Court ruled that the agency shop provision of a collective bargaining agreement, under which non-union local government employees had to pay a service charge equal to union dues as a condition of employment, did not violate their First Amendment rights. The Court explained, however, that this ruling only encompassed the union's non-ideological activities, such as bargaining, contract administration, and grievance procedures, and that non-union members were entitled to refunds for political contributions and other union expenditures unrelated to collective bargaining activities.

Wolman v. Walter, 45 U.S.L.W. 4861 (June 24, 1977)—In an eight-part opinion in which each justice concurred and dissented in various parts, the Court upheld an Ohio statute which authorized the state to provide non-public school pupils (more than 96% of whom were in sectarian schools) with the same texts, tests, and scoring services as used in public schools, as well as speech, hearing, and psychological diagnostic services by public employees. The Court ruled, however, that the statute's provisions which authorized the state to supply non-public schools with the same instructional supplies, equipment, and field trip transportation violated the First Amendment's Establishment Clause. The Court reasoned that texts, tests and services could not usually be used for sectarian purposes while the supplies and equipment could more easily be applied to such use.

Dothard v. Rawlinson, 45 U.S.L.W. 4888 (June 27, 1977)—A divided Court held unconstitutional an Alabama law requiring state prison guards to be at least five feet, two inches tall and weigh at least 120 pounds, on the grounds that it violated the Fourteenth Amendment's Equal Protection Clause. It did, however, uphold a regulation which bars female guards from "contact" jobs in a maximum security, all-male penitentiary, since that regulation was legitimately related to the nature of the job.

Jones v. North Carolina Prison's Labor Union, 45 U.S.L.W. 4820 (June 23, 1977)—The Court upheld the constitutionality of state prison regulations forbidding inmates from recruiting other prisoners for membership in a prisoner's labor union, as well as prison officials' refusal to deliver bulk mailings concerning union activities. The Court argued that these regulations violate neither the First nor Fourteenth Amendments since they are related to legitimate concerns about prison operation and security.

U.S. v. Lovasco, 45 U.S.L.W. 4627 (June 9, 1977)—With only Justice Stevens casting a dissenting vote, the Court ruled that the government's 17-month delay in seeking an indictment against a federal firearms defendant, two of whose potential witnesses died attendance zones, and establishing magnet schools.

Overruling the plan, Justice Rehnquist wrote, "It is clear ... that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more ... does not offend the Constitution."

The Court sent the case back to the district court to "make new findings and conclusions as to violations in light of this opinion." Rehnquist cautioned, however, that "only if there has been a systemwide impact may there be a systemwide remedy."

While the *Brinkman* case might be interpreted as a limitation upon the Court's discretion in desegregation cases, a companion case decided on the same day, *Milliken v. Bradley*, 45 U.S.L.W. 4873, clearly strengthens judicial discretion in fashioning remedies in this area. In *Bradley*, a unanimous Court upheld a district court directive that the State of Michigan institute remedial and compensatory educational programs (in reading, testing, counseling, and inservice training) for students subjected to past acts of intentional segregation, and that it bear one-half of the cost necessary to implement such programs.

Chief Justice Burger's majority opinion first summarized the history of the case and reviewed the Court's guidelines in determining judicial remedies in desegregation cases. He noted that (1) "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation; (2) the decree ... must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct;'" and (3) in devising a remedy, the federal courts "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."

Burger then pointed out that the state's main challenge concerned the scope of the lower court's decree—" ... petitioners claim that, since the constitutional violation found by the district court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments"—but he rejected this contention. "Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation," Burger explained. "The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task."

Three Anti-Abortion Laws Upheld

After the Supreme Court's 1973 decision in *Roe v. Wade*, 410 U.S. 113, holding that laws prohibiting abortions were unconstitutional, opponents began to push for laws that would prevent public agencies from performing nontherapeutic abortions or supporting them with public funds. Since a substantial percentage of all abortions are supported in some way with public funds, they believed that this would significantly lower the incidence of abortions. On June 30, the Court held that three such laws were constitutional.

In *Beal v. Doe*, 45 U.S.L.W. 4781, the Court held that Title XIX of the Social Securities Act, which establishes Medicaid, does not require states to pay

during that time, did not justify dismissal of the indictment under the Fifth Amendment's Due Process Clause.

Nyquist v. Mauclet, 45 U.S.L.W. 4655 (June 13, 1977)—In a five to four decision, the Court held that a New York statute which barred resident aliens from state financial assistance for higher education unless they applied for, or planned to apply for U.S. citizenship, violated the Fourteenth Amendment's Equal Protection Clause.

Trimble v. Gordon, 45 U.S.L.W. 4385 (April 26, 1977)—By a narrow five to four margin, the Court held unconstitutonal, on the basis of the 14th Amendment's Equal Protection Clause, an Illinois law which allowed illegitimate children to inherit only from their mother when a parent died without a will, while allowing legitimate children to inherit from both parents under such circumstances. Justice Rehnquist wrote a concise and biting dissent in the case, describing the Equal Protection Clause as "one of the majestic generalities of the Constitution," reviewing the history of the Clause, and calling upon the Court to stop conducting a "school for legislators" by telling them how to better carry out their responsibilities.

Trans World Airlines v. Hardison, 45 U.S.L.W. 4672 (June 16, 1977)—The Court, in a seven to two decision, held that TWA had not violated Title VII of the 1964 Civil Rights Act when it was unable to accommodate an employee whose religious beliefs prevented him from working on Saturdays. The Court explained that TWA had made reasonable efforts to accommodate such needs but was stymied by the seniority provision of its agreement with the union.

International Brotherhood of Teamsters v. U.S., 45 U.S.L.W. 4506 (May 31, 1977)—Even though a legitimate seniority system may perpetuate past discrimination, a seven-judge majority held that employers may, consistent with Title VII of the Civil Rights Act, continue that system as long as there is no evidence of discriminatory intent. In effect, the decision seems to reflect the Court's unwillingness to penalize white workers for prior discriminatory practices of their employers, and the decision may provide a hint as to how the Court will rule in the *Bakke* case (see *On the Docket* on page 43).

Carey v. Population Services International, 45 U.S.L.W. 4601 (June 9, 1977)—"There is substantial reason for doubt whether limiting access to contraceptives will in fact substantially discourage early sexual behavior," Justice Brennan wrote in overturning a New York law which made it a crime to sell contraceptives to anyone under sixteen. The Court also held the law's prohibition against anyone except pharmacists selling contraceptives and its blanket ban against advertising or displaying contraceptives to be a violation of the rights of privacy and free speech.

for abortions which are not medically necessary but are rather the choice of the pregnant woman. Justice Powell delivered the Court's opinion in *Beal*. "Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage," Powell explained, "it is hardly inconsistent with the objectives of the Act for states to refuse to fund *unnecessary*—though perhaps desirable—medical services." He emphasized, however, that a state may provide such coverage if it so desires.

Justice Powell also delivered the Court's opinion in *Maher v. Roe*, 45 U.S.L.W. 4787, holding that a Connecticut welfare regulation which permits Medicaid benefits for pregnancy and child-birth, but not for medically unnecessary abortions, does not violate the Equal Protection Clause. In *Maher*, Powell first distinguished between the present case and *Roe v. Wade*. Whereas the statute in *Roe* "imposed severe criminal sanctions on the physicians and other medical personnel who performed abortions, thus drastically limiting the availability and safety of the desired service," Powell noted, "the Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." Powell acknowledged, however, that poverty "may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions..."

The third case, *Poelker v. Doe*, 45 U.S.L.W. 4794, involved a policy directive by St. Louis Mayor John H. Poelker that city hospitals perform abortions only when there is a threat of grave injury or death to the mother. A Per Curiam decision held that this constituted no constitutional violation for the reasons set forth in *Maher*.

Justices Blackmun (who wrote the opinion for the seven-judge majority in *Roe v. Wade*), Brennan, and Marshall dissented in all three cases, declaring the Court's decisions contrary to the holding in *Roe* and a denial of equal protection. This disagreement was perhaps most vividly expressed by Justice Blackmun in *Beal* when he observed, "Implicit in the Court's holding is the condescension that [the indigent woman] may go elsewhere for her abortion. I find that disingenuous and alarming, reminiscent of 'let them eat cake.' "

While there will doubtless be further Court rulings in this area, at the time this article was prepared Congress was about to vote on whether federal funds could be used for elective abortions. *The New York Times* reported that the debate over this issue was unusually bitter and personal. The *Times* said that Utah Senator Orrin G. Hatch told Illinois Senator Charles H. Percy, supporter of federal funds for abortions, "The only persons who argue for abortion are those who are already born." Recalling that Mr. Percy's parents had been poor, he said, "You might not be here if your views were accepted 57 years ago." Shortly thereafter, Indiana Senator Birch Bayh observed "a remarkable parallel" between those who opposed abortion and those who, by voting against housing, education, and rat control "do not [show] the same degree of sensitivity for the quality of life after birth."

Powell acknowledged that poverty "may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions . . . "

U.S. Gains Control over Nixon Papers and Tapes

In another unprecedented chapter in the events surrounding Richard Nixon's presidency, the Supreme Court upheld the Presidential Recordings and Preservation Act which gave the U.S. control over 42 million documents and 880 tape recordings accumulated during Nixon's terms of office. The Court, by a seven to two margin, held that Nixon was "a legitimate class of one" requiring special treatment in order to avoid possible destruction of the materials.

The case, *Nixon v. Administrator of General Services*, 45 U.S.L.W. 4917 (June 28, 1977), involved a series of events immediately following Nixon's resignation. On September 8, 1974, the Administrator of General Services, Arthur Sampson, entered into an agreement with Nixon under which Nixon basically retained "all legal and equitable title to the materials" which were to be housed in a federal facility near Nixon's California home. While Nixon agreed not to remove any originals for three years, he had the right, after that time, to withdraw any and all materials at his discretion.

Tape recordings were treated separately in the agreement. While they were to be donated to the U.S. as of September 1, 1979, they could be destroyed if Nixon so requested prior to that time, and, in any event, "were to be destroyed at the time of [his] death or September 1, 1984, whichever event shall occur first." Otherwise, the tapes were not to be removed and reproductions could be made only by "mutual agreement."

On September 18, 1974, a bill was introduced in the Senate to overrule the Nixon-Sampson agreement. Passed by Congress on December 9 and signed into law by President Ford on December 19, the new Presidential Recordings and Materials Preservation Act directed the Administrator of General Services to retain complete possession and control over Nixon's materials and tapes, prohibited destruction of the tapes and materials, and made them available for judicial proceedings. The Act also enabled executive agencies and departments to have access to the materials, which were to be kept in Washington, and directed the Administrator to prepare regulations governing public access to the materials.

Nixon argued that the Act violated five principles and guarantees of the Constitution: the principle of separation of powers, the presidential privilege, his privacy interest, his First Amendment association rights, and the Bill of Attainder Clause. Writing the opinion of the Court, Justice Brennan rejected each of these challenges.

Brennan first dismissed the arguments that the Act violated the principle of separation of powers. Brennan noted that not only have Presidents Ford and Carter rejected this claim, but the Act insures that control over the material remains in the Executive Branch. Nixon's argument, he said, rests upon an "archaic view of the separation of powers as requiring three air tight departments of government."

Turning to the question of whether presidential privilege shields these materials from archival scrutiny, the court noted that unlike the 1974 case of

United States v. Nixon, 418 U.S. 683, where there was a claim of absolute presidential privilege as against the Judicial Branch, "this case initially involves [Nixon's] assertion of a privilege against the very Executive Branch in whose name the privilege is invoked." The Court also dismissed the contention that the potential disclosure of communications given to Nixon in confidence would adversely affect the ability of future presidents to obtain the kind of advice necessary for effective decision-making. The Act contains safeguards to prevent disclosure of confidential presidential materials, Brennan said, and neither President Ford nor President Carter regard the Act as an obstacle to presidential decision-making.

Because of the "unblemished record for discretion" of the government archivists, as well as the protections built into the Act, the Court likewise rejected Nixon's privacy and First Amendment arguments.

Finally, Nixon had argued that the Act was in fact a Bill of Attainder—a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without giving him the protections of a judicial trial. After determining that this case involved no punishment traditionally judged to be prohibited by the Bill of Attainder Clause, Brennan asserted that the legislative background of the Act, as well as the Act's many provisions which protect Nixon's interests, established its nonpunitive purpose.

Calling the Court's holding "a grave repudiation of nearly two hundred years of judicial precedent and historical practice," Chief Justice Burger issued a critical 41-page dissenting opinion.

In his dissent, Burger first discussed the separation of powers issues. "Separation of powers is in no sense a formalism," he said. "Each branch of government [must] be free from the coercive influence of the other branches." Burger believed that the Act violated separation of powers principles because it involved the "coercive influence" by the legislature over the presidency and "intruded into the confidentiality of Presidential communications protected by the constitutionally based doctrine of Presidential privilege."

Burger also rejected the Court's arguments regarding the privacy and Bill of Attainder issues. Intrusion of the sort permitted by the Act "must be subjected to the most searching kind of judicial scrutiny," Burger said, and this Act does not meet that test. The fact that Congress singled Nixon out for special treatment, Burger argued, does not support the validity of the "legitimate class of one" rationale, but rather solidifies the contention that the Act is a Bill of Attainder. "This result," Justice Rehnquist added in his dissent, ". . . will daily stand as a veritable sword of Damocles over every succeeding President and his advisors . . . "

Justices White, Blackmun, Powell and Stevens each wrote concurring opinions in which they stressed the uniqueness of this case. Justice Stevens considered two factors unmentioned in Brennan's opinion to be especially relevant: that Mr. Nixon had resigned from office under "unique circumstances," and that he had accepted a pardon for offenses committed while in office. ☐

On the Docket

Missouri v. Horowitz, 538 F. 2d 1317 (1976)—As a result of failing a course, Charlotte Horowitz was dismissed from the University of Missouri-Kansas City Medical School. The Court will determine whether she was entitled, pursuant to the Fourteenth Amendment's Due Process Clause, to notice of charges and a hearing prior to her dismissal.

Bakke v. Regents of the University of California 553 P. 2d 1152 (1976)—In 1973 and 1974, Allan Bakke, a white applicant to the University of California at Davis Medical School, was denied admission even though he had higher credentials than many of the 16 minority students admitted under a special admissions program. Does the special admissions program violate the Fourteenth Amendment's Equal Protection Clause since it affords preference on the basis of race?

Parham v. J. L., 45 U.S.L.W. 2421 (1976)—A Georgia statute authorizes parents or guardians to voluntarily commit children under eighteen to mental hospitals without affording them a prior opportunity to be heard. Does the statute violate the Fourteenth Amendment's Due Process Clause?

U.S. v. Ceccolini, 542 F. 2d 136 (1976)—A police officer conducted a constitutionally illegal search by examining the contents of an envelope, thus learning the identity of a key witness. Should the witness' testimony be excluded because it is the result of an illegal search?

Bordenkircher v. Hayes, 547 F. 2d 42 (1976)—A prosecutor bargained for a plea of guilty by threatening to bring an additional indictment if the accused did not accept. The Court will decide whether such action violated defendant's due process rights.

Santa Clara Pueblo v. Martinez, 45 U.S.L.W. 3745 (1976)—Women members of a New Mexico Indian community who are married to nonmembers challenged an Indian ordinance denying membership to the children of female-line mixed marriages while admitting offspring of male-line mixed marriages. Among the issues to be determined by the Court on appeal are whether the federal courts have jurisdiction over such controversies, and if so, what legal standards of equal protection should be applied.

Landmark Communications v. Virginia, 45 U.S.L.W. 2430 (1977)—A newspaper was convicted and fined $500 for publishing an article concerning possible disciplinary proceedings against a particular judge, since the article violated a state law requiring confidentiality of judicial inquiries. The Court will decide whether the statute is unconstitutionally vague and overbroad, and whether the First Amendment protects newspapers from being punished for publishing truthful statements about a public official.

McDaniel v. Paty, 45 U.S.L.W. 2445 (1977)—Tennessee has a constitutional prohibition which makes ministers and priests of any denomination ineligible to serve in state legislatures. The prohibition was subsequently applied to prevent a priest from serving as a delegate to a state constitutional convention. The Court will decide whether such prohibitions violate the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause.

INTERVIEW

(Continued from page 31)

small towns, our teachers recommend calling the police chief. Janice Berman, a teacher at New Trier High School in suburban Northfield, says that lots of times the chiefs will come themselves. If they can't, they will almost always send someone, because they recognize that better community relations and respect for law begin in the classroom. In larger cities, our teachers had good luck calling the juvenile department, the community relations department, or the preventive programs department.

To get the help of judges, our teachers suggest that the direct approach is best. If you don't know a judge, just phone a court, explain what your course is about, and ask the judge to come at a time that is convenient.

Don't forget the clients of the system. Several of our teachers have recruited classroom speakers from ex-offenders organizations. There are many of these groups in most urban areas, and our teachers recommend contacting them either through parole and probation offices, or through civic organizations such as the League of Women Voters and church groups.

In general, it pays to be creative. Charles Kuner spotted a potential resource when he saw the author of a book on police interviewed on television. He just called up the station, got the man's phone number, and recruited him for a classroom presentation. He also recommends that you use graduates of the school as a resource. Two or three Farragut High grads who are now lawyers have provided a great deal of assistance. Janice Berman found a great classroom resource through a teacher at her school whose husband is a Chicago policeman. He now comes into the class at least once every semester. Charlie Hart took a tour of a state penitentiary with his church group, and while there got to know an assistant warden who has spoken to his class on several occasions.

Marion Cobb recommends that you call your state representative's office for the names of lawyers and others who may be resources. She also suggests that you make up a brief form that asks students to list lawyers, judges, police, and others who may be relatives or friends of the family.

As these examples show, the key is not to be shy. Janice Berman says "I'm usually an introverted person, but when it comes to getting a resource for my students I'm extroverted. If we're on a field trip and I see a lawyer who seems to be doing a good job, I just walk up to him and ask him for his card and tell him that I hope he'll be able to come to speak to my students. Sometimes it takes two or three calls, but when they come they almost always like it so much that they'd be offended if I didn't ask them for the next semester." And remember that contacts lead to contacts.

The point of it all is to explore their feelings, and to make them seem more human to students.

Always ask a resource person to recommend others. Even the ones that can't help may recommend others who can.

One last bit of advice about scheduling classroom presentations. Remember that resource people are apt to be very busy, so be as flexible as you can in working them into your schedule. And resource people often have to cancel at the last minute, so it's a good idea to have another lesson or activity planned on the topic they were to discuss.

Of course, getting them to come is only the beginning. How do you make sure that the experience is educationally rewarding? Our teachers are unanimous in recommending that teachers carefully prepare both the resource person and the class.

The resource person has to know what the class has been studying, how his presentation fits into the course of study, and what sorts of questions to anticipate. One way to do this is on the phone, or failing that, in a brief meeting before class. Another possibility is to ask students what they'd like to learn from the presentation and then send the resource person a list of possible questions ahead of time.

Either way, it's essential to get them away from canned presentations. Charlie Hart says that police who come to his class are sometimes timid and uncertain, and want to "hide behind the films they've brought with them." He recommends that their formal presentation be held to 10 or 15 minutes, and cover such basic processes as arrest procedures and rights of the accused, with the rest of the period open for questions.

Chuck Thomason carries this one step further by involving resource persons in classroom activities. The key, he says, "is that we don't treat them as experts who are bringing us the one true word, but rather as human beings who can both contribute to the class and learn from it. We want them, above all, to be people."

To do that, Thomason involves them in role-playing, trying to place them in roles different from those they play in real life. Therefore, ex-offenders might play policemen or prison guards, while cops might play prisoners or persons who have been arrested. The point of it all is to explore their feelings about the system, and to make them seem more human to students.

Another technique is the human graph, asking resource people and students to take a position pro or con or somewhere in-between on a controversial question such as "the main purpose of prisons is to punish." After arguments on each side of the issue, people on the graph are allowed to change their position and explain why. Thomason also recommends encouraging students to ask questions which get at how resource leaders feel about what they do. For example, almost all students want to ask lawyers what it feels like to defend someone who they know is guilty.

That raises the question of how to prepare students so that they can make the most of the experience. Thomason makes the basic assumption that good students don't just sit there and passively absorb information, but rather are active participants in the learning process. It's up to them to make the resource person's presentation worthwhile, and if they don't think about what they want to learn in advance and come up with some good questions, then they know that they'll be responsible for a flat session. One way to help students prepare is to have them conduct an opinion survey about a controversial topic such as capital punishment. The responses to this survey are then compared and analyzed, and students get an idea of the wide range of opinions and the complexity of the problem. When the community resource person comes into the classroom, students should have a lot of questions that they'd like to have answered.

Charlie Hart uses a slightly different technique. He runs through possible questions with his students before the presentation, but he asks them not to write the questions down in advance, because he wants to avoid a canned response as much as a canned presentation. If the questions that have been suggested interest students, they'll ask them at some point or another, but if students haven't written out questions in advance they're more likely to respond to what the resource persons are actually saying, not what they expect them to say.

After the presentation, of course, teachers will want to discuss with students what the resource person said, explore how it fits or doesn't fit with what they studied before, and try to use it as a link to further lessons. One last step that our teachers suggest is to not only send a letter of thanks to the resource person, but to send a letter of appreciation to his supervisor. These letters are put in resource persons' files and are much appreciated by them.

Seeing the System in Action

Field trips are of course an instructional activity, and so we might more appropriately discuss them in another article in this series, but we consider them here because the teachers told us over and over that these trips were a tremendous help for them, especially in the early days of teaching about law. The trips taught teachers about legal processes, helped them see what interested students, and helped them find lawyers, judges, and other resources for their program. In fact, the teachers we talked to were more enthusiastic about field trips than any other aspect of law-related education. As John McKinnon says, "I've never had a bad experience on a field trip. Every time on the bus back I get at least 60 to 80 questions from students who want to know more about what they've just seen."

If the rewards are great, however, the pitfalls are too. There are administrative headaches to worry about, accidents to fear, and the ever-present need to plan carefully and well in advance. Nonetheless, all the teachers we talked to told us it was worth it and that they wanted to do more of it.

Finding out about where to visit is much like finding community resource persons. Call bar associations, courts, police departments, and anybody else you can think of. If you've gotten in touch with community people already, ask them to recommend sites that you and your class might visit.

The three best sites seem to be police departments, courts, and prisons. Police departments often have programs for conducting school tours, involving visits to crime labs, training facilities, and other departments that fascinate kids. Ride-along programs that enable students to ride in patrol cars for a tour of duty are the best activity, but they're harder to arrange. Janice Berman had to work some time to convince her suburban police department that the idea could work, and then had to convince them that girls as well as boys should be able to ride-along. Both obstacles were overcome, however, and the program now goes forward every year with automatic approval.

Court tours are probably the most common form of field activity. In any metropolitan area, there will probably be a wide variety of courts to choose from—local, state, and federal courts, as well as courts of original jurisdiction and appeals courts. Most of the teachers we talked to tried to take their students to more than one courthouse in a semester.

John McKinnon has been taking his students on tours for ten years, and by now has built up such a good rapport with court administrators and judges that he and his class are usually directed to the more interesting trials. He recommends going to court on Wednesdays or Thursdays, since Mondays and Tuesdays are generally given over to jury selection and are much less interesting than cases in progress. He thinks that jury trials may be best for students, since they give students the opportunity to hear opening and closing statements.

When he takes a class through a courthouse, they generally attend a trial in the morning together, but in the afternoon split up into groups of a half dozen or so. He has a list of the cases that are going on in the various courtrooms, and students can choose to visit the kinds of cases they think will interest them the most. He says that students can get a great deal out of even an hour or two of sitting in on a case.

Charlie Hart follows the same basic procedure, giving his students about a half a day on their own in the courthouse. He tells them not to expect the kind of courtroom drama they are accustomed to from TV and the movies, but he's found that the one place where they can usually find drama, where the "tension is so thick that you can cut it," is in divorce court. There, the issues are easy to grasp and it is possible to know what's happening in only a few minutes, so divorce cases represent a particularly good learning experience for students.

Community resource people are a key to court visits. Lawyers can help set up such visits and can conduct the students through the courts, explaining procedures and various functions. Judges are often helpful, talking to students in

KA-POW!
FUNKY WINKERBEAN
THE COACH'S BEEN STRUCK BY LIGHTNING! GO GET SOME HELP!
BATIUK
RIGHT! I THINK THERE'S A LAWYER IN THE NEXT FOURSOME!

their chambers about what they have just seen. Sometimes, judges work out impromptu role-plays with them, as when one judge explained a case that he had recently handled and asked students what they would have done in his position. And of course court tours may give students a chance to meet and talk with prosecutors, public defenders, defense attorneys, and lots of other actors in the system.

State and local correctional institutions are another favorite site for classroom visits. Prisons are much grimmer and starker than police departments and courts, and teachers find them useful for precisely that reason. They discourage would-be law-breakers, and at the same time raise a raft of questions about the purpose of prisons and how well they are functioning. And sometimes they have an even more direct application to the schools. Charles Kuner took his students to a state boy's training center which operates on the principle of positive peer pressure. The students were so impressed by this approach that they wanted to explore something like it for their own school, and the result is a peer counseling program at the high school now.

Of course, taking students through a prison isn't the most relaxing experience. John McKinnon reports being driven nearly to ulcers by the thought of taking 120 students each semester through one or another correctional institution. He never had a problem in ten years, but took last year off to give his nerves a rest.

There are some other good locations too. In many cities there are regional offices of the Federal Bureau of Investigation and the Secret Service of the U.S. Treasury Department. In Chicago, these regional offices are in the same building and conduct tours for students. The teachers report that these tours are well conceived and educationally very rewarding.

Another resource that may well exist in your community is a public law library. In Chicago, the Cook County Law Library is open to the general public for several hours each afternoon, and John Gilbert of Chicago's Hubbard High School has found that it is a good resource for his students. They go there each day for two or three weeks to research an issue, finding pertinent cases and seeing the evolution of the law through various holdings and rationales. Their teacher accompanies them on the first visit to orient them to the library and its services, but after that they are on their own to research the project they have chosen. In addition to building their research skills, the experience gives students an atmosphere they like, a feeling that they're not doing school work but the kind of work that lawyers themselves do.

Here are some tips our teachers had on field trips:

1. Find out in advance how many students the facility will accommodate; nothing ruins a tour more than too many people and too little space.

2. Make reservations early. This wasn't a problem in the Chicago area five or six years ago, but now courts, police departments, and prisons often have long waiting lists for tours. Start looking for dates at the very beginning of the school year, or before.

3. Give yourself plenty of time to handle any red tape involved in tours. Get the forms early and get them returned early. If students are required to get their parents' permission and the permission of other teachers before they can take the trip, give them the appropriate forms early and tell them that it's up to them to get the forms filled out or they won't go.

4. Make sure you explain to other teachers that field trips are an integral part of your course. Try not to pull your students out of someone else's course repeatedly, and reciprocate graciously when someone else wants to take students on a trip that will require them missing your course.

The teachers unanimously agreed that there are lots of resources for teaching about the law and legal system—books, films, games, people, and places. They caution, though, that no one is going to present these resources to you on a silver platter. You'll have to search them out, and what you make of them will largely depend on the energy, enthusiasm, and skill you bring to the subject. However, our teachers say that the rewards—lively classes and an educational program that students are really interested in—make it all worthwhile. □

"A STROKE OF LUCK, MARQUIST! YOU'VE BEEN FOUND MENTALLY INCOMPETENT TO STAND TRIAL."

New York Project Offers Help Across State

Four years ago, there was a great deal of interest in law-related education in New York State, but efforts there were fragmentary and tentative. Then, in the summer of 1974, the New York State Bar Association and the New York State Education Department joined forces on an ambitious statewide program that has put on teacher training institutes and workshops across the state, provided consulting help to programs of all kinds, funded four major regional projects and more than a dozen innovative local programs, and made more than 25 small grants to support a wide variety of specific law-related activities such as curriculum development.

The state bar and state department have worked together on all aspects of the project. For example, they've shared responsibility for the materials which the project has made available.

The state department in 1971 put together two curriculum guides, *Teaching About Basic Legal Concepts in the Junior High School* and *Teaching About Basic Legal Concepts in the Senior High School*. These guides contain extensive outlines and detailed teaching strategies to assist teachers in planning law-related lessons. They're available from the New York State Education Department, Bureau of Secondary Curriculum Development (attention: Publications Distribution Unit, Finance Section), Albany 12234. The junior high guide is $1.00; the senior high guide is $2.00.

Through the New York State Bar Association, residents of New York State can get several different types of materials. The *Mock Trial Manual* for secondary school teachers and students details case studies and involves students in actual trial situations (single copies free to New York residents on request to Public Relations Office, New York State Bar Association, One Elk Street, Albany 12207). The state bar also offers *Law and the Courts*, a layman's handbook on court procedures (single copies 50c), and *The Family Lawyer* column. New York residents may order as many copies of this column as needed for class distribution; they're mailed out monthly during the school year.

Another resource is a statewide *Journal* of law-related education activities dealing with both substantive law and practical teaching approaches and strategies. It is available from the state bar, at no cost to residents of the state.

The statewide project offers a wide variety of consulting services, ranging from help in curriculum development to assistance in putting together a team of community people who can support a law program in the schools. The state bar's contribution is a lawyer-in-the-classroom program and an effort to work with local bar associations around the state to marshal resources in support of local programs.

The state education department and state bar have also shared funding responsibility. The state department, through the Title IV-C program, has funded three of the four major regional projects that offer teacher training, help in curriculum development, and a variety of other assistance. These projects generally provide teacher training in the summer and follow-up workshops during the school year.

The regional centers are located in or near major cities in several parts of the state. In the *Buffalo* area, contact, Anton C. Schwarzmueller, 291 Windermere Blvd., Amherst 14226, 716-836-3000. In the *Rochester* area, contact Peter W. Knapp, R. L. Thomas High School, 800 Five Mile Line Road, Webster 14580, 716-671-1990. In the *Syracuse* area, contact James J. Carroll, Westhill Central School District, 4501 Onondaga Blvd., Syracuse 13219, 315-475-1621. And in *New York City*, contact Frances Low, Director, Open Doors, 20 West 40th Street, New York 10019, 212-391-1960.

In addition to these regional projects, in 1976 the state education department funded 13 programs around the state through Title IV-C of the Elementary and Secondary Education Act. Each has somewhat different goals and activities, but all concentrate on strengthening the law-related and civic education portions of the curriculum and developing materials and techniques to increase students' participation and skills. These programs may well provide a useful resource. For more information about them, please contact Donald Bragaw at the address given below.

The state bar has helped in funding by making bloc grants in support of teacher training, publications, conferences, mock trials, and other law-related education activities. These small grants (last year the range was from $200 to $3500) are for one year only and support a specific activity, but project officials think that they have been very successful in stimulating interest in the field and providing teachers and lawyers with a resource for getting something started or for improving an existing program. If the program continues this year, applications will probably be accepted in November and December for an award by February 1. Twenty-seven out of 65 applications were funded last year, so your chances of getting a bloc grant are pretty good.

For information about the bloc grant program and the Title IV-C programs in your area, or for information about how the statewide project may be able to provide assistance, please contact either Donald Bragaw, Bureau of Social Studies, New York State Education Department, Albany 12234, 518-474-5978 or Dan Goldstein, New York State Bar Association, One Elk Street, Albany 12207, 518-445-1250. —CW

opinions
CONCURRING & DISSENTING

The more than 300 opinion cards that readers sent us from the first issue of *Update* constituted the bulk of our correspondence.

As indicated in the *Opening Statement*, these responses helped us tailor *Update* more to your needs and interests. We take this opportunity to thank those who responded for their many thoughtful ideas and comments.

We've summarized the responses on a facsimile of the card which appears below. The grades in the first response represent the grade point average for each article.

1. Please grade us from A to F on each of the following sections:

A- "The Court Grapples with Equal Protection"
B+ "From Pregnancy Benefits to Undercover Agents"
B+ "Being Ripped Off? Call a Kid"
B+ "Newsclips"
B+ "A Plea for Equality"
B "Cases on . . . Animals and Accidents"
B- "Oregon Project Thrives on Hard Money"
B "Focus on Audio-Visual Materials"
B "Federal Funds Available"
B "New Statewide Programs"
B+ "Summer Programs for Teachers"

2. Would the Supreme Court Report ("The Court Grapples with Equal Protection") have been more useful to you if it had contained more information on legal substance and procedure(64) or if it had focused more on the broad social implications of the decisions(117)? (35 readers wanted us to retain the same balance.)

3. Would you like more articles about what teachers are doing in the classroom?
195 yes 35 no

4. Which topics would you like to see us emphasize in future issues?

80 criminal law
142 juvenile law
144 student and teacher rights and responsibilities
122 consumer law
189 practical law/skills that students should know
82 freedom of expression
72 right to privacy

5. What sections should we add to *Update*?

195 classroom strategies
68 researching the law
78 program ideas
134 opposing views on critical issues
37 in-depth book reviews
74 evaluating law-related programs
75 rationales for teaching about law

Over 150 of our readers used the 'additional comments' section of the card to give us more detailed reactions to the issue. These comments were generally very helpful. Here's a sampling:

Standing alone in the Rip Van Winkle department is "Useless magazine, for which I have no need or desire to ever view again. I teach *basic history* not artsy-craftsy rubbish such as this."

In the constructive criticism category:

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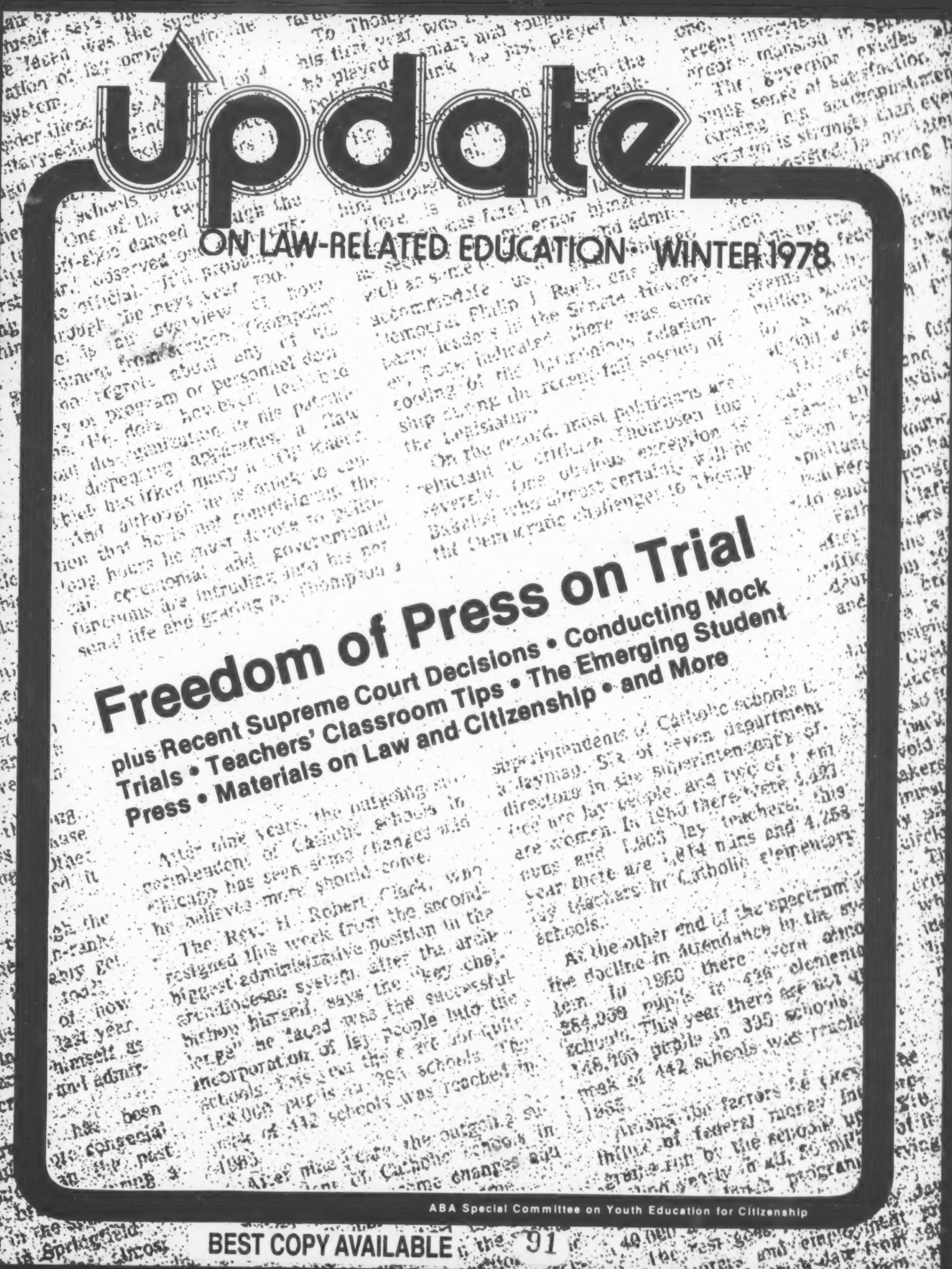

Update

ON LAW-RELATED EDUCATION • WINTER 1978

Freedom of Press on Trial

plus Recent Supreme Court Decisions • Conducting Mock Trials • Teachers' Classroom Tips • The Emerging Student Press • Materials on Law and Citizenship • and More

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OPENING STATEMENT

Reporter of the news, maker of the news, or subject of the news? While the news media have periodically been characterized in each of these fashions, their primary role has been to report the news, to be a source of information about everything from local bazaars to global politics. With recent technological advances and the growing celebrity status of reporters, however, the media increasingly find themselves at the center of controversies about which they had previously reported. And as with many other societal conflicts, the issues these conflicts have raised have come before our courts.

In the lead article, Oregon Judge Alfred Goodwin and ABA staffer Lynn Taylor explore some of these controversies, ranging from fair trial/free press to the law of libel. Their analyses illuminate how much these issues influence the media, our legal and governmental systems, and average as well as not-so-average citizens.

Other articles in this issue examine further dimensions of the free press guarantee. Just as the mass media are confronting new situations and thus new controversies, so too has the student press expanded its reporting, often with controversial results. These dilemmas and their implications for law-related education are explored in an article by Chris Fager of the Student Press Law Center. In addition, Cynthia Kelly takes a look at freedom of the press in colonial times, providing us with insight into the historical roots of the guarantee, and an article by John Walsh of the East-West Learning Center focuses on free press/fair trial in Japan, outlining the way another culture has approached this conflict.

Also highlighted in this issue are suggestions by the National Street Law Institute's Ed O'Brien and Lee Arbetman on the use of mock trials, teacher recommendations for secondary school programs, and our regular sections on recent Supreme Court decisions, funding opportunities, the *Family Lawyer*, and new curriculum materials.

Please continue to share with us your reactions to *Update*, and let us know your recommendations for future issues.

—Norman Gross

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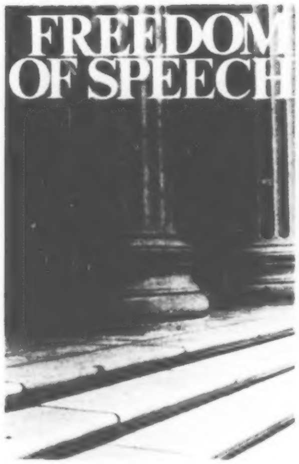

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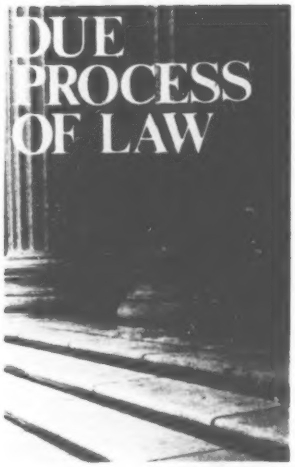

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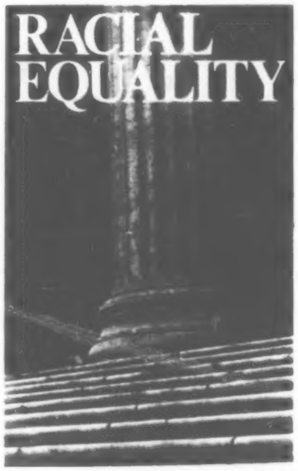


No. 6004-5

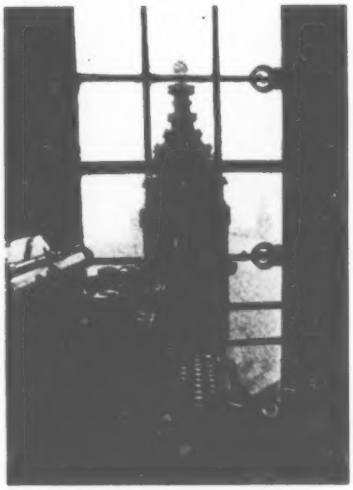
WOMAN & THE LAW

No. 6005-3

contents

Volume 2, Number 1 Winter 1978

4
Supreme Court Report
Freedom of Press on Trial



9
Court Briefs
From Forced Retirement to Tainted Identification

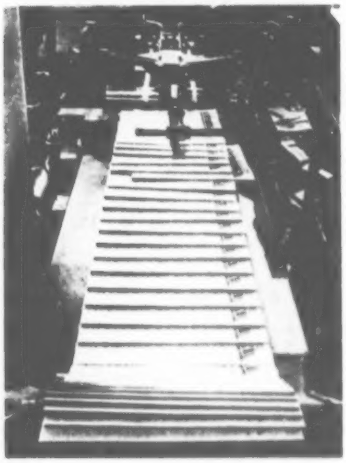
13
Classroom Strategies
From Classroom to Courtroom: The Mock Trial

16
Update Looks Back
The Struggle for a Free Press

18
Views from Abroad
Free Press v. Fair Trial in Japan

21
Newsclips

23
In the Field
The Emerging Student Press



27
Interview
Beginning a Law Program

32
Family Lawyer
Cases on the Bill of Rights

35
The $$ Game
Have You Considered Humanities Funding?

37
Curriculum Update
Focus on Law and Citizenship

Credits
Pages 4-5 and 23, David Travis; pages 6, 11 and 41, United Press International; page 9, Paul S. Conklin; page 14, National Street Law Institute and Lewis Saks, East Detroit Public Schools; page 16, Bettman Archives; pages 18-19, Candida Photo Service; page 21, Slug Signorino; page 27, Dean Mathews; page 35, Don Johnson.

SUPREME COURT REPORT

Freedom of Press on Trial

More and more these days, the press is reporting on its own brushes with the law

Alfred T. Goodwin and Lynn Taylor

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- *There is a brutal murder of a Nebraska family—can the judge order reporters not to publicize the gruesome details?*
- *A California newsman obtains new information about a cult slaying of a beautiful actress—must he reveal his source?*
- *Confidential government information is stolen—can the press be restrained from publishing it?*
- *A Florida youth is tried for murder—will TV coverage from the courtroom disrupt proceedings?*
- Time *magazine incorrectly reports about a society matron's divorce—can she recover for libel?*

Among the subjects the press likes most to cover are its own encounters with the legal system, especially when it comes to defending its First Amendment rights. This widespread coverage has highlighted the apparent conflict between freedom of press and other basic rights and interests. For example, what happens when freedom of the press seems to conflict with an accused person's right to a fair trial or with the government's interest in maintaining the country's security? What happens when a free press seems to threaten the decorum of a courtroom or to injure an individual's reputation or invade his privacy?

Looking at some recent cases can illustrate the legal problems—and the societal issues—posed by these values in conflict.

Sensational Murders

David Berkowitz, alleged "Son of Sam," was charged with murdering six young women over a twelve-month period. The murders themselves, speculation about who the murderer was, and the subsequent coverage of Berkowitz when he was apprehended were splashed across the front pages of the nation's papers and widely commented about by columnists and broadcasters.

It seemed to many that the coverage was prejudicial to Berkowitz's rights. For example, the *New York Post*'s headline the day after his arrest was "CAUGHT!" Under a picture of Berkowitz a subhead stated "Son of Sam was on Way to Kill Again." The headline the next day was

---

Judge Alfred T. Goodwin serves on the U.S. Court of Appeals, Ninth Circuit, and is Chairman of the American Bar Association's Adjunct Committee on Fair Trial-Free Press. Lynn Taylor is Assistant Staff Director of the ABA's Communications Division and a recent graduate of the DePaul University College of Law. Both are former newspaper reporters.

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"INSIDE THE KILLER'S LAIR" (the story that followed described Berkowitz's apartment), and a headline a few days later was "HOW I BECAME A MASS KILLER BY DAVID BERKOWITZ" (the story that followed was based on letters Berkowitz had written a girlfriend years earlier). The stories themselves weren't much less prejudicial than the headlines. For example, the story on the arrest did begin with a qualification—"The man police say is the Son of Sam"—but immediately rendered the qualification meaningless by continuing "was on his way to claim more victims when he walked into the arms of waiting detectives."

Coverage of this sort strongly implies Berkowitz's guilt and thus limits his ability to receive a fair trial, but other coverage may preclude a fair hearing of the evidence in a different way. An editorial in the September 5 issue of the *New Yorker* magazine claimed that the *New York Post* and the *New York News* "have gone to irresponsible lengths to make [Berkowitz] appear deeply insane." For example, two days after his arrest the *News* headlined "SAM CHANGED AFTER LSD TRIPS," and the story spoke of a "devastating personality transformation." The *New Yorker* pointed out that coverage of this sort may be "prejudicial to the best interests of society, for if enough people become convinced by the newspapers that the defendant is indeed insane, it may be impossible to find twelve jurors who can judge the issue objectively," and he could be found not guilty by reason of insanity when he was actually sane.

Does publicity about sensational crimes inevitably preclude a fair trial? Questions of this sort have been wrestled with before. In unison the media have said "no." Many judges have said "yes." With increasing frequency in the last decade judges have indicated their belief that publication of certain information—even if it was revealed at a public hearing—would impair a fair trial, and have tried to prohibit the press from printing certain details of crimes or proceedings.

The media derisively label these restrictions "gag orders." They have persistently fought their imposition—in the courts, in newspaper editorials and magazine articles, and on the air—asserting that gag orders are a prior restraint on the media's right to freedom of speech as guaranteed by the First Amendment.

The press's handling of David Berkowitz's arrest caused a furor.

The case they needed to take their constitutional challenge of gag orders to the Supreme Court involved the proceedings against Erwin Simants, who was charged with a multiple murder in a small town in Nebraska. The case ultimately provided resolution to a number of difficult fair trial/free press issues.

The press was angered by the news blackout, and the constitutional fight was on

On the night of October 18, 1975, Erwin Simants, an unemployed handyman with an I.Q. of 75, took his brother-in-law's gun, walked to the house next door and raped and then shot at point-blank range ten-year-old Florence Kellie. As other family members came to her aid, he also shot them. In all, six members of the Kellie family were murdered. Investigators later found evidence of necrophilia.

Simants was apprehended at home the following morning, but only after an anxious night for the residents of Sutherland, Nebraska, a community of 850, who had been warned by local officials to "lock your doors and windows" because "there's a sniper loose with a shotgun and he's killing people."

As shocking as the crime was, the trial might have been of interest mainly to the Nebraska media except for the series of events that followed Simants' arrest. Local officials gave the press conflicting stories and withheld information. The judge presiding over the preliminary public hearing (which in Nebraska is held to establish that cause exists to hold an accused person for trial) granted a joint motion by the prosecutor and public defender to prohibit the media from reporting on the proceedings of the hearing, which lasted almost a full day. That meant the media couldn't report the testimony of nine witnesses, who spelled out in detail many gruesome aspects of the crime.

The press, understandably, was angered by the nearly total news blackout, and the constitutional fight was on. Nebraska news organizations appealed the restraining order to district judge Hugh Stuart in Lincoln. Although he terminated the prior sweeping order, he substituted his own which, although more limited in scope, still prohibited considerable material from being disclosed to the public.

Still not satisfied, the Nebraska Press Association appealed the decision to the Nebraska Supreme Court and later to the United States Supreme Court, in the case of *Nebraska Press Association v. Stuart* (427 U.S. 539). Judge Stuart and the state of Nebraska argued that the publicity surrounding the crime would make it difficult to impanel an impartial jury, thus jeopardizing Simants' right to a fair trial. They pointed out that Nebraska law required a trial within six months of arrest and that a change of venue could move the trial only to adjoining counties, which had been subject to essentially the same publicity as the county in which the crime was committed. The Nebraska Press Association, joined by NBC and other national news organizations, argued that the order flew in the face of the First Amendment's guarantee of a free press, thus jeopardizing the public's right to know.

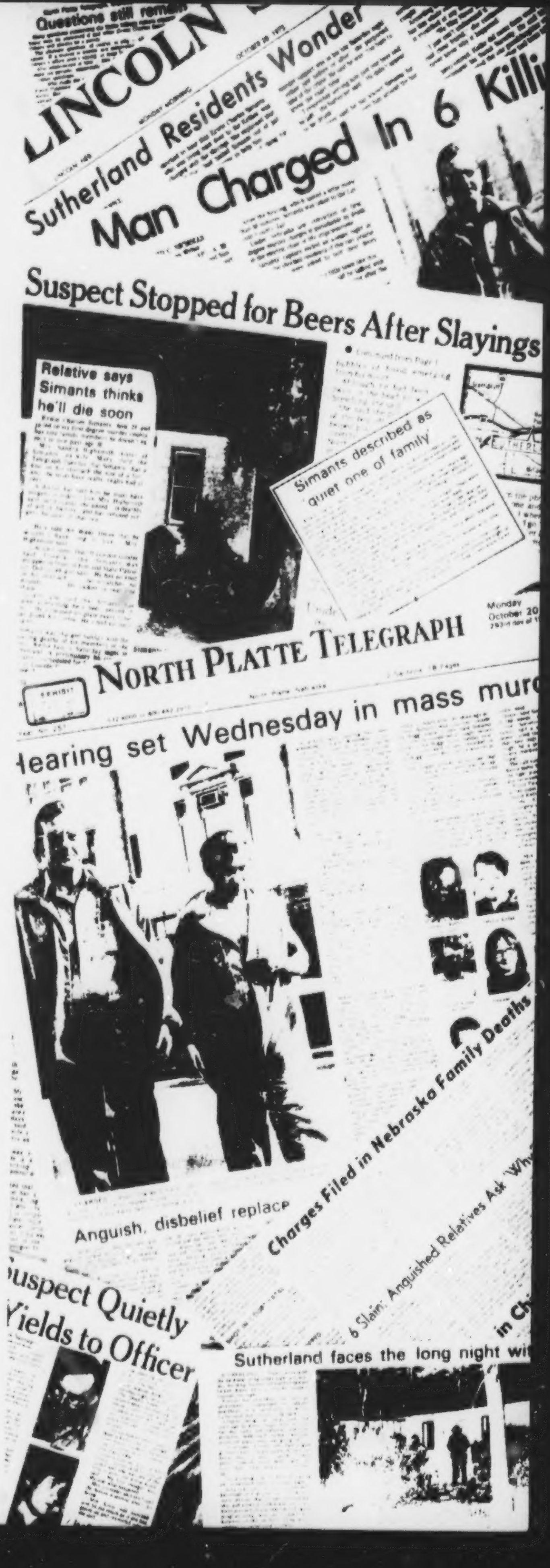
Chief Justice Burger, speaking for a unanimous Court, acknowledged the conflict between the guarantees of free press and fair trial, but denied that the Court was forced to choose, once and for all, which right had precedence: "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other . . . and it is not for us to rewrite the Constitution by undertaking what they declined to do." Rather, the Chief Justice continued, it was necessary to consider closely the circumstances of this case in reaching a more limited decision.

The Chief Justice noted that many cases established the defendant's right to trial by an impartial jury, guaranteed in federal cases by the Sixth Amendment and extended to the states by the Due Process Clause of the Fourteenth Amendment. He pointed out that the case of Dr. Sam Sheppard, *Sheppard v. Maxwell* (384 U.S. 333 [1966]), had established that excessive pretrial publicity could result in an unfair trial and that "trial courts must take strong measures to ensure that the balance is never weighed against the accused."

Did that mean that the Court was deciding in favor of the trial judge and his gag order? Not necessarily. The Chief Justice went on to point out that a long series of cases had established that "any prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity." That means that those who would gag the press have a heavy burden of proof. They must prove that (1) no lesser means would accomplish an important purpose and (2) that the gag order would in fact work.

The Chief Justice said that Judge Stuart and the state had failed to show that other alternatives wouldn't have accomplished the goal of assuring a fair trial. These alternatives included (1) changing the "trial venue to a place less exposed to the intense publicity"; (2) postponing the trial to allow the publicity to subside; (3) posing searching questions to prospective jurors to "screen out those with fixed opinions" on guilt or innocence; and (4) using "emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." The Chief Justice added that sequestering the jury might also help, because even though it would occur after the pretrial publicity, it would lessen the impact of that publicity and emphasize the jurors' duty to decide solely on the evidence presented during the trial.

Chief Justice Burger went on to note that Judge Stuart and the state had also not met the burden of proving that the gag order would have worked in any event. After all, the Nebraska court's jurisdiction was limited only to a portion of the state. Besides, he said, it is hard to predict what information will undermine a juror's impartiality, making it difficult to draft an order that would specify which information should be kept from potential jurors. Finally, the crime occurred in a small community where rumors would pass swiftly by word of mouth.


Questions still remain
LINCOLN
Sutherland Residents Wonder
Man Charged In 6 Killi
Suspect Stopped for Beers After Slayings
Relative says Simants thinks he'll die soon
Simants described as quiet one of family
NORTH PLATTE TELEGRAPH
Monday October 20
Hearing set Wednesday in mass murd
Charges Filed in Nebraska Family Deaths
Anguish, disbelief replace
Suspect Quietly Yields to Officer
6 Slain; Anguished Relatives Ask 'Wh
Sutherland faces the long night wi

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The decision was widely hailed as a major victory for the press, but a close reading shows that the victory was not total. The Chief Justice explicitly rejected the contention that the First Amendment must prevail in all such conflicts. Rather, he said that there is a very strong presumption against prior restraint on the press in criminal cases. But he would not preclude the possibility of a case arising in the future which would justify such an extreme measure.

One other portion of the decision, however, did give the press an unqualified victory. The Court ruled that the judge was clearly in error in prohibiting the press from reporting what happened at the preliminary hearing, which was held in open court. Burger pointed out that the *Sheppard* decision established the settled principle that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." The remedy in such an instance is to hold a closed hearing, Burger said, not to hold an open hearing and bar the press from reporting what went on there.

What was happening to Erwin Simants while all this was going on? After both case and cause had been splashed across the headlines, could he recieve a fair hearing? In January, 1976, before the Supreme Court ruled on the gag rule issue, he went on trial in the county in Nebraska where he lived. Seventy-two persons were examined on voir dire for jury duty. Of those, more than a third said they already had formed an opinion on the murders—either as a result of the publicity in the media, or through word-of-mouth information they had received, or because of friendship with the victims. Nonetheless, four of those who said they had an opinion were accepted as jurors because they said they could still view the evidence with an open mind. The jury subsequently found Simants guilty of six counts of murder. In spite of the widespread pretrial publicity and no change of venue, apparently Simants had received a "fair trial."

There is other evidence that such publicity does not necessarily prevent defendants from obtaining a fair hearing of the facts. Professor John Kaplan of Stanford Law School has written that newspaper publicity and other assertions made outside the courtroom have virtually no impact on jurors, since jurors almost invariably come to assume that they know more about the facts of the case than any reporter because of their closer personal observation of the trial.

Case Citations

Throughout *Update*, citations such as 545 F. 2d 30 (1976) appear so that you can, if you wish, read an entire decision and also learn of other cases and resources on the topic. For those of you who are unfamiliar with such citations, here is a brief explanation.

The first number (545) refers to the volume in which the case appears; the abbreviation which follows (F. 2d) indicates which reporter system to go to—in this instance the Federal Reporter, Second Series; the next number (30) tells you the page number; and the date of the decision (1976) is the last piece of information.

Citations for decisions of other federal as well as state courts use the same format, the only difference being the reporter system in which the case appears.

Of course, a law school library is often the best place to research a case, but most bar associations, county or city governments, and law firms have at least the Supreme Court reporters. Establishing contacts with law librarians, practicing attorneys, and others who have ready access to such resources can thus be especially valuable for you and your students.

And Edwin A. Heafey, Jr., a former president of the American Board of Trial Advocates, said during a National Homicide Symposium held in October that the trials of John N. Mitchell, Bobby Seale, and Angela Davis showed that pretrial publicity may not have the anticipated effect. All three had been the subject of massive pretrial publicity, and many observers doubted whether they could receive a fair trial, but in fact all were acquitted.

Fair Trial/Free Press Guidelines

The Nebraska case by no means resolves all fair trial/free press issues. While it appears that judicial gag orders will face very tough sledding in the future, 23 states do have voluntary free press/fair trial guidelines that assist the media, law enforcement officers, and court personnel in deciding what should and should not be published.

Most of the guidelines were drawn up in the 1960's, many in response to the Warren Commission report calling for stricter reporting standards as a result of the coverage of events following the assassination of President John F. Kennedy. Generally, their goal is to open up the lines of communication between the bar, media, courts, and law enforcement agencies. Specifically, they set forth information that is appropriate for the press to publish immediately following an arrest, and describe the types of information that may be prejudicial.

Can these voluntary guidelines be made mandatory by court order? This was one of the side issues in the *Nebraska Press* case, and the Nebraska supreme court said no. Although the question could come up again in another jurisdiction, the case is strong precedent in opposition.

By and large the voluntary agreements have been found to work fairly well, but certainly not perfectly and not always. In fact, as the "Son of Sam" case shows, they are most strained just when they are most needed. In sensational cases, when public interest is high, the competition for the public's attention among the media can result in questionable journalistic practices.

Cameras in the Courtroom

While the *Nebraska Press* decision provided guidance on restraining orders, it did not address another touchy problem—what to do about electronic media in the courtroom.

In federal courts and in state courts in all but six states, broadcast and photographic coverage of proceedings—jury selection, hearings, and the trials themselves—is prohibited. The ban can be traced to the 1935 trial of Bruno Hauptmann for the kidnapping of Charles Lindbergh's baby. Lindbergh was the object of national adulation for his solo flight across the Atlantic, and the trial of the man accused of kidnapping his child attracted so much media attention that a circus atmosphere was created.

The ban was reinforced by the 1965 trial of Billie Sol Estes in Texas, when broadcast media and still photographers were once again allowed in the courtroom. Estes was the object of widespread media attention because he was closely identified with then-President Lyndon B. Johnson. He was ultimately found guilty of swindling farmers whom he had induced to purchase fertilizer tanks through fraudulent misrepresentations.

(Continued on page 40)

COURT BRIEFS

From Forced Retirement to Tainted Identification

Norman Gross

At the beginning of the Court's new term, it heard arguments on a variety of cases which have received widespread public attention: the *Bakke* case on the issue of reverse discrimination; the Watergate tapes case seeking the right to record and reprint the tapes which the jury heard in the Watergate trial; and a suit by India, France, the Philippines, and the now defunct government of South Vietnam against six American drug companies for antitrust violations. At the time of *Update*'s printing, the decisions in these cases were not yet handed down.

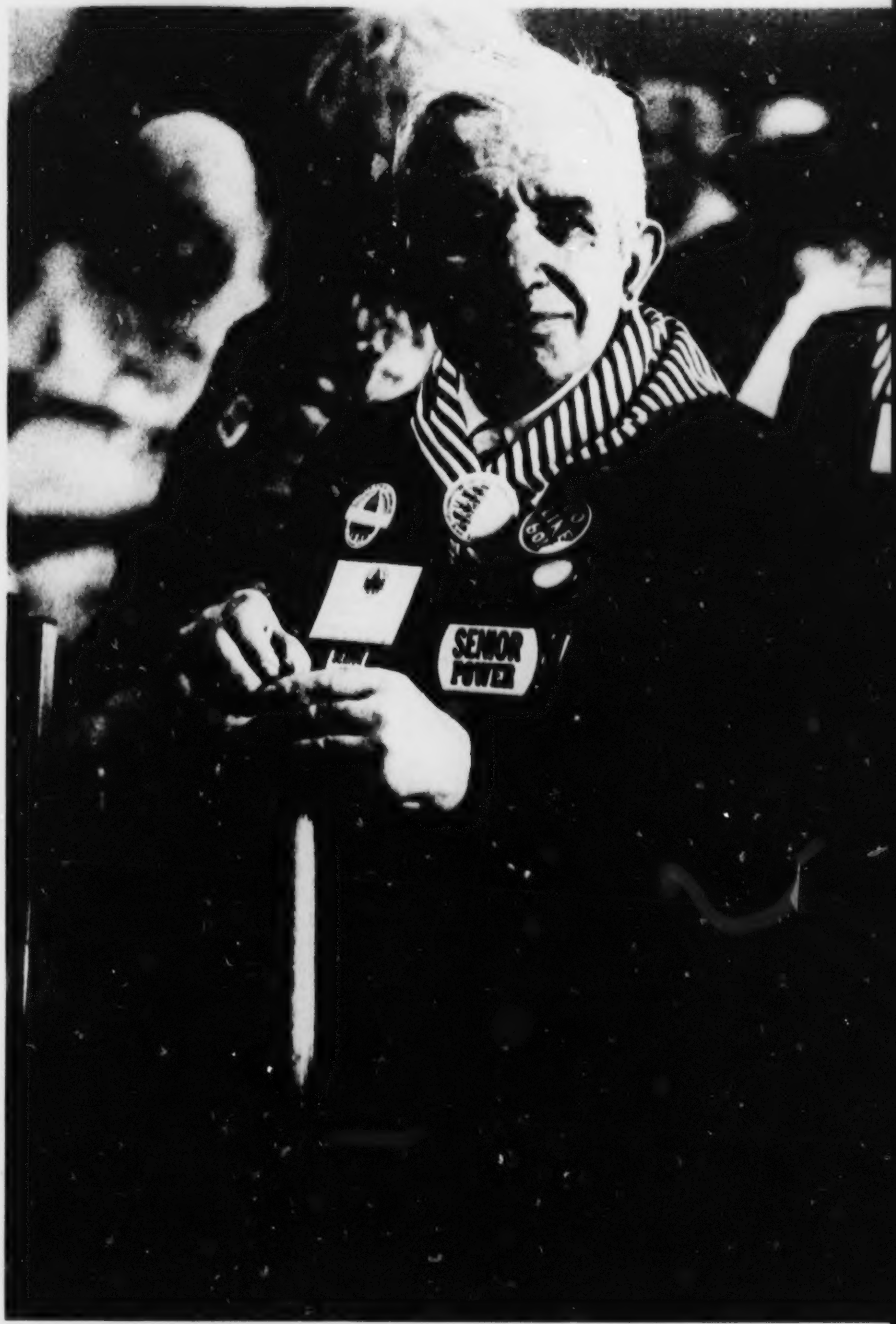
The Court has delivered relatively few full opinions thus far. Those of major interest for law-related educators are provided in this section of *Update*.

Retirement Plan Upheld

Many older Americans dread retirement and are bitter about retirement policies that force them to stop working at a certain age. Many contend that such requirements discriminate against older people.

Congress agreed. In 1967, it passed the Age Discrimination in Employment Act, which makes it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . " The act further states, however, that employers may continue "a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan," as long as such plans are not a subterfuge to evade the purposes of the act, and as long as such plans do not provide a reason to refuse employment to an older person.

Harris S. McMann, who worked for United Air Lines from 1944 until he was forced to retire at age sixty in 1973,



challenged the company's plan as a violation of the act. By a seven to two margin, the Supreme Court rejected his contention, in the case of *United Air Lines v. McMann,* 46 U.S.L.W. 4043 (December 13, 1977).

Seventy year-old Chief Justice Warren Burger delivered the opinion of the Court. After reviewing the legislative history of the act, Burger noted that "we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans . . ." Any attempt to regard the 1941 United plan as "a subterfuge to evade an act passed 26 years later," Burger said, "attributes, at the very least, a remarkable prescience to the employer."

Justices Marshall and Brennan disagreed. Expressing concern for the "unduly narrow interpretation of a Congressional enactment designed to remedy arbitrary discrimination in the workplace," they argued that the legislative history nowhere "permits involuntary retirements." Pointing to the explicit language of the act, the dissent also noted the "anomaly that results" from the majority's opinion, since the person who has retired could on the following day apply for the vacant position and could not be denied the job because of his age. Finally, they pointed out that "the mischief the Court fashions today may be shortlived."

This last observation was based on the fact that Congress is currently discussing amendments to the Age Discrimination in Employment Act. Both the Senate and House have already passed legislation which may bar forced retirement for those under seventy, and in late January, a Senate-House Conference Committee will meet to work out the differences between the two bills. The Court's decision in the *McMann* case may well speed that process.

Women Workers Win a Victory

Last year, those advocating equal rights for women workers suffered a major setback when the Supreme Court held that General Electric's policy of denying sick-leave benefits to pregnant workers did not violate Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating on the basis of sex. Writing for the six judge majority in the case of *General Electric Company v. Gilbert* (429 U.S. 125), Justice Rehnquist explained that the General Electric plan was "nothing more than an insurance package, which covers some risks but excludes others."

In *Nashville Gas Company v. Satty,* 46 U.S.L.W. 4027 (December 6, 1977), the Court was confronted with a similar fact situation. Nashville Gas required pregnant employees to take formal leaves of absence 25 days before the expected childbirth and did not provide sick pay to these employees while on pregnancy leave. In addition, however, employees lost all accumulated job seniority during that time and, as a result, needed to reapply for employment when they were ready to return to work. The case thereby offered the Court the opportunity to extend, modify, or clarify its decision in *Gilbert.*

The dissenters pointed out that "the mischief the Court fashions today may be shortlived"

As in *Gilbert,* Justice Rehnquist delivered the opinion of the Court. "On its face, [the company's] policy appears to be neutral in its treatment of male and female employees," Rehnquist wrote. "If an employee is forced to take a leave of absence from his job because of disease or any disability," Rehnquist explained, "the employee, whether male or female, retains accumulated seniority and indeed continues to accrue seniority while on leave. If the employee takes a leave of absence for any other reason, including pregnancy, accumulated seniority is divested." Rehnquist recognized, however, that policies "neutral on their face, but having a discriminatory effect may run afoul of [Title VII]."

Drawing a distinction between benefits and burdens, Rehnquist argued that while no evidence was produced to suggest that men received more disability benefits than women, Nashville Gas's seniority policy "has imposed on women a substantial burden that men need not suffer." Since there was "no proof of any business necessity" advanced to justify the seniority policy in question, the Court found against the company.

In what might be a considerable understatement, Justice Stevens pointed out in a concurring opinion that the Court's explanation of the legal distinction between the sick-pay and seniority policies "may engender some confusion." He offered an alternative approach: "although some discrimination against pregnancy—as compared with other physical disabilities—is permissible, discrimination against pregnant or formerly pregnant employees is not." To put it another way, Stevens said, "the distinction depends upon whether the employer has a policy which adversely affects a woman beyond the term of her pregnancy."

Whatever rationale is applied, it seems clear that the Court, while willing to allow companies to draw distinctions in cases of sick-leave pay, was not willing to do so when loss of employment would occur. A holding permitting loss of employment would provide companies with a lawful means of violating the Civil Rights Act, a result clearly contrary to the intent of Congress.

Another dimension of the case not addressed because Nora Satty did not appeal the issue, is whether the company had any right to force her to take pregnancy leave 25 days prior to childbirth. It is a question which will undoubtedly confront the Court head-on in the very near future.

Police May Order Drivers from Car

In the 1960's, "Justices Handcuff Police," "Court Coddles Criminals," and "Impeach Earl Warren" were familiar refrains. During this period, the Court handed down a series of controversial decisions protecting the rights of those suspected or accused of committing crimes. To put it gently, these were not greeted enthusiastically in many quarters.

In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Court held that indigent defendants had the right to counsel in all felony cases, not only for capital offenses as had previously been the rule. Nine years later, this ruling was extended to include any offense which could result in imprisonment for the accused. In 1964, as a result of *Malloy v. Hogan,* 378 U.S. 1, the Fifth Amendment protection against self-incrimination was held applicable to state as well as federal proceedings. In *Escobedo v. Illinois,* 378 U.S. 478 (1964), and the more famous *Miranda v. Arizona,* 384

U.S. 436 (1966), the Court by narrow 5-4 decisions imposed upon the police the affirmative obligation to inform suspects of their constitutional rights.

Perhaps the most controversial and least understood decisions involved the "exclusionary rule," which prevents the prosecution from introducing evidence secured in violation of the Fourth Amendment protection against "unreasonable searches and seizures." Under the rule, even evidence which clearly proves the accused's guilt can not be used at his trial if law enforcement officers secured it unlawfully. Justice Thomas C. Clark, writing for the Court in the case which extended this rule to state proceedings, (*Mapp v. Ohio*, 367 U.S. 643 [1961]), succinctly explained the rationale for this rule: "Nothing can destroy a government more quickly than its failure to observe its own laws . . . "

In recent years, the Burger Court has handed down a series of decisions modifying the impact of these and other Warren Court rulings. This trend continued in the case of *Commonwealth of Pennsylvania v. Mimms*, 46 U.S.L.W. 3369 (December 5, 1977), in which the Court significantly expanded police search and seizure powers.

The case involved Harry Mimms, who was stopped by two Philadelphia police officers for driving an automobile with an expired license plate. One of the officers asked Mimms to step out of the car. After he did so, the officer, noticing a large bulge that might be a weapon, frisked Mimms and found a loaded .38 caliber revolver in his waistband. Mimms was arrested and later convicted for carrying a firearm without a license. He appealed, claiming that the seizure was illegal and the evidence inadmissible.

Did ordering the driver to get out of the car result in a seizure contrary to the Fourth and Fourteenth Amendments? The Court, in a per curiam decision, ruled that it did not. The decision said that "establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault." Indeed, the decision continued, it appears "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." The Court did not feel that this ruling placed a serious burden upon the driver, since he is "being asked to expose to view very little more of his person than is already exposed."

Three justices—Brennan, Marshall, and Stevens—sharply dissented from the majority opinion. Noting that full arguments were not even presented in the case, they said it was "most disturbing" that the announcement of a major development in Fourth Amendment jurisprudence had been handed down "almost casually."

"Until today the law applicable to seizures of a person has required individualized inquiry into the reason for each intrusion, or some comparable guarantee against arbitrary harassment," Stevens wrote. "But to eliminate any requirements that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits."

Stevens also questioned the rationale of the decision, pointing out that "the Court has based its legal ruling on a factual assumption about police safety that is dubious at best." In support of his argument, Stevens pointed out that 1977 FBI statistics indicate that an average of eleven police officers have been murdered during "traffic pursuits and stops" in each of the past ten years, "but it is not clear how many of those pursuits and stops involved offenses such as reckless or high speed driving, rather than offenses such as driving on an expired license, or how often the shootings would have been avoided by ordering the driver to dismount." Furthermore, Stevens noted that many police authorities recommend that the violator should never be allowed to leave the car, since this could actually increase the danger to officers.

Tainted Identification

Shortly after noon on December 14, 1967, a Chicago woman was awakened from a nap to find a man standing nearby, armed with a knife. After

throwing her back down on the bed and choking her until she was quiet, the intruder covered his face with a bandana and raped her. The woman, who saw the man's face for only ten to fifteen seconds, told police that while she didn't know her assailant, she thought he was the man who had made offensive remarks to her the evening before in a neighborhood bar.

The woman reviewed hundreds of police photos the following week and finally narrowed the possibilities to two or three men, one of whom was James Raymond Moore. Other evidence also implicated Moore.

On December 20, Moore was arrested, and the next morning he appeared before the judge. The woman was also present at the hearing, accompanied by a policeman who had told her she was going to view a suspect and identify him if she could. She also had signed a complaint provided by the policeman that named Moore as her assailant.

At the hearing, Moore was called before the bench and charged with rape. The State's Attorney then reviewed the evidence linking Moore with the crime and asked the woman whether she saw her assailant in the courtroom. She pointed at Moore.

Moore was subsequently tried and convicted of the crime. His attorney challenged the identification process, because it had been done in a way which implied Moore's guilt, and done when he was not represented by counsel. The trial and appellate courts rejected this challenge, but the Supreme Court reversed their rulings in the case of *Moore v. Illinois*, 46 U.S.L.W. 4050 (December 13, 1977).

Speaking for a unanimous Court (Justice Stevens not participating), Justice Powell reviewed Court holdings in this area: "The Court in *United States v. Wade* [388 U.S. 218 (1967)], emphasized the dangers inherent in a pre-trial identification conducted in the absence of counsel. Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion . . . can lead a witness to make a mistaken identification. The witness then will be predisposed to adhere to this identification in subsequent testimony at trial." He then noted that "it is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case." The Court also suggested that the short time the woman had to see her attacker may not have been sufficient for a later positive identification.

Justice Blackmun, while concurring in the judgment of the Court, disassociated himself from the implication "that there is something insignificant or unreliable about a rape victim's observation during the crime of the facial features of her assailant when that observation lasts only 'ten to fifteen seconds' . . . I therefore cannot be a party to the Court's degradation, and almost literal dismissal, of so vital an observation."

Although the Court ruled the identification unconstitutional, this does not mean that Moore goes free. Rather, he faces the prospect of a re-trial consistent with the Court's holding. The state, if it decides to re-try the case, must then either establish that the identification would have occurred even if the episode had been handled free from suggestive factors, or must prove Moore's guilt without using the woman's pretrial identification as evidence.

ABOUT THE LAW

TEACHING ABOUT THE LAW,
A GUIDE TO SECONDARY & ELEMENTARY SCHOOL INSTRUCTION
(abridged, paper edition)
by Ronald A. Gerlach & Lynne W. Lamprecht
is scheduled for release in March, 1978 from
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From Classroom to Courtroom: The Mock Trial

Perry Mason move over—students throughout the country are waging exciting courtroom battles and learning about law and legal processes at the same time

Lee Arbetman and Ed O'Brien

Across the country, exercises are going on that look like trials, that deal with real facts and common situations, that feature judges, lawyers, witnesses, and jurors. Everything is as realistic as possible—except that the participants are youngsters who are learning about law and the legal system through a simulation known as the mock trial.

In many mock trials, students playing lawyers do so well that they could almost pass for the real thing. Judge Harold Greene, a District of Columbia jurist who has presided at many mock trials, says that some high school students perform better in these exercises than do attorneys in his courtroom. In other simulations, students playing lawyers work under the same constraints as real lawyers—having, for example, no more than 30 minutes to prepare for trial—and still manage a creditable job.

Why is it that the trial—something which for years was considered solely the province of the legal profession—is suddenly becoming a popularly accepted educational experience for non-lawyers?

Part of the mock trial's appeal lies in the fun involved in preparing for and participating in the simulated tiral. Who doesn't want to become—if only for a brief time—a Perry Mason or a distinguished judge or the aggrieved plaintiff demanding justice? While television depiction of trials often distorts the reality of legal procedures, the courtroom drama which comes into our living rooms several times each week surely heightens the mock trial experience for students.

Rationale for Mock Trials

Mock trials are more than fun, however; they're first and foremost invaluable learning experiences. Participation in and analysis of mock trials provides students with an insider's perspective from which to learn about courtroom procedures. Mock trials help students gain a basic understanding of the legal mechanism through which society chooses to resolve many of its disputes. And while obtaining this knowledge, students develop useful questioning, critical thinking, and oral advocacy skills, as well as significant insight into the area of law in question.

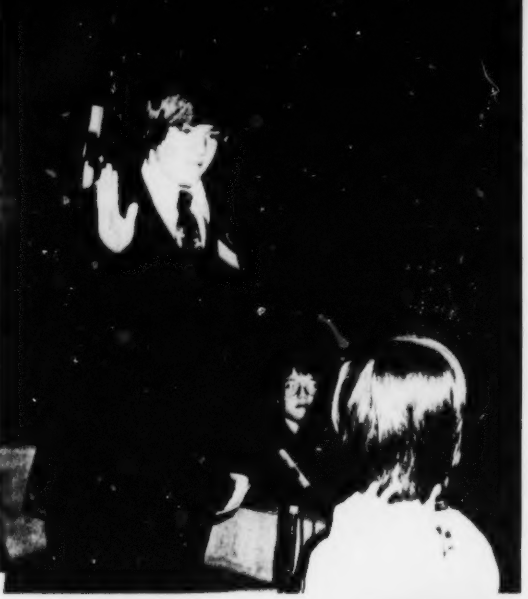
Participation in mock trials can help students better understand the roles which the various actors play in the justice system, including the difficult conflicts those persons must resolve daily in performing their jobs. On a more complex level, it is an excellent vehicle for the study of fundamental law-related concepts such as authority and fairness.

The mock trial also provides a natural opportunity to incorporate field experiences and community resource persons into the law-related curriculum. Visits to local courts either prior to or after classroom mock trials will make the activity a more meaningful learning experience. Inviting judges, attorneys, and law students to take part in mock trials not only helps students bridge the gap between simulated activity and reality but also gives them more empathy for these resource persons and enables them to ask thoughtful and direct questions—and it gives the resource people a natural vehicle for sharing their knowledge and experience. Finally, mock trials will give students some practical knowledge about courts and trials which can be invaluable should they ever be witnesses in a real trial or principals in a legal action.

Types of Mock Trials

The mock trial begins where actual trials begin—with a conflict or dispute which the parties have been unable to resolve on their own. Mock trials may draw upon historical events, trials of contemporary interest, school and/or classroom situations, or hypothetical fact patterns. Most mock trials use some general rules of evidence and procedure, an explanation of the basic facts, and brief statements for each witness (see box on pp. 46 and 47 for a sample criminal law mock trial from the Street Law curriculum). Other mock trial formats range from free-wheeling activities where rules are created by the student participants (sometimes on the spot) and no scripts are used, to serious attempts to simulate the trial process based on simplified rules of evidence and procedure, to dramatic reenactments of historical trials in which scripts are heavily relied upon.

Ed O'Brien and Lee Arbetman, both attorneys and former classroom teachers, are currently on the staff of the National Street Law Institute in Washington, D.C.



The format chosen depends, of course, upon the objectives which the teacher has established for the activity. But regardless of how mock trials are used, teachers often feel that training would help them feel more comfortable with this strategy in the classroom. For this reason a number of law-related teacher training programs have included mock trials in their courses or summer institutes. Many teacher education programs are described in the ABA's *Teaching Teachers About Law: A Guide to Law-Related Teacher Education Programs* (available for $2.00), and a complete list of summer teacher education programs is provided free of charge by the ABA each spring. (Write YEFC, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.) Training sessions provided by these programs explore the rationale for using mock trials in the classroom, explain simplified rules of evidence and procedure, and offer teachers an opportunity to prepare for and "walk-through" a mock trial under the supervision of group leaders.

Not surprisingly, when law students are involved in law-related programs, the mock trial is frequently used. In this format the teacher doesn't have to locate additional community resources; law students have an excellent learning experience as they teach trial procedure to high school students; and high school students benefit from being exposed to knowledgable resource people who happen to be close to them in age. We have information on law student programs around the country. Please write us at the address listed at the end of the article.

Training and community resources are a big help, but they're not essential. You can still begin to conduct mock trials with your students by following the basic steps we've outlined here and by doing further reading or becoming familiar with some of the commercially-prepared materials on the market. (See the bibliography on the facing page for some suggested resources.)

How to Prepare for and Conduct Mock Trials in the Classroom

After teaching about the purpose of trials and the procedure involved, we suggest the following:

a) Distribute mock trial materials to the students. The facts and basic law involved should be discussed with the entire class. Teachers may develop fact

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patterns and witness statements (e.g., brief summaries of each witness' testimony), have students develop them, or use already published trial materials.

b) Try to match the trial to the skills and sophistication of your students. For example, if your students are unfamiliar with mock trials, you probably should begin with a simple exercise like the one we've provided on pages 46-47, *State v. Randall.* This case is based on a minor altercation, and it's very unlikely that an incident of this sort would actually go to trial, but that doesn't make it any less valuable as a learning device. Remember that the aim of mock trials isn't always to imitate reality, but rather to create a learning experience for students. Just as those learning piano begin with simple exercises, so those learning mock trials can begin simply and work up to cases which more closely approach the drama and substantive dimensions of the real thing.

c) Students should be selected to play attorneys and witnesses, and then groups formed to assist each witness and attorney prepare for trial. For example, *State v. Randall* could easily involve the entire class. The tasks for the prosecution team, in order of presentation at the trial are: opening statement, direct examination of James, direct examination of Arlene, cross-examination of Phillip, cross-examination of Randall, and the closing statement. Tasks for the defense team are: opening statement, cross-examination of James, cross-examination of Arlene, direct examination of Phillip, direct examination of Randall, and the closing statement. In addition, four students are needed as witnesses and twelve students can serve as the jury. Such a division of tasks directly involves approximately two dozen students, and others can be used as bailiff, court reporter, judge, and as possible replacements for participants, especially witnesses, in the event of an unexpected absence. Still other students may serve as radio, television or newspaper reporters who observe the trial and then "file" their reports by making a presentation to the class in the form of an article or editorial following the trial.

d) Students work in the above mentioned task-groups in class for one or more class periods, with the assistance of the teacher and an attorney or law student. During this preparation time, jurors might explore the role of the jury, the historical development of the

(Continued on page 47)

Mock Trial Materials

There are a number of books and games that can help you conduct successful mock trials:

ABA Special Committee on Youth Education for Citizenship, *Gaming: An Annotated Catalogue of Law-Related Games and Simulations,* 1975. This catalogue describes a number of simulation games relating to trials, including information on cost and addresses for ordering. Teacher Resource. The cost is $1.00; order from YEFC, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.

Todd Clark, et al., *Kids in Crisis,* 1975. This simulation game focuses on how a juvenile court makes its sentencing decisions in delinquency, neglect, and child abuse cases. Secondary. The cost for a class set is $32.50; order from Social Studies School Service, 10,000 Culver Blvd., Culver City, California 90230.

Arlene Gallagher and Elliot Hartstein, "Pro Se Court: A Simulation Game," 1973. This game, included in a special children's issue of the *Law in American Society Journal,* couples role-playing and decision making in the legal context of small claims court. Elemenary. The cost is $2.75. Order the May, 1973 issue of *Law in American Society Journal* (Volume II, Number II) from Law in American Society Foundation, 33 North LaSalle Street, Suite 1700, Chicago, Illinois 60602.

Ronald A. Gerlach and Lynne W. Lamprecht, *Teaching About the Law,* 1975. Chapter 9 of this methods text contains a full discussion of mock trials and moot courts, as well as samples of each exercise. Teacher Resource. The cost is $9.95; order from W. H. Anderson Co., 646 Main Street, Cincinnati, Ohio 45201.

Ethan Katsh, et al., *Plea Bargaining: A Game of Criminal Justice,* 1974. A game designed to help students experience the pressure of overcrowded city dockets and learn about the justice and injustice of plea bargaining. Secondary. The cost is $17.50 for 18 student kits, $25.00 for 35 student kits; order from Simile II, 1150 Silverado, P.O. Box 1023, LaJolla, California 82037.

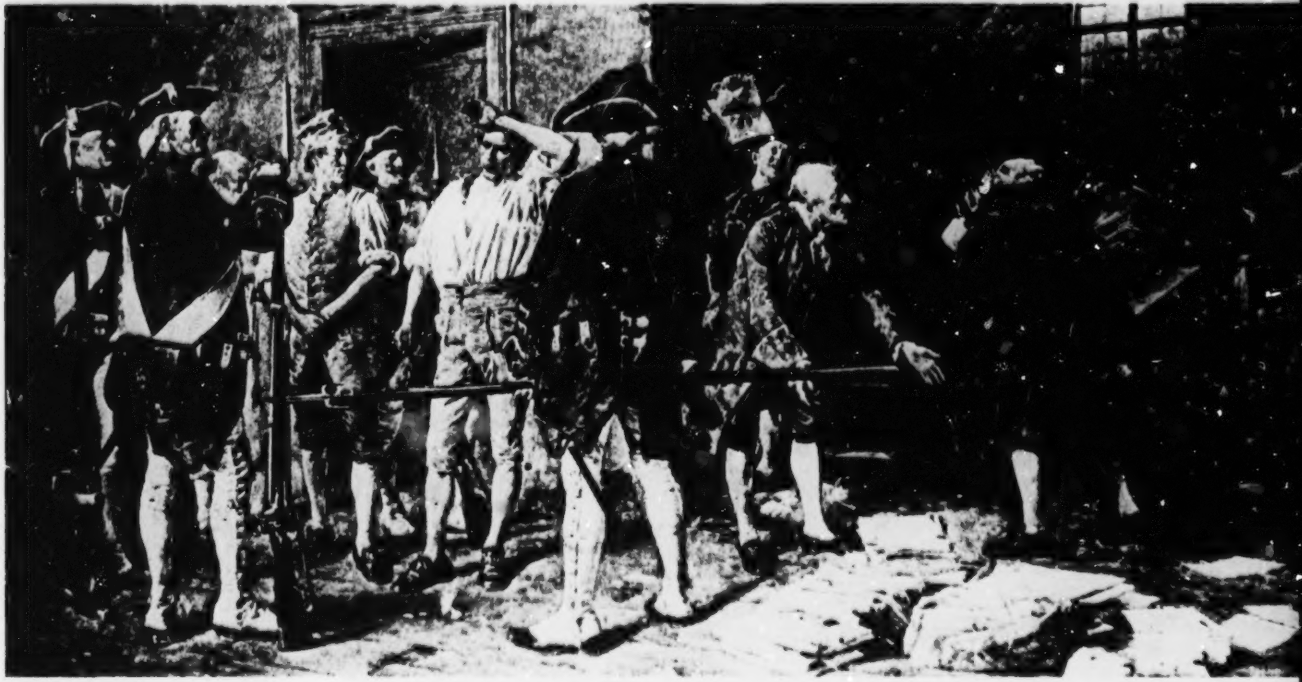
Law in a Changing Society, *Upper Elementary Program,* 1978. This comprehensive program for upper elementary students contains many activities and materials relating to jury selection and mock trials. For information on its cost, please contact Jim Miller, Education Service Center 13, 7703 N. Lamar, Austin, Texas 78752.

National Street Law Institute, *Street Law, A Course in Practical Law,* 1975. The teacher's manual to this text includes directions on how to do mock trials and contains sample trials with witness statements in seven areas of law. Secondary. The cost is $5.95 a copy for one to nine copies, $5.50 apiece for ten to ninety-nine copies; order from West Publishing Co., 170 Old Country Road, Mineola, New York 11501.

New York State Bar Association Committee on Citizenship Education, *Mock Trial Manual,* 1975. A booklet designed to help secondary school teachers prepare and present mock trials for civil cases, criminal cases, and appeals. It includes one sample script and follow-up questions. Teacher Resource. Single copies are free to New York residents; order from the New York State Bar Association, One Elk Street, Albany, N.Y. 12207.

Robert H. Ratcliffe (ed.), *Great Cases of the Supreme Court* and *Vital Issues of the Constitution* (both 1975). Each of these books contains a mock trial and trial script. *Great Cases* is intended for seventh and eighth graders, *Vital Issues* for high school students. The faculty editions of *Great Cases* and *Vital Issues* cost $2.43 apiece; the student edition of *Great Cases* is $3.24, the student edition of *Vital Issues* $3.60. Order from Houghton Mifflin Company, Dept. M, One Beacon Street, Boston, Massachusetts 02107.

Richard Weintraub, et al., *The Jury Game,* 1974. In this game, students play roles of justice system personnel and citizens involved in the pretrial jury selection process. Secondary. The cost is $15.00 for a class set ($22.50 for sets containing eight-page players' booklets); order from Social Studies School Service, 10,000 Culver Blvd., Culver City, California 90230.



The Struggle for a Free Press

Journalists had to fight hard, but eventually free press prevailed

Cynthia A. Kelly

Bob Woodward and Carl Bernstein would have had a tough time as journalists in Colonial America. The concept of freedom of press as we know it today did not exist for most of the colonial period. While government officials today would be very surprised if reporters didn't keep an eye on them, colonial rulers expected that newspaper people would treat them with respect and would not rock the boat. For example, government authorities suppressed the colonies' first newspaper, *Publick Occurrences*, after just one issue. Exactly how did we progress from press censorship to watchdog reporters like Woodward and Bernstein?

Cynthia A. Kelly is a lawyer who is seeking her doctorate in education at Northwestern University. She is a former Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

When the colonists came to America, they inherited the common-law restrictions on the press which existed in England. In the sixteenth and seventeenth centuries, criticism of the king or of the English government was a crime known as "seditious libel." Such attacks upon the king, his ministers, or their policies subjected the publishers to criminal prosecution. And this law was enforced. For example, in one thirty-year period there were over seventy prosecutions for seditious libel. In addition, all books and papers had to be registered with the Stationers' Company, a government-created monopoly, and submitted to an official licensor before publication.

In 1683, the king gave licensing power to the governors he had appointed to rule over the American colonies. He reasoned that "great inconvenience may arise by the liberty of printing," and gave governors the right to ban any publication that hadn't been previously licensed. Just as in England, all writers had to submit their materials for approval before publication.

It was this power which was used to suppress the first newspaper. On September 25, 1690, Benjamin Harris published *Publick Occurrences* in Boston without government permission. The major story of the first and only issue described an attack on the French in Canada, and Harris charged that someone persuaded the Indians, who were supposed to be part of the war party, not to show up at the last minute. In addition, he included an article describing a scandal in the French court, in which the king was said to have seduced his daughter-in-law.

By publishing these stories, Harris succeeded in outraging both the Puritan clergy and the government authorities. The governor of Massachusetts therefore issued an order suppressing the paper on the grounds that it had been published without a license. It was to be ten years before anyone was to attempt to publish another newspaper.

Obviously, the legal restrictions made it hard for would-be publishers, but there were indirect pressures operating to restrict freedom of the press. Because much of the population was illiterate, a publisher was never sure his paper would sell enough copies to be a commercial success. Most publishers were forced to supplement their income by serving as printers for the government, and their economic dependence on the authorities naturally led to a less critical style of reporting.

In addition, government authorities controlled the postal system. Each newspaper was forced to make an individual arrangement with the postmaster general in order to assure its distribution. Typically, the postmaster general set high rates or delayed distribution of those periodicals he did not like for one reason or another.

As a result of these limitations, the two newspapers established in Boston in the early 1700's mostly consisted of official and commercial news. Both were sanctioned by government authorities and were careful to steer clear of trouble.

In 1721, however, James Franklin began the *New England Courant*, a newspaper which was to play a key role in shaping the definition of freedom of the press. James Franklin, elder brother of Ben, wanted to include articles about current issues and personalities. He asked his literary friends to furnish him with short pieces "serious, sarcastic, ludicrous or otherwise amusing." In short, Franklin's newspaper offered citizens the chance to criticize the political and religious establishment.

Franklin may have been encouraged to begin the newspaper because of a change in the law the previous year. A dispute had arisen between the assembly and governor, with the assembly wanting its views printed publicly for all the colonists to read. When the governor refused, the assembly informed him that he no longer had any licensing authority, since the king had been stripped of such power by Parliament. When the governor responded by asking the assembly to pass a new licensing law, it refused.

The *Courant* was controversial from the beginning. It immediately launched an attack against two of the most powerful leaders of the Puritan clergy: Increase and Cotton Mather. Boston was in the midst of a smallpox epidemic and the Mathers advocated inoculation to control the spread of the disease. The *Courant* began a crusade against their "unscientific" views.

Unfortunately for the Mathers, the governor no longer had the licensing power, so the paper could not be summarily shut down. Even though the *Courant* was spared the fate of *Publick Occurrences*, however, Franklin was not out of danger. The seditious libel law was still in effect, and the governor could prosecute after publication for violation of this law.

It was inevitable that Franklin would eventually clash directly with government officials, and in the summer of 1722 it happened. He published an article which attacked Governor Shute himself for not acting vigorously to capture a pirate vessel preying on New England shipping. Since shipping was essential to Boston's economy, Franklin's charge was serious.

The governor responded by ordering Franklin to refrain from seditious libel and calling him before the General Court, which proceeded to throw him in jail for his high affront. Franklin remained in jail until the General Court adjourned three weeks later. Although he apologized for printing deprecatory comments about the governor, he resumed his attacks on the political and religious establishment as soon as he was released. He complained about the governor's absences, noted the amazingly large number of religious hypocrites in the community, and even published a satirical piece on the General Court for imprisoning him.

It was inevitable that Franklin would eventually clash with government officials, and in the summer of 1722 it happened

This was more than those in power could tolerate. The General Court therefore issued an order declaring that Franklin be strictly forbidden from printing the *Courant* or any publication of a like nature, unless the publication was first reviewed by the secretary of the province. This constituted a bold attempt to reestablish the old licensing power. Had it succeeded, our concept of freedom of the press might have evolved quite differently.

Franklin tried to sidestep this order by publishing another issue of the *Courant* with his brother's name as publisher. The authorities saw through the subterfuge and tried to act against Franklin, but the grand jury refused to indict him for contempt of court for publishing without receiving permission. Apparently the grand jury, composed of citizens from all walks of life, simply did not think that Franklin should be punished for publishing his opinions. Frustrated in their attempt to indict Franklin, the government authorities gave up, and Franklin proceeded to publish the *Courant* without interference.

The *Courant* case was thus significant in developing a free press in America. First of all, it established the concept, later to be upheld by the United States Supreme Court in its interpretation of the First Amendment, that government authorities could not censor prior to publication. The *Courant* case is thus a landmark in the struggle against press licensing. Secondly, and perhaps even more importantly, the case established that the authorities were not all-powerful, but rather could fail in the face of public opposition. When the grand jury refused to indict Franklin, they were in effect endorsing the concept of a vigorous, independent press, responsible to its readers and not to government officials.

Thus the *Courant* case and the more famous *Zenger* case—the 1734 New York ruling which protected publishers from conviction for seditious libel if they could prove that the allegations they had published were true—spelled the beginning of the end for government authority over newspapers, and prepared the way for free press as we know it. ☐

Free Press v. Fair Trial in Japan

One of the world's newest democracies tackles an old problem—with surprising results

John E. Walsh

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At first glance, Japanese guarantees of fair trial and free press may seem strikingly similar to our own. Article 21 of Chapter III of the Japanese Constitution states: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed." Article 37 of the same chapter states in part: "In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal." The Japanese, however, have a culture and a legal system very different from ours, and the way they confront the conflicts which arise between freedom of the press and fair trial may convey important lessons for us.

Japan differs from the United States and other common law countries, for example, in that it does not have a jury system. This means that in its effort to strike a balance between free press and fair trial, Japan does not have to worry about prospective jurors having reached their own verdicts in advance of the trial on the basis of reports in the news media.

In Japan, all cases are tried by judges, either a single judge or a collegate panel of judges. The Japanese judge has four duties: keeping order in the court and presiding over the trial; determining the facts in the case; applying the appropriate standards of guilt or innocence; and setting the penalty, if any. The question of free press - fair trial in Japan thus boils down to one of keeping judges themselves free from contamination by the news media.

Three Guidelines

Freedom of the press in Japan is interpreted literally and liberally. And although the Japanese press is probably freer than the press in any other country, and the Japanese people—including, of course, their judges—may be the world's most avid readers of the daily press, there are at least three Japanese "ways of doing things" that make it possible for Japan to maintain a relatively full freedom of the press on the one hand and to assure a high probability of a fair trial on the other.

Two of these guidelines have to do with the role of the judges in conducting criminal cases and in the administration of justice. The third has to do with the press itself.

Stated somewhat awkwardly, the first guideline is that the judge is supposed to be the last person to learn the truth of any case. As a recent article explained "the rule which requires the judge to be free from any bias or prejudice forbids him to have access to any evidence until it is introduced properly in the course of the trial. He must listen to the oral testimony of the witnesses and the reading of written documents as they are presented and gradually reach his own conclusions." (Atushi Nagashima, assisted by B. J. George, Jr., "The Accused and Society: The Administration of Criminal Justice in Japan," in *Law in Japan*, edited by Arthur Taylor von Mehren [Cambridge, Massachusetts.

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Harvard University Press, 1963]).

Two points of judicial responsibility follow from the guideline that the judge should be the last person to learn the truth of a case. First, judges who think they might be biased or prejudiced or who foresee a possible conflict of interest in a given case are expected to excuse themselves from hearing that case. A judge, knowing himself or herself to be incapable of conducting an impartial tribunal, would in effect be acting unconstitutionally in hearing such a case. Second, judges who take on a particular trial have a moral duty to decide the case on the evidence—and only on the evidence—presented during the hearings. As a corollary of this guideline, judges are very active participants in trials in Japan. They may, for example, summon witnesses at their own discretion and even suggest further evidence that should be submitted. A trial judge may permit or order the prosecution to add, withdraw, or change the charge in the case.

The second guideline might be called simply the standard of judicial competence. Judges, by reason of their training and experience, are presumed to know the difference between facts and such things as rumors, guesses, opinions or possibilities. The assumption is that no matter what the judge might read in the press or hear on television, he or she will be persuaded only by the facts or "the truth." To quote from the Nagashima article, "It is generally thought in Japan that the trial judge is not only an impartial umpire of the trial but also a personification of justice, in that he is able to discern the true from the false so as to convict the real offender and discharge the innocent." Japanese judges on the whole take great pride in their profession and they are recognized in Japan and elsewhere in the world for the thoroughness and care with which they examine all evidence pertaining to a case.

This second guideline gives rise to a most interesting contrast regarding the "hearsay rule" in Japanese and in Anglo-Saxon jurisprudence. (The "hearsay rule" prohibits the introduction of second-hand evidence, as distinguished from original evidence. For example, a witness can testify about what he or she heard the defendant say, but cannot testify about what another person said the defendant said. In general, only a person who was actually there can testify as to what was said.)

No one disputes that the Japanese Constitution forbids introducing hearsay evidence, but in Japan this prohibition is interpreted very broadly. Japanese judges will frequently admit hearsay evidence if they think it will help them get to the truth. Judges in America tend to interpret the hearsay rule much more strictly in order to make sure that the lay jurors are not misled by something that is merely hearsay.

The third broad guideline governing discussions of free press - fair trial in Japan is that a free press itself has a corresponding duty to be a responsible press. At a minimum this guideline means that the press itself should recognize the right of persons accused of a crime to a fair and impartial trial and should not report things in a way that might make a fair trial impossible. As has been suggested, the need for restraint on the part of the press in fulfilling the "public's right to know" is somewhat less in a country without a jury system, but some restraint is still necessary. Prior censorship under any democratic constitution would be intolerable, so the responsibility for whatever restraint is needed must rest with the members of the communications profession themselves. Both judges and journalists tend to take their professional responsibilities very seriously in Japan.

Some Actual Cases

To get a feeling for the free press—fair trial issue in Japan it is helpful to go back to a case already decided. This case, known as the Hakata Station TV News Film Seizure case, is highly important although it was decided by Japan's Supreme Court almost ten years ago.* It is complicated—arising out of an incident in which police tried to break up a student demonstration against the docking of an American nuclear submarine—and replete with charges and counter-charges. In the end, however, the Japanese Supreme Court had to face the issue of free press - fair trial head on.

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*I am grateful to my friend and colleague, Mr. Takeo Hayakawa of the Faculty of Law of Kobe University, for his exceptionally clear analysis of this case and for his translation into English of the pertinent documents. Readers interested in a copy of his paper, presented at the East-West Culture Learning Institute's Seminar on "Problems of Law and Society: Asia, the Pacific, and the United States," may write to the Director, Materials Resource Collection, East-West Culture Learning Institute, 1776 East-West Road, Honolulu, Hawaii 96822.

The question was whether a court could require a TV station to turn over news films, which it had acquired in the normal process of its work, for use as evidence in a court trial. The press argued that turning over the TV news films would constitute an infringement on freedom of the press. They weren't so much concerned with these particular films as with the principle involved, fearing that a decision in favor of the government would lead to further encroachment and thus inhibit their news gathering activities. The accused argued that since the news films were the only objective evidence available, he could not get a fair trial without them. Put differently, the issue before the Court was whether freedom of the press includes the right to withhold evidence that might be crucial in determining the guilt or innocence of a person accused of criminal conduct.

An inferior court had demanded earlier that the TV news films be turned over for use by either the defense or the prosecution. When the TV stations refused to comply with the court's order, the court had the news films seized and taken into its custody. The Hakata TV News Film Seizure case gets its name in part from the need to determine whether this seizure was constitutional.

The Supreme Court of Japan, in what appears to be one of its most subtle decisions, determined that in free press - fair trial disputes the balance scale of justice can be tipped in either direction, if just perceptably so, depending on the circumstances in individual cases. In other words, free press and fair trial are equal rights, and decisions about which should prevail have to be reached on a case by case basis. The Court further found that since the accused was charged with a serious crime, the right of fair trial took precedence over the right of freedom of the press. The Court was at pains to show that even in this case the restriction on freedom of the press was minimal. It also pointed out that what was involved was a "potential impediment to their freedom of news gathering in the future, not to the freedom of information itself" and concluded that "a detriment to this extent cannot be said to be more than news media can endure in the cause of attaining fairness in criminal justice."

Today in Japan, a case which may result in a new landmark decision on free press - fair trial is underway. Something of a Japanese Watergate, it involves former Prime Minister Tanaka, the leading figure in the so-called Lockheed bribery case. And as with American press coverage of Watergate, the Japanese press covers the Tanaka case very closely. The case thus provides an excellent opportunity for educators and students alike to follow how the Japanese press keeps the public informed and to examine what steps are being taken to insure Mr. Tanaka "a speedy and public trial by an impartial tribunal."

The Japanese Context

It might be helpful to American readers, in concluding, to put the free press - fair trial controversy in Japan in its wider context of Japanese traditions, values, and ways of thinking. The Japanese generally emphasize ethical or moral rather than purely legal solutions to conflicts. This penchant runs very deep in Japanese culture. As Edwin O. Reischauer, former U.S. Ambassador to Japan, has written: ". . . personal feudal obligations in Japan were conceived in moral rather than legal terms, and both authority and loyalty became absolute. There was thus no room for the development of the concepts of inalienable rights, shared authority, and representative bodies, which grew in postfeudal times in the West into the institutions of democracy."

Rather than mechanically or technically placing blame and guilt, the Japanese try to find solutions to disputes that are for the good of all the parties concerned, that are fair and honorable, and that will result in subsequent harmonious personal relationships. Seen in this context, the Supreme Court's decision in the Hakata TV News Film Seizure case takes on deeper meaning. Very significantly, the Supreme Court did not make the bold statement that free press was of somewhat lesser value than fair trial. Rather it called on the news media "to endure" some restraint or "detriment" in order that a fair trial might be held. The whole of society, it implied, would know and applaud the fact that the news media was enduring something less than full freedom for the sake of a higher social good. Conversely, the Court implied that an accused person should not have "to endure" a trial that might be biased either for or against him just to protect the fullest possible reaches of the right of free press.

I should also emphasize the drastic change of political thinking imposed on Japan with the new constitution of May 3, 1947. Prior to this constitution, the people of Japan were taught that all sovereignty was vested in the Emperor. Such rights as the people had were granted by the Emperor and consequently could be taken away by the Emperor or his representatives. As Reischauer suggests, national welfare and social acceptability, rather than the rights of individuals, were the dominant values.

The new democratic constitution inverted this order and vested all sovereignty in the people themselves. Article 1 of Chapter I states: "The Emperor shall be the symbol of the State and of the unity of its people, deriving his position from the will of the people with whom resides sovereign power."

Japan's experience with both the exercise and the protection of fundamental human rights is thus still relatively new. Group solidarity and social and familial ties and obligations remain very strong in Japan. Loyalty to friends and to such institutions as schools, professions, and companies or corporations is highly valued. In stark contrast to the continually escalating number of lawsuits in America, the Japanese turn to the law relatively infrequently, and litigation still involves some loss of face for those who win as well as for those who lose. When their Constitution says "these fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolable rights" (Article 11), it is saying something that has little or no underpinning in traditional Japanese thought.

In this light, it is something of a surprise to non-Japanese observers that both freedom of the press and the right to a fair trial should be as highly treasured as they are in Japan. It may very well be that Japan, as it continues to stress moral, ethical, and aesthetic values within its new jurisprudential framework, will contribute important insights to discussions of free press and fair trial throughout the free world. ☐

NEWSCLIPS

"Marvinizing" New Legal Concept

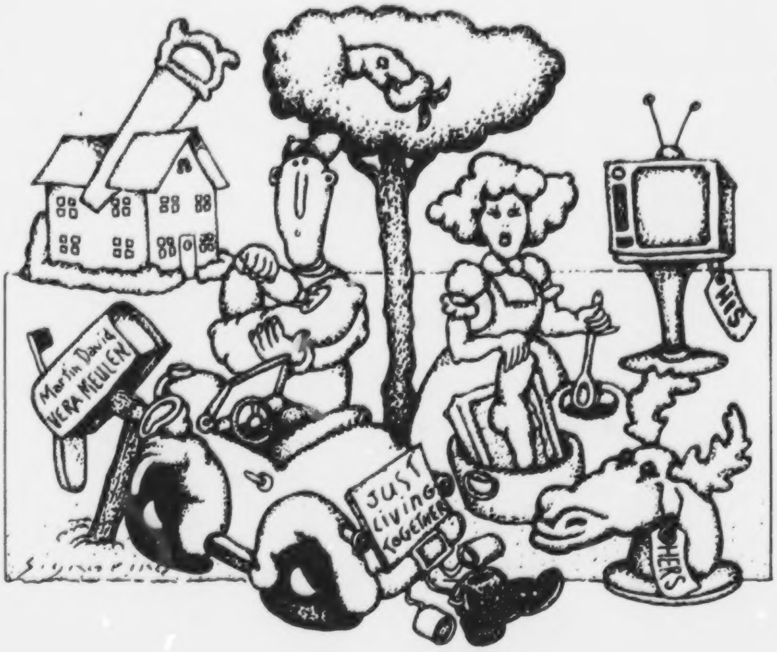
Shifting his leading role from the movie and TV screen to the courts, Lee Marvin was recently involved in a case helped establish that adults who live together and engage in sexual relations without getting married can be held to oral agreements concerning their earnings and property rights. His performance in this California case, however, was less than virtuoso, since it may result in an obligation to pay his leading lady one-half of the property he acquired during their seven years together.

In the process, Marvin may have added a new word to the language. Lawyers are starting to use "Marvinize" as a synonym for "live together" as they seek to sort out the legal ramifications of this evolving new concept.

Some of the cases that have sprung up after Marvin's deal with the same issue Cynthia Lang is suing rock performer Alice Cooper for $7 million, and Swedish actress Britt Eklund is suing British rocker Rod Stewart for half of the estimated $20 million he earned during their two years together.

What about other possible legal tangles of Marvinizing: landlords who won't rent, insurance companies who won't give coverage, and credit companies who won't give credit to live-togethers? According to an article in the December '77 issue of *Student Lawyer* magazine, a publication of the ABA's Law Student Division, suits have been instituted in each of these instances.

The magazine goes on to point out some other legal problems. What about the sixteen states which still have laws on the books against fornication? What's the line between prostitution and seeking a split of the proceeds after living together? Both, after all, may involve sex for money. Finally, what about gays living together, roommates who live together without having sex, or arrangements involving more than two people?



All in all, it looks as if changing morals in America will continue to pose new issues for staid Lady Justice.

On the Job Training

The police have always been at the front lines of our legal system—enforcing the law, apprehending criminals, testifying in court. Within the last decade, the police have also increasingly fought other, unwelcome legal battles. More and more officers have had to defend themselves against civil suits brought by people who claim that the police violated their civil rights. Many of these suits have alleged police brutality.

But now the tables may be turning. The *Christian Science Monitor* reports that police officers themselves are bringing law suits against people who allegedly have assaulted or defamed them. According to Wayne Schmidt, Operating Director of Americans for Effective Law Enforcement, the number of civil suits filed by lawmen has quadrupled in the last three years. In Los Angeles, for example, the Los Angeles Police Protection League has financed about 50 law suits filed by its members during the past five years. Sergeant Sam Flores, a League Board member, explains that such law suits are especially high among young officers who are more cognizant of their rights and unwilling to suffer abuse.

Don't Tell Him About Law-Related Education

On its face, it appeared to be a situation we've all heard about: a white landlord refused to rent a black woman an apartment and she filed suit, alleging discrimination because she was black and single.

Not so, said Manhattan landlord Stanley Stahl, pointing out that blacks occupied 30% of his apartments and singles lived in 60% of his units. His refusal, Stahl explained, was based upon the woman's profession—Judith Pierce was an attorney. Stahl did not want to rent to intelligent persons, aware of their

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☐ Grades 11-12, teacher · Newman, Edwin S. ***Civil Liberty and Civil Rights*** (Legal Almanac Series) Oceana Publications, Inc. (1970). $4.95 / 117 pp. / hardback.
Explains how the law operates to protect freedom of expression, due process rights, civil rights, and the separation of church and state. Appendix includes the Bill of Rights. SBN 379-11071-7

☐ Wincor ***The Law of Contracts***. SBN 379-11068-7

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☐ Sloan ***Environment & The Law***. SBN 379-11077-6

☐ Reitman & Davidson ***The Election Process: Voting Laws & Procedures***. SBN 379-11069-5

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rights, who might give him trouble in the future.

Amazingly enough, the New York State Supreme Court accepted his explanation. Justice Edward Greenfeld noted that although this was a "regrettable" situation, there was no law against such discrimination. "The only restraint which the law has imposed upon the free exercise [of a landlord's discretion] is that he may not use race, creed, color, national origin, sex or marital status as criteria." Greenfeld continued, "He may decide not to rent to singers because they are noisy or not rent to bald-headed men because he has been told they give wild parties."

All of which raises some very interesting scenarios: landlords throughout the country may begin refusing to rent office and apartment space to law firms and lawyers; intelligent people throughout the country may start lobbying for their own equal rights amendment; and an eviction notice may soon be delivered to the Supreme Court.

This also poses a special problem for those of us in law-related education. While we must continue educating students about their rights and responsibilities as tenants, be sure to remind them not to tell the landlord about their course in law-related education.

Office of Education Establishes Law-Related Task Force

In October, the United States Office of Education set up a Study Group on Law-Related Education. The group was charged with reviewing the state of the art of law-related education, exploring the current Office of Education and federal role, and recommending what future action, if any, the federal government should take in support of law-related education.

Heading up the group is Steven Y. Winnick, an attorney in the Office of the General Counsel of HEW. Serving with him are representatives of various OE agencies as well as representatives of the National Institute of Education, Department of Justice, National Endowment for the Humanities, and the Office of the Assistant Secretary for Education.

The group has already held a number of meetings, and current plans call for the submission of a report with recommendations in March. Mr. Winnick has informed *Update* that he welcomes your recommendations on the federal role in law-related education. Write to him at: Office of the General Counsel, Office of Education, 400 Maryland Avenue S.W., Washington, D.C. 20202.

Directory Set for Publication

In February, the third edition of the ABA's *Directory of Law-Related Educational Projects* will be available. Describing over 325 projects throughout the country, it reflects the continuing momentum of the law-related education movement as well as the rich diversity of programs in the field.

of Law-Related Education Projects

Copies are available for $2.00 each from the ABA Special Committee on Youth Education for Citizenship. *Update* subscribers will be receiving free copies of the *Directory* upon its publication.

Some Sound Advice About Lawyers and Law

"A good thing to remember about needing a lawyer is don't."

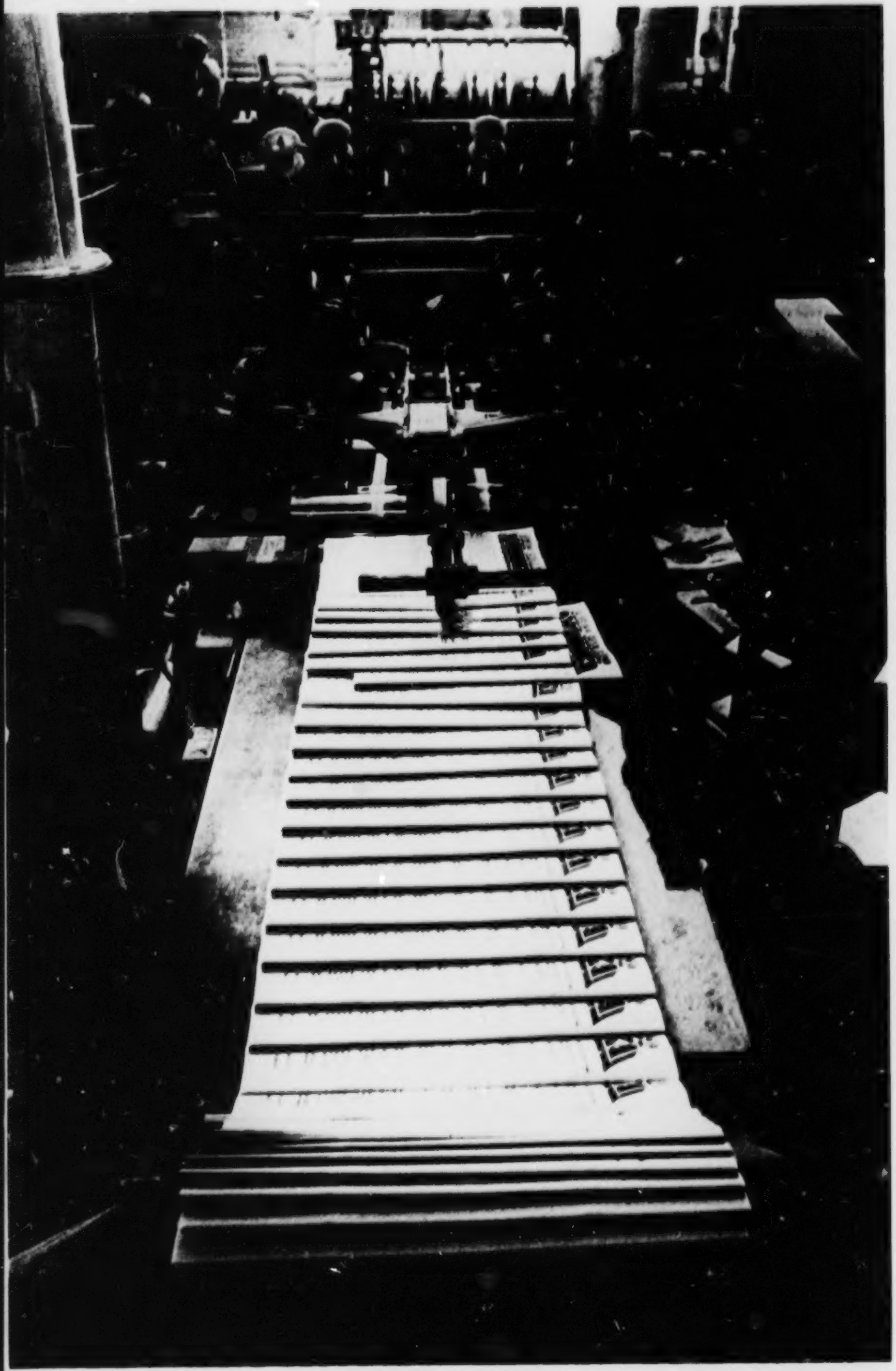
"Things they say in law books are only to look at, and not to understand."

"I looked up what a habeas corpus is twice, but I forgot it three times."

These pearls of wisdom (reported in the ABA Young Lawyer's publication, *Barrister*) came from elementary pupils in St. Louis in response to their teacher's informal poll about the legal profession. The teacher, Ken Wilson, has been conducting such polls for 15 years.

Other gems include: "The Justinian Code is a well-known code few people have ever heard of." And, 'The difference between lawyers now and in the past is today they know not to try to do everything, but to specialize. Like cows give milk, while chickens prefer to lay eggs."

Sounds like they'll make great lawyers. ☐



The Emerging Student Press

Student papers once just covered proms and sports—now they report on sex and other controversial issues

Christopher Fager

Students and teachers are discovering—often under difficult circumstances—that actually experiencing First Amendment/free press problems is one way to learn about constitutional rights. Student journalists today are increasingly willing to deal with such tough issues as drug abuse, adolescent sexuality, and the shortcomings of schools, and to delve deeper into more traditional matters than they have previously done. And the more they get into controversial areas, the more they run the risk of problems with confidentiality of sources, freedom of information, and all the other tangles that bedevil their real-world counterparts.

Some of these tangles lead to long court struggles and costly appeals, resulting in the enunciation of new con-

Christopher Fager, a graduate of Boston University School of Law, is Director of the Student Press Law Center and a practicing attorney in Washington, D.C.

stitutional principles; others are resolved quietly, through negotiation or compromise. Either way, student journalists are learning lessons in democracy which can serve as instructional experiences for the entire student body.

Confidentiality of Information

What does a reporter do when he or she has information about criminal activity and the police demand to have that information? Does the First Amendment protect student reporters from disclosing the sources of their information? Should the First Amendment protect student reporters in this situation?

Students in Eldon, Missouri learned the answer to these questions—the hard way. Working on the school paper, students produced a story entitled: "It's A Problem: Police-Youth Relationship." The article, which discussed animosity between local police and youth, quoted five alleged witnesses to a marijuana arrest as saying that no marijuana was seen or discovered until it fell from the pocket of the arresting officer.

Shortly after the story appeared, the students and their faculty advisor received subpoenas to appear in court and identify their sources for the story. The county prosecutor, who caused the subpoenas to be issued, wanted to learn of any evidence which might show that the police acted improperly. Naturally, the lawyer for the defendant was also interested in this information, for if the story were accurate, and the police had planted the drugs, the defendant would be found not guilty.

What was the obligation of the students and their faculty advisor? To reveal their sources—witnesses who had asked to remain anonymous—would damage their credibility and make it difficult to get confidential information in the future. On the other hand, the U.S. Supreme Court has ruled that in most situations, unless there's a state law to the contrary, reporters must disclose information relating to criminal conduct. (*Branzburg v. Hayes*, 408 U.S. 465 [1972].) And, if the students did not disclose their sources, an innocent person might be convicted for a crime he did not commit.

In response to the subpoena, the students went to the courthouse. By now, the students had an attorney of their own. If they failed to provide the information requested, they could face contempt of court citations and possible jail terms.

Before going before the judge, the students and their teacher met with the prosecutor. Was there some way to settle the matter without a confrontation? If the students would simply give the prosecutor the information, they would be allowed to leave.

The students and teacher gave the prosecutor a firm "no" to this request. According to the teacher: "My students were reporting in good faith. They knew that the people did not want their names disclosed. It was a case of common sense and conscience . . . "

The stage was set for a classic free press/fair trial conflict but, fearing an unproductive confrontation, neither the prosecutor nor the defense lawyer attempted to bring the students before the judge to force disclosure of the information. The prosecutor decided not to prosecute the case, and the defendant was placed on probation.

The students were thus able to maintain the confidentiality of their source. They also learned something about the law governing disclosures—and something about how a conflict may be avoided.

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Students' Right to Know

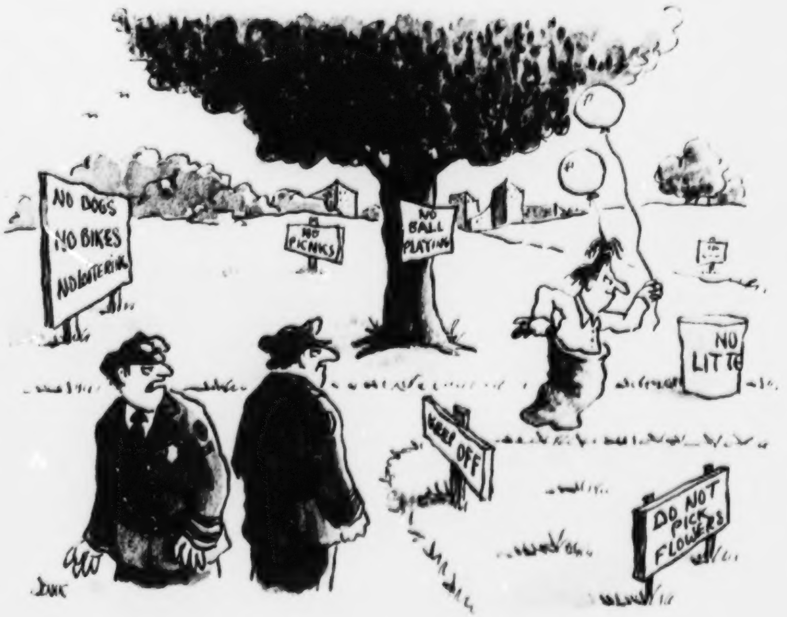
Do student government officials have the right to withhold from students the actual vote counts in a student election? The student government at White Plains (New York) High School believed it had such a right, and it said no to a request from a student editor for the number of votes each candidate had received.

The student editor insisted that the election results "belonged to everyone, especially the students of White Plains High School." Suppression of the vote tallies, said the editor, "was tantamount to vote tampering."

For their part, student government officials did not want the results made public because they feared that publicizing them might adversely affect a run-off election to be held four days later. They were afraid some students might vote for whichever candidate received a plurality in the original election. There was also another problem: students who had lost the election by large margins might be humiliated if the results were made public.

The editor refused to accept either reason and offered arguments as to why the tallies should be released. Among those reasons was the spectre of election fraud—student reporters had seen some students voting twice. Citing the New York State Freedom of Information Act, and the public's right to know the editor announced that he was ready to take legal action to compel release of the vote counts. Student government representatives complained about what they called "threats" from the student editor.

In this case, however, as in the confidentiality of information case, legal action wasn't necessary. After consulting a lawyer, the student government backed down and agreed to release the election results.



"Keep an eye on him, Lou. I'll go call the sign department."

Freedom from Prior Censorship

When Lauren Boyd and Gina Gambino, student editors at Hayfield Secondary School, Fairfax County, Virginia, set out to investigate knowledge about contraception among students, they had no idea their names would end up in federal law books. Today, the case of *Gambino v. Fairfax County* represents an important precedent for the First Amendment rights of student journalists.

Boyd and Gambino wanted to publish an article entitled "Sexually Active Students Fail to Use Contraception," but their school principal objected, citing a school board policy forbidding the "teaching" of sex education. The principal, Doris Torrice, was willing to permit publication of those sections announcing results of a canvass of student attitudes toward birth control, but she wanted passages containing information on contraceptives deleted. After losing an appeal of the principal's decision before the school board, Boyd and Gambino decided to sue their school officials. The two young women believed their constitutional rights had been violated.

Going to court to secure civil rights is a venture not to be undertaken lightly. For students, like adults, litigation is time-consuming, unpredictable and expensive.

To Boyd and Gambino, the element that mattered most was time. It was December 1976 when they filed their law suit against county school officials in United States District Court in Alexandria, Virginia. As high school seniors, they were set to graduate in June, 1977. They wanted their censored article to run in their paper, *The Farm News*, before graduation.

A trial of their case was set for February 15th. After trial, it did not take the trial judge long to decide the case. On February 23, District Judge Albert V. Bryan, Jr. decided that the students' First Amendment rights had indeed been violated. Bryan ruled that the school could not interfere with the publication of the article in the school paper. The students had won a victory—or so they thought.

Two weeks later, the school board decided to appeal the decision, asking Judge Bryan to "stay" his order until the appeals court decided the case. If the article were to run, argued the school, that fact would "moot" the school's claim that it had the power to stop publication, there being no point in trying to stop something that had already happened.

Hearing that the school board would file its appeal as quickly as possible, Judge Bryan stayed his order pending the outcome of the school's appeal. The case was now before the United States Court of Appeals for the Fourth Circuit in Richmond. An oral argument was scheduled for May 5—one month before graduation, but the death of one of the three judges set to hear the case brought an end to the students' hope of a decision before the end of the school year.

When the students graduated, the case was still pending. The final decision in the case was not released until October 17, nearly 11 months after the initial censorship. The students won, but it took the judicial system nearly a year to vindicate constitutional rights to which they were entitled.

The decision, however, does stand as an important precedent for student journalists, and a brief look at the court's reasoning will give us additional insight into such student press conflicts.

School officials offered several arguments to support their action. They contended that the First Amendment did not apply to *The Farm News* because it is an "in-house" organ of the school system, founded and sponsored by the Fairfax County School Board. They also argued that even if the First Amendment did apply, the article was unprotected because its publication would contravene a school policy prohibiting the teaching of birth control as part of the curriculum.

The District Court opinion, affirmed by the Court of Appeals, rejected both arguments. District Court Judge Albert V. Bryan noted that the extent of the schools' involvement in providing funding and facilities does not determine the applicability of First Amendment guarantees. Judge Bryan also held that the contents of the school newspaper could not be considered "an integral part of the curriculum." Just as the school library contained materials and information on birth control, so too could the school newspaper, he held.

When the case was appealed, Appeals Court Judge Donald Russell cast a lone dissenting vote. Since the School Board clearly has the authority to determine what should or should not be included in the curriculum, he argued, it would be a "mockery" of such authority to allow the policy to be frustrated and contravened through an article in the school newspaper.

Valuable Learning Experiences

Three different cases, three different resolutions, but all valuable learning experiences for student journalists and students alike. As student newspapers continue to grow in quality and vitality, student journalists will be more and more involved in First Amendment conflicts. If these experiences can be springboards to learning about law and legal processes, then we will come that much closer to fulfilling Justice Stewart's observation that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." And who is better qualified to protect those freedoms than a free and responsible press? □

Major Student Press Cases

Dickey v. Alabama, 273 F. Supp. 613 (1967). A federal District Court ruled that a university had acted unconstitutionally in suspending the editor of an official, school-sponsored newspaper for writing an editorial critical of state officials. "The imposition of such a restraint," wrote the court, ". . . violates the basic principles of political and academic expression as guaranteed by our Constitution."

Tinker v. Des Moines, 393 U.S. 503 (1969). Although not directly addressing issues of free press, *Tinker* is the landmark decision on the First Amendment rights of students. The Supreme Court ruled that high school students may not be prohibited from expressing themselves, in this case by wearing black armbands to protest the Vietnam war, unless the school can show that substantial disruption of or material interference with school functions would result. Teachers and students do not "shed their constitutional rights at the schoolhouse gate," the Court said.

Trujillo v. Love, 322 F. Supp. 1266 (1971). A federal District Court ruled that the fact that community college officials had labeled a newspaper a "teaching tool," when in reality it had functioned as a forum for student expression, did not permit censorship. "Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech," the court said.

Shanley v. Northeast Independent School District, 462 F. 2d 960 (1972). A U.S. Court of Appeals ruled unconstitutional the suspension of five high school seniors for the publication of an underground newspaper which advocated review of marijuana laws and contained information on birth control and abortion. The court ruled that "expression by high school students cannot be prohibited because other students, teachers, administrators, or parents may disagree with its content."

Vail v. Board of Education, 354 F. Supp. 592 (1973). A federal District Court ruled that school officials may not impose a flat ban against all underground publications. The decision said, "The Board has the burden of telling students when, how and where they may distribute materials, consistent with the basic premise that the only purpose of any restrictions on the distribution of literature is to promote the orderly administration of school activities by preventing disruption and not to stifle freedom of expression."

Joyner v. Whiting, 477 F. 2d 456 (1973). The U.S. Court of Appeals upheld a District Court's decision that a college may not withdraw funding, fire editors, or in any way suppress a student publication merely because it dislikes or disagrees with the newspaper's editorial content.

Bayer v. Kinzler, 383 F. Supp. 1164 (1974). The U.S. Court of Appeals affirmed a lower court's ruling that the seizure of a "Sex Information Supplement" to an official high school paper by the administration was unconstitutional. The supplement was "primarily composed of articles dealing with contraception and abortion" and was "serious in tone and obviously intended to convey biological information rather than appeal to prurient interests." The court continued, ". . . it is extremely unlikely that distribution of the supplement will cause material and substantial interference with schoolwork and discipline."

Trachtman v. Anker, 46 U.S.L.W. 2157 (1977). Student journalists wanted to disseminate a questionnaire to students "requiring rather personal and frank information about sexual attitudes, preferences, knowledge and experience," and publish the results in the school newspaper. Fearing that such a questionnaire would "force more emotionally immature individuals to confront difficult issues prematurely," and possibly result in students suffering psychological harm, the school board refused the request. While acknowledging that protected First Amendment rights were involved, the court ruled that school authorities had a "rational basis for the decision" and upheld their action.

Beginning a Law Program

Looking for a way to liven up your classes—successful teachers talk about methods, objectives, practical tips

Charles White

What law program is right for city kids and suburban kids, students studying consumer problems and students studying government, good readers and bad readers, college-bound kids and those entering the job market without a college education? The answer is that there probably isn't any one program that would meet all the needs of these students. There isn't any one right way to teach about law, any more than there's just one right way to teach about government or history. Instead, teachers are determining what they want to accomplish in teaching about law, taking into account the needs of their students, and coming up with courses designed to achieve these objectives. How do these different objectives shape law programs, what methods do teachers find best, and what tips do teachers have on beginning a successful law course?

In preparing this article we interviewed secondary teachers in Chicago and its suburbs. The teachers are about evenly divided between city and suburbs, and represent a wide variety of schools and students. None is a lawyer or law student. Most of them began teaching without any particular expertise in the area. We think they're pretty representative of secondary teachers across the country.

What Teachers Are Trying to Accomplish

Most of the teachers we talked to hope to give their students something of practical value, skills that they could use in a variety of everyday circumstances. But the teachers differ in what they choose to emphasize.

Diane Farwick of Chicago's Waller High teaches a year-long course on law in American society, featuring units on consumer law, the Supreme Court and the First Amendment, criminal law, and juvenile rights and responsibilities. The consumer unit is a good example of the course's practical nature. Part of this unit is shaped by students and their problems. "The kids are always bringing up things they don't understand, or coming in with problems. Their questions about cars and insurance and credit have a lot to do with how the course turns out." The basic curriculum deals with advertisements, detecting and reporting fraud, landlord/tenant questions, credit, and many other topics in which law plays an important part.

For Charles Kuner, a teacher at Chicago's Farragut High, law is a chance to express his deeply felt concern for his students' needs. "I can't see teaching about social problems and society in an unrealistic, abstract way. I teach survival skills, and I'm not about to be neutral or objective. These kids need help in staying out of trouble, and they need to know how the system really works, especially for people who are poor or in a minority." His main law course, the Sociology of Crime, focuses on criminal law (a big favorite with students), especially such youth-related topics as juvenile courts, juvenile corrections, and drugs and the law. In another course on social problems, he gets into such law-related topics as marriage and divorce. In a third course,

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this one on careers, he places those interested in legal careers with attorneys for 14 weeks of internships. They spend two hours a day, four days a week, at a law office, interviewing and observing lawyers, talking to others in the office, sitting in on client interviews, and generally becoming familiar with legal terminology and lawyers' work. Three different courses, but one common concern—introducing students to law as it actually is, preparing them for the various ways law might influence their lives.

Johnny Gilbert, a teacher at another Chicago high school, also stresses practical law but with a slightly different focus. He tries to provide a basic introduction to the criminal system, with special emphasis on rights of the accused. He too discusses drug law, evidence, and corrections, but he also tries to provide a thorough understanding of the Constitution and Bill of Rights.

For Charlie Hart, a high school teacher in Elgin, Illinois, law is a chance to break out of the mold and try something new for himself and his students. "I was disappointed with the government course I was teaching, and I didn't feel that it was meeting the needs of my students. I was feeling frustrated, trying to find something more appropriate for my teaching style." After a successful six-week pilot unit on law in a government class, he began offering a full semester (18-week) elective course on the criminal justice system that covers a wide range of topics, from criminal law through legal processes, school law, and vocations. The vocational emphasis was a bit of a surprise, but when students showed an interest in careers in law and law enforcement, he began exploring vocational possibilities as part of the course.

For John McKinnon, a teacher in suburban South Holland, teaching practical law means a one-semester course which deals heavily with important civil law concepts such as domestic relations, torts, real estate, wills and estates, and tax, as well as with criminal law, court structure, and constitutional law. He too is concerned with giving students an introduction to law-related careers—he's proud of how many of his students have gone into legal work—and with preparing them for some of the ways law will touch them in their everyday lives. Though criminal law is alluring, it receives relatively little attention (one unit out of twelve) in his course, because the prosaic areas of civil law—for example, laws on buying houses and liability for automobile accidents—are far more likely to affect students when they become adults.

Other teachers may alter this emphasis by stressing concepts, but they too seek to convey hard information and hope to build skills. Janice Berman, a teacher at suburban New Trier High, explains that teaching about law is not "just a means to convey facts, but rather a way to help students think better and understand better. I stress ideas, the critical tools of social analysis." She believes that law is a better vehicle than history to accomplish this goal. Thus in her one-semester course on crime and justice she strives to put questions about law into the context of the Constitution and the Bill of Rights, and tries to show how examining law and crime can provide opportunities to look at society from a new perspective, to see how unemployment, frustration, and a host of other factors contribute to urban riots, or to see how men's attitudes toward women contribute to the crime of rape and influence how rape cases are prosecuted. Yet many topics of her course are similar to those of practical law courses (criminology, law enforcement, juvenile delinquency, the judicial system, penology), and she believes that, while conveying facts isn't the purpose of the course, "there must be a factual basis to what students learn. I want students to think carefully about certain problems—plea bargaining, recidivism, and corrections—and you just can't do that if you don't understand the process or don't know the facts."

For one teacher, law was a chance to try something new for himself and his students

Another teacher mixing concepts and practical skills is Edie Sauter, a high school teacher in suburban Norridge. Her course in English-Social Studies devotes one quarter to the topic of order, using law to explore how people organize their civilization. Since her course is heavily individualized, with students expected to pursue their own interests, students in effect have a large voice in what the course contains. Though the course is concept-oriented, it does contain plenty of elements of practical law, including juveniles and the law, crime, and student rights. In addition, some students pursue independent study on other practical concerns, such as legal careers.

The Methods Teachers Use

The teachers we talked to rely heavily on simulations, which is not surprising given their objective of introducing students to law as it really is. Visits to courts and prisons, and classroom appearances by lawyers and law enforcement people, can help show students the law in action, but simulations have the added benefit of putting students in the hot seat, of requiring them to make hard decisions of guilt or innocence, or putting them in the place of police officers on a beat or probation officers dealing with difficult clients.

As we noted in the last issue of *Update*, these teachers make heavy use of commercially prepared simulations. They also create simulations to demonstrate a particular point or to fill a void in the commercially prepared materials.

Chicago's Johnny Gilbert uses a law-making simulation in which the class is broken into small groups to discuss changes in a law the class is familiar with. Each group works on its own for a couple of days drafting a revised law, then the class gets together to compare their versions and decide on a version that best represents their thinking.

Marion Cobb, a teacher in suburban Park Forest, has created a simulation on prison riots, in which students role-play prisoners and authorities who must settle their dispute. John McKinnon has created simulations for jury selection and parole board hearings, as well as plea bargaining and sentencing exercises. Diane Farwick's consumer unit is filled with simulations on such topics as budgeting, house hunting, and investments.

According to Charlie Hart, simulations work well in law courses because so much of law has to do with processes. "In my sociology and economics courses I don't use simulations. They can take too long for too little. It's different in law. Students have so many misconceptions about the legal process that simulations are really necessary." Diane Farwick notes that any teacher familiar with new social studies methods should be able to feel comfortable with simulations. "If you've done any role playing or group work with students, you should be able to adapt what you know to a law format." The larger problem, she feels, is more one of a teacher's attitude. "Many teachers must have a quiet classroom, or must be able to supervise all students. These exercises aren't for them. Students will make a lot of noise, and if you use small groups you won't be able to keep an eye on all of them. But if the exercise is a good one, all the noise and activity will be constructive. It'll be the sound of kids arguing about something they care about, the disposition of a difficult case or the resolution of a tough conflict."

The simulation that all these teachers use and enthusiastically recommend is the mock trial. This month's *Update* features an article on how to put on mock trials (see page 13), and our teachers were able to suggest a few wrinkles not mentioned in that article. Marion Cobb has her students create the dispute that is to be resolved by the trial. She says, "I think students learn most from making the cases up. I have them work in groups to create the situations. The most important thing is making sure that the outcome is in doubt. I suggest that they write it up factually, like a police report in which the evidence is not overwhelming, so the case could go either way."

Johnny Gilbert has had good luck adapting actual Supreme Court cases for mock trials. Since his students are principally interested in rights of the accused, he's done adaptations of such cases as *Miranda v. Arizona* (warning accused persons of their rights) and *Berger v. New York* (a search and seizure case).

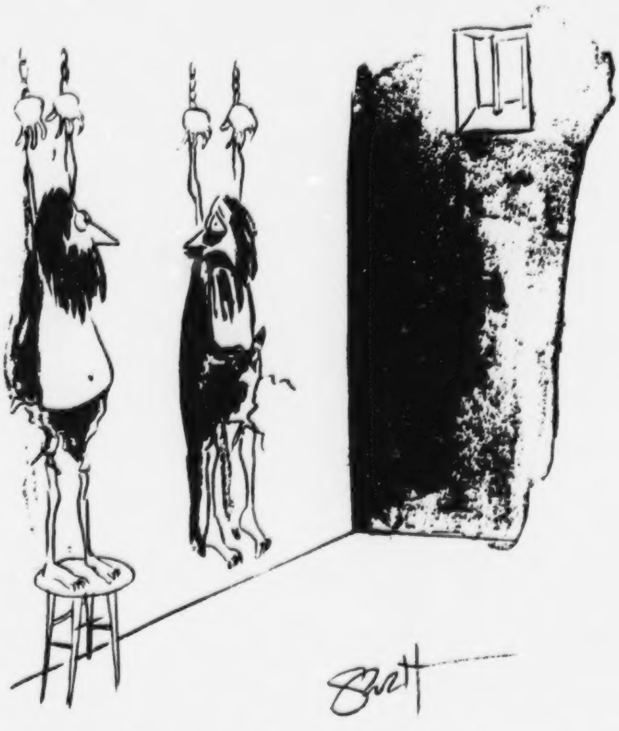
Edie Sauter has found that mock trials work well in her English-Social Studies curriculum, since they build reading skills and help students construct logical arguments. She uses actual transcripts of local cases as the basis of mock trials. The transcripts, which often deal with high school students and other juveniles, are provided by public defenders and other resource persons. She merely removes the last pages from the transcripts, so students don't know the outcome of the cases, and adapts them to the interests and abilities of her students. Those who are not comfortable with the exercise can use the transcripts more or less verbatim, adding only opening and closing statements. Others use the transcripts as a starting point and adapt freely. She's had success video-taping the mock trials and playing them back so that kids have a second chance to evaluate the exercise. She says taping is particularly good for students who are too nervous in their role-playing to get much out of the exercise while it is happening.

The mock trial has long been a staple of law school pedagogy, and these teachers borrow several other techniques from law schools. Most of them use case studies, a technique in which actual legal cases are studied both as a means of illuminating a particular area of law and as a means of building reading and analytical skills. (See the Fall, 1977 issue of *Update* for an article on the case study method.) A couple of them also require students to do some basic legal research. For example, Johnny Gilbert has students research an issue of law. This two-to-three-week project involves going to a law library to read the pertinent cases and trace the development of a topic through the years. He says this enables students to see the various ways the law has been interpreted, while at the same time building their writing skills. John McKinnon also asks students to write legal briefs. He's put together a sizable law library at the school, partly as a result of donations such as a set of the Illinois statutes, partly as a result of purchases made through the school library of such volumes as the *U.S. Reports* and the *North East Court Reporter.* Besides serving as a resource for student's research papers, these reports of cases serve as a good source of situations for mock trials. McKinnon's students also draft various kinds of legal agreements, an exercise designed to help them become familiar with legal terminology.

These teachers also have had success with more traditional kinds of research. For example, Janice Berman supplies each student with a bibliography listing more than 500 books available in the school library and asks them to choose from this list in doing outside reading for reports to the class and papers.

Edie Sauter has found that kids' own interests can be the springboard to independent study projects. Among the topics her students have pursued are juvenile delinquents in fact and fiction, law and film censorship, and famous trials in fact and fiction.

In general, then, our teachers make heavy use of individualized learning and/or small group work in the classroom. They also count on the maturity



Gee, I wish I could have afforded a good lawyer!

and good sense of students in another learning technique, the field experience. See the interview on page 29 of the Fall, 1977 *Update* for these teachers' tips on conducting successful field excursions.

Tips for You

We asked these teachers to tell us about the obstacles they have encountered and to suggest ways of overcoming the problems and creating successful law programs. Here are their tips:

1. Plan carefully. Even though the teachers we talked to stressed over and over again that you should be flexible, willing to listen to students and work their concerns into the program, that doesn't mean that the program should be unstructured. Rather, there should be flexibility within a clear structure, so that students know what the course will entail and when, what is expected of them, and what the course is to accomplish.

In the words of Charles Kuner, "it's essential not to be surprised. Plan carefully, think hard about your goals and objectives, have a well-structured syllabus. When you're introducing a new area like this, you don't want to leave anything to chance." Edie Sauter adds that students are apt to be interested in a lot of legal topics, and unless the teacher provides a structure the program is likely to appear fragmentary and inconclusive. The solution is to find a general topic (such as her "order and change") which will provide a structure while giving students some room to explore their own interests. Janice Berman adds that a course structure is particularly important when you're not using a textbook to organize the course. Always let students know where they are and what to expect in the next two or three weeks.

2. As a corollary to the first tip, make sure that your objectives not only be well conceived but measurable. Janice Berman points out that your main goals for the entire course may be hard to measure. For example, you may want students to develop a deeper understanding of issues of law and crime and a more constructive attitude toward the solution of problems. But that's all right as long as your objectives for each component of the course are small enough to measure (e.g., in considering juvenile corrections problems, do students know the meaning of key terms, do they understand the charges that have been levelled against the present system, can they suggest some fresh solutions.)

3. Learn how to handle controversial issues. Since the very nature of legal disputes is conflict, and since we tend to turn more and more to the courts to resolve tough problems, it is quite possible that studying about law will involve some touchy issues. Charlie Hart felt that one way of building his students' interest was to talk about student rights questions they may have encountered, including some practices in his school of doubtful legality (i.e., can the school withhold grades if students owe library fines?) Before doing so, however, he sent his principal a list of the topics he proposed to discuss, indicating that if the principal objected to any topics he would not bring them up, but would rather respond to them if students raised them. The principal didn't see any problem and the unit went ahead without any hitches.

A unanimous recommendation was that teachers learn to say, "I don't know"

Janice Berman is also sensitive to the potential for controversy. One of her responses is to limit the course to juniors and seniors. Another is to use potential problems as learning opportunities. For example, when one student wanted to give an oral report on violent crime that featured many lurid details, she asked him to avoid sensationalism. When he objected and pointed out that he had free speech rights, she pointed out that the other class members have rights too, especially since they must be present during the report. Sharing the difficulty of drawing a line between liberty and license turned the matter into a learning experience.

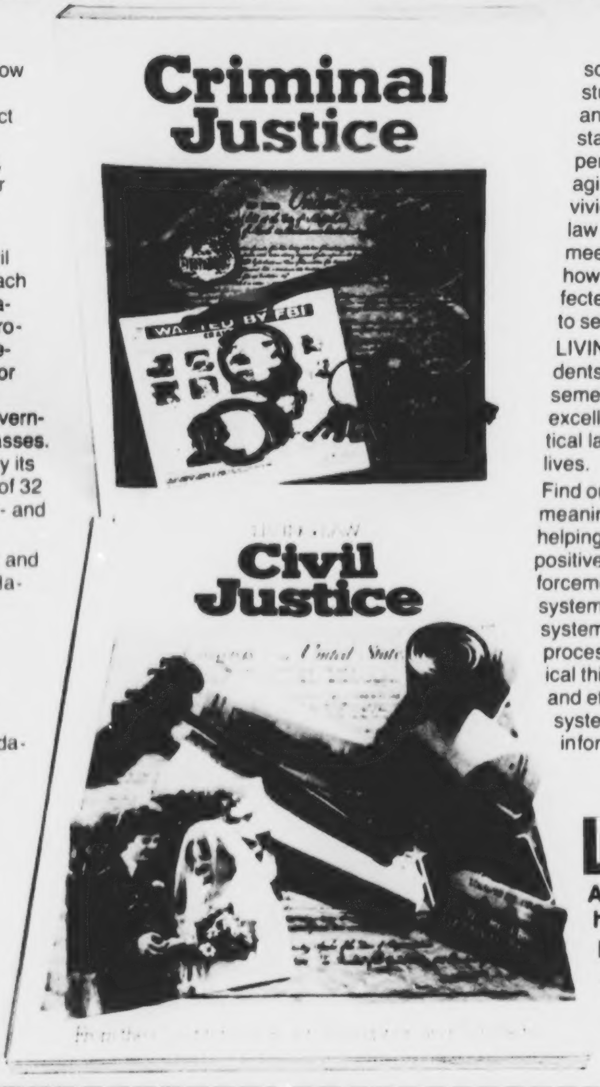
4. Go to workshops, institutes, and anything else that promises to give you help and greater confidence. Most of our teachers began teaching law before getting special law-related teacher education, and found that they were able to put something together without the help of a formal program. But when they did eventually attend teacher education programs, all thought it helped. Some have attended one or two day workshops put on by the ABA; some have attended workshops or the multi-week summer institute offered by the Law in American Society Foundation in Chicago; some take part in regular monthly meetings sponsored by Chicago's Constitutional Rights Foundation Project. Our teachers told us that these forums helped introduce them to new materials and techniques, and gave them the chance to compare notes with and learn from other teachers.

5. Another recommendation that was unanimous is that teachers must learn how to say, "I don't know." As John McKinnon puts it, "You've got to remember that you're a teacher, not a lawyer. Don't put yourself in the position of giving legal advice." Our teachers felt that saying that they weren't experts might well make for a better learning environment, since students could be encouraged to seek some answers on their own, rather than look to the teacher as the source of all wisdom.

6. There's an important qualification on the last bit of advice. Don't be too modest—don't convince yourself that you know so little that you can't teach the course. You don't have to be a lawyer or a legal expert to teach about law. As Janice Berman puts it, "If you have a firm grounding in methodology, the subject matter will fall into place. Remember that you don't need a great deal of depth to offer a course in high school. Students will pursue their own interests in law and justice, and you'll learn from them as well as teach them."

All in all, then, our teachers have the same basic purpose, to show students how the law actually operates in our society, and to give them tools—either specific skills or general understanding—that will help them cope with that reality. They also use the same general teaching techniques. Despite the similarity of topics and methods, however, the courses are far from identical and in fact show the rich options law-related education offers. The same basic purposes and the same general subject areas can be applied to a number of disciplines (English, sociology, criminology, as well as a study of law itself), can be adapted to the needs and abilities of very different students, and can be shaped to fit the philosophy and style of the instructor. In fact, an impression that came through clearly in talking with these teachers was that one of the things they liked so much about law was the creative freedom the subject gave them.

WHAT YOUR STUDENTS DON'T KNOW ABOUT THE LAW CAN FILL TWO BOOKS.



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Will Bernard

Cases on the Bill of Rights

TAKING THE FIFTH

Summoned to testify in a bribery probe, a politician was asked if he had ever paid off any public officials. When he refused to answer on constitutional grounds, investigators tried to have him punished for contempt.

"By 'taking the Fifth,'" they complained in a court hearing, "he is sabotaging this very important inquiry."

But the court upheld the witness' privilege under the Fifth Amendment to remain silent.

"The privilege may not be violated," said the court, "(merely) because its restraints are inconvenient or because the disclosure of wrongdoing will promote the public weal. It is a barrier interposed between the individual and the government, and neither legislators nor judges are free to overleap it."[1]

The Fifth Amendment, traceable to the evils of the Inquisition and the Star Chamber, is based on the unfairness of forcing a person to convict himself. However, there are important limitations.

For one thing, the privilege is personal. One man invoked the Fifth Amendment when questioned about his cousin, the defendant in a manslaughter case. But it was obvious that the only purpose of the witness was to protect his cousin, not himself.

Ordering him to answer, the court said he had "no right, under the pretext of shielding himself, to (shield) others seeking shelter behind his privilege."[2]

Furthermore, there must really be a risk of incrimination. A witness in a burglary was asked whether he had ever served time in prison. He pleaded the Fifth Amendment, but the court ruled that he must answer because his reply could have no criminal consequences.

Even though he could be embarrassed by his "past," said the court, embarrassment wasn't a weighty enough reason to block the course of justice.[3]

1. *Doyle v. Hofstader,* 257 N.Y. 244, 177 N.E. 489 (1931)
2. *People v. Schultz,* 380 Ill. 539, 44 N.E. 2d 601 (1942)
3. *State v. Crummit,* 123 W. Va. 36, 13 S.E. 2d 757 (1941)

(For this and other *Family Lawyer* articles, descriptions are sometimes adapted from cited cases).

HOT PURSUIT

Policemen are chasing an armed robbery suspect down the street when he reaches his own home and ducks inside. May they go in after him, or must they first get a warrant?

The question involves the Fourth Amendment to the Constitution, which forbids "unreasonable search and seizure." And the answer of the United States Supreme Court, in considering this "hot pursuit" situation, is that the police may indeed go in without a warrant.

"The Fourth Amendment," said the Court, "does not require officers to delay an investigation if to do so would gravely endanger their lives or the lives of others."[1]

Other exigencies too have been held to justify entry without a warrant.

In one case, police went into a house after neighbors reported that a woman inside was screaming for help.[2] In another case, police entered an apartment after shots from the inside had been fired into the street.[3]

In both cases the actions of the officers were approved.

Of course, these are exceptional circumstances. And the Supreme Court has warned that exceptions must be "jealously and carefully drawn" to prevent abuse.[4]

In another case an inquisitive policeman climbed in a window and discovered an illicit still. But his only excuse for not first getting a warrant was to avoid the red tape.

Held: the entry was unlawful.

"The right of officers to thrust themselves into a home is a grave concern," said the Court, "not only to the individual but to a society which chooses to dwell in freedom from surveillance. When the right of privacy must yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman."[5]

1. *Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967)
2. *People v. Clark,* 68 Cal. Rptr. 713 (1968)
3. *People v. Robinson,* 75 Cal. Rptr. 395 (1969)
4. *Jones v. United States,* 357 U.S. 493, 499 (1958)
5. *Chapman v. United States,* 365 U.S. 610 (1961)

POOR MAN'S LAWYER

Anyone facing a serious criminal charge, if too poor to hire his own lawyer, is entitled to have one provided by the state. But which lawyer? May the accused person insist on naming whomever he pleases? Could he, for example, demand "the best lawyer in town"?

In most cases courts have refused to give him that much leeway. One judge commented:

"The Constitution does not assure every man that only a leader of the bar will speak for him. Even the State cannot command such representation; most criminal cases are prosecuted by young men who have yet to be acclaimed but who are not in the least unequal to their responsibility on that account."[1]

Courts are also wary when an indigent defendant, after being found guilty, blames the outcome on bad work by his lawyer.

"Monday morning quarterbacks," said one court in dismissing such a complaint, "always would have won the game. Hindsight is easier than foresight."[2]

Nevertheless, even though the indigent defendant is not entitled to special treatment, he is indeed entitled to competent representation. If he does not get that, he has been cheated of his constitutional right to a fair trial.

One man pleaded guilty to a fraud charge only because his court-appointed lawyer warned him—mistakenly—that otherwise he faced a long term in jail.[3]

Another man, convicted of burglary, pointed out that his court-appointed lawyer was functioning in an alcoholic haze during most of the trial.

In both of these cases the defendant was entitled to a new hearing. Such proceedings, as one judge put it, were "a mockery of justice."

He added:

"Even the worst criminal is entitled to his day in court."[4]

1. *State v. Rush,* 46 N.J. 399, 217 A. 2d 441 (1966)
2. *Johnson v. State,* 39 Wis. 2d 415, 159 N.W. 2d 48 (1968)
3. *Cooks v. United States,* 461 F. 2d 530 (1972)
4. *Franklin v. State,* 471 S.W. 2d 760 (1971)

STOP AND FRISK

Does a policeman have a right to stop a private citizen on the street and pat him down for weapons?

To the citizen, such an experience can be—in the words of the Supreme Court—"annoying, frightening, and perhaps humiliating." To the policeman, on the other hand, this might be the best way to protect himself against having his questions "answered by a bullet."

The law takes a middle position. It allows a "stop and frisk" when, but only when, there are good grounds for the officer to fear violence. A hunch isn't enough.

In one case a policeman stopped and frisked a man after seeing him talking with several known narcotics addicts. He did find heroin. But the evidence was thrown out of court because the policeman had insufficient reason to expect trouble.

For all he could tell, said the court, the men "might have been talking about the World Series."[1]

But in another case an officer observed a man apparently "casing" a jewelry store—inspecting the windows, pacing off distances, having furtive conversations with a companion.

When the officer frisked this man, he found a pistol. And a court held the evidence admissible on a concealed weapon charge, since there was good reason to fear that an armed robbery was in the making.[2]

An outsider's tip, if reliable enough, may also justify a search.

Police were summoned to a factory and told by a company official that one of his employees was armed. Officers frisked the man and found a gun—and the gun was later held to be admissible in court.

The judge said such information, from a neutral, non-professional informer, was ample grounds for the police to handle the situation the way they did.[3]

1. *Sibron v. New York,* 392 U.S. 41 (1968)
2. *Terry v. Ohio,* 392 U.S. 1 (1968)
3. *State v. Lakomy,* 126 N.J. Super. 430, 315 A. 2d 46 (1974)

"Justice Burns believes in tempering the law with humor."

THE IDEA OF LIBERTY

First Amendment Freedoms

by Isidore Starr

Exciting New Law Education Textbook for High School Students

"The Idea of Liberty—First Amendment Freedoms" is a comprehensive introductory High School textbook outlining the development of First Amendment freedoms. Dr. Isidore Starr uses both historical background information and landmark decisions of the Supreme Court of the United States to examine the persistent value conflicts in American society that have molded our First Amendment freedoms into what they are today.

Each of the six sections of "The Idea of Liberty—First Amendment Freedoms" covers a specific freedom:

Section	
One	An Establishment of Religion—Separation of Church and State
Two	Freedom of Religion
Three	Freedom of Speech
Four	Freedom of the Press
Five	The Right of the People Peaceably to Assemble
Six	The Right to Petition for Redress of Grievances
Conclusion	

Dr. Starr has incorporated unusual learning features into "The Idea of Liberty" to both excite and inform High School students about the law. Such features include:

- * **Pertinent case studies** and problems for participative classroom discussion
- * **Charts** designed to increase comprehension of important principles
- * **Photos** of important Supreme Court justices and the Warren and Burger Courts
- * **Selected cartoons** intended to stimulate class discussion

About the Author

Isidore Starr is a lawyer, Professor Emeritus of Education at Queens College, and former president of the National Council for the Social Studies. He is the author of dozens of books and articles on law-related education and he is currently a member of the American Bar Association Special Committee on Youth Education for Citizenship.

"The Idea of Liberty—First Amendment Freedoms" by Isidore Starr, published by West Publishing Company, 1978, in soft cover text form, approximately 200 pages, is for the High School level. Write or call the address below for more information.

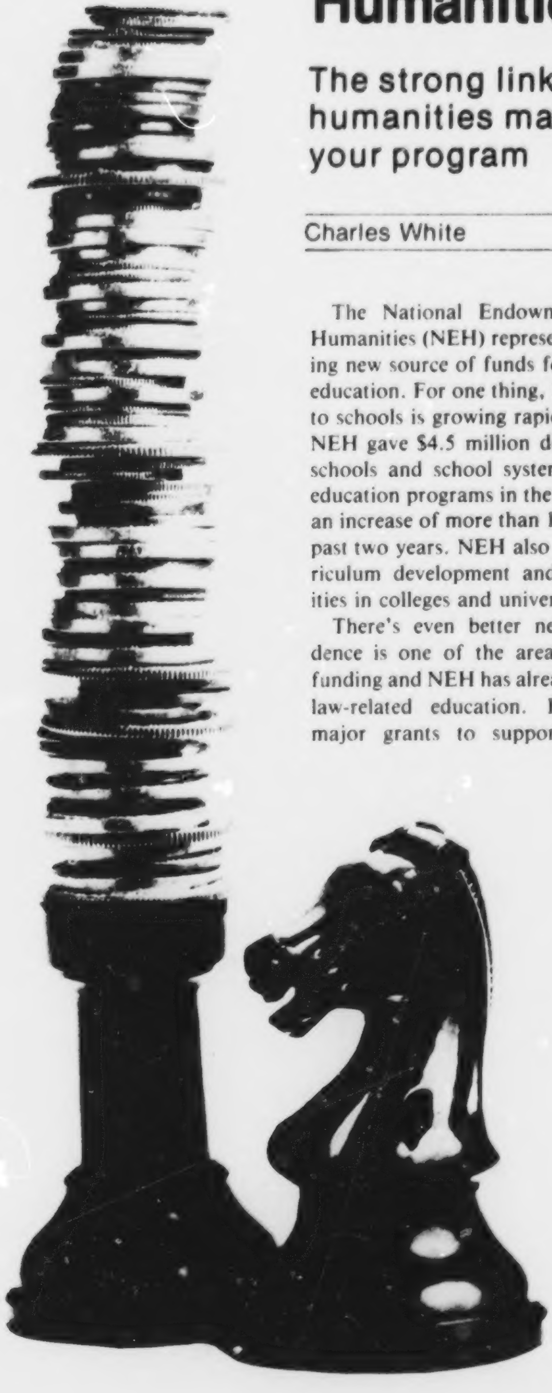
WRITE OR CALL:
Ms. Jean Mignogna
WEST PUBLISHING COMPANY, INC., DEPT. U-2
170 Old Country Road, Mineola, New York 11501
Phone 516/248-1900

WEST PUBLISHING COMPANY, INC.

Have You Considered Humanities Funding?

The strong links between law and the humanities may be the key to money for your program

Charles White



The National Endowment for the Humanities (NEH) represents a promising new source of funds for law-related education. For one thing, NEH support to schools is growing rapidly. Last year NEH gave $4.5 million dollars to help schools and school systems strengthen education programs in the humanities—an increase of more than 100% over the past two years. NEH also supports curriculum development and other activities in colleges and universities.

There's even better news: jurisprudence is one of the areas eligible for funding and NEH has already supported law-related education. It has made major grants to support curriculum development work by the Law in a Free Society project in California and has recently provided considerable funds to the American Bar Association's Special Committee on Youth Education for Citizenship for a three-year program to stimulate elementary programs in law and the humanities. Moreover, NEH's guidelines make it an ideal source for broad-based, conceptual programs which touch on such humanistic disciplines as history, literature, anthropology, and ethics—all areas related to the law.

Basically, NEH seeks to help educational institutions at all levels and of various kinds improve instruction in the humanities. NEH is mainly interested in the quality of programs, and unlike many funding sources, it will support traditional as well as innovative efforts which are "interesting and practible." In view of the steady decline in students' writing ability, it actively seeks proposals which strive to improve expository writing within the context of the humanities.

There are two funding cycles each year. Those projects which submit applications by April 1 will be notified of NEH's decision by next October; those submitting by November 1 will be informed in April. NEH encourages projects to make an initial inquiry at least eight weeks before the deadline date, in order to see if the proposal is eligible and likely to be supported. A full draft should be submitted at least six weeks before the deadline so that a staff member can study it and make suggestions about revisions.

Though some grants are very large, many fall between $30,000 and $120,000, making NEH a funding source worth considering for small as well as large projects. Any school system, state education department, consortium of schools (including private schools) or other educational organization is eligible to apply. Generally, NEH is interested in proposals that have been endorsed by "large administrative units" such as school systems.

Three kinds of grants are available through NEH's Elementary and Secondary Education Program:

Extended Teacher Institutes Grants support the establishment of year-long institutes in which school teachers and administrators work together on curriculum design, under the guidance of experts from schools and colleges. Institute programs generally consist of an intensive period of course development, followed by testing of the curriculum in the teachers' own classrooms. Participating institutions are expected to share 20% of the costs.

Regional Development Grants support long-term programs of curriculum development and evaluation, in-service teacher training, and other activities aimed at strengthening humanities teaching and learning throughout an entire school district or group of schools. These grants support the development of exemplary models which will prove valuable for others considering similar endeavors. Allocated just once a year, during the November funding cycle, these grants may run for as long as five years.

General Project Grants support model projects in elementary and secondary education that fall outside the purview of the other two categories. Projects may be large-scale and reflect the need for new or revised materials in traditional areas of study, or they may focus on new areas and the development of new courses and programs. Generally, they involve demonstration projects that can be completed in a specified period, usually a year. These grants encourage collaborative efforts among schools or between schools and colleges.

In addition to these school-based categories, NEH's Institutional Grants Program supports new programs that will strengthen the humanities curriculum in individual colleges and universities, and NEH's Higher Education Projects Program supports new programs that give promise of strengthening humanities education generally in colleges and universities. Since these programs can provide funds for consulting help, evaluation, and curriculum development, universities and colleges wishing to begin or improve a law-related program should explore this source of grants.

For a brochure describing details of the various programs, as well as the application procedures, write the Director of Education Programs, Mail Stop 202, National Endowment for the Humanities, Washington, D.C. 20506.

The National Humanities Faculty

Another possible source of assistance for humanistic law-related programs is the National Humanities Faculty in Concord, Massachusetts. The Humanities Faculty recently received a $600,000 grant from NEH to provide middle and secondary public and private schools with help in improving their humanities curricula. This program will not provide funds, but rather will provide each selected school or school district with 18 days of on-site assistance from high school and college humanities faculty, plus a two-week summer seminar for five of its faculty members, for which expenses will be paid. The Humanities Faculty estimates that the value of each of these service grants is $22,000.

Fifteen such service grants will be awarded in September, 1978. Applications can be submitted either for a March 15 deadline, a June 15 deadline, or an August 15 deadline. The advantage of submitting early is that the staff of the Faculty will be able to work with applicants on refining their proposals.

Targeted subject areas for this program are modern languages, social studies, and English. The latter two offer plenty of possibilities for law-related curricula, an area already familiar to the Humanities Faculty. Indeed, two of its publications, *Authority of Citizenship* and *Why Judge?*, deal in part with law-related education.

For further information, contact Dr. Edwin J. Delattre, Director, National Humanities Faculty, 1266 Main Street, Concord, Massachusetts 01742, 619-369-7800. ◻

Drawing by Joseph Mirachi
1977 The New Yorker Magazine, Inc.

"I find you guilty to the nth degree"

CURRICULUM UPDATE

Charlotte C. Anderson

Focus on Law and Citizenship

Print and a-v materials that provide information, develop skills, and help young people learn about responsibility

Recently, there has been a growing emphasis on citizenship education in our schools. Here's a sampling of materials on this important topic.

Elementary

- ***Greenhouse*** (1973). 16mm. film, 16 minutes. Brief teacher's guide provided in can lid. Producers suggest grades 4-8 but since older children may not relate well to the narrator-central character, who appears about ten years old, and children younger than grade 4 well might, it may be better for grades 1-5. A quietly effective film about vandalism. The boy opens the story by saying, "People are either wreckers or builders. I was a wrecker." Because he was bored and had nothing better to do, the boy threw a rock and shattered the greenhouse windows. To pay for the damages, he is made to work for the old man who runs the greenhouse. At first the boy finds it tedious, boring work. Slowly, he begins to see the beauty of the plants and appreciate all the effort it takes to nurture them. Just when he is starting to respect the old man's labors and take pride in his own contributions, vandals strike. Gazing on the wreckage he can now empathize with the old man's reaction to the earlier destruction. Because the film presents a very believable situation and does not moralize, it should be an excellent lead-in to a discussion of values and responsibility. The purchase price is $160, rental $15. Address orders to Barr Films, P.O. Box 5667, Pasadena, California 91107.

- **"*. . . So I Took It.*"** (1975). 16mm. film, 10 min. No teacher's guide available. Grades 2-6. This is a simple story told by a girl about ten years old. The story begins with a typical shopping excursion. The girl admires something she can't afford to buy and her girl friend tells her to take it. She does and gets away with it. After that they work together to outwit the clerks, to avoid the cameras. Her girl friend gets caught, but she avoids getting picked up.

  Soon after she is shopping with her little brother and shows him how to do it. They get caught and end up in a very cold, sterile room at the station while they wait for their parents. The closing scenes focus on a family session with a counselor in which the girl is recounting how she got involved in shoplifting and how she felt about herself. Her relief that it is over is evident.

  Because most children have probably been tempted in very much the same way these children were, and because the story is told from the perspective of one who has been there, the viewers should be readily able to identify with the trauma which resulted from giving in to this kind of temptation. The film should provide a sound basis for exploring personal responsibility for one's own behavior, the law regarding shoplifting, the role of the police, store surveillance devices, etc. The purchase price is $175, rental $25. Address orders to Motorola Teleprogram, Inc., 4825 N. Scott Street, Suite 23, Schiller Park, Illinois 60176.

- ***People at Work*** (1975). A career awareness filmstrip series which has some lessons particularly relevant to citizenship education. These include *People at Work Serving the Community*, *People at Work Serving the Nation*, *People at Work Enforcing the Law*, and *People at Work Preserving the Environment*. Each lesson consists of an 8 to 10 minute color filmstrip and a 33⅓ RPM record or tape cassette. There's an extensive teacher's manual for the whole series. Probably most suitable for grades 3-5. In each strip we hear the voices of an adult teacher-type narrator and a child who probes and questions. Through this exploration the viewer is introduced to the key people who serve the community and nation, who enforce the law and who are assuming responsibility for preserving the environment. One of the messages that is conveyed is that these are roles open to the "average" citizen who in performing these tasks is creating a better living space for all of us. The filmstrip titled "Serving the Community" unfortunately shows only males performing the vital tasks of community service. In the three other filmstrips reviewed here women are more visible. Ethnic representation is fairly well balanced.

  The teacher's manual suggests ways to introduce the unit, which presumably can include all or only a few of the filmstrips in the series. The manual provides vocabulary words, observation and listening clues, questions to be given before viewing the film, follow-up discussion guide, and "further learning activities," as well as teacher and pupil resources. Each lesson, which includes 1 filmstrip, 1 record or cassette, 10 spiritmasters, and the teacher's manual, is $25. Address orders to Pathescope Educational Media, Inc., 71 Weyman Avenue, New Rochelle, N.Y. 10802.

- ***You—Me—and the Three R's of Law*** (1976). Grades 1-6. Softcover, 91 pp. This curriculum, funded by the New Hampshire Crime Commission and now part of the elementary curriculum of the Rochester (N.H.) School Department, includes material focusing on "Responsibility," "Rights and Privileges," and "Reasons for Law;" thus the title, "Three R's of Law." At the primary level, the context is interpersonal ("You and Me"), home, school, and community. At the intermediate level, the context expands to include state and country. Among the concepts treated are private and public rights and privileges, respect, obligation, freedom, and justice.

  In addition to suggested activities and topics of discussion for "The 3 R's of Law" for each grade level, the handbook includes a brief discussion of the system of justice at the federal level and within the state of New Hampshire. Although this is state-specific material, it easily can be used as a model for studying one's own state.

  Bonuses are an annotated bibliography of resources correlated with the study for each grade level and a glossary of law-related terms. A neat little handbook with a wealth of classroom ideas which should serve as a catalyst for the teacher to generate further learning experiences. The purchase price is $3.95. Address inquiries to Mrs. Faustina Trace, Superintendent's Office, 62 So. Main St., Rochester, N.H. 03867.

Charlotte C. Anderson holds a doctorate of philosophy from the School of Education, Northwestern University. She is a curriculum developer and teacher education specialist who has taught at both the university and elementary levels. She's recently joined the staff of the ABA Special Committee for Youth Education for Citizenship.

Secondary

- ***Rights and Responsibilities: A Citizenship Series for Junior and Senior High School Students*** **(1975).** Videotape cassettes, 20 minutes each. Teacher's guide with bibliography available. This series consists of eleven 20-minute programs. Only the first four, which tell Larry's story, are reviewed here. In the first program, *I Didn't Care,* Larry, a young man in his twenties, traces the beginnings of his life of petty crime—how he started shoplifting, how his relationship with his father deteriorated, and how he dropped out of school and began burglarizing homes. The following program, *Dead Path,* depicts Larry's arrest, questioning, trial, and sentencing. The major officials and the highlights of the procedures are well presented. In *Change,* Larry describes his five years behind prison bars. He reflects on his own and others' reactions to prisons and wonders why some people change and others don't. The final program in this set is *An Interview With Larry.* Several junior high students, who have viewed the first three programs, ask Larry questions such as: "How did you feel about the police before you were caught?" "Did you make any friends in prison?" "How do your parents feel about you now?"

  Teachers using these programs will probably feel the need for additional resources to answer questions the film raises but does not answer. You may want more information about arrest procedures, sentencing, the structure of the penal system, conditions of parole, constraints on ex-offenders, as well as other aspects of the legal system. The bibliography in the teacher's guide will be useful. In addition, see *Street Law* (West Publishing Co.) and *Criminal Justice* (Scholastic Book Services). Advisable to preview with enough time to gather resources you feel you and your students will need. Available only on ¾ inch videocassettes; the purchase price is $135 each. All inquiries should be directed to AIT, Box A, Bloomington, Indiana 47401.

- ***Street Law—A Course in the Law of Corrections*** **(1976).** Developed by the National Street Law Institute. Softcover, 104 pp. student text; 79 pp. teacher's manual. High school. This supplemental edition to *Street Law: A Course in Practical Law* (West Publishing Co.) was developed for corrections personnel and inmates as well as high school students, so it has a particularly realistic, relevant, "tell it like it is" tone which should go a long way in capturing the interest of teenagers. Some of the insights secondary school teachers gain from reading a teacher's manual prepared for possible use in correctional institutions should, when shared with high school students, greatly enrich the course of study.

  Includes thorough, but easy to follow, directions for doing legal research—a skill which is often put to use in the course of study. The student text defines terms, describes legal procedures, and generally provides the reader with a wealth of information. At strategic points, problems are posed which call for the reader to apply the previously given information to a specific case. (Teachers are given help analyzing the problems in the teacher's manual.) Some of the topics covered are sentencing, probation, rights of prisoners, and parole. The final chapter is a corrections law mock trial.

  A brief bibliography of print material is provided, as well as a more extensive annotated bibliography of audio-visual aids. The teacher will have to correlate these resources with the lessons, since this correlation has not been provided. Some initiative will be required in going beyond what is actually given in the manual if teachers wish to actively involve students. For example, at one point the manual says, "This chapter readily lends itself to an activity-oriented classroom. Class debates, roleplays, and mock hearings can be scheduled . . . " But the structure of these activities is not provided nor are specific points identified where they may be useful. In general, though, this is a richly-packed hundred pages. The teacher's manual costs $2.50. One to nine copies of the student text are $3.50 each; ten to ninety-nine copies are $3.25 each; more than one hundred copies are $3.00 each. Available from West Publishing Co., Inc., Dept. U, 170 Old Country Road, Mineola, N.Y. 11501. Attention: Jean Mignogna.

- ***Voter Education, State Goverment: The Decision-Making Process,*** **and *Individual Rights*** **(1975-76).** Developed by the Institute for Political/Legal Education. The central component for each unit in this year-long program is a comprehensive curriculum guide for both teachers and students. In addition, there are separate guides for specific activities such as organizing voter registration and canvassing drives, and for constructing, implementing, and evaluating community surveys. Filmstrips are also included. Secondary.

  The *Voter Education* manual directs students in canvassing, registering voters, campaigning, and analyzing issues through simulations, projects, and field study activities which take them out into the community to work side-by-side with adult political participants. The *Government* manual focuses the student's attention on county and state government, beginning with a study of community needs and how these are communicated to the legislature. Guidelines for effective lobbying and simulations, as well as information on how to organize a Model Congress, are provided. The *Individual Rights* manual gives students insight into the basic foundations of law and the concept of freedom of expression as guaranteed under the Bill of Rights. Included are strategies for introducing the study of law, specific case studies, and a mock trial for the classroom.

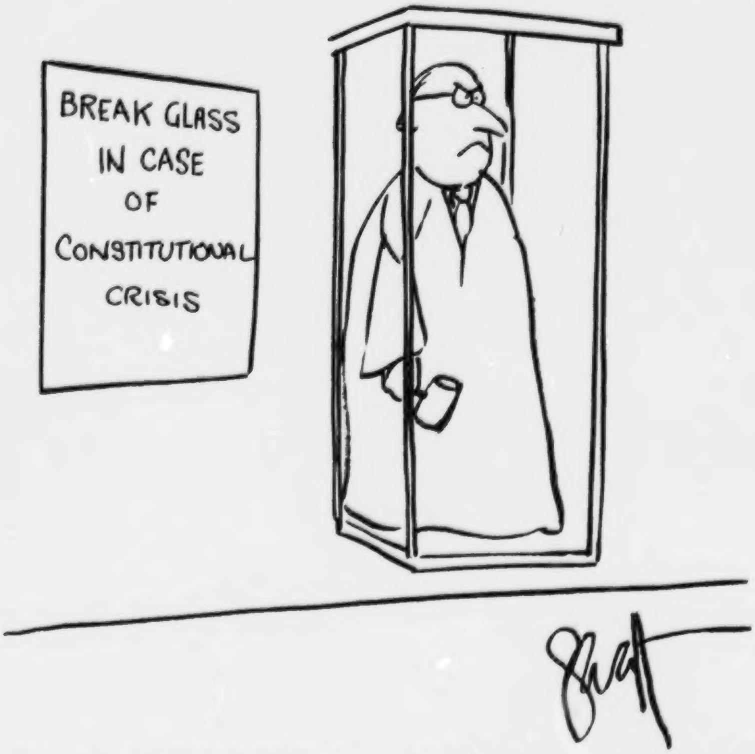
  Each of these manuals includes a bibliography of print and audio-visual materials. This program provides teachers with carefully worked out strategies for moving students into the community to become active participants in the democratic political process. Students don't just "read about" but "learn by doing"—doing something of real value to the community such as registering voters and participating in elections. Teachers who implement this program should reap many rewards, especially in "turning students on to active citizenship." The prices of the manuals are: *Voter Education,* $7.50; *Government,* $10.00; *Individual Rights,* $3.50. For information on other components or for purchasing materials, contact Institute for Political/Legal Education, 207 Delsea Drive, R.D. #4, Box 209, Sewell, N.J. 08080.

- ***Scholastic American Citizenship Program*** **(1977).** Program available in either a single hardcover text or a four-volume softcover edition with teaching guides and spiritmaster exercises. Secondary. The volume titles in the softcover edition are: *Foundations of Our Government; The Presidency, Congress, and the Supreme Court; State and Local Government;* and *Politics and People.*

  Foundations of Our Government begins by asking the question, "Why do we need government?" and uses the example of the story of the mutiny on the Bounty to explore the crucial reasons. This exploration is followed by the "six main purposes of the U.S. government" as designated in the Preamble of the Constitution. This format of moving from something close to the students and/or likely to be of high interest to them to the more formal aspects of government is consistent throughout the program. In this volume there is a chapter devoted to the tools and skills needed to study government—distinguishing facts and values, comaring and classifying, using a scale to compare governments (democratic to totalitarian). The remainder of this volume explores the historical development of our democratic government and the function and structures of our system of government today.

  In *The Presidency, Congress, and the Supreme Court* the duties, powers and roles of the officials in the three branches of government are explored. The relationships between these three branches are examined as well as how the personalities of the office-holders affect these relationships. *State and Local Government* begins with an examination of the decision-makers, the structures, and the revenues of state and local government. The second unit treats the legal system, with special emphasis on juvenile courts. The final unit examines the problems these levels of government must deal with—poverty, insuring equal opportunity, and pollution.

  Politics and People begins by expanding the student's perception of what "politics" is. No, it is not just what happens when people run for office. Rather, "Politics is competition between interest groups or individuals for power or leadership in a government or other



group." This broadened concept of politics is then used to demonstrate politics in action in everyday relations, as well as election campaigns for governmental offices, including the Presidential election. The second half of the text focuses directly on the student's developing role as a citizen. Types of potential citizen actions are explored, pressure groups are discussed, and the role of the citizen in foreign policy is examined. The final chapter "Challenges You Face" gives an overview of the state of the planet and the issues and problems which currently and in the future will have to be monitored and managed by active, informed, and committed citizens.

The material in each of these volumes is designed to actively involve the student. A special recurring section, "Action Project," has students explore issues raised in the immediately preceeding readings. Other features include: annotated bibliographies in both the student texts and the teaching guides, glossaries of key words and terms, pre- and post-tests as well as unit tests, and spiritmaster exercises. Format and treatment should make this program suitable for students with a wide range of ability and achievement. The purchase price of softcover texts is $2.75; the hardcover volume is $9.45; the spiritmaster volume is $9.45. Address orders to Scholastic Social Studies Center, 904 Sylvan Avenue, Englewood Cliffs, N.J. 07632.

- ***Criminal Justice*** (1978). One of a projected set of two texts in the Living Law Program developed by the Constitutional Rights Foundation. (The second volume on *Civil Justice* is scheduled for publication in March, 1978). Components include a softcover student text, a separate 56-page teaching guide, as well as a separate set of spiritmasters with tests, exercises, and activity forms to supplement the text. High School. The student text examines the American criminal justice system, the causes and kinds of crime, the role fear of crime plays in our society, police work, the court system (the adversary system, procedures involved in a trial, the right to counsel, plea bargaining, appeals, and juvenile justice), and probation and parole.

The student text is designed to insure active student involvement with the material. The authors create a dialogue with the student by directly speaking to "You," the reader. At the close of each short presentation is a section titled "Your Turn" which asks the reader questions about the material. The text also directs students to "peer teach" various topics covered. The teaching guide gives the teacher specific direction in facilitating peer teaching as well as using resource experts in the classroom and planning and carrying out field activities. Other valuable teacher aids include: clearly stated objectives for each chapter, pre- and post-tests, as well as a short teachers' bibliography at the close of each major section. Extremely well done. Should be an exciting course to teach and participate in. The cost of student text is $2.95. Available through Scholastic Book Services, 50 West 44th Street, New York, N.Y. 10036.

K-12

- ***Authority*** (1977). Six multi-media kits, each of which contains 4 color filmstrips with tape cassettes, 30 softcover student books, 1 teacher's edition with evaluation materials. In this curriculum developed by Law in a Free Society, the concept of authority is treated in an increasingly sophisticated manner appropriate for the growing maturity of students. Levels I and II are for the elementary grades, levels III and IV the intermediate grades, and levels V and VI the secondary grades. The teacher's edition states, "Our goal is to foster knowledgeable reflection upon issues related to authority."

In order to facilitate this "knowledgeable reflection," the units in each level are organized around the same set of topical questions. These are: Unit 1—"What is authority," Unit 2—"How can we use authority?," Unit 3—"What are some considerations useful in selecting people to fill positions of authority? What are some considerations that are useful in evaluating rules?," Unit 4—"What might be some common benefits and costs of authority?," Unit 5—"What should be the scope and limits of authority?"

In the primary levels these questions are explored in the context of settings familiar to the child—"What do you think is wrong with each of these rules? No sixth grader can use the cafeteria. No food is allowed in the cafeteria." In the high school levels, these questions are explored in historical situations and socially and geographically distant contexts, as well as contexts in which the adolescent functions.

The teacher's edition has easy-to-follow, completely-developed lesson plans. Enrichment activities are delineated at the close of each unit. Evaluation exercises are strategically placed in each unit. These instruments, and the criteria for teacher assessment of responses, probe for divergent thinking and higher-level responses.

The filmstrips are a particularly intriguing ingredient of the program. The storylines and the characters portrayed manage to simultaneously entertain and teach.

The teacher's edition and student materials have lessons and exercises correlated with each episode. Creative, lively, and thoughtful instructional materials, and one of the very few providing a systematic K-12 design. Purchase price: levels I and II are $75 each, III and IV $88 each, V and VI $117 each. Address inquiries to Law in a Free Society, 606 Wilshire Blvd. Santa Monica, California 90401. ☐

Correction

On page 25 of the Fall, 1977 issue of *Update*, two errors were made in our description of the book *The Youngest Outlaws: Runaways in America*. The correct name of its author is Arnold P. Rubin, and the correct price is $6.95. We regret the errors and extend our apologies to Mr. Rubin.

Supreme Court Report

(Continued from page 8)

Estes appealed, claiming that the decision to open the trial to the media deprived him of his right to a fair trial. The state contended that televising portions of the trial did not deny him due process, since Estes could show no specific prejudice that resulted from the coverage. The state also argued that no one can document the psychological effects of televising a trial, that the court has no power to edit or censor events, and that televising criminal trials would be enlightening to the public and would promote greater respect for the courts. The controversy reached the Supreme Court in *Estes v. Texas*, 381 U.S. 532 (1964).

The TV coverage of the trial became a story in itself

A closely divided Court found for Estes. Justice Clark's majority opinion pointed out that in a preliminary hearing "at least 12 cameramen were engaged in the courtroom . . . cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and counsel table." Clark granted that the Sixth Amendment specifies that trials are to be public, but pointed out that this was not to make them spectacles but to prohibit secret trials and such abuses as occurred under the Spanish Inquisition and the English Star Chamber. As long as representatives of the media (including television) are present and free to report, Clark argued, the public isn't being deprived of its right to know.

Justice Clark then pointed out four ways in which television might impair the fairness of a trial:

(1) Jurors are apt to be affected. Since only the most notorious cases are likely to be broadcast, the television coverage will convince jurors that they are in the midst of a *cause celebre*. Moreover, televising may cause jurors to be more attentive to the cameras than to the evidence presented, and coverage of the jurors during the trial may open them to public harassment, or at least to the "pressure of knowing that friends and neighbors have their eye on them."

(2) Witnesses might be influenced too. "Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly . . . . Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear."

(3) Televising trials will also place extra responsibilities on judges, who must supervise the coverage and make sure that it does not compromise the fairness of trials. Besides, "judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States."

(4) Finally, courtroom television will inevitably affect the defendant. "Its presence is a form of mental—if not physical—harassment . . . . The inevitable close-ups of the defendant's gestures and expressions . . . might well transgress . . . his dignity and his ability to concentrate on the proceedings before him . . . . The defendant is entitled to his day in court, not in a stadium."

Justice Clark concluded that televising the trial had violated the due process guarantee and prevented a "sober search for truth," so Estes' conviction was overturned. The ban on broadcast and photographic coverage is now codified by both state and federal judicial canons of ethics and, as noted earlier, by court rules in most states.

An interesting exception has been Colorado. Instead of prohibiting all cameras, it developed specific guidelines that allow Colorado judges to regulate the way in which cameras are used in the courtroom. As a result, there has been continued use of cameras in Colorado courtrooms since 1956.

The electronic media repeatedly point to Colorado's success in allowing broadcast media access to court proceedings. Also, they argue that the equipment in use today is far more sophisticated than that of the sixties, and thus is less likely to disrupt the trial process. Furthermore, and perhaps of greatest importance, there is increasing recognition that much of the public recieves its information solely over radio and television. As a result, in the last two years Washington, Georgia, Alabama, Florida, and New Hampshire have begun to allow television coverage and still photography in courtrooms. Federal rules still prohibit cameras in all federal courtrooms, including the U.S. Supreme Court.

Florida's newly-instituted one-year experiment in allowing TV and still camera coverage was tested thoroughly this fall during the two-week trial of 15-year old Ronnie Zamora. He was accused of murdering an elderly woman. His controversial defense was that he was a "television addict" and had acted under the influence of television intoxication. Specifically, the defense said the shooting had been "triggered" by a particular episode of the TV show, "Kojak."

Not surprisingly, television networks became interested in the murder trial. Of the 60 members of the media who eventually covered portions of the trial, all three U.S. TV networks and the BBC were represented. In addition, there were reporters from the two major wire services, *TV Guide*, and from major papers in New York, Los Angeles, Chicago, London, West Germany, Sweden, Iceland and Canada.

Chaos was avoided by using a single, noiseless "pool" camera, nonglare lighting and quiet still cameras. The hullabaloo was confined to a single small adjacent room where the other stations plugged in to monitor the trial. There, the TV coverage itself became a major news story. Occasional offenders of the court-imposed rules prohibiting television in other parts of the building were asked to desist or leave—by the other media representatives.

The Florida experience proved to many observers that fears of distraction and grandstanding by participants in a trial are groundless and that a fair trial can be held in spite of the presence of a highly competitive group of media representatives.

Other state courts are likely to try "experiments" as a result of the Zamora trial. In fact, Wisconsin will institute a one-year pilot program beginning April 1. And at least one federal judge, Jack B. Weinstein of Brooklyn, N.Y., believes that cameras should be allowed in federal courts, particularly the United States Supreme Court.

Judge Weinstein recently stated that the public should have a chance to hear important arguments, such as whether Allen Bakke has a right to enter medical school or whether the supersonic Concorde should be allowed to land at Kennedy International Airport. He argues that it would promote public understanding of complex issues and of the legal processes involved in reaching vital decisions.

In a recent interview in the *Washington Post* Judge Weinstein stated, "In the long run, in a democracy such as ours, the public must believe that court holdings and the legal process are fair and sound, or the decisions will be overturned by legislation, constitutional amendment or social resistance."

"Access" Becomes an Issue

As the Nebraska case and the recent developments on courtroom broadcasting show, the courts are opening up to the media, but information still does not flow freely from courts and government to reporters. For example, there are prohibitions on releasing information the government has tagged "secret" and on covering juvenile court proceedings. In addition, those subject to court discipline (lawyers, bailiffs, court clerks, and shorthand reporters) are often forbidden to release information to the media.

Antagonism between the press and government is growing as the press more frequently challenges the right of governmental units to keep information from the public. The most notorious instance, of course, is the Pentagon Papers case. Daniel Ellsberg, a former government employee, had leaked classified documents on the U.S. involvement in Vietnam to the *New York Times* and the *Washington Post*. When the newspapers began publishing the documents, the federal government sought an injunction that would prevent them from being published. The Court of Appeals for New York granted the injunction, but the Court of Appeals for the District of Columbia refused. With these conflicting opinions before them, and with both sides agreeing on the urgency of the case, the justices of the U.S. Supreme Court heard the case immediately and handed down a decision only four days after the arguments.

Though *New York Times Company v. U.S.* (403 U.S. 713 [1971]) arises from very different circumstances than the *Nebraska Press* case, the fundamental issue is the same: can the government impose a prior restraint on publication to prevent the disclosure of allegedly harmful information. As in the *Nebraska Press* case, the Court decided that the government had not met the heavy burden of showing that these circumstances posed a grave enough threat to justify the prior restraint.

Of the six judges who constituted the majority in the Pentagon Papers case, three—Justices Black, Douglas, and Brennan—took what might be called the absolutist position, stressing that under the First Amendment, the press must be left free to publish news without censorship, injunctions, or prior restraints. They argued that the purpose of the First Amendment was to prohibit the government from suppressing embarrassing information. The other three judges in the majority—Justices White, Stewart, and Marshall—took a narrower view, noting that the government had not proved that disclosure of the documents would "surely result in direct, immediate, and irreparable damage to the nation or its people," and thus prior restraint could not be tolerated.

The three judges who dissented—Chief Justice Burger and

On the witness stand in Ronny Zamora's televised trial for murder, Timothy Cahill points a finger to his head the same way, he said, Zamora pointed a gun at him.

Justices Harlan and Blackmun—complained that the case had been decided in unseemly haste and without an adequate record. They argued that the First Amendment right was not absolute. They suggested that if the record showed that publication would pose grave dangers, the prior restraint might be upheld.

In the Pentagon Papers case, Justices White and Stewart observed that the government had erred in seeking the injunctions, suggesting that a more constitutionally defensible course might be to take action *after* publication against those who publish classified information. That course was followed by Virginia authorities in a recent case involving the *Virginia-Pilot*, a Norfolk paper that printed an article accurately reporting that the state's judicial inquiry and review commission had investigated complaints against a domestic relations judge. The problem was that state judicial investigations are confidential. The newspaper was subsequently indicted for violating a statute forbidding identification of judges who are being investigated, found guilty, and fined $500.

The decision, which has been appealed and accepted for hearing by the United States Supreme Court (*Landmark Communications v. Virginia* (45 U.S.L.W. 2430 [1977]), raises the question of whether the press may be punished for printing the truth about a public official in connection with his public duties. The commission will probably argue that secrecy in such proceedings is necessary to prevent a judge who has been erroneously charged from being harmed by the publicity. It may also contend that confidentiality is necessary to encourage those with complaints against the judiciary to step forward.

The news media also have been attacking the prohibitions against reporting on certain proceedings involving juveniles. Most states provide that juvenile proceedings be closed to the public unless the judge orders them opened. It should be noted that many newspapers voluntarily do not publish the names of juveniles unless there are compelling circumstances to do so.

But in 1976 an Oklahoma court prohibited the press from reporting the facts of juvenile proceedings that had been made public. The press found this restriction an unacceptable restraint.

The case involved an eleven year-old Oklahoma youth who had been charged in July, 1976 with the fatal shooting of a railroad switchman. The boy appeared at a detention hearing which reporters were allowed to attend. Reporters learned his name, and photographers took his picture as he left the courthouse. An Oklahoma paper ran the picture, and his name was broadcast on radio and television stations. Several days later a state juvenile court judge prohibited the press from publishing the boy's name or picture again. The press appealed the decision in the case of *Oklahoma Publishing Co. v. District Court* 430 U.S. 308. Last March, the Supreme Court agreed with the press, ruling that courts may not suppress such public information.

What about those who are subject to the discipline of the courts and have been ordered not to reveal details of a case to the media? Some lawyers argue that they have a First Amendment right to bring important aspects of a pending case to the public's attention. Many judges fear that lawyers could use the media to influence public opinion and thus compromise a fair trial and damage the dignity of the court and the judicial process.

The issue has been decided differently in two federal

Prior Free Press Cases

Near v. Minnesota, 283 U.S. 691 (1931)—This precedent-setting case on prior restraint and censorship standards involved an injunction prohibiting further publication of a periodical known as the *Saturday Press*. The Minneapolis paper was charged with carrying "malicious, scandalous, and defamatory articles" about the mayor, other public officials, and the "Jewish race." The Supreme Court set aside the injunction in a narrow five-four decision. Speaking for the Court, Chief Justice Hughes noted that public officials must "find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."

Pennekamp v. Florida, 328 U.S. 331 (1946)—A Florida court held the *Miami Herald* in contempt for publishing two editorials and a cartoon criticizing the leniency of a Florida trial court in several non-jury proceedings. Overturning this ruling, the Supreme Court noted that "freedom of discussion should be given the widest possible range compatible with the essential requirement of the fair and orderly administration of justice . . . We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida."

Roth v. United States, 354 U.S. 476 (1957)—One of the most troublesome and controversial free press questions concerns whether obscenity is protected by the First Amendment. The *Roth* case was the first time the Court directly addressed this issue, and the Court emphatically responded that it was not: "We hold that obscenity is not within the area of constitutionally protected speech or press . . ." The question then remained as to what constitutes obscenity, and the Court replied that the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest . . ."

Since the *Roth* case, the Court has been defining, refining, and clarifying obscenity standards. For information on the latest Court decisions, see the Fall, 1977 *Update*.

Sheppard v. Maxwell, 384 U.S. 333 (1966)—A landmark decision in the free press/fair trial area, the case involved the murder of Dr. Sam Sheppard's pregnant wife, and the pervasive press coverage of his arrest and trial. The massive, prejudicial publicity resulted in the Court's overruling Sheppard's conviction and sending the case back for a retrial.

Although the press has long been regarded "the hand-maiden of effective judicial administration, especially in the criminal justice field," wrote the Court, "it must not be allowed to divert the trial from basic legal procedures, including the requirement that the jury's courts. In the Seventh Circuit (the federal district covering the states of Wisconsin, Illinois, and Indiana), an appeals court said that court rules requiring lawyers to avoid public comment on pending civil and criminal cases should be imposed only to prevent comments " . . . that pose a serious and imminent threat of interference with the fair administration of justice . . . " But in a later case brought by a Virginia attorney over the same issue, a district court judge in the Fourth Circuit (the federal district covering Virginia and four other states) disagreed with this narrow, restrictive standard, ruling that the First Amendment right of free speech is not absolute in any sense, but may be limited by reasonable restrictions designed to prevent interference with a fair trial. The conflict has not yet been addressed by the Supreme Court, which denied a request to review the Seventh Circuit opinion.

Confidential Sources

If a lawyer does give a reporter information in confidence, does that reporter have to tell the court, if requested to do so, who was the source of his information?

That's the problem that confronted *Los Angeles Times* reporter William Farr. Farr claimed he had been given information about an interview with a potential witness in the 1970 trial of the Charles Manson "family" for the slaying of actress Sharon Tate and her friends. The problem was which of the six attorneys involved violated the judge's order not to release the information to the press?

The judge ordered Farr to reveal the identity of his informant. Farr, citing a California shield law that protects reporters from being forced to divulge confidential sources, refused to comply with the order. He subsequently spent 46 days in jail for contempt of court during 1972 and 1973. He also has spent many other days in court over a seven-year period. Some actions are still pending.

Farr still has not revealed the name of the source. Judges are slowly learning that prison sentences, imposed on members of the media to force them to reveal their sources, will not work and only earn "bad press" for the judiciary.

When four *Fresno Bee* reporters and editors were imprisoned for an indefinite sentence in 1976 for refusing to tell a California judge how they obtained transcripts of a sealed grand jury testimony, local papers made a *cause celebre* out of their imprisonment and the public picketed the jail. Fifteen days later, the four were released.

The Fresno press's position was that the reporters did not obtain the testimony illegally and that its publication was in the public interest. They also argued that if forced to reveal their sources, other information sources would dry up and thus restrict the free flow of information to the public.

The conflict over confidentiality of sources is not limited to the courts and the press. Congress also has been confronted with the press's intractability on the issue of protecting its sources, even when subpoenaed to testify.

The Christian Science Monitor reported in 1976 that in the previous two-year period, the attorney general had approved forty-two subpoenas to newsmen and that at least ten had been jailed in the prior three years for refusing to reveal news sources.

This was the background to the confrontation between the House ethics committee and Daniel Schorr, then a CBS correspondent. Schorr was subpoenaed by the committee and asked to reveal who it was that had leaked a secret congressional report on the Central Intelligence Agency to him.

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verdict be based on evidence received in open court, not from outside sources." This is an exciting as well as an important case, written in a manner that will appeal to students.

Branzburg v. Hayes, 408 U.S. 665 (1972)—Does the requirement that newsmen testify before grand juries about their confidential sources of information violate the First Amendment guarantees of speech and press? No, said a sharply divided Court in a case involving reporters who wrote stories on drugs and Black Panther activities for the *Louisville Courier-Journal*, the *New York Times*, and a New Bedford, Massachusetts television station.

"The Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task of determining whether crimes have been committed and who committed them," said Justice White for the five-judge majority. Justice Douglas disagreed. "Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press," he wrote in a dissenting opinion. "Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And fear of accountability will cause editors and critics to write with more restrained pens."

Saxbe v. Washington Post, 417 U.S. 843 (1974)—This case challenged a Federal Bureau of Prisons policy prohibiting personal interviews between newspeople and inmates. After summarizing alternative means of communication afforded the press, and the reasons advanced by prison authorities for the guideline, the Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." Justice Powell, one of four dissenters, responded, "The Court's resolution of this case has the virtue of simplicity, but I believe that we must look behind bright-line generalities . . . and seek the meaning of First Amendment guarantees in light of the underlying reality of a particular environment."

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)—In this celebrated case, discussed at some length in our lead article, the Supreme Court held that court-imposed "gag" orders, while not prohibited in all circumstances, must meet very stringent guidelines, including a presumption against their use. The opinion of the Court, delivered by Chief Justice Burger, contains an excellent discussion of the free press/fair trial controversy, providing an historical background to the problem, a full discussion of prior holdings on the rights of fair trial and free press, and a careful analysis of the facts and issues of this particular case. It also contains many references to previous cases and to books and articles.

LEO'S NEWSSTAND
PURVEYOR OF FREE SPEECH
STRONGHOLD OF FIRST AMENDMENT
BULWARK OF LIBERTY

Schorr had given the information to the *Village Voice*, which published much of it in February, 1976. In refusing to turn over the name of his source, Schorr argued, "For a journalist, the most crucial kind of confidence is the identity of a source of information. To betray a confidential source would mean to dry up many future sources for many future reporters. The reporter and the news organization would be the immediate losers. The ultimate losers would be the American people and their free institutions."

The House ethics committee eventually devoted some $150,000 to the investigation, over a five-month period. It involved 13 former FBI agents and included 285 interviews. Schorr, who never revealed the source of the information, did not go to jail but did lose his job at CBS.

Libel: A Troublesome Thorn

The press's efforts to maintain the confidentiality of its sources has, however, been attacked successfully in a new way. In October, the Supreme Court refused to review an Idaho court ruling that denied reporters the right to keep their news sources' names secret when they were sued for libel. The case involved a state undercover narcotics agent, Michael Caldero, who sued the *Lewiston Tribune* and one of its reporters for libel and invasion of privacy. The issue was an article about Caldero's shooting an associate of a drug dealer whom he was arresting. The article quoted an unnamed "police expert" who speculated that Caldero didn't have sufficient legal cause to shoot the man.

During pretrial discovery proceedings in Caldero's suit for libel, the trial court ruled that Caldero would have to prove that the paper had been maliciously motivated in printing the story before it could require the paper to reveal its source in a deposition. However, the Idaho supreme court overruled this holding, and the U.S. Supreme Court declined to review the case.

Although the ruling concerned a pretrial issue, and thus may have limited value as a precedent, it does suggest that newspapers may be faced with the unpalatable choice of protecting their sources or protecting their pocketbook. Or, to put it another way, they can stand by their principles and refuse to name sources, but it may cost them dearly if libel suits are successfully brought against them.

This does not bode well for reporter William Farr, who has been sued for $24 million in California for libel by two of Manson's defense attorneys. They contend that Farr's refusal to name his source implicated them indirectly.

Libel suits are thus becoming a difficult area for the media. This wasn't always the case, for a 1964 Supreme Court case, *New York Times v. Sullivan* 366 U.S. 254, established guidelines that made it difficult for public figures to prove that they had been libeled by the press.

The case involved a signed advertisement the *Times* had run which criticized the government of Montgomery, Alabama, for its cruel mishandling of civil rights demonstrators. On the basis of factual errors, Montgomery City Commissioner L. B. Sullivan sued the *Times* for libel. The Alabama courts agreed that he had been libeled and awarded him damages of more than $500,000, but the U.S. Supreme Court was unanimous in overturning the decision.

Justice Brennan's decision spoke of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement [and] caustic . . . attacks on government and public officials." Under the Constitution, Brennan said, a "public official" cannot recover damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Later decisions involving Wally Butts, athletic director of the University of Georgia, and retired Army General Edwin Walker extended this rule to "public figures."

But that raises a further problem: when is a person a public figure? For more than ten years, the courts frequently sided with the press in finding that a person was a "public figure" on a very wide variety of grounds. But recently, the Supreme Court indicated that it will look more closely at these cases and will balance an individual's right to privacy against the press's right to publicize information. This will be a particularly important factor when the information is erroneous.

The turn-about case involved the wife of Russell Firestone, who won a $100,000 libel suit against *Time* magazine for incorrectly reporting that her husband had been granted a divorce from her on the grounds of extreme cruelty and adultery. *Time* appealed the judgment, arguing that Mrs. Firestone was a public figure who should have to show "actual malice" under the *New York Times v. Sullivan* test in order to prove libel. However, in the case of *Time v. Firestone*, 424 U.S. 448 (1976), the Court ruled that Mrs. Firestone was not a public figure, since she had not assumed "any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence [it]." Justices Brennan and Marshall dissented, pointing out that Mrs. Firestone had called several press conferences during the divorce proceedings, a fact which led them to conclude that she was a public figure under the meaning of previous decisions.

Nonetheless, the majority opinion in *Firestone* is now the law of the land, limiting the number of "public" persons who must prove actual malice to win a libel action, and thus making the press somewhat more vulnerable to such suits. In *Firestone*, and again in the more recent Idaho case, noted above, the Supreme Court has put the media on notice that it will hold them financially accountable, and that they are not immune from attack where there is a strong interest to be balanced against the media's right to freedom of speech.

In this brief article, we've been able only to sketch lightly some of the legal issues relating to the media and the First Amendment. We should point out that concentrating on actual cases, as we have, inevitably emphasizes—and perhaps overemphasizes—the potential for conflict. Actually, many disputes are resolved peaceably, either through the voluntary free press/fair trial guidelines or through negotiation, compromise, and conciliation between the media and the courts.

In addition, many legal scholars believe that the Constitution creates no direct antagonism between the news media and the legal profession. They point out that the Constitution is a limit on government, rather than on private individuals and groups. The Constitution requires that *government* assure the fairness of trials; the Constitution forbids the *government* from censoring the press. It is within these limits established by the Constitution that government must try to reconcile free press and fair trial, but, as Chief Justice Burger observed in the *Nebraska Press* case, it is a mistake to try to establish a hierarchy of rights, to try to assert that the Constitution must be interpreted to show that one right necessarily has precedence over another.

For example, on the free press/fair trial issue, one way that government might act to assure a fair trial without exceeding the limits placed on it by the First Amendment would be for judges to control the flow of information emanating from officers of the court—lawyers, bailiffs, etc. —rather than attempting to specify directly what the press shall not publish. Since the judge's order would apply to those under the court's jurisdiction, rather than to a separate entity like the press, this course of action might be less questionable under the Constitution that would restrictive orders on the media.

Whatever the outcome of the many constitutional issues relating to freedom of the press, however, the controversies themselves serve the fundamental objectives of both the justice system and a free press. Widespread and vigorous debate over these issues should help promote informed public opinion while improving the administration of justice in our nation. □

Materials on Free Press

A number of excellent print and a-v materials deal with the First Amendment guarantee of a free press. All the materials listed below are appropriate for secondary school students. For materials on the Bill of Rights generally, see the Fall, 1977 issue of *Update*.

Print

Todd Clark, *Fair Trial/Free Press* (1976). This paperback includes case studies and discussion questions to illuminate the conflict between the right of the press to publish the news freely and the right of the defendant to a jury which is free from prejudice created by pretrial publicity. The cost is $3.12; schools receive a 25% discount. Order from Benziger, Inc., Order Department, Front and Brown Streets, Riverside, New Jersey 08075.

Franklin S. Haiman (ed.), *Freedom of Speech* (1976). This paperback is part of the ACLU's series *To Protect These Rights*. It contains discussions of many landmark free press cases, as well as other major cases on freedom of expression. The cost is $5.75; order from National Textbook Company, 8259 Niles Center Road, Skokie, Illinois 60076.

Todd Clark, Richard Weintraub, and Barry E. Lefkowitz, *Fair Trial v. Free Press: A Resource Manual for Teachers and Students* (1975). This paperback manual includes opinions on the role of the press, several case studies, and student activities relevant to the court decisions, as well as a glossary of legal terms, general law-related teaching strategies, and a bibliography. The cost is $2.75. There is a student manual which contains material extracted from the resource manual. It costs $ .75; order from the Institute for Political/Legal Education, 207 Delsea Drive, R.D. #4, Box 209, Sewell, N.J. 08080.

The Bill of Rights Newsletter, (Fall, 1973). This issue of the newsletter concentrates on free press. It features an opinion quiz, articles on the problems of a free press and on the press and Watergate, interviews with five newsmen who discuss protecting their sources, a classroom moot court on the confidentiality of sources, and a review of Supreme Court opinions. A classroom set of 35 copies costs $10.00; order from Social Studies School Service, 10,000 Culver Blvd., Culver City, California 90230.

Media

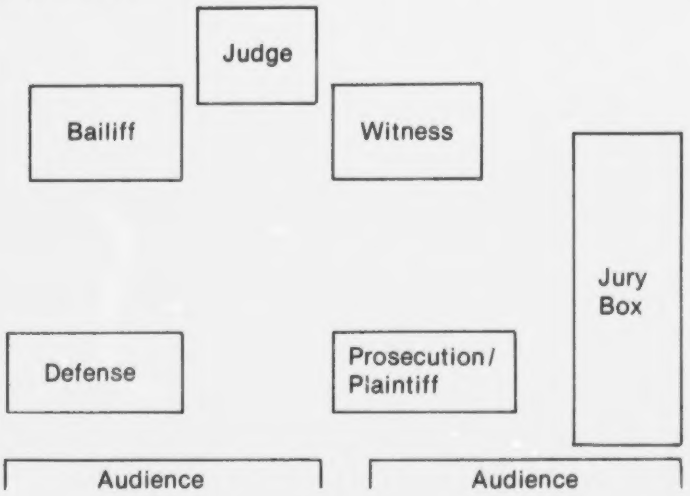
Free Speech and Press (1974). A kit containing a color sound filmstrip, student source books, duplicating masters, and a teacher's guide. The unit, which is appropriate for students in grades 7-12, asks open-ended questions about the extent and limits of First Amendment privileges, and provides examples of situations in which the exercise of free expression might violate the rights of others. The cost is $49.00; order from Xerox Education Publications, 1250 Fairwood Ave., P.O. Box 444, Columbus, Ohio 43216.

Rights, Wrongs, and the First Amendment (1974). This twenty-eight minute color film concentrates on the conflict between the right to free expression and the need for national security, providing a look at a number of historical controversies, up to and including the Pentagon Papers case. The film can be purchased for $300 and rented for $50. Order from Rediscovery Productions, Inc., 2 Halfmile Common, Westport, Connecticut 06880.

The Student Press (1972). This kit contains a color sound filmstrip, student manuals, and a teacher's guide. By examining a situation in which the student council refuses permission to sell an "underground newspaper" on school grounds, the unit explores the conflict between freedom of expression and a school regulation. The cost is $27.75 (with record or cassette). Order from Guidance Associates, 757 Third Avenue, New York, N.Y. 10017.

Mock Trial Outline: *State v. Randall*

Layout of Classroom



Participants

judge (could be a visitor to class with legal experience)
4-6 prosecutors
4-6 defense attorneys
2 witnesses for the prosecution
2 witnesses for the defense
1 bailiff
jury composed of twelve persons, one of whom should be named jury foreman; alternates may also be designated.

Simplified Steps in a Trial

1. Calling of Case by Bailiff: "All rise. The Court of ________ is now in session. Honorable Judge ________ presiding."

2. Opening Statement: First the prosecutor (criminal cases) or plaintiff's attorney (civil cases), then the defendant's attorney, explain what their evidence will be and what they will try to prove.

3. Prosecution's or Plaintiff's Case: Witnesses are called to testify (direct examination) and other physical evidence is introduced. Each witness called is cross-examined (questioned so as to break down the story or be discredited) by the defense.

4. Defendant's Case: Same as the third step except that defense calls witnesses for direct examination; cross-examination by prosecution/plaintiff.

5. Closing Statment: An attorney for each side reviews the evidence presented and asks for a decision in his/her favor.

6. Jury Instruction (Jury Trials Only): The judge explains to the jury appropriate rules of law which it is to consider in weighing the evidence. As a general rule, the prosecution (or the plaintiff in a civil case) must meet the burden of proof in order to prevail. In a criminal case this burden is very high. In order that innocent persons do not lose their freedom, the prosecution must set out such a convincing case against the defendant that the jurors believe "beyond a reasonable doubt" that the defendant is guilty. In a civil case, plaintiff has burden of proving his/her case by "a preponderance of the evidence." In most states the entire jury has to be convinced, though a recent Supreme Court case permits 9-3 verdicts in state non-capital criminal cases. Understanding that a unanimous (or 9-3) decision by the jury is required will help students understand why jury deliberations are sometimes so lengthy.

7. Deliberation and Decision: In making a decision, the judge or jury considers the evidence presented and decides which witnesses were most credible.

8. Sentencing (Criminal Trials Only): After a defendant is found guilty, a study of the defendant's background is usually prepared by a probation officer, who then makes a sentencing recommendation. The judge pronounces sentence.

Facts

James and Arlene go to a night club to have a drink. Randall, who has been drinking, comes up to their table and, saying he knows Arlene, tries to talk to her. James gets angry and asks Randall to leave. An argument takes place and a fight then occurs. The police are called and Randall is arrested for assault on James. Randall claims James caused the fight and he was only defending himself.

Witnesses and Their Statements

For the Prosecution
1. James
2. Arlene

For the Defense
1. Phillip, a waiter in the nightclub
2. Randall

James: "I was just sitting in the place with Arlene, listening to the music, when this guy came up and started bothering her. I asked her if she knew him and she said 'No.' So I told him to split. The man was blind drunk, and he kept bothering my girl. So I stood up and told him to leave before I called the manager on him. About that time he squared off on me and when I turned to walk away he hit me."

Arlene: "I was with my boyfriend, James, at this club when an old friend of mine, Randall, came over to our table. Randall had been drinking, and he grabbed my arm and told me to dance with him. James asked me if I knew him, and I said 'No' because James is very jealous. Then James told Randall to leave before some trouble got started. Randall didn't leave, and James stood up to argue with him. The next thing I knew, they were fighting."

Phillip: "This guy was sitting with this girl when Randall went over to them. I know Randall because he plays in a band here occasionally. Randall had only two drinks. I know because I was waiting on his table. Randall motioned to the girl to dance, and then he held her arm to help her up. The guy she was with got mad and started yelling. Randall smiled and told him to be cool. The guy jumped up and grabbed Randall. Randall hit him back; they really went to it. After that, the cops came."

Randall: "I was at this club, walking around, checking the place out. I saw Arlene. I had been going with her for two years, but I hadn't heard from her for a couple of months. I went over to ask her how she was doing. I had had a couple of drinks, but I wasn't even a little high. I asked her to dance, and the guy with her looked at me funny. I know Arlene well, and I knew she wanted to dance with me, so I took her by the arm. Then this guy sitting with her started to confront me. I told him I didn't want any trouble. Then he jumped up and before I knew it, he grabbed me and hit me."

Jury Instructions

(1) Defining Assault and Battery. Generally, the law holds that assault is an unlawful threat to injure another person, coupled with an ability to do so and a display of force sufficient to make the victim fear immediate harm. ("Unlawful" means either contrary to law or without legal justificiation.) Battery is an unlawful use of force on the physical person of another. Thus the least touching of a person may constitute a battery.

(2) Defining Self-Defense. The law recognizes the right of an individual to defend himself, and he need not wait to do so at his peril. That is, he need not delay his defense until the alleged aggressor has made the first move. The test is reasonableness. If a person has a reasonable fear for his own safety, he may take reasonable—not excessive—steps to defend himself.

Jury Deliberation

Once instructed, the jury deliberates the verdict. They must decide from the evidence whether the prosecution has shown Randall to be guilty beyond a reasonable doubt. The jury foreman writes the verdict on a slip of paper and hands it to the judge who reads it in "open court."

Mock Trials

(Continued from page 15)

jury system, and other topics related to their part in the mock trial. Sutdent attorneys should use this time to outline the opening statements they will make. Because these statements focus the attention of the jury on the evidence which will be presented, it will be important for these students to work in close cooperation with all attorneys and witnesses for their side. In the opening statement for the defense, for example, the attorney might begin by saying:

> "Ladies and gentlemen of the jury, today we will present evidence which will show a man is being charged with assault for his activities in connection with an incident in which any one of you would have reacted the same, reasonable way he did. Our witnesses will testify that the defendant, Randall, approached an old friend at a night club and politely asked her to dance, but that he had the misfortune of encountering the woman's date, who had, on that night, had too much too drink. When that man unreasonably confronted and began attacking the defendant, we will show that my client responded reasonably and in his own self-defense . . .as any one of you would have done."

This opening statement would then continue to explain the evidence to be presented in support of the defendant. The prosecution statement, of course, will outline the case against the defendant.

Student attorneys should develop questions to ask their own witnesses and rehearse their direct examination with these witnesses. In *State v. Randall,* the prosecutors should carefully develop their questions with both James and Arlene (as the defense attorneys should do with Phillip and Randall). James and Arlene, both thoroughly familiar with their witness statements, should practice answering the prosecutor's questions with testimony not inconsistent with their witness statements. (These statements, which may be considered to be sworn-to pretrial depositions or affadavits, can be used by the other side to impeach a witness who testifies inconsistently with the statement.) For example, after James takes the stand, the prosecutor could begin with a line of questions such as:

"Would you please state your name and address?",

"James, please tell us where you were on the night of ________?";

"Can you tell us what happened at the night club on that night?"

On direct examination, questions should not be leading; that is they should not have the answer included as part of the question (e.g., "Isn't it true that you were at the Blue Bird Cafe on the night in question?" is a leading question). Leading questions may, however, be used in cross-examining a witness in order to impeach the witnesses' credibility in the testimony (e.g., a defense attorney could ask James: "Isn't it true that you hit Randall because he was asking Arlene to dance"?)

While some attorney-witness groups are constructing the questions and testimony for direct examination, other attorneys should be thinking about how they will cross-examine the witnesses for the other side. As mentioned, the purpose of cross-examination is to make the other side's witnesses seem less believable in the eyes of those determining the facts of the case (i.e., the jurors in a jury trial or the judge if no jury is used). Leading questions, sometimes requiring only a yes or no answer, are permitted. Frequently it is wise to ask relatively few questions on cross-examination so that the witness will not have an opportunity to reemphasize strong points to the jury. In cross-examining Phillip, the waiter, the prosecution might try to suggest to the jury his inability to see and hear clearly the events he has testified to in favor of the defendant. Questions along the following lines might be employed:

> "Is the night club a place for people to relax, listen to music and dance?"
>
> "Are the lights there kept low in order to encourage an intimate atmosphere?"
>
> "On the night in question, weren't you also busy waiting on other tables?"
>
> "Then isn't it true that because of the darkness, the music and your other activities, you could not be absolutely certain of what you just testified to seeing and hearing at James' table?"

The closing arguments are rather challenging since they must be flexible presentations, reviewing not only the evidence presented for one's side but also underscoring weaknesses and inconsistencies in the other side's case which arise out of the trial proceedings. The prosecution's closing statement in the *Randall* case might include some of the following language:

> "Ladies and gentlemen of the jury, you have listened patiently and carefully to the evidence which each side has presented in this trial. You have heard testimony which proved beyond a reasonable doubt that on the night in question, Randall did approach James and Arlene, harassing them for no good reason, and that the defendant did, in fact, physically assault James. The defense has only been able to present testimony from the defendant, whom the evidence suggests was actually drunk at the time of the assault, and Phillip, a waiter at the club who was not only a friend of the defendant but who also claims to have seen and heard what transpired in a room which was noisy and dark while he was located in another part of the club."

By the way, don't be alarmed if your students aren't this proficient. Students will develop questioning and oral advocacy skills through repeated use of the exercise.

e) Once all preparation has been completed, convert the classroom into a courtroom by rearranging desks as shown in the diagram on page 46. It is also helpful to have long tables for each attorney team to work from; the teacher's desk can serve as the judge's bench.

f) Conduct the trial with a teacher, students or resource person (perhaps a law student, lawyer or actual judge) as a judge. A student jury may be used. The role of the jury is often minimized in television trials. Students should understand that the jury determines the facts in a case, primarily through their acceptance or rejection of the testimony offered by various witnesses for both sides. The judge deals with questions of law. For example, in *State v. Randall* the judge will explain assault and self-defense, the two legal issues involved in the case, to the jurors.

Don't interrupt the trial to point out errors. If a witness comes up with an off-the-wall comment, or if a student playing an attorney fails to raise an obvious objection, let it go. Wait until the debriefing, when you'll be able to put the whole exercise in perspective.

For educational purposes, it may be best to have the jury deliberate in front of the entire class, instead of retiring to a private place as occurs in actual trials. This will enable students to see first-hand the process of decision making, enabling them to learn what evidence was persuasive and why. Since the student jury may be representative of the community, their deliberations should provide a good analogy to real jury deliberations. Specific jury instructions for the *Randall* case have been included in the materials in the box. Simplified steps in the trial have been included to assist teachers in organizing the trial process.

g) Set aside sufficient time for debriefing what happened in the trial. The debriefing is the most important part of the mock trial exercise. It should bring the experience into focus, relating the mock trial to the actors and processes of the American court system.

Students should review the issues of the trial, the strengths and shortcomings of each party's case, and the broader questions about our trial system. Does our judicial system assure a fair trial for the accused? Are some parts of the trial more important than others? Would you trust a jury of your peers to determine your guilt or innocence? Students should also explore their reactions to playing attorneys, witnesses, jurors, and the judge. What roles do each play in the trial process?

If a resource person has participated in the mock trial, the debriefing is an excellent way to make the most of his or her experience and insights. Since the mock trial is a common frame of reference, the resource person has a natural vehicle for expressing ideas and observations, and students should be better able to grasp the points that are being discussed.

Mock Trial Competitions

A variety of spin-offs have come from mock trials. One of the most rewarding is the area-wide mock trial competition. These competitions are like single elimination basketball tournaments. That is, teams from different schools compete against each other, with the losers eliminated and the winners proceeding to the next round. (Of course, the same model could be used for competitions between classes within a school.) The Street Law project has been conducting city-wide mock trials in Washington since 1972, and we'd be glad to send you information on how you can set up your own competition.

These competitions are real attention-grabbers, which build students' interest, involve volunteers in a creative way, and provide excellent public relations and publicity for your program. The competitions need not be expensive. They can usually take advantage of time donated by lawyers and judges, and judges or law schools can often make courtrooms available at no cost.

Mock Trials for Elementary Students

While mock trials have probably found greatest acceptance in secondary school classrooms, an adaptation of the technique for elementary school students has been developed by Arlene Gallagher and Elliot Hartstein of the Law in American Society Foundation in Chicago. The "Pro Se Court" simulation provides for roleplaying coupled with decision-making activities in a simplified procedural context which can serve as a stepping stone for later mock trials.

Somewhat more elaborate materials in this area have been developed by Margaret Caylor of the Law in a Changing Society Project in Dallas. That teaching unit, "The Mock Trial," is actually a kit for upper elementary teachers which contains everything from a judge's robe and gavel to roleplaying situation sheets for students. This kit uses historical situations such as those involving Roger Williams and Anne Hutchinson as well as staged classroom incidents which can quickly be converted into trial exercises. This kit has been widely used by teachers across the state of Texas and by some in Oklahoma. (See bibliography on p. 15 for more information on these and other materials.)

There is one point to remember that applies to mock trials at any level. Don't forget that the objective is not the precise replication of an actual trial but a learning experience for you, your students, and even for any resource persons who may be helping out. The emphasis shouldn't be on perfection, but on a nonthreatening exercise with plenty of time for debriefing, enabling the class to go over key points in the trial and better understand the whole experience. To put it another way, don't forget that mock trials should be both fun and a learning experience.

For additional information and assistance on mock trials, mock trial competitions, and materials, write or call the National Street Law Institute, 605 G Street, N.W., Washington, D.C. 20001 202-624-8217. ☐

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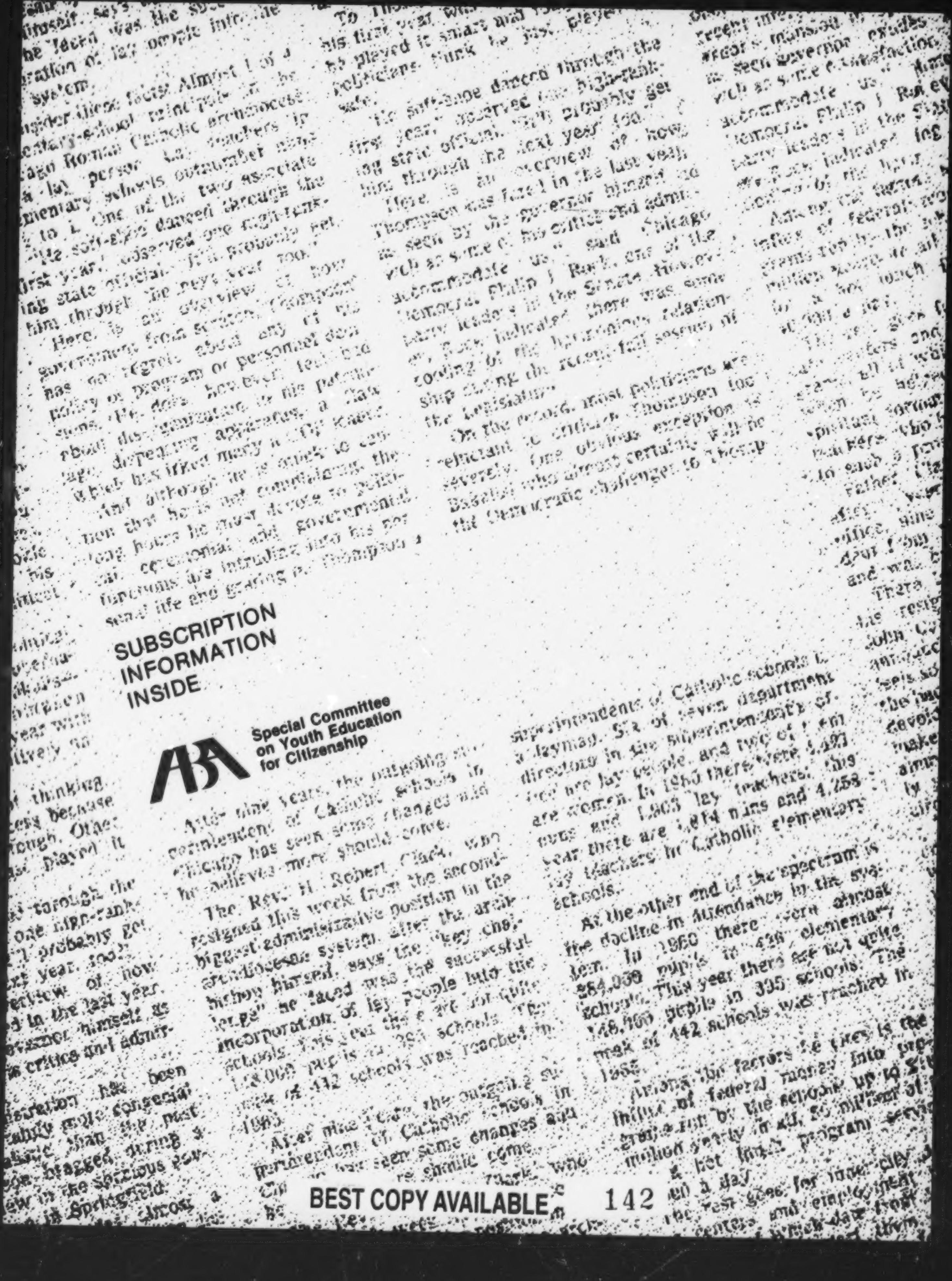

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OPENING STATEMENT

British troops randomly intruding upon the privacy of colonists in their homes, writs of assistance providing them with the "legal" sanction to do so, James Otis delivering his stirring oration on the right to privacy—these are but a few of the images which come to mind in considering the origins of the Fourth Amendment. The conflict seemed clear-cut and straightforward in colonial days—a basic case of oppressor versus oppressed, tyranny versus justice. And as a result of these experiences, the protection against unreasonable searches and seizures and the requirement of a warrant became embodied in the Fourth Amendment as fundamental beliefs and guarantees of our democratic nation.

As with other Bill of Rights guarantees, however, the Fourth Amendment today is engulfed in controversy. No longer are the instrusions so blatant, the conflicts so clear.

Critics claim that criminals are benefiting from the Fourth Amendment far more than law-abiding citizens, that American law enforcement officials are being handcuffed in their efforts to detect crime, apprehend wrongdoers, and protect the general population.

Are these criticisms justified? How have the courts dealt with the multi-dimensional dilemmas posed by the Fourth Amendment? What standards have emerged, how have they been applied, and what alternatives or future trends must we consider and anticipate?

These are some of the questions addressed in this issue of *Update*. In the lead article, Co-Editor Charles White traces the development of major Supreme Court cases in this area, ranging from bugged telephone booths to searches of motorists. He also reviews the range of Fourth Amendment issues which the Court has had to deal with in recent years.

In *Classroom Strategies*, Cynthia Kelly offers a systematic approach for presenting Fourth Amendment issues to students. Building upon the language of the Amendment itself, Ms. Kelly shows how value clarification, role-play, films, and other approaches can illuminate Fourth Amendment issues.

Other articles provide additional perspectives on this topic. In *Update Looks Back*, John Walsh compares and contrasts English rules of search and seizure with those of the states. Co-Editor Norman Gross examines court rulings and rationales in cases of school searches and seizures, and Charles White examines the historical basis of the Amendment.

A new feature, *Opposing Views*, also makes its appearance in this issue. With the controversy over the Equal Rights Amendment heading down the back stretch, Philip Kurland and Ruth Bader Ginsburg tackle the question, "Is the ERA Constitutionally Necessary?" Regular *Update* sections *Court Briefs, Newsclips, Family Lawyer* and *Curriculum Update* round out our Spring, 1978 offering.

This issue marks the beginning of *Update*'s second year of publication. We want to thank all of you for your support of the magazine, and urge you to send us your articles, ideas, and suggestions.

All of those associated with *Update* and the Special Committee also want to take this opportunity to wish you a very pleasant summer. Please feel free to call upon us if we can provide any assistance in your 1978-79 activities.

—Norman Gross

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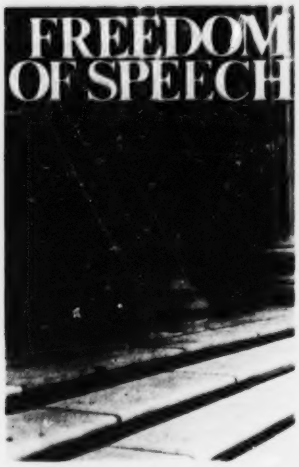

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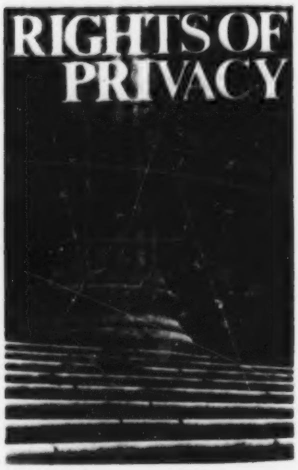

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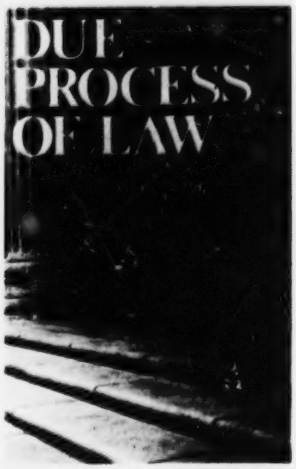

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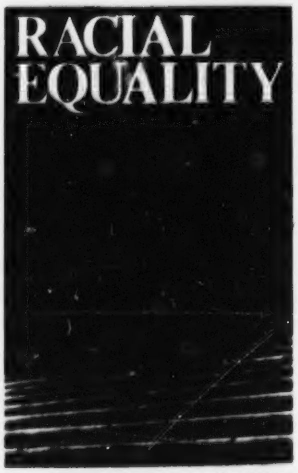

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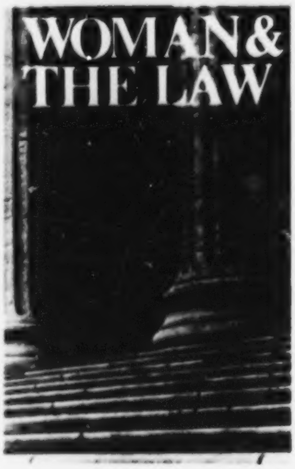


No. 6005-3

contents

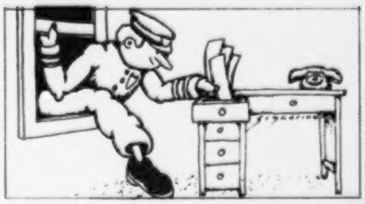
Volume 2, Number 2 Spring 1978

4

Supreme Court Report
In Search of Fourth Amendment Standards

8

Classroom Strategies
Teaching About Search and Seizure



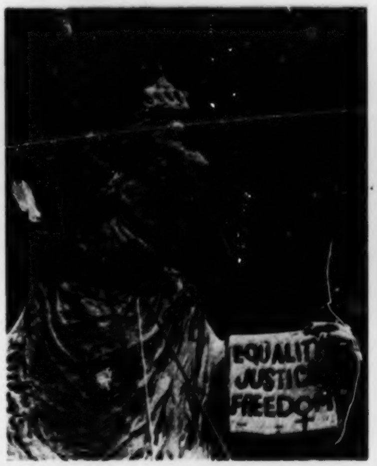
13

Court Briefs
From Plea Bargaining to Student Discipline

INDIAN LAND
NO
TRESPASSING

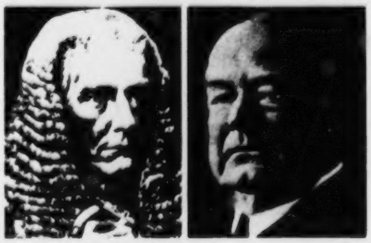
16

Opposing Views
Is the ERA Constitutionally Necessary?



20

Views From Abroad
Privacy vs. Crime Detection in England and the United States



23

Newsclips

25

Update Looks Back
Righting an Old Writ

28

In the Field
Search and Privacy in the Schools

33

Curriculum Update
A Potpourri of Materials

47

Family Lawyer
Cases on Privacy and Property

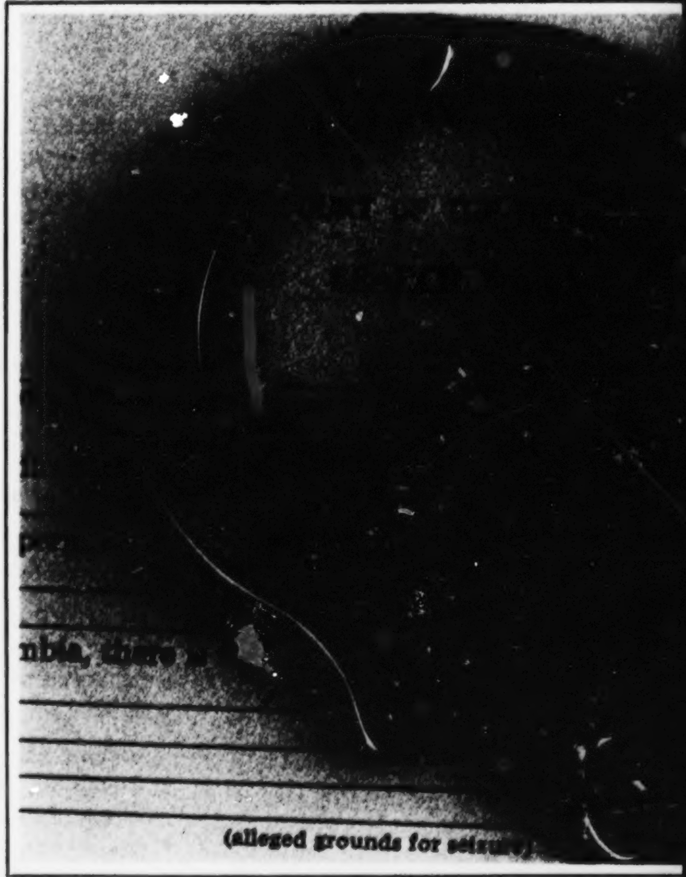
Credits
Pages 4-5, 13, and 23, Paul Conklin; pages 9 and 10, Slug Signorino; pages 15 and 43, Mimi Forsyth; page 16, Jean-Claude LeJeune; pages 20 and 25, the Bettman Archive; page 23, United Press International; page 28, Ken Love; page 35, Brenda Burbank; page 36, Henry R. Martin; page 37, Wayne Stayskal; page 41, Tom Stratton; page 48, James Estes.

SUPREME COURT REPORT

In Search of Fourth Amendment Standards

Over the years, search and seizure cases have given the Supreme Court fits

Charles White



They called it the silver platter doctrine, a simple way for federal law enforcement officials to get around Supreme Court limitations on their freedom to search and seize. For almost half a century, the Court's rule prohibiting the use of illegally secured evidence only applied to federal searches, so when federal officials wanted to search without a warrant, all they had to do was tip off state or local police, who conducted a search and handed the evidence over to federal officials on a "silver platter."

While this particular aberration ended when the Court applied its rule to the states, search and seizure remains one of the least understood and most troublesome areas of law. In fact, one of the consequences of applying this rule to state courts was an enormous increase in the number of search and seizure cases reviewed by the Court. Year in and year out the Court labors mightily over search and seizure cases, coming down with new guidelines almost faster than state courts can digest them or police officers can learn them. Yet the doctrines are riddled with exceptions and the area remains shrouded in uncertainty.

Unlike its landmark holdings such as *Brown v. Board of Education*, in which the Court unanimously outlawed segregated schools, the Court in search and seizure cases has rarely spoken with one voice. Part of the problem is that search and seizure is an intricate area, encompassing a wide range of issues, situations and concerns. A hint of its innate complexity is suggested by the length of the Fourth Amendment, which deals only with search and seizure but is longer than the First Amendment, which covers the freedoms of religion, speech, press, assembly, and petition.

The confusion generated by search and seizure is unfortunate, because it is the arena for conflict between some highly important values. On the one hand, a civilized society must allow police to search persons and places and seize evidence if crime is to be fought and law-abiding citizens are to be secure. On the other hand, an individual's right to privacy is one of the most valued of democratic freedoms. In the words of Justice Frankfurter, the Fourth Amendment has "a place second to none in the Bill of Rights" because "the knock at the door . . . as a prelude to a search without authority of law but solely on the authority of the police [is] inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples." To put the conflict in its simplest terms, how can we guarantee the freedom and dignity of the individual while preserving a safe and orderly society?

My purpose in this article will be to focus on the dynamics of decision-making, to look at some of the dilemmas the Court has wrestled with in trying to reconcile competing values and evolve seach and seizure standards. (For a somewhat different approach to the area, focusing on some of the general principles courts have developed on search and seizure, see Cynthia Kelly's article on page 8.)

Putting Teeth into the Fourth Amendment

The Fourth Amendment is designed to prevent abuses of the government's power to search and seize. It goes into

---

Charles White has a doctorate in American Civilization from the University of Pennsylvania. He has taught at Northsestern University and Kendall College and is now Assistant Staff Director of the ABA's Special Committee on Youth Education For Citizenship.

and as I am satisfied

some detail on the prohibition against unreasonable searches and seizures and on the requirements for a warrant, but says nothing about what will happen if the government violates these provisions. The Supreme Court got into interpreting the amendment relatively late. Throughout most of our history, it was thought that the Bill of Rights applied to the federal government only, and, since in the early days of the republic there were few federal criminal laws, virtually no search and seizure cases were decided by the Court before this century.

It wasn't until 1914, that the Court settled on a means of making the Fourth Amendment effective. The case began when federal authorities suspected a man named Weeks of using the mails to conduct a lottery. They entered his home without a warrant and seized personal papers and effects, including some letters. Weeks objected to the government's introducing this evidence against him, but a lower court followed the common law dictum that evidence is admissible no matter how it was secured, and Weeks was convicted.

He then appealed to the Supreme Court, and won a reversal in *Weeks v. United States,* 232 U.S. 383. Justice Day, writing for the majority, declared that the papers were "taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of his rights." But what could be done about the violation? How could the Fourth Amendment be made effective?

Justice Day noted that the Fourth Amendment applies to "all alike, whether accused of crime or not." He reasoned that: "if letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution." He therefore ruled that the seized items could not be used as evidence.

Thus was born the controversial "exclusionary rule," the doctrine that illegally seized evidence can't be used against the accused, no matter how relevant it is to the case or how convincingly it demonstrates his guilt. (See John Walsh's article on page 20 for a comparison of the English and American practices concerning illegally-secured evidence.)

If illegally seized evidence is admitted, the judge said, "the Fourth Amendment . . . might as well be stricken from the Constitution"

The *Weeks* decision applied only to evidence introduced into federal court, and it was thus in this period that the silver platter doctrine came into play. Gradually, however, the Court edged toward applying the amendment and the rule to the states.

In *Wolf v. Colorado,* 338 U.S. 25 (1949), for example, the Court executed a series of fancy legal pirouettes. While declaring that the Fourth Amendment was binding on the states, it left the remedy for illegally seized evidence to their discretion. At the time of the *Wolf* decision, seventeen states had voluntarily adopted their own versions of the exclusionary rule, and a few more adopted it in the next decade, but the silver platter doctrine continued to flourish in states which did not have the rule.

An example of the silver platter in action is provided by the facts of *Elkins v. United States,* 364 U.S. 206 (1960), in which Oregon police were searching a home for evidence of obscene motion pictures. They didn't find what they were looking for but did find wire-tapping apparatus traced to Elkins. The state then tried to convict him of wire-tapping but failed when judges threw out the evidence because the search warrants were invalid. Not to be stymied, Oregon officials then turned the evidence over to federal officers, and Elkins was convicted of wire-tapping in federal court.

By a six-to-three margin, the Supreme Court held that the silver platter doctrine's time was up. Justice Stewart's opinion noted that the silver platter doctrine compromised the integrity of the federal courts by permitting illegally seized evidence to be admitted. In Stewart's words, the federal courts must not allow themselves to become "accomplices in the willful disobedience of a Constitution they are sworn to uphold."

After getting its feet wet in *Wolf* and *Elkins*, the Court finally took the plunge in 1961 and declared in *Mapp v. Ohio*, 367 U.S. 643, that the exclusionary rule did apply to state as well as federal courts.

As one commentator has noted, "the facts in the case reflected no credit on the Cleveland police department." The case began when three policemen came to the home of Dollree Mapp and demanded to be admitted. They wanted to question her about a suspect in a bombing incident who they thought was hiding there, but they refused to give her any information and just said they wanted to talk with her. She called her lawyer, who told her not to let them in without a warrant.

The facts in the case reflect no credit on the Cleveland police department

The frustrated cops kept a vigil outside for three hours, and, when they were joined by four more officers, forced their way into her house. Her lawyer then arrived, but they refused to let him see her. When she demanded to see a warrant, one of them waved a piece of paper in front of her which was apparently not a warrant. She grabbed it and put it down her dress, on the mistaken belief that her person was safe from search. After a struggle, the police handcuffed her, retrieved the paper, and searched the rest of the house. They never did find the suspect, but they did discover a trunk containing allegedly obscene material. Mapp claimed that the trunk had been left behind by a boarder, but she was nonetheless convicted on an obscenity charge.

Mapp's lawyer didn't ask the Supreme Court to overrule *Wolf* but that is what the Court did. Justice Clark's opinion for the majority noted that most of the states now required the exclusionary rule in whole or in part, largely because they had become convinced that other remedies were ineffective. He noted that the lack of an exclusionary policy in many states served to "encourage disobedience" to constitutional standards by federal officials, permitting a kind of reverse silver platter doctrine whereby federal officers could "step across the street" to deliver unconstitutionally seized evidence to state authorities. Justice Clark pointed out that "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." He concluded, "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

Justice Harlan spoke for the three dissenters. He noted that almost half the states *hadn't* adopted the exclusionary rule, and wrote that the decision was destructive of federal doctrine, since different states, with varying problems of crime control, should be allowed to deal with the unlawful search problem as they saw fit. He called the majority opinion unwise in principle and policy, and said that the decision made the Court's voice "only the voice of power, not of reason."

The exclusionary rule was thus catapulted into all the courts of the nation at the very time that crime rates were rising off the charts. Not surprisingly, the *Mapp* decision was tremendously unpopular, rivaling *Miranda* in bitter public denunciations. To many laypeople it seemed to fly in the face of common sense. They reasoned that if the police suspected someone, searched him, and found evidence of the crime, then that proves that they were right to search him and thus the search was reasonable and the evidence should be used to convict him. The court has emphasized, however, that the exclusionary rule is designed to protect all people—guilty and innocent alike—from arbitrary searches. It stands as a deterrent to overzealous police conduct. Still, the criticisms are easy to understand since the exclusionary rule is only applied if the search is unreasonable and something is found. If nothing is found or if the case never goes to trial, there is nothing to exclude, so it's no wonder that to many citizens the rule seems to benefit the guilty only.

But how do the courts determine whether a given search is reasonable or that a warrant is required? The exclusionary rule's applicability to the states vastly increased the number of search and seizure cases reviewed by the Supreme Court, and enabled it to begin working toward authoritative answers to at least a few of the major search and seizure questions.

Wiretapping and Other Electronic Surveillance

A series of cases in the 60s and 70s raised some particularly troublesome problems for the Court, since they dealt with sophisticated equipment that couldn't have been foreseen by the bewigged gentlemen who came by horse to Philadelphia to write the Constitution. How does the fourth amendment prohibion against unreasonable searches apply to telephone bugs, spike microphones, and all the other sophisticated devices for surreptitiously listening in on conversations? Under what circumstances can police wiretap without first securing a warrant?

When wiretaps first came before the Court in the 1920s, the majority applied the Fourth Amendment literally. In *Olmstead v. United States*, 277 U.S. 438 (1928), bootleggers brought to justice by wiretap evidence sought to have the evidence excluded, claiming that such searches were unreasonable under the Fourth Amendment. However, the Court looked at the language of the amendment and its historical background, and concluded that its purpose was to prevent the use of governmental force to search for "material things." But in this case nothing material was involved, just words.

The majority was careful to point out that the wiretap was applied to ordinary telephone wires outside of the homes and offices of the accused. Therefore, there was no trespass. "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only." Since the defendants had no property interest in "telephone wires reaching to the whole world," the Court said, they couldn't complain that their fourth amendment rights were violated.

Justice Brandeis dissented, arguing that the amendment must be capable of adapting to a changing world. He foresaw a day in which new inventions would be able to reproduce papers without removing them from a desk drawer and "the most intimate occurrence of the home" will be exposed to a jury. He said that whenever "a telephone line is tapped, the privacy of the persons at both ends of the line is invaded," and he argued that the amendment prohibited such searches. The makers of our Constitution, he argued,

> knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

The cases that followed reflect the problems that search and seizure have given the Court. Apparently unwilling to overturn *Olmstead* directly and outlaw wiretaps on fourth amendment grounds, in the 1937 case of *Nardone v. United States*, 302 U.S. 379, the Court declared that Section 605 of the Federal Communications Act forbade wiretaps, so there was no need to get into the consitutional question. As one commentator pointed out, this was "a remarkable piece of statutory construction," since the section in question was drafted to forbid the unauthorized interception of telegraph messages. Besides, it antedated the *Olmstead* decision, and so one would think that if it clearly prohibited wiretaps, it should have been used by the Court to reverse Olmstead's conviction.

Of course, new equipment not using telephone wires would pose a problem for the Court, but the kind of instrument used in *Silverman v. United States*, 365 U.S. 505 (1961), allowed the Court to apply the Fourth Amendment while using the narrow construction advanced in *Olmstead*. In this case, officers had gathered information about illegal gambling by using a microphone with a spike about a foot long attached to it. The apparatus was hooked up to an amplifier and earphones. Officers located in a house next door to the defendants' dwelling inserted the spike into a party wall, hitting a heating duct and in effect turning the defendants' entire heating system into a conductor of sound. Since the "unauthorized physical penetration" of the spike into the defendants' house constituted physical intrusion "without their knowledge and without their consent," the Court ruled an illegal search had been conducted under the Fourth Amendment. However, even though the Court was not required to overturn *Olmstead*, it accepted Justice Brandeis's position that the amendment must change to meet changing circumstances. As the opinion put it, "inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of . . . real property law."

Olmstead was finally explicitly overruled six years later in *Katz v. United States*, 389 U.S. 347. Katz had been convicted of illegal gambling on the basis of evidence obtained by placing an electronic listening device on the outside of a public telephone booth. This was not a wiretap and hence was not prohibited by Section 605. Katz argued, however, that the booth was a "constitutionally protected area" intruded upon by the listening device, and thus should be excluded under the reasoning of the *Olmstead* decision. The Court said that wasn't the issue, since "the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."

To replace the *Olmstead* formulation the Court enunciated the principle that "the Fourth Amendment protects people, not places. . . . What [someone] seeks to preserve as

(Continued on page 43)

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Teaching About Search and Seizure

Cynthia A. Kelly

Stepping gingerly through the Fourth Amendment? Here's a six-step model to increase your gait

To paraphrase Dickens, search and seizure is the best of subjects and the worst of subjects. Teachers who decide to teach about search and seizure are fortunate in that the law of search and seizure is well developed and presents questions that are intellectually challenging as well as interesting to students. In fact, this area is so rich that the United States Code Annotated lists over 7,000 search and seizure cases—virtually all of which have been decided within the last fifteen years.

The sheer number of cases, however, suggests that this area may be difficult to teach about. The courts have resolved many issues on a case-by-case basis, and the basic search and seizure concepts include many exceptions and complicated distinctions. In addition, courts in different jurisdictions have often reached different conclusions in cases with similar fact situations.

In order to begin teaching about search and seizure, then, teachers must develop some method for presenting the fundamental legal concepts without getting bogged down in legal details. This article presents a model for organizing and presenting such information.

After an introductory exercise designed to make students familiar with the important values at stake in search and seizure, a logical method for organizing search and seizure concepts is suggested by an examination of the language of the Fourth Amendment. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

First, students must be able to understand what "search" and "seizure" are under the amendment. If there has been no search or seizure, the Fourth Amendment does not apply. Second, students must be able to tell when a search or seizure is "unreasonable," since the Fourth Amendment clearly does not prohibit all searches and seizures, but only those which are unreasonable. Third, students must understand what a warrant is, when it is required, and how to determine if it is valid. Finally, students must be able to decide if a search and seizure was properly conducted.

Lesson One: Determining Values and Attitudes

A good way to introduce students to this area is by asking them to respond to a series of questions designed to probe their attitudes about crime, privacy, and the role of the Constitution, the police, and the courts. The following questionnaire is designed to generate students' interest and set the stage for issues to be explored later on. It can also be used at the end of the unit to assess changes in students' attitudes.

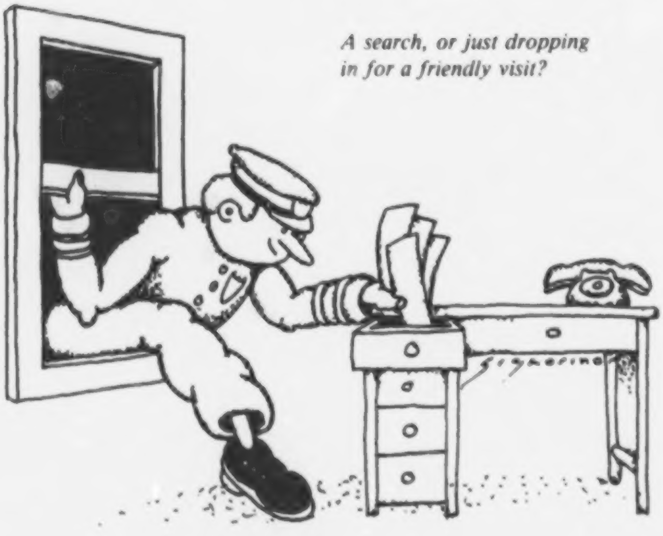
Ask students if they strongly agree, probably agree, probably disagree, strongly disagree, or are undecided about each of the following statements:

1. We must permit the police to utilize every available means in combating criminal activity.
2. If we have a lawless police force, we are inviting a lawless response from the people.
3. The fact that evidence is secured illegally should not relieve the criminal of his obligation to pay his debt to society.
4. Recent Supreme Court decisions prohibiting the introduction of illegally obtained evidence in court have handcuffed the police in their efforts to restore law and order to our society.
5. Police who violate constitutional provisions while performing their duties should be subject to criminal and civil sanctions.
6. Only individuals with something to hide would refuse to allow the police to search their belongings.
7. Principals should have the right to search student lockers.
8. Electronic surveillance is a necessary tool in the fight against crime.

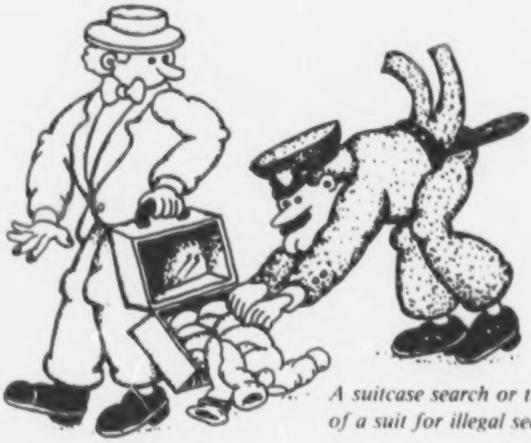
Lesson Two: Defining "Search" and "Seizure"

Students could begin by reading the Fourth Amendment and developing their own definitions of search and seizure. In carrying out this exercise, students could be asked to consider who/what the Fourth Amendment is designed to protect. Who/what is the Fourth Amendment trying to limit? Students should try to distinguish between a search and a seizure. Is it possible to have one without the other? Do they usually happen together? Which constitutes a more serious invasion of privacy?

One way of building understanding is to present students with various situations and ask them to decide whether there has been a search or a seizure within the meaning of the Fourth Amendment. A list of suggested situations appears below:



A search, or just dropping in for a friendly visit?



A suitcase search or the beginning of a suit for illegal search?

1. A police officer walking down a dark street notices an abandoned car, shines his flashlight in the car, and discovers a shotgun on the back seat. [no search]
2. Harry is walking down the street. The police stop him and look through the suitcase he is carrying. [a search]
3. The police take a sample of Mary's blood in order to determine its alcoholic content. [a search]
4. As a police officer walks by a house with its front door open, he sees a stolen radio. [no search]
5. A police officer climbs through a window in Mike's house and looks at the papers on his desk. [a search]
6. A police officer notices marijuana growing in Tom's front yard. [no search]
7. Federal narcotics agents listen to Jane's telephone conversation by using an electronic device. [a search]
8. John is arrested and taken to jail. [a seizure]
9. George's car is stopped at the border by police. [a seizure]
10. Susan's boyfriend breaks into her apartment and looks through her desk for love letters. [no search]

In general, a search is any forcible seeking out, prying into hidden places, exploratory investigation, or quest. More specifically, the Supreme Court has defined a search as "any governmental violation of a person's reasonable and justifiable expectation of privacy." *Katz v. United States,* 389 U.S. 347 (1967). Thus, under the Fourth Amendment definition, a search or seizure must involve action by the *government.* Situation 10 is not a search or a seizure because the government is not involved—the action there is taken by a private citizen. While Susan's boyfriend may be tried for breaking and entering, he has not violated her Fourth Amendment rights.

In all the other situations described above, there is action by the government. Whether or not there is a search or seizure under the Fourth Amendment therefore depends on (1) whether the government officials are dealing with "persons, houses, papers, or effects" and (2) whether they are violating someone's reasonable and justifiable expectation of privacy. In situation three there is a search because the police are invading the privacy of a person by examining the content of her blood. In situation two they are invading the privacy of a person's effects (his suitcase), and in situation five, the privacy of both an individual's house and his papers. In situation seven, the police are invading a personal right to privacy when they use a wiretap to listen in on a telephone conversation.

In situations one, four, and six, however, the police are not carrying out a search. Although they are dealing with a

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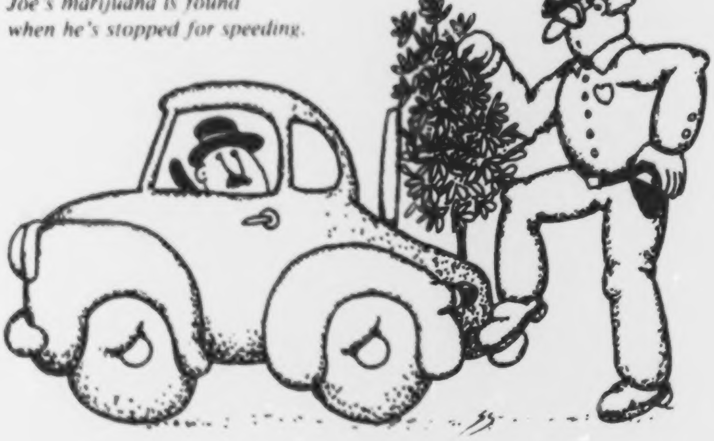
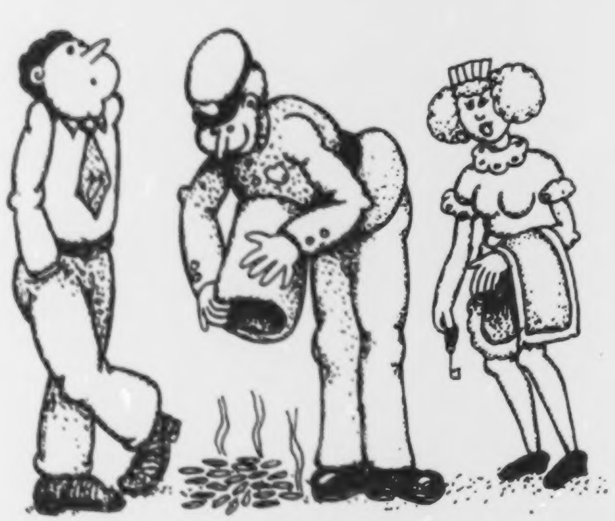
Joe's marijuana is found when he's stopped for speeding.





Luckless Joe, confronted by the evidence he left behind in his hotel room.

person's effects in these situations, they are not violating anyone's reasonable or justifiable expectation of privacy. In situation one, the police officer is doing his duty in examining an abandoned car on a dark street, and the owner of the car has no justifiable expectation of privacy when he or she leaves a shotgun in plain view on the back seat. Similarly, in situations four and six, the individuals left their property in places where it was reasonable that anyone, including the police, could have discovered it. In such situations, there is no search under the Fourth Amendment.

Situations eight and nine are examples of seizures under the Fourth Amendment. A seizure is defined as a sudden and forcible grasp, a taking into possession, a taking into physical custody or control. In situation eight, a person is taken into custody by the police, and in situation nine the police take control of a car.

Lesson Three: Defining an "Unreasonable" Search or Seizure

Once students have a basic understanding of the definitions of "search" and "seizure" they can then explore the meaning of an "unreasonable" search or seizure. In general, the courts have held that a search or seizure of private property is unreasonable unless it has been authorized by a valid warrant. In any search and seizure situation, then, the courts assume that the police (or governmental official) should have obtained a warrant. If they did not, they must demonstrate why the search or seizure should still be upheld as reasonable.

The courts have recognized, however, that the police can't be expected to obtain a warrant prior to every search or seizure. For example, there are many emergencies demanding immediate action, and it would handcuff police to require them to get warrants in such situations. Exceptions have thus been created to protect the safety of officers and the public, to insure that evidence will be seized before it can be destroyed, and to apprehend suspects and prevent escape. In ruling on the reasonableness of search or seizure, then, the courts must balance the need for immediate action against the invasion of individual privacy that is involved.

In order to give students an understanding of the exceptions to the warrant requirement which have been upheld, ask them to examine each of the situations below and decide whether the police have engaged in an unreasonable search or seizure under the Fourth Amendment.

1. A garage mechanic who is working on Joe's car notices some marijuana cigarettes under the seat and turns them over to the police. [not a "search" under the Fourth Amendment]

2. The police see Joe—a known pusher—standing at a bus stop in the business district of the city. They stop and search him, and find a bag of marijuana in his pocket. [unreasonable]

3. The police sneak into Joe's yard after dark, climb over a fence into his garden and find marijuana growing. [unreasonable]

4. When the police arrest Joe for speeding, they also search his trunk and find marijuana there. [unreasonable]

5. The police go to Joe's house. His wife agrees to let them search the house for marijuana. They find marijuana in a kitchen cupboard. [reasonable]

6. Joe is arrested for burglary. A police officer searches his clothing and finds a cigarette case filled with marijuana. [reasonable]

7. After Joe spends the night at a hotel, the police ask the maids to turn over the contents of the wastebaskets

and they find marijuana cigarettes. [reasonable]

8. The police see Joe driving a car which was reported carrying stolen merchandise. They stop him, search the car, and find marijuana. [reasonable]

9. The police see Joe pacing back and forth nervously in front of a jewelry store in an area of the city where there have recently been a series of jewelry store robberies. An officer stops and frisks Joe, feels something he thinks is a gun, and pulls out a metal container filled with marijuana. [reasonable]

10. Joe's neighbors report that screams are coming from his house. The police arrive to investigate and they also hear screams. When no one answers their knock, they enter the house and find two bags of marijuana on the dining room table. [reasonable]

In analyzing these situations, students should immediately recognize that the issue of reasonableness does not even arise in situation one. In that case, there is no search because there is no action by the government. A private citizen has the right to conduct a search without violating the Fourth Amendment and to turn the evidence over to the police. (Of course, if done at the urging of the police, government action *is* present).

In analyzing each of the other situations, students should decide whether there is any reason why the police should be excused from the general requirement that they obtain a warrant. In the second situation, the police have clearly engaged in an unreasonable search. This type of arbitrary and indiscriminate search is exactly what the Fourth Amendment is designed to prohibit. Similarly, in situation three, the police do not have the right to trespass on private property.

The police have also engaged in an unreasonable search in situation four. When the police arrest someone for speeding, they have no right to conduct a general search of the automobile. In order to be reasonable, the search of the car must be related to the nature of the offense for which the arrest was made. For example, if the police stop Joe for speeding and smell liquor on his breath they could search the car for evidence of drunken driving.

Each of the other searches represents a situation which has been recognized as an exception to the warrant requirement. Situation five involves the exception for searches by consent. An individual who consents to a search by the police is viewed as waiving his right to protection from the Fourth Amendment. While the person who owns property can obviously consent to its being searched, the example points out that the head of the house or one equally in control of the premises may also consent to a search.

Situation six represents the exception for searches which are incident to a valid arrest. The rationale for this exception is that an officer should be able to search an arrestee immediately in order to prevent escape, assault, or the destruction or concealment of evidence. This reasoning has led the courts to rule that the search must be reasonably related to the arrest and take place at the same time.

The key is whether there's a valid reason why police shouldn't have to get a warrant

Situation seven involves the exception for searches of abandoned property. The courts have reasoned that anyone who leaves his property behind cannot expect it to be protected from prying eyes.

In situation eight, the search is reasonable because the police had information that the car might contain contraband. Note the difference between this situation and the one in which Joe was arrested for a traffic violation. In traffic cases police can search the car only if they suspect the presence of something directly related to the traffic offense, but here the police have reason to think that the car contains contraband so they have probable cause to search it.

"Probable cause" is an important concept for students to understand. As we'll see in the next section, it is a standard prescribed by the Fourth Amendment for issuing warrants. As this situation shows, it is also a standard for certain situations in which a warrant may not be necessary. Probable cause exists where the facts and circumstances known to the officer would justify a reasonable person in concluding that a crime has been committed. The quantity of information which constitutes probable cause must be measured by the facts of each particular case.

Situation nine describes the "stop and frisk" exception. Under the Fourth Amendment, the police have the right to detain a person in a public place if they reasonably suspect that he is committing or is about to commit a felony. Following this seizure, if the police officer reasonably believes that this person intends to do him bodily harm, he can also search him for a dangerous weapon.

In this situation, the officer's initial search must be limited to frisking (running the hands over the outer surface of the subject's clothing). Only if the frisk reveals further evidence that the subject has a weapon may a more intensive search to locate the weapon be made.

Situation ten presents the exception for any situation in which there is a reasonable basis for believing that delaying a search to obtain a warrant would endanger the physical safety of the officers or of third persons. This exception also covers cases where delay to obtain a warrant would endanger the success of the search, as by permitting the destruction or removal of the items sought. For example, suppose a man carrying stolen gems walks out of his house, notices that a policeman has seen him, and ducks back in. If the police had to get a warrant there is every likelihood the evidence would be removed or destroyed by the time they were able to search the house.

A rank order strategy could effectively teach students about the warrant exceptions. Students could be asked to rank situations such as those presented above according to how important it is that the police obtain a search warrant. Discussion could focus on how and why students differentiated among the various situations.

Lesson Four: Recognizing A Valid Warrant

A good way to help students understand the warrant requirement is to ask them what it accomplishes, what values it protects. Students might be asked to agree or disagree with Justice Jackson's defense of the warrant requirement in *Johnson v. United States,* 333 U.S. 10 (1948): "The point of the Fourth Amendment which often is not grasped by zealous officers," he wrote, is that it requires that the need for a search be decided by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is . . . to be decided by a judicial officer, not by a policeman."

You might also discuss with students some other reasons for the warrant requirement, such as the necessity of showing a neutral third person that the information justifying the search was available prior to and not after—and possibly as a result of—the search, and the creation of a pre-search record that will help trial and appellate courts determine if the search was lawful.

A second useful exercise is to have students note the Fourth Amendment's explicit requirements for a warrant: that it will only be issued on a showing of probable cause supported by oath or affirmation and that it must specifically describe the place to be searched and the persons or things to be seized. A role play will help bring these words to life for students.

Standard Warrant Forms

Affidavit for Search Warrant—General Form

The undersigned, being first duly sworn, deposes and says:

I

He resides at ______ [*street address*], in the City of ______, County of ______, State of ______.

II

______ [*Specify affiant's official capacity, such as:* He is the duly elected, qualified, and acting sheriff of the County of ______, State of ______, and as such is authorized to make searches and seizures.]

III

______ [*Describe place to be searched, property to be seized, and the person or persons possessing said property, such as:* He ______ (has reason to believe *or* is positive) that on the premises known as ______ (*specify exact location, including apartment number, if any*), there is now being concealed certain property, namely ______ (marijuana), the possession of which property is a felony. Said property is being used as the means of committing a felony and said property is possessed by ______, who intends to use it as the means of committing the crime of ______ (illegal possession of marijuana) in violation of ______ (*cite statute*).]

IV

______ [*Set forth facts showing probable cause for issuance of the warrant, such as:* The facts tending to establish the grounds for issuance of a search warrant are as follows: A confidential informant, who has proven very reliable in the past and is familiar with ______ (marijuana), says that ______ [*names*] have in their possession at this time a quantity of ______ (marijuana), at the above-described location. This informant saw the ______ (marijuana) in the apartment within the past two days. The identity of the informant cannot be revealed because of fear for his personal safety.]

Wherefore, the undersigned prays for issuance of a search warrant for the above-described property.

[*Signature*]

Search Warrant—General Form

The ______ [People of the] State of ______, to ______ [*specify official authorized to execute warrant*].

Proof by affidavit having been made before me by ______ that there is probable cause to issue the search warrant requested in the affidavit attached hereto and by reference made a part hereof as if fully set forth herein,

You are hereby commanded to search the following ______ [premises *or* person(s) *or* vehicle(s)]: ______ [*describe place or person(s) or vehicle(s) to be searched*] for the following property: [*describe property to be seized*], and if you find said property or any part thereof, to bring it forthwith before this court or any other court in which the offense relating to the property taken is triable or to retain such property in your custody according to the provisions of ______ [*cite statute*].

Dated ______, 19____

[*Seal, if required*] [*Signature*]

For example, students could be given this situation. Police have reason to believe that George Hilton is running an illegal gambling club in his home. How do they go about securing a valid warrant to search the property?

The first step is for students playing the police to execute an affidavit under oath or affirmation which sets forth the facts showing probable cause for the issuance of the warrant and describing the property to be seized and the place to be searched. The sample affidavit on this page should help students determine the kind of information that is required.

The next step is for the police to bring this affidavit to a magistrate (an officer of the relevant court) and ask him to issue a warrant. In the role play, several students might serve as a panel of judges, or a series of individual students might play judges. They will review the affidavit and question the officers to see if the probable cause requirement has been met. The courts have ruled that probable cause means more than mere suspicion but less than the evidence necessary to support a conviction. If the officer uses information supplied by an informant in trying to establish probable cause, special rules for testing the adequacy of the information apply. Basically, the information must contain enough specific facts to permit the magistrate to determine for himself that: (1) the informant is a generally reliable person, and (2) the informant gained his information in a manner that justifies relying on it.

This might be a good time to ask a lawyer, judge, police officer, or other resource person to participate. They could advise the students playing judges, comment on the simulated hearings, and discuss actual hearings in the community, going into such matters as how judges question police officers seeking a warrant, the evidence they use in determining probable cause, and reasons for turning down requests for warrants.

If the students playing judges decide that the probable cause requirement has been met and that the affidavit is specific enough, they then must draw up a warrant. The sample warrant on this page should help them.

One of the first things they'll have to decide is how particularly the property to be seized and the places to be

(Continued on page 40)

COURT BRIEFS

Norman Gross

From Plea Bargaining to Student Discipline

Plea Bargaining Narrowly Upheld

Plea-bargaining—the name itself conveys something less than textbook descriptions of the trial process. The guarantee of one's innocence until guilt is proven and the right to a fair and speedy trial don't seem to fare too well in the arena of bargained pleas.

Important justifications, however, are offered in support of plea-bargaining. Advocates point out that it eases the backlog of cases before the court, avoids the time, expense, and uncertainty of a trial, and often enables defendants to recieve lesser sentences. Only recently has the Court acknowledged the practice and usefulness of plea bargaining, saying: "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concommittant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned and are constitutionally legitimate." In *Bordenkircher v. Hayes*, 46 L.W. 4089, January 18, 1978, the Court confronted a situation which highlighted the inherent tensions in this troubling area.

The case involved Paul Louis Hayes, a twice convicted felon, who was indicted by a Fayette County (Kentucky) grand jury of forging an $88.30 check. Hayes faced a possible sentence of two to ten years on the charge.

After arraignment, the state's attorney met with Hayes, his lawyer, and the clerk of the court to discuss a possible plea arrangement. The prosecutor offered to recommend a five-year sentence if Hayes would plead guilty. He pointed out, however, that if Hayes did not plead guilty, and "save the court the inconvenience and necessity of a trial," he would go back to the grand jury for an indictment under the Kentucky Habitual Criminal Act, which could possibly result, because of Hayes' two prior felony convictions, in a mandatory sentence of life imprisonment.

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When Hayes decided to plead not guilty, the prosecutor secured an indictment under the Habitual Criminal Act. At trial, Hayes was found guilty of forgery and was sentenced to life in the penitentiary. The district court and appellate court disagreed as to the constitutionality of the prosecutor's action, but the Supreme Court, by a narrow five-four margin, held that it was valid.

Speaking for the majority, Justice Stewart saw no distinction between a case in which a prosecutor originally indicts the accused on a more severe charge and then bargains for a lesser charge, and the present case where the prosecutor threatens to seek a stronger indictment as part of the plea-bargaining process. While agreeing that prosecutors would violate the Due Process Clause of the Fourteenth Amendment if they acted vindictively against the defendant, he refused to conclude that "a prosecutor acts vindictively and in violation of due process of law whenever his charging is influenced by what he hopes to gain in the course of plea-bargaining negotiations."

The whole purpose of plea-bargaining, Stewart pointed out, is to persuade the defendant to plead guilty and thus forego his right to a trial. The difficulty in determining when such action crosses the line of constitutionality, however, is reflected in Stewart's other comments. He said:

> To punish a person because he has done what the law plainly allows him to do [i.e., plead not guilty] is a due process violation of the most basic sort, and for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Although the defendant was faced with "unpleasant alternatives," Stewart concluded, the facts of this particular case present no due process violation.

Four justices disagreed. In one dissenting opinion, Justice Blackmun (joined by Justices Brennan and Marshall) felt that the case presented the same degree of prosecutorial vindictiveness as the Court had found in several of its prior decisions, and he expressed the concern that the Court's holding would give plea-bargaining "full sway despite vindictiveness." Blackmun also discussed several distinctions which he saw between an initial indictment on a lesser charge with the threat of a harsher indictment should the accused decide against the plea bargain. It is conceivable, Blackmun wrote, that the grand jury would have initially refused to return the harsher indictment. There was also no indication that Hayes was given another chance to plead guilty to the lesser charge after the new indictment was handed down.

In a separate dissenting opinion, Justice Powell provided another interesting perspective. "Although I agree with much of the Court's opinion," Powell said, "I am not satisfied that the result in the case is just or that the conduct of the plea bargaining met the requirements of due process."

"Persons convicted of rape and murder often are not punished so severely"

He pointed out that if he were the defendant, he might not consider five years in prison for forging an $88.30 check a "generous offer." Powell also reviewed Hayes' previous convictions, pointing out that neither of them resulted in his imprisonment. Yet, Powell said, "the addition of a conviction on a charge involving $88.30 subjected Hayes to a mandatory sentence of imprisonment for life. Persons convicted of rape and murder often are not punished so severely."

Academic Dismissal Upheld

The Supreme Court recently decided a case that raised for the first time the question of whether students who flunk out of school have a constitutional right to due process.

The Court had previously dealt with the requirements of due process in cases of disciplinary violations. In one case, *Gross v. Lopez*, 419 U.S. 565 (1975), a closely divided Court (5 to 4) held that "at the very minimum, students facing suspension . . . must be given *some* kind of notice and afforded *some* kind of hearing." This was required, Justice White wrote, because "the total exclusion from the educational process for a more than a trivial period is a serious event" for suspended children and could damage their standing with their teachers and "interfere with later opportunities for higher education and employment." Two years later, in the case of *Ingraham v. Wright*, 45 L.W. 4364 (1977), the Court by the same five-to-four margin held that a hearing was *not* required prior to corporal punishment. An ordinary paddling does not threaten any serious right, nor cause any grievous loss, the Court argued.

It was with this background that the Court confronted the academic dismissal of Charlotte Horowitz. Ms. Horowitz gained admission to the University of Missouri-Kansas City Medical School in 1971 as a fifth year student. She came to the school with exceptional academic credentials and excellent recommendations.

Although Ms. Horowitz did well in purely academic subjects, her performance in clinical courses was deficient. In the spring of 1972, faculty members criticized her lack of patient rapport and expertise in identifying clinical problems, and her erratic attendance and poor personal hygiene. Toward the end of that year, a reviewing body of students and faculty recommended that she not be advanced to the final year of medical school. However, in a subsequent letter confirming a personal conversation, the Dean told Ms. Horowitz that she was being promoted but on probation. He warned her that she must improve her relationships with others, keep established schedules, attend to personal appearance, and deal with criticisms and suggestions maturely.

After dissatisfactory performance in the following term, the review board recommended that she not be allowed to graduate on schedule, and if she did not make radical improvements, that she be dismissed from medical school. As an appeal of that decision, she was allowed to take oral and practical exminations under the supervision of seven practicing physicians, only two of whom recommended that she be allowed to graduate on schedule. Two others recommended immediate dismissal, and three recommended that she remain at the school on a probationary basis. At subsequent meetings, the review board affirmed its position against Ms. Horowitz' graduation and then decided that she be dropped from the school. She challenged this decision, contending that she had been stigmatized and her chances of gaining employment in a medically-related field were severely damaged without being accorded a hearing required by the Fourteenth Amendment.

In *University of Missouri v. Horowitz*, 46 L.W. 4179, March 1, 1978, the Court ruled unanimously that Ms. Horowitz had received more than a sufficient hearing. "We decline to further enlarge the judicial presence in the academic community," Justice Rehnquist wrote for the majority. There were, however, disagreements concerning what distinctions, if any, exist between academic and disciplinary dismissals, whether Ms. Horowitz' dismissal was for academic or disciplinary reasons, and whether any hearing would be required for academic dismissals.

In the majority opinion, Rehnquist noted that since Ms. Horowitz had been accorded "at least as much due process as the Fourteenth Amendment requires," there was no need to decide whether constitutional interests were involved. Yet he then went on to draw distinctions between "failure of a student to meet academic standards and the violation by a student of valid rules of conduct." Rehnquist pointed out that judgments about academic performance are, by their very nature, "more subjective and evaluative than the typical factual questions presented in the average disciplinary decision," and thus not easily susceptible to an evidentiary and adversarial process.

Justice White, while concurring in the Court's holding, expressed disagreement with the Court's opinion that "academic dismissals" would not require minimum due process protections. Justice Marshall, in a separate opinion, also agreed with the Court's holding, but felt compelled to comment at some length on the distinction Rehnquist drew between academic and disciplinary violations.

Marshall pointed out that on most points, Ms. Horowitz had a much stronger case than that presented in *Goss*. "With [Ms. Horowitz] having much more at stake than did the students in *Goss*, the administration at best having no more at stake, and the meetings between [Ms. Horowitz] and the dean leaving some possibility of erroneous dismissal," Marshall argued, "I believe that [she] was entitled to more procedural protection [than in *Goss*] . . . before the school could dismiss her."

Marshall also questioned whether such considerations as personal hygiene, peer and patient relations, and being on time could be termed "pure academic reasons." He argued that these facts were indeed "of a type susceptible to determination by third parties."

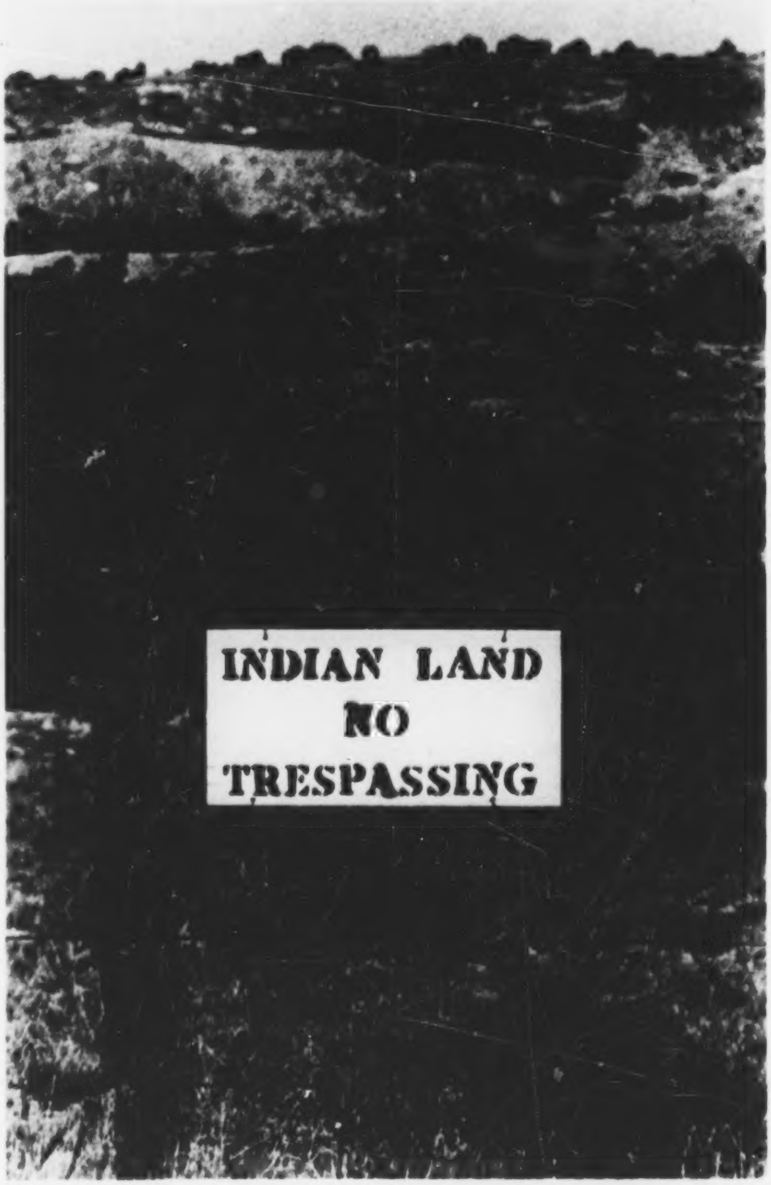
A Lesson in American History

Do Indian tribal courts have criminal jurisdiction over non-Indians? This was the fascinating question addressed by the Court in the case of *Oliphant v. Suquamish Indian Tribe*, 46 L.W. 4210, March 7, 1978.

Under an 1855 treaty, the Suquamish relinquished rights to land in the State of Washington and agreed to settle on a 7,276-acre reservation near Port Madison (located on Puget Sound across from Seattle). Since 1973, they have operated under their "Law and Order Code" which gives them criminal jurisdiction over Indians and non-Indians alike.

In 1976, Mark Oliphant and Daniel Belgarde were arrested by tribal authorities, the former for assaulting a tribal officer and resisting arrest and the latter after a high speed race ending in Belgrade's colliding with a tribal police vehicle. Both were brought before a tribal court and released on their own

(Continued on page 37)



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OPPOSING VIEWS

Is the ERA Constitutionally Necessary?

EQUALITY
JUSTICE
FREEDOM

No, it is an irrelevancy that diverts energy from securing effective legislation

Philip B. Kurland

Philip B. Kurland is a professor of law at the University of Chicago Law School. His most recent book is Watergate and the Constitution.

Yes, it will impel long overdue reform and insure that women are equal under the law

Ruth Bader Ginsburg

Ruth Bader Ginsburg is a professor of law at Columbia University's School of Law and general counsel to the American Civil Liberties Union.

I do not oppose the ERA, nor do I support it. I regret it. It is substantively an irrelevancy. It is symbolically a divisive instrument diverting energies that might better have been spent on securing effective legislation.

Why an Amendment?

A constitutional amendment is appropriate for any of four reasons, none of which applies to the ERA. It may be necessary to change governmental structure. There is no other appropriate way to accomplish such an end. It may be necessary to reverse a Supreme Court decision without awaiting self-correction by that body, as was done by the income tax amendment. It may be necessary to secure enfranchisement for the disenfranchised, so that their voices may be heard through their representatives, as was the case with the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. It might be necessary to remove an earlier amendment promulgated in an excess of piety and in the absence of judgment, as with the Twenty-First. It is hardly appropriate merely to erect a symbol of changed times, as evidence of the power of the franchise.

The ERA Does Not Affect Nongovernmental Behavior

The ERA, like most provisions of the Constitution—the most noteworthy exception being the Thirteenth Amendment that prohibits slavery—is directed to governmental behavior, not individual behavior. It would not create equality of treatment by nongovernmental agencies. It would not create authority in governmental agencies to inhibit unequal treatment by individuals. That authority the government already has, whether it is deemed to derive from the Commerce Clause or the Fourteenth Amendment. Contrary to the expressions of both the proponents and opponents of ERA, it should have no effect on the legality of abortions; it would not assure equal pay for equal work by individual employers; it would not command proportionate representation either in public or private employment or in education.

The ERA Is Ambiguous

There are two possible interpretations of the language of the ERA. Both are put forth at different times by its proponents and opponents. The first, the so-called "unisex" interpretation, would have the amendment read so that men and women must be treated the same whatever the differences between them and whatever the rationality of the different treatment proposed by governmental action. That there are biological differences between males and females cannot be denied. That these biological differences may call for differences in governmental treatment is acknowledged by most. A unisex reading would preclude such disparate treatment. It has largely been abandoned by proponents but husbanded by opponents.

The alternative reading, that government may distinguish between the sexes only when it has a rational basis for doing so, would make the amendment redundant. That requirement already exists in the Equal Protection Clause of the Fourteenth Amendment. Whatever discretion is vested in the Supreme

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The equal rights amendment is designed to serve two main purposes. First, it would impel federal and state legislatures to undertake long overdue statutory reform; second, it would provide a firm foundation for judicial development of the principle, not yet explicit in our Constitution, that men and women count as full and equal individuals under the law.

The ERA and the Legislatures

The role of women has changed immensely in the last fifty years. Nowadays, families are small, few commodities consumed at home are made there, and people live much longer than they once did. As a result of these changes, women are entering all fields of endeavor in ever increasing numbers—for example, business, the professions, government. But our legislators have lagged behind in revising the law to take into account this new reality.

Comprehensive revision has occurred in a few states with state equal rights amendments on the books. But generally, in Congress and in state chambers, the task of systematic legislative review has not yet begun in earnest.

A look at federal legislation tells the story. Some 800 provisions of the United States Code contain gender-based references. A few samples: The aid to dependent children program provides support for the two-parent family with an unemployed father, but not for the family with an unemployed mother. Men have priority over women in job training and placement under the work incentive program. The Social Security Act authorizes benefits for the spouse of a male worker which are not accorded to a similarly situated spouse of a female worker.

Part of the picture, too, are civil rights laws that prohibit discrimination on the basis of race, national origin and religion, but not on the basis of sex. For example, gender isn't listed in the public accommodations title of the Civil Rights Act of 1964. A Congress prepared to end the White Cafe was not yet ready to close down the Men's Grill.

Some samples from the thousands of outmoded state laws: Alabama permits a father, but not a mother, to recover for the wrongful death of a child. Until very recently, Louisiana allowed a husband to sell or mortgage the family home without even telling his wife, regardless of all the work she did to help purchase and maintain the home. Both laws were upheld as constitutional in 1977.

The equal rights amendment gives our legislators a two-year period to update laws now lagging behind social change. In theory, the job could be done without an equal rights amendment. But history strongly suggests that the task will continue to be relegated to a legislative backburner without the propelling force supplied by the ERA.

The ERA and the Courts

Turning from the legislature to the judiciary, until 1971 the Supreme Court's performance in this area was altogether solid, predictable, dependable. The Court consistently held that government could classify by gender.

Six years and several decisions later, where does the matter stand? What premise underlies the Supreme Court's 1971 to 1977 gender discrimination constitutional decisions?

According to Pennsylvania District Judge Newcomer, "A lower court faced with [the Supreme Court's post-1970

Kurland

Court by the Fourteenth Amendment, which is lamented from time to time by ERA proponents, would also be vested in the Supreme Court by the ERA. No change would likely be brought about by this amendment with this construction.

Conclusion

The primary effect of the ERA is to provide a diversion of energies from the legislative arena, where substantive laws for the effectuation of women's interests might be accomplished. The secondary effect of the ERA is to provide a battleground, primarily for women who view its symbolic significance differently. For the one it symbolizes equal status with men, for better, for worse, for richer, for poorer, forever. For the other it symbolizes the destruction of the institution of the family and all the values that pertain to that institution, including divorce and the right to alimony. For me, it is not a symbol, but a shadow, "full of sound and fury and signifying nothing." The sooner the decision as to ratification is made, one way or the other, the better off we shall all be. □

Ginsburg

line of gender discrimination] cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea."

In light of its once solid, predictable response, the Supreme Court has taken some remarkable steps in a new direction. But the Court shies away from doctrinal development. The tendency has been to deal with each case as an isolated instance. No majority opinion acknowledges without qualification what computer-runs on federal and state statutes reveal: that the particular laws the Court deals with are part of a general design, a law-making proclivity reflecting distinctly non-neutral notions about "the way women (or men) are."

Why is the Supreme Court reluctant to provide the guidance lower courts seek in this area? Mr. Justice Powell addressed the problem in his concurring opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court must tread lightly, he said, in the border ground between constitutional interpretation, a proper judicial task, and constitutional amendment, a job for federal and state legislatures.

But the equal protection guarantee of the Fourteenth Amendment applies to all persons, and the Supreme Court has indeed acknowledged that women are persons. Why, then, the reluctance to interpret the equal protection principle dynamically?

Because it is historic fact that neither the founding fathers nor the Reconstruction Congress that passed the Fourteenth Amendment had women's emancipation on the agenda. Recall that when the post-Civil War amendments were added to the Constitution, women were denied the vote, now recognized by the High Court as the most basic right of adult citizens. Married women in many states could not contract, hold property, litigate on their own behalf, or even control their own earnings.

The Fourteenth Amendment left all of that untouched. Courts are sensitive to this history, a history that serves as a counterweight to judicial recognition of the need for constitutional principle to accommodate to a changed social climate.

The equal rights amendment would remove the historical impediment—the absence of any intention by 18th and 19th century Constitution-makers to heed Abigail Adams' plea to "remember the ladies." Our Constitutional Fathers, after all, were saddled with and never questioned the common law legacy—that women and children were properly subordinated to men.

In sum, without the equal rights amendment, the judiciary will continue to be plagued with a succession of cases challenging laws and official practices that belong on history's scrap heap. And the Supreme Court will continue to confront the need for doctrinal development to guide the lower courts, and the difficulty of anchoring that development to the text of 18th and 19th century draftsmen.

With the equal rights amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and women are created equal.

The Numerical Majority Argument

Women outnumber men, some point out, and therefore are well situated to push for legislation to end discrimination. Skipped over in this appraisal is the fact that during most of our nation's history total political silence was imposed on the numerical majority. Moreover, a count of women at the center of government is revealing. Only eighteen women serve in the House of Representatives, one in the Senate, none on the Supreme Court. Worse than being "discrete and insular," which for minority groups at least has the advantage of fostering political organizing, women are separated from each other and therefore remain far distant from the political potential ascribed to them.

Not a "Unisex" Amendment

Finally, I turn to the argument that the amendment ignores the biological differences between men and women. The Senate Judiciary Committee's majority report clearly states that the ERA is not a "unisex" provision. The amendment does not stamp man and woman as one (the old common law did that); it does not label them the same; it does not require similarity in result, parity, or proportional representation. It simply prohibits government from allocating rights, responsibilities or opportunities among individuals solely on the basis of sex.

Would it be wiser to attend to the bathroom exception, and the one directed to "unique physical characteristics," by expressly including these two qualifications in the text of the amendment? Should we send the equal rights amendment back to the drawing boards for this purpose? Other human rights guarantees may be instructive on this point.

"Congress shall make no law abridging the freedom of speech, or of the press." Is the first amendment formulation seriously defective because the text does not say "except for language defamatory or obscene, words threatening to precipitate an immediate breach of the peace, or generating a grave and irreparable danger to national security?" The same question might be asked with respect to virtually all the grand principles safeguarding individual freedom and dignity in our fundamental instrument of government.

The equal rights amendment's generality seems to me necessary and appropriate for a Constitution meant to govern generations we will not see. Yes, there will be some work in this for the judges, but most of them seem reliable enough to interpret the amendment in the spirit of its legislative history. At least judges will find in the Senate Judiciary Committee's majority report on the equal rights amendment considerably more guidance than they now have from the legislative branch in measuring gender discrimination claims against an equal protection standard.

And, of course, students of history know that any qualification written into the equal rights amendment purporting to protect or benefit women is fraught with danger for them. For sex classification was never perceived as "back of the bus" regulation. Rather, almost every gender line drawn by the law keeping women from working at the bar as lawyers or behind one as bartenders, or from serving on juries, for example—was rationalized as a favor to females. Nor does the ERA open opportunity to any woman by derogating from protections enjoyed by another. As the Bar Association of the City of New York explained in its report on the ERA:

> The amendment would eliminate patent discrimination, including all laws which prohibit or discourage women from making full use of their political and economic capabilities on the strength of notions about the proper "role" for women in society. Any special exemptions or other favorable treatment required by some women because of their physical stature or family roles would be preserved by statutes which utilize those factors—rather than sex—as the basis for distinction.

Conclusion

At the nation's first centenary, Susan B. Anthony urged our lawmakers to complete the promise of the American Revolution and of the post-Civil War constitutional changes. Her words are worth noting in the months ahead when the fate of the equal rights amendment will be decided. She said:

> Now, at the close of a hundred years, we declare our faith in the principles of self-government. We ask no special favors. We ask justice, we ask equality, we ask that all of the civil and political rights (and responsibilities) that belong to the citizens of the United States be guaranteed to us and our daughters forever. ☐

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John E. Walsh

Privacy vs. Crime Detection in England and the United States

Two common law countries have little in common when it comes to search and privacy

The essence of all the discussions about searches and seizures is how best to strike the very fragile and delicate balance between the government's need to seek evidence of crime and the rights of individual citizens to maintain their privacy of person and property. The Fourth Amendment to the Constitution of the United States declares the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The same right has long been recognized and protected in England and the commonwealth countries.

However, neither the U.S. Constitution nor the English unwritten constitution contains enforcement mechanisms for the right. The Fourth Amendment, for example, is silent on what will happen if the right is violated, giving credence to one observer's remark that "there is something peculiarly exasperating about a broad affirmation of human rights unaccompanied by any machinery for giving them effective legal protection." (S. A. de Smith, *Constitutional and Administrative Law*).

English and American courts have evolved very different means of protecting the citizen's fundamental human right to privacy. The purpose of this article is to look at these contrasting approaches with an eye to illuminating differences in the two cultures and suggesting a variety of means for protecting this important right. We shall also see how recent thinking about searches and seizures is leading, at least in the United States, to a new understanding of the very nature of privacy.

The contrasting English and American views become clear in the answers to two questions:

1. What steps can be and are taken against those who unlawfully invade the privacy of others?
2. What use is made of illegally seized evidence during a criminal trial?

These two questions are answered in one way in England; they are answered in a much different way in the United States.

Punishing Invasions of Privacy

In England, law enforcement agents who violate the rights of personal privacy are held responsible for these violations of the law in the same way that they would be held responsible for other types of crimes. Even those acting in the bona fide belief that their conduct is justified by the need to maintain public order are not free from criminal and civil liability for the wrong they have committed. Thus in the English view those who themselves violate the law, however well intentioned their efforts and however laudable the result in bringing guilty persons to justice, are not above the law or outside of its reaches. Depending on the circumstances, the remedy may be either a civil action or a criminal prosecution.

A glance at what actually happens in one of the commonwealth countries suggests that the English system has a variety of ways of controlling police behavior and punishing overzealous officers. In Toronto, civil suits against offending officers are a real remedy. One Toronto lawyer has said that "Canadian juries are quick to resent illegal activity on the part of the police and to express this resentment by a proportionate judgment for damages." To give this remedy more muscle, the head of the police force is personally liable for wrongs committed by police officers. One researcher found that Toronto police tend to obey the rules, irrespective of sanctions, because they are particularly sensitive to (and influenced by) criticism from prosecutors and judges. (Dallin Oaks, "Studying the Exclusionary Rule in Search and Seizure," *University of Chicago Law Review*, Summer, 1970).

The English approach may at first seem strange to some Americans who feel that far too much crime already goes unpunished and are sorely tempted to give the law enforcement agents as much latitude as they need to do their job well. These people find it difficult to conceive of police agents being overly zealous about their work when they think of how important law and order are to any society and of how highly sophisticated some kinds of crime can be. To the English, however, malpractice by the police is still malpractice, and it is perhaps all the more dangerous and insidious than other kinds of malpractice for the very reason that it is carried on in the name of the law itself. In short, if the police do not police themselves, they must be policed by society.

In stark contrast, then, to the English view that the police who act unlawfully in searching and seizing should themselves be punished is the American view that illegal police activity is something other than criminal. It is not condoned but neither is it punished. Jacob W. Landynski, who made an extensive study of this matter, concludes that not only are police agents rarely prosecuted for searching and seizing unlawfully in the United States, but also that the police department's own administrative discipline has proven far from adequate. ("Search and Seizure," in Stuart Nagel [ed.], *The Rights of the Accused*).

Landynski adds that civil suits against police are defective for a variety of reasons, including the very practical reason that police officers are usually not people of financial means. In addition, American juries are very unwilling to find against a police officer who uncovers evidence of crime. Unlike their Canadian counterparts, who are sensitive to criticism about the illegal seizure of evidence, American police usually believe that the courts are trying to handcuff them and let criminals go free. Our police are far more likely to be influenced by their peers than by judges and lawyers.

The *Manual on the Law of Search and Seizure*, prepared by the Department of Justice for law enforcement personnel, is a most valuable source of practical information about how American police are expected to perform their duties. Naturally, its focus is on convicting criminals, but at no point does it even mention that the law enforcement agents might themselves be brought to court for violations of the law. It notes that law enforcement should be lawful but says nothing of what will happen to police personnel if it is not; it mainly stresses that the police should do nothing that would invalidate the evidence they obtain so that it will not be admissible in court. In the set of instructions on "Stop and Frisk" there is an interesting and curious reference to following the guidelines from the very beginning in order to save possible embarrassment later on. This official document thus supports the conclusion that police agents who search and seize unlawfully may be embarrassed later but will not be punished.

Admissibility in Court

A second major contrast between England and the United States in search and seizure matters concerns the admissibility of tainted evidence in court. The contrast flows directly, perhaps, from the different treatment accorded overzealous police officers in each country.

Since the English system has a variety of means to control the actions of its law enforcement officers, the English courts will admit any evidence, otherwise regarded as trustworthy, whether or not it was seized lawfully. The manner in which the evidence is obtained is thus immaterial. The evidence itself is thought to be valid and germane even though it may have been seized in violation of the defendant's rights of privacy. This policy frequently gives rise in England to what the American courts have regarded as at best an anomaly,

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that is, that someone should be convicted on evidence that was itself unlawfully obtained. This seems to put the courts in the position of cooperating in or approving of illegal behavior.

As we've seen, in the United States there are few direct checks on overzealous police, so our judges have tried to prevent invasions of privacy by ruling that evidence unlawfully seized is not admissible in the courts. According to what has come to be called the "exclusionary rule," evidence that has been illegally acquired is not admissible, which means in theory that it can play no part in determining whether the defendant is guilty or innocent. This evidence may even have been so powerful as to have assured a conviction against the defendant. Nonetheless, because of the manner in which it was seized, the evidence is treated as if it did not exist or as if it had never been seized in the first place. Since nearly all other countries permit unlawfully seized evidence to be admitted, the exclusionary rule is a peculiarly American phenomenon.

This history of the rule shows that American courts have keenly felt that it was necessary to discourage police misconduct. In 1914 the United States Supreme Court broke with common law precedent in the case of *Weeks v. United States* and excluded from federal trials all evidence obtained unconstitutionally. Almost fifty years later, in *Mapp v. Ohio*, the same rule was extended to all the states. (See article on page 4.) The important thing to note, however, is that in the time between the *Weeks* case and the *Mapp* case about half of the states had adopted the exclusionary rule on their own volition. As the Supreme Court has often explicitly stated, the purpose of the exclusionary rule is to deter police misconduct, "to compel respect for the constitutional guarantee in the only effectively available way, by removing the incentive to disregard it." And, even more directly, "the purpose [is] to deter the lawless action of the police."

Critics point out that the exclusionary rule has given rise to anomalies of its own. More than fifty years ago, Supreme Court Justice Benjamin Cardozo noted that under the rule "the criminal is to go free because the constable has blundered," a most roundabout way of doing justice. In effect, a police officer's illegal search is turned into a criminal's ticket to freedom. The criminal benefits, society loses, and the offending policeman is not directly affected.

Cultural Causes?

In short, the English courts do not follow the exclusionary rule and the American courts do. It is probably saying too much to argue that the English courts emphasize crime detection and the conviction of criminals and those of the United States the right to privacy. The reason the United States courts employ the exclusionary rule and the English courts do not is much more likely to be found in a real or imagined higher incidence of unlawful searches and seizures in America. The exclusionary rule is felt to be necessary in America in order to deter law enforcement officers from massive and widespread neglect of the right to privacy in their crime detection efforts. The English do not seem to worry about this possibility and, as pointed out earlier, they feel they have other adequate means for handling such unlawful searches and seizures as might from time to time arise.

Letting the criminal "go free because the constable has blundered" is a most roundabout way of doing justice

The root cause of these differences might be found in contrasting notions or (or experiences with) crime, violence, and law enforcement. One clue may be that English police officers do not feel the need to carry guns while American police officers do. Perhaps crime and violence, while serious, do not seem urgent to the English; perhaps the English people (and their courts) assume that crime can be effectively handled without extraordinary measures, so the overzealous officer is an exception who can be dealt with individually. In contrast, Americans may have much more of a "seige mentality," a feeling of living in a fragmented, violent society in which danger is always lurking. In these circumstances, we may create such pressures on police to combat crime that the courts believe the only way to control overzealous behavior is through the extreme measure of the exclusionary rule.

Future Directions

Even a brief article on privacy versus crime detection in England and the United States would be incomplete if it did not mention some of the newer thinking about privacy to which the controversies about search and seizure and about the exclusionary rule have given rise. Much of this new thinking results from the threat to privacy posed by technological advances. Anyone who has a driver's license, applies for a credit card, buys a house, or opens a bank account must supply private information about himself. Since almost all of this data is fed into computers, many people fear that computer networks could make a huge range of personal information available to anyone with access to the system. New listening devices and more sophisticated surveillance equipment offer still other challenges to the right to privacy.

A lengthy and penetrating "Note" in the March 1977 *Harvard Law Review* offers a thorough consideration of some new thinking on preserving privacy in an increasingly crowded technological society. The main point is that the exclusionary rule itself is not a sufficient safeguard of individual privacy. Rather, what is needed is a clear recognition by society that there is a core area of individual privacy into which the state may not enter uninvited under any circumstances whatsoever. This area of protected and privileged privacy would include, for example, correspondence, telephone conversation, confidential face-to-face conversations, diaries, and certain kinds of business transactions. This private area would simply be outside the public domain and outside of public access whether for reason of crime detection or any other public purpose.

In summary, the "Note" says:

> Belief in the uniqueness of each individual is one of the fundamental moral tenets of Western society. Such uniqueness inheres in being human and is not an entitlement to be granted or withdrawn by the state. In fact, one of the primary purposes of law is to ensure respect for this belief by preserving each person's right to a private life free from unwanted intrusion and disclosure . . . The privacy value should not suffer abridgement simply because there is reason to believe a person is involved in criminal activity. □

NEWSCLIPS

Law Stalks Amin

What do you do with a rampaging, blood-thirsty autocrat who has terrorized a whole nation? Simple. You sue him.

Chicago attorney Luis Kutner has a two-pronged strategy to bring Uganda's Idi Amin to justice. According to an article in the ABA's *Student Lawyer* magazine, Kutner will begin by bringing suit in U.S. District Court, charging Amin with civil crimes under a new and untested statute that eliminates immunity of sovereigns from prosecution. Kutner says, "under this statute you can sue a sovereign state or sovereign individual in U.S. courts." The suit will be on behalf of Ugandans, and Kutner plans to begin by serving a summons on the Ugandan Embassy in Washington. "Amin will be asked to respond to it. . . Once you formalize a lawsuit, it takes on judicial dignity."

Kutner's other plan is to establish a Nuremberg-type tribunal through the UN. If Amin should refuse to testify, Kutner says the UN has the power to go into Uganda and put him into custody. If the UN refuses, Kutner will sue Secretary-General Waldheim for "nonfeasance."

Kutner has specialized in international human rights litigation since 1931, representing such notables as Josef Cardinal Mindszenty, former Congolese Prime Minister Moise Tshombe, and some 4,000 Americans imprisoned in foreign countries.

Kutner knows he has a tough row to hoe but remains confident: "I will get all the way home with this one. I will get him ultimately. There is no doubt about it . . . I will get Amin in the end."

National Civic Education Conference Scheduled

From August 28-September 1 in Santa Monica, the Danforth Foundation will sponsor a National Conference on Civic Education to explore the state of civic education and offer participants comprehensive workshops in eight exemplary civic education projects. For more information, contact Charles N. Quigley, Executive Director, Law in a Free Society, 606 Wilshire Boulevard, Santa Monica, California 90401, 214-393-0523.

Uganda's Amin and New Jersey's long-hairs: heading for trouble with the law?

Justice from Head to Toe

Three recent cases show that the law covers our bodies, along with everything else. Starting from the top, a federal court handed down a decision that is bad news for long-haired drivers on the New Jersey turnpike. A group of shaggy-maned drivers asked for an injunction against the state police department, alleging "numerous violations of their constitutional rights," coupled with "callous indifference" by top officials who were "oblivious" to complaints. However, the court decided that the victims failed to show a causal link between the attitude of the top-brass of the state police and the conduct of troopers. Apparently the troopers can continue to hassle the long-hairs as long as it's not department policy.

In another case, a New York court was called on to decide whether a woman's buttocks were "private parts." Defendant James Thomas was charged with touching Barbara Starkey's buttocks during rush hour on a subway. He said that if any crime was committed, it was assault or harassment, a minor offense because no actual physical injury was inflicted. He argued the New York Sexual Abuse Act specified such private parts as genitals and breasts but didn't mention buttocks at all.

Judge Benjamin Altman wasn't convinced. He patiently noted the dictionary definition of buttocks, analyzed past cases, and concluded that, yes indeed, buttocks were private parts under the New York law. He went on to say, "If the alleged occurrence had in fact taken place in an area where the social mores condone the unconsented touching or pinching of the buttocks (rumor has it that Italy may be such an area), perhaps the defendant's position could be sustained," but the offense is not treated so "cavalierly" in New York, even on the subway.

Finally, clean feet made all the difference in a shoplifting case in Florida. Roberta Lee Adam, 24, was vacationing in Clearwater when she was accused by a Zayre Department Store security guard of taking a $3.99 pair of sandals. Ms. Adam, a New York commercial artist, said that she had purchased the sandals at the store the day before and returned to the store to try on a second pair, but had put them back on the shelf and left the store wearing her own sandals. The security guard said she entered the store barefooted and walked out in the sandals she had tried on and not paid for.

Clean feet saved the day for Ms. Adam. The arresting officer swore that he checked the soles of her feet and found them "fairly clean." That, coupled with a receipt for sandals and sand in the sandals she was wearing as she left the store, caused the state's attorney to drop the charges on the day she was to be tried.

Ms. Adam—who had been arrested, fingerprinted, forced to remain in Clearwater longer than she wanted, and required to make a special trip back for her trial—then turned around and sued Zayre for false arrest, false imprisonment, and malicious prosecution. A jury agreed and awarded her $30,000 in damages. Her mother was probably happy that good grooming paid off, though perhaps a little chagrined that her daughter's feet were only "fairly" clean.

Minnesota Court Refuses to Let Man Become a Number

A district court judge recently turned down the request of a Minneapolis man who wanted his name changed to a number, saying that it would be an "offense to basic human dignity."

According to a *New York Times* story, Michael Dengler filed a petition seeking to legally assume the name 1069, which he had used for more than four years. He said each of the numbers had symbolic significance for him, and that taken together they "describe what is inherent in me."

The 32-year-old Dengler, a former resident of North Dakota, had twice been denied such permission by courts in that state. The North Dakota Supreme Court conceded that "One Zero Six Nine" might qualify as a name, but balked at his use of numerals instead of words.

Mr. Dengler said he had opened a checking account in Minnesota as 1069 and had his Social Security card under that number. He said he had little trouble passing checks: "I just write the check and say 'Would I write a bad check with a name like this.' "

His problem was that potential employers and utility companies refused to accept his number as a name. He described one job interview at a large corporation in which a personnel officer told him, "You come in here with a name. We'll give you a number."

Unfortunately, Mr. Dengler wasn't able to convince the judge, who said that he could not "in good conscience add to today's inhumanity by giving it the stamp of judicial approval." He added that "dehumanization affects our culture like a disease in epidemic proportions, and to allow the use of a number instead of a name would only provide additional nourishment upon which the illness of dehumanization is able to feed and grow."

Hold the Anchovies

A $3 million corporate merger may hang on the tastebuds of one judge. According to an article in the *American Bar Association Journal,* Administrative Law Judge Joseph E. Dufresne may be known as "pizza Joe" before the controversy is over.

The case began when the Pillsbury Company bought Fox Deluxe Foods and its 2% share of the frozen-pizza market. Pillsbury's Totino-brand pizza already has 14% of the frozen-pizza market, and the Federal Trade Commission argued that by acquiring Fox the company had gobbled up too big a share of that market. Pillsbury shot back that all pizzas taste just about the same, give or take a pepperoni, so its share of the business should be considered in the light of the $3-billion pizza market, not just the $500-million frozen pizza market.

Dufresne took the matter under advisement one lunch hour, when he went to the Pillsbury research kitchens and ate 10 samples of various kinds of pizza. He didn't give any hint on how he would rule, apparently wanting to digest the evidence first.

As the *ABA Journal* pointed out, Dufresne may have committed two procedural errors: first of all, he washed the pizza down with water, not beer; second, he wasn't watching TV.

Order in the Court

A California judge recently came up with a new reason for excusing someone called for jury duty. Judge Harry Brauer told his wife Georgia to forget about being a juror in his courtroom. "You don't pay any attention to what I say at home," he said, "and there's no reason to believe you'd listen to anything I would say here."

Judges Told to Turn Courtroom Into Classroom

Everyone knows that lawyers have problems with their public image, but it seems now that judges do too. According to a report in the *Chicago Sun-Times* a recent national survey showed that 26% of the public believe that court decisions are influenced by political considerations and 37% believe that defendants in criminal trials must prove their innocence—the exact opposite of our bedrock principle that accused persons are innocent until proven guilty.

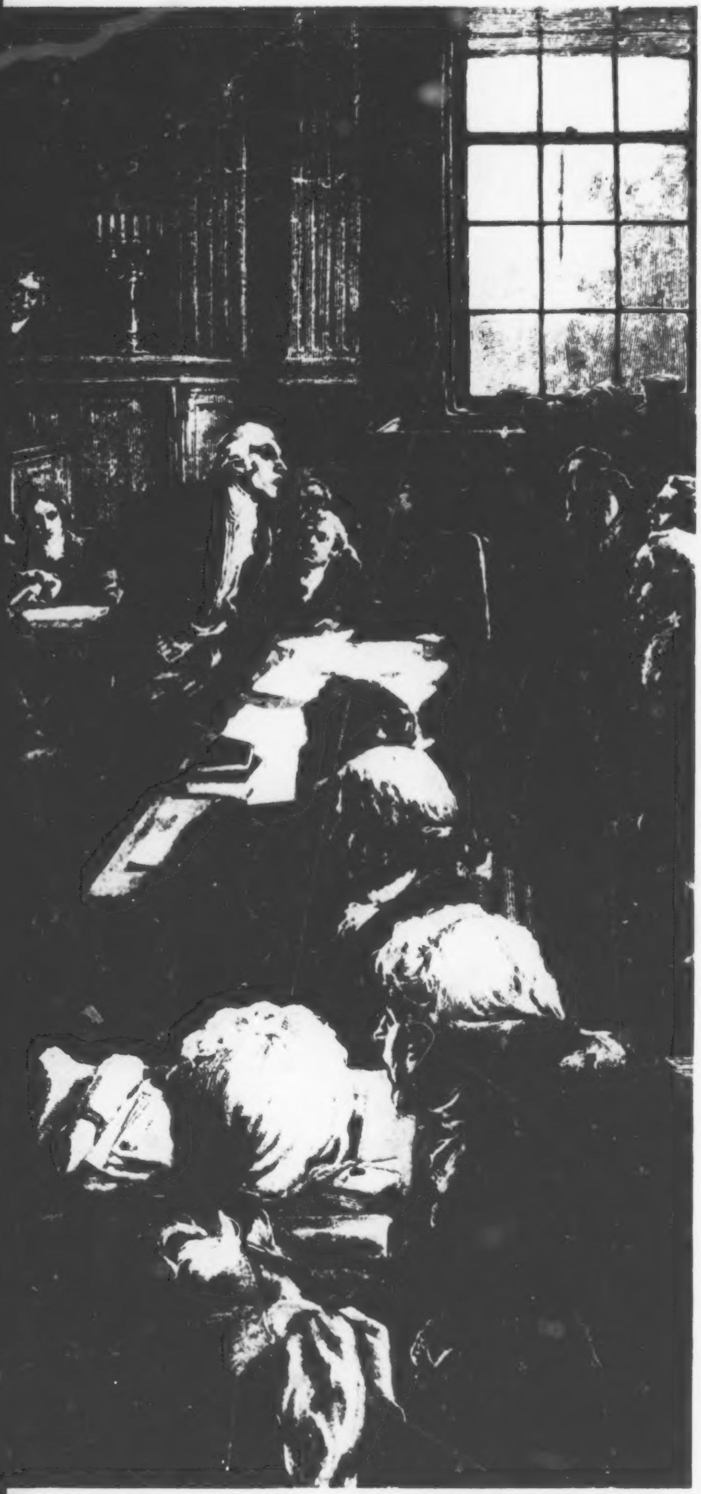
At a recent meeting of the National Center for State Courts, former CBS president Fred W. Friendly told top state court judges "you judges cannot brush aside public disenchantment with the courts. . . . Judges can no longer afford to take the lofty attitude that they are above it all."

According to Friendly, now a professor of broadcast journalism at Columbia University, judges must remember that the courtroom can be a classroom in which lessons "can last . . . longer than the verdict, and clear messages about the law's expectations and penalties can spur lawful behavior."

Friendly said that in particular judges must explain the "crazy quilt of discrepancies in sentencing" that result in prison terms varying from 30 days to 15 years for the same crime. He added that judges also need to explain "why so many violent crimes do not end in a jury trial," citing one study showing that only 2.7% of the felony arrests in New York City ever come to trial.

Friendly suggested such reforms as substituting plain English for "legalese," using innovative instructional films to make jurors' out-of-court waiting time a lesson in how the courts work, cooperating with reporters to improve stories about the courts, and televising court cases. —CJW

UPDATE LOOKS BACK



Righting an Old Writ

Losing a crucial court case made the colonists fighting mad

Charles White

Most of the guarantees in the Bill of Rights have an English rather than an American background. For example, when the Constitution was written, trial by jury and the privilege against double jeopardy had been a hallowed part of the English common law for centuries. To understand why they were prized, we must study English—not American—history.

However, one of the amendments in the Bill of Rights has a rich historical background in America as well as in England. The Fourth Amendment's guarantee that persons and possessions are secure "against unreasonable searches and seizures" grew directly out of the struggle against British authorities. Indeed, the colonists' resentment against sweeping searches and seizures was one of the main causes of the revolutionary fervor.

Most of the colonists' anger focused on the writs of assistance, sweeping warrants which were used in the search for smuggled goods. They were called writs of assistance because they charged all officers of the crown with assisting those carrying out the searches. In England, the writs were used as early as the beginning of the seventeenth century, when the king empowered authorities to "enter into any vessel, house, warehouse, or cellar, search in any trunk or chest" to find smuggled goods. In America, similar writs were frequently issued for the same purpose.

In theory, the writs were a powerful weapon for the authorities. They didn't specifically name the persons or places to be searched, nor did they prescribe the goods that were sought. They were, in effect, licenses for the authorities to search anywhere their suspicions took them. What is more, the writs were not limited in time. Warrants today in the United States and England are good for only a certain limited length of time; after that, their authority runs out and they must be returned to the court that issued them. These writs, in contrast, were in effect for the entire reign of the sovereign under whom they were granted, and for six months after his death. It was not uncommon for a writ to be in effect for thirty or more years—a kind of perpetual hunting license.

In practice, however, enforcement of the smuggling laws during most of the colonial period was lax, and colonists got along well with the help of a few judicious bribes. That happy situation changed abruptly for the worse in 1760 when the English government decided to crack down on the

BEST COPY AVAILABLE

colonial scofflaws. After all, much of the illegal trade was carried on with the French West Indies, and the English were then at war with the French.

But enforcing the laws strictly would mean nothing short of a disaster for the colonists. The laws were designed to benefit the mother country, at whatever expense to the colonies. The infamous Molasses Act, for example, would ruin the colonial rum industry and cripple colonial shipping if it were enforced.

A ray of hope, however, was provided in October by the death of King George II. Six months after his death all the writs of assistance would lose their effect, and if the colonists could prevent new writs from being issued they could tie the hands of customs agents.

Unfortunately, another death that year made it harder to block the writs in court. Chief Justice Sewall of the Massachusetts Superior Court had died earlier in 1760. Though he had granted other writs of assistance upon the government's request, John Adams reported that he "had been troubled over the legality and constitutionality of the writ and the power of the court to grant it." The power to appoint his successor lodged with the governor of Massachusetts Bay Province, who was appointed by the King and served him faithfully. The governor overlooked several liberal lawyers (including one who had twice been promised the first vacancy on the court) to name someone who could be counted on to accede to what the government wanted. Thomas Hutchinson wasn't even a lawyer, and since he remained Lieutenant Governor of the province, his appointment as Chief Justice constituted a clear conflict of interest. The only thing he had to recommend him was his loyalty to his masters.

In the colonies, lawyers argued that sweeping warrants were "the worst instrument of arbitrary power, the most destructive of English liberty . . . "

In early 1761, just before the authority of the old writs ran out, the colonial government asked the Superior Court to issue new writs. Sixty-three Boston merchants joined forces to oppose the request.

The colonial government's attorney general argued that citizens didn't have a right to privacy against the king: "Everybody knows that the subject has the privilege of house only against his fellow subjects, not versus the king . . in matters of crime." He even argued that the writs were beneficial, providing "a check" on arbitrary authority since they couldn't be executed without the presence of a sheriff who could be counted upon "to have his eye over" the customs officials.

Oxenbridge Thatcher, one of the merchants' lawyers, argued that the English law authorizing the writs of assistance didn't apply to the colonies. Though a general statute made all English laws applicable to the colonies, he argued that the law authorizing the writs couldn't apply since it specified that the writs were to be issued by the Court of the Exchequer and there was no such court in the Massachusetts Bay Colony.

However, the argument that electrified the courtroom was not Thatcher's legalistic analysis but the stirring speech of the merchants' other attorney, James Otis, Jr. Otis ranged far beyond specific statutes to attack the whole principle of the writs of assistance as an infringement on basic liberties and an affront to the English Constitution. He denounced writs as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book." Otis asserted that the writs of assistance were against "the privilege of house. A man who is quiet is as secure in his house as a prince in his castle." He argued that the statutes were unenforceable and void because they were in conflict with the Magna Carta. "An Act against the Constitution is void; an Act against natural equity is void," Otis said, thus enunciating the principle of judicial review and helping lay the groundwork for the U.S. Supreme Court's role as arbiter of the Constitution.

Otis was so forceful and eloquent that, as Chief Justice Hutchinson later acknowledged, the court seemed inclined to deny the writs. However, Hutchinson persuaded the other justices to suspend judgment until he ascertained what the practice was in England, on the theory that colonial authorities had the same powers as their English counterparts. But Hutchinson didn't write for advice to the Attorney General of England (who might well have expressed doubts about the validity of the writs), but to the Massachusetts agent in England, an employee of the colonial government and a man who had previously served the government as a prosecutor. He replied that in England general writs were issued as a matter of course, without even a court order. With this justification, the Superior Court then issued the writs.

Otis lost the case but won the war. As John Adams wrote many years later, "Mr. Otis' oration . . . breathed into this nation the breath of life. . . . He was a flame of fire! . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance . . . . Then and there the Child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free."

Many events leading to the Revolution flowed directly from the court's decision to grant the writs. The next year, the Massachusetts legislature retaliated by cutting the pay of Superior Court judges, withholding entirely Hutchinson's extra allowance as Chief Justice, and firing the provincial agent whose response had made it easy for the Court to grant the writs. The legislature struck at the writs directly by passing a bill outlawing general warrants and permitting only special warrants, but the governor's veto killed it. Three years later, after the passage of the Stamp Act, the Chief Justice's house was destroyed in a riot. Afterwards, every time the government tried to enforce the writs it was frustrated by crowds of angry citizens.

Though Otis' speech and the acts of defiance in Massachusetts are by far the best known landmarks in the controversy over the writs, the other colonies also fought them, more quietly but just as effectively. In Connecticut, Delaware, Georgia, Maryland, Pennsylvania, Rhode Island, and Virginia, courts either refused to grant the writs or ignored applications for them. A South Carolina court delayed for as long as it could and finally, in 1773, complied only under heavy pressure. A New York court granted a writ promptly, but not in the form demanded, then delayed for five years before declining to grant one in the customary form. According to a modern historian, "this courageous action by the judges of most of the colonies in preserving the principles of the common law in the face of mounting pressures from the executive—which paid their salaries and could at any time remove them, or offer them preferment—was in no small part responsible for the later determination of Americans to secure an independent judiciary, free of political control." (Jacob Landynski, *Search and Seizure in the Supreme Court,* p. 37.)

At the very time when the colonists were battling the writs of assistance, the writs were also under fire in England. They had always roused popular ire, and with increasing frequency in the 1700s tax laws that would require large-scale searches were voted down by Parliament. For example, though the cider tax was passed in 1763, it led to disturbances in the cider counties and to angry protests in the House of Lords, on the grounds that "private homes . . . are made liable to be searched at pleasure." A few years later the government gave up and the act was repealed. (Around the time the Cider Act was legislated out of existence, Parliament passed a law explicitly authorizing writs of assistance for the colonies, proving once again the old saw about everything depending on whose ox is gored.)

During these years the English also struggled against general search warrants designed to stifle a free press. In one famous instance in the early 1760s, the Secretary of State authorized a general warrant to seize and search anyone who might be involved in printing an anti-government pamphlet. This dragnet brought in 49 printers and publishers and led to the arrest of the pamphlet's author, John Wilkes, and the search of his possessions. The printers retaliated by bringing suit for false imprisonment. They won and were awarded damages of 300 pounds. Chief Justice Pratt told the jury in the case that "to enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."

In another famous case, *Entick v. Carrington,* an editor whose papers were seized in a search won a verdict of 300 pounds in a suit for trespass, even though, unlike Wilkes, he had been named in the warrant. The Court ruled that the warrant was deficient in not specifying what evidence was sought. The Chief Justice sustained the verdict on appeal, noting that if "this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger" whenever the Secretary of State suspects someone of seditious libel.

At the very time the colonists were battling the writs, they were also under fire in England

These decisions were enormously popular, and Parliament soon took action against general warrants. William Pitt spoke eloquently against them in what has become one of the famous speeches in the evolution of English liberty: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of that ruined tenement."

"Well, this trial has provided us all with a lot of laughs, hasn't it? But, if I may be serious for a moment, I find you guilty as charged and sentence you to twenty years in the pen."

Drawing by Handelsman; © 1978
The New Yorker Magazine, Inc.

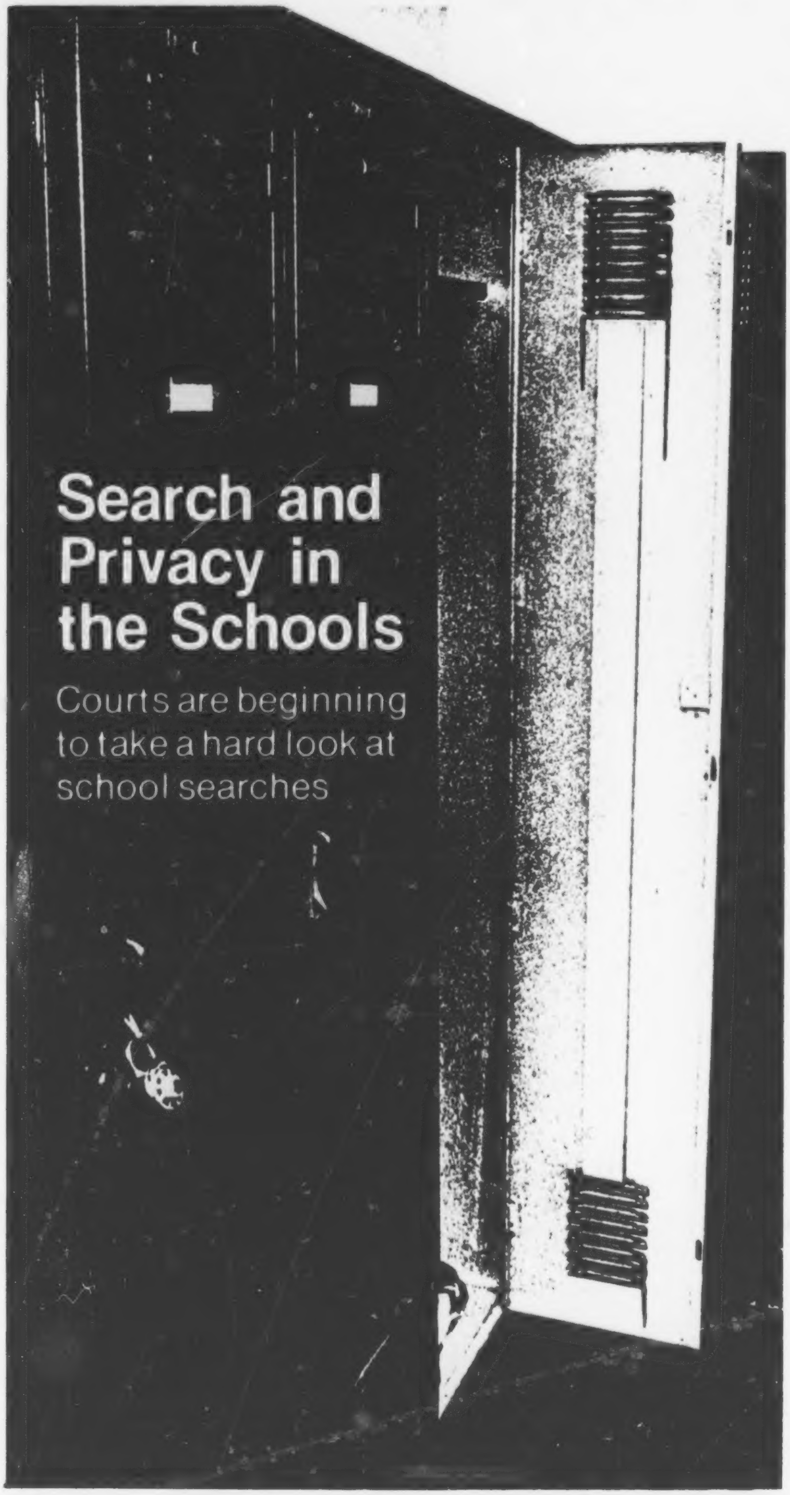
Spurred by Pitt's speech and popular discontent, in 1766 Parliament voted that general warrants were illegal except where specifically provided for by an Act of Parliament.

As one might expect, with so much strong opposition to general warrants in England and America, six of the new states—Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania and Virginia—adopted safeguards against illegal searches in their constitutions. Not surprisingly, the most comprehensive was found in the Massachusetts Declaration of Rights. It specified that every person has the right to be secure from unreasonable searches and seizures, and went on to state that all warrants must be supported by "oath or affirmation" and specifically designate the "person or objects" of search and seizure.

The Massachusetts article appears to have been the model of the Fourth Amendment to the Bill of Rights, which even borrows its language in several places. In a very real sense, then, the wheel had come full circle, and the "spark of liberty" that James Otis had struck thirty years earlier had been given lasting life in the fundamental charter of the new nation. ☐

IN THE FIELD

Norman Gross



Search and Privacy in the Schools

Courts are beginning to take a hard look at school searches

The scene is not uncommon: a principal suspects a student of possessing drugs, searches him, discovers incriminating evidence, and turns it over to the police. The student is subsequently charged and challenges the introduction of the evidence on Fourth Amendment grounds. As William Buss points out in an excellent article on school search and seizure (*Iowa Law Review*, April, 1974), there are variations on the theme—a vice-principal instead of a principal, a search of a student's locker rather than his person, stolen goods instead of drugs—but the basic issue is usually the same. Is such a search permitted by the Fourth Amendment?

The issue has now been raised dramatically in New York. The New York Civil Liberties Union has just filed suit against the New York City school board on behalf of two high school girls searched by school authorities.

According to the girls' lawyer, school officials got a report that one of the girls was alone in a classroom during a fire drill. Even though nothing was reported stolen and her record didn't justify suspicion, she was strip-searched in the presence of a female security guard. She became distraught, but the search continued. Nothing was found, but she was still suspended for five days without a hearing and with no explanation of the basis of the suspension.

The other incident allegedly happened in Brooklyn's James Madison High School. Someone in an English class reported a wallet missing and suspected it was stolen. Security guards searched students' coats, pockets, and handbags, and then frisked the students. Once again the search was fruitless. However, a fifteen year-old girl who resisted being patted down was later disciplined by the school. (The school board hasn't publicly given its version of either incident.)

The Civil Liberties Union claims that the searches violated the girls' rights under the Fourth Amendment. The suit asks for $370,000 in damages and an injunction against unreasonable student searches.

Generally speaking, school officials justify searches of students by saying that they have the authority and responsibility to insure the order of the school and the safety and welfare of students. Considering the problems of widespread drug use and growing violence and vandalism in the schools, they argue, student searches are a necessary, if distasteful, responsibility. Students, on the other hand, ask how these searches can be reconciled with their right to privacy and the Fourth Amendment's guarantee against unreasonable searches and seizures.

Are there special characteristics of the school setting which enable school officials to conduct searches of students without according them the full constitutional protection of the Fourth Amendment? A look at prior New York student search and seizure cases may suggest the answer to that question and, at the same time, reveal the countervailing considerations involved, illustrate the way that New York courts have dealt with school search and seizure cases, and provide a possible preview of the case just filed on behalf of the New York co-eds.

In Loco Parentis

One of the most common contentions of school officials charged with illegal searches is that the special characteristics of the school and the doctrine of "in loco parentis" require that they have only a "reasonable suspicion," rather than "probable cause," to conduct a search or seizure. The courts have often agreed that such considerations validate searches and seizures that would be illegal if carried out by police. This was the case in *New York v. Jackson,* 319 N.Y.S. 2d 731 (1971).

The case began when a high school coordinator of discipline got a tip from an informant about a student named Andre Jackson. The coordinator went to the class Jackson was attending and asked that he come back with him to the office. Jackson agreed, but seemed nervous. The coordinator noticed a bulge in a pants pocket that Jackson kept putting his hand into. When they got close to the office, Jackson bolted and ran out of the school. The coordinator yelled to a policeman assigned to the school, "he's got junk and he's escaping." He then ran after Jackson and caught up with him three blocks later, pulling Jackson's hand out of the pants pocket and forcing it open to disclose a syringe, eyedropper, and other narcotics works. He gave the evidence to the policeman, who by then had caught up with them.

This evidence was later introduced in a criminal action against Jackson, but was challenged as an unreasonable search and seizure under the Fourth Amendment. Specifically, Jackson and his lawyer argued that the coordinator was a government official who had to have probable cause to make the search.

By a two-to-one margin, the New York Supreme Court found the search justified. The majority based its holding mainly on the doctrine of in loco parentis. That doctrine basically holds that parents who send their children to school expect them to receive certain safeguards, and, in many respect, expect school officials to stand in the place of the parent while children are in school. Thus, school officials may exercise not only whatever authority and control is necessary in educating students, but also have the power and duty to preserve order and discipline and protect the morals, health, and safety of students.

The majority argued that common law as well as state statutes recognized the in loco parentis doctrine. Thus the school official was justified in acting "as a parent of ordinary prudence would . . . in comparable circumstances." Only a reasonable suspicion—not probable cause—was required to support a search and seizure.

Moreoever, the court argued, the coordinator's responsibility "did not end abruptly at the school door." Since the student decided to run from the school, he thereby extended the coordinator's authority and responsibility beyond normal school limits.

The dissenting justice raised one of the important issues in the student search area. He argued that the coordinator "was not enforcing school regulations but . . . was chasing the defendant to make an arrest," a situation which usually requires probable cause. Since a police search under those circumstances would have been found unconstitutional, there seemed no reason to grant a school official, particularly a coordinator of discipline, greater rights than a policeman. He also pointed out that a "body search" is quite distinct from the search of a student locker. In loco parentis, he concluded, cannot justify a personal search which takes place beyond the limits of the school.

The Problem of Consent

If a person willingly consents to a search, then the search is clearly reasonable and not subject to a Fourth Amendment challenge. Courts have used this principle in various ways to justify student searches. For example, some cases have held that since parents have the authority to conduct certain kinds of searches, this authority is transferred to school officials under the in loco parentis doctrine. Other cases have held that administrators themselves can consent to student searches by law enforcement officers. But in cases of administrators' consent, as in instances where consent was allegedly given by students themselves, the question has sometimes turned on whether the consent was given voluntarily. *New York v. Overton,* 301 N.Y.S. 2d 497 (1969), is a key case on this issue.

The case began when three Mount Vernon police detectives obtained a search warrant enabling them to search two students and their lockers at Mount Vernon High School. They presented the warrant to the vice-principal, who then summoned the students to his office. The detectives searched the boys and found nothing. Two detectives then took one of the youths to his locker, leaving Carlos Overton behind with one of the detectives and the vice-principal.

When asked if he had marijuana in his locker. Overton didn't answer at first but under continued questioning said "I guess so" or "maybe." All three went to Overton's locker, which the vice-principal opened with his master key. The detective searched it and found marijuana in the pockets of Overton's jacket.

There may have ordinarily been no problem in getting the evidence introduced but the warrant was subsequently found to be invalid insofar as the locker search was concerned. The question thus arose as to whether the vice-principal acted voluntarily and independently of the warrant or whether he felt that the warrant gave him no choice but to open the locker.

The Court of Appeals of New York agreed that if he was acting under the compulsion of an invalid warrant, the consent might be involuntary. But the court held the search constitutional because the vice-principal had testified that he would have consented "regardless of the presence of the invalid search warrant."

The court went on to describe the very real responsibilities and powers given school officials under the in loco parentis doctrine. Citing the need to maintain discipline in an environment where student "inexperience and lack of mature judgement can often create hazards to each other," the court concluded that "not only have the school authorities a right to inspect, but this right becomes a duty when suspicion arises that something of an illegal nature might be secreted" in a student's locker.

The court also argued that Overton had no reasonable expectation of privacy in his locker. It pointed out that all Mount Vernon High School students gave the combinations of their lockers to their home room teachers who in turn passed that information to the central office. The privacy of the locker, the court argued, was against other students —not against school authorities. Furthermore, school regulations established what may and may not be kept in lockers. The need to maintain order and discipline, combined with the non-exclusive nature of the locker, the court argued, empowered the vice-principal to consent to the search.

Three judges dissented, arguing that the invalid warrant made the situation "instinct with coercion," thereby negating any voluntary consent to the search.

A Change of View?

As the prior cases suggest, through the early 1970's the overwhelming number of student search and seizure cases were decided in favor of the school authorities. Although the Supreme Court had not, and still has not, ruled directly on the issue, and although there were often forceful dissents, courts throughout the country had spoken with a near-unanimous voice. *New York v. Scott*, 358 N.Y.S. 2d 403 (1974), reflected a possible shift in this attitude.

The case involved a seventeen-year-old high school student who was observed twice within an hour entering a student bathroom with a fellow student

School Search and Seizure Cases

State of Louisiana v. Mora, 307 S. 2d 317 (1975)—In this case, a physical education instructor noticed the suspicious conduct of a seventeen-year-old high school senior placing his wallet in a valuables bag. While the student was in the gym, the instructor opened the bag, inspected the contents of the wallet, and found marijuana. A divided court held that the school official's search of the student's personal effects is not a "specifically established and well-delineated" exception to the warrant requirement and that the marijuana could not be used against him in a criminal trial.

State v. McKinnon, 558 P. 2d 781 (1977)—In response to a call from the Snoqualmie (Washington) Chief of Police, a high school principal searched McKinnon and found marijuana. The court upheld the action, arguing that school officials should not have to meet the same probable cause standard as law enforcement officers. "The factor to be judged in determining whether the school official has reasonable grounds," the court held, "are the child's age, history, and school record, prevalence and the seriousness of the problem in the school," the necessity for an immediate search, and the reliability of the information leading to the search.

Belliner v. Lund, 438 F. Supp. 47 (1977)—When a fifth-grade student reported $3.00 missing from his coat pocket (the latest in a series of complaints by students of missing money, lunches, and personal items), the teacher conducted an extensive two-hour search with the aid of other teachers and school administrators. Initially, coats were searched; students were then asked to empty their pockets and remove their shoes; a strip-search and a search of student desks and books followed. The money was never located. While the court recognized that school officials need not establish probable cause in such cases, it considered the school's actions excessive, especially since there was no suspicion that any particular student had stolen it.

Mercer v. State, 450 S.W. 2d 715 (1970)—In Austin, a Texas high school student emptied his pockets, revealing marijuana, after the principal threatened to call the boy's father. The boy was subsequently adjudged a delinquent and committed to the Texas Youth Council. A divided court held that the principal was acting in loco parentis, not as a government official. This removed the incident from Fourth Amendment guidelines, since the amendment applies only to searches carried out by the government.

State v. Young, 216 S.E..2d 586 (1975)—This case involved a seventeen-year-old Georgia High School student who, when the principal approached him, "put something down, ran his hand in his pants." When told to empty his pockets, marijuana was discovered. In an opinion delineating the various considerations under the Fourth Amendment, the court divided cases into three categories: those involving private persons; those involving governmental agents whose conduct constitutes state action under the Fourth Amendment; and those involving governmental law enforcement agents whose violations of the Fourth Amendment trigger the exclusionary rule. The court argued that not only was the principal's action reasonable, but the exclusionary rule applies only to action taken by law enforcement personnel in any event. A strong dissenting opinion disagreed with all major points of the majority, contending that the opinion "places no limits on the nature and extent of searches a school official may make," other than imposing "minimal standards."

Moore v. Troy State University, 284 F. Supp. 725 (1968)—Troy State University had a regulation reserving to the university "the right to enter rooms for inspection purposes." At the request of police officials who did not have a warrant, college officials searched Moore's dormitory room at Troy State and discovered marijuana. Moore was subsequently suspended from school and sought reinstatement, but the court denied his request. It held that the regulation was a "reasonable exercise of the college's supervisory duty . . . despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students."

Piazzola v. Watkins, 316 F. Supp. 624 (1970), affirmed at 442 F. 2d 284 (1971)—In a case arising under the same fact situation as *Moore*, Piazzola challenged the introduction of the marijuana at a subsequent criminal proceeding. While the university had the right to make reasonable searches in furthering its educational objectives, the court held, searches for criminal evidence must be conducted consistent with the Fourth Amendment guarantees.

and exiting within five to ten seconds. He had been under observation for six months for "possible dealing with drugs."

The incidents were reported to the coordinator of school security, who ordered Scott to the principal's office, where he was searched. Thirteen Glassine envelopes containing white powder were found in his wallet. The security coordinator then conducted a strip search and found a vial containing nine pills. In a youthful offender hearing, Scott moved to suppress the evidence on Fourth Amendment grounds. He lost in trial court and in an initial appeal, but won a unanimous decision in the Court of Appeals of New York.

The court held that public school teachers do not "act as private individuals" or "possess all the parental prerogatives." Rather they must be considered "agents of the state." Moreover, while students may have no reasonable expectation of privacy in their lockers, a different situation exists with respect to their privacy of person.

The court saw the ultimate issue as how to balance "basic personal rights against urgent social necessities." It did not deny that "the primary purpose of school searches may be to protect the school environment," and it noted the "epidemic danger" of drugs in the school, but it concluded that these considerations did "not permit random, causeless searches," which might cause "psychological damage to sensitive children" and expose them to serious consequences such as the possibility of criminal conviction.

It said that among the factors to be considered in determining sufficient cause to search students was "the child's age, history and record in the school, the prevalence and seriousness of the problem in the school [and] the exigency to make the search without delay."

What Lies Ahead?

Search and seizure raises complex and troubling questions wherever it occurs, but placed in the context of the school environment, it becomes even more problematic. How *do* we balance the student's right to privacy with the authority and responsibility of school officials to maintain order, safety and discipline in the school?

It appears that there aren't any simple answers—that much will depend on the variables in each situation. The court in *Scott* mentioned a few. There are others.

For example, does it make a difference if the search is of a locker, wallet, pocketbook, or the student's person? What if the object of the search is a weapon, drug, obscene picture, stolen goods, or explosives? Is the evidence to be used in school disciplinary proceedings or criminal prosecutions? How reliable was the information relied upon in conducting the search?

The Supreme Court has never accepted a student search and seizure case, and no one can predict how it might rule if it should review one, but an interesting perspective is provided by the Court's decision in *In re Gault,* 387 U.S. 1 (1966).

> **". . . unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure"**

Gault involved a challenge to the practice of treating juveniles very differently from adults in criminal proceedings. In the latter part of the nineteenth century, when a special system of justice was established for youngsters accused of wrong-doing, the underlying rationale was that juveniles must be insulated from the full force and consequences of the criminal process, and must be accorded informal and flexible treatment. It sought to protect them by handling cases of youthful misconduct in a manner less than criminal, and by stressing rehabilitation rather than punishment.

Unfortunately, the special treatment accorded juveniles meant that they often lacked the constitutional guarantees accorded adults. Many juvenile court judges had little or no formal higher education, and informal hearings were often stripped of due process guarantees that would have been routine in adult cases. Sentences, even when imposed with the best of intentions, were often more severe than adults would receive for a similar crime.

The Supreme Court therefore held in *Gault* that certain, but not all, due process requirements must be followed in juvenile proceedings, including the right to a lawyer, the right to cross-examine witnesses, and the right to appeal. In establishing these guarantees, the Court wrote, "Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."

Students today are in some ways like youngsters under the old juvenile justice system. They too are presumed to need special treatment, in the interests of which they are often accorded less than full constitutional guarantees. Thus school officials are given wide latitude through in loco parentis and other legal doctrines, just as juvenile court judges had sweeping powers in treating juveniles who came before them. Given this situation, it is possible that the courts might again determine that students require basic Fourth Amendment rights to guard against possible abuses of discretion—this time by school officials.

While all this is highly speculative, it is certain the problem won't go away. New York City school officials, realizing this, are trying to deal with both the danger of drugs and weapons in the schools and the need to protect students' right to privacy by issuing guidelines for school officials to consider in conducting searches. These guidelines recommend that school officials respect students' privacy in conducting searches and take into account the factors the New York courts specified in the *Scott* case.

Meanwhile, according to a story in *Education Daily,* the New York Civil Liberties Union wants the school board to issue specific regulations declaring strip searches or random searches on large numbers of students unreasonable. The NYCLU will also propose that school authorities show a solid basis for suspicion before they conduct any body searches.

The interplay between the board and the NYCLU may suggest the most constructive and effective way of dealing with the dilemma. If educators, students, parents, and concerned citizens can together develop guidelines designed to attain the elusive balance between preserving students' privacy and protecting the safety and discipline of the schools, then court-ordered guidelines won't be necessary. More importantly, those directly involved in the problem will have engaged in a vital cooperative process and will have a real stake in seeing the guidelines work. ☐

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About the Author

Isidore Starr is a lawyer, Professor Emeritus of Education at Queens College, and former president of the National Council for the Social Studies. He is the author of dozens of books and articles on law-related education and he is currently a member of the American Bar Association Special Committee on Youth Education for Citizenship.

"The Idea of Liberty—First Amendment Freedoms" by Isidore Starr, published by West Publishing Company, 1978, in soft cover text form, approximately 200 pages, is for the High School level. Write or call the address below for more information.

WRITE OR CALL:
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CURRICULUM UPDATE

Charlotte C. Anderson
Kathy Erlinder, Barbara Ann Pearson

A Potpourri of Materials

Print and A-V on law, values, government, citizenship and other topics

Elementary and Middle

■ ***Citizenship Decision-Making,*** Roger LaRaus and Richard C. Remy (1978). Grades 4-9. Teacher's resource book which includes student materials on blackline masters and complete lesson plans. 8½ by 11 softbound, with 3 holes punched for easy use in loose-leaf notebook. 244 pages. Available May 1. Approximately $10. (Addison-Wesley, Inc., Innovative Division, 2725 Sand Hill Road, Menlo Park, CA 94025)

These materials build students' skills in making, judging, and influencing group decisions. The lessons focus on the broad spectrum of group decisions ranging from the kinds of decisions children face daily in their peer, family, and school experiences to the decisions faced by governmental agencies. It soon becomes apparent to both teacher and students that the decision-making skills being learned here are functional in any group context.

Students learn that members of groups have to make decisions about rules, goals, and the allocation of resources. They are exposed to these basic criteria for judging group decisions:

(1) What are the consequences of the decision for many groups? (2) Does the decision concern a goal, resource, or rule affecting me? (3) How do I feel about the decision? (4) Why is the decision fair/unfair, good/bad? The lessons introduce children to five basic methods of influencing decisions—the use of authority, power, reward, affection, and information. It is a credit to these authors that they have developed an instructional strategies packet which conveys potentially complex concepts and processes through meaningful and enjoyable learning experiences.

Citizenship Decision-Making has 25 lessons organized into four units. Unit I: "Decisions and You," Unit II: "Making Decisions," Unit III: "Judging Decisions," Unit IV: "Influencing Decisions." Each lesson is a carefully structured, completely defined, self-contained set of instructional activities. The lessons may be used individually, grouped into lesson sets, or taught sequentially as an entire unit or units. Specific suggestions for various groupings of lessons are given, as are ideas for infusing the materials into different facets of the curriculum. Background information for the teacher, step-by-step teaching strategies, instructional options, plus blackline masters for student materials are included in each lesson. These materials are so carefully structured that little additional preparation is needed to teach any lesson, while at the same time each lesson serves as a mini-inservice experience for the teacher.

■ ***Growing Up With Values*** (1974). Middle and upper elementary. Set of two filmstrip kits developed in consultation with Dr. Maria W. Piers, Dean of the Erikson Institute for Early Education. 10 filmstrips with 5 stories in two kits. The set costs $110 with record, $125 with cassette tape. (Parents' Magazine Films, Inc., 52 Vanderbilt Avenue, New York NY 10017)

The series opens with comments by Dr. Piers (intended to be heard by the teacher, not the children)—"These filmstrips about the moral conflicts of A.J. and his friends are typical of young people. Should he and his friends take the law into their own hands? Can breaking into the classroom ever be justified?"—and closes with her words: "A trusted teacher can stimulate the open-ended discussion on moral conflicts, the kind of conflicts a grade-schooler is thoroughly familiar with."

Dr. Piers' discussion establishes the intellectual and pedagogical context for this set of charming stories of A.J. and the gang. Part of the charm and success of the films stem from the carefully-balanced mixture of realism and hyperbole. The children are a mixture of "type" and real children. Many of the adults are also caricatures drawn in such a way as to intensify the children's dilemmas. A coach, for example, spouts every cliche in the coaching handbook about toughness and winning.

In *The Burnt Sienna Caper* the children break into the classroom to retrieve crayons which they feel the teacher has unfairly confiscated. *Irwin Kariotis* tells the story of Irwin—everyone's favorite target. A.J. describes him as "a kid who carries a huge briefcase, gets a twenty-dollar allowance, and is scared of germs." In *Double Dribble* the boys rig the basketball hoop in order to win, only to discover that the other team is cheating too. Does this cancel out their responsibility? In *Five Finger Discount* one recalcitrant youngster manipulates the others into trying their hands at shoplifting. A.J. switches costumes with his friend Grady in *Happy Halloween* and discovers that when he is with black youngsters he gets treated differently.

The stories offer good open-ended cases for teachers to use in exploring moral issues. The lack of any teaching guide—except for Dr. Piers' comments—is unfortunate. But the cases are rich enough and the treatment creative enough to be worth the extra preparation time. One question? Are boys the only children who face moral dilemmas worthy of examination in the curriculum? Only one girl plays any kind of pivotal role—and in that role she is portrayed as passive.

These filmstrips should be as effective with adults as with youngsters. Suggested use: PTA meetings, pre- and in-service teacher education courses.

■ ***Free Press: A Need to Know the News*** (1977), ***The Presidency*** (1977), ***Protest: Breaking Laws to Change Laws*** (1976). Middle and upper elementary grades. Filmstrip kits; part of the program *Let's Find Out*. Each kit costs $25 and consists of an 8-10 minute color filmstrip with accompanying 33⅓ RPM record or tape cassette, 6 spirit-masters, and an extensive teacher's manual. (Pathescope Educational Media, Inc., 71 Weyman Avenue, New Rochelle, NY 10802)

Free Press: A Need to Know the News prods the viewer to consider the sources of "news" or information. For example, news about our school comes through the loudspeaker system, school newspaper, bulletin boards, and memos; while news about our nation comes from newspapers, radio, and TV. The function of a free press in creating an informed, active citizenry is explored.

The central theme of *The Presidency* is presidential power. The filmstrip traces the

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historical basis for limiting the power of the President and describes the constitutional safeguards which the founders of this nation provided. Probably more suitable for upper grades and especially for eighth-grade American government courses.

Protest: Breaking Laws to Change Laws explores the uses and limits of protest in a democratic society. The Boston Tea Party and the civil disobedience of Thoreau are linked to contemporary protests against segregation, the Vietnam war, and sexism. The film emphasizes the rights of all citizens —those who do not protest as well as those who do.

The teacher's manual included in each kit not only provides discussion questions and activities but also has a detailed outline for developing a full teaching unit.

■ ***Joy Ride: An Auto Theft*** (1976). Middle school and early high school. 16 mm., color film, 13 minutes. Purchase, $247.25; rental, $37. (Barr Films, P.O. Box 5664, Pasadena, CA 91107)

A non-narrated film based on a real event. Two young boys happen on a friend's car and decide to try it out. They take turns driving, test the car's responses—how fast will it go from a dead stop to 60?—and convince two girls to join them. The foursome parks the car by the side of the road and clambers down through the underbrush to an old wreck the boys had discovered earlier. All four pile into the front seat and play at driving at breakneck speeds and feigning excitement and fright.

Soon they discover that they have played too long—the car must be returned or the owner will discover it is missing. They pull out in a flurry of dust and squealing tires. A police car takes up pursuit, but instead of stopping, the driver tries to outrun it. The terror-striken riders plead with him to stop, but he loses control and plows into an embankment. We are shown a flashback to the four in their make-believe high-speed ride in the old wreck. This time it is not make-believe. The film closes with the note that three were killed; one of the girls was permanently paralyzed. This gripping film makes its point without preaching.

Secondary

■ ***Civil Justice*** (1978). Secondary. Part of the *Living Law Program* developed in cooperation with the Constitutional Rights Foundation. Soft-cover student text, separate 55-page teaching guide, and bound set of 35 spiritmasters with tests, exercises, and activity forms to supplement text. Student text, $2.95; spiritmasters, $9.95. (Scholastic Book Services, 50 West 44th Street, New York, NY 10036)

Civil Justice introduces high school students to law education through highly readable units on consumer law, advertising, family law, nuisances and negligence, contracts, and housing law. Legal issues in these areas focus on experiences that teenagers and young adults would likely encounter in everyday life. The text uses a case-by-case approach, first presenting a situation or incident, then discussing the basic issues and concepts involved. Relevant discussion questions are raised in each lesson, and fieldwork is emphasized as a means of student involvement. The text offers an especially valuable glossary of legal terms, and each unit contains a bibliography of references written to appeal to high school students and young adults.

The teaching guide contains an overview, a follow-up, a teacher's bibliography, and well-developed but concise instructional plans for each unit. Teachers are encouraged to use resource persons, and directions are given for planning fieldwork for students, such as comparison shopping and a visit to a courtroom to observe a breach of contract case. Furthermore, teachers are encouraged to develop their own students into "peer teachers," experts on self-selected topics who teach younger children in other social studies classes or students their own age. The guide includes unit tests and pre- and post-tests. The spiritmasters contain copies of the tests, exercises, field activity report forms, and worksheets.

Overall the *Civil Justice* text, teaching guide, and spiritmasters are very usable and well-constructed materials, offering teachers and students a creative and innovative approach to learning the basic issues associated with civil justice. *Civil Justice* and *Criminal Justice* (reviewed in the Winter, 1978 *Update*) comprise an excellent series on our nation's justice system.

■ ***Law and Society*** (1977). Secondary. Three multi-media kits, each containing audio-cassettes and filmstrips, a teacher's guide, and 10 soft-cover student's books. *Law and Lawmakers* and *Law and Crime* each cost $93.50; *Law and the Environment* costs $67. Additional sets of 10 student books, *Readings in Law*, are available at $17.50 for each multi-media kit. (The Encyclopedia Britannica Educational Corporation, 425 N. Michigan Avenue, Chicago, IL 60611)

An excellent law curriculum with lessons devoted to the lawmaking process, civil rights, environmental law, contract and family law, criminal justice, and juvenile law. In each kit, contemporary topics are viewed from both historical and contemporary perspectives, using source materials collected from magazine articles, government documents, speeches and interviews, and the writings of legal scholars. Students are provided with conflicting opinions on each issue and encouraged to draw their own conclusions. The students' books, *Readings in Law*, contain authentic source materials that legal experts themselves might use in making judgments about these important contemporary topics.

Law and Lawmakers (teacher's guide, students' books, 3 filmstrips, and 2 audio-cassettes) presents lessons on the history of our legal system. Additionally, this kit explains how law can be used as a vehicle for social change in promoting individual and civil rights. An especially exciting component of the program is an audio-cassette of civil rights speeches by Presidents Truman, Johnson, and Kennedy.

Law and the Environment (teacher's guide, students' books, 2 filmstrips and 1 audio-cassette) presents lessons exploring the role of law in conflicts between industrialists and environmentalists. This kit presents an overview of the change from a primary emphasis on progress—which usually involved exploitation of natural resources—to an emphasis which also takes into account the pollution of the environment and possible health hazards to citizens.

Law and Crime (teacher's guide, students' books, 3 filmstrips and 2 audio-cassettes) presents lessons on the nature of crime, the decriminalization process and "victimless crimes," changes in theories about the nature of crime, and how the three branches of the criminal justice system (the police, courts, and corrections) deal with crimes and criminals.

Overall the *Law and Society* program is well done and ambitious, with exceptionally well-prepared instructional materials. The teacher's guide presents summaries and goals for lessons which are comprehensive yet allow for great flexibility and student involvement. The student books contain readings keyed to lesson topics, as well as very useful glossaries of legal terms. In the treatment of these crucial issues, the program addresses the student as a concerned, mature, and intelligent young adult.

■ ***Crime & Criminals: Opposing Viewpoints,*** David Bender and Gary E. McCuen, editors (1977). Secondary. Softcover student text. 159 pages. List price, $3.95, school price, $2.95. Each sub-topic or chapter also available in pamphlet form—list price, $1.35, school price, $ .98. (Greenhaven Press, Inc., 1611 Polk Street, N.E., Minneapolis, MN 55413)

Crime & Criminals presents students with alternative points of view on complex and sensitive issues and encourages critical thinking and analysis. The book does not pretend to cover all aspects of controversy surrounding the causes and cures of crime in America but, rather, presents students with essays, speeches, and articles in each of the following areas: the causes of crime; dealing with criminals; dealing with juvenile offenders; dealing with white collar crime; and gun control and crime. Suggested questions enrich students' reading, and exercises stimulate class discussion.

In the series of essays dealing with the "Causes of Crime," for example, Senator Hubert Humphrey argues that poverty, unemployment, and urban decay are the major causes of crime. Students are urged to consider such questions as what Senator Humphrey meant when he said that the new racism is the neglect of the cities. This is followed by a Boston newspaper columnist's article attacking what he calls the "myth that poverty causes crime," and the student is asked to consider what evidence the author presents and how statistics may be used to support any given position. The student then considers a businessman's view that the inefficient court system is the major cause of crime, the position of a police chief that criminals are born and not made, and finally the view of a clergyman that the increase in crime is a spiritual problem.

Exercises center on distinguishing fact from opinion, distinguishing primary from secondary sources, understanding stereotypes, and analyzing cause and effect relationships. *Crime & Criminals* effectively emphasizes a most important element of citizenship training and law-related education—the necessity of studying all sides of an issue and the ability to analyze, criticize, and evaluate the positions of others in developing one's own stand. It provides an excellent format for studying criminal law and would be equally useful in teaching reading skills, decision-making, current affairs, and other areas.

Crime & Criminals is the 13th volune in and most recent addition to the *Opposing Viewpoints* series. Other law-related volumes include *America's Prisons: Correctional Institutions or Universities of Crime* and *American Justice: Is America a Just Society?* Each chapter or series of opposing viewpoints within each book is also available in pamphlet form. A catalogue of available pamphlet and book materials may be ordered from the publisher.

■ ***The Jury . . . and Justice for All*** (1977). Junior and senior high. 16 mm., color film, 25 minutes. Brief teacher's guide in can lid. Purchase, $225; rental, $25. (Post-Script, Box 213, Birmingham, MI 48012)

This non-narrated film, produced by the Center for the Administration of Justice at Wayne State University, presents a great deal of information effectively. It focuses on a group of persons who have been called for jury duty. Among the potential jurors is a woman who has served on a jury before and, thus, is able to answer the others' questions and put them at ease. This woman has confidence and pride in the jury system, as well as in the capacity of the average citizen to serve as a juror.

A judge and an officer of the court address the group. Through these briefings basic procedures and terminology are explained, distinctions between criminal and civil trial procedures are drawn, and terms such as "presumption of innocence" and "burden of proof" are defined. The film makes the point that in a trial by jury there are two judges—the judge, who deals with the law, and the jury, who deal with the facts.

Flashbacks of courtroom activity keep this highly verbal film moving. Another positive feature is the ethnic balance and portrayal of both men and women in leadership roles. Don't be surprised if by the end of the film your students are ready to go to court with these jurors. This would be an excellent film to show prior to taking a class to visit a court in session.

■ ***Changing Views on Capital Punishment*** (1977). Junior and senior high. Color filmstrip and cassette or record, $22.00. Discussion guide. (Educational Resources Materials—the New York Times, 110 S. Bedford Road, Mt. Kisco, NY 10549)

Changing Views attempts to give the student an historical perspective on America's use of the death penalty. In enumerating the various crimes through our history which have resulted in the death penalty (in Colonial America, adultery or witchcraft; in the post-World War II era, espionage), the program urges students to consider how changing societal values and mores have affected the use of capital punishment in any given period of history.

The program encourages students to consider capital punishment from three perspectives: the constitutionality of the death penalty in light of the Bill of Rights' prohibition against "cruel and unusual punishment"; the appropriateness of the death penalty under specific factual circumstances; and the effectiveness of the death penalty in deterring crime. The filmstrip points out the fluctuating standards which have resulted from the courts' difficulty in agreeing on just what constitutes "cruel and unusual punishment" under the Eighth Amendment. The continuing confusion around the question is summarized by Chief Justice Warren Burger's admission that "the future of capital punishment has been left in an uncertain limbo."

There are no ready answers to the questions raised by capital punishment, and the filmstrip does not attempt to supply answers but rather raises the constitutional and social issues which must be considered in developing a reasoned position on the question. While the materials and questions provided in the discussion guide tend to solicit more fact regurgitation than reflective thinking, the filmstrip itself raises a sufficient number of controversial and complex questions to assure meaningful classroom discussion.

■ ***Juvenile Justice Series*** (1977). Secondary. A series of four 16 mm., color films: *Street Violence; Delinquency: The Process Begins; Delinquency: The Chronic Offender;* and *Delinquency: Prevention and Treatment.* Each film is 28 minutes long. Extensive teacher's guide and resource booklet available. Purchase, $395; rental, $50. (Motorola Teleprograms, Inc., 4825 N. Scott St., Suite 26, Schiller Park, IL 60176)

These very realistic films, using interviews and case studies of kids who have actually confronted the juvenile justice system, should be highly effective with young people. In each film a criminal justice specialist introduces the viewers to the issues of juvenile justice and comments on the topics under consideration. At strategic points, he reflects on what they have just heard and seen.

Delinquency: Street Violence focuses on violence in two different-sized cities—Detroit, Michigan, and Falmouth, Massachusetts. Both are typical in their fear of these "violent children." It is this perspective that pervades these films—that these are *children,* our children. They are sorely troubled. And we are fearful and anxious, often failing to constructively meet the needs of these children in distress. The series suggests that some of the "easy" answers society has tried —such as incarcerating these youngsters—often contribute to their delinquency.

Delinquency: The Process Begins reviews the cases of two boys who receive quite different sentences for approximately the same offense. The commentator suggests that, since the criminal justice system has no central principle guiding its treatment of juveniles, the family (which may have precipitated the problem) often decides what action should be taken.

Delinquency: The Chronic Offender is the story of Joe, a young prison inmate, who has developed all the traits of the "hard core" recidivist. The commentator suggests that breaking the cycle of returning to prison must involve providing opportunities outside the prison and not making confinement any more attractive than the outside.

The final film, *Delinquency: Prevention and Treatment,* examines three types of programs designed to lead juveniles away from crime. One program refers arrested youngsters to a juvenile officer who not only involves them in constructive activities but at the same time functions as a positive role model. The second treatment program uses peer-group therapy sessions in juvenile institutions. The third program is a community-based group home.

The instructor's manual for the four films is very well developed, providing a statement of goals and objectives for each film, a discussion of the concepts and issues treated in the film, a well-organized overview of the content of the film, detailed suggestions for

"Good heavens—that's the very same story my husband told me when he came in last night!"

preparation and follow-up, and a list of references. In addition to the instructor's manual, a booklet entitled *Historical Overview and Critical Assessment of Juvenile Justice System* helps the teacher understand and interpret some of the issues raised in the films.

■ ***Labor Unions: Power to the People?*** (1978). Junior and senior high school. Color filmstrip with cassette or record and teacher's guide. Purchase price is $22. (Educational Enrichment Materials—the New York Times, 110 S. Bedford Road, Mt. Kisco, NY 10549)

This new addition to the *New York Times Current Affairs Series* traces the development of the American labor movement and its impact on working people and the country. The program opens with a general explanation of the oppressive conditions of the Industrial Revolution and briefly traces the growth of unions up to the present time.

Excellent use is then made of union leaders and supporters expressing their ideas, which are contrasted to those of management and others critical of unions. A national union president discusses the effect which organized labor has had in improving working and living conditions and in bringing about such social legislation as workmen's compensation. The President of the National Association of Manufacturers criticizes union wage advances, blaming them for increased prices. Finally, a teamster who is active in union reform discusses the dissatisfaction of many rank and file members with union leadership and the efforts that are taking place toward achieving greater democracy within unions. As the program concludes, the original speakers return to discuss the role that unions play in a democratic society and the challenges which technology and the growth of multinational corporations pose to both the labor movement and society as a whole.

The program encourages the student to weigh and evaluate the ideas presented and their sources. The narration includes breaks during which the teacher may stop the program for class discussion. The teacher's guide provides suggested questions for the program breaks as well as follow-up discussion topics and activities. A ditto master of key vocabulary words is included.

The *Labor Unions* program as a whole gives students a good overview of the development of the labor movement and the important legislative, political and social role which unions play today. The dialectical method employed in the filmstrip encourages evaluative and decision-making skills in students and could be carried through to discussion questions and activities. This has unfortunately not been done well in the teacher's guide, which prompts students to do little more than regurgitate information.

NO HORSING AROUND HERE TO CORNER

■ ***Robin . . . A Runaway*** (1976). Junior and senior high school. 16 mm., color film, 32 mins. Purchase, $395; rental, $40. (FilmFair Communications, 10900 Ventura Blvd., Studio City, CA 91604)

Fourteen-year old Robin is picked up and arrested as a runaway. The scenes showing her being handcuffed, booked, and finally locked behind bars are thought-provoking and emotionally wrenching. Adult viewers may well question if our society treats children in distress in reasonable or warranted ways. Young viewers may well wonder if the rights guaranteed under the Constitution extend to all citizens regardless of age.

The scenes are potentially disturbing enough to serve as an effective catalyst to student research on the law as it relates to runaway juveniles and detention procedures.

Follow-up activities may include having students examine runaway laws in their community or learning about community resources which address the runaway problem.

■ ***In the Box*** (1976). Junior and senior high. 16 mm., color film, 14 minutes. Purchase, $195; rental, $20. (FilmFair Communications, 10900 Ventura Boulevard, Studio City, CA 91604)

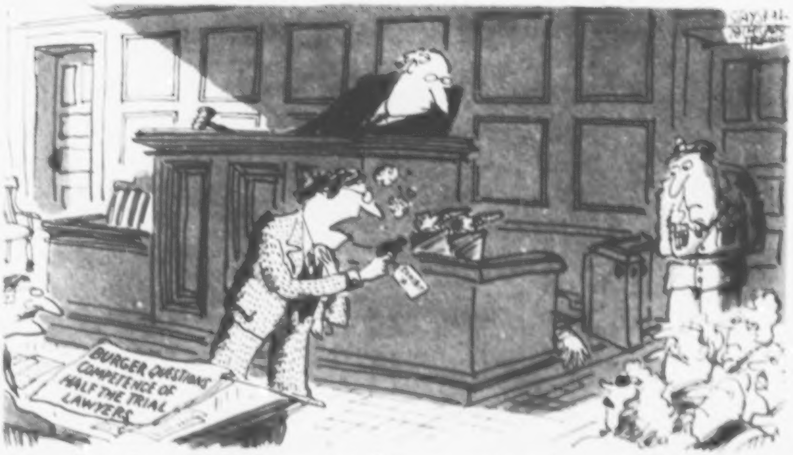
The film opens with a surrealistic scene in which two young adults, Phil and Betty, are ushered into a box representing the financial straits that ordinary people can get into by overcharging, making unwise purchases, and not providing for unexpected circumstances. The box is operated by automation-like men who stay on the outside spouting legal jargon and threatening action by creditors as the two captives cringe inside the box. Phil's and Betty's stories are told through flashbacks; the narrator makes the point that "Neither Phil nor Betty was wild and reckless" in their buying habits. In fact, Phil has become "boxed in" through illness and Betty through losing her job.

The two are finally give a "parole" to seek help, which they find through a community-based credit counseling center and ultimately through Chapter XIII of the federal bankruptcy law. The film provides good, clear legal information, portrays realistic debt problems, and does both through a clever, effective device—"the box." ☐

Court Briefs

(Continued from page 15)

recognizance or after posting bail. Both were to be tried by a tribal court when they challenged its jurisdiction over non-Indians. Citing a 1974 Supreme Court case which describes Indian tribes as "quasi-sovereign entities," the Suquamish argued that criminal jurisdiction flows automatically from their sovereign powers of government on the Port Madison Indian Reservation.


BURGER QUESTIONS COMPETENCE OF HALF THE TRIAL LAWYERS

". . . So you took this gun you claim was empty and . . . oooops!"

Reprinted courtesy of The Chicago Tribune

In a six-to-two decision (Justice Brennan not participating), the Court ruled against the tribal court's jurisdiction. In explaining the Court's reasoning, Justice Rehnquist takes us on a little trip through history, reviewing treaties, statutes, and court cases which either directly or indirectly support the Court's holding.

At the outset, Rehnquist points out that the Suquamish "do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision." The issue, therefore, is whether tribal sovereignty inherently provides them with such jurisdiction.

Rehnquist brings us back to 1834 when "few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment." Because of the absence of formal tribal courts, there was little need to address the question of their possible criminal jurisdiction over non-Indians.

An 1830 treaty with the Choctaw Indian tribe (which had one of the most sophisticated tribal structures) is instructive, Rehnquist writes. The treaty guaranteed to the tribe "the jurisdiction and government of all the persons and property that may be within their limits." Yet at the conclusion of the treaty, the Choctaws expressly requested permission to try non-Indians for violations of their laws—an indication that they did not consider this an inherent part of their sovereignty.

Rehnquist also reviewed an 1878 decision by Judge Isaac C. Parker, a man "as critical of the decisions of this Court as this Court was of the evidentiary rulings of Judge Parker . . . [who] was constantly exposed to the legal relationships between Indians and non-Indians." In order to give an Indian tribal court jurisdiction over offenders, Judge Parker held, "such offender must be an Indian." Rehnquist traced this policty to the present, noting a 1960 Senate report which said that "non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges."

One particularly interesting case discussed by Rehnquist is *Ex Parte Crow Dog*, 109 U.S. 556 (1883). In this case, the Court addressed the reverse of the issue in the *Oliphant* case—whether U.S. federal courts had jurisdiction to try Indians who had committed offenses against other Indians on reservation land. The Court concluded that criminal jurisdiction was exclusively in the tribe, and noted the danger of seeking to extend United States law "over the members of a community separated by race [and] tradition . . . from [a government] which seeks to impose upon them the restraints of an external and unknown code . . .; which judges them by a standard made by others and not for them . . . " These considerations, Rehnquist believed, spoke as forcefully against the Suquamish's argued right to try non-Indians according to their customs and procedures.

In conclusion, Rehnquist expressed his awareness of the problems of crimes committed by non-Indians on today's reservations. He indicated, however, that Congress, and not the courts, must institute any change in policy designed to address this problem.

Justice Marshall and Chief Justice Burger dissented from the Court's opinion. In a brief paragraph, they stated their view that "Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation."

Judge Freed from Liability

Doctors, dentists, and even lawyers have to worry about malpractice, and in *Stump v. Sparkman* (46 L.W. 4253, March 28, 1978), the Supreme Court had the opportunity to examine a possible case of judicial malpractice.

The case began when Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana ordered that fifteen-year-old Linda Spitler be sterilized without her consent or even her knowledge. Linda's mother had submitted a petition saying that her daughter was "somewhat retarded" and that Linda had left home on several occasions to "associate with older youth or young men." That was apparently sufficient for Judge Stump, who approved the petition. Linda was then sterilized, thinking that she was having her appendix removed.

Two years later, Linda married Leo Sparkman, and her inability to become pregnant led to her learning about the sterilization. She then filed suit against Judge Stump and others for violations of her constitutional rights.

Justice White, writing for the majority, held that a judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. Despite the unfairness that sometimes results, White continued, "the doctrine of judicial immunity is thought to be in the best interest of the proper administration of justice," since it enables a judicial officer to exercise the authority vested in him—to be "free to act upon his own convictions, without apprehension of personal consequences to himself."

"What Judge Stump did on July 9, 1971 was beyond the pale of anything that could sensibly be called a judicial act," said Justice Stewart writing on behalf of the three dissenters. "False illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act," he argued. "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."

School Officials Liable for Nominal Damages Only

School disciplinarians got good news in *Carey v. Piphus* (46 L.W. 4224, March 21, 1978), when the Court ruled that students who have been suspended from school without receiving their due process rights can recover only nominal damages from school officials unless they can show actual injury or malice.

The case arose out of two separate incidents in the Chicago schools. One involved Jarius Piphus, then a freshman at Chicago Vocational High School, who was suspended for twenty days when his principal saw him smoking "an irregularly shaped cigarette." In the second case, sixth-grader Silas Brisco was suspended for twenty days for wearing an earring in violation of school rules. The principal had previously banned earrings for boys because he viewed them as a symbol of membership in a youth gang, while Brisco argued that the earring was merely a symbol of black pride.

Piphus sued for $3,000 in damages, Brisco for $5,000, both arguing that they had been denied their due process rights.

The students said that the deprivation of a constitutional right, regardless of any injury which may have been caused, should result in the award of damages. They also argued that there should be a "presumption of injury" in all cases of constitutional deprivations. The school officials, on the other hand, argued that unless actual injuries are proven, the students are entitled at most to nominal damages.

A unanimous Court agreed with the officials' contention. There must be proof that an illegal suspension causes "mental suffering and emotional anguish" for compensatory damages to be awarded, they explained, and there must be proof of actual malice for the award of punitive damages.

They emphasized, however, that denial of procedural due process can result in nominal damages, even without proof of actual injury. "By making the deprivation of such rights actionable," the Court held, "the law recognizes the importance to organized society that those rights be scrupulously observed."

Advocates for the students and the students themselves, however, wonder whether the Court's decision simply gives them a right without any effective remedy.

Aliens and Equal Protection

Can a state prohibit aliens from becoming state troopers? This was the question confronted by the Court in *Foley v. Connelie,* 46 L.W. 4237, March 22, 1978.

The case involved a New York state law which provides that "no person

Other Decisions of Note

Durst v. United States, 46 L.W. 4141, February 22, 1978—A unanimous Court decided that a judge may impose a fine, or require restitution, or both as conditions of probation under the Youth Corrections Act (YCA). The act is designed to reduce criminality among youth, especially those between the ages of sixteen and twenty-two. Its three main features are tailoring rehabilitation to individual needs, separating youth offenders from hardened criminals, and flexible determination in length of commitment and supervised release. The challenge of the fine and restitution conditions was based upon the absence of any explicit language to that effect in the YCA.

Pfizer v. Government of India, 46 L.W. 4073, January 11, 1978—In a five-to-three decision (Justice Blackmun not participating), the Court upheld the right of the governments of India, Iran, and the Phillipines to sue for triple damages under our anti-trust laws. The case was brought against Pfizer and other drug companies, charging that they conspired to restrain and monopolize trade in certain antibiotics in violation of the Sherman Act. The dissenters, Chief Justice Burger and Justices Powell and Rehnquist, argued strongly against the Court's "undisguised exercise of legislative power" which they considered "not only plainly at odds with the language of the statute but also with its legislative history and precedents of this Court."

National Education Association v. South Carolina, 46 L.W. 3452, January 17, 1978—Without hearing oral argument or writing a formal opinion, the Court by a five-to-two margin summarily affirmed the validity of the National Teachers' Examination in hiring and classifying South Carolina teachers, despite its allegedly discriminatory impact upon black applicants. The lower court had held that there was no proof of a racially discriminatory purpose in the state's use of the NTE and that the state had carried its burden of justifying the test despite its disparate racial impact.

Lorillard v. Pons, 46 L.W. 4150, February 22, 1978—A unanimous Court held that workers who file age discrimination suits against their employers under the 1967 Age Discrimination in Employment Act (ADEA) are entitled to jury trials even though the act contains no provisions expressly granting such a right. The Age Discrimination in Employment Act is designed to protect workers between the ages of forty and sixty-five from job discrimination on account of their age. Writing for the Court, Justice Marshall reviewed the legislative history of the act and found congressional awareness of an established right to a jury trial in private actions under the Fair Labor Standards Act and a similar intent to insure such a remedy under ADEA.

shall be appointed to the New York State police force unless he shall be a citizen of the United States." This law, enacted in 1927, requires aliens to relinquish their foreign citizenship and secure American citizenship in order to become state troopers. Edmund Foley, an alien who was not then eligible for American citizenship because of the federally-imposed waiting period, was turned down when he tried to join the state police. He then challenged the state law as a violation of his Fourteenth Amendment equal protection rights.

A divided Court upheld the law. Writing for the majority, Justice Rehnquist began by considering what test to apply in determining the validity of Foley's equal protection challenge. Rehnquist acknowledged that the Court generally gives "close scrutiny to restraints imposed by states on aliens." He argued, however, that prior cases indicated that only a rational relationship is required in cases where aliens seek those "important non-elective executive, legislative and judicial positions" dealing directly with the "formulation, execution, or review of broad public policy."

Rehnquist pointed out that a state can clearly deny aliens the right to vote, to run for elective office, or to serve on juries, for those "lie at the heart" of our political system. The role of the police, Rehnquist suggested, can more immediately affect the lives of citizens than these other roles from which aliens can be excluded. "In the enforcement and execution of the laws," Rehnquist concluded, "the police function is one where citizenship bears a rational relationship to the special demands of the particular position."

Justices Marshall, Brennan, and Stevens disagreed with the majority opinion. In his dissent, Justice Marshall argued that the police were not in fact involved in the "execution of broad public policy." He felt that this term referred to the "responsibility for actually setting government policy." The job of a state trooper in his view did not fall under that category.

Also, he referred to the case of *In re Griffiths*, 413 U.S. 717 (1973), in which the Court held that states could not prevent aliens from practicing law "despite a recognition of the vital public and political role of attorneys." Similarly, Marshall argued, the state could not prevent aliens from serving as state troopers. Since no "compelling state interest" was advanced in support of the statute, he would hold it in violation of the equal protection clause.

In a separate dissent, Justive Stevens raised a different line of argument. He questioned the wisdom of a policy "denying a law enforcement agency the services of a Hercule Poirot or Sherlock Holmes," and asked, "What is the group characteristic that justifies the unfavorable treatment of an otherwise qualified individual simply because he is an alien?" He said that no one suggested that aliens as a class were not intelligent or courageous enough, so the disqualifying characteristic must be that foreign allegiance puts their trustworthiness and loyalty in doubt. "But if the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law? Are untrustworthy or disloyal lawyers more intolerable than untrustworthy or disloyal policemen?" Stevens thus found the Court's decision inconsistent with *Griffiths* and concluded that the discrimination was without constitutional justification. □

Central Illinois Public Service Company v. U.S., 45 L.W. 4163, February 28, 1978—Appropriate to the time of year, the Supreme Court by an eight-to-one vote decided that reimbursement for lunch expenses of employees not on overnight company business did not constitute "wages" subject to withholding by their employer under the 1954 Internal Revenue Code. This did not mean, however, that employees were not required to declare this reimbursement as income on their income tax returns. This case is not recommended reading for those already bewildered by income tax rules and regulations.

Christiansburg Garment Company v. Equal Employment Opportunity Commission, 46 L.W. 4105, January 23, 1978—The 1964 Civil Rights Act, which authorizes the award of attorneys' fees to prevailing parties in Title VII actions, has always benefitted winning plaintiffs. In this case, a unanimous Court decided that a prevailing defendant is to be awarded such fees, but only when a court finds that the plaintiff's suit was "frivolous, unreasonable, or without foundation." (In contrast, the plaintiff attorney's fees are awarded in all but special circumstances.) The Court justified this distinction by pointing out that the plaintiff is Congress' chosen instrument to vindicate "a policy that Congress considered of the highest priority," and that such fees are awarded against someone found to be in violation of federal law.

U.S. v. Ceccolini, 46 L.W. 4229, March 21, 1978—The Court by a six-to-two margin ruled that the testimony of a key witness, who was identified as a result of a clearly illegal search, could be introduced at trial despite the defendant's Fourth Amendment objections. While the case involved a complicated set of factors, the Court based its decision mainly on the distinction between excluding a live witness as opposed to an inanimate object, and the fact that the witness would have been identified even if the illegal search had not occured.

Ballew v. State of Georgia, 46 L.W. 4217, March 21, 1978—In 1970, the Court in the case of *Williams v. Florida*, 399 U.S. 78, held that the use of a six-person jury in a state criminal trial was constitutional under the Sixth and Fourteenth Amendments. In *Ballew*, the Court held that a jury of only five persons is contrary to the trial by jury guarantees embodied in those amendments. Speaking for a unanimous Court, Justice Blackmun referred to extensive scholarly work on jury size which indicated that smaller juries would reduce the likelihood of effective group deliberation, increase the risk of convicting innocent persons, result in a greater diversity of verdicts, and erect barriers to minority representation.

183

Classroom Strategies

(Continued from page 12)

searched must be described. In general, courts have ruled that the warrant must identify the premises with sufficient accuracy to enable the executing police officer to determine the place to be searched. If the exact address of the premises is unknown, the premises may be described by identifying its occupant. In a small town, for example, the description "the house occupied by Joe Johnson in Streeterville in Shawnee County" would be sufficient.

The courts also do not demand detailed descriptions of the items to be seized. However, the description should include as many facts as possible. For example, the following descriptions have been held to be sufficient: "A quantity of heroin," or "gems, women's wearing apparel and burglary tools." In this case, it would be sufficient to include a description such as "gambling implements and apparatus used, kept, and provided to be used in unlawful gambling" or "numerous slot machines, roulette wheels, and other gambling devices and games of chance, such as are commonly used in gambling houses."

Lesson Five: Conducting a Valid Search and Seizure

Once the students understand what constitutes a valid warrant, they are then ready to examine how search and seizure must be conducted according to the Fourth Amendment. Simulation is an excellent way of presenting students with the issues that arise in this area of law. Students who assume the roles of police officers should gain insight into the complex nature of the decisions that police officers face, and students who assume the roles of those who are searched should develop a clearer understanding of how a warrant protects their rights.

For example, using the form presented on page 12, students could be asked to draft a search warrant which gives the police the right to search for a stolen stereo at a private residence. Students could then be divided up into groups of five, with two students in each group assuming the roles of police officers, one student assuming the role of the owner of the house, and another student assuming the role of guest. The fifth student in each group would act as an observer.

As the police officers in each group execute the warrant, they will have to face a number of basic issues. First, they have to decide whether or not to knock and announce their presence. In order to highlight this issue, students acting as owner and guest might act differently in each group. For example, the owner and guest in one group could sit quietly; in another group, they could be playing music so loud that they don't hear a knock; in a third group, there could be loud thumps and cries that might indicate that a fight is in progress but might also be the sounds of a playful scuffle.

The debriefing of this portion of the exercise would ask students to decide if the police should be required to announce their presence prior to entering the house. Common law rules have required that before an officer enters to effect a search, he is required to announce his identity, purpose, and legal

Search and Seizure A-V

Search and Privacy (1968). This film, discussed in detail in the classroom strategies article, can be purchased for $280.00 or rented for $25.00 plus shipping. Order from Churchill Films, 662 North Robertson Boulevard, Los Angeles, California 90069.

Search and Seizure (1975). This filmstrip for secondary students recreates an actual case in which a police officer arrests a college student for driving without a license, searches him, and finds marijuana. During "stops" in the filmstrip, students are asked to decide whether or not the student's Fourth Amendment rights were violated by the search. The film then presents the Court's majority and minority opinions. The cost is $20.00 for either record or cassette. Order from Educational Enrichment Materials, 110 South Bedford Road, Mt. Kisco, New York 10549.

The Right to Privacy (1970). In this film for junior and senior high students, electronic eavesdropping devices are used to obtain the evidence necessary for getting a warrant. A home is subsequently searched and illegal bookmaking materials are seized. At a pretrial hearing, opposing attorneys argue whether the warrant is valid. The decision is left open-ended. The cost is $330.00 for purchase, $18.00 for rental. Order from BFA Educational Media, 2211 Michigan Avenue, Santa Monica, California 90406.

Search and Seizure (1973). This filmstrip opens with a tense interrogation scene in which government officials are trying to get a man to return to "right think"—thought which has official sanction. Fourth Amendment issues are then raised through a variety of situations, including the invasion of a home by government agents and the search of passengers involved in a hijacking. A particularly interesting segment of the filmstrip offers opposing views on the need for search warrants and the value of electronic surveillance. The cost is $49.00 for a multi-media kit containing thirty source books, a cassette or record, a teacher's guide, and sixteen spirit duplicating masters. Order from Xerox Education Publications, Education Center, Box 444, Columbus, Ohio 43216.

Marijuana Possession: A Contemporary Case Study (1972). The grounds for seaching someone's person are examined in a fictitious account of police, called to the scene of a teenage party, who search the party-goers and find marijuana on one boy. The audience is asked whether the marijuana should be admissible evidence against the boy even through there seemed to be no cause for a personal search. The cost of this secondary filmstrip is $27.75. Included are three student manuals and a teacher's guide. Order from Guidance Associates, 757 Third Avenue, New York, New York 10017.

Freedom and Security: The Uncertain Balance (1973). In this secondary-level film, various cases on denying the right to privacy for the sake of national security are examined through a series of interviews with people directly involved in these issues. Covers the Bank Secrecy Act, police collection of comprehensive surveillance files, and the limit and scope of federal grand juries. The sale price is $325.00 ($350.00 after July 1); the rental fee is $35.00 for three days. Order from Edupac, Inc., 231 Norfolk Street, Walpole, Massachusetts 02081.

authority. Statutes in a number of states require this, but the Supreme Court has not specifically ruled on whether the requirement of prior announcement is part of the Fourth Amendment. However, such requirements are generally subject to exception when there is reasonable ground for believing that prior announcement would endanger third persons or the officer making the search or would permit destruction of the items sought.

In the debriefing, the observers should describe the situation and the police actions. The students should then decide if the police were justified in entering without knocking in any of the various situations. They might consider why the police should be required to knock and whether in some situations it might be constitutionally acceptable for the police to enter without knocking.

The simulation will also require the students to consider how the scope of the search should be defined. The students who serve as police must decide where they will search. For example, can they search desks or closets? Can they search the owner and the guest who are on the premises? Again, in each group the students who act as owner and guest could act differently. In one group, they might sit quietly during the search; in another they might act as if they were under the influence of drugs; in another they might try to interfere with the search.

The debriefing of this aspect of the simulation would focus on what and whom the officers were allowed to search. The courts have ruled that the search may not exceed the area(s) described in the warrant. Thus a search of the house does not automatically authorize the search of all persons on the premises. In addition, the search may only extend to those places where the items to be seized could reasonably be. For example, the police could not search in a desk drawer when they are seeking a stereo.

Few cases deal with the question of whether the police can prohibit people from moving around in their own house during a search. Undoubtedly, officers can take steps to restrain interference at least for a reasonable time. Violent behavior by people on the premises would also probably give the police the right to search them for weapons.

After hearing the observers' reports, students should be asked to consider whether the police in each situation conducted a lawful search. Did they search only those places which could reasonably hold what was named in the warrant? Did they search people on the premises? If so, did they have grounds to search them?

If the students playing police seize evidence, you should also confront the question of whether the seizure was reasonable. It is obviously reasonable to seize the items named in the warrant, but what if the police find some other contraband such as narcotics? The teacher can raise this issue by placing some illegal item in plain view in one situation; in another group, this item could be in a closet where the officers could reasonably have searched for the stereo.

What happens when searchers find something not included in the warrant?

In the debriefing, students should consider whether the police ever have the right to seize things which were not listed in the warrant. In general, the courts have held that an item may not be seized unless the officer has reasonable grounds for believing that it is an item described by the warrant. However, items not described in the warrant may be seized if all three of the following conditions are met:

1. The officer had probable cause to believe they were subject to seizure (e.g., they were clearly illegal—a gun, for example—or were vital evidence of another crime),
2. they were in plain view or the officer came across them while conducting the search authorized by the warrant, *and*
3. the officer did not have reason to believe he would come upon them when he obtained the warrant.

These debriefings offer excellent opportunities to involve law enforcement officers, who often deal with such nitty-gritty questions in carrying out searches.

Lesson Six: Using a Film to Teach About Search and Seizure

Films can help you teach about search and seizure in many ways. One of the most effective techniques uses the film as a springboard for discussion. For example, the teacher can apply the case study technique (see the fall 1977 *Update*) to a film by stopping the film at appropriate points and asking students to identify the facts and issues and reach a decision. The students' decision can then be compared with the actual court decision in the case.

Many films include actual "stops" for student discussion, but films without stops can also easily be adapted to the technique. (See the box on page 40 for information about the film discussed here and other films and filmstrips about search and seizure.)

Search and Privacy by Churchill Films is a film which presents three search and seizure situations and is an excellent vehicle for helping students define a "reasonable" search under the Fourth Amendment.

In the first situation, police become suspicious of Eddie, a former drug pusher, because of a tip given by an unreliable informant. They decide to try to search his house without a warrant. After Eddie reluctantly admits them, they conduct a thorough search and find narcotics. At the film stop, the narrator asks whether the search was reasonable. In addition, teachers might raise the following questions:

1. What grounds did the police have to suspect that Eddie had narcotics in his house?
2. Did they have probable cause to believe he had narcotics in his house?
3. Does it make any difference that their informant was "unreliable"? What would have made the informant "reliable"?
4. Could the police have secured a warrant to search Eddie's house? Should they have tried to get a warrant?
5. Did Eddie consent to the search? Did he have any real choice about whether or not to admit the officers?
6. If Eddie agreed to let the officers come in, is he entitled to claim that the police violated his rights under the Fourth Amendment?

Divide students into groups and ask each group to reach a decision as to whether Eddie's constitutional rights were violated. Each group should assume the role of the Supreme Court and write an opinion in this case. The opinion should state the decision and the reasoning in terms of the language of the Fourth Amendment.

In the second situation, the film presents a scene in a high-crime area that is instigated by a reliable tip that Eddie is selling narcotics. Again, the police do not seek a warrant. After officers observe Eddie talking to a couple in a restaurant, they follow the couple's car, stopping and searching them and the car, but finding nothing. At this point the film stops and students are asked to decide if the search was reasonable.

In addition, teachers might ask the following questions:

1. How is this search different from the first search? Does it make any difference that a "reliable" informant told the police about Eddie's activities?

2. It appears that no money or goods passed between Eddie and the couple. Did the police then have probable cause to stop the couple? What if they had seen Eddie and the couple exchange money in the restaurant?

3. If the police had probable cause to search the couple, should they have been able to search the car?

4. If the police conduct an illegal search and find evidence of a crime, can they use that evidence against the defendant? If they don't find any evidence of a crime, does one have any legal remedy for the violation of one's privacy?

5. The general rule is that police must secure a search warrant before carrying out a search. Does this situation fall under any of the exceptions to this rule?

After students have had a chance to discuss the issues, ask them to role play a civil law suit brought by the couple, who allege that their civil rights have been violated. A team of students should prepare the arguments for the police. Other students should sit as judges in the case. If necessary, the class can be divided into a number of courts, and the decisions in the various courts can be compared. Each judge should reach a decision on whether the police violated the couple's rights. A good complementary exercise is to have the students investigate other means of reporting and combatting overly zealous police activity.

The final sequence deals with electronic surveillance. Without a warrant, the police plant an electronic device in a public telephone booth which they suspect Eddie often uses to arrange drug deals. Before Eddie comes to the booth, however, they listen to a very personal call a woman places to her brother, even though the booth is in sight and they know that Eddie isn't making the call. They then listen to Eddie's conversation describing a proposed drug deal. The police stake out the location, observe the sale, and arrest the participants. The students are asked to weigh the arguments of the police who say they need electronic surveillance to combat crime, and individuals who claim that such surveillance is a serious invasion of privacy. Students might be asked:

1. Did the police officers conduct a "search" in this situation?

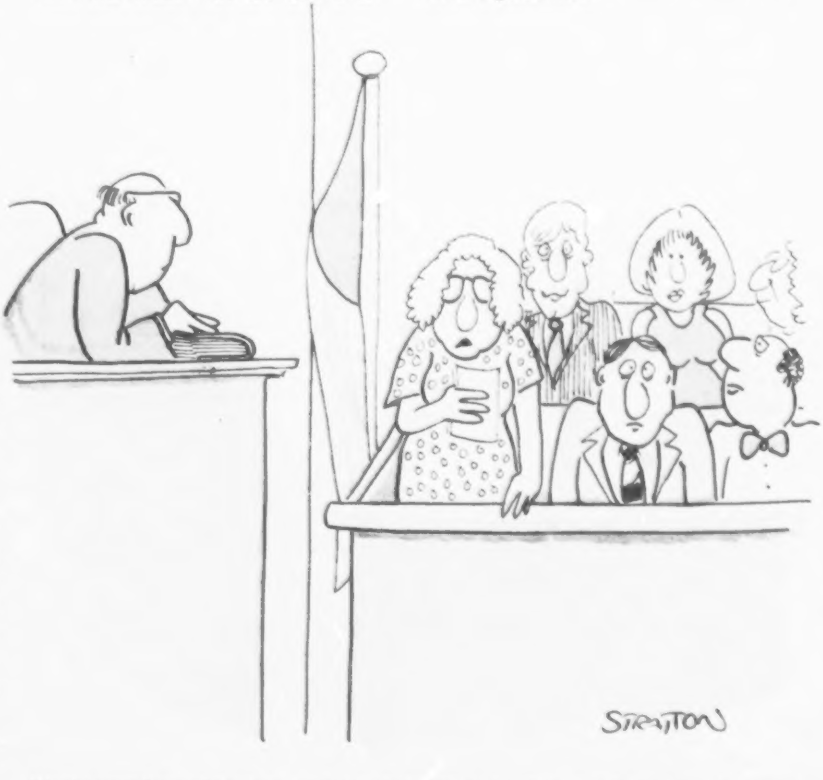
2. Should the police be required to have a warrant here?

3. Are there situations you can think of when electronic surveillance should be allowed without a warrant? If so, when?

4. If the police have a warrant which allows them to engage in electronic surveillance, can their right to listen be limited? Should they be allowed to listen to all conversations? Do innocent individuals who are also overheard have any right to challenge the police surveillance?

After answering these issues, students could conduct a survey to determine how other students and/or members of the community feel about surveillance. If possible invite a member of the police department to discuss how surveillance is used and why it is necessary. Invite members of the American Civil Liberties Union or other civil rights organizations to present their views about surveillance and its possible abuses. Ask students to find newspaper and magazine articles discussing current cases raising issues about surveillance.

One final thought. Search and seizure *is* a tricky area, but the key to teaching it is to avoid getting tangled up in legal details. Instead, help students focus on the important values that are in conflict in every search and seizure issue. If students can understand the values and interests at stake in the delicate balance between privacy and the need for effective law enforcement, they'll have the indispensable framework for learning and evaluating the many search and seizure guidelines.



We the members of the jury have concluded that clouded, poorly presented, inconsistent, and circumstantial evidence, is better than no evidence at all—guilty."

Supreme Court Report

(Continued from page 7)

private, even in an area accessible to the public, may be constitutionally protected." Looking at the facts of this case, the Court reasoned that one assumes when he places a phone call that it will not be broadcast to the world. Since Katz's "reasonable expectation of privacy" was violated by the bug, the evidence was secured by an unreasonable search and could not be used against him.

Justice Black's dissent in part restated the *Olmstead* argument that the Fourth Amendment protected things, not conversations, but he went on to frontally attack the notion that the proper role of the Court is to rewrite the amendment to bring it into harmony with the times. Black pointed out that tapping telephones was an unknown possibility to the men who wrote the amendment, but tapping is nothing more than eavesdropping and they were surely familiar with that. Since the framers could have written the amendment to outlaw eavesdropping and didn't, he argued that it didn't outlaw wiretaps. He concluded that the Court had erred in substituting the concept of privacy for the amendment's clear language, making the amendment "its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy."

Clearly the Court's decision didn't mean that all electronic eavesdropping was impermissible, since there was always the possibility of securing a valid warrant to monitor conversations electronically. But what would the requirements be for such warrants? The Court provided some guidance in another 1967 case, *Berger v. New York*, 388 U.S. 41. The state of New York had passed a law permitting warrants for eavesdropping under certain conditions, but the Court struck it down because the warrant application required neither a showing of probable cause for the commission of a specific crime, nor a particular description of the conversation to be "seized." Also, the Court ruled that the length of authorization for such warrants (two months) was excessive. What the Court seemed to be doing here was applying some standard precepts against excessive searches to the new area.

One of the most controversial aspects of wiretapping has involved national security. In the turbulent days of Vietnam protests, President Nixon's administration claimed that the President did not need warrants to order wiretaps on radicals who threatened national security. In one instance, the government tapped the phones of three white radicals in Ann Arbor, Michigan who were suspected of a conspiracy to destroy a CIA office. When the taps were disclosed in a trial before federal district court, the judge ruled that they violated the fourth amendment rights of the defendants.

The government appealed to the Supreme Court in *United States v. United States District Court*, 407 U.S. 297 (1972). It argued that the tap was "reasonable" because it was installed solely to gether intelligence needed to protect the nation from subversion. The government claimed that it needn't ask for warrants because domestic security cases require great secrecy and raise issues too complex for judges to weigh.

The Court didn't accept this reasoning. Writing for the majority, Justice Powell pointed out that judges were competent to pass on national security warrants, since "courts regularly deal with the most difficult issues of our society." As to the secrecy argument, he noted that police seeking warrants in criminal cases were also interested in secrecy and that judges traditionally "have respected the confidentialities of all involved." The opinion concluded that the President could not be exempted from the normal fourth amendment requirement to seek warrants before searches, though it did suggest that national security cases might

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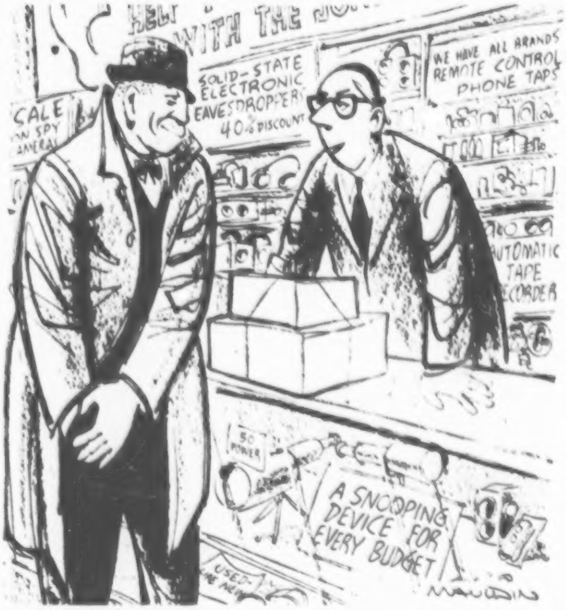
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"I trust you'll only be using this stuff in the interest of national security, mister . . . "

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require a more flexible standard of probable cause for warrants and a less strict time limit on them. The decision didn't deal with the touchy question of whether the President needs a warrant in cases involving suspected foreign agents.

The decision is still causing repercussions. After much soul searching the Justice Department recently indicted former FBI Chief L. Patrick Gray and other top FBI officials for ordering break-ins of the offices of a number of "radical" groups and the homes of many persons suspected of knowing something about radical activities. Other FBI officers are expected to be reprimanded for their conduct in the early 70s. Defenders of the officials say that they acted under what they thought were lawful orders and claim that they are being made scapegoats. To civil libertarians and many others, prosecuting the agents will help right an old wrong and symbolize that law enforcement officials are not above the law.

Searches on Arrest

The courts have traditionally held that the Fourth Amendment permits police officers to make some type of search without a warrant when they arrest a person. In the Court's reasoning, this constitutes an emergency exception to the general warrant requirement, since police officers must be able to search the accused person for weapons or for evidence that might otherwise be destroyed. However, over the years the Supreme Court has been sharply divided over what limits to place on searches on arrest.

According to Jacob Landynski's article in *The Rights of the Accused,* reasonable search incidental to arrest was originally confined to the person of the arrestee and the area within his reach. Beginning with the 1947 case of *Harris v. United States,* 331 U.S. 145, the Court moved to the position that the entire premises could be searched, on the theory that once privacy had been lawfully invaded to make an arrest, the search of the premises was only a minor and reasonable additional intrusion. However, for the next two decades the Court was closely divided on the question of the proper scope of searches on arrest, and the cases followed a see-saw pattern, with either the traditional view or the view advanced in *Harris* predominating, depending on changes in the Court's composition.

Finally, in 1969 the Court came down with what seemed to be a decisive ruling. In *Chimel v. California,* 395 U.S. 752, the Court by a convincing six-to-two margin held that a warrantless search on arrest should be limited to the arrestee's person and the area "within his immediate control."

The facts in the case suggest that police had stretched the privilege to search to its limits. One afternoon three police officers came to Chimel's house with a warrant authorizing his arrest for burglarizing a coin shop. The arresting officers asked his permission to "look around," but when he refused to give his consent, they told him they would search anyhow "on the basis of a lawful arrest." They then looked all through his entire three-bedroom house, in many instances opening drawers and rummaging through them. The entire search took forty-five minutes and revealed many coins and medals.

The Court did not deny that it was reasonable for arresting officers to search the arrestee to remove weapons, or to search his person for evidence that might be destroyed. And, the Court continued, "the area into which an arrestee might reach in order to grab a weapon . . . must be governed by a like rule." But there is no justification, the Court concluded, for a search of "any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other . . . concealed areas in that room itself." After all, police can always seek a warrant to conduct a full-scale search.

However, a case decided four years later seemed to many commentators to indicate that the Court was shifting once again in the direction of giving police officers wider discretion to conduct warrantless searches on arrest. The case began when a police officer in the District of Columbia stopped a car and checked the operator's license. He noted that the birthdate on the license differed from that on the driver's selective service card, and, when he returned to the police station he checked the files and found out that the man's license had been revoked. When he saw the man driving a few days later he stopped him, looked again at the license, concluded it was forged, arrested him, conducted a full search of his person (as required by departmental regulations), and found a crumpled cigarette pack that turned out to contain narcotics.

The defendant, a man named Willie Robinson, moved to have the evidence excluded, arguing that the search was unreasonable for a mere traffic offense. He prevailed in the appeals court but lost by a six-to-three vote before the Supreme Court in the case of *United States v. Robinson*, 414 U.S. 218 (1973).

Writing for the majority, Justice Rehnquist said that the government need not show that there was a probability that the defendant was armed or would try to destroy evidence. If the suspect was arrested on probable cause, "a search incident to the arrest requires no additional justification."

Justice Marshall, joined by Justices Brennan and Douglas, wrote a stinging dissent. He raised the possibility that police could from now on use the pretext of a traffic offense to conduct a search for which they had not probable cause to get a warrant. He noted that the crumpled cigarette pack could not possibly have been mistaken for a weapon or for evidence related to the offense for which Robinson had been arrested. That being the case, he saw no justification for the officer to remove the pack and examine its contents. He would exclude the evidence as the fruit of an unreasonable search.

Former Solicitor General Erwin Griswold offers another perspective on the Court's decision in *Robinson.* In his book *Search and Seizure: A Dilemma of the Supreme Court,* he writes that the decision that a full search is reasonable whenever a valid arrest is made "is a rule that police officers can understand. Of course, an arrest is an indignity, but . . . a search of the person seems an understandable incident to the arrest, and does not add much to the indignity." Griswold points out that the decision will be easy for courts to apply and offers small grounds for appeal. "It represents a real step forward, and it may indicate a tendency on the part of the Court to establish types or categories which may simplify the handling of search and seizure cases in the days to come."

The Exclusionary Rule Revisited

Mr. Griswold's hoped-for simplification of search and seizure hasn't happened yet, and there are literally dozens of search and seizure areas besides those discussed here posing their own special problems for the courts. Border searches, searches by government officials other than police, stop and frisk cases, searches to which the suspect has allegedly given his consent—the list could go on and on.

However difficult the special problems of determining what is a reasonable search in each of these areas, the crux of popular discontent is the exclusionary rule, which applies a drastic remedy to unreasonable searches, very often resulting in the collapse of the government's case.

As we've seen, the exclusionary rule rarely has elicited the support of the full Court, and in recent years, particularly after President Nixon's appointments to the Court, justices have been more and more apt to express doubts about the wisdom of the rule. For example, in a 1971 case with the intriguing name of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, Justices Harlan and Blackmun expressed considerable uneasiness with the rule and Chief Justice Burger delivered a strong attack against it. Burger pointed out that the rule wasn't likely to keep the police on the straight and narrow because its effects weren't felt at the time of the search but months later, and it was the prosecutor and not the police officer who suffered when a case is thrown out on the basis of illegally seized evidence. Besides, he said, search and seizure law was becoming so complex that police officers have great difficulty understanding it, and there were many problems of communication between the courts and the police. He urged that the rule be dropped once an alternative was developed, and strongly suggested that Congress provide "some meaningful and effective remedy against unlawful conduct by government officials."

Books and Simulations on Search and Seizure

On Privacy, Law in a Free Society (1977). These multi-media instructional units are designed for grade levels from kindergarten through twelfth grade and include sound filmstrips, student resource books, and a teacher's guide. The units are grounded in a conceptual approach, asking questions (what is privacy? what are some of the benefits and costs of privacy? what should be the scope and limits of privacy?) which get progressively more complex at each succeeding level. The cost varies according to grade level. For more information, contact Law in a Free Society, 606 Wilshire Boulevard, Suite 600, Santa Monica, California 90401.

Rights of Privacy, John H. F. Shattuck (1977). A comprehensive look at one's rights to privacy, including freedom from unreasonable searches and seizures, privacy of association and belief, and privacy of information. Useful for advanced high school students or as a teacher resource. The cost is $5.75. Order from National Textbook Company, 8259 Niles Center Road, Skokie, Illinois 60076.

Television, Police, and the Law, Prime Time School Television (1976). Students use television programs to explore the justice system, the role of the police, due process rights, and the problem of crime. Search and seizure issues are a prominent part of the curriculum, which includes articles, charts, and activities. The cost is $4.50 per kit (includes reader, six spirit masters, and teacher's guide). Order from Argus Publications, 7440 Natchez Avenue, Niles, Illinois 60648.

Police Patrol, Todd Clark (1973). An excellent simulation designed to promote understanding of the problems police officers face in carrying out their everyday duties. Search and seizure plays a prominent part in all of the sixteen different role-playing situations. The game includes teacher's manual, incident sheets, wall charts, police manuals, police call cards, observer evaluation forms, and attitude surveys. The cost is $12.50 plus $1.00 for shipping and handling. Order from Simile II, P.O. Box 910, Del Mar, California 92014.

The Right to be Let Alone, Gerald S. Snyder (1975). Broad discussion of the right to privacy, including an analysis of the constitutional and historical basis for this right. Describes the effects of modern technology, with an emphasis on the problems posed by electronic surveillance and computer data banks. Secondary. The cost is $6.89. Order from Julian Messner, Division of Simon & Schuster, Inc., 1230 Avenue of the Americas, New York, NY 10020.

Students' Rights: Issues in Constitutional Freedom, Richard S. Knight (1974). Secondary school paperback designed to promote discussion and activities on student rights controversies. The pamphlet focuses on privacy, dress codes, freedom of expression, and due process. The cost is $3.28 to the general public, $2.46 for educators. Order from Houghton Mifflin Company, Department L, One Beacon Street, Boston, Massachusetts 02107.

In 1976, Chief Justice Burger and five other justices constituted a majority in a case that many saw as the beginning of a whittling back of the exclusionary rule. In *Stone v. Powell*, 96 S.CT. 3037, the Court turned down habeas corpus petitions from two prisoners who challenged on fourth amendment grounds their conviction in state court for murder. The decision hinged in part on the peculiarities of federal habeas corpus jurisdiction, but the Court's reasoning suggests that the exclusionary rule faces an uncertain future.

Speaking for the majority, Justice Powell said that the primary justification for the rule is to deter police from violating the Fourth Amendment. It is, then, a means to an end rather than a constitutionally mandated end in itself, a "judicially created remedy" which presumably can be unmade by the Court.

The exclusionary rule, said Burger, only excludes "truth from the factfinding process"

Since deterrence is the principal goal, it follows that evidence should be excluded where it will reasonably have some effect on police conduct, and the present cases couldn't serve that purpose, since the petitioners had been given ample opportunity to challenge the legality of their search in state court. Powell noted that the rule is, "despite the absence of supportive empirical evidence," thought to deter unlawful police activity, but if it is "applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice." He therefore rejected the habeas corpus review while holding that the exclusionary rule is still appropriately applied at trial and on direct appeal.

Chief Justice Burger's blistering opinion in support of the majority opinion noted the "costs to society and bizarre miscarriages of justice" caused by excluding reliable evidence, and said that the function of the rule is simple—"the exclusion of truth from the factfinding process." Swinging a broad sword, the Chief Justice then wrote that "a more clumsy, less direct means of imposing sanctions" on policemen is difficult to imagine, especially since the evidence is often thrown out on appeal years after the alleged bad search took place.

Justice Brennan, joined by Justice Marshall, wrote in dissent that the purpose of the exclusionary rule is not solely to deter police misconduct. "The prevailing constitutional *rule*," he wrote, "is that unconstitutionally seized evidence *cannot be admitted* in the criminal trial of a person" whose rights were violated. To admit such evidence is to convict him "in derogation of rights mandated by . . . the Constitution of the United States."

What does the future hold for the exclusionary rule? Are the many criticisms of it justified? Empirical studies are generally inconclusive about the effectiveness of the rule, but there are plenty of reasons to suggest that it is not working as it should, ranging from the fact that it has no effect at all on the overwhelming majority of police conduct that is not meant to result in prosecution to the lack of disciplinary action against police officers whose misconduct caused evidence to be thrown out.

On the other hand, the rule has made police officers generally aware of the Fourth Amendment, thus rescuing the warrant provision from the dust-bin of disuse. For example, before *Mapp* the Minneapolis Police Department had apparently only used two search warrants in more than thirty years. As the deputy police commissioner of New York noted in 1965, "We had to reorganize our thinking, frankly. Before this nobody bothered to take out search warrants." It is hard to imagine that the Court's decisions in this area, as in several others regarding the rights of the accused, haven't contributed toward making the justice system operate more frequently under established rules of due process.

Is there any way to preserve the gains made through the rule while eliminating the miscarriages of justice that the Chief Justice laments? It is hard to think of a very good alternative to some sort of exclusionary rule. As Justice Murphy said in a dissent in *Wolf*, a tort remedy under existing law is illusory, since in a trespass action the measure of damages is "simply the extent of injury to physical property." And there seems little realistic chance of prosecuting errant police officers, for, in Justice Murphy's words,

> Self scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.

There is, of course, the possibility of changing the law to make tort suits a more feasible alternative, perhaps along the lines suggested by Chief Justice Burger in his dissent in *Bivens:* creating a special cause of action for damages where fourth amendment rights have been violated and establishing a quasi-judicial tribunal to adjudicate claims. However, Congress made no move to enact such legislation following the Chief Justice's trial balloon and the courts, of course, can't make these changes in the law themselves.

Perhaps a more feasible alternative is suggested by Justice White's dissent in *Stone v. Powell.* The Court does have the power to modify the exclusionary rule, and White suggested changing it so that it does not apply when evidence "was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief." As many commentators point out, the landmark cases in search and seizure tend to arise from instances such as *Mapp* in which the police clearly behaved outrageously. Wouldn't it be possible to retain the exclusionary rule for these instances and admit evidence seized in the vast majority of cases involving officers who act in good faith, often in the confusion and danger of the moment?

In the words of former Solicitor General Griswold, "if the police officer acted decently, and if he did what you would expect a good, careful, conscientious police officer to do under the circumstances, then he should be supported" and the evidence admitted. That, of course, might well plunge courts into the mare's nest of deciding long after the fact what is "honest" error by the police and what is an intentional attempt to search and seize illegally.

As usual in search and seizure, there aren't any easy answers. It looks as if the controversy surrounding the exclusionary rule and the many other fourth amendment issues will continue to be with us for some time.

FAMILY LAWYER

Will Bernard

Cases on Privacy and Property

Seven O'Clock Whistle

For years the seven o'clock whistle at a furniture factory went echoing unchallenged through the neighborhood. But one day a disgruntled home owner filed suit to "abate this nuisance."

"I just don't like the noise," he told the court. "What gives them the right to intrude on my peace and quiet?"

However, the company was able to prove that no one else in the neighborhood found the whistle annoying. The court dismissed the case on the ground that the complainant was overly sensitive—out of step with the rest of the community.[1]

When is noise an illegal nuisance? There are no hard-and-fast rules. But generally speaking, the law follows the tastes and sensibilities of the average person. It also examines the common-sense realities of the situation. Thus:

In another case, a court refused to shut down an admittedly noisy day nursery. The court pointed out that the nursery was located on a commercial street where there was plenty of other noise anyhow.[2]

And in a third case the court declined to interfere with Little League games played on a sandlot. Nowadays, the court told an objecting neighbor, we must accept "not only modern conveniences buy also modern inconveniences."[3]

On the other hand, a man who kept a diesel truck at his house was ordered to stop revving the motor at 6 a.m.

"Noise made during normal sleeping hours," said the judge, "may be a nuisance while the same noise during the day would not be."[4]

And another householder had to pay damages for playing his radio full blast, all day long, at an open window near a neighbor's kitchen.

True, the "noise" was nothing but radio programs. But the court said the man's spiteful motive pushed it beyond the pale of legality.[5]

(For this and other *Family Lawyer* articles, descriptions are sometimes adapted from cited cases).

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1. *Redd v. Edna Cotton Mills*, 136 N.C. 342, 48 S.E. 761 (1904).
2. *Beckman v. Marshall*, 85 S. 2d 552 (1956).
3. *Lieberman v. Township of Saddle River*, 37 N.J. Super. 62, 116 A. 2d 809 (1955).
4. *Muehlman v. Keilman*, 272 N.E. 2d 591 (1971).
5. *Gorman v. Sabo*, 210 Md. App. 155, 122 A. 2d 475 (1956).

Unsightly Fence

The Harpers watched with growing distaste as the man next door put up a fence. He built it of plain boards, crudely nailed together, and it offended their sensibilities.

When their complaints were rebuffed, the Harpers took the matter to court, charging "nuisance."

"That fence is an eyesore," they told the court. "It detracts from the value of our property."

But the court decided that even though the fence was unsightly in the eyes of the neighbors, it was not a nuisance in the eyes of the law.[1] As one judge explained:

"(Property owners are) not compelled to consult the 'esthetic taste' of their neighbors as to the kind of fence they should build. They (are) within their rights in satisfying their own taste."[2]

The ruling reflects the law's reluctance to enforce any particular standard of beauty. However, suppose the man had built the fence purely out of spite toward the Harpers. In such circumstances most courts would indeed step in. Thus:

Another man put up a 11-foot fence close to his boundary line, shutting out most of the light and air from the neighbor's house. Admitting a spiteful purpose, he claimed he could build whatever he pleased on his own land.

But a court ordered the fence removed because of his motive.

"What right has the defendant to shut out God's free air and sunlight from the windows of his neighbors," demanded the court, "simply to gratify his own wicked malice? None whatsoever."[3]

A dual motive—spite plus something else—may improve the fence builder's legal position. A farmer conceded that he hoped to irk the neighbors with his new board fence. But he also needed the fence to keep in some turkeys. With this legitimate reason as a justification, the baser purpose, a court decided, made no difference.[4]

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1. *Haehlen v. Wilson*, 11 Cal. App. 2d 437, 54 P. 2d 62 (1936).
2. *Bixby v. Cravens*, 57 Okla. 119, 156 P. 1184 (1916).
3. *Burke v. Smith*, 69 Mich. 380, 37 N.W. 838 (1888).
4. *Green v. Schick*, 194 Okla. 491, 153 P. 2d 821 (1944).

Right to Live Alone

To boost their income, a number of colleges and universities have adopted rules requiring students to live in dormitories. But disgruntled students have countered by taking the matter into the courtroom.

"I prefer to live alone," one youth pointed out, "and I have a constitutional right to do so. Forcing me to live in a dormitory is an interference with my right of privacy."

But the court disagreed, reminding the student that even the right of privacy has limits. The right was adequately protected, said the court, so long as his private quarters within the dormitory were kept inviolate against unwarranted search or intrusion.[1]

Another student challenged the live-in rule on grounds of discrimination.

"They let you live outside if you are over 21," he told a court. "Obviously this is discriminatory against those of us who happen to be younger."

But again the court decided in favor of the college. The court said the discrimination was lawful if it had a reasonable educational purpose. And it was reasonable, said the court, to consider younger students in greater need of experience in group living.[2]

On the other hand, another college did run into a constitutional roadblock. This school simply assigned all students to the dormitory until the rooms were filled. The remainder were permitted to live where they pleased.

But this arrangement was held unconstitutional because there was no educational justification for dividing students in such an arbitrary manner.

If the college wanted to increase its income, said the court, it should have spread the financial burden equally on all students—just as it would by raising tuition.[3]

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1. *Pratz v. Louisiana Polytechnic Institute*, 316 F. Supp. 872 (1970).
2. *Prostrollo v. University of South Dakota*, 507 F.2d 775 (1974).
3. *Mollere v. Southeastern Louisiana College*, 304 F. Supp. 826 (1969).

Condominium Life Style

"A little democratic sub-society."

That is how a judge recently described the owners of units in a condominium. He pointed out that just as in the larger community, they give up some of their freedom in exchange for the advantages of group living.

How much freedom do they lose? Generally speaking, the board of directors has the power to make "house rules." Within reason, these rules are enforceable by law, even though individual owners may not like them. For example:

The board of one condominium voted to exclude all liquor from the clubhouse. One of the owners objected in court, arguing that liquor had not been causing any problems.

But the court upheld the board's action. Pointing out that restrictions on drinking are widespread, the court said:

"There is nothing unusual about a group of people electing to prohibit (liquor) in commonly owned areas."[1]

In another case the by-laws authorized the directors to make improvements up to the amount of $5,000. Over the protests of several owners, the board decided to spend $500 for a new basketball court.

Again, a court found this within the scope of the board's discretion, ordering all the owners to pay their share.[2]

Still, there are limits. In another condominium the board, worried about noise, decreed that there should be no playing of music after eight p.m.—including weekends.

But a court said this was going too far. Noting that such a rule could apply even to radio and television, the court said this was just too much interference in the private lives of the owners.

Some noise, added the court, is "one of the penalties of modern civilization."[3]

I.R.S.
LICENSE TO STEAL
James Estes

"I don't care who you are, you don't have a license to. . .oh never mind."

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1. *Hidden Harbour Estates, Inc. v. Norman*, 309 S. 2d 180 (1975).
2. *Ambruso v. Board of Managers*, 330 N.Y.S. 2d 107 (1972).
3. *Justice Court Mutual Housing Cooperative, Inc. v. Sandow*, 270 N.Y. S.2d 829 (1966).

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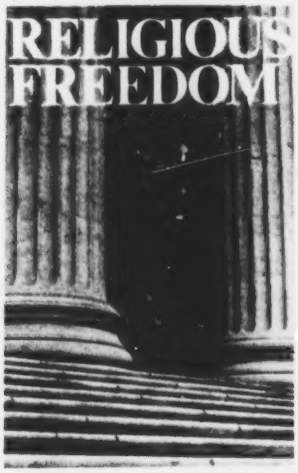

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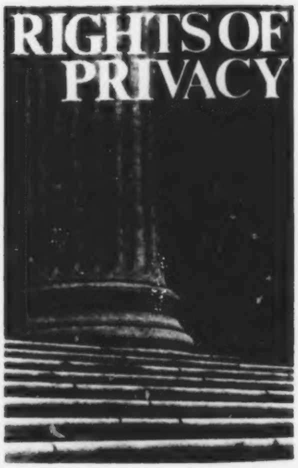

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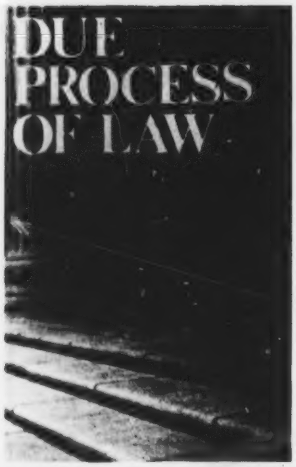

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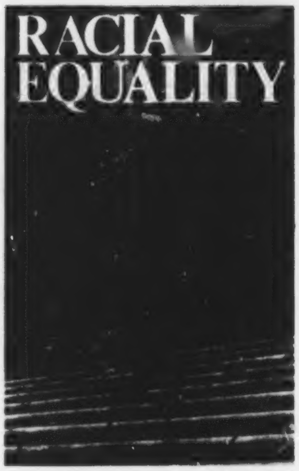

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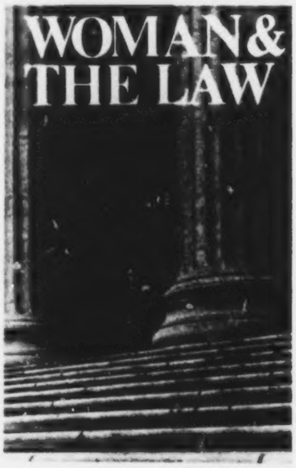

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OPENING STATEMENT

Why a special issue on sports and the law? The simplest answer is that it's a subject with wide appeal. Sports seem to be more and more important to Americans these days, especially since the growth of women's sports has enlisted lots of athletes and fans among what used to be known as the gentler sex. At the same time, the law is playing a much more visible role in sports. Athletes' contracts are big money and big news, lawsuits are almost as common as warm-up suits, and agents and sports lawyers are a new breed of superstar.

But you don't have to be a sports fan to appreciate sports and the law. Frank Kopecky, head of Sangamon State University's Legal Studies Program and the author of this issue's *Supreme Court Report,* says that sports cases can introduce every standard area of law, from torts to trusts, from contracts to crimes. Even if you can't tell a Red Sox from a Red Wing or a Met from a Jet, sports law can tell you about legal principles that are as important off the field as they are on.

For example, Kopecky's article shows how baseball players' salaries have been as much influenced by antitrust and labor law as by batting average and runs driven in. A student at Sangamon State's Legal Studies Program, Mariann Pogge, contributes "From Cheerleader to Competitor," a capsule account of how law has helped women to get off the sidelines and into the action.

Two other people at the Legal Studies Program also offer insights into sports and the law. Dennis Gilbert writes about the NCAA's legal troubles in trying to keep college sports amateur, and John Palincsar's article on sports lawsuits shows the problems of trying to apply off-field standards to on-field action.

Other articles on the topic include a *Family Lawyer* section on sports and torts and an article by professors Stephen Conn and Paul Beach on sports and the law in American history.

The rest of the issue examines a wide range of concerns. The *Court Briefs* section is the fullest ever, as we try to bring you up to date on the busy end of a busy Supreme Court term. Michael Froman and Kathy Kosnoff Erlinder contribute the first part of a two-part series on teaching about contract law, Enid Vazquez kicks off a new feature, *Youth Perspectives,* with an article on the importance of student participation, and our regular *Curriculum Update* section reports on new materials.

Your letters have helped give us plenty of ideas for improving the magazine. Keep it up. Tell us what you'd like to know more about and what articles you'd like to see. Let us hear from you.

—Charles White

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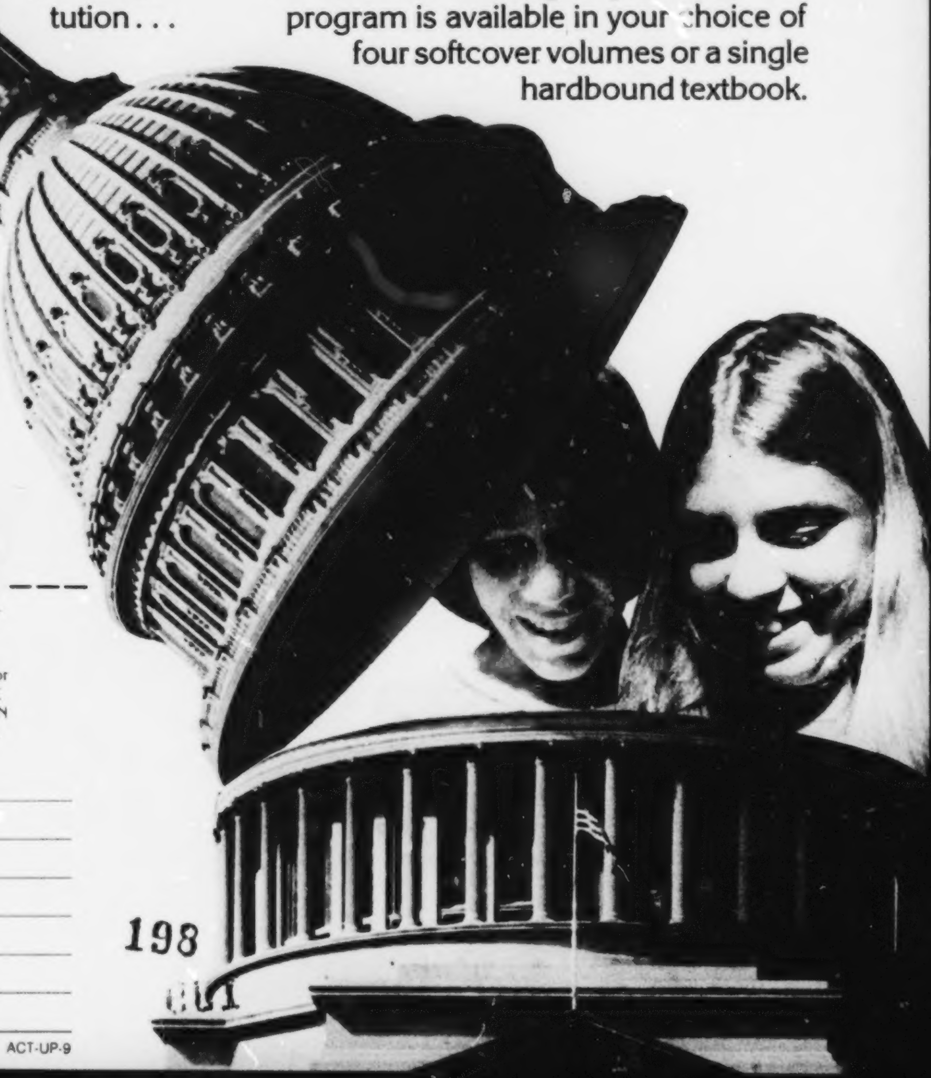

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contents

Volume 2, Number 3 Fall 1978

4

Supreme Court Report
Ballplayers Score Big in the Legal Game

7

Court Briefs
From Bakke to Filthy Words

12

Classroom Strategies
Teaching About Contracts

15

Sports and the Law
From Cheerleader to Competitor

20

Sports and the Law
The NCAA Goes to Court

25

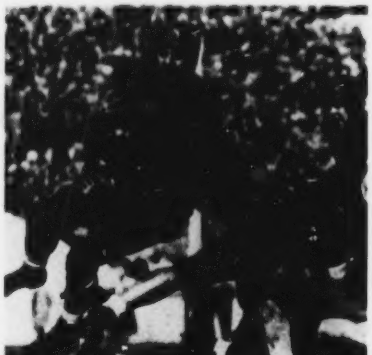
Sports and the Law
If You Can't Beat 'Em, Sue 'Em

28

Youth Perspectives
Letting Kids Do It

30

Update Looks Back
The More Things Change. . .



33

Newsclips

46

Curriculum Update
Materials to Kick-off the New School Year

55

Family Lawyer
Cases on Sports and Torts

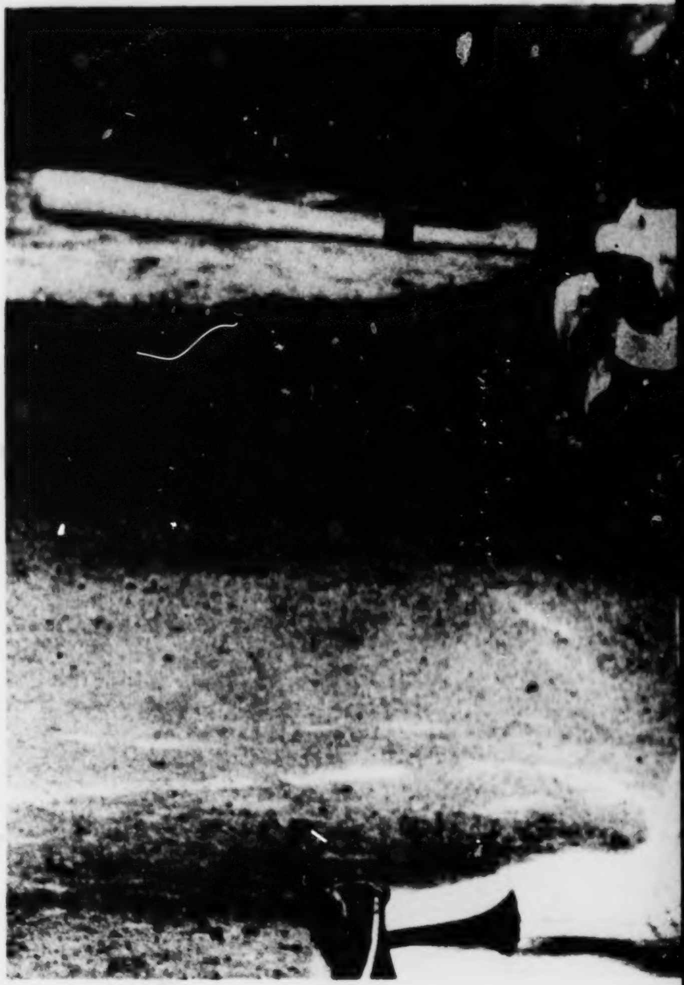
Credits
All photos by UPI, except those on page 7 (Mimi Forsyth), and pages 12-13 (Carol White). Cover drawing, Slug Signorino; page 6, B. Wiseman; page 8, Wayne Stayskal; pages 33 and 34, Dean Mathews; page 36, Pat Oliphant; page 47, Edwin Lepper; pages 48 and 55, Brenda Burbank; page 56, Tom Stratton.

SUPREME COURT REPORT

Ballplayers Score Big in the Legal Game

Major leaguers are shedding the reserve clause by going on the lawpath

Frank Kopecky



These days you almost have to have a lawyer interpret the sports section for you. Sports pages during the off-season used to carry nostalgic stories about old sports heroes and articles full of wishful thinking about the home team's chances for next season. Now baseball's "hot stove" league might more appropriately be called the "hot suit" league, with newspapers full of stories about contract negotiations, strikes, law suits, and labor arbitration awards. Such unlikely figures as Commissioner of Baseball Bowie Kuhn and labor leader Marvin Miller now dominate the news.

During the winter of 1977, baseball fans were treated to a series of articles concerning the lucrative contract negotiations of free agent ballplayers and the continuing legal battles of Charles Finley, the colorful owner of the Oakland A's. In 1977, a record number of ball players, including Mike Torrez, the Yankees' pitching star of the World Series, had played out their contracts and were free to sign with any club who would meet their salary demands. The competition was heavy and the salaries paid were high. Meanwhile, Charlie Finley was trying to move his A's from Oakland to Denver. During the winter Finley threatened to sue the other owners for not authorizing the move, Oakland threatened to sue Finley for moving, and Denver threatened to sue him for not coming. While all this was going on, the federal courts in the case of *Finley v. Kuhn* ruled that the baseball commissioner had the authority to set aside Finley's proposed sale of Vida Blue, Rollie Fingers, and Joe Rudi to the New York Yankees and Boston Red Sox for $3.5 million. By the start of the season, Torrez was in Boston, Finley's A's were in Oakland, Vida Blue was in San Francisco, and Denver was still in the American Association.

The Reserve System

All of this points out that professional spectator sports are a business, and a big business at that, competing with movies, TV, and the theatre for the leisure time and money of Americans. As in so many industries, the key legal questions deal with possible antitrust violations and labor/management relations. However, in sports these chronic trouble spots are given a special twist by the reserve system.

In order to keep players with the same club, thus enhancing fan identity, professional sports have developed the reserve system. The reserve system, as it formerly existed, required a player to remain with the club that originally signed him for as long as he was in the sport unless he was traded or released by the club.

The traditional reserve system had two basic elements. First, each player signed a contract, usually for a year, which gave the team the option to renew the contract for another year if the player did not agree to terms. Since the renewed contract also contained an option clause, the team could re-

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Frank Kopecky is Director of the Center for Legal Studies and Coordinator of the Legal Studies Program at Sangamon State University in Springfield, Illinois. He is a graduate of the University of Illinois College of Law and a loyal Chicago White Sox fan.

new it again the next year. Thus the contract could theoretically be extended year by year for the ballplayer's entire lifetime. Perhaps that's not so theoretical. Pitcher Jim Bouton reports that the owners turned down his suggestion that the reserve clause automatically expire on a player's 65th birthday. Maybe they thought ageless Satchel Paige would make another comeback.

Options to renew are not unusual in contract law. Many leases give the tenant the option or right to renew the contract for another period of time. The difference in sports is that the teams agreed to use a uniform contract form which contained a standardized option clause. The player had to sign a contract with an option or not play the sport. He had no alternative, except to retire.

The second element of the old reserve system authorized each team to place players on a reserved list. The other teams agreed not to negotiate with players on another team's list unless authorized to do so by the team, so in effect a reserved player could not deal with any other club.

The option clause and the reserved list effectively tied the player to only one club. The player had to deal with the club which originally signed him and owned his contract, unless that club decided to trade him or release him from his contract.

The reserve system is still one of the major points of contention between the owners and players. The player loses his economic ability to deal with any club other than the one which owns his contract rights. He has the choice of either dealing with this club or quitting the sport—a choice which gives the club a great bargaining leverage. The reserve system tends to keep salaries relatively low, which players resent. Owners, on the other hand, argue that the reserve system is needed to maintain fans' interest in their local team and to keep the teams in the league relatively equal by preventing wealthy clubs from raiding the rosters of poorer franchises.

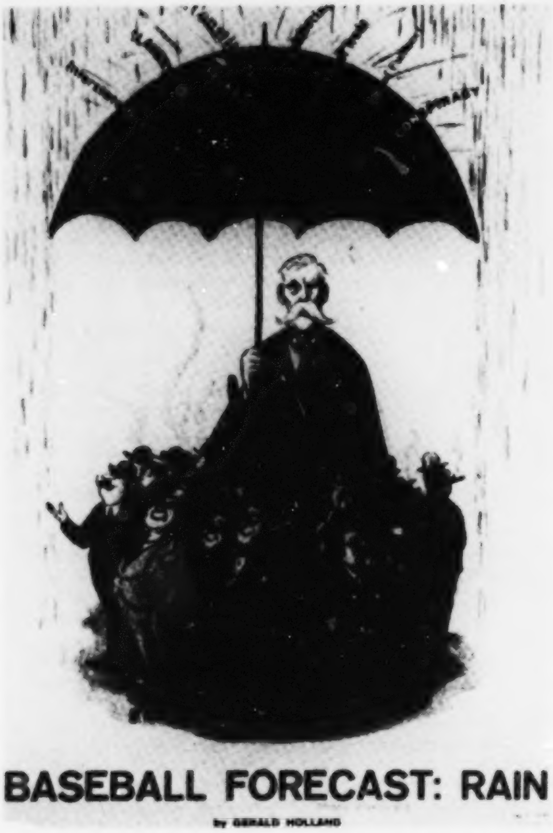
This article will concentrate on baseball because the reserve system differs a bit from sport to sport, and there isn't enough space to get fully into the antitrust aspects of the system in each sport. For a brief discussion of some important cases on other sports, see the box on pp. 44-45.

An Antitrust Violation?

While it is understandable for sports owners to organize their teams in a manner which will limit competition in any geographic area and carefully control the supply of athletes, this policy seems to conflict with the antitrust laws of our country. The Sherman Antitrust Act, passed in 1890 and still our principal antitrust law, states that in interstate commerce "every combination in the form of trust or conspiracy in restraint of trade is illegal."

The antitrust laws are designed to prevent businesses from entering into agreements which limit competition. If the manufacturers of radios, for example, entered into an agreement which divided the country into exclusive market areas and limited how much they would pay for parts, these manufacturers would be found in violation of the Sherman Act. Should baseball be treated differently? On three different occasions this question was raised in the Supreme Court, and on all three occasions the Court answered yes.

In 1922 the Supreme Court, in its landmark decision *Federal Baseball Club of Baltimore v. National League,* 259 U.S. 200, ruled that baseball was exempt from regulation under the Sherman Antitrust Act. The case involved a Federal League ball club. The well-financed Federal League was created in 1913 and competed against the National and



How one cartoonist saw the Supreme Court ruling that exempted baseball from federal antitrust laws.

American Leagues, operating clubs in eight cities, including six which also housed teams from the existing leagues. Competition between the new league and the existing leagues was rough, including player raiding and the blacklisting of players who jumped their contracts to play in the new league.

The new league wasn't able to attract enough fans, and in 1915 most of the owners of the Federal League reached an agreement with the existing leagues that gave two Federal clubs major league franchises, with the rest receiving a financial settlement. The agreement involved the dismissal of an antitrust suit the Federal League had filed against organized baseball, alleging that baseball was a conspiracy in restraint of trade. (Ironically, the judge presiding over that case was none other than Kenesaw Mountain Landis, who was to become commissioner of baseball in a few years.)

However, the Baltimore Federal League club wanted a major league franchise and refused to settle, suing organized baseball under the antitrust laws. It claimed that the established leagues had illegally conspired to destroy the new league by buying up some clubs and inducing the others to leave the league.

The Baltimore club won its case in the trial court, but that decision was reversed in the Supreme Court. The unanimous opinion of the Court was written by Justice Oliver Wendell Holmes, one of America's finest jurists. Mr. Justice Holmes served on the Supreme Court from 1902 to 1932, and his book *The Common Law* is considered a legal classic.

Although commentators agree that Holmes really booted this case, he did not make the naive statement often attributed to him that baseball was not under the antitrust laws because it was a sport, not a business. Holmes held that baseball was a business but did not fall under the Sherman Antitrust Act because it did not engage in interstate commerce.

Interstate commerce in 1922 had a much narrower meaning than it does today. By the late 1930s interstate commerce had grown to include any business which sells or advertises a product or service which crosses state lines. In 1922, however, "interstate commerce" was limited to businesses manufacturing products which physically travelled across state lines.

Holmes acknowledged that teams crossed state lines as part of the business, but this was not enough to qualify the business as interstate commerce. "The transport," Holmes argued, "is a mere incident, not the essential thing." Holmes reasoned that a baseball club's traveling is analogous to a firm of lawyers sending out a member to argue a case in another state. Neither produces a product and engages in interstate commerce. Hence, both are exempt from the Sherman Act.

The Players Get into the Act

Federal Baseball represented an antitrust challenge brought by one team against the established leagues. Essentially it is an instance of the owners going to court because they could not come to an agreement among themselves.

Most of the baseball antitrust action, however, has involved disputes between the players and the owners. At first, the ballplayers took direct action against the system. In 1890, the players created the Players' League as a means of avoiding the reserve system, and in other years the players struck over the system. These attempts to defeat the reserve system failed, but they did indicate the groups that would do battle in the courts sporadically over the years. In one camp are the players, sometimes as individuals and sometimes with the help of a union. In the other camp are the owners, banded together into leagues which are ostensibly under the direction of the commissioner of baseball, but are actually run by the owners themselves.

One of the first major court tests of the legality of the reserve clause and the validity of baseball's antitrust exemption occurred after World War II, when a Mexican league tried to compete against the big leagues and managed to lure some players away from their teams. Baseball commissioner A. B. "Happy" Chandler, a colorful former U.S. Senator from Kentucky, announced that all players who jumped their contracts to play in the Mexican League would be put on the ineligible list and banned from organized ball.

The Mexican version of a big league folded quickly, and the repentant ballplayers wanted another chance at the majors but were barred by Chandler's edict. One player, Danny Gardella, claimed that he was the victim of an illegal blacklist and sued for treble damages under the Sherman Act. A district court dismissed his complaint, but in *Gardella v. Chandler,* 172 F. 2d. 402 (1949), an appeals court found merit in the suit and sent the case back for a full hearing.

The appeals court judges noted that the definition of interstate commerce had changed radically since *Federal Baseball.* Indeed, Judge Jerome Frank thought recent Supreme Court decisions on antitrust might well render *Federal Baseball* "an

(Continued on page 39)

COURT BRIEFS

From Bakke to Filthy Words

Highlights of the Supreme Court's spring term (plus some cases you've never heard of)

Norman Gross

Bakke One More Time

England's media has the test-tube baby, the U.S. press has *Bakke*. Americans, unless they've been asleep for the past year, may already have learned more than they want to know about the case. But do people really understand it? And what implications does *Bakke* have for other tough equal protection problems facing the Court? Here's *Update's* look at the *Bakke* case.

Allen Bakke, of course, is a white male who was twice denied entry to the University of California at Davis Medical School. During each year that he applied, most of his test scores exceeded those of regular admittees, and they far exceeded the scores of 16 minority students who entered under a special admissions program. Bakke contended that he was excluded from the Davis Medical School on the basis of race, in violation of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

Out of the montage of six opinions and the intricate alignment of the court's justices, the following messages emerged:

1) Outlawed are university admissions programs which use race as the *sole* criterion or which set aside a specified number of places for minority students;

2) However, race *can* be considered along with grades, leadership potential, geographic origin, and a multitude of other factors in reaching admissions decisions;

3) Courts will give strict scrutiny to any racial classification, whether it involves so-called reverse discrimination or discrimination against historically disadvantaged groups.

Each of these holdings were the result of five-to-four splits in which Justice Powell cast the deciding votes. And in each, Powell's reasoning did not necessarily correspond to the rationale offered by his colleagues comprising the balance of the five-justice majority.

For example, in holding racial quotas unlawful, four justices—Chief Justice Burger, and Justices Stevens, Stewart and Rehnquist—did not rely on the Constitution at all. Rather, they based their opinion on Section 601 of the 1964 Civil Rights Act, which provides:

> No person of the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimina-

tion under any program or activity receiving Federal financial assistance.

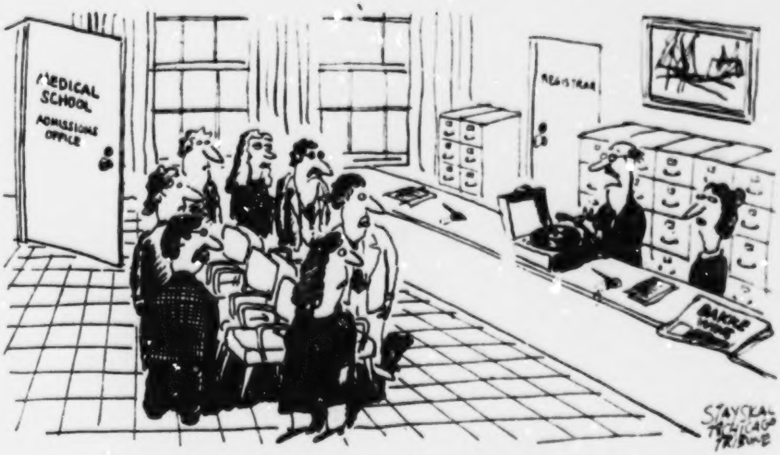
Since Bakke was excluded because of his race from a school receiving federal financial assistance, these justices decided that the "plain language of the statute" required Bakke's admission. They also emphasized that they were not lending their names to any part of the decision that "purports to do anything else."

This disclaimer was prompted by Powell's swing vote, which was based not on Section 601, but on the Equal Protection Clause of the Fourteenth Amendment. Powell argued that Davis' quota system could not be justified under "strict scrutiny"—that is, the University did not prove "compelling state interests" which might justify this racial discrimination. (For more information about various Equal Protection tests, see the Spring, 1977 *Update*.) Thus, while five justices found quotas unlawful, only Powell based that decision on constitutional grounds.

A similar but even more complicated scenario exists in regard to upholding race as one of many factors to be considered in admissions decisions. Powell, as noted above, found quotas to be unconstitutional under the strict scrutiny test. Yet he held that race could be *one* of many factors legitimately considered in selecting new admittees.

His colleagues on this latter issue (Justice Brennan, White, Marshall and Blackmun), while agreeing with Powell, went a step further than Powell was willing to go. They not only believed that race could be considered among other factors in admissions decisions, but also argued that the Davis plan was fully constitutional under the Equal Protection Clause. They reached this opinion by applying the strict scrutiny test, as Powell did, but held that the University had indeed proven "compelling state interests." Thus, a five-justice majority was established on the issue of whether race was properly one of the legitimate factors in admissions decisions, even though four justices disagreed with Powell on the larger issue of the plan's overall constitutionality.

Norman Gross is both a lawyer and an educator. He is currently Staff Director of the ABA's Special Committee on Youth Education for Citizenship.



"So as I said, the six chairs in the middle represent our last six openings. Okay now, is everybody ready?"

Further complicating matters were the unique aspects of the Davis affirmative action program: it was instituted voluntarily by a state medical school having no record of past discrimination against minority groups. The decision thus left open the question of what effect the Bakke ruling might have on other affirmative action programs such as those: 1) mandated by law; 2) involving private institutions; 3) correcting a history of discrimination; or 4) involving matters other than education, such as employment.

Some answers to these questions may be gleaned from the Court's action in dealing with a series of appeals on lower court equal protection rulings; others may be answered during the Court's next term.

The Court, for example, may have signalled a receptivity to racial goals in certain cases when it recently refused to review a lower court order involving the settlement of an American Telephone and Telegraph job-bias suit. The settlement, which established goals for hiring and promoting women, blacks, and other minorities, had been challenged by the union on behalf of phone workers. In settling the suit, AT&T neither admitted nor denied past discrimination.

A second case, which the Court sent back for reconsideration in light of Bakke, involved student governmental regulations at the University of North Carolina. The challenged regulations called for the appointment of two blacks to the campus legislature if at least two weren't elected. How the lower court will respond on the basis of *Bakke* is an open question. The arrangement could be overturned as an unconstitutional quota, or it might be upheld because it adds persons to the legislature and doesn't require that anyone be replaced.

Two cases currently on the way to the Supreme Court may provide greater insight into the area of employment discrimination. In the first case, the Kaiser Aluminum and Chemical Corporation entered a voluntary affirmative action program with its union although there was no official finding of past discrimination. That agreement has now been challenged by a white male contending that it violates the 1964 Civil Rights Act.

The second case involves a challenge to a court-imposed hiring of minorities by the Los Angeles County Fire Department. The lower court found a history of discrimination, and required that a specific percentage of blacks and Mexican-Americans be appointed until the department's racial composition matched that of the County's population. The County is contesting not only the Court's finding of discrimination, but the remedy as well.

Clearly, ***Bakke*** provides some hints but few answers. Perhaps, however, the Court's ambiguous action is in the best interests of society, giving lower courts and all of us more opportunity to work through these difficult issues, rather than handing down a decision that would straightjacket us into a particular approach.

Snail Darter Prevails

It was like a modern-day David slaying Goliath. The small but mighty three-inch snail darter halted construction of the nearly-complete $100-million Tellico Dam when the Court ruled that the Endangered Species Act prevented destruction of the darter's "critical habitat." Unless Congress amends the law, the decision will result in strict application of the Act's provisions.

The facts of the case—*Tennessee Valley Authority v. Hill*, 46 L.W. 4673, decided on June 15, 1978—might suggest a different outcome. In 1967, construction began on the Tellico Dam. Its primary purpose was to stimulate shoreline development, generate electricity to heat 20,000 homes, and generally improve economic conditions in the area. However, environmentalists thought it was not necessary and would destroy a precious wilderness area.

Local citizens and national environmental groups initially sought to stop construction by suing under the National Environmental Policy Act of 1969. They halted it temporarily, but the TVA filed an acceptable environmental impact statement and the district court gave the go-ahead to proceed.

In 1973, two events profoundly changed this state of affairs. First, a University of Tennessee ichthyologist discovered the snail darter, a previously unknown species of perch, in the Little Tennessee River. Four months later, Congress enacted into law the Endangered Species Act, which authorized the Secretary of Interior to declare various species "endangered" and to identify the "critical habitat" of these animals. Upon such designation by the Secretary, federal agencies were required to take steps "to insure that actions authorized, funded, or carried out . . . do not jeopardize the continued existence of such endangered species . . . or result in the destruction or modification of habitat of such species . . . "

The environmentalists seized upon the new law and sued to save the tiny perch. The snail darter and his home, the Little Tennessee River, were officially designated "endangered" and "critical habitat," and the legal fight was on.

Throughout the litigation, the TVA maintained that "the Act did not prohibit the completion of a project authorized, funded, and substantially constructed before the Act was passed." In addition, Congress continued to provide large sums of money for the dam's completion even though its appropriations committees were informed of the snail darter's plight. When the case reached the Supreme Court, the scorecard read one-to-one in lower court decisions.

"Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet," wrote Chief Justice Burger in finding for the snail darter. The plain language of the Act and its legislative history, he contended, show that Congress considers the value of endangered species as "incalculable." Absent a clear and explicit message from Congress to the contrary, Burger and five judicial colleagues felt they had to rule as they did, despite TVA's report that the dam stood "ready for the gates to be closed and the reservoir filled."

The environmentalists seized on the new law, and the legal fight was on

Clearly amazed by the Court's ruling, the minority justices called for an interpretation "that accords with some modicum of commonsense and the public weal." They believed that in any event Congress would act to "prevent the grave consequences" of the Court's decision, which left the unfinished dam "a conversation piece for incredulous tourists."

Court-Press Battle Rages On

In the lead article on "Freedom of Press on Trial" in the Winter 1978 *Update*, the authors note, "Among the subjects the press likes most are its own encounters with the legal system, especially when it comes to defending its First Amendment rights." The accuracy of this statement was vividly reflected by the widespread press coverage of *Zurcher v. Stanford Daily*, 46 L.W. 4533, in which the Court held that the Fourth Amendment does not forbid warrant searches of newspaper offices for criminal evidence. The fact that the press was not implicated in the crime made no difference, the Court held.

The case involved a 1971 demonstration about which the Stanford University student newspaper carried various articles and photographs. The Santa Clara County District Attorney's Office, believing that other negatives and photographs contained evidence concerning various felonies, secured a warrant for an immediate search of the newspaper's offices. Without any notice to the newspaper staff, a search was conducted of the *Daily*'s photographic laboratories, filing cabinets, desks and waste-paper baskets. The search revealed only the photographs that had already been published on April 11, and no materials were removed from the *Daily*'s office.

Shortly thereafter, the newspaper filed suit, alleging that the search deprived them of their First, Fourth, and Fourteenth amendment rights.

The Court, in a five-to-three decision (Justice Brennan not participating), upheld the search. Justice White, writing for the majority, noted that the Fourth Amendment has never been a barrier to searching for evidence of a crime in places owned or possessed by people not themselves implicated in the crime. He emphasized the state's right in "enforcing the criminal law and recovering evidence . . . whether the third party is culpable or not."

White also dismissed the argument that such searches would "threaten the ability of the press to gather, enlarge, and disseminate news." The *Stanford Daily* had contended that searches would be physically disruptive, cause confidential sources of information to dry up, deter reporters from recording and preserving information, and generally have a chilling effect on news operations.

White believed, however, that "the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." He further noted that there have been very few instances in the entire United States since 1971 which have involved the issuance of warrants for searching newspaper premises. "This reality hardly suggests abuses," White argued.

In a dissenting opinion, Justice Stewart argued that a subpoena would be a much more effective means of securing possible criminal evidence in the possession of the press and, at the same time, would avoid disruption of newsrooms and newsgathering processes. "A subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it," Stewart noted. In addition, it would allow a newspaper the opportunity to challenge inappropriate requests for information. "The legitimate needs of government," Stewart argued, "thus would have been served without infringing the freedom of the press."

In a separate dissenting opinion, Justice Stevens argued that "the only conceivable justification for an unannounced search of an innocent citizen is the fear that if notice were given, he would conceal or destroy the object of the search." Since there was no evidence that this was the case, Stevens argued that the warrant did not comply with the requirements established by the Fourth Amendment.

Court-Press: Round 2

Stanford Daily was not the only ruling that made the press mad last spring. Two weeks prior to the case, the Court had aroused the ire of the press corps by refusing to review two state court orders requiring reporters to identify confidential sources of information. Both cases involved civil suits for defamation.

In the first, *Oxberger v. Winegard*, 46 L.W. 3685, an Iowa husband filed a defamation suit against a reporter who had written an article about his divorce in *The Des Moines Register-Tribune.* In the second case, *Hubbard Broadcasting v. Ammerman*, 46 L.W. 3700, four deputies charged an Albuquerque radio station with malicious defamation after it broadcast a report which accused one of having served a prison sentence, another of having attempted to smuggle an alien from Mexico to become the sheriff's housekeeper, and two of having used county-owned cars to go to a race track. The Court's refusal to hear the cases means that the reporters will have to reveal their sources or face contempt of court charges.

Two other decisions which disturbed the press were *Houchins v. KQED*, 46 L.W. 4830 (June 26, 1978), and *Federal Communications Commission v. Pacifica Foundation*, 46 L.W. 5018 (July 3, 1978). The former denied San Francisco TV station KQED special access to a local prison, holding in a four-to-three decision that the press enjoyed no greater right of access than the general public. The *Pacifica* case, in which radio station WBAI-FM was reprimanded for broadcasting a "Filthy Words" monologue during the afternoon, is discussed more fully on pages 37-38.

The KQED ruling did have a silver lining for press advocates, however, because only three of the seven justices (Marshall and Blackmun did not participate) ruled out all special access rights for the media. Stewart, who concurred in the judgement and thus provided the swing vote, stressed that "more flexibility" should be accorded the media in light of "the critical role played by the press in American society."

Also of some solace to the press was the unanimous decision of *Landmark Communications v. Virginia*, 46 L.W. 4389 (May 1, 1978), in which the Court struck down criminal sanctions imposed upon a newspaper for disclosing confidential information about disciplinary proceedings against a Virginia judge. Chief Justice Burger, who wrote the majority opinion in *KQED,* also did so in the *Landmark* case. Despite denying special access to the media in *KQED,* Burger did not hesitate to uphold the press' right to engage in "public scrutiny" of governmental affairs, and "to accord judges no greater immunity from criticism than other persons and institutions."

Clearly, the press took Burger's words about criticism to heart in its robust coverage of the Court's press rulings, and the heated struggle between the press and the courts seems destined to intensify. We can also expect continued coverage of that struggle in all facets of the mass media—not bad news for those of us in law-related education.

Philadelphia May Dump on New Jersey

For years, Philadelphia has been the butt of jokes. W. C. Fields' tombstone epitaph, "I'd rather be here than in Philadelphia," and the oft-quoted contest awards, "First Prize—one week in Philadelphia, Second Prize—two weeks in Philadelphia" are but a few of the ways the City of Brotherly Love has been dumped on.

On June 23, Philadelphia got a measure of revenge. Rejecting New Jersey's pleas that it not become "the dumping ground of America," the Court, in *Philadelphia v. New Jersey* (46 L.W. 4801), ruled that Philadelphia can dispose of its garbage and waste in its neighbor's landfills. In so ruling, the Court overturned a New Jersey statute prohibiting the importation of "solid or liquid waste which originated in or was collected outside the territorial limits of the state . . ."

The purpose of the legislation was to prevent deterioration of the "quality of the environment of New Jersey," thus protecting "the public health, safety and welfare." The Court's action affected more than the immediate parties, since at least six other New England and mid-Atlantic states have passed similar laws.

Writing for the seven-judge majority, Justice Stewart noted that the Court has "consistently found parochial legislation of this kind to be constitutionally invalid" under the Commerce Clause.

Unreported Cases

By Veronica Geng

WASHINGTON—The Supreme Court may or may not have taken the following actions last week:

FIRST AMENDMENT: In a landmark decision, the Court ruled unanimously in favor of a twelve-year-old plaintiff who sought damages on account of being denied the chance to audition for the Clint Eastwood role in the motion picture "Maddened Rustlers." The Court's opinion, written by Chief Justice Happ, argued that exclusion of the little girl was "rotten, beastly, a crying shame —really makes the Court sick." The case was not decided, as had been expected, on the ground of sex discrimination; rather, the Justices invoked the First Amendment's guarantee of freedom of expression. The Court thus affirmed for the first time the constitutional right to a screen test.

SEARCH AND SEIZURE: Overturning the "dog's breakfast" doctrine of search and seizure, the Court held unconstitutional the Drug Enforcement Administration's system of obtaining search warrants, under which a judge who issues a warrant receives the rest of the afternoon off, while a judge who refuses a warrant is reclassified as a Controlled Substance. Justice Happsberger, writing for the majority, said that such procedures "lean upon the delicately coiffed maiden of the Fourth Amendment with the great ugly

"What is crucial," he noted "is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."

While Stewart rejected the argument that such a statute could be likened to a quarantine law, which has been upheld by the Court, dissenting justices Burger and Rehnquist found the analogy convincing. Wrote Rehnquist, "I simply see no way to distinguish solid waste . . . from germ-infested rags, diseased meat, and other noxious items" which New Jersey could justifiably prevent from entering its borders. Moreover, he saw no relevance to the fact that the landfills were already being used to take care of New Jersey's own waste products: "the physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State."

Tribal Sex-Bias Left Standing

The legal relationship between the government and the Indian nations is unique. No other ethnic or racial group has a separate federal agency comparable to the Bureau of Indian Affairs. No other group has made treaties with the United States, or successfully sued state and local governments for a return of their lands. And no other group could operate under laws which seem to directly contravene the United States Constitution.

This unusual relationship is primarily a result of the sovereignty accorded Indian tribes by Congress, giving them some of the powers of separate nations. In *Santa Clara Pueblo v. Martinez* (46 L.W. 4412, May 15, 1978), the Court again demonstrated its reluctance to infringe upon that sovereignty.

The case involved Julia Martinez, a full-blooded member of the Santa Clara Pueblo, who married a Navajo Indian

(Continued on page 35)

brutish heavily muscled shoulder of procedural error," and cited Judge Cheerful Hand's famous dictum. "I shall keep at it with these metaphors until I'm very old and it's unbecoming."

TAXES: Without hearing arguments on the issue, the Court ordered the Internal Revenue Service to desist at once from collecting personal income taxes—a practice that Justice Hapenny defined in his opinion as "inconsiderate" and "the product of diseased minds." He pointed out that the government could easily collect the same amount of money by manufacturing and selling wall-plaques that say "Uncle Sam Loves Your First Name Here."

CONTROVERSY: In one of their occasional "piggy-back" decisions, the Justices resolved some of the long-standing issues that clog the Court calendar. They ruled that nurture is more influential than nature, that men make history, that Iago is driven by motiveless malignancy, that one isn't too many and a thousand is enough, that there is an earthly paradise, and that Don Bucknell's nephew Ed doesn't look anything like John Travolta. Justice Hapworth dissented but was too polite to say so.

CRIMINALS: By a 9-0 vote, the Court held unconstitutional a New York City statute that would have mandated criminal convictions for suspects who fail to take policemen aside and "read them their duties." The statute had required that suspects deliver these "Caliban warnings" to policemen in order to remind them of their power of life and death, their obligation to attend to personal hygiene, etc.

The Court, in an opinion by Justice Happell, contended, "Who can doubt that this would be the first step toward compelling suspects to serve their arresting officers creamed chicken on toast points?"

MORAL BLIGHT: Citing "want of attractiveness" as a reason, the Court declined, 7-2, to hear an appeal by the publisher of two so-called men's magazines, Rude Practices and Men's Magazine. In the majority opinion, Chief Justice Happ explained that appellant's arguments were "unprepossessing and—let's be frank about it—just incredibly disingenuous."

Dissenting, Justices Happer and Happner said they wanted to pretend to hear the case and then rule against the appellant for "putting out such a clumsily edited and typographically unappetizing publication."

In a related decision, the Justices unanimously refused to hear a song written by a Kleagle of the Ku Klux Klan.

GREED: Splitting 8-1, the Court upheld the consitutionality of a federal program for the redistribution of wealth. Under the program, which is known as "horizontal divestiture," rich people are asked to lie down, and poor people then divest them of their money. Justice Happold, dissenting, said that the program would diminish the impact of a standing Court order requiring that income in excess of $8,000 a year be bused across state lines to achieve bank-account balances.

GIBBERISH: The Court voted unanimously not to review a case in which a court of appeals struck down a lower federal court's decision to vacate an even lower court's refusal to uphold a ruling that it is not unconstitutional to practice "reverse discrimination."

Chief Justice Happ, who wrote the opinion, said that the Court "is not, nor will it consent to be, a body of foolosophers easily drawn into jive baloney-shooting." A brief was filed by the Modern Language Association as amicus curiae ["Curiosity about Don Ameche"].

As is their custom, the Justices closed the session with an informal musicale, playing a Corelli gig. Justices Hapgood, Hapworth, Happner, and Happer performed on violin, Justice Happell on bassoon, Justice Happsberger on harpsichord, Justice Happold on oboe, Justice Hapenny on flute, and Chief Justice Happ on viola d'amore.

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CLASSROOM STRATEGIES

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Teaching About Contracts

Ways to beat the small print and make you a contracts whiz

Michael Froman and
Kathy Kosnoff Erlinder

Everyone knows that contracts are important and probably should be covered in a law course, but plenty of teachers think the subject is so tangled, complex, or just plain boring that they skip it and move on to something with more sex appeal.

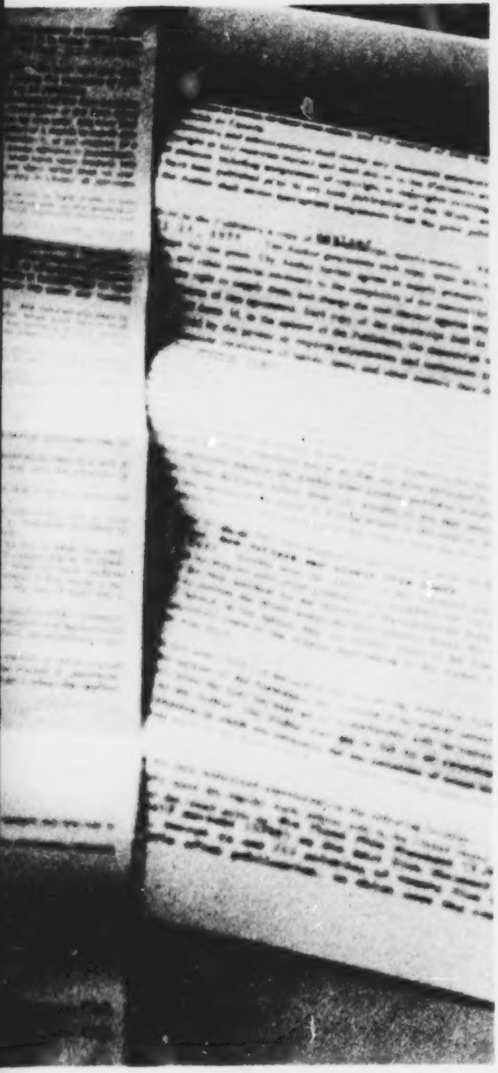
In this article, *Update* comes to the rescue with some lively strategies for introducing the subject, demystifying it, and pointing out the common sense that underlies much of contract law. The purpose isn't to make your kids mini-lawyers, but rather to help them become more intelligent consumers by giving them a general understanding of what contracts are and how they work. (Next issue we'll take up strategies for presenting minors and contracts, breach of contract, and remedies.)

To cap off this article, we've provided an actual contract that should really interest your students, the standard agreement between pro football players and team owners. (See pages 50-53.) Sure, leases and consumer contracts affect everyday life, but unfortunately they don't carry with them the excitement of a pro sports contract which involves big money and is frequently in the news. This football agreement should provide an original way to make some basic points about contracts.

Lesson One—Making a Contract

One good way to introduce the subject is to have students themselves make up a contract. Of course, you don't expect them to draw up an ironclad agreement the first time out, but you can expect that the exercise will help them see what purpose contracts serve, how they result from bargaining, and why clear language and common sense can be more important than legalese.

What contract should they create? Anything will do, but why not begin with a contract between you and the students on what the contracts unit will cover and how it will be taught. You might have them negotiate with you as a group, agree on terms as a group and choose negotiators, or have them break into small groups which will negotiate with you separately. The small group alternative has the advantage of showing them that contracts covering the same topic can be very different, depending on the needs of the parties and the skills



of the negotiators, but any of the alternatives will introduce kids to the give and take that is part of making a contract. And any alternative will also give you a lot of ideas about what students want to know and are willing to do.

In coming to an agreement, the class will have to confront a lot of issues which are basic to all contracts. They'll be introduced to the *quid pro quo* of bargaining, they'll have to come up with language that is sufficiently clear for each party to know what is expected of him, they'll have to decide how ambiguities should be dealt with, and they'll have to confront the problem of what happens if either side doesn't live up to its bargain.

You can discuss all these elements of a contract with the kids during the debriefing, and can also point out some other issues the exercise has raised. Why is it useful to write down a contract? Has there really been a meeting of minds about the contract or are some people still unsure what is required of them? What happens if an unforeseen contingency prevents one party from completing the contract?

Lesson Two—Recognizing a Contract

Perhaps one of the most dangerous misapprehensions about contracts is the widely-held idea that an agreement must be signed in writing in order to constitute a contract, that without such a document one has no legally enforceable rights or obligations. The flip side of this mistaken notion is that if it's in writing, it must be a contract.

The Statute of Frauds does dictate that certain types of contracts *must* be in writing to be enforceable. These include contracts for the sale of an interest in land and any contract that cannot be performed within one year. Additionally, the Uniform Commercial Code requires a written contract for the sale of goods when the price is $500 or more. The enforceability of contracts, however, hinges more on the presence of certain required elements than it does on whether they are written or not.

The irony (and often the tragedy) of these misconceptions is that all too frequently people who think they have a contract have nothing. Even more alarming, many people who believe themselves free of contract obligations are bound and obligated every day of their lives.

So many contracts are made in the daily course of events that it's impossible to enumerate all of the possible situations where a contract is formed, but the following hypotheticals may serve to sensitize your students to the many misconceptions which exist about contracts and create some curiosity about what makes some promises contracts and others just promises.

Ask your students whether a contract has been created in each of the following situations:

1. Tom hands the Good Humor man 50c and gets back an ice cream bar at the same moment.
2. Tom and his girlfriend, Bootsie, go to the Biograph Theatre.
3. On Tom's birthday, he receives a document from his grandfather which says, "I, Lucius Garvin, hereby promise to give my grandson, Tom Simpson, my Model-T Ford when he reaches the age of 18." Six months later, Grandfather gives the car to Tom's cousin Meg.
4. Tom makes an oral agreement with the owner of Musicat, the local stereo dealer, that he will pay him $50 per month for 10 months if he can have his stereo component system now. The owner agrees and they shake hands. When Tom fails to send Musicat any payments, they begin sending threatening letters which disturb Tom's mother. "Don't worry," says Tom. "They can't do a thing to me." He continues to enjoy his "free" stereo and ignores Musicat's letters.
5. Tom's mother takes her favorite boots to the shoemaker and asks him to resole them.
6. Tom's father, a carpenter, receives a call from Isabelle Nogudnik. Isabelle promises to pay him $500 in December if he will rebuild her back porch before Thanksgiving. "You've got a deal," he replies.

When you make a contract, you exchange an act for a promise or a promise

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for a promise. In either case, a contract must contain at least one promise or commitment to do something in the *future*.

The exchange between Tom and the ice cream man in the first hypothetical involved no promise by either party of a future performance; it was a completed transaction in and of itself. Therefore, no contract was created.

In the second example, however, Tom and Bootsie *offered* an act (the payment of money) and have paid the money (*consideration*) in order to secure the Biograph's promise that it would show a particular movie. The Biograph *accepted* that offer and is contractually bound to fulfill its promise. Offer, consideration, and acceptance, all essential to the formation of a contract, will be treated more fully later. The important point to make to your students here is that in nearly any exchange where those three elements are present, chances are the parties have created a contract. The other important point illustrated by this example is that a contract may be quite informal, but a contract nonetheless.

Could Tom sue his grandfather in the third situation? Sure he could—but not with any luck. While Grandfather has clearly offered his car to Tom, and we can assume that Tom accepted that offer, there was no consideration given by Tom, and hence no contract. You're not legally bound to fulfill your promises to someone unless he has given you something in exchange. That "something" is called consideration. While Grandfather clearly offered Tom a promise (that he would get the car when he reached 18), Tom gave nothing in exchange for that promise. Thus, Grandfather Garvin's gesture was no more than a promise—and promises, as we all know, can be broken.

In situtation four, when Tom said he would pay Musicat for its merchandise, and the store gave him the stereo equipment as consideration for his promise to pay, a contract was created. The lack of a written document does not affect the existence of that contract.

The fifth example is included to point out to students that, whether the standard language is exchanged or not, a contract may often be inferred. If Tom's mother and the shoemaker said nothing at all to each other, a reasonable person would nevertheless conclude that her actions implied an offer of reasonable payment in exchange for the shoemaker's act of repairing her boots. Applying this "reasonable person" standard, the court would probably find that an implied contract existed.

Finally, no money or merchandise changed hands between Tom's father and Ms. Nogudnik, but a contract has been made anyway. Each person gave a promise as consideration for the other, thus creating a contract.

Note the differences between this example and situation three. Tom's grandfather made a promise but got nothing in return, not even another promise, so no contract was created. In this example, however, while no money or services have been traded yet, each party has made a promise that raises an expectation in the other, and the law will enforce those promises.

Lesson Three—Offer and Acceptance

Your kids are probably already very familiar with bargaining. After all, they have traded baseball cards, swapped comics, and made other deals with each other for years. The important thing for them to understand is that contracts are basically the result of the same process of offers and counter offers which culminate in a meeting of minds. If they can see contracts as a kind of logical extension of something they are already familiar with, then the subject should lose much of its strangeness for them.

A good way of getting the concept of give and take across is to divide students into groups of two and ask them to "make a deal" with each other. To make the arrangements somewhat comparable, you might ask each to bargain his way out of his most hated task. So Mutt, who hates mowing the lawn, might be paired off with Jeff, who hates taking out the garbage. Perhaps they could just swap jobs, but more likely there'll be some problem (like Mutt's family's huge lawn) that will require harder bargaining. The ground rules are just that each party is free to accept, reject, or make a counter offer to any proposal, until they mutually agree on a deal.

Or you might want to give the paired kids a situation drawn from real life. Get some copies of a standard lease from a realtor or lawyer, pass them around, then have one student play a tenant whose rent has just gone up from $100 to $150 a month and the other a landlord who is insisting that the rise is justified because his taxes are going up (this isn't in California) and because his heating bills are growing every winter. The tenant wants to stay and the landlord won't back down, but maybe some bargaining might be possible on other parts of the lease. Perhaps the landlord would allow more of a decorating allowance; perhaps he'd agree to give the tenant the option to renew at the same rent for the next two years.

If this standard lease form is typical, it will be filled with clauses that are objectionable to the tenant and so should offer plenty of opportunities for bargaining. Students should understand that the printed lease forms can be altered if both parties agree. Too many laypeople think these densely printed forms, complete with small type and incomprehensible words, are some kind of magical legal document that can't be touched. Actually, they're just an offer from one party (the landlord here) to the other, and the consumer is free to bargain as hard as he can to make the offer more acceptable. Remember that these documents only become legally enforceable contracts when each party signs the document, attesting that the terms are agreed on.

After students have reported on their arrangements and given their feelings on the bargaining process, ask them how they made their offers clear and specific enough, if they had any trouble formulating their offers, and if the person they were bargaining with had any trouble understanding them. In their answers, they'll probably bring up the law's four essential terms for avoiding indefiniteness: who the parties are, the subject matter and quantity, the time for performance, and the price or consideration. Avoiding indefiniteness is essential if there is to be a true meeting of minds, a mutual assent necessary to forming a valid contract. Besides being clear, a valid offer must contain a conditional promise which can be matched by the other party making a promise in return or performing a specific act.

The following hypotheticals will help your students distinguish valid offers from other kinds of statements:

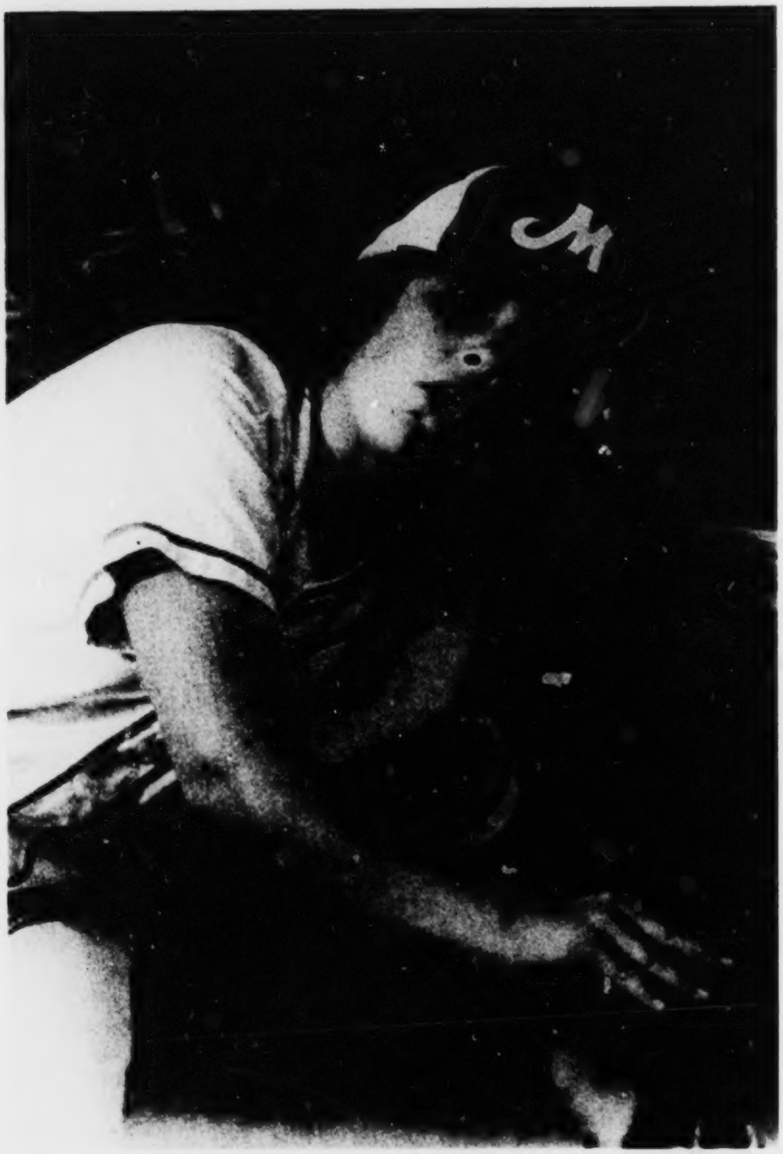
1. Laurel remarks to Hardy, "I think I'll sell my dunebuggy before winter."
2. Ralph admires Norton's conspicuously expensive wristwatch and compliments him on it as they sit next to each other at Casey's Pub. "For

(Continued on page 49)

From Cheerleader to Competitor

Women are getting off the sidelines and into the action—with a big boost from the law

Mariann Pogge



Historically, the American woman's place in athletics has been much the same as her position in the working world. The stereotypical success story for a teenage girl was to be a cheerleader or the steady girlfriend of a football star. Continuing this role into womanhood, the successful female was one who had captured a man with a promising future. Since the late 60s many women have rebelled against being man's cheerleader. Consequently, today's woman is more likely studying to be a doctor, lawyer, or business executive than looking to marry one. This trend has currently spread to school-age girls. Many teenage females are trading their pom-poms for basketballs.

Woman's invasion of man's athletic sanctuary, like her entrance into the working world, proceeds slowly and often with difficulty. The female athlete must contend with centuries-old prejudices which have become institutionalized in the educational system. This article will examine women's historical place in sports, discriminatory practices against female athletes in schools, and progress made towards surmounting these obstacles.

Centuries of myths, traditions, and beliefs support the relegation of women to spectators of sports rather than participants. Muscles and physical strength were admirable in males but ugly and undesirable in females. Female fashions reinforced this premise. During the 1800s women poured themselves into waist cinchers which constricted their internal organs and made them prone to genteel fainting spells at the slightest exertion. Spike heels and tight skirts of the 1950s kept the average woman at a careful pace.

The delicacy of the female sex was not

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only a social but also a medical belief. In a 1840 lecture to students at New York's College of Physicians and Surgeons, Dr. Chandler Gilman stated,

> In women, inferiority of the locomotive apparatus, the apparatus of physical labor, is apparent in all parts . . . the brain is both absolutely and relatively smaller than in men. Women have an abundant supply of soft and semifluid cellular tissue which creates softness and delicacy of mind, low power, non-resistance, passivity, and under favorable circumstances, a habit of self-sacrifice.

Even those who supported women's athletics held prejudices about the adaptability of the female temperament to competitive sports. Ethel Perrin, Chairperson of the Women's Division of the National Amateur Athletic Federation in 1928, stated,

The judge said boys needed the character that sports gave, but girls didn't

> Girls are not suited for the same athletic programs as boys. Under prolonged and intense physical strain, a girl goes to pieces nervously. A boy may be physically so weak that he hasn't the strength to smash a creampuff, but he still has the will to play. A girl is the opposite.

Discrimination in Schools

These myths and beliefs have been institutionalized, particularly in the educational system, where most children receive the bulk of their athletic training and attitudes. Boys are provided with equipment, coaches, and most important, encouragement for the development of their bodies. As Brenda Fasteau points out in her article "Giving Women a Sporting Chance," (*Ms. Magazine*, July, 1973) girls from early childhood on are discouraged from taking pride in active and strenuous use of their bodies.

Evidence of sex discrimination in schools ranges from lack of media coverage to unequal financial support and allocation of equipment.

One high school teacher complained, "In the latest edition of the school paper, there were five articles on football and no mention at all of the girls' tennis team, which had won its last three matches." And consider these instances of sex discrimination in college athletics.

•At a Southern state university, female students could not take coaching courses for credit, with the result that they were not qualified to coach teams.

•At one Ohio institution, a woman could not use the handball courts unless a male signed her up.

•Men but not women in one school could receive academic credit for participating in intercollegiate athletics.

•At another school, female teams had to pay for their own transportation and meals, while the university footed the bill for first class air fare for the men's football team.

Differences in financial allocations for men's and women's teams are often enormous. One large university spent over $2.6 million for its men's intercollegiate athletic program and allotted not one cent for the women's program. In 1973 the University of Washington allotted only $18,000 of a $2.6 million athletic budget for women's sports.

A problem must be recognized before it can be corrected, and women as a class are beginning to realize what Edward Bellamy stated over 100 years ago:

> Be it remembered that until woman comes to her kingdom physically, she will never really come at all. Created to be well, and strong, and beautiful, she long ago sacrificed her constitution. She has walked when she should have run, sat when she should have walked, reclined when she should have sat . . .

In a 1974 *Sports Illustrated* article, Bill Gilbert and Nancy Williamson remarked, "An explosion of female participation in athletics has been noted (with varying degrees of pleasure and alarm) by virtually every sports administrator in the U.S." Women are breaking out of their delicate stereotype. Though the average man is larger, stronger, and heavier than the average woman, the gulf between them is rapidly shrinking. According to Ann Crittenden Scott in her article "Closing the Muscle Gap," the difference in strength between trained male and female athletes is far less than between average or untrained men and women. In addition, differences of strength *within* either sex are far greater than differences between them. Dr. Jack Wilmar of the University of California asserts that the vast superiority of male over female strength is probably more an "artifact of social or cultural restriction imposed upon the female . . . than a result of true biological difference in performance between the sexes."

Women are beginning to demand their rights as athletes, and the law has been involved at every turn. Major avenues have been court action, legislation, and the passage of Title IX prohibiting sex discrimination in education.

Court Action

Lawsuits or the threat of legal action have led many schools to accept girls on boys' teams, especially in noncontact sports. Before the passage of Title IX, female athletes challenged rules barring girls from boys' athletic teams with the constitutional argument that such rules denied women equal protection under the 14th Amendment.

Challenges to segregated athletic programs arose in two main types of situations: girls who wanted to participate on boys' teams where no girls' teams were provided, and outstanding female athletes who wished to compete on boys' teams where there was a girls' team because the male team offered them an opportunity to make better use of their athletic ability.

One of the first cases to deal with the issue of mixing male and female athletes was *Hollander v. Connecticut Interstate Athletic Conference* (Super. Ct. of New Haven Co., Conn., March 29, 1971). No track team was provided for women, and Ms. Hollander argued that the 14th Amendment promise of equal protection to all U.S. citizens applied to education, of which athletics was a part. However, the court refused to overturn a rule forbidding girls to participate on the boys' track team. The court found partial justification for the rule forbidding girls in that it reflected the customs and traditions of sports. The court also asserted that competition between males and females would probably produce psychological damage to members of both sexes:

> The present generation of our male population has not become so decadent that boys will experience a thrill in defeating girls in running contests . . . With boys vying with girls in cross country running and outdoor track the challenge to win, the glory of achievement, at least for many boys, would lose incentive and

Billy Jean beat Bobby Riggs—but was she good enough to beat the best men?

> become nullified. Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow.

The court in *Haas v. South Bend Community School Corp.*, 289 N.E. 2d 495 (Ind. 1972), recognized the absurdity of this position. In this case, a proven female athlete challenged a rule of the Indiana High School Athletic Association which prohibited mixed teams in interscholastic and intraschool athletics and also forbade matches between male and female teams. No female golf team was provided at this school, and though Ms. Haas shot a qualifying score she was not allowed on the male team. The trial court upheld the rule, but the Supreme Court of Indiana reversed the decision by a narrow margin. The court pointed out that the rule mandating separate teams was reasonable in the sense that if girls were permitted to try out for boys' teams, boys should logically be able to try out for the girls' team. Since males as a class possess a higher degree of skill in traditional sports, males would probably come to dominate both male and female teams, thus excluding females from sports. In the present case, however, where no separate team was provided for females, the rule was discriminatory. Thus where separate male and female teams existed, the school had reason to restrict mixing. Where there was no team for females, a woman should be allowed to try out for the male team and be judged solely on her athletic ability.

Bucha v. Illinois High School Association, 351 F. Supp. 69 (N.D. Ill 1972), is one of a small number of athletic discrimination cases in which teams were provided for both sexes. *Bucha* was a class action suit challenging the association's rules which forbade mixed interscholastic competition. The girls bringing the suit were both outstanding athletes who asserted the right to equal educational opportunity and the right to equal treatment regardless of sex when trying out for athletic teams. However, the court resolved the case in favor of the association, arguing, as the court did in *Haas*, that allowing mixing of teams might result in male domination of both teams.

The States Act

Legislative change has been precipitated by court cases in some areas. For example, in one case two high school girls in Michigan, Cynthia Morris and Emily Barrett, filed suit against a rule preventing them from participating in interscholastic tennis matches. In the case of *Morris v. Michigan High School Athletic Association*, the U.S. Court of Appeals for the Sixth Circuit agreed that girls may not be prevented from participating fully in interscholastic noncontact athletics.

The suit probably helped pass a new law. Shortly after the complaint was filed, the Michigan Legislature enacted a law guaranteeing that all female pupils be permitted to participate in noncontact interscholastic athletic activities and to compete for positions on the boys' team even if a girls' team exists. According to the American Civil Liberties Union, suits or the threat of suits prompted at least five other states —Connecticut, New Jersey, Indiana, Minnesota, and Nebraska—to integrate noncontact sports in their high schools, and New York and New Mexico now have regulations which call for the integration of the sexes in all noncontact sports whenever there is a high school team for boys but not for girls.

The Key Law

Title IX is the most far-reaching response to women's demands for athletic rights. Suits based on the 14th Amendment led to some advances for women, but progress was slow because the cases were so different and because, as we have seen, judges did not agree on how the amendment applied to women's sports. Progress through changes in state laws was also piecemeal, with laws differing greatly from state to state. Passage of Title IX by the federal government was a giant step forward—it deals directly with women's rights to equality in sports and affects every school receiving federal funds, which is virtually every school in the country.

The main provision of Title IX is an absolute prohibition against discrimination: "No person in the United States shall, on the basis of sex, be excluded from participation in, denied benefits of, or be treated differently from another person or otherwise be discriminated against" in any athletic program at an institution receiving federal funds.

The Department of Health, Education and Welfare subsequently issued regulations which govern the interpretation of this act. Probably the most controversial of these regulations were those dealing with equal athletic opportunities for men and women in competitive sports. Athletic associations around the country said that equal opportunity was impossible in male and female sports. Many claimed that a strict application of Title IX would destroy collegiate athletics as it is known today. As a result, HEW's final regulations fall far short of the absolute proscription of sex discrimination which Title IX asserts.

The regulations essentially give women's sports "separate but equal" status, greatly undermining the Title's prohibition of different treatment according to sex. The educational institution may operate separate single-sex teams in such contact sports as basketball, football, wrestling, and ice hockey. Schools can also offer separate team for noncontact sports, such as tennis, golf, swimming, and track. If, however, a school fields only one team in a noncontact sport, the excluded sex must be permitted to try out for the single-sex team.

Thus it is conceivable that the female who excells in tennis may try out for the men's team if there is no separate women's team, but the girl who wants to be a football player is out of luck if there is no women's team. The only check on the discrimination permitted by this section is a general requirement that the schools provide equal athletic opportunity for members of both sexes. Thus the female football player's only recourse would be to gather enough women to form a team, which the school would be bound to support.

When women's athletics is taken seriously, the results can be striking

Regulations governing financial support also fall short of Title IX's absolute prohibition against sex discrimination, permitting unequal expenditures for members of each sex or unequal expenditures for male and female teams, as long as all teams receive "necessary" funds.

Supporters of this regulation argue that unequal support is justified because even after opportunities are equalized, fewer girls will participate in competitive athletics than boys. In addition, some sports are more expensive to equip than others. If one sex predominates in such a sport (football, for example), total expenditures will be unequal.

One author who disagrees with this position points out that past discrimination may be a major reason why girls are not as interested as boys and will not come out for competitive athletics. If throughout their school years girls have had no training, no access to gyms and equipment, and no encouragement to participate, it is hardly a justification for unequal expenditures that at the age of 16, girls are not as interested in sports as boys. In addition, though a warning has come through that equal expenditures would change the face of intercollegiate athletics, a major purpose of Title IX is to prevent the tuition, fees, and tax dollars of female students and taxpayers from being used to benefit only men.

The separate but equal doctrine which the HEW regulations prescribe has had both positive and negative reactions. In "Giving Women a Sporting Chance," Brenda Fasteau points out that, as a class, men have the potential to perform better athletically than women as a class. The very best male athletes—ones who enter the Olympics—are still better than the very best women. Even in professional sports it is debatable whether Billie Jean King, at one time the best female tennis players in the world, would even make the top 10 if male and female professional tennis players competed against each other.

However, if women are allowed to try out for men's teams, men should, in all fairness, be allowed to try out for women's teams. The result would probably be an overwhelming majority of men on both teams. This new form of exclusion for female players would destroy Title IX's purpose of giving females equal opportunity to achieve their athletic potential.

Several other writers agree with this position but point out that males and females have equal athletic capacity in their pre-high school years. Medical evidence that girls aged 9 to 12 are at least as strong as their male peers convinced the New Jersey Supreme Court that girls of that age must be allowed to play little league baseball (*N.O.W., Essex County Chapter v. Little League Baseball,* 127 N.J. Super. 22, 318 A. 2d, 33 [1974]). For this reason and for the purposes of healthy male-female contact in a competitive situation, several authors assert that athletic segregation of the sexes before junior high school is neither justified nor desirable. Since the regulations on Title IX permit (but do not require) integrated male and female teams, even in contact sports, they argue that sports should be integrated on the pre-high school level.

Brenda Fasteau suggests other guidelines which would assure compliance with the spirit of Title IX.

1. Coaches of women's teams should be paid as much as those for men's teams.
2. Scholarships must be equalized for men's and women's sports.
3. From first grade through college, girls and boys should have gym classes together and equal access to athletic facilities and instruction. Students, regardless of their sex, should be encouraged to perform to the best of their individual ability.
4. Because girls have not enjoyed the same physical and psychological opportunities as boys to develop athletically, resources should be made available for at least two teams per sport, one for boys and one for girls.

A Law That Works

The growth in women's sports since the passage of Title IX is remarkable. In high school, girls' participation in interscholastic sports has increased dramatically. In 1971, 7 percent of high school athletes were girls, but today almost 30 percent are female. The same trend is clear in college sports. In 1974, only 60 colleges offered women's athletic scholarships; in 1978, 500 colleges offered grants. And some real money is now being made available to women's sport. For example, the Berkeley campus of the University of California spent only $5,000 on women's sports in 1972 but now spends $500,000 a year.

When women's athletics are taken seriously, the results can be striking. In Iowa, for example, girls basketball draws bigger crowds than boys. Women's basketball is a matter of state pride. Consequently, high school and college women in Iowa are able to try out for teams without the amusement or disdain frequently encountered by female athletes.

If women are going to continue their struggle from cheerleader to participator in life, they will need the "character" which the *Hollander* court restricted to men. As Simone de Beauvoir proposed in 1949:

> Not to have confidence in one's body is to lose confidence in oneself . . . It is precisely the female athletes, who being positively interested in their own game, feel themselves least handicapped in comparison with the male. Let her swim, climb mountain peaks, pilot an airplane, battle against the elements, take risks, go out for adventure, and she will not feel before the world that timidity.☐

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First Amendment Freedoms
by Isidore Starr

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About the Author

Isidore Starr is a lawyer, Professor Emeritus of Education at Queens College, and former president of the National Council for the Social Studies. He is the author of dozens of books and articles on law-related education and he is currently a member of the American Bar Association Special Committee on Youth Education for Citizenship.

"The Idea of Liberty—First Amendment Freedoms" by Isidore Starr, published by West Publishing Company, 1978, in soft cover text form, approximately 200 pages, is for the High School level. Write or call the address below for more information.

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The NCAA Goes to Court

The game of the week has become the case of the week in the big business of college sports

Dennis Gilbert

College sports are big business these days. At large schools, athletic budgets can easily run into the millions. College games often outdraw the pros, and TV contracts are almost as sweet for college sports as for their pro counterparts. The pressures on coaches to build a winner may even be greater in college than in the pros.

At the same time, college sports are supposed to be amateur. Coaches are paid, ticket prices are high, pro scouts fill the stands, and recent graduates sign big contracts, but college athletes themselves are somehow expected to remain pure. They're supposed to rise above their surroundings and retain their virtue against all the odds.

To help them stay on the straight and narrow, there are rules regulating who can participate, when they can play, how many times in a given year they can compete, what grades they must maintain, and how many years of eligibility they have. And there are as many rules directed to the school itself, to see that it doesn't gain an unfair advantage over its rivals. Naturally, every suspected violation of these rules raises delicate questions of guilt or innocence, and there's now a growing body of law on college athletics that applies constitutional principles to off-field wrangles.

The NCAA and Its Rules

The responsibility of governing intercollegiate sports rests with the amateur and collegiate athletic associations. The largest and most powerful organization regulating intercollegiate athletics is the National Collegiate Athletic Association (NCAA). The NCAA has nearly 800 member institutions, far exceeding the membership of its nearest competitors.

The NCAA regulates the conduct of athletic programs, dealing with issues such as admissions, financial aid, eligibility, and recruiting. The association can enforce its rules by putting institu-

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tions on probation and preventing them from competing in championship competitions sponsored by the NCAA.

The rules and regulations created by the NCAA are published annually in the *Manual of the National Collegiate Athletic Association,* which includes over 230 pages of NCAA rules and cases interpreting these rules. (The paperback manual can be obtained for $3.00 by writing the NCAA at its headquarters at P.O. Box 1906, Shawnee Mission, Kansas 66222.)

There is nothing unusual in private associations creating rules and enforcing them. Many aspects of our lives are governed by the rules of private associations. Corporations, unions, churches, and private clubs all issue rules which regulate what their members can or cannot do. The difference is that the rules of most private associations are of interest to their members only, but the rules of the NCAA are of interest to every college sports fan.

Most of the NCAA's mass of rules and regulations are directly or indirectly trying to keep intercollegiate sports "amateur." That means that recruiting and financial aid are among the most complex and regulated aspects of college sports, for it is in these two areas that the NCAA tries hardest to keep intercollegiate athletics amateur.

The NCAA's *Manual* includes many regulations which try to impose some order and fairness on the recruiting process. The regulations begin with a problem of definition—when does a prospective student of a college become a "prospective student athlete"—and continue to govern the number of contacts and when and where they can and cannot take place, as well as tryouts, publicity, transportation, and precollege expenses. Another group of regulations on financial aid to the athlete while in college deals with such matters as arrangements for employment, loans, tuition payments, room deposits, and even application processing fees and fees for orientation counseling tests.

The Courts Get Involved

The NCAA, in effect, is acting as a government in passing laws and regulating the activities of its members. The NCAA obtains its authority through the law of contracts, since the member schools enter into an agreement or contract agreeing to abide by the rules of the association.

The law provides the general framework for a corporation, union, or a regulatory association such as the NCAA, but then allows the private association a great deal of latitude in developing internal rules. The courts have generally deferred to private associations and enforced their decisions unless they are discriminatory or totally violate concepts of fair play and due process.

In recent years, however, there has been a trend towards greater public involvement. Laws have been enacted controlling the activities of private associations and regulating the relationship between the private association and its members. The NCAA has been affected by the trend. Courts recognize the NCAA has a great deal of power over the lives of athletes and coaches. While individual schools may agree to be in the NCAA or not, coaches and athletes have little or no choice. They either accept the rules or do not play or coach for an NCAA school.

Courts have sometimes been willing to intercede in order to protect the due process rights of athletes and coaches. Procedural due process is a very important right, for it guarantees every citizen a hearing prior to a governmental action which hampers his rights. This does not mean that full-dress court procedure is always required, but that there must be at the least some sort of hearing with an impartial decision-maker which gives the accused person notice of the charges against him and an opportunity to present his side of the story.

Under the Fourteenth Amendment, no person can be denied life, liberty, or property without due process of law. But how does a private association come under the Fourteenth Amendment, which applies to the states? There are two ways. First, courts have held that the NCAA is so intertwined with state colleges and universities that its actions constitute state action under the Fourteenth Amendment. Second, courts have held that a student athlete has a right to play sports which is similar to a property right that cannot be taken away without a hearing that meets procedural due process standards.

The reasoning here is similar to the U.S. Supreme Court's reasoning in *Goss v. Lopez*, 419 U.S. 565 (1975), a landmark due process case on suspending public school students. There, the Court ruled that students have a property right to an education (since so much of one's earning power can be attributed to scholastic success or failure) and determined that this right is jeopardized by school suspensions. Similarly, though athletes are amateurs in college their eventual earning power may be tied to how well they did while playing college ball. If they're deprived of their right to play in college they may lose future income, so they have a property right to play collegiate sports that cannot be taken away under the Constitution without a hearing that meets the Fourteenth Amendment's due process requirements.

No Due Process for Tark the Shark?

You expect a lawyer to holler that his client didn't do it, so it didn't surprise anyone when Jerry Tarkanian's lawyer said, "Jerry has been denied due process, which is completely wrong. But even without due process, the man is innocent."

Observers were taken aback, however, when the state's attorney and the judge agreed that the Nevada basketball coach had been framed.

The Tarkanian incident began in the early 70s, when the NCAA began to investigate the basketball program of the University of Nevada-Las Vegas. The university had been a basketball power for years. In 1976-77, it had a 31-3 record, placed third in the NCAA post-season tournament, and had six of its players drafted by the pros.

Unfortunately, the NCAA decided that a lot of its players were pros already. After years of probing, in 1977 the NCAA charged violations of 18 of the association's bylaws, including allegations of bought players, fraudulent grades, and cash handouts. It placed the university on probation for two years, which meant that its team couldn't compete in post-season play and was barred from appearing on NCAA-sanctioned games on TV.

It also suggested that coach Jerry Tarkanian be barred from the school's athletic program for the two-year period. The NCAA does not directly penalize individual athletes and coaches, but rather orders the university to do so and penalizes it if it doesn't comply. As Nevada's athletic director Bill Ireland points out, "the NCAA doesn't pull the trigger but gives you the gun and tells you to do the job yourself."

When the school followed orders and barred him from coaching for two years, Tarkanian lived up to his reputation as Tark the Shark by immediately going on the offensive. He claimed that he was the victim of an NCAA vendetta and filed suit in state court to prevent the school from carrying out the suspension. Since he was technically suspended by the university rather than by the NCAA itself, he wound up in the ironic position of suing his own employer, who, truth be told, probably wanted nothing better than to be forced by the court to keep on the man who had taken them to basketball glory.

Tarkanian claimed the vendetta against him went back to a newspaper column he wrote years ago blasting the NCAA. Other observers thought the NCAA might be after him because he escaped unscathed even though it found more than 20 violations against the recruiting program at Long Beach State when he was coach there. Long Beach State went on probation, but Tarkanian avoided punishment when he quit to take the Las Vegas job. (After the incident, the NCAA put in a new rule that a coach who has been suspended cannot shift to another NCAA college without the new school losing its eligibility for two years, but of course the rule didn't apply retroactively to Tarkanian.)

Tarkanian thought his reputation had been ruined and said his new goal in life was "to expose the NCAA for the fraud it is." He got unexpected support from the Nevada attorney general's office. The office normally would defend the school but bowed out this time, saying its own 21-month investigation showed "beyond a reasonable doubt that [Tarkanian] did not commit any of the alleged violations of NCAA legislation." And the deputy attorney general said that the NCAA uses sloppy investigative procedures that a law enforcement agency would be "crucified" for employing.

At the hearing Tarkanian's lawyer argued that his client had never had the due process that the Fourteenth Amendment requires before someone can be deprived of property, in this case Tarkanian's freedom to earn a living in his chosen profession. He then introduced affidavits from players who claimed that investigators had shown their prejudice against Tarkanian by saying things like, "he's just one step ahead of us. But we're out to get him and we will." The affidavits also claimed that investigators harrassed the players.

The judge granted Tarkanian the injunction, and, even though the suit was against the university and technically didn't involve the NCAA, wound up lambasting the association. He called the evidence against Tarkanian "total 100% hearsay," claimed an NCAA investigator had "an obsession to the point of paranoia to harm the plaintiff," alleged that Tarkanian was the victim of star chamber proceedings and trial by ambush, and said in summary that the NCAA's case against Tarkanian could be "reduced to one word: incredible."

While the order is being appealed to the Nevada Supreme Court, Tarkanian has stayed on as coach. As Bill Ireland puts it, sounding not at all displeased, "they told us to shoot him but we missed." Meanwhile Tarkanian has gone on record that he will continue the fight and hopes to "cause the NCAA to change their investigative procedures."

Did the NCAA violate Tarkanian's due process rights? The association has a policy against discussing cases, so it won't comment, but it's too early to count it out yet. After all, its past record shows more judicial successes than failures.

Mychal Thompson—From Basketball Court to Law Court

The case of University of Minnesota star basketball player Mychal Thompson illustrates how closely the NCAA regulates and how hard it is to determine what process is due.

When Thompson was starring for Minnesota in the mid-70s, the school was a powerhouse in the Big Ten Conference and in NCAA basketball generally. Things turned sour when the NCAA accused the university's basketball program of many violations of NCAA rules. When the university conducted its own investigation, it found

Basketball coach Jerry Tarkanian, before the NCAA got after him.

that Thompson had sold his two complimentary season tickets for $180, an apparent violation of the association's rule that an athlete can't "directly or indirectly use his athletic skill for pay in any form."

The university and the NCAA both conducted hearings on the case (Thompson declined to attend either), with the result that the NCAA ordered the university to declare him ineligible for the remaining half of the 1975-76 season. The university grumbled that the penalty was far too severe (it wanted to force him to give the money back and take away his complimentary ticket privilege in the future), but it went along with the order and suspended Thompson.

This decision galvanized Thompson to action. He immediately went to court, asking for an injunction to prevent the university from declaring him ineligible. He argued that he had been deprived of due process since he had waived his right to appear at the hearings because the university had told him that the charge was minor and probably wouldn't result in a heavy penalty. The district court agreed that his property interest had been violated without due process and granted the injunction until a hearing meeting due process requirements was held.

To comply with the court order, the university conducted a rather elaborate two-tiered hearing process which Thompson and his attorney attended. These proceedings dragged on until after the 75-76 basketball season, enabling Thompson to continue playing for the team.

These hearings again confirmed that Thompson had sold the tickets, but concluded that extenuating circumstances made ineligibility much too strong a sanction. The university refused to suspend him, and found itself in the middle of a battle with the NCAA.

After much negotiation (and just before the start of the next season), the association slapped the school with an indefinite probation in all sports until it suspended Thompson. The university went to court and asked for an injunction staying the suspension. An interesting sidelight to the suit is that Thompson, who had sued the university a few months before in getting an injunction against *his* suspension, now joined the university in an amicus brief in support of its fight against *its* suspension.

The federal district court ruled for the school. "Minnesota and NCAA are bound by the findings" of the university's disciplinary hearings, the court reasoned, going on to say that the school could not disavow the hearings without "making a mockery of due process." The court claimed that by imposing penalties against the school the NCAA transgressed upon the university's constitutional duty to "afford due process hearings to [Thompson] and to abide by the results."

The association appealed, claiming that Thompson had more than ample procedural protection, that no one disputed the facts of the infraction, that the university was not an impartial decisionmaker since it was vitally interested in keeping Thompson eligible, and that permitting member institutions to determine the penalties against their own athletes would destroy the NCAA by resulting in "as many interpretations and types of enforcement as there are member institutions." In essence, the NCAA advanced its contract with the university to counter the school's constitutional arguments.

The association's arguments were persuasive. In the case of *Regents of the U. of Minn. v. NCAA*, 560 F. 2d 352 (1977), the U.S. Court of Appeals ruled that the NCAA's rules were not arbitrary and capricious, that they furthered the legitimate goal of amateurism in sports, and that the university's own hearings and those of the NCCA afforded at least the minimal due process required by *Goss v. Lopez*. "Due process is flexible and calls for such procedural protection as particular situations demand," the court said, in ruling that the university could have declared Thompson ineligible after the hearings during 75-76 season "without violating any due process rights."

A cynic reading between the lines of the court record might well wonder about the purity of the university's motivation. It did conduct a thorough investigation of the NCAA charges, and in fact the specific charge against Thompson came to light first as a result of the university's own fact finding. However, you have to ask yourself whether the university's subsequent concern for Thompson's due process rights was the result of its deep and abiding veneration for the Constitution or its natural interest in keeping its star eligible while at the same time staying off probation itself. In any event, it got half of what it wanted. Thompson graduated before the appeals court decision came down, so he never did lose his eligibility, but the university did go on probation.

The law's delays kept Minnesota star Mychal Thompson in the game.

Equal Protection and the NCAA

Besides the due process cases, the NCAA has also had to defend itself against charges of violating another part of the Fourteenth Amendment, the equal protection clause. That clause was enacted after the Civil War to prevent states from passing laws that explicitly discriminated against blacks. However, its language—no state shall deny to any person "the equal protection of the law"—is broad and it has been applied in many different kinds of cases in recent years.

In cases on the NCAA and equal protection, there is again the preliminary question of whether the NCAA's actions are "state" action under the law and then the substantive question of whether a group's equal protection rights have been denied.

Parish v. NCAA, 506 F. 2d 1028 (1975), involved Centenary College, a small private school in Shreveport, Louisiana. The controversy focused on an NCAA rule that high school seniors can get athletic scholarships and participate in college sports only if their high school grades or the results of standardized tests suggest that they can achieve at least a 1.6 average (on a 4.0 scale) during their freshman year. The rule was put in to prevent colleges from ignoring academic standards entirely in recruiting.

The NCAA ruled that Centenary had violated the rule. When the school refused to declare ineligible the five basketball players it had improperly admitted to the college, the NCAA placed it on probation and it lost its right to play in post-season tournaments and on TV. The five players continued to play, but sued the NCAA anyway, saying that the NCAA ban on their school violated the equal protection rights of a vaguely defined group that included the educationally deprived, persons with less than normal intelligence, student athletes, and cultural minorities.

The athletes won the first round when the court agreed that the NCAA's rule constituted state action, not only because state-supported colleges are heavily involved in the NCAA, but because the NCAA, in "taking upon itself the role of coordinator and overseer of college athletics . . . is performing a traditional government function." Indeed, the court went on, there could be little doubt that "were the NCAA to disappear tomorrow, government would soon step in to fill the void."

However, the athletes lost the second round, and the case, when the court ruled that they hadn't shown that the NCAA rule irrationally discriminated against them.

Courts have applied two types of tests to equal protection cases. A strict judicial scrutiny is required in cases where a fundamental right (such as voting or life) is involved or where the classification is based on "suspicious" criteria such as race, religion, or alien status. That's a tough test that requires the state (or, in a case like this, the NCAA) to show that its classification meets "compelling" needs.

In this case, however, the court ruled that no fundamental right or "suspect" group was involved (only one of the five players was black), which meant that the NCAA's rule only had to meet a test of "minimum rationality." That is, was it rationally related to a legitimate goal? The court had no difficulty in deciding that the rule bore a rational relationship to the student athlete's ability to become an integral part of the student body and not just a hired athlete, certainly a legitimate goal. It therefore upheld the rule and the school's probation.

In *Shelton v. NCAA*, 539 F. 2d 1197 (1976), a different equal protection challenge met the same fate. Lonnie Shelton, a college basketball player, signed a pro contract and was declared ineligible by his college, in conformance with an NCAA rule that anyone who signs a pro contract has lost his amateur status. Shelton admitted that he signed the contract but declared that it was invalid and that he wanted to retain his amateur status. He said that the NCAA rule making him ineligible was too broad, did not allow for cases such as his own, and created an impermissible classification in violation of the equal protection clause.

It wasn't the court's business to tell the NCAA how to run its operation, the judge said

The court was not impressed. Since no fundamental rights were at stake, it applied the rational relationship test and determined that the rule was a reasonable way of protecting the amateurism of collegiate athletics, not only a legitimate goal but the main purpose of the NCAA. It admitted that the rule might cause hardship in cases like Shelton's, but said that the hardship could be avoided by not signing a pro contract in first place. Besides, even if the rule were not the best possible means of achieving amateurism, "it is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rule."

Not all equal protection arguments are fruitless. In *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F. 2d 492 (1977), the Puerto Rican equivalent of the NCAA ran afoul of the equal protection clause. The LAI had a rule that prohibited student athletes who were (1) not born in Puerto Rico and (2) entered college after their 21st birthday from competing in certain track and field competitions.

Rivas Tenorio and another Columbian were deprived of medals and prizes they had won because they had entered college in Puerto Rico when they were over 21. They then sued, saying that the regulation contravened the equal protection guarantee of the Constitution.

A district court found for the LAI, but the appeals court disagreed. The appeals court said that no fundamental right was involved, and that the rule might well meet the rationally-related test since it is designed to promote the legitimate goal of preventing "the injection of professional athletes into the competitions." However, the court was forced to apply strict judicial scrutiny to the case because it didn't simply prohibit anyone over 21 from participating but discriminated on its face between Puerto Ricans and non-Puerto Ricans. Since alien status is one of the "suspect" categories, the court ruled that the LAI must prove that it had a compelling reason for explicitly distinguishing between aliens and residents, a much harder test that shifts the burden of proof to the LAI and makes it much less likely that it will prevail when the case is re-heard in district court.

More to Come?

These are but a few of the cases involving the NCAA. Most have been filed in the last few years, and it's a pretty safe prediction that more and more will come up in the future.

It was probably inevitable that the NCAA would need lawyers by the carload. Its rules would fill a fair-sized phone book, and it regulates something that means a lot to fans, players, and coaches. Moreover, expanded definitions of state action in the past few years have made it easier to haul private associations into court, and there is no shortage of disgruntled people just waiting for the chance.

The NCAA probably didn't bargain for a life of litigation when it set out to preserve the purity of college athletics, but that's what it has, and what it's likely to have, unless a day comes when coaches spurn pay, athletic scholarships wither away, and college sports again become teams of kids out for fun competing with each other in rough playing fields before a few nonpaying friends and families.

Sound too utopian to come true? Probably. Better make way for the next flying wedge of lawyers. ☐

SPORTS & THE LAW

If You Can't Beat 'Em, Sue 'Em

More and more sports action is being replayed in the courts

John Palincsar

Let's imagine it's the closing moments of the big game. The score is tied. On and off the field sentiments are near frenzy. Suddenly, your key player is down with an injury in what can only be termed a questionable display of sportsmanship by the opponents. The crowd is hushed. Time itself seems suspended as the trainer confirms that the injury is serious and calls for the stretcher. Everyone is stunned until a plucky cheerleader wipes a blond wisp from her tear-filled eyes, then with difficulty hoists a megaphone nearly as big as she. The crowd is electrified by her cheer, "Give me an S. Give me a U. Give me an E. Whazzit spell? Louder, I can't hear you."

This scenario is no longer very far-fetched. Increasingly, injuries in both amateur and professional athletic contests are becoming subject to either civil or criminal legal actions. It's a realistic concern that law suits may cause some talented athletes not to compete or may convince some schools to discontinue athletic programs.

Of course, the concern about injuries is not new. For instance, in 1905, after vicious conduct during a Penn-Swarthmore football game, President Theodore Roosevelt bristled that he might abolish the sport by executive fiat unless the contests could be toned down. No one dared the Roughrider's wrath. Appropriate revisions to the rules were timely instituted.

What is new is filing suit as a result of sports injuries. Several factors contribute to this trend. For one thing, sports injuries are a worse problem than every before, and more is at stake now, since exhorbitant medical costs have magnified the consequences of even minor injuries. Athletes in many sports are incredibly large, literally capable of

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death-dealing blows. In professional sports, gigantic sums of money hang in the balance. In amateur athletics, coaches regularly preach mayhem to impressionable minds. Add intrinsic racial enmities and the fact that spectators enjoy rough action, and it is a wonder that violence is controlled as well as it is.

At the same time, lawsuits as a result of sports injuries may be more successful, if courts rethink the traditional defense of consent, or assumption of risk. And in our litigation-crazed society, many people think, with considerable validity, that the "big guy" (the team owner, college, or school district) should act as the insurer of the "little guy," even if the little guy in question is a linebacker with bad knees.

Intentional Violence

Intentional sports violence is a key question because much of it can be avoided. The most well-publicized case of recent sports violence occurred in professional basketball when a Kermit Washington haymaker broke Rudy Tomjonavich's jaw and put him out for the season. This incident was handled well, without the need for a lawsuit. The league president assessed a more than nominal fine and suspension against Washington, who made a manly and sincere apology for his foolishness in the heat of competition. (Washington's apology is a factor not to be minimized, considering the adulation young people give so freely to professional athletes.) To minimize on-court conflicts next season, the National Basketball Association will add a third referee and curtail the use of hand checking.

All sports are not so responsible. Faced with the struggle of two competing leagues and the loss of substantial television revenues, professional hockey apparently cherishes its reputation for violence. A case in point occurred in Minneapolis during a 1975 game, when Dave Forbes of the Boston Bruins attacked Henry Boucha of the Minnesota North Stars. After a first period penalty to both men, Forbes pounced on Boucha from the rear, pummeling him with his fists and hockey stick. Unfortunately for Forbes, the local state's attorney was in the stands. Outraged that the league seemed to be doing nothing to control violence, he convinced a grand jury to indict Forbes for aggravated assault with a deadly weapon. Forbes was incredulous: "I'm disillusioned with the whole system. I just don't see, no matter how wrong the act is, how anything that happens in an athletic contest can be criminal."

The law does not share his opinion. As early as 1878 in a criminal trial of a soccer player for the death of an opposing player, the English court in *Regina v. Bradshaw* announced that no rules "of any game whatever can make lawful that which is unlawful by the law of the land."

However, the Forbes case raised difficult questions about the extent to which the courts should intervene in athletic altercations. In the end, the jury could not agree upon a verdict and a mistrial was declared. Nonetheless, the case serves notice that unprovoked attacks may result in criminal prosecution of bellicose athletes.

Of course, civil actions for intentional sports injuries are possible regardless of the success of criminal actions, and have a greater chance of success since the standard of proof in a civil suit (preponderance of evidence) is lighter than a criminal suit's "guilty beyond a reasonable doubt."

"Assumption of risk" is an important concept in the law governing civil suits for injuries, whether they occur on or off the sports field. For example, if you take a ride with someone who you know has had his license revoked for reckless driving, you are voluntarily assuming the risk that he might drive dangerously, and you probably couldn't win a suit against him if you were injured in an accident. The principle governing this situation is the common law doctrine that no injury is done to one who consents.

However, both on the field and off consent is not unlimited. Courts have ruled that one can't assume the risk of being injured because of blatant and intentional violations of safety rules. Thus, in *Bourque v. Duplechin*, 331 So. 2d. 40 (La. App. 1976), when a baserunner deliberately ran five feet out of the baseline to mow down the second baseman, the court found recovery permissible.

Nonintentional Injury

A much more difficult problem to treat legally is nonintentional injury. Generally, you become liable to someone if you cause him injury by failing to observe reasonable care. The key is usually how reasonably foreseeable injury may be.

Obviously, logic and past experience dictate that in many contact sports frequent injuries are inevitable, and the law recognizes that participants in an athletic contest realize that they may be hurt as well that they may hurt others. Therefore, the concept has evolved that the participant generally consents to the possibility of nonintentional harm and assumes the risk to himself.

For example, in the case of *Hellriegel v. Tholl*, 69 Wash. 2d 97, 417 P. 2d 362 (1966), a man at a picnic chided his companions that they could not throw him in the lake. In the roughhousing which ensued, the man's neck was broken when someone fell on top of him. Of course, no one would consent to having his neck broken, but recovery was denied on the theory that it was reasonably foreseeable that some injury might occur during the horseplay.

Formalized sports are a bit different, because a participant's expectations are influenced by the fact that the rules of the contest set limits to his opponents' conduct. However, traditionally courts have reasoned that one assumes the risk that his opponents may not always follow all the rules. In other words, since you can reasonably foresee that in the heat of action some rules will be violated, you in effect are consenting to the possibility of injuries caused by rule violations.

A recent court decision may signal a major change in this concept. An Illinois court held a player liable for a nonintentional injury because he violated an obvious safety rule. In *Nabozny v. Barnhill*, 31 Ill. App. 3d. 212, 332 N.E. 2d. 258 (1975), the goalkeeper of the Winnetka High School soccer team was injured when he dove for the ball and a forward from Hansa High School accidentally kicked him instead of the ball. The goalkeeper sued for a fractured skull and permanent brain damage suffered as a result of the contact. The appellate court allowed recovery, based on the need for safety embodied in the Federation Internationale de Football's rule that any contact with the goalkeeper is forbidden.

The problem with the *Nabozny* ruling is that it does not take into account the fact that even a reasonable person has a difficult time exercising due care during a heated athletic contest. Of course, some athletes in contact sports view the rules with the same regard which Richard Nixon holds for the Constitution. Nonetheless, the law should not punish the great majority of athletes who in giving their all sometimes violate rules of the game and unintentionally cause injuries.

Hopefully, other courts will recognize that *Nabozny* goes too far and restrict recovery in sports injuries to only those resulting from outrageous conduct beyond the reasonable expectations of the participants. That may happen, since no other court has yet come up with a decision similar to that in *Nabozny.* Rules can be a helpful guide to assess whether particular conduct is outrageous, but the rules—and their safety value—should not be the sole determinant. The test should be announced in terms of the expectations of participants. To be actionable, conduct resulting in injury should be gross and unexpected.

Until the courts choose a clear direction, both sponsors and participants of athletic contests must be concerned about possible legal actions. In an article in *Trial* Magazine (Jan., 1977), Samuel Langerman and Noel Fidel have compiled a helpful list of duties to minimize the risk of injury and legal exposure, such as (1) employing competent coaches and referees, (2) providing safe facilities, (3) enforcing rules concerning proper fitting of uniforms and protective gear, (4) setting up review procedures to assure that players will not advance beyond their skills, (5) selecting opponents with care to avoid mismatching, and (6) establishing check-up procedures for those who have been ill or injured.

Officiating Challenged

We live in a society in which more and more people are eager to go to court when they feel they've been wronged. Naturally, this frame of mind affects sports as much as it affects other areas of life.

One symptom is a willingness to turn to the courts to second-guess referees. On November 16, 1975, in the final moments of a crucial football game between the St. Louis Cardinals and the Washington Redskins, Quarterback Jim Hart threw a touchdown pass to wide receiver Mel Gray, tying the game. The only problem was that virtually everyone in the stadium except the referee felt that Gray hadn't held on to the ball. Instant replays appeared to show that the ball had been dropped, but the score counted and the Redskins eventually lost in overtime. George Morse, an irate fan, filed a lawsuit in federal court asking that the referee's decision be reversed. However, a judge dismissed the case on the grounds that the outcome of a game was outside the courts.

A 1977 Illinois court decision did not demonstrate the same degree of judicial restraint. In the 1977 high school basketball tournament, St. Michael's thought it had beat Walther Lutheran 67-66 in a thriller. However, the official scorer had mistakenly counted a basket for St. Michael's at the close of the first half and the mistake wasn't noted until the game was over. Then the basket was taken away from St. Michael's, costing it the game. The St. Michael's team, feeling aggrieved, took its quest for justice to the courts, and an Illinois court issued an injunction requiring the second half to be replayed. St. Michael's lost once again, this time 64-63. Had justice been served by involving the courts in this case, or is inaccurate officiating simply one of many vagaries in an athletic contest?

Where all these suits and threats of suits is going to lead is debatable. Thus far, litigation has not seriously hampered the growth of sports in this country. In fact, litigation involving women and sports may actually be encouraging more sports activity. However, with athletes more and more willing to consider lawsuits, and with sports fan forming advocacy groups to promote new legislation and intervene in important sports lawsuits, the trend towards greater litigation appears likely to continue.

A few years ago critics of the adversary system complained that the rules used by courts left too much to chance and surprise. A movement was begun to make the rules of court more orderly. A goal of this movement was to eliminate the sporting theory of justice. The concern of sports fans may be just the opposite. How do we eliminate the justice theory of sports?

Every conceivable wrong in society does not have a legal remedy. If so, we would all be in court most of the time. Instead, there must be a cognizable right which has been invaded for a legal remedy to exist. The present trend in sports law of fabricating new rights is senseless. The legal institutions may be seen as foolish or trivial for entertaining frivolous actions; worse, sports themselves may suffer from the interference. □

Letting Kids Do It

Some tips on making youth participation really work

Enid Vazquez

In Chicago there is a teen managed newspaper called *New Expression.* It began publication in March, 1977, and has a 40,000 circulation rate. Teens do all of the writing, editing, layouts, photography, and selling of ads. Their work has amazed adults across the nation, but it shouldn't. The teens are interested in journalism and have found a project where they can invest their talents.

There is a need for more projects like *New Expression* which are people-oriented and skill building at the same time. In this way, youths can learn to respect the rights of others, and also to be aware of problems in society. Whether they become involved in law, communications, social work, or whatever, they can learn first-hand how to get something done to improve the quality of life. A common complaint is that schools do not prepare students for what they'll be doing most of their lives. Good work and volunteer opportunities can help fill the gap.

Law-related education is supposed to involve students more. Also, practically everything that a student can get involved in has a law-related slant. What better way is there then to achieve your objectives?

As a more experienced and better educated person, you can provide your students with the guidance they need to get tasks done. Academics is fine, but rather than just learn about what others have done, students need to think and do for themselves. They can use some "real world" experiences. A student on the principal's advisory council at a college-prep high school told me that they never met unless the principal called a meeting, and then he would read letters he had received which praised the school. The students never got to call a meeting or propose an agenda.

Student Advocacy

Besides *New Expression,* I know of many other programs where young people are real participants. One is the Chicago Public Education Project, where students are trained to be student advocates. It involves high school students who must put in their time after school. It has a reputation for being a place with outstanding youth participation.

Robert Anderson is a student advocate volunteer with the Chicago Public Education Project. CPEP offers student rights workshops at their downtown offices and at community centers. Anyone can attend the workshops, but the focus is for students and their parents. An ideal place for the workshops would be the public high schools, but schools are the least likely places to meet because of a well known obstacle: the fear school officials have of students who know their rights and can become assertive individuals.

When Robert finished CPEP's advocacy training program, he stayed on with them because he was very enthused with what they were trying to accomplish. In one case Robert got a suspension dropped by talking with the vice-principal in charge of discipline. The vice-principal wanted to suspend a student who had cut a class more than twenty times, but Robert argued that since the class teacher had failed to report the student after the third cut, the school had no right to punish the student so long after the facts were known.

Even though Robert is successful as an advocate, he feels that it is more important for school officials to use alternatives to suspension. Students don't ask for them because they don't know any exist, probably because school officials rarely use alternatives.

Besides fear, there is apathy. "People act like things [problems] don't exist." He refers to students as well as school officials.

But even energetic students can't get far without help. A friend of Robert's is a member of a city-wide student government group. His friend wants to work on real issues that affect public school students, but claims that the advisor to the organization only wants them to do fundraising. She does not want to hear about student rights.

"They all feel that way," said Robert. "They feel it's a threat. They don't want a lot of hair-raising in their school."

Providing entertainment is the work of Mouseketeers. As for fund-

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Enid Vazquez is on the advertising staff of New Expression. *She will be a freshman this year at DePaul University, majoring in communications.*

raising, students don't usually see where it goes, the same way they don't usually understand what's been done with the school fees that they pay.

Both Robert and his friend have aptitude and energy they can apply to tasks. Whether they really can or can't depends on the adults they work with. Robert works side-by-side with the directors and student lawyers of CPEP. He tries to raise their level of competence. His friend faces a wall of resistance.

Student Court

Resistance is often unfounded. Even adults have told me that they see many benefits of active student participation within the schools. One of these voices came from within the Chicago Board of Education itself. A friend of mine who works for the Board told me about a unique set-up that his high school had when he was there. A panel of students would review cases in which the school rules had been broken by a student. After hearing both sides, the panel would make recommendations to the disciplinary officer.

The students were usually much harsher than the school official. If parents complained, the school official could say "Look, I gave him a three-day suspension. His peers suggested that I suspend him for ten days." This seems to be the norm rather than the exception. Also, students rarely challenged the decisions of their peers.

I had just graduated from high school and never before heard of a student court that was actually used and was effective. Amazed, I asked my friend why there aren't more such courts here in Chicago. He said, "Because they're afraid. They think students will make excessive demands if such a thing occurs. It's not like that at all."

Student courts and other kinds of participation offers a good opportunity for law-related education. It can take some pressure off of school officials; at the same time, students can learn more about responsibility, the law, and legal process. This type of activity can also build pride in a school.

Making Participation Work

What these examples come down to is the elimination of age prejudice so that young people can be free to use their abilities. If you want them to participate, let them do it. That way they're participating. Let the underclassmen work at the traditionally senior jobs. Set up worthwhile goals that go beyond fundraising and entertaining. Hopefully you know enough to make the activity what it should be—a worthwhile learning, growing experience.

Unlike the attitude of the public schools, the programs I've talking about are not afraid of a student voice. Youth Communication, the non-profit organization that publishes *New Expression*, has three teens on their board of directors. Richard Ware, Director of CPEP, said that students do the same community work he does. They can help him plan for future work. Youth Communication and CPEP articulate their concerns.

The opportunity for students to express their concerns and to be able to influence the conditions around them can be very beneficial for the future of this society. Students who learn how to speak up will probably not be intimidated when someone tries to rip them off. Also, the experience of helping someone with a problem is very good training for sensitizing students to the needs of others.

A law-related focus can be provided in any program. *New Expression* teens recently drafted a copyright agreement. A lawyer came in to talk with them about the history of copyrights and explain the new law concerning copyrights which came into effect recently. It wasn't a very easy subject to deal with, but they did. An advisor could have drafted the agreement, or have a lawyer do it. But it would have taken away the teens' opportunities to wrestle with it themselves.

Opportunity is the bottom line, then. On it you can base an effective program that will teach students something they can use for the rest of their lives, whether they go out into the work force or not. Teach them to think for themselves, to make plans and set goals, to make decisions that have real weight.

For more awareness of the law in this country, try to provide a more concrete experience than reading and writing. You can go beyond make-believe situations if you realize that students get involved in real law-related situations, like running away, shoplifting, buying goods, and working. They need to understand the laws concerning their actions and concerns of others over those actions. With more knowledge they might be able to help themselves as well as others. ☐

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UPDATE LOOKS BACK

The More Things Change. . .

From shovelboard to pinball, we've been surprisingly consistent in how we've regulated sports

Stephen Conn and C. Paul Beach

No sports fan needs to be told that the law now affects the structure and even the content of sports at every level of competition. But is this "intrusion" of the legal system into the world of sport really new?

Some of it is. It's only recently that professional sports became a multibillion dollar business falling under a host of laws, and it's only recently that the law became involved to assure equal access for minority groups and women in governmentally-funded sports. But generally the interaction of law and sports goes back to the early colonists and is a continuous, if complex, theme in American history. It has reached not only organized competitions but also leisure activities that have appeared throughout the American experience.

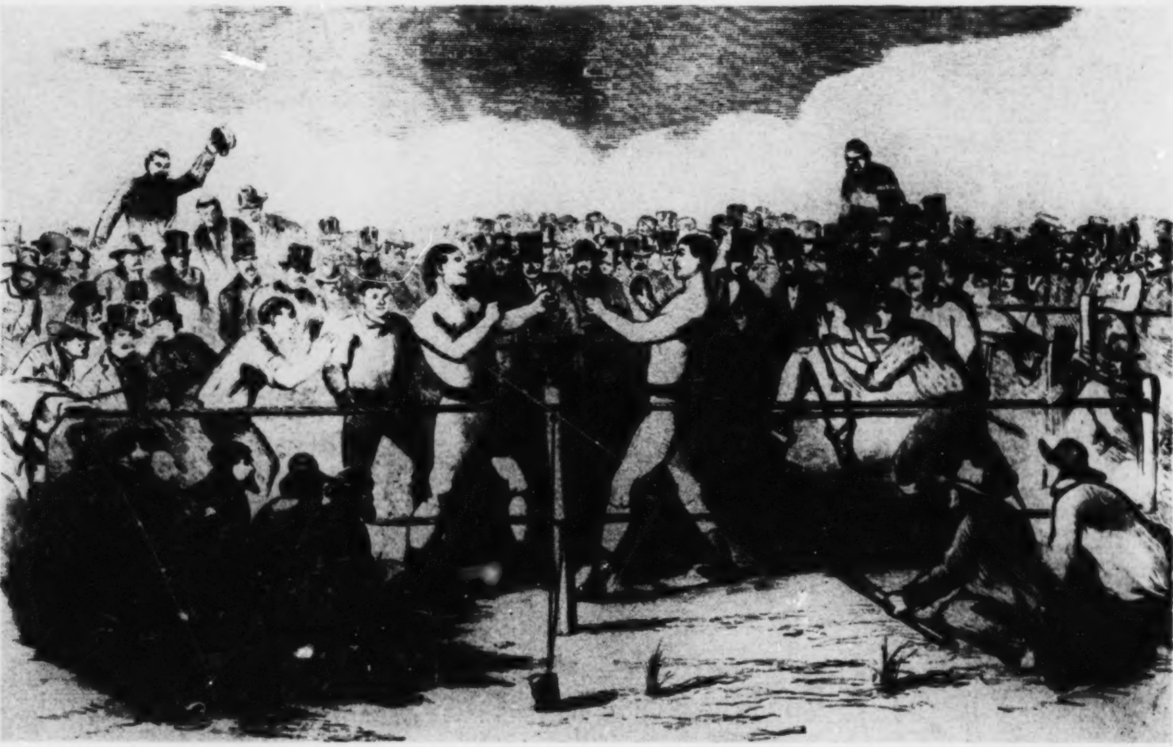
The history of sports and the law in this country reveals a surprising continuity of values and concerns from the earliest days to the present. Of course, there've been changes which reflect changes in our society, but a general consensus about the roles of sports and law runs through more than 300 years of our history.

What Sports and When?

Puritans in early Massachusetts sought to limit both the time and type of sports indulged in by the colonists. In order to enforce the Sabbath and foster religious conformity, the Court of Assistants in Massachusetts Bay in 1630 ordered one John Baker to be "whipped for shooting at fowle on the Sabbath day."

The Puritan magistrates sought to limit sport more generally in 1647:

> Upon complaynt made of great disorder that hath bin observed and is lik to increase, by the use of the game called shovelboard, it is therefore ordered and enacted by the authoritie of this Court, that no person shall henceforth use the said game of shoffleboard in any house of common entertaynment.



In 1650, "bowling or any other play or game," was similarly prohibited in the vicinity of "houses of common entertainment."

This is not to suggest that the Puritans were dead set against sports. In fact, much of the military training during this period consisted of strenuous physical exercise and athletic contests, and Puritan ministers preaching to militamen often urged them on to greater "skill of hand, strength of body, and courage of mind." The law sometimes reflects this emphasis. In Rhode Island, for example, a statute ordered every father to provide his sons with bows and arrows, as a safeguard against failure of musket ammunition.

It wasn't, then, that the Puritans thought sports in general were sinful, but that sports shouldn't come between man and God and shouldn't provide the occasion for gambling, drinking, and riotous conduct that would weaken the community.

After all, they were engaged in a great enterprise on an unknown and often harsh continent, thousands of miles from civilization. They had to be concerned with the basic problems of food, shelter, health, safety, and public order, so they promoted sports to serve military needs and provide relaxation, but tried to control them to prevent the collateral evils commonly associated with sports.

How successful the Puritans in Massachusetts were in actually controlling sport or its ancillary "evils" is impossible to know. However, their efforts to prohibit certain sports and limit others to certain times and places were continued in state Sunday "blue laws" and restrictions seeking to control gambling.

In Pennsylvania, for example, the legislature in 1794 provided for punishment of those who would "use or practice any unlawful game, hunting, shooting, sport or diversion" on the Sabbath by a fine of four dollars for each offense, or "six days imprisonment in the house of correction." The same enactment also punished gambling in connection with "cock-fighting, cards, dice, billiards, bowls, shuffle-boards, horseracing or any game of hazard or address," regardless of the day on which it was done.

But that law was amended later when it came into conflict with desirable activities. For example, the desire of the state to promote county fairs led the legislature to modify this statute in 1879 to permit Sunday harness racing at such events. Similarly, the popularity of Sunday baseball and football gave rise to another amendment in 1933 to allow such games to take place between 2:00 and 5:30 in the afternoon. Meanwhile, the courts had decided that the original enactment allowed private recreation on Sundays in municipal parks. The history of such legislation in other states is also illustrative of the tension between moral ideals and the popularity of sporting events.

Just as blue laws have been weakened in almost every state, so outright prohibitions of certain sports are much less common now. For example, pinball was often outlawed because it was associated with gambling and "bad elements." However, as social attitudes have changed it has found new acceptance as a harmless form of recreation and has recently been legalized in such cities as New York and Chicago.

On the other hand, we outlaw some sports that the early settlers found unobjectionable. Even the Puritans apparently saw nothing wrong with dogfights, cockfights, and bearbaiting, but we have made them illegal on humanitarian grounds.

All in all, though, many old attitudes persist and are reflected in law. For example, like the Puritans we are troubled by gambling. In the wake of the "Black Sox" scandal in baseball, in which gamblers fixed the 1919 World Series, at least 32 states passed laws providing fines and imprisonment for throwing games and bribing ballplayers.

And the blue laws aren't quite dead, though the surviving ones deal mostly with forbidding horseracing and other sports with overt betting on Sunday, and so are perhaps as much a testimony of our concern for gambling as an indication of our respect for the Sabbath.

Where Sports Can Take Place

Besides determining which sports are legal and when they can occur, the law has also dealt with the location of sporting activities.

Laws generally restrict games to places where players and spectators can play by their own rules without disturbing other people and their property. The Puritans tended to regulate such matters directly. For example, an ordinance enacted by the selectmen and council of Boston in the 1650s spelled out the restrictions and indicated why they were needed:

> Forasmuch as sundry complaints are made that several persons have received hurt by boys and young men playing at football in the street, these are therefore to enjoin that none be found at that game in any of the streets, lanes or enclosures of this town, under penalty of twenty shillings for every such offense.

Similar complaints were made against "violent riding in the streets," and in 1672 the Court of Assistants prohibited horseracing within four miles of towns.

Today we still try to insure that sports are safe to spectators and bystanders, but we usually do it in a different way. One consequence of urbanization was the creation of "fields" and "tracks" where participants could be separated from fans. Through zoning ordinances and allocations of public land to stadiums and fields, we have created sites within which sports events occur without fear of liability for most injuries to spectators. The creation of such special places for sport means that direct laws such as the Puritans' are generally no longer necessary.

Laws and Rules

Just as there has been a general continuity in what sports laws have regulated over the years—the time and place of sports, for example—so there has been continuity in what they *haven't* regulated. Throughout our history, laws have generally not tried to govern the actual conduct of sports or replace sports' internal rules.

To be sure, there are exceptions. Because of the big money bet on boxing and horseracing, the many allegations of fixing, and the threat of mob influence, many states have set up athletic commissions to license figures in these sports and set rules for the contests.

However, most sports are left to regulate their internal

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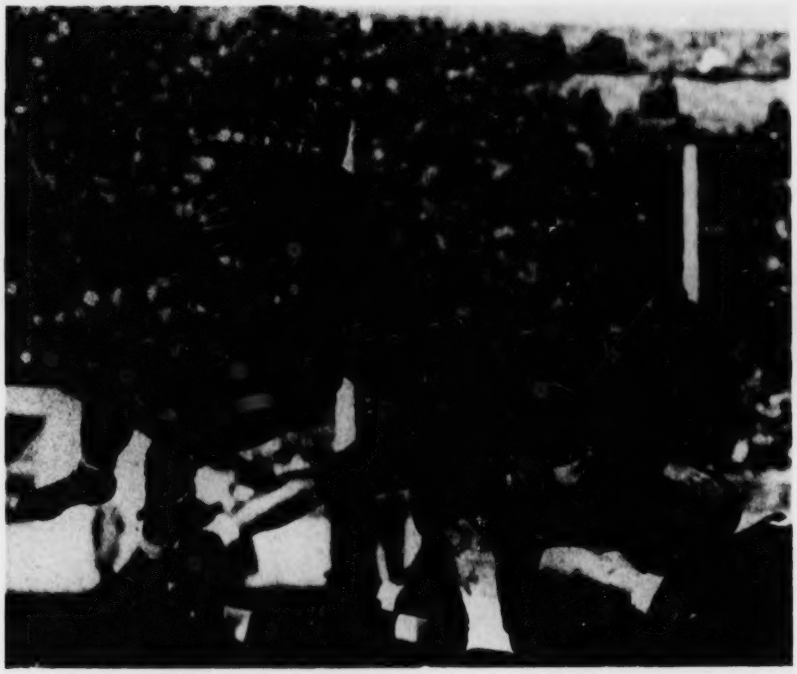


When college football became too rough for the Roughrider, he stepped in and the law stayed out.

structure through their own rules. Conduct of players which might be viewed as "antisocial" or even "illegal" if it transpired at work, school, or in the street, is tolerated if it does not vary too far from the purposes and rewards of the game, which are established and legitimized by the game's own rules. An example of this special assessment of conduct is purposeful cheating. Such violations of the rules as carrying too many golf clubs or throwing a spitball are not considered violations of law but are regulated solely by the internal mechanisms of the sport.

This doesn't mean that the threat of the law stepping in has not on occasion influenced sports. The spectre of both civil and criminal actions has been invoked when sports exceed certain community norms.

When college football became too rough even for Teddy Roosevelt, White House pressure led to a new collegiate sports association and new rules. In pro baseball, the owners chose meaningful self-regulation only when the law threatened to intrude. By 1920, baseball had been rocked by scandals. Several players were under investigation for having thrown the 1919 World Series, allegations were rife that gambling was ruining the sport, and the owners had squabbled publicly and even hauled each other into court in disputes over players. Fearing that the law would step in if they didn't act, the owners set up a centralized government for the sport and gave the Commissioner of Baseball almost unlimited power to investigate anything detrimental to baseball and punish wrongdoers. As if to demonstrate that the new regulations would have teeth, they chose federal judge Kenesaw Mountain Landis, a nationally-known jurist with a law-and-order reputation, as the first Commissioner.

Scholars suggest that self-regulation is essential because a sport's internal law gives it a necessary separate reality from day-to-day living. Both players and spectators must have knowledge of and some fundamental allegiance to the rules of the game. One sports sociologist argues that a breakdown of that separate reality can affect how spectators behave and destroy the legitimacy of the game as a public event not directly subject to law:

> [Violence] by fans can . . . be directly encouraged by the rule breaking of coaches and players during contests, and by behavior of referees who seem biased, overly permissive, or generally incompetent. (Howard Nix, *Sports and Social Organization,* 1976).

This suggests that the rules of a game must be working rules if the game is to be afforded the special treatment it needs to be a self-defined source of pleasure for players and spectators. So far, rules seem to have done the job pretty well here. Though fans in this country have sometimes become rowdy because referees seem to be regulating a game unfairly or incompetently, for the most part they have thought that contests are fair and have adhered to the results established by a sport's own code.

Keeping the Balance

Obviously sports can't exist entirely in a world of their own, above the law. Governments have a legitimate interest in many aspects of sports, from location of stadiums to radio and TV broadcasts.

Just as obviously, most of us don't want to see law get in the way of the game as it is played. If lawmakers tried to redefine a game by passing laws (rather than by encouraging self-regulation), some secondary problems of the game might be solved, but it would be destroyed as a thing apart from the workaday world. The game would lose its special attraction as a diversion. It would be too much like the world around it.

Fortunately, through most of American history the balance between law and rules has been well maintained, thus keeping the prosaic realities of the law away from the playing field. With any luck, we'll keep that happy balance in the future. ☐

NEWSCLIPS

Lawyers' Wives Good Resource

In many law-related education programs around the country, lawyers' wives groups and lawyers auxiliaries are providing a wide variety of services to teachers. Lawyers' wives groups contain many former teachers and have excellent ties to bar associations and judges' groups. (By the way, don't be fooled by the name of the organization. Men are also welcome as members, as long as they're married to a lawyer.)

Lawyers' wives groups have been especially valuable in helping teachers make effective use of the community. In many localities they have helped teachers make initial contact with community resource persons, conducted court tours, and provided administrative assistance and numerous other support services.

For information about the lawyers' wives group in your state, contact Eleanor Barnard, Chairman, Youth Education for Citizenship Committee, National Lawyer's Wives, 228 Woodlawn Avenue, Winnetka, Illinois 60093.

All in the Family?

Charles Harrod is not what you'd call a tactful lawyer out to win friends among his fellow members of the bar. Harrod moved to San Diego recently, saw "a lot of shoddy attorneys practicing," and decided to do something about it.

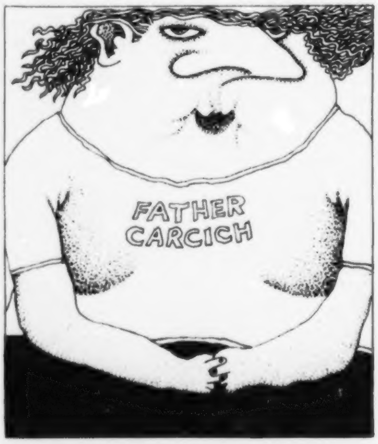
He placed an ad which asked, "Were you satisfied with the results of your court case? If not, was it due to your attorney's negligence, ineptness, improper advice or fraudulent representations? If so, you may have an action for money against your attorny. Call the Legal Malpractice Clinic."

The phone rang off the hook. Harrod got about 500 calls from people wanting to sue their attorneys, generating so many cases that he will probably have to add some new lawyers to his staff.

But the most interesting phenomenon might be the reaction of Harrod's fellow lawyers. Harrod says that many lawyers "were just livid that I would do such a thing. A couple . . . threatened to beat me up. One even called with a bomb threat."

Judges weren't any happier, and one of them took direct action when Harrod showed up in his courtroom to handle a criminal case for a vacationing associate. Judge Raul Rosado questioned Harrod about his ad and his published opinions of lawyers' incompetence, threatened him with contempt if he spoke, and finally ordered him from the courtroom for good. Rosado said, "If he comes back I will say, 'No, you cannot practice before me.' "

Harrod says he's undaunted and will continue his malpractice work, but he probably wishes he could add judicial malpractice to his clinic.



T-Shirt Ploy Fails—For Now

When convicted forger Anna Johnson, 32, went before a Baltimore Criminal Court judge, her T-shirt pled for equality in sentencing. Her shirt had two words on it, "Father Carcich," an obvious attempt to remind the judge about the very Reverend Guido John Carcich, who had received only a suspended sentence the previous month even though he had been convicted of diverting $2.2 million in funds raised for the poor by his order.

"I was trying to make it clear to the judge that the scales of justice should be tipped evenly," said Johnson's lawyer, Morris Kaplan. If Carcich could get probation for diverting more than $2 million, he said, then his client should receive nothing worse for forging $600 worth of checks.

The judge didn't see it that way, sentencing Johnson to five years in jail, but Kaplan thinks he may prevail eventually. "I think the judge was touched by the shirt, even amused by it." He thinks that if he brings Carcich up again and can show that Johnson can get a job, the judge might reconsider the sentence.

Kaplan isn't planning on having any more shirts made up. "You can only do this effectively once," he said. "After the first time you become a bore."

Drama Coach Takes on Lawyers

The spellbinding trial lawyer is part of American mythology. With rumpled country charm and sly wit, he mesmerizes jurors, dazzles spectators, and turns the courtroom into the best show in town.

According to drama coach Joseph Gustaferro, however, that myth isn't any more real than Paul Bunyan. "Lawyers get stage fright. Their mouths get dry and cottony. They stutter. They fall into the 'and . . . uh' syndrome."

The 34-year-old Gustaferro, a Chicago actor and director, is trying to change all that by teaching lawyers dramatic techniques. In an interview appearing in the *Chicago Tribune,* Gustaferro said he has trained 300 lawyers.

What are some of his tips for courtroom actors? "For some reason lawyers try to talk without opening their mouths . . . I recommend that they put a cork in their mouths every morning while showering and try to talk. This forces them to overarticulate, so when they take the corks out they sound much better."

Then there's the problem of shifty-eyed lawyers. "So many lawyers ask you questions and they're looking at your tie, your ear, the floor, out the door . . . anywhere but at you. Eye contact sets a witness at ease and gets better answers."

And Gustaferro tells lawyers not to forget about the courtroom conditions. "If a closing argument is going to take 45 minutes to an hour, the sunlight should not be in the jury's face, the thermostat should be turned down."

Gustaferro's rationale for all this isn't too complimentary to the jury system. He says that jury members are shaped by the media. "They are people who watch *Rhoda*, and you have to take this into consideration."

Women Attorneys Make Headway

In 1873, U.S. Supreme Court Justice Joseph P. Bradley declared that "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Justice Bradley's opinion went on to state that it was the law of the land as well, and the Court upheld Illinois' refusal to grant a license to practice law to Myra Bradwell because she was a woman.

According to an article in the *Wall Street Journal*, all that has changed, and some observers now predict that the law may become the first traditionally male profession to achieve full sexual integration. About 9.3% of the nation's 441,000 practicing lawyers are women, up sharply from 2.8% in 1970. Moreover, the percentage should continue to grow—more than 25% of law students these days are women.

The *Journal* quotes one woman lawyer as recalling that a senior partner of a law firm told her in a job interview a number of years ago, "We'll hire a woman over my dead body." The woman adds, "Well, he was right." She was hired by the firm in 1973, after the man had died.

Though discrimination is waning, women may be getting into the profession just in time to share equally in widespread unemployment. In California, for example, the population will grow only about 10% in the next seven years but the number of lawyers will almost double.

Bad News for Louisiana Husbands?

It looks like Louisiana wives may soon get equality with their husbands. The Louisiana Senate overwhelmingly approved a change in the 200-year-old "head and master" law that gives husbands absolute authority over their wives and property.

Under the law, which dates back to the days when Louisiana was a French colony, husbands are allowed to sell family homes without consulting their wives and can cut off wives' credit even if they have their own salary.

If the Senate bill is enacted, Louisiana husbands and wives will become equal before the law.

Law Snags Accused Nosher

For generations, shoppers have nibbled a little at fruit displays—a cherry here, a grape there, who's hurt by it? But according to a Maryland jury, when a shopper eats two strawberries the supermarket is victimized and the nosher is a criminal.

Jackie Datcher, 33, says she didn't eat the strawberries, but the jury was persuaded by store detective R. M. Smith, who testified he saw her lift her hand to her mouth and saw two strawberries go in. "We believed the detective," a juror said, "because we didn't see any reason why he would have pursued the whole thing so far unless he was sure she had eaten the fruit."

Assistant State's Attorney Gary Courtosis said it was an open and shut case. "Obviously strawberries in a chewed condition deprive someone of the value of his strawberries. Strawberries in a swallowed state even more so."

Meanwhile, Ms. Datcher has spent $300 for her defense, making the cost of each strawberry $150, and she hasn't yet been sentenced. The maximum penalty for petty shoplifting is a fine of $500 and 18 months in prison.

Colonel Sanders' Interview Extra-Crusty But Not Libelous

Colonel Harlan Sanders recently found out that one of the hazards of being outspoken is the law of libel. The octagenarian Sanders, who founded Kentucky Fried Chicken and still serves as its spokesman, sold his interest in the company some time ago, and according to him the place has gone to the dogs.

In an interview in the *Louisville Courier-Journal*, Sanders said the company's gravy is no more than wallpaper paste with a little "sludge" thrown in. "My God that gravy is horrible," he said. "They mix tap water with flour and starch and end up with pure wallpaper paste. There's no nutrition in it, and they ought not be allowed to sell it."

As for the company's new "crispy" recipe, "it's nothing in the world but a damn fried doughball stuck on some chicken."

That was too much for a Kentucky Fried Chicken franchisor in Bowling Green. He sued the Colonel, the newspaper, and the corporation for libel.

However, the court ruled that the Colonel's comments make it clear that he "did not have the Kentucky Fried Chicken of Bowling Green, Inc. or any other particular restaurant in mind" but was "discussing Kentucky Fried Chicken generally."

Though Kentucky Fried Chicken franchisors are no doubt dismayed by the decision, it preserves Sanders as a kind of cranky national resource and a welcome relief from corporate blandness.

"Jush One More, Ol' Buddy"

California party givers now have more to worry about than wilted canapes and warm beer. The California Supreme Court has ruled that hosts can be sued for damages caused by their guests' drinking.

The case involved a passenger who was injured when the car in which he was riding cracked-up. He sued the host who had poured the car's driver too many drinks at a party just before the accident.

According to the court, it's all a matter of reasonableness—"One who serves alcoholic beverages (under circumstances which create a reasonable foreseeable risk of harm to others) fails to exercise reasonable care."

—CJW

Court Briefs

(Continued from page 11)

with whom she had 10 children. Two years prior to her marriage, in 1939, the Pueblo passed a membership ordinance which barred children whose father is not a Santa Claran from membership in the tribe.

One result of this ordinance was that the Martinez children did not receive the federal benefits that tribal members received. Mrs. Martinez filed a civil suit contending that this constituted sex-discrimination, forbidden by the Indian Civil Rights Act (ICRA) of 1968 which provides in part that "no Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of the laws."

While the ICRA on its face would seem to support Mrs. Martinez's contention, the Supreme Court in a seven-to-one decision disagreed. Writing for the majority, Justice Marshall based the Court's decision on procedural grounds rather than going to the merits of the issue.

Based upon a review of the Act's legislative history, Marshall argued that the section in question provided only for criminal relief under habeas corpus—that is, the process which determines whether an accused has been unlawfully deprived of his liberty—and does not entail a recourse to the federal courts for possible civil rights violations. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," Marshall said.

He described the congressional provision as an accommodation designed to "[prevent] injustices perpetrated by tribal governments, on the one hand, and, on the other, [to avoid] undue or precipitous interference in the affairs of the Indian people." Because of the absence of any "unequivocal expression of contrary legislative intent," Marshall concluded that suits against the tribe under the ICRA were "barred by its sovereign immunity from suit."

While the seven-judge majority awaited explicit word from Congress before it would deal with the merits of such suits, Justice White held no such reservations. In his dissent, he said that the Court's action "substantially undermines ICRA's purpose of 'protecting individual Indians from arbitrary and unjust actions of tribal governments.' "

The New York Times offered an interesting exchange between Allan R. Taradash, one of Mrs. Martinez's attorneys, and Paul Tafoya, Governor of the Santa Clara Pueblo, on the issue of whether these rules were a traditional part of the tribal culture. Said Taradash, "If I honestly believed that this discriminatory rule was part of the Santa Clara position and culture, we never would have filed the suit. But it was a rule made only in 1939 by an all-male council. We have done extensive research and have found no traditional justification for such a rule."

Said Tafoya in response: "If someone else can tell us who is a Santa Clara Indian and who is not, if the Court can decide our membership, then we have been stabbed through the heart, we have no sovereignty." Under tribal law, he continued, "the man is the provider . . . Myles Martinez is a provider and can be recognized as an Indian tribal member anytime he wants to return to the Navajo reservation."

Death Penalty: Confusion Reigns

It is easy to understand why the Court has had so much trouble with capital punishment. The death penalty is final and irrevocable. It leaves no recourse, no chance to appeal if new facts are discovered.

While only two justices—Brennan and Marshall—consider capital punishment contrary to the Eighth Amendment's Cruel and Unusual Punishment Clause, other justices have joined them to strike down the death penalty on other grounds. For example, a five-judge majority in the 1972 case of *Furman v. Georgia* (408 U.S. 238) ruled that the states had violated principles of equal protection in death penalty cases—that is, they had employed it randomly, and all too often against poor and minority defendants.

Many states responded with new laws that tried to do away with subjective judgments by making capital punishment mandatory for certain crimes, reasoning that the punishment couldn't be called random if it applied to everyone committing the same crime. However, two years ago a splintered Court struck down laws that imposed mandatory death sentences for certain crimes, but upheld other laws that specified factors to be considered in determining whether to impose the death penalty.

In its most recent decision, *Lockett v. Ohio*, 46 L.W. 4981, July 3, 1978, Chief Justice Burger acknowledged that the Court's rulings may not have provided the clearest guidelines on this issue. The signals from the Court, he said, "have not . . . always been easy to decipher." However, the Court's decision *Lockett* and its companion case *Bell v. Ohio*, 46 L.W. 4995, probably won't clarify much.

Both cases involve an Ohio death penalty statute which provides that once a defendant is found guilty of aggravated murder, the death penalty must be imposed unless one of the following three circumstances is established: (1) the victim had induced or facilitated the offense; (2) it was unlikely that the accused would have committed the offense if he had not been "under duress, coercion, or strong provocation," or (3) the offense was "primarily the product of [the accused's] psychosis or mental deficiency." In both *Lockett* and *Bell*, the defendants did not commit the murders, but were accessories who were heavily implicated in the events surrounding the crimes. Applying the statute to the facts in each case, the jury sentenced the defendants to death.

Despite the Chief Justice's desire to give states the "clearest guidance that the Court can provide" and "to reconcile previously differing views," the rulings simply highlight the inability of the Court to speak with one voice.

Burger's opinion, for example, maintained that the Ohio statute is unconstitutional because it too sharply limits the mitigating factors that can be considered, preventing "the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense." Only Justices Stewart, Powell, and Stevens joined the Chief Justice in his reasoning.

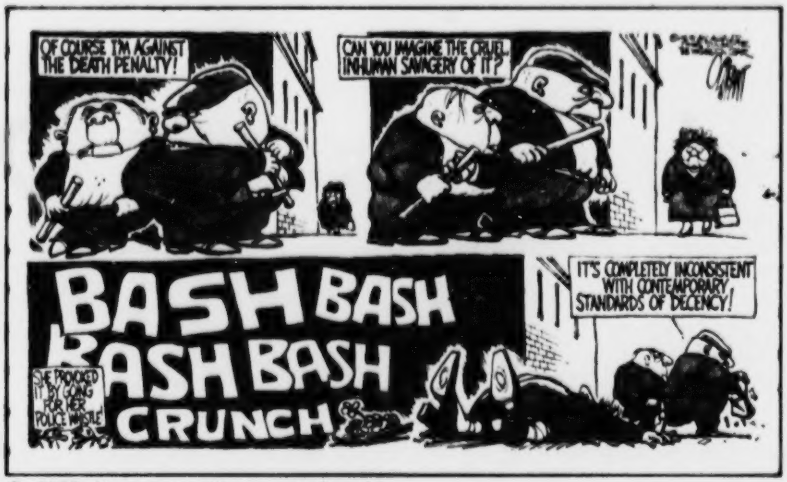
Justice White, who agreed that the statute was invalid but found different grounds, called Burger's reasoning an "about-face" that "invites a return" to the situation prior to the *Furman* case, when considering many factors arguably led to inconsistent or random application of the penalty. White supported a more limited ruling that was suggested by Justice Blackmun in a separate concurring opinion. "I would hold," White wrote, "that death may not be inflicted for killings consistent with the Eighth Amendment without finding that the defendant engaged in conduct with the conscious purpose of producing death."

Justice Rehnquist, who would have upheld the Ohio law, expressed uncertainty as to whether the decision "represents the seminal case . . . on capital punishment, or whether instead it represents the third false start . . .within the past six years."

The most immediate impact of the Court's ruling is the deterrent effect it will have on the imposition of the death

penalty. Legislatures will once again go to the drawing board in response to the latest signals from the Court, and states will not carry out executions without a clear legislative mandate. Also, the decision will give judges and juries greater latitude in considering mitigating factors.

Thus, it is highly unlikely that the penalty will be imposed in the near future, except in extraordinary situations such as the *Gilmore* case in Utah.


OF COURSE I'M AGAINST THE DEATH PENALTY!
CAN YOU IMAGINE THE CRUEL INHUMAN SAVAGERY OF IT?
BASH BASH
BASH BASH
CRUNCH
SHE PROVOKED IT BY GOING FOR HER POLICE WHISTLE!
IT'S COMPLETELY INCONSISTENT WITH CONTEMPORARY STANDARDS OF DECENCY!

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Landmark Law Upheld

Laws designed to preserve historic landmarks won an important victory when the Supreme Court ruled they do not constitute a "taking" of property under the Fifth Amendment. The case—*Penn Central Transportation Company v. City of New York*, 46 L.W. 4[illegible]6, June 26, 1978—involved one of America's most famous buildings, Grand Central Station.

Over the past 50 years, all 50 states and over 500 municipalities have passed laws to protect and preserve historic and architecturally unique structures. New York City passed such a law in 1965, and established an 11-member Land-

marks Preservation Commission to carry out its objectives.

When Penn Central submitted a plan to build a 50-story structure atop Grand Central, the Commission denied their request. Penn Central then filed suit, alleging that the New York law violated the Fifth Amendment provision which declares "nor shall private property be taken for public use, without just compensation."

Justice Brennan, speaking for the six-judge majority, rejected Penn Central's "broad arguments." While admitting that the Court has been unable to develop any "set formula" for resolving such issues, Brennan noted that previous decisions have upheld land use regulations adversely affecting property where states have concluded that such laws promote the general welfare.

"Nothing the Commission has said or done suggests an intention to prohibit *any* construction above the terminal," Brennan wrote. Because no "taking" was involved, the Court did not consider the issue of "just compensation."

Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens, believed that the law placed too great a burden on Penn Central and other owners of landmark buildings. Not only will the denial cost Penn Central millions of dollars each year, Rehnquist argued, but the New York law puts "the property owner . . . under an affirmative duty to *preserve* his property *as a landmark* at his own expense."

The bottom-line question in an emminent domain case, Rehnquist pointed out, is upon whom the loss resulting from the public law should fall. Despite New York's "precarious financial state," Rehnquist suggested that the burden should be "spread evenly across the entire population of the city," and not fall just on Penn Central.

"Filthy Words" Can Be Regulated

Before a live California audience, George Carlin delivered a 12-minute monologue on "filthy words," the words "you couldn't say on the public airwaves . . . the ones you wouldn't say, ever." Shortly thereafter, the monologue did indeed appear on the public airwaves, over New York radio station WBAI at two o'clock on a Tuesday afternoon.

As a result of a complaint filed by a father who heard the broadcast while driving with his young son, the FCC issued a warning to the station that further complaints might be followed by "available sanctions." Pacifica Foundation, owners of WBAI, challenged the FCC action all the way to the Supreme Court, where the monologue became part of the Court's formal record in *Federal Communications Commission v. Pacifica Foundation*, 46 L.W. 5018, decided on July 3, 1978.

The key issue was whether the FCC could discipline that station ownership for material that everyone agreed was not legally obscene, or whether the material was protected by the First Amendment. (In a series of cases, the Court has held that material must appeal to prurient interest and be without redeeming social value to be considered obscene. Since Carlin's monologue wasn't erotic and had the serious purpose of satirizing our obsession with dirty words, it clearly wasn't obscene by the legal definition.)

Although the justices disagreed over various parts of the decision, a five-judge majority ruled that the FCC could regulate "indecent" as well as obscene broadcasts. In the majority opinion, Justice Stevens noted the special First Amendment problems of broadcasting, including its "uniquely pervasive presence in the lives of all Americans" and its easy accessibility to children. He emphasized the "narrowness" of the decision, basing it primarily on a "nuisance rationale." Quoting Justice Sutherland's statement that a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barn," Stevens wrote "we simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."

Stevens conceded that the ruling may lead to some self-censorship by broadcasters. He believed, however, that at most it "will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities [which] surely lie at the periphery of First Amendment concern."

In one of two dissenting opinions, Justice Brennan regarded "the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided," he found himself "unable to remain silent." He accused the majority of "acute ethnocentric myopia," arguing that it permitted the taste of the majority to completely prevent expression protected by the First Amendment from entering the "homes of a receptive, unoffended minority." Brennan also noted "that words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that comprise this nation."

Justice Stewart, joined by Justices Brennan, White, and Marshall, wrote a separate dissent which focused on the statutes governing the FCC. "Since the Carlin monologue concededly was not 'obscene,' I believe that the Commission lacks statutory authority to ban it," Stewart wrote. Given these circumstances, he found it unnecessary to address the "difficult and important issue" of whether under the First Amendment the FCC could prohibit constitutionally-protected speech over the air.

Syndicated Columnist Nicholas von Hoffman, never known for his timidity with words, offered this analysis of the case:

> To realize how birdlandish the Court's ruling is, you must know that it is unreasonable to suppose wee ones ever listen to WBAI. The FM station . . . takes no ads, plays no bubble gum music, and is directed primarily at avant garde intellectuals, unemployed Ph.D's and other over-educated malcontents who, depending on your politics, may be juvenile in spirit but certainly not in age.

Apparently only one complaint was filed about the broadcast. But perhaps one pig in the parlor is enough. □

Other Cases of Note

Hicklin v. Orbeck, 46 U.S.L.W. 4773 (June 20, 1978)—The Court struck down the "Alaska Hire Act," which had attempted to remedy Alaska's "uniquely high unemployment" by requiring all oil and gas leases and related contracts to employ Alaska residents in preference to nonresidents. A unanimous Court found the Act violative of the Privileges and Immunities Clause of Article IV, which bars "discrimination against citizens of other States where there is no reason for the discrimination beyond the mere fact that they are citizens of other States."

Nixon v. Warner Communications, Inc., 46 U.S.L.W. 4320 (April 18, 1978)—During the criminal trial of several of Nixon's former advisors, some 22 hours of tape recordings made of conversations in the ex-President's office were played to the jury and the reporters and public in the courtroom, and the reels of tape were admitted into evidence. Should the rest of us be permitted to hear them? By a slim majority, the Supreme Court said no, deciding that the common law right of access to judicial records did not compel the trial court to release the actual tapes for broadcasting and sale to the public. The Court found that the Sixth Amendment guarantee of a public trial is satisfied by the opportunity of the public and press to attend the trial and report observations and does not require that the media be given the right to broadcast evidence produced at trial.

Pinkus v. United States, 46 U.S.L.W. 4479 (May 23, 1978)—Whoever those little people running around your neighborhood are, the Supreme Court says they are not part of the "community"—that is, not the community by whose standards obscene materials are to be judged. One of the tests used to determine if material is obscene is whether it is "in conflict with community standards." The Court noted that a jury including children in its definition of "community" might well reach an artificial "average standard" of what is offensive.

Butz v. Economou, 46 U.S.L.W. 4952 (June 29, 1978)—In a 5-4 decision, the court held that federal officials do not have absolute immunity from suits charging they violated constitutional rights. The case involved a $32 million suit against former Agriculture Secretary Butz and other officials, charging they maliciously instituted administrative proceedings against Economou's company because he had been critical of the Agriculture Department. The Court held that executive branch officials have absolute immunity from such suits only when they can show they acted within the scope of their duties or when such protection is essential "for the conduct of the public business."

Monell v. New York City Department of Social Services, 46 U.S.L.W. 4569 (June 6, 1978)—For years, the Department of Social Services and the Board of Education of New York City have as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before medical reasons required such leaves. Reversing themselves on the doctrine that municipalities were wholly immune from suit, the Court held that local governing bodies can be liable in instances where its official policy deprives individuals of their constitutional rights.

City of Los Angeles v. Manhart, 46 U.S.L.W. 4347 (April 25, 1978)—The Court held that the L.A. Department of Water's requirement that female employees make larger pension fund contributions violated sex discrimination provisions of the 1964 Civil Rights Act. The requirement had been based on the fact that women as a class live longer than men. The Court found that the result of the policy was nevertheless discriminatory in its "treatment of a person in a manner which but for the person's sex would be different."

Supreme Court Report

(Continued from page 6)

impotent zombi." Moreover, Judge Frank thought there was substantial truth in Gardella's attack on the reserve system. He called the system "shockingly repugnant" to basic moral principles, an "illegality" perpetrated by a private "dictatorship." He noted that the penalties for violating the reserve clause were severe: "The violator may perhaps become a judge (with a less exciting and often less remunerative occupation) or a bartender or even a street-sweeper, but his chances of ever again playing baseball are exceedingly slim."

Alarmed by these judicial rumblings, organized baseball settled the Gardella suit out of court, only to find itself defending eight other antitrust suits by 1951. Uncertain of its chances in court, baseball turned to Congress, pushing bills which would provide a blanket antitrust exemption for all professional sports. However, Congress refused, partly because the courts were considering suits which would test the legality of the present system.

One of these cases, *Toolson v. New York Yankees*, 346 U.S. 356, reached the Supreme Court in 1953. Toolson was a minor league ballplayer in the Yankee organization. He refused to report to the Yankee farm club in Binghamton, New York and was placed on an ineligible list. Since no other club would deal with him, Toolson claimed that this amounted to blacklisting and a conspiracy against him in violation of the antitrust laws.

However, by a 7 to 2 *per curiam* decision the Supreme Court reaffirmed its holding in *Federal Baseball*. (A *per curiam* opinion is issued by a majority of the justices, with no one justice taking credit for writing the opinion. As in *Toolson*, they are usually short and are often used when the Court wishes to reaffirm a previously established principle.) The opinion reasoned that despite the fact that concepts of interstate commerce had changed, the Court had created an exception to the antitrust policy which baseball had relied on for 30 years, and it would be unfair to eliminate this decision retroactively by overruling *Federal Baseball*. Furthermore, the Court reasoned that Congress had the primary responsibility for developing the antitrust policy of the nation, and it could always pass legislation eliminating the exception. Baseball was then in the enviable position of being outside the antitrust laws, with the Supreme Court suggesting that Congress should change the law and Congress looking toward the courts for a solution.

The dissent in the case argued that baseball was interstate commerce in any reasonable sense of the phrase. Justices Burton and Reed pointed to baseball's heavy capital investment, its exchange of large sums across state lines, its many purchases of materials in interstate commerce, "its radio and television activities which expand its audiences beyond state lines, it sponsorship of interstate advertising, and its highly organized 'farm system' of minor leagues . . . throughout the United States, and even in Canada, Mexico, and Cuba," and concluded that "it is a contradiction in terms" to say that baseball is not engaged in interstate commerce. Moreover, the dissenters were not swayed by Congress's unwillingness to act. Rather, they argued that since Congress had *not* acted to exempt baseball from the Sherman Act, baseball was covered and should be required to show that it was not a monopoly in restraint of trade.

The position of baseball is even more anomalous when considered in relation to other professional sports. In a series of decisions, courts have held that professional boxing, football, basketball, and hockey are under the antitrust laws. (See box on pp. 44-45.) Presumably, other professional sports would also be under the antitrust laws, making professional baseball the only exception.

By the 1970s, many commentators thought the time was right for another attempt to challenge baseball's exemption. Curt Flood's case provided an excellent vehicle for once again raising the issue before the Court.

Curt Flood was not an ordinary ballplayer. He had played center field for the St. Louis Cardinals for 12 years and maintained a .293 lifetime batting average. He was captain of the team from 1965 to 1969. During the time Flood played, the Cardinals were a very good team, winning the pennant in 1964, 1967, and 1968, and in the World Series in 1967.

However, after the 1969 season, without consulting Flood, the Cards traded him to the Phillies. Flood, who had extensive business interests in St. Louis, refused to go to Philadelphia, instead quitting baseball. While other players have balked at trades and then generally given in, Curt Flood argued that he was not "a consignment of goods" but "a man, the rightful proprietor of my own person and my own talents."

According to the judge, "only the totalitarian-minded will believe that high pay excuses virtual slavery."

Despite the fact that he began with two strikes against him —*Federal Baseball* and *Toolson*—Flood challenged the reserve system in court. He was supported in his suit by the Players Association. Besides arguing that the reserve system violated antitrust laws, Flood, a black man, charged that it was a form of involuntary servitude, contrary to the Thirteenth Amendment. Flood's lawyer, former Supreme Court Justice Arthur Goldberg, apparently hoped that the Court, in light of an even greater expansion of the concept of interstate commerce and in recognition of decisions regarding other sports, would reverse its previous baseball decisions.

Curt Flood's claim of involuntary servitude was a little difficult for the public to swallow when it was announced that Philadelphia had offered him $100,000 a year for his services. However, he found comfort in Judge Jerome Frank's opinion in the Gardella case: "If the players be regarded as quasi-peons, it is of no moment that they are well paid. Only the totalitarian-minded will believe that high pay excuses virtual slavery."

When the case finally reached the Court in 1972, Flood lost by a 5 to 3 margin (Justice Powell not participating). His stand for his principles was costly, since he lost time from the peak of his career and, except for a brief comeback, never played baseball again.

In reading Justice Blackmun's opinion for the Court in *Flood v. Kuhn*, 407 U.S. 258, it doesn't take one long to determine how the Court is going to rule. The first four pages of the opinion consist of a nostalgic summary of baseball's importance to America's development. Blackmun talks about the "thrills" of baseball, lists the names of more than 80 baseball figures past and present, and even quotes whole poems on baseball. After this exercise in romanticism, Blackmun gets into legal reasoning remarkably similar to *Toolson*. The exemption given baseball in 1922 was probably incorrect, particularly in light of today's interpretation of interstate commerce. *Federal Baseball* and *Toolson* are "aberrations" confined to baseball. Nevertheless, baseball has developed for over 50 years with this exemption in existence. Congress has not eliminated it. Therefore, the Court will allow it to stand and wait for any remedial action to come from Congress.

In order to understand the Court's reasoning, one has to appreciate the significant role that the concept of precedent or *stare decisis* plays in our legal system. Courts generally follow the opinions of previous courts. While previous decisions can be overruled, courts are reluctant to do this unless they feel the decision is grotesquely wrong. The practice of following previous decision, or precedent, is known as the doctrine of *stare decisis* (the decision before). By following previous decisions the legal system encourages stability and uniformity. Justice Blackmun reasoned that baseball had developed with the understanding that the exemption to the antitrust laws existed. It would be unfair at this late date to retroactively remove the exemption. On the other hand, if Congress wanted the exemption abolished, it could remove the exemption prospectively, replacing it with a new set of rules to govern professional baseball.

If there is any consolation to ballplayers in the decision it is that they are coming closer to winning. Nine justices voted for baseball in 1922, seven in 1953, and only five in 1972. Moreover, one of the five, Chief Justice Burger, went along reluctantly with the majority. In a separate concurring opinion, he expressed "grave reservations" as to the Court's position, concluding that the "least undesirable" course was to let the matter rest with Congress.

Andy Messersmith paved the way for star free agents. . .

The dissenters were Justices Douglas, Brennan, and Marshall. Justice Douglas had joined in the majority opinion in *Toolson,* but in *Flood* he wrote, "I have lived to regret it." He called *Federal Baseball* a "derelict in the stream of the law that we, its creator, should remove." He noted that many had accused the owners of "predatory practices," and said the players were clearly "victims of the reserve clause." Like the dissenters in *Toolson,* he concluded that "the unbroken silence of Congress should not prevent us from correcting our own mistakes."

In a separate dissent, Justice Marshall noted a previous decision holding that "antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free-enterprise. They are as important to the preservation of our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." He then pointed out that it is "this Court that has made [the players] impotent, and this Court should correct its error."

Reviewing baseball's long struggle to keep its antitrust exemption, a congressional committee looking into sports recently concluded that baseball has succeeded because it has usually been able to convince whatever forum it was before that some other forum was more appropriate. For example, it convinced the *Toolson* court that Congress was the more appropriate forum to decide antitrust policy, and even convinced the Court that Congress's failure to act on bills that would explicitly grant antitrust exemption to sports somehow meant that Congress acquiesced in baseball's exemption.

The same pattern appears in questions of state versus federal law. In *Federal Baseball,* the owners argued that baseball should be exempt from federal regulation because the states were "entirely competent to reach and deal with any evil in the field of sport." However, in the mid-60s, when the state of Wisconsin sued under state antitrust laws to prevent the Milwaukee Braves franchise from moving to Atlanta, baseball went before the state supreme court in *Wisconsin v. Milwaukee Braves, Inc.*, 31 Wisc. 2d. 699, and argued successfully that only federal law could regulate sports adequately.

Baseball also tried to play this shell game in labor law. In 1969, it argued unsuccessfully before the National Labor Relations Board that the board didn't have jurisdiction because any labor dispute in professional sports would not affect interstate commerce and was strictly a local affair. It then turned around and argued in the Flood case that what was involved was not an antitrust matter but a labor relations issue which should properly be presented to the National Labor Relations Board.

Collective Bargaining to the Rescue

The decision in *Flood v. Kuhn* left the baseball reserve system intact, but as any good ballplayer knows, there are several ways to score a run. The ballplayers scored and scored big! Through the process of collective bargaining and arbitration, the reserve system was drastically changed, and labor law played a big part in the process.

Major league ballplayers belong to the Major League Baseball Players Association. Baseball players, like truck drivers, coalminers, and steelworkers, have a right to organize into unions and bargain collectively with their employers. The main difference is that in other industries salaries are set by collective bargaining, but in sports collective bargaining only sets minimum salaries, and each player negotiates his own salary with team management. That's the only way it can be, since players differ radically in ability and deserve very different levels of compensation. However, the players do care equally about such things as pensions, playing conditions, and grievance procedures, and the Players Association bargains over these matters.

The basic law governing labor relations in this country is the National Labor Relations Act, sometimes called the Wagner Act. Under the National Labor Relations Act, the baseball owners were required to meet with players' representative to bargain in good faith about minimum salaries and working conditions.

In 1966 Marvin Miller, a former official of the United Steelworkers of America, was named executive director of the Players Association. Miller and the Association began to bargain more aggressively with the owners. In 1972 the players conducted a strike over the issue of contributions to their pension fund. The start of the 1972 season was delayed 10 days, and 86 games were cancelled. The players demonstrated through this strike that they were willing to take concerted action against the owners, giving them muscle for more important battles.

The Basic Agreement which governs baseball, negotiated the following fall between the owners and the players, put the first dents into baseball's reserve system. Veteran players were for the first time given a limited right to veto trades and sales, and salaries were for the first time subject to binding arbitration. Also, the Agreement included a grievance system for resolving disputes between players and clubs. This grievance procedure turned out to be an important weapon in the players' fight against the reserve system.

Arbitration and the Reserve Clause

Most labor contracts contain clauses dealing with arbitration and a grievance procedure for complaints arising under the contract. Grievances between labor and management which cannot be resolved informally are turned over to an impartial arbitrator for resolution. Arbitration is becoming a popular method of resolving disputes under contracts. Usually, a dispute can be resolved more rapidly and with less cost through arbitration than through court action. Also, in labor disputes, arbitration often eliminates the need for strikes. Frequently a mutually agreed upon arbitrator is selected by the parties or is selected by a random method from a previously determined list. Baseball uses a panel of three arbitrators. The players select one arbitrator, the owners another arbitrator. These two, who are usually selected because they will vote in favor of the side they represent, then select a third arbitrator who is the impartial tie-breaker.

Everyone knew that in theory the reserve clause put players at a disadvantage, but it took the cases of Ken Harrelson and Catfish Hunter to show just how well star players could do on the open market.

and Catfish Hunter proved how much a star was worth.

Generally, teams release a player from his contract only when he is no longer of use to them and of no value on the trading market. Harrelson and Hunter, however, were established major leaguers at the peak of their careers. Both became free agents because of the always-unpredictable Charlie Finley, owner of the Oakland A's.

Harrelson was hitting a ton and contributing greatly to the Oakland A's in 1967 when he got into a dispute with Finley and called him a "menace to baseball." Finley reacted like Mr. Dithers finding Dagwood sleeping on the job—he fired the ingrate. In most jobs, being fired really is punishment, but in Harrelson's case it was like Brer Rabbit being thrown into the briar patch. All of a sudden a proven big league player was available to any team who could sign him, and Harrelson was in terrific demand. Bidding was furious, and Harrelson wound up signing with the Boston Red Sox for about $150,000 a year, or almost 10 times what he had been making at Oakland.

If the players needed a further lesson in the bargaining advantage of being a free agent, they got it a few years later when Catfish Hunter and Finley fell out. Catfish was a far better ballplayer than Harrelson, and may even have been the best pitcher in baseball in the first half of the 70s.

In 1974 Hunter negotiated a two-year contract with the A's. Under the contract, he would receive $50,000 in cash per year and $50,000 in deferred payments to a third party. Finley, for very complicated tax reasons, refused to make some of the deferred payments. Hunter then claimed that since Finley had refused to comply with the contract, or in legal terms had "breached" the contract, the contract was void. The dispute was taken to arbitration.

Once the facts that the contract had not been complied with had been established, the arbitrator had two choices—he could have ordered Finley to comply or he could release Hunter from the contract. In contract law, when one party to the contract does not perform his obligations under the contract, a court may order compliance. This is known as specific performance. However, it is frequently more appropriate to treat the contract as void and allow the party injured as a result of the breached contract to obtain monetary damages. Finley argued that the appropriate remedy was specific performance; Hunter argued that the contract should be declared void.

Messersmith got a million; Seitz got fired; the owners got furious

The impartial arbitrator on the panel which heard the case was Peter Seitz, a respected labor arbitrator who at one time had been General Counsel of the Federal Mediation and Arbitration Services. Seitz' decision supported Hunter, releasing him from his contract and making him a free agent. Finley then challenged the decision in court, but the court ruled against him, pointing out that courts should defer to the judgment of an arbitrator unless it is clearly erroneous.

Hunter was free to bargain with other teams in the league, and the competition was fierce for his services. He eventually signed a five-year contract with the Yankees for a total figure somewhere between $3.2 and 3.75 million, giving him six or seven times as much per year as he had been getting.

The Hunter and Harrelson cases applied to them only and didn't weaken the legal basis of the reserve clause, but once players got wind of what was possible a direct assault on the clause was inevitable.

Many ballplayers began to bargain more vigorously with their clubs, and several refused to sign their 1975 contracts, thus playing out their option year. Eventually almost all of these players signed contracts; Andy Messersmith, a pitcher for the Los Angeles Dodgers, did not. Andy Messersmith was a very respectable pitcher. Through 1975, in eight

Sports Materials

There aren't any curriculum materials yet focusing on sports and the law, but many general books on the subject could provide background for teachers and be adapted for the classroom. Here is a sampling. (The books without publisher and price are out of print.)

Recent Developments

Sheldon Gallner's *Pro Sports: The Contract Game* (1974) is a well-written book designed to help athletes turning pro and fans who want to know more about the legal/financial side of sports. Gallner includes sample contracts and has lots of good tips on negotiating strategies. He also talks about agents versus attorneys, league jumping, and whether players and fans get a fair shake. (Scribner hardbound, $3.50).

Government and the Sports Business (1974) contains papers on sports economics that read like unintentional self-parodies (maybe they're terrific for other economists), but also includes excellent discussions of such law-related topics as labor relations, antitrust, broadcasting, and taxation. (Hardbound $11.95, softbound $5.50; order from the Brooking Institution, 1775 Massachusetts Ave., N.W., Washington, DC).

James Michener's encyclopedic *Sports in America* (1976) contains long chapters on women and sports, the media, financing, and government regulation. (Fawcett paperback, $2.50).

Bob Woolf's *Behind Closed Doors* (1976) is a lively first-person account by one of the first and most successful sports lawyers. Woolf tells about negotiating lucrative contracts for such stars as Derek Sanderson (hockey), Julius "Dr. J" Erving (basketball), and John Matuszak (football), and also offers some general ideas about the recent legal/financial revolution in sports. (Atheneum hardbound, $9.95).

The Historical Background

Robert Smith's *Baseball* (1970) is full of baseball lore and contains a long chapter on the history of player-owner relations, including the early days (1966-70) of the players' union. Smith's sympathies clearly lie with the players and union.

Harold Seymour's *Baseball: The Early Years* (1960) and *Baseball: The Golden Era* (1971) are definitive histories of pro ball up to 1930. Among other subjects, Seymour covers the early parade of contract jumpers, the beginnings of the reserve clause, competing leagues, antitrust suits against baseball, and early attempts at players' unions. (*The Early Years* is out of print; *The Golden Era*, an Oxford University hardbound, costs $15.95.)

As the Players See It

Everyone but utility infielders and fourteenth-round draft choices is writing a book these days. Many go into the legal/financial side of the game. Among the best are Jim Bouton's *Ball Four* (1970, Dell paperbound, $1.75) and Curt Flood's *The Way It Is* (1971, Pocket Books, $1.25), both very frank and jaundiced accounts of how baseball was run only a few years ago; Bill Libby's *Catfish: The Three Million Dollar Pitcher* (1976, Coward, McCann hardbound, $7.95), the story of Catfish Hunter's legal and financial adventures; and Bernie Parrish's *They Call It a Game* (1971), a player's version of football players' growing militancy in the 60s.

—CJW

seasons of major league ball with three clubs he had compiled a 112-77 win/loss record with an earned run average of 2.69.

The Players Association, anxious to have a ruling on the legal consequences of playing out an option, helped Messersmith prepare a grievance.

As explained earlier in this article, the reserve system consists of two basic elements—an option clause which ties the player to the team for an additional year every time the contract is renewed and a reserved list which prohibits other teams from dealing with a player on the list. The Dodgers had renewed Messersmith's contract, so they claimed he was bound for another year. There was also the issue of whether other teams would deal with Messersmith if he were declared a free agent. The grievance was filed to declare Messersmith a free agent and to prevent the other clubs from blacklisting him.

In December 1975 the arbitration panel, with Peter Seitz as impartial arbitrator, ruled that by playing out his option Andy Messersmith had become a free agent. Furthermore, the arbitrator ruled that the reserved list applied only to players under contract. Andy Messersmith was free to bargain with any club, and the clubs were free to bargain with Messersmith. After brisk bidding, he eventually ended up with the Atlanta Braves for a reported $1 million three-year contract.

This decision was soon challenged in the courts when the owner of the Kansas City Royals team filed an action to set aside the arbitrator's decision. He argued that the arbitrator did not have the authority to set aside the reserve system. The other 23 clubs intervened on his side.

It's not entirely clear why the Kansas City owner was chosen to carry baseball's fight to the courts. After all, Messersmith hadn't been under contract to him. It may be an example of "judge shopping," a fairly common occurrence in cases that can be brought in a variety of jurisdictions. Perhaps the owners felt that judges in that jurisdiction were more likely to be sympathetic to their side, and so convinced the K.C. owner to file their suit.

If that was their reason, they guessed wrong. In *Kansas City Royals v. Major League Baseball Players Association,* 409 F. Supp. 233 (8th Cir., 1976), the judge ruled that under established principles of arbitration law the courts will defer to the decision of the arbitrator unless he clearly overstepped his authority. By taking this position, courts encourage the use of arbitration as a means of dispute resolution and minimize the likelihood of appeals to the courts.

Arbitrator Seitz didn't fare as well as Messersmith. He was fired by the owners as a baseball arbitrator shortly after the Messersmith decision. Under the arbitration agreement between owners and the players, either side is free to discharge the impartial arbitrator should they become dissatisfied with his performance. The owners exercised this option at the earliest possible time.

The Messersmith decision ended the reserve system as it had existed. Dozens of players, including Richie Zisk, Bobby Bonds, Rollie Fingers, and Reggie Jackson, have played out their option year and have negotiated contracts with new clubs. The papers for the last few years are full of stories concerning these players.

Yet most people who follow baseball realize that a reserve system of some sort is needed. In the long run, if the game is to succeed competition must be balanced within the league and players must remain with a team long enough to retain fan identity.

The Players Association and the owners, realizing that it is in their mutual interest to have a workable reserve system, created one through the process of collective bargaining. The new reserve system established by the 1976 Basic Agreement between the owners and the Players Association is complicated, dividing players into two categories, those who were in major league baseball prior to the Messersmith decision and those who entered the league after the decision. Those in the first category could become free agents by playing out the option year, as Andy Messersmith had done, but could only exercise this right once. Then they are treated like new ballplayers; that is, they cannot become free agents until they put in five more years of major league service.

The owners went judge-shopping, but the courts backed the arbitrator

Players now also have more control over trades. A player with five years of major league service can demand to be traded, and can veto trades to six clubs. If his team fails to make the trade, he then becomes a free agent. However, a player traded at his request cannot ask to be traded for another three years.

What the Future Holds

Many sportswriters and fans (not to mention club owners) feared that the Messersmith decision and the new collective bargaining agreement would destroy baseball as it has been known, but that doesn't seem to have happened. The vast majority of players made eligible for free agent status by the Messersmith decision have chosen to remain with their present clubs. Though they may have used their new bargaining power to exact higher salaries, that affects owners' pocketbooks more than the game played on the field.

It's still too early to tell if ticket prices will go up on account of higher salaries to players. However, some economists contend that the new rules will result in the pie of revenues being sliced differently, with players getting a larger cut, but will not necessarily require a larger pie (more revenues exacted from fans).

As for the owners' argument that the new system will destroy competitive balance, it is interesting to note that of the 24 players who played out their options in 1976 and signed with new teams, all but one signed with a team that had a worse win-loss record than the team he had left. So far, no team has managed to build a winner by signing expensive free agents.

Disputes continue to rage about whether the high-priced ballplayers have lost their incentive to play hard. After all, most of them have signed long-term contracts which guarantee them big earnings no matter how well or badly they play, and it's certainly plausible that some might have lost their competitive edge. However, a glance at their statistics suggests that most are performing as well as they did before their big contracts. The main exceptions are injured players, including free-agent trailblazers Catfish

Hunter and Andy Messersmith. This emphasizes that disabling injuries are an everpresent threat to athletes and gives credibility to players' arguments that they need to bargain freely for long-term contracts to get some security against accidents and injuries that can shorten a career.

One effect of players' greater bargaining strength will probably be higher salaries for all players. After all, it is in a team's interest to keep its younger players reasonably satisfied, so that they will be less eager to play out their options when they've put in five years of service. Another effect will probably be more multi-year contracts, even for younger players, as teams try to minimize insecurity by binding ballplayers who are about to qualify as free agents for longer periods.

Of course, agreement on the reserve clause doesn't mean that the union and management will lie down together like

Antitrust in Other Sports

Starting a conversation about antitrust law will clear a room faster than yelling fire. All of a sudden watches will be consulted and babysitters remembered. Anyone standing at the door will risk being trampled. Does it have to be that way? Does antitrust law have to be conversational Sominex? Here is *Update*'s bold attempt to cut through the dullness, present a few basic antitrust principles, and tell you about developments in other sports.

Naturally sports teams and leagues want to be unregulated. Like all businesses, they feel they can make more money and put out a better product if they're allowed to do what they want. Unfortunately for them, much of what they want to do seems, on the surface at least, to be flatly illegal under the Sherman Act and its successors.

But that doesn't mean they're helpless. They have four possible ways to get around antitrust, and at one time or another they've tried them all.

Blanket Exemptions

The first thing other sports tried was to get under baseball's umbrella. Whenever faced with an antitrust suit, they argued that if one sport had an exemption why shouldn't they? For example, in *Radovich v. National Football League,* 352 U.S. 445 (1957), the owners were faced with a suit by a former all-pro guard who had jumped the NFL to play in a competing league that soon folded. He alleged that he had been blacklisted, prevented from getting back into organized football, and victimized by an illegal conspiracy. The owners replied that the baseball exemption should cover them too.

No dice, said the Supreme Court. The Court admitted that its reasoning might seem "unrealistic, inconsistent, or illogical" in light of *Toolson,* but it held that football was interstate commerce and was covered by antitrust laws. It sent the case back to a lower court to determine if the reserve clause and the alleged blacklist actually constituted an antitrust violation.

Other sports have fared no better. In a series of cases the courts have made no distinction between team sports (hockey, basketball) and individual sports (boxing, golf)—all are interstate commerce and none can have the sweeping exemption accorded baseball.

Legislative Exemptions

When they failed to get a blanket exemption from the courts, pro sports often tried a second route, turning to Congress for at least partial exemptions. In 1961, for example, professional sports got a law exempting telecasts of football, baseball, basketball, and hockey from antitrust laws. These sports can bargain as leagues with networks, selling TV rights which are then split equally among the teams.

Pro football also got a limited exemption in 1966 that allowed the National Football League to merge with its competitor, the American Football League. The new law allowed a common draft of college players, equal division of TV income, and controlled expansion.

For the most part, however, Congress has seen that antitrust exemptions cause trouble for players and fans. For example, allowing the two football leagues to merge eliminated competition for new players and cut salaries for first-year players by as much as 50 per cent. Pro basketball players saw what happened in football and wouldn't let it happen in their sport. One basketball player said that in 1971, when the competing basketball leagues asked for an antitrust exemption to merge, "We went right down to Congress and testified against the bill and killed it. And that's why we earn those big salaries and the football players don't. We were minding the shop. They weren't."

Reasonable Restraints

The third route for getting around antitrust laws is to argue that a sport's rules are a "reasonable" response to unique conditions and not an illegal restraint of trade. Despite the Sherman Act's sweeping language, courts have held that it forbids only combinations which "unreasonably" restrain trade.

What would constitute a "reasonable" restraint of trade in sports? Before the TV exemption, a federal district court judge permitted some pooling of TV revenues by pro football teams because "professional football is a unique type of business [with] problems which no other business has." He noted that most businesses do as well as they can and don't care if they drive their competitors out of business. In football, teams compete as hard as they can on the field, but if they compete hard in a business way they run the risk of destroying the league and injuring themselves. (*United States v. National Football League,* 116 F. Supp. 319, [1953]).

Other associations have been able to argue that their rules are reasonable and do not constitute an illegal restraint of trade. For example, in *Molinas v. National Basketball Association,* 190 F. Supp. 241 (S.D. N.Y. 1961), a federal district judge ruled that suspending a pro player for betting on the point the lion and the lamb. A new Basic Agreement will be negotiated next year, and one can expect hard bargaining about pensions, working conditions, expense money for traveling ballplayers, and a host of other bread and butter issues.

However, most of the disruption may have passed, and something like peace may have come to professional baseball. After the next few years, the free agent bidding wars should diminish. Moreover, it's important to remember that the changes in the reserve system have been accomplished not through the courts but through arbitration and collective bargaining. That means that the future of organized baseball will probably be worked out by the players and owners, rather than by the judiciary or by legislatures. With a little luck, the attention of baseball fans will once again focus on the game as it is played in the field and not as it is played in the courts. ☐

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spread of a game was a reasonable exercise of the league's powers of self-preservation. And in *Deesen v. Professional Golfers' Association of America*, 358 F. 2d 165 (9th Cir. 1966), a federal district court ruled that the PGA's rules governing who may compete in tournaments didn't violate antitrust laws since eligibility standards were required by the nature of the industry.

Unfortunately for the owners, these "reasonable" restraints have mostly dealt with disciplinary rules, and courts have been unwilling to find the reserve system and player draft reasonable means of accomplishing legitimate purposes. The general question, as posed by the Supreme Court in *White Motor Co. v. United States*, 372 U.S. 253 (1963), is whether "the restraint is more restrictive than necessary, or excessively anticompetitive." The problem for pro sports is that the reserve system and player draft are very restrictive, and leagues do not seem to have "explored the availability of less restrictive alternatives."

The National Football League has been hit hard by three decisions. In *Kapp v. National Football League*, 390 F. Supp. 73 (1974), a district court judge ruled that most of the reserve system is "patently unreasonable" because it perpetually restrains a player from bargaining freely. The judge also found unreasonable an NFL rule that gives football commissioner Pete Rozelle the final decision in all disputes, since he is hardly an impartial arbiter between labor and management.

In *Smith v. Pro Football*, 420 F. Supp. 738 (1976), a federal district court determined that the player draft system in football violated antitrust standards because it is "absolutely the most restrictive one imaginable. It leaves no room whatever for competition among the teams."

And in *Mackey v. NFL*, 543 F. 2d. 606 (1976), an appeals court found the Rozelle rule an unreasonable restraint of trade. Under that rule a team that loses a player must be compensated by the team that signs him. That means the free agent isn't really free, since his new team will have to give up players or draft choices to get him. The court said the rule was far more restrictive than necessary for the competitive balance of the league and operated as a perpetual restriction on a player's ability to sell his services.

The Labor Exemption

Though pro football is appealing these decisions, the future for the league's player reserve and draft systems doesn't look good. Which brings us to the fourth way sports might be able to get around antitrust: making the reserve system and player draft a subject of collective bargaining. You see, federal statutes generally exempt labor unions and collective bargaining agreements from antitrust laws. The reasoning is that collective bargaining is in the public interest. The courts in *Smith* and *Mackey* implied that some forms of a draft or reserve system might be permissible if they were the result of "genuine, arms length" bargaining between the owners and union.

An example of the labor exemption in action was provided in 1976, when the National Basketball Association owners and players agreed to a new collective bargaining agreement which settled an antitrust suit out of court and permitted the two basketball leagues to merge. The suit, which had been brought in 1970 by basketball superstar Oscar Robertson, contended that the reserve system, player draft, and proposed merger with the American Basketball Association violated antitrust laws. (*Robertson v. NBA*, 389 F. Supp. 867 [1976].)

The settlement shows how restrictions on players might be made "reasonable." A team now only has rights for a year to a drafted player. If he doesn't sign, he can be drafted again. If he again doesn't sign with the team that drafted him, in a year he's a free agent. Anyone can play out his option and become a free agent. Until 1981, a basketball version of the Roselle rule will give compensation to the player's old club. After that, there will be no compensation, though the old club can retain the player by matching any offer he gets.

In one sense, sports owners may feel that avoiding antitrust this way is a hollow victory. After all, one of the main reasons they tried to keep antitrust laws at bay was to have the upper hand in dealing with players. If they get out from under these laws only by tough agreements with players' unions, they may feel they've gained little.

However, in another sense they've gained the sport's right to govern itself, at least within limits. Players' unions have agreed that some form of reserve system and common draft is necessary for maintaining competitive balance and retaining fan support. Agreements like the ones in baseball and basketball won't destroy the way the game is played, nor will they necessarily pinch owners financially. They're much fairer than the old system, and, best of all, they let those who know the sport best—owners *and* players—determine its future.

Perhaps we'll see fewer antitrust battles in the future—but for now, don't bet on it.

—Charles White

CURRICULUM UPDATE

Charlotte C. Anderson
and Kathy Kosnoff Erlinder

Materials to Kick-off the New School Year

Print and a-v from practical law to privacy, from justice to juveniles

Elementary

■ ***What "Liberty and Justice" Means*** (2nd edition, 1978). Elementary. 16 mm. color film, 16½ minutes. Purchase: $240; Rental: $18 for 3 days. (Churchill Films, 662 No. Robertson Blvd., Los Angeles, CA 90069).

In this film, a young boy of Spanish descent listens to the salute to the flag and wonders "What does 'liberty and justice' mean?" He then takes part in a naturalization ceremony with his parents and others who have become citizens in search of "liberty and justice."

The narrator says that one of the problems with liberty is that people often want to keep it just for themselves, but there can be no true liberty unless it is shared. The film provides a brief look at this dilemma throughout American history, including the early conflicts over religious freedom and the irony of a democracy which allowed slaves to be excluded from both liberty and justice.

A playground dispute over a basketball court shows that issues relating to liberty and justice are relevant to children's everyday experiences. The film closes with an open-ended exploration of the questions—"Are we leaving some people out? Do we all have justice and liberty?" This is an excellent film which treats the subject simply and yet suggests plenty of complexity for classroom discussion.

Secondary

■ ***Justice*** (1976). Secondary. Four filmstrips with cassettes or records, teacher's guide, visual transparencies, and duplicating masters. $89.95 with cassettes, $85.00 with records, plus $1.75 shipping. (Newsweek Educational Division, 444 Madison Avenue, New York, NY 10022)

This four-part filmstrip kit is a general introduction to crime and punishment in America. The producer has attempted to give students both historical insights and an understanding of the current system and its problems. The first strip, "Conformity and Control," examines the changing definitions of crime. "Reasons to Resist" analyzes some of the causes of crime and the breakdown of obedience to conventional standards. "Justice and the Courts" explores the role of the courts, from arrest to sentencing, in the criminal justice system. Finally, "Reform or Retribution" criticizes the vindictiveness of our approach to corrections.

The broad subject matter of these four short filmstrips results in surface treatments of very complex issues. In the category of general introductory materials, however, the kit is well done and would provide a good overview for a class that will delve more deeply into specific areas of crime and criminal justice.

The teacher's guide includes complete scripts as well as a discussion guide.

■ ***Practical Law***, by Paul C. Cline, *et al.*, (1978). Junior and Senior High. 153-page softbound student text ($3.90) and teacher's guide ($1.05). Teacher's guide free with order of 25. (Holt, Rinehart and Winston, CBS Inc., 383 Madison Avenue, New York, NY 10017)

This is an attractive, highly readable text designed to directly involve the student. It does not merely present information but lists objectives and provides questions in the text which help readers identify important points. Review questions and a feature called "You and the Law" are located at the close of each chapter. Activities range from individual projects such as writing essays to group projects calling for interviewing community leaders.

The areas covered include the law, the police and the courts, civil law, the Bill of Rights, criminal law and your rights, and corrections. Three "features" recur in each chapter. One feature called "Focus on Careers" describes the training and work of law-related professionals such as forensic technicians, attorneys, and probation and parole officers. Briefly described "cases" are strategically placed to allow students to apply the text information. The third such feature consists of biographical sketches or factual anecdotes related to the text.

One very useful aspect of the teacher's guide focuses on developing reading skills through basic strategies on extracting information from narratives. Strategies for higher level skills such as inferring would also be welcome.

Generally, this is a well-developed set of teaching materials which could have been even better with attention to a few details. For example, while the case studies may be stimulating they may well also prove quite frustrating to student and teacher alike because no guidelines for examining the cases are given in either the student text or teacher's guide. The teacher's guide only notes that "before discussing a case study with the class, the teacher might find it advantageous to discuss it with an attorney." Small comfort if you didn't and students ask about these cases!

Another problem is that nowhere in the entire chapter devoted to the Bill of Rights are the amendments quoted, nor is it mentioned here or in the teacher's guide that they can be found in the appendix to the text. Also, while the teacher's guide does have a list of books and films, these are not annotated, and there is no indication of which films and books are most appropriate for which sections and chapters.

Despite these few limitations, however, this should prove a very effective law-related program for secondary students and more advanced students in junior high schools.

■ ***Personal Law*** (1977). Secondary. Four color filmstrips with cassettes, teacher's guide, ACLU resource book "The Rights of Young People," and 16 duplicating masters. Purchase price, $85. (Newsweek Educational Division, 444 Madison Avenue, New York, NY 10022)

This material gives young people a practical sense of how the law actually works and how it can work for them. It does not present broad constitutional doctrines or landmark Supreme Court cases, but rather explores and explains the day to day legal hassles experienced by everyone at some time—consumer contracts, credit ratings, warranties, tort liability, landlord-tenant disputes, divorce, and family conflicts.

This program uses real-life examples familiar to young people to give students a

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better understanding of the civil law system, legal procedures, and the way civil courts function. More importantly, the program teaches students in a very practical way their rights and responsibilities as consumers, parties to a contract, wage earners, members of a society and members of a family.

The teacher's guide includes complete scripts, discussion questions appropriate to particular sections of each filmstrip, a glossary of common legal terms, and suggested learning activities for individual and classroom work. Sixteen duplicating master sheets are included which dovetail with the learning activities in the guide. Suggested questions and activities have been carefully prepared to stimulate thought and reinforce legal concepts and procedures.

While no teaching aid can provide everything, Newsweek's *Personal Law* kit can provide a strong foundation for the teacher who is trying to make the "survival skills" of law part of secondary education.

■ ***Vital Issues.*** Secondary. Single copies are $.45, with discounts on bulk orders. Annual subscriptions (10 issues) cost $4. (Center for Information on America, Washington, CT 06793).

Vital Issues is published ten times yearly and often features examinations of legal issues by leading authorities. The following recent issues are excellent supplemental sources for law-related courses.

"Plea Bargaining: What Is It? Why Does It Exist?" by Herbert S. Miller, Vol. XXVII, Number 7 (1978). The author does a fair and thorough job of explaining plea-bargaining as a useful shortcut for the overcrowded criminal justice system while exposing the systematic violation of due process which results. The pamphlet describes the dilemma of the defendant who must weigh the prospect of leniency against the threat of a longer sentence if he refuses to plead guilty and instead demands his right to trial. Contains concise explanations of the roles of prosecutor, defense attorney, and judge in what is essentially a pretrial determination of the accused's fate.

"Education for Citizenship: The Oldest, Newest Innovation in the Schools," by R. Freeman Butts, Volume XXVI, Number 8 (1977). Dr. Butts sets forth the dilemma which has faced American education since its beginning: how to prepare students for citizenship in democracy while avoiding political indoctrination. The result has been uneven development, and sometimes regression, in civic education. Butts traces civic education through American history and discusses its status today.

"Delinquent Girls: How Does a Non-Profit Voluntary Organization Provide Services to Juvenile Female Offenders?" by Ruth Sykes and Patricia Green, Volume XXVII, Number 9 (1978). This pamphlet describes the work of Operation Sisters United, which was developed by the National Council of Negro Women (NCNW). This program was started to give support to delinquent girls in order to diminish the likelihood of repeated offenses and adult crime. Starting as a pilot project in Washington, D.C., the program has now expanded to three additional sites. Unlike rehabilitation programs in institutions, the SU program helps girls to adjust to their families and their communities while remaining with their families *in* their communities. Their program merits discussion among teachers and students interested in the problem of helping juvenile offenders.

■ ***America's Prisons*** (1976). Secondary. Multimedia kit including 5 wall posters, 30 11" by 14" photograph-cards, 1 cassette tape, 20 duplicating masters, and 1 teacher's guide. Purchase price, $59.95, plus shipping and handling. (Correctional Service of Minnesota, 1427 Washington Avenue, South, Minneapolis, MN 55404)

This kit includes a variety of materials giving a realistic perspective on prison life. The core item is the teacher's guide which includes the 20 duplicating masters and gives specific strategies for using each of the other items in the kit.

The 30 photo-cards include photographs taken in penal institutions across the country. On the back of each card are excellent open-ended questions and suggested activities for individual and small-group study. The photos lend themselves to open inquiry because they are not identified on the cards themselves. However, this information is given in the teacher's guide so that it may be shared with the students at appropriate times.

The cassette tape has a rather disconnected but highly effective series of comments about prison life by inmates and prison officials. These voices give a frighteningly realistic view of the violence within prisons as well as revealing the inmates' relationships with each other. The tape also includes a very explicit discussion of homosexuality in prisons.

The black and white photographs and wall posters are starkly striking. The teacher's guide and duplicating masters provide some excellent learning activities. All in all, these materials should be most worthwhile for older students.

■ ***The Idea of Freedom: First Amendment Freedoms,*** by Isidore Starr (1978). Secondary. Softbound text, 234 pages. $4.00, with quantity discounts available. (West Publishing Co., Inc., 170 Old Country Rd., Mineola, NY 11501)

This text is the first in Isidore Starr's series *Great Ideas in the Law.* It devotes a section to each of the six freedoms designated by the First Amendment, with separate chapters within each section devoted to key aspects of the freedom under consideration. For example, the section on freedom of speech has the following chapters: "Speakers, Hecklers, and Draft Card and Flag Burners," "Freedom of Speech in the Schools," and "Academic Freedom." The section on freedom of religion has such chapters as "X-Rays, Blood Transfusions, Peyote and Snakes," "Conscientious Objectors," and "The Flag Salute Cases."

The author examines each of the freedoms by discussing some of the landmark cases of the Supreme Court. In many chapters, relevant cases are first described, then students are asked how they might resolve the cases. Following this, decisions of the Court are given, often with excerpts from both majority and minority opinions. Questions are raised throughout the text to help students focus on critical aspects of the cases and apply the principles more generally.

The author traces historical shifts in the Court's decisions, revealing the social, economic, political, and personal forces shaping the Court's interpretations. For example, in discussing the flag salute cases he writes, "What led the Court to change its mind between 1940 and 1943 was, in part, the change in the composition of the Court. Two

"Due to a clerical error, your uncle's millions go to science and you get his body."

other developments were influential. The *Gobitis* ruling was attacked in many newspaper editorials, law reviews, and magazines. During the period between these two cases, members of Jehovah's Witnesses were mobbed, beaten, and harassed because of their views toward the flag salute."

The book is rich in substance, but the publishers could make it more accessible to both students and teachers by improving the design. Moreover, although a teacher's guide will be available upon publication of the entire series, it would be useful if at least preliminary guides were printed in conjunction with the publication of each individual unit.

"The jury will be in just as soon as somebody remembers where they were sequestered, Your Honor."

K-12

■ ***Privacy*** (1977). Elementary and secondary. Six multimedia kits, each containing 4 color filmstrips with tape cassettes, 30 softcover student books, and 1 teacher's edition with evaluation materials. Kits for grade levels I and II (elementary) are $75 each; levels III and IV (intermediate) are $88 each; levels V and VI (secondary) are $117. (Law in a Free Society, 606 Wilshire Blvd., Suite 600, Santa Monica, CA 90401)

All the kits consider the same set of questions—"What is privacy?" "What factors might explain differences in privacy behavior?" "What might be some benefits and costs of privacy?" "What should be the scope and limits of privacy?"—but the questions are treated in an increasingly sophisticated manner in each succeeding kit.

The teacher's guide for each kit provides a detailed outline of the content and objectives of the entire K-12 curriculum. This overview not only gives teachers basic background on some issues related to privacy but provides the context for approaching the subject with students. This guide has easy-to-follow, completely developed lesson plans. Enrichment activities are delineated at the close of each unit, and evaluation exercises probe for divergent thinking and higher-level responses.

The student books include a wide variety of readings and activities. The four filmstrips contained in each kit present a story exploring one or more major issues. These filmstrips are particularly well done and manage to simultaneously teach and entertain. The teacher's edition and student materials have lessons and exercises correlated with each filmstrip episode.

Law in a Free Society's *Authority*, another program in this series, was reviewed in the Winter, 1978 *Update*. Like that program, *Privacy* has a systematic K-12 design presented through creative, lively, and thoughtful instructional materials.

Teacher Resources

■ ***The Methods Book: Strategies for Law-Focused Education,*** by Arlene F. Gallagher, *et al.* (1978). Elementary and secondary teacher resource which includes background information as well as specific learning strategies. Softbound, 138 pages. $7.95, with quantity discounts available. (Social Science Education Consortium, Inc., 855 Broadway, Boulder, CO 80302)

This text, developed under the auspices of the Law in American Society Foundation, is a basic reference/resource for both preservice and inservice teachers. The opening chapter focuses on the American legal system and gives information on the framing of the Constitution, the Bill of Rights and its relationship to the Fourteenth Amendment, the court system, the Supreme Court, and the structure and function of the criminal justice system. This chapter should be a useful reference for both teachers and older students.

Case studies, values analysis, role-playing, simulations, and mock trials are treated in separate chapters. Each briefly defines and describes the method and gives specific strategies for using it. Each chapter generally provides sample activities for elementary through secondary grades.

Another chapter offers specific strategies for using community resources tailored to the level of the children. It describes how to get children out into the community, as well as how to bring community resource people into the classroom.

The final chapter gives teachers the tools to evaluate their own law-related classroom instruction, including sample checklists, anecdotal records, semantic differential scales, and Likert scales. The chapter sketches the characteristics of good teacher-made tests and closes with a discussion of teacher self-evaluation, including a set of questions to help teachers establish their own criteria for self-evaluation.

This text offers a good overview of some of the more useful teaching methods for law-related education. It is a good book for the beginner who wants to start using law-related curricula and for the old hand at law-related education who can use a good refresher course or a catalyst to explore alternative methods.

■ ***Legal Systems,*** by Blair Kolasa and Bernadine Meyer (1978). Hardbound teacher resource, 603 pages, plus glossary. $15.95. (Prentice-Hall, Inc., Englewood Cliffs, NJ 07632)

The purpose of this comprehensive text is to help the reader understand the nuts-and-bolts legal processes as well as such substantive areas of law as contracts, torts, crimes, organizations, and commercial transactions. The approach is analytical, since the authors view the law as much more than a set of rules, seeing it as a dynamic, changing process which influences people and is influenced by them.

The text does not merely explain law and the legal process, but rather helps the reader examine them by analyzing the decision-making that takes place within the civil, criminal, and administrative legal processes. Decisions and procedures are flow charted so that the reader can visualize not only the steps in the process but also the outcomes of decision-making.

Legal Systems was prepared for undergraduate law-related courses and graduate courses outside of law school. (It is regrettable that this analytical approach is not also used in law schools.) It introduces the reader to the law, uses a systems format to delineate steps in the legal process, and analyzes the myriad factors at work in the decisions that are made by various actors in that social process. It is a highly recommended book for anyone who wants to understand how our legal system really works. ☐

Classroom Strategies

(Continued from page 14)

five dollars, you can have it," chuckles Norton.

3. A boy needs to have surgery on his hand. His father asks the doctor how long the boy will be kept in the hospital, and the doctor replies, "three or four days, not over four; then the boy can go home . . . " Is that an offer, and can the man sue if his son is hospitalized for over a month?
4. Helen writes to Frank: "Financial problems require that I sell my house. I would consider $35,000 for it." Frank writes back, "I will pay $35,000 for your house." Has he accepted a valid offer, and does a contract exist?
5. A hardware store advertises: "Tuff-Guy Chain Saws—Now Available at General Hardware for $50."
6. The same hardware store advertises that it will sell "One hundred Tuff-Guy chain saws for $50 each to the first one hundred customers to walk through our doors Saturday."
7. The president of Wunnerful Widgets Inc. writes to the owner of General Hardware, "I will sell you any quantity of widgets you desire for $3 a pair." Is this a valid offer? Has a contract been created if the owner of General Hardware writes back, "Fair enough. I accept."?

A "feeler" or a statement of one's intent to enter into discussion does not constitute an offer. Thus, in the first example, Laurel's statement, "I think I'll sell . . . " is merely a statement of intention. Even if Hardy should reply "love to have it; here's the cash," no contract would result.

In the second example, the offer is made in jest and so is not a valid offer. Even if it is "accepted," no contract is created. The test used by a court would be whether a "reasonable person" in Ralph's position would believe Norton's "offer" to sell his very valuable watch for five dollars to be a serious proposal to enter into a contract. Unless that ficticious "reasonable person" could perceive such a statement to be a sincere offer, then acceptance is irrelevant, for there has been no meeting of minds or mutual assent.

The third scenario is included to point out to your students the importance of distinguishing between an offer and an expression of opinion. Again, the test applied in the case of the doctor's statement is whether a reasonable person would think the doctor proposed a bargain or stated opinion.

In the actual case that this hypothetical is based upon, *Hawkins v. McGee*, 146 A. 641 (1929), the court held that the doctor had not made an offer to perform an operation resulting in four days hospitalization. Rather, a reasonable person in the position of the boy's father should have understood that the doctor was merely expressing an opinion as to how long the hospital stay would be.

In the fourth example, the statement made by Helen in her letter to Frank could reasonably be interpreted as a solicitation of bids or an announcement of her intent to contract in the future. Such a statement cannot be "accepted," however, because it does not express a present intention to be bound to a contract.

In the absence of special circumstances, an ordinary newspaper advertisement is not an offer. The hardware store ad in example five would more appropriately be considered a request to the potential customer to make an offer for the chain saws. Therefore, if the store is unable to procure the saws, and a customer lays down $50, the store is under no contractual obligation to sell him one. Most advertisements are not offers to sell because they lack sufficient words of commitment to sell.

The sixth example, however, would probably be considered a valid offer. How is it different? If an advertisement contains words expressing the advertiser's commitment or *promise* to sell a particular number of units or to sell them in a particular manner, there is a much greater likelihood that a valid offer has been made.

The importance of such definiteness is illustrated by the final example. For a contract to be formed, the parties must reach mutual assent on all of the essential terms of the agreement—(a) parties, (b) subject matter and quantity; (c) time for performance, and (d) price or consideration. Ask your students to consider which of these essential elements are present in the "offer" made by Wunnerful Widget.

Wunnerful Widget's offer is not fatally defective on its own. Had General Hardware's acceptance supplied the missing terms, a contract could have been formed. However, since the offer doesn't contain details as to the quantity to be contracted for and the acceptance does not fill in this missing term, there is no contract because of indefiniteness.

It's also useful to look at the process from the standpoint of the person to whom the offer is made. Ask your students what alternatives they have when they are asked to respond to a valid offer. As common sense would suggest, they can (1) accept the offer and all of its essential terms and conditions; (2) totally reject the offer; or (3) add, modify, or delete terms undesirable to them.

If they choose the latter alternative, they have effectively rejected the original offer and made a counter-offer. If this occurs, the entire process begins anew until one party either totally rejects or accepts the offer or counter-offer of the other.

Students should understand that an offer, in and of itself, creates no legal relationship or obligation. What the offer does create is the power to accept it and thereby create a contract. In this regard, it is important to understand who has the "power of acceptance" and what form that acceptance can take.

Again, the law is eminently sensible. It holds that an offer may be accepted only by the person it was intended for. Obviously, when Alphonse offers to buy Gaston's motorcycle, he creates a power of acceptance in Gaston only. Even if Godot or anyone else with an identical motorcycle should "accept" Alphonse's offer, no contract would result. However, General Hardware's offer to sell $50 chain saws to the first 100 customers on Saturday morning created a power of acceptance in each of those 100 people.

Lesson Four—Consideration

The third and least understood essential of a contract is consideration. As we learned from the second lesson's example where Grandfather promised his model-T Ford to Tom, a bare promise—even in writing—is generally insufficient of itself to create a legal obligation. Something—some consideration—must be given in return.

The function of the consideration requirement is to distinguish between those promises which are enforceable and those which are not. There is no strict definition of "consideration" on which all courts agree, but generally to support a promise by consideration you must *do* or *promise to do* something you are not legally obligated to do, or you must *refrain* from doing or *promise to refrain* from doing something which you have a legal right to do. In a valid contract, then, each party is doing something he does not have to do (or refraining from something he has a right to do); each party is suffering a "detriment" of some sort.

The following scenarios illustrate situations where consideration may or may not be present. Discuss the definition with students, then ask them whether there is consideration from both parties to support a contract in each of the following situations.

1. Rich Uncle offers his nephew $5,000 if he will refrain from drinking and smoking until he reaches 21, and Nephew refrains. Uncle refuses to pay on Nephew's 21st birthday, Nephew sues, and Uncle says there was no contract because Nephew suffered no legal detriment, and in fact benefitted by refraining from such harmful activities.
2. Crash runs a red light and collides with Dash. Because Crash has no insurance, he makes a deal with Dash. It reads in part, "in consideration of Mr. Crash's payment of $500, Ms. Dash promises not to bring any legal action against Mr. Crash." Has a contract been created? What consideration did Ms. Dash give in return for Crash's payment?
3. Marjorie is hired by the local department store to work for the full month of December for $100 per week. At the height of the Christmas rush, Marjorie tells the store owner that she won't work one more day unless he promises to give her another $50 per week. The store owner promises but later refuses to pay up. Can Marjorie sue for breach of contract? Did she have an enforceable contract for the additional $50 per week? What did each party give as consideration to support the contract?
4. Wealthy Widow offers to give her summer estate to the Misguided Children's Foundation if they will promise to maintain the rose garden surrounding her husband's gravesite on the grounds. The Foundation accepts her offer and signs a contract. However, Widow later decides to sell the mansion to a Hare Krishna sect. She claims that the Foundation had never given any consideration, so there is no contractual obligation to complete the deal. Is a promise to maintain a rose garden sufficient consideration for a summer estate?

The New York Court of Appeals ruled on the problem presented in the first example in 1891 in the case of *Hamer v. Sidway* (124 N.Y. 538). While the court did not sanction the enjoyment of alcohol and tobacco, neither did it

The NFL Standard Players Contract

THIS CONTRACT is between _________, hereinafter "Player," and _________, a _________ corporation (limited partnership) (partnership), hereinafter "Club," operating under the name of the _________ as a member of the National Football League, hereinafter "League." In consideration of the promises made by each to the other, Player and Club agree as follows:

1. TERM. This contract covers one football season, and will begin on the date of execution or April 1, 19____, whichever is later, and end on April 1, 19____, unless extended, terminated, or renewed as specified elsewhere in this contract.

2. EMPLOYMENT AND SERVICES. Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game. Player will report promptly for and participate fully in Club's official pre-season training camp, all Club meetings and practice sessions, and all pre-season, regular-season and post-season football games scheduled for or by Club. If invited, Player will practice for and play in any all-star football game sponsored by the League. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League.

3. OTHER ACTIVITIES. Without prior written consent of Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football-related activities other than for Club or from engaging in any activity other than football which may involve significant risk of personal injury.

4. PUBLICITY. Player grants to Club and League, separately and together, the authority to use his name and picture for publicity and promotional purposes in newspapers, magazines, motion pictures, game programs and roster manuals, broadcasts and telecasts, and all other publicity and advertising media, providing such publicity and promotion does not in itself constitute an endorsement by Player of a commercial product. Player will cooperate with the news media, and will participate upon request in reasonable promotional activities of Club and the League.

5. COMPENSATION. For performance of Player's services and all other promises of Player, Club will pay Player a yearly salary of $________, payable as provided in Paragraph 6; such earned performance bonuses as may be called for in Paragraph 24 of or any attachment to this contract; Player's necessary traveling expenses from his residence to training camp; Player's reasonable board and lodging expenses during pre-season training and in connection with playing pre-season, regular-season, and post-season football games outside Club's home city; Player's necessary traveling expenses to his residence if this contract is terminated by Club; and such additional compensation, benefits and reimbursement of expenses as may be called for in any collective bargaining agreement in existence during the term of this contract. (For purposes of this contract, a collective bargaining agreement will be deemed to be "in existence" during its stated term or during any period for which the parties to that agreement agree to extend it.)

6. PAYMENT. Unless this contract or any collective bargaining agreement in existence during the term of this contract specifically provides otherwise, Player will be paid as follows: If Player has not previously reported to any NFL club's official pre-season training camp in any year, he will be paid 100% of his yearly salary under this contract in equal

agree with Uncle's contention that Nephew's abstention had been a benefit to the boy and therefore not sufficient legal detriment to be "consideration." It held that the nephew had a legal right to smoke and drink and that in refraining from doing something he was legally entitled to do, he had provided consideration for the $5,000. In upholding the nephew's claim, the court made it clear that *limiting one's free choice of behavior* (be it where one goes, what one does, or how one spends one's money) is the essence of consideration.

Applying the same reasoning to the second hypothetical, we can see that in promising not to sue for damages, Ms. Dash has certainly limited her free choice of behavior. She has promised to refrain from doing something (suing) which all adults have a legal right to do when they have a valid claim. (However, one must have a "valid" claim and be willing to forego suing on that claim before courts will look upon that forebearance as consideration.)

In situation three, has Marjorie limited her "free choice of behavior" in agreeing to continue her work at the department store in exchange for the owner's promise of a raise? Not really, because she had earlier entered into an informal contract with the store owner to work the entire month of December for $100 per week. Most courts would hold that since Marjorie was already legally obligated to perform her contract (to work for $100 per week), her promise to continue to work was not a detriment and therefore would not constitute consideration for the store owner's promise to give her an extra $50. Since Marjorie gave no real consideration, her employer's promise was only a promise and, therefore, not enforceable. Broken promises, where nothing is offered in exchange, are matters for the conscience and not the court.

But can maintenance of a rose garden serve as consideration for Widow Wealthy's summer mansion? The exchange hardly seems equal, but it is nonetheless enforceable. In most situations, so long as you suffer *some detriment*, no matter how small, courts will find that there was consideration. If the requirement of consideration is met, courts will usually not inquire into the adequacy of the consideration.

It might be interesting at this point to ask students to create some hypotheticals of their own to illustrate consideration and the other elements of a contract. The best way to come up with hypothetical situations is to do what we've done and adapt actual cases. Contracts casebooks, such as those used in law school, would provide a ready

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weekly or bi-weekly installments over the course of the regular season period, commencing with the first regular season game played by club. If Player has previously reported to any NFL club's official pre-season training camp in any year, he will be paid 10% of his yearly salary under this contract in equal weekly installments over the course of the pre-season period, commencing with the end of the first week of Club's official pre-season training camp as designated for Player and ending one week prior to the first regular season game played by Club, and 90% of his yearly salary in equal weekly or bi-weekly installments over the course of the regular season period, commencing with the first regular season game played by Club. If this contract is executed or Player is activated after the start of Club's official pre-season training camp, the yearly salary payable to Player will be reduced proportionally and Player will be paid the weekly or bi-weekly portions of his yearly salary becoming due and payable after he is activated. If this contract is terminated after the start of Club's official pre-season training camp, the yearly salary payable to Player will be reduced proportionately and Player will be paid the weekly or bi-weekly portions of his yearly salary having become due and payable up to the time of termination (prorated daily if termination occurs before one week prior to the first regular season game played by Club.)

7. DEDUCTIONS. Any advance made to Player will be repaid to Club, and any properly levied Club fine or Commissioner fine against Player will be paid, in cash on demand or by means of deductions from payments coming due to the Player under this contract, the amount of such deductions to be determined by Club unless this contract specifically provides otherwise.

8. PHYSICAL CONDITION. Player represents to Club that he is and will maintain himself in excellent physical condition. Player will undergo a complete physical examination by the Club physician upon Club request, during which physical examination Player agrees to make full and complete disclosure of any physical or mental condition known to him which might impair his performance under this contract and to respond fully and in good faith when questioned by the Club physician about such condition. If Player fails to establish or maintain his excellent physical condition to the satisfaction of the Club physician, or make the required full and complete disclosure and good faith responses to the Club physician, then Club may terminate this contract.

9. INJURY. If Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and, in accordance with Club's practice, will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period, as Player is physically unable to perform the services required of him by this contract because of such injury. If Player's injury in the performance of his services under this contract results in his death, the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary or, in the absence of a stated beneficiary, to his estate.

10. WORKMEN'S COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workmen's compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workmen's compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workmen's compensation.

11. SKILL, PERFORMANCE AND CONDUCT. Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, Club may terminate this contract.

source, but students can also go to primary sources—state and federal reporter systems—which contain a great variety of contracts cases. Of course, a law school library is often the best place to research cases, but most bar associations, county and city governments, and law firms have some reports of cases.

Lesson Five—Looking at an Actual Contract

The main purpose of these introductory lessons is to make contracts less scary for students, but sooner or later you'll have to help them cope with contracts which are tougher than the simple hypotheticals we've posed in this article. It's important for them to see that many contracts are the final result of long negotiations that go on until an agreement is reached on terms which will dictate each party's rights and duties.

What these terms are, which party they favor, and how they came to be included usually is a reflection of the relative bargaining position of the parties. Nearly any term or clause may be included in a contract, and the law will enforce it so long as it has been agreed to by both parties and does not require anything illegal.

The contract reprinted below is the basic agreement between the National Football League and the players union. It is essentially straightforward in language, without complicated references to statutory law or lawyerly "wherefores" and other impenetrable jargon.

The contract could be the basis of a wide variety of exercises. You might xerox it and pass it out to the class as a whole. Ask them to discuss how the requirements for a valid contract which were discussed earlier appear here in a more complex and sophisticated form. What consideration is being exchanged between the parties? What promises are the parties exchanging? Is the contract specific as to parties, subject matter, and time for performance?

Several clauses would be found in most kinds of contracts. For example, paragraph 22 serves to protect the integrity of the document. Under it, neither party may later complain that the contract was modified orally and really means something different from what it says. However, the parties can modify the contract in writing, and paragraph 24 gives them space to do so.

You might also have students discuss some of the clauses that are peculiar to this contract. Have them think about why each clause is there. Does it represent the interest of the teams, the players, or both? Is it required by the nature of the sport? For example, Paragraph 3, "Other Activities," requires the player to refrain from activities off the field that might make him unable to perform as an athlete. Pre-

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12. TERMINATION. The rights of termination set forth in this contract will be in addition to any other rights of termination allowed either party by law. Termination will be effective upon the giving of written notice, except that Player's death, other than as a result of injury incurred in the performance of his services under this contract, will automatically terminate this contract. If this contract is terminated by Club and either Player or Club so requests, Player will promptly undergo a complete physical examination by the Club physician.

13. INJURY GRIEVANCE. Unless a collective bargaining agreement in existence at the time of termination of this contract by Club provides otherwise, the following injury grievance procedure will apply: If Player believes that at the time of termination of this contract by Club he was physically unable to perform the services required of him by this contract because of an injury incurred in the performance of his services under this contract, Player may, within a reasonably brief time after examination by the Club physician, submit at his own expense to examination by a physician of his choice. If the opinion of Player's physician with respect to his physical ability to perform the services required of him by this contract is contrary to that of the Club's physician, the dispute will be submitted within a reasonable time to final and binding arbitration by an arbitrator selected by Club and Player or, if they are unable to agree, one selected by the League Commissioner on application by either party.

14. RULES. Player will comply with and be bound by all reasonable Club rules and regulations in effect during the term of this contract which are not inconsistent with the provisions of this contract or of any collective bargaining agreement in existence during the term of this contract. Player's attention is also called to the fact that the League functions with certain rules and procedures expressive of its operation as a joint venture among its member clubs and that these rules and practices may affect Player's relationship to the League and its member clubs independently of the provisions of this contract.

15. INTEGRITY OF GAME. Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.

16. EXTENSION. If Player becomes a member of the Armed Forces of the United States or any other country, or retires from professional football as an active player, or otherwise fails or refuses to perform his services under this contract, then this contract will be tolled between the date of Player's induction into the Armed Forces, or his retirement, or his failure or refusal to perform, and the later date of his return to professional football. During the period this contract is tolled, Player will not be entitled to any compensation or benefits. On Player's return to professional football, the term of this contract will be extended for a period of time equal to the number of seasons (to the nearest multiple of one) remaining at the time the contract was tolled. The right of renewal, if any, contained in this contract will remain in effect until the end of any such extended term.

17. RENEWAL. Unless this contract specifically provides otherwise, Club may, by sending written notice to Player on or before the April 1 expiration date referred to in Paragraph 1, renew this contract for a period of one year. The terms and conditions for the renewal year will be the same as those provided

sumably both the team and the athlete want him to stay fit, so why is it necessary to make it part of the standard contract? Why doesn't the clause enumerate the prohibited activities but rather speak in generalities? What sort of activities might be covered: skydiving? professional wrestling? skiing? What about an athlete who falls from his roof when he is shingling it?

Paragraphs 8, 9, 10, 12, and 13 also relate to injuries, an important subject in a sport where almost all players are hurt at least once a year. Under clause 13, what happens if a team releases a player but he claims that he is injured and can't perform? Paragraph 13's grievance procedure allows the league commissioner to choose an arbitrator if the player and team can't agree on one. Is that in the interest of players, considering that the commissioner is an employee of the owners?

As an alternative to a general discussion of the contract, you might break the class into small groups and have each group analyze a clause. What does it say? What effect would it have? What is its purpose? Does it favor management or players? They could then report on these and other matters to the class.

You might also have each group create two or three hypothetical situations that could arise under their clause. Ask them how the clause might apply to each scenario.

Another small-group possibility would be to role-play union and management teams bargaining on a new contract. Each group can be given one clause to negotiate, or they can be asked to work out an agreement based on several key clauses. To introduce some zip into the exercise, tell students to bargain hard and try to reach an agreement both parties can live with. Prepare students as much as possible by giving them background information on certain clauses.

For example, the "option clause" (paragraph 17) now permits the team to renew a player's contract (at 90% of his last year's salary) for a single year if he doesn't come to terms, but after that year he's free to sign with any team he wishes. However, under the so-called Roselle Rule, promulgated by the league commissioner, his new team has to compensate his old team by giving up players or draft choices. (For more on the option clause, see lead article and box on pp. 44-45.)

Let's assume that the players want an end to the option year and the Roselle rule, while management wants the rule retained and the option lengthened to two years. How can they work out this impasse? Can concessions on some other issues included in the contract provide a way for one side to make concessions on this issue? What about

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in this contract for the last preceding year, except that there will be no further right of renewal in Club and, unless this contract specifically provides otherwise, the rate of compensation for the renewal year will be 90% of the rate of compensation provided in this contract for the last preceding year. The phrase "rate of compensation" as used above means yearly salary, including deferred compensation, and any performance bonus, but excluding any signing or reporting bonus. In order for Player to receive 90% of any performance bonus under this contract he must meet the previously established conditions of that bonus during the renewal year.

18. ASSIGNMENT. Unless this contract specifically provides otherwise, Club may assign this contract and Player's services under this contract to any successor to Club's franchise or to any other Club in the League. Player will report to the assignee club promptly upon being informed of the assignment of his contract and will faithfully perform his services under this contract. The assignee club will pay Player's necessary traveling expenses in reporting to it and will faithfully perform this contract with Player.

19. FILING. This contract will be valid and binding upon Player and Club immediately upon execution. A copy of this contract, including any attachment to it, will be filed by Club with the League Commissioner within 10 days after execution. The Commissioner will have the right to disapprove this contract on reasonable grounds, including but not limited to an attempt by the parties to abridge or impair the rights of any other club, uncertainty or incompleteness in expression of the parties' respective rights and obligations, or conflict between the terms of this contract and any collective bargaining agreement then in existence. Approval will be automatic unless, within 10 days after receipt of this contract in his office, the Commissioner notifies the parties either of disapproval or of extension of this 10-day period for purposes of investigation or clarification pending his decision. On the receipt of notice of disapproval and termination, both parties will be relieved of their respective rights and obligations under this contract.

20. DISPUTES. Any dispute between Player and Club involving the interpretation or application of any provision of this contract will be submitted to final and binding arbitration with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs. If no collective bargaining agreement is in existence at such time, the dispute will be submitted within a reasonable time to the League Commissioner for final and binding arbitration by him, except as provided otherwise in Paragraph 13 of this contract.

21. NOTICE. Any notice, request, approval or consent under this contract will be sufficiently given if in writing and delivered in person or mailed (certified or first class) by one party to the other at the address set forth in this contract or to such other address as the recipient may subsequently have furnished in writing to the sender.

22. OTHER AGREEMENTS. This contract, including any attachment to it, sets forth the entire agreement between Player and Club and cannot be modified or supplemented orally. Player and Club represent that no other agreement, oral or written, except as attached to or specifically incorporated in this contract, exists between them. The provisions of this contract will govern the relationship between Player and Club unless there are conflicting provisions in any collective bargaining agreement in existence during the term of this contract, in which case the provisions of the collective bargaining agreement will take precedence over conflicting provisions of this contract relating to the rights or obligations of either party.

23. LAW. This contract is made under and shall be governed by the laws of the State of ________.

24. SPECIAL PROVISIONS. (The original contract leaves several inches of blank space here.)

Our thanks to Ed Garvey, Executive Director of the National Football League Players Association, for permission to reprint this contract.

union demands for an end to the practice of fining players who miss days of training camp (permitted under paragraph 2 of this contract)? What if players want some control over when and where they're traded? (Paragraph 18 gives them no rights.) What if management wants to increase its authority to levy fines and keep its authority to reduce the size of teams (an area not covered by this contract)?

Another spin-off of studying the NFL basic agreement could be to invite a labor lawyer or negotiator to answer some questions that were raised in class or play a judge in a mock trial based on one of the hypotheticals students come up with.

You might also want to get into other labor agreements that are closer to home. Many of your students' parents may belong to unions, and some students themselves may be members of a union, such as grocery store checkers and baggers, and may themselves have a copy of a union contract. In many school districts, teachers themselves are covered by a collective bargaining agreement which is readily available. Any of these contracts could serve as the basis for exercises such as the ones outlined here. It would be particularly valuable to get union and management representatives to come to class and talk about these contracts and the negoitation process.

Will these lessons fully prepare your students for the world of contracts? Well, not quite. Every one of the areas we've discussed is rife with rules, subrules, and exceptions to rules. Undoubtedly, as your class works through these activities you and the students will want to research some source materials on contracts.

But these exercises should provide the basis for mastering the basic elements of a contract—offer, acceptance, consideration—and understanding the bargaining process through which contracts get made.

Things have changed a lot since the days when a man was as good as his word and a promise was a question of honor. The law has provided a complex system intended to keep us all honorable. Next issue, we'll look at how contracts work as ties that bind, what problems cause disputes, and what happens when one side doesn't keep its word. □

Contracts Materials

Law in Everyday Life (1978). This high school text summarizes most areas of law which are of practical importance to young people. The chapter on "Buying and Borrowing" gives fairly extensive coverage to contracts, includes current cases, and tells students how to find information about contract law in their state. Each chapter concludes with questions for discussion and exercises to test comprehension. Paperback, 232 pp. Student text (1-9 copies) costs $4.92, (10 or more) $3.69. Teacher's manual is $1.29. Order from McDougal, Littell & Company, P.O. Box 1667-R, Evanston, IL 60204.

Law and the Consumer (1974). This high school booklet on consumer law includes very good sections on oral, written and implied contracts. Other sections discuss warranties, fraud in contracts, and security interests. One chapter is devoted to the consequences of breach of contract. Case descriptions and discussion questions included. Paperback, 101 pp. Cost: $2.28 to teachers or schools, $3.04 list. Order from Houghton Mifflin Company, One Beacon Street, Boston, MA 02107.

Street Law: A Course in Practical Law (1975). Developed by the National Street Law Institute for grades 8-12, the student text covers criminal, consumer, family, housing, environmental, and individual rights law. The consumer section includes a fairly extensive discussion of written and oral contracts, warranties, and the position of minors who contract. Very good text for any general law course. Paperback, 352 pp. Student text (1-9 copies) $3.50, (10-29) $3.25. Teacher's manual is $2.50. Order from West Publishing Co., 170 Old Country Road, Mineola, NY 11501.

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Understanding Consumer Credit (1968). Well-organized presentation of the advantages and disadvantages of credit, guidelines for borrowing money, and warnings about consumer contracts. Includes illustrations, questions, and exercises. Paperback, 46 pp. The cost is 99c. Order from Follett Publishing Company, P.O. Box 5705, 1010 W. Washington, Chicago, IL 60607.

Legal Systems (1978). This text was developed for college law-related courses but is also an excellent resource for teachers. The chapter on contracts is an excellent summation of contract law and Uniform Commercial Code provisions in all states. (See *Curriculum Update* review for more information about this book.) Hardback, 603 pp. The cost is $15.95. Order from Prentice-Hall, Inc., Englewood Cliffs, NJ 97632.

The Law of Contracts (1970). Describes legal aspects of contracts, including how contracts are made, how they operate, and various kinds of contracts. Also includes discussion of contract reforms and contracts in international law. Provides some technical information. Appendices include sample contract forms and a summary of state statutes on contracts. More appropriate as a teacher resource than classroom text. Hardback, 120 pp. The cost is $4.95. Order from Oceana Publications, 75 Main Street, Dobbs Ferry, NY 10522.

What You Should Know About Contracts (1969). A very detailed layman's guide to the requirements for a valid contract, contract interpretation, dissolving contracts, and the Uniform Commercial Code. Appendices include examples of contracts and a glossary of legal terms. Very useful. Hardback, 173 pp. The cost is $4.95. Order from Arco Publishing Company, Inc., 219 Park Avenue South, New York, NY 10003.

Will Bernard

Cases on Sports and Torts

Human Target

Thousands of times every hunting season a hunter, out to shoot game, hits a human being instead. Taking due note of this carnage, the law is quicker to impose legal liability in hunting than in any other sport.

The basic rule: a hunter must not pull the trigger without ample assurance that he is indeed shooting only at game.

In one case a hunter, noticing "something grey" in a tree, decided it was a squirrel and fired away. But the something grey turned out to be a man plucking wild grapes.

Struck in the shoulder, the man sued for damages and collected. The court said the hunter had not exercised a degree of care "commensurate with the danger."[1]

Furthermore, a hunter must handle his weapon with the extra circumspection it deserves. In another case a hunter leaned his gun—with the safety off—against the side of a wobbly duck blind. It discharged, sending a slug into his companion's leg.

Here too the court held the hunter liable for failing to show a sensible concern for the gun's deadly potential.[2]

Nevertheless, there can be no liability if the injury was truly accidental. Thus:

Joe and Eddie, on a bird hunt, were agreed as to their respective locations in the woods. But Eddie, after stopping to tie his shoelaces, failed to call out that his position had changed. When Joe saw a bird taking wing, he fired his shotgun and unwittingly hit Eddie.

Although Eddie later filed a damage suit, the court could see no grounds for holding Joe responsible. The court said he had merely "fired in a direction where any experienced bird hunter would not be without having given warning that he was out of position."[3]

(For this and other *Family Lawyer* articles, descriptions are sometimes adapted from cited cases).

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[1] *Koontz v. Whitney,* 109 W. Va. 114, 153 S.E. 797 (1930).

[2] *Adams v. Dunton,* 284 Mass. 63, 187 N.E. 90 (1933).

[3] *Barnes v. Haney,* 280 Ala. 39, 189 S. 2d 779 (1966).

Collision at Second Base

Sprinting from first base to second on a ground ball, Eddie determined to prevent a double play at all costs. With his right arm held high, he slammed full speed into the second baseman. Although Eddie did not succeed in stopping the double play, he did succeed in fracturing the second baseman's jaw.

The victim lost no time in suing Eddie for damages.

"This was unnecessary roughness," he told the court. "Furthermore, I wasn't even in the baseline when he hit me."

The court decided Eddie was indeed liable for inflicting this "wanton injury" on a fellow athlete.[1]

Like any other citizen, a baseball player can be held liable for illegal behavior. The mere fact that baseball is a sport does not exempt it from basic rules of law.

On the other hand, some risks must be accepted as a part of the game. Another player, sliding into second base, fractured the second baseman's ankle. The latter had been gazing toward the outfield to catch a throw.

But here the court found no basis for liability, since this was the kind of accident that is "normal" to the game.[2]

Nor is there any liability when there is no provable act of negligence. In a sandlot game, the youth at the plate realized that his hands were sweaty. He wiped them on his pants, then gripped the bat as hard as he could.

But when he swung, the bat slipped out of his hands and struck another player in the leg.

Was the batter liable for the harm he had caused? A court said no because he had made every reasonable effort to be careful.

Said the judge:

"What more could he have done?"[3]

---

[1] *Bourque v. Duplechin,* 331 S. 2d 40 (1976).

[2] *Tavernier v. Maes,* 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

[3] *Gaspard v. Grain Dealers Mut. Ins. Co.,* 131 S. 2d 831 (1961).

"Harrison K. Woodleigh NEVER yields."

Accidents at Camp

It was Activity Hour at a summer camp, and a group of boys were having a water fight on the grass. One youngster, making a quick turn, skidded and hit the ground with a thud. Upshot: a damage suit against the camp.

"Grass is slippery when wet," noted the boy's attorney in a court hearing. "The counselor in charge had no business allowing such a dangerous game."

But the court decided the game was not unusually dangerous, at least in terms of the camping life. Holding the camp not liable, the judge said he did not want to "so sterilize camping activities as to render it sedentary."[1]

This is the law's usual attitude—that recreation at camp is expected to include some degree of risk. Courts take a similar view with regard to the condition of camp grounds. Thus:

At another camp a rustic trail led from the bunks to the social hall. Walking there one night, a boy strayed off the trail and collided with a tree. Could the camp be held liable for having failed to string lights along the pathway?

A court said no, because darkness was appropriate to camping atmosphere. The judge commented:

"Floodlighting the woods would be unfair to (campers) who seek the adventure of living closer to nature, participating in astronomical study at night or bird study before dawn."[2]

Still, hazards must be kept within reasonable limits.

A girl camper, swinging on a ladder bar, lost her grip and fell onto some rocks. In these circumstances a court ordered the camp to pay damages for injuries suffered.

The court said tolerating the presence of rocks, right where campers were likely to fall, showed a disregard for sensible standards of safety. The rocks, said the court, added nothing to the sport except danger.[3]

[1] *Sauer v. Hebrew Institute of Long Island,* 233 N.Y.S. 2d 1008 (1962).

[2] *Kimbar v. Estis,* 153 N.Y.S. 2d 197 (1956).

[3] *Robbins v. Camp Sussex, Inc.*, 216 N.Y.S. 2d 176 (1960).

"We Are Not Responsible"

Marvin decided he had a good claim for damages after hurting his shoulder in a golfing mishap. He had been thrown out of a golf cart when it tipped over. The cause: grabby brakes.

But in a court hearing, the rental company brought out the contract form which Marvin had signed.

"It says we are not responsible for any injuries even if we are negligent," said the company. "That puts us in the clear."

However, the court pointed out that the "not responsible" clause was buried in a thicket of legal verbiage. Finding it invalid, the court ruled in Marvin's favor.[1]

Such clauses are often used in sports and entertainment activities to protect the management against lawsuits. But generally speaking, the law is reluctant to let management—or anyone else, for that matter—escape responsibility for negligence.

Hence, the courts tend to disregard these clauses if they reasonably can.

In another case such a statement appeared on the tickets sold at a roller skating rink. But the tickets were immediately collected at the door. A jury decided this arrangement did not give patrons fair warning of the management's claim of non-liability.[2]

On the other hand, such a clause will usually stand up in court if the message gets across successfully.

At a gym, a woman skidded on a slippery spot in the locker room, but when she sued for damages, the management pointed to her membership contract, excusing it from any and all liability.

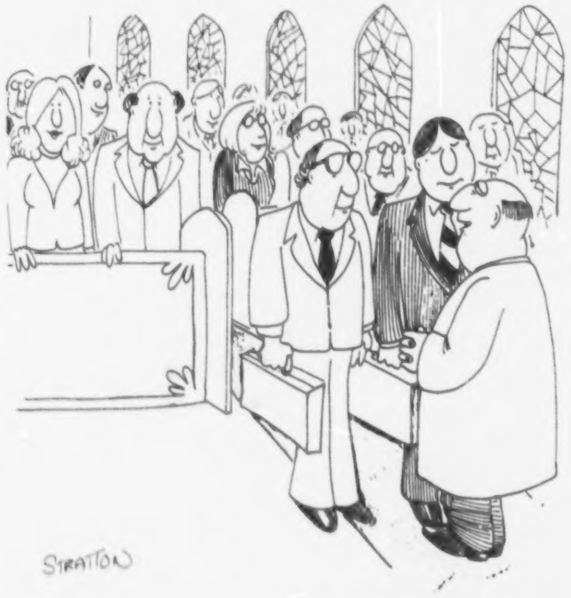
The contract language was perfectly clear. Furthermore, the woman had had plenty of time to read it. Accordingly, a court upheld its validity and turned down her claim.

"She voluntarily applied for membership and agreed to the terms upon which this membership was bestowed," said the court. "She may not repudiate them now."[3]

[1] *Baker v. Seattle,* 79 Wash. 2d 198, 484 P. 2d 405 (1971).

[2] *O'Brien v. Freeman,* 299 Mass. 20, 11 N.E. 2d 582 (1937).

[3] *Ciofalo v. Vic Tanney Gyms, Inc.*, 177 N.E. 2d 925 (1961).



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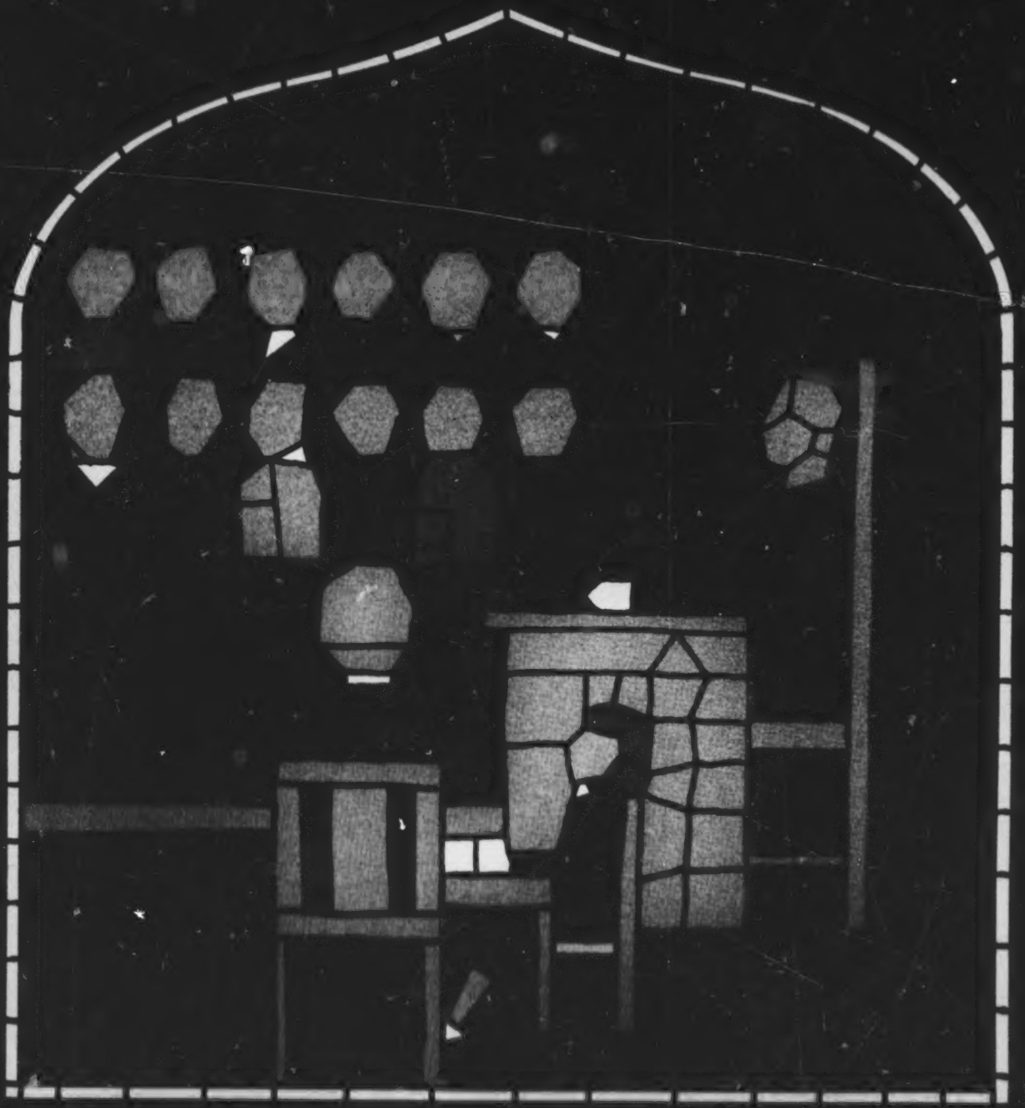

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OPENING STATEMENT

The massacre/mass suicide of American cultists in Guyana was *the* bizarre news story of the decade. It was covered like a blanket by daily papers, news magazines, and television. The cult phenomenon stirred reactions from psychologists, clergymen, public figures, and assorted savants of all stripes.

But amidst all the furor, one aspect of the tragedy got lost—the constitutional dimension. Many people called for a tough look at cults in general; many others blamed U.S. officials for allowing the situation at Jonestown to deteriorate. Almost no one pointed out that the Bill of Rights' guarantee of the "free exercise of religion" places extra burdens on those who would investigate religions and curtail their activities.

This isn't to say that religions are exempt from the law, nor that U.S. officials are necessarily without blame in how they handled the situation. It is to say, though, that very few Americans, in or out of the media, seem aware of the special place of religion in American law and American life. This issue of *Update* tries to explore the roles of religion and law in the democratic adventure while discussing how our Constitution deals with religion.

This issue's lead article is a panoramic look at how the Supreme Court has grappled with a dozen tough church-state issues. Its author is one of the giants in law-related education, Isidore Starr, a lawyer and educator who has often examined the First Amendment freedoms in the course of his long career.

Iz Starr's article predicts that religious issues will always be with us, and as if to confirm his prediction, two articles by Lisa Broido focus on issues that have sprung up in this decade. One article by Ms. Broido looks at the many legal tangles raised by attempts to deprogram Moonies, Hare Krishnas, and other young cultists. Her other article deals with a brand new phenomenon, born-again Christian business directories that may violate anti-discrimination laws.

One of the perennial church-state issues has been the taxation of churches. In an *Opposing Views* debate, Dean Kelley of the National Council of Churches argues that exempting churches from taxation is the best way of meeting the constitutional imperative of neutrality toward religion; in reply, New York lawyer Steven Delibert contends that such exemptions violate the Constitution by favoring religion.

Two other articles round out this issue's look at religion and the law. *Update*'s expert on comparative law, John Walsh, examines how two old antagonists, the Saudis and the Israelis, handle church and state issues. He finds some surprising similarities. This issue's *Update Looks Back* covers one of the more unfortunate episodes in the annals of American law, the federal government's no-holds-barred battle to eliminate the Mormon practice of polygamy.

Of course, we also include a generous portion of *Update*'s regular features. Law students Ilene Goldstein and Tom Stanfa weigh in with another installment of our *Classroom Strategies* on teaching about contracts. Co-editor Norman Gross reports on some important new Supreme Court decisions, *Family Lawyer* tackles some tricky problems of evidence, and *Curriculum Update* tells you about good new materials on a variety of topics.

The next issue of *Update* will focus on juvenile justice, and the one following will deal with school law as it affects students, parents, teachers, and administrators. We'd like to know what you'd like to see us cover in *Update*. Please write us with suggestions.

—Charles White

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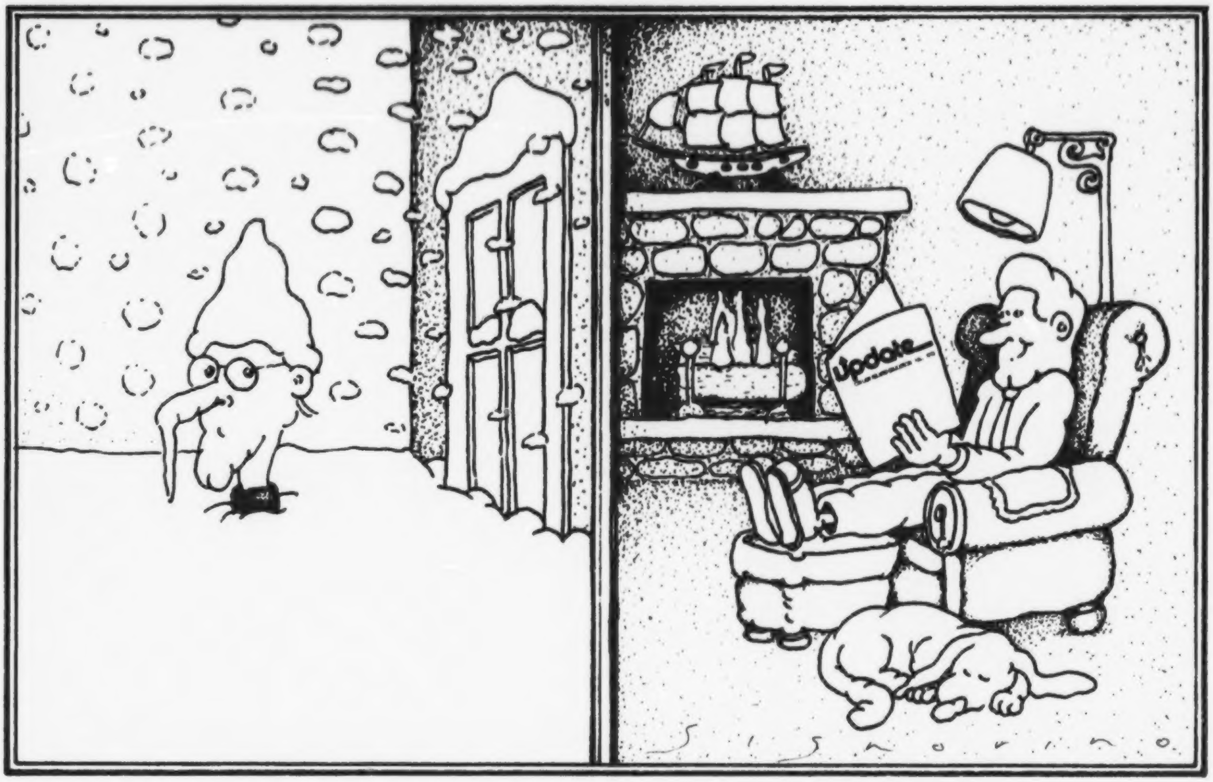

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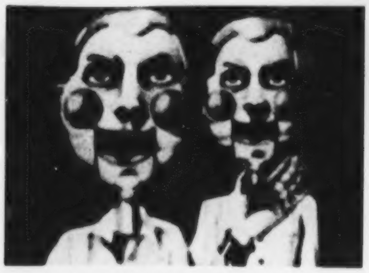
contents

Volume 3, Number 1 Winter 1979

4

Supreme Court Report
Teetering on the Wall of Separation

7

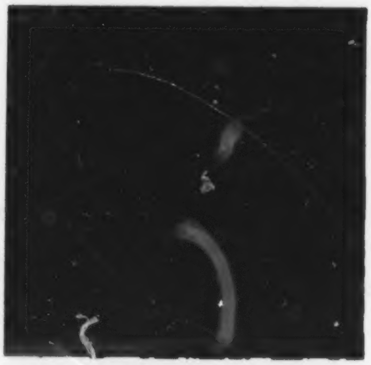


Religion and the Law
Sectual Discrimination

12

Court Briefs
From Double Jeopardy to Bakke Revisited

16



Opposing Views
Should Churches be Taxed?

20

Dubious Achievements in the Law

26

Views from Abroad
Religion and the Law in the Middle East

30

Religion and the Law
Christian Yellow Pages Under Fire

33

Newsclips

35

Update Looks Back
The Crusade Against Polygamy

39

Family Lawyer
Cases on Witnesses and Evidence

41

Classroom Strategies
Teaching About Breaching

54

Curriculum Update
Materials Aplenty for 1979

Credits:
All photos by UPI, except those on page 12 (National Street Law Institute), page 16 (Rapho Guillumette), page 30 (Alfred Gescheidt), page 35 (courtesy Utah Historical Society), page 41 (Kimberly Lile), and the Hare Krishna photo (Jean-Claude LeJeune) on page 9. Cover design, Siemens Communication Graphics; page 4, Jeffrey Gelick; page 7, courtesy Inter-Varsity Press; pages 20-24, Slug Signorino; page 33, Dean Mathews; page 40, Robert Hageman; page 55, Randy Glasberger, page 56, Harley L. Schwadron.

SUPREME COURT REPORT

Teetering on the Wall of Separation

After hundreds of cases, the Court is nowhere near the end of religious tangles.

Isidore Starr

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The proper relation of church and state has been a persistent dilemma for our nation, and especially for the Supreme Court. Justices have often seemed to diverge sharply in trying to balance the claims of religion and law. For example, Justice Wiley Rutledge, who served on the Court in the 1940s, wrote " . . . we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."

His colleague on the High Court, William O. Douglas, took a different tack: "We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions."

One Justice reminds us of the metaphoric wall of separation and the need to remember the theocratic excesses of the past; the other reminds us of our religious heritage and the need to respect our religious roots.

We may wonder whether these standpoints are complementary or irreconcilable, but one thing is sure: this kind of complex, multifaceted response to church/state dilemmas has been characteristic of the Court over the years. In trying to preserve both the free exercise of religion and its disestablishment, and in trying to protect the rights of believers and doubters alike, the Court has been confronted with issues ranging from parochaid to polygamy, from school prayers to conscientious objectors.

The Constitutional Debate

Naturally, the Constitution provides a major source of guidance to the Court as it wrestles with these dilemmas. Those who wrote the Constitution and the Bill of Rights were well aware of the church-state conundrum, and tried to resolve it with three sweeping statements.

The first is the concluding sentence in Article VI: " . . . but no religious test shall ever be required as a qualification to any office or public trust under the United States." This is the only substantive reference to religion in the body of the Constitution. The only other reference is to "the year of our Lord" in Article VII, but that is merely customary usage rather than a substantive provision. Contrary to popular opinion, the Presidential Oath in the Constitution contains no mention of "So help me God." Initiated by George Washington, it has simply become the custom to add this phrase in the swearing-in ceremony.

The other two religion clauses are found in the First Amendment. They are better known than Article VI and more widely applicable: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

With these three constitutional references we have the sum and substance of the mandates. Each is absolute in its outreach. The religious test oath clause is unamendable. It simply says: Never! The First Amendment is almost as absolute: It says "no law."

But these guarantees, if sweeping, are also capable of many interpretations. For example, do the first ten words of the First Amendment call for a complete separation of church and state and, by implication, sectarian religion and public education? Those who favor this absolutist interpretation buttress it with the practical argument that to make any exception invites "the nose of the camel into the tent," "the foot in the door," and the "slippery slope" syndrome. Another school of interpreters concludes that the Constitution does not advocate a wall of separation between the religious and the secular, but rather only a prohibition on the establishment of a national religion and a preferential treatment of one sect over another.

As the Justices search for principled answers to perennial church-state questions, they often look beyond the Constitution and turn for additional guidance to a second major source of wisdom, the rich legacy of historical writing on church and state. When the nine Justices sit in their chambers and conference room weighing the meaning of these constitutional provisions, the ghosts of Roger Williams, Thomas Jefferson, James Madison and other colonial giants stalk the room and haunt their deliberations with whispered messages from a period rich with the claims of both the church and the state.

Justice Holmes once remarked that "A page of history is worth a volume of logic," an observation verified by a reading of the church-state cases. In the cases that follow, the references to history are many and varied, with the logic at times falling into the seductive category, rather than the deductive or inductive. In reading the historical record, each Justice marches to the tune of his own drummer, because history does not speak with mathematical certainty. The judicial use of the record of the colonial religious experience and the movement for disestablishment has evoked both criticism and defense of the Court, but the church-state literature is so valuable and the dilemmas so intractible that Justices will probably always look to the past in resolving the disputes of the present.

With this background in mind, let me try to provide some insight into the three religion clauses, taking them up in the order they appear in the Constitution and Bill of Rights. Given the extensive and complex nature of this area, what follows is but a panorama of the legal challenges and judicial responses.

Religious Test Oaths

As noted earlier, the prohibition of a religious test for public office in Article VI is the only substantive provision in the Constitution itself relating to religion. This clause was inserted into the document because the article requires that all federal officials take an oath to support the Constitution, and the framers wanted to guard against Congress adding a religious element to that oath.

According to nineteenth century Supreme Court Justice Joseph Story, the prohibition of a religious test was designed "to cut off forever every pretense of any alliance between church and state in the national government." That purpose is not surprising, since the framers of the Constitution themselves went to some lengths to keep religion separate from their deliberations. Not once did they engage in prayer during their four months together, and nowhere in the Constitution is there any invocation to God or acknowledgement of man's dependence on Him.

Article VI clearly prohibits religious oaths for federal office holders. The question for the Court was whether it had come to apply to state officials as well. The Maryland

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test oath case of 1961 offers us an unusual insight into the process of judicial decision-making because it shows how one issue can reach out and touch all three references to religion. (See box on p. 49 for official name and citation of each case discussed in this article.)

The Maryland Constitution provided that "No religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . " A man named Torcaso had been appointed by the Governor to the office of Notary Public, but refused to take the oath and was denied his commission to serve. He appealed to the courts on the grounds that this oath violated Article VI of the United States Constitution and Amendments I and XIV.

The founding fathers tried "to cut off forever any alliance between church and state"

Maryland's response was that a state had the power to impose criteria for its public office holders. In addition, the state took the position that no one is compelled to hold public office. The state courts upheld the state's position.

In deciding this case, the Supreme Court Justices could have based their decisions on any one of four grounds. First, they could have sided with Maryland, agreeing that the state could constitutionally prohibit those who wouldn't take the oath from holding office. If instead they sided with Torcaso, they could have chosen any of three rationales for applying the federal Constitution to this state requirement.

The key to each of these rationales is the Fourteenth Amendment. Since the 1920s, the U.S. Supreme Court has been incorporating provisions of the Bill of Rights (which applied initially only to the federal government) into the Due Process Clause of the Fourteenth Amendment (which applies to the states). At the time of this case, the First Amendment had been incorporated completely, so that both Congress and the states could pass "no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

Thus the Court could have ruled that the Maryland oath violated the First Amendment's wall of separation between church and state by establishing religion. They could have decided that the oath infringed on Torcaso's First Amendment right to believe or not to believe. Or they could have announced that Article VI applied to the states under the Fourteenth Amendment Due Process Clause.

Speaking for a unanimous Court, Justice Black declared the oath unconstitutional. He begins, not surprisingly, by turning to the pages of history. People, he says, came to this country "largely to escape religious test oaths." When they came here, however, one of the first things they did was to enact their own test oaths and to establish theocratic governments favorable to their own particular faiths.

And now comes the voice from the past. George Calvert, the first Lord Baltimore, one of the "wise and farseeing men in the Colonies," spoke out against this practice both in England and in the Colonies. It was his hope "to establish in Maryland a colonial government free from religious persecutions." It was these courageous dissenters who created the traditions which led to Article VI and Amendment I.

But on what grounds was the oath unconstitutional? If the Justices had decided to base their ruling on Article VI, they would have had to create a precedent by incorporating it into Amendment XIV, thus making it applicable to the states. If, however, the issue were decided under the First and Fourteenth Amendments, the Court would have no such problem because it would be following well-established precedents. So, the latter and easier route was taken and the Maryland law was declared to be unconstitutional because it invaded Torcaso's freedom of belief and religion guaranteed by Amendments I and XIV.

In a footnote Justice Black indicates that since the ruling is based on the First and Fourteenth Amendments, there is no need to consider Torcaso's argument that the Maryland oath also violated Article VI. This argument, nevertheless, seems to haunt the Justice and, in the following quotation, Black seems to indicate that the spirit of Article VI hovers over the case.

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can they constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can they aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

As Justice Black points out, since there are groups in this country who do not profess a belief in the existence of God (Buddhism, Taoism, Ethical Culture, and Secular Humanism), the religious test oath discriminates against them too.

Establishment of Religion

Many of the most furious church-state battles have been fought over one form or another of alleged state preference to religion. This issue comes up repeatedly because, though no one religion predominates, ours is clearly a religious society. Examples of the pervasiveness of belief are all around us. Congress and our legislatures have refused to follow the example of the Constitutional Convention, preferring to begin their daily deliberations with prayer; a recent poll of high school student leaders found that only one percent classified themselves as atheists; a recent Gallup poll of voters found that heavy majorities would vote for a woman or a black or a member of any major religion as President, but most would not vote for an atheist.

Naturally, our laws sometimes reflect this omnipresence of religious belief, and it's the Supreme Court's job to determine whether these laws constitute "an establishment of religion" forbidden by the First Amendment.

Tax Exemption of Churches. Is it constitutional for a state to grant tax exemptions to religious organizations for properties which they use exclusively for religious worship? Isn't such an exemption a subsidy which aids in establishing religion? Aren't such tax exemption laws unconstitutional under the First and Fourteenth Amendments?

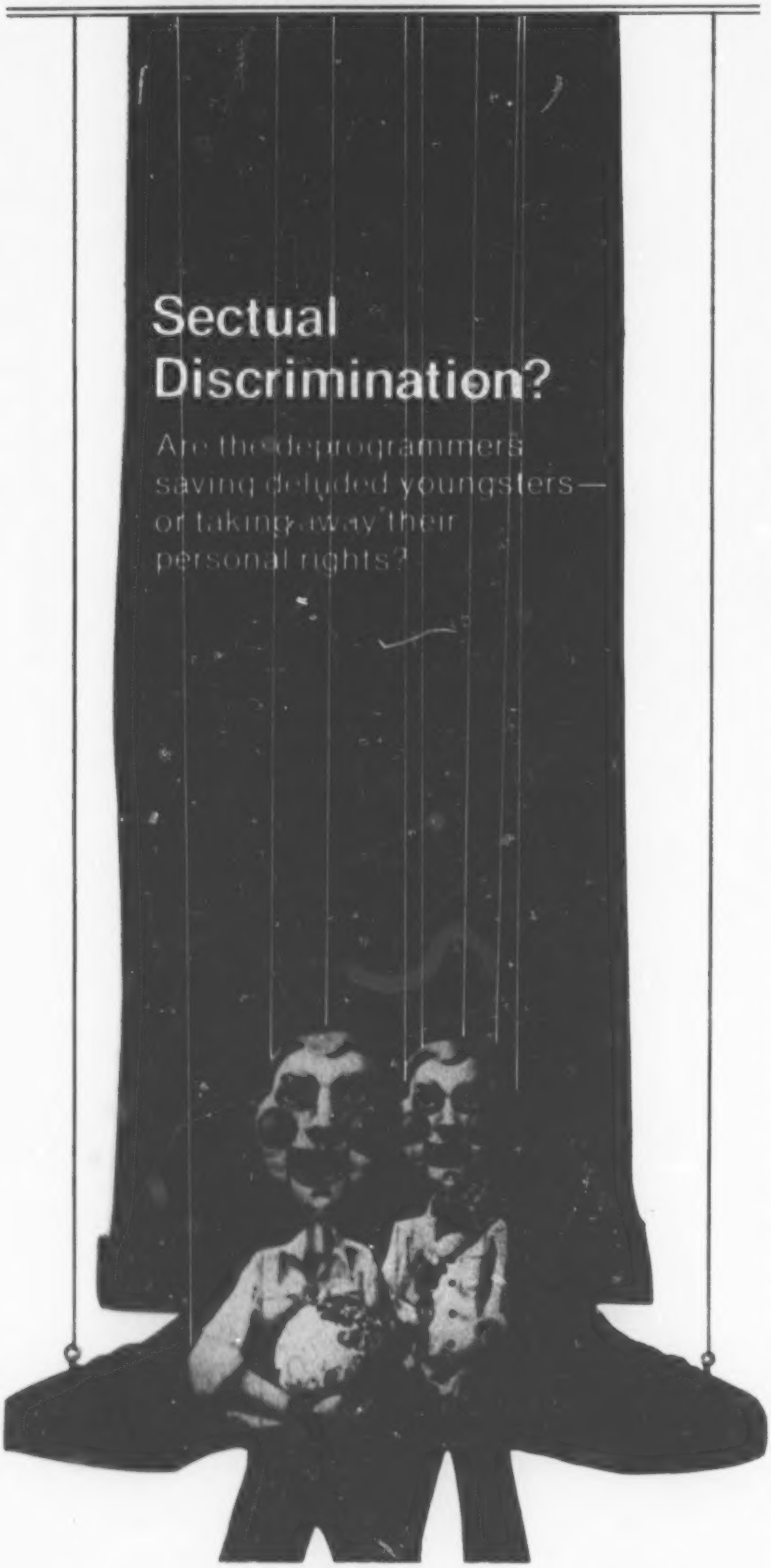
All 50 states (as well as the federal government) exempt places of worship from taxation. These laws and constitutional provisions were called into question in 1970, when the Supreme Court was asked to rule on a challenge to the New York State provision.

(continued on page 47)

262

RELIGION & THE LAW

Lisa Broido



Sectual Discrimination?

Are the deprogrammers saving deluded youngsters—or taking away their personal rights?

Even before the grisly massacre of American cultists in Guyana, most Americans viewed the new religious cults with great suspicion. In busy airports, on college campuses, on street corners and in shopping malls, Americans have been increasingly confronted by the well-dressed, smiling young followers of Reverend Sun Myung Moon, the saffron-robed converts of the International Society for Krishna Consciousness, and members of other unconventional new "cults." These groups have aroused the wrath of many over the past decade, especially because they are so different from more established religions.

There's nothing new in a conflict between accepted religions and dissenting religions. Puritans, Quakers, Mormons, and many others have faced opposition in this country. What is new is the weapon often used against these new religious groups, a procedure known as "deprogramming."

The Deprogramming Controversy

Religious deprogramming tries to neutralize the beliefs of recently indoctrinated sect members. Often deprogrammers abduct cult members, hold them against their will, and subject them to intense mental, emotional, and even physical pressure. Young "religious freaks" are frequently crammed into cars, barricaded in hotel rooms, and threatened and harrassed until they renounce their newly acquired affiliations.

Leaders of the religious cults are naturally outraged. Shi Vrom, President of the Evanston (Il.) Chapter for Krishna Consciousness, calls deprogramming "ridiculous" and warns that it could "end up spreading to political ideas and eventually turn into a 1984 situation." The American Civil Liberties Union, The National Council of Churches, The World Fellowship of Religions, and others have taken a stand against deprogramming for the same reason. In a recent A.C.L.U. report entitled *Deprogramming and The Law*, this practice is condemned as "a threat to basic freedoms guaranteed by the Constitution."

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On the other hand, many people support deprogramming. The deprogrammers and the parents of sect participants justify it on the theory that the new devotees have already been "programmed" by the cults and this process simply brings them "back to reality." Many claim that these products of such upper-middle class suburbs as Lake Forest, Grosse Pointe, Great Neck, and Bel Air have been "brainwashed" against their free will. How else, they argue, could these former pot-smoking, jean-clad youths suddenly be chanting eastern prayers or quoting from the Bible? Even ex-"Moonies" such as Bill Ephland (see box) agree that extreme measures are sometimes necessary to extricate these young people from psychological captivity. He describes his own deprogramming experience as a necessary evil which gave him a "chance to think freely again."

Over the past several years, in running battles from state to state and court to court, a controversy has raged about the legality of deprogramming. This emotional issue directly affects the strength of the American family and raises profound questions about religious liberty and parental control which are just now being addressed.

The War Against the Cults

No one knows how many young people are members of religious cults in the United States. Although the recent estimate of one to three million is probably far too high, the number is certainly a substantial one. Why are such religious groups as The Unification Church, The Divine Light Mission, and The Love Family attracting many young people? Some experts hypothesize that the aftermath of Vietnam and Watergate has caused these youths to reject traditional American values and search for more absolute truths. Others contend that these communal religions provide a sense of participation and companionship which some young people are unable to find in more established religions.

Many parents are unwilling to accept these sociological explanations for the upsurge in cult membership. They contend that the high-pressure evangelizing techniques of these sects are part of a "mass conspiracy" by greedy cult leaders to create "zombies" of their children. There may, in fact, be some truth in these claims. While most rank-and-file cult members are out pushing flowers, trinkets, and literature for 12 to 14 hours each day, many of the people up top live in luxury. The Love Family leader lives in a Swiss chalet with Persian rugs, expensive silver, and a squadron of servants. The Reverend Moon has a $600,000 mansion overlooking the Hudson. And Congressional reports reveal that Moon's Unification Church may be linked to lobbying and disclose that many cults recruit heavily among wealthy and powerful families in an effort to affect the political process.

Thousands of parents have resorted to hiring religious deprogrammers like Ted Patrick to get their children back from sects they consider dangerous and radical. Patrick, a former consultant to California Governor Ronald Reagan, is the originator of deprogramming in this country. His personal battle against the sects began when his son was supposedly kidnapped by the Divine Light Mission. He began deprogramming full-time in 1972 and is estimated to have engineered over 1,000 deprogrammings—between jail sentences.

Ted Patrick has engineered over 1,000 deprogrammings —between jail sentences

Thanks to Patrick, deprogramming has blossomed into a big business which can cost a parent as much as $25,000. Large deprogramming centers exist in Minnesota and Pennsylvania, and free-lance deprogrammers have emerged everywhere. Some parents have even set up an "underground network" with pro-deprogramming chapters in all major areas.

The deprogramming methods which Patrick describes in his book *Let Our Children Go* are often harsh. Here's how he began deprogramming Hare Krishna member Ed Painter:

> "Get me a scissors," I said.
>
> "Scissors? What for?"
>
> "First thing we're going to do is cut that knot of hair off his head."
>
> Ed came to attention. "What? Who are you? What right do you have to go cutting my hair? I have a right to wear this. It's part of my religion. I'm a legal adult. I'm twenty years old."
>
> "Shut up and sit down," I told him, "Just shut your mouth and listen."
>
> "I won't listen. I don't have to listen. I want to leave!"
>
> "Well, you're not going to leave. Where's those scissors?"
>
> Four of his relatives held him down and I cut off the tuft of hair they all wear on the back of their heads and I removed the beads from around his neck . . . I took him by the arms and flung him into a corner against the wall, and I said, "All right you hatchethead ____ __ __ ____, you move out of this room and I'll knock your ____ head off."

In his book Patrick also admits to using mace and depriving his victims of sleep.

According to deprogrammed "Moonie" Bill Ephland the process is generally not this primitive. He claims that his deprogramming consisted mostly of encounter sessions with his parents and involved no physical harm or lack of sleep. Whatever the method of deprogramming—mild or severe—this practice has become the subject of considerable legal dispute.

Deprogramming in the Courts

Freedom of religion is a constitutional right which has historically been heavily safeguarded in the courts. But what about groups accused of political and economic chicanery? Should they be afforded the same protection? What if these sects are a threat to the sacred American family institution?

Traditionally, it has not been the role of the judiciary to question the sincerity with which religious precepts are held. The courts have leaned towards a religious tolerance unless there existed a definite threat to the rights of others or the order of society. To overcome the courts' reluctance to closely examine religions, most parents and deprogrammers contend that the religious cults use "mind control" on their participants. Their usual defense has been to take the issue of deprogramming off trial and instead try the religions themselves. This strategy has been surprisingly successful, especially considering that there has been no concrete evidence that any sect member was forced to adopt his new way of life.

Thus deprogramming cases have become examinations of ideologies rather than trials of religious rights. *People v. Patrick* (N.Y. Crim. Ct. Aug. 6, 1973) is a prime example. In this case, 20 year-old David Voll pressed charges against Ted Patrick for assault after one of his fingers was dislocated when

Patrick and Voll's father took him forcibly from his New Testament Fellowship. Judge Bruce Wright allowed the defense to introduce evidence that ridiculed the beliefs of the Fellowship, shifting the issue from Patrick's actions to Voll's faith. Even the prosecuting attorney, Fordham Law School Professor John J. Ortez, admits that "It was clear that Voll's Fellowship was on trial." The ploy worked. The court found Patrick's behavior "justifiable" in light of the religion's tenets, and he was acquitted of all charges.

Justification

In several other deprogramming suits juries have also ruled that the deprogrammers were justified. A number of deprogrammers have won their cases by claiming they were acting as "agents" of the parents and invoking the "Doctrine of Justification" found in many states' laws. According to a New York State law, for example, the doctrine can condone a normally illegal offense that takes place during "an emergency situation" in which public or private injury is imminent. Probably the legislators intended to permit such acts as breaking into a burning home to save someone from a fire. However, some deprogrammers have avoided conviction by claiming that they were saving cult members from a great enough wrong to justify assault and kidnapping.

Sometimes this line of reasoning works so well that deprogrammers aren't even indicted. David Goodman, age 19, filed a complaint against two members of his family and four other men for abducting him in a parking lot, physically harming him, and attempting to deprogram his beliefs in the Unification Church while confining him in a New York motel. Persuaded that a "higher law" between parent and child "justified" their actions, the grand jury refused to indict. As the district attorney explained, "implicit in their findings was the belief that the family had a right to take reasonable steps to rescue the child from a situation which they believed constituted a danger to his health and welfare."

In the subsequent case of *United States v. Patrick* (W.D. Wash, Dec. 11, 1974), Ted Patrick was dismissed of kidnapping charged filed by Kathe Crampton. Even though Ms. Crampton was legally an adult, the jury was persuaded that Patrick was acting as an agent for the family. The judge in this case, John McGovern, held that "Parents like the Cramptons . . . have justifiable grounds, when they are of reasonable belief that their child is in danger, under hypnosis or drugs or both, and that their child is not able to make a free, voluntary, knowledgeable decision to stay within the so-called community."

Recent court decisions have begun to dissallow the defense of justification in deprogramming proceedings. In *People v. Patrick*, 541 P 2d 320 (1975), Patrick was convicted of false imprisonment and sentenced to a year in jail and a $1000 dollar fine when the jury wasn't swayed by his argument that he was justified in holding two adult-age women who had not joined cults but merely had left their strict Greek Orthodox homes. Patrick, in conjunction with their parents, held the women in a room with barred windows and shouted accusations at them in an effort to deprogram them of their non-affiliation. The judge refused to accept Patrick's "choice of evils" defense because there was no evidence of "imminent public or private injury" which required "emergency action."

Patrick was also convicted recently in Orange County, California for the false imprisonment of a Hare Krishna member. The court there held that the defense of justification could not be introduced in the trial and emphasized that the guarantee of religious freedom must be afforded court protection.

Conservatorship Proceedings

Conservatorship orders are another line of defense for deprogrammers seeking legal sanction. Conservatorship orders are designed to preserve the property of persons who are unable to manage their own affairs "because of debilitating factors which create a condition falling short of incompetency." They have traditionally been used to obtain guardianship over senile elderly people.

These proceedings were initially

Above, Rev. Sun Myung Moon; left, Hare Krishna convert.

created for the benefit of those involved and were fairly easy to obtain. In fact, many states have temporary conservatorship laws which permit such orders to be signed without any notice to the conservatee.

Many parents have used conservatorship orders to obtain temporary guardianship rights over their adult children, who are then deprogrammed. In many instances, a parent need merely hire a lawyer and sign an affadavit attesting to the incompetence of the offspring. Medical and psychological tests are often unnecessary, and the prospective ward is frequently afforded no opportunity to oppose the petition. This procedure has become so streamlined that a "legal deprogramming kit" now exists where parents can simply fill in the blanks of ready-made affadavits to gain guardianship rights.

Although many parents continue to be successful in obtaining legal custody of their children for religious deprogramming, this practice has begun to receive increased scrutiny in the courts. The leading case concerning conservatorship proceedings is *Katz v. Superior Court*, 141 Cal. Rptr. 234 (1977). This litigation involved the use of temporary conservatorship orders to gain control of five members of the Unification Church who were no longer minors. The California statute at the time of this proceeding provided that a conservator could be appointed over a person "likely to be deceived or imposed upon by artful or designing persons."

The grand jury let the deprogrammers go and indicted the Krishnas instead

Applying this statute, a lower California court placed the "Moonies" under the custody of their families for 30 days, and permitted deprogramming to continue with parental accompaniment. Judge S. Lee Vivuris' ruling seemed heavily influenced by his concern for the preservation of the family. "The child is the child even though a parent may be 90 and a child 60," he opined, adding, "a great civilization is made of many, many great families and that is what is before this court."

Vivuris' ruling was eventually overturned by a California Appellate Court in late 1977. The court found the statute's language too vague to justify removing a person's constitutional right to religious freedom. Further, it noted that the judiciary does not have any special ability to weigh the validity of one's chosen religion. "In the field of beliefs, and particularly religious tenets," the court concluded, "it is difficult, if not impossible to establish a universal truth against which deceit and imposition can be measured."

Looking Ahead

The *Katz* trial and other recent deprogramming decisions reveal that the courts are beginning to recognize the definite threat this practice poses for religious liberty. The case of *Murphy v. People* (N.Y. Sup. Ct. 1977) best illustrates the direction the law appears to be taking.

This bizarre suit began when Marlee

An Ex-Moonie Talks About Deprogramming

Bill Ephland is a 24 year-old ex-"Moonie" who presently lives with his parents in Oak Brook, a posh Chicago suburb. He joined the Unification Church in 1975 when he was experiencing alienation and indirection in his college career at Northwestern University. He was eventually deprogrammed in October of 1976, after more than a year of intermittent involvement with this controversial sect. Bill is now very grateful that he was "de-brainwashed."

This interview was conducted in the Ephlands' home last November by Lisa Broido. Bill's mother was also present at this time. She has taken an active stand against religious cults as the editor of a newsletter for a pro-deprogramming group of "concerned parents and friends." Her comments provide additional insight into the emotional problems which religious cults present for many parents.

Update—Do you believe you were "brainwashed" by the Unification Church?

Ephland—Oh, without a doubt. One is brainwashed—"seduced" is really a better word—by these cults.

Update–How do they go about doing this?

Ephland–It's a process developed by Moon, or the people up top. In my own experience, I was drawn to the Unification Church because they provided a closeness which I needed. The next step is to go to a lecture. The problem there is that there are only a few recruitees and many recruiters—so you're surrounded. You can't ask questions, or they get around them in one lecture after another. It becomes an exhausting experience of listening, listening, listening . . . Until one does as I did one weekend—I broke down and accepted the cult without questioning.

Update— Was there any physical force or did you freely enter?

Ephland—Well, I did [enter freely], although I have heard of some instances of physical harm. What they do is psychologically and subtly take control of you. They may say "the door is open, you can leave," but you can't. It's hard.

Update—What was your deprogramming like?

Ephland—The first attempted deprogramming, I came back from a weekend retreat and my parents had private dicks waiting for me. At that time, there was no Ted Patrick or professional deprogrammers so they put me in a hospital remedial program. This was a very inefficient way of dealing with the situation. The following year I felt moved to go back [to the Moonies]. Nothing had been done about the brainwashing. It was a very black and white situation and I was still under their control. But the second time I went back to the Moonies, I had lost some of my zeal for the cult and sense of unity with the group. I finally left on my own and went up to Minnesota to be deprogrammed.

Update—What happened in Minnesota?

Ephland—The Minnesota deprogramming Center is one of two deprogramming, rehabilitating centers in the country where people come from various cults to be deprogrammed or de-brainwashed.

Kreshower, a 23 year-old Hare Krishna woman, brought charges against her mother and a private detective for holding her for four days of deprogramming. The grand jury not only wouldn't indict her mother and the detective, but went on to reverse the charges and indict two leaders of her Manhattan temple with unlawful imprisonment through "mind control."

In March of 1977, New York Supreme Court Justice John J. Leahy revoked the indictments against the Hare Krishna leaders and criticized the grand jury for their "direct and blatant violation" of religious freedom. Justice Leahy indicated his sympathy for those families whose children had left them for religious cults, but emphasized that the right to individual choice was the prevalent issue. Finally, Justice Leahy issued a "dire caveat to prosecutional agencies throughout the length and breadth of our great nation that all of the rights . . . under the Constitution of the United States . . . shall be zealously protected to the full extent of the law."

Despite Leahy's emphatic attack on the legality of deprogramming, the emotional turmoil and legal battles won't go away. The recent murders/suicides of Jim Jones's followers can only blacken still further the public image of all cults. And in truth many grave questions remain about the plethora of cults that have sprung up among young people.

The problem is that the courts have little or no objective means of proving that cults are so different from other religions that they and their members are not deserving of the protection of the Constitution. For example, the dictionary definition of a cult—"a minority religious group regarded as spurious"—is unhelpful since all religions start out as minorities and are usually greeted with suspicion.

Similarly, if cult members give most of their property to their sect, so do some clergy and members of many well established religions. And the charge that cult leaders live lavishly is weakened when one remembers that the princes of many churches often surround themselves with luxury. Another charge often levelled against the cults is that their members must remove themselves from society and cut themselves off from friends and family. But is this so different, a court might ask, from what happens to the missionaries and monks of existing religions?

The point isn't that these new religions are necessarily like older ones, or that they don't necessarily pose a threat. They may well be as dangerous and subversive as their worst enemy thinks. But it is exceedingly difficult to *prove* in a court of law that the cults themselves and the methods they use to win converts are evil enough to justify the radical measures of kidnapping and deprogramming.

Perhaps some day hard evidence will be developed that some or all of the cults are committing fraud, using illegal means of persuasion, or otherwise breaking the law. Until that day comes, though, our tradition of respecting the free choice of the individual, to say nothing of the Constitution's guarantees of religious freedom, will require the courts to take a long, hard look at deprogrammers who break the law and compromise individual dignity in the name of a greater good. ☐

Update—Do most people come freely, as you did?

Ephland—No, most people have to be hauled in.

Update—Do you feel this is legally right?

Ephland—People have differing views concerning the validity of deprogramming. My feeling is that these means are necessary. People are programmed by the cults and must be deprogrammed.

Update—What exactly happens at the Center?

Ephland—One is put into a room, and over a period of days, or however long it takes, is talked to without harrassment. They are made to think again. I was surrounded by people who cared about me and loved me during my deprogramming. A parent is usually present during this time, as my mother was.

Update—Mrs. Ephland, Bill's cult experience must have been a difficult time for everyone concerned. How did it affect your family?

Mrs. Ephland—It was horrid. A nightmare. There was nobody who could help us and understand our situation. The general reaction of most friends was "If that's what he wants to do, let him." But, as Bill's parents, we knew that something was terribly wrong with him. The more I investigated, the more I found out, the more scared I got. When I went down to the Church, they wouldn't even let me see him. When they finally let me see him, they wouldn't even leave us alone. They had literally kidnapped our son. Even though they say "the door is open, you can go," he was held psychologically. They had convinced him his family and friends were "satan."

Update—Do you feel that cult members have a right to practice freedom of religion as protected by our Constitution?

Mrs. Ephland—No, because they are not religions. They are all front organizations in order to gain money and power. I think parents have a right to deprogram because there is a total personality change in their child. They can completely alter one's life in a weekend.

Update—Have the recent court decisions condemning deprogramming had an effect on this practice?

Mrs. Ephland—There are only two deprogramming centers in this country now, because the cults are always threatening to sue. We are presently trying to get another one in Chicago under the umbrella of Northwestern University.

Update—Why do you support deprogramming?

Mrs. Ephland—I don't believe that these young people join these cults on their own free will. They are harassed and broken until they just stop thinking. Something happens, something snaps. And when these kids come out of this, they're so grateful! Their eyes clear up and it is as if they have come back from another land. Some women stop menstruating while they are in these cults and they start again after deprogramming. That shows something about the unnaturalness of these organizations. My question is that if these youths feel so strongly about their beliefs, why are they afraid to come home? If your faith is strong, why doesn't it hold up?

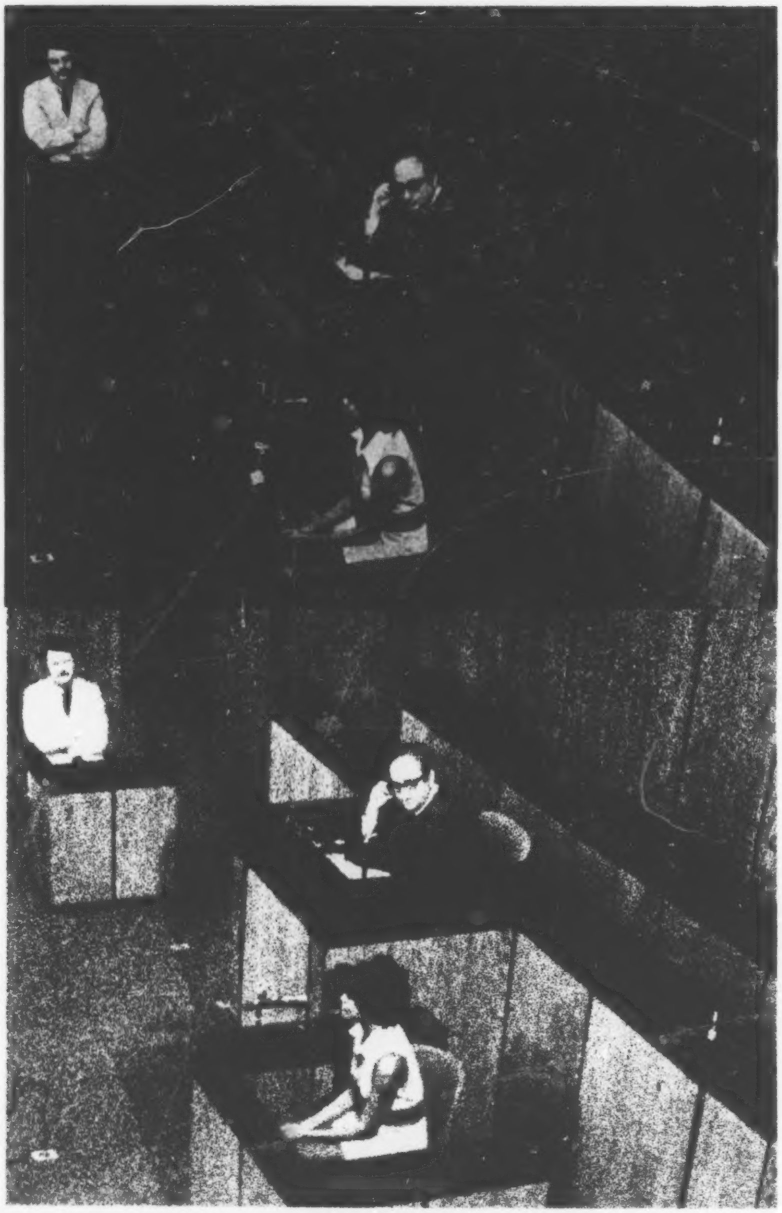
—LB

COURT BRIEFS

Norman Gross

From Double Jeopardy to Bakke Revisited

Some key recent cases and a preview of what's to come



Describing the Supreme Court as a legal vineyard may be grounds for metaphoric malpractice—with the only defenses being literary license and freedom of analogy. On the other hand, it might be an apt description.

Each year the seeds of High Court decisions are planted by grants of certeriorari—last year, the Court agreed to review 4,704 cases. Some of these seeds are never ripened and harvested (I promise to stop this metaphor soon), but are returned for more nourishment and development. Others flourish in the sun of judicial examination and are bottled and distributed for public consumption. They appear throughout the year, but most of the vintage variety emerge in the spring.

All of which is a long way of saying that with the Court's planting season upon us (and with this metaphor finally over), this edition of *Court Briefs* has few new cases to report. Therefore, we are taking this opportunity to cover some holdings from the Court's last term, alert you to the important cases awaiting decision, and provide a summary of an important recent ruling for good measure. Moreover, *Court Briefs* examines recent congressional and executive action overruling one of the Court's more controversial decisions in the past few years.

Court Tangles with Double Jeopardy

Like most sections of the Constitution, the Fifth Amendment guarantee against double jeopardy is deceptively simple and straightforward: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " And like other constitutional provisions, it is subject to almost infinite judicial interpretation.

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For example, what constitutes "jeopardy"? What is meant by "the same offense"? What if the accused, rather than the government, requests a new trial?

A useful starting point is understanding the rationale for the Double Jeopardy Clause. The most quoted statement in this regard was provided by Justice Black in *Greene v. United States,* 356 U.S. 184 (1957):

> . . . the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

This does not mean, however, that the accused may not be subject to multiple trials. Despite the "same offense" provision, for instance, a person may be subjected to both civil and criminal prosecution for the same act. Similarly, because of our federal justice system, it is not double jeopardy for the federal and state governments to prosecute and punish for the same act. Nor does the failure to secure a conviction under one statute preclude prosecution under a separate statute.

In addition, if a jury fails to reach a verdict and is discharged by the judge, a second trial is permissible on the grounds that it is merely a continuation of the first. Finally, because the Fifth Amendment is a prohibition against *governmental* action, it also does not apply when the accused seeks a new trial or appeals a verdict, since this is considered a voluntary waiver of his protection against double jeopardy.

These and other fine-line distinctions have no doubt contributed to the almost total absence of double jeopardy discussions in law-related education. Below is a summary of five double jeopardy decisions handed down by the Supreme Court on June 14th which, if nothing else, may serve as deterrent to those law-related educators even contemplating raising the issue in their classrooms.

In the initial trial of the first case, *Burks v. United States* (46 L.W. 4632), the jury found David Burks guilty of bank robbery. Burks had offered a defense of insanity, but both prior to and after the jury verdict, the judge denied his motion that the government's evidence was insufficient to convict him.

Burks appealed these rulings to the court of appeals, which agreed with his contention and remanded the case to the district court "for determination whether a directed verdict should be entered or a new trial ordered." Burks then appealed this ruling to the Supreme Court, arguing that the Double Jeopardy Clause precluded a second trial once the court of appeals ruled that the evidence was insufficient to support a guilty verdict.

The Court ruled that the government couldn't have a "second bite of the apple"

A unanimous Supreme Court agreed that the government couldn't have a "second bite of the apple." Chief Justice Burger, writing for the Court, distinguished between a reversal based on trial error and one based upon insufficient evidence. He explained that reversals for trial error (such as an incorrect ruling on the admissibility of evidence or an instance of judicial misconduct) permit a second trial because the defendant "has been convicted through a judicial process which is defective in some fundamental respect." Reversal because of insufficient evidence, on the other hand, is based upon the government's failure to prove its case and "forbids a second trial [which would afford] the prosecution another opportunity to supply evidence it failed to muster in the first proceeding."

A similar issue arose in *Greene v. Massey,* 46 L.W. 4636, where on appeal from first-degree murder convictions, the Florida Supreme Court in a *per curiam* decision reversed and ordered a new trial. While the majority stated that "the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendant committed murder in the first degree," three of the four majority justices on the Florida court also filed a "special concurrence" in which they examined various asserted trial errors and determined that at least one of them established grounds for reversal. Their concurrence concluded that "for the reasons stated, the judgments should be reversed and remanded for a new tiral so we have agreed to the *per curiam* order doing so."

The defendants were subsequently retried and convicted of first-degree murder. They then pressed their double jeopardy claims all the way to the Supreme Court, arguing that the Florida Supreme Court had already found the evidence to convict insufficient.

The Court held that "[s]ince the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings . . . we are bound to apply the standard announced in *Burks* to the [*Greene*] case . . ." Because the Court was unsure whether the Florida Supreme Court reversed on the basis of trial error or insufficiency of evidence, however, they remanded the case to the lower court for determination of that issue.

While concurring in the judgement, Justices Powell and Rehnquist emphasized their belief that the prohibition against double jeopardy was not "fully applicable in state criminal proceedings." This disagreement carried over to the third case, *Crist v. Bretz,* 46 L.W. 4639, in which the key issue was at what time does jeopardy "attach".

Under federal law, jeopardy attaches

when the jury is empaneled and formed. The Montana rule, however, provided that jeopardy did not attach until the first witness was sworn.

The distinction was critical in this case, for the prosecutor discovered a mistake in his charges after the jury was empaneled but before the first witness was sworn. The trial judge denied his motion to amend. After losing on appeal seeking reversal of the trial judge's ruling, the prosecution successfully dismissed the entire charge and filed a new and corrected one. When a second jury was selected and sworn, the defendant moved for dismissal, claiming that the second trial violated Fifth and Fourteenth Amendment guarantees against double jeopardy.

Writing for the six-judge majority, Justice Stewart explained that "the reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interests of an accused in retaining a chosen jury." He argued that this rule was not "simply an arbitrary exercise of line-drawing," but rather "a settled part of federal constitutional law."

Throughout history, he pointed out, there runs "a strong tradition that once banded together a jury should not be discharged until it had completed the solemn task of announcing a verdict."

Chief Justice Burger wrote a brief but biting dissent, arguing that the Court's decision was but "another example of how constitutional guarantees are trivialized by the insistance on mechanical uniformity between state and federal practice. . . . All things 'good' or 'desirable' are not mandated by the Constitution," Burger continued, and states should not be precluded from experimenting with different procedures "which are compatible with constitutional principles [and] . . . attuned to the special problems of the criminal justice system at the state and local levels."

In a separate dissent, Justice Powell also questioned the wisdom of constitutionalizing the rule of trial practice. In addition, he pointed to an apparent inconsistency in jury and nonjury cases. In nonjury cases, Powell noted, jeopardy attaches when the "court begins to hear evidence." He wondered how this rule could be justified in light of the Supreme Court's decision.

The fourth in the series of cases, *Sanabria v. United States* (46 L.W. 4646) was described as having "somewhat unusual facts" by the majority, and being "an odd an unusual [case], factually and procedurally" by a minority justice. Given these accurate descriptions, the detailed facts and rulings of the case will be left to ambitious readers' research.

Suffice it to say that the Court prevented the government from appealing this unusual case, which involved the exclusion of certain evidence and a subsequent acquittal for the defendant.

The final case, *United States v. Scott,* 46 L.W. 4653, raised the issue of whether an indictment dismissed on the basis of a defendant's allegation of prejudicial pre-indictment delay precluded the government from retrying the case. In a narrow five-to-four decision, the Court ruled that where a defendant successfully terminates his trial prior to a determination by judge or jury regarding his guilt or innocence, the Double Jeopardy Clause does not prevent an appeal by the government.

The Chief Justice reminded the Court that the Constitution didn't mandate "all things 'good or desirable' "

Writing for the majority, Justice Rehnquist reviewed the history of the Double Jeopardy Clause and acknowledged that the Court had previously handed down decisions which would seem to preclude further prosecution. Pointing to the underlying rationale of the clause, however, Rehnquist noted that this is "scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact."

Rehnquist further argued that while a "true acquittal" would bar further prosecution, the ruling in this case could not be considered an acquittal since "there was not a resolution, correct or not, of some or all of the factual elements of the events charged." Only the public has been deprived of its right to "one complete opportunity to convict those who have violated its laws," Rehnquist wrote.

In the dissent, Justice Brennan argued that the distinction between true acquittals and mid-trial dismissals unrelated to factual innocence was "fatally flawed." He described the Court's ruling as "literally incapable of principled application" and pointed to a host of other principles and policies of the law—such as entrapment, insanity, right to speedy trial, and statutes of limitations—which preclude criminal liability even if criminal action could be proven. He concluded, "it is regretable that the Court should introduce such confusion in an area of law that, until today, had been crystal clear."

Obviously, Justice Brennan is more confident than most about what the Double Jeopardy Clause means.

Congress/President Overrule Court

The first *Court Brief* ever reported in *Update* concerned General Electric's refusal to include pregnancy as part of its disability plan for workers. In the six to three decision of *General Electric Company v. Gilbert* (December 7, 1976), the High Court majority upheld the constitutionality of the plan, ruling that it was "nothing more than an insurance package, which covers some risks but excludes others."

Two years later, Congress and the President have concluded that it might be constitutional, but it certainly isn't fair. With the enactment of PL 95-555, pregnancy and childbirth must receive the same treatment as other disabilities under fringe benefits plans. The new law, an amendment to Title VII of the Civil Rights Act, also prohibits all sex discrimination on the basis of "pregnancy, childbirth, or related medical conditions." Thus, if such actions as mandatory leave, dismissal, promotion denial, or reduction of seniority are traced solely to a woman's pregnancy, employers will come face-to-face with the new law.

Tracing the interplay of the three government branches in resolving this issue offers unique opportunities for promoting legal, social, and political understanding. Since this ruling affects all employers, including school systems, readers may also want to assign students the task of investigating the practical, local impact of the new law. This would include interviewing such persons as teachers, administrators, school system or teachers' union lawyers, and other school people; reviewing recent suits brought under the law; and otherwise examining how it has affected your community.

Police Search Powers Expanded

On the first anniversary of its ruling that police may order drivers from cars and search them if they detect a suspicious bulge in their clothing (see Winter, 1978 *Update*), the Court by a slim 5-4 margin has held that criminal suspects who are passengers in a getaway car don't even have a right to challenge the legality of a police search of the car. The search in question yielded a sawed-off rifle and rifle shells which were used against defendants Frank Rakas and Lonnie King at their trial.

Justice Rehnquist's majority opinion in the case, *Rakas and King v. Illinois* (47 L.W. 4025, December 5, 1978), dealt a blow to Fourth Amendment proponents by limiting the number of defendants who can sue to exclude evidence. His decision calls into question the so-called "target theory," under which "anyone legitimately on premises where a search occurs may challenge its legality."

In other words, Rehnquist's decision holds that while the owner of a car (or house or other premises) would be able to protest the search, his guests couldn't since they had no "expectation of privacy." Thus, the exclusionary rule, under which illegally secured evidence can't be used against a defendant, doesn't come into play.

In what was probably the most revealing statement in his majority opinion, Rehnquist said, "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected."

Justice White, writing on behalf of himself and Justices Brennan, Marshall, and Stevens, strongly questioned the rationale of the majority opinion. "Because the majority conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense," White said, "I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as correct results in specific cases."

White then proceeded to reiterate two "long established" doctrines of the Court. First, people are entitled to some level of privacy in an automobile; second, one has such a right to privacy even if one does not own the car. He reminded the majority justices of *Katz v. United States,* 389 U.S. 347 (1967), in which the Court held that the Fourth Amendment protects people, not places.

In a concluding statement, White warned, "After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person." (For more on the Court's handling of Fourth Amendment issues over the years, see the Spring, 1978 *Update.*) □

On the Docket

Sex discrimination, rights of minors, and a sequel to *Bakke* head up the cases awaiting decision by the Supreme Court this term. Here's a capsule summary of what to look for in the coming months.

Sex Discrimination—*Doren v. Missouri* (47 L.W. 3144, September 19, 1978). A male defendant was convicted of first-degree murder and assault with intent to kill by an all-male jury. Do the Missouri laws, which excuse women from jury duty upon request, violate the Sixth Amendment?

Caban v. Mohammed (47 L.W. 3144, September 19, 1978). A New York law requires consent of an unwed mother, but not the natural father, prior to adoption of an illegitimate child. It also allows the mother, but not the father, to adopt the child without the other's consent. Does the law violate equal protection and due process guarantees?

Orr v. Orr (47 L.W. 3379, December 5, 1978). An Alabama alimony statute permits a court to award alimony to a divorced wife, but not to a divorced husband. Does the law violate the Fourteenth Amendment's Equal Protection Clause?

Bakke Revisited—*United Steelworkers of America v. Weber* (47 L.W. 3401, December 12, 1978). This and two related cases, all involving 32-year old lab analyst Brian Weber, serve as fascinating sequels to the *Bakke* decision outlawing quotas in higher education. The issue: whether employers and unions can voluntarily adopt a quota system reserving 50% of training program slots for minorities when there is no showing of prior discrimination.

Commitment of Juveniles—*Parkham v. J.L.* and *Public Welfare v. Institutionalized Juveniles* (47 L.W. 3257, October 17, 1978). Companion cases challenging Georgia and Pennsylvania statutes which permit institutionalization of minors in mental health facilities without the youngsters' consent or a hearing. Do such statutes violate the Fourteenth Amendment's Due Process Clause?

Pretrial Press Ban—*Gannett Co. v. De Pasquale* (47 L.W. 3325, November 14, 1978). Three reporters for Rochester newspapers were removed from a pretrial criminal hearing, and transcripts of that hearing were subsequently sealed. The Court will decide whether, under the First and Sixth Amendments, there is a right of access to such proceedings.

Pay or Stay—*Hunter v. Dean* (47 L.W. 3145, September 19, 1978). A 19-year old first offender pleaded guilty to burglary and was sentenced to a two-year term or probation with payment of a fine, court costs, and attorney fees. Is denial of probation on basis of defendant's poverty contrary to the Equal Protection Clause?

Drivers' Due Process—*Mackey v. Montrym* (47 L.W. 3147, September 19, 1978). Massachusetts' "implied consent statute" imposes an automatic 90-day suspension of drivers license, without a hearing, if one arrested for drunken driving refuses to take a breathalizer test. Does the law violate the Fourteenth Amendment's Due Process Clause?

Ma Bell Calling—*New York Telephone Co. v. New York State Department of Labor* (47 L.W. 3146, September 19, 1978). Does a New York law which permits striking workers to receive unemployment benefits violate federal law? After being forced to pay $40 million to finance its workers' walkout, New York Telephone decided to find out.

Should Churches Be Taxed?

Yes—tax exemption unconstitutionally establishes religion

Steven Delibert

Religious bodies enjoy a broad range of exemption from taxes, and receive other favorable tax treatment. The entire system is unconstitutional and should be abolished.

Religious organizations are classified by federal statute as exempt from the payment of income tax, and enjoy the further benefit of classification as one of the limited number of tax-exempt organizations to which donations may be taken as tax deductions. State and local governments follow the federal lead in granting income tax exemptions and deductibility of contributions to religious organizations, and also exempt them from real and personal property taxes, sales and use taxes, and most or all of the myriad other levies which they impose.

This entire network of special favoritism for religious activities is no more or less than an unconstitutional establishment of religion, in contravention of the dictates of the First Amendment. The tax preference is granted to churches because of a governmental decision that religious activity is beneficial and is to be encouraged, which is a decision that it is not open to the government to make.

There can be little doubt that the system of tax exemption which now prevails is a powerful aid to religion. Religious bodies are permitted to enjoy the receipt of income, and the possession of real and personal property, without paying the tax cost of such activities which substantially every other part of society incurs. Still more important, by permitting tax deductions for contributions to religious organizations, the federal government provides a powerful stimulus for making such contributions, in preference to other possible dispositions of donors' money.

The benefits obtained from tax exemption may not be so great, nor so direct, as those which would be obtained from such clearly prohibited actions as outright government subsidy of religious activity, but they are benefits nonetheless, and important ones; they may not be granted if they are for purposes which the Constitution prohibits.

That such benefits are granted solely on the basis of a governmental decision that religious activity is beneficial, and to be encouraged, is equally clear. The federal income tax statutes which provide exemption for religious organizations and deductibility of contributions make this fact abundantly plain, for they do not grant this preferred status on the basis of any "good works" or other socially useful activity done by churches, but explicitly on the basis of their existence as religious organizations as such. A religious organization qualifies for exempt status whether or not it performs any of the activities traditionally considered to be charitable; it is exempt solely because of its character as a religious organization. (To the extent that church-sponsored organizations do conduct traditional charitable activities, of course—such as denomination-owned but nonsectarian hospitals whose primary purpose is not the propagation of faith—they should be granted tax preferences to exactly the same extent as their lay counterparts.)

The courts, moreover, have long recognized that churches have tax exemption precisely because they are religious bodies. As long ago as 1924, in the case of *Trinidad v. Sagrada Orden de Predicatores*, 263 U.S. 578, the Supreme Court observed, "evidently the exemption is made in recognition of the benefit which the public derives" from religious activities. Similarly, as recently as 1970, in considering the constitutionality of New York State's property tax exemption for churches, the Supreme Court listed religious groups among many kinds of social welfare organizations in holding "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the

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No—through tax exemption government remains neutral toward religion

Dean M. Kelley

The main thrust of this article is that churches (and other religious bodies) provide a service or function that is essential to society as a whole, and that tax exemption is an optimal arrangement for enabling them to do so. This argument is addressed particularly to those citizens who do not have a present stake or interest in religion themselves—or do not think they have—but who need to understand what it is doing for them and for society as a whole.

Tax exemption of churches has recently become a subject of interest and controversy as municipalities and states are increasingly pressed for revenue. Much of the discussion has flourished so freely because it is unencumbered by knowledge of facts or law.

Let me begin by trying to clear up some misconceptions. The issue of whether or not churches should be taxed has nothing to do with taxation of the clergy. Though in some states ministers may pay less tax on real property, basically they pay property and income taxes like everyone else.

Nor is the issue whether commercial enterprises that churches happen to own should be taxed. At one time horror stories were told of churches buying hotels and factories, farms and office buildings with the great advantage of not having to pay corporate income taxes. There were never more than a handful of such instances, and since the Tax Reform Act of 1969 churches have had to pay corporate income tax on "unrelated business income." This tax loophole was closed, by the way, because the National Council of Churches and the U.S. Catholic Conference jointly asked the House Ways and Means Committee to eliminate it.

What is the issue, then? It is whether churches and other religious bodies should have to pay taxes on their property and on their income that is genuinely necessary to the free exercise of religion. Generally, that means the essential facilities of the church and the voluntary contributions of the faithful for the operation of the religious organization.

In 1970, in the case of *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, the U.S. Supreme Court held that the traditional property tax exemptions for churches do not violate the nonestablishment clause of the First Amendment and are therefore constitutional. The question remains, however, whether such exemptions are desirable. Should the real estate and income of churches used for religious purposes be exempt like the property of nonprofit charitable, educational, and health-care institutions; or should it be taxed like business property and the property held by individuals for their personal residence, pleasure, or income?

The nontaxation of churches is part of a larger government policy of encouraging a wide variety of nonprofit voluntary organizations. As a nation, America has always been marked by the number and diversity of its private associations. A century and a half ago, Alexis de Tocqueville observed that Americans are constantly forming associations to establish hospitals, libraries, schools, orchestras, and museums, as well as to provide human services of all kinds.

These voluntary associations exist to attain objectives which neither government nor business is attaining. In a real sense they are the people's part of American public life, an invaluable collective self-reliance. The history of the nation would be entirely different—and incomparably poorer—without such organized voluntary efforts.

Government doesn't have to subsidize these activities. It is enough if it simply gets out of the way and leaves them alone. One way in which government commendably "gets out of the way" and lets voluntary organizations perform their important work is by

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Should Churches Be Taxed?

Delibert

public interest." (*Walz v. Tax Commission*, 397 U.S. 664).

It may indeed be true, as the courts, the legislatures, and professional religionists all appear to believe, that religious activity is in fact beneficial, and society is the better for it—but that is a decision which the First Amendment simply forbids our government to make. Many, indeed, do not agree—religion has been called everything from "the opiate of the people" to "a concerted effort to deny the most obvious realities," and the survivors of the hundreds who recently died in Guyana no doubt have other choice epithets—but that is not the point. The First Amendment long ago decided for us that the Congress may make no law "respecting an establishment of religion," and the Supreme Court has told us repeatedly since that the meaning of this command is clear: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." (*Everson v. Board of Education*, 330 U.S. 1[1947]).

Congress and the states, however, have done just that, in granting to religious organizations highly preferred tax treatment, solely because they are religious organizations.

Aside from the constitutionally impermissible claim that "religion is good for you," Dean Kelley, my good friend and colleague on the ACLU Committee on Church and State, has offered many eloquently expressed justifications in support of tax exemptions for churches. On examination, however, it becomes clear that they are without merit.

The first, and most superficially appealing, of these claims is that to tax churches with all other organizations would constitute an abridgment of the free exercise of religion, which the First Amendment proscribes no less sternly than it does establishment. The courts, however, have never recognized such a claim.

While a tax aimed at religious groups and no others would clearly raise the most serious free exercise problems, merely subjecting religious organizations to the same burdens borne by all others would raise no such difficulties. A tax on newspapers—affecting one of the other basic rights in the Constitution, the freedom of the press—provides a good analogy. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Supreme Court struck down a tax on newspaper advertising because it was a "deliberate and calculated device . . . to limit the circulation of information . . ." But the Court went out of its way to observe, "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." Plainly, no abridgment of "free exercise" would result from subjecting religious bodies equally with all others to general tax statutes.

Another claim frequently advanced in support of special tax treatment for churches is that excessive "entanglement" between government and religion is thereby avoided. This was, in fact, one of the primary grounds upon which Chief Justice Burger relied in his opinion for the Court in the *Walz* case.

The "entanglement" argument, however, if anything, cuts in precisely the opposite direction. An examination of the Chief Justice's opinion in *Walz* reveals that it merely assumes that "excessive" entanglement, whatever that might be, would result from the process of evaluation, assessment, and enforcement involved in the collection of property taxes. It wholly ignores the far more onerous and distasteful "entangle-

Kelley

"exempting" them from taxation.

I placed the word "exempting" within quotation marks because a strong argument can be made that nontaxation of these organizations is a normal condition which requires no special justification or extenuation. Government taxes the producers and amplifiers of *wealth*—individuals and profitmaking collectives (corporations). Nonprofit associations are normally not included in the category of wealth producers and are therefore not taxed, since each of the members of such associations already pays his or her share of taxes and need not be taxed again for the time, effort, interest, and money contributed to voluntary associations from which he or she derives no monetary gain.

The argument is sometimes made that nontaxation is a kind of *quid pro quo*, that government doesn't tax voluntary entities because they support colleges, hospitals, and other facilities that otherwise would have to be supported by government funds. This line of reasoning is not applicable to churches, however, since government could not constitutionally set up or operate a church to provide the religious services churches provide.

Why then should government not tax churches? Because churches are not just voluntary nonprofit organizations, but are much more. They operate on an entirely different scale, and their ministrations are not advantageous to their members alone but to the society as a whole. Churches mediate, enable, and fulfill a function that is essential to all known human societies and which government cannot effectively provide. The First Amendment's sweeping religion clauses demonstrate that the founding fathers recognized the vital role of religious belief.

Religion is entitled to special treatment not just because it deals with the most intense and sensitive commitments of the human heart, but also because it performs a function of secular importance to everyone—and its special treatment is the best way of insuring that the function is performed. What each religion is doing for its adherents is to help them to "make sense" of life, especially of their own lives, and particularly of those aspects of their lives which are both unsatisfactory and unalterable: failure, handicap, defeat, loss, illness, bereavement, and the prospect of their own death.

Unless most people, most of the time, can find moderately satisfactory ways of answering the ultimate questions—"Who am I?" "Why am I here?" "What is really real?" "What will be the end of it all?"—the society of which they are a part will be in peril.

It might be asked why the consolations of *religion* should necessitate special treatment for *churches*. After all, the two are not one and the same. The First Amendment protects the free exercise of "religion" and makes no mention of any organizational structure. Isn't it possible that one may find the consolations of religion outside of any formal organization or structure of worship?

The answer to that is that intellectual propositions in the abstract do not seem to fill the hunger for meaning. Rather, what is needed is the continuing rein-ment" which is compelled by the present system of exemption.

Under the present system, government is faced with a Hobson's choice, indeed. It must either accept the risk of large-scale frauds, by accepting at face value not only the claims to "religious" status of the unquestionably *bona fide*, sincere adherents of various faiths, but also those of a wide variety of cultists, frauds, fakers, and con men; or it must undertake the odious task, fraught with danger of Constitutional violation, of defining "religion" and "faith", testing the *bona fides* of religious faiths, and otherwise treading perilously near the borders of those inquiries into "heresy" which "are foreign to our Constitution," and flatly prohibited to the government. (*United States v. Ballard*, 322 U.S. 78 [1944]).

Surely the "entanglement" is far less, in degree and in kind, and is far less objectionable, if the government taxes churches than if it refrains from taxing them but must intrude into such delicate and difficult matters as faith and creed, heresy and orthodoxy, sincerity and sham. If the "entanglement" question is of any relevance at all—the word does not appear in the Constitution—it may indeed suggest that the least onerous "entanglement" would result from the outright abolition of such exemptions.

Another claim raised in support of the continued exemption of churches from taxation is that they are somehow "extra-territorial"—that they are not in or of the civil society or the body politic, and the only proper governmental attitude is to abstain totally from any relation at all with religion. The difficulty with this position is simply that it ignores reality. Religious groups have been deeply involved in civil affairs in this country from its beginnings. They have spoken and acted vigorously, often with great effect, on all sides of every major issue in the country's history, from the War of Independence to the modern civil rights movement and the controversy over birth control.

Churches are very much "in and of" society in another respect, too: like every other institution, they require and receive numerous governmental services; but unlike other institutions, they do not pay for them. The First Amendment requires that they should.

Finally, it has been argued that churches—and all other "voluntary associations" which are dedicated to social uplift—are not part of the wealth-producing engine of the economy and for that reason alone should not be taxed. Such a formulation suffers from several failings. First, it simply does not accord with the system of tax exemption as it now exists. Many exempt organizations have a large paid staff, contract for goods and services, generate large amounts of income, and are generally indistinguishable from profit-making enterprises, except that their income is not distributed to individuals and their goals are goals of social welfare. Second, the characterization of an organization as not organized for profit does not alone satisfy the test for exemption. The goals of the organization are also a part of the test, and as we have already shown, it is not open to the government to decide that the pursuit of religion is a worthy or beneficient end to be encouraged by the government.

It is plain, in sum, that religious organizations today are granted significant economic advantages by governments at all levels, solely because they are religious organizations. It is forbidden to government to confer advantage on any organization, however, solely because of its religious nature, and any such action constitutes a clear attempt to establish religion in violation of the First Amendment.

The practice is, in short, unjustifiable, and should be ended forthwith. □

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forcing experience of a supportive company of fellow believers bound together by strong commitment to the faith. It is for this reason that there is—properly speaking—no individual religion, no "instant" religion, no invisible or disembodied religion. Religion exists as a functioning reality only to the degree that it is embodied in an ongoing community—a "church."

Nontaxation is the most appropriate way to encourage churches because it neither prefers nor suppresses any particular religion. It maximizes the possibility of the fulfillment of the religious function in the only way government can, by leaving it strictly "on its own"—which is precisely the arrangement commanded by the two religion clauses of the First Amendment.

This arrangement is vastly preferable to an alternative that has sometimes been suggested. Some have argued that tax exemptions are equivalent to subsidies, so legislatures could end exemptions and instead directly appropriate government funds to private associations that perform public services. This would create all sorts of entanglements and dependencies. It would oblige government to examine, inspect, evaluate, compare, audit, regulate or control such organizations. In the words of the Supreme Court in the *Walz* case, it would "introduce an element of governmental evaluation and standards, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize."

The beauty of nontaxation is that it allows the public itself to evaluate these various organizations. A tax exemption, in and of itself, does not provide one cent to an organization. As the Court said in *Walz*, "the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Without contributions from its supporters, a church or other voluntary association has nothing to spend. Thus tax exemption allows the purely voluntary mechanism of personal choice to determine which of the many private associations will flourish.

Finally, I should point out that taxing churches is not likely to solve the revenue problems of any city or state. Despite a widespread belief to the contrary, churches account for very little tax-exempt property. In New York City, for example, church property is less than 5% of tax-exempt property, and only about 1½% of all property in the city. Tax-exempt housing, parks, public schools, private schools, and hospitals each account for more tax-exempt property in the city than all the churches, synagogues, monasteries and other religious property combined.

Tax exemption is not something to be turned on and off like a spigot, but an optimum, constant condition for allowing the religious function to be performed in a "free market" situation, where would-be practitioners are allowed to flourish or fail on the basis of how well they meet the religious needs of adherents—without governmental interference either to hinder or to help. One does not have to be a partisan of one religion or of any to appreciate and wish to maintain this commendable "hands off" neutrality of government toward religion, which the First Amendment commands and which tax exemption so excellently epitomizes. □

Dubious Achievements in the Law

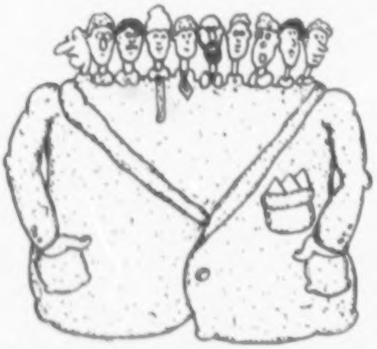
Our year-end round-up of judicial hi-jinks,
law enforcement lows, and legal bum raps

Maybe Daddy Took His T-Bird Away

In Boulder, Colorado, Tom Hansen, 25, found a lawyer to take his case, suing his parents for $350,000 in damages because they were guilty of "willful and wanton neglect." He terms it "a suit of malpractice of parenting."

Let Them Eat Tour Buses

A Federal Appeals Court in D.C. held that a business competitor of Ellen Proxmire is not entitled to damages because the Senator's wife used Capital Hill connections to further her burgeoning tour business. The court ruled that "simple use of one's status in society is not itself illegal."



It's Simple, You Just Get Ten Witness Chairs

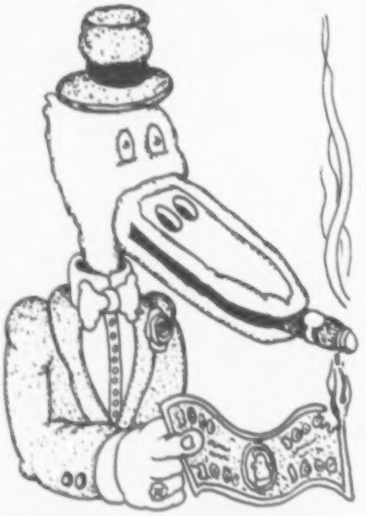
An Ohio public defender said that his client was unable to stand trial on rape charges because he had ten distinct personalities, some of which might testify against each other.

"It's Six to One I Won't Come Back Alive, But I'm Game"

Indiana convict Ralph Dodson lost a bid to be transferred to a women's prison. The court ruled that it wasn't cruel and unusual punishment to lock him up with men and keep him celibate.

Worse, Some Nights She Pulled in "HeeHaw" On Her Fillings

The FCC found evidence that CB broadcasts speeded up an Ohio woman's heart pacemaker, making her dizzy and faint.



When They Said Duck, the Computer Didn't Understand

The General Accounting Office successfully put Donald Duck's name on the federal payroll and gave him a salary of $99,999 a year. A watchdog computer raised no objections, even though the salary was more than twice the legal limit for civil service pay.

Have They No Sympathy for the Chronically Ill?

The *Update* Quick on the Uptake award goes to HEW official Christopher Cohen, who announced that after extensive study, "HEW has determined that more than one tonsillectomy for the same patient in one year might be prima facie evidence of welfare fraud."

Don't Let That Man Take a Nuclear Safety Course

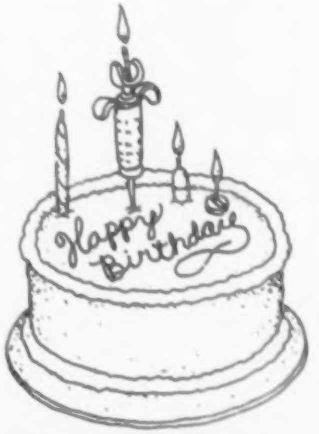
Kentuckian Charles Briley was convicted of making a U-turn across the grass median of an interstate highway. His reason? He didn't want to miss the final session of his driver-improvement course.

"Well If I'm Not, Who Is?"

Philadelphia police court judge James T. McDermott told a jury, "I am the law. I am the law. There is no other law save me," but the state supreme court reversed him anyway.

"No, You're Not, *I'm* the Law"

Norfolk (Va.) Judge Vernon Hitchings hit the ceiling when Frances Savage wrote that his court was like a "three-ring circus" in a letter to a local newspaper. He slapped her with contempt of court, saying "judges do not have to endure misrepresentations of fact."



Doesn't Anybody Want Files Anymore?

The Colorado State Penitentiary has slapped an embargo on Christmas cookies and cakes sent to prisoners. It seems too many of them are laced with drugs.

At First His Lawyer Wanted To Claim He Was Dead

After being involved in an auto accident, Chicago police chief James E. O'Grady sued the other driver for $150,000 in damages. His complaint alleged that he had "sustained severe injuries of a permanent and lasting nature . . . and been prevented from attending his ordinary occupation, business and affairs." O'Grady eventually settled for $750, and later said his doctor bills hadn't totalled $200 and that he hadn't had to miss even a day of work. What about his original allegations? "Oh, that's just lawyer's language. You know how those things work."

See, He'd Been Strolling Through This DAR Luncheon

Go-Go dancer Violet Guilli was strolling by the Norfolk (Va.) city jail when several inmates yelled, "take it off." She lifted up a T-shirt to bare her chest, winning applause from the inmates and an arrest for disorderly conduct from the authorities. She said she was on her way to visit her boyfriend, himself serving 90 days for disorderly conduct.

"The Kid on the Trike Got Away, But We've Got the Sidewalks Blocked"

A seven year-old Minnesota boy caught shoplifting 29-cent plastic squirt guns was convicted in an hour-and-a-half juvenile court trial. The judge said, "we want to impress the child that this is not the way to go."

It's Right There in the Epistle to Griffin Bell

A court of appeals threw out a North Carolina case because the prosecuting attorney informed the jury that the law enforcement powers of the District Attorney come from God and to resist those powers is to resist God. He said the Bible supported his position.

Mary Poppins Courses Begin Next Week

A St. Louis court said that mail carriers can't take short cuts across private lawns without permission. The court felt that short cuts unconstitutionally take private property without giving due compensation.

And Violin Lessons So They Can Learn to Carry the Cases

Texan Jim Day, owner of the machine gun shooting range outside of Dallas, thinks that tommy guns are the wave of the future. "People down here are getting ready for terrorism. I think the federal government is going to subsidize machine gun training programs for executives one day."

"Give Them an Inch and They'll Have Us Doing Needlepoint"

The Jaycees voted this year to expel any chapter admitting women. The reason, according to one disgruntled Jaycee, is that a lot of members "think that if they have women around they won't be able to drink and swear and look at stag films any more."

"Give Them Another Inch and They'll Beat Us to a Pulp"

Woman boxer Cathy "Cat" Davis spent $8,000 in legal fees convincing New York authorities to give her a boxing license.

Catch 78

Twenty-five years ago, Beatrice Braude was fired from her government job, ostensibly as part of a budget cutback. After a 20-year struggle, she finally pried the truth out of Uncle Sam—she was fired as a security risk. The firing was unjustified, but she has no chance to win reinstatement and collect back pay. A federal court has ruled that she waited too long after her discharge to file the suit.

Good Neighbor Policy Lands Him in Jail

A Virginia judge ruled that women's lib doesn't give men the right to pinch a woman's "posterior end." He sentenced Walter Combre to 60 days and a $150 fine for patting a neighbor on the fanny.

It's Probably Just As Well Patton Didn't Live to See This

When the Army dragged its feet about letting gay Sgt. Bill Douglas have his discharge, the six-year veteran showed up at his mess hall in a black evening gown, heels and wig.

He Wouldn't Have Minded, But He'd Just Filled the Tank

When the IRS tried to seize a Las Vegas attorney's Cadillac for unpaid taxes, he grabbed one revenue officer around the neck, menaced another with a sledge hammer, then fell to his knees and prayed that God would strike the IRS officers dead. His lawyer claimed the IRS "staged the confrontation to provoke him into a mental rage."

And Think What He'd Have Said If He Were Really Mad

Update's Splintered Gavel, given annually to the most intemperate opinion of the year, was won hands down this year by the Utah Supreme Court. Chief Justice A.H. Ellett warmed up by saying that the U.S. Supreme Court's obscenity standard "ought only to be advanced by depraved, mentally deficient, mind-warped queers." Wielding his pen like a battle axe, he went on to compare judges who use technicalities to excuse obscenity to "a dog who returns to its vomit" in search of a morsel of redeeming value. "If those judges have not the good sense to resign from their positions as judges, they should be removed," either by impeachment or the vote of "decent people."

Are You Sure the Chili Will Go Through That Little Tube?

Texas prison officials decided to feed convicted murderer David Lee Powell intravenously to keep him alive for execution. Powell was attempting to cheat the hangman by dying of malnutrition.

Who Was That Woman I Found in Your Grave Last Night?

Beatrice Daigle of Woonsocket, Rhode Island, filed suit against a cemetery that buried her husband in the wrong grave. After 17 years of praying at what she thought was her late husband's grave, cemetery officials discovered that a woman was buried there.

Of Course Not, They'd Be Robbing Book Stores

A Providence, Rhode Island stick-up man was arrested leaving the scene of a crime because he let store manager David Lopes answer the phone during the robbery. Asked why Lopes was allowed to take the call, a cop said "you've got to realize these guys are not Rhodes scholars. If they were, they wouldn't be robbing milk stores."

Your Tax Dollars at Work

Under a new sunset law, Colorado got rid of three small agencies with combined annual budgets of under $7,000. However, it cost $212,000 to carry out the reviews of the agencies, meaning that the state spent $31 for every dollar it saved.

It Was an Emergency and Her Watermelon Was Out of Reach

A Maryland woman was charged with assaulting a police officer with a banana after she had refused to pay the toll on the Chesapeake Bay Bridge. Beside hitting the officer with the fruit, she rammed his cruiser and then led him on a high-speed chase for five miles.

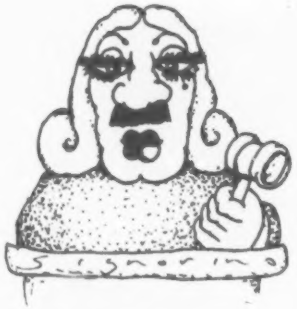
Roses Are Red Flints Cause Friction We're Glad We're Not In Their Jurisdiction

Three D.C. Appeals Court judges put their decision in verse (sort of):

"With little support but with admirable zeal,
Appelant advances this timely appeal.
A panel of judges now having been polled,
The trial court's order we hereby uphold."

They Kept His Tear-Stained Hankie as a Memento of the Trial

A San Francisco court ruled that CPA Tom Horsley couldn't recover damages from a waitress who'd stood him up on a date. But the judge ordered that Exhibit A—a red cardboard heart with a symbolic rip in it—be returned to the disappointed swain.



He Just Meant They All Wear Robes

New York lawyer Martin Erdmann once called judges "whores" and "madams," but sang a different tune when he was appointed to a criminal court judgeship. It was just a metaphor, he said.

On the Grounds That He's Paranoid and Can't Take a Little Joke

A special *Update* award for chutzpah goes to Marlene Swimley of Chicago. Ms. Swimley, who has already been convicted for trying to hire a man to bump off her husband, went to court and asked for $500 a month in permanent alimony and title to the couple's $250,000 home.

When Asked, Three Plant Employees Thought *They* Were Kilowatts

The Water and Electric Board in Eugene, Oregon burned six tons of confiscated high-grade marijuana in its generating plant, producing 4,000 kilowatt-hours of electricity.

Maybe He's Right, But Let's Check First with Jimmy Hoffa

"There is no such thing as organized crime."—Reputed mobster Meyer Lansky.

That's Easy for Her to Say—She's Over Thirteen

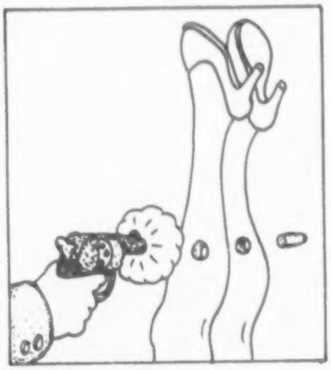
"It seems an absolute witch hunt. They're after him because he's rich, famous, and completely brilliant. It's so unjust." —Jacqueline Bisset, defending director Roman Polanski.

Besides, They Have a Helluva Time Getting a Public Defender

Attorney General Griffin Bell said that fat cat defendants like John Mitchell and Patty Hearst might not get a fair shake from our justice system. Ever willing to jump to the defense of an unpopular cause, Bell reminded us that "even the rich have rights."

Now They're Training a New Batch of Dogs to Listen for Explosions

The *Update* Limp Billy Club, awarded for law enforcement lows, goes to the St. Louis Police Department. While training dogs to sniff out explosives, police officers strapped two sticks of dynamite to a car in the airport parking lot, then mistakenly let the car's owner drive off in the vehicle and had no way of locating him to warn him of the danger.



Sam Peckinpah's Doing the Movie

The battling Radovichs of Homewood, Illinois went at it one last time. Margaret Radovich shot her husband twice in the chest while he slept, then got into the bed herself and fell asleep. He regained consciousness, pulled the gun out of her hand and shot her once in each leg. He then attempted to throw the gun out of the window but it fell back into the room. Mrs. Radovich found and reloaded the gun.

While he crawled into another part of the house, she crawled after him and shot him again. She then shot herself while he broke a window and called for help.

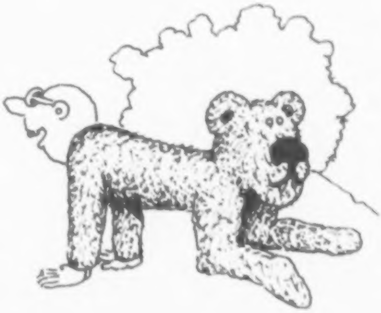
When police broke in, she took one more shot at her husband. The shot missed and she fell dead.

Now Let's See, the Hip Bone's Connected to the Ear Bone

A California court ordered a hospital to pay $250,000 to a local woman who suffered "permanent lung damage following an improperly administered enema."

If They Win, We Want the Name of Their Lawyer

A Louisiana couple has sued South Central Bell Telephone Company because one of its repairmen failed to arrive on time. They say the inconvenience caused them to be in a "terrible mood," occasioning family bickering and a canned chili dinner. The couple is seeking $500, the sum they spent on a weekend trip to New Orleans to alleviate their depression.



In Cleveland, It's Like Tipping Your Hat

Update's coveted Squashed Mortarboard goes to Educator of the Year John Gallagher. The Cleveland school board president was convicted this year of baring his behind at a passing car.

One of Those Days When You Wish You'd Put in a Little More Time on Your Loaf of Bread Impersonation

An Australian prisoner snuck onto a bread truck and got through the gates with no trouble. Unfortunately, when he jumped out at the next stop he found himself in the yard of another prison.

Especially Dynamic Factors Like Bread Trucks

The Federal Law Enforcement Assistance Administration spent $25,000 to find out why prisoners want to escape and concluded that escapes are "associated with static and dynamic factors."

Polish Pope Meets Shaggy Dog

Pope John Paul II may soon have to contend with California process servers. Lawyer William Sheffield put down a deposit 10 years ago for a St. Bernard puppy from a Swiss monestary. The dog died, the monks wouldn't return the deposit, and Sheffield successfully sued the Vatican for $400 for breach of contract. He hasn't been able to collect, though. He tried to attach the offering plate at a San Francisco Cathedral, since the offering was billed as "the Pope's Collection," but the church successfully denied that it was specifically the Pope's money.

And Don't Even Think About Bringing in a Dancing Snake

In a special vote, the residents of Henryetta, Oklahoma, decided by a two to one margin that they did not want poisonous snakes or disco dancing in their town.

280

Some Lawdible Achievements

A sampling of innovative ideas that may make the legal system work better

Courtroom Bias to Decline?

The California Supreme Court ruled this year that prosecuting attorneys may no longer use their peremptory challenges to exclude persons from juries solely because of race, sex, religion, or other "group bias." The issue came up in trials of two black men accused of killing a store owner in a robbery. In both cases, the prosecutor used his challenges to eliminate blacks entirely from the jury. According to the court, this violated the defendant's "right to trial by a jury drawn from a representative cross-section of the community."

Ex-Cons Help Train Cops

Ex-cons enrolled in Delancey Street, a San Francisco rehabilitation program, are helping train police cadets. They offer four weeks of role-plays that help the recruits understand the criminal mind and anticipate some of the ploys they will see on the street.

The plots and dialogues of these simulations are unerringly realistic. The ex-cons enact, from their own experiences, situations they feel cause the most problems and misunderstandings for police. DS members also assist in working out the plots, complete with witnesses lying, suspects swearing, and crowds interfering.

After each scene, the "teachers" answer questions and make observations revealing the tricks of their former trade. All in all, a positive way of having the inmates run the asylum.

New Ideas Cut Hassle of Jury Duty

Nothing has distressed prospective jurors more than having to cool their heels for days and sometimes weeks waiting to be called to hear a case. Now courts are taking steps to eliminate most of the waiting.

In San Jose, California, a telephone alert system allows jurors to go back to their jobs and homes until they are summoned to serve on a jury. This system might save tens of thousands of dollars a year in fees that would have been paid to jurors who waited all day in the assembly room but were never called.

In Detroit, a "one day/one trial" system guarantees that anyone called to court who is not chosen for duty that day is discharged for a year. Those who are chosen serve for only one trial, an average of three days.

In St. Louis, computers are getting into the process, so that jurors who once had to kill a week sitting around waiting for the call now serve only two days. The computer prescreens people and provides judges and lawyers with biographical information that makes hours of repetitive questioning unnecessary.

Of course, all this efficiency can go too far. In many cities around the country, jury duty has become a kind of singles bar without the booze. Young unattached men and women report that those long hours in the assembly room are just the ticket for striking up acquaintanceships that might lead to something big. If these innovations catch on, it might be back to comp-u-date for the swinging set.

Clinics Bring Down Cost of Legal Service

In many localities around the country, innovations are bringing legal services within anyone's budget. Low-cost, streamlined legal clinics have been able to cut the cost of uncontested divorces, name changes, and other routine legal matters by more than 50%. And in divorce cases, do-it-yourself kits containing instructions and forms are available for less than $20.

At legal clinics like California's Law Store, an unlimited consultation with an attorney on one topic sells for $10. Though some consultations take as long as an hour, 10 minutes is enough for most problems. The attorney will write a letter or make a phone call for you for another $10.

Legal clinics hold costs down by doing a volume practice, relying on paralegal aides and other staff, and using preprinted forms and fixed systems for routine parts of a case.

Also contributing to lowering the cost of legal services are group and prepaid legal plans which offer participants reduced-cost or employer-paid legal services.

Rape Victims No Longer on Trial

The federal government has just enacted a measure designed to "end the public degradation of rape victims" by making their prior sexual behavior inadmissible as evidence in federal rape trials. Under the measure, a defense attorney's questions will be limited to the assault itself. The bill's sponsors hope the measure will serve as a model for state rape laws around the country.

New Programs Boon to Witnesses

Studies show that as many as 40 to 50% of criminal cases are dropped because witnesses fail to show. To combat this, courts around the country have,

- talked to witnesses' employers so they won't lose pay if they miss work to testify;
- begun on-call notification systems that eliminate unnecessary trips to court, summoning witnesses by phone when they are needed;
- offered transportation for the aged, the infirm, and the poor to get to court;
- set aside special waiting rooms for witnesses and day care centers for their children;
- created easy-to-read booklets which explain court procedures and the vital role of witnesses.

The programs have apparently improved witnesses' attitudes and greatly increased chances that they will appear and testify. □

VIEWS FROM ABROAD

Religion and the Law in the Middle East

The Saudis and the Israelis are surprisingly similar when it comes to church and state

John E. Walsh

No one needs to be told that Israel and her Arab neighbors are bitterly divided. For more than 30 years, a state of war has existed between Israel and many of the Arab nations, and even now, as prospects for peace seem brighter than ever before, the Middle East provides the longest-running and perhaps most vitriolic example of religious enmity in the modern world.

For the Arab nations, all of whom are Islamic, the war against Israel is a holy war, a religious duty to expel the devil. For the Israelis, the Jewish religion strongly influences the war and national policy. Many Jews, for example, think that Israel should keep the hotly disputed West Bank because the Bible implies that the territory should belong to the nation of Israel.

Amidst all the furor, it is easy to lose sight of some real similarities between the Arab people and the Israelis, and some linkages between their religions. Both the Arabs and Jews are descended from the same racial stock, the ancient Semites. Their religions, though different in many profound ways, are both monotheistic and have a common source in Abraham and the Old Testament. The distinguished American Orientalist, Charles Cutler Torrey, argues a close relationship between the two religions in his book *The Jewish Foundation of Islam.*

There are also similarities in how the religions are practiced. Judaism in Israel and Islam in the Arab nations are at once religions and powerful political forces with strong influences on law. In fact, the sharpest contrasts aren't between the Islamic nations and Israel, but between a secular democracy such as the United States and the strongly institutionalized religion one finds throughout the Middle East.

The Saudi Theocracy

The Islamic nations are all different, and no one of them can stand for the others, just as no one Christian country can represent all of Christianity. Besides encompassing ethnic diversity—most are Arab, but Iran, Pakistan, and Indonesia are not—the Islamic countries contain many very different approaches to the relationship of church and state. Saudi Arabia stands at one end of this spectrum, presenting a case study of pristine Islamic thinking and showing an orthodox form of the religion in full sway.

Saudi Arabia, the birthplace of Mohammed, the founder of Islam, is about three times the size of Texas and has an estimated population of from five to seven million. It contains Islam's most holy city, Mecca. Muslims the world over turn toward Mecca while saying their daily prayers five times a day, and every Muslim tries to make a pilgrimage to Mecca at least once in a lifetime.

At no time since the beginning of the Muslim calendar in 622 A.D. has any non-Muslim power ruled over any portion of Saudi Arabia, nor has any other religion ever had more than a handful of followers there. The religion is so omnipresent that it is a requirement for citizenship. To be a Saudi Arabian, one must declare oneself a Muslim.

It is difficult enough for a devout Christian to determine the proper relationship between church and state, between what is God's and what is Caesar's, but it is virtually impossible for a Saudi to make that distinction. All aspects of life fall under the jurisdiction of the Islamic religion and its laws. Islamic law, as given in the Koran and translated into concrete prescriptions for all parts and activities of life, is sacred. Nothing stands outside it or is purely secular.

What in other countries might be called church and state are in Saudi Arabia simply one and the same thing. The nation is a classic example of a theocracy. The hereditary king is both the head of state and the *Iman* or religious ruler. His power is absolute. He rules without a constitution or legis-

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lature, and the cabinet serves completely at his pleasure.

Saudi Law

The king is also the final arbiter of legal disputes, a kind of one-man Supreme Court. The nation has a two-part court system. Administrative courts hear commercial disputes and other cases that might not be covered by religious law, but most cases are decided by religious courts. These are presided over by Islamic judges appointed by the king. Though trial by jury and *habeas corpus* are unknown, these judges have a reputation for incorruptability and impartiality, and most observers feel these courts are essentially fair. The king, since he is just as much the religious leader of the nation as he is the head of state, retains final jurisdiction even over those cases that would be thought of as completely religious in nature.

As far as possible, the law of Saudi Arabia is the law of Islam, that is, the law as found in the Koran and as interpreted and handed down through the years in the Sharia, the compilation of Islamic law. These two sources of law cover literally everything in daily life, from birth to death.

For example, marriage, divorce, and inheritance are all governed by the ancient system of Islamic law. This code gives men many more rights than women. A man may have as many as four wives at one time, but a woman can have but one husband. A man can divorce his wife by simply repeating "I divorce thee" three times before witnesses, but a woman can instigate divorce only with great difficulty. And in most divorce cases, children stay with the husband. In all court cases, the testimony of one man equals that of two women.

In addition, the law of Islam is in full force over crimes and punishment. Under Islamic law, homicide and wounding are civil wrongs rather than crimes against the state. Thus, Islamic law recognizes the right of the victim or his family to bring charges against the accused. Often the penalty is blood-money or some other form of compensation paid to the victim or his family. Islamic law also imposes very severe penalties for a few precisely defined crimes such as theft, illicit sex relations, and drinking alcohol. Even today adulterers are occasionally stoned to death and thieves have their right hand amputated.

Public morality committees, officially recognized by the government, act as religious police. They attempt to enforce pious behavior, demanding that Muslims observe such religious requirements as the five daily prayers, fasting during Ramadan, and the seclusion of women. They also crack down on such prohibited behavior as the public use of musical instruments, the sale of dolls, public smoking, and dancing.

Foreigners and Saudi Law

Since in effect the church and the state are one and the same in Saudi Arabia, everyone in the country, even non-Muslims, is required to adhere to Islamic law. In one sense, this is a small problem because very few non-Muslims live in Saudi Arabia. Saudis are particularly intolerant of agnosticism and atheism, and any Jews formerly resident in the country emigrated in 1948 or adopted Islam. The few Christians working in the country may attend Christian church services, but these are not open to the public.

However, the puritanical form of Islam practiced in the country may provide some real difficulties for Christians living there and for Muslims from other countries, who account for about 25% of the population of the five major cities. For example, the Islamic law absolutely prohibiting drinking alcohol is vigorously enforced. American teachers going to Saudi Arabia to teach in the schools have told me that before they can get their visa they must agree to abide by this law during their stay in that country.

Of course, Saudi Arabia's oil riches have inevitably brought it into closer contact with the rest of the world, and so required some modifications of Islamic law. Since the ancient Islamic law might prove inadequate to deal with automobiles, airplanes, and the com-

Israeli soldiers and civilians praying at Jerusalem's Wailing Wall.

plexities of the oil business, it has been supplemented by royal decrees and government regulations which have the force of law. No decree or regulation, however, can conflict with Islamic law.

As a result of royal edicts, banks are now allowed to charge a "commission" (rather than "interest" prohibited by Islamic law), and insurance contracts are now allowed on all forms of property, though life insurance is still prohibited. Moreover, the severity of Islamic law for foreigners is somewhat mitigated by the practice of referring their cases to the local political leader rather than to Islamic judges. And the religious police have lost some of their power, especially in the cities.

All in all, though, Islamic law still reigns supreme. The religious courts have jurisdiction over most cases, and the *ulema*, a group of jurist-theologians, are still recognized as the highest authority in legal matters. Perhaps no other nation on the face of the earth—and surely no other nation of major importance—provides as clear an example of a religion whose tenets have the full authority of law.

Israel's Mixed Heritage

The Saudis' practice of unifying church and state is obviously very different from our attempts to build a wall between religion and government. We have nothing remotely like their religious courts, and our laws are the result of secular lawmaking, not received religious doctrine. The Israeli system presents fewer surprises. Though church and state in Israel are far closer than they are in our country, they are still somewhat separate, and a secular tradition runs through Israel's short history.

The constantly shifting balance between church and state in Israel reflects the very real divisions in Israeli society. On the one hand, about 15 to 35% of the population is made up of devout Jews. The devout Jew, just like the devout Muslim, finds it difficult if not impossible to distinguish sharply between the sacred and the secular, the church and the state. All of life is unified and integrated in the practice of the Jewish religion, that is in following the Judaic law.

What this means in Israel can perhaps be best understood by reference to a specific historical fact. Israel does not now have a formal, one-document constitution. The draft constitution, prepared by Dr. Yehunda Leo Kohn and debated in the Provisional Council in 1950, was defeated at least in part on the grounds that "Israel's Torah is her constitution." Although by no means unanimous, the final decision on a written constitution was that it was not necessary for Israel to have a written constitution since the Torah—the body of law contained in Jewish scripture—includes not only precepts for man's spiritual guidance but also all of the essential directives for his social and political life.

Several religious political parties helped defeat the proposed constitution. Though the religious parties have never commanded anything like a majority of Israeli voters, they've sometimes held the balance of power in Israel's multiparty system, and so had a real impact of Israeli lawmaking. For example, they were instrumental in the state's recognition of the Sabbath and holy days, as well as the continued observance of Jewish dietary laws by public agencies.

Yet this is only one side of the picture. Israel is not a theocracy, in large part because of the great ethnic and religious diversity of its people. Though Jews make up more than 80% of the population of Israel, there are more than 60,000 Christians in the country and several hundred thousand Islamic Arabs, to say nothing of the hundreds of thousands of Islamic Arabs in occupied territories.

As if this weren't enough diversity, the Jewish population itself is divided almost equally among Jews who emigrated from Europe, those who emigrated from Africa and the Arab nations, and those who are descended from Jews who came to Palestine before the state of Israel came into existence 30 years ago. While many Israeli Jews adhere to Orthodox Judaism, a greater number either are not strongly religious or adhere to Conservative or Reform Judaism.

As a result of this mixed heritage, Israel could not structure its government solely by the tenets of any particular religious group. Moreover, as Norman L. Zucker points out is his book *The Coming Crisis in Israel,* "Judaism does not have a political philosophy dealing with the modern democratic state. . . . Consequently, political concepts such as constitutional limitation, checks and balances, separation of powers, the rule of law, and presidential or parliamentary structure are rudimentary in Talmudic law." For all the insistence on a "Torah Constitution," the reality of the case is that the founders of the state of Israel could find very little guidance in the Torah for helping them to decide to what extent a modern Jewish state should have a specifically Jewish character.

The Israeli Solution

The question of whether there should be no separation of church and state in Israel or whether there should be a complete separation was compromised in a way that showed more than a little ingenuity. Interestingly enough it is the same kind of compromise that obtains in Indonesia, another nation of diverse heritage which became independent after World War II. Jewish Israel and Islamic Indonesia are the only two nations in the world that have a cabinet-level minister of religion. In Israel, this department is known as the Ministry of Religions. (Please note plural.)

Like most compromises, the creation of a cabinet-level Ministry of Religions in Israel has not completely satisfied either the ultra-Orthodox Israelis or those more liberal Israelis who would like to see the church and the state altogether separated. The Ministry of Religions, as Nadav Safran points out in *Israel the Embattled Ally,* carries on its work confronted by irrepressible opposition between two segments of the population over an issue both consider vital. "One segment (consisting of about 15 percent) wishes in effect to turn the country into a theocratic state; the other, probably twice as large, wants to make it into a fully secular state. Between these two extremes, the center is divided . . . between those favoring some links between religion and state while opposing others, and those leaning toward complete separation but prepared to tolerate at least temporarily some links."

There is no officially established state religion in Israel, but the Ministry of Religions involves the state in religious matters in a way that would be impossible in the United States. For example, the Ministry provides for the religious needs of the population through some 200 religious councils partly financed and appointed by it, regulates the production and sale of kosher food, enforces Sabbath restrictions and burial procedures, and maintains or restores religious shrines.

Israeli courts are something like ours, but Israeli schools would be unthinkable here

The Ministry also regulates and selects some of the members of rabbinical councils, whose major responsibility is to interpret Judaic law and supervise rabbinical courts. These courts in turn are financed by the Ministry. They have jurisdiction over personal matters, such as marriage, divorce, alimony, and inheritance.

However, unlike the religious courts in Saudi Arabia, the Jewish courts do not have jurisdiction over non-Jews. Each major religious group in the country—the Muslims, the Druzes (an offshoot of Islam), and the Christians—has its own court system for personal matters, and these courts are also supervised and financed by the Ministry.

And, in another contrast to Saudi practice, the vast majority of legal disputes are handled by secular courts. These courts apply Israeli law, which is not specifically religious in character but rather an amalgam of the diverse codes that governed Palestine before the creation of Israel, as supplemented by laws passed by the Israeli parliament. Since both English and French law strongly influenced Palestinian jurisprudence, Israeli law contains many guarantees and procedures that Americans would be familiar with, including the right to be represented by counsel, the right to remain silent, and protections against warrantless searches and double jeopardy.

Education is another good example of how the "mixed" relationship between church and state works in Israel. There are three kinds of schools, all supported entirely or in large part by the state: state schools, religious state schools, and recognized independent schools.

However, though the state schools are more secular than religious schools, they aren't free of religious teaching. According to a directive of the Ministry of Education and Culture of 1959, all schools are expected to attempt to raise "Jewish Consciousness." For example, all pupils are to receive classroom instruction in religious subjects as well as Jewish prayers, rites, customs, folklore, and religious symbolism. Furthermore, the schools are to hold celebrations on the eve of the Sabbath and Jewish holidays so as to create a "Jewish atmosphere" and make the children more positively receptive to the values of their religious heritage.

In all aspects of life, then, historical conditions have forced Israel to resolve the question of the relationship of church and state in a directly pragmatic way: Israel is in practice neither a theocratic nor a secular state.

Our Wall of Separation

Israel resembles the U. S. in that lawmaking and the court system are largely secular. It is, however, different in many ways from our system of separation of church and state. We have nothing like a government agency to supervise religions, help fund them, and have a hand in enforcing religious laws. As for mixing religion and education, our courts will not approve even brief nondenominational prayers. We simply have nothing like the Israeli policy of suffusing secular schools with religious instruction.

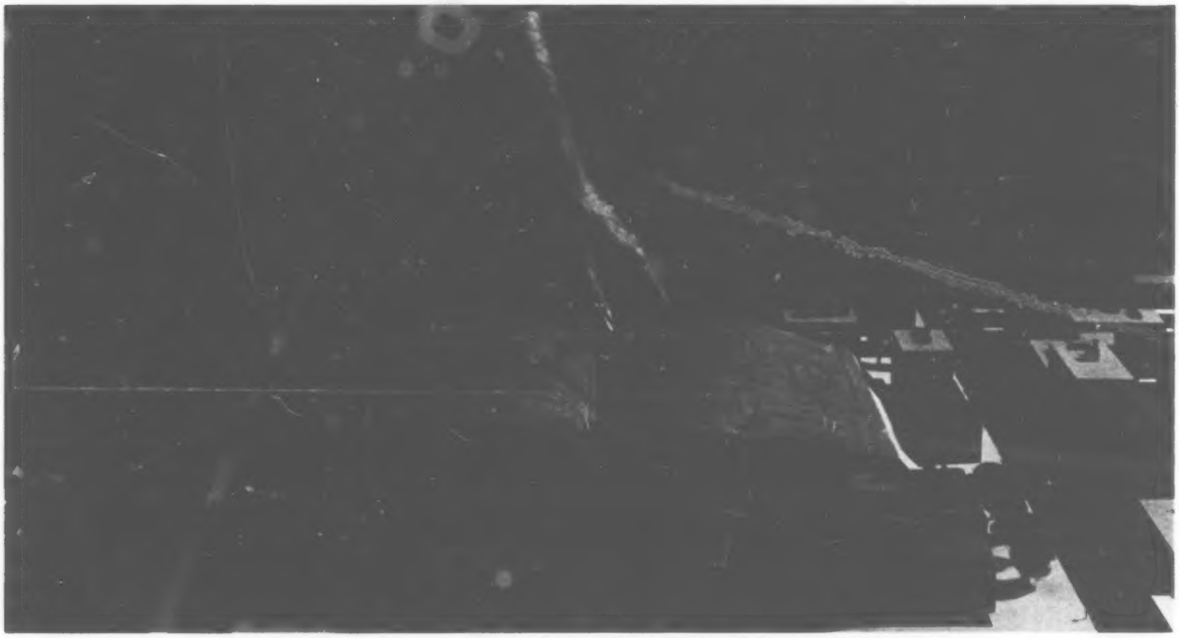
As I suggested at the beginning of this article, the Saudis and the Israelis may have more in common on church-state relations than either country has with the United States. Though the two religious-legal systems are very different, the importance of religious courts and law and the state recognition of religion make both nations very different from the United States.

We should always be aware that our attempt to separate church and state has not been followed by most of the nations of the world. If we are to understand other nations and cultures, we cannot forget that it is our practice that is the minority one. The cases of Saudi Arabia and Israel should remind us that world civilization is made up of many perspectives and political-religious philosophies and that each has the right to present its claim to validity and legitimacy before the court of world opinion. □

Christian Yellow Pages Under Fire

Do born-again business directories illegally discriminate or are they protected by free-press guarantees?

Lisa Broido



Born-again Christians Joseph and Mary Faithful have just moved to Modesto, California. Mr. Faithful desires "to have his car repaired by a mechanic that is Christian" and Mrs. Faithful "wants to enjoy Christian fellowship while getting her hair fixed." Where do they turn in a town without friends and relatives? According to its promotional literature, the *Christian Yellow Pages* can solve their problems. This directory is one of a growing number of annual business guides that requires its advertisers to avow in writing that they are "born-again" Christians. Along with the others, it has received severe public criticism and has even been equated with the "buy Christian" campaigns of Nazi Germany which began with the boycott of Jewish stores and escalated to harsher anti-Semitic measures.

The courts will soon decide whether these exclusively Christian publications are legal. In suits that raise fundamental legal and constitutional issues, the Anti-Defamation League of B'nai B'rith, a Jewish service agency, has joined several California plaintiffs in contending that the directories constitute religious discrimination that is prohibited by law.

The *Christian Yellow Pages* is a national enterprise run by Californian W. R. Tomson. To be included in one of the local directories, you have to pay a fee ranging up to $900 and sign a pledge which states: "Advertiser herewith acknowledges the fact that he has accepted Jesus Christ as his personal Lord and Saviour according to the Holy Bible (John: 13) and knows that he is a born-again Christian." "Born-again," as it is used here, refers to a religious experience generally described by fundamentalist Christians. Thus it excludes not only Jews and non-Christians, but many Catholics and Protestants as well.

In addition to restricting advertisers by their religious affiliation, the *Christian Yellow Pages* also limits the religious preferences of its employees. Every applicant for a job within this organization must give a brief testimony of his born-again religious experience before he can be considered. Further, each regional director must sign a contract stating that "all persons hired by said Director or associated with the *Christian Yellow Pages* must qualify as born-again Christians according to the Holy Scriptures."

The *Christian Yellow Pages* is published in more than two dozen areas, including Miami, Atlanta, Dallas, Houston, Richmond, Seattle, and San Francisco. These 12-36 page books resemble the yellow pages of the telephone company except for the white cross looming above the scenery on the cover and the inclusion of biblical quotes throughout the text. According to National Director Tomson, there are more than a million copies of his publication in print. Lawsuits permitting, he plans to expand this profitable religious undertaking even more during the next few years.

The *Christian Business Directory*, headquartered in San Francisco under the direction of Dan Loeffler, is another "buy Christian" enterprise. Loeffler is also associated with the California Christian Campaign Committee, which advocates the election of "Christians to public office." The *Christian Business Directory* is available in San Francisco, Tucson, Phoenix, Minneapolis, and Chicago. According to the publisher there are over 135,000 copies in circulation. Due to public disfavor and legal pressures, the *Christian Business Directory* may not come out this year.

Although the *Christian Yellow Pages* and *Christian Business Directory* are distributed without charge by churches and religious stores, they are unquestionably money-making ventures. Along with spreading the word of the Lord, their avowed intent is to earn profits for the publisher and advertiser by encouraging the patronage of Christian-run businesses. One *Atlanta Christian Yellow Pages* representative told *Newsweek* that the purpose of the directory "is to more or less keep money within the Kingdom." A *Christian Yellow Pages* brochure says that "it is out of harmony . . . for a Christian to give his business to those who are part of the anti-Christ system."

CHRISTIAN YELLOW PAGES.

Christian Yellow Pages is a directory of business and professional people who have declared that they are born-again believers in Jesus Christ.

If you use this directory to find the product or service you need — please make it a point to tell the advertiser that you located him through their ad in the CYP directory.

"As we have therefore opportunity, let us do good unto all men, especially unto them who are of the household of faith. (Gal. 6:10)

Directories Challenged

The born-again business guides have received criticism from both Christians and non-Christians. Florida pastor Charles Davidson was quoted in the *Christian Century* as stating that the ethics of these directories "run counter to the highest Christian principles of fairness and non-discrimination in the marketplace." The General Assembly of the Presbyterian Church in the U.S. (Southern) has even passed a resolution which asks its members not to use these booklets.

They also face stiff opposition in the courts. The California suits against the *Christian Yellow Pages* and the *Christian Business Directory* allege violations of several state statutes, including the California Civil Rights Act, which prohibits religious discrimination in business. The suits also charge infringements of the Unfair Business Practice portion of the California Civil Code and the California Anti-Trust Act.

The Jewish owners of Grecian Tile Company, David Pines and George Aronek, along with the ADL are plaintiffs against the *Christian Yellow Pages* in a Los Angeles suit. As the manufacturers and distributor of tiles which depict crucification scenes, they felt that this directory provided a good audience for their product. When they were informed that they had to sign an oath stating that they had "accepted Jesus Christ" as their "personal Lord and Saviour" they decided to seek legal redress for what they consider a competitive disadvantage.

One of their lawyers told *Businessweek* that he feels that the Christian directories are "an insidious evil, money-making operations attempting to cloak themselves in a mantle of religiosity." The plaintiffs in the Grecian Tile suit are seeking monetary damages and an injunction to prevent further publication of the *Christian Yellow Pages*.

The ADL and plaintiffs in the other two court cases make similar allegations. In a San Mateo suit, a Roman Catholic real estate agent charges that he was refused advertising space because he would not avow that he had been "born-again." The third case involves a Jewish owner of a women's specialty store who feels discriminated against by the restrictive religious policies of the *Christian Business Directory*.

W. R. Tomson contends that his publications are protected by constitutional guarantees of freedom of speech, press, and religion. In a recent interview, Tomson insisted that the directories do not represent "bias *per se*, but rather bias for born-again Christians." He adds that the directories do not discriminate on the basis of sex or race, factors which cannot be changed, but rather distinguish on the basis of religious preference. He argues that the directories do not unfairly discriminate "since anyone can be a born-again Christian." Finally, he claims that "every ethnic group does the same thing in one way or another," pointing to such publications as *Buy Israel* and *The Jewish Yellow Pages*.

But the ADL points out that Tomson's defense overlooks some important distinctions. *The Jewish Yellow Pages*, while it may be primarily of interest to

Jews, opens its pages to everyone who wishes to advertise, regardless of religion. And, though there may be a moral difference between discriminating on the basis of race and discriminating by religion, the California statute doesn't recognize the distinction. It flatly declares that no business establishment shall "discriminate against, boycott or blacklist, [or] refuse to . . . sell to . . . any person in this state because of race, creed, religion, [or] color."

A Legal Precedent?

Tomson's free press defense may also face tough sledding. There is no direct precedent, but the Supreme Court's decision in *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 93 S. Ct. 2553 (1973), suggests that using the First Amendment against charges of discrimination will be difficult.

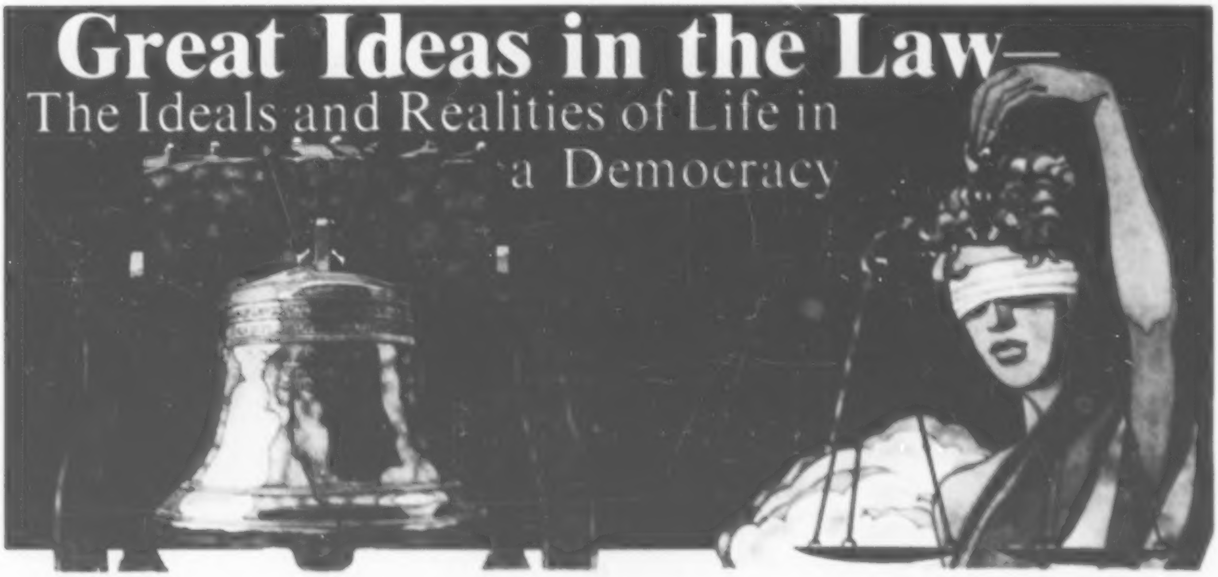
In the Pittsburgh case, the city human relations commission had issued an order requiring the *Press*, a major daily paper, to eliminate separate help-wanted ads for men and women. The *Press* argued that the order violated the First Amendment by restricting its editorial judgment.

However, a sharply divided Court determined that the classified section of the newspaper constituted commercial speech unprotected by the First Amendment. The courts have long distinguished between speech which can usually be regulated (commercial advertising) and speech which in most cases cannot be regulated (expression which conveys social, political, and artistic ideas). For example, a city ordinance which bans handbills has been upheld when it prevented commercial ads from being passed out; it might not be upheld if it prevented political literature from being disseminated.

In the Pittsburgh case, the Court determined that the classified ads were commercial speech and were not protected by the First Amendment. The Court pointed out that "discrimination in employment is not only commercial activity, it is illegal commercial activity . . . We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."

If the commercial-speech exception can be used to prevent a newspaper from claiming First Amendment protection against a charge of discrimination, then it would seem even harder for the Christian directories, overtly commercial ventures which traffic in ads rather than protected speech, to base their defense on the Amendment.

However, the facts and issues of the Christian directory cases differ a bit from the *Pittsburgh Press* case, there is continuing debate over whether commercial speech should be protected, and it's always risky to make predictions about pending cases. Only time and the courts will tell if the directories are legal.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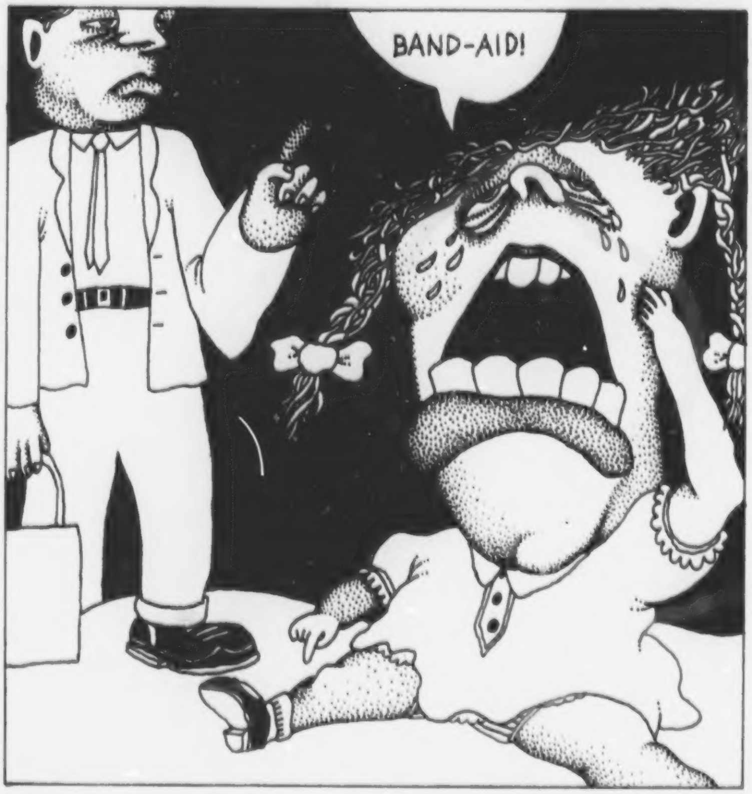
NEWSCLIPS

SIG Wants You

Law-related education now has its own special interest group (SIG) as part of the National Council for the Social Studies. The group encourages teaching of law-related education at all levels and promotes law-related education within NCSS and its affiliates. SIG group members must belong to NCSS.

The group, which meets yearly at the NCSS Annual Meeting, offers a chance for you to exchange information, interests, problems, and concerns about law-related education. You can find out more about the organization by contacting its chairperson, David Schimmel, at the School of Education, University of Massachusetts, Amherst, Mass. 01003. To join, you need only pay the annual dues of $5.00. Just send a check to treasurer Tom Thomas, 220 S.E. 102nd, Portland, Oregon 97216.



Trademark Hassles Take Strange Twists

In lots of companies, the advertising department tries to make the product a household word, while the legal department fights just as hard to prevent that from happening.

Why this corporate schizophrenia? According to an article in the *Chicago Tribune*, if the name of the product is widely misused—Xerox coming to stand for all photocopiers, Scotch Tape coming to stand for all cellophane tapes—the company could lose its exclusive rights to the trademark. Then any manufacturer could sell "xerox" machines or "scotch tape" and benefit from all the advertising these corporations have done.

Once upon a time, "aspirin," "cellophane," "escalator," "zipper," and dozens of other words were trademarks. Only the company that had developed these products could use these names.

However, when courts determined that these words had come to have a common meaning, they could no longer serve as legal trademarks. Now a host of companies use the old trademarks in selling their products, with all advantage lost for the original trademark owners.

Losing a trademark is nothing but trouble for a company. According to Xerox trademark counsel Robert Shafter, his company's name "has been built up for years. It's an asset. To come up with a name to replace it would cost a fortune."

How do big companies try to protect their trademarks? They mainly work at correcting misuse of the trademark in print. Often they run advertisements for writers and editors, explaining correct use of their trademarks. For example, one shouldn't say, "I'll xerox that." "Xerox" is a trademark, and shouldn't be used as a verb.

And when Coke, Levi's, Vaseline, or Orlon is written in lower case in newspapers, magazines, or books, the trademark owner will send a letter saying the name is a trademark and should be capitalized.

Corporate watchdogs also send letters to dictionary editors, because dictionary listings of trademarks as common words have been used in court as evidence that a trademark has become generic.

Finally, the companies' own advertisements supply words telling what the product is. So they say Dacron polyester, Kleenex tissue, Crayola crayons, and Scrabble crossword game.

There's a limit to all that, though. No lawyer in the world can make a trembling youngster looking at a bleeding little cut scream for a "Band-Aid brand adhesive bandage." Trademark or no trademark, the kid is going to yell for a band-aid.

LRE Bill Enacted

Congress has passed and President Carter has signed a bill that authorizes the creation of a law-related education office as part of the U.S. Office of Education. The office would serve a similar function to OE offices on such subjects as consumer education, ethnic heritage studies, and women's educational equity. The law-related bill authorizes grants to a wide variety of educational agencies and nonprofit groups for everything from curriculum development and dissemination to research and evaluation.

There is, alas, a large fly in the ointment. The legislation *authorizes* an expenditure of $15 million per year for the office, but it *appropriates* no funds. Therefore, actual funding will have to come through another act of Congress, and given the administration's intention to control government spending, securing an appropriation for the legislation will be a difficult uphill struggle.

What will happen now is anyone's guess, but current speculation is that the new office won't be funded before fiscal 1980 (the 1979-80 year) and that it won't have an annual budget of more than $5 million. Even at that level of funding, however, the office would provide a significant new source of grant money for the field.

OE staffers are now at work preparing the regulations for the new office. The tentative regs will be published in the *Federal Register*, giving interested people the opportunity to make recommendations. Keep an eye on the *Federal Register* to learn about regulations and the timetable for comments. We'll also keep you informed in future issues of *Update*.

Network Show Highlights Law for Teens

CBS's weekly *30 Minutes* program, a version of *60 Minutes* for teen-agers, carries a five-minute segment on law for teens that could be a real bonus for secondary law-related programs. The five-minute "Who's Right" segment features Pat McGuire, a young lawyer who is a staffer for the National Street Law Institute. Each week she answers questions on topics ranging from censorship of student press to locker searches and liability for auto accidents. She presents a hypothetical situation based on the question, suggests the legal rights and responsibilities of young people, and tells viewers some of the practical things they should think of when confronted by a similar situation.

The Street Law Institute, which acts as a consultant for the show, recommends that students be assigned to watch the "Who's Right" segment (the last five minutes of the show) and discuss it in class. The show airs at 1:30 Saturday afternoon in most parts of the country, but check your local listings for the exact time in your area.

Here's the schedule of "Who's Right" topics for the rest of the season, as well as a rundown on other segments of the show which touch on law-related topics for kids.

January 20—"Does a minor have the right to choose his or her own religion?" (Another segment of the show will touch on censorship of a school play.)

February 3—"Can a child choose which parent to live with in case of divorce?"

February 10—"What rights does a minor have in employment?"

February 17—"Can a student be suspended from school without a hearing?"

March 3—"What is a teen driver's liability toward passengers in his or her car?"

March 10—"Can police stop a car without cause?" (Another segment will deal with teen drug abuse.)

March 17—"Can a school discriminate against women athletes?"

March 24—"Can a teacher legally hit a student?" (Another segment will examine a teachers' strike.)

April 7—"The responsibilities of teen-age parents." (Another segment wil look at vandalism in the schools.)

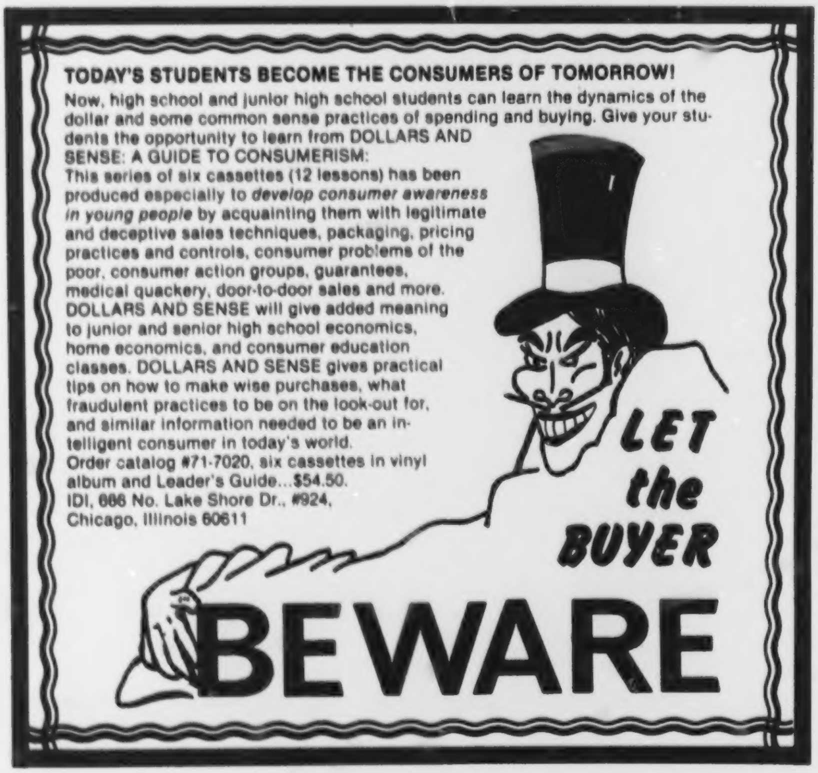
April 14—"Can a school prevent a student newspaper from publishing an article?" (Another segment will look at teen-age runaways.)

April 21—There will be no "Who's Right" segment, but another portion of the show will deal with teen-age parents.

April 28—Rerun of February 10 show.

May 5—Rerun of March 3 show.

May 12—"Can a principal open a school locker without permission?" □



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UPDATE LOOKS BACK

The Crusade Against Polygamy

Plural wives for the Mormons meant 40 years of trouble for the law

Charles White

In 19th century Utah, this scene of domestic bliss . . .

Could lead to this picture of woe.

In the late 1840s, the Mormons came to the end of their long trek west in a hot, dry, barren land that early pioneers had passed by on their way to Oregon or California. After a journey of more than a year, in wagons lumbering slowly through uncharted and dangerous territory, the Mormons found a desert and rejoiced.

The very remoteness and austerity of the land was part of its appeal. The Mormons were fleeing a religious persecution that had, in the 20 years of the sect's existence, forced them to move from state to state, destroyed much of their property, and killed their leader, victim of a mob while prisoner in an Illinois jail.

Like Anne Hutchinson or Roger Williams setting forth into the New England winter to escape persecution for their beliefs, the Mormons sought freedom rather than comfort. Secure in their faith, they were sure they could make the desert bloom, if only they could be free of harassment.

As it turned out, the land was the least of their problems. They had gone far enough to leave the mobs behind, but not far enough to escape the federal government and its laws. Over the next 40 years, the Mormons found themselves embroiled in a series of increasingly ugly legal battles designed to destroy the religiously-sanctioned practice of polygamy. The struggle tested the First Amendment's guarantees of religious freedom, put some bruises on the legal system, gave the Supreme Court several unhappy moments—and led to a constitutional doctrine that has stood the test of time.

Creating a Theocracy

The first Mormon settlers quickly set up a government and applied for admission to the union. They assumed, quite correctly, that they would have more latitude as a state than as a territory under the supervision of the federal government and its courts. Congress wouldn't admit Utah as a state, but the first settlers succeeded quite well in their other efforts to create a system that

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Charles White has a doctorate in American Civilization from the University of Pennsylvania. He has taught at Northwestern University and Kendall College and is now Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

protected them from outside interference.

The non-Mormon (Gentile) population was tiny, and the territorial legislature was completely dominated by Mormons. So were the strong territorial militia and the territorial system of land allocation, for some years in the hands of the church rather than federal land offices. In addition, President Fillmore appointed church leader Brigham Young as the first territorial governor, thus solemnizing the union of church and state.

With effective control of the executive and the legislature, the Mormon leaders moved quickly to control the courts as well. In most territories, federal district courts, whose judges were appointed by the President, had primary civil and criminal jurisdiction. However, the Utah legislature gave these functions to the territorial probate courts, whose judges were usually Mormon bishops. Moreover, the legislature created the offices of territorial attorney general and marshal, appointed high Mormons to them, and for good measure made the federal courts dependent on the legislature for financial support.

All in all, the Mormons were able to create, in the words of a modern historian, a "formidable if homespun . . . fortress of home rule" which was to frustrate the federal government's drive to enforce the law for several decades.

Polygamy in the Open

Even in far-away Utah, however, the Mormons quickly came to national attention. The religion had faced persecution back in the states because Americans judged it "unique," "foreign," "alien," and "the enemy of American life." Generally, this was a result of fear and ignorance rather than any real insight into the Mormon way of life. However, when the Mormons were secure in their fortress, they publicly acknowledged a secret practice that gave ammunition to their enemies. In 1852, the Mormons announced that "the plurality of wives" was a tenet of their faith, and in fact the taking of more than one wife was a duty of Mormon men.

The Mormons said that the system was not sensually motivated, but was designed to further a God-given responsibility to strengthen family ties and bring children into the world. According to a Mormon historian,

> From the first it was known that polygamy would involve sacrifice . . . Its introduction was not a call to ease and pleasure, but to religious duty; it was not an invitation to self-indulgence, but to self-conquest; its purpose was not earthly happiness but earth-life discipline.

It also had the social end of increasing population, absorbing surplus women into marriage, and preventing adultery and prostitution.

No matter how much the Mormons claimed that the practice created a "consecrated motherhood and fatherhood system," however, polygamy was anathema to non-Mormons. At a time when sexual prudery was at its zenith, the system shocked the moral sensibilities of the nation and seemed like a return to savagery. The Republican Party platform of 1856 linked polygamy with slavery as "twin relics of barbarism" which must be destroyed.

But the federal government didn't do much for more than a decade. Slavery was the more pressing problem, Utah was remote and inaccessible, and Congress was content to merely pass a law "to punish and prevent the practice of polygamy in the Territories of the United States." No serious attempt was made at enforcement, and in the late 1860s a Congressional committee reported that the "law is at present practically a dead letter."

The law probably had no effect because the Mormons were so well prepared to fight any attempt to make it work. Every new territorial governor found that real power remained with the church, the local courts were still staffed by Mormon bishops, and federal officials were convinced that no indictments could be expected from Mormon grand juries. Moreover, they thought the secrecy involved in plural marriages and the Mormon domination of trial juries would have made convictions impossible even if indictments could be secured.

The Federal Crusade

And so the legal battles to end polygamy were inseparable from political battles over control of the territory's justice system. In the 1870s and 80s, Presidents appointed get-tough governors and judges, and Congress passed increasingly stringent laws designed to break the Mormon stranglehold and put some distance between church and state. As in most crusades, zealotry sometimes got the better of fairness, and Washington's lofty ends were often smirched with tawdry means.

President Grant began the crusade by appointing a territorial chief justice who said that the day would soon come when "the disloyal high priesthood of the so-called 'Church of Latter-Day Saints,' shall bow to and obey the laws that are elsewhere respected, or else those laws will grind them into powder."

When even he couldn't get convictions under existing laws, Congress obliged with new legislation. The 1874 Poland Act, for example, transferred criminal and civil jurisdiction from the probate courts to the federal courts, abolished the offices of territorial marshal and attorney general, and provided that in any prosecution for polygamy a prospective juror could be challenged for belief in plural marriage. It also set up a system whereby an equal number of Mormons and Gentiles would serve on trial juries.

The Chief Justice said th
law would grind the
Mormons into powde

The Mormons immediately sought a court fight to determine the constitutionality of the anti-bigamy laws, and George Reynolds, Brigham Young's secretary and an avowed polygamist, became a voluntary defendant in a test case.

The Mormons argued that the practice was sanctioned by "celestial law." They said it wasn't a civil contract but a religious ceremony, and as such was protected by the First Amendment to the Constitution, which provides that Congress shall make no law impairing the free exercise of religion.

In *Reynolds v. U.S.*, 98 U.S. 195 (1878), the Supreme Court rebuffed this line of reasoning. On the central issue in the case, it handed down a landmark ruling that distinguished between religious *beliefs*, which are protected by the First Amendment, and religious *actions*, which are subject to criminal law.

The Court argued that the First Amendment left Congress free "to reach actions which were in violation of social duties or subversive of good order." Since polygamy has always been found "odious" among civilized men, it clearly could be prohibited by legislation.

Moreover, the Court argued that if religiously motivated actions were outside the reach of the law, the government would be powerless to stop any crimes undertaken as part of religious belief, including human sacrifices which might be condoned by religious sects. In short, the Mormon's reasoning would "permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

The Crusade Turns Nasty

Up to this point, the campaign against polygamy had proceeded pretty much within reasonable constitutional guidelines, at least as understood in the rough and ready jurisprudence of those times. Federal judges in the territory had come down hard on polygamy but usually were sustained by higher courts.

When the crusade gathered momentum, however, constitutional safeguards began to take a beating. One difficulty with the *Reynolds* case was that it settled only the constitutional question. It made it no easier to secure convictions against polygamists who did not admit their crime. In 1880, President Rutherford B. Hayes pinpointed the problem in a message to Congress calling for sterner measures:

> Polygamy will not be abolished if the enforcement of the law depends upon those who practice and uphold the crime. It can only be suppressed by taking away the political power of the sect which encourages and sustains it.

Congress dutifully went back to the drawing boards. One of the major obstacles to convicting suspected polygamists was that all Mormon marriages were secret. Without a formal record, it was exceptionally difficult to prove that a polygamous marriage had taken place. To correct this, the 1882 Edmunds Act made "unlawful cohabitation" a crime.

The most controversial sections, however, were political, declaring all registration and election offices in Utah vacant, providing for a board of five presidentially-appointed commissioners to register voters and manage elections, and prohibiting those living in polygamy from voting or holding office.

During congressional debate on the bill, opponents vigorously asserted that it would take away the political privileges of suspected polygamists without a trial, unconstitutionally depriving them of their rights without due process of law. Polygamy might be an evil, but, as one senator put it, "I am not willing to persecute a Mormon at the expense of the Constitution of the United States."

Nonetheless, the bill became law and proved very effective. The commissioners disenfranchised thousands of persons, and the courts sent 1,300 polygamists to jail. Many others, including John Taylor, who had succeeded Brigham Young as church leader, went into hiding to avoid prosecution.

Federal officials thought that the key to getting convictions was to keep Mormons off juries, no easy task considering that they represented more than 90% of the territory's population. In one instance, for example, more than 200 persons were disqualified for belief in polygamy before a grand jury of 15 could be chosen. But the effort was apparently worth it. One U.S. marshal later recalled that with all-Gentile juries he "could convict Jesus Christ."

With polygamy seemingly on the run, Congress tried to apply the clincher with a new bill passed in 1887. The Edmunds-Tucker Act broke with common law tradition by permitting wives and husbands to testify against each other. Under this law, when Mormon women refused to testify, they would often be jailed for months.

Even more alarming to opponents, the act seemed flagrantly unconstitutional. It took away the ballot and right to hold office not merely for polygamists but for anyone who wouldn't swear to support the Constitution and the laws of the United States, especially the anti-polygamy laws. Eventually 12,000 persons—about 40% of the territory's registered voters—lost their right to vote.

Other controversial provisions overturned an act of the territorial legislature and dissolved the incorporation of the Mormon church, directing the Attorney General to wind-up its affairs. The property of the church (except for actual houses of worship and burial grounds) was to be forfeited and used for the public schools. Congressional opponents bellowed that this was "naked, sinful confiscation," but the sections passed and became law.

Faced with this devastating blow, the church once again sought the protection of the Constitution, and once again failed before the Supreme Court.

In *Mormon Church v. U.S.*, 136 U.S. 1 (1890), a divided Court upheld the constitutionality of dissolving the Church's incorporation. Speaking for the Court, Justice Bradley argued that Congress had plenary power over the territories, arising from the federal government's power to make all needful rules and regulations respecting the territory of the United States. Thus he reasoned it had the power to disapprove

THE MORMON OCTOPUS ENSLAVING THE WOMEN OF UTAH

An illustration from an anti-Mormon publication of the 1880s.

of acts of territorial legislatures, and so could repeal the territorial act incorporating the church and dispose of its property.

The disincorporation was appropriate, he said, because the church was actively involved in furthering a crime. Thus, the question was whether "such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself," and whether the church's funds should be applied to unlawful ends.

The three dissenting justices were persuaded by the Mormon's argument that the Constitution protected the inhabitants of territories as well as of states, and thus Congress could not pass laws impairing the obligation of contracts and taking property from one entity and giving it to another. Chief Justice Fuller's minority opinion said that Congress had the power to pass laws making polygamy a crime, but argued that Congress "is not authorized to seize and confiscate the property of persons, individuals, or corporations, because they may have been guilty of criminal practices."

The Mormons Lose Again

The Mormons fared no better in another key case decided the same year. In *Davis v. Beason*, 133 U.S. 333, the Court unanimously upheld an Idaho law that went even farther than the federal Edmunds-Tucker Act in disenfranchising Mormons. The Idaho statute provided that no person "who is a member of any association which teaches . . . or encourages . . . the crime of bigamy or polygamy . . . is permitted to vote at any election or to hold any position or office . . . within this Territory."

The law went well beyond disenfranchising polygamists or those who wouldn't swear to uphold the laws, directly penalizing membership in the church itself, on the dubious assumption that *all* Mormons fully accepted the church's teachings, and so were equally guilty of advocating polygamy. The Mormons argued that the statute unconstitutionally prohibited "the free exercise of religion" and directly conflicted with the First Amendment. The Mormon attorneys also asserted that it deprived persons of liberty without due process, in violation of the Fourteenth Amendment, and established a religious test for office, in violation of Article 6 of the U.S. Constitution.

The Court, however, unanimously decided otherwise. Justice Field's opinion began by reiterating once again the monstrous nature of polygamy, and argued that teaching and advising persons to practice such a crime is itself criminal, just as aiding and abetting crimes are in other cases. Thus, the Court reasoned, the methods employed by the Idaho law "are directly and immediately suitable," since they seek "to withdraw all political influence" from those hostile to the anti-polygamy statutes.

By using questionable methods, the government left a legacy of bad feeling—and bad law

Modern commentators have been hard-pressed to find merit in this opinion. As in *Mormon Church*, the Court seemed to completely lose sight of the distinction put forward in *Reynolds* between beliefs and actions. As Leo Pfeffer points out in *Church, State, and Freedom* (Boston, Beacon Press, 1967), "the effect of this decision was to allow a person to be punished merely for being a Mormon . . . guilt by association with a vengeance."

Once these decisions were rendered, the Mormons had no practical alternative but to surrender. Later that year, the head of the church issued a manifesto against polygamous marriages, advising all Mormons "to refrain from contracting any marriage forbidden by the law of the land." Presidents Cleveland and Harrison then pardoned convicted polygamists, church property was returned, and existing polygamous marriages were winked at so long as no new marriages took place. In 1896, Utah was finally admitted to the Union, with a constitution that provides that "no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited."

What did this long and acrimonious struggle accomplish? From a practical standpoint, the federal government succeeded in virtually ending polygamy. Though a few Mormon fundamentalists have continued the practice, it has largely disappeared.

And one solid piece of constitutional interpretation emerged from the fray. In *Reynolds* the court enunciated a basic First Amendment principle by distinguishing between liberty of opinion, which is fully protected by the Constitution, and the actions of church members, which can be lawfully regulated by the criminal code. Though the Court in *Davis* and *Mormon Church* ignored this principle, it remains a guiding standard which has been the basis of many important decisions.

Many modern historians have suggested, however, that polygamy could have been ended by gentler means.

Compromise would have been difficult, but there were grounds for reconciliation. For one thing, polygamy was never a massive social problem. Even at the zenith of polygamy, in the early days of the territory, probably no more than ten per cent of Utah's population belonged to polygamist families, and the number of plural marriages fell steadily after the 1850s. Even before the federal crusade, Mormons were rejecting polygamy, perhaps because the fervor of early generations had faded, perhaps because few men wanted to take on the financial burden of plural wives and extended families.

Secondly, the Mormons were much less monolithic than the federal government supposed. The early Mormon settlers did present a united front on most matters, but as the first generation died off, the Mormon community became far more heterogeneous. For example, Mormon juries found against Mormon defendants in some key cases, and by the 1890s Mormon voters were dividing their allegiance between the two major parties.

Finally, each side had something the other wanted. The Mormons wanted to see the territory become a state; the federal government wanted polygamy eliminated before it would admit Utah as a state and release it from direct federal supervision.

We'll never know what would have happened had a conciliatory course been followed. But it is clear that the crusade against polygamy tarnished the law, weakened constitutional guarantees, and often denied fair treatment and due process. In using un-American means to "Americanize" the territory, the federal government left a legacy of bad feeling—and bad law. ☐

FAMILY LAWYER

Will Bernard

Cases on Witnesses and Evidence

Murder on Tape

Virginia telephoned the police to report that she was nervous about prowlers. While she was on the line a man burst into the room, exchanged angry words with her, then shot her dead.

In due course a neighbor was arrested for the crime. At the trial, police brought in a tape recording of Virginia's telephone call—including the conversation with the killer and the fatal shots.

The defense attorney objected to this "hearsay" evidence, but the court overruled his objection. And the tape helped send the defendant to prison for murder. Said the court:

"The rules of evidence are founded upon considerations of reliability. A mechanical record, if audible and not tampered with, is likely to be much more accurate than oral testimony."[1]

As a general proposition, evidence on tape is indeed admissible in the courtroom. However, the recording must meet a minimum standard of quality. If it is too faulty, it won't get by.

In a robbery trial, the prosecution offered a tape recording of the defendant being interrogated by two detectives the day after the crime.

But the quality was so uneven that the court rejected the evidence. The court said there was too much risk that the jurors would resort to guesswork to fill in places they could not really understand.[2]

In another case the language on the tape was clear enough, but the sound level was so low that only the juror closest to the machine could hear it.

From the defendant's point of view, this was grounds enough for the tape to be thrown out. But the court decided to accept it. The judge said he could see no reason why the jurors should not listen to the tape one at a time.[3]

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1. *State v. James,* 41 Oh. App. 2d 248, 325 N. E. 2d 267 (1974).
2. *Lamar v. State,* 258 Ind. 504, 282 N. E. 2d 795 (1972).
3. *Searcy v. Justice,* 20 N. C. App. 559, 202 S. E. 2d 314 (1974).

(For this and other *Family Lawyer* articles, descriptions are sometimes adapted from cited cases).

"Only Circumstantial"

It happens all the time. A newscaster describing a criminal investigation will say that "the evidence so far is only circumstantial." The implication is clear: that circumstantial evidence is second-rate, not as reliable as direct, eyewitness evidence.

This preference for eyewitness evidence is hard to justify. Psychologists have been demonstrating for years that eyewitnesses may differ dramatically in describing the same event.

No less an authority than the United States Supreme Court has said that "the annals of criminal law are rife with instances of mistaken identification."[1]

On the other hand, all of us are constantly showing our trust in circumstantial evidence. Steam rising from a cup of coffee convinces us—by circumstantial evidence—that the coffee is hot. Dog tracks in the mud convince us—by circumstantial evidence—that a dog has passed by.

And, whatever the newscasters may say, the law itself does not consider circumstantial evidence second-rate. Actually, most verdicts of guilty are based on circumstantial evidence—fingerprints on a gun, skid marks on a pavement, possession of stolen goods.

In fact, some elements of a crime simply cannot be proven in any other way. Take murder. To win a conviction the prosecutor must prove that the killer had "malice aforethought." Yet no one really "saw" what he had in mind before the killing. Only from his words and his deeds can the jury deduce an evil purpose.

Of course, if circumstantial evidence is not necessarily worse than eyewitness evidence, it is not necessarily better either. Both kinds can do the work of justice, proving the guilty guilty or the innocent innocent.

Judging evidence by its label makes no more sense than judging a book by its cover.

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1. *United States v. Wade,* 388 U. S. 218 (1967).

Hungry Burglar

Jimmy was burglarizing a delicatessen one night when he felt a pang of hunger. Picking out a wedge of Swiss cheese, he took one large bite—then left the remainder on the counter.

But that one bite proved to be his undoing. Arrested as a suspect, Jimmy was asked at the police station to bite into a piece of cheese. The teeth marks on the two cheeses matched perfectly, and Jimmy was duly found guilty of the crime.[1]

Of course, identification by dentures is nothing new. Two centuries ago Paul Revere, a sometime dentist, was able to identify a slain American officer by the bridgework he had made for him many years earlier.

But identification by bite marks is comparatively recent. It has generally been used not to identify a victim but to identify a criminal.

In another case a homicide victim was found to have sustained bite marks on her nose. At the trial, the prosecutor tried to compare these with the bite of the accused. But the defense attorney objected:

"Comparing bite marks is too chancy. It is not a recognized scientific technique, like comparing fingerprints."

Nevertheless, the court decided to admit the evidence for what it was worth. The court said bite marks, even if not as persuasive as fingerprints, are at least good enough to deserve consideration.[2]

Of course, dental evidence may exonerate the innocent as well as convict the guilty. Thus:

A man accused of passing a counterfeit check came up with an alibi. At the time of the crime, he said, he had been at the dentist having his teeth X-rayed. An X-ray picture was brought into court and identified as showing his teeth.

Result: he was cleared of the charge.[3]

1. *Doyle v. State,* 159 Tex. Crim. 310, 263 S. W. 2d 779 (1954).
2. *People v. Marx,* 54 Cal. App. 3d 100, 126 Cal. Rptr. 350 (1975).
3. *People v. Greenspawn,* 346 Ill. 484, 179 N. E. 98 (1931).

In Vino Veritas?

Pliny, a sage of ancient Rome, said: *"In vino veritas"*—in wine there is truth. Does the law agree that alcohol, by loosening a person's tongue, makes him more honest?

The question arises when a criminal suspect has made a confession while "under the influence."

No court says that intoxication actually increases the likelihood of honesty. But by and large, intoxication does not invalidate the confession either. Thus:

In a murder case the defendant had confessed to the police while still shaky from the whiskey he had been imbibing. Yet he was sober enough to talk coherently about the crime.

The court decided his confession was acceptable evidence—and it played a part in sending him to prison.[1]

Of course it is a matter of degree. In another case a confession of robbery was thrown out of court because the man had been in an alcoholic daze when he made it. The court said such a statement was inadmissible because it was "not the product of a rational intellect and a free will."[2]

Similar questions have arisen, though less often, in connection with drugs.

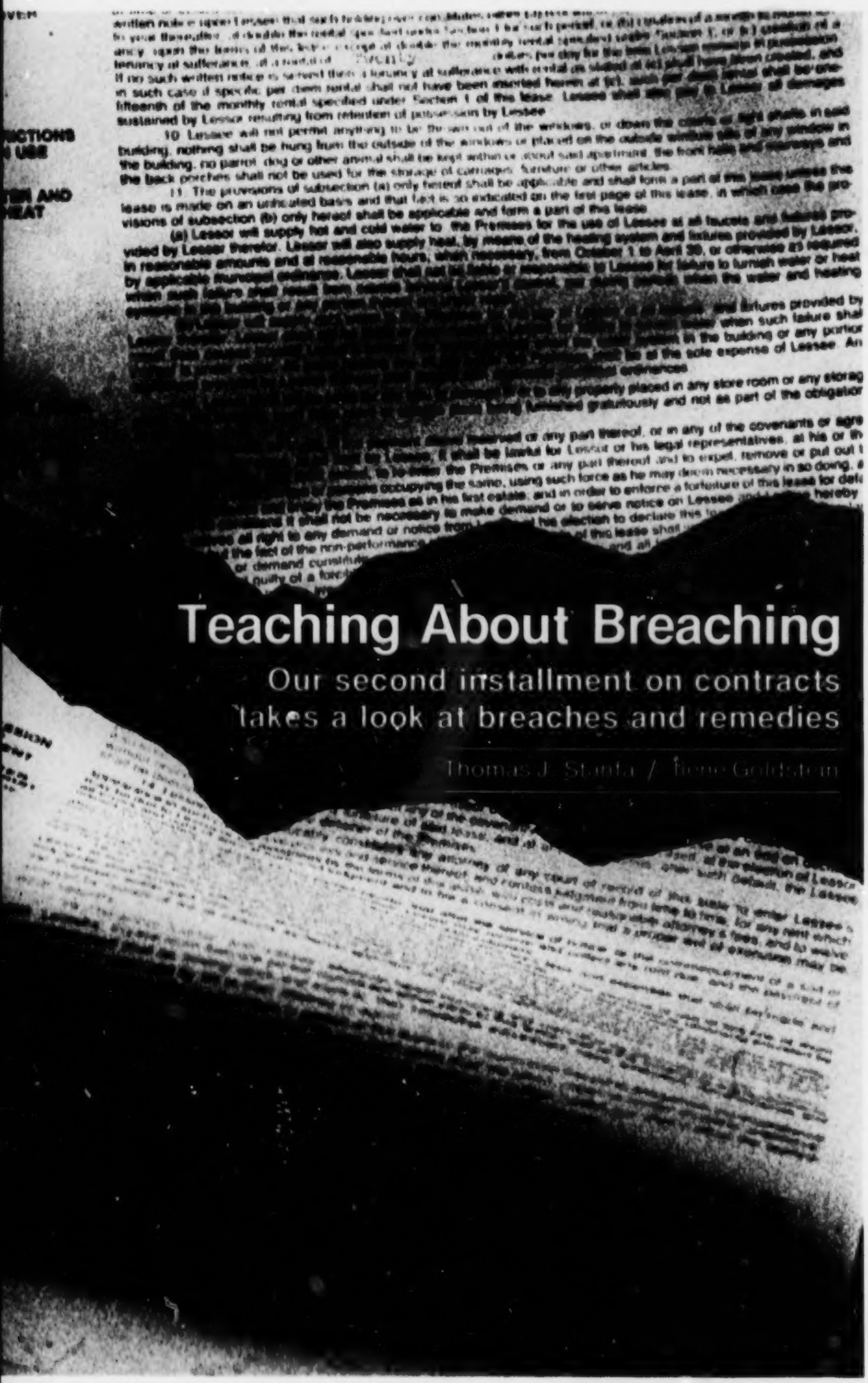
One man had swallowed several barbiturates just before being picked up on suspicion of burglary. His eyes were dilated, his speech was slurred, and he wasn't making sense.

He too made a confession—but not until eight hours of cooling-off time had elapsed. By then he had recovered sufficiently to walk and talk with no special difficulty.

The court held the confession admissible because at the time it was made, the defendant had at least an adequate understanding of what he was doing.[3]

1. *Commonwealth v. Smith,* 447 Pa. 457, 291 A. 2d 103 (1972).
2. *Logner v. State of North Carolina,* 260 F. Supp. 970 (1966).
3. *People v. Wolfram,* 12 Ill. App. 3d 262, 298 N.E. 2d 188 (1973).

"You realize Madam, there's a penalty for early withdrawal!"



Teaching About Breaching

Our second installment on contracts takes a look at breaches and remedies

Thomas J. Stanfa / Ilene Goldstein

"Mommy, mommy, you told me that if I was good I could have a cookie." Our frustrations with broken promises and broken contracts have their roots in early childhood and continue growing throughout our adult lives. We are all very familiar with having promises broken, but all too often we have no experience with remedies. Of course, the best remedy is no remedy. The contract should be water-tight when entered. But even the most water-tight contract can spring a leak or burst, so in this article we'll explore what constitutes a breach of contract and consider both informal and formal remedies.

Lesson I: Recognizing a Breach of Contract

Before students grapple with their possible remedies when the other party fails to live up to his end of the bargain, they must first deal with the concept which allows them to pursue their remedy—a breach of contract. Generally, a breach is a " . . . failure, without justification, to perform all or any part of what is promised in a contract." In other words, when you fail to perform what you've promised, your nonperformance will be regarded as a breach of contract.

Nonperformance can cause breaches in all kinds of contracts. For example, leases can be broken when the tenant fails to pay the rent or the landlord fails to keep the property in good living condition. A consumer contract can be broken if the store fails to deliver the merchandise or delivers the wrong merchandise. It can also be broken if the consumer fails to pay for the merchandise.

Is every failure to perform a breach? No. The law has recognized that certain circumstances can excuse not carrying out one's part of the bargain. Have students consider the following hypotheticals.

1) Mr. Washington contracts with Mr. Wealthy to use Mr. Wealthy's auditorium for his circus. One week prior to the circus's opening date, the auditorium burns down.

2) On May 5, Mr. Cain contracts to rent rooms in Mr. Able's hotel on June 11. The rooms overlook a street that the Queen's coronation parade (scheduled for June 11) will pass over. Both Mr.

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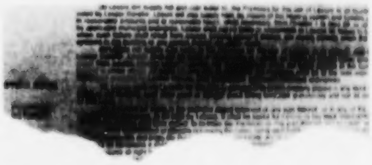
Cain and Mr. Able know that the only reason Mr. Cain wants to rent the rooms is for the purpose of viewing the Queen's coronation parade. One week prior to the parade, the Queen becomes ill and the parade is cancelled. Mr. Cain refuses to pay for the rooms.

3) Mr. B. T. Kid agrees to sell Mr. J. James 10 handguns imported from Mexico. However, before the deal can go through the federal government passes a law forbidding the importation of guns.

In situation one students may feel there is a breach since Mr. Wealthy did not perform his part of the agreement and have the auditorium for Mr. Washington's circus. However, in this situation there really is no breach of the contract. It is impossible for Mr. Wealthy to rent the auditorium because it no longer exists. As common sense suggests, impossibility of performance discharges an obligation to do what one promised.

In the second hypothetical, Mr. Cain's refusal to rent the rooms is not a breach of contract. Both Mr. Able and Mr. Cain knew that Cain rented the rooms only to observe the Queen's parade. When the parade was cancelled, the rooms were no longer of any use to Cain. This example is factually similar to the 1903 English case of *Krell v. Henry*. In that case, the court held that if the purpose of a contract is defeated, the obligation to perform the promise is excused.

The last hypothetical suggests a third reason why nonperformance may not constitute a breach. If a change in the law makes what one promised to do illegal, the duty to perform that promise is suspended.



Lesson II: Minor and Material Breaches

While most nonperformance constitutes a breach, much depends on how serious the failure to perform has been. Because nonperformance can vary so radically, the law has recognized two different kinds of breaches.

Students should be able to distinguish between the two because each gives rise to a different action. If courts find a minor breach, the contract remains in force and both parties, including the wronged one, must live up to their end of the contract. However, a material breach goes to "the heart of the contract," and if the courts find a material breach the wronged party may treat the contract as ended. Even if he's received goods under the contract he doesn't have to pay for them. He has no further obligation to do what he promised to do.

Because terminating a contract is a radical measure, as a matter of judicial policy courts tend to find minor rather than major breaches. By doing so, they maintain the integrity of contracts, providing a clear signal to those entering into agreements that the courts will not easily hold a breach to be material and thus void a contract. And even when they do find a material breach, courts will often impose remedies compelling the parties to perform their responsibilities, rather than ruling that monetary damages be provided.

One good way to introduce the two different types of breaches is to have students work with hypothetical breach of contract situations. Begin by emphasizing that it is often very difficult to determine whether a breach of contract is material or minor. Then ask your students whether there is a breach of contract in the situations given below. If they decide that there is a breach, ask them to state whether the breach is material or minor. The debriefing will help them learn about the factors that courts take into account in deciding the extent of the breach.

Have them consider the following hypos:

1) On Monday, Tom promises to pay Betty $5 to paint his portrait on Friday. In return, Betty promises to paint Tom's portrait. On Friday, Betty tells Tom that she does not feel like painting his portrait.

2) Bill promises to repair Joe's porch by July 1. In exchange, Joe promises to pay Bill $100. Bill repairs Joe's porch, but it is not completed until July 7.

3) Suppose in the above example that Joe needed his porch repaired by July 1 because photographers were going to take pictures of it for their world-famous "Porch Beautiful" magazine on that day. Bill knew about the photographers when he entered into the contract and agreed to have the porch repaired by July 1.

4) In February, Mary Beth contracts to be employed by Mr. Jones beginning on April 1. On March 1, Mr. Jones tells Mary Beth that she will not be hired.

5) On Monday, Abbott contracts with Costello to buy 100 pairs of shoes for $10 apiece. On Tuesday, Costello sells Abbott 97 pairs of shoes.

6) Farmer Watkins promises to deliver a thousand bushels of corn to a cannery by September 1. However, a key harvesting machine breaks, and he's unable to deliver any corn on time.

7) Farmer Simkins has the same contract as his neighbor Farmer Watkins. His machinery doesn't break, but he still misses his deadline, getting only 600 bushels there on time. However, he says he can fulfill the contract if given more time.

In the first situation, students may think that the breach is minor because the contract is so small. However, the size of the contract has nothing to do with the extent of the breach. In this situation, Betty's breach is material. She wilfully refused to paint Tom's portrait after they entered into a valid contract. In general, a purposeful breach is more likely to be deemed material than an innocent or negligent breach.

The second situation represents a minor breach of a contract. The principle here is that the wronged party must not be allowed to reap a windfall profit from the breached contract. Joe lost little when his porch wasn't repaired on time, so his obligation to pay is not relieved. The contract is still in force, and he must pay Bill when the work is completed, though he would be able to recover any damages he incurs because of the later completion date.

The next situation is superficially similar but actually very different because Joe and Bill created a "time is of the essence" clause. They knew that if the porch was not repaired by July 1, the photographs of the porch would not be taken. Time generally is not essential in contracts. However, when the parties create a "time is of the essence" clause, failure to meet the specific date is most often considered a material breach.

In situation four, Mr. Jones has created a material breach by reneging on his promise to hire Mary Beth. The hypothetical is based on the 1853 English case of *Hochester v. De La Tour* which propounded the concept of "anticipatory repudiation." In its simplest form, anticipatory repudiation means that if one party claims that he will not fulfill his end of the bargain before the time of performance, the other party may treat the contract as ended (and therefore a material breach of the contract). The wronged party can sue on the whole contract.

The fifth hypo demonstrates the concept of "substantial performance." This means that even though a person did not do everything he promised to do, he did almost everything. If one substantially performs his part of the contract, any breach will be minor. Costello has substantially performed the contract by giving Abbott 97 pairs of shoes. However, Abbott may sue him for the minor breach—the cost of the three missing pairs of shoes.

Farmer Watkins' dilemma illustrates another criteria for determining breach. If the courts found that getting a replacement machine in the midst of the harvest would be a hardship for him, they'd determine that the breach was minor. In general, the greater the hardship on the breaching party the less material the breach.

In hypo seven, Farmer Simkins' breach is also minor, since he fulfilled part of the contract and seems likely to perform the rest.

The students should now have an understanding of what constitutes a breach of contract. They can proceed to the more difficult task of choosing an appropriate remedy.

Lesson III: Informal Remedies

"You can't do that. I'll take you all the way to the Supreme Court!" Many of us have vowed this very thing as revenge when someone's broken a promise to us. But do any of us have first-hand knowledge of a case that has gone all the way to the Supreme Court? Probably not. Not many cases actually reach the High Court.

What about a lower court? You can try, but you've got to be dedicated. The time and money necessary to bring a case even to trial is overwhelming. In most larger cities, the average wait (backlog) is between three and five years to bring a civil case to trial. In addition, the cost of the average trial is staggering.

So what can you do if you feel you've been cheated under a contract but want to settle the matter quickly? In practice, you'd be well advised to settle the dispute out of court or in an informal in-court setting such as small claims court. There are many alternatives available if you feel you've been cheated. Let's look at them.

One step to take if you're dissatisfied is to get in touch with the other party to the contract. Find out why that person did not fulfill his or her promise. There may be legitimate reasons. Maybe the two of you can come to terms. Whether or not this meeting will work of course depends on the circumstances and the willingness of the parties. If the parties do agree to change the contract they will have created new obligations and will be bound under this new contract.

How can you get quick satisfaction when someone's broken his contract with you?

One way to effectively demonstrate this approach in class is to break the students down into pairs. Tell them that they have entered into a contract with their partner. Give both students a copy of an original contract like the following and tell them that one of them has breached it.

Contract for Painting House

I Leonardo agree to paint Allen's house and supply the paint for $650, to be completed by January 15.

I Allen agree to pay Leonardo $650 for painting my house by January 15.

Signed—Leonardo
—Allen

You can use this example first to reinforce some points made by the article in the last *Update* on teaching about contracts. Is this a good contract? If not, what's wrong with it? What additional information might be needed? Would students sign it? Why or why not?

The situation that they'll be role-playing is that on January 9 Leonardo tells Allen that he is not going to paint the house. Their job is to meet with each other and do anything they feel is appropriate in their situation.

Give one of the students Leonardo's circumstances. He finds out that the paint he is to supply is not $8.00 a gallon as he expected. Instead, the price of paint jumps to $15.00 a gallon. Leonardo needs 30 gallons of paint. Instead of costing Leonardo $240 for the paint as he expected, the cost of the paint will be $450. It will take Leonardo five days to paint Allen's house. After expenses he will make $200 instead of the $410 he expected to make. Leonardo's wife is expecting a baby and he needs all the income he can get. He thinks he just can't afford to work for $40 a day when he could make twice that on another job.

Give the other student Allen's circumstances. Allen has a buyer coming to look at his house on January 16. The house presently looks shabby, and the real estate broker has told Allen that if it is painted before the buyer comes to look, he can probably get $5,000 more for it.

Have the pair of students take it from there. Allen can hold Leonardo to the agreement, or Allen and Leonardo can try to reach a new agreement. Whatever decision the students make should be presented to the rest of the class, accompanied by their reasons for that decision.

After this exercise the students should be encouraged to discuss the advantages of this kind of informal dispute resolution.

In conjunction with this nonlegal remedy, introduce the concept of "party expectations." Expectations of the parties are basically the benefits each party thought he'd receive from the contract. What was Leonardo's expectation from this contract? Probably to make a fair amount of money. What was Allen's expectation for the contract? Of course, he expected to have his house painted, but is it reasonable for him to expect the value of his house to increase $5,000 from this contract?

The teacher should tie in one more concept with this exercise. In Lesson II students learned about the concept of hardship. Get the students to explore this concept in the case. Would it be a hardship on Leonardo to force him to spend five days painting a house for half of what he could make on another job? Could a painter get another job on short notice in any event? What about the hardship Allen suffered? Could Leonardo's problems have been avoided if he covered himself on a price rise by writing a clause into the contract? Should such a clause be in the new contract?

Other possible remedies short of a

full-fledged legal proceeding can be identified by investigating consumer organizations in your community. Such groups include consumer action columns in your local newspaper, consumer action programs on both radio and television stations, private organizations like the Better Business Bureau, and governmental offices focusing on consumer protection.

Have the students make a list of the consumer groups in their area. Then have the students do some research. How does one contact such a group? How does one find out what kind of consumer problem the group handles? Make a chart of this information and post it in the classroom.

Governmental agencies dealing with consumer rights are a particularly good resource. Such agencies include consumer fraud divisions of both the state and federal governments and state and local departments of consumer education. Have the students do some field work with these groups. They can pick up any available literature and make a chart of the governmental agencies available in your locale and the area of disputes the agencies specialize in. On field trips they can observe the agencies in action.

Students can also interview persons from consumer groups and report back to the class, or invite people from consumer action groups into the class to explain their jobs. Have the resource people run through a case from beginning to end. If you're fortunate these people may be presently working on a situation which they can discuss with the class. You and your students could then keep tabs on the case until its eventual outcome.

If your school has a newspaper, you may want to set up a school consumer action column. It could be focused on actual problems that have confronted young people and teachers, giving your students first-hand experience in settling real disputes.

Or you could set up a consumer action service that isn't tied to the school paper and handles problems that arise out of school. One model is the Consumer Action Service of the Protect Your Rights and Money Class at St. Paul Open School, which *Update* profiled in its Spring '77 issue.

This group actively solicits problems from people in the community. Their "clients" have brought them hassles ranging from Dobermans and rental deposits to automobiles and insurance. They get the facts of each case, call the party complained about to try to work out a settlement, consult law books, talk with volunteer lawyers who assist the class, and sometimes involve consumer action people from government offices and newspaper consumer columnists. Their goal is always to get the best possible settlement for the people who consult them.

A program like this can really make contracts come alive. Teacher Joe Nathan says kids "learn that it is important to read a lease or contract before they sign . . . they learn that they're responsible for protecting their own rights." And one of the students sees a larger benefit: "A case is more than just helping somebody get their money or whatever. It's learning how to analyze, understanding larger meanings, being aware of the process."

Lesson IV: In-Court Remedies

Often the parties to a breached contract can get together and work out a satisfactory remedy. But what can you do if the other guy's broken the contract and refuses to come up with an alternative that satisfies you? In many jurisdictions you've got an option that won't require you to hire a lawyer and face the expense and delays of a full-dress legal proceeding.

In many states and localities, small claims courts offer you a good bet if you feel the other party has welshed on his side of the deal. These courts are sometimes called Pro Se courts, from the Latin words meaning "for oneself." As the name implies, the person who seeks relief in a Pro Se court doesn't have to retain an attorney. The filing fee in Pro Se court is nominal, generally between $10 and $20, which may be reimbursed if the court rules in your favor.

Pro Se courts handle a variety of cases from car accidents to broken contracts, but a person may only seek relief in Pro Se court if he/she is suing for less than a certain dollar amount. For example, in Chicago a person may only use a Pro Se court for amounts under $500.

Pro Se courts generally operate very informally. A judge usually decides cases without a jury. A complete trial, including statements by plaintiff and defendant, as well as witnesses' testimony, may take only 10 minutes.

The best way for students to understand Pro Se court is for them to go and see it. The student will learn a great deal about how the law functions from watching these cases (also see "Why I Went to Small Claims Court" in the Fall '77 *Update*). Besides learning about cases and decisions in laypeople's terms, kids watching these cases will learn about need for careful preparation and the kinds of evidence helpful in winning a case—photos, records, documents, witnesses' testimony. When students return to the classroom, have a lawyer available to answer their questions on what they observed in Pro Se court.

Finally, students should understand that if informal means fail and for some reason you can't use a small claims court, you are entitled to a full-fledged legal proceeding. The type of relief one seeks depends on the situation. "Remedies" is that area of law which deals with the different types of relief available.

The basic underlying principle of a remedy is to protect the expectations of the parties to the contract and to give the parties what they rightfully deserve. It is not imperative that the students master every specific type of remedy. The most important goal is that the students have a basic conceptual framework for this area of the law.

One good way to introduce students to remedies is to place them in a situation which demands a remedy. For example, pose the following situation to your class for discussion: A buyer and seller contract for the sale of a piece of real estate which is valued at $20,000. The closing is to take place in three weeks. Just before the closing, someone offers the seller $25,000 for the house, and he decides that he won't go through with the original sale.

First, ask the students if there is a breach of contract. (There is.) Next, ask them how the buyer has been hurt. (He did not recieve the land he contracted to buy.) Then ask the class what they think the appropriate remedy is in this situation. One possible remedy would be to sue for $5,000, because this amount would put the buyer in the position he would have expected to be had the contract been fulfilled—which is what a damages remedy provides. Another and probably better remedy in this case is what is termed specific performance. Specific performance is a remedy which requires the breaching party to do what he promised to do. It is often the type of remedy one opts for in a sale of land contract. In this situation, the seller could be forced to sell the house (specific performance) for the $20,000 contract price. This would give the buyer the option of keeping the house or realizing a quick profit by selling it.

Finding the best remedy in most cases is a good deal harder. The key question in finding a just remedy is determining how the innocent party has suffered by the breach. But determining what would have happened if the contract had not been broken plunges us into the same fog of speculation that surrounds all might-have-been's. What would have happened to the sales of Dave's Jewelry Store if the shopping center hadn't broken its lease and rented a store to his competitor? That's as speculative as what would have happened to European history if it hadn't rained at Waterloo, or what would have happened to our country if John Kennedy hadn't been assassinated. Nonetheless, the courts have to engage in this sort of educated guesswork all the time in trying to see that the parties get what they rightfully deserve.

One of the best ways to teach about remedies, then, is to have kids act out an exercise that will raise the uncertainties and might-have-been's of actual cases. This mock hearing may do the job. (The box on p. 46 will suggest some basic steps in a mock trial; for a fuller guide to mock trials, see Ed O'Brien and Lee Arbetman's article in the winter '78 *Update*.)

We've provided below the facts and witness statements for a hearing to determine the appropriate remedy in a breach of contract case. We're assuming that the case has already gone to trial and the jury found a breach, but you may wish to adapt the exercise so that it covers the issue of whether there was a breach and, if so, what remedy should be applied.

Here are the facts in the case of *Gallup v. O'Buck*. Harry Gallup, a veteran horse trainer, makes a deal with Fast Eddie O'Buck—restauranteur, man about town, and owner of Ms. Alpo, a four-year old filly. For one year, beginning Nov. 1, Harry will train Ms. Alpo, enter her in races, and bear all the expense of feeding and caring for her; in return, Fast Eddie will give him 75% of Ms. Alpo's winnings during the year.

None of the tracks are open during the winter, so Harry's expenses pile up till late spring. Ms. Alpo is then entered in six races, winning one, placing second in one, and finishing in the money in two others. Harry also has her entered in six races in the local track's fall meet, but before she can race Fast Eddie declares their contract at an end and swoops her away.

Harry sues for breach of contract, and wins when the case comes to trial two years later. But what remedy shall be applied? Should Fast Eddie be required to pay money to Harry? If so, how much? Or should Fast Eddie be required to return the horse to Harry so that he can race here in six races and retain 75% of the winnings? What problems are there with this remedy?

Who to believe, Longshot Louie or Fats Feldman?

This mock hearing will determine what remedy Harry is entitled to. Both sides can call witnesses and make opening and closing statements to the jury. Here is Harry's statement on his own behalf:

> I did what I promised in my agreement with Fast Eddie. I trained Ms. Alpo well and got as much out of her as she could give. If she'd have been allowed to race in the fall she'd have won one or two races, finished in the money in a couple, and finished out of it only twice. She had that kind of record in the spring meet, and she's done about as well since then under different trainers. That means she would have won about $10,000—and I'm entitled to $7,500 or 75% of what she would have won.

Longshot Louie also testifies for Harry:

> I'm owner and sole proprietor of L.L. and Son, equestrian investment service. In other words, I put out a tout sheet telling people how to bet. Ms. Alpo is a pretty predictable horse. As long as she's not in over her head, she'll win her share. For the fall meet, Harry had her matched with other horses in her class, including some she had raced before. He expected to make money on her, and he would have if her owner hadn't prevented him from racing her.

Here's the testimony on the other side. Fast Eddie says:

> I don't think I broke the contract in the first place. I took the horse back because Harry wasn't doing the job. If she'd have raced in the fall she probably wouldn't have won a thing, the way he was handling her. Now he's got the nerve to claim that she would have won $10,000 and I should pay him $7,500. He's trying to make a fortune on pure speculation. I know he ran up some expenses in the winter—though not as much as he says—so I'm willing to make up the difference between what he can prove he spent and what Ms. Alpo made in the spring. That's probably a few hundred dollars. Any more than that and I'm being ripped off.

Fats Feldman, hotshot turf columnist for the local paper, also testifies for Fast Eddie:

> Who can tell what will happen in a horse race? If we knew, no one would show up and they could make the joint into a parking lot. I don't know if Eddie was training her well or not. I do know, though, that you just can't predict which horse will win and why. You might say that's what makes a horse race.

Harry's attorneys will claim, in both the opening and closing statements, that the fairest solution is to give Harry his share of what the horse probably would have won had she been allowed to race. They admit that it is impossible to predict exactly what Ms. Alpo would have won, but they point out that one can make a good estimate, and Harry deserves 75% of that amount. Anything less, they say, would be unfair to their client. After all, he's not in business just to break even. He wants to make a profit, and he's entitled to the profit he'd have made on Ms. Alpo if Fast Eddie hadn't broken their contract.

They add that Harry isn't interested in racing her again. It's been two years and she's not the same horse. Besides, it would take months to get her back in shape, and Harry would have to run up huge bills again and barely break even should she win her share.

In reply, the Fast One's lawyers contend that Harry is entitled only to what he can prove he lost. Anything more would be unfair to their client. And they reject completely the notion that Harry should be allowed to race the horse for six races. They claim the horse would be traumatized by having to change stables another time and that she'd probably never race well again.

The judge's charge to the jury should emphasize that a court of law has already found that Fast Eddie broke the contract without justification. Therefore, Harry is entitled to some compensation, but how much and in what form is completely up to the jury. They can award Harry the $7,500, the few hundred Eddie is willing to pay, or something in between. However, given that both parties reject the possibility of returning the horse to Harry for six races, the option of specific performance is probably not available.

This exercise also lends itself to another wrinkle. Just as in a real trial of this sort, an out of court settlement is always possible. At any time—before the hearing, during it, while the jury is still deliberating—the lawyers and their clients can get together and agree on a settlement.

Once the verdict is reached, whether through the jury or an out of court settlement, debrief the exercise. Naturally, you'll want to ask some basic questions raised by all mock trials—such as how students felt about the roles they played—but you'll also want to focus on questions raised by this particular exercise. Do class members feel that the final result was fair? Why or why not? How did jury members feel about the burden of having to decide what remedy is fair in this case? What evidence did they find persuasive, and why? Did this hearing raise all the evidence they would have liked to have in order to reach a fair verdict? Is justice more likely to be served by an out of court settlement? Should a matter like this go to a jury or is it better resolved by a judge?

Conclusion

Teaching about breaches and remedies provides plenty of opportunities to introduce students to the justice system as it operates in practice. These exercises should suggest the kinds of problems that come up all the time in contract law and the wide variety of means for resolving them. It's important for students to understand that most disputes never wind up in a court of law, and that even some that reach court are negotiated before the trial is concluded.

These exercises should also help students become aware of the kind of help that is available to them if they think they've been ripped-off as consumers. The next issue of *Update* will contain an article on the special problems of minors and contracts, giving you strategies for teaching about when minors may contract, for what services they may contract, and why minors are treated differently under contract law.

Mock Trial Guide

To conduct a mock trial, distribute the materials to the students, discussing the facts and basic law involved with the entire class. Then select students to play attorneys, witnesses, jury members, bailiffs, and (sometimes) the judge. Since there are several attorneys on each side and four witnesses, there should be enough roles for the entire class. If not, others can serve as reporters who cover the trial, and offer "broadcasts" or "front-page stories" afterwards.

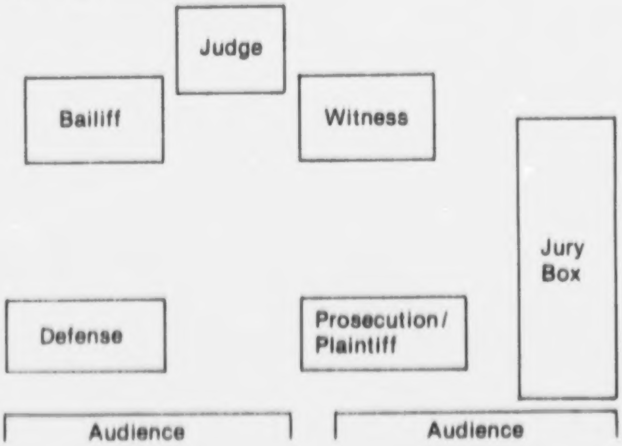
Attorneys and witnesses should begin planning for the hearing immediately. Each side will prepare opening and closing statements, as well as questions for direct examination of its witnesses and cross-examination of the other side's.

Each opening statement should indicate the evidence to be advanced in favor of its position; in each side's concluding statement the attorneys will review both sides' evidence and make as convincing a case as possible for their client.

Attorneys should work beforehand with their witnesses, carefully developing questions that will put their case in the best possible light. Witnesses can answer questions in their own words, but their answers must not be inconsistent with the facts included in their witness statements. Attorneys also should prepare their witnesses for probing questions from the opposing attorneys, and, at the same time, they should plan the questions they themselves will ask when they cross-examine the other side's witnesses.

Arrange the classroom as shown below. Then conduct the trial with a teacher, a student, or a resource person (such as a lawyer, law student, or an actual judge) as the judge. Don't interrupt the trial to point out errors. Wait until the debriefing, when you'll be able to put the whole exercise into perspective. For educational purposes, it may be better to have the jury deliberate in front of the entire class, instead of retiring to a private place, as occurs in actual trials. This will enable students to see first-hand the process of decision-making, and learn what evidence was persuasive.

Layout of Classroom



Supreme Court Report

(continued from page 6)

Unlike the brief unanimous decision of the Court in the Maryland test oath case, this ruling was considerably longer, with two concurring opinions and one dissent. Chief Justice Burger's opinion for the majority begins with the usual reference to the pages of history to show that a tradition of tax exemption goes back to colonial times and the early days of the Republic. Then, invoking familiar precedents, he concludes that history and past decisions support the conclusion that tax exemptions of religious organizations do not violate the Establishment Clause of the First Amendment as incorporated into the Due Process Clause of the Fourteenth.

Among the specific reasons given for the conclusion are:

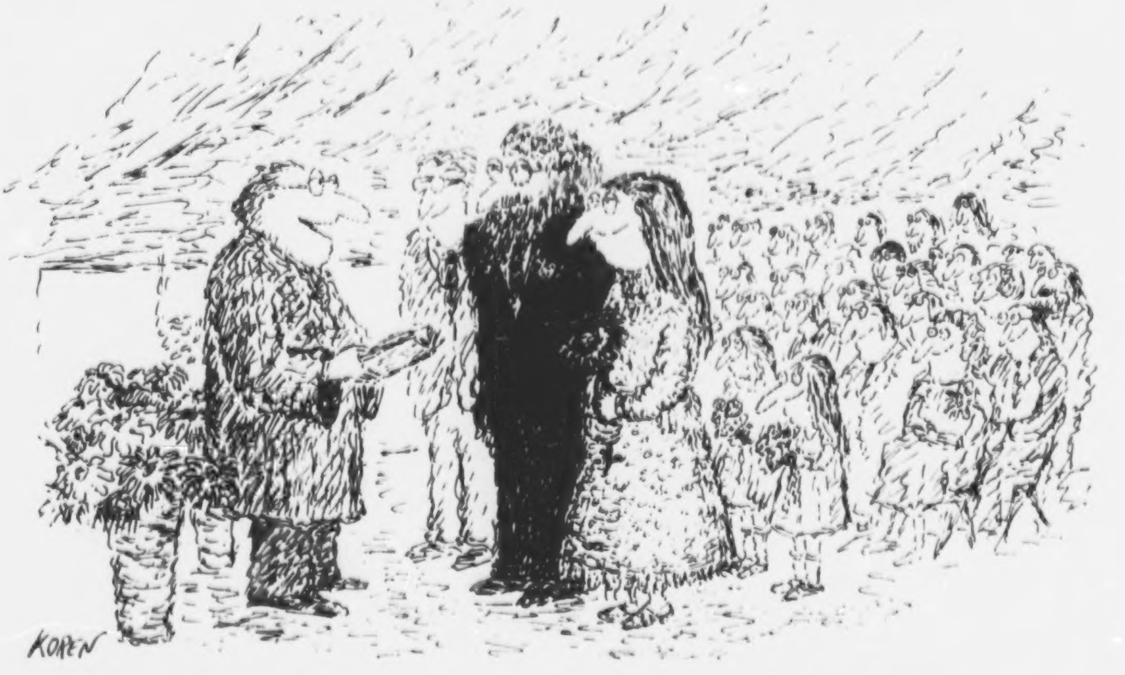
> There is neither advancement nor inhibition of religion in tax exemption.
>
> All religious groups are treated equally; there is no preferential treatment here and the churches are included with other charitable, scientific, professional, and patriotic groups in this exemption.
>
> In tax exemption the Government does not transfer funds, it simply refrains from demanding them.
>
> A state has the power to exempt from its taxation "certain entities that exist in harmonious relationship to the community at large," and that foster its "moral and mental improvement."

Justice Douglas was the sole dissenter. In his long years on the Court, his ideas on church-state relations changed greatly. He began by arguing that the state and religion should cooperate; he ended by insisting that the wall between church and state should be high and impregnable.

In a style characteristic of his later opinions, his dissent in the tax case brands the Court's ruling "a long step down the Establishment path." Why don't we, he asks, follow the Maryland oath case precedent condemning state and federal laws which aid believers against nonbelievers? By siding with believers against agnostics, atheists, and antitheological groups in its tax policies, he argues, the Court is throwing its weight behind an establishment of religion. (For more on the controversy over taxing churches, see this issue's *Opposing Views*, pp. 16-19.)

Never on Sunday. Many states have enacted Sunday closing laws, rooted in the religious tradition of "the Lord's Day" of church attendance and prayers. By this time such laws are becoming an anachronism, but their place in the church-state controversy is guaranteed by the issues they raise. Do they constitute an unconstitutional establishment of religion under the First and Fourteenth Amendments?

In 1961 the Supreme Court was called upon to decide four cases involving the constitutionality of the Sunday closing laws of Maryland, Massachusetts, and Pennsylvania. The complainants were employees of a discount store, the owners of a department store, and Orthodox Jews. The latter argued that their Sabbath day is Saturday and that they were disadvantaged religiously and economically by these laws, which established a tenet of the Christian religion. The others took the position that the Sunday closing laws were



"Do you, Jane, and you, Jonathan, jointly vow to split the royalties, paperback rights, book-club proceeds, and movie options with each other in the event that the marriage dissolves and results in a work of fiction or nonfiction based on this union?"

Drawing by Koren; © 1977
The New Yorker Magazine, Inc.

predominantly religious in nature, aimed at the constitutionally impermissible goal of encouraging church attendance and membership in the predominant Christian sects.

These four cases, with their majority, plurality, concurring, and dissenting opinions, wander all over the constitutional terrain. What emerges is a cacophony of voices agreeing that the laws in question are constitutional. The majority recognizes a growing secularization of what was once a spiritual experience. Sunday, in the eyes of the Justices, has become a day of rest, relaxation, and family togetherness. The state, in its wisdom, can decide to set aside Sunday to improve "the health, safety, recreation, and general well-being of our citizens."

Justice Douglas dissented in all four cases. He posed the issue as follows: "The question is whether a state can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority." He answers in this way: "There is an 'establishment' of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it."

Required Prayers and Bible Reading. With these cases we enter a terrain familiar to many people. In the tax-exemption and Sunday closing cases the Court decided that the challenged legislation did not unconstitutionally establish religion, but in these cases it ruled that school prayer did violate the Constitution by establishing religion. These decisions engendered a controversy that has not only continued to simmer but has led to a genteel type of lawlessness on the part of educators supported by community opinion.

Those who thought the ruling was atheistic and communistic couldn't have read it carefully

Since school cases will soon be taken up in an *Update* issue focusing on education and the law, my treatment of these cases here will be brief. In 1962 the Court declared unconstitutional the required recitation of the New York State Regent's prayer in the community of New Hyde Park. The 22-word nondenominational prayer was prepared by the Board of Regents as a way of developing moral and spiritual values in the school. By a six to one margin, the Court ruled that the Board of Regents was not in the business of writing prayers for children. By doing so, it had violated the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment.

One would have thought by the vociferous and vicious attacks on this ruling as atheistic and communistic that this was a sweeping indictment of prayers. Many of those who attacked the decision could not have read it with care.

The following year, the Court confronted squarely the issue of required prayers and sectarian Bible reading in the Pennsylvania and Maryland schools. This time, an eight to one decision outlawed these practices as enhancing religion and, thus, breaching the wall of separation. Five opinions were written, totaling 113 pages, in an attempt to answer the charges lodged against the Court the previous year.

In a key sentence, Justice Clark's opinion for the majority declares: "In the relationship between man and religion, the State is firmly committed to a position of neutrality." What this generalization actually means in practice will be seen in the cases which follow.

Public Aid for Parochial Schools and Colleges. Public assistance to the parochial schools is an issue that refuses to go away. Politically, it means votes; economically, it means direct or indirect financial assistance to hard-pressed religiously-oriented educational institutions; and socially, it offers parents and students a choice in education philosophies. No sooner do the courts declare a parochial law unconstitutional than, Phoenix-like, a new law rises to take its place—somewhat different and more ambitious and complex.

To summarize the cases and the nuances in the opinions would require an extended analysis. Instead, I'll focus on the options available to judges in resolving these sensitive issues.

Let us assume that a community decides to do the following:

> Pay tax monies for bus transportation of public and parochial students to their schools;
>
> Buy with tax monies secular textbooks which will be loaned to parochial schools;
>
> Use tax funds to defray part of the salaries of parochial school teachers;
>
> Provide parochial schools with such state-financed services as standardized tests and scoring assistance, therapeutic guidance, remedial services, field trips, and loan of instructional materials and equipment.

Are these forms of assistance constitutional under the Establishment Clause of the First Amendment as incorporated into the Fourteenth Amendment?

When these issues reached the United States Supreme Court, the Justices could follow any one of the several constitutional routes. There is the absolutist position advocated by Justice Rutledge, based on Madison's famous *Memorial and Remonstrance Against Religious Assesments*, that the wall of separation is high and must not be breached.

At the other end of the continuum is the position that church and state are not adversaries, but partners in a common endeavor to foster good citizenship. So long as the state or federal assistance shows no preference for one religion over another, the legislation is constitutional.

A third option emerged in 1930 when Louisiana used tax monies to purchase secular books for parochial schools. It was challenged under the Fourteenth Amendment as an unconstitutional taking of private property for public use, rather than on the separation of state and church principle, but the issue is basically the same. The Court upheld the state's action as benefitting the child and the state, not the religion. This child benefit theory played a significant role in future rulings.

A fourth principle that has been advocated is that of neutrality—that is, the government must do nothing to aid or hinder religion. Over a period of time the Justices have clarified this approach to church-state issues by specifying certain guidelines by which legislation must be judged.

1. The purpose must be secular, not sectarian.

2. The primary effect must be neither to enhance nor hinder religion.

3. There must be no excessive entanglement between state and church.

With these guidelines the Court has approved bus transportation and loans of texts to parochial school students, as well as standardized tests for them and scoring, diagnostic, and therapeutic services. These services, however, must be performed by public school personnel or consultants hired by local school boards. No monies may be given directly to the parochial schools. The following laws were struck down: instructional equipment, field trip transportation, salaries for parochial school teachers, and tax benefits, as well as tuition reimbursements to parents who send their children to parochial schools.

The rationale for striking down some forms of aid and approving others is that the impermissible forms would benefit parochial education itself, rather than the child. In other words, the Court requires that the state not provide aid to the school (where it might contribute to religious educa-

Cases Referred to in This Article

Popular Reference	**Official Citation**
Maryland Religious Test Oath Case	*Torcaso v. Maryland* 367 U.S. 488, 81 S.Ct. 1680 (1961)
Tax Exemption of Churches Case	*Walz v. Tax Commission of the City of New York* 397 U.S. 664, 90 S.Ct. 1409 (1970)
Sunday Closing Laws Cases	*McGowan v. Maryland* 366 U.S. 420, 81 S.Ct. 1101 (1961)
	Gallagher v. Crown Kosher Supermarket of Massachusetts 366 U.S. 617, 81 S.Ct. 1122 (1961)
	Two Guys from Harrison-Allentown v. McGinley 366 U.S. 528, 81 S.Ct. 1135 (1961)
	Braunfeld v. Brown 366 U.S. 599, 81 S.Ct. 1144 (1961)
Required Prayers and Sectarian Bible Reading Cases	
New York Case	*Engel v. Vitale* 370 U.S. 421, 82 S.Ct. 1261 (1962)
Pennsylvania and Maryland Cases	*Abington Township v. Schempp; Murray v. Curlett* 374 U.S. 203, 83 S.Ct. 1560 (1963)
Parochaid Cases	
Louisiana Textbook Case	*Cochran v. Louisiana State Board of Education* 281 U.S. 370, 50 S.Ct. 335 (1930)
New York State Textbook Case	*Board of Education v. Allen* 392 U.S. 236, 88 S.Ct. 1923 (1968)
New Jersey Bus Transportation Case	*Everson v. Board of Education of Ewing Township* 330 U.S. 1, 67 S.Ct. 504 (1947)

Popular Reference	**Official Citation**
Ohio Parochial Aid Case (the most comprehensive and most recent case)	*Wolman v. Walter* 433 U.S. 229, 97 S.Ct. 2593 (1977)
Church-Related College and University Assistance Case	*Tilton v. Richardson* 402 U.S. 672, 91 S.Ct. 2091 (1971)
Mormon Polygamy Case	*Reynolds v. United States* 98 U.S. 145 (1878)
Amish Secondary School Case	*Wisconsin v. Yoder* 406 U.S. 205, 92 S.Ct. 1526 (1972)
Flag Salute Cases	
Pennsylvania Case	*Minersville School District v. Gobitis* 310 U.S. 586, 60 S.Ct. 1010 (1940)
West Virginia Case	*West Virginia State Board of Education v. Barnette* 319 U.S. 624, 63 S.Ct. 1178 (1943)
Conscientious Objector Cases	*United States v. Seeger* 380 U.S. 163, 85 S.Ct. 850 (1965)
	Welsh v. United States 398 U.S. 338, 90 S.Ct. 1792 (1970)
	Gilette v. United States; Negre v. Larsen 401 U.S. 437, 91 S.Ct. 828 (1971)
Sabbatarian Cases	
Seventh Day Adventist Case	*Sherbert v. Verner* 374 U.S. 398, 83 S.Ct. 1790 (1963)
Worldwide Church of God Case	*Trans World Airlines v. Hardison* 97 S.Ct. 2264 (1977)
Arkansas Evolution Case	*Epperson v. Arkansas* 393 U.S. 97, 89 S.Ct. 226 (1968)
Tennessee Clergy Disqualification Case	*McDaniel v. Paty* 98 S.Ct. 1322 (1978)

tion), but rather provide aid to children themselves and earmark it strictly for nonsectarian purposes.

This can be a hard distinction to draw, but in its most recent case on parochaid the Court found that aid for guidance counseling is impermissible because helping parochial students select courses would inevitably involve the state in the day-to-day curriculum of the schools. It also struck down aid for field trip transportation because the schools would control the timing, frequency, and destination of the trips, so the aid would be to the school rather than to the children themselves.

But the Court has ruled that busing students to and from school is O.K. because parochial schools don't control such transportation, the transportation is not tied to specific learning activities, and the busing is part of the state's legitimate concern for the safety and well-being of all children. Similarly, speech, hearing, and psychological counseling is permissible because it isn't controlled by the school and is directly relevant to the child's well-being.

When it comes to church-related colleges and universities, the Justices tend to be more sympathetic to financial assistance. In approving federal grants for buildings to be used for libraries, music, arts, science, and language instruction, the Court in a five to four decision found the purpose to be secular, not sectarian. College students, declared the Court's opinion, are more sophisticated than their younger counterparts and, therefore, less easily indoctrinated. Also, there is no reason to suppose that sectarian dogma will intrude or be tolerated in secular instruction, where the spirit of academic freedom prevails.

One aspect of the law, however, was found to be unconstitutional. The provision that the buildings would revert to the college after 20 years made it possible for the college to use them for sectarian purposes. This was declared unacceptable under the Establishment Clause.

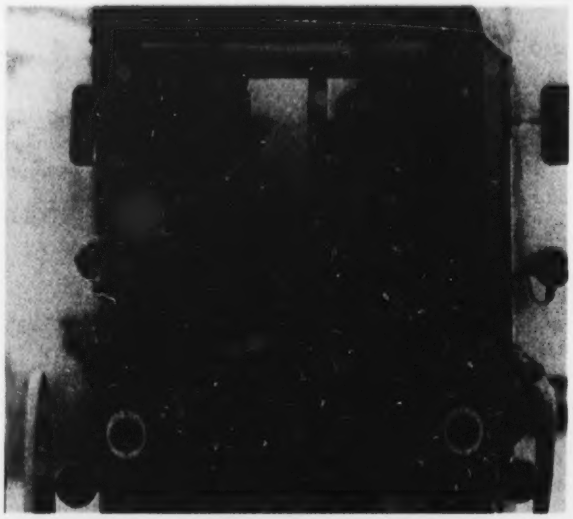
Freedom of Religion

Freedom of religion, the second of the religion clauses of the First Amendment, involves its own unique complexities. In its most simple connotation, it means the freedom to believe or not to believe. You and I have the right to be orthodox, agnostic, or atheist.

The complex constitutional confrontation takes place when the police power of the state demands conformity of an individual whose religion commands him to do something that puts him in conflict with the state. The specific instances can involve almost anything—from snake handling or peyote smoking during religious rituals to refusing blood transfusions—but the fundamental conflict is the same: the state invokes its power to protect the lives, health, morals, welfare, and safety of the community; the individual takes a stand on freedom of religion or conscience.

The Supreme Court cases move from the Mormons to Jehovah's Witnesses and the Amish, and from those who refuse to salute the flag to those who refuse to serve in the Armed Forces. They even encompass teaching about evolution in the school curriculum.

In the Mormon polygamy case of 1878, a unanimous Court turned a deaf ear to the plea of the Mormons that plural marriages were a religious obligation. Religious beliefs, proclaimed the Court, were protected by the First Amendment, but actions based on such beliefs were not immune from the arm of the law. (See *Update Looks Back*, pp. 35-38, for more on this case and the campaign to wipe out polygamy.)



These Amish boys will grow up in one of the nation's most traditional societies.

However, almost 100 years later, in 1972, the Court ruled that the beliefs of another group, the Amish, did justify them in not obeying the law. In this case, as in so many freedom of religion cases, the crux of the matter was not so much that sect members committed an overt criminal act (like taking plural wives), but rather that their religion compelled them to refrain from doing something that the law commanded. The Amish claimed that state law should not require them to send their children to public secondary school. A nearly unanimous Court agreed that the historic and venerable Amish had every right to protect the spiritual heritage which they hoped to pass on to their children from the secular influences of the public secondary school.

Justice Douglas, dissenting in part, wondered aloud whether this opinion of the Court is a step toward overruling the Mormon polygamy case, since in this instance a religious practice based on a religious belief was approved. By blunting the belief/action dichotomy of the Mormon case, the Court, he said, may be opening the door to a more sympathetic view of religious practices.

The Flag Salute Cases. The cases initiated by the sect known as Jehovah's Witnesses have done more than those of any other religious group to probe the nature, scope, and limits of the principle of religious freedom. Between 1938 and 1943 they began 20 major cases before the Supreme Court, winning 14 of them.

The flag salute cases brought by the Jehovah's Witnesses provide one of the most intriguing examples of judicial reversal in the Court's entire history. In 1940, the Court was confronted by a suit claiming that a Pennsylvania requirement that the flag be saluted daily in public schools violated the religious freedom of Jehovah's Witnesses, who were brought up to believe that such a gesture of respect for the flag was forbidden by scripture. The suit pitted freedom of conscience, protected by the First Amendment, against the state's authority to require school children to engage in patriotic exercises.

By an eight to one margin, the Court ruled in favor of the state. Justice Frankfurter, writing for the majority, ruled that religious liberty is an individual, precious right, but each citizen also has political responsibilities to the community which protects this and other rights. A state can require ceremonies for all children because "national unity is the basis for national security."

However, just three years later, the Court by a six to three margin struck down a West Virginia law that required all school children, including Jehovah's Witnesses, to salute the flag. Even though the nation was in the midst of a great war, and one might have thought that national unity was even more of an imperative, the Court determined that the individual's right of self-determination must be protected. Since the West Virginia law violated the sanctity of "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," the Court declared the act unconstitutional.

Writing for the majority, Justice Robert Jackson pointed out that "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." He pointed out that national unity, loyalty, and patriotism could be achieved in other ways than through compulsory flag salutes, and concluded with a passage that has become one of the most quoted in constitutional law:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .

The Conscientious Objector Cases. In the second flag salute case the Court decided not only on the basis of religion but also on a broader concept, freedom of the intellect and spirit. This broader basis also underlies the conscientious objector cases of the Vietnam War, where there is implicit a concern for the importance of intellectual and spiritual freedom, even in time of national emergency.

Our country's draft laws have recognized the dilemmas posed by conscientious objectors, exempting those from combat whose "religious training and beliefs" prevent them from taking human life. Federal law has defined such belief as "an individual's relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." By permitting conscientious objection on religious grounds but not for personal moral reasons, does the law unconstitutionally establish religion?

In 1965, the Court was confronted by three cases of young men who claimed conscientious objection but did not believe in God in the conventional sense. Did the law exempt only those who believe in an orthodox God, or could it encompass a broader faith?

In deciding the case, the Court was acutely aware of the religious diversity of a country with more than 250 sects and a vast range of views about a supernatural deity. The way out, a unanimous Court decided, was to formulate a rule of law covering this diversity of viewpoints, permitting young people to be exempted if they demonstrated "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God." Since these three men passed this test, they won their cases and were accorded CO status.

That decision did not resolve all difficult conscientious objector questions. Six years later, the Court was confronted by the cases of two young men who sought conscientious objector status because they objected not to all wars but to the Vietnam War in particular. The young men argued that limiting CO status to only those who opposed all wars violated the religion clauses of the First Amendment.

Not so, said the Court. The law didn't discriminate among religious groups, and so didn't contravene the prohibition

Further Readings

There is a wealth of teacher resource materials on law and religion. Here is a sampling. (The books without publisher and price are out of print.)

Dolbeare, Kenneth M. and Hammond, Phillip E., *The School Prayer Decisions: From Court Policy to Local Practice* (1971). A study of how five midwestern communities reacted to the Supreme Court's rulings and an explanation of why they did not comply. (University of Chicago Press, hardbound, $8.00).

Duker, Sam, *The Public Schools and Religion: The Legal Context* (1966). A collection of important Supreme Court rulings, including both concurring and dissenting opinions.

Healey, Robert M., *Jefferson on Religion in Public Education* (1962). A comprehensive account of the emergence of Jefferson's thinking on the wall of separation theme.

Howe, Mark DeWolfe, *The Garden and the Wilderness* (1965). It has been rightly described as an "urbane and witty" commentary and critique of the Court's approach to church-state issues. Although the author agrees with many of the Court's rulings, he offers trenchant criticism of the reasoning. (University of Chicago Press, $1.95 paperback, $5.75 hardbound).

Kurland, Philip, *Religion and the Law* (1961). A critical commentary on the Court's reasoning in church-state legal matters.

Muir, William K., Jr., *Prayer in the Public Schools: Law and Attitude Change* (1967). Interviews with 28 public school officials before and after the school prayer decision to evaluate why they reacted as they did. (University of Chicago Press, $2.55 paperback, $7.50 hardbound).

Pfeffer, Leo, *Church, State and Freedom* (1967). This book is one of the best one-volume works on the subject, by one of the distinguished authorities in the field. It surveys and analyzes issues, positions, and important Supreme Court and state court rulings.

Pfeffer, Leo, *Religious Freedom* (1977). An excellent brief summary of the subject. (National Textbook Company, $5.95 paperback, student discounts available).

Schimmel, David and Fischer, Louis, *The Civil Rights of Students* (1975). Chapter five is an excellent expository account of Court rulings as they affect the religious rights of students. (Harper and Row, $7.50 paperback).

Stokes, Anson Phillips, *Church and State in the United States* (1950). Regarded as the definitive work in this field up to the year 1950.

Old antagonists Darrow (l.) and Bryan share a relaxed moment.

against an establishment of religion. Although religious training or belief is required for exemption, no partisan creed or religious organization is singled out for special treatment.

One of the young men claimed that the Catholic religion taught him to distinguish between just and unjust wars. Didn't the law interfere with his freedom of religion and conscience? Once again the Court said no, finding no interference with any religious ritual or practice. If the law imposes an incidental burden to some young men, it is more than compensated for by the government's interest in obtaining manpower for the armed forces.

Never on Saturday? Several religions practiced in this country observe the Sabbath on a day other than Sunday. When their members try to observe their Sabbath, however, they often run into conflict with the law. The dispute over whether they are being deprived of their freedom of religion shows how the two religion clauses in the First Amendment are closely intertwined.

In 1965, the Court was confronted by the complaint of a Seventh Day Adventist, who claimed that she lost her job, as well as her unemployment insurance benefits, because her religion prohibited her from working on Saturday. She tried to get other employment, but failed because the plants in the community insisted on a six-day week. She was then denied unemployment benefits on the ground that she had failed to accept "suitable available work."

By a six to two margin, the Court upheld her right to unemployment benefits because she had been put to the "cruel choice" of choosing between her religion and her work. Justices Harlan and White dissented. Their ironic response is that the majority, by singling out a religious group for a special benefit, is contributing to an establishment of religion.

A recent case involved a member of the Worldwide Church of God, a Sabbatarian sect. When he was transferred to another building, he lost his seniority and was required to work on Saturday. He refused and was fired. He appealed under Title VII of the Civil Rights Act of 1964, which makes it an unlawful employment practice for an employer to discriminate against an employee on the basis of religion. He also appealed under a guideline of the Equal Employment Opportunity Commission which requires an employer "to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without a serious inconvenience to the conduct of the business."

In a seven to two ruling, the Court upheld the company on the ground that it had done all that could be reasonably expected of it within the framework of the seniority system. But the two dissenters, Justices Marshall and Brennan, saw the majority opinion as an "ultimate tragedy" because it "seriously eroded our devotion to the principle of religious diversity." They went on to say: "All Americans will be a little poorer until today's decision is erased."

Teaching About Evolution. The Tennessee "monkey trial" of 1925 is the most famous judicial battle over whether the schools should teach a subject that offends a particular religion. Fundamentalists in Tennessee were instrumental in passing a law forbidding public schools "to teach the theory that denies the story of the divine creation of man as taught in the Bible." John Scopes, a young biology teacher, violated the law when he taught Darwin's theory of evolution. Critics scoffed that Darwin implied that man was descended from the primates, so the press dubbed the case "the monkey trial."

The Scopes case featured the epic confrontation of two giants of the time: Clarence Darrow, the nation's most celebrated trial lawyer, defended Scopes and academic freedom; William Jennings Bryan, former U.S. Secretary of State and three-time nominee for President, was a special prosecutor for the state. Despite the legal fireworks, the result was a stand-off. Scopes was convicted by the trial court but the conviction was overturned on a technicality by the state supreme court.

In 1968, the Justices of the U.S. Supreme Court had the opportunity to decide a nearly similar case. An Arkansas law dating from the 20s forbade teaching the theory "that mankind ascended or descended from a lower order of animals." A Little Rock teacher challenged the law, and the Court agreed with her, trotting forth several reasons why the law offended the Constitution. Once again, the Court's thinking shows how closely related the First Amendment clauses are.

Justice Fortas' opinion for the unanimous Court held that the law violated *both* religion clauses of the First Amendment, on the grounds that the two clauses have the joint goal of requiring government to be neutral between religion and religion, and between religion and nonreligion. Since the Arkansas law "cannot be defended as an act of religious neutrality," it must be struck down both as tending to establish a particular religious view and as tending to frustrate the free exercise of other views.

A concurring opinion by Justice Stewart added the weight of yet another First Amendment clause. He pointed out that the law was unconstitutional because it also violated the Amendment's guarantee of freedom of communication.

Clergy in Politics. Many states have provisions which attempt to assure the separation of church and state by disqualifying ministers from holding political office. Such laws have been challenged as infringing on the free exercise of religion, in effect pitting the two religion clauses of the First Amendment against each other.

In April of this year, the Justices decided unanimously that a Tennesse law disqualifying ministers from serving as legislators was an unconstitutional infringement on freedom of religion. Chief Justice Burger wrote that the fatal defect in the law is that it conditions the right to free exercise of religion on the surrender of the right to hold public office.

Concluding Thoughts

The historic road from theocracy to disestablishment of religion and from religious intolerance to religious freedom has been long and tortuous. The American people and the courts have grappled with and will continue to encounter legislative policies and local customs bearing on the sensitive areas of the spiritual and the secular. In addition to the issues discussed above, the courts have been involved in released time mandates, religious proselytizing, and ecclesiastical controversies involving church governance. There is no dearth of problems.

Nor is there any one way of settling conclusively all the issues. As we indicated in the opening quotes from Justices Rutledge and Douglas, the absolutist principle of separation of church and state will be countered with the contention that we are a religious people and that the church and state are not adversaries, but partners in the democratic adventure. On this continuum of opposing positions, judges will strive to formulate principles that either accommodate the two or accentuate the polarities. The resolution of these soul-searching and mind-perplexing controversies is of great consequence to every American. In this matter, to paraphrase Abraham Lincoln, no one is a bystander. □

Religion and Law Materials

A wide variety of curriculum materials can help you teach about religion and the law. Here are some of the best of them.

Books

Freedom and Authority in Puritan New England (1970). This paperback text by Allen Guttman examines the relationship between freedom and authority, especially as exemplified by the Purtians' conflicts over religious freedom. It provides a thought-provoking organization of documents by the original participants. This text is recommended for use in grades 9-12 and costs $3.64. Order from Addison-Wesley Publishing Company, Jacob Way, Redding, MA 01867.

God and Government: The Uneasy Separation of Church and State (1972). This secondary level text by Allen Guttman discusses the major conflicts between religion and the state, with special attention to prayer in the public schools. Excerpts of cases, opinions, speeches, and articles are also provided. This paperback text costs $3.64. Order from Addison-Wesley Publishing Co., Jacob Way, Redding, MA 01867.

Inherit the Wind (1955). This popular play by Jerome Lawrence and Robert E. Lee is based on the famous "Scopes Monkey Trial" in which a Tennessee teacher, John Scopes, was charged with violating a state law prohibiting the teaching of the theory of evolution. The play is notable for many confrontations between defense attorney Clarence Darrow and special prosecutor William Jennings Bryan. This paperback is available at most bookstores for $1.50. Special student discounts may be obtained by writing Bantam Books, 666 Fifth Avenue, New York, NY 10019.

The Idea of Liberty: First Amendment Freedoms (1978). A considerabe portion of this secondary text by Isidore Starr is devoted to current and historical religious issues. It includes such chapters as "X-Rays, Blood Transfusions, Peyote and Snakes," "Conscientious Objectors," and "The Flag Salute Cases." The cost for this paperback text is $4.00, with quantity discounts available. Order from West Publishing Co., Inc., 170 Old Country Road, Mineola, NY 11501.

Films and Filmstrips

Freedom of Religion (1969). This 16mm color film questions the limitations of religious freedom. It focuses on the story of a pregnant Jehovah's Witness who, after suffering an injury in an automobile accident, refuses a blood transfusion which would save her life and the life of her unborn child. The emergency issue is brought to a judge for a decision, but the resolution is left to the student. This film is recommended for grades 7-12. It can be purchased for $285 or rented for $18. Order from BFA Educational Media, 2211 Michigan Avenue, Post Office Box 1795, Santa Monica, CA 90406.

Liberty Under Law—The Schempp Case: Bible Reading in Public Schools (1969). This secondary-level 16mm color film focuses on the famous Schempp case which challenged the constitutionality of a Pennsylvania law requiring Bible reading in school. The issues are followed through a re-enactment of the circumstances which gave rise to the case in Abington High School, the pressures put on the Schempp family, and the trials in the lower courts. The film also includes commentary on other freedom of religion cases. The rental cost is $24, the purchase price $460. Order from Encyclopaedia Britannica Corporation, Preview and Rental Department, 425 North Michigan Avenue, 10th Floor, Chicago, IL 60645.

Religious Freedom in America's Beginnings (1971). This 16mm color film provides historical background about European religious persecution and early colonial religious issues in the Plymouth Colony, Rhode Island, Pennsylvania, and Maryland. The film shows the distribution of religious freedom among the various colonies, refers to the slaves' plight with respect to religious freedom, and discusses the effects of westward expansion on religious liberty. The cost is $195. Order from Coronet Instructional Media, 65 East South Water Street, Chicago, IL 60601.

The Witches of Salem—The Horror and the Hope (1972). This 16mm film uses actual court records to dramatize the background and trial of the Salem "witches." It raises important issues connected with due process, freedom of religions, power conflicts, checks and balances, and individual rights. The purchase price is $390, the rental price $35. Order from Learning Corporation of America, 1350 Avenue of the Americas, New York, NY 10019.

CURRICULUM UPDATE

Charlotte C. Anderson
Lisa Broido

Materials Aplenty for 1979

Good new print and a-v cover topics from mugging to the Supreme Court

Elementary

■***The Supreme Court*** (1977). Middle and upper elementary. Filmstrip cassette series, teacher's guide. Purchase: $28. (Pathescope Educational Media and the Associated Press, 71 Weyman St., New Rochelle, NY 10802).

This filmstrip describes the Supreme Court clearly and understandably for elementary kids. It discusses the purpose of the Supreme Court, its historical development, and the implications of its growing power. A discussion of *Brown v. Board of Education* reveals the great impact which Supreme Court decisions can have upon American society.

This and four other filmstrips are in a package called the "United States Government." The other strips are *The President, The Vice President, The United States Senate,* and *The House of Representatives.* The filmstrips can be purchased separately for $28 or as a set for $112 (one free filmstrip).

Each filmstrip is accompanied by an extensive teacher's guide which contains the script, follow-up activities, and a suggested unit outline. Six excellent and often creative spirit masters are also provided with each strip.

■***Thinking About Thinking*** (1978). Upper elementary and middle school. Set of five filmstrips with tape cassettes. Sixty-five page instructor's manual and student exercise sheets included. The kit costs $95, plus shipping and handling charge of $3.50. (Ergo Films, P.O. Box 3420, Los Angeles, CA 90028).

One of the objectives of law-related education is to develop children's critical thinking skills. This set of filmstrips, one of the few materials designed to specifically meet this objective, introduces children to the elements of logical reasoning.

The filmstrips follow the activities of a group of children while they go about their every-day experiences. As the children plan and play baseball games, deal with adults, attend festivals and carnivals, ride on buses, and go to school, they wrestle with problems of logic.

Having these children spontaneously and repeatedly focus on logical reasoning processes makes the filmstrip stories rather contrived. Also, often too much is going on in one filmstrip. If viewers focus on the logic problems they can easily lose track of the plot; yet if they don't focus on the logic problems, they will not be able to grasp the operation being presented.

In order to effectively use these in the classroom, the filmstrips would need to be shown more than once and/or stopped at critical intervals to review the logical operation being presented. And the producers could make these better teaching tools by more careful editing. At several points, sound is not well coordinated with the visual image.

The background section of the teacher's manual does give teachers a good short-course in logical reasoning. The manual also includes discussion questions and student exercises.

Middle-Secondary

■***Mugging—You Can Protect Yourself*** (1977). Upper elementary through secondary. 16mm color/film, 30 minutes. Purchase: $395; rental: $50 for 3 days. (Learning Corporation of America, 1350 Avenue of the Americas, New York, NY 10019).

This highly informative film explores what one should do when confronted by a mugging. The opening scene of the film portrays muggings of an elderly lady, a middle aged woman, and a young boy on a bicycle, emphasizing that this problem affects all age groups.

Mugging—You Can Protect Yourself is narrated by Police Officer Liddon Griffith of the New York Housing Authority Police. Motivated by the second mugging of his 82 year-old grandfather, he has done extensive research on this crime and for three years has conducted community service programs on preventing muggings. Throughout most of the film, Officer Griffith works with a group ranging from senior citizens to young children. He first explains the precautions one should take to avoid muggings (traveling with others, walking in the middle of the sidewalk, etc.) and then demonstrates some practical procedures one may take in the event of an attack. Griffith is a firm believer that one should "not fight for property," yet he recognizes that in a life and death situation one must know the strategies that one can use in self-defense.

Griffith also provides helpful hints against muggings. He suggests, for example, that one should scream "Help Fire!" rather than "Help Police!" when being mugged because people are more likely to react when they think they may be in danger too.

A particularly interesting portion of the film has Griffith interviewing several ex-muggers. They help provide first-hand information on what a mugger looks for in a victim and offer insights as to why they became criminals.

A brief teacher's guide recaps the main points made in the film and suggests activities for discussion. This useful film gives practical guidelines for combatting muggings which can be beneficial to nearly everyone.

■***Lawfulness and Lawlessness*** (1977). Grades 3-12. 11"x14" black and white photographs, teacher's guide. 60¢ per photo, $7-$15 each set. (Documentary Photo Aids, Inc., P.O. Box 956, Mount Dora, FL 32757).

Documentary Photo Aids really believes a picture is worth a thousand words. This company publishes several series of 11"x14" documentary photos and editorial cartoons dealing with legal, political, and social issues. These photo aids generally portray controversial issues designed to provoke classroom debate and discussion. Further, their extremely low cost is particularly appealing to the educator whose desire to vivify his curriculum is in direct conflict with a dwindling school budget.

This Documentary Photo Aids series offers an inexpensive yet effective way of improving a law-related curriculum. The set of 12 enlarged and captioned photos probes the fundamental question of why we obey or disobey laws. Such photos as a boy about to shoplift, an armed man robbing a bank, and San Quentin prison could stimulate discussion on the motivations and deterrents to a crime. The photos explore both historical and current events and provide quotations from such diverse sources as Martin Luther King, Jr., the Bible, and ex-convicts.

Other Documentary Photo Aid sets which may enrich a law-related high school curriculum include "The Rosenberg Atomic Spy

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Case," "The Scopes Monkey Trial," "The Teapot Dome Scandal," "The Trial of Sacco and Venzetti," "Wounded Knee," "The Feminist Revolution," "Busing," and "Amnesty." Each set includes a brief teacher's guide which provides sample questions and a bibliography. If you're tired of fumbling with projectors, cassettes, and phonographs, this may be a new and reasonably-priced way to motivate your class to think about the law.

■***The Reluctant Delinquent*** (1977). Upper elementary through secondary. 16mm color/film, 24 minutes. Purchase: $360; weekly rental: $50. (Motorola Teleprograms, Inc., 4825 North Scott St., Suite 23, Schiller Park, IL 60176).

The Reluctant Delinquent is a poignant film which examines the relationship between juvenile delinquency and learning disabilities. The film relates the case history of Robbie, a boy who has been arrested 21 times and has been the victim of such demeaning labels as "mentally retarded," "juvenile delinquent," and "trouble maker" throughout his life. At the outset of the film, he is shown in public school suffering from the dizzying effects (the film is literally hazy during this portion) of student ridicule and teacher pressure.

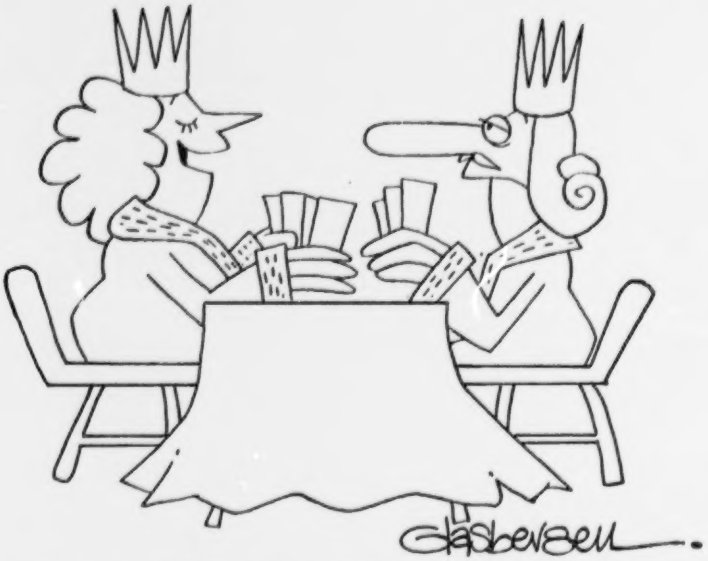
Once Robbie is properly diagnosed as a dyslexic and a "reluctant delinquent" who can not learn to read and write through conventional methods, his story becomes more hopeful. He is placed in a special school which helps him to vent his previously violent frustration through learning. At the end of this film, Robbie still has a long way to go until he achieves his goals, but it is evident that he has undergone a positive change. "I feel better about myself," he tells us, "people believe in me . . . and I'm learning."

This thought-provoking film is highly recommended for heightening students' awareness of the problems which plague the learning disabled. It also emphasizes the important role which diagnostic and special learning programs can play in diverting young people out of the criminal justice system. No teacher's guide is provided with this film, but a class viewing is certain to lead to active discussion and questioning.

■***Crime, Corrections, and Privacy*** (1975-1978). Upper elementary through secondary. Loose leaf volumes containing article reprints which are periodically updated, teacher's guide. Purchase: $50 for each volume. (Social Issues Resource Series, P.O. Box 2507, Boca Raton, FL 33432).

The loose leaf binder on *Crime* consists of 100 removable articles reprinted in their entirety. They deal with such topical criminal problems as school violence, gun control, street gangs, and vigilanties. The chronologically-arranged articles are carefully selected from a diverse collection of newspapers, magazines, law journals, and government publications.

The age-old conflict between the individual's right to privacy and society's need for national security is shown provocatively in the binder on *Privacy*. Some of the more intriguing articles include "How Uncle Sam Covers The Mails," "Private Medical Secrets Aren't So Secret," and "How Much Does the Boss Need to Know?"



"It's agreed then. . .in Poker and Pinochle the King will beat a Queen, and in Hearts and Bridge the Queen will beat a King."

The binder on *Corrections* surveys the role of our corrections system today. The volume includes personal accounts of offenders, discussions of prison conditions, and contrasting theories on rehabilitation. As in all these volumes, the material is presented objectively so the reader can draw his own conclusions.

This series is a fine program which would enrich any classroom from upper elementary through college. Each volume includes a teacher's guide which outlines teaching strategies and methods of evaluation.

There are 25 other volumes in the series, dealing with such vital topics as drugs, ethnic groups, and energy. The publisher also puts out annual supplements every March (20 articles for $10) to reflect new developments in each area.

Secondary

■***Lobbying: A Case History*** (2nd edition, 1977). Secondary. 16mm color/film, 18 minutes, teacher's guide. Purchase: $255; rental: $14 for 3 days. (Encyclopaedia Britannica Educational Corporation, 425 North Michigan Avenue, Chicago, IL 60611).

Lobbying has increasingly become widespread in the United States. This film focuses on the controversy surrounding a proposed replacement of a dam in Illinois; however, this case study can be generalized to any of the thousands of issued being lobbied for in this country today.

The film shows how interested individuals can organize to affect the outcome of political decision-making. We learn the viewpoints of the opposing interest groups and follow the lobbyists as they attend strategy sessions, committee hearings and legislative meetings. An interview with a professional lobbyist reveals that today's lobbying is highly complex and businesslike.

A brief teacher's guide offers useful class activities and questions for discussion. Any secondary social studies, government, or contemporary problems class would benefit from this film. With our government constantly growing more complex and yet more directly affecting our lives, young people must understand how to influence the political process. This film will help such understanding.

■***Dollars and Sense: A Guide to Consumerism*** (1977). Secondary. Six cassettes (12 lessons) packaged in a binder, teacher's guide. Purchase: $59.50. (Instructional Dynamics, Inc., 450 E. Ohio St., Chicago, IL 60611).

This audio cassette series aims to promote heightened consumer awareness. Interviews with members of the Federal Trade Commission, the Better Business Bureau, and various consumer protection organizations all provide listeners with reliable ways to protect themselves against deceptive selling practices.

The program discusses recent consumer laws, offers practical tips for better shopping, and points out the many local, state, and federal organizations which help the buyer. Some particularly noteworthy portions of the series include an interview with an FTC member on truth in packaging, a discussion about door-to-door selling techniques, and an expose of medical quakery.

The producer's promise of "lively interviews that make the material entertaining" doesn't always come true. It would be difficult for the average student, or teacher for that matter, to listen to many of these tapes in a row. Generally, though, this is a well-developed set of teaching materials, accompanied by a teacher's guide offering many helpful suggestions.

This series will help arm consumers with the most valuable weapon they can have against fraud—knowledge.

■ ***The Right to Die, Privacy Under Attack,*** and ***Gun Control: The Right to Bear Arms*** (1977). Secondary. Color filmstrips and cassette tapes, individual teacher's guide. Purchase: $24 each. (Current Affairs Films, 24 Danbury Road, Wilton, CT 06897).

This well-balanced and objective series of filmstrips deals with constitutional issues. For example, the widespread publicity of the Karen Ann Quinlan case and medical advancements which keep terminally-ill patients technically alive have caused many to question whether in certain circumstances people shouldn't have the right to end their lives or the lives of other persons who are artificially kept alive. This emotional issue is examined in *The Right to Die.*

Our society, the filmstrip notes, seems to be moving toward accepting a right to choose death under some conditions. California has recently passed a "right-to-die" law for patients with terminal illnesses, and other states are considering similar legislation. For the dramatic cases of terminal cancer victims or vegetating coma patients, death often seems to be a preferable alternative. "But," the filmstrip asks, "what about the common, everyday cases?" Should "extraordinary measures" be taken for an elderly person who suffers a stroke or a baby who is born mentally retarded? *The Right to Die* explores the cloudy legal and ethical factors shrouding these issues and should provoke active thought and discussion in the classroom.

Gun Control: The Right to Bear Arms presents the legal and historical background of the gun control issue. Many important questions are raised by this film: Would a ban on handguns help diminish violence? What are the negative effects of such a ban? Conflicting opinions are presented objectively in this film, so that viewers may reach their own decisions.

The constitutional right to individual privacy is the subject of *Privacy Under Attack.* Government agencies, computers, banks, credit card companies, and even public libraries are all shown monitoring the private affairs of citizens. Society's need for information and its desire for national security often conflict with the individual's need for privacy. "Where will a balance be struck?," the filmstrip inquires. This program does not provide an answer but simply presents the issue and allows students to make their own judgments.

Each Current Affairs filmstrip and cassette is accompanied by an in-depth teacher's guide which offers background information, a bibliography for further research, ideas for class discussion, and follow-up activities. All in all, an excellent series which presents timely constitutional issues in an informative and entertaining format.

■ ***The Right to Pollute*** (1976). Secondary. Two-part filmstrip with two cassettes, teacher's guide. Purchase: $48. (Educational Audio Visual Inc., Pleasantville, NY 10570).

This filmstrip examines the conflict between industrial growth and preservation of the human and natural environment. The first part focuses on the pollution problems that industrial expansion and over-consumption have caused modern industrial nations. Part two deals with the Third World's difficulty in meeting the basic needs of its people, let alone concerning itself with pollution. Both parts include specific case studies—including the mercury poisoning scandal in Manitoba, Canada, and the Aswan Dam disaster in Egypt—to help illustrate the complex and contrasting interests which often surround environmental issues.

The Right to Pollute raises a timeless legal conflict between private interest and the public good. It is accompanied by spirit masters and an in-depth teacher's manual which offers excellent ideas for classroom discussion.

■ ***Law in Everyday Life,*** by Elinor Porter Swiger (1978). Secondary. Softcover textbook, 232 pages. Purchase: 1 to 9 copies $4.92, 10 or more copies $3.69, teacher's manual $1.29. (McDougal Littel and Co., P.O. Box 1667-R, Evanston, IL 60204).

Law in Everyday Life is a comprehensive law text for the high school. It discusses the law as it affects work, driving, education, the family, marriage, crime, and other areas of interest to young people, then carries students beyond to future roles as parents, consumers, taxpayers, and participants in trials.

Each chapter of *Law in Everyday Life* begins with high-interest questions to spark students' awareness of legal issues. The body of each chapter then goes on to explore recent cases and specific statutes in order to illustrate how legal principles can be applied to everyday situations. The text also provides extensive information about alternative sources of legal aid (pro se courts, law school clinics) and pays special attention to laws concerning the rights of women and minorities.

An extensive teacher's manual provides overall objectives for each chapter, as well as suggested approaches and additional student activities. Though the book would benefit from some graphics and pictures, it is a fine text which treats legal issues in a way that young people will find relevant for their own lives. It is highly recommended for a high school overview course about law.

"Have the legal staff check into why we must obey the rules, Miss Lovett."

K-12 Teacher Resource

■ ***It's Your Right*** (1978). K-12 and parent/teacher resource materials. Multimedia Edu-Pak containing a variety of components. $43.67 for complete kit; components can be purchased separately. (NEA Distribution Center, The Academic Building, Saw Mill Road, West Haven, CT 06516).

This kit contains a variety of law-related materials produced by the National Education Association over the past several years. According to the NEA's promotional material, the heart of the program is the color, sound filmstrip *It's Your Right . . . The Law Says,* which examines the rights of juveniles in today's legal system and attempts to answer practical questions of concern to students. The filmstrip is accompanied by a teacher's guide and script, as well as a booklet entitled "Student Discussion Questions on Local Issues." (The filmstrip, including teacher's guide and booklet, is available for $18.00.)

Other materials in the kit dealing with this topic include "Your Child and the Law," a package of 30 leaflets for parents available for $2.50, and the cassette tape *Youth and the Law* and its teacher's guide, available for $9.00.

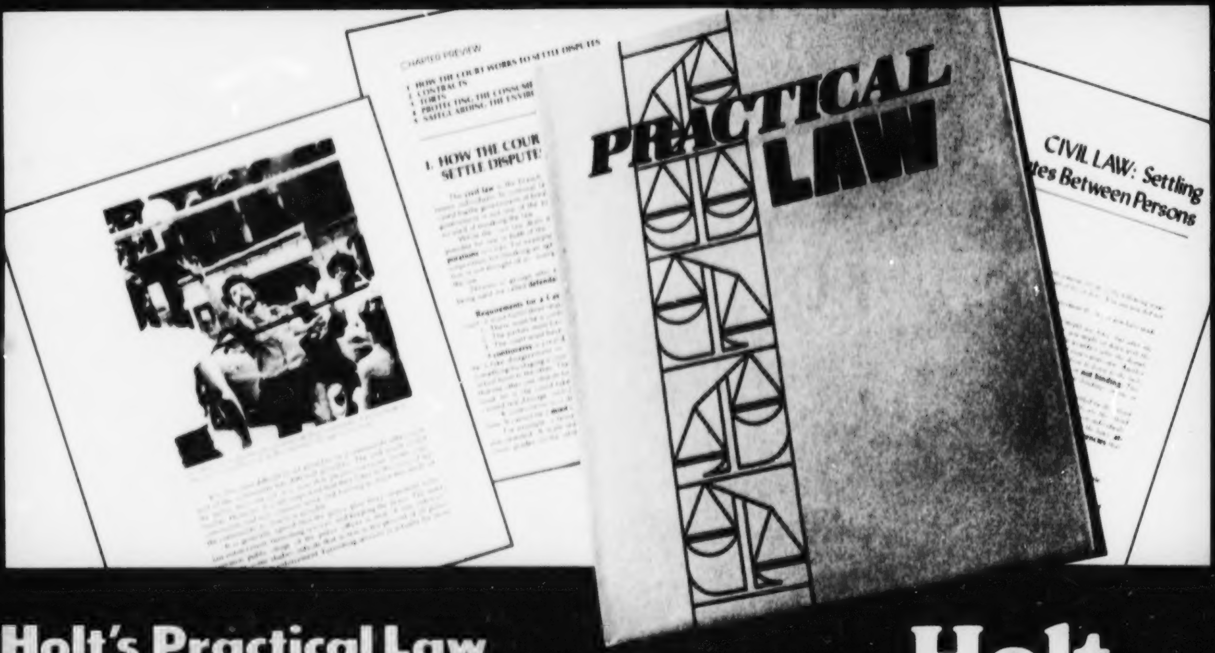
The kit also contains a strong set of materials on school law, including a cassette tape featuring Ramsey Clark on *Future Rights Enforcement* ($9.00), and the books *Code of Student Rights and Responsibilities* ($1.50), *The Rights of Teachers* ($1.50), and *What Every Teacher Should Know About Student Rights* ($2.00).

Materials about law and government include the book *Background Notes on the Constitution of the United States* ($1.50), the pamphlets "Citizen Action Can Turn Things Around" and "Truth in Government" (50c each), and *Learning to Govern,* a book of 20 spirit duplicating masters for the middle grades on ethics in government. The spirit-master book includes a teacher's manual and is available for $7.50.

Finally, the kit contains two how-to-books, *Law Enforcement Education in the Middle Grades* ($4.50) and *Values, Law-Related Education, and the Elementary School Teacher* ($1.50).

Although some of the components of the kit may be dated, it offers educators a fine resource for educating themselves, their students, and the members of the community about the law. All in all, this program represents a positive affirmation by the NEA of the importance of law-related education. ☐

Law is more than rights-and-wrongs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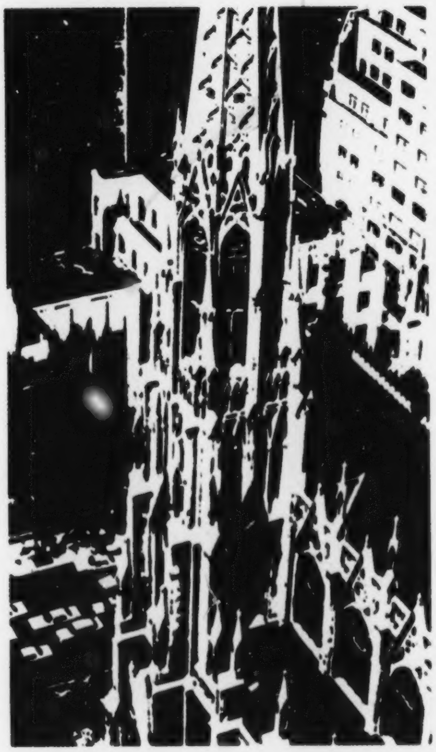

Special Committee
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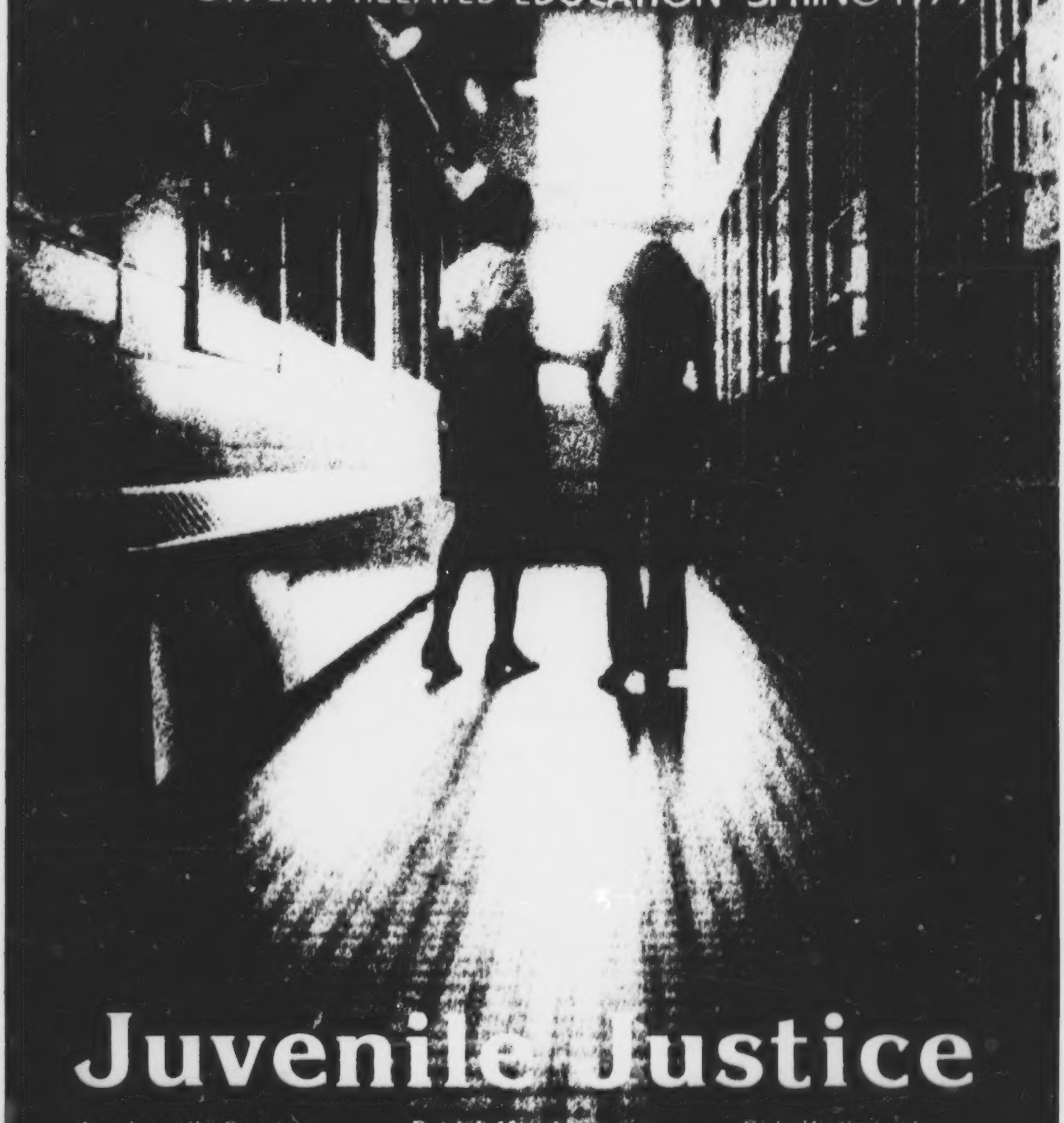

Juvenile Justice

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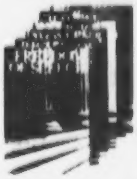

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contents

Volume 3, Number 2 Spring 1979

4

Supreme Court Report
Juvenile Justice from Hammurabi to John Rector

7

Classroom Strategies
Juvenile Justice in Action

10

Opposing Views
Are Our Juvenile Courts Working?

14

Interview
Portrait of a Maverick

18

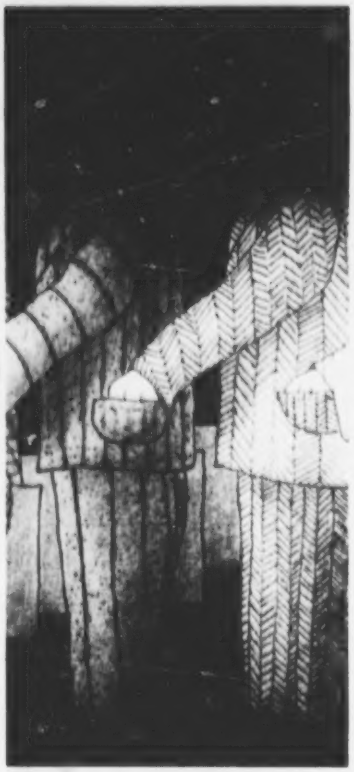
In the Field
A Double Standard For Girls?

21

Views From Abroad
Does Sweden Have a Better Idea?

24

The $$ Game
Getting Juvenile Justice Support



28

Curriculum Update
A Juvenile Justice Cornucopia

31

Court Briefs
From Striking Teachers to Diplomats Striking Out

45 Kids
per class
cla

35

Newsclips

38

Anatomy of a Lawsuit
A Legal Battle Brews

42

The Lighter Side of the Law
Legal Language—Help or Hype?

Credits
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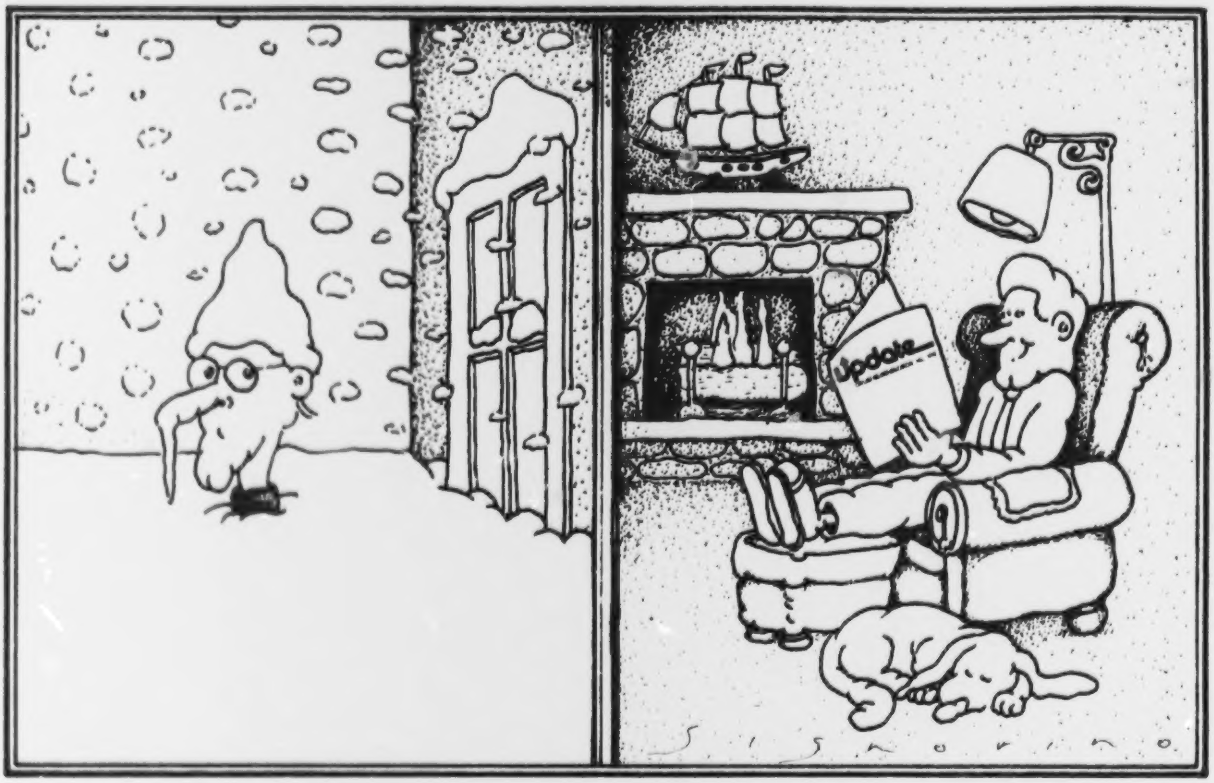

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opening statement

Once this country's juvenile justice system seemed a shining innovation, a way to give youngsters the individualized attention and kind concern they needed in a harsh world.

Now the system is under attack from all sides. Conservatives think it is too lenient. Liberals think it's erratic and unfair to many kids accused of minor crimes. Plenty of Americans don't know much about the system but think that somehow it must be to blame for juvenile crime.

In a special section of this issue, **Update** takes a close look at the juvenile justice system in crisis. The articles in this section give you the background of the system, show it in action, suggest some changes—and tell you about good teaching materials and strategies.

Following the special section are such regular features as **Court Briefs** and some new ones like **Anatomy of a Lawsuit.**

As always, we welcome your reactions to the magazine and your suggestions for future issues.

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Juvenile Justice from Hammurabi to John Rector

Trying to bring justice to kids has troubled courts for years

Gerald Gault was a lawyer's dream. This 15-year-old Arizona boy, accused of a minor crime, clearly seemed to have been railroaded by the juvenile justice process. He wasn't given adequate time to prepare his case. He wasn't told that he could remain silent or have the assistance of counsel. He wasn't allowed to confront the witnesses against him and cross-examine them. He wasn't given a public trial, nor was a court record kept. And he wasn't given the right to appeal.

All in all, he wasn't given any of the due process protections of an adult—and he *was given* a sentence far greater than an adult would have received for the same crime. His quest for justice took him all the way to the Supreme Court, and helped revolutionize the juvenile courts. His story dramatizes dilemmas of juvenile justice which have troubled leaders from the ancient Babylonian Hammurabi to the head of our nation's juvenile justice office, John Rector.

It all started in 1964, when Gerald and a young companion were brought before the Arizona juvenile court. The two of them, it seemed, had been making dirty phone calls, "of the irritating, offensive adolescent sex variety." One of the calls was made to a Mrs. Cook, who reported the boys to Deputy Probation Officer Flagg.

Things moved fast after that. Young Gault was taken into custody that day by the sheriff and brought to the local

Wallace Mlyniec

detention home. When his mother arrived there, she was told to report to court the very next day. The next day Officer Flagg filed a very cursory petition with the court, which was not served on Gault or his mother. In fact, neither saw it until two months later. Even if they had seen it, it wouldn't have helped them understand the charges against 'Gerry, since it did not deal with the facts of the case and merely said that he was a delinquent "in need of the protection of this Honorable Court."

A Hasty Judgment

When the Gaults appeared in court the day after he was arrested, there was of course no lawyer for young Gault. It is unclear exactly what the substance of the calls was, since no transcripts were made of the hearing. Of course, as in all juvenile courts, the victim was not there.

At later hearings in the federal courts, the judge and other witnesses were unclear about the testimony that day in juvenile court. Young Gault, in response to questioning by the judge, may have confessed that while he dialed the number his companion actually made the call. At any rate, the hearing adjourned with Judge McGhee saying he would "think about it." Seven days later (during three of which Gerald was in the detention home), the judge was ready to pass sentence.

Had Gerald been an adult, he could have been sentenced to a fine of $5 to $50 or imprisoned for up to two months. But because he was a child, only 15 at the time, he was committed to the state industrial school until 21, unless sooner discharged by law.

The precise reason for Gault's sentence was unclear. He was on probation at the time for purse snatching, and Judge McGhee claimed authority from the statute which defined delinquency in part as "habitually involved in immoral matters." However, the judge later admitted he had only vague recollections of Gerald's prior behavior.

A retired woman lawyer in Arizona saw the case for what it was. Ignoring the fact that Gerald would probably never spend six years at the school, conveniently ignored by the Supreme Court as well, she set out to have the outrageous sentence and conviction reversed.

The Court Comes Down Hard

The case proceeded through the federal courts for three years, but the Supreme Court's eventual decision was worth waiting for, at least as far as Gerald and his lawyer were concerned. Mr. Justice Fortas, speaking for the Court in *In re Gault* (387 U.S. 1 [1967]), said "the condition of being a boy does not justify a kangaroo court."

Pointing out that "industrial schools" and "receiving homes" were euphemisms for institutions of confinement, Fortas said that "it would be extraordinary if our Constitution did not require . . . due process" before sentencing a child to incarceration.

Fortas argued that the juvenile court, with its informal procedures and ideal of the kindly judge who would act in the best interest of the child, had fallen short of its noble goals. Quoting an earlier decision, he wrote, "there may be grounds for concern that the child gets the worst of both worlds: that he gets neither the protections awarded to adults nor the solicitous care and rehabilitative treatment postulated for children."

Fortas and a majority of the justices agreed that children were (1) entitled to notice of specific charges giving rise to charges of delinquency and (2) entitled to get the charges in advance of the hearing to permit preparation. The Court also agreed that children were entitled to the assistance of counsel during a delinquency trial.

Affirming that the Bill of Rights and Fourteenth Amendment were not written for adults alone, the Court also held that the protection against self-incrimination and the right to confront and cross-examine witnesses were necessary in the juvenile court to insure that a child's liberty would not be restrained without due process of law.

Fortas noted in particular that "confessions" by juveniles require "special caution," and argued that it would be surprising "if the privilege against self-incrimination were available to hardened criminals but not to children."

Although Justice Fortas's opinion did not abolish the juvenile court, it bid fair to revolutionize it. Arbitrariness was supposed to disappear. No longer were conversations between the fatherly judge and the child to be the basis for a finding of delinquency. Nor would hearsay statements from probation officers be permitted. No findings of delinquency could be sustained in the absence of sworn testimony by competent witnesses who were subject to cross-examination.

The decision was not unanimous. Justice Harlan concurred in part and dissented in part. He agreed that Gerald had been denied due process, but argued that the Court had gone too far. By stipulating the privileges that must be accorded to youths, he felt the decision prevented legislatures from coming up with creative solutions to juvenile problems.

Justice Stewart dissented entirely. He pointed out that juvenile hearings are "simply not adversary proceedings" and should not be converted into "criminal prosecutions," with all the attendant due process trappings. Reminding the Court that the juvenile system was originally set up as a reform that would remove youngsters from the harshness of the adult system, he called the *Gault* decision "a long step backwards into the nineteenth century."

Children in a World of Woe

To understand why the juvenile courts had operated so long without the due process standards of adult courts, and why the *Gault* decision was such a legal bombshell, you have to first understand how children were traditionally treated under the law and why the juvenile justice system was seen as a major innovation.

Despite age-old adages about the wonders and hopes of childhood and the pious statements which issue periodically from modern-day conferences and commissions, the plight of children in the world has hardly ever been a happy one. The earliest codes of ancient Egypt, the Greek city-states, and the Roman Empire, as well as the scriptural texts of early religions, all treated children harshly.

A catalogue of these abuses provides a grim picture. In the name of justice and societal stability, children have been bought and sold, shackled and whipped, maimed and murdered and left on the mountainside to die. In our enlightenment, we have abandoned these more obvious barbarisms and replaced them with our modern juvenile justice system. Unfortunately, but perhaps with good reason, many people today consider this institution a nonsystem or non sequitur at best and at worst the modern-day equivalent of leaving our unwanted or imperfect children on the mountainside to die.

To understand this system, which concerns not only delinquent children, but neglected children and those guilty of such noncriminal behavior as running away or being ungov-

(Continued on page 50)

CLASSROOM STRATEGIES The CRF Staff

Juvenile Justice in Action

Exciting ways to teach about delinquents, runaways, and minors and contracts

BEFORE
AFTER

- The hazards faced by minors in America are compounded by their inability to protect or represent themselves. Fortunately, the child advocacy movement has increasingly called attention to the most unconscionable problems faced by children. Federal policies have also forced reforms on states reluctant to change unsavory practices such as mixing juveniles and adults in jails and prisons.
- But at the same time that the public is becoming aware of the plight of some young people, the vicious and senseless brutality of a tiny percentage of minors creates a clamor for tough treatment for juveniles who brutalize others. The dilemma faced by our juvenile system is to balance the needs of young people during their formative years with peaceful citizens' need to be protected from dangerous youths.
- Although most Americans have strong opinions about what should be done with youthful criminals, far too few juveniles or adults know much about our system of juvenile law or the problems faced by many young people in our society who become involved in the system. The activities that follow do not provide a comprehensive look at the juvenile justice system, but rather illustrate how the justice system tries to help manage difficult human conflicts. We hope that these activities will help students understand the juvenile system—and function more effectively as members of society.

— Todd Clark, Education Director, Constitutional Rights Foundation

Strategy 1.

Role-Playing a Fitness Hearing

Karen DeMunbrun
Doris Bloch

Violent crimes committed by juveniles are a major national concern. Senator Edward M. Kennedy has called the problem "the plague of juvenile violence," and has said that

- Although juveniles under age 18 constitute only about one-fifth of the population, they account for nearly one-half of all those arrested for serious crimes.
- Juvenile violence has been increasing faster than crime generally. From 1966 to 1976 arrests for violent juvenile crime more than doubled.

As you might expect, there is growing public pressure to "get tough" with juveniles. In the July 11, 1977, issue of *Time* magazine, associate editor Edwin Warner states: "If society is to be protected from the violent young, respect for punishment must be restored. Youngsters should know just what to expect if they commit a particular crime. An adult crime—like armed robbery, rape or murder—deserves adult treatment."

In some states, a juvenile may be tried as an adult if he or she is found to be unfit to be tried as a juvenile. In California, 16-year-olds face that prospect. The minimum age for each state varies; have your students find out what the age is in your state.

The Process. The district attorney receives the case from the police and decides that the minor involved should be tried as an adult. He or she asks the juvenile judge to schedule a "fitness hearing" for the minor.

Before the hearing, a probation officer is asked to investigate the juvenile and submit a report to the juvenile court containing information on the minor's behavioral patterns and social history. This report includes such information as the minor's relationship with family members, degree of success in school, types of recreational activities, work experience, and character of friends.

The Fitness Hearing. The district attorney explains why the minor is *unfit* to be tried as a juvenile and should be tried as an adult. The defense attorney, who is in many cases a public defender, represents the minor and seeks to convince the judge that the minor is *fit* to be tried as a juvenile. Witnesses may be called by both attorneys to reinforce the facts.

After considering the testimony and the probation officer's report, the judge may consider any one or a combination of the following criteria to determine whether or not the minor is fit to be tried as a juvenile:

1. The seriousness of the crime.
2. The minor's previous delinquent history.
3. The degree of criminal sophistication exhibited by the minor.
4. Whether or not the juvenile court has been successful in past attempts to rehabilitate the minor.
5. Whether or not there is a chance the minor can be rehabilitated under the jurisdiction of the juvenile court.

If the minor is found fit he/she remains under the jurisdiction of the juvenile court, where there are fewer due process safeguards—but also fewer severe punishments. If found unfit the minor is transferred to the adult court system. In the adult system, the minor may be able to post bail and have a trial by jury, but if found guilty of the crime the minor may be sentenced to state prison. For example, in December, 1978, a 14-year-old, Robert Earl May, Jr., was found guilty on four counts of armed robbery and sentenced to 48 years in a Mississippi state penitentiary.

Springboard Activity

When deciding whether or not a minor is fit to be tried as a juvenile, one of the factors the judge may consider is the seriousness of the crime. Listed below are 19 crimes. Write them on the chalkboard or duplicate the following list. Ask your students to choose the seven crimes they believe to be the most serious.

- rape
- loitering
- robbing a bank
- using drugs
- stealing a car
- drunkenness
- killing someone in a fist fight
- selling drugs
- killing someone on purpose
- disturbing the peace
- kidnapping
- burglarizing a home when owner is away
- killing someone in a car accident when you are the driver
- shoplifting
- vandalizing a school classroom
- child beating
- borrowing a car without owner's permission
- setting fire to an abandoned building
- firing a gun into an occupied building

Using their answers, select the seven worst crimes. Discuss why students chose the crimes they did. Then compare the students' response to this list of seven crimes identified as serious by the Criminal Justice Profile 1976, State of California.

- willful homicide
- forcible rape
- robbery
- aggravated assault
- burglary
- grand theft
- motor vehicle theft

Role-Play Activity

In the following role-play situation the class will decide if Anthony is fit to be tried as a juvenile. The role play is not intended to teach court procedure, but to provide an understanding of the human and legal issues involved in a legal process.

Begin this role play by telling students about Anthony's case. Anthony is accused of willful homicide because Al died as a result of a head injury. Anthony states he had a fight with Al and that they had been drinking. Witnesses at the party they both attended saw them fighting. Then share copies of Anthony's probation report with students.

Probation Report

Name:	Anthony
Age:	17
Lives:	With mother and father in a modest but respectable neighborhood.
School:	Became involved in gang activity in the 10th grade. Dropped out of school for a short time. Best friend killed in gang activity. Anthony dropped gang activity and returned to school. Teachers report that his grades are above average.
Prior Record:	Three years ago, charged with being under the influence of alcohol: case dismissed. Two years ago, charged with joyriding: released to parents. A year and a half ago, charged with being under the influence of alcohol and school vandalism: six months' formal probation.

Then write on the board the five factors the judge considers when determining fitness. (If possible, transfer these factors, the role descriptions, and the probation report to separate sheets of paper and make copies available to the students.)

Review the probation report with the class, and choose seven students to play the roles of: judge, district attorney, defense attorney, probation officer, the minor, his mother, his father. The remaining students play the role of observers.

Then role play the fitness hearing according to the steps outlined in the role description of the juvenile court judge.

Follow this with a debriefing, during which the observers will comment on the activity. They will refer to the specific questions outlined in their role description.

Role Descriptions

Juvenile Court Judge: This hearing is for the purpose of deciding whether or not the minor is fit to be tried in juvenile court. As the judge, you preside, call the case, and follow these procedures:

1. Ask the probation officer to present his/her report and sentencing recommendation to the group.
2. Give the defense attorney a chance to respond to the report.
3. Next, the defense attorney may call the probation officer to question him/her more fully about the information contained in the report.
4. The district attorney may then cross-examine, comment, and present counterarguments.
5. You may then call on the parent or parents to respond to all that has been presented. Ask whatever questions you believe are necessary to help you fully understand the relationship between the adults and the child.
6. Finally, you call on the child in the case. Explain that you want to do what is best for him and question him regarding his own attitudes about what has happened and his reaction to the testimony presented and the recommendations that have been made.
7. After everyone has had an opportunity to present his/her position fully, you must decide on the action which you believe will be best.

Probation Officer: You have prepared the probation report, drawing your information from such sources as parents, school, police, and social service agencies. After you present your report tell the others what you recommend—fit or unfit. You will then be questioned by both attorneys, who will try to draw out additional information which supports their position. You *cannot alter facts*, but you may provide information which is a more detailed account of what the report already states.

Defense Attorney: It is your job to see to it that your client is found fit to be tried in juvenile court. After the probation report is presented you will have the opportunity to respond and ask questions. You should try to ask questions that deal only with positive factors in your client's background, such as his good academic record and his dropping out of a gang. These will strengthen your contention that your client should be found fit.

District Attorney: You speak for the people. It is your job to see that the public is protected from criminals. After you have heard the probation report and the defense attorney's response you will explain to the court why you think the minor should be found unfit for juvenile court and should be tried as an adult. You may cross-examine the probation officer and should ask questions which support your position on the matter. You may wish to focus on Anthony's drinking and prior convictions.

Parents: You are in court today because you are required to appear with your child. The judge will hear a report from the probation officer and will then ask both lawyers, you, and your child to respond to the recommendation that your child be tried in adult court. You may respond to the situation any way you wish. You may place the blame on your child, accept responsibility yourself, get angry at the court or the probation officer, etc. Act as you believe a parent might act under similar circumstances.

Minor: You will be given an opportunity to comment on the probation department's report about you. You *cannot alter the facts* presented, but you can provide explanations or background information which you believe would help your case and influence the judge before he/she decides whether or not you are fit to be tried in juvenile court. Be prepared to tell the judge what you think the decision should be.

Observers: It is your job to evaluate what has happened at the hearing. After the hearing has taken place you will share your impressions with the class. Your teacher will ask you the following questions:

1) Do you think people at a fitness hearing would behave the way the players in the role play behaved?
2) Based on the "facts" of the case, including the probation report and role-play discussion, what is

(Continued on page 46)

Are Our Juvenile

No!

**Senator
Edward M. Kennedy**

As I travel around the country I find that the problem of crime ranks right alongside unemployment and inflation as the chief concerns of the American people. Crime is not confined to our urban ghettos; it stalks everyone, everywhere. The inner-city resident refuses to open the door to anyone after nightfall. The suburban family's neighborhood stroll is a thing of the past. The farmer in the wide open plains locks his door to secure his family and property. The elderly couple waits for police escorts before venturing out to the local supermarket.

Crime has become an integral part of our existence. We read about it, think about, talk about it—and experience it.

And what is Congress doing about the problem? We have committee after committee dealing with the issues of the economy and energy, but there isn't much discussion about crime. There are plenty of hearings about what to do about inflation and unemployment, but when it comes to crime there is a strange silence.

The Cancer of Juvenile Violence

When we speak about violent crime one problem stands out above the rest—the plague of juvenile violence. Juvenile crime is more than a fact of life today; it is a fact of death. A gang of girls aged 14 to 17 is formed for the sole purpose of terrorizing the elderly; a 16-year-old youth mugs an 86-year-old woman and steals her purse; two young boys murder a minister in the course of a petty robbery.

Juveniles themselves are often the victims of such violence; in one recent study, over one-half of all black ghetto youths stated that they were afraid to walk streets more than one block from home.

The statistics are foreboding and all too familiar: although juveniles under the age of 18 constitute only about one-fifth of the population, they account for nearly one-half of all those arrested for serious crime. And juvenile violence has been increasing faster then crime generally. Practical steps must be taken to check this growing cancer of violent juvenile crime.

We must start with our juvenile justice system. Although juveniles commit a disproportionate amount of violent crime, their chances of being arrested, convicted, and punished are *lower* than for an adult! Indeed, recent research by James Q. Wilson and others confirms that the chances of punishment are especially low for the chronic, repeat offender, who manages to commit numerous crimes without being caught. Yet it is this repeat offender who commits the bulk of serious juvenile crime.

Juvenile Court Shortcomings

What has led us to this terrible state of affairs? The obvious inefficiency of juvenile courts—highlighted by delays of a year or more, even for the most violent crimes—contributes to the high dismissal rate. Delay undercuts any effort to make certainty of punishment a reality.

The juvenile courts often lack the evidence needed to sustain the charges. Legal constraints—which prevent the police from fingerprinting or photographing a juvenile or placing him in a lineup—often make arrests and convictions impossible.

Even when a conviction is obtained the judge may be hampered by incomplete information about a juvenile's prior record. Without fingerprints and mug shots, the police often cannot link an arrested juvenile to other previously unsolved crimes. Concerns over privacy may prevent even the sentencing court itself from examining the sealed record of the defendant. If the offender's prior record is unknown or unavailable, the result is likely to be an arbitrary sentence; one juvenile may be sentenced too severely, another too leniently.

But the major problem confronting the juvenile justice system is much more fundamental, and can be traced to an unrealistic myth: that juvenile courts are somehow equipped to rehabilitate and treat *all* juveniles, whether they be status offenders, juvenile delinquents, or violent criminals.

The special juvenile court was created in the name of benevolence, in the name of doing good. The original purpose of the court was to promote rehabilitation by establishing special procedures which would prevent juveniles from drifting into a life of crime. Forget the nature of the crime, forget the prior record of the offender; if you are a juvenile, you receive a special pass, entitling you to bypass the regular criminal justice system

(Continued on page 12)

Courts Working?

Yes!

Judge William S. White

Senator Kennedy, in response to what he refers to as "the growing wave of violent juvenile crime," has called for some drastic changes in the way society handles juveniles charged with violent offenses. To mention a few, he would eliminate juvenile court jurisdiction over minors charged with violent offenses and proposes that they be tried and sentenced by adult criminal courts. Implicit in this recommendation is the notion that the criminal justice system is effective in protecting the public from such behavior and that the juvenile justice system is not.

I submit that the deficits of juvenile courts in this regard pale in comparison to the deficits in the assumptions the Senator makes about juvenile crime and the ability of criminal court processing to protect society from its depredations.

Kennedy Assumption #1

There is a new plague of violent juvenile crime. One of the examples used by the senator is Chicago, where the rate at which black youths committed homicide nearly tripled from 1966 to 1970.

Fact: The worst is over. In Chicago, the absolute number of juveniles referred to juvenile court for homicide declined from 133 in 1973 to 102 in 1978. Further, according to the FBI's *Uniform Crime Reports*, between 1974 and 1977 the proportion of juveniles arrested for violent crimes declined by 7%.

Ironically, Paul Strasburg's *Violent Delinquents* (Simon & Schuster, 1978), which Mr. Kennedy cites, concludes that the concept of juvenile violence is not useful for program purposes for two primary reasons: (1) there are too few of these youngsters; and (2) their violent behavior usually appears to be a random subset of other predominant actions. This finding was echoed by a more recent study by D. M. Hamperian and others, *The Violent Few: A Study of Dangerous Juvenile Offenders* (Lexington Books, 1978): "If there is a substantial number of youth who are repetitively committing violent acts, their delinquencies have not come to the attention of the police." Consequently, researchers have turned their focus to the "chronic offender." (M. G. Neithercutt, *Effectiveness of Intervention Impacting Violent Juvenile Offenders*, Bay Area Research Design Associates, San Francisco, California, page 3.)

How appropriate, then, is this recent intense interest in juvenile justice? It is welcomed, but much can be filed under "a day late and a dollar short." Since 1974, under the rubric of "diversion," the U.S. Senate has directed most of its attention and the bulk of federal dollars away from the serious offender, away from juvenile justice, to the status offender and voluntary agencies.

Kennedy Assumption #2

The courts and corrections have a significant impact on crime statistics.

Fact: Neither the cause nor the cure for crime, juvenile or adult, can be found in the justice system. Even a casual look at the juvenile court will tell you that, like criminal court, it is a poor people's court and that violent crime is principally a problem associated with the inner-city poor. Until the millenium, which will provide a good economic base and the good social environment needed by every person, we must use our most effective methods to control the offender who assaults, robs, rapes, and kills.

Kennedy Assumption #3

The juvenile justice system has been less effective in coping with the serious violent offender than the adult system.

Fact: Juvenile courts are more likely to act in cases of violent crime, and, when they do, they are more effective than adult criminal courts. In a recent study comparing processing of 16- and 17-year-old offenders in the criminal versus the juvenile system, it was found that the criminal court was much more likely to do nothing than was the juvenile court. (R.J. Gable, *The Pittsburgh-Buffalo Project: An Investigation of the Outcome of Judicial Proceedings Involving 16- and 17-Year-Old Youth,* National Center for Juvenile Justice, Pittsburgh, Pennsylvania, 1979, pages 26, 28-29, 39.)

In a matched sample of 100 offenders appearing before criminal court in Buffalo, New York, and the juvenile court in Pittsburgh, Pennsylvania, the study found that the criminal court dismissed 74% and juvenile court dismissed only 48%. The juvenile court was just as likely

(Continued on page 12)

Are Our Juvenile Courts Working?

Kennedy

and receive "treatment" in a court bent on helping you.

But good intentions are not enough. We now know that the ability of such courts to rehabilitate the violent juvenile or predict future criminal behavior must be viewed with increasing suspicion. The idea of independent juvenile courts—established as an alternative to the stark world of the adult criminal justice system—has backfired. There has been a notorious lack of rehabilitation and an equally notorious increase in arbitrariness and injustice.

Status Offenders Hardest Hit

And, while the violent juvenile is often let off with a slap on the wrist, these very same courts are not so lenient when it comes to the great bulk of youngsters who appear before them every day. I am talking about the status offender—the truant, the runaway, the so-called "stubborn child." According to LEAA, at least three-quarters of a million juveniles were jailed in 1974; of these, less than 12% were arrested for violent crimes! Most of the punishment was directed against juvenile delinquents who had committed petty crimes, status offenses, or no offense at all!

Astoundingly, almost 5% of those jailed had not committed any offense, but were there because the authorities "didn't know what to do with them." One boy was jailed because his mother had been hospitalized and there was no other adult at home. One child was in jail to protect her from her own father, who had been accused of beating her. Other children were held in custody because they were deemed mentally ill or retarded.

The message is clear—if juveniles want to get locked up they should skip school, run away from home, or be deemed "a problem." If they want to avoid jail, they are better off committing a robbery or burglary. The two-track system of separate adult and juvenile courts often makes a mockery of our criminal justice system and undermines respect for law. The chronic violent juvenile, in particular, reaps the benefits of a sentencing system that reserves the heaviest punishment for adult offenders nearing the end of their criminal careers.

If kids want to avoid jail they are better off comitting robbery than skipping school

The impact of such sentencing arbitrariness is clear. The violent juvenile knows that if he is occasionally arrested not much will happen. Crime pays handsomely. His prior record is unknown; the

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White

to impose the sanction of commitment to a facility: 15% (juvenile court) versus 16% (adult court). But perhaps more important when addressing the matter of violent crime, the juvenile court was twice as likely (20% versus 10%) to commit an offender to a facility for offenses involving injury of persons.

Quite coincidentally, the crime rate for juveniles aged 14 through 17 appears to be lower in Pittsburgh, where 16- and 17-year-olds go through the juvenile system, than in Buffalo, where they are tried as adults. This difference exists even though the two communities are demographically identical on all critical social indicators, *i.e.*, sex, race, age, density, etc.

In another recent study of over 800 juveniles found delinquent in Cook County in 1974 for committing violent offenses (rape, robbery, homicide, assault and battery), some 200 of these were committed to the Youth Division of the Department of Corrections. The remaining 606 constituted the base group of a recidivism study. They were traced from their base findings of delinquency in 1974 through March, 1977, for finding on new offenses. The study reveals that, of the 606 juveniles in the base group, only 84 had findings for new offenses—violent or nonviolent. In other words, the proportion with any overall recidivism was 1 in 7, or 14%. (Michael Brennan, *Recidivism Study of Violent Offenders,* Juvenile Division, Circuit Court, Cook County, Illinois, September 22, 1977.)

Other studies also indicate that the juvenile system is succeeding. In Cook County we have had a federally funded program called UDIS, an acronym for Unified Delinquency Intervention Services. This agency receives from the juvenile court referrals of youths who have been adjudicated delinquent so often, or for an offense so severe, that they would otherwise have been committed to the Illinois Department of Corrections (DOC). UDIS deals with these juveniles without institutionalization.

Recently, a report of UDIS operations has been filed with the Illinois Law Enforcement Commission. The report contains three findings of great significance:

1) Significant reductions in the incidence of offenses, as high as 2/3 of the pre-intervention rate, can be achieved even with the most chronic, serious delinquents in Cook County through the use of energetic correctional intervention;
2) Whether the program was UDIS or DOC, correctional intervention in the life of the chronic juvenile offender in this study had a powerful and apparently long-term inhibiting effect on subsequent delinquent activity;
3) The recidivism analysis did not make a case for the overall superiority of either UDIS or DOC. It concludes, however, that reports of the futility of juvenile corrections have been greatly exaggerated. (Charles A. Murray, Doug Thomson, and Cindy B. Israel, *UDIS: Deinstitutionalizing the Chronic Juvenile Offender,* prepared for the Illinois Law Enforcement Commission, American Institute for Research, January 1, 1978.)

Kennedy Assumption #4

The juvenile court has the following defects which require elimination of jurisdiction over serious and "career offenders":

1) Delays in trying cases;
2) High dismissal rates;
3) Uncertainty of punishment;
4) Restrictions on fingerprinting of juveniles;

juvenile court makes a half-hearted effort to rehabilitate; certainty of punishment is a joke.

The juvenile does not feel unjustly treated; rather, he is contemptuous of our criminal justice system. He scoffs at the threat of punishment and boasts about beating the odds. He is a hero among his pals.

Some Remedies for the Future

What should be done? First, some significant punishment should be imposed on the young offender who commits a violent crime. This should translate into jail in a special juvenile facility for the most serious violent offenders; victim restitution, community service, periodic detention, or intensive supervision are all promising alternatives for less violent offenders.

Second, we must eliminate the two-track criminal justice system for serious violent juvenile offenders. Dual tracks should be defined by the nature of the criminal career rather than by the age of the offender. Age cannot justify treating the 17-year-old rapist or murderer differently from his adult counterpart. The poor, the black, the elderly—those most often victimized by crime—do not make such distinctions. Nor should the courts.

Third, the rules of the game should be changed concerning efforts to identify violent juveniles—especially the chronic offender. The law should permit the photographing and fingerprinting of offenders; lineup identifications should be permitted. Most importantly, an up-to-date criminal history of the offender should be readily available to judges at the time of sentencing.

Fourth, we must make every effort to take the juvenile courts out of the business of punishing status offenders or jailing the "problem child." Imprisonment should be prohibited and penalties vastly scaled down. In my own state of Massachusetts, for example, all status offenders are referred to the Office of Social Services rather than the state juvenile correctional department. No status offender is locked up. Instead, social workers attempt to solve the family and school problems which have brought these juveniles to the attention of the courts.

Finally, we must address the underlying social causes of crime. We cannot surrender in our continuing battle to demolish ghetto slums, eliminate poverty and discrimination, and provide decent education and health care to all our citizens. We must reaffirm our commitment to social justice. Such a commitment is an integral part of any long-range crime-fighting program. ☐

Senator Edward M. Kennedy is Chairman of the Senate Committee on the Judiciary. This article is adapted from a speech he gave last October to the International Association of Chiefs of Police.

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5) Lack of necessary evidence due to privacy restraints;

6) Lack of capacity to rehabilitate "all offenders."

Fact (1): Delays are no more characteristic of the juvenile court than other courts. A survey of 13 states, representing 40% of the nation's population, shows that 75% of all juvenile court cases were disposed of in 90 days or less. Less than 3% of all cases took a year or more. (D.D. Smith, *Preliminary Report: National Uniform Juvenile Justice Reporting System,* National Center for Juvenile Justice, Pittsburgh, Pennsylvania, 1979, page 35, Table 12.) Unfortunately, I doubt if this prompt disposal can be found in the criminal system.

Sending youngsters to adult court shunts them into a system with a record of failure

Fact (2): The Pittsburgh-Buffalo study previously mentioned does not support the Kennedy charge of high dismissal rates.

Fact (3): The same can be said of his charge of uncertain punishment. (Strasburg, *Violent Delinquents,* page 107.)

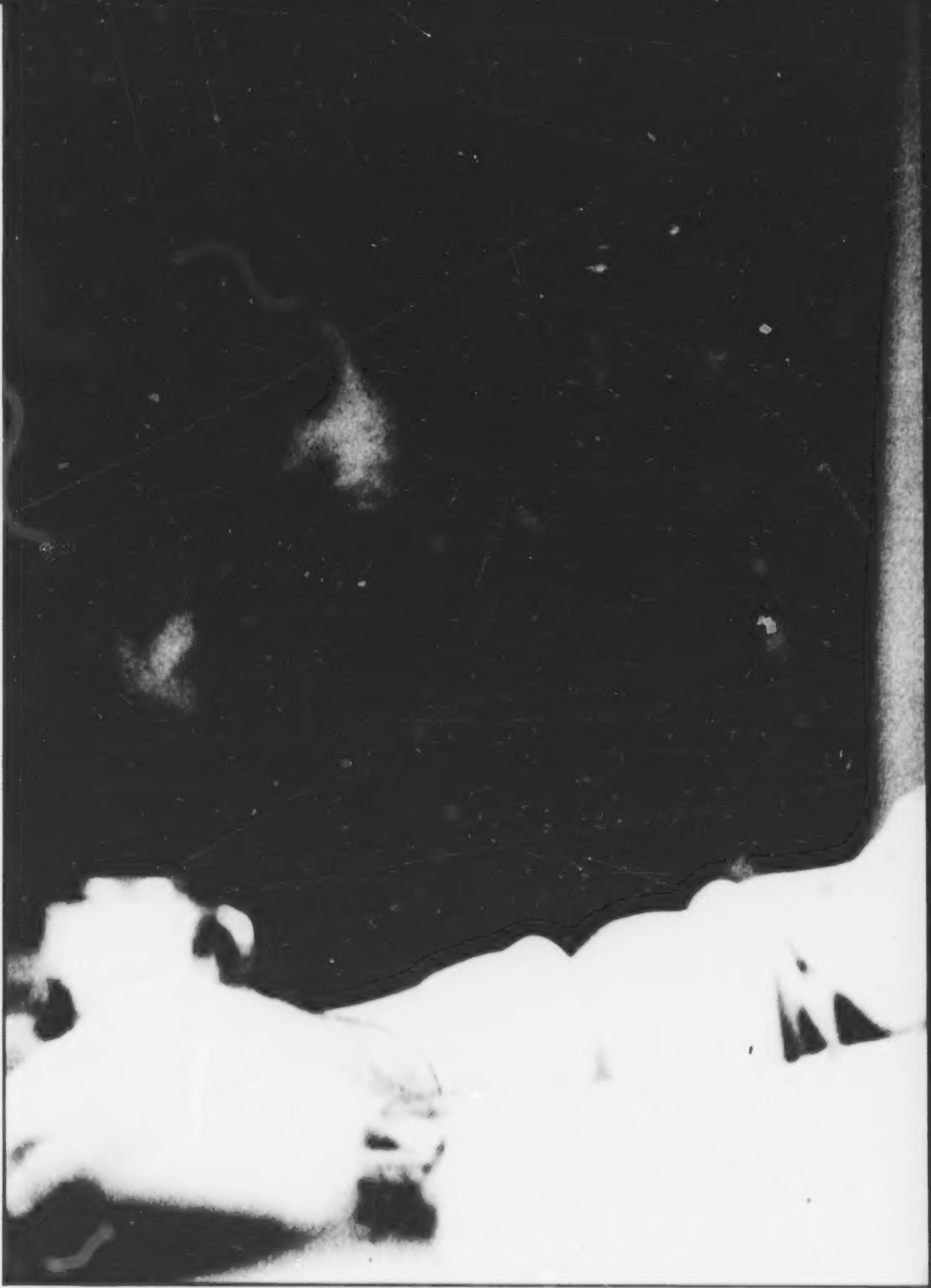
Facts (4) and (5): I was completely puzzled by the Kennedy claim that police were hampered by restrictions on juvenile fingerprinting and photographing, and by juvenile court privacy restraints. An analysis of the statutes of the 50 states indicates that most permit fingerprinting and photographing of juveniles. (T.S. Vereb and C. Sheaffer, *Juvenile and Family Court Records: Statutes Analysis,* Preliminary Draft, National Center for Juvenile Justice, Pittsburgh, Pennsylvania, 1978.)

Fact (6): The Senator is correct. The juvenile courts cannot rehabilitate all offenders. However, this rebuke is especially painful when it comes from a member of the U.S. Senate, an appropriating body that has withheld funds from juvenile courts for rehabilitation of the violent juvenile offender. Recognition of the courts' inability to rehabilitate all violent juvenile offenders is reflected in the statutes of all 50 states, which permit certain juveniles who commit serious offenses to be prosecuted as adults. (H. Hurst, *Juveniles as Criminals—A Profile of the Statutes on Waiver of Children to Criminal Court,* Address to American Academy of Child Psychiatry Annual Conference, St. Louis, Missouri, October, 1975.)

Senator Kennedy calls for elimination of juvenile court jurisdiction over violent juvenile offenders. In this regard, I observe that neither the LEAA Task Force (National Advisory Committee on Criminal Justice Standards and Goals) nor the Institute of Judicial Administration and American Bar Association Joint Commission on Juvenile Justice Standards (two of the most severe critics of juvenile court methods for dealing with delinquent youths) has advocated criminal court processing of all, or even most, juveniles charged with serious crime. Both groups have opted for a separate system of justice for most minors accused of serious crime. They have done this because they know, as I know, that criminal court processing would not provide greater public protection but would instead shunt more young people into an overloaded system with a record of proven failure. ☐

The Honorable William Sylvester White is Presiding Judge, Juvenile Division, Circuit Court of Cook County, and President, National Council of Juvenile and Family Court Judges.

INTERVIEW



Portrait of a Maverick

Lawyer Patrick Murphy is a rebel with a cause, and his cause is kids

Walter M. Perkins

Harper's Magazine called attorney Patrick Murphy's book *Our Kindly Parent—The State* "the best single description of the shattered promise of America's juvenile court system."

Murphy, a 1964 graduate of Northwestern University Law School, has been a juvenile advocate for about ten years. A friendly, articulate, intense man, he bristles with indignation as he warms to his favorite subject, the tragic treatment of youngsters in juvenile court. One won-

ders how Patrick Murphy, a bachelor, got into this particular line of advocacy.

"I was offered the job of Chief Attorney of the Juvenile Legal Aid Society in 1970. At the time I was in private practice, but had been interested in the Juvenile Court for several years. In 1969, I spent about six months representing indigent and neglected youngsters who had been incarcerated at a pretrial detention center for delinquents."

Since Murphy's main goal has been to force wholesale change in the way juveniles are treated, he has concentrated on class action suits which have had a strong impact on the Illinois juvenile justice system. He has argued and won cases at every state and federal level, including the United States Supreme Court.

In an interview with *Update*, Murphy, now an attorney in private practice in Chicago, expounds on his views and demonstrates why he has a national reputation as a juvenile justice advocate.

Update: Milton Luger, former head of the delinquency division of LEAA, has said, "With the exception of a relatively few youths, it would be better for all concerned if young delinquents were not detected, apprehended, or institutionalized. Too many of them get worse in our care." What is your reaction to this statement?

Murphy: I think I would have to agree that children often get worse in our care rather than better. The way the juvenile justice system is set up and too often operates, it becomes not a court, but a disciplinary arm of society aimed at the poor.

As far as the first part of the statement, you have to define "delinquent," because a lot of the kids we bring into the system are not really delinquents, although that's what we call them. For instance, the kid who hits his mother over the head with a frying pan because he is mentally disturbed. Is he a delinquent? I mean it really is an assault but at the same time it's the act of a very disturbed youngster.

Update: What is the most shocking instance you can recall of a detrimental act done by "Our Kindly Parent"?

Murphy: Matilda who was tied to a bed for 28 days and then 32 days . . . a kid who was locked up in solitary confinement for 9 consecutive months . . . another juvenile who was locked up in solitary for 60 days and pumped full of Thorazine . . . Bobby Crane being given the wrong age by a social worker, classified as retarded, and placed in a facility for the retarded. Just the overall way that parents are often scornfully treated by social workers.

Update: In the case of "Bobby Crane," is there a legal basis for holding the state responsible for what you describe as his institutionalization?

Murphy: Yes, we filed a lawsuit in federal court which will probably go to trial later this year. We alleged violation of his eighth amendment rights due to cruel and unusual punishment, and his fourteenth amendment rights, his right to treatment. We've finished discovery, won all of the pre-trial motions, and are ready for the trial.

In Matilda's case, she was tied to her bed, and we sued and received a $50,000 judgment for that.

Update: Can legal action require the state to provide proper services?

Murphy: The law is pretty clear that the system is there to help the juvenile. You've got to provide the same type of care that's provided in a good home. If you get involved early enough in a case, you can force the state to act, and we have done so in many cases. The case I prefer is where I come in after the fact, when the kid has already been screwed by the state. What often happens is that a kid will be brought into the system at the age of eight, nine, ten or eleven and placed in a series of foster homes. At some point these juveniles begin to lack identity or any feeling of self worth and become tough characters to deal with. Those are the ones I enjoy working with because they need the help the most. They need someone in there to push the system to do the job.

Update: Where the state has been clearly remiss, or if you will negligent, in its parental role, what are some of the possible remedies that are available?

Murphy: You can sue them under the Civil Rights Act, as we have done in several cases, receiving money damages. Under the Juvenile Court Act, you should be able to go in and get orders requiring state agencies to provide certain services.

In Illinois, however, the Supreme Court has ruled that the juvenile court has no right to tell a state agency how to take care of its wards. The only option the court has is to remove the ward if it is dissatisfied with the services the agency is providing. That decision was a misplaced decision which I hope will be overcome by legislation. In the meantime, it gives those of us in Illinois who do this type of work a clearer avenue into federal court.

Update: What are some of the major weaknesses in the juvenile justice system?

Murphy: Ten years ago the major problem was bad institutions. A place like Sheridan [an Illinois facility], which was originally built for a population of about 100 adults, was used for 400 juveniles under maximum security circumstances. As lawsuits proliferated and people became aware of what was going on, many of the bad institutions were eliminated.

Another major problem in Illinois is placement for juveniles between the ages of 10 and 14. Since the state lacks its own placement facilities, it purchases services from private "charities." I use charities in quotation marks, since they make the state pay full cost for the child.

Often they refuse to take difficult-to-place youngsters, and many openly discriminate against minorities. I had a case recently where the charity did take minorities, but wouldn't let them go to church because they were located in an all-white area.

Today there is not enough proper care for children who need it. Agencies charged with providing services, like the Department of Children and Family Services and the Department of Mental Health, are often non-responsive.

Update: Have you encountered any other state juvenile justice systems that are either much better or much worse than Illinois's?

Murphy: I'm familiar with the New York and California systems. I think that New York is probably in the same situation as Illinois. California might be somewhat better. I've found that as you move from East to West the criminal and juvenile justice systems tend to get better, possibly because they are newer.

We never lost an issue, but I reached the conclusion that much of what we did was counterproductive

Update: Are there any redeeming aspects of the juvenile justice system as you see it?

Murphy: Oh sure. . . . First of all you may get a kid who makes a serious error who is treated with restraint by the authorities. Usually if you are dealing with well-to-do kids it's easier to get a positive result.

But even in cases involving poor kids, I've found that if decent legal assistance intervenes before the adjudication you can often manipulate the system to provide the proper services for the juvenile.

Update: If you were in charge of the Illinois juvenile justice system, what are some of the immediate changes you would make?

Murphy: I don't think I would ever be put in charge of it (laughter). This question really brings up quite a philosophical point. We filed many lawsuits, which are described in the book, and never really lost a major litigated issue. At the same time, by the end of my stint with the Juvenile Legal Aid Society, I had reached the conclusion that much of what we did was counterproductive. By eliminating some of those terrible places, we in effect strengthened the system. We started off on the wrong step because the system needs to be totally revamped in my judgment.

The juvenile justice system works well when you are dealing with neglected kids who have been seriously abused or with serious delinquents. Most of the other kids should not be in the system in the first place.

Assistance for these types of juveniles has to come in the form of full employment programs, a guaranteed annual wage, and vouchers for the kids to go to the school and physician of their choice. These types of programs in the long run are much cheaper than our present public aid or juvenile justice system.

Update: Are you talking about reallocating funds?

Murphy: When you are talking about reforming the juvenile justice system you have to realize that (a) it's a poor people's court and (b) it's a court where we dump poor people's problems when we don't know how to deal with them outside of the courtroom structure. To really resolve it, we have to do so outside of the juvenile justice system.

The system was built on a foundation that seems to say that if poor people need help they have to somehow degrade themselves before help will come. Degradation can take the form of a finding of delinquency, neglect, or a minor in need of supervision, and then help will come to the child and/or family. You should not have to come into the juvenile justice system to get those types of services.

Update: Do you see any indication that we'll be able to provide these services without putting kids into the system?

Murphy: No, not really. I think it's too complex and people don't know how to deal with the various public aid regulations. Also the educational lobby does not want to see a voucher system instituted. For instance, in Milwaukee a youngster can go to any school of his choice in the city or suburbs. This system develops fine schools and motivates students to go to the best school they can.

Update: To what degree are politics responsible for the present state of the juvenile justice system?

Murphy: Very little from a positive

point of view. From a negative point of view, no one understands the juvenile justice system, no one wants to understand. So it's really hard to get politicians moving to reform it.

On the other hand, when legislation is introduced, most politicians tend to go along with the established order. That's not to say that on some occasions the established order is not correct. But on other occasions, you have to look at it and realize that if there are problems in the juvenile justice system, then the established order has to be at least part of the problem since many of the people have been there for so long.

Update: Given the maxim that "children are our greatest natural resource," how has the juvenile justice system been allowed to deteriorate to its present state?

Murphy: The juvenile justice system may be a reflection of society as a whole. Also people do not really consider children as important as they did maybe 50, 60, or 70 years ago. I also think that there are a lot of influences working toward breaking down the responsibilities of the family as far as its child-care role is concerned.

In addition, the system does not try to motivate children. Matilda McIntosh, one of the cases excerpted in my book, is a good example. Matilda was a young lady with a 160 IQ, brilliant. She was in the system and no one tried to motivate her to go to school. When someone like her begins to act out, they put them in jail or a mental hospital.

The system simply says, why should we motivate this person to do anything? But kids should be motivated and even pushed at times to go to school.

Update: I got the impression from your book that you don't think much of most social workers.

Murphy: I don't think a great deal of social bureaucrats. People who work for a lot of the bureaucracies tend to worry about themselves, their paychecks, and their jobs, instead of the kids and people who go through the system.

Speaking particularly about the Department of Mental Health, while the administration may be insensitive, the people who work in those institutions are doing a heroic job under bad conditions.

Update: What about juvenile court jurists?

Murphy: Most judges in the juvenile courts, it's not that they are insensitive, but they don't want to be there, they don't understand it . . . they want out.

The juvenile court is often considered exile, like traffic court. It's unfortunate. I do most of my litigation in federal court, and juvenile court is considered to be the lowest on the totem poll. Yet it's where some of the most important events take place because it deals with children and families. The impact on society is far greater than it could ever be in, say, a personal injury case.

Update: Is there a major reason that juveniles become delinquent?

Murphy: I would say at least 90 percent and maybe 95 percent of the kids I represent who have committed serious crimes did not have a father in the home. I don't know if there's a correlation between that and anything else but it certainly is a factor.

Update: Does anything positive result from institutionalizing status offenders?

Social bureaucrats tend to worry about their paychecks and their jobs, instead of the kids

Murphy: If we're talking about jailing them, no. If we're talking about institutionalizing them because they're status offenders, no. A period of institutionalization is not uncalled for when a juvenile is suffering from a serious emotional disturbance that neither the kid or parents can handle. I don't think that institutionalization should be forced, however.

Many of the kids I represent would want to be out of the home for a brief amount of time and be able to go to a benign institution that gives therapy.

Update: A recent study done in Texas indicated that the longer the person was locked up, the more likely he would be a recidivist. Is this study consistent with your experience?

Murphy: Yes, if a kid goes to the Department of Corrections as a juvenile, you can be pretty sure that he's going to end up there as an adult.

Update: How would you assess the current public attitude toward juvenile offenders?

Murphy: Well, it's obviously a feeling of throw 'em all away. I think that because the public is not interested they can't make the distinction between a thug who shoots someone, a kid who runs away from home, one who commits a minor crime, or a juvenile who is disturbed.

Update: Is there a growing trend toward "getting tough" with juvenile offenders?

Murphy: The public waxes and wanes, but I think in the long run people feel sympathetic toward children and are willing to give them a second chance. The trend seems to be toward getting tough, but I don't trust that alleged trend. Even the hardest-nosed juvenile court judges when faced with a youngster standing in front of them are not all that hard-nosed.

Update: What kind of juvenile justice system do you see the United States having in the near future, the next 5 to 10 years?

Murphy: Ultimately, I want to see a system where the juvenile courts concern themselves with children who commit serious crimes.

I think there should be a separate court that serves as a court of last resort to deal with other family problems. Before one would get involved with this court, it would be up to the community to try to provide services for the family if the family required them. I'm talking about runaway problems, truancy, or emotional disturbances. These problems should be resolved in the community, in private settings with private therapists or whatever supportive services are necessary.

Failing that, I would like to see a court that would deal with these problems, but only by way of compelling the proper agencies to provide services to the kid and family. I would make it separate from juvenile court.

Update: Thank you Attorney Murphy.

Murphy: Call me Pat. ☐

Walter M. Perkins has a law degree from DePaul University. He most recently worked as a Senior Vocational Rehabilitation Consultant for the Illinois Division of Vocational Rehabilitation, and is presently an Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

A Double Standard for Girls?

Plenty of people think the system is discriminating against young women

Lisa Broido

The women's liberation movement has brought about tremendous reforms for women. More women are taking an active role in the legal system, and new laws are constantly emerging to protect their constitutional rights. There remains, however, one group of females who may be receiving differential treatment from the courts. These are the thousands of young women who many claim are the victims of an antiquated juvenile justice system which applies different standards to boys and girls.

The problem is serious because more and more women are coming into contact with the juvenile system. Arrests of young women have increased markedly in the past decade. According to the FBI's *Uniform Crime Reports,* the number of females processed by the juvenile courts rose by 235% from 1960 to 1975. Many experts have concluded that girls are committing more crimes—and more serious crimes. Changing attitudes about women, they argue, are causing adolescent females to enter the "traditionally male" sphere of violent crimes.

However, a recent systematic study of young women in the juvenile justice system, conducted by University of Chicago sociologists Sandra Stehno and Thomas Young, casts doubt on these conclusions. Their findings show that, although more girls are committing crimes, the striking percentage increases in arrests of juvenile females are largely due to computations from small numerical bases. They also report that the types of crimes committed by women under 18 years of age in 1975 were similar to those committed in 1965.

"There is little evidence to support the belief that a female juvenile crime wave is occurring," concludes Stehno. "The real problem with our juvenile justice system is the extent to which girls are treated differently on the basis of their sex."

Big Penalties for Small Crimes

According to several recent national reports, over 60% of all females in the juvenile justice system are considered to be "status offenders." That means that most young women incarcerated in the United States wouldn't be in jail if they were adults. Their "crimes" primarily consist of running away from home, truancy, incorrigibility, waywardness, and alleged promiscuity. According to these same reports, approximately 18% of all males in the juvenile system were arrested for status offenses. Boys, it seems, are generally charged with rape, robbery, burglary, and other more serious offenses.

Not everyone agrees that these statistics indicate unfair treatment. Many point out that status offenders are under the protection of the court, and are to receive help rather than punishment. And many contend that boys and girls are not treated differently. Robert Wallach, a probation officer for the Cook County Sheriff's Office, does not believe that young female offenders receive more severe sanctions in Illinois: "Although more female status offenders are processed by the courts, this is not a reflection on the legal system. Parents are more likely to report a daughter than a son, but with safeguards built into the laws there is only a limited way we can deal with them."

But others contend that status offenders *are* in effect being punished for their transgressions, and point out that they may even receive more severe punishment than juveniles who commit serious crimes. A study of detention practices in 23 states and the District of Columbia concluded that status offenders are often detained at a higher rate and for a longer period of time than youths apprehended for more serious crimes. Since girls are overwhelmingly charged with these offenses, it seems logical to conclude that they spend more time in detention than boys.

Little Sisters and the Law, a report by the Female Offender Resource Center, further supports the belief that juvenile girls are detained disproportionately: "Despite the fact that the crimes which girls are accused of are categorized as less serious and less harmful to society, they are often held in detention for longer periods of time and placed less frequently in community programs than boys."

Sexploitation

Young women, many experts contend, often receive differential treatment for promiscuity and sexual offenses. A study by Thomas Monahan in Philadelphia found that police were less likely to detain a girl apprehended for a criminal offense than a boy, but *more* likely to arrest her for a sexual offense. And sociologist Meda Chesney-Lind found that girls who were considered to be sexually promiscuous were treated more severely by the Honolulu courts. Accordingly to Sandra Stenho, "prostitution was our biggest offense when I worked for the Juvenile Department of Corrections in Illinois. The girls with records of promiscuous behavior received an inordinate number of psychiatric references and out-of-home placements."

Several sources have reported that girls are required to receive physical examinations to determine their past sexual histories far more frequently than boys. Jean Strouse's study of the New York Juvenile Courts in *Up Against the Wall* revealed that all girls brought before the court were given Wasserman vaginal smears even when they had committed nonsexual crimes. Another report by the National Council of Jewish Women uncovered several detention centers which insisted that all female juveniles undergo a pelvic exam "to determine if they were pregnant," indicating again that the system may confuse female delinquency with sexuality.

Judicial "Big Father"

Why are young women more likely to be arrested and detained for sexual crimes and status offenses than their male counterparts? According to sociologist Anthony Platt in *The Child Savers,* the answer lies in the origins of the juvenile justice system. Contrary to the popular belief that this separate legal system was created to protect youth from the "horrors" of the adult courts, he contends that the real motive for creating the juvenile court was to reestablish traditional family morals, to instill respect for parental authority, and to enforce conventional sex roles. Platt may have a point. The disproportionate number of female status offenders detained by the juvenile court system can be viewed as a perpetuation of traditional double standards.

Sociologist Chesney-Lind agrees that the present differential treatment of female juvenile offenders can be traced to the origins of the youth courts. Pointing out that juvenile judges are usually male, she calls the juvenile court a "Big Father" which maintains traditional sex roles by requiring women to be "obedient and chaste" while encouraging young men to "sow their wild oats."

Many juvenile judges vigorously deny the charge of bias. One juvenile judge from Denver says flatly, "Girls and boys receive the same punishments for the same crimes in my court. Anything less than such equal treatment would violate the constitutional rights of both sexes."

However, observers argue that historically juvenile courts have received very little scrutiny from higher courts, and say that juvenile judges may have a dangerous amount of discretion. *Little Sisters and the Law* points out that when the juvenile court was established in 1899, it abandoned many of the formal procedures and constitutional protections of adult courts in order to provide individual attention to delinquent children. "At best," the report states, "such a framework can give the decisionmaker welcomed flexibility; at worst it can result in discriminatory treatment."

Parents may also contribute to the disproportionate number of female status offenders who pass through the juvenile justice system. Many studies show that parents refer their daughters to legal officials for status offenses far more frequently than they refer their sons. A study in New Castle, Delaware, for example, found that female status offenders were more than twice as likely as male status offenders to enter the system via parental referral to court. A 1973 *Yale Law Journal* study of the New York Family Court found that 59% of all PINS (persons in need of supervision) referrals were initiated by parents and that most PINS (62%) were females.

Sociologist Chesney-Lind summarizes these findings in more easily comprehensible terms: "Since parents have different standards for girls and boys. . .they seldom ask the police to find and punish a son who doesn't come home after a date."

A Lack of Funds

Many observers say that female status offenders end up in detention centers and training schools because of a shortage of money. Although the entire juvenile justice system is in need of funds, the discrepancy between the money alloted for boys and girls is often startling. An LEAA task force on women recently reported that only 5% of LEAA juvenile justice discretionary grants and 6% of all block grants from 1969-75 were specifically for young women. (The report did not discuss grants for coed programs.) Another report found that the United Way (a private organization) gave $4 to boys' organizations to every $1 to girls'.

Many argue that this shortage of cash means that many girls must be sent to large, impersonal institutions, not because they are dangerous, but because there are no other places to put them. Probation officer Robert Wallach does not agree. He says that as many alternative programs are available in his court's jurisdiction for girls as for boys, but he adds that the Cook County Juvenile Court is one of the "most progressive in the country."

Even in Chicago, however, some youth workers find discrimination. "There are simply fewer community-based alternative programs available for girls than for boys," says one Chicago probation officer, "and many end up in detention centers when their parents are often the ones who should be locked up."

New Directions

Most girls who come into the juvenile system are status offenders, so the key to improving the treatment of juvenile women (and lessening possible discrimination) lies in new ideas about such offenders. One promising development is that many programs have been established to prevent girls from being detained for nonadult crimes and provide healthy alternatives to impersonal facilities.

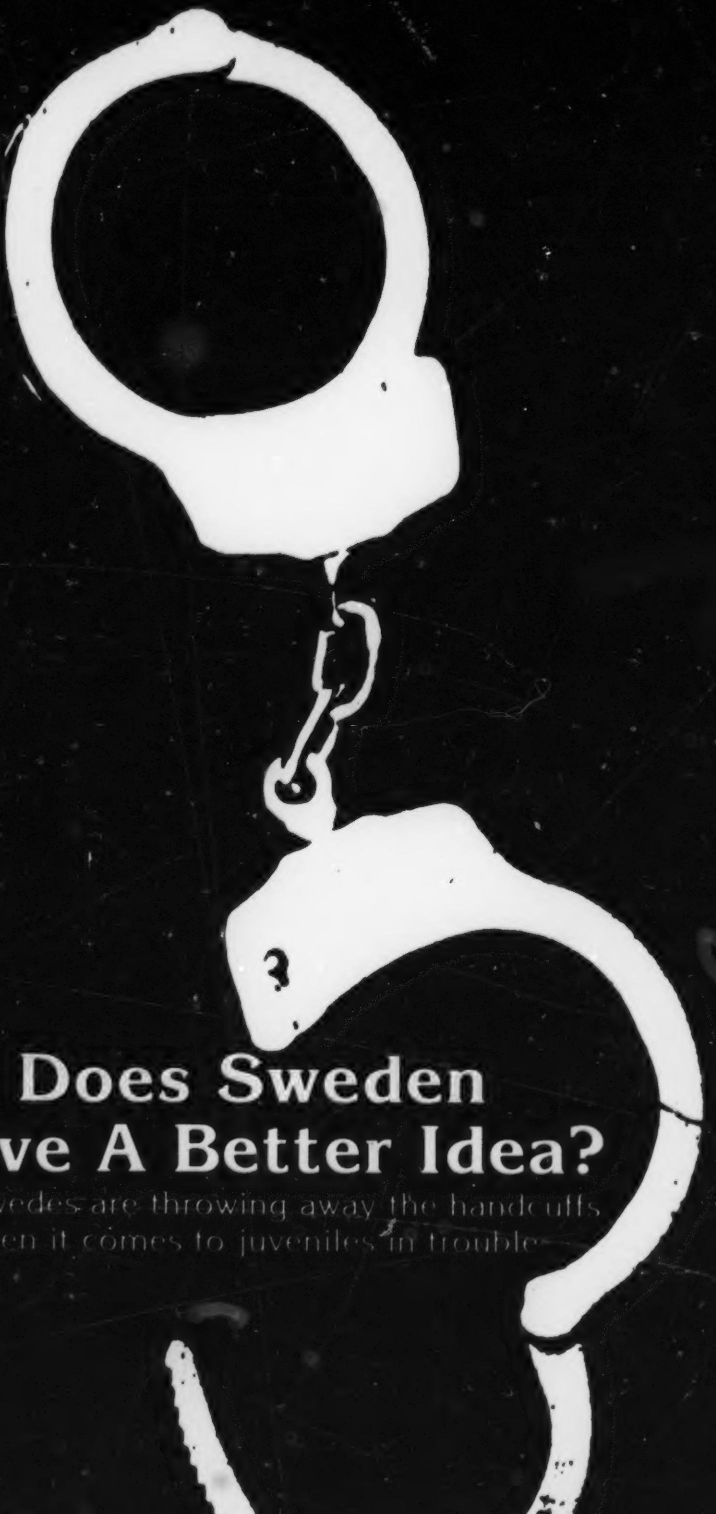
Also, recent court decisions and legislative acts have attempted to check the juvenile court's broad authority over status offenders. In the case of *Gesicki v. Oswald* (336 F. Supp. 371 [1971]), a statute permitting state officials to place children in custody because they were "in danger of becoming morally depraved" was held as impermissibly vague. Further, the Juvenile Justice and Delinquency Prevention Act of 1974 has provided resources for states and communities to set up new programs which will divert status offenders from incarceration.

Most observers still feel that girl offenders are spending an inordinate amount of time under lock and key for what are essentially child crimes, but these new steps could lead to a better day for at least some of the little sisters in the law. □

Lisa Broido has just graduated from Northwestern University and is now working with the ABA's Special Committee on Youth Education for Citizenship. She will attend law school next fall.

Does Sweden Have A Better Idea?

The Swedes are throwing away the handcuffs when it comes to juveniles in trouble



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John F. Walsh

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An American Training School

When I first came to know Speed he had just about used up his welcome at the minimum security training school. He had been in and out of it over a period of some three years, and even those who wanted the most to help him were becoming convinced that he was a hardened recidivist.

The training school itself was one of the best of its kind in the United States: a number of red brick cottages with some 30 to 40 boys to a cottage. An ample staff of psychologists and social workers. Excellent teachers in the academic program and in a wide variety of vocational and technical programs. Good athletic facilities. Adequate, wholesome food. Movies occasionally. No corporal punishment, and isolation only for the most serious breaches of discipline, such as beating a guard or extorting their meager treasures, whatever they might be, from younger, weaker inmates.

Yet everyone connected with the training school admitted that something was still lacking, something was wrong. The record was clear: two out of every three boys who served time in the training school were either recommitted to the same school or sent on to the prisons intended for the more mature and advanced criminals. They might not have been as quick as Speed in becoming second offenders, but for two-thirds of the boys, the "training" was not for a normal life in the larger society but for how to survive behind bars.

Speed's dossier and that of many others read something like this: He had come from a broken home and showed no special attachment to either father or mother. He had run away from a foster home in which he had been placed. He did not like school, met with little if any success there, and became first a disciplinary problem and then a truant. He had no hobbies or special interests. He refused to get involved in sports or in any organized group activity.

He had been picked up for shoplifting twice, then was caught while driving a stolen automobile. He enjoyed cars but was in no way curious about how they ran or how to fix them. He sought out companionship on a casual basis but had no steady boy or girl friends. His health was generally good, and there was no evidence that he was mentally retarded.

As volunteers we did not sit in on staff meetings in which individual cases were discussed. But in general conversations with staff members it became clear to me that they regarded it as something of a minor miracle that even a few boys rehabilitated themselves and stayed out of future trouble with the law.

In the American system, commitment may be a kind of last resort, as much for punishment, custodial care, and protecting society as for rehabilitating the child. By the time a boy reaches training school he is already pretty well convinced that society is against him, that he was just unlucky enough to have been caught, and that he will never get a fair chance no matter what he does. And in the training school itself he must be very careful—if he values his own physical safety and well being—not to give anyone the impression he is or would like to be on the side of the law.

The general feeling among the staff at the training school, in short, was that by the time a boy comes there the chances are largely against his rehabilitation. And everyone on the staff—no matter what philosophy of corrections they favored—agreed that rehabilitating kids and preventing juvenile crime was part of a larger social problem, and that training schools could at best offer only partial and fragmented solutions.

The Swedish Experiment

Sweden has made a clear decision that the way to counter juvenile delinquency is through positive efforts to help offenders rather than to punish them. To this end, Sweden has set 15 as the age of criminal responsibility. Even though Swedish young people are most criminally active (generally in theft) at ages 14 and 15, children under 15 *cannot* be punished. Rather, they are dealt with exclusively by child welfare committees of the local social welfare boards.

Persons from 15 to 18 (the age of civil majority in Sweden) are considered completely responsible for their crimes but are very seldom prosecuted or punished by imprisonment. The law requires the police not only to turn the matter over to the prosecutor but also to notify a child welfare committee. Prosecutors may bring charges against youths, but in practice this very rarely happens. Even though juvenile crime is rising sharply in Sweden, statistics show that public prosecutors increasingly waive prosecution and leave the matter to a child welfare committee. Twenty years ago they dropped prosecution in about 80% of the cases involving youths aged 15 to 18; by 1973, they were dropping 90% of such cases.

Offenders over 18 are considered young adults and are usually prosecuted. Here too, however, one sees evidence of the Swedish belief that education and rehabilitation are far preferable to punishment. In 1973, only about 15% of the 18- to 20-year-old offenders were jailed; more than half were fined, with the rest put under the jurisdiction of a child welfare committee or placed on probation.

Child Welfare Committees

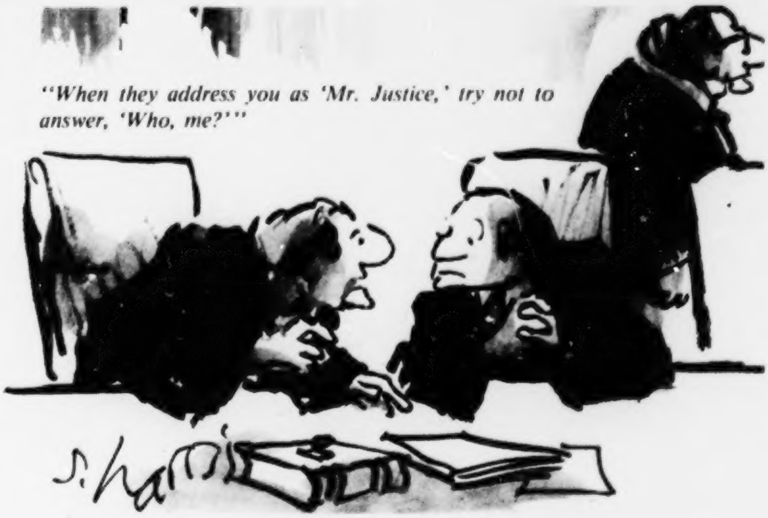
Given the Swedish philosophy, the child welfare committees are by far the most important institution dealing with young people who in other countries would be processed through the legal system.

The main idea behind the child welfare committees is not only preventing crime but showing public interest in and concern for the young offender. Though the committees began at almost exactly the same time as the American juvenile justice system (the late 1890s), they have developed in a very dissimilar way. The committees are both essentially and symbolically different from the police and the courts.

The committees, of which there are more than 1,000 in Sweden, are composed of laypeople elected by the local government. Members are often social workers, pastors of the Lutheran State Church, public school teachers, and others selected for their interest in and devotion to the care of children. Whenever practicable, expert legal and medical knowledge is represented on committees. Many committee members are women, as are most of the professional social workers who serve as staff for the committees.

When a committee is informed of charges against a juvenile, its staff makes an inquiry into his school and home circumstances. In general, a social welfare officer pays a home visit, talks with the child and his parents, contacts the school welfare officer, and sometimes the teacher, in order to get a full picture of the child. The recommendations of the social welfare officer form the basis of the committee's decision on action to be taken.

The committee has a wide choice of options. It may simply let the matter rest. This occurs in almost all first cases, especially when the child and his parents have accepted the welfare officer's offer of voluntary help. In other cases, the committee might provide aid of different kinds, including advice and financial support (helping to make job or training arrangements, medical care, and direct money assistance). Another common



"When they address you as 'Mr. Justice,' try not to answer, 'Who, me?'"

measure is supervision of the juvenile.

If these preventive measures have been ineffective, the committee can take charge of the child for social care, placing him in a suitable institution such as an approved school or a vocational school.

The Swedes feel that social care hasn't been working, so they've radically cut down its use in recent years. For example, from 1971 to 1973, the number of children in juvenile welfare schools fell by more than a third.

Instead, there has been a marked increase in serious noncompulsory and noncoercive measures such as aid, education, advice, support, and, in a case where a young person must be taken care of, placement in a private foster home. These measures are voluntary because there's a growing conviction that unless the young person and his parents are willing to accept the help of the committee, the help will be of no value.

Distrust of Institutions

Swedish sentences, for adults and juveniles alike, tend to be lenient by American standards. The Swedes clearly believe incarceration should be used only when necessary, and then only for the shortest possible time. The more quickly an offender can be absorbed back into normal life in the society, the happier the results for all concerned.

"Remand homes," which are something like our reform schools, have proven very unsuccessful in rehabilitating youngsters. And Swedish studies made on institutional groups indicate that incarceration "reinforces alienation, apathy and negative self-image, as well as making identification with the criminal way of life easier, not harder, to accept."

Therefore, the Swedes have decreased the number of young people in these homes from 1,000 in 1964 to about 400 in 1974. Instead, they are placing youngsters in suitable foster homes and trying to provide them with a better environment during adolescence and meaningful leisure time activities.

The Swedish distrust of institutionalization also extends to "benign" facilities such as rehabilitation centers for youngsters with serious social, medical, and psychic problems, such as alcohol and drug abuse. Generally, the Swedes prefer to limit public care in such institutions to three months or so, since long institutional periods very often give unsatisfactory results. Young people are usually placed in institutions only as an initial step in a "chain of treatment" primarily composed of noncompulsory follow-up measures.

This nonpunitive system occasionally runs into resistance from the Swedes themselves. One author points out that the Swedish person who has his car stolen and ruined may grumble about how lenient society is. But the same person prides himself on the maturity of a system which holds coercion and police interference to the minimum necessary to ensure good order.

Can We Learn from Sweden?

Many Americans might well contend that the United States and Sweden have so little in common that the Swedish experience in treating juveniles is not helpful to us. True, Sweden is a much smaller country. It is roughly the size of California and has a population of slightly over eight million. True also, Sweden has a much more homogeneous population than does the United States, and a much longer cultural and national heritage.

However, the two countries are similar in many regards. Sweden has a comparatively high standard of living, the Swedes have experienced the same urbanization and weakening of traditional social forces that we have, and their juveniles, like ours, seem particularly prone to crime. (One author estimates that approximately two-thirds of those seized for serious crimes in Sweden are under 20 years of age.) Finally, Americans, whether or not they like Sweden's general social welfare ideology, are much attracted to that country by the respect its people and government pay to basic human rights and to concepts of social and economic justice.

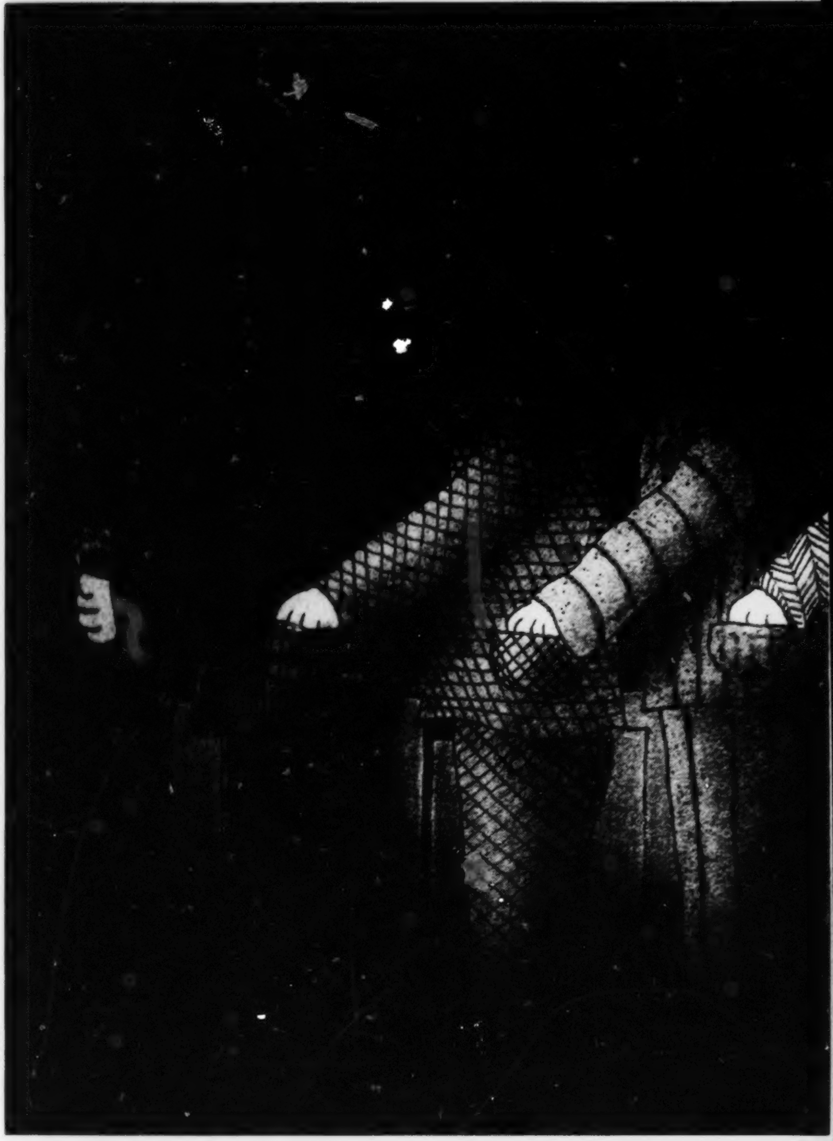
But is the Swedish system succeeding well enough to be accepted as a model? The juvenile crime rate has continued to rise, and many observers have pointed to serious problems in this system. The division of authority between the prosecutor's office and the child welfare committee may be inefficient and confusing to juveniles and their parents. The child welfare committee's fact finding lacks due process safeguards, and some committees have too few well-trained personnel to offer adequate supervison and help for young people. Moreover, several months often lapse between police apprehending a juvenile and the child welfare committee completing its investigation of the case.

No one thinks the Swedish system is perfect in itself, or that even its best aspects can be transferred "as is" to the American scene. But Sweden has taken the lead in reminding us that rehabilitating juveniles and preventing juvenile crime is not just a matter for the police and for correctional officers.

Whether my friend Speed and those like him would more surely and quickly find their way back to life as law-abiding citizens in Sweden or the United States is an unanswerable question. But I cannot help feeling that a local child welfare committee in Sweden would have taken an early interest in Speed—and he would have been glad that someone cared. ☐

John E. Walsh, a former Vice President for Academic Affairs at the University of Notre Dame, is a Research Associate on the staff of the East-West Center's Culture Learning Institute. He has a doctorate in the Philosophy of Education from Yale University.

THE $$ GAME



Getting Juvenile Justice Support

10 strategies for getting the money from their pocket to yours

Deborah Stewart

Why is it that the very idea of grantsmanship and fund raising immediately makes most people extremely nervous, even those with experience in securing grants and raising money? Perhaps it is because we have the mistaken notion that "hustling for bucks" is equivalent to manipulating the system. Of course, in some cases it is just that or worse, becoming merely a game to secure funds.

But acquiring funds for law-related education does not have to be manipulative, nor does it have to be done by an experienced fund raiser. In order to acquire funding from any source, the first essential is a positive attitude. You must really believe in the worth of your particular program before you can successfully convince the funding source of its worth. Equally important, however, is the ability to proceed logically and follow the rules of the particular funding source in question.

Juvenile Justice Dollars

People who are familiar with funding from the Law Enforcement Assistance Administration (LEAA) know that these dollars for criminal justice have diminished, and that law-related projects must compete for dollars with police, courts, and corrections efforts in their states. But another source of LEAA funding exists which is focused exclusively on juvenile justice projects and which is specifically charged with *preventing* delinquency, in part through education. These funds are administered by the same criminal justice planning agency that administers LEAA funds, known generally as the state planning agency (SPA), but called different names in each state. (For the name and address of the chief juvenile officer in each state, please write YEFC at 1155 E. 60th Street, Chicago, IL 60637.)

Funding under the Juvenile Justice and Delinquency Prevention Act (JJDP) is for states which agree to meet the Act's mandates for prevention, the deinstitutionalization of status offenders (juveniles who've committed noncriminal misbehavior like cutting school or running away from home), and separation of juveniles from adult offenders. A key provision of the Act calls for establishing innovative programs to prevent delinquency through involving traditional

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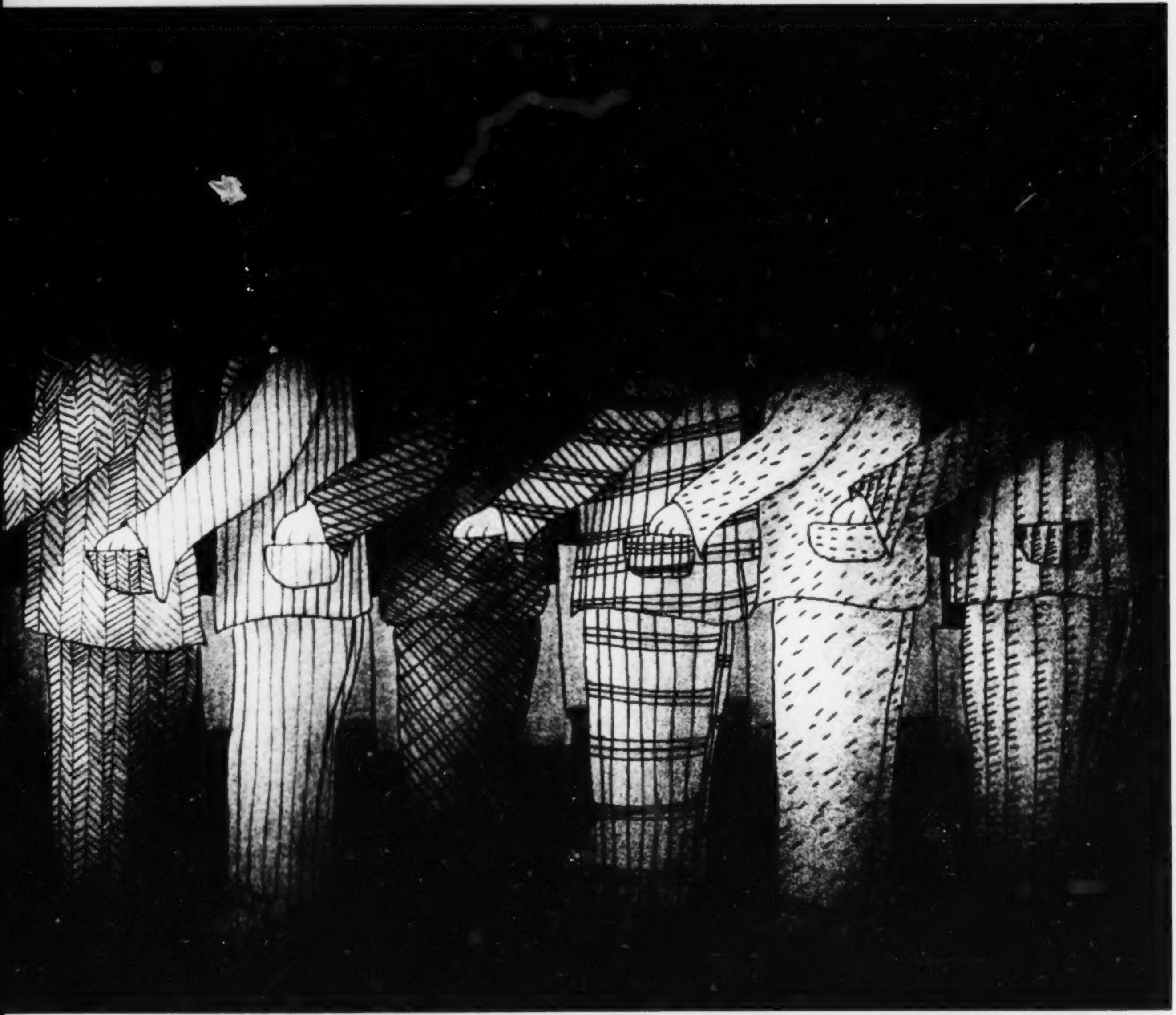

juvenile justice components and a coordinated effort of local schools, the business community, and private citizens.

Law-related education is one of the many activities that funds can go toward. JJDP money can be used for personnel, curriculum development, teacher training, and field practicum experience, so it can readily support almost any educational activity that meets the requirements of the Act.

Your logical first step, then, is to find out just how your state is implementing the Act. You can find out by getting a copy of your state's annual comprehensive plan from your SPA.

Ten Steps to Funding

1. *The LEAA/JJDP Act Planning Process.* Every state has to prepare an annual comprehensive plan focusing directly on juvenile justice. A state's juvenile justice advisory committee (comprised of juvenile justice system professionals, *educators*, youth and citizen advocates, etc.) must be involved in planning and reviewing juvenile comprehensive plans and action programs.

If law-related education is explicitly recognized as a priority in the plan, then your proposal stands a good chance of being funded. Even if it's not explicitly in the plan, you may well have a chance. Read the plan carefully, especially in the area of juvenile delinquency prevention. You might well find that your program fits under one of the existing categories.

And don't forget that you always have the opportunity to persuade the SPA to recognize law-related education as a priority in next year's plan. Each state's plan is due in Washington by July 31st for funding the next fiscal year (October-September), so the time to become involved in your state's planning process is right now.

Contacting your state's juvenile justice planner, or a juvenile justice planner in the SPA office in your area, is the *best* place to start. They'll be able to give you information on the planning process, membership in the juvenile justice advisory committee, and the established funding categories.

Hint: Keep trying! Juvenile justice planners are very nice but extremely busy, harried individuals. Treat them with care

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if you plan to proceed any further!

2. *State Juvenile Justice Advisory Committees.* One way to influence your state's plan is to get the ear of those who serve on the advisory committee. Find out who they are, and, more importantly, who they represent.

Although the law requires representation by the juvenile justice professions and community people, the balance shifts from state to state and can be critical to your planning. Which members might be most receptive to law-related education? Have any members worked with your program? Perhaps you should invite several to see what you're doing and to serve as classroom resources.

You might also wish to influence the composition of the committee in your state. Find out how members are selected, and suggest people who've worked with your program and are familiar with law-related education as possible new members.

Another possibility is to use your network of community resources (judges, lawyers, police and others who've worked with your program) as an entree to the committee. Many of these people may be familiar with LEAA funding and can help you devise a strategy. Perhaps some of them know members of the committee and can make a personal appeal on your behalf.

One more tip. The advisory committees also review proposals, and being present at their regular meetings can greatly aid your understanding of the review process. (Hint: Attend meetings *before* you submit a proposal, as well as after!) Your availability, should questions arise, could make all the difference in getting a favorable review of your proposal.

3. *LEAA Bureaucracy.* Everyone knows that federal funding means federal, state, and usually local bureaucratic hurdles to jump before there is any consideration of your carefully prepared proposal. You must know the "rules," the forms, the procedures, the deadlines, and the proposal format specified by your state. Unfortunately, every federal funding source requires slightly different information or presentation of that information. Again, my advice is to go directly to the source—the juvenile justice planner in your state planning agency or in the SPA office in your area. Don't rely on another local applicant who may or may not have all the *right* information. Connecticut and some other states have additional written criteria for reviewing proposals. These are available, *but only if requested.*

4. *Documenting Local Support.* One distinct advantage of law-related education projects is that by definition they require the participation of all elements of the juvenile justice system. Therefore, it's extremely important that you use this built-in advantage by documenting how your efforts involve educators, police, youth officers, juvenile court officials, attorneys, private youth-serving agencies, *and youths themselves.* Make sure you secure community participation *and* endorsement by key groups. And point out how your network of support and coordination can maximize resources for youth, because it is precisely the cooperation and increased coordination of all actors in the juvenile justice system that makes law-related education projects attractive.

The point is—
become informed,
get involved,
and be insistent about
preventive programs such
as law-related education

5. *State Interagency Relationships.* It's a good idea to also use your state department of education in your approach to the SPA. State agencies must cooperate to effectively address the far-reaching mandate of preventing delinquency. Connecticut's state department has a part-time consultant to help local school systems develop law-related education programs, train teachers, and educate state and community agencies as to the value of law-related education. But involving other state agencies, whether in education, labor, or children and youth services, can also help secure juvenile justice funding.

6. *Program Components.* It's important to stress that you are not just proposing a school program, but a means of involving the system as a whole. Explain that you are envisioning a curricular program that will also look at and work with the entire system in your area.

Components which would broaden the impact of your project might include:

Systemwide involvement (police, court, corrections, and community schools and agencies); Teacher-training opportunities; School curriculum review, revision, and development; Student self-help projects; Review of truancy, suspension, and other school problems; Parent and citizen involvement; Law student practicum experience; and Job skill training and development for youth.

7. *Best Applicant.* Once you've put together your network of support, decide which group or agency should make the actual appeal for funds. Should your proposal for juvenile justice money come from the school system itself, or should it come from another agency that the project will cooperate with? A lot will depend on the circumstances.

Once you become familiar with your SPA and the composition of the state's juvenile justice advisory committee, you will be in a better position to assess which agency has the most credibility and can perhaps offer additional in-kind or financial resources that would enhance the project's impact. It is important to proceed through the best applicant, whether police, court, private agency, state agency, or local school system. Find out what funds and categories are available in your state's comprehensive plan, and select the applicant which has the greatest chance of being funded.

8. *Multiple Funding.* Any funding source wants to get the most mileage out of its grants. If you've got other sources of money (private or public) and if you have additional resources (personnel, materials), by all means point them out in your proposal. Any grantor is delighted to learn that it isn't being asked to pick up the whole load.

Check with your state department of education to find out about such funding sources as Title-IV C, which supports educational innovation. *The Foundation Directory* is an indispensable resource for researching private funding opportunities. This publication, which describes more than 5,000 foundations, is available for $36 from the nonprofit Foundation Center, 888 Seventh Avenue, New York, NY 10019. The Center has many other publications and services to help you.

9. *Unique Approaches or Program Models.* In your proposal, demonstrate other special features of your program. Don't be bashful. Tell the funding source if you have capability to evaluate, to give technical assistance to other areas, to provide community education, or to develop publications for broader usage. If you're adopting a model that has already proven its worth elsewhere, by all means tell them about its successes.

At the same time, you'll want to develop approaches or program models which uniquely address your community and/or state's needs and resources. Two examples from Connecticut include funding for (1) a regional resource center for training police youth officers and developing law-related education materials and audio-visuals, and (2) a statewide conference on "delinquency prevention education" jointly sponsored by the Connecticut Consortium for Law-Related Education, the Connecticut Justice Commission, and the State Department of Education. This particular conference not only fostered needed communication among police officers and juvenile court and school personnel, but also led to a partnership to develop new projects through the schools and funded with juvenile justice funds.

10. *Research Findings.* Make sure that your proposal carefully links the problems to be addressed with your proposed plan of action and expected outcomes. Cite if you can statistics from your area to demonstrate the extent of the problem (vandalism, juvenile crime, whatever) you plan to deal with.

It never hurts and usually helps to also cite a few pertinent studies indicating the impact of education in general or law-related education in particular on delinquency prevention. Although this requires additional homework, it may mean the difference between a good idea and a funded project.

In a January, 1977, background paper on prevention prepared for LEAA, Albert P. Cardarelli of Boston University's Department of Sociology talks about the needs and problems of education for prevention. "The importance of the school as an institution capable of direct intervention cannot be overstated. The school generally has the student captivated for some forty hours per week, and has the potential to develop a wide range of programs to modify both behavior and intellectual performance. It is the major social institution outside the family that affects youth behavior, and has a major impact on the social and self-definitions of the individual."

Other researchers argue for using the school as a major institution for prevention, since it is frequently the focal point in the neighborhood for cultural and recreational activities. By establishing linkages with other legitimate institutions in the neighborhood, many school functions could be performed more effectively and efficiently.

It is important for policy makers to realize that the isolation of the school from neighborhood agencies and activities may actually impede the school from helping children achieve their full social and educational potential. In this sense, you should consider using youth service agencies or multi-service agencies already established within the neighborhoods. Effective inter-agency coordination may not only lead to innovative programs, but may result in real and meaningful youth development.

One Final Point—Keep Trying!

Juvenile justice issues, plans, and action programs (funds too, unfortunately) are constantly in flux at the federal, state, and local levels because of a whole host of seemingly uncontrollable factors (including public concern and shifting guidelines and program priorities). But that uncertainty has a positive side too. If you get turned down the first time, you might find a better reception the next time you try.

Remember, you can always re-approach the juvenile justice unit in your SPA to apply under another category, to apply under a multi-year approach, or to apply during the next fiscal year.

The point is—become informed, get involved, and be insistent about the *need* for delinquency prevention (it is far less costly than later incarceration, juvenile or adult) and the *need* for delinquency prevention education because it increases the commitment of the local school and the community at large.

Delinquency prevention is all too often everyone's problem but no one's responsibility. If you can help juvenile justice planners see that law-related education is a way of sharing that important responsibility by building widespread support for delinquency prevention, you will have done them (and yourself) a favor. ☐

Deborah Stewart knows all about those nice but harried juvenile justice planners because she is one, with the Connecticut Justice Commission. She has a background in child development and human relations and has worked for a family court in Michigan and for the Georgia Department of Human Resources.

National Projects Can Help

Looking for help in getting juvenile justice money from your state? LEAA's Office of Juvenile Justice and Delinquency Prevention (OJJDP), which addresses national juvenile justice issues, has now funded six multistate projects to provide a variety of services for state and local LRE projects, including helping them build community support and secure funding.

The fact that the national OJJDP has supported law-related education for a two-year pilot effort should help persuade state planning agencies of the importance of the field. Another kind of persuasive evidence is the language of the Juvenile Justice and Delinquency Prevention Act of 1974 (as amended in 1977). The Act specifies that juvenile justice money can be used to support "programs . . . designed to encourage . . . youth to remain in elementary and secondary schools." A later section specifically authorizes "training for . . . teachers and other educational personnel . . . including persons associated with law-related education programs."

The 1977 amendments also widened the scope of the Act. It now deals with all youth, not just delinquents, and emphasizes prevention as well as rehabilitation.

Statements like this one from OJJDP administrator John Rector emphasize the vital role of law-related education in meeting this broader mandate: "No doubt much of the difficulty that youth encounter with the juvenile justice system is due to their lack of knowledge of their rights and responsibilities under law. . . . Without such an understanding, it is impossible for youths to be active, productive members of society."

The six projects funded by OJJDP are the ABA's Special Committee on Youth Education for Citizenship (Chicago), the National Street Law Institute (Washington, D.C.), the Constitutional Rights Foundation (Los Angeles), Law in a Free Society (Los Angeles), the Children's Legal Rights Information and Training Program (Washington, D.C.), and Phi Alpha Delta Law Fraternity International (Los Angeles).

The ABA is acting as coordinator for the OJJDP/LRE effort, so to find out how your project can benefit from this program, write staff director Norman Gross at YEFC, 1155 E. 60th Street, Chicago, IL 60637.

CURRICULUM UPDATE

Charlotte C. Anderson
and Lisa Broido

A Juvenile Justice Cornucopia

Good new materials explore our troubled system of justice for kids

Books and Booklets

■ ***Juveniles and the Law*** (1977), by Charles L. Cutler and Howard J. Schwach, and ***Youth Crime and Punishment*** (1978), by George Pollock and Howard J. Schwach. Secondary. Purchase: $1.50 each. (Xerox Publications Unit Books, 1250 Fairwood Avenue, Columbus, OH 43216).

These two inexpensive Xerox "unitbooks" contain a variety of high-interest articles, vignettes, plays, comics, poems, and stories about juvenile justice.

Juveniles and the Law discusses *In Re Gault* (juvenile due process), *Goss v. Lopez* (students' right to an informal hearing when threatened with school expulsion), the Family Educational Rights and Privacy Act of 1974 (parents' rights to view school records and challenge their contents), dress codes, curfew regulations, freedom of speech, and suspension. It also provides historical sketches about the development of juvenile law, a case study of how the law prevents child abuse, a play about a boy who is mistakenly arrested, and a hypothetical story about a town which has "a day without law."

Youth Crime and Punishment provides students with additional insight into our juvenile justice system. Some of the highlights of this booklet include an editorial which asks "Why Is Youth Crime Growing?," poetry written by juvenile offenders, profiles of a juvenile court judge and a probation officer, an interview with a juvenile delinquent, and a discussion of the various types of correctional options for young criminals.

Both *Youth Crime and Punishment* and *Juveniles and the Law* contain relevant vocabulary listings and definitions. These concise, informative, and entertaining magazines are a low-cost way to show students how the law affects them.

■ ***The Children's Rights Movement: Overcoming the Oppression of Young People***, edited by Beatrice and Ronald Gross (1977). Paperback text, 390 pages. Purchase: 1-4 copies, $3.95 each; over 5 copies, $3.60. (Anchor Books, Doubleday & Co., 501 Franklin Ave., Garden City, NY 11530).

Thanks to a growing movement on behalf of youngsters, people are becoming aware that the legal rights of minors are frequently violated by their families, schools, and even the institutions that were originally designed to help them.

The Children's Rights Movement consists of a collection of articles and essays by some of the most respected advocates of the rights of youths. James Hold, Margaret Mead, Edgar Friedenberg, Benjamin Spock, and some young people themselves are among the contributors. The book reveals the legal injustices which young people often encounter and provides some guidelines for changing the institutions and attitudes which contribute to these inequalities. Good reading for secondary students which can also serve as a teacher resource.

Simulation

■ ***Kids In Crisis*** (1976). Secondary. A simulation game containing 41 role description folders, 41 probation reports, 5 sheets of role tags (on heavy board with string for wearing), one 32-page *Bill of Rights Newsletter (The Rights of Children)*, and a teacher's guide. Purchase: $32. (Developed by the Constitutional Rights Foundation, available from Zenger Publications, Inc., Gateway Station 802, Culver City, CA 90230).

A simulation game which attempts to acquaint students with juvenile justice proceedings through role playing. Students can simulate five different actual cases involving youths who have been arrested for drunken driving, prostitution, parental abuse, drug use, and shoplifting. Dividing into groups of six to nine people, students assume the roles of judges, lawyers, defendants, probation officers, parents, and observers. The judge must eventually reach a final verdict after reading the available probation reports and hearing the testimony of parents, the probation officer, and the defendant.

Kids In Crisis, if executed properly, can be a stimulating way to educate students about the juvenile justice system. A 16-page teacher's guide, included in each kit, provides helpful background material, and an observer rating sheet that can be duplicated is provided for members of the class who are viewing the simulation. The game can involve 25-41 players, and will probably take two or three class periods to play.

Audio-Visual Materials

■ ***Juvenile Justice: Society's Dilemma*** (1976). Secondary. Color filmstrip, cassette, and teacher's guide. Purchase: $24. (Current Affairs Films, P.O. Box 398, 24 Danbury Rd., Wilton, CT 06897).

"I'm here for running away . . . no crimes," a young girl tells us in *Juvenile Justice*. "The only charge they had me on was incorrigible and runaway." She is one of thousands of teenage status offenders who have been placed in a juvenile correctional center because alternative rehabilitative facilities are unavailable. She's been jailed, along with others who have committed far more serious crimes, for something which would go unnoticed if she were an adult.

"You game to steal a car, man? I know where this mean Continental is," says another youth in this film strip. If he is arrested for this major crime, we are told, he will probably be pampered by the juvenile justice system. His informal trial is likely to be conducted before a sympathetic judge. No criminal records will be kept, no names will appear in the news, and if he is finally institutionalized, it probably won't be for long. He will be like the multitude of other young rapists, robbers and murderers who get off lightly because of their age.

Juvenile Justice: Society's Dilemma is a fine filmstrip which questions the disparities and incongruities of our juvenile justice system. Should the status offender be removed from the juvenile courts? Should juveniles who commit adult crimes receive adult penalties? It offers some suggestions for improving the juvenile court system, but for the most part the viewer is left to decide for himself how this 19th century invention can be remodeled to fit 20th century needs.

■ ***The Squires of San Quentin*** (1978). Secondary. 16 mm color/sound film, 30 minutes, teacher's guide. Purchase: $395; weekly rental: $50. (M.T.I. Teleprograms, 4825 North Scott Street, Suite 23, Schiller Park, IL 60176).

A documentary, recently nominated for an Academy Award, about a unique and successful juvenile delinquency program operating at San Quentin Prison for the past 13 years. The Squires is a volunteer inmate project giving young people who've been in trouble with the law the opportunity to talk with prisoners. The program encourages youths to share their problems and helps them value their freedom through exposure to the grim realities of prison life.

"We want to share our experiences . . . so they [the young offenders] don't become our next-door-neighbors here," says a San Quentin convict. He and approximately 40 other Squires work with each group of young men for three consecutive Saturdays to achieve this goal.

This film follows a group of juvenile delinquents as they go through the program. They are shown engaging in informal "rap sessions" with the inmates, touring the maximum security prison, and forming personal relationships with prisoners. The Squires are able to relate to the kids, helping them express their feelings and motivating them to take responsibility for their actions.

The *Squires* is accompanied by an in-depth teacher's guide which gives objectives, suggests discussion questions, and provides supplementary background information. Although the candid prisoner-delinquent discussions occasionally result in outbursts of profane language that go uncensored, this film is highly recommended for high school audiences.

■ ***Should Juveniles Be Punished? Opposing Viewpoints: Time Magazine v. Fortune News*** (1977). Secondary. Audio cassette and teacher's guide. Purchase: $4.98. (Greenhaven Press, 1611 Polk Street N.E., Minneapolis, MN 55413).

Should Juveniles Be Punished? is one of a series of 40 audio cassettes by Greenhaven Press which present contrasting viewpoints on current controversial issues. These cassettes try to encourage analytical thinking and promote classroom discussion about sensitive topics.

On this cassette, the question of whether juveniles should be punished is addressed by *Time Magazine* and *Fortune News*. *Time* argues that the punishment of juveniles is an effective deterrent against young people committing crimes. It maintains that "an adult crime . . . deserves an adult punishment." *Fortune News*, a newspaper which attempts to help ex-convicts and promote prison reform, contends that most juvenile punishment only leads to a continued life of crime. It believes that "the needs of children" should command top priority from the United States juvenile court system.

At the outset of the tape, the narrator poses a series of questions for students to consider during the debates. A teacher's guide providing helpful background material accompanies the cassette.

■ ***Dead End*** **(1978) and *Nobody Coddled Bobby* (1978). Secondary. Two 13-minute 16 mm. color/sound films. Purchase: $250 each; weekly rental: $40 each. (M.T.I. Teleprograms, 4825 North Scott Street, Suite 23, Schiller Park, IL 60176).**

M.T.I. Teleprograms, in conjunction with CBS News, has recently released two films focusing on juvenile justice.

Dead End is an episode from "60 Minutes" about Judge Joe Sorrentino, a renowned lawyer and part-time Los Angeles Juvenile Court Judge. Sorrentino has seen the juvenile court system "from both sides of the bench." As a youth, he was a high-school dropout, street gang member, juvenile delinquent, two-bit boxer, and Marine reject. His life seemed to have reached a dead end until he decided to resume a school career that eventually led to Harvard Law School.

In this film, Sorrentino is shown speaking to adult audiences about problems with the juvenile justice system and conducting informal get-togethers with young people who have had run-ins with the law. Sorrentino is dissatisfied with our present juvenile justice system and works hard to improve it. His personal understanding of its disparities and his down-to-earth speaking style make him both a believable role model for youthful offenders and a respected proponent for reform.

Nobody Coddled Bobby is a "60 Minutes" exposé revealing some distressing truths about our juvenile correctional system through the story of Bobby Nestor, a 17-year-old placed in a correctional center because his parents wanted to "teach him a lesson." Though his criminal record consisted merely of some minor crimes and status offenses, he was exposed to hardened adult criminals who forced him to have sex with them. Four months later, he hung himself.

Nobody Coddled Bobby and *Dead End* are not accompanied by teacher's guides, but these two excellent films are certain to serve as catalysts for active classroom discussions.

Home-Grown Materials

The following are juvenile justice materials developed by state and local law-related programs. They provide a good classroom resource, as well as a model of what state and local programs can do in curriculum development.

■ ***The Juvenile Justice System: A Mini-course Bulletin***, prepared by Donald P. Vetter and Charles Frederick for the Law-Related Education Program for the Schools of Maryland and produced under the auspices of the Maryland State Bar Association (1978). Secondary. Softbound 3-hole binder booklet, teacher's guide, and student resource sheets. Purchase: $6.00. (Maryland Law-Related Education Program, 15516 Old Columbia Pike, Burtonsville, MD 20730).

This unit is divided into four topics: Causes of Juvenile Crime, Role of the Police, Juvenile Court System, and Disposition of Delinquents. The teacher's guide defines course goals, gives detailed lesson plans, offers variations on nearly every lesson, and identifies other print and media resources. While most of the booklet focuses on the Maryland juvenile justice system, the issues are set within the broader national context.

This is an excellent resource, put together by educators who have a sound grasp of good curriculum and pedagogy, as well as knowledge of the subject. It shows how to promote general skill development while increasing students' knowledge of the juvenile justice system. Maryland schools and youth agencies will find this directly useful for instruction, and agencies from other states would do themselves a favor by taking a look at these materials.

■ ***You Have the Right, If You Know It: A Rights and Responsibilities Handbook for Virginia Teenagers*** (1978). Junior high and secondary. Softbound, 50-page handbook. Free. (For information contact: Youth Involvement Committee, Virginia Division for

Drawing by Levin; © 1979
The New Yorker Magazine, Inc.

"I'm afraid I'll still require one more form of identification."

Children, Eighth Street Office Building, 7th floor, Richmond, VA 23219).

The subtitle of this manual more accurately reflects its content and purpose than does the main title. The developers feel that one basis for responsible behavior is information, so they use a question-and-answer format to explore many topics of interest to youths, including transportation, juvenile court, drugs, education, employment, financial responsibility, sexual conduct, health, parental rights, family planning, and legal change.

Many questions deal with Virginia state law and federal law, but more seek general, factual information. The section on drugs, for example, asks: "What type of addictive or abusive drugs are there? Are hallucinogens addictive?"

The attractive format and straightforward approach should appeal to young people. It doesn't preach; it does give a broad range of information that should aid students in making responsible decisions about issues they face daily.

All in all, a useful handbook for Virginia school and youth agencies, and a viable model for agencies in other states developing youth-oriented handbooks.

■ ***Orange County Legal Education Program*** (1977). K-12. Softbound 3-hole binder packets with teacher and volunteer guides. (Copies of curriculum guide describing the program and giving overviews of the lessons are available for 50¢ from the Orange County Legal Education Program, 1300 B South Grand Avenue, Building B, Santa Ana, CA 92705).

This program covers a wide range of law-related topics, including materials on the juvenile justice system for the upper grades. In addition to its content, this program offers a model for using volunteers from the legal profession in the classroom.

Each lesson/unit details the teacher's and the volunteer's roles in presenting the material, with separate packets for each. The teacher's packet lays out the lesson/unit and suggests strategies to be used both before and after the volunteer has been in the classroom. No detailed lesson plans are given, but rather presentation techniques are "left to the discretion of the teacher." This packet does, however, include an appendix providing an overview of the juvenile justice system in Orange County, sketches of cases, definitions, and other law-related information unlikely to be part of the typical teacher's repertoire.

The volunteer's packet has a very different content and format. It includes a "script" for classroom presentation and a section on child development characteristics "to be used by the volunteer as a guide to the special characteristics of children that will be involved in the lesson." It is well worth perusing as a guide for cooperative efforts by schools and the legal profession. ☐

Charlotte C. Anderson has a Ph.D. from Northwestern University's School of Education. She is an elementary educator on the staff of the American Bar Association's Special Committee on Youth Education for Citizenship. Lisa Broido is working for YEFC until the fall, when she will enter law school.

Oscar-Winner Stirs Controversy

A hardened prison lifer asks a group of terrified kids, "When you wake up in the morning, do you think, 'Maybe I'll kill someone today?' When I wake up, I think about it."

Another one snarls "I don't like nothin' in the first place, and I don't like you."

The kids are there because someone still hopes they can be scared out of crime. The lifers are trying their best to do just that, not by preaching, but by telling the kids what prison life is really like.

Scared Straight is a 54-minute documentary about a delinquency-prevention program that takes a hard, cold look at prison life. The film has often been shown on television and has received widespread praise. It was just honored with an Academy Award. But some teachers think it falls short of its goal of frightening kids out of crime.

The 16 tough teenagers in *Scared Straight* have all been in trouble with the law. They're cocky before their trip to Rahway Prison in New Jersey, but the moment the prison doors bang behind them they enter a harsh and horrifying new world.

The youths are placed in desolate cells with dirty toilets. Later, they spend hours with the lifers for a graphic account of life behind bars.

The tough Rahway convicts mince no words with their young delinquent visitors. They vividly describe the homosexual rapes and life threats that are part of their daily existence. They verbally harass the youths, and some even proposition them.

Narrator Peter Falk tells us that the Rahway Program has been very successful. Approximately 8,000 of the 10,000 participating teenagers have evidently gone straight—and only one of the youths in this film has been busted since it was produced.

Despite these claims of success, some teachers find the program counterproductive. They argue that the film may unconsciously glorify the tough lifers, especially for youngsters who have no other role model to turn to. Others question the value of pedagogy based on fear.

Everyone agrees, however, that *Scared Straight* is a shocking film which should not be shown to young viewers without adult guidance. The grim realities of prison life are often accompanied by foul language. But to censor the candid accounts of the prisoners would risk compromising this work and minimizing its jarring impact.

(You can order the film by contacting Pyramid Films, Box 1048, Santa Monica, CA 90406. Three-day rental: $100 + shipping; purchase: $650.)

COURT BRIEFS

Norman Gross

From Striking Teachers to Diplomats Striking Out

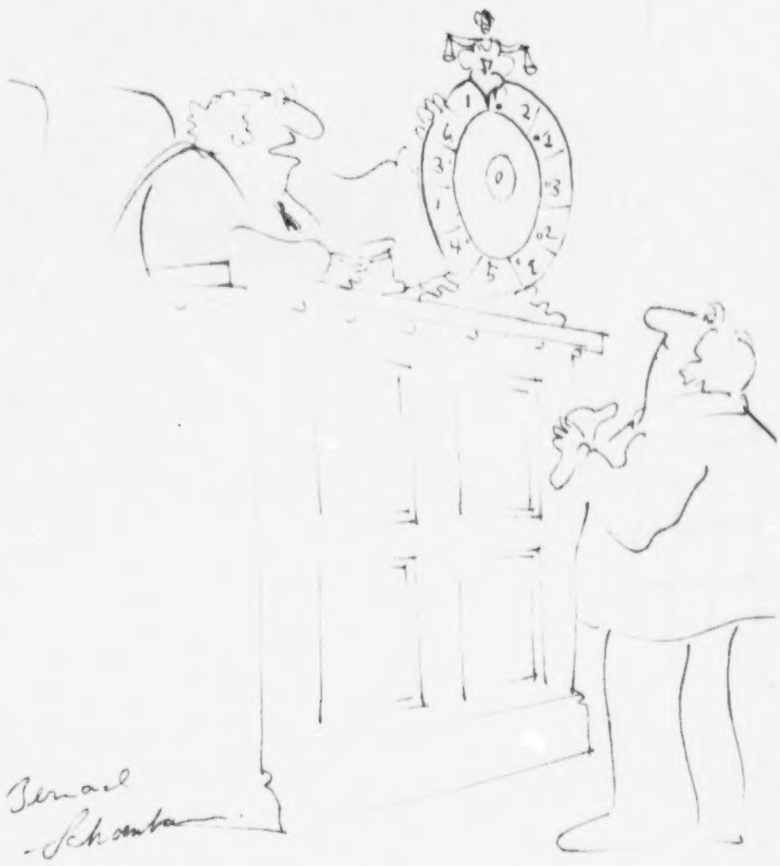
Church Schools Need Not Deal with Unions

On March 21, the Supreme Court ruled that church-run schools are not required by federal law to recognize teachers' unions. Though important constitutional issues were potentially at stake, the five-to-four decision dealt principally with the federal law setting up the National Labor Relations Board (NLRB).

The case, *NLRB v. Catholic Bishop of Chicago* (47 L. W. 4283), began when the NLRB ordered union-representation elections for lay teachers at several Illinois and Indiana parochial schools in 1974 and 1975. The teachers voted to unionize, but school officials refused to recognize the unions and instead challenged the NLRB's orders in court.

Chief Justice Burger's opinion for the majority noted that the First Amendment's "free exercise of religion" clause may preclude government entanglement with the religious mission of the schools. Burger emphasized that for the NLRB to resolve charges of unfair labor practices against church officials would involve "inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. . . .We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment ques-

Bad morale, Bad schools
UFT
...orale, Bad ...hools
45 Kids per class is no class
UFT



"Let's see what the wheel of justice has in store for us."

tions that would follow."

However, the majority held that it need not base its decision on these constitutional issues since the laws governing the NLRB contained "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered." Therefore, the majority held that the NLRB lacked jurisdiction in the case and could not force the schools to recognize the unions or bargain.

Justice Brennan wrote the opinion for the dissenters. Speaking for Justices White, Marshall, and Blackmun, he called the majority's construction of the statute "plainly wrong in light of the Act's language, its legislative history, and this Court's precedents. [The construction is] seemingly invented by the Court for the purpose of deciding this case."

Brennan said that "those familiar with the legislative process know that explicit expressions of Congressional intent . . . are not commonplace." Looking at the history of the Act, he said that on several occasions Congress itself had rejected amendments to the Act that would specifically exclude employees of religious, charitable, and scientific institutions, thus strongly implying that they are already covered by the NLRB.

Brennan admitted that the Court would have had to handle the tricky constitutional questions raised by the case if it had construed the statute differently, but said that the Court avoided the issue by a "cavalier exercise in statutory interpretation which succeeds only in defying Congressional intent."

Indigents Have Limited Right to Counsel

The famous *Gideon* decision gave indigent defendants the right to a lawyer, but, like most landmark decisions, it left many questions open. The Court has now answered one of these, ruling that an indigent person has no constitutional right to a state-appointed lawyer in a misdemeanor case if his eventual sentence does not include a jail term.

The case involved Aubrey Scott, who was fined $50 after being convicted of shoplifting merchandise valued at less than $150. Scott represented himself during the trial because he could not afford a lawyer and the court refused to appoint one for him. He appealed the decision, arguing that he had been denied the right to counsel guaranteed by the Sixth and Fourteenth Amendments.

By a five-to-four margin, the Court in *Scott v. Illinois*, 47 L.W. 4250 (March 6, 1979) denied his appeal. Writing for the majority, Justice Rehnquist noted that "actual imprisonment is a penalty different in kind from fines or the mere threat of [imprisonment]." It is "the line defining the constitutional right to appointment of counsel." Thus, if Scott had been sentenced to a jail term instead of being fined, he would have been able to successfully appeal the decision.

Pointing to the Sixth Amendment protection of right to counsel "in *all* criminal prosecutions," Justice Brennan chided the majority for ignoring established principles in this area. Reminding the majority that "the services of a professional prosecutor were considered essential in the prosecution of this offense," Brennan said the assistance of counsel for the defendant is also critical. It serves "not only to equalize the sides in an adversary criminal process, but also to give substance to other constitutional and procedural protections afforded criminal defendants."

Law Exempting Women from Jury Duty Overturned

Laws which are gender-based—specifically authorizing something for one sex but not the other—are facing increasingly tough sledding in the courts. In *Duren v. Missouri*, 47 L.W. 4089 (Jan. 9, 1979), another one was overturned.

The Missouri law permitted women to avoid jury duty simply by filing for an exemption. In addition, women who didn't appear for duty were presumed to have filed for an exemption. As a result, while in some counties women comprised more than half of the population, they constituted less than 15% of those on jury lists.

Billy Duren, convicted by an all-male jury of first-degree robbery and murder, challenged the law as a violation of the "fair cross-section" requirement of the Sixth and Fourteenth Amendments. He prevailed when an almost-unanimous Court held that the "important role played by women in home and family life" is insufficient reason for excluding them from jury duty.

Justice Rehnquist filed the sole dissenting vote. He accused the majority of playing a "constitutional numbers game" and contended that there was no "demonstrable unfairness" in the composition of the jury.

In a footnote to his dissent, Rehnquist noted the response of Duren's counsel when asked the difference between men and women jurors: "It is that indefinable something—I think that we perhaps all understand it when we see it and when we feel it, but it is not that easy to describe, yes, there is a difference." Building upon this description and "similar mystical incantations," Rehnquist argued that "today's decision will cause states to abandon not only gender-based but also occupation-based classifications for purposes of jury service. Doctors and nurses, though virtually irreplaceable in smaller communities, may ultimately be held by the Court to bring their own 'flavor' and 'indescribable something' to a jury [list]."

Pleading for a modicum of common sense, Rehnquist noted that "no one but a lawyer could think that this was a managerially sound solution to an important problem of judicial administration."

Alimony Laws Must Be Gender-Neutral

In a decision described by ERA opponent Phyllis Schlafly as "the beginning of the end of all alimony," the Court ruled by a six-to-three margin that alimony laws must be "gender-neutral" in order to withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The case, *Orr v. Orr*, 47 L.W. 4224 (March 6, 1979), thus appears to invalidate laws in 11 states requiring husbands but not wives to pay alimony.

". . .The old notion that generally it is the man's primary responsibility to provide a home and its essentials can no longer justify a statute that discriminates on the basis of gender," wrote Justice Brennan for the six-judge majority. The key test is the needs and equities of each situation, Brennan argued, free from the "baggage of sexual stereotypes."

The three dissenting judges did not believe that the Court should have ruled on the merits of the case. Justice Rehnquist, for example, argued that the Court in its "eagerness to invalidate Alabama's statutes" dealt "too casually" with the case and controversy requirement of Article III of the Constitution.

The Article III requirement means that persons bringing claims into federal court must demonstrate a "personal stake" in the case. They must suffer "a distinct or palpable injury" bearing a "fairly traceable causal connection" to the government action in question. In this way, a court is assured the parties will pursue their rights vigorously and that its time will be well spent.

The dissent argued that federal courts are not commissioned to roam at large, gratuitously righting wrongs and vindicating rights

Rehnquist pointed out that the challenge in this case was brought "by a divorced male who has never sought alimony, who is demonstrably not entitled to alimony even if he had, and who contractually bound himself to pay alimony to his former wife." He argued that federal courts are "not commissioned to roam at large, gratuitously righting perceived wrongs and vindicating claimed rights."

Among those hailing the Court's ruling was Marvin Mitchelson, the attorney for Michelle Triola Marvin. Said Mitchelson, "What's fair for the goose is fair for the gander." He described the decision as a "landmark recognition of equal protection under the law for men and women."

First Amendment Protects Teachers' Complaints

The Supreme Court held that teachers who criticize policy in public are protected by the First Amendment from retaliatory firing (*Pickering v. Board of Education* 391 U.S. 563 [1968]), but what about teachers who speak up in private?

On January 9, a unanimous Court ruled that a public employee's private complaints to a superior have the same protections as a complaint made in public. The case involved Essie Givhan, a junior high school teacher in rural Mississippi, who was dismissed from the school district after she criticized the principal for school policies she considered racist.

"Neither the First Amendment itself nor our decisions indicate that freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public," Justice Rehnquist wrote in *Givhan v. The Western Line Consolidated School District*, 47 L.W. 4102. He and his High Court colleagues refused to accept the school district's arguments that Givhan had made "petty and unreasonable demands" in a series of private encounters with the principal. "Having opened his office door to [Givhan]," Rehnquist said, "the principal could hardly argue that he was the unwilling 'recipient' of her views."

The Court's decision, however, may not lead to Givhan's reinstatement. If the school can show that she would have been fired anyhow, the school action will be upheld. The Court therefore sent the case back to the trial court to resolve this issue.

New York Bell Gets Busy Signal

"Heads, you win; tails, I lose." That must have been the feeling of the New York Telephone Company as it was forced to provide $46 million in unemployment benefits to 33,000 employees who staged a seven-month strike in 1971 and 1972.

The unusual situation resulted from a New York law which provides full unemployment benefits—now at $125 a week —to strikers after eight weeks off the job. New York Bell felt that the law conflicted with federal labor laws requiring governmental neutrality in labor disputes.

In *New York Telephone Company v. New York State Department of Labor*, 47 L. W. 4303 (March 21, 1979), a divided Court rejected New York Bell's arguments. The case turned mainly on whether federal law preempted state law on the issue.

Justice Stevens, joined by Justices White and Rehnquist in the Court's decision, noted that the New York law could be presumed valid since Congress had left it alone during 44 years of co-existence with the National Labor Relations Act. "A state's power to fashion its own policy" of jobless pay cannot be overturned, Stevens wrote, "on the basis of speculation about the unexpressed intent of Congress."

Justices Blackmun, Marshall, and Brennan concurred with the result, but offered somewhat different reasons for finding that federal law did not take precedence over the New York act.

In opening his dissent, Justice Powell wrote "the Court's decision substantially alters. . .the balance of advantage between management and labor prescribed by the National Labor Relations Act." Along with Chief Justice Burger and Justice Stewart, Powell felt the New York law struck at the heart of the federal act. "The effect of the New York statute is to require an employer to pay a substantial portion of the wages of employees who are performing no services in return because they have voluntarily gone on strike. This distorts the core policy of the NLRA—the protection of free collective bargaining."

While only Rhode Island has a similar law (most states provide benefits only in limited circumstances, such as lockouts and instances where nonstriking workers replace striking employees), the decision is clearly a victory for labor and will deter further challenges in the courts. The question remains, however, as to whether the decision may lead to new state or federal legislation.

Diplomats Strike Out in Court

U.S. Foreign Service workers thought they had a legitimate gripe. They are required by federal law to retire at age 60, but no mandatory retirement age is imposed on federal Civil Service employees. Taking their grievance to court, they argued that the law violated the Due Process Clause of the Fifth Amendment.

In *Vance v. Bradley,* 47 L.W. 4176 (February 22, 1978), a nearly unanimous Court turned them down. The Court concluded that compulsory retirement at age 60 was rationally related to the goal of assuring the professional competence of diplomats. First, the rule removes from the Service those less equipped than younger persons to face the rigors of overseas duty; second, the rule is part of the promotional policies of the Service, designed to create promotion opportunities and thus spur morale and stimulate superior performance.

The majority hinted that it didn't necessarily find the law wise, but that it believed that courts should show restraint in overturning legislation. "The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think the political branch has acted."

Justice Marshall was the only dissenter. He argued that a person's interest in continued government employment surely ranks as an important personal concern, and that the elderly are a minority which has "suffered from discrimination based on generalizations that are inaccurate." Therefore, he would apply a stricter test, requiring the government not only to show that its law was not irrational, but also that there was a "substantial relationship" between the law and legitimate governmental purposes. Applying this test, he found that the government had fallen far short of proving that "persons of that age or older are less capable of performing their jobs than younger employees."

He noted that Civil Service workers often serve abroad, doing work similar to that of Foreign Service personnel, yet they were not required to retire at 60. He also argued that mandatory retirement was unnecessary. The Foreign Service reviews employees annually and removes those who don't measure up, so any older employee not doing the job could easily be weeded out.

The decision may not be the end of the controversy. Claude Pepper, a 78-year-old U.S. Representative from Florida, has introduced a bill in Congress to overturn the mandatory retirement provision of the Foreign Service legislation. Pepper has been very successful in removing mandatory retirement for other federal employees, and his endeavor to do so for Foreign Service officers is being taken seriously at the State Department.

Norman Gross is both a lawyer and an educator. He is currently Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

Other Cases of Note

New York City Transit Authority v. Beazer, 47 L. W. 4291, March 20, 1979—A divided Court turned down a claim by blacks and Hispanics that the Transit Authority's policy of refusing to employ persons who use methadone violates the Civil Rights Acts and the Equal Protection Clause. The Court held that even though most of the persons receiving methadone maintenance in the city were black or Hispanic, the plaintiffs had not shown invidious discrimination against them, since safety requirements make it rational for the Transit Authority to have a rule against the use of this powerful drug.

Colautti v. Franklin, 47 L. W. 4094, Jan. 9, 1979—By a six to three vote, the Court declared unconstitutional a Pennsylvania law that required a doctor performing an abortion to choose the method most likely to save the life of a fetus that might be old enough to survive outside the womb. The majority said the law's language was unconstitutionally vague and that it tried to second-guess the doctor in making what was essentially a medical decision. It called the law "little more than a trap for those who act in good faith," and said that it could have a "profound chilling effect on the willingness of physicians to perform abortions . . . in the manner indicated by their best medical judgment."

Miller v. Youakim, 47 L.W. 4185, February 22, 1978—A unanimous Supreme Court struck down an Illinois law which provided greater monthly payments to children placed in foster homes with nonrelatives than to children placed with relatives. The Court held that the foster care program was designed to meet the needs of all eligible neglected children, whether they are placed with related or unrelated foster parents. Providing lesser benefits to neglected children living with relatives conflicts with the overriding goal of providing the best available care for the children.

Nevada v. Hall, 47 L.W. 4261, March 5, 1979—In a landmark decision on a state's immunity, the Court ruled six to three that a state may be sued in the courts of another state. Nevada claimed that its law, setting a $25,000 ceiling on state liability in a law suit, should govern the amount of the award in a suit brought against a Nevada state employee in a California court. The California court, however, awarded $1 million to a California family injured in an automobile accident with the Nevada man. The Supreme Court ruled that Nevada would have to pay up. It said "each sovereign governs only with the consent of the governed" and "while the people of Nevada have consented to a system of limited liability, the people of California, who have had no voice in Nevada's decision, have adopted a different system. . . .equally entitled to our respect."

NEWSCLIPS

Crime—An Equal Opportunity Employer

FBI statistics show that women are committing more and more crimes. Twenty-five years ago, women accounted for only about one of nine persons arrested, but now they account for one of five. And they're being arrested for more serious crimes. In the early 50s, 8% of all female arrests were for serious offenses; now 28% are charged with such crimes.

According to the FBI, the increase in serious crimes is almost entirely accounted for by larceny. Also, such less serious offenses as embezzlement, fraud, and forgery have increased as women have entered the work force and been able to share in the joys of white collar crime.

Cash Cuts Crime

Police in Albuquerque have come up with a new way to encourage people with knowledge about a crime to step forward. Since 1976, the city has spent $50,000 on its crime stoppers program, paying tipsters from $25 to $2,000 and promising complete confidentiality for informants. According to police, the program has helped solve more than 500 crimes.

Bar v. Gal

In Florida, it costs you from $300 to $500 if a lawyer fills out the papers for your uncontested divorce and goes to court with you. Jacksonville legal secretary Rosemary Furman says she can fill out the papers and give you a kit to do the rest yourself for $50.

According to an article in *Esquire* magazine, the bar is now suing her for unauthorized legal practice. Miami lawyer R. Layton Mank, her chief nemesis in the bar, says "you just can't let any gal who wants to start giving this advice do it." He argues that she doesn't know enough to tell people who come to her that they may be forfeiting social security rights or ask them about their wills or other problems.

In defending the bar's decision to sue her, he adds, "I know it's difficult to convince the lay person that the unauthorized practice program is not designed to protect lawyers. But the fact is, its purpose is only to protect the public."

In reply, Ms. Furman claims that she doesn't give legal advice, but rather fills out forms and tells her "clients" where to file them and how to behave in court. She says the bar is motivated by "pure greed. . . . They're furious when anyone invades their turf. They say a secretary can't do this—and they say the word like I'm a leper."

Ms. Furman says she knows lawyers are sometimes necessary, as for example in her own case. She's hired one to defend her against the bar's charges.

IRS Squelches Irishman's Luck

You'd think life would be easy for Californian Frank McNulty after he won $128,000 in the 1973 Irish Sweepstakes, but the Internal Revenue Service has taken all the joy out of it. McNulty is now serving a five year sentence in federal prison for failing to pay taxes on his winnings.

McNulty, who deposited his winnings in England, claims that the money isn't taxable, but according to the government he now owes $112,000. The unrepentant McNulty says, "They ain't gonna get it. I didn't commit any crime."

Florida Funds LRE

Teaching about the law and legal processes in Florida schools was boosted this year by an appropriation of $150,000 specifically earmarked for mini-grants ($2,500-$5,000) in law education. This is the first time a legislature has directly appropriated funds for law-related education. Leaders in the field speculate that the act, which involves no mandatory instruction, might provide a model for other states.

The appropriation will support instruction in the rights and duties of citizens under the law and under the state and federal constitutions; in-service training for teachers and administrators; activities to involve governmental agencies, private organizations, and other community resources; and integration of the program into the general curriculum. Both individual schools and school systems are eligible to apply. Priority is to be given to elementary law-related proposals.

The Florida Bar has been very active in supporting law-related education throughout the state. For more information about this legislation, please contact Ann Marie Karl, Law Education Coordinator, The Florida Youth and the Law Project, The Florida Bar, Tallahassee, Florida 32304 (904-222-5286).

When Pop Goes Pop

Lawyers for Pepsi-Cola Bottlers of Dayton were trying to defend the company against charges of producing defective bottles when two Pepsi bottles exploded in the courtroom, showering the chambers with broken glass and soda pop. The bottles were exhibits in a civil trial on charges by James Massey that a "defective" bottle of Pepsi had exploded, cutting his Achilles tendon.

All wasn't lost for the defense team, however. Common pleas Judge Walter Rice declared a mistrial. He said the incident was just too prejudicial to permit an impartial verdict from the jury.

How a nation keeps 82% of its people in prison.

In the Republic of South Africa, 4½ million whites rule 21 million blacks through the policy of *apartheid:* The blacks are not citizens, have no rights, are limited more completely in their ability to work, learn, prosper and decide their own destinies than convicted and imprisoned criminals are in most other countries. These two remarkable documentary films show the past, present and future of one of the world's most agonizing and dangerous adversary situations.

THE AFRIKANER EXPERIENCE: Politics of Exclusion
(36 mins. edited from:)
SOUTH AFRICA: The White Laager
(58 mins.)

Produced by Peter Davis in association with United Nations TV, Swedish TV, WGBH-Boston.

Learning Corporation of America
1350 Avenue of the Americas, New York, N.Y. 10019 (212) 397-9360

Summer Workshops in LRE Listed

Looking for a workshop to sharpen your skills in law-related education? The ABA has put together a list of 50 or so teacher education programs that will take place this summer.

They range from awareness workshops for beginners to in-depth seminars for veterans, and they cover an impressive array of legal topics and approaches to the study of law.

The list will tell you what each institute will specialize in, when and where it will take place, who's eligible to attend, the cost, the number of credits, which grade levels are emphasized, and all the other information you will need to find a program that's right for you. For a free copy of the list, just write to YEFC, 1155 E. 60th St., Chicago, IL 60637.

A Hungry Man Can't Be Just

Illinois taxpayers are paying about three times as much as their counterparts in California and New York to keep their Supreme Court justices fed and housed. When the justices meet in Springfield every other month, the state provides them with rent-free housing, meals that include lobster tails at $7.90 a pound, a $10,000 car, and a cook-housekeeper who is paid $109 a day.

That amounts to more than $54,000 to maintain the justices for the 60 or so days they are in Springfield, or about $118 a day for each justice. New York and California pay expenses of about $40 a day for their justices under similar circumstances.

Some taxpayers are suggesting that the Illinois justices look into lobster helper, but there's been no reply yet from the bench.

LEAA Guide Now Available

The Law Enforcement Assistance Administration has put out a guide to criminal justice information that should be helpful to teachers of law-related education.

The *Directory of Criminal Justice Information Sources* lists hundreds of organizations that will respond to inquiries and make publications available, usually at no cost or a nominal cost. Among the hundreds of national organizations listed are many specializing in community crime prevention, corrections, courts, juvenile justice, and police.

The *Directory* lists the person to contact in each group and runs down the information and publications the groups can provide. You can get a copy by sending $2.35 to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Ask for stock no. 027-000-00466-1.

New LRE Resource

Many teachers around the country have found that newspapers are filled with stories about law that can be worked into stimulating lessons. Now a joint project of the American Bar Association and the American Newspaper Publishers Association (ANPA) may be able to help teachers and curriculum developers make a more systematic use of newspapers in law-related classrooms.

The ANPA coordinates almost 500 Newspaper in Education programs around the country. These programs are run locally by newspapers which make classroom sets available at reduced cost. The local programs often develop curriculum guides and put on teacher education workshops. ANPA is interested in law-related education because it can improve teaching about citizenship, one of the most important aspects of the ANPA program.

If your project would like to work with a Newspaper in Education program in your area, please drop Charles White a line at YEFC, American Bar Association, 1155 E. 60th St., Chicago, IL 60637. The ABA/ANPA project won't be able to provide funds to projects, but it will probably be able supply a limited amount of consulting help.

You needn't prepare anything like a formal proposal; just indicate in a few paragraphs what you'd like to accomplish by working with a Newspaper in Education program, which students you hope to reach, and what sort of curriculum approach you envision. The information will then be sent to ANPA, to see if there is a Newspaper in Education program close by that can work with you.

Most-Sued Accepts Lawyers' Thanks

Norman A. Carlson, director of the Federal Bureau of Prisons, thinks he is the most-sued man in government. "My tenure as head of the federal prison system has coincided with an era of activist courts and a record number of inmate suits," Carlson told the Clearwater

(Florida) Bar Association. He said he suspected the bar's speech invitation "was in gratitude for my help in relieving the unemployment problems of young lawyers."

"Aw, Can't We Do Anything Right?"

Chief Justice J. P. Morgan of the Missouri Supreme Court thinks that court reform is going around in circles. In a speech in St. Louis, Morgan took note of the movement toward establishing neighborhood justice centers to make informal problem-solving available to the American people.

"The great theory now is that we must bring the law back to the people," he said. "Hell, we just finished taking it away from the people. We got rid of the justices of the peace."

They All Want To Be Henny

The following story is reprinted in full from the *Chicago Sun-Times*.

"Take my car—please!

"The master of the one-liner, Henny Youngman, discovered Tuesday night that those parking restrictions at the Navy Pier entrance to ChicagoFest are no joke.

"After appearing in two performances at the ChicagoFest comedy stage, Youngman learned that Chicago police had had the last laugh. His car had been towed away.

"It could not be confirmed that his wife was in the car and that he parked in the tow-away zone on purpose."

Synergy Highlights Elementary LRE

The current issue of *Synergy* magazine focuses on elementary programs in law and the humanities. This special 112-page double issue provides a good description of the activities supported under a three-year grant from the National Endowment for the Humanities.

Guest editors Lynda Falkenstein and Charlotte Anderson of the ABA's youth education staff put together more than a dozen articles on the hows and whys of teaching young children about the role of law. Each of the eight elementary programs around the country working with the ABA contributed an article on what it is doing, and these should prove a rich resource for elementary teachers looking for creative ways to introduce law-related topics in their classroom.

SYNERGY
LAW AND HUMANITIES IN THE ELEMENTARY SCHOOL
SPECIAL DOUBLE ISSUE

Copies of the issue are available for $4.50 from Robert C. Points, Director, ILC, College of Education, University of Wyoming, Laramie, WY 82071. For more information about the ABA/NEH project, contact Lynda Falkenstein, YEFC, 1155 E. 60th Street, Chicago, IL 60637. ☐

Rx for Classroom Blahs . . .

Here's a glimpse of what's now available in *Update* reprints.

- **Sports and the Law**
  Legal sports action from athletic sex bias to sports and torts. Plus teaching about contracts.
- **Freedom of Press on Trial**
  Emerging student publications, free press/fair trial conflicts, and the struggle for a free press. Plus mock trial teaching strategies.
- **Focus on Search and Seizure**
  School locker searches, electronic bugging, the search for Fourth Amendment standards. Plus "Is the ERA Constitutionally Necessary?"
- **Religion and the Law**
  School prayer, polygamists, deprogrammed Moonies, and other First Amendment tangles. Plus dubious achievements in the law.
- **Discipline and Due Process in the schools**
  School discipline from the days of flogging to recent Supreme Court cases. Plus how to begin a law program.

In addition, every issue of *Update* gives you **Court Briefs, Curriculum Update, Newsclips, Family Lawyer,** and other regular features.

To order, just return this issue's reply card.

Update
ON LAW-RELATED EDUCATION FALL 1978
Sports and the Law
Update

ANATOMY OF A LAWSUIT

A Legal Battle Brews

A disputed teacher contract sends two lawyers head to head

Charles White

Karen Gardner knew before she started that teaching at a struggling private school wasn't going to be easy—and it wasn't. What she didn't know was that before she was through she'd have a hard-fought legal battle with the school to get what she thought she deserved.

She began teaching English at Faulkner School, a tiny K-12 private school on Chicago's South Side, in 1974, her first job after getting her M.A.T. By the end of her second year there, she'd had plenty of experience with low salaries and a chronically unrepaired building. The high school division was in big trouble (enrollment was down to 30 students), a new administration came in almost every year, and teachers left almost as fast.

Despite all that, Karen liked her job—teaching English in grades 7–12, advising the staff of the school yearbook, and counseling college-bound seniors—and she expected to stay on. The size of the school suited her, and she liked the students and her colleagues.

As the 76–77 school year started, things seemed to be looking up. Though the high school enrollment continued to slide, enrollment in the school as a whole had stabilized. Her pay for that year was going up by six% (more than she had expected), and the school's director, whom the teachers liked and respected, was returning for another year.

Storm Clouds on the Horizon

Things started to go sour several weeks into the fall term. The director left (rumor had it that he was forced out), and another period of uncertainty began.

The acting director was a member of the school's board of trustees. She had hardly taken over before the board greatly increased the secondary teachers' responsibilities, giving each of them more classes to teach and more contact hours.

The teachers were also greatly alarmed by a rumor that the board would cut their salaries. They thought these developments added up to one thing: the school was in big trouble and was demanding that they make huge sacrifices. None of the teachers knew what would happen next, or if the school would manage to stay open.

The turmoil was tough on everyone. Karen, like the other teachers, had almost no free periods left, but all this was happening at a time when she was already feeling ill. All in all, by the middle

Ruth Stern Geis worried that her client's case against the school seemed almost too strong.

of November she was "working twice as hard and feeling a lot worse."

Nonetheless, Karen helped organize the teachers to resist the rumored salary cuts. Prior to a meeting the administration called to announce the pay cuts, she and most of the other teachers got together one day after school to talk about their options.

The word was that the administration would claim that teachers' contracts were invalid because they had not been signed by a member of the board as well as by the director.

The teachers decided that they might have a legal case, but that it was far better to try to work things out through negotiation and to seek a lawyer's help only if attempts at compromise failed. They decided that if the school were truly in financial trouble and if the board couldn't pay their full salaries, they would ask for a shorter work day, a shorter school year, or fewer classes.

The Board's Side of It

The teachers thought the board was acting arbitrarily, coming down hard without telling them why the dire measures were needed. The board, naturally enough, saw the whole matter very differently. According to its president, William Holland, a successful Loop lawyer, the board members felt very strongly that the school was important and must survive. "Faulkner is the last private school on the South Side not associated with a church or a university. It is 99% black. My greatest thrill is seeing kids graduate, and I think I've put in more time on this board, serving without pay, than I have on any similar activity. Even my wife can't understand why I do it."

Mr. Holland remembers that in the fall of 1976 the school was in shambles and the board had to step in to set it right. The director had been hired to increase student enrollment, but instead enrollment was 30 or 40 students below projections, a serious deficit for a school that relies almost entirely on tuition.

A worse problem, according to Holland, was that the director had greatly overstepped his authority. He argues that the board has sole authority to hire, fire, and issue contracts. The director merely recommends that the board hire someone or that it pay a certain salary; the decision itself must be taken by the board.

This director, however, made decisions on his own. "We wanted to review the teacher and student situation, and we asked him repeatedly to bring in teachers' contracts to be approved, but he never did. The matter kept getting put off, but we finally demanded an accounting. When we asked him to come to a board meeting to explain, he resigned instead."

Holland remembers that the board was appalled at what it found in his files. The board had authorized 6% raises, but the director had given some teachers as much as 60% increases. Other teachers had three different contracts, each calling for different compensation.

In Holland's opinion, the board had no choice except to step in and take decisive action. He thinks one of his strengths is that he is not afraid to act. "On the board, I insist on making decisions on the information we have and moving on. Very few things cannot be corrected at a later time."

In this particular crisis, the board did some legal research and decided that there were grounds to declare the existing contracts invalid. Holland explains, "there are at least two and usually three sides to any legal question. It's not a matter of right or wrong. We looked at the law, and we thought we had a good, defensible position."

Holland remembers the meeting with the teachers as a "very disturbing discussion." The board offered contracts and suggested what it had previously authorized as wages, but some teachers were

School Board President William Holland thought his side could make a successful defense.

getting paid more, and its suggestions didn't sit well.

Karen also remembers that the meeting was unpleasant, with the board asserting that there wasn't enough money to pay teachers their full salaries, that some teachers were rehired who shouldn't have been, and that teachers' contracts weren't valid anyway.

The Legal Maneuvering Begins

Karen, who by now was acting as a spokesperson for the teachers, decided with several other teachers that they should consult a lawyer. Karen suggested an old friend who lived next door and was taking a few cases while waiting to set up a law firm with her husband.

Ruth Stern Geis met with the teachers at Karen's apartment. As she saw it, the teachers had a valid contract but had only three alternatives. They could treat the contract as breached, stop working, and sue for the salary they would be owed for the rest of the year. This involved a big risk, since it might take years for the case to come to trial and there was always the chance that they would lose.

A lower-risk alternative was to refuse to sign the new contracts the board was offering but continue to work. If they signed no new contract, made no new oral agreement, and took care to note when endorsing each of their paychecks that they were accepting them only in partial payment of what they were owed, they would most likely preserve their right to sue for the difference between what they were promised under the first contract and what they were eventually paid.

The third alternative was to go ahead and sign the new contracts. The teachers would then be assured of work for the rest of the year, but they'd lose entirely their right to sue for the breach of the previous contract. A legal doctrine called "novation" provides that one cannot sue for breach of contract if he signs a replacement contract.

Ruth met with the teachers, explained their legal rights, and was hired by several of them to negotiate new contracts with the board. But she had no luck at all in this preliminary skirmish.

As she recalls, "my attempts to negotiate with the president of the board failed entirely. He wouldn't budge from the position that the contracts were invalid and that teachers could either take or leave what they were offered." After all the furor, the board asked most teachers to take only minor salary cuts, about $200 to $300 apiece, so those teachers all decided to take the simplest course and just sign the new contracts and keep their jobs.

However, another development did give Ruth a chance to show what she could do. At the meeting in Karen's apartment, a new rumor surfaced. One teacher said that he'd heard that Karen and another teacher would be fired. As Ruth remembers it, "Karen's jaw dropped. She'd never considered the possibility of losing her job, but all the other teachers had apparently seen it coming."

Since Karen was feeling ill anyhow, she proposed an alternative which might be best for her and for the school. She wrote a letter to the board offering to work fewer hours a week and voluntarily take a proportionate pay cut. She would have more time to rest and recover, the students would still receive their required English instruction, and the board would save more than $3,000 of her salary.

Karen thought she was fired because the board wanted a centerpiece for its get-tough policy

The Other Shoe Drops

A few days before Thanksgiving, Karen got her reply. The board not only rejected her offer, it told her that she was fired. The board didn't claim, then or later, that Karen was fired for incompetence. She had excellent recommendations on file from her first two years of teaching at Faulkner, and she had not been evaluated at all for the current school term. Even though she was ill, she thinks her teaching was as good as ever. Apparently, the board agreed, since they never once suggested that she wasn't doing a good job.

What were the reasons then? Why was Karen one of only two teachers let go? (The other was fired for incompetence, and didn't fight it).

The board's stated reasons ignored the existence of a written contract. They said she was fired because the school had hired too many teachers and because she was only certified to teach English. Mr. Holland now recalls that letting her go was part of phasing out the high school (the upper grades were dropped the next year). "We had almost as many teachers as students in the high school, and that obviously couldn't continue."

However, overhiring isn't listed in the contract as one of the permissible reasons for firing a teacher, and even if it were, why her and not another teacher? As for lacking additional certificates, Karen points out that almost no teacher has extra certificates on the secondary level, and certainly none of the other secondary school teachers at Faulkner did.

Were there then hidden reasons for her firing? Karen thinks that the board needed to pick someone out to show that it could get tough, and because she'd organized the resistance she was an obvious scapegoat. Besides, the board may have felt that she could be easily replaced, thinking that anyone with a college degree could teach English.

To Sue or Not to Sue

At first, Karen didn't think at all of suing. Mostly, she just felt relieved to be away from all the conflict at school. But as Karen gained perspective on the experience, she started to weigh the pros and cons of a law suit. There were several reasons not to sue. The whole episode was distasteful, and she didn't want to relive it. More than the indignity of being fired, she resented how crassly the board handled the whole affair. In her mind, the board acted "shoddily. They took a hard line with us, as if we were stupid to have relied on contracts signed by the school's director."

Besides reopening old wounds, Karen was afraid that a suit would be futile. "They didn't even pay their heating bills," she thought, "so why would they pay me." Besides, she was afraid that the suit would take years and years, and since it looked like Faulkner would fold any minute, legal action seemed like a complete waste of time.

Then there was always the chance that the school would win a law suit. "I knew we had a strong case in fairness and in logic, but I didn't know if we had a strong case in law. I understood enough about the law to know that seeming to be in the right according to common sense might not be enough in court."

Ruth was able to reassure her. "The case looked so good it was almost scary. I kept thinking that I must be overlooking something. I'll probably never have another case as strong on the facts."

Karen and Ruth talked it over and decided to go ahead with the suit. Ruth would represent her on a contingency fee basis. In the event that they won the suit or settled out of court, she would take a third of the amount that Faulkner was to pay Karen. If they lost the suit, she would receive nothing.

Who to Sue—and for How Much?

The decision to sue opened up a whole new series of decisions for Ruth. First of all, how much should they sue for? They would have liked to sue for actual damages *and* punitive damages, which could have added up to a considerable amount of money, but they were stymied. The board hadn't alleged that Karen was an incompetent teacher or otherwise damaged her reputation. Secondly, Ruth could find no way to sue on the basis of a tort (a civil wrong unconnected to a contract).

Tort law encompasses all sorts of accident and injury claims. If you slip on someone's icy sidewalk, or if his car hits you, you may have a tort action against him. Punitive damages are sometimes possible under tort law, and tort cases can involve a lot of money.

The problem here was that a broken contract was involved, so the suit fell under contract law rather than tort law. That meant that they could sue for only what they could prove that Karen lost as a result of Faulkner's breaching its contract with her. The law would only put Karen in the same position she would have been had the contract been honored.

Therefore, they sued to recover a little over $7,000, $6,600 of which represented the portion of her $9,600 yearly salary that would have been paid if Faulkner had not breached the contract. To this sum was added the amount of Karen's NDEA loan that would have been cancelled had she been allowed to complete the year of teaching ($350) and an estimate of expenses for looking for a new job ($250). The suit also asked for interest and court costs.

The second big decision was who should be sued? The school, of course, but it might close. Even if it didn't, it might have so many debts that a judgment would be very hard to collect.

Therefore, Ruth recommended that they also sue the board of directors as an entity *and* each member of the board individually. By this decision, Ruth hoped to "pierce the corporate veil" and involve the board members personally. In other words, if the board members lost the suit, they themselves would have to reach into their pockets. One of the main reasons for incorporating (a school, a business, whatever) is to sharply limit the personal liability of the principals in the enterprise. For example, in a corporation the board of directors are generally not liable personally for claims against the enterprise, but partners are usually liable for claims against the partnership.

Common sense told Karen Gardner that she was in the right, but she knew a court might see it differently.

Then why even try to knock down the corporate fence and get at the directors as a body and as individuals? In this case, Ruth thought there was some factual basis for the attempt, since the decision to fire Karen came directly from a vote of the board members. Because of the individuals' action in voting, it was arguable that the board members as a body and as individuals were liable, along with the corporate entity of the school.

But there were important tactical reasons for suing the board and its members. Ruth wanted everyone on the board to know about the lawsuit and to realize that it was a serious matter. If the board members felt they might lose their own money, they might be more willing to pressure the school to settle the case out of court.

Additionally Ruth hoped to "aggravate them" and divide and conquer. She knew that the president of the board was a lawyer, and that it was probably he who had assured the board that the contracts were invalid. She also guessed that he'd probably represent the school in the suit. If it were only the school being sued, there would be no conflict of interest between the lawyer (i.e., the president of the board) and the client (i.e., the school).

However, once the individual board members were made defendants, many conflicts of interest arose between the lawyer and his clients. Ruth was hoping that members of the board, when they realized they might be individually liable, would retain new disinterested legal counsel, who might urge an objective resolution of the matter.

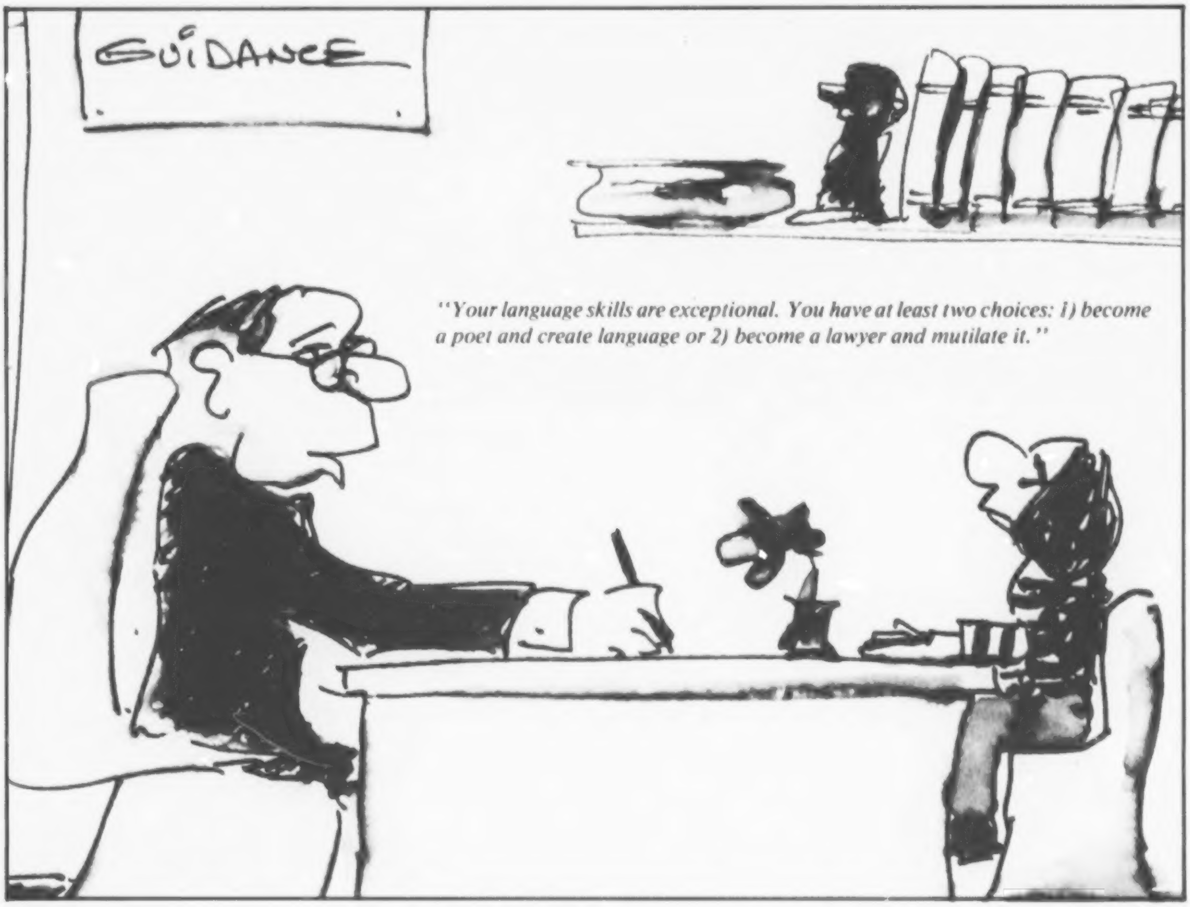
Once these decisions were made, there was the considerable work of beginning the lawsuit. Ruth had a complaint to write, almost two dozen people to serve with summonses (one of the problems with suing the whole passel of directors), and, most of all, a strategy to devise to beat the backlog of cases and get a decision while there was still a school to sue.

Stay tuned to *Update* for the next thrilling episode. ☐

Charles White has a doctorate in American Civilization from the University of Pennsylvania. He has taught at Northwestern University and Kendall College and is now Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

Legal Language— Help or Hype?

Where that jawbreaking jargon comes from— and what (if anything) we can do about it



"Your language skills are exceptional. You have at least two choices: 1) become a poet and create language or 2) become a lawyer and mutilate it."

Will Rogers, who is dead but still funny, once said

> The minute you read something and you can't understand it, you can be sure it was written by a lawyer. . . . Every time a lawyer writes something, he is not writing for posterity. He is writing so endless others of his craft can make a living out of trying to figure out what he said.

The language of law has been the object of satire and disdain since the first lawyers appeared on the scene and opened their cavernous mouths. Jeremy Bentham, who, like Howard Cosell, was a nonpracticing lawyer (any similarity ends there), described members of the bar as "harpies of the law who poison the language to fleece their clients." To paraphrase Mark Twain, perhaps legal language is something everybody criticizes but nobody reads.

Today legal language is under enthusiastic attack from within and without the profession. Jimmy Carter, no paragon of clarity, has called for an end to obfuscation in law. To be sure, lawyers have indulged and, no doubt, will continue to indulge in linguistic abuse and rhetorical overkill. This is particularly true of the torrent of regulations which pours forth from the governmental bureaucracy of which Mr. Carter is the ostensible head.

Varicose verbiage is also found in abundance wherever lawyers draft documents aimed at the supposedly unsuspecting public. Apartment leases and insurance policies leap into mind as examples. Lawyers also tend to lapse into Latin when English or Esperanto would do as well or better. And, as with all professions, which Shaw described as conspiracies against the laymen, members of the bar periodically revel in pompous pretense.

The War of the Words

There is a great hue and cry for simplifying legal language; for the use of what is, somewhat euphemistically, described as "plain English" in legislation, regulations, and judicial opinions. Well and good. No one but a fool or an autocrat would contend that the law should be made even more incomprehensible than it inevitably is to those upon whom it is to be inflicted. But is it all so simple?

Consider a "plain" word: chicken—a simple word for a simple bird. Its meaning is clear and self evident, or so it would seem. You may be surprised, if not dismayed, to learn that a federal court spent some of your tax dollars trying to figure out what the parties to a contract meant when they used the word "chicken" in an agreement.

Chicken is a humble, unassuming concept; imagine what happens when courts try to divine the meaning of "plain" yet sublime phrases such as Due Process and Equal Protection.

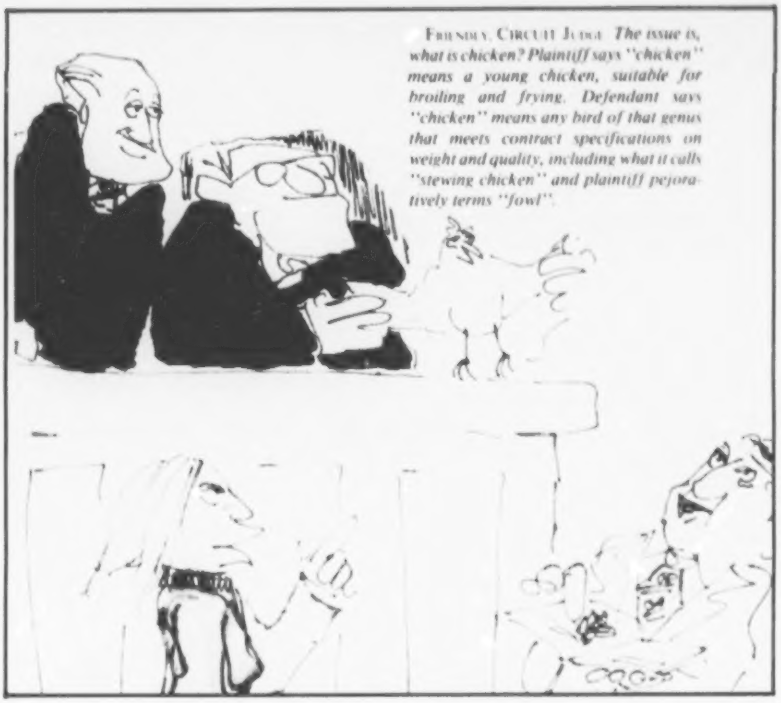
Legal terms like those are the ground upon which competing social interests do battle. H.G. Wells might have called it the "war of words." Swords may get beaten into plowshares, but the language of law gets beaten as adverse parties struggle to impose that interpretation which will best protect and promote their interests. In a society allegedly based on the rule of law, legal language, whether plain or ostentatious, inevitably becomes the focus of dispute and the means to power and dominance. Simplification of legal language will not alter this central fact. Indeed, there is some danger that it may obscure it by lulling readers of law into a false sense of comprehension.

Judges Get into the Act

But not only are legal terms fought over by lawyers, to make matters worse the terms are sometimes read by courts in a way which appears to be quite contrary to their plain and ordinary meaning. Judge Learned Hand, the only jurist to have his name banned in Boston, said that there is no surer way to misread a document than to read it literally. To understand this comment, which is worthy of Lewis Carroll, let us step through the looking glass of the law and consider the case of *Wickard v. Filburn,* decided by the United States Supreme Court in 1942. Wickard, the plaintiff (which is to say the angry party), ran a small dairy farm on which he grew a small amount of wheat, most of which was hungrily consumed right on the premises by him and all the little Wickards. Unbeknownst to Wickard, the U.S. government, in a wartime effort to control the volume of wheat moving in interstate commerce, had set a quota on the amount of wheat that could be grown on farms.

The constitutional basis of this regulation was, according to the feds, who are not inclined to conservatively construe any mandate, the Commerce Clause of the Constitution, which permits Congress to regulate commerce among the states. Any farmer whose crop exceeded the quota would be fined. Well, old farmer Wickard, organic before his time, was happily sitting in his field munching wheat when told that he had exceeded the quota and would be assessed a penalty.

"Now wait just a minute!" Wickard



FRIENDLY, CIRCUIT JUDGE *The issue is, what is chicken? Plaintiff says "chicken" means a young chicken, suitable for broiling and frying. Defendant says "chicken" means any bird of that genus that meets contract specifications on weight and quality, including what it calls "stewing chicken" and plaintiff pejoratively terms "fowl".*

Wickard v. Filburn, 317 U.S. 111 (1942).

said. "Here I am sitting in my own field, in my own state, and I'm munching my own goddamn wheat. Now I ain't no lawyer and never regretted it, but I read this here Commerce Clause and it talks about commerce *among* the states, but it don't say nothing about a farmer sitting in his own damn state gobbling down his own damn wheat."

The Supreme Court looked at the Commerce Clause and damned if it didn't say nothing about strictly local, *intra*state activities that had nothing to do with *inter*state commerce. What was a body to do? Then one of the justices said "Yeah, but what if a million farmers grew a little wheat and sat down on their farms and ate it. Maybe it would have an effect on wheat prices which might in turn create shortages and surpluses which might then obstruct the flow of interstate commerce." The other justices all blinked at once and, swayed by the specter of rotting wheat, said "Maybe you got something there," and sure enough they decided that even an activity which is strictly local and intrastate was within the purview of the Commerce Clause when it had a substantial economic effect on interstate commerce. So they threw some words into the U.S. Constitution which weren't there before, at least not to the naked eye.

Statutory Construction

Reading law, as you can see, is as maddening as talking to the cheshire cat, and, generally, far less amusing. The process by which courts read law or, more specifically, legislation, is called statutory construction (or destruction, as the case may be).

The construing of statutes is, at best, an imperfect science. At worst, it is a Holy Grail in which courts, searching for the legislative intent (if any) behind statutes, occasionally run roughshod over rules of grammar. But the task of making sense of statutes is not so elementary. Consider the following New Jersey statute:

> Any person who utters loud and offensive or profane or indecent language in any public street or other place to which the public is invited is a disorderly person.

Query (which is the word used by lawyers to preface a question when they seek to remind the listener that the inquiry to follow has been conceived in the formidable depths of the legal mind), what does "offensive language" mean? A survey of cases construing the above unassuming statute reveals that calling someone a "rat" or "scum of the earth" is "offensive," while casting the seemingly equal epithets of "mutton head" and "czar" is not. (The astute reader will correctly surmise that these are old cases: the threshold of offensiveness has risen markedly in recent years.) Query, what in hell does it all mean? Your guess is as good as the courts and possibly much better.

The sublime and more than occasionally ridiculous subject of statutory construction touches on one of the most elementary yet elusive of legal concepts: the distinction between courts and legislatures. Even to courts (some would say especially to courts) the difference is not so clear.

Who's Writing the Law Here?

As courts and legislatures are a primary, though hardly exclusive source of law, a feeling for legal language requires some appreciation of the differing functions performed by those institutions.

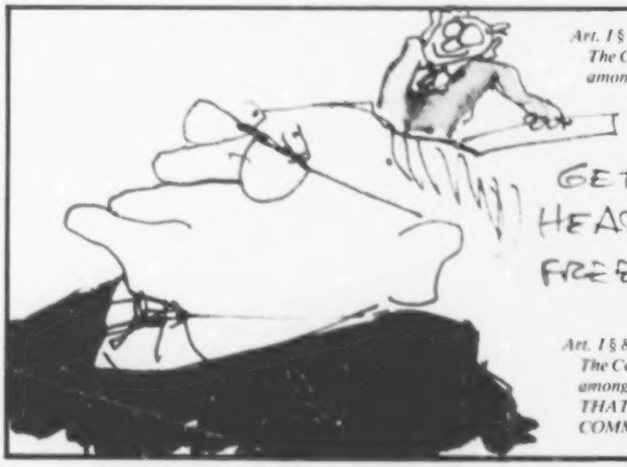
It does little to clarify matters to say that courts adjudicate and legislatures legislate. A flicker of further elucidation is provided by noting that legislatures, to the extent that they do anything constructive at all, formulate social policy by drafting broad rules, whereas courts decide cases properly before them by applying these broad rules as well as judicially developed principles, known as the common law, to the facts presented.

The judiciary, which the late Alexander Bickel described as the "least dangerous branch," doesn't (or at least shouldn't) sit around issuing opinions on abstract questions unrelated to concrete controversies involving adverse parties. Judges do not simply don their robes and decide, as legislators might, that today would be a capital day to say something penetrating and profound about air pollution. Courts lie dormant until someone comes to them requesting help.

But can that someone be just anyone? And can any court hear any case? Some understanding of three crucial concepts is necessary to even begin to comprehend when the judiciary can swing (or shuffle) into action and make law. These core concepts are ***jurisdiction, standing,*** and ***mootness***. All of them simple little plain words.

Jurisdiction is the legal term used to describe the authority which entitles a court to hear and decide a case. It also has some extra-judicial applications.

Jurisdiction comes in two flavors, and both must be present before a court can dish out justice, or whatever it happens to have on ice that day. One is jurisdiction over specific persons or property. This is based on the contact that given persons or property have with a certain state and involves due process concepts of notice of a pending lawsuit and opportunity to be heard (as well as seen). If this sort of jurisdiction strikes you as one of those "procedural technicalities," consider how it



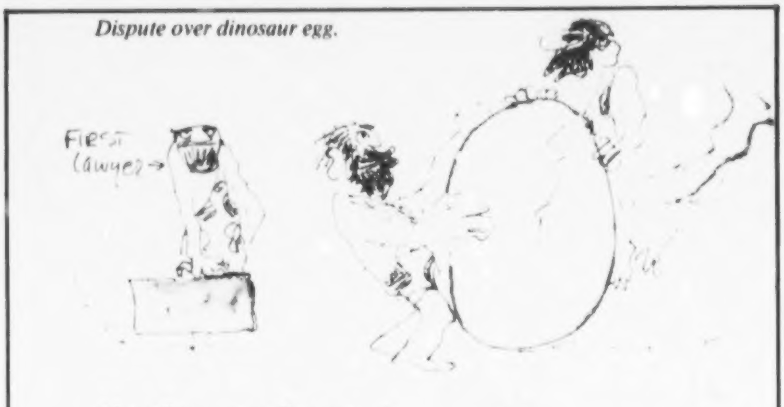
Art. I § 8
The Congress shall have Power to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.

GET INSIDE THE JUDGES HEAD (SOME HAVE MORE FREE ROOM THAN OTHERS)

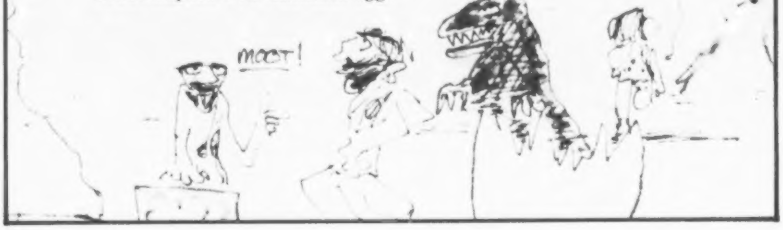
Art. I § 8 (as seen by a court in Wickard v. Filburn*)*
The Congress shall have Power to regulate Commerce with foreign nations, and among the several states (INCLUDING LOCAL, INTRASTATE ACTIVITIES THAT HAVE A SUBSTANTIAL ECONOMIC EFFECT ON INTERSTATE COMMERCE), and with the Indian tribes.

would feel to learn that a state in which you had never set foot (nor even wanted to) had convicted you, in absentia, of torturing cats. (*See* Franz Kafka's *The Trial.*)

Dispute over dinosaur egg.



Moot dispute over dinosaur egg.



The second type of jurisdiction necessary for a court to have power to resolve a controversy is jurisdiction over the subject matter of a lawsuit. Subject matter jurisdiction, like everything else in America, is very specialized. For example, only federal courts can decide admiralty cases.

But a court may be up to its gavel in jurisdiction and still not be able to make any law unless there is before it a live and kicking controversy between adverse parties who have what is known as standing to sue. In order to have standing to sue, a prospective litigant must have suffered an injury to a personal interest which comes arguably within the zone of those interests protected by a statute or constitutional guarantee. (The same court that found interstate commerce in the act of eating homegrown wheat on a small dairy farm said that.) Standing, a legal term in "plain English" drag, has been known to cause some confusion here and there.

Closely related to standing is the concept of mootness, which basically means that, because of a change in circumstances, a court can no longer grant the relief requested by persons who had standing to sue before the change. When a case becomes moot there is no longer a live controversy before the court and, as the question is now academic, no judicial action can, generally speaking, take place. "Moot" is one of the earliest legal terms, invented by Homo Malpracticicus, the prehistoric precursor to the present day lawyer. This homo sapien was, like his descendants, upright in posture, if not in character. The term "moot" caught on, and even today, oozes primal finality.

Once a court has jurisdiction over the subject matter of a case and over parties who have standing to sue, it can, unless the case becomes moot, do its thing, which is to say it can hear and decide the case. The court may write an opinion which, with varying degrees of intelligibility and sagacity, explains its decision. All judicial opinions must be read cautiously and with an eye toward uncovering the holding of the court: the way in which the court resolves the issue before it by applying legal principles to the facts at hand.

The holding is the meat of the opinion, or, if you prefer, the soybean. Comments made by a court which are not directly related to the question presented by the case are known as *dicta*, and are not as entitled to precedential weight as the holdings (though they do have considerable value as judicial hints of the way the court may decide future questions). The holding of a case is not fixed or static but evolves as its principle is applied in later cases involving new and different factual settings.

Legal Language: A Word or Two for the Defense

Ambiguity, always present to a degree in language, is even more inescapable in an adversary legal system. And perhaps it is not an altogether bad thing; maybe it is indispensable to the survival and growth of civilization. (Sure, you may say, but what about America?) As former Attorney General Levi put it in his *Introduction to Legal Reasoning,*

> The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. . . . In an important sense legal rules are never clear, and if a rule had to be clear before it could be imposed society would be impossible!

With the aid of ambiguous rules that keep most everyone pinned down by semantic streetfighting, society becomes practicable, if not especially enjoyable.

"When I hear a man talk about unalterable law," someone once observed, The language of law is in a continual state of change, and those who attempt to read it without that aspect in mind do so at their own peril.

Law is not a science. It is not precise or quantifiable. It is rather an art of accommodation, and it is, as Samuel Johnson described it, copious and generous. (In fairness to Johnson, who was a wise man, despite his inexplicable affection for Boswell, it should also be noted that, when asked about a certain individual, he noted that he did not want to speak ill of the person behind his back but believed him to be an attorney.) As formalistic and arcane as it can be, the language of law provides, by its very ambiguity and play, a buffer which blunts social clash and allows for some conciliation of conflicting interests.

It might be said that those who favor the movement for a return to "plain English" in law, seek to reduce legal language to a level where even a child can understand it. Such an effort, though highly meritorious in some respects, underestimates both the complexity of law and the subtlety of children. ☐

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Classroom Strategies

(Continued from page 9)

your evaluation of the judge's decision? Do you agree with the decision? Explain.

Class Discussion

Which factor or combination of factors do you think should be the most important in deciding whether or not a minor is tried as a juvenile or adult?

a) age
b) seriousness of crime
c) previous history of delinquency
d) degree of criminal sophistication
e) chance for minor to be rehabilitated in the juvenile justice system

Resource experts such as probation officers, juvenile court judges, public defenders, and district attorneys should be asked to attend the class. They will be able to answer questions and provide helpful comments.

Karen DeMunbrun is a CRF staff writer with a specialty in preparing curriculum materials for use by students with special learning needs; Doris Bloch is director of community programs and public relations for CRF. She has developed a number of successful community conferences for young people and adults.

Strategy

2.

A Simulation About Runaways

Christa Burke
Kathleen Smith

The Juvenile Justice and Delinquency Prevention Act (JJDP) was developed in response to the inconsistencies of our nation's juvenile justice system. As Senator Birch Bayh (D-Ind.) pointed out, "The present juvenile justice system does not deal with youth in an adequate fashion. The courts indiscriminately incarcerate nonviolent status offenders with the more serious offenders in our correctional and detention facilities."

His remarks call attention to the perplexing problem of the juvenile status offender—a young person not convicted of a violent crime and whose actions would not be subject to legal penalties if he/she were an adult. Bayh says that "status offenders—runaways, school truants, incorrigible, neglected, abused and dependent children—are more likely to be detained, institutionalized and held in confinement for longer periods of time than those who are charged with or convicted of criminal offenses." Some states have begun to deal with this inconsistency by passing laws which stipulate different handling of status offenders.

The following role play can be used in the classroom to explore the dilemma of the runaway as it relates to the juvenile justice system and the problems inherent in the courts' jurisdiction in this area. It offers students an opportunity to learn about the problems of runaways, the reasons young people run away from home, and the feelings and viewpoints of runaways, their families, and the juvenile probation officers who must try to help them. Through this activity they will be able to identify and define possible solutions to the runaway problem.

Background Information

Children run away for different reasons: lack of acceptance, lack of parental love, sibling rivalry, child abuse or neglect, overprotective parents, alcoholism or drug abuse in the family, desire for adventure, lack of communication in the family. Family discord seems to be the common denominator in most runaway cases. The result of all this domestic uncertainty and/or violence is that young people often feel forced to seek answers to life's problems from the street and not from parents.

Runaways are often picked up by police for curfew violations or other minor offenses. After police identify a runaway, the young person is turned over to a juvenile probation officer (P.O.). Depending upon the laws of the state, this officer has differing lengths of time to decide what to do with each runaway who has been picked up.

States receiving JJDP Act funds can detain status offenders for 24 hours if they are residents of the state and for 72 hours if they are from another state. In those states which make no distinction between status and criminal offenders, runaways can be held for 15 days and, depending on the disposition of their case, incarcerated.

Usually, the P.O. schedules a family conference to help resolve the conflicts which may have led to the child's leaving home and tries to find solutions to the problem. Two possible approaches are:

The family conference, in which the main objective is to make the family take responsibility for the runaway; and *individual counseling*, which deals with the juvenile runaway in peer settings or individually.

Activity and Instructions

Discuss this background information on the problems of runaways and the possible approaches for dealing with them. Then prepare students by telling them that they will be role playing a family conference called by a P.O. to deal with Emily, a young woman who has run away from home.

Divide the class into small groups of five. Give each group copies of the following role descriptions. Have the students choose roles and prepare by reading their role descriptions. Each player should develop his or her role in reaction to the information contained in these role descriptions. They should try to be as realistic as possible, stay in character during the family conference, and discuss frankly their feelings about the situation.

EMILY says, "My parents won't let me breathe. I can't do anything with my friends. They don't trust me, and are always on my back. Nag, nag, nag, everyone in our house is always fighting."

EMILY'S MOTHER is a nervous, harried woman, dissatisfied with her husband and with her life. She has a sharp tongue.

EMILY'S FATHER has a drinking problem and has been out of work for a year. He often argues with his wife and kids.

EMILY'S SISTER is two years younger than Emily. She often squabbles with her sister and her parents, but she is more timid than her sister and gets along better with her family.

JUVENILE PROBATION OFFICER: As the probation officer, it is your job to try to resolve the present conflict concerning the runaway. You will conduct a family conference. Your primary goal is to help the family stay together and to send the runaway home. You must try to ***make the family feel responsible for solving the problem of the runaway.*** If it is impossible to send the child home because the parents do not want her, because she has been abused, or for some other reason, you might try to get the parents to agree to place their child with a relative or in a foster or group home. If the family refuses to do *anything*, you may have to place the child under the care of the county and detain her in juvenile hall.

During the family conference, the probation officer can ask members of the family questions such as: Why are you here? How do you feel about this situation? When did this problem start? What have you done in the past that worked? What do you want to do now? and What do you think would help? However, those playing family members may interrupt, argue with each other, threaten each other, etc.

The P.O. should attempt to discover the conflicts in the family and resolve them by discussion. He or she may make any of the following decisions:

- Send the runaway home with parents. No further action.
- Send the runaway home with follow-up counseling through the probation department.
- Place the runaway at the home of a relative or friend, pending juvenile court disposition.
- Place the runaway in a foster home, pending juvenile court disposition.
- Place the runaway in a private group home for troubled youths, pending juvenile court disposition.

At the close of the conference, the P.O. should inform the family what action he or she is going to take in the case, then share it and the rationale with the rest of the class.

Discussion Questions

After the role plays are completed, reconvene the class and debrief the session using these discussion questions:

1. What decision did the probation officer make in the case? Why? Do you agree or disagree? Why?

2. In your opinion, is the youth in the case delinquent? Why or why not? From your reading and experience, how important would you say family life is in contributing to juvenile delinquency?

3. In your opinion, are there youngsters who would get into trouble no matter what their family life was like? If so, what other factors might account for their getting into trouble?

4. Ask members from each group to describe the runaway conference they participated in. What were some of the issues involved? How were the conflicts resolved? If conflicts or problems were not resolved, why did this happen?

5. What were your feelings when you played the runaway? The parent? Another family member? The juvenile probation officer?

6. Were the decisions of the P.O. fair in your case? Why or why not?

7. Based on your experience in the conference(s), what do you believe are the main reasons young people run away from home?

8. What possible solutions can you think of for the runaway problem? What do you think should be done for/with runaways?

9. When should runaways *not* be sent home? Why? Where should they go in these situations?

Finally, don't overlook opportunities for getting resource persons involved. Invite police and/or probation officers who handle runaway cases to visit the class to observe the role plays and participate in the debriefing session. They can give your class the benefit of their experience with actual family conferences and provide many insights into the dilemmas of runaways.

They can also help set up valuable field experiences. Have them arrange visits to a juvenile diversion project center or runaway center.

Christa Burke is the director of a statewide California project which is helping over 30 school districts to implement a CRF-developed law program which involves the bar and justice system; Kathleen Smith is the staff development director of the California dissemination project.

Strategy

3.

Hypos on Minors and Contracts

Phyllis Maxey

Richard Weintraub

All of us make promises, but not all of those promises are contracts. They would not be recognized or enforced in a court of law. A legal promise or contract may be oral or written, but it must have three characteristics:

> AN OFFER—"I will sell you this TV set today, if you promise to pay $25 a month for the next 18 months."
>
> ACCEPTANCE—"OK."
>
> CONSIDERATION—The agreed-upon exchange: a TV for $450.

The following activities explore situations in which minors make contracts. The sentence completion exercise, What Do You Think?, can be used as an introduction to the case studies that follow. Students can use the exercise to share their own experiences with and understanding of contracts. The case studies will extend their understanding of the legal dimensions of contracts.

What Do You Think?

1. I was really ripped off when ______
______.

2. When considering a contract with a correspondence school, I should ______
______
before paying money for such a course.

3. When someone sells me something that doesn't work like it is supposed to, I can ______.

4. If I bought a stereo for my car and then decided I didn't want it, I could return it to the store if ____.

5. In some cases, a merchant would rather have my parents sign a contract instead of me because ____.

6. If I took my car into a repair shop, and I was charged for things I didn't ask to be done, I would ____.

Case 1—A Model Ripoff?

(This case is adapted from an exercise by Susan McKay in *Civil Justice*, Scholastic Book Services, New York: 1978, pp. 73-76.)

Joanna is 17. All her life she has wanted to be a fashion model. One day on the way home from her summer job, she sees a notice on a door. The notice reads:

> Enter the world of high fashion. Make top dollars as a model. If you have what it takes, step through this door. Our agency may change your life.

Joanna pauses for a moment. "Do I have what it takes? Maybe it's time to find out." She walks inside.

A well-dressed woman greets her at the door. She introduces herself as Mrs. Hunt and asks Joanna a few questions. Then she asks Joanna to "model" the clothes she is wearing. Joanna does her best. She is relieved when Mrs. Hunt tells her that she could definitely be a top model.

Mrs. Hunt explains that Joanna will need to know a little more about make-up and hair styling. She will also have to learn how models walk and pose. However, in a short time she should be making top dollars as a model.

Joanna is thrilled. She tries to concentrate while Mrs. Hunt explains about the modeling school, but her mind is on high fashion. It seems that Joanna will have to attend the school for six months before the agency will try to place her. This will cost $100 a month. Joanna thinks that sounds like a fair price. After all, soon she will be making nearly $100 per hour as a top model.

Mrs. Hunt gives Joanna a set of papers to sign. She explains that it is the agreement to attend the school and pay the monthly fee. As Joanna is about to sign, Mrs. Hunt asks, "You are 18, aren't you?"

Joanna pauses for an instant. It is clear she must be 18 in order to qualify. "Oh, yes," she lies, "I was 18 on my last birthday." Quickly Joanna signs the papers. Now she is on the way to a bright new career.

After a week of lessons, Joanna begins to wonder. She seems to know more about make-up and hair styling than the young woman teaching her. She checks with some of the other students. She finds that Mrs. Hunt has given them all the same encouragement. It is obvious to Joanna that some of them do not "have what it takes." She starts asking questions about which graduates the agency has placed. It turns out that the six-month course is no guarantee of work at all.

After a week at the modeling school, Joanna realizes that she knows more about hair styling and make-up than her teacher. Can she get out of her contract?

Questions. (A.) Why do you think Mrs. Hunt asked Joanna if she was 18? What difference do you think Joanna's age could make to a contract? Does it matter that Joanna lied? (B.) Do you think Joanna should keep to the terms of the contract? Why or why not? (C.) Can Joanna legally get herself out of the contract? And what about Mrs. Hunt? If she wanted to cancel the contract, could she do it?

Discussion. Joanna can get out of her contract. She can cancel the contract even though she lied to Mrs. Hunt about her age. Why? Minors have the right to cancel certain contracts that adults would normally have to keep. The law defines minors as individuals under a certain age set by state law, usually between 18 and 21.

Why can minors get out of contracts? Under the law, all parties to the contract must be able to give "sane and intelligent consent." Minors may be very sane and intelligent, of course, but the law presumes that individuals under a certain age lack experience in dealing with contract situations. The law presumes a lack of mature judgment.

There are certain contracts, however, that minors cannot cancel. In most states, minors are not allowed to cancel contracts for the "necessities of life"—food, shelter, medical care. In addition, if a minor decides to cancel a contract, it must be done within a "reasonable time."

Mrs. Hunt may not cancel the contract with Joanna. It makes no difference if the adult knows that the other party is a minor. It makes no difference for her if the contract is for necessities or not, since the law is designed to protect minors, not businesspersons.

Case 2—Can a Minor Sue?

John, age 17, needed new tires for his

SUE
CONTRACT

car. He bought a set of four retreads from "Randy's Retreads," a dealer who retreaded tires in his own shop and guaranteed the retreads for 10,000 miles. John drove the car on the retreads for 6,000 miles before he had any trouble. Then one day a tire blew out.

Questions. (A.) What rights does John have against "Randy's Retreads," if any? (B.) Do you think John should expect Randy to give him a newly retreaded tire? His money back? That portion of the cost of the tire that would be 40% of the 10,000 mile guarantee that remains? Explain your reasoning. Explain why he should get 40%. (C.) Could John return all of the tires?

Discussion. Randy has made a contract with a minor, John. He cannot break that contract and must live up to the warranty. Often a warranty will state the conditions for refunds for an unsatisfactory product (money, a replacement, etc.). If it doesn't state conditions, however, the parties will have to work out a settlement between themselves, or, if that fails, John will have to sue Randy. See pages 43-46 of the Winter 1979 *Update* for strategies to teach about negotiations and judicial remedies for breached contracts.

Case 3—Can a Minor Be Sued?

Bob, age 15, wanted new speakers for his stereo. His friend's dad, Mr. Ferguson, promised to give him $50 for his old speakers. Bob agreed to bring the speakers over to the Ferguson's on Saturday.

Bob didn't deliver the speakers on Saturday. He didn't call Mr. Ferguson either. Finally, a week later, Mr. Ferguson called Bob. Bob said, "Oh, sorry, Mr. Ferguson, but I've changed my mind. I've been looking around at new speakers and I think I'll just keep my old ones. Everything is so expensive now."

Questions. (A.) Does Mr. Ferguson have a contract with Bob? (B.) Does Bob have the right to change his mind and not sell Mr. Ferguson the speakers? (C.) What could Mr. Ferguson do about it? Could he take Bob to court?

Discussion. Mr. Ferguson *does* have a contract with Bob, but remember that Bob is a minor. Bob can cancel the contract when he wishes, so in effect Mr. Ferguson has no chance of successfully suing him. He'll just have to do without the speakers.

Case 4—What Are Necessities?

Maria, age 17, had a new part-time job. She was working for Blue Jeans store as a sales clerk and earning about $50 a week. Blue Jeans gave each of their clerks a 15% discount on all clothing bought from that store.

Maria opened a charge account and bought all of her Christmas gifts at Blue Jeans. Before she knew it, her account was up to $160. Maria was worried that she wouldn't be able to pay back all of that money.

After the Christmas rush, the Blue Jeans store didn't need additional help and Maria lost her job. She still had a $100 balance left to pay on her charge account, but no money coming in. After paying nothing on her account for two months, she received two warnings.

After shopping around, Bob decides that he doesn't want to sell his speakers. Could Mr. Ferguson take him to court? If they have a contract, can Bob cancel it?

Questions. (A.) Can Maria cancel her agreement to pay for the clothes? (B.) What could Blue Jeans do about the $100 that Maria owes?

Discussion. Maria has not bought "necessities," she has bought gifts. Therefore, she can cancel the contract if she wishes, and the store has little likelihood of collecting from her. However, there are ways for them to deal with the situation. For example, the store might offer her a job to help her pay back the rest of the money, since she already paid back $60 while working there.

If Maria refused such an offer, what other options does the store have? Could they see that Maria gets a bad credit record, or get the clothes back from her family and friends?

Wrapping Up the Lesson

Because the definitions of "minors" and "necessities" may vary from state to state, the discussion of these cases can be enriched by inviting a lawyer to class. Your local bar association can probably help you get one.

There are other situations where a minor is bound by a contract. Each state is different, however, and you must look at your own state's laws. Generally, minors can be held to military enlistments, insurance policies, bank accounts, and educational loans. Why not invite a neighborhood bank officer and local insurance broker to your class to explain how your state's statutes on minors affect their businesses?

You should also encourage your students to debate whether or not minors should have the same legal obligations as adults in carrying out contracts. Is the present system fair? On the one hand, it may give a few minors an unfair way of wriggling out of contracts; on the other hand, it may make it harder for all minors to function in society, since many merchants cope with the law by simply refusing to extend credit or sell on installment to any minor. Or merchants may demand that any contract be with the minor's parents, thus making it harder for kids to take on adult responsibilities and pick up skills they'll need as adults.

What alternatives are there to the current policy? Could youngsters be protected by other means?

What is the case for continuing the policy of allowing them to cancel most contracts? Does this reflect reality (do most youngsters of 16 or 17 lack judgment and need to be protected) or is it condescending? Are youngsters getting more savvy in the ways of the world? If so, should the age of majority be lowered? To what age? Has the age of majority been lowered in your state? Have youngsters proven capable of meeting their new responsibilities?

The Emancipaton Problem

You might add another dimension by telling your students that in most states a youngster can leave home, get a full-time job, or get married while he is still a minor, but taking on these new responsibilities won't make him an adult in the eyes of the law. He'll still be treated as a minor when it comes to making contracts, which can make it hard on young married couples who want to rent an apartment or buy on credit while they're still under age. Should the law take into account a minor's "emancipation" from his parent's home, or do minors out in the world need the protection the law now gives them? ☐

Phyllis Maxey is project director of an innovative CRF program designed to raise questions regarding the legal, moral, and ethical problems faced by business in American life; Richard Weintraub is the Associate Education Director of CRF and second-term president of the California Council on Children and Youth.

Supreme Court Report

(Continued from page 6)

ernable, it is necessary to divide our considerations into tnree separate time periods: prior to 1899, 1899 to 1967 (the *Gault* decision), and 1967 to the present.

What seems to tie these three periods together is the function of punishment in the lives of children and the effectiveness of the methods by which this punishment is meted out.

A Harsh Law for Children

Prior to 1899, there was no such thing as a juvenile court. At common law, children who committed crimes were subject to the same criminal penalties as were adults. Penalties at this time were harsh, hanging being the most common. Interestingly enough, an old lawyers' tale relates that while hanging was the prescribed penalty for pickpocketing in London, the crime itself was most often committed at public hangings. To be sure, many of the pickpockets must have been children darting around in the crowds.

There was some respite from this harshness. Courts eventually ceased to condemn children to death, but that did not eliminate the possibility of other criminal sanctions against them. When convicted, children were sent to penal facilities where they spent their time with hardened adults, better learning the ways of crime. Children committing minor crimes were sometimes sent to special children's institutions such as the New York House of Refuge or the Chicago Reform School. But those who were found guilty of felonies or serious misdemeanors were confined with adults in penitentiaries that were, at least after 1820, geared to a severe regimen of discipline, isolation, and meager diet.

Things weren't much better for another group of children, the street waifs. These poor and homeless children—crowding the streets of the cities, begging, probably picking pockets, and generally being an affront to the local burghers—were first dealt with in late 16th century England. The Elizabethan Poor Law permitted local governments to take custody of children receiving improper care and to bind them out to the lowest bidder, who was then expected to train, educate, and discipline the child to transform his evil nature into god-fearing righteousness.

More often than not, discipline was the primary goal. In addition, hundreds of children were shipped to the colonies in an effort to populate the vast American continent. It may just be that we are a nation of PINS (Persons in Need of Supervision), with cultural threads leading back to the independence and resourcefulness of those early ragamuffin citizens.

Many aspects of the Elizabethan Poor Laws found their way to America. Colonial and early governments bound out poor and idle children to settlers heading west. Others were apprenticed out to local citizens who were to provide board, lodging, and medical care, as well as training. Still later, however, others found their way into almshouses where they, like their criminal counterparts, spent their days mingled with adults whose future was already behind them. By 1867, 2,300 children resided in almshouses in New York alone.

Birth of a Noble Ideal

During the 1800s, reformers like Jane Addams, Dorothea Dix, Elbridge Gerry, and others were shocked by the festering conditions in jails and almshouses. They shared a belief that children could be saved from a life of crime through proper discipline and training. This developed into the theory that the child who committed a crime or who was likely to commit a crime was as much a victim as was the target of his offense.

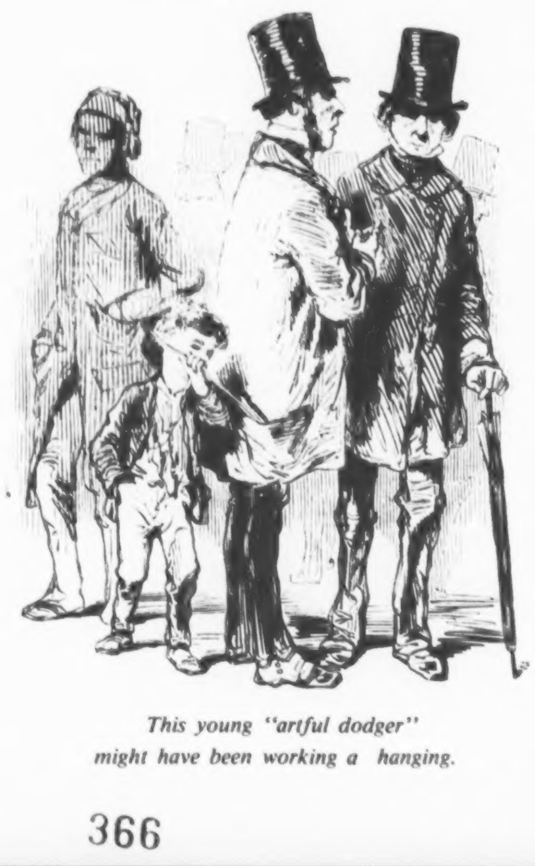
Since poor children comprised the bulk of the lawbreakers, the reformers saw little difference between youthful criminals and the waifs who aimlessly flooded the streets of our growing cities. Something had to be done to save all these children from preying upon the public. That something was the separation of children from dissolute adults.

By treating children's problems in separate institutions, society could be protected and children could be saved. This "reform" movement to segregate children from adults and to create separate children's institutions for the purpose of altering behavior gave rise to the second stage of the development of juvenile justice in America.

The first juvenile court, established by the Illinois legislature in 1899, was unlike any other existing court. There were no lawyers; legal rules of evidence were nonexistent; the niceties of legal formalism were missing; even concepts of guilt and innocence were irrelevant.

What concerned Judge Tuthill in his Chicago courtroom was not so much whether a child had transgressed the social order, but whether his condition and behavior in the community demonstrated a need for the state to intervene along the lines of a medical model and "cure" or rehabilitate the child, who would otherwise grow into an antisocial adult.

The method was simple. The kindly father figure of the judge, acting with the concerned probation officer, would review the current life of the child. Sometimes parents were present. Hardly ever were there witnesses, since the probation officer could be trusted to supply accurate information.



This young "artful dodger" might have been working a hanging.

The result could be probation for those children who, in the court's judgment, were in need of the solicitous care of the state. As often as not, the result was placement in an institution dedicated to the care and rehabilitation of children. More often than not, however, care and rehabilitation translated into stern disciplinary techniques.

The juvenile court movement spread rapidly. By 1925, this special court system was functioning in all but two states. And while minor differences existed among the juvenile courts, they all performed their work informally, and behind a cloak of secrecy which protected the children but also the court and the institutions which cared for them.

Rumblings of Change

As early as 1937, Dean Roscoe Pound of Harvard Law School had noted that the "powers of the Star Chamber were a trifle in comparison with those of our juvenile courts." The child care facilities, euphemistically called industrial training schools or receiving homes, were gradually coming to be viewed for what they were. One state supreme court called them "buildings with white-washed walls, regimented routines and institutional hours."

Further, the promise of the court had not been realized. Rather than rehabilitating youngsters, statistics began to reveal that these courts and institutions were frequently way-stations along the road to crime. The benefits had just not been realized. And if they were not being realized, then the rationale for the juvenile court's informality could no longer be maintained. The stage was set for the highest court in the land to seriously consider the operation of perhaps the lowest court in the land.

Prior to its decision in *In re Gault*, the United States Supreme Court had generally refrained from interfering with the state juvenile courts. While the Supreme Court had on previous occasions discussed the duties and responsibilities of parents and had dealt with custody battles between parents, it had avoided considering how juvenile courts gave state authorities the legal custody of children in order to rehabilitate them.

A Precursor of *Gault*

That reluctance to examine the juvenile justice system, however, began to change the year before *Gault*, when the Supreme Court accepted the case of *Kent v. United States* (383 U.S. 541 [1966]). *Kent* originated in the District of Columbia juvenile court. Because the Supreme Court had supervisory power over the District of Columbia courts at that time, and perhaps because Justice Fortas and others were looking down the road to a time when the entire juvenile court process could be examined, the Supreme Court agreed to hear arguments in the case.

Kent was a 16-year-old boy with a prior delinquency record. He was charged with rape, housebreaking, and robbery. The evidence against him was strong; the crime was serious. In the course of the interrogation by the police, Kent admitted committing several other rapes and housebreakings.

As in most juvenile courts, a judge of the District of Columbia court had the authority to waive jurisdiction over a child and transfer him to the adult court if he could no longer be rehabilitated in the juvenile system. There Kent would receive all of the procedural protections of an adult criminal trial, but would also be eligible for the death penalty or a long jail sentence.

Sensing that the judge might order a waiver of jurisdiction and send him to an adult court, Kent's counsel had requested a hearing on the waiver issue, a full psychiatric examination, and access to the social file which the judge would consider in making his decision. Since the statute permitted waiver only if a child was no longer a fit subject for rehabilitation, Kent's counsel was prepared to introduce a psychiatrist's evidence that Kent suffered from severe psychopathology and would benefit from hospitalization in a facility for the mentally disturbed. In other words, he *could* be rehabilitated within the juvenile setting.

According to the Court, juvenile judges don't have "a license for arbitrary procedure," and can't take actions that would be "inconceivable" for adults.

The judge never ruled on the motions; he held no hearing; he did not even confer with Kent, the boy's attorney, or his parents. The social file, which was never shown to counsel, indicated that Kent's personality structure was rapidly deteriorating, and that he was possibly mentally ill. Nonetheless, the judge waived juvenile court jurisdiction over Kent. While he claimed a full investigation of Kent's background had been made, his order cited no reasons for his decision to transfer the case to the adult court.

In the adult court, a jury found Kent innocent of the rape charge by reason of insanity but guilty of six counts of robbery and housebreaking. The judge subsequently sentenced him to jail for a period of from 30 to 90 years.

Kent's lawyers challenged his conviction all the way to the Supreme Court, where they prevailed when the Court ruled in their favor by a narrow five-to-four margin.

The dissent was brief. It merely urged the Court to send the case back to a lower court for reconsideration.

Justice Fortas's opinion for the majority was both lengthy and hardhitting. While limiting his opinion to the requirements of the D.C. statute rather than the requirements of the United States Constitution, Fortas indicated that the waiver decision must be made with procedural regularity to insure that the essentials of due process and fair treatment were met.

Fortas used strong language in overturning the juvenile court's decision. He reminded juvenile judges that statutes give them wide discretion, but not "a license for arbitrary procedure," and said that there is simply no place in our system "for reaching a result of such tremendous consequences without ceremony. . . . It is inconceivable that a court . . . dealing with adults . . . would proceed in this manner."

To provide due process, the majority held that the juvenile court should have provided Kent with a hearing, albeit an informal one, with counsel, and with access to the social records which the judge had inspected. Additionally, a statement of reasons should have accompanied the waiver order.

For Morris Kent, the decision meant the difference between a 30- to 90-year sentence in jail and a rehabilitative stay in a mental hospital. For everyone else, it was unclear.

But What Does It Mean?

It seemed that snap decisions, made without input from the child and his attorney, could no longer be made, but the effect of *Kent* nationwide was not uniform. Many judges and commentators read the opinion broadly, suggesting that waiver decisions in every state must be made in accordance with the constitutional principles of due process set forth in *Kent.* Others saw it merely as an interpretation of the District of Columbia statute and therefore inapplicable anywhere else.

Even today states are experimenting with lowered ages for juvenile court jurisdiction and other ways to eliminate the hardened, possibly nonrehabilitatable juvenile from the system. The Supreme Court, as it often does, has at least twice avoided the consideration of some of these methods.

The *Gault* decision also caused uncertainty. Some repercussions occurred fairly rapidly. Both federal and state courts, as well as state legislatures, expanded the rights of participants. Today, much of the informality and many of the abuses have disappeared from the juvenile court.

But *Gault* left many questions unanswered. The justices did not rule on two issues before them, whether juvenile courts had to keep transcripts of delinquency proceedings and whether juveniles had the right to appeal. And there were a slew of other questions not even raised by *Gault*, like whether juveniles had a right to trial by jury or were covered by the Bill of Rights' protection against double jeopardy. Some of these questions have now been answered, but many others remain unresolved.

Which Standard of Proof?

In 1970, one of the questions was answered in *In re Winship* (397 U.S. 358). Prior to that case, state statutes permitted many juvenile court judges to find guilt in delinquency cases using a preponderance of the evidence standard. In adult courts, the burden has traditionally been proof beyond a reasonable doubt.

Generally speaking, the standard of a preponderance of the evidence is met when the judge finds that the existence of guilt is more probable than its nonexistence. The beyond a reasonable doubt standard is met when a judge has an abiding belief to a moral certainty that a person is guilty.

While cynics might scoff at such legal hairsplitting, the trial judge in Winship's case candidly admitted that while he could not find the young man guilty of larceny beyond a reasonable doubt, he could find him guilty by a preponderance of the evidence. Finding him so, the judge committed the 12-year-old to the state training school for an initial period of 18 months, subject to extensions until his 18th birthday.

The Supreme Court disagreed with the New York statute. According to Justice Brennan's majority opinion, to insure fairness and due process of law, the state must prove guilt beyond a reasonable doubt in delinquency cases just as it

Most Juvenile Justice Standards Okayed

The juvenile court revolution since *Kent* and *Gault* has led to many long looks at the system and numerous suggestions for reform. One of the most important groups studying the system—the Joint Commission on Juvenile Justice Standards of the ABA and the Institute of Judicial Administration—has now come up with 21 volumes of recommended standards on almost every aspect of the juvenile justice system. According to commission head Judge Irving Kaufman, these standards try to refashion "the archaic system by which this country metes out justice to its youth."

The 21 softcover volumes, which represent eight years of study, can be useful resource materials for anyone interested in this area of law. For example, the volume entitled *Schools and Education* (available for $7.95), may be particularly valuable for those involved with law-related education. Among other recommendations, it suggests standards for the administration of special programs for handicapped children, outlines the constitutional rights of students, sets up guidelines for limiting the regulatory powers of schools, and discusses the handling of crime investigations (search and seizure and interrogations) in public schools.

Rights of Minors (available for $6.95) is another volume which may be beneficial to educators. This publication examines the complex issues of child support, explores the rights of minors to obtain medical treatment, provides policies for regulating youth employment, and covers many other issues.

At its most recent national meeting, the ABA House of Delegates approved 17 of the 21 volumes. The ABA-accepted standards—which will serve as guidelines to states looking at their juvenile justice systems—cover a broad spectrum of issues. Some of the proposed changes include requiring juveniles to be tried by juries, encouraging youths to have attorneys at all stages of judicial proceedings, minimizing parental roles in court deliberations, and adding new controls to assure the privacy of children's court records.

Four of the volumes of standards were too controversial to receive the support of the ABA at this time. For example, the commission withdrew a request that juvenile courts drop their jurisdiction over status offenders when the standard met with considerable opposition in the ABA's House.

Although some of the commission's proposals were rejected by the ABA, the ratification of the majority of its standards is an important gesture. It signifies that there is a growing discontent with the juvenile court's traditional system, which metes out justice according to the court's subjective views of what is in the "best interest" of each child. Rather, the standards support constitutional due process for people of all ages and recommend penalizing offenders according to the severity of their crimes.

The preliminary 21 softback volumes of the juvenile justice standards may be ordered from: Ballinger Publications, 17 Dumster Street, Cambridge, MA 03213. (Complete Set: $168.80; individual volumes: $5.95-$7.95. The 17 ABA-approved volumes will be available from Ballinger in clothbound next year for $351.)

—LB

must in adult criminal cases. The justices ruled in this manner because they recognized, as they had in *Gault*, that the beneficial aspects of the juvenile court could not disguise the fact that a serious loss of liberty is a possible result of the delinquency proceeding, just as it is in an adult criminal prosecution.

The majority opinion was at pains to point out that requiring proof beyond a reasonable doubt would not "risk destruction of the beneficial aspects of the juvenile process." The new standard wouldn't disturb the confidentiality of juvenile proceedings, nor affect the informality, flexibility, or speed of the hearing, nor limit a wide-ranging review of the child's social history and the creation of individualized treatment for him. What it would do is assure that juveniles in jeopardy of losing their liberty would have one of the "essentials of due process" available to adults.

Chief Justice Burger and Justice Stewart joined in a short but stinging dissent. They called the decision a regression to an earlier system that would frustrate the "legislative judgment of the States" and further straitjacket an "already overly restricted system." They pointed out that the juvenile court needed more support, more staff, and better facilities —and, most of all, "breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court."

As usual, the decision left plenty of questions unanswered. The Court specifically withheld consideration of the standard of proof in PINS cases. In fact, in later cases the justices have been reluctant to consider any aspects of the juvenile courts' PINS jurisdiction. Nonetheless, the due process standards enunciated by the Court in delinquency cases are beginning to be made applicable to PINS cases by state courts and legislatures.

A Change of Direction

In *Kent, Gault,* and *Winship*, the Court extended due process protections for juveniles. But in its most important delinquency case since *Gault, McKeiver v. Pennsylvania* (403 U.S. 528 [1970]), the Court said that due process did *not* require a jury trial for juveniles.

When McKeiver was 16, he was charged with stealing 25 cents from another boy. He requested a jury trial, but since the Pennsylvania statute did not require jury trials in juvenile proceedings, he was tried before a judge and found guilty.

The jury trial issue was not raised in *Gault* and had been avoided by the Court at least once before. The question for the Court was whether the right to a jury trial, guaranteed by the Sixth Amendment, was applicable to juveniles, and if it wasn't, whether the Fourteenth Amendment's guarantee of due process required that children be tried before a jury rather than a judge.

The Court consolidated McKeiver's case with two others from North Carolina, which had a similar law. After recounting the legal history of the juvenile court and after cataloguing its failures and abuses as well as its promises, Justice Blackmun and a majority of the Court refused to require jury trials in delinquency offenses.

They did so for various reasons. It was clear that the Supreme Court was not yet ready to abandon the hopes and ideals of the juvenile court. The majority feared that jury trials would entail delay, formality, and the clamor of the adversary system, thus effectively ending the idealistic prospect of an intimate, informal protective proceeding.

While recognizing the system's failings, the Court refused to believe that its shortcomings would be eliminated by adding all of the adult criminal trial protections to the juvenile court process. Further, they held that "fundamental fairness," the due process standard developed in *Gault* and *Winship*, did not require a jury. Administrative hearings and petit offenses were not tried before juries. And, as Justice White indicated, there was no evidence that juries find facts better than judges.

While the Court did not require juries, it did not prohibit them. Justice Blackmun acknowledged the juvenile court's authority to appoint advisory juries. He also encouraged state legislatures to continue to experiment to find a workable system, pointing out that juvenile juries could be part of that experimentation.

Many advisory panels are now making this recommendation to state governments, and some state supreme courts have found that their state constitutions require juries in juvenile court delinquency cases. But as far as the United States Supreme Court is concerned, juries are not required even where the juvenile system bears a striking resemblance to the adult system.

McKeiver raised another issue, whether there was a right to a public trial in juvenile court. In the North Carolina cases consolidated with McKeiver's, a request to admit the public was specifically denied. Since the Supreme Court affirmed the decision of the lower courts, this ruling was affirmed as well.

To Justice Brennan, writing in dissent, both trial by jury and the right to a public trial serve to protect against the misuse of the judicial system. Consequently, in his view, while states could prohibit one or the other, they should not be permitted to deny both, thus completely cloaking their acts from public scrutiny. Nonetheless, the majority of the Court ignored this issue, and preserved, at least by silence, the juvenile court's right to proceed in secrecy.

A Maybe on Double Jeopardy

The final protection in delinquency cases that the Court has considered is the right to be free from double jeopardy. In two cases, *Breed v. Jones* (421 U.S. 520) in 1974 and *Swisher v. Brady* (46 L.W. 4881) in 1978, the Court made it clear that being tried on delinquency charges did place a child in jeopardy. That is, such trials subjected him to the anxiety, insecurity, and personal strain of proceedings on guilt and punishment, to say nothing of the risk of conviction. Consequently, the Sixth Amendment's ban on double jeopardy prohibits the state from proceeding against a child a second time for acts for which he has already been tried.

However, it's not all that clear how this applies. Surely the state cannot retry a child on delinquency charges after he has been found innocent of those violations. And, according to the unanimous *Breed* decision, a child cannot be transferred to the adult court for prosecution on the same violations he's already been tried on in the juvenile court.

In *Swisher*, however, the Supreme Court sanctioned, at least as far as double jeopardy protections were concerned, a Maryland practice of maintaining a two-tiered juvenile court. Under this system, masters or hearing examiners make initial determinations that are then reviewed and possibly altered by a juvenile court judge. Does this give the government two cracks at the accused? The six-judge majority said no.

Chief Justice Burger's opinion held that the state does not require the juvenile to be tried twice, but rather has created a system in which an accused juvenile is subjected to a single proceeding which begins with a master's hearing and ends with an adjudication by a judge.

"All I know is they're trying a new system—twelve judges and one juror."

Justices Marshall, Brennan, and Powell dissented. They said the Court would not countenance this system for adults, and should not permit it for juveniles. They also raised due process objections, because a judge making the final decision has not heard the evidence and may overrule the master on the basis of a "cold record."

However, the lawyers in the case never raised the due process issue. It remains for another court, at another time, to resolve the role of masters in the juvenile court.

The Noncriminal Side of It

Most juvenile court issues reaching the Supreme Court have dealt with delinquency, but that is only part of the juvenile court problems facing us. What about neglected and dependent children, who often fall under family or juvenile court jurisdiction?

The Supreme Court has traditionally been reluctant to consider what rights children possess. In the abortion cases, however, the Court began to deal with conflicting rights within the family. In *Planned Parenthood of Missouri v. Danforth* (428 U.S. 52 [1976]), for example, the Court was confronted with a state law that required an unmarried pregnant minor to get the consent of at least one of her parents before she could have an abortion. The state argued that the law was of a piece with other "provisions reflecting the interest of the state in assuring the welfare of minors," citing statutes on the care of neglected children, child labor laws, and compulsory education provisions, among others.

However, the Court held that the child's right to privacy in this instance outweighed the state's interest in preserving parental authority and safeguarding the family unit. The majority held that "constitutional rights do not mature and come into being only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution."

In *Smith v. Organization of Foster Families for Equality and Reform* (OFFER) (431 U.S. 816 [1977]), the Supreme Court was asked to rule on a series of New York statutes governing the transfer of children from one foster home to another or from a foster home back to a natural home.

Lawyers from the ACLU Children's Rights Project asked the Court to rule that once a child had lived in a foster home for a year, the psychological tie that developed between the child and foster parents translated into a psychological family. When this occurred, they argued, the Fourteenth Amendment liberty interest in family privacy became vested in the foster family, and the child should not be removed—even to his natural family—without a due process hearing.

This plunged the Court, in its own words, into "complex and novel questions" of law. Justice Brennan's decision for the majority canvassed the issues and acknowledged the gravity of the questions, but stopped short of saying anything definitive. Rather than pinpointing the rights of all parties involved, he said that the New York procedures were adequate to protect the legal rights of the foster family *even if* the plaintiffs were correct and the psychological bonds of the foster family translated into a legal right.

This term, the Supreme Court will decide whose rights prevail when parents seek to commit their children to mental hospitals. In companion cases, *Parkham v. J. L.* and *Public Welfare v. Institutionalized Juveniles*, youngsters are challenging Georgia and Pennsylvania statutes which permit institutionalizing minors in mental hospitals without their consent or a hearing. Does the Fourteenth Amendment's Due Process Clause require more before minors can be committed?

Yet other issues remain which the Supreme Court will probably be called upon to decide in the future. How deeply, for instance, can the state intrude into the biological family to protect children? Rights to counsel, the use of social reports, and burdens of proof in nondelinquency cases are all issues which state courts and legislatures are resolving. Adequate care issues also require resolution, since in many cases the decisions in state courts have been contradictory.

The complexities of the neglect and dependency jurisdiction of the juvenile court far surpass the complexities on the delinquency side. In the latter, at least, a criminal law model existed to give guidance. In the former, the guide appears to be a body of law that does not fit squarely with day-to-day practicalities and may be lagging behind medical and psychological realities of today.

Delinquency and the Court

Major issues in delinquency cases still remain for the Supreme Court to consider. These include denying bail to juveniles and the attendant preventive detention power of the juvenile court, the existence of indeterminant sentencing, especially for minor offenses, and the entire rationale behind the juvenile court's power to incarcerate status offenders.

Additionally, right to treatment issues, being decided in state and federal courts on Fourteenth and Eighth Amendment grounds, have never reached the Court for substantive

Teachers' Favorite Materials

Update recently asked a number of teachers throughout the country to tell us about some of their favorite curriculum materials for teaching students about juvenile law. Here is a sampling of their responses.

Simulations and A-V

Clark, Todd, *Police Patrol* (1973). Pennsylvania teacher David Schreffler maintains that this role-playing game is "one of the best simulations on the market today." He finds that it is most effective when used with a police officer in the classroom. The officer can role play the offender while a group of students act as the law enforcers. Schreffler contends that a debriefing session with a police officer after such a simulation "does more than a six-week course in helping to change adolescent attitudes towards the police." ($12.50 for a game which can be played by 20-35 pupils. Order from: Simile II, 1150 Silverado, P.O. Box 1023, La Jolla, CA 92037.)

Katsh, Ethan, Ronald M. Pipkin, and Beverly S. Katsh, *Plea Bargaining: A Game of Criminal Justice* (1974). David Zitlow of White Fish Bay (Wisc.) High School, along with many other instructors who were polled, recommends the gaming approach to teaching about juvenile justice. This simulation game is designed to help students experience the pressures of overcrowded court dockets and learn through role playing about the justices and injustices of plea bargaining. Zitlow finds that *Plea Bargaining* is "easy to set up, flexible for the allotted time period, and involves everyone." ($17.50 for 18 student kits, $25.00 for 35 student kits. Order from: Simile II, 1150 Silverado, P.O. Box 1023, La Jolla, CA 92037.)

Story of a Trial (1966). St. Louis teacher Henry Tepe endorses this "oldie-but-goodie" for teaching about law in the middle-secondary grades. This film follows a petty theft case through all the steps of the juvenile justice system from arrest to sentencing. It shows how the legal system protects one's rights and should provoke active classroom discussion. (Sale: $310, rental $23. Order from: BFA Educational Media, 2211 Michigan Avenue, Santa Monica, CA 90404.)

Books and Periodicals

The Bill of Rights in Action (newsletter). A number of instructors noted that this quarterly publication of the Constitutional Rights Foundation is particularly useful for teaching about the juvenile system. Nancy Vojtik of Waukesha High School in Wisconsin feels that it provides "realistic exercises which carry through the themes discussed in each issue." Other teachers have indicated that the Fall 1974 issue on "The Rights of Children" (reprints are still available for $7 per classroom set) really helps motivate kids to learn about juvenile justice. (The cost is $25 for a yearly subscription for a class set of 35. Order from: Constitutional Rights Foundation, 6310 San Vincente Boulevard, Suite 402, Los Angeles, CA 90048.)

Clark, Todd, *Criminal Justice* (1978). David W. Schreffler, a teacher at Garden Spot High School in New Holland (Pa.) says this text is fast becoming a favorite of his for teaching students about the law. It discusses the contrasts between juvenile and adult court procedures, examines correctional alternatives, and probes student attitudes towards police authority. Schreffler finds that this text provides valuable activities such as peer teaching and role playing in order to develop varied skills. ($2.95 softcover. Order from: Scholastic Book Services, 904 Sylvan Avenue, Englewood Cliffs, NJ 07632.)

Haskins, Jim, *Your Rights Past and Present: A Guide for Young People* (1975). Marsha Gray, a teacher at Skyline High School in Dallas, finds that this student text offers excellent material for a juvenile law curriculum. It analyzes the legal rights of youths in the school, the family, the home, and the juvenile justice system. Both historical and contemporary cases are cited to teach young people how the law affects them. ($5.95 hardbound. Order from: Hawthorne Books, 260 Madison Ave., New York, NY 10016.)

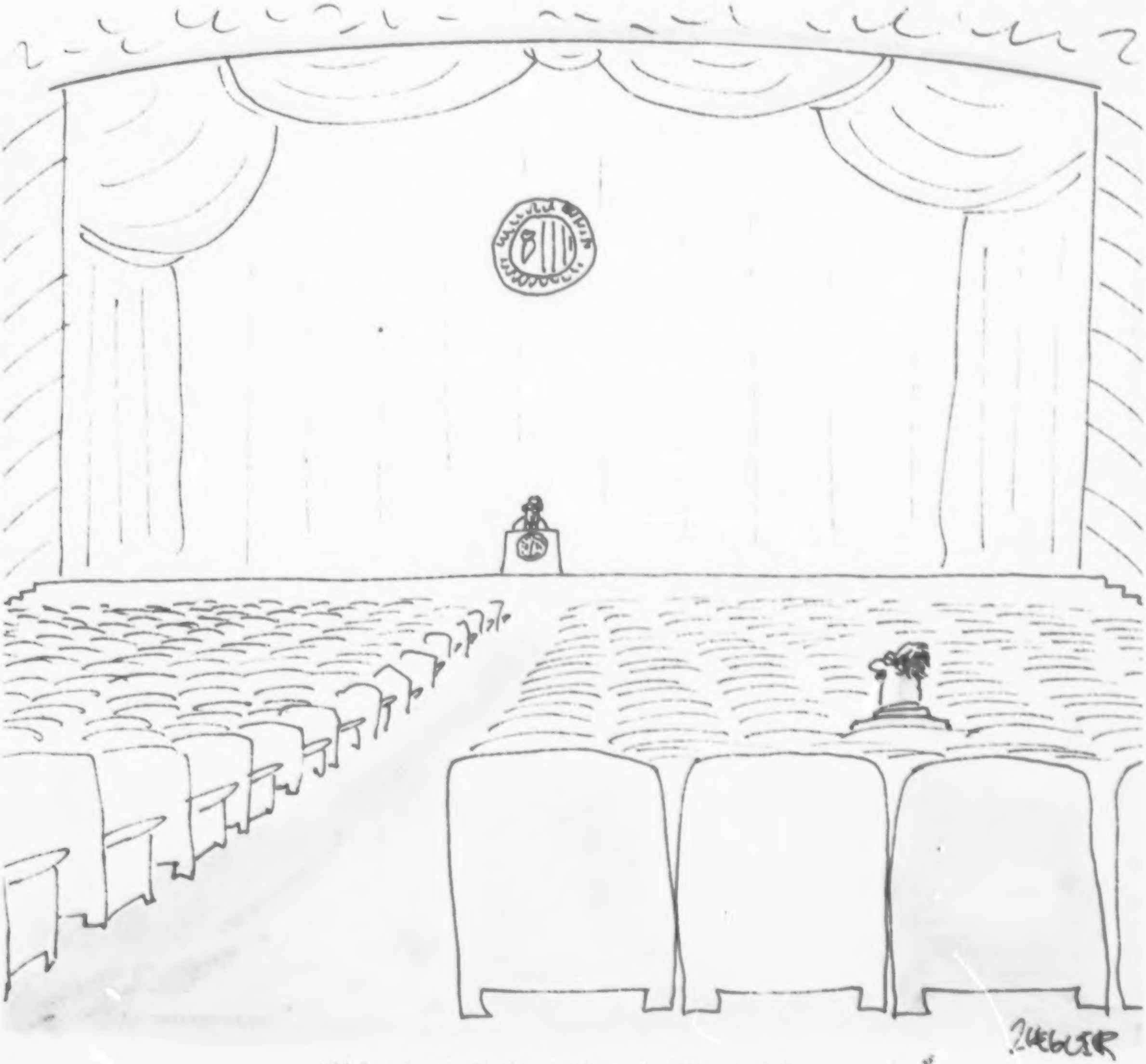
Riekes, Linda and Sally Mahe, *Juvenile Problems and Law* (1975). Several teachers said they were extremely pleased with this text and silent filmstrip on juvenile justice. Henry M. Tepe, a teacher at Southwest High School in St. Louis, points out that the book "has interesting lessons on problem solving, juvenile procedure, and issues facing the juvenile court." Harold Zimmerman, a seventh grade teacher at Brittany Middle School in University City (Mo.) feels that it is "well laid out" and particularly likes the filmstrip. ($4 softcover. Order from: West Publishing Co., 170 Old Country Road, Mineola, NY 11501.)

consideration. If legislators and administrators do not respond in these areas, the Court will undoubtedly be called upon to resolve them.

But the process of litigation is slow, and the Supreme Court chooses its cases carefully and for its own reasons. If swift progress is to be made in expanding protections in the juvenile court, advocates would better serve their clients by concentrating their efforts on legislatures rather than waiting for the Supreme Court to rule.

There is no question that the problems are many and difficult to solve. But the cost to our children is too great to ignore. We must remember that the measure of our society is the manner in which we treat our most vulnerable citizens. Growing up is an awesome experience, filled with wonders and uncertainties. It is up to us to see that those fragile years are years of promise and hope and not years of sadness. □

Wallace J. Mlyniec is an attorney who for the past six years has directed Georgetown School of Law's Juvenile Justice Clinic. He is a consultant to the National Advisory Commission on Juvenile Justice and to the social worker training program at San Jose State University in California.



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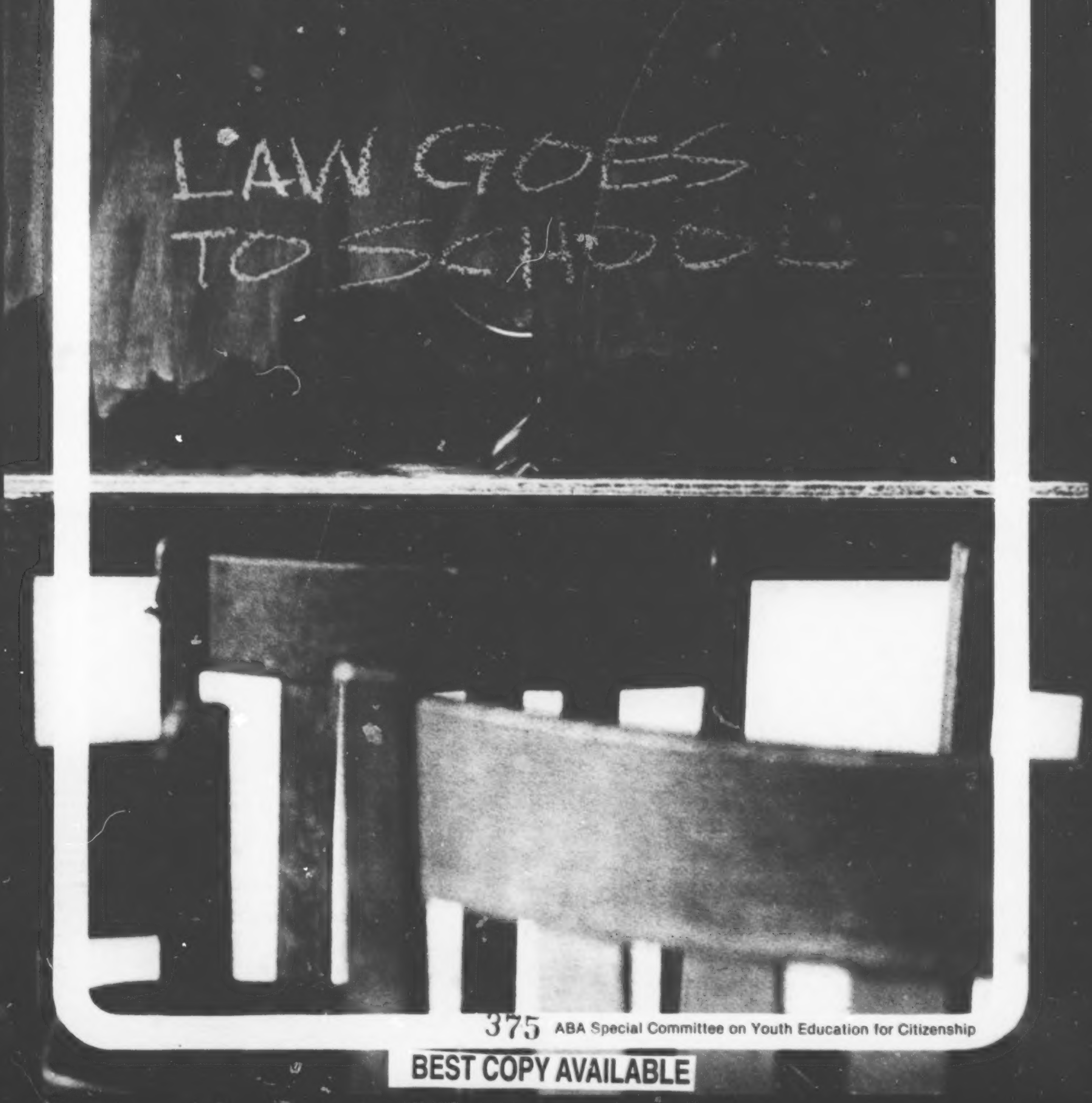
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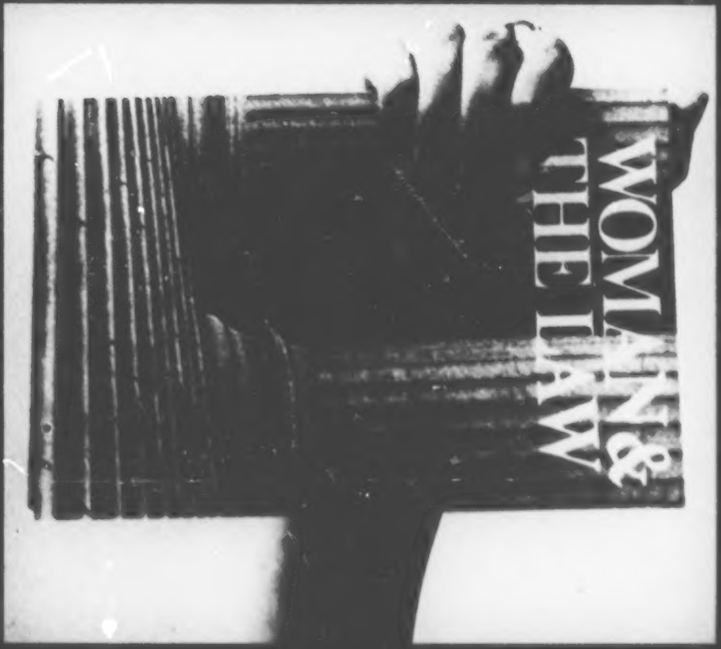

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contents

Volume 3, Number 3 Fall 1979

4
Supreme Court Report
25 Years of Controversy

8
Interview
"You Must Dasegregate!"

11
Law Goes to School
Justice Is for Kids, Too

14
Classroom Strategies
Teaching About Student Rights and Responsibilities

17
Views from Abroad
What? Students Have No Rights in Canada?

20
Update Looks Back
Life in a Fishbowl

24
Opposing Views
Is Law Polluting the Schools?

26
Court Briefs
New Decisions to Reckon With

33
Newsclips

35
Up & Coming
Toward Bicentennials of Significance

36
Anatomy of a Lawsuit
A Legal Battle Ends

41
Curriculum Update
New Materials on the Market

51
Practical Law
Wheels

Credits
Photos: cover Don Johnson; pages 5 and 8/9, Paul Conklin; pages 14-15, Jean-Claude LeJeune; pages 17, FPG/Myron Sutton; pages 20-21, FPG/Orville Andrews; pages 26-27, John Neubauer; pages 28, Stan Bratman and Mimi Forsyth; page 29, Ken Love; pages 36-37, 39, Kimberly Lile.

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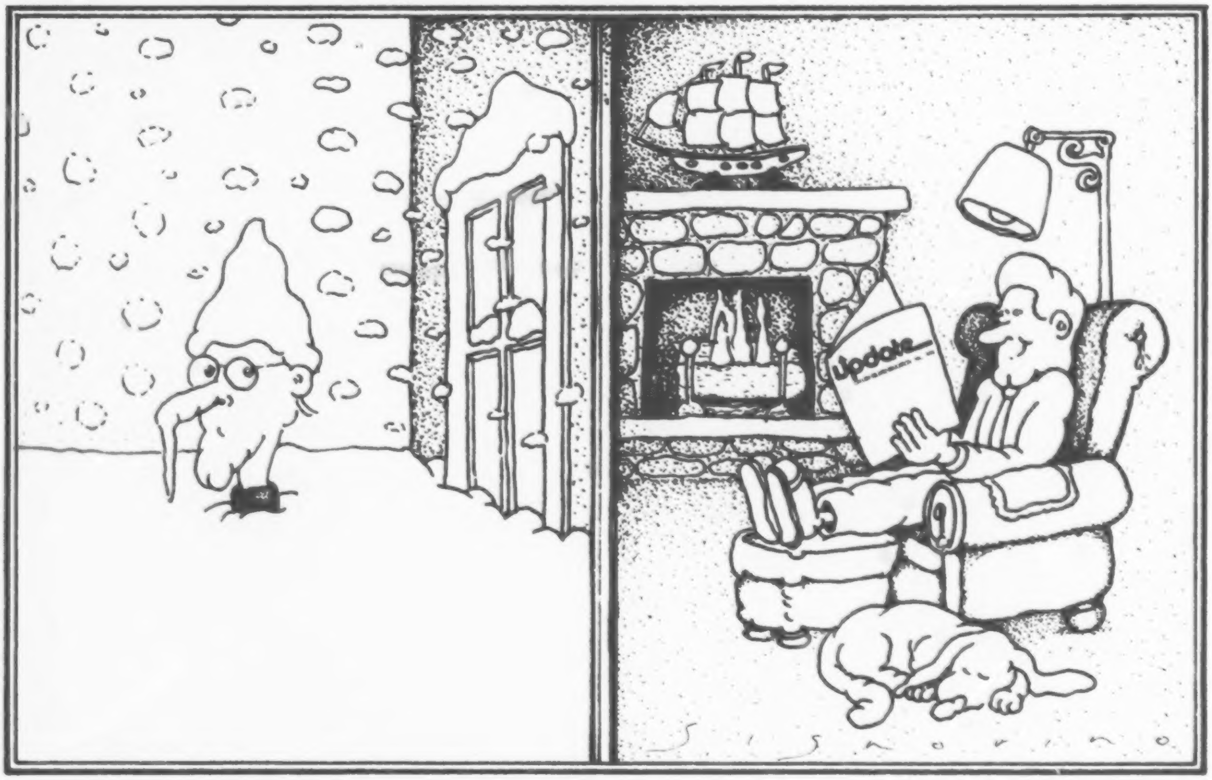

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In a special section, **Update** looks at this revolution in law and schooling—what's happening now, how we got here, where we'll go from here, and how these issues can help you in your teaching.

This **Update** also marks the debut of a brand-new feature, a section on practical law that your students need to know. In our inaugural section, we'll take a look at the dizzying legal ramifications of kids and cars.

Of course, we still offer our continuing features. We report on a bevy of recent Supreme Court cases, finish our coverage on the anatomy of a lawsuit, and give you a bicentennial challenge. Enjoy.

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SUPREME COURT REPORT

25 Years of Controversy

Recurring school desegregation battles provide a glimpse of Supreme Court decision-making

Ivan Gluckman

Twenty-five years ago, the Supreme Court delivered its decision in the case of *Brown v. Board of Education* (347 U.S. 483 [1954]). Certainly, it must be regarded as one of the Court's most far-reaching and well-known decisions. But *Brown*, important as it is, did not leap suddenly upon the judicial stage to change our nation, nor did it mark the end of judicial activity affecting segregation in public schools.

Like most other areas of the law, school desegregation represents a continuing process of change and development of ideas, in response to the arguments of men and the perceptions of jurists. As stated by one of our greatest jurists, Oliver Wendell Holmes:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.
>
> *Common Law* (1881)

Because of its scope and effect in American life, desegregation offers a good opportunity to analyze how the judicial system operates. The long struggle to desegregate the schools has seen courts experiment with many approaches to the problem. Courts have at times gone slow and given districts leeway to fashion their own solutions, but at times they've imposed firm guidelines on recalcitrant districts. The remedies themselves have varied from the color-blind policy enunciated in the first decisions to the color conscious remedies of later decisions, in which districts are required to show that schools contain an acceptable number of students from each race. Are such diverse approaches contradictory? Perhaps. Certainly they are not neatly and formally logical. Rather, in Justice Holmes' words, they represent the "experience" that informs the law, that enables it to be a living, changing organism, always seeking ways of applying old principles to new facts.

Preparation for Change

Attempts to secure fair and equal treatment for persons of all races has been continuous, of course, ever since the end of slavery in 1865. These efforts accelerated during the twentieth century, especially during World War II, which promoted a stronger sense of community in America than had been felt in many years. When the war ended, many successful efforts were made to bring down racial barriers, but attempts to bring about change through legislation were blocked by strong political opposition in Congress. Accordingly, civil rights leaders made the decision to launch a major campaign through the federal courts.

By the early 1950s much had already been accomplished. The Supreme Court had repudiated racial segregation in a variety of areas of life: housing (*Shelley v. Kraemer* and *Hurd v. Hodge*, 334 U.S. 1 and 24 [1948]); employment (*Steel v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 [1944]); and transportation (*Henderson v. United States*, 339 U.S. 816 [1950]).

Some progress had even been made in education. The question was whether the Equal Protection Clause of the Fourteenth Amendment forbids segregation in the schools. Did "separate but equal" facilities satisfy the Constitution, or did the Constitution require equal access to the same facilities?

In the early 50s, the doctrine which permitted "separate but equal" facilities continued to be upheld, but it had been seriously weakened by a series of attacks. In *Sweatt v. Painter* (339 U.S. 629 [1950]), for example, the state of Texas had created a separate law school in response to the attempts of a black applicant to enroll at the state university. But the Supreme Court refused to sustain the state's action, saying that even if the physical facilities offered were in fact equivalent, other qualities "incapable of objective measurement" had to be considered. These included "standing in the community, traditions and prestige" and the factors of "isolation" and "academic vacuum removed from the interplay of ideas and the exchange of views" with other students.

In *McLaurin v. Oklahoma State Regents* (339 U.S. 637 [1950]), decided at the same time, the Court ruled against the University even though it had admitted the black plaintiff to its graduate school and eventually permitted him to use the same classrooms, library, and cafeteria as other students. But the administration had insisted that he sit at a table or desk designated for "colored" students, and the Court ruled that such separation from other students was impermissible because it would "impair his ability to study, to engage in discussions and exchange views with other students."

Despite the rulings in these and other cases, the Supreme Court had still not moved against segregation in schools below the university level, nor had it specifically overruled the separate but equal doctrine established in the case of *Plessy v. Ferguson* (163 U.S. 537 [1896]). Indeed the Court specifically said in the conclusion of its opinion in *Sweatt v. Painter* that it was unnecessary for it to reexamine the *Plessy* doctrine. Nevertheless, it was clear that the Court's rulings on specific instances of racial discrimination in education had severely weakened that decision.

The *Brown* Thunderbolt

The *Brown* case was actually only one of a number of cases brought by the

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NAACP's Legal Defense Fund as a concerted strategy for eliminating segregated public schools. As such, these cases were widely recognized as something more than the previous cases, important as they had been. For one thing their scope was far greater. If successful they would affect almost everyone in the country, and not merely a relatively small number of university students.

For this reason, the Court moved very slowly in dealing with them. It heard arguments in 1952 and rearguments on a number of questions in 1953, and did not decide the case until 1954. Even after the 1954 decision, the Court heard reargument in 1955 on the form its decrees should take. The Supreme Court was therefore well aware, as was most of the country, that the decision in *Brown* and related school desegregation cases would be no ordinary decision, but rather a momentous social and political event.

Many commentators have indicated that it was this awareness which led the Court to take as much time as was necessary to produce an opinion which could draw the unanimous support of all of the Justices, and one which was remarkable as well for its simplicity and clarity. Clearly, the Court was not just addressing the parties or even the legal fraternity, but all of the nation, and perhaps the world.

The fundamental importance of the decision was, of course, its specific abandonment of the separate but equal doctrine, not only in education but in all public services. The Court found that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." To separate students from others solely because of their race, the Court continued, "generates a feeling of inferiority. . . that may affect their hearts and minds in a way unlikely ever to be undone." Therefore, the Court held that segregated students "are deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

An equally important part of the decision was the Court's recognition of the fundamental role of education as a matter to be protected by the courts. Some of its words on this subject are worth quotation:

> Today, education is perhaps the most important function of state and local governments. . . .It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

This sweeping language not only provided the basis for the serious intervention in the lives of millions which desegregation represented, but also the basis for the many other educational decisions which have flowed from the federal courts in the 1960s and '70s. It is also a good example of the way in which the judicial process, itself changing under the pressures of social change, produces still further changes in society.

Law must be stable and yet it cannot stand still —Roscoe Pound (1923)

Despite the Court's unanimous and sweeping 1954 decision, the road to complete desegregation of the public schools was, of course, far from open. Court battles continue today, 25 years later. Does this indicate that school districts have ignored or evaded the Court's decree? To some extent, they have. Has the Court itself backed away from its original commitment? Some scholars would say so.

The answers to these questions are not simple, and cannot be categorical. The fact is that every broad decision of the Supreme Court, like those of the Congress and the executive branch, must be interpreted through later cases as the implications of the decisions reveal themselves in different contexts. New information and changing public attitudes also play their part in determining exactly how legal doctrines and court decisions will be applied. The *Brown* decision and its many progeny offer an excellent example of this process.

Desegregation since *Brown*: The Machinery of Change

One year after its initial decision that public schools could not be constitutionally segregated, the Supreme Court considered the more difficult question of how its order was to be carried out. It was this second *Brown* decision (349 U.S. 294 [1955]) which contained the famous and puzzling directive that the desegregation process should proceed "with all deliberate speed."

In stating its intention in this somewhat peculiar manner, the Court was demonstrating its awareness that the process would not be a simple one. It provided that the lower federal courts should oversee the process, and that in doing so, they might take into consideration, "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas. . .and revision of local laws and regulations which may be necessary in solving the foregoing problems." Nevertheless, the courts were directed to see that "the defendants make a prompt and reasonable start toward full compliance."

The second *Brown* opinion brings to light the many difficulties of our judicial system in producing change, especially where the issues are large, as they surely are in school desegregation. The Court's directive in *Brown* specifically ran only to those school districts who were defendants in the cases. But where the legal issue is one involving the U.S. Constitution, all citizens and governmental entities similarly situated are expected to follow the Supreme Court's directive. Even so, the process is not automatic, and the Court has no "troops" to enforce its orders. Only subsequent suits in federal district courts will do that—and this takes time.

The Supreme Court's order itself specifically provided both time and reasons for delaying compliance, and these opportunities were taken full advantage of over the years following the 1955 order. Advocates of desegregation had to contest each step in court. They often felt the process was overly difficult, especially considering that the Supreme Court had spoken so unequivocally. Other observers believe, however, that the delays inherent in the process were and are neces-

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sary to allow the necessary human adjustment to social change.

In some cases, of course, the refusals of local authorities to comply were clearly willful. School systems vied with each other in coming up with creative evasions. In other cases, as in Little Rock, Arkansas, attempts of local school authorities were not supported by the state government, which claimed that the public wouldn't permit compliance.

But in all cases, the courts stood firm. Finally, in 1964, the Supreme Court said, "The time for all deliberate speed has run out, and that phrase can no longer justify denying these Prince Edward County children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia." (*Griffin v. County Bd. of Prince Edward County*, 377 U.S. 218 [1964]).

How to Measure Compliance?

Besides coping with attempts to evade desegregation, courts were confronted with the difficult problem of deciding which methods were acceptable in carrying out the mandate and which were not. Several cases came before the Supreme Court in 1968, for example, involving districts which sought to desegregate through a program of voluntary transfers. These so-called "freedom-of-choice" programs were challenged on the ground that, regardless of their intent, they did not, in fact, achieve desegregation. In *Green v. County School Board* (391 U.S. 430 [1968]), the Court unanimously rejected the freedom-of-choice plans, and stated that the measure of an effective desegregation plan could only be the extent to which it actually achieved desegregation of the schools.

The Court's decision in *Green* was important for another reason as well, although this was not immediately realized at the time. For the first time, in this decision, the Court declared that school boards have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." This not only elevated the responsibility of local school officials, but introduced a term—"affirmative duty"—which was to play an important part in later efforts to eliminate racial discrimination from many other aspects of our society. Again, the ramifications of court decisions are often wide and difficult to foresee.

Gradually, the federal district courts, charged as they were with overseeing the execution of the Court's general order, found themselves more involved in the details of school administration. Redistricting, reassigning students and faculty, and above all planning transportation became matters of everyday concern to judges, who found themselves involved for months at a time in desegregation cases. Meanwhile, Congress had become involved in the process with the passage of the Civil Rights Act of 1964, and the executive branch with administrative regulations pursuant to the legislation.

With the involvement of federal administrators in the process, the Court's holding in the *Green* case took on new importance. If desegregation remedies could only be judged on the basis of their actual results, then standards had to be developed and applied. While there was much argument as to whether these numbers were "goals" or "quotas," failure to meet them determined whether or not the school district was in compliance with the law.

The great tides do not turn aside and pass the judges by
—Benjamin Cardozo
(1921)

No Let Up for the South

Many thought that with the retirement of Chief Justice Warren and other Justices regarded as liberals on the Court, the pace if not the direction of the Court's action on desegregation would change. So far, that hasn't been the case, at least as far as the South is concerned. Between 1969, when Warren Burger was appointed Chief Justice, and June of 1977, the Supreme Court decided 14 cases involving school desegregation in the southern states. With only one exception, all of the decisions were unanimous, and their content and tone clearly reflected a desire to end all vestiges of the dual school system in the South.

Probably the most sweeping of these decisions came in *Swann v. Charlotte-Mecklenburg Board of Education* (402 U.S. 1 [1971]). In this case, the county-wide school system was a very large one and had remained largely segregated by 1969, despite a four year-old desegregation plan relying on geographic rezoning and a free-transfer provision. When the district failed to produce a new plan, the federal district court imposed one. Among other features, this plan grouped several outlying elementary schools which were largely white with black inner city schools, and required the district to engage in large-scale busing until the schools reached a quota close to the proportions of blacks and whites in the overall community.

The school board believed that the court had exceeded its authority and refused to comply. But in its unanimous decision, the Supreme Court fully supported the district court, saying that when a local school authority failed to devise effective remedies, the district courts have broad discretion to fashion one that will work. Commenting specifically on the busing part of the plan, Chief Justice Burger said, ". . . bus transportation has long been an integral part of all public education systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."

Resistance in the North

In many ways, the *Swann* case represents the high-water mark for the Court's support of judicial intervention into school desegregation. Since that time, the courts have continued to enforce desegregation, but the Supreme Court has shown increased wariness about the scope of these orders. Some would say this merely reflects the more conservative views of members of the Court. Others would say that the Court is reacting to increased resistance to court orders by the electorate.

Clearly, the widespread use of busing which began with the *Swann* case played a part. A Gallup survey taken at about that time revealed that 76 percent of respondents opposed busing, almost as many in the East and Midwest as in the South. Even blacks opposed busing, though by a narrow margin of 47 to 45 percent. In his book *Affirmative Discrimination,* Nathan Glazer spoke for many critics of busing: ". . . a legitimate, moral, and constitutional effort to eliminate the unconstitutional separation of the races . . . has been turned into something else —an intrusive, costly, painful, and futile effort to stabilize proportions of races in the schools through transportation."

This growing dissatisfaction with busing as a remedy is also evidenced by the record of Congress in 1972. In that year, at least 59 constitutional amendments addressing school desegregation and busing

(Continued on page 48)

Walter M. Perkins

"'You Must Desegregate!'"

How one school administrator made the court order work

Historians will remember 1968 as one of the watershed years in American race relations. Martin Luther King was assassinated and the cities erupted in violence. Led by George Wallace, law-and-order candidates ran strong. School busing was a hot issue in many parts of the country.

In the mid-summer of 1968, one school district came head to head with racial turmoil and court-ordered change. School District 151, a small (six school) elementary district 10 miles south of Chicago, became the first northern district to be mandatorily desegregated by a federal court order.

Although popularly known as the South Holland School District, 151 is actually composed of parts of three separate racial and ethnic communities. South Holland itself is divided between a partly desegregated industrial and commercial area and an all-white elite area. Harvey Highlands is virtually all white. Phoenix is virtually all black and is geographically separated from the rest of District 151.

Tom Van Dam became superintendent of 151 only a few weeks after the order went into effect. He came from the Chicago system, where he'd been principal of an inner-city high school and held other administrative posts. It was his job to somehow make desegregation work for these diverse communities.

At the time of the desegregation order and afterward, community hostility was high and the necessary support low. A long court fight against the order deepened hostility to the desegregation decree. As a result, white students left District 151 schools in droves, and voters repeatedly refused to approve referenda that would have increased the low tax rate in the district.

In this interview with *Update,* Tom Van Dam tells how the district became a model of successful integration and gives his opinion on the courts' involvement in desegregating the schools.

Update: Why were three such disparate communities as Phoenix, South Holland, and Harvey Highlands combined into a single school district?

Van Dam: The boundaries were originally created by the Cook County Board of Trustees long before any residential boundaries were created.

Update: Why was it hard to desegregate District 151?

Van Dam: Basically what has happened here is that this school district was desegregated by court order without any pre-planning for community or staff. It was done instantly, without any money given by the federal government for teacher in-service training or community preparation. The judge issued the order in July and it went into effect in September, 1968. I became the superintendent in August, 1968 and had to implement the order with almost no planning.

We lost a third of the staff here who just literally quit. A number of people were hired who had no classroom experience. They called them provisional teachers. We were cross-bussing kids, white and black. In addition, we had to deal with a very hostile community.

Staff was desegregated completely, without any training or preparation. So we began from scratch in an extremely hostile, chaotic situation. Prior to desegregation, the reading scores of the students within the school system were not good. A number of black and white students were reading below grade level.

What we had to do was first straighten out staff and create programs that individualized instruction in the various subject matter areas. We also had to develop feelings about students and parents.

Update: How did you go about these objectives?

Van Dam: We worked very hard to bridge the gap between the white and black parents and white and black staff members. That's very hard to do when you are dealing with the basic prejudices that exist in the country. The black community had considerable problems over a period of time and therefore was certainly suspicious of the white administration. The board, at that time, had quite a few members on it who did not have their children in the school system. They had taken them out and put them in private and parochial schools. We lost over a thousand students to private and parochial schools, resulting in a loss of state aid. We had a terrible financial problem that still exists.

However, over a period of 11 years we've developed the kind of program where now, according to the Stanford test data, on a districtwide basis we have almost reached national norms in reading. The white students' median is above national norms. While black students are still below it, they are certainly catching up. If we keep going at them, in time they will be brought up to national norms.

Another factor is the fact that our students are generally quiet and orderly. I think we've suspended only one student during 11 years. In addition, our staff does many things for their students that I never even know about—things that they go out of their way to do for kids. You know, just because they are interested in children.

Update: Does data indicate that there is a causal relationship between student/racial composition and actual achievement?

Van Dam: I think that learning, for anybody, is definitely related to his experiential background—the kind of experiences he had as a child, even before starting school. I firmly believe that no one race or nationality has the inside track on intelligence. I think we are all effective in certain basic areas, with some of us being better in certain areas than others. It behooves us to discover these areas and to open paths for development of these potentials in children and everyone else.

Update: Could you give us some examples of successful things that you have done that some other school districts have failed to do.

Van Dam: Well, with desegregation, we mixed bodies, white and black, in this school system for a period of over 11 years. Immediately people think of desegregated schools as being chaotic, violent, having lower standards. This has not occurred here. For one thing, we still maintain the right to administer corporal punishment in this school system, although it is very seldom administered. But students are aware of it.

We've got teachers that have developed instruments for keeping track of every child in reading, math, and all other subject matter areas. Each student, parent, and teacher signs a contract yearly saying what they'll do in terms of achievement, behavior, and other educational-related areas.

We maintain comprehensive profiles on each student so that we know about him in terms of his interests, background, feelings, family, hobbies, and other pertinent areas. We go out of our way to develop programs for him and to make school a happy and interesting place, yet a place where there are demands put on him to learn. That kind of relationship, I think, is very effective in maintaining control.

Update: Are the implementations that your district has made easily replicable?

Van Dam: I think so, much of it is. I think the success of desegregation, or of any school system, is to individualize your instruction and know your children. This really is one of the basic failures, in my opinion, of the American high school. Teachers are still teaching to groups *en masse*. Maybe that's why they've got a control problem, because they don't know their student body.

Update: It is true that the South on the whole has made more progress in desegregation of schools than the North?

Van Dam: Yes, I think so. In talking with some of my colleagues from the South, I feel that perhaps their relationships with minority groups are more open. They are on a more sharing idea plane, whereas in the North things are much more subtle, and therefore perhaps more insidious and difficult to combat.

Update: The courts have been heavily involved in education since the Brown decision in 1954. Does your experience indicate that educators resent court involvement in education?

Van Dam: The problem with the courts, or any judge—we had Judge Julius Hoffman [of Chicago conspiracy trial fame]—is to make decisions and then think that they have achieved something great while leaving all of the administrative problems to other people. I think Judge Hoffman has been intelligent enough to leave us alone and not interfere in the administration of the school system because he knows that we have done very well here. However, he has not helped us. His abusive attitude has, in the past, at least when you go back 10, 11 years, really created a real schism in the community. All persons involved were sometimes abused during the proceedings by Judge Hoffman. I think it would have been much wiser if he had just listened to them talk and still made the same decision. We would still be where we are at, but not with the kind of community hostility that we had to deal with.

Hoffman has done nothing toward helping this community. He took all of the credit and deserved none. Hoffman created a lot of hostility among people who normally would have supported desegregation. Among other things, he purposefully kept a lot out of the record that should have been there. At times he prompted the federal attorney to object and then he would sustain the objection.

Update: What particular problems does desegregation of personnel cause?

Van Dam: I think it's good. I think one of the pluses of desegregation is that it gets rid of staff who are incompetent and cannot do the job. It breaks up all the old liaisons. It forces staff to reorganize, to rethink, to redo its program, and that's good. I like it.

Update: Do you favor mandatory or voluntary desegregation?

Van Dam: I think mandatory is necessary in some cases, although I believe voluntary desegregation is preferable. I think it's good when a community realizes its responsibilities and moves to do it on a voluntary basis. It's much wiser to go that way than mandatory, because you maintain control of the system. The board, teachers, and administrators can change things.

If it becomes mandatory, with court involvement, it freezes the system and forces you to function within the mandates of the court order, which often aren't very wise. In our case, the judge divided the black community up arbitrarily, block by block. The problem with this approach is that affluent kids who have deep experiential backgrounds tend to live in one area, whereas poor children with multiple problems live in another area. So the school that gets the poor kids with all their problems inherits a number of problem children while a school that by court order gets this other section gets fewer problem children.

It is much wiser when you scatter your problem children between schools. In that way, they get much better service and more individualized help. It's just a matter of geographics. Only the school people know the areas, and how that school system should be divided and administered. When you get a court going in and doing it cold-bloodedly, it causes more problems.

Update: Is the district still under court order?

Van Dam: Yes, District 151 is still under a continuing court order. We remain in what's called the primary state.

Update: What duties must you continue to fulfill under this primary order?

Van Dam: We still must make biannual reports on faculty/student ratios and faculty assignments, the school calendar, and the overall physical state of the schools.

Update: How do you move from the primary to the secondary part of the order?

Van Dam: It would be necessary to appeal in order to do that. We have chosen to remain in this status because, in reality, it's not that much trouble making out the reports.

Update: What's your present student and staff ratio?

Van Dam: We have 48 percent black students and 43 percent black staff. There are minor fluctuations but that's how it stands now.

Update: What major problems were posed for you with School District 151 appealing the 1968 court order and you, as an employee of the Board, trying to implement it?

Van Dam: A major problem was money. As long as we appealed we could not get funds from HEW for in-service or anything else. We had to create a desegregation program without any money from the federal government.

Update: Were there any personal tensions between you and members of the community during this time?

Van Dam: No, neither I nor my staff had any problems with the community. Not living in the community was a personal advantage to me. I believe that these people have great faith in the democratic process and the courts.

Update: What is your relationship with the community today?

Van Dam: I think the feeling of the community is that I've done a fairly good job in a difficult situation. People thought the district would fail, and it's become a good quality program.

Update: What effect do the repeatedly defeated tax referenda have on District 151?

Van Dam: To date there have been 13 defeated referenda. The community's way of getting back at Judge Hoffman has been their failure to support these referenda. We are presently running a 1979 school system on a 1967 tax base. As a result we have had to cut staff and seek other methods of funding. Competitive grant awards comprise 25 percent of our income, as state aid is very meager. We have even checked out all local property to make sure that they're on the tax rolls.

Update: What is your opinion of lawyers and judges based on your experience.

Van Dam: Lawyers and judges, either because of their personal school experience, or the fact that they have children, often make assumptions that they know how to run schools. After desegregation takes place they often tend to ignore the importance of staff training and individualized instruction in the development of a quality school program. They think that moving bodies and changing boundaries brings about desegregation, when in effect you create monstrous problems for schools and teachers. Our problems aren't the kids but the adults. Once you move bodies and haven't developed a program, you're dead.

Update: On the basis of your experience, what would you say are the advantages of desegregation?

Van Dam: In a desegregated school system you have the tools for developing a much better school system than in a segregated system. Prior to desegregation, you've got people functioning who can get away without really being competent in certain areas because either the impetus isn't put there by the administration or there are forces existing causing that staff member to function ineffectively.

Once you desegregate, you've got a mixed student body, which means you can no longer shoot to the middle of the class. You've got to be able to know where every child is, you've got to be able to develop better programming because it breaks up all the old liaisons.

People that work in the school district think that they have a lease on schoolroom number 16 for the next 40 years. When you desegregate, all those leases are broken. Nobody has a lease on anything. At that point, the staff has to sit down and develop a program. It's a healthier situation.

Update: Dr. Van Dam, are there any other comments that you would like to make, any particular axes that you have to grind on the record?

Van Dam: No, no axes to grind. We feel we're really trying to do a job with kids, and I would like to see every child functioning at his peak. ☐

Walter M. Perkins has a law degree from DePaul University and a journalism degree from Bradley University. He most recently worked as a Senior Vocational Rehabilitation Consultant for the Illinois Division of Vocational Rehabilitation, and is presently an Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

LAW GOES TO SCHOOL

Justice Is for Kids, Too

A school ombudsperson shares the tricks of the trade

Stuart Goldblatt

John was pretty upset. "I told him I just spent $900 on a special paint job," he explained, "and then the damn gate bangs shut on the side of my car when I'm leaving the parking lot. The school should pay for the repair! But Mr. H said the school wasn't responsible—and, anyhow, what was I doing out of class during the second period? (Expletive deleted.) I feel like bustin' something up!"

"Wait a minute, John," I replied. "I don't really know what the story is on insurance for that sort of thing—but I'll find out, I promise. Meantime, describe just what happened. If anyone else saw it, send them to me. And get an estimate from a body-repair shop, so I know what I'm talking about."

It was October 1976, shortly after I had opened shop as "Student Ombudsperson" at Northport (N.Y.) High, and John was my first real "client." I went out to the parking lot and looked at the dents and scratches on his customized Camaro; then I checked the offending gate just as two custodians were fastening it so that it couldn't swing shut again.

But when I tried to get information about the district's insurance, I found myself referred from one office to another, and back again, until I began to feel unwanted. In response to my query, I first was told that the district's policy didn't cover this sort of incident; in view of our $26 million budget, I found that improbable.

A second person conceded that such insurance did exist, but cautioned me that if I started filing claims for every kid in school, the premium would go up and angry taxpayers would rebel. "Well," I replied, "I don't really plan to drum up multiple insurance claims—but John seems to me to have a legitimate gripe, and I mean to follow it up."

After one or two more dead-ends, it turned out that Mr. O was the man to see, and he was helpful. So we had statements by John and a witness notarized, and we filed a claim with the district's insurance carrier. Six weeks later, John received a check for $172.80. And I received a letter from John, thanking me. "Step down, brother! Next case. . . ."

Setting Up the Program

The Student Ombudsperson is one feature of Northport High School's legal program, directed by Thomas O'Donnell. In 1976, through O'Donnell's efforts, the district received a three-year E.S.E.A. Title IV-C Developer Grant, which created Project P.A.T.C.H.—Probationary Adjustment Through Community Help. The grant made possible the further development of an existing imaginative law program, the establishment of an in-house student court—in which students partcipate as plaintiffs, defendants, jury, judge, and lawyers, and exercise authority over school-related conflicts—and the creation of a Student Ombudsperson.

Since there was little precedent—none, probably—for a rookie high school ombudsperson to follow, my role and the procedures I would follow were not precisely defined when I started. That was the first task. Then, with O'Donnell's help, a campaign followed to win acceptance of the ombudsperson by the faculty and administration. (With a few exceptions, staff members have been supportive of the program.)

My basic premise was—and is still—that my function is to help students. *Any* complaint or problem—academic or nonacademic—may be brought by a student to the ombudsperson. I investigate students' grievances, seek answers to their problems—and defend students' rights.

Opening the Complaint Window

In the weeks which followed John's first complaint, other students came to me with their problems. (By the end of the second year, the number of cases handled by the ombudsperson had reached over 100.) Some were trivial and easily disposed of; others proved complicated and difficult to resolve.

Most often, cases fell into two categories: complaints about "unfair" disciplinary action by administrators; and complaints about the policies or actions of individual teachers. For example:

- Mike was suspended for "loitering" alongside the school building during a free period. Conferring with the Assistant Principal, I suggested that the student had, in fact, broken no existing school rule, and that the "referral" turned in by the security guard seemed vague and contradictory. The suspension was revoked.
- Janet's parents received an "interim report" from a phys. ed. teacher stating that her passing grade might be in jeopardy because of two class "cuts." According to Janet, she had been present on one of the dates in question, when a substitute teacher had taken attendance; on the second occasion, her mother had picked her up at school before her gym class because she felt ill. At the attendance office I discovered that Janet had yet to cut a class in high school. So, later that day—between volleyball games—I explained Janet's story to the teacher and asked her to rescind the cuts. No way! Kids today are going to hell in a hand-basket, was the gist of her response. Look at the way they'd "trashed" the nation's capitol a year or two back! Well. . . I called the youngster's mother and asked her to send me a note confirming Janet's account. Then I brought the letter to the Director of Athletics and explained the matter to him. "I don't want to overrule a teacher," he said, "but I have to accept the mother's word. Don't worry; I'll take care of it. The kid won't be penalized."
- Nancy spoke to me on behalf of another student—Sally—who, it seemed, was terribly upset about being picked on by a teacher—namely me! Jeez! I straightened out the matter, I think. (Sally was very talkative—and very sensitive, too, I guess. "Sorry, Sal," I said, "but—in my sunset years—gimme a break, will you. Now and then, shut up!")

A number of personal and legal problems were also brought to me. One youngster needed $10 to buy supplies for a gourmet cooking class. I could only offer her a long-term, low-interest loan; luckily for me, she declined it. Another student had received a summons for "loitering" with a friend in a parking lot. Happened that the officer also found some pot in the friend's van. "Do you have any prior record?" I asked. "If not, it probably won't amount to more than a fine. But maybe you ought to check with a lawyer."

In other instances, too, I've referred the troubled student to someone who might be better able to help than I. I am not, after all, a lawyer, counselor, psychiatrist, or banker. But I kept track of those cases, to make sure they were resolved; if I seemed to be just passing the buck, I would be likely to lose the respect of my constituents.

Disputes Between Students

Recently, an angry young woman asked for my help in recovering her down jacket which she had left, a week earlier, in the school cafeteria. When she realized a few moments after lunch that she had left it and returned to the cafeteria, another student was wearing the jacket and insisted it was his. The Assistant Principal, after interviewing both students, had decided that he couldn't be sure whose jacket it was, especially since the alleged thief promised to produce a saleslip to prove his ownership. The next day, I asked for the saleslip and took it downtown to the store it had supposedly come from. "Sorry," said the manager, "not my saleslip. Besides, I don't even carry those things."

After the crestfallen young man had returned the jacket, I asked the Assistant Principal to allow me to resolve the matter rather than suspend the student. Following a long talk with the youngster—and, again, with O'Donnell's assistance—a meeting was arranged between the two students. Apologies—sincere, I believe—were tendered, and an offer to dry-clean the jacket was made. I think we did something positive for human relations in that one; I felt pretty good about it.

On other occasions, too, I've found myself asked to deal with disputes between students. One such controversy involved the amount due a student band for performing at a club-sponsored dance. A prior verbal agreement had been reached, but afterwards a disagreement arose over whether or not the band had fulfilled its part of the "contract."

A lengthy session found the ombudsperson acting as mediator. "You guaranteed us $200," said the head of the Bitter Creek Band. "Then this clod hands me a roll of $1 bills without even counting it. When I got home, it was only $125."

"You didn't play the whole two hours," was the response. "And your fourth man didn't show up."

"We had to wait for that other group to clear the stage. There weren't two hours left."

At 5:15 P.M., after twice recessing so that I could talk separately with each side, the band agreed to settle for another $45. By that time, the last bus had left; two kids needed a ride home. (In a similar but more complicated instance the outcome was less happy. Here, one group proved unwilling to acknowledge its responsibility in the matter; in my advisory role, I could only reluctantly recommend that it be dropped.)

Northport's Student In-House Court proved to be a remarkably appropriate vehicle for resolving several other cases. With the agreement of all parties concerned, two students brought a civil suit against a social studies teacher and the department chairman for—it was alleged—unfairly conducting a current events contest which their class had lost to another. Most of our trials are short, lasting no more than one school day, but this one took three days. (Students who served as lawyers, jurors, and the judge were excused from classes for the whole three days, under a provision which

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allows for "in-school field trips.")

The trial was marked by voluminous motions and counter-motions, and the often rather intense interrogation of teacher-witnesses by student-lawyers. At the conclusion, a verdict in favor of the plaintiffs was returned by the student jurors, and the student judge ordered a rematch of the contest in question. (As one of the defendants, I confess to feeling that the verdict was a gross miscarriage of justice.)

In another instance, several students—and their parents—accepted the authority of the in-house court to deal with charges that they had vandalized a teacher's car. The defendants were found guilty; damages were assessed, and paid.

The student court is also working well as an alternative to suspension. Our emphasis has been on persuading the defendant to examine his attitudes and actions; sentences take the form of appropriate "pay back" penalties.

A Few Modest Suggestions

Early in my career as Student Ombudsperson, I came to realize that: a) not all student grievances prove to be justified, and b) some staff members clearly resent my intervention on behalf of students. In a few instances, my request for information from a teacher has led to an emotional confrontation. Self-restraint and tact, as well as an acute sense of fairness, seem to be required of the would-be ombudsperson.

Without the support and cooperation of the administration and staff, obviously, the ombudsperson would be unable to function effectively. Fortunately, with the help of the high school's "Teacher Interest Committee," and the administration, O'Donnell and I have been able to formulate an acceptable set of specific procedures to be followed by the ombudsperson. Among other provisions, he has no authority to overrule teacher or administrative decisions, or to resolve a disciplinary matter himself; he can only make recommendations. But the ombudsperson can proceed up the administrative ladder to the very top if he feels that is necessary to resolve a problem.

It's hard to make generalizations that could apply to other ombudspersons, since circumstances will differ in every school. But here are a few tips:

- The ombudsperson should be given enough time to do the job right. I've been able to devote half my work day to being ombudsperson, and often I've needed that much time and more.
- It's helpful if the ombudsperson can be part of an existing law program. That way, the ombudsperson and the law program can complement each other, as they do through our in-school student court.
- Try to have technical assistance available. It's a good idea to know a few lawyers whom you can call when you're confronted by a case with legal implications, such as a student who's caught with pot. A lawyer can help you give better advice by explaining the legal options and telling you what could happen to the youngster.
- Finally, be prepared for something new all the time. One of the best things about the job is that it's never boring. Every new case is different from any you will have had before.

Helping the School Be Fair

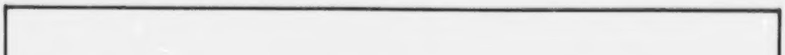
Like other institutions, today's school may sometimes appear impersonal, bureaucratic, and unresponsive to the student. Simply put, the educational ombudsperson is there to help the student to deal with the discrepancy in size, power, and complexity between himself and the institution.

In recent years, moreover, the courts have stated plainly that students *do* have legal rights. "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect." (*Tinker v. Des Moines School District,* 399 U.S. 503 [1967].) One of these fundamental rights is "procedural due process"; and implicit in the concept of "due process" is fair treatment (*Goss v. Lopez,* 419 U.S. 565 [1975].)

Besides, experience indicates that there are fewer school disciplinary problems, and less disrespect for authority, when students believe that their conduct in school is regulated by reasonable, clearly stated, and equitably enforced rules. It seems likely, also, that more positive student attitudes result when they perceive that there exists an established procedure to seek remedies for genuine grievances. I believe that the Student Ombudsperson is playing a constructive role in Northport High School.

P.S. I've just had a third phone call from Mrs. C. Her son, Frank, didn't graduate last June because he failed a one-semester English course. He took it over in summer school, but failed again. Turns out, he's a nice kid; both the teachers and his guidance counselor would like to see him get his diploma, but . . .

I told her I'd spoken to the Chairperson of the English department and the Principal, and asked her to have her youngster come over to see me. I think I have a handle on the case. ☐



CLASSROOM STRATEGIES David Naylor

Teaching About Student Rights and Responsibilities

What every student (and teacher) should know

Student rights and responsibilities is a hot topic in our society. Within the past 10 years, court decisions have helped transform it from a largely ignored and discredited subject to a subject of vital importance, capable of arousing strong emotions among students, parents, teachers, and school administrators.

Despite (or perhaps because of) its pervasive and volatile character, teachers often give student rights and responsibil-

ities a wide berth in the classroom. Some think it's unworthy of discussion, too frivolous and too far removed from "important" subject matter to be given valuable class time. Others see it as too controversial for classroom discussion, a veritable Pandora's box capable of inflaming student passions and engendering community wrath. And still others imagine that it is too complex to deal with intelligently, requiring more knowledge than teachers can be reasonably expected to have.

In actuality, student rights and responsibilities is neither too frivolous, too controversial, or too complex. Properly handled, the subject can illuminate a host of vital issues and become an integral part of the school curriculum. Here's a structure for dealing with student rights and responsibilities, a range of issues and approaches that can be used to teach students about this topic effectively.

A Rationale

Perhaps the best response to the question, "Why should I teach about student rights and responsibilities?" is simply, "You should teach about it because it's too important to ignore." Student rights and responsibilities is an excellent vehicle for helping students clarify and critically examine some of the most basic values of our society, some of the most fundamental characteristics of our legal system, and some of the most important developments of our society. Furthermore, as Alan Levine and Eve Carey observe in their very informative and useful book, *The Rights of Students* (Avon Books, 1977), students spend a large part of their lives in and around schools.

> [T]he policies that govern the school have as much impact on students' lives as most policies formulated by the President and Congress have on the lives of adult citizens. It is as important, therefore, for students to be able to discuss school policies openly as for adults to be able to debate freely issues of national policy.

Student rights also serve as a vehicle "for exploring moral and ethical reasoning, and for fostering a search for effective ways to deal with contemporary value conflicts." (*Values, Law-Related Education and the Elementary School Teacher,* NEA, 1976.) By studying the evolution of student rights and responsibilities, students become more aware of how change occurs and more capable of understanding the importance of change in the life of our country. By using student rights and responsibilities as a focal point, teachers can help students understand everything from constitutional law to administrative regulations, from judicial review to judicial remedies.

And *you* can teach about student rights and responsibilities. A growing number of books, journals, articles, and other resources—both print and nonprint—are available. I've noted a number of them in this article. And many law-related courses and workshops deal with student rights and responsibilities. One way to find out what's available in your area is to contact the ABA's Special Committee on Youth Education for Citizenship (YEFC), at 1155 E. 60th St., Chicago, Ill. 60637.

We have come too far, learned too much, and produced too many resources for the myth of legal complexity to serve as an effective deterrent. The remainder of this article, therefore, is designed to suggest an approach to teaching about student rights and responsibilities and to provide examples of a variety of teaching strategies that you can put to work in your classroom.

1.

Issue One

Classification or Capacity?: Do Students Have Rights?

Before looking at student rights cases, teachers should provide a broader perspective. The development of student rights can be described as the move from a classification to a capacity, an evolutionary history which has much in common with other groups in American society. For example, in the famous case of *Dred Scott v. Sandford* (15 L. Ed. 691 [1857]), the Supreme Court defined the legal status of a slave. Speaking for the Court, Chief Justice Roger Taney wrote:

> The only matter in issue before the court, therefore, is, whether . . . [slaves] are citizens of a State, in the sense in which the word "citizen" is used in the Constitution of the United States. . . . We think they are not, and that they are not included and were not intended to be included under the word "citizen" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

Depriving slaves of rights accorded to citizens was not an isolated instance. As a result of being classified as "women," "juveniles," "prisoners," and "students," other groups have been denied the constitutional rights of citizens.

The importance of being classified in such a way is that once you're included in the group, the issue of rights becomes moot; it is no longer germane. It is not surprising, therefore, to find that in the landmark case involving student rights, *Tinker v. Des Moines Independent School District* (393 U.S. 503), Justice

Abe Fortas, writing for the Supreme Court, acknowledged this legacy. He wrote:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

The movement of students from a classification to a capacity, a history shared by the other groups listed above, reveals one of the most fundamental characteristics of our legal system and of our life as a country—the concept of change. By studying student rights and responsibilities from this perspective, students increase their ability to understand the society in which they live and the kinds of concerns, value conflicts, and mechanisms that are part of how society changes.

Sample Lesson One

Topic: Do Students Have Constitutional Rights?
Strategy: Conflicting Quotations
Procedures:

1. Give each student a copy of the Fortas quote and the two quotes below.

   > [T]he constitutional rights of adults and juveniles are not coextensive.... "The state's authority over children's activities is broader than over like actions of adults".... [T]he conduct of minors may be constitutionally regulated to a greater extent than that of adults.

   Federal District Court Judge Sheridan in ***Bykofsky v. Borough of Middletown*** (1975)

   > It is abundantly clear from the development of law over a period of two centuries or more that the relationship of the state to children is a parental one. . . .[T]he state stands in *loco parentis* to children in school. Thus a child has no more right to defy the school than he does to defy his own parents.

   Federal District Court Judge Young in *Cordova v. Chonko* (1970)

2. Discuss each quotation, using such questions as:

   How are the words "child" and "adult" defined in your state (e.g., in Ohio, a "child" is a person under the age of 18.)

   In what ways does the law provide different treatment for "children" and "adults"? (e.g., contracts, property, inheritance, capacity to commit crimes. See Alan N. Sussman, *The Rights of Young People* [Avon Books, 1977] for further information.)

   To what extent are parents free to impose rules and regulations on their children? Should Bill of Rights protections apply to family members in the privacy of the home?

   In what ways could the school be said to act *in loco parentis* (in the place of parents)? How do the roles of parent and school differ? Should Bill of Rights protections apply in the school?

3. Use a piece of oaktag or chart paper to prepare a chart, then ask students to compare and contrast the legal obligations of adults, parents, children, school officials, and students. Encourage them to suggest reasons for similarities and differences, and write their responses for each of these five groups. Display in a prominent place in the room and refer to it as the unit progresses.

2.

Issue Two

Competing Interests: Which Should Be Given Preference?

Since the Constitution of the United States contains no direct reference to education, the states have assumed the power to control and regulate it. But the actual administration of schools in almost every state is delegated by statute to local districts. In this way, local school boards and school officials acquire the authority to make the rules and regulations which govern the day-to-day operation of the schools.

Under common law, however, parents had control over the education of their children. While state statutes have modified parental authority, parents continue to have many educational obligations. On occasion, parents and state officials have disagreed on children's education. For example, parents who want to educate their children at home may well run afowl of state compulsory education laws.

The wishes of children themselves have been ignored for the most part. School conflicts typically deal with disputes between parental wishes and state wishes. Yet the very nature of our educational system suggests that at least three interests are at stake—those of the state, those of the parent, and those of the child. The following exercise is designed to help students focus on the potential conflict between these three interests. The essential question raised is, "When conflicts arise, which interests should be given preference?"

Sample Lesson Two

Topic: Which Interest Should Be Given Preference?
Strategy: Forced Choice
Directions: Each of the areas listed below is of significance to students, their parents, and the school. For each, indicate which of these three groups you believe should have the right to decide if a conflict develops. Place an "x" in the appropriate space to indicate your response.

Who Should Control . . .

1. Access to a student's report card?
   Student ____ Parent ____ School ____
2. Attendance at school?
   Student ____ Parent ____ School ____
3. Choice of the type of elementary or secondary school to attend?
   Student ____ Parent ____ School ____
4. Access to student scores on an I.Q. tests?
   Student ____ Parent ____ School ____
5. Selection of what courses or subjects to study?
   Student ____ Parent ____ School ____
6. Nature of the course content?
   Student ____ Parent ____ School ____
7. Type of instructional materials used?
   Student ____ Parent ____ School ____
8. Access to a student's locker?
   Student ____ Parent ____ School ____
9. Use of corporal punishment?
   Student ____ Parent ____ School ____
10. Participation in the flag salute?
   Student ____ Parent ____ School ____

Procedures:

1. Distribute a copy of the exercise to each student. Review and clarify directions (and items if necessary).

(Continued on page 43)

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VIEWS FROM ABROAD

John E. Walsh

What? Students Have No Rights in Canada?

For those wishing a return to the good old days, look no further than our friendly neighbor to the north

The principal at Blackstone High in northern Minnesota knew he was in trouble when he looked out of his office window and saw a group of kids passing out literature blasting his administration and the school board. He didn't like it, but, being a principal well versed in the law, he knew there wasn't much he could do about it.

As long as the kids were peaceful and weren't disrupting the educational process, he'd face a long and probably losing court battle if he tried to discipline them.

But just a few miles to the north, his counterpart at a Canadian high school could do just about what he wanted in a similar situation. A Canadian principal faced with a peaceful protest could ask the kids to leave, suspend them, or even have them arrested.

Most American students would be surprised at the lack of student rights in Canada. After all, didn't plenty of potential draftees go up there as a way of protesting the Vietnam war? Isn't Canada a country with political and legal traditions like ours—and with a reputation for protecting individual rights? It is, but with one fairly glaring exception—Canada has no constitutional guarantees or legal protections for students under 18.

Student Rights in the U.S.

The drive for student rights has been strong in both the United States and Canada over the past two decades. However, students in the U.S. have had some successes, while Canadian kids have gotten nowhere. Our courts have made all the difference.

American courts have recognized that many constitutional guarantees apply to students in the school. Their present position is accurately summarized in the opinion of *Dunham v. Pulsifer* (312 F. Supp. 411 [1970]), in which the judge stated that "the Constitution does not stop at the public school door like a puppy waiting for his master, but instead it follows the student through the corridors, into the classroom and onto the athletic field."

The protection of the Constitution has been vital to student rights because most Americans probably do not think that students (and young people generally) should have extensive rights. As David Schimmel and Louis Fischer write in *The Civil Rights of Students,* "even today a majority of parents, teachers and administrators do not honestly think that the Bill of Rights applies to most school situations."

Instead, most Americans probably yearn for the good old days of *in loco parentis,* when school authorities were regarded as standing in for the child's parents. That is, they were expected to assume the full duties, responsibilities, and obligations of a surrogate parent while students were in school.

Interestingly enough, school authorities were also thought to have some jurisdiction over students even outside of school time and away from the school premises. For example, students could be punished—or even suspended or expelled from school—for things they wrote about school at home and sent to the local newspaper. The courts of the past also upheld the authority of public school officials to expel students for becoming pregnant, contracting venereal disease, smoking off school grounds, and hiring a communist speaker for an off-campus engagement.

Courts have been whittling away at the *in loco parentis* doctrine in the past two decades. Two United States Supreme Court cases are particularly important. *Tinker v. Des Moines Independent Community School District* (393 U.S. 503 [1969]) dealt with the constitutionality of suspending a group of students who were protesting the Vietnam war by wearing black armbands. The highest court ruled that children are indeed "persons" under the Constitution and do not shed their constitutional rights "at the schoolhouse gate." Thus they have a right to express themselves, as long as they don't materially disrupt the educational process. *Goss v. Lopez* (95 S. Ct. 729 [1975]) took the rights of American students one step further. In this decision, the Supreme Court held that students who are suspended by the school are entitled to at least minimal "due process."

In other areas, ranging from locker searches to supervision of the student press, the doctrine of *in loco parentis* is also losing much of its clout. Although judges, teachers, parents, school administrators, and students are still searching for definitions of constitutional rights within the school setting, it's clear that students are citizens rather than subjects, that they have rights which can be successfully asserted in court.

Oh Canada!

The student rights situation is quite different in Canada. William E. Alexander and Joseph P. Farrell, in their book *Student Participation in Decision-Making,* state that they have not found a single lawsuit involving the rights of students in Canada. They go on to say that most legal experts agree that "the Canadian Bill of Rights does not apply to secondary school students while they are in school." In other words, there is at present no means for students or their parents to bring about a lawsuit alleging an infraction of student rights.

This requires a brief explanation. Canada's Constitution is in part unwritten, as is England's, and in part written, as is that of the United States. The written part of the Constitution is known as the British North America Act of 1867 (the Chief of State of Canada is technically the King or Queen of England and is represented in Canada by a Governor). According to the British North America Act, education and hence school law are functions of the various provinces rather than of the central government. Only the provincial legislatures can make laws relating to education.

Canada does have a Bill of Rights, but the significant point is that it is a parliamentary legislative enactment and it is thus subordinate to the British North America Act. The Canadian Bill of Rights can neither violate nor rescind the British North America Act, which, as we have seen, leaves all education and all laws relating to education to the provinces. It follows then that the Canadian Bill of Rights simply does not apply to students at school. This may seem like nothing more than a legalism or technicality intended to slow down or thwart the student rights movement, but in fact it has made the crucial difference.

To be sure, each Canadian province could easily enact its own bill of rights, and students would then come under a provincial rather than a Canadian bill of rights. Judicial review would be established, and the ultimate effect would be virtually the same. The provincial courts at least could then step in during particular cases and determine whether the rights of students have been violated.

However, the fact of the matter is that provincial legislatures have not created their own bill of rights, perhaps for the same reason that states in our country have not created new protections for citizens. Most polls show that the American people are not receptive toward granting new rights to the criminally accused and others, and, in fact, polls suggest that the Bill of Rights itself wouldn't pass if put to a popular vote. If the climate of opinion in Canada is similar, then the best protection for individual rights is the national Bill of Rights, which, as we have seen, leaves students out in the cold.

Since they are not protected by the Bill of Rights, students have no way of involving the courts when they think their rights are violated. School boards and school administrators are both legislators and judges in cases involving students. They not only make the rules but also determine innocence or guilt and decide on punishment. Students have a high respect for the impartiality of Canadian courts. They feel that if the courts could hear their cases they would have a much better chance of getting due process and a fair decision. As the system now stands, however, students have no appeal and must accept decisions rendered by the very persons they are in conflict with.

Student Rights in Canada

Although there have been no lawsuits in Canada alleging violations of student rights, this does not mean that there are no infringements on the rights of students in the Canadian schools or that Canadian students are unaware of their rights. "The situation in the secondary schools is terrible," says Morna Ballantyne, a recent Canadian high school graduate. "Students have little or no say in the school administration. School newspapers are subject to prior restraint, and there is censorship of conflicting opinions and prohibitions on distributing controversial literature."

Student activists in Canada originally thought that decisions like *Tinker* and *Goss* would spur student rights in their country, but in fact the decisions had no impact north of the border. Immediately following the *Tinker* holding, a student in the province of British Columbia phoned his school and asked if he could distribute some anti-war materials. He was promptly told that he would be arrested if he did so. The Canadian courts have also failed to impose on their schools the relatively minor requirements of due process that *Goss* set out for American schools. In fact, according to Professor Romulo Magsina of Memorial University in Newfoundland, Canadian schools don't even adhere to the most minimal due process standards.

Many critics of the Canadian schools feel that the system leaves too much

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power in the hands of school boards and school administrators, who tend to be more interested in the school's good order and smooth functioning than in the rights of students. Furthermore, rules and regulations often differ markedly from one school district to another, and even within the same district different principals frequently enforce rules in very different ways. Mike Manley-Casimer, a professor of education at Simon Fraser University, puts it more strongly: "Canadian students are often the unfortunate subjects of principals' capricious whims."

A Trickle of Movement

The anamolies of the situation, coupled with the inability to be heard by an impartial arbiter of justice, have helped to fuel the student movement in Canada. Students are confused by the inconsistency that rules their lives. How can a 16-year-old girl who has a right to an abortion without parental consent (as she does in Toronto), they ask, be required to get her teacher's permission to go to the washroom? The student movement wants to formalize rights and privileges that will apply to all Canadian high school students.

In an effort to do just this, student groups throughout Canada have drafted bills of rights and are working to get them recognized and passed by their various provinces. In honor of the "International Year of the Child," high school students in Manitoba recently drew up a bill which gives them greater autonomy from principals. It is doubtful, however, that it will be accepted.

Toronto students also prepared a bill of rights. The draft was quite lengthy, in an attempt to be both specific and comprehensive. Something of its flavor can be gleaned from the two typical articles quoted by Alexander and Farrell: (1) "Every student may exercise his or her right of free speech, press, assembly, and expression, subject to the laws applicable to the general public." (2) "Every student shall have the right to determine his or her dress and hair including hats and armbands except where it is an actual danger of health or safety or where it violates the laws applicable to the general public."

Other articles dealt with the right to wear political buttons, to write and distribute leaflets, to assemble peacefully and form organizations, to petition for redress of grievances, and, *mirable dictu,* to hold hands and give other publicly accepted professions of affection. As was to be expected, neither the local school boards nor the provincial government paid attention to these claims.

Where To?

The student rights movement in Canada is still in the *in loco parentis* stage. Unlike the United States, power rests with school officials, and students have little or no redress. Professor Manley-Casimer, along with other education experts, sees "little likelihood for immediate change in the area of Canadian student rights."

But change is always a slow process. The fading out of the concept of *in loco parentis* in the United States was a gradual and uncertain one. Even some Supreme Court justices were badly split over these issues and gave forceful and cogent dissenting opinions.

Perhaps in the 1980s, Canada will follow the lead of the United States and extend the protections of the Bill of Rights to students. The best guess, however, is that Canada will soon seek—and find—an answer to this problem that is distinctively her own. □

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Life in a Fishbowl

The rules governing teachers' private lives

Lisa Broido

Picture yourself as a small-town school teacher relaxing at a neighborhood bar with a frosted mug of beer. Just as you are about to challenge your friends to a sociable game of "Pong," you feel a firm tap upon your shoulder. As you turn to find a scowling president of your local school board, you know, with shuddering certainty, that you're about to be fired.

A scenario like this one actually took place not long ago. In the late 1930s, a Pennsylvania teacher who worked at her husband's beer garden after school was fired because she "took an occasional drink of beer, served beer to customers, played pinball and showed customers how to play pinball." A court sustained the decision on the grounds that the teacher's conduct had been of "such an immoral and intemperate nature as to constitute incompetence as well as immorality."

This is not an isolated case. Due to the sensitive nature of their position, teachers have traditionally been expected to maintain a higher standard of conduct than most other professionals. School boards often argue that teachers can't do their jobs right without the respect of students and their parents. That's why their lives outside the classroom have been scrutinized as much as their performance inside the classroom—and often even more.

And riding herd on teachers isn't ancient history. Only 30 to 50 years ago, teachers were dismissed for smoking cigarettes, dancing, playing cards, "loiter-

1. You will not marry during the term of your contract.
2. You are not to keep company with men.
3. You must be home between the hours of 8 p.m. and 6 a.m. unless attending a school function.
4. You may not loiter downtown in ice cream stores.
5. You may not travel beyond the city limits unless you have the permission of the chairman of the board.
6. You may not ride in a carriage or automobile with any man unless he is your father or brother.
7. You may not smoke cigarets.
8. You may not dress in bright colors.
9. You may under no circumstances dye your hair.
10. You must wear at least two petticoats.
11. Your dresses must not be any shorter than two inches above the ankle.

ing" in downtown ice cream stores, staying out late on weeknights—in short for doing anything which did not meet with the approval of *everyone* in the community. In some places, teachers are still expected to meet tough standards of private behavior—or else.

In the past, courts generally sustained those firings, usually agreeing that school boards have the right to look into the private lives of teachers. As a 1941 decision by the Supreme Court of Wyoming put it: "The peculiar relationship between the teacher and his pupils is such that it is highly important the character of the teacher be above reproach. . . . Not merely good character, but good reputation is essential to the greatest usefulness of the teachers in the schools."

Forbidden Fun and Frolic

The personal habits and amusements of teachers, particularly in small communities, have been subject to the kinds of restraints that would make even Snow White tarnish. Seemingly harmless activities like theatregoing were once considered taboo for instructors. And the sanctions against cardplaying and dancing were even greater.

In 1929, 11 high school teachers were booted out for attending a local dance in Ottawa, Kansas. A Mississippi contract during this same time (undoubtedly typical of many) stated that "no teacher is allowed to attend dances at home or away when in the employ of this board." A young teacher named John Scopes got in trouble for dancing long before he was fired for teaching about Darwinism.

Cigarette ads which tell women that they have "Come a Long Way, Baby" really apply to teachers. Most school districts frowned upon teachers who smoked, but became apoplectic when the smoking teachers were female. A woman teacher using tobacco was considered "the hallmark of wantonness" until well into this century.

In a bizarre 1920s case, for example, a principal spotted cigarette smoke drifting from under the door of a woman teacher's room at home. Outraged, he recommended that the State Board of Examiners deny her a permanent license. After the board determined that the evidence against her was just too shaky, the principal reported that she had an illegitimate baby and spent too many weekends in a nearby city. The principal later admitted that he had fabricated this scandal simply because he did not want any female teachers who smoked—even privately—in his school.

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Female teachers are not the only ones who have been restrained from smoking. In a backwoods community in Missouri, men were asked to sign resignations along with their contracts, to be effective immediately if they should "smoke a cigarette, pipe or cigar at anytime and in anyplace." Thus, while the rest of the male townfolk enjoyed tobacco at picnics and other social gatherings, teachers and clergymen were forced to abstain.

Wedding Bells Yes, School Bells No

In the early part of this century, if a school marm walked down the aisle to say "I do," she was essentially saying "I don't" to walking back into her classroom. More than half the cities in the country—including San Francisco, Boston, Pittsburgh, and St. Louis—had rules against employing married women as teachers in the 1930s. Those few who bothered to battle against these policies usually found that the courts were on the school board's side.

Married women were ousted from schoolhouses because it was believed that they could not devote enough time to the "primary" responsibilities of their homes and families. Some even claimed that married women teachers would subvert the entire institution of the American Family. "What is to become of the homelife in this country?" one man demanded in a 1935 *American School Board Journal*, "if a child gets the idea from seeing married women teachers in the schools that such a proceeding is proper." (Married men as well as married women, were sometimes affected by such policies. Johnson City, Tennessee decided to employ only single teachers of either sex, and fired five married men and nineteen married women in one year.)

When the economy crashed in 1929, boards had yet another reason to dismiss married women who were teachers. Women who had tied the knot were often the first to lose their jobs, since teachers who had the support of their husbands were expected to sacrifice their jobs to benefit the unprotected single women of the community.

If marriage was bad, divorce was worse. Florence Gray, a former teacher who taught in Michigan during the 1930s, says she received a notice of dismissal when her husband left her. Although Mrs. Gray eventually got her position back when the community recognized that she was the injured party, she claims that she never fully recovered lost pay and respect. She says now, "Too bad no one ever thought to sue for his rights back then."

Sex and the Single Teacher

Our legal system tells us that one is considered innocent until proven guilty, but this principle often did not apply to teachers. Especially in sexual matters, rumor or gossip—no matter how unfounded—was often sufficient cause for giving instructors their walking papers. Courts upheld dismissals on vague and unproved charges because they reasoned that teachers with "tainted reputations" could not serve as models for young students.

In the mid-1930s, a young principal from a small town in New York was asked to resign from his position because he had been spotted on several occasions walking one of his prettiest teachers home. Although the board admitted that they could not prove that he had done anything immoral, they forced him to leave, in the words of an educational historian, "on account of the tongue-wagging which had poisoned the minds of the villagers."

The British philosopher Bertrand Russell had his contract rescinded by the City College of New York in 1940 because of his essays on sex and marriage. A lower court upheld the decision on the grounds that his works showed a lack of "good moral character."

School boards have also used contracts to constrain their teachers' relationships with members of the opposite sex. One 1935 contract, for example, stipulated that teachers could "not keep company with sorry young men." Another required that they could not go out on "dates" on weeknights. A North Carolina school board even went so far as to force its single teachers to pledge that they would not "fall in love, become engaged or secretly married." No wonder one young Iowa teacher complained in 1933 that "How I conduct my classes seems to be of no great interest to school authorities, but what I do when school is not in session concerns them tremendously. . . . They want me to be an old maid!"

No Time of Their Own

For an annual salary of approximately $650 (a pitiful amount even in the 30s), teachers were literally owned by their school boards. Their free time was gobbled up by sports practices, debating events, play rehearsals, 4-H club meetings, Sunday school classes and other extracurricular activities—all without receiving any additional pay. "I shall consider myself at all times the willing servant of the school board and the townspeople," stated a typical contract, ". . . donating of my time and service and money without stint for the uplift and benefit of the community."

Even weekends did not belong to teachers, who were often forbidden to leave their school districts on Saturdays and Sundays. "This town tries to draft my time and services," one Texas teacher complained in the mid-30s, "they don't seem to realize that I need my weekends as much as they do."

School boards also dictated where teachers could live. In the 19th century, they were subjected to the grueling practice of "boarding 'round." This involved moving from home to home each week in lieu of cash wages. Later, teachers were obligated to live in dormitories or special rooming houses where they were not free to come and go as they pleased.

Freedom of Speech Outside the Classroom

Teachers are expected to encourage their students to be active citizens, but often teachers themselves have been denied this democratic right. They have frequently been restricted from taking part in any public criticism of candidates, organizations, and issues because it was feared that they would lose their neutrality in the classroom.

For example, in 1932 a teacher from a strongly Republican town in New York was curbed from speaking publicly in favor of Al Smith. A teacher from Montana suddenly started receiving "unsatisfactory" ratings once she supported a socialist candidate during World War I.

She wasn't alone. During the Red Scare of World War I and the post-war years, the slightest inkling that teachers had socialist or communist tendencies was enough to send them flying out of the schoolhouse gate. The fearful New York legislature passed a law specifically providing for ousting teachers who committed "treasonable or seditious acts" or joined organizations "which preached the overthrow of government."

"Teachers are becoming the most tight-lipped and timorous creatures of any profession in the country," the editor of the *New Republic* wrote during this

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time. "The school boards are doing everything possible to turn the guides and instructors of our children into milksops."

The organizations a teacher joined were also under constant scrutiny. Blacklisted groups would vary according to local opinion. Membership in the Ku Klux Klan, for example, meant dismissal in some areas, while in others it was mandatory. Involvement in controversial organizations like the American Civil Liberties Union and teachers unions almost inevitably placed a teacher in deep water.

The Times Are a Changin'— Or Are They?

Teachers are no longer getting fired for dancing, cardplaying, and smoking cigarettes, but what they do outside the classroom is still fair game for school boards. Teachers continue to be dismissed for "behavior unbecoming a teacher" and "unprofessional conduct." The main difference today is that teachers are defending their privacy rights more frequently in the courts. And thanks to changing societal attitudes and the strong fist of teachers unions, they are winning more often.

Unless school authorities can *prove* that a teacher's conduct impairs his ability to teach in the classroom, courts today are generally reluctant to uphold dismissals. The 1972 Texas case of *Caldwell v. Johnson* shows how judicial attitudes have changed.

This suit involved a coach at a rural school who was fired for his "failure to meet accepted moral standards of conduct for the teaching profession." A board member had spotted Caldwell parking on a country road for half an hour with a local waitress after a basketball game. This would have been enough to fire him half a century ago, but the court ruled that his firing was an unconstitutional invasion of privacy. "School districts may examine the conduct of teachers both in and out of the classrooms," stated the judge, but "before a teacher can be discharged for personal conduct, the court feels that a showing must be made that such conduct had a direct effect on the teacher's success in performing classroom duties." Since there was no showing that the coach's relationship with the waitress directly interfered with his work, he was reinstated with back pay.

The National Education Association (NEA) defends many teacher privacy rights cases each year. Its DuShane fund provides interest-free loans—on the local, state, and national level—to pay any teacher whose case has legal merit and who is pursuing legal remedy for redress. The NEA takes the position that "the determinant of employment must be professional performance, not conduct which has no demonstrable relationship to teaching," and they are willing to fight for this right.

According to Barbara Stein, one of NEA's lawyers, "this has been a good year for teacher privacy rights cases." In *Stoddard v. School District No. 2*, for example, a teacher was awarded $33,000 in damages because her Cokeville, Wyoming school had failed to renew her contract solely because they disapproved of her private conduct. Despite what the official dismissal letter stated, the principal admitted that Ms. Stoddard was actually asked to leave because of the location of her trailer, her failure to attend church regularly, her obesity, and rumors about her personal life.

The board didn't like it when the coach parked with a waitress, but what did that have to do with his job?

The American Civil Liberties Union (ACLU) also actively defends the privacy rights of teachers. In *Reinhardt v. Board of Education*, for example, an unmarried tenured teacher was discharged for becoming pregnant, even though she eventually married the baby's father. With the help of the ACLU, the teacher was reinstated with back pay. The court found that her personal conduct did not affect her classroom performance.

Although the burden of proof for dismissals based upon private conduct now lies with the school authorities, teachers still have plenty of problems. Many teachers agree that school boards have subtle ways of getting at teachers who they don't like. These include rigging teachers' ratings, assigning them to undesirable schools, sticking them with difficult students, and giving them unpleasant extracurricular activities. "If there is a way, they'll get rid of a teacher," one teacher said, "they'll make it very uncomfortable." Another warned that "A teacher better have everything down pat, lesson plan, daily activities, schedule, etc."

Not only can school boards make teachers so unhappy that they resign, but if a case does go to court it may last years. According to Faith Hanna, another lawyer for the NEA, it can take as long as seven years for teachers to get reinstated—and that's assuming the evidence is clearly in their favor. In almost every case, they have to overcome a mountain of procedural obstacles before they can prevail.

Some teacher privacy issues are still undecided. The courts continue to be divided over whether the state can require teachers to live in the town where they work. The Supreme Court of New Hampshire struck down a Manchester ordinance that required all city employees (including teachers) to be residents of the city. The Supreme Courts of Wyoming and Michigan, on the other hand, have upheld such policies.

Courts are also divided on permitting homosexuals to teach in the classroom. The California Supreme Court held that a teacher's private homosexual relationships could not lead to the revocation of his teaching certificate. However, the Washington Supreme Court okayed a school board's discharge of a gay teacher. The Supreme Court of the United States has declined to look at this issue, so it remains unsettled for the moment.

Unwed motherhood, bisexuality, and transexuality are other issues of private conduct where the laws are neither neat nor precise. The trend seems to be that teachers cannot be penalized unless their private life has a clear impact upon the effectiveness of their teaching. Yet the line between public and private conduct can be hard to draw, and there are still exceptions to this rule.

Teacher conduct remains a very difficult problem, laden with both parental and community concern. It requires a balance between the constitutional rights of the teacher as an American citizen and the best interests of the school, community, and students.

Some teachers wholeheartedly believe that their private conduct should be scrutinized. "The entire life of a teacher," elementary school teacher Beulah Avis of Florida wrote the editor of *Today's Education,* "contributes to what he is and what he does in the classroom." Yet most would be infuriated if they had to live in fish bowls like the teachers of yesteryear. ☐

Edward J. Meade, Jr.

Is Law Polluting the Schools?

Our indomitable author argues both sides of the case

Yes!

Over the past decade, a new wave of state laws has begun to affect public schools. Unlike earlier federal decrees based on constitutional law, aimed at matters of justice and equity, and affecting the *context* of schooling, these new laws seek to repair educational deficiencies of local schools. They come with various labels—minimum competency requirements is a frequent one—and are aimed at affecting the *content* of schooling.

I do not quarrel with the intent of such legal initiatives. Each of us—parent, educator, elected and appointed official—should be concerned with educational quality, the aim of many of these new laws. Nor do I question their subsidiary goal of holding the schools more accountable for what they do.

I have more difficulty with the means specified for improving the quality of education. Generally, the laws mandate testing programs to assure that schools pay attention to minimal competencies. Is that what they do? I am not at all certain.

What Do Tests Accomplish?

Clearly these tests do, in fact, separate those who can from those who cannot pass the test. More than that, perhaps, they succeed in placing blame on the child who fails. Don't we have better and earlier ways of setting clear expectations and offering children opportunities of meeting them? Shouldn't we ensure that the student has an equal opportunity to learn before we require a certain level of student performance? Isn't the result little more than laying the blame on the weakest and most powerless groups—the impoverished and the culturally different?

I cannot condone such an effect, and I would think no one else can either. And beyond this effect, there is another one that troubles me as well. It is that these mandated testing programs affect the *content* of education and, to my way of thinking, in ways that limit teaching and learning for students of all kinds.

It is one thing for a government, especially state governments which have the legal authority to establish and provide for public education, to require that students be given instruction in certain curriculum areas. Few can quarrel with general requirements that schools teach reading, writing, numeracy, and the like. Likewise, it is reasonable to require other subjects of instruction, e.g., science, physical education, and history. (As an aside, some states require teaching the history of the state, the results of which seem more often reflective of chauvinism than of good history.)

However, when these content requirements become more and more specific and detailed in law and regulation, they

No!

Should the law assure an expanded context of justice in schools? I think it should, for several reasons. First and foremost, justice in the schools is morally right and in keeping with the legal foundation on which this nation was built. Second, it also teaches some very important lessons. If the public schools are expected to train for citizenship, what better way to underscore such training than for schools to be just, fair, and equitable in what they do?

A Legal Revolution

Have not public schools been just in past years? Certainly, but how just is a more proper question. In earlier times, much of the justice that prevailed in schools was implicit—as it was in the society at large. Over the past 25 years or so, we came to realize that we needed to be more explicit about fairness and justice, especially in the public sector. We had to make certain that individual rights were assured, and we had to make certain that these rights were extended to all citizens.

The legal revolution in education—largely based on constitutional mandates—has affected everyone in the school. For example, it has:

- guaranteed minimal due process for suspended students;
- enlarged the rights of speech and action for students, teachers, and parents, individually and as groups;
- desegregated students and staffs;
- addressed equality of opportunity and affirmative action;
- affected collective bargaining and the ways schools are financed.

In short, new laws and decrees have helped schools and their staffs go about their work in ways that are lawful and reflective of justice.

Step by step, these laws, their interpretations, and the procedures for implementing them are shaping and defining the *context* for schooling. By and large, they are determining who schools must serve—pupils, parents, taxpayers—and how they serve them. Further, they provide a constitutional basis for how schools must deal with those who serve in the schools—teachers, administrators, and other employees. What these laws, decrees, and interpretations do not determine is what schools should teach, that is, the content of courses.

An Antilaw Backlash

There is now a list of familiar "case words"—*Brown v. Board of Education, Lau, Goss, Bakke, Serrano v. Priest,* to name only a few. Education as well as the law is well aware of them and others like them. Today, some educators know almost as much as lawyers about the judicial system, court pro-

Yes!

reduce local initiative, shape pedagogy in rigid ways, and sometimes lead to the neglect of non-mandated courses. Further, it seems to me that the more curriculum is determined by law, the more schooling will be influenced by special interests and momentary fashions. One need only look at certain laws passed some time ago in vocational education and observe their limiting effects over the years. The uselessness of such specifically-designed curriculum in light of changing technology and conditions shows the folly of this course of action.

So-called competency testing programs further define what is to be learned—and from a level of government, usually the state, that is far removed from the local schoolhouse. In some cases these mandated testing programs result in teaching for the tests and little more. It is as if the minimum is the maximum, or as if all that is useful is determined by the test. Additionally, these programs generally require a new bureaucracy to implement them and to hold the teaching force accountable. And, finally, such tests fall as much on districts for whom they serve little purpose as on districts for whom the results might have some function. Are the costs, therefore, equal to the benefits?

Let me be clear about tests. They are valuable, albeit limited, tools for finding out gaps and gains in knowledge and skills. But without a follow-up capacity to deal with deficiencies, or without incentives to go beyond, tests *per se*, including minimum competency testing, may do little more than enhance state control over schooling and limit the range of content and instruction for schools and students.

A Healthier Alternative

In my judgment, what should be taught and how it can be taught is better determined locally, without state laws mandating specific content or competency tests. I repeat that I do not quarrel with broader and more general legislation that spells out the areas expected to be taught, or, indeed, that requires diagnostic assessments to find out what is being learned and how. But legislating curriculum and competency testing programs goes too far in determining content. It offers less incentive for improving the quality of education than when that choice and that responsibility rests with local communities.

To me, the interaction of parents, teachers, and citizens in local school communities is where one can expect the quality of education to be better defined, shaped, and produced. The more we rely on the state or the federal government for such definitions, the more likely our schools will be increasingly uniform and mediocre.

Certainly, the federal and the state government can and should enact laws to insure justice and equity for the context in which schooling should take place. They also can and should enact laws to broadly define the areas of content—but not the content *per se*, as seems to be the effect of minimum competency legislation. Indeed, there already are enough non-mandated instruments and guidelines governing educational content, such as college aptitude tests, and college and job entry requirements.

Rather than more laws of this kind, a more effective approach to improving quality in schools is through local responsibility. The local school board, the parents, the teachers, and the citizens at large know their students and their needs, and can involve themselves collectively in more effective ways than one could ever expect from a law. It already is clear, for example, that some minimum competency laws limit local involvement in schools and the responsibility of local school districts to be accountable to their public. Hardly a lesson in democracy for this nation under law. ☐

No!

cedures, and laws that affect the schools.

To some educators, these legal intrusions are seen as annoyances, if not obstacles, to their work. They claim that implementing these mandates inhibits their roles as educators. To other educators, these legal actions are welcomed as relief from responsibility. These others sometimes use the law as an excuse for not making educational decisions. Neither view is right. What is right for educators to understand is that delivering justice and equity in education is as much their responsibility as it is for judges and lawyers.

In some ways it is unfortunate that the courts had to find remedies for injustice in schools. Why, for example, did education need to have a *Goss* decision to insure the rights of students to minimal due process in disciplinary proceedings? Why did states need to have court decisions about school finance when their own constitutions call for equal opportunity in education? Why did educators wait for the courts to rule out discrimination by sex?

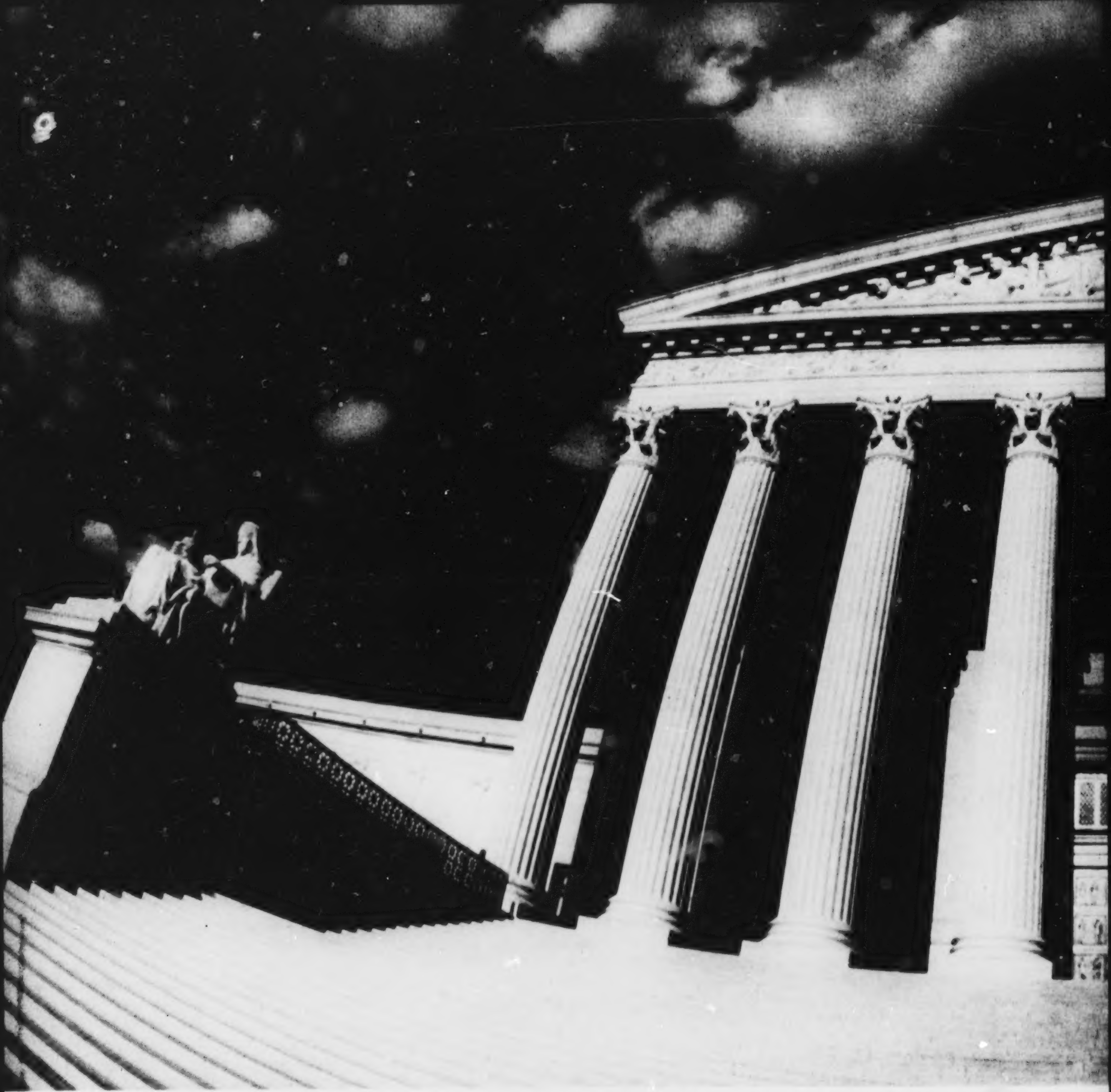
Teaching by Example

Of all public institutions, one would have thought that the schools would take the lead in such matters. After all, our system of public schools was established in large measure to insure an enlightened, lawful, and participating citizenry. And, is there not an almost universal mandate in state constitutions calling for training in citizenship as part of the schools' mission?

To my way of thinking, the ways schools deal with student publications teach more about freedom of speech than do classroom discussions in civics courses. Similarly, classroom lessons about fairness and justice are made real when the actions of school authorities reflect due process in dealing with students, parents and teachers.

To be schooled in a context of justice and equity is, perhaps, the best lesson of all. It is consistent with what we want for ourselves and need for our common good. As a people, and as a society of law, we do not want our children, or any one else for that matter, to suffer injustice—deliberately or by neglect or default. Nor do we want our schools inadvertently to teach injustice or to be unfair. In short, the expanding context of justice and equity in schools, which has been brought about by laws and judicial decisions, affords a healthier climate for the public schools to carry out their mission. ☐

Edward J. Meade, Jr. is a member of the education program staff of the Ford Foundation.



COURT BRIEFS

Walter M. Perkins

New Decisions to Reckon With

The Supreme Court speaks on the press, reverse discrimination, and search and seizure

The end of the 1978–79 Supreme Court term was full of action, since the Court, as usual, saved its most controversial cases for last. The results made blacks glad, the press mad, and gave plenty of fireworks for everyone.

Court Okays Private Affirmative Action

In *Steelworkers v. Weber* (47 L.W. 4851), a case described as the "Blue Collar *Bakke*," the Supreme Court was faced

with a dilemma. Should it construe an anti-discrimination law narrowly, and decide that it prohibited an affirmative action program, or should it look at the spirit of the law and permit the program?

By a 5-2 margin, the Court chose to follow the spirit of the law. In the words of Justice William Brennan, writing for the majority, "It would be ironic indeed, if a law triggered by a nation's concern over centuries of racial injustice, and intended to improve the lot of those who had been excluded from the American dream for so long, constituted the first legislative prohibition of all voluntary, private race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."

Weber involved a nationwide voluntary affirmative action plan set up in 1974 by Kaiser Steel, through a collective bargaining agreement with the United Steelworkers. The plan created a special training program for skilled craft jobs, with 50 percent of the slots going to whites and 50 percent to blacks and women.

The program was to stay operative until the number of blacks in craft jobs was proportionate to the number of blacks in the local labor force. At the time the plan was implemented in '74, 1.83 percent of skilled craft workers at Kaiser's Gramercy, Louisiana plant were black, as opposed to a 39 percent black share of the local work force.

Brian Weber, a 32 year-old Kaiser worker at Gramercy, applied for one of 13 vacant openings at the plant. Weber couldn't get one of the six slots reserved

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for whites because he lacked seniority. When two black workers with less seniority were admitted to the program, he brought suit in Federal District Court, alleging violation of Title VII of the 1964 Civil Rights Act.

At issue in *Weber* was whether Congress intended by Title VII to ban this type of voluntary affirmative action quota plan when it prohibited discrimination on the basis of race.

The law says, "No person in the United States shall, on the ground of race, color, or national origin be excluded from participating in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Recognizing the interpretation problem, Justice Brennan began by looking at the legislative history of the act. After quoting speeches by such supporters as then Senator Hubert Humphrey, he said, "An interpretation of Title VII that forbade all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute and must be rejected."

Chief Justice Warren Burger, who along with Justice William Rehnquist constituted the minority, accused the majority of ignoring the literal meaning of the law and "totally rewriting a crucial part of Title VII to reach a desired result. The Congress expressly prohibited the discrimination against Brian Weber that the Court approves now."

Rehnquist added that "the legislative history of Title VII indicates that Congress meant to outlaw all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative."

While there will be the inevitable comparison with *Bakke*, legally they are very distinct. *Bakke,* handed down almost a year to the day of Weber (June 29, 1978), struck down a rigid quota system for admission to the University of California Medical School at Davis but suggested that affirmative action programs might be justified under certain circumstances.

The distinction between the two cases is that *Weber* involved interpretation of a federal statute and was based on action between a private employer and a private union, while *Bakke* was based on Fourteenth Amendment equal protection guarantees. The Fourteenth Amendment comes into play in *Bakke* because state action is involved; in *Weber*, though, we have alleged discrimination by a private agency, so the case centered on a law

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rather than the Constitution.

Weber will have ramifications far beyond one steel mill. In effect, it allows private institutions to remedy consequences of racial discrimination without subjecting them to a decisive argument over guilt that belongs to the entire society.

Of course, not all questions are settled. The Supreme Court will soon hear arguments on a related affirmative action case, *Fullilove v. Kreps,* a challenge to a program that sets aside 10 percent of federal public work construction grants for minority-owned companies.

Closed Hearing Decision Draws Wrath of Press

Americans who've assumed that a public trial was guaranteed by the Constitution were jolted by a recent Supreme Court decision that permits criminal proceedings to be closed to the press and public in certain circumstances. Editorials in papers across the country promptly labeled the decision a dangerous blow at a vital democratic freedom, but there are indications that the decision may be less sweeping than was first supposed.

In a narrow 5 to 4 decision, the Court ruled that the guarantee of a public trial is a personal right that can only be asserted by the defendant in a criminal proceeding. Although this case involved excluding the press and public from a pretrial hearing, many observers surmised from the welter of concurring opinions that the decision may extend to trials also.

While recognizing that the press and public have a First Amendment right of access to hearings, the majority reasoned that the First Amendment right must be balanced against the defendant's right to a fair trial, guaranteed by the Sixth Amendment. Where it appears that a defendant's rights will be prejudiced by adverse pretrial publicity, he may be granted closure of the pretrial hearing—if the prosecutor and judge agree.

The case, *Gannett Company, Inc., v. DePasquale* (47 L.W. 4901), involved a request by defendants, who were on trial for second-degree murder, robbery, and grand larceny, that the press and public be excluded from their pretrial hearing because they feared that the publicity would hurt their chances for a fair trial. The trial judge agreed, and the newspaper involved appealed all the way to the Supreme Court.

In reaching their decision, the High Court majority took note of the historical fact that pretrial hearings, by their very nature, have always been less public than trials.

Justice Potter Stewart's opinion for the majority noted that pretrial suppression hearings pose special problems because their purpose is to screen out unreliable and illegally obtained evidence and make sure that the jury does not find out about it. Publicity concerning pretrial hearings could influence public opinion against defendants and inform potential jurors of damaging information that may end up being entirely inadmissible at trial.

The majority opinion, joined by Chief Justice Warren Burger and Justices Lewis Powell, William Rehnquist, and John Stevens, stipulated that when ordering a hearing to be closed, the trial judge must state on the record that an open hearing will prejudice the defendant. It held the adversary process will protect the public's interest in the event of a closed hearing, through the clash of opposing interests represented in a criminal proceeding.

Justice Rehnquist, in a separate concurring opinion, reasoned that since the Court holds that the public has no right of access where parties agree on a closed proceeding, the trial court does not have to give any reasons for closing a trial or pretrial hearing to the public.

The other Justices filed an opinion concurring in part and dissenting in part. Justice Harry Blackmun spoke for them. He summarized the history of the "public trial" clause of the Sixth Amendment, concluding that "the importance we as a nation attach to the public trial is reflected both in its deep roots in the English common law and in the seemingly universal recognition in this country since the earliest times."

Justice Blackmun also stated that "the fact that the Sixth Amendment casts the right to a public trial in terms of the right of the accused is not sufficient to permit the inference that the accused may compel a private proceeding simply by waiving that right."

According to the Reporters Committee for Freedom of the Press, in the first month after the July 2 decision courts around the country entertained about one request per day to close proceedings. The Reporters Committee said judges were granting two out of every three requests, most to protect the accused's rights but a few to spare the parties embarrassment. In at least two states, judges kicked reporters out of courtrooms but allowed other members of the public to remain.

Perhaps alarmed by these lower court actions, Chief Justice Burger recently indicated on two occasions in newspaper interviews that judges might be misread-

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ing the decision. Though his off the cuff remarks do not have the force of law, they do hint that the Court might hear another court-closing case in the future in order to deliver a more definitive decision.

Court, Press Clash on Libel

In a decision that many feared would chill the editorial process, the Court has ruled 6-3 that a public figure claiming libel may inquire into the state of mind of those who've allegedly libeled him, and may also look into the editorial process.

The plaintiff in *Herbert v. Lando* (47 L.W. 4401) was Colonel Anthony Herbert, the subject of a *60 Minutes* segment in 1973. Colonel Herbert, a much decorated Vietnam veteran, filed a libel suit against *60 Minutes*, producer Barry Lando, and reporter Mike Wallace, arguing that his reputation had been damaged when the show implied that he had not reported war crimes committed by American soldiers. Herbert maintained that he reported the crimes but that the Army covered up evidence of the atrocities.

The case that eventually reached the Supreme Court arose out of pretrial questioning of Herbert's libel suit. During discovery proceedings, Herbert's lawyers questioned producer Lando for several days about his thinking when putting the story together and about the show's editorial process. They were trying to determine if he and his colleagues had acted with malice, since they have to show malice to prove their case.

After the third day of questioning, Lando balked at answering any more questions. He claimed that the First Amendment's free press guarantee shielded him from such inquiries. Herbert's lawyers insisted, and the issue of whether he'd have to respond went all the way to the Supreme Court.

Justice Byron White, speaking for the majority, said that he'd have to answer. "Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant. . . .The rules are applicable to the press and other defendants alike, and it is evident that the courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objection."

White further observed that "accordingly an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by our prior cases, and would substantially enhance the burden of proving actual malice."

Dissenting Justices William Brennan and Thurgood Marshall would permit questions about Lando's state of mind, but not about the show's editorial process. In Marshall's words, "Here the concern is . . . that the very process itself may be chilled. Journalists cannot stop forming tentative hypotheses, but they can cease articulating them openly. If prepublication dialogue is freely discoverable, editors and reporters may well prove reluctant to air their reservations or to explore other means of presenting information and comment. The threat of unchecked discovery may well stifle the collegial discussion essential to sound editorial dynamics."

The press at first was overwhelmingly hostile to the decision. Writers and cartoonists complained that the decision allowed journalists' innermost thoughts and emotions to be probed. One cartoonist conjured up 1984 with a drawing of a newspaperman hooked up to a futuristic gadget that revealed all his thoughts.

Later commentary, however, looked at the legal status of libel in this country and put the decision in a broader perspective. The prevailing case to determine whether a public figure has been libeled is *New York Times v. Sullivan* (360 U.S. 254), a 1964 landmark decision requiring public figures who think they've been libeled to prove that the defendant acted with malice, a reckless disregard of the truth. Defendants who are not public figures have an easier burden of proof.

The reason for the distinction between public and private figures, according to Justice Brennan's opinion for the Court in *Sullivan,* is that we have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement [and] caustic" attacks on public figures.

As many observers pointed out, this standard makes it exceedingly hard to prove libel against public figures, and makes our press one of the freest in the world. To go one step farther and permit the press to avoid any questions about the editorial process would give it a virtual *carte blanche* to say anything at all, with no fear whatsoever of libel. After all, the only possible way for the other side to prove libel is to ask questions about the newsmen's state of mind.

The remedy, they suggested, was not an absolute shield for newsmen, but rather narrower rules of discovery, so that opposing lawyers couldn't keep editors on the stand for days with unfocused questions.

Court Whittles Away at Exclusionary Rule

In a case signifying further cutting back of the exclusionary rule, the Supreme Court recently upheld a "good faith" exception to the controversial rule. By a 6-3 margin, the Court held that a policeman who seeks to enforce a law need not speculate about the constitutionality of that law (*Michigan v. DeFillippo,* 47 L.W. 4805).

The exclusionary rule is used to suppress evidence that is the fruit of unreasonable searches and seizures violating the Fourth Amendment. Justices have reasoned that throwing out illegally seized evidence is one way of assuring that police will be bound by Fourth Amendment restrictions. But the rule has aroused the ire of many Americans, who complain that its practical effect is to set criminals free because police have blundered in seeking evidence. (See the Spring, 1978 *Update* for a series of articles on the search and seizure controversy.)

In a landmark decision authored by Chief Justice Warren Burger, the Court upheld the arrest, search, and seizure of a suspect who was originally detained by Detroit police under an ordinance later held to be unconstitutional.

That ordinance authorized police to stop and request identification of persons when they had reasonable cause to suspect them of criminal activity. Persons who refused to identify themselves could be arrested until their identity was determined.

The suspect in this case, Gary DeFillippo, was observed by police in an alley with a female companion at about ten o'clock at night. When asked to identify himself, DeFillippo was reportedly vague and evasive. Police arrested him under the ordinance, and a search at the time of the arrest revealed that he had small amounts of marijuana and phencyclidine.

DeFillippo was charged with possession of the phencyclidine, and at trial moved to suppress the evidence that was found on him during the search. The trial court denied the motion but was overruled by the Michigan Court of Appeals. The higher court held that the Detroit ordinance was unconstitutionally vague, and as a result the subsequent arrest and search were invalid.

In overruling the Michigan Court of Appeals, the Supreme Court majority said, "Here the officer effected the arrest of respondent for his refusal to identify himself; contraband drugs were found as a result of the search of respondent's person incident to that arrest. If the arrest was valid when made, the search was valid and the illegal drugs are admissible in evidence."

The dissent, written by Justice William Brennan and joined by Justices Thurgood Marshall and John Paul Stevens, saw the essential issue in a different way. It said that the majority was wrong in focusing on the good faith of the arresting officers and allowing them to presume the validity of the ordinance.

Justice Brennan characterized the dispute as not between the defendant and the police but between the defendant and the state, saying: "The ultimate issue is whether the State gathered evidence unconstitutionally. Since the State is responsible for action of its state legislation as well as its police, they can hardly argue that this constitutional defect was the product of legislative action and the police were merely executing the law."

The decision disappointed civil libertarians, but the Court's ruling in a closely related case extended constitutional protections for criminal suspects.

In *Brown v. Texas* (47 L.W. 4810), the Court held unanimously that stops based on "stop and identify" laws (such as the one at issue in the Michigan case) must be based on objective criteria. The effect of this decision, also written by Chief Justice Burger, is that police are prohibited from detaining and questioning persons for simply looking suspicious.

The Court held that the Fourth Amendment prohibits "unreasonable" seizures (arrests) such as this one. It found that the arrest was not based on "specific, objective facts" that the defendant was engaged in criminal activity. In these circumstances, "the balance between the public interest in crime prevention and the [defendant's] rights to personal security and privacy tilts in favor of freedom from police interference."

Women Lose, Vets Win

One of the many benefits of having served in the armed forces is an automatic test-score bonus for veterans applying for state and federal civil service jobs. The rationale is that those who've served their country deserve preference in hiring. But the overwhelming number of vets are men, so women have argued that the test-score bonus works to their disadvantage and is a vestige of discrimination that should be ended.

In *Massachusetts v. Feeney* (47 L.W. 4650), the Supreme Court tackled the issue head on, deciding that veterans preference laws are not discriminatory, unless women can prove that the government intended to discriminate. In reaching its decision, the Court overruled a three-judge panel which had found a Massachusetts veterans preference statute unconstitutional.

The case was brought by Helen Feeney, a 12-year state employee who had repeatedly scored highly on the open competitive civil service examinations. But despite the high scores, she was twice passed over on the eligibility list by a veteran who scored lower but was given a higher position because of veterans preference points. In 1975, after her position was abolished, she went to court, arguing that the Equal Protection Clause of the Fourteenth Amendment prohibited such discrimination.

The three-judge panel agreed. It found that "While the goals of the preference were legitimate and the statute had not been enacted for the purpose of discriminating against women, the exclusionary impact upon women was so severe as to require the state to further its goals through a more limited form of preference."

But the Supreme Court saw it differently, determining that the law made a distinction between veterans and nonveterans and not between men and women. The Court concluded that the statute was neutral on its face in regards to gender, and that although it had a disproportionate effect on women, it didn't constitute invidious gender-based discrimination prohibited by the Equal Protection Clause.

In reaching its decision, the Court reviewed the general standards governing equal protection. The Court has held in the past that the Equal Protection Clause does not prohibit states from making classifications which may have a disproportionate effect on one group or another. In most cases, the Court need only determine that the classification bear a rational relationship to legitimate state objectives.

However, where classifications are drawn on groups that have historically been the targets of overt and covert discrimination (minorities and women), the Court will take a much harder look at the purposes behind the law and the discriminatory effect.

Even with this harder look, however, the Court found that the Massachusetts' veterans preference law was not gender based because the term "veteran" included women who were veterans and because a substantial number of male nonveterans were affected by the statute in the same way that Ms. Feeney was.

In dissent, Justice Thurgood Marshall, speaking for himself and Justice William Brennan, said, "Although neutral in form, the statute is anything but neutral in application. It inescapably reserves a major sector of public employment to an already established class which historically is 98% male." Marshall further argued that "where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of this particular legislative scheme."

Women found more to cheer about in a related case decided the same day. In *Davis v. Passman* (47 L.W. 4643), the Court held 5-4 that congressmen may be sued for sex discrimination under the Fifth Amendment.

This case was brought by Shirley Davis, who at the time of her firing in 1974 was deputy administrative assistant to Congressman Otto Passman of Louisiana's Fifth District. Despite praise for her hard work and competence, Passman fired her in a letter in which he explained that it was necessary that the slot be filled by a man.

The evidence was strong that Passman had violated her rights, but the question was whether the Constitution provided a remedy. In legal terms, can "a cause of action and a damages remedy be implied directly under the Constitution when [the equal protection component of] the Due Process Clause of the Fifth Amendment is violated"?

In deciding that it could, Justice Brennan, writing for the majority, cited a previous case against federal agents accused of an unreasonable search in violation of the Fourth Amendment (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 [1971]). There the Court had decided that someone whose Fourth Amendment rights were violated could sue the government for monetary damages.

The four dissenters—Justices Powell, Rehnquist, and Stewart and Chief Justice Burger—filed three dissents. Basically, the dissenters argued either that the doctrine of separation of powers protected the former congressman or that he might be protected by the Constitution's "Search and Debate Clause" (see "Proxmire Gets Fleeced"). The main dissent focused on the separation of powers question, pointing out that Congress had never made a provision allowing its employees to sue and instead exempted them from protections granted other workers. Until Congress does protect its employees, the dissenters argued, the courts should not get involved.

Parents Can Commit Minor Children

Children in Georgia and 35 other states are hereby cautioned not to make their parents mad at them or they could wind up being committed to a mental institution—in their own best interests, of course.

In a 6-3 decision, the Supreme Court upheld a Georgia law which allows parents to commit their minor children to state mental health hospitals. In *Parham v. J.R.* (47 L.W. 4740), the Court said the law met the necessary constitutional requirements to insure that parents were acting in the best interests of the children.

The precise issue in this case was what process is constitutionally due a minor child whose parents seek to put him in a state mental institution. Is the child entitled to a court hearing, or do less formal proceedings satisfy his rights?

The case is important because it raises the central issue in most juvenile justice cases—to what extent is a child entitled to full due process, as opposed to the more flexible standards traditionally used by juvenile courts?

The Georgia law allows parents to request that their children be institutionalized. If the superintendent of the hospital agrees, they may be admitted to the facility.

The juvenile bringing the case alleged that the statute violated due process requirements because (1) Georgia's Mental Health Director failed to publish statewide regulations defining specific procedures to be used when admitting minor children and (2) the admission requirements in the eight regional facilities were very different, since each superintendent devised his own procedures.

The U.S. District Court agreed, holding that commitment to any of the hospitals constituted severe deprivation of a child's liberty, and thus required the application of the Due Process Clause of the Fourteenth Amendment.

The court expressed the opinion that while most parents act in good faith regarding the best interests of their children, some might still regard mental hospitals as a dumping ground. It said that the review conducted by hospital superintendents and their staffs were insufficient to protect the child's liberty interests because of (1) the inexactness of psychiatry and (2) the fact that information relied on to make commitment decisions may not always be reliable.

The Supreme Court wasn't convinced. Chief Justice Burger, speaking for the majority, conceded that children have a protectible interest in being free of unnecessary bodily restraints and in not being wrongly labeled due to an improper decison by the hospital superintendent. But parents retain a substantial, if not dominant role in the decision of whether to voluntarily commit the child. Unless there's a finding of neglect or abuse, the traditional presumption that parents act in the best interests of their children should be upheld.

Therefore, the Court held that while the Fourteenth Amendment Due Process Clause does require inquiry by a neutral factfinder, it doesn't require that the inquiry be conducted by a judicial officer or that the factfinder hold an adversary hearing. In short, due process is not offended by the "informal traditional medical investigative techniques" of the hospital superintendent and his staff.

Justices William Brennan, Thurgood Marshall, and John Stevens dissented. They drew a distinction between children committed by their parents and wards of the state who are committed by social workers. They agreed that due process does not require formal hearings before a parent commits a child, but said formal hearings should be required before a social worker commits a ward of the state.

Proxmire Gets Fleeced

Thanks to an 8-1 Supreme Court decision, Senator William Proxmire (D-Wis.) will have to take care in what he says about future recipients of his infamous Golden Fleece award.

Proxmire gives the "Golden Fleece" award to government agencies that he feels have used particularly creative means to waste the taxpayers' money.

The award that led to this lawsuit was given to federal agencies that had funded scientist Ronald Hutchinson's study of the emotional behavior of monkeys. The press release announcing the award doesn't mention Hutchinson's name, but does point out that "The NSF, the Space Agency, and the Office of Naval Research won the Golden Fleece for jointly spending $500,000 to determine why monkeys clench their teeth."

Hutchinson took exception with Senator Proxmire's ridicule of his research, claiming that he was defamed and that his professional and academic standing had suffered. In *Hutchinson v. Proxmire* (47 L.W. 4827), he sued Proxmire for libel.

The issue was whether the Constitution's Speech or Debate Clause shields a senator from allegedly defamatory statements made in press releases and news conferences. The clause reads "for any Speech or Debate in either House, [representatives and senators] shall not be questioned in any other place." It was designed to ensure full and frank exchange of ideas among elected representatives, but did it extend to statements made off the Senate floor and directed to the public?

In deciding that it didn't the Supreme Court overruled two lower court decisions holding that the Speech and Debate Clause's immunity covered press releases and news conferences because they were part of Congress' information function. The majority emphasized that "in contrast to voting and preparing committee reports, which are part of Congress' function to inform itself, press releases and newsletters are attempts by individual members to inform those outside of the chamber." Such functions are not protected by the Speech and Debate Clause because they are not essential to congressional deliberation.

Justice Brennan was the sole dissenter. He argued that "public criticism by legislators of unnecessary governmental expenditures, whatever its form, is a legislative act shielded by the Speech and Debate Clause."

In a related case, the Court decided 6-2 that the bribery prosecution of a former member of Congress could not include evidence referring to the congressman's past support of bills in exchange for money (*U.S. v. Helstoski,* 47 L.W. 4710). The reasoning is that these bills involve legislative acts which are immunized by the Speech and Debate Clause.

Former Representative Henry Helstoski (D-NJ) was charged with accepting bribes in exchange for introducing private bills suspending the application of immigration laws and allowing aliens to remain in the United States.

However, Helstoski may not be out of the woods yet. The Court noted that the protection only extends to *completed* acts. It said that a promise to deliver a speech, to vote, or to solicit votes is not "speech or debate within the meaning of the clause, nor is a promise to introduce a bill at some future date a legislative act." Thus the prosecution could introduce evidence of these incompleted acts, and may still have a chance to convict the former congressman. □

NEWSCLIPS

Why Do You Think They Call Them Sneakers?

What would you take if you were an urban looter—television sets, tape recorders, air conditioners, liquor? According to a Ford Foundations study, the answer is "none of the above."

The Ford study found that the most popular items were tennis shoes, because they're easy to use, easy to sell, and difficult to trace. Not surprisingly, the biggest loser in the looting during New York City's blackout was the owner of "The Sneaker King" in the South Bronx. He had four stores filled, floor to ceiling, with sneakers before the looting, but nary a Ked after it.

ACLU Backs Winners

The American Civil Liberties Union has made its reputation by defending the rights of the poor, the despised, the helpless, and other downtrodden groups. But now, according to the *Chicago Tribune*, the New Jersey ACLU is representing some folks who are doing very well, thank you—professional gamblers who won an estimated $1 million in just one month from a New Jersey gambling casino.

The gamblers are "card counters" who descended *en masse* on blackjack tables and won big. Counters memorize every card that is played, and when the advantage turns to the player they make large bets.

Philip Wexler, a spokesman for the New Jersey casino, says "We spotted the counters right away. They sat at tables with a $25 minimum and a $1,000 maximum. They would bet $25 most of the time and then suddenly they would jump the bets up to a $1,000."

The casino reacted pretty much as you would expect—it threw the bums out. It rationalized that since Nevada's Gambling Commission allows a ban on counters on the grounds that they pose a threat to the state's economy, the same principle should protect the New Jersey casino.

The ACLU sees it differently. "It is a case where the casinos say we will not play with anybody who knows how to play the game," argues Steven Nagel, ACLU Director for New Jersey. "They're saying, 'we'll take the money from all the poor slobs who don't have a chance, but we'll throw you out if you know how to beat us.'"

Swedes Spare the Rod

By an overwhelming 259-6 margin, the Swedish Parliament has passed a law saying that parents may not strike their children or treat them in any other humiliating way. According to the *New York Times* News Service, this is not a child-abuse statute, since mistreatment of children is a well established criminal offense already.

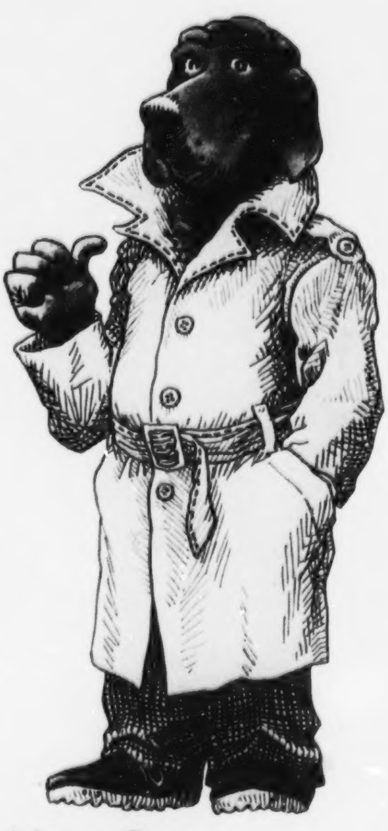
Rather, it is a law against spanking. Although the matter of humiliating treatment is vague, refusing to talk to children, depriving them of a meal, or peeking into their mail seems to be illegal too.

The author of the law says it was based on testimony "showing overwhelmingly that children just do not respond when they are hit or threatened." He added: "Their reaction is the opposite. They think in terms of revenge, and they can live in fear."

Opponents call it a "totally absurd, totally ridiculous law, the kind of thing that means nothing and cannot be interpreted or enforced."

The law does not prescribe punishment for harsh parents, on the assumption that complaints will be handled by the police and social workers, with referrals to family courts.

Rather, proponents of the law see it principally as a teaching tool. One said "we hope to use the law to change attitudes. If we launched a big campaign on the subject, it would probably be forgotten in a year. But the law stays, and it enters the public consciousness."



Move Over, Smokey

A lovable bear named "Smokey" has been asking us to prevent forest fires for several decades. Soon a bloodhound will lead a blazing battle against crime.

Dancer-Fitzgerald-Sample, one of this country's largest ad agencies, has created a canine spokesman for the National Council on Crime and Delinquency (NCCD). Cloaked in a Bogart-type trenchcoat, and sporting flopping ears, this law enforcement dog will be part of the first major crime prevention campaign to be launched in this country. He remains nameless for now, but a "name-that-dog" contest is probably down the road.

Jack Weil, executive vice president and creative director of the ad agency, says that the success of Smokey the Bear gave him the idea to create an animal that would do the job for the NCCD. Weil doesn't claim that his bloodhound will wipe out crime altogether, but hopes that he will "take the bite out of it."

Nice Try, But No Cigar

Credit them at least with a bright idea. Mr. and Mrs. Alexander D. Walter, Jr. of Redlands, California, claimed that the tax law is illegal because figuring up taxes amounts to work without pay. According to the *Washington Post,* they said this is "involuntary servitude," prohibited by the Thirteenth Amendment to the Constitution.

But the U.S. Tax Court didn't bite. It said that filling out your income tax return is not forced labor. Judge Samuel B. Sterrett agreed that Walters' time is valuable, but rejected the claim, commenting that their "reward is the privilege of living in a civilized society." Sterrett did not say if that reward is taxable.

Study Debunks Crime Myths

Most Americans would probably agree that we are in the midst of a crime wave, that cities are unsafe, and that most criminals are unemployed. *Myths and Realities About Crime,* a new study put out by the federal Law Enforcement Assistance Administration, punctures these and other widely held beliefs. The study showed that:

1. Actually, the crime rate held fairly steady between 1973 and 1976, the years covered in the study.
2. Nine out of ten big-city dwellers felt at least reasonably safe when out alone during the day. However, decidedly fewer (54%) felt that way at night.
3. An unlocked door or window, or even a key, is used to enter most burglarized homes and apartments.
4. Men are nearly twice as likely as women to be the victims of violent crime.
5. Although their median income was low, 77% of the U.S. prison population were wage earners before their imprisonment.
6. Big city dwellers are more apt to be mugged or robbed, but they are less likely than those in small cities to be victims of assault, personal theft, and household theft.

Maybe There Is Justice After All

The typical American victim of violent crime is likely to have a longer police record than the criminal who assaults him. According to Gary Feinberg, a Nova University Professor of Criminal Justice, the typical victim is also likely to be young, poor, unmarried, black, and living with several roommates.

Feinberg, who drew his profile of a typical crime victim by studying Justice Department statistics from the last decade, reported that contrary to popular belief, elderly people are the least likely of any age group to become crime victims.

Poll Shows Kids Still Turning On

A recent HEW survey shows that high school seniors have plenty of experience with liquor, drugs, and cigarettes. A study of the class of '77, the most recent group for which there is complete information, showed that

- 93% had tried liquor (mostly beer), and roughly 70% had a drink at least once in the month they were questioned, which HEW considered "regular use."
- 56% had tried marijuana, and 35% had used it in the past month.
- 76% had tried cigarettes, and roughly 39% were "regular smokers."

The results came in HEW's annual *Report on Marijuana and Health,* a publication that has chronicled the growing popularity of pot among kids since 1971. HEW found that only 7% of Americans over 35 had tried pot.

Can This Be Reefer Madness?

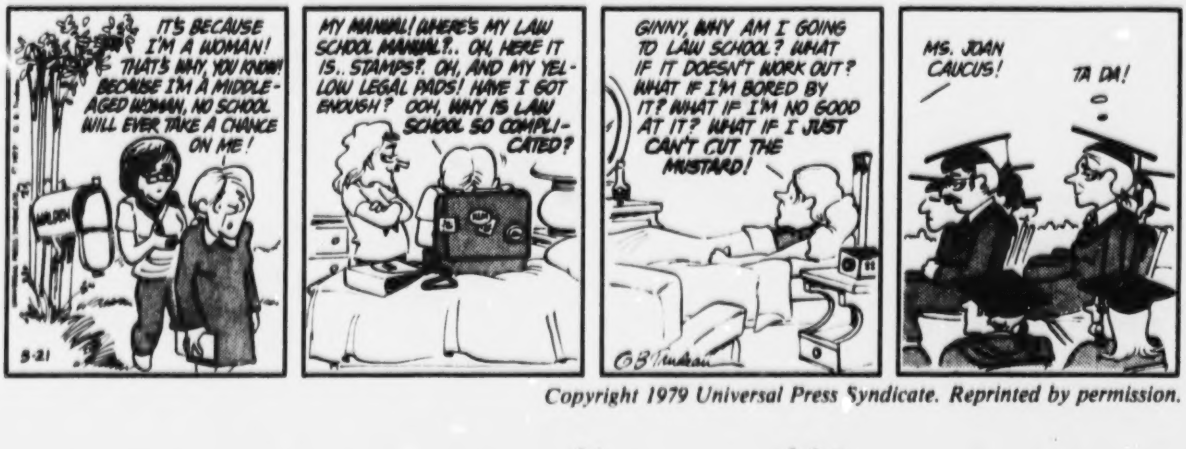
A recent Gallup Poll shows that by a 53 to 41 percent margin, the American people now favor removing criminal penalties for possessing small amounts of marijuana.

Observers think that helps to account for the increasing tendency of state legislatures to ease marijuana laws. Nine states now have made possession of an ounce or less of the drug a civil infraction rather than a crime.

Can the Snoopy Chair Be Far Behind?

Cartoon character Joanie Caucus is probably a more famous woman lawyer than any of her real contemporaries, so it's fitting that she be memorialized in a special scholarship for her sisters in the law.

Ms. Caucus, who appears in the Pulitzer Prize-winning strip *Doonesbury,* graduated from the Boalt Hall School of Law of the University of California at Berkeley. Now, thanks to a grant of $100,000 from the Exxon Corporation, women over 30 who have experience in some aspect of the legal profession have a chance to compete for scholarship help at Boalt Hall and follow in the Caucus footsteps. ☐


IT'S BECAUSE I'M A WOMAN! THAT'S WHY, YOU KNOW! BECAUSE I'M A MIDDLE-AGED WOMAN, NO SCHOOL WILL EVER TAKE A CHANCE ON ME!
WALDEN
9-21
MY MANUAL! WHERE'S MY LAW SCHOOL MANUAL?.. OH, HERE IT IS.. STAMPS?. OH, AND MY YELLOW LEGAL PADS! HAVE I GOT ENOUGH? OOH, WHY IS LAW SCHOOL SO COMPLICATED?
GINNY, WHY AM I GOING TO LAW SCHOOL? WHAT IF IT DOESN'T WORK OUT? WHAT IF I'M BORED BY IT? WHAT IF I'M NO GOOD AT IT? WHAT IF I JUST CAN'T CUT THE MUSTARD!
G.B. Trudeau
MS. JOAN CAUCUS!
TA DA!

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UP AND COMING

David Schimmel

Toward Bicentennials of Significance

Can we do it right this time around? It's up to you

In the aftermath of the bicentennial of 1976, many Americans know we could have done better. The bicentennial left us with memories of tall ships, big parades, and fireworks; but little of substance remains. Two upcoming bicentennials—of the ratification of the Constitution in 1987 and the Bill of Rights of 1991—give us two new opportunities to insure that these become bicentennials of national significance. And law-related education can help our nation achieve this goal.

Education and the Bicentennials. For almost 200 years, a major purpose of public schools has been to teach students to understand the Constitution and Bill of Rights. Yet there is ample evidence—in educational surveys, opinion polls, and public events—that many Americans have not been educated to live according to these documents. The coming bicentennials are appropriate occasions for the public schools to recommit themselves to this task.

What can we do? We can take the lead in establishing a partnership among educators and lawyers to help plan and observe these bicentennials as national "educational" events. The goal would be to educate all citizens—in our schools and communities—about the importance and function of these basic legal documents in their individual lives and in our national life.

How? By thinking boldly; by viewing every school, courthouse, and townhall as a potential classroom in democracy; by seeing every lawyer, parent, and public official as a potential teacher. By not focusing on specific events or a specific year, but by starting an educational process that could begin in 1980 and could span the last two decades of the century.

How can the ideals and values of the Constitution and Bill of Rights be brought to life in your school and community? Here are a few possibilities:

- Create state and local bicentennial committees composed of educators, lawyers, and civic leaders.
- Develop a plan for mobilizing educational, legal, and community resources to educate all citizens about how the Constitution and Bill of Rights affect their lives.
- Seek legislation supporting educational programs for the bicentennials and providing assistance.
- Publish a directory of local bicentennial resources—speakers, films, books, and special events.
- Help develop (or adapt) curriculum for local schools and community programs for adults on topics such as: The Role of the Citizen in Constitutional Change, How to Implement the Constitution in Your Community, and the Constitution and the Future.
- Set up courthouse education centers. Designed for jurors, students, and other citizens, these centers could be established in every community courthouse. Under the theme "Implementing the Ideals of the Constitution," the centers could make basic information available in written form, on tape, or on film so that all citizens, regardless of reading ability, could understand how our legal system works and how it could work for them. These centers could turn the nonproductive time of jurors and witnesses into valuable opportunities to "learn while waiting."
- Ask educational organizations and community groups to plan appropriate bicentennial workshops, conferences, and year-long programs.
- Encourage local TV networks, newspapers, and magazines to develop public service features on recent constitutional controversies such as those surrounding the Skokie march, the death penalty, abortion, freedom of the press or student rights.
- Urge schools to develop community education programs to help local citizens become legally literate. Such schools could become neighborhood "drop in centers" for preventive legal education and might offer mediation and arbitration services to decrease unnecessary litigation.

These brief examples suggest the limitless possibilities of using the bicentennials to improve and expand law-related education. The goal would be to see that appropriate bicentennial information and activities would be available to every student and adult by 1987.

It's up to you. Will we improve on the events of 1976? Will the bicentennials reflect the values, ideas, and ideals of our basic legal documents? If we commit our time and our energy, we can help insure that these will be bicentennials of educational importance. This is an invitation to begin, and the time to begin is now.

Send your ideas and plans for the bicentennials to *Update.* During the coming months we will keep you in touch with important bicentennial developments—from federal legislation to funding possibilities and challenging educational ideas.

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A Legal Battle Ends

The concluding chapter of one teacher's fight over a disputed contract

Ruth Stern Geis had never handled a case on her own before. A young lawyer, not long out of law school, she found herself in the nervous position of representing a good friend on her first time out.

Her client, Karen Gardner, had been fired by Faulkner, a small private school on Chicago's south side, in the middle of the 1976-77 school year. She felt that the grounds for her firing—that the school was "over staffed"—violated the contract. She was suing to recover the balance of her salary and some other costs. (See the Spring, 1979 *Update* for more details on the beginning of the case.)

Everything about the mechanics of filing a lawsuit was new to Ruth, and many details proved much trickier than she expected. Even the very first step in the case—serving summonses and the complaint on the other side—gave her headaches.

Another Kind of Service Comedy

To sue someone, you generally have to serve him with (1) a complaint which details the charges against him and the damages being sought, and (2) a summons telling him when and where he must file his answer to the complaint. Usually, the other side has a month to six weeks before it must respond. The case is then assigned to a judge, who hears pretrial motions and, eventually, tries the case itself. Karen's case officially began in July, 1977, when Ruth wrote the complaint and began the process of serving the summonses.

There would have been no problem serving the summonses if she had just sued the school, but she decided to sue the board of directors as an entity and as individuals. So instead of one summons to serve she had more than 20.

She was stymied off the bat by not knowing the names of the board members. If she didn't know who they were, they couldn't be served, and thus couldn't be sued. A friend of Karen's who was still teaching at the school came to the rescue, somehow finagling a list of board members and secretly passing it to them.

The next step was to have the summonses served. Summonses can't simply be mailed or left on the doorstep. They have to be personally served on the recipient himself, or left with someone of capacity, another adult or child old enough to understand what he is accepting.

Ruth had the sheriff's office deliver the summonses. (In Chicago, sheriff's deputies will serve people for less than $10 apiece, plus mileage.) After several weeks, the sheriff's office reported that many of the summonses couldn't be served, so Ruth sent out a second batch. The second set of summonses also gave the other party several weeks to reply, causing yet more delay.

The sheriff's deputies were eventually able to serve about 80 per cent of the names, but they missed perhaps the most important person on the list, Board President William Holland, who was also serving as the lawyer for the other side. The first summons, to be delivered to his office, had the wrong address on it. The sec-

412

ond came back with the notation "not found," even though it had the right address. "Maybe the secretary just said, 'Sorry, we're not accepting any summonses today,'" Ruth says. In any event, when the second summons failed, she hired a private investigator for $25, and he was able to serve Holland right away at home.

The other side responded to this barrage of summonses with a mixture of annoyance and amusement. For example, here's how Mr. Holland remembers his own serving. "Some guy came to my house on a Saturday morning and served me. He seemed kind of scared. I don't think that was necessary. They know where my office is."

As for the others, Holland said in an interview after the case that some people served with summonses weren't on the board at all. "I really wonder where they got those names from. I would have corrected it at trial, but I saw no need to tell them that they were wrong at that time." In other words, if the other side didn't know who to sue, Holland wouldn't tell them.

One of the reasons Ruth had wanted to sue the board as individuals was to remind them forcefully that there was a serious suit pending. She thought that this might make them nervous and nudge them towards a quicker settlement.

Holland thinks this ploy was worth trying—"if I were in her position I'd have done the same thing"—but says it didn't work. He told the board that there was no good legal basis for suing its members as individuals. Joining the board to the suit was "spurious," because the board had not acted recklessly or negligently in firing her. Therefore, he told them, they had no personal liability in the case and would eventually be severed from it.

The Plaintiff's Strategy

More than six months elasped between when the case was begun and the time when Holland (the last person served) offically responded to the suit. This delay worked against one of Ruth's principal goals—getting the issue resolved as quickly as possible. Karen and Ruth were afraid that the school might go out of business before the suit could be heard, because in Cook County civil cases often take five years to get to trial.

To expedite the case, Ruth tried to keep the issues sharply focused and avoid anything that would muddy the water. For example, the formal complaint is only two typewritten pages long. It states simply the core of Karen's case: that she had a signed contract, that she was ready and willing to continue to work but was wrongfully discharged, and that she deserved her lost salary, some expenses, plus interest and court costs. The first count of the complaint was entered against the Faulkner school, the second against its board of trustees and against each member individually.

The Defense's Strategy

In responding to the first batch of summonses, Mr. Holland filed an answer to the complaint and demanded a jury trial. As the other trustees were finally served (including himself), Holland went to court and amended the answer to include them as well.

Like the complaint, the answer is short and simple. It denies that she had a valid contract because it was never approved by the board of trustees. Therefore, the answer asks a judgment in favor of the defense, plus costs.

Ruth was not surprised that Holland had requested a jury trial. "I think it's always good strategy for the defense to ask for one. The backlog for jury trials guarantees that the case won't come up for a long time." The longer the case drags on, the more likely that the plaintiff will give up, lose interest, or settle out of court for a lesser amount.

But Mr. Holland says that his real purpose was not delay at all. "I would always take a jury. My reasoning is that I can persuade them in my favor....I think I could have made a strong argument in this case." With a faraway look in his eyes, he begins to sketch out the line he would have taken: "A small, struggling private school, trying to help out a community...Yes, I think I could have made a strong appeal to the jurors."

An Alternative to a Jury Trial

Ruth had an ace up her sleeve in trying to get a quick resolution of the case. Jurors are triers of *fact* rather than interpreters of the *law*. Where the facts of a case are in dispute, the jurors try to determine where the truth lies.

However, where there is no dispute over the facts, the law permits the case to be tried by the judge alone, since he or she is competent to decide how the law should apply. This alternative is called a summary judgment.

Karen and Ruth had been afraid that Holland's response to the complaint would have raised all sorts of new issues, almost assuring that the case would have to go before a jury. Karen says, "he could have said that the language of their letter firing me was a lie to spare my feelings, that they thought I was an incompetent teacher, that I deserved firing for other reasons than they had alleged. They couldn't have proven it, but they might have confused things enough so there would have been no alternative to a jury trial."

However, the school's reponse raised no new issues. In Ruth's opinion, the facts of the case weren't really in dispute. Both sides agreed that Karen worked at the school, received a certain salary, and was fired by letter at a certain date. The dispute between them was legal, not factual. Did she have a valid contract with the school, or was the contract that she had signed invalid?

Since there is no substantial backlog for summary judgments, the case might be decided soon, even within months—provided Ruth could convince the judge that it need not go to a jury.

Building the Plaintiff's Case

In going for a summary judgment, Ruth had all the more reason to keep her argument simple and directly on point. She feared that if the judge felt there was any real possibility of a dispute over the facts, if there was any uncertainty in his mind at all, he would refuse the motion for summary judgment and hold the case for a jury.

Therefore, she worked overtime to make the motion for a summary judgment as clear, concise, and tidy as possible. She remembers this as being one of the toughest pieces of writing she has done.

As one means of keeping it simple, the motion for summary judgment was only against the school itself. As long as the school was still in business, and as long as the summonses had done the job of reminding the board members of the suit, there was no real need to seek a judgment against them at that time.

The two-page motion itself begins by asserting that there is "no genuine issue as to any material fact and therefore plaintiff is entitled to a judgment as a matter of law." It continues with a series of short statements which briefly build the argument in support of a summary judgment. Each of these statements is carefully keyed to the documents—a brief, two affidavits, contracts between Karen and the school—which support the point being made. The complaint is also included in the packet of materials.

The brief is slightly longer and much more legalistic. It tries to appeal to accepted authority—the rulings of other courts—to convince the judge of the points of its case.

In an interview after the case, Ruth put her argument in layman's terms. "Basically, the law says that you can't keep secrets in your head when you sign a contract. The idea of a contract is that both parties are aware of all their rights and duties under it. For example, the contract that Karen signed is called an 'integrated contract.' That means that it contains all the relevant data. In Karen's contract, there are only blanks for two persons to sign—the teacher and the director of the school. They claim that she should have known that something was missing, that a board member's signature was also required, but nothing in the contract would have led her to know that. She had every reason to think that it was a valid contract."

Other evidence also showed that Karen had reasonably assumed that the contract was valid. Her contracts in the previous two years had been signed only by herself and the school's director, and both contracts had been fully honored. Moreover, every month her salary checks were signed by a member of the board. If the board had felt that her contract was improper, they had plenty of opportunity to inform her. As Ruth puts it, "silence implies consent, and they never squawked."

Much of this evidence was laid out in Karen's own affidavit, which was attached to the motion and brief. Her affidavit was two pages long. It consisted of a series of short statements that she would testify to if she were a witness at a trial of the case. Affidavits are given before a notary public, and the persons giving them swear to them on their oath.

In support of these arguments, Ruth included all three of Karen's contracts. She thinks the contracts themselves were the best evidence her side had.

Another argument in the brief tried to anticipate the other side's response. Ruth felt that the school would argue that the director had overstepped his authority, issuing and signing contracts without the board's approval.

To counter this, she secured an affidavit from the director who had signed Karen's contracts. He said that he believed he had authority to sign the contracts for the school, and, more importantly, that he knew of no communication from the board to teachers indicating that he did not have the authority.

The Defense's Response

As with all motions, the other side received a copy of the motion for summary judgment and was given an opportunity to respond. As expected, the school filed a response urging that the motion for summary judgment be denied because there were genuine factual issues. In support, it filed an affidavit by the school's interim director and one by William Holland himself.

In essence, the school argued that teachers knew that the former director had gone beyond his authority. The affidavits said that teachers are required to know the school regulations, which indicate that only the board can issue contracts. A copy of the school's bylaws was attached as evidence.

The affidavits said that previous contracts had had a space reserved for the signature of a board member, and that teachers were familiar with the system by which contracts were distributed without any signature, signed by the teachers, then returned to the director for submission to the board for its approval and a signature of an officer. The affidavits also said that the contract forms had been

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414

changed by the former director without the approval of the board. In support, a teacher contract from a previous year was offered in evidence.

In an interview following the case, Mr. Holland put the school's argument in a nutshell. "Normally, someone signing a contract would have the right to rely on what the contract said, but in this case we thought that the teachers had been advised of what the correct procedure was and should have known that they were not signing valid contracts."

The Case Comes to a Head

The law is often attacked for its slow pace, but in this lawsuit the end came quicker than anyone, even Ruth, had expected.

Both the motion for summary judgment and the school's response were filed with the judge the case had been assigned to. After reading the school's response, Ruth thought she detected many holes in their argument. For one thing, she felt the affidavit from the interim director was off point because the contract referred to (the one with the blank for the board member's signature) and the procedure outlined all dealt with the 1973-74 school year, which was three years before the disputed contract and one year before Karen had started teaching at Faulkner. Besides, the bylaws for the school didn't clearly say that a board member had to sign the contracts, and in any event no one had told Karen and the other teachers about the bylaws.

Ruth decided to go to the judge with a new motion, this one to strike the other side's affidavits on the grounds that they were inadmissible as evidence. Ruth argued that the affidavits were not relevant (the interim director's was based on contracts and procedures in effect three years before the disputed contract), and that they were conclusory (Mr. Holland's affidavit contained his interpretation of the bylaws, but the bylaws themselves were the best evidence and did not need his interpretation).

Faulkner Board President William Holland said he had few regrets about the case.

Ruth says now that she didn't care whether the judge struck them or not. She just wanted to make him aware of their weaknesses.

The hearing on Ruth's motion to strike the affidavits was set for May 31, 1978. The judge met with the two lawyers that day in his chambers. He briefly looked through the school's affidavits and said, "Well, Mrs. Geis, I'm going to leave these affidavits in, for whatever they are worth." When Ruth heard that, she felt that her motion had accomplished just what she hoped it would.

Ruth had tried all along to keep her case simple and easy to follow, and she thinks it paid off in this session. Leafing through the documents, the judge seemed able to put his finger on the basic issues in just a few minutes. Ruth remembers, "he spent about three minutes glancing through them, and then started to ask questions. He was like a laser beam, getting right to the heart of the matter. And he wasn't asking me questions, he was asking Holland. One of the hardest things I had to do," she continues, "was to be quiet. I wanted to say, 'yes and not only that, but look at this and this.'."

After a few minutes, Ruth remembers, the proceedings became pretty informal, with the judge referring to Karen by her first name. After peppering Holland with a number of questions, the judge finally said "Frankly, counselor, I think you have been leading this little lady [Karen] down the garden path."

At this point, it became clear to everyone which way the judge was leaning. As Mr. Holland remembers, "I enjoy a good solid litigation, but I'm not a fool. My discussions with the court, and the things I heard during the pretrial motions, suggested that we would be better off to settle."

The judge then specifically asked if they had tried to reach a settlement. When he broke off the conversation to take a phone call, Ruth and Mr. Holland began to negotiate. Ruth recalls him saying, "I suppose you want it all," to which she replied that her client would probably settle for $5,000. (The amount she was suing for was a little under $7,200). The judge gave them two months to work out the settlement, and the case entered its final stages.

Wrapping It Up

Ruth looks back on most of the case with undisguised pride, but feels she didn't handle the negotiations as well as she could have.

She thinks she was right in agreeing to negotiate, but that she might have gotten more. "If we had refused to negotiate, we probably would have seemed greedy and we might have irritated the judge. He might have heard the case in summary judgment and reduced the damages anyhow, or he could even have taken another look at the evidence and decided the case merited going to a jury."

She feels that her inexperience showed when she spoke too soon in offering to settle for $5,000. "I should have asked for more, set my sights higher. In negotiating, you have to start with an extreme position. My problem was that I thought like a judge, not like an advocate. I should have waited to name a figure, or at least I should have named a higher figure, say $5,500."

Ruth also feels that she unnecessarily threw away a bargaining chip. "I realize now that it was really important to the school that we permit them to pay on installments. We didn't mind that at all, so we didn't make a bargaining point about it. But that's the wrong way to look at it. You have to realize how it affects *them.* If it matters to them, then you should get something in return for conceding the point."

However, the damage had been done. When the school offered $4,500, a fair compromise seemed to be $4,750, splitting the difference. Ruth and Mr. Holland were thus able to go back to the judge with the settlement worked out. The money would be paid back, in monthly installments of various sizes, from September to December, 1978. When the last payment came in (a few days late) in December, the school had fulfilled its obligation under the settlement, and the case was officially over.

In Retrospect

The three people most heavily involved came to the dispute with different experiences, feelings, and expectations. Naturally enough, even now they have very different perspectives on the case—and on each other.

Karen found the experience surprisingly good on the whole. It hadn't been unpleasant or nasty, and it hadn't taken a lot of time. In fact, only about 14 months elapsed between the day the case was filed and the day the first check arrived. "But it was more than the money," she says, "and I think an important principle was upheld here. People shouldn't get away with breaking contracts. If contracts can be violated, what's the point in the legal system?"

In accordance with their initial agreement, Karen paid Ruth one-third the amount of the settlement. This doesn't seem excessive at all to her, and in fact she thinks Ruth deserved more.

Does Karen have any tips for others who might be in a similar situation? "Yes. Save everything. I guess I thought all along that the school was shaky, so I saved my contracts, the stubs from my paychecks, everything. When we were putting together our case, it was really helpful to have all this material. Otherwise, we would have had to subpoena the school, and that would have slowed everything down."

As for Ruth, she's naturally pleased with how the case came out. "It almost seemed like a textbook example," she says. She feels, though, that Karen might have expected a little more than she got. "I think Karen wanted an apology from the school. It was an emotionally wrenching experience for her, and she thought she was wronged. But the system isn't set up that way. It won't force the other side to apologize, but gives you money instead."

What's Ruth's evaluation of her opponent? "I had my problems with Holland at first. In one of our early phone calls, before the suit was filed, I accused him of running a shoddy operation and may have called him a name. But eventually I came to like him. He really believed that it wasn't a good contract. He had clearly in mind what the proper procedure should be, and I think perhaps he was too close to see that teachers couldn't be expected to know the procedure."

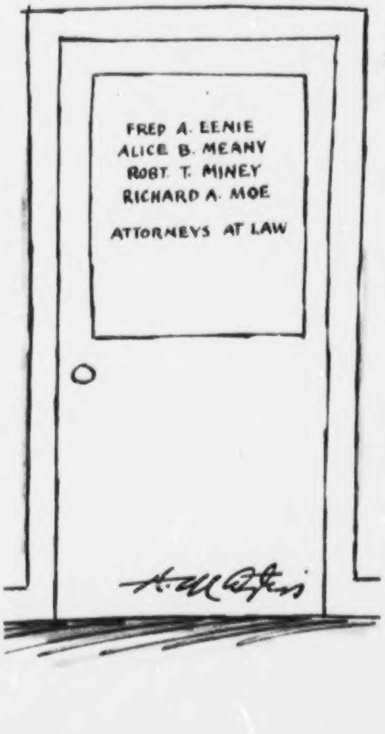
Mr. Holland naturally sees the case differently, but expressed less disappointment than one might expect. He says now he would do nothing differently if he had it to do over again. "I'm not really satisfied, but under the circumstances I don't think we did too badly. My reading of the judge was that we had better settle." He pauses, a half smile on his face. "Now, if we could have gotten another judge..."

Holland is a veteran lawyer, with a large practice. He took on this case as part of his service to the board, taking no fee in return and asking only that his costs be reimbursed. Understandably, the case is much less important and memorable to him than to either Ruth or Karen. "We've been sued by other teachers. There were eight or nine pending cases when I came on the board. We settled them too. It's not that we couldn't have won 75 percent of them, but it's too much trouble, so we prefer to settle out of court. Other members of the board say that gives us a bad image, but I say, 'tell them not to sue.' "

Holland says that he agreed to the settlement to avoid expense and bother. "The case could have taken three days to try. We talked about it in board meetings, and realized that three or four board members and the school's director might be called as witnesses. All in all, six or seven people could have been tied up." As for an appeal, "that could have taken another three years, tying up time, people, and money. It's just not worth it."

Holland adds that enrollment has stayed low at Faulkner, but the school is in better shape now than it was in the turbulent days when Karen was fired. "The whole atmosphere is different now. There are no cliques or factions. There's less criticism, more willingness to volunteer time."

And there have been a few other changes as well. Now the contracts have been revised and are clearer. There's a place for board members to sign, and there's a provision that permits the board to cancel contracts if enrollment falls below a certain level. Thanks to Karen Gardner, teachers and board members at Faulkner now have a better idea of where they stand. ☐



CURRICULUM UPDATE

Lisa Broido

New Materials on the Market

They cover crime, morality, and kids' rights

Elementary — Middle

■ ***Citizens Band Radio: A New Hue and Cry*** (1978). Upper elementary through secondary. Twenty-five minute, 16mm color/sound film. Purchase: $365; rental: $50. (MTI Teleprograms Inc., 4825 N. Scott St., Suite 23, Schiller Park, IL 60176).

This film tells students how to "tune in, turn on and help each other out" with CB radios. It shows how citizens who own these increasingly popular gadgets can be more public spirited and community minded.

Citizens Band Radio opens with a look at how citizens of the past were obliged to raise an alarm when they witnessed a crime. It then shifts to the modern-day counterpart to this "hue and cry"—the CB.

CB owners are shown as additional "eyes and ears" for law enforcers by reporting fires, potential crimes, car accidents, etc. They are seen meeting in community awareness groups such as REACT and working with police officials.

The film explores another side of CB's as well, pointing out that CB's are often an invitation for crime. These fairly expensive units are a prime target for theft, and CB owners can be victimized by unscrupulous operators who answer their calls for help. Also, there are many "CB vigilantes" who are too overzealous in their attempts to thwart crime and end up getting in the way.

Many young people are fascinated with electronic apparatus such as CB radios. This film shows how they can help the "smokey" instead of trying to avoid him.

■ ***Growing Up Moral: Dilemmas for the Intermediate Grades*** (1978), by Peter Scharg, William McCoy, and Diane Ross. Middle Level. Softcover, 183 pages. Purchase: $5.95. (Winston Press, 430 Oak Grove, Minneapolis, MN 55403).

April saw her two best friends cheating on a spelling test. Should she fink on her pals? John's father will not let him join a B-ball team which has Mexican players. Must he obey his dad this time?

Adolescents face difficult moral dilemmas everyday. They must learn to make responsible decisions concerning peer pressure, parental authority, current issues, and the law.

Growing Up Moral shows teachers how they can help their students to grow morally. It includes more than 50 tested dilemmas which can be reproduced for teaching, giving transcripts of some actual student sessions to illustrate how they can be used.

This is an extremely well-written text which brings the theories of Piaget and Kohlberg into classroom practice.

Secondary

■ ***The Theft*** (1976), ***Runaways*** (1976), and ***The Tunnel*** (1975). Secondary. Three 16 mm. color/sound films, 25 min. each. Purchase: $360 each; three-day rental: $40 each. (The Little Red Filmhouse, 119 South Kilkea Dr., Los Angeles, CA 90048).

The Little Red Filmhouse may sound like a fairy tale company, but it has produced three highly realistic, award-winning films concerning juvenile offenders.

Runaways is a moving story about two young girls, Kathy and Debbie, who have left home. Kathy is a naive teenager who runs away from her middle-class family because she feels her parents are too strict. Debbie, an experienced runaway from a poor home, shows her how to survive on the streets. The two girls eventually go to a runaway house where a staff member counsels each one individually. Kathy agrees to set up a reconciliation meeting with her parents, but Debbie returns to the streets when she learns that she is a "throwaway" whose mother no longer wants her. This fine film reveals the harsh realities of trying to make it on the run and examines some helping facilities for runaways.

The Theft is a fiction film, done in documentary style, about a teenage boy who is pressured into crime by older youths. He regrets the burglary, throws away the loot, and refuses to commit any more crimes, but he's still not out of the woods. This well-done and believable movie shows young people that they must learn to stand up to peer pressure in order to avoid the anxiety, guilt, and trouble with the law which accompany crime.

The Tunnel gives a dramatic portrayal of the growing youth-gang problem in America. It tells the story of a teenage boy, Damen, who won't become a member of a gang. He insists he can "take care of himself," refusing the help of a school official and an offer of police protection. He decides instead to take the situation into his own hands by getting a gun, precipitating yet more violence. This intense film probes the reasons for getting involved in youth gangs and provides the viewer with insights into how teachers, parents, young people, police, and school officials react to the problem.

■ ***Criminal Justice: Trial and Error*** (1978). Secondary. Nineteen minute color filmstrip and cassette, teacher's guide. Purchase: $24. (Current Affairs Films, 24 Danbury Road, Wilton, CT 06897).

This filmstrip takes a hard, cold look at our poorly functioning criminal justice system, with its overcrowded dockets, understaffing, and uneven manner of meting out justice.

Trial by jury, we learn, is the exception rather than the rule today. Ninety percent of all criminals are able to "cop a plea" for a lesser charge or reduced sentence. We also discover that the courts are a "revolving door" for "career criminals" who break the law as a profession.

Not only does *Criminal Justice* point out why the system isn't working, it also explores some of the changes that are being made. The Major Violators Program, a systematic effort to identify and incarcerate recidivists, is one way that the government is trying to cut through the clogged courts. New state laws limiting the discretionary power of judges is another.

Yet the filmstrip is quick to add that it is too early to tell whether new legislation and programs will make any real difference. Also, many of the reforms are highly controversial. The viewer is basically left to decide for himself whether our criminal justice system can be rescued.

■ ***Seven for the People*** (1979), by Zena Collier. Secondary. Hardback, 191 pages. Purchase: $7.79. (Simon and Schuster, 1230 Avenue of the Americas, New York, NY 10020).

This book takes a lively look at seven organizations which act in the public interest—the American Civil Liberties Union, Common Cause, the National Urban League, the League of Women Voters of the United States, the Sierra Club, the National

Organization for Women, and Ralph Nader: Public Citizen.

Although these seven citizen groups are concerned with different issues, they are shown to share several common threads. First, the author says they are all dedicated to "improving the quality of daily life and . . . preserving the rights and freedoms guaranteed to all citizens under the United States Constitution." Second, she says they attempt to achieve their goals by such peaceful means as lobbying and taking court action to enforce compliance with the law.

Seven for the People is highly readable book which proves that the man on the street can work with others to improve our society.

■ ***The Justice Series*** **(1979).** Secondary. Four 16mm color/sound films. Purchase of full set, $1,295; rental of full set, $60. Individual rentals or purchase also available. (Coronet Films, 65 East South Water St., Chicago, IL 60601).

This four-part documentary series examines what's being done to save our floundering justice system. It shows how creative community action can help reduce crime, as well as revitalize neighborhood spirit and promote civic pride.

Justice: The Role of the Community (27 1/2 min. Purchase: $385; rental: $15). An inspiring look at three different programs that are helping the community: "Aunt Martha's," a volunteer service center which lends a helping hand to troubled youngsters; "Operation DARE," an ex-offender counseling effort; and "Fifth City," an inner-city community involvement program.

Justice: Fear, Crime and Prevention (26 1/2 min. Purchase: $361; rental $15). An examination of three successful approaches that community groups are taking to reduce crime and fear: a citizens band radio patrol, a joint task force of police and social workers, and a community youth service program.

Justice: Crime, Criminals and the System (26 1/2 min. Purchase: $371; rental: $14). A look at America's struggling justice system from a wide range of perspectives, examining why it isn't working and what can be done about it.

Justice: Justice and the Criminal Courts (23 min. Purchase: $392; rental: $16). A series of opinions on how to help our problem-ridden judiciary, offered by some people who know the system from the inside—an ex-offender, the director of the Chicago Crime Commission, etc.

Teacher Resources

■ ***That's Not Fair!: Helping Children Make Moral Decisions*** **(1977), by Larry C. Jensen.** Elementary. Softbound, 179 pages. Purchase: $6.95. (Brigham Young University Press, Provo, UT 84602).

As young people grow up, they constantly need help facing situations which require moral reasoning. Not only must they learn to choose between right and wrong, but they must discover how to choose among good values which come into conflict. And they must learn that some wrongs are worse than others. For example, youngsters have difficulty understanding that lying is worse than exaggerating or that breaking something intentionally is worse than breaking it by accident.

That's Not Fair! shows teachers how to help pupils deal with such moral concerns as sharing, punishment, respect for property, delayed gratification, and aggression. It provides an in-depth look at Piaget's theories on the development of moral thought and shows how they can be applied in the classroom.

Jensen's lessons are both creative and educational. Each activity focuses upon realistic conflicts of fictional characters and tells what should be taught and how. Worksheets consist of enchanting line drawings, primary-level stories, and questions, and can be easily duplicated for student use.

Few teacher resource books combine theoretical ideas with practical application as well as this one. A must for the elementary educator who desires to help students chose among good and bad and the hazy areas in between.

■ ***Children's Rights: Contemporary Perspectives*** **(1978), edited by Patricia A. Vardin and Ilene N. Brody.** Secondary. Paperback, 182 pages. Purchase: $6.95. (Teachers College/Columbia University Press, 562 West 117th Street, New York, NY 10025).

A thought-provoking collection of articles and essays by child advocates in law, education, psychology, and government. It addresses some fundamental questions. Should children have the same rights as adults? Do young people need legal advocacy to protect their rights? How can the rights of youngsters be realized?

This comprehensive book examines the rights of minors from a moral and legal perspective, and also provides comparisons with what other countries are doing and an in-depth discussion of the rights of the handicapped and abused.

Also included is an essay by Judge Mary Conway Kohler of the National Commission on Resources for Youth. She urges that children should be given the opportunity to participate in decision making by performing significant community services that affect others.

The final chapter of this anthology is devoted to the views of children themselves. It shows how responsible and mature kids can be when they are provided with a platform for voicing their opinions. Good reading for both high school students and teachers. □

The Law Is Just a Game

TRIAL LAWYER

Your spouse tells you during dinner that he/she hid some stolen money in the basement. Can the government force you to testify?

If you did not know that the "husband/wife privilege" gives married persons the right to keep silent about their mates, you would be well on your way to losing the *Trial Lawyer* game.

Trial Lawyer-The Jurisprudence Game is a fun new way to learn about America's criminal justice system. Chicago trial attorney J. N. Vail created the game because he believes that "to know your rights is to possess them."

It's not easy to win this colorful board game. Players face many obstacles as they try to be the first to fill their jury boxes with jury members. Failure to answer "Evidence" questions like the one above results in the loss of a valuable juror. An ill-fated roll of the dice can mean forfeiting a turn for having an incompetent lawyer or a character witness who has just been impeached. An opponent landing on a "Stop and Frisk" space could discover that you're concealing a weapon and take away two of your jurors.

Over a thousand school districts have purchased *Trial Lawyer* so far. Its distributor claims that educators have found the game useful for teaching about a wide range of legal topics from police interrogation to mistrials, from entrapment to habeas corpus.

The game is designed for persons eight years and older. A special school edition, incuding a primer on the American legal system and over 96 Supreme Court rulings, is now available.

So, if you want your students' understanding of the law to go beyond *Monopoly's* "Go to Jail—Go Directly to Jail," *Trial Lawyer* could be a good addition to your classroom.

(You can order this game from Professional Games, 900 Golfview Road, Glenview, IL 60025. School edition: $14.95; regular version: $9.95).

Classroom Strategies

(Continued from page 16)

2. Use a show of hands to tally student responses. Record them on the chalkboard.
3. Group items under appropriate categories and discuss results obtained. Encourage students to share reasons for their choices.
4. Have students suggest criteria for determining when each of the interests (student, parent, school) should be given priority.

3.

Issue Three

Conflict and Controversy: What Role for the Courts?

Since the famous *Brown v. Board of Education* decision in 1954, state and federal courts have become increasingly involved in school matters. The *Tinker* case in 1969 gave greater impetus to this trend. More and more, such school issues as busing, finance, appearance of students, and expression of students and teachers are being decided by the courts.

Dramatic and controversial remedies have resulted. These have included placing a Boston high school under judicial control because of school desegregation problems and briefly shutting down the entire educational system in the state of New Jersey until the state legislature enacted a more equitable system of school finance.

The dilemma confronting the courts was discussed by Supreme Court Justice Abe Fortas in *Epperson v. Arkansas* (393 U.S. 97[1968]), the decision which invalidated that state's anti-evolution statute. He wrote:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

"Lay off, Your Honor. I'm not half so heinous once you get to know me."

Student rights issues provide an excellent opportunity for teaching about judicial review and the role of the courts. Examining these issues can be used to further students' understanding of such fundamental concepts as federalism, the separation of powers, and the meaning of "government of law."

Sample Lesson Three

Topic: What Role for the Courts?
Strategy: Semantic Differential
Handout: Courts and Schools: How Do You Feel?

> Have the courts taken over control of our schools? Some people suggest that they have. For example, court decisions have forced many schools to alter their dress codes, discipline policies, and rules governing access to athletic facilities. How do you feel about court decisions that force schools to change some of their rules and regulations? Indicate your views by placing an "X" on one of the spaces between each of the paired words below. Use only one "X" for each pair of words.

Wise _ _ _ _ _ _ Foolish
Democratic _ _ _ _ _ _ Autocratic
Necessary _ _ _ _ _ _ Unnecessary
Fair _ _ _ _ _ _ Unfair
Desirable _ _ _ _ _ _ Undesirable
Warranted _ _ _ _ _ _ Unwarranted
Comforting _ _ _ _ _ _ Disturbing
Helpful _ _ _ _ _ _ Harmful
Successful _ _ _ _ _ _ Unsuccessful

Procedures:

1. Distribute a copy of the exercise to each student. Clarify instructions and provide sufficient time for students to complete the exercise.
2. Reproduce the exercise on the board or on a transparency. Tally and record student responses.
3. Discuss student responses. (Note: This exercise can be used before or after investigating this issue. If you do it before, encourage students to express their feelings and to develop hypotheses to be tested as the unit progresses. If you do it afterwards, ask students to cite specific examples to support their views.)
4. Use student responses to explore such questions as:
   If education is a state function, how is it possible for federal courts to rule on cases involving school rules and regulations?
   Does judicial review give too much power to the courts? How (if at all) should judicial review be restricted?

4.

Issue Four

Students and the First Amendment: What's Permitted?

In the landmark *Tinker* case, the Supreme Court held that:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Yet in that same decision, the Court also recognized the right of school authorities "to prescribe and control conduct in schools." "Our problem," the Court stated, "lies in the area where students in the exercise of First Amendment rights collide with the rules of school authorities."

You can illustrate the difficulty of this problem by focusing on specific clashes over First Amendment rights. While many different teaching strategies can be used to examine such conflicts, two are recommended especially.

One approach is to focus on a specific situation, through use of an actual or hypothetical case. The case study method is an example of this approach, a variation of which is provided in "Sample Lesson Five" in this article. An article in the Fall, 1977 *Update* describes this method in detail. The article is especially useful since it focuses on the *Tinker* case.

The other approach uses a series of critical instances, either real or hypothetical. Examples of this approach include the forced choice exercise below and the question and answer technique, examples of which may be found in *The Rights of Students* and other titles in the American Civil Liberties Union Handbook Series.

Sample Lesson Four

Topic: How Has the First Amendment Been Interpreted in the School Setting?
Strategy: Forced Choice
Directions: Each of the following situations deals with student claims to First Amendment rights. Indicate your beliefs about each of these situations by using one of the following responses. Place the appropriate letters in the space provided to the left of each situation.

SA = Strongly Agree
SD = Strongly Disagree
A = Agree D = Disagree
U = Uncertain

______ 1. Students have the right to speak out in the classroom whenever they wish to make their own views known.
______ 2. Students have the right to wear buttons, armbands, and other insignia which represent their views.
______ 3. Students have the right to picket, hold rallies, and engage in peaceful demonstrations during school hours to protest school policies.
______ 4. Students have the right to distribute literature on school property free from any type of censorship by school officials.
______ 5. Students have the right to publish articles in the school newspaper that criticize school policies and/or school officials.
______ 6. Students have the right to place messages, notices, and other material on school bulletin boards to express their views.
______ 7. Students have the right to form their own clubs and associations no matter how controversial the organizations are.
______ 8. Students have the right to refuse to salute the American flag.
______ 9. Students have the right to publish whatever they wish in school-sponsored newspapers.
______ 10. Students have the right to refuse to participate in any religious ceremonies conducted in school.

Procedures:

1. Give each student a copy of the exercise. Clarify the instructions and provide ample time for students to complete it.
2. Tally student responses. Encourage students to express reasons for their choices.
3. Have students identify some of the reasons why school officials might oppose student claims (e.g., interference with the proper and orderly operation of the school; risk of violence or disorder; age and maturity of students; captive nature of students; invasion of the rights of others; desire to impose moral standards). Ask students to indicate which factors apply in each situation and to assess their value.
4. Use resources such as Levine and Carey's *The Rights of Students* to make students aware of how the courts have ruled in each of these situations.
5. Invite the school principal, superintendent, school board attorney, and other resource persons to discuss these issues with the class.

5.

Issue Five

Students and Due Process: What's Required?

The Fifth and Fourteenth Amendments guarantee that no person shall "be deprived of life, liberty, or property without due process of the law." Assuring a fundamental fairness in government proceedings, the right of due process protects the citizen against unfair, unreasonable, and arbitrary laws (substantive due process) and unfair, unreasonable, and arbitrary proceedings (procedural due process).

Once students are recognized as citizens, the question becomes whether the constitutional rights of due process apply in the school setting. Gradually, though often reluctantly, courts have been saying that they do. However, court decisions are by no means uniform.

For example, no clear guidelines have emerged on whether students' hair length or clothes can be regulated. Some federal courts of appeal (the First, Second, Third, Fourth, Seventh, and Eighth Circuits) have said that wearing one's hair at a certain length or wearing a beard is constitutionally protected. Other federal courts of appeal (the Fifth, Sixth, Ninth and Tenth) have not been receptive to this claim. The result is a confusing set of standards which vary according to the circuit court district in which the school is located.

Guidelines for procedural due process, however, are more clearly established. The Supreme Court's decision in *Goss v. Lopez* (419 U.S. 565 [1975]) did much to clarify students' rights to procedural due process in schools, although troubling questions still remain.

Sample Lesson Five

Topic: Are Students Entitled to Due Process in Disciplinary Proceedings?

Strategy: Case Study Method *(Goss v. Lopez)*

The Facts

During a period of widespread student unrest in the Columbus, Ohio public school system, school administrators suspended many students for disruptive or disobedient behavior. The suspensions were for 10 days. School officials refused to give students a hearing to determine the facts underlying the suspensions.

The students contended that they had been treated unfairly. They argued that school officials had erred by depriving them of their right to an education without a hearing to determine the accuracy of the charges. That denial, they charged, violated their Fifth and Fourteenth Amendment right to due process.

The school officials disagreed. They declared that neither the U.S. Constitution nor the Ohio Constitution guarantees the right to an education at public expense. Thus, they pointed out, the Due Process Clause does not apply to suspensions or expulsions from school. Furthermore, they suggested that even if the Due Process Clause does protect a right to public education, it comes into effect only when the state subjects a student to a "severe detriment or grievous loss." Since the loss of 10 days of school is neither severe or grievous, the Due Process Clause does not apply to these cases.

The Issue

Does the Due Process Guarantee require school officials to grant a hearing to students before suspending them for 10 days?

The Opinions

Opinion I

1. Education officials and state legislatures—not federal courts—have the authority to determine rules that apply to routine classroom discipline.
2. Since Ohio law creates the right to a free public education, Ohio law may also create the circumstances under which that right may be restricted or taken away.
3. Education in any meaningful sense includes teaching each pupil the necessity of rules and the need to obey them. The school fails the student if it does not properly discipline him when punishment is merited or if its disciplinary actions are so formalized that they invite a challenge to the teacher's authority.
4. A decision to require due process procedures for school suspensions would turn the teacher-student relationship into an adversary process. Such a decision could seriously impair the ability of school officials to maintain order and decorum.
5. The argument that a student's interest in education is infringed by short suspension is too speculative and too insubstantial to justify imposing a constitutional rule.
6. If student claims were upheld, due process protections would likely be held next to apply to many other routine school decisions (e.g., grading, promotion, curriculum requirements).
7. If due process is required in these instances, then it is required whenever government infringes *any* interest to which a person is entitled, no matter what the interest or how inconsequential the infringement. This would give courts a vast power, a whole new role in our society.

Opinion II

1. By establishing a public school system and requiring children to attend, Ohio has recognized that a student has a right to a public education. This right is a property interest which is protected by the Due Process Clause.
2. The Due Process Clause also forbids arbitrary actions which deprive a person of his liberty. If sustained, these charges could seriously damage the students' standing with their fellow pupils and their teachers, as well as interfere with later opportunities for higher education and employment.
3. A 10-day suspension is not a trifling matter and may not be imposed in complete disregard of the Due Process Clause. It is a serious event in the life of the suspended child and of serious consequence to his reputation.
4. At the very minimum, students facing suspension must be given *some* kind of of notice and afforded *some* kind of hearing. A student must be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence and an opportunity to present his side of the story. Due process requires at least these basic precautions against unfair findings and arbitrary suspension.
5. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and basic hearing requirements should follow as soon as practicable.
6. The Due Process Clause does *not* require that hearings in connection with short suspensions give the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his

POLICE DOGS
UNDERCOVER DOGS
CASSADY

own witnesses to verify his version of the incident.

7. Longer suspensions, or expulsions for the remainder of the school term or permanently, may require more formal proceedings.

Procedures: (For variations of the case study method, see David T. Naylor, "Law Studies in the Schools: A Compendium of Instructional Strategies," *Social Education,* March, 1977, pp. 174-76.)

1. Present the facts and state the issue in *Goss v. Lopez* (either orally or in written form).
2. Distribute a copy of Opinion I to half the class and a copy of Opinion II to the other half.
3. Instruct students to read each of the seven arguments in the respective opinions and then rate each argument on basis of its strength. Use a 1-5 scale for this purpose, with 1 = very strong and 5 = very weak.
4. Discuss the issue raised in *Goss v. Lopez.* (You may wish to divide the class for this purpose.) Use a show of hands to ascertain how the class feels the case should be decided and how it feels the case was decided by the Supreme Court. Discuss.
5. Use student rankings to assess and analyze the strengths of the arguments advanced in Opinion I and Opinion II.
6. Since the Court decided in favor of the students, ask the class to evaluate the predictions made in points six and seven in Opinion I.

6.

Issue Six

Students and the Courts: What Lies Ahead?

The development of student rights in the past 10 years has had an important impact on schools. However, many issues need further clarification. How many of the constitutional rights of adults should be extended to students?

In the following exercise, several student rights issues, as yet unclarified, are presented in a hypothetical format. Students are asked to assume the role of judges and decide these questions. The exercise is designed to help students become aware of possible developments in student rights in the future.

WIZZO
UNIMPROVED!

"You're taking this truth-in-advertising business a little too *seriously, Higgins."*

Sample Lesson Six

Topic: What Lies Ahead?
Strategy: Hypothetical Situation

How Would You Decide?

1. Mark Duffy is a senior at Polk High School. Upon graduation, he plans to attend a very prestigious college in the East. That college has admitted Mark on the condition that he succeeds in getting at least "B" grades in all of his courses during his last semester at Polk.

   At the end of the semester, Mark receives 3 "A's", 2 "B's" and a "D" in American History. Very disappointed, Mark meets with the history teacher and principal in an effort to change the grade. He complains that the teacher's grading policies were arbitrary and unfair.

   Furthermore, Mark points out that he did not know he would get this low grade until the course was over. He failed the final exam and got a "D" on his term paper, which was returned only two days before the class ended. Mark's efforts to get the grade changed fail. Without a grade change, Mark will not be able to attend the school of his choice. Feeling that his entire future is in jeopardy, Mark takes the matter to court, charging that his right to due process has been violated. If you were the judge, how would you decide? Are students entitled to due process protections in the assignment of grades?

2. Carla Crane graduated from the Monroe City Schools. She was an average student, received average grades, and never had a serious discipline or attendance problem. On many occasions Carla's parents were told that her academic performance was satisfactory and that she needed no special or remedial instruction.

   Unfortunately, Carla found that she could not get a job. When her parents had her tested by a team of educational specialists, it was discovered that Carla was a functional illiterate. She could only read and write at the fourth-grade level. Given special tutoring by these specialists, her performance improved considerably within only a few months.

   Carla and her parents believe that school authorities have been negligent. They sue the school for failing to use reasonable care in providing Carla with adequate instruction, guidance, and supervision. If you were the judge, how would you decide? Is the school system liable for damages?

3. Cary McDonald and Charles Young are seventh-grade students at Buchanan Junior High School. They are upset with a Board of Education decision which removed several controversial novels from the reading list in their English course. The Board decision not only removed the books from the list, it also forbade teachers from accepting any of the books for academic credit. Cary and Charles argue that their right to academic freedom has been violated. They take this matter to court. If you were the judge, how would you decide? Do students have a right to academic freedom?

Procedures:

1. Divide the class into groups of three. Give each group one of the situations above.
2. Ask students to pretend that they are judges on the federal court of appeals. Instruct them to read the facts of the case assigned to them and to reach a decision. Indicate that they should

provide written reasons for their decisions.

3. When students have reached their decisions, have student "courts" report the results of their deliberations to the class. Compare and contrast decisions and reasons for those decisions.
4. Encourage students to suggest possible consequences of those decisions (e.g., What limits, if any, would they establish? What effect would the decision have on teachers and students?)
5. Reassemble students into groups of three. Have each group write at least one hypothetical case involving a possible student rights issue in need of clarification (e.g., locker searches, rights of elementary students, etc.) Discuss student responses.

7.

Issue Seven

What Obligations Do Students Have?

Many educators stress the importance of student responsibilities and bemoan their lack of acceptance. Seldom, however, do educators provide opportunities for students to discuss these responsibilities. The exercise below suggests one way this might be accomplished. The items are based upon the 1974 NCSS Position Statement on Student Rights and Responsibilities. (See *Social Education*, April, 1975, pp. 241-45.)

Sample Lesson Seven

Topic: How Important a Responsibility?
Strategy: Rating Scale
Directions: Listed below are a number of different responsibilities that students are said to have. Indicate the importance of each by circling the appropriate number on a five-point rating scale, where 1 = Important and 5 = Not Important.

1 2 3 4 5 A. To attend school regularly.
1 2 3 4 5 B. To take care of school property.
1 2 3 4 5 C. To conform to school rules and regulations.
1 2 3 4 5 D. To accept the consequences of one's own behavior.
1 2 3 4 5 E. To volunteer information to school officials upon request.
1 2 3 4 5 F. To refrain from interfering with the education of other students.
1 2 3 4 5 G. To be courteous to school officials and fellow students.
1 2 3 4 5 H. To do one's school work conscientiously.
1 2 3 4 5 I. To avoid encouraging other students to engage in inappropriate behavior.
1 2 3 4 5 J. To respect the opinions and ideas of others.

Procedures:

1. Distribute a copy of the exercise to students and clarify directions for its completion.
2. Tally and then discuss student responses. Encourage students to suggest other responsibilities they might have.
3. Discuss such questions as: (a) what is the relationship between student rights and responsibilities? (b) Should rights and responsibilities vary with age—e.g. should they be the same for primary students as for high school students? (c) How are responsibilities determined?
4. Use this exercise to help students assess the degree to which they meet their responsibilities. Suggest the exercise be titled, "How Responsible Am I?" and the rating scale be changed to 1 = Always and 5 = Never. In order to respect student privacy do not collect or tally student responses.

A Few Last Thoughts

Will teaching about student rights and responsibilities be as predictable as teaching about the Smoot-Hawley Tariff? Probably not, but it will be a great deal more lively. Your students will probably be truly interested in the topic, and they (and you) will have a lot more fun with it than with Smoot and his cohorts.

You can probably defuse any potential controversy by following a few common sense rules. Don't let yourself be perceived as an advocate of student rights (or of administrative control, for that matter). Make it clear that you're teaching about student rights *and* responsibilities. Your job is to raise these issues to clarify students' thinking, not to lead them to the barricades. Make sure all sides have a chance to be heard, including the school administration.

The subject is so compelling, the learning opportunities so numerous, that teaching about student rights and responsibilities can surely be justified as part of your professional duty. And if you're professional about how you go about it, you should have clear sailing. ☐

MISSING PERSONS BUREAU
BURBANK

"He says he doesn't know how long she's been missing, but it was sometime after football season started."

Supreme Court Report

(Continued from page 7)

were introduced, and a busing moratorium was enacted as part of the Education Amendments of 1972.

Some observers say the Court began to change when desegregation decisions were applied to the cities of the North after *Swann.* They point out that previous efforts had been directed almost entirely against southern communities. Whatever the reason, the unanimity of the Supreme Court began to crack as the northern cases came before it.

One new legal factor in the equation was the appearance in decisions of the so-called *de jure* and *de facto* distinction in dealing with school segregation. *De jure* segregation is caused by some kind of governmental action or involvement, such as school districting, while *de facto* segregation happens as a result of societal factors not caused by governmental actions. This distinction had been important for some time in other race discrimination cases, because the Bill of Rights only protects against acts of the state. If a person is harmed by other discrimination, there is no constitutional violation, although certain private acts of discrimination—such as refusing to sell housing to blacks—might be barred by statute.

But until cases involving northern cities came before the federal courts, little was said about the *de facto-de jure* distinction in school desegregation cases. One reason might be that the dual-race school systems of the South were merely assumed to be the result of past governmental action, while this could not be assumed in the North. Opponents of busing knew that if the distinction were applied to the North, busing proponents would have the tough job of proving that segregation was the result of government action, and not just of residential patterns.

Not all Justices thought busing proponents should have the burden of proof. In *Keyes v. School District No. 1, Denver* (413 U.S. 189 [1973]) Justice Powell argued against the *de jure-de facto* distinction, stating that segregation in northern schools was "fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half." Powell, the only southerner on the Court, went on to state that "the evil of operating separate schools is no less in Denver than it was in Atlanta," and that since "public school authorities are the responsible agency of the State, if the affirmative-duty doctrine is sound constitutional law for Charlotte, it is equally so for Denver."

Despite Powell's plea, the Court applied the distinction, but it decided against the school system anyway. Finding evidence of an *intent* to segregate on the part of the authorities, the Court upheld an order to desegregate. And even though the objectionable acts of the board had only affected a part of the district, the order affected the entire district. So to that extent the *Swann* doctrine was maintained in Denver, the first large city outside the South to come before the High Court.

Despite the *de facto-de jure* distinction

Desegregation Materials

A number of excellent print and a-v materials deal with desegregation of schools. Here's a sampling of materials for the secondary level.

Print

Judith F. Buncher (ed.), *The School Busing Controversy: 1970-75* (1975). A paperback collection of articles from major newspapers documenting the court decisions, social furor, and political action of the school busing controversy. The cost is $6.95. (Facts on File, Inc., 119 W. 57th St., New York, NY 10019)

Equality Through Integration: A Report on Greenburgh School District No. 8. An in-depth paperback report of how a school system in New York State integrated its schools while providing quality education. The cost is $1.50. (Anti-Defamation League of B'nai B'rith, 315 Lexington Avenue, New York, NY 10016)

Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1976). Universally-praised book provides the best guide for anyone exploring the Court's *Brown* decision and its progeny. The cost of the paperback edition is $6.95. (Vintage Trade Books, Random House, 201 E. 50th St., New York, NY 10022)

J. Harvie Wilkinson, III, *From Brown to Bakke: The Supreme Court and School Integration: 1954-1978* (1979). This hardback calls *Brown* "the most important political, social and legal event in twentieth century America." It traces the development of school desegregation decisions carefully, noting the many problems and the Court's responses. The author is a former Supreme Court clerk of Justice Powell. The book's cost is $17.95. (Oxford University Press, 1600 Pollitt Drive, Fair Lawn, NJ 07410)

A-V

Busing: A Rough Ride in Southie (1976). A 16mm documentary about the effects of court-ordered busing in South Boston. Included in the 28-minute film are interviews with both black and white families and depictions of antibusing demonstrations and rallies. The purchase price is $350, the rental fee $40 for one day, $60 for two days. (Kauffman and Boyce Productions, P.O. Box 283, Allston, MA 02134)

Color of Justice (1971). In this 26-minute, 16mm film, violence breaks out when black students are bused into a previously white school. A black lawyer explains that this type of incident is not new, but shows how the black struggle for equality has been helped by legal decisions, constitutional amendments, and other contributions to the black cause. The sale cost is $350, the rental fee $50. (Rediscovery Productions, 2 Halfmile Common, Westport, CT 06880)

De Facto Segregation (1972). This 22-minute 16mm film dramatizes an open school board meeting on whether to end *de facto* segregation by busing in minority students. It presents four different views offered at the meeting. Resolution is left up to the viewers. The purchase price is $340, the rental fee $23 for three days. (BFA Educational Media, 2211 Michigan Avenue, Santa Monica, CA 90404)

Hear Us O Lord! (1968). The case study of a white family in South Holland, Illinois. The 51-minute 16mm film examines their fear and anger when their community's schools are desegregated by busing. The purchase price is $470 (color), $235 (b & w); the rental fee is $18 (color), $13.50 (b & w). (Indiana University, Audio-Visual Center, Bloomington, IN 47401) and its required finding of segregationist intent, lower federal courts continued to issue desegregation orders in the North, most of them depending heavily on busing. To do this, it was necessary to expand the concept of *de jure* segregation to include not merely overt actions of governmental officials, but also actions which appeared to have indirect segregation effects, and in some cases, merely the failure to take action to avert segregation in the school. (See for example ***Kelly v. Guinn*** 456 F.2d 100 [9th Circ. 1972], involving the Las Vegas schools.)

Another blow to the *de jure-de facto* distinction was a concept which began to be emphasized in the decisions of the mid-seventies, the "affirmative duty" of school boards to desegregate. First stated in the ***Green*** case in 1968 and reemphasized in ***Swann,*** this duty was imposed upon school boards found to maintain segregated schools, ***even in absence of proof that governmental actions created the segregated situation.***

. Such a position made it very difficult to maintain a clear line between *de jure* and *de facto* segregation, and a growing number of consititional lawyers as well as some of the Justices on the Supreme Court urged abandoning the distinction. The distinction remains today, but is largely ignored.

A Blow to Busing

That didn't mean that desegregation suits against Northern districts had clear sailing. In fact, the Court has begun to restrain the reach of the lower courts in prescribing remedies.

The first indication that the Supreme Court would limit the area of court control of local authority appeared in the 1974 case of ***Milliken v. Bradley*** (418 U.S. 717), which involved the Detroit area schools. The lower court had prepared a desegregation plan that included a number of suburban school districts as well as those in the city itself. The reason for this was clear: because city schools were overwhelmingly black, the only way to attain the desired degree of desegregation was to mix in white children from the suburbs. When the plan was announced, it caused howls of outrage that could be heard all the way in Washington, and the anger of the state's white suburbanites helped George Wallace score an upset victory in the 1972 Michigan presidential primary.

When the case reached the Supreme Court, the Justices found no problem with the order as it affected Detroit, even though no evidence had been found of any governmentally intended discrimination. But discriminatory patterns existed which the school board had done very little to correct. What was questioned, however, was whether the courts could compel districts outside Detroit—which had not been shown to have engaged in segregative actions—to participate in the desegregation plan.

By a five to four margin, the Court held that they could not. Even though these districts were part of the state of Michigan, and there was some basis for contending that the state government itself might have contributed to the segregated patterns of Detroit area schools, the majority did not think this was sufficient to justify imposing the desegregation plan on the suburban districts. In so ruling, the majority specifically stated that local control of public education is deeply rooted in this country, and that local school districts were not mere administrative divisions of the state.

The dissenters felt that the problem of segregated schools was serious enough to override this objection, if, as appeared to be the case, the only remedy was a metropolitan one.

Some other decisions also seemed to show that the Court was having second thoughts about busing. Two years later, in ***Dayton Board of Education v. Brinkman*** (433 U.S. 406 [1977]), the Court overturned a lower court's order against the Ohio city's school board, on the ground that the facts did not justify a systemwide remedy. In yet another case, ***Pasadena City Board v. Spangler*** (427 U.S. 424 [1976]), the Court held that a California district which had already complied with a court-ordered desegregation plan was not required to make further reassignments of students in order to insure that the originally desired racial mix was maintained.

But that doesn't mean the Court is abandoning desegregation. Some decisions, in fact, opened whole new areas in the struggle against desegregation. In a second review of the Detroit situation in 1977, for example, the Court made clear that court orders were not limited to attendance and assignment plans, but could involve remedial education and support programs as well. In other words, courts could go beyond mixing bodies and get into matters of educational quality.

Moreover, the decision went even further and said that to the extent that the state was involved in causing the segregated school system to exist, it could be ordered to pay for programs designed to solve the problem.

A Wild Card for the Future

The *de jure-de facto* distinction has been disappointing as a defense for northern districts, but a possible new defense in desegregation suits is indicated by a Supreme Court decision that did not involve schools. It arose instead out of a complaint against the police department in Washington, D.C. Black recruits alleged that a written test used by the department was discriminatory because black applicants failed the test at a rate four times greater than white applicants. No other evidence was presented that the police department intended to discriminate, and the lower court found that the test was reasonably related to the legitimate purpose of insuring a minimum level of verbal ability in police recruits.

In ***Washington v. Davis*** (426 U.S. 229 [1976]), the Supreme Court upheld the use of the test as constitutional. The Court held that the mere finding of a racially disproportionate effect was not sufficient to invalidate a testing procedure. Although relevant as evidence, the results of the test would have to be looked at against a background of "the totality of the relevant facts" in determining whether the governmental unit had demonstrated an intent to discriminate.

How does this affect desegregation? It appears to conflict with decisions which found discriminatory intent largely through the statistical evidence of school enrollment, and this contradiction has not escaped the eye of attorneys defending school districts in desegregation cases. Since the ***Davis*** decision, the Supreme Court has sent an Omaha case back to the circuit court, ordering reexamination of the question of segregative intent and of the consequent plan prescribing a systemwide remedy. (***School District of Omaha v. U.S.,*** 97 S.Ct. 2905 [1977]). A New York district court also referred to the standard established in ***Washington v. Davis*** in a desegregation case, but upheld its previous finding of intentional segregative acts by the state education commissioner. (***Arthur v. Nyquist,*** 429 Fed. Supp. 213 [1977]).

Moreover, last year the Supreme Court itself upheld the use of a nationally standardized teachers' examination to screen prospective teachers and establish salary levels. The examination had been attacked as discriminatory, because its racially disproportionate scores resulted in 96 percent of new teachers being white. After finding no evidence of intentional discrimination, the Court concluded that the test was a valid way to assure teacher competence. The Court could not find it unconstitutional purely on the basis of the disproportionate racial effect. (*National Education Association v. South Carolina*).

This decision will probably have an effect on future cases of alleged discrimination in education, but thus far it has had little effect upon desegregation cases. This year, the U.S. Supreme Court has reviewed two more suits involving large northern school systems, those of Columbus and Dayton, Ohio. In both, the Court ordered compliance with lower-court plans involving large-scale busing. In both, the primary evidence of the intent to segregate was based largely on statistical evidence.

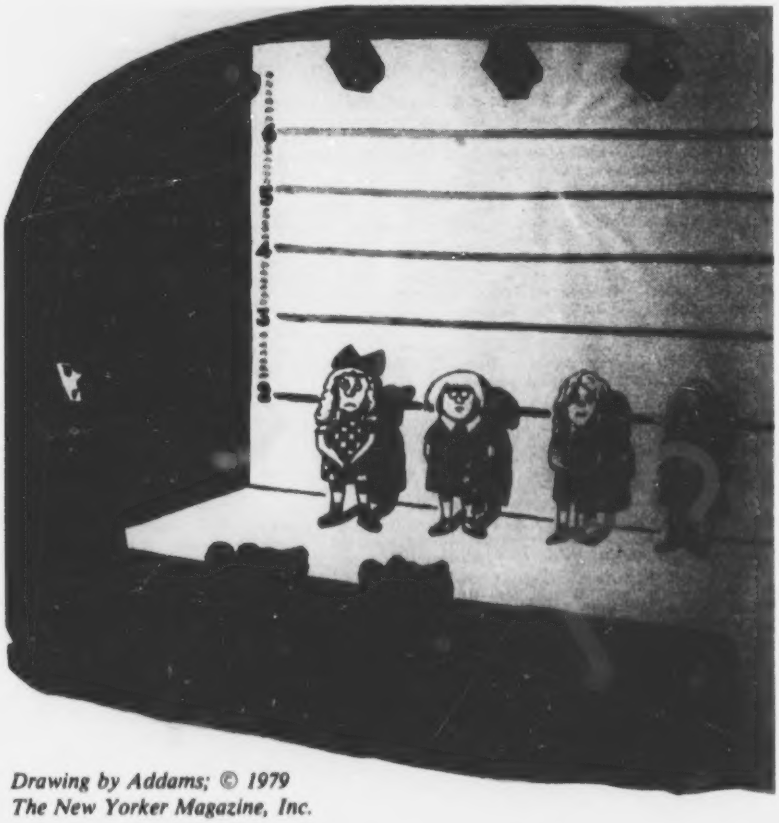
Of Roots and Branches

A famous aphorism taught to most law students in their first year of law school states that the law is a seamless web. This is particularly true of that part of our legal system known as the common law, that body of rules and principles created in thousands and thousands of judicial decisions. It is built up like coral from the sea bottom, growing out and up, interconnecting from one area of dispute to some other area, creating a confusing but always growing body of legal knowledge.

As this article has tried to show, in this process judges have considerable latitude in deciding how broadly or how finely they will draw their conclusions in the case before them. Usually, especially at the lower court levels, judges are exhorted to stay close to the specific facts of the case, so as to avoid suggesting general principles which they might not wish to apply in some other case. This is what is known to lawyers as judicial restraint. At appellate levels, and particularly that of the highest courts, it is expected that judges will, over time, develop principles of more general applicability, so that those involved in similar situations will have some guidelines as to what is and is not permissible.

With regard to school desegregation and other difficult legal problems, the courts, and particularly the U.S. Supreme Court, have moved slowly and carefully, as has historically befit this unelected branch of our government. In the course of 25 years, however, a large body of definitive law has been developed, and the number of new desegregation suits may diminish as that law becomes applied throughout the land.

At the same time, some of the principles developed will continue to be applied in areas unanticipated by the judges who enunciated them, each continuing to form a living part of the evolution of the law. This has certainly been the case with *Brown's* ringing words on the importance of education. It has been the source of dozens of efforts to expand legal rights in education, whether for the poor, the bilingual, or the physically handicapped. It has also played its part in the expansion of student rights and the rights of females to equal treatment.



Drawing by Addams; © 1979
The New Yorker Magazine, Inc.

There can be little doubt that *Brown* and the many school desegregation cases which have followed it will continue to have a rippling effect through the legal pools of education and race discrimination, and on into the larger and more remote circles of due process, equal protection, and other constitutional issues. But as in the pond waters of our metaphor, the ripples eventually fade, or are nullified by other forces of social change, manifesting themselves in still other judicial decisions. This will undoubtedly occur in desegregation decisions as well.

Already, public opposition to large-scale busing and judicial impatience with long-term supervision of desegregation plans has led to more amicable solutions of the problem, such as out-of-court settlements based upon compromise plans developed in the local community. Such plans need not fit the sometimes artificial patterns demanded by racial statistics commonly used as the basis for court-designed desegregation plans.

They may, instead, take into account the growing preference for cultural pluralism among many racial and language groups, and their rejection of total assimilation as a goal. Perhaps in some instances it is better that minority children be grouped in schools that provide them with instruction in their own language and culture. As Clifford Hooker concluded in *The Court and Education* (1978),

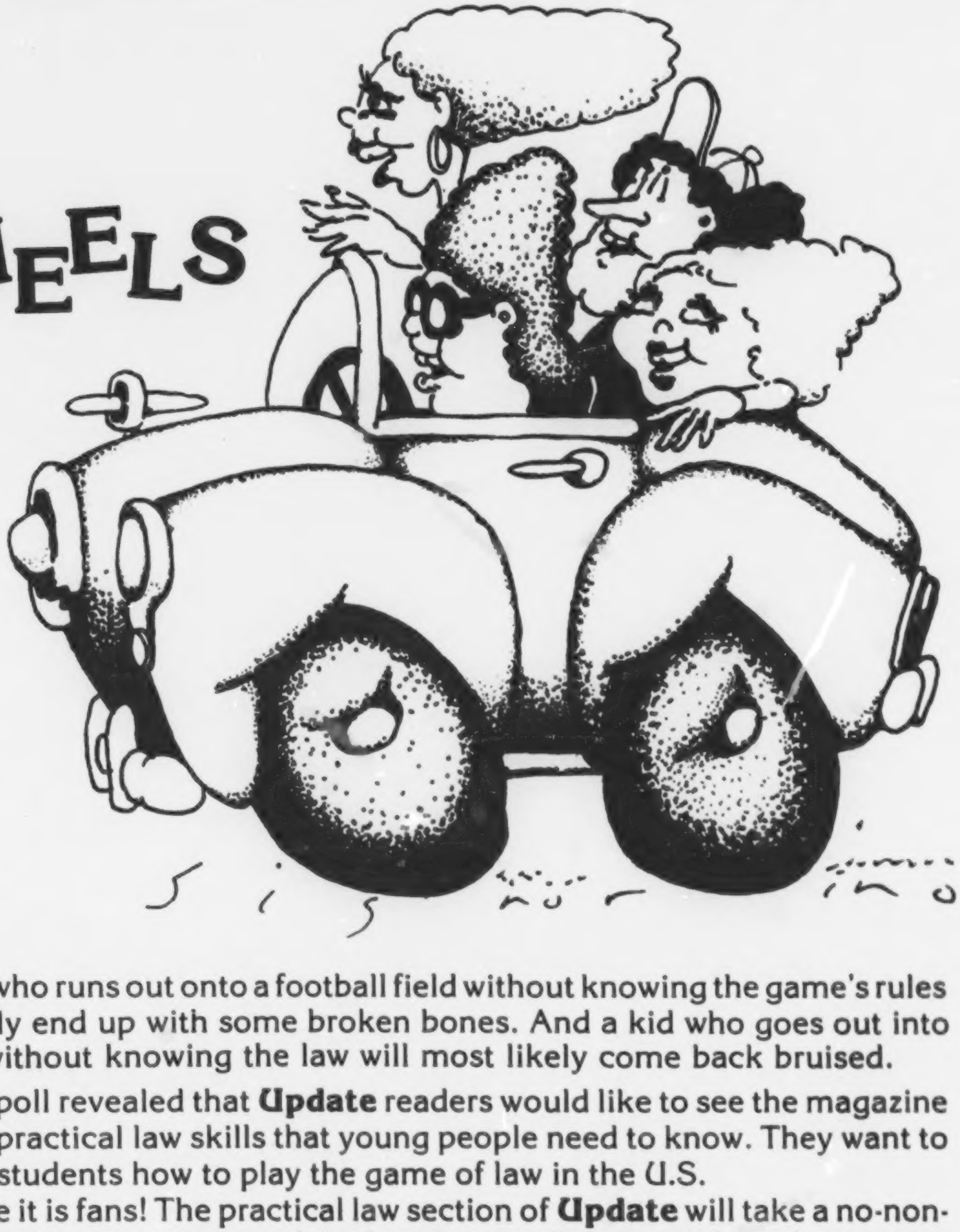
> Courts in the future will be pressed to recognize the forces of political democracy in a pluralistic society. But pluralistic politics need not be equated with judicial abdication. Courts in desegregation cases can manage negotiations among many and divisively affected parties.

No one can predict what will come in the long and painful struggle to desegregate the schools, but we can hope that in this, as in other vital human issues, the law will function in the way succinctly suggested by Samuel Johnson long ago: "The law is the last result of human wisdom acting upon human experience for the benefit of the public." ☐

PRACTICAL LAW

Walter M. Perkins and Lisa Broido

WHEELS



A player who runs out onto a football field without knowing the game's rules will probably end up with some broken bones. And a kid who goes out into the world without knowing the law will most likely come back bruised.

A recent poll revealed that **Update** readers would like to see the magazine emphasize practical law skills that young people need to know. They want to teach their students how to play the game of law in the U.S.

Well, here it is fans! The practical law section of **Update** will take a no-nonsense look at important areas of the law that youths can apply to their everyday lives. This inaugural section deals with a topic that is uppermost in the minds of most adolescents—WHEELS. It discusses how a minor can get rid of a "lemon," what to do after an accident, how the law handles teenagers who abuse their driving privileges, and much more.

We'll be doing practical law sections in forthcoming issues. Let us know what topics you'd like to see us cover.

What to Do About That Lemon

The used car salesman in our society is generally portrayed as a fast-talking, cigar-smoking slickster in a loud checkered sportscoat who tells his customers that his cars are real "cream puffs" that were "only driven to church on Sunday." Although this stereotype is probably unfair, plenty of kids still get stuck with "lemons on wheels" when they buy their first cars. And even worse, they don't know what kind of legal action to take once they've been taken for a bum ride.

Most courts used to follow the rule of *caveat emptor*—Latin for "let the buyer beware." If someone bought something that was worthless or defective, it was his tough luck. Today the laws are designed to safeguard consumers—particularly if they are minors.

For example, the courts try to protect inexperienced young people from shady business transactions by making it easier for them to get out of contracts. If a person under the age of 18 contracts with an adult, he can "disavow" the agreement with few hassles as long as it does not involve "necessities" like food or clothes.

Thus, if Joe Minor is unhappy with the used VW he got from E-Z Motors, he can return it at any time because it is not considered a basic necessity. He can take it back for any or no reason at all, regardless of whether he lied about his age when making the contract.

The catch is that most streetwise adults won't take the risk of contracting with a minor. Most sellers will insist that an automobile be purchased in the name of a parent, guardian, or other adult who is willing to take on full responsibility for it.

Let's say that Joe has his dad sign for the car. Can he and his father still return it if it expires a few days after they buy it? The answer to this query is a qualified yes. A number of protections are available to consumers like Joe and his dad in the form of warranties. *Warranties* are written or oral guarantees of the quality and/or performance of products that are sold.

Joe and his dad must be careful to read their contract carefully—small print and all—in order to know what kind of guarantees they can expect for their car. They should also feel free to negotiate with the dealer and suggest new clauses which can be added to the contract. If the dealer won't stand behind his product (or at least give a price that reflects this fact), they should take their business elsewhere.

Most salesmen make specific promises about the products they sell. These promises are called *express warranties.* These guarantees can be either written or oral, but the latter is extremely difficult to prove. Salestalk, or "puffing" as the courts call it, is not considered to be an express warranty. Thus, if a dealer tells you that an engine "purrs like a kitten," he's not really making a promise. If he makes a specific claim—telling you that a car will get 35 miles per gallon when it only gets 12—you may have a good case, but it's still best to get everything in writing. After all, it's your word against his.

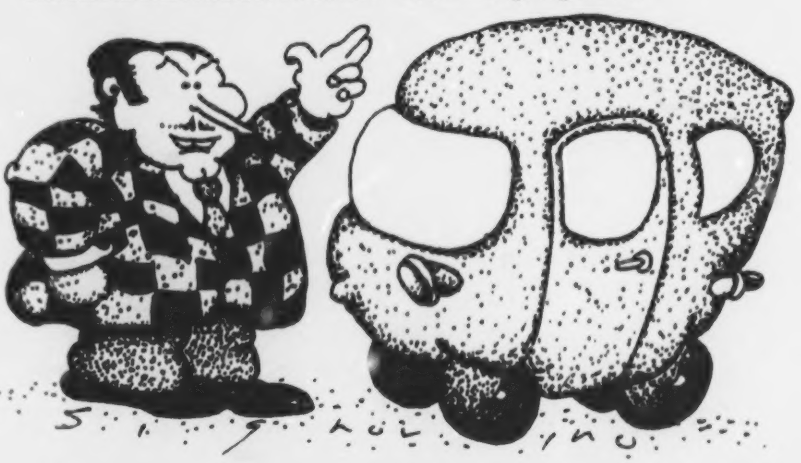
What if the car dealer made no promises to Joe and his dad, either orally or in writing? They may still be protected. The Uniform Commercial Code provides that certain warranties must be "implied." *Implied warranties* are imposed in order to promote higher business standards. Every seller, whether a professional dealer or your next-door neighbor, must offer a general warranty of "merchantability" which guarantees that the product can be used the way it is supposed to be. Unless the dealer "disclaimed" his warranty by *clearly stating* (either orally or in writing) that he didn't guarantee that it would run but would sell it "as is," Joe is entitled to a working car.

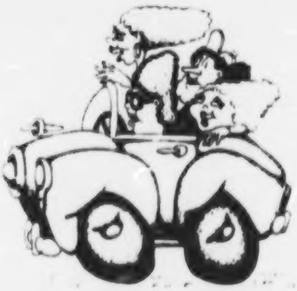
There are several courses of action that Joe and his father can take if they get stuck with a sickly "Bug." They should start by going directly to the dealer and trying to informally settle things with him. If this doesn't work, however, there are some federal agencies where they can go for help. The Department of Transportation's National Highway Safety Administration has a toll free hotline for auto consumer complaints at (800) 424-9393. Consumer Products conducts a hotline at (800) 638-2666, and there is an Auto-Recall hotline at (800) 424-9323.

Every state also has local agencies that disappointed car buyers can contact. A Chicagoan who buys a car that doesn't live up to the dealer's promises, for example, can report this to the Consumer Fraud and Protection Division of the Illinois Attorney General's Office. There, a hearing officer will try to resolve the matter out of court with both parties. And if this fails, the state may take the seller to court under the Consumer Frauds Act or other Illinois laws. That would subject the dealer to criminal penalties.

If the state won't prosecute, you still have the option of filing a civil suit against the seller. Law suits, however, should always be the last resort. They are expensive, time consuming and messy. If all else fails, though, an unhappy consumer can sue the seller for "breach of contract" or "misrepresentation" if he fails to live up to his end of the bargain. The consumer can even go as far as suing the manufacturer itself if the maker's negligence may have contributed to the car's defectiveness.

Can the law always protect you from lemons? No, not completely. Many minors and adults get shafted on cars every day. But the law is making it harder for sellers to "sting" their customers, and giving buyers—whether minors or adults—a fighting chance.





Why Insurance Companies Penalize Young Drivers

Everyone knows that skyrocketing gas prices are taking all the joy out of driving, but many of us forget that young drivers face an even bigger obstacle to fun on wheels—the enormous price of car insurance. Young people under 21 often pay more than $1,000 annually for complete coverage.

Why do they have to pay so much? How are the rates determined? What can they do about them?

Insurance rates are determined by actuaries, who calculate them on the basis of the accidents that have occurred in the past. The differing rates that drivers pay are arrived at via a classification system which is based on objective criteria like (1) age, (2) sex, (3) marital status, (4) age of car, (5) whether or not car is used in driving to work, and (6) geographical location.

Why do the young have to pay more for car insurance? Well, research indicates that younger persons, particularly below the age of 21, are simply involved in more accidents. Reasons for this are legion. A recent report by the Organization for Economic Cooperation and Development indicated that, "the maturing process of the adolescent is, generally speaking, far from being complete at the age of 18." Their immaturity shows in "egocentricity, lack of self-discipline, and the search for an outlet to work off energy and emotions."

While young people in general pay astronomic rates, young men pay even more than young women. In fact, sex and marital status are considered secondary classifiers after age and can either drive the rate you pay up or down.

A recent study by the National Association of Independent Insurers indicated that losses incurred by young male drivers are 41 percent more than losses of young female drivers. Additionally, young single male drivers incur losses which are 84 percent more than losses of young married male drivers.

But what about the kid who's in a high-risk category but has a good driving record? Shouldn't he be exempt from the higher rate? Isn't the classification system unfair to him? Insurance companies feel that ending the classification system wouldn't work, and point out that costs would actually be increased for the majority of motorists who are in low-risk categories.

For example, a report of the National Association of Independent Insurers shows that "if sex and marital status were eliminated as classification criteria, rates for young female drivers would have to increase 29 percent in order to subsidize the losses of young males. Similarly, rates for young married males would have to increase 68 percent in order to subsidize the losses of young single males."

If all of this sounds depressing, it is. However, John Schreiner of Allstate says that even if young people fall into a high-risk category, they can do some things to lower their insurance rates. Since most youngsters drive a family car on a part-time basis, the easiest way for them to save money is to be added to their parents' policy instead of carrying a policy of their own. If they do have their own car, they could marry, live in a rural area (fewer accidents), have a low annual mileage rate, have a good driving record, and not drive to work.

But maybe kids should just stop worrying about insurance. With the gas situation as it is, insurance rates may soon become a moot point anyway.

What to Do After an Auto Accident

You never expect it to happen, but someday you'll probably be involved in a car accident. According to the National Safety Council, approximately 30 million motorists had accidents in 1977. And nearly one fifth of these accidents involved drivers who were under the age of 20.

Amid the post-collision excitement of the piercing sirens and flashing lights, many drivers end up saying and doing things that lead to unnecessary legal actions, big financial losses, or even jail sentences. Thus, no matter how shaken up you might be, try to follow these recommended post-accident DO's and DON'T's.

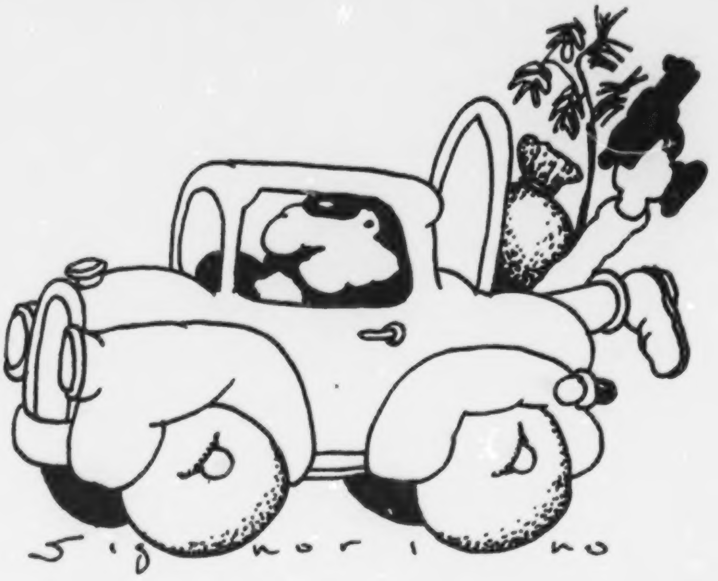
Do's

- Stop at the scene of the accident. Remember hit-and-run driving is a serious crime which is punishable by prison or fines, even if you were innocent of causing the accident. If you panic and drive away, go back to the scene of the crime as soon as you get yourself together. Such an action may mitigate the penalty you will receive for skipping out at first.
- Notify the police immediately if someone is injured or killed.
- Try to get the names and addresses of as many witnesses as possible. Also take down the badge number of police officers and the names and addresses of any doctors and ambulance drivers who may be there.
- Exchange driver's licenses, registration certificates, and insurance company information with the other driver. Get the names and addresses of any passengers or pedestrians who might have been involved.
- Contact your insurance agent and/or the other owner's agent as soon as possible.
- If possible, try to have pictures taken of the damaged cars, skid marks, or other physical evidence.
- If you collide with an unattended vehicle, try to find the owner. If that's not possible, leave a note with your name and address.
- Fill out accident reports carefully. All states require that accident reports be filled out in case of injury or death, and reports are also required if the property damage is in excess of $50 to $300 (depending upon the state). Be sure to include the location and time of the accident, the extent of injuries and damages, the names and addresses of all persons involved, etc.

Don't's

- Don't make any statements to police, motorists, bystanders or *anyone* until you have consulted a lawyer. When your emotions are running high, you are prone to say things that are distorted and self-incriminating. Take the fifth.

- If you are the victim of an accident, absolutely do not accept any money. The extent of your injury or damage may be greater than you think, and you may be entitled to more than you realize. Accepting cash may be regarded by the law as a full settlement of your claim. Don't be tempted by the green stuff.
- Don't sign anything without the advice of a lawyer. Insurance adjusters will try to get you to settle your claim at the lowest possible cost. Even if a settlement sounds like a good one, hold out for a while. Don't believe adjusters who tell you that you are "holding things up" and "may end up with nothing."
- Don't do anything without consulting a doctor. Even if you think that you aren't hurt, you should make sure. Whiplash injuries to the neck and spinal cord, which may eventually cripple, can show up days or weeks after an accident. Hairline fractures are not always evident right away. Don't accept a settlement until you are absolutely sure that no complications will arise. Once you sign a release form it may be impossible to reopen the case if your injuries become more serious.



Cops and Cars: What Are Your Rights?

As your students and their friends cavort about town on their wheels, have they had occasion to pause and reflect on how the Fourth Amendment applies to drivers and passengers? Probably not.

Like most young adults, they probably have never given the fourth a second thought. However, since the overwhelming number of police/citizen confrontations involve cars, they should know what their rights are and how the fourth applies.

In general, the Fourth Amendment prohibits unreasonable searches and seizures, and sets up requirements for search warrants. To put teeth into the Fourth Amendment, judges refuse to accept illegally seized evidence, even if it clearly implicates the accused. This *exclusionary rule* has caused plenty of controversy.

Simple right? Wrong. As in all constitutional areas, the Fourth Amendment only gives general, minimum guidelines that must be followed.

Whether a motorist, his vehicle, or passengers can be seized or searched depends on the reasons for the initial stop. If the original stop is unlawful, any search of people or the vehicle is unlawful too. Here are some hypothetical situations which will show you what can and cannot be done.

Hypo #1. Paul and some friends are cruising the streets of a low crime area at a slow but lawful speed, observing all traffic rules. This particular area has had a run of unsolved burglaries over the past few weeks. Noticing that a policeman is observing him from behind, Paul slows down and begins glancing nervously in his rear view mirror.

The policeman pulls up and orders him to stop. Is an arrest and subsequent search of Paul and his car lawful? The Supreme Court says no. The Fourth Amendment was designed to prevent arbitrary searches, so investigatory stops must be based on reasonable grounds of suspicion. Since there were no adequate grounds in this case, any contraband found on Paul, his friends, or in his car would be excluded at trial via the exclusionary rule.

Hypo #2. Sylvester's car stalls at an intersection. A traffic policeman comes over to assist him and notices a bag of what appears to be marijuana on the seat. He arrests Sylvester and searches him and the vehicle, including the locked glove compartment and trunk. He finds an unregistered .38 in the glove compartment and a suitcase full of more marijuana in the trunk.

Sylvester thinks the searches are illegal, but he's only half right. Under the circumstances, the body search and searches of the open areas in his car under his immediate control would be upheld. Although he was not initially observed doing anything illegal or acting suspiciously, Sylvester's carelessness with the grass triggered the ***plain view doctrine*** and gave the policeman the right to lawfully arrest and search him. Since the policeman was where he had a lawful right to be (outside of the car looking in) and since the grass was in plain view, Sylvester's expectation of privacy was lost.

However, the warrantless search of the glove compartment and trunk would probably not be upheld, since they were not under his immediate control and the police could have waited and gotten a search warrant from a judge. The rationale is that the police have a right to protect themselves by searching the areas immediately around the suspect, in case he has a weapon. Since a weapon in a locked glove compartment or trunk is no threat, they'd have to get a warrant.

Hypo #3. Silas is weaving merrily down the street, traffic laws and street signs the last thing on his mind, when he runs a red light and is arrested. Can he or his car lawfully be searched?

The Supreme Court has said that since an arrest based on probable cause is lawful, a body search incident to that arrest is also valid. It's not clear whether a search of the car itself would be lawful.

Some local jurisdictions, notably New York, have been questioning the propriety of arresting, not to mention searching, traffic offenders. Justice Potter Stewart has indicated that arrests for traffic violations may be unreasonable under the Fourth Amendment. Thus far the Supreme Court has not agreed.

Hypo #4. Simon is driving down the street, minding his own business. A policeman, who had previously received a tip from an informant that Simon is carrying a loaded handgun, pulls him over and orders him out of the car. As he's getting out, the policeman sees the handgun in his belt and arrests him. He then searches Simon and his car and finds stolen goods in both places. Is this a valid search?

As long as the search was *timely* in relation to the arrest, and as long as the policeman could demonstrate that he had previous valid reasons for believing the informant was ***reliable,*** it would be considered lawful. Failing to demonstrate the reliability of the informant would mean that the policeman lacked probable cause and the arrest and search would be invalidated.

By the way, the law may be getting tougher on passengers. The Supreme Court recently upheld a New York law allowing a jury to assume that an illegal weapon found in a vehicle belongs to all occupants, unless it is found in the possession of one particular person. We can assume, at least at this point, that this law will be interpreted to include other types of contraband as well.

One last point. How should your students act when the cops stop and search them? They ought to remember that the streets are not a good place to challenge what they believe to be an unlawful search. If they squawk loudly about their rights, they are apt to make the cops even more suspicious. It is best to remain calm, observe carefully, and later record exactly what happened.

Q's&A's

Can Daddy Take the T-Bird Away?

Probably. If it's daddy's car, he has a right to say who can and cannot drive it. Even if junior paid for the car, most of the time dad has had to co-sign for it, so legally it's his. And even if a minor legally owns the car and pays for all its expenses out of his own pocket, his folks can usually have his license revoked if they want to. Many states require that a parent or guardian sign the application for a learner's permit or driver's license of a person who is under 18 years of age. Thus, according to the Uniform Vehicle Code, any person who has signed the application of a minor can request that it be revoked.

There is one drastic measure a youth can take to still have "fun, fun, fun" in his T-Bird—he can get married. Most states free minors from parental control of their licenses if they tie the knot.

What Can You Do If You Get Caught in a Speed Trap?

Not much. Any driver who has ever received a speeding ticket will probably tell you he was rooked. However, some small towns really do deliberately try to trap unwary drivers with unexpectedly low speed limits on certain stretches of road. Auto clubs have waged bitter campaigns against such money-making gambits for years, but they continue to thrive. If a patrolman pulls you over for a seemingly unjust speeding violation, you can't do much but pay up. If the speed limit was clearly posted, you can't break the law no matter how unreasonable you think it may be. The only thing you can do is report it to an auto club or state authorities, so that others might not be trapped in the future.

Is It Thumbs Down for the Thumber?

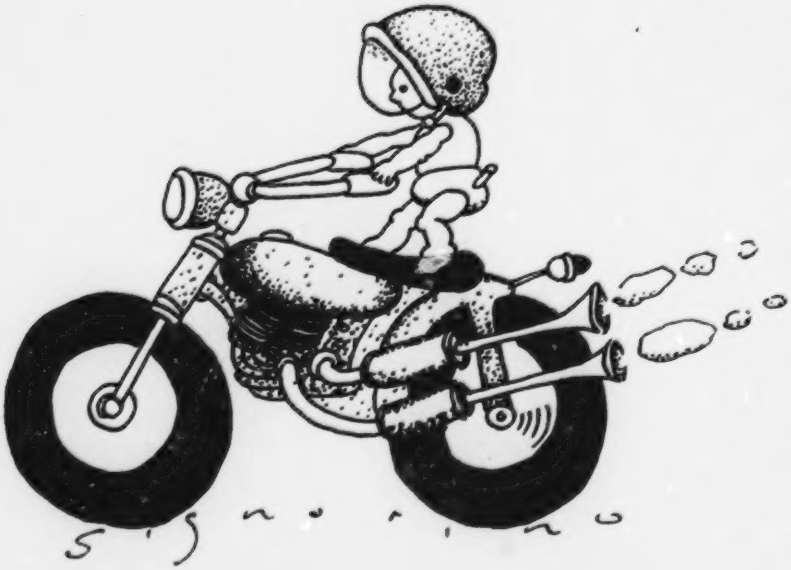
Yes and No. According to the Uniform Vehicle Code, hitchhiking is legal in almost every state provided that you don't stand on the "improved roadway." In other words, a person can thumb a ride at his own risk if he remains on the shoulders of the road and does not interfere with traffic in any way. However, hitchhiking on highways and freeways is always out.

Are Minors #1 with Rent-a-Car Companies?

No! In fact, they aren't even in the running. None of the national car rental agencies leases automobiles to persons under 21 years old. A parent or adult who rents a car in his own name and then allows a youth to drive it will not be covered by the company's insurance policy. In the event of an accident, the adult will be held liable for any damages the youth causes. And O.J. Simpson will not come running to the rescue.

Must You Buckle Up?

In most states, your conscience is the only thing that can force you to fasten your safety belt. Puerto Rico and Brook Park, Ohio are the two places in the United States which require seat belts by law. Despite statistics showing that over 25 percent of all auto fatalities could have been prevented with seat belts, John Q. Public won't sit still for a law forcing him to buckle up.



Is Riding a Motorbike Without a Helmet Against the Law or Simply Hardheaded?

It's always hardheaded, but whether it is illegal varies from state to state. It also can depend on one's age. Some state courts have held that it is a constitutional exercise of police power to require the wearing of safety helmets. An injured motorcyclist, they argue, may endanger others on the highway. Other state courts have overturned helmet laws. The Illinois Supreme Court, for example, acknowledged the importance of helmet wearing in a 1969 case, but added that it could not "... justify the regulation of what is essentially a matter of personal safety."

Thanks to the lobbying of motorcycle groups, many state legislatures have recently revoked their helmet laws. But stricter laws may still apply to kids, since some states have amended their helmet laws to cover *only* persons under age 18. By the way, motorcycle fatalities have doubled in those states which have revoked their helmet laws.

Is It Illegal to Abandon a Junker?

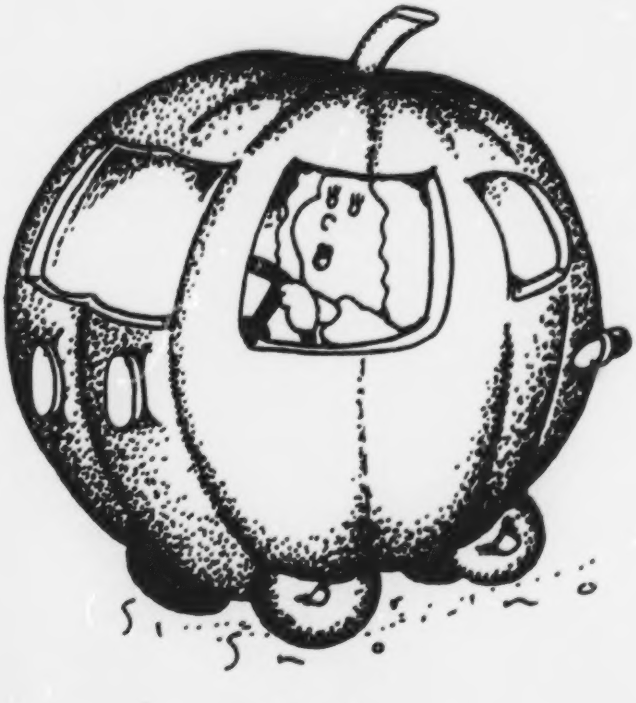
Yes. In an effort to protect the environment, many states now forbid you to get rid of your old clunker on their property. Abandoning your motor vehicle illegally for more than 48 hours (the exact time varies from state to state) is usually considered to be a misdemeanor. Authorities are permitted to tow the car away at your expense. If the car is new they must make an attempt to contact the owner, but if it is very old (in some states seven years or more) they don't always have to. After 15 days (this varies, too) they can sell your discarded car at a public auction and put the proceeds in their treasury.

Can a Car Turn Into a Pumpkin at Midnight?

Not exactly, but it can turn into a headache. Remember how Cinderella's coach changed into a pumpkin as the clock struck 12? Well, something like this happens to thousands of young drivers every night. Many states do not allow teenagers who are under 18 to drive between the hours of midnight and 5:00 A.M. unless there is an adult in the car or an emergency that makes it necessary for the minor to drive. Violating this rule can lead to the suspension of a youngster's license for 30-60 days. Repeat offenders can even have their licenses revoked until their 18th birthday. There is no additional fine for leaving glass slippers behind.

Can a Cop Take Your Blood and Breath?

Yes. According to the "implied consent law," which is in force throughout the country, if a person is issued an operator's license he has automatically agreed to have his blood, urine, or breath tested to determine his sobriety. A police officer has a right to ask a driver to take a test if he has "reasonable grounds" to believe that the motorist has been drinking. A driver cannot be forced to take such a test, but if he refuses his license can be revoked or suspended for up to six months. Under many state laws, drivers have up to 90 minutes to decide whether to submit to testing and can consult an attorney during this time. That may be a sobering experience. □



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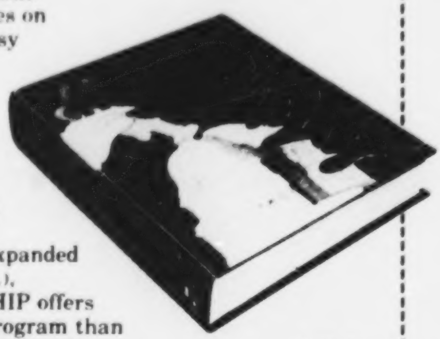

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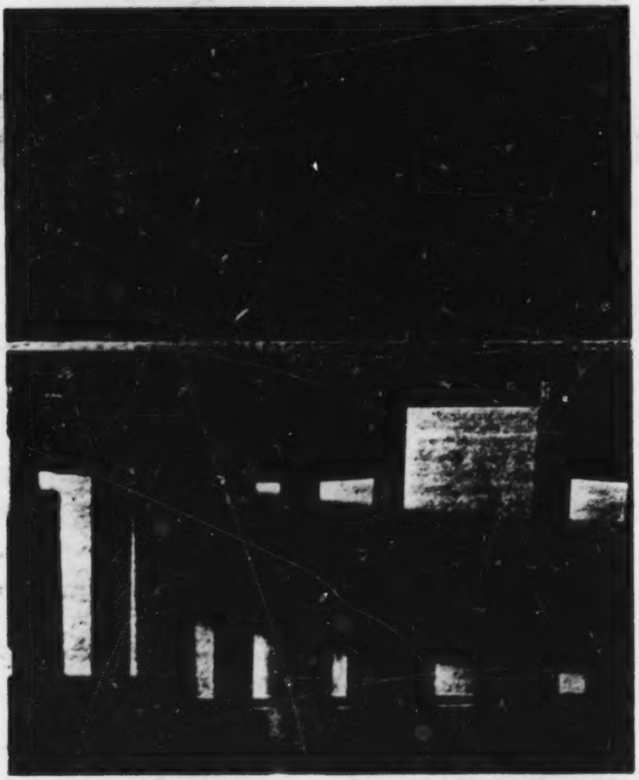

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contents

Volume 4, Number 1 Winter 1980

2
Supreme Court Report
May Both Sides Win

6
Law in the Eighties
Morality on Trial

9
Law in the Eighties
Space-Age Crime Stoppers

12
Classroom Strategies
Teaching About the Future Is No Joke

16
Law in the Eighties
Educationel Malpractice Worying You?

21
Law in the Eighties
A Minority Agenda

24
Law in the Eighties
Civil Liberties and the Atom

29
Newsclips

32
Dubious Achievements in the Law

38
Court Briefs
The Court Tackles Some Tough Ones

51
Practical Law
Jobs

Credits

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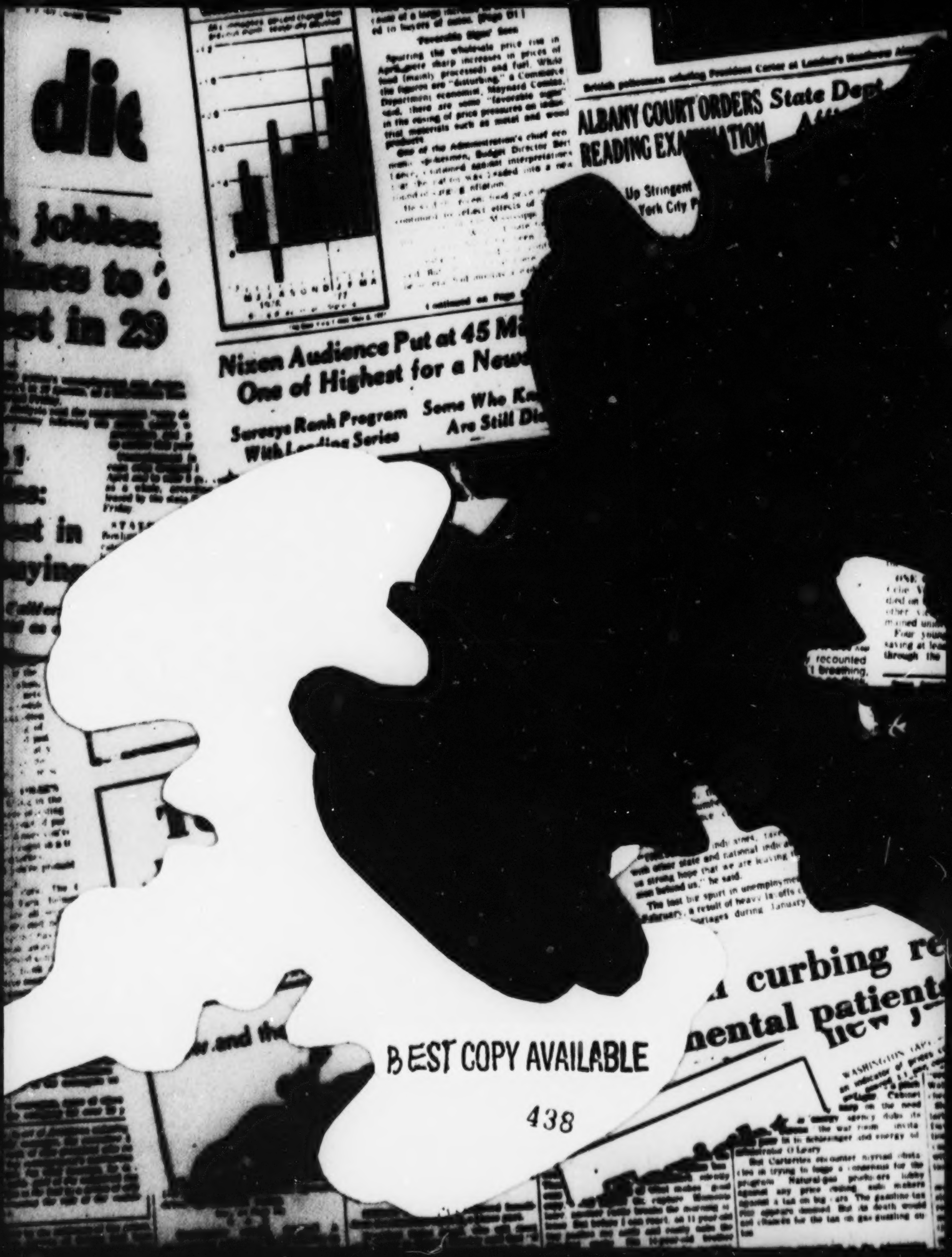
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SUPREME COURT REPORT

May Both Sides Win

No one benefits when the courts and media are on a collision course

Joel F. Henning

Our two most important truth-seeking institutions are the media and the courts. As an inevitable result, the media and the courts are competitors in the truth-seeking business. Compromises and accomodations have kept their relationship relatively peaceful over most of our history. But there are hard questions that come up from time to time. This is such a time.

Today, freedom of the press is facing its most serious challenge. The truce between government and the media has been shattered. Cries of alarm issue daily from the media, while the executive and judicial branches of government take action that creates deep insecurity in the media. Confrontation between government and the media is healthy. But all-out hostility is not. So the outcome of the current crisis will have a serious impact on the America of the '80s.

This short article cannot deal with all the issues that have been joined in the past decade, including the matter of reporters' "privilege" to protect their confidential sources (*Branzburg v. Hayes*, 408 U.S. 665 [1972]), the media's special claims to be protected from searches and seizures on warrant (*Zurcher v. Stanford Daily*, 436 U.S. 547 [1978]), and the plaintiff's right in a libel action to obtain journalists' records in order to establish malicious intent (*Herbert v. Lando*, 47 L.W. 4401 [1979]). These cases have created much controversy, but none of them can rightly be said to have abridged existing constitutional rights. In each case, the press was seeking an extension of its First Amendment rights, or an exception to a general rule of law.

While these decisions did nothing to help the press function, none involved *direct* restrictions on the press. On the other hand, limits on where the press can go and what it can publish are like shackles on its ability to operate as an essential truth-seeking institution. A few recent cases directly threaten the public interest by attempting to impose such limits.

Prior Restraint

Before 1971, the government had never attempted to censor a newspaper by bringing a lawsuit to stop publication. But in 1971, Daniel Ellsberg, a former Pentagon and White House official, provided several newspapers, including the *New York Times*, with the top-secret Pentagon Papers. The *Times* successfully challenged a restraining order against publication in *New York Times v. U.S.*, 403 U.S. 713 (1971), but, as Professor Alex Bickel said after representing the paper in that case, the "spell was broken." In a sense, freedom of the press was diminished.

After all, the government successfully, if only briefly, prevented publication. Also, the decision itself fell short of a ringing and unanimous affirmation of press freedom.

The Court divided 6-3 in favor of the *Times*. Of the six justices constituting the majority, only three—Black, Douglas, and Brennan—argued that the First Amendment prohibited all censorship, injunctions, or prior restraints on the press. The other three justices in the majority—White, Stewart, and Marshall—held that the government had not met the burden of showing that direct harm would surely result if the documents were published. The dissenters—Chief Justice Burger and Justices Harlan and Blackmun—thought that the case had been decided too quickly and without an adequate record. Clearly, the Pentagon Papers case did not put to rest the issue of prior restraint, even though the *Times* won the right to publish the papers.

This year, the government once again censored a publication by obtaining a

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temporary restraining order against an article scheduled for the April, 1979 issue of the *Progressive Magazine.* That article purported to reveal "secrets" of how to build an H-bomb, even though the author insisted that he had obtained all of his information from public sources. Six months later, the government dropped the *Progressive* case, after other publications printed a letter containing materials similar to that in the *Progressive* article.

The Pentagon Papers and the *Progressive* article involved matters of the utmost security—Vietnam War strategy and H-bomb "secrets." In such matters, the government argues, the public interest in government secrecy overrides even the First Amendment. The problem is that the government has a vested interest in secrecy, as our founding fathers understood, not only to protect the public, but more often to protect the selfish interest of government officials. And governments have very great power to *keep* their secrets.

Censorship by prior restraint is an unequivocal violation of freedom of the press and is prohibited (except in obscenity cases) unless the most exceptional emergency is shown by the government. The Supreme Court has never yet supported the government's attempt to restrain publication. The conflict between the Sixth Amendment right to a fair trial and the First Amendment free press guarantee requires the Supreme Court to apply a balancing test, but no such balancing test is used in cases of prior restraint.

Our constitutional scheme uniquely allows the press to operate free and unfettered, even if that means the occasional exposure of *bona fide* government secrets. And the fact is that from our beginnings as a nation, through a Civil War and two World Wars, we survived and prospered with no government restraints on publication. The founding fathers intended the press' compelling self-interest in disclosure to be a counter to the government's compelling self-interest in secrecy. As James Madison put it, the press must be preserved as a "sentinel over the public rights." (*Federalist Papers,* No. 51)

The Supreme Court has recently been attacked by the press for "dismantling" the First Amendment. It's worth recalling, then, that in the Pentagon Papers case the majority insisted that the government bears the burden of showing that publication would *surely* cause direct and immediate, grave and irreparable harm before it can legally restrain publication. (*See also Nebraska Press Association v. Stuart,* 427 U.S. 539 [1976].)

Why is this so fundamental to our constitutional scheme? Because in most other countries the government not only makes news, it edits the news as well, by controlling what can be published. To insure that the democratic process is not manipulated by the government, we insist on the right of the private, independent press to report and edit as it sees fit, even if that means the press often publishes news not really fit to print.

Locking the Press Out

Ironically, the Supreme Court has sided with the press when the issue was license to publish almost anything it can discover about government, but in *Gannett v. De Pasquale*, 47 L.W. 4901 (1979), the Court recently dealt the press a damaging blow by sanctioning the *exclusion* of the press from at least some judicial proceedings. It is ironic because the freedom to publish means nothing if direct access to the news is prohibited. A further irony is that the Court now seems to be more anxious to preserve press freedom to cover the executive than the judicial branch of government.

The *Gannett* ruling may have come about as a result of an earlier holding which struck down a state's attempt to censor the press by means of prior restraint. *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), involved a state court order prohibiting publication of any news implicating an accused mass murderer. As in the Pentagon Papers case, the Supreme Court struck down the order because the state's argument that published reports would prejudice prospective jurors was not based on certainty but was merely speculative. In words that echoed the holding in the Pentagon Papers case, Chief Justice Burger, speaking for a unanimous court, wrote that "any prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity."

However, while the press was celebrating its victory, few noted another portion of Burger's opinion that might have ominous consequences for press freedom. Pointing out that the trial judge had held an open pretrial hearing in the case but then barred the press from reporting what was said, Burger stated that the remedy for prejudicial reporting was to hold a closed hearing rather than let the press in and then be compelled to issue a gag order.

The judge in the *Gannett* case followed that suggestion, so the case offers an alternative means of censoring press coverage of judicial proceedings. In *Gannett,* the Supreme Court *upheld* a decision of a state court which prohibited the press from attending a pretrial hearing. The exclusion of the press was sustained on the theory that further publicity concerning possibly inadmissible confessions might be prejudicial to the defendants at their later trial.

The Sixth Amendment includes the right to a public trial. The question is whether a defendant, or the court, can waive the right and compel a private trial, or whether the press has an independent right to observe judicial proceedings in the absence of compelling justification. In *Gannett,* the closed hearing involved prejudicial confessions which might have been involuntarily obtained, including those of two 16 year-olds. Using the strict standards established in the Pentagon Papers and Nebraska Press Association cases, the Court might have found that the individual rights of the defendants would surely have been impaired by publicity.

But the grounds for closing the *Gannett* hearing are not clear, and the justices of the Supreme Court seem to be in disagreement as to whether the decision extends the constitutionality of exclusionary orders to full-blown trials as well as pretrial hearings. The Court also seems to be saying that the press has no First Amendment right to be present at a trial, when the parties agree to close it. If *Gannett* stands as law, press rights secured in the Pentagon Papers and Nebraska Press Association cases will have largely been defeated.

In the six months since *Gannett* was decided by a narrow 5-4 decision, motions to close courtrooms have been made in nearly 100 cases across the country. They have been granted by judges about half the time. In one such case, the Virginia Supreme Court approved the closing of an entire murder trial on the basis of little more than the trial judge's observation that "having people in the courtroom is distracting to the jury." Fortunately, the Supreme Court has agreed to review this case. This gives the Court the opportunity to narrow the broad and ominous implications of the *Gannett* decision. (*Richmond Newspapers, Inc. v. Virginia,* 48 L.W. 3178 [1979])

Joel Henning is the ABA's Assistant Executive Director for Communications and Education. He was the first director of YEFC. He will shortly be leaving the ABA to head his own educational consulting and publishing operations.

Traditionally, the press has had limited access to the judicial process. It is excluded from "side bar" conferences between judges and attorneys, even during jury trials. Private negotiations between the parties and their attorneys are essential in plea bargaining and the settlement of civil matters. No one argues that fundamental personal rights of defendants should not be protected, even at the cost of abridging freedom of the press. But, except in truly extraordinary circumstances, no argument seems to support the exclusion of the press from the trial itself.

An Ominous Future?

Secret trials are a hallmark of totalitarian regimes—Nazi Germany, Stalinist Russia, Iran under both the Shah and the Ayatollah Khomeini. A democratic government allows the public to observe its justice system at work. And it admits the press to trials so that a broader public than the people in actual physical attendance may follow what is happening.

Judges should not be able to close trials in their discretion except when overriding issues of individual constitutional rights are at stake. Judges, like the rest of us, must be accountable for their official acts. If the press is excluded, the public will not be able to take account of judicial conduct. If the *Gannett* ruling, therefore, is interpreted to include trials, the result will be antithetical to the working of our democracy, because the press will not be able to provide a counter to the broad discretion of the courts.

In short, the press is not itself the embodiment of the national interest, but is one important means for American citizens to get at the truth and act upon it to insure that our democracy works. It is one party to a never-ending struggle with the government. The result of this perpetual contest provides the American public with a rough-cut, inefficient, but nevertheless reasonably effective means of maintaining our democracy. Denying the press its right to publish all but the most volatile government secrets, or denying it the opportunity to cover all but the most prejudicial of court proceedings, will cripple its ability to compete and cause the government to win the contest.

The conflict between the press and the courts may be taking on a new dimension. *The Brethren*, Bob Woodward and Scott Armstrong's new book on the inner workings of the Supreme Court, pierces the veil of secrecy which has obscured the internal Court procedures and rituals. I do not share the fear of some that such coverage is causing crippling damage to the Court's ability to handle so many of America's most difficult social issues, although it will surely cause further strain on the relations among the nine justices.

What is most remarkable and reassuring about *The Brethren* is that superstar investigative reporter Bob Woodward failed to uncover any corruption or serious misconduct on the Court. After our dismaying experiences with Watergate and Vietnam, we can wince at the personal foibles of our justices, and snicker at the gossip, yet cannot but admire their basic integrity and dedication to justice.

The public is demanding increased accountability from all institutions of power and authority, and the Supreme Court cannot wholly set itself apart. Government secrets are—in all but the most critical matters—fair game for the press, and the Court's secrets are no exception.

The issues that pit press against government are not simple and the debate will never end. The debate itself is what the First Amendment was intended to protect. When the debate ends, our democratic experiment will have failed. ☐

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LAW IN THE 80'S

Morality on Trial

Should prostitution and pornography be against the law?

Every major city has its "strip" or "skid-row," its own pocket where porn, sex for hire, gambling, and drugs make the scene. The signs read: "Adults Only," "X-Rated," (or even "XXX-Rated"), and "You Must Be 21 to Enter." Typically, the local police stage raids to clean up the area whenever violence breaks out or the local civic clubs express moral outrage. More often, however, the police wink at the areas and let them go about their business.

The "strip" is, however, just a small physical indication of a larger issue which confronts the American people and the law—to what extent should the law enforce certain moral values? There is no problem with some moral commandments. For example, murder is a moral concept, and society agrees that murder should be punished, though it can't decide whether the death penalty is an appropriate punishment.

But the societal consensus falls apart when it's a matter of legislating about what are commonly called vice or morals offenses. Many laws embody moral standards, including prohibitions on gambling, drugs, marijuana, alcohol, pornography, and sexual relations between consenting adults. The last category includes laws on such topics as homosexuality, prostitution, and adultery. In addition, sexual relations between consenting teenagers are criminal offenses according to many states' laws.

In the 1970s, localities all across the

Frank Kopecky

country have debated whether to change the laws enforcing personal morality. In some places, prostitution and possessing small amounts of marijuana are no longer crimes. In other places, vice laws remain on the books and still have teeth in them. The debate seems to be getting hotter. How it comes out will tell us a lot about what we expect of the law.

From Comstock to Woodstock

Society's attempt to enforce moral values through laws is not new. During the colonial period, many groups used the legal system to enforce their version of morality. The Puritans, for example, imposed a strict code of morality on their early settlements.

In the 1800s, the nation's commitment to enforcing morality was epitomized by the rise of "Comstockery," an exaggerated censorship of literature and art because of alleged immorality. The idea was named after Anthony Comstock, a nineteenth century moral crusader. As head of the Committee for the Suppression of Vice, he sponsored the Comstock Law of 1873, which forbade the interstate mailing of obscene or lewd materials.

The twentieth century gave us the constitutionalization of a vice offense in the Eighteenth Amendment's prohibition against the manufacture, sale, or transportation of alcohol. From 1919 to 1933, "the noble experiment," as Prohibition was called, demonstrated nationwide the problems inherent in enforcing morality. Corruption and criminality increased and clogged the nation's justice system as society flagrantly refused to follow the "dry" moral value. Prohibition was a costly failure, eventually repealed by the Twenty-First Amendment.

The outlines of the debate are the same now, but the specific controversies would profoundly shock Comstock and his cohorts.

In June of 1978, Miami voters, led by Bible-quoting Anita Bryant, voted to repeal an ordinance that had banned discrimination against homosexuals in housing and employment. In contrast, California voters gave Anita's crusade a setback. In November, 1978 the voters of California rejected Proposition 6, which would have required school boards to fire any teacher found guilty of public homosexual activity.

On the same day, the voters of Seattle, Washington decided to keep a city ordinance which prohibited discrimination on the basis of "sexual orientation." But a different result was reached in Washington in 1977 by the state supreme court. The court upheld another school board's dismissal of a public school teacher because, according to the court, his admitted status as a homosexual had impaired his effectiveness as a teacher. The dismissal was legitimate under the school board's policy of discharging employees for "immorality." The U.S. Supreme Court refused to hear the case on appeal, so the Washington court's decision still stands.

Even the nation's prostitutes have gotten into the action, challenging laws against prostitution on constitutional grounds. A prostitutes' lobby called COYOTE has entered federal courts in Providence, Rhode Island, charging that the state's prostitution law violates the right to privacy, provides for cruel and unusual punishment with a maximum jail sentence of five years, and is discriminatorily enforced only against women. The name COYOTE—which is an acronym for "Call Off Your Old Tired Ethics"—indicates what the organization thinks of morality's role in vice legislation.

Even the nation's hookers have gotten into the legal action, challenging laws against prostitution on constitutional grounds

COYOTE and Anita Bryant's crusade are indicative of our country's debates over morality. In the United States the law is faced with the dilemma of reconciling two conflicting concepts. On the one hand we believe that individuals should have a great deal of freedom. On the other hand, we recognize a need to establish a standard of conduct for society. The dilemma is acute when one individual's freedom impacts on the values or moral stance of others, especially when free speech, one of our constitutional rights, comes in conflict with our standards for the family and children.

This article focuses on just two of the vices regulated by the law, prostitution and pornography. These issues have produced much of the debate over the decriminalization of vice. Both deal with sex, and the word "pornography" is even etymologically linked to prostitution through the Greek word "pornographos," which literally means the "writing of harlots."

Why Decriminalize?

During the past 20 years, decriminalization has lessened or removed many criminal penalties for so-called "victimless crimes." Victimless crimes are those which do not involve anyone but the actor, but which are nonetheless prohibited by the law. Prostitution is termed "victimless" because it involves two consenting adults. Those who favor decriminalization argue that without a victim there can be no injury; therefore, there is no basis in law for the prosecution of the crime.

Many organizations are advocating the decriminalization of prostitution. The National Organization of Women is collaborating with the American Civil Liberties Union to promote decriminalization. The American Bar Association's 1972 Special Commission on Crime Prevention and Control recommended the dismantling of criminal sanctions for prostitution.

Those who advocate decriminalization of prostitution and other morals offenses do so for various reasons. Most argue that immorality as such is not a sufficient basis to impose criminal sanctions. In effect, a person is jailed or fined simply because the majority does not like what he did. Decriminalization advocates are also concerned that the emphasis on vice prohibits concentration on more serious crimes. Herbert Packer, the late law professor, explained in his noted work *The Limits of the Criminal Sanction* that "some things are more harmful than others. Homocide is more harmful than muttering voodoo incantations; rape is more harmful than reading dirty books. And in a world of limited resources, we need to draw discriminations about the remoteness of harms."

Advocates of decriminalization also argue that vice laws invade privacy. The U.S. Supreme Court has recognized that the right to privacy places some forms of sexual activity beyond the control of the state. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court declared that a state statute which barred the sale of contraceptives to married persons was unconstitutional. The Court explained that

(*Continued on page 48*)

Frank Kopecky is an attorney and Director of the Center for Legal Studies at Sangamon State University. He wishes to acknowledge the assistance of Rebecca Wilkin, research assistant in the Center, in the writing of this article.

LAW IN THE 80'S

Space-age Crime Stoppers

Futuristic anticrime gadgets take a page from James Bond

After dipping for a few years, the crime rate is soaring even faster than inflation. But before you buy a bazooka and go out only in groups of 10 or more, you should know that help may be on the way, and from some unlikely sources.

Thanks to man's walk on the moon, the Vietnam war, and good old American ingenuity, law-enforcement agencies across the country are increasingly turning to futuristic technology to help wage the battle against crime.

Criminal labs are beginning to look like a scene out of *Star Wars,* with a dazzling array of scanning electron microscopes for examining particles wiped from criminal suspects, new data systems for analyzing drugs in a flash, video document examiners for reconstructing seemingly demolished papers, and much more.

Most of the new anticrime inventions have been developed outside of the law-enforcement community. Some sprang from developments in the military, medicine, and private industry. Others emerged as a result of the nation's space program. The National Aeronautics and Space Administration (NASA) even has a Technology Utilization Division, with 10 field centers around the U.S. working to find practical applications (such as crime-fighting) for aerospace discoveries.

These new tools are not only aiding in the apprehension of criminals, but unearthing a host of criticism and legal hassles as well. A number of these James Bond-like innovations have faced tough sledding in the courts because their reliability as evidence is questionable.

Lisa Broido

Many critics also worry that these new devices are not really worth the cost. Nevertheless, the new line of law-enforcement technology for the 80s is both intriguing and impressive. Here is just a sampling of some of the new gadgets for crime-fighters.

Electrophoresis. Just five years ago, the only thing serologists (blood specialists) could determine from a bloodstain was whether it was from an animal or was one of the four human bloodtypes (A, B, O, and Rh). Now, thanks to electrophoresis, a new method of examining bloodstains through the use of chemicals and electricity, police labs can tell the sex, race, and health of the person the blood came from and can even identify what drugs he was taking. According to Dr. Brian Wraxall, the serologist who helped to discover this process, it is now possible to determine up to 13 separate blood factors. He believes that with further study, scientists will soon prove that blood is specific to each individual and can be used like fingerprints to make positive identifications.

Harvard's Dr. Howard Baden, under a grant from the Law Enforcement Assistance Administration (LEAA), is studying electrophoresis for use on human hairs. Baden is convinced that hair, like blood and fingerprints, is different for every person. He hopes that someday scientists will be able to match a given hair to a given head.

Scanning Electron Microscope (SEM). A Dick Tracy dream come true. At last the particles wiped from the hands and clothes of a suspect can be tested for gunshot residue quickly and accurately. By placing these particles in a vacuum chamber and bombarding them with electrons, police can determine whether the suspect has recently fired a gun. If gun-shot residue shows up in the form of antimony or barium, the suspect better think up a good alibi fast. Thanks to a SEM gunshot residue test that showed the presence of lead, copper, zinc, and barium on her right hand, a California woman was recently convicted of murdering her husband.

Ultrasonic Cavitation. Crooks often scratch out the serial numbers on guns and stolen goods so that their steps will be harder to trace. NASA's Lewis Center, in conjunction with Chicago State University, has finally found a way to restore these obliterated markings. The metal object is immersed in water and surrounded by millions of vibrating bubbles produced by ultrasonic energy. These cavitation bubbles lift out the metal particles left in the serial number grooves. And voila! A clearly legible shadow of the long past number magically appears. Says Harrison Allen, Jr., one of the founders of the technique, "catching criminals will be a little faster and cheaper with this new method."

Document Enhancer. Here's a space program spin-off that will be launched to fight the underworld as soon as its costs are brought down. NASA's Jet Propulsion Lab, in conjunction with the California Institute of Technology, is working with the same equipment that was used to produce sharp pictures from the moon—a vidicon camera and computer—so that documents that have been damaged, erased, or altered can be reconstructed by law-enforcers.

Though American courts shun lie detectors, hundreds of police departments are buying them

The vidicon camera will be used to scan a page and measure the brightness of the millions of dots along each line. Next the degree of brightness for each dot will be recorded on magnetic tape and fed into a computer, which will remove all background data and sharpen the contrast. The restored image will then be played back on a TV viewer so that it can be read by the naked eye. "This will be a valuable law-enforcement tool in the near future," says a NASA spokesman.

Law-Enforcers Meet the Computer. White collar criminals have used computers for years, and now police and F.B.I. officials are finally getting into the act. A number of new computer systems have recently been developed to give the good guys the advantage in the never-ending cops and robbers game. The American Civil Liberties Union (ACLU) and others are worried that we may be getting closer to Orwell's *1984*, where the government has a dossier on everyone, but "progress" marches on in the name of justice.

One of the most sophisticated computerized law enforcement aids is the Video Information File manufactured by Ampex Corporation. Video File is a storage and retrieval system that can hold fingerprints, documents, and other visual material. Information is recorded on magnetic tape and can be retrieved on a TV screen (soft copy) or reproduced on a piece of paper (hard copy). The system can search tapes for data at a speed of 380 feet per second, and one tape can store enough records to fill 10 four-drawer filing cabinets. Unlike microfilm and other more traditional record keeping methods, videofiles can be easily erased and updated.

Here's how the system works. The St. Louis Police Department has recently developed a computerized crime-fighting program. As a result, if you are the victim of a crime in St. Louis, your chances of putting the bum behind bars may be better than in many other cities. The police will probably sit you down in front of their new "scientific criminal identification program" and ask you to tell them everything you remember about the suspect and the crime. Any identifiable marks or tatoos? Hair color? Crime location? Type of crime? All this data will be fed into a computer and matched with persons on file who share the same traits and characteristics. The pinpointed suspects will then appear on a screen for your possible identification—a far cry from the old method of shuffling through stacks of mugshots.

Laser Fingerprinting. If laser technology can be made cheaper and easier, the days of dusting for fingerprints may soon be over. Canada's Ontario Provincial Police are currently working on a technique that will make it possible to identify fingerprints without any powders or chemicals, by using a laser light in a dark room. "Chemicals and powders can destroy a print and whatever it is found on," says a spokesman for the project. "The beauty of the lasar technique is that it preserves everything so perfectly."

Nobody knows exactly what it is that makes the prints illuminate. Xerox Corporation thinks that it's due to foreign properties on the fingers. The National Research Council believes that there must be some body properties that make the prints glow. Whatever the reason, this new method of fingerprint identification figures to be a boon to law enforcement.

The New Lie Detectors. A fairly new device called the "voice stress analyser" (VSE) threatens to phase out the old polygraph method of lie detection. It's simple, portable, and fast, and doesn't

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require any of those menacing wires that are usually connected to a subject's body. Is it more reliable? Well, that remains to be seen.

Like the polygraph, the VSE is designed to detect stress—not lying—by measuring the psychological responses of the person who is being questioned. Instead of recording blood pressure and breathing, however, it picks up fluctuations and variations in the voice that are supposedly caused by stress. Many critics say that the VSE is less accurate than the polygraph (whose own reliability is questionable) and feel that it is a greater threat because it can be used clandestinely, without the subject's knowledge.

Despite the fact that the results of the VSE—like those of the polygraph—are inadmissible as evidence, hundreds of law enforcement agencies are buying the machines for criminal investigations. Why? Because criminals confronted with this "truth machine" sometimes break down and confess. "It's a great time saver," says one Florida cop. "It indicates quite accurately if the subject has a knowledge of the crime," adds a North Dakota detective.

And what about the future of traditional lie detectors? According to Allen Bell, one of VSE's inventors, the devices are almost obsolete now. He envisions a day when computers will pinpoint and monitor the specific area of the brain where stress originates. Frightening? "Perhaps, a bit," he admitted to *Psychology Today*, "but is telling the truth that bad?"

Some Kinks to Iron Out

Although the science of criminal investigation appears to be marching along rapidly, it faces a number of real problems. For one thing, these scientific innovations don't always receive approval from the courts. Judges generally only like to admit evidence that has been obtained by tried and true methods. They are wary of anything that is the least bit questionable.

In the past, evidence that was obtained by new scientific or technological advances had to pass the *Frye* test of admissibility. This was the same test that was applied to lie detectors, ballistics, fingerprints, and other crime-fighting techniques that have emerged through time. It required that a new scientific discovery be accepted by the general scientific community before it could satisfy judicial caution.

Due to the increasing specialization of science, the *Frye* test has been modified somewhat in recent years. *General* recognition is no longer necessary. Today recognition of reliability can be accorded by a specialty within a particular field of science.

Even under this less restrictive test, attorneys have difficulty introducing evidence based on new scientific discoveries, but that doesn't mean the innovations are useless. The new tests can still have a powerful impact on how police pursue a case before trial, and they can still play a role in plea bargaining procedures. If a new test has given police a valuable piece of evidence against a suspect, his attorney may well wish to bargain for a reduced sentence rather than test the admissibility of the evidence in court.

Many argue, however, that the tests should be given very strict scrutiny. Not only are some of the new crime-fighting techniques seen as unreliable by the courts, but forensic scientists themselves have been shown to be fallible. A nationwide test of the proficiency of crime labs from 1974-1977 turned up extremely alarming results. Of the 205 labs which responded, 71 % failed to correctly type a bloodstain, 50 % could not identify a blood sample, and 68 % misidentified a cowhair. If the majority of crime labs tested failed these routine tests, critics wonder, how can they handle more difficult techniques?

John Sullivan, Director of the Forensic Science Program at the LEAA's National Institute of Law Enforcement and Criminal Justice, is working with others to rectify this situation. In addition to sending experts to crime labs around the country to provide remedial training, he also plans to establish uniform standards for forensic labs and to begin a certification process to enforce these standards.

Sullivan looks forward to a time when policemen, lawyers, judges, and law-abiding citizens have more faith in forensic science. "Someday," he says, "I hope that the crime lab will be looked upon as an invaluable tool for law-enforcers."

No doubt plenty of problems remain before new scientific discoveries can be fully used against criminal suspects, but to John Sullivan and others like him the effort has taken on the dimensions of a crusade. Sullivan cites the kind of frustrations that have led him to work overtime for the improvement of crime-fighting techniques. "One time they brought in a guy who I was sure had just shot his girlfriend," Sullivan recalls. "If only we knew about gun-shot residue tests then . . ." ☐

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AN UNEQUAL OPPORTUNITY EMPLOYER
S. Harris

LAW IN THE 80'S Ronald A. Gerlach

Teaching About the Future Is No Joke

Here is a bag of tricks to liven up your classroom

Going beyond the events of yesterday and today represents a special challenge to teacher and student alike. Certainly not always 100 percent predictable, and sometimes entirely unexpected, the future is unlike the history and current events which have been the staples of law studies programs.

Any attempt to study the future as it may involve our laws and legal system is no easy task. In some ways, it may be downright frightening! There is no one right answer, or single set of references to rely on. Nor is there any central authority and clearly defined content area to guide our investigation. If left to go totally unchecked, our attempt to study the future might only lead to unbridled speculation in a law studies classroom.

Yet few subjects present as stimulating an intellectual challenge and at the same time offer as much opportunity for heightening our receptivity to new ideas and expanding our creativity. In effect, we are forced by the very nature of the subject matter to forsake the search for *the* right answer, to put aside any blind dependence on authority and delve into the unknown. We must prod our own imaginations, reflect on our own values,

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and put to work all the knowledge, analytical skills, and experience we possess.

But what aspects of the future should we look to? I've chosen five subjects—the power of the courts, the media and the law, juvenile justice, government regulation, legal assistance—which are very important right now.

Since these areas are already found in many established law studies and social studies programs, they should be "non-threatening," enhancing and supplementing teaching rather than posing a problem for a teacher's subject competency or challenging the content emphases found in her/his course of study.

And these are vitally important areas for American law. How well we cope with the problems they raise could help determine the survival of our democratic form of government.

The lessons which follow include a blend of case studies, value clarification strategies, community involvement exercises, and basic skill activities. I've made no attempt, however, to provide a comprehensive treatment of the subject matter. Rather, the materials are intended only to be illustrative, to stimulate teachers and students to creatively find new dimensions to some perennial issues.

Strategy

1.

The Power of Our Courts . . . Continuing Concern and Controversy

It was a sunny, but chilly spring afternoon when testimony in the assault and battery case concluded in city court. The defendant in the case was being tried on two counts of assault, carrying a pistol and firing a gun inside the city limits as the result of a quarrel at a "social club."

It was then that the judge turned to the courtroom spectators, some of whom themselves were awaiting trial, and said "The court, of course, is not endowed with the wisdom of Solomon. Therefore, I'm going to ask you to decide this case.

"I don't know of any particular precedent," the judge continued, "for what I'm doing. But I'm going to ask for a show of hands . . . that is, to vote on the guilt or innocence of the defendant. I want no conversation. I just want a show of hands."

The defendant won the vote and the judge ordered the charge against her dismissed. Despite the victory, the defendant and her attorney seemed stunned. The stakes seemed just too high for what had happened!!

- What do your students think of the trial judge's actions in this case? What do they think was meant by the statement "The stakes were just too high "?
- Suppose the defendant had lost. Would she have had grounds for appeal? If so, what? If not, why?
- What, in effect, may a judge do? *Not* do? In answering this question, invite a judge to your class or try to arrange for a meeting at the courthouse.
- Suggest to your students that they ask the judge about his or her responsibilities to assure a fair trial? Raise such issues as admissibility of evidence, proper and improper questioning of witnesses, proper and improper opening and closing statements to the jury.

Another aspect of the problem is that judges may make policy through their power to interpret laws and regulations. Many have accused the judges of usurping legislative powers in such areas as school desegregation, affirmative action, abortion, and criminal procedure. Others have responded that judges are merely fulfilling their unique responsibility to preserve constitutional guarantees.

A Better Way to Pick Them?

The tremendous powers and important responsibilities of judges have caused great concern over *who* should serve as a judge and *how* he/she should be selected. Below is a series of 10 questions which might be used to determine the qualifications of persons interested in becoming judges. (Items adapted from a poll used by the Judicial Selection Committee, Cincinnati Bar Association, 1973.) Which of these questions do students feel should be most important. Least important? Ask them to rank the questions from 1 (most important) to 10 (least important). Are any of these requirements for being a judge used in your community? In your state? If so, which?

- Would the person be courteous toward counsel, litigants?
- Is the person susceptible to his/her own personal bias or to other pressures?
- Would the person be attentive to legal arguments/testimony?
- Is the person too young or too old to serve?
- Does the person have the legal ability for the particular office?
- Does the person have sufficient actual experience in practice?
- Would the person be punctual?
- Is the person trustworthy?
- Would the person carefully study the case and render prompt decisions with appropriate findings?
- Does the person have a good reputation in the community?

Suppose your students were given the task of preparing a plan which would be used to select all trial court judges in the United States beginning January 1, 1985. What would they do?

- Some of the options which they could have in devising a plan for the selection of trial judges might include that *judges are to be*:
  —Elected *or* appointed;
  —By the people, *or* the legislature, *or* the governor/chief executive;
  —In a community, *or* state, *or* the nation;
  —For a life term, *or* four years, *or* six years;
  —With political parties involved *or* not involved in the selection process.
- Add any other options to the list which you feel they might have in deciding how trial judges are to be selected.
- Ask them to make a list of the advantages and disadvantages of choosing each option.

In 1940, Alfred M. Kales recommended the adoption of a three-step plan for use in the selection of judges. A combined nomination, appointment, and election process was the key to the selection of judges under what later became known as the Missouri Plan.

Under the Missouri Plan, a nonpartisan commission of lawyers and lay people nominated three individuals for each judicial vacancy. From the three names, the governor would appoint a judge. After about 12 months, the people of the community where the judge served would be asked to indicate by election ballot that . . . "Yes" the judge should be retained in office . . . "No" the judge should not be retained in office.

- How is the Missouri Plan similar to/different from the one students devised?

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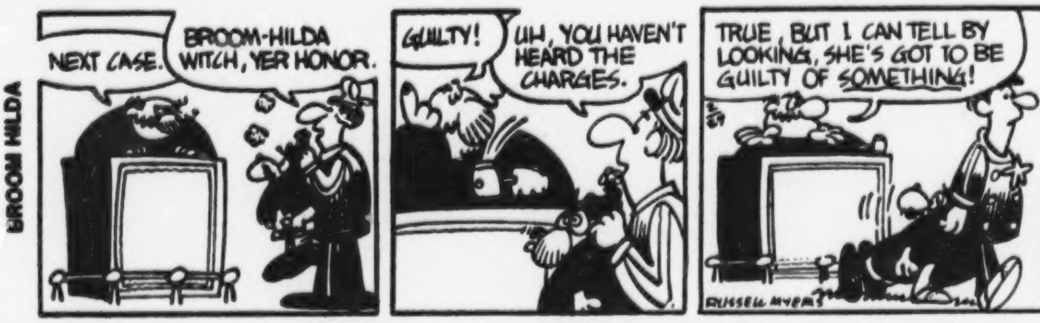
BROOM HILDA
NEXT CASE.
BROOM-HILDA WITCH, YER HONOR.
GUILTY!
UH, YOU HAVEN'T HEARD THE CHARGES.
TRUE, BUT I CAN TELL BY LOOKING, SHE'S GOT TO BE GUILTY OF SOMETHING!
RUSSELL MYERS

- Where does the cartoon appear to be happening? What things in the cartoon helped lead you to this conclusion?
- How is what happened similar to but different from what happened in the city court case?
- Would Broom Hilda have grounds for an appeal? Explain.

- Is there anything in the Missouri Plan which they hadn't considered in preparing their own?
- What are the strengths and limitations of each plan.
- Might their plan be combined with the Missouri procedures to produce a better plan? Explain.

Strategy
2.
The Media and the Law

September 28, 1992. It was 9:05 a.m., 25 minutes to court time. Lawyers and witnesses were in "makeup," and the courtroom, now a video-tape studio, was deserted. In just 25 minutes, the hot lights would be turned on. And the lawyers, witnesses, defendant, and judge would file into the studio where the trial would begin.

In the studio, there would be no jury. Nor would there be any other spectators except for a few of the studio's A-V crew with cameras and microphones.

Following completion of the proceedings, the judge would retire to chambers to review and edit the tapes from the trial with the help of a technical assistant. All extraneous matter such as objectionable questioning of witnesses, outbursts by the defendant, and arguments between attorneys would be deleted from the tape.

Several days later, a jury of 12 men and women would be called into an adjacent viewing room by a court supervisor to see the edited tapes. The judge would be present only to instruct the jury regarding the law in the case.

The jury would view the tapes in 50-minute segments accompanied by 10-minute rest periods. No discussion of the case would be permitted until the tapes were completed.

Following completion of the tapes, the jury would meet in a conference room to discuss and decide the case. With the court's permission, taped excerpts of the trial could be replayed for the jury.

The chairperson of the jury would assume the responsibility of informing the judge when a verdict had been reached. After the jury had been polled by the judge, it would be dismissed. Within 24 hours, the judge would meet with the attorneys and defendant in the case to announce the decision.

- Would these proceedings be consistent with/or contradictory to the rulings of the Supreme Court in the Sam Sheppard and Billie Sol Estes cases of the 1960s? These cases held that cameras in the court and heavy publicity might violate defendants' rights (see Winter, 1978 *Update*). This case is different in that electronic media are present but the public is not. If the tapes were not available to the public and press, a whole new raft of issues might be raised.
- Would your students be in favor of the court proceedings described above? Why or why not?
- How might such changes in our trial court system be justified?
- What effect do your students think this type of court proceeding might have on our 1st, 5th, and 6th amendment rights? Explain.

In a 1979 Supreme Court case, *Gannett v. DePasquale* (47 L.W. 4901), Justice Potter Stewart (writing for the majority) noted that the centuries-old English and American tradition of conducting trials in public "demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings." And, Stewart continued, "not many common law rules have been elevated to the status of constitutional rights." He would permit trials to be closed to preserve the rights of defendants.

- What effect, if any, would Potter Stewart's position have on the hypothetical 1992 trial proceeding?
- Have there been any other recent Supreme Court decisions which might lend support to the use of the 1992 proceedings?

What Price Privacy?

The recent explosion of privacy law and increasing rulings by the courts on behalf of the individual have caused many representatives of the news media to feel that their news gathering ability has been severely restricted. In support of their claim, news media representatives cite the court-mandated disclosure of confidential news sources by reporters, authorized police raids on newsrooms across the country in search of evidence, and enormous court judgments against publishers.

Coupled with these developments is the widely held belief that the news media as well as other groups are just poking about too much in people's lives. Many feel that the personal lives of individuals, including public officials, are none of the news media's or public's business. Ask your students these questions:

- How do you feel about current court restrictions on the news media?
- What effect do you suppose these restrictions might eventually have on reporting?
- Which of the following would you consider "newsworthy"? Why? Which, if any, of the information would you restrict the news media from using? Why?

(Continued on page 42)

Cynthia Kelly and Bernice McCarthy

EDUCATIONEL MALPRACTICE WORYING YOU?

You can breath easier if your students can spell better than this

Edward Donohue didn't seem any different from the rest of his classmates on that graduation night in 1976. Like the other kids graduating from his Long Island suburban high school, he looked proud in his cap and gown. There was one important difference, though—they could read their high school diplomas, and he couldn't.

Even though he would later be adjudged functionally illiterate—with the language, reading, and spelling of a third grader—his teachers had passed him in every required subject.

According to a *Chicago Tribune* story, Donohue didn't learn enough to fill out a job application and had trouble finding work. He couldn't read a menu, so he avoided embarrassment by always ordering hamburgers.

As time passed, he became angrier and angrier, and finally consulted a lawyer. Six months after graduation, he filed a $5 million lawsuit against his school system, on the grounds that it had failed to evaluate his needs and provide the appropriate help.

As an example of the school system's misdiagnosis and lack of caring, he pointed out that when his mother went to school about once a month to speak with teachers about his reading difficulties, she was told that Edward was "slow" but would catch up and not to worry. Once she suggested that he be sent to a reading clinic she had heard about at nearby Hofstra University, but the high school told her that the district didn't want to spend $2,000 a year to pay for her son's enrollment in it.

Donohue isn't the only student to complete school successfully only to find that he lacked the basic skills for employment. These students and their parents are turning to the courts to find out what went wrong and what they can do about it. In court actions for what has been labelled "educational malpractice," parents and students are claiming that schools should be held liable for their incompetent or negligent teaching practices.

In the majority of cases, individual teachers would not be personally liable in suits for educational malpractice since state laws usually require school systems to assume responsibility for teachers' actions in "the normal performance of their duties." However, being successfully sued for educational malpractice would probably derail a teacher's career permanently, and even the threat of malpractice actions would greatly alter how teachers go about their work.

The Case Against the Schools

The first major educational malpractice case was filed in the early 1970s. In *Peter W. v. San Francisco Unified School District* (131 Cal. Rptr. 854 [1976]), an 18-year-old graduate sued school officials. Peter W. had attended San Francisco public schools for 12 years, maintained an average attendance record, and been free of any serious disciplinary action. A school district intelligence test showed that Peter had an average or slightly above average IQ.

During his elementary and high school career, Peter's mother often asked about her son's scholastic progress. These questions were met with assurances by his teachers, as well as by school administrators, that Peter was performing at or near grade level, and that no special remedial instruction was necessary. Upon graduation, however, Peter couldn't read any better than a child in the fifth grade.

Feeling that he was gravely hurt in his ability to get a job, he sued the school district, alleging that school officials were negligent in failing to notice his reading disabilities, assigning him to classes which were too difficult, carelessly promoting him, and assigning him to classes with unqualified teachers.

Besides these charges of negligence, he also claimed that school district officials misrepresented that he was performing at or near grade level. Peter asked the court to award him $500,000 to cover the cost of remedial tutoring and to compensate him for the loss of income caused by his low reading level.

Donohue's allegations were similar. In *Donohue v. Copiague Union Free School District* (407 N.Y.S. 2d 874 [1978]), he claimed that the school officials were negligent when they failed to evaluate his mental ability, failed to hire proper personnel, failed to teach him so that he could cope with various subjects, failed to properly supervise him, failed to advise his parents of the difficulty and the necessity to call in psychiatric help, and failed to adopt accepted professional standards and methods to cope with problems.

Getting Nowhere Fast

Neither suit ever got to trial. In baseball terms, they struck out without even getting their turn at bat.

In dismissing them, the courts first outlined the student's burden of proof in an action for educational malpractice: A student basing his/her claim on a negligence theory would have to prove (1) that the teacher owed him/her a duty of care, (2) that the teacher breached that duty, and (3) that the student's educational injury was caused by the teacher's conduct. Both the California appellate court (unanimously) and the New York appellate court (by three to one) concluded that the students could never even meet the first of this three-part standard—they could not show that teachers were under any *legal* "duty of care" to educate their students.

The courts recognized that teachers who were duty-bound to educate under state law were also bound to faithfully perform their duties, to educate "with care." However, that didn't mean teachers owed students a *legal* duty of care, a duty which would allow an individual student to sue them in court for a failure to reach certain educational objectives.

"Duty of care," as the courts pointed out, is a fundamental concept in tort law, the area of law dealing with civil claims by one party against another. You can be sued if courts decide that in a given situation you had a duty of care to someone. Among the many duty of care relationships that courts have recognized is the duty of a doctor towards a patient or a lawyer towards a client. The issue in *Donahue* and *Peter W.* was whether this legal relationship should be extended to teachers and students.

As the *Donohue* court pointed out, in deciding whether or not there is a duty of care in a given situation, courts look into a wide range of "public policy considerations," trying to determine what the practical effect will be if they recognize a legal duty of care. The *Donahue* court neatly divided them into these categories:

moral considerations—how does society view the relationship of the parties, and to what degree should courts be involved in regulating such a relationship?

preventive considerations—can the defendants (the teachers) adopt means to avoid doing injury? Was the injury reasonably foreseeable? What is the degree of certainty that the alleged injuries were caused by the defendants?

economic considerations—can the defendants pay damages?

Would we have a more just society —and better schools— if we permitted students to sue for educational malpractice?

administrative considerations—will recognizing a duty of care flood the courts with litigation? Will it lead to a rash of feigned claims? What difficulties are inherent in proving the plaintiff's case?

The burden on the courts, then, was to decide some basic questions of fairness and social policy. Would we have a better and more just society (with better schooling) if we permitted students to sue for education malpractice? Or would we have a more contentious, legalistic society, in which teachers would be unfairly burdened with defending such suits and in which education would ultimately suffer?

The Courts Demur

Looking at these considerations, both courts saw nothing but difficulties in imposing a legal duty of care on teachers. First, the courts emphasized that there was no workable standard of care against which a teacher's conduct could be measured. In the words of the California court, "Classroom methodology affords no readily acceptable standards of care, or abuse, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what should be taught. . . ."

In addition, the California court noted that it would be difficult to prove that the teacher's conduct was responsible for the student's injury. Achieving literacy in the schools, the court said, is "influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process." Besides the influence of home and the media, there are "physical, neurological, emotional, cultural, [and] environmental" factors. The New York court added that "failure to learn does not bespeak a failure to teach." Pointing out that Donohue didn't allege that his classmates were illiterate, the court inferred that his "illiteracy resulted from other sources."

Finally, the courts identified a number of practical administrative considerations. Noting that the public schools had been charged with responsibility for "many of the social and moral problems of our society at large," the California court predicted that holding them to an actionable duty of care would expose them to countless court suits. "The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation." The schools would spend precious time and money defending such suits, with no guarantee that educational performance would improve one whit.

The *Donohue* court added that public education involves an "inherent stress" between the needs of individual students and students as a whole. "It is not for the courts," the majority argued, "to determine how best to utilize scarce educational resources to achieve those sometimes conflicting objectives." If the courts recognized a legal duty of care, the *Donohue* court predicted, they would inevitably have to "oversee the administration of the State's public school system."

A Dissent Opens a Few Doors

In the *Donohue* case, Justice Suozzi dissented, answering the arguments in the majority opinion point for point. For example, he said that the question of whether Donohue failed to learn because of the school system, or because of other forces, "is really a question of proof to be resolved at a trial." As for the fear of a flood of litigation and the difficulty of assessing damages, he pointed out that there's no reason to differentiate between educational malpractice and other forms

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of malpractice litigation currently before the courts.

Turning to the allegations raised in this particular case, Suozzi argued that the record did show a record of negligence. "Anyone reading [Donohue's] high school transcript would be hard pressed to describe his work as a 'satisfactory completion' of a course of study." Given this record of failure, the question is "whether the school had a duty . . . to do more than merely promote [him] in a perfunctory manner from one year to the next."

Choosing a strong analogy, the judge likened this negligence to

> that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose this specific condition and (2) treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease. Such medical malpractice would never be tolerated.

The judge wrote in conclusion that "to dismiss the complaint, as the majority proposes, without allowing the plaintiff his day in court, would merely serve to sanction misfeasance in the educational system."

A Back Door Approach

Suozzi's dissent also suggested a promising approach to remedying such malpractice. This would involve suing on a theory of intentional or fraudulent misrepresentation. According to the law, "misrepresentation" is a statement by one person to another that, under the circumstances, amounts to an assertion not in accord with the facts. Fraudulent misrepresentation is a statement made by a person who knows that it is false.

If this approach were followed in suits against school systems, teachers would be held liable in cases where they knowingly make false statements about students' educational progress, which students and their parents then rely on. *Peter W.* made such an allegation, claiming that school officials misrepresented that he was performing at or near grade level. The California court did not deal with this complaint, however, because he did not show any facts which demonstrated that he and his parents relied on statements by the school authorities.

That this approach is a promising one is suggested by the dissent in *Donohue.* Even though Donohue did not charge fraudulent misrepresentation, the dissenting judge went out of his way to note that "the cause of action for intentional and fraudulent misrepresentation could, if properly pleaded, withstand a motion to dismiss."

The misrepresentation theory would avoid the problems associated with defining teacher competence. Instead, teachers would be liable for educational malpractice only where they intentionally misrepresented students' educational progress, thus misleading parents about their children's substandard performance.

If such grounds for suit were widely adopted, one could expect school systems to protect themselves by giving parents a full picture of their children's shortcomings in school. While this in itself might do little to improve the schools' performance, one would expect that parents apprised that their children were doing badly would demand more from the schools, and thus more systems might adopt reading clinics and other remedial techniques.

Should Courts Get Involved?

Whether students allege educational malpractice or fraudulent misrepesentation, however, their biggest hurdle will probably be to convince judges that courts are an appropriate forum for enforcing educational accountability. While it seems clear that educators are better qualified than courts to decide matters of teaching and learning, many argue that this factor should not deter the courts from recognizing a legal remedy for negligent teaching. After all, it may be that the courts are the only forum where students can effectively air their grievances against an increasingly unresponsive and unresponsible school system.

To be sure, judicial intervention has a number of negative implications. Consider the following:

- schools could revert to minimum

A Whopping Burden of Proof

By holding that there was no legal duty of care to educate, the *Donohue* and *Peter W.* courts didn't allow the students to present evidence of negligent teaching. Even if they had, however, there is no guarantee that students could have prevailed. The students would still have had to prove that teachers breached their legal duty and that their conduct caused the students' failure to learn.

These legal standards pose severe problems of proof for the student. First, how are the courts to decide what constitutes a "breach of duty"? What standards are to be applied in determining whether or not a teacher was performing competently in the classroom? By analogy to medical malpractice cases, a teacher would be required to exercise the skill and knowledge of a member of the profession who is in good standing. What components should characterize such a standard? At the present time there is no universally accepted research on effective and ineffective teaching. If professional educators can't agree on what is good teaching, how can the courts be expected to recognize it?

There are some general standards which courts could employ, however. Educators have created levels of proficiency, defined in terms of each child's ability. These are common-sense standards available for use in defining general expectations for grade level abilities. In addition, state and federal laws are imposing standards. For example, many states have adopted competency standards which define specific levels of performance. Federal laws such as the Education for All Handicapped Children Act, which outlines specific procedures which educators must follow in evaluating students with educational handicaps, can provide courts with some objective standards in assessing teacher performance.

Who's to Blame?

An equally serious problem, however, is to prove that the teacher's conduct caused the student's failure to learn. As the court noted in the *Peter W.* case, there are many factors which determine whether and how a student learns. Since teachers have control over only a few of those factors, it will be difficult for students to prove that their failure to learn was a result of actions—or failures to act—on the part of the teacher.

A brief explanation of the rights and duties of these segments of the educational process is helpful in understanding the complexity of proving educational malpractice. An analysis like this could be very helpful in deciding where blame should lie when a student fails to learn.

standards or the least common denominator to protect "grey" areas;

- schools might shy away from starting new practices and programs, instead practicing "defensive teaching," the way doctors who perform all the tests every time and avoid risky operations practice defensive medicine;
- the adversary relationship between students and teachers could promote hostility and increase students' alienation;
- schools might rigidly adhere to general rules and ignore individual needs; and
- schools could be financially devastated, paying huge sums of money to lawyers and individual students, rather than spending money to improve educational services for all.

These are powerful considerations, but one can make the case that judicial intervention might actually *improve* education. For example:

- schools would be forced to evaluate and reassess the present conventional wisdom about teaching practices;
- schools would be held accountable for their teaching;
- students and parents would have channels for their grievances;
- competent teaching would be more highly regarded;
- scholars would conduct more educational research.

A Cloudy Crystal Ball

With so many questions up in the air, forecasting the future is about as difficult as forecasting the weather. Part of the problem is suggested by the words of the California court, which noted that in making decisions on such cases, judges must take into account "the moral imperatives which [they] share with their fellow citizens." Since these imperatives—for judges and citizens alike—are mixed, decisions could easily go two very different ways.

On the one hand, judges might agree, as do many laypeople, that we have too much law already in our society. Given the great difficulties of proving educational malpractice, they might well decide that there are better ways than lawsuits for remedying the deficiencies of the schools. As the California court already pointed out, laypeople dissatisfied with the schools have an opportunity to make themselves heard through elections of school board members and referenda on school bonds, and through appeals to the state commissioner of education.

On the other hand, judges are well aware that public education is in bad repute these days. That dissent in the *Donohue* case shows that judges can be sympathetic to the view that schools are

Students:

- have the *right* to knowledgeable teachers who are proficient in presenting that knowledge so that it is understandable;
- have the *right* to accurate diagnosis regarding any serious impediments to learning at their grade level;
- have the *duty* to cooperate in the learning process. They should perform the learning tasks set before them when they can, and when they can't they should communicate that problem to their teachers;
- have the *duty* not to interfere with the learning of fellow students.

Parents:

- have the *right* to be informed at set intervals of time (each school quarter) if and when their child's performance is below grade-level or substandard; if that situation exists, they have the *right* to expect help and counsel from school administrators and teachers to find the resources to correct such deficiencies;
- have the *duty* to monitor their
- have the *duty* to guide their children in performing the learning tasks expected and required as homework.

Teachers:

- have the *right* to function in the performance of their jobs with competent and caring administrative assistance;
- have the *right* to exercise professional judgment in imparting knowledge and skills;
- have the *duty* to accurately assess the progress of all their students and to notify the proper administrative personnel when any single student needs more help than they can give;
- have the *duty* to notify parents of the progress or lack of progress (based on accepted grade-level standards) of their students.

Administrators:

- have the *right* to expect professional competence from their teachers and resource personnel;
- have the *right* to establish standards of proficiency for all students;
- have the *duty* to assist teachers in all phases of their professional tasks;
- have the *duty* to establish appropriate lines of communication to parents and superiors on the progress or lack of progress of the students entrusted to their care.

Bad Teaching or Bad Learning?

To show how this analysis might apply in practice, let's look at a student who is alleging that a particular teacher is guilty of educational malpractice. To make it interesting, let's suppose the student can show the necessary connection between the teacher's conduct and his failure to learn (perhaps by comparing the performance of his class with a similar class, where the teacher's instruction is the only different factor). Has he won the case? Not necessarily. His claim may still be defeated if the teacher can prove "contributory negligence" on his part.

The doctrine of contributory negligence holds that a person who is injured because of someone else's actions cannot recover damages where he was partially responsible for what happened. For example, a person who is hit by a train while walking on a railroad track would be prohibited from recovering damages for his injuries, since his carelessness contributed to the accident. Similarly, in this hypothetical suit for educational malpractice, the teacher might be able to argue that a student's own actions contributed to his failure to learn. If the teacher could show that the student rarely attended class, for example, the court might agree the child does not deserve damages.

So it's a chicken and egg question. We know what happens when a child doesn't learn, but do we know why?

slovenly in their educational practices and unresponsive to legitimate inquiries from parents. It is at least conceivable that at some point in the future, a court will determine that educational malpractice is a reasonable way to make the schools more responsive.

None of these speculations, however, are going to do anything for Ed Donohue. He is working as a carpenter now. He was married last year to a woman he describes as "a very good reader." She's been helping him learn to read newspapers and magazines.

He still dreams of saving enough money to find a private tutor or enroll in a reading clinic. "I have to do something," he said. "I don't feel complete." □

How One Student Almost Won

While educational malpractice is not easy to prove, it can be done. In *Hoffman v. Board of Education of the City of New York* [410 N.Y.S.2d 99 (1978)], a New York man who was improperly assigned to classes for the mentally retarded won in lower court and came within a vote of prevailing in the state's highest court.

A Failure to Retest

Danny Hoffman was a child who had almost no intelligible speech when he started kindergarten in 1956. Four months later, he scored 74 on the school psychologist's primarily verbal intelligence test. Under state law in effect at that time, students who scored below 75 were placed in special classes. Because Danny scored below this cutoff point, he was placed in a class for children with retarded mental development (CRMD). However, the school psychologist noted in his report that Danny's "intelligence should be re-evaluated within a two-year period so that a more accurate estimation of his abilities could be made."

Despite this written recommendation Danny was not retested. He remained in CRMD classes for years. Finally in May, 1969, after the Social Security Administration found that Danny was not sufficiently handicapped by his retarded status to pursue gainful employment, Danny's mother requested that he be retested. On this intelligence test, Danny scored a 94, placing him in the normal range of intelligence.

Danny then sued school district officials, claiming that they were negligent in failing to follow the school psychologist's recommendation that his intelligence be reevaluated within a two-year period The school district argued that the continuous education of Danny by his succeeding teachers amounted to a "constant re-evaluation," and that, at most, they were guilty of an error of professional judgment not severe enough to constitute negligence.

Bad News for the System

The New York court disagreed. The court stated that, in placing Danny in a CRMD class (when it should have known that a mistake could have devastating consequences), the school created a duty to take reasonable steps to ascertain whether that placement was proper. The court brushed aside the school district's argument that it had to consider the public policy issues outlined in the *Donohue* case before it could reach a decision, declaring that Danny's situation was very different.

The court's opinion could "see no reason for [denying] fair dealing to one who is injured by exempting a governmental agency from its responsibility for its *affirmative* torts. Such a determination would simply amount to the imposition of private value judgments over the legitimate interests and legal rights of those injured [by torts]." In other words, Danny was injured and had a right to damages, irrespective of the public policy considerations of recognizing a right to sue for education malpractice.

The court went on to say that this case didn't just involve omission of good teaching, but rather an active failure to follow good educational practice. As a result, it was significantly different from most educational malpractice cases. Thus, the court said its holding does not mean that "the parents of the Johnnies who cannot read may flock to the courts and automatically obtain redress. . . . If the door to educational torts for nonfeasance is to be opened . . ., it will not be by this case which involved *misfeasance* in failing to carry out the individualized and specific prescription of defendant's own certified psychologist. . . ."

Concluding that "not only reason and justice, but the law as well, cry out for [Danny's] right to a recovery," the court ruled that he should receive $500,000 in damages to compensate him for the school district's negligent acts.

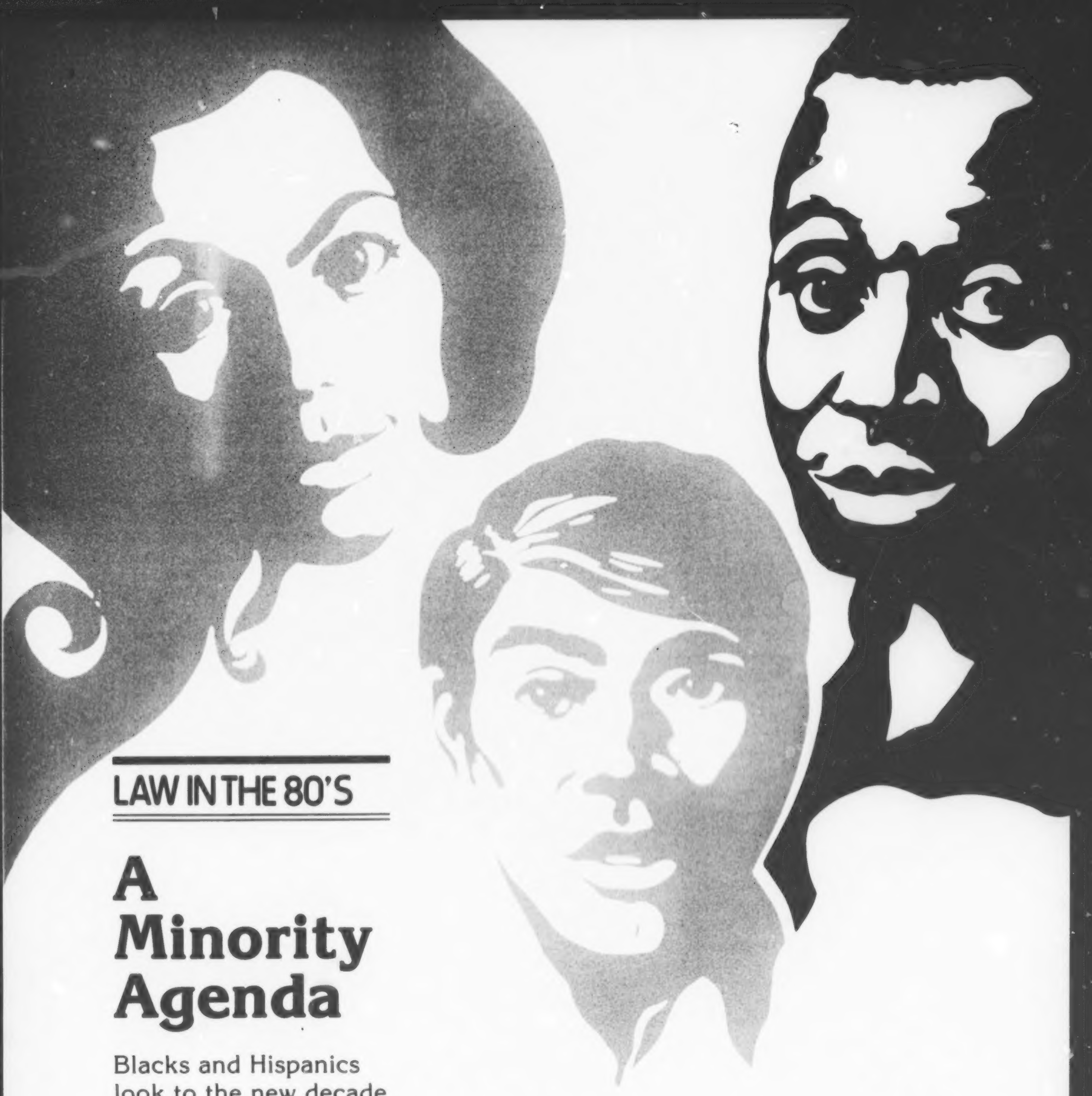
A Close Decision on Appeal

The city had better luck before the New York State Court of Appeals, the same court that had ruled against Ed Donohue. By a 4-3 vote, the court dismissed the judgment, holding that "the court system is not the proper forum to test the validity" of educational decisions or to "second-guess" such decisions.

The appeals court brushed aside the arguments of Hoffman's attorneys that his case involved "an affirmative act of misfeasance" and not just a "failure to educate," as in the Donohue case. It said that its decision in both cases rests on "the principle that courts ought not interfere with the professional judgment of those charged . . . with the responsibility for the administration of the schools in the state."

Rather, the court said, state education law provided that parents can ask the State Education Commissioner to hear appeals on decisions of local districts.

This alternative might provide help for youngsters currently in school, but it does nothing for Danny Hoffman. Now 28, he works as a part-time messenger despite tests that show him to have "above-average intellectual potential."



LAW IN THE 80'S

A Minority Agenda

Blacks and Hispanics look to the new decade

Walter M. Perkins

By the time you read this article we will have started our long, irrevocable trek into the eighties. With inflation continuing to spiral and the news media reminding us daily of the newest shortages, it looks like the old saying that "no news is good news" should be changed to read "none of the news is good news."

As we begin 1980, many people are saying that the seventies were the "me" decade, where people became overly preoccupied with their own self-interests. While this assessment may have some truth, the seventies also saw an increase in the groups which work to better the condition of a number of minorities.

In a two-part series, *Update* will examine some of the priorities of several of these organizations. This article will look at what blacks and Hispanics see ahead in the eighties. Next issue, we'll look at the plans of some women's and children's organizations.

Certain issues affect groups across the board. Inflation, unemployment, and energy are areas of grave concern, and the groups I talked to have all devised different strategies for dealing with the problems. These groups are approaching the eighties cautiously, for they have already witnessed how courtroom victories can become legislative fodder when restrictive amendments are tacked on.

An Hispanic Agenda

Hispanics are one of the largest minorities in the country today, accounting for about 10 percent of the population. The National Council of La Raza, one of the country's largest Hispanic advocacy groups, conservatively estimates that there are 16-17 million Hispanics in America. This number does not include an estimated 4½ million undocumented workers—others call them illegal aliens—or the 3½ million Puerto Ricans living in Puerto Rico. The term Hispanics includes Puerto Ricans, Cubans, Mexican nationals, and Mexican Americans, as well as any persons whose ancestry is based on Spanish culture.

According to Raul Yzaguirre, President of La Raza, the most pressing issue facing Hispanics as we enter the eighties is "bilingualism and biculturalism in all aspects, but particularly as it affects education." He thinks this will be an important issue not only for Hispanics, but may be the key civil rights issue in the 1980s, in the way that desegregation was the civil rights issue of the fifties and sixties.

Yzaguirre, one of five recipients of the 1979 Rockefeller Public Service Award, goes on to say, "This problem represents a confrontation of different perceptions and different ways of looking at what America and this society ought to be." It matters to all ethnic groups if we are to be a homogeneous melting pot or a heterogeneous assemblage of diverse cultures.

Yzaguirre says other major problems facing Hispanics include (1) immigration policies, particularly as they affect Mexico, (2) discrimination, (3) unemployment, (4) school dropouts, and (5) gang violence.

Asked to expand some of these problems, he said, "Education and employment are in my mind part of the same problem. These two issues are particularly galling to Hispanic youths. Hispanics are the most undereducated minority in this country, and consequently the dropout rate among Hispanic youths is the highest."

Immigration has also been of major concern to La Raza and Hispanics generally. Major legislation affecting the Hispanic community died in the 95th Congress and was not reintroduced into the 96th.

If passed, the legislation would have (1) given amnesty for undocumented workers, (2) allowed for civil sanctions against employers who hire undocumented workers (harsher legislation would have allowed criminal sanctions against employers), and (3) restored previous Mexican immigration policies.

In lieu of this proposed legislation, a Select Commission on Immigration and Refugee Policy was set up to "study the Hispanic situation." Mike Cortes, La Raza's Vice President for Research, Legislation, and Advocacy, says that "the National Council of La Raza has no basic objections to the establishment of the Commission but is concerned that there is not much Hispanic representation on the Commision and virtually no Hispanic staff members."

> **"People don't realize the oppression that Hispanics have suffered. We have got to find some ways of getting that across."**

Blacks Face Other Problems

While Hispanics and blacks face some of the same problems, particularly those relating to inflation, unemployment, and civil rights issues, Robert Anderson of the Joint Center for Political Studies listed the (1) census, (2) energy, (3) reapportionment, and (4) voter registration as some of the major issues confronting blacks during the coming decade. Much of the black political agenda is concerned with preserving some hard-won gains, while the Hispanic agenda tends to center on winning some fundamental rights.

Making sure that blacks do not get significantly undercounted in the 1980 census has been a major concern of the Joint Center, which specializes in technical assistance to minority elected officials. Because localities receive funds for federal programs based on their population, people actually living in an area and not being counted are being shortchanged under the revenue sharing programs, the new development block grant programs and others.

Robert Anderson points out that reapportionment is important because not only does it "determine how many black elected officials you might have, but, obviously, how money is going to be distributed among the cities and states. Many social service progams are funded based on a combination of population and other factors."

Other problems are more general. High on the list clearly are the questions of unemployment and inflation. The Joint Center is one of a group of black organizations that are trying to outline some priorities for the President on the 1981 budget.

Dr. Elizabeth Farrar, the Center's Vice President, adds that it is also interested in the question of energy. For example, its book *Energy and Equity: Some Social Concerns,* says that the energy problem affects blacks and other minorities disproportionately.

Why? Because the poor pay a much larger portion of their income for direct energy supplies than those who are relatively affluent, "meaning that any energy price increases are likely to hit the poor much more strongly than the well-to-do. Small users of electricity and natural gas almost invariably pay more per unit than larger users, meaning that those who use the most energy are rewarded, a perverse system for a nation concerned about energy shortages."

Besides pushing for short-term gains like more black delegates at the Democratic and Republican conventions, the Joint Center has also been taking a hard look at the minority business and economic development area. "In many ways," Dr. Farrar says, "I guess that the black economic presence is much greater than it's ever been before, but this fact often is not translated into paved streets, better transportation, and provision of other vital services."

A Legislative Program

Other black-oriented groups have other priorities. The Congressional Black Caucus, started in 1971 with the then nine black House members, now numbers seventeen. It has a staff that prepares Caucus documents, public statements, testimony, press statements, and letters to national leaders, members of Congress, and other groups.

Economic and civil rights issues are major concerns of the Congressional Black Caucus as it sets its legislative agenda for the coming decade. Other areas that are also of continuing interest to this group include (1) health, (2) housing, (3) education, (4) urban development, and (5) international issues involving third world countries.

Walter M. Perkins has a law degree from DePaul University and a journalism degree from Bradley University. He is presently an Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

The astronomical unemployment rate in the black community, particularly among youth, prompted a Caucus staffer to say that "a large proportion of them are becoming victims of perpetual joblessness. When they don't get at least a part-time job as teenagers, and still remain unemployed by their early twenties, by the time they become 25 they're often eliminated from the labor market entirely."

To meet this problem, the Caucus' primary thrust has been around the Humphrey-Hawkins Act. But, according to the Caucus staffer, "the Humphrey-Hawkins Act is a guideline for economic policies which would require that economic decisions not attempt to reduce inflation at the cost of higher unemployment. This is precisely what Congressman Augustus Hawkins, co-sponsor of the Act, says is happening now!

"Humphrey-Hawkins predicted not only the policy at the time it was being considered but even more so the current economic policy, increasing interest rates, restrictions on the Federal domestic budget, and a series of other actions which attempt to put the squeeze on the economy on the assumption that a slowed-down economy will reduce inflation—but, as most of the major economists predicted, it increases unemployment at the same time."

Plans for the New Decade

Each of these groups has definite strategies for reaching its goals. Raul Yzaguirre indicates that La Raza "wants a bill that will give a broader, more inclusive definition of bilingual and bicultural education. Essentially we want to change the program from a volunteer to an entitlement program."

In other words, if you want this type of education you are entitled to it. Citing statistics which indicate the critical importance of this issue to Hispanics, Yzaguirre said, "One third of Chicanos and Puerto Ricans have not completed high school, about 25% of Chicanos and Puerto Ricans have less than five years of formal education, and 20% of migrant farmworkers have never been in a classroom."

La Raza is also working very hard for passage of the Bilingual Courts Act, "so that the kind of discrepancies in administration of justice that we have seen all over the country due to language problems will be eliminated." And La Raza is trying to push through Congress a bill adjusting the status of undocumented workers and modifying the existing immigration laws in a variety of important ways.

One hopeful sign to La Raza is the cooperation of black and Hispanic groups. Mike Cortes says that "there are more areas of agreement than conflict between blacks and Hispanics." As evidence, Cortes cited the recent establishment of the National Committee on the Concerns for Hispanics and Blacks, a coalition of over 35 national black and Hispanic organizations. Raul Yzaguirre of the Council and M. Carl Homan, President of the National Urban Coalition, co-chair the Committee.

As for the priorities of black groups themselves, Elizabeth Farrar of the Joint Center indicates that one of the areas her program will be inquiring into is competency-based education. "We are interested in whether competency-based education is going to be used as a code word to put black children or children with different types of backgrounds to the side of the mainstream of American education. We have a grant to investigate these issues."

> **"People see blacks in the newspaper, and they think we've got it made —but in any area of real power, it's simply not there."**

The Congressional Black Caucus is very concerned about some restrictive amendments that have been proposed for various types of legislation affecting blacks and poor people. According to a Caucus staffer, the Labor-HEW Appropriation Bills are usually the vehicle for these amendments. There are amendments to restrict HEW from enforcing school desegregation through busing. There are amendments to prohibit the use of quotas, which actually prohibit the use of numbers as far as showing any amount of progress in desegration.

An example is an amendment in the Justice Department Authorization Bill that would have prohibited the Justice Department from handling any suit that would lead to school busing. According to the Caucus, if it had passed litigants would have been prevented from bringing desegregation suits to the Justice Department because a court might order busing as a result. Nevertheless, the amendment actually passed the House and was only dropped in Conference.

"In addition," a Caucus staffer said, "there are amendments to the Legal Services Program Bill that restrict the handling of certain types of cases, including busing, abortion, and refugee cases. In essence, if you are poor you will only be given an attorney for certain types of cases."

No Breakthrough Seen

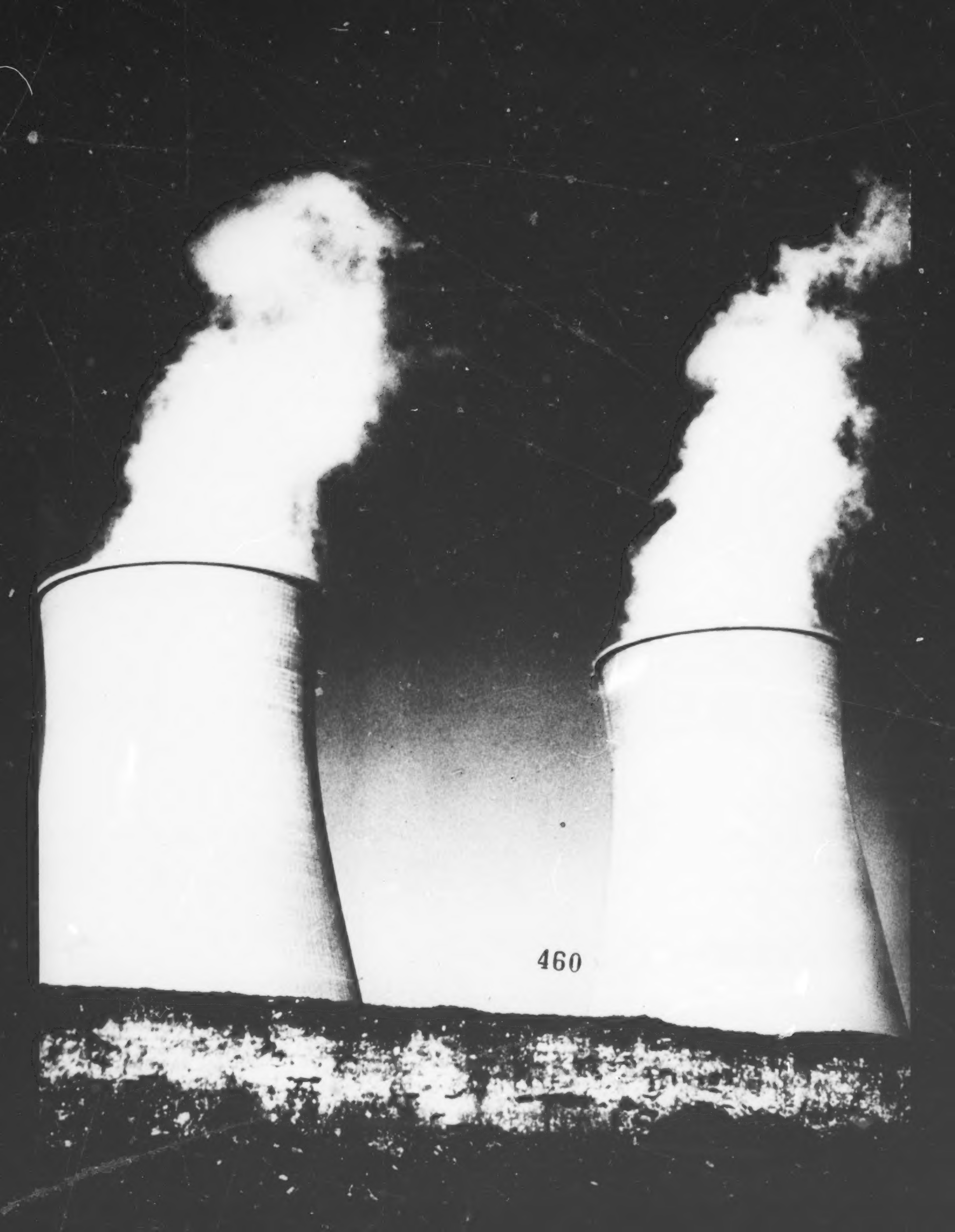
Of the three groups interviewed, only La Raza indicated anything close to optimism about the eighties. As Raul Yzaguirre sees it, "A lot of the ingredients necessary to make a forward thrust are in place. We have good organization and leadership, as well as well-defined issues."

But Yzaguirre knows it won't be easy. "One of the things that I find incredible is that people don't understand Hispanic history and Hispanic presence in their country. They don't understand the depth of oppression that we have suffered for hundreds of years, particularly Mexican Americans. They don't understand the torment, aggression, and lawlessness that we have had to suffer for all of these years. Finally, they don't realize that people are still being arrested and convicted for enslaving Hispanics. I think we have got to find some ways of getting that reality and consciousness across to America."

Elizabeth Farrar of the Joint Center says, "I am not very optimistic about the eighties. I think if we can hold onto the progress made in the sixties and seventies, and maybe advance a little more, we will do well. I think that the eighties is not going to be a period of expansion or greater liberalization of opportunities for blacks."

Concerning this same issue a Congressional Black Caucus staff member said, "With some optimism we can make further progress, but I don't know that anyone in the Caucus feels we are going to make any fundamental breakthrough and achieve true equality in the next decade for black Americans."

As an example, he points out that there was a bill on the floor recently concerning retirement for airline pilots, without even getting into the issue that there are virtually no black airline pilots now. "Every once in a while these issues come up, and it's phenomenal that the country doesn't understand. They see blacks in the newspaper, and they think that black people have it made. However, in just about any area of real power, the law firms, the banking industry, it's simply not there."



LAW IN THE 80'S

Civil Liberties and the Atom

Can the Bill of Rights survive in the nuclear age?

You say you don't have enough to worry about? Try this on for size. It's perhaps the single most serious worry there is. The deliberate misuse of materials used to harness atomic power may be the greatest risk to the environment and human beings which exists in the world today. The spectre may take the form of domestic terrorism or international military adventurism. Either way, the gravity of the threat will force us to rethink, and possibly revamp, basic American notions of civil liberties.

America's obsession with civil liberties blossomed with the adoption of the Constitution. The Articles of Confederation contained a few pronouncements on civil liberties—free access to all states, certain privileges of trade and commerce—but basically civil liberty protections were a matter for the states. When the Articles proved ineffectual to ease the growing pains of a young nation, a new Constitution evolved—without a bill of rights.

Some safeguards existed in the new document, such as prohibitions against bills of attainder and ex post facto laws, and provisions for trial by jury and writs of *habeas corpus*. Nonetheless, the proponents of the document soon learned that the American people would not support the Constitution without a bill of rights. Only 39 of the 55 convention delegates signed the final draft submitted to Congress in September of 1787. Ratification by the states hinged on including civil

John Palincsar

liberty protections. On June 8, 1789 James Madison responded with a set of civil liberty guarantees modeled after the Virginia Constituion. Those suggestions became the model for the first ten amendments to the United States Constitution. A political expedient at the time, today those amendments serve as the cornerstone of our freedoms.

The Bill of Rights exists to protect the individual from arbitrary government power. Though support for the Bill of Rights waxes and wanes, generally Americans would rather see some crimes go unsolved than give government unbridled authority to apprehend criminals.

But in the nuclear age a new and awesome power, more fearsome than the political power wielded by any government, threatens to overshadow our 200-year commitment to civil liberties. The balance has shifted, and we may have no choice but to reconsider our reverence for civil liberties in light of the possibility for nuclear terrorism.

Life Under the Mushroom Cloud

In a diverse nuclear industry, we must have adequate protection for electrical generating stations, fuel production facilities, recycling facilities, storage and waste handling sites, and nuclear weapons compounds, as well as transportation of nuclear materials. And we must find ways to insure the trustworthiness of workers and assure that terrorists never get their hands on nuclear materials.

Nuclear materials are a passkey to power. If political zealots like the anti-Shah Iranian students got ahold of them, they could hold the whole world ransom. They could sell them to a foreign government, ransom them back to the United States, win non-negotiable political demands, or get widespread media attention. They'd have the option of building a bomb or using the materials as a deadly pollutant.

In 1975, an MIT undergraduate student, using unclassified information available at every university physics department, designed a one-kiloton yield bomb (equivalent to 1000 tons of TNT) with "a fair chance" of working. The weapons parts, except for fissionable materials, were available at your local hardware store at a cost of between $10,000 and $30,000. The finished product could be transported in a pickup truck. Recently, *The Progressive* magazine won what might prove the ultimate pyrrhic victory when it gained the right to print do-it-yourself bomb plans. As the author pointed out, however, nothing in the article couldn't be gleaned from unclassified documents.

And terrorists could have a devastating effect without going through the trouble of making a bomb. Sabotage is the most serious threat among possible terrorist activities. For example, plutonium inhaled or ingested in infinitesimal amounts will cause death. Accordingly, the maximum safe concentration has been set at .00003 (three millionths) of a gram per cubic meter of air. By contrast, an estimated 2,500 kilograms of plutonium exist in the U.S. today. According to an AEC projection, by 1990, the amount would be between 44,000 and 92,000 kilograms.

**Nuclear materials
are a passkey to power.
If political zealots
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on them,
they could hold
the whole world ransom**

The AEC report suggested that eventually there might be a million kilograms of plutonium in commerce. A small amount in a city's drinking supply or showered in the air could have devastating results. A punctured transportation container might spew a trail of death across half the nation.

International Adventurism

The threat of volatile nations getting the bomb is almost as scary as terrorists having nuclear materials. Some of the hottest places on earth (Israel, South Africa, India, and Pakistan) refused to sign the Nuclear Non-proliferation Treaty of 1968. There are persistent rumors that Israel and South Africa have developed nuclear bombs, perhaps from fissionable materials diverted from nuclear plants.

Observers think they know how one country might have gotten the materials. The Nuclear Materials and Equipment Corporation (NUMEC) of Apollo, Pennsylvania deals in nuclear materials for peaceful uses. From 1957 through 1965, NUMEC sent half a ton of Uranium-235 to various foreign customers. But many of its records were incomplete or inaccurate; some had been "inadvertently destroyed." During the time 391 pounds of enriched uranium could not be accounted for; when assiduous accounting was attempted—including exhumation of NUMEC's waste disposal dump—206 pounds remained missing. The market value of this missing material was more than $1 million.

At the time, NUMEC was under contract to Israel to assist in the development of a plant to preserve agricultural products by irradiation. American military officials grew nervous about frequent Israeli visits to NUMEC, which held a wealth of classified information as well as the nuclear materials. Concern increased when intelligence reports revealed Israeli pilots were practicing maneuvers characteristic of the delivery of thermonuclear weapons. Later at a Virginia cocktail party, a CIA official let slip that Israel had several nuclear weapons ready for use.

Making the Plants Safe

Many of the protections against terrorism and theft of materials don't raise civil liberties problems. For example, the federal government has put much thought (and money) into making nuclear installations secure against attack. According to the best estimates available to nuclear energy officials, a 747 jumbo jet loaded with fuel would crumple relatively harmlessly off the stressed concrete and steel shells which house nuclear core reactors if a hijacked jet were plunged into a kamikaze dive at a plant. In an impressive test, a similar concrete shell withstood the impact of a locomotive at full speed.

But many observers feel a less spectacular assault might have a better chance of success. Ever since the Rosenbaum Report for the now defunct Atomic Energy Commission (AEC's responsibilities were divided five years ago between the Nuclear Regulatory Commission [NRC] and the Energy Research and Development Administration [ERDA]), government planning has conceived of a "maximum credible threat" as being an assault by 15 well-trained, well-equipped terrorists with at least three of the members having infiltrated the plant's work force. Of course, well-developed guerilla units such as the Irish Republican Army or the Palestinian Liberation Organization could easily field ten times that number of highly trained, fully committed saboteurs. The grisly legacy of Jim Jones

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and his followers in Guyana reminds us that it is possible to get hundreds of fanatics to lay down their lives in a single pointless instance. Still, defense plans revolve around 15 attackers.

Though the wisdom of these plans is open to question, they don't impinge on civil liberties. Neither do transportation safety suggestions such as solid communications networks among law enforcement officials and secrecy as to the times and types of shipments. Today some transportation systems are equipped with backup systems reminiscent of James Bond: poison gas, sticky foam, anti-personnel weapons, secret triggering devices.

Generally, the size, training, and equipment of security staffs can also improve safety from terrorism. Hi-tech touches like voiceprints, signature prints, or fingerprints scanned by computer may help also.

Another promising defense is to make the materials dangerous to handle. Some of the most powerful nuclear materials, such as bomb grade Plutonium-239, present the smallest immediate threat to thieves. With a half-life of 24,400 years, Plutonium-239 is an alpha emitter whose radiation can be insulated by a sheet of paper. Of course, long term exposure to the substance would cause certain death from its continuous radiation. Yet it could be handled with relative impunity for short periods of time. One way to foil thieves, then, is to "spike" it with another high level radioactive substance—usually a gamma emitter—which would be easier to detect and more dangerous to the thief's health.

Better security of nuclear materials could also be achieved through better accounting methods. Observers think that many plants keep sloppy records, and thus are ripe for thefts that would go undetected. A 1973 study by the Federal General Accounting Office claimed "significantly limited" ability to prevent theft in two or three nuclear power plants studied. In one plant it was possible to enter a restricted materials storage area simply by reaching over the top of a door and opening it from the inside. An inherent part of the "materials unaccounted for" (MUF) problem is setting acceptable standards of the "limits of error for materials unaccounted for" (LEMUF). For instance, in the case of plutonium with its 0.5 percent LEMUF, a patient plant worker might purloin enough of the substance to make a bomb without detection if the theft continued in minute amounts over a protracted period of time.

What Price Security?

Although some improvements in security may be achieved without intrusion on civil liberties, others simply may not. Intelligence against theft or sabotage is probably the crucial link in the prevention of a disaster. Security studies have repeatedly cited the need to work closely with the CIA, FBI, and similar organizations. However, these common-sense suggestions threaten to invade the privacy of plant workers and others.

By the mid-80s, more than 21,000 civilians will have been scrutinized for clearance to work in the nuclear industry. Lie detectors or polygraph tests seem a reasonable tool to help unveil nefarious intentions of plant workers but such tests are inadmissible in either civil or criminal proceedings because juries tend to rely too heavily on "machine findings" despite the uncertain nature of the tests. The strong argument is made that personnel decisions should not rest on data so inconclusive that it could not stand up in court.

Also, the use of lie detector tests is easily abused. At the Cimarron, Oklahoma nuclear fuel processing plant operated by Kerr-McGee, questions asked employees included whether they had ever talked with newsmen about the plant, whether they belonged to the union, whether they had ever been involved in anti-nuclear movements, and even whether they had ever had an affair with another plant employee.

This was the same plant where the bizarre Karen Silkwood story unfolded. En route to a meeting with a union official and a *New York Times* reporter, Silkwood died in an automobile crash on November 13, 1974. After conducting a "radiation check" of her vehicle, company officials removed a number of papers from her wrecked car. On the possibility that Silkwood may have been smuggling nuclear materials out of the plant, the FBI had amassed a voluminous file on her. If she was a genuine security risk, such actions might have been justified, but what if she only intended to warn of unsafe

1.

BEWARE OF DOG

2.

WE WARNED YOU!
SCOTTY

conditions at the plant? At what point do security measures stop protecting the public and start protecting the industry?

Certainly, persons with serious mental illness are risks for employment at a nuclear facility. Perhaps a person's entire psychological file should be made public if he or she seeks employment at a nuclear facility. One's rights of privacy may just have to suffer for the greater good of enhanced security. But what purpose is served if a record is made public that a man sought counseling because his marital problems resulted in impotence?

The right of privacy is a relatively new right. No place in the United States Constitution enumerates an explicit right to privacy. Instead the right was established by the Supreme Court in 1965 as emanating from a number of other rights, particularly the Fourth Amendment protection against unreasonable searches and seizures. It is not accidental that this right is being asserted vigorously in the modern age. Intrusions of the government into people's private lives are easier now than ever. We live in an age of electronic miracles, of snooping devices readily used or abused by the government. A gigantic information network exists in which government officials are privy to a wealth of personal information about every citizen. The Nixon era demonstrated that unscrupulous officials may gather intelligence on personal and political enemies for illegitimate purposes.

Most Americans agree that the right to privacy is precious, but obviously the threat of nuclear adventurism is enormous. Can the right to privacy be breached to protect the public from nuclear terrorists? That is a difficult balancing test for any right.

Jeopardized Rights

Rights of free speech and association also present problems. These crucial first amendment rights are perhaps our most cherished. After all, freely exchanged ideas on liberty, printed in pamphlets and espoused at meetings throughout the colonies, precipitated the American Revolution.

Can these rights survive in the nuclear era? Both rights involve tough choices. Just how much information should a plant employee be allowed to leak to the media? On the one hand, if the plant is pursuing reckless safety procedures unchecked by regulatory control, the media may be an employee's court of last resort. On the other hand, the employee who shares classified information which would serve as a primer for terrorism has performed a service to no one.

Rights of association also are threatened. A person who in his youth was a black activist might be denied employment by a racist hiding behind a feigned concern for safety. A member of an anti-nuclear group might be fired simply to foreclose the public's access to information which might be bad for business.

Similarly, surveillance of groups offers serious opportunities for civil liberties abuses. Resistance to the nuclear power industry is stiffening nationwide. The essence of opposition is the fear of a release of nuclear materials. Yet spying on anti-nuclear organizations might proceed on the theory that terrorists exist within such organizations. Under the Uniform Crime Control and Safe Streets Act of 1968, wiretapping and infiltration of a group could be permitted without a warrant if "foreign security" was at issue. With such high stakes, domestic security risks may also inspire some "creative," if illegal, law enforcement tactics.

**If a person
in custody
refused to talk,
officials might
resort to torture
to save an entire city**

A Doomsday Scenario

So far, we've looked at the civil liberties threat posed by protective measures. Once nuclear materials were taken, exigencies would almost surely make recovery more important than civil liberties. Martial law might be declared to avoid panic and to prevent looting and other crimes. Martial law might result in the forced evacuation of literally millions of people; or, more likely, martial law might be used to prevent evacuation, which could present more problems in the swarm to get out than could be managed by the best contingency plan.

Of course, martial law would also suspend the Bill of Rights and other guarantees. Dragnets would be possible as an unlimited number of suspects might be arrested to determine connection with the crime and to prevent looting. If a person in custody refused to share vital information, authorities might even resort to torture to save an entire city. House to house searches, perhaps citywide, would also be likely. Fourth Amendment protections against warrantless arrests and searches would pale against the potential doom the terrorists could wreak. The government would act strongly, sorting out legal niceties later.

It is a well established principle of both case and statutory law that if an act, which would otherwise be a crime, avoids worse harm than it causes, then the act may be excused. For example, sailors in Wisconsin were permitted to break into a heat shed to take refuge from a vicious Great Lakes storm. After the San Francisco earthquake, city official dynamited a number of homes to stop fires from spreading. Typically, the limit for excused criminal conduct is set at the taking of another life. But that limit has never been tested against the carnage of a nuclear crisis. Against the life of a city, would any action be too rash?

The Threat Today

The fear of civil liberties violations in the name of nuclear energy is real. In response to a poll by *People & Energy* magazine, startling information came to light. Citizens and groups involved in anti-nuclear organizations reported that mail arrived already opened, homes and offices had been searched surreptitously, and wiretappings were suspected if unproved. Under the Freedom of Information Act, it was discovered that the CIA and the FBI had collected news articles and letters on at least one group with no violent record, claims, or intentions. Files were also maintained by various public utilities and local police departments on individuals and groups who had indicated no violent propensities.

Since Russel W. Ayres eloquently raised civil liberty concerns about nuclear power in the *Harvard Civil Rights-Civil Liberties Law Review* (1975), the issue has had much discussion but no resolution. As expected, the industry maintains there is no problem at all. The American Civil Liberties Union has termed the NRC position "alarming" in testimony at Washington, D.C.

As NRC may be reorganized in the political fallout of the Three Mile Island incident, that agency cannot be depended upon to formulate lasting civil liberties safeguard standards for the industry, any more than it can ensure any other type of safeguards. Perhaps the only way to protect the civil liberties so deeply cherished by Americans is to find alternative energy sources to nuclear power. Meanwhile, one of the real costs of nuclear power to Americans may be its contamination of some basic concepts of civil liberties. ☐

NEWSCLIPS

Mock Trial Leads to Real Controversy

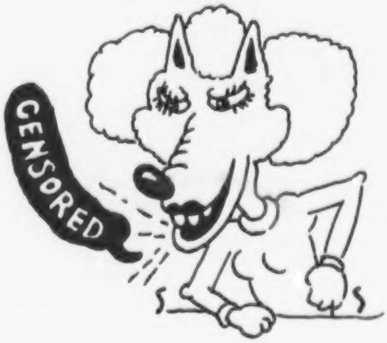
In many classrooms around the country, students have tried Harry S. Truman for the war crimes of dropping atomic bombs on Japan. Teacher Janet Fielder, 28, didn't think she was doing anything unusual when she gave the exercise to her ninth grade classes in Independence, Missouri, but she failed to take into account one little fact: in Truman's hometown, feelings about the former president still run high.

According to the *ABA Journal*, the director of the Truman Library called the mock trial a "false and misleading teaching model." He said, "a trial is an adversarial situation that forces people to choose sides. Rarely can history be made so simple." And a state senator asked the legislature to reprimand the teacher for "poisoning the minds" of the students.

But Ms. Fielder says that basic community reaction was "overwhelmingly" positive. The president of the Missouri Bar, which has been active in promoting law-related education for many years, calls Truman "a great president," but says he's neither shocked nor offended by the trial. "I've never considered the leaders of this country to be beyond citizen criticism."

In any event, the controversy damaged the exercise. Student juries acquitted the former president in 15 minutes or less, apparently, according to Ms. Fielder, because the student-jurors "feared for my job." But she says the whole affair taught her students valuable lessons "about standing up for one's beliefs, about how easily one's freedoms can be taken away."

Would the late president have minded the exercise? Ms. Fielder says he wouldn't, and cites a letter from Bess Truman endorsing the project. Some observers speculated that if Harry Truman were alive today, he would have testified in his own defense.



You Bet Your Bleep It's a Victory

The Chicago Sun-Times reported recently that women may have won another right, though it's probably not at the top of their list of priorities. Thanks to a decision by an Illinois state administrative law judge, women can now use profane language on the job, if that is the standard in the office where they work.

The case began when the Illinois Department of Revenue twice tried to fire investigator Pearl Fox for using profane language. The judge found that since profanity is widespread among the department's male employees, both in the office and in public, and since no disciplinary proceedings have ever been taken against them, Mrs. Fox was discriminated against because of her sex.

Justice Chides Brethren

Supreme Court justices often lambaste their colleagues in their opinions and dissents, but Justice Thurgood Marshall carried the practice one step further at a recent meeting of the Second Circuit Judicial Conference. The *ABA Journal* reported that Marshall, who served on the Second Circuit Court of Appeals before his appointment to the High Court, told the lower court judges that in several recent cases, "your performance was far better than that of my brethren."

He praised the Second Circuit for its decision in the libel case of *Herbert v. Lando,* noting that the lower court's decision was reversed by the Supreme Court. He also praised another Second Court ruling overturned by the Supreme Court, claiming that the Supreme Court decision "afforded insufficient protection to constitutional rights."

Marshall concluded by urging the lower court circuit to continue the good work, adding "ill-conceived reversals should be considered as no more than temporary interruptions in the protection of individual rights."

This Joke Is in Contempt

Have you heard about the lawyer who plea-bargained his way into heaven? As he walks through the gate, he meets a bearded man with a long robe who chats briefly and then scurries off.

"That was an interesting fellow," the lawyer tells a passerby, "he told me he was a federal judge."

"Oh no," replies the passerby, "that's God. He only *thinks* he's a federal judge."

When in Doubt, Spit It Out

The lawyer asks, "How long did you stay there before the ambulance arrived?" Which of the following two answers by the witness will have the most impact on a jury?

- "Oh, it seems like it was about, uh 20 minutes. Just long enough to help my friend, Mrs. Davis, you know, get straightened out."
- "20 minutes, long enough to help Mrs. Davis get straightened out."

According to an article in *Student Lawyer* magazine, a North Carolina study found that juries tend to find the first witness unconvincing, incompetent, untrustworthy, and unintelligent. They're more likely to be convinced by the brisker testimony of the second witness.

Researchers taped criminal trials and discovered that many witnesses, especially women, use a style characterized by

- hedges—remarks such as *I think, it seems like, you know, kinda,* and *sort of.*
- hesitation forms—such as *uh, um,* and *well.*
- polite forms—for example, the use of *sir* and *please.*
- question intonation—making a declarative statement in such a way that it sounds like a question.

When the taped testimony was read to "juries" consisting of college students, they invaribly found it less effective than direct and streamlined rewrites of the testimony.

The authors of the study refer to such manner of speech as "powerless," and say that it is a characteristic of American women and people who are poor and uneducated. The study also found that witnesses who tried to use a "hypercorrect" style, using flowery words and fancy expressions, were also not effective as witnesses.

The moral seems to be that a direct, simple, and forceful style is most likely to do the job. Now if only someone could convince lawyers of that.

L.A. Kiddie Kops Smoke Out Pot Use

While some jurisdictions are winking at pot use and concentrating on harder drugs, the Los Angeles Police Department has created a special six-member undercover unit that has arrested more than 700 teenage drug pushers, almost all of them for selling marijuana.

All of the unit's members are at least 21 years of age, but they are chosen for the assignment for their boyish looks. The *Chicago Tribune* reports that they enroll in high school, normally using a cover story about having transferred from some other school. Police officials claim that the undercover policemen do not entrap pushers, but rather wait until they are approached and offered drugs.

Not everyone is happy with the program. Terry Smerling, staff attorney for the American Civil Liberties Union, which has filed a suit seeking to halt the special unit, has called the police department "deterrent crazy." He claims the police have no business invading high schools to spy on students in classrooms.

Students, naturally enough, don't like the idea either. In fact, it is they who've christened the unit the "Kiddie Kops."

Surprisingly, however, many parents complain too. The father of one arrested youngster called them a youthful Gestapo Corps, saying "kids are becoming paranoid—they think the police are everywhere, watching every move they make . . . good God, it's getting so kids are afraid to make out in their cars. . . ."

So far the Kiddie Kops have no plans to disrupt high schoolers on lover's lane, but they are eyeing the cafeterias suspiciously. Food that bad, they reason, must be against some law.

And Whatever You Do, Don't Wear a Propeller Beanie

What do judges talk about when they get together? The awesome duty of rendering justice? New laws and rules that a conscientious judge should know?

Maybe some judges tackle these esoteric topics, but, according to a *Chicago Sun-Times* story, they're more interested in how to get re-elected. Noting that 80 judges had secretly gathered recently for what it called a judicial "charm school," the paper reported that the re-election tips usually went only skin deep.

"You are what you wear!" said one judge. "Don't wear sports coats, neck chains, loud shirts, or leisure suits. Don't wear loafers. People will think, 'hey, there's a loafer!'" The same speaker suggested that judges get a hold of a book like *Dress for Success,* and that they dress like actor Jack Lord on the television show *Hawaii Five-O.*

Other tips were that judges should not walk around courthouses with cigars stuck in their mouths, and should send each juror a "thank you" note or a red, white, and blue "I was a juror" certificate.

It's All Because *The Fugitive* Is off the Air

Convicted robber James Shelton has a lot to learn about being on the lam. Shelton began okay by successfully escaping from an Iowa jail, but he stumbled badly at hiding out when he showed up as Bachelor Number One on the *Dating Game.*

Not only didn't Shelton win a date, but he was spotted by one of his former jailers and the cops are now on his trail.

"The irony," according to R.D. Dunkin, director of the correctional facility, "was that Bachelor Number Two was a probation officer."

Sexual Harassment Cases Have Impact

What can you do when the boss leers at you, makes sexually loaded double entendres, and finally comes out and makes a pass at you? For most women who turn the boss down, the traditional options have been to quit the job or reconcile themselves to never getting anywhere in the organization. Some women don't even have a choice—they're fired on the spot.

All that may be changing now. *Business Week* magazine reports that an employer who fires a woman because she turns down her boss' unsolicited sexual advances violates the 1964 Civil Rights Act.

Feminist groups have targeted the issue as a major new area for litigation. For example, a New York City group sponsors TV spots urging victims of sexual harassment to phone the project for counseling. There, counselors suggest "coping strategies" for setting the boss straight, or, if the situation has reached the quit or dismissal state, give the victims names of lawyers equipped to handle the case.

The women's groups also argue that sexual harassment need not go as far as the demand for sex in order to be objectionable. They say obscenity directed at women workers and uninvited embraces also qualify. And waitresses at Detroit's Metropolitan Airport claim that indirect sexual harassment was involved when their employers ordered them to wear provocative costumes.

But sexual harassment cases are hard to win. The victim must prove that she was sexually coerced, that she resisted, and that her refusal had a negative impact on her job.

In a bizarre twist, she also must prove that members of the opposite sex were not coerced. Since the basis of the action is discrimination directed against women, a bisexual boss who had sexually harassed both male and female subordinates would seemingly be in the clear.

New Twist in Public Interest Law

For years, the words "public interest law" have tended to be synonymous with liberal causes. Organizations such as the Consumers Union, the Sierra Club, Common Cause, and a host of organizations under the direction of Ralph Nader have had a powerful effect on American society by filing lawsuits and entering amicus briefs in the suits of others.

But now, according to conservative columnist James J. Kilpatrick, the scales of justice are more evenly balanced. Kilpatrick says that the National Legal Center for the Public Interest is providing a conservative counterweight to such liberal forces. The Center, which has set up six regional litigating foundations, opposes expansive government regulations. It won a major battle in a suit to compel the Occupational Safety and Health Administration to get warrants before searching private businesses, and has filed suits against government directives in reverse discrimination.

Mom Bites Shrink

The AP reports that a mother whose 25-year-old son sued her for "parental malpractice" has filed her own suit against the son's psychiatrist. Mrs. Shirley Hansen of Boulder (Colo.) claims that the doctor encouraged the suit, which she said held her up to nationwide ridicule.

The son's suit, which sought $350,000 in damages from his parents for alleged "intentional infliction of emotional distress," was dismissed in March.

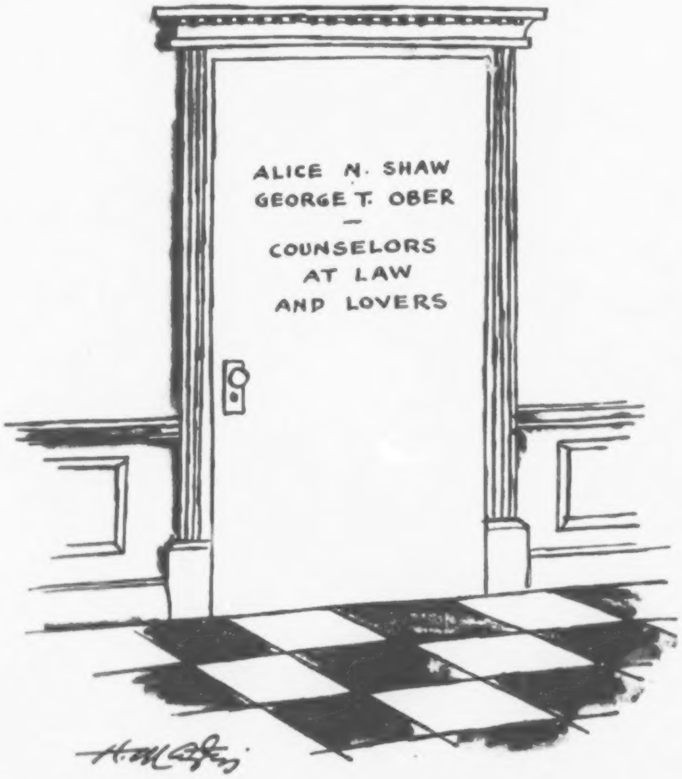
Getting in a few licks of her own, mom pictured her son as a "hippy" who was suspended from high school for selling marijuana, chose to live with friends on a beach in Hawaii, and refused to find work.

Virginia Is Really for Lovers

T-shirts and bumper stickers have been saying for years that "Virginia is for lovers," and now the state supreme court has officially agreed. The court ruled that a single woman living with a man has the right to take the state bar examination and qualify as a lawyer, even though her living arrangements might not be to everyone's taste.

The state bar had argued that permitting her to take the test would "lower the public's opinion of the bar as a whole," and a lower court had agreed. However, citing several decisions of the U.S. Supreme Court, the Virginia high court held that a state's qualifications must have some "rational connection with the applicant's ability or fitness to practice law."

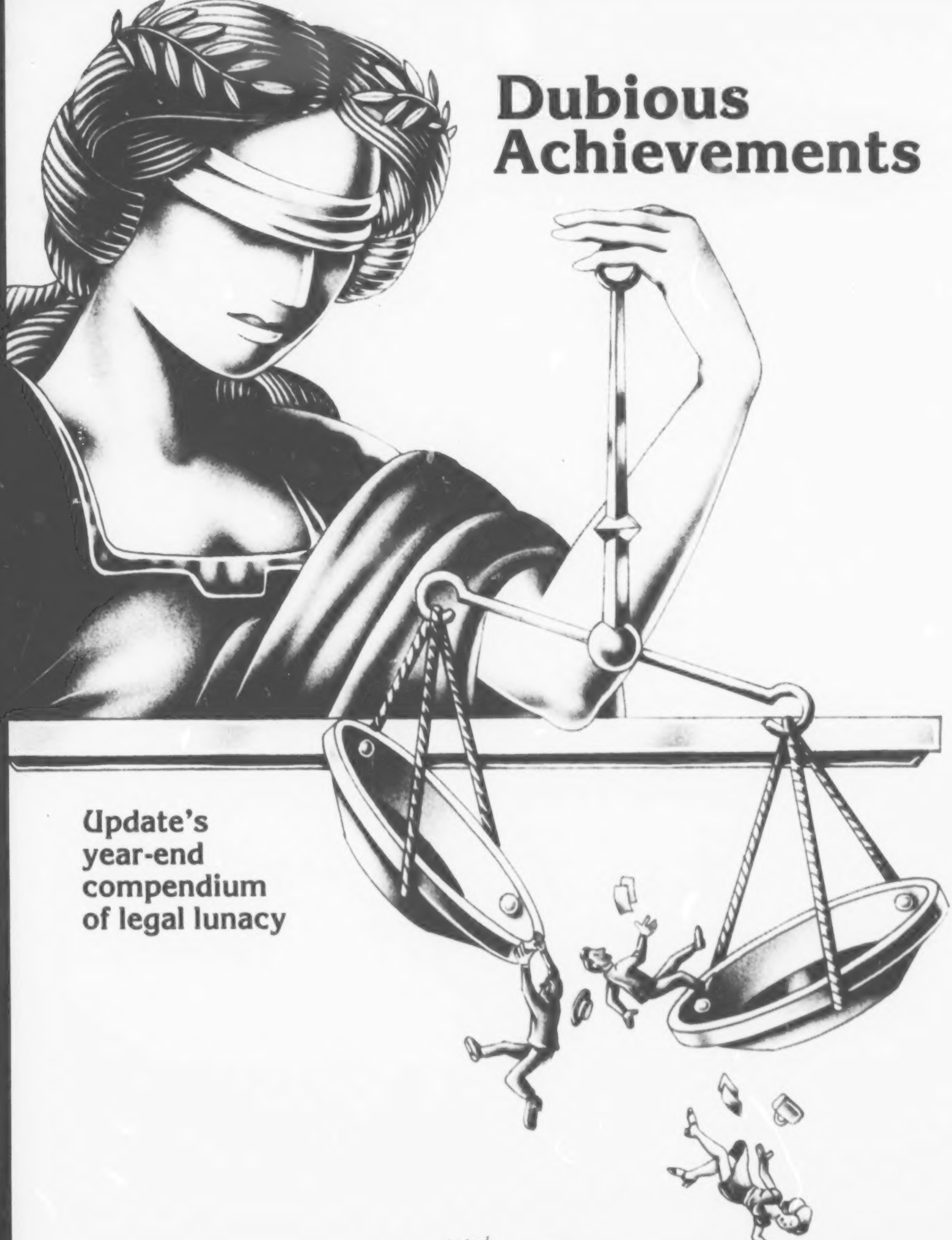
As the *Washington Post* commented, the decision may have saved the careers of many Virginia lawyers. The lower court had written "a lawyer should be above reproach, above gossip." Pointing out that "reproaching lawyers and gossiping about them has been a major pastime in most communities at least since there were lawyers," the *Post* said that if the above-reproach standard was applied across the board, the state would have few lawyers left. It added, "of course, there are people around who say that wouldn't be such a bad thing."



Drawing by Henry R. Martin; © 1979 The New Yorker Magazine, Inc.

Dubious Achievements

Update's year-end compendium of legal lunacy



Judge Refuses to Talk Through Hat in Courtroom

Norfolk, Virginia, Judge Vernon Hitchings insisted that Rabbi Joshua Sackett remove his skull cap in court, yelling "I don't care what your religion is." Hitchings says he doesn't know what all the fuss is about. "All I did was ask the man to take his hat off."

It's More Effective Than the Pill, But It May Have Unconstitutional Side Effects

Federal Judge Wilbur Owens gave convicted thief Zola May Humphries a choice. Noting that the 20-year-old Georgia woman already had three small illegitimate children, Judge Owens sentenced her to five years' probation, on the condition that she not sleep with anyone unless she wanted to spend those years in jail. Her lawyer preferred that sentence to another form of birth control—putting her in the slammer now and effectively keeping her from getting pregnant—but civil rights and civil liberties groups think the decision might establish a bad precedent.

Judge Not, Lest Ye Be Judged I

When West Virginia Supreme Court Justice Darrell W. McGraw tried to investigate conditions in Kanawha County Jail, after a teen-age prisoner had hanged himself there, he got in a scuffle with sheriff's deputies who refused to let him in the jail and was charged with battery and obstruction of justice. In return, McGraw, who came out of the incident bloodied and black-eyed, swore out warrants for assault and battery against the deputies.

Judge Not, Lest Ye Be Judged II

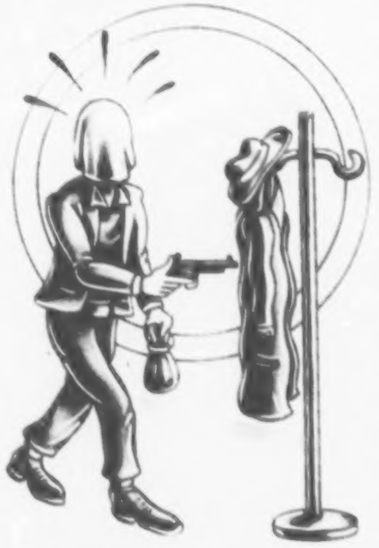
Seattle Judge Norman B. Ackley wanted to know what it was like to be a juror, but it looks like he'll never find out. Ackley served jury duty, but eight lawyers, in eight separate cases, asked that he be excused. One of them explained that if she accepted him, she'd "have an unpredictable juror with a superior knowledge of the law," the legal equivalent of a loose cannon on the deck. Maybe he'd have made it if he'd left his robe and gavel at home.

Your Tax Dollars at Work

Looking into higher-than-average levels of radioactivity in a drinking fountain at a nuclear power plant, the AEC revealed that a hose connected a well-water tap to a radioactive waste tank. Their no-holds-barred conclusion? "The coupling of a contaminated system with a potable water system is considered poor practice, in general."

But Not Until After They've Filled Their Arrest Quota

An enterprising dope dealer in Chicago went too far. He was arrested after trying to sell marijuana to two patrolmen as they sat in their marked squad car. "I know cops are like everyone else," he said, "they like to turn on."



Who Was That Unmasked Man?

Stick-up man Ralph Graves has a lot to learn. He stuck up a doughnut shop successfully, but a customer recognized him when he lifted up the corner of his pillowcase mask on his way out the door. It seems he had forgotten to cut eye holes.

He Should Have Waited for the Express

A suspected burglar in the Chicago suburbs was foiled when he tried to use a commuter train for his getaway. The neighbor who saw him leaving the scene of the crime with a TV video game also saw him walk to the station and board a train. Police pulled him off at the next stop.

Nice Work, If You Can Get It

San Francisco court clerk Patrick Lynch mistakenly recorded that house painter James Russell had been convicted of a felony instead of a misdemeanor. As a result, Russell served 15 months in state prison, rather than 83 days in the county jail. He later won $100,000 in compensation for 12½ months' worth of overtime.

No, No, You've Got It All Wrong. A Criminal Lawyer *Defends* Criminals

Law student William McFarland went overboard demonstrating his grasp of the criminal mind. In what Palm Beach, Florida, police termed "a fantastically ingenious job," McFarland updated the Trojan horse trick by smuggling himself into a bank vault inside a crate. Police claim he took $50,000 worth of loot, and would have gotten $250,000 more if a guard had not interrupted him.

It Gives Them Something to Do, But Making License Plates Would Be More Useful

Members of Minnesota's House of Representatives, casting around for some way to stay awake after lunch, have started to give speakers 0 to 10 ratings, like the judges do at some athletic events. In the first weeks, their highest score went for a speaker who favored a bill they eventually turned down, conclusively disproving the notion that politicians are incapable of keeping two ideas in their heads at the same time.

Next Come Subway Painting and Doodling in Wet Concrete

According to a New York court, topless dancing is an art form protected by the First Amendment right to free expression. While admitting that topless dancing may not rise "to the plateau of artistic endeavor in the minds of all," the judge ruled that to some people it is an art form.

Figure of Speech

More news on the First Amendment front: When undercover women police officers arrested male dancer Rex (Sexy Rexy) Clifton for indecent exposure during his dance at a bar in Coldwater, Michigan, his supporters hollered that their rights were being trampled. Patrons and employees of the bar, which caters to women and features male strippers, said "we are petitioning for our Constitutional rights to be entertained by male dancers." Besides, a spokeswoman said, the dancers have "nice figures."

Salad Daze

Hampshire College student Davis Bates was fired from his cafeteria job when he refused to stop writing "No Nukes" on salads with carrot sticks and making red hammers and sickles in the cottage cheese. To add to Bates's troubles with the administration, antinuclear students complained that he was implying that Communists were behind their movement. The question is, does the First Amendment cover edibles?

Caviar Emptor

Oil heir Baron Enrico di Portanova sued ABC-TV for $200 million, claiming that the network erroneously reported that the huge mansion he was building in Acapulco would be the home of the Shah of Iran. The Baron said that as a result of the report he and his wife would be regarded as enemies of Iran and "dealt with accordingly." He says he's never been to Iran except to stop off at the airport to buy caviar. Until the fuss about the Baron's palatial digs blows over, he and the Baroness will hole up in their suite at Claridge's in London.

We Knew It All the Time, But We Never Thought They'd Admit It

A Federal Tax Court in California recently said that deductibility "isn't controlled by a sense of what is fair or equitable." The pronouncement came in a case challenging the policy of allowing medical expenses for childbirth to be deducted from taxes, while not giving a similar deduction for adoption expenses.

Squeezing Blood from Grits Department

Florida's new "pay as you stay" law requires prison inmates to pay almost $15 a day for room and board. Sounds good, but less than 3 percent of the inmates have any assets at all and can pay the fee, and prison officials think that the cost of keeping track of prisoners' financial statements will far outweigh the revenue from those who can pay.

Jail Bait

More news from those no-nonsense disciplinarians of Oklahoma. Eighty-five-year-old Ardell Meslas was tossed back into the hoosegow by the state patrol board. His crime? He'd twice made passes at women in nursing homes. Meslas, who has been behind bars for all but five years since 1917, says "I'd write a book, if I could write."

A Little Knowledge Is a Dangerous Thing

Chicagoan Arlene Otis was doing very well, allegedly ripping off welfare to the tune of $25,000 a year until she was recognized as a suspect and arrested—in the Criminal Courts Building, where she had gone to interview a judge in connection with her university graduate work in criminal justice.

Ve Hof Vays of Making You Learn

Parents of sixth grade students in Beegs, Oklahoma, complained that their children were being whipped as a form of motivation. The school superintendent shrugged off the charges. "There are new people who've moved into our community," he said, "they're not used to the type of discipline that we have here."

Next She'll Ask Permission to Lease His Body to Science

The good news is that LA lawyer Herbert Blitz, 47, will no longer have to pay alimony to his ex-wife. The bad news is that he's in an irreversible coma. His ex-wife argued that he was still breathing and his heart was still working, so he should have to pay, but the judge said that under the circumstances he should get a break.

He's Just Envious 'Cause He's Got to Wear Those Boring Robes

Illinois Judge Dexter A. Knowlton tossed spectator Sue Watts, 19, out of the courtroom for wearing a green T-shirt with five-inch high letters saying "Bitch, Bitch, Bitch." She came back after borrowing a denim jacket from a friend, but some of the letters on her T-shirt were still visible, so the judge tossed her into the clink for three days.

Chasing Your Own Ambulance for Fun and Profit

Judge Margaret O'Malley found that being a judge is *not* one of the safest jobs in the world. Stepping down from the bench in her Chicago courtroom, she took a spill, landed on her elbow, and had to spend several weeks in the hospital. Then she did what any other lawyer would do—filed a $150,000 damage suit against the courthouse building for allegedly violating the building code.

Taking a Hair Line

An example of ready wit, lawyer-style: It seems that a young graduate of Harvard Law School, excessively proud of his beard, was interviewing at a stodgy Wall Street firm. After a tour of the firm's offices, a hiring partner, anxious to convey the expected grooming habits of young attorneys, observed "You'll notice that nobody in our office has a beard."

"Oh really," the young man asked, "hormonal problems?"

He did not get the job.

Of Course, Their Expense Vouchers Will Have to Be in Triplicate

Moslem guerrillas in the Philippines thought they could get $60,000 in ransom when they kidnapped American missionary Lloyd Van Vactor. But after getting nowhere for three weeks, they reduced their demands to "reimbursement" of kidnapping expenses. They claimed to have invested in three powerful outboard motors and in fatigue uniforms in order to pose as soldiers for the abduction.

If It Were Up to Us, We'd Question the Victim's Mother

Watsonville, California, police are looking for an unknown intruder who they say smashed a window at Roger Smith's house, entered the home, made his bed, and fled.

If All Else Fails, You Can Always Try Pulling the Covers over Your Head

Our special Telling It Like It Is award goes to the TV listings of the *Washington Post*. In describing *Scared Straight*, a graphic documentary about the brutalities of prison life, the *Post* helpfully cautioned: "Viewers offended by reality should exercise discretion."

Is This What They Mean by the Ten Early Warning Signs?

Its ads barred from the airways by law, Marlboro cigarettes have found a new advertising gimmick. The company has donated hundreds of street signs to the Dominican Republic, with the name of the cigarette as prominent as the name of the street.

(4) Find Lawyer, (5) Destroy List

Mark Maybry of Albuquerque is a defense lawyer's nightmare. After his mother was found murdered, police sleuths had a pretty good idea who did it when they found a list in his room which read: "Things to do: (1) buy shells, (2) shoot father, (3) shoot mother."

He's Probably His Own Best Friend

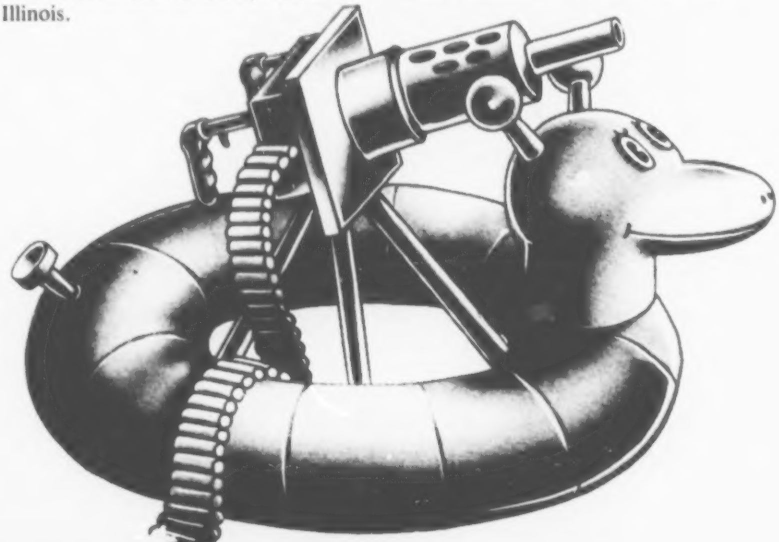
Oakland, California, police thought they had a tough one on their hands after laying siege for two hours to the house where a gunman was hiding out. But ten tear gas canisters later, they discovered that the man they wanted was right beside them, shouting pleas to himself to come out and give himself up.

So Much for Officer Friendly

Seven-year-old Bryan Powell learned about clout the hard way. The Springfield, Illinois, boy was struck by a car driven by an off-duty cop. His injuries were slight, but another cop gave him a ticket for jaywalking and a stern lecture as he lay on the hospital examination bed. The little tyke beat the rap though—you have to be at least 13 to be prosecuted in Illinois.

A Lavatory Experiment

Lorene Bynum saw that the toilet seat was dirty and that there wasn't enough tissue paper to cover it, so she took off her shoes and attempted to stand on the seat. She stood, the seat slipped, she fell. No luck collecting damages, though. The Arkansas Supreme Court, after lengthy deliberation, said that a commode seat just wasn't intended to be used that way.



Semper Paratus, or You Never Know When the Wisconsin Armada Will Attack

The Illinois legislature tried to abolish the state's naval militia, on the flimsy grounds that it had "no ships, no boats, and no canoes. It doesn't even have a paddle." Economy-crazed legislators, ignoring the fact that no aquatic enemy has dared attack the state in the militia's 85-year history, complained that it had a budget of $41,000 a year and an armory with a swimming pool.

Accidents Will Happen and Happen and Happen

A preternaturally klutzy Chicago preacher, slipping and falling all over town, hurt his head twice, his back six times, his shoulder twice, his chest twice, his neck seven times, and his side twice. In the same four-year period, he also had 30 automobile accidents, four fires, a couple of burglaries, and was even poisoned in a restaurant once. And, to cap it all off, after he collected more than $100,000 in claims, the authorities had the nerve to decide his misfortunes might be self-inflicted and to arrest him for insurance fraud.

Send That Man to Law School

A thief who was interrupted by a security guard while emptying out an exhibit booth at a convention saved himself by pretending to be an exhibitor. He even gave a 45-minute sales pitch to the guard, eventually convincing him to buy a camera.

Pregnant Men Do the Darndest Things

Wichita police think that 18-year-old Jim Price has an identity problem. They say he was doing fine posing as a pregnant woman at a welfare office, but then broke away, ran to nearby house, and held an elderly couple at knife-point. Charges ranged from aggravated kidnapping to attempted theft, but did not include tacky impersonation.

But Only if You Were Literate

In an effort to stem rapes, police in New Brunswick, New Jersey, gave calling cards to women they encountered walking alone at night at Rutgers University. The cards said, "If I were a rapist, you would be in trouble."

It Actually Boils Down to the Exchange of Little White Cards Between Consenting Adults

California Judge Lorne Miller joked that a prosecutor in a rape case had "no romanticism" about him. When women's groups complained, he claimed that he was not insensitive to the problems of rape, pointing out that he didn't "have any notions that rape is a romantic thing, or even a sex thing."

Would He Have Gotten 50 Percent Disability If He'd Actually Drunk the Stuff?

The Rhode Island Supreme Court ruled last year that an employee is entitled to workers' compensation when he injures himself whomping a coffee machine which fails to dispense a cup of coffee. Michael Denardo suffered a 10-percent loss in the use of his right hand when, while on the job, he smacked a coffee machine that took his money but did not deliver the goods.

But a Tree with Four on the Floor Does Get Great Gas Mileage

Florida Judge Alfred Nesbitt dismissed charges against 50 drivers because the police radar system that caught them is too inaccurate. He cited evidence such as the radar clocking a tree at 85 mph and a house at 28 mph.

Just a Little on Our Knee, Thanks; We've Got to Go Back to Work

New Yorker Carlos Diezcanseco was charged with drunk driving after his auto rammed a parked car, but his lawyer said he'd been made woozy by a rare Peruvian linament he was using to ease pain in his shoulder. The judge let the jurors sample the stuff, and sure enough, they became wobbly, dizzy, and dazed. They acquitted him of drunk driving, but recovered in time to convict him of driving without a license or insurance.

Think of It This Way, It's Like Missing Out on 144 Holes of Golf

Our Let Them Eat Cake award goes to Supreme Court Justice William H. Rehnquist, who wrote a majority opinion saying that if you are arrested by mistake and held in jail for eight days, your constitutional rights have not been violated. Rehnquist allowed as how there might be a violation "after the lapse of a certain amount of time," but not a mere eight days.

He Couldn't Be Shot Because He Was Out of Season

Bob Holt was strolling along in downtown Seattle, disguised as a mallard duck, when someone spun him around, pulled off his duck head, and battered him with the bill. Holt doesn't understand it. "I didn't speak to him, I didn't flap my wings, I didn't do anything like that."

No One Can Remember What Their Faces Look Like, Even Without Masks

A band of shameless hussies in upstate New York stole merchandise while their pals exposed themselves to distract store clerks. Apparently, groups of up to ten have been known to use the divert-and-loot tactic.

First, a Trip to Dog Court to Change His Name

Wealthy Connecticut woman Dorothy Connelly left $20,000 to her pet poddle, Bay-Lee Brucy Connelly. Ruff, huh?

Getting It Up, Up, and Away

In a considerable understatement, prison officials said it was an "unsuccessful conjugal visit" when an inmate escaped and left his wife sleeping in their prison apartment. Michael Grant walked out on his wife and away from a minimum security California prison about ten hours before the conjugal visit was to end.

Checkmate

Burglar/rapist Charles A. Merriweather was furious when his victim had only $11.50. Ever resourceful, he had her make out a check to him for $50, warning her, "It better not bounce, or I'll be back." Armed with a clue not even the Cub Scouts could overlook, police arrested him a short time later.

Well, That Explains 10% of the Decisions We Can't Understand

Former Judge Harold R. Tyler thinks that 10% of his former colleagues on the federal bench have mental problems. He recommended that nominating panels carefully screen potential candidates for mental as well as physical health problems.

A *Brief*case, Indeed

New York stamp dealer Zoltan Gordan Bana couldn't be stopped by a little matter like having no clothes. When muggers took his money, his watch, and his clothes, he just used his briefcase as a fig leaf and gave chase, attracting the attention of a City Hall policeman who eventually made the arrests.

Has Anyone Told Sinatra About That Precedent?

Memphis Judge Willard Dixon dismissed a traffic charge against a member of a barbershop quartet when the quartet sang for him in his courtroom. "Case dismissed," he burbled, "they were great."

. . . And if a Rug's Not Handy, You Can Always Sweep It Under the Flag

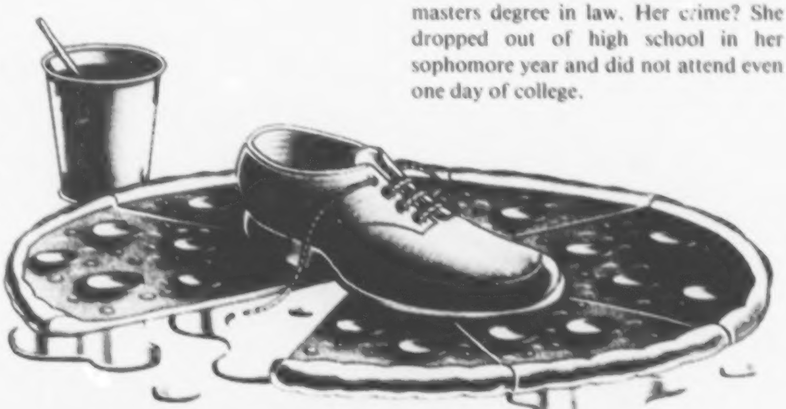
Winner hands down of this year's Avert Your Eyes award is Kentucky State Representative Dwight Wells. To thunderous applause, he told his colleagues that newspaper writers had the duty to hide the truth when it is unflattering to the state.

Are You Sure Clarence Darrow Did It This Way?

Defense wiz Richard "Racehorse" Haynes said he successfully defended Houston police officers accused of kicking a black prisoner to death by moving the trial to a nearby farm town. "I knew we had that case won when we seated the last bigot on the jury," he told a reporter after the trial.

And She Didn't Pass Gym Either

The Supreme Court of South Carolina disbarred woman lawyer Gabrielle Elliott, even though she was a top law school student and had gone on for a masters degree in law. Her crime? She dropped out of high school in her sophomore year and did not attend even one day of college.



. . . With Sausage, Anchovies, and Two Bus Tickets to Juarez

Indiana Sheriff Loren Wilkie, a nice guy if there ever was one, thought there was no harm in ordering a pizza for two inmates. But when he opened the cell to deliver the treat, the prisoners jumped him and took off running. Wilkie didn't get very far chasing them. The reason? He slipped on the pizza and fell.

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COURT BRIEFS

The Court Tackles Some Tough Ones

This term's cases range from abortion to minority construction grants

The well-rested Supreme Court which reconvened on October 1 has an opportunity to do a great deal of intellectual honing during the present term. Cases that the Court has agreed to hear range from capital punishment to free press-fair trial. They provide both a chance to clarify some controversial past rulings and an opportunity to open up new territory.

Court Dives into Affirmative Action Thicket

For those still pondering the meaning of the *Bakke* and *Weber* cases, get ready for the latest affirmative action/reverse discrimination debate, the 10 percent set aside controversy as ennunciated by *Fullilove v. Kreps* (48 L.W. 3072). At issue is the constitutionality of the 1977 Public Works Employment Act, which sets aside 10 percent of the $4 billion appropriation for minority businesses.

Fullilove and the other plaintiffs are contractors who work for New York State. They assert that Congress violated the Constitution and the 1964 Civil Rights Act by passing the law. They say that racial classifications should be invoked only with extraordinary justification. "In order for a racial classification to pass constitutional muster," they say, "a compelling state interest must be shown" and the classification by race must be the least discriminatory means available. They also insist that the size of the set aside was arbitrary. "Why 10 percent?" asked one of their attorneys. "Why not 4 percent—the number of black contrac-

Walter M. Perkins

tors in the United States?"

In reply, the government has maintained that Congress need not provide a detailed justification for the 10 percent set aside, since it has "unique competence" to right past wrongs as it saw fit.

Fullilove is just one of many suits brought by contractors against the grant. In some jurisdictions the suits have prevailed, but the lower courts which considered *Fullilove* explicitly found the act constitutional.

Fullilove, which is a direct challenge to the constitionality of a congressional act, could potentially have as great an impact as either *Bakke* or *Weber,* since it involves the constitutional rights of workers and businesses in the market place, instead of the rights of professional students or the rights of those seeking on-the-job training.

As *Time* magazine points out, the act's constitutionality may be in doubt, but no one questions its effectiveness. Before the act, minority businesses were getting only about one percent of government contracts. With the act's help, they got 19 percent of the $4 billion in public works.

Capital Punishment One More Time

Fearlessly grabbing yet another hot potato, the Court will soon review two very diverse capital punishment cases. Neither will require the Court to reconsider the constitutionality of the death penalty, but each will allow the justices to further refine their thinking about its application by various states.

In *Beck v. State* (365 So.2d 1006 [1978]), the Supreme Court will decide whether a death sentence conferred by an Alabama court is constitutional. The defendant, Gilbert Beck, was convicted of the 1976 robbery and murder of an 80 year-old man. He was originally scheduled for electrocution on March 30 of last year.

At issue in this case is the fact that the judge instructed the jury to either acquit him or find him guilty of robbery and murder. The jury could have been given the option of finding the defendant guilty of robbery alone.

In *Godfrey v. State* (243 Ga. 302 [1979]), the Supreme Court must determine whether the "aggravating circumstances" required by Georgia law in capital punishment cases were present. Defendant Robert Godfrey was convicted in 1977 of the murder of his wife, mother-in-law, and 12 year-old daughter in Rome, Georgia.

However, in order to recommend the death penalty under Georgia law, the jury must find that the murder was "outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or aggravated battery." The jury in recommending capital punishment did find that the murder was "outrageously and wantonly vile, horrible and inhumane" but left out the reasons for their finding. The Court will determine whether the jury's omission renders the death penalty verdict unconstitutional.

"What We *Really* Meant. . . ."

The press, public, and the Supreme Court itself are still feeling the fallout from the Court's July decision in *Gannett Company Inc. v. DePasquale* (47 L.W. 4901), allowing courts to close pretrial hearings to the public and press as long as the trial judge states on the record his reason for doing so. Now the Court has accepted another court-closing case, giving it a chance to explore the issue anew.

Perhaps startled by the press' outrage, four justices tried to explain the ruling in speeches, articles, and interviews

Gannett involved a test between the Sixth Amendment guarantee of a public trial and the press' First Amendment right to freedom of speech. The defendants in *Gannett* were charged with second degree murder, robbery, and grand larceny. Fearing that adverse pretrial publicity would interfere with their fair trial rights, they requested that the press be excluded from their pretrial hearing.

In upholding the lower court, the five-judge majority, speaking through Justice Potter Stewart, said that the guarantee of a public trial is an individual right that can only be asserted by the defendant. If he doesn't request it, the Constitution does not automatically require that the court remain open to the public.

The press responded with howls of outrage, lambasting the Court in editorials all across the country. Perhaps startled by the furor, no fewer than four of the Court's justices tried to explain the decision in speeches and interviews.

Many court watchers have noted that the majority decision is far from clear, leaving unresolved such key questions as whether trials themselves may also be closed. Pointing out that it is unprecedented for the secrecy-loving court to even partially go public, observers argue that the Court itself is not at all comfortable with its decision in this case.

With the print on the *Gannett* decision barely dry, the Court has now accepted a case that will give it the opportunity to explain what it really meant. As many predicted, the first major test of *Gannett* will involve a situation where it was applied to exclude the public and press from the trial itself. In *Richmond Newspapers v. Virginia* (48 L.W. 3178), a Virginia Appeals Court upheld a state statute allowing exclusion of the public and press from trials where the court, in its discretion, feels that such persons would impair the conduct of a fair trial. Since *Gannett* was cited as authority, the Court will get the opportunity to further clarify its policy in this extremely sensitive area.

Abortion Again Before Court

Abortion is the issue that won't go away for the Supreme Court. Its decision in *Roe v. Wade,* 410 U.S. 113 (1973), established that laws flatly prohibiting abortions were unconstitutional, but ever since, state legislatures and Congress have passed laws that would prevent public agencies from performing nontherapeutic abortions or supporting them with public funds. These laws have generated new cases and new headaches for the Court, and the latest in a long line of disputes will come before it later this term.

Williams v. Zbaraz, Quern v. Zbaraz, and *U.S. v. Zbaraz* (all 48 L.W. 3350) are closely linked cases that raise the issue of whether it is constitutional for the federal government to refuse to pay for abortions for poor women, even if their doctors believe the procedure is medically necessary.

Two years ago, in *Maher v. Roe,* 432 U.S. 464, the Court ruled that Congress was indeed acting constitutionally when it allowed states to refuse to pay for abortions that were not medically necessary (elective abortions). The question in the Zbaraz cases is whether the federal act—the Hyde Amendment—is constitutional when it allows states to refuse to pay for medically necessary abortions of Medicaid patients when they pay for all other medically necessary procedures for such patients.

The case arose when a pregnant 38-year-old woman in Illinois suffered from varicose veins and blood clots. Three doctors testified that she had a 30 percent risk of developing thrombophlebitis and being hospitalized for a long period if she carried the pregnancy to term. Nonetheless, the state refused to pay for an abortion, citing the language of the Hyde Amendment, which limits Medicaid financing to cases in which the women's *life* is endangered by the pregnancy.

A district court, in striking down the financing ban, said that while a state may legitimately refuse to finance elective abortions, it can't preserve the life of a "nonviable" fetus at the cost of increasing the risk of death for indigent pregnant women. The federal government, the state of Illinois, and an antiabortion group called Americans United for Life appealed the decision, arguing that Congress and the state legislature (which passed a similar law) made a rational "policy judgment," embodying "strong and legitimate interest in encouraging childbirth."

Among the constitutional issues raised are whether the Hyde amendment violates the equal protection component of the Fifth Amendment and whether the state law violates the equal protection clause of the Fourteenth Amendment.

The government said it was also concerned with avoiding spending "tax revenues to support an activity that many taxpayers find morally repugnant." Furthermore, the government said that abortion is different from other medical procedures because no other procedure involves the termination of a potential human life. It said that, "the special characteristics of an abortion provide a rational basis for the imposition of funding restrictions." □

On the Docket

Some other big cases awaiting decision in the next six months raise important constitutional issues. Others involve statutes. Here's a rundown:

U.S. v. Mendenhall (48 L.W. 3014)—The high court will decide whether the predetermined "drug courier" profile used by federal agents in airport narcotics investigations is constitutional. A lower court has ruled that the profile "cannot be used in the absence of other evidence because the traits that arouse agents' suspicion can have innocent explanations."

The profile includes such elements as "short roundtrips between major drug centers, purchasing ticket with cash, no baggage except for carry-on items, deplaning last, and, in general, nervous or unusual behavior."

The basic constitutional question presented is whether the Fourth Amendment is violated by requesting identification from a person on the basis of facts that indicate to an agent that the person may be a narcotics courier, but that are also consistent with innocent behavior.

U.S. v. Henry (48 L.W. 3161)—Has the Sixth Amendment right to counsel been violated when a robbery suspect makes incriminating statements to a cellmate who happens to be a former FBI informant? A lower court has ruled yes, even where the informant has been cautioned not to question the suspect but merely to report any voluntary statements that he made. The leading case in this area, *Massiah v. U.S.* (377 U.S. 201 [1964]) prohibits the government from eliciting statements from an indicted defendant unless he has waived his Sixth Amendment right to counsel.

Whirlpool Corp. v. Marshall (48 L.W. 3030)—The combination of rising union influence and government-imposed safety standards has corporations complaining and workers vigorously asserting their hard-won benefits. It remains to be resolved, however, whether workers can validly refuse to perform tasks that they feel are dangerous to their health or safety.

Whirlpool presents a situation where a worker at a company plant in Manion, Ohio, fell to his death from a wire mesh guard screen. Two weeks later, two other employees were suspended from their shifts and given written reprimands after refusing to walk on the screen for safety reasons.

In the *Whirlpool* case, the Supreme Court will decide whether the Labor Department can allow workers such discretion if they reasonably believe there is a real danger of death or serious injury. Is the Labor Department regulation a valid exercise of the Labor Secretary's broad rulemaking authority, and is it consistent with the Occupational Safety and Health Act and with congressional intent?

Consolidated Edison Company of New York, Inc. v. New York Public Service Commission (48 L.W. 3141)—In a case involving the giant utility Con Ed and the First Amendment, the high court has agreed to resolve whether the company has the constitutional right to include statements of its views on controversial subjects along with its bills to customers.

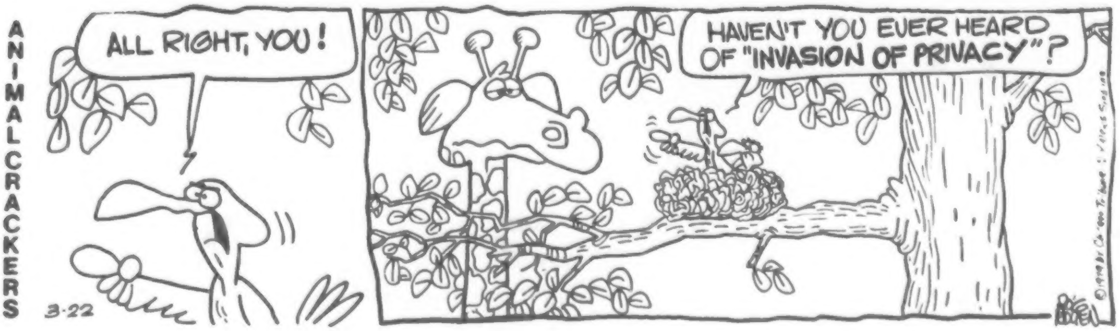
The New York Court of Appeals (the state's highest appellate court) ruled in May that the New York Public Service Commission's order barring the use of bill inserts did not violate the First Amendment, even though the utility was addressing issues of controversial public policy.

The Appellate Court reasoned that "a utility's customers constitute a captive audience and have a right to be shielded from a one-sided dissertation on nuclear power and other disputed and controversial topics." This case is destined to be one of the most important First Amendment cases decided by the Court during the present term.

Industrial Union Department, AFL-CIO v. American Petroleum Institute (48 L.W. 3071)—The United States government, through its various agencies, has unquestioned regulatory authority, particularly in the areas of health and safety. The Supreme Court will decide the extent of that authority and the exact role that the judiciary has in overseeing that function.

In what has popularly become known as the "benzene case," a federal appeals court ruled a year ago that federal regulatory agencies must balance the cost of regulation against the anticipated benefits. The Occupational Safety and Health Administration (OSHA) must therefore determine whether benefits expected from required standards bear a reasonable relationship to costs imposed by such standards.

The 5th Circuit Court of Appeals earlier ruled that OSHA must provide an estimate that will demonstrate the expected benefits that should result from reducing the permissible exposure limit for benzene from 10 parts per million to 1 part per million. The Supreme Court's ruling in this case is expected to have a fallout effect on other industries whose workers come in continuous contact with toxic chemicals.


ANIMAL CRACKERS
ALL RIGHT, YOU!
HAVEN'T YOU EVER HEARD OF "INVASION OF PRIVACY"?
3-22

Classroom Strategies

(*Continued from page 15*)

—The names of rape victims.

—Information concerning the sexual activities of a public official.

—A story centering on the alcoholism of a politician or a member of his/her family.

—Figures indicating the personal wealth of a businessman.

—The arrest record of an individual.

—The names of people on welfare.

—Papers revealing the dishonesty of a government employee.

- How would you guard against or what would you do about information which was fraudulent? . . . misleading ? . . . damaging to a person's reputation, health or livelihood?
- Can courts preserve the press's right to gather and print the news and at the same time preserve the individual's right to privacy? How? What guidelines might be drawn up? Should the guidelines be different for public officials and ordinary citizens?

Strategy 3.

What Directions for Juvenile Justice?

In the late sixties and early seventies, the Supreme Court of the United States announced several decisions which extended to young people many of the rights accorded to adults accused of a crime. As a result of the *Gault* case (387 U.S. 1 [1967], for example, juveniles have the right to have their parents notified of the charges against them, the right to legal counsel, and the right to confront witnesses against them (see Spring, 1979 *Update*).

The decisions in *Gault* and the later *Winship* case (397 U.S. 358 [1970]) were heralded by many as a triumph for the civil liberties of young people. Inside and outside of the juvenile courts, the rights of young people were to be protected. "Treatment and rehabilitation" rather than "punishment and retribution" were to be emphasized by our justice system in dealing with young people who had broken the law.

During the seventies, however, the number of crimes committed by young people has continued to grow. The increasing frequency and cost of vandalism, as well as violent acts committed by juveniles, have been of particular concern. As a result, further reform and changes in our system of juvenile justice seem imminent. In some states, such as New York, new laws have already been enacted.

But what kinds of reform and changes should be made? Should new laws and programs emphasize "treatment and rehabilitation" or stress "punishment and retribution" for those young people who have committed criminal acts?

Where Do You Stand?

Exactly what direction our juvenile justice system will take in the near future remains unclear. If it were left up to your students, what reforms or changes, if any, would be made? Before they answer, ask them to consider the following proposals regarding the treatment of juveniles.

1. Thirteen, fourteen and fifteen year-olds who are charged with having committed a violent crime should be tried in adult criminal court.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree
2. Solitary confinement of a young person judged to be a juvenile delinquent should be barred *except* if ordered for medical reasons.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree
3. Parents should be held financially responsible for the destructive acts of their children even if they have tried "their best" to supervise the young people's activities.
   Strongly Agree Strongly Disagree

How many words can you find below that are related to recent Supreme Court cases involving young people and the law?

Horizontally?
Vertically?
Diagonally?

(*for solution, see page 45*)

E	S	W	A	J	U	R	Y	E	O	P	M
X	U	T	I	N	K	E	R	A	O	Y	C
P	E	X	E	N	O	F	B	Z	C	O	K
R	P	E	E	R	S	P	W	O	O	D	E
E	B	A	K	K	E	H	C	L	U	E	I
S	U	S	P	E	N	S	I	O	N	R	V
S	P	G	A	U	L	T	V	P	S	N	E
I	E	A	D	U	L	T	I	E	E	N	R
O	Q	A	O	E	L	G	L	Z	L	Z	P
N	U	C	O	N	F	R	O	N	T	O	X
A	A	A	W	I	T	N	E	S	S	E	S
X	L	W	R	I	T	M	N	O	S	P	Q
S	T	R	I	C	K	L	A	N	D	W	Z

Mildly Agree Mildly Disagree

4. The names of young people allegedly involved in criminal activities, the offenses of which they have been accused, and the final court rulings in their cases should never be made available to the news media.
Strongly Agree Strongly Disagree
Mildly Agree Mildly Disagree

5. Juveniles who have been found by the courts to have caused serious injury to an elderly or physically disabled person should be removed from their homes and community without delay and placed in a state detention facility for young people.
Strongly Agree Strongly Disagree
Mildly Agree Mildly Disagree

6. The upper age limit for young people who may be judged by the courts to be school truants, runaways, etc., and therefore in need of state supervision, should be raised to 18 years of age.
Strongly Agree Strongly Disagree
Mildly Agree Mildly Disagree

7. The law should require parents to post a $1,000 bail bond to obtain the release of their son/daughter who has been accused of committing a criminal act.
Strongly Agree Strongly Disagree
Mildly Agree Mildly Disagree

8. Any young person between the ages of eight and sixteen should be held personally accountable by the courts for his actions.
Strongly Agree Strongly Disagree
Mildly Agree Mildly Disagree

9. The best thing that could be done is to close all detention facilities for young people and place the juveniles in community-based centers and foster homes.
Strongly Agree Strongly Disagree
Mildly Agree Mildly Disagree

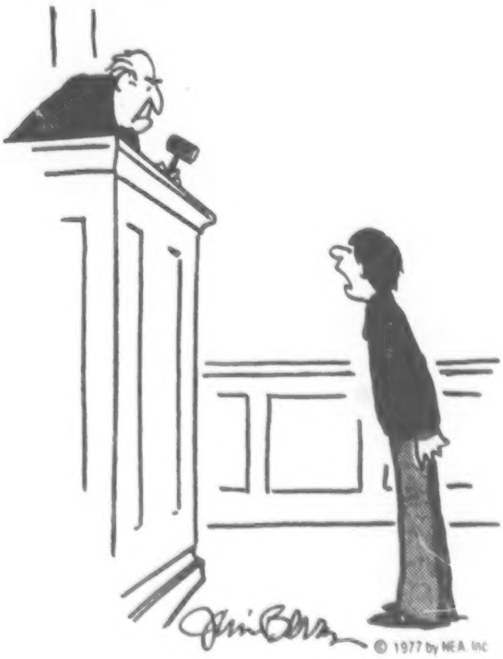
10. Even if a juvenile is sent to adult criminal court and there found guilty, he or she should receive a lighter sentence than would an adult.
Strongly Agree Strongly Disagree
Mildly Agree Mildly Disagree

A Case Study

One of the best ways to explore what changes *should* take place is to look at what changes *have* taken place. New York's new law raises plenty of questions about how the justice system should treat juveniles.

In 1978, the New York State Criminal Procedure Law and Family Court Act was amended making 13, 14, and 15 year-olds criminally responsible for certain violent acts. As you will find in the case described below, implementation of this new law has not been without its problems.

Berry's World


© 1977 by NEA, Inc

"Hey, wait a minute! What happened to the ol' 'slap-on-the-wrist'?"

- What seems to be happening in the cartoon? How do you know?
- What does the cartoonist appear to be saying about recent trends regarding juvenile justice?

Leonard Green was 15 years old when he was arrested by police for robbery and charged with a felony. He was one of the first juveniles in New York to be indicted under the state's new 1978 "juvenile offender" law.

Under the new law, Green's case was subject to the state's criminal justice processes rather than family court. If certain circumstances were shown to exist, however, the case could be removed to family court.

In court, Green's attorney asked the judge to bar the public and press from the courtroom. This is standard practice in juvenile court, but not in adult court.

- Suppose you were Green's attorney. What would you argue?
- Suppose you were the counsel for the State of New York. What would you contend?
- How would the members of your class decide the case? Ask them to be prepared to defend the decision. Having studied the Green case, what problems do your students foresee in implementing the changes which they supported in the preceding exercise?

Strategy 4.

Big Government/Little Children—Looking into the Future

September 1, 1983. Today at twelve noon, two new federal laws regulating television and radio commercials will go into effect.

Praised by some and criticized by others, the regulations provide that "All television advertising directed at children under eight years old is herewith prohibited." Moreover, the new laws include the additional provision that all radio and television advertising for highly sugared foods directed at children under twelve years of age is prohibited.

Ask your students to indicate which of the following statements are "true" or "false" about the new regulations by circling their choice. If there is not enough information to prove a statement "true" or "false," circle the "?" symbol.

T F ? The regulations specifically outlaw the manufacture of sugar products.
T F ? The new laws will hurt the business of the candy industry.
T F ? The laws only pertain to children and not to adults.
T F ? The regulations prohibit the sale of certain goods to children under twelve.
T F ? Both television and radio advertising will be effected by the new regulations.
T F ? The laws ban all kinds of advertising of sugar products.
T F ? The regulations are designed to discourage misleading advertising and promote healthy eating habits.

Clear wording of a law is often the key to its proper enforcement. Is the wording of the two new advertising regulations clear enough? Is there anything else your students might want to know about or add to the laws to strengthen their clarity?

Would your students be in favor of the new regulations or opposed to them? Why?

Why do they think "sugared products" as well as certain age groups were singled out in the laws?

Can they think of any other products which are heavily regulated or are not allowed to be advertised on TV?

Ask them to suppose they were an owner of each of the businesses listed below affected by the new laws. What would they do?

"Flakely Candy Co."
"J. & G. Advertising Co."
"WIGB Television"

What legal arguments could they present in opposition to the new laws? What else could they do to help sell candy bars, advertising services, time slots for commercials?

Some Alternatives

Suppose that in 1983, the federal government could be persuaded to consider the following alternatives to an outright ban on advertising designed for eight year olds. Which, if any, would your students support? Why?

1. Instead of a total ban, organizations such as the American Dental Association, American Medical Association, and Action for Children's Television should be given "equal time" on television to prepare messages which point out why certain products are bad for young people.
2. Instead of a total ban, the U.S. government should eliminate certain types of commercials during hours in the day when young children are most likely to view TV.
3. Instead of a ban, parents rather than the U.S. government should watch over what television programs and commercials their children view.
4. Instead of a ban, the U.S. government should provide that all commercials on television be followed by either a U.S. stamp of approval or a warning from the appropriate governmental agency.
5. Instead of a ban, the U.S. government should refrain from interfering with young people's right to listen and let the children decide for themselves whether they want to watch program A or B or buy product X or Z.

Emphasis on Need to Protect Health/Welfare of People	Emphasis on the Absolute Right to Advertise
[______________	______________]

Where on the above line would students place government regulation of advertising now?
Where on the line do they think it should be? Why?

Too Much Government?

Several years ago, the cartoon presented below appeared in a local newspaper. It expressed a viewpoint on government regulation which seemingly is gaining in popularity among the American people. Ask your students to examine the cartoon carefully, then complete the exercises which follow by checking one or more of the following items completing each statement:

- The cartoon includes:

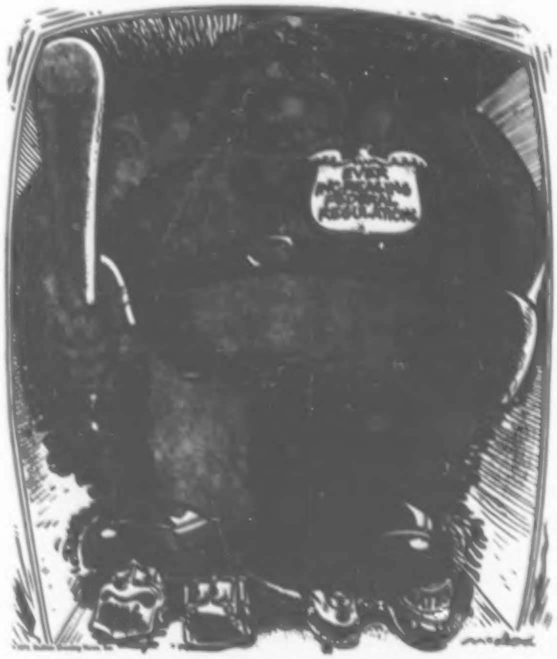
____ an airplane
____ an automobile
____ a train
____ a truck
____ a boat
____ a badge
____ a man in uniform
____ a police station
____ a man running
____ a club with rope

(Identification of items in visual)

- What appears to be happening in the cartoon?

____ A crime is being committed by the person in the cartoon.
____ "Rails" appears to be saying: 'Won't Congress ever give us a little

McLeod in *The Buffalo Evening News*, 6-24-75.



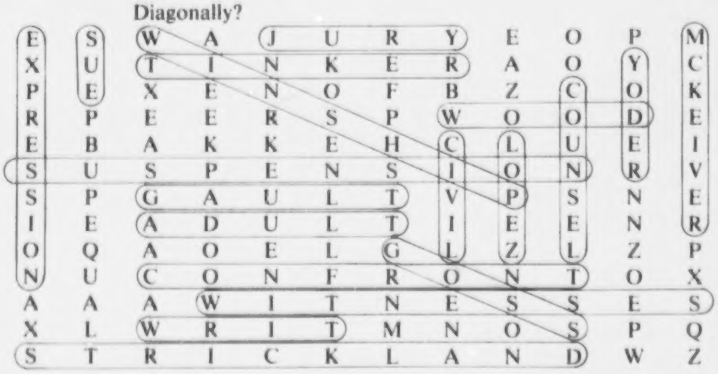
"Won't Congress ever give us a little running room?"

How many words can you find below that are related to recent Supreme Court cases involving young people and the law?

Horizontally?

Vertically?

Diagonally?



E	S	W	A	J	U	R	Y	E	O	P	M
X	U	T	I	N	K	E	R	A	O	Y	C
P	E	X	E	N	O	F	B	Z	C	O	K
R	P	E	E	R	S	P	W	O	O	D	E
E	B	A	K	K	E	H	C	L	U	E	I
S	U	S	P	E	N	S	I	O	N	R	V
S	P	G	A	U	L	T	V	P	S	N	E
I	E	A	D	U	L	T	I	E	E	N	R
O	Q	A	O	E	L	G	L	Z	L	Z	P
N	U	C	O	N	F	R	O	N	T	O	X
A	A	A	W	I	T	N	E	S	S	E	S
X	L	W	R	I	T	M	N	O	S	P	Q
S	T	R	I	C	K	L	A	N	D	W	Z

running room.''

____ The huge person is being carried to his destination by four different kinds of transportation.

____ "Rails" and the others are being "crunched/crushed" by the big fellow.

(Description of what action is occuring)

- The cartoonist is attempting to show that:

____ the federal government is keeping business in line.

____ the federal government is working for the people.

____ the federal government is over-regulating transportation.

____ the federal government has no interest in transportation.

____ the federal government's business is promoting the growth of big business.

(Analysis of why certain things are taking place)

- Write, draw, or tell about another situation that is based on an idea similar to the one found in the cartoon.

(Application of theme)

- Keep a personal diary until tomorrow listing all the things you do after you leave class today. Place check (✓)next to any activity in which government regulation might be/is involved.

(Application of theme)

- Prepare a list of advantages/disadvantages to government regulation. Which reasons do you think are most important? Why?

(Application of theme)

A Tough Hypo

There is considerable government intervention also in the relationship of children with their parents. If, for example, the mothers and fathers of young people are unable or unwilling to take care of them or have abused them, the government may remove the children from their family and place them in foster homes. This task is often the responsibility of a social services agency or a department in a state's government.

The "foster home" itself, generally speaking, is a temporary rather than permanent family living arrangement, in which a set of "substitute" parents provide for the care and custody of the child assigned to them. Usually, the foster parents must agree in writing that they will return the child to the government agency involved in the case upon demand. The child, in turn, is either returned to his/her original family or matched with another set of parents for adoption. Ask your students:

- What do you think of this arrangement?
- Who do you suppose the foster care program is designed to benefit? How?
- What problems, if any, might develop in this type of arrangement?

With the current furor over child abuse, many people want new laws and new government power to protect children. But many observers think that government regulations may interfere with the natural growth of the child. The following hypothetical (based on the actual case of *Ninesling v. Nassau County Dept. of Social Services*, 46 N.Y. 2d 382 [1978]) raises many questions about law and the family.

While his single mother thought over whether she would keep Chuck or allow another family to adopt him, the four day-old child was placed in a foster home by an agency representing the state government.

The Johnson family, where Chuck was placed, had served as foster parents on a number of other occasions. Each time, the Johnsons were informed that the child eventually would be removed from their care and possibly placed with adoptive parents.

Several months went by with the foster parents and baby growing to know and love each other more and more. Rather than remaining detached, a strong emotional bond seemed to develop between Chuck and the Johnsons.

Then one day the state agency notified the Johnsons that their foster care of the baby would need to come to an end. A new set of permanent parents had been found for Chuck.

The Johnsons, however, contacted the agency and asked that they be allowed to adopt Chuck. After a meeting with officials from the agency, the Johnsons were informed that their request had been denied.

Instead of returning the child to the agency, the Johnsons asked the courts to order the state agency to allow them to keep Chuck and formally adopt him.

- How would your students have decided the case?
- What things would they want to take into consideration before deciding?

In deciding the case, the court noted that it would be in the best interests of the child for the Johnsons to return him to the state agency for placement. The court's decision was based on the following points:

- Foster care was designed to be temporary.
- The Johnsons were aware of its intended purpose.
- Different standards were used by state agencies to screen families for foster care and adoption. (In foster care arrangements, the state agencies were concerned mostly with the ability of families to provide board and care, while in adoption proceedings, an attempt was also made to match the race/religion/age of the adoptive parents with those of the child's natural parents.)

Because of the above, the court ruled that foster parents would have to demonstrate (1) that they could provide a better home for a child than the one proposed by the state agency and (2) that removal from their home would have a detrimental effect on the child.

- How do your students feel about the court's decision in the case involving Chuck and the Johnsons? Why?
- In what other kinds of family matters is the government likely to become involved?
- What kinds of government involvement would they like to see strengthened? Eliminated? Left about the same?

Strategy 5.

Legal Assistance—Current Challenges/Future Directions

"A basic *tenet* of the professional *responsibility* of *lawyers* is that every person in our society should have ready *access* to the *independent* professional *services* of a lawyer of *integrity* and *competence* . . ."

The statement which you have just read is found in the Code of Professional Responsibility of the Bar of the State of Ohio. Ask your students.

- Replace each of the eight words which are italicized with another word which has the same meaning.
- Write a brief letter to a friend explaining what they feel the state bar is saying.
- Then answer the questions which follow:

  Do you agree or disagree with the contents of the statement? Why or why not?

  Do you think lawyers have met this responsibility?

  Do you think lawyers should be forced to "live up" to this responsibility? If so, how? If not, why?

Community Survey

Everyone has an opinion about lawyers and the cost of legal services. Occasionally some of them are printable. To help your students understand the legal services question as ordinary folks see it, ask them to interview five adults in their neighborhood. They should ask the adults to respond to the following questions as openly as possible. If the adults seem hesitant, they should:

(1) read the questions to them in advance before requiring an answer;

(2) explain that the interview is part of a class assignment on law; and that

(3) no one's name will be used in reporting the results. If the adults still hesitate, they should respect their privacy, thanking them for their attention and finding another individual to interview.

- How many times during your life can you remember going to a lawyer?
- What was the purpose of each visit with an attorney?
- How would you rate the cost/fees of your attorney?

  ____ Quite fair!

  ____ Too high!

  ____ A real bargain!
- Were you satisfied with what the attorney did for you? If not, why?

How Lawyers See It

In Spring 1974, Gary R. Hoffmann and Albert R. Fingerman wrote an article on legal services which appeared in the Cincinnati Bar Association's *Journal* (Vol. I, No. 2). Based on their own experiences as practicing attorneys, the authors offered the following assessment regarding the availability of lawyers.

> The last two decades have produced . . . a plethora of low-budget, understaffed legal aid organizations which are federally funded and which provide stop-gap type legal assistance for the indigent [poor person].
>
> In contrast . . . we find the wealthy American, who, in many instances, uses his attorney's services to combat a multitude of major problems and minor annoyances on a regular bases. . . .
>
> The middle class American, however, can obtain neither free federally funded legal assistance nor can he afford to purchase assistance at the going hourly rate. He limits his use of an attorney to those sporadic instances in which he cannot possibly avoid one.

Ask your students which of the following statements *best* describes the viewpoint of the authors:

- Every person in our society has ready access to the services of an attorney.
- There is some form of legal assistance available to all Americans whether they be rich, poor, or middle class.
- The poor suffer the most, with little, if any, legal assistance available to them.

Does the information collected (and compiled) from the community survey conducted by your class regarding "legal services" support or refute the contention of Hoffmann and Fingerman? Explain.

To wrap up the exercise, invite an attorney from one or more of the organizations listed below to speak to your class on the subject of legal assistance.

- Local Bar Association
- Legal Aid Society
- Public Defender's Office
- American Civil Liberties Union

What to Do About It

A number of legal scholars have suggested that prepaid legal service plans be created. Similar to the medical profession's Blue Cross-Blue Shield programs, the proposed plans would cover major legal assistance as well as simple advice and consultant expertise. That is, for a monthly payment (premium) a participant and his family would be entitled to specific legal services, either from an attorney of his own choice (open panel), or from a staff attorney employed by the plan (closed panel). Ask your students:

- Would you be in favor of such a program? Why or why not? Would it matter to you if the plan used an "open" or "closed" panel?
- Which of the three groups described in the preceding article—the rich, the poor, the middle class—do you suppose the plan would benefit the most? The least? Why?
- Why would you suppose some attorneys might favor the idea, while others might oppose it?

Another suggested remedy is that lawyers be permitted to advertise. The rationale is that advertising would help low-cost legal clinics and help keep fees down.

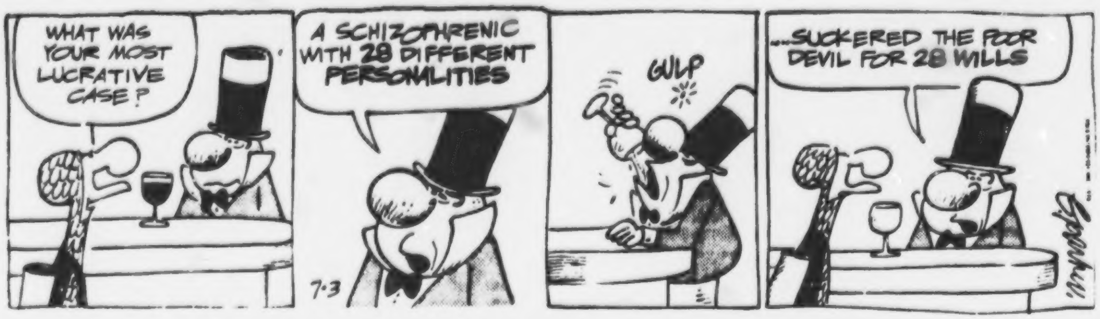
Until two years ago, no lawyer in the United States could advertise his or her services. Advertising was viewed as beneath the dignity of the profession and as a potential threat to the profession's high standing in the community.

In 1977, however, the Supreme Court of the United States lifted the ban on lawyer advertising. In a 5-4 decision, the Court held that the ban violated the right of free speech for attorneys. Now, any lawyer can advertise, although over half of the states have some rules limiting the scope of this advertising.

Have your class consider the following advertisements. Which would be acceptable to them? Why?

On a T-Shirt . . .

Been busted? The Legal Clinic, 632-2222


WHAT WAS YOUR MOST LUCRATIVE CASE?
A SCHIZOPHRENIC WITH 28 DIFFERENT PERSONALITIES
GULP
...SUCKERED THE POOR DEVIL FOR 28 WILLS
7-3

- What kind of image is the cartoonist creating regarding the legal profession?
- What effect, if any, might this kind of image have upon the practice of law?
- What could be done about this type of portrayal of lawyers?

On Television . . .
Are you still using him!! Get with it Marge! Everyone's switching to the law firm of Bones and Jones.

On an Office Sign . . .
No Frill Wills $25.00!

On the Radio . . .
In case after case, Allan consistently wins more big cash awards from juries. 30% more!

On the Side of a Dented Car . . .
Sideswiped? Call Susan Archer, Attorney-at-Law, 337-0612

On Airplane Banner Over a Stadium . . .
Call John Marshall, Attorney-at-Law

In a TV Program Guide . . .
For a limited time only! No Money Down for Civil Lawsuit! Call Allyn & Does.

After discussing these ads, ask your students:

- What might have been the major advantages to lifting the ban on advertising? What might have been the major disadvantages?
- Do you think the change will enhance the opportunity to obtain legal services? If so, how? If not, why?
- With which of the statements would you most agree? Least agree? Why?

1. Advertising can only cause the demise of professional dignity. There must be respect if lawyers are to carry out their duty to the public.
2. Regulations imposed on lawyer advertising are really a product of the country club set and stuffed shirts of the profession. Their monopoly of legal business must be ended and free competition imposed.
3. Showmanship and self-laudatory types of ads should be banned and stiffer regulation imposed if lawyers are not to deceive the public which they serve.
4. To date, few lawyers advertise regularly, and complaints from the public have been negligible. Until an overwhelming danger is shown to exist, lawyers' constitutional rights to free speech should not be diminished.

Do It Yourself

A good final exercise is to ask students to wrestle with some of the problems themselves. Give them the assignment of writing two sample advertisements for the law firm of Johnston & Sims.

- One ad should be prepared for use on radio or television; the other for a magazine or newspaper.
- Both of the ads should reflect what students feel would be acceptable lawyer advertising.

Within the foreseeable future, there may well be a clear need to prepare a "bill of rights" protecting lawyer advertising and/or a "code of regulations" limiting the kinds of advertisements which lawyers use to solicit business. Ask students to prepare a "bill of rights" or "code of regulations" to guide future lawyer advertising. In preparing their guidelines, they should consider the following:

- What are acceptable media for advertising?
- What are acceptable contents for an ad?
- What kind of regulation might violate an attorney's right to freedom of speech?

In addition, they may want to consult with a member of your local bar association regarding the project.

In Retrospect

Any excursion into the future of law and our legal system need not be restricted to these subject areas. In truth, the number of potential topics seems almost limitless. They include:

- Future revisions of our Bill of Rights and Constitution.
- Formation of a government on another planet jointly settled by the peoples of the USSR and USA.
- New policies/programs for convicted felons, including the use of laser surgery, hypnotism, banishment, etc.
- The growth of international law to handle future food and energy crises.
- Laws/regulations for a multi-national conglomerate.
- Advances in law enforcement/criminal detection technology.
- Changes in the definition of criminal insanity and the criteria used by the courts to ascertain it.
- New trends in criminal activity/behavior.
- Society's response to the problem of violence.
- Developments in education and legal changes in teacher/student rights/responsibilities.
- Law's role in changing/perpetuating the status of minority groups.
- The formation of a new international organization with real police powers.

And the list could go on and on. A potpourri of topics can be used to initiate classroom discussion/analysis of the future of our laws and legal system. This flexibility should permit subject matter and course content to be tailored to the needs and interests of a class as well as to the demands of the established curriculum.

The choice is ours! Hopefully, we will select subjects that center on the productive study of key societal concerns—and challenge the intellect and creativity of our students. ☐

Morality on Trial

(Continued from page 8)

a right of privacy exists which shields the marital relationship from governmental intrusion. In his opinion, Justice Douglas stated that it was "repulsive" to think that ". . . we [would] allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."

Advocates of decriminalization also argue that enforcement of vice laws is very difficult. They say that enforcement hurts those who are arrested more than it helps society. Besides, the arrest rates for prostitution are very low, suggesting that the laws are seldom enforced.

Another argument in favor of decriminalization is that the present status of vice legislation leaves the system wide open for governmental corruption. Bribery and payoffs create "under-the-table" regulation of the vice while compromising the integrity of police. And the huge profits of the business—Gail Sheehy in her book *Hustling* estimates that prostitution is a $10 billion enterprise in the United States--naturally attract organized crime.

Advocates of decriminalization say that legalized prostitution would permit government to regulate prostitution, just as it regulates other commercial businesses. In addition, they point out that health regulations could be enforced if prostitution was legalized.

The Other Side of It

Many people are strongly in favor of maintaining legal sanctions against prostitution and vice in general.

Those against decriminalization argue that there really are victims in morals offenses, whether the victim is an individual or society as a whole. In the case of prostitution, it is sometimes argued that the victim is the prostitute, often-times victimized by violence or by her pimp. Many people think prostitution is degrading to women. And red-light districts promote crimes which clearly do have victims. This criminal subculture is littered with muggings, drugs, burglary, and even murder.

The primary reason given against decriminalization is that prostitution and other vices offend the moral standards of the American people. The moral implications of prostitution laws were illustrated recently when Mayor Koch of New York City announced that station WNYC, New York's public radio station, will begin broadcasting a "John Hour," giving the names of all prostitutes' clients who have been arrested and charged. This is an enforcement mechanism, an attempt to maintain the prohibition against prostitution through public awareness. It shows that the shame and stigma of prostitution are part of the moral code legislated into law.

Society throughout history has taken upon itself to establish standards of conduct by one means or another. The law takes a socialization role in limiting what society feels is wrong, distinguishing between harms that are tolerated and those that are not.

Trouble in the Combat Zone

Each side in the debate over decriminalization could use what's happened in Boston to bolster its cause. Boston has its strip, but it was specifically sanctioned as the place for vice by the city government. Boston in effect resigned itself to an ineradicable social phenomenon and designated an area of town within which to confine prostitution and pornography.

Boston's experience gained national status, possibly through its name: The Combat Zone. The Combat Zone is a two-block stretch of downtown Boston within which adult theaters, bookstores, and nightclubs flourish. The containment and control worked for a while, but violence has erupted in the area. A Harvard football player was killed in the zone during a robbery, and drug dealing has become a major problem. *Newsweek* reports that police corruption is rampant. A 25-man vice control squad descended on the zone to control the situation, arresting dozens of prostitutes and chasing the rest into a nearby neighborhood, creating a howl of protest from the residents.

The problems of the Combat Zone point out the difficulties of enforcing vice laws, while at the same time showing the problems of limited decriminalization. On the one hand, sanctioning vice seems to lead to more (and more serious) crime. Boston officials probably thought they were merely creating a red-light district, but in fact they were sanctioning a battlefield. On the other hand, prostitution is the oldest profession, despite being illegal almost everywhere, because the law has never succeeded for long in suppressing it. As the Boston experience shows, police can clean up a neighborhood, but prostitutes will just set up shop somewhere else.

New Directions in Motown

The city of Detroit has taken a different tack to deal with the practical problem of vice control. In essence its approach is exactly the reverse of Boston's. Boston wanted to keep vice to one small area; Detroit has tried to spread it out.

Detroit's "Anti-Skid Row" ordinance is in the form of inverse zoning. It prohibits "adult motion pictures" and "adult bookstores" within 1,000 feet of any two other regulated uses, which include other theaters, adult bookstores, liquor stores, and pool halls. "Adult" is defined as describing or relating to a list of "Specified Sexual Activities" or "Specific Anatomical Areas."

The owners of two theaters wanted to show adult films but were within 1,000 feet of each other. They went to court to have the ordinance declared unconstitutional as a violation of their First Amendment rights to free speech. But in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), the Supreme Court ruled against them. The Court upheld the city's right to zone commercial establishments by confining them to one area or dispersing them throughout the city.

Justice Stevens, writing for the Court, emphasized the problem and the Court's solution to it. He said that "whether we applaud or despise what is said, . . . every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." As in most morals cases, the Court weighed two factors, the individual's freedom to choose and the majority's standard of conduct, this time deciding that the standards of the community had priority.

The Court on a Tightrope

In our nation's legal system the U.S. Supreme Court has the final say in interpreting "morality" legislation. As a result, the Court is caught squarely in the middle of the national debate over morals offenses.

The Court has most often addressed the issue of obscenity/pornography, since it confronts squarely the First Amendment right to free speech. In obscenity regulations, the Court draws the final legal line between morality and immorality, and it has not had an easy time deciding the issue.

For more than 20 years, the Court has been groping for an adequate definition of obscenity under our Constitution. The Court's decision in *Miller v. California*, 413 U.S. 15 (1974), set the current standard by which judges determine if a state's obscenity statutes are constitutional. The facts in *Miller* were simple. Miller had mailed five unsolicited advertising brochures for illustrated adult books, in violation of California's obscenity statute. The problem was that the offensive material reached people who hadn't consented to seeing it. In upholding Miller's conviction the Court found the California statute constitutional and gave guidelines for judging obscenity laws.

A conviction under anti-obscenity laws would be okayed, (a) "'[if] the average person, applying contemporary community standards' would find that work taken as a whole, appeals to the prurient interest, (b) [if] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law, and (c) [if] the work taken as a whole, lacks serious literary, artistic, political, or scientific value."

There have been difficulties with these standards. The main problem has been the trouble of defining the "community" moral standard used to judge allegedly obscene materials. What is the common standard in a heterogenous community? And what about the problems of hundreds and thousands of communities with different standards? Since localities determine the governing standard, it is not surprising that different standards will be reached for cities such as New York and a small town in the Bible Belt. Many have worried that the small towns will in effect set the standards for the whole country. After all, someone worried about a possible obscenity conviction might make his materials as safe as possible, thus in effect imposing the most restrictive standards throughout the country.

A major (and enduring) problem is regulating obscene material that might fall into the hands of children. Even civil libertarians feel that regulations are justified when the interests of children are considered. It is a difficult task, but the courts and society seem fairly united in their determination to keep obscene materials from youngsters. The motion picture rating system and the family viewing hour on television reflect this concern.

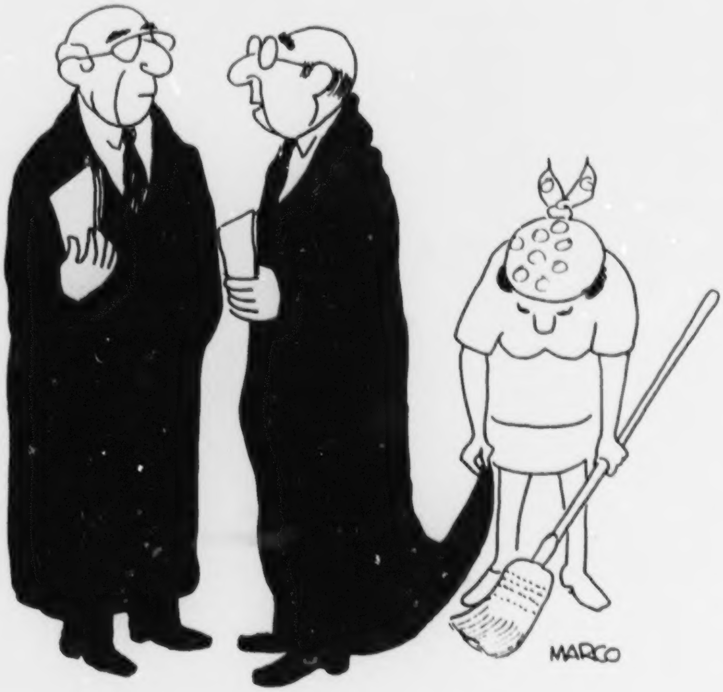
But this effort can easily raise First Amendment problems. The U.S. Supreme Court squarely addressed the importance of considering children in *FCC v. Pacifica Foundation*, 438 U.S. 727 (1978). The FCC had issued an order against Pacifica Foundation, which owned a radio station that had broadcast at two o'clock in the afternoon satiric humorist George Carlin's now well-known monologue, "Filthy Words," (there are seven of them). The Court was concerned because broadcasting is uniquely accessible to children, and, as the Court said, "Pacifica's broadcast could have enlarged a child's vocabulary in an instant." On the other hand, the public's interest in First Amendment freedoms was also involved.

This time, the Court decided that protecting our children came first. The Court reiterated its holding from the *Ginsberg* case, 390 U.S. 629 (1968), "that the government's interest in the 'well being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." The Court made the holding even though apparently only one complaint was filed about the broadcast.

The law sometimes tries to also deny adults access to pornography. In Georgia, for example, two theater owners were enjoined from screening allegedly obscene films at the Paris Adult Theatres I and II, even though signs at the door said, "You must be 21 and able to prove it. If viewing the nude body offends you, please do not enter." In 1973, in the case of *Paris Adult Theatre v. Slaton*, 413 U.S. 49, the Court was asked, "Can a state bar the showing of obscene, pornographic films to adults?" The answer was yes.

The *Paris* case presents directly the issue of morality's place in American law. The Court held "that the states have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theatres from which minors are excluded." The Court's reason for the decision emphasized the interest of the total community environment. The Court quoted approvingly Chief Justice Earl Warren's statement that "there is a right of the nation and of the states to maintain a decent society." Thus the Court could find that state laws designed to protect "the social interest in order and morality" were constitutional.

In the *Paris* case, the Supreme Court also quoted the late Alexander Bickel, a noted educator and lawyer, to define the dimensions of the problem and justify its holding. Bickel wrote: "A man may be entitled to read an obscene book in his room, or expose himself indecently there. [We] should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about



the rest of us, and to impinge on other privacies."

However, the Court has found that certain morals laws go too far in impinging on individual freedom. For example, the Court has determined that the right to privacy includes the right to view pornography in one's own home. The Court explained this view in *Stanley v. Georgia,* 394 U.S. 557 (1969).

The case began when police found obscene films in a bedroom drawer while searching Stanley's home for evidence of bookmaking. Convicted of possessing the films, he appealed all the way up to the Supreme Court. The Court agreed with him. It said that "fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." The Court also approvingly quoted from Justice Brandeis' dissenting opinion in *Olmstead v. United States,* 277 U.S. 438 (1928): "The makers of the Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."

The fundamental issue in all these cases, as Bickel points out, is between individual liberty on the one hand and social order on the other. In trying to reconcile these two important values, it appears that the Court distinguishes between public and commercialized distribution of pornography, which can be regulated, and strictly private activities, which are less open to regulation.

Looking Ahead

The dilemma posed by the conflict between individual freedom and society's right to set certain standards of conduct will continue. Individual freedom is one of our nation's highest principles, but we also allow the law to set standards of conduct whenever individual liberty threatens to harm others. The dilemma is produced in trying to define the degree of harm imposed on others when an individual engages in a particular activity.

The line between individual freedom and social control will move as moral standards change. Twenty-five years ago, *Playboy* and other girlie magazines were sometimes forced off the newstands; now far raunchier magazines such as *Hustler* are available almost everywhere. Nonetheless, there are still moral standards enforced through law, as witness the fact that outright pornography is still either banned or regulated.

Today's writers who are concerned with the dilemma between individual freedom and moral standards still quote the words of two nineteenth century English writers who gave us opposing views on the role of law in the enforcement of morality. In *Liberty, Equality, Fraternity,* Judge James Fitzjames Stephen wrote that "the enforcement of morality is regarded as a thing of value, even if immoral acts harm no one directly, or indirectly by weakening the moral cement of society."

In opposition to Stephen's views, and in support of decriminalization, today's writers still echo the words of John Stuart Mill, who wrote in *On Liberty*: "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others." He added that "his [a member of society's] own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right."

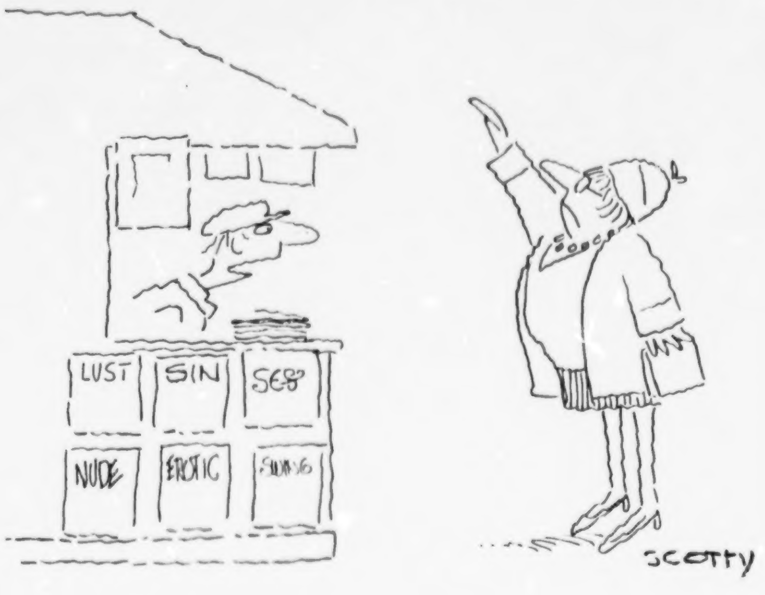
As the debate enters the 1980s, American society will continue to judge whether a particular moral value should have the force of law. It must question if there is harm to others in the particular activity. It must weigh the benefits of regulation against the benefits of decriminalization. Society should also ask if a certain law leads to hypocrisy, as when laws are put on the books and then ignored.

One way to make these questions real for your students is to hold a mock election. Assume that a popular referendum will be held in your state. The voting age is lowered to 14 for this election. The referendum will determine if the state will keep or eliminate penalities for certain morals offenses. In other words, the referendum will determine the role of the law in the enforcement of a standard of conduct.

The ballot reads: "Answer yes or no." In addition, for our purposes, you must explain your vote.

1. The state will repeal all laws penalizing sexual relations between consenting adults.
2. The state will repeal all laws penalizing sexual relations between consenting teenagers.
3. The sale and distribution of pornographic materials will not be regulated in this state.

While we usually do not have an opportunity to vote directly on issues such as those listed in this hypothetical referendum, in the long run the wishes of the majority of society are reflected in the law, particularly when the issues arouse popular interest, as they usually do when morals are at stake. If the past is any guide to the future, your students will be confronted for the rest of their lives with the tough problem of where to draw that line between an individual's privacy and society's moral standard. □

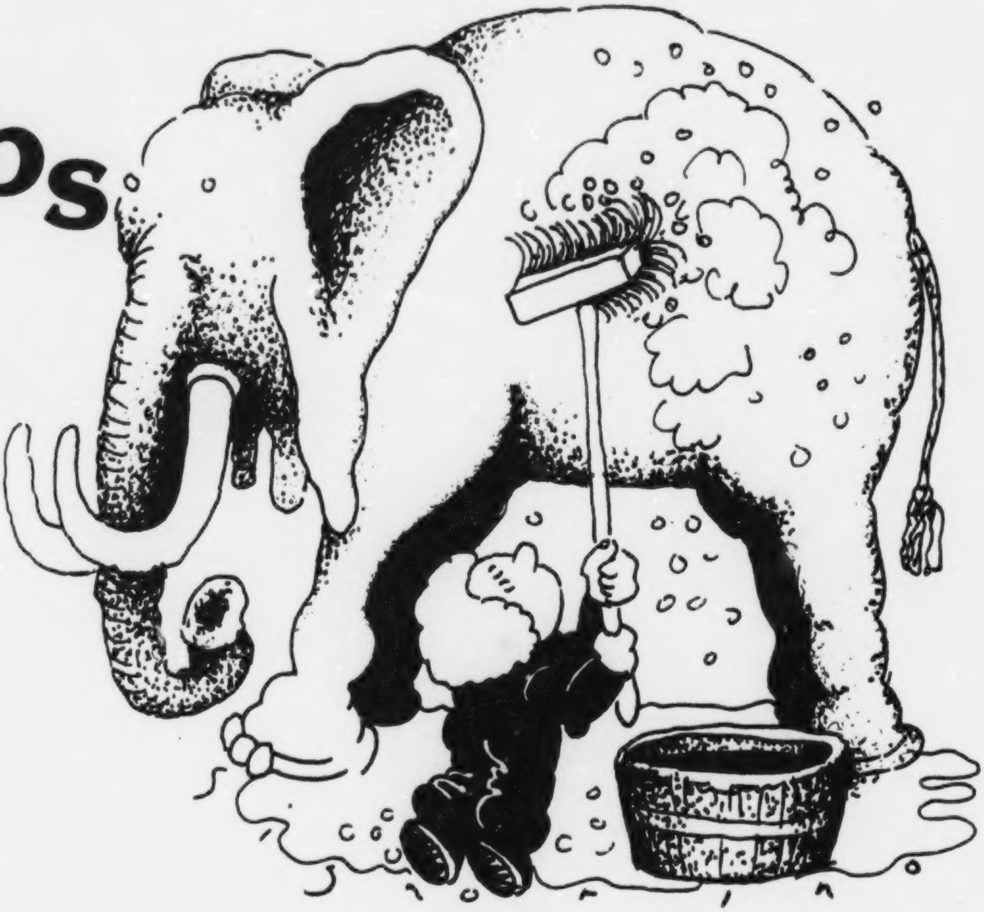


"Look, lady, hold back the tide of pornography at some other newsstand, will ya?"

PRACTICAL LAW

Elizabeth Dreyfuss and Richard D. Ellmers

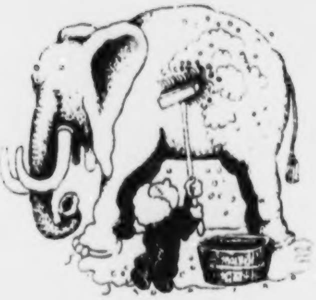
Jobs



Some people think jobs come through Central Casting, that some Merlin steps down to make one child "Donnie" and another "Marie." The reality is that job getting is a skill, and one that most people in our society use many times.

In a popular book, **What Color Is Your Parachute?** (Ten Speed Press, 1979), Richard Bolles suggests that job seekers have to be creative and active. They also have to know something about the laws that govern the workplace.

This special section gives you and your students a run-down on the legal considerations of getting and holding a job. And with so many kids working after school and summers (and the rest thinking about getting a job), that means there's something for everyone here.



How to Avoid Falling Flat on Your Application

An application is the first step toward establishing a job identity with an employer, and it may have other official uses. It gives a picture of job capabilities, qualifications, and experience. It provides a handwriting sample and a test of literacy.

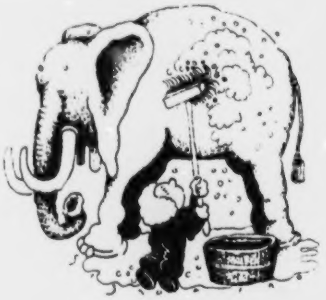
Most likely, your kids will apply for pretty low-level after-school and summer jobs. Companies don't want to spend a lot of time hiring for these jobs, so they often use the application as a test, flunking out people who give "wrong" information.

Unfortunately, the things they look for can hit minority kids particularly hard. If a family moves a lot, the kid's social security number (which shows the state where the card was issued) may not agree with his present address, and so he'll be dropped for an honest inconsistency. If his parents are divorced, he may have used more than one name. If he doesn't list them all, an employer checking his references is apt to assume he's a fraud.

Kids should answer questions honestly and accurately, since false statements are grounds for termination at any time. On applications for government jobs, there are legal sanctions as well for misleading answers. Youngsters should fill the application out by themselves and not give the appearance of needing help to complete the forms.

One more tip. They should make a photocopy of the form or fill out two, keeping one for their records. The interview may be scheduled for some time in the future, and they should review their application before the interview. It is important that they not make statements at the job interview which are inconsistent with the application.

Below, we have created a sample job application, highlighting the legal and other considerations of each question.



Jumping the Interview Hurdle

Before your students interview, they should find out about the job. They can ask questions of guidance counselors, people in the community, and persons already working for the company.

Here are some of the questions they might want to ask *before* the interview: What skills will be necessary? What are the hours of employment? Is this employer fair, honest, well regarded in the community? Will s/he treat them fairly? Is this person complying with the law in: hours, safety on the job, employment of minors, equal employment opportunity, equal pay for equal work? Can this person guarantee them a certain number of hours of employment per week? Under what conditions? Are they going to be sent home because there is nothing to do? Are there circumstances under which they may be suspended from work? What are the rules on attendance and smoking? What problems does the employer have? Shoplifting? Employee theft? Careless work? Lack of supervision?

When they interview, they should ask questions which will help them to decide whether this is a good job for them. Are there opportunities for advancement? If the job is a deadend, will it provide an opportunity for skill development and job experience or making contacts with people in a field of interest?

Of course most of the time they'll be answering questions. That's where the legal considerations pop up. In recent years, many laws have been passed to assure that minorities get a fair shake in hiring.

Companies that want to stay on the right side of the law must be very careful of what they ask. Basically, they should avoid questions which aren't job-related or which might reflect prejudices against minorities.

For example, employers shouldn't ask about whether the applicant has a mortgage or has bought anything on credit. Such questions aren't job-related and discriminate against the poor and minorities.

Employers also shouldn't ask whether the applicant has children, who takes care of the children when they're ill, or whether the applicant is using birth control. All these questions used to be asked mostly of women, reinforcing old stereotypes about the family and about women's unsuitability for a job. (However, employers can ask if an applicant is free to travel, work weekends, etc. And the personnel office will want information about applicants' family *after* they're hired.)

Some other questions might also indicate bias. Generally, interviewers shouldn't ask directly about:

marital status
maiden name
spouse's name
spouse's occupation
spouse's income
car accidents
lawsuits/complaints
length of residence
form of transportation to work
loans
bankruptcy
credit cards
mother's maiden name
citizenship
place of birth
proficiency in speaking/reading/writing English
other languages spoken
church affiliation

What happens when an employer asks these questions? Well, an applicant can go ahead and answer, hoping to get the job. However, the applicant should take

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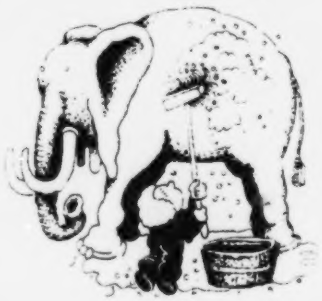
***Richard D. Ellmers** is a third-year Cleveland-Marshall law student who worked as a consultant in personnel security. His work included investigation and screening of job applicants for commercial and corporate clients.*

The Job Application

	APPLICATION FOR EMPLOYMENT	**CONSIDERATIONS**
Name	John Henry Travis (J. H. Travis, John H. Travis, Jr.) or Kyle T. Smith (Kyle Travis)	Include all names which you have used in business or are known by. If recently married, include maiden name.
Social Security Number	297-28-7418	Number reflects the geographical area of its issuance—explain if list of former residences does not include area of issuance.
Address	3065 East 65th Street (This should be your legal residence (domicile). May not be where you customarily sleep. Where possible, it should be: 1) the address where you receive mail 2) location of most of your belongings 3) place where people know you 4) the address of your voter's registration, drivers license, telephone directory.)	This is the first number checked by employer. No other discrepancy on an application is regarded as more indicative of fraudulent or dishonest intent. Lie detection techniques frequently include this item. Provide explanations when necessary. Do not delete a previous address.
Telephone Number	555-8882 (If you don't have a phone, don't list a bar, restaurant, bowling alley as a contact number.)	Another number which reflects a geographical area. It should be consistent with other numbers or explained.
Person to Contact in an Emergency	555-6137	
Employment History	You should have a list of people you have worked for and the dates of employment (paid jobs and volunteer). You should have obtained recommendations in writing from people you have worked for or with. You should have obtained permission to use names of people who know you well enough to recommend you.	Government applications may require that every full time job be listed. Do not delete a previous employer. Explain lapses in employment, even conflicts with supervisors. Deletions and discrepancies may lead to inferences of dishonesty because few employers today initiate criminal charges; instead, they terminate employment.
Other	You might have letters commending you for community, religious, charitable, and athletic activities.	
Education	You should have dates of school attendance written down for quick reference. You might consider having a transcript of your school record if it is an impressive record.	Your school record should include: —grades, attendance accurately recorded. —awards, distinctions, extra curricular activities. —nothing which injures your good name, except results of a due process hearing. —your permission in writing expressly authorizing the release of specific documents. —evidence of your graduation or properly filled out forms of your withdrawal from school.
Criminal Record Or Prior Conviction	If you have a common name, it is a good idea to include your date of birth on the job application even if it is not asked; to be careful about listing present and former addresses; to consistently use your full name for all official purposes. These steps may help to avoid confusing you with someone who has the same name you have and also has a criminal record.	Convictions: —an employer may legitimately inquire as to previous *convictions* for *felonies*. These are a matter of public record. —*arrests* are not a matter of public record and state and local authorities do not regard arrests as an appropriate subject for inquiry. —*misdemeanor* inquiry is permissible for special categories of employment. —*juvenile records;* applicants are not required to provide information about juvenile court actions.
References	Try to select people who have something in common with the employer. You may use juvenile court or probation officers but other suitable references are preferable. Do not use prominent people unless they know you well.	Employers attach greater significance to information from neighbors, associates, former employers.
Miscellaneous Items	Disabilities or medical problems.	Do not mention unless the problem could constitute a safety hazard or injustice to the employer if concealed. Recitation of medical problems on an application may be considered indicative of a negative attitude towards employment.
	Special skills, hobbies and interest.	Cite them if they are related to the employment desired.

note of the offending questions after the interview, in order to have the option of confronting the company later on with the threat of a lawsuit (see pages 56-57).



What to Do About Lie Detector Tests

Lie detection or truth verification interviews may be routine when applying for jobs as police officers, bonded messengers, or bank employees, as well as for positions involving national security. They're also used by all-night retail food stores, retail drug outlets, high volume gas stations, and other companies where low-level employees have access to large amounts of cash or valuables.

Some lie detectors measure pulse and heartbeat; a new variety measures rapid, minute, inaudible variances in the human voice caused by stress. Interviews can be conducted in the employment office. They consist of a series of pre-arranged and tape recorded questions. The responses are graphically charted and analyzed during or immediately after the interview.

Should an applicant undergo such a test or interview?

Some states regulate such testing and some prohibit pre-employment testing altogether. A call to a law library or labor union might enable you to find out what the law is in your state.

There is no federal law on the subject now, but one may be in the works. For the past several congressional sessions, both the Senate and House have been considering bills which would flatly prohibit federal agencies and businesses in interstate commerce from using lie detectors to screen potential employees.

If you are asked to take such a test, remember it is voluntary. You may object to a question, decline to respond, or terminate the interview at any time. However, you naturally run the risk of not getting the job. Perhaps the time to object is before the interview, when the person giving the test goes over the questions with you. (That is done to prevent you from registering stress because you're surprised by a question.) If you can tactfully, even charmingly point out the weakness in a question—"Isn't that rather broad?" or "Is that really related to the job?"—perhaps you can get it dropped.

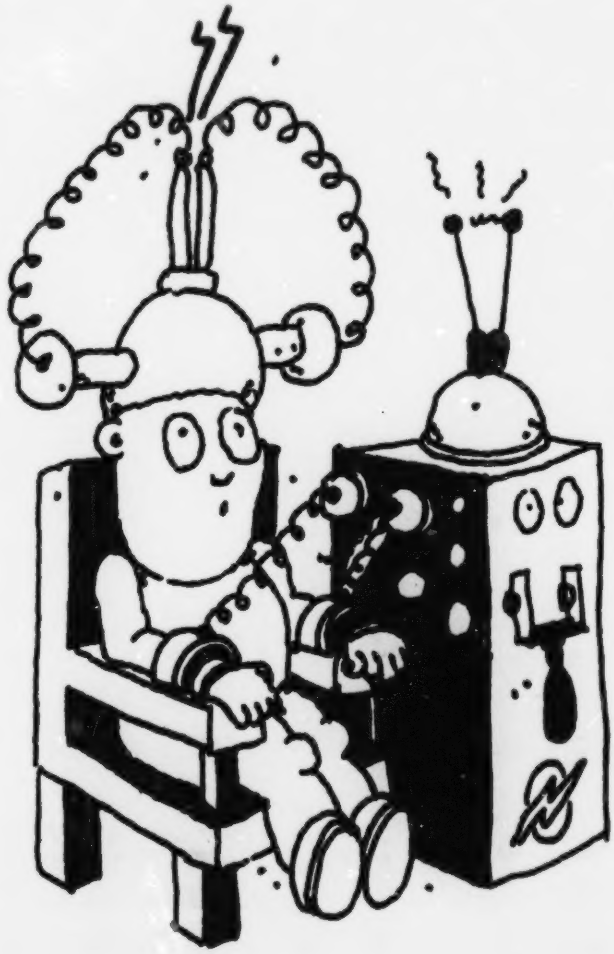
In any event, you should not answer questions which are not job-related, which are of personal or sexual nature, or which require you to make damaging admissions. Remedies for abuses in the lie detection interviews may be available from the U.S. Department of Labor and the Equal Employment Opportunities Commission. Be alert for: discriminatory use based on race, sex, etc., which are prohibited by statute; intimidating or exploratory questions unrelated to job qualifications; and arbitrary dismissals based solely on unfavorable test results.

What to Do When They Make an Offer

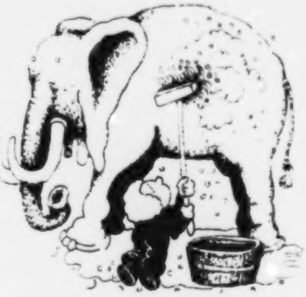
The employer should give job candidates formal notification, usually in writing, of the job description and rate of pay at which they have been accepted. If this is not done, they should ask for clarification.

They should also find out if there is a probationary period with special rules, e.g., regarding tardiness or attendance. A lot of young employees are washed out in the first few weeks because they simply don't know what is required of them.

To avoid hassles later on, newly-hired employees should find out as much about the job as they can before they start. For example, they should write down all orientation information about employer's rules, regulations, benefits, and termina-



tion and promotion procedures. If this information is not available, it's best to ask a supervisor, not a co-worker.



How Law Affects Jobs for Kids

Editor's Note: *We were in the midst of researching this topic ourselves when we ran across this article, which covers the topic handily and is especially appropriate for this section. Not only is its author, Jennifer Mysona, a young person herself (she's a senior at Holy Name Nazareth High School in the Cleveland area), but also this piece is part of her after-school work of selling articles to local newspapers. This one appeared in the* Metro Student News. *It's based on library research and interviews with the school business law teacher and three attorneys.*

Minimum Wage

In 1975, the average worker between 14-19 made $974. In 1976, there were 7,401,000 people between 14-19 earning an average of $1,032.

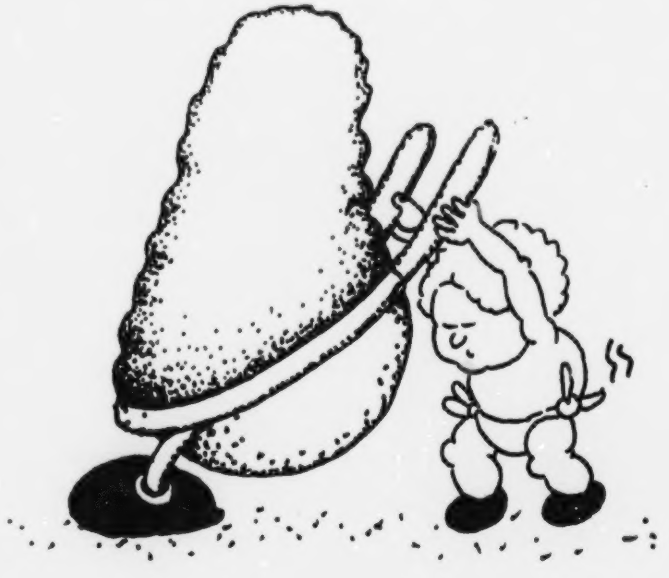
The wages of young workers continue to rise. Labor unions have made some wage increases mandatory. Others come about through the law. As of January 1, 1979, all workers who worked 20 hours per week or more for employers meeting certain government requirements had to be paid $2.90 an hour. On January 1, 1980, minimum wage for workers rises to $3.10 an hour. And, by January 1, 1981, most employers will have to pay their employees a minimum of $3.25 per hour.

Child Labor

The federal government and every state has child labor laws. Although the laws vary, they are based on the principles that early years are better used for education in a free society; that certain heavy work is harmful or dangerous for young bodies; and that child labor at low wages takes jobs from adults.

Agricultural work, domestic work, and such jobs as babysitting, golf caddying, and helping parents in nonhazardous work are usually, but not always, exempted from state child labor laws.

The federal law forbids labor of children under 16, except those engaged in the above-mentioned activities, and those who are actors in motion pictures, theatrical productions, radio, or television. In addition, children between 14 and 16 may be employed in occupations other than mining, manufacturing, and processing, if the employment is confined to periods that will not interfere with their schooling, health, or well-being. Examples of such jobs would be office and clerical work, retail work, running errands, and making deliveries by foot, bicycle, or public transport; garden maintenance without use of power mowers; soda fountain work; and gasoline station work (without use of pits or racks).



Occupations found hazardous by the U.S. Secretary of Labor require employees to be at least 18. This category includes jobs in mining coal and other minerals, logging and lumber production, slaughtering and meat packing, roofing, wrecking, demolition or excavation work. Also barred to minors under 18 are jobs that involve operating power-driven hoists, motor vehicles, and power-driven woodworking, metal forming, punching, and shearing machines. The minor may not work in the manufacture of brick, tile, and like products or of explosives and explosive components, nor may he or she work where exposed to radioactive substances, or where the task involves the use of circular saws, bandsaws, or guillotine shears.

The Law for Kids

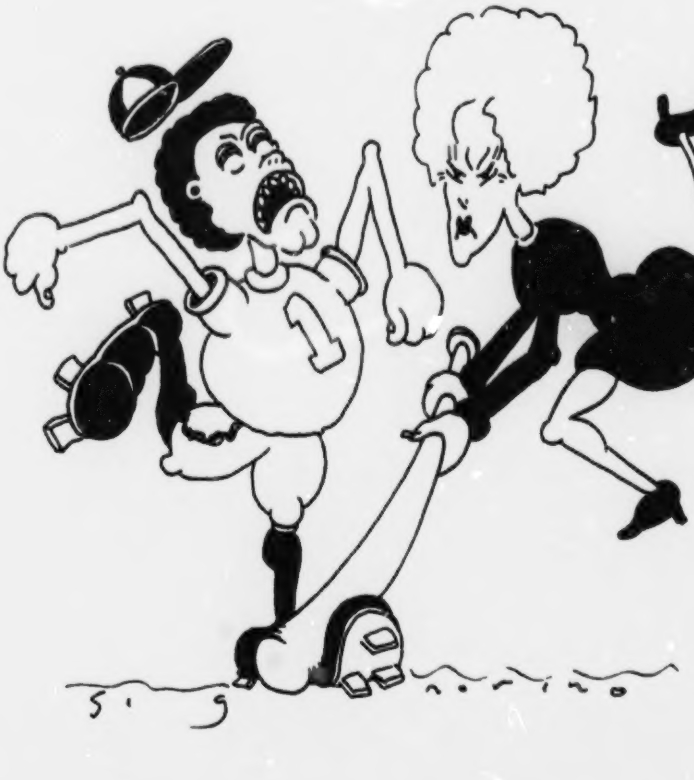
Ohio law requires students between the ages of 6 and 16 to attend school fulltime. All of the states place a limit on the number of hours which a student may work. [Editor's Note: In Ohio, for example, the law specifies that no one under sixteen may be employed more than three hours a day on any school day, more than eighteen hours a week while school is in session, and more than eight hours on a day which is not a school day. Other provisions give minors under sixteen a rest period of at least thirty minutes every five hours and forbid them from working before seven in the morning or nine at night, even on school vacations.]

Ohio requires students under 18 to obtain a work permit. The work permit consists of three parts. The first part has to be filled out by the employer stating and guaranteeing what job the student is performing. The second part is a physician's statement certifying that the employee is in a good physical condition. The final part is filled out and signed by a parent or guardian stating that they are aware of their child's working conditions.

How to Make Equal Opportunity an Ally

The minorities protected by the law today add up to a majority. Females alone constitute more than half the population. Add blacks, Hispanics, Native Americans, and Asian-Americans, and you have close to two-thirds of the people in this country.

The discrimination against them goes back a long way in American history. Their status originated in their economic condition, but their problems did not end there. White men always enjoyed the right to buy, sell, own land; to defend their property in court; to be educated; to be active in government.



These minorities usually had none of these rights. Sheltered from the burdens of democratic society, these minorities were also denied its blessings. They were routinely denied the privileges of white men, and, since they often didn't have the vote, they didn't even know how to read.

What are the effects of these historic differences in status? Does the discrimination practiced against one generation affect the next? Does a past of discrimination condemn some to perpetual inequalities in the future? These are hard questions with which Americans have asked their legislators to deal. Today's laws grow out of our economic history and are aimed at overcoming the effects of it.

To protect the status of freed men after the Civil War, the 13th, 14th and 15th Amendments were added to the Constitution. Nearly 100 years later, Congress passed the Civil Rights Act of 1964. Its Equal Employment Opportunities provisions (Title VII) forbid discrimination in hiring based on race, national origin, or religion. Discrimination on the basis of sex was made illegal by amendment to the Civil Rights Act in 1972. The goal of the law is to make all members of the work force equal in status to the white male, to make qualification to do the job the sole basis for hiring, promotion, and termination.

How do you write laws which prohibit discrimination on the basis of race, religion, and sex and at the same time affirmatively promote the hiring of those who carry the stigma of the past, the badge of previous discrimination? Legislators have done it by creating a right of action for those who receive disparate treatment. The right of action means the minority workers have a right to file a complaint against their employer in a civil action. The Equal Employment Opportunity Act creates a statutory right to seek relief when disparate treatment is shown. There is no need, as the law is presently interpreted, to show intent to discriminate.

The Law in Action

Here is an example inspired by a chapter on this topic in *Legal Systems* by Blair J. Kolasa and Bernadine Meyer (Prentice Hall, Inc., 1978). John and Louise both fill out job applications at Menswork, Inc. John tells Louise that he'd been on a softball team all summer with the director of personnel of Menswork. The personnel director suggested that John apply for a job.

Louise completes her application feeling confident that her better grades and superior job experience will weigh in her favor when the job is awarded. Louise is surprised when she hears that Menswork, Inc. has hired John and turned her down.

She talks among her friends and hears the name of a local group—WHEN (Women Have Employment Needs). She goes to a meeting of WHEN, where she is handed a photocopy of Title VII of the Federal Civil Right Act and her state's Civil Rights Act. The group studies the law and a law student answers questions about it.

With the help of WHEN, Louise figures out that the legislature of her state and the Congress of the United States have passed laws relevant to her and her search for a job. Louise begins to get THE BIG PICTURE. Menswork, Inc. uses a word-of-mouth recruitment system. WHEN members explain to Louise that several cases have condemned word-of-mouth recruitment as a violation of the Equal Employment Opportunities Act.

Can she do anything about the discrimination? A lot depends on statistics. Courts have held that statistics "create an inference of discrimination" if they show a big difference between the racial/ethnic/sexual make-up of the labor market in a community and the people who apply for and get jobs in a particular company. WHEN reminds Louise that Equal Employment Opportunities Act does not require Louise to show the court that Menswork, Inc. intended to discriminate. It is enough for her to show a pattern and practice of discrimination on the part of Menswork, Inc. Then, Menswork will have an opportunity to present its side of the story.

Another piece of the big picture slips into place when Louise learns some new phrases from WHEN members. "Menswork's hiring practices perpetuate past discrimination," she is told. It takes a few days but finally Louise sees clearly that if softball is the way to jobs at Menswork, she is not likely to ever get one. Her qualifications for the job are irrelevant if that's the way it is done.

Louise soon finds out that she can read laws and that they are publicly available at the court house. The Civil Rights Act of her state created a Civil Rights Commission with members appointed by the governor and approved by the Senate. She realizes that there is also a federal Equal Employment Opportunities Commission established under the Civil Rights Act of 1964. However, the state law covers firms under 15 employees, like Menswork; the federal statute does not, so she goes to the State Commission.

Louise files a complaint with the State Civil Rights Commission against Menswork within the 10-day period specified in the statute. She meets with an investigator who determines that Louise's complaint is within the jurisdiction of the Commission. From questioning Louise and looking at the documents and notes which she has organized and dated, the investigator creates a formal complaint which Louise signs. An investigator goes to Menswork to ask about their hiring practices.

The Commission's first efforts are: (1) to determine if it is "probable" that there has been discrimination against Louise and (2) if probable cause is found, to try to informally resolve the problem. Informal resolution fails, however, when Menswork's president stands behind the company's personnel practices. Menswork's records show that the personnel director's softball team has been the method of recruitment in 8 out of 14 hirings. The president refuses to advertise available jobs in newspapers read by women and other minorities, even though he does advertise his products in those newspapers.

The Commission, after determining that there is probable cause to believe Menswork is violating the law and informal methods have failed, issues a formal complaint with a notice of time and place of a hearing. The rules of evidence in Louise's state expressly allow the use of statistical evidence to prove discrimination.

Victory and Aftermath

The softball statistics carry the day for Louise, and the Commission finds that Menswork has violated the state's civil rights law. The Commission issues "findings of fact" and an order requiring Menswork to "cease and desist" from its practices. Menswork is also required to take affirmative action to effectuate the purposes of the act, i.e., advertise jobs in newspapers of general circulation.

What if the Commission had refused to issue a complaint when Louise came to them? The Civil Rights Act in Louise's state empowers the state trial courts to review the commission's decision and either enforce it, modify it, or set it aside.

Louise happily does not have to go this route, but she does take note of one important aspect of administrative law: If she had left out any of her objections to Menswork's hiring practices when she made out her complaint with the Civil Rights Commission, she would be unable to raise those issues in the trial court. Fortunately, she remembered what her high school law teacher always said to her—facts get determined early, and once they are determined, they are not reconsidered. When the umpire says, "It's a strike," it is a strike.

Louise finally sees the big picture. If playing softball is the way to jobs at Menswork, she'll never get one

Personally, Louise feels terrific. Things were so bad in her town that people just assumed "you have to know someone to get a job at Menswork." And she has seen how groups like WHEN work. There, she found support at a time when she felt helpless, support from people who had been through similar situations. They shared information which was helpful in understanding the big picture. Louise learned to use language which effectively described an illegal practice. With the help of WHEN's files, she developed a feeling for what documents and evidence were relevant to her cause.

She also found her state's Civil Rights Commission. At first, they seemed a little rusty—after all, some of them had gotten their jobs by attending fish fries and steer roasts. Lousie felt that the fact that she knew what the law said and could cite specific language in the law by code section helped convince the people at the commission to look into the matter.

Not only did Louise get a job at Menswork but she also received back pay from the day John started work. These were not the things that pleased her most, however. Menswork now has new personnel practices. They include affirmative actions which are taken by the company to advertise jobs without reference to sex. The ads appear in newspapers available to everyone in the community. In addition, Louise is thinking of playing softball. Why not? She knows almost everyone on the team.

Finding the Perfect Plaintiff

Title VII of the Civil Rights Act is given effect by people like Louise. There are no cops to enforce Title VII. Instead, it's done by men and women who, dealing with an employment agency, an employer, or a labor union, know or feel or think they are being passed over for employment in spite of their ability to do the job. Their right of action in court has been created by these recent statutes.

Louise, the plaintiff in our example, started off by filing a complaint in which she alleged facts showing that an employer has violated the law. Frequently, the facts and law shown in a complaint like Louise's could be shown by many others who have been similarly injured by the same employer. Great strides toward equal opportunity in employment are made when these plaintiffs join together and come before the court as a class. Class actions enable a relatively small number of plaintiffs to litigate an issue which, if resolved in their favor, change things for a great number of people. For example, a successful claim for back pay raised by a few against a national corporation can bring relief to thousands of employees.

The coverage of Title VII of the Civil Rights Act is extended each time a representative plaintiff and the class s/he represents prevail in court. Their ability to raise a new issue and gain relief is the way in which past discrimination is overcome by today's plaintiffs. It all rests on the individual on the job or in search of the job. S/he must be alert, be articulate, be sensitive, and s/he must act. Lawyers interested in creating a single job market, where hiring and promotion are based on ability to do the job, call it "the search for the perfect plaintiff." —E D

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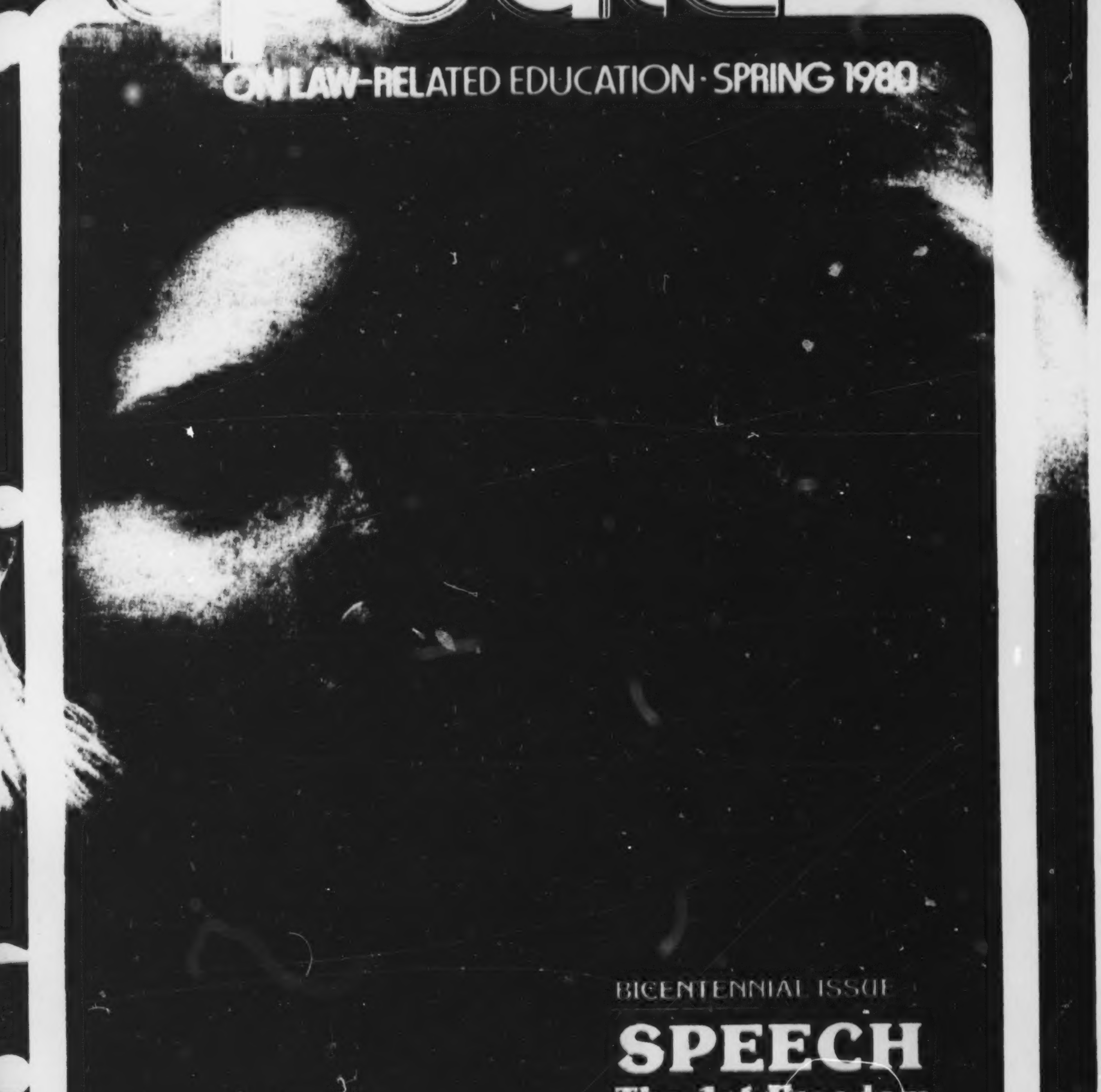

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contents

Volume 4, Number 2 Spring 1980

4
Supreme Court Report
Carving Exceptions out of The First Amendment

8
Classroom Strategies
Teaching About Free Speech for Students

14
Speech: The First Freedom
Who Says Teachers Have Rights

18
Speech: The First Freedom
How Are Communists Treated in France, Germany and the U.S.?

23
Speech: The First Freedom
If Courts Recognized Student Rights

26
Speech: The First Freedom
Freedom Fighters of the 30's

31
Newsclips

34
Law in the 80's
Beyond Racial Discrimination

38
Court Briefs
The Supreme Court Speaks

44
Classroom Strategies
New Directions for Youngsters in Trouble

52
Curriculum Update
Help Is on the Way

59
Practical Law
Booze

Credits
Photos: cover, Paul Conklin; pages 4-5, 34-35, 38-39, John Neubauer; page 8, Black Star/Walker; page 9, Black Star/Margolin ("Save Free Tuition"), Jean-Claude LeJeune ("Revolution"); pages 14-15, Harold M. Lambert; page 23, Black Star; pages 26-27, the Bettman Archive.

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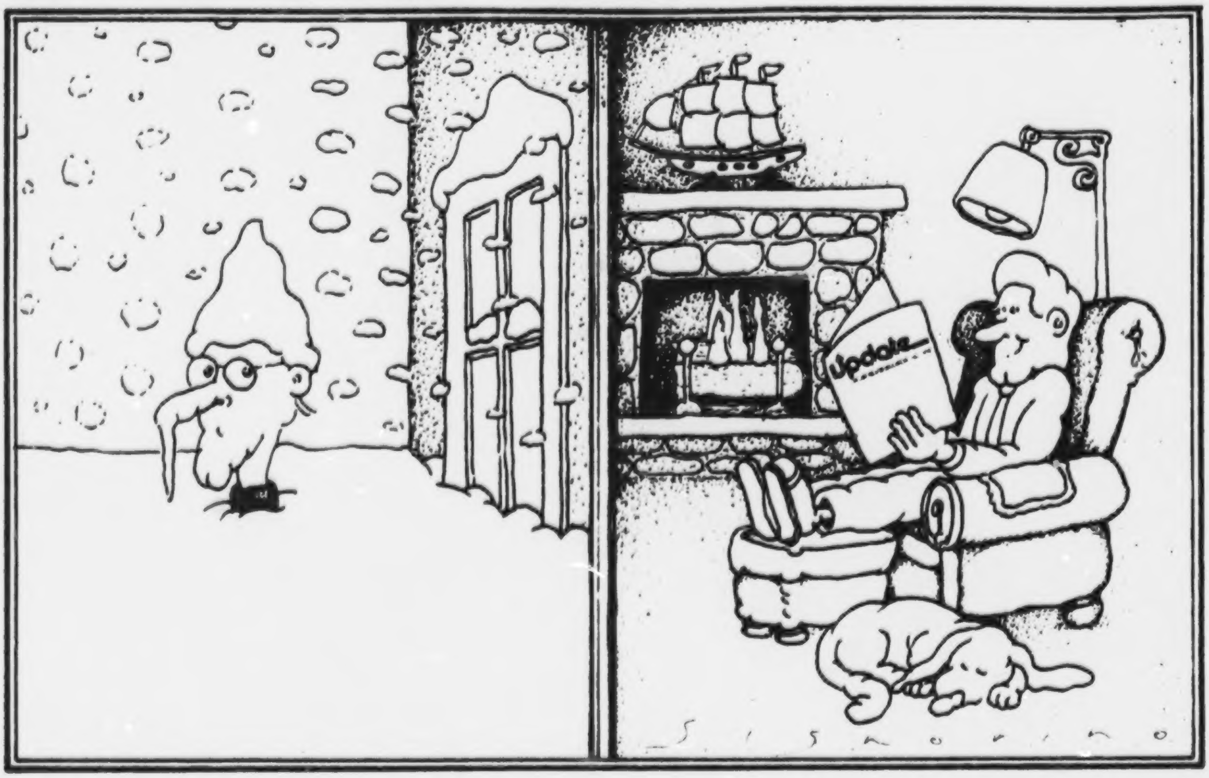

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opening statement

"The most beautiful thing in the world is freedom of speech." Diogenes said that more than 2,000 years ago. It's as true today as it was then.

Freedom of speech is the most basic of our freedoms. It makes it possible for men and women to think, to know, to feel—to be. The Founding Fathers knew how important it was. That's why they put it at the head of the Bill of Rights.

Yet it's a freedom that is much abused. Everyone loves free speech in the abstract. We all want it for ourselves. But how often are we tempted to deny it to others.

In a special section of this issue, **Update** takes a close look at some of the epic free speech confrontations in American life. We look at how free speech has fared in the Supreme Court, and examine it in action in schools, in the political arena, and in America's labor struggles. There's plenty to say on the subject, and, in fact, we had so much material that we were forced to delay the conclusion of our series on minority agendas for the 80s until the next issue.

This issue not only celebrates the First Amendment, but marks the first step in a program to make the Bill of Rights and the Constitution a living reality for more Americans. Thanks to the generosity of the M.D. Anderson Foundation, the American Bar Association's Special Committee on Youth Education for Citizenship has embarked on a three-year program to help school systems throughout the country develop strong educational programs to commemorate the forthcoming bicentennials of the Constitution and the Bill of Rights.

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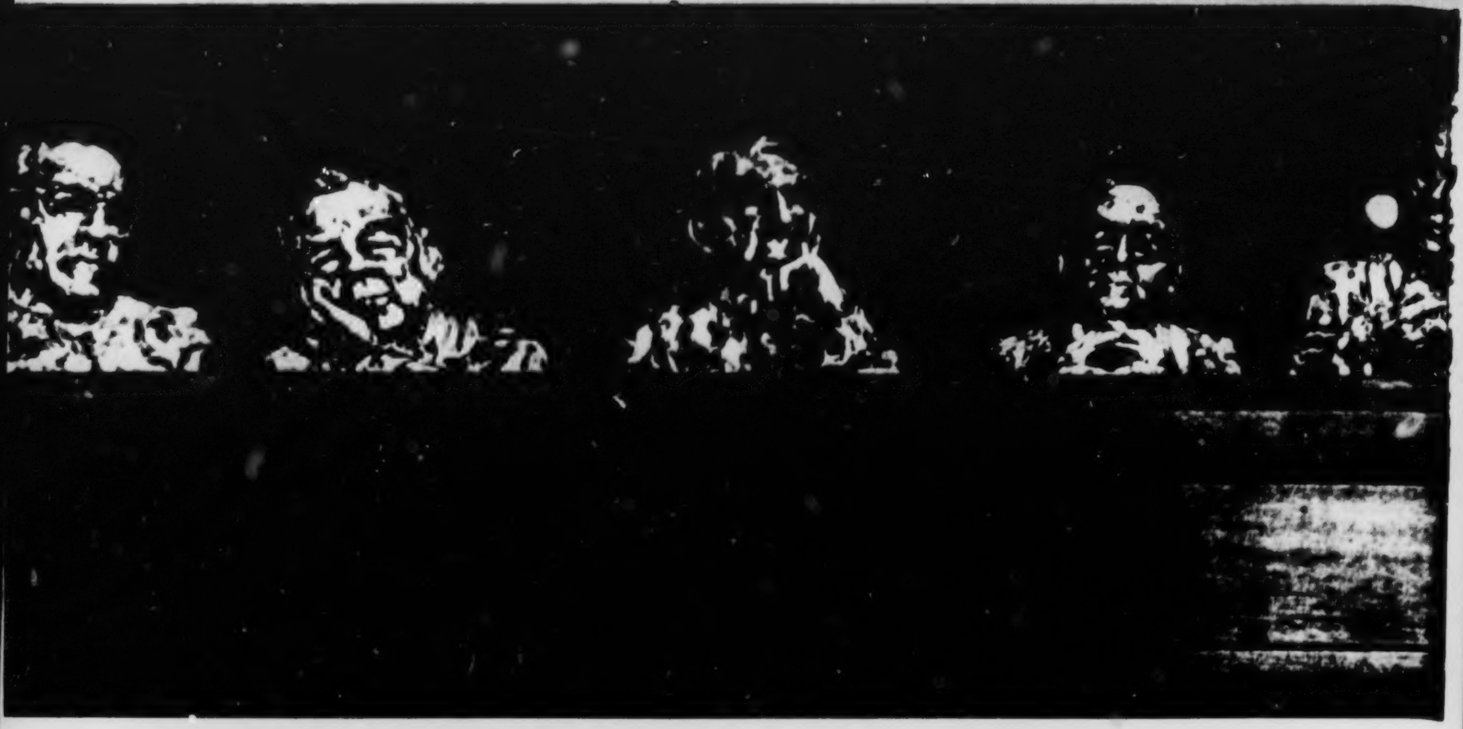

SUPREME COURT REPORT

Carving Exceptions out of the First Amendment

For the Supreme Court, freedom of speech has never been absolute

Franklyn S. Haiman

We Americans see ourselves as a people who cherish personal liberty and our country as a place where all are free to speak whatever thoughts are in their minds. The First Amendment to the U.S. Constitution presumably enshrines these values into fundamental law with its ringing proclamation that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Yet this is a nation which, less than a decade after ratifying the Bill of Rights, could adopt an Alien and Sedition Law which made it illegal to "write, print, utter, or publish . . . any false, scandalous and malicious writing or writings against the government." It is a nation which could send men like Eugene V. Debs to jail for making speeches in opposition to our participation in World War I. And it is a nation which, in recent years, has found its citizens sharply divided over questions such as whether a group of neo-Nazis should have been allowed to demonstrate in Skokie, Illinois; whether comedian George Carlin should have been permitted to broadcast a satiric monologue on "Filthy Words" over the airwaves; and whether the *Progressive* magazine should have been barred from publishing an article entitled, "The H-Bomb Secret: How We Got It, Why We're Telling It."

The fact of the matter is that despite our theoretical commitment to a free and uninhibited marketplace of ideas, we have made all kinds of exceptions to that general principle—some out of clear and compelling necessity, some for dubious reasons, and some with justifications that can be debated persuasively both pro and con. The result is a complex body of law in which legislatures and ultimately the U.S. Supreme Court have attempted, often unpredictably, to establish the boundary lines between speech which is protected by the First Amendment and speech which can be prevented or, if already uttered, punished. Many categories of speech have been placed outside the umbrella of First Amendment protection, encompassing a wide variety of communication behaviors.

Slander and Libel

Historically among the earliest exceptions to freedom of expression was the law of personal slander and libel, making it possible for people to be sued if they uttered or published defamatory remarks about other persons. This body of law was already recognized by the 14 states that comprised the Union when the First Amendment was adopted.

Although the U.S. Supreme Court has

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since drawn some limits on the circumstances in which actions for defamation can be successful, the basic proposition remains that injurious falsehoods about other people are generally unacceptable in the marketplace of ideas. The conditions set by the Supreme Court are (1) that actual harm must be shown before anyone can collect for libel, and (2) that public officials or public figures who have thrust themselves into visible controversy on public issues cannot win libel suits unless they prove that the communicator knew the statements to be false or uttered them in reckless disregard of whether they were true or false (*New York Times v. Sullivan*, 376 U.S. 254, 1964; *Gertz v. Welch*, 418 U.S. 323, 1974; *Time v. Firestone*, 424 U.S. 448, 1976). Public officials and those in the forefront of public controversy have to meet a higher burden of proof, the majority said in the *Sullivan* case, because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement [and] caustic . . . attacks on government and public officials."

The late Supreme Court Justice Hugo Black suggested that the law of libel is an unjustifiable deviation from the philosophy of the First Amendment (*Curtis Publishing Company v. Butts*, 388 U.S. 130, 1967). Those who agree have said that a remedy for defamatory falsehoods more in keeping with the principles of a free society would be giving those who claim to have been defamed a right to reply in the same forum. Let members of the public hear both sides of the story, it is argued, and they can make a judgment for themselves about what to believe, just as they make choices among political candidates and commercial competitors.

The counterargument is made that replies rarely catch up with original allegations, and that when doubts are planted in peoples' minds they can never be completely wiped out. Further, it is said that falsehoods serve no useful purpose in public discourse.

While the Supreme Court has agreed that *calculated* falsehoods have no place in debate on public issues (*Garrison v. Louisiana*, 379 U.S. 64, 1964), it has cautioned of a chilling effect on debate if people fear to voice criticisms of public officials because they can't prove allegations they think are true. That's why the Court has extended the protection of the First Amendment to false statements about public officials and public figures, as long as they are not deliberate or reckless lies.

Invasions of Privacy

Of more recent vintage than the law of defamation are the legally-imposed penalties for circulating information which is truthful but intrudes upon the privacy of other people. The invasion-of-privacy concept as an exception to freedom of speech and of the press had its inception at the turn of this century, and has been the basis of numerous law suits ever since.

Only a handful of those cases has reached the U.S. Supreme Court, however, and thus definitive guidelines are still lacking for many aspects of the problem. The Court *has* ruled that portraying people involved in a newsworthy event in a false light cannot result in an invasion of privacy suit unless, as in libel of public officials, there is proof of knowing or reckless disregard for the truth (*Time v. Hill*, 385 U.S. 374, 1967). The Court has also made clear that news media cannot be barred from, or punished for, disseminating information obtained from open public records, such as the names of rape victims or juvenile offenders (*Cox Broadcasting Company v. Cohn*, 420 U.S. 469, 1975; *Smith v. Daily Mail Publishing Company*, 99 S.Ct. 667, 1979).

But what about embarrassing but truthful material which is not already a matter of public record? The Supreme Court has not yet spoken, and lower court decisions have gone in different directions. The California Supreme Court has upheld invasion-of-privacy judgements for disclosing that a respected woman in the community had once been a prostitute (*Melvin v. Reid*, 397 Pac. 91, 1931) and that a rehabilitated man had been convicted of hijacking a truck 11 years earlier (*Briscoe v. Reader's Digest Association*, 483 P.2d 34, 1971). On the other hand, a U.S. Circuit Court of Appeals decided that the *New Yorker* magazine could not be punished for invasion of privacy because of a story it published about the sorry living conditions of a person who had been a prominent child genius many years earlier. The court found that the material in question was of legitimate newsworthy public interest and thus protected by the First Amendment

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(*Sidis v. F-R Publishing Company*, 113 F.2d 806, 1940).

The speech-versus-privacy issue is one of enormous difficulty for a society such as ours, which places the highest of priorities on both of these values. Surely we must be wary of legislatures and courts deciding for the press and public what is a newsworthy matter. Yet it is obvious that the zeal of some communicators can, if unchecked, cause serious discomfort for those whose private lives are exposed.

Another facet of free speech versus privacy is the so-called captive audience problem. Should communication which would otherwise unquestionably be free be limited when directed to an unconsenting and unwilling audience? The Supreme Court has ruled, for example, that mailers of sexually oriented advertising may be prevented from communicating with persons who do not want to receive such mail (*Rowan v. Post Office Department*, 397 U.S. 728, 1970), and that public transit companies may prohibit display advertising by political candidates on the grounds that such messages may be offensive to their passengers (*Lehman v. Shaker Heights*, 418 U.S. 298, 1974).

On the other hand, the Court has said that people in public places cannot expect to be entirely insulated from unwelcome views, and can "effectively avoid further bombardment of their sensibilities simply by averting their eyes" (*Cohen v. California*, 403 U.S. 15, 1971). The Supreme Court has yet to determine whether billboards and residential picketing can be totally prohibited because they allegedly make captives of their audiences.

The Obscenity Problem

Privacy considerations cause widespread sympathy for people's right to be free from speech they do not want to hear, but what about *consenting* audiences? Can they be prevented from receiving information which those in power deem morally unacceptable?

Controversy has surrounded the suppression of so-called obscene material since the first state laws against it were adopted in the early 19th century. It continues to this day, with the Supreme Court consistently divided 5-4 on the issue. A majority adheres to the view expressed by the Court in 1957 "that obscenity is not within the area of constitutionally protected speech and press" (*Roth v. U.S.*, 354 U.S. 476, 1957), and defines obscene materials as those which "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value" (*Miller v. California*, 413 U.S. 15, 1973).

The minority, apparently influenced by recommendations in 1970 of a presidentially-appointed Commission on Obscenity and Pornography, holds that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually-oriented materials on the basis of their allegedly 'obscene' contents" (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 1973).

Justice Stewart said he knew it when he saw it, and plenty of laypeople have no doubts about what it is, but the Supreme Court just can't define obscenity

Those who believe that obscene communication should be restrained used to claim that such material caused antisocial behavior. But the Commission on Obscenity and Pornography found no convincing evidence that it did, causing a shift to the argument that obscenity is debasing to human values and that it leads, if not directly to perverse behavior, then at least to a weakening of moral fibre which is ultimately conducive to licentious conduct. In making the case for legislative restrictions, comparisons are commonly drawn between the pollution of our air and water and the pollution of our minds.

Opponents reject the analogy between physical and psychological pollution, arguing that the First Amendment forbids government intrusion into the province of the mind. In a free society, consenting adults should be able to see, hear, and read whatever they please. Even if it is conceded that obscenity is valueless and perhaps degrading, there is no sure way to prohibit it without censorship, which inevitably spills over into the domain of useful social criticism. Supreme Court Justice Potter Stewart, who once said of hard-core pornography that "I know it when I see it" (*Jacobellis v. Ohio*, 378 U.S. 184, 1964), has now changed his mind and has joined in the view expressed by Justice William Brennan in 1973 that "our problem in the obscenity area is that we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech . . . none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level" (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 1973).

Despite the staggering problems of drawing a clear and defensible boundary around obscenity and pornography, a five-man majority of the Supreme Court has gone even further, approving of government efforts to regulate the dissemination of material which is admittedly not obscene but is regarded as "indecent" or "For Adults Only." While recognizing that the First Amendment prohibits total suppression of such materials, the Court has allowed cities to use their zoning powers to restrict the location of "adult" theatres and "adult" bookstores (*Young v. American Mini Theatres*, 427 U.S. 50, 1976), and has approved the Federal Communications Commission's efforts to control the times of day at which "indecent" monologues may be aired (*F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 1978). The dissenters described the first of these decisions as "a drastic departure from established principles of First Amendment law" and the second as reflecting "a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the members of this Court, and who do not share their fragile sensibilities."

Smile When You Say That

Fragile sensibilities seem also to be at the core of another exception the Supreme Court has carved out of the First Amendment, this one dating back to 1942. Confronted with the conviction of a Jehovah's Witness for having called a police officer a "damned Fascist" and "a God damned racketeer," the Court unanimously held that freedom of speech does not extend to a class of expression labelled "fighting words"—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (*Chaplinsky v. New Hamp-*

Franklyn S. Haiman is Professor of Communication Studies at Northwestern University and national Secretary of the American Civil Liberties Union. He is the author of numerous books, monographs, and articles on freedom of speech.

shire, 315 U.S. 568, 1942). The theory behind the fighting-words doctrine is that verbal abuse is like knocking the proverbial chip off of someone's shoulder, with the speaker responsible for having sown the seeds of disorder.

The changing cultural scene of the turbulent 1960s, with abusive rhetoric routinely used to express political views, led the Supreme Court to narrow the reach of the fighting-words doctrine. General insults cannot now be punished (*Cohen v. California,* 403 U.S. 15, 1971). Rather, the words must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (*Gooding v. Wilson,* 405 U.S. 518, 1972). This still places the onus for starting a fight, not on the one who throws the first punch, but on the one who hurls the first epithet. However, that seems not to trouble the First Amendment consciousness of Supreme Court justices, who apparently are not persuaded by the aphorism that "sticks and stones will break my bones, but names will never hurt me."

The tendency to hold speakers responsible for the actions of listeners reaches its fullest expression in the law of solicitation, which makes it a crime to urge illegal conduct. Incitement to riot, solicitation to draft evasion, or urging the violent overthrow of the government are all prohibited. The theory seems to be, as Judge Learned Hand once put it, that "words are not only the keys of persuasion but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state" (*Masses Publishing Company v. Patten,* 244 F. 535, 1917).

But the Court's problem is how to draw the line between punishable incitement, on the one hand, and, on the other hand, the advocacy of ideas, which is protected by the First Amendment, even though the ideas might lead others to commit illegal acts. In its first major pronouncement on this issue, the Court said that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree" (*Schenck v. U.S.,* 249 U.S. 47, 1919).

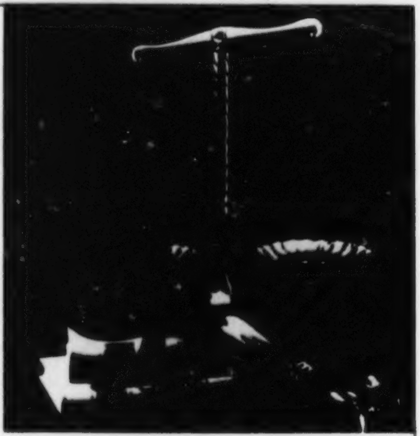
But Justice Oliver Wendell Holmes, who authored that clear-and-present-danger test for the Court, soon came to realize how easily it could be misapplied. He vehemently objected, for example, six years later, when a majority of the Court upheld a man's conviction for disseminating a revolutionary document:

> It was said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, is acted on unless some other belief outweighs it. . . . But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration (*Gitlow v. New York,* 268 U.S. 652, 1925).

During the ensuing three decades, the clear-and-present-danger test was sometimes used to protect free expression and sometimes to suppress it. By 1957 the Supreme Court felt the need to come up with a clarifying formula:

> The essential distinction [between unprotected and protected advocacy] is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something (*Yates v. U.S.,* 354 U.S. 298, 1957).

(Continued on page 46)



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Teaching About Free Speech for Students

One of the big jobs is to convince kids that others have rights, too

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Frank Pawlak

The first day of a new school year finally begins. This year, the teacher will spend the first 10 weeks of her American Government course discussing the practical aspects of the law. She starts by asking what students think a course dealing with the law should involve. One eager student, who shows promise to be the one to count on when discussion lags, says, "My rights."

That's probably typical of what most secondary students would say when asked to describe "what the law means to me." Indeed, the experiences which most teens have had with the American legal system necessarily make them ask what the system can do *for* them as opposed to what the system requires *of* them.

Given the extremely limited material assets of most teens, the intangible assets of freedom of mobility, conduct, and, at the heart of it all, expression mean a lot to them. Consequently, most secondary students are greatly concerned with how the legal system deals with "my right" of free expression.

Yet if instruction about student freedom of speech is to succeed, it must encompass more than simply a laundry list of what is and is not allowed under the law. Students must also become aware of the almost foreign concept of "others' rights" if they're to have a full understanding of freedom of speech.

The teacher must help students realize that the individual right of free expression takes on meaning only when considered against some important social values. Only if students recognize the dynamics of the self/society tension will they be able to decide whether speech is within or outside the protective bounds of the First Amendment.

The lessons which follow include a number of teaching strategies intended to present students' freedom of speech *and* the social milieu surrounding the exercise of that right.

Strategy

1.

An Introduction

Since students have to realize that free speech is derived from the First Amendment, a logical starting place is a discus-

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sion of the Amendment itself and its literal ramifications. The teacher might begin by writing the following part of the First Amendment on the board:

> Congress shall make no law . . . abridging the freedom of speech . . . , or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

A class discussion could then center on fundamental questions concerning the language of the Amendment.

- What do the students think "freedom of speech" means? Is it limited to only speaking or writing? Or is it to be extended to other forms of "expression" as well? If so, which ones?
- What does it mean to "peaceably" assemble? What factors would connote a "nonpeaceable" assembly? In making the distinction between the two, would it help to consider the length of time of the assembly, the amount of people there, the place of assembly, or the actual conduct of the group assembled? If so, why?
- For what "grievances" is the right "to petition the Government for a redress" recognized? Should every complaint which any single individual has be included? Or are the complaints to be broader and more important in scope? If so, what factors would help determine what makes the grievance important?
- When it is said that "Congress shall make no law . . . ," is the right of freedom of speech to be protected only from legislative acts? Or is the protection intended to be extended to actions which any governmental agency may engage in? On the other hand, if no governmental action at all is involved, is the right of freedom of speech still protected?

Protection for Heroes or Troublemakers?

Once students have become familiar with the nuances of the First Amendment, presenting some fact situations might help clarify the problems of providing protection for a student's right to express himself. Have students consider some hypotheticals featuring the fictitious Ray Brown. These are adapted from an exercise created by Norman Gross.

Ray Brown is a senior at Public High School. He is black and has been very active in the Afro-American Society during his years at the school, which is coed and has an evenly balanced racial composition. Ray feels that racism pervades the entire school system and that it is especially evident on the part of the school principal.

Below is a list of possible ways for Ray to express his concern and dissatisfaction. Have each student respond to each suggested alternative. Should Ray Brown's engaging in the activity be protected under the First Amendment? Is it a valid exercise of his right of freedom of speech? What other facts would help you make a decision? (See box for how courts decided somewhat similar cases.)

1) Ray should be allowed to use a sound truck to express his views in front of the school.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree
2) Ray should be allowed to pass out leaflets to students as they enter the school. The leaflets are highly critical of the school's racial policy and call the principal a racist pig.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree
3) When he so demands, Ray should be allowed to bring in a speaker who would talk about racism to the student body at a school assembly.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree
4) Ray should be allowed to place an ad in the school newspaper denouncing the school policies as racist.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree
5) Ray should be allowed to picket against school policies on a public sidewalk near the school.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree
6) Ray should be allowed to wear a black beret to his classes in protest of school policies.
   Strongly Agree Strongly Disagree
   Mildly Agree Mildly Disagree

It Depends on the Courts

The interpretation of the First Amendment—and the degree to which the right to free speech has been deemed absolute—is not in the the least an easily settled question. In puzzling over the Ray Brown hypotheticals, students may find great consolation in the fact that Supreme Court Justices themselves have been unable to reach any sort of historical consensus as to how the Amendment's provisions are to be applied within particular factual contexts. Although somewhat more precise in articulating a standard for evaluating cases involving student expression, the Court generally bases its free speech decisions on one or another or a hybrid of philosophical learnings. The following exercise may help students become more aware of the major constitutional theories developed by the Court over time. These help the Court deal with how the First Amendment ought to be interpreted in light of its importance to American ideals.

After the students have considered Ray's various methods of calling attention to racism, you might begin a discussion on the differences and similarities in their answers. As individuals, and as a class, what patterns emerge from their responses? One way of helping them see patterns is to write the following four categories on the board:

a) *Strict Constructionism.* The First Amendment language is clear. "No law" means that freedom of speech can *never* be impinged.
b) *Preferred Position.* Since the First Amendment is located in a primary position in the Bill of Rights, it follows that the rights protected by it also are to be accorded a primary position. They are to have preference over all other rights which may come into conflict with them.
c) *A Balancing Test.* Freedom of speech is one of a number of values which must be balanced against each other in a particular factual context. The most important of them in a given situation is the one to be afforded primary constitutional protection.
d) *Clear and Present Danger.* Freedom of speech must be regarded as absolute unless there is an obvious and imminent danger to society caused by the speech.

The students might then attempt to place their answers to the Ray Brown exercise within one of these four categories.

You might point out to students that the last two tests involve weighing values against each other. Whether the competing values are free expression v. preservation of society from danger, or free expression v. preservation of social stability, or any of a dozen other possibilities, the resolution of the conflict very often depends on balancing the values and deciding which has priority. This notion of balancing will come up

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again and again in these exercises.

Having completed the categorizing, students can deal with the following questions:

- Which of the four approaches, if any, would be most preferred by Ray Brown? Why? Which of the four approaches, if any, would be most preferred by the administrators of a high school? Why?
- What are the strengths and limitations of each approach?
- What interests do students wish to have protected if their speech is going to be subject to judicial scrutiny? What interests do the administrators of the high school wish to have protected?
- Would it be possible to alternatively use one or another of the approaches, based upon a particular fact situation presented to a court?
- The law does not provide for an exact analysis of cases involving student expression. You can't just program in the facts, push a button, and get the expected answer. Does that pose too many problems? Can there be any real protection of student rights under the circumstances? Or should the law be as flexible as it is in dealing with such cases? Why or why not?

Strategy 2.

Vocal Expression

In dealing with freedom of speech, youngsters must realize that a student's right to free speech is necessarily balanced against the most important community value for the schools—that is, maintaining order and discipline in the learning environment. Perhaps the importance of such a balancing can be most clearly demonstrated by considering the various kinds of vocal expression.

When students initially consider what the First Amendment protections entail they usually think about the obvious—"speech." But courts have held that "expression" covers much more than formal speech. It can, for example, also encompass picketing and various forms of protest demonstrations. The following classroom activities attempt to broaden students' ideas about expression, while giving them more exposure to the self/community interreaction underlying First Amendment principles.

A Case Study

On December 14 and 15, 1970, a number of students at Pennsylvania's Abington High School organized a sit-in in the hallways during and after school. On the second day of the sit-in, the students were cleared from the hallways pursuant to a court injunction. On that same day, the

Key Cases on Student Free Speech

The Ray Brown hypotheticals are loosely based on actual cases addressed by federal courts. The differences between the actual cases and the hypotheticals could result in entirely different outcomes. For example, some of the actual cases deal with universities, while Ray's cases have a high school setting.

And some of the facts in the real cases differ from the facts of the hypos. In case three, for example, Ray seems to be demanding the right to call a school assembly, but in the actual case an organization is requesting that an outside speaker be allowed to speak, with no mention of a school assembly. In case six, the hypo makes no reference to Ray's being disruptive, which is the determining factor in the court's decision.

The importance of all these factors shows the difficulty which courts have had in determining the exact extent to which a student's right to free expression is protected under the First Amendment. They also suggest that students can never be cautioned enough to ask for all the facts before they try to judge a case

1. In *Wisconsin Student Assn. v. Univ. of Wisc. Regents*, 318 F. Supp. 591 (D. Wis. 1970), a federal district court held unconstitutional a state statute forbidding use of sound-amplifying equipment in a state university without the permission of the administration. In general, courts have recognized that amplified sound may intrude on others' rights, and so states may constitutionally try to restrict sound-amplifying equipment and other forms of distruptive expression (see case 5). The problem here was that the statute was overbroad. The court held that the statute failed to set any objective standard to govern the exercise of discretion by the administrative office.
2. In *Scoville v. Board of Education of Joliet*, 425 F.2d 10 (1970), the Seventh Circuit Court of Appeals held that students who sold a literary magazine highly critical of the school could not be expelled, unless it could be shown that publishing the paper and distributing it to students would substantially disrupt or materially interfere with school procedures.
3. In *Stacy v. Williams*, 306 F. Supp. 963 (N. D. Miss., 1969), the U.S. district court held that officials cannot prohibit the voicing of views which the majority of students or teachers find disagreeable, as long as the school is open to other outside speakers. If an organization's request for an outside speaker is denied, there must be a fair and prompt review procedure for challenging the administration's decision.
4. In *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y., 1969), the U.S. district court held that students could not be prevented from placing a paid advertisement opposing the Vietnam War in the school paper, as long as the paper was found to be a forum for the dissemination of ideas.
5. In *Gayned v. City of Rockford*, 408 U.S. 104 (1972), the United States Supreme Court held that an "anti-noise" ordinance that prohibited any demonstrations disturbing classes on or near school grounds was constitutionally valid, since it simply prohibited expression that materially disrupted classwork.
6. In *Hernandez v. School Dist. No. 1, Denver, Colo.*, 315 F. Supp. 289 (D. Colo., 1970), the U.S. district court held that suspending high school students of Mexican descent for wearing black berets was not a violation of their First Amendment rights to free expression, because the students had engaged in disruptive conduct.

students were suspended from school for what the administration deemed "an activity disruptive to the normal operation of the school." The students bought their case to court, claiming that their rights under the First Amendment were violated by the suspension.

In *Gebert v. Hoffman*, 336 F. Supp. 694 (E.D. Pa. 1972), the federal district court held that students must be allowed to express their opinions so long as they do so without materially disrupting school activities or causing substantial disorder. The court further held that a sit-in was not illegal merely because it was in school, because other students gathered to watch, or because school administrators were distracted from their regular duties. The court stated that "courts can only consider the conduct of the demonstrators and not the reaction of the audience."

It found, however, that in this case the demonstrators did substantially interfere with school activities because they were noisy, missed scheduled classes, and required other classes to be relocated. It found that as the demonstration went on, protestors became noisier and the crowds of on-lookers became larger and more vocal. Weighing all the facts, the court concluded that under the circumstances the school was justified in suspending the students.

Have your students recreate the high school sit-in scene in a classroom role-play session. All students, both participants and observers, should be told to be particularly aware of the changing disposition of the protesting students and growing number of onlookers as the role-play develops. After the session has concluded, have students discuss the following questions:

- Why were the students suspended? Should they have been suspended earlier? Later? Not at all? Why or why not?
- Were the student suspensions a direct result of the growing numbers or restlessness of the crowd? If the numerical or character make-up of the crowd were different, would that have had any effect on whether or not the students should have been suspended?
- Do you think the "punishment" assessed against the protesting students was fair? Should they have been given a more or less severe punishment? Would the kind of punishment change your thoughts about whether or not the students' free speech rights were violated?
- What if the school had a regulation that permitted demonstrations on campus but not in the classrooms, building property, or administration areas? Would such an administrative policy of limiting the *place* but not the *right* to protest change any of your answers? (As a matter of fact, in the case of *Sword v. Fox*, 446 F.2d 1091 [4th Cir., 1971], the Fourth Circuit Court of Appeals upheld such a restriction. It emphasized that students do not have an "unlimited right to demonstrate" and schools may place "reasonable, nondiscriminatory" restrictions on demonstrations "to protect safety and property" and "maintain normal operations.")

An "Evaluation" of Rights

Any legal "balancing" of rights in student expression cases—whether engaged in by a judge, a lawyer, or a layman—is extremely difficult and sensitive. This is all the more true because of the importance accorded freedom of expression in a democracy.

Below is a series of 10 questions which might be used to "tip the balancing scales" one way or the other. Which of these questions do students feel should be given greatest consideration? Least consideration? Have the students rank the questions from 1 (most important) to 10 (least important). What other questions should be considered before a student's right to express his views vocally might be interferred with?

- Where is the student speaking?
- Why is the student speaking?
- What is the student speaking about?
- To whom is the student speaking?
- Is the student's delivery calm and reserved or assertive and inciting?
- Are the student's views similar to those of the administrators of the school who have the "power" to "punish" him?
- Is the crowd gathered to listen to the student hostile to him, or is it responsive to what is being said?
- Are the people gathered to listen to the student few or great in number?
- Is the student known to be a "troublemaker?"
- How have similar incidents involving other students been dealt with by the administrators of the school?

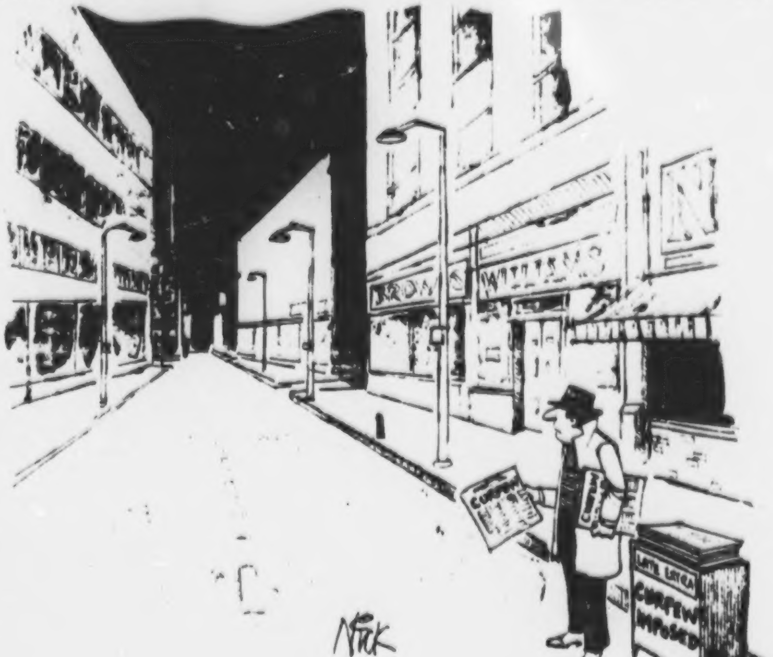
Similarly, have the students consider the following attitudinal continuums.

Emphasis on need to protect educational values	Emphasis on need to protect a student's right to speak

[________________________________]

Emphasis on governmental action as protector of educational values	Emphasis on governmental action as protector of a student's rights to speak

[________________________________]



Emphasis on community action as protector of educational values	Emphasis on community action as protector of a student's right to speak

[______________________________]

Where on the above lines would students place their own personal attitudes toward a student's right to engage in free speech? Where on the lines do they feel our democracy's social values are best reflected?

Strategy
3.
Symbolic Expressions and the Student Standard

The First Amendment's "free speech" clause protects symbolic as well as vocal examples of individual expression. Still, when students seek to express themselves on even a symbolic level, resolving the conflict again focuses on balancing the rights of students against the need for the preservation of institutional order.

The "Controlling" Case

In 1965, when the war in Vietnam escalated in intensity, a group of students in Des Moines, Iowa, began wearing black armbands to school to protest the war. Because they feared disruption, principals of the schools adopted a rule prohibiting the wearing of the armbands. Two students refused to abide by the rule and were eventually suspended. Ask your students:

- Were the students justified in wearing the armbands? Were they justified in wearing the armbands after the principals adopted the prohibitory rule? Why or why not?
- Were the principals justified in adopting the rule? Were they right in thinking that wearing armbands would cause a "disruption" in the schools?
- Were any individual rights of the students violated when they were suspended? In what ways were the students exercising their right to free speech?

The above facts actually arose in the landmark case of *Tinker v. Des Moines,* 393 U.S. 503 (1969). The students and their parents filed suit in a U.S. district court against the school officials. They sought to restrain them from taking disciplinary action, alleging that the antiarmband rule was unconstitutional. The district court upheld the schools' action as "reasonable." The students then appealed to the United States Supreme Court. Discuss the following questions with your students.

- What are the arguments favoring the students' position? What are the arguments favoring the principals' position?
- Should the Supreme Court review the case? Why or why not?
- How should the case be decided? What factors should be taken into consideration before the case is decided?

In actuality, the United States Supreme Court ruled in favor of the students by a 7 to 2 vote. The majority opinion set forth the analytical principles that are now applied to all public school freedom of speech cases. The Court held that:

- A student's First Amendment right of free speech is protected against infringement by a state agency, such as public schools, by the due process clause of the Fourteenth Amendment. (You'll recall that the First Amendment says that *Congress* shall pass no law abridging freedom of speech. For many years, this Amendment and the rest of the Bill of Rights were held to apply only to the federal government. However, in a long series of cases, the Supreme Court has held that many provisions in the Bill of Rights—including the protection of free expression—apply to the states through the Fourteenth Amendment's guarantee that no state shall "deprive any person of life, liberty, or property, without due process of law.")
- Symbolic expressions, such as wearing an armband, are protected by the free speech clause of the First Amendment, as applied to the states through the Fourteenth Amendment.
- But student expression is not absolutely protected by the First Amendment and may, when "materially disruptive," be abridged by school officials. It's this language which sets up

(Continued on page 49)

48 L.W. 4162 !?!

Are you unsure about the meaning of 48 L.W. 4162? You are not alone. Legal citations are unfamiliar to most Americans. However, they're easy to understand and will help you find cases cited in *Update* and other publications.

First a look at Supreme Court citations. The most recent Supreme Court decisions appear weekly in a loose-leaf volume called *United States Law Week*. A citation in this publication looks like the following:

Schaumberg v. Citizens for a Better Environment, 48 L.W. 4162.

Broken down, the citation gives the following information:

(1) the name of the case, with the party appealing to the Supreme Court listed first, and the party against whom the appeal is being brought listed second:

Schaumberg v. Citizens for a Better Environment

(2) the volume and page where it can be found in *United States Law Week:*

48 (volume) L.W. 4162 (page)

Supreme Court cases which are not so recent appear in a publication called the *United States Reports.* A citation for the case of *Kahn v. Shevin* 415 U.S. 351 (1974), for example, tells us the following:

(1) the name of the case, with the party appealing to the Supreme Court listed first, and the party against whom the appeal is being brought listed second:

Kahn v. Shevin

(2) the volume and page where it can be found in *United States Reports:*

416 (volume) U.S. 351 (page)

(3) the year the case was decided:

1974

Citations for decisions of other federal as well as state courts are similarly structured, the only difference being the reporter system in which the case appears.

A law school library is usually the best place to research a case, but most bar associations, county or city governments, and law firms have at least the Supreme Court reporters. Establishing contacts with law librarians, practicing attorneys, and others who have ready access to such resources can thus be especially valuable for you and your students.

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SPEECH: THE FIRST FREEDOM

Who Says Teachers Have Rights

When it comes to the First Amendment, courts are just now emphasizing teachers' rights as much as their responsibilities

Freedom of expression has been celebrated in our nation's classrooms for generations. Youngsters learn that this cherished right is part of the fabric of our great democracy, part of the freedoms which set us unmistakably apart from the totalitarian nations of the world. Yet the very teachers offering these lessons have often felt that they could not speak freely themselves.

For example, Lisa Broido's article in the Fall 1979 *Update* ("Life in a Fishbowl") points out that teachers were often fired 40 or 50 years ago for supporting unpopular political candidates. They could also lose their jobs for belonging to organizations like the Ku Klux Klan, the Nazi Party, or the Communist Party. Criticizing the board of education or the principal would have just been unthinkable for most teachers.

But what about the First Amendment? Doesn't its guarantee of free speech protect teachers? Until the last few decades, the answer in most cases was no.

The issue is not one of simple right and wrong. Courts have held—and continue to hold—that the efficiency of the schools and the educational process itself may be jeopardized by some kinds of speech by teachers. But on the whole courts seem to be giving more and more weight to teachers' right to speak out.

At the height of the McCarthy era, the Supreme Court was confronted with a case of a teacher who argued that his First Amendment rights were limited by a New York law that tried to eliminate members of the Communist Party and other revolutionary groups from the schools. He challenged the law as an abridgement of his right to free speech and assembly, but struck out before a divided Supreme Court.

Can Teachers Belong?

"It is clear," wrote Justice Minton for the majority, that citizens "have the right under our law to assemble, think, and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not." (*Adler v. Board of Education*, 324 U.S. 485, 1952).

The majority reflected a widely held belief that teaching is a very important and sensitive occupation and those who would teach in public schools must submit to thorough scrutiny by school offi-

Louis Fischer

cials. "One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

Among the three dissenting justices, Douglas expressed the strongest objections to the law and to the position of the majority. Condemning the law as one based on the repugnant principle of guilt by association, Douglas feared that teachers will "tend to shrink from any association that stirs controversy. In that manner, freedom of expression will be stifled." Under such laws, "the teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin . . ."

Fifteen years later, the same law was challenged by Harry Keyishian, this time with radically different results. (*Keyishian v. Board of Regents of New York,* 385 U.S. 589, 1967). The majority of the Court, in declaring the law unconstitutional, seems to have been influenced by Douglas's powerful dissent in *Adler.* The Court explicitly recognized that "scholarship cannot flourish in an atmosphere of suspicion or distrust. Teachers and students must remain free to inquire, to study and to evalute, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Keyishian* rejects guilt by association and distinguishes mere membership in a controversial organization from participation in unlawful activities. Belonging is protected, while illegal activity is not, for teachers or anyone else.

While the Constitution does not mention academic freedom as such, in the eyes of the Court such freedom is an aspect of the First Amendment. As the Court expressed it in *Keyishian,* "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . ."

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Thus, it is clear today that the free speech guarantee protects teachers who are members of unpopular, controversial organizations and lawfully participate in their activities. The *Keyishian* case has been cited many times as sound and authoritative law, and its holding will probably not be changed in the foreseeable future. And, although freedom of association is not explicitly mentioned in the Constitution, it has been protected in *Keyishian* and elsewhere as an aspect of freedom of speech.

But it's important to note that these decisions don't let teachers say anything they want in school. Neither the Douglas dissent in *Adler,* nor the majority opinion in *Keyishian,* grants teachers a license to propagandize their students or urge them to join organizations. Teachers' work should meet professional standards and remain relevant to accepted school objectives. However, in his private life, a teacher's social creed and political philosophy are protected. They can't be grounds for disciplinary action.

Douglas's dissent warned that teachers ran the risk of becoming pipelines for safe and sound information and sterile instruction.

But what if the teacher says or writes something that *is* directly related to schooling, something which administrators think does serious harm to the schools? It would seem reasonable to apply Justice Minton's views to such situations and expect teachers not to publicly criticize their own employers. After all, this is a generally accepted position in private business. Why should teachers have rights that most workers don't? However, the Supreme Court has decided that teachers, as public employees, do have some right to speak out on school conditions.

A Letter to the Editor

Marvin Pickering, a high school teacher in Will County, Illinois, was fed up with his superintendent and board of education. He let off steam in a long letter to the editor in the local newspaper. His letter was harshly critical of the superintendent, claiming that the super threatened teachers and that his threats "are insults to voters in a free society." Pickering accused the superintendent of creating a totalitarian atmosphere and charged him and the board with squandering money on sports while neglecting teachers and school maintenance.

The board of education, upset by the letter, charged that Pickering's accusations contained "many untrue and false statements" which directly impugned "the motives, honesty and competence" of the board and administrators. It also said that the letter was "highly disruptive to the discipline of the teachers and morale and harmony among teachers, administrators, Board of Education and residents of this District."

After a hearing, the board fired Pickering. Pickering, convinced that the letter was protected by the First Amendment, took his case to court.

The local court ruled in favor of the board, and the Illinois Supreme Court upheld the ruling. The Illinois high court considered Pickering not as "a mere member of the public," entitled openly to criticize public officials. On the contrary, "he holds a position as teacher and is no more entitled to harm the schools by speech than by incompetency, cruelty, negligence, immorality, or any other conduct for which there may be no legal sanction" (*Pickering v. Board of Education,* 225 N.E. 2d 1, 1967).

The court, in a line of reasoning similar to Justice Minton's, said that by accepting a teaching position Pickering in effect gave up his right to criticize the schools, a right he would have had if he had not been a teacher. It concluded that "a teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against officials is not promoting the interest of his school . . . ." The court considered the board's decision reasonable and not capricious or arbitrary. Therefore, it upheld Pickering's dismissal.

The U.S. Supreme Court, however, disagreed with the board and reversed the dismissal (*Pickering v. Board of Education,* 391 U.S. 563, 1968). In the words of Justice Marshall, who wrote on behalf of the Court, the problem was "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The Court noted that Pickering's letter

criticized the school board spending and the board's ways of telling the public why more funds were needed. His criticism was not directed towards his principal, other teachers, or anyone he'd normally be in contact with in his daily work. Thus, his criticism would not harm any close working relationship necessary for the effective functioning of the schools.

But what of the letter's mistakes? It contained some exaggerations and one false statement, claiming that $50,000 a year was spent to transport athletes when the correct figure was $10,000. These errors didn't trouble the Court. It found that even with the mistakes the letter didn't cause the controversy and conflict feared by the board. Instead, the letter was greeted by public apathy and disbelief.

The Court noted that ,"Free and open debate is vital to informed decision making by the electorate. Teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allocated to the operation of the schools be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. . . ."

Since Pickering's letter did not hurt his teaching or the operation of the school, the Court concluded that unless he made false statements intentionally or recklessly, his "exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

Why is a teacher still liable to be fired for *knowingly* speaking falsehoods? Justice White, in a separate opinion, wrote that, "Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment."

Does the *Pickering* case grant teachers an *absolute* right to speak out on school-related matters? No. Justice Marshall said that some public jobs might require so much confidentiality "that even completely correct public statements might furnish permissible ground for dismissal." Similarly, a close working relationship between a superior and subordinate might be undermined by public criticism. In cases like that, criticism could justify the subordinate being transferred or even fired. Examples of such close relationships might be those between a superintendent and assistant superintendent, a principal and vice-principal, or a superintendent and the board.

Pickering's letter made charges about matters of public record, so members of the public had access to the facts and could check their accuracy. What if a teacher carelessly made false statements that harmed the school, and the general public had no easy access to the facts? The board might require the teacher to verify his facts before publishing them, or, in the absence of such verification, to write a retraction. Gross mistakes in the letter might even raise questions about the teacher's fitness to teach. However, the letter alone would not suffice as evidence of incompetence; other evidence would also have to be presented and examined.

What About Private Criticism?

Bessie Givhan was a junior high school English teacher in racially torn Mississippi. Her district had just been desegregated by court order. The principal of her new school fired her after a series of arguments, claiming that she made "petty and unreasonable demands" in an "insulting," "loud," and "hostile" manner. The lower courts found her demands to be "neither petty nor unreasonable," since they involved charges that the school was discriminating racially. Nonetheless, they ruled against her on the grounds that "privately expressed . . . complaints and opinions to the principal" were not protected by the First Amendment.

A high school teacher blasted his superintendent and the school board in a harsh letter to the editor. Could they fire him?

Givhan fought the decisions all the way up to the U.S. Supreme Court, and the Court wound up agreeing with her. In a case decided last year, it extended the *Pickering* principle to private criticisms (*Givhan v. Western Line Consolidated School District*, 47 L.W. 4102).

Justice Rehnquist, writing for a unanimous Court, indicated that the First Amendment requires the same kind of balancing test for private expression as for public expression. A teacher's freedom of speech is not lost simply because he chooses to "communicate privately with his employer rather than to spread his views before the public." However, the teacher's interests in free speech "must be balanced against the interests of the State, as an employer, in promoting the efficiency" of the public schools. The teacher's criticism, public or private, is not protected if it interferes with the operation of the schools or with his classroom duties.

Justice Rehnquist also indicated that in the case of private communication, the circumstances matter, along with the content. Therefore, the "[M]anner, time and place" of the confrontation may also be considered when balancing rights in conflict.

Looking at all the factors in this case, the Court had no difficulty in deciding that Ms. Givhan's First Amendment rights had priority over the school's concerns. It ruled the school could not fire her for what she said.

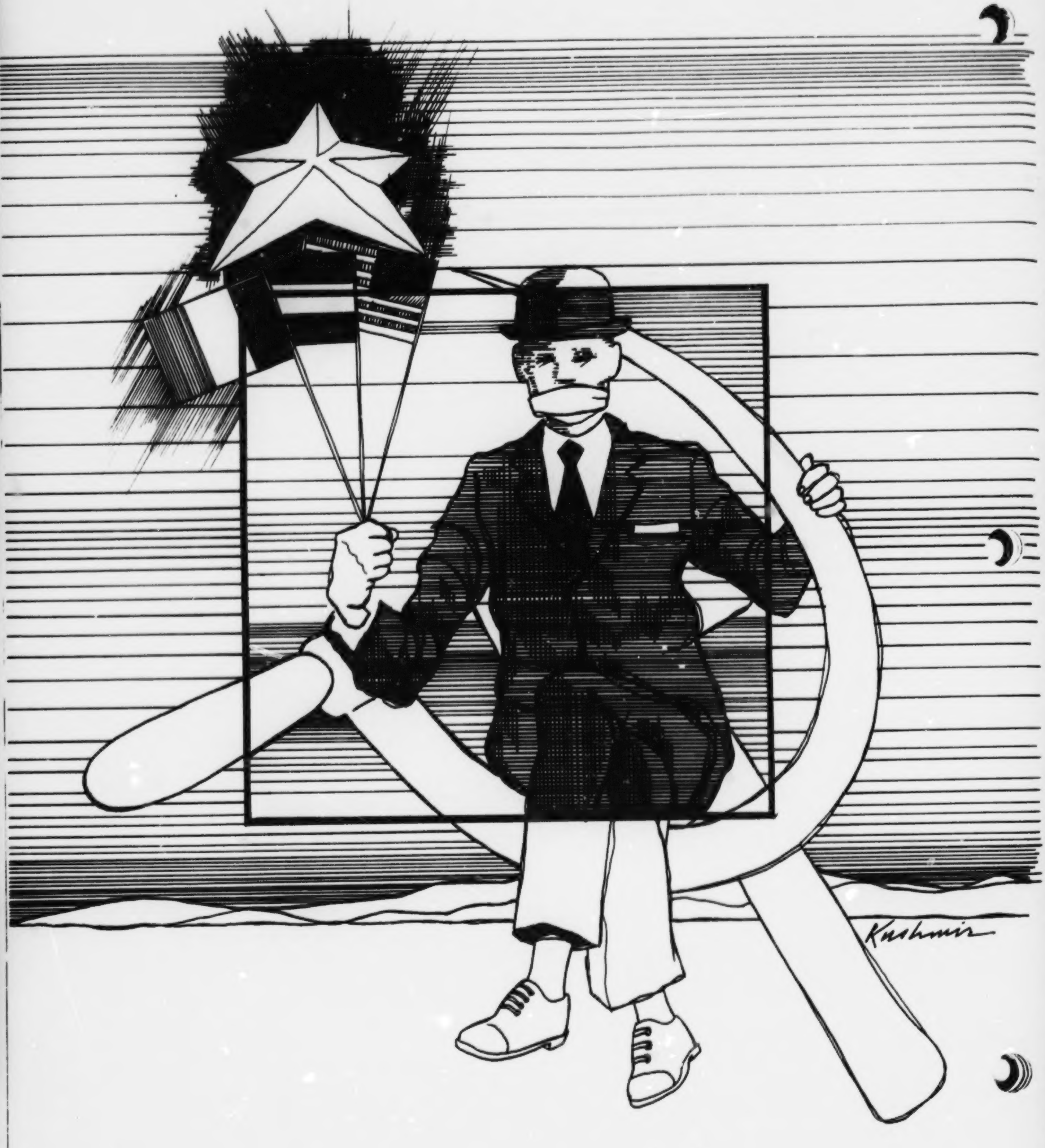
Lower Courts Speak

Adler, Keyishian, Pickering, and *Givhan* are the Supreme Court cases involving teachers' freedom of expression. The first limited teachers' rights, but the more recent ones extended them. Other courts, both state and federal, have also addressed free speech questions raised by teachers. These apply principles announced by the Court, and help clarify the scope and limits of such freedom.

Is criticism of coworkers protected by the First Amendment? The issue was raised in 1973, when a Texas high school teacher's criticism received extensive media coverage. Haywood Lusk told his superintendent both orally and in writing about frequent assaults and robberies on school grounds. He also wrote that the principal and the staff were "mentally and sociologically unqualified to deal with modern, complex, multi-racial student bodies." He repeated the criticism before the Dallas City Council and School Board and claimed that to survive, students in his school "learn to disobey authority, run, lie, cheat, and steal." His criticism and the attendant publicity injured his relationship with his principal and produced some hostile parent reactions. Did the school have the right to dismiss him?

A federal district court ruled that it did not. The court noted that "society's interest in information concerning the operation of its school far outweighs any strain on the teacher-principal relationship." The judge would restrict the teacher's right to free expression only if its exercise "materially and substantially im-

(Continued on page 55)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How Are Communists Treated in France, Germany and the U.S.?

Very differently

The toughest free speech decisions involve drawing a line between using the right legitimately and misusing it. Almost everyone agrees that in a democracy political candidates and their supporters must have the right to speak their minds freely. But what if one of the parties is antidemocratic? What if this party would impose an authoritarian regime if elected, a regime that would abrogate all individual rights—including the right to freedom of speech? Does the right to free speech extend even to those who have contempt for it, even to those who would deny it to others if they had the chance?

These questions have troubled democracies around the world for many years, especially since the early 1920s, when the international Communist movement organized political parties wherever permitted and began to work to achieve political power. Even those countries most profoundly committed to democratic principles haven't agreed on whether or not the Communists are to be accorded the free speech protections given other groups.

Part of the difficulty is that world opinion is divided about the Communists. Are they a Marxist democratic group, or are they totalitarian? The Communists themselves have often proclaimed loudly their allegiance to democratic values. Many national parties around the world have boasted of their independence from Moscow. They've said that their brand of Communism is their own, fully compatible with democratic values and procedures.

On the other hand, anticommunists have pointed out that no national Communist regime is at all democratic. They've also noted that Communist leaders around the world have often seemed to take their orders from abroad. Given this history, they ask how anyone can be expected to believe that the Communists will respect human rights and democratic traditions.

This article compares France, Germany, and the United States; it focuses on how broadly or narrowly each of these three countries interprets and protects the free speech rights of Communists.

The French Response

Of the three countries being compared here, France appears to go the furthest in protecting the right of Communist Party members to express freely their opinions. The Communist Party is not only legal, it is active and successful. It has been among the two or three largest parties in France since the war. In most recent elections, it has garnered between 20 and 25 percent of the vote for members of the National Assembly. In collaboration with the Socialists, the Communists have come within a few hundred thousand votes of electing the president of the republic.

Why this tolerance for the French Communist Party? The reasons are partly legal/constitutional, partly cultural.

Interestingly enough, the French Constitution of 1958 does not specifically include a reference to the rights of individuals. Rather the Preamble to that Constitution says, "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and completed by the Preamble to the Constitution of 1946." This statement indicates the pride of the French people in the Declaration of the Rights of Man of 1789 and the profound influence this Declaration has had in French constitutional law itself and in shaping the constitutional law of other countries.

Indeed it would be difficult to improve on the statements regarding freedom of speech as they appear in Articles 10 and 11 of the Declaration of 1789. Article 10: "No one must be molested for his opinions, including religious ones, provided that the expression of them does not disturb the public order established by law." Article 11: "Free communication of thought and of opinion is one of the most precious rights of man: therefore every citizen may speak, write, and print freely, taking only into account the abuse of this liberty in such cases as are determined by law."

The Constitution of 1958 does demand that all political parties respect the principles of national sovereignty and democracy, but in spite of this restriction Communists are regularly elected to the Naitonal Assembly. The conservatives in France have tried on several occasions to have the Communist Party outlawed but always in vain. The majority opinion seems to be that the Communist Party itself and the means employed by its members to further their ideological goals are not illegal, that is, they do not show disrespect for "national sovereignty and democracy."

And in fact, this view may have some grounding in reality. The Communist Party in France is not made up exclusively of convinced Marxists. It also draws adherents from among those who are radically dissatisfied with the economic and social policies of the French government. Many members are intellectuals, who presumably are among the fiercest defenders of free speech.

Additionally, French Communist leaders have claimed that they don't take orders from abroad. They say their movement is a French reaction to French problems. The French are an intensely nationalistic people, so the success of the Communist Party apparently means that its leaders have convinced a large chunk of the population that the movement is genuinely independent.

France has enjoyed what has been called "a living tradition of freedom." Communists are not banned from civil service positions, Communist members of the National Assembly have full parliamentary immunity, and being a Communist does not exclude a person from holding a university teaching position. Perhaps the best known illustration of the latter is the case of Professor Joliot-Curie. He was, in fact, dismissed from his post as High Commissioner of Atomic Energy for France by reason of his public statements that he accepted without reservation the resolutions of the Congress of the French Communist Party of 1950. When he died, however, in 1958 he was given a national funeral in a solemn ceremony at the Sorbonne.

The German Prohibition

In contrast with France, which provides the greatest free speech protection of the three countries for Communist Party members, Germany provides the least. In fact, Germany provides none at all. On August 17, 1956 the Constitutional Court declared the German Communist Party illegal and unconstitutional.

The Parliamentary Council of West Germany passed the Bonn Constituton or "basic law" on May 8, 1949; it was subsequently approved by the eleven West German state Diets. (Although this document serves as a constituion, it is technically a "basic law," *Grundgesetz*, rather than a "constituion," *Verfassung*, on the theory that a final German Constitution awaits the re-unification of West and East Germany.)

Those who drafted the new German Constitution were convinced that this Constitution should *not* be value free or value neutral. The very purpose of the Constitution was to build a social and democratic state, "a fundamental free democratic order." This principle is incorporated in the Constitution in such a way that is legally unchangeable, beyond the power even of the constituent authority, the people themselves, or their representatives to alter it.

While France gives Communists the same rights as any political party, Germany gives them none at all. Since 1956, the German party has been outlawed.

Several articles of the German Constitution give the reader some insight into the meaning of freedom of speech in a constitution dedicated to building a social and democratic state.

Article 5 (1) reads:

> Everyone has the right to express his opinion freely in speech, writing, and picture and to spread it, and to inform himself unhindered from universally accessible sources. Freedom of the press and freedom of presentation of news through film and broadcast are protected. Censorship does not take place.

(This statement of the principle of freedom of speech, written in 1949 and mentioning film and broadcast, sounds highly contemporary except for one thing. Like Article 10 of the French Declaration of 1789, it uses the masculine pronoun *his* exclusively. A spokesperson for the Women's Liberation Movement would want to do something about that.)

Article 18, with its concept of forfeiture of freedoms, will sound strange to most American readers. It says clearly that those who "combat the fundamental free democratic order" have lost their ability to use democratic freedoms. It reads:

> Whoever abuses the freedom of expression of opinion, in particular freedom of the press . . . to combat the fundamental free democratic order, forfeits this freedom. The forfeiture and its extent will be pronounced by the Federal Constitutional Court.

With reference to Article 18, two things must be pointed out. First, the expression "to combat the fundamental free democratic order" is to be construed literally. To speak out against or to criticize the fundamental free democratic order is not the same as "to combat it." Second, to forfeit freedom of expression means to forfeit the exercise of the right of freedom of expression. It does not mean to forfeit the right itself.

Articles 5 (1) and 18 refer to individuals. Article 21 (1) refers to political parties. It reads:

> The parties participate in forming the political will of the people. They can be freely formed. Their internal structure must correspond to basic democratic principles. They must produce public accounts concerning the sources of their means.

All in all, then, the German Constitution is roughly comparable to its French counterpart in containing both strong guarantees of free speech and provisions designed to ensure that the nation remain democratic. But while the French have apparently decided that the Communist Party does not pose a serious enough threat to democracy to justify limiting its free speech rights, the Germans have come to exactly the opposite conclusion.

The German Federal Constitutional Court held that the German Communist Party was actively militant in its program and combative in its attitude toward the existing democratic order, and was therefore unconstitutional. The party was dissolved and its funds confiscated. The German Court held further—and this will be of interest when we examine the position taken by the United States Supreme Court—that it was unnecessary to show either that any specific criminal action against the security of the state had been taken or that there

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was a realistic chance of the party's fulfilling its objectives in the foreseeable future.

The U.S. Compromise

We have seen that in France members of the Communist Party have virtually unlimited freedom of speech, while in Germany the Communist Party is illegal. The United States draws a distinction between speaking favorably about Communism in the abstract and acting to overthrow the United States government. This puts the United States at something of a midpoint between the French position and the German.

The American Communist Party was founded in 1919, at a time when public opinion against "Bolsheviks" was running high. In the years immediately after World War I, 17 states passed criminal syndicalism laws, aimed at discouraging radical political action. In 1919 alone, 26 states passed laws against displaying red flags. State legislatures and Congress were filled with investigations of the "red menace."

Though it did not always face such overt hostility, the party remained tiny and never found favor with the voters. Communist candidates rarely received more than a small fraction of the vote. In many elections, there simply were no Communist candidates.

Nonetheless, when the international situation heated up before World War II, and when the cold war began after the war, Congress responded with tough laws aimed specifically at the American Communist Party. For example, the Smith Act of 1940 was America's third sedition law. It made advocating forceful overthrow of the government a crime. Also outlawed was becoming a member of any group which advocated the overthrow of any government in the United States by force or violence.

Critics pointed out that the act didn't punish overthrow of the government, or even attempts to do so. Rather, it punished *advocating* or *teaching* that overthrowing the government was desirable. Didn't that conflict with the Constitution's free speech guarantees?

Freedom of speech is guaranteed by the First Amendment to the Constitution. This form of "guarantee" is in the English tradition of respect for human rights that goes back to the Magna Carta and beyond. Indeed, the Magna Carta to which King John affixed his seal at Runnymede in 1215 contains no reference to freedom of speech among its 63 Articles. Freedom of speech, at least for the Barons, was already taken for granted.

The Supreme Court of the United States has had occasion to rule on many different aspects of freedom of speech, including the question of whether the First Amendment protected the freedom of Communist Party members to advocate the violent overthrow of the United States government. In deciding freedom of speech issues, the Court for many years followed the clear-and-present-danger guideline laid down by Justice Holmes in *Schenck v. United States* in 1919 (249 U.S. 47); more recently the Court has tended to follow the "balancing of interests" guideline laid down by Justice Frankfurter in *Dennis v. United States* in 1951 (341 U.S. 494).

Out of a veritable jungle of distinctions within distinctions, one principle emerges. U.S. Communists can advocate Marxism as an abstract doctrine, not as a revolutionary call to action.

The clear-and-present-danger guideline would mean that members of the Communist Party are afforded the full protection of the Constitution and that they enjoy freedom of speech, except in cases where the exercise of such freedom presented both a clear and a present danger to the United States. Thus, if the danger to the United States were clear but not immediate, freedom of speech would be protected.

The "balancing of interests" guideline means, according to Justice Frankfurter, that the demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the conflicting interests, rather than by following dogmatic guidelines. Frankfurter insisted that the clear-and-present-danger guideline was too rigid. Striking the balance between the demands of free speech in a democratic society and the demands of national security called for reasonableness in examining the circumstances of individual cases.

Reasonableness, in fact, is the basis for both the clear-and-present-danger guideline and for the "balancing of interests" guideline, and many of us will see very little difference between the two. Frankfurter's real point was that the "balancing of interests" is more a legislative than a judicial task. He thought that the role of the Supreme Court is to judge whether the judgment of the legislature has been fair and reasonable.

Any reading of the federal legislation in the United States attempting to deal with striking the balance between internal security and freedom of speech reveals just how perplexing the matter is. And reading even the major Supreme Court cases on the same issue is like hacking one's way through a veritable jungle of distinctions within distinctions and subtleties within subtleties.

However, one basic distinction does emerge. It is our major means of striking the balance between freedom of speech, on the one hand, and, on the other, the security risk from Communist Party members. Advocating Communism in the abstract or as a system of thought falls under the protection of the Constitution. But advocating revolutionary *action* to bring about a Communist regime in the United States does not. Justice Harlan, in delivering the opinion of the Court in *Yates v. United States* in 1957, said: "The essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely to believe in something" (354 U.S. 298).

Yates reversed the conviction of five Communists, but the doctrine announced there was sometimes sufficient to convict. For example, in *Scales v. United States* in 1961, the Court by a 5-4 decision upheld the conviction of Scales as a Communist who advocated revolutionary action and forcible overthrow, rather than merely advocating an abstract revolutionary doctrine (367 U.S. 290). In the words of the Court, Scales' conviction did not raise First Amendment problems because he was a "knowing," "active" member of a subversive group and personally had a "specific intent to bring about violent overthrow."

So, in the United States, Communists have the right to express some ideas but not others. No federal legislation has succeeded in destroying the party, not even the 1950 McCarren Act (requiring "Communist-action" and "Communist-front" organizations to register with the Attorney General) and the 1954 Communist Control Act (making membership in the party subject to the penalties of the McCarren Act). The party has not even been destroyed by heavy infiltration by federal agents. (In fact, some have suggested that the dues of undercover FBI agents account for most of the party's funds.)

All in all, then, the party has not been outlawed directly, as in Germany, but it has been far more circumscribed than the French party. What each person will have to decide for himself, of course, is whether the government has succeeded in preventing subversion while at the same time preserving the free speech rights of Americans who happen to be party members.

Looking at the Broader Picture

Free speech for Communists is but one of many freedom of expression issues. I chose it because it highlights one of the perennial puzzlers of democracy—whether or not to accord free expression to a group which may scorn democracy—but other aspects of free speech give a somewhat different picture of how these three countries deal with expression in a democratic society.

If the topic is Communism, the French seem by far the most receptive to free and full expression. But in other ways, American practice permits more freedom of expression than French practice. For example, in France radio and television has been a government monopoly since the beginning of World War II. Though strict rules govern the amount of time granted to candidates and guarantee fairness during campaigns, Frenchmen have complained for years that news bulletins put the case for the government in power.

Another difference between French and American practice deals with public demonstrations. France's history is replete with examples of street demonstrations which erupted into revolutions and toppled governments. As a result, all public demonstrations must be authorized by the government. It's often been suggested that the government in power may be more apt to withhold permission than an American government would be.

A third difference has to do with offensive remarks against the president of the republic. French law makes it illegal to utter abusive or contemptuous words about the president. For example, someone shouting "Resign! Down with the president!" during a motorcade would probably be convicted of violating the law. This attempt to secure the dignity of the head of state has no parallel in our society, but it is one the French take seriously. The law was invoked no fewer than 300 times in the 12 years of General De Gaulle's presidency.

The point is not, then, that any country has a patent on freedom of expression, but that each democracy shapes its laws according to its own lights and applies great principles differently. As Sybille Bedford has said in *Faces of Justice,*

> The law . . . is an essential element in a country's life. It runs through everything: it is part of the pattern, like the architecture and the art and the look of the cultivated countryside. It shapes, and expresses, a country's mode of thought, its political concepts and realities, its conduct. It all hangs together whether the people themselves wish to acknowledge it or not. . . .

Each country carries the burden and the glory of its own history. Probably the German nightmare of Nazism has contributed to a horror of dictatorship and influenced the decision to ban the Communist Party. The French have suffered no comparable dictatorship, which perhaps helps account for their decision to permit a party which may be antidemocratic; but ,as we have seen, their history of rebellion makes them fearful of demonstrations which may get out of hand.

And America? How can we account for our compromises regarding free speech for Communists and our vigor to defend free speech in other situations? That is a worthy subject for any law studies program. □

Radicals and Free Speech

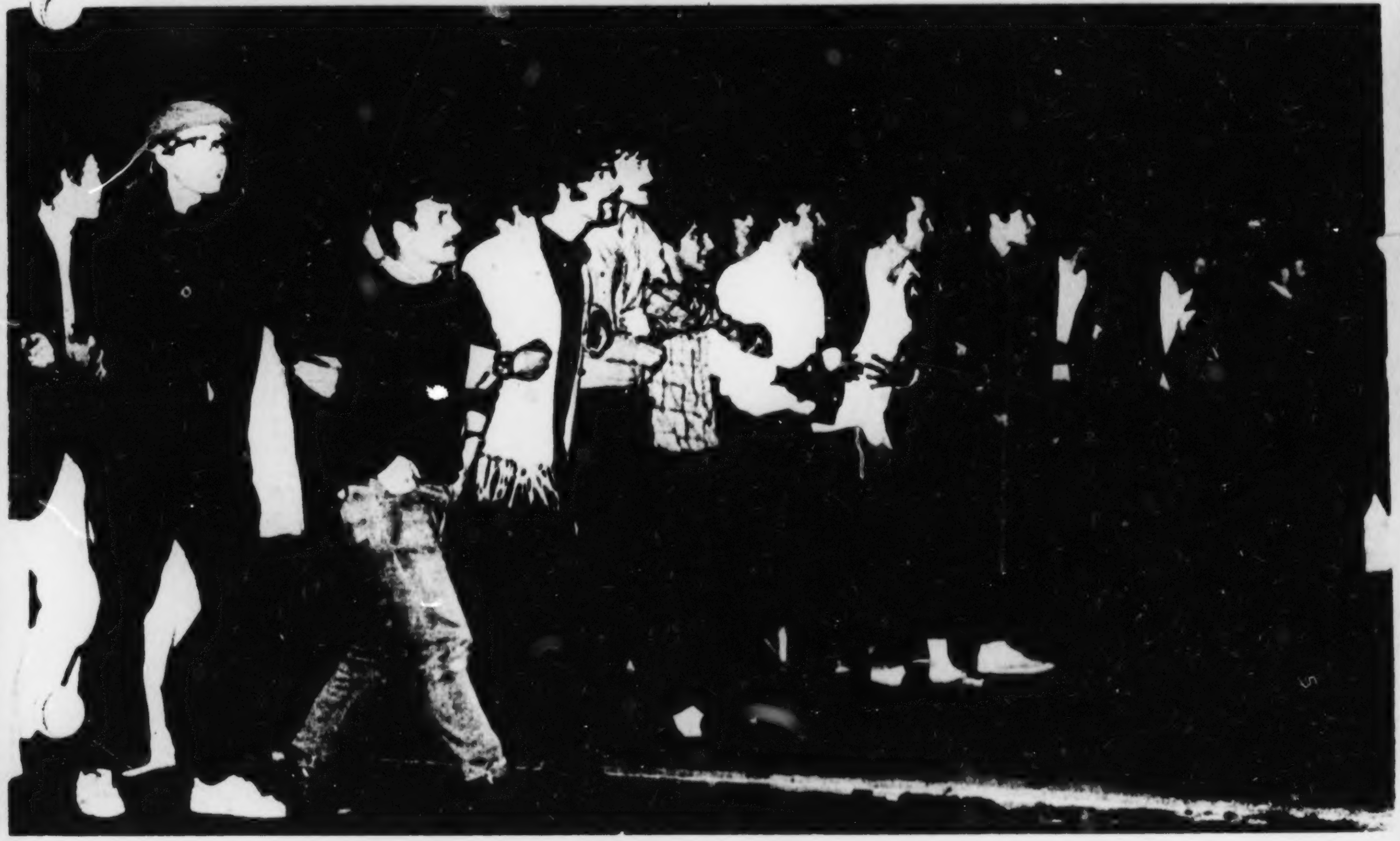
The story of the International Workers of the World, a radical union involved in many free speech disputes in the early years of the century, is told in Joseph Conlin's *Bread and Roses Too: Studies of the Wobblies* (Westport: Greenwood, 1969) and Patrick Renshaw's *The Wobblies* (Garden City: Doubleday, 1967). Robert Mur- *Hysteria, 1919-1920* (New York: McGraw-Hill, 1964) covers an antiradical fervor that affected many groups. Edwin P. Hoyt's *The Palmer Raids, 1919-1920: An Attempt to Suppress Dissent* (New York: The Seabury Press) looks at the period for young adult readers.

For the cold war in the U.S. see Alan Barth's *The Loyalty of Free Men* (New York: Viking Press, 1951), Frank J. Donner's *The Un-Americans* (New York: Ballantine Books, 1961), Gordon Kahn's *Hollywood on Trial: The Story of the 10 Who Were Indicted* (New York: Boni and Gaer, 1948), Robert M. MacIver's *Academic Freedom in Our Time* (New York: Columbia University Press, 1955), John O'Brian's *National Security and Individual Freedom* (Cambridge: Harvard University Press, 1955), and Telford Taylor's *Grand Inquest: The Story of Congressional Investigations* (New York: Simon and Schuster, 1955).

"Money, shmoney—hand over the groceries!"

SPEECH: THE FIRST FREEDOM

David Schimmel



Eleven years ago, a High Court dissenter warned of chaos

If Courts Recognized Student Rights

Have his warnings come true?

By the 1960s, Justice Hugo Black had developed a reputation as one of the Supreme Court's strongest defenders of free speech. He had opposed government censorship in every form and strongly defended the rights of extremist groups to express their views freely. First Amendment freedoms, he wrote, "must be accorded to the ideas we hate, or sooner or later they will be denied to the ideas we cherish" (*Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 1961).

Although he always believed in keeping the *content* of speech free from government regulation, he never believed that people had a right to speak anywhere they wanted. And to Justice Black, schools were a place for learning, not speech making. Therefore, when the majority of the Court voted in the *Tinker* case to protect the right of a student to wear a black armband to class in defiance of school rules, Black was deeply disturbed (*Tinker v. Des Moines Independent School District*, 393 U.S. 503, 1969). As a result, he wrote a pessimistic dissenting opinion. In contrast to Justice Fortas's majority opinion, which viewed *Tinker* as a narrow and limited decision, Black predicted it would have a fundamental and far-reaching impact.

Now that 10 years have passed, we can ask what the aftermath of *Tinker* has been. Have Black's dire predictions been borne out? What has the decision done to (or for) the schools, and what are its educational implications for the coming decade?

The familiar facts of the case can be outlined briefly. In 1965, at a time when Americans were bitterly divided over the war in Vietnam, a group of students from Des Moines, Iowa, wore black armbands to school as a protest against the war. Because they feared disruption, the principals adopted a rule prohibiting the armbands. Although they knew about the prohibition, John and Mary Beth Tinker deliberately wore armbands to school and were suspended.

As a result, the students and their par-

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ents went to court to have the antiarmband rule declared unconstitutional. The district court upheld the schools' action as "reasonable," the appeals court was divided, and the U.S. Supreme Court ruled in favor of the Tinkers. Writing on behalf of the Court, Justice Fortas held that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This, he explained, had been the unmistakable holding of the Court for over 50 years.

Radical Change

Justice Black viewed *Tinker* very differently. He saw it as a fundamental break with the past, as a dangerous precedent which would encourage a flood of litigation by students objecting to school rules.

Black strongly denied the majority's claim that the Court had long held that students take their freedom of speech with them to school. The truth, he asserted, was just the opposite: courts had consistently upheld the authority of school officials to enforce rules restricting student expression. The Court, he wrote, never held that a person has a "constitutional right to say what he pleases, where he pleases, and when he pleases." Now, under *Tinker*, even reasonable restrictions could be declared unconstitutional by the courts. Now pupils "from kindergarten through high school" would have a right to express their political views during school hours and in class.

The decision, he predicted, would turn students loose "with lawsuits for damages and injunctions" against their teachers and school officials. It would encourage students to challenge elected school officials in court and believe "it is their right to control the schools rather than the right of the States."

Fortas responded that the decision broke no new ground but only applied the decisions of the past to a specific, peaceful protest involving "direct, primary First Amendment rights." The holding was narrow and limited. It did not involve the school's authority to regulate "deportment," demonstrations, disruptive action, or dress and grooming. Most important, it did not involve a situation in which school authorities might have "forecast substantial disruption of, or material interference with school activities."

Bad for Education and Citizenship

Black's second concern was that the decision would have a negative impact on education in general and on citizenship training in particular. The decision would encourage students to believe that they were sent to school to broadcast their views on politics and other subjects, "to educate and inform the public."

Black sharply disagreed with this notion. Public schools, he wrote, "are operated to give students an opportunity to learn, not to talk politics by actual speech or 'symbolic' speech." In fact, the original idea of schooling, which Black did not believe was out of date, "was that children had not yet reached the point of experience and wisdom to teach all their elders . . . that taxpayers send children to school on the premise that at their age they need to learn[,] not teach."

Black said that the case broke fundamentally with the past, and would encourage a flood of litigation, undermine authority, and destroy good citizenship education

In the past, Justice Black noted, discipline was a vital part of citizenship education, and schools "undoubtedly contributed . . . to making us a more law-abiding people." Today, he wrote, school discipline is still "an integral and important part of training our children to be good citizens—to be better citizens." But this training is seriously undermined when courts allow students, as in this case, to "crisply and summarily refuse to obey a school order designed to give pupils who want to learn the opportunity to do so."

Justice Fortas had a dramatically different view of the way schools should prepare students to be good citizens. First, they should practice the Bill of Rights. Since schools are educating students for citizenship, they must scrupulously protect the constitutional rights of individuals; otherwise, they will "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Second, Fortas argued that there is no trouble-free way to prepare students to be effective citizens in a democracy. Allowing open disagreement in schools may be uncomfortable and risky, but the risk is worth it. In defining constitutional freedom in the public schools, he wrote:

> [Fear of] disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. . . . Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

Will Undermine Authority

Black's third prediction was that the *Tinker* decision would encourage permissiveness, undermine authority, and transfer control of the schools from educators to students. In this case, the majority ruled that protesting students had the right to disobey a reasonable school order. By allowing students to defy school officials, Black believed that *Tinker* would begin "a new revolutionary era of permissiveness" fostered by the judiciary. After this holding, he wrote, some students "in all schools will be ready, able, and willing to defy their teachers on practically all orders." As a result of this case, all the public schools will be subject "to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." In fact, Black wrote, *Tinker* might compel "the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."

In contrast, Justice Fortas saw nothing revolutionary or permissive about his decision; nor did he believe it would lead to disruption. On the contrary, the majority indicated that disruption and disorder were not protected. Thus Fortas ex-

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plained that student conduct, in or out of class, which "for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the Constitutional guarantee of freedom of speech."

Prediction and Experience

Ten years of experience with the *Tinker* decision support some of Justice Black's predictions but not others. I think, for example, that Black's first prediction was right. *Tinker* did have a profound effect on the number and scope of students' rights cases and on the standards for judging them.

Before *Tinker*, courts used the "reasonableness" test to determine whether a school rule restricting student freedom was constitutional. Under this test, school officials had broad discretion, and all kinds of administrative restrictions were upheld if there was any reasonable purpose, such as maintaining discipline. Under this test, a district court judge found the Des Moines antiarmband rule valid, and most other state and federal judges probably would have done the same.

Tinker abolished this approach. Rules that restricted a student's constitutional rights could no longer be upheld by simply showing a rational connection between the rule and the need for discipline or order.

Tinker established a much higher test. To justify school rules that restrict students' freedom of expression, schools must now present *evidence* (not simply reasons, professional intuition, or honest concerns) that the rules are necessary to prevent disruption—not some disruption, but "material and substantial" disruption. Thus *Tinker* changed the basic standard for judging school policies that restricted student rights. Furthermore, the burden was now on school officials to justify such restrictions rather than on the students to prove that they were unreasonable.

Black also was right in his belief that *Tinker* would have a broad impact and lead to extensive litigation. During the past decade *Tinker* has directly influenced hundreds of students' rights cases, and it has been cited over 1,000 times in later judicial decisions. Furthermore, since 1969 *Tinker* has been the controlling precedent in almost every major state and federal case concerning the rights of students or teachers to freedom of speech, freedom of press, and freedom of association.

In addition, Black correctly foresaw that *Tinker* would not just be applied to free speech issues. Despite the majority's insistence that its decision was strictly limited to pure First Amendment rights, the *Tinker* principles have been more broadly applied by the courts. In 1970, for example, a federal judge in Alabama used the substantial and material disruption test in upholding a teacher's right to assign a controversial book to her high school English class (*Parducci v. Rutland*, 316 F. Supp. 356, 1970). In 1972, Justice Powell cited *Tinker* as precedent in a case upholding the right of students to form radical organizations on campus (*Healy v. James*, 408 U.S. 169, 1972).

Is *Tinker* Bad for Civic Education?

Black's second prediction was that *Tinker* would undermine school discipline and the training of "good citizens." But what is a good citizen? And how should schools prepare students to become such citizens in a constitutional democracy? The answer, according to Black, is through obedience to school rules, not through talking politics or challenging authority.

Fortas replied that the decision was limited, would uphold reasonable authority, and would help children become independent and vigorous citizens

Fortas disagreed. He thought that discipline and obedience were not the keys to training good citizens. He viewed good citizens as active and independent Americans who openly debated political and social issues. Rejecting the notion that students should be prepared for such a role through regimentation, indoctrination, and simply learning what they are told, he said that only by protecting constitutional freedoms and the right to argue about national issues could schools prepare students to be independent and effective citizens.

While many educators agree with Black in identifying discipline as a major school problem, there is no evidence that stricter discipline will produce more responsible citizens. On the contrary, recent studies tend to support the Fortas position. For example, a report on the *Prevention of School Violence and Vandalism* by Senator Birch Bayh's Juvenile Delinquency Subcommittee recommends that schools educate students about their rights and responsibilities and involve them in the process of establishing written codes for the school community.

While the report acknowledges that such steps take extra time and effort, it emphasizes that broad participation in developing and revising school rules "provides one of the best civics courses to which young students can be exposed." According to a former president of the National Organization on Legal Problems in Education, "if students help develop these school codes, they will see better that they are the primary beneficiary" and therefore will be more supportive of school rules.

Similarly, a research report by Johns Hopkins University suggests that student participation in the school decision-making process "often increases student commitment to the school and can reduce student offenses" against both the staff and the school. And a recent study conducted by Cynthia Kelly in the Chicago area indicates that in those schools which more carefully observe the letter and spirit of the Constitution concerning students' due process rights, students tended to have a more positive attitude toward school rules, be more positive about the law, and be more positive about their schooling.

Although the research on this issue is still incomplete, recent data indicates that Justice Fortas was probably right: schools that practice the Bill of Rights and allow students freedom of expression tend to be more effective in preparing them to be active, responsible citizens than those that emphasize rigid discipline and unquestioning compliance.

Revolutionary Permissiveness

Black's next concern was that *Tinker* would lead to an era of revolutionary permissiveness, undermining the authority of school officials and surrendering control to the students. Has this fear been fulfilled? Many critics of school discipline are inclined to say yes. The evidence, however, points the other way.

The question is not whether schools are more permissive or less disciplined today than in 1969, but whether *Tinker* requires permissiveness or inhibits reasonable discipline. And the answer to this question is

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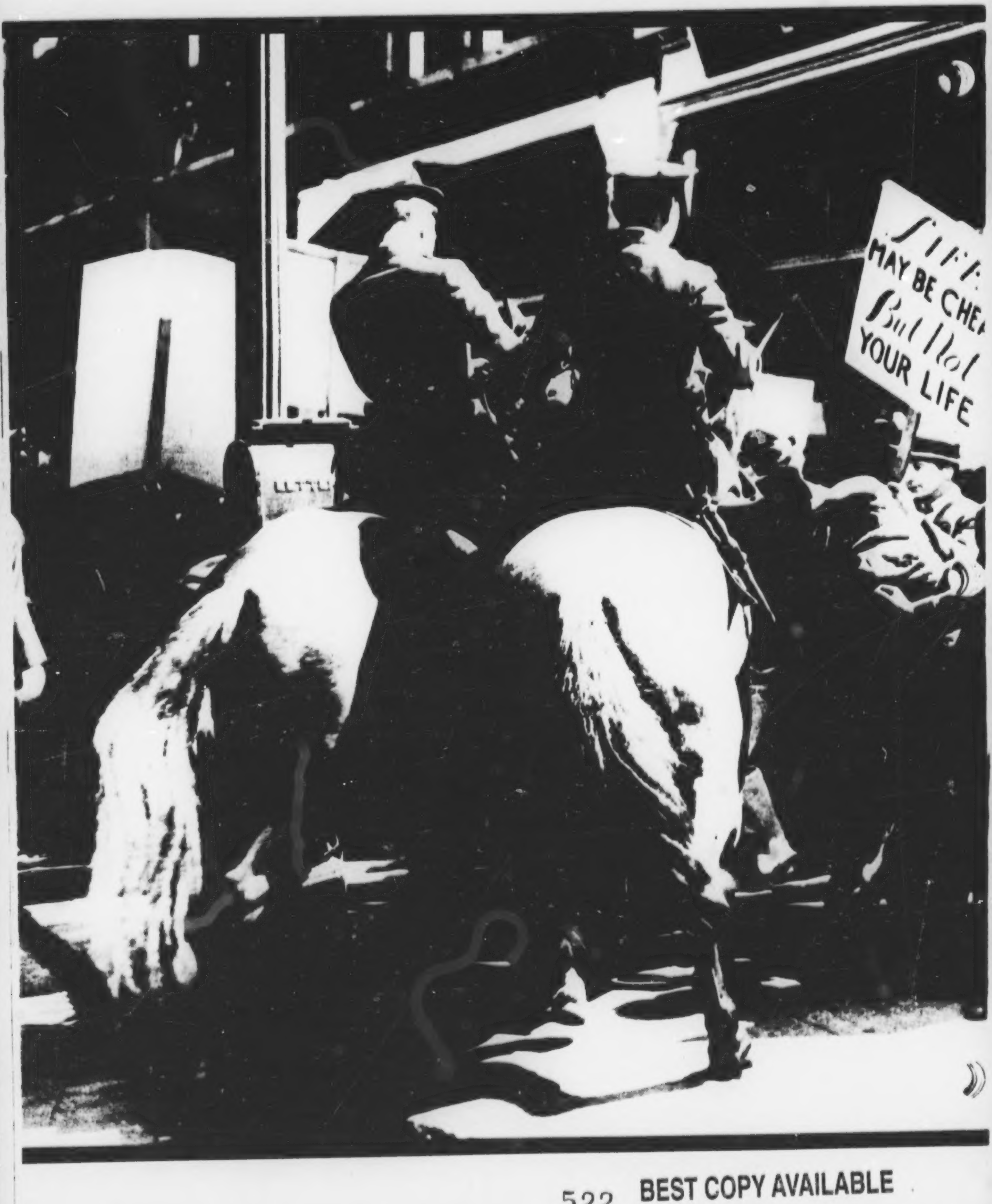

LIFE
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But Not
YOUR LIFE

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WE ARE
FIGHTING

SPEECH: THE FIRST FREEDOM

Freedom Fighters of the 30s

Violence and vigilantism in New Deal America

In June 1934, the Republic Steel Corporation's monthly budget for arms and ammunition included, besides gas, "149 revolvers, 10,000 rounds of .38 caliber revolver ammunition, 1,000 rounds of .45 caliber submachine gun ammunition, 1,000 shotgun shells, 450 rifle cartridges and 100 riot sticks." Three years later, in the famous Memorial Day Massacre outside its Chicago plant, ten demonstrating strikers were killed, six of them shot in the back.

That atrocity was one of the last public convulsions of an old order whose routine terrorism regularly intimidated workers and effectively restricted their constitutional rights. If laboring men and women are no longer victimized by repressive violence, it makes it easy to think of the New Deal decade as a civil liberty breakthrough, as a time when free speech came finally into its own. Unions also won their long-contested right to exist and organize—validated by the Wagner Act, the Magna Carta of labor-management relations—further suggesting a new era for First Amendment freedoms. And most historical interpretation has sensed a momentous shift of power that dramatically increased substantive justice, equality, and due process for the country's working population.

Still, no one has polled the workers

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themselves. They might well have a more pessimistic view, seeing a process infested with booby traps. After all, they might say, are rights ever granted without strings attached? What had been so steadily denied for some 140 years of constitutional history must surely have its trade-off, the Bill of Rights as the original Catch-22.

Nor would the skeptics be entirely wrong. The United States has long had a vast array of systems to inhibit free speech and association, an arsenal not limited to obvious forms of suppression. The changes of the 30s were affected by this legacy. To understand what happened in the decade, we have to look at a far broader definition of freedom than the right to organize and bargain collectively.

The Bad Old Days

During the century that ended in Roosevelt's inauguration, the demands of economic growth did not generally square with the dynamics of freedom. Corporate industrial power dominated American life, setting the conditions of existence in as one-sided a struggle as the country has ever witnessed. Workers' ability to exercise their First Amendment rights in this environment was affected by two overriding realities: behavior modification and violent intimidation. The behavior controls were subtle, pervasive, powerful and often clothed in legal or pseudolegal trappings. The violence was overt, specific, and brutal and provided quick punishment for those daring to challenge the status quo.

Both the criminal law and a variety of institutional arrangements helped create "the spirit of consent and submission" that accustomed people to accept their place in society and not speak out against it. The vagrancy laws forced individuals to work on terms set by the employing class. If they did not they'd suffer imprisonment and exploitation in the workhouse or convict lease system. Unemployment itself became a crime, "the crime of being poor" in the legislation directed against tramps. Should the victims of this system dare challenge it, other ordinances against disturbing the peace, loitering, or unlawful assembly came into play. These were class weapons of cultural intimidation, disguised as impartial applications of "equal justice under law." As the French novelist Anatole France put it, "the law, in its majestic equality, forbids the rich as well as the poor from sleeping under bridges."

Foreign-born workers suffered the additional threat of deportation, and all workers knew that many kinds of normal behavior could be construed as having a bad tendency or being criminal and antisocial. Whole states of mind and behavior suffered outlawry or were driven underground by the established order.

> **Criminal laws helped make workers timid. Vagrancy laws forced them to work on the bosses' terms. Ordinances against disburbing the peace and unlawful assembly also packed a wallop.**

Alongside the law as Big Brother stood some stalwart institutional exponents of a repressive status quo, most notably peonage, sharecropping in Southern agriculture, and the company town. All three systems gave employers complete control over their laborers, denied them freedom to move, controlled the details of their private lives, and forced them to accept the terms of existence as defined from above. Designed to make labor submissive by a total surveillance, these programs of degradation operated without interference from—and often with the collaboration of—public officials.

In spite of this unilateral dominion of power, some workers still resisted, thereby evoking the cruder weapons of repression awaiting the free speech militants of that day. To name them is to realize the unequal terms of combat that faced such activist protest: agents-provocateurs, company spies, union-busting, yellow dog contracts, blacklisting, strike breakers, martial law, injunctions, conspiracy trials, state constabularies, the national guard, federal troops when necessary, official and pseudo-official violence, and killing without fear of retribution. Those not willing to accept the self-censorship the culture demanded found their First Amendment rights symbols of futility, not power.

An Ambiguous Legacy

When Roosevelt took office, a tremendous toll had already been extracted from working class proponents of change, and the range of dissent had been drastically narrowed. Four union movements and most radical tendencies within organized labor no longer existed, while the survivors of a century of mass protest found themselves isolated in organizations of cautious conservatism. The laboring men and women of the country had about as much free speech as the banks had deposits—and not much desire to protest after a century of "behavioral vandalism" by their opponents.

Yet the economic collapse of the old order encouraged many to hope that the political imperatives of recovery and a revived popular activism might radically alter the distribution of power and set the climate for civil liberties in the years ahead. Their hopes were only partially realized.

Much would depend on what the federal government itself would do in that tumultuous decade of change. As it centralized and dominated the bureaucratic management of American life, the New Deal revolution clearly transformed as well the parameters of freedom. In a major alteration of systems, the Roosevelt Administration brought about a massive shift from the free enterprise repression of the past to the cold war conformity of the future, with the 1930s representing the transition era, and, as such, a confusing one for historians. Certain significant breakthroughs did occur, but on the whole future generations have inherited an ambiguous legacy. The age-old tension between freedom and suppression did not get resolved as much as it took new, sometimes bewildering forms.

The new equation of forces that would emerge was conditioned by the overriding importance of recovery and the search for that holy grail by the astutely pragmatic operators of Roosevelt's "broker state." Not willing to end the long-time collaboration with the corporate power brokers of the national economy, the New Deal still recognized that their massive and open resistance to change was disastrously counterproductive. As labor protest intensified and momentous disruptions occurred, the federal government supported policies that would promote civility, conciliation, and compromise in place of the open warfare then being waged over labor's right to organize.

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Having recognized that support for collective bargaining was essential to recovery, FDR's administration underwrote an impressive commitment to First Amendment freedoms. The Wagner Act, its validation by the Supreme Court (*NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 1937), and the decisions of the National Labor Relations Board greatly reduced intimidation, violence, and corporate contempt for basic liberties. Physical assaults, police beatings, vigilante justice, and murders waned in the wake of federally enforced fair play, regardless of historic reflexes such as that by Republic Steel. Even at the municipal level, speakers found greater freedom from random harassment, a trend promoted by the Supreme Court decision in *Hague v. CIO*, which upheld the union's right to hold outdoor meetings in Jersey City without permits from the police department (307 U.S. 496, 1939).

Peaceful picketing finally emerged as a legitimate avenue of communication in *Thornhill v. Alabama* (310 U.S. 88, 1940). The case arose when Byron Thornhill was convicted under an Alabama law that put picketing on a par with loitering and made it a misdemeanor. But the Supreme Court struck down the law, holding that peaceful picketing was a form of expression protected by the First Amendment.

A New Repression?

The same pragmatic opportunism that had promoted this forward progress would, however, ignore other equally important free speech arenas and respond to repressive impulses already gaining an ominous momentum elsewhere. The New Deal was not preoccupied with civil liberties when the victims lacked power or were anathema to politically influential members of Roosevelt's congressional coalition.

The Southern Tenant Farmer's Union, for example, did not have the strength to win New Deal support or overcome the opposition of the senator in whose state it was based. Incipient unionists in the South also lacked the muscle and patronage to sustain First Amendment freedoms. In 1952 a Senate investigation disclosed that Southern textile workers still lacked basic constitutional rights when union recognition was an issue.

Nor did migratory laborers achieve the civil liberty that mass production workers in the North had obtained at such great cost. In fact, the New Deal did not commit federal power to a sustained and effective intervention on behalf of those for whom the government was not politically obligated to show concern. This same irresolute libertarianism would manifest itself again when racism replaced labor as the political dynamite threatening the stability of carefully contrived coalitions.

Many American workers did not join the civil liberty constituency during Roosevelt's New Deal, and even those who did found free speech and association ringed with unexpected restrictions, the trade-off the pessimists had predicted. Having won important gains for free expression, dissent, and political activism, workers now faced an expansion of surveillance and new forms of intrusion, intervention, and intimidation in their lives.

Under the New Deal, repressive action was no longer the work of the bosses, but rather became a government monopoly. Deportations, loyalty tests, and sedition laws now silenced dissent.

Repressive action was no longer the work of bosses, but rather became increasingly a government monopoly. It would soon become covert, preventive, and general, testing all free speech for the remotely subversive tendencies it might exhibit. A new system of internal security was emerging. It threatened to expand the social controls and coercive conditioning that so many victorious militants thought lay buried in the wreckage of the old order.

Other Ways to Silence

For a politically sensitive administration, the pressures to invent new forms of suppression were irresistible. The right wing had by no means disappeared, and powerful conservative and superpatriotic forces were attacking the New Deal's redistribution of power and liberty. Sensitized to subversion by Depression unrest and agitation, appalled by clandestine fifth columns and anarchy abroad, egged on by the vociferous investigators of un-Americanism, FDR's government moved to contain "subversive activities," some of which included the very behavior that the Wagner Act had seemingly made legitimate for all time.

Besides unleashing J. Edgar Hoover's FBI and its mania for amassing dossiers on suspect Americans, the New Deal contributed a loyalty/security program with basic irregularities; the Hatch Act, prohibiting political action by government employees, which has free speech consequences; a peacetime sedition act (the Smith Act) that imposed "the most drastic restrictions on freedom of speech ever enacted in the United States during peace"; antiradical deportation legislation; the Smith Act prosecution of an obscure local group of Trotskyite workers at the behest of the rival Teamsters Union; and a long campaign to expel Harry Bridges of the West Coast Longshoremen's Union for exercising his constitutional rights.

If the Roosevelt Administration and the Supreme Court had helped nationalize due process and protect First Amendment freedoms, that same government and its administrative cohorts also helped nationalize political surveillance and other repressive practices. These measures prepared the way for an even greater threat to individual rights in the postwar world, as internal security policies proliferated.

Worse still, Washington's practices helped create a nationwide atmosphere of suppression. State and local communities adopted the Attorney General's list of suspect organizations for purges of their own. Un-American investigations at the state level zeroed in on labor, including the CIO. The industrial security program imposed a loyalty check on millions of workers in nonsensitive areas. Many Americans became obsessed with "association" as a way of judging the validity of controversial ideas and their authors. Instead of judging ideas on their merits, these Americans looked at the speaker's background for traces of radicalism. Even a hint of association with "subversives" was enough to damn him and his ideas.

Anticommunism captured the labor movement itself, symbolized by the oath requirement of the 1947 Taft-Hartley law. This provision required that all union officers seeking the protection of the Wagner Act would have to submit an anti-Communist affidavit. It narrowed the range of permissible expression and often denied procedural justice to the radical elements within the unions.

Nor can the "chilling effect" of the government's antiradical campaign be discounted. A federal administration that has the time, energy, and interest to indict a trucker's local in Minneapolis as a clear and present danger to the country has to be taken seriously. If a few fanatics of one single local can overturn the United States, who may not be suspected or attacked? Harry Bridges discovered the reach of that vindictive paranoia in his 16-year fight (1934-1950) to escape deportation.

Nor were security obsessions the only force lessening the immense libertarian achievements that followed the Wagner Act victory. A certain backlash set in, unforeseen fallout from the new status of unions themselves. The most serious and long lasting was the decline of union democracy, particularly in unions that espoused the corporate market ideology themselves. Many dissident workers found that the right to organize and bargain did not protect their personal autonomy and free speech within the one organization central to their lives. And black workers discovered that unions remained notorious outposts of racism. Even the company town lived on, in the vast, bureaucratic, pyramidal factory structures that often created alienation and the "collaborationist mentality" among workers.

Outside the unions and the plant gates, a new balance of forces was also developing. The first was around the issue of free speech for the bosses. Corporate free speech had traditionally been intimidating by reason of its power, antiunionism, and the muscle of illegal practices. But after the passage of the Wagner Act, management complained that the National Labor Relations Board was restricting its free speech rights. In 1941, the Supreme Court agreed that executives had a First Amendment right to oppose unions, as long as their speech was not clearly "part of a pattern of coercion" (*NLRB v. Virginia Electric Power Co.*, 314 U.S. 469).

At the same time, the Court was cutting back on some of the newly won free speech protections of union members. Almost immediately after its sweeping decision in *Thornhill* that states couldn't prohibit peaceful picketing, the Court began to have second thoughts. Since picketing involves more than just communication of ideas—it is a social phenomenon that may cause actions having nothing to do with the ideas being expressed—the Court declared that it couldn't be immune from *all* regulation. In a long series of cases in the 40s and 50s, the Court held that picketing was susceptible to injunctions if it became "speech plus," a vague and difficult measurement given the raucous atmosphere in which much picketing takes place. Presenting labor's case to a wider public, a way of communicating beyond the picket line, ran into the media's long-standing underrepresentation of labor's point of view.

Summing Up

Has the frontier of freedom been dramatically extended by the struggles and achievements of this decade of turmoil? What's been won and lost in the process?

Certainly free speech greatly benefited from the sanctions against the bosses' goon squads and other forms of coercive private power. The momentous new federal role on behalf of due process and free expression also marked a historic gain. The "violence colony" no longer could count on open season against labor organizers, agitators, and radical dissenters, either in the factory or on the streets. One of the great issues in American history, the right to organize, over which so much speech had been suppressed, had moved close to a final resolution. Capitalism's crisis and the world war that followed generated a significant ideological shift on behalf of human and civil rights, vastly narrowing overt intimidation against free speech.

On the other hand, political surveillance, loyalty/security policies, exposure by un-American investigators, and judicial prosecutions amounted to ideological pacification. They severely damaged free expression and association, defamed reputations, and destroyed livelihoods. Old style vigilantism had largely died out, but vigilantes still operated—openly in the witch-hunt investigations, and secretly as agents of disruption and harassment in organizations suspected of potential subversion. Workers were learning that free speech, even when newly acquired, can be quickly cancelled out.

It would be better to remember the 30s, then, for its transitional character. In a time of traumatic crisis, a militant labor movement extracted a decisive gain from an ambivalent community, much as black militants had done during Reconstruction. And just as Reconstruction represented the end of a terrible system of social control, so too did the New Deal render unacceptable ancient patterns of repressive behavior.

The victory, however, was incomplete in each case. As reaction set in, new illiberal measures were invented, dissent contained, surveillance extended, and self-censorship reimposed. Historians cannot ignore either the changes that invigorated free speech or the many new currents that threatened to submerge First Amendment liberties. ☐

NEWSCLIPS

Will Howard Cosell Do the Commentary?

Miami lawyer Murray Meyerson is betting that a TV-happy country is ready for videotaped wills. Showing a real gift for metaphor, Meyerson says, "it's a way of putting a little flesh on the skeleton."

Meyerson explains that the video version doesn't substitute for the written will required by law, but says it's a way to relay personal information through a dramatic medium. "Just think of the pleasure it would give a wealthy man to cut off his free-spending brother," he says, "then explain it all in color."

According to an AP story, Meyerson tapes a client signing a written will, asking questions like "in what year did World War II end?" to establish if the client is of sound mind. Then the client is left alone with the camera to convey any personal thoughts.

One problem, though. Educators who have struggled for years to convince students that there was more to World War II than *Hogan's Heroes* may wonder about the question designed to show that the client is of sound mind. Maybe something more personal would be in order, like "can you find your foot?"

If at First You Don't Succeed . . .

Leonard Burris is one of those convicts who believes that time behind bars should be used profitably. For the second time in just a little more than two years, Burris has been indicted for filing multiple false income tax returns. On both occasions he was already serving time at the California Men's Colony at San Luis Obispo.

According to the *L.A. Times*, in 1979 Burris filed seven phony tax returns seeking refunds of $19,000, peanuts compared to what he tried to obtain in 1977, when he was charged with filing 83 returns seeking $351,000. For all his trouble, however, the Internal Revenue Service says that it has never lost a penny to him.

When he was sentenced on the first tax case, Burris told the judge that most of his difficulties were attributable to a desire to deceive people. This time he'll probably fess up to a lack of imagination too.

Nice Try But No Cigar

What can you do when your name is down in the alphabet and you suspect that those lucky Albertsons and Barbers are getting all the business? According to the Rhode Island Board of Examiners, you can't do what Dr. Nathan Feigelman did—invent a mythical partner named Aaron A. Aaron to get your office listed first in the yellow pages.

A *Chicago Tribune* story on the case says that Feigelman denies that was the motive. He says he really went into business with a fellow by that name, but that the deal fell through. The Examiners said, however, that he'll have to get himself a new telephone number and get rid of the partner if he wants to practice again.

"Red" Judge Tough on Crime

Six years ago, when Justin Charles Ravitz was elected a municipal judge in Detroit, many observers expected all hell to break loose. Ravitz, you see, isn't a typical judge. He's a young (still in his 30s) nonconformist who openly admits that he is a Communist.

But according to the *Chicago Tribune*, Ravitz has turned out to be a hard worker who has won respect from cops and others with no sympathy for his politics.

For example, in the first eight months of last year, Ravitz gave prison sentences to 68% of the persons convicted in his courtroom, the second toughest sentencing among the 20 judges in his level of court. Ravitz is especially hard on drug peddlers.

The lawyers that appear in his court agree that he has done a good job. Prosecutor Stephen Boak says "we always get a fair shake before Ravitz . . . on complicated legal matters I think we get a better shake before him than other judges who are less likely to do the research or to grasp the legal issues involved."

James Howarth, Chief Deputy Defender for the Legal Aid and Defenders Association, ranks Ravitz number one among the 20 judges now sitting on the Recorder's Court of Detroit.

And even the police are happy with his work. Deputy Chief James Bannon says "I think he has performed better than the judges whom the police endorsed as being more of their conservative political persuasion."

Ravitz's biggest innovations may be in style rather than substance. He never buttons his black robe, never wears a necktie, and comes to court in bluejeans and boots. Nor does he require that he be addressed as "Your Honor." The greeting "Chuck Ravitz" is just fine with him.

New Law Backfiring?

According to articles in the *Chicago Tribune*, the federal Freedom of Information Act is tying the hands of law enforcement officials and may not be accomplishing the purposes for which it was passed.

The five-year-old Freedom of Information law was passed to protect the public's right to know. However, instead of being used by public interest groups and newspapers, as Congress envisioned, a Justice Department official says that "It's quite apparent that the primary users are attorneys whose clients have . . . disputes with government agencies."

As a result, federal law enforcement agencies have sometimes been forced to disclose informants' identities and investigative methods. According to a study by the General Accounting Office (GAO), once-reliable FBI informants now refuse to provide information for fear their identities will be disclosed.

Among the horror stories cited by GAO is the case of a terrorist convicted of two murders who apparently learned the name of the informant by writing to the FBI for certain files. Another case involved a businessman who refused to cooperate in an FBI probe of foreign agents because he feared that the hostile agents might learn of his undercover role under the Freedom of Information Act.

Justice Department officials claim that the Freedom of Information Act hampers them in another way, enabling defense attorneys to delay trials and spy on prosecution cases. For example, one Justice Department official said that in a pending criminal case prosecutors were preparing to go to trial when a defense lawyer slapped them with a Freedom of Information lawsuit seeking "all records pertaining to the investigation." As a result, prosecutors and IRS agents were pulled off their investigative and trial preparation work to spend weeks reviewing virtually every paragraph of the 13,000 pages of material considered for the suit.

"What, Us Obey the Law?"

Congress has passed hundreds of laws affecting American workers and causing employers all over the country to pull out their hair. However, a *Chicago Tribune* story points out that what's sauce for the goose is not always sauce for the gander. A look at several government agencies shows that those who create and enforce the laws don't always live by them. For example,

- Employees of Energy Department plants using radioactive materials are not protected by the Environmental Protection Agency's standards for exposure of workers to such materials.
- Members of Congress have exempted their 16,500 employees from major job discrimination and job safety laws. Capitol Hill workers are not covered by the Civil Rights Act, the Equal Employment Opportunity Act, the Equal Pay Act, and many others.
- A study of employment practices

followed by the Department of Health Education and Welfare shows that the Department, which oversees discrimination charges in universities, has a wage structure which is roughly the same as that which it is vigorously attacking in universities.

- And even the White House is not immune. A woman who formerly was managing editor of the White House news summary filed suit against the White House four years ago because her salary was about half of her male predecessor's. When she charged the White House with violating the 1964 Civil Rights Act and the Equal Pay Act, Justice Department lawyers argued that the White House was exempt from both laws. Both President Ford's and President Carter's administrations carried on the fight against her. After a four-year struggle, the White House settled out of court, agreeing that employees at her level and below would be subject to civil rights and equal pay laws. However, those above her, including the President's assistants, still are not covered.

The picture is not entirely bleak, however. Sharon P. Smith, author of *Equal Pay in the Public Sector: Fact or Fantasy?*, says blacks and women are ultimately better off working for the government. "A federal woman is better off than a woman in the private sector, but she still gets less than a man."

The government may be embarrassed by these instances of discrimination, but that won't prevent it from enforcing the law against others. As one EEOC official said, "What are we supposed to do, forget about [discrimination] because we aren't perfect outselves?"

New Pregnancy Law to Run Up Costs

A new law is giving pregnant workers wide-ranging medical, disability, and job protection, but employers are not all that enthusiastic about it.

When the new law took effect last April 29, employers were no longer allowed to refuse sick leave or disability benefits to women whose pregnancies kept them from working. And they had to cover normal pregnancy and delivery costs in the company health plan.

The new law (reported in the Winter, 1979 *Update*) was passed by Congress to overturn a Supreme Court decision which held that company insurance policies need not cover pregnancy.

Peter N. Thexton of the Health Insurance Association of America has estimated that the additional insurance costs nationwide will amount to at least $1.6 billion.

Thexton estimates that costs will go up because before the law employers usually gave women six weeks of absence during pregnancy and delivery. But now, the disability must be paid on the same basis as any illness or other medical problem. Thexton estimates that the average disability period for pregnancy is really 11.3 weeks, meaning benefits will have to be paid an additional 5.3 weeks in a normal case.

By the way, the new costs won't necessarily be entirely borne by employers. Here at the ABA—to take a random example—employees' monthly insurance payments have already gone up to meet some of the new costs of the pregnancy law.

An LRE Pitfall

The *Chicago Tribune* reports a law-related show-and-tell episode that backfired. Seven-year-old Jonathan Sarkin brought in Dad's handcuffs to show his class at Perkins Elementary School in Newark. But he forgot to bring along keys and had to be pried free by police officers. If it was embarrassing for Jonathan, think how red-faced his father, Stephen, must have been. He's the county District Attorney and a former FBI agent.

New Laws Help Women Buy Property

According to a UPI story, two federal laws passed in 1975 are giving new meaning to the old cliche "women's place is in the home."

In the four years since the Equal Credit Opportunity and Fair Housing Acts were passed, thousands of women have taken advantage of them to buy their own homes and condominiums. The National Association of Realtors estimates that women bought 8% of all single-family homes sold last year and a whopping 33% of all condominiums.

In the bad old days before the law, a borrower used to have to give an affidavit that she was not going to bear children. That is now illegal, as is asking a woman loan applicant if she's taking birth control pills, and if her income includes child support, alimony, or separate maintenance payments.

Now the mortgage lender cannot ask the woman any financial information regarding her spouse or former spouse. He can only deal with the gross income she currently has, how long she's worked at her job, what debts she has outstanding, and the number and age of her dependents.

However, the battle may not be entirely won yet. A Newhouse News Service story quotes former HUD Secretary Patricia Harris as saying that some lenders are still reluctant to make loans to single women. Therefore, HUD has started a grass-roots campaign to educate women, realtors, and lenders on the new status of women in the housing market.

Part of the campaign will make lenders and realtors aware of the full extent of the federal laws. Another goal will be to convince them that women are creditworthy and that projections show that women's income will keep pace with that of married men.

Robert M. O'Neil

Beyond Racial Discrimination

New directions in equal protection

In the quarter century since *Brown v. Board of Education*, most of the Supreme Court's concern for equality has focused on racial discrimination. Not until reasonable progress had been made in striking down barriers which denied equal opportunity to minorities could the Court in good conscience devote much time or thought to other dimensions of equality. By the mid-1970s, however, basic principles of equal access and equal opportunity had been established—although their application and observance

remain far from uniform, and true equality is still diluted by forces such as social pressure, which lie beyond the reach of law.

What's Ahead for Affirmative Action?

In the mid-70s, the Supreme Court began to turn its attention to the problem of so-called "reverse discrimination"—the claim of whites that preference for minorities denied them equal opportunity. The first such case raised the basic issues in striking form. Like subsequent cases, it was filed by a white male who charged that minorities were being given favored treatment.

Marco DeFunis was white. He had graduated from college *magna cum laude* and been elected to Phi Beta Kappa. In 1971, he was one of the 1,600 people competing for 150 places in the first-year class of the University of Washington Law School. He was denied admission even though his law school aptitude test scores and predicted first-year average were higher than those of several minority students accepted by the law school.

DeFunis felt that he had been discriminated against. He filed suit against the university, contending that the law school admissions committee decided against him because of his race. He said that this violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A local judge ordered that he be admitted to the 1971 entering class. The university complied, but appealed the case.

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Both sides based their arguments on concepts of equal justice and equal opportunity. DeFunis and his supporters argued that he was being denied equal treatment under the law and an equal chance for quality education. The university and its supporters argued that affirmative action policies were designed to give blacks and other minority group members equal opportunity.

This first big reverse discrimination case ended anticlimactically. In 1974, in *DeFunis v. Odegaard* (416 U.S. 313), the Court refused to decide the merits of the preferential admission challenge because DeFunis was about to graduate from law school, and so the case was moot. There was more than a hint that the Court simply was not ready to address the issue, and probably should not have taken the case.

Four years later, in the celebrated case of *Bakke v. Regents of the University of California* (438 U.S. 265, 1978), the Court did reach the merits of a preferential admission challenge, but divided in such a way as to leave many issues unsettled. The program in question guaranteed 16 places out of a medical school class of 100 to minorities. Four Justices felt such a preference violated the nondiscrimination provisions of the 1964 Civil Rights Act, so they did not reach the constitutional question. Four other Justices felt the program was consistent both with the Constitution and with the federal laws.

Because of this split, Justice Powell (the ninth member of the Court) became the critical vote. In his view the particular program was unlawful because it favored minorities on racial grounds without a legislative or administrative judgment that past racial discrimination needed to be overcome by such positive action. But Justice Powell went on to indicate that other types of preferential programs—especially those that sought to promote "diversity" in the student body—would probably get his vote.

After the *Bakke* decision, many colleges and universities did give greater weight to diversity as a goal of minority admission and financial aid programs. In fact there have been remarkably few legal challenges to such programs since *Bakke*, and the Supreme Court has had no occasion to speak further to these issues.

A year later, though, the Court did address a related question. A labor agreement at a Louisiana steel mill provided special advancement opportunities for minority workers, and a white employee who had been excluded from the program brought suit. In *Steelworkers v. Weber* (47 L.W. 4851) the Supreme Court upheld the program under federal civil rights laws; there was no constitutional issue here since the Equal Protection Clause does not apply to hiring policies of private companies.

What's ahead for equal protection? Greater emphasis on age discrimination, sex discrimination, and equal treatment (rather that equality of access or opportunity).

The majority felt that an employer and union might jointly develop programs to eliminate the vestiges of past discrimination and segregation. In the plant, for example, blacks held a substantially smaller share of the craft and skilled jobs than they accounted for in the surrounding community. Although the Court had earlier held that federal civil rights laws protected white as well as minority workers, and did not compel minority programs, neither did they prevent employer and union from entering an agreement to expand opportunities for historically disadvantaged minorities. That was all the parties had done here, so the Court had no need to define the outer limits of these laws.

It is clear, then, that the Supreme Court has already gone well beyond simple cases of racial discrimination. And on the docket for the 1980 term is a case challenging a federal law which requires certain federal contractors to reserve at least 10 percent of their business for minority-owned firms. The Court may well uphold this law—even though it looks more like a racial quota than other policies that have been challenged—because it reflects an explicit judgment of Congress that such measures are needed to overcome past discrimination.

On the other hand, the Justices have indicated grave concern about quotas—those that favor minorities as well as those that exclude—and might thus look unkindly on so precise a preference. In any event, the decision in the minority contractors' case will amplify the Court's views on the whole question of affirmative action.

The Cutting Edge of Equal Protection

What are likely to be the major equality issues of the 1980s? Several general comments might be helpful. For one, we will probably see greater emphasis on equality of *treatment*, rather than the equality of *access* and *opportunity* that have been the desiderata since the 1950s. In higher education, for example, courts may increasingly look at how students are treated once they are admitted. Questions about the allocation of scholarships and other benefits will probably emerge in much the same way admission challenges did a decade or so ago. In other areas, the emphasis on fairness of treatment will take the courts beyond the threshold, very likely into the inner workings of governmental agencies and perhaps even certain private institutions to which some constitutional guarantees also apply.

Second, more attention will be given to other dimensions of equality. Perhaps the most obvious is that of classification based on gender or sex. Over the last 15 years the Supreme Court has dealt uncomfortably with challenges to laws that treat men and women differently. Although several state courts have treated such classifications essentially like racial distinctions, the Justices have consistently declined to do so. They have, instead, adopted less rigorous standards of scrutiny. (To be sure, the Supreme Court has never held that even *racial* classifications are *per se* invalid for all purposes. It has struck down every classification which disadvantaged minorities since the Japanese relocation cases of World War II—but always on the facts of the case, leaving open the possibility that such a classification might pass muster. Thus even if the Court had been much harsher on sex or gender distinctions than it has been, it would have stopped short of holding that government can *never* treat men and women differently.)

Whether or not the Equal Rights

After graduating from Harvard Law School, Robert M. O'Neil served for a year as law clerk to Justice William J. Brennan, Jr., of the United States Supreme Court. Following some years as a member of the law faculty of the University of California at Berkeley, he entered university administration at the University of Cincinnati, and came to Indiana University as Vice President-Bloomington and Professor of Law in the fall of 1975. Earlier this year he was named President of the University of Wisconsin. He is author of Discriminating Against Discrimination *(1976), and many other works on equal protection.*

Amendment is adopted, the Supreme Court will, probably in the next decade, move closer to a racial-type standard for judging sex distinctions, and might well overrule some of its earlier and more tolerant decisions. However, the issues are complex. For example, as recently as the summer of 1979, the Court upheld a state law which gave veterans an absolute preference in public employment (*Massachusetts v. Feeney*, 47 L.W. 4650). Since almost all veterans are male, this law strongly favored men over women. But there was nothing in its terms about sex or gender, and no evidence that it was a devious or covert way of favoring males. Thus the willingness of the Court to allow such a *de facto* sex preference does not necessarily reflect a callous attitude toward gender classifications, and in fact the Court might have handled a comparable *racial* preference in the same way.

Third, the Court in the 80s may be more rigorous in reviewing classifications based on age. Several years ago, in *Massachusetts Board of Retirement v. Murgia* (427 U.S. 307, 1976), the Justices held that Massachusetts could force state troopers to retire at age 50—even though there was no logical relationship between that particular age and health or efficiency. Since then, Congress has enacted laws which raise the mandatory retirement age and thus leave little force to the Court's rather unsympathetic views on age discrimination.

But even so, the concerns of an increasingly elderly population will surely come to the courts. A group which has been relatively passive is now becoming increasingly vocal and effective in both political and legal forums. Thus challenges to policies which disadvantage the elderly will almost certainly appear on the Supreme Court docket in growing numbers. And there will eventually be "reverse discrimination" suits challenging special benefits and privileges for "senior citizens," although such programs as Social Security would surely be upheld.

There is one other area which the Court will probably give increasing attention to in the next decade, classifications affecting "fundamental interests." A special standard of equality is apppropriate for such classifications. For example, in the 60s many states enacted laws setting up special residency requirements that newcomers had to meet before they could become eligible for welfare. Did such statutes deny them equal protection of the law? The Supreme Court said they did.

The Supreme Court held that states could not impose waiting periods on newcomers who sought welfare because such laws unduly burden a fundamental interest—the constitutional right to travel freely between states (*Shapiro v. Thompson*, 394 U.S. 618, 1968). It is clear that this standard would also apply to laws which affect other fundamental interests, for example those denying freedom of speech or of the press or religious liberty.

But the full potential of this doctrine has not yet been tapped. Nor has there been full development of a related principle under which the Court has struck down laws creating "irrebutable presumptions."

A clear statement of this doctrine came about in the case of *Cleveland Board of Education v. LaFleur* (414 U.S. 632, 1974). In this case, two pregnant teachers challenged a school board rule that required them to stop working after the fifth month of their pregnancies. Did such a rule violate their rights, or was it justified by the school system's interest in continuity of teaching?

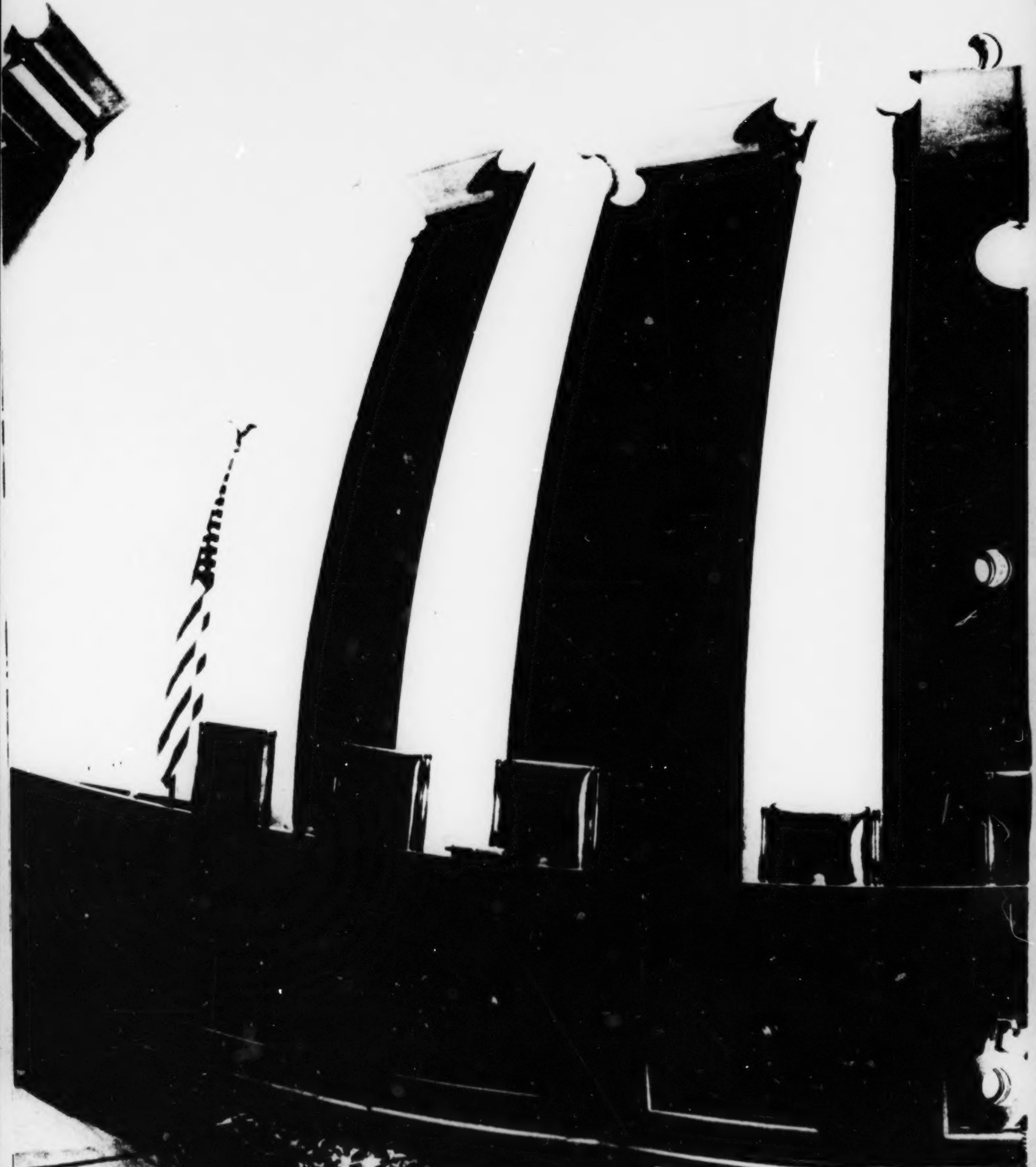
By a seven to two vote, the Supreme Court sided with the teachers. The majority held that since freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment, the board had to show that its rules didn't arbitrarily or capriciously impinge on that liberty. That it could not do, since its rule presumed that *every* pregnant teacher after five months is physically incapable of continuing, even when the medical evidence as to an individual teacher might be wholly to the contrary. Since teachers under the rule couldn't present any evidence that they were fit, the rule amounted to an irrebutable presumption which, the Court said, has long been disfavored under the due process clause.

In a few other recent cases the Court has used this approach to strike down either "irrebutable presumptions" or immutable classifications—both of which may serve to deny equality of treatment or access. In the future, it is likely that more laws will fall afoul of one or the other of these related principles of equality and fairness.

The General Outlook

The 1980s will presumably see no lessening of the Supreme Court's concern for equal opportunity. What they will bring are changes in *emphasis*—some of which are already apparent in the Court's acceptance of "reverse discrimination" or "preferential treatment" cases. Along the way, discrimination based on age and sex—and perhaps such other grounds as wealth or citizenship—will receive renewed attention. The basic principles will remain essentially the same, but their application will vary as the subject matter of the cases reaching the Court's docket changes.

"Golly, Counsellor, you're right. I do feel guilty down here."



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COURT BRIEFS

The Supreme Court Speaks

New decisions cover free speech, the CIA, search and seizure, and the marital privilege

The Court has been unusually busy this winter. Appropriately for this issue of *Update*, many of its decisions have First Amendment implications.

Two Decisions Help Government Keep Secrets

When the federal Freedom of Information Act was passed with great fanfare, its proponents claimed that it would strengthen our democracy by opening up government to public scrutiny. In two decisions announced on the same day, the Supreme Court has considerably dimmed those hopes.

In *Kissinger v. Reporters Committee for Freedom of Press* (48 L.W. 4223), the Court voted 5-2 that 22,000 pages of transcripts and other papers dating from Henry Kissinger's service in the Nixon and Ford administrations were beyond the reach of the law.

Before he left office, Kissinger donated these documents to the Library of Congress, on condition that they not be made public for 25 years or until five years after his death, whichever comes later.

Two lower courts had ruled that the State Department transcripts did not belong to Kissinger but to the government because they had been produced with

Walter M. Perkins

government time and labor. However, the Supreme Court saw it differently.

Justice Rehnquist's opinion for the majority ruled that once Kissinger removed the transcripts from the State Department, he removed them from the reach of the Freedom of Information Act as well. Rehnquist reasoned that the agency cannot be accused of "withholding" the documents because they are no longer in its files.

"In such a case," he wrote, "the agency has neither the custody or control necessary to enable it to withhold."

Joining in the majority were Chief Justice Warren Burger and Associate Justices Potter Stewart, Byron White, and Lewis Powell.

In a dissenting opinion, Associate Justice John Paul Stevens wrote that the Court's interpretation "creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future F.O.I.A. requests."

William J. Brennan's dissent said that "if F.O.I.A. is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the F.O.I.A. requester."

Many observers felt that the other F.O.I.A. case limited the scope of the act even more. In *Forsham v. Harris* (48 L.W. 4232), the Court ruled 7-2 that the act does not apply to data compiled and possessed by a private organization operating under federal grants.

The case was raised when doctors specializing in diabetes brought suit against HEW to obtain raw data compiled by a private, government-financed study of the long-term effects of drugs used in diabetes treatment. The results of that study showed that the drugs presented long-term health risks, stimulating a heated controversy in the medical community.

The majority decision, also written by Justice Rehnquist, said that such data does not constitute "agency records" and that a federal agency was therefore under no obligation to retrieve them in a response to a request under F.O.I.A.

He said that if Congress had wanted to include this sort of material within the reach of the act, it could have done so.

Walter M. Perkins has a law degree from DePaul University and a journalism degree from Bradley University. He is presently an Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

A Setback for Free Expression?

Many commentators thought the Supreme Court hammered yet another nail into the First Amendment's coffin with its recent decision that secrecy agreements signed by employees of the CIA are judicially enforceable contracts (*Snepp v. U.S.*, 48 L.W. 3516). The agreements prohibit CIA staffers from publishing any information about the agency without obtaining prior approval.

The plaintiff, Frank Snepp,a former CIA agent, had contended that enforcement of such agreements constituted prior restraint in violation of his First Amendment rights.

In a rare unsigned opinion, the Court decided 6-3 that such agreements are enforceable and include unclassified as well as classified information. In another departure from court policy, the Supreme Court rendered its ruling without formally granting review—and in the absence of debate by the opposing sides. The Court, in fact, disposed of Snepp's First Amendment argument in a single footnote and instead focused its deliberations on the common law of fiduciary duty.

In requiring that Snepp turn over his $125,000 in earnings to the CIA the Court said, "whether Snepp violated his trust does not depend upon whether his book actually contained classified information. The purpose of the agreement was to give the intelligence agency a dependable prepublication review procedure to insure that they and not the individual employee, decide what information can be disclosed."

The dissent by Justice Stevens (joined by Justices Brennan and Marshall) stated that "Congress has not seen fit to authorize the remedy the Court creates today." Going further, the dissent charged the anonymous majority with granting the government "unprecedented and drastic relief" in a manner that was "highly inappropriate and perhaps even beyond this Court's jurisdiction."

The dissenters also disputed the majority on the merits of the opinion. "Even if Snepp had submitted the book to the agency for prepublication review," they wrote, "the Government's censorship authority would surely have been limited to the excision of classified material. In this case, then, it would have been obliged to clear the book for publication in precisely the same form as it now stands. Thus, Snepp has not gained any profits as a result of his breach; the Government, rather than Snepp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity."

As press critics pointed out after the decision, many lawyers thought that the opinion gave the government broad new powers to restrict a wide variety of government employees from releasing information. Many, noting that the revelations in the book *The Brethren* must have been most uncomfortable for the justices, hypothesized that the Court was fashioning a remedy that could apply to "faithlessness" of Supreme Court clerks who tattle on their bosses.

Writing in the *New York Times*, Anthony Lewis compared the decision to the British Official Secrets Act, which clamps a tight lid on release of government information. Lewis suggested that the Court violated our doctrine of separation of powers by supplying a far-reaching remedy that Congress has refused to provide.

First Amendment: A Victory for Solicitors

Nobody likes door to door solicitors. As a result, many localities have ordinances seeking to restrict them. In a recent 8-1 decision, the Supreme Court has struck down one such ordinance, stating that "it infringed on the free speech right of organizations whose primary purpose is to gather and disseminate information about and advocate positions of public concern" (*Village of Schaumburg v. Citizens for a Better Environment*, 48 L.W. 4162).

In this case the Village of Schaumburg (Illinois) had enacted a law, typical of ordinances of this type, that required organizations engaged in door to door and on-street solicitation to not only be licensed but actually prove that "at least 75 percent of the proceeds be used directly for the charitable purposes of the organization."

Schaumburg used the ordinance to deny Citizens for a Better Environment (CBE) a solicitation permit. It said that CBE's fund raising was mainly to pay for salaries and other administrative costs of the organization. CBE attacked the ordinance as overly restricting its public interest activities.

In striking down the ordinances, the Court indicated that Schaumburg's public interest in limiting fraudulent behavior by such organizations could be achieved by putting less of a burden on the organization's activities. Justice White, speaking for the majority, said, "Organizations of this kind, although they might pay only reasonable salaries, would necessarily spend more than 25 percent of their budgets on salaries and administrative expenses and would be completely barred from solicitation in the village."

The lone dissenter, Justice William Rehnquist, argued that the majority decision fails to give communities adequate guidelines for determining the distinctions between commercial and charitable organizations.

Marital Privileges Axed

One of the odd facts that most people know about the law is that spouses cannot testify against each other. But that is no longer a fact, thanks to a recent Supreme Court decision (*Trammel v. U.S.*, 48 L.W. 4201).

This criminal case deals with a conspiracy to import heroin. Federal agents arrested a man and his wife, then granted her immunity from federal prosecution if she'd testify against her husband. He objected, invoking the marital privilege to keep her from testifying. She was permitted to give evidence anyway, and, after he was convicted, he appealed the issue to the Supreme Court.

In a unanimous ruling, the Court held that husbands or wives may, if they choose, testify against their spouses in federal criminal trials. The decision overturned a Supreme Court precedent that allowed the spouse who was on trial to veto the decision of the other spouse to offer incriminating testimony.

Chief Justice Burger's opinion said that the marital privilege dates from early English common law. It was based on the concept that "husband and wife were one, and that since the woman had no recognized separate legal existence the husband was that one." He added that the modern justification for the rule "is it's perceived role in fostering the harmony and sanctity of the marriage relationship."

Burger said that neither justification remains valid. Obviously, women now have legal standing. And as to the adverse impact on a marriage, the Chief Justice said "when one spouse is willing to testify against the other in a criminal proceeding, whatever the motivation, their relationship is almost certainly in disrepair; there's probably little in the way of marital harmony for the privilege to preserve."

Burger also said that the marital privilege was broader than the privileges between priest and penitent, attorney and client, and physician and patient, all of which "limit protection to private communications," as against the public acts heretofore shielded by the marital privilege.

However, the ruling applies only to testimony about criminal acts observed by the spouse or to communications "made in the presence of a third person." Confidential communications between spouses were not an issue in this case, so earlier rulings on that subject remain undisturbed. Also, the Court's decision does not compel one spouse to testify against the other, but merely permits the spouse to do so if he or she wishes.

The decision brings the federal courts into line with a majority of the 50 states, 26 of which have either abolished the spouse's veto power or abolished the marital privilege entirely.

Results Matter More Than Motives In School Segregation

In *Board of Education v. Harris* (48 L.W. 4035), the Supreme Court in a 6-3 vote ruled that school districts practicing de facto segregation, as well as those practicing de jure segregation may be denied funds under the Emergency School Aid Act (ESAA). ESAA was passed by Congress in 1972 to encourage voluntary school desegregation (pupils and personnel) by making extra funds available to school districts that did so.

De facto refers to segregation that is present because of discriminatory housing patterns. De jure indicates conscious segregation on the part of the school district itself. The New York City Board of Education had maintained that it was not directly responsible for the school segregation that exists in New York and therefore was entitled to the funds.

The Court, speaking through Justice Harry Blackmun, characterized the primary issue as intent v. impact. That is, it is irrelevant whether there is a discriminatory intent in a particular case if the result is a discriminatory impact on the class of people that the legislation was designed to aid.

Justice Blackmun said, "In sum, we hold that discriminatory impact is the standard by which ineligibility under ESAA is to be measured irrespective of whether the discrimination relates to demotion or dismissal of instruction or other personnel or to the hiring, promotion, or assignment of employees; that a prima facie case of discriminatory impact may be made by a proper statistical study and, in fact, was so made here; and that the burden of rebutting that case was on the Board."

Justice Potter Stewart, speaking for a

"Shame on you for suggesting such a tactic—unless, of course, you can cite a precedent."

dissent which included Justices Powell and Rehnquist, stated, "It is my view that a school district is ineligible to receive ESAA funds only if it has acted with a racially discriminatory motive or intent in its faculty assignment policies."

Other school districts, including Chicago, whose school officials are readying themselves for the upcoming school desegregation battle against the Justice Department's Civil Division, are expected to be affected by this decision.

Court Limits Search Power

The Fourth Amendment protects one of the vital democratic freedoms, the right to be free from unreasonable searches and seizures. But looking at it from another angle, it's clear that the amendment puts limits on the power of police to investigate crimes and arrest wrongdoers.

As a result, the amendment has become a battleground, with interpretations of it serving as a tug of war between civil libertarians on the one hand and police and prosecutors on the other. *Ybarra v. Illinois* (48 L.W. 4023), one of the first cases decided by the Court this term, found the civil libertarians on the winning side—though in keeping with tradition, the Supreme Court decided the constitutional issues on the narrowest grounds possible.

The crux of this case was whether a patron of a bar could be lawfully searched during a search of the premises under a warrant. Speaking for the six-man majority, Justice Potter Stewart stated that he could not. Stewart said that, "A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."

In deciding this case the majority, which in addition to Justice Stewart included Justices White, Marshall, Brennan, Powell, and Stevens, overturned the lower court decision but, for some reason, did not specifically find the applicable Illinois statute unconstitutional. That statute allows an officer to search persons present on the premises named in a search warrant when it is necessary (A) to protect himself from attack or (B) to prevent the disposal or concealment of any instruments, articles, or things particularly described in the warrant.

A "reliable informant" had previously given sworn information indicating that he had observed 15 to 25 tinfoil packets on the person of a bartender named "Greg" in the Aurora Tap Tavern. The informant, who was an admitted heroin user, knew that illegal drugs were commonly transported in tinfoil packets. In addition, the informant stated that he later had a conversation with the bartender and was told that he would have some heroin for sale on the following Monday.

Police acting on this information secured a warrant authorizing the search of the bar and bartender for such "evidence as heroin, contraband, other controlled substances, money ... and narcotics paraphernalia." When agents from the Illinois Bureau of Investigation entered the tavern to execute the warrant, Ventura Ybarra was present with approximately 11 other patrons. After announcing their office the agents stated that they were going to conduct a "cursory search for weapons."

When Ybarra was initially searched, the officer noted a cigarette pack with objects in it but made no attempt to remove the pack from Ybarra's possession. But upon a subsequent search, the cigarette pack was confiscated and found to contain six tinfoil packets of what later was determined to be heroin. Ybarra was then indicted by an Illinois grand jury for possession of a controlled substance.

Ybarra contended that both of the searches violated his Fourth Amendment rights against unreasonable searches. The applicable case, *Terry v. Ohio* (392 U.S. 1, 1969) allows a weapon frisk where there is a reasonable belief that the person searched is armed and dangerous.

In finding that neither of the two searches that Ybarra was subjected to was constitutional, the majority reasoned that "nothing in *Terry* allows a generalized cursory search for weapons" or indeed any search whatever for anything but weapons. The Court based its analysis on the fact that nothing in the warrant alleged that the informant had ever witnessed anyone in the bar actually purchase narcotics. Additionally, the Court noted that at the time that the warrant was executed, there was no reasonable belief that Ybarra was armed and dangerous (*Terry* requirement), and the officer who searched him later testified that Ybarra acted "generally in a manner that was not threatening."

Chief Justice Burger, in a dissent joined by Justices Blackmun and Rehnquist, chided the majority for what he termed its "unjustifiable narrowing of the *Terry* decision." Burger felt that a search for weapons was justified and required given the physical circumstances that the officers were in. He indicated that "officers are not required to assume that they will not be harmed by patrons of the kind of establishment shown here, something quite different from a ballroom at the Waldorf."

Justice Rehnquist, in a separate dissent joined by the Chief Justice and Justice Blackmun, admitted that "a person does not forfeit the protection of the Fourth Amendment merely because he happens to be present during the execution of a search warrant."

But he then went on to reach the same conclusion as the Chief Justice, reasoning that the physical circumstances under which the warrant was executed justified the initial weapons frisk of all patrons. He concluded that the officers were acting under a valid search warrant and the reasonable scope of that warrant was not exceeded by locating and confiscating the heroin in Ybarra's pocket.

It's Getting Harder to Sue Uncle Sam

In what may be a forewarning to possible litigants in the celebrated "Agent Orange" case (involving damage to military personnel from chemical defoliants used by the U.S. in Vietnam), the Supreme Court has given a strict reading to the two-year statute of limitations in the Federal Tort Claims Act, which is the only means of suing the U.S. Government for negligence (*United States v. Kubrick*, 48 L.W. 4030).

In a 6-3 decision written by Justice White, the Court held that the time begins to toll as soon as someone knows that he has been injured and that the government is responsible. Courts had previously interpreted the statute as meaning that claims must be brought within two years after a person realized that the medical treatment received was possibly improper. The government had maintained that such a standard gave litigants too much flexibility, and the Supreme Court agreed with the government's position. The distinction may seem slight, but it made all the difference here.

In April 1968 the plaintiff, William A. Kubrick, a veteran, was admitted to the Veterans Administration Hospital in Wilkes-Barre, Pennsylvania for treatment of a leg injury. During the course of his stay he was administered Neomycin, an antibiotic. About six weeks after he was discharged, Kubrick began to notice a ringing in his ears accompanied by some hearing loss. His condition was diagnosed at that time as a bilateral nerve loss and he was advised that the Neomycin may have been responsible.

Kubrick then filed for an increase in his V.A. benefits, which was denied in September 1969. He resubmitted his claim, which was again denied. The V.A. claimed that there was no causal relationship between the hearing loss and the administration of the Neomycin. Additionally, it said there was no evidence of "carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault on the part of the government."

In 1971, Kubrick filed an administrative appeal with the V.A. In rejecting his appeal the Veterans' Administration admitted Kubrick's hearing loss "may have been caused by Neomycin irritation," but denied the claim, saying that such treatment was in accordance with acceptable medical procedures and the government was therefore blameless.

Finally, Kubrick filed suit in Federal District Court under the Federal Tort Claims Act, alleging that the treatment he had received from the V.A. had resulted in his hearing loss.

The District Court held for Kubrick and awarded him $320,000 in damages, noting that "he had exercised reasonable diligence and had no reasonable suspicion" that he had been the victim of negligence. The Appeals Court affirmed the lower court holding.

The Supreme Court decision, which was joined by Chief Justice Burger, and Justices Stewart, Blackmun, Powell, and Rehnquist, indicated that Kubrick did not exercise the necessary diligence and that therefore his claim was barred by the two-year statute of limitations. Their decision turned on the fact that while the plaintiff was properly diligent about ascertaining the cause of his injury (the Neomycin), he was not diligent about determining whether the Neomycin was negligently administered.

In conclusion, the majority stated "it goes without saying that statutes of limitation often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or the other rights to which they are attached or are applicable."

Mr. Justice Stevens, writing for the dissent which was joined by Justices Brennan and Marshall, recognized that tort claims normally arise at the time of the plaintiff's injury. However, "the victim of medical malpractice frequently has no reason to believe that his legal rights have been invaded simply because some misfortune has followed medical treatment."

Concerning diligence, which was the key to this case, Justice Stevens indicated that "the issue of diligence in a negligence case should be resolved by the fact finder [trial court] not by the Supreme Court of the United States." □

Other Decisions of Note

Workers' Safety: *Whirlpool Corp. v. Marshall* (48 L.W. 4189)—The Supreme Court unanimously upheld a federal regulation that bars employers from disciplining workers who refuse to perform tasks they believe may place them in immediate danger. The Court found that a regulation issued by the Labor Department was within the authority of the Secretary of Labor and conformed to the Occupational Safety and Health Act of 1970.

Faculty Unions: *NLRB v. Yeshiva University* (48 L.W. 4175)—By a 5-4 vote, the Court decided that Yeshiva's teachers are managers rather than employees and thus should not have been granted full union rights by the National Labor Relations Board. The majority argued that faculty members "effectively determine" curriculum, grading systems, and admission standards, all of which are managerial functions. The decision is expected to hamper efforts to organize instructors at the nation's 1,600 private colleges. It will have no effect on organizing public school and public college faculty, however, since these aren't covered by NLRB.

Antitrust: *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* (48 L.W. 4238)—A unanimous Court struck down California's system of controlling wine prices, saying that it constituted price fixing under federal law. State price-control mechanisms are exempt from federal antitrust laws as long as the state controls them, the Court said, but in California the wine wholesalers in the state effectively set the prices, and so the federal law applies.

Immunity from Prosecution: *U.S. v. Apfelbaum* (48 L.W. 4217)—The Supreme Court unanimously held that a person's testimony given under immunity may be used against him to prove he lied to a grand jury. The Court held that the Fifth Amendment, which protects a defendant against self-incrimination, does not preclude all uses of immunized testimony.

Parochaid: *Committee for Public Education and Religious Liberty v. Regan* (48 L.W. 4168)—By a 5-4 margin, the Supreme Court held that New York State did not violate the First Amendment's Establishment of Religion Clause when it authorized using public funds to reimburse private (including church-sponsored) schools for administrating and grading various state-prepared tests, and for performing record keeping and reporting services mandated by state law.

First Amendment: *Brown v. Glines* (48 L.W. 4095) and *Secretary of Navy v. Huff* (48 L.W. 4122)—In these two closely related cases, decided on the same day, the Court held that regulations in the Armed Forces which require prior command approval for circulating petitions to Congress on military bases do not violate either the First Amendment or federal law permitting servicemen to communicate *individual* grievances to members of Congress without prior approval of military superiors.

Victim's Rights: *Martinez v. California* (48 L.W. 4076)—A unanimous Court held that the family of a person killed by a parolee five months after his release by state parole officials did not have a claim against the state. The Court held that the California statute that grants parole officials absolute immunity against state court claims arising from their decisions to release prisoners, does not deprive victims and their families of their Fourteenth Amendment rights.

Legal Malpractice: *Ferri v. Ackerman* (49 L.W. 4054)—The Supreme Court ruled that court-appointed counsels in federal cases are liable to state malpractice suits brought by their former clients. The Court noted that "as public servants, the prosecutors and the judge represent the interest of society as a whole. . . .[so] the societal interest in providing [them] with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity." In contrast, however, court-appointed counsel for the defense essentially does the same work as privately retained counsel. In such a case, fear of "a malpractice claim does not conflict with performance and may in fact enhance that function."

CLASSROOM STRATEGIES

Debra Dresbach

New Directions for Youngsters in Trouble

Diversion programs offer a second chance for truants, runaways, and other "incorrigibles"

When Congress enacted the JJDP Act of 1974, its intent was to help states develop alternative solutions to problems some young people experience while growing up. These solutions were *not* to include locking status offenders up with seasoned juvenile delinquents in probation camps, state training schools, juvenile halls, and other settings that provide perfect educational breeding grounds for crime.

But what would those alternatives be, and how much would they cost? What would happen to the runaways, truants, and incorrigibles—estimated at more than 730,000 youths throughout the country—who had broken no criminal law? Should they be turned loose on the streets?

One of the most viable alternatives in treating status offenders is to make more use of community-based diversion programs. Unlike full-security juvenile correctional institutions, diversion programs handle only status, first-time, and nonviolent offenders.

Young people are not required to stay involved in diversion programs, unless their participation is a condition of probation. These programs provide young people who have no direction, nothing to do at home, and too much time on their hands with a hangout where they may find advocates, friends, and positive redirection.

Most young people have committed offenses at one point in their lives which could cause them to be labeled as status offenders. They, no doubt, have pondered the consequences of being caught, so they should be interested in how diversion programs deal with status offenders.

The following strategy can be used in your own classroom. It actively engages students in a simulation to develop and plan activities for a diversion program. Students are asked to think of project activities which they feel will help status offenders avoid getting involved in criminal activity and will lend focus, responsibility, and self-esteem to their lives.

Assignment

Present to your students the following hypothetical situation: A high school in a neighborhood just like yours was recently awarded government money to begin a diversion project for local teenagers. The government grant will pay for a project staff of three professionals and a secretary. They might be a counselor, a probation officer, and a teacher; or an artist, a photographer, and a writer; or any three professionals from other occupations. The school campus will be the center for diversion project activities during afterschool and weekend hours.

The project director has talked to your school principal about having a youth board for the initial planning phases of the project. The board will consist of 30 students who will be responsible for suggesting innovative diversion project activities for teenagers.

Your class will function as that board, designing activities and projects to help students learn survival; reading, writing, and arithmetic; communication, employment, and career planning skills.

Instructions

Before your class begins to think of possible projects they feel other young people will benefit from, read them or distribute to them the following real-life examples of how some diversion projects have actually brought out these skills in status offenders.

1) *Survival skills*—Every Wednesday evening, one group of students in the ABC diversion project is assigned to make dinner for 40 elderly residents of the neighborhood. They assist the elderly with transportation to and from the school cafeteria where the meal is served. Students are given a check for $100 by the project director and told to cash it at the local bank in order to purchase groceries for the meal. They must plan the meal first, then assign separate crews for meal shopping, preparation, serving, and cleanup.

2) *Basic skills*—Another group of students plans, researches, and writes a monthly newsletter on student employment opportunities in the area. They have the assistance of the project artist, photographer, writer, and secretary, but they must initiate all story ideas and complete the written copy. The editorial staff of the newsletter is responsible for measuring column width, story inches, picture size, and layout to fit within the space and master design of the newsletter.

3) *Communication skills*—Other students in the diversion project feel one of the best ways the diversion project has helped them work out personal problems is with group and peer counseling support. They expressed a desire to offer a similar service to all young people in their community by establishing a 24-hour telephone hotline which they would man.

The best way for students to understand what diversion means is for them to act it out. Have them decide how to help kids in trouble.

With the professional assistance of project staff counselors, students man telephones, console the callers, and inform them of community resources that will help them with their particular problems. Each week, the counselors and students who man the hotline compare notes on some of the more difficult phone calls they received and discuss the most helpful approach in dealing with these cases.

4) *Employment skills*—Another group of students at ABC, headed by the employment supervisor, have begun a youth-operated gardening and maintenance crew dubbed the "Touch-Ups." They advertise with various church groups and local newspapers, bid on solicited and unsolicited jobs, and, through their operation, can offer employment to any project teenager who wants a job.

5) *Career planning*—All project students participate in a career planning workshop in which they are asked to identify what they are good at, determine if they would like to incorporate their skills and talents into a career, and figure out the best avenue toward achieving this career. Resume writing, interview preparation, and dressing for work are some of the lessons offered in each workshop.

Lesson

After sharing these diversion project examples with students, divide the class into six groups. Each group will think of at least five activities it feels that other young people would benefit from participating in. These activities can be variations of the samples, or they can be entirely new. Tell the class that diversion project activities should be designed to improve one or more of the following skills:

Survival skills—Cooking, cleaning, shopping, and using a credit card and checking account.

Basic skills—Reading, writing, and arithmetic.

Communication skills—Listening to and understanding other people and responding to what they say; participating in group discussion and being able to express oneself.

Employment skills—Job training, problem-solving, and decision-making; being able to work with others, responsibly complete a task, and manage one's time.

Career planning skills—Identifying personal needs, likes, and dislikes, and then establishing goals and priorities.

While groups are thinking of activities, circulate around the room and offer assistance. When groups are finished, spokespeople from the groups will tell the class what activities their groups thought of and why these activities are appropriate for a juvenile diversion project. After the spokespeople have shared their groups' ideas, have your class lead a discussion on which activities are best and why.

This exercise should suggest to students the critical need for status offenders and all young people to develop communication skills, self-awareness and esteem, and responsibility. It is an exercise that stretches the imagination, forcing your students to think through developmental problems facing youths while growing up.

It's important for students to understand the role the community plays in juvenile diversion projects and how this social interaction generates a sense of community commitment in young people. After all, this is the central difference between juvenile correctional institutions and community correctional projects for juveniles. Whereas both are meant to keep young people from committing crimes, one isolates them from their community, the other integrates them into their community.

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Supreme Court Report

(Continued from page 7)

But this formulation did not seem to be an adequate answer to the problem either, and in 1969 the Court made another effort to establish a definitive guideline. This time, as with the original *Schenck* case, the opinion was unanimous. The Court held that under the First Amendment, states could forbid speech only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio,* 395 U.S. 444, 1969).

The *Brandenburg* test remains the prevailing precedent. It protects at least as much speech as the *Schenck* and *Yates* formulas, but emphasizes that in order for communication to be stripped of First Amendment immunity, ensuing illegal action must be both imminent and likely. What the *Brandenburg* principle does *not* do, any more than any other legal precedent has ever done, is take the more daring position that the members of an audience are in charge of their own behavior, and that a speaker who implores them to break the law should not be held responsible for *their* decision to act.

Fraud and Intimidation

If speakers are responsible, at least in part, for what their listeners do, then communicators must exercise some measure of control over their audiences. That may or may not be true as a general proposition, but it clearly is true when speakers use deception or coercion to get what they want, thus depriving their listeners of genuine freedom of choice. For that reason, legal sanctions have been developed to deal particularly with deceit and intimidation.

The most commonly cited example of prohibited deceptive speech is "falsely shouting fire in a theatre, and causing a panic" (*Schenck v. U.S.,* 249 U.S. 47, 1919). Beyond that classic illustration is a whole range of government controls on false and misleading commercial advertising and on fraudulent transactions. Recent Supreme Court decisions extending First Amendment protection to truthful commercial speech make it clear that false and misleading ads may still be prohibited (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 1976; *Bates v. State Bar of Arizona,* 433 U.S. 350, 1977).

But there may be problems with other kinds of falsehoods. Everyone deplores lies in areas like politics and religion, which may be as harmful as lies in selling cigarettes and cereals. But there is a big danger in allowing courts, legislatures, or government commissions to pass judgement on the truth or falsity of religious and political utterances. In cases like these, many observers think that it is far safer to let listeners find the truth for themselves rather than give government the power to control what's said.

This does not mean that religious and political leaders are free to line their own pockets with money they have raised for other purposes. Such behavior is subject to prosecution for fraud. It does mean, however, that the First Amendment forbids courts or other agencies of government to weigh the truthfulness of whatever religious claims or political assertions they make (*U.S. v. Ballard,* 322 U.S. 78, 1944).

What about intimidation and verbal threats? They are limited by a variety of federal and state restrictions, as well as by the common law of assault. It is a federal offense, for example, to utter threats against the life of the President of the United States and successors to the presidency. Although the Supreme Court has cautioned that threats against the President may sometimes be mere "political hyperbole," expressed in the heat of an emotional moment, and entitled to First Amendment protection (*Watts v. U.S.,* 395 U.S. 705, 1969), the likelihood that threats will be taken seriously by the Secret Service and the courts should cause great care about indulging in such utterances. Federal law also makes it illegal to transmit across state lines any threat to kidnap or injure another person, to send any threatening letter in the U.S. mail, and to harass anybody in connection with the collection of a debt.

State law typically prohibits physical intimidation and bribery, particularly when soliciting votes. And the common law of assault provides protection against symbolic behaviors, usually in the form of nonverbal gestures, which place a person in immediate fear of physical injury.

Different Strokes . . .

Thus far in this review, our analysis has focused on the *kinds* of communication which are not protected by the First Amendment. But that is only part of the free speech story. There are certain groups of *people* whose expression can be limited in ways that would be constitutionally intolerable if applied to the public at large.

Prisons and prisoners, for example, function under sharply curtailed rights of free expression. The justification is that the state needs to maintain adequate security in such settings. Although the Supreme Court has said that prisoners are not expected to sacrifice *all* of their constitutional rights, and that censorship of their mail must be "no greater than is necessary to the protection of the particular government interest involved" (*Procunier v. Martinez,* 416 U.S. 369,

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"You certainly have to admire his perseverance."

1974), it has also ruled that prison authorities can ban media interviews of particular inmates (*Pell v. Procunier*, 417 U.S. 817, 1974; *Saxbe v. Washington Post*, 417 U.S. 843, 1974), and that prisons can forbid prisoners' unions from recruiting. (*Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 1977). Furthermore, the Court has held that the news media have no general First Amendment right of access to jails for the purpose of reporting information about them to the public (*Houchins v. KQED*, 438 U.S. 1, 1978).

Military personnel, at least in their on-duty hours, are another class of citizens with limited free speech rights, because, as the Supreme Court has put it, "the military is, by necessity, a specialized society separate from civilian society. . . . An army is not a deliberative body. . . . Its law is that of obedience" (*Parker v. Levy*, 417 U.S. 733, 1974). Thus court martial punishments have been sustained for utterances deemed "unbecoming an officer and gentleman" and prejudicial to "good order and discipline in the armed forces" (*Parker v. Levy*), and for publications designed "to promote disloyalty and disaffection among the troops" (*Secretary of the Navy v. Avrech*, 418 U.S. 676, 1974). Military bases have been declared out of bounds for speeches and leaflets in support of political candidates (*Greer v. Spock*, 424 U.S. 828, 1976) unless the military "has abandoned any claim" to exclusive control over parts of the property by allowing, for instance, a public highway to run through it (*Flower v. U.S.*, 407 U.S. 197, 1972).

Even public employees who are not in the armed services give up some of their First Amendment rights when they accept government jobs. Persons in federal civil service positions, for example, are prevented by the Hatch Act from participating in partisan political activities. Some people have argued that this impinges on bureaucrats' First Amendment right to engage in political speech, but the Supreme Court has rejected challenges to the Hatch Act (*United Public Workers v. Mitchell*, 330 U.S. 75, 1947; *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 1973). Similar restrictions at the state level have also been sustained by the Court (*Broadrick v. Oklahoma*, 413 U.S. 601, 1973).

On the other hand, the First Amendment rights of government employees may help kill off the patronage system. The Supreme Court has held that non-policy-making government employees have a First Amendment right not to be fired from their jobs because of their political beliefs and associations (*Elrod v. Burns*, 427 U.S. 347, 1976), and a federal district court in Illinois has interpreted that decision as also logically prohibiting the hiring and promotion of nonpolicy-making government personnel on a patronage basis (*Shakman v. Democratic Organization of Cook County*, 48 L.W. 2242, 1979). Whether the Supreme Court will ultimately uphold that extrapolation remains to be seen. If it does, a radical change will have to take place in the way politics operates in many communities.

Government employees are not free, of course, to talk publicly about a great deal of information they learn of while performing their duties. Some of this material, like tax returns and individual census data, is submitted by citizens who expect, and are entitled to, confidentiality. Other information must be kept secret to make effective law enforcement possible and to protect the nation's military security. It has never been considered a breach of an employee's free speech rights to curb communication about such matters. The Central Intelligence Agency, however, has gone so far as to require its employees to sign an agreement *never* to divulge *anything* they have learned in the course of their employment without first submitting it for clearance by agency officials. This arrangement has been challenged, though unsuccessfully, on First Amendment grounds (*Alfred A. Knopf v. Colby*, 509 F.2d 1362, *cert. denied*, 421 U.S. 992, 1975).

Free speech? Sure, but not everywhere, and not for everyone (prisoners, military personnel, and public employees—especially CIA agents—take notice)

Location Matters Too

Besides the restrictions applied to certain people, there are restrictions on numerous *places*, forbidding speech which the First Amendment would permit elsewhere. For example, numerous court cases have dealt with the question of whether expression which would clearly be protected by the First Amendment on public streets and sidewalks can be carried onto the property of public facilities like schools, libraries, bus terminals, airports, hospitals, or the lobbies of government offices. The Supreme Court has spoken to some of these matters and lower courts to others.

Regarding public schools, the Supreme Court has said that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but may engage in any communication which does not "materially and substantially interfere" with the educational process (*Tinker v. Community School District*, 393 U.S. 503, 1969). The Court has also held that a silent vigil in a public library to protest against its racially discriminatory policies was protected by the First Amendment (*Brown v. Louisiana*, 383 U.S. 131, 1966).

Lower courts have found a free speech right to solicit for political and religious purposes, pass out leaflets and carry placards in the large open areas of municipal bus terminals (*Wolin v. Port of New York Authority*, 392 F.2d 83, *cert. denied*, 393 U.S. 940, 1968), airports (*Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, *cert. denied*, 421 U.S. 992, 1975), and the waiting rooms of government offices (*Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319, 1974; *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372, 1971).

A federal district court in Texas, however, has recently held that a county hospital's ban on solicitations without prior approval was not in violation of the First Amendment (*Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital District*, 48 L.W. 2360, 1979). The district court relied for its decision on a principle enunciated by the U.S. Supreme Court in a 1972 opinion:

> The nature of a place, the pattern of its normal activities, dictates the kind of regulations of time, place and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library . . . making a speech in the reading room almost certainly would. . . . The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time (*Grayned v. Rockford*, 408 U.S. 104, 1972).

Whether that principle does, in fact, justify a sweeping ban such as that imposed by the Dallas County Hospital—which included its first floor halls and lobby, cafeteria, gift shop, vending machine area, parking lots, and adjacent hospital streets and sidewalks—is a question that may well be addressed by an appellate court.

Obviously, using hospitals, libraries, and other publicly owned-and-operated places for free speech raises many First Amendment questions. Even more problems are presented by *privately* owned-and-operated facilities of a public or quasi-public nature. Is there a First Amendment right of access to such places?

That issue was first confronted by the Supreme Court back in 1946, when it ruled that Jehovah's Witnesses could not be stopped from urging their cause in Chickasaw, Alabama, simply because it was a company town, owned lock, stock, and barrel by a local shipbuilding corporation. The Court reasoned that

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it (*Marsh v. Alabama*, 326 U.S. 501, 1946).

With the coming onto the national scene of the ubiquitous modern-day shopping center, many observers thought that the logic of the Supreme Court's company-town decision compelled a similar ruling on these new facilities. That, indeed, was the Court's first impulse, as it struck down an injunction against the picketing of a shopping-center grocery store (*Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 1968). But on second thought a majority of the justices backed off to the more qualified position that messages irrelevant to the purposes of a shopping center could be banned (*Lloyd Corporation v. Tanner*, 407 U.S. 551, 1972). Then, on third thought, the Court's majority retreated all the way to the view that shopping centers are not like company towns at all, and that their owners have the right, if they so choose, to exclude all would-be communicators from their property (*Hudgens v. N.L.R.B.*, 424 U.S. 507, 1976). That remains the present state of affairs.

A very different sort of private property which has been the subject of serious public-access dispute is the mass communications industry. Here the question has not been only whether the *property* rights of newspapers and broadcasting stations give them the privilege of excluding others from their channels, but whether their own *First Amendment* rights to communicate whatever they please prevail over the arguments of people who claim that the First Amendment gives them a right of access to the medium.

The High Court Response

The Supreme Court's answer to that question has been unequivocal with regard to newspapers and compromising with respect to radio and television. According to the Court, the public simply has no right of access to a newspaper's pages. No matter what a newspaper says about you, the Bill of Rights doesn't require the paper to give you space to reply. For example, the Court has unanimously and forcefully struck down a state law requiring that newspapers give a right of reply to editorial criticism of candidates for public office. In so doing the Court declared that "An enforced right of access . . . brings about a confrontation with the express provisions of the First Amendment" (*Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 1974).

But the electronic media have been held to a different standard. Because they operate in a physically finite amount of space, and are licensed to broadcast on a given channel by the government, the Congress has decided, and the Supreme Court has agreed, that they may be required by the Federal Communications Commission to operate in the public interest. In fact, the F.C.C. has imposed on broadcasters the Fairness Doctrine and the right to reply to personal attacks. In turning down challenges to these rules, the Supreme Court has said:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market, whether it be by the government or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here (*Red Lion Broadcasting Company v. F.C.C.*, 395 U.S. 367, 1969).

But what the Supreme Court seemed to be giving to the public in *Red Lion* in access rights to radio and television, it partially withdrew only four years later. The particular issue which had arisen was whether broadcasters had the right, as some of them asserted, to refuse to sell advertising time to individuals or groups to express views on public issues. Holding that broadcast channels were not common carriers, the Supreme Court found nothing in the First Amendment which required stations to sell air time for editorial advertisements (*Columbia Broadcasting Company v. Democratic National Committee*, 412 U.S. 94, 1973).

Many critics of the present system of privately owned mass media contend that without any substantial right of public access, the First Amendment has become a largely empty vessel. The soapbox orator, the pamphleteer, the marcher, and the novice political candidate have no chance of success, it is argued, unless their messages are given exposure by the mass media, which are more likely to respond to the whims and biases of their owners, editors, and advertisers.

Those who manage the media reply that viewpoints with value and with public support will gain a hearing, if not because of journalistic integrity then at least because of the competition among the media to hold the interest of their audiences. That presumes, of course, a variety of channels, owners, and editorial decision makers—a condition which unfortunately does not exist in many communities, and may not be diverse enough at the national level as well.

To maintain a truly free marketplace of ideas in a technologically advanced mass society such as ours, it is not enough that there be an *absence* of government restrictions on speech. There must also be the *presence* of an abundance of voices, sufficiently amplified to be heard throughout the land. How that is to be attained, and the First Amendment preserved, is the challenge we face in the years ahead. ☐

Further Reading

Many good books exist on freedom of speech. We note two new ones in this issue's *Curriculum Update*. Here are some others.

Among the best histories of the First Amendment are two by Zechariah Chafee: *The Blessings of Liberty* (Philadelphia: J.B. Lippincott Co., 1956) and *Free Speech in the United States* (New York: Atheneum, 1969 [originally published 1941]). Thomas Emerson's *Toward a General Theory of the First Amendment* (New York: Random House, 1966) is a landmark work.

Classroom Strategies

(Continued from page 13)

the main test which later courts have used to determine whether a particular instance of student expression is permitted under the First Amendment. That's why the words "materially disruptive" crop up so often in the cases discussed in this article.

In examining the decision of the Supreme Court, have your students consider the following questions:

- What do the students think about the Supreme Court decision? Is it right or wrong? Why or why not?
- What kinds of activities would be considered "materially disruptive" and therefore not subject to First Amendment protection? Is it proper to even impose such a limitation on any freedom of speech cases?
- What are the consequences of the decision? Does it serve as a tool by which to undermine the authority of schools? Or is the decision to be applied in a more limited way? (For a full discussion of these questions, see David Schimmel's "If Courts Recognized Student Rights" on page 23.)

Reading Between the Lines

Since *Tinker* has had a major effect on later student rights cases, your students should closely examine both the majority and dissenting opinions to gain a complete familiarity with the decision's principles. One way to do this is to have students examine each of these quotations. Which, if any, would they agree with? Why? Which do they think come from the majority opinion, and which from the dissent? (The first five quotations are taken from the majority opinion written by Mr. Justice Fortas. The second five quotations are taken from the dissent of Mr. Justice Black.)

- "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
- "(U)ndifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression."
- "Any word spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society."
- "In our system, state-operated schools may not be enclaves of totalitarianism . . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."
- "In the absence of a specific showing of constitutionally valid reasons to regulate speech, students are entitled to freedom of expression of their views."
- "If the time has come when pupils of state-operated and supported schools, kindergarten, grammar school or high school, can defy and flaunt orders of school officials to keep their minds on their own school work, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."
- "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens."
- "(G)roups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins and smash-ins. . . . Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. . . ."
- "(I)t is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the State that collects the taxes to hire the teachers for the benefit of the pupils."
- "This case . . . subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."

A second way for students to become acquainted with the principles argued in the case would be through a dialogue/debate presented before the entire class. Several students might be assigned to defend the majority position of Mr. Justice Fortas or the dissenting position of Mr. Justice Black. Once the debate has been completed, members of the class could be allowed to direct questions to speakers or respond to the arguments presented by either side. The teacher should ensure that the following major points are discussed during the session.

- The strengths and weaknesses of each position.
- The values which either position would best protect.
- The impact which either position has on traditional education.

Finally, teachers might consider conducting a mock trial (see Winter, 1978 *Update*) based on the facts of the *Tinker* case. This activity would focus students' attention on the specific questions and issues of *Tinker*, in a context somewhat similar to the actual procedure of judicial

Drawing by Lorenz; © 1979 The New York Magazine, Inc.

"Just tell the press the Ambassador feels it would be inappropriate to comment until he's had time to study the complete text."

decision making. The activity is highly recommended to involve more students in a detailed examination of the principles being dealt with.

Strategy

4.

Practical Application

Although *Tinker* is crucial to analyzing later cases on freedom of student expression, students should not conclude that, simply because a legal standard has been articulated, the law provides clear-cut answers to particular problems. Ask the students to indicate, based on the *Tinker* standard, which of the following statements are "true" or "false." If there is not enough information to provide a "true" or "false" answer, circle the "?" symbol. (For more information on several of these cases, and for a discussion of student free speech in the 70s, see "If Courts Recognized Student Rights.")

T F ? *Case No. 1:* A school rule against wearing insignia not related to school activities can no longer be upheld.

T F ? *Case No. 2:* A school rule against wearing black armbands to support a national moratorium can no longer be upheld.

T F ? *Case No. 3:* A school rule against wearing "provocative symbols" that "would cause a substantial disruption of the student body" can no longer be upheld.

The teacher might then introduce the following cases actually adjudicated by federal courts. In each of these cases, courts dealt with one of the above fact situations, with the *Tinker* standard invoked as controlling.

Case No. 1:

Guzick v. Debrus, 431 F.2d 594 (6th Cir., 1970). The Sixth Circuit Court of Appeals held that (1) the existence of a long-standing rule against wearing buttons or insignia not related to school, (2) the racial composition of the school, (3) the atmosphere of tension, and (4) the racial confrontations of the past justified school officials in suspending students for wearing black armbands.

Case No. 2:

Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir., 1971). The Fifth Circuit Court of Appeals held that the mere possibility of disruption, without any facts or evidence supporting such a threat, would not justify suspending students for wearing black armbands.

Case No. 3:

Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C., 1971). The court held that the fact that (1) there were several groups of protesters with divergent views, (2) that the students had been noisy, belligerent, and disrespectful toward teachers, and (3) that violence was threatened in the past justified suspending students for wearing black armbands, since the situation was "explosive" and the student mood "very tense."

The college president hit the ceiling when kids wanted to organize a campus SDS chapter. Did he have the right to veto the idea, or did the Constitution protect the kids?

- In what ways are the facts of the above cases similar to the facts of *Tinker*? In what ways are they different?
- Were the students justified in acting the way they did in each of the above situations? Were the administrators justified in suspending the students?
- Were the different courts correct in the way they decided each case? Are the decisions consistent with the "student standard" set forth by the Supreme Court in *Tinker*?

The students might also be encouraged to develop a classroom discipline code consistent with the standard set forth in the *Tinker* decision. Have them then consider their own high school discipline code in light of *Tinker*. In both instances, students should be encouraged to pay particular attention to:

- Whether the rights of the students or the preservation of educational order is more clearly favored;
- How specific each code is, need be, or should be;
- The severity of the disciplinary sanctions imposed under each code for particular offenses.

Strategy

5.

Other Forms of Expression

Students' right to free expression is indirectly related to their contacts within the school and with outside speakers who may come to the school. Courts have reasoned that the organizations people belong to and the speakers they bring in to hear are closely tied to personal expression and thus are deserving of First Amendment protections.

Again, the issue is the balance between individual freedoms and educational values. The following activities seek to reinforce the idea that protection of student association is not necessarily absolute.

A Right to Organize

Back in the turbulent days of campus protest, students of Central Connecticut State College asked that their chapter of Students for a Democratic Society (SDS) be recognized as a campus organization. Recognition would have permitted them to use campus facilities for meetings and announce meetings through the campus bulletin board and school newspaper.

The college president denied the group official recognition. He said he wasn't satisfied that it was independent of the national SDS, which he thought had a philosophy of violence and disruption.

The students sued to get their group recognized. After striking out in the district court and court of appeals, they were vindicated by a unanimous Supreme Court decision in their favor.

In the case of *Healy v. James,* 408 U.S. 169 (1972), the Supreme Court held that it wasn't up to the students to show that their group was not under the influence of the national SDS. Rather, it was up to the school to prove that it was closely linked to the national SDS and that there was evidence that it would be disruptive. In denying them official recognition without justification, the college president had violated their First Amendment right of association.

However, the Court did provide that a school may issue certain regulations governing the conduct of student groups, though the regulations would have to be in accord with the *Tinker* standard. That is, regulations would have to be based on a substantial threat of material disruption which might interfere with the school's order.

Have students consider the following alternatives to the rationale of the *Healy* decision. Which, if any, would they support? Which, if any, might be more in keeping with the protections afforded by the First Amendment?

- All student organizations should be given official recognition regardless of the trouble they may cause.
- All student organizations should be given official recognition unless there is a formal school resolution not allowing them.
- No student organization should be given official recognition unless it can prove that it will abide by the rules of the school.

Then introduce the following examples of organizations which might seek official recognition from a school's administration. Which, if any, would probably be allowable under the *Healy* decision? What other facts might have to be known before a decision could be made?

- A subversive group designed to violently overthrow the city's politicians.
- An antiracism group designed to combat discriminatory school policies by whatever peaceful means possible.
- A proracism group designed to promote policies encouraging segregation by whatever means possible.
- A devil-worshipping society.
- A "Friday after school" beer drinking society.

Finally, have your students conduct an attitude survey of five adults, asking them the following questions and whatever others they feel may help to discover adults' feelings about student association. Have students encourage adults to answer the questions as openly and honestly as possible.

- What organized student groups, if any, should be denied access to a school's facilities? (You may wish to give them examples like the above list.)
- Should decisions about official recognition of student groups be made only by the school's administrators?
- Should the parents of students attending the school be included in the decision-making process? What about the students themselves?

After the survey is completed, have students react to the answers. Are the answers similar to those the students would have provided? If not, does it matter that adults in the community might differ with students (and possibly among themselves) about students' right to free expression through association?

A Right to be Represented

In the 1969 case of *Stacy v. Williams* (see box on page 11), a U.S. district court was called upon to analyze several of a college's regulations regarding outside speakers and determine whether or not the regulations were constitutional. The court's analysis resulted in the following guidelines for outside speakers.

- Students may be required to notify and seek the approval of the school's administration before an outside speaker is allowed to appear on campus.
- But if the school does allow outside speakers, it can not ban a particular one simply because his views are different from those of the majority of the school's population.

Ask students to find out about your school's policies on outside speakers. What would happen if a student organization asked a Ku Klux Klan leader to give a talk at the school?

- If an outside speaker is denied approval to appear at the school, a fair reviewing procedure must be provided, allowing students to challenge the administrative decision.
- Courts would uphold a decision to bar an outside speaker if evidence could be presented showing that the speech would constitute "a clear and present danger" to maintaining school order and discipline.

Have the students consider the following questions regarding the *Stacy* decision.

- Do the judicial guidelines adequately protect a student's right to free speech?
- Should the guidelines be extended to high schools as well as colleges?
- Do the guidelines make it possible for a student group to force a school administration to allow outside speakers to appear? Should they?
- Are there any differences between the court's "clear and present" standard and the *Tinker* court's "material and substantial interference" standard? Does it matter if there are?

An outside speaker simulation will help students become more fully aware of the "trade-off" between student rights and school administrative policy. Have students enact what might happen if a high school student council was to ask the principal to allow a Ku Klux Klan leader to speak in school. The simulation should cover the following major points:

- The interests of both the student group and the principal.
- The effects which the speaker would have on the student body.
- The student group's specific reasons for requesting that the leader be allowed to speak.
- Any relevant particulars involving the place, time, and manner of the leader's speech.

Finally, have several students consult with one of the administrators of your high school regarding its outside speaker policies. Are outside speakers allowed to appear at the high school? If not, why not? Should they be? If outside speakers are allowed to appear, are there any limitations on who can speak and when and where they can speak? Are such limitations part of formal school policies.?

Conclusion

These strategies have attempted to examine the most frequent forms of student expression. Strategies can be developed to cover other situations involving student expression, predicated on the rights of freedom of religion, conscience, the press, and personal appearance.

To some extent, these adjunct forms of student expression involve principles similar to those addressed above. On the other hand, these types of student expression involve concepts of constitutional law different from and sometimes broader than those applying to free speech.

Of course, it's the job of the classroom instructor to design a curriculum which best meets the needs and interests of the students. Still, regardless of the specifics of the curriculum, the teacher can help make students aware of the protections afforded them under the First Amendment, how those protections might be applied to particular factual settings, and what other values are involved when expression occurs in schools. After such a curriculum, students should be better able to understand the legal considerations of one of their most cherished values—the right to act, speak, and think the way they feel. ☐

CURRICULUM UPDATE

Mabel McKinney-Browning

Help Is on the Way

Good new materials cover everything from the First Amendment to the Fourteenth

Books

■ ***The Amendment That Refused to Die*** (1978), by Howard N. Meyer. Secondary, Teacher Resource. Paperback, 253 pp. $5.95. (Beacon Press, 25 Beacon St., Boston, MA 02108).

Despite intermittent attacks by a Supreme Court often more diligent about protecting property rights than human rights, the Fourteenth Amendment enters its hundred and twelfth year having been seriously wounded in a number of skirmishes, but apparently resilient and determined to win the war.

The Amendment That Refused to Die gives a comprehensive history of the Fourteenth. Meyer covers early proposals that the Bill of Rights be made to apply to the states as well as the federal government, then reviews the political realities after the Civil War which made the amendment necessary. Much of the book is devoted to interpretations of the amendment by courts.

Taking you behind the scenes, Meyer introduces little remembered but important characters like John A. Bingham, an Ohio congressman instrumental in getting the Fourteenth passed through Congress, Albion Tourgee (Plessy's lawyer), and the first John Marshall Harlan, the original great dissenter.

Increasing activities by the Ku Klux Klan, combined with some curious interpretations of the Fourteenth Amendment by a seemingly indifferent Supreme Court, illustrate the problems of enforcing an amendment whose intent was apparently very clear to the drafters.

Written in a richly anecdotal style, reminiscent of the classic *Simple Justice* (the history of *Brown v. Board of Education*), Howard N. Meyer's book deserves to be on every law-related educator's bookshelf. Because of its easy to understand style, this book is recommended for students tenth grade and up.

Curriculum Guides

■ ***Children's Books: A Basis for Exploring Citizenship and Law*** (1979), edited by Judy Cawthon. Elementary. Softbound, 108 pp. curriculum guide. $1. ***Law-Citizenship Education: A Scope and Sequence Approach for Kindergarten through Grade Eight*** (1978), prepared by Ira Eyster and Judy Cawthon. Elementary. Softbound, 150 pp. curriculum guide. $1. (Law-Focused Project, Southwest Center for Human Relations Studies, University of Oklahoma, 555 Constitution, Norman, OK 73037).

Children's Books: A Basis for Exploring Citizenship and Law is directed to teachers of early elementary students. It is a practical guide to teacher-made materials and classroom activities, using children's literature to examine such law-related concepts as justice, equality, power, and property. Lessons include texts of selected children's books and suggested activities for highlighting law-related concepts while building language arts skills. An extensive bibliography of children's literature relevant to law-related education is also provided.

Early elementary teachers should take a look at this guide. It will provide many good, practical, easy-to-do suggestions for incorporating law-related concepts into the language arts curriculum.

The second guide, *Law-Citizenship Education*, outlines a curriculum to be used in kindergarten through grade 8. The focus of this guide is five concepts: equality, power, justice, property, and liberty. Using a spiral curricular approach, each elementary level—primary, intermediate, and upper—deals with these concepts in an increasingly sophisticated manner. For example, primary activities introducing these concepts grow out of discussions of children's literature, activities in the intermediate grades are designed to expand the students' understanding of the process of law, and activities in the upper elementary grades focus on critical analysis of the American system of justice and governance.

This guide describes an adjunct curriculum which may be used to supplement assigned social studies texts. It also contains a well-organized and comprehensive bibliography.

Teachers should find this guide worthwhile too.

■ ***Juvenile Justice*** (1978), prepared by John F. Khanlian, Karen K. O'Konski, and Linda Six. High School. Softbound, 193 pp. curriculum guide. $8. (Institute for Political/Legal Education, 207 Delsea Drive, R.D. 4, Box 209, Sewall, NJ 08080).

One of the most established law-related education programs is the New Jersey-based Institute for Political/Legal Education. IPLE's program is designed to involve high school students in the political, governmental, and legal process. Those teachers who have used IPLE's materials in the past have found them to be timely and transportable to both urban and rural settings.

The most recent publication from IPLE, *Juvenile Justice*, is a revision of an earlier curriculum guide of the same title. This edition is distinguished by two new sections, "The Maze of the Courts," which introduces students to the United States court system, and "From Arrest to Appeal," a discussion of adult criminal procedure. Other sections of the manual deal with the rights of students in school and the juvenile justice system.

Cases, both actual and hypothetical, are included for information, explication, and illustration of the law. The suggested activities for students range from inviting a juvenile judge to speak, to conducting a poll of the student body on its experiences with the juvenile justice system. Each section is followed by a bibliography, sometimes annotated, listing relevant reference and resource materials and including an annotated listing of films and filmstrips.

This manual provides teachers with a thorough examination of the juvenile system that will engage students' attention and lead them to understand the issues of juvenile justice through such participation activities as discussions, simulations, mock trials, role playing, and moot courts.

Teachers' Manuals and Materials

■ ***The Constitution and Amendments to the Constitution*** (1977), by Barbara Nesbit. Elementary, Junior High. Duplicating Masters and Guides, 24 pp. $4.25. (Milliken Publishing Co., 1100 Research Blvd., St. Louis, MO 63132).

Teachers who are faced year after year with the prospect of making the Constitution and Bill of Rights meaningful, understandable, and interesting to their students will find these duplicating masters quite useful. Designed for students in upper elementary and junior high school, this work treats the Constitution as a living document for our times.

BEST COPY AVAILABLE

The text is not written in the actual language of the Constitution, but rather in today's vernacular. This, in itself, provides younger students and even older students who are less able readers with some help in understanding the content.

Each segment of the text paraphrases the Constitution and Bill of Rights and provides an explanation or illustration of the content. Important concepts are highlighted in the text and are further explained by cartoons or charts. Following each segment is a series of five to ten short answer questions which students use to check their knowledge. An excellent selection of review questions is also provided.

■ ***In Search of Justice*** (1978), by William M. Gibson and E. Steven Coren. Junior High, Secondary. Softbound, 118 pp. legal education materials. Free. (Printed and distributed by Massachusetts Bar Association Foundation, Incorporated, 1 Centre Plaza, Boston, MA 02108).

This instructional guide for a course in law-related education is designed for lawyers who have limited classroom teaching experience. Teachers of LRE will also find the guide useful, since it outlines a very logical and organized approach for incorporating law into the classroom program.

The primary goal of this guide is to "encourage youth to inquire further into the American system of justice by use of recommended readings, discussion of ideas, and research which will enable them to broaden their perception of their society and its laws."

The guide is divided into several units, including civil law, criminal law, the legal system, trial procedure, statutory analysis, law reform, and employee rights reform. Each unit contains supplementary information about the topic, an outline of the substance of the unit, a series of discussion activities with appropriate questions, and follow-up or independent activities. The book also includes a script for a mock trial and an excellent section on problem analysis.

Designed for use with junior high school and secondary school students, this book is highly recommended for lawyers whose more sophisticated understanding of the law makes it difficult for them to know what to teach young people about the law. At the same time, the guide's treatment of law is easily understandable, and will be of great use to teachers whose background in the law is sketchy at best. All in all, an excellent teaching resource for law-related educators.

■ ***Advocates in Brief*** (1979), edited by Lynne Auker. Junior High, High School, Junior College, Adult. Softbound, 92 pp. teachers' guide. Free. (Developed by WGBH Educational Foundation, available from Lyn Anderson, Information/Distribution, Office of Radio and Television for Learning, 125 Western Avenue, Boston, MA 02134).

The *Advocates in Brief* is a guide to a new series of twenty 30-minute debates, shown on PBS Thursday mornings at 10:30 until May 22. These debates are intended for viewing by junior high school, high school, junior college, and continuing education classes.

This guide provides an outline for each debate in the program schedule. It details the pros and cons of each argument, provides teachers with information about issues, and even gives a list of vocabulary which may be unfamiliar to students. It is full of cartoons, activities, and charts which teachers may use to increase the student's understanding of debate issues.

Additionally, students get a bird's-eye view of debate as a tool for conflict resolution. Debate topics deal with issues of special interest to young people, ranging from the legalization of marijuana to the efficacy of the death sentence. A summary key provides a quick overview of the variety of topics and concepts dealt with in the course of the program series.

All in all, this is a very well-written and complete teachers' guide which should prepare both teachers and students for productive viewing of this award-winning series.

Films

■ ***Child Abuse and the Law*** (1977). Preservice/Inservice Teacher Education. 16mm, super 8mm, prerecorded video-cassette, color/sound film, 27 minutes. Purchase: $325.00; rental: $32.50. (Perennial Education Inc., 477 Roger Williams, P.O. Box 855, Ravinia, Highland Park, IL 60035).

A pervasive issue in our culture, which only recently has received a great deal of media coverage, is child abuse and neglect. This film says that in each year there are approximately one million *reported* cases of child abuse. It is estimated that the actual number of abuse cases is three to four times that number. Child abuse is defined as any physical or mental injury, including sexual abuse, which is perpetrated on children.

In 1973, the Federal Child Abuse Law was enacted. This law demands that teachers report suspected abuse cases, while providing them immunity from civil suits that might arise from such reports. Thus reporting suspected child abuse is not simply what teachers ought to do, but rather something they have a legal obligation and responsibility to do.

This critical professional issue is dealt with candidly in this film. Teachers in the film explain how they were first alerted to the problem of abuse and how they handled it. Following each anecdote is a statement from a lawyer indicating the correct legal procedure for the teacher to follow and a statement from a pediatrician detailing the more common indicators of certain kinds of abuse.

The primary message is that the law requires inquiry into any suspicious behavior or injury teachers may notice. It is not incumbent upon teachers to *prove* abuse or neglect, but it is incumbent upon them to become involved.

This film provides an excellent opportunity for administrators and teachers to become informed of their legal rights in what is becoming an increasingly critical area.

■ ***Who Do You Tell?*** (1979). Elementary. 16mm, color/sound film, 12 minutes. Purchase: $195; weekly rental: $25. (MTI Teleprograms Inc., 4825 N. Scott Street, Shiller Park, IL 60176).

This sensitive and appealing film provides children with an understanding of the problem-solving process through animation and film. The animation is an excellent way of personifying a problem and the importance of seeking solutions (an especially useful tool in working with young children).

The film explains to children how to solve problems in their lives by using the family sup-

STAND BY FOR SPECIAL BULLETIN
BURBANK

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Two New Ones on the First

■ ***Free Speech, Free Press, and the Law*** (1980), by Jethro K. Lieberman. Secondary, Teacher Resource. Hardback, 157 pp. $7.95. (Lothrop, Lee & Shepard Books, a division of William Morrow & Company, Inc., 105 Madison Avenue, New York, NY 10016).

Jethro Lieberman, Legal Affairs Editor of *Business Week* magazine, has done a wonderful job of explaining the First Amendment's free speech and free press clauses in this little book. Using 50 celebrated cases to illustrate the major free expression issues that have arisen in American history, Lieberman looks at such topics as prior restraint, the clear-and-present-danger test, nonverbal speech, the freedom not to speak, and where and how speaking and publishing may be done. A final chapter—"You Be the Judge"—gives readers the facts of some recent cases and lets them decide for themselves before learning of the actual decisions.

Lieberman's handling of the cases combines an eye for drama with a scholar's reverence for the truth. Best of all, Lieberman knows how to simplify without condescending, how to cut through the verbiage of legal cases to get to the glowing issues at their heart. It's hard to imagine a better introduction to the First Amendment for secondary students.

■ ***The First Freedom: The Tumultuous History of Free Speech in America*** (1980), by Nat Hentoff. Secondary, Teacher Resource. Hardback, 328 pp. $9.95. (Delacorte Press, Dell Publishing Co., Inc., 1 Dag Hammarskjold Plaza, 245 East 47th Street, New York, NY 10017).

Nat Hentoff's book is as good as Jethro Lieberman's, but with interesting differences of approach and attitude. Lieberman, a lawyer, lays out the facts of each case objectively and is willing to concede, if only for the sake of argument, that those who seek to limit speech may have defensible reasons. Hentoff, a journalist and board member of the New York Civil Liberties Union, takes a more partisan approach.

He notes, for example, that he's indebted for his abiding concern with the First Amendment to "those officials at Northeastern University in Boston who tried to censor the writings of the staff when I was editor of the *Northeastern News* in the early 1940s." His anger undimmed by the years, he writes with fire of attempts to control what's said and written.

The first part of the book looks at the free speech rights of students, teachers, librarians, and free-speaking "persons" under the Constitution. Like Lieberman, he builds his chapters on well-written recapitulations of actual cases, but unlike Lieberman he considers many cases decided by lower courts, as well as Supreme Court cases.

The middle sections of the book cover the First Amendment's history from colonial days to the Communist cases of the cold war. The final sections deal with freedom of—and from—religion, the constitutional powers of the free press, and "the outer limits of protected speech—and beyond." The book concludes with an excellent bibliography of First Amendment books.

All in all, an incisive, passionate, insightful book.

—CW

port system and, when appropriate, the community support system. Strongly emphasized is the idea that children are not alone with their problems. Strategies for dealing with problems are generated through student discussions of issues ranging from "who do you tell about stolen bicycles" to "who do you tell about child abuse."

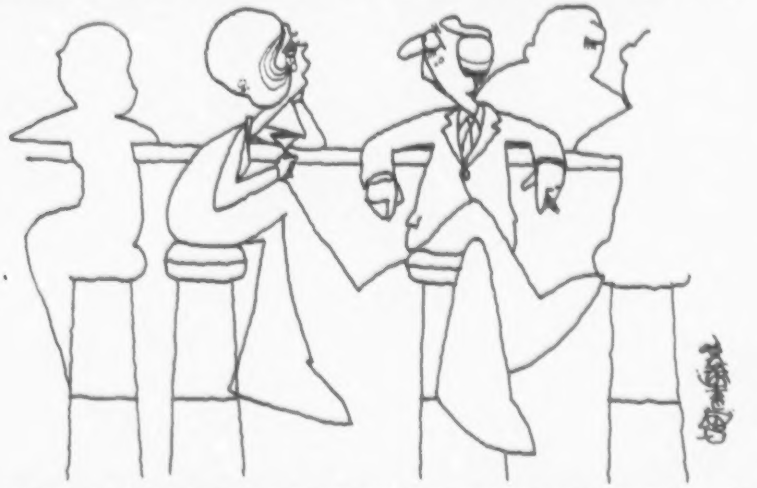
This award-winning film is appropriate for use throughout the elementary grades as a catalyst for classroom discussions of many issues, including the relationship between independence and interdependence in group life. Accompanying the film is a discussion guide which provides a number of useful suggestions for follow-up by the teacher.

■ ***Police Tapes*** (1978). Junior High, Secondary. 16mm sound film, 2 parts, 25 minutes each. Purchase: $495; weekly rental: $95. (MTI Teleprograms Inc., 4825 N. Scott Street, Shiller Park, IL 60176).

"Pity the poor cop. He (or she) is caught in one of society's most perplexing dilemmas. He is the charnel house cleaner, the custodian of our ills, the keeper of our secrets, the resolver of our disputes." Thus begins this film essay into the working lives of police officers. The film attempts to bring a sense of humanity to these "protectors" of our society.

This documentary follows policemen on their beats, and in squad cars answering calls ranging from simple assault to murder. Each case is visually illustrated from the moment the police officer is on the scene until the initial resolution is complete. This is followed by the officers discussing their interpretation of the crime. These debriefing segments are the most useful aspect of the film, since they allow viewers to see the logic, sometimes difficult to understand, that the officer brings to the situation.

This film is appropriate for junior high and high school students. It can be used to discuss such issues as the role of law enforcement in society, the pressure, stress, and frustration of being a law enforcement officer, and the criminal justice system in general. The film is accompanied by two teachers' guides. One is a narrative which provides background into the various issues depicted in the film. The second is a discussion guide to aid teachers in more appropriate use of the film. Both guides are well done and meet their goals.



"What's a girl like me doing in a joint like this? Trying to decide whether to buy it for my entertainment conglomerate."

■ ***Stop Police*** (1979). Junior High, Secondary, College, Adult. 16mm color/sound film, 14 minutes. Purchase: $250; weekly rental: $40. (MTI Teleprograms Inc., 4825 N. Scott Street, Shiller Park, IL 60176).

Stop Police is an episode from the popular program "60 Minutes." The film portrays police officers training to respond in situations requiring immediate critical decisionmaking. The film stresses that guidelines and/or rules are essential to the personal safety of police officers, as well as to the safety of the general public.

But police officers in the film suggest that laws, rules, or guidelines are sometimes in conflict with the conscience and judgments of the officers. The discussion broadens to include such issues as the extent to which rules hamper a cop's ability to do his job.

This film provides an excellent background for a challenging discussion of the efficacy of rules, the need for personal interpretation of guidelines, rules, and laws, and the understanding that rules do not always conform to our personal perspective. Further, students interested in a law-enforcement career get an excellent view of the rigorous physical and mental training required. ☐

Teachers' Rights

(Continued from page 17)

pedes the teacher's proper performance of his daily duties in the classroom or disrupts the regular operation of the school . . ." (*Lusk v. Estes*, 361 F. Supp. 653, 1973).

Do teachers have a right to complain? A Virginia junior high school teacher complained about her repeated assignment as a "floating" teacher. Despite warnings from the principal that he didn't want to hear about it any more, the teacher wrote a letter of complaint to the superintendent and also filed a grievance about her "floating position." When her contract was not renewed because she "had been insubordinate and had displayed a poor attitude," Donna Johnson went to court. The federal district court protected her right to complain, concluding that "the right of a teacher to voice concerns about conditions which interfere with the education of her students falls squarely within the protection afforded by the Constitution." (*Johnson v. Butler*, 433 F. Supp. 531, 1977).

How about a teacher who openly espouses controversial positions in the community? The issue was raised in the case of a lecturer at the University of Delaware who was the faculty advisor to the Campus Gay Community organization. In interviews with three local newspapers, Richard Aumiller urged that gays should admit their homosexuality, tried to clear up misconceptions about homosexuals, and sought acceptance for them. But his contract was not renewed becaue the university president believed the interviews were "evangelistic" promotions of homosexuality and would harm and embarrass the university by implying official approval of homosexual conduct.

In a decision which relied on *Pickering*, a federal district court ruled that the professor's activities were protected by the First Amendment, since its basic purpose is to protect "the free expression of controversial and unpopular ideas" from interference by the government. There was no evidence that Aumiller was trying to convert students, nor did he abuse his special position in the classroom. His statements were attempts to educate people to accept homosexuals as equals and to eliminate stereotyping (*Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1977).

Finally, the Los Angeles Teachers' Union was successful in its attempt to circulate on school premises a controversial petition. The school board attempted to prohibit its circulation for fear that the petition would "*cause teachers to take* and defend opposing political positions, thereby creating discord and lack of harmony." But the California Supreme Court disagreed, finding the petition an essential part of the democratic process. In the opinion of Justice Peters, the petition "epitomizes the use of freedom of expression to keep elected officials responsive to the electorate, thereby forestalling the violence which may be practiced by desperate and disillusioned citizens" (*Los Angeles Teachers' Union v. Los Angeles City Board of Education*, 455 P. 2d 827, 1969).

Teachers Don't Always Win

Not all First Amendment cases involving free expression are resolved in favor of teachers. The facts of the particular dispute are always important and must be carefully considered to determine whether or not the Supreme Court precedents will apply.

In the *Watts* case, two Alaskan teachers were dismissed for publishing an "open letter" to the Seward School Board that contained several serious accusations. The letter falsely charged that the superintendent ordered a custodian to do electrical work "beyond his skill in a dangerous building." It also claimed that he had threatened "to get one-third of the faculty this year and half of the remainder the next year." Other damaging statements were contained in the letter. Sound like the *Pickering* situation? Maybe, but the court found major differences.

The Alaska court, in ruling against the *teachers, distinguished the case from Pickering* in three important ways. First, the accusations were false, not made in good faith, and were "in reckless disregard of the truth." Second, the false statements were not about matters of public record, therefore could not be easily corrected by the school board. And finally, the letter led to a year-long intense public controversy involving teachers, the school board, and the public. With these differences in mind, the court upheld the dismissal of the teacher (*Watts v. Seward School Board*, 454 P. 2d 733, 1969).

Other courts have held that the First Amendment does "not endow a teacher . . . with a license to vilify superiors publicly" (*Pietrunti v. Board of Eduation of Brick Township*, 319 A. 2d 362, 1974), or protect a teacher who distributed leaflets prepared by a student revolutionary group and containing serious false charges (*Gilbertson v. McAlister*, 403 F. Supp. 1, 1975).

Still other cases could be cited to remind us that although the right of teachers to freedom of expression is now firmly established in constitutional law, no right, not even this one, is absolute.

Still, during the past two decades teachers have made real gains. Now the public is far more ready to recognize their right to free expression. Actions which got them fired in decades past, such as belonging to controversial organizations and criticizing school officials, are now firmly protected by the Supreme Court's interpretation of the First Amendment.

Drawing by B. Braun: © 1978
The Illinois School Board Journal

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"For crying out loud, Bosley, this is only your evaluation conference!"

Students' Rights

(Continued from page 25)

no. Judges in dozens of student discipline cases during the 70s have echoed the words that limit the *Tinker* holding: no student "for any reason" has a constitutional right to "materially disrupt classwork," cause "substantial disorder," or interfere with "the rights of other students." And there are no reported cases in which courts have denied school officials the authority to prevent substantial disruption.

Furthermore, there is no evidence that courts are allowing students to take control of the curriculum or the school's disciplinary system. While many schools have increased academic choice and encouraged students to participate in school governance, judges have granted them no constitutional right to determine texts, course requirements, teacher qualifications, academic standards, or disciplinary procedures. Educators and school offials have retained legal control over all these areas. They have often invited student participation. But this has been a matter of educational choice, not constitutional compulsion.

Legal Implications

Has *Tinker* finally settled the legal issues concerning student freedom of expression? Yes and no. Justice Fortas articulated two major constitutional principles designed to clarify the scope and limits to student First Amendment rights: (1) students take the right to freedom of expression with them to school; (2) this freedom does not give students the right to substantially and materially disrupt school work or interfere with the rights of others.

While the "substantial and material disruption" test resolved some issues, it raised other questions about the precise meaning of this standard. For example, how much evidence of disruption is needed to justify restricting a student's rights? Although the answer is still evolving, two federal cases—one from Ohio and the other from Texas—will illustrate the conservative and liberal edges of the judicial response. (For ideas on how to teach about these cases and many other aspects of student expression, see Frank Pawlak's article on page 0.)

Tom Guzick, a junior at Cleveland's Shaw High School, wore a button in class advertising an antiwar demonstration. Pursuant to a long-standing rule prohibiting the wearing of any symbol unrelated to education, the principal asked Guzick to remove his button. Guzick refused, saying that a Supreme Court decision "entitled him to wear the button in school." After Guzick was suspended, he went to court.

School officials argued that the no-symbol rule was necessary because in past years the wearing of buttons with racial slogans had led to hostility and disruption at this integrated school. Guzick argued that there was *no* evidence that *his* button would cause any disruption. But a majority of the Sixth Circuit Court of Appeals ruled in favor of the school (*Guzick v. Debrus*, 431 F.2d 594, 1970). It distinguished *Guzick* from *Tinker* on several grounds: Shaw's prohibition had been uniformly enforced against all symbols for years; some buttons had caused serious disruption in the past; and it was ad-

Materials on Student Rights and Responsibilities

Plenty of materials exist on the rights and responsibilities of students. Here is a sampling.

Legal Cases

Alan Levine, ***The Rights of Students*** (1977). This American Civil Liberties Union handbook covers such topics as First Amendment rights, personal appearance, due process, corporal punishment, discrimination, and school records. The book is based on major cases in each of these areas. The cost is $1.75, plus postage and handling. (Avon Books, Mail Order Department, 224 W. 57th Street, New York, NY 10019)

David Schimmel and Louis Fischer, *The Civil Rights of Students* (1975). This book uses the case study approach to investigate the civil rights of students. Cases involve freedom of speech, freedom of the press, freedom of association, freedom of religion and conscience, dress codes, racial and ethnic segregation, sex discrimination, and due process. Appendices include notes on how to use the legal system, summaries of leading cases, and suggestions on how to use the book in a classroom. The cost is $7.95. (Harper and Row Publishers, Inc., 10 E. 53rd Street, New York, NY 10022)

David Naylor, "Teaching About Student Rights and Responsibilities," *Update on Law-Related Education* (Fall, 1979). This article includes a series of lesson plans illustrating how cases on student rights and responsibilities can be incorporated into the classroom. The cost of the back issue of *Update* is $2.00. (American Bar Association, Circulation Department, 1155 E. 60th Street, Chicago, IL 60637)

Curricula

Student Responsibilities and Rights (1978). Three-week unit composed of methodology, lesson plan, student resources, and pre-post tests. It provides for comparison and contrast between student rights and responsibilities and the Bill of Rights and the Constitution. The cost is $8.00. (Law-Related Education Program for the Schools of Maryland, Greenbelt High School, 8950 Edmonston Road, Greenbelt, MD 20770)

"Youth in School" (section in text *Juvenile Justice* [1978]). A comprehensive curriculum guide designed to acquaint young people with their rights and liabilities under the law, as it affects them in school and under the juvenile court system. The cost of the text is $8.00. (Institute for Political/Legal Eduction [IPLE], 207 Delsea Drive, R.D. 4, Box 209, Sewell, NJ 08080)

David Schimmel and Louis Fischer, *Consuming Educational Services* (1979). This curriculum module for 11th grade students tries to help them understand their role as consumers of services, specifically of educational services. Organized in five units—the right to education and the duty to go to school, freedom of speech and press, due process in school, search and seizure, and student and parent involvement in educational decisions—the module also includes a pretest and a unit test, a guide for teachers, statements of general and specific objectives for each unit, selected constitutional amendments and excerpts from pertinent Appellate Court decisions, a glossary of legal terms, and listings of further resources for both students and teachers. The cost is $4.00, prepaid. (Adda Manosalvas, New Careers Training Laboratory, Room 1212, 33 West 42nd Street, New York, NY 10036) ministratively impractical for officials to permit some buttons and not others.

But as the dissenting opinion pointed out, "there was no indication" that the wearing of this button would cause *any* disruption. Thus *Guzick* exemplifies a narrow interpretation of *Tinker* in which factors of past disruption and administrative convenience seemed to outweigh a student's right to freedom of expression.

A liberal interpretation of *Tinker* is provided by the *Butts* case from Dallas, Texas. It also arose on a day of antiwar protest when tensions were high. Disruptive student demonstrations had occurred in a nearby community, a manifesto was published asking students to boycott classes or wear "black armbands of protest," and officials believed prowar students would try to tear armbands off the protesters. Under these circumstances, officials banned all armbands to prevent serious disruption. However, since there was no evidence that the armband wearers would cause trouble, the Fifth Circuit ruled that the expectations of disorder by others were not enough to suspend the students' right of symbolic speech (*Butts v. Dallas Independent School District*, 436 F.2d 728, 1971).

What more was required to justify the school's action? According to this court, administrators should first develop solid information on the intentions of the protesters and then determine "based on fact, not intuition" that disruption would probably result from wearing the armbands. Second, officials should make an effort to bring leaders of different student factions together to agree on mutual respect for each other's constitutional rights.

If actions such as these had been tried and failed, the failure might justify restricting the armbands. But in this case no such attempts were made. The court concluded that *Tinker* "declared a constitutional right which school authorities must nurture and protect, not extinguish," unless there is "no practical alternative." Clearly in this case administrative convenience was given far less weight than in *Guzick*. And this court expected educators to do much more than collect evidence of possible disruption before restricting a student's constitutional rights.

While *Guzick* and *Butts* illustrate a conservative and liberal interpretation of *Tinker*, how will most judges resolve close cases in this area? How will they rule when officials restrict student freedom in tense situations where there is evidence of some (but not substantial) disruption? The answer might be found in *Karp v. Becker* (477 F.2d 171, 1973). Here the Ninth Circuit ruled on a controversy involving a few chanting and shoving student demonstrators who were protesting the nonrenewal of a teacher's contract. Fearing violence, the vice-principal prohibited all students from bringing protest signs into the school. Steve Karp, one of the peaceful protestors, sued.

Was the vice-principal right? Can schools impose restrictions where there's more disruption than in *Tinker* but substantial disorder has not yet occurred? The court said "yes." The issue, wrote the judge, is whether the evidence is sufficient to support the school officials' "forecast of a reasonable likelihood of substantial disorder." The judge explained that in cases such as this, courts should avoid the temptation to be a "Monday morning quarterback." Instead of "second-guessing" school officials, courts should focus on "whether the apprehension of the officials was unreasonable under the circumstances." Here the judge ruled that the vice-principal's forecast of substantial disruption was not unreasonable and that the school's prohibition of Karp's sign was not unconstitutional. From this decision, it would appear that in close cases, courts will tend to support administrators who take action to prevent substantial disruption which is based on sufficient evidence.

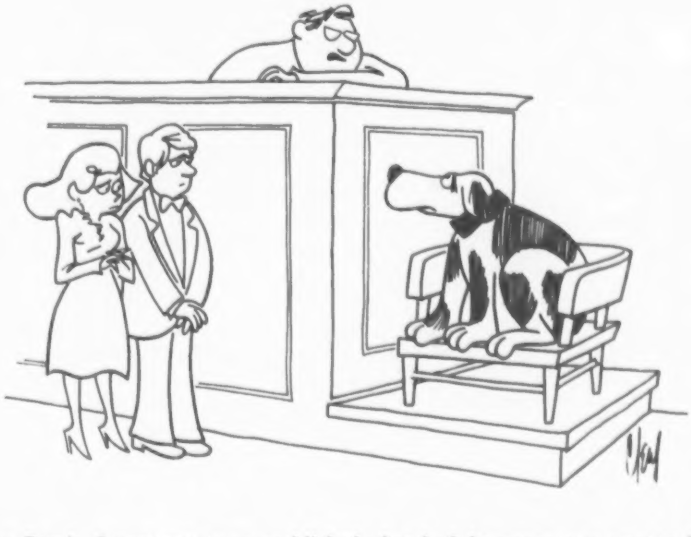
Guzick, *Butts*, and *Karp* not only illustrate the way *Tinker* has been applied during the past decade, but also indicate three types of interpretations that can be expected in the future. This is not to suggest that judges have unlimited discretion, but only that the "substantial and material disruption" test, like other constitutional standards, cannot be applied by the courts with mathematical predictability.

Educational Possibilities

During recent years, the *Tinker* case has become a standard part of many legal studies programs. Increasing numbers of students and teachers now know that students have a right to wear armbands to school. But some of the central issues raised in the Black-Fortas debate are rarely confronted by educators or highlighted in curriculum materials. And these are issues that may be essential in preparing students to be responsible citizens in a democracy.

One set of issues concerns how citizens should respond to laws they believe are unconstitutional. How, for example, should students respond to rules they believe violate their rights? Must they first try to change them through school channels? What should they do after they try and fail? If there are no school procedures for students to challenge such rules, do they have a right to defy them? And how should students respond when the rights of others are violated?

Another set of questions concerns what citizens should do about rules that are unjust but not illegal. How do we know if a rule or law is unjust? What should we do if we are unable to change unjust rules? Does civil disobedience undermine or strengthen our legal system? Finally, what are the responsibilities



"Now Bernie, I want you to go and lick the hand of the person you want to have custody of you."

of educators to incorporate such issues into the curriculum and help students think through these complex and critical questions?

And there's another dimension to the question.

Just as the *Tinker* case can help students think more deeply about issues of law and justice, so it can help us think more broadly about the ways we teach about law *outside the classroom*. While Fortas and Black differed about constitutional interpretation and educational methods, they agreed that schools teach citizenship through the nonformal or "hidden" curriculum, through the way they develop, judge, explain, and interpret their rules and disciplinary policies. It was precisely because both justices recognized that school governance has a profound influence on shaping student attitudes toward law that their disagreement was so intense.

It is almost a cliche to note that schools, like parents, teach as much by what they do as by what they say. This is especially true in the field of law where, for example, we teach as much about search and seizure or due process by what we do in hallways and the principal's office as by what teachers and texts say about the Fourth and Fourteenth Amendments in class. If our goal in school is to educate students to respect our legal system, but we violate students' constitutional rights through our disciplinary system, then our behavior will defeat our goal. Even when school officials are unaware that they are acting illegally, the unintended consequence of such institutional hypocrisy is to teach legal cynicism.

Today most law-related education ignores the nonformal curriculum. An important goal for the 1980s should be to redesign our approach to law studies so that the formal and hidden curriculum can complement and reinforce each other. There are several ways this can be done.

First, we can broaden our teaching of the Bill of Rights to include a full spectrum of cases dealing with students as well as adults. Just as *Tinker* is often used in a unit on free speech, so we can use recent court cases resolving conflicts between students and schools when we teach freedom of press, religion, and association, as well as equal protection, due process, and search and seizure. Such cases are lively, relevant, and easily available (see box on page 56). They have been successfully used in the public school curriculum, and they teach students about the limits as well as the scope of their constitutional rights.

Second, we can incorporate the study of student codes into our law curriculum in the same way we teach other subjects we take seriously. If a teacher simply handed students a text and said, "Take this home and read it carefully; you will be held responsible for everything that's in the book," we would conclude that the teacher didn't care, was incompetent or both. Too often, however, this is exactly the way we "teach" students about school rules and procedures, about a legal system that affects them every day and for which we hold them accountable.

Challenge for the 80s

Shouldn't this be changed? If our law classes are going to teach anything thoroughly, shouldn't they carefully examine the school codes that directly affect all of our students? Curricula that illustrate how this can be done have been developed for Maryland, New Jersey, and New York (see box). The Maryland material explains the relationship between the rules of the school and the laws of the state and federal government, plus constructive ways to evaluate and change school rules. Such materials suggest how schools can teach law through the formal and nonformal curricula, and they can be developed or adopted by every law studies project.

In reviewing the cases that followed *Tinker*, it seems clear that some of Justice Black's predictions have been fulfilled and others have not. Although Justice Black correctly predicted that *Tinker* would lead students to demand their rights more frequently and to initiate lawsuits when they believed their rights had been violated, this has not subjected schools "to the whims and caprices of their loudest-mouthed" students. Rather, it has led to a growing and active interest in the law on the part of students, teachers, parents, and administrators.

Tinker did not begin a "new revolutionary era" of judicially fostered permissiveness, as Justice Black feared. Judges have consistently allowed administrators to protect schools from student expression that would lead to disorder. On this issue Justice Fortas was right. Constitutional rights and freedom in the schools have proven to be compatible with reasonable discipline and effective citizenship education.

As we approach the bicentennial of the Constitution in 1987, some educators still feel that practicing the Bill of Rights in the public schools is risky. But as Justice Fortas pointed out, our Constitution says we must take this risk, and our history says the risk is worth it. Thus, there may be no better way for schools to observe the coming bicentennial than by practicing what we teach about the law—by risking on the side of the Constitution. ☐

"This is that joint account I was telling you about."

Patricia McGuire

Booze

What's All the Controversy Over Drinking Ages?

"How do you think a guy feels if he's old enough to die for his country but isn't old enough to drink in it?"
—19-year-old Navy machinist's mate

"Looking at the incredibly disproportionate number of teenagers involved in traffic accidents and major crimes, I am convinced that of the choices, 21 is the best drinking age."
—Pennsylvania State Police Officer

The drinking age is a subject sure to stimulate discussion, if not heated debate, among students, parents, and school officials. While the use and abuse of alcohol by people of all ages is a prominent health issue, the drinking age has also been an important legal and political issue for the past decade. The pogo-stick behavior of some state legislatures, first lowering, then raising the drinking age, highlights the controversial and complex nature of the issue.

Prior to the early 1970s, all states except New York (which established 18-year-old drinking in 1934) maintained the drinking age at 21, the universally recognized age of majority.

But in the late 1960s, the drafting of 18-year-old men to fight in Vietnam provided special impetus to efforts to secure rights of adulthood for people younger than 21. This movement culminated with the ratification of the 26th Amendment to the Constitution in 1971, giving 18-year-olds the right to vote in federal elections. States quickly followed suit, lowering from 21 to 18 not only their voting ages, but also the ages at which young people could make contracts, marry without parental consent, own property, and exercise the other prerogatives traditionally associated with legal adulthood.

What Age for Drinking?

In many states, the drinking ages were not automatically lowered along with other ages of majority. This definition of the age of majority in the Arkansas Code is a good example of the way some state

MAJORITY/DRINKING AGES STATE-BY-STATE*

State	Majority Age	Drinking Age**
ALABAMA	19	19
ALASKA	18	19
ARIZONA	18	19
ARKANSAS	18	21
CALIFORNIA	18	21
COLORADO	18	18/21
CONNECTICUT	18	18
DELAWARE	18	20
FLORIDA	18	18
GEORGIA	18	18
HAWAII	18	18
IDAHO	18	19
ILLINOIS	18	21
INDIANA	18	21
IOWA	18	19
KANSAS	18	18/21
KENTUCKY	18	21
LOUISIANA	18	18
MAINE	18	20
MARYLAND	18	18/21
MASSACHUSETTS	18	20
MICHIGAN	18	21
MINNESOTA	18	19
MISSISSIPPI	18	18/21
MISSOURI	18	21
MONTANA	18	19
NEBRASKA	19	19
NEVADA	18	21
NEW HAMPSHIRE	18	20
NEW JERSEY	18	19
NEW MEXICO	18	21
NEW YORK	18	18
NORTH CAROLINA	18	18/21
NORTH DAKOTA	18	21
OHIO	18	18/21
OKLAHOMA	18	18/21
OREGON	18	21
PENNSYLVANIA	18	21
RHODE ISLAND	18	18
SOUTH CAROLINA	18	18/21
SOUTH DAKOTA	18	18/21
TENNESSEE	18	19
TEXAS	18	18
UTAH	18	21
VERMONT	18	18
VIRGINIA	18	18/21
WASHINGTON	18	21
WEST VIRGINIA	18	18
WISCONSIN	18	18
WYOMING	19	19
DISTRICT OF COLUMBIA	18	18/21

*SOURCES: State Codes, through 1979 Supplements; Information available from the Distilled Spirits Council of the United States, Washington, D.C.; *The Book of States*, 1979.

**Where split drinking ages are given, the first figure is for beer and/or wine, the second figure is for all other alcoholic beverages.

legislatures chose to split the drinking age from the age of majority:

> *Ark. Stats. § 57-103 (1979 Cum. Supp.):* All persons of the age of eighteen (18) years shall be considered to have reached the age of majority and be of full age for all purposes, and until the age of eighteen (18) is attained, they shall be considered minors. Any law of the State of Arkansas which presently requires a person to be of a minimum age of twenty-one (21) years to enjoy any privilege or rights, or to do any act, or to participate in any event, election or other activity, shall be deemed to require that person to be of minimum age of eighteen years; except that this Act (this section) shall not repeal, amend, or otherwise affect any existing laws concerning or in any way relating to beer, wines, spiritous, vinous, or malt liquors, or other alcoholic beverages, and the sale thereof to persons under twenty-one years of age.

Similarly, other states such as California and Pennsylvania maintained the 21-year-old drinking age while lowering all other ages of majority to 18.

However, a majority of states did choose to lower their drinking ages. By 1978, 27 states had drinking ages of 18, 19, or 20 for all liquors, and an additional 12 allowed beer and wine at 18 or 19 and other alcoholic beverages at 21.

Some Second Thoughts

In the mid-1970s studies were reported, first in scientific journals, then in the popular press, citing higher rates of teenage drinking, drinking among increasingly younger children, an emerging problem of teenage alcoholism, and increased alcohol-related traffic accidents involving teenagers. Some commentators linked the findings of the studies to the lowering of the legal drinking ages. But others felt that the evidence was not sufficiently systematic or thorough to support conclusions about the lower drinking ages.

An analysis of surveys of teenage drinking by Dr. Howard T. Blane and Linda Hewitt of the University of Pittsburgh reported that teenage drinking rose after World War II, but did not increase significantly in the decade between 1966 and 1975. Dr. Morris E. Chafetz and Dr. Blane, writing together in *Psychiatric Opinion* in March 1979, suggest that the recent public concern over teenage drinking may be due to a lag time in the public awareness of the results of the scientific studies, as well as careless use of terms such as "alcoholism" and "problem drinking."

Legislators in a number of states, however, felt that the statistics sufficiently indicted the lower drinking ages, and they began to take action. From 1977 through the beginning of 1980, 10 states raised the drinking age from 18 to 19, 20, or 21. These states were Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, Tennessee, and, most recently, Illinois and New Jersey.

Other state legislatures have considered proposals to raise their drinking ages, including such states as Ohio, Georgia, Maryland, Florida, Virginia, and Connecticut. To date, the proposals in these and other states have been rejected, but attempts to raise the age will probably be made again.

Patricia McGuire is Legal Commentator of 30 Minutes, *a CBS television program for young people that airs on Saturday afternoon in most parts of the country. She directs the D.C. Street Law Program and is an Adjunct Professor of Law at Georgetown School of Law.*

Drinking Age: The Lawmaking Process

Drinking, and the health and legal issues surrounding the use of alcohol, impact directly on young people. A nationwide survey of students in grades 7 through 12 conducted in 1974 revealed that, by the age of 17, only 17.2 percent of the students classified themselves as abstainers from alcohol, and that "...24.3 percent, or about one in four, of the adolescents 13 years old or younger drink frequently enough and in large enough quantities to be classed as at least moderate drinkers."

The Legislative Debate

Legislative efforts to raise the drinking age from 18 to 19 aim to sever the "high school connection." According to this theory, the presence of 18-year-old seniors in high school, who are capable of purchasing liquor, makes alcohol that much more readily available to younger students. This theory considers it less likely for 19 year olds to be in high school, and thus leaders of a younger group.

Opponents of the "high school connection" theory claim that studies show that drinking was fairly prevalent among teenagers long before the drinking ages were lowered, and that a change in the legal age is unlikely to stem the flow. In fact, under the "forbidden fruit hypothesis" raising the drinking age may encourage underage drinking.

Whatever position young people take on the issue of drinking, laws about the drinking age and alcohol education are immediately relevant to them for two primary reasons:

(1) even if high school students do not drink themselves, statistics indicate that it's likely that their friends do;

(2) the age of majority is an important standard affecting a variety of rights of young people; changes in portions of that age, such as drinking, may affect young people's perceptions of their other adult rights and responsibilities, and may influence the perceptions of others as well.

Because of the relevance of the drinking age, students may find that the legislative process can take on a special meaning for them. Even if they are not yet old enough to vote, high school students can participate in the legislative process in other important ways. Two significant ways in which citizens may participate in the legislative process are by (1) writing letters to legislators, and (2) testifying at public hearings on proposed legislation.

The letter-writing and public-testimony models of citizen participation are most adaptable to the classroom setting. Through simulated citizen participation activities, students can develop their spoken and written abilities, analysis of issues, synthesis of personal opinions, and numerous other skills. Classes may turn the simulations into actual participation in their states, if students so desire.

Following are sample letters to legislators, arguing pro- and con- the drinking age issue. Additionally, teachers may wish to try the accompanying model legislative hearing.

Letter in Favor of Raising Drinking Age

Representative _______
General Assembly
Capitol Bulding
State Capitol, Any State

Dear Mr./Ms. Legislator:

The age at which young people can buy and consume liquor in this state is a matter of serious concern to me and members of my community. I am writing to urge you to vote in favor of bills proposing to raise the drinking age from 18 to 21 for all liquors.

I have become convinced that the drinking age should be raised for these reasons:

(1) Alcohol abuse is the most serious drug problem among teenagers.

(2) The number of young people dying in alcohol-related traffic accidents is rising each year.

(3) The opportunity for 18-year-old persons who are still in high school to purchase liquor legally makes it more likely that liquor will then be made available to younger students in high school.

According to surveys and statistics available from the National Institute on Alcohol Abuse and Alcoholism, about 70 percent of the teenage population has had some experience with drinking, and close to one in five gets drunk one or more times a month. This widespread use and abuse of alcohol by young people indicates a serious need for our legislature to take aggressive action to slow down the youth drinking trend. Since studies also show that beer is the overwhelming choice of teenagers who drink, the drinking age for beer as well as other liquor should be raised to 21.

For young people who are just learning to drive as well as to drink, the mixture may be fatal. The National Highway Traffic Safety Administration reports that automobile accidents are the leading cause of death of young people, and that alcohol is involved in about 60 percent of car accidents causing the death of people in the 16-24 age group. Some studies have shown increases in the number of alcohol-involved accidents with teenage drivers in certain jurisdictions after the lowering of the drinking age. The jurisdictions showing increases included Maine, Michigan, Wisconsin, and Ontario, Canada (where much research on the relationship between drinking age and alcohol-involved problems has been conducted).

Raising the drinking age to 21 may not end these problems. However, combined with strong alcohol education programs in schools, parental involvement in education and role modeling, and community awareness, we will surely be able to make great strides toward resolving, rather than encouraging, the problem of teenage drinking.

I will be looking forward to your legislative leadership on this issue. Thank you for your time and consideration.

Sincerely,

A concerned citizen

Letter Against Raising Drinking Age

State Senator _______
State Senate
Capitol Building
State Capitol, Any State

Dear Senator _______:

I am strongly opposed to any proposals to raise the drinking age in this state from 18 to 19, 20, or 21. Such proposals under-

(Continued on page 63)

Legislative Hearing on Drinking Age Bill

After a bill is introduced in a legislative session, it is usually assigned to a committee for further study. At some point, the committee schedules the bill for a public hearing. The public hearing provides an opportunity for all interested citizens to voice their opinions on the proposed legislation, and for legislators to ask questions about the arguments and information presented by individual citizens and lobbying groups.

A simulated legislative hearing is an exciting classroom tool. It helps students examine many sides of an issue while learning important skills in questioning, analysis, listening, responding to questions, and general oral presentation. The setting for the hearing may be wherever appropriate for the bill at issue—a committee of the U.S. Senate or House, an agency, a state legislature, or county or city lawmakers. Teachers may restrict the number of students roleplaying legislators and witnesses, or the number of participants may be expanded to provide a speaking role for all students in the class.

The classroom may be arranged for a public hearing in this manner:

LEGISLATIVE COMMITTEE

WITNESS TABLE

AUDIENCE/ OBSERVERS   AUDIENCE/ OBSERVERS

Simulation

In 1972, the age of majority in State X was changed from 21 to 18 for all rights and responsibilities of adulthood, including making contracts, marrying without parental consent, and drinking. This year, prompted by letters from concerned citizens, State Senator Jones has introduced this bill before the state legislature:

> The sale or delivery of alcoholic beverages to persons under the age of 21, or the possession or consumption of alcoholic beverages by persons under the age of 21, shall be a misdemeanor, subject to not more than one year in prison, or not more than $1000 fine.

The bill has been assigned to the legislature's Public Health and Safety Committee, chaired by Senator Jones. Senator Jones announces a public hearing on the proposal. These persons will testify at the hearing:

President of the Statewide PTA: "I know I speak for all parents in our state in supporting this proposal. The law must assist parents and teachers in fulfilling their duty to protect the welfare of our young people. The teenage years are a critical time in the physical as well as social development of our young citizens. Alcohol should not be easily available to them, both because of the physical harm that may come from drinking so young, and because of the peer pressure to drink, which is convincing despite our best educational efforts."

Director, Community Relations Division of State Police: "Police don't enjoy curtailing young people's good times. However, we've had too many tragic instances of traffic accidents, vandalism, and criminal behavior involving intoxicated youngsters. It's not just the 18 and 19 year-olds. It's the younger kids, 14-15-16, who get the stuff from their older friends. A lot of high school seniors are 18, and those older students have a lot of strong influence on their young friends."

President of the Statewide Student Council Association: "Legal restrictions aren't going to stop kids from drinking. Passing this bill is only going to make kids more cynical about the law, because they're going to ignore it anyway. Also, raising the drinking age isn't going to do a single thing to teach kids how to drink responsibly. My association would support a law requiring schools to include alcohol education classes as a regular part of their curriculum."

Representative of Association of Beer and Wine Distributors: "There should be one consistent age for all of the rights and responsibilities of adulthood. We can hardly expect 18-year-old people to take their adult contractual obligations seriously if we insist on treating them as infants when they want to have a drink. The 18-year-old age of majority has been successful, and we should continue to work for its full implementation."

Procedure

Prior to beginning the simulation, teachers should assign roles, including at least three or four members of the committee and the witnesses. The class may be divided into these groups for preparation:

(1) *Legislators:* prepare questions for each witness.

(2) *Witnesses in Favor of Bill:* become familiar with the testimony as given; try to anticipate questions the legislators will ask; learn the arguments of the other side and be prepared to argue against them.

(3) *Witnesses Opposed to the Bill:* same directions as (2).

Teachers may desire the class to do additional research, and to prepare lengthier statements. All statements should be available to all participants prior to the hearing.

The hearing should be conducted in this manner:

(1) All witnesses sit in audience. Panel takes places. Chair calls the meeting to order.

(2) Chair calls the first witness.

(3) Witness makes a presentation to the panel, based on the prepared statement. Witness should avoid reading; rather, witness should look directly at the panel members and try to speak as persuasively as possible.

(4) Panel members may interrupt and question the witness as they see fit, or they may wait until the witness has finished speaking.

(5) Panel proceeds in same manner with each witness.

(6) After hearing all of the statements, and questioning the witnesses, panel may have a debate among its members, to decide whether to recommend passage or rejection of the bill to the full legislature. The panel may decide to rewrite the proposal at this time.

Debriefing

After conducting the simulation, teachers should discuss these questions with the class:

(1) What purpose does the public hearing serve in the lawmaking process? How important is that purpose? Are there other ways to accomplish that goal?

(2) Did this particular public hearing meet its goals? Why or why not?

(3) Were the witnesses convincing? What did each witness do that was helpful to the position? What might each witness have done to make a stronger case? What was the motive of each witness who testified? Should a witness' motive affect how the legislators regard the opinion of the witness?

Practical Law

(Continued from page 61)

mine the rights of young people, while offering no truly effective solutions to the problem of teenage drinking. I urge you to vote against any of these proposed bills.

There are three strong reasons why the drinking age should remain at 18:

(1) The drinking age should remain consistent with the other ages of majority.

(2) No study has produced any convincing evidence of the relationship between the lowering of drinking ages and the rise of alcohol-involved problems of young people.

(3) In a society which accepts drinking as normal social behavior among adults, education, not prohibition, is the only logical way to approach the issue of teenage drinking.

The 18-year-old age of majority has worked well in this state. However, we can hardly expect young people to continue to fulfill the responsibilities of adulthood well, if we split the definition of adulthood apart, and save the privileges for a later age.

Leading studies show that the legal drinking age has little to do with teenage drinking behavior. Adult role models and peer group pressure are much more significant. Professors Rooney and Schwartz of Catholic University have even reported that drinking among young people increased in some states after drinking ages were *raised*. Additionally, regarding traffic accident statistics, the reports linking teenage alcohol-involved accidents with the lower drinking age simply are not conclusive, and reports do exist showing evidence to the contrary.

The statistics do show that teenagers will drink, regardless of the drinking age. To try to solve the problem by further legal restriction will only encourage a lack of respect for law among young people, who will continue to drink.

The use and abuse of alcohol by teenagers and adults is a major concern for everyone. Teenagers will learn to drink, either in secret and recklessly, or openly and responsibly in an educational atmosphere fostered by parents and other responsible adults. The legislature should turn its attention to the need to encourage alcohol education programs in every school curriculum, and in the community.

I am looking forward to your leadership on this issue. Thank you for your attention to this matter.

Sincerely,

A concerned citizen

Schools and Drinking

There are those who think school drives people to drink. Be that as it may, students who drink on school grounds, or at school-sponsored functions such as dances or games, may well be subject to school disciplinary proceedings as well as to arrest. School officials have a general legal responsibility to protect the welfare of all students, and courts have generally upheld reasonable disciplinary actions by school authorities in cases involving alcohol or drug use by students. (In cases involving suspension, however, school officials must comply with the minimal due process guidelines afforded to students in *Goss v. Lopez,* 419 U.S. 565, 1975.)

Some Touchy Problems

Teachers and school officials confronting students who are drinking or using other drugs must make a number of choices in deciding how to handle the situation. Some of the questions they may face include:

(1) Should the students who are found drinking on school grounds be reported to the police or dealt with solely through the school disciplinary process?

The answer to this question may depend on the severity of the student offense as well as the nature of the school's policies and practices. Offenses directly impacting on other students may result in more severe treatment. School officials may always call in police if they feel such action is warranted, and courts are usually reluctant to second-guess administrators' judgment in this area. However, many times police involvement is not appropriate. Nor is the school disciplinary process always the best recourse. Other questions must also be considered.

(2) Should the parents of the students be informed of drinking incidents?

Again, this decision will depend on school policies and practices, as well as the particular circumstances of the case, including the student's background. Also, the receptiveness of the particular parents to the problem is important. If the parents and school think parents' role is merely to punish, little may be accomplished by way of helping a student with a drinking problem, or even by way of deterring the nonproblem student from continuing to drink. On the other hand, parents who understand that the parental role model is critical in alcohol education may be the most effective persons to respond to a student drinker.

(3) Should the drinking student receive special counseling?

This decision depends on the circumstances of the individual case and student, and the nature of the counseling program available at the school. Teachers and school officials should have a mechanism for making the appropriate response to this question. Some jurisdictions, such as the District of Columbia and Hawaii, allow minors to consent to receive alcohol and drug counseling and treatment without parental consent. School personnel should be familiar with state laws in this regard.

"Beer Rules" and Student Athletes

In addition to the general cases of students drinking at school or school-related activities, cases frequently arise which involve student athletes being suspended or expelled from athletic teams for their involvement with alcohol. Rules which prohibit student athletes from any involvement with alcohol usually govern their behavior both in and outside of school during the playing season, and maybe even year-round.

Two issues generally confront courts faced with cases involving athletes barred from their teams: (1) Was the rule and the subsequent suspension of the athlete from the team reasonable in light of the circumstances? (2) Are extra-curricular activities so much a part of the educational process that the *Goss* due process standards must be applied whenever a student is suspended from an extra-curricular activity?

Two cases illustrate the problems encountered by school athletes involved with alcohol.

A Linebacker Against the Wall

William B. is a 16-year-old linebacker on the Central High football team. His team has this written rule:

> Any player who possesses, consumes, or transports alcoholic beverages, or rides in a car in which he knows of the presence of alcoholic beverages, shall be immediately suspended from the team for the remainder of the season, or, if the offense occurs during the off-season, shall be ineligible to play for the first six weeks of the following season.

The players call this the "beer rule," and all are fully aware of it.

On June 7, 1971, after school was out for the summer, William and some friends were riding in a car. Two of the friends had a case of beer and were drinking. William was not drinking, but he was aware of the beer. One of the friends tossed a can out the window, which caught the attention of a police officer who happened to be nearby. The officer stopped the car, spotted the beer, and arrested all of the occupants.

William, charged with possession, pleaded not guilty, and his case was subsequently dropped by the county prosecutor. However, William is worried that the football coach is going to find out about the incident.

(1) What should William do?
(2) If the coach learns of the incident, what should he do?
(3) If the coach chooses to enforce the "beer rule" and suspends William from the football team, what should William do?
(4) If William is suspended and decides to take his case to court, how should the judge decide? Why?

(*Note:* In ***Bunger v. Iowa High School Athletic Association,*** 197 N.W. 2d 555, 1972, a case with similar facts to the case given above, the Supreme Court of Iowa held that the Association's "beer rule" was unreasonable, in that it penalized the athlete for mere presence in a car containing beer, regardless of evidence that the athlete did not possess or consume the beer. The court also held that the rule was outside the permissible scope of school rules because it applied outside the football season, outside of school, and in the absence of any illegal action by the student.)

A Forward in Trouble

Betsy B. is a forward on the Arlington High basketball team. The team has a rule calling for the immediate expulsion from the squad of any player who drinks, smokes, or uses drugs. On a Saturday night during the basketball season, Betsy attends a party at a friend's house. Other members of the basketball team are also present. Some of the kids, including Betsy and other players, are drinking beer.

The following Monday, the women's basketball coach learns of the party. The coach stops Betsy and asks her whether she was at the party and involved with the drinking.

(1) How should Betsy respond?
(2) If Betsy admits drinking, what should the coach do?
(3) How do the facts of this case differ from the facts given in the linebacker case?
(4) How might the legal issues in this case differ from those presented in that case?
(5) If Betsy is suspended and takes her case to court, how should the judge decide? Why?

(*Note:* In ***Braesch v. DePasquale,*** 265 N.W. 2d 842, 1978, the Supreme Court of Nebraska found that the "beer rule" was reasonable and served a legitimate rational interest to discipline student athletes. Furthermore, the court said that the penalty of expulsion from the team was neither an arbitrary nor an unreasonable means to deter athletes from using alcohol. The court also found that a student has a "significant" interest in participation in high school athletics, but not one greater than the academic interests protected by *Goss*. In this case the students had advance notice of the rule and specific notice of the violation. They also had an opportunity, along with their parents, to discuss the misconduct before the disciplinary action was taken. Therefore, the court found that the minimal due process required by *Goss* was satisfied.)

Alcohol Education

> If the problem of alcoholism is to be solved in the future, it will be because those young people who chose to drink have adopted a responsible attitude toward alcohol. Legal controls have proved largely ineffective in controlling alcohol use and abuse by youth. Preaching and scare tactics have also generally met with failure. Adult examples of responsible behavior are important. . . . Responsible behavior and decision-making by youth, also requires that they be presented with all the facts—positive and negative—about alcohol in an unbiased manner.
>
> —Terry Bellicha, Director
> National Clearinghouse
> for Alcohol Information

In 1970, in recognition of a serious national problem of alcohol abuse, and of the need for research and education in the field, Congress enacted the Alcohol and Drug Abuse Education Act, and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Program Act.

The latter law provided for the establishment of research centers and programs for the treatment and prevention of alcoholism on the federal, state, and local levels. The Act established the National Institute on Alcohol Abuse and Alcoholism (NIAAA).

The National Clearinghouse for Alcohol Information is the distribution center for the material published by NIAAA. The Clearinghouse can provide books, pamphlets, posters, and other information. To obtain the basic package and publications list, call or write:

National Clearinghouse for
Alcohol Information
P.O. Box 2345
Rockville, Maryland 20852
(301) 468-2600

Under the Alcohol and Drug Abuse Education Act, the Office of Education has been able to establish five training and resource centers around the country, each of which services ten states. This program has established a network of trained teams and supportive technical assistance to over 3,000 school districts and communities. The central office, located in Washington, provides leadership and planning for the regional system. The central office may be contacted by writing:

Alcohol and Drug Abuse Education
Program
United States Office of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Additionally, teachers may find out

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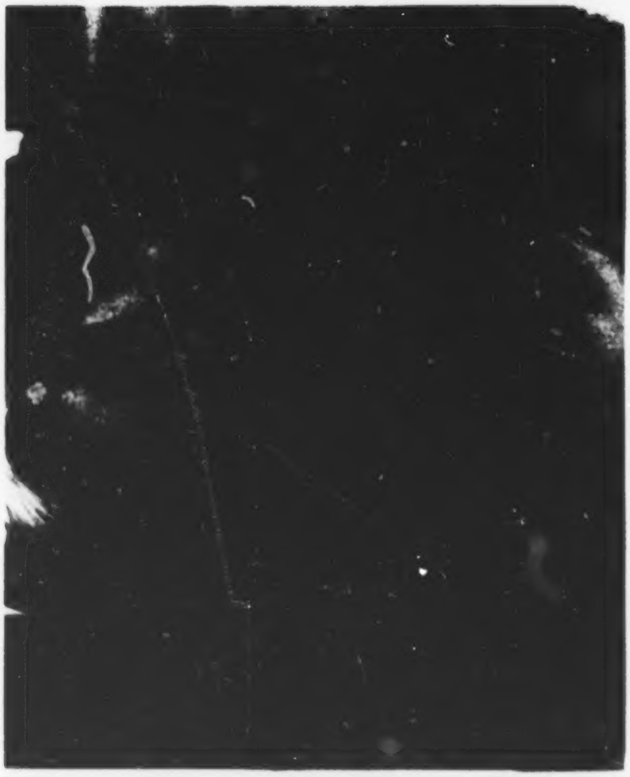

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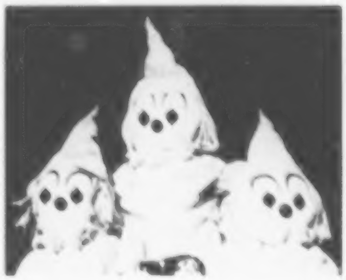
contents

Volume 4, No. 3 Fall 1980

4
Supreme Court Report
The Dislike of the Unlike



9
Law Around the World
Folklaw

12
Law Around the World
South Africa: The Last Plantation

18
Law Around the World
Unsnarling Legal Tangles

24
Classroom Strategies
Teaching Global Law

27
Law Around the World
There Is an Alternative to the Adversary System

30
Law Around the World
Russia's Schizophrenic Courts

34
Classroom Strategies
Teaching Global Law

39
Law in the 80s
Minority Agenda for the 80s: Part II

44
Newsclips

60
Court Briefs
A Supreme Court Round-up

67
Practical Law
Privacy in Schools: Something to Sniff At?

Credits
Photos: Cover, David Attie; pages 4-5, Herbert Jackson; pages 9, 24-25, United Nations; pages 12-13, Alpha/Choroszewski/Douglas; page 39, Janet Garstka.

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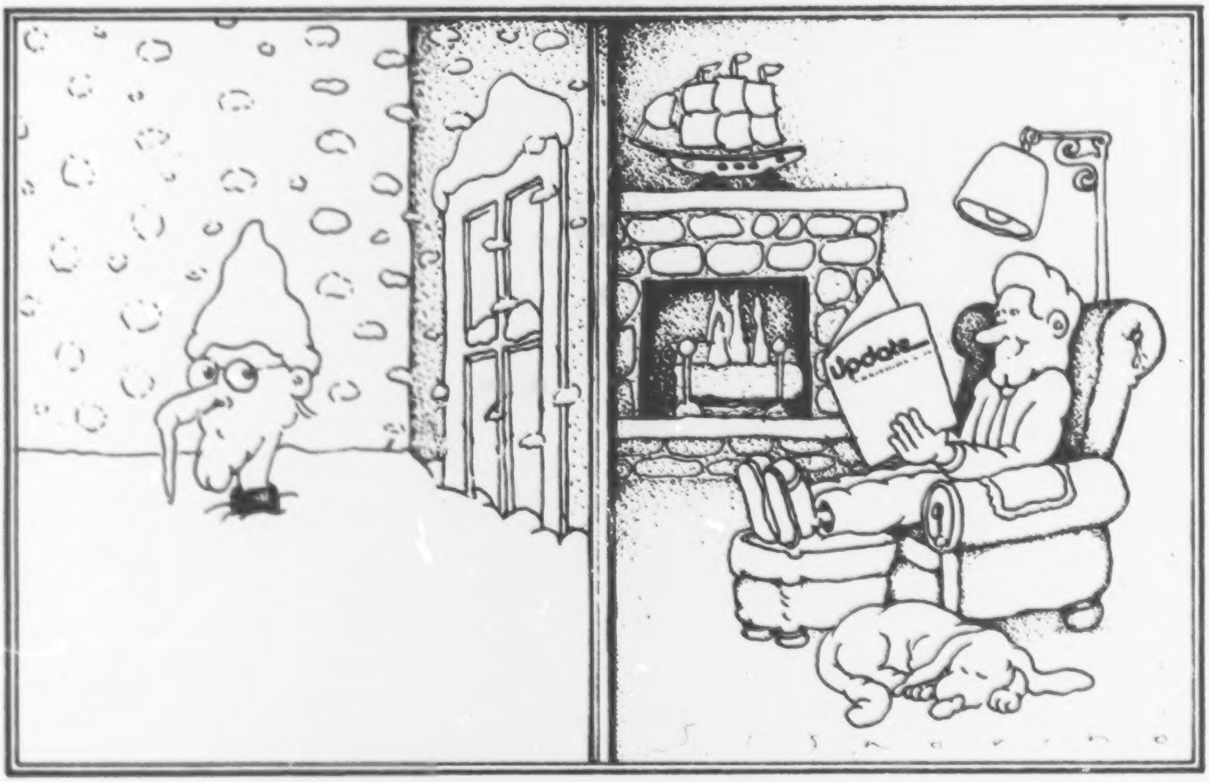

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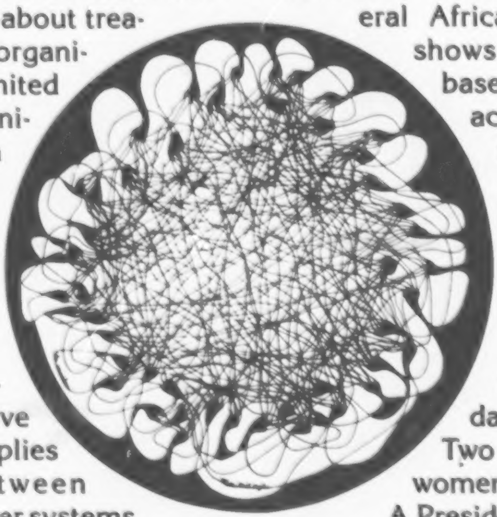
opening statement



One way to explain what this issue is about is to explain what it doesn't cover. It isn't an issue about international law. There's nothing here about treaties or international organizations like the United Nations or the Organization of American States. We hope to cover international law in a special issue next year.

Nor does this issue offer the usual approach to comparative law. Comparative law almost always implies comparisons between American law and other systems, and inevitably, the comparisons seem to be more favorable to the US and less favorable to the other countries.

That's why we've called this issue "Law Around the World." It focuses on law as it exists in other countries, and not as it compares with American law. Major articles look at Europe's nonadversarial system, Russia's schizophrenic courts, and how several cultures try to unsnarl legal tangles.

Several major articles combine substance with teaching strategies. One suggests materials and strategies on topics raised in other articles. Another looks at law-oriented folktales from several African cultures. A third shows how case studies based on folktales and actual cases from a variety of cultures can enrich the upper elementary curriculum.

Readers may recall we greeted 1980 with Part One of the minority agenda for the eighties. Part Two looks at the future of women and children.

A President appoints Supreme Court justices, and once appointed, they serve until retirement or death. A sobering thought in an election year, particularly when five of the nine justices are over 70. "Court Briefs" surveys a number of decisions these men made this busy term. Our regular look at "Practical Law" peeps at kids and privacy this time.

Donning warm clothes once again, we'll be putting our fuzzy-hatted heads together for a winter issue of **Update** on justice.

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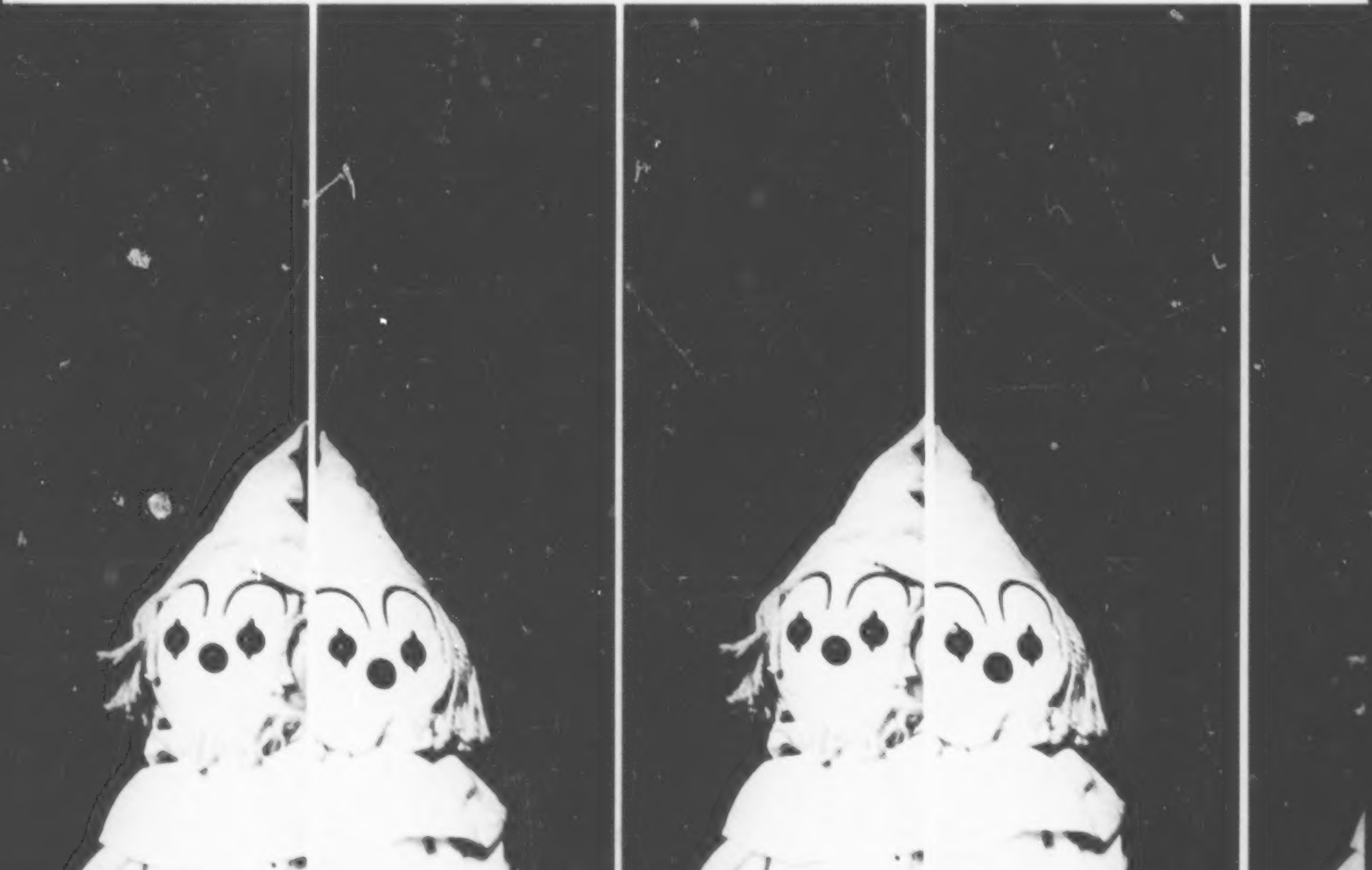
SUPREME COURT REPORT



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Carlos Cortés and Van Perkins

In a clannish, multi-racial, multi-cultural society, it is the courts that protect groups against . . .

The Dislike of the Unlike

One of the freedoms most cherished by Americans is the right to be different. We are one of the most diverse nations in the world—racially, ethnically, and religiously—and our diversity has shaped our laws and our government. In a society as sprawling, complex, multifaceted, and constantly changing as the United States, diversity has continuously been before the courts. Among the hot potatoes we've asked judges to handle are discrimination, compensatory justice, immigration, status of aliens, and the equality of rights, opportunities, and benefits.

As the nation's highest judicial body, the Supreme Court has constantly been called upon to deal with diversity in its many forms. The Constitution has changed relatively little over the years, but the Supreme Court has greatly changed its handling of diversity. Why? Because the tides of history have created new moral-ethical climates which affect both judges and the context of cases.

Because of the need to consider both diversity as a general issue and specific varieties of diversity, we will address two questions. One deals with categories of diversity. How do recent Supreme Court decisions related to specific types of diversity differ from or provide continuity with the Court's handling of these types of diversity in the more distant past? Our other question deals with diversity in general. In what respect do recent Supreme Court decisions, as compared to earlier decisions, reflect a consistent across-the-board stance toward the general subject of diversity?

In examining these questions we'll look at three categories of diversity: (1) racial and ethnic diversity, focusing on the issues of racial discrimination, ethnic sov-

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ereignty, and linguistic difference; (2) religious diversity; and (3) gender diversity. (See the box following Brian Winchester's article on South Africa for resources on discrimination and prejudice.)

In general, the Supreme Court has moved from merely accepting these various types of diversity to determining that they deserve protection. With some types of diversity, they've gone a step beyond protection and argued that some form of compensatory action is necessary to right old wrongs. The question is whether this adds up to a consistent general stance towards diversity or represents a case by case response to the different issues posed by different groups.

Racial Discrimination

Because race and slavery were intertwined, the federal government has treated race as a legally differentiating factor in society since the founding of the republic. Article I of the Constitution singled out one race, black Americans, by categorizing them as three-fifths persons for computing representation and direct taxes. The Supreme Court, in 1857, went even further when in *Dred Scott v. Sanford,* 60 U.S. 393, it ruled that, whether slave or free, "descendents of Africans" imported into the United States as slaves were not, and in effect could not become, citizens.

The Civil War and the Civil War Amendments (13th, 14th, and 15th) reversed *Dred Scott* by freeing and conferring citizenship on all black Americans. In fact, however, basic attitudes towards blacks remained little changed until well into the 20th century, and the Court expressed society's dominant attitude on the issue of race in *Plessy v. Ferguson,* 163 U.S. 537 (1896), validating the "separate but equal" doctrine which, despite the Court's efforts to deny the fact, stamped "the colored race with a badge of inferiority." Social attitudes toward blacks began to change in the late 1930s, and court decisions followed suit by taking a more critical look at some forms of segregation. After chipping away at *Plessy* for a decade-and-a-half, the Court took a major step toward protecting minorities by overturning the separate but equal doctrine (*Brown v. Board of Education,* 347 U.S. 483 [1954]) and then affirmatively attacking school segregation by such means as busing. (See *Update,* Fall, 1979, for a detailed review of this subject.)

Van L. Perkins is a Professor of History and former Vice Chancellor at the University of California, Riverside. Carlos E. Cortés is a Professor of History and former Chair of the Chicano Studies Program and Latin American Studies at the University of California, Riverside.

Then, in the 1970s, the Supreme Court took the issue of the struggle against racial discrimination and its effects beyond simple protection into compensatory action. In three key cases the Court grappled with the issue of whether or not mere protection against future racial discrimination was sufficient, when groups which historically had suffered racial discrimination now found past discrimination to be a formidable obstacle to future equality. In general, the Court took the position that some types of compensatory justice were necessary, at least for the near future, in order to truly effect protection against discrimination.

In *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the Court, in a confusing and divided opinion, struck down the use of rigid quotas in admitting students to medical school, but indicated it would approve admissions plans which gave special and compensatory consideration to minority status.

Lately the Court has grappled with the effects of past discrimination. Can the law give preference to minorities or must law be color blind?

A year later, in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), the Court moved further in approving compensatory action when it upheld a plan jointly agreed to by Kaiser Steel and the Steelworkers in which 50% of the openings in a job training program were set aside for blacks. Such voluntary, private, race-conscious efforts to abolish traditional patterns of segregation and hierarchy were, the Court ruled, permissible.

Most recently, in *Fullilove v. Klutznich* (decided July 2, 1980), the Court upheld a 1977 federal law specifying that 10% of the public works funds authorized by Congress to stimulate employment are to be earmarked for minority group businesses.

These three cases show that while many questions remain unanswered regarding exactly what is and is not permissible, the Court has demonstrated a willingness to accept—if not yet to order—compensatory programs intended to remedy past discrimination.

Ethnic Sovereignty

The nature of the Court's treatment of Native American (American Indian) diversity is unique because that diversity rests, in part, on a political conception of Indian tribes as self-governing communities. The Court has held that Indian tribes retain inherent, though limited, powers of sovereignty, a concept most fully developed in *Worcester v. State of Georgia,* 31 U.S. 515 (1832). In *Worcester,* the Supreme Court confronted a series of Georgia laws designed to assert that state's control over the Cherokees, and, ultimately, to force them off their valuable land and open it to settlement by whites. Did Georgia have jurisdiction over the Cherokees, or were they in a protected legal position?

Writing for the Court, John Marshall held that the U.S. Constitution and treaties with the Cherokees established that they were neither a foreign nation nor a state, but rather a "once numerous and powerful people" who retained considerable (though not absolute) sovereignty and powers of self-government. Marshall wrote:

> A weaker power does not surrender its independence, its rights to self-government, by associating with a stronger, and taking its protection. . . . The Cherokee Nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves.

For the most part, however, societal attitudes toward Native Americans differed little from attitudes toward black Americans. Neither Marshall's eloquence nor the Court's decision in *Worcester* persuaded President Andrew Jackson to protect the Cherokees against Georgia. (In fact, Jackson is supposed to have said, "John Marshall has made his decision, now let him enforce it!") The concept of limited sovereignty, rather than protecting tribes, was used primarily to negotiate treaties, often in turn quickly violated, which provided a legal rationale for depriving Native Americans of their ancestral lands and their civil rights.

With the changing attitudes toward minorities in general during the 1960s and 1970s and the enactment of the Indian Civil Rights Act of 1968, the limited sovereignty concept (reaffirmed and broadened in *Williams v. Lee,* 358 U.S. 217 [1959]) provided the basis for a series of cases which began to protect diversity by upholding tribal authority in issues as diverse as child custody (*Fisher v. District Court,* 424 U.S. 382 [1976]) and regulation of on-reservation liquor sales (*United States v. Mazourie,* 419 U.S. 544 [1975]).

But doesn't the separate legal treatment of Native Americans run afoul of the Fourteenth Amendment's equal protection clause, which grants all citizens the right to equal protection of the law? In *U.S. v. Antelope,* 430 U.S. 641 (1979), the Supreme Court found no equal protection problems in laws relating to Native Americans. The Court held that federal regulation of the Indian tribes is not an impermissible racial classification. Rather than acknowledging a "racial" group consisting of "Indians," Congressional Indian acts merely recognize the unique status of Indians as "a separate people with their own political institutions."

By utilizing the combination of the general principle of legal equality of persons established in *Antelope* and the doctrine of limited sovereignty, the Court has the tools to fully protect and even take compensatory action in regard to Native American diversity.

Some indication of the Court's general direction may be provided in its recent decision, *United States v. Sioux Nation* (decided June 30, 1980), ordering the federal government to pay $105 million to eight tribes of Sioux Indians as compensation for the 1877 illegal seizure of the Black Hills of South Dakota. While controversy rages regarding the adequacy of the amount of the settlement, and the issue of monetary compensation versus restoration of at least that part of the Black Hills not privately owned, the decision—in part because it is the largest award since Congress authorized such claims in 1946—may be a historical landmark in recognizing the legitimacy of compensatory action for past discrimination against an entire ethnic group.

Linguistic Diversity

In the area of linguistic diversity, the Supreme Court has moved from acceptance to protection of persons of linguistic differences, although it has not gone so far as to provide compensation for past injustices, as it has in the cases of racial discrimination and territorial loss. While various issues of linguistic diversity could be addressed—for example, employment, voting rights, and provision of basic public services—we will restrict our analysis to linguistic diversity in the schools.

In the 1920s, the Supreme Court dealt with two prime cases involving languages other than English in the schools. Both focused on ethnic private schools—German-language schools in Nebraska and Asian-language schools in Hawaii. In both, the Supreme Court upheld the right of these private schools to offer instruction in another language.

During the wave of patriotism following World War I, Nebraska passed a law aimed at eliminating German-language schools in the state. The act prohibited the teaching of "any subject to any person in any language other than the English language," except for teaching foreign languages to students who had completed the eighth-grade. A teacher convicted under the act appealed to the Nebraska Supreme Court, which upheld his conviction. The Court said the statute was a reasonable exercise of the state's police power. Its reasoning suggested considerable hostility toward linguistic diversity:

> The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.

The teacher then appealed to the U.S. Supreme Court, and in *Meyer v. Nebraska,* 262 U.S. 390 (1923), the Court struck down the Nebraska law as unconstitutional. It reasoned that the statute infringed upon the teacher's liberty to carry out his profession and the parents' liberty to engage him to teach, freedoms granted under the Fourteenth Amendment's due process clause: "No State shall . . . deprive any persons of life, liberty, and property, without due process of law." The Court's language speaks eloquently of the individual's right to be different:

> That the State may do much, go very far, indeed, in order to im-

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> prove the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

However, the Court did not challenge the state's right to require all schools in the state to offer some instruction in English.

While *Meyer* dealt with private and denominational schools which served as alternatives to public schools, *Farrington, Governor of Hawaii v. Tokushige,* 273 U.S. 284 (1927), dealt with private Asian-language schools which supplemented the Hawaiian public school system, in which English was the prescribed language of instruction. A 1920 Hawaiian statute and related regulations established stern licensing requirements for private foreign-language schools and teachers, restrictive course and textbook limitations, and mandatory teacher competence in the English language and U.S. history and government.

In arguments before the Supreme Court, the Hawaiian Attorney General argued that the purpose of these laws was to "alleviate the evils" of schools which sought to teach Asian children "loyalty to a foreign country and disloyalty to their own country, and hamper them during their tender years in the learning of [English] in the public schools."

The Supreme Court wasn't convinced. In reasoning similar to *Meyer,* it held that the due process clause protected the liberty of the teachers in these schools and the parents and students who attended them.

> Enforcement of the Act probably would destroy most, if not all, of [the schools]; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.

Through the *Meyer* and *Tokushige* decisions, the Court accepted linguistically diverse private schools. However, protection within public schools for linguistically diverse students did not come until *Lau v. Nichols,* 414 U.S. 563 (1974). In that decision, the Court ruled in favor of a San Francisco Chinese family that contended that its child had been denied equal educational opportunity because the public school's sole language of instruction was English, in which the child lacked proficiency to benefit from the instruction.

The Court relied on the 1964 Civil Rights Act, which bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." Remedies might include teaching English to Chinese students or offering them courses in their native language. While the Court has not gone so far as to rule in favor of compensation for past injustices—as in the cases involving racial discrimination and land loss—in the *Lau* case the Court moved well beyond acceptance of language diversity to protection of linguistically diverse students.

Linguistic diversity is now a big issue for the schools, but it's been a legal hot potato for years

Religious Diversity

Until well into the twentieth century, the Court had little concern with issues dealing with freedom of religion, since First Amendment guarantees were not considered to be applicable to the states, and the national government did not become greatly involved in regulating religious activity. A major exception occurred when the federal government moved to abolish polygamy as practiced by adherents of the Mormon religion. In *Reynolds v. U.S.,* 98 U.S. 145 (1878), the Court rejected the Mormon claim that the free exercise guarantee of the First Amendment protected their practice of polygamy. In its decision, the Court drew a distinction between religious belief (with which the government could not interfere) and practice (which could be regulated or prohibited when it was repugnant to general societal values). Viewing monogamous marriage as a foundation of U.S. society and therefore worth preserving for the social good, the Court deemed this sufficient justification for the prohibition of polygamous marriages. Conformity and nonacceptance of religious diversity triumphed.

By the 1960s much had changed. First Amendment freedoms had been applied to the states through the Fourteenth Amendment, and the Court had come to accept a role as the major force in protecting these freedoms. In the process, the Court came increasingly to accept and even protect religious diversity.

Greater acceptance of religious diversity was illustrated in a case involving a conflict between Wisconsin's compulsory education law and adherents of the Old Order Amish faith who withdrew their children from the public schools after the eighth grade. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Court upheld the Amish. The state, the Court held, had a legitimate interest in promoting the education of its citizens, but that interest was not sufficient to override the religious beliefs of the Amish, who removed their children from the public school in order to prepare them for life in a separated agrarian community which is the keystone of the Amish faith. Under those circumstances, at least, the First Amendment's guarantee of free exercise of religion—synonymous here with acceptance of religious diversity—was held to be of greater importance than uniform, universal education.

In *Sherbert v. Verner,* 374 U.S. 398 (1963), the Court went even further, beyond acceptance to protection. Sherbert, a Seventh-Day Adventist, was discharged by her employer because she would not work on Saturday, the Adventists' Sabbath, and could not find new employment for the same reason. The State Unemployment Compensation Commission of South Carolina denied her claim for unemployment compensation, rejecting her reasons for refusing employment requiring Saturday work. The Supreme Court disagreed. Denial of her claim abridged Sherbert's right to the free exercise of religion. The withholding of an economic benefit was no more valid than the use of direct coercion. The Commission's ruling, the Court held, would have forced Sherbert to choose between following the precepts of her religion and forfeiting benefits, or abandoning the precepts of her religion to accept work. This choice, the Court felt, would place the same kind of burden on the free exercise of religion as would a fine imposed on her for her Saturday worship.

(Continued on page 58)

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LAW AROUND THE WORLD

Folklaw

The world's peoples have a lot to teach us about solving disputes

> Two words to a bargain . . . Those who will not work shall not eat . . . Finders, keepers . . . My house is my castle . . . Better ten guilty escape than one innocent person suffer . . . Right wrongs no person . . . Two wrongs don't make a right . . . Good law springs from bad morals . . . Let the buyer beware

Proverbs and law? The fit is more natural than you might think. In fact, proverbs and folk literature provide delightful glimpses of how law influences the lives of people everywhere in the world.

The wise barrister in early Europe understood the importance of proverbs and was well advised to become something of an expert in them, as these short bits of wit and wisdom were used freely in lower courts before which peasants appeared. A 14th century German legal document went so far as to declare that "wherever you can, attach a proverb; do so, for the peasants like to judge according to proverbs."

Proverbs and folk literature provide unique insights into the human environment in which law operates. They convey the special nuances, feelings, and values of a people. Expressing what have been called the "seed elements in the human experience," folklore is sometimes called the mirror of a people.

As an expression of culture, folklore has the capacity to reveal both the informal and formal mechanisms at work in society, promoting better understanding about law in various cultures.

But folklore speaks for itself! So let us

Lynne Schwab and
Lynda Falkenstein

now look at some examples of folktales and proverbs which concern familiar law-related concepts and questions. At the same time, they illuminate the values and feelings of peoples many miles away.

The Feast

The first tale is told by the Bamun people of Cameroun, a country in west central Africa. It focuses on the idea of *responsibility*.

This is the story of a chief who ruled over many villages. He decided to give a great feast for all his people. The chief sent messengers to the villages announcing the event. His messengers told the people of the day and place for the festival and asked each of them to bring a calabash of palm wine.

The great day of the festival came. People bathed and dressed in their best clothes. Hundreds of people with their families were at the house of the chief. There was drumming and dancing. As each person entered the chief's compound, each went with a calabash to a large earthen pot into which was poured the liquid refreshment that each brought.

Now there was one man who wanted very much to attend the feast, but he had no palm wine to bring. His wife said, "Why don't you buy some palm wine from so-and-so, who has plenty?"

But the man replied, "What! Spend money so that I can attend a feast that is free? No, there must be another way." And after awhile, he said to his wife, "Hundreds and hundreds of people will pour their wine into the chief's pot. Could one calabash of water spoil so much wine? Who would know the difference?"

And so he filled his calabash with water and went with the others to the chief's village. When he arrived, he saw the guests and all the villagers pouring their wine into the big pot, and he went forward, poured his water there and greeted the chief. Then he went and sat down, waiting for the serving of the palm wine.

When all the guests had arrived, the chief ordered the servers to fill everyone's cup. The cups were filled, and each awaited the signal to begin drinking. The man who we know brought only water was very impatient, for there was nothing so refreshing as palm wine.

Finally, the signal came from the chief, and the guests tipped their cups to their lips. They tasted. They tasted again. Again they tasted. And what they tasted was not palm wine, but water, for each of them had thought, "One calabash of water cannot spoil a great pot of good palm wine." And each of them had filled a calabash at the spring. Thus, the large earthen pot contained nothing but water, and it was water they had to drink at the chief's feast. . . .

Looking for something new? Here's a case involving a spider, a squirrel, a crow, a field of hotly contested corn, and a lucky storm.

This tale raises many important questions. Just a few which students might discuss include: (1) How important are one individual's actions to an entire group of people? (2) Should your actions be determined by whether anyone will know about them or not? Is a wrong thing made more right if nobody knows it happened? (3) If you were the chief in this folktale, what would you do in the future about holding feasts and inviting guests? What kinds of rules would you make and how would you enforce them? (4) Is there ever a time when people can or should be responsible for other people's actions?

Spider and Squirrel

This second tale is from the Akan people of Ghana. It focuses on the concept of *property* by illustrating the proverb "if you trample on another's property in looking for your own, you will never find your own."

Once upon a time there lived a squirrel who was a very fine farmer. In those days every animal had a large plot of land on which he grew his crops, and at the time this story begins, Squirrel had a fine big field of guinea corn.

Now since Squirrel was so adept at climbing trees and leaping from branch to branch, he never had to make a path to his plot of land. He simply chose a likely piece of bush and no matter how far it was from the road, he could always reach it through the tops of the trees.

Squirrel was delighted with this particular field. The soil was so rich that his guinea corn promised to be the best in the neighborhood, and he was rightly proud of the results of his labor.

One day when Squirrel's corn was almost ready for harvesting, Spider was out hunting in that part of the country and came across the field full of the finest-looking guinea corn he had ever seen.

"I wonder whose field this is?" said Spider to himself, as he walked round and round the field looking for the path that he hoped would lead him to the owner's house. But, of course, he could not find one.

"Well, this is a strange thing. How can anybody have a field with no path to it? I must look into this and see if I can profit by it."

All the way back to his home and family, Spider considered how he could convince other people that the field belonged to him, and that evening after supper he had an idea.

"Tomorrow," he said to his family, who were clustered around him, "you must all come with me to a place I have discovered, and if you work hard for only one day, then you will be rewarded with a whole field of corn for which anyone else would need to work for months."

He explained to his family what he wanted them to do, and very early the next day Spider and his children were at work with their hoes making a path through the bush leading to Squirrel's farm. When this was done the crafty spiders broke pieces of pottery and scattered them along the path, so that it would appear that they had dropped them over a period of several weeks as they went daily to hoe and weed.

Then, without a word to poor Squirrel, the spider family began to cut down the corn and take it home with them. Each morning they came back for a little more and spent the rest of the day eating and resting.

Squirrel soon discovered that he was

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The authors express their appreciation to Cecila Dumor, Foreign Curriculum Consultant, Michigan State University, for her invaluable assistance in identifying and selecting the folktales and proverbs included in this article.

being robbed, and one morning he hid himself in the trees, waiting to see who was stealing his corn. Along came Spider and his family, and no sooner had they begun to cut down the guinea corn than Squirrel leapt out of his hiding-place.

"Why are you stealing my corn?" he asked.

"It is my corn," replied Spider. "Why are you trespassing on my field?"

"It is my field," said the angry Squirrel.

Spider laughed.

"Oh no!" he said. "It cannot be your field, for there is no path leading to it except the one that my family and I made."

"But I do not need a path," explained Squirrel. "I always come by the treetops."

Spider went on laughing, while his family continued to cut down Squirrel's harvest, so Squirrel cried:

"I shall go to court about this, you thieves! I dug this field and planted and weeded it, and I am not going to stand by and watch you steal it from me."

So Squirrel went to court and Spider was sent for to state his case.

"Of course the field is mine," said Spider to the judge. "Have you ever seen a field with no path leading to it through the bush?"

The judge had to admit that all the fields he had seen had paths leading to them, and when Spider showed him the path he had made and Squirrel admitted that the path was not his, the judge ruled that the field belonged to Spider and his children.

They all danced and shouted with glee and decided to work very hard the next day, to cut down the whole of the remaining harvest and take it home to store. So the next morning poor Squirrel had to watch the Spider family reaping the harvest over which he had toiled for so long. They tied the corn into great bundles and when all was cut, they started off for home staggering under their great loads.

Suddenly a great storm arose. The sky was black with clouds and the rain beat down so heavily that Spider and his family had to leave their bundles of guinea corn at the roadside and dash to a shelter in an unused hut. It was the worst storm they had had for a long time, and when the sky finally cleared and the sun shone again they made their way back along the steaming ground to the path where they had left their bundles of corn. Then they stood still and gazed in surprise at a gigantic black crow who was perched on the corn with outstretched wings.

So great was the crow that by spreading his wings he had kept the rain from falling on the bundles of guinea corn, and it was quite dry.

Spider was delighted.

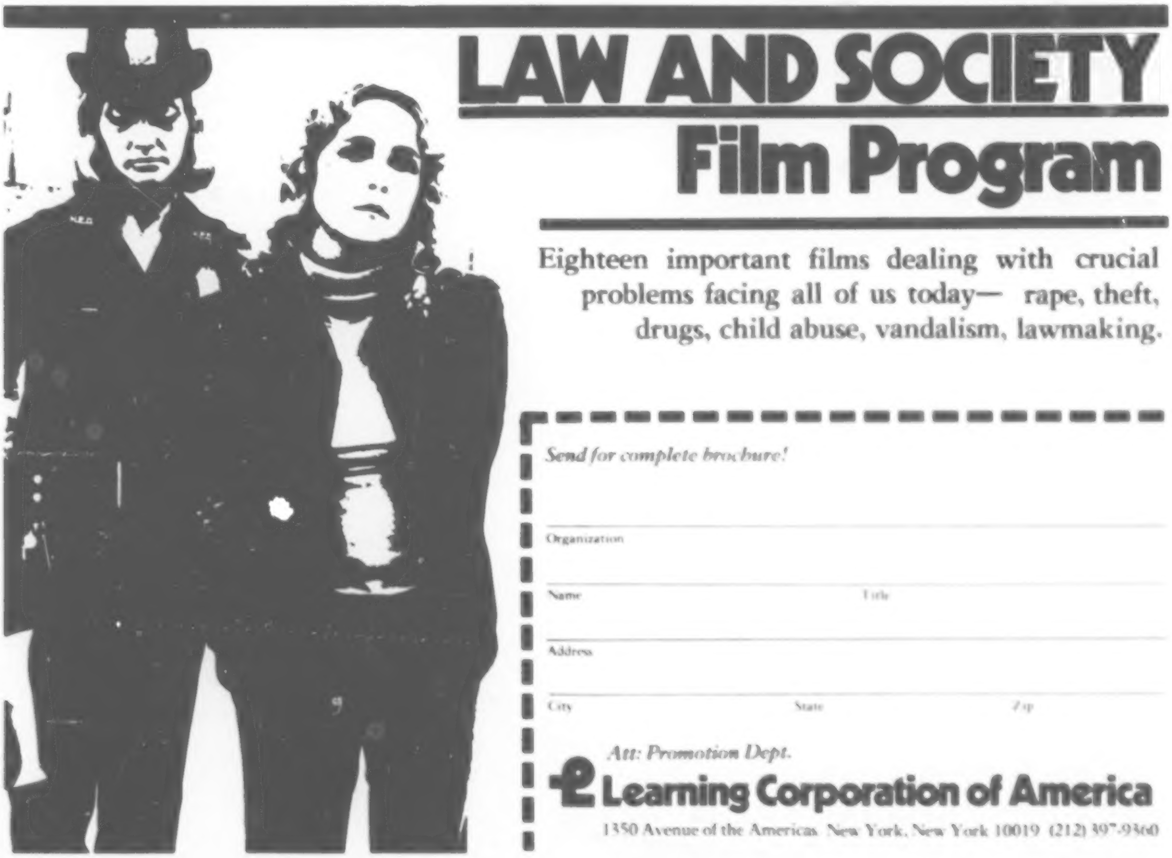
"Thank you, Crow. Thank you!" he said happily. "You have kept my corn dry and now I shall not have to spread it all out in the sun again."

"*Your* corn?" objected the crow. "It's my corn now. Who ever heard of anyone leaving bundles of corn unattended by the side of the path. Go away! This belongs to me."

Then the crow gathered up all the corn in his huge claws, and flew away out of sight. So there was nothing left for the Spider and his family to do except return home empty-handed and very angry.

So it is said that "if you trample on another person's property in looking for your own, you will never find your own!" Furthermore, "if you poison another (either by what you say or what you do) some of the poison gets into your own mouth."

(Continued on page 55)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LAW AROUND THE WORLD

South Africa: The Last Plantation

In June of 1976 world attention focused on South Africa as black opposition to the system of white supremacy erupted into open revolt. The trouble started when school children in Soweto, a black township just outside Johannesburg, protested against white control of their school curriculum. A confrontation between students and police quickly escalated into widespread rioting during

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which hundreds of blacks, many of them school children, were killed by South African police.

Exactly nine months later, with relative calm restored, an event of perhaps equal significance to the Soweto uprising passed virtually unnoticed. South Africa's white lawmakers simply legislated away any culpability on the part of the South African police involved in suppressing the Soweto uprising. They passed an indemnity bill which gave the police immunity from civil or criminal prosecution for what they did "in good faith" to prevent disorder. What is most significant is that though the Indemnity Act was passed on March 16, 1977, it *backdated* immunity to June 16, 1976, the day rioting broke out in Soweto. This effectively annulled a number of civil cases pending at the time in which blacks had accused the police of assault and malicious damage.

The resort to an ex-post-facto indemnity law was as predictable as it was outrageous. A precedent had been established years earlier and under similar circumstances with the passage of the 1961 Indemnity Act. According to Brian Bunting's ***The Rise of the South African***

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Reich, that law "laid down that no proceedings, whether civil or criminal, arising from acts committed during the 1960 state of emergency (the widely publicized Sharpeville massacre), could be brought in any court of law against the government or its officers."

Ex-post-facto immunity is only the tip of a legal iceberg. Statutory racism has established South Africa as unique among the world's political systems, for only in South Africa is white supremacy a governing principle for all of daily life, and only in South Africa is white supremacy effectively sanctioned by law. The edifice of de jure discrimination, pervasive from "cradle to grave," determines where people may live, where they may work, what kind of employment they may seek, who may vote, who may attend which schools and which churches, who may own property, whom one may marry, and where one may be buried—all on the basis of race. Needless to say, whites have extensive rights and privileges. Africans have few.

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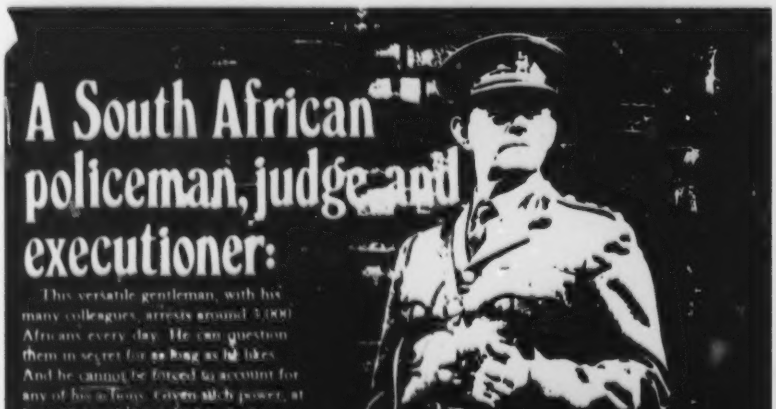


A South African policeman, judge and executioner:

This versatile gentleman, with his many colleagues, arrests around 3,000 Africans every day. He can question them in secret for as long as he likes. And he cannot be forced to account for any of his actions. Given such power, at least 15 people have died under his 'questioning' in the past few years. This is South Africa's police State. This is how apartheid is enforced. Help us work towards ending it. Join the Anti Apartheid Movement, 89 Charlotte Street, London W1 Tel: 01-580 5311

From De Facto to De Jure

While the legal institutionalization of racial discrimination is relatively recent, it is based on well-entrenched custom. Historically, whites dominated through military success and through taking control of the land in the process of creating an agrarian society. The relationship which typically developed between whites and blacks was one of landlord to tenant, or worse, master to serf. Whites were thus conveniently able to avoid real economic competition with blacks.

However, when industrialization threatened to ignore the racial hierarchy in favor of securing the cheapest labor available, whites struck back with tough new laws. In order to stay on top, successive white governments, especially since 1948, have transformed South Africa's system of racial discrimination. White supremacy in politics, economics and social circles, once guaranteed by custom, is now insured by law.

In addition to the more visible and humiliating aspects of social segregation—segregated schools, restaurants, and public transport—South African law attempts to regulate political and spatial separation as well. The economy, on the other hand, has of necessity remained integrated due to its dependence on black labor, but black labor can't be competitive thanks to race-inspired labor laws governing everything from wages to unemployment compensation, job security, and unionization.

A closer examination of "apartheid" (segregation) statutes shows what it is like to be black and living in South Africa.

Separating the Races

South Africa's all-white parliaments have committed themselves to creating an elaborate system of social privilege. To that end mixed marriages were prohibited in 1949. Illicit carnal intercourse between the races was declared a criminal offense the following year (it is revealing that immorality between members of the same race is not a crime). Segregation of public premises or public vehicles has been permitted since 1953. Subsequently, the Minister of Native Affairs was empowered to prohibit Africans from attending church services in a white area.

White South Africans have gone to preposterous lengths to separate the races. For example, they provide separate telephone booths, separate tellers' windows in banks, separate time clocks in factories, and even separate dry cleaning facilities for the various races (after whites complained about their clothes being cleaned with Africans' clothes). In *House of Bondage,* Ernest Cole reports, "A recent session of the Nationalist-dominated Parliament delved in all seriousness into the question of whether apartheid (segregation) should extend to the high-tide or the low-tide mark at South Africa's beaches. The M.P.'s concluded that the Africans could wade across from black beaches into white water, thus "spoiling" it for white swimmers. The solution arrived at by the lawmakers was to use the precedent of international convention: Apartheid was extended out to the three-mile limit!"

Social separation is further reinforced by spatial separation. Laws passed in 1913 and 1936 legalized the creation of African Reserves (later called Bantustans and more recently referred to as African Homelands). These laws restricted any further sales of land to Africans, ultimately limiting them to a total of 13 percent of South African land. Looked at another way, whites, who represent 17 percent of the population of South Africa, have allocated 87 percent of the land to themselves.

Subsequent amendments to the Natives Acts have empowered white authorities to control the movement of Africans between the so-called Reserves and white urban areas, register Africans in those areas, and eject unemployed or disorderly Africans, all of which has provided whites with considerable political and economic leverage as well as a powerful instrument of social control.

South African Realpolitik

Presently, Africans can neither serve in the South African Parliament nor vote for others to represent them, though interestingly enough there was a time in the distant political past when the franchise had been extended to some Africans. That franchise, however, was limited by property and literacy qualifications which ensured that whites always retained political control. Now, white South Africans would have us believe, in defense of their peculiar brand of separate development, that the franchise for blacks is in the process of being restored through the vehicle of homelands independence.

The homelands policy is as brilliant in its conception as it is transparent in its intent. If blacks can be convinced to accept "full political rights" and "independence" within those areas designated as African homelands, (1) white South Africa will defuse international criticism of its racist policies, (2) the white minority will be transformed into a majority by forcing blacks to relinquish their South African citizenship in exchange for homelands citizenship, and (3) the South African government will thus absolve itself of any welfare obligation while continuing to enjoy the benefits of an abundant surplus of cheap black labor from those same neighboring homelands.

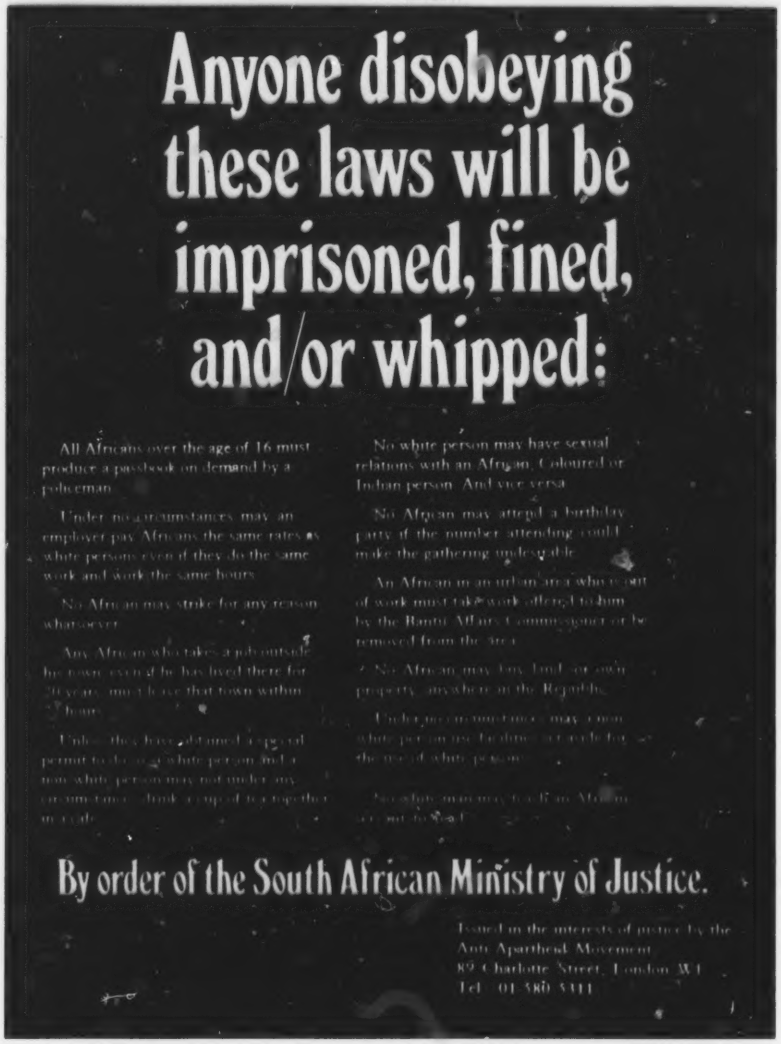
Three homelands have so far been granted "independence," and a familiar pattern is emerging. South Africa provides most of their food requirements, provides the lion's share of their national budgets in direct subsidies, and employs the majority of their employed males outside the homelands within South Africa itself. Clearly they are neither economically viable nor politically independent.

Economic Discrimination

The laws regulating economic intercourse are as comprehensive and discriminatory as those governing political and social relations. Widespread pay discrimination keeps African wages low, and low wages in turn exclude many African workers from unemployment benefits. Skilled African building workers have been prohibited from working in white urban areas and whites prohibited from placing contracts with African builders. Rigid segregation has been introduced into professions such as nursing.

Until very recently, African workers were denied the right to organize unions, strike, or hold certain skilled occupations. But these "reforms" have been so hedged with qualifications that their impact has been seriously diluted. The law allowing blacks to unionize, for example, also makes it very difficult for those same unions to strike.

Nonetheless, if there is one area where blacks have a modicum of power it is in the field of labor. The dependence of the South African economy on skilled and unskilled black workers has provided African workers with a potentially powerful bargaining tool. As a result, there has been a recent epidemic of legal and illegal strikes. Unfortunately, blacks have gained concessions in wages or entrance to more skilled positions only after whites have vacated those positions for higher and better paying ones, thus leaving white power and the racial hierarchy intact.



Anyone disobeying these laws will be imprisoned, fined, and/or whipped:

All Africans over the age of 16 must produce a passbook on demand by a policeman.

Under no circumstances may an employer pay Africans the same rates as white persons even if they do the same work and work the same hours.

No African may strike for any reason whatsoever.

Any African who takes a job outside his town, even if he has lived there for 20 years, must leave that town within 72 hours.

Unless they have obtained a special permit to do so, a white person and a non-white person may not under any circumstances drink a cup of tea together in a cafe.

No white person may have sexual relations with an African, Coloured or Indian person. And vice versa.

No African may attend a birthday party if the number attending could make the gathering undesirable.

An African in an urban area who is out of work must take work offered to him by the Bantu Affairs Commissioner or be removed from the area.

No African may buy land or own property anywhere in the Republic.

Under no circumstances may a non-white person use facilities set aside for the use of white persons.

No white man may teach an African to read.

By order of the South African Ministry of Justice.

Issued in the interests of justice by the
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Above and facing page: Two posters from an English anti-apartheid group.

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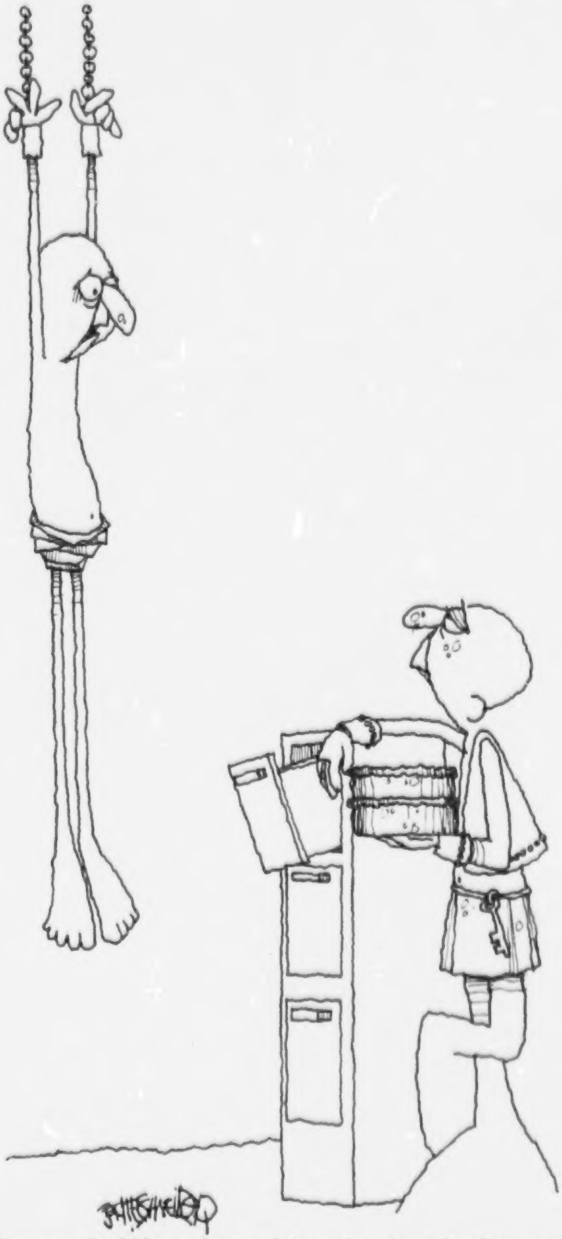
Procedural Injustice

South African laws are unjust in themselves and unjust in how they are applied. South Africa has routinely ignored fundamental rights which are precious to democracies. In the context of white supremacy such fundamental rights as protection from search without a warrant and from detention without trial, and the protection of habeas corpus, become a threat to the status quo. Such protections no longer exist in South Africa, as the following examples show.

In 1955, Parliament gave the police power to enter and search premises without a warrant. One year later, another law effectively prohibited courts from issuing restraining orders in banishment cases. Thus, even if an African received a banishment order by mistake, he would be unable to get a restraining order to prevent his banishment but had to remove himself first and arrange for his case to be argued afterwards.



"If I told her once, I told her a thousand times, 'a cake with a file in it!'"

The General Law Amendment Act of 1962, commonly called the sabotage act, made it an offense to injure or destroy the health or safety of the public, or essential goods or services (water, power, post and telephone services), or any property. Theoretically, the "crime" of trespass could fall under the purview of this act. Furthermore, once trespass was proven one would be liable to penalties under the sabotage act unless it could be established that the offense was not committed with intent to promote general dislocation or endanger the public safety. In other words, defendants have to prove their innocence, instead of the state's having to establish their guilt. One is guilty until proven innocent in this instance.

A 1963 act provided for detention of up to 90 days without trial for the purpose of interrogating anyone *suspected* of having committed or *intending* to commit any offense under the Suppression of Communism Act, the Unlawful Organizations Act, or for the offense of sabotage. This same law also empowered the Minister of Justice to keep in jail any person serving a sentence under the Suppression of Communism Act and similar laws—even after the expiration of his sentence—if the Minister is satisfied that that person is *likely* to advocate, advise, defend, or encourage the achievement of any of the objects of communism.

Further "refinement" of the detention laws occurred in 1967 with the passage of the Terrorism Act. This provided for the *indefinite* detention without trial of *suspected* terrorists or persons in possession of information about terrorist activities.

Cosmetic Change?

During his first full year in office (1979), South Africa's new Prime Minister, Pieter Botha, approached the problems of internal change in such a way as to suggest a movement away from previous white intransigence on racial issues. Among the more remarkable "reforms" in 1979 were an amendment to allow the registration and thus recognition of black trade unions, and a resolution to gradually abolish statutory job reservation which had reserved certain skilled occupations for whites for almost a quarter century. Close scrutiny of these ostensibly reformist changes reveals, however, that their effect will not be to compromise the apartheid system but, according to the London *Financial Times*, "to modernize and streamline the system, and make it work better."

The government left no doubt as to the real purpose of the decision to recognize black trade unions when it announced, "Black trade unions will now be effectively brought under the discipline and control of the law, and this will include a ban on political activities, a control over their membership, access to their financial statements and balance sheets, and control over their overseas spending." Furthermore, unions are permitted to bargain only if they are registered, and the government registrar's decision to grant or withdraw registration cannot be challenged by any legal appeal.

Statutory job reservation applies to only 4 percent of the jobs performed by whites. In all other cases collective agreements between the present (nonblack) registered unions and employers determine job reservation and advancement. Since the government has historically shown reluctance to interfere with such "free enterprise," blacks will probably continue to be barred from better jobs.

Furthermore, the introduction of black trade unions into the collective bargaining process is expected to have little immediate effect on the economic color bar since the new labor legislation requires unanimous agreement by both black and white member unions to change such provisions. A white veto thus ensures that the racial hierarchy within the work force will remain intact until the government or the employer forces meaningful change.

The fact that Botha has not been as unyielding on internal racial matters as his predecessors is thus best interpreted as pragmatic self-interest. His recent "reformist initiatives" are simply the latest in a series of cosmetic-only changes.

Putting It in Context

Americans familiar with the long and sorry history of segregation laws in the United States realize that racist societies often use the law to enforce discrimination. American blacks had to put up with perversions of procedure and legal inequalities (in voting, work, schooling, and a host of other areas) that in many ways rival the unfairness of South African law. They would probably have no difficulty understanding the bitter irony that blacks face today in South Africa. When white South African officials demand that blacks act within the law or face the consequences, blacks know all too well that the consequences of acting within racist law might just be worse than the consequences of breaking it.

Discrimination and Prejudice

"The Last Plantation" raises a number of general issues the teacher might pursue. An excellent 16mm film on discrimination and prejudice, *Eye of the Storm*, is available from Marlin Motion Pictures. This 28-minute documentary deals with the learning experiment conducted by a third grade teacher in Iowa. By labelling the students brown-eyed and blue-eyed, the teacher provokes prejudices in the two groups. Marlin Motion Pictures' address is 47 Lakeshore Road East, Port Credit, Ontario, Canada, L5G 1C9. For older students, ***The Prejudice Film*** briefly traces the history of prejudice, from jokes to physical violence, and comments upon possible remedies. This 28-minute 16mm film is available from City Films, 376 Wellington Street West, Toronto, Ontario, Canada. It can provide a basis for discussion about human rights.

On racism in America, the Social Studies School Service offers *Racism: Opposing Viewpoints*, a collection of 14 readings and three activities which deal with differing ideas about racism and its relation to imperialism, immigration laws and the IQ controversy. Gary E. McCuen gathered primary sources into *The Racist Reader* (Anoka, Minn.: Greenhaven Press, 1974). Educational Audio Visual, Inc. has a record or cassette set available, *Civil Liberties*, which features minidramas on busing in Detroit and reverse discrimination in higher education, followed by a dialogue between two legal professionals, Roger Baldwin and Robert McKay. Inquiries about this set can be addressed to EAV, Pleasantville, NY 10570; the product number is 7KK 008/7RR 008.

Racial Equality by Laughlin McDonald (Skokie, Ill.: National Textbook Co., 1977) discusses slavery, Reconstruction, disenfranchisement, school desegregation and many other issues related to racial oppression in the United States. It is available in paperback.

Several items relating to school desegregation include Janet Stevenson's *The School Segregation Cases* (New York: Franklin Watts, 1973) geared to young people; *Comparing Political Experiences: Busing in Boston*, a collection of four activities put together by the High School Political Science Curriculum Project at the Social Science Development Center, 513 North Park Street, Indiana University, Bloomington 47401; and *The School Busing Controversy: 1970-75*, edited by Judith Buncher. The last volume collects newspaper articles from all over the nation and reprints them in thematic groups—court decisions, federal policies, and public reactions. It was printed in New York by Facts on File, Inc., 1975.

More scholarly material on South Africa is available in several books and articles. Brian Bunting's *The Rise of the South African Reich* (Baltimore: Penguin Books, 1963) has an especially useful chapter, "South Africa's Nuremberg Laws." *No Neutral Ground* by Joel Carlson (New York: Thomas Y. Crowell, 1973), *House of Bondage* by Ernest Cole (New York: Random House, 1967), and *South Africa: The Violence of Apartheid* (London: International Defense and Aid Fund, 1969) are three additional books you might find useful.

A number of articles take a closer look at certain topics. Herbert Adam's article, "Conquest and Conflict in South Africa," in *The Journal of Modern African Studies* (13: 4), 1975, and *A Survey of Race Relations in South Africa* (annual) from the South African Institute of Race Relations in Johannesburg by Muriel Horrell, *et al.*, treat racial issues more specifically. Two additional references are Fatima Meer's "Domination through Separation—A Resume of the Major Laws Enacting and Preserving Racial Segregation," in David M. Smith's *Separation in South Africa* (Occasional Paper #6, Department of Geography, University of London) and Benjamin Pogrund's "1975: The Year of Change," *Africa Report* (July/August 1975).

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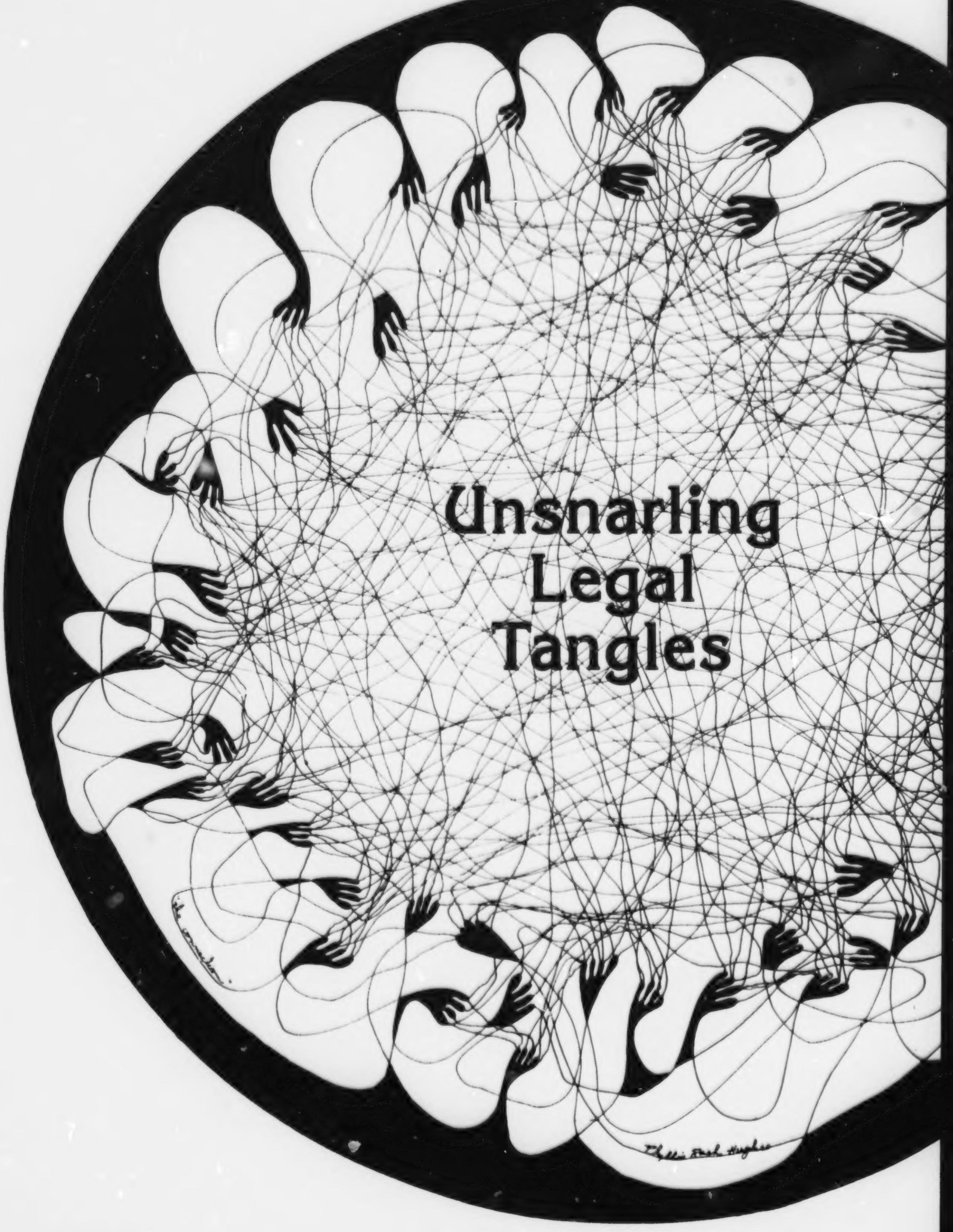
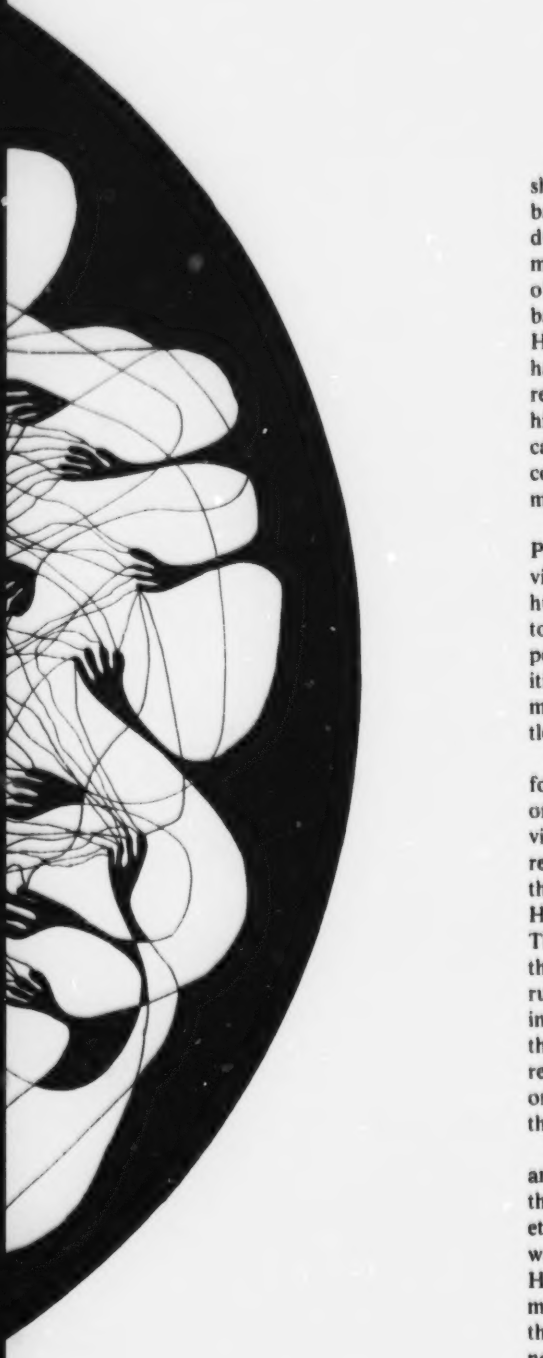


Unsnarling Legal Tangles



LAW AROUND THE WORLD

From Africa to Arizona, they're experimenting with new ways to settle disputes

Imagine a crowded market place on a shopping day. Paul, a delivery man, is backing up his vehicle to deliver his produce. Harold, who is a merchant, has momentarily left his wares near the edge of the roadway. Smash!! Crash!! Paul backs up and hits Harold's merchandise. Harold exclaims, "You stupid fool. You have just destroyed my wares!" Paul replies, "Why, only an idiot would leave his goods so close to the road." Unless calmer minds prevail and a voluntary compromise is reached between the two men, a dispute has just been created.

This scene could have taken place in Pekin, Illinois, or Peking, China, or a village on the African plains. Wherever human beings gather, disputes are likely to occur. All societies, whether rich or poor, technologically advanced or primitive, Eastern or Western, have developed mechanisms and social institutions to settle disputes and resolve conflicts.

One way to settle the dispute would be for Paul and Harold to brawl in the street or to have a shoot-out. Resorting to violence to settle the dispute would not really resolve anything and would more than likely aggravate the situation. Harold's goods would still be damaged. The commerce and the domestic peace of the community would be further disrupted. Also, Harold, Paul, or a totally innocent bystander could be hurt. Furthermore, the dispute would not be resolved in a final sense because the loser or his relatives and friends might continue the violence in the form of revenge.

Most societies would reject violence and force and would attempt to resolve the dispute in a peaceable manner. Societies must also settle the dispute in such a way that the resolution is final. Paul, Harold, and the rest of the community must be able to put the dispute behind them and go on with the everyday business and activities of the society. In addition, in order to insure the finality of the decision, the parties to the dispute—Paul and Harold—and the remaining members of the society must believe that the dispute was resolved fairly and justly. The resolution of the dispute must be consistent with the sense of justice which prevails in the society.

The dispute between Paul and Harold would be resolved differently in different places in the world. In some societies, informal community groups or a group of the village merchants would attempt to settle things. In all likelihood, these informal groups would attempt to help the parties involved reach a compromise. In other parts of the world the elected officials or other political leaders would become involved. In still other countries, such as the United States, formal courts have been created to resolve disputes in the society.

An Informal Process

The Ndendeuli people who live in the southern region of the African country of Tanzania use a bargain system of dispute resolution which is representative of the dispute settlement mechanism found in many less developed cultures. The following description of the Ndendeuli dispute settlement mechanism is based upon the writings of P.H. Gulliver, a British anthropologist who lived with the Ndendeuli and studied their culture for a considerable length of time.

As a result of the poor soil conditions found in the part of Africa where they live, the Ndendeuli are migrant cultivators who farm a plot of land for no more than three seasons and then move to another plot of land. Ndendeuli live in communities of 150 to 250 people. A community consists of several farming hamlets. Virtually everyone in the community is related directly or indirectly to one another through blood or marriage. In such a kinfolk community the need to maintain social stability is immense. The economic and social survival of the community is dependent on close and har-

Frank J. Kopecky and Rebecca S. Wilkin

monious relationships between the individual and the community.

If the dispute between Harold and Paul had taken place in a Ndendeuli village, a community meeting referred to as a "moot" would be called. Moots may be part of a regularly scheduled festival or gathering or they may be called for a special purpose. Paul and several of his relatives would meet with Harold and some of his relatives. Less directly involved members of the community who might be present would also participate. There would be no chairman of the moot. The moot would take place informally, with members allowed to discuss the dispute between Harold and Paul.

Often a person who is regarded as wise and who has leadership qualities will act in the capacity of a mediator. During the discussion social pressure will be exerted to force Harold and Paul to reach a settlement. There will be an appeal to the mutual interest of both Harold and Paul to remain in good standing with the community. The final decision will largely depend on the respective bargaining strength of Harold and Paul. This bargaining strength will be dependent on how much vocal support they are given by their relatives within the community, which is in turn dependent on the position of these relatives in the community.

In the end, some type of compromise will be reached based on concepts of equity. It is important to the existence of the community that the decision which is reached be final and that Harold and Paul make and truly agree with the decision. As if to symbolize the conclusion of the dispute and the healing of wounds, a moot ends with the taking of food and drink.

An Adversary Process

In the United States, because of our common law tradition and the disproportionate attention given to the policy making functions of the United States Supreme Court, we often emphasize the law making of the courts and neglect the dispute resolution functions. The lawsuits and criminal complaints heard each day in hundreds of courthouses are disputes which could not be resolved without court involvement. A trial thus becomes one of our society's means of resolving disputes.

Courts cannot act unless the litigants (the parties in the dispute) petition the court to hear the case. In our society, Paul and Harold would literally and figuratively battle their case out in the courts. Assuming that the damage caused by the incident justified the cost of litigation and that Paul and Harold could not reach a voluntary settlement, Harold (plaintiff in the case) would file a lawsuit in the courts. This suit would be a civil suit asking for damages based on the theory of negligence. This type of lawsuit is an example of a tort case.

The lawsuit would be tried using a procedure known as the adversary process, in which the two parties argue, each trying to prove his version of the truth. Harold, the plaintiff, would attempt to prove that Paul, the defendant, carelessly or negligently backed his vehicle into Harold's wares, causing damage to his property. Paul would undoubtedly answer by contending that he used reasonable care in backing up his vehicle and that Harold was guilty of contributory negligence because he left his wares close to the road. This case would most likely be tried by a court consisting of a judge without a jury. If the judge concluded that Paul was at fault, he or she would order Paul to pay damages. No damages would be assessed

It All Started with Ordeals, Oaths, and Battles

The development of the adversary system was influenced by very early Greek and Roman law, as were most western legal systems. However, its formal historical roots are usually traced to the very beginnings of English law. At first, the primitive tribes which lived on the British Islands did not separate law from religion. Resolving disputes and punishing crimes were tied to religious ritual. Cases were decided on the basis of magic or lots.

As time progressed, methods of dispute settlement in Anglo-Saxon England became more formal, with rules and procedures used in local courts. However, in these courts, which flourished a thousand years ago, decision-making was very little like it is today in common-law courtrooms.

For a time, the Anglo-Saxon courts continued to make use of supernatural forces for guidance in the decision-making process. For example, when a person was charged with a crime by a local court, his innocence or guilt was usually tested by one of two methods—trial by ordeal or trial by oath.

Trial by ordeal was one of the most common methods by which a court reached a decision, especially when the evidence was unclear. The ordeals were used to determine the guilt or innocence of the accused. There was no element of compromise or bargain in the ordeal. In a sense, the accused individual went on trial against God's judgment. The court often chose the type and severity of the ordeal to fit the crime.

One of the most frequently used ordeals was the ordeal by water. The accused was bound hand and foot and thrown into a pond or stream. If the person sank, he was said to have been received by the water. He was then pulled out and freed, if the court agreed that he truly had been "received." If he was rejected by the water and floated, he was said to be impure and guilty, since the river would not accept him. He was pulled from the water and made to pay a fine, or perhaps was put to death.

Trial by ordeal may seem barbaric, but it is important to note that it shows the beginnings of major concepts in the adversary system. Why? Because the individual was a direct participant in the proceedings. He had a crucial role in determining his own guilt or innocence. His fate was not imposed on him by magic or chance, but depended on what he did.

Trials by ordeal did not entirely disappear for centuries. They were revived in the Salem witch trials of late seventeenth century New England, where many persons accused of being witches died trying to prove their innocence through trials by ordeal.

Anglo-Saxon England also used trial by oath to decide innocence or guilt in the county courts. This procedure involved appeals to God to make the truth known. The accuser would swear before God that his claim was true. The defendant would swear before God that he was innocent. Since the widespread belief was that God would punish those who lied

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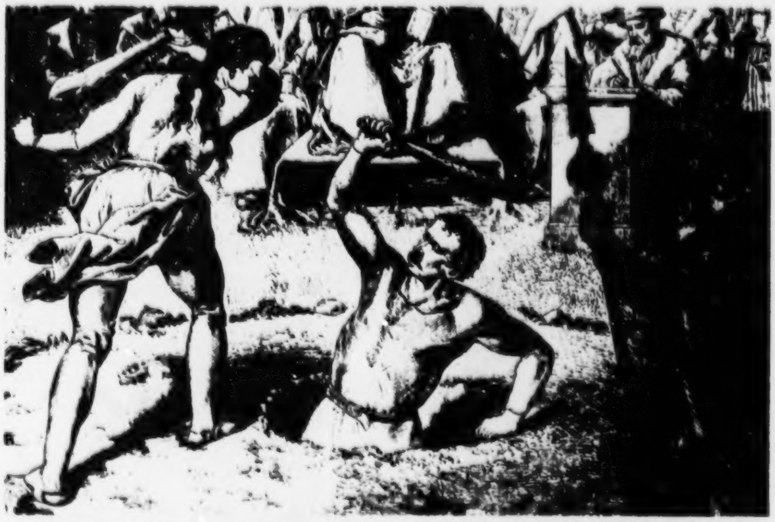
against either party if Harold's actions were deemed the cause of the damages.

Comparing the Two Ways

The Ndendeuli and U.S. procedures are examples of two basic models used to resolve disputes—the court model and the bargain model. Laura Nader develops these two models in her book, *Law in Culture and Society,* which deals with legal anthropology and alternative methods used to resolve disputes. Generally, Western and advanced societies tend to rely on the court model, while Eastern and primitive societies tend to place greater emphasis on the bargain model. It is safe to say, however, that virtually no society uses one method to the exclusion of the other. The dispute resolution process actually used is a combination of these models, with certain elements being stressed in different societies.

In the court model, a third person is given the power to decide or judge the case. The person is said to adjudicate (to act as judge). He or she resolves the issues and has the coercive power to enforce his or her decision. In the bargain model, if third parties are found at all, their role is limited to being mediators or facilitators of discussion. They have no authority to enforce a decision. Rather, they attempt to have the parties to the dispute reach an agreed settlement. The whole focus of the process in the court model is to impose an external verdict, while in the bargain model it is to reach a compromise.

The decision maker or judge in a court model will undoubtedly rely on normative values and laws in reaching a decision. On the other hand, in the bargain model, the mediator will stress the common or mutual interests of the parties. For example, in Paul and Harold's case, the judge in the court model would be interested in statutes that may have been violated and prior case precedents which



under oath, the procedure functioned in a sense as a primitive lie detector test.

Trials by oath introduced witnesses to Anglo-Saxon courts. The court decided which party had to give proof and the number of witnesses the person had to call. However, the witnesses did not testify to the facts of the case, but rather gave an oath as to the reliability of one or another of the parties. The higher the rank of the witness, the more weight was given to the oath.

Trial by oath introduced important elements into English legal procedure. Most notably, courts rendered decisions based at least in part on "testimony" given under oath. However, trials were not examinations of the facts of the case, and the witnesses were like our character witnesses, who may be called in trials to testify to the honesty and integrity of a party rather than to elucidate the facts of a case.

Other important elements of English procedure came about when William the Conqueror, who led the victorious Norman invasion of England in 1066, introduced trial by battle. In trial by battle the disputants fought to determine which one was telling the truth. The winner, who was of course often the strongest, was said to be the honest party. The battles did not necessarily end in death, and punishment would later be given to the "guilty" party.

Trial by battle may look very different from modern procedure, but in fact it is the antecedent of the adversary system. Older men, women, and children could have a champion to do their battle. These gladiators were, in a sense, the forerunners of modern day lawyers who do battle for their clients.

Jerome Frank, an American judge and critic of the legal system, equated our adversary system with trial by battle. In *Courts on Trial,* he called this the "fight theory of justice," in which opposing sides do battle in the courtroom to determine the truth according to elaborate procedures and rules.

Beginning in the twelfth century, the kings of England consolidated their power, and England saw the growth of centralized administration of justice. The common law, a form of general law common to all the country, was developed and used by the King's Courts. Trial by battle moved into the courtroom as the adversary process became a prominent part of the dispute resolution system. The jury system was developed and refined, and witnesses began to be called to present facts to the court for each side. In addition, the judge assumed a passive role as a neutral umpire overseeing the administration of the King's justice.

The English common law and the adversarial system were transplanted to colonial America. Here the adversary system was adapted and intensified to accommodate the values and needs of American society. It continues to be the basis of our legal system, though recent problems have led to a search for new methods of resolving legal disputes.

may shed some light on whether Paul or Harold was at fault in this situation. In the bargain model, the mediator would most likely stress the fact that the market place requires a peaceful and harmonious relationship between all those who work in it and that Paul and Harold will have to continue to work near each other in the future.

The prospective reasoning in the bargain model emphasizes what is most likely to happen in the future. The reasoning in the court model is retrospective, since as it focuses on what happened and who was at fault in the situation. The ultimate decision in the bargain model is the compromise reached by the parties, while in the court model there is often a winner and loser, with a clear cut decision in favor of one party or the other.

A Third Way

If Paul and Harold's dispute had occurred in any complex, industrial society, chances are that a court using a much more formalized hearing process than the Ndendeuli moot would be called into action. The court model of dispute resolution would be used. An external third party, a judge or a jury, would decide the case.

But the method through which the judge gathered information about Paul and Harold would vary depending on the country in which the dispute arose. In the United States, Canada, England, and most other common law systems of justice, the adversary process of fact finding would be in use. In Continental Europe and other countries which follow the Roman/Civil Law tradition, the inquisitorial or nonadversarial system would be used. The inquisitorial system is common to most western European nations, although the process differs, often markedly, from country to country. The inquisitorial system has had many changes through time. Like the adversarial system, it also incorporates elements of the bargain model.

The major difference between the two systems centers on the role of the judge. In the inquisitorial system the judge is an active participant in the fact finding process, while in the adversarial system the judge is a more passive participant, relying on the parties or their attorneys to supply the information about the case. In the adversarial system the judge is to be a neutral figure, remaining impartial and only deciding the case on the basis of information which is introduced during the trial. The attorneys are the combatants in the trial. They control what information the judge will use to decide the case.

The theory underlying the adversary system is that an accurate and truthful determination of what occured between Harold and Paul can best be made by allowing the opposing sides of the lawsuit to present their respective cases as forcefully and as thoroughly as they can. Each side is given the opportunity through cross-examination and argument to tear down the case of the other side. This process puts a great deal of the responsibility for the presentation and argument of the case upon the attorney. The judge acts in the role of a referee, keeping the combatants within the prescribed rules of the process. After both sides rest, the judge or jury retire from the scene and base their decision solely upon the evidence produced by the parties at the trial.

Since the evidence presented is largely controlled by the attorney, the ability of the judge to question witnesses and to seek information is severely limited in the adversary process. Elaborate rules of evidence have been created to keep certain types of information from reaching the judge or jury. American trials are punctuated by frequent objections to evidence and motions to suppress information. Witnesses are not allowed to freely state what they know about a case but instead are asked to respond to a series of questions put to them by the opposing parties. One of the criticisms of the adversary system which is frequently heard is that the outcome of the case may be dependent upon the ability and the competency of the attorney presenting the case. It is said that the side which has the best advocate or "champion" has great advantage in the trial of a case in the adversary system.

If the word "inquisitorial" brings to mind "The Inquisition," the connection is historically accurate, for it provided the model for the European civil courts. Out of fear of widespread heresy, the Catholic hierarchy, with the cooperation of the secular state, organized tribunals which investigated and judged cases of suspected heresy. These tribunals of the church endured in continental Europe from late medieval times into the seventeenth century in some countries. Often the inquisitors, the judges of the tribunals, took evidence and judged the case in secret. The Inquisition is most noted for the widespread fear and severe forms of torture and punishment which were forced on the populace; however, as a form of court procedure, the inquisitorial system never again was noted for such excesses. (See pages 27 and 30 for articles on the inquisitorial system in Germany and the Soviet Union.)

The Third Way in Action

If Harold and Paul went to the inquisitorial court with their dispute, they and their attorneys would not play as significant a role in the court process. In the model inquisitorial system, the judge would control both the pretrial investigation and the actual trial. In civil cases, such as Harold and Paul's, a three-judge panel might try the case. The presiding judge would appoint a reporting judge, or delegated judge, to do the investigation. The reporting judge would question the parties and all witnesses to develop all facts for *both* sides. This judge would summarize all the evidence and testimony in a written report (dossier) which would then be given to the presiding judge. The weight given the evidence and inferences allowable would be left to the court's discretion.

In many countries using the inquisitorial court method today, changes have been made in the process. For example, often the investigation may be handled by the prosecutor. Both Germany and Russia rely on prosecutors to carry out the pretrial investigation in criminal cases. As with many systems of dispute resolution, the inquisitorial system incorporates a mixture of methods.

At the actual trial, the judge actively develops and presents the case on the basis of the dossier, rather than by having the case presented to the court by the opposing sides. Witnesses are called as representatives of the court; they are not called as witnesses for one side or the other, as in the adversary system. Witnesses are allowed to present testimony in an uninterrupted narrative. The air is not punctuated with "objections" and insertions by the attorneys. The judge questions all witnesses. The lawyers for either side may question witnesses at the end of their testimony, but they cannot cross-examine a witness. This brings about a lesser role for the attorneys. They are not "champions," as they are in the adversary system.

Some Other Ways

In every society, the court is "the place of last resort" for settling disputes. It has been suggested that, at least in the United States, people by nature will try to settle their differences outside of a courtroom in most situations. In this way, the parties will try to solve their dispute along the lines of the bargain model, avoiding the "winner-take-all" solution which often accompanies the court model of dispute settlement.

Yet elements of the bargain model do exist in the court setting. Many lawsuits are settled through negotiations conducted by the opposing attorneys. Settlement out of court in a lawyer's office is a solution for many civil disputes. Also, pretrial conferences help resolve many civil cases. Judges can hold pretrial conferences with both parties present. Judges cannot tell the parties how they will rule, but they can suggest possible outcomes of the dispute as a means to force the parties to carefully consider the consequences of their respective claims. Judges in these situations are acting more like mediators, while also playing a more active part in the process like their counterparts in the inquisitorial system.

To take another example of settlement, by far the largest percentage of criminal cases are resolved through a process known as plea bargaining. In plea bargaining the accused agrees to admit that he committed a criminal offense. In return, prosecutors agree to drop other charges against the accused. The net result is that the accused pleads guilty to a charge far less severe than the charge that would be presented at a full trial.

There are many other ways of settling disputes without resorting to full-dress court procedure. One way is through administrative hearing processes. For example, a law may stipulate that in case of a dispute over equal opportunity in the workplace, the employee and employer take the problem to hearing officers at a state or federal equal opportunity agency. This will keep the dispute out of the courts.

The law, through legislation, can also eliminate the need to go to court by not recognizing that an adversary dispute exists. The passage of no-fault automobile insurance and no-fault divorce laws have eliminated the need to have full court trials to determine guilt or innocence.

Increasingly, federal, state, and local governments, along with the legal profession, are recognizing the need for alternative means of dispute resolution which emphasize mediation or arbitration. These alternatives have been urged because of difficulties in processing minor civil and criminal disputes. Extensive delay, high costs, assemblyline procedures, and citizen dissatisfaction with the court system have been cited as reasons for implementing alternative means. In January of 1980 the federal government passed the Dispute Resolution Act, which authorized the expenditure of 10 million dollars for state, local, and nonprofit groups to improve existing or establish new minor dispute resolution mechanisms.

These alternative means rely rather heavily on the use of mediation. (Remember the Ndendeuli.) Mediation facilities, such as the Neighborhood Justice Centers set up by the Department of Justice, have been designed and used as walk-in centers to take referrals from social agencies, police, prosecutors, or the courts. Mediation facilities primarily focus on disputes between persons having an ongoing relationship which, as in the example of the Ndendeuli, promotes the usefulness of the mediator, who has no power to enforce the decision. Mediation is increasingly used for disputes between relatives, landlords and tenants, employers and employees, and buyers and sellers, as well as between neighbors.

Another form of alternative dispute settlement is arbitration, which on an informal level can be used where mediation fails. In arbitration the parties consent to have an impartial third party decide the outcome of the dispute. The third party is not a government employee like a judge or an administrative hearing officer. Arbitration can be an informal, simple proceeding in which the decision of the arbitrator is not binding on the parties. When the parties consent to have the arbitrator give a binding decision, arbitration can be formal and nearer to a full-scale court proceeding.

Arbitration has been very common as the dispute settlement mechanism used in labor disputes. Stories of professional athletes winning large salary arbitration awards frequent the sports pages of the daily papers. Arbitration is being increasingly used, as laws are requiring that in many types of disputes the parties must submit to binding arbitration instead of going to court. The court can review the decision of the arbitrator, but unless there has been a procedural error, the decision is final.

Variety Ahead?

The formal adversary court process remains the final solution to disputes arising in our society. It is only one of the many ways that disputes are settled in this country and around the world. Throughout time every society and culture has adapted its dispute settlement methods to accommodate its perceived needs.

Societies around the world try to maintain harmony and order through informal and formal mechanisms which bring an end to disputes. We're already beginning to make more use of informal mechanisms, some borrowed from other cultures, like mediation. Will these informal mechanisms prevail? Depending on the course of history, the possibility exists that people in the future viewing a film depicting our courtroom trials will find them as archaic and amusing as we would find a twelfth century joust between knights. ☐

More on Dispute Settlement

The American Bar Association has two free publications on experimental ways of resolving disputes in this country. For copies of the *Report on the National Conference on Minor Disputes Resolution* and the *Dispute Resolution Quarterly Bulletin,* write the Committee on Resolution of Minor Disputes, American Bar Association, 1800 M Street, N.W., Washington, D.C. 20036.

Other publications on new ways of resolving disputes include David E. Aaronson, et al., *The New Justice: Alternatives to Conventional Criminal Adjudication* and Daniel McGillis and Joan Mullen, *Neighborhood Justice Centers: An Analysis of Potential Models* (both available from the National Institute of Law Enforcement and Criminal Justice, a part of the Law Enforcement Assistance Administration of the U.S. Department of Justice), and Earl Johnson, Jr., Valerie Kantor, and Elizabeth Schwartz, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* (Denver: National Center for State Courts, 1977; it can be ordered from the National Center at 1660 Lincoln Street, Denver, Colorado 80203. It is publication No. R0023, and it appeared January, 1977).

Also see L. D. Solomon and W. S. Richards, "Toward a New Mode of Conflict Resolution in Civil Matters," *DePaul Law Review,* vol. 27, page 1 (1977).

—FIK and RSV

CLASSROOM STRATEGIES

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Margaret Stimmann Branson

Teaching Global Law

Law around the world for younger students

There is a folktale which has been told for hundreds of years throughout central Europe. It is about a young girl so wise she is able to solve problems that baffle her elders—and achieve justice in the bargain. In the German and Russian versions of the story the girl has no name. She is known simply as "daughter." In this retelling of the story, she is known as Tatianna, and the story is entitled "Tatianna the Wise Girl Judge."

Once there was a man whom everyone thought was very poor. He had neither horse nor wagon. His clothes were tattered. His meals were scanty. He lived in an old, cold cabin on the edge of the forest. But the man did not consider himself poor. He thought of himself as rich, because he had a daughter, Tatianna.

Although Tatianna was just nine years old, she was very wise. She could solve problems which baffled those many years her senior. In time a judge heard of her. He sent word to the father: "Bring your daughter with you to my court tomorrow."

The next day Tatianna and her father went to the village court. The judge motioned for them to be seated. They listened while two brothers aired a quarrel. Their father had died. In his will he had said that his farm should be divided between his sons. The soil on one part of the farm was deep and black. Rich crops grew on it. The soil on the other part was thin and rocky. Nothing would grow on it. The brothers could not agree on how to share the farm. Even when the judge tried to divide the land between them, they were dissatisfied. So at last, the judge called Tatianna before him.

"I hear you are a wise girl," he said. "Tell me, what would you do, if you were judge?"

Tatianna hesitated for a moment. Then

she said, "Let one brother divide the farm. Let the other brother take first choice."

It was done. The brothers went away in peace.

Tatianna Revisited

It is interesting that a similar case came before an historical figure of the early nineteenth century. He rendered a decision very similar to Tatianna's. For it he was acclaimed by the peoples of southern Africa. That historical figure was the feared and fearless warrior-statesman, Shaka Zulu.

Shaka Zulu is not as well known to the general public in the western world as he deserves to be. A contemporary of Napoleon, Shaka built up one of the most highly skilled and disciplined armies the world has known. With it he conquered and pacified a vast empire—and he did it all in the space of 12 years. But if the general public is not acquainted with Shaka, students of military science certainly are. The Nazis, for example, studied his tactics, and they tried in vain to replicate Shaka's feats of pacification during the time they held much of Europe under their sway.

One of the ways in which Shaka Zulu (*Zulu* means heaven) preserved the peace among the disparate peoples who comprised his empire was by taking an active part in the settlement of disputes which arose among them. He held court at the new Bulawayo, his capital in what is now Zimbabwe.

At the new Bulawayo, Shaka's court convened under a huge, spreading fig tree situated in the five-acre yard in front of his Great Council hut. Every morning shortly after sunrise and before breakfast, Shaka appeared to serve as magistrate, resplendent in his chief's attire, his *assegai* in hand. (An *assegai* is a shield combined with a heavy, broad blade.)

One day two chief herdsmen came before him to air their grievances. According to E. A. Ritter, who has written the definitive biography of Shaka, this is what transpired.

Each accused the other of encroaching on his grazing lands, and because of this serious faction, fights had occurred amongst their respective herdsmen. Shaka told each of them to delineate the boundaries of his section, and found that there was indeed a considerable overlap in the rival herdsmen's claims. He asked the first one to affirm on oath that justice would be done if his, the herdsman's boundary award for his own section were granted. The herdsman solemnly affirmed by his *dadewetu* (sister). Then turning to the other chief herdsman, Shaka received a similar affirmation.

"Good!" said Shaka. "You will now, each of you with all your herdsmen and cattle, exchange sections. On your own showing that will leave you both with considerable empty space between you, and if any member of either party encroaches on this, they will eat earth. *Ngitshilo!* (I have spoken!)"

A real-life equivalent of Tatianna's case involved the feared and fearless warrior-statesman Shaka Zulu

"Heaven thunders wisdom!" acclaimed the councillors in chorus. "Give thanks to it!"

"*Baba! Nkosi!* (Ruler! Your will be done!)" responded the two litigants with upraised right hands. They withdrew with a dubious look as they puzzled out the implications of this Solomon-like judgment.

Law as a Universal

The two cases just presented here are of interest for several reasons. First, they reveal similar decisions reached by very dissimilar judges, widely separated in time, place, and tradition. For all we know, "daughter" or Tatianna never lived. And, if she did, where or how she acquired her legal acumen is never made clear. Shaka, on the other hand, was not only a real person, he was a powerful, vital, and brilliant man. He was groomed for leadership by his predecessor. He had many opportunities in the course of his "apprenticeship" to observe how a successful ruler kept the peace by settling disputes which arose among his people. Secondly, the similarity of these cases and the manner in which they are adjudicated tend to confirm what anthropologists and students of jurisprudence tell us about the universality of law. Scholars now generally agree that:

1. Law is a universal, a cultural constant.
2. Every society has legal institutions.
3. All societies have developed procedures that can be called into operation when trouble arises.
4. All societies have devised methods of redressing grievances or "righting wrongs."

Because law is a universal does not mean, of course, that all peoples have the same idea about what is or ought to be "good," "right," or "fair." Neither do all peoples go about adjudicating disputes or righting wrongs in exactly the same ways. Those differences, however, do not belie the fact that almost all societies have the same basic ingredients of law. Almost all societies have:

- rules
- procedures of inquiry
- methods of mediation or adjudication
- modes of redress or ways of "righting wrongs."

Those four basic ingredients of law continue to attract the attention of scholars. To understand law as it functions in various societies, scholars have been focusing their attention on the so-called "trouble cases" which surface among all peoples. They have happened on a fruitful method of study, one which can be commended to teachers and students in both elementary and secondary schools.

Cases from Other Cultures

The value of the case study method need not be re-established here. Its utility has been demonstrated time and again in professional schools. Thanks to the work of pioneers in law-related education such as Isidore Starr and Charles Quigley the special values of the case study method for elementary and secondary students also have been demonstrated. These pioneers have shown how cases decided by the United States Supreme Court and lesser tribunals can be made comprehensible and educationally valid learning experiences for students as young as 10 or 11 years of age.

(Continued on page 47)

Margaret Stimmann Branson teaches education at Holy Name College and Mills College. She has written many curriculum materials, including several for the Humanities Series of Global Perspectives in Education. She is a member of the Advisory Commission to the ABA's youth education program.

LAW AROUND THE WORLD

Charles White

There Is an Alternative to the Adversary System

A European system may meet America's needs

Just about everyone agrees that criminal justice in America is a mess. From all sides comes the cry the courts are slow and the cost of justice high. Many think that the system has become so unwieldy that it would long ago have fallen of its own weight if plea bargaining didn't dispose of 90% of the cases.

Some critics think that the fundamental problem is our adversary system of trying cases, which places heavy reliance on a battle between prosecution and defense that may bewilder the jury, delay justice, and bankrupt everyone but the lawyers.

These observers are looking at an alternative that has been around since the Middle Ages but is only now attracting serious attention here. The continental system is shared in one form or another by all European countries but England. For years lambasted as a carry-over from the Inquisition and a creature of an all-powerful state, it now gives promise of delivering justice promptly and economically.

While legal cases in England and the U.S. are generally shaped by the parties, who determine the issues, call witnesses, and present evidence, continental cases are generally shaped by judges. While in our system judges are basically passive, reacting to what the lawyers on each side present, in the continental system they're actively in charge of the cases, calling witnesses, determining which order witnesses will be heard in, and conducting most of the questioning.

A Case with Ugly Facts

One way of deciding whether the continental system has anything of value for our own is to see how it handles a tough case. Though the criminal proceedings against Dr. Ulrich Brach took place in West Germany more than 20 years ago, this rather bizarre case provides a clear example of just how different continental procedure is from Anglo-American. It is fully reported in Sybille Bedford's book *The Faces of Justice: A Traveler's Report*, which serves as the basis of this abbreviated account.

Dr. Brach was a physician in the German army. At the time of his "crime" he had been stationed for a year at a base about 200 miles from his home in the town of Karlsruhe. Because he couldn't find quarters for his family at the base, his wife and child, a girl of about 12, had continued to live in Karlsruhe, where Dr. Brach joined them every other weekend.

During this year, Dr. Brach's daughter had been accosted more than a dozen times by a man who exposed himself to her on her way to school. The man never touched her, but she was frightened and confused by the incidents. The girl told her mother, and the mother went to the police, but nothing happened. Dr. Brach learned about these incidents, but since he was away throughout the week, there was little he could do.

Then, in February, the man exposed himself to the girl on a Saturday, when her father was at home. When she returned home, Dr. Brach picked up a pistol, and he and the girl went out to search for the man. His daughter identified a small, elderly man, and Dr. Brach went up to him, told him he was placing him under arrest, and said he was going to take him to the nearest police station.

The man seemed to acquiesce, and the two began to walk together. However, the man turned into a large park in the center of town. The doctor realized that this was not the proper way and urged the man to follow him. However, the man pressed on. After walking for some time, the doctor was able to hail a passerby, a large teen-age boy who agreed to help him bring the man to the police station.

The man then made a feeble attempt to escape, trotting a few feet off, but was easily apprehended by the boy and Dr. Brach, who showed him the pistol as warning. The three walked along, arguing about whether he would go to the police station. Reaching a wall of the park, the man seized a branch of a tree and began to pull himself up. The boy rushed at him, and tried to drag him down. Dr. Brach pulled out his gun and fired two shots into the air. The boy ducked and sprang back. The man tried to get beyond the wall, Dr. Brach lowered his arm, and as he did a third shot went off, or was fired. It hit the man in the stomach and he slumped down. Within minutes he was dead.

Dr. Brach was eventually charged with a crime less serious than murder: wounding with intent to do grievous bodily harm. The case was extensively reported in the press, and caused widespread public controversy. Thousands of people expressed themselves in letters to the press, the police, and the judiciary. Many writers (most of whom were women) hailed the doctor as a hero. The other faction, noting that the doctor was in the army, found the whole business a disquieting reminder of the bad old days of military autocracy and defiance of democratic rule.

The case had all the elements of a *cause célèbre*— a sex criminal, a killing, and a prominent defendant

The Trial of Dr. Brach

Dr. Brach's case has all the elements of a *cause celebre*—sex, murder, a prominent defendant. In our country, his trial would probably be marked by extensive maneuverings by his lawyers and the prosecution, by protracted wrangles over jury selection, and by a long acrimonious trial. However, the German trial was conducted quickly, quietly, and inexpensively.

One of the first differences that would strike an observer from a common law country is the physical set-up of the court. We are accustomed to a bench for the judge and a separate box for the jury, but in this trial there is just a long, slightly raised table at which sit eight men and one woman in a row. Three of these people are the professional judges; the others are lay judges, a kind of rough equivalent to our jury. At the conclusion of the trial, they will deliberate together with the professional judges to arrive at a verdict and set a sentence.

The chief judge dominates the proceedings. Sybille Bedford, an Englishwoman familiar with her country's system of justice, writes, "It was a strange experience to hear the (attenuated) inquisitorial procedure at work, to hear all questions, probing questions and soothing questions, accusatory and absolving questions, questions throwing a favorable light and questions having the opposite effect, flow from one and the same source, the bench, and only from the bench, while public prosecutor and counsel for the defense sat mute, taking notes."

The judge's questions are based on the accused's *dossier*—the extensive file on the case which has been built up by police and prosecutors through months of questioning of the defendant and other witnesses in the case. Having extensively studied the *dossier*, the judge is prepared to bring out by his questions the full story of the incident as well as background events leading up to it.

The judge is an impartial questioner. Unlike the prosecution and the defense lawyers we are familiar with in our system, who are preoccupied with getting only their side of the case into the record, the judge methodically seeks to get the whole story. Sometimes, his manner is relaxed and informal, designed to put the witness at ease. For example, in questioning the doctor about his nine-hour drive home the night before the incident (an important consideration in determining his mental state), the judge asks about the road conditions, and finding out that the doctor had to contend with ice and patches of fog, remarks, "Sounds filthy. We all know that road."

Later on, in questioning the doctor's daughter, the judge "asked her some questions about school; he nearly made her laugh; then, friendly and matter of fact, he told her that now they must speak about those disagreeable things." According to Sybille Bedford the judge's informal manner and offhand questions, "informed by moderation, good sense and respect for other people's feelings . . . [constituted] a performance of high human quality."

In keeping with the informality of German trials, there is no witness stand;

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rather, witnesses merely face the court and are questioned. At one point in the proceedings, a witness raises a point not covered by Dr. Brach's testimony, and the judge, rather than calling Brach anew and swearing him in, merely looks over to where he is sitting and asks him a question based on what the witness has said.

Much of the trial is taken up with a long examination into Dr. Brach's character. One of his supervisors in the army is represented by a letter; another testifies in person. The most important analysis of the defendant, however, is the testimony of a professor of psychiatry employed by the court itself, not by one or the other of the parties. The professor describes Dr. Brach as a man "rather lacking in initiative, decent, but clumsy and without drive, a man who found it very hard indeed to get a grip on reality." His lack of personal aggressiveness, the professor says, made him act the way he did when he had to cope with the situation in the park.

Through the judge's patient, careful questioning, the essential facts emerge. That Dr. Brach thought he had the right to use force if necessary to make the arrest. That there was little chance of the man successfully getting away at the wall, since the boy was holding on to his legs until frightened off by Brach's shots, and, in any event, the man probably would not have escaped even if he did get over the wall.

Wrapping It Up

Even though a number of persons testify—including Dr. Brach's wife, the adolescent boy who tried to help Brach control the man, a couple who saw the shooting in the park, and several women victimized by the exhibitionist—it only takes the court a little over a day to hear all the evidence. The prosecutor and the defense counsel have the opportunity to ask supplementary questions, but rarely do so. Their only important role in the case comes at the end, when each delivers a final statement to the judges.

In a long lifeless speech, the prosecutor says that although the law permits citizen's arrest, it does not permit any physical violence to be used in such situations. Admitting that the doctor was under psychological strain, the prosecutor argues that he must bear the consequences of his "own willful decision to wound another man." He says that a verdict of not guilty would pave the way for vigilante justice. In recommending a sentence, he recognizes that Brach had an impeccable previous record, and notes that he would be dismissed from the army if sentenced to a year or more of prison. Therefore, he suggests that a sentence of 10 months would be "the just and sufficient retribution in this case," making it clear to Brach and the public that people can't take the law into their own hands.

The defense lawyer's speech, though equally long-winded, is entirely different. Mrs. Bedford had been struck by the "moderation" of the trial, "the climate of impartial reserve, the abstention from censorious comment: censure of the dead man against whom nothing could be said to have been proved, restraint from censure (on the whole) of Dr. Brach who is not yet convicted." However, the defense lawyer makes the kind of arm-flapping, stem-winding speech we would associate with country lawyers of the old school. He points out that the true criminal isn't on trial, that Brach's shot rid society of an obnoxious character who might even, someday, have murdered a child. Citing a number of previous cases, he says that the law permits violence in an emergency situation, which surely this was. He asks for a verdict of not guilty.

The Continental system may be faster, more economical, and easier on witnesses and defendants. But is it just?

The case raises all sorts of troublesome issues, and we might expect a jury to puzzle over it for a long time, but the German panel is ready with a verdict (and a justification of the verdict) within four hours. At 6 P.M. on the trial's second day, the presiding judge announces that Dr. Brach has been found guilty and sentenced to four months imprisonment, to be suspended while he serves three years of probation. His weapon is confiscated, and he is ordered to pay the cost of the prosecution.

The judge goes on to read a statement indicating the reasons for the judgment. The shot that killed the man had neither been justified in law nor necessary in fact. There had been no emergency, at least not as the law defines it. In mitigation, though, the doctor had a blameless past and faced a grim situation as a parent, aggravated because as a doctor he knew what exhibitionism could do to a child, and because his own enforced absences from home made him unable to take action earlier. And, due to lack of sleep and a grueling drive the night before, the doctor had been "below par" on that day. Furthermore, he was the head of the family—there was now a new seven-month-old baby—and might face civil liabilities from a legal claim filed by the victim's widow. "In view of all these circumstances," the judge says, "we hold the sentence of four months deferred to be the just and sufficient penalty for this deed."

That's not quite the end of it. Within five weeks after the trial, the professional judges are required to file a lengthy document thoroughly going over the evidence in the case, analyzing the legal issues raised, and justifying the decision finally reached. In Dr. Brach's case, this document is 6,000 words long (about the length of this article).

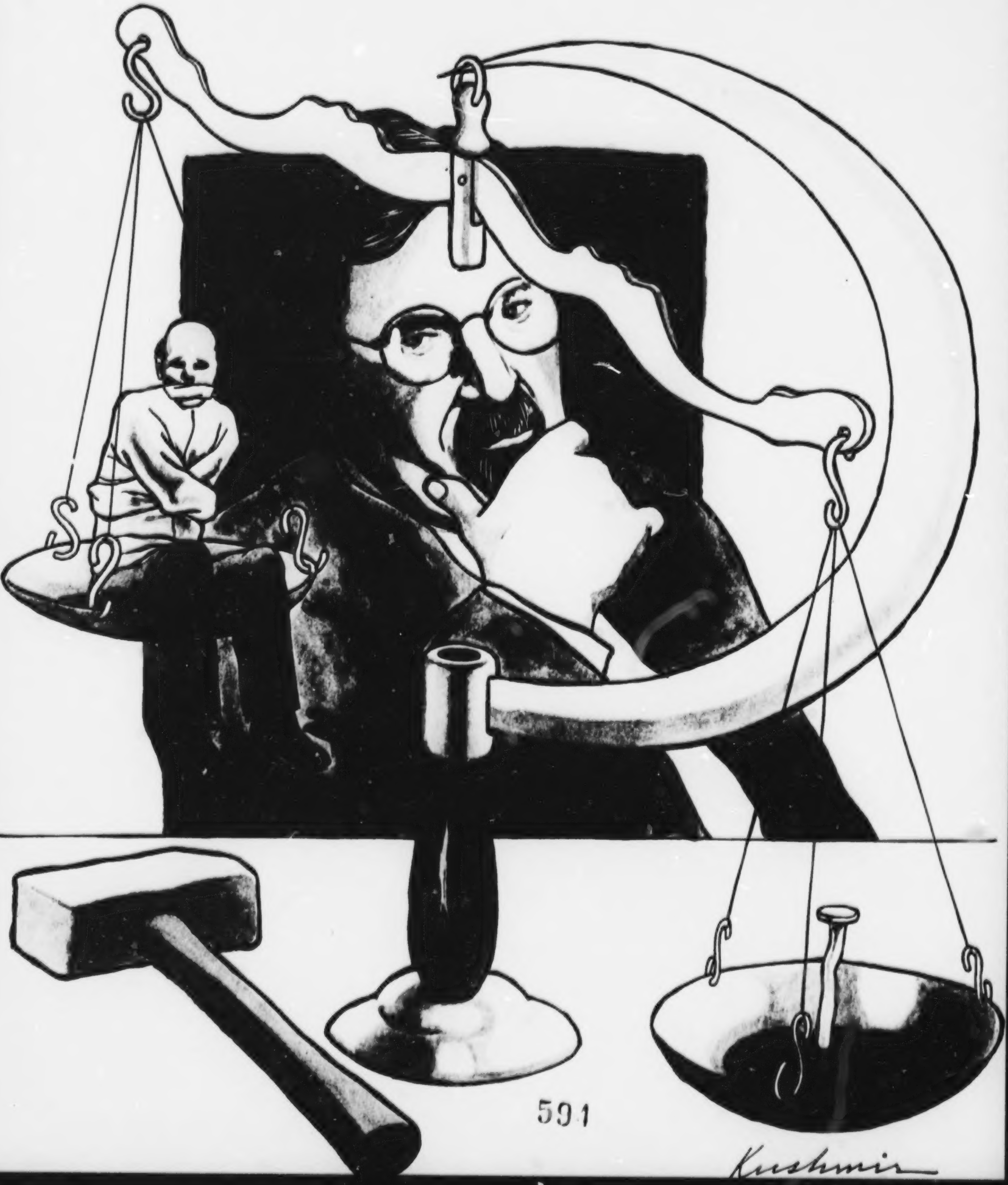
Was the verdict fair? It seems pretty clearly a compromise, acknowledging the principle that one must obey the law, even in trying circumstances, but applying a very mild punishment to Dr. Brach. An American court might have completely exonerated Brach (assuming the case even came to trial), but perhaps we are more tolerant of vigilantes than other countries. Given the circumstances—the case was decided just 14 years after Germany had emerged from a lawless, militaristic dictatorship—the verdict may well have been just.

But even those who have misgivings about it would probably agree that the German system provided certain benefits for Dr. Brach. The trial was short, and he and his family were spared hours of unpleasant cross-examination. Nor were they kept long in suspense waiting for a verdict. Most important, the doctor presumably was spared the kind of staggering bills he could have expected in our system. He had no need to employ specialists to help select a jury, nor did he have to hire experts to testify on his behalf. Moreover, given the shortness of the trial and the limited role of lawyers in the German system, he probably paid his lawyer much less than an American defendant would have. And if he had won the case, the state would have paid his legal bills.

Which System Is Best?

It's impossible in a short article to go over every point of difference between the two systems, but here are a few of the major arguments in favor of German

(Continued on page 52)


Kushmir

Sharon Irish

Russia's Schizophrenic Courts

Political trials crack-up their justice system

The judge peers over her glasses and quizzes the accused. "You admit that you were taking galoshes out under your coat?"

"Yes, I must have done it."

"Then why did you deny it when you were stopped?"

"Perhaps I really didn't know they were there."

"Then why did you run away?"

"I. . . don't know."

"You don't know? Do you know that it is wrong to take for yourself the fruits of your collective's labor? Do you know that that is stealing?"

"Of course I do."

"And what do you think about it, about the way you have behaved?"

"It was very wrong."

"Yes, we agree. Very wrong. With whom were you operating—to steal footwear?"

"Not with anyone."

"Are you sure? We have had a lot of trouble lately at the Red Hero plant; a lot of shoes have been missing. What did you intend doing with the galoshes afterward?"

"I didn't intend anything. Honest, I'm telling you."

"Then why did you take them? The court wants to hear your explanation."

Where did this exchange take place? In a people's court of the Soviet Union. This trial stretched to an hour, even though the defendant admitted taking a pair of boots. His eventual explanation was that he was drunk and didn't know what he was doing.

A Westerner in this Soviet court would have as many questions as the judge. Why all the questions? Isn't it enough that the defendant pleads guilty? What purpose is served by an hour-long trial to accomplish what Americans would do in a gavel rap?

The trial is not the first time this trivial matter has been thoroughly canvassed. A Russian trial is essentially a reconstruction of the extensive investigation which precedes the court appearance. Here's how the system works. In the case of the galoshes theft, the drunk man was stopped by the guard at the factory gate with a suspicious bulge under his jacket. The foreman called the police. After the suspect was arrested, the authorities conducted a thorough examination of the case. In this instance, the suspect, his relatives, his neighbors, and his coworkers were interviewed. In complex cases, an investigation includes autopsy, search, medical and psychiatric examinations, subpoena of documents, and examination of witnesses. In all cases, the accused is available for extensive questioning by the investigator, frequently contributing heavily to the pretrial report.

The investigation usually takes two to four months. George Feifer, in his book *Justice in Moscow*, says wide discretion is allowed in jailing the accused or letting the person stay at home during the investigation. Alternatives like releasing people to the custody of their collective or having them sign promises to stay put are used on occasion.

Does all this preparation result in justice? In many ways, it does. For all participants in the garden variety trial, for example, there are no trump cards. Little is left to chance and few opportunities exist for cleverness in the Soviet courtroom. With a case so "out front" due to the thorough preliminary investigation, there are a number of advantages for defendants. They know the charges against them, and the evidence on which they are based. The prosecution cannot introduce evidence with which the defendant is not familiar. The investigation can also save innocent persons the strains and humiliation of a trial, since the comprehensive research is likely to uncover facts which will show that charges should be dropped.

What's the Theory Behind All This?

If Karl Marx could have visited Moscow after the Russian Revolution, he would have been surprised at the tenacity of crime. In Marxian thought, law is necessary because of economic inequalities that encourage criminal activity. According to Marx, laws are needed only as intermediate measures until the society's bourgeois underpinnings are destroyed. But the reality has proved very different. Crime has not disappeared, nor has the legal order dissolved. Instead, the interim socialist law has lasted and provided a cornerstone for the Soviet system. From V.I. Lenin's time on, law and the state have remained important. A statement by Lenin, framed on the wall in many precinct headquarters in Russia, gives testimony to the continuing emphasis on law and order: "The tiniest violation of the Soviet legal order is a chink which is immediately used by the enemies of the toilers."

The Court as Educator

Politics interwoven with law is not necessarily a cause of injustice. In fact, the communist concern for each individual within a social context may humanize the system. Law is not intended just to punish wrong-doers. The broader aim is the education of every person to effectively serve the society all Russians share. To accomplish this, the court scrutinizes each case not only to respond immediately to the accused, but to find related circumstances which may require altering.

The court judges the criminal, not the crime. As with the thief who stole some galoshes, the parental concern of the court extends beyond the actual theft to include environmental situations which might contribute to crime's spread. If the defendant associates with others known to be involved in criminal activities, these stray citizens, too, must be admonished. Thus, Article III of the law concerning the judicial system of the USSR states:

> The Court by all its activity is educating USSR citizens in a spirit of devotion to their fatherland and to the cause of socialism—in a spirit of unswerving precision in carrying out soviet laws, of care for socialist property, of labor discipline, of an honorable attitude towards state and social duty, and of respect for the rules of socialist life together.

In a majority of cases, this idea of justice cultivates a loyal populace and helps the society run efficiently.

To reach a broad cross section of people in the system, the courts involve the public in several ways. If members of a collective farm are disgruntled with the quality of a factory product delivered to them, they can initiate a court case with a petition and thus participate in a civil proceeding. Other social organizations—trade unions, religious bodies, and various arms of the Communist Party—have the same prerogative. The educative role of the court is thus expanded.

For the mass of Russian people, the people's courts *are* the law, since almost all civil and criminal cases are first heard there. Even there, at the bottom of the Soviet judicial hierarchy, the Communist Party has its say. The judges are slated by the Communist Party and elected for five years. As representatives of the official Communist line, they reiterate the social and moral consequences of criminal acts.

Joining with the judge, two lay assessors form a mini-jury of three. These citizens serve only part of each year and have minimal legal training. Lay assessors have equal weight to the judge in deciding cases, though they often go along with the professional opinion. (The Soviet method of trying cases is similar to that on the Continent, and Charles White tells more about that method in his article in this issue.)

The power of appointment of all key personnel—prosecutors and defense counselors, as well as judges—is held by the Central Committee Secretariat. As American political scientist Robert Sharlet notes: "The result is that all those who investigate, prosecute, preside, defend and even study the administration of justice in the USSR, first must pass through a system of political filters. . . ."

The long reach of the Soviet legal network seemingly explores every crevice, every crack in society, to preserve and protect the socialist revolution. In a system where each individual is expected to pull for the common good, all crimes, even the most petty, are potentially dangerous to the state. The state is still all-powerful, and the law is one of its main weapons.

Apparently here to stay, the law has been transformed by its administrators over the decades. Under Joseph Stalin, the whole judicial system became a perverted forum to eliminate any people deemed undesirable by the vicious and erratic government. Such severity softened a bit under Khrushchev, though neo-Stalinist advocates and Khrushchev's own easily triggered obstreperousness gained prominence in the early 1960s. Even today, pressed by serious long-term problems, the Soviets often respond with harsh police tactics.

The People's Courts

Since the Soviet state is not going to wither away, who slaps Ivan's hand? The courts do. The Soviet justice system works quite consistently for certain offenders, including those who are frequently victimized by American justice. Who are these people? Well, take a poor, illiterate galoshes thief. No constitutional principles are at stake with the "little guy" on trial. But in Russia, that person's entire history is reviewed in court by a judge and two citizen-jurists to establish his underlying needs and problems.

Understanding a defendant's motivation is one way to arrive at a more precise justice. Verdicts are not churned out on assembly lines, but rather are delivered individually after a cautious process. For a man who steals boots, the court would ask: Was the crime committed under coercion? Did the man or his children need clothing which they could not afford? Was his apartment heated enough to keep his family warm? Had he been acting funny and had any of his neighbors noticed? Had there been any past misconduct?

Another outreach available to the court is the use of witnesses: Experts may be called on behalf of a defendant whether or not s/he requests it. Say a driver hits a pedestrian on an icy bridge in a snow storm. The court can bring in traffic officials to answer questions about road conditions and posted warning signs if the judge and assessors deem it useful for the trial.

To reach even further, courts often hold their sessions on circuit—in factories, apartment houses, schools. To show the system in action, courts may stage demonstration trials in collective farms or other enterprises where crimes have occurred. Sessions are held at times that are convenient for workers to attend.

So, as lay assessors, litigants, witnesses, and observers, ordinary citizens are involved in Soviet courts, and by their participation learn more about the legal system and its methods.

The people's court, as a social nexus, has a wide range of penalties available to use as "teaching sentences." If the court discovers improper conditions in a factory during the trial of one of its workers, for example, the judge can issue correctives to the factory, or the individual foreman, to prevent other situations which may lead to crime. As in most systems, punishments range in severity. Public censure, confiscation of all or part of a criminal's property, a money fine, and deprivation of the right to take certain jobs are imposed on those convicted of relatively minor offenses. Banishment, deportation, imprisonment, and death are penalties reserved for serious crimes. There is a large leeway between minimum and maximum sentences, so that the punishment can be individualized for maximum effect.

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Is this a good system? Does it achieve justice in routine cases? As in most countries, 80 percent of Soviet trials involve family conflicts, housing and labor problems. Many of these trials occur without prosecution and defense lawyers, and few of the cases are appealed. In these litigations, the Party's role is supervisory: Making sure the courts are doing their jobs. Wide participation in the judicial system by offshoots of the Communist Party—collectives, volunteer auxiliary police groups, and the Young Communist League, for example—provides informal checks on the courts. The court may well be more responsive to the everyday concerns of citizens because of the active involvement of these groups.

Does It Work?

This dilution of the court's professionalism has a flip side, however, because the Communist Party's supervision can turn into continual interference. For example, the demonstration trials conducted by circuit courts seldom end in acquittals. Though these trials are intended as public sessions to teach the legal process, more often they show off the judges' powers to convict and discipline individuals, thereby warning others. In fact, judges dodge criticism from above, currying favor with the Party, by consistently convicting defendants and handing out harsh sentences. Party members on trial may receive gentler treatment, as politics encroach on the legal process.

The extent of Party interference versus Party supervision is not clear. An ongoing debate between Alexander Solzhenitsyn and George Feifer points to this uncertainty. (See the May 1980 issue of *Harper's*, as well as volume three of Solzhenitsyn's *The Gulag Archipelago* [1978] and Feifer's *Justice in Moscow*.) Solzhenitsyn says judges are able to try cases on their own merits only 15% of the time, since most trials hold some interest for the state, or personally concern an office-holder. According to him, the Party overwhelms judicial process. Feifer contends that the Party only indirectly oversees justice personnel. Robert Sharlet suggests reality is somewhere in between Feifer's and Solzhenitsyn's opinions.

A Russian legal expert, writing in 1977, noted that Party meddling in the justice process not only violates Party discipline but socialist legality, too. In practice, however, meddling seems common.

In the cases we've looked at so far, Party involvement hasn't had broad social implications. What happens in a Soviet court when the offense is ideological, when the accused has *consciously* challenged the validity of the law or the standard morality? Here, the court usually makes an example of the accused, hoping others will take note. When socialism confronts legality, when politics is threatened by law, as in the case of ideological "crimes," legality takes the back seat.

If It Were You...?

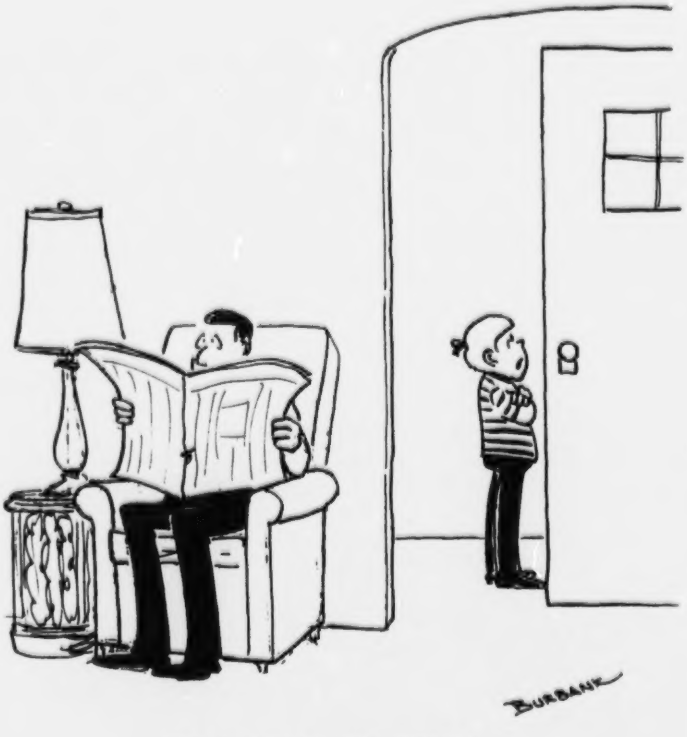
You don't have a permanent job because your father is an invalid. So, you work temporary jobs and write plays, which you consider your real work. You also collect modern art: some works by Russian painters and books on Western artists from Matisse to Rauschenberg. Sometimes foreigners visit your communal apartment to see the works of Russian artists that cannot be displayed in the USSR. For several years your three neighbors, crowded with you into a one-family apartment, watch you closely, note your comings and goings, your visitors, your calls made from the hall phone.

Next, agents from the Criminal Investigation Department drop by when you "happen" to be talking to an American correspondent from *Newsweek*. They later search your apartment and confiscate a number of your precious drawings and paintings. You are jailed. You are not sure whether you have been charged with parasitism for being irregularly employed, or another act. Finally, you learn the accusation is pornography: The confiscated drawings done by a friend to illustrate the manuscripts of your plays, and your unpublished writing, have been labelled pornographic.

This is what happened to Andrei Amalrik in 1965. He had a weak heart and suffered from the cold, unheated cells during his detainment while the investigation proceeded. He knew his situation was hopeless, even though he was allowed to see his file, with the statements made against him by his neighbors, and was allowed to prepare his defense with advice from a counselor. In fact, however, the case was already decided against him; the question was really how long he would have to serve. Though the pornography charged was dropped, he was still sentenced—to two and a half years of forced labor in a Siberian village—for parasitism.

As if the file weren't already loaded enough, most counselors in political trials are careful not to defend their clients too

(Continued on page 50)



"Do you have a search warrant?"

Teaching Global Law

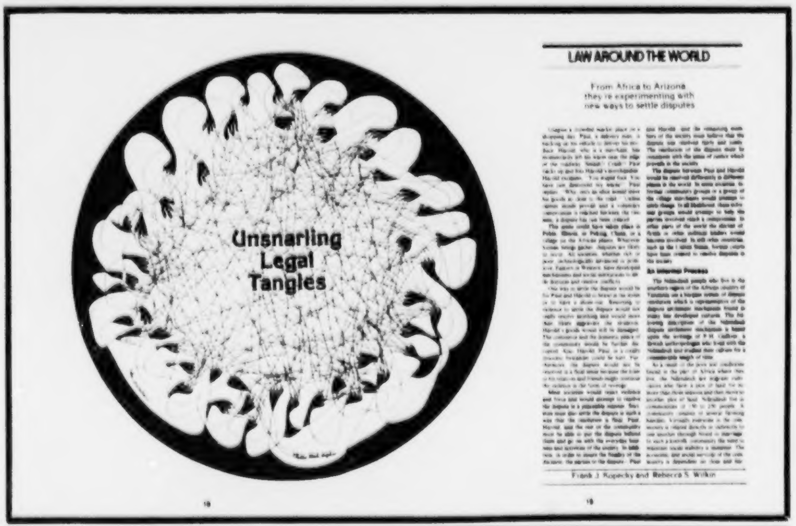
Using these articles to bring the world to your secondary class

Consider the following two legal scenarios. The first scene opens with a series of formalities. Litigants render testimony; the amount of money the plaintiff agrees to pay the defendant is set. Next, witnesses are called and oaths are taken. The rest of the case proceeds in an orderly fashion. The issue at hand is adultery.

The second case is somewhat similar in formal trappings. The issue at hand, however, is curious, and many feel that it indeed cannot be settled in a court of law. At issue is the power of a force. This force, while rather pervasive throughout the land, seems to have an undue impact on young people. Indeed, many go so far as to directly attribute physical actions to the influence of this force. The hearing proceeds in an orderly fashion, but there are occasional outbursts and numerous debates across the land, as people take sides on the issue of the force.

Which of these two cases happened in the U.S., and which in a "primitive" culture? Contrary to ingrained Western perceptions, the second scenario, not the first, describes an actual U.S. case. The first scenario, about the adultery case, is based on the ubiquitous (if unofficial) urban court system in Freetown, Sierra Leone. The second scenario describes the trial of 15-year-old Ronnie Zamora for murder in Miami, Florida. Since he had raised the defense that he was "intoxicated" by watching TV at the time of the crime, debate at the trial was over the force of the unwritten word—television.

While the description given here of the Zamora case is a bit skewed, it is one legitimate way of looking at his trial. It merely presents a different facet of the intellectual/legal prism than we are accustomed to. Similarly, the rendering of the Sierra Leone case, while also perhaps skewed,

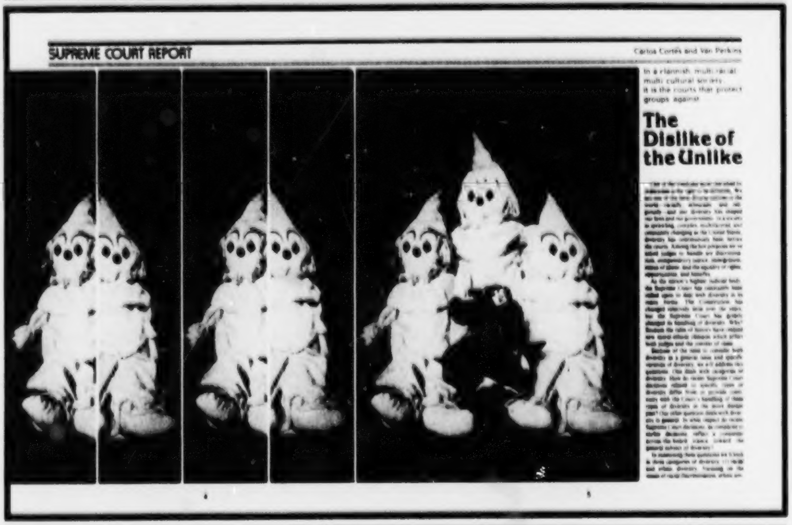


LAW AROUND THE WORLD

Unsnarling Legal Tangles

From Africa to Arizona they're experimenting with new ways to settle disputes

Frank J. Kopecky and Rebecca S. Wilkin



SUPREME COURT REPORT

Carlos Cortés and Van Perkins

In a clannish, multi-racial, multi-cultural society, it is the courts that protect groups against

The Dislike of the Unlike

A real life equivalent of Taliano's case involved the feared and fearless warrior statesman Shaka Zulu

LAW AROUND THE WORLD

Charles White

There Is an Alternative to the Adversary System

A European system may meet America's needs

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LAW AROUND THE WORLD

South Africa: The Last Plantation

LAW AROUND THE WORLD

Russia's Schizophrenic Courts

LAW AROUND THE WORLD

Folklaw

nevertheless is a legitimate way of looking at the unofficial legal system of that culture.

Unfortunately, most of us are not adequately equipped to explore sensitive cultural issues in the classroom—let alone introduce law in other lands. Teacher education does not put a high premium on learning about other cultures. Despite protestations from advocates of global studies, international education, and multi-cultural education, teacher preparation does not include that wider perspective so crucial to functioning in today's world.

If teachers don't know a subject, students can't learn it. A 10-nation 1971 study showed that U.S. students, in the main, have a strong national identification, spend considerable time in school on patriotic practices, and are quite knowledgeable on domestic issues. But they are much less knowledgeable and therefore less interested in international issues.

This ethnocentrism is especially apparent when we look for precollegiate materials on legal systems in other nations, or more comparative, cross-cultural approaches. There is simply not much available—yet. Exciting materials and approaches are currently being developed by various projects across the country, at the Constitutional Rights Foundation and the International Law-Related Education Center, Portland State University, to name only a few. In practice, however, precollegiate law-related education still remains a monolegal approach, narrowly focusing on U.S. law and its applications.

This monolegal diet has the same attitudinal repercussions as our monolingual culture. Just as many of our English-speaking children grow up wishing that others would "talk *normal*, the way we do," so too, many students decry the "non-normal" state of other nations' legal systems and look forward to the day when others will advance and adhere to the "normal"—as defined by us. The standards for evaluation are often set by an early age. What we do is normal, everything else is quaint and aberrant, if not exotic and bizarre.

Bemoaning this state of affairs will serve no useful purpose unless coupled with a vigorous campaign to introduce the legal systems of other nations. Fortunately, there are a growing number of sources that can be marshalled. In the following sections, I suggest a variety of approaches and resources that correlate with the articles in this issue. I've recommended materials on the basis of cost and availability. Many of them are either free or, in the case of films, free-loan. They provide a way of building on the contents of this issue at little (if any) cost to the schools. (See box for ordering address, and other pertinent information.)

South Africa

A look at the South African legal system provides a unique opportunity to examine the double-edged sword contained in every law. In this case, intent is equally as important as content. Unfortunately, much of the material on South Africa available from their Information Service does not address both these issues. Teachers interested in exploring the issue of South African law would do well to consult the materials on apartheid prepared by U.N. Education Information Programs. Especially useful is their leaflet, *United Nations Activities Against Apartheid*. Included in this presentation are a legal time-line, historical explanation, and useful teaching ideas.

A number of audio-visual materials, though without particular focus on law in South Africa, are nonetheless useful for discussion of law-related issues. A two-part color filmstrip, accompanied by cassettes and a teacher's guide, is available from the Social Studies School Service: *White Roots in Black Africa* was produced in 1978 and may be ordered for the 1980 price of $55.00. (Order number CA4604C/Address: 10,000 Culver Blvd., Dept. YO, PO Box 802, Culver City, Calif. 90230.) The program examines the situation of whites in Africa, with a focus on South Africa.

Seeing Southern Africa is also available from the Social Studies School Service. These four filmstrips with cassettes or records and a teacher's guide, give a basic introduction to the geography and peoples of southern Africa, and trace the development of the separatist apartheid policy. Produced for junior high students, this set costs $69.00 and the order number is COR190R (for records) or COR190C (for cassettes).

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Another filmstrip, *Africa: An End To White Rule?* treats the racial tensions in southern Africa. An activity-oriented spirit master presents review materials, and the strip is accompanied by a teacher's guide and a record or cassette. It is available from Social Studies School Service for $22.00; the order number is NYT112R (with record) or NYT112C (with cassette).

The study of South Africa offers numerous opportunities for moral dilemmas and role-playing situations. One scenario might involve the fate of student exchanges (e.g., AFS) in light of the fact that only white South African students are sent. The purchase of a South African gold coin is another opportunity for questioning the impact of one's actions. To what extent does the purchase of South African gold contribute to maintenance of cheap labor under the apartheid system?

Divestiture is an equally controversial subject. To what extent are citizens responsible for monitoring the investment practices of their banks, colleges and churches? Conversely, U.S. business can be viewed as a positive, motivating force, especially in light of the Sullivan Principles.

A useful simulation game is *Apartness*. The simulation assigns students to groups accorded unequal status. Debriefing leads to an investigation of the apartheid system.

The Soviet Union

Perhaps the key concept in Sharon Irish's article on the Soviet legal system is the force of social control and change carried by the legal system. "Law is not intended just to punish wrong-doers. The broad aim is the education of every person to effectively serve the society all Russians share. To accomplish this, the court scrutinizes each case not only to respond immediately to the accused, but to find related circumstances which may require altering." Class discussion might focus on the extent to which U.S. law performs the same function. To what extent do precedents, the so-called landmark cases, perform this social change function in our country?

The 20-part video-tape series *Soviet Society* offers a number of useful episodes: *The Political System*, Parts I, II, III; *Intellectuals and Intellectual Dissent*, Parts I and II (30 min. each). Herbert J. Ellison of the Institute for Comparative and Foreign Area Studies, University of Washington, developed the series. He skillfully utilizes quotes from Soviet journals and cartoons from the Soviet humor magazine *Krokadil* to illustrate his points. The video-cassettes are available on a free-loan basis from the University of Illinois, Russian and East European Center. In addition, they circulate *The Soviet Citizen and His Community: U.S.S.R.*, Part 6, (17 min.). This film offers a fascinating inside look at the workings of Soviet institutions for socialization and justice.

The Soviet Embassy also has a large number of short educational films available on a free loan basis. The quality of these films, however, does vary, both in terms of content and physical condition. Preview is therefore strongly suggested.

More audio-visual materials are available from the Social Studies School Service (10,000 Culver Blvd., Dept. YO, PO Box 802, Culver City, Calif., 90230). *Russia and Communism* is an historical and interpretative sound filmstrip set; the second and third sections deal with Russia since 1917 and the government and the economy. (For all four filmstrips, the cost is $60.00; for cassettes, the order number is FH10C and for records, FH10R.) A second selection is entitled *The Soviet Union: Half a Century*. This two-part set traces major events in Soviet history since 1917 and concludes with a discussion of dissent in the USSR today. A teacher's guide with suggested activities and 12 spirit duplicating masters accompanies the set. (The cost is $55.00; the order numbers, EAV038R [records] and EAV038C [cassettes].)

Diversity in the U.S.

Diversity is part and parcel of our contemporary multi-cultural society. As the Perkins and Cortes article indicates, Supreme Court action in this area will only increase in the future. There are numerous classroom activities on sex and race differences. The areas of ethnic sovereignty, linguistic difference, and religious diversity, however, present challenges.

One helpful paperback prepared by the social science staff of the Educational Research Council of America is *Prejudice and Discrimination* (1973). Geared to the reading level of junior high students, the book would be valuable for high school people as well. It is crammed with pictures, has a glossary of terms and discusses topics ranging from immigration and the diversity in the United States—Asian Americans, black Americans, Native Americans and Spanish-speaking Americans—to the Holocaust and anti-Semitism in the United States. Another paperback, for the elementary level, is Irene Fandel Gersten and Betsy Bliss' *Prejudice* (New York: Franklin Watts, 1974). This little book is full of anecdotes and has one section on prejudice and the law.

Charley Squash Goes To Town is a short (5 min.) 16mm film produced by the National Film Board of Canada. Based on a comic strip character, this film tells of a Native American man who leaves the reservation for the city and his experiences there. (The National Film Board of Canada's Edmonton office is located at 10031-103 Ave., Edmonton, Alberta, T5J OG9.)

Materials on religious diversity are particularly sparse. The *Wisconsin v. Yoder* case can be highlighted through a study of the Amish, an often misunderstood group. Ann Ackerman, a high school sociology teacher, has developed a unit on the Old Order Amish under the aegis of the Indiana Religion Studies Project. The 15-day unit is designed to explore five basic institutions: family, education, religion, politics, and economics. The teaching techniques include group discussion, brainstorming, analysis of charted information, and surveys.

Dispute Settlement

Both the article by Charles White on the continental system of justice and the article by Frank Kopecky and Rebecca Wilkin on dispute settlement around the world deal with new ways of untangling legal problems. A look at alternative methods of dispute settlement offers an opportunity for thinking globally but acting or relating locally. Students might be encouraged to examine alternative methods of dispute used in different settings such as the classroom, cafeteria, gymnasium, and art studio. Further, the evolution of the overall school rules might be examined as students investigate when student hearings were first instituted or when a campus ombudsman was first used.

Many of the articles included in this issue provide intriguing background for a "What if . . ." exercise. What if the continental system were tried in our country? What are the pros and cons of having a judge or judges control and shape the procedure? Is this a system we might want to try in this country? What about in schools?

The World Crosses Your Door Step

South Africa

UN Activities Against Apartheid is available free of charge from Education Information Programs, Dept. of Public Information, UN, New York, N.Y. 10017. The simulation game, *Apartness*, can be found in Howard Mehlinger, *et al.*, *Global Studies for American Schools*, National Education Association, Washington, D.C., 1979, $5.00.

The Soviet Union

Contact Elizabeth Talbot, Russian and East European Center, University of Illinois, 1208 W. California, Urbana, Ill. 61801, for Herbert Ellison's *Soviet Society*, available on a free-loan basis.

For materials from the Soviet Embassy you can write to the Film Library of the U.S.S.R. Embassy, 1125 16th St., N.W., Washington, D.C. 20036 or the Permanent Mission of the U.S.S.R. to the United Nations, 136 E. 67th St., New York, N.Y. 10021.

Diversity in the U.S.

Ann Ackerman can be reached at the Indiana Religion Studies Project, Indiana University, Sycamore Hall, Room 230, Bloomington, Ind. 47405, for free copies of *The Plain People: A Unit on the Amish*.

Dispute Settlement

Write to the African Studies Program, University of Illinois, 1208 W. California, Urbana, Ill. 61801 for a free-loan of *The Cows of Dolo Kem Paye*.

Folklaw and Folklore

Culture's Storehouse: Building Humanities Through Folklore (Intercom #90/91) by Janet Barnet is available from Global Perspectives in Education, Inc., 218 E. 18th St., New York, N.Y. 10003, for $5.00.

The U.S. adversarial system might be faulted on a number of counts. As Kopecky and Wilkin state, "Elaborate rules of evidence have been created to keep certain types of information from reaching the judge . . . witnesses are not allowed to freely state what they know about a case . . . the outcome of the case may be dependent upon the ability and competency of the attorney presenting the case." Students might want to discuss what types of cases or types of defendants either benefit or suffer under such a system.

The issue of prospective vs. retrospective styles of dispute settlement is equally engaging. Increasingly, many in this country are deciding that the adversary system highlighted in our retrospective style of law leads to the creation of an unpleasant set of future circumstances. If one side must win and the other side lose, bad feelings will only get worse. This is especially true of disputes involving neighbors and friends. Might not the prospective, bargain model be more meaningful in such situations?

An alternative mechanism of dispute settlement is explored in James Gibbs' film, *The Cows of Dolo Kem Paye*. The Liberian Kpelle community of Fokwele is examined as it resolves an incident of rice destruction by cows belonging to a chief, Dolo Kem Paye. Kpelle resolves disputes by formal and informal means. The informal settlement of disputes involves a group of kinsmen and neighbors listening to complaints and affecting a social reconciliation between the disputing parties. The formal settlement of disputes involves a court hearing by a chief, who is assisted by a clerk who records the case, interprets Liberian law, and has other related duties.

A dispute is taken to the chief or his clerk, who hears the statement of the grievance and decides whether a trial is warranted. A trial consists of the chief and his council hearing evidence from the plaintiff and defendant, summoning and examining witnesses, and reaching a decision. In examining the parties in a dispute, any person present may ask a question. Witnesses may be asked to swear an oath that they are telling the truth. This often involves swallowing a ritually potent medicine which will kill the person if He or she is not telling the truth.

The Kpelle formal method of resolving disputes combines Liberian national and Kpelle "traditional" procedures. The courts of the paramount and district chiefs are formally recognized by the Liberian government. Although they lack official recognition, the courts of town chiefs are similar to these courts and are utilized by the Kpelle. *The Cows of Dolo Kem Paye*, along with a teacher's guide, is available on a free-loan basis from the African Studies Center, University of Illinois.

Folklaw and Folklore

Despite the apparent sophistication of our culture, "traditional" trappings such as proverbs and folklore are still very much a part of our existence. Indeed, academics have identified a new genre, aptly called urban folklore.

What is urban folklore? It's those tales that spread quickly through an office or group of friends. They're always supposed to be true, to have happened to a friend of a friend, or someone's cousin or brother-in-law. One is about a man who was able to buy a nearly new Porsche from a woman for $50. After the deal is consummated, he asks her why she was willing to sell a nearly perfect car for such a ridiculous price. "Because," she says, "my husband ran off with another woman and asked me to sell his car and send him the money."

Other tales involve ghostly hands scratching at windows, or people on lovers' lane terrorized by a maniac. The only problem with these rumors is that they're not true. When you try to track down the source, it turns out that it didn't happen to someone's cousin, but that he heard about it from someone, who turns out to have heard about it. . . .

Why do these rumors spread so fast, and why are they believed? For the same reasons that folktales exist. They serve to satiate our curiosity about the unknown and the exciting. They also provide explanations for these phenomena. Often these bizarre tales involve a moral dilemma. Increasingly, we are realizing that rational ordering cannot always adequately meet the complex challenges of modern day existence.

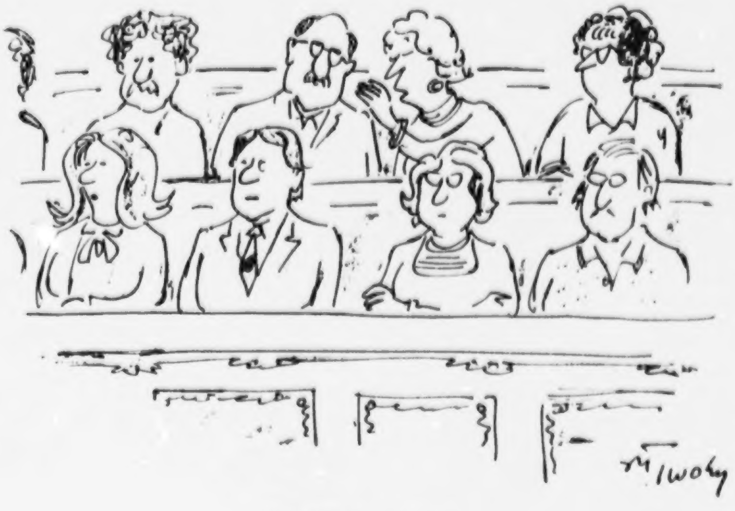
Asking students to come up with urban folktales current in their circle will help convince them that such tales are not solely the province of "primitive" people. And many of the tales might have moral/legal overtones, as do many of the traditional folktales found in other cultures.

Often folk beliefs come into question when a society is experiencing a period of accelerated growth. This issue might be explored by devising a scenario based upon a number of actual witchcraft cases recorded in various African countries, Brazil, and the Caribbean. In many cases a witch, assured to have the power of life and death, is killed. The accused claims self-defense, since there seems to be ample evidence that this person did indeed have other-worldly powers. Therefore, the murder was preventative. Students might wish to stage a mock "traditional" court as well as an American-style mock court hearing on this kind of case. Further, an analogy can be made to our insanity pleas. To what extent is the defense of insanity similar to falling under the spell of witchcraft?

A number of excellent materials are available on folklore. *Culture's Storehouse: Building Humanities Skills Through Folklore* presents a multidisciplinary sampling of folklore for middle grades. Students encounter common human themes such as ambition, trust, deceit, and harmony within nature in a variety of different cultural settings.

Conclusion

The above listings, while by no means exhaustive, do highlight some of the more accessible resources available. Teachers seeking additional assistance might address personal inquiries directly to the appropriate organization listed in the box.



"Guilty. Pass it on."

One might wish that the media could supplement these sources and make a contribution towards cross-cultural understanding. The media do at times attempt to fill this void, but often the presentations serve to exacerbate the problem of understanding.

In past years the media have featured stories of legal sanctions which seemed geared solely to a new reinforcement of the phrase "cruel and unusual." We have been treated to accounts of thieves in other cultures having their hands cut off, and recently the entire country took sides on the issue of whether or not they had the right to see a Saudi Arabian princess executed by a firing squad (*Death of a Princess*).

Commercial films often only confound the montage of cross-cultural law images. The film, *Midnight Express*, for instance, depicts the harsh Turkish prison treatment accorded a drug violator. He would probably have received a minor fine in this country. While the content of these presentations cannot be faulted technically, the context, or lack thereof, can. Bereft of any serious exploration of the culture, these presentations serve to highlight the offbeat and reinforce an already narrowly defined view of legal systems.

Whatever the source of lessons, sensitivity and sensibility would dictate that comparisons with the U.S. be avoided. In "we-they" situations, "they" always come out at a disadvantage. Where possible, broad cultural comparisons should be utilized. As human beings, most of us tend to have a built-in proclivity for polarization. If at all possible, we should downplay our attention to difference.

A useful strategy might be to ask students to identify common philosophical strands underlying the various systems examined. The philosophy behind law, ethics, and sanctions in all cultures springs from a series of common values. An exploration of these is preferable to highlighting differences.

Our ignorance of other cultures and especially divergent thought and value systems has made us in many ways a psychologically vulnerable people. Perhaps through our efforts our children will be better able to order their world than we have been. ☐

LAW IN THE 80'S

Walter M. Perkins

Minority Agenda for the 80's: Part II

The future of women and children

Foreign affairs have recently dominated the media and, in fact, our everyday lives. Events in Iran, Afghanistan, Cuba and other parts of the globe have been a jolting reminder of how truly interdependent the world has become. Domestic affairs, while not currently receiving much visibility, despite the presidential campaign, should remain an important priority as we enter the eighties. The reality and tragedy of the recent Vietnam War and its aftermath should have taught us, if nothing else, the necessity of maintaining a balance between the quality of our foreign and domestic programs.

The winter issue of *Update* examined the programmatic priorities of several organizations working with minorities. In this, the last of a two-part article, we talked with a number of groups whose constituencies are women, children, and families about their priorities for the eighties. For whatever reason, the emotional fervor of the sixties has been replaced by groups that are concerned with a wide range of issues.

Women's Rights

With our rapid advance toward a totally computerized society it is hard to realize that women were granted voting rights a mere 60 years ago in 1920.

That year marked the passage of the Nineteenth Amendment which said, "The right of the citizens of the United

States to vote shall not be denied or abridged by the United States or by any state on account of sex." The slowness—yet willingness— of the law to change is perhaps best understood when it is realized that feminist groups and other sympathizers labored for the Nineteenth Amendment for approximately 50 years.

Feminist groups argued then and now that the Nineteenth Amendment did not bestow any constitutional rights on women besides the right to vote. They have also argued that the Equal Protection and Due Process Clauses of the Fourteenth Amendment were not intended to apply to women. While the Supreme Court has granted women some minor concessions in the name of the Fourteenth Amendment, women have learned not to consistently rely on the Court for a favorable interpretation regarding their status. Hence the necessity for the Equal Rights Amendment (ERA) in the eyes of many.

The Equal Rights Amendment was first introduced into Congress in 1923. From the beginning ERA has been a controversial topic, even among women within the feminist movement itself. Its opponents worry that its passage will result in laws favorable to women being taken off the books. Its supporters argue that the amendment is a necessary follow-up to the Nineteenth Amendment and will result in women being given their full citizenship rights. Congress finally approved passage of the ERA in 1972. In order for it to become a reality three-fourths of the state legislatures must adopt it. To date 35 of the necessary 38 have done so.

Passage of the Equal Rights Amendment is a prime priority for all of the women's groups interviewed in this article. All have been working in one way or another to ensure its eventual passage, although recent events have not given them cause to be very optimistic.

ERA and Other Issues

The ERA is the number one priority of the National Organization of Women (NOW). NOW, one of the newer feminist groups, founded in 1966, has identified Illinois as one of the pivotal non-ERA states and has waged a monumental effort for its ratification there. Mary Jane Collins, president and executive director of the Chicago chapter of NOW, reports that one of NOW's strategies in Illinois has been to mobilize forces like labor who favor ERA to exert a greater effort to get it passed.

Collins says, "Illinois is a key state and that's why we are so interested in it. It has a better chance than Mississippi or Alabama for instance. Secondly, Missouri is right next to us and it's a labor state also. Florida is another possibility where a similar coalition could be put together and although it's a southern state, it does have some of the progressive elements that some of the others lack. In Nevada and Utah, where there are conservative religious groups, it is a much more difficult situation.

The black women's movement has been similar to the white feminist movement in that it originated out of common concerns faced by both groups. As time went on, however, it became clear that the particular needs of black women necessitated them forming their own organizations. Nevertheless, since many of the major problems facing black and white women are the same, these groups have formed various types of coalitions and networks to address common issues when necessary.

Maryellen Thomas of the Chicago League of Black Women indicates that "we are an organization concerned mostly with educating and informing. We are making our constituencies aware of the positive aspects of ERA as well as some of the possible repercussions should it be passed."

Ms. Thomas says that besides the ERA her organization is also concerned about (1) employment discrimination, (2) housing discrimination, (3) street safety programs for women, (4) wife abuse and (5) racism and sexism in general.

She feels that the issue of sexual harassment in the marketplace is one that affects all women, but is of particular relevance to black women given their historical status vis-a-vis the legal and social system. She says, "Sexual harassment on the job is a major problem facing women as they enter the job market in increasing numbers. Some of the harassment is, of course, intended as playful, but in a competitive atmosphere where a woman's bread and butter is on the line, it is simply not funny. When personal comments are continually made about your body, it is offensive and I think women in general, and black women in particular, are tired of being on the defensive."

Priorities for the Eighties

The women's movement had its beginning in the late 1850s. Besides voting, equal employment rights have remained a constant goal from the beginning.

The National League of Women Voters is one of the older, better known women's organizations, having been founded in 1920. According to Pauline Pantsios, president of the Chicago League of Women Voters, a branch of the National League of Women Voters, legislative priorities include laws affecting the environment, international relations, trade, energy conservation and equal access without regard to sex or race in the areas of education, jobs, housing and medical care.

Mary Jane Collins of Chicago NOW says that the priority issues of her group for the eighties include those affecting ratification of the ERA, economics and jobs, education, violence against women, and health issues affecting women, like abortion and the National Health Insurance Plan.

Amplifying on the economics issues Ms. Collins said that "Economics is going to be a big issue for women in the eighties. We now have a dramatic surge in the number of women in the work force. A lot of jobs have been created in traditional women's fields, but the breakthroughs in the nontraditional fields are still minuscule, and women, as a result of that, are still earning $.59 for every dollar that men earn."

While NOW's national organization decided not to endorse any presidential candidate, the Illinois chapter endorsed candidates in the presidential primaries for the first time in history, coming out for Senator Edward Kennedy and Representative John Anderson.

The Draft . . . A Reality for Women?

The military draft, some recall, has been a women's issue as far back as World War II when the United States considered drafting women to fill certain noncombat support positions. At some point women may face the prospect of registration. Ms. Thomas of the Chicago League of Black Women feels that "Registration and the draft are current crucial issues facing women. While we are for the ERA we must determine whether we can accept some of the consequences that go along with its passage."

Walter M. Perkins has a law degree from DePaul University and a journalism degree from Bradley University. He is presently an Assistant Staff Director of the ABA's Special Committee on Youth Education for Citizenship.

Pauline Pantsios of the Chicago League of Women Voters says that "We're told that right now even though we don't have equal rights we do have equal responsibilities and that perhaps women will be eventually asked to register for the draft. Perhaps they will later be drafted with or without an Equal Rights Amendment. Presently our organization has not taken a position on the draft for men or women."

Concerning the possibility of women registering and being drafted, Ms. Collins of NOW indicates that it has a two-fold position on that issue. "We are basically opposed to a peace-time draft and believe that the current call for the draft is a political tactic that doesn't have much to do with the reality of Afghanistan or Iran." NOW does favor registration in case of a national emergency.

Ms. Collins indicates that NOW frowns on a draft at this time for another reason. "Everything you read about the military says that it is clear that they don't like the composition of the Army right now; it's not white enough and they are worried about that. We also think that the Pentagon, despite an increase in the military budget, is still in a financial crunch. The draft is one way for them to still spend the money they want for hardware and significantly cut the personnel budget."

Children Have Problems Too

If women ever succeed in fully writing themselves into the Constitution, the next constituency that Congress may well have to deal with is children. Today, of course, there are an awesome number of public and private organizations that address children's rights and other social welfare issues. This was not always true, however.

In fact, in the late nineteenth century there was such a dearth of organizations serving the needs of children that a child brutality case in 1874 was actually investigated and resolved by the Society for the Prevention of Cruelty to Animals!

The turn of the century brought about the realization that, perhaps, children were at least as important as animals. Organizations like the Children's Bureau, established in 1912, led the fight against children being exploited in the labor market. Other organizations like the Society for the Prevention of Cruelty to Children battled the twin issues of child abuse and neglect.

Although in theory committed to do whatever is in "the best interests of the child," much of the early legislation and court cases were directed toward preserving the sanctity of the family, at any cost. As courts and legislators have painfully discovered, what is best for the family may not always be in the best interests of the child.

The juvenile court is perhaps one of the most graphic examples where intended benevolence toward children has failed. By limiting the enforceable legal rights of children, courts in effect placed them at the subjective mercy of whatever jurist they happened to appear before. This, of course, eventually led to cases like *In re Gault* and its progeny, which inculcated some measure of objectivity into juvenile court proceedings. *Gault* (387 U.S. 1 [1967]) was the case that gave juveniles: (1) right to notice of charges, (2) right to counsel, (3) right to confrontation and cross-examination, and (4) privilege against self-incrimination.

Today children have tough organizations speaking up for them. A century ago, they had to appeal to anti-cruelty and animal-protection groups.

The last few years have seen the emergence of many organizations concerned with the welfare of children and families. Some of these organizations have had a national impact and are well known for their work. Others, while laboring in relative obscurity, have nevertheless been effective in helping to better the lot of children and families.

The Children's Legal Rights and Information Program (CLR), headed by Roberta Gottesman, a lawyer and educator, was started five years ago. Children's Legal Rights, located in Washington, D.C., is a unique program offering training and technical assistance to nonlegal professionals working with children in various capacities.

Ms. Gottesman describes the basic components of her program by saying, "We focus on providing different types of training seminars for people who work with children. For example, we teach social workers about the law and all of its implications regarding abuse, neglect, investigations and judicial court proceedings and related types of things. We also do the same thing with mental health people, juvenile justice workers and foster care personnel."

The CLR program also provides technical assistance for different jurisdictions by evaluating their juvenile codes and adoption laws and advising them of new laws that have been passed around the country. In addition, they advise these jurisdictions of the types of challenges that have been made to certain laws and what response should be made to certain legislative changes.

Ms. Gottesman feels that some of the major issues facing children as we enter the eighties are problems involving foster care and termination of parental rights. She indicates that there will be greater emphasis put on specialization of agencies working with children, funding of alternative community programs and deinstitutionalization.

Deinstitutionalization refers to the current trend of emphasizing alternatives to incarceration for juveniles. Concerning deinstitutionalization, which is already a priority of the Office of Juvenile Justice and Delinquency Prevention, Gottesman states, "The community can't have it both ways. They want deinstitutionalization but they don't want it in their neighborhood. They will find that judges will become more cognizant of the right to treatment issues. That is, if you take children's liberty away, you have to give them appropriate treatment. On that basis, judges will begin closing institutions where it is evident that treatment is not forthcoming."

Foster care has been a major national problem for many years. The CLR director says that there are major efforts going on to try to eliminate foster care homes as "dumping grounds" for children. She says, "There has been tremendous emphasis on trying to rehabilitate the family in child abuse/neglect situations where they have taken a child away from the parents and placed him in a foster care home. Many current efforts are directed toward eventually getting the family back together."

This brings up a related topic, the termination of parental rights. Traditionally courts have been very loathe to terminate parental rights since children have been considered the sacred chattel of their parents. According to Ms. Gottesman, in the future there will be a thrust toward allowing parents to get their acts together and put the burden on them to show that within a certain period of time they can actually fulfill their parental role.

CDF Wages Legislative Battle

The Children's Defense Fund (CDF) is located in Washington, D.C. It is one of the better known children's advocacy organizations. Headed by Marian Wright Edelman, CDF was originally established as the Washington Research Project in 1968 to help poor people and minorities gain full benefit from legislation passed on their behalf. After five years of taking a generalized approach to various social problems, CDF decided in 1973 to focus all of its activities on behalf of children.

Ellen Hoffman, CDF legal director, indicates that the Fund's activities fall into five general areas: (1) education, (2) health care, (3) child care and development, (4) child welfare, and (5) juvenile justice. To address these problems CDF's staff engages in extensive research and monitoring of federal agencies, public education, and testimony to legislative bodies, as well as drafting legislation and engaging in litigation.

Ms. Hoffman says, "We talk in the area of child health about primary care—getting kids to a doctor, seeing that they have ample preventive care. In the educational area, we are concerned about getting kids into schools, and making sure that they have what they need to get through successfully. In child welfare we work to get kids out of the foster system and into a permanent family either through adoption or returning to their own home, which is possible in many cases. In all of the areas that we work in, we're talking about fairly fundamental things that deal with poverty-level children. We try to change the national policies to meet those fundamental needs."

Most issues that affect children have a correlative effect on the family. Using the issue of welfare as an example, Ms. Hoffman states, "We have tried to show that welfare is a children's issue. Most people perceive of it as an issue involving young, healthy men who are lazy and trying to avoid working. The fact is that the majority of welfare recipients are children and they are the ones affected when policy changes are made. The next largest number of recipients are women."

The Children's Defense Fund, while addressing a multitude of children's issues, has recently concentrated its efforts on getting two particular pieces of legislation passed. One bill known as H.R. 3434 was passed into law in June of this year. Major provisions in this law will provide preventive services for the family before prematurely removing the child from the home, provide adoption subsidies for children with special needs, and require regular case reviews of children who have been placed in foster care homes.

The other major programmatic priority of CDF is CHAP (Child Health Assurance Program). The legislation, if passed, would require stronger enforcement of the Early and Periodic Screening Diagnosis and Treatment program of Medicaid which grants poor children the right to basic medical care, screening for health care problems, and diagnosis and treatment for those problems. At present CHAP has been passed by the House, reported by the Senate Finance Committee and is awaiting full Senate action.

Afro-American Family and Community Services

Afro-American Family and Community Services (AFCS), located on the west side of Chicago, was founded following the 1968 "riots" which occurred after the assassination of Dr. Martin Luther King.

Hoping to address major problems in the black community before they reached the crisis stage, the Afro-American Family and Community Services program was started to provide more comprehensive social welfare services to that community. Says Executive Director Benjamin Finley, "As blacks who profess to have a commitment, concern and responsibility to the black community, we began to look at ourselves and our expectations of the social welfare institutions in Chicago. We realized that the major problem was that we were the only major ethnic group in this city that had not established a system of social welfare services. We then decided to do two things. First we organized black social workers as a separate entity in order to address the needs of black professionals and their responsibility to the total community. Secondly, we decided that it was necessary to initiate the development of a social welfare institution which would provide comprehensive services to black families and which would serve as a model for the field in the black community."

While AFCS provides a comprehensive range of social services and community agency referral services, it has perhaps been most successful in providing individual and family counseling and in easing the adoption of black children. Concerning counseling, Mr. Finley says, "We don't restrict the problem areas that we work with. Our philosophy about treatment or so-called treatment is that everyone has strengths. We are not pathology oriented."

Making suitable adoption placements has been a major problem for many child welfare agencies. AFCS has been very successful in this area. Asked for the reasons behind this success, Finley states, "Well, it's not just our agency. There are two other successful black adoption agencies in the country (Homes for Children in Detroit and Harlem Dowling in New York). The problem is that the traditional child welfare agency has been unable to relate to the black community in the way we have been able to." Finley indicates that unlike other agencies his program has had few problems placing the older child. He says, "It's very interesting because we get many people who come in to us saying, 'I don't want an infant. I want an older kid because I cannot stop working. I want someone who is either in school or about to enter school.'"

According to Benjamin Finley, the key issue facing the black community as we enter the eighties is survival. He notes, "We are not anywhere close to liberation and we must go back and take a systematic look at the ways in which black people, families and communities have coped with basic survival issues and document this information for the younger people coming up."

Asked why he didn't mention jobs and inflation as important problems facing the black community Mr. Finley says, "Lack of jobs and inflation are symptoms of the basic problem in our community, which is a denial of access to the opportunities that lead to jobs. I see no way that this is going to change. While there will be shifts in attitude among individuals, the basic changes in institutionalized racism will not change because that is endemic to white institutions and no one has assumed the responsibility for effecting change on that level."

Taking cognizance of the fact that 1980 is a presidential election year Mr. Finley indicated that, "The ideal candidate must show that he is committed to the concept that all people are dignified and due the respect of every governmental and private institution that impacts on our lives. This includes making sure that every functionary within those institutions operates in a way that indicates their respect for people as individuals and human beings."

In conclusion Benjamin Finley says, "I think that because our society is so anti-youth oriented it fails to give credence to some of the assessments of our institutions made by children. You come to me and ask me what is wrong with schools and I say, I haven't been in school for 13 or 14 years. Our children can tell you what is wrong with schools, you just have to go to them and ask them."

CYC Works with Young and Old

Started in 1956, the Chicago Youth Centers (CYC) tries to develop social service delivery systems that span preschool through senior citizens. Ronald Bailey, the program director, indicates that CYC works with local and state law enforcement agencies to develop programs for kids who have been judged delinquent.

The center also does a lot of outreach work with youth gang members. Asked whether gangs are still a significant problem, Bailey responds, "If we're talking about the gangs of the sixties, they are not organized as they were at that time except in the Hispanic community. I have a real problem with the word 'gang.' One of the mistakes that was made with gangs in the sixties was the emphasis on destroying them instead of utilizing them as a vehicle to change behavior and motivate kids to do things in a positive way."

Asked to comment on some of the major social problems that his organization must contend with and how it does so, he says, "Our kids often come to us with negative self-images. This is not isolated but is reflective of the total society. People hate to deal with the fact that racism is still very much alive in America. If you analyze the images that are presented to these kids by the media you'll understand that by the time they are four or five years old they already possess a negative image of themselves because they always see themselves portrayed in a subservient or stereotyped role and rarely in a leadership capacity."

Continuing, Bailey assails the way that television often portrays blacks as being happy in their communities and makes the historical analogy of how slaves were often portrayed by the media of the day as being happy and content with their situation.

Noting that 1980 is a presidential year the CYC program director says, "Whoever wins is going to have to begin to be sensitive to the needs of the cities. It seems as though there is no problem in this society in increasing the defense budget. When it comes to increasing or even maintaining social programs, those types of expenditures suddenly become inflationary. I have difficulty understanding why domestic expenditures are considered inflationary, while defense spending is not. Much of the anger and hostility that we see in our kids everyday is brought on by the living conditions."

CYC's legislative priorities include the pending youth employment bill. Bailey indicates that while the Labor Department statistics show black teen unemployment rates hovering at about the 40 percent mark, he feels that they actually are closer to 60 or 65 percent. He says, "We have got to find a productive role for them to play. We are developing whole generations of kids who have never had jobs. This legislation if passed would place year-round emphasis on youth employment, a departure from previous job programs."

Ronald Bailey feels that government and private industry should engage in a joint effort to solve the youth unemployment problem. He says private enterprise has as much to lose as anyone if the cities fail. "Private enterprise has a responsibility to give of its talent and dollars by training young people and helping them gain viable skills that they can sell."

Asked what the black community should be doing to help itself as we enter the eighties, Bailey says, "We need to begin to support black business while at the same time looking at alternative methods of education. We also need to develop self-pride and take a hard look at our family structures. In addition we should begin pooling our resources so we can begin to address our own needs. The income that we earn in this country totals more than some nations. We must develop systems so we don't become conduits for our money. They say that in order for a community to be viable and self-sustaining a dollar should turn over three or four times. Often with us it turns over once; we get it, we spend it, it's gone. We ought to begin speaking seriously about the whole question of organizing our community. It will be hard work but it is the only alternative to the types of frustrations that we are experiencing today."

Looking Ahead

Though these groups differ in some important ways, each is proposing fundamental changes in the way American society treats women and children. No one knows if they will succeed, but if the major problems of women and children are not solved soon it will not be due to a lack of concern and hard work. As more women and youth groups focus on the political process and other methods to solve their problems, we will likely see a significant improvement in conditions across the board. ☐

"Thank you, Johnson. This pleases the Court."

NEWSCLIPS

As If Ring Around the Collar Weren't Enough

Bad news for white-collar criminals. The *New York Times* reports that crooks convicted of fraud, embezzlement, stock swindles, and other nonviolent crimes are being increasingly sent to jail. Though sentences are still shorter than the average for such violent crimes as robbery, they appear to have increased in severity.

According to one U.S. Attorney, "the idea of a short culture-shock jail sentence for white-collar crimes is taking hold." Another U.S. Attorney says that "the hue and cry over disparities in sentencing have lead prosecutors to urge jail for white-collar criminals."

However, slicksters don't automatically have to trade pinstripes for prison stripes. They are usually first offenders, and people convicted of any offense for the first time are often placed on probation. Moreover, some judges tend to look upon a white-collar criminal as they would upon a neighbor, a respectable, upstanding member of the community who does not need to be rehabilitated or restrained.

That's why you have a nine in ten chance of getting jail if you're convicted of a bank robbery, but still only a three in ten chance for jail if you embezzle from a bank.

A Good Reason to Look Forward to Your 25th Birthday

An analysis of rape in 26 cities indicates that the typical victim is a poor, young, unmarried woman who is attacked by a member of her own race. The LEAA study found that women who defended themselves reduced the likelihood that the rape would be completed, but also increased the chances of receiving additional (nonrape) injuries. Proportionately more black and minority women are rape victims than are white women. The highest-risk age group is women between 16 and 24 years old.

The most likely hours for attack are between 6 P.M. and midnight, and the most dangerous locations are open public areas like streets or parks. Most attacks were by strangers who appeared to be 21 years or older, were alone, and attacked women who were alone. About 70 percent of all victims did something to protect themselves (they usually fought back or cried for help). Weapons were used in less than half of the attacks studied, but their use appeared to be an effective means of intimidation, and proportionately more women were actually raped when the offender was armed. Knives were the most common weapons used in rape and attempted rape.

No Takers for Free Money

If your bank offered $10 absolutely for free, wouldn't you take them up on it? Sure you would—if you knew about the offer. But bankers don't get rich by giving money away, so officials at the Northwestern National Bank in Minneapolis knew what they were doing when they tucked away the $10 giveaway order in a 4,500-word booklet which federal regulations required they send to customers.

To prove that no one reads these booklets, the bank inserted the give-away sentence in 100 of the 115,000 booklets. Predictably, not one person answered. The bank says that shows that the government's requirements are ineffective and a big waste of money.

The bank's spokesman said that banks across the country could pay tens of millions of dollars to prepare and mail such booklets. "Somewhere along the line," he adds, "all those costs will have to be paid by the banks' customers."

Moral: Don't Do Favors for Lawyers

Florida teenager Jeff Streeter says he'll never do it again. A night in jail and a conviction are just too high a price to pay for being a nice guy.

According to an AP story, it all started innocently enough, when lawyer Warren Dawson saw him waiting in a courthouse corridor and asked him to do a favor. Dawson's client was on trial before a judge on charges of assault, battery, and resisting arrest in the beating of a 67-year-old man.

Dawson was sure that the witnesses couldn't really identify the defendant, and to prove his point, he asked Streeter (who looked nothing like the defendant) to fill in for his client and sit at the defense table.

Sure enough, three of four state witnesses immediately identified Streeter as the culprit. Then the fun started. Dawson rose, explained to the court that the man sitting next to him was not the defendant, and brought forward the real defendant. But the judge wasn't having any of it. Noting that the witnesses had identified him, the judge found Streeter guilty and sent him to jail. Though he was released the next day, the conviction still held at presstime for this story.

Meanwhile, Dawson says that it all goes to prove his point—that witnesses tend to identify whoever's at the defense table.

Your Tax Dollars at Work

Credit the *Chicago Sun-Times* with a bright idea. To show how the Illinois gun-permit system is working, enterprising reporters submitted firearm-owner applications in the names of gangster John Dillinger, Cuban revolutionary Che Guevara, outlaw Frank James, Travis Bickle (a gun freak from the movie *Taxi Driver*), Peter Gusenberg (a hood killed in the 1929 Valentine's Day Massacre), and the Godfather himself, Don Vito Corleone.

Each was accompanied by photos of the bad guys or the actors who played the fictional characters. Each was "notarized" by a seal that read "Nobody Public" and signed by one Max Bialystock, the con-man hero of Mel Brooks' movie *The Producers*. Three had made-up driver's license numbers.

But the best joke was reserved for last—the Illinois Department of Law Enforcement delivered all the licenses except Corleone's. Apparently, that was an offer they *could* refuse.

It Wasn't the Burger, But the Principle

Maybe it could happen only in Rhode Island, where every little thing must seem bigger. The *Chicago Tribune* reports that mathematician Donald Stanhope thought he had won a Big Mac in a McDonald's contest. In response to the question "Which perennial 20-game winner won and lost over 20 games in a single season?" Stanhope replied Cy Young (25-21 in 1894). No, said McDonald's. The right answer was Walter Johnson, who was 25-20 in 1916.

To which Stanhope replied that Johnson had not lost "over 20" games. Six months later, he got the state's attorney general to agree with him, and McDonald's ended up donating $1,000 to the Rhode Island Special Olympics as a settlement. But did Stanhope get his burger?

Marriage in a Throwaway Society

Linen napkins have given way to paper, mom's beef stew to Big Macs, but marriage remains an anomaly, a lifetime commitment in an era of convenience. All that will change, however, if some Alaska legislators have their way.

According to the *American Bar Association Journal*, an Alaska bill would allow for short-term marriage contracts, with the marriage ending if the contract were not renewed. Here's how the system would work. The blissful couple agree in advance to a marriage contract, which stipulates that they will love, honor, and obey for only a bit of forever, perhaps five years.

Whatever shape the marriage is in, it expires at the end of the time limit unless both parties agree to renew. All this is bad news for divorce lawyers, but good news for greeting card makers ("Congratulations on Your First Renewal").

Sic Semper Transit Gloria Carpool

Another entry in the ludicrous law sweepstakes: Discovered in an effort to rework the city's municipal taxicab ordinance was a Kansas City, Kansas, law that forbids neighbors from organizing carpools for getting to work. Group riding is allowed only when the mayor declares an emergency, like a transit strike. Those declared emergencies are few and far between, however; the city has had only two transit strikes—in 1918 and 1961. Although the police chief has said he would be "most reluctant" to enforce the law, it is still on the books and energy-conscious carpoolers face fines of up to $500.

Lie Detectors on the Rise

Everyone knows that you can't introduce lie detector evidence in court, right? Wrong. In the last ten years, state courts have been more and more willing to reexamine old decisions forbidding the use of polygraph test results as evidence. According to the *New York Times*, in at least 30 states results have been allowed as evidence in court.

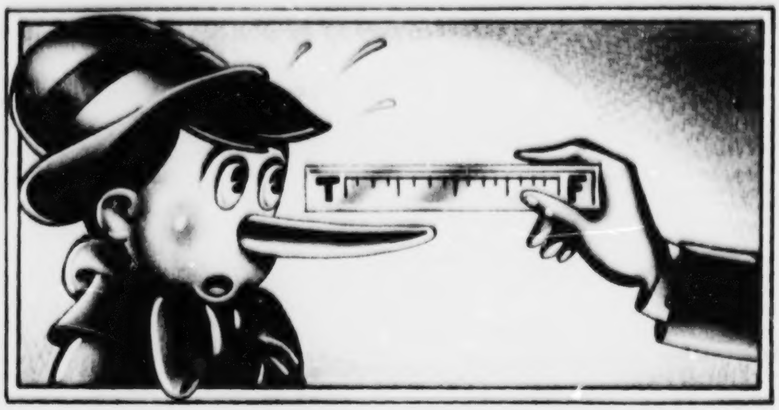
There are still holdouts, however. The Justice Department maintains that lie detector tests should not be admitted in federal criminal trials. It questions the reliability of the tests, especially when they're given by an examiner retained by the defendant. Rather than have a "trial within a trial" over the validity of polygraph findings, the federal government wants to keep the evidence out of court entirely.

Yet the federal government is willing, and even eager, to use lie detectors in cleaning its own house. When Attorney General Benjamin Civiletti was trying to find out who had leaked information about Abscam, an undercover federal investigation of political corruption, he wired some of his own employees to polygraphs.

Though lie detector evidence is being admitted more and more often, most tests are used during preliminary investigations, to narrow down the list of suspects. The FBI conducted almost twice as many polygraph examinations in 1979 as in the year before, and polygraph examinations administered by the Armed Services are also going up, although at a slower rate. Polygraphs are also finding a steadily growing market in private industry, which uses the device to screen job applicants and combat thievery.

The polygraph can measure such physical functions as heart beat, blood pressure, and respiration rate. The instrument does not detect lies *per se*; rather, it detects the fear of detection—whether a person is disturbed when answering one question, in comparison with other questions.

Until recent years, the landmark case was a 1923 ruling of the U.S. Court of Appeals that polygraph examinations should not be admitted as evidence until the technique had gained "general acceptance" among experts on psychology and physiology.



In recent years, though, courts have begun to become convinced that the instrument has become much more sophisticated, and polygraph examiners more professional, than they were in the early years.

In one recent New York case, a court admitted lie detector evidence, arguing that the test is as reliable as "fingerprints, ballistics evidence, blood tests, voice prints, neutron activation analysis, and others [which] have all passed the same standard [of general acceptance] and have been admitted into evidence."

Yet some lawyers still claim that polygraph evidence creates an "illusionary aura of objectivity and accuracy" that is likely to mislead jurors. As one of them put it, "the nature of the examination performed by polygraph examiners is more closely akin to that performed by psychiatrics than to the objective, scientific analyses performed by technicians with respect to fingerprints, ballistics, and blood."

Many civil libertarians say that the polygraph is inherently intrusive. They argue that the testing process, in which a person is wired to the machine, invades privacy and degrades human dignity.

A Mean, Well-lighted Place

A 1979 Law Enforcement Assistance Administration study, set up to investigate whether street lighting reduces crime, yielded inconclusive results. Well-lighted streets may make residents and pedestrians feel safer, but the study found that crime actually increased under the bright lights in some areas. The project's director, James Tien, speculated that the increase might be the result of things like car thieves being better able to see what they were doing; the increase in crime rates may also be attributable to more crimes being noticed by residents and reported to police.

Uniformity of lighting may be the most important factor in lessening fear of crime. The relative brightness of one area may simply send muggers and burglars to an adjacent street or alley that is darker.

But Just Let Anyone Try to Spit on the Sidewalk

Remember those "how many Indians can you find in this picture" games we used to play as kids? Louisville detectives would have been terrible at them, if a story reported in the *Chicago Tribune* is any indication.

Fred LeCompte, who runs a Louisville Bank only 80 feet from the entrance of Churchill Downs, says that the neighborhood is virtually crawling with bookies at Kentucky Derby time. So he wasn't surprised when two detectives came up one Derby Day and said they were going to round up persons making illegal bets. LeCompte took a look around, and this is what he saw:

> The light bulb was on in the second-floor apartment, indicating the bookies were open for business. One man was stationed in the window with a telescope so he could check odds on the Downs' total board. There was a bookie in each of the two pay telephones in front of the building; two more were leaning against the mail box; two others were in my lobby.

In all, LeCompte counted 25 bookies. The detectives missed them all.

Elementary Strategies

(Continued from page 26)

But valuable as those learning experiences have proved to be, they have tended to focus almost exclusively on law and legal processes in our own society. We contend that the time is ripe to broaden the study of law and legal processes to encompass other cultures. Such study could expand students' understanding of and empathy for those whose cultures differ from their own. It could provide students with a mirror for looking more critically at their own society and at its legal processes. It could afford opportunities for students to increase their power to reason and to hone their problem-solving skills.

Teachers complain—and rightly—that they constantly are being exhorted to enrich the curriculum but that they seldom are furnished with the materials or tools necessary. Lest lack of materials prevent teachers from at least experimenting with the rich possibilities inherent in case studies drawn from other cultures, the remainder of this article will be devoted to specific examples and suggestions for making them work in the classroom. Each of the cases which follow are suitable for use with middle schoolers or students in upper elementary grades and in junior high school.

These cases focus on the fourth and generally neglected "ingredient of law," modes of redress or ways in which wrongs are righted. Certainly the other three ingredients of law—rules, procedures of inquiry, and methods of mediation or adjudication—are deserving of attention. But comparative cases appropriate to their study must await another time and place.

Case #1: The New Dress

This case took place in a village in Turkey. Mustafa, a 16-year-old village youth, was going to the city on business. An older, married woman asked him to buy her a dress while he was there. She wanted a bright red one made of shiny material. She said she would pay him for it on his return.

Mustafa returned with the dress and asked for his money. "I'll pay you later," the woman said. Whenever he asked for the money, he got the same reply. Finally he became angry. The woman said, "Come to my house tonight. I will put a big copper pot outside. You can take it and sell it. If you get more than 70 liras for it (the cost of the dress), give me what is left over."

Late that night when Mustafa was carrying the pot, a friend saw him. Mustafa said, "Help me hide this. Later we will sell it and divide the money."

"Enjoy your vacation, Your Honor?"

The friend helped Mustafa, but the next day he went to the woman's husband. He told him how Mustafa had taken the pot and where it was hidden. The husband went to the police with the story.

That night the police officer and the husband waited near the place where the pot was hidden. When Mustafa came to pick it up, they captured him and called him a thief.

When the case came to court, the judge asked the woman: "Do you owe money to Mustafa?"

"No, I do not," she replied.

Then the judge turned to Mustafa. "Do you have any witnesses?" he asked.

"No," said Mustafa, "but shiny material like that in her dress cannot be found in the village. It is sold only in the city."

Later Mustafa did produce four witnesses. Each swore he had seen the dress before it was given to the woman.

Finally the judge turned to the wife. "Will you take an oath that Mustafa has not paid for the dress?" he inquired.

The woman did not answer. She began to cry.

Case #2: Fire in the Schoolhouse

This case happened in a small city in the Soviet Union. After an argument with his father, 14-year-old Alexander stormed out of the family apartment. He went to a school building and climbed into the attic where he intended to sleep. Earlier in the year, he had slept there on two occasions. But now it was December and very cold. Alexander was glad, therefore, when he found a can of kerosene in a corner of the attic. He used it to make a campfire in a small metal box to warm himself. In time he drifted off to sleep. The hot box burned the floor. Alexander awoke to see the flames. Frightened, he gathered his belongings and ran away. He told no one of what had happened.

As a result of the fire, the roof over the school office collapsed. Many records stored in it were burned. So, too, were tables, chairs, desks, and other furnishings in the school office.

Later the police learned that Alexander sometimes slept in the school building. Because of his age, he could not be arrested or charged with criminal responsibility for the fire. But he and his father

"More on that later, but now this bulletin just handed to me... TV news anchorman robbed at gunpoint..."

were ordered to appear in court together.

Alexander told the judge what had happened, but he said he was not the only young person who sometimes slept there. It was easy to get into the attic, he said.

The city attorney asked the judge to make Alexander's family pay for the damages.

Alexander's father told the judge that he had very little money. He got a small pension from the government because he had been injured in World War II. He made a few extra rubles each month. That was all he had to take care of himself, his wife, Alexander, and a daughter who was ill.

Case #3: The Boy Who Had Magical Fright

Here is a case from Mexico. Senora Maria went to the *presidente* or elder of her village to complain. She had been working on a plantation cutting coffee. While she was there, an older boy, Felipe, "picked on" her six-year-old son. She said Felipe had hit him several times. The six-year-old was so upset that he came down with an illness. Senora Maria said it was the *susto* or magical fright. It was a sickness in which the people of her village believed.

"My little boy cannot sleep since he came down with the *susto*," she said. "During the night he yells and screams. He wets his bed. He never did those things before. Please! I am asking the *presidente* to help me make my little boy well again."

The *presidente* listened carefully to Senora Maria, then he turned to Felipe. "Tell me what happened," he urged.

"Her boy would never leave me alone," Felipe answered. "He followed me around while I was trying to work. He called me names. He stuck out his tongue at me. He made fun of me. Finally I just got tired of it and I hit him."

The *presidente* turned once more to the mother. "What do you think will make your son well again?" he asked.

"If I could take him to the curer, I know the curer could make the *susto* go away. But I am a poor woman. I need 30 pesos to pay the curer, but I have no money."

Case #4: The Public Apology

Mr. Ishimoto was a member of Japan's House of Representatives. Mr. Kuri wanted to replace him, so he became a candidate for that office. As election day drew nearer, the contest between the two men heated up. Kuri made several public radio broadcasts. In them he said Ishimoto did not deserve re-election. He had behaved improperly while he was a vice-governor, some years before he was elected to the House. He had accepted a large sum of money from a company which sold electrical equipment. In exchange, Ishimoto promised certain favors to that company. Anyone who used high office for his own personal gain was bad, Kuri said.

Ishimoto was angry about the radio broadcasts. He took Kuri to court. He said Kuri had damaged his reputation. He had "smeared his good name." He asked the court to force Kuri to make a public apology. He asked that the apology be printed in all of the city's newspapers for one week and that it be broadcast on the radio for three days.

"I have the right to say what I did about Ishimoto," Kuri told the court. "Japan's Constitution guarantees free speech. It also says that public officials can be criticized."

Case #5: The Cooked Goose

Almost on schedule a flock of geese returned to the beach of a California community. Each year that community was visited by migratory birds. They came in November and left in March. But one year when it came time for the birds to leave, the residents noticed that something different happened. Two of the geese stayed behind. One was a magnificent gander with a great wingspread and shining feathers. The other was his life's mate. On closer inspection it was discovered that the female was blind. The gander had stayed behind to take care of her.

Touched by the gander's faithfulness and the helplessness of his mate, the citizens began to watch over the geese. They took turns bringing grain for the pair to eat. Daily they filled a can with fresh water for the pair to drink. They noticed that as soon as the can was filled the gander would rattle it to let his mate know it was there.

One evening in midsummer a small boat drew near the beach. Two men were on board. One man was 29 years old; the other man was 20. The older man baited a fishhook with lettuce. When the gander nibbled at it, he reeled the bird in and strangled him on the deck. Then the two men barbecued and ate the goose, for their dinner.

Witnesses later reported what had happened to the police. The two men were arrested and charged with cruelty to animals. Then they were released on bail.

When people in the community learned of the gander's death, they were shocked. When they heard that the two men accused of the crime were life-long residents of the community, they became even more angry. Some talked openly about tarring and feathering them.

At last the men accused had their day in court. Neither denied what witnesses had reported. The older man told the judge, "I did a bad thing. But I think the town is doing just as bad a thing to me. Nobody talks to me anymore. It's not safe for me to leave my house until after dark. I'm being treated like an outcast in my own hometown."

Preparing Students

Prior to using these case studies, the teacher will want to talk informally with students and explain briefly these steps in the judicial process:

First: The facts must be found. If the case is to proceed further, it must be established that a person's or a group's rights have been infringed upon.

Second: Responsibility for what has happened must be determined through whatever the appropriate procedures of inquiry and adjudication are. That determination could be made through informal hearings or it could be made through formal hearings and trials.

Third: Decisions must be made about how wrongs are to be righted or grievances redressed.

The ways in which wrongs are righted vary from society to society. Nevertheless, regardless of the society and regardless of the particular issues involved in a case, modes of redress or ways of "righting wrongs" worldwide tend to fall into one of three categories:

1. *Compensating the Injured Party or Making Restitution*

When it has been agreed that a person has been wrongfully deprived of something—possessions, job, good name, or health—that person may be compensated or repaid in some way. For example, if a person is wrongfully deprived of health because of an automobile accident, the wrongdoer may be ordered to pay damages. If a person has been wrongfully deprived of a job, the wrongdoer may be ordered to restore the job and to pay the person for the time she/he was out of work.

2. *Punishing the Wrongdoer*

Punishment can take many forms. The most frequently used punishments are fines, seizure of property, corporal punishments, and banishment.

3. *Counseling*

This mode of redress is especially important in cases in which the disputants must continue to live or work together. For example, the school principal, headman in a village, or judge in a court of law may talk with those concerned, trying to get them to understand their roles and their obligations to one another and to society. Or the "counselor" may try to get the disputants to agree to put aside past differences and to try to live peacefully together in the future.

Using the Case Studies

Once students have been introduced to the three steps in the judicial process and the three major ways in which all societies try to right wrongs or redress grievances, they should be ready to consider some specific cases.

1. Begin by dividing the class into groups of three. Each three will constitute "the judges" or "hearing officers" for the case.
2. The judges should read the case carefully several times.
3. The judges should then consider together the following questions:
   What are the facts in this case?
   Who has been wronged? How?
   Who is most at fault in this case? Why ?
   What other person or persons also are at fault? Why?
   What should be done to right the wrongs which have been done?
   Should those who have been wronged be repaid or compensated in some way? If so, how? By whom?
   Should those who did wrong be punished? If so, how? By whom?
   Should any person or persons involved in this case be counseled or given advice/help? If so, what kind of counseling do they need? Who should provide that counseling?
4. Each group of judges should present its findings orally.

The class then should compare and discuss each group's judgment and its implications. This should lead to a lively discussion of rights, wrongs, and remedies, giving students insights not only into other cultures but also into the quest for justice which has preoccupied men and women the world over. ☐

Creating Cases for Younger Children

There is no shortage of raw material for law-related cases aimed at younger children. All of the cases in this article, for example, were adapted and retold by Margaret Stimmann Branson from a wide variety of sources.

"The Cooked Goose" is based on a real case. It was adapted from three articles which appeared in *The San Francisco Chronicle* in late July, 1980. "The Public Apology," also based on a real case, was adapted from a book by John M. Maki (with translations by Ikeda Masaaki and others), *Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-1960* (Seattle: University of Washington Press, 1964) pp. 47-69. Pages 210-11 of E.A. Ritter's book *Shaka Zulu* (London: Panther Books, 1972) tell the story retold in this article.

"Tatianna, the Wise Girl Judge" is based on "The Peasant's Wise Daughter" from *Household Stories*, collected by the Brothers Grimm (London: George Routledge and Sons, n.d.) pp. 300-303 and on "The Wise Little Girl" from *Russian Fairy Tales* by Aledsantr Afanas'ev (New York: Pantheon Books, 1945) pp. 252-55.

"The New Dress" is based on a case reported by June Starr in "Turkish Village Disputing Behavior" in *The Disputing Process—Law in Ten Societies* edited by Laura Nader and Harry F. Todd, Jr. (New York: Columbia University Press, 1978) pp. 146-47.

"Fire in the Schoolhouse" is based on an actual case reprinted in *The Soviet Legal System* by John N. Hazard, William B. Butler and Peter B. Maggs (New York: Oceana Publications, Inc., 1977) pp. 442-43.

"The Boy Who Had Magical Fright" is based on a report of a case in a Zapotec village in the state of Oaxaca, Mexico, in *Anthropology: The Cultural Perspective*, James P. Spradley and David W. McCurdy (New York: John Wiley, 1975) p. 415.

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Russia's Courts

(Continued from page 33)

vigorously, since they can be punished for their efforts. Counsel in politically sensitive cases must be cleared by the Committee of State Security (KGB). An advocate who conducted a spirited defense of Alexander Ginzburg in 1968 was expelled from the Party and dismissed from his post as head of a legal consultation office. He had adopted a "non-Party, non-Soviet line in his defense."

Dissenters and Refuseniks

Russian disapproval of dissenters—especially those who use Western pressure in their behalf—takes several forms: bureaucratic harassment, confinement to psychiatric hospitals, charges of official hooliganism, or forced expatriation. All but the first of these require some sort of court action. The accused may be tried under one of the political acts of the Criminal Code. Those trials are semiprivate since they focus directly on state security. Or the trial may not directly deal with alleged anti-Soviet agitation, but rather with charges of hooliganism—a catch-all word for disorderly conduct as well as assault. In these instances, the criminal trial is no different from that for theft, except that the accused is on the docket for a crime generally unrelated to his or her really objectionable activity—dissent.

Former United States ambassador to Moscow George Kennan recently mentioned the "veritable orgy of inflammatory oratory" by the United States against the USSR. Kennan warns we must be careful not to exploit the desperate plight of Soviet political victims for our own chauvinistic purposes. Yet the tragic stories mount, and Soviet "justice" in these cases is more and more a hollow boast.

Anatoly Shcharansky was arrested in March of 1977. Shcharansky was an essential link between Jews who want to leave Russia and those dissidents who choose to voice their concerns, yet want to stay. Active along with physicist Yuri Orlov and poet Alexander Ginzburg in a watch group that monitored Moscow's compliance with the human rights provision of the 1975 Helsinki declaration, Shcharansky's fluent English helped his dissident circle connect with Western news reporters.

Are dissidents and those who want to leave criminals? How does the Soviet legal system decide about these individuals? The young physicist, Shcharansky, had the dubious distinction of being tried for treason. The maximum penalty for treason under the Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) is death. The four-day trial began after Shcharansky had already been detained 16 months. Judge P.P. Lukanov and two people's assessors heard the case in the Moscow courtroom, where a carefully selected audience observed Shcharansky conduct his own defense.

The indictment charged that Shcharansky had given state secrets to Western diplomats and intelligence agents between 1974 and 1977. The allegations centered on refuseniks—Soviet citizens who have applied to emigrate and have been turned down. Many refuseniks worked in sensitive posts with classified information, according to government officials. Shcharansky, a refusenik himself, supposedly gave names of refuseniks and their job locations to Robert Toth, a correspondent for the *Los Angeles Times*. Toth published this material in a series of articles, exposing the sites of Soviet defense plants and research institutes.

What happens when law and politics collide? In the Soviet Union justice is first and foremost among the victims.

The crisp, dry account of the daily trial proceedings given to the press by Soviet government spokesmen provided sharp contrast to the emotional messages delivered by Shcharansky's brother, Leonid. Leonid Shcharansky, the only relative or friend allowed to attend the officially "open" hearing, emerged from the nondescript brick court building the first day of the trial, distraught because he felt sure his brother would be sentenced to die. Twice during the next few days, encouraged by Anatoly's smiles, Leonid was able to communicate with his brother—once to yell words of solidarity before being silenced by the guards. Still, the tension heightened outside the courthouse as family, friends and relatives waited long hours for Leonid's eyewitness accounts. Finally, the decision came down. The three jurists convicted Shcharansky and sentenced him to three years in prison and ten years in a labor camp.

Shcharansky's wife, Avital, who was able to emigrate to Israel shortly after their marriage, worked with her attorney, Irwin Cotler of McGill University, to prepare a petition documenting the violations of Soviet law and international agreements that took place during Shcharansky's investigation and trial. Pretrial violations which Cotler detailed included the unconstitutional character of Shcharansky's lengthy detention, with no access to counsel, and later, no choice of counsel; the illegal solicitation of Shcharansky for information about the Jewish emigration movement in exchange for reunion with his wife; a "choice" of cooperation or death, with investigators declaring Shcharansky's guilt throughout the inquiry; the unauthorized searches of Shcharansky's apartment and the harassment of Shcharansky's friends.

During the trial itself, the court admitted illegally obtained evidence over Shcharansky's objection and Shcharansky was not allowed to call witnesses in his behalf. Witnesses who *were* called were pressured—they were searched, their visa applications were questioned, and they were threatened with labor camp for noncooperation. According to attorney Cotler, Shcharansky did not transmit the list of refuseniks' names and places of employment. That information had already been made public when the Helsinki Monitoring Group published the information Dina Beilina compiled prior to Toth's articles. In any case, none of the information allegedly given to Toth by Shcharansky was classified as secret under Soviet law.

Shcharansky's openness in his contacts and communications belied the supposedly secret nature of his activities. Apparently Shcharansky placed too much faith in Article 125 of the Russian constitution, which guarantees free speech. Contradictions exist in Soviet law, and these legal splits can be used to advantage by prosecutors. The ambiguous Article 70 of the Criminal Code prohibiting the dissemination of "slanderous inventions defamatory to the Soviet political and social system" enables authorities to silence protest and dissent despite constitutional guarantees.

Irwin Cotler's appeal pointed out some of these disparities, hoping to prompt a reversal of the judgment due to one-sided and incomplete investigation. The 900-page appeal, citing 40 serious violations of the Russian legal system, was delivered to the Soviet embassy in Ottawa, Canada shortly after Shcharansky's sentencing. No one knows the impact of this effort, yet Shcharansky's situation has improved. In January 1980, Shcharansky was reported to be extremely ill in Chistopol Prison. He has since been transferred to a labor camp, where his brother and mother have been able to visit him.

Other Legal Crack-Ups

Courts have been used to suppress dissent in less celebrated cases as well. The apartment of Moscow economist Ida Nudel was ransacked by the authorities, and she was under surveillance constantly. Why? She was known as the "guardian angel of prisoners of conscience" for her support of those whose fate she now shares. Since 1971, when her application to emigrate to Israel was refused, she had been active in the Soviet Jewish emigration movement: Outside her residence she hung a banner saying, "KGB—Give Me a Visa."

She was arrested June 21, 1978 and convicted of malicious hooliganism in connection with a demonstration protesting the arrest of Vladimir and Maria Slepak. Sentenced to four years of internal exile in a labor camp in the Siberian swamps, she slept with a knife under her pillow at first to fend off the men in the hostel where she was quartered. Now she keeps a dog. Few other people in the isolated region are Jewish, and no one there seems to empathize with her plight.

Some dissidents don't get any trial at all. Andrei Sakharov, the recipient of the 1975 Nobel Peace Prize and a widely known human rights activist, was banished by an administrative order which commanded him to exile in the city of Gorky, 250 miles away. The order allowed him only two hours to leave Moscow. His forced removal was an official tactic to isolate him, to demoralize his associates, and to prevent his ongoing "subversive activities." He is now unable to leave Gorky, his ground floor apartment is constantly watched, and contact with his children and friends in the West is forbidden.

The chief violation of Soviet dogma committed by these individuals and countless others is thinking for themselves. Their verdicts were predetermined, their sentences were harsh, and the legal system, threatened by their very existence, broke down in order to silence them. During an atypical, candid conversation reported in the *New York Times* in 1970, a Leningrad Party official said to an expatriated dissident mathematician: "What do you want? If you think that we ever will allow somebody to speak and write anything that comes into his head, then this will never be. . . . Of course, we don't have enough power to force all people to think the same, but we still have enough power not to let people do things that will be harmful to us."

It's obvious that the Party plays a significant role in all political cases and in many minor cases. The results are sometimes good—as with the consistent, relatively speedy verdicts delivered in theft and assault trials. Often the effects are bad. But it may not be fair to place the blame solely on communist ideology.

From Czars to Communists

Russian history, to a great extent, produced Soviet law. It is difficult to say how well communist justice works, since so much of the Soviet system reflects not only ideology and Party politics, but the Russian experience prior to 1917 as well. The legal system has been stamped by Russian czars and Orthodox saints, as well as twentieth century fanatics. A number of minority groups within the USSR have struggled with both medieval and modern totalitarian states, desiring independence and experiencing violence and deprivation of rights. Injustice can be administered in the name of any legal theory, and Russia's iron-fisted law may be connected less to socialism than to historical traditions long opposed to individual liberties.

Most observers of the Soviet legal system are impressed by the humanism explicit within Soviet statute law and in the Constitution. The concern for the integrity of the person and equality before the law pervades the Fundamental Principles of Criminal Procedure, the Criminal Code and the Code of Criminal Procedure. The third federal constitution, drafted in 1977, is truly a model of human rights protections: The political rights of franchise, equality, speech, assembly, association and religion (and lack of religion) are insured.

One provision, however, constricts the exercise of these rights to rigid conformity. That is, you can do whatever you want as long as it is in the interest of socialism. The trouble is that the definition of "socialist legality" takes more forms than there are republics in the federation. Leonid Brezhnev offered one defense in 1976 at the 25th Party Congress. Brezhnev recalled Lenin's statement that what is moral is that which serves communism. "Everything for the mass" is the clear call: The liberation of the individual is not possible until the mass is free. Given Brezhnev's assumptions that tight discipline and social order are requisites in Russia, the intrusive neighborly watching of other citizens and the relatively harsh sentences for criminal activities make more sense. Here is a nation, until quite recently ruled by an autocratic czar, and essentially medieval in character, which suddenly finds itself in a fast-paced, urban, pluralistic world. Russia's efforts to keep up with other global powers has had a price—a high price exacted by state authority from those who have conscientiously opposed its methods. ☐

Justice Under a Red Flag

Andrei Amalrik gives a personal, moving account of his arrest, trial and labor camp experiences in *Involuntary Journey to Siberia* (New York: Harcourt, Brace and Jovanovich, 1970). A very recent study of a number of dissidents, Joshua Rubenstein's *Soviet Dissidents: Their Struggle for Human Rights* (Boston: Beacon Press, 1980), is written by the New England coordinator of Amnesty International. A more scholarly but quite readable article by Robert Sharlet is "Dissent and Repression in the Soviet Union," *International Journal* 33 (1978): 763-95.

Several works are available in paperback on Soviet law and its differences from other systems. Ivo D. Duchacek's *Rights and Liberties in the World Today: Constitutional Promise and Realities* (Santa Barbara: ABC Clio, 1973) analyzes 100 bills of rights and constitutions of Western and Communist countries ($5.95). More comparisons, which include the Soviet constitutions of 1936 and 1977, can be found in S.E. Finer's edition of *Five Constitutions: Comparisons and Contrasts* (Baltimore: Penguin Books, 1979), available for $4.95. Laura Nader and Henry F. Todd, Jr. have edited *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press, 1978), full of Good case studies ($7.45)

—SI

Continental System

(Continued from page 29)

procedures. (Readers interested in the whole story couldn't do better than consult John Langbein's book, *Comparative Criminal Procedure: Germany*, a thorough, thought-provoking, and very well-written examination of the German system. It's the basis of much of the rest of this article.)

Fact Finding. American lawyers have an almost mystical faith in the ability of an adversarial trial to bring out the truth. They believe that rigorous direct and cross-examination by top-flight lawyers will uncover all sides of the story, unearth every relevant detail.

But does reality live up to myths? Judge Jerome Frank, a strong critic of the adversarial process, argues that the adversarial system is an artificial one that can very easily obscure sober fact finding.

For example, our system of direct examination and cross-examination is a sure fire way to make any witness—even the most truthful—uncertain and ill-at-ease. As one witness said, "I want to tell the truth, but every time I try some lawyer objects." In case witnesses aren't traumatized enough, handbooks for lawyers suggest all sorts of techniques to unsettle hostile witnesses, minimize the effect of their testimony, and make them seem evasive. According to Judge Learned Hand, "About trials hang a suspicion of trickery and a sense of victory depending upon cajolery or worse."

As Judge Frank points out, in every case, at least one party is supremely interested in misrepresenting, exaggerating, or suppressing the truth. And there may be cases in which neither side has an interest in the full truth coming out. In the trial of the Watergate burglars, for example, the defense wanted to treat the whole thing as a minor break-in and get it over as soon as possible. The prosecution, naturally enough, was interested in convicting the men actually on trial rather than conducting a wide-ranging inquiry into the whole case. The truth did come out, thanks to some vigorous questioning from the bench by Judge Sirica. But in taking upon himself the task of questioning the defendants, Judge Sirica was abandoning the passivity usually associated with judges in our system and was, in fact, behaving much more like the presiding judge in a continental trial.

American judges are usually like umpires in a ball game or referees in a fight. They are there to ensure that the rules are obeyed and the contest fair, but it's the contestants who determine the result. German judges get into the action. They have the duty of independent investigation and must satisfy themselves of the justness of the result. Therefore, they conduct a trial in all cases, even when the defendant confesses. Thus the guilty plea, which ends so many proceedings here, really has no counterpart in the German system. The German court will conduct its own inquiry, even in seemingly open and shut cases, until it is satisfied that justice has been done.

Part of its concern for the whole story is shown in the way it questions witnesses. Another example is its willingness to consider issues not raised by either side. In the case of Dr. Brach, the German court took it upon itself to consider two possible defenses that were not raised by the defendant and his counsel: that Brach acted either in self-defense or under duress. Though the court eventually determined that neither defense was justification for his act, the judges no doubt felt that they had to consider these defenses to fully canvass the case and consider every relevant aspect.

One American witness said, "I want to tell the truth, but every time I try, some lawyer objects."

"Professional" Judges and Prosecutors. Our judges are almost invariably veteran lawyers who were appointed or elected after years of private practice. In Germany, however, lawyers can spend their whole career on the bench. They do not enter the judiciary from private practice, but rather choose a judicial career upon finishing a two-year apprenticeship after their university legal training. Appointments to the judiciary are by merit, and since judicial posts are prestigious, the ministry of justice can fill most vacancies from the top of the class. After a probationary period of three or four years, judges with satisfactory records are promoted to life tenure.

Prosecutors are also career civil servants. In our country, state's attorneys and attorneys general are usually elected, often after they have had a career in private practice. Moreover, many subordinates in these offices are political appointees rather than civil servants. In Germany, however, prosecutors generally have chosen their career after their apprenticeship and usually hope to follow it for life.

Clearly, the German system has some advantages. Judges and prosecutors don't have to worry about re-election, and so can concentrate on delivering justice, even in the most sensational cases. Moreover, they are specifically trained for their jobs, which they expect to perfect over a lifetime of service.

Some Other Advantages?

The Role of Laypeople. In his book on German criminal procedure John Langbein writes that "the jury system lies at the root of much of the dissatisfaction with common law criminal procedures. We select, inform, control, and review juries in ways that have become ever more complicated, time-consuming and expensive." Since jury trials are unwieldy they are used less and less often here. Instead, plea bargaining disposes of a great majority of cases, in ways that may have nothing to do with justice.

Yet despite the many difficulties with making the jury system work, American lawyers and judges think that it is essential as a means of involving the general public in the legal process. Without juries, they reason, the law would seem imposed on the people by an elite, professional cadre, rather than a democratic institution in which lay people play a key role.

The German system of lay judges may be a compromise worth trying, a way of integrating lay people into the process without running into all of the complications and expense of the jury system. There are many levels of courts in Germany, each with varying proportions of lay and professional judges, though in almost all courts the lay judges are in the majority. As the Brach case shows, the lay judges sit in judgment with their professional colleagues.

Lay judges serve 12 days a year. Like American jurors, they receive a modest salary for their days of service. The court in which they will serve and the days on which they will serve are determined by public drawing of lots.

The German system of assigning jurors avoids most of the expense and delay of the American system. In Germany, lawyers have to accept whichever lay judges are assigned randomly to the case, except in very narrow circumstances, as when a lay judge is a victim or witness in the case, or is related by blood or marriage to the victim or accused.

Another advantage of the German system is that lay judges have more opportunity to become involved in the truth-seeking process. Jurors almost never are permitted to ask questions of witnesses, but lay judges have the same questioning privileges as their professional counterparts.

The German system also avoids another difficulty with the Anglo-American system. As an American jurist has pointed out, "juries have the disadvantage . . . of being treated like children while the testimony is going on, but then being dosed with a kettleful of law during the [judge's] charge that would make a third-year law student blanch." After the charge, they must deliberate alone, generally without guidance from the judge.

In contrast, German lay and professional judges deliberate together. Therefore, the professionals are well placed to answer questions about what degree of proof is necessary and how possible factual doubts might be handled.

Speedy Trials. By Anglo-American standards German trials are very rapid. One study showed that almost half of the criminal trials last approximately two hours. Similarly, deliberations about the verdict and sentence don't take long, lasting about an hour for each day of the trial. (These figures don't take into account the lengthy statement of reasons drafted by the professional judges after the verdict has been announced.)

Plea Bargaining. Langbein calls Germany "the land without plea bargaining." In America, prosecutors bargain over pleas because their offices and the courts are overwhelmed with cases. Langbein and others assert the German system still works, permitting a thorough investigation and full-fledged trial in all cases.

Besides, they say German prosecutors couldn't plea bargain if they wanted to. Unlike their American counterparts, who have full authority to modify or drop charges, German prosecutors are required by law to prosecute all cases for which there is sufficient evidence. And they have no inducement to bargain even if they could, since all cases (even ones involving guilty pleas) go to trial, and the trials are brief in any event.

The Other Side of It

Defenders of the Anglo-American system dispute every one of these claims. As for fact finding, they point out that questioning by the police and prosecutors forms the basis of the accused's *dossier*, and thus forms the basis of the judge's questioning at the trial. Since police and prosecutors are concerned with building a case against the defendant, many think this stacks the deck unfairly.

Continental judges and prosecutors may lack the wide experience that their American counterparts have. Moreover, they may see themselves first and foremost as bureaucrats, answerable to their superiors, rather than as members of the community who have a wide and varied experience with life as it is actually lived. As one critic puts it, "Both judge and prosecutor tend to become bureaucratic, bookish, and authoritarian-minded. . . . In the judiciary as in other bureaucracies, conformity and industry offer the royal road to success."

The Germans may be able to select lay judges much more quickly than Americans, but there is also the possibility that lay judges with bias will wind up judging cases. A more serious objection to the lay-judge system, however, is not that the lay judges have too much influence but that they have too little. In the vast majority of cases, lay judges follow the lead of their professional colleagues. One study shows that lay judges outvote professional judges in only 1.4% of all cases. (Compare this with an American study which shows that our juries arrive at a verdict that is different from that of the presiding judge in 22% of cases.)

American jurors are treated like children during the testimony, then the judge's charge almost drowns them in law

No one disputes that German trials are brief, but critics point out that pretrial investigation is time-consuming and trials often occur months or even years after the incident. Therefore, they argue that there is not much overall saving in time. A nonadversarial system is probably less expensive for a defendant, but it might well be more expensive for the state, which has to pay for more judges and courtrooms. Reimbursing successful defendants for their legal costs would add more to the state's bills.

Though Americans are fed up with our criminal justice system, public opinion may not be ready to adopt a nonadversarial alternative. The continental system relies heavily on agencies of government, such as the judiciary and the prosecutor's office, to deliver justice. Someone accused of a crime really can't do very much to protect himself. He must hope, rather, that the state's fact finding will reveal the truth and clear him.

Unripe for Change?

But a system that calls for more reliance on government and less on the individual is struggling against a strong tide of conservatism in this country. With more and more of our people becoming suspicious of government and "bloated" bureaucracies, the climate of opinion seems hardly ripe for adopting a system which presupposes a caring, efficient government and downplays the role of the individual.

Moreover, lawyers and judges on the Continent have long had a great respect for Anglo-American procedure, and credit it with serving as the model for many improvements in their system. Thanks in part to our Constitution and Bill of Rights, revolutionary zeal on the Continent led to many reforms in the 19th Century that did away with the practice of "trying" defendants strictly on the basis of their *dossier*, often in courts where they were not present or even represented by a lawyer. Among the procedures Europeans have borrowed from us are notice of charges, availability of defense counsel, lay participation in the trial process, and the principle that all evidence, even if it is already in the *dossier*, must be established at trial through testimony of witnesses.

Some German jurists are still dissatisfied with their system and look to ours as a source of reform. For example, German Appeals Court Judge Hans-Heinrich Jescheck notes that because judges do so much, lawyers often come to court unprepared. He adds that critics in Germany claim that the judge's predominance is "a relic from the time of the old inquisitorial trial" and question whether judges can truly be fair toward defendants.

Among Judge Jescheck's remedies are —surprise—"Germany should move toward an adversary process, because cross-examination appears to be a psychologically preferable method of extracting the truth," and should follow our lead and break the trial into two parts, one to determine guilt and the other to impose sentence.

Maybe the grass is always greener on the other side of the fence. Perhaps the German system looks good because there have been relatively few studies of it, so that we assume that it really works like it's supposed to, contrasting it with the imperfections of our system, which we know all too well.

Where to Go from Here

Given the realities, of course, our country won't move quickly towards a nonadversarial system. Half a million lawyers in this country have been brought up in an adversarial system, and that system is deeply embedded in our common law heritage. But that doesn't mean that we can't adopt some aspects of the continental system, at least on a pilot basis. The continental system itself is a mixed one (an overlay of common law protections on the inquisitorial system), and there is no fundamental reason why our adversarial system cannot be enriched with some reforms from the Continent.

For example, as law professor Abraham Goldstein has suggested in the *Stanford Law Review*, American judges could become more active, commenting on the evidence, requiring witnesses to be summoned even when counsel did not call them, appointing experts, and even suggesting a defense to counsel.

Judges could take a more active role in overseeing police practices. In theory, judges are supposed to exercise this control by their power to grant or deny arrest and search warrants, but in practice most judges routinely accede to what the police ask for.

Judges also could be more active in putting limits on plea bargaining. They could refuse to accept pleas unless they were sure that the defendant had not been coerced and that the public interest had not been too casually bargained away by prosecutors. They could take a closer look at the facts underlying guilty pleas and the appropriateness of the charges and the proposed sentences.

Plea bargaining could be attacked in other ways as well. For example, American prosecutors have almost unlimited discretion to bring or to drop charges. Perhaps some of this discretion should be taken from them. There are other ways of relieving the overload. In Europe, for example, substantially fewer acts are declared punishable by law.

We might also experiment with lay judges. Vermont's county courts have been mixed tribunals for many years. In these courts, a professional judge is joined by two lay judges elected by the voters. This role for lay people dates back to concern that the circuit judge, representing state power, would impinge on the customs of local communities. Their position is guaranteed by the Vermont constitution. A variety of experiments in other states might come up with new ways of involving lay people without running into the delay and expense of lengthy jury selection.

These are but a few of the possible borrowings. Americans are becoming convinced that something has to be done about the criminal justice system, but it remains to be seen whether their concern will lead to fundamental changes in how justice is done. If reform does come, however, don't be surprised if it comes from this old rival of the adversary system. □

Fighting Over the Adversary System

Recent interest in the continental system has sparked a lively debate on the virtues and defects of nonadversarial procedure. The best single book on the subject is John Langbein's *Comparative Criminal Procedure: Germany* (St. Paul, MN: West Publishing Company, 1977). This book is so well written that, though intended for law students, it can serve as a text for bright secondary school students. Langbein goes through the nonadversarial procedure carefully, contrasting it with ours at every point and using thought-provoking questions as the central teaching tool.

Sybille Bedford's *The Faces of Justice: A Traveler's Report* (New York: Simon & Schuster, 1966) could also serve as classroom material. It covers more than a dozen cases, in five European countries, all of them reported with a novelist's eye for telling detail and human emotion. Jerome Frank's *Courts on Trial: Myth and Reality in American Justice* (Princeton, NJ: Princeton University Press, 1950) is still the classic critique of the adversary system. See especially Chapter VI, "The 'Fight' Theory Versus the 'Truth' Theory."

Much of the debate over the nonadversarial system has been fought in the usually musty pages of law journals. Favorable accounts of European procedure are found in John Langbein's "Land Without Plea Bargaining: How the Germans Do It" (*Michigan Law Review*, Vol. 78, No. 2, December 1979) and "Continental Criminal Procedure: 'Myth' and Reality" (*Yale Law Journal*, Vol. 87, No. 8, July 1978).

Critiques of the European system can be found in Abraham Goldstein and Martin Marcus, "The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany" (*Yale Law Journal*, Vol. 87, No. 2, December 1977) and "Comment on *Continental Criminal Procedure*" (*Yale Law Journal*, Vol. 87, No. 8, July 1978). For the critique of a German jurist, see Hans-Heinrich Jescheck's "Principles of German Criminal Procedure in Comparison with American Law" (*Virginia Law Review*, Vol. 56, No. 2, March 1970).

For balanced accounts of the two systems, which suggest modest changes in American procedure, see Gerhard O. W. Mueller and Fré Le Poole-Griffiths, *Comparative Criminal Procedure* (New York: New York University Press, 1969); Jan Stepan, "Possible Lessons from Continental Criminal Procedure" in Simon Rottenberg (ed.) *The Economics of Crime and Punishment* (Washington, DC: American Enterprise Institute for Public Policy Research, 1973), and Abraham Goldstein, "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure" (*Stanford Law Review*, Vol. 26, No. 5, May 1974).

For more on the adversarial and inquisitorial systems, see Rene David and John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (London: The Free Press, 1968) and Marian Neef and Stuart Nagel, "The Adversary Nature of the American Legal System from a Historical Perspective" (*New York Law Forum*, vol. 20, page 123 [1974]).

For a political science perspective on courts, see Sheldon Goldman and Austin Sarat (eds.), *American Court Systems: Readings in Judicial Process and Behavior* (San Francisco: W. H. Freeman & Company, 1978) and Martin Shapiro, "Courts," in Fred Greenstein and Nelson W. Polsby (eds.), *Governmental Institutions and Processes* (Reading, Mass.: Addison-Wesley Publishing Company, 1975).

Folklaw

(Continued from page 11)

This tale also raises many law-related questions. Some which students might explore include: (1) What does *ownership* mean? What are the different ways a person can go about getting ownership of something? Because you have something in your possession, does that necessarily mean you *own* it? (2) How do you think Squirrel felt when the judge ruled in favor of Spider? What might have been Squirrel's thoughts about the law? (3) If you were the judge in this situation, how might you have decided? (4) Do you agree with the moral of this folktale which suggests that if you harm someone or something, eventually you will be harmed by that action also?

The Hot-Water Test

Our third tale is also from Africa. It provides students another view of an idea introduced in the previous folktale, the miscarriage of justice. In this tale, Ijapa the Tortoise triumphs over what is "right" and in so doing raises the issue of a sometimes unjust world. The point of view expressed in this tale is that good and evil exist as components of life. Sometimes justice wins out, sometimes not.

It is said that one time Ijapa was called upon to come and help harvest the chief's fields. The idea interested Ijapa because he had neglected to care for his own fields, which therefore had produced nothing, while the chief's fields were full of yams. He thought about how he might use the occasion to fill his empty storehouse. A plan came to him. In the night he went to the chief's fields and dug a deep hole. He made the opening small at the top, and he sprinkled leaves and grass around the opening to disguise it. Then he carried away the dirt from the hole and threw it into the bush.

Morning came. Ijapa went to the chief's house, saying, "Here I am." Opolo the frog was already there, as were Ekun the leopard, Ekute the bush rat, Ewure the goat, Agbonrin the deer, and many others. They went out to the chief's fields to dig yams. Now, the other workers put the yams they dug into their baskets and carried them to the chief's storehouse. But Ijapa, he put a yam into his basket, then dropped a yam into the hole he had dug the night before. He put another yam into his basket and dropped another one into the hole. For each one he put into the basket he put another in the hole. Some of the workers scolded him for being slow, but Ijapa said: "I have great respect for the chief's yams. I handle them gently so as not to bruise them." The work went on. At last, all the yams were harvested. The workers went home.

That night when darkness came, Ijapa took his wife and children to the place where he had hidden the yams. They went back and forth many times, each carrying as many yams as he could, until the hole was empty. Ijapa's storehouse was full. He was pleased.

But when daylight came, servants of the chief found Ijapa's hole. They found the path he and his family had made while going back and forth. They followed the path to Ijapa's storehouse. There they saw the yams, and they returned to report their discovery to the chief. The chief sent for Ijapa. He spoke sternly. "Ijapa, it is reported that you have taken yams from my field."

Ijapa said: "Oh, great chief, I came to help you with your harvest. I labored in the hot sun. I brought yams to your storehouse. Then I returned home. Now you reproach me. It is not I who has taken your yams."

The chief said: "Ijapa, your habits are widely known, and in addition there is a path from my fields to your storehouse."

Ijapa said: "Oh, sir, I went to your fields to work for you, I returned. Could this little walking have made a path? If there is such a path, it was made by others to discredit me. Were there not other persons in the fields, also?"

The chief said: "There are no paths from my fields to their houses, only to yours. Therefore, suspicion falls on you. If you are innocent, we shall discover it. Let us prepare for the hot-water test. Tomorrow the people will assemble. We shall come to the truth of the matter."

The next day the people gathered in front of the chief's house, where a large pot of water was heating over a fire. When the water began to boil, the chief said: "Ijapa has been accused of stealing yams. He denies it. For this reason he will take the test. He will drink a bowl of the boiling water. If he is guilty, he will feel great pain. If he is innocent, he will not be

Where to Find More Folklaw

There are many fine collections of folktales about the law. See in particular Ricardo E. Alegria, *The Three Wishes: A Collection of Puerto Rican Folktales* (New York: Harcourt-Brace, 1969, $6.75); Juan Sauvageau, *Stories That Must Not Die* (Publishing Services, Inc., 1975, each of the four paperback volumes costs $2.25); Stith Thompson, *One Hundred Folktales* (Bloomington, Indiana: Indiana University Press, 1969, paperback, $6.95); Sabine R. Ulibarri, *My Grandma Smoked Cigars* (Quinto Sol Publications, 1977), and Kathleen Arnott, *African Myths and Legends* (New York: Oxford University Press, 1962, $10.95).

Three other books provide both folktales and thoughtful essays on law and culture. E. Adamson Hoebel's *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, Massachusetts: Harvard University Press, 1954) contains folktales and descriptions of the legal system of five primitive peoples, plus essays on such topics as religion and law and the cultural background of law. It is available in paperback for $4.95. Paul Bohannan (ed.), *Law and Warfare: Studies in the Anthropology of Conflict* (Garden City, New York: The Natural History Press, 1967, $6.95 in paperback) contains essays on many primitive cultures, descriptions of some advanced legal systems, and essays on the nature of legal anthropology. *Law in Culture and Society* (Chicago: Aldine Publishing Company, 1969), edited by Laura Nader, deals with law in many nonwestern societies, contrasting it to law in more advanced cultures.

Useful background materials are found in Judith M. Barnett's *Culture's Storehouse: Building Humanities Skills Through Folklore* (New York: Center for Global Perspectives, 1978). For a psychological perspective, see Bruno Bettleheim, *The Uses of Enchantment: The Meaning and Importance of Fairy Tales* (New York: Alfred A. Knopf, 1976, $3.95 in paperback). Archer Taylor's *The Proverb* (Hatboro, Pa.: Folklore Associates, 1962) contains law-related proverbs.

New LRE Center Opens

Portland State University's Law-Related Education Center is developing a major program focused on teaching about law in an international setting. The university-based program is multi-pronged, including teacher-training, special materials development, research, and other activities. A TV series for young children on international LRE will be modelled on *Sesame Street*. An International Conference on Law-Related Education is in the works for the spring of 1982. Further information on any aspect of this project can be obtained by contacting Lynda C. Falkenstein, Director of Law-Related Education, Portland State University, P.O. Box 751, Portland, Oregon 97207, (503) 229-3119.

harmed. In this way we shall know the truth. Let us begin."

Ijapa spoke, saying, "Oh, sir, though I will be proved innocent, you still will not know who has taken your yams. There were many persons there. Let them all be tested."

The chief considered it. He said: "This is good advice. Let everyone who was in the fields take the test."

Ijapa now became very helpful, as though he were the chief's assistant. He ordered that the pot be removed from the fire. "Place it here," he said, "so that the chief may see it from where he sits." They moved the pot of water from the fire as Ijapa directed.

"Because I am the youngest," Ijapa said, "it is I who should serve the water."

The chief agreed. So Ijapa took the bowl, filled it with hot water from the pot, and served it to Opolo the frog. Opolo drank. The hot water burned him inside. He cried out in pain. Ijapa filled the bowl again. He presented it to Ekute the bush rat. Ekute drank. The water scalded his mouth. He cried out. Tears came to his eyes. Ijapa refilled the bowl and handed it to Ewure the goat. Ewure drank. He cried. Ijapa gave hot water to Ekun the leopard. Ekun drank. He moaned in pain, and tears flowed from his eyes. Each person drank; each person suffered.

Then it came to be Ijapa's turn. The chief said: "All these persons have taken the test. All share guilt. Now it is Ijapa's moment for guilt or innocence."

Ijapa said: "I, Ijapa, am innocent. Yet I am the one who was accused. Therefore, I shall drink the largest portion of the hot water. In this way I shall prove beyond doubt that I did not commit the crime. The bowl is too small. Therefore, bring me a large calabash."

The chief sent for a calabash. Ijapa filled it to the brim.

He carried it to the chief, saying: "See it, great chief, see how full the calabash is!"

The chief replied. "I see it. You do well, Ijapa."

Ijapa carried the calabash back and forth saying, "Family of the chief, see how full the calabash is!"

The chief's family called out: "We see it. You do well, Ijapa!"

"Men of the village," Ijapa chanted, "see how full the calabash is!"

The men of the village called out: "We see it. You do well, Ijapa!"

"Women of the village," Ijapa sang, "see how full the calabash is!"

The women of the village answered: "We see it. You do well, Ijapa!"

Ijapa showed his calabash of water to this one and that one, each in turn, as evidence of the large amount of hot water he would drink. They could see that Ijapa was not shrinking from the ordeal. But Ijapa spent a great deal of time at this business, and the entire village was constantly singing, "We see it. You do well, Ijapa!"

Meanwhile, the water in the calabash was getting cool. At last the chief said: "Ijapa, we have declared ourselves enough. You do well. But now let us get on with it."

So Ijapa drank. Because the water had become cool, it did not pain him. He emptied the calabash. The chief nodded his approval. Ijapa said: "You have seen it. I did not cry out. Tears did not come from my eyes. How then can I be guilty?" And as an additional proof of his innocence, Ijapa jumped into the pot from which the water had come. The water in the pot also was cool. Ijapa made sounds of pleasure. Then he came out. He said to the chief: "As you see, it was not I who committed the crime. Surely it must be Opolo, and Ekute, and Ewure, and Ekun, and Agbonrin who are guilty, for it was they who felt the pain."

The other creatures protested, but the chief agreed with Ijapa. Thus it was that the chief found all of them except Ijapa guilty of the theft of his yams.

Since then, whenever a person tries to absolve himself of a bad action by putting the fault on others, people say: "When Ijapa accuses the whole community, He himself must have something to hide."

This tale suggests many follow-up questions. A few of them might be: (1) Have you ever known someone who was blamed for another person's misdeeds? How did that person feel? (2) Give some examples of situations where all the "evidence" said one thing but the conclusion was really wrong. (3) What does "guilt by association" mean?

Law and Culture

Each of the stories describes an approach to dealing with a law-related issue. Each might be viewed as a kind of curriculum which has instructed members of a society about what rules are important and how they might be enforced. These lessons have been passed from generation to generation through the informal structure of the culture and family. The process has contributed to development of what Paul Bohannan describes as "strong feeling for the definition of rights and obligations . . . maintained without courts and formal procedures."

Proverbs have reinforced the values and lessons contained in these stories. Look, for example, at the following statements also coming from west Africa:

- A single hand cannot lift the calabash to the head.
- A single peg cannot stretch out a skin.
- If you see wrongdoing or evil and say nothing against it, you become its victim.
- There are no gods to support a lazy person; one's greatest support is one's own arm.
- It is one's deeds that are counted, not one's years.
- The hand of a child cannot reach the shelf nor can the hand of the adult get through the neck of a gourd.
- When the right hand washes the left hand and the left hand washes the right, then both will be clean.

Thus folk literature acts both as a reflection of law-related ideas and as a means of instructing members of the society about those views. Folk literature clearly has a place in a law-related classroom, but students must be prepared for the tales. It is particularly important that students recognize that they are looking into a unique cultural context with each tale. That context should be considered for what it is and not compared to any other.

Too often "comparative" studies become comparison of things or views of the world which can't accurately be compared because each has different starting points. For example, in some societies law is very minimal, not because conventional remedies don't exist but because controversy is condemned. Hence, a comparative approach to understanding law in a culture such as the Zuni might be very misleading, for it is said that the Zuni prize good manners and harmonious behavior above all other virtues. Moreover, most comparisons pit the U.S.—a sophisticated, complex society—against a "primitive" culture, which naturally loses in the comparison.

In the Other Person's Shoes

The anthropological approach encouraged here reduces the likelihood of ethnocentric attitudes developing among students. Rather than making implied or explicit comparisons with our practice, the anthropological approach asks students to understand a culture on its own terms.

Use of folk literature in law-related studies contributes to an increased sense of what Carlos Cortes has referred to as "perspectivism," or what it looks like when you stand in another person's shoes. This knowledge is a vital ingredient of a more elusive goal of law-related education, empathy for others.

Harvard Professor Roger Fisher emphasizes that perspectivism plays a significant role in effective conflict management. He says, "a critical feature in the process of improving a relationship is the degree [illegible] which the views and interests of the other party are taken into account in developing one's own views." In his book, ***International Conflict for Beginners,*** Fisher further suggests that conflict management and international negotiation should begin with understanding the political problems of those we are trying to influence. He says we must understand their view of the situation and, most importantly, we must respond to their sense of enlightened self-interest.

In simplest terms, both Fisher and Cortes urge us to begin problem-solving by understanding the values, goals, and ethos of others involved in the conflict. While in no way a panacea, folk literature can richly add to these understandings since it reflects a culture's innermost soul.

Violence and Fantasy

It is important to briefly address two concerns which are sometimes expressed about the use of folktales with children. The first focuses on violence and the second on fantasy. Both are common in folk literature.

Bruno Bettelheim strongly argues that folktales help children. He begins his argument by stating "the most difficult task in raising a child is in helping that child find meaning in life," and goes on to say that "our cultural heritage, when transmitted to the child in the right manner," is vital to this task.

Bettelheim feels nothing conveys this heritage as well as literature and, especially, folktales, which he feels best match the emotional and psychological being of children. He says this match occurs because young children think through their problems by fantasy, rather than by rational thinking, and because they at first understand people as either good or bad, instead of as the complex combinations people really are. So folktales speak to children in language they can comprehend, helping them understand themselves and others, and helping them begin to deal with the question of meaning in their own lives.

But if folktales are helpful, why do they have to have violence and evil in them? May Bennie, a University of Washington librarian, explains it by saying that the fantasy and violence in folktales help bring out a child's fear and put a boundary around it, such as when the wolf in *Little Red Riding Hood* is killed. Ms. Bennie points out that the violence that happens is counteracted by the good. And Bettelheim adds that evil acts usually do not pay off in the end. Folk tales ultimately reassure children and give them hope that things will work out well or that they will be able to do something difficult. And that hope is what sustains us when nothing else can.

Folk literature can be valuable in a law-related curriculum. It helps students understand the pervasiveness of law in society by focusing attention on its role in an informal or nonlegal environment. It encourages students to view law as an agent of human beings, a tool which varies from culture to culture.

But there's an important caveat. Folk literature works best through an anthropological rather than a comparative approach. Students should learn about and become sensitive to the cultural setting associated with the literature being drawn upon. Yet at the same time folk literature does deal with universals like guilt and innocence, crime and punishment, justice and injustice. Teachers should thus seek a delicate balance of emphasis. On the one hand, folk literature can help students better understand the unique features associated with individual cultures and peoples, but on the other hand folk literature can also encourage students to respect the similarities linking us all.

CIA
CLANDESTINE
OPERATIONS
SUPPLY
CENTER

"If you ask me, Bernie, the Agency's due for an overhaul."

Diversity

(Continued from page 8)

Compared to its progress in accepting and protecting racial, ethnic, and religious diversity—and even sometimes compensating for past injustices—the Supreme Court has moved slowly on addressing gender diversity as a salient issue. Through most of U.S. history, gender-based discrimination has tended to stifle diversity. A great body of law has reinforced the idea that men work and women remain in the home. Women did not win even such a basic human right as suffrage until the adoption of the Nineteenth Amendment in 1920.

Gender Diversity

Until very recently the Supreme Court was content to leave things as they were, generally accepting gender-based societal values and occasionally reinforcing them, as for example in *Bradwell v. State,* 83 U.S. 130 (1873), which upheld a state law prohibiting the practice of law by women. Most notably, the Court chose not to include women among the groups protected by the equal protection and due process clauses of the Fourteenth Amendment.

Not until the 1970s did the Court begin to assert itself seriously in the area of gender-based discrimination. Two cases illustrate the shift. In *Frontiero v. Richardson,* 411 U.S. 677 (1973), the Court struck down federal statutes which provided that spouses of male members of the armed services were automatically considered "dependents" eligible for military benefits, while spouses of female members were not "dependents" unless they could prove they received over one-half their support from their wives.

Such a differential test clearly penalized married female members of the armed services by assuming that their male spouses worked (and so were not eligible for dependent benefits), while assuming that female spouses of male members did not work. Brushing aside the government's claim that its rule was an "administrative convenience," the Court stated that "the Constitution recognizes higher values than speed and efficiency." It held that the Constitution's equal protection guarantees forbade a rule clearly based on unproven generalizations about gender.

In the *Frontiero* decision, the Court not only explicitly recognized gender discrimination as a factor in inequitable treatment, but it also asserted protection to promote equality. Since the principles of *Frontiero* are applicable to comparable discrimination in other areas of employment, the net effect was to promote diversity in the workforce by removing one of the more insidious forms of discrimination in employment compensation.

Two years later, following the principles laid down in the *Frontiero* case, the Court struck down a provision of the Social Security Act which provided benefits for widows with dependent children, but denied them to widowers (*Weinberger v. Weisenfeld,* 420 U.S. 636 [1975]). The purpose of the benefit was to enable the surviving parent to remain at home to care for the child. To deny the benefit to male parents while granting it to female parents was irrational, the Court declared, since a male parent who has sole responsibility for raising a child faces the same child-care problems as a female parent. Thus, in the equal protection of persons of both genders, *Weinberger* is the counterpart to *Frontiero.* Where *Frontiero* validated the place of women in the workforce, so *Weinberger* validated the appropriateness of men remaining at home in the child-rearing role.

In spite of these charges, the Court has remained cautious, limiting its activity in dealing with gender-based diversity. Four members of the Court, in *Frontiero,* would have placed gender-based discrimination on the same footing as racial-based discrimination. That is, they would have held that classifications based on sex, like classifications based upon race, alien status, or national origin, are inherently suspect and therefore must be subjected to the closest judicial scrutiny. That would mean that a governmental agency accused of discrimination would have to show a "compelling" reason for acting as it did, a much more stringent burden of proof than the usual test that its rule was "rationally related" to a governmental objective.

To date the Court has not accepted that position. Unless it does, or unless the Equal Rights Amendment is ratified, equal protection of gender diversity will remain on tenuous grounds.

The limits of the Court's role in this

"They must be shooting craps. They wouldn't dare be praying."

area may also be seen in two other cases—*Geduldig v. Aiello,* 417 U.S. 484 (1974) and *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976). In these two cases, the Court said it was all right to exclude pregnancy from disability benefit plans, even though benefits were provided for such male-based and equally "voluntary" disabilities as circumcision. The effect was to legitimize a barrier placed in the path of those women who depart from traditional societal values and want to combine the roles of employee and childbearer. (Thanks to a federal act passed after the General Electric case, pregnancy and childbirth must now receive the same treatment as other disabilities under fringe benefit plans.)

More on Diversity and the Court

There is no body of literature on this subject which is both readily available and convenient in form. In the absence of such readings, one must resort to law review journals and the cases themselves, or to more general works. In the latter category, the following may be useful. The appropriate chapters in James Stuart Olson, *The Ethnic Dimension in American History* (1979), summarize both the contemporary and the historical roles of ethnic groups in American society, and Stephen L. Wasby does somewhat the same thing from the Supreme Court's point of view (and includes a few pages on gender discrimination) in *Continuity and Change: From the Warren Court to the Burger Court* (1976). Wilcomb E. Washburn, *The Indian in America* (1975) and Carl Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (1980) are excellent treatments of those two subjects, though neither focuses on the law or the Court.

More Court-oriented works which will provide useful background and occasionally information directly related to the Court's handling of diversity are: Leo Pfeffer, *Church, State and Freedom* (1967), the best brief treatment of the subject, which includes an analysis of major Supreme Court opinions; Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1976), an excellent study of the Court's role in desegregation; and J. Harvie Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (1979), an excellent synthesis but likely to be controversial in its judgments.

Future Directions

Overall, then, the Supreme Court has evolved in its stance toward diversity. For the most part, it has moved in a more open, positive, and constructive direction. Yet, as we have seen, inadequacies still exist in reference to different types of diversity.

Acceptance of diversity seems to be gaining in the Supreme Court. The Court has come a long way from the nonacceptance of religious diversity in the *Reynolds* Mormon polygamy case to the acceptance of religious diversity in the *Yoder* Amish education case. The Court has also come a long way from dealing with blacks as constitutional nonpeople to dealing with them as people with the same rights as all other Americans. In addition, the Court has come a long way from not accepting women as a group to be given Fifth and Fourteenth Amendment protections to accepting gender as a salient factor in the *Frontiero* and *Weinberger* cases.

The issue of protection for diversity is less clear-cut. For example, the *Lau* decision on classroom languages, the *Sherbert* Adventist unemployment compensation decision, the *Fisher* Indian child custody decision, and the *Frontiero* military dependent decision reflect an increasing awareness that acceptance still may not result in equality unless steps are taken to provide group protection. The same holds true for compensatory action for past discrimination and inequality of treatment, as reflected in the recent *Sioux Nation* decision awarding compensation to the Sioux Indians for their historical land loss, and the *Fullilove* decision providing for compensation for historical inequities toward minorities by providing that minority firms receive at least 10% of all contracts for government-funded public works projects.

Yet, as reflected most clearly in the *Bakke* decision, there is still great disagreement on the Court over the nature and degree of protection and compensatory action. Moreover, the Court's reluctance to address many gender-based issues and its treatment of gender-based benefits as in the *Geduldig* and *General Electric* cases indicate that protection and compensation are still volatile issues.

Finally, no one knows what the ultimate effect of Supreme Court diversity decisions will be. Perhaps lower courts and government, private businesses, and individuals will translate certain Court protections and compensation into what some might view as encouragement of diversity. But perhaps the net effect may be less diversity.

The implementation of the *Lau* decision through bilingual education, for example, may be interpreted as encouragement for the retention of non-English languages and non-Anglo cultures. Or it may be viewed as a more effective way of bringing linguistically different children into the U.S. mainstream, thereby reducing the long-range significance of ethnic cultures and home languages.

The Sioux land decision may be implemented by the federal government and by the Sioux themselves as a means of reinforcing Sioux culture and identity. Or it may be implemented in such a way as to actually undermine the Sioux culture.

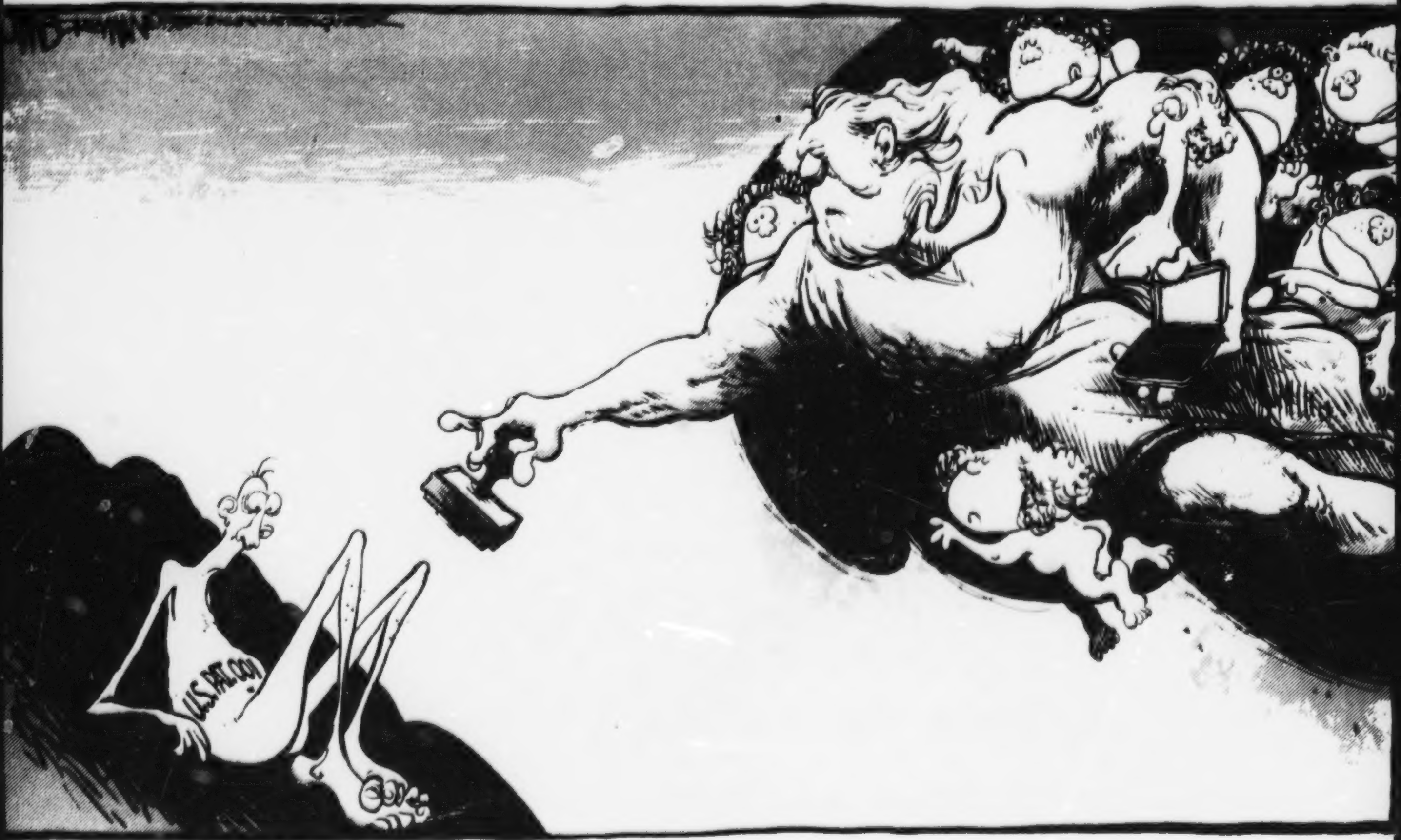
The *Sherbert, Frontiero,* and *Weinberger* decisions may be viewed as promoting societal diversity by encouraging "culturally different" groups to seek redress through the courts and, indirectly, to be less concerned with tradition, conformity, or the proverbial, if mythical, "melting pot." Or these decisions may be seen as changing the very definition of what it means to be an American and to enjoy American rights.

History has already wrought significant changes in the ways that the Supreme Court has dealt with societal diversity. As history continues, the societal climate will continue to change and, with it, the Supreme Court of the future. The meaning of those future changes for diversity are impossible to foretell.

Clearly the Court has fashioned a variety of devices which may be used to promote diversity, but how will they be used—or not used? If the loudly proclaimed "swing to the right" should occur, what would it mean for the Court's stance toward diversity? What would the passage or defeat of the Equal Rights Amendment mean in terms of Court decisions toward diversity or even its willingness to hear certain cases? What impact will the growing number of culturally and linguistically different immigrants have on U.S. society and Court reactions?

Whatever the answers to these questions, diversity will always be with us and, for that reason, will always be an issue for our legal system. ☐

Walter M. Perkins



A Supreme Court Round-up

The Court answers questions ranging from "Can life be patented?" to "When must Miranda warnings be given?"

What if no one showed up at the polls this election year? What if it didn't really matter who was elected president in 1980? As increasing numbers of the American public are apparently disenchanted with the lackluster offerings of the major parties, some people are beginning to wonder out loud whether the real political power in this country isn't vested in the judicial branch as opposed to the executive or legislative.

The judiciary as epitomized by the United States Supreme Court is, at least theoretically, immune from the goings on in the political marketplace. Nevertheless, it took politics to get them there, although once appointed they remain until death or impeachment. The presidential sweepstakes takes on an added dimension when one considers that seven out of nine of the current Supreme Court justices are Republican appointees. It gets even more interesting when you look at the ages of the incumbents and realize that five of them are over 70 years of age. The next president could conceivably fill all of those vacancies with fresh "partisan" blood.

In a time when the citizens of this country are desperately looking for strong leadership, this Supreme Court has consistently failed to provide it. Evidence of this is seen in the narrowness of some of its decisions that significantly affect social policy, like the recent 5-4 abortion decision. This court has also become known for its numerous dissenting opinions.

The Supreme Court was particularly busy this term, handing down major decisions in the areas of abortion, affirmative action, Indian rights, and search and seizure. It becomes increasingly difficult to put a label on the court, as its justices agree in many major decisions but seemingly have a difficult time agreeing on the rationales. Here are some of the more important cases decided this term.

And You Thought the Electric Light Was a Bright Idea

In a decision that propels us beyond the scary "Orwellian" predictions in the classic novel *1984*, the Supreme Court in a 5-4 decision in *Diamond v. Chakrabarty*, (48 L.W. 4714) has ruled that laboratory-created organisms may be patented under current U.S. patent laws. The closeness of the decision indicates that the ruling should be given a very narrow reading.

Despite the science fiction and futuristic overtones, the original case was filed back in 1972, when microbiologist Ananda M. Chakrabarty filed a patent application to protect his invention of bacteria which were capable of breaking down multiple components of crude oil. This, of course, is a tremendous aid in fighting oil spills. Naturally occurring bacteria are only able to break down simple components of crude oil.

While the subject of this particular case took many people by surprise, many large scientific and research organizations have been involved in genetic engineering for a number of years. Many hormones and disease-fighting organisms have already been created. While genetic engineering has its strong supporters, many persons are somewhat frightened of its potential power and possible future directions and implications.

At issue was the congressional intent of 35 U.S.C. § 1101 which reads, in part: "Whoever invents or discovers a new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent thereof, subject to the conditions and requirements thereof."

The majority opinion written by Chief Justice Burger and joined by Justices Stewart, Blackmun, Rehnquist and Stevens said that the plain language of the statute and its legislative history indicated that "Congress thus recognized that the relevant distinction was not between living and inanimate things but between products of nature, whether living or not, and human-made organisms." Therefore, according to the majority, any man-made organisms may be patented under the current patent laws. The majority emphasized that "laws of nature (Newton, Einstein), physical phenomena and abstract ideas are not patentable."

Justice Brennan, writing for the dissent, was joined by Justices White, Marshall and Powell. While ostensibly looking at the same statute and legislative history, the dissent concluded that Congress originally intended the patent laws to cover inanimate but not living things. Therefore, they concluded bacteria should not be patented. As support, Brennan cited the 1930 Plant Patent Act which extended patent protection to certain asexually reproduced plants. The minority also cited the 1970 Plant Variety Protection Act which patented certain sexually reproduced plants but specifically excluded bacteria.

Quoting Hamlet ("It is sometimes better to bear those ills we have than fly to others that we know not of") in recognition of those who are against the new trend toward genetic engineering, the majority stood firm, saying "The grant or denial of patents on micro-organisms is not likely to put an end to genetic research or to its attendant risks."

The Supreme Court stayed away from the sci-fi overtones of genetic engineering, and its decision was narrowly drawn, but the case will be debated for years.

Lest anyone get the idea that this is a landmark case, it should be noted that in 1873 the Patent Office granted Louis Pasteur a patent on "yeast free from organic germs or disease, as an article of manufacture." We guarantee that you'll hear more about this one.

Miranda One More Time

The seemingly straightforward dictates of the *Miranda* warnings have been subjected to some curious judicial interpretations on the one hand while being the subject of countless disputes between legal scholars and laypeople on the other.

Miranda, you will recall, enunciated the rights that a criminal suspect is entitled to once arrested. One of those "rights" requires that "interrogation" of a suspect must cease once he asks to consult with an attorney. Finally, after 14 years, the Supreme Court has gotten around to defining interrogation and its limits.

In *Rhode Island v. Innis* (48 L.W. 4506), defendant Thomas Innis led police to a gun believed to be used by him in the murder and robbery of a cab driver, after one of the officers casually suggested to him that there was a school for handicapped children nearby and "God forbid" if one of them found the gun and was injured by it.

The suspect, who had been given his rights at least three times and had already requested an attorney, then broke down and led police to the weapon. At issue is what the definition and limits of interrogation are within the meaning of *Miranda*.

Justice Potter Stewart, speaking for a 6-3 majority, said that "interrogation refers not only to express questioning, but also to any words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating reponse from the suspect."

That would make it seem like Stewart was about to agree with Innis that the remarks constituted "interrogation," but Stewart went on to say "Since police surely cannot be held accountable for the *unforeseeable* results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." The Court upheld Innis's conviction at the trial court level by viewing his actions as an unforeseeable result of the officer's comments.

The nation's law enforcement officers now have the difficult task of enforcing a decision that, at least on the surface, flies in the face of the spirit of the *Miranda* decision. *Miranda* specifically said "any evidence that an accused was threatened, tricked or cajoled into a waiver [of his right to remain silent] will of course show that the defendant did not voluntarily waive his privilege." (384 U.S. 486 [1966]). Future courts will have to determine whether ostensibly unintentional or informal appeals to the morality or consciousness of a criminal suspect, who has already asserted his right to remain silent, violates *Miranda*.

Justice Marshall, in a dissent joined by Justice Brennan, said, "One can scarcely imagine a stronger appeal to the conscience of a suspect than the assertion that if the weapon is not found an innocent person will be hurt or killed." He continued saying, "As a matter of fact, the appeal of a suspect to confess for the sake of others, 'to display some evidence of decency and honor,' is a classic interrogation technique." (*See* F. Inbau and J. Reid, *Criminal Interrogation and Confessions*, pages 60-62, 2d ed. 1967.)

Justice Stevens, in a separate dissent, reminded the majority that "*Miranda* requires that the term 'interrogation' be broadly construed to include either 'express questioning or its functional equivalent.'" Stevens continued saying, "In my view any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question, whether or not it is punctuated by a question mark. The Court, however, takes a much narrower view. It holds that police conduct is not the 'functional equivalent' of direct questioning unless the police should have known that what they were saying or doing was likely to elicit an incriminating response from the suspect. This holding presents a plain departure from the principle set forth in *Miranda*."

A Home Remains a Castle

The Supreme Court has come down firmly in favor of protecting the sanctity of the threshold against unreasonable police intrusion. In one of the more important Fourth Amendment decisions in recent years, the Supreme Court has ruled 6-3 that a New York statute authorizing police officers to enter private residences with force (if necessary) and without warrants to make a routine felony arrest is unconstitutional. This decision will have an immediate and far-reaching effect on New York and 23 other states that have similar statutes.

Justice John Stevens, writing for the majority, in *Payton v. New York* (48 L.W. 4375) and joined by Justices Brennan, Stewart, Marshall, Blackmun, and Powell, states that the "Fourth Amendment's ban on unreasonable search and seizure, long interpreted as prohibiting warrantless searches in the home, applies equally to arrests in the home." Continuing, Justice Stevens said, "Absent exigent [emergency] circumstances, the threshold may not reasonably be crossed without a warrant." In making their decision the Court closed a significant gap in the Fourth Amendment that had been present since *United States v. Watson* (423 U.S. 411 [1976]) was handed down. *Watson* held that a warrant was not necessary to arrest a person in a public place.

Payton actually involved two separate warrantless arrest situations. On January 16, 1970, New York City detectives believed that they had "probable cause" to arrest Theodore Payton for murdering a gas station manager two days earlier. Acting without an arrest warrant, detectives proceeded to Payton's house at 7:30 A.M. to arrest him. Despite music and lights on at the apartment, police concluded that no one was home. They then summoned assistance and used crowbars to enter the dwelling. Inside, they found the apartment empty but observed a 30-caliber shell casing (in plain view) which was seized and admitted as evidence in Payton's murder trial.

Although Payton attempted to suppress the 30-caliber shell as evidence, the trial court held that the warrantless and forcible entry was authorized by the New York Code of Criminal Procedure. The lower court further found that the 30-caliber shell casing was properly seized since it was in plain view.

In a related case which was consolidated into *Payton* because of the similarity of the issues, one Obie Riddick was arrested on March 14, 1974, for two armed robberies which occurred in 1971. The police failed to obtain an arrest warrant.

When detectives went to Riddick's house to arrest him, his three-year-old son responded to their knocks on the door by letting them into the apartment where the defendant was lying on a bed. Before permitting him to dress, detectives searched the room he was in, confiscating narcotics and drug-related paraphernalia. The defendant was subsequently indicted on narcotics charges. The trial court upheld the entry, arrest, and search as being authorized by the New York Code of Criminal Procedure.

In affirming the conviction of Payton and Riddick the New York Court of Appeals (New York's highest appellate court) said: "There is a substantial difference in circumstances allowing entry to search a dwelling and situations where police seek entry to make an arrest."

The Supreme Court, in overruling the New York court, found that there are no significant differences between warrantless entries to conduct searches and warrantless entries to effect arrests. Justice Stevens stated, "In terms that apply equally to seizure of property and seizure of people, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

Writing for the minority, Justice Byron White (author of the *Watson* opinion), argued that the majority failed to correctly interpret the Fourth Amendment. He said, "The Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than somewhere else."

As rationale, Justice White cited four major common law restrictions as amply protecting defendants' Fourth Amendment rights. Common law required the following steps in order for officers to effect a warrantless arrest at one's dwelling: They must be in pursuit of a felon; they must knock; they must announce their presence; they can come only during daylight hours.

The majority emphasized that the *Payton* ruling applies to nonemergency situations only. They did not give guidelines concerning what circumstances are considered exigent.

Don't Leave Home Without It

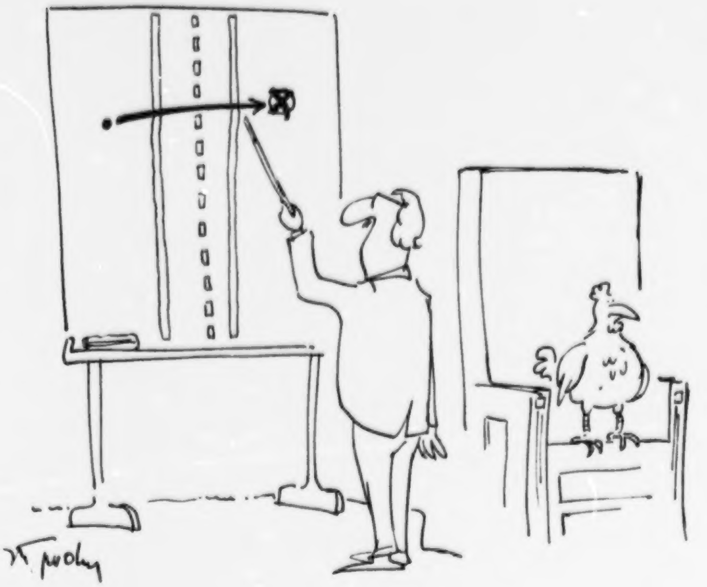
Still another search and seizure decision will have many business people chaining themselves to their briefcases. The Supreme Court has ruled 6-3 in *United States v. Payner*, (48 U.S.L.W. 4829) that evidence illegally seized from a third party may be used against a defendant as long as the defendant was not the direct victim of the illegal activity.

The defendant, Jack Payner, was charged with falsifying his federal income tax return by denying that he had a foreign bank account. However, the IRS, in its characteristically diligent manner, later uncovered documents indicating that Payner had executed a loan agreement pledging the proceeds of a Bahamian bank account as security.

How did the IRS happen upon this incriminating information? In a caper known officially as "Operation Trade Winds" and unofficially as the "Briefcase Caper," the Internal Revenue Service investigated financial affairs of American citizens in the Bahamas and had occasion to photograph documents that were in the briefcase of a Bahamian banker.

To do this the IRS enlisted the aid of a number of private investigators and informants, including one Sybol Kennedy, who dined with the banker, a Mr. Wolstencroft, while a locksmith helped IRS agents enter Wolstencroft's hotel room where they photographed the contents of his briefcase, including the loan agreement.

Finding himself on trial for income tax



evasion, Payner moved to suppress the loan agreement as a violation of his Fourth Amendment rights. The federal district court rejected this argument, citing the general rule that the Fourth Amendment protects only those whose legitimate privacy interests have been violated. It is well settled that bank depositors do not have expectations of privacy and therefore no protectable Fourth Amendment interest in copies of checks or deposit slips retained by a bank (*United States v. Nille,* 425 U.S. 435 [1976]).

It is also agreed that a defendant has no legal standing to assert the Fourth Amendment in cases where a third party's Fourth Amendment rights have been violated (*United States v. Nille*). The district court, however, excluded the illegally seized evidence by exercising its inherent supervisory powers under the Constitution. These powers have traditionally been exercised to (1) deter *intentional* illegal activity by government agents and (2) to protect the integrity of the courts.

Before invoking its supervisory powers the trial court noted that "the IRS counsels its agents that the Fourth Amendment's standing limitation allows them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties."

In reversing the court of appeals, which had upheld the lower court's exercise of its supervisory powers, the Supreme Court said that "the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party."

Writing for the minority, Justice Marshall, joined by Justices Brennan and Blackmun, cited numerous instances where the court's supervisory powers have been used to suppress evidence illegally obtained by government agents.

Marshall also criticized the majority: "The Court's decision to engraft the standing limitation of the Fourth Amendment onto the exercise of the supervisory powers is puzzling not only because it runs contrary to the main purpose of the supervisory powers—to protect the integrity of the court—but also because it appears to render the supervisory powers superfluous. In order to establish that suppression of evidence under the supervisory powers would be proper, the Court would also require Payner to establish a violation of his Fourth or Fifth Amendment rights in which case suppression would flow directly from the Constitution. This approach is totally unfaithful to our prior supervisory power cases, which, contrary to the Court's suggestion, are not constitutional cases in disguise."

The Exclusionary Rule Is Further Eroded

In a further refinement of the famous "fruit of the poisonous tree doctrine" (*Wong Sun v. United States,* 371 U.S. 971 [1963]) the Supreme Court said that an in-court identification by a robbery and assault victim could be admitted as evidence even though police lacked probable cause to make the initial arrest.

Their reasoning? According to the Court, the victim's in-court identification was based on her observance of the defendant at the time of the crime and was not a result of his subsequent unlawful detention by officers. Readers will recall that the "fruit of the poisonous tree" doctrine prohibits officers from using evidence obtained in an illegal manner. In *United States v. Crews* (48 L.W. 4324), decided recently by the Supreme Court (Justice Marshall did not sit because of illness), the defendant was trying to pass himself off as a "suppressable fruit" because of the illegal nature of his arrest.

The scenario? A number of women had been assaulted and robbed in a restroom near the Washington Monument. One of the victims had given officers a fairly clear, though general description of her assailant. Based on this description officers staked out near the scene and observed a suspect, later identified as Keith Crews. They approached him and asked his age (16) and why he wasn't in school. They also informed him of his resemblance to the suspect but allowed him to leave. Officers then summoned a tour guide who had previously reported a young man loitering around the area on the day of one of the assault/robberies. The guide tentatively identified Crews as that young man.

Based on this and the earlier description of the assailant, officers apprehended Crews as a suspected truant. He was taken to police headquarters, questioned, photographed, and released. The next day the victim made a positive picture identification of Crews as her assailant. She and two other victims subsequently made lineup and court identifications.

In convicting the defendant, the trial court suppressed the photo and lineup identification because the initial arrest lacked probable cause, making it illegal. The victim's in-court identification was allowed because the trial court viewed it as being independent of the original detention. The District of Columbia Appeals Court reversed the conviction and ordered suppression of the first victim's testimony citing it as "fruit of the poisonous tree." The Supreme Court reversed the appellate court citing the holding in *Gerstein v. Pugh* (420 U.S. 103 [1975]) which stated that "an illegal arrest, without more, has never been considered a bar to a subsequent prosecution, nor as a defense to a valid prosecution."

The Court asserts that before Crews was ever approached the police had already obtained "evidence" that implicated him in the crime. The "evidence" they referred to was the general description of the suspect previously given to the police by the victim.

The Court via Justice William Brennan distinguished this case from *Dawn v. Mississippi* (394 U.S. 721 [1969]), where the defendant's identity and connection to illegal activity was only discovered after an illegal arrest and search. Instead, *Bynum v. United States* (274 F.2d 767 [1960]), was cited as precedent for this decision. Brennan said, "The parallels between *Bynum* and this case are apparent. The pretrial identification obtained through use of a photograph taken during respondent's illegal detention cannot be introduced; but the in-court identification is admissible, even if the respondent's argument be accepted, because police knowledge of respondent's identity and the victim's independent recollection of him both antedated the unlawful arrest and were thus untainted by the constitutional violation."

Antiabortionists Win This Round

The Supreme Court's recent 5-4 decision upholding the constitutionality of the controversial "Hyde Amendment" which denies federally funded abortions to the poor, except in very narrowly defined instances, prompted nationally syndicated columnist Carl Rowan to make the following analysis: "The Supreme Court's new social policy permits lawmakers cowed by religious zealots to say to poor women: 'If you give birth to a baby, we will pay the costs of birth. If you can't afford to have the baby, or care for it, we will declare it dependent—sort of. But we won't pay to help you not have a baby, because we are adopting the religious-social doctrine that if you get pregnant, you've got to have the baby.'"

This case, *Harris v. McRae* (48 L.W. 4941), involved a statutory issue as well as several constitutional issues. Title XIX, the statute in question, was enacted in 1976 as an amendment to the Medicaid program. The purpose of Title XIX is to provide federal assistance to participating states who wish to provide certain medical benefits to poor people. The issue considered by the Court was whether Title XIX required states to fund the cost of medically necessary abortions when the Hyde Amendment prohibits federal reimbursements.

The federal district court found that before the enactment of the Hyde Amendment, Title XIX would have required participating states to include medically necessary abortions in its Medicaid program. The Hyde Amendment, however, relieved individual states of that obligation.

In agreeing with the trial court, Justice Potter Stewart, speaking for the majority and joined by Chief Justice Burger and Justices White, Powell, and Rehnquist, said: "It's well settled that if a case may be decided on either statutory grounds or constitutional grounds, this Court for sound jurisprudential reasons, will inquire first into the statutory question. This practice reflects the deeply rooted doctrine 'that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable.'" (*Spector Motor Co. v. McLaughlin,* 323 U.S. 101 [1944].)

Justice Stewart continued, saying, "Title XIX was designed as a cooperative program of shared responsibility, not as a device for the federal government to compel a state to provide service that Congress itself is unwilling to fund."

The Court then turned to the various constitutional issues presented by this case. Among other claims, the plaintiffs contended that the Hyde Amendment was a violation of the "Liberty Clause" of the Fifth Amendment.

Liberty was construed in the landmark *Roe v. Wade* case (410 U.S. 113 [1973]) as giving women during the early stages of pregnancy the freedom to choose whether they wished to have an abortion. A later case, *Maher v. Roe* (432 U.S. 464, [1977]), involved a Connecticut welfare regulation that permitted payments to pregnant women for medical expenses related to childbirth, but withheld payments for abortions that were not considered medically necessary. The Supreme Court said that the "liberty" granted in *Roe v. Wade* did not include medical subsidies for abortion not considered to be medically necessary.

The Hyde Amendment allows federal funds to be spent on abortions only where rape or incest has occurred and been promptly reported to authorities, or where the prospective mother's life is endangered. This is a very narrow interpretation of "medically necessary." The Hyde Amendment does not allow federal funds to pay for abortions for cases where full-term pregnancy would cause other physical or psychological harm to the prospective mother. In deciding whether Hyde violated the "Liberty Clause" within the meaning of *Roe v. Wade,* Justice Stewart said, "To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services."

The Court then turned to the First Amendment claims of the plaintiffs, who had also alleged that the Hyde Amendment violated the "Establishment of Religion" and "Free Exercise of Religion" clauses. The Court quickly dismissed both claims, saying that plaintiffs lacked standing under the "Free Exercise Clause" since none of them indicated that their desire for an abortion was based on personal religious beliefs. Concerning the "Establishment Clause" claim, the Court said that the fact that the Hyde Amendment's funding restrictions coincide with the tenets of the Roman Catholic Church does not in and of itself indicate a violation of the "Establishment Clause."

The final issue for disposition was the plaintiffs' contention that the Hyde Amendment was not rationally related to a legitimate governmental purpose and thus in violation of the Fifth Amendment's "Equal Protection Clause."

In finding that the Hyde Amendment did not violate the "Equal Protection Clause" Justice Stewart said, "Where as here, Congress has neither invaded a substantial constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that Congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard."

"Equal Protection" enthusiasts will recall that the Court uses what is known as the two-tier analysis in deciding "Equal Protection" cases. The first tier requires laws to bear a rational relationship to a legitimate governmental activity. If the law does not involve a group with a "suspect classification" and is rational, it is presumed constitutional. The fact that a particular law may have an adverse, disproportionate effect on a particular group does not necessarily render it unconstitutional.

"Suspect class" refers to those groups who, because of their historic adverse treatment by the legal and social system, have been given special protection by the government. Laws that involve classifications based on race, national origin or alien status are all considered inherently suspect.

In such cases, the Court will employ "rigid scrutiny" in determining the constitutionality of such classifications. This doctrine shifts the burden of proof to the government and requires it to show that the law is more than rational; a law's existence must be explained by a compelling necessity.

Justice Marshall in a separate dissent (Brennan, Blackmun and Stevens also dissented) said, "In this case, the federal government has taken upon itself the burden of financing practically all medically necessary expenditures. One category of medically necessary expenditures has been singled out for exclusion. The consequence is a devastating doctrine that impacts on the lives and health of poor women. I do not believe that a Constitution committed to the equal protection of the laws can tolerate this result."

Court Rights Old Wrong

What originally began as a military battle over the rightful ownership of the legendary Black Hills in South Dakota, has culminated in the unprecedented granting of $122 million in principal and interest to the Sioux Nation in *United States v. Sioux Nation of Indians* (48 L.W. 4960) decided by the Supreme Court.

The ghostly presence of historical adversaries, General George Armstrong Custer and Sioux Chiefs Sitting Bull and Crazy Horse, were felt recently as the Supreme Court decided 8-1 (Rehnquist dissenting) that an 1877 congressional act nullifying the 1868 Fort Laramie Treaty between the U.S. government and the Sioux, was in effect an unconstitutional taking of property without just compensation within the meaning of the Fifth Amendment.

The Fort Laramie Treaty pledged that the Great Sioux Reservation, including the Black Hills, were to be set aside for the exclusive use of the Sioux Nation. The treaty further specified that none of the land involved could be parceled off without the written consent of three-fourths of the adult male Sioux population.

As military history buffs will recall, however, gold was discovered in the Black Hills after execution of the 1868 treaty. The United States government, finding itself unable to keep greedy white prospectors off of the land and ostensibly acting "in the best interests of the Sioux," set up a special Indian Commission in 1876 to study the problem. The commission drew up an agreement signed by only 10% of the adult male Sioux population, which took away the Indians' right to over seven million acres in return for subsistence rations, hunting rights and other government largess. An 1877 congressional act formalized the agreement into a law which has been the subject of much long and bitter litigation.

In 1920 Congress enacted a special jurisdictional act, which for the first time gave Indian tribes a forum for litigating claims against the United States. In 1923 the Sioux Nation sued the United States in the Court of Claims saying that the government had taken the Black Hills without just compensation. In a unanimous decision in 1942 the court of claims said that it was not authorized to decide whether the compensation given the Sioux for the Black Hills in 1877 was adequate. It further characterized the Sioux claim as a moral claim that is not protected by the Just Compensation Clause.

In 1946 Congress enacted the Indian Commission Claim Act, which was the first general legislation allowing tribes to litigate treaty claims against the United States. Pursuant to the statute the Sioux refiled their Black Hills claim with the Indian Claim Commission in 1950. After much deliberation, in 1968 the Commission listed three questions for determination: (1) What land and rights did the United States acquire from the Sioux by the 1877 Act? (2) What, if any, consideration (compensation) was given for that land and those rights? and (3) If there was no consideration for the government's acquisition of the land and rights under the 1877 Act, was there any payment for such acquisition?

In 1974 the Commission decided that Congress was exercising its power of eminent domain when it passed the 1877 Act, instead of as trustee for the Sioux. They concluded that the government must pay just compensation to the Sioux for the Black Hills. The government appealed to the Court of Claims on the issue, citing res judicata. Res judicata means that the issue has already been litigated and decided. The Court of Claims, in finding for the government, agreed that the taking of the Black Hills had already been decided back in 1942.

In 1978 Congress passed a statute that allowed the Court of Claims to review the Indian Claim Commission's 1974 decision notwithstanding the res judicata issue. In 1979 the Court of Claims affirmed the Indian Commission's 1974 decision in favor of the Sioux.

The Supreme Court, in a majority opinion by Justice Harry Blackmun, first considered whether the 1978 statute was a violation of the separation of powers doc-

"And he gets visitation rights to your hair dryer."

trine. In holding that Congress did not overstep its bounds in enacting the statute the Court made the distinction between situations where Congress merely creates new legal rights and where it seeks to influence the outcome of a judicial decision. The latter would be a clear violation of the separation of powers doctrine while the former is clearly within Congress's powers.

Justice Blackmun said, "In sum, Congress's mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers."

The second major issue that the Court had to consider was whether the 1877 Act amounted to a taking without just compensation in violation of the Fifth Amendment. After a thorough review of the applicable cases, the Supreme Court via Justice Blackmun concluded that "the 1877 Act effected a taking of tribal property which had been set aside for the exclusive occupation of the Sioux in the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the government to make just compensation to the Sioux Nation, including an award of interest, which must now, at last, be paid."

In reaching this decision Justice Blackmun said that it was reasonable to conclude that the government's grant of ration, hunting rights and other amenities was an attempt to compensate the Sioux for depriving them of their chosen way of life and not compensation for the Black Hills.

Justice William Rehnquist, the lone dissenter, in substantiating his claim that Congress violated the separation of powers doctrine by passing the 1978 Act, said, "What Congress has done is uniquely judicial. It has reviewed a prior decision of an Article III Court, eviscerated the finality of that judgment, and ordered a new trial in a pending case."

First Amendment Resurrected—Somewhat

The Supreme Court's decision last term in *Gannett v. DePasquale* (47 L.W. 4902) allowing pretrial hearings in criminal cases to be closed to the public and press had some media persons, perhaps prematurely, sounding the death knell for the First Amendment. *Gannett,* you will recall, specifically said that the Sixth Amendment right to a public trial is personal to the defendant and may be exercised by him alone.

As predicted, the current round of media access cases involves the trial itself. This term, the Supreme Court in *Richmond Newspapers, Inc. v. Virginia* (48 (L.W. 3549) decided 7–1 that "absent in overriding interest articulated in the findings, the trial of a criminal case must be open to the public." Chief Justice Warren Burger wrote the majority opinion and Justice William Rehnquist was the lone dissenter. Justice Lewis Powell did not sit.

The defendant in the *Richmond* case had been previously tried for murder on three separate occasions, with one conviction being reversed and the other two sessions ending in mistrials. Fearing that the defendant might be prejudiced by adverse publicity, the defense motioned to have the fourth trial closed to the public, including the press. The prosecution did not object to this move. Richmond Newspapers, Inc. subsequently filed suit challenging the court's decision as an abridgement of the press's First Amendment right to public access to news-making events.

The Richmond case says that trials must be open to the public, but it doesn't provide guidelines, and seven different opinions don't help much

In reversing the Virginia court, Chief Justice Burger said that the trial judge failed to determine whether there were other ways to ensure that the defendant's fair trial guarantees were maintained. He also cited the trial judge for failing to list in the record his reasons for closing the trial. In sum, the majority said that the lower court apparently didn't recognize any public right to attend trials. Yet, the Supreme Court gave only minimal guidelines for open courtrooms, while ruling in favor of the concept.

Supreme Court buffs will recall that in most cases the Court hands down a majority and minority opinion. In some instances where they are in accord on the result but not the rationale, individual justices will write separate concurring and separate dissenting opinions. People on both sides of the media access issue are no doubt readying themselves for the next round of cases, especially in light of the fact that there were seven different opinions in this case.

To Classify or Not to Classify

The affirmative action seesaw continues as civil libertarians scored a significant victory in *Fullilove v. Kreps* (48 L.W. 3365). For the third time in three terms the Supreme Court has decided a major case involving the rights of minorities in higher education and the workplace. (*Bakke* and *Weber* were the previous cases.)

In a 6-3 opinion, the Court upheld the 1977 Public Works Act which specified that 10% of the $4 billion in available funds be given to minority contractors. Minority business enterprises were defined as companies in which blacks, Hispanic-Americans, Oriental-Americans, American Indians, Eskimos or Aleuts had at least a 50% interest.

The "set aside" provision was challenged in a number of lawsuits by trade associations representing nonminority construction companies around the country. Their contention was that the program constituted an unconstitutional preference based on race.

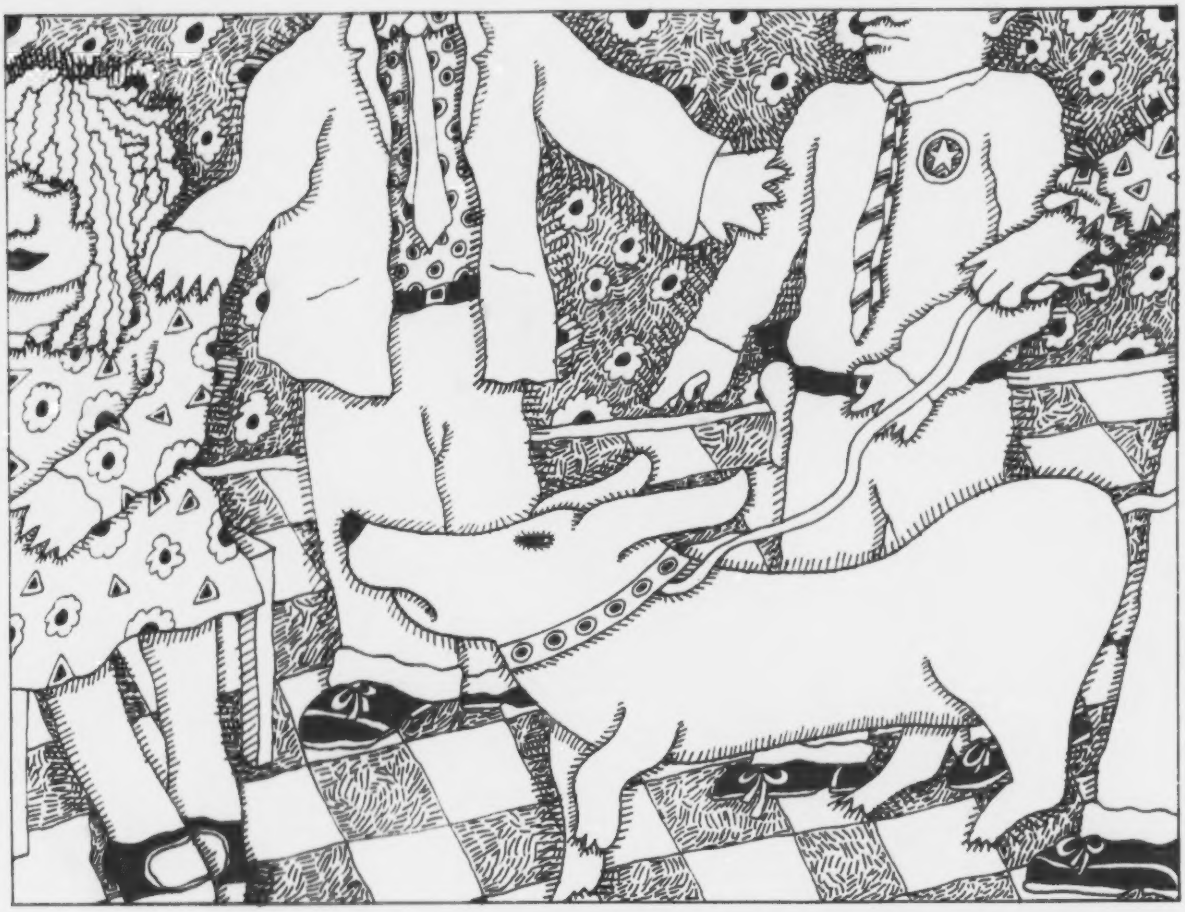
At issue are the limits of Congress in legislating remedial procedures where there has been documented, historical racial discrimination against certain groups. Chief Justice Burger, in an opinion joined by Justices Byron White and Lewis Powell, intimated that Congress had reason to conclude that minority contractors had suffered from discrimination as well as the constitutional authority to remedy the problem.

Burger said, "We reject the contention that in a remedial context Congress must act in a wholly color-blind fashion. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." The other majority opinion was written by Justice Thurgood Marshall and joined by Justices Harry Blackmun and William Brennan.

In one of two dissents, Justice Potter Stewart, joined by Justice William Rehnquist, stated, "It took many decades after the adoption of the Fourteenth Amendment before the states and federal government were finally directed to eliminate detrimental classifications based on race. Today the Court derails this achievement and places its imprimatur on the creation once again by government of privilege based on birth." Justice John Paul Stevens wrote a separate dissent. ☐

PRACTICAL LAW

Patricia McGuire



Privacy in School: Something to Sniff At?

> . . . the students did not have a justifiable expectation of privacy that would preclude a school administrator from sniffing the air around the desks with the aid of a drug-detecting canine . . . *Doe v. Renfrow*, 475 F. Supp. 1012 (1979)

If students in school do not have a justifiable expectation of privacy in the scent they may emit, what, if any, privacy may they expect in the school setting? Can students reasonably expect to be free from searches and surveillance of their persons and possessions, lockers and private actions? May they control information generated about them during their school years?

The answers to these questions are diverse, at times enigmatic. The answers are difficult, not only because of the traditional "ifs," "ands," and "buts" lurking in every question of the law applied in school, but also because of the complex nature of the right to privacy itself.

"The right to be let alone. . . . The right to control information about oneself. . . . The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." All of these, and more, are part of the mosaic of privacy. The late Supreme Court Justice William O. Douglas best described this mosaic as "zones of privacy" created by the penumbralike effect of rights emanating from the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution.

Fascinating as the evolving legal doctrine of privacy may be for scholars and specialists, what practical value does this right have for students, as they watch a canine team sniffing up and down the rows of their classroom? Can they do something to protect themselves?

As the following articles report, students in school do have some significant rights to privacy, particularly with regard to educational records. However, in the realm of personal privacy and student search, the law continues to evolve, as courts try to find the balance between the privacy interests of students, and the obligation of school officials to preserve the safety of the school environment and the productivity of the educational process.

The Fourth Amendment Goes to School

> Any expectation of privacy necessarily diminishes in light of a student's constant supervision while in school. Because of the constant interaction among students, faculty, and school administrators, a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting. *Doe v. Renfrow*

To what extent may a student's privacy right be diminished by the school environment? That's a matter of great debate among state courts and a few federal courts. Central to the debate is the balance between the need for order and control in the educational process versus the amount of protection afforded students by the Fourth Amendment.

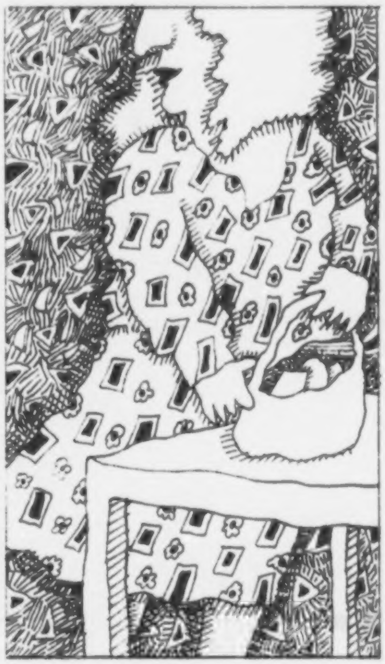
While the Supreme Court has accorded students rather considerable free speech rights (*Tinker v. Des Moines Independent School District*, 393 U.S. 503 [1969]), and has extended to them at least minimal Fourteenth Amendment due process protections (*Goss v. Lopez*, 419 U.S. 565 [1975]), the Court has yet to rule on the applicability of the Fourth Amendment to students in school.

Outside of the school context, the Fourth Amendment presents enough puzzling questions to keep all courts busy. Simply stated, a search conducted by a law enforcement officer is presumed to be unreasonable, and thus unconstitutional, unless it is conducted under the authority of a warrant, issued by a judge or judicial officer, and based on probable cause, which is a reasonable belief that a crime has been, or is being, committed.

The Supreme Court has recognized a few instances in which a search may be reasonable even if conducted without a warrant. These instances include: (1) searches conducted immediately after a legal arrest, limited to the person arrested and area of his or her immediate control; (2) searches conducted to ensure the safety of the police officer (the *Terry* case's "stop and frisk" exception); (3) searches conducted in emergency situations to prevent a suspect from escaping or evidence from being destroyed; (4) searches resulting from the officer's seeing illegal items in plain view; (5) searches by the consent of the person searched; and (6) searches in special locations, including borders and airports.

How Courts Decide

Almost no searches of students by school administrators are conducted under the authority of warrants. Nor do school searches usually fall within any of the categories of acceptable warrantless search. Rather, because of the way that most courts have treated them, school searches emerge as an entirely separate species.



Courts generally ask one or more of four primary questions in student search cases:

1. Did the student have a justifiable expectation of privacy in a particular area at the time the search began?
2. Did the status of the person conducting the search trigger enough "state action" considerations to require the application of the Fourth Amendment?
3. Was the scope of the search reasonable through to its termination?
4. Was the intent of the search to uncover evidence for school disciplinary proceedings, or for criminal prosecution?

If the answer to question number one is no, the court may or may not proceed further. Locker search cases frequently turn on this issue. Because the school owns the lockers, reason some courts, the school may inspect them at any time. A few courts, while ruling in favor of the school, have suggested that it would be most appropriate for the school authorities to give students written notice of the school's right to inspect.

Along with locker searches, courts may get no further than question number one in cases involving surveillance of student actions in public places, or, as suggested by the *Renfrow* excerpt, dog searches. Some courts see the special nature of the school setting and the relationship between students and teachers as placing limitations on what might otherwise be legitimate expectations of personal privacy. On the other hand, personal searches of a student's body, clothing, or immediate possessions usually will result at least in a "yes" answer to question number one, and so a move to the next level of inquiry.

The second critical question in student search cases is: who conducted the search, and by what legal principles is that person's action governed? The cases generally fall within three categories on this issue: searches initiated and conducted by police officers; searches initiated and conducted by school officials with the assistance of police officers; and searches initiated and conducted by school officials alone.

In general, if police officers initiate and conduct a search of a student or student's possessions in school, courts will test the legality of the search by full-blown Fourth Amendment standards. A police search must be conducted with a warrant based on probable cause, or within one of the recognized exceptions to the warrant requirement, listed above.

However, if the police are simply ancillary to a search initiated and conducted by school officials, the cases are not so clear; courts are divided on the issue of whether any police involvement at all requires that the search be measured by full Fourth Amendment standards. Finally, if the police are not involved in any way, and if the search is initiated and conducted solely by school officials, a majority of state courts will not apply full-blown Fourth Amendment standards in determining whether the search violated student rights.

The cases involving searches of students by school personnel raise this ques-

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tion: are the school officials acting as agents of the government, or as private individuals? Again, the answers given by state courts to this question are diverse, but the decisions may be classified into three general schools of thought:

1. Because of the *in loco parentis* doctrine, the school official is a private individual, and therefore the Fourth Amendment does not apply to that person's actions. *In loco parentis*, "in the place of parents," is the traditional common law doctrine that gives teachers and administrators the equivalent of parental authority over students. While the principle has been diminished with increased recognition of student rights, courts may still invoke it in particular types of cases, such as search cases.
2. The school official is a state agent, but is not a law enforcement officer within the meaning of the Fourth Amendment. For this reason, and because of the *in loco parentis* doctrine, searches of students by school officials do not need to meet the probable cause test for legality. Rather, the search will be legal if the school official had some "reasonable suspicion" that the student was involved in some wrongdoing, or that the safety of students was in danger. (The majority of state courts which have ruled on the issue have articulated a variation of this principle.)
3. The school official is a state agent and is the equivalent of a law enforcement officer. Therefore, the search must be tested by full-blown Fourth Amendment standards.

As for questions number three and four, two 1979 federal court rulings indicate that the standard by which a school official's search of a student is judged may shift, depending upon the scope of the search, and the intent of the school officials in conducting the search. While something less than probable cause may be sufficient to justify a search of possessions or even a "pat-down" of the student's clothing, a "highly intrusive invasion such as the strip search" requires the existence of probable cause to justify the official's actions. (*M.M. v. Anker*, 607 F.2d 588, aff'g 477 F. Supp. 837 [1979]. See also *Doe v. Renfrow*, cited above.) However, a search conducted to aid school discipline may require less justification than a search conducted to gather evidence for a criminal prosecution (*See Doe v. Renfrow.*)

The case studies which follow are based on these two recent federal cases:

Case #1: Fire Drill Fallout

Martha M., a 15-year-old high school student, hides in a classroom during a fire drill. An assistant principal finds Martha crouched behind a classroom door. The pocketbooks and bookbags of students who went out on the fire drill lie open in the classroom. The assistant principal, Ms. Bates, knew that Martha had once been accused of stealing. Ms. Bates decides to take Martha to her office for questioning.

The other students return from the fire drill, and the classroom teacher reports that nothing is missing. Nevertheless, because Ms. Bates feels that Martha has not been cooperative in answering her questions, Ms. Bates decides to press the investigation.

Ms. Bates directs Martha to empty her purse onto the desk. As Martha does so, Ms. Bates thinks that she sees an item fall out of the purse that looks like a small marijuana pipe. Just then, Martha makes a quick movement, and the alleged pipe disappears. Ms. Bates immediately suspects that Martha took the pipe and hid it in her clothing. Because Ms. Bates wants evidence when she confronts Martha's mother with Martha's behavior problems, she decides to search for the pipe.

Assistant Principal Bates calls in a counselor, and together they frisk Martha. Finding nothing in a pat-down search of Martha's clothing, the school officials ask Martha to begin to remove her clothing. The search concludes after Martha is fully stripped and subjected to a body search. No pipe is found.

1. What expectations of privacy did Martha have?
2. What interests did Ms. Bates have?
3. Considering Martha's and Ms. Bates's interests together, were the interests of one greater than those of the other at the beginning of the search? Did this balance change as the search progressed?
4. Assume that Martha sues Ms. Bates and asks $10,000 damages. If you were the judge, how would you decide?

Note: In *M.M. v. Anker*, a case with facts similar to those given above, the trial court held that the school official acted unreasonably from the outset of the search. The official conducted a search, allegedly to uncover stolen property, in the absence of any evidence or reason to believe that any property was even missing, and in the absence of any reasonable suspicion that the student might have possessed stolen property. Moreover, the court found no "legally cognizable interest" to justify the intensification of the search after the spotting of the alleged marijuana pipe.

The school official raised a defense of good faith immunity to damages, citing *Wood v. Strickland*, 420 U.S. 308 (1975). In that case, the Supreme Court recognized that public employees whose duties require them to exercise some discretion may have a qualified immunity from damage liability, if they can prove that their actions complied with the Court's notion of good faith. The trial court rejected this defense of the school official, citing *Strickland*'s holding that good faith immunity is not available if the school official "knew or reasonably should have known" that his or her actions would violate the student's constitutional rights. The student was awarded $7,500 in compensatory damages.

In affirming the lower court's decision, the U.S. Court of Appeals for the Second Circuit held that strip searches in schools require probable cause, while other searches may be justified on the reasonable suspicion standard.

Case #2: Capricious Canine?

In order to crack down on increasing drug use among the students of Highland Senior High, the school board directed the superintendent of schools to arrange a thorough search of the school and students in order to uncover illicit drugs. The school officials agreed that dogs trained to sniff for drugs would be used in the search. The school officials then held an organizational meeting. They invited the local police to attend, to advise the school system on how to proceed with such a search. The police, in turn, invited a private dog handler to advise the school officials.

The school officials and the police agreed that the search was totally for school disciplinary purposes, and that no criminal prosecutions would result from any evidence seized.

On the day of the schoolwide search, first-period teachers kept their students in the classrooms while the two-and-one-half hour search was conducted. Canine teams visited each classroom. A team included a school official, a dog and dog handler, and a uniformed police officer.

Jane Doe sat quietly at her desk when the canine team entered her classroom.

As the dog passed her desk, it gave an alert signal. The dog continued to signal even after Jane emptied her pockets and purse, revealing no drugs.

Because the dog continued to alert, Jane was taken to the nurse's office, where she was subjected to a strip search. No illegal drugs were found. Later, Jane explained that she had been playing with her dog that morning, and that her dog was in heat.

1. What expectations of privacy did the students of Highland High have?
2. What are the interests of the school officials? What is the balance between these interests and those of the students?
3. Compare the case of Jane Doe with that of Martha M. in the first case study. What factual issues may be cited to distinguish the two cases?
4. Assume that Jane Doe sues the school board and asks for $10,000 damages. If you were the judge, how would you decide?

Note: In *Doe v. Renfrow*, the trial court held that the detention and canine search of the students was not a search within Fourth Amendment limits, but rather an action justified by the *in loco parentis* status of the school officials. Nor did the presence of police assistants alter this finding.

The court did acknowledge that, were it not for the fact that the search was clearly for educational discipline purposes with no arrests or prosecutions to ensue, it might have required the school personnel to satisfy the probable cause standard. However, wrote the Federal District Court for the Northern District of Indiana, "... so long as a school is pursuing those legitimate interests which are the source of its *in loco parentis* status ... it is the general rule that the Fourth Amendment allows a warrantless intrusion into the student's sphere of privacy, if and only if the school has reasonable cause to believe that the student has violated or is violating school policies."

With regard to the strip search of Jane Doe, the court ruled that the search was unreasonable. The court acknowledged that the nude search was an intrusion into the student's justifiable expectation of privacy, and that school officials would need probable cause to justify such an in-

Unmarked Case Opinion Strategy

Directions: Students read the facts of the case and analyse them briefly, based on the questions given. Once the students clearly understand the facts and issues, teachers ask them to read Opinions I, II and III, and to decide with which opinion they agree.

Divide the class into three groups based on the student agreement with the opinions. Ask each group to appoint one or several spokespersons to try to persuade students from other groups to their particular opinion. After a period of time for preparation of these arguments, conduct a debate. Following the debate, poll the students to find out if any opinions changed, and why. Discuss the rest of the questions. Compare the student opinions with the decision of the court.

The factual situation below and the opinions which follow it are based on the case of *State v. Young*, which was decided in the Georgia state courts. The actual decision of the Court of Appeals of Georgia may be found in 209 S.E.2d 96 (1974). The decision of the Supreme Court of Georgia can be found in 216 S.E.2d 586 (1975). The Supreme Court of the United States refused to hear the appeal from the Georgia State Supreme Court, *cert. denied*, 423 U.S. 1039.

Facts of the Case

Russell Young was a 17-year-old student at Fulton County Senior High School. One day during school hours the assistant principal saw Russell and two of his buddies talking in the corridor. The assistant principal began to walk toward the students.

As the principal approached the students, one of the boys jumped up and shoved something into his pocket. The assistant principal took the boys to his office, and ordered them to empty their pockets. Russell emptied his pockets. The contents of Russell's pockets included a small bag containing less than one ounce of marijuana. When the assistant principal saw this, he called the police, and Russell was arrested. Russell was then convicted of a misdemeanor in Fulton County Criminal Court.

Russell now argues that his conviction should be reversed because the marijuana was uncovered and seized as a result of an illegal search and seizure. In his appeal, he asks that the evidence of the marijuana be excluded from his trial.

- What issues are involved in this case?
- What specific laws are involved?
- On appeal, how should the district attorney argue?
- On appeal, how should Russell's attorney argue?
- What are the interests of the school in this case?

Opinion I

We hold that the assistant principal did not violate Russell Young's Fourth Amendment rights. The standard by which we judge the legality of a search of a student done by a school official is necessarily different from the standard we apply to searches by police officers.

School officials must maintain discipline and security so that the educational process of the schools can take place in an orderly manner, and so that the majority of students can learn in a safe and secure place, protected from the few students who tend toward criminal behavior.

In order to carry out their duty to maintain and enforce school rules and general order, school officials may take appropriate action to control student behavior. This power includes searching out and taking dangerous items from student possession.

School officials must be allowed to search a student when they think he possesses a dangerous item, such as a gun, or drugs. Although police must have probable cause to search a citizen on the street, school officials do not need probable cause to search a student so long as they have some reasonable belief that a search is necessary to perform their public duty.

In this case, the assistant principal had sufficient reasons for the search: the students seemed to be hiding something; the students acted in a guilty manner when the assistant principal approached. Under these circumstances, the search was reasonable and proper under the Fourth Amendment, and Young's conviction should be upheld.

Opinion II

Although the outer limits of the Fourth Amendment were violated in this case, the evidence seized is not trusion. The dog alert alone, held the court, was insufficient to provide probable cause. However, the court rejected Jane Doe's request for damages, finding that the school officials' actions met the good faith standard set forth in the *Strickland* opinion. The Appeals Court for the Seventh Circuit ruled recently that Jane Doe is entitled to damages but upheld the trial court on all other issues.

What Can Students Do?

In the trial court opinion in the *Anker* case, Judge Dooling declined the opportunity to write a policy on school searches for the City and State of New York. He did say:

> Nothing, however, in the evidence thus far produced and referred to by counsel suggests that the search questions arising in the schools can be reduced to an ordered system through judicial intervention. . . . What the evidence referred to does indicate, of course, is that much could be done administratively and by rule to systematize search procedures and to create safeguards for teachers and students alike against unsupervised search decisions. The initiative, however, must be taken by school systems and must not be imposed by judicial intervention. (*M.M. v. Anker*, 477 F. Supp. 837, 846 [1979])

Teachers and students might engage in a number of educational activities as part of a school's initiative in creating safeguards for student search actions.

1. Design and conduct a survey of students in the school to find out how much they know about privacy. Based on the results of the survey, design and propose a schoolwide program of privacy education.
2. Invite local attorneys to participate in a round-table discussion of privacy both in school and in the community.
3. Invite the attorney for the school or school district to class to discuss the development and current status of the school's policy on student privacy and searches.
4. Conduct a class debate on the question: should full Fourth Amendment rights apply to students in school?

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subject to the exclusionary rule, because the assistant principal is not a law enforcement officer; therefore, the marijuana could not have been suppressed.

The exclusionary rule was established by the Supreme Court to provide a method for dealing with evidence seized in an illegal search. However, not every illegal search and seizure triggers the exclusionary rule. This rule prevents illegally seized evidence from being presented at trial only if the evidence were seized as a result of illegal *state law enforcement action*.

In this case, although the search was conducted by someone whom we may consider to be a state official, i.e., the public school assistant principal, we cannot consider this person a law enforcement official. Therefore, the exclusionary rule is not available to Russell Young. He must find some other way to correct any violation of his rights, such as through a civil rights action or tort claim. In any event, Young's conviction for possession of marijuana must be upheld.

Opinion III

This case primarily concerns a criminal prosecution and conviction which resulted from the search of Russell Young and seizure of marijuana in his possession. The facts of this case have nothing to do with maintaining school order; there is nothing in the facts to indicate that Young posed a threat to the educational process of the school.

If Young were an adult, the marijuana would have been suppressed before trial because it was seized illegally; the fact that Young is a minor and the marijuana was seized by the assistant principal should not make a difference.

All citizens of this state are guaranteed protection from unreasonable searches and seizures by the Constitution. A student's right to this protection is the same as that of an adult, and not watered down in any way. Moreover, a student does not leave this right at the schoolhouse door (the Supreme Court so held in the *Tinker* case).

A public school official is an agent of the state, and must abide by the same Fourth Amendment restrictions by which police officers are bound. Therefore, school officials must have probable cause to search a student. The facts of this case show that the assistant principal did not have probable cause. Therefore, Young's conviction must be overturned.

Questions for Discussion

1. Which of the three opinions conforms most closely to your own opinion? Why?
2. Is there an opinion, other than the one that is like yours, that is also convincing? If so, why? If not, what do you find wrong with the other arguments?
3. Opinion I endows school officials with certain search powers that are greater than those of a police officer. Should the courts define the authority of school officials? How does this opinion depict the educational role of school administrators? Do you agree?
4. Should school officials have extensive search powers? What limits would you set?
5. Do you agree with the distinction drawn in Opinion II between law enforcement officials and school officials? How realistic is the remedy offered by this opinion?
6. How does Opinion III interpret the facts of this case? Do you agree? What constitutes a threat to the educational process?
7. Does the fact that Young was criminally prosecuted and convicted make a difference in this case? Should it?
8. The Supreme Court has said that students' rights do not end at the schoolhouse door (*Tinker*). What does this mean? Why isn't this ruling controlled in this case? Should it be?
9. What if this same search were conducted by
   - a parent?
   - a camp counselor?
   - an employer of an employee?
   - any other person?

   How do you make distinctions? Should there be distinctions depending on whose right is being violated, and who is doing the violating? Why?

(*Note:* Opinion II most closely correlates to the opinion of the Georgia State Supreme Court in *State v. Young*.)

School Records and Student Privacy

In contrast to the oft-murky realm of physical privacy in school, students and their parents enjoy some clear rights of privacy and control with regard to school records. Federal legislation has provided the framework for the nationwide development of written school policies governing the collection, maintenance, and dissemination of information about students.

The Family Educational Rights and Privacy Act of 1974 (popularly called the "Buckley Amendment" after its sponsor, former Senator James Buckley of New York) and the HEW regulations implementing the law help schools, students, and parents to safeguard the privacy and accuracy of school records. Tools provided include:

1. *Access:* Students 18 years of age or older, and parents of students under the age of 18, have a right to know about and to examine any records which the school maintains about the student (with a few exceptions defined in the law, such as material in the sole possession of a teacher).
2. *Challenge:* Students 18 years of age or older, or the parents of students under the age of 18, may seek to correct, explain, or expunge school records about the student that are inaccurate or misleading. The law spells out specific informal and formal mechanisms for such challenges.
3. *Privacy Control:* The law protects the privacy of student records by strictly limiting the persons who may have access to student records without the explicit written consent of the student who is 18 or older, or of the parent of a student under 18.
4. *Notification of Rights:* Any schools covered by the law, which includes all public and private institutions receiving federal education funds, are required to provide annual written notice of the availability of these rights to students and parents.

Nothing in the law or HEW regulations prohibits a school or school system from providing greater rights than those minimums specified in the federal legislation. In fact, in formulating written policies and establishing procedures to challenge the content of student records, many schools and school systems have gone beyond the minimum.

For example, while the federal law makes the rights applicable to students over the age of 18, but only to parents of students under the age of 18, schools and school districts may extend the rights to see and to challenge the content of records to students under the age of 18 as well. Additionally, a school may prescribe a more formal grievance procedure and hearing process than required by the federal law. In fact, some schools and school districts have established a uniform set of due process procedures which may be activated by student record grievances, as well as by disciplinary grievances, such as suspensions.

A simulated Buckley Amendment hearing challenging a note in a student's file can help students see the practical dimensions of school information privacy.

Because of something in her school records, Rose didn't get the job she wanted. Can she do anything?

Buckley Amendment Hearing

Under the federal law, students 18 years of age or older, and parents of students under the age of 18, may request changes in any educational records that are inaccurate, misleading, or a violation of privacy or other rights of the student.

Generally, under school policies designed to comply with the law, the first step in the grievance procedure requires the student or parent to make the request for changes to a designated school official, such as the principal, registrar, or other authorized person. School policies may require the request to be in writing. Even if a written request is not required, however, the complaint and remedy desired should be in writing, with a copy sent to the chief school official, and a copy kept by the student or parent making the request.

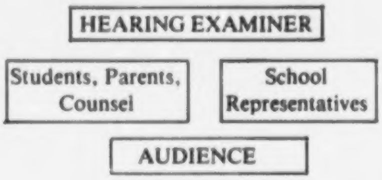
If the school, through its designated official, refuses to make the change requested, the student or parent has a right to a formal hearing. The federal law requires the school to notify the complainant of this right at the time the request is refused.

The hearing must be conducted by an impartial person, defined in the HEW regulations as someone "who does not have a direct interest in the outcome of the hearing." The law does not prohibit personnel of the school in question from acting as the hearing examiner, so long as the person can demonstrate impartiality.

Depending upon the procedures of the particular school, the hearing may be very formal, with specific provisions made for the presentation of evidence, standards of proof, transcripts of proceedings, and other triallike characteristics. The federal law does not contain such requirements, other than that the hearing be conducted "within a reasonable period of time" after the denial of the request, and that the complaining party be allowed to be represented by counsel, with a full opportunity to present evidence.

Following are a statement of facts and witness statements with which teachers and students may conduct a simulated hearing.

Teachers wishing to conduct a simulated Buckley Amendment hearing may arrange the classroom in this manner:



HEARING EXAMINER

Students, Parents, Counsel

School Representatives

AUDIENCE

Facts in the Case

Rose Miller, a junior at Western High School, applied for a summer job with the local bank. She did very well on the clerical tests, and received good recommendations from her previous summer jobs.

Despite those positive qualifications, she didn't get the job. Rose learned that the bank had checked into her school records and found some information that the bank personnel manager considered to be damaging enough to prevent Rose from getting the job. Rose had given the school permission to release her records to the bank, but she had no idea that potentially damaging information was in her school file.

Rose and her mother immediately requested that the school remove the bad information and send an explanation and apology to the bank. After unsuccessfully pursuing informal solutions through the guidance counselor and the principal, Rose and Mrs. Miller requested a formal hearing.

At Western, hearings are conducted by a panel of three teachers who are not involved in the case. These hearing examiners listen to statements from all of the parties involved, and they may interrupt any testimony to ask questions. The parties may be represented by counsel, and the counsel may cross-examine the testimony of the other side at the end of each statement.

The parties involved in this hearing included:

- Rose Miller, a student
- Mrs. Miller, Rose's mother
- Counsel for the Millers
- Ms. Burke, guidance counselor
- Mr. Adams, principal
- Counsel for the school
- Three hearing examiners, teachers at Western

Witness Testimony

Rose Miller: "I was in the parking lot with a bunch of kids one day during lunch. Some of the kids were smoking grass, but I wasn't. Suddenly, Ms. Burke, the head guidance counselor, appeared out of the blue! She seemed quite upset, telling us that Principal Adams was enforcing a new school policy on drug use, and that we'd all be very sorry for what we were doing. She left, and I didn't think any more about the incident.

"A few weeks later Mr. Adams called me to the office to ask me if the personnel manager of First Federal Savings could see my school file. I said sure, I really wanted the job. Next thing I knew, the bank refused to give me the job! The secretary in personnel told me that they found some stuff about my being a drug user in my school file. I was shocked! I never would have let them into my file if I knew the school kept stuff like that in it. There was no way I could convince the bank people that there was a mistake. They consider school files to be the absolute truth."

Mrs. Miller: "When Rose told me she didn't get a job because of information in her school file, I went right over to Western and demanded to see what was there. What a hassle! Ms. Burke was not about to let me see anything. I had to go straight to Mr. Adams, and even with that, it took several weeks for them to comply with my request.

"I finally did get to see Rose's file, and I nearly died when I saw the counselor's note, 'Rose Miller has been involved with drug users.' I immediately demanded that Mr. Adams destroy the note, but he refused. He wouldn't even let me put in an explanation. That's the reason why I asked for this hearing: to get that note removed from Rose's file, and to get an apology from Mr. Adams."

Ms. Burke: "There's no way I can adequately advise and counsel students without maintaining information about their activities. Whether a student uses drugs or has tendencies to use drugs can really affect his or her academic performance, and I need to know that information for the student's own good. The note I put into Rose's file is not inaccurate. I saw her associating with a group of students all of whom appeared to be smoking marijuana. She doesn't deny she was with them."

Mr. Adams: "I certainly want to do everything I can to protect the privacy rights of our students, as well as all of their other rights. In fact, when the bank called to ask about seeing Rose Miller's file, I told them I'd have to get her written consent first. She readily gave me her consent, although she didn't bother to check the file herself.

"Simply stated, there is nothing inaccurate in Rose Miller's file, only information that makes her uncomfortable. However, the information is true. I'm sorry she didn't get the job she wanted, but I'm not going to apologize for doing the job I must do. I need to protect the educational and safety interests of every student in this school. To do this, I need to collect certain information, especially information about the prevalence of our current drug problem. Without such information, I can't do my job."

Directions for Class

1. Teacher assigns roles.
2. Parties meet in small groups to examine testimony and to prepare questions for the other side.
3. Chief hearing examiner calls the meeting to order.
4. First witness for the student makes a presentation based on the prepared statement.
5. Panel may interrupt witness to ask questions.
6. At the end of the witness testimony, counsel for the other side may ask the witness questions.
7. Hearing examiners proceed in the same manner with each witness.
8. After hearing all of the testimony, hearing examiners deliberate, and then announce a decision whether to: (a) deny the request of the Millers, but allow them to put an explanatory note in Rose's file as required by the federal law; or (b) grant the request of the Millers and order the school to remove and destroy the note in question.

Debriefing

After conducting the simulated hearing, teachers may use these questions as a basis for further classroom discussion:

1. For each witness, which arguments were the strongest? Weakest? How would you have presented the testimony differently?
2. Was one witness more persuasive than any of the others? Why? Did any witness convince you to change your mind about this case?
3. How did the hearing examiners balance the different interests of the parties in this case? Do you agree with their decision? Why or why not?
4. What was the purpose of this hearing? Was the purpose achieved? Why or why not? Was the procedure fair?
5. As a result of this simulation, what did you learn about the privacy of student records? What recommendations would you make to the student and school involved to help them to avoid similar problems in the future?

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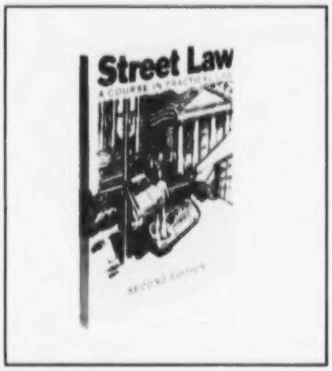

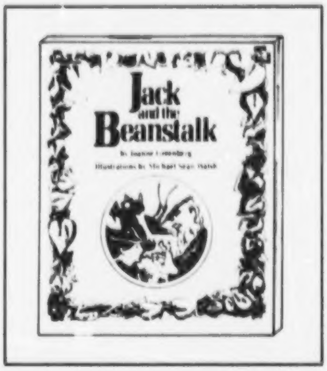

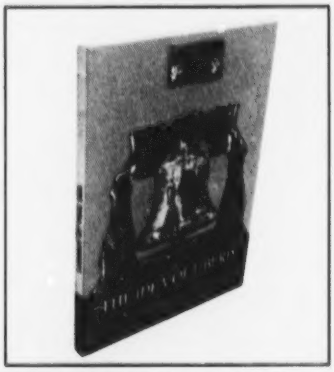

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contents

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2

Supreme Court Report
Widening the Scope of Due Process

6

What Is Justice?
The Court and the Cops

10

What Is Justice?
When a Trial Becomes a Political Circus

14

What Is Justice?
Due Process: What Is It?

18

What Is Justice?
When Does Conscience Matter More Than Law?

22

Court Briefs
The Supreme Court Speaks

25

Speech: The First Freedom
Free Speech and the Military

28

Speech: The First Freedom
Locked Books, Locked Minds

49

Curriculum Update
Justice and Due Process

60

Legal Lunacy

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COURT REPORT

Widening the Scope of Due Process

The Burger Court is often seen as conservative, but not when it comes to protecting the rights of children, prisoners, and other minorities

The Fifth and Fourteenth Amendments to the Constitution guarantee to all persons that life, liberty, and property cannot be taken away without due process of law. The Fifth Amendment, like the other amendments in the original Bill of Rights, limits only the power of the federal government. When the Fourteenth Amendment became the law of the land in 1868, the Constitution, in theory at least, controlled state power as well.

But what is due process, when does it apply, and to what agencies of government does it apply? Does it demand full-dress legal hearings or can it be satisfied with more informal methods? Does it apply equally to the police and librarians, welfare bureaucrats and wardens? Who can claim the right to due process, and under what circumstances?

All these are questions for the courts to decide, and, in recent years especially, courts have been more and more concerned with monitoring the procedures by which governmental authority is exercised. In the last dozen years, state agencies have been increasingly subjected to

Victor Rosenblum

judicial inquiry. As a result, many kinds of governmental activity which had been previously thought the province of the states and beyond the reach of the Constitution have been brought within the powerful orbit of procedural due process.

Right or Privilege?

The language of the due process clause has, of course, remained constant over the years, but the contours of interpretation have been altered as additional perceptions and insights have found their way into judicial construction. Perhaps the most important of these has involved the way courts decide whether due process applies. There's been a shift from what might be termed a right-privilege approach to a protectable interest approach. Pedantic as these distinctions may appear, they hold the key to understanding the growing applicability of due process in recent years.

Prior to the 1970s, the triggering question for determining whether a particular governmental action was subject to the restraints of the due process clause was "does the action affect a right or only a privilege of the parties?" If *rights*—that is, legally enforceable claims—were impaired by state or federal action, then government had to act through a fair and reasonable process. If, on the other hand, the government acted on *privileges* rather than rights, then the government didn't have to follow any procedural format before altering or destroying these privileges.

A typical ruling concerned standards for removing government employees from their jobs. Government employment, it was maintained, was a privilege, not a right. Hence, in the absence of statutes explicitly requiring certain procedures, the federal, state, and local governments were free to fire employees at will or whim.

In one of the most startling and disturbing cases of this type, a federal employee was fired in the late 1940s for allegedly engaging in subversive activities and constituting a security risk. She was fired without ever having the opportunity to confront her accusers or to know and rebut the particular charges against her. In *Bailey v. Richardson*, (182 F.2d 46 [1950]), the U.S. Court of Appeals for the District of Columbia Circuit ruled that she was properly dismissed from her job after she had been found "disloyal to the government of the United States." The finding of disloyalty was based upon her responses to questions in a proceeding at which she was the sole witness. No affidavits other than hers were presented for the record. Ms. Bailey contended, however, that secret evidence cost her the job. She argued that such evidence could not constitutionally be used against her, but the court said that she was not entitled to due process at all.

The court said government employment was "completely internal" to a branch of government. Thus, in the absence of statute or ancient custom to the contrary, "executive offices are held at the will of the appointing authority." Since the due process clause does not apply at all to having a government job, the court reasoned, the particular basis cited for dismissal is immaterial. "To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right."

She was fired without knowing the precise charges against her and without having the opportunity to confront her accusers

After an equally divided Supreme Court affirmed the Court of Appeals' decision in *Bailey v. Richardson* (341 U.S. 918 [1951]), courts continued to agonize over whether government employees were entitled to hearings, but the right-privilege dichotomy remained the accepted criterion for deciding whether or not constitutional due process had been triggered. Not until *Goldberg v. Kelly* (397 U.S. 254) in 1970 did it become clear that the Supreme Court was prepared to reconsider the constitutional propriety of protecting only rights but never privileges.

Without explicitly overruling its previous distinctions between rights and privileges, in the *Goldberg* case the justices rejected the notion that someone could be deprived of a government benefit without a hearing merely because the benefit was a privilege. The case began when residents of New York City receiving Aid to Families with Dependent Children claimed that state and local officials cut off their aid without prior notice and hearing. This, they said, constituted a violation of the due process clause. The welfare authorities maintained that, since hearings were available after aid was cut off, they hadn't been denied due process. Receiving financial assistance was a privilege, not a right, the authorities argued; consequently there could be no invasion of due process through suspending a mere privilege.

The majority of the Supreme Court did not analyze in depth the right-privilege distinction. Justice Brennan simply observed that "the constitutional challenge cannot be answered by an argument that public assistance benefits are a privilege and not a right." Rather, he said, it's a question of the interests involved. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudications."

In weighing the respective interests involved, Justice Brennan noted that the welfare recipient seeking redress from the welfare bureaucracy is not the only one who benefits from being accorded a pre-termination hearing. Important governmental interests are promoted as well:

> From its founding the nation's basic commitment has been to foster the dignity and well being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." The same governmental interests which counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

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The Court in the *Goldberg* case said that due process requirements can even override the fiscal needs of the state. Although the Court recognized the importance of "not imposing on the states or the federal government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process," it stressed that the constitutional obligation must come first.

What "rudimentary due process" made mandatory were timely and adequate notice detailing the reasons that government wanted to cut off money and an effective opportunity for a recipient to defend himself by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Teachers' Due Process

Two years after its decision in the *Goldberg* case, the Supreme Court fully reexamined criteria for triggering due process, especially the role played by the right-privilege distinction. *Board of Regents v. Roth* (408 U.S. 564 [1972]) and *Perry v. Sindermann* (408 U.S. 593 [1972]) dealt with whether nontenured faculty members qualified for due process protection when they were not rehired. Both cases involved college teachers who claimed they were fired for publicly criticizing the administration. Did they have a right to a hearing before they could be let go?

In these cases, the Court placed an official judicial tombstone over the grave it had symbolically dug in *Goldberg*. The right-privilege dichotomy was dead as a means of determining when due process applies. Writing for the five-three majority in both cases, Justice Stewart made it emphatically clear that "the Court has fully and finally rejected the wooden distinction between rights and privileges that once seemed to govern the applicability of procedural due process rights."

Did that mean the teachers were entitled to a hearing? Not necessarily. The basic premise of Justice Stewart's rulings was that the *nature* of the interest at stake, rather than a predetermination of whether the particular interest achieves the formal legal status of a right, must determine whether due process requirements apply. Justice Stewart did not submit an exhaustive list of interests that qualify for due process protection, but he synthesized the guidelines for determining the liberty, property and other constitutional interests safeguarded by due process.

With regard to liberty interests, for example, Justice Stewart declared that, in addition to freedom from bodily restraint, liberty denotes freedom to contract, to engage in common occupations of life, to acquire useful knowledge, to worship God in accordance with one's conscience and generally to enjoy those activities recognized as essential to the orderly pursuit of happiness by free people: "In a constitution for a free people there can be no doubt that the meaning of liberty must be broad indeed."

Many of the landmark due process decisions of the past decade have involved either teachers or students

The Court declined, however, to broaden liberty's meaning to the point of holding that a teacher is deprived of his liberty interest when "he simply is not rehired in one job but remains as free as before to seek another." Can teachers ever be deprived of liberty if they're not rehired? Yes, said Justice Stewart, if the school accuses them of dishonesty or immorality or something else entailing a stigma that would deny the teachers the freedom to get other work.

Do teachers have a property interest in continued employment? Justice Stewart stressed that the property protected by due process "extends well beyond actual ownership of real estate, chattels or money." Teachers and other public employees have a legitimate claim to due process on property interest grounds if they show that the alleged property interest was created by existing "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Tenure agreements fit this bill. But even nontenured employees may have a legitimate interest in continuing employment because the "rules or understandings" of a school are not limited to rigid, technical forms or written agreements. If a teacher had worked for 10 years in a school that didn't specifically offer tenure but tacitly had the equivalent by an unwritten rule that anyone doing a good job would be invited back, then that teacher might have a legitimate expectation of continued employment, and so have a protectable property interest under the Fourteenth Amendment.

One of the two teachers in *Roth* and *Sindermann* met this criterion. His case was sent back to a lower court to determine if he had the right to a hearing. The other (who had only taught for a year) did not meet the standards and so had no right to a hearing.

What was most significant about the rulings in *Roth* and *Sindermann* was the explicit declaration that a formal right to a job or to any other benefit was no longer a prerequisite to due process protection. The protection of due process was assured when key interests are at stake, even though a person has no right to a valuable governmental benefit, and even though the benefit may otherwise be denied for any number of acceptable reasons.

While the dichotomy between rights and privileges was clearly eliminated in 1972, the Court added a new legal dichotomy in construing the *scope* of due process protection. New emphasis was placed on the difference between triggering due process and determining the process that is due.

What Process Is Due?

Due process is triggered by the nature of the liberty, property or other protectable interest asserted. No balancing is involved; the key to triggering is the nature, not the weight, of the interest involved. The kind of process that is due, however, is not identical in every case to which constitutional due process applies. The particular facts of the particular case and the weight of those facts in light of all the surrounding circumstances, including such factors as cost, benefits and available alternatives, determine exactly what process is due.

It was traditionally assumed that once due process was triggered, some kind of hearing was required as process that is due. Therefore, those who wanted a hearing had to figure out first how to show that due process applied to them. A good example of how this works in practice was provided by the 1975 Supreme Court case of *Goss v. Lopez* (419 U.S. 565). In that case, school children who had been suspended were able to show that they had a property interest in going to school. Thus due process was triggered, and they won the right to a hearing.

But later cases showed that things weren't so simple. The very next year, in *Bishop v. Wood* (426 U.S. 341), a case involving a policeman who was fired, the

(Continued on page 39)

The 1950s are generally regarded as a period of relative conservatism and stability in the United States. Except for a brief recession in 1958, the economy boomed and unemployment rates were low. College students were generally apolitical, and the Korean "police action" was fought with little domestic opposition. On Capitol Hill, Senator Joseph McCarthy was garnering publicity and frightening many Americans with his allegations of Communist infiltration into nearly every area of government. In both presidential elections in that decade, Dwight D. Eisenhower, a moderate Republican and war hero, soundly defeated liberal Democrat Adlai Stevenson of Illinois.

It's ironic, then, that one of the great legacies of the fifties was the liberal Warren Court. In 1953, when Earl Warren was appointed Chief Justice of the United States Supreme Court by President Eisenhower, not many court watchers would have predicted the pattern of judicial decisions over which he was to preside. Warren, a conservative Republican and former governor of California, had supervised the internment of Japanese-Americans early in World War II and was hardly a good bet to earn a reputation as a great civil libertarian. But in the years following the Warren appointment, the Supreme Court handed down some of the most momentous and progressive decisions in its history, and Eisenhower came to regard the Warren appointment as a mistake.

In 1954, in *Brown v. Board of Education of Topeka, et al.* (349 U.S. 294 [1954]), the Court held unconstitutional the provision of "separate but equal" public schools for blacks and whites. *Brown* marked the beginning of the end of formally segregated public schools, and was the first major victory of the modern black civil rights struggle. *Brown* was also the first indication of an unprecedented period of judicial activism by the Court.

One example of this activism was the Warren Court's long look at the practices of state and local police. Under former Chief Justices, the Supreme Court had generally left the administration of justice to the states, and had refrained from imposing its definitions of what police should do. While there had been exceptions to this general "hands-off" rule, no prior Court had intervened so dramatically, so often, and so directly on local policing as the Warren Court. Consequently, no prior Court was as controversial or as unpopular among local officials as the Warren Court.

During the 1960s, critics called the Warren Court's decisions "handcuffs on the police" and "obstructions of justice." During the 1960s, the roadways became dotted with billboards and bumper stickers demanding the impeachment of Earl Warren. During the 1960s, the Warren Court was charged with emphasizing "the rights of the individual at the expense of the safety of society," which was often cited as a cause of increasing crime rates. In the 1968 presidential campaign, for example, law and order was an issue of primary importance, and the successful candidate—formerly vice-president to the man who had appointed Warren—promised to crack down on "soft-headed judges."

Now that the law and order rhetoric has cooled, it's worthwhile to look in some detail at the decisions which stirred this controversy, and to consider whether

The Court and the Cops

Now that the smoke has cleared, what's been the effect of the Warren Court's most controversial decisions?

James J. Fyfe

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or not their effects were as great as charged. The most divisive of these was *Miranda v. Arizona* (384 U.S. 436 [1966]).

Miranda and the Police

Miranda was an unusual decision because it was prescriptive. Most court decisions tell police what they must *not* do if evidence is to be admissible in court. In 1936, for example, in *Brown v. Mississippi* (297 U.S. 278), the Supreme Court told local police that they could not introduce into court a confession obtained after the suspect had been tortured. But in *Miranda*, the Court *prescribed* a series of steps that the police *must* take if they hope to use a suspect's confession or admission against him in court.

In *Miranda*, the Court ruled that, before police could begin interrogating people in custody, they must advise those persons that they have the right to remain silent, that anything they say can and will be used against them in court, that they have the right to consult with an attorney, and that attorneys will be appointed to represent indigent defendants. Further, the Court mandated that interrogations must cease if suspects indicate a desire to remain silent, and that questioning then must be delayed until the arrival of attorneys to represent suspects who desire them. Finally, the Court stated that "if the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."

Reaction to this holding was immediate. Cases against several defendants accused of particularly heinous crimes were dismissed on the grounds that prosecution evidence consisted of confessions obtained in violation of *Miranda*. In a newspaper comic strip, a man rushed into a police station, exclaimed that he had just murdered his wife, and laughingly declared, "But you can't do anything about it, because you didn't advise me of my rights before I confessed."

In fact, however, such a declaration is not affected by *Miranda*, which speaks only to the admissibility of statements taken from persons in police *custody*. It is also very important to note that *Miranda* excludes only statements or evidence found as a result of the statements of defendants not advised of their rights to silence and to counsel.

A defendant caught red-handed by police in a burglary would probably be convicted even if police later took a statement from him in violation of *Miranda*. His statement would be excluded from evidence, but the testimony of the police who caught him in the act—which should be sufficient to convict him—would not. On the other hand, if, after his arrest, the burglar gave police admissions to other previous crimes in the absence of *Miranda* warnings, prosecutions against him in those cases would be unsuccessful. Thus, since most criminal defendants are caught in the act, *Miranda* affects the outcome of only that small percentage of cases in which the state's investigation begins by interrogating a suspect against whom there exists no conclusive physical or eyewitness evidence.

Further, it is doubtful for two reasons that *Miranda* affects very many of even these cases. First, with or without *Miranda* warnings, few defendants in cases where no other evidence exists or is likely to be found are unwise enough to assist in their own prosecutions by making self-incriminating statements. Second, where such eyewitness or physical evidence *is* likely to develop, defense attorneys often advise their clients to make confessions in hopes of obtaining more lenient treatment in return for their cooperation: "If you tell them what they want to know instead of making them work to find it for themselves, it will probably go better for you in court. They'll find it either way."

On the other hand, the few cases that are substantially affected by *Miranda* very often involve spectacular crimes and generate great publicity. The man who murders his family, for example, usually eliminates all eyewitnesses and often succeeds in eliminating all physical evidence. In such a case, he usually cannot be prosecuted successfully unless he makes self-incriminating statements to the police, because the courts are prohibited from inferring that his silence in the face of accusations against him indicates his guilt.

On occasion, police have obtained confessions from such defendants in violation of *Miranda* and then have uncovered irrefutable evidence (like a bloody ax) that the defendant did, in fact, commit the crime. But while the crime is solved in the sense that we know who did it, such a defendant is sure to be acquitted unless the police develop totally independent evidence of his guilt. Such an acquittal is certain to lead to wide publicity and public doubt that the courts are acting in the best interests of society.

Miranda clearly remains a controversial decision. Those who support it point out that federal police agencies had been working under similar restrictions long before 1966; but those who attack it argue that federal agencies do not usually investigate heinous crimes like murder, and that they have nearly unlimited investigative resources. Those who support it point out that *Miranda* is merely the last in a series of Supreme Court interventions which began in 1936. That was the year *Brown v. Mississippi* declared the "third degree" unconstitutional. Those who attack it argue that there is substantial difference between torture and the police techniques which preceded Ernesto Miranda's confession to a crime he did, in fact, commit.

Despite all the controversy, however, *Miranda* probably affects only a small number of cases. And it will probably continue to control interrogation practices for a long time to come. Despite some minor "reinterpretations" of *Miranda* based on the facts of cases which have since come to the Court, there is no indication that the basic premise of *Miranda*—that abusive police interrogation of suspects be curtailed—is in any danger of being overturned by the Court.

Limitations on Searches

Another Warren Court decision concerning the "exclusionary rule" has affected far more police cases. Federal law enforcement officials have been subject to the exclusionary rule since 1914 when, in *Weeks v. United States* (232 U.S. 383), the Supreme Court "barred the use of evidence secured through an illegal search" from criminal trials in federal courts. If police got the evidence illegally, they couldn't introduce it in court against the defendant. In *Weeks*, however, the Court refrained from applying the exclusionary rule to state criminal proceedings and instead left the issue of whether or not to adopt the rule for the state courts to decide individually.

On the logic that ends (evidence of guilt) justify means (illegal searches), many state courts chose to continue to admit illegally seized evidence into criminal proceedings. Given this official stamp of approval, police in many jurisdictions routinely engaged in illegal

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searches of persons, homes, premises, and automobiles. In some big cities, for example, impressive arrest statistics were generated by police narcotics officers whose work largely consisted of illegally stopping and searching suspected addicts and arresting those found to be "holding" small quantities of narcotics.

It was also common practice for police to violate the Fourth Amendment by proceeding to the homes of persons arrested on the street, searching those homes illegally, and adding to charges already filed "possession" of whatever contraband (weapons, narcotics, stolen property) was found. Gambling enforcement in these places also routinely involved illegal, warrantless "raids" and wiretaps on suspected bookmaking operations. Vehicles driven by suspected gamblers, narcotics dealers, or other shady characters also were routinely stopped and illegally searched for contraband by police.

In 1961, the Supreme Court attempted to limit such abuses by deciding in *Mapp v. Ohio* (367 U.S. 643) that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." In delivering the Court's majority opinion, Justice Tom Clark anticipated that the Court would be accused of "handcuffing the police," but he argued that there was little evidence that "the exclusionary rule fetters law enforcement." Quoting Benjamin Cardozo, he acknowledged also that, in some cases, *Mapp* would allow the criminal "to go free because the constable has blundered." But he argued also that the higher principle of official adherence to the Constitution was involved: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard to the charter of its own existence."

The Case Against the Rule

In the 20 years since *Mapp*, the exclusionary rule has been attacked by both conservatives and liberals. One of the most comprehensive critiques of the rule was included in an *amicus curiae* ("friend of the court") brief filed by the state of Illinois in a challenge to use of the rule in federal criminal trials (*United States v. Robinson*, 410 U.S. 982 [1973]). Illinois argued that the rule benefited "only the guilty" since they would escape conviction, while the "innocent man whose rights are violated must sue civilly to secure damages," an approach Illinois termed "ineffective."

The brief further stated the rule focused attention away from the basic questions of guilt or innocence, and caused defense attorneys to focus on the issue of suppression of evidence. This hindered adequate preparation of "defenses on the merits," argued Illinois, and resulted in legal "gamesmanship" which served to destroy public confidence in the courts.

Illinois also alleged that the rule had several negative effects on the police. First, Illinois argued that *Mapp* made it easy for corrupt policemen to appear to be aggressively enforcing the law by making "massive gambling raid(s) without securing evidence of probable cause." When cases were subsequently dismissed for violation of the exclusionary rule, police (who were receiving bribes from those arrested) could blame the courts for hindering their seemingly honest efforts.

Second, Illinois argued that there was no evidence that the rule deterred police misconduct. Indeed, it asserted that the rule served to encourage police prying. This was so because police are under tremendous pressure from the public and their supervisors to catch criminals. They respond to this pressure, argued the brief, by making arrests and "altering" their testimony so that their "minor technical errors" will not result in acquittals of criminals. Since it is the primary purpose of the police to prevent crime and apprehend criminals, Illinois suggested that both the pressure upon police and their perjurious response to it were predictable and rational.

Further, because it is so simple for a police officer to alter his testimony, the rule did not deter officers who willfully violated it: instead, they responded to it with altered—perjurious—testimony to hide their violations. Nor, reasoned Illinois, did the rule deter officers of good faith from violating the rule. This was so because such officers "[think], albeit mistakenly, that [they are] acting within the law." In other words, the rule did not deter well-intentioned, honest mistakes.

Illinois also argued that the courts had not clearly and unequivocally communicated the law of search and seizure to the police. The brief pointed out the judicial ambiguity in this area by observing that courts have sometimes declared illegal those searches conducted pursuant to warrants issued by other courts. This bred contempt for the law on the part of both the public and the police, the brief suggested, and failed to deter police misconduct because "[i]t is unreasonable to expect deterrence when the subject does not know what he is forbidden to do."

More on Police

Here are some materials on the police and their response to court directives:

Donald J. Newman, *Introduction to Criminal Justice*, 1978, second edition (Lippincott). Good discussion of structure and control of the criminal justice system, and the effect of the courts on the police.

John Kaplan, *Criminal Justice: Introductory Cases and Materials*, 1973 (Foundation Press). Good college text on criminal procedures.

Peter Manning, *Police Work*, 1977 (MIT Press). Scholarly study of the dilemmas facing police and the techniques they use to deal with those dilemmas.

Illinois concluded by arguing that correction of clear police abuses such as those involved in the *Weeks* and *Mapp* cases did not require the blanket application of the exclusionary rule to *all* police searches. Instead, the brief stated, the constitutionality of searches should be evaluated individually on the basis of whether police acted in "good faith" or in willful violation of defendants' rights, and with consideration of the gravity of the crime involved. Under such a formulation, evidence of a serious crime found in an illegal search by an officer who had acted in "good faith" would presumably be admissible, and evidence of a minor crime found in a willful illegal search would not.

The Other Side of It

The Supreme Court never addressed the merits of these arguments or of this alternative to the exclusionary rule, because it dismissed *Robinson* on other grounds. That's too bad, because it would have been interesting to see how the Court addressed a questionable assumption in the brief. The assumption is the notion that current pressures on police to arrest and convict criminals are rational. This assumption is questionable simply because it is beyond the capability or legal authority of the police to respond to those pressures as the public thinks it should. The fact is that public expectations of the police are often molded by the way television and movie cops handle problems. As a result of this "Starsky and

(Continued on page 35)

WHAT IS JUSTICE?

When a Trial Becomes a Political Circus

Cases that brought our court system to the breaking point

Charles White

It can't happen here. Other countries have blatantly political trials, in which dazed defendants are convicted of trumped-up charges, but we don't. We have nothing to compare with the show trials of the Stalinist Purges or current trials like that of Mao's widow. In trials such as these, the defendants' real offense is not breaking this or that law, but being on the wrong side of the government. Defendants are on trial not because they are criminals, but because they are political figures who got caught in a power squeeze.

Occasionally politicians do go on trial in this country, but when they do it's because there's reasonable suspicion that they have committed a crime. For example, most Americans are satisfied that the Watergate and Abscam defen-

dants were put on trial for specific crimes, rather than for political reasons.

As for political radicals in the United States, most of us probably assume that free speech protects what they say. If they get in legal trouble, it's because they've broken the law.

Thus, when committed revolutionaries complain about political trials and political prisoners in the United States—as Bernadine Dohrn did when she surrendered after 11 years as a fugitive—we're tempted to shrug it off as so much overheated (and dated) rhetoric.

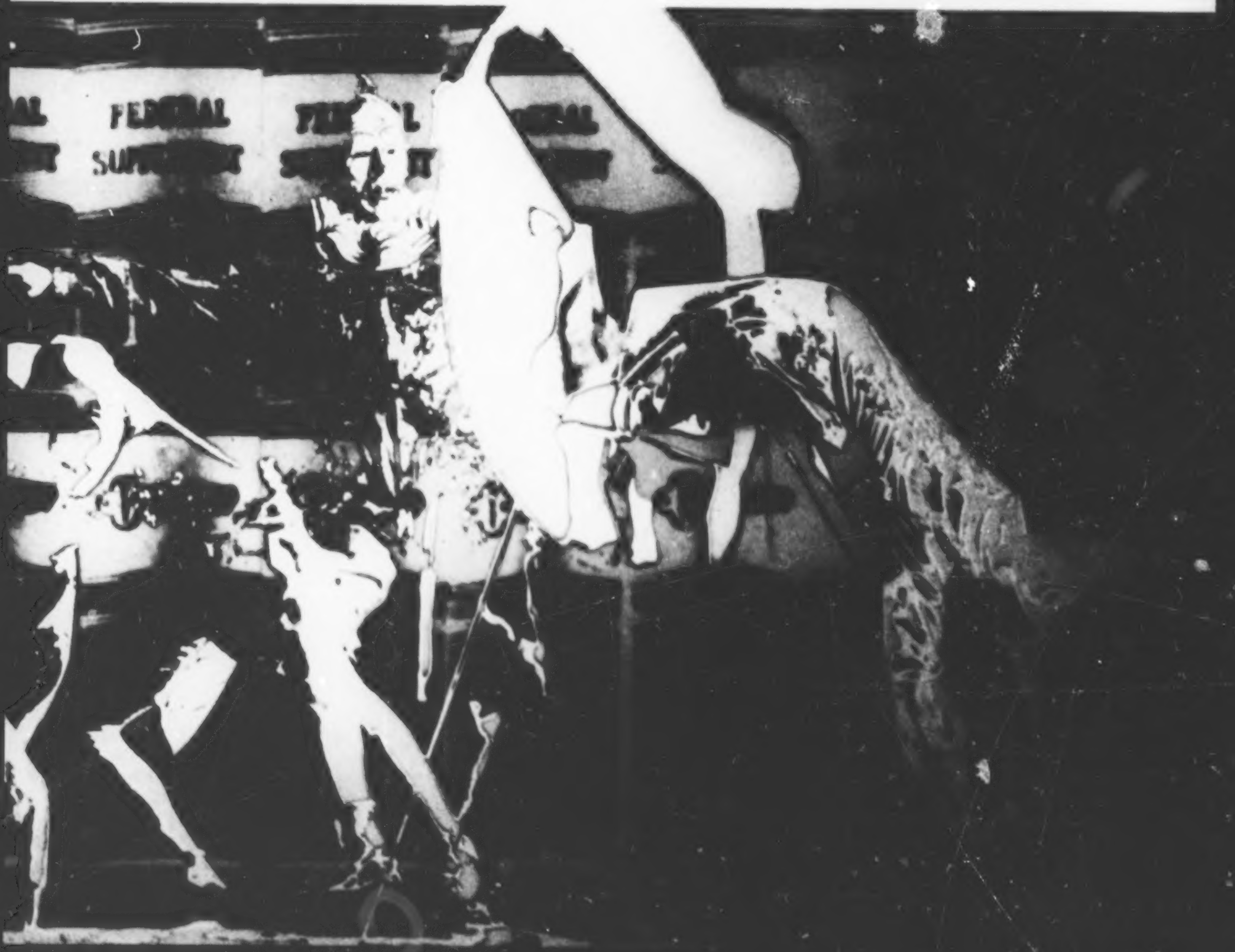
But should we be so sure? Prominent political figures such as former Senator Charles Goodell and former U.N. Ambassador Andrew Young have publicly complained of political prosecutions in our country. Amnesty International, a nonpartisan group set up to combat political persecutions around the world, has identified a growing list of Americans whom they believe are in prison solely for what they believe. Scholars have argued that many trials in American history were politically motivated, and former Supreme Court Justice William O. Douglas has identified five such cases. Four of these reached the Supreme Court, and in the fifth the Court played a small role. (See Justice Douglas's opinion in *Illinois v. Allen*, 397 U.S. 352, 1970.)

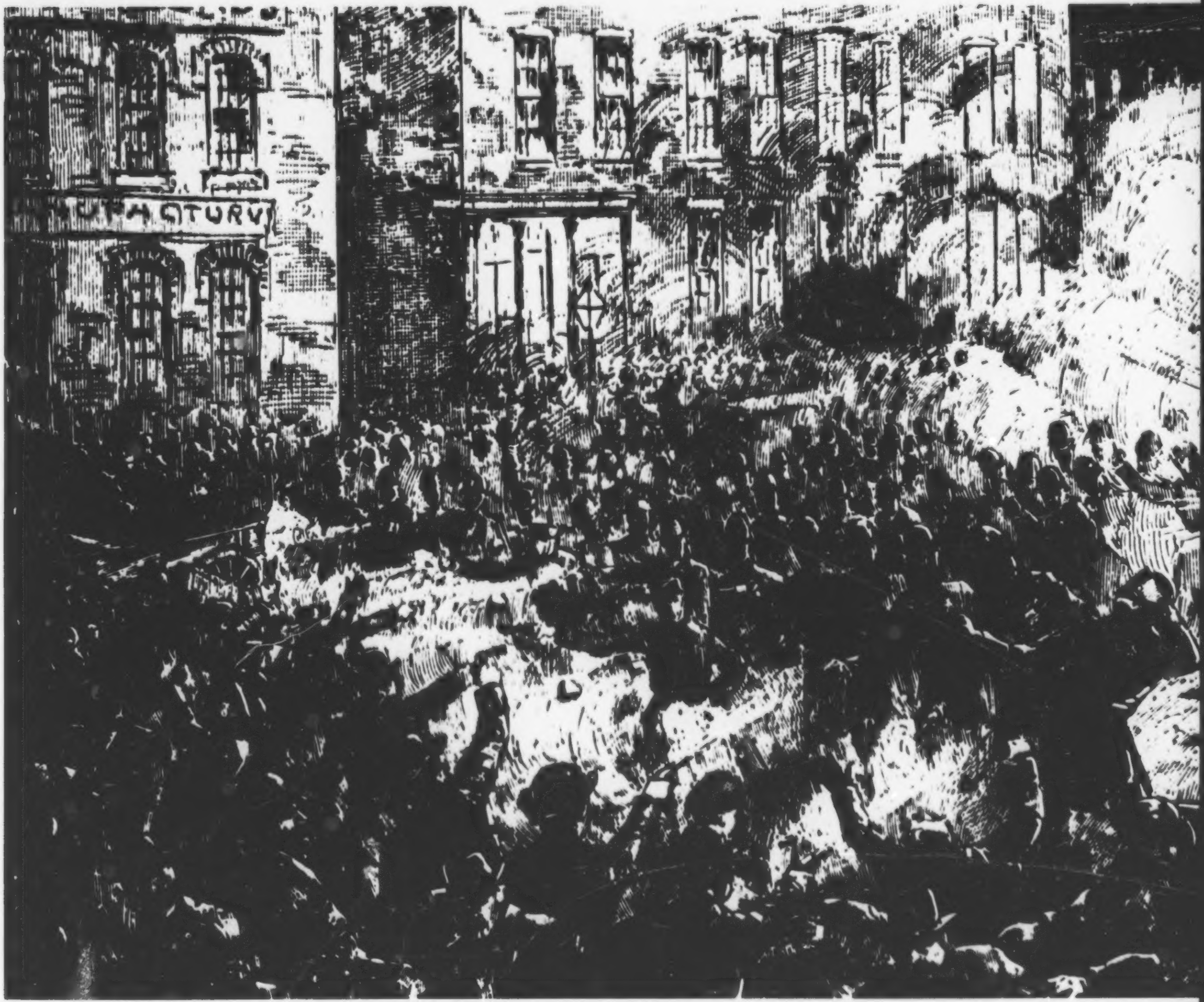
Where does the truth lie? Prosecutors and judges almost always deny that there's any such thing as a political trial. Defendants and their lawyers often charge politically inspired victimization by the courts. Which side is right? What are political trials, do they exist here, and, if they do, do they pose a threat to the administration of justice?

One way of answering these questions is to look at the five cases explicitly identified by Justice Douglas (as well as one implicitly identified) to see whether in fact political trials exist, and, if they do, what implications they have for our notions of due process and fair play. The first installment of this article will look at three early cases.

The Anarchists' Case

The first of the cases identified by Justice Douglas had its roots in the bitter struggles of labor and management after





the Civil War. As America underwent the transition from an agrarian society to a major industrial power, the nation witnessed a long series of strikes, lockouts, and other troubles between workers and management.

In 1886, labor organizations across the country were pushing for an eight-hour day. Agitation was particularly pronounced in Chicago. On May 3, there were scuffles between strikers and nonunion workers (called "scabs" by the strikers) outside the McCormick reaper works. A police riot squad was called in to cool the disturbance, and before the fighting was over, two strikers were killed and four policemen wounded.

One of the witnesses to the trouble was August Spies, editor of a German-language radical newspaper. Spies, who had made a speech to the strikers before the trouble started, was an anarchist, committed to social and political revolution in the United States.

Outraged by the killings, he rushed to his office and dashed off two circulars, one in English and the other in German. The English circular said, in part, that workers should "destroy the hideous monster that seeks to destroy you. To arms, we call you, to arms!"

In the article he then composed for the newspaper, he was even more inflamatory. If the union men "who defended themselves with stones . . . had been provided with good weapons and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate. As it was, only four of them were disfigured. That is too bad."

He and other anarchists called for a mass protest meeting at Haymarket Square the next evening. Police prepared for the worst, but according to most sources the crowd was small and orderly. A reporter from the *Chicago Tribune* later testified that "It was a peaceable and quiet meeting . . . [with no speakers advising] that they were going to use force that night." Chicago Mayor Carter Harrison listened to the speeches of Spies and other anarchists, concluded that the meeting was tranquil, and returned to a nearby police station to advise that the large force of police reserves concentrated there be sent home.

Shortly after the mayor had left the

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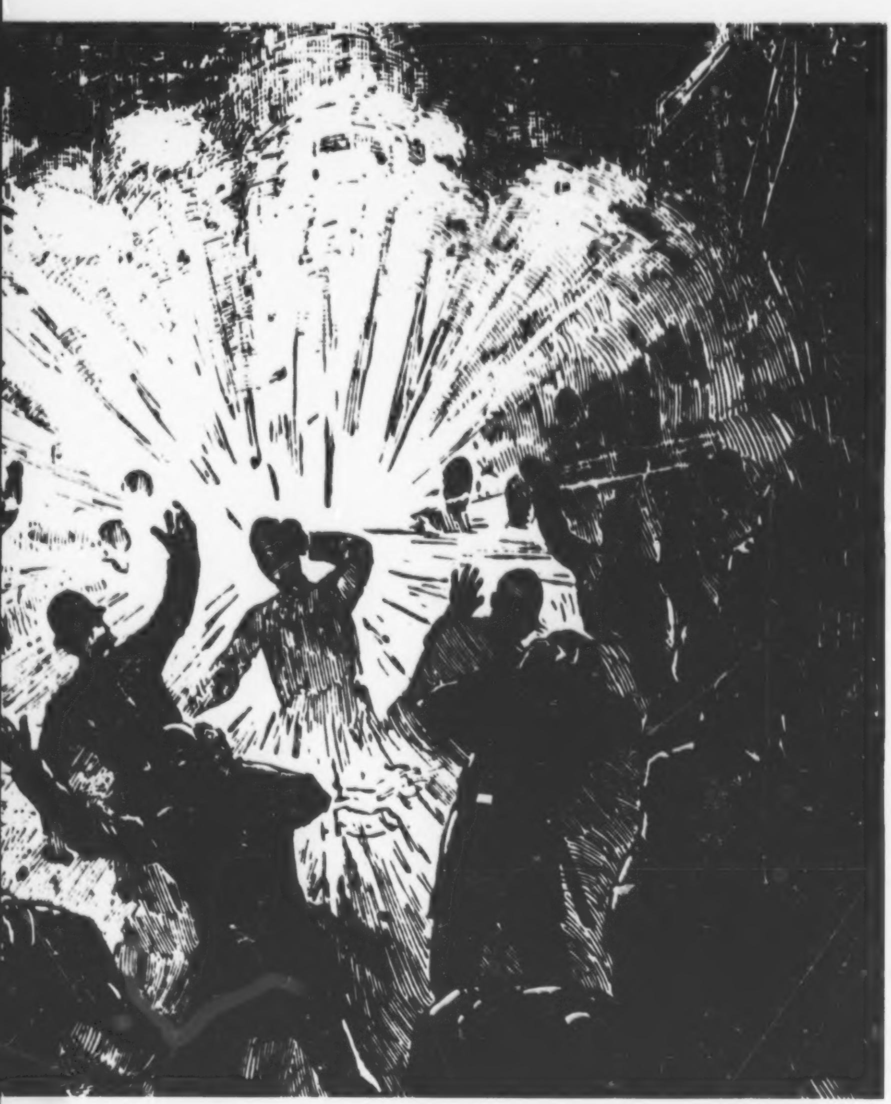
652



meeting, a storm came up and people began to drift off. Soon no more than 200 remained. Nevertheless, the police inspector in charge of the men at the station marched a contingent nearly as large as the crowd to the meeting area and demanded that the meeting disband. The man then speaking, Samuel Fielden, said "we are peaceable." At that instant, a bomb was thrown into the tightly massed police rank. Pandemonium broke loose. Many officers were knocked to the ground and wounded. The others pulled their weapons and began firing. After two minutes (and at least 275 shots), the firing ceased. One officer died on the spot (six others were eventually to die of their wounds) and sixty-seven were wounded.

Newspapers in Chicago and around the country immediately assumed that the anarchists were to blame for the bomb. In those rough-and-ready newspaper days, the line between news stories and editorials often disappeared. Thus stories of the crime were filled with denunciations of the anarchists, claiming that they were "vipers," "ungrateful hyenas," and "serpents" who used the "cowardly tactics" of "curs" to "inaugurate a reign of lawlessness."

The papers and public opinion demanded action, and the police provided it, rounding up every anarchist and socialist they could lay their hands on. When a question came up about search warrants, State's Attorney Julius S. Grinnell advised "make the raids first and look at the law afterwards." Within a few days more than 200 radicals were under arrest.

The police were sure that the anarchists were, in general, responsible for the crime, but they were faced with the legal problem that no one knew who had thrown the bomb. Would it be possible to bring charges against the anarchists if the identity of the actual bomb thrower remained a mystery? Eventually prosecutors decided that it didn't matter. Inasmuch as Spies, Fielden, and other anarchists had "advocated over and over again the use of violence against the police and had urged the manufacturing and throwing of bombs, their culpability was clear." In other words, legal proceedings could be taken against the "accessories," though the "principal" was unknown. This constituted a new interpretation of the accessory statute, and was to constitute one of the major legal disputes of the case.

Three weeks after the incident, thirty-one anarchists or socialists were indicted, but only eight were put on trial. It was not clear why these eight were selected. Four were anarchist leaders who had been at the Haymarket meeting (though two had left before the bomb went off). Two others had been at a meeting the night before, at which the prosecutors would argue the scheme had been hatched. One had been at neither meeting, but had made bombs. The other defendant had been at neither meeting nor made any bombs.

The defendants were put on trial a few months after their indictment. They attempted immediately to secure a separate trial for each defendant, but the judge ruled against them. The judge's decision was a real blow, since it meant that evidence against any one defendant could be used against them all. It set the stage for a wide-ranging prosecution case, which introduced many kinds of evidence in an attempt to show that the defendants had been part of a conspiracy whose final result was the bomb throwing and deaths.

The Prosecution Attacks

The prosecutor's case rested on three main points: that the defendants had access to dynamite and other weapons, that there was a conspiracy to attack police, and that the defendants were all committed to a violent social revolution and had ample motivation for the deed.

The prosecution had no difficulty showing that one of the defendants, young Louis Lingg, had made and distributed bombs, including many distributed the day of the bombing. Lingg, an aggressive youth of 21 who had been in this country for less than a year, prob-

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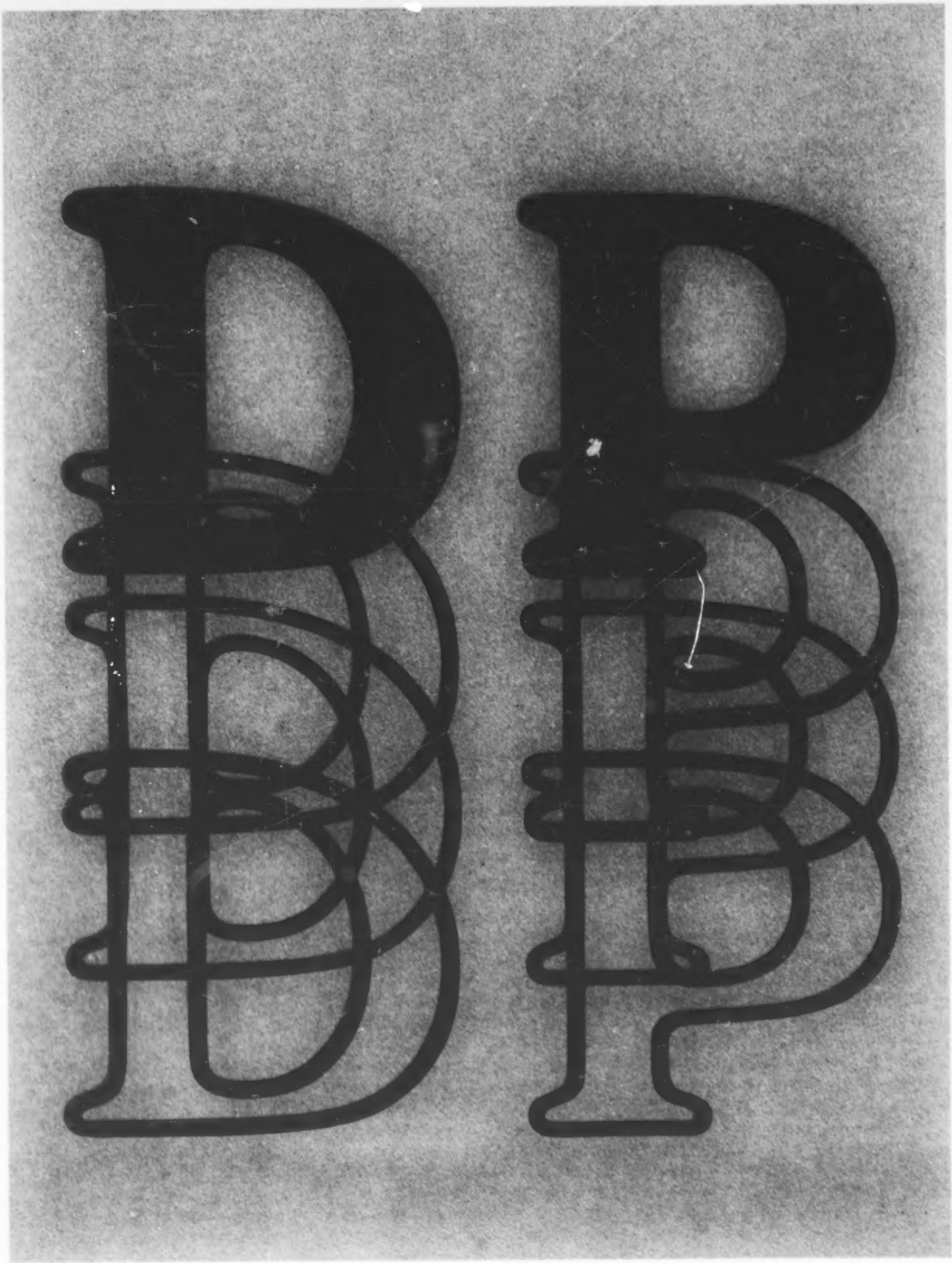

Patricia McGuire

Due Process: What is It?

Some tips on how to present a tricky topic

"Who will police the police?" Even at this paraphrased distance of several thousand years, the concern expressed by Plato over the potential excesses of the Republic's "guardian" class has a familiar ring. Two hundred years ago, the Constitution's authors, facing the same concern, decided to put their fate, and ours, in a "government of laws, not men." A written Constitution, not a philosopher king (or queen).

Even so, upon completing the main body of the written document, the framers realized that something was still missing. The government of laws, so logical on paper, was to be implemented by men and women none the less, and so would be subject to the infinite variety of human interaction, conflict, and excesses. How should the governors be governed? The answer was proposed in the Bill of Rights.

Beyond enumerating specific individual fundamental rights, such as freedom of speech and religion, beyond mandating specific processes for certain governmental interactions with individuals, such as the requirement for grand jury indictments, the authors of the Bill of Rights recognized the necessity to create a watchdog to guide and restrain all government encroachment upon the fundamental human interests in life, liberty, and property. The watchdog is "due process of law."

This ultimate limitation of arbitrary governmental action lies in the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." Over 100 years ago, this same language, with one important variation, was again included in an amendment to the Constitution: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The Fourteenth Amendment operates to impose upon state governments the same due process watchdog as the Fifth Amendment imposes upon the federal government.

What Is Due Process?

Neither the words "due process" nor the concept were new in 1791. The conceptual roots lay in King John's Magna Charta, and the words evolved through later centuries. Yet even today, 766 years after Runnymede, 190 years after the ratification of the Constitution and Bill of Rights, debate rages: what is due process of law, and what does it require of our government? What does due process require of "we the people" who are ultimately responsible to make it work?

The Supreme Court struggles with this issue annually: When must an attorney be made available? When must statements of an accused be excluded from a trial? What can a reporter publish prior to a trial? Nor are the questions all related to criminal processes. Perhaps even more complex and subtle questions arise in the civil areas: What kinds of procedures are required before a federal agency imposes regulations on a private industry? What processes must a zoning commission pursue before granting a variance? May state law allow a tenant to be evicted without notice or a hearing?

The preceding paragraph illustrates the first important fact about due process for teachers of law-related education: due process is not an isolated issue to be taught in a vacuum. Due process is a concept which cuts a broad swath through all legal topics; it's not just for the Bill of Rights teachers.

The second important fact about due process lies in its very definition. The right to due process means that the government cannot infringe upon citizen rights without fair procedures. Fair procedures have been interpreted to mean, at the very minimum, that the government must give the citizens some notice of the actions it plans to take, and also that the citizens must have an opportunity to respond, to be heard.

Due process does *not* mean that the *result* of the fair procedures will be favorable to the citizen. Due process does, however, assume that the result of fair procedures will be the achievement of justice.

When Is the Process Due?

The first step in coming to an understanding of how due process works is to ask: Is the citizen entitled to fair procedures? The answer to this question depends upon the extent to which a proposed government action will infringe upon a citizen's life, liberty, or property, including one of the specifically enumerated individual rights listed in the Constitution.

In criminal actions, in which the citizen faces a potential loss of liberty, the due process requirement is clear, and elucidated at some length in the Fourth, Fifth, and Sixth Amendments, as will be discussed below. However, with regard to noncriminal actions, the response is not at all clear or consistent. Civil due process cases are most immediately concerned with the nature of the citizen's interest threatened by government action. For example, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the initial question was whether a welfare recipient had a property interest in public assistance payments. Justice Black, in dissent, said no, that such payments were not a property entitlement; however, Justice Brennan for the majority said yes.

Once the nature of the citizen's interest is resolved, the next question is whether that interest is being threatened with such a degree of encroachment as to warrant requiring the government to follow due process procedures. Again, in *Goldberg* the Court said that, if welfare recipients were not accorded some minimal due process prior to the termination of their benefits, the resulting harm would be "brutal" and "unconscionable" to those recipients who did not deserve to have their rights terminated.

A finding that some procedural due process is required has been significant in reshaping the law with regard to the treatment of juveniles (*In re Gault*, 387 U.S. 1 [1967]; *In re Winship*, 397 U.S. 583 [1970]; *McKeiver v. Pennsylvania*, 403 U.S. 528 [1971]); the right of unmarried fathers to have a say in the care and adoption of their children (*Stanley v. Illinois*, 405 U.S. 645 [1972]; *Caban v. Mohammed*, 47 U.S.L.W. 4462 [1979]); confinement of mentally ill persons (*O'Connor v. Donaldson*, 422 U.S. 563 [1975]); repossession of consumer goods (*Fuentes v. Shevin*, 407 U.S. 67 [1972]); abortion rights of minors (*Bellotti v. Baird*, 442 U.S. 622 [1979]); public education and student discipline (*Goss v. Lopez*, 419 U.S. 565 [1975]; *Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 [1978]); and a host of other civil law issues.

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What Process Is Due?

Once courts decide that some due process is required to protect the interests of citizens in a situation of potential governmental infringement, the question arises: What kinds of procedures are required? Again, in the criminal due process area, the actual procedures are fairly specific, although even specific guarantees, such as the right to counsel, have required extensive interpretation. For the areas in which some civil due process is required, the issue, once again, is neither clear nor consistent. While courts will order only "minimal" due process, the procedure minimally allowed for a student threatened with suspension may not satisfy the interests of a welfare recipient about to have his or her payment terminated.

For the criminally accused, the process which is due is embodied in the concept of a fair trial: a speedy, public hearing before an impartial judge and a jury of one's peers; an adversarial process, in which the accused, through the effective assistance of counsel, may confront and cross-examine his or her accusers, and present evidence in defense; a process in which the accuser must prove the guilt of the accused, beyond a reasonable doubt.

While all of these required procedures may seem clear in the plain meaning of the Fifth and Sixth Amendments, applying the procedures can become complex, giving rise to constitutional cases. Legislators, as well as courts, continue to wrestle with the definition of a "speedy" trial. A "public" trial has been a source of controversy in recent years, particularly as the Supreme Court has tried to strike a balance between the rights of the defendant and those of the press (*Gannett v. DePasquale*, 443 U.S. 368 [1979]; *Richmond Newspapers v. Virginia*, 48 U.S.L.W. 5008 [July 2, 1980]). A "public" trial takes on a new meaning with the most recent Court decision allowing televised criminal trials (*Chandler v. Florida*, 49 U.S.L.W. 4141).

The "right to counsel" must be accorded by states and the federal government in felony cases (*Gideon v. Wainwright*, 372 U.S. 335 [1963]), and in misdemeanor cases in which imprisonment is a possibility (*Argersinger v. Hamlin*, 407 U.S. 25 [1972]). The right to counsel has been intimately linked to the right to remain silent, i.e., not to incriminate oneself, and this powerful duo has resulted in the far-reaching *Miranda* decision (*Miranda v. Arizona*, 384 U.S. 426 [1966]) and 15 years of subsequent interpretation and narrowing (*Oregon v. Mathiason*, 429 U.S. 492 [1977]; *Brewer v. Williams*, 430 U.S. 387 [1977]; *Rhode Island v. Innis*, 48 U.S.L.W. 4506 [1980]). These decisions have had significant impact on police procedures as well as on the admissibility of evidence at trial. Similarly, the continuing interpretation of the Fourth Amendment through years of cases has stated and restated procedural norms for issuing warrants and conducting warrantless searches.

As this sampling of criminal issues and cases illustrates, while the elements of criminal due process are outlined in the Fourth, Fifth, and Sixth Amendments, their actual implementation is not static, but subject to change with time and interpretation. This flexibility gives rise to continual change in actual procedures used by police and courts.

The Constitution does not provide a similar outline for the process due in civil matters, aside from the Seventh Amendment's provision for a right to a jury trial in all civil cases in which the matter in dispute is in excess of 20 dollars. The forum for vindicating a civil due process right is not necessarily the courtroom, and the arbiter is not necessarily wearing judicial robes.

In determining the elements of civil due process, the courts use a balancing test to decide what procedures are minimally necessary, in a given case, to afford the citizen rightful protection without at the same time imposing more expense and burden on the government than is necessary. The traditional forms of criminal due process, such as right to counsel and an impartial judge, are used as a guide, but not uniformly imposed.

Civil due process, in its most basic form, may be satisfied through some form of notice, and an opportunity for a hearing. The actual form of the notice and hearing may vary widely. For example, in school suspension cases, the *Goss* due process standard may be satisfied through a corridor encounter between a student and principal, in which the principal informs the student that suspension is impending for a rules infraction, and the student counters with, "But I did it because . . . etc."

On the other hand, the *Goldberg* decision says that before cutting off public assistance payments to a welfare recipient, the recipient must have some opportunity for a hearing before an impartial person, at which counsel may be present, and the claimant may confront and cross-examine witnesses.

With all of these varying judicial interpretations of what constitutes minimal due process in a given case, however, it is important to remember that the judicial decree orders only the *minimum*. Nothing prohibits the government agency from doing more than the minimum. For example, despite the *Goss* minimums, many school systems now require more consistent, semi-formal or even formal hearing procedures.

A Few Notes to Teachers

While the preceding material is offered as a guide to the meaning and shape of due process, it is not, of course, comprehensive. For students, "due process" can sound like a confusing, jargon-laden idea. In the initial approach to the concept, simplicity may be the best route. Once students gain facility with thinking and speaking about "due process" as meaning "fundamental fairness" or "fair procedures," they will be better able to understand the layering-over of issues which interact with due process.

Remember that due process does not judge the result directly: the principal may still suspend the student; the welfare recipient may still not get the benefits; the accused may still go to jail. The concept of due process assumes, to a certain extent, that a genuinely fair procedure, with a result based solely on the evidence adduced through that procedure, will achieve justice.

However, keep in mind that factors other than strictly procedural deficiencies—such as discrimination—may affect the fairness of a hearing. While this article does not discuss the relationship between due process and equal protection, the two frequently intertwine to form a web of protection. An objectively fair process may violate equal protection if the decision-maker allows the process to be a sham, and bases a final decision on prejudices which were not revealed in the course of the proceedings.

On the other hand, due process may help remedy a denial of equal protection, using fair processes in place of traditionally arbitrary decision-making. For example, the Supreme Court has ruled that a blanket maternity leave policy, while administratively convenient, discriminated against pregnant women by presuming that all pregnant women weren't capable of teaching beyond the sixth month of pregnancy. Rather than striking down the rule on equal protection grounds, however, the Court determined that the policy violated the women's right to due process, and ordered the school boards to "employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty . . ." (*Cleveland Board of Education v. LaFleur*, 414 U.S. 632 [1974]).

As with other individual liberties, the due process concept cuts across the spectrum of legal issues a law-related education course might deal with. Whether teachers and students are considering consumer rights, family affairs, or criminal justice, questions continually arise regarding the necessity and adequacy of notice and hearing procedures.

While, of necessity, teachers may include due process considerations when teaching any of the substantive areas, teachers may also opt to teach a separate due process unit, perhaps as part of a larger unit on the Bill of Rights. The following material offers sample goals, objectives, and teaching strategies for a five-day due process unit. The strategies represent a wide variety of legal issues, and so may individually be incorporated into units on specific subjects like criminal law.

Goals and Objectives for Due Process Unit

As a result of the objectives and activities in this unit, students will develop an understanding of the term "due process," comprehension of the role of due process in our system of government, and an ability to recognize the practical applications of the due process guarantee in citizens' everyday issues.

Specifically, through the activities in this unit, students will be able to:

(1) define the term "due process" and identify the sources of the term in the U.S. Constitution;

(2) describe situations in which they have encountered, or been deprived of, due process;

(3) analyze a variety of civil and criminal factual situations in order to determine whether the due process guarantee should be applicable;

(4) analyze opinions of the Supreme

(Continued on page 53)

". . . broiled breast of chicken, baked potato, hold the butter, light salad, vinegar, no oil—are we still under 1000 calories?"

Sharon Irish

Does Conscience Matter More Than Law?

Yes, No, Maybe.
Which answer would you give your students?

Huck Finn and Miss Watson's soon-to-be-free slave, Jim, were floating around a big bend in the Mississippi, searching the dark river banks for any sign of Cairo, Illinois. You may remember that at this point in Mark Twain's novel, Huck and Jim were "trembly and feverish," each for different reasons. Jim was anticipating his freedom—the chance to save some money, buy his wife, find his children. Huck was sweating his part in helping Jim to escape. Pacing up and down the raft, Huck thought:

> . . . and who was to blame for it [Jim's escape]? Why, *me*. I couldn't get that out of my conscience, no how nor no way. It got to troubling me so I couldn't rest. . . .

After miserably lingering over questions from his conscience, fidgeting about not telling anyone of Jim's flight, and being shocked at Jim's suggestion he would steal his children if their master wouldn't sell them, Huck silently decided to "paddle ashore at the first light, and tell."

Upon sighting Cairo, Jim helped Huck into the canoe to check out a landing spot. Huck was, of course, still determined to turn Jim in, until Jim's remarks "took the tuck all out of" him:

> . . . You's de bes' fren' Jim's ever had; en you's de *only* fren' ole Jim's got now. . . . Dah you goes, de ole true Huck; de on'y white genlman dat ever kep' his promise to ole Jim.

Hearing that, Huck sickened. Just then a skiff came near Huck's canoe, and the two men in it asked about the raft and its occupants. They were searching for five runaway slaves. Huck hesitated, struggled inwardly, and finally wove a convincing story about his "pap" on the raft with smallpox. The two men paddled back in fear, offered him money in pity, and left Huck with his conscience once again. Feeling low and mean, Huck returned to the raft, hopeless about his learning to do "right." Then he thought:

> . . . S'pose you'd a done right and give Jim up: would you felt better than what you do now? No, says I, I'd feel bad—I'd feel just the same way I do now. Well then, says I, what's the use you learning to do right, when it's troublesome to do right and ain't no trouble to do wrong, and the wages is just the same?

Huck's Not the Only One

Described as only Mark Twain could describe it, Huck's moral dilemma has been a common one in human history, though the wages are seldom equal. The laws of the state require one action; an individual's conscience requires another. Slavery was one of the tragically legal institutions against which many consciences resisted.

Huck's quandary centered on a specific action and focused on his notion of wrong. All moral experiences, according to Edmond Cahn in *The Moral Decision*, involve these two aspects. How are moral experiences affected by law? How is law affected by moral principles? When morality is legislated and then applied in specific situations, what are some of the possible outcomes?

Edmond Cahn's primary concern is the progression *from* laws *to* their impact on individual activity. He traces the steps from a group's moral legislation to its impact on an individual, who then reworks the group command to suit her/his own character and ultimately makes use of this moral imperative in a personal way (either by action or abstention).

But what if this progression is reversed? What happens when an individual's morality confronts and conflicts with a group's legislation? Examples of this abound. Almost every issue—abortion, the death penalty, the draft, payment of taxes, slavery—has had objectors for reasons of conscience. How do these objectors fare before the law? Do they ever succeed in changing it? What does this have to do with fairness? With due process?

The Power of Juries

In thinking about an individual's morality colliding with law, most of us probably set the law up as one entity and morality as another, opposing one. In fact, of course, every participant in the legal system operates with a set of morals that can greatly affect the law and contribute to its fluidity. For example, you might think that conscious, intentional no-saying to society's rules—civil disobedience—would result in an automatic guilty verdict. But few courts of law dispose of a case so automatically. Particularly where juries render judgments, lay participation can infuse great uncertainty into an apparently cut-and-dried case.

Judges and lawyers alike have been miffed at the unpredictable behavior of juries. Juries traditionally have the freedom to decide a case based on their own understanding of the facts and the law, regardless of the judge's instruction.

This tradition derives from seventeenth century England. In 1670, William Mead and the Quaker William Penn were tried for holding an unlawful assembly in Gracechurch Street, London. The presiding magistrates were convinced of Penn's and Mead's guilt, though the evidence against them was vague and incomplete. Penn and Mead insisted on their procedural right to a jury trial. The jury, in its turn, refused to find the two men guilty as charged. For the jury's independence of thought, the magistrates fined them "40 marks per man and imprisonment till paid."

The jury remained locked up for several weeks (an odd form of sequestering!), until one of the jurors, Edward Bushell, applied for a review of the case. The king's judges unanimously decided that the fine and detention of the jurors was contrary to law. In his opinion, Chief Justice John Vaughan elaborated on the frequently different opinions derived from the apparently same set of facts. Vaughan asked rhetorically:

> Must therefore one of these [jurors] merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity?. . .
>
> A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning.

The liberty of the jury to decide as it sees fit—even if it decides differently than the judge would or ignores the law in coming to its verdict—is central to our system of justice. Juries introduce a wild card into the system, but one that is necessary if the system is to have public support. Philander Coates, the wise and philosophical old judge in James Gould Cozzens' novel *The Just and the Unjust*, says that juries are part of the ancient "conflict between liberty and authority":

> The jury protects the Court. It's a question how long any system of courts could last in a free country if judges found the verdicts. It doesn't matter how wise and experienced the judges may be. Resentment would build up every time the findings didn't go with current notions or prejudices. Pretty soon half the community would want to lynch the judge. There's no focal point with a jury; the jury is the public itself. That's why a jury can say when a judge couldn't, "I don't care what the law is, that isn't right and I won't do it." It's the greatest prerogative of free men. They have to have a way of saying that and making it stand. They may be wrong, they may refuse to do the things they ought to do; but freedom just to be wise and good isn't any freedom. We pay a price for lay participation in the law; but it's a necessary expense.

A jury can say, "I don't care what the law is, that isn't right and I won't do it"

The Law on Trial

What this means, of course, is that courts are not only legal institutions. Sometimes, they're moral institutions too, in which the law as well as the defendants are on trial.

You could argue that the jury's power to decide against the law, to decide that the law just isn't fair and they're not going to have any part in it, is necessary in a diverse, mobile society such as ours. Take Huck Finn, for example. His story takes place at a time when many Americans were changing their mind about slavery. It takes place in a setting—the Mississippi River—that is precisely the dividing line between two societies, one slave and one free. Would it make a difference if Huck were tried in Illinois or Missouri? If he were tried in 1830 or 1860? Of course it would. Huck's case could become a referendum on the morality of slavery, to be decided differently depending on when, where, and under what circumstances it took place.

So Huck's case could exemplify two different instances of the interplay of morality and law. The morality of the boy, who decides that the law is wrong, and the morality of the jury, which might agree with him.

But it's not necessary to turn to fiction to find morality interacting with law. Our history provides plenty of examples of personal challenges to laws. If you're opposed to killing human beings for any reason, you're confronted with the draft, a legal but, to your eyes, immoral institution. Abortion offers another difficult moral dilemma for many people.

Most believers in democracy would accept the value of individual analysis of various issues, and the subsequent necessity to protect differences of opinion. What if these differences call an individual to consciously, conscientiously, act outside the law? What is the procedure for adjudicating what one author has called "holy disobedience"?

Before we explore some actual cases of people who challenged the draft, allow me a digression. When considering a moral question, it often helps to personalize an issue. As Edmond Cahn points out, when morality is generalized, everybody agrees. "Thou shalt not kill," right? Except there are any number of ways within the law that killing is justifiable (killing in self-defense) and excusable (killing by accident). So, the scenario described below is meant to give some identity to an otherwise amorphous, perhaps insidious, problem. Though hypothetical and woman-centered, its intent is to include those of us not immediately confronted by the dilemma of registration for military service.

An Unhappy Fantasy

Maxine woke up jubilant one sunny June morning, arched her back toward the ceiling and yawned just as Matilda, the grey feline who shared her small space, sauntered in to remind Maxine of breakfast. Maxine had two weeks off from the lab where she worked. Two weeks, fourteen days, 336 hours, of time for herself. She grinned at the mirror as she began to brush her teeth. Rubbing her stomach, which was already demanding toast and yogurt, Maxine fed Matilda and put the coffee water on. She loved early mornings without the pressure to pack a lunch, get dressed, gobble breakfast and head to work. The whole day seemed longer just thinking about loafing, drinking coffee and reading the paper.

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The paper . . . she headed down the hall, unlocked the door and—her stomach did a double flip, her mouth went sour. CONGRESS DECLARES WAR, the headline read. "Draft call begins," read the next line.

"Holy Goddess," Maxine said under her breath. There she stood—20, ablebodied, of sound mind, unmarried, childless—the perfect draftee. But unwilling. No, adamantly opposed said it better. She had registered, though that action had not set well with her. At the time she had rationalized it, thinking the issue was not military conscription but women's equality. Maxine had decided, rather too quickly perhaps, that she should stand and take the responsibilities that equality brought. Though she always had been opposed to war, she had argued on principle that if men were drafted to kill and be killed, women should be too. She remembered her statement to her co-worker, Jerry, in shrill irritation, "Men and women are in this world together. We make babies, we make war. If our separate roles are ever to be challenged it will be when men claim the babies and women claim the killing."

A clever remark, she had thought at the time. But faced with a very real newspaper headline, her thoughts seemed naive and impotent. She was sad, depressed, and angry, all at once. The world seemed too big, too crazy; she could already envision the tragic faces of people fleeing their homes, the lists of war dead, the neighbor's son without legs, the fear and tension in people's faces. This, abstracted into war, was legal?

Her anger mobilized her. On with her shorts, her T-shirt, her socks, and shoes. Out the door and into the sun, now fuzzy through pastel haze. Stretch, pull, up, down, to the side. Bounce and hold. Breathe. She was running now. Running, and hoping to stomp her anxiety into the cinder path. No such luck. The questions ran at her heels—nipping and biting. War is wrong, war is wrong, war is wrong. In and out with her breath, this litany was part of her being. What could she do?

Conscience in the Courts

Suppose that Maxine decides to express her objection to war by refusing to cooperate further with the Selective Service System. Even though, as a member of one of the peace churches, she probably could have a conscientious objector's draft exemption, she returns her draft card with an eloquent moral and political defense of her action.

For this act, she is put on trial. Can she make her case a meaningful protest? Can she use it as a forum to attack what she considers an immoral policy? Can she use it, ultimately, to change the law?

The answer to all these questions is, probably not. Courts of law ordinarily don't examine the underlying assumptions of the law. They don't see themselves as appropriate forums for political decision. Their work, they say, is to convict or acquit on the basis of the facts presented in a particular case.

Why aren't jurors ever told that they have the power to decide on any basis they want?

At Maxine's trial, then, the prosecutor and judge would probably agree that the only issue to be resolved was whether she had violated the draft laws knowingly and willfully, whether she did so with a required "criminal intent." Does "intent" mean that Maxine will have the chance to discuss her motives? No, because the law draws a distinction between "intent" and "motive." Probably the judge will refuse to let her and other witnesses testify about her reasons for resistance.

In addition to limiting testimony and the issues presented to the jury, the judge would probably also impress upon the jury the distinction between his role and theirs. In an actual draft-resistance case from the late sixties, the judge told the jury:

> You decide the facts, and I lay down the law. . . . You must take the law laid down by the court, and none other.
>
> The only question for you to decide here is whether or not . . . [the defendant] knowingly and willfully violated the Selective Service Act. . . .
>
> Motive, no matter how laudable or praiseworthy that motive may be . . . [is] never a defense where the act committed was an intentional violation of law—a crime.
>
> Now some jurors may believe that the Vietnam war is immoral or unconstitutional or illegal. . . . [But] if you allow your personal beliefs . . . to affect your judgment in this case, you will be violating your oath as a juror.

As this suggests, the adversary system in the United States requires a certain passivity on the part of the judge and jurors. Facts are analyzed and the verdict rendered dispassionately, with the law as a guide. Jurors are actively discouraged from injecting their consciences, their own views and morality, into the procedure. They're encouraged to accept existing law; they're discouraged from thinking about motivation or asking questions of moral intricacy.

In keeping with this attitude, jurors are never told of their power to ignore the law and decide cases as they will. Bushell's case clearly establishes the principle that juries are free to decide pretty much on any basis they want. Unless it's a question of bribery or jury tampering, juries can decide for good reasons or for bad, on the basis of the facts, on the basis of the law, or on some totally different basis.

If jurors have this power, why aren't they told about it? The standard reason is that to do so would weaken the law. The law, everyone would agree, is a less than perfect means of resolving disputes or settling questions, but at least it has the virtue of being accepted from one end of the country to another, in all kinds of communities, in cases stretching back into our history. If the notions or prejudices of each jury were determinative, then we wouldn't have a system of law. No one would know on what basis juries might decide in any given case. Sometimes justice would be served; sometimes it would not. But in neither instance would we have a true system of laws.

Those who support telling jurors of their power argue that the jury is a political as well as a legal institution. Ever since the trial of John Peter Zenger in colonial America, juries have from time to time confronted government with the people's judgment that certain laws or policies were out of line with underlying principles. Jurors aren't robots; they're not required merely to mechanically apply the law to a given series of facts. They are free men and women, and they must, as the conscience of the community, be permitted to look at more than the mere letter of the law.

However, as Charles Rembar points out in his book *The Law of the Land*, those in favor of this reform always assume that it would work to the advantage of defendants, particularly politically committed defendants like Maxine. But the danger of exercising this power in favor of the defendant is that it can also

(Continued on page 37)

COURT BRIEFS

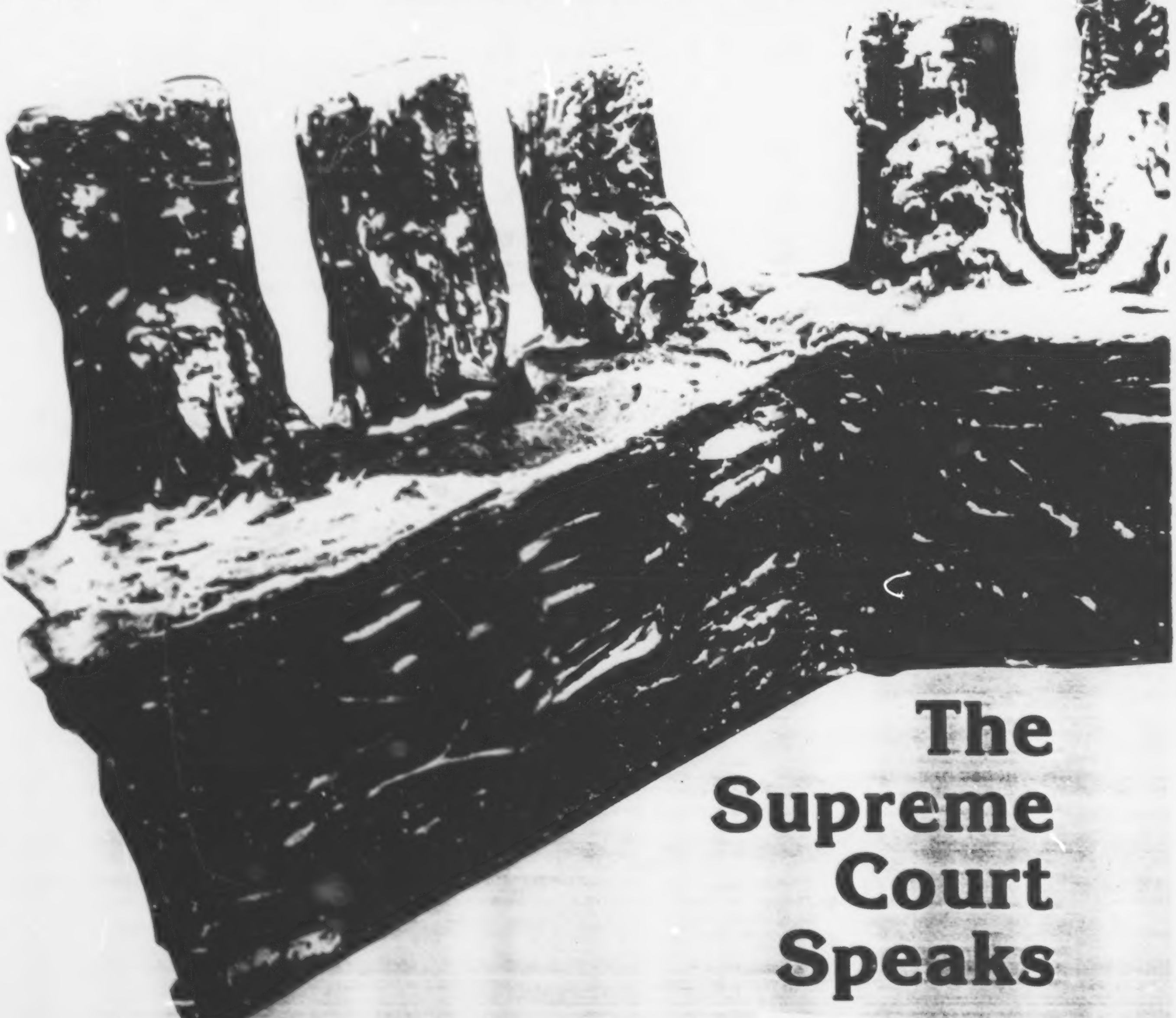
One of the few bad things about vacations is that you invariably return to a desk full of work. The Supreme Court, whose desks are piled higher than most, had the unenviable task of sorting through over 1,000 petitions for rehearings upon their return for the 1980-81 session on October 6. Of that awesome number, only 28 petitions for review were granted by the Burger Court this term. In some instances, the cases the Court declined to review were as interesting and important as the ones they decided to hear.

What the Court Didn't Do

U.S. Exercises Immunity

Although few understand the logic, most know that the United States government cannot be sued for damages resulting from alleged torts unless it consents to the action. In *Naisbitt v. U.S.* (49 LW 3120), the Supreme Court refused to review a lower court decision that the government's sovereign immunity prevented it from being sued in a case in which it allegedly failed to protect the public from the dangerous behavior of two off-duty servicemen.

Survivors of three civilian victims who were murdered by the off-duty servicemen in Utah six years ago contended that the government was liable because it knew that the servicemen had psychiatric problems and failed to properly supervise their actions. The Supreme Court, in declining to review the $2 million claim, let the trial and appellate court decisions stand.



The Supreme Court Speaks

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NOW Boycott Continues

The National Organization for Women's three-year economic boycott against states which have not ratified the Equal Rights Amendment does not violate section 1 of the Sherman Antitrust Act or Missouri antitrust law according to the Supreme Court in *Missouri v. N.O.W.*, 49 LW 3054.

For the last three years, NOW has solicited pledges not to sponsor conventions in non-ERA states from over 300 organizations, including the National Council of Churches and the National Democratic Committee. Missouri filed suit in 1978, contending that the boycott violated its state antitrust law. To date, Missouri claims to have lost over $19 million in convention revenues.

In declining to review the appeal by Missouri, one of 15 states that has not ratified the ERA, the Supreme Court let stand a federal appeals court ruling that the boycott was an expression of NOW's First Amendment right to petition the government for a redress of grievances.

Other non-ERA states include: Alabama, Arkansas, Arizona, Florida, Georgia, Illinois, Louisiana, Mississippi, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

Youth Rights Tested

Until further notice, publicly supported family planning clinics may dispense contraceptives to minors without notifying their parents of the children's sexual activities or participation in the program. Parents in Lansing, Michigan, had won a lower court action against the clinic in *Doe v. Irwin* (49 LW 3027), claiming that

The Court gives itself a raise and finds time for other work too

Walter M. Perkins

failure to notify them of their children's actions violated parents' fundamental Fourteenth Amendment equal protection rights as well as their First Amendment free exercise of religion rights. A federal appeals court reversed, and the Supreme Court let that decision stand.

What The Court Did

Judges Hike Own Pay

In a case unlikely to win much sympathy from an inflation-ravaged public, the Supreme Court has unanimously granted the federal judiciary (including themselves) a hefty pay raise. Thanks to the Court's 8-0 vote in *U.S. v. Will* (48 LW 4045), salaries for federal district judges will increase from $54,500 to $61,600, effective immediately. Appeals court judges will jump from $57,500 to $65,000. Associate justices of the Supreme Court will go from $72,000 to $81,300, while the Chief Justice's salary increases from $75,000 to $84,700. Justice Harry Blackmun took no part in the decision.

Conflict of interest, you say? Nay, says Chief Justice Warren Burger, author of the opinion. Citing the 550-year-old common-law Rule of Necessity, Chief Justice Burger quoted Pollack's *A First Book of Jurisprudence* (1896): "Although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise."

What this simply says is that the judiciary got tired of waiting on the legislature to act and opted to decide matters itself. Quite honestly, Congress has been very reluctant to raise judicial salaries above its own, presently $60,662.50 for representatives and senators alike. In addition, federal judges have been leaving the bench at an alarming rate (24 during the seventies) and judicial sympathizers fear that the present salary scale makes it difficult to attract top legal talent to the bench.

U.S. v. Will is a consolidated class action suit originally instituted by a group of federal district judges on behalf of the entire federal judiciary. The original cases challenged Congressional statutes that altered the effects of the Executive Salary Cost-of-Living Adjustment Act enacted in 1975.

At issue is the correct interpretation of the Constitution's compensation clause, which states, "The Judges, both of the Supreme and inferior courts, shall hold their offices during good Behavior, and shall at stated times receive for their services, a Compensation, which shall not be diminished during their Continuance in Office."

The Adjustment Act provides annual cost-of-living adjustments. Federal judges are paid at the beginning of each month, which means that salary adjustments will take effect on October 1, the start of the new fiscal year.

In October 1975, federal salaries increased an average of five percent. Judges and other high ranking officials covered under the Adjustment Act received similar raises. In each of the next four years, however, Congress adopted statutes that effectively denied federal judges raises that they otherwise would have received under the Adjustment Act. The suing judges contended that once judicial increases are set by Congress, a later alteration violates the compensation clause and is therefore unconstitutional.

The Supreme Court, in a rare unanimous decision, found that the congressional statutes enacted in 1976 and 1977 were signed into law by the president after the cost-of-living increases had already taken effect on October 1. These statutes served to diminish compensation under the compensation clause and are therefore unconstitutional. The statutes enacted in 1978 and 1979, however, were signed into law by the president before October 1 and as a result did not violate the compensation clause.

In what could be a new trend, a Cook County (Illinois) Circuit Court judge, James L. Griffin, has filed suit alleging that his present salary of $50,500 is inadequate and doesn't allow him "to maintain himself in a manner and standard of living to which he is entitled by reason of his education, station in his community, and efforts expended during his lifetime to improve himself as an American citizen."

Judge Griffin specifically wants the Illinois Supreme Court rule banning judges from "practicing law, holding positions of profit, or government positions" declared unconstitutional. The state constitution does allow outside income if it is "usually incident to the ownership of rental property."

The Illinois Court Commission—which can censor, reprimand, and remove judges from office if they have been found guilty of improper behavior—is the named defendant. Griffin says that the commission has not taken action against judges who are farmers, authors, teachers or who have other outside income.

So Sorry

In a brief (for the Supreme Court) six-page, unsigned opinion, the Court held unanimously that even where the government intentionally violates a defendant's fundamental Sixth Amendment right to counsel, the indictment shouldn't be dismissed unless the defendant can show prejudice as a result of the violation.

In *U.S. v. Morrison* (49 LW 4087), defendant Hazel Morrison was indicted on two counts of distributing heroin. After retaining private counsel she was twice visited by Drug Enforcement Agency agents who belittled her attorney while urging her to cooperate in a related investigation. Both visits were made without the knowledge of her attorney, although he was informed immediately afterwards by the defendant, who wouldn't play ball with the agents.

Morrison later moved to dismiss the indictment on the grounds that the agents' conduct had violated her rights to effective counsel under the Sixth Amendment. She failed to specify how her rights had been violated. The district court denial of the motion was reversed by the Court of Appeals for the Third Circuit, which held that the defendant's Sixth Amendment rights had been violated whether her case was prejudiced or not. They further concluded that the proper remedy was dismissal of the indictment with prejudice (no leave to reinstate).

The Supreme Court, in reversing the court of appeals, balanced the defendant's Sixth Amendment rights against the public's interest in the effective administration of criminal justice and concluded that, even if there were a constitutional violation, dismissal of the criminal indictment was an inappropriate remedy.

Justice Byron White, writing for the majority, concluded that, "Here respondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with

(Continued on page 57)

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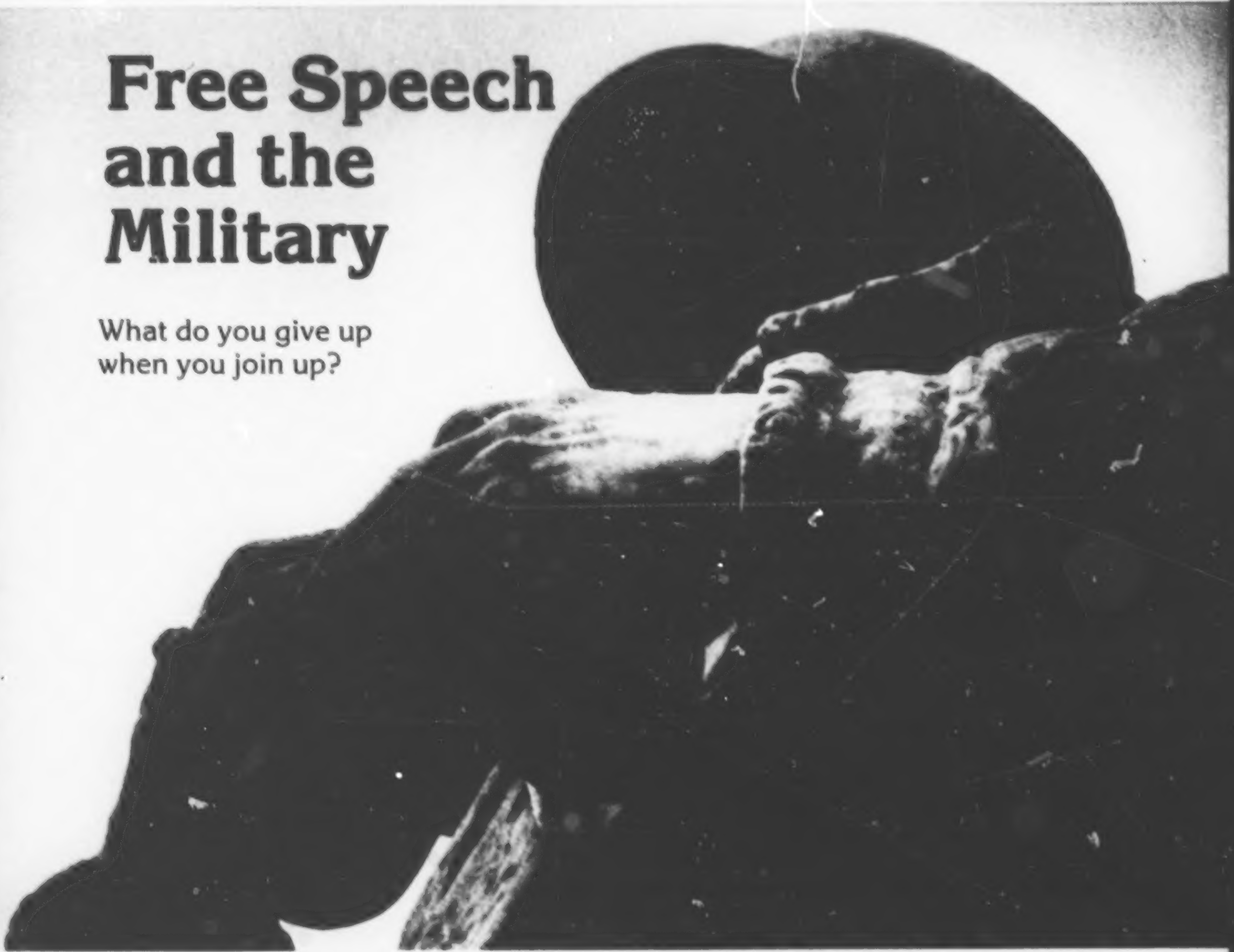
Edward Sherman

Free Speech and the Military

What do you give up when you join up?



The young major thought he was doing the right thing when he criticized army tactics in a military journal article. His commanding officer had another opinion. He called the major in and dressed him down. As the major recounted the incident later, "I was told that my ideas were not only wrong but dangerous, and that henceforth I will keep them to myself. Particularly, I was not to publish anything incompatible with solid infantry doctrine. If I did, I would be hauled before a court-martial."

That incident took place in the 1920s. The young major was Dwight David Eisenhower, and we all know who had the last laugh. Nonetheless, the experience didn't persuade Eisenhower that military people should have full freedom of speech. Since the military is entrusted with the defense of the nation, it has always been given great discretion in limiting what its members may say and write. The First Amendment notwithstanding, there is general agreement that speeches likely to cripple the military's ability to function—as in Professor Zechariah Chafee's classic example of circulating an attack on the commander's competence on the eve of battle—is not protected by the First Amendment.

The problem is to distinguish between times when speech poses a genuine danger to the military from times in which a free trade in ideas is actually needed as a check on official incompetence or, indeed, tyranny. After all, suppressing speech so that unity will be preserved might be a cover for insulating commanders from criticism and squelching differing points of view.

Changing Standards

Eisenhower's grudging acceptance that the military had a right to censor him would probably have been approved by most Americans at least as late as World War II. Most Americans agreed that the military, unlike other institutions, cannot afford the luxury of divisive criticism and rightly demands conformity. The Korean

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War, and more dramatically the Vietnam War, shook this premise. In *U.S. v. Vorhees*, a 1954 decision reviewing a colonel's court-martial conviction for publishing without approval a book critical of General MacArthur, the newly created Court of Military Appeals made the first judicial pronouncement that the First Amendment directly applies to the military. It held that military censorship must be limited to security reasons (4 U.S.C.M.A. 509).

The Vietnam War witnessed the first widespread efforts by military personnel—both individually and as part of organized movements—to publicly criticize the military and American foreign policy. The military reacted with court-martials and new regulations imposing censorship and restraints on a wide range of speech activities.

Extensive litigation in the military courts—and ultimately in the civilian courts reviewing the constitutional questions—resulted in imposing greater burdens of proof on the military, as well as strict conformity to procedures if the military wished to justify its speech restrictions. However, the restrictions generally survived the challenges, receiving Supreme Court approval for vaguely worded speech offenses, a lesser standard of immediate danger to allow suppression of speech, and broad censorship and prior restraint regulations. These decisions drew spirited dissents from a sizable Court minority, and although the issues have been settled within the narrow confines of the situations presented, the principles are still far from clear.

Conduct Unbecoming

The case of Lt. Henry Howe was based on two court-martial offenses applicable only to officers—"uttering contemptuous words" against the President and other officials and "conduct unbecoming an officer and a gentleman." Could these offenses be constitutionally used to punish Howe for criticizing foreign policy?

Shortly after American ground troops began to fight in Vietnam in 1965, Howe, while off-duty and in civilian clothes, joined an antiwar demonstration in a downtown park, carrying a homemade sign reading, "Let's Have More Than a Choice Between Petty Ignorant Facists in 1968" and "End Johnson's Facist Aggression in Vietnam." He was sentenced by a court-martial to two years confinement and dismissal, despite a First Amendment defense. In *Howe v. U.S.*, the military courts upheld the conviction on two rationales—that Howe's words endangered the military subordinate-superior structure and violated the traditional American policy that the military does not interfere in politics (17 U.S.C.M.A. 165).

Neither rationale is entirely persuasive. The President, as Commander-in-Chief, is only a military superior in a remote way, and public criticism of him (which in this case was directed at foreign policy issues) is different from an attack upon a superior with whom there is a work relationship. The Supreme Court's 1968 *Pickering* decision (391 U.S. 363) held that public employees' criticism of a remote employer (a teacher's letter-to-the-editor criticizing the school board) is protected speech, while criticism of a closer superior may not be because of the impact on job performance.

Fourteen black marines complained that Vietnam was a white man's war and said blacks shouldn't fight there

In a day when firefighters and other public employees routinely criticize department policies while continuing to perform their duties, it's hard to justify forbidding military officers to criticize national policies personified by the President. As for the concern over military interference in politics, the military has, in fact, countenanced and even sponsored a wide range of politically directed activities by its officers, especially in support of favored policies. So long as it used its personnel to express support for more military appropriations and other pet political positions, how can it forbid critics from expressing their views?

Lt. Howe's choice of words was unfortunate, and the military might have had some basis to reprimand him if his words reflected on the way he did his job. Still, given the off-post, off-duty nature of his conduct, its traditional First Amendment form, the degree of indulgence generally accorded political hyperbole, and the absence of evidence of any adverse impact on his performance or on morale and discipline in general, this seems a classic case for First Amendment protection. The court's lack of concern for reconciling its decision with existing decisions involving other public employees and its failure to enunciate the countervailing interests of society in allowing free speech set an unfortunate pattern for later treatment of First Amendment issues by the military.

Race and "Disloyalty"

The next military speech case concerned another court-martial offense that doesn't have a civilian counterpart—making "disloyal statements." The case involved both criticism of the war and inflammatory racial rhetoric. In 1969, Pvt. Daniels and Corporal Harvey received ten and six year sentences from a court-martial for statements to other black marines in a bull session during a break in training. They said that Vietnam was a white man's war and black men should not fight there. They urged the others to inform the commander that they would not fight there at a "request mast" (a procedure for discussing complaints).

Fourteen black marines joined them in requesting mast but were turned away with a warning that they might be subject to mutiny charges. Several weeks later, after the unit had completed its training and most had left for Vietnam assignments, Daniels and Harvey were arrested on charges of "disloyal statements" and conspiracy to cause insubordination, disloyalty, and refusal of duty.

The Court of Military Appeals' decision partially upholding and partially reversing their convictions made a significant concession to the First Amendment in stating that "disagreement with, or objection to, a policy of the Government is not necessarily indicative of disloyalty to the United States." One could criticize the military or even war policies, the court said, without being disloyal, citing the case of selective-conscientious objector Captain Dale Noyd, whose refusal to participate in the war "demonstrated a genuine dedication to the United States as a political entity, [though] scruples of conscience about the Vietnam War compelled him to refuse to obey." However, it held that the court-martial of Daniels and Harvey could properly have found their statements to be disloyal since they urged men who were highly "susceptible" to racial rhetoric to disobey orders (19 U.S.C.M.A. 529 and 539).

Daniels' and Harvey's statements were more dangerous than Lt. Howe's and made in a forum and a manner which rendered them not so clearly the kind of political discussion the First Amendment is designed to protect. But the court

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glossed over two factors—that the speech was directed at using grievance procedures and that no adverse impact on obedience, morale, or discipline was shown.

Under civilian First Amendment precedents there would not have been a "clear and present danger" sufficient to allow suppression of speech. Why? Because there was still ample opportunity to counter their advocacy of disobedience with rational discussion (50 years before, in *Abrams v. U.S.*, 250 U.S. 616, Justice Holmes wrote that speech may only be forbidden in an "emergency that makes it immediately dangerous to leave the correction of evil counsels to time.") Under the 1969 *Brandenberg* decision (that rhetoric threatening violence before a sympathetic audience does not in itself constitute a "clear and present danger"), it would be hard to argue that the marines' encouragement of disobedience at some indefinite time in the future, in fact resulting in no adverse consequences, was a danger real and immediate enough to justify supressing free speech (*Brandenberg v. Ohio*, 395 U.S. 444).

In effect, the military court was saying that the special circumstances of the armed services made it impossible to guarantee as much free speech to military personnel as to civilians. To permit more censorship the court applied a more flexible "clear and present danger" standard to the military. It viewed morale and discipline as so easily undermined that the military should not have to wait until the danger is immediate and apparent.

Since racial discontent and antiwar sentiment in the military in the 1960s were serious problems, the military was probably justified in being alarmed by the coupling of these causes with open advocacy of disobedience (accepting the court's reading of the record, which is debatable, that the statements were not simply overblown rhetoric). But aren't there dangers too in suppressing advocacy, especially if there's no likelihood that it will be acted upon? For example, personnel are less likely to use normal grievance procedures and discuss discontents openly if they risk court-martial for expressing themselves strongly. Furthermore, allowing quick suppression of this kind of speech takes no account of the legitimacy of the complaints (a number of the marines had been promised special schooling and assignments which were not fulfilled) and the healing effect of openly discussing and responding to such discontents.

At the very least, the First Amendment would seem to call for a more complex analysis of the dangers and countervailing interests involved. For example, what were the nature and importance of the subjects raised? Were alternative forums for discussion available? Did the command have the ability to monitor and control the situation?

The Antiwar Press

A year later, the Court of Military Appeals definitively declared that the usual "clear and present danger" test does not apply to the military, adding revolutionary rhetoric to the situations which justify suppressing speech even without proof of immediate likelihood of danger. In *U.S. v. Priest*, 21 U.S.C.M.A. 564, it upheld the conviction of Seaman Roger Priest for "disloyal statements" made in underground newspapers left on military installations. The papers attacked U.S. involvement in Vietnam, criticized career military personnel, and used such bombastic language as "SMASH THE STATE—POWER TO THE PEOPLE," "BOMB AMERICA, MAKE COCA-COLA SOMEPLACE ELSE," and "TODAY'S PIGS ARE TOMORROW'S BACON."

During the Vietnam War, many bases were hit with underground newspapers, but the military brass wasn't amused

The court found the papers to be "a call to violent revolution against our Government as an institution because of its role in the Vietnam War." As in *Howe*, it made no allowance for hyperbole (or humor), and again there was no evidence that any service member was influenced by the offending language.

In rejecting the "clear and present danger" test, the court relied on the 1952 *Dennis* decision, in which the U.S. Supreme Court upheld the conviction of Communist Party officials. The Supreme Court held that there was no immediate likelihood that the Communists' call for violent overthrow of the government would be heeded. However, it decided that "the gravity of the evil, discounted by its improbability," justified such invasion of free speech as is necessary to avoid the danger (*Dennis v. U.S.*, 341 U.S. 494).

Dennis is an odd precedent for the court to rely on. Decided at the height of national concern over Communist subversion, *Dennis* was modified by later decisions that advocacy *cannot* be suppressed unless it rises to a level of incitement likely to produce unlawful action (*Yates v. U.S.*, 354 U.S. 298). It has thus been viewed as restricted to the Communist-type of clandestine, disciplined conspiracy, ready on a moment's notice to put its violent plans into action.

Priest's papers are just not in the same league with the Communist conspiracy. Although the antiwar movement was active and virulent, there was no evidence that Priest was part of a conspiracy in which disciplined members were prepared to act on his call for revolution. Furthermore, his statements, unlike the Communists', were issued publicly, enabling the authorities to monitor and assess their danger and, consistent with the spirit of the First Amendment, to respond to them in the public forum.

If, as the court believed, Priest's revolutionary bombast was likely to be followed, the gravity of the evil threatened would be great. But the court's conclusion rested on the assumption that critical statements cannot be countered in the open forum because some members of the military lack the "maturity of judgment to resist propaganda." However, the military possesses considerable resources for providing information to counter the kinds of statements made in Priest's papers, and it is hard to see why military members are less capable than other citizens of seeing through outrageous or spurious arguments.

Furthermore, if strongly critical statements must be kept from service members to preserve morale, the result could be a brainwashed military, deprived of information and critical faculties for judging political issues as citizens and voters. "Every statement critical of a military program or policy," a federal court observed in 1972, "can have an effect on attitudes and morale, which can arguably affect in turn order and discipline." But the court went on to deny that those concerns were enough to suppress speech under our Constitution. "Motivation is too intangible a concept," the court wrote, "to meet the directness required . . . in order to override the First Amendment" (*Stolte v. Laird*, 353 F. Supp. 1392).

However, some of Priest's statements went beyond political rhetoric to en-

(Continued on page 33)

SPEECH: THE 1st FREEDOM **Judith F. Krug**

The results of school censorship

Locked Books, Locked Minds

"May you live in times that are interesting," says an ancient Chinese curse. The fact that it is a curse will be doubted by few Americans today.

Our society is in the midst of multiple crises: food, money, energy, terrorism, drugs—not to mention a tax revolt. We live daily with double-digit inflation, the threat of depression, a rapidly shrinking dollar, unemployment, poverty, a housing shortage, the neutron bomb, and an environment that is both unsound and unsafe. Yesterday brought a threat of a strike by fire fighters and teachers; today brings a threat of a strike by postal workers; tomorrow the threat of a strike by garbage collectors, airline pilots, or auto workers.

These are, indeed, interesting times! But they're also frustrating, depressing, and even fearful. Not surprisingly, one of the most pronounced aspects of the current environment is its seeming conservatism. The swing to the right has been described alternately as a resurgence of the old right and the development of a new far right. Regardless of the name, however, the demands are the same: this country must return, ultimately, to the "values and principles that made us great," a return that will bring with it a less complicated and more understandable existence.

Such yearnings are not new. Neither is conservatism a new feature in our existence. Indeed, the threads of conservatism are an integral part of the fabric of American society, and these threads, meandering through our history, have played a major role in the development of

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our country and our society. At this juncture in our history, the threads appear to be coming together into whole cloth.

The Effect on Schools

Unfortunately, some of this growing conservatism is fueled by an anti-intellectualism that seems to have begun in the seventies, when the social pendulum started to reverse the swing of the 1960s, a swing that had led the country toward novel mores, values, and lifestyles. What is anti-intellectualism? Richard Hofstadler, in his book *Anti-Intellectualism in American Life*, defines this phenomenon as:

> A resentment and suspicion of the life of the mind and of those who are considered to represent it; and a disposition constantly to minimize the value of that life.

Such anti-intellectualism is intimately linked with the drive to censor, to limit thought. Of course, it isn't limited to the right. Anti-intellectualism and pressures to censor emanate from all points on the political spectrum. That censorship *seems* now to be a hallmark of the political right is simply a reflection of our present situation and not an indication that censorship is solely a conservative vice.

For today, anti-intellectualism is exacerbated by fear, frustration, and both a real and perceived helplessness and powerlessness. In a word, people are no longer able to cope. In such periods, people turn inward, using their energies to protect what's dearest to them, namely, their children.

One means to protect children is to reform schools and libraries. The reason is obvious: schools and libraries are probably two of the largest physical edifices in any given community. They are massive collections of bricks and mortar which shout out to every passerby, "This is where your tax money goes." In addition, schools and libraries are institutions where people will listen. Washington won't listen; state and local officials won't listen; but people in schools and libraries will.

In many localities, the tax-paying citizens have determined, knowingly or intuitively, to reestablish their control over these institutions. They've wanted to remove the revolutionary ideas that the schools plant in the minds of students and that the libraries reinforce by the books they make available. Once local control was reestablished, they've assumed it would be a short, easy step to return to "traditional principles and values—the ones that made America great and kept it that way for 200 years."

Many of these principles are promoted by the "textbook watchers." Their bywords are "back to basics," but the slogan often means more than renewed emphasis on fundamental learning skills; for many it means the elimination of learning materials both in classrooms and libraries that challenge basic values. Often, it seems to the textbook watchers, education programs needlessly question values or discuss problems that are better dealt with by the family in the home. School library collections are criticized not only because they supplement the curriculum, but because the materials are purchased with "taxpayer funds."

As a result of such pressures, libraries and schools today are experiencing unprecedented challenges. The materials sustaining attacks form a veritable "best books" list not only of newly published materials but of those from the last 20 years that provide provocative new perspectives, question old-line values and principles, and deal with previously "taboo" subjects. Among the most prominent reasons for attacking materials are their "anti-American, anti-Christian, anti-Semitic, and just plain filthy" content. Add to that list blasphemous, depressing, teaches humanist secularism, and anti-family, and you just about have it all.

According to the textbook watchers, schools have been placing revolutionary ideas in the minds of students

All, that is, from the right of center. For even as these battle cries of the censor resound with increasing frequency, the left of center is active too. From this quarter we hear calls for the removal of materials which are allegedly racist—like *Huckleberry Finn* or *Mary Poppins*—or "ageist," or sexist, the charge frequently rendered against supposed pornography by liberals who shrink from the conservative term "smut." These pressures are real, but at this point in our history they are not as pervasive as the ones from the other side, so I'll concentrate in this article on traditionalist assault on the schools and libraries.

Librarians have traditionally resisted attempts to make libraries a censorship tool, a tool to protect or reinforce a particular set of contemporary community ideologies, attitudes, or standards. In general, librarians have successfully resisted such attempts, but if they sometimes failed, it was believed the courts would ultimately vindicate them on First Amendment grounds. Such reliance on the courts may have been misplaced.

Will the Courts Protect?

To fully understand the situation, consider the 1972 case of *Presidents Council v. Queens Community School Board No. 25*, 45 F.2d 289. The case centered on *Down These Mean Streets*, the Piri Thomas novel of life in a Puerto Rican barrio, which was removed from a Queens junior high school library because the school board found it offensive. The New York Civil Liberties Union took the case to court on behalf of students, parents of students, teachers, a librarian, and a principal. After losing at the district court level, NYCLU appealed to the Second Circuit appellate bench. In its decision, the appellate court said:

> After a careful review of the record before us and the precedents we find no impingement upon any basic constitutional values. Since we are dealing not with the collection of a public bookstore but with a library of a public junior high school, *evidently* [author's emphasis] some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of bookburning, witch hunting, and violation of academic freedom hardly elevate this intramural strife to First Amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars. When the court has intervened, the circumstances have been rare and extreme and the issues presented totally distinct from those we have here.

The court, in a nutshell, decided that the person or body to determine "what the library collection will be" would be

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the duly elected school board. Is that rational? Is it logical? Yes. Who otherwise would have the ultimate authority? Librarians? Teachers? Parents? Perhaps students? In the end, it makes a lot of sense to say that the duly elected board, which has been empowered by the state to oversee the functioning of a school system, should have that authority. The court, to a large extent, was right, for it went on to say that any student who wants to read this book could buy it in a bookstore or secure it in the public library. And if the student merely wanted to learn about the barrio, another book could be read that was less explicit, less violent, less sexually oriented.

But while the decision made sense, it was disquieting. Following the Second Circuit's opinion, the case was appealed to the U.S. Supreme Court, where *certiorari* was denied in late 1972.

A different decision was reached in 1976, when the U.S. Court of Appeals for the Sixth Circuit ruled, in a case involving student plaintiffs, that school officials cannot go through a school library and arbitrarily ban books they dislike. In *Minarcini v. Strongsville City School District*, 541 F.2d 577, the appellate court overruled a 1972 school board decision that had removed Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch-22* from the Strongsville, Ohio, high school library. After agreeing that the state of Ohio had specifically committed the duty of selecting and purchasing textbooks to local boards of education, the court said that discretion as to the selection of textbooks must be lodged somewhere and "we can find no federal constitutional prohibition which prevents it being lodged in school board officials who are elected representatives of the people."

However, the only reasons on the record for the removal of these materials, both from the curriculum and the library, were "the book is completely sick" and "it is garbage." The court responded

> In the absence of any explanation of the board's action which is neutral in First Amendment terms, we must conclude that the school board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the board members found distasteful.

Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville high school or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members.

In July of 1978, U.S. District Court Judge Joseph L. Tauro enjoined the Chelsea, Massachusetts, School Committee "from removing, or causing to be removed, in whole or in part, the anthology *Male and Female Under 18* from the Chelsea High School library because of the theme or language of the poem,

Another View: Book Banning on Trial

The work of book banners is never done, and precious little thanks do they get for their labors. Books crammed with radical ideas and contemporary language tumble daily off the presses, some headed for public and school libraries. There hasn't been time to purge those shelves of incumbent books with impure thoughts, to say nothing of blocking arrivals.

Finding little time to read such books, school board members of the Island Trees Union Free School District on Long Island consulted a pony. A group called Parents of New York United furnished a list of bannable books, along with provocative excerpts. The board ordered nine of the books removed from school libraries. Some ungrateful parents went to federal court, where District Judge George Pratt dismissed their suit. He found the board's policies "misguided"—but beyond judicial supervision.

Last week the United States Court of Appeals reinstated the suit, allowing the discontented parents to try to prove that the board violated the First Amendment. The issue at the trial will be whether the board, in the guise of judging the suitability of books for school children, actually wanted the books banned because their ideas were unconventional or unpopular.

We confess to an ingratitude akin to that of the suing parents. If the book banners win, the content of taxpayer-supported libraries may be limited to what's acceptable to the most narrow-minded, meddlesome people. There's some satisfaction in knowing that this court decision, if it stands, will require censors to reason before they strike, to justify their actions. Yet taking school officials to court is hardly the correct routine solution.

What's wrong with the censors is not that they violate authors' rights to be read or that they deny a book's tenure. It's the way those censors drift from their legitimate role of setting school library policy—what kinds of books are suitable for students at particular age levels—to judging books on the narrowest political and social grounds.

For example, the Island Trees board considered a complaint that a certain anthology contained undue praise for Malcolm X. But it justified removing the volume with a very different and bizarre reason: one of its essays was Jonathan Swift's "A Modest Proposal for Preventing the Children of Poor People in Ireland From Being a Burden to Their Parents or Country." That classic satire was deemed unworthy of shelf space because it suggested, in language too subtle for some parents, the slaughtering of babies.

But judicial decrees will not rid school boards of yahooism. Acquisitions and exclusions of books are largely unreviewable by judges. Questions of taste, utility and cost are properly entrusted to local officials. Most of the time judges can't tell for sure whether a school system has rejected a book for permissible or impermissible reasons, and most of the time the inquiry won't be worth the judicial effort.

Court intervention is feasible only when the censors act recklessly, with obvious political purpose. Removing books because they recall religious strife or slavery might be reviewed in court; besides depriving children, such censorship can be dangerously offensive to a community. Extremist censors sometimes do succeed, so it is good to have the Court of Appeals decision as a sentinel. But the lower court's instinct was sound: the best way to combat the censors is through intelligent political action.

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'The City to a Young Girl.'" In *Right to Read Defense Committee of Chelsea v. School Committee of Chelsea*, 454 F. Supp. 703, Judge Tauro held that the anthology is to be made available to students "in accordance with standard library procedures."

The chairperson of the school committee, who had publicly labeled the poem "obscene" and "salacious," led the disputed action to have the work removed from the library. Judge Tauro determined that the committee's attempt to ban the book would not pass First Amendment standards established by the U.S. Supreme Court and lower courts which have ruled on similar issues. Relying heavily on the Sixth Circuit decision in the *Minarcini* (Strongsville) case, Judge Tauro distinguished it from the *Presidents Council* case. According to Judge Tauro, the Second Circuit implicitly acknowledged "that, however absolute may be a school board's discretion in selecting books, there are boundaries to its authority to remove a book from a library."

The Courts Stay Divided

The Chelsea and Strongsville cases may make it seem as if *Presidents Council* was an aberration, but in fact courts have been unable to speak with one voice. On August 2, 1979, U.S. District Court Judge George C. Pratt handed down the decision in *Pico v. Board of Education, Island Trees Union Free School District* (U.S. Appeals Court, 2d Circuit, 79-7960), a suit involving student plaintiffs. The decision resurrected *Presidents Council*. The Island Trees case involved a Long Island (N.Y.) school. It concerned the removal, in March of 1976, of 11 titles from the school library. One of these titles, Bernard Malamud's novel *The Fixer*, also was used in the curriculum. In his decision, Judge Pratt said:

> With all due reference to those courts [the ones that decided the Chelsea and Strongsville cases], they do not accurately interpret the Second Circuit's holding in *Presidents Council*. It is true that a variety of considerations may affect the decision of what books to maintain in the school library at a given time.... But the principal reason for selecting and keeping books is their content. Indeed, in deciding what books to place in the school library a school board not only may—but must—choose on the basis of content; to do less would be to neglect their statutory duty.

What is the purpose of public education? In upholding a school board, the judge said that schools must indoctrinate

Judge Pratt went on to say:

> At the heart of the controversy is the constitutional role of the school board in public education. In New York, control of the public schools is committed to locally elected bodies.... One of the principal functions of public education is indoctrinative, to transmit the basic values of the community.

Three weeks later, a U.S. district judge in Vermont handed down a decision in another library case. The case focused on the removal from the library of the novel *The Wanderers*, and the establishment of a restricted shelf on which were placed *Dog Day Afternoon* and, later, *Carrie*. Subsequently, the school board said that the school library no longer would be permitted to select fiction; that right was reserved to the school board—although the librarian would be responsible for recommending appropriate materials. Students and the librarian filed suit, but the judge tossed their case out of court:

> The court finds nothing in the board's library/media policy to restrict the board's prereogatives under state statute to control strictly and closely the collection of the high school library. The board may exercise that authority by reviewing individual works, by screening all proposed additions to the collection or by prohibiting new additions to the library altogether. Since the defendant's actions are consistent with the board's policy and procedural promulgations, there has been no violation of the plaintiffs' due process rights (*Bicknell v. Vergennes Union High School Board*, U.S. District Court for the District of Vermont, 78-223).

Appeals were filed in both the Island Trees case and in the Vermont case, and decision were rendered on both by the Second Circuit on October 2, 1980. In the Island Trees case, the Second Circuit overruled Judge Pratt by a two-to-one margin and remanded the case for trial, giving students a chance to get the books restored to the library. However, the two justices in the majority, Charles P. Sifton and Jon O. Newman, offered separate, and strikingly different, opinions. In announcing the court's decision, Judge Sifton laid stress on the school board's "unusual and irregular intervention" in the operation of the library, arguing that this in itself defines a *prima facie* case of constitutional violation in school book censorship cases.

By contrast, Judge Newman, in his concurring opinion, focused more on

ADULT VOCATIONAL GUIDANCE

"I see. And is there anything else! you've ever thought you might like to do besides *drive a Choo-Choo?"*

substantive standards. "What is significant," he stressed, "is that the school has used its public power to perform an act clearly indicating that the views represented by the forbidden book are unacceptable" (U.S. Court of Appeals for the Second Circuit, 79-7960).

The panel's division was further highlighted in the Vermont case. Here, however, the appeals court *upheld* the judge and disappointed the students and librarian. Once again the decision was by a two-to-one vote. For the majority, Judge Newman argued, "There is no suggestion that the books were complained about or removed because of their ideas, nor that the Board members acted because of political motivation" (U.S. Court of Appeals for the Second Circuit, 79-7676).

So the present state of the law is unsettled. Certain points, however, have secured widespread agreement. Clearly, since school boards have wide authority to select curriculum, hire and fire teachers, and enter into contracts involving millions of dollars, they have the authority to select books for the school library. Obviously, most of them have delegated this to librarians, but in principle the power is theirs.

The sticky legal question is *how* and *why* they use this power. If they set up rational and detailed policies and procedures for selecting books (say, deciding to build up the library's collection of music books and deemphasize books on Eastern Europe), courts will probably decline to intervene. After all, the libraries can't buy every book available, and so they must have some standards to guide their choices.

But if there are no articulated standards, or if the standards are vague (rid the library of "filth"), or if the board merely swoops through the library and yanks out books that have generated controversy, then courts are much more likely to sniff the scent of censorship and explore whether the First Amendment has been violated.

What the Future Holds

Many legal scholars have pointed out that the law of an era is what people who live in that era want it to be. In my opinion, the majority of the present Supreme Court does not believe that the First Amendment, particularly freedom of the press, is an absolute—and that view probably reflects the view of the majority of the citizens at this time.

Such a view, however, is not necessarily determinative, for one aspect of the genius of our Constitution is that its guarantees were designed to protect the rights of minorities and minority viewpoints. The majority can and does take care of itself by the legislative process.

The battle lines between majority and minority are being drawn in many places around the country. In a newspaper reporting about a librarian's being fired as a result of an intellectual freedom controversy, a letter to the editor indicated that the writer was "tired of hearing all this garbage about the minority. I'm the majority and it's about time you took care of me."

Given the "interesting times" in which we live, these battles have only begun. As the struggle to preserve freedom of inquiry is pushed forward, those at the fore take heart from the words uttered by James Madison more than 150 years ago:

> A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives. ☐

Military Speech

(Continued from page 27)

courage desertion. Priest suggested that desertion would "bring this rotten system down on its knees" and offered names and addresses of groups which would assist deserters. Desertion was of epidemic proportions at that time, threatening the effectiveness of our fighting forces. Making desertion seem desirable or easy to accomplish could, under these circumstances, constitute incitement likely to produce unlawful action. Even given the traditional free press setting of Priest's statements and the impersonal manner of distribution, the court's finding that the desertion language was without constitutional protection seems correct.

In the Federal Courts

While the Court of Military Appeals was working out its sparing application of the First Amendment, lower federal courts were taking differing approaches. Several found the "general articles" under which many of the speech-offense cases were prosecuted ("conduct unbecoming an officer and a gentleman" and "conduct prejudicial to good order and discipline," under which "disloyal statements" falls) to be unconstitutionally vague and overbroad. (See, for example, *Levy v. Parker,* 478 F.2d 772.) However, in 1974 the Supreme Court upheld their constitutionality and endorsed the basic approach in *Priest.*

The case involved Captain Howard Levy, considered by some the Dreyfus of the Vietnam War. Levy was court-martialled for disobeying an order to teach Green Beret troops and for inflammatory statements about the war made at the post hospital and in a letter to a black sergeant in Vietnam.

It was not the strongest case for a free speech defense. Although there was no evidence that listeners had been led to unlawful action, the statements were intemperate, frequently repeated, and made on post, in fact on duty, to subordinates. Furthermore, his own act of disobedience suggested that he was engaged in more than abstract advocacy. Unlike Lt. Howe, he went beyond criticizing political figures to denigrating military units with which his listeners were in close contact. He flirted with openly counselling his listeners to refuse to fight in Vietnam.

The Supreme Court decided first of all that the "general articles" were not too vague to satisfy the Constitution. The majority's decision was based on assumptions, disputed by three dissenters, that the military can't precisely define the full range of conduct it needs to forbid and that the capacity for abusing the general articles is small. The majority also found that punishing Levy under the general articles did not violate the First Amendment. Instead the majority adopted the *Priest* formulation of "clear and present danger," rather than the civilian version of the test, stating that while "advocacy of violent change" is tolerable in civilian society, it is unacceptable in the military (*Parker v. Levy,* 417 U.S. 733 [1974]).

Most importantly, the *Levy* opinion offered a broad rationale for applying different constitutional standards to speech in the military. "The military is, by necessity," wrote Justice Rehnquist for the majority, "a specialized society separate from civilian society."

This "separate society" rationale ignored developments since World War II which have made military life much more like civilian life. While discipline and obedience are still important, the military now tends to lead by persuading subordinates and instilling initiative in them.

Behavior patterns and life style have also changed. A high percentage of the present volunteer military work in 9-to-5 jobs requiring technical proficiency.

Many military people are now accorded substantial rights of privacy and individuality.

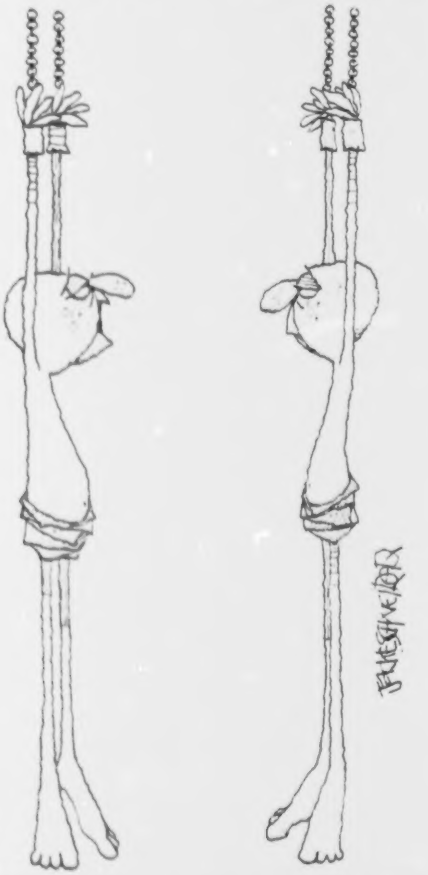
The majority also made no attempt to demonstrate how military personnel are different from other public employees such as police, firefighters, and prison guards. They also work under life-endangering conditions and require discipline but their right to criticize has not been restricted in the interests of morale and obedience.

Despite these problems, the rationale in *Levy* continues to guide the Supreme Court. The Court's most recent military speech cases, *Glines* and *Huff* in 1980, relied heavily on *Levy* to uphold regulations requiring commanders' permission to distribute petitions or literature on post, in uniform, or in a foreign country. (See *Brown v. Glines*, 100 S. Ct. 594 and *Secretary of Navy v. Huff*, 100 S. Ct. 606.) Under the regulations, commanders can forbid distributing literature or petitions if they determine that distributing them would be "a clear danger to the loyalty, discipline or morale" of service members. The decision effectively exempts the military from the doctrine, most recently affirmed in the Pentagon Papers case, that the First Amendment forbids "prior restraints" on speech and press (*New York Times v. U.S.*, 903 U.S. 713).

The Supreme Court had already forbidden partisan political activity on military posts. In a case decided in 1976, the Court held that a base commander had the authority to forbid third-party candidate Dr. Spock from distributing literature and holding a rally at the base. The rationale? The military must be insulated "from both the reality and the appearance of acting as a hand-maiden for partisan political causes and candidates" (*Greer v. Spock*, 424 U.S. 828).

Glines and *Huff* extend the commander's authority even further. Now the commander can not only prohibit partisan political activity on post, he can shield personnel from other kinds of persuasion as well, in the interests of insuring readiness for duty and discipline.

An additional issue in the *Glines* and *Huff* cases shows how seriously the Supreme Court takes the need for discipline and obedience. A federal statute exists which guarantees military personnel the right to communicate with members of Congress. Did the commander violate this law when he suppressed the petitions? No, said the majority, drawing a distinction between the right of *individuals* to try to convey grievances to Congress and the group right of petition.



"It figures... I was at the lowest point in my Biorhythm Chart...."

Three justices dissented. One of them, Justice Brennan, noted that the regulations permit suppression "for reasons far less urgent than imminent, serious, peril to the United States or its citizens," the only situation justifying "prior restraints." He contended that while "maintenance of military discipline, morale, and efficiency are undeniably important, they are not always, and in every situation, to be regarded as more compelling than a host of other governmental interests which we have found insufficient to warrant censorship."

Glines and *Huff* only approved the regulations on their face, observing that irrational, invidious, or arbitrary denials would give rise to First Amendment claims. However, as Brennan noted, the terms "discipline" and "morale" are "amorphous," inviting "latitudinous interpretation that intolerably disadvantages the exercise of First Amendment rights," and commanders possess neither the disinterest nor qualifications to serve as impartial censors.

Where Are We Now?

After a decade of military speech cases, the First Amendment rights of military personnel are more limited than the rights of such other "special situation" groups as police, firefighters, public employees, and students. The "separate society" rationale and the broad deference accorded command judgments can be used to uphold suppressing speech in almost any situation.

Many feel that the courts must find some reasonable stopping point, some definite standard akin to the traditional "clear and present danger" test, which will insure protection for at least certain kinds of speech. This will require a new willingness to scrutinize military justifications for suppressing speech. It will also require courts to articulate and weigh, in every case, both the danger from the speech and the contervailing value of free speech as a corrective promoting efficiency and democracy in our society. ☐

Court and Cops

(Continued from page 9)

Hutch'' mentality, the public often expects the police to solve its problems without regard to procedural safeguards, legal requirements, or the limitations of "scientific crime detection."

Members of the public often expect police to chase youths on no other grounds than that "they're noisy" or "they look funny." But unless a law has been violated, the police have little or no formal authority to meet this expectation. Members of the public often expect police to obtain search warrants with quick telephone calls on the basis of "tips." But the reality is that obtaining search warrants is a lengthy process which requires the police to show a judge that probable cause exists. Members of the public often expect police to find and identify perpetrators' fingerprints at the scenes of minor crimes. But the reality is that undertaking such a process is both extraordinarily expensive and rarely successful. Instead, fingerprints are most often useful to link a crime to a suspect whose identity is already known. Members of the public also expect police to dramatically reduce crime. But the best research shows that crime is caused by social and economic conditions over which the police have no control.

In the same way that these public expectations of the police are not rational, public pressures on the police to catch crooks are often not rational. How should police respond to these pressures? Instead of altering testimony so it accords with the law, police should alter public expectations so they accord with law. Their failure to do so should be laid at the feet of the police administrators who have encouraged these expectations, rather than at the feet of the jurists who have interpreted the law that limits what the public may rationally expect of police.

Before one can begin altering those irrational public expectations, it would be valuable to know *why* many police have encouraged them. One reason is that saying "yes" to an unreasonable expectation is, in the short term, a lot easier than trying to change the expectation. Peter Manning points out that, unlike most occupational groups, American police have not clearly defined their *own* mandate, or societal role. As a result, they have spent much effort responding to the often irrational definitions of that mandate offered by people outside the occupation. On occasion, those definitions require arresting and convicting offenders in disregard of legal limits.

A second reason is that the irrational expectations are often very attractive to the police themselves. These expectations define the police as omnipotent, tremendously effective swashbucklers and crimefighters. That's much more satisfying than the reality of policing and criminal investigation. Like the real life of the often romanticized cowboy of the Old West, the real life of the cop usually involves long periods of tedium interrupted by occasional moments of excitement.

A third reason is that the public's exaggerated notions of scientific crime detection credit the police with a high level of professionalism. The idea that many crimes are solved in pristine laboratories by white-coated police scientists certainly lends an aura of sophistication to investigative operations. The reality, however, is that relatively few police cases are resolved in this way. Instead, most are solved on the far less glamorous basis of informants' tips and the tedium of knocking on doors to find witnesses.

Thus, there is a double irony in the public's expectations and pressures. First, contrary to the Illinois brief's argument, it is ironic that these public pressures usually are not rational; at the very least, they are not informed. Second, it is ironic that police themselves have often encouraged the very expectations and pressure which cause them problems. Indeed, few police departments have done very much to discourage these expectations by informing the public of the differences between television cops and real cops.

The Illinois brief also contains a fundamental inconsistency which involves its argument that a less drastic alternative to the current exclusionary rule would deter police misconduct. If, as the brief points out, the police are under great pressure—however irrational and ill-informed—to arrest and convict criminals, and if the exclusionary rules does not deter police who intentionally violate the rights of citizens, and if it is easy for police officers to alter their testimony, what would an alternative to the exclusionary rule change? A change in the law does not relieve or change the public pressures under which police work. Wouldn't police officers who "willfully violated" the rights of defendants continue to alter their testimony to make it appear that they were acting in "good faith"?

There is some evidence that police would tailor their testimony to fit the law. Shortly after *Mapp*, New York defense attorney Richard Kuh (who later held the office of New York County District Attorney) conducted a study in which he reported that the testimony typically offered by narcotics officers changed after the decision.

Convenient Testimony

Before *Mapp*, officers typically testified that they had made arrests after searching persons who "looked suspicious, and found in their pockets glassine envelopes containing a white powder subsequently determined to be heroin." After *Mapp*, when such searches were inadmissible in New York courts, officers typically testified that they made arrests after observing persons "who looked suspicious, and who reached into their pockets, withdrew their hands, and dropped glassine envelopes to the ground" as officers approached. Never losing sight of either envelopes or defendants, officers would continue, they retrieved the envelopes, and found in them a white powder subsequently determined to be heroin. Kuh called such cases "dropsy" arrests, and found that almost all the post-*Mapp* narcotics misdemeanor arrests he studied included similar testimony. Thus, either New York City's junkies suddenly became butterfingered, or police were altering their testimony.

Obviously, it is impossible to determine whether any individual officer in Kuh's study had altered his testimony, so that specific accusations of perjury were almost impossible. Many New York judges were as aware of the "dropsy" phenomenon as was Kuh, however, and they apparently countered it in a unique way. Within a few years after *Mapp*, they routinely found that "dropsy" cases involved involuntary actions on the part of defendants, and that, for some unexplained reason, the resulting glassine envelopes were inadmissible. By the same logic, however, glassine envelopes found by police as a result of *clearly intentional* abandonment were admissible. Thus, narcotics officers soon began to testify that, "I saw a suspicious male and began to approach him. As I drew nearer, he stared at me, put his right hand in his right trouser pocket, removed it, and surreptitiously flicked his right wrist, throwing several glassine envelopes to the ground. Never losing sight of them, etc. . . ."

Nor is evasion of the law of search and seizure limited to big city police. In the early 1970s, I interviewed state troopers who patrolled a highway between two major cities. According to these officers, "hippies" from City A routinely travelled to City B to buy marijuana. Ever alert, officers would stop long-haired drivers and illegally search their rundown flower-painted Volkswagen vans. If such a search uncovered marijuana, the officer involved would typically testify that he had stopped the car not in pursuit of marijuana, but because it appeared to be "a safety hazard." Then, pursuant to his duties as a highway safety officer, he tested the brakes by running the van up to 70 miles per hour (pre-55 mph limit), jammed on the brakes, and was surprised to find that they worked very well. They worked so well that the sudden stop dislodged a *large* glassine envelope, containing a substance later determined to be marijuana, from its hiding place under the driver's seat and hurled it under the dashboard, right between the trooper's legs. There it was in the officer's plain view, and he recognized it and placed the hapless motorist under arrest.

Given the sophistication and obvious premeditation of these evasions of the exclusionary rule, it's hard to see what real effects the suggested alternatives would have. Any alternative could easily be evaded by what the Illinois brief generously calls "testimonial alterations." The brief overlooks the fact that even case-by-case evaluations of the admissibility of evidence would continue to be based upon police testimony. If "testimonial alteration" is a problem now, there is no reason to believe that it would cease to exist if the exclusionary rule were modified. Instead, it's only likely that its form would change somewhat.

What Can Be Done

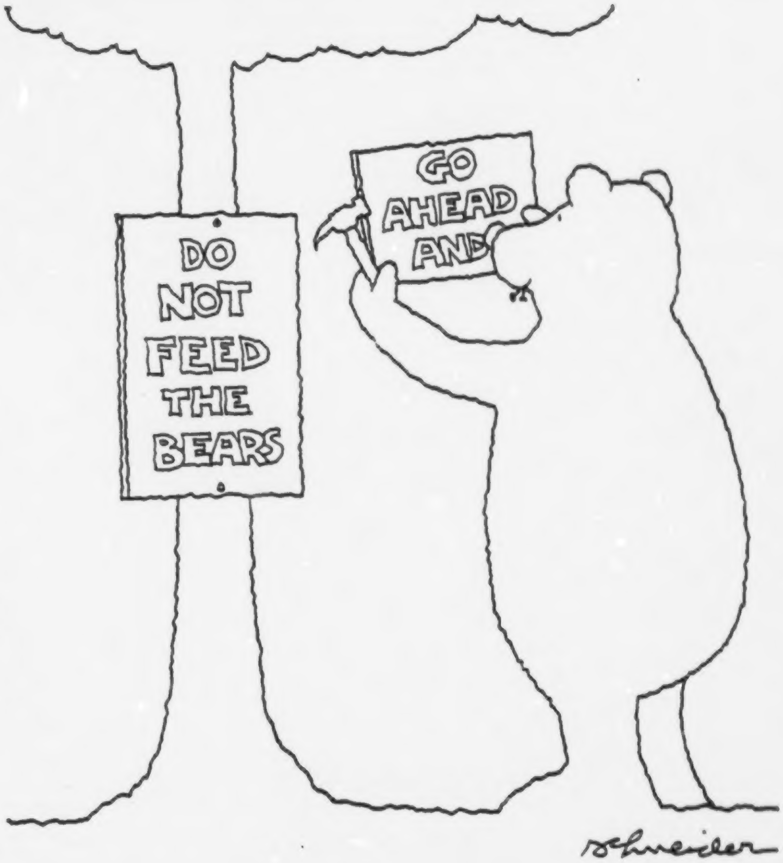
Because the Illinois arguments against the exclusionary rule are also frequently voiced by police elsewhere, it's clear that they are generally not happy with it; but I've argued that a lesser alternative to the current rule would do little to alleviate the problems of assuring justice within the limits of the Fourth Amendment's search and seizure provisions. I argue that because I think the Illinois brief incorrectly defines the source of police problems with search and seizures. The problem is not the exclusionary rule *per se;* the problem is that police have often responded to irrational pressures to violate it.

Thus, changing the rule does not appear to be a promising means of addressing the problems of police corruption and perjury cited in the brief. The situation is not hopeless, though, because changing the irrational expectations and pressures upon the police is a worthwhile avenue to explore. In New York City at the time of the "dropsy" study, for example, the police department was responding to public pressure to clean up the narcotics problem by requiring narcotics officers to meet a quota of four arrests per month. In later years, it became clear that this system was not working well. Because most of the narcotics arrests involved street junkies, little heroin was taken out of circulation, and major dealers remained safe in their operations. At the same time, narcotics use continued to increase and widespread corruption and perjury were found among narcotics officers.

Patrick V. Murphy, the department's commissioner at the time, then lifted the arrest quota system. Instead, he assigned narcotics officers to work in teams which conducted lengthy investigation and undercover operations directed at big-time drug dealers. While changing the department's response to public pressures in this way dramatically reduced the number of narcotics arrests made, the amount of drugs seized by the department increased dramatically. Most important for the purposes of this discussion, Murphy acknowledged that the pressures upon narcotics officers to make great numbers of arrests were irrational and, by removing them, he caused the virtual disappearance of "dropsy" cases.

This type of administrative action appears to be a more effective way of achieving control of searches and seizures than would any judicial action to modify the exclusionary rule. Like democracy, the exclusionary rule is often criticized as imperfect. But just as democracy is probably the best among a range of imperfect means of governing, the present exclusionary rule is probably the best means of controlling police searches.

Like democracy, the exclusionary rule requires the police to adjust to some limits. They can best do that by assessing the irrational pressures upon themselves and by reforming departmental policies to lessen them. At the same time, the courts should resist the hue-and-cry to abolish the exclusionary rule or to weaken it by adopting some "good faith" theory. □



Conscience

(Continued from page 21)

be used against him/her. A jury can convict an innocent person as well as acquit a technically guilty protester, for reasons which are also beside the law. As Rembar puts it,

> Juries can be unlawfully vicious as well as unlawfully lenient. . . . Not so long ago, in cases too many to mention, the defendant was convicted, in reality, not of murder or rape, but of being black. Or of being a foreign radical. Or of being Jewish.

Due Process and Justice

What about the appellate courts? Will they provide a way to raise moral questions and achieve justice? The cases examined in the rest of this article are ones which were considered by the Supreme Court. What are some of the questions considered by the High Court when it considers cases of civil disobedience? How does due process contribute to or inhibit justice?

Lawyers and judges almost always place due process at the very heart of our quest for justice. Supreme Court justices, even as they've disagreed over almost everything else, have agreed that due process is vital to preserve a democratic society. Justice Felix Frankfurter wrote, "The history of American freedom is, in no small measure, the history of procedure," and Justice William O. Douglas wrote, "It is a procedure that spells much of the difference between the rule of law and the rule by whim or caprice."

Why is due process so central? Because it is the way that courts discover truth, and thus are able to render justice. It does, for our legal system, what the scientific method does for scientists.

Due process has two aspects—procedural and substantive. Procedural due process simply means that the judicial process itself is fair and unbiased. It encompasses, at a minimum, notice of the charges against one and an opportunity to be heard in one's defense in a hearing that is fair and not a sham. It is through fair procedures such as these that courts are enabled to find the truth.

Substantive due process looks at the law itself, not just the procedures that are used to apply it. This requires that a court be convinced that the law, not merely the procedures for its enforcement but its actual purpose, is a reasonable exercise of governmental authority.

Individuals who are prompted by their moral beliefs to contravene the law have raised arguments both of substantive and of procedural due process.

Two cases which were argued together before the Supreme Court and a third, separate case may shed some light on judicial treatment of individuals acting on behalf of their consciences. A conscientious objector, under the most recent Universal Military Training and Service Act, was exempt from combatant training and service in the armed forces if, "by reason of religious training and belief, he was opposed to participation in war in any form."

Juries can be unlawfully vicious as well as unlawfully lenient; not so long ago defendants were convicted not of murder but of being black or Jewish

Already, one can imagine a number of words in these phrases which could easily be contended. Men who most readily received the C.O. classification (IV-E) were those who belonged to the traditional "peace churches," and could demonstrate an enduring commitment to their professed beliefs. Thus, as fairly clear-cut cases, Brethern, Mennonites, and Quakers rarely went to court unless they refused to register.

In 1971, the cases of Guy Porter Gillette and Louis A. Negre challenged the phrase "war in any form," claiming an individual could object to a *particular* war for reasons that are "religious" in character. Earlier cases had questioned the meaning of "religious training and belief." This phrase from the Universal Military Training and Service Act had been expanded upon by the courts in the mid-sixties. The amendation stated that this term referred to "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation," but did not include "essentially political, sociological, or philosophical views, or a merely personal moral code."

Gillette and Negre opposed the war in Vietnam. Gillette was convicted of willful failure to report for induction. His request for classification as a C.O. had been supported by his statement that he was willing to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but that the Vietnam War was unjust. Therefore he could not enter and serve in the armed forces during the period of this conflict. His request had been denied, and he had subsequently failed to report for induction.

Louis Negre sought a discharge from the armed forces when he received orders for Vietnam duty. Believing the Vietnam conflict was unjust, Negre claimed fighting in Vietnam violated his Catholic duty to discriminate between just and unjust wars, and to refuse to participate in unjust ones. After completing infantry training, Negre sought release from the Army, finally asking judicial relief by *habeas corpus* after his discharge was denied. The Supreme Court agreed to hear these two cases together to resolve "vital issues concerning the exercise of Congressional power to raise and support armies, as affected by the religious guarantees of the First Amendment."

Update briefly considered this case in light of the First Amendment, in Isidore Starr's Supreme Court Report in the Winter 1979 issue on religion and the law. The First Amendment challenge confronting the Court in the Gillette and Negre cases was based on their contention that by exempting only those whose religious beliefs precluded participation in all wars, the law unconstitutionally established religion. In *Gillette v. U.S.* and *Negre v. Larsen*, 401 U.S. 437 (1971), the Court decided that the law did not discriminate among religious groups. Although religious training or belief is required for exemption, no partisan creed is singled out for special treatment. Thus the law doesn't establish religion, and the Court found it constitutional on First Amendment grounds.

Another of Gillette's and Negre's arguments is of special interest to this article. Both claimed that the distinction between objectors to all wars and objectors to particular wars was "arbitrary and capricious" and worked "invidious discrimination" among people. They asked that the law be struck down because these distinctions made the law substantively flawed and thus invalid under the due process clause of the Fifth Amendment. This line of argument is a good example of the kinds of considerations that might lead to a law being struck down on the basis of substantive due process. As it turned out, the Court didn't buy the argument. It condoned the substance of the law and deemed it constitutional on due process grounds.

Another draft case shows, however, that procedural due process can sometimes come to the aid of protesters. In *Gutknecht v. U.S.*, 396 U.S. 295 (1970), the use of delinquency regulations by the draft board was found wanting.

David Gutknecht surrendered his registration certificate and notice of classification by leaving them on the steps of the Federal Building in Minneapolis, together with a statement explaining his opposition to the war in Vietnam. Gutknecht was then declared delinquent for failing to have his registration certificate and current classification notice in his personal possession at all times. Because he was delinquent, later he was ordered to report for induction at the next call. Though Gutknecht did report for induction, he refused to cooperate with the processing. Consequently he was indicted under the Military Selective Service Act of 1967. He was tried, found guilty, and sentenced to four years in prison. His conviction was affirmed by the Court of Appeals (8 Cir. 406 F. 2d 494).

The Supreme Court considered the legality of using the delinquency regulations to speed up Gutknecht's induction. A board could declare a registrant "delinquent" whenever he failed "to perform any duty or duties required of him." But the Court found that the delinquency regulations had no statutory standard or even guidelines. "It is a broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions," the Court said. Yet these regulations were used in deciding the order-of-call. (Boards were mandated to induct delinquents first, volunteers second, and nonvolunteers third.) Citing the statutory policy to select persons for training and service "in an impartial manner," the Court found that the local board had used delinquency (which was not a classification like I-A) to accelerate Gutknecht's induction, a procedure which it deemed biased.

Justice William O. Douglas delivered the opinion that reversed the lower court's:

> If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed. Standards would be needed by which the legality of a declaration of "delinquency" could be judged.

In a 1963 essay, "The Bill of Rights Is Not Enough," Justice Douglas pointed to the gray areas which allow government to go unchecked. These gray areas can be seen in Gutknecht's original conviction. As Douglas wrote then "If the Bill of Rights were being written today, it also would encompass some of the recurring evils arising out of the vast exercise of authority through the administrative agency."

Justice: Divine and Mortal

Gutknecht's victory was no doubt sweet, but he very likely realized that it was incomplete. Though he had demonstrated that a governmental *procedure* was unjust, the Court's decision did nothing to touch the substance of the law. In cases involving procedural questions, legal intricacies become the focus of decision-making, and the overriding moral issues are usually obscured. So in Gutknecht's case the procedures for calling men to duty were changed, but the bedrock issues—the existence of the draft and the war in Vietnam—were untouched.

Those who object on the basis of conscience generally envision a moral, philosophical, or religious ideal. But courts are always confronted with reality, and have a much more prosaic idea of justice.

Substantive due process, of course, does touch the body of the law. Through substantive due process, a law can be challenged, definitions revised, and, at times, considerable changes made.

However, those who believe that a law is immoral will probably be disappointed most of the time in their efforts to convince courts that it should be declared invalid. Why? It comes down to the vast differences between two concepts of justice. Those who believe that a law is immoral are motivated by philosophical, religious, or moral justice, all concepts looking toward the ideal, with what should be rather than what is. The law, on the other hand, sees justice differently. Courts deal, day in and day out, with thousands and thousands of disputes. In this grubby actuality of conflicting testimony, confused witnesses, and clever lawyers, the courts feel they have all they can do to sort out the truth and see that rough justice is done.

Conditioned by the manifold difficulties of finding the truth in trial courts, appellate court judges have a very different notion of justice than do philosophers or clergymen. In looking at a law to determine whether it denies substantive due process, a court doesn't ask vast philosophical questions. It doesn't appeal to God, or to some ideal system of right and wrong. Rather, it asks whether the substance of the law bears a reasonable relation to an appropriate governmental activity, whether it accords with the Constitution, as interpreted through previous decisions. If it does, then it's substantively okay; if it doesn't, it's struck down. But in neither case does the Court ask the kind of questions that protesters are apt to ask.

Where does that leave the protesters? Can they ever hope to bring their concept of justice into accord with the justice that our legal system tries to deliver? Yes, they can, but probably not through the courts. Rather, they would be well advised to take political action, to convince lawmakers to change the law or adopt a new policy.

In doing so, of course, protesters sometimes make use of the courts, but in a political, rather than legal sense. That is, many of the protesters against the Vietnam War burned their draft cards not because they hoped that the courts would declare the Vietnam War unconstitutional, but because they hoped for publicity from the act and a chance to make a case against the war in their trial. As we've seen, not all of them got that chance, but the cumulative weight of their protest did help swing American opinion against both the draft and the war.

So, in these real examples, as in the fictional one provided by Huck Finn, morality and law are intertwined. The legal process is by no means separate from morality, nor is morality something apart from the law. But the law works in its own way, and with its own concept of justice. Unless men and women become angels, human justice will never be as pure and perfect as the divine variety. But that still leaves all of us, as individuals, plenty of opportunity and plenty of responsibility (oh that tiresome word!) to examine the moral dimensions of laws and to work to make them closer to the ideals of truth and justice for all. ☐

Widened Scope

(Continued from page 5)

Court took a restrictive view of the liberty and property interests involved and decided the lawman wasn't entitled to due process.

To further confuse things, a 1978 case held that a hearing wasn't always necessary if due process was triggered. In *Ingraham v. Wright* (430 U.S. 651) the Court held that due process was triggered when school children were punished corporally, but that didn't mean they had the right to a hearing first.

The rulings and reasoning in these three basic cases underlie my preference for terming the Supreme Court's due process decisions of the past decade as products of evolution and innovation but not quite revolution. This point warrants some enlargement.

Applying the *Roth* formula for deciding whether a liberty, property or other constitutionally protectable interest triggers applicability of due process, the five-four majority in the *Goss* case ruled that due process does apply to expulsions from the public school system. Students have no constitutional right to an education at public expense, but Justice White emphasized state statutes and administrative practices gave them a legitimate expectation (entitlement) to a public education. This property interest meant that due process was required.

The Court found that students had a protectable liberty interest as well as a property interest. The reasoning? The charges of misconduct that had led to the students' suspensions triggered constitutional protection because they could damage seriously the students' standing with other pupils and teachers and could impair later opportunities for education and employment. That the suspensions were only temporary, amounting to 10 days, was deemed, nonetheless, to be "a serious event in the life of the suspended child" that may not be imposed in disregard of due process.

As to the process that was due, Justice White geared it to the needs of students and to the realities of school administration. Recognizing that budgets and facilities might well be overwhelmed by imposing formal court-like procedures upon schools, he wrote, "We stop short of construing the due process clause to require . . . the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge" or any other trial-like practices. What is essential, White stressed, is that the student be given oral or written notice of charges, an explanation of the evidence relied on, and opportunity to present his or her side of the story. These procedures were far more informal than those required for welfare recipients in *Goldberg*.

Readers of the *Goss* opinion might well have concluded that, henceforth, the Court would place less emphasis on whether due process applies and more emphasis on the criteria for determining what process is due. No sooner said than undone, for in *Bishop v. Wood*, a police officer who had progressed from probationary to "permanent" status learned that he was not entitled to due process at all when discharged. Why? The Court found that no property interest triggered due process because of a lower court judge's controversial interpretation of applicable state law. The lower court had said North Carolina law didn't grant legitimate expectations of due process.

In dissent, Justice Brennan castigated the majority's approach as "a resurrection of the discredited rights-privileges distinction." If what the majority said didn't warrant Justice Brennan's rebuke, what the majority did certainly raised serious new doubts about what it takes to show that a liberty or property interest qualifies for due process protection.

Ingraham found a constitutionally protectable interest in both liberty and property when children receive corporal punishment in the schools. Nonetheless, the assumption that due process always requires some kind of hearing was repudiated here on the ground that alternative avenues were available to achieve the same kind of result as a hearing. Because teachers who spank could be sued in the regular courts for violating their duties as teachers, schools were not constitutionally required to provide *Goss*-type hearings before corporal punishment was administered. The practical message of *Ingraham* to teachers and school officials wanting to avoid the hearing requirement was spank first, suspend later. What was clear at the end of the seventies was that great ferment existed about procedural due process, but it was hard to be certain about the consequences of the ferment.

Recent Developments

The Supreme Court's most recent decisions have not resolved these uncertainties. They have, however, made it clear that the justices are determined that due process be taken seriously, even in realms formerly immune to its strictures. In a major 1980 decision involving due process for prisoners, the Supreme Court ruled that a prisoner transferred against his will to a mental hospital is entitled to due process since his liberty interest is af-

"If I approved this expense account, Simpson, you would be subject to a government windfall profits tax."

fected. *Vitek v. Jones* (100 S.Ct. 1254, 1980) centered upon a convicted felon who had been transferred from a state prison to a state mental hospital without his consent. A Nebraska law authorizes such transfers if a designated physician or psychologist finds that the prisoner suffers from mental disease that can't be given proper treatment in prison. The Supreme Court had no difficulty finding a protectable liberty interest in the prisoner's reasonable expectation that he would not be transferred to a mental hospital without some opportunity to be heard.

The state maintained that any state-created liberty interest that Jones had was satisfied completely once a physician or psychologist made the requisite findings and that Jones, consequently, was not entitled to any procedural protection. Not so, responded the Court. If the state grants a prisoner the expectation that adverse action will not be taken against him unless he behaves in a certain way, then determining whether such behavior has occurred becomes critical, and due process become applicable. "Nebraska's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting a transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution." Were an ordinary citizen subjected to such summary treatment, "it is undeniable that protected liberty interests would be unconstitutionally infringed." A convicted felon also is "entitled to the benefit of procedures appropriate in the circumstances." Thus the transfer of a prisoner to a mental hospital without a hearing was ruled outside the range of confinement justified by the prison sentence.

Although the Supreme Court did not believe that counsel must be made available to an inmate facing transfer, it agreed that the minimum process due in the circumstance including written notice, a hearing that discloses the evidence being relied upon, opportunity to be heard in person and to present evidence, opportunity to confront and cross-examine witnesses, an independent decision-maker, a written statement by the fact finder as to the evidence relied on and the reasons for transfering the inmate, and provision for qualified and independent assistance—though not necessarily by an attorney—to the inmate.

At the same 1980 term, the justices ruled that elderly patients in a nursing home have no protectable interest in receiving care in a particular facility. Consequently, due process was not triggered for them when government agencies were conducting proceedings to decertify a particular facility, even though decertification would require their transfer to other facilities. Whatever legal rights patients may have against a nursing home for failing to maintain necessary standards, the Court ruled, the patients are not denied any constitutionally protected interest when federal or state agencies ordered decertification.

Justice Brennan, the sole dissenter in this 7 to 1 ruling, urged that the patients have a constitutionally protected property interest by virtue of their legitimate entitlement to continue residency at the home of their choice. The fact that the patients were not directly the subjects of the enforcement proceeding undoubtedly underlay the majority's ruling. Resort to a direct-indirect test for determining whether due process has been triggered in this instance smacked, nonetheless, of judicial opacity to the traumas of the aged.

Easy as it may be to criticize the Court for alleged amorphousness and inconsistency, it remains a salient fact that the Burger Court has done more systematic probing into the nuances of due process and has done more to expand the procedural borders of due process protection than any of its predecessors.

Instead of building high judicial fences around this dimension of constitutional protection, the Court has extended protection to people dealing with public institutions traditionally thought of as beyond the pale of constitutional concern. If absolute certainty of criteria for protection has not yet been achieved and if the process that is due remains determinable according to the particular facts and circumstances of each case, these are not the kinds of uncertainty that snuff out hope or aspiration. Procedural fairness has been made realistically accessible to millions by the Burger Court, and the road to further progress is unfenced. ☐

"That letter of resignation was a cute touch, Bernie..."

Political Trials

(Continued from page 13)

ably did have the temperament of a bomb thrower.

Several other defendants had been found with dynamite in their possession. Spies, for example, had kept some in his desk drawer at work. Several owned pistols and rifles. All of the defendants were alleged to belong to armed sections of the anarchist movement which had drilled with weapons.

The second pillar of the prosecution's case, evidence of a conspiracy to attack police, was based on a meeting that had been held the night before the bombing. Forty or more radicals had gathered in an open meeting to discuss the killings at the McCormick factory. One of the defendants, Adolph Fischer, attended the meeting, and another defendant, George Engel, suggested a plan to coordinate the movements of armed radicals throughout the city in times of disturbances. The plan provided that when the word "Ruhe" ("peace" in German) appeared in the letters column of Spies's newspaper, armed men should gather at predetermined spots and, possibly, help workers storm police stations.

The prosecution then pointed out the word "Ruhe" had indeed appeared in the paper the next day, and introduced as evidence a note to the typesetter in Spies's own hand asking that the word be inserted.

In trying to prove that a nationwide conspiracy existed to foment revolutions, the state introduced, with the judge's consent, some unusual evidence. This evidence included a booklet by a New York anarchist leader and the platform of a radical anarchist group.

The prosecution's third main point was that the defendants had ample motivation for the crime. Both German-language and English-language radical papers published in Chicago had carried articles on making bombs, along with exhortations to use them. Since all of the defendants had had some connection with the papers, the prosecution introduced article after article into evidence to show their thinking.

With this material placed before the jury, the prosecutors were able to frame the issue as a conflict between civilization and barbarism. In closing statements, the prosecutors repeatedly made statements such as, "The very question . . . is whether organized government shall perish from the face of the earth," and "Anarchy is on trial; the defendants are on trial for treason and murder," and "[a verdict of not guilty in such cases] shocks the public interest with demoralization of the law."

The Defense Fights Back

The defense chopped away at each pillar of the state's case. The defense introduced witnesses who testified that neither of the two defendants who were on the scene had shot at police. Carrying weapons wasn't illegal, nor was owning dynamite. (Spies claimed that he kept dynamite in his desk to show others.) Some of the bombs Lingg made were recovered, and the defense argued that his bombs were of a different type from the bomb fragments found at Haymarket.

According to the state's attorney, anarchy itself was on trial, with the fate of civilization and organized government handing in the balance

As for the meeting the night before, the defense pointed out the vagueness of the plan, arguing that it was to go into effect only in the event of a general uprising or in the event of a police attack, and that neither condition was present at Haymarket. The defense pointed out that even the state's witnesses—two radicals who had turned state's evidence in return for immunity—had testified that there was nothing in the plan about the Haymarket meeting. The defense also argued that many of the six defendants who were not at the meeting were ignorant of the plan.

As for the alleged nationwide conspiracy, the defense argued that there was no evidence that the defendants had ever read the booklet by the New York anarchist or the platform of the radical group.

Most of the defense's fire, however, was aimed as what they took as the weak link in the state's case. The defense argued that the trial was to determine the defendants' guilt or innocence of murder. It wasn't designed to prove that they believed in a certain set of political ideas. It wasn't enough to show that the defendants were revolutionaries—the state had to show that their actions had directly resulted in the bomb throwing and the deaths. Therefore, the defense hit hard on the paucity of evidence linking the defendants in a tight conspiracy that resulted in the deaths.

The evidence was strongest, perhaps, against Spies, for he was at Haymarket, had knowledge of the "conspiracy" hatched the night before, had inserted the word "Ruhe" in the paper, and was on record as favoring violence. But the defense denied that he had thrown the bomb, and said that he inserted the word as a result of an anonymous note. It alleged that he did not know of the "conspiracy" when he had inserted the word but learned of it only later and sent messages that readers should ignore the signal. The defense argued, finally, that he should not be convicted on the basis of his general sentiments in favor of violent social revolution.

The defense didn't deny that Lingg had made bombs, but pointed out that he hardly knew the others, wasn't present at the meeting where the alleged conspiracy was discussed, had never heard of it, and had an iron-clad alibi for the time of the bombing. (The prosecution agreed that he wasn't the bomber.) Albert Parsons and Samuel Fielden didn't attend the alleged conspiracy meeting, had no knowledge of the conspiracy, and neither could have been the bomb thrower (Parsons had left Haymarket and had an alibi; Fielden was in plain view when the bomb was thrown and clearly hadn't done it). Engel and Fischer were at the conspiracy meeting but both had alibis for the bombing.

The evidence was weakest against Michael Schwab and Oscar Neebe. Schwab was co-editor of Spies's paper and had written some editorials in favor of violence. He had left the Haymarket meeting before the bomb went off. Neebe had owned $2 worth of stock in the paper, had distributed a few of Spies's circulars, and had been found with a pistol, sword, and red flag when arrested. The prosecution never alleged that he had been at Haymarket, and in fact conceded that the evidence against him was weak by not asking for the death penalty for him in its summation to the jury.

In its summation, the defense charged the state with playing upon the prejudices of the jury and with introducing totally irrelevant material. Anarchism wasn't on trial, only eight men who could lose their lives for their political beliefs. The state had not introduced convincing evidence that the person who had thrown the bomb was in any way influenced by any of the defendants, or had ever heard of them. In short, the defense argued that anything unconnected with the Haymarket deaths had nothing to do with the case. And with this mass of spurious evidence left aside, there was no case against them.

After only a few hours deliberation, the jury convicted all eight defendants, and sentenced seven of them to death. The eighth, Oscar Neebe, was sentenced to 15 years in the state penitentiary.

The Anarchists' Appeals

With feeling running so high against anarchism, securing a fair trial for the defendants had been a major challenge for the justice system. Thanks to a defense fund, the defendants had been able to secure reasonably good lawyers, though the defense team was generally drawn from the socialist camp and was short of criminal experience. The defendants were accorded many of the due process requirements in effect at the time—notice of the charges against them, time to prepare a defense, opportunity to offer witnesses and cross-examine the witnesses against them, opportunity to address the jury, etc. However, on appeal, they argued that they had been deprived of two vital due process ingredients — the right to an impartial judge and the right to an impartial jury.

The defense appealed first to the Illinois Supreme Court. For this appeal, the defense team was strengthened by Leonard Swett, a friend and law associate of Abraham Lincoln. This appeal claimed that many of the judge's instructions to the jury were in error, that illegal evidence had been brought to bear against the defendants, that some of the judge's remarks were improper, and that the jury was improperly impanelled.

On the question of the jury, the state said that the defendants had indeed had an impartial jury, pointing out that nearly 1,000 potential jurors had been summoned before 12 impartial ones could be found.

However, the defense responded that those selected were far from impartial. Time and again, the defense said, the trial judge had overruled its challenges for cause even though the potential jurors seemed hopelessly biased. For example, in one instance a potential juror admitted not only prejudice against all anarchists, but also kinship to one of the policemen fatally wounded by the bomb. The judge said he could serve, and the defense had to use one of its peremptory challenges to get rid of him. Another was qualified by the judge even though he was a close friend of one of the policemen killed by the bomb and had an opinion on the case based upon information given him by police officers. Another was qualified even though he said "I hardly think you could bring proof enough to change my opinion."

The defense was able to eliminate the most hostile jurors through its peremptory challenges, but there was a fixed number of such challenges, and so they were forced to accept many jurors who seemed only slightly less prejudiced than the others.

The state supreme court held that the jury wasn't biased. If a juror said he was prejudiced against anarchists, that was no worse than a prejudice against crime.

Another problem was the way in which the pool of potential jurors was selected. Instead of having a number of names drawn out of a box that contained many hundreds of names, the trial judge appointed Henry L. Ryce as a special bailiff to go out and summon men who he thought would make good jurors. An affidavit of a friend of Ryce's claimed that Ryce boasted that he was selecting potential jurors prejudiced against the defendants, so that a death penalty would be inevitable. In any event, it was clear that only clerks, merchants, and manufacturers were selected to be part of the pool, leading to a final jury that had no working men on it and only one person of foreign birth (an important consideration in a case where only two defendants were native born).

The other thrust of the appeal was similar to the defense's case at trial: that the state's theory of conspiracy was a meaningless "jumble," an unprecedented and dangerous expansion of the law of conspiracy. On appeal, the defense argued that the judge had erred by permitting this line of attack and allowing the state to introduce speeches, articles, and other evidence far removed from the actual Haymarket crimes.

Perhaps the participation of Swett added an important symbolic weight to this point. Years before, he and the other founders of the Republican Party vigorously pursued a policy (abolition of slavery) that others, such as John Brown, had tried to reach through violence. Recalling the founding of the Republican party, the old lawyer pointed out that its most radical leaders called the U.S. Constitution "a league with hell," established underground railways, and conspired to break the law by helping slaves to escape. John Brown had gone one step farther and committed violence. But, Swett said, "if there had been no Republican party, there would have been no John Brown's raid, and, therefore, all Republicans who made speeches and believed in the utopian idea of a change in society . . . were like the Anarchists . . . and ought to be hung."

The defendants failed utterly before the Illinois Supreme Court. It upheld the trial court on every contested point. For example, on the defense's argument that one of the jurors should not have been permitted to serve because he had said that he had a prejudice against "socialists, communists, and anarchists," the court said that the theories of these groups would involve "the destruction of all law and government" by "revolution, bloodshed and murder." Since the revolution would abolish the right to property, which amounted to "theft and robbery," the prejudice against anarchism is "nothing more than a prejudice against crime."

The Final Moves

The defendants' only remaining hope was a successful appeal to the U.S. Supreme Court. However, that possibility seemed exceedingly remote. The U.S. Supreme Court can become involved in state court proceedings only if there is a substantial federal question involved.

The Supreme Court had traditionally been very reluctant to intervene in state court proceedings, but the defendants' lawyers thought they saw a glimmer of hope. The Fourteenth Amendment to the U.S. Constitution, which had been passed approximately 20 years before, largely to insure the rights of the newly freed slaves, prohibited *states* from depriving "any person of life, liberty or property without due process of law." If the defense team could show that the defendants had been deprived of due process by the state courts, then there was the possibility that the Supreme Court would act, under the Fourteenth

Amendment, to nullify the results of the trial and order a new one.

For the appeal to the Supreme Court, the defense team (now augmented by another longtime Republican leader, General Ben Butler) focused on the alleged deprivation of the right to an impartial jury.

However, in *Spies et al. v. Illinois* (123 U.S. 131 [1887]), the Court decided that the due process clause did not permit it to supervise state criminal trials. The Court's decision stated that the U.S. Supreme Court simply could not supervise the details of criminal trials of state courts, and if the Illinois Supreme Court found that the anarchists had been fairly tried and justly convicted, it was not for the nation's highest court to overturn their decision.

As Supreme Court historian Leo Pfeffer points out, the Court did a seeming reversal three years later in a railroad case, *Chicago, Milwaukee and St. Paul Railroad v. Minnesota* (134 U.S. 418 [1890]). In this case, the state of Minnesota had passed laws regulating railroad rates, but the Supreme Court, relying on the due process clause of the Fourteenth Amendment, ruled that rates cannot be fixed so low that the railroad will not make a reasonable profit, for that amounts to taking private property for public use without just compensation. Pfeffer argues that this shows the Supreme Court was willing to use an entry provided by the Fourteenth Amendment to protect business interests, but not to protect individual rights.

With the last judicial appeal exhausted, the defendants could only ask the governor of Illinois for clemency. Three of them—Spies, Schwab and Fielden—signed a statement of penitence, renouncing the use of force to secure reform. The others refused to renounce their principles. The governor commuted the death sentences of Schwab and Fielden to life imprisonment, but allowed the others to die. Lingg cheated the hangman by committing suicide (appropriately enough, blowing himself up with a bomb that had been smuggled into prison), and the others were executed.

As the fear and outrage engendered by the bombing dissipated, many persons became troubled by the trial and verdicts. By the 1890s there were 375 branches of an Amnesty Association, claiming a membership of 100,000 in Chicago alone. Petitions to the governor to pardon the remaining defendants were signed by most of Chicago's leading businessmen (including a future U.S. secretary of the treasury) and most of the city's lawyers (including a future president of the American Bar Association). Almost all Cook County judges joined the petitioners, and some were outspoken in calling the trial a travesty of justice.

The case was finally concluded in 1893, when the new governor of Illinois, reformer John P. Altgeld, pardoned Neebe, Fielden, and Schwab. Not content merely to exercise clemency, Altgeld wrote a long analysis of the case which angrily charged that the defendants had been cheated of a fair trial. Altgeld specifically attacked the methods of jury selection, the legal theory that permitted the defendants to be tried as accessories even though the main culprit had never been identified, and the judge's rulings which permitted the prosecution to make anarchism itself a major issue.

When passions faded, many of the city's leaders decided that the courts may have gone too far, and some judges openly called the case a travesty of justice.

The Debs Case

The next case that Justice Douglas identifies as political also had its origins in labor strife. Employees of the Pullman Car Company in Chicago were engaged in a bitter strike with management. The strike received particular attention because company founder George Pullman had set up a paternalistic model town for his employees and in many circles was seen as a benevolent employer. The workers claimed, however, that the town was far from ideal and that Pullman had refused even to listen to their grievances.

One of the unions expressing support for the Pullman strikers was the American Railway Union, under the leadership of Eugene V. Debs. Though the strikers were not really railway men, but rather factory workers, the American Railway Union voted to support them by boycotting all Pullman cars. Pullman did not sell cars, but rather leased the sleepers, parlor cars, and diners to the railroads. Since the cars belonged to Pullman, the railway workers hoped that by refusing to handle the cars or to move a train containing them they would put pressure on the company to settle the strike.

The union's boycott made life difficult for the railroads. They felt they could not drop the cars from their trains because they had contracts with the Pullman company. Besides, the boycott raised the worst specter of unionism for them. The union had no grievances against them, yet the boycott probably hurt them more than it did Pullman. If the union were able to get away with this, there was no telling what mischief it would make next. Thus the railroads, through the General Managers' Association, agreed to support Pullman, and transportation was tied up through much of the country.

In some localities around the country, there was violence as railway workers refused to move trains containing Pullman cars, or tried to remove the cars from trains. Debs, coordinating the strike from union headquarters in Chicago, steadily counselled peaceful means and deplored violence.

The U.S. attorney general at that time was Richard Olney, a former railroad lawyer himself. Olney saw that injunctions issued by federal judges could be used to keep the railroads running. U.S. attorneys, acting under his orders, went to federal judges throughout the country asking for injunctions forbidding the strikers to interfere with the property or operation of the railroads.

The theory behind the injunctions was that in disrupting the movement of mail and interstate commerce, strikers were engaged in an illegal conspiracy, using force and intimidation against other employees and relying on violence toward railroad property. The injunctions, hastily drawn up and hastily approved by federal judges, were served on the chief officials of the union, strictly forbidding them to hinder or interfere in any manner with "mail trains, express trains, or other trains . . . engaged in interstate commerce."

Another provision forbade any union representative to attempt by coercion, threats, or persuasion to induce any employee to abandon his job. Under these injunctions, sending telegrams or any form of communication to workers for the purpose of encouraging them to forsake their duties was no longer permissible. The *New York Times* referred to this new legal weapon against strikes as a

"Gatling gun on paper." Events were to prove that the paper wasn't exaggerating.

Olney appointed as special district attorney in Chicago Edwin Walker, who also served as a lawyer for the General Managers' Association of the railroads. Walker encouraged the railroads to report any interruption of service caused by the strike, particularly the names of any persons who encouraged employees to strike or who in any way sought to discourage workers from performing their duty.

Debs's case soon showed the extraordinary power of this new legal weapon. United States attorneys, seeking to convict Debs of contempt of court, read to the judge telegrams that Debs had sent to strike leaders urging them to continue their struggle against the railroads. The judge stopped them after a few telegrams and found Debs guilty, sentencing him to a six-month imprisonment.

In a few weeks, the union's top leadership, as well as its leaders in communities across the country, were either in jail or up to their shoulders in legal trouble. With its leadership decimated, the strike soon collapsed.

Most of the charges of contempt of court were soon dismissed, probably because once the strike collapsed, their purpose was served. When Debs and other top union officials appealed their convictions, however, the government pursued the charges against them.

An Appeal to the High Court

Defending Debs on appeal were 80-year-old Lyman Trumbull, yet another friend of Lincoln's and a former U.S. senator, and a much younger man, Clarence Darrow, just beginning a long career of labor and criminal law.

The defense made two principal arguments: First, that the federal court lacked jurisdiction and, second, that it was an unconstitutional deprivation of rights to prosecute a criminal charge without a jury trial.

In denying that the federal courts had jurisdiction, Darrow argued that the Sherman Anti-Trust Act, which government lawyers cited as their authority, was intended to apply only to business combinations, since at no place in the law was "there any mention of any labor organization or strike or boycott."

In arguing that the injunctions were unconstitutional, the defense said that to uphold this sweeping new power "would be absolutely destructive to liberty and intolerable to a free people. . . . No man could be safe; no limits could be prescribed to the acts which might be forbidden or the punishment to be inflicted."

Gene Debs probably was in more political cases than any one else.

Darrow added that acts of violence could be prosecuted without extinguishing the right to strike itself. In an argument recalling the defense in the anarchists' case, he protested that Debs had not personally participated in any violence, and, indeed, had urged that strikers refrain from violence. The defense argued that the defendants were being prosecuted for their words alone, merely for calling for a strike. In Darrow's words, "To make men responsible for the remote consequences of their acts would be to destroy individual liberty and make men slaves. . . . If it is lawful for men to organize and . . . cease labor, they cannot be regarded as criminals because violence, bloodshed or crime follow such a strike."

In *In re Debs*, 158 U.S. 564 (1895), the Court found jurisdiction both in the Sherman Anti-Trust Act, which outlawed conspiracy in restraint of trade, and in the government's implied powers over interstate commerce. As for the due process argument, the Court held that the right to punish for contempt did not abridge the right of trial by jury. The Court pointed out that the same act may be both a crime and a contempt of court—the former to be tried by a jury, the latter by the court which issues the writ. If a question of disobedience had to be submitted to another tribunal, whether a jury or another court, the proceeding would lose half its efficiency.

Management everywhere exulted in the creation and vindication of a powerful legal tool against strikes, a tool which was to restrain the labor movement until the Norris-La Guardia Act, 37 years later, rescinded the judicial doctrine that the Court had approved in the Debs case.

As for Debs himself, he wound up serving the full six months of his sentence. Many of his top associates served three-month terms for contempt. With the strike broken, the power of the union declined quickly. His union destroyed, Debs soon moved to the left and became a leading light of the Socialist Party. He was to be involved in other allegedly political trials.

As in the anarchist case, Governor Altgeld had a strong opinion on the injustice of the courts. Since Debs was a federal prisoner, Altgeld could not pardon him, but that didn't prevent him from angrily denouncing the proceedings that had put Debs behind bars. Altgeld argued that it created a form a government not hitherto known to man—government by injunction. A federal judge could now issue an order prohibiting almost anything, including some things that the law did not forbid. In effect, the judge could legislate and, having done so, proceed to arrest people and, without a jury trial, to imprison them. Thus, the judge becomes "legislator, court and executioner," depriving citizens of the constitutional guarantee that "no man shall be deprived of his liberty without a trial by an impartial jury."

The Sacco-Vanzetti Case

The next case identified as political by Justice Douglas is perhaps the most famous criminal trial in American history. Nicola Sacco and Bartolomeo Vanzetti were, before their arrest and trial, obscure Italian immigrants. Members of a nonviolent anarchist group, they were little known outside of their circle of radical politics. They were to become famous around the world. Not since the time of the Dreyfus Affair—the French criminal proceedings against Alfred Dreyfus in the 1890s—had international interest in a case risen to so high a peak.

Though none of the charges against them was directly political, partisans of the two claimed that the political overtones of the case infected the process and made a fair trial impossible.

After the First World War, the United States witnessed a nationwide crusade against Bolshevism, Communism, and radicalism of all sorts. The Bolshevist revolution in Russia stirred fears of a similar revolution here. Newspapers were full of scare stories, with headlines such as these from the *Boston Herald* appearing almost daily: "Bolshevik Plan for Conquest of America," "Reds Pervade Empire State," "Bride Thinks Reds Kidnapped Missing Groom," "Boston Armed at All Points against Reds."

The U.S. government, using as its weapon the newly passed Espionage Act, began criminal proceedings against thousands of suspected radicals in all parts of the country. Radicals who had emigrated from other countries were often deported.

It was in this climate that Sacco and Vanzetti were tried. The crime they were charged with was both simple and brutal. On April 15, 1920, the paymaster and a guard of a shoe factory in South Braintree, Massachusetts, were killed by two men armed with pistols. The killers grabbed two boxes containing the factory's payroll, amounting to almost $16,000, and fled in a car containing several other men. Two days later the car, which turned out to have been stolen, was found abandoned in the woods, some distance from the crime. Leading away from the spot were the tracks of a smaller car.

Eyewitnesses told police they believed the criminals were Italians, so police began looking for Italians owning cars in the region. Police located one such car in

Materials on Political Justice

There is no single book devoted to political trials in the United States, perhaps because many lawyers and judges don't recognize that such trials exist. Former Senator Charles Goodell's *Political Prisoners in America* (New York: Random House, 1973) is on a related subject. Though it glances at several epochs in American history, the focus is on the 1960s and early 1970s. It contains a number of useful suggestions for dealing with politically motivated trials.

Political Trials, edited by Theodore L. Becker (Indianapolis: Bobbs-Merrill, 1971), defines "political trial" in an introduction and then looks at six foreign cases and five U.S. cases. Otto Kirchheimer's *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, N.J.: Princeton University Press, 1961) is a scholarly handling of the issues, mostly dealing with foreign examples.

Two books touch on the Supreme Court's treatment of the cases deemed political by Justice Douglas. They are Leo Pfeffer's *This Honorable Court: A History of the United States Supreme Court* (Boston: Beacon Press, 1965) and William F. Swindler's *Court and Constitution in the Twentieth Century* (Indianapolis: Bobbs-Merrill, 1969; Vol. II of this two-volume set appeared in 1970).

The most comprehensive of the many books on the Haymarket Affair is Henry David's *The History of the Haymarket Affair: A Study in the American Social-Revolutionary and Labor Movements* (2d edition, New York: Russell & Russell, 1958). Irving Werstein's *Strangled Voices: The Story of the Haymarket Affair* (New York: Macmillan, 1970) is a brief version for young people. *The Chicago Haymarket Riot: Anarchy on Trial*, edited by Bernard R. Kogin (Boston: D. C. Heath, 1959), is a collection of readings from the period. It includes newspaper accounts of the Haymarket disturbance, excerpts from the trial and the appeals, as well as analyses of the case by the judge, one of the defense attorneys, and Governor Altgeld. For more on Altgeld's condemnation of the trial, see his biography, *Eagle Forgotten*, by Harry Barnard (Indianapolis: Bobbs-Merrill, 1938).

Generally, books on political trials are written by those who are outraged by what they think of as a mockery of justice. (Jessica Mitford suggests that those who support the trials feel justified by the results and see no need to defend them in print.) However, there are occasional exceptions. Frederick Trevor Hill's *Decisive Battles of the Law* (New York: Harper's, 1907) contains a chapter generally defending the decision in the anarchists' case. An English commentator, Laurence Webley, makes a spirited defense of the verdict in *Across the Atlantic* (London: Stevens & Sons, 1960).

For more on the Pullman strike and the Debs case, see Almont Lindsey's *The Pullman Strike* (Chicago: The University of Chicago Press, 1942).

Millions of words have been written about the Sacco-Vanzetti case. Felix Frankfurter's *The Case of Sacco and Vanzetti* (Boston: Little, Brown, 1927) contains a closely reasoned defense of the two men by a law professor who was later to become a Supreme Court Justice. Probably the best single book on the case is G. Louis Joughin's and Edmund M. Morgan's *The Legacy of Sacco and Vanzetti* (New York: Harcourt, Brace, 1948). Morgan, a professor at Harvard University Law School, contributed a detailed analysis of the legal aspects of the case. His co-author contributed a dozen chapters on the social conflicts brought about by the case, as well as on the many plays and novels written about the two men. There is also a 24-page bibliography. An excellent discussion of the legal aspects of the case is found in Osmond K. Fraenkel's *The Sacco-Vanzetti Case* (New York. Knopf, 1931). Herbert E. Ehrmann's *The Untried Case: The Sacco-Vanzetti Case and the Morelli Gang* (2d edition, New York: Vanguard, 1960) argues that the crime was committed by the Morelli Gang of Providence, Rhode Island.

Francis Russell's *Tragedy in Dedham* (New York: McGraw-Hill, 1960) takes another look at the case. David Felix's *Protest: Sacco-Vanzetti and the Intellectuals* (Bloomington: Indiana University Press, 1965) focuses on protests against the verdict. *Commonwealth versus Sacco and Vanzetti*, edited by Robert P. Weeks (Englewood Cliffs, N.J.: Prentice-Hall, 1958), is a collection of excerpts from the trial, newspaper accounts, and other primary documents.

Although the vast majority of books and articles on the case argue the defendants' innocence, there are dissenting voices. Robert H. Montgomery's *Sacco-Vanzetti: The Murder and the Myth* (New York: Devin-Adair, 1960) tries to prove that the trial and subsequent proceedings were fair and that the men were justly convicted. Max Eastman's "Is This the Truth about Sacco and Vanzetti?," *National Review*, Vol. XI, No. 16 (October 21, 1961) expresses doubts about Sacco's innocence.

—CW

a garage awaiting repairs. On May 5, the owner of the garage, acting on instructions from the authorities, called police when several men came to fetch the car.

Among the three men arrested were Sacco and Vanzetti. The third man had a strong alibi for the day of the crime, so he was let go. Sacco, a worker at another shoe factory, had taken the day of April 15 off. Vanzetti, a self-employed fish peddler, couldn't prove by work records where he was that day.

The police became suspicious because not only were both Sacco and Vanzetti armed when arrested, but both of them lied during their first interrogation. They tried to conceal their movements on the day of their arrest, the friends they had been to see, and the places they had visited.

On the strength of this and other evidence, the prosecution secured an indictment against them four months after their arrest. On May 31, 1921, more than a year after their arrests, they went on trial.

The Prosecution's Case

Legal scholars who have studied the case agree that the prosecution presented its evidence skillfully. Though none of its proof was overwhelming, the prosecution was able to weave it into a plausible mesh. The main points of the prosecution's case were:

1. Sacco was not at his usual place of work on April 15.
2. He lied to his employer to account for his absence from work that day.
3. Eyewitnesses identified Sacco (or someone looking like Sacco) as the killer.
4. When arrested, Sacco had a pistol and cartridges, some of which were of the same manufacture as the bullet which had killed one of the victims.
5. The state's experts testified that the marks on the bullet were similar to those on other bullets shot from Sacco's pistol.
6. Sacco lied to police about his whereabouts on April 15.

The evidence against Vanzetti wasn't as strong. It was that:

1. He was closely associated with Sacco.
2. He carried a revolver that was similar to one that may have been taken from the murdered guard.
3. Several witnesses placed Vanzetti close to the site of the crime.
4. On arrest, Vanzetti told a number of lies on matters relevant to the case.

The Defense's Response

Legal scholars agree that the defense was as inept as the prosecution was skillful. The chief defense counsel, himself a radical and a professional defender of radicals, was from out of state and was not even a member of the Massachusetts Bar.

Nonetheless, despite its shortcomings, the defense was able to substantially weaken much of the prosecution's case. The defense produced expert witnesses who disagreed with the state's witnesses on whether the bullets were fired from Sacco's pistol. The defense pointed out that almost nothing was known for certain about the pistol taken from the guard, so the state hadn't met its burden of proving that Vanzetti's pistol was the same one. In addition, the defense tried to show that it had come in his possession in another way.

The prosecution was ruthless, taking every opportunity to impress the jurors with Sacco and Vanzetti's radicalism and their alleged draft dodging during the war

The defense introduced a number of witnesses to support Sacco's testimony that on April 15 he was in Boston seeing about a passport to Italy, among them an official of the Italian consulate in Boston who swore that Sacco visited the consulate (12 miles from the scene of the crime) 45 minutes before the murder. A number of witnesses who claimed that they had been Vanzetti's customers that day testified that he was pursuing his customary trade as a fish peddler.

The defense also had some success discrediting the testimony of the state's eyewitnesses. The defense showed that there was some doubt about what date one of the witnesses against Vanzetti had allegedly seen him; others disagreed as to where Vanzetti was in the car; all got only fleeting glimpses of him; and one swore that the person he saw was speaking clear and unmistakable English (Vanzetti's English was broken).

As to the witnesses against Sacco, the defense was able to show that they were unable to positively identify Sacco at a preliminary hearing about three weeks after the incident but, more than a year later, were able to give positive identifications. The defense argued that the prosecution, contrary to accepted procedures, had shown Sacco and Vanzetti singly to the potential witnesses, rather than as part of a line-up. Moreover, Sacco and Vanzetti were not even allowed to be their natural selves; they were required to simulate the behavior of the bandits.

One of the witnesses, who viewed the scene from a distance of 60 to 80 feet, saw the man she identified as Sacco only for two or three seconds, in a car traveling at the rate of 15 to 18 miles per hour, but nonetheless proceeded to give an elaborate description of his height, weight, clothing, hair length, and even complexion and eyebrows. The defense argued that her identification was based on subsequent viewings of Sacco, rather than on what she claimed to have seen that day.

A Losing Gamble

By all accounts, the defense had less success in trying to explain Sacco and Vanzetti's behavior the day of their arrest. In order to show why they had been carrying weapons, and why they had lied to police, the defense felt that it had to put them on the stand to explain how they were influenced by the political climate of the time. Thus, Vanzetti testified that he carried a revolver, "because it was a very bad time, and I like to have a revolver for self-defense."

The reason they had lied to police about what they were doing the day of their arrest is that they thought they were being held, not as suspects in a murder trial, but because they were suspected of radicalism. Two of their friends had already been deported. Another, a New York radical named Salsedo, had been arrested and held incommunicado for weeks by the Department of Justice. Vanzetti was sent to New York by his radical group in Boston to confer with the Italian Defense Committee in charge of the case of Salsedo and all other Italian political prisoners. On his return, May 2, he told his friends that the Defense Committee had urged the Boston group to dispose of the radical literature and thus eliminate the most damaging evidence in the deportation proceedings they feared. The death of Salsedo on May 4—he fell or was pushed to his death from the room in which he was held by authorities—made disposing of the literature all the more urgent. It was for this reason, the radicals testified, that they had gone to get the car on the day of their arrest.

Commenting on the case many years later, Harvard Law School Professor Edmund M. Morgan noted that the defense took a tremendous gamble in introducing evidence of the defendants' radicalism, because, given the temper of the times, this evidence was most likely to inflame the jury. According to Morgan, the defense counsel woefully mismanaged this evidence, failing entirely to impress the jury with the men's fear of deportation (and worse) because of their radical views.

Given this opportunity, the District Attorney took every advantage. In direct examination, Sacco had said he came to America in 1908 because he "liked a free country." Morgan notes that on cross-examination, this led to 14 pages of sarcastic questioning, followed by 81 pages on such subjects as Sacco's flight to Mexico to avoid the draft in World War I, his use of an assumed name to avoid the draft, and his social philosophy. Morgan writes, "If the District Attorney's purpose was to create in the jurors antipathy and contempt for the defendants, his conduct of their cross-examinations was well-nigh perfect."

The judge also comes in for criticism from Morgan. "A prosecutor animated by a desire only to abstract the truth would have foregone these tempting opportunities to arouse irrelevant antagonisms. An able judge mindful of the necessity of protecting ignorant defendants from the damning effects of their own immaterial absurdities . . . would have been quick to confine the cross-examination . . . to its narrowest limits, but the record does not reveal such a prosecutor or such a judge."

Coupled with the defense's inability to make the most of the experts' contradictory testimony about the bullets, as well as the defense's woefully inept summation to the jury, the evidence of the defendants' radicalism may have been enough to tip the verdict in the prosecution's favor. For whatever reason, the jury found the defendants guilty as charged.

Appeals Stymied

Massachusetts law at that time required convicted defendants to ask the judge who had presided in their case for a new trial, rather than permitting them to file motions directly in a higher court. The trial judge was empowered to review any new evidence that might be brought forward and determine whether a new trial was required.

Between 1921 and 1927, the defense team filed eight motions before Judge Webster Thayer, the man who had originally heard the case. Judge Thayer refused new trials each time. When defense attorneys appealed his denials to the Massachusetts Supreme Judicial Court, the Massachusetts High Court replied that the judge had the final decision regarding the facts, and they could overrule him only on questions of law.

A number of the motions for a new trial were based on affidavits that the defense had secured from prosecution witnesses after the trial. In each instance, prosecution witnesses recanted their testimony. However, in motions before Judge Thayer the prosecution was able to show that the defense had applied high-pressure tactics, and, in many instances, it was able to produce its own affidavits from the witnesses reaffirming their original testimony and renouncing their recantation.

The defense was as inept as the prosecution was skillful, failing entirely to convince the jurors of Sacco and Vanzetti's fear of deportation for their radical politics

Two of the motions deserve further comment. One brought forward evidence suggesting that the Morelli Gang of Providence, Rhode Island, had committed the crime. In late 1925, Celestino F. Medeiros, then in jail, sent Sacco a note through a jail messenger. It read, "I hereby confess to being in the South Braintree Shoe Company crime and Sacco and Vanzetti was not in said crime." Medeiros presented plenty of credibility problems. He had been "a crook, a thief, a robber, a liar, a rum-runner, a 'bouncer' in a house of ill-fame, a smuggler, and a man who had been convicted and sentenced to death for . . . murder."

Using Medeiros's statements as a start, the defense team tried to gather evidence that the Morelli Gang actually carried out the crime. They showed that the Morellis were desperate criminals, that they had stolen shipments of merchandise from the shoe factory where the robbery occurred, that Joe Morelli bore a strong resemblance to Sacco, that when accused of this crime they gave false alibis, that Medeiros had worked with the Morelli Gang on previous occasions, that after the South Braintree robbery he had a sum of money which would have constituted his fair portion of the proceeds, and that the Morellis were armed with pistols of the type that might have been used in the murders.

These hypotheses, the defense thought, gained credibility when contrasted with what was known about Sacco and Vanzetti. In the words of Felix Frankfurter:

> There was no claim whatever at the trial, and none has ever been suggested since, that Sacco and Vanzetti had any prior experience in holdups or any previous association with bandits; no claim that the $16,000 taken from the victims ever found its way into their pockets; no claim that their financial condition, or that of Sacco's family . . . was in any way changed after April 15th; no claim that after the murder either Sacco or Vanzetti changed his manner of living or employment. . . . Nor, during the three weeks between the murder and their arrest, did they behave like men who were concealing the crime of murder. They did not go into hiding; they did not abscond with the spoils; they did not live under assumed names. . . . When arrested, Sacco was found to have in his pocket an announcement of a forthcoming meeting at which Vanzetti was to speak. Was this the behavior of men eluding identification?

Judge Thayer turned down the request for a new trial, however, concluding that "The affidavit of Medeiros is unreliable, untrustworthy, and untrue. To set aside a verdict of a jury affirmed by the Supreme Judicial Court of the Commonwealth on such an affidavit would be a mockery upon truth and justice."

The Supreme Judicial Court of Massachusetts, as Thayer noted, had supported him on every appeal. The Court upheld him this time as well: "The judge . . . has decided that no reliance can be placed upon the alleged confession; that its truth is not substantiated by other affidavits. . . . These decisions are matters of fact. Upon them the judge's findings are final. . . . The granting or the denial of a motion for a new trial rests under the judicial discretion of the trial judge . . . and his decision will not be disturbed unless it is vitiated by errors of the law, or abuse of discretion."

The other important defense motion focused precisely on the judge's possible "abuse of discretion." It asked for a new trial on the grounds that Judge Thayer was prejudiced against the defendants. This was one of a series of last-minute efforts. It failed on procedural grounds.

Yet, since under Massachusetts law the trial judge was all-important in an appeals process (to say nothing of a judge's importance in any criminal proceedings), the charges against him are worth examining. The defense pointed out that he was well aware of the radicalism of both defendants, and charged that his remarks to the jury as to their patriotic duties, his references to the heroic dead of World War I, and similar observations may have prejudiced the jury. His restrictions on some of the defense's cross-examination, coupled with his liberality to the prosecution in the cross-examination of Sacco, the defense argued, may have proceeded from his wish to convict the defendants, and may have thus denied them their right to a fair trial. The defense also alleged that Judge Thayer's reasons for denying a new trial also showed prejudice.

The defense said that Judge Thayer's prejudice was amply shown in statements he made out of court. For example, the defense argued that he showed his prejudice against the chief defense lawyer by saying to a reporter, "I'll show them that no long-haired anarchist from California can run this court!" An acquaintance of the judge claimed that Thayer said the defendants "were draft dodgers and anarchists and entitled to no consideration;" and a Dartmouth college professor quoted him as saying, "Did you see what I did with those anarchistic bastards the other day?"

Higher Authorities

Though the defense could not win a new trial from the Massachusetts Supreme Court, it did eventually have the opportunity to present its case before another forum. As the date set for the executions of Sacco and Vanzetti approached, extraordinary pressure, both from within the United States and from other countries, induced Governor Fuller of Massachusetts to appoint an Advisory Committee to help him decide on the defendants' petitions for clemency. Fuller appointed three men to the Committee: Abbott Lawrence Lowell, President of Harvard University and a lawyer; Samuel W. Stratton, President of Massachusetts Institute of Technology, a nonlawyer; and Robert Grant, a writer of fiction who was formerly Judge of the Massachusetts Probate Court.

The Advisory Committee took testimony for several weeks and studied the record thoroughly, including the motions for a new trial and the allegations of Judge Thayer's bias. As to the hypothesis involving the Morelli Gang, it concluded, "It does not seem to the Committee that these affidavits to corroborate a worthless confession are of such weight as to deserve serious attention."

As to the judge's alleged bias, the Advisory Committee found that no unquestionably prejudicial speech or act of his took place before the jury. Moreover, members of the jury, examined by the Advisory Committee, stated that the judge's conduct did not prejudice them. Therefore, the Advisory Commission merely noted that the judge was "indiscreet in conversation with outsiders during the trial," and let it go at that.

SAVE SACCO & VANZETTI
HYDE PARK WEDNESDAY 10 at 7 pm
SAVE SACCO

Rallies around the world protested Sacco and Vanzetti's execution.

The Committee, after reviewing all the evidence, decided that Sacco and Vanzetti had been proven guilty beyond reasonable doubt. They were especially impressed with the fact that both men were heavily armed and acted suspiciously at the time of their arrest.

After receiving their report the governor announced that he found "no justification for executive intervention." Unless the U.S. Supreme Court acted, they were doomed to die.

As the day of the execution drew near, defense lawyers sought a writ of certiorari, on the grounds that the case raised federal constitutional issues, particularly relating to due process. Justice Brandeis refused to consider the application because members of his family had been active on behalf of the defendants. Justice Holmes denied the petition because there was no proof, he said, of a sham trial. Rather, it was a question of whether the Supreme Court could interfere with the verdict of a state court on the ground that the laws in Massachusetts were defective. Holmes noted that the defense believed that Judge Thayer was prejudiced, yet the laws of Massachusetts compelled them to appeal to him each time for a retrial. But Holmes found this procedure consistent with the federal Constitution. Indeed, he said that if the laws of Massachusetts provided that a trial before a single judge should be final, without appeal, the procedure still would have been consistent with the Constitution of the United States.

In short, Holmes gave Sacco and Vanzetti the same message that the earlier Court had given the Chicago anarchists: The due process clause of the federal Constitution is not offended if states develop their own trial and appeal procedures. The states, naturally, will set up different systems, and it isn't the job of the federal courts to supervise them and pass judgments on whether their procedures truly are fair.

With all legal avenues now closed, Sacco and Vanzetti were executed shortly after midnight of August 22, 1927. Ironically, Celestino Medeiros, convicted of another crime, was executed with them.

CURRICULUM UPDATE

Mabel C. McKinney-Browning

Justice and Due Process

Here are plenty of materials to help you teach about a vital (and elusive) subject

Films

■ *Plea Bargaining: The American Way of Justice* (1978). Secondary. 16 mm or 3/4 video-cassette, color/sound film, 1 hr. Purchase: $625, rental: $60. (Thurber Productions Film Library, P.O. Box 315, Franklin Lakes, New Jersey 07417.)

Is "plea bargaining" a necessary evil? This film explores that question from the courtroom to the district attorney's office, from the public defender's office to the judge's chambers to the prisoner's cell. In each of these settings the issue is the same: Should a plea be entered or should the case go to trial?

The feelings of the judge, the public defender, and the district attorney are effectively and fairly portrayed in this documentary of real courts and real people. While the prisoner is portrayed as passive in comparison to others involved in these courtroom dramas, the viewer is kept constantly aware that this "wheeling and dealing"—plea bargaining—will determine the fate of a human being: one who is in many cases ill-equipped to protest, to make intelligent judgments, or to act in his/her own behalf.

Narrated by Bill Moyers, produced and directed by Robert Thurber, this film will be shocking to those who are unfamiliar with this practice. However, it is a realistic exploration of a "necessary evil" in the eyes of those who are familiar with the need to move astronomical numbers of cases through the court system.

This film is extremely well done. It treats a controversial subject with a depth and clarity not often found in films available for classroom use. While no study guide is available, teachers will find this film rich with opportunities to explore and discuss the issue of justice.

■ *I Live in Prison* (1976). Secondary. 16 mm., color/sound film, 26 minutes. Purchase: $400, rental: $35. (Learning Corporation of America, 1350 Avenue of the Americas, New York, New York 10019.)

"Prison Preventers" is an organization of 30 California prisoners who speak at public meetings around the state, giving community residents the "real" picture of prison life. This film records such a meeting, focusing on the experiences of three men: one white, one black, one chicano. While the personality of each man is obviously different, the viewer will immediately be struck by the pervasive negativeness of the prison experience. As each man articulates his individual experiences, opinions, and emotional reaction to the situation, the audience is introduced to a series of scenarios which shock and enlighten.

Freedom, rights, responsibility, and justice are dealt with by each prisoner as these relate to and impinge on their lives in prison. This view is in no way rose colored. Rather it is a "tell it like it is," realistic discussion of life "inside." Prison, these men tell us, exacts a high price from those who live there. A discussion guide accompanies this film.

■ *Judge Horton and the Scottsboro Boys* (1979). Secondary. 16 mm., color/sound film, 98 minutes. Lease: $700, rental: $70. (Learning Corporation of America, 1350 Avenue of the Americas, New York, New York 10019.)

In the mid-1930s nine young black men, ages 13-20, were arrested, tried, and sentenced to death or life imprisonment for the rape of two white women on an Alabama freight train. The Supreme Court overturned this conviction, proclaiming that the young men were denied adequate counsel.

This film depicts their retrial, presided over by the politically well-connected and fair-minded Judge Horton. The judge is destined to preside over a trial of racial, political, and philosophical harassment and dishonesty which will lead to the demise of his political career.

While the film illustrates how a court can unwittingly deny due process, viewers are treated to an excellent historical review of our nation's posture in regard to race and communism. From the selection of an all-white, male jury to the fearful and secret revelation by the women's attending physician, the viewer is held captive by this incredible story.

Due process, responsible citizenship, justice, and simple basic decency to fellow human beings are explored in a most thought-provok-

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ing way. This "made-for-television" film is excellent viewing.

■ *Jail* (1979). Junior high, secondary. 16 mm., color/sound film, 25 minutes. Purchase: $395, rental: $100. (Artvision, 140 East 81st Street, New York, New York 10028.)

This film is a graphic presentation of the juvenile justice system. The viewer meets a young man as he is released from jail. The film explores his crime—school vandalism—his pursuit by police, and his incarceration. While the presentation is somewhat stilted, the film chronicles a number of circumstances experienced by the youthful offender. For example, the emotions of loneliness, fear, disbelief, and depression are dealt with in some detail. As his incarceration progresses, the young man is subjected to a number of deprivations and inhumanities, including rape. His personal reactions to these events are also explored.

The most significant message of this film is that individuals have a responsibility to protect their own rights. In committing a felonious crime this responsibility is abandoned. The question this film presents—who is the *real* victim of crime?—can lead off a discussion providing teachers with an alternative point of reference for exploring issues of justice.

Books

■ *The Teen-Ager and the Law* (1978), by Albert L. Ayars and John M. Ryan. Secondary. Soft-bound, 165 pp. Supplementary text and reference book. $4.95. (The Christopher Publishing House, 53 Billings Road, North Quincy, Massachusetts 02171.)

The purpose of this book, say its authors, is to help teen-agers become more aware of their rights, responsibilities, and obligations, while gaining a respect for our legal system. The book explores all areas of the law which have significance to teen-agers. For example, there are chapters dealing with the legal system, the role of citizenship in law enforcement, family relationships, marriage and divorce, civil law, criminal law, school law, automobiles, teen-agers in business, and the reasons for having laws. There is also a discussion of the ways in which lawyers can help teen-agers. Finally, a glossary of legal terms is provided which students should find very helpful.

The authors provide some general information about areas of the law most affecting the lives of teen-agers. While many laws change from state to state, the authors have chosen to present areas with similar requirements across states.

This book may simply be used as a reference/resource book for teachers as well as students. It would be appropriate also as a supplementary textbook in a variety of courses. For example, the chapter on marriage and divorce might be used in a sociology course. The book is written simply and clearly. It is extremely well done and should be a welcome addition to classrooms.

■ *The Jury: Its Role in American Society* (1980), by Rita J. Simon. Secondary. Hard-bound, 157 pp. Teacher resource. $18.95. (Lexington Books, D. C. Heath & Company, Lexington, Massachusetts 02173.)

This book, written by a professor of sociology and law, combines those two disciplines into a highly readable text exploring the jury as it functions in American courts.

Part I of the book provides historical background on the demography and deliberations of the jury since its inception. Part II deals with selection and the decision-making process as manifested by the jury. Part III further explores jury deliberations, focusing on a number of areas which have an impact on how juries decide. For example, there is a discussion of the effect of mass media on public attitudes and opinions which, of course, ultimately affect jury decisions. The final chapter of the book uses political trials, from the late 1940s to the mid-1970s, to highlight the role of the jury as an arbitrator of justice and/or a reflector of public prejudice and conformity.

While this book is intended as a college textbook, it is an excellent source or even supplementary text for secondary students. Certainly, it deals with an issue of critical importance to discussions of due process.

■ *Taking the Fifth* (1980), by Mark Berger. Secondary. Hard-bound, 286 pp. Resource book. $23.95. (Lexington Books, D. C. Heath & Company, Lexington, Massachusetts 02173.)

This book, written by a law professor, provides an overview of the history and contemporary application of the Fifth Amendment, as well as an in-depth discussion of the growth and development of the Fifth Amendment in the court system. Beginning with a discussion of English, colonial, and early constitutional law, the book provides an historical perspective for studying the Fifth. Chapter II of the book is a lengthy discussion of all aspects of our legal policy based on this constitutional amendment. Chapter III deals with the use of the Fifth Amendment in the courtrooms. Several chapters deal with the case law that has shaped its meaning in contemporary times. The final chapter of the book is a discussion of future legal decisions and the effect they might have on enforcement of Fifth Amendment rights.

Teachers will find this book highly readable. A great deal of effort was taken to make the book suitable for the general reader, as well as for lawyers. The book will be an excellent resource for teachers who are interested in doing a detailed study of the Fifth Amendment with students.

■ *Your Rights When You're Young* (1979), by Maxine Phillips. Soft-bound, 96 pp. Student text. $2.25. (New Readers Press, Publishing Division of Laubach Literacy International, Box 131, Syracuse, New York 13210.)

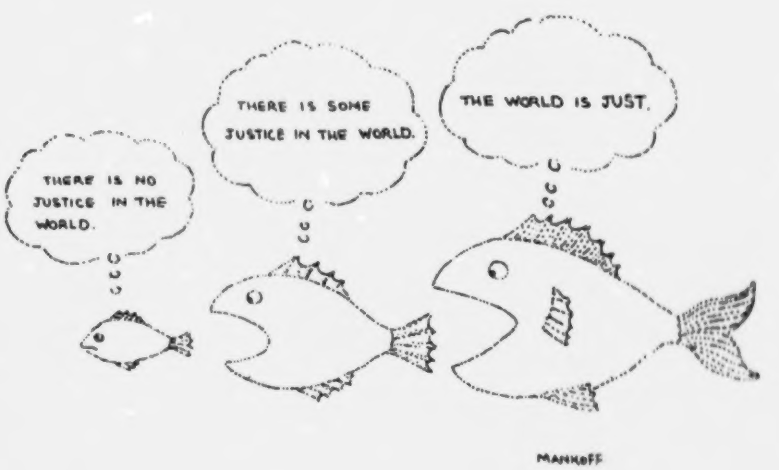
"The way laws affect us depends on what written laws say, what courts say, and the actions of people who carry out the laws." Thus begins this book focusing on discussions of the legal rights of young people under 18. Chapters focus on subjects such as the written law, the courts, agencies responsible for enforcing laws, students' protection of their rights, strategies for changing laws, and the changing rights of young people. Issues such as the family, the community, medical care, the school, police, and the courts are discussed in some detail.

As each chapter begins, students are given a brief outline of the chapter. These outlines are repeated as headings throughout the chapters, allowing students to go directly to areas of particular interest to them. Appendices include tables on marriage, the courts, and legal age for alcohol, as well as a bibliography of other relevant books of interest to young people.

This book is not intended to be a source for legal information in particular states. Rather, students are encouraged to seek legal assistance if they are having particular legal difficulties. However, the book's size and readability will make it an excellent source for quick access to information about the legal rights of young people.

■ *Teaching the Bill of Rights* (1965), by William J. Brennan, Jr. Secondary. Soft-bound, 23 pp. Teacher resource. $.25. (Anti-defamation League, B'nai B'rith, 315 Lexington Avenue, New York, New York 10016.)

In 1962, at the 42nd Annual Meeting of the National Council for the Social Studies,


THERE IS NO JUSTICE IN THE WORLD.
THERE IS SOME JUSTICE IN THE WORLD.
THE WORLD IS JUST.
MANKOFF

Drawing by Mankoff; ©1981, the New Yorker Magazine, Inc.

Supreme Court Justice William J. Brennan, Jr. delivered an address entitled "Teaching the Bill of Rights." The Antidefamation League of B'nai B'rith has reprinted the text of Justice Brennan's speech, and teachers will find his comments pertinent as they begin to teach the Bill of Rights.

Justice Brennan begins his speech by addressing the need for effective teaching about individual liberty and constitutional rights. He suggests that our responsibilities as citizens are shifting and our relationship to government is rapidly changing. An additional concern is that we, as citizens, have become less active in our rigorous protection of the Bill of Rights. The result, Justice Brennan contends, is that in practice there are many breaches of the liberties protected by the Bill of Rights.

Justice Brennan builds a strong case for teachers to actively work with students in constitutional law. He admonishes teachers not to feel threatened by this subject matter. He emphasizes that they need not present the Constitution to elementary and secondary students in the same manner that a lawyer might. Rather, he suggests teachers deal with constitutional issues from a larger perspective, encouraging students to begin to think about the larger issues that the Constitution reflects. The latter part of the speech deals with actual instructional strategies for teaching the Bill of Rights.

All in all, this small booklet is well worth the 25¢ per copy. It is highly recommended for teachers who are moving into the subject area of justice. If you have ever questioned the efficacy of teaching this subject area, take a look at Justice Brennan's speech.

■ *A Living Bill of Rights* (1961), by William O. Douglas. Junior high, secondary. Softbound, 72 pp. Student text. $.75. (The Antidefamation League of B'nai B'rith, 315 Lexington Avenue, New York, New York 10016.)

While some of the material included in this booklet is dated, because new cases have replaced some of those cited as landmarks, the booklet has maintained its credibility.

It is divided into four sections. The first section is a discussion of the author's own perspective on the importance of freedom in America. The next section is an introduction to the Bill of Rights. The third section explores the Bill of Rights in terms of the basic freedoms that it protects. Each basic freedom is discussed in some detail, with citations of landmark court cases which have shaped its meaning for contemporary times. The last section of the booklet, "The Bill of Rights in Action," discusses events which challenge our liberties, giving students a perspective on the evolution of the Bill of Rights. The booklet contains a bibliography of resource books dealing with the Constitution, the Bill of Rights, and the issues of freedom and justice.

■ *Vows, Rip-off, Jurists, Moot* (1977), by Gary Zarecky and William M. McCarty. *Claim* (1978), by David Hatz and Gary Zarecky. Secondary. Soft-bound, about 25 pp. Individual learning units. Each unit is sold in sets consisting of five student books and one teacher's guide. Each set costs $6. (Interact, Box 262, Lakeside, California 92040.)

Teachers searching for ways of infusing law-related topics into the curriculum will find these individual learning projects an excellent alternative. They may be used as class assignments for group work or as individual assignments for extra credit. Each unit is developed around a particular theme. For example, *Claim* deals with consumer rights, *Rip-off* deals with shoplifting, and *Vows* deals with marriage and divorce.

Units are accompanied by a teacher's guide which provides information about the contents as well as alternative strategies for classroom usage. Each is divided into nine activities, including introductory reading, formal essays, role playing, presentations, debriefing, and testing. Each activity is discussed in detail and presented in a manner which allows students to work independently, with teacher assistance in the form of an interview or group discussion. All of the units feature a brief discussion of the law. Two of the units, *Rip-off* and *Moot*, are simulation activities. In all of the units, role playing is a major strategy.

Teacher guidance is a key to successful use of these units. They are excellent supplements to instruction, since they provide students with an opportunity to get inside the issues.

■ *Short Stories in Law Education* (1980), by Robert Rader and John and Linda Thorstad. Grades 6-12. Four softbound books, each about 64 pp., $3.75 each. (Paul F. Amidon and Associates, Inc., 1966 Benson Avenue, St. Paul, Minnesota 55116.)

This series of short stories, designed for use in law-related education courses, developmental reading classes, social studies classes, and English and language arts classes, can be used as supplementary materials for any of these curriculum areas. Each book contains a separate story.

The series focuses on contemporary issues. For example, the energy crisis provides background for the selection "Power Line Protest." Another story, "The Schoolhouse Burglary," centers around the issue of school vandalism. In "The Apartment House Murder," students evaluate a crime. In "The Delinquency of a Minor," students decide who is liable when a teen-ager dies after a drug and liquor party.

In each story students have an opportunity to discuss relevant subject matter which challenges even reluctant readers to think critically about important issues. Additionally, stories develop understanding of a number of legal concepts, including probable cause, arrest warrants, search warrants, circumstantial evidence, and direct evidence.

Each book contains a table of contents, a list of reading skill objectives, and discussion questions. Teachers are encouraged to use these tools in ways that they feel are appropriate for their classes. The accompanying teacher's guide suggests a number of activities designed to help students get the most out of the series.

This format is both timely and useful for law-related education curricula. Teachers will find these books most helpful in incorporating law-related content into other subject areas.

■ *Law, Order, and Justice* (1979), by David T. Naylor. Secondary. Soft-bound, 108 pp. Student text. $5.50 (Hayden Book Company, Inc., Rochelle Park, New Jersey 07206.)

"Law is supposed to protect us and punish criminals. . . . Order is the peaceful relationship among people in a society. . . . Justice includes ideas of fairness, equal treatment and protection of rights." These three issues are the subject of this student text. It was created to provide information about and inspire future studies into issues of crime, justice, law, and order.

This book is an excellent mix of activities that immediately provide active participation while at the same time supplying information on the various issues. The author employs a number of interesting strategies. For example, one activity includes several newspaper articles dealing with the same issue over a space of time, as well as letters to the editor on the issue. Thus, students are provided with the opportunity to look at one issue or situation from two points of view—the more objective viewpoint of the reporter and the subjective viewpoint of the reader. Much of this book is presented as questions, so that students might think of law, order and justice in terms of themselves and not as abstracts. Generally, controversial subject areas are handled very well.

Teachers will find this text quite useful. The format and readability, as well as the selection of activities, make it appropriate for all high school students.

■ *Law in the Classroom: Activities and Resources* (1979), by Mary Jane Turner. Elementary, secondary. Soft-bound, 233 pp. Resource handbook. $17. (Social Science Education Consortium, Inc., 855 Broadway, Boulder, Colorado 80302.)

At last a handbook that not only helps teachers to know what to request of a resource leader but gives the resource person guidelines for making presentations in the classroom. It "provides practical assistance to resource persons who will be making presentations about the law and the justice system in schools and organizational settings." Beginning with an introduction providing background information for both the teacher and the resource person, this handbook does just that.

The book suggests a number of learning strategies suitable for elementary and secondary classrooms and includes activities focusing on four types of law content: introduction to law, individual rights, criminal law, and civil law. For each content area, the activities section also provides a number of handouts for duplication and classroom use by the resource person. A bibliography of additional sources and resources that can be used in teaching law to school and community groups and an index to content and activities round out this guide.

While most of the materials presented are for secondary students, each content area presents at least one elementary activity. Many of the secondary activities are also adaptable for elementary students. After seeing this handbook, teachers will find it much easier to convince community resource people to feel comfortable in bringing their expertise to the classroom.

Project-Created Materials

■ *Street Law: A Course in Practical Law*, Second Edition (1980), by Lee P. Arbetman, Edward T. McMahon, and Edward L. O'Brien. Secondary. Soft-bound, 165 pp. Student text, $8.75. Teacher's manual, $8.75. (West Publishing Co., 170 Old Country Road, Mineola, New York 11501.)

While it is hard to make good things better, the authors of the new *Street Law* text have done just that. The second edition of *Street Law: A Course in Practical Law* has been organized around four basic themes: the law; public policy (what the law should be); practical realities (skills and practical options for dealing with the law); and value concepts (values of the society reflected in larger issues).

These themes are carried through in each of the six chapters of the student text. Chapters include: Introduction to Law and the Legal System; Criminal and Juvenile Justice; Consumer Law; Family Law; Housing Law; and Individual Rights and Liberties. This edition contains some new materials on juvenile law, cars and the consumer, voting and lobbying, controversial crimes, choosing a lawyer, and discrimination against the handicapped. One new feature is the "Where You Live" boxes. In these boxes, laws which are most subject to local statute are identified. Thus teachers are immediately cued to assign students to look up local statutes, increasing opportunities to provide legal accuracy. Another excellent feature is the "advice" sections. They contain advice on such areas as what to ask your lawyer, how to deal with contracts, or how to enter consumer complaints.

This edition has been completely updated for legal accuracy. It includes many more teaching strategies for encouraging student participation, including mock trials. The format is changed for the better. Previous users of *Street Law* will be pleased to find the book contains many more illustrations and that important areas are highlighted in the body of the text. Administrators will be glad to know that for this new edition of *Street Law*, the student edition is also available in hard cover (it costs $12.75, less in quantity). An excellent glossary and a comprehensive list of "Important Organizations to Know" round out this edition.

■ *Teaching Young People About the Law Through Literature* (1980). Compiled by Marilou Sorenson, with Nancy Mathews. K-8. Soft-bound, 138 pp. Annotated bibliography. $2.25. (Department of Curriculum, Utah State Office of Education, 250 East Fifth South, Salt Lake City, Utah 84111.)

This law-related bibliography for elementary classrooms focuses on four content areas—citizenship, conflict and conflict resolution, authority and governance, and values.

A short introduction providing the teacher with an outline of the content covered is included at the beginning of each section. Although the annotations are brief, coding provides additional information that will be useful to teachers.

Entries are coded to indicate general reading level, grade level, and genre. Each section provides some nonannotated, supplementary listings which contain related material. For example, short stories, poetry and articles are listed as related, supplementary materials and are not annotated.

In several instances, the editors also provide activities for certain types of books. For example, there are a number of activities on how to use biographies and autobiographies in the classroom. Also suggested are questions for discussion and suggestions for other uses (i.e., role play, comparing the story to another story, creating a dramatic plan, and writing a sequel to the story). An index is provided which cross-references each entry with areas in this guide where it will be appropriate.

All in all this bibliography is a comprehensive guide for elementary LRE and an excellent teacher resource.

■ *JETS: Justice Education Teaching Strategies* (1980), edited by Murray Nelson. Elementary, K-6. Seven soft-bound books, 33-80 pp. Curriculum guides. Available free to Pennsylvania teachers. (For information contact: Dr. Robert Schell, Pennsylvania Department of Education, 333 Market Street, Harrisburg, Pennsylvania 17126.)

Each grade from kindergarten through grade six has a separate curriculum guide in this series. The guides are organized around three basic themes: understanding self and others, understanding society, and understanding safety and crime prevention. In grade six, these themes focus on four units which are more narrowly defined: rules and laws, authority, conflict, and crime.

Each unit begins with a discussion of purpose and objectives. Each then goes on to discuss a number of discussion alternatives and activities for working with students. The units provide a number of suggested worksheets which are easily duplicated. Each guide also provides a listing of supplementary materials, including a student reading list and listings of appropriate filmstrips. In some cases, this listing is annotated.

Some effort has been made to integrate other subject areas within these units. Many language arts and mathematics as well as social studies activities are incorporated into the materials. As units need not be taught in sequence, teachers will be able to integrate the units into their programs individually.

These units are an excellent addition to our growing collection of materials for elementary classrooms.

■ *Rules, Rules, Rules* and *Responsibility and You* [Grades 2-3], *Learning About Laws* and *Learning About Responsibilities*, [Grades 5-6] (1980), by David T. Naylor, Ronald Sterling, Glenn Markle, Beverly Thomas, and Mary Naylor. Four soft-bound books, about 41 pp. each. Duplicating masters and curriculum guides. $15 for the whole set of four, free to Ohio teachers. (Ohio State Bar Association, 33 West 11th Avenue, Columbus, Ohio 43201.)

Each of these booklets represents an instructional unit developed around the theme of the title. Each unit is developed through a series of lessons. For example, the booklet *Rules, Rules, Rules* contains lessons entitled Rules and You, Rules at Home, Rules at School, Rules at Play, and Rules in the Community, as well as lessons discussing the meaning of rules and your feelings about rules.

Each lesson is keyed to a number of handouts which are available in duplicating masters which accompany the booklet. These guides are developed in such a way that teachers are given a number of suggested procedures for carrying out the lessons.

Enrichment activities for follow-up are also included. For the primary grades, enrichment activities include such suggestions as vocabulary development and creative writing. Activities used in the fifth and sixth-grade guide include using the newspaper, conducting interviews, and providing classroom experiments.

Where additional teacher information is needed, the teacher is directed to books or articles which might serve as resources. These guides will be quite useful in developing language arts and study skills. They also include several short stories which are available for duplication.

These curriculum guides are another welcomed contribution to the growing list of LRE materials available to elementary teachers.

■ *Law in Action Series* (1980), by Linda Riekes and Sally Mahe Ackerly. Elementary, junior high school. Soft-bound, about 140 pp. Teacher's guide, four student texts, each $4.75. (West Publishing Company, Inc., 170 Old Country Road, Mineola, New York 11501.)

Another new edition! Four of the five books in this series are now available in the second edition—*Courts and Trials*, *Young Consumers*, *Law Making*, and *Juvenile Problems and the Law*. The fifth book in the series, *Youth Attitudes and Police*, is currently under revision. All of the books are also still available in the 1975 edition.

Each of the new books covers new material. One new addition, "Extra, Extra," suggests projects which students can do for special credit. Another, "News Bulletins," is included at the end of each chapter to test or review chapter contents. Greatly expanded are the "Notes to the Teacher" sections, giving clues for highlighting important information for students or special procedures for handling questions and dealing with particular content. "Notes to the Teacher" also contain suggested instructional resources.

As with the first edition of this book, many of the activities focus on the language arts. All in all, this new edition is destined to be as successful as its predecessor.

For Your Information

■ *Bibliography of Newspaper in Education Publications* (1980), distributed by American Newspaper Publishers Association Foundation. Single copies free. (The Newspaper Center, Box 17407, Dulles International Airport, Washington, D.C. 20041.)

This bibliography provides information on more than 100 teacher guides and curriculum materials to aid the classroom use of newspapers. The guide is divided into subject areas and includes a chapter on social studies and citizenship education. Each entry includes source, grade level, and pricing information on curriculum guides or materials.

■ *Guide for Multicultural Education: Content and Context* (1977), distributed by The Office of Intergroup Relations. $1.25. (Publication Sales, California State Department of Education, P.O. Box 271, Sacramento, California 95802.)

This guide provides an excellent overview of multicultural education, with a timely discussion of the continued need for multicultural education as well as the objectives it seeks to accomplish. Included are excellent sections on teacher references for multicultural education and techniques for introducing multicultural concerns into the classroom. There is also a very useful section detailing procedures for analyzing multicultural curriculum material.

Strategies

(Continued from page 17)

Court applying, or denying application of, the due process guarantee to civil and criminal cases;

(5) compare their own opinions regarding the scope of due process to the Supreme Court rulings;

(6) interpret and apply the direction of a court to redraft a statute to create provisions for constitutional procedures;

(7) apply and synthesize their knowledge about due process by participating in a simulated administrative hearing process.

The following activities assume that the students are familiar with the difference between civil and criminal law.

Day

1.

Recognition and Definition Exercises

Through this series of exercises, students will learn to define "due process," to identify the sources of due process in the U.S. Constitution, to identify due process encounters in their own experience, and to analyze whether given factual situations require constitutional due process.

(1) *Definition Brainstorm*

Step 1: Teacher writes "Due Process" on board.

Step 2: Students write a one sentence definition.

Step 3: Students read their answers, while teacher lists responses on board.

Step 4: Looking at all the responses, teacher asks for student consensus on one universal definition.

(2) *Identification of Sources of Due Process*

Step 1: Teacher asks students to identify the source of their definitions of due process. List on board as responses are given.

Step 2: Reading of the Fifth and Fourteenth Amendments. Teacher asks a student to read aloud.

Step 3: Discussion Questions:
What does the Fifth Amendment say? What does the Fourteenth Amendment say? What is the difference between the Fifth and Fourteenth Amendments? (At this point, depending upon time and prior knowledge of the class, teachers may give a brief explanation or reminders regarding the history of the original Bill of Rights, the original intent of the Fourteenth Amendment, and the Supreme Court's later interpretation of the Fourteenth Amendment as making the Bill of Rights applicable to the states, in addition to the federal government.)

Step 4: Teacher asks class to discuss meaning of "life, liberty, and property," and to identify other places in the Constitution where aspects of these interests are also protected (i.e., Bill of Rights).

(3) *Identification of Personal Due Process Experiences*

Step 1: Teacher asks students to think about instances in which they (or someone they know) have been treated fairly or unfairly by a public agency.

Step 2: Volunteers recite their experiences (examples might include encounters with the police or juvenile justice system; a summer job or other work experience; a consumer problem; or a school discipline experience).

Step 3: After hearing each experience, teacher discusses with class why each example of treatment was fair or unfair; what could or should have been done differently.

(4) *Problems for Analysis*

Given each of the following problems, students should determine whether the citizens have a right to due process, and, if so, what the procedures should be.

a. An unwed father does not want his girlfriend to put their child up for adoption, but the state law requires only the mother's consent for the adoption of illegitimate children.

b. A tenant has just received notice that the private owner of the building has sold it to a developer for the purpose of converting it to a condominium. Local housing law is silent on the issue of condominium conversion.

c. Residents of a local neighborhood have complained for several weeks about being disturbed by crowds of teenagers hanging out in the street and playing radios at night. One night the police spot three 15-16 year old youths sitting on the curb, and take them to the local police station for loitering.

d. Many years ago, the Zoning Commission allowed an old chemical dump to be rezoned for a new housing development. After a recent rash of serious illness among the residents of the development, the Board of Health declares that the development must be closed and destroyed. The residents are told to sell their homes.

e. The local transit system has announced that it will raise fares by 25 cents. A group of regular commuters thinks this is unfair.

(To teachers: please note that your local or state law or regulations may differ from the examples cited above. Please tell the students to assume the existence of the problem as stated. After the students state whether the citizens *should* have a due process right [is the government denying them life, liberty, or property without due process?], and what procedures should be used, then it would be appropriate to discuss your local law and procedure.)

Day

2.

Case Studies

Through the use of case studies, students will be able to analyze sets of facts to identify due process and substantive issues, to apply their knowledge of due process in formulating their own opinions about how the cases should be decided, and to compare the rulings of the Supreme Court to their own opinions and analyses.

Case #1: Criminal Due Process

FACTS: Albert Jones was apprehended by the police shortly after a murder was reported. Jones fit the description of the suspect, and was not far from the park where the victim, Charley, was found. At the time the police arrested Jones, they advised him of his *Miranda* rights. During the ride back to the police station in the scout car, one of the police officers who was sitting beside Jones in the back seat said, "I sure hope that the guy who shot old Charley didn't leave his gun in that playground." Jones nodded silently. "Hey, Jones, you got any kids?" asked the officer. Jones smiled, and murmured, "Yeah, three." The officer was silent for a minute, and then commented, "It sure would be terrible if some kids

"Cut me off when I start beating you up."

found a gun lying around that playground."

Jones was silent for a few minutes, and then told the officer to take him to the park. The scout car turned around. At the playground, Jones led the police to a gun hidden under a bush. The police testimony and the gun (which bore Jones's fingerprints and matched the bullet that killed Charley) were introduced into evidence at the trial. Jones was convicted and sentenced to life in prison.

Questions for Discussion

(1) What are the most important facts in this case?

(2) Why do you think the officer was talking to Jones?

(3) Did Jones voluntarily lead the officers to the gun?

(4) How might the legal issue in this case be stated?

(5) What does due process have to do with this case?

(6) Should Jones's attorney appeal this case? Why or why not? If the case is appealed, what arguments will be made in Jones's behalf?

(7) If the case is appealed, what will the government argue?

(8) If you were the appeals court judge, how would you decide? Why?

(*Note:* In *Rhode Island v. Innis*, 48 U.S.L.W. 4506 [1980], on a similar set of facts to those set forth in this problem, the Supreme Court held that off-hand remarks by a police officer did not constitute an interrogation, and that the defendant's incriminating actions and statements were totally voluntary. However, in *Brewer v. Williams*, 430 U.S. 387 [1977], the Court ruled differently on a similar set of facts. In *Brewer* the comments of a police officer appealed to the religious scruples of the accused, ultimately resulting in the accused's making incriminating statements and leading the police to the victim's body. The Supreme Court held that this was an impermissible interrogation, and a violation of the defendant's Sixth Amendment right to counsel.)

Case #2: Civil Due Process (Unmarked Opinion Strategy)

FACTS: Hilda Peterson is an unmarried mother of three children, ages six months, three, and four and one-half years. Since the birth of her first child, Hilda has been receiving public assistance payments under the Aid to Families with Dependent Children program. Hilda is unemployed. Hilda's social worker has urged her to return to school to complete her high school diploma and acquire some secretarial training. Additionally, the case worker has urged her to try to get a job, and the social worker even arranged for several jobs, which Hilda refused. Hilda feels that she cannot leave her children at this stage in their lives.

Six months ago, the social worker reported to the AFDC Board that Hilda was not cooperating with his efforts to get her a job. Several weeks after that report, AFDC stopped making payments to Hilda. When Hilda went to the AFDC Board to protest, she was told that a hearing would be scheduled, if she desired to appeal the decision. The hearing, scheduled for two weeks later, consisted of a member of the AFDC Board, the social worker, and Hilda.

Hilda was never advised as to whether she could bring an attorney or other representative, and the few guidelines available for the hearing process do not mention attorneys. The guidelines simply state that, after payments are cut off, the welfare recipient has a right to appeal to a member of the AFDC Board, who will hear the recipient's side of the case and make a decision. In Hilda's case, the decision to cut off her payments was upheld by the AFDC member at her hearing.

Questions for Discussion

(1) What are Hilda's interests in this case? Do they fall within the "life, liberty, or property" interests mentioned in the Constitution? Why or why not?

(2) What has happened to Hilda's interests in this case? To what degree, if any, have her interests been harmed?

(3) What are the interests of the government in this case? Why doesn't the AFDC Board conduct a hearing before the decision is made to terminate someone's welfare payments?

(4) Should Hilda be accorded some kind of due process?

(5) If Hilda is allowed due process, what kinds of procedures would be fair?

Directions to Teachers: Ask students to read each of the following opinions. Then ask each student to identify which opinion most closely matches his or her own, and to explain reasons why. If time permits, opinions can be used as the basis of a more formal classroom debate.

OPINION I

Welfare payments are a property interest for those individuals who qualify to receive them. However, while Ms. Peterson does have some property interest, her due process rights were not violated in this case, because she was given an opportunity to be heard after the benefits were ended. Due process does not always require very formal proceedings, and a full-blown hearing would unduly burden the government in this kind of case.

OPINION II

Welfare payments are a gift from the taxpayers. No one has a right to receive them. Therefore, no one can claim a property interest in them. Courts must act responsibly in ruling on due process claims, to ensure that we do not interfere with proper legislative and agency functions. The agency acted responsibly in providing some minimal hearing procedures, which were more than sufficient. If every welfare case had to be heard before the termination decision was made, millions of taxpayer dollars would be wasted, both in the expense of the hearing processes, and in the continuation of welfare payments to individuals who should not be receiving them.

OPINION III

Welfare payments are indeed a property interest for those who are eligible to receive them. Moreover, it is brutal and unconscionable for the government to terminate payments to people who may well deserve to continue to receive them. For a mother with three young children, even one day without the necessary income can be a horror. The interest of saving money by prompt termination of payments to possibly ineligible recipients does not outweigh the interest of ensuring no unjust interruption of payments to people who really need the income. Ultimately in this kind of case, the defenseless children are really the ones who must suffer. Process is due to all the Ms. Petersons of the world, and it must be given before the decision is made to end payments.

(*Note:* Opinion III paraphrases the majority opinion of Justice Brennan in *Goldberg v. Kelly*, 397 U.S. 254 [1970], a case with a set of facts which parallels those given in this case study. Opinion II paraphrases Justice Black's vigorous dissent. Opinion I represents a compromise position.)

Day

3.

Legislative Drafting Exercise

Problem: State X has had this law on the books for a number of years:

> The parent or guardian of any child under the age of 18 may commit such child to the care of the Superintendent of Central State Mental Hospital for observation and diagnosis. If the Superintendent finds, after the observation and diagnosis period, that said child suffers a mental illness, upon consent of the parents the Superintendent may detain the child for care and treatment for any length of time deemed necessary.

John Doe, 14-years-old, posed behavioral problems for his parents and teachers since he was a small child. After several years of a variety of unsuccessful treatments, John's parents applied for his committment to Central State, and John was admitted. A suit was brought on John's behalf, alleging that his commitment violated his right not to have his liberty curtailed without due process of law. Attorneys for John's parents and for State X argued that John's due process rights were protected by the actions of his parents.

The Supreme Court of State X upheld a lower court finding in John's favor. The court held that a child's due process rights did exist independently of the parents' actions, and that those rights could only be protected by according the child an opportunity for a hearing on the issue of commitment. At minimum, said the court, the child should have an independent advocate, and an opportunity for a hearing if so requested.

The legislature of State X now faces the task of rewriting the statute. There are three distinct positions among the legislators:

a. that group which feels that the legislature should conform exactly to what the State Supreme Court said, including no more and no less than what the court intended and ordered;

b. a group which feels that the court's decision did not go far enough, and that the statute should be rewritten to include extensive procedural protections for the child;

c. a group that feels that the court, once again, is interfering with family life, and usurping the authority of parents; this group wants to rewrite the statute to conform to the letter of the court's decision, but keep the spirit that parental authority over children has primacy.

Directions to Teachers:

Step 1: Students may be given this problem for homework several days before the class in which it will be discussed. As part of a homework assignment, students may be instructed to:
  (a) decide which group of legislators they find themselves most in sympathy with;
  (b) roughly rewrite the statute reflecting their policy position.

(*Note:* If teachers prefer these activities to be done during class time, this activity may take one and one-half class periods.)

Step 2: Divide class into three groups to represent the various legislative positions.

Step 3: Each group of legislators works as a group to rewrite the statute according to their stated positions (students bring to the groups the drafts they wrote for homework).

Step 4: At the end of the rewriting time, a spokesperson for each group reads the new statute to the class. If time and board space permit, the drafts might be written on the board; overhead projectors would also be helpful for this process.

Step 5: Discussion. (The scope of this step depends upon time allotment.) The discussion may take a full-scale legislative debate format, with each proposal being introduced, debated, amended and voted upon. With less available time, teacher may simply lead the class in a comparative analysis of the three different statutes.

Step 6: Conclusion. Questions to raise include:
  What did this exercise teach the students about due process?
  Was this action by the state legislature necessary? How else might John Doe's due process problem been resolved?
  Should children have due process rights vis-a-vis the decisions of their parents in cases such as this? In what other kinds of situations might the same problem arise?

(*Note:* In *Parham v. J.R.*, 99 S. Ct. 2493 [1979], the Supreme Court upheld a Georgia statute similar to the one cited in this exercise. While upholding the dominant role of parents in deciding to commit a child, the Court also found that the independent determination of the doctor was sufficient to protect minimum due process requirements.)

Days

4 & 5.

Mock Administrative Hearing

Through participating in a simulated zoning hearing students will be able to apply the concepts of due process which they have learned in previous exercises, to examine the utility of due process, and to draw some conclusions concerning the availability and meaning of the due process guarantee in citizens' daily lives.

Problem: Upland is a quiet, unassuming town. It consists of blocks of neat, unpretentious single-family homes, mostly constructed of brick and clapboard. There is a small shopping district, including a drug store, shoe repair shop, sandwich shop, bakery, hardware store, and Clyde's, the town tavern. The residents of Upland can trace their roots here for several generations. The majority of the homes are inhabited by married couples with children. Several generations live in some of the homes.

While all seems well at first glance in Upland, the mayor has been worried by recent census reports hinting that young couples in their twenties and thirties are moving out of Upland at a rapid rate. From what the mayor has been able to learn, these young adults are unhappy with the slow pace of life in Upland, and the lack of entertainment or social diversity.

Concerned with finding a way to slow down the exodus, the mayor talks to a developer friend. The developer agrees to buy some properties at the edge of town to convert them into an entertainment center, including a movie theater, restaurant, and night club.

The properties bought by the developer are zoned for single-family houses only. Also, the zoning for the entire town prohibits sale of liquor by the drink, although Clyde's was able to get an exception so long ago that no one can remember the circumstances.

The developer applies for an exception to the zoning regulations. The zoning commission schedules a hearing, and half the town turns out for the event.

These individuals testify at the hearing:

For the exception
The developer
The mayor
A local resident
Against the exception
Clyde's owner
A minister
A local resident

WITNESS STATEMENTS

The developer: "As I envision this development, it will be a very tasteful, totally harmonious part of this community. It will be planned to allow minimal change in the local landscape and neighborhood character. It will be on the outskirts of the community, so as not to interfere with the privacy of the residential areas. Ultimately, I'm sure, it will enhance everyone's property value."

The mayor: "I have known this developer for years, and I have the highest confidence in the plans that are being designed. More important, we may not have a town to worry about in a few years, if we don't move on this now. The plans are exciting, and certainly guaranteed to keep our young people, the future of Upland."

A local resident: "I am 30-years-old. My spouse and our child are planning to move into the city. We both work there, anyway, and there's little reason to return here each night, except to sleep. Whenever we want to see a movie or have a quiet drink, we have to go to the expense of getting a sitter and driving into the city. Nobody I know would be caught dead in Clyde's; it's a crummy place."

Young folks are moving out of Upland as if the place were on fire; will a new entertainment center keep them around (and what does this have to do with due process)?

Clyde's owner: "This whole action is part of the mayor's slanderous attempt to put me out of business. Clyde's has a proud tradition of serving this town for 75 years. But I didn't support the mayor in the last election because the mayor's policies are going to destroy this town. Young people wouldn't leave if the mayor wasn't encouraging them to do so."

A minister: "I speak not only for my congregation, but on behalf of all the churches in town. We don't need another drinking establishment. Lord knows Clyde's gives us enough trouble. We have nothing against a nice entertainment spot, but we don't want all kinds of offensive movies coming into town. We think this whole problem can be solved in ways that won't destroy the peace and beauty of Upland. We ask the zoning commission to deny this exception, while we work on other solutions to the entertainment problem."

A local resident: "We've been getting along fine for years. Now this upstart mayor brings in some city friends with plans to clog our streets with traffic, give alcohol and who knows what kind of entertainment to our young people, and ruin our neighborhood. The mayor and zoning commission have no right to allow such destruction of our property and lives. People who don't like it here should leave."

Directions to Teachers

Step 1: With the whole class, have class read the fact pattern and witness statements.

Step 2: Questions for Discussion:
(1) What are the most important facts?
(2) What is the legal issue?
(3) What are the arguments on each side?
(4) Does anyone in this case have a *right* to this hearing, or is the process being allowed at the discretion of the zoning commission?

Step 3: Describe the Hearing Process:
(1) Zoning commissioners take places.
(2) Chair calls meeting to order and announces the issue.
(3) Chair calls witnesses, all in favor first, then all opposed.
(4) Each witness is allowed to make a statement. Then members of the commission may question.
(5) Commission deliberates, votes, and announces decision.

Step 4: Appoint Roles:
(1) three to five zoning commission members, including a chair;
(2) witnesses:
  For the exception
  Mayor
  Developer
  Resident
  Against the exception
  Clyde's Owner
  Minister
  Resident
(3) Assistant counselors to help prepare witnesses

Step 5: Small Group Work:
(1) Students divide into three groups: zoning commission, witnesses pro, witnesses con;
(2) Zoning commission members develop questions they want to ask each witness;
(3) Witness groups discuss strategy, including arguments to emphasize, points to downplay.

Step 6: Conduct Hearing

Step 7: Board Deliberation and Vote

Step 8: Questions for Debriefing:
(1) Did all the interested parties get treated fairly?
(2) How could the procedure have been made more fair?
(3) Was the decision based on the result of a fair proceeding?
(4) Was the decision just?
(5) What responsibilities do citizens have to act to protect their due process right? □

Court Briefs

(Continued from page 24)

the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals.

"In arriving at this conclusion, we do not condone the egregious behavior of the government agents. Nor do we suggest that in cases such as this a Sixth Amendment violation may not be remedied in other proceedings. We simply conclude that the solution provided by the Court of Appeals is inappropriate where the violation, which we assume has occurred, has had no adverse effect upon the criminal proceedings."

Smile . . . You're On . . .

Those two adversaries, the free press clause of the First Amendment and the fair trial clause of the Sixth Amendment, squared off again in *Chandler v. Florida* (49 LW 4141), with free press gaining a decisive (8-0) victory (Justice John Paul Stevens declined to participate). However, the victory was narrow as far as judicial interpretation is concerned.

At issue was the constitutionality of Florida's experimental project allowing television cameras in the courtroom at the judge's discretion and over the objections of defendants. Presently states allow electronic coverage of trials with varying types of due process procedures.

Though Chief Justice Warren Burger has been a fervent opponent of electronic media in the federal courts, he authored *Chandler,* saying "An absolute constitutional ban on broadcast coverage of trials cannot be justified" even though "there is a danger that in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence."

As in most landmark constitutional cases, the decision is not as sweeping as it initially appeared to be. For example, the decision only applies to state courts. The ban on electronic media in the federal courts by the Judicial Conference of the United States, of which Chief Justice Burger is chairman, still stands.

In addition, the Supreme Court for some reason chose not to specifically overrule the last landmark case in this area, *Estes v. Texas* (381 U.S. 532, 1964). In *Estes* the 5-4 majority said that the televised trial in that case was unconstitutional. The majority in *Chandler* suggested that while it was not overruling *Estes,* the older decision's effect is limited to the facts of that case.

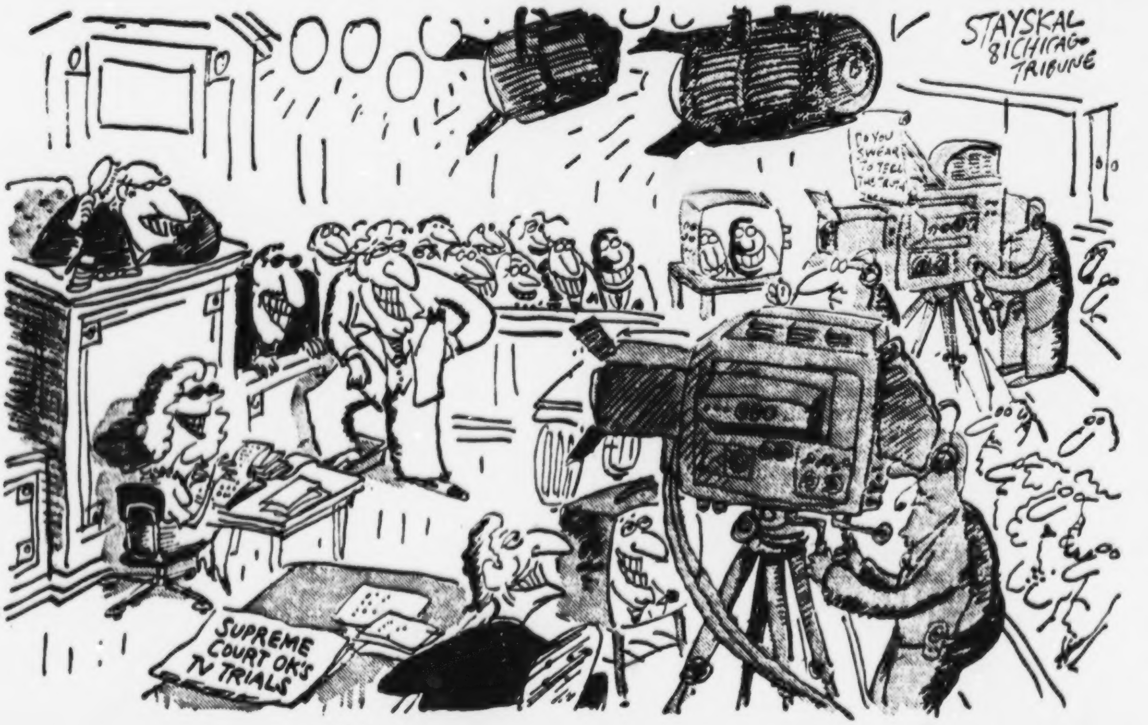
The Florida case began in July 1977, when Miami policemen were charged with conspiracy to commit burglary, grand larceny, and possession of burglary tools. The media taped and broadcast segments of their trial. Both before and after the trial, the defendants moved to have the authorizing judicial canon declared unconstitutional. It reads:

> Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

This canon does not give the media a constitutional right to access, but is merely an example of the Florida Supreme Court exercising its supervisory powers over the Florida state courts.

After the conviction, the Florida District Court of Appeals upheld the trial court and found that there was no evidence that the presence of television cameras prejudiced the defendants' case or denied them their due process rights.

The Supreme Court, in rejecting the policemen's arguments that *Estes* pronounced an inherent (per se) constitutional ban on televised trials, said via Chief Justice Burger that, "The six separate opinions in *Estes* must be examined carefully to evaluate the claim that it represents a per se constitutional rule forbidding all electronic coverage. Chief Justice


STAYSKAL
'81 CHICAGO TRIBUNE
DO YOU SWEAR TO TELL THE TRUTH
SUPREME COURT OK'S TV TRIALS

Earl Warren and Justices William Douglas and Arthur Goldberg joined Justice Tom Clark's opinion announcing the judgment, thereby creating only a plurality. Justice John Marshall Harlan provided the fifth vote necessary in support of the judgment. In a separate opinion, he pointedly limited his concurrence."

Justice Harlan had said, "Permitting television in the courtrooms undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from pursuing a novel course of procedural experimentation." Harlan concluded that in "notorious criminal trials" the arguments against televised trials were more important, since TV could infringe upon the "fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment."

After determining that *Estes* did not enunciate a per se prohibition against electronic media in the courtroom, but presumably was limited to the kind of sensational case discussed by Justice Harlan, the Burger Court then determined the feasibility of adopting such a rule in *Chandler*.

Chief Justice Burger, in rejecting a per se ban, said, "A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly." In other words, be on the lookout for further cases in which the defense will try to show that particular, specific prejudices were caused by the TV eye.

One More Time Around

In a continuing crackdown on the procedural rights of criminal defendants, the Supreme Court has upheld the right of the government to appeal sentences that it believes are too lenient. In *U.S. v. Di Francesco* (49 LW 4022), a 5-4 decision written by Justice Blackmun and joined by Chief Justice Burger, and Justices Stewart, Powell, and Rehnquist, upheld the Organized Crime Control Act of 1970, which allows the government to appeal sentences of defendants who are found to be "dangerous special offenders" under the act.

At issue was whether the act constituted a violation of the Fifth Amendment's prohibition against double jeopardy and whether a criminal sentence, once pronounced, is accorded the same constitutional finality and conclusiveness that an acquittal verdict is given.

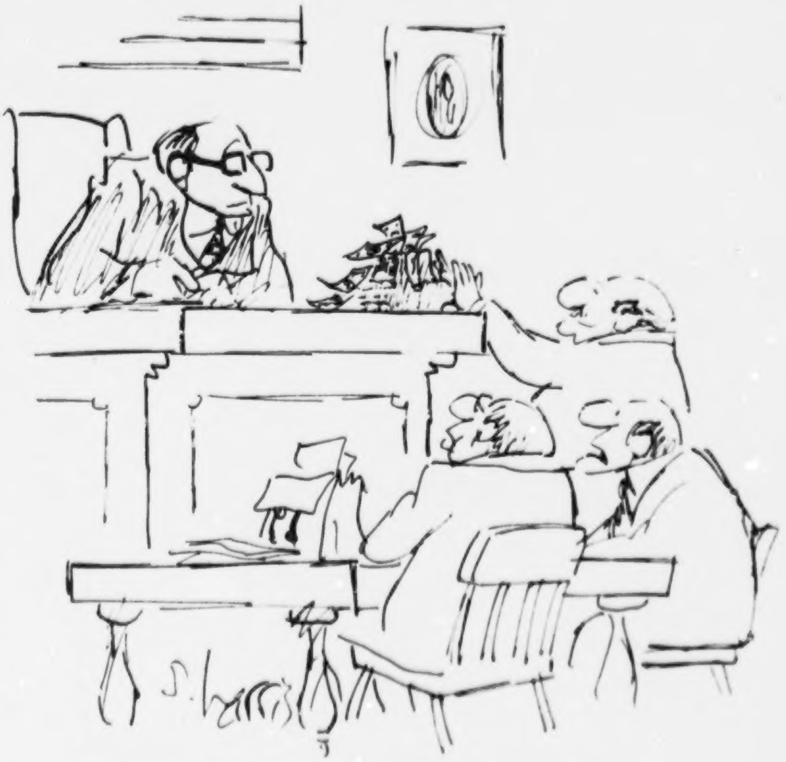
Defendant Eugene DiFrancesco was convicted of racketeering, damaging federal property, and conspiracy. In addition, he was found to be a "special dangerous offender" under the Organized Crime Control Act. DiFrancesco was sentenced to a total of 10 years on charges that could have netted him 34 years in prison.

The government then appealed the defendant's sentence, asking that his sentence be increased. DiFrancesco contended that the appeal violated the double jeopardy clause of the Fifth Amendment. On appeal the Second Circuit unanimously (3-0) affirmed the original conviction, but by a 2-1 vote and without reaching the merits of the special offender issue, the court dismissed the government's appeal on double jeopardy grounds.

Historically, the double jeopardy clause protects defendants against multiple punishments and multiple trials. A summary of double jeopardy holdings indicates that the guarantee against double jeopardy has been said to consist of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense" (*North Carolina v. Pearce*, 395 U.S. 717).

It has long been settled that the double jeopardy clause prohibits a second trial where a defendant has been acquitted. The law has been unsettled where the defendant has been convicted and subsequently sentenced. In finding that sentencing is not accorded the same constitutional finality as acquittal, Justice Blackmun said, "The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence."

Continuing, Blackmun argued, "Under section 3576 [of the Organized Crime Control Act] the defendant is charged



"I thought plea-bargaining was something entirely different."

with knowledge of the statute and its appeal provisions and has no expectation of finality in his sentence until the appeal is concluded or until the time to appeal has expired" (49 LW 4028).

A corollary issue was whether the increase of a sentence on appeal under section 3576 constituted multiple punishment in violation of the double jeopardy clause. In finding that it did not, the Court said that under ordinary circumstances a defendant's sentence may not be increased after he has begun to serve it. However, when Congress has specifically allowed a defendant's sentence to be subject to appeal, there is no violation of the double jeopardy clause.

Justice Brennan, writing for the minority and joined by Justices White, Marshall, and Stevens, said, "Because the Court has demonstrated no basis for differentiating between the finality of acquittals and the finality of sentences, I submit that a punishment enhanced by an appellate court is an unconstitutional multiple punishment. To conclude otherwise, as the Court does, is to create an exception to basic double jeopardy protection, which, if carried to its logical conclusion, might not prevent Congress, on double jeopardy grounds, from authorizing the government to appeal verdicts of acquittal. Such a result is plainly impermissible under the double jeopardy clause" (49 LW 4032).

Let's Make a Deal!

In a decision obviously not destined to restore public faith in the integrity of public officers, the Supreme Court has ruled unanimously that a state trial judge who was bribed to issue an injunction enjoys absolute immunity in a civil suit for damages. In *Dennis v. Sparks* (49 LW 4001), the Court also ruled that the judge's immunity is not derivative and that co-conspirators *are* subject to suit.

Judicial immunity has its roots in common law and is designed to absolutely protect judges from suits arising from their judicial acts. Unfortunately, immunity also protects judges who commit crimes on the bench from being subjected to damage suits. (They can, of course, be forced to testify concerning their judicial conduct and can be criminally prosecuted where it is warranted.)

The state court judge, who was not named in the Supreme Court's opinion, was bribed by defendant Orville E. Dennis and others. As a result, the judge allegedly entered an injunction which halted the production of minerals from oil leases controlled by the plaintiffs.

In a subsequent action for damages the judge claimed judicial immunity and was severed from the case. The other defendants then urged dismissal, on the grounds that there was a failure to allege action "under color of state law," a necessary component under federal law. In other words, with the judge out of the case, how could they face a damage suit under the law?

The Supreme Court, in a decision written by Justice Byron White, rejected the defendants' theory of "derivative immunity," saying that it had no basis in common law. White continued, "Here, [the defendants have] pointed to nothing indicating that, historically, judicial immunity insulated from damages liability those private persons who corruptly conspire with the judge."

Let's All Listen In

The issue of derivative immunity surfaced once again as the Supreme Court heard arguments on December 8 in the celebrated *Halperin v. Kissinger* case, which will determine the existence or extent of immunity in the executive branch.

Morton Halperin was at one time a trusted aide of then National Security Adviser Henry Kissinger. In 1969, in an attempt to discover the source of news leaks within the State Department, a tap was placed on Halperin's phone and remained there for 21 months, some time after he left government service. Halperin was never implicated in any of the media leaks.

The former State Department aide later brought a damage suit against then President Richard Nixon, Kissinger, Attorney General John Mitchell, and H.R. Haldeman, Nixon's chief of staff. The basic issue is whether the president or his aides enjoy immunity in the exercise of presidential actions that are clearly unconstitutional. The government argues that the president and his top advisers should be free to make necessary decisions concerning national security.

However the Court decides, it's clear that there is much more authority for granting immunity to the president than to his aides. If derivative immunity is acknowledged, it becomes a serious problem to determine exactly where in the chain of command immunity should be cut off. The Court is expected to resolve this issue very soon.

What the Court Will Do

A Right to Sue?

The Supreme Court has agreed to determine whether section 504 of the Rehabilitation Act of 1973 gives a handicapped person the right to sue recipients of federal funds. Section 504 says, "No otherwise qualified handicapped person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under federally aided programs."

In *University of Texas v. Camenisch* (49 LW 3295), Walter Camenisch, a deaf graduate student in a master's degree program at the University of Texas, asked the school to provide a sign language interpreter so he could receive maximum benefit from his classes. When the school refused, Camenisch took it to court, claiming a violation of section 504.

If the Court determines that section 504 grants a private cause of action for handicapped persons, the Court will then determine the scope of that legal obligation. Advocates of the handicapped will be watching this case very closely, because a decision either way will have an enormous impact on the rights of the disabled for many years to come.

To Draft or Not to Draft?

Does a male-only draft constitute invidious discrimination against men? The Supreme Court will decide this spring whether women should be drafted. *Rostker v. Goldberg* (49 LW 3252) was filed by antiwar student activists in Philadelphia. The question of sex discrimination was the main issue to be determined, and a three judge appellate court agreed that the draft was discriminatory this past July.

If the Supreme Court upholds the appellate court, Congress will be forced to either amend the Selective Service Act or scrap it altogether. The notion of reinstating the draft has been supported by opponents of the volunteer army, whose critics argue it is too poor and too black. Secretary of the Army Clifford Alexander denies these charges and cites the current army as the best trained and educated in the history of this country.

Until the case is decided, registration of men for the draft will continue as scheduled. □

Update's Annual Compendium of

Legal Lunacy

NEVER GIVE A TRUCKER AN EVEN BREAK

Truck driver Barbara Reed phoned her company, Chevron Inc., for mechanical assistance when a defective windshield wiper prevented her from driving in the rain. Company mechanics refused to help, and, after a near collision with a car, Reed parked her truck and called the California Highway Patrol. Before she could return to the truck, she was knocked unconscious and raped by three men. When she returned to work four days later, Chevron announced they were dismissing her "for her own good." Reed is charging discrimination and suing for $5 million.

NEVER GIVE A ROOKIE CAB DRIVER AN EVEN BREAK

Rosemary Belson, a rookie cab driver in San Francisco, was raped at gunpoint in her cab, then fired by her boss for not screening her customers carefully enough. "You stick your neck out too far," cab owner Guey Wong told her. "I can't afford to take any chances. I'm lucky the cab wasn't hurt. You might endanger my insurance, you might increase my rates." Belson plans to discuss the situation with the Equal Employment Opportunity Commission, maintaining that male cabbies who get robbed don't get fired.

OH HELL— NEVER GIVE *ANYONE* AN EVEN BREAK

High school senior Tina Bahadori ranked fifth in her class, had been accepted by MIT, and won a speaking contest that entitled her to give the valedictory address at graduation. The straight-A student, who attended school in Atlantic City, New Jersey, withdrew from speaking when 80 of the school's 140 teachers signed a petition against her because of her Iranian nationality. According to the school's principal, Bahadori was not politically active and, to his knowledge, never said anything for or against the revolutionary regime in Iran.

WE HEARD A RUMOR THAT THE TID-E-BOWL MAN IS LIVING IN LUXURY IN SOUTH AMERICA

Chicagoan Lola Chambers, 49, was fed up with a ring that kept losing its stone and a jeweler who wouldn't give her satisfaction. So she went to the store, looked at a hefty gem worth $7,000, then popped it in her mouth and mumbled something about how she'd swallow the diamond unless she got to see the top man. Clerks refused, cops were called, and the stone disappeared. She says she ditched it in a potted palm, and X-rays of her stomach showed nothing, but since the ring was never recovered, she was convicted anyway.

HE ALSO CLAIMS TO READ *PLAYBOY* FOR THE ARTICLES

Judge James Barbuto of Akron, Ohio, was convicted of swapping judicial help for sexual favors, after a number of women testified that they had sex with the judge, often in his chambers, in exchange for lenient verdicts in cases. Barbuto denied the charges, as well as charges that he showed the women pornographic pictures and paraphernalia. Barbuto explained that he kept the materials in his office during the 1970s, when he was a common pleas judge, for use in antiobscenity lectures.

THINGS GOT SO BAD, THEY WERE HIDING IN TAX SHELTERS

A Senate subcommittee is investigating reports that overzealous IRS agents in Idaho tried to get their pound of flesh by publicly embarrassing delinquent taxpayers. During the mid-seventies, they chained taxpayers' autos to telephone poles and parking meters, and also put locks on the doors of businesses, along with signs explaining that the owners of the businesses were delinquent taxpayers. The IRS in Idaho says there's nothing like that going on now.

ON SECOND THOUGHT, NEVER MIND THE CIRCUMCISION

Kansas salesman Thomas L. Brown sued his barber for a haircut so short it cut away his self-confidence and earning potential. Brown contended in small claims court that the cut caused him "mental tension and anguish." Barber Mike Spade said that Brown had hair to his shoulders and bangs over his eyes before the "trim" he consented to.

SO FAR THEY HAVEN'T CHARGED HER WITH KEEPING A DISORDERLY VEHICLE

A Milwaukee woman's 18-year-old daughter was sitting in the woman's car waiting for a friend when two men stole the car, raped her, then let her go before fleeing with the vehicle. Police spotted the car and chased it until the car went through a roadblock and crashed into two vehicles, one of them a police squad car. A couple of months later, the victim's mother received a $1,600 hospital bill for treatment of injuries suffered by one of the two men. Then the state told her she had to post a $2,300 security deposit because of the crash, or lose her license to drive. The state later rescinded its request, but the city asked $1,260 for damages to the police car that had been crashed into.

CONTINGENCY SLEAZE

How honest are lawyers? Most people wouldn't think a test was necessary to give an answer to that question, but a reporter for *American Lawyer* magazine went to the trouble of confirming everyone's prejudices. Reporter Jane Berentson, posing as an accident victim, went to 13 New York negligence lawyers with a fabricated case. She did not directly offer to lie to improve the case, but strongly implied she'd be willing to alter the facts if it would help. Five of the 13 lawyers said they'd do it. As one of them put it, "If you're asking me to help fabricate a story, I can do this . . . everybody lies under oath."

MIND YOUR PLEAS AND CUES

Suspected car thief Larry William Self of Pensacola, Florida, was sentenced to ten years for contempt of court for challenging Circuit Judge William Rowley in court to hike his one-year term for contempt first to five years, then to ten years. Self, who didn't see a pattern developing—or didn't care—dared the judge to hike his bond to $50,000. Crowley raised him—he made the bond $100,000.

IT WAS EITHER THAT OR ASSAULT WITH A DEADLY EATING UTENSIL

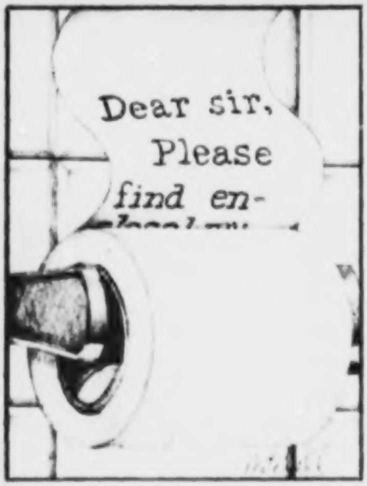
Prosaic minds would call it a run-of-the-mill domestic brouhaha. Mary Seals stabbed her husband with a fork; he belted her with a tire iron. Disorderly conduct? Nope. The Colorado Springs police charged the couple with dueling.

AND SOME JUST DON'T *WANT* A CRACKER

Jane Messina of a Boston suburb had only one complaint with Sheba, a white sulfur-crested cockatoo she bought two years ago—the bird hasn't said a word. A triple damages suit against Debbie's Pet Land brought no relief, though. The jury was swayed by a vet's testimony that some birds just won't talk. As the judge put it after the trial, "Some are smarter than others; some are retards."

EVERYONE KNOWS THE PAST TENSE OF SLIT IS SLUT

Sixteen-year-old Margaret Barile probably thinks being on Clintondale High School's homecoming court is not worth the honor. It seems she showed up for the homecoming parade wearing a skirt with an eight-inch slit in the front, violating the school's notion of what was "all-American" and "wholesome." Faculty advisor Risha Rothberger ordered her to stitch up or tape the slit, change clothes, or be thrown off the court. An assistant principal overruled her, allowing Margaret to ride in a car in the parade, but with a blanket over her exposed knees. Since then her house has been egged, her life interrupted by obscene phone calls, and her lawn decorated with funeral wreaths. Two hundred of her fellow students have petitioned to have her name stricken from homecoming records and her homecoming court picture left out of the school yearbook.



LET'S HOPE HE DOESN'T START RECYCLING

Prison officials reported that an unidentified inmate is willing to risk plenty for justice. The inmate, doing 4-25 years in the Chillicothe (Ohio) Correctional Institution, sent an appeal of his sentence—neatly typed—on toilet paper. "It is quite rough on myself to even spare this paper," he wrote. "If I get another illiterate, biased, and prejudiced decision from this court before my next issue of paper, I'm going to be hurting."

IS THAT A BAYONET IN YOUR POCKET OR ARE YOU JUST GLAD TO SEE ME?

One more male bastion fell when the Army convicted Private Cheryl Taylor, 20, of indecently assaulting a male soldier. According to the Army, which is cracking down on sexual harassment, Private Taylor abused another soldier with indecent language and then placed her hand in his groin area and squeezed. She was sentenced to 30 days at hard labor and fined $298.

GOOD SOUFFLES MAKE GOOD NEIGHBORS

A Baltimore judge dismissed a deadly weapons charge recently against 36-year-old Thelma Trumper, but she still faces trial on assault charges. It seems Thelma got mad at the neighbors and hurled a volley of eggs at them.

WITH ALL THOSE COPS AROUND, HE THOUGHT IT WAS A DUNKIN' DONUTS

James Harris of Chicago spent several unscheduled days in Cook County Jail, all because he helped himself to coffee and a donut in the police station where he had gone to bail out a few disorderly friends. Although Harris chipped in 25 cents for the snack, that wasn't enough for the cops, who had told him the coffee was for the police officers only. Peeved with Harris's attitude, they demanded he produce identification. After a quick scan of the files, they informed him he was really "Johnny Harris," wanted for jumping bail. Bond was set at $1,800, and Harris spent a day in jail before his lawyer convinced someone to check Harris's fingerprints. No connection to the bail jumper. But then someone found out the real Johnny Harris was supposed to appear in court the next day, and—you guessed it—Harris was kept another night so that there would be someone to bring to the judge. All the while the actual bail jumper was safely in prison serving time for burglary.

ON SECOND THOUGHT, SEND FOR MY LAWYER

Kevin Foster was one of hundreds of St. Louis citizens who got a sign emblazoned with "Send Help," part of a citywide drive against rape. He tossed it in the back of his car and forgot about it. So when a policeman drove by recently and saw the sign in Foster's car, he stopped to see what was wrong. "He was just sitting there, rolling a joint," the police officer said. Foster was booked for possession of marijuana.

YOU'RE NOBODY 'TILL SOMEBODY WANTS YOU

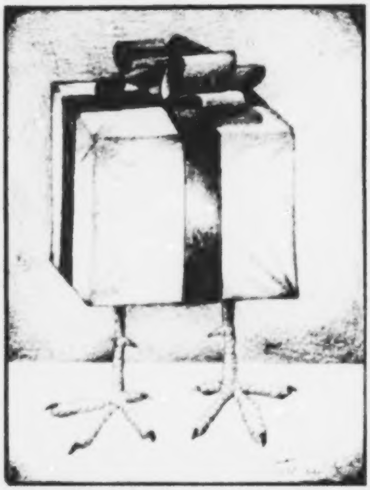
Willie Herron was tired of life on the run and turned himself in at a Chicago police station. That might have been the beginning of a straight life for the thief and dope addict, who had been wanted by police for years. But this time the police wouldn't have him. Their trusty computer didn't show anything on Willie, so they said they couldn't accept his surrender.

THREE-TO-ONE THAT'S A SOCIAL RELATIONSHIP DOWN THE DRAIN

You thought the only risk in golf was that of boredom verging on coma? Thanks to the Colorado Supreme Court, you can now lose your shirt while thrashing around the rough. The court ruled that Lloyd W. Hammer will have to cough up the $24,600 he lost to golfing opponent Frederick C. Berckfeldt in one disastrous round of golf. Despite Colorado's law against gambling, the court ruled that the debt was part of "a bona fide social relationship" and so falls outside the state's gambling prohibition.

TOOTSIE ROLL

Chicagoan James Heinzel, a Cook County state's attorney, was awarded $3,463 in worker's compensation. His injury? He stubbed his big toe while rushing to answer a telephone. In case you're interested, the award was calculated at 40 percent of the value of a healthy toe, making a whole pedal digit worth $8,660.



NLRB RULES THAT TURKEY IS NOT GRAVY

The National Labor Relations Board has ordered Aeronca, Inc., an aerospace parts maker, to give turkeys to its 900 employees as Christmas presents. The panel ruled that the Middletown, Ohio, firm had violated an NLRB regulation when it eliminated a 25-year-long practice (not mentioned in the contract between the union and Aeronca) of giving employees 14- to 16-pound turkeys. When company officials stopped giving the birds away, the union filed a complaint charging Aeronca violated the NLRB act by "unilaterally discontinuing a longstanding practice. . . ." Aeronca was ordered to reinstate the turkey bonus and "make employees whole by paying the value of lost Christmas turkey bonuses with interest."

DOES THAT MEAN HE COMMITTED A GENUINE SIMULATED CRIME?

Eddie McAlea walked into a jewelry shop in Liverpool, England, waved a gun, and announced, "This is a stick-up." Undaunted, the store owner chased the would-be thief out of the shop, and McAlea was arrested shortly thereafter for assault with intent to rob. McAlea was also charged with possession of an imitation firearm after officers noticed he had forgotten to remove a protective cork from the barrel of his toy pistol. McAlea's lawyer later pleaded, "This can only be described as a bungling, amateurish incident."

AVON MAULING

A Chicago teenager found a driver's license and was on his way to return it to its owner when he was struck by a car. Elton Houston, an Avon products supplier, told police he heard a noise, stopped his car, and then backed over the boy, who was lying on the pavement. He then pulled ahead and ran over the boy again. Houston was charged with reckless homicide.

. . . WE FIND THE DEFENDANT ADORABLE. . . .

Conclusively proving that judges *do* have a sense of humor, California's Superior Court Judge Jerrold S. Oliver permitted Robert L. Hill, a Disneyland employee who plays Winnie the Pooh, to take the stand in his costume. Hill was on trial for allegedly striking nine-year-old Debbie Lopez with a Pooh paw. Because of a "Hunny" jar atop Winnie's head, Hill could only nod his head for a "yes" answer and shake his belly sideways for a "no" response, but that didn't prevent him from nuzzling the court reporter with his nose after he was sworn in, demonstrating how he walks around Disneyland and generally acting cute. He won after jurors deliberated only 21 minutes.

CHICKEN COUP

Another California superior court judge, Raul Rosado, went his colleague one better by having two (count 'em) costumed animals in court at the same time. In a momentous case dubbed *Chicken v. Chicken,* the original San Diego Chicken, Ted Giannoulas, 25, won the right to continue performing in a chicken outfit, even though his former employer, a local radio station, had hired a new chicken. The station's new chicken was also in court wearing his costume. After the verdict, Judge Rosado said, "This puts this case to nest once and for all." And Giannoulas said, "I feel like a free bird."

AND THEY HAD TO USE THEIR OWN DIMES IN THE PAY TOILET

A California appellate court reversed a robbery conviction because the trial judge "improperly pressured the jury to reach a verdict" in order to save the state money. California, you remember, is the state that made tightfistedness, as in Proposition 13, a statewide passion. The appellate court decision said that when jurors were sent out to eat lunch at their own expense, they may have felt they were being punished for wasting the state's time and money in lengthy deliberation of the case. Lunches are usually paid for at public expense.

THE KLAN KEEPS 'EM IN STITCHES

The Ku Klux Klan used the Arizona Department of Economic Security, a state welfare agency, to recruit workers to sew sheets into Klan robes. The jobs paid $3.90 to $4.25 an hour as piece work. When agency personnel asked the state attorney general's office whether it was legal to list the Klan, they were told it was all right as long as it agreed to be an equal-opportunity employer.

THE FOUNDING FATHERS WERE JUST PERMISSIVE PARENTS

Students in a high school civics class in Vassalboro, Maine, circulated a petition among the townspeople urging the repeal of laws that coddle criminals. A majority of adults signed the document —which proposed that the matter be put on the 1980 election ballot— without even bothering to read it. Of the 476 respondents, fewer than 9 percent recognized that the petition called for the repeal of the Bill of Rights. The title had been deleted, but the text of the first ten amendments was printed verbatim.

WE WOULD'VE SENT IT TO THE COMMITTEE ON BIG GREEN THINGS

The Louisiana legislature was faced with a crucial question last year: which committee should delve into the "watermelon bill," which calls for the melon to become the state's fruit.

Under House rules the bill should have gone to the Committee on Municipal, Parochial and Cultural Affairs. But one representative, Jamie Fair, thought the Agriculture Committee should get the bill, for obvious reasons. Agriculture won.

BUT THE TIPS ARE TERRIBLE

In Illinois—where John Wayne Gacy is among 26 men sentenced to death—state authorities announced that they were considering using a citizen volunteer executioner, should the death penalty be reinstated. They were flooded with dozens of applications from people who offered some fanciful and altruistic reasons for wanting the job. A 52-year-old Chicago policeman deemed it "an honor and a privilege" to take part in the executions. An inmate in a New York prison, who was scheduled for a parole hearing, wrote, "I do need a job, plus a new start in life." A funeral director offered his services, since his constant traffic with death had left him immune to soul searching. A man from Georgia cited his civic service in the Lions Club, a German sent a family snapshot, and a Baptist minister enclosed his card, which bore the legend "Discover the Difference."

LIFE IN THE FAST LANE

Dar Abel Sloniker, a soldier stationed at Fort Sill, Oklahoma, was cited by police for speeding and nearly causing two accidents. Police clocked Sloniker at 45 miles per hour on a winding mountain road posted with a 15 mph speed limit. Sloniker was on roller skates at the time.

BUT NEXT WEEK SHE'S GOT AN INTERVIEW WITH A HIGH-POWERED POETRY FIRM

California lawyer Douglas Page filed suit to get his ex-wife thrown out of graduate school, claiming that her quest for an advanced degree in English is frivolous. Society has no need for people with such degrees, he said. Page noted that during his seven-year marriage his wife had had six majors but no job.

FOR NOW, THEY'RE JUST CALLING HIM "HEY, YOU"

The son of Stephen Stitt and June Rice still isn't listed in Florida birth records although he is almost two years old. A recent state law says a birth certificate must list a child's last name as that of the father only. His parents want Austin John to be listed as either Austin John Rice or Austin John Rice-Stitt. The Florida Department of Health and Rehabilitative Services has refused to grant the parents a birth certificate, and the state court of appeals also ruled against the parents.

IT WAS THE DIMMER SWITCH IN HIS DOGHOUSE THAT TIPPED THE VERDICT

A Danbury, Connecticut, small claims court recently ruled that the owners of Tony, a mutt, would have to pay the $119 fee for a veterinary abortion of Frosty the Huskie. Frosty's family said they didn't want any more unwanted puppies brought into the world, but Tony's family squawked that there were no biological tests to identify Tony as the papa. Even so, the judge ruled that the other evidence against Tony was strong enough to warrant his owners coughing up payment for the vet bill.

SHE ALSO REQUESTED A UNIFORM WITH VERTICAL STRIPES

When Alberta Taylor pleaded guilty to a drug abuse charge in Columbus, Ohio, she did so by phone, and the judge delayed execution of her one-to five-year sentence. Taylor, 39, weighs more than 500 pounds and jail officials weren't sure at first whether they could accommodate her at the jail.

TOOLS OF THE BETRAYED

District Judge Ted Miller of Des Moines enlisted the aid of an expert when he was locked out of his courtroom. Convicted burglar Loren Wilson was in the courthouse hallway, on his way to be sentenced, as the judge and building janitor fumbled to open the courtroom door. Using a paper clip, nail file, and plumber's wrench, Wilson neatly opened the door in seconds. In response to the judge's profuse thanks, Wilson mumbled, "Think nothing of it. It's a matter of professional courtesy." Insde the courtroom, Miller sentenced Wilson to the maximum penalty for burglary—ten years. "If I need him again, I know where he'll be," the judge said.

NOBODY MENTIONED YOU HAD TO LIVE NEXT DOOR TO REGISTERED VOTERS

Joan Emuch, 23, a secretary, wanted to be the village treasurer-clerk in Enosburg Falls, Vermont, but was excluded from the race because she rented an apartment and wasn't a landowner. So she bought two cemetery plots. But village moderator Garnett Harvey said the two plots weren't enough to constitute ownership of property under local law and ruled her name off the ballot.

WHEN HE WOKE UP THE NEXT MORNING HE ASKED, "IS THIS WHAT THEY MEAN BY 'HUNG-OVER?' "

Sent to service 29 heifers in Wales, Arab, the prize bull, damaged his most vital asset, leading veterinarians to prescribe total abstinence until his recovery. Alas, a few months later, Arab fell prey to temptation when several seductive heifers wandered over from a neighboring farm, and the ensuing night of passion ended Arab's stud days for all time. Owner John Lloyd then sued neighbor Sara Ann Wright for $352,000, charging that her *vaches fatales* had terminated a great career. The judge, however, ruled that Arab had handicapped himself beyond repair the first time around, and awarded Lloyd just $347.24.

AND IF ANYONE MAKES A FALSE MOVE, THE CHAIR GETS IT

The defense pleaded insanity, but the judge sentenced 25-year-old Ronald Palmer to 985 years. Ignoring the pleas of Palmer's family that he should be given psychiatric help, Circuit Judge Mel Grossman of Fort Lauderdale, Florida, ruled that the crime was so bizarre that he insisted on the right to review Palmer's parole petitions for the first 328 years. The crime? Palmer walked into a wake and threatened to shoot the corpse if the mourners didn't turn over all their cash and valuables.

AND HE HAS HIS ROBE ON BACKWARDS

During deliberations in a murder trial, juror Carol Crane read a passage to other jurors from a law book she had brought into court with her, saying, "The judge is wrong and this is the law." Although Manhattan Supreme Court Justice Edward Greenfield said he found Crane's conduct unforgiveable and fined her $1 for contempt of court, he later forgave her enough to drop the contempt charge when she pleaded that the misdemeanor might hamper her in pursuing a future legal career.

WE'RE COMING IN AFTER YOU WITH OUR FANGS BARED

Sam Jones, 15, was trapped by police in the act of burglarizing a Phoenix, Arizona, store. He steadfastly ignored police demands that he come out of hiding and surrender. Finally, patrolman Al Femenia announced to Jones that vicious German shepherd dogs from the police K-9 unit had been brought to the scene and that they would be turned loose to hunt Jones down if he didn't give up. Jones finally surrendered when the police outside began barking.

WHEREUPON THEY WERE NAMED INNOVATIVE RESOLUTION MAKERS AND DULY CONGRATULATED

Tennessee legislators officially lauded basketball teams, football squads, softball players, marching bands, beauty queens, friends, relatives, and themselves in 767 resolutions during the 91st General Assembly. Representative Tom Wheeler praised a couple for reaching their first wedding anniversary, as well as the girls who won Campbell County titles for Little Miss Talent, Ideal Miss Talent, Miss La Petite, and Our Little Miss. Such honorary resolutions are estimated to cost $51.73 each, adding up to $40,000 worth of best wishes. A resolution introduced by two Republicans asking that House members refrain from making frivolous resolutions was referred to the Rules Committee.

IF WE CATCH YOU AGAIN, IT'S CHAMPAGNE AND CAVIAR FOR SURE

Punchy cops, overburdened with corraling crooks at Chicago's mammoth lakefront festival, decided to make their 500th arrest memorable. When the perplexed pickpocket was charged, he was given a standing ovation by the officers, presented with a basket of fruit and cheese, and handed a free pass to next year's fest. However, there were no goodies at all for crook number 501, who groused that he was really the 500th but was cheated of the award because the cops stalled in booking him.

HE SAID THE HARDEST PART WAS GETTING THEIR SOCKS OFF

Campus cops at the University of Southern California solved the case of the phantom pedicurist, but they had to let the culprit go. Seems the varmint would hide under library tables and paint the exposed toenails of unsuspecting USC coeds. The case was cracked when one alert student, on her way home from the library, noticed that her toenails, which had been pink, were now green. The culprit was apprehended with 15 different shades of nail polish, but couldn't be charged because painting toenails without permission is only a misdemeanor and officers must witness a misdemeanor to make an arrest. Police declined to speculate how many coeds might have had their toenails polished, saying that many "may be unaware of his artwork." □

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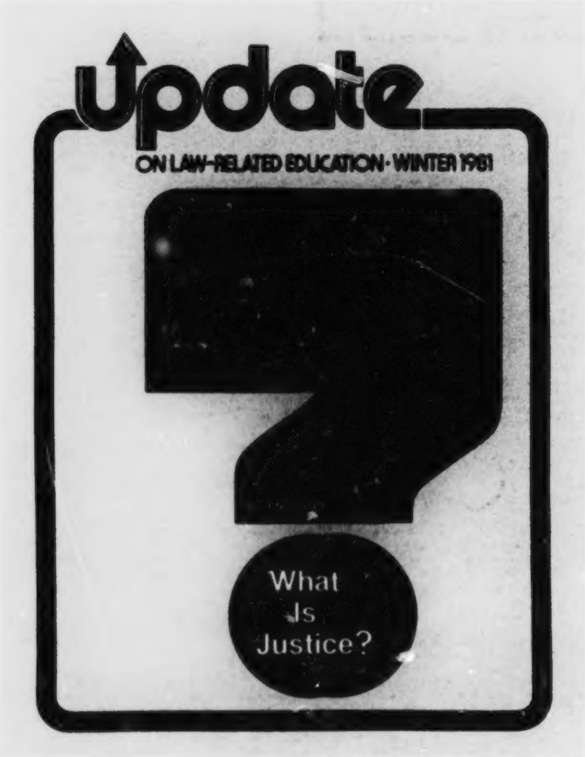
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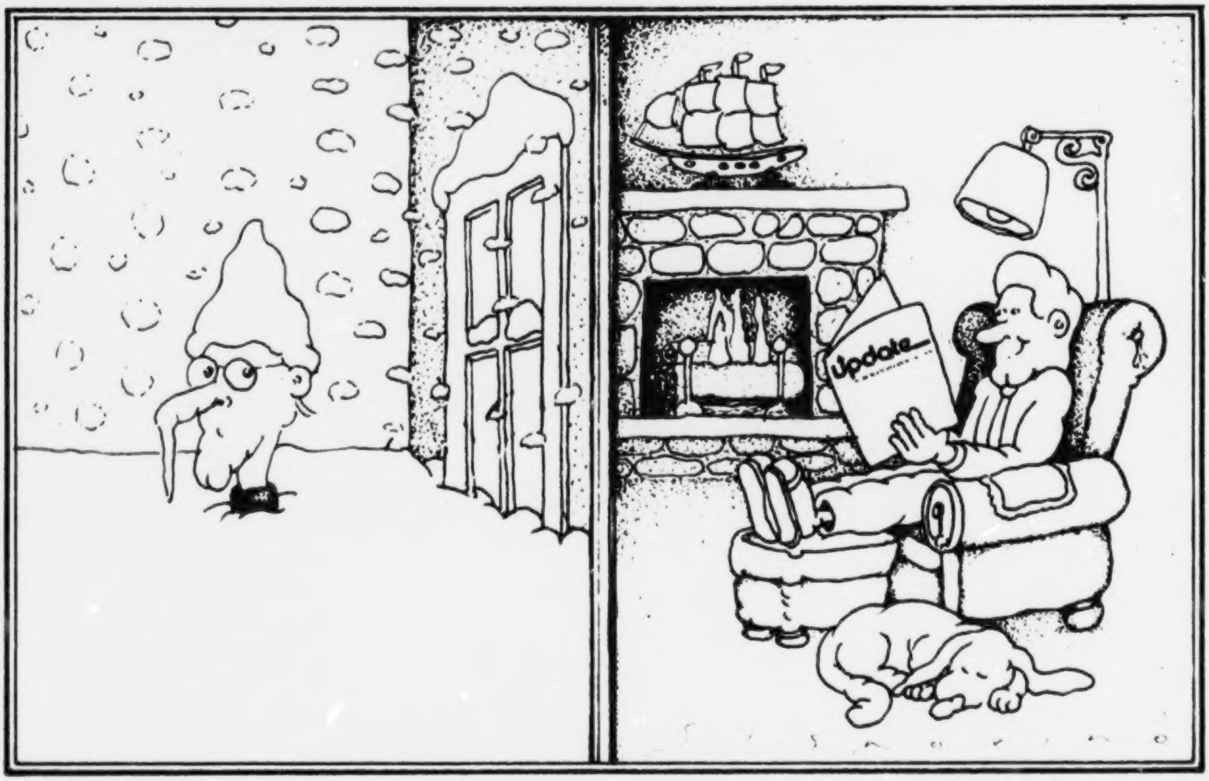

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contents

Volume 5, Number 2 Spring 1981

2
Supreme Court Report
Sharing the Constitution Is Not Easy

6
Law and the Family
Who Gets the Kids When Mom and Dad Call It Quits?

10
Classroom Strategies
"I Do"

14
Law and the Family
The Debate Over Sex Education

18
Opposing Views
Should the Family Protection Act Be Passed?

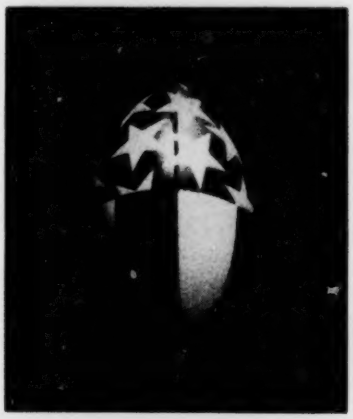
22
Law and the Family
Marriage in India

26
Law in the Future
If I Were Dictator

32
Court Briefs
Latest Decisions on the Rule of Law

36
Legal Lunacy

38
What Is Justice?
When Law Becomes A Political Football



60
Curriculum Update
Materials on Law and the Family

67
Practical Law
Do Kids Have Rights at Home?

Credits
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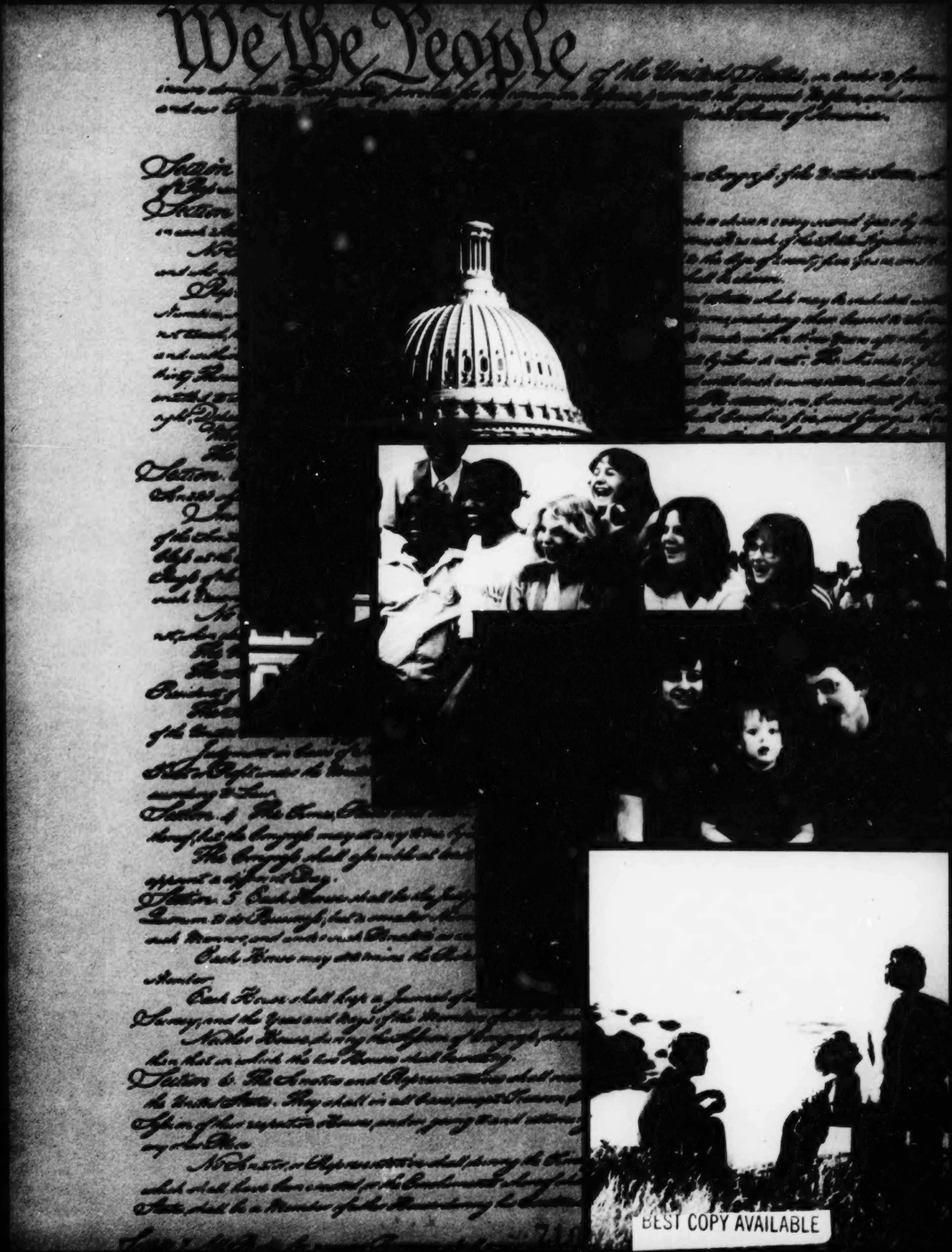
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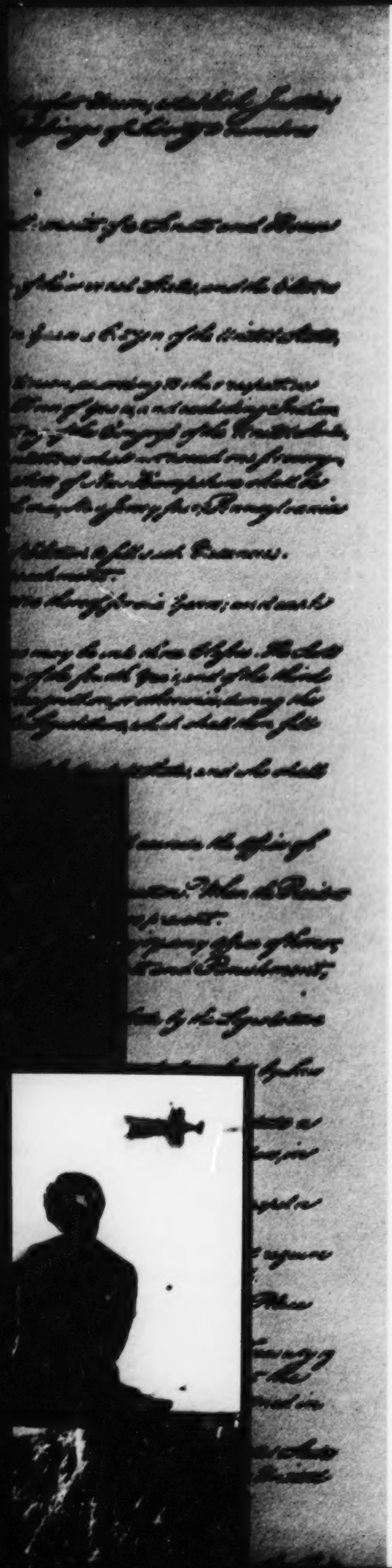

SUPREME COURT REPORT

Parents, children, government:

Sharing the Constitution Is Not Easy

Diane Geraghty

Embedded in American law is the idea that parents have a right to raise their children as they see fit without interference from government. This traditional view has roots in both English and Roman law. There were periods in ancient Rome, for example, when a father had absolute control over the lives of his children, including the right to sell or sacrifice them. Under English law, children were considered to be the property of their father, and he decided where they lived, if they worked, and how they were disciplined.

This historical view that childrearing is the responsibility of parents has been elevated to the status of a fundamental constitutional right by the United States Supreme Court. In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the Court stressed that the term "liberty" as used in the Fourteenth Amendment of the U.S. Constitution "denotes not merely freedom from bodily restraint but also the right of the individual to. . .establish a home and bring up children. . . ."

Subsequent Court decisions have defined this parental prerogative to include the right of parents to exercise primary control over the custody, education, health, discipline, and economic well-being of their children. See, for example, *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

The right of parents to raise their children is not, however, an absolute right. In the last 100 years, courts have increasingly permitted the state to intervene in the parent-child relationship where the welfare of the child required it. The Supreme Court has, for example, allowed states to enforce compulsory vaccination laws, child labor restrictions, and mandatory primary school attendance over the objection of parents. The justification for this degree of governmental control has been the interest of the state in seeing children become part of an educated and responsible adult electorate and the state's duty to protect the health and safety of all of its citizens (*Prince v. Massachusetts,* 321 U.S. 158 [1947]; *Jacobson v. Massachusetts,* 197 U.S. 11 [1904]).

To make the balancing all the harder, children themselves have certain constitutional rights that courts must take into account. In this three-way balance, courts must weigh the state's obligation to protect the child's best interest, the constitutionally protected rights of parents, and the child's own constitutionally protected interests. Beginning with the Court's decision in *In re Gault,* 387 U.S. 1 (1967), that a minor accused of a crime is entitled to certain procedural rights, the Court in several cases has reiterated its view that the mere fact that a child has not reached a certain age does not automatically disqualify him or her from being considered a "person" and thus entitled to constitutional protection. See, for example, *Tinker v. Des Moines,* 393 U.S. 503 (1969); *Goss v. Lopez,* 419 U.S. 565 (1975).

The Court's decisions, however, have not held that a child's constitutional rights equal those of adults in all situations. Rather, the Court has pointed to a child's special vulnerability and lack of maturity as justifications for using a flexible approach in outlining the scope

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of a child's constitutional rights. For example, in *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld the constitutionality of a New York law forbidding sale of obscene materials to minors. Though the law would have run afoul of the First Amendment had it applied to adults, the Court held that, even when sensitive constitutional guarantees are at stake, the state may have authority over children that it lacks over adults.

As a result of this "constitutionalization" of the family relationship, the Supreme Court in the last few years has been called upon to reassess much of the law's traditional thinking about the appropriate role of the government vis-a-vis parents and their children. At what point may the state interfere in a constitutionally protected family relationship? Can its interference include the authority to permanently sever ties between a natural parent and his or her child? What weight should be given a child's view when parent and state come into conflict over a childrearing issue? And what if a parent and child disagree about some aspect of the child's upbringing and each claims a constitutional right to have his or her way?

Parent v. Child: Abortion

In 1973, the Supreme Court decided that an adult woman's right of privacy includes the right to terminate a pregnancy at will *(Roe v. Wade*, 410 U.S. 113 [1973]). But two questions involving parental and children's rights followed from that decision. First, does a minor child also have a right to an abortion? Second, what happens if parents object to a child's abortion decision on religious, moral, or health grounds?

The Supreme Court considered both of those issues in *Bellotti v. Baird*, 443 U.S. 622 (1979). *Bellotti* involved a Massachusetts statute which required an unmarried minor to obtain the consent of her parents before securing an abortion; if either parent refused, a court could order the abortion "for good cause shown."

The Court in *Bellotti* reaffirmed a position it had earlier adopted in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), that a minor girl does have a constitutional right to make an abortion decision in the first trimester of pregnancy without interference from the government. The Court stressed that the reasons for recognizing an adult woman's privacy right are only heightened when a child is involved. Because of her age and corresponding maturational and educational background and financial dependence, a minor who bears a child inevitably has responsibilities with grave consequences.

Recognition that a minor has a constitutionally protected right to obtain an abortion, however, is thought by many to be in direct contradiction of preexisting parental rights. These rights include not only the freedom to instill in children a parent's own system of religious and moral values, but also the long-standing rule that parental consent is required before a minor may be given medical care in a nonemergency situation.

What happens when parents and children disagree, and each claims a constitutional right?

The court in *Bellotti* was not insensitive to this alleged conflict between a child's privacy interest and a parent's role in the upbringing of children. *Bellotti*, like *Danforth* before it, stands for the proposition that the state may not give a third party—parents or judge—the absolute right to veto any minor's decision to have an abortion. The Court noted that many minors are mature enough to make an informed and reasonable choice. The Court left open, however, the possibility that some legislatively required parental input in the child's abortion decision, short of total veto authority, may not violate the Constitution.

That possibility has just become a reality. In *H.L. v. Matheson*, a case decided in late March of this year, the Court upheld a Utah law that required a doctor to inform parents of a child's decision to have an abortion. The parents do not, however, have veto power under the law. (For a full discussion of the case, see this issue's Court Briefs.)

Parent v. Child: Mental Health Commitment

In *Parham v. J.R.*, 442 U.S. 584 (1979), the Court decided another case involving a dispute between parent and child over appropriate health care for the child. At issue in *Parham* was a Georgia statute authorizing parents to place a child in a state mental hospital. Under the terms of the statute, after a parent applied for a child's commitment, the child was temporarily admitted for diagnosis. If observation revealed that the child showed symptoms of mental illness and appeared suitable for treatment, then the child was admitted, subject to the parents' right to remove the child on request.

Parham was a class action in which children who had been voluntarily committed to state mental hospitals by their parents or guardians argued that a parent's right to admit a child to a hospital for medical treatment of a physical condition should not carry over to mental hospital commitments. Why? Because of the loss of liberty and stigma involved in such a confinement. These children argued that before such voluntary commitment could take place, the state must step in and provide them with procedural protections guaranteed by the due process clause of the Fourteenth Amendment. Specifically, they argued that they were entitled to notice of the proposed admission and the right to an adversarial hearing where they could object to the commitment.

The Court assumed that a child does have a liberty interest, protectable under the Fourteenth Amendment, in not being improperly committed to a state mental institution. It went on to say, however, that "[s]imply because the decision of a parent is not agreeable to a child or because it involves a risk does not automatically transfer the power to make that decision from the parents to some agency or officer of the State."

It resolved the conflict between the constitutional interest of the child and the traditional authority of the parent by deciding that while parents have no absolute right to require commitment of a child, they retain primary responsibility for deciding medical care issues for their children. The Court decided that minimum due process in connection with a parent's voluntary commitment decision requires only independent examination and review of the parents' decision by a qualified professional, not the full precommitment adversarial hearing that the plaintiffs had asked for. Underlying the decision is the Court's belief that, as a general principle, parents act in the best interests of their children.

Traditionally, courts have been reluctant to involve themselves in family matters. Recently, however, courts, includ-

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ing the Supreme Court, have demonstrated an increased willingness to examine legal issues arising out of the family relationship and the impact that the state has on that relationship.

Parent v. State: Unwed Fathers

One of the areas that the Court has considered in some depth in recent years is the rights of unwed fathers vis-a-vis their children. This line of cases began with the Court's opinion in *Stanley v. Illinois*, 405 U.S. 645 (1971), which held that a state cannot presume that all unwed fathers are automatically unfit to have custody of their children. In so holding, the Court drew fathers of illegitimate children under the umbrella of protection that the Fourteenth Amendment gives to families, including the right of parents to raise their children. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. . . ."

Subsequent Court decisions, however, have made it clear that the familial rights of unwed fathers are not necessarily equal to those of parents whose children are the product of a marital relationship. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), the Court examined the constitutionality of a Georgia statute which provided that only the consent of a mother was required if her illegitimate child were to be put up for adoption. Unwed fathers were left out of the picture under the law. Unless they legitimized the child by marriage or formal court procedure, their consent was not required before the child could be put up for adoption.

The situation was very different for fathers of legitimate children. If a child's parents were married, separated, or divorced, the consent of both parents was necessary. And if a parent refused consent, the child could only be adopted if the parents were found to be "unfit."

In *Quilloin*, the child's mother later married a man who sought to adopt the child. The natural father had never lived with the child, although he had from time to time supported and visited the child and supplied toys and gifts.

The natural father, who was admittedly not an unfit parent within the meaning of Georgia law, argued that *Stanley* meant he could not be treated differently from divorced or married fathers. The Supreme Court disagreed, and in so doing provided insight into the family interest the Constitution seeks to protect.

The Court in effect defined a family relationship as one in which a parent has at some point in the child's life "shouldered . . . significant responsibility with respect to the daily supervision, education, protection, or care of the child." Thus, Georgia could constitutionally prefer the adoptive family which did meet this definition over the interest of the unwed father. The case is grounded on the importance of the family, but under these facts, the state and not the biological parent has the authority to protect traditional familial interests.

The state's power in this regard is not without limitation, however. In *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court struck down a New York statute which required an unmarried mother's consent for adoption but not that of an unmarried father. There the father had lived with the family for several years, had supported the children, and had remained in constant contact with them. The Court concluded that the statute was overly broad and discriminatory on the basis of gender where a father actually shared childrearing responsibilities with the mother for a period of time and maintained a significant interest in the child.

When can courts take children away from their parents?

Parent v. State: Terminating Parental Rights

Quilloin and *Caban* both involved efforts by the state to sever the legal bonds between natural parent and child in order to free up a child for adoption. The need to terminate biological family relationship, however, is not limited to questions involving illegitimate children. Too often children are abused or neglected in their own homes.

In all jurisdictions, the state can remove such children from the physical custody of their parents, arranging for their temporary placement in the homes of relatives, foster families, or state institutions. These temporary placements, while removing children from immediate harm, often create instability and anxiety in the child, particularly where there is frequent shifting of the child from one placement to another. One solution to this situation is not only to remove children from the custody of their parents, but also to cut the legal ties that bind them, thus making the child available for adoption by a new family.

Because of the fundamental constitutional right which parents have to the custody and raising of their children, one of the most delicate questions in the law today is under what circumstances the state can permanently terminate the rights of natural parents. Two different answers have been evolved by legislatures and the lower courts.

In some jurisdictions, a parent's rights can be terminated only if the parent is found to be "unfit" under state law. "Unfitness" typically means a parent has engaged in a pattern of highly unacceptable conduct with respect to a child, such as physical or sexual abuse, serious neglect, or abandonment. It can also include parental deficiencies such as habitual addiction or moral turpitude.

In other jurisdictions, there has been a determination that forcing the state to prove a parent unfit places too much emphasis on the rights of natural parents and not enough on the needs of the child. In those jurisdictions, therefore, a parent's rights can be terminated on a showing that the best interest of the child requires severance of the biological family relationship.

To date, the Supreme Court has not taken a position on the constitutional implications of either of these legislative choices. (There are dicta from the Court indicating a potential disagreement among Court members. Compare the majority opinion in *Quilloin* with Justice Stevens's dissent in *Caban*.)

The Court has, however, agreed in its current term to decide certain questions in connection with a termination action. Among the issues presented for review in *Santowsky v. Kramer* (80-5889) are the standard of proof required in a termination case. Should the state have to prove that "a fair preponderance of the evidence" shows that parents are guilty of "permanent neglect," or should the higher standard of "clear and convincing evidence" be used?

The Court's opinion in this and other cases may provide not only answers to those questions, but to the larger question of the constitutional parameters governing disputes between child and state, child and parent, and parent and state. It may also provide guidance on the ultimate question—the degree of autonomy to which the family is entitled in making its own economic, discipline, and health decisions in modern American society. ☐

Who Gets the Kids When Mom and Dad Call It Quits?

Kramer v. Kramer was last year's surprise movie hit. Good acting, writing, and directing had plenty to do with it, but there may have been one other thing that kept them standing in line. *Kramer v. Kramer* was the first American movie to deal realistically with one of the most heart-wrenching problems in contemporary American life: who gets control of the children when a family splits up? *Kramer v. Kramer* hit it big because it hit a raw nerve.

With divorce statistics soaring—in some jurisdictions there's one divorce for every two marriages—more and more parents are having to decide who'll get custody of the children.

And when they can't decide, of course, a court has to decide for them. As *Kramer v. Kramer* shows, this decision is getting harder and harder for courts to make. Why? Because male and female roles are changing, and courts can no longer rely on the old assumptions to guide them.

In the movie, for example, it's the mother who leaves the child behind (it used to be just husbands who deserted), it's the mother who has the higher paying job, but it's the father who has proved that he's a good homemaker and parent.

Even though the movie thus turned male/female stereotypes on their head, the custody battle in the film was finally decided in the traditional way—the mother got the child. But plenty of real-life cases are different. They show that stereotypes are breaking down, giving judges headaches and, sometimes, leading to unexpected custody decisions.

Here are some typical fact situations.

Case #1: Joe and Marge have been separated for almost a year. Their divorce will be final soon. They have a son, aged 16, and a daughter, aged 9, both of whom are with Marge. When the couple separated, Marge took a full-time job as a salesperson for a sporting goods chain. When she travels (occasionally during the winter months, more frequently in the spring and summer), the children stay with Joe. Joe thinks her traveling is bad for the kids, since Marge seems to be spending more and more time on these business trips. He petitions the court for custody of the children.

Case #2: Jackie and Walter have been divorced for six years. Their daughters, aged 7, 10, and 12, live with Jackie in the house the family has lived in since just before the oldest child was born. Walter visits the girls each weekend. Jackie informs Walter that she wants her boyfriend, Wayne, to move into the family home. Walter protests and petitions the court to change the original custody order and give him custody of the three children.

Changing Standards

Which parent will prevail in these cases? Today, the answer is not at all clear, but through most of our history custody decisions were almost automatic. Years ago, courts had little difficulty in determining which parent should have custody of the children, because the sex of the parent was the sole criterion considered. Oddly enough, though, in one era it was the father who almost always won, but in another it was the mother who prevailed.

At common law, a father had an inherent right to custody unless he was found to be unfit (usually where he deserted or physically abused his children). This preference in favor of the father was a staple of common law for several centuries. It was based on the presumption that it would benefit the child to be in his or her father's care because of the father's natural and legal obligations to support and protect the child.

Although fathers had preference throughout the colonial period, an exception to this rule developed in which the mother was granted custody of a child of "tender years." At what age was a child of "tender years"? That was the base of contention in many cases. Results varied from court to court, but generally "tender years" seemed to have been age 10 or less. An old Illinois case suggests the reason for the presumption. In that case custody of a young child was awarded to the mother based on the "tender care which nature requires and which it is the peculiar province of a mother to supply"

Teri Engler and Julie Gorman

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(*Miner v. Miner*, 11 Ill. 43 [1849]). By the middle of the nineteenth century, the tender years doctrine had evolved into a general legal presumption in favor of maternal custody, and the mother became the preferred custodian unless she were proven to be unfit.

In addition to their reliance on the tender years doctrine, courts frequently stated that the best interests and welfare of the children were important considerations in custody cases. However, the courts were clearly making judgments based on a preconceived notion that it was in the best interest of young children to place them in the custody of their mother. Thus, the "best interest of the child" standard developed parallel to the tender years doctrine, and had the same result.

As a result of recent social and legal trends, most courts have now discarded the tender years doctrine altogether. That a mother is fit is only one factor to be considered and, standing by itself, does not necessarily mean that a father won't get the kids. The law now requires that custody decisions be resolved in accordance with the best interest of the child. These tend to favor the mother (remember *Kramer v. Kramer*), but not always. More and more courts are taking close looks at a wide variety of factors.

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Which Evidence Is Considered?

The best interest standard is purposefully vague, with a great deal of discretion vested in the trial court. Virtually any evidence concerning the child's environment is relevant in determining what is in the best interest of a particular child. Although some states have statutes which enumerate factors which the trial court should consider, they are rarely phrased so as to exclude other evidence. Courts regularly look at such things as:

- the physical facilities available in each home;
- the location of each parent's home;
- the composition of the families;
- the moral standards of the parties;
- the age, sex, and health of the child;
- the financial status of each party;
- the child's preference; and
- the emotional bonds between the child and each party.

From this maze of information, a court must focus on what it considers to be most essential and then place the child accordingly. This latitude is designed to protect parents and children from inflexible rules which might ignore the all-important human aspects of custody disputes.

But critics note that it also permits, and perhaps even encourages, the biases of a judge to be given free rein. As one court stated: "[A] judge should not base his decision upon his disapproval of the morals or other personal characteristics of a parent that do not harm the child. It is not his function to punish a parent by taking away a child" (*Stack v. Stack*, 189 Cal. App. 2d 357 at 371 [1961]).

What Evidence Prevails?

What factors tend to be given more weight by courts? As this list shows, the child's preference is just one of many factors that courts consider. A child has no constitutional right to determine his or her custody, but some states have legislation which gives a child's choice special significance or even controlling weight. Thus, the child's choice as a factor in determining his or her own custody is important, but it's a legislatively granted privilege, not a right.

The stability of the child's home environment is another important factor, and it is clear in custody cases that the

"I said we got a take-over bid from AT&T."

courts lean towards more traditional environments. For example, courts have often awarded custody to the parent who is a regular churchgoer, a strict disciplinarian, a believer in traditional education and middle class values, instead of to the parent who is indifferent to religion, a loose disciplinarian, and a proponent of experimental education and new values.

Another factor which often counts is which parent is at home more and places a greater emphasis on family values and activities. In the example we gave in case # 1, Marge the traveling saleswoman might be in trouble if judges follow traditional patterns of decision. This is a fictional case (and so might be a good one to try out with your students, since there's no "right" answer), but real cases with somewhat similar facts have gone against the mother.

In one case, for example, the father was given custody even though he traveled a good deal in his work too. The reasoning? The court was impressed with the husband's arguments that the mother's career had become more important to her than her children, and the kids felt neglected when she was on the road. Wouldn't they feel neglected when he had to travel? No, said the judge, because children expect their father to have to work.

The parents' emotional maturity is also an important factor. In numerous cases, it has been considered materially relevant to assess the parties' temperaments, personalities, and capabilities. The physical and emotional health of the parents has been a key issue in custody disputes as well.

Sex Enters In Too

Parents' sexual conduct has been scrutinized in a number of recent cases on the grounds that it has a significant impact on the child's home environment and emotional well-being. Case # 2 is based on the landmark case of *Jarrett v. Jarrett*, 78 Ill. 2d 337 (1979). In that case, the Illinois Supreme Court concluded that the trial court had properly transferred custody of the Jarrett children to their father because Mrs. Jarrett had been living with her boyfriend. The court declared that the mother's nonmarital sexual relationship and cohabitation went directly against the public policy of strengthening the integrity of marriage and safeguarding family relationships, and that the change of custody was necessary for the children's moral and spiritual well-being and development.

Several courts have struggled with the question of whether a parent's homosexuality can be considered in custody cases. The only protection against decisions based on prejudice in these situations has been the general requirement that some harm to the child must be demonstrated before any factor such as a parent's homosexuality can be considered.

In practice, however, this safeguard seems to be no more than a theoretical one. In the *Jarrett* case, for example, the court held that no actual harm to the children had to be established in order to change custody. It was sufficient to show that the parent's conduct and/or the home environment was *potentially* injurous to the kids. Similarly, while several courts have held that a parent's homosexuality does not render him or her unfit as a matter of law, the majority have nonetheless concluded in the end that it was in the best interest of the child to be in the custody of the heterosexual parent. These decisions have been based on such factors as the allegedly unhealthy role modeling by a homosexual custodial parent, the reaction of the children's peers to the custodial parent's homosexual relationship, and the purported abnormal and unstable living arrangement of a homosexual parent.

Afraid of losing custody of the kids? Then stay on the straight and narrow. Judges frown on parents with live-in lovers, and homosexuals fare even worse.

In several homosexual parent custody cases the courts have implied that in making custody decisions they see a distinction between homosexuality as a mere sexual preference and homosexuality as a practice. The courts seem to be saying that the former does not necessarily have an adverse effect on children, but the latter is viewed as far more detrimental and unacceptable.

Other Considerations

There are a number of factors which the courts have squarely rejected as criteria for determining custody, including past marital misconduct and race of the parents in an interracial marriage. The relative wealth and religion of the parents, while carrying some weight with regard to the welfare of the child, are not exclusive factors in discerning the best interest of the child.

Courts do not like to shift children back and forth between contesting parents and, therefore, a change in, or modification of, custody is not easy to bring about. In the sample cases gave earlier, however, Joe will find it easier to get a change of custody than will Walter, because his divorce is not final and thus his custody order is tentative and more easily changed. After the decree is final, no change of custody will be ordered unless the party seeking the change can convince the court that:

- the change of circumstances, which occurred after the original decree was granted, has had a significant effect on the child; and
- the new circumstances indicate that a change of custodial arrangement would serve the best interest of the child.

A tool commonly employed by courts to resolve factual questions so that the best interest of the child may be served is the appointment of a guardian ad litem. The guardian ad litem represents the child and aids the court by gathering information and then presenting evidence and making recommendations as to the child's custody.

Many states provide by statute for the discretionary appointment of a guardian ad litem or attorney to represent the child (i.e., the court is under no duty to provide a child with counsel, even though his or her custody is at issue). The statutes characteristically allow the guardian ad litem a fairly broad range of activities to carry out his or her responsibilities, such as interviewing the parties and the children involved, and getting academic, medical, and psychiatric reports to present to the court.

State courts have been faced with a substantial increase in divorce actions in the past several years, with a corresponding increase in the number of child custody contests. Clearly, it would be difficult to formulate universally applicable criteria for determining the best-interest-of-the-child standard, since what is "best" or "least detrimental" in a given setting is usually indeterminate and speculative. But *Kramer v. Kramer* teaches an important lesson about how courts work. By placing so much discretion with individual judges, decisions are unpredictable and the child's best interest may not be achieved in the end—unless, of course, the parents work it out themselves. ☐

CLASSROOM STRATEGIES

Just as elementary, secondary, and higher education programs that neglect law-related education are failing to adequately prepare their students to live in our society, law-related education teachers who leave out family law are also shortchanging students. And such teachers are missing out on an opportunity to teach about what most Americans in a recent survey listed as the area of highest priority in their lives: their families.

At the heart of family law is marriage. The vast majority of Americans marry in their lifetime, and everyone is touched by this institution. Unfortunately, in the eyes of many, most people are also now affected in some way by divorce. Consequently, I believe this creates a burden on our schools to explain the legal, social, and economic issues surrounding both marriage and divorce.

"I Do"

How to teach your students about marriage and divorce

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So teaching about marriage and divorce is more than a fad or an add-on to the curriculum. It is (or should be) at the heart of curricular programs that try to give kids insight into the world as it is—and skills to help them cope with life's realities.

The following six strategies on marriage and divorce are adapted from the family law chapter of the newly released text *Street Law, A Course in Practical Law,* Second Editon (West Publishing Co., 1980) and its accompanying teacher's manual. Permission has been granted by the publisher for their use in this article.

A study of marriage and divorce should begin with the practical aspects of getting married: the steps to take for a stable marriage, who can and cannot get married, and how to deal with law-related documents (e.g., applications, licenses) as well as the important societal issues involved: why are the laws the way they are, should they be changed, etc. Marriage should also be considered from a personal standpoint: do students ever wish to be married; if so, when; what logistical, social, economic, and other issues should they consider before getting married?

Strategy

1.

Requirements for a Formal Marriage

A couple desiring a valid, fully legal marriage must follow certain steps before they can get married. Usually they must first have a brief physical examination. In most states this includes a blood test for venereal disease, given by either a private doctor or a public clinic. Tests must be performed close to the time the couple intends to apply for the marriage license.

Once they have the results of the blood test, the couple can visit the clerk of the court or the marriage license bureau to apply for a license. The clerk will ask the couple a number of questions, such as their names and ages, whether there is a

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For further information on methods and materials to teach family law or other law-related areas, contact the National Street Law Institute, 605 G Street, N.W., Washington, D.C. 20001, (202) 624-8217.

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blood relationship between them, the names of their parents or guardians, and whether either of them has been previously married.

The couple must swear to the truth of all of the information and then pay a small license fee. There is often a short waiting period, usually a few days, before the couple can return to the clerk's office to pick up the license. Some states also have a waiting period between the time the couple picks up the license and the date of the marriage. A few states require the couple, especially if they are young, to take part in premarital counseling before the license is granted.

For a marriage to be legally valid, each spouse must:

1. be above the minimum age for marriage;
2. be single or legally divorced;
3. not be a close relative of the other;
4. have taken the required physical exams or tests;
5. have carried out the requirements involved in applying, paying for, and waiting for the marriage license; and
6. have the marriage ceremony performed by a person authorized by law.

Based on the above information, discuss the following questions with students.

a. According to the marriage license application in the box, can William and Myra be legally married in Colorado? Why or why not? Could they be legally married if they lived in your state?

b. Why do you think states have minimum ages for getting married? Should there be age requirements, and, if so, what should they be?

c. Some states allow females to get married at a younger age than males. For example, one state has a law that males under 18 years of age must have parental permission to get married, but females only need parental permission until age 16. Why do you think the age requirement is different for males and females. Is this fair? Explain.

The answers to these questions are:

a. Even with parents' permission, Colorado law requires that someone be 16 in order to get married. Therefore, William and Myra cannot be legally married in Colorado without a special court order or unless they wait until Myra reaches her sixteenth birthday. Students should check the laws in their states to find out the minimum age for getting married.

b. Two of the major reasons for establishing a minimum age for marriage are

What Does This Form Tell You?

APPLICATION FOR A MARRIAGE LICENSE

TO THE CLERK OF THE CIRCUIT COURT:

I hereby make application for Marriage License, to be issued in accordance with the Laws of this state, under penalties of perjury, the following statement, to wit:

Male's Name William Halder	Female's Name Myra Gambrell
Age 16	Age 15
Date of Birth 9/17/64	Date of Birth 5/8/65
Birthplace Colorado State	Birthplace Louisiana State
Residence 6220 Clay Street Denver, Colorado	Residence 311 Mountain View Drive Boulder, Colorado
Marital Status: Single ✓ Widowed ____ Divorced ____	Marital Status Single ✓ Widowed ____ Divorced ____

(If previously married list exact date of death and place or exact date of divorce decree and where granted for all previous marriages)

Relationship, if any NONE

Signature of person consenting if male is a minor

____

(Parent or Guardian)

Signature of person consenting if female is a minor

____

(Parent or Guardian)

____

(Applicant)

Sworn to and subscribed before me this ____ day of __________, A.D., 19__.

Check here if License is to be mailed: To one of the contracting parties To Minister of the Gospel	____________ Clerk of the Court or other Comparable Official County of ________ State of ________
____________ ____________ ____________	____________ ____________
(Give name and mailing address)	(Give complete address and affix Court Seal)

(1) marriage entails legal and financial obligations for which a minor may not be held responsible, and (2) marriage involves a serious commitment which requires a certain degree of maturity and judgment not generally found in the very young. Therefore, minors are often considered to be risky marriage candidates. Students should discuss whether setting a minimum age requirement for marriage does anything to ensure these legal and personal obligations. If students think there should be a minimum age, they should discuss what they think it should be and why.

c. This question should be used to provoke student responses to the different treatment of men and women under some laws. One reason females have had lower age limits is that they generally have not been responsible for the principal legal support obligations (although customs and the law in this area are changing toward more equal responsibility). Some people also believe women mature earlier than men, and it has generally been more acceptable for a male to marry a younger woman than vice versa.

The marriage application will help increase student skills in reading and understanding legal documents. The teacher might explore the reasons for asking each question on the application. Another technique might be to distribute blank forms and have students roleplay filling out an application by having a male and female student questioned by a clerk from a marriage bureau. The teacher may wish to give an additional set of hypothetical facts for use in this exercise.

Strategy

2.

Case Study on Race and Marriage

A well-known case which examines the proper role of legislatures and courts in marital requirements is *Loving v. Virginia*, 388 U.S. 1 (1967). This case also illustrates how recent changes in constitutional law have impacted on family law.

Ask students to read the facts of the case. In 1958, Harvey Loving, a white man, and Diana Jeter, a black woman, decided to get married. Both legal residents of Virginia, they traveled to Washington, D.C., to get around the Virginia state law forbidding marriage between persons of different races. After they were married, they returned to Virginia, where they were arrested and charged with violating the ban on interracial marriages. The Lovings pleaded guilty and were sentenced to one year in jail. The judge, however, suspended the sentence on the condition that the Lovings leave Virginia and not return for 25 years. The Lovings moved to Washington, D.C., but appealed their case to the U.S. Supreme Court, asking that the law against interracial marriages be declared unconstitutional.

Ask students to answer the following questions:

a. How would you decide this case and why?

b. Should the right to marry be regulated in any way by the state? If so, how?

c. Which, if any, of the following should be concerns of the state in licensing marriage: age, sexual preference, mental capacity, health, blood relationships, religion, race? Why?

The answers to these questions are:

a. In this case, the U.S. Supreme Court decided that Virginia's antimiscegenation statute violated the equal protection and due process clauses of the Fourteenth Amendment. Virginia argued that it was up to the state to regulate marriage and that interracial marriages caused problems in society, that the children of such marriages suffered, and that the law did not discriminate because blacks and whites were treated equally (i.e., neither could marry the other). The Lovings argued that they had a "liberty" interest under the Fourteenth Amendment which included a "right to marry" and that this right was being taken away without due process. They stated that this law was an example of discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

b. Marriage has traditionally been subject to state regulation. Areas the state has been concerned with include: age, sexual preference, mental capacity, health, blood relationships, religion, and race. Whether the state *should* regulate marriage requires balancing individual liberty with the interest in protecting individuals and society against possible problems caused the state by marriage between certain persons.

c. Students can give their opinions as to which, if any, of the listed areas should be subject to state regulation. In discussing each area, students should be asked to give the reasons for their points of view. Some questions to consider include:

—At what age should a person be able to get married?

—Should society allow marriages between persons of the same sex? (Note: no state has formally authorized marriage between persons of the same sex.)

—Can mentally ill or retarded individuals lead a normal married life?

—To what extent should and do religious factors play a role in marriage?

Strategy

3.

Common-Law Marriage

One of the most intriguing topics to students (perhaps because of their own or their families' situations or, more likely, their own prurient interest) is how people can actually be legally married without having gone through a formal marriage ceremony. Begin by asking students to examine the facts of the following case and decide if Kim and Arthur were legally married.

Kim Johnson and Arthur Little move in together and live as husband and wife. They never obtain a marriage license or have a formal marriage ceremony, but Kim signs her name as Mrs. Kim Little.

Whether Kim and Arthur have a legal common-law marriage depends on the state where they live. The District of Columbia and 13 states—Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas—allow what is known as common-law marriage. Common-law marriages are established without blood tests, licenses, or a formal ceremony.

To have a valid common-law marriage a couple must meet the following requirements:

1. They must consider themselves to be husband and wife.
2. They must present themselves to the public as husband and wife.
3. They must act like a husband and wife by living together and having sexual relations.
4. They must meet the minimum age requirements for a legal marriage.

If Kim and Arthur meet these four requirements and live in one of the states recognizing common-law marriage, they

(continued on page 62)

The debate over sex education

New school programs raise cries of government interference with the family.

Health? It's a "state of complete physical, mental, and social well-being, not merely the absence of disease and infirmity," explains the health education coordinator to the gathered parents. She is a visitor to the school, a consultant to the national PTA who is working for a program funded by the federal Public Health Service.

And the health curriculum? She says, it's a "unified program of learning experiences, planned by both school and community with scope, sequence, progression, and continuity, from K through 12, taught by teachers trained and prepared

in health education, designed to develop critical thinking and individual responsibility for one's health."

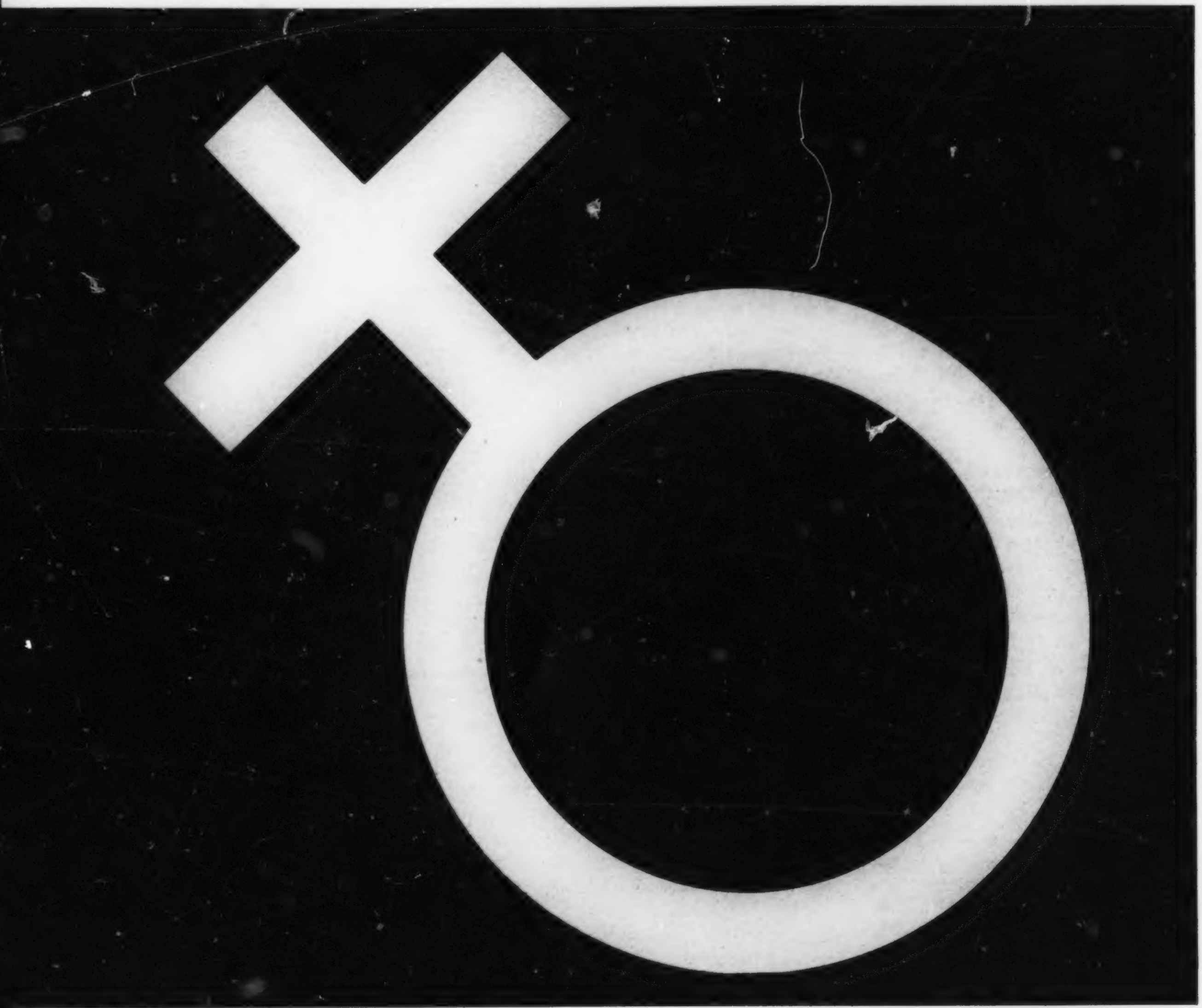
"But what about the problems at our school—the drugs, the parties. . . ?" blurts out a parent. The smiling coordinator answers that "health affects everything individuals do, as well as the way they feel about themselves, about others, and about their environment. . . . It's hard to communicate to the next generation healthy and appropriate ideas when we ourselves have had bad experiences with health education."

"Then who's going to handle this? What can we do?" "You have to start with kindergarten," she says. A successful comprehensive program will help kids develop "SELF-AWARENESS—a good self-image and strong sense of identity, positively reinforced throughout the learning experience; an ability to effectively MAKE DECISIONS regarding health—that is, to recognize and clarify problems, to reason critically and creatively . . . and an ability to COPE—to get along effectively with individuals or groups, to initiate action or to participate, and to be open to new ideas and experiences."

"I believe in sex and I believe in education, but I'm not sure I believe in sex education," whispers one parent to another.

The audience of parents reacts to the proposal. *"Who could disagree with that—you are preaching to the converted,"* announces one. *"It's all so vague—what does this have to do with what is going on?"* another asks. *"Well, you may think a priest, or minister, or rabbi should handle these things, but I can tell you there is a whole high school in our city just for pregnant girls,"* warns another.

Whispered exchanges offer individual



interpretations of the "health products and services" alluded to in the statement of goals. "Please," interjects a school administrator, "we are just trying to get your cooperation now. We don't want to have to impose our own program on you later." *"How can we cooperate when we don't know what we're talking about. There isn't any framework,"* rejoins another parent. *"I disagree,"* responds another. *"I see a very definite framework in the comprehensive package, with a latent ideology bound up in it. I don't feel that social adjustment is the end of life. Is this the coming of the therapeutic state here in our school? Is 1984 here already?"*

And on this note of hysteria, or rudeness, or irrelevance, or perspicacity—depending on your point of view—the meeting adjourns. Parents sign up to work on committees on "peer pressure," "substance abuse," and "sexuality."

The New Sex Ed Debate

This scene or some variant of it has been played out in both public and private schools in many communities across the country over the past few years. The meeting recreated above took place in a private school in Chicago, in which I participated as a parent. In California it has come about through the California State PTA's "Health Education— Awareness and Action" project, funded by the Bureau of Health Education, which is a section of the Center for Disease Control, which in turn is a component of the Public Health Service. Under this federal grant, the PTA developed model school/community health programs in eight states.

Why are these programs controversial? Many parents feel that the deliberately bland bureaucratic language, which is the same in the sales pitches for all these PTA model programs, masks a consistent ideology. For these parents, "critical thinking" is a euphemism for education challenging family/religious values. Focusing on "the relationship between physical, mental, emotional, and social well-being" is a virtual *carte blanche* for anything the health program (spread through all 12 grade levels) wants to teach. "Self-awareness" and "a good self-image" show a decided bias toward classroom programs borrowing the techniques and ideology of encounter groups and other quasi-therapeutic fads that promote self-acceptance as a cure-all. Other phrases—such as the goal of teaching children to "maintain optimal community and environmental health and conservation of resources"—seem to sneak in social programs that are only loosely connected to health.

And there are other objections too. "We find that such laws promote perversion, pornography, permissiveness and pork-barreling," announced Robert Marshall in 1977, in testimony opposing continued funding of the Family Planning Services and Population Research Act of 1970, the act that got the federal government into family planning on a large scale. Now it appears another "p" has joined the social ills of the 1970s to be treated in the social programs of the 1980s —pregnancy. More specifically, *unwanted* pregnancy, identified in 1975 by Willard Cates, Jr., Abortion Surveillance Branch Chief in the Center for Disease Control, as "the number two sexually transmitted condition."

In many communities, programs designed to tackle adolescent pregnancy are cropping up under such rubrics as "Parenting Education," "Family Life Education," and "Skills for Effective Living"—and under the auspices of well-known groups such as the National Foundation-March of Dimes, the YMCA, the Red Cross, the Girl Scouts, many youth groups, and some church groups. Some of these gatherings are student forums. Others are training sessions for teachers and sometimes for parents.

"No more Federal Funds!" "Gordon in Brave New World!" Thus read the signs greeting one such assembly in Wichita, a training session on sex education led by Sol Gordon, author of some of the most controversial teaching materials promoted by the Center for Disease Control. That was in June.

This January, Health and Human Services Secretary Richard Schweiker announced that the federal government would stop funding sex education. Whereupon there issued forth in the popular press a spate of letters and columns, warning of the tragedy attendant upon a withdrawal of federal support for sex education, the authors frequently bearing titles indicating expertise in things familial and affiliation with research institutes or departments in universities. It appeared you were either for sex education or against it, that you were a very small and ignorant minority if you were against it, and that only the federal government could assure its continuation. Letters and columns against the "new sex ed" have been equally insistent that the federal government's role is the crux of the matter.

Why is it specifically *federal* support that is at issue now, beyond all the issues that have gone into the wars over sex education starting over a decade ago? Why are some parents mobilizing in communities all over the country, Davids parrying a new thrust by a governmental Goliath?

The Campaign Against Adolescent Pregnancy

Summoned to the scene to treat anticipated outbreaks of unwanted pregnancy has been a host of healers sustained by federal funds, but family may not be welcome around the bedside. The main staging site for this operation is the classroom. And locked in combat in the surrounding battlefield is a snarl of opponents: parents vs. professionals, classroom teachers vs. counselors, church vs. state, court vs. court, bureaucracy vs. legislature, state government vs. federal government, professionals vs. paraprofessionals, and family vs. the state—all promising to make the Great Pregnancy Panic the constitutional showdown of the century.

The impetus for this latest round has come from Titles VI, VII, and VIII, known as the Adolescent Pregnancy Prevention Act, passed at the urging of Department of Health, Education and Welfare Secretary Joseph A. Califano, Jr., and part of the Health Services and Centers Amendments of 1978 (Pub. L. No. 95-626).

Beginning with a catalog of the social and economic costs of adolescent pregnancy and parenthood and concluding that a variety of integrated and essential services are needed "in preventing pregnancies and future welfare dependency," Title VI holds that federal policy "should encourage the development of appropriate health, educational, and social services where they are now lacking or inadequate, and the better coordination of existing services where they are available in order to prevent unwanted early and repeat pregnancies and to help adolescents become productive, independent contributors to family and community life." Eligible for grants are any organizations and agencies capable of providing all core services in a single setting or creating a network to provide

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these services. The ten types of "core services" include referrals and education relating to sexuality and family life.

And floating somewhere among the vaguely described services and referrals is the critical new, specifically federal component in the controversy over the "new sex education"—abortion. While federally funded "family planning" has been around for over a decade, and embraced abortion after 1973, what is new on the educational side is the teacher's responsibility for knowing about community resources to provide or make referrals for "family planning," which has now come to mean abortion as one among several methods of "fertility control," meaning prevention of births. A community resource invited into a classroom may use this occasion to promote a family planning clinic.

What has been critical in the federal government's contribution is that the recipient of the grant must arrange for the provision of contraceptives and abortions to all minors who "need" these services, even without parental consent. Many existing community sex education programs and family planning agencies on the state and local level do not make these services available to minors without parents' consent and so are denied federal funds. Thus volunteer agencies providing several of the specified services but excluding abortion or referrals for abortion are eliminated from receiving federal funds.

Realistic Sex Education

What also comes along with the new sex education is an earlier introduction of birth control information into the curriculum and a use of more aggressive teaching techniques to change adolescents' behavior so they will actually use contraceptives before they become "sexually active," not just know about their existence. Lonnie Meyers put it this way at the fourth annual meeting of the National Abortion Federation (June 1980), where she strongly argued for teaching school children about birth control in kindergarten: "I am in favor of having all the techniques available to them—IUD's right out here on the table, diaphragms, pills, condoms, the whole bit. . . . Teaching contraception in grade school may be repugnant to some, but not teaching it may change the three R's from reading, 'riting, and 'rithmetic to rampant random reproduction."

New methods found now in sex education are an outgrowth of federally funded teacher training conferences, pilot projects, and experimental curricula. They include peer counseling, questionnaires and guided imagery exercises, and sharing of feelings or problem solving in groups. Also new on the scene are materials offering what is called in policy proposals realistic sex education. These include hard-hitting audiovisual materials designed to desensitize the subject of sexuality and "deprogram" students (and maybe teachers and counselors) who have "hang-ups" such as guilt, which they may have received from "inappropriate" upbringing, experience, or influence from peers and the media. Some films have been reported to constitute aversive conditioning, designed to make the child-rearing option unattractive. The success of sex education courses may be quantitatively evaluated by measuring the reduction of the guilt level in before and after questionnaire sessions dealing with attitudes toward different types of sexual activity. And of course ultimately their success is counted by the reduction in the number of unwanted births.

How all these ingredients have given the decade-long debate over classroom sex education a sharp new turn can be seen in a look at an existing sex education program on the local level—the program in the Chicago school system.

Chicago has had its own sex education guidelines since 1965, thus predating the federally supported programs and, in fact, specifying that the program must continue to receive only local funding and remain under local control. The sex education coordinator for the system, Beverly Johnson, explains that the guidelines establish that parents at each school must see and approve the materials and must approve any ongoing use of an outside community resource before the school can proceed with a program. One-time use of an outside community resource must be approved by the principal of the school. Peer counseling is not used; it is felt that teenagers need, and themselves prefer, an adult's direction.

The guidelines state that the family is the basic unit of society, and that marriage is society's way of providing for the needs of intimacy and friendship. Teachers and administrators in the Chicago system are under some pressure from activists outside the system to introduce birth control information earlier (before seventh grade). Except for occasional training programs, the Chicago system does not work with Planned Parenthood, the single most prominent agency in the family planning field, receiving around one-quarter of the total

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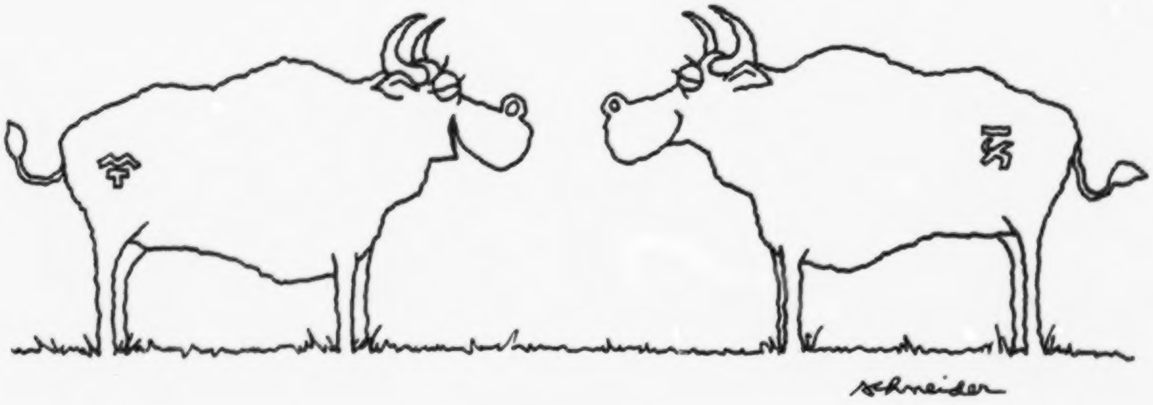
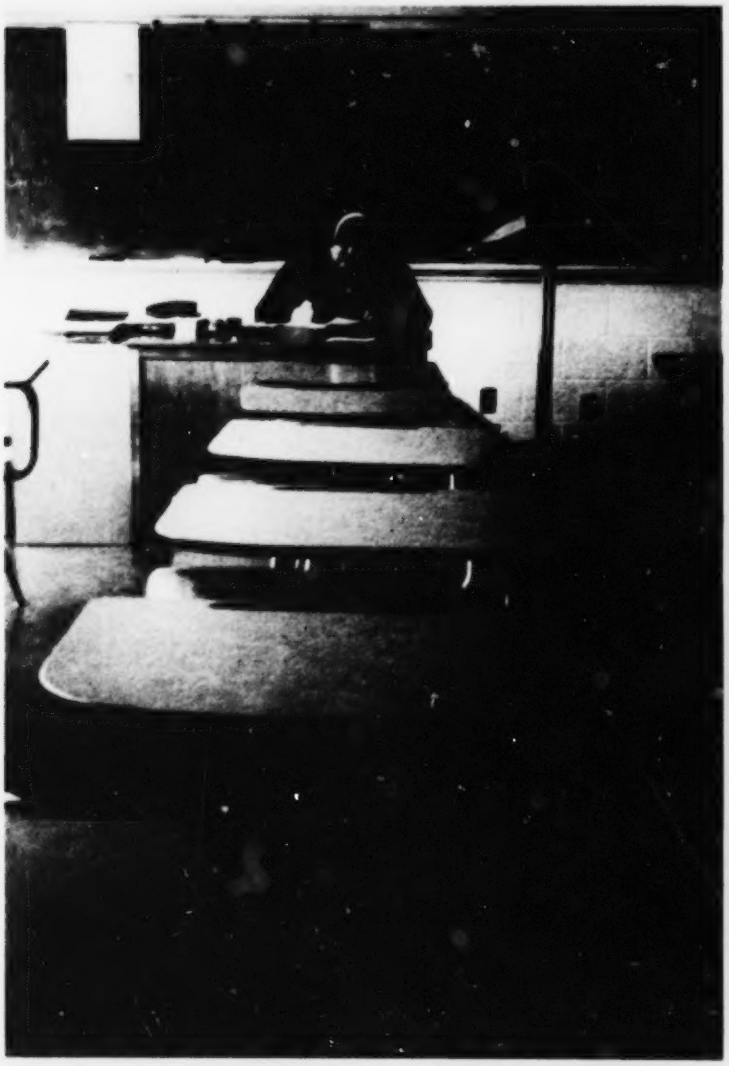


"Love Your Logo"

Should the Family Protection Act Be Passed?

Provisions:

- financial aid for religious schools
- voluntary school prayer
- job discrimination against homosexuals
- parents must be notified if their child wants an abortion



YES

The proposed Family Protection Act is a comprehensive effort to redirect governmental policy toward the goal of encouraging the family. The proposed act is in an omnibus proposal, and it would be impossible in the limited space available here to examine it in detail. Instead, it will be useful to focus on a few provisions of the act which address fundamental issues and raise serious legal questions.

Notifying Parents

Section 504 of the act would provide that no program may receive federal funds unless, prior to providing a contraceptive device, abortion counseling, or an abortion to an unmarried minor, the agency notify the minor's parents or guardian. The section would futher provide that no program receiving federal funds may treat a minor for venereal disease unless a "reasonable effort" has been made to notify the minor's parents or guardian within 24 hours of the decision to begin treatment.

This section appears to conflict with a trend established in recent decisions of the Supreme Court. There was a time when the Supreme Court explicitly defended the Christian family. In 1890, Justice Joseph P. Bradley condemned polygamy as "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world" (*Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1, 49 [1890]). Today, however, the Supreme Court regards the family as a mere association of autonomous individuals. The consequences of this view can be seen clearly in the cases excluding parents from decisions on providing contraceptive services and abortions to their minor children.

In *Eisenstadt v. Baird* (405 U.S. 438 [1972]) the Court reversed the Massachusetts conviction of William Baird for distributing contraceptives to unmarried persons, stating that "If the right of privacy means anything, it is the right of free from unwarranted governmental in-

(continued on page 20)

Charles E. Rice

NO

It is not easy to criticize a proposed law called the Family Protection Act. One immediately feels somewhat on the defensive, as though one were about to defend murder or sin, or had been asked to attack the family itself. Nevertheless, many of the provisions of the act have little or nothing to do with protecting the family, and those which do impinge directly on the family are likely to do more harm than good.

Since space is limited, it is only possible here to consider a few specific provisions of the proposed act, concentrating on those which are likely to be most controversial and those which are likely to have the greatest impact on families and the human beings in families.

The act is religiously inspired. Its important provisions read like a catalogue of correctives for the social and legal trends regarded as harmful by religious conservatives. Beginning with the more public matter of guaranteeing favored tax treatment for parochial schools, the act moves on to assure that no federal court will ever again throw God (in the form of 'voluntary' school prayers) out of the public schools. The act then declares homosexuals to be outside the protection of federal antidiscrimination laws. Finally, moving to more intimate areas, the act attempts to assure that parents will know when their children are asking about contraceptives, abortion, or treatment for venereal disease.

The bill is a *tour de force*. It is intelligently drafted, and is probably as close to being constitutional as it can be, given that most of its provisions have the transparent purpose of reversing or nullifying recent constitutional decisions by the Supreme Court and lower federal courts on matters covered by the proposed act.

Notifying Parents

Section 504 of the act probably bears the most direct relationship to the family. This section would forbid the payment of federal funds to any program or agency unless the program guarantees that

(continued on page 21)

Peter R. Bonavich

FPA: Yes

(continued from page 19)

trusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Following this line the Court has held that the state may not require that an unmarried minor obtain the consent of her parents before she kills their grandchild by abortion (*Planned Parenthood* v. *Danforth* (428 U.S. 52 [1976])). Neither may consent be required before providing contraceptive services to minors (*Carey* v. *Population Services International*, 97 S. Ct. 2010 [1977]), though a recent case establishes that a state may constitutionally require that parents be notified that their minor and dependent daughter is seeking an abortion (See *H. L.* v. *Matheson*, 49 L.W. 4255 [1981]).

This is not the place for an argument as to why this judicial trend, which is so hostile to family integrity, should be reversed. Rather, the point here is merely to note that the Family Protection Act's requirement of notice to parents when contraceptive or abortion services are provided to unmarried minors is a limited, prudent response to this problem. The constitutional authority for such a provision is found in Congress' power to enforce the Fourteenth Amendment. The Court's undermining of the family has been accomplished under that amendment and the Congress has the power to undo that mischief. Whether the Supreme Court will defer to the Congressional judgment in this matter remains to be seen. But at the very least, this provision of the act would clearly present the issue.

Homosexuals and Discrimination

Section 508 of the proposed act would amend Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) to state that the term "unlawful employment practice" shall not be taken to include any action or measure taken "with respect to an individual who is a homosexual or proclaims homosexual tendencies." The section further provides that the federal government shall not enforce "nondiscrimination with respect to in- the individual, married or single, to be dividuals who are homosexuals or who proclaim homosexual tendencies."

Title VII bars discrimination in employment on the bases of race, color, sex, religion, and national origin. Thus, it does not bar discrimination on the basis of homosexuality. This section would reaffirm that exclusion despite widespread contentions that discrimination against homosexuality is necessarily a discrimination on the ground of sex or religion. This section obviously refers to discrimination solely on the basis of homosexuality. It would clearly not exclude from the coverage of the act a discrimination on the grounds enumerated in the statute—e.g. race, color, etc.—against one who happened to be a homosexual but who was not discriminated against for that reason.

It can hardly be contended that Congress is required to treat employment discrimination against homosexuals in the same way it treats discrimination, for example, on grounds of race. Instead, this section is a legitimate effort to block the destructive tendency to regard homosexual activity as a legitimate alternative lifestyle and to regard the homosexual "family" as authentically a family.

It is difficult to imagine any public policy more destructive of the family than one which would legitimize the homosexual relationship as an alternative form of family life. In the nature of things the family, which is the basic society, has to be the heterosexual family, because only that family is ordered toward the procreation of new generations. In short, a society in which it makes no difference whether boys marry girls or other boys is virtually insane and a party to a suicide pact.

This, however, is not to countenance oppression against those who may have homosexual tendencies. Rather, the issue is whether the law should elevate avowed homosexual practice to the level of protection provided by statute against discrimination on the grounds of race, religion, sex, etc. The act in this respect is a limited effort to safeguard the associational rights and the religious freedom of those who regard homosexual activity as an abomination and, as far as teachers are concerned, as a clear and present danger to their children.

Strengthening Religious Schools

Sections 104 (a) and 104 (b) of the proposed act operate to strengthen the entitlement of nonprofit, private, parent-controlled schools to tax-exempt status. There can be no serious constitutional objection to these provisions, but they are worth mentioning here in this brief analysis because the private school, particularly the religious school, is central to the effort to restore the family.

Christian schools are increasing throughout the country at a rate of more than two a day. This increase is a reflection of the evident failure of the public schools to perform their basic academic job and the conversion of those public schools into aggressive agencies for the promotion of secular humanism. The provisions of the act, therefore, which encourage private, parent-run schools, are commendable.

Section 501 of the act provides that any tax-exempt school shall be eligible to receive financial assistance under federal programs of aid to education. This section may present problems with respect to the Supreme Court's erratic decisions on aid to education. But it would be desirable to enact this section, for, like the parental notice provisions, this would clearly present the issue to the Court.

Voluntary School Prayer

From a legal standpoint, one of the most intriguing sections of the act is Section 106, which would remove federal court jurisdiction over cases involving voluntary prayer in public schools and other public buildings and over cases involving teacher qualifications required by the states. There is no controversy over the fact that Congress has full authority to define the jurisdiction of lower federal courts. The issue, however, is whether Congress has the power to withdraw a particular subject, such as voluntary school prayer, from the appellate jurisdiction of the Supreme Court.

The Exceptions Clause of Article III, Section 2, which provides that "the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make," was intended, according to Alexander Hamilton, to give "the national legislature . . . ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove" the "inconveniences" which might arise from the powers given in the Constitution to the federal judiciary (*The Federalist*, No. 80 [emphasis in original]).

This power of Congress was so broadly interpreted that a specific authorization by Congress of appellate jurisdiction was construed by the Supreme Court to imply that such jurisdiction was excluded in all other cases. Congress clearly has power to withdraw prayer cases from the appellate jurisdiction of the Supreme Court, so

(continued on page 65)

Charles E. Rice is a professor of law at Notre Dame Law School. He is the author of many books on constitutional law.

FPA: No

(continued from page 19)

parents of an unmarried minor will be told prior to giving the minor a contraceptive device, abortion counseling, or an abortion. The program also must attempt to tell parents when it is proposed to treat a minor for venereal disease.

This provision is unwise. Far from protecting the family, it is more likely either to complete the destruction of an affected family or to do untold harm to one member of the family, the unmarried minor. In some number of cases it will do both. The provision will be defended as an attempt to ensure parental consultation, or perhaps to give parents an opportunity to exert their natural control over the upbringing and behavior of their unmarried minor child. In most cases it would accomplish neither of these goals. Rather, it will simply deter children who are in trouble, and who fear their parents, from seeking or receiving help in any orderly, reputable way.

It is a fact of life, though not a pleasant one, that parents whose children trust them and seek aid from them do not need Section 504 or any law to make sure they are told about abortions, venereal disease treatment, or contraceptives. For parents who are not in that enviable position, Section 504 will only assure that no one will hear about their child's problem—until, in some number of tragic cases, it is too late for anyone to do anything about it.

It is also a fact of life that many parents are angry when they discover that their child has sought an abortion, or contraceptive counseling, or that the child has a venereal disease. Imagine 100 children who now would secretly seek counseling. Of that number, how many will, if the act becomes law, still seek counseling and then dutifully confer with their reasonable, recently-informed parents? How many will be harmed, either because they receive no advice from anyone, or because they seek and receive illegal help? The consequences of untreated venereal disease and of botched abortions far outweigh in human suffering any good that can come from having informed parents.

The constitutionality of Section 504 is really of secondary importance. Until the abortion decisions, the Supreme Court cases on family autonomy had involved state intrusions on the autonomy of the family as a unit. In *Planned Parenthood v. Danforth* 428 U.S. 52 (1976), the Court finally addressed a situation which involved a conflict between the wishes of the child and the wishes of the parent. The Court held that the state lacks power to give a parent an absolute veto over the wish of a child to have an abortion. It is not accurate to say that *Danforth* and related cases such as the recent cases of *Parham v. J.R.*, 442 U.S. 584 (1979), and *H.L. v. Matheson* (49 L.W. 4255), decided only a few days ago, have an impact on family autonomy, i.e., the freedom of the unitary family from state intrusion. Rather, these cases address the question of the degree to which states may control the balance of power *within* a family that is in discord. That is quite a different problem.

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The Supreme Court appears to be more willing recently to tolerate governmental efforts to reinforce parental power over the private decisions of their children, as both *Parham* and the *H.L.* case illustrate. *Parham* permitted parents to commit their children for mental treatment without a prior court hearing. In the *H.L.* case, the Court declared that states may constitutionally require notice to parents that a child who still resides with and is dependent on the parents is seeking an abortion. It is not clear, however, how legal reinforcement of parental power can be said to protect the "integrity" of the family. It may well not keep the family together at all. Indeed, such laws will often be destructive of family stability, since they will cause worsening of existing family discord in many cases.

Homosexuals and Discrimination

The act's provisions regarding homosexuality are remarkable. If the words of Section 508 are given their normal meaning, they would completely deprive homosexuals of any federal protection against otherwise unlawful employment discrimination. Professor Rice feels that the act would "clearly not exclude" from Title VII coverage acts of discrimination against a homosexual based on race, color, national origin, religion, or sex (except homosexuality). However, courts often interpret laws literally. If so read, this act would make homosexuals legal outcasts where employment discrimination is concerned.

Even if Section 508 merely assures that homosexuality will always be a permissible basis for employment discrimination, the provision is highly destructive. Homosexuality is irrelevant to most occupations. It is a trait which, like race, sex, religion, and national origin, often provokes irrational, arbitrary, and stereotyped responses in employers and others. Title VII wisely allows employers to discriminate because of sex if the basis for the discrimination is a "*bona fide* occupational qualification." Those who are furiously determined to root out homosexual employees (schoolteachers are a favorite target) should be expected to prove that traditional sexual preference is a *bona fide* occupational qualification. If that proof is adequate, homosexuality would be, for that occupation, a legitimate basis for dismissal or refusal to hire. Section 508 is an expedient but very unjust way to avoid the challenge of demonstrating to a court of law that homosexuality is related to job-effectiveness, in teaching or any other occupation.

It should be added that Section 508 and Title VII have nothing at all to do with legitimizing lifestyles, or determining forms of authentic families. Moreover, the section also has little or nothing to do with associational rights or religious freedom. One might with equal force argue that integrated schools impinge on associational rights.

Strengthening Religious Schools

There is little to say about the act's basic provisions to guarantee private school tax-exemption. This method of providing subsidies to private schools is surely constitutionally valid, and probably is a desirable way to encourage self-help in educational efforts. However, the act's attempt to boot-strap tax-exemption into a right to receive federal subsidies is, with regard to religious elementary and secondary schools, patently unconstitutional. It is time to accept the Supreme Court's determination to prevent direct cash subsidies to religious grade and high schools.

Professor Rice makes the intriguing suggestion that this provision should become law in order to 'present the issue' to the Supreme Court. It is irresponsible to favor enactment of a provision into law solely in order to give courts of law the unpleasant chore of invalidating the provision.

Voluntary School Prayer

Section 106 of the act would withdraw cases involving voluntary school prayer from the jurisdiction of the lower federal

(continued on page 65)

Marriage in India:
Law and Custom

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Joan L. Erdman

Driving along the moonlit narrow road in the otherwise dark desert night, we stopped briefly at a silent compound to holler and ask our way. We were trying to find the small village of Palasni, near the former princely state capital of Jodhpur in India's western Rajasthan desert. There the colorful nomadic community called Rebari was holding a mass marriage for their offspring, uniting families with each other by binding their children in wedlock.

When we finally found the group we knew, walking along the road toward the village for the feeding of sweets to all the marriage parties, we joined them. After eating the sweets, we returned to the compound of one of the bridegrooms to

Just awakened from his preceremony sleep, a Rebari bridgroom sits with a family member awaiting the gift-arranging events. ▲

The youngest bridgroom at a Rebari community marriage awaits the camel ride to enter his bride's house. ►

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await the post-midnight ceremonies which would unite the couples. The bridegroom was sleeping on a string bed in quilts heavy against the cold night desert air, and we huddled around a fire with the menfolk, talking slowly and exploring the differences between western ways of raising animals and their expertise with their camel-herds.

Finally the bridegroom was awakened, the turban of the betrothed was placed on his head, and the ceremony of arranging the groom's gifts to the bride began. The groom, not older than 12, sat with his uncle, watching but remaining shyly and sleepily silent. Men from the party left to deliver the gifts to the bride, and preparations began to move the groom and his party to the place where all the grooms would mount camels for their ultimate trip to the brides' quarters.

Just outside the village we joined the gathering of bridegrooms: the oldest was about fourteen, the youngest about two years old. Why such a young bridegroom? Could marriage here mean something different than the license to live together and raise a family which follows marriage in the United States?

The marriage ceremonies uniting the five young grooms and their equally young brides ended at about dawn, and the parties retired to prepare for departure to their own villages. Brides would pay brief visits to the grooms' families, and then return to their natal households. There the brides would await—sometimes for many years—the separate ceremonies which mark, for the Rebaris, the consummation of marriage, and the beginning of cohabitation. These ceremonies would occur only after the bride reached puberty. I wondered, as we observed these colorful and ceremonial events, what is an Indian idea of marriage? And how does Indian law take into account such particular marriage customs as those of the Rebaris?

India's newspapers, and those of Indian communities in the United States, are resplendent with advertisements asking for spouses appropriate in age, height, caste, sub-caste, income, language, education, and even complexion, to the requirements of the family seeking a match for their son or daughter. Most marriages are arranged by go-betweens, however. They tell the seeking family of possibly suitable candidates. These candidates are then seen and researched by members of the seeking family.

With the exception of some urban, college-educated young men and women, young people growing up in India expect their family (including parents, aunts and uncles, and grandparents) to find them an appropriate spouse.

These processes take place in an atmosphere of trust and expectation that the parents have only the best interests of their children at heart.

In many families, the prospective spouse is introduced to the suitor, and it is possible for either of them, at a later time, to indicate to their families that they wish to accept the proposal, or to look for another suitor. Some arrangements, however, are carried out despite the doubts and even rejection of the parties concerned. The range of experiences, I have been told, is from delight with the perspicacity of the parents' choice, to acceptance of a spouse as suitable, to a suicide committed by a young man rather than entering the arranged marriage. Yet the widely accepted and continuing convention in India is the acceptance and approval of a family's choice as well-intentioned and fitting in the selection of suitors.

The appropriate matching of couples as married pairs is regarded as an art and a science in India. Such matters as horoscopes, physical size and skin complexion, social status and expectations, preferences regarding life-style, educational complementarity, and dietary coordination are all considered in order to assure that the marriage is a successful joining of two people who will complement each other.

These processes decide how a married couple becomes a *social* entity. How a couple becomes a *legal* entity is dependent on a mixture of family and regional customs, religious community, and the type of marriage contract.

Today, in a country more illiterate than literate, with about 80% of its peoples living in villages that are frequently isolated from courts and lawyers, it is hard to educate people about what the law provides and to persuade them to use legal processes (whether judicial or police) in handling legal problems. The Rebari marriage ceremony in Palasni, for example, was outside the codes: the brides and grooms were under the legally permissible age for marriage; the question of whether or not they are Hindu was unsettled; and the rules regarding numbers of guests fed were not followed. Yet for the parties concerned, the marriages have taken place and are legitimate. How did this marriage of law and custom take place?

A Long History

India's ancient civilization has contributed a heritage of texts and commentaries which is still part of independent India's legal system. Also part of this heritage are the laws and legal structures which were brought to India by invaders and conquerors, including the Mohammedan and Mughul rulers during the twelfth through eighteenth centuries and the British in the eighteenth, nineteenth, and twentieth centuries.

Before India gained independence from Britsh rule, efforts were made to codify the law and regulate marriage. However, whoever attempts to govern India—whether a foreign conqueror or an independent Indian ruler—is faced with one of the most varied cultures in the world. A glance at India's history will show how attempts to regulate and codify a universal human activity such as marriage have taken into account many varied customs and traditional practices.

India's beginnings, as far as we can trace them now, are in the ancient Indus Valley civilization in the northwestern part of the subcontinent. The incursion of the Aryans into India in successive waves from about 2400 to 1500 B.C. brought a people who joined the Dravidian settlers, a darker-skinned race which dominates South India today. The earliest texts, called the Vedas, which are still learned and recited in contemporary India, stem from this Aryan incursion and Aryan culture.

Buddhism and Jainism had their roots in earlier philosophies, but were founded in the sixth century B.C., and co-existed with the already predominant Brahmanism, a pre-Hindu popular religion. Greek influence in India, and Indian influence in Greece, stems from the entrance of Alexander the Great into India from the northwest in 327 B.C.

In the following centuries, India was ruled sometimes by subcontinental kingdoms, sometimes by regional kingdoms, until unity was forged, though never completely, by the Mughul rulers, the most famous of whom are the emperors Akbar and Aurangzeb.

European movement into India began with the landing of Vasco da Gama on the Malabar Coast in May 1498, which was followed by Portuguese trade, French and Dutch settlement, and the arrival of the English East India Company. The East India Company established factories

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and settlements in India, engaging in numerous battles with local rulers who had gained strength after the decline of the Mughuls in the early eighteenth century. A decisive victory of the British came in 1757 at Plassy.

In 1857 the British Empire replaced the East India Company. India became independent in 1947.

Today India is the second most populous country in the world, and the seventh largest in land area. According to the most recent census, in 1971, India's total population was 547,949,809, up 25% from 1961. Literacy rates were 39.4% for males, and 18.7% for females.

Under the Indian Constitution, promulgated in 1950, the official national language of India was English until 1965, when Hindi replaced it. English continues to be used for certain official purposes and for the transaction of business in Parliament.

India's Constitution also specifies 14 languages recognized for official purposes, mostly on a regional basis. These languages are Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Malayalam, Marathi, Oriya, Punjabi, Sanskrit, Tamil, Telugu, and Urdu. Besides these official languages, there are 17 secondary languages, each spoken as a mother tongue by more than 500,000 people. These include a number of tribal and regionally-specific languages. In addition, 19 other languages are each spoken as a mother tongue by more than 100,000 persons in India.

Almost everyone in India speaks more than one language, sometimes using different languages for school and home, or for home and office work. Educational institutions usually teach one or two other Indian languages in addition to the regional mother-tongue. Cultural patterns and traditions are generally language-specific, although numerous households combine languages spoken, since they include married couples with different mother-tongues. Multi-lingualism is considered the norm in India.

Just as there are many languages in India, there are many religions and communities. No one language is spoken by all Indians, and no single code of family law is subscribed to by all Indians.

Family Law's Ancient Roots

As the census data shows (see insert), Hindus are India's largest group. The sources of law in India are Hindu and are known collectively as *Dharma Shastra*. These ancient sources affect law today. While Hinduism is regarded in the West mainly as a religion, it is, in India, a combination of diverse religious and cultural practices which are not only household and temple activities, but also regulations and prescriptions, as in a legal system.

The *Dharma Shastra*, or religious text, is not a single book, but a text which includes groups of laws about religious rites and ceremonies, civil laws regarding the protection of life and property, and laws relating to the atonement for various sins committed. These sections are known collectively as *Smriti* (that which is remembered). In addition, there is a section called *Shruti* (that which is heard). *Shruti* refers to the earliest and most sacred religious works of the Hindus, called the Vedas, which were handed down orally by the Aryans in India.

Even today, Indian law incorporates both the purely oral "heard" traditions of *Shruti*, and the remembered traditions of *Smriti*, which are both oral and written. In other words, Indian thought has long been hospitable to both custom and more formal precepts.

In addition to the *Dharma Shastra*, there are numerous commentaries on Hindu texts. These commentaries are ancient treatises, which were and still sometimes are delivered aloud to philosophers assembled for this purpose. They are not considered other than the compositions of men acquainted with the teachings of the sacred Vedas. The compositions are based on decisions of those acquainted with the law, and on the customs of the peoples. Modern scholars have suggested that these manuals were initially written by teachers for the guidance of their students, were at first held to be authoritative in limited groups, and only later were acknowledged as sources of sacred law applicable to all.

The most well-known treatise is called the *Manu Smriti*, which has been translated into English as the *Laws of Manu*. In this treatise, the householder or second stage of a proper Hindu life is described as beginning with marriage. A student enters "the order of householders" after completing the study of the Vedas under a teacher during his first life-stage, that of studentship. Upon completion, the student is honored by sitting on a couch and being adorned with a garland, the present of a cow, and a honey-mixture. Then, the treatise continues, "having bathed, with the permission of his teacher, and performed according to the rule the *Samavartana* [the rite on returning home], a twice-born man shall marry a wife of equal caste who is endowed with auspicious (bodily) marks." Modern custom substitutes the giving of other goods (a watch, a radio, a piece of property) for the cow, and regional sweets for the honey mixture, but in essence the tradition continues in orthodox households.

Manu's text then goes on to list the appropriate qualifications of the maiden, in order to make the marriage fruitful and proper. The text indicates what is lawful for each caste, what will be the result of an improper matching of groom and bride, and the several ways of obtaining a bride, such as the gift of a daughter by her father, voluntary union between a maiden and her lover, forcible abduction, or seduction by stealth of a sleeping or intoxicated or simple-minded girl.

According to both *Smriti* and *Shruti*, Hindu family law is prescriptive. The results of an improper union, or of a less-preferred method of obtaining a bride, are the denial of auspicious fruits of the union, rather than the denial of the union itself. This means of handling practices that are not preferred, but already have been completed, is continued in contemporary Indian codes, as I shall discuss later. In this and other ways, the complexities and subtleties of ancient legal precepts have continued into modern codification.

But Hindus are not alone in India. In India, the British found a predominantly Hindu population, which had accepted the refugee Parsi Zoroastrians, been joined as well as ruled by Muslims, and was partially being converted to Christianity, though the latter efforts produced minimal results. In addition, ancient Christian and Jewish groups continued to exist in India, unrelated to the British influence. The British as rulers of India had to consider how to maintain order and, even before that, what order to maintain. For example, all these groups had already established cus-

(continued on page 48)

The division of Indians by religion according to the Census of 1971.

Jewish	.001%
Parsi	.016%
Hindu, Jain, Sikh & Buddhist	85.800%
Muslim	11.200%
Christians	2.600%
Other	1.093%

Total population of India according to the Census of 1971: 548,159,652.

Law in the Future

How I'd revolutionize the schools . . .

If I Were Dictator

Robert J. Rubel and
John H. Rubel

Our educational system is caving in under tight fiscal policies, increasingly strident student demands, reduced student attendance, increased fear of crime, decreased SAT scores, and busing controversies.

In such strained situations, our children quickly lose the well-rounded and diverse educational environment that for generations promoted the ability to think and reason clearly—and ultimately to produce high-quality and creative goods and services for our country. Another jarring consequence of our educational dissolution seems to be that today's children have ceased to understand just how they are members of society. And therein lies a problem that remains with these small citizens well into their adulthood, causing difficulties at many turns.

Although the primary focus of this article concerns reducing crime and violence in our nation's schools, such problems are only superficial—like the epidermis on our nation's body. If the skin is cold, clammy, and gray, its unhealthy condition indicates a general malaise of the entire body. To avoid treating the symptoms rather than the disease, we must subordinate the immediate issue of school crimes and look deeper inside the illness called "American education."

Illness may be treated in various ways, depending upon its seriousness. In severe cases, it may be necessary to hospitalize the patient and put him under such heavy sedation that the brain relinquishes control to attending physicians. In cases of mild illness, it is possible to keep the patient at home, free to accept or disregard medical treatment. Politically, assuming control of the "national body" would constitute dictatorship, and permitting freedom of will would constitute a democracy. Since we consider rampant school crime a serious illness, and since we want to demonstrate ideal concepts undistilled by political considerations, we here dramatize only the dictatorial approach. Admittedly, feasible tactics against America's 1981 problems of school crime and violence lie somewhere short of this article's fantasy edicts. Putting our proposals into effect would require modifying them to democratic reality.

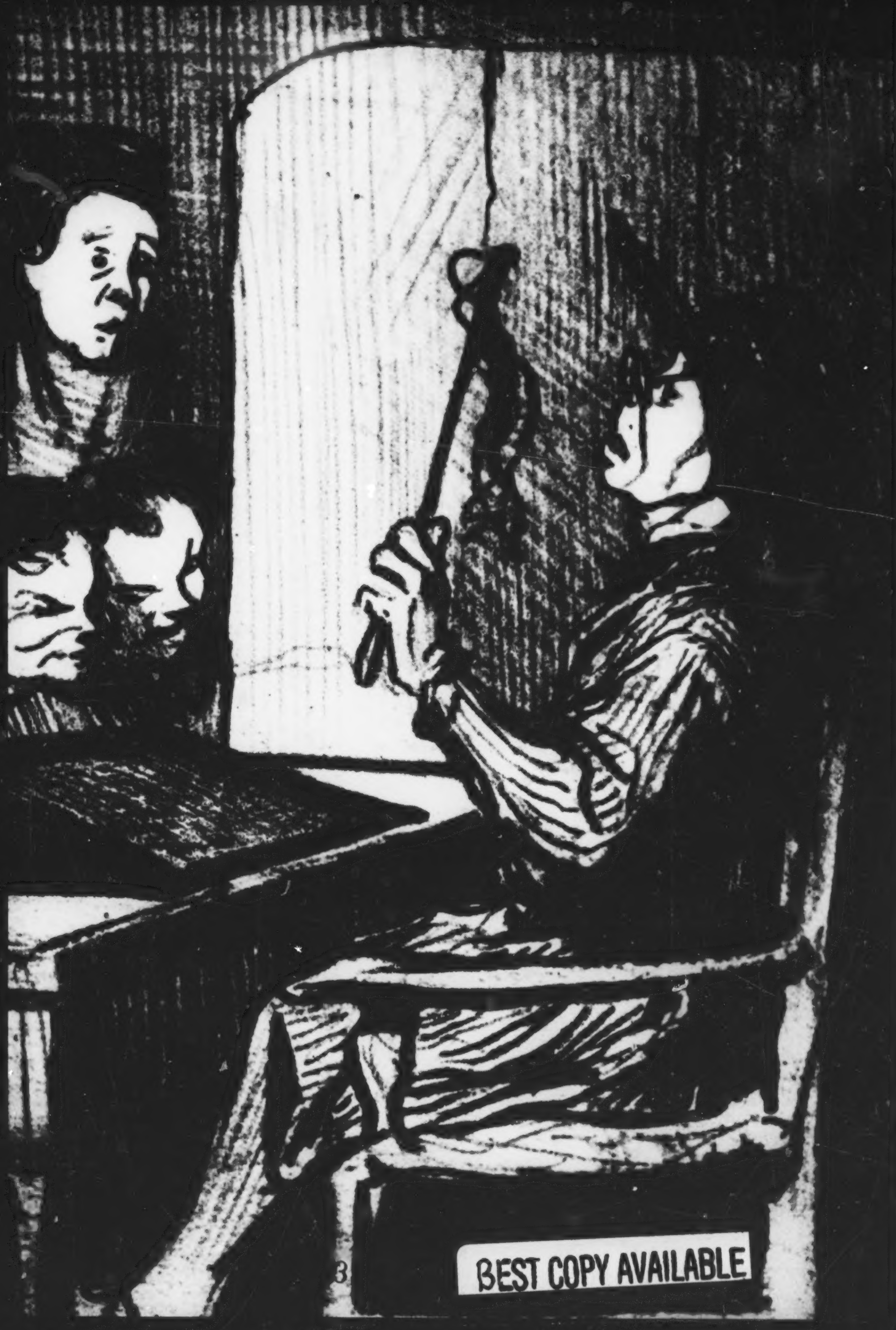
For the sake of this story, imagine, if you will, that this anecdote is a tape recording sent by an aging, benign dictator in response to his distant grandaughter's request for material to be used in a historical summary for her high school civics class.

Thoughts on Education

(Transcribed recollections of His Excellency, concerning the reformation of education in his country: December, 2009.)

Well, Jean, you are supposed to interview me for your term report? And you want me to tell you what I did for the schools, and why I did it? Ah, grandaughter, I am more than happy to oblige, although I suspect that my accomplishments in this area are covered adequately in your history textbooks.

Although it may sound odd to you, I think that my changes in our educational system accounted for much of my overall success in this seat of power. Of course,



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you cannot remember back 25 years, but I recall the time as if it were yesterday. I clearly remember that on March 4, 1984, I abolished the old school system. I simply sent everyone home, then reopened schools that summer. That summer of 1984 was the beginning of our year-round educational system, my first big step in remaking our society. But I get ahead of myself.

When I was your age—sixteen, isn't it, Jean? Like you, by the time I was sixteen I had been in school some nine years. Times were a lot different then, and so were the schools.

The youth of today owe much to my childhood experiences in the 1960s and '70s, for they founded *your* educational system. My experiences taught me the need to change nearly everything about schools. I and my fellow students were learning very few of the right things. The important things. The poor quality of my education proved to me that the entire system was so bankrupt that it was no longer serving people's needs.

So after I gained power, I immediately set about to reform the educational system. I established the now famous Four Goals of Education. I'm sure you can name them right off: Choice; Safety; Quality; Integrity. As these really are the nucleus of my educational reform, and you have a report to do, let me review them for you in some detail.

The First Goal

Choice, as you have undoubtedly learned, referred to any child's freedom to attend any school, whether public or private. Choice was one of my most important changes, Jean, for it broke up the old monopoly system that had come to govern the nation's elementary and secondary schools. I had long recognized monopoly as the cause of most problems in public schools, including violence and crime as well as steadily declining educational quality.

By the 1980s, students could seldom choose the schools they attended. Parents who could not afford private schools had no alternative but to sent their children to whichever public school was mandated by the district in which they lived. Of course, some people claimed that the public could express its will through the ballot box by electing or failing to elect members of the local board of education. But new board members couldn't solve education's complex ills, because the game's rules—not its players—were wrong.

One way to make schools better: Restore competition, give parents a choice, and end the dictatorship of educational monopolies

So I introduced several critical reforms soon after taking power. First, I created a great number of local school districts, generally within boundaries of so-called "standard metropolitan statistical areas," especially in large cities. If you're not certain what I'm talking about, let's say that in large cities I made many school districts where previously there had been only a single large district. Cities still retained remnants of the old central school district office, but its functions were limited to providing local boards certain services and supplies.

Second, I insisted that each *school* in these small districts was to be responsive to a citizens' board, carefully screened to be comprised only of successful and articulate businessmen who had expressed concern over the quality of American education. These boards were charged with keeping close watch on the quality of children's education.

My third and most important reform of public school structure was the long-discussed "mandatory tuition" system. I realized quite early that a good deal of the reason people viewed education as an inalienable right was their mistaken belief that such public education was "free" to them. After all, they didn't have to pay for it every semester. To disabuse everyone of this ridiculous notion—and to force public schools to compete qualitatively with private schools—I made people pay schools directly for their children's education. Of course, taxes were lowered to offset these direct expenses. . . . It's a bit complicated to put in your paper, Jean, but you can summarize by saying that this process placed no additional financial burdens on citizens, and that taxpayers with no school-age children realized substantial savings. Further, my ultimate purpose was realized immediately. The mandatory tuition had a profound impact upon those new billpayers: parents, then forcibly allied with their local schools, became very concerned about the quality of their children's education and about how well their children prepared for their classes.

And the mandatory tuition was simple while also *fair,* for it allowed all parents to choose the public or private school where they sent their children.

Of course, these changes did not make all schools good. Indeed, some public schools had to close altogether, and within five years, about one-third of all elementary and secondary students were attending private schools. Today the figure is nearly 40%, but this percentage is generally stable and is even declining somewhat in areas where public schools are becoming more competitve.

Anyway, Jean, remember when you write about this period of history, that I, as a benign sovereign, ended the autocratic dictatorship of educational monopolies over our land. I restored freedom of choice and self-government to the people, the consumers themselves: parents and children. This was the most important single action I was able to bring about, because competition for students finally forced schools to upgrade their programs while also controlling their students' unruly or criminal behavior.

The Second Goal

Safety, my second goal of educational reform, was easier to achieve than I had expected. To this day, I remember my goal statement: To improve school environments by decreasing tolerance of unruly behavior. I did so through a National Bill of Rights for Students. The first three of its fifteen rights are most important: freedom from unequal rules, freedom from crime and the fear of crime, and freedom to study in silence.

By the 1980s, Jean, the many different school districts in the country had their own rules and regulations. Even worse, the districts allowed the administrators of local schools great power in fixing their individual school's policies and rules. This led to important inconsistencies between schools and districts, and frustrated governmental efforts to set fair and lucid standards for student gover-

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nance and conduct. So I had a Code of Student Conduct made national law to govern student behavior. Of course, a Code of Teacher Conduct and a Code of Administrator Conduct went with the package, but for your report, Jean, the Student Code is most critical.

Simply put, I created the Code of Student Conduct to bring consistency and fairness to rules which govern students. Before I put it into effect, unmanageable youth had consistently been violating the rights of nonviolent, noncriminal, nondisruptive students. Now, Jean, you must understand that life in organized society always restricts to some degree people's freedom to do whatever they wish. And, Jean, because my neighbors, my fellow students, may want what I have, *my* freedom (and my very safety) will be endangered if they are totally free to take it from me. So, if each of us is to be *more* free individually, we must all be *less* free collectively. That paradox is the historical rationale for all limits upon social behavior.

Although schools are now no longer fearsome places, students of the 1980s longed to be *free of fear*. Back then fear for one's personal safety was quite common and disruptive. A few violent acts can instill such fear in nearly everyone in a school. As you can imagine, a vicious assult injuring only one or two children in a school may spread terror and fear to hundreds of others. We got rid of the fear, Jean, by getting rid of the terrorists. My men moved in and shipped them away to detention centers where, at worst, they could victimize each other. We didn't try to rehabilitate them, or even to analyze their social needs. Children who interfered with learning and threatened others simply were sent elsewhere. Although such an extreme remedy is far from perfect, it is better than letting a few rotten apples spoil the lot.

The third freedom you should put in your report concerns permitting students to study in silence. Even today many students are from large families in small residences without room for quiet study. I established this freedom by making classroom order—and silence when appropriate—a student's *right*, rather than merely a goal of administrators and teachers. Violating the student right of classroom order became a more serious offense than ever before, and my enforcement people had wide-ranging power to protect that right.

To help secure the right to study in silence, we immediately opened study halls supervised by faculty teams for 14 hours each day. You can still study in them until 9 P.M. At first, to keep students from being assaulted on the streets, we established escort services using neighborhood volunteers, but as crime on the streets, like crime in the schools, abated, we found that such precautions were no longer needed. Eventually both the public schools and the communities around them became safe again—a fulfillment of my goal.

The Third Goal

Because quality was the third goal in my educational reform, our schools have improved so much in the last 25 years that you can hardly imagine how inadequate they were before my changes took effect. Kids once only attended school for nine months per year. School days were shorter, too, and almost anyone could become a teacher without risking dismissal for simple incompetence. Startling, isn't it? As you can imagine, the quality of education emerging from this mess continued to decline, because this sloppy system was producing successive generations of teachers even worse than those who preceded them. So I made a few changes.

First, I developed a range of schools which could offer American youth a variety of alternatives. Since the mandatory tuition system allowed kids to attend schools of their parents' choice (provided only that the school would accept *them*), to keep kids in the public schools, we needed to provide a more comprehensive and complete program than the private schools could offer. The chart I am sending along with this tape recording shows how we accomplished this under my reformation.

The idea behind these options was that a child needed to complete only 12 years of school to receive a basic education to a depth and to a degree challenging his interest and potential in one of three chief areas: basic knowledge and skills; voca-

"Very amusing, but may I remind the witness that we are not on TV yet and he should just answer yes or no."

Drawing by Modell; copyright © 1981, The New Yorker Magazine, Inc.

tional training and skills; or advanced academic and professional learning. But just changing the schools did not accomplish this objective. The accompanying reforms did that.

Second among these reforms was extending the school year to a year-round trimester system. Surely you can understand that idle buildings and teachers over the old summer vacation was counterproductive to my educational goals.

Third, and philosophically linked to diversifying the schools and extending the academic year, I forced children to pass the now well known Normalized Qualifying Examinations (NQEs) between certain grades or be dropped from school. Blocking grade advancement through national tests carried out my philosophy that schooling was a *privilege*, not a right.

This constant screening process made schools become more competitive. The threat of losing students through both the voucher system and failures of the Normalized Qualifying Examinations forced them to tighten academic requirements and to improve teaching standards.

Fourth, and perhaps most important to improving educational quality, I required literacy and subject competence exams for each teacher every five years. Although failures caused automatic dismissals, excellence caused salary bonuses. But the bonuses were based on pay rates tied to the aggregate NQE scores at the school in which the teacher taught. Teachers then had a tremendous interest not only in how well they did on their *own* tests, but also in how well their students could do on the NQEs. Unlike earlier times, teachers began to support dismissing fellow teachers who failed their exams, for by implication such teachers were impeding student learning through their own poor preparation.

The Fourth Goal

Integrity, Jean, is a word which means honesty, morality, and tenacity. By making integrity a goal, I intended the educational process to have strength by being fair to all students through consistent rules fairly and evenly enforced in *all* schools.

To help insure integrity, I required all schools to establish discipline review boards to settle disputes over violations of codes of conduct. The codes themselves sustained just and consistent rules throughout the land; the discipline review boards assured fair treatment of students and staff under those rules.

Each school's discipline review board was headed either by the principal or by one of the vice-principals. By secret ballot, the administration, faculty, and students each elected a representative to serve on the board for one year. Students sent by teachers to the principal's office could be expelled or otherwise disciplined as their cases warranted, but extended suspensions and expulsions were only ordered after the review board had weighed testimony to confirm, reverse, or modify the judgment. Students who felt that they had been unjustly disciplined could appeal to the board for a hearing.

Only elected board members had a vote, and the principal initially served as chairman (until mayors later appointed the chairman from the community). Our procedures required that the student board member report his or her activities periodically to a student council composed of representatives from every grade in the school. These procedures united the largest possible majorities of students, teachers, and administrators in a cooperative effort to extinquish crime, violence, and other misbehavior from every campus in the land. The very few teachers who—out of sympathy, incompetence, or both—encouraged disruptions of any kind were subject to the same disciplinary process, including even dismissal.

There was some danger that the important right of protest would be suppressed under this system, but I made it clear that actions were not considered "misbehaviors" or "disruptions" unless they impeded the educational process.

All in all, Jean, these forms of governance soon rid schools of their disrupting minority. Time has proven that only a small portion of any student body ever caused real problems. We initially expelled less than 5% of the nations's precollege students, and within a few years that number fell markedly. At first, some schools were more seriously afflicted than others, and some lost almost half their students for awhile. But we had to pay that price!

Where did we send those who were expelled? Well, there were two kinds of youngsters being thrown out of schools: those who were out-and-out terrorists—simple criminals—and those who showed some educational promise. As I have said about the terrorists, these were shipped out to detention camps. But those whom we thought we could save—with those we took some care. We created several thousand small, special places for these salvageable students who were merely troublesome. We avoided larger institutions, because sizeable gatherings of unruly people are hard to manage. We spent sums of money almost as great as people once spent for cigarettes to establish special centers for ejected students.

Most of these centers were small storefronts in their home neighborhoods where no more than a dozen students attended at one time. Among the other special centers, all of which served about 12 expelled students, some were residential arrangements, either remote or in neighborhoods. We hired and trained psychological and psychiatric workers to counsel these students many hours each week. Although we gave them counseling, job training, medical attention, and personal instruction, our results were mixed. As we anticipated, young troublemakers turned out generally better than those who were expelled as adolescents, by which time they were less malleable and more susceptible to peer pressures.

But we *did* help schools to function again, and our results improved with time. And as a result of these programs, many expelled kids turned out fine.

Some Last Thoughts

Well, Jean, those are the highlights as I recall them, although I haven't time to explain specifics of curriculum, test scores, methods, and the like. We upgraded teaching staffs drastically by giving thousands of sub-strandard teachers early retirement. Teaching had become a dangerous and unpopular profession which attracted fewer and fewer really good people. But we invited experienced volunteers to teach, and once we had established safe, happy, interesting classes which motivated students, other qualified people pitched in to help.

At one time over a million part-time volunteers, most of them with college degrees, were teaching the basic skills. Immigrants taught foreign languages. Retired professors gave seminars for gifted secondary students. Technicians, professionals, and business people taught such classes as health, law, history, psychology, biology, electronics, and physics.

Gradually we regained strength with trained and motivated teachers and, as you know, some 25% of public school instruction is still done by part-time instructors from outside the regular teaching professions, usually teamed with a school employee who handles paperwork and various routines. Private firms allow qual-

738

ified employees to teach as volunteers for at least one year at a time, providing an important source of this supplementary teaching power. It's another example of cooperation among all groups in America.

In fact, Jean, it was then, early in my regime, that we re-introduced the student-teacher concept which you participate in today as student-teacher of geometry to seventh graders. Now others will aspire to excel as you have, and to be recognized for their learning as you are. Although my educational system is relatively new, many of its principles were succeeding when my grandmother, your great-great-grandmother, grew up in the last century! Only we forgot some of these earlier lessons for awhile...

So that ends my thoughts on this topic, Jean. Please send me a copy of your paper when it is typed. I look forward to seeing you at Christmas. Please say "hello" to your folks for me.

Epilogue

So ends our brief narrative. As you reenter the educational realities of 1981, you realize, as do we, that these pipedreams are born of frustration from seeing our learning system collapse while generations of children grow up with marginal educations and no understanding of what it means to be productive members of society.

Today we find that most kids grasp only poorly just *why* they are going to school. In a similar vein, most teachers seem to have forgotten distinctions between *teaching* and *educating*. As we begin the 1980s, *teaching* appears to be our schools' predominant pastime. We "teach" some algebra, science, English, and so forth. But from this process, few children have become "educated" in the traditional sense, so that they can "give a true account of their gift of reason, to the benefit and use of man" (Francis Bacon, 1623). Today's youth often fail not only to grasp their courses' *contents* but also to realize what their failure means to themselves and others.

Much of the current discord over public education results from our sense that basic assumptions which founded America's educational system have somehow been lost. Professional educators have devised ways of transferring knowledge and skills to youth, but they have somehow omitted transmitting the *ideals* of education. We stongly suspect that in some way the entire American educational system is breaking down. And we are right.

Viewed dispassionately, the tried-and-true functions of education—integrating concepts, exploring ideas, guiding personal development, diversifying opportunities, promoting socialization, and teaching articulation—seem to be threatened in a profoundly unwholesome way.

Most disturbingly, these deprived children realize neither their own educational poverty not the consequences of growing up as unproductive citizens. Most of them will learn these consequences too late—if ever. Bleak futures await them, and as a consequence our culture suffers.

His Excellency's Program for Expanding Public Education for America's Youth July, 1984

+8		(Optional) Colleges and Universities		Special Placement in Industry for All High-Tech Graduates	Some Students May Be Able to Go on to Junior Colleges
+7					
+6	Professional Training				
+5					
+4					
+3	Advanced Academic Preparatory				
+2			(Optional) Jr. Colleges		
+1				High-Tech Skills	
⑫	Academically Advanced High School	Academically Average High School	Academically Low High School		Special Services High School
11				Three-Year Voc-Tech Basic Skills Training	
10					
9					
⑧	Academically Oriented Middle Schools		Non-Academic Basic Skills Middle School		Special Services Middle School
7					
6					
⑤	Basic Training Is Achieved in the Primary Schools				Special Supervision and Services Primary School
4					
3					
2					
1					
K					
N					

Note—Circled grades (5,8,12) show the testing points for the normalized qualifying examinations.

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The Supreme Court speaks on statutory rape, minors and abortion, and a host of other issues

Latest Decisions on the Rule of Law

Statutory Rape Law Upheld

California, like nine other states, places criminal liability upon males, but not females, for having sexual intercourse with a minor. A 17-year-old male charged with having sexual relations with a 16-year-old female argued that the law violated his right to equal protection. By the narrow vote of 5-to-4, the Court rejected the challenge, and held that the California law permissibly furthers the state's interest in preventing teen-age pregnancy. The case, decided on March 23, 1981, is *Michael M. v. Superior Court of Sonoma County* (49 L.W. 4273).

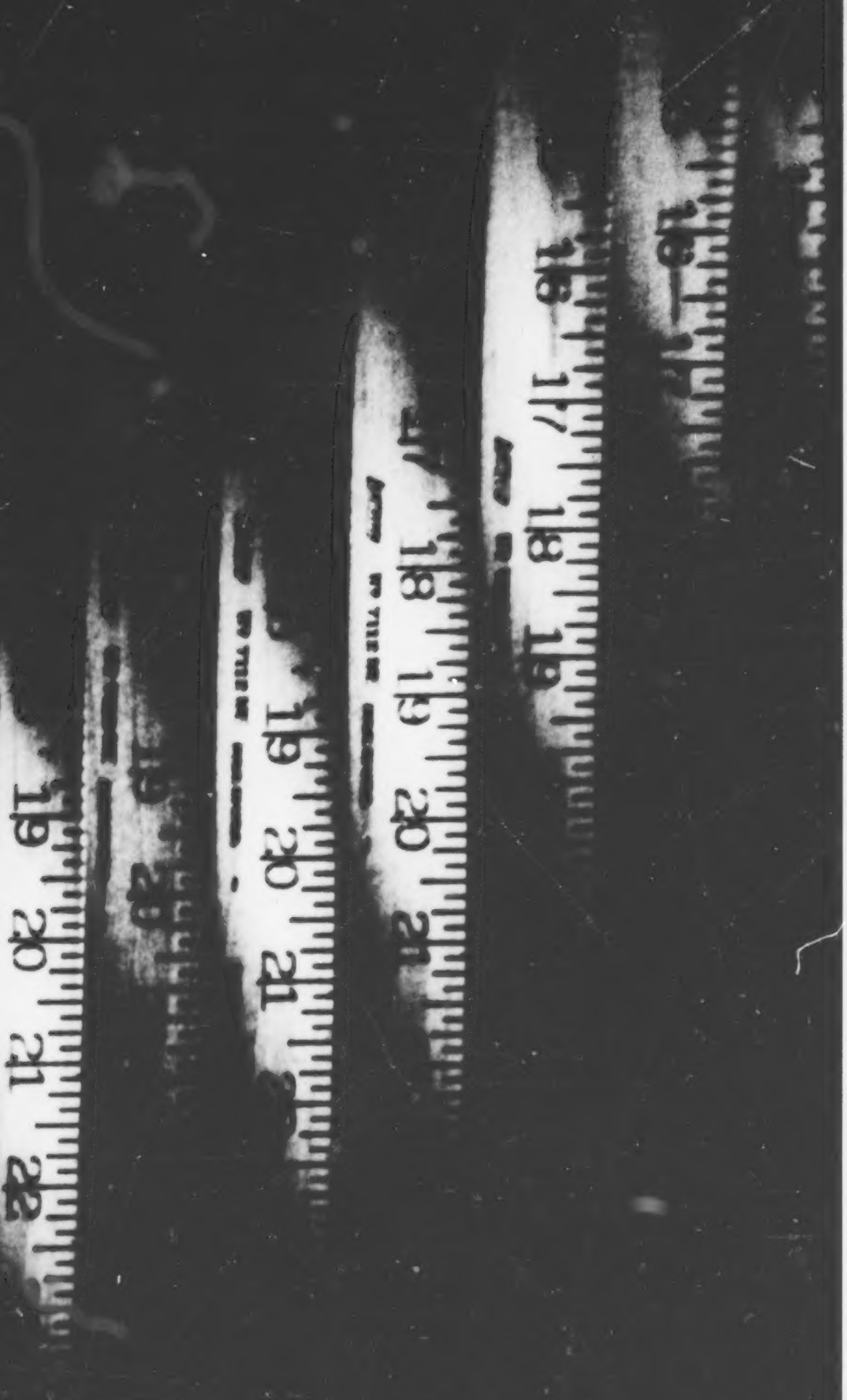
"Because virtually all of the significant harmful and inescapably identifiable consequences of teen-age pregnancy fall on the young female," wrote Justice Rehnquist in the plurality opinion, "a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct." Moreover, Justice Rehnquist argued, "we cannot say that a gender-neutral statute would be as effective as the statute California has chosen to enact. That State persuasively contends . . . that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution."

This line of reasoning is consistent with Justice Rehnquist's repeated concerns that the Court, under the guise of equal protection, is too often substituting its judgment for the judgment of legislative bodies. Rehnquist also noted that this was not a case "where a statute is being challenged on the grounds that it invidiously discriminates against females . . . the statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male."

In a concurring opinion, Justice Stewart noted the difference in applying constitutional standards to cases of alleged racial discrimination and gender discrimination. "Detrimental racial classifications by government always violated the Constitution," Stewart wrote, "for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as a result of sexual intercourse; males cannot."

Justice Stewart further noted that females who engage in sexual activity are not freed from criminal liability in California. Other laws prohibiting persons of either sex from contributing to the delinquency of anyone under 18 years of age are part of a broader statutory scheme "that protects all minors from the problems and risks attendant upon adolescent sexual activity."

Two dissents were filed in the case. In



Norman Gross

one, Justice Brennan argued that the majority had not properly applied the Court's standards in sex-discrimination cases. Noting that the standard requires proof of a "substantial relationship to an important governmental objective," Justice Brennan did not believe that the state met that burden. Moreover, Brennan wrote, "the historical development of (the law) demonstrates that (it) was initially enacted on the premise that young women, in constrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the state's protection." These "outmoded sexual stereotypes," Brennan argued, are not sufficient to establish the "substantial relationship" standard of the equal protection clause of the Fourteenth Amendment.

In a separate dissent, Justice Stevens questioned the validity of "the plurality's newly-found wisdom." The fact that a female faces a far greater risk is reason to include her in the prohibition, "not a reason for granting her a license to use her own judgment on whether or not to assume the risk."

The decision was a plurality, rather than a majority, because of the separate concurring opinion of Justice Blackmun. While agreeing with the judgment, Blackmun's separate opinion reflected his bitterness over recent Supreme Court decisions on the issue of abortion, including the case of *H. L. v. Matheson,* also discussed in this section. (Justice Blackmun wrote the Court's opinion in the controversial 1973 *Roe v. Wade* case, which gave women freedom-of-choice during the first trimester of their pregnancies.)

Noting that the plurality recognized that "teenage pregnancies . . . have increased dramatically over the last two decades" and that this has "significant social, medical, and economic consequences for both the mother and her child, and the State," Blackmun sarcastically noted that "there have been times when I have wondered whether the

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Court was capable of this perception, particularly when it has struggled with the different but not unrelated problems that attend abortion issues."

Job Bias Standards Set

The situation is familiar. You are a woman or member of a minority group who applies for a promotion. The position remains vacant for some time, and is finally given to a white male. You're convinced that you are equally qualified for the job, and have been passed over for promotion because of discrimination, so you file suit under Title VII of the 1964 Civil Rights Act. But what are your chances of prevailing? And who has to prove what once the case comes to trial?

A unanimous court answered those questions in the case of *Texas Department of Community Affairs v. Burdine,* 49 L.W. 4214 (March 3, 1981). In Title VII cases, says the Court, the burden of proof is as follows:

1. The complaining party has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. This involves proof that you applied for an available position, you were qualified for that position, you were rejected despite this qualification, and the position remained open with the employer seeking other applicants of similar qualifications.

2. Once you have proven the above, the burden shifts to the employer "to articulate some legitimate, non-discriminatory reason" for your rejection.

3. If the employer does so, the burden then shifts back to you "to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination."

The Supreme Court's action overturned a ruling by the Court of Appeals for the Fifth Circuit which required the employer to prove by a preponderance of the evidence the existence of legitimate non-discriminatory reasons for its action, and to prove also that those promoted were better qualified. The Supreme Court indicated that these standards were in error since Title VII does not "demand that an employer give preferential treatment to minorities or women . . . diminish traditional management prerogatives . . . (nor) require the employer to restructure his employment practices to maximize the number of minorities and women hired."

The case involved Joyce Ann Burdine, a Field Services Coordinator in the Public Services Career Division (PSC) of the Texas Department of Community Affairs (TDCA). After her supervisor resigned in November of 1972, she applied for the supervisor's position, which remained vacant for six months. During that time, the U.S. Department of Labor, which funded PSC, threatened to terminate the program because of overstaffing, lack of fiscal control, poor bookkeeping, lack of communication among PSC staff, and the lack of a full-time project director.

TDCA officials, however, persuaded the Department to continue funding the program, conditioned upon the appointment of a permanent project director and a complete reorganization of the PSC staff, among other measures. Following this agreement, the TDCA executive director hired a male from another division of the agency as project director and, in reducing the PSC staff, fired Burdine along with two other employees, thus leaving another male as the only professional within the division. Although Burdine was later rehired in another division of the agency, she continued her suit, alleging discrimination in being passed over for the earlier promotion.

At the trial, the executive director explained that the promotion and termination decisions were made after consultation with aides on the relative merits of the various candidates. He noted that the three terminated individuals didn't work well together, and that their release would help solve PSC's problems.

While the case does not mark a change in the Court's interpretation of the Civil Rights Act, it sets forth in a clear and unmistakeable way the guidelines for suits in this area. The burden falls mainly on the complaining party, and the employer has "discretion to choose among equally qualified candidates, provided the decision is not based upon discriminatory criteria."

Radio Free Enterprise

While we have not secured an official reaction from the White House (nor, for that matter, have we solicited one), the Reagan team is undoubtedly pleased with the Court's 7-2 holding that the FCC need not review format changes in deciding radio license renewals and transfers. The Court agreed with the FCC's policy that the public interest is best served through radio formats being determined by market forces and competition among stations.

The case, *Federal Communications Commission v. WNCN Listeners Guild* (49 L.W. 4306), revolved around the Court's interpretation of a section of the 1934 Communications Act empowering the FCC to grant licenses only if "the public interest, convenience, and necessity" is thereby served. *The Wall Street Journal* reports that the decision strengthens recent FCC efforts to promote media competition and reduce governmental regulation. Kristen Glen, who argued the case against the FCC, said the ruling means "open season for maximization of profits" and "eradicates the concept of public trusteeship."

The WNCN Listeners Guild instituted the suit when the New York radio station changed its format from classical music to progressive rock. Since under a 1976 FCC policy statement a hearing on the change was not required, the Guild challenged the policy statement as contrary to the 1934 Communications Act and subsequent Supreme Court rulings in this area. New York's high court agreed, saying that the 1934 Act required the FCC to hold a hearing when such a change affected a significant segment of the public and involved unique and economically viable programming.

In overturning the New York ruling, Justice White found the FCC policy reasonable and rational. Congress has delegated the responsibility of determining "public interest" standards to the FCC, White wrote. Its determination that diversity and innovation can best be achieved through open market competition is constitutionally permissible, reflecting "a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on license discretion."

White also dismissed arguments that the FCC policy infringes listeners' First Amendment rights "to receive suitable access to social, political, aesthetic, moral, and other ideas and experience." While the general public interest is promoted under the First Amendment, White noted, it is not intended to grant individuals "the right to have the Commission review the abandonment of their favorite entertainment programs."

Justice Marshall, joined by Justice Brennan, dissented. The issue in this case, Marshall argued, is not whether the FCC may rely on market forces to promote diversity in radio programming. Rather, the issue is whether, given the validity of this general policy, the FCC must hold a hearing when it is shown that there may be no substitute for the abandoned format although a significant number of people desire it and it is economically viable. In such limited circumstances, Marshall argued, a hearing should be required.

Abortion Notification Okayed

Few, if any, recent issues have been as difficult and divisive as the abortion controversy. Since the Court's 1973 decision in *Roe v. Wade*, pro- and anti-abortion forces have waged heated battles in our nation's courts and legislatures, and in the media.

The most recent skirmish centered on a Utah statute which required a physician to "notify, if possible," the parents of a minor upon whom an abortion is to be performed. The statute was challenged by a 15-year-old pregnant girl whose doctor agreed that it would be in her best medical interest to have an abortion, but who refused to perform the abortion without first notifying her parents because of the criminal liability imposed by the statute. The Court, in a 6–3 decision, turned back the challenge and upheld the statute's constitutionality in *H. L. v. Matheson*, 49 L.W. 4255, decided on March 23, 1981.

The decision affirmed the holding of the Utah Supreme Court that the notification requirement was "substantially and logically related" to the well-being of the patient, and "promotes a significant state interest in supporting the important role of parents in child-rearing." Both the lower courts and the Supreme Court rejected contentions that the statute unconstitutionally restricts the minor's right to privacy or unduly intrudes into the doctor-patient relationship.

Writing for the majority, Chief Justice Burger emphasized that the minor in this case "is unmarried, fifteen years of age, resides at home, and is a dependent of her parents." He therefore refused to consider whether the statute would be unconstitutionally overbroad if applied to mature and emancipated unmarried minors, since the plaintiff was neither and therefore lacked the standing to challenge the law on this basis. Burger further noted that the law "gives neither parents nor judges a veto power over the minor's abortion decision" in any event.

"Emancipated" minors are those who are married, self-supporting, or in other respects are independent of their parents. "Mature" minors are those who demonstrate the capacity to make and form judgments about their own welfare. H.L., the court determined, failed to meet either of these criteria.

In a concurring opinion, Justice Stevens argued that the Utah statute was valid even if applied to mature and emancipated minors. Since notice, rather than a veto power, is at the crux of the statute, Stevens felt that it advanced the state's legitimate interest in insuring parental consultation in this critical decision. Stevens continued:

> The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the state's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercises wisely as possible her right to make the abortion decision.

Justice Marshall, joined by Justices Brennan and Blackmun, dissented. "The Utah requirement of mandatory parental notice unquestionably burdens the minor's privacy rights," Marshall wrote. Since families regrettably do not always reflect the ideals of supportiveness, caring, and aid, Marshall argued, substantial interference in the form of "physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision" may follow parental notification.

In regard to the asserted state interest in "protecting parental authority and family integrity," Marshall pointed out that the rationale underlying the Supreme Court's previous holdings in this area has been to protect family privacy from unwarranted state intrusion. "Ironically, Utah invokes these decisions in seeking to justify state interference in the normal functioning of the family," Marshall argued.

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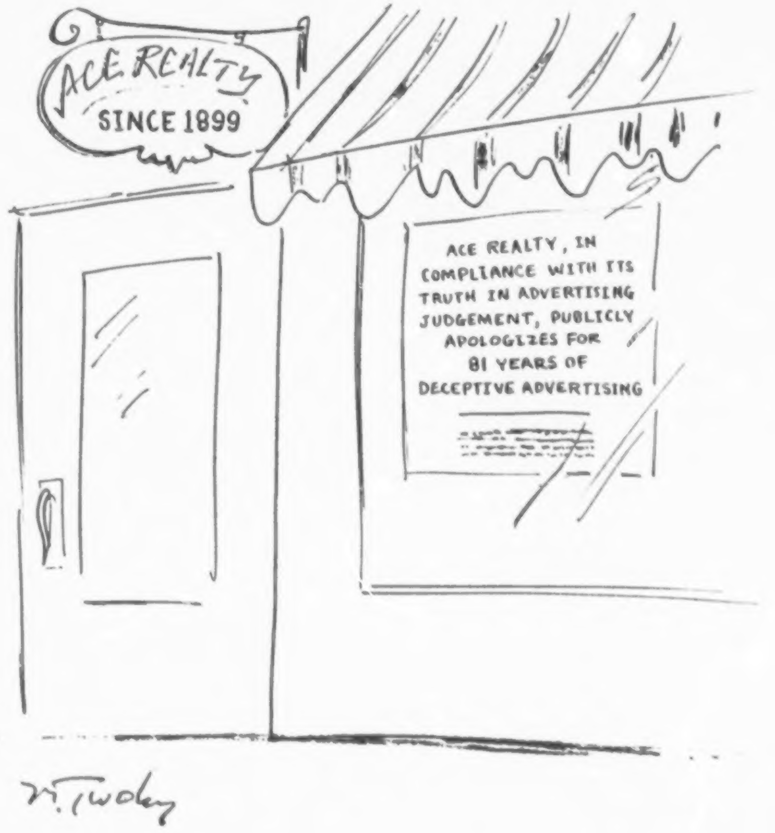
ACE REALTY
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ACE REALTY, IN COMPLIANCE WITH ITS TRUTH IN ADVERTISING JUDGEMENT, PUBLICLY APOLOGIZES FOR 81 YEARS OF DECEPTIVE ADVERTISING
W. Twohy

An Updated Compendium of

Legal Lunacy

THE SPECIALTY OF THE HOUSE IS POODLE NOODLE CASSEROLE

A family in Salina, Kansas, decided to add a little variety to Mom's home cooking by including dog on the menu. Police determined that there was nothing wrong with a doggie dinner, as long as the animal was legally obtained. Killing and dressing dogs is as permissible as using rabbits or other game for home consumption, allowed the county health department director.

JUDGE EATS JIM CROW

When Edward Sharpley and Tahlia Odom went before probate judge Felix Felton of Tuscumbia, Alabama, to get a marriage license, Felton told them he couldn't issue it. Felton told Sharpley, "I was obeying the good Lord's will. Down in my heart, I don't think it's right." Sharpley is black and Odom is white. A federal court differed with Felton's interpretation of the good Lord's will and found him in violation of a 1970 federal court order making state laws against miscegenation illegal.

MAYBE HE COULD ASK A FRIEND TO SIGN THE CHECKS

A Milwaukee judge has ruled that a man who had a vasectomy must continue to pay child support for two children born to his former wife while they were married, even though he is not the father. The woman claimed that her husband had agreed to her getting pregnant by another man because he could not father children. The husband denied that there had been such an agreement. Judge Robert Curley said the man, who before his divorce had represented the twin boy and girl as his own, had waited too many years to challenge the obligation to help support the children. The couple was married in 1971 and divorced last year.

I'LL SEE YOU IN THE BUNNY PAPERS

At Baptist-run Baylor University in Waco, Texas, students were warned against posing for the *Playboy* photographer who came to town looking for young women for a "Girls of the Southwest Conference" feature. Baylor president Abner McCall announced that any woman whose nude or seminude picture appeared in the magazine and who was identified as a Baylor student would face prompt disciplinary action and possible expulsion. When editors of the school newspaper, the Baylor *Lariat*, editorialized against McCall's stand, saying the women themselves should decide whether to pose, the three editors were fired. Two journalism professors quit, even before university officials stripped scholarships from two of the student editors and urged them to finish their educations elsewhere.

OCCUPATIONAL HAZARDS WE NEVER GAVE MUCH THOUGHT TO

Police chief Dennis Whetmore of Moses Lake, Washington, took off his gun in a bathroom stall in the Criminal Justice Building and forgot to retrieve it when he was finished with his ablutions. Later in the day he realized his holster was empty, went back to get the gun, and discovered it was missing. "An officer almost has to remove his gun to use the commode," Whetmore explained. "You don't want the gun banging against the commode—it could be dangerous."

OH, NO, *PLEASE* DON'T THROW ME INTO THE BRIAR PATCH

At the Vienna (Illinois) Correctional Center, inmates are learning to operate stills and make alcohol. Prison authorities think the program will qualify the prisoners for still operator jobs that will be part of the new gasohol industry in Illinois. The prison is offering the program with a local community college. Only one member of the Illinois Board of Higher Education, which approved the program, voiced concern about mixing inmates, alcohol, and combustibles.

NOW ALL WE HAVE TO DO IS FIND SOMEONE WHO'S *MORAL*

"Ford Motor Company took the transgressions to the government and blew the whistle on itself. I view it as Ford's finest hour. I've never been prouder of my client. It lays to rest all this nonsense of who is moral and who is immoral." Those were the words of Ford lawyer James F. Neal, after the Pinto prosecution admitted into evidence a 1972 conviction in which Ford was found guilty of 350 counts of providing "false and fictitious" emission test results to the government and fined $3.5 million.

NO, NO. . .WE SAID *STOW* HIS *GEAR*

A Navy corpsman was convicted of stitching the left ear of a drunk and rowdy sailor to a medical treatment table in Virginia Beach, Virginia. A summary court-martial officer ordered Hospital Corpsman 3rd Class James Ashley to forfeit $200 in pay and reduced his rank from E4 to E3.

AND THEN THEY HAVE TO GO LIVE WITH HIS WIFE

It is the policy of corrections authorities in Alamos, Mexico, to arrest any prison guard who is on duty when an inmate breaks out and lock him up for the remainder of the escapee's sentence.

THAT EXPLAINS THOSE SIX PIZZAS DELIVERED TO THE INQUIRY BOARD

In 1976, Woodford County (Illinois) Circuit Judge Samuel G. Harrod was charged with making young men appearing before him get haircuts. The Illinois Courts Commission investigated and suspended Harrod for a month for the practice. The judge was charged recently with harassing members of the courts commission by sending them phony magazine and book subscriptions. When the Illinois Judicial Inquiry Board filed a complaint against Harrod for this latest indiscretion, he, in turn, filed his resignation.

I SAW MOMMY ROBBING SANTA CLAUS

A Michigan woman, Carole Roberts, took her three kids for a visit with Mr. and Mrs. Santa Claus and ended up being accused of removing $40 from the North Pole cash register. The accusation was untrue, but, Roberts says, Mr. and Mrs. Claus defamed her with their public allegation, uttered "in a loud and boisterous tone of voice in the presence of other customers, causing great injury to the plaintiff's reputation of honesty, uprightness, and truthfulness." Roberts, who's asking for unspecified damages, said great harm was done to her children.

COULDN'T HE FIND AN ALLIGATOR HAIR SHIRT?

An unidentified—but undeniably nude—Des Moines man walked into a local 7-11 store, dropped to the floor, did five push-ups, and left. Moments later, he returned and delivered an obscene gesture and remark. One of the customers in the store said the man was punishing himself for a poor golf game.

WE NEED A SECOND RULING ON WHO HAS TO WEAR THE CORSAGE

Dating is never easy for the Clearasil set, but no one has more problems than Rhode Island high school senior Aaron Fricke. The 18-year-old had to go to federal court to win the right to escort the date of his choice—another homosexual—to the senior prom. Judge Raymond J. Pettine said that Fricke's First Amendment right to make a statement about his sexuality superseded school officials' fears that a male couple at the prom might provoke violence by heterosexual classmates.

$500,000 EXTRA FOR SWEET ROLLS

New Yorker Susan Ahlquist, 31, filed a $2 million sex discrimination suit against her former employer. Ahlquist says that she was forced to quit her job because she refused to get coffee for her boss and wouldn't wash his dirty cups. Complaining got her nowhere. According to Ahlquist, boss Robert Abrahams just said, "A man of position should not have to get his own coffee," and that he had verified this with his wife.

BUT SOME OF US *ARE* WIVES AND DAUGHTERS

After deciding for the plaintiff in a sex discrimination case brought by a fired female employee of the Los Angeles County Housing Authority, U.S. Judge A. Andrew Hauk went on to describe the woman as a "buttinsky" who was "always writing memos, always complaining....But would they have [let her go] if it had been a man? I would say probably not, because probably a man wouldn't do these crazy things if he was an employee. But I suppose that's one of the prices we pay in this day of women's lib for hiring women in some of these jobs....They have their monthly problem, which upsets them emotionally, and we all know that, at least any of us who have wives and daughters...." The plaintiff was a grandmother who said she had not had that particular problem for 20 years.

YOU *COULD* HAVE IT YOUR WAY AT BURGER KING

Los Angeles businesswoman Kathleen Bick decided to take her partner, Larry Becker, out for a celebratory dinner. She chose a fancy and prestigious restaurant, L'Orangerie, for the evening, but the two stomped out in protest when a waiter handed Bick a white menu without prices and her guest a green menu with prices. Lawyer Gloria Allred prepared a lawsuit after L'Orangerie refused to change the dual menu practice. The two are claiming discriminatory treatment under California's Unruh Civil Rights Act. Said Allred: "The old idea that only men need to know about money, and women do not, and that we will be told when men decide we need to know, is a myth that we expect to meet a sudden death in this lawsuit."

TRUE, *PEOPLE* MAGAZINE HAS NEVER DONE A COVER ON HIM

A policeman testified that he saw Morris Davie, accused of setting a forest fire, drop to his knees, raise his hands, and say, "O God, please let me get away with it, just this once." In Davie's first trial, the judge agreed with his defense lawyers that the prayer was privileged communication, meant to be heard by God alone, not the police, and granted an acquittal. In the British Columbia Appeals Court, the prosecution argued that private communication can only be between two people and God is a theological or spiritual being, not a person. A new trial, with the prayer as evidence, was granted.

BEST COPY AVAILABLE

Charles White

When Law Becomes a Political Football

Part II of our series on political trials

In 1970, in a separate concurring opinion in a rather obscure criminal case called *Illinois v. Allen,* Justice William O. Douglas broke with almost 200 years of tradition. Judges and lawyers in general, and justices of the U.S. Supreme Court in particular, have shied away from the very notion of political trials. By definition, political trials are those in which the noisy presence of political controversy has invaded the sedate precincts of the law, shattering the tranquility of judicial examination and, perhaps, obscuring the sober search for truth. That isn't to say that the results of such trials are necessarily unfair, that justice is, in fact, bent by the political climate or political pressures. It is to say, though, that such trials almost inevitably test the fundamental fairness and objectivity of the judicial process.

In *Illinois v. Allen,* Justice Douglas altered somewhat the judiciary's posture of embarrassed silence in the face of possible political trials. Because the situation in *Allen*—an obstreperous defendant who had to be forcibly removed from the courtroom during his trial—inevitably brought to mind a trial much in the news at that time, that of Bobby Seale, the Black Panther leader who was bound and gagged during the trial of the Chicago Eight, Justice Douglas used the occasion to discuss the real problems presented by political trials, which, according to Douglas, "frequently recur in our history."

In introducing his discussion of political trials, Douglas cites five such cases which reached the U.S. Supreme Court in one form or another. The first part of this article, published in the Winter, 1981 *Update,* considered three cases on Douglas's list: the trial of the anarchists accused of the Haymarket bombing in 1886; the case of Eugene V. Debs, convicted of violating an injunction during the Pullman strike of 1894; and the case of the radicals Sacco and Vanzetti, convicted of murder by a Massachusetts court in 1920. This portion of the article will look at the other two cases explicitly cited by Justice Douglas.

A Parade—and a Bomb

The struggles between management and labor from the Civil War through the 1930s were often bloody. Union men and women claimed that the bosses often opposed strikers with club-swinging private police, Pinkerton detectives, *agents provocateurs,* and, where the local authorities would cooperate, regular police and even National Guard troops. The union people said that the violence was directly provoked by the bosses, with the unarmed strikers suffering by far the heaviest casualties.

However, public opinion generally saw it differently. Newspaper accounts (almost always pro-management) convinced many Americans that the left was using strikers to foment revolution. When police were hurt and killed in these battles, it seemed to many that they were the first victims of the coming class war.

The Haymarket affair, which began with violence at a strike site, is a good case in point. The bomb that was set off in Haymarket Square killed more than seven policemen. It was also the death of anarchism as a political movement of any respectability in the United States, and it severely hampered union organizing for years to come.

Thirty years later, another dynamite bombing allegedly perpetrated by anarchists began a long judicial/political process filled with eerie reminders of the Haymarket case and even foreshadowings of the Sacco-Vanzetti case that was to come a few years later. Santayana's dictum that those who don't know the past are condemed to repeat it was never better illustrated than by this case.

In 1916, World War I had been rag-

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ing in Europe for two years, but America was officially neutral. However, many Americans felt that the U.S. must consider entering the war. In the summer of 1916, preparedness parades were held across the country as a way of building patriotism and of stressing the need for American readiness.

Others, however, were violently opposed to the war. Socialists and anarchists, for example, saw it not as a battle between two rival political philosophies, but as a kind of internecine struggle among the capitalist giants. According to them, it didn't matter much which side won, because in either case, working men and women were sure to lose.

The San Francisco Preparedness Day parade was held July 22, 1916, against a background of raw feelings on both sides. Meetings for and against the parade had been held for weeks. Police were heavily guarding the parade line, expecting the worst.

A half hour after the parade had begun, a sudden explosion went off in the crowd lined up along the parade route. Bodies of men and women were everywhere. Blood flowed toward the gutter. Pieces of flesh lay about the sidewalk and street. When not enough ambulances could come to remove all the wounded, delivery trucks were pressed into service. Ultimately, the bomb would claim ten dead and forty wounded.

According to Richard A. Frost, a historian who has made the fullest study of the case, "the police took charge in a haphazard way. [No one] roped off the area or supervised the gathering of evidence." Souvenir hunters had a field day, digging metal out of a wooden fence or from their own clothing. The police department later had to publicly request that such evidence be turned in. Much evidence was totally beyond recovery, because a few hours after the bombing police had flushed the whole area with a fire hose, washing away powder burns and metal fragments along with the blood and flesh.

Just as in the Chicago anarchist case, the local newspapers assumed that political radicals were responsible. There were the predictable calls to "rid our city of these mean and loathsome vermin." Looking around for specific suspects, the newspapers cast their eyes toward an impressive parade of anarchist leaders, including none other than Lucy Parsons, widow of one of the Haymarket anarchists, who had visited the city a month before.

The city fathers started a reward fund, with money kicked in by the city itself, by some of its politicians as individuals, and by groups like the Chamber of Commerce. In short order, $17,000 was collected (about the equivalent of $75,000 now), leading the *New York Times* to call the fund a sweepstake for perjurers that would lead to a determination to catch and convict "the real criminal if possible, but someone, anyhow."

Enter the Pinkertons

The San Francisco Police bomb squad searched its files for potential suspects, but most of the men on its list were safecrackers. The police got help, however, from private enterprise. A detective named Martin Swanson, who worked for the Pinkerton Detective Agency, had been for several years assigned to work with some major utilities in the San Francisco area that had been plagued by bombings.

A few years earlier, Swanson had tried to round up enough evidence to convict a San Francisco radical named Tom Mooney, and two companions, for the dynamiting of a transformer some miles from San Francisco. Mooney and his companions were acquitted, but Swanson didn't forget them. The night of the bombing, he approached District Attorney Charles Fickert and suggested that Mooney (who was not on the San Francisco police's list of suspects) be investigated.

Fickert apparently was impressed enough to hire Swanson on the spot as a special investigator. He was to play a crucial role in the case. The cooperation of the police and private detectives probably seems odd now, but it was routine at the time, particularly in cases involving even indirect threats to powerful corporate interests.

Mooney, his wife, and two radicals named Billings and Weinberg were arrested without warrant, and their rooms were broken into and searched. Swanson and the police found some bullets, a pistol, and copies of radical newspapers. Like their counterparts in Chicago 30 years earlier, the local newspapers jumped on the defendants' radicalism—all were associated with anarchistic or socialistic politics—and assumed that they were guilty. In the first four or five days of Mooney's custody, the newspapers wrote that Mooney had tried to flee the city, that he had burned papers, and that he had written letters detailing the ramifications of the "dynamite gang." These and other stories were later found to be untrue, but they must have contributed to prejudicing public opinion against him.

According to Richard A. Frost's book on the case, "Once Mooney and [the other defendants] were arrested, every lead that did not indicate their guilt was abandoned. Eyewitnesses who told the police of suspicious persons were dismissed if their descriptions did not fit the two prime suspects. . . . Not a single witness prior to the arrest of Mooney and Billings offered the police information specifically incriminating them. Nor did the prosecution yet have any other evidence of their complicity in the Preparedness Day bombing. The arrests were therefore false arrests. In the absence of evidence, no warrants for the arrests could have been obtained."

However, the arrests had the effect that prosecutors hoped for. A newspaperman who wrote a book on the case explained that the arrests were "to advertise the case, to give time for witnesses to come forward . . . and 'identify,' to enable a case against the suspects to be made. This backwards process—arrest first, get the evidence afterwards—is the greatest curse of American police-work."

Another reason for the arrests was probably to subject Mooney and the other defendants to tough questioning, hoping that they would crack. They didn't. Mooney was kept incommunicado for six days. Forty-one times he demanded counsel, and every time the request was sidestepped or ignored. Yet he told investigators little that could be used against him.

Enter the Witnesses

As in the Sacco-Vanzetti case, the witnesses who came forward didn't have to identify Mooney and the other defendants in a line-up. The major witnesses saw them alone in jail. One witness first saw their photographs in the bomb bureau's file of dynamiters and then was taken to the cells where they were confined.

Perhaps it was necessary to make everything easy for these witnesses. They constituted one of the most bizarre collections of lowlifes ever to grace (or disgrace) a major trial. Two of them had relatives in jail. One wrote a letter to her convict-husband strongly indicating that her testimony would get him out early. The other had been a prostitute and later signed a statement indicating she had been a drug addict at the time of the trial.

Another witness had deserted his 17-year-old wife, whom he had infected with syphilis. He had later been convicted of petty larceny for stealing a watch in a house where he was living with a group of female impersonators. A fourth witness had been syphilitic for many years, and had been diagnosed as having a permanent syphilitic affliction, whose effects may include distortion of memory and hallucinations.

Perhaps the most damaging witness against Mooney was a cattleman from Oregon named Frank C. Oxman. He had deserted his first wife, been a bigamist, been indicted for obtaining property by false pretense, and, two years before his testimony in the Mooney trial, had apparently offered false testimony in a suit against a railroad.

In Mooney's trial, Oxman tried to augment his testimony with that of an old pal from Illinois named Ed Rigall. Oxman told the authorities that he had run into Rigall on the street and that the two had seen Mooney and others drive up, deposit a suitcase on the sidewalk, and drive off. However, Rigall had never been to California and the story was a complete fabrication. In trying to convince him to come to San Francisco to testify, Oxman wrote, "...I have a chance for you to come to San Francisco as an expert witness in a very important case. You will only have to answer three or four questions. I will post you on them. You will get mileage and all that a witness can draw. Probably $100 in the clear, so if you will come, answer me quick in care of this hotel and I will manage the balance. It is all okay. I need a witness."

Did the prosecutors and police know what a menagerie they had collected, or did they conveniently turn a blind eye to the witnesses, doing them the favor of not investigating them or their circumstances in any detail? The answer is probably a little of both. One fascinating sidelight of the case is that in 1918, after Mooney and the others had been tried, but at a time when retrials for some were a possibility, a federal official bugged the office of District Attorney Fickert. In one conversation, an associate says, "Chief, if you can get a witness who will put Mrs. Mooney at Steuart and Market Streets, I don't give a damn if you put her there in a balloon," to which Fickert replied, "I think I can put her there in a taxicab. It looks as though we had a witness." On another occasion, a private detective called on Fickert to discuss new witnesses in the case. The detective said that with his help, "you could get up a real thriller...I can frame the damndest lot of stuff you ever heard of."

But how could the prosecution dare put this collection of misfits and liars on the stand? Wouldn't they be ripped apart by any decent defense attorney? They would, in a contemporary trial, because discovery rules now force the prosecution to share information about its witnesses with the defense prior to the trial. However, no such rules existed in those days. The prosecution was able to hide whatever sordid information it learned about its witnesses. For example, Oxman's original affidavit, a grab-bag of confusion which garbled San Francisco streets and the time of explosion, and gave descriptions of Mooney and others which did not fit their appearance (at that time Oxman hadn't seen them or pictures of them), was conveniently lost, and not recovered until years after the trial. Moreover, Oxman was sprung on the defense as a surprise witness, so the defense had no opportunity to probe his unsavory background.

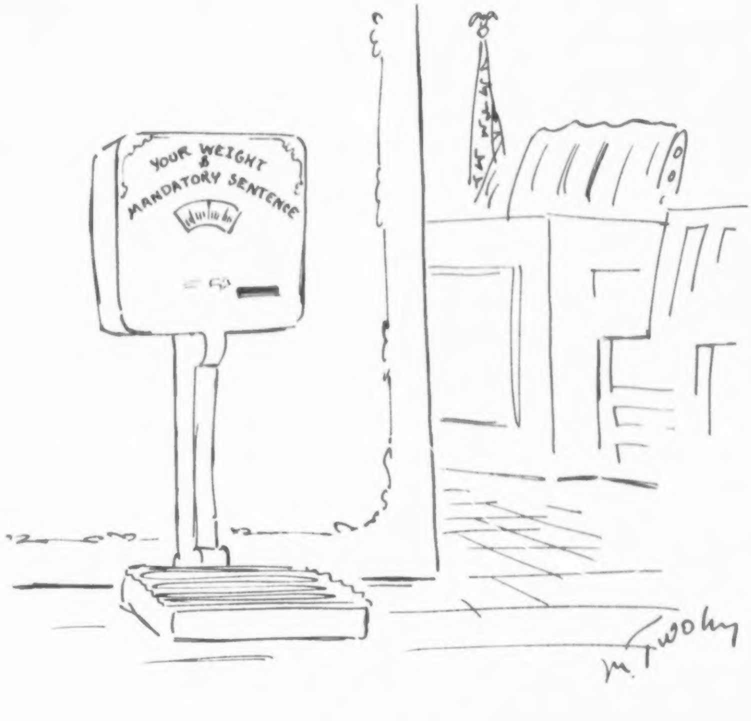
Mooney's Trial

In one way, however, Mooney was more fortunate than the Haymarket anarchists. The Haymarket anarchists had been tried together, so that testimony against any one of them could be used against all of them, making it far easier to prove the existence of a conspiracy. Mooney and the other defendants were tried separately. (The last two to be tried—after the furor had abated—were acquitted.) Moreover, the judge in Mooney's trial was conscientious, apparently unswayed by public opinion, and determined to give him as fair a trial as he could.

As in the Chicago case, the prosecution attempted to prove the existence of a very widespread conspiracy. Like their Chicago counterparts, prosecutors raided the office of the local anarchist paper, seizing letters that purported to show that the radicals had anticipated explosions like the one that had occurred. The prosecutors alleged that Mooney had conspired with national anarchist leaders, such as Alexander Berkman, to bring about an uprising in California.

The star witness against Mooney was Oxman, who testified that he saw Mooney drive up in a car and supervise the placing of a suitcase on the sidewalk. (Rigall came to San Francisco, but didn't testify, because the prosecution distrusted what he had to say.)

Oxman was followed on the stand by



Mellie and Sadie Edeau (a mother and daughter) who testified that they had seen Mooney get into a car like the one described by Oxman and drive off in the direction of the bombing site. (After the trial, their testimony also would be impeached, when co-workers quoted Mellie as saying that she would be a witness because "there was a lot of money in it.")

The prosecution's summation tried to tie the case to other alleged bombings in the state, but this ran afoul of an admonition from the judge to confine remarks to the present case. Nonetheless, the prosecution compared Mooney to John Wilkes Booth, because he and his fellow-anarchists "were bent on destroying the very government which Lincoln preserved and defended." Perhaps showing some doubt in its own witnesses, the prosecution argued that the jury was not responsible for defective testimony: if a man is hanged on perjured testimony, the perjurer, not the juror, is guilty. The prosecution asked for the death penalty as a way of "kicking the props out from under anarchy in San Francisco."

The defense team, in contrast to most political trials, had no radical lawyers on it. It consisted of a conservative San Francisco lawyer and a former U.S. congressman from New York who had been associated with Tammany Hall. The defense put 12 persons on the stand to give eyewitness testimony that Mooney and his wife were watching the parade from the top of a building, over a mile from where the explosion went off. The defense was also able to introduce an extraordinary piece of corroborating evidence. A photographer on top of the building had taken pictures of the parade. These showed that the Mooneys were on the building, and, by enlarging a clock on a building in the background of the picture, the defense was able to show that the Mooneys were there eight minutes, five minutes, and two minutes before the bomb went off.

The defense also hammered away at inconsistencies in the prosecution witnesses' testimony. One witness (the syphilitic who was subject to hallucinations) claimed that he saw the defendants come and go on foot. And if they had come by car, they would have had to drive against the flow of the parade for a mile.

The defense put several witnesses on the stand to say that they had seen a dark object flashing down before the explosion, suggesting that a bomb had been thrown from a rooftop, rather than left in a suitcase. Another witness testified that Martin Swanson had attempted to bribe him.

In its summation, the defense pointed out that it wasn't its responsibility to discover who committed the crime. The defense claimed that the prosecution had woefully failed to prove that the bomb was part of a grand conspiracy. It directly accused Swanson of trying to engineer a frame-up.

The judge's charge to the jury may have favored the defense. He told them that they could take into consideration the manner of the arrest, because if the officials had willfully violated Mooney's rights, that affected the good faith of the prosecution, and might taint the credibility of its witnesses. Nonetheless, after a short deliberation, the jury returned a verdict of first-degree murder, with the punishment set as the death penalty.

The Case Unravels

The prosecution had almost no time to sit back and savor its victory. A month after the conviction, Ed Rigall wrote the prosecutors, telling them that he had letters from Oxman, and implying that he would turn these compromising letters over to the defense unless he was paid off.

A few weeks afterwards, the defense discovered Rigall on its own. After long haggling, the defense was able to secure the letters. At the same time, Mellie Edeau's co-workers came forward to impeach her testimony.

By April, 1917, just three months after the trial, Mooney seemed close to vindication. The judge became convinced that an injustice had been done, the police attitude softened, foreign protests called the case to world attention, and Mooney's fate became a genuinely national issue. However, it was to prove neither simple nor easy to do anything for Mooney.

One major problem was that in the months between the end of the trial and the revelations regarding Oxman, Rigall, and the Edeaus, the judge had formally sentenced Mooney. That meant that the case was officially out of his hands, so he had no way to order a new trial himself, and did not even have standing to request a new trial from higher courts. About all he could do was to ask the attorneys on both sides to join him in asking the state's attorney general to confess error to the California Supreme Court and request a new trial. The prosecution attorneys refused, but the judge went ahead and drafted a request to the attorney general himself.

In transmitting copies of Oxman's letters to the attorney general, the judge wrote, "As you will at once see, they bear directly upon the credibility of the witness and go to the very foundation of the truth of the story told by Oxman on the witness stand. Had they been before me at the time of the hearing of the motion for a new trial, I would unhesitatingly have granted it. Unfortunately, the matter is now out of my hands jurisdictionally. . . ."

The attorney general delayed his decision on this request for several months, but finally filed with the state supreme court a formal consent to reversal of judgment. He did not confess error, for on examining the record he found no reversible error; but he agreed that justice would be served by a retrial.

The court, however, wouldn't go along. In reasoning almost identical to that used by the Massachusetts Supreme Court a few years later in denying requests that Sacco and Vanzetti be retried, the justices concluded that they lacked authority to order a reversal unless they found error in the record. The court stated that it was not authorized by the California Constitution to go outside the record. Its powers of review were limited. In cases of substantive injustices that could not be reached through the record, the remedy lay with the governor. He alone had the pardoning power.

At least one of the justices reviewing the case realized that the conviction was unjust, but even he believed that the court could do nothing to change it. Long afterward, he wrote privately: "As a juror, I would never have convicted upon the record presented, nor do I believe for one moment that if [Mooney were] tried now or at any time after the intense feeling against him . . . had subsided, that the result would be a conviction."

Justice Raymond E. Peters, a legal scholar and member of the California Supreme Court in the 1960s, held that the court was gravely at fault in its reasoning. Supposing another man had confessed to the bombing, he asked, would the court nevertheless allow Mooney to hang? He contended that if no procedure existed for setting aside the judgment, the court should have invented one.

Given the attitude of the court, the trial judge had no alternative to writing the governor and asking for a pardon and retrial. Citing "simple justice and fair play," he said it was a matter of public record that the testimony of many of the state's witnesses was worthless, and that the state attorney general had agreed that Mooney deserved a new trial. Only the governor could grant it.

But as it turned out, he wouldn't. He did, however, commute the sentence to life imprisonment.

Over the next few years, almost everyone even remotely involved in the case came to the conclusion that justice hadn't been done. The powerful Hearst newspapers, which had led the pack howling for Mooney's scalp, recanted and began taking a softer line. A special investigation ordered by Woodrow Wilson and conducted by future Supreme Court Justice Felix Frankfurter recommended a new trial for Mooney, and President Wilson pressured the governor of California on several occasions. Nine of the ten jurors still alive signed a petition calling on the governor to grant Mooney a pardon. (The tenth juror agreed that Mooney deserved it; he just didn't want to presume to give the governor advice.)

Even the key police officers involved in the case and one of the prosecutors finally relented. The policeman in charge of prosecution witnesses went public with the story of how these witnesses had been force-fed cooked evidence. The officer in charge of the entire case became a supporter of Mooney's freedom. Denying that he had been a party to any fraud, the assistant DA who had prosecuted one of Mooney's colleagues came to regret his own part in the case:

> Like all prosecutors, I was blind to all but the pursuit—the case which would end with the conviction of my quarry. . . . Unconsciously, with no wrong intent, the prosecutor retains the facts which further his case. Others, perhaps vital to the proof of innocence of the accused, are cast aside. . . . Witnesses whose testimony is wholly false or founded on little fact can make almost any case for such a prosecutor. The fair-minded district attorney constantly has to guard against them.

Nonetheless, this impressive array of second thoughts and regrets had no effect on getting Mooney out of jail. The state supreme court had said that it was powerless to act unless an error of law were found in the record. New facts were irrelevant, since it could only decide on the basis of the record before it. Mooney's attorneys, with the help of a defense fund supported by leftists and unions, continued to work on the case, going to court repeatedly with petitions for ancient writs such as *coram nobis* and *audita querela,* which were almost unknown in American courts. Each time a new governor of California was elected, Mooney's supporters appealed to him for a pardon. Each time hopes were raised, but in the end nothing happened.

The years dragged on. Mooney aged. Many of his old comrades died, but the case wouldn't die. New supporters on the left, and in the unions, kept it alive.

The Courts Act

Finally, in 1935, Mooney, after 19 years in jail, succeeded in getting a hearing before the United States Supreme Court. Both the Haymarket anarchists, in the 1880s, and Sacco and Vanzetti, in the 1920s, had appealed to the U.S. Supreme Court to overturn their convictions in the state courts. In both cases, the Court's answer had been the same: It is not the business of the U.S. Supreme Court to supervise state courts. Though the Fourteenth Amendment to the U.S. Constitution does forbid states to take away life, liberty, and property without "due process of law," the Court held that state courts must be accorded wide latitude to determine what due process was.

Yet there were signs that the Court's attitude was changing. The Supreme Court had granted an appeal for a writ of *habeas corpus* against a state criminal conviction at least once in the 1920s, in a case where the threat of mob violence dominated the trial (*Moore v. Dempsey,* 261 U.S. 82 [1923]). In 1932, in a case arising out of the rape and murder convictions of the Scottsboro boys, the Supreme Court set aside the convictions of these youths, accepting the argument that the trial court's failure to accord them the right of counsel constituted a denial of due process (*Powell v. Alabama,* 287 U.S. 45 [1932]).

If the Fourteenth Amendment could be violated when a state denied the right of counsel, perhaps it was violated if the state knowingly offered perjured evidence. In the Scottsboro case, however, the Court had found its evidence in the trial record; in the Mooney case, that wasn't possible.

Despite the uncertainties, Mooney's attorney went ahead with a writ of *habeas corpus,* which is the ancient recourse of those imprisoned without sufficient cause. Mooney's attorneys claimed that the deliberate use of perjured testimony was as much a domination of the court as if the state had used military force or permitted the court to be dominated by mob violence.

In reply, the state contended once again that the only remedy lay with the governor, that the courts had no power to reopen the case, that the acts of a prosecuting attorney could not in themselves amount to a denial of due process, and that Mooney had raised no federal question. The state warned that if the Supreme Court got involved, it would become "the Court not only of last, but of ever continuing resort."

In early 1935, in *Mooney v. Holohan,* 294 U.S. 103, the Court agreed with Mooney that a federal question was involved. Lecturing the State of California on the character of justice, Chief Justice Charles Evans Hughes wrote that due process cannot be satisfied, "if the state has contrived a conviction through the pretense of a trial. . . through a deliberate deception of court and jury by the presentation of testimony known to be perjured." However, the Court was not ready to take full jurisdiction. Because the Court was not satisfied that the California courts had failed to provide corrective judicial process, it ordered that Mooney should first seek a writ of *habeas corpus* in the California system. Thus, *Mooney v. Holohan* was a victory for civil rights under the Fourteenth Amendment—the Supreme Court has cited it as a precedent at least 50 times—more than it was a victory for Mooney himself.

The U.S. Supreme Court's decision put the California Supreme Court in a dilemma. It had previously held that Mooney's only remedy lay with the governor, but now it was faced with the prospect that the United States Supreme Court would do what it said it could not do itself. Therefore, it ordered a hearing on the writ, hoping, one of Mooney's attorneys said, that they could "beat us on the facts."

The hearings dragged on for more than a year, constituting a very comprehensive review of the case. The court appointed a referee to hear the testimony and review the record. The referee concluded that Mooney had had a fair and impartial trial, that he had been prosecuted in good faith, and that no state officials had abetted the presentation of perjured testimony. By a five to one vote, the state supreme court then denied the writ of *habeas corpus.* The court made only one concession to Mooney. It did find that the Oxman letters were "suspicious and questionable in character." However, no injury was done Mooney by "such assumed corruption" on Oxman's part, since Rigall did not testify.

The defense appealed this finding to the United States Supreme Court, but the petition for certiorari was denied without comment. Mooney had come to the end of the judicial road.

The Politics of Freedom

Mooney had, of course, the one possibility that had been his ever since the beginning: the possibility of convincing the governor to grant him a pardon. In his more than 22 years of captivity, California's governors had all been Republicans, and almost all had been conservatives. However, in New Deal America, politicians of this kind were fast becoming an endangered species.

In the gubernatorial elections of 1938, Mooney pinned his hopes on the Democratic candidate, Cuthbert Olson, who was thought to be sympathetic to granting him a pardon. And Mooney did more than merely trust in Olson's goodness. He lobbied for his pardon, and like most who want favors, he contributed money (from the Tom Mooney Defense Fund) to Olson's campaign.

In due course, Olson was elected. A few days after the election, he granted Mooney a full and unconditional pardon, declaring that his conviction had been based wholly on perjured testimony. Surely the pardon was just. The facts unearthed in Mooney's 22-year struggle for freedom amply show that he was framed.

Nonetheless, one can't avoid some doubts about the way he was freed. Nothing could be more blatantly political than Mooney's receiving a benefit from a politician whom he had handsomely supported with campaign funds. But no one can blame him for using whatever means he had at his disposal—surely, the courts had given him no cause for hope—and, in the symbolic sense, this denouement was singularly appropriate. After all, the case had been political from the first.

Directly Political Cases

The Haymarket anarchists, Sacco and Vanzetti, and Tom Mooney were all convicted of murder. In these cases, there was no question that a crime had been committed; the only question was whether the defendants were guilty. These cases were indirectly political. That is, politics enters because the police may have seized the defendants because of their political beliefs, and these beliefs may have been used against them to help make up for weak evidence and thus secure a conviction.

There is another, very different kind of political case. Here the political figures are clearly involved from the beginning, but the question is whether a crime has been committed. These are the cases in which defendants are engaged in political action—trying to influence the direction of society by persuading the electorate—and may have violated the law through something they have written or said. In these directly political cases, the facts are usually not in dispute. Both prosecution and defense agree that the defendants wrote or said certain words. The only question is whether these words violated the law or are protected under the First Amendment.

In his opinion in *Illinois v. Allen*, Justice Douglas gives one example of such a case, the Cold War prosecution of Eugene Dennis and other leaders of the U.S. Communist Party for conspiring to organize the party and to advocate the overthrow of the government by force. The *Dennis* case is just one of a long series of directly political cases, one of a number of difficult legal conflicts through which the courts have tried to fashion a policy that would protect First Amendment rights of association and speech, while at the same time guaranteeing the government's right to protect itself from violent revolution.

The First Amendment says that, "Congress shall make no law . . . abridging freedom of speech; or the Press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These are strong words, and there has always been a school of jurists who believe that "Congress shall make no law" means just what it says, that the government has no business at all regulating speech and the press.

However, in times of stress—and particularly in wartime—pressure always builds to protect our endangered system by limiting what people can say. The courts have generally gone along with some limitation on speech and the press. But how much limitation, and in what circumstances?

Only a few situations present clear-cut cases. For example, if rioters were running through the streets carrying weapons, and their leaders ordered them to open fire on some police officers trying to barricade a street, even First Amendment absolutists would agree that the orders to fire are not protected under the First Amendment because they are a direct incitement to illegal violence. To take an example from the other end of the spectrum, the First Amendment would seem to clearly protect a college professor who lectures on Marxism as part of a class, with no intention of advocating violence.

But most cases are not so clear-cut. In these in-between cases, courts have had to come up with standards that protect speech while giving government the right to protect itself. In the past 60 years, dozens of directly political cases have been the testing ground for these evolving standards.

Superpatriotism and the War

America's entry into World War I set off an outburst of patriotism that's hard to imagine now. Believing that we had entered the war to end all wars, the war to make the world safe for democracy once and for all, Americans saw the conflict as a kind of holy war, with all right-thinking people on the one side and only knaves and traitors on the other.

As soon as we had declared war, Congress passed the Espionage Act of 1917, making it illegal to attempt to cause insubordination among the military services or to obstruct the draft. In 1918, this act was given more teeth. The 1918 version made it a crime to say anything that interferred with the sale of U.S. bonds or to make statements which included any "disloyal, profane, scurrilous, or abusive language about the form of government of the United States . . . or the military or naval forces of the United States, or the flag. . . ."

Clearly, many provisions of these laws had less to do with spies and more to do with stopping criticism of the war. More than 2,000 prosecutions took place under these laws. Almost all of these were of people who had criticized the war or how it was being conducted.

Judges made the government's job easier by ruling that if there was any *possibility* that a critical statement or opinion would reach troops or would fall on the ears of draftable youth (any male between 17 and 45), then it must have been intended to cause mutiny or obstruct recruitment. Unless a politician spoke only to kindergarten classes or ladies' garden clubs, there would be the chance that his words would reach someone

Under the act, people were convicted for urging that war revenues be raised by heavier taxation instead of by sale of Liberty Bonds; for saying that the draft was unconstitutional; for saying that a referendum should have preceded a declaration of war; for saying that war is against Christian teachings; even for criticizing the Red Cross and the YMCA.

Under a state espionage act, a luckless Minnesota man was convicted of obstructing the war effort because he had told a group of women knitting for the war, "no soldier even sees these socks."

Were these convictions constitutional? Or did they constitute an impermissible stifling of free expression? The answers weren't long in coming, because a whole raft of cases reached the Supreme Court in the years after the war.

Clear and Present Danger

The most famous of these was *Schenk v. United States*, 249 U.S. 47 (1919). The defendants in this case were members of the Socialist party, and Schenk himself was the party's secretary. They had sent to men who had already been drafted (but who had not yet been inducted) a leaflet arguing that the draft was unconstitutional and that the government had no power to send American citizens to shoot up people of other lands. The leaflet urged the recipients to "assert your rights" and not be intimidated. But, as Leo Pfeffer points out in *The Liberties of an American*, there was nothing in the leaflet urging anyone to resist the draft, nor did the government present any evidence showing that anyone who had received a leaflet had actually resisted conscription.

Writing for a unanimous Court, Justice Oliver Wendell Holmes rejected the Socialists' claim that the conviction violated their constitutional right of free speech. The most stringent protection of free speech, Holmes said, did not permit a man to falsely shout "Fire!" in a theater and thus cause a panic. The question in every case is how the words are used, under what circumstance they are used, and whether they are of such a nature as to create a clear and present danger that Congress has a right to prevent.

Holmes argued that the "clear and present danger" test was a question of proximity and degree. In this case, there was a clear and present danger that some of the recipients of the leaflet might in fact be seduced by it, and so resist induction into the Armed Forces.

According to Pfeffer, "under the clear and present danger test, there must be an immediate danger that the words will cause unlawful overt acts." Therefore, "speech is constitutionally protected until it has virtually become action." Though this test was used to *convict* Schenk and the others, it actually sets up stringent standards for prosecutors, who cannot focus on the evil mind or evil intent of the speaker, or even on the evil nature of the spoken words, but must focus on the overt acts which are likely to be the consequence of the words. Thus, the test generally protects free speech.

Nonetheless, all judicial tests are apt to be flexible in practice, and in many of the cases right after World War I, the Court approved convictions even when, to our eyes at least, the danger seemed neither clear nor present. For example, Socialist leader and perennial presidential candidate Eugene V. Debs was convicted of attempting to incite insubordination in the Army and obstruct recruitment. The speech in question was not addressed to troops, but to a Socialist convention, though in the speech he did approve of draft resisters and other war critics. Even though Justice Holmes privately had doubts about Debs's guilt—he wrote to a friend, "I think it quite possible that if I'd been on the jury, I should have been for acquittal"—he and the rest of the Court approved the conviction in *Debs v. United States*, 249 U.S. 211 (1919).

Evil Tendency

Another test was used in a later case, *Whitney v. California*, 274 U.S. 357 (1927). Anita Whitney was a wealthy San Francisco woman who had long been active in left-wing causes. She was also the niece of a former justice of the United States Supreme Court. In 1919, she had been a member of the Socialist party when the party split into militant and moderate factions. Ms. Whitney had labored in vain to prevent her own wing of the party from adopting the more radical program of the Communist Workers party.

Although she had been a force for moderation, she was charged with violating California's Criminal Syndicalism Act. Under this act, which was similar to state laws around the country, those who organized or were members of groups "pursuing political change by unlawful methods" were liable to prosecution. Though the federal Espionage Act had been repealed after the war, these state acts remained in force and accounted for a good many prosecutions.

Miss Whitney appealed to the U.S. Supreme Court, but a majority of the justices affirmed her conviction, ruling that the government may punish expression "tending to incite crime, disturb the public peace, or endanger the founda-

"It was meditated, Your Honor, but not premeditated."

tions of organized government."

This standard—sometimes called the "evil tendency" standard—makes it far easier for government to gain convictions, since prosecutors need to show no immediate consequences of the words, just their general bad tendency.

Justices Holmes and Brandeis disagreed with the Court's majority, writing an eloquent opinion which is often cited:

> Fear of serious injury cannot alone justify supression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. . . . Every denunciation of existing law tends in some measure to increase the probability that there will be a violation of it. . . . But advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.

By focusing on incitement, Justices Holmes and Brandeis once again advanced the central tenet of the clear and present danger test: that there be an actual, immediate danger of an illegal *act* following from the words in question. Since there seemed to be no immediate danger from Miss Whitney's organizing efforts, Holmes and Brandeis would free her. (As it happened, she was freed anyway. The governor of California pardoned her before she had served a day. This seemed to satisfy public opinion, infuriating only Tom Mooney, then beginning his second decade in San Quentin, who raged that the governor's pardon showed once again that there's one law for the rich and another for the poor.)

The Communist Menace

When war broke out in Europe in 1939, the United States Congress feared that the war might soon involve us. One of its responses was to pass a new sedition law. The Smith Act was officially called the Alien Registration Act, though as Zechariah Chafee pointed out, this bill was "no more limited to the registration of aliens than the Espionage Act of 1917 was limited to spying." One of its provisions made it a crime to advocate or teach the overthrow or destruction of any government in the United States by force or violence. It was also a crime to publish or circulate any written material furthering such advocacy. If two or more people conspired to commit these offenses, they too were subject to punishment under the act.

Ironically, there were very few prosecutions under the act during World War II, but a spate of prosecutions followed the war. Though the act says nothing directly about Communists, all of the post-war prosecutions were aimed at the Communist party of the United States.

The first and most important of these centered on Eugene Dennis and eleven other leaders of the party. This New York City trial was one of the longest and most bitterly contested in American history. The record of the case amounted to more than 16,000 pages (the trial lasted nine months), and the case was front-page news from coast to coast. Eventually, all of the defendants were convicted and received long prison sentences. Their lawyers were imprisoned for contempt of court and later disbarred.

The Communists appealed, claiming that the First Amendment guaranteed them the right to express their views and try to persuade others. The big question, of course, was whether the Supreme Court would agree with them, but an important lesser question was what test the Court would apply. Would it apply the "evil tendency" test (making it easier to sustain the convictions), or would it apply the clear and present danger test?

The Dennis Case

In the end, the Court voted 6-2 to sustain the convictions, relying on an altered version of the clear and present danger test. However, the Court spoke with many voices, and its decision hardly resolved the issues.

In the first place, Justice Tom Clark did not participate at all, since he had been U.S. Attorney General when the prosecution began. Justices Frankfurter and Jackson concurred in the result, but both issued separate opinions. Justices Douglas and Black dissented. Thus, the opinion of Chief Justice Vinson actually reflected the views of a minority of the Court, consisting of himself and Justices Reid, Burton, and Minton.

Leo Pfeffer's *The Liberties of an American* summarizes very well the diverse opinions in the case. Pfeffer points out that the Chief Justice's opinion accepted the clear and present danger test, but asserted that it must be properly understood and applied. In the first place, Vinson said, the evil that the government has a right to protect against is not limited to a *successful* overthrow of the government by force and violence. Even if the attempt is unsuccessful or doomed to failure from the start, it is a grave evil which the government has the right and duty to prevent. Hence, the fact that the Communist Party is too weak to successfully overthrow the government does not mean that the government may not punish its leaders for making the attempt.

In the second place, clear and present danger is not an absolute standard that can be applied equally in all circumstances. A danger that is clear in one set of circumstances may not be clear in another set. The courts must determine "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Thus, the clear and present danger test, properly understood, does not require the government to wait until a *putsch* is about to be executed, the plans have been laid, and the signal is awaited. In view of the nature of the Communist conspiracy, covertly organized with rigidly disciplined members ready to act, the danger was sufficiently clear and present to justify punishing the defendants for conspiring to advocate the overthrow of the government by force and violence.

Justice Frankfurter concurred, but for different reasons. He stressed that the Court should not invalidate an act of Congress unless there is patently no reasonable basis for it. In other words, the responsibility for balancing and reconciling the competing demands of national security and individual freedom rests with Congress, which is democratically elected and answerable to the people. Thus, the law cannot be overturned unless it is clearly outside the pale of fair judgment and can only be characterized as arbitrary and unreasonable. In the present case, what we know of the methods of Communism establishes that the judgment of Congress is far from unreasonable, and so the law should stand.

Justice Jackson concurred for yet another reason. The clear and present danger test was devised, he said, for the American type of individualistic radicalism. It was, however, totally inapplicable to the government's efforts to meet the threat of the international Communist conspiracy. Citing the recent *coup* in Czechoslovakia, which showed the danger of according Communists the usual protection of freedom of speech, press, and assembly, Jackson voted to uphold the convictions.

In dissent were Hugo Black and William O. Douglas, who in many free speech cases found themselves in the minority, like their predecessors Holmes and Brandeis. Said Black:

> These [defendants] were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind to overthrow the Government. They were not even charged with saying anything or with writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and to publish certain ideas at a later date. The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forceful overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids.

Justice Douglas's dissent said that the defendants might be liable if they had taught the techniques of sabotage, the planting of bombs, the art of street warfare, and the like. However, in fact, all they did was organize people to teach the Marxist-Leninist doctrine, chiefly found in four books, at least one of which, Marx and Engels's *Manifesto of the Communist Party*, was more than 100 years old and was widely taught in college courses around the country.

Douglas went on to say that Communism has been so thoroughly exposed in this country that it has been crippled as a political force—in a memorable phrase, Douglas called the Communists "miserable merchants of unwanted ideas"—and the defendants' activities were in no way a clear and present danger to the nation.

Following the Supreme Court's decision in *Dennis*, the United States undertook 15 prosecutions under the Smith Act of other leaders of the Communist party. More than 120 Communists were put on trial, and nearly 100 convicted.

The Pendulum Swings Back

Six years later, 1957, another case involving prosecution of Communists under the Smith Act reached the Court. In *Yates v. United States*, 354 U.S. 298, the Court considered the convictions of 14 leaders from California. This time around, the result was entirely different for the Communists. By a 6-1 vote, the Court reversed their convictions.

The Supreme Court rarely explicitly overrules one of its previous decisions, and it didn't there. Rather, John Marshall Harlan's decision for the majority tried to draw distinctions between the two cases. In *Yates*, the trial judge had erred by failing to make clear in his instructions to the jury that the Smith Act permitted advocating an *abstract* doctrine of forcible overthrow of the Government. Advocacy is illegal only when it promotes unlawful *action* to forcibly overthrow the government.

"The essential distinction," Harlan wrote, "is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."

As Harlan pointed out, the line between the abstract and action-directed advocacy is "often subtle and difficult to grasp." That's why the trial judge's error was serious. The jury had to understand the differences between the two kinds of advocacy.

In essence, the *Yates* decision requires the government to show a closer connection to illegal action. By bringing action more into the equation, the Court made the prosecution's job harder, and the net result of *Yates* was to virtually end prosecutions under the Smith Act.

The pendulum swung further back toward free expression in two 1969 Supreme Court cases. In *Watts v. United States*, 394 U.S. 705, the Supreme Court had to deal with a case where words might plausibly seem a lot closer to overt action. An 18-year-old black youth attending a civil rights rally in Washington, D.C. told a small crowd that he was not going to report for the draft, adding "if they ever make me carry a rifle, the first man I want to get in my sight is L.B.J. They're not going to make me kill my black brothers."

Was this a dangerous threat to the President or merely a raw but permissible way of expressing a political opinion? By a narrow 5-4 vote, the Supreme Court said that the First Amendment protected even this kind of violence-laden speech. In reversing his conviction, the majority ruled ". . . the statute initially requires the Government to prove a true 'threat.' We cannot believe that the kind of political hyperbole indulged in by [the defendant] fits within that statutory term. . . . His only offense here was a kind of crude offensive method of stating a political opposition to the President. Taken in context . . . we do not see how it can be interpreted otherwise."

The second 1969 decision was a major landmark in applying the First Amendment to political cases. It is also one of the few political cases to involve a right-wing group. The case began in 1964, when the national TV audience watched Ku Klux Klansmen in Ohio set a large wooden cross aflame. Clarence Brandenburg, the leader of this particular Klavern, spoke of a march on Washington, claiming that the Klan:

> has more members in the state of Ohio than does any other organization. We are not a revengent organization, but if our President, our Congress, our Supreme Court, continues to supress the white Caucasian race, it's possible that there might have to be some revengence taken.

Brandenburg was sentenced to 10 years in prison for violating the Ohio Criminal Syndicalism statute, a law like that under which Anita Whitney had been convicted. But when Brandenburg's case reached the Supreme Court in 1969, in *Brandenburg v. Ohio*, 395 U.S. 444, the Court unanimously reversed.

> . . . In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act. . . . But *Whitney* has been thoroughly discredited by later decisions. . . . These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid . . . advocacy of the use of force or of law violation *except where such advocacy is directed to inciting . . . imminent lawless action and is likely to incite or produce such action*. (Emphasis added)

This new definition requires that the offensive speech not only be directed to inciting *imminent* lawless *action*, but that it also be *likely* to produce such action. In articulating this standard, the Supreme Court has made the clear and present danger test more specific and put more teeth into it. If the test remains in effect, it will be impossible for prosecutors to gain convictions because of speech having an "evil tendency" or possibly leading to unlawful action. Now the incitement must be direct, the danger imminent. Under this standard, political speech is freer than even before in American history.

Paradoxically, then, it may well be in the directly political cases that the government will have the greatest trouble securing a conviction. That still leaves, however, many other weapons in the prosecutor's arsenal, many other kinds of laws that can be—and have been—used against members of unpopular political groups. ☐

Indian Marriage

(continued from page 25)

toms of their own for family matters. Would it be possible to retain this range of customs and still govern?

Can Law Unify?

Faced with this extraordinary complexity, the English had to determine whether a unified legal system could—or should—be implemented in India. Another question was to what extent a formal legal system would unify, would make a governable entity out of a diversity of peoples and language groups.

Basically, the English compromised. They tried to accommodate both *their* common law tradition and the Indian peoples' many customs. The purpose was to establish a national order of law, but one that would arise, at least in part, from India's own history and, more importantly, from Indians' own needs. Marriage law was one of the principal areas in which varying Indian customs, traditions, and judicial precedents were integrated into legislative acts, intended to result in a formal and national legal system. Independent India has continued this process.

As we review the law of marriage in India, tracing its codification and later amendments, we can see how the British and independent Indians have used law to promote social change, while accepting the customs of particular communities. Of course, the British and the Indians have had somewhat different agendas. For example, the British wanted to eliminate child marriage; the Indians are trying to reduce its frequency. In both cases, however, the effort has shown sensitivity to existing customs.

The British Contribution

The British began by trying to learn Hindu law. This effort came about in three stages: (1) an attempt by the British to understand the nature of Hindu law; (2) an attempt to classify and standardize Hindu law and develop precedent for case law; and (3) efforts, motivated by modern social conceptions, to introduce a formal legal code, which were again taken up in independent India. The Hindu Code, statutes effected in 1955-56 in India, is representative of this third and current stage of Indian law formation.

Note that each stage has a regress in it. An attempt to understand the nature of Hindu law assumes that there is something which is "the law." Classification and development of standards and precedents depends on an assumption that the assumed law is logically organized and works procedurally on precedent. And finally, the introduction of a code assumes that social change in India can be implemented by law, and should be so implemented.

But with regard to marriage, the British assumptions proved problematic. The British were looking for a single point in time at which a couple could be said to be married, like the current American "Under the powers granted to me by . . . I now pronounce you man and wife." Since the British attached property rights and status determinations to marriage in their own legal system, it was essential to know exactly when a marriage occurred. But for the Hindu, and for most other Indian marriages, the event is a process, taking place *through* time rather than *at* a particular moment in time.

The British were looking for a single point in time at which a couple became married, but for most Indians, marriage takes place *through* time rather than *at* a particular moment.

Indian marriages usually follow a sequence which gradually joins the couple as a social entity. There is no singular rite or custom in all of India which in itself signifies that marriage has occurred. For some, seven circles around a sacred fire with bride and groom tied together indicates affirmation of marriage. For others, the tying of black beads around a bride's neck, or the birth of the first son, confirms the joining of the two as a social entity. For Indians, family custom and community requirements dictate the process which makes a marriage acceptable. Thus the British were faced with the choice of making custom an integral part of legal formulations, or placing themselves in opposition to long-accepted existing customs.

The resultant legal system of India, which has continued into the post-independence period, is a body of laws which, in areas of family law, is distinct for the five communities distinguished by the British: Hindu (which includes Sikhs, Jains, and Buddhists), Muslim, Parsi, Christian, and Jewish.

The separate codes for the five communities, and the efforts to determine which code applies on the basis of community membership, is a distinctly British contribution to India's laws. Family law does not differ from state to state. An Indian's domicile does not determine the law applicable to him. Rather, the law that applies depends on what religious community an Indian belongs to.

How is "community" defined? It is important to understand that although the Indian communities which have their separate family law are religious communities, the law is not necessarily religious law. Nor is it necessary that a community member be an ardent believer, or even a practitioner of the faith, for the community law to be applicable. What is a community, then? A community is a *legal* group, and membership in it determines which law applies.

The definition of community membership is, for Muslims, Parsis, Christians, and Jews, on a positive basis. For example, a Muslim is one who believes that there is only one God and that Muhammed is His Prophet. But Hindu law applies to a category of people that includes Hindus *and* a broad classification of persons who do not fall into the other communities. Hindu law applies to:

1. any person who is a Hindu, Jain, Buddhist, or Sikh by religion;
2. any person born of Hindu parents, i.e., who are Hindus, Jains, Buddhists, or Sikhs; and
3. any person who is *not* Muslim, Christian, Parsi or Jew.

Converts to Hinduism, Jainism, Buddhism, and Sikhism are included in the first category, and the intention of the convert and acceptance by the community is sufficient evidence of conversion. Thus the category "Hindu" is not a religious one, and the division of family law by community is not necessarily coordinate with religious precept.

Modern Marriage Law

By continuing to recognize the traditions of religious communities, lawmakers have given custom an integral role in modern Indian marriage law. Although the law has been used as an agent for social change, enforcement varies widely from region to region, and the implementation of directive codes regulating such matters as marriageable age and dissolution of marriages remains a low priority. In effect, custom has priority over legal precedent—providing that the custom does not directly conflict with an existing formal legal code.

Although Article 44 of the Indian Constitution anticipates a time when there will be a single civil code for all of India's citizens, the separate codes for separate communities continue to be valid in India today. But there are exceptions. For instance, two persons, belonging to any community or nationality, can choose to marry under the Special Marriage Act of 1954. This choice brings them under the provisions of this law and some others, governing matters such as inheritance and succession. For example, if a Hindu male marries under the 1954 Act, he automatically loses rights to property jointly held by his family.

Two parties, who belong to different communities (except Muslim males who are permitted within their faith to marry a non-Muslim), where neither wishes to convert to the other's faith, or where a civil marriage is desired, can *only* marry under the Special Marriage Act of 1954. A uniform family law is thus applicable to both persons, though they profess different faiths, once they marry under the act of 1954. Thus this act provides a valid opportunity for spouses of different religions to marry legally.

But most marriages do not take place under this law. Many marriages, indeed, do not take place under any of the laws governing the five communities. For example, accepted marriages are performed in accordance with the customs of a particular tribal group. Such customs need not be sacramental, and may be extremely simple. For instance, in the Himalayan region, a practice called *Jhajra* (which means putting a ring in the bride's nose) is the customary form of marriage.

Tribal peoples are governed by marriage and divorce customs of their respective tribes. Generally, the age of marriage is higher, and unions are by negotiation or elopement. Of course, such customs, in order to be legally acceptable, must be proven as the tribe's own, and a tribe must be so defined as a legal entity. Therefore, the initial issue that must be faced is a determination of the tribe to which the parties belong, and whether there is a legal code under which they may be charged or judged, or even married. Their custom may take precedence over all codes.

Until 1955, when the Hindu Marriage Act became effective, polygyny (the state or practice of having several wives) and polyandry (the state or practice of having several husbands) were legally practiced in India. Since then, these practices, for persons covered by the Hindu Code, have become a criminal offense punishable by imprisonment up to seven years, or up to ten years if the marriage was concealed from the later spouse(s). However, modern India still permits the Muslim custom of limited polygyny, though few Muslims have a plurality of wives.

Under Hindu law, marriage was long considered a sacramental union that was sacrosanct, inviolable, and immutable. The Hindu Marriage Act of 1955 made divorce a legal possibility by removing almost every aspect of the sacramental tie. However, a sacred ceremony is still necessary in most Hindu marriages, and Hindu marriages have not yet become a legal contract only. But lack of consent or an underage bride or groom does not make the marriage invalid, or even voidable, nor does nonconsent of the guardian.

Under the current law, any two Hindus can marry, despite earlier prohibitions on certain marriages between different castes or subcastes or relationships. Hindu law specifies that the existence of a blood relationship, called *sapinda*, prohibits marriage. Yet, in another acceptance of traditional practice, if custom permits such a marriage, it may take place.

Family law does not differ from state to state. Where Indians live matters less than which religious community they belong to.

Modern India is continuing, with some adaptions, the British attempt to end child marriages. Dating back to 1872, laws in both British and independent India have gradually increased the legal age of marriage. A 1978 law applicable to Hindus restrains marriage of a male below 21 years and a female below 18 years of age. (Like many other places in the world, including many states of the United States, India has consistently allowed a lower minimum marriage age for girls than for boys.) The law prescribes penalties for parents and guardians who are involved in arranging the marriage of underage boys and girls. But the marriage remains valid, and is not affected by the legal act.

So, although the Rebaris in our opening scene are performing a marriage ceremony which is not valid under the marriage acts, the marriages themselves will be considered valid. But the parties bringing about the marriages are liable to punishment. Here again, the custom of the particular community, and the actions taken by the community in accordance with its customs, are given validity within the law.

So far, we have mainly looked at only the Hindu law. A separate code exists for each of the other four religious communities. These codes differ in many respects. For example, a girl married under legal age cannot repudiate the marriage under any code except the Muslim. But a Muslim girl married under Muslim law can repudiate her marriage before age 18 if (1) she was given in a marriage prior to the age of 15 and if (2) the marriage has not been consummated.

The codes also differ as to who may marry. Muslims cannot marry certain foster relations, certain blood relations, and certain relations by marriage. Hindus also cannot marry certain collateral relations, but these differ from those specified for Muslims. Parsis have their own rules about marriages prohibited on the basis of blood and affinal relations. Also, Parsis cannot marry non-Parsis under either Parsi law or the Special Marriage Act of 1954. But marriage between a Christian and a non-Christian is valid, under the Indian Christian Marriage Act of 1872. A Christian marriage may be declared null and void if one party is impotent, if the parties are related within prohibited degrees of consanguinity or affinity, or if the marriage is a bigamous one.

Marriage Ceremonies

The specifically enacted regulations for each community also consider marriage ceremonies and the registration of marriages. Early Hindu law prescribed elaborate ceremonies for marriage. Under the Hindu Marriage Act of 1955, custom is assigned a specific role in marriage ceremonies. The Hindu ceremonies may be either *shastric* (according to the ancient texts), in which case they must include the *saptapadi* (seven circles around a sacred fire), or they may be any customary ceremony and rites which prevail in the caste or community to which one of the parties in the marriage belongs. Thus any ceremony recognized by either the bride's or bridegroom's side, however elaborate or simple, is sufficient. Where mutual consent with no ceremony at all is customary, it too is sufficient.

Muslim law gives simple provisions for marriage. All that is essential is a proposal by or on behalf of one of the parties, accepted by the other party at the same meeting. While the Hanafi school requires that proposal and acceptance be made in the presence and hearing of two male witnesses or one male and two female witnesses, no witnesses are required in Shia law. No writing or religious ceremony is essential.

In Parsi law, the ceremony of *ashirvad* (benediction, blessing) is essential, and must be performed by a Parsi priest in the presence of two Parsi witnesses. Although registration of a Parsi marriage is essential, failure to do so does not affect the marriage's validity.

The Christian Marriage Act of 1372 follows English law in describing elaborate procedures and ceremonies of marriage. Included are authorized performers of marriages, notification and declaration, registration as compulsory, and witnesses as necessary. The marriage must be solemnized by a priest.

Civil marriage under the Special Marriage Act of 1954 has its own procedure and formalities. Although registration is compulsory and failure to do so can be punished by a fine of up to 25 rupees (about $3), an unregistered marriage is not necessarily invalid. In the states of Assam, Bihar, Orissa, and Bengal, laws provide for the voluntary registration of Muslim marriages. In order to assure Indian women's status in monogamous marriages, in 1974 the Committee on the Status of Women in India recommended that registration be made compulsory for all marriages.

Looking Further at Indian Marriage

Film: *Courts and Councils: Dispute Settlement in India.* Produced by University of Wisconsin's South Asia Center in conjunction with Worldview Productions and Ron Hess. 16mm. Color. 30 minutes. Distributed by: Distribution Office, South Asian Area Center, 1242 Van Hise Hall, University of Wisconsin, Madison WI 53706.

Articles: "An American Museum Throws a Hindu Wedding," by Doranne Jacobson. *Asia Magazine*, November/December 1980, pp. 12-19. (Subscriptions to ASIA for 1 year/6 issues are $7.97. Send name, address, and check to ASIA, P.O. Box 1308-A, Fort Lee, NJ 07024.)

"Rajput Adulthood: Reflections on the Amar Singh Diary," by Susanne Hoeber Rudolph and Lloyd I. Rudolph, *Daedalus*, Spring 1976, Vol. 105, 2, pp. 145-167.

Novels: Rama Metha, *Inside the Haveli;* Philip Inason (Woodruff), *Call the Next Witness;* R.K. Narayan, *The English Teacher.*

INDIAkit: *Images of Women in the Mass Media in India,* by Linda Wojtan. Available on loan from Outreach Educational Project, South Asia Language & Area Center, The University of Chicago, 1130 E. 59th St., Chicago, IL 60637. Tel. 312-753-4132 (afternoons). Deposit $10; user's fee $2, for a two-week loan period. UPS costs additional.

Newspaper: *India Tribune.* Published in Chicago, Illinois. Subscription available from *India Tribune,* 3941 West Lawrence Avenue, Chicago, IL 60625. 1 year/24 issues, $6; 2 years, $10.

Books: *The Laws of Manu,* trans. by Georg Buhler. New York: Dover, 1969 (reprint of 1886 volume XXV of Max Muller's *Sacred Books of the East* [1886]); J. Duncan M. Derrett, *Religion, Law and the State in India.* London: Faber and Faber, 1968.

Towards Equality. Report of the Committee on the Status of Women in India. Government of India, Ministry of Education and Social Welfare, December 1974. *We the Judges. Studies in American and Indian Constitutional Law from Marshall to Mukherjea,* by William O. Douglas. Garden City, NY: Doubleday & Co., 1956.

Bibliography: *Women of South Asia: A Guide to Resources,* by Carol Sakala. Millwood, N.Y.: Kraus International Publications, 1980.

"You Can't Change Custom by Law"

Marriage law and custom in India are complements, and despite efforts to implement social change by law, the enactments do not stand in opposition to established customs. Family law in India remains essentially personal. That is, the applicable law derives from a person's birth, community, and religious affiliation, rather than from the territorial boundaries within which the person lives, or in which a lawsuit is brought. Only by declaring that he or she has accepted the custom of the region in which he or she is currently living can that region's customs be valid for someone who has shifted domicile there.

Furthermore, and again unlike United States law (although we do allow certain exceptions for Quaker marriages), Indian family law takes into account community or tribal custom in allowing certain agreements or practices. In this sense, it is the ancient Hindu philosophy of law which prevails; law is a combination of *shruti* and *smriti* (that which is heard and that which is remembered). In addition, Indian laws clearly state the limitation of their scope. They may penalize or punish a party involved in a particular event, but the event itself may remain valid, such as a marriage between underage parties. In this way, Indian law maintains its responsiveness to people's actions.

Delicately balancing an effort to educate people about the law and bring them within its purview, with an effort to retain diversity in community, custom, and practice, India's family law is necessarily complex, yet offers avenues for secular justice, as in the Special Marriage Act of 1954.

As the Rebari mass marriage indicates, children are still married in India, even though their marriages remain unconsummated until puberty. Families still arrange their children's marriages, although opportunities for nonarranged "love" marriages exist and are used. Family law is set in codes for particular communities, but it is subject to discussion and change. And custom can still be the basis for legitimate marriages.

India is a country where the incorporation of the past into the present and future is an on-going process. Modernization does not mean the substitution of new for old, but the bringing of old customs and practices into new contemporary light. The effort to retain traditions while revitalizing peoples through social development and legal codification is a fascinating study for everyone interested in law and legal systems as processes rather than merely unchanging enactments. □

Sex Education

(continued from page 17)

federally funded caseload in family planning in the U.S. and frequently called upon to put together programs for schools and communities.

Johnson believes that many of the most controversial materials in sex education may not be doing very well, so that to know what the situation is across the country one obviously has to look at what materials are continuing to be used, not just at what is being promoted or has been used in some places. She estimates that 75 percent of the materials that come to her attention are, in her judgment, inappropriate for the targeted grade level or the Chicago schools. Johnson believes that sex education programs cannot be effective without parents understanding the contents and giving their support.

The contrast between this local program and existing and potential federal models reveals the key issues in the current debate: the degree to which parents have a role in directing the sex education program, parents' responsibility for the rearing of and ultimate authority over their children, respect for traditional values in sexuality, and the balance of power between the state and federal governments.

A Health Fednet

The Adolescent Pregnancy Prevention Act aims to set up a kind of "health Fednet" both linking up all federal programs in the health sector and linking up the public health sector with the educational sectors.

"The citizens of Kansas hardly know what has hit them," announced the American Life Lobby's newsletter this fall, wondering if this was to be a blueprint for the country. "What is truly amazing is how the whole bureaucracy sprang immediately into being," reported one Kansan, Mary Jo Heiland. "Within two months, Adolescent Pregnancy Prevention occupied two buildings and was headed up by Dr. Lula Mae Nix, who set up the model program in Delaware." Dr. Nix had been the director of the office of Adolescent Pregnancy Programs established within the Public Health Service.

To fully understand how this linkage works one must understand the workings of earlier programs by which the federal government has incrementally extended control over health care and health education and has enlisted the support of mass communications for public information.

A major recent initiative was the National Health Planning and Resource Development Act of 1974, which established the nationwide network of Health Service Agencies (HSAs) and State Health Planning and Development Agencies (SHPDAs); these agencies design statewide health administration guidelines, including health education. The 1976 Public Health Service Act amendments established several new mechanisms for health promotion.

Pressures for cost containment led to a major policy shift formulated in the "Derzon Memo" of June 4, 1977, issued by Robert A. Derzon, head of HEW's Health Care Financing Administration. This memo called for a government-directed campaign to "change social values regarding cost-inducing activities," to be carried out by prodding states to adopt "living wills" legislation and by reducing unwanted births under Medicaid and welfare through extending birth control programs "reaching teenagers as well as adults." Probably because cost-cutting is the major goal, death education has been introduced into the "family life education" area in some programs, along with "values clarification" exercises incorporating "lifeboat ethics." The philosophy behind the Derzon memo—that health costs must be kept down, even at the risk of terminating lives—had led to much of the controversy over the new health education.

Should the government try to change social values, especially when it comes to delicate areas like love, sex, and death?

How do such federal priorities in health get built into state and local health education? HSAs can't be approved unless they meet federal standards, so the ultimate control is at the federal level. Wayne Penn and C. Gregory Buntz explain how the Certificate of Need (CON) Program in federal oversight of the 205 HSAs throughout the country sets in motion "a complex political system" strongly influenced by "powerful interest group politics." With the threat of federal sanctions a strong motivating force in this process, "a complex idiosyncratic pattern develops in each state," with the pattern further complicated because in most states, the "provider" interest groups—the health care professionals—are much stronger than other interest groups, lumped together as "consumers" in the current parlance of health care administration.

One astute "consumer" group that has penetrated the byzantine byways of HSAs with their federal and local linkages is Kansas Right to Life, which has mobilized opposition to proposed sex education programs and an ambitious Title VI program to expand an adolescent pregnancy program operated by the University of Kansas, an academic center known for its enthusiasts of behavioral engineering, according to Vance Packard's *The People Shapers*. Although the Kansas Health Department claimed that the Title VI grant funds were to be spent "on medical and nutrition services," Mary Jo Heiland reported that the budget breakdown revealed that they would be spent to establish a referral and promotional network for sex education, abortion referral, and family planning services. KU was to provide the computer programming capable of tracking a child anywhere in the state, and another grant going to a new organization of school districts was to set up sex education programs including family planning. As Heiland saw it, "the children who find themselves caught in this social planning flywheel will be studied, educated, sensitized, brainwashed and tracked by social workers, family planning workers, and educators who have themselves been trained by Sol Gordon and Planned Parenthood."

Just what are the interest groups engaged in the pregnancy prevention campaign? And what is the nexus between health politics and the politics of education, between community and classroom, established by recent initiatives on the federal level?

A Sex Ed Complex

A look at the hearings and planning meetings dealing with family planning, population affairs, and comprehensive health education will reveal a clear pattern. The single most prevalent advocate of federally funded sex education is the Planned Parenthood Federation of America, which through its research arm, the Alan Guttmacher Institute, supplies most of the information to policy makers and demonstrates the need for a federally funded campaign against teenage pregnancy. Through its many state and local components, Planned Parenthood also provides the services to resolve the problem. The Guttmacher Institute's *11 Million Teenagers: What Can Be Done About the Epidemic of Adolescent Pregnancies in the United States?*, published in 1976 and widely disseminated to government officials and the media, underlay Title VI. Its proposals are almost exactly reflected in the act, and its statistics on the social, economic, and environmental costs of unwanted pregnancy were widely quoted in the media and in the testimony of groups endorsing federally funded sex education. And it is the "epidemic" metaphor that has caught on in the public mind. Given its own special office, adolescent pregnancy has joined the Public Health Service's repertoire of yellow fever, smallpox, measles, syphilis, and swine flu. It too is now a part of the immunization campaigns in which schools and community have been enlisted.

The basic objectives of this campaign are consonant with the overall goals of the Planned Parenthood Federation, which are spelled out in its *Five Year Plan: 1976–1980*. The central objective is "to bring about the virtual elimination of unwanted pregnancy in the United States by the end of the decade." Establishment of "universal reproductive freedom," the Plan asserts, will require several elements of social change, namely (1) "extending family planning services to meet the needs of those whose ability to regulate their fertility is presently limited by age, economic, geographic or other barriers," (2) "reaffirming and protecting the legitimacy of induced abortion as a necessary back-up to contraceptive failure," (3) "committing society's educational institutions, including the family, to the improvement of sexual literacy, understanding and responsibility among all people, especially the young," (4) "abolishing the arbitrary and outmoded restrictions—legal, regulatory and cultural—which continue to limit the individual's freedom of choice in fertility matters," and (5) "promoting biomedical and socio-demographic population research."

Planned Parenthood's own outline, in 1975, of its ambitious mission to engage the whole community in a national drive against "the continuing shame" of teenage pregnancy, the shame being the teenagers' lack of opportunity to decide whether or when to bear a child," precisely describes the current sex education-therapeutic-pharmaceutical complex. The "service and educational programs at the community level," as the Plan explains, "are all complementary parts of a single national strategy . . . as 'catalyst' or change agent."

And this ambitious proposal is becoming a reality in some places. As Kansas experienced it the summer of 1980, "Title VI sets up the network, it involves everything and everyone. . . . Schools, churches, businesses, hospitals, social service agencies, parents, grandparents, the whole community could become involved in stamping out teenage pregnancy."

Organized knowledge is also in evidence as a political force. A veritable vatican for the propagation of public health has selectively mobilized, funded, and promoted physicians, researchers, and even ethicists in support of the health priorities suggested in the Derzon memo.

For over a decade the organized medical profession has been drawn into the whole area of "life" issues, of which the adolescent pregnancy problem is a part. These are the issues that are beginning to creep into the family life education area. In what has frequently been interpreted as a "call to action" (see insert) an editorial in the 1970 *California Medicine* entitled "A New Ethic for Medicine and Society" announced that "new facts and social realities" were usurping "the traditional Judeo-Christian ethic of Western civilization." It said that the medical profession, as it had done in the abortion debate, would likely devise the "semantic gymnastics" to ease the public out of the eroding Judeo-Christian ethic and into a new quality-of-life ethic.

Big Brother (Sister?) Versus the Family

This vigorous direction of change of public values, this cooperation of various school and community sectors to launch it, the resort to public relations and propaganda to popularize it, and the coordinated all-directional strategy to achieve it have been seen before in school health and citizenship crusades and crises. There was, for example, the movement to Americanize and resocialize the new immigrants in the nineteenth century, the Child Health Organization's campaign to uplift the whole nation's health after the disgracefully poor health showing of rejected draftees during World War I, and most of all America's first nationwide movement for health instruction in the public schools, led by the Women's Christian Temperance Union and culminating in Prohibition.

And how are they taking to such help now in the heartland? From North Carolina, where a bill was put forth for "Raising a New Generation," a physician reported, "We are in a battle for our very lives." Comparing notes, Mary Jo Heiland announced in May: "Title VI and its related grants is a Trojan Horse par excellence." And the call went out to all the families in Kansas whose teens might be "targeted":

> If they want our kids, they will have to realize we have been charged by God Himself with their bodies and souls until they are old enough to make their own decisions. They have a fight on their hands . . . a fight we cannot lose. Please join us. God and His power will lead us. We have Him on our side . . . they have all the worldly tools (money, power, influence), but we have it all! The price may be dear, but we will win!

Clearly, what sets the current teen pregnancy campaign apart from all the earlier health crusades in our history is the current lack of consensus both on the very diagnosis of "the problem" and consequently on the appropriate remedies, the extent to which this campaign violates the religious principles and moral sensibilities of a considerable portion of the populace, and finally the extent to which some people are fully aware that their values are being attacked, their natural prerogatives preempted, and their wishes circumvented in the political process.

First, the matter of diagnosis and prescription. In a review of various proposals on the pregnancy problem in *Commonweal* (May 23, 1980), Margaret O'Brien Steinfels observed that only one side of the debate has made its case: that it is a medical problem calling for medical solutions. And she predicted that this public health view would likely win because "it is simple; it is cheap; and it appears to be value-neutral in exhorting improved health and well-being for adolescents."

What is the prospect for this view in the 1980s? The Guttmacher Institute has just come out with another report on the current state of affairs: *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981). Acknowledging that while the birth rate has gone down the abortion rate has gone up, and that abortion is likely to remain a divisive issue as well as an undesirable treatment, the report calls for an infusion of federal funds to more vigorously implement the type of program outlined in the earlier report but placing more emphasis on two aspects: "reaching young people with information about sexuality, fertility control and reproduction before they become sexually active—indeed before they reach puberty—and developing new, improved contraceptive methods."

In its elegantly presented and extensively varied statistical breakdowns, this report shows demographic changes in the total sexual activity-fertility picture since the last report in 1976, but the basic message remains the same: federally funded intervention is needed to prevent unwanted births. The report asserts that "many parents, although willing, are unable to provide accurate information to teenagers about sexuality, reproduction and contraception" and that "a recent government-sponsored study found that 98 percent of parents reported needing help in talking to their teenage children about sex." "Confidentiality" (meaning not informing parents) and belief that the clinic was said to "really care about teenagers" were the top criteria governing teenagers' choice of a family planning clinic. A report from *Advances in Planned Parenthood* (1979) asserts that these programs have been successful "by becoming the best friends in the adult world that many of these students have ever had, and by acknowledging that contraception is both permissible and necessary if the student has made a decision to be sexually active."

And the other side's diagnosis and remedy? Noting that its diversity makes it hard to describe and to mobilize, Margaret O'Brien Steinfels points out that its numbers include "Southern Baptists, John Paul II, some physicians, radical feminists, political conservatives and many Marxists, as well as most parents and pregnant adolescents." Since my own views fall somewhere on this side of the issue and I have been acquainted with at least one each of the above-suggested breeds, I will explain what I know about them and then indicate some points of political philosophy and education in a democracy on which I do think they ultimately come together.

In contrast to the impersonal demographic profile of the teenaged client presented in the Guttmacher Institute reports and implied in the officially value-free bureaucratic and medical solutions supported by federal funds are the perspectives of the many private crisis pregnancy counseling groups that cannot receive Title VI funds because of their refusal to provide or make referrals for abortion. Teachers, counselors, social workers, and parents of adolescents may be interested in a current profile of the pregnant teen, presented at the ninth annual academy (August 1980) of the Alternatives to Abortion International (AAI). Johanna C. Miller, a professional social worker, executive director of the Care and Counseling Center, and director of an educational program for parents and adolescents, stressed the danger in missing the real need of "that girl," for whom pregnancy is only a symptom of what is going on. Lonely, unhappy, and uninterested in school *before* the pregnancy, under unprecedented pressures from the media and peer groups, alienated from or in direct conflict with their families, often only casually involved with the boy friend, and suffering from low self-esteem and lack of affection, these girls are simply thrown back into the same situation after an abortion, and putting them on a steady contraceptive regime doesn't get at many potential underlying troubles either.

A good number of these girls know all there is to know about contraceptives but for complicated reasons (some known, some not known) don't want to use them or don't use them properly. The fact that girls want to conceal their pregnancy from parents, Ms. Miller stressed, indicates that basic communication is missing in the home. Her center, which is affiliated with AAI, regards itself as "a supportive agency to fill the needs of women with unplanned and troubled pregnancies from a total standpoint—physical, psychological, social, and spiritual," and "it is a love-care relationship" it strives to establish. The common features of all these affiliates is the effort to counsel the whole girl as an individual. These affiliates, and doctors and psychiatrists serving as advisors to AAI, also present a harsh profile of the society pressuring teenagers and note the alarming increase in teen suicide over the past few years.

All groups dealing with teen pregnancy, both the Planned Parenthood and

A New Ethic for Medicine and Society

An editorial under this title appeared in *California Medicine* (September 1970). It provides insight into the issues underlying the controversy over family life education, issues that are muted both in the popular debate and in the bulk of testimony at hearings on FLE legislation. The editorial notes that the Judeo-Christian ethic "has always placed great emphasis on the intrinsic worth and equal value of every human life regardless of its stage or condition" and "has been the basis for most of our laws," "much of our social policy," and "a keystone of Western medicine." It "is still clearly dominant, but there is much to suggest that it is being eroded at its core and may eventually even be abandoned."

The editorial announces that "hard choices will have to be made with respect to what is to be preserved and strengthened and what is not." What is impelling this creation of a new ethic is not basic needs but "the use of scarce resources and the various elements which are to make up the quality of life or of living which is to be sought," which is "quite distinctly at variance with the Judeo-Christian ethic and carries serious philosophical, social, economic, and political implications for Western society and perhaps for world society."

This "process of eroding the old ethic and substituting the new . . . may be seen most clearly in changing attitudes toward human abortion," the 1970 editorial continued. "Since the old ethic has not yet been fully displaced, it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent," so the "result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous. . . . The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life" are "necessary because while a new ethic is being accepted the old one has not yet been rejected."

The editorial predicts that the medical profession's role in changing attitudes toward abortion will be a prototype of what is to come since "no other discipline has the knowledge of human nature, human behavior, health, and disease and of what is involved in physical and mental well-being which will be needed" in "what is almost certain to be a biologically oriented world society."

the prolife groups, seem to agree that the family, with its shortcomings or its stresses, is a critical component in the problem. But the approaches they take and the priorities they follow are very different. A Planned Parenthood official in Chicago told me that their counselors make every effort to get the girl to tell her family, perhaps through an intermediary such as a neighborhood mother, but that one-quarter of their clients would not seek their services if they had to inform their parents. Thus this organization has been active in the courts to strike down any legal barriers, including parental notification and informed consent, that get in the way of carrying out its overriding goal of wiping out unwanted pregnancy.

Many of the alternate "prolife" affiliates, in contrast, take personal action to make up for the deficits of families. For instance, the Christian Action Council, the largest Protestant prolife group in the U.S., provides for a "Shepherding Committee" in all its programs, described in its operating manuals as "securing homes for unwed girls and women who are displaced from their homes as a result of their decisions to have their babies." And Birthright groups, as reported in one newsletter, are able to provide help because "they are private and volunteer and obtain homes, care and clothing on the basis that we have a responsibility to help our neighbor in need."

But, as was suggested by one AAI academy speaker who got into this work by taking a pregnant girl into her home, they tend to be confident that "with proper care and counseling, parents can do the right thing." One doctor who has over 30 years of experience with sex education in the schools and who has treated more than 500 unwed mothers—Dr. William A. Lynch, who is also associate editor of *Child and Family* magazine—opposes mandated classroom sex education because he feels it is not helping children communicate with their parents. His approach is to present a program to parents first to help them provide sex education; then, if they wish it, he talks to the children himself.

Any well-trained social worker or teacher is aware of an inherent conflict between *helping* the client in her or his own interest and *controlling* the client in the interest of the collective state. A balance between the two is hard to achieve in a bureaucratized large organization, under contract to the government and under the gun to produce cost-effective results. It is also hard to achieve in any organization having the double goal of individual "health" and population control. Although a congressional survey to serve as the basis for proposed legislation to get government funds for groups such as AAI was in the works this past summer, AAI's own magazine at the same time was making a compelling case against federal funding. "When government subsidizes, it eventually controls," warn AAI cofounders Dr. John F. Hillabrand and Lore Maier. "Each case must be seen as individual and the solution and resolution must therefore be equally unique."

Dissension Within the Ranks

And to get back to the potential patient in the classroom—is there a need for a second opinion? What appears to be a united front of professional groups in support of the new sex education in fact reflects only the prevailing leadership. It is impossible in this space to do more than simply catalog some of the kinds of disagreements there are over educational methods.

In the domain of psychology and psychiatry, for example, there is Rhoda Lorand, well known for advancing the "latency theory," holding that unnaturally stimulated early sexual awareness in grade school children crowds out a natural inclination to learn the academic basics and inhibits both learning and emotional development. Several psychiatrists have joined Lorand, a psychoanalyst, in this perspective, an interpretation that should have an even more acute bearing on sex education if early instruction in birth control is mandated.

A survey of psychiatrists in the May 1979 issue of *Medical Aspects of Human Sexuality*, to cite another point of disagreement, reported that 47 percent of psychiatrists believe that only 25 percent of teenagers aged 16-19 "are capable of making a mature decision to engage in sexual relations" and that 35 percent believe that 25-50 percent are so capable. Since "mature decision making" underlies the new sex education guidelines based on the model promoted by the PTA, this is a challenge to the advisability of mandating a standardized program.

"American medicine is not well," pronounced bioethicist Leon R. Kass in 1975 in *Public Interest*, citing the medical profession's profound confusion over its very goals and warning against succumbing to external pressure to serve the false goals of happiness and civic moral virtue. Kass objected to the World Health Organization's "gerrymandering the definition of health to comprise a 'state of complete physical, mental, and social well-being'"—a definition now inscribed in every new comprehensive health education creed and constituting a kind of civil religion.

There is also much controversy over competing new "healthisms," including the "self" therapies of the human potential movement, now in ascendancy, some say, because of the potential for producing a less costly yield of health. While cat fights over professional turf may be involved, there seems to be sincere concern among both health professionals and back-to-basics educators that the new behavior modification techniques, as carried out by subprofessionals, paraprofessionals, or peers, may constitute risky experimentation on "human guinea pigs," an unwarranted invasion of privacy, and a step toward forced conformity or thought control. The narcissism coming from the cult of "the imperial self" and the whole therapeutic mentality have been variously criticized for having a pernicious effect on human character and the capacity for leadership, a subversive effect on education, and an ultimately destructive effect on culture and tradition.

The statistical models and the socioeconomic assumptions of the Guttmacher Institute's 1976 "Epidemic" report have been challenged by the economist Jacqueline Kasun in *Economics and the Family* (1980). And showing how sex education in specific programs in California constitutes "compulsory 'consciousness raising,'" she debates a sociologist colleague, Paul V. Crosbie, in *Public Interest* (1979-80).

"Public health deserving of that name must recognize that public health is people, individual people, not numbers and statistics," announced Herbert Ratner in 1974 at the United Nations World Population Conference in Bucharest, where there was unfurled an international plan to enlist all the mass communications media including schools to educate school children at all levels in "family life and responsible parenthood." Himself a public health director and clinical professor of family and community medicine, Ratner raised a fundamental question of professional ethics on what he saw as an ominous turn in the direction of public health. Speaking for the U.S. Coalition for LIfe, he said "with the exception of the control of communicable disease, compulsion or coercion for the so-called greater good of society—or manipulation—is to be decried, especially when it is accomplished at the expense of the individual."

And on this matter of ethics turns the entire debate over the new sex education. In 1969, as the government was about to embark on family planning targeted at the poor, Judith Blake, a population control advocate herself, claimed this program "invites charges of genocide, dissemination of dangerous drugs, and subversion of moral standards—ironically, it now appears, for the purpose of 'health' and a dubious welfare goal." Material currently sent out by perhaps the most zealous of the population control groups, Zero Population Growth, itself warns that the use of propaganda and manipulation remains the major issue in the field. As Steven Garland and Robert Trudeau put it in a collection on *Research in the Politics of Population,* the means—be it indoctrination or subtle manipulation—should be considered part of the outcome, for "instead of mere low fertility," they note, you may get "a nation of sheep with low fertility."

"Barriers to Sex Education"

What are the organized groups that are battling the family life education establishment? Who are the "consumers" talking back to the "providers?" As they themselves are well aware, they are frequently labeled right-wing extremists, religious fanatics, bookburners, hysterical rumormongers, Yahoos, bigots, and maybe even closet crazies. More coolly, they have been studied by the government as "barriers," most recently in a national study commissioned by the Center for Disease Control and carried out by Mathtech. The conclusion in this study was that they were, for the most part, merely "citizens' groups," a denomination apparently signaling lack of expertise and lack of a claim to represent any recognized corporate sector of the American polity.

A look at these groups, their activities, and their publications reveals a different picture. As groups they fall into the general categories suggested already—back-to-basics education groups, right-to-life groups, civil libertarian groups opposing the federal government's role in population control and/or behavior modification, and breakaway professional groups taking a "prolife" stand (such as physicians, nurses, and public health workers). And there are grassroots parents' coalitions linking several or all of the issues covered by the other groups. These organizations testify at state- and federal-level hearings, participate in Health Service Agency meetings, report on conferences, and issue periodic newsletters with commentary as well as reportage on the activities they attempt to monitor. And all the indications are that these people can write as well as read without moving their lips. They seem more interested in swapping books than in burning them.

While no single wider political agenda is common to all these groups, they do share some striking similarities. In two states I studied carefully with the state health plans in hand—Kansas and Pennsylvania—and in the second-hand accounts, what has sometimes been called "an orchestrated right-wing agitation" appears on examination to be, instead, a spontaneous and instantaneous reaction to what is perceived to be a frontal attack on the "eroding Judeo-Christian ethic" and the advocacy of an ecological, collectivist ethic. It is the similar assumptions in the new mandated K-12 health guidelines and the similar manner of implementation that are producing these incidents, not so much the contents or rumored contents, as in the sex education battles of a decade ago. It was, in fact, the mere guidelines presented at my children's school—and seeing a whole world view set in concrete, as it were—that got me looking into the whole matter in the first place.

The testimony of Naomi King, president of the Pittsburgh-area Parents' Alliance to Protect Our Children (PAPOC), at hearings for a proposed Plan of Health in 1979 which includes much of the wording of the model PTA guidelines, indicates the common ingredients in all the recent battles over family life education. Mrs. King discerned a consistent theme of specific private and governmental institutions that could be traced back to at least 1959, "attempting to change the social environment and the nature of the family as the basic unit of our society," including behavior change, social change, and changes in the schools as social structures. Community and voluntary organizations were to be used in getting parental acceptance of this health education, which included "family planning" and "more relevant information."

"What does 'more relevant' refer to?" asked Mrs. King. "Information on deviant sexual behavior which to some is an ideal way in controlling population? That these subjects will be taught without moralizing (they already are) and treated as though all things are relative—no right and no wrong? Taught with psychologi-

"Save your breath. Mom already has my deposition."

cal techniques such as sensitivity training, group therapy, peer teaching, according to the theories of Simon, Kohlberg, Dewey or Skinner?"

Mrs. King found that the goals throughout all these plans were the same: "to avert 'births' (not conceptions or fertilizations); limit family size; neutralize parents and traditional religions; put a price tag on human life (cost and benefit analysis) and to control people. . . . We see the familiar words: psychological, social and environmental."

Objecting to the open-ended language, she also saw "a blatant attempt to force 'attitudes and values' of certain individuals in society on others, while talking about freedom of choice." Certainly, maintained Mrs. King, "there can be no freedom after 'behavior change,' 'peer pressure' and 'social change.'"

Echoing often repeated objections I have heard about HSA hearings and meetings in general, Mrs. King called for "adequate" hearings to be held on all plans and bills "designed to reduce the authority of parents, making them only custodians, or designed to change our children's behavior, or enter into areas which invade the rights and privacy of the family." In concluding, she said, "Isn't it a shame that children are not learning how to 'think' and 'reason' but only how to 'behave' according to the behaviorists, population planners and social planners?"

Reactions to federally and state mandated FLE courses all over the country invariably include four basic objections: that the manner of implementing the plans is deceptive and undemocratic, that the guidelines are open to wide interpretation, that the plans embody a relativistic "cost-benefit" survival ethic, and that they involve manipulative teaching techniques.

Randy Engel, director of the U.S. Coalition for Life, testified that the HSA had overstepped its jurisdiction and infringed upon the constitutional rights of parents. An observer in another state found that the pseudo-participatory democracy of the community groups set up to implement the plans "is a means of bypassing elected representatives and vesting power instead in 'citizens committees,'" selected to expedite a centrally initiated and predetermined plan. Joan Janaro, the president of the Pennsylvania Coalition for Basic Education, reports that parents have been complaining for years about their frustration in working on parents' district sex education committees, "and they are literally banging their heads against the wall because the philosophy is already determined. Then the parents are called in. Those who are not aware of what is happening can easily fall into the trap."

Sometimes the state health plans make detailed provisions for a specific type of survival ethics exercise. "The 1981 Plan for the Health of Kansans," with a cover showing three interlocking circles saying "Life Style," "Environment," and "Health System," calls for a new teaching concept called TRIBES—an acronym for "Teaming for Responsibility, Identity, and Belongingness in Education Systems," described "as one way to establish peer groups in a constructive classroom environment for the emotional development of students and the prevention of behavior and health problems." TRIBES, one of its proponents explains, takes advantage of children's dependence upon approval from friends and deliberately uses this peer influence. TRIBES exercises include a forced-choice "lifeboat" exercise in which one must ditch two of seven described people. As Mary Jo Heiland observes, no other options are possible, such as having people take turns hanging out of the boat. She and other parents wonder what kind of effect this might have on nine-year olds.

Propaganda and Totalitarianism

In what sense do the FLE programs constitute propaganda, a term that keeps coming up in the criticism? In *Propaganda*, the French Protestant theologian and political scientist Jacques Ellul offers a cross-cultural perspective on propaganda, viewed as a "sociological phenomenon that results from the totality of forces pressing in upon an individual in his society," paradoxically an inescapable necessity for everyone in contemporary advanced technological societies but also "a menace which threatens the total personality."

In a democracy, in which the will of the people is sacred, propaganda must be developed to tie the citizens to the decisions of the government. Currently, with a crisis of basic values and a relaxation of civic virtues, governments are being forced to reconstruct their nations psychologically and ideologically, claims Ellul. In the family life education programs one sees what Ellul would call integrative *horizontal* propaganda—"exceptionally efficient through its meticulous encirclement of everybody through the effective participation of all present, and through their public declarations of adherence." Ellul explains that this "is peculiarly a system that seems to coincide perfectly with egalitarian societies claiming to be based on the will of the people and calling themselves democratic: each group is composed of persons who are alike, and one actually can formulate the will of such a group." However, he concludes, "all this is ultimately much more stringent and totalitarian than explosive propaganda," the kind of blatant propaganda associated with totalitarian societies in the past. The greatest harm is in not recognizing propaganda and its effects, Ellul concludes, and "propaganda is most effective, most dangerous, and least noticed inside a group."

Why do these "pro-family" groups, thought by many to be part of a wicked reactionary movement, keep seeing propaganda in what so many "liberal" educators assert is uniquely designed to "clarify" thinking and create freely and critically thinking individuals?

Recently, there has been a revision of that bipolar ideological arrangement in which family-church-property lies to the right under "fascism" and everything else to the left under democracy or liberalism. Sociologists and historians, in works such as Christopher Lasch's *Haven in a Harmless World: The Family Besieged* (1977), Jacques Donzelot's *The Policing of Families* (1979), and Onalee McGraw's *The Family, Feminism and the Therapeutic State* (1980), show that the family, which at its strongest should be seen as a positive solution in the evolution of a liberal state, has been weakened not by a defect within but, as Lasch puts it, "because organized interest groups, such as the health and welfare professions and the adolescent peer group, have a stake in promoting their own conceptions of the world, which compete with the family."

Certainly the new sex education, advanced vigorously by "the helping professions," has pitted child against parent, generation against generation, and parent against professional. And "all the technicians of relational life," as Donzelot describes them, use the confession form along with the expertise form. Lasch finds that corruption works as a form of social control, whereby "the dissolution of authority brings not freedom but new forms of domination," a point made by Roland Huntford in his portrait of Sweden, *The New Totalitarians*, in which he shows how state-mandated sexual liberation operates as a counterrevolutionary device and binds the younger generation to the state. Ellul points out that to accomplish this binding of the individual to the state through

Threats to the Family?

In recent literature on the family two thematic concerns continue to grow. They are raised by voices from both the left and the right of the political spectrum. One group of studies sees the family as actually besieged by the so-called helping professions, in collusion with the state, resulting in a loss of personal and political freedom. Many of these works build on theory first elaborated by the sociologist Philip Rieff in his *The Triumph of the Therapeutic: Uses of Faith After Freud* (1966). Rieff analyzes the development of a therapeutic "counterfaith," "with nothing at stake beyond a manipulable sense of well-being;" this "systematic hunting down of all settled convictions represents the anti-cultural predicate upon which all modern personality is being reorganized." In an essay on Wilhelm Reich, he explains how "sex education becomes the main weapon in an ideological war against the family," whose "aim is to divest the parents of their authority." "American children seem to me more than a little Reichian," he observed prophetically in 1966.

A second group of studies foresees radical threats to the very existence of the family in genetic engineering, manipulation, and a revitalized eugenics movement. In showing the relationship of "biopolitics" to other developments, these studies tend to elaborate a principle enunciated by Aldous Huxley in his preface to *Brave New World:* "As political and economic freedom diminishes, sexual freedom tends compensatingly to increase."

The Family Besieged

Jacques Donzelot, *The Policing of Families* (1979). Building on the French historian Michael Foucault's conceptions of the "biopolitical dimension" and "policing" as the aim "to make everything that composes the state serve to strengthen and increase its power, and likewise serve the public welfare," Donzelot shows successive transformations of the family within an emerging social sector of which it has been "both queen and prisoner." In France, as in the United States, mandatory sex education is seen as one tool of all of the "psy" disciplines orbiting around the school /family relation.

Roland Huntford, *The New Totalitarians* (1972). Study of Sweden with a chapter on "The Sexual Branch of Social Engineering" showing sexual liberation as "licensed release." "The citizen must feel that the State cares for him, even in what should be the last resort of privacy."

Christopher Lasch, *Haven in a Heartless World: The Family Besieged* (1977). A social historian's socialist perspective on the shattering impact of the helping professions on the family, in a process beginning in the nineteenth century and culminating in the situation today, in which "the state controls not merely the individual's body but as much of his spirit as it can preempt; not merely his outer but his inner life as well; not merely the public realm but the darkest corners of private life, formerly inaccessible to political domination."

Onalee McGraw, *The Family, Feminism and the Therapeutic State* (1980). A conservative political scientists's perspective on the "undeclared civil war, whose outcome will determine how our society defines itself." She exemplifies the traditional Judeo-Christian view of the family as the core institution that transmits the shared moral values and cultural norms of a moral community, contrasting her perspective with the "humanist-feminist" view in which the family "becomes the lowest administrative unit of the state," with the state as the defining agent that grants freedom to the individual and also the instrument by which the individual is liberated and then supported with therapeutic "coping mechanisms."

Charles Carroll, "The Primary Community—the Family or the State?" *Marriage and Family Newsletter* (1975).

The Family: America's Hope (1979), includes essays such as Michael Novak's "The Family, An Embattled Institution," in which he argues that the family is the "only department of health, education, and welfare that works."

James Hitchcock, "Beyond 1984: Big Brother Versus the Family," a scenario for the year 2000 brought by the new religion of "health;" and "Family Is as Family Does," showing the politics of the White House Conference of Families and a hidden agenda of expanding government programs. Both are in *The Human Life Review* (1980–81).

The Family Annihilated?

Daniel Callahan, *The Tyranny of Survival: And Other Pathologies of Civilized Life* (1973). Speculation by director of Hastings Institute of Society, Ethics and the Life Sciences on the case studies of population control and genetic counseling and engineering, arguing that "the heated outcry for survival, especially survival of the species, is probably as dangerous as that of individualism (its mirror-image)" and that if you "put individualism, technology and an obsession with survival together—that is when the whole house of cards will burn down."

Jacques Ellul, *The Technological Society* (1964). This Protestant theologian and political philosopher foresees a "biocracy" by the year 2000, with population engineering breeding superior human beings, in which "a dictatorship of testtubes rather than a dictatorship of hobnailed boots will not make it any less a dictatorship."

Vance Packard, *The People Shapers* (1977). Whole sections on "Techniques for Controlling Behavior" and "Techniques for Reshaping Man," replete with scholarly references.

Paul Ramsey, *Fabricated Man: The Ethics of Genetic Control* (1970). A Methodist theologian and ethicist's perspectives on the dangerous implications of the self-modification of man, leading to the destruction of human parenthood and perhaps species suicide.

James V. Schall, *Human Dignity and Human Numbers* (1971). A Jesuit theologian and political philosopher's perspective on revolutionary threats to human equality and value posed by efforts to control man "for his own good." Shares Ramsey's view on radical consequences following from separation between recreation and procreation in sexuality.

horizontal, or small group, propaganda, the existing small organic groups—family, village, parish, brotherhood—must first be broken down to create a society that is both mass and atomized.

Could it be that these staunch family-chauvinists sense this pressure? All the new definitions of public health regard the family as simply one system, and "belief systems" (the recurrent phrase in health plans) that hinder "wellness" are to be chucked.

Yet while this pattern might indicate a kind of "social sector fascism" at work, to borrow Donzelot's phrase, what is interesting is that the traditional professions are also under stress from demands of the state, bureaucratization, loss of autonomy, and popular control, leading some among their ranks to warn of the onset of a kind of democratic totalitarianism. It has been the abandonment of the Hippocratic oath by the medical profession which has led to the formation of the World Federation of Doctors Who Respect Human Life. This organization's first newsletter, edited by Dr. Herbert Ratner, asserts that today's doctors are repeating a pattern found in Nazi Germany in pursuing the idea "that the physician's obligation to society transcends his obligation to the individual."

The breakdown of families and other organic intermediate groups, the atomization of individuals, the subjection of the professions to the dictates of the state, the hint of an emergency authorizing intervention for public health—all are classic precursors of totalitarianism. Has the religion of public health been carried too far?

Could it be that the pro-family movement might have something? As Ellul points out, only the organic group is immune to the "psychological contagion" of modern propaganda that hits the individual totally on his own in a malleable environment. Perhaps in some senses the family is not only "a haven in a heartless world" but also a bulwark of freedom.

Denouement

And for the latest reports on family life education from points east and west. . . .

Kansas did not get the Title VI grant, perhaps because of the controversy it provoked, but Kansas Right to Life reports that the program is going forth with reduced funding, with some of the names changed to protect the program. The contested vague definitions and open-ended guidelines were passed in the Pennsylvania State Health Plan 1979-84. Opposing groups in both Kansas and Pennsylvania are urging citizens and legislators to demand precise cost breakdowns to avoid rule by bureaucracy.

At the private school where I first heard the model comprehensive health education guidelines, spelled out at the beginning of this article, I am happy to report that an excellent parent-initiated and democratically developed health program is now in the works—apparently without any constraints from outside funding and without invasive measures to deal with teen pregnancy. Here, at a school founded by John Dewey—no hero to most of the groups described heretofore—parents have drawn up guidelines defining community standards for teenagers which most certainly would gain the approval of most of the groups opposing the new health education. As Sandra Pauley—a heroine to those groups for her leadership in opposing the new sex education in Decatur, Illinois—has so aptly said, "It is time for parents to take back, not just their rights, but their responsibilities."

Two Approaches to Sex Education

Generally speaking, there are two very different approaches to sex education, population education, and family planning. The family-oriented groups emphasize the importance of the private sphere; the public health groups emphasize the importance of schools and government generally.

Family-Oriented Perspective

Alternatives to Abortion International, 1833 W. 8th St., Suite 206, Los Angeles, CA 90057. Publishes quarterly magazine *Heartbeat* and practical how-to guides on setting up crisis pregnancy counseling services.

American Family Institute, 114 Fifth St., SE, Washington, DC 20003. Publishes booklets of scholarly studies.

American Life Lobby, Education Office, P.O. Box 490, Stafford, VA 22554. Publishes monthly newsletter *About Issues,* reporting legislation, federally funded or supported activity, and news in area of "life" issues and sex education. Puts out special publications and news packets on special subjects, such as Title VI.

Catholic Archdiocesan Offices of Education and of Pro-Life Activities. Pamphlets and sex education programs depending on the particular region.

Child and Family, 346 Harrison, Oak Park, IL 60304. A scholarly quarterly which is edited by Herbert Ratner, MD and public health officer.

Christian Action Council, 788 National Press Building, Washington, DC 20045. Puts out a ***Manual on Formation of a Crisis Pregnancy Center*** and operates many centers throughout the country, based in Protestant churches.

Education Update, Heritage Foundation, 513 C Street, NE, Washington, DC 20002. Newsletter edited by Onalee McGraw, reporting on education and family issues.

The Mel Gablers, Educational Research Analysts, P.O. Box 7518, Longview, TX 75607. Monitor textbooks and put out packets on specific topics such as sex education.

Human Life Center, St. John's University, Collegeville, MN 56321. Publishes *Human Life* and other materials.

Human Life Review, Human Life Foundation, Room 540, 150 East 35th St., New York, NY 10016. Quarterly scholarly review including material on family issues.

Rhoda Lorand, Ph.D. and Diplomate in Clinical Psychology, 40 Central Park South, New York, NY 10019. Her opinion is frequently solicited on particular sex education and general health education programs, and her responses sometimes are circulated in newsletters.

Marriage and Family Newsletter, 1331 Fifteenth St., N.W., Calgary, Alberta, Canada T2N 2B7.

National Congress for Educational Excellence, 11524 E. Ricks Circle, Dallas, TX 75230. Bimonthly newspaper *The School Bell,* with meticulous reporting of all federal or quasi-federal activity in the educational do-

But about those guidelines. The same therapeutic perspective toward education, the values clarification language, and the open-ended definitions have apparently stuck in our guidelines. It is the guidelines themselves, I believe, that may be a "Trojan horse" a hollow vehicle ushering in what one reporter has called "the quiet invasion" throughout the K-12 curriculum.

So while I will be able to "dialogue" democratically about my philosophical misgivings at my school, in view of the upcoming National Family Sexuality Education Week in October, promoted by "helping professionals," I would like to sound a warning from Charlotte T. Iserbyt of the Guardians of Education for Maine, which despite most undemocratic dealings by officials was able to crack secret "skills" sessions led by the ever-traveling author of *Barriers to Sex Education* and mount an effective silent protest. The sex educators, she reports, "have retreated into their situation ethics ivory towers to plot their next attack on the yahoos. I suspect they are carefully rereading and underlining the most important sections of . . . *Barriers to Sex Education*, and that we will see cropping up in our small towns advisory councils made up of staunch citizens who belong to the YMCA, Boy Scouts, the local churches, the granges, etc. who are concerned about the increase in illegitimate pregnancies and who will go to our local school boards and community agencies to ask that 'something' be done. Sneaky, sneaky. Don't fall for it." □

main, reflecting a back-to-basics point of view. Also has a library of resource materials on programs, textbooks, and parental action.

Parents' Alliance to Protect Our Children, 44 East Tacoma Avenue, Latrobe, PA 15650. Naomi King is president of the organization and editor of monthly newsletter, which contains reports on legislation and conferences and essays on philosophical issues in education.

Pennsylvania Coalition for Basic Education, 1310 South Negley Ave., Pittsburgh, PA 15217. Joan Janaro, president, periodically publishes booklets and is currently circulating a questionnaire on parents' perspectives on sex education, to form the basis for a program to support parents' direction of the emotional and ethical development of their children.

Primum Non Nocere, Box 508, Oak Park, IL 60303. Newsletter of World Federation of Doctors Who Respect Human Life.

U.S. Coalition for Life, Box 315, Export, PA 15632. This organization opposes any state involvement in population control. It monitors the U.S. government's role nationally and internationally. Operates a legislative research service. Randy Engel, director, puts out *Prolife Reporter*, special reports, and reprints of scholarly material. Engel's detailed testimony on proposed State Health Plan of Pennsylvania available.

Public Health Perspective

Bureau of Health Education, Center for Disease Control (U.S. Public Health Service), 1600 Clifton Rd., NE, Atlanta, GA 30333.

Alan Guttmacher Institute, 360 Park Ave., South, New York, NY 10010. This component of Planned Parenthood is the foremost research, policy analysis, and public education organization in the field. Publishes policy reports described in this article: *11 Million Teenagers: What Can Be Done About the Epidemic of Adolescent Pregnancies in the United States* and *Teenage Pregnancy: The Problem That Hasn't Gone Away*. Also publishes the monthly scholarly journal *Family Planning Perspectives, Family Planning/Population Reporter, Washington Memo*, and special reports.

Institute for Family Research and Education, 760 Ostrom Ave., Syracuse, NY 13210. Publishes *Journal of the Institute for Family Research and Education*.

International Planned Parenthood Federation, Western Hemisphere Region, 105 Madison Ave., New York, NY 10016.

Marriage and Family Life Review, The Hayworth Press, 149 Fifth Ave., New York, NY 10010.

National Alliance for Optional Parenthood, 2010 Massachusetts Ave., NW, Washington, DC 20036. Puts out *Exploring the Parenthood Choice: An Activities Guide for Educators* and other materials.

National Council on Family Relations, 1219 University Ave., SE, Minneapolis, MN 55414. Publishes the scholarly quarterly *Family Relations*.

Planned Parenthood Association/Chicago, Leslie Library, 55 E. Jackson Blvd., Chicago, IL 60604. A comprehensive library with many books, booklets, and journals for sale, as well as catalog of films and other materials for sex education programs. Holdings of the other Planned Parenthood components vary.

Population Reference Bureau, Inc., 1337 Connecticut Ave., NW, Washington, DC 20036. Puts out *PRB Report*, Population Education Materials, and PRB wall charts. Operates Population Information Services (202) 785-4664.

National PTA Comprehensive School/Community Health Education Project, 700 North Rush St., Chicago, IL 60611.

Office of Adolescent Pregnancy Programs, Public Health Service, U.S. Department of Health and Human Services, 200 Independence Ave., SW, Washington, DC 20201.

Zero Population Growth, 1346 Connecticut Ave., NW, Washington, DC 20036. Publishes *Population Education Resources Kit* and *Elementary Population Activities Kit*. This organization is now privately, not federally, funded, and it regards its role as separate from the family planning approach, but its materials may be used in the environmental health component of comprehensive health education, and its materials are disseminated by Planned Parenthood. Publishes monthly newsletter *ZPG National Reporter*.

Mabel C. McKinney-Browning

Materials on Law and the Family

Good new a-v helps you bring the issues to life

The family is a topic of great concern these days. Many good new curriculum materials are focusing on one aspect or another of parents and children. Many of these films are clearly law-related. In others, legal concerns and topics are latent and can easily be brought out in class discussion.

■ ***Ways of the Law: Family Law—Part 1: Domestic Relations; Part 2: Juvenile Justice*** (1980). Secondary 3/4-inch or 1/2-inch video cassettes, 19 minutes each. Purchase: $90 for each part. (Mr. Peter A. Pantsari, Southern Educational Communications Association, P.O. Box 5966, Columbia, SC 29250).

These two cassettes on family law are part of *Ways of the Law*, a series of 15 video cassette programs designed to introduce students to the inner workings of law, its history and the changing nature of law, and "the forces and ideas which bring about changes in our legal system."

The first program, *Domestic Relations*, introduces the viewer to the legal areas which fall under this general term. Pages of a family album unfold to explore such issues as the marriage contract, custody, divorce, adoption, paternity, and separation. Teenage marriage and family court are also realistically dealt with in this program.

The second family law program, *Juvenile Justice*, examines the family court, including laws and practices designed to protect the rights of young offenders. The purpose of the family court for juveniles is to determine "the best interest of the child," so the proceedings aren't adversarial and the family court judge, acting on behalf of the juvenile, serves as both judge and jury.

The programs are accompanied by a teachers' guide which provides teachers with pre- and post-telecast activities, suggested court cases, and a supplementary materials listing. These programs provide an interesting introduction to the subject of family law.

■ ***Violence in the Family*** (1978). Secondary. Color filmstrip program, tape cassettes, 44 minutes (entire program). Purchase: $149. (Human Relations Media, 175 Tompkins Avenue, Pleasantville, NY 10570).

Violence in the Family is a four-part filmstrip series designed to "increase the viewer's awareness of, and sensitivity to, the problem of family violence and to acquaint viewers with some of the measures that are being taken to deal with it."

Part one, *The Dynamics of Family Violence* (10 minutes), examines the ideal family model, contrasting it with statistical evidence of violence in actual families. Violence, the film emphasizes, is a part of the home life of many American families.

Part two, *Child Abuse and Neglect* (12 minutes), introduces the viewer to several abused or neglected children. These children are not all from poor, lower class backgrounds, nor are the parents—the abusers—psychotic. What is true is that abused children are likely to suffer severe emotional and physical damage. Is child abuse a new phenomenon? Hardly. This filmstrip looks at the long historical and social tradition of child abuse. It closes with a look at programs and court policies designed to deter, if not eradicate, future abuse cases.

Part three, *Battered Wives* (12 minutes), reports on the many cases of wife abuse which take place. Wife beating stems from the historical position of women as subservient and inferior to their husbands. Many abused wives find they have no one to report such violence to because of laws and societal structures prohibiting action against the husband. In recent years, shelters for "battered wives" have found their way into our communities. There women can find shelter and protection from their husbands.

Part four, *Adolescent Abuse* (10 minutes), examines physical, emotional, and sexual brutality perpetrated on adolescents by their parents. This is major cause of teenage runaways. It may result from a family's reaction to the changes going on in the adolescent. Stress and tension created by the parents' inability to adjust to their maturing child often result in acts of violence toward the child. The filmstrip concludes with a examination of services available to adolescent abuse victims.

While violence is not usually thought of as a characteristic of family life, this filmstrip series helps us re-evaluate relationships within families. An excellent study guide accompanies this program.

■ ***Tap Dance Kid*** (1978). Middle and Upper Elementary, Junior High. 16 mm., color/sound film, 48 minutes (full version), 33 minutes (edited version). Purchase: $625 (full), $450 (edited); Rental: $50 (full), $40 (edited). (Learning Corporation of America, 1350 Avenue of the Americas, New York, NY 10019).

1. "If adults made laws to make children happy, the world would be a much better place to live in."
2. "Childhood has always been referred to as a happy, carefree time, but it is really a living torture."
3. "Children should be taken seriously because they are human beings like everyone else, except in many cases smarter."

These are the three tenets of the "Children's Rights Crusade" dramatized in this film by the dilemma of eight-year-old Willie Sheridan. His prime ambition is to be a professional tap dancer like his Uncle Dipsey. His father's prime ambition is to steer Willie away from tap dancing and to some more conventional activity.

Willie's twelve-year-old sister Emma is a rebel at heart. She's president of the "Children's Rights Crusade" and a student of law. She sees it a violation of Willie's rights if he is forbidden to audition for a part in his Uncle Dipsey's summer stock musical.

She and other members of the "crusade" think Willie's problem will make an excellent test case. She decides to fight her brother's cause through the "courts," taking her legal

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appeals to her lawyer father, who lays down the antidancing family law. Emma then decides to circumvent the law, and sneaks Willie out of the house and to the theatre. Found out, Emma takes her angry parents to the theatre, where they see that Willie is talented and serious about his dancing ability.

This excellent film explores a number of important family issues. These include the rights of children to make decisions concerning their future, the manner in which parents deal with the relative importance of children's concerns, and the roles which parents designate as suitable for boys and girls. A study guide accompanies the film.

■ *Luke Was There* (1976). Middle and Upper Elementary. 16 mm., color/sound film, 32 minutes. Purchase: $450, rental: $40. (Learning Corporation of America, 1350 Avenue of the Americas, New York, NY 10019).

What happens to a child who is suddenly left alone in a large city? This film tells of a young boy, Julius, left in just such a circumstance. His mother is hospitalized, and there is no adult to take guardianship of Julius. He is taken to a children's shelter, where frightened, lonely, and confused he is rebellious and uncommunicative. One of the counselors at the shelter, Luke, works to win Julius's trust.

Eventually Julius becomes more at ease in the shelter, depending on Luke for guidance and making friends with his roommate, Max. But Max teaches Julius how to shoplift and get money from strangers. "Harmless" fun until Max cajoles Julius, angry with and disappointed in his friend Luke, into helping him snatch a lady's purse.

Afraid to return to the shelter, Julius wanders through a train station where he encounters a little boy, Ricardo, who has been abandoned there. Ricardo attaches himself to Julius, who now finds himself responsible for another person's well-being. Having no place else to go, Julius and Ricardo return to the children's shelter. Luke welcomes them and shows Julius that he is always his friend, even when they are not together.

This film explores the dependency that children can come to feel for important adults in their lives, as well as society's responsibility for the care of the young and the maintenance of the family. Such family law issues as child custody and guardianship, as well as the efficacy of such institutions as a children's shelter, may be discussed after viewing this film. A study guide accompanies the film.

■ *Portrait of a Vandal* (1978). Upper Elementary, Junior High, Parent Groups. 16 mm., color/sound film, 12½ minutes. Purchase: $240, rental: $48. (Centron Films, 1621 West Ninth Street, Lawrence, KA 66044).

"A kid angry with a teacher throws a rock at a school window. A girl ignores the boys in her class, and they decide to destroy her bike." From such simplistic motives arise the horrendous acts of vandalism which plague our schools and sometimes our homes. This short film allows the viewer to witness an act of vandalism. Hardly the work of criminals, vandalism is simply the work of people out of control.

How does it get started? Who gets hurt? What are the consequences, legal and social? Who gets involved: families, police, and victims? This film provides answers to these critical questions. A study guide is available for use with the film.

■ *The Runaway Problem (Edition II)* (1980). Junior High, Secondary, Parent Groups. 16 mm., color/sound film, 12½ minutes. Purchase: $290, rental: $58. (Centron Films, 1621 West Ninth Street, Lawrence, KA 66044).

When kids run away, they are trying to "find their dreams and escape the hard times of home." Thus begins this short documentary on a pervasive family problem—runaways. Where do they go? How do they live? Are they frightened, happy, sad, disturbed? These are the questions of parents who have suffered the loss of a child through this chronic social problem.

On the street, the kids learn the true meaning of independence as they are exposed to a raw and terrifying existence. No particular age or economic status characterizes the runaway. Only the destruction of a family relationship seems to be a common thread.

A heart-rending film, this documentary, which is accompanied by a study guide, introduces the problem and offers no solution. It does, however, identify the "Runaway Hotline" as a source of help for some, solace for others. This nationwide hotline can be used for parents to send messages to runaway children, and for runaways to contact parents. It is a service for families who can't keep in touch any other way.

■ *Surviving Your Parents' Divorce: A Teenager's Guide* (1980). Secondary. Color filmstrip program, tape cassettes or 12" LP records, 26 minutes (entire program). Purchase: $79. (Sunburst Communications, Department TG, 39 Washington Avenue, Pleasantville, NY 10570).

"Some 12 million children under the age of 18 have parents who are divorced. . . . Close to 40% of all children now under 18 will witness the breakup of their parents' marriages before they themselves reach adulthood." These surprising figures suggest that in every classroom there are children going through the breakup of a marriage and the restructuring of a family.

In this two-part program—*The First Year* (12 minutes) and the *The Long Run* (14 minutes)—viewers explore the reactions of children to their parents' divorce. While the film focuses mostly on teenagers, the feelings of younger children are also explored. Part one examines the period immediately following the divorce. It looks at the actions and reactions of both parents and children. Part two identifies common problems experienced by teenagers living with a single parent. How do teenagers cope with their parents' new relationships? Are custody arrangements as workable in practice as they are in design? Can teenagers be exected to view their parents as individuals, respecting their unique personalities and needs?

These questions are answered with clarity and depth within this series. The accompanying study guide will help teachers to maximize this excellent program's impact on students.

■ *Two Families: African and American* (1974). Upper Elementary, Junior High, Secondary. 16 mm., color/sound film, 22 minutes. Purchase: $315, rental: $30. (Learning Corporation of America, 1350 Avenue of the Americas, New York, NY 10019).

What is family? This film examines the family structure from two culturally diverse perspectives—African and American.

The viewer is introduced first to the extended family of an African boy, Chintu. In this family, age and sex determine a harmonious division of work, property, and responsibility. Males play the dominant and powerful role. Decisions concerning division of property, marriage, and work are made by the male head of the family. Emphasis in this family is on working together for the good of the entire family unit.

By way of contrast, the viewer is introduced to an American family through its young son, Todd. His is a nuclear family consisting of mother, father, and offspring. The film explores the family relationship of these individuals living in an urban setting. The film explores such issues as the working mother, the "over-committed" father, and children expected to take on certain "family" responsibilities because of these work arrangements.

This film provides an excellent introduction to the study of family law. Each family demonstrates that environment, as well as cultural tradition, contributes to the formation of this basic institution. Discussions arising from this film may include the legal roles and responsibilities of men and women in the family, the legal bountaries of the marriage contract, and laws which govern property ownership. A study guide accompanies the film.

■ *My Father Sun-Sun Johnson* (1977). Junior High, Secondary. 16 mm., color/sound film, 28 minutes. Purchase: $385, rental: $35. (Learning Corporation of America, 1350 Avenue of the Americas, New York, NY 10019).

Sun-Sun Johnson was a man who had everything. He was a financial success; he had a nice family; he was well-liked and respected by the members of the community. But he had one problem—he was a chronic gambler. He gambled away his property, and lost the respect of his wife and members of the community. He retained, however, his self-respect and the devotion and loyalty of his son.

This film opens as Sun-Sun turns over the deed to his home to his business rival as payment for debts. He retains a small piece of property some distance from town which he and his son will farm. The initial embarrassment of the son at this dramatic change in family circumstances eventually gives way to a new harmony, and the new family structure—father and son—becomes stronger. Conflict between the newly divorced parents and the eventual remarriage of the mother naturally affect the son, but the viewer sees the son again in maturity as he deals with these intense family issues.

This film is an excellent representation of the strong feelings—both negative and positive—which can exist between family members. It also explores many of the problems faced by children of divorced parents. A study guide accompanies this film. □

Strategies

(continued from page 13)

would be legally married and would need to obtain a divorce from a court before they could marry someone else. If they live in a state that does not recognize common-law marriage, they are not legally married and are free to move out and marry someone else whenever they desire.

The time required to create a valid common-law marriage varies from state to state. In some states, a couple may be considered married after a short period of time (maybe only a day). Other states require a longer period of time, such as a year or more.

Also discuss with students whether they believe common-law marriage should be legal. Does it benefit or harm society?

Students may ask whether the "Lee Marvin situation," whereby two people live together and do not marry, constitutes a common-law marriage. Usually, the answer is that it does not, either because the couple resides in a state which does not recognize common-law marriage (see list above) or, if they do, because they still do not fully meet the legal requirements for a valid common-law marriage, discussed above. Note, however, that California and several other states have recognized contracts to share property between unmarried couples when it was proved that promises were actually made and relied on by both parties. However, most states refuse to declare such living arrangements or such contracts legal. To do so, many courts say, would be recognizing the crimes of "adultery" or "cohabitation" or otherwise condoning premarital sex.

Family Law Materials

For Classroom Use

Civil Justice, Constitutional Rights Foundation (CRF). Published by Scholastic Book Services, 1978. See chapter on family law and discussion of family law in teachers manual. Family law issues also covered in their quarterly *Bill of Rights in Action* and in *Kids in Crisis* (secondary simulation). Contact CRF, 1510 Cotner Avenue, Los Angeles, California 90025 (213) 473-5091.

Authority, Privacy, Justice, Diversity and Freedom, Law in a Free Society. All of these K-12 curriculum units include some family law issues. Contact Law in a Free Society, 5115 Douglas Fir Drive, Calabasas, California 91302 (213) 340-9320.

Street Law: A Course in Practical Law, National Street Law Institute. Second Edition published by West Publishing Co., 1980. See chapter on family law in this secondary text and corresponding chapter in teachers manual. Also available from the National Street Law Institute are family law mock trials and a packet of family law teaching strategies. Contact NSLI, 605 G Street, N.W., Washington, D.C. 20001 (202) 624-8217.

Filmstrips

"Child Abuse: America's Hidden Epidemic." Available from Social Studies School Service, 10000 Culver Boulevard, Department L1, P.O. Box 802, Culver City, California 90230.

"Coming of Age in the Seventies: New Careers, New Values, and New Life Styles." Available from N.Y. Times Publishing Co., Catalog Department Bk, 357 Adams Street, Bedford Hills, N.Y. 10507.

"Violence in the Home: An American Nightmare." Available from N.Y. Times Publishing Co., Catalog Department Bk, 357 Adams Street, Bedford Hills, N.Y. 10507.

"Welfare: Who Benefits, Who Pays?" Available from N.Y. Times Publishing Co., Catalog Department Bk, 357 Adams Street, Bedford Hills, N.Y. 10507.

"Who Gets Baby Martha, An Exercise in Law and Family Relations." Available from Social Studies School Service, 10000 Culver Boulevard, Department L1, P.O. Box 802, Culver

Legal Resources

Children's Legal Rights Journal, Children's Legal Rights Information Program (CLR). Periodical providing information to professionals. Contact CLR, 2008 Hillyer Place, N.W., Washington, D.C. 20009.

Family Law, Cases and Materials, by Judith Areen (Foundation Press, 1978). An excellent compilation of the leading family law cases.

Family Law in a Nutshell, by Harry Krause (West Publishing Co., 1977). Good summary of law in this area.

Strategy

4.

Hypothetical on Financial Responsibilities

If one of the goals of teaching about marriage is to enable students to be better equipped to make their own future marriages work, we must consider problems which are likely to occur during a marriage. Such problems often arise over what the responsibilities are of each spouse and over arguments regarding decisions in the marriage.

The present trend in the law is to require husbands and wives to support one another in accordance with their respective needs and abilities. As a result, many states now require both spouses to pay for necessary family items purchased by either of them. However, a number of states retain the traditional rule that only the husband has a legal duty to provide his wife with food, clothing, shelter, medical care, and other necessaries of family life. If the husband fails to provide such essentials, the wife can purchase the necessary items and make her husband pay for them. At the same time, the wife has no legal duty to pay her husband's bills.

In addition to the basic necessities, some courts have required the husband to maintain the family in accordance with his economic position. In general, however, a woman could not obligate her husband to pay for luxury items bought without his knowledge.

Ask students to apply the above stated law to the following hypothetical. Bryan and Kelly have been married for five years. Both work, and each earns about $12,000 per year. They are having problems paying their bills and often fight over money. Kelly goes shopping and charges groceries, clothes for the children, and a stereo costing over $400.

Bryan gets angry and tells Kelly he is not paying for anything.

a. Is Bryan responsible for the debts of his wife?

b. Suppose Bryan was out of work and charged these items without telling his wife. Would she have to pay?

c. Do you agree or disagree with the following statement? "Husbands should be required to support their wives, but wives should not have to support their husbands." Explain your answer.

Answers to the above are as follows:

a. Bryan would probably be responsible for the groceries and clothes for the children since most states retain the traditional rule that it is the husband's legal duty to provide his wife and children with necessities such as food and clothing. Bryan would probably not be required to pay for the stereo since it could be considered a luxury rather than a necessity item.

b. This answer depends on the state. In most states, Kelly would not have to pay for these items. However the trend in many states is toward requiring spouses to support each other on an equal basis according to their needs.

c. This question gives students an opportunity to debate this important current issue. Students who support the proposition might argue that: (1) a man is more suited to earning money while a woman is more suited to taking care of the house and children, or (2) this reflects the reality that men usually hold higher-paying jobs than women.

Students who oppose the statement may argue that the traditional view of family roles is not supported by facts and that changing economic and family roles require a change in the law. Therefore, husbands and wives should share the same burden of responsibility. Students could also consider how the Equal Rights Amendment, if ratified, would affect the law in this regard.

Strategy 5.

Decisions in a Marriage

Married life involves many decisions and responsibilities. It calls for cooperation, sharing, and a division of labor. Just how marital responsibilities are divided depends upon the individual couple. In most marriages husbands and wives make important decisions based on what they work out between themselves. Historically, however, the law gave the husband most of the decision-making authority within the family.

Today, the roles of women and men are changing both inside and outside of marriage. There is now a greater sharing of marital roles and responsibilities. Employment outside of the home has given many women new status and independence. Likewise, men are now more likely to share household duties and child care. Despite the changes, many laws and social customs remain that can have a legal and practical impact on marriage.

The following is an opinion poll which can be conducted by asking students to indicate their opinion on each of the statements below.

Strongly Agree	Agree	Don't Know	Disagree	Strongly Disagree

a. Wives should take care of the house and children, and husbands should provide the family income.

b. When a woman gets married, she should keep her own name and not change it to that of her husband.

c. Married women should work only if they have no young children.

d. As the head of the household, the husband should have the sole right to choose where the family will live.

e. Husbands and wives should own everything equally, regardless of who earns the income or pays for the goods.

There are no "right" answers to this exercise; rather, it should be used to clarify students' attitudes. The teacher should not try to impose his or her own view on the class, but should compile the results into a class profile. What do the results mean? If most of the class agree with a, c, and d and disagree with b and e, does this reflect a traditional view of the role of men and women in marriage? Is this good or bad for society? Why do the students think the way they do? Can the class analyze the results of the opinion poll?

The teacher can also divide the students into small groups, with each group discussing one of the statements in the opinion poll. These groups might be formed of students who all voted the same way, and the groups could then make a list of reasons why they voted the way they did for later presentation to the class. This might result in a class debate between representatives of groups with opposing points of view. Groups might also be formed with one-half the students in each group having voted opposite to the other half. Following a discussion of the issue, the group or class could be repolled to ascertain if changes in attitudes have occurred.

"How d'you expect me to plead 'guilty' or 'not guilty' when I haven't heard the evidence?"

Strategy 6.

Negotiating a Separation Agreement

Divorce is a major topic, with many issues for consideration by teachers and students. Included should be why people get divorced, how can they work to prevent this from happening, and, if a couple has decided a divorce is necessary, what steps do they then take to bring about a fair and equitable settlement for themselves and their children.

Because of space limitation in this article, I will limit my focus to property settlements. This will provide the opportunity to illustrate how role playing can be used effectively in teaching family law and at the same time present teachers with a strategy which can be used to deal with the very important question of whether the courts and the adversarial system are the best methods for dealing with family disputes.

A separation agreement is a legal contract. It will be enforced in court unless the judge decides it was unfair or did not provide adequately for the children. If the couple wishes, they can go to court and make this agreement part of what may be called a legal separation or limited divorce. This may be useful because it will make it easier to require a spouse to pay money promised under a separation agreement.

Whether or not a couple needs to have lawyers involved depends on the circumstances. In a simple situation with little or no property or with no children involved, lawyers might not be needed. But if the separation is more complicated, involving children or division of property, such as a house, cars, or joint bank accounts, each spouse should be represented by an attorney.

Ask the students to read this fact situation. Bill and Rachel were married at age 21. One year later they had a baby. After two years of marriage they find themselves constantly fighting and are generally miserable. They are not sure they want a divorce, but both think it might be better to live apart for a while. Bill works as an auto mechanic and brings home $1,000 a month. Rachel used to work as a teller in a local bank, making $800 a month, but has not worked since having a child. They rent an apartment for $300 a month, and they own the following property: $500 in a savings account; a car worth $1,500; and furniture and appliances.

A roleplay can be conducted in front of the entire class or, to maximize participation, small groups can be formed and each can roleplay the situation. Whichever is done, each roleplaying group should have four students assigned to play the roles of husband, wife, and an attorney for each. Each spouse and his or her attorney should meet for a few minutes beforehand to discuss what they would like the attorney to attempt to achieve in each negotiation, and a student should be assigned to be a reporter and to record all decisions which are agreed upon.

Negotiation Boxscore

	GROUP					
ISSUES DECIDED	#1	#2	#3	#4	#5	#6
Alimony: Who Pays?						
Whom does the child live with?						
Who pays child support?						
Will wife work?						
Who lives in apartment, who moves?						
Who gets $500 in savings acct.?						
Who gets the car and appliances?						

The chart in the box can be used by these reporters and also can be drawn on the board by the teacher after the roleplaying is over to illustrate differing decisions made by the groups and to form the basis of a discussion as to why the decisions varied.

Following the roleplay you may wish to debrief by asking:

1. Did both sides negotiate fairly? Was the result fair?
2. What role did the attorneys play? Was this a useful role?
3. What techniques were used in the negotiation?
4. Was the roleplay realistic?
5. What was the tone of the negotiation?
6. How could the negotiation have been conducted differently to improve the way it was conducted or its result?

This roleplay is designed to sensitize students to the physically, emotionally, and financially painful process of separation and divorce. It also should make students ask themselves such questions as what would I do if I was in this situation, is this process of negotiation necessary, could it be done a different way, and how can the legal system be improved?

Through this exercise, students are provided the opportunity to experience the legal system firsthand. Although it is simulation, divorce attorneys who have observed students in this roleplay have commented on how close to reality the negotiations seem to be, and such attorneys have proved to be very useful as classroom resource people in debriefing the roleplay.

Conclusion

The above strategies have been designed to address the overall goals of law-related education as well as the specific objectives of family law. Teachers who integrate family law into their law-related curriculum—whether it be in civics, government, social problems, sociology, history, or a separate law-related education course—will find that this may be the most teachable area of law. It also may be the area which best achieves the law-related education goals of providing an understanding of how the law affects our daily lives, creating awareness of current issues and controversies, encouraging citizen participation in our legal system, and improving students' basic skills, including critical thinking, reasoning, communication, observation and problem solving, and bringing about a greater sense of justice in our society. ☐

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FPA: Yes

(continued from page 20)

that the Court could hear no appeals on the subject, whether from state courts or from lower federal courts (see *Ex parte McCardle*, 19 L. Ed. 264 [1868], upholding this principle with respect to Reconstruction legislation). At the same time, Congress could withdraw from lower federal courts the power to hear prayer cases. There is ample precedent for such withdrawals of jurisdiction in labor relations and other areas.

A final comment is in order on the practical effect of the withdrawal of Supreme Court and lower federal court jurisdiction in school prayer cases. Unlike a constitutional amendment, such a withdrawal would not reverse the Supreme Court's rulings on school prayer. Presumably, at least some state courts would strictly follow those decisions as the last authoritative Supreme Court expression on the subject. But there would at least be no opportunity for further extensions of its errors by the Court. And in cases where supporters of the school prayer decisions sought to extend them, for example, to outlaw chaplains in the armed forces, those state courts would be apt to show a greater measure of prudence than the Supreme Court has sometimes shown on the subject.

It may be expected, however, that some state courts would openly disregard the Supreme Court precedents and would decide in favor of school prayer once the prospect of reversal by the Supreme Court has been removed. But that result would not be such a terrible thing.

It must be remembered that we are talking about Supreme Court decisions which, in the judgment of the elected representatives of the people and the President (or of 2/3 of the Congress overriding his veto), would appear so erroneous as to be virtually usurpations. It would be a healthful corrective of those decisions for the people to trust for a time in the state courts, upon which the framers of the Constitution primarily relied, and to be protected against further excesses in that area on the part of the Court. In the process, the Court might learn a salutary lesson so that future excursions by the Court beyond its proper bounds would be avoided.

Finally, because a statute rather than a constitutional amendment is involved, the Court's jurisdiction could readily be restored should the need for it become apparent. In any event, S. 450 would withdraw jurisdiction only in cases involving "voluntary" prayer. It would leave untouched the power of the federal courts to deal with cases involving the most important rights protected by the free exercise of religion clause of the First Amendment.

In his First Inaugural Address, President Abraham Lincoln warned that "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal." The Supreme Court school prayer decisions are a distortion of the First Amendment in a matter of substantial importance. It is within the power—and it is the duty—of Congress to remedy this wrong.

The withdrawal of jurisdiction, as provided in the proposed act, would be a measured and appropriate response. It would be preferable to a constitutional amendment in that it would have no permanent impact on the Constitution. If experience showed it to be unwise, it could be readily repealed by a statute. But it would restore the balance of governmental powers. And, most important, it would restore to the people their right, under the establishment clause of the First Amendment, to affirm voluntarily that in fact this nation is "under God."

FPA: No

(continued from page 21)

courts and from the appellate jurisdiction of the Supreme Court.

It has been a very long time since Congress tampered with the appellate jurisdiction of the Supreme Court. It is almost equally rare for Congress to withdraw matters from the jurisdiction of the lower federal courts based on the specific subject involved in the litigation. The act's provisions in this regard represent a constitutional oddity. Moreover, the exclusion only of cases involving *voluntary* prayer would provide some entertaining problems in interpreting state law to determine whether federal courts have jurisdiction. We certainly can expect the word "voluntary" to receive a thorough going-over!

In a more serious vein, it would be a dangerous precedent to deprive the federal courts, especially the Supreme Court, of jurisdiction over narrow subject-matter areas. Assuming that Congress has the constitutional power to do so, Section 106 is an opening for further piecemeal and politically-motivated destruction of federal judicial power. The provision reveals a deep anger and abiding mistrust toward all federal courts and toward the nation's highest court in particular. Seen in that light, Section 106 is quite disturbing. It is a somewhat cynical attack on those courts and on the uniform interpretation given in recent years to the First Amendment's establishment clause.

Without the Supreme Court at the top of the judicial structure, each state court would in practice be free to follow or ignore current precedents on voluntary school prayer. This would mean, as time passed, a patchwork quilt of diverse decisions by state courts. After a few years, there might well be not one but fifty meanings of the establishment clause. Is this a desirable way to correct the 'errors' of the Supreme Court? Would it not be more honest for those who seek to reverse the school prayer decisions to try to do so by altering the First Amendment?

In closing, it must be said that it *would*, indeed, be a terrible thing to ignore the Supreme Court's rulings in future prayer cases. It is a terrible thing even if the court's rulings are "errors." The concept of error by the highest court in the land is not an easy one to make meaningful. We are a nation of laws; the Constitution is the supreme law of the land. The Court has the final say on the meaning of the Constitution. It follows that an error by the Court on a matter of constitutional interpretation is by definition an error in the Constitution. As such, it can be corrected only by changing the Constitution. In practice, of course, it can also be corrected by the Supreme Court itself. It is, however, *not* within the power of Congress alone to make such corrections, and it would be a misuse of judicial power for state courts to ignore or overrule Supreme Court interpretations of the First Amendment.

America has a pluralistic, diverse society. In such a nation, much mutual tolerance is required. Many members of our society disagree with the moral strictures which underlie the Family Protection Act. Many agree strongly. It would be destructive to coerce conformity with either body of opinion. Autonomy and personal responsibility, not coerced conformity, are the values which should be protected in order to assure the family's integrity and survival as the fundamental social unit. ☐

Court Briefs

(continued from page 35)

Undoubtedly, both sides of the abortion debate will mobilize their forces in response to this Court decision. Anti-abortion forces will apply pressure on other state legislatures to enact similar legislation, while pro-abortion forces will argue that such statutes foster unsafe and illegal abortions.

The New York Times recently cited a study by the Allen Guttmacher Institute which reveals the hard statistics of teenage pregnancy. The study estimates that teen-agers constitute 18 percent of sexually active women, but have 46 percent of the illegitimate births and 31 percent of all abortions in this country. Whatever one's position on the abortion issue, these statistics are reason for concern. Whether legislative and judicial pronouncements favoring pro-life or pro-choice forces will reverse this troubling trend remains an open question.

Religious Scruples Protected

"Courts are not arbiters of scriptural interpretation." So spoke the Court as it upheld the claim of a Jehovah's Witness for unemployment benefits after he quit his job rather than make turrets for military tanks.

The worker, Eddie Thomas, was transferred to the turret department after his employer closed the roll foundry in which he was working. Upon learning that all the remaining departments also produced weaponry, Thomas quit and applied for unemployment compensation. The case, *Thomas v. Indiana Employment Security Division*, (49 L.W. 4341) was decided on April 6, 1981.

The 8-1 decision reversed rulings by the Indiana Supreme Court which held that the free exercise of religion clause of the First Amendment did not apply because Thomas' decision was "personal-philosophical" rather than religious in nature. The Indiana high court also held that if benefits were paid to someone who quit work because of religious convictions, the state would be fostering religion and thus violating the First Amendment's establishment clause.

Writing for the majority, Justice Burger devoted most of his attention to the free exercise issues. "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," Burger noted. Nor is it essential that all of the followers of that creed share a particular belief or interpretation. This latter statement was particularly important to Thomas' case since the state court had stressed that a co-worker and fellow Jehovah's Witness had no qualms about working in the tank turret department.

Having established Thomas' free exercise claim, Burger next held that the admittedly neutral Indiana legislation, which required "good cause" in leaving one's job as a prerequisite to receiving unemployment compensation, unduly burdened Thomas' free exercise rights. He wrote:

> Where the state conditions receipt of an important (public) benefit upon conduct prescribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon the free exercise is nonetheless substantial.

The Indiana high court had held that voluntary unemployment was not covered under the statute, and that "good cause which justifies involuntary unemployment must be job-related and objective in character."

Burger also rejected the contention that paying benefits to Thomas would "involve the state in fostering a religious faith." Quoting an earlier ruling of the Court, Burger argued that this extension of unemployment benefits "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."

The lone dissenter, Justice Rehnquist, argued that the Court's ruling only "adds mud to the already muddied waters of First Amendment jurisprudence." The Court has gone "far astray" in interpreting the free exercise and establishment clauses, Rehnquist wrote, and in exacerbating the tension between the two clauses.

Management Wins, Loses

Among the colorful quotes from Yogi Berra is the admonition, "The game's not over 'til it's over." An interstate freight carrier discovered the shattering truth of this Berraism when the Supreme Court upheld a worker's right to sue for violations of the minimum wage law, even after management prevailed in an arbitration hearing. The 8-1 decision, ***Barrentine v. Arkansas-Best Freight System***, 49 L.W. 4347, was decided on April 7, 1981.

The case arose when Barrentine and some fellow truckdrivers became upset because they were not compensated by Arkansas-Best for the federally mandated pretrip inspections they were conducting. In accordance with a collective-bargaining agreement between Arkansas-Best and their union, the truckdrivers filed a grievance, pointing to a contract provision requiring Arkansas-Best to compensate drivers "for all time spent in (its) service." The grievance committee, composed of three representatives each from Arkansas-Best and the union, rejected the grievance without explanation.

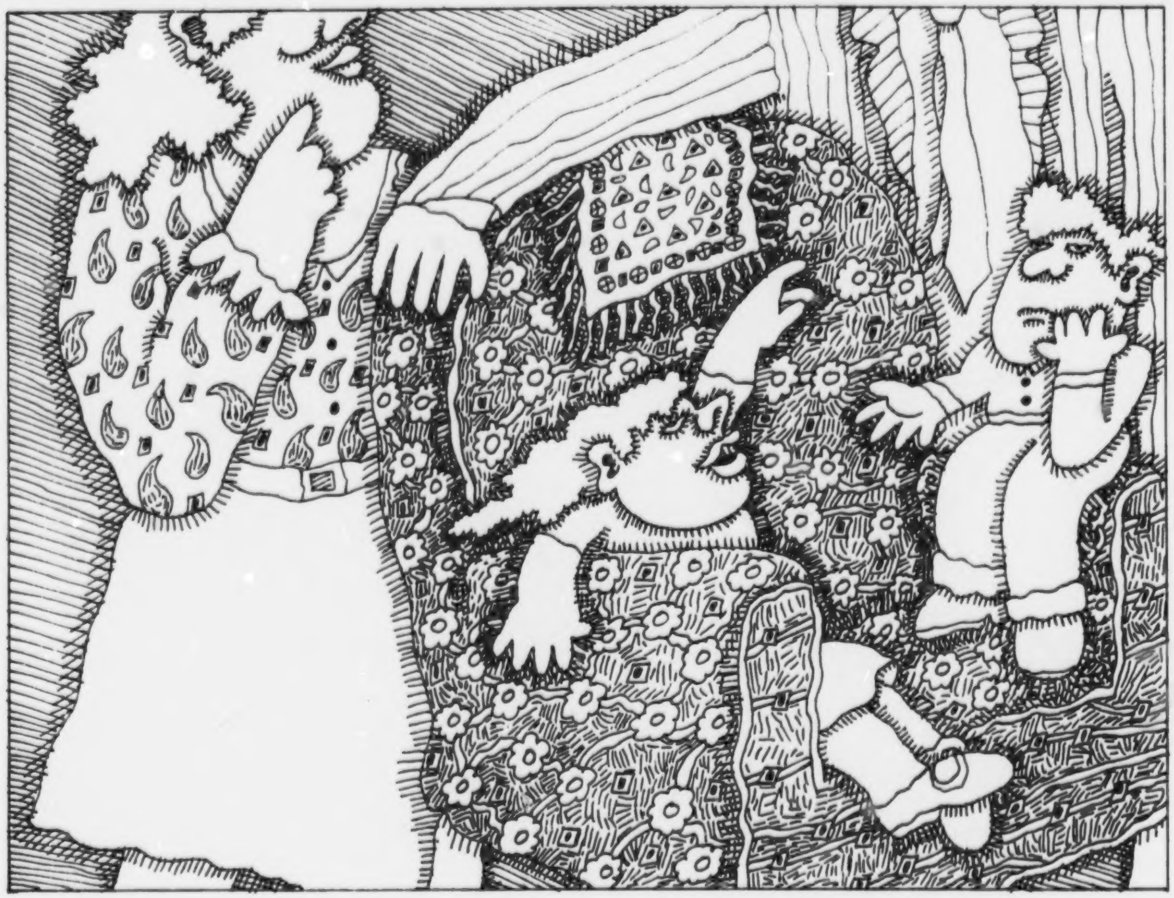
The truck drivers then filed suit in federal court, alleging their rights to compensation under the Fair Labor Standards Act (FLSA), and contending the union breached its duty of fair representation. Management prevailed in both the district and appeals courts before the Supreme Court reversed.

Justice Brennan, writing for the seven-judge majority, noted the tension between two important national labor policies: the Labor-Management Relations Act, which promotes negotiated "terms and conditions of employment through the collective-bargaining process," and the FLSA "guarantees cover(ing) employees' specific substantive rights." When such rights are as fundamental as the minimum wage provisions, Brennan argued, suit under the FLSA is not precluded by an employee's resort to the collective-bargaining process.

Brennan explained that the Labor-Management Relations Act was addressed to the *collective* best interest of workers, while the FLSA provides protection to *individual* workers. Thus, while the union may indeed have reached a fair decision in terms of its overall membership, the collective-bargaining process may not sufficiently protect an individual worker's substantive rights.

The Court's ruling prompted a strong dissent from Chief Justice Burger. Noting that the "people's patience with the judicial process is wearing thin," Burger chided the majority for "making federal courts small claims courts." This "routine wage dispute," the Chief Justice argued, like other minor disputes, can be "resolved more swiftly and to the satisfaction of the parties without employing the cumbersome, time-consuming, and expensive processes of litigation." □

Teri Engler and Susan Sussman



DO KIDS HAVE RIGHTS AT HOME?

"...I think the children should be entitled to be heard. . . . It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny." *Wisconsin v. Yoder,* 406 U.S. at 245 (1972), Justice Douglas, dissenting in part.

There is no question that kids are "persons" within the meaning of the Bill of Rights. In *In re Gault,* 387 U.S. 1 (1967), the Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In *In re Winship,* 397 U.S. 358 (1970), the Court held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to the procedural safeguards contained in the Sixth Amendment. In *Tinker v. Des Moines School District,* 393 U.S. 503 (1969), the Court ruled that students' First Amendment rights had been abridged when they were disciplined for wearing black armbands to school in protest against the war in Vietnam. Justice Fortas stated: "Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

But despite the growing trend to recognize young people's constitutionally-protected rights in the schools and juvenile courts (see the Fall and Spring, 1979, issues of *Update),* kids are legally under the control of their parents. Courts have consistently upheld parents' constitutional right to control the actions and activities of their children, and the closest the Supreme Court has come to recognizing that children's rights and interests may be separate from their parents' was in Justice Douglas's dissenting opinion in *Wisconsin v. Yoder.*

Looking at the rights that kids and parents have at home and focusing on whether granting or denying certain rights is fair to them is not only an exercise that's immediately interesting to students, it is also a good introduction to the concept of "fundamental fairness" on which due process of law is based. It provides a lead-in to studying how due process applies in the schools, juvenile courts, and other institutions which play a part in young people's lives.

Do Parents Own or Owe Their Kids?

Children's rights are protected by family and juvenile laws in which the main objective is children's "right" to adequate parental care. As long as parents don't abuse or neglect their kids, they have legal power to make a wide range of decisions which affect the lives of their children.

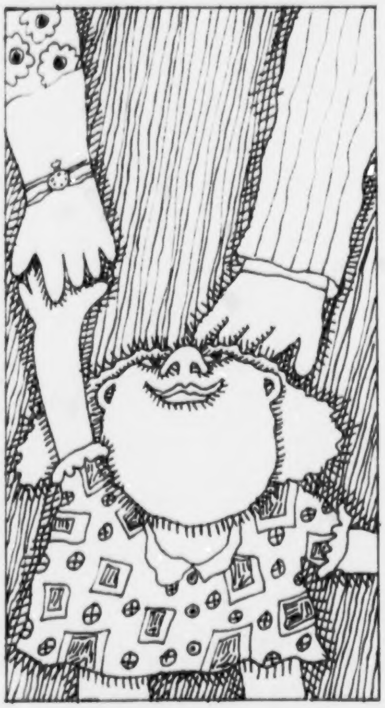
For example, parents may decide where their children will live, what religion they practice, where their children go to school and what extracurricular activities they may participate in, whether they may work, go out with friends, date or get married, and when they must come home at night. Parents may also control their children's personal appearance, what movies they see or if they may watch television, whether kids save or spend their money, and what they do for summer vacation. The list goes on and on.

Some reformers suggest that a "children's liberation" movement should follow the trail blazed by the civil rights and women's movements, but the majority of youths' rights cases that have been won to date have expanded parents' power over their kids as against the state's power, rather than increasing the rights of the youths themselves.

There are many reasons why parents have traditionally been given so much authority over their kids. First, children are necessarily dependent on their parents for support and care for a long time after their birth. Second, parents must protect kids from their own actions and the actions of others, since kids are generally too young and inexperienced to be able to fend for themselves. And because of the special relationshp between parents and their children, parents are thought to know what is in their children's best interest when making decisions on their behalf.

What Kids Have to Do

Kids must obey the reasonable demands of their parents. What is a reasonable parental demand? Clearly, children need not obey their parents if ordered to commit an illegal act or to do something that might seriously endanger their physical or mental health. But parents do have the right to require their children to do such things as their homework or chores around the house and yard. Kids may also be required to turn over their earnings from jobs or personal savings to their parents for any reason, though some states require parents to let their children keep whatever they earn once they reach a certain age (usually 16 or 17 years).



Parents' rights to control the upbringing of their children has traditionally included the right to discipline them by the use of corporal punishment. Most courts have held that parents may only be held accountable for physically punishing or imposing confinement on their kids when they go beyond a standard of "reasonableness" in doing so. The courts take many factors into consideration in determining whether the punishment was reasonable, such as the offense that the child is being punished for, the age, sex and strength of the child, his or her past behavior, the type of punishment used and its proportion to the seriousness of the child's offense, and the extent of harm to the child. Interestingly, the corporal punishment of a child at school, even over parents' express objections, has been held *not* to violate either the child's or the parents' constitutional rights. The rationale: a school's interest in maintaining discipline and order outweighs any interests or rights of parents and their kids.

Of course, with parental power comes responsibility. Under the parents' responsibility statutes of almost half the states, parents may have to pay for any damages caused by their children. Usually, the act must have been "willful or malicious"—that is, the child must have intentionally hurt someone or their property for no reason at all. Typically, parents' liability for their children's acts is limited under these laws to a specified amount, such as $500 or $1,000. Sometimes parents can be found negligent if they allowed their child to do something that they knew he or she shouldn't have, like allowing the child to drink or drive the family car without a license.

Do parents have a continuing obligation to support their children once they become adults? This has been a hotly debated issue in recent years. A common question has been whether parents who are financially able should be required to pay their children's college expenses. The trend in such cases appears to support court orders for a college education, although some courts require a parent who is financially able to continue to support his or her adult child only if the child is incapable of self-support because of a physical or mental disability. The extent of this obligation often depends on the parents' station in life; thus, a rich parent might be liable for a more extended and expensive college education than a parent of less substantial means. Also, divorce decrees often include support orders which last until the child finishes college or turns 21.

Just as the law requires parents to support and care for their young children, adult children in several states have been called upon to support their parents when in need. A number of states have passed family responsibility laws, under which children must take care of their parents in their old age. Sometimes the support requirement exists only where the parents had actually supported their children in the past. In any case, almost all of the

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laws limit the children's support obligation to what they can reasonably afford.

The duty of children to obey their parents and of parents to support their kids continues until a youth reaches the age of majority (generally, 18 years) or becomes legally "emancipated." There are no set procedures by which emancipation may be accomplished and the child may "escape" parental custody. Generally, minors who live apart from their parents and are self-supporting, who are married, or who enlist in the armed forces will be treated as emancipated. In some states, a minor's pregnancy is not by itself enough to constitute emancipation. The courts have broad discretion in this area and seem to evaluate the facts of individual cases with a desired result in mind.

Emancipation is also important in the context of minors' commercial dealings. Because kids are thought to lack maturity and need protection from sharp merchants, they have the special power to avoid contractual obligations for all but "necessary" items. Most of the time an adult can't enforce a contract with a kid, though the kid can against the adult. However, states' laws which have made it easier for minors to be emancipated have significantly restricted minors' reliance on that legal defense.

What happens when parents and kids disagree? Courts are usually reluctant to become involved in disputes between parents and their minor children, but in extreme cases a child may be declared a MINS, PINS or CHINS—a minor, person or child in need of supervision. In these situations the youth may be taken out of the home if the court decides that he or she has been continually disobedient or is otherwise beyond the control of the parents. The child must be represented by an attorney before the court can take any action, and if there is no money to pay for a lawyer the court will appoint one. This court-appointed attorney is called a "guardian ad litem."

Parents, too, must behave or they may find themselves facing a lawsuit by their children for "parental malpractice." Surprising numbers of kids—mostly teenagers—are beginning to take their parents to court on such charges as withholding love and forcing them to go on a round-the-world cruise. However, judges have been willing to side with the children in only a few instances.

Kids' Sexual and Reproductive Freedom

In response to the host of problems created by unwanted teenage pregnancies, minors have increasingly been granted treatment for venereal disease, birth control, pregnancy care and abortions without their parents' consent.

In the past few years laws have been passed which permit minors to be treated for venereal disease without parental consent. The rationale behind the laws which allow minors to get V.D. treatment on their own is that kids would otherwise be discouraged from seeking treatment at all, which could create an even greater health risk to themselves and others. In some states there are minimum age requirements; for example, in Illinois you have to be 12 or older before you can get treatment for venereal disease without parental consent. However, only a few

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states prohibit the doctor from notifying the parents of the child's request for venereal disease treatment. Most leave this decision to the doctor's discretion.

Pregnant minors may receive prenatal care without parental consent in over half the states, though in some places a pregnant youth is limited to consenting to medical treatment which is directly related to the pregnancy itself.

An individual's right to privacy in connection with decisions about procreation extends to minors as well as to adults. In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), the Supreme Court held that a state may not impose a blanket requirement that married women have the consent of their spouse or that unmarried women have the consent of their parents as a condition for obtaining an abortion. The Court held that states can inhibit the privacy rights of minors only if the restrictions serve some significant state interest that isn't present in the case of an adult. *Planned Parenthood* found that no such state interest could justify giving parents an absolute veto over abortions sought by their minor children.

In a related case, however, the Supreme Court stated that the *Planned Parenthood* decision did not mean that *all* minors, regardless of their age or maturity, may consent to an abortion. The problem with the particular state law in *Planned Parenthood* was that it required minors to get special consent before they could terminate their pregnancies, without a good enough reason. This seems to imply that a state may require some form of adult intervention in a minor's decision to have an abortion, as long as she is provided with some due process protections.

What about birth control? In *Carey v. Population Services International*, 431 U.S. 678 (1972), a state law which prohibited giving nonprescription contraceptives to kids under 16 was held to be an unconstitutional attempt by the state to stop promiscuity among young people. The Court reasoned that since a state can't impose a blanket prohibition, or even a blanket requirement of parental consent, on a minor's choice to have an abortion, it can't prohibit distributing birth control to minors either. The *Carey* case did not make it clear under what circumstances a state *would* be justified in restricting the distribution of birth control to minors.

Only a few states have laws which require kids to have their parents' consent before they can get birth control. In other states, like Illinois, a doctor can provide birth control information and services to kids under 18 years of age if they are referred by another doctor, a clergyman, or a family planning center.

Can Minors Get Medical Treatment On Their Own?

Historically, a minor could not get medical treatment without the parents' express or implied consent. The purpose of this consent requirement was twofold: (1) to protect minors from the consequences of their own lack of judgment, where they are not mature enough to understand the consequences of the medical treatment, and (2) to protect the parents' vital interests in the care and custody of their children. Courts frequently held that physicians who treated minor patients without authority to do so could be sued in a civil action or charged with the crime of battery.

Today, the consent requirement has been modified to some extent by state laws and case decisions. The courts have created three exceptions to the general rule of parental consent for a minor's medical treatment: (1) where there is an emergency situation in which the child's life or health is in great danger, (2) when a minor has been legally emancipated from his or her parents' custody and control

Kids, Parents, and Medical Treatment

SIMULATION I

Characters: Alice Armstrong, Mrs. Armstrong, and Dr. Fisher.

Scene 1: Dr. Fisher's office

Alice is waiting for Dr. Fisher to arrive. She is sitting in a chair and appears quite nervous. From time to time she bites her nails, taps her feet and drums her fingers on the arm of the chair. Dr. Fisher finally enters.

Alice: (jumps to her feet) Boy, am I glad to see you! Did you get back the results of that blood test you took last week?

Dr. Fisher: (looks concerned) Alice, I've been your family's doctor since you were a little girl, and I'm sure that they will be quite disappointed to hear the news. You're pregnant. About eight weeks, I would say.

Alice: But . . . no . . . it can't be! I'm only 15 years old. Dr. Fisher, what am I going to do? I can't raise a baby . . . I'm just a kid.

Dr. Fisher: Frankly, young lady, I have to agree with you. But what do you propose to do?

Alice: Well, it's not going to be very easy but I guess I'd better go home and talk to my mom.

Dr. Fisher: Good idea. I'll be here when you decide what you want to do.

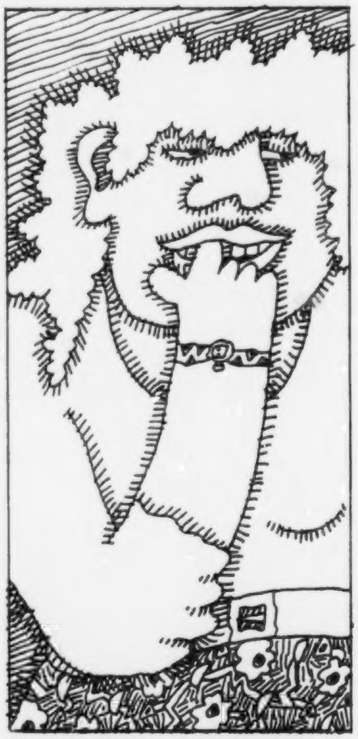
Scene 2: Alice's house

Mrs. Armstrong is in the kitchen when Alice arrives.

Alice: (very nervous again) Mom, I have to talk to you. You'd better sit down for this.

Mrs. Armstrong: (looks worried) What? What is it? What's wrong, dear?

Alice: Dr. Fisher . . . uh . . . well, the doctor . . . uh, I'm pregnant!



Mrs. Armstrong: (very upset) You're what?

Alice: I'm eight weeks pregnant and I've got to have an abortion. I'm going to ask Dr. Fisher to help me. . . .

Mrs. Armstrong: (interrupting her) This is terrible news. I don't know what we can do. . . . Your father and I believe that abortion is killing (see the first section), and (3) if the minor is close to the age of majority and can understand the nature and consequences of the treatment (i.e., he or she is a "mature minor").

What happens when there's an emergency? The emergency rule comes into play when the condition of the child is so serious that any delay in getting a parent's express consent would endanger the life or limb of the child. In a typical case, a doctor or dentist could treat the child if, in his opinion, the minor's health would be seriously affected if he or she did not receive immediate attention. In one case, for example, a court held that the treatment of a fractured bone was serious enough to give rise to this exception. The focus here is on the emergency situation and the physician's professional opinion, not minors' ability to make a decision on their own.

The mature minor doctrine provides another way for kids to obtain medical assistance without first seeking their parents' permission. How do courts decide when a child is a mature minor? They ask questions about things like: (1) the child's ability to appreciate what the medical procedure is all about and its possible consequences, (2) how complicated the treatment is and how beneficial it's likely to be, and (3) if it would be practical for a youngster to try to get the parents' consent. Courts have generally found kids to be mature minors for purposes of medical treatment where they were at least 15 years old, intelligent and independent, and had a good understanding of the decision they were entering into.

Recently, the courts have begun to authorize medical treatment of children in situations where the child is seriously ill and the parents have refused to consent to the treatment. The courts allow the state to invade parents' control over the care and custody of their child on the theory that the state in these cases does a better job of looking after what is in the child's best interest. The courts use a balancing approach to deal with the competing interests of the parents and the state. When the child's death is a likely consequence

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an innocent life. I'm afraid we'll have to forbid you from going ahead with this. We won't let you do it.

Questions for Discussion:

1. Should Alice have the right to an abortion without her parents' consent? Why or why not?
2. What arguments could Alice make that the decision to have an abortion should be made by her alone? What interests do her parents have in being allowed to grant or deny it? Are there any other interests involved in this case?
3. Whose interests should be given priority? Why?
4. Would your answers be different if Alice had been 12 years old? If she had been 17?

SIMULATION 2

Characters: Rick Jones, Mr. Jones, and Dr. Powers, the head of Children's Memorial Center for Mental Health

Scene 1: Dinnertime, the Jones's dining room

Mr. Jones and Rick are at the table, finishing their meal.

Mr. Jones: Rick, you seem sort of out it tonight. Tell me, how are things going at school?

(Rick doesn't respond. He stares at his plate.)

Mr. Jones: What's the matter? You don't like my cooking? Well, okay. Tell me, what's going on with the swim team?

(Again Rick doesn't respond. He idly pushes the food around in his plate.)

Mr. Jones: Oh! I almost forgot to tell you. Your mother needs the car tonight after all and. . . .

(Rick suddenly becomes enraged. He swings his arm across the table, knocking all of the food and plates onto his father's lap and the floor.)

Mr. Jones: (shaking him by the shoulders) What is the matter with you? What are you doing? Are you crazy?

Scene 2: A mental hospital

Rick is waiting quietly for Dr. Powers to arrive. He seems confused and disoriented. Dr. Powers enters.

Dr. Powers: Good morning, Rick.

Rick: Doctor, where am I? What is this place?

Dr. Powers: This is the Children's Memorial Center for Mental Health. Your parents brought you here last night. They're quite concerned about you.

Rick: But . . . where are they?

Dr. Powers: They're back at home, Rick. You're going to stay here a while for some tests.

Rick: I want to go home! You can't keep me here. I've got to talk to my parents . . . I want to see a lawyer!

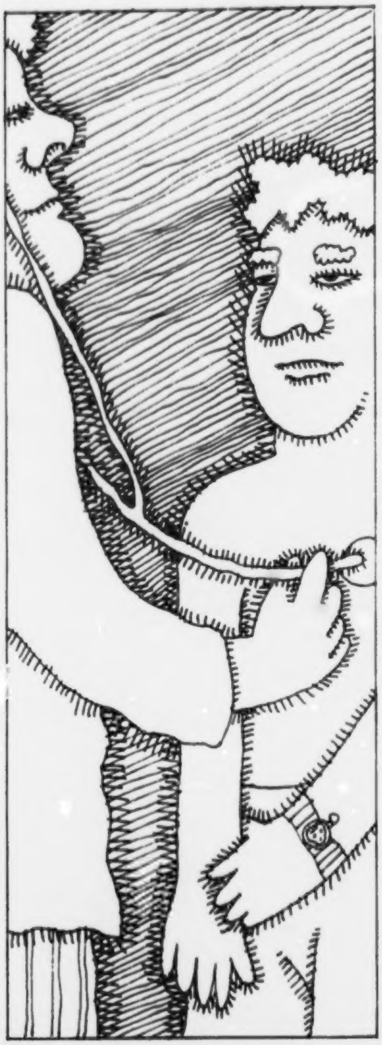
Questions for Discussion:

1. Should Rick's parents be able to commit him to a mental institution without his consent?
2. What rights does Rick have in this case?
3. Who should decide whether Rick's parents were acting in his best interest? Who should decide what is Rick's best interest?

(Note: This role-play is loosely based on *Parham v. J.L. and J.R., Minors, Etc.*, 442 U.S. 584 (1979). In that case, the Supreme Court upheld a Georgia law which allows parents to request that their children be institutionalized without a formal hearing or representation by an attorney.)

of the parents' refusal to allow medical treatment, the state's interest is considered sufficient to override the parents' objections and the treatment is ordered. On the other hand, in cases which don't threaten life, such as those involving mere cosmetic surgery, the courts generally defer to the parents' wishes.

Parents' refusal to consent to treatment of their minor children is often based on their religious beliefs. In a Pennsylvania case, a 16-year-old boy had polio which resulted in curvature of the spine. The family's doctor recommended that the boy undergo a complicated spinal operation but the mother, who was a Jehovah's Witness, refused to permit the boy to receive any blood transfusions, making the surgery impossible to carry out. That court stated that unless a child's life is immediately endangered by his or her condition, the state does not have enough of an interest in a minor child's health and safety to outweigh a parent's religious beliefs and right to control the life of the child. But the court did not decide the case on this basis. It ordered that the child's views on the operation be considered. When the boy testified that he did not want to have the operation, the court refused to order the treatment that the state had requested.



SIX STRATEGIES FOR TEACHING ABOUT CHILDREN'S RIGHTS

1. Give each student a copy of the statements below.

> "That children should be protected by the Constitution, and in particular by the Bill of Rights, is a new frontier. . . . Those of us who support this movement hope to establish that a child has a right to . . . adequate nutrition and medical care; . . . to due process of law, to equal protection of the laws, and to privacy." Senator Birch Bayh, Senate Committee on the Judiciary, 95th Cong., 2d Session, Report on Constitutional Rights of Children (1978).
>
> "Parents should have control over their minor children. Many children are incapable of self-improvement as a result of rational discussion. Limiting the freedom of children, therefore, is necessary both to protect children from their own actions and to protect society from the untutored."

Discuss with students what they think about the two statements, using such questions as:

—Do kids have constitutional rights? Should they?

—Should kids have the same constitutional rights as adults? Do they?

—Where in the Constitution do the rights that Senator Bayh speaks of come from?

—Do you think that either of these viewpoints is common? Which do you agree with?

2. The survey which follows contains five questions which have "substantive" legal answers (1-5) and five questions which do not (6-10). Distribute a copy to students and ask them to fill it out. Use a show of hands to tally their responses and record them on the chalkboard or an overhead projection. Discuss the students' reasons for their choices, then compare what the law really says about the first five statements. Does the law limit children's or parents' rights? Is the law fair to kids? To parents?

Young people are required to take their parents' last name.

AGREE DISAGREE NOT SURE

Young people have to obey everything their parents tell them to do.

AGREE DISAGREE NOT SURE

Young people may not leave home without their parents' permission.

AGREE DISAGREE NOT SURE

It should be up to the young person to decide how he or she spends personal income.

AGREE DISAGREE NOT SURE

Young people should have a right to un-

Materials on the Family

There are a number of good books which explore balancing the rights and interests of children, parents, the schools and the state. Here are a few that would be useful reading, particularly for secondary teachers:

H. Krause, *Family Law*, (1977). An understandable description of basic family law concepts and the leading cases. (West Publishing Company, P.O. Box 3526, St. Paul, Minn. 55165.)

F. McCarthy, *Juvenile Law and Its Processes*, (1980). An introduction to the historical and legal background of contemporary juvenile law and the present legal context in which the law operates. Also looks at issues and problems in juvenile law which are likely to be emerging in the future. (The Bobbs-Merrill Company, Inc., 4300 W. 62nd St., Indianapolis, Ind. 46468.)

Children's Rights Handbook, Youth Liberation Press, Inc. (1979). The main purpose of this book is consciousness-raising—that is, introducing readers to ideas on children's rights, including whether young people should have political rights, organizing kids to defend their own interests, and training special "child advocates" to represent kids' interests. (Youth Liberation, 2007 Washtenaw Ave., Ann Arbor, Mich. 48104.)

employment benefits if their parents don't allow them to work.

AGREE DISAGREE NOT SURE

Young people are totally dependent on their parents for food and shelter.

AGREE DISAGREE NOT SURE

Young people should adopt most of their parents' morals and values.

AGREE DISAGREE NOT SURE

Wisdom comes with age.

AGREE DISAGREE NOT SURE

Parents generally respect the rights of young people.

AGREE DISAGREE NOT SURE

Young people generally respect the rights of their parents.

AGREE DISAGREE NOT SURE

3. Now break students into small groups and have each group develop a "Kids' Bill of Rights" and a "Parents' Bill of Rights." Have students share their work with their parents; then, during the next class period, compare and contrast their contributions and parents' responses. Post the Bills of Rights around the classroom or the school, or publish some of them in your school paper.
4. Have students act out the two role-plays in class (see box), using the "Questions for Discussion" to debrief afterwards.
5. Divide the class in half and have each side work together to prepare its arguments for a debate based on the following statement:

> The old legal rule that parents must consent to the medical treatment of their kids has become obsolete in this day and age.

As students debate, make lists of their opposing views on the chalkboard. Use this as a starting point for a class discussion afterwards.

6. How are decisions affecting family members usually made? Discuss this briefly with students, then have them develop a plan for a "Family Council" or contract for parents and kids that deals with such things as dividing chores, deciding who controls children's dress, entertainment, educational plans, etc. Students should focus on what is fair to everyone involved as they devise their procedures for family decision-making. What happens in the event of a disagreement between parents and kids?

Have students get their parents' reaction to their proposals. How do their ideas differ? How are they the same? What would be the advantages and disadvantages of a family's adopting such a plan to help it make decisions. □

Another View: Lawmakers Are Eroding the Rights of Parents

Joan Beck

You may not believe in spanking, but in some states you can't prevent another adult—such as a teacher or school principal—from whacking your child.

A doctor has to get your permission to give your teen-ager a tonsillectomy, but not an abortion.

You can't control what public school your child attends in the face of a desegregation order. And if you don't make sure he goes to school, you could lose his custody.

You can refuse to give your consent to the marriage of your child if he or she is younger than 18. But you can't prevent a doctor or public or private agency from giving your offspring contraceptive information and supplies without even telling you.

Federal laws, state laws, and case law have all been nibbling away at parents' rights in recent years without diminishing parents' responsibilities. The power of the state "is without question pervasive and complex" over fathers and mothers, says a new study by the American Civil Liberties Union. "Today, state involvement in the raising of children is a fact of life." (See *The Rights of Parents* by Alan Sussman and Martin Guggenheimer.)

At the same time, the movement for children's rights is sniping at parents from another direction, aiming to reduce adult "power" over the young. The movement is largely bogged down in its own rhetoric for the present. But it does create a crossfire of criticism that makes many fathers and mothers uneasy and ambivalent about being even reasonably authoritative.

Some laws that diminish parental rights are undoubtedly essential. Laws that try to protect children from abuse and neglect, for example, need to be more strictly enforced to reduce the rising incidence of physical, psychological, and sexual harm that thousands of parents inflict on their young.

Some recent laws even serve to strengthen parental rights. You can insist, for example, that your school district provide an appropriate education for your handicapped child. You can demand a hearing before your youngster is expelled from school. You can inspect your child's school files and challenge any material you find there.

But one reason parents so vehemently oppose mandatory busing for desegregation is that it is a major escalation in government interference with parental rights. And the further youngsters are bused away from their homes, the more difficult it is for parents to exercise what rights they do have over their youngsters' schooling.

The other areas that make parents angriest are laws and court rulings that seem to encourage minors to go behind their parents' back for contraceptives, abortions, and treatment of venereal disease, alcoholism, and drug addiction. Doctors must get parents' permission for all other forms of medical treatment, except in emergencies. But in these areas they need not even tell parents what is happening to their children.

For government to seem to conspire to prevent parents from knowing that a child is pregnant, sexually active, alcoholic, or infected with VD is a major undermining of parental responsibilities and rights. It also cuts minors off from what help and guidance their parents could give them if they were fully aware of their problems.

Along with the problems of a sexually permissive society, the increasing prevalence of divorce has given government a major opening for interfering with parent-child relationships. In cases of divorce, the courts may decide whether your children will live with you, how much time you can be with them, how much money you must spend on them, and much, much more.

The country is full of bureaucrats eager to write more legislation, draw up more regulations, and hand down more court orders aimed at imposing their concept of a family on your family. Some laws are necessary to protect children from abusive, inadequate, and indifferent parents. But these exceptions should not be used for further encroachments on what is one of the few areas of privacy left in American life.

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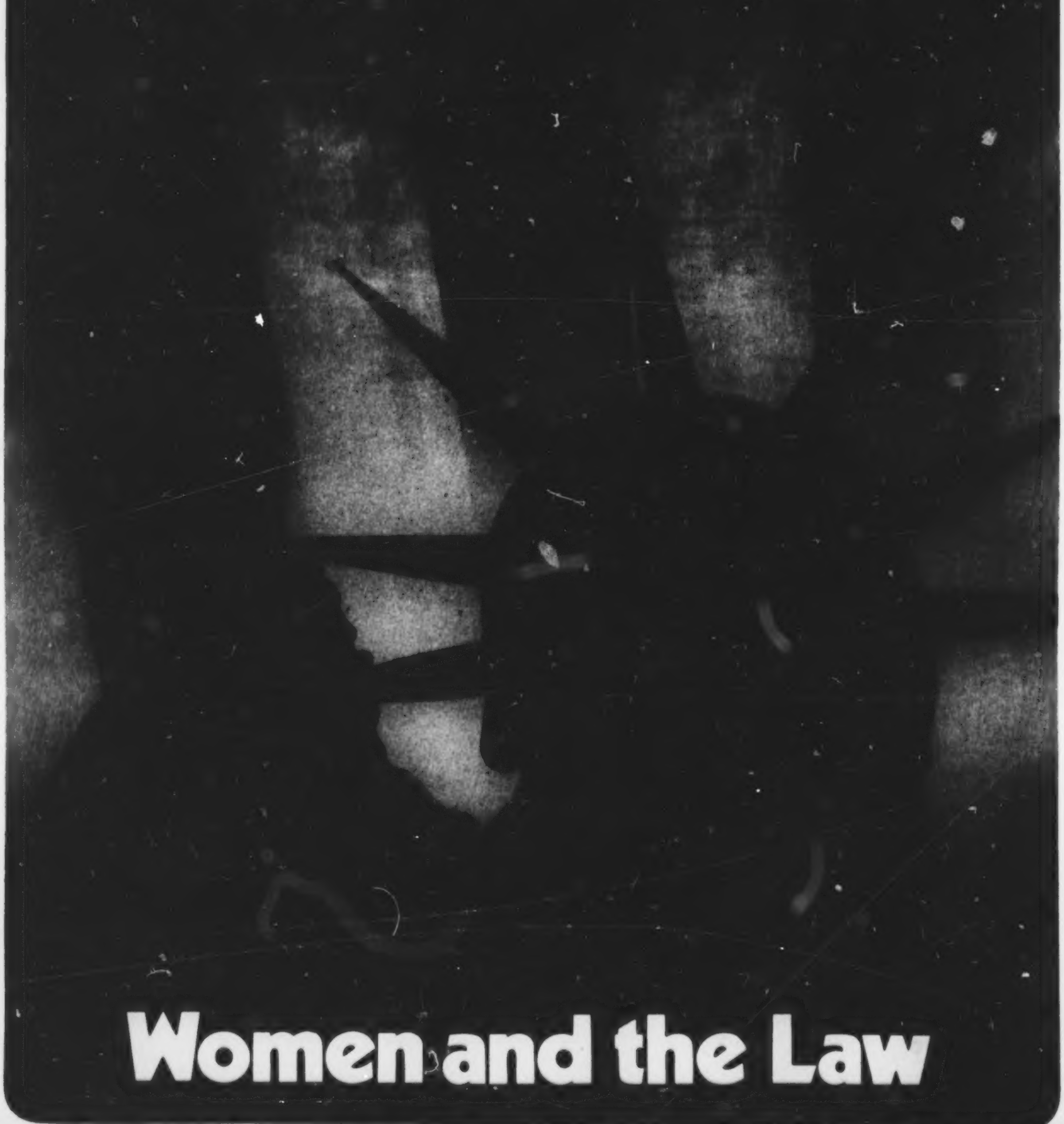

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ABA Special Committee on Youth Education for Citizenship

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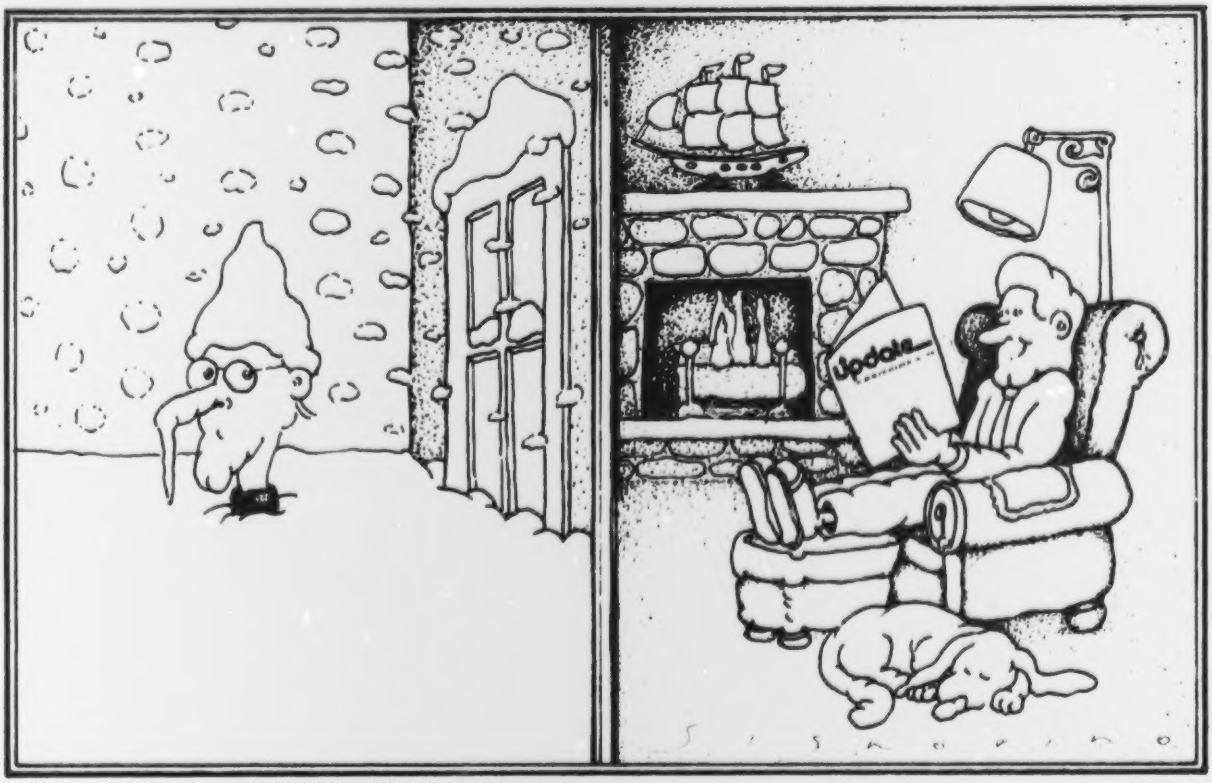

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contents

Volume 5, Number 3, Fall 1981

2
Women and the Law
Out of Aprons and into the Job Market

6
Women and the Law
Is Abortion a Women's Issue?

10
Women and the Law
Classroom Strategies for Handling Women's Issues

14
Women and the Law
The Tug of War Between Law and Custom

18
Women and the Law
The Limits of the Law

22
Women and the Law
The Last Bastion of Macho

26
Climbing the Legal Ladder
Don't Call Me Madam

28
Climbing the Legal Ladder
Some Kinds of Discrimination Die Hard

31
Curriculum Update
Materials on Women and the Law

34
What is Justice?
"Hell, We Couldn't Even Agree on Lunch"

38
Court Briefs
Females in Fatigues, Comparable Worth, Hostage Deal and more

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Out of Aprons and into the Job Market

It's the economy that's sending women into the work-force, but it's the law that's giving them a fair shake

Susan Spiegel

By law, almost all jobs are now open to women. Women today can dream of becoming doctors, lawyers, butchers, or construction workers, and that dream can become a reality. Laws at the local, state and federal level now protect the right of a woman to choose an occupation according to her abilities and interests.

Legal Discrimination

The law in this country has not always supported equal employment opportunities for women. To the contrary, until the last several decades, women faced legal barriers to many employment opportunities. Generally, the laws that deliberately excluded women were based on generalizations about physical differences between men and women and the special role of women as mothers, without consideration of the abilities or life choices of individual women workers.

Because married women were not considered to be persons separate from their husbands, in most states married women could not make contracts without their husbands. Without the ability to make contracts, married women were unable to conduct their own business enterprises. In addition, some laws specifically prohibited the employment of women in certain occupations.

A Supreme Court decision addressing the right of women to practice law illustrates the pervasiveness of the legal barriers faced by women in the past. In the decision, *Bradwell v. Illinois,* 83 U.S. 130 (1873), the Court rejected Myra Bradwell's claim that Illinois's refusal to permit her to practice law in that state violated her right to choose her occupation under the privileges and immunities clause of the Fourteenth Amendment to the Constitution. Although Ms. Bradwell had received training in law and had passed the Illinois bar examination, the state supreme court refused to admit her to the bar solely because she was a woman.

The majority of the U.S. Supreme Court upheld that exclusion because they did not consider occupational choice a right connected with U.S. citizenship; as a result, they concluded that the privileges and immunities clause did not guarantee an individual the right to

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choose any occupation. Three Supreme Court justices, in a separate opinion, agreed with the exclusion of Ms. Bradwell, but for a different reason: the natural timidity and delicacy of women makes them unfit for many occupations and, according to God's design, they belong at home making babies. This view of women and their role in society was the rationalization underlying discrimination against women for decades, persisting even to the present day.

Protective Labor Laws

Although the exclusion of women from professions was pernicious, even more women lost employment opportunities because of laws ostensibly enacted for their protection. Protecting women workers was justified by the alleged physiological differences between men and women, especially women's supposed lower tolerance for stress, the inability of women to work when pregnant, and the adverse effect of long hours and unhealthy conditions on the health of future generations.

These laws had a tremendous negative effect on the ability of women to find work. Laws limiting the total number of hours women could work, requiring employers to afford them rest periods, and imposing minimum pay made many employers prefer to hire men. Some laws prohibited employers from hiring women at all for certain jobs and certain situations, including, among many others, working in mines, as newspaper carriers, or as barmaids. As a result, such jobs were totally unavailable to women, regardless of the willingness of individual women to face the risks associated with them. Similarly, women were often denied the opportunity to earn the extra pay given to employees working the night shift because of laws prohibiting the employment of women at night.

In addition to restricting employment opportunities, these laws reinforced a "common knowledge" of women as weak, delicate, secondary to men, and requiring special protection, an attitude that persists even today among some employers. Although wage and hour protection was later extended to male workers as well, many of the special protection laws survived as vestiges of an era when special treatment was the only means to protect part of the workforce from unsound working conditions. Few of those laws would survive constitutional scrutiny today; many have been invalidated in lawsuits under equal employment laws.

Recognizing Discrimination

Discrimination in employment can and does occur at any point in an employer-employee relationship, from the recruitment stage to postemployment benefits. Following are some illustrations of how discrimination appears in the workplace.

1. *Recruitment*—Employer advertises for a job opening using sex-specific words, such as "handyman," "salesman," and "counterboy," dissuading females from applying for the job.

   Employer sends notices of the job opening only to all-male schools or advertises the job opening only in male-oriented magazines. Employer instructs employment agency to refer only male applicants for the job opening.

The laws designed to protect women wound up hurting them by implying that women workers were delicate and weak.

2. *Hiring*—Employer hires man less qualified than female applicant.

   Employer requires job qualifications that eliminate most female applicants.

   Employer requires different qualifications of men and women applicants.

   Employer evaluates qualifications subjectively and relies upon stereotypes in evaluating women.
3. *Training*—Employer provides training to male employees that will enable them to perform their jobs, but excludes female employees from such training.
4. *Job Assignments*—Employer assigns female employees to separate job classification that is less desirable than job classification to which male employees are assigned.
5. *Compensation*—Employer pays male employees more than female employees for the same work.

   Employer provides male employees opportunities for extra compensation through overtime pay and shift differentials, but excludes female employees from those work opportunities.
6. *Seniority*—Employer maintains separate seniority lines for male and female employees.
7. *Promotions*—Employer promotes male employees, but maintains female employees in lower job classifications.
8. *Benefits*—Employer provides sick leave and disability benefits to employees, but not for pregnancy or pregnancy-related disabilities.

   Employer provides pension benefits that are higher for men than for women.
9. *Terms and Conditions*—Employer affords male employees opportunities for recognition and personal growth (e.g., representation of employer at conferences, travel, etc.), but excludes female employees from such opportunities.

   Employer provides unequal facilities (e.g., gyms, restrooms, etc.) to male and female employees.

   Employer requires female employees to retire at an earlier age than male employees.

   Employer requires female employees to perform tasks not required of male employees in the same job classification (e.g., cleaning, errands, etc.).

   Employer requires female employees to abide by codes of conduct but does not require male employees to do so.
10. *Sex Harassment*—Employer requires female employees to provide sexual favors in order to retain employment or obtain benefits.
11. *Discharge*—Employer requires female employees to perform at a higher standard than male employees in order to retain job, obtain job benefits, etc.

    Employer discharges female employees for pregnancy or for unwed pregnancy.

The Law Steps In

The Equal Pay Act. Congress first acted to eradicate sex-based employment discrimination in 1963 when it enacted the Equal Pay Act, 29 U.S.C. § 206. This law prohibits covered employers from paying unequal wages to male and female employees except when the pay difference results from a seniority system, a merit system, a pay scale tied to quantity or

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quality of work product, or "any other factor *other than sex.*" Of course, not every female worker is entitled to the same pay as every male worker. Only similarly situated workers must be paid equal wages.

The act defines the elements that make job situations similar so that equal pay is required.

First, the jobs must involve "equal work," or substantially the same job duties. The jobs need not have the same titles. For example, an employer cannot pay different wages to men and women performing essentially the same work merely by calling the men "orderlies" and the women "aides." In addition, the job duties need not be totally identical. So long as the primary job duties are the same, the jobs are generally considered "equal" even if some workers in one job also perform some other duties, particularly if the extra duties are infrequently performed and involve a similar level of work.

Second, performance of the jobs being compared must require equal levels of skill, effort, and responsibility. Thus, a male employee and a female employee might perform substantially the same duties, yet the male employee also expends extra effort to perform a strenuous lifting task. If the extra effort is substantial and a regular part of his job, the employer may pay him more than the female employee even though the jobs are otherwise similar. Other factors considered included the amount of responsibility or supervision; the amount of mental effort; and the experience, training, education, and ability of the employee.

Third, the jobs must be performed under similar working conditions. Thus, an employer may pay employees more for working in an unsafe area or under hazardous conditions even if the result is higher pay for male workers.

It is obvious that the existence of unequal employment opportunities for men and women does not violate the Equal Pay Act. An employer who discriminates against women by hiring them only for a low paying job does nothing illegal under the Equal Pay Act. In fact, that kind of discrimination may often be the very reason that jobs situations are unequal, thus justifying unequal pay. Protection against discrimination broader than unequal pay is found in other laws.

Title VII of the Civil Rights Act of 1964. The major law protecting women from a denial of equal employment opportunities is Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e. It prohibits employers with 15 or more employees, unions with 15 or more members, and employment agencies from denying equal employment opportunities on the basis of race, color, religion, sex, or national origin. Under the law, the Equal Opportunity Employment Commission (EEOC) has power to investigate complaints of discrimination, to negotiate settlements of such complaints, and to file lawsuits in federal court against offending employers, unions, and employment agencies. These suits can ask for injunctions against the unlawful practices and money damages for individuals injured by the practices. Individuals may also file suit in their own behalf after filing charges of discrimination with EEOC and following the required procedures.

Sarah Bernhardt played Hamlet, Sandy Duncan was Peter Pan, but women can't be sperm donors.

While the prohibition contained in Title VII is broad, not all discrimination by covered employers is illegal. Employers may treat employees differently on the basis of legitimate ability tests or in accordance with the requirements of *bona fide* (i.e., legitimate) seniority and merit systems. These exceptions apply to all types of discrimination. In addition, employers may discriminate on the basis of sex where sex is a "bona fide occupational qualification [usually referred to as BFOQ] reasonably necessary to the normal operation of that business or enterprise."

The "BFOQ" Defense

Exactly when sex is a BFOQ is difficult to define. When the law was considered in Congress, there was little debate to guide judges in interpreting the prohibition.

When is the gender of an employee really essential to the performance of a particular job, as required by the BFOQ exception? If employers were permitted to answer this question on the basis of prejudice or stereotypes, the BFOQ exception would create a huge loophole allowing sex-based discrimination to continue undisturbed.

According to the EEOC regulations interpreting the BFOQ exception, the preference of customers or other employees for a male employee does not make being male a legitimate job qualification. Nor are assumptions about women in general (e.g., that turnover is higher among women generally than among men generally) or stereotypes of women (e.g., that women are not aggressive salespersons) legitimate bases for a BFOQ exception. (An employer may of course reject a particular woman with an employment history demonstrating high turnover; the employer simply cannot reject a particular woman on the assumption that women generally have a high turnover rate.)

Similarly, the fact that the work may be "unromantic," unpleasant, or even hazardous does not justify excluding women. The courts have ruled that women have the right to choose work not traditionally performed by women because of "romantic" notions about their sex. For example, an employer can't refuse to hire women for a job requiring them to perform emergency repairs on telephone poles at midnight. As a result, employers cannot base their exclusion of women on state protective laws that aimed to protect women workers but resulted in denying them equal access to work. Many of these laws have been totally invalidated; in some states, the protections have been extended to male workers.

The only BFOQ specifically approved by the EEOC is the qualification of gender when required for authenticity and genuineness, such as for actors and actresses. Even that exception for dramatic veracity may be questioned. Consider performances of *Peter Pan* (played by Mary Martin and Sandy Duncan), *Hamlet* (played by Sarah Bernhardt), and Shakespeare's plays (in his time, all roles were played by men). Moreover, the law does not permit a similar use of race as a job qualification, even if the goal were authenticity and genuineness of a dramatic production.

Some legal scholars have suggested that a BFOQ can only be legitimate when the "intrinsic characteristics of one sex," i.e., sexual characteristics, are essential for the performance of the job. Under this analysis, an employer would be permitted to discriminate on the basis of sex for the following jobs: sperm donor, wetnurse, stripper, fetus breeder, model, and escort.

The Supreme Court has agreed in principle that the BFOQ should be a narrow exception. Yet the Court has upheld a

(Continued on page 53)

Is Abortion a Women's Issue?

Pro-choice

Sally A. Hudson-Nicholas

Abortion has been legal in the United States since 1973 when the Supreme Court decided the landmark cases of *Roe v. Wade* (410 U.S. 113) and *Doe v. Bolton* (410 U.S. 179). In these decisions, the Court firmly held that the government cannot interfere with a pregnant woman's decision to have an abortion during the first two trimesters. Thus, abortion is ultimately a woman's issue, determined by the Court to fall within the realm of an individual woman's right to privacy.

However, it is also a critical issue to society as a whole. With the right to terminate one's pregnancy now under attack, abortion has become a divisive issue in our society. If the antichoice movement achieves its goal to ban all abortions, the impact on both our legal system and private lives will be swift and brutal.

That the issue is even debated so fiercely is ironic. Every major public opinion poll has shown that a large majority of Americans favor the legality of abortion. The latest survey, conducted for *Time* magazine by the research firm of Yankelovich, Skelly and White, Inc., found that only 35% of the sample favored making abortion illegal. Futhermore, when the issue was worded differently, fully 68% felt that the individual woman should be able to decide when abortion should and should not be permitted. Government interference on this issue is clearly disfavored. Thus, support for legal abortion has remained stable, in spite of the conservative movement discerned by the pollsters in other areas of our society.

The Supreme Court, as already noted, decided 7-2 to uphold the due process rights of women to control their reproductive privacy. The Court noted that our entire Anglo-American legal system is founded on the premise that only *after* birth are legal rights and responsibilities conferred. Thus, the attempt by antichoice groups to ban abortion goes

(Continued on page 8)

Pro-life

Paige Comstock Cunningham

Before we can even begin to discuss whether abortion is a women's issue, we must first define the issue. The question is *not*, "Is the fetus a human being?" That question has been decisively settled by biological evidence. Nearly every medical textbook on embryology, genetics, and biology, and countless publications and texts for lay people state clearly that when an egg is fertilized with a sperm, human life begins. That is not an opinion, but a simple statement of biological fact. (Ample scientific authority was presented in the testimony of several scientists and doctors before the Subcommittee on Separation of Powers of the United States Senate Committee on the Judiciary on April 23, 1981, regarding the beginning of human life.)

Neither is the issue one of rights over one's own body. "It's my body and I can do what I want with it" is a phrase that is endlessly and agonizingly repeated. To a degree, it is true, but it skirts the issue. We have lotions, creams, powders, pills, capsules at our disposal—an endless array of drugs and cosmetics to make our bodies attractive, to relieve our aches and pains, and to charge us up and calm us down. And usually what we do does not directly affect someone else's well-being. Abortion does. It is designed to terminate pregnancy. An abortion is chillingly efficient: the pregnancy is "terminated" by terminating the life of the unborn child. In exercising control over her own body, a woman destroys both the freedom of choice and the body of another unique individual.

How Courts See It

The real issue, then, is "Should the developing fetus be protected?" The Supreme Court stripped legal protection from the fetus in *Roe v. Wade*, the 1973 decision legalizing abortion, by denying it the status of legal personhood (410

(Continued on page 9)

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Pro-Choice

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against not only the will of the majority, but also our judicial and legal systems.

Before considering the serious problems that would arise were abortion made illegal, it is necessary to analyze the approach of the antiabortion movement and to understand its beliefs.

Defining Personhood

The foundation of the antichoice argument is the belief that a fetus is a person, deserving of constitutional protection. The basic premise is that life begins at conception. What this ignores, however, is that the presence of biological life does not unquestionably equal personhood. It may be scientifically proven that at the moment of conception a human organism begins to develop. However, the assertion that the completely dependent zygote is a person is a philosophical and religious claim. There is simply no scientific consensus on the point at which human life begins, and all attempts to define personhood are thus arbitrary.

Antichoice and prochoice advocates alike must deal with this irresolvable question in a way that is best for society as a whole. This basic conflict in the abortion controversy cannot be fairly resolved by allowing a small group to impose personal religious beliefs on our pluralistic society.

Both the Establishment Clause and the Free Exercise Clause of the First Amendment are violated by legislative attempts to redefine personhood. These two clauses are the foundation of one of our most fundamental values—the separation of church and state. The Free Exercise Clause guarantees that every citizen has the right to his or her own religious beliefs. The Establishment Clause provides that the government shall establish no religion.

Allowing specific religious beliefs to affect our lawmaking would seriously weaken this First Amendment separation of church and state—the very core of our democracy. Indeed, even among religious groups, no consensus exists as to when personhood begins. Many organized religions, such as the United Church of Christ, the Presbyterian Church, the Methodist Church, and most Jewish groups, support the prochoice position.

The Dangers of the HLA

In their attempt to subject our heterogeneous society to specific religious and theological dogma, the antichoice factions have launched a campaign that would undermine our legal system. The main thrust of this endeavor is to pass the Human Life Amendment. This act would amend the Constitution to include fetuses as persons, rendering abortion, under *all* circumstances, illegal. The Supreme Court's rulings on abortion would be null, thus eroding the judicial branch's authority. Furthermore, both our civil and criminal traditions would be undone.

Unwanted pregnancies are inevitable. Family life can be strengthened only when every child is wanted and cared for.

There is no historical basis for according a fetus legal rights. The framers of the Constitution, deliberating at a time when abortions could easily and legally be procured, showed no intention of including fetuses in the coverage of the document. No amendment has ever included fetuses as legal persons. In the areas of civil and criminal law, countless cases have openly disavowed the legal rights of the unborn. If a fetus were accorded the status of personhood through the Human Life Amendment, even areas of law that have no relation to abortion would be seriously disrupted.

In civil law, for example, the Human Life Amendment could grant fetuses the right to sue. Inheritance and property laws could be disrupted if fetuses were viewed as persons in the eyes of the law. Even more disturbing would be the legal relationship established between a fetus and the mother. Intolerable governmental intrusions into one's privacy could be expected. Miscarriages would be suspect. The standard of prenatal care could be defined by the government. It is conceivable that fetus-protection lawyers would be involved in tort actions, suing mothers for negligently exposing fetuses to German measles or potentially harmful medications.

In the area of criminal law, a case has already arisen which portrays the upheavals which the Human Life Amendment would create. A lawyer objected that the fetus of a jailed pregnant woman was held in violation of its rights. Since the fetus had not committed a crime, the argument ran, it could not be constitutionally detained. This sort of logic was easily overturned under our present legal system. But under the mandate of the Human Life Amendment, this type of suit could win.

Never in the history of Anglo-American law has abortion been considered murder. The antichoice movement, however, holds that abortion *is* murder, and therefore other areas of criminal law would be rewritten. A felon involved in a crime which resulted in the miscarriage of a fetus could be guilty of murder. Not only would abortion be considered murder; the use of IUD's and low estrogen birth control pills would also subject the woman and her doctor to criminal prosecution, since they prevent implantation of the fertilized egg in the uterus.

The Primacy of Privacy

The Supreme Court carefully considered these sub-issues in *Roe v. Wade*. In holding that the Due Process Clause of the Fourteenth Amendment was violated by restrictive state abortion laws, the Court considered the right of privacy to be of greatest importance.

The Constitution itself does not specifically mention the right of privacy, but it has long been acknowledged by the Court, in cases where a fundamental personal interest is involved. Earlier cases such as *Griswold v. Connecticut*, 381 U.S. 438 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), had extended the reach of personal privacy to areas such as marriage, contraception, and procreation. In *Roe v. Wade*, the Court had to decide whether the right to privacy includes the right to choose an abortion.

In considering the issue of abortion, the Court had to first determine what standard of proof to apply to state claims that abortion laws were justified. The Court could have merely required the states to show that abortion laws were "reasonably related" to a legitimate governmental interest. This standard is relatively easy for the states to meet, and thus allows the Court to defer to the legislature so as not to "create" law. However, in cases involving fundamental rights "implicit in the concept of ordered liberty," the Court will use a stricter standard, requiring states to show a

(Continued on page 45)

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Pro-Life

(Continued from page 6)

U.S. 113). To briefly review the Court's holding: the state cannot prohibit any abortion prior to the time the child is viable—able to live outside the womb, albeit with artificial means. Only after viability may the state prohibit abortion.

Even then, such prohibition is not effective, because any abortion is allowed for reasons of the "life and health" of the mother. The Court went on to very broadly describe "health" to include not only the woman's physical health, but also her psychological, emotional, and even familial health, whatever that is. (Does that mean that if a woman has two children and does not want any more, she can abort the third because it was unplanned?) Thus, even in the third trimester, abortion is freely available. No one has ever been convicted of performing a third trimester abortion. Although Chief Justice Burger commented in his concurring opinion that the Court was not acknowledging the right to "abortion on demand," his assessment is not accurate; at any time prior to birth, abortion is legal.

The Supreme Court did not actually say that the fetus was not human, only that it was not a person. What it said was that the fetus, until it reaches the magic moment of viability, is only *potential* life. Life thus became not a biological fact, but a subjective standard. And even after viability, the fetus did not attain legal protection. Justice Blackmun, author of the *Roe* majority opinion, and the rest of the majority were persuaded that "the word person, as used in the Fourteenth Amendment, does not include the unborn."

The word "abortion" does not appear in the Constitution. Neither is the right to choose an abortion listed in the Constitution. The Court found such a right to exist in the "right to privacy," but the word "privacy" is not mentioned in the Constitution. It is found in court cases, and is thought to derive its protection from the Fourteenth Amendment.

One need only look at the development of this right to see why so many legal scholars, both prolife and prochoice, criticize the creation of the abortion right. The phrase "right of privacy" originally appeared in a now-classic law review article in 1890, written by Samuel Warren and Louis Brandeis. The authors advocated protection to prevent publication or use of facts relating to one's personal life, establishing the principle that each person has a protectable interest in a private life, both physical and emotional. This right was expanded to the "right to be let alone." Early right of privacy decisions protected the parents' right to educate their children privately, the right to teach children in a language other than English, the right not to be involuntarily sterilized, and the right to marry a person of a different race.

The right of privacy, twisted to include a woman's decision to abort, can permit the destruction of any unwanted person.

The right was further extended in the years immediately preceding *Roe v. Wade* in a series of decisions regarding reproductive issues. In *Griswold v. Connecticut* (381 U.S. 479 [1965]), for example, the Court found that contraceptives could not constitutionally be prohibited within the precincts of the marital bedroom. Next, the Court extended the right to use contraceptives to unmarried persons (*Eisenstadt v. Baird*, 405 U.S. 438 [1972]). Finally, in *Roe*, the right of privacy was found to embrace the woman's decision to abort.

An Uncontrolled Right

Almost immediately after the Supreme Court created the abortion right, lower courts were quick to enlarge it, and to give it a position of preeminence, reigning above every other constitutional right, and even destroying many of those rights.

First, and most obvious, is the sacrifice of the right to life of the unborn. Subsequent Supreme Court decisions have held that this right, which originally existed to *protect* the family and the marriage unit, excluded the parents from the child's abortion decision. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), the parents' right to grant or refuse consent to their minor daughter's abortion was denied. This spring, in *H.L. v. Matheson*, (49 L.W. 4225 (1981), the Court found that parents were entitled to at least notice of their minor, dependent daughter's proposed abortion. In *Danforth*, the Court went on to hold that the husband has no right to prevent the abortion of a child who is half his.

Several lower courts even held that hospitals were *required* to perform abortion procedures, regardless of the personal convictions of the medical staff. And numerous federal judges decided that indigent women were entitled to free abortions paid for by state and federal dollars, ignoring the shocked consciences and moral convictions of the taxpayers.

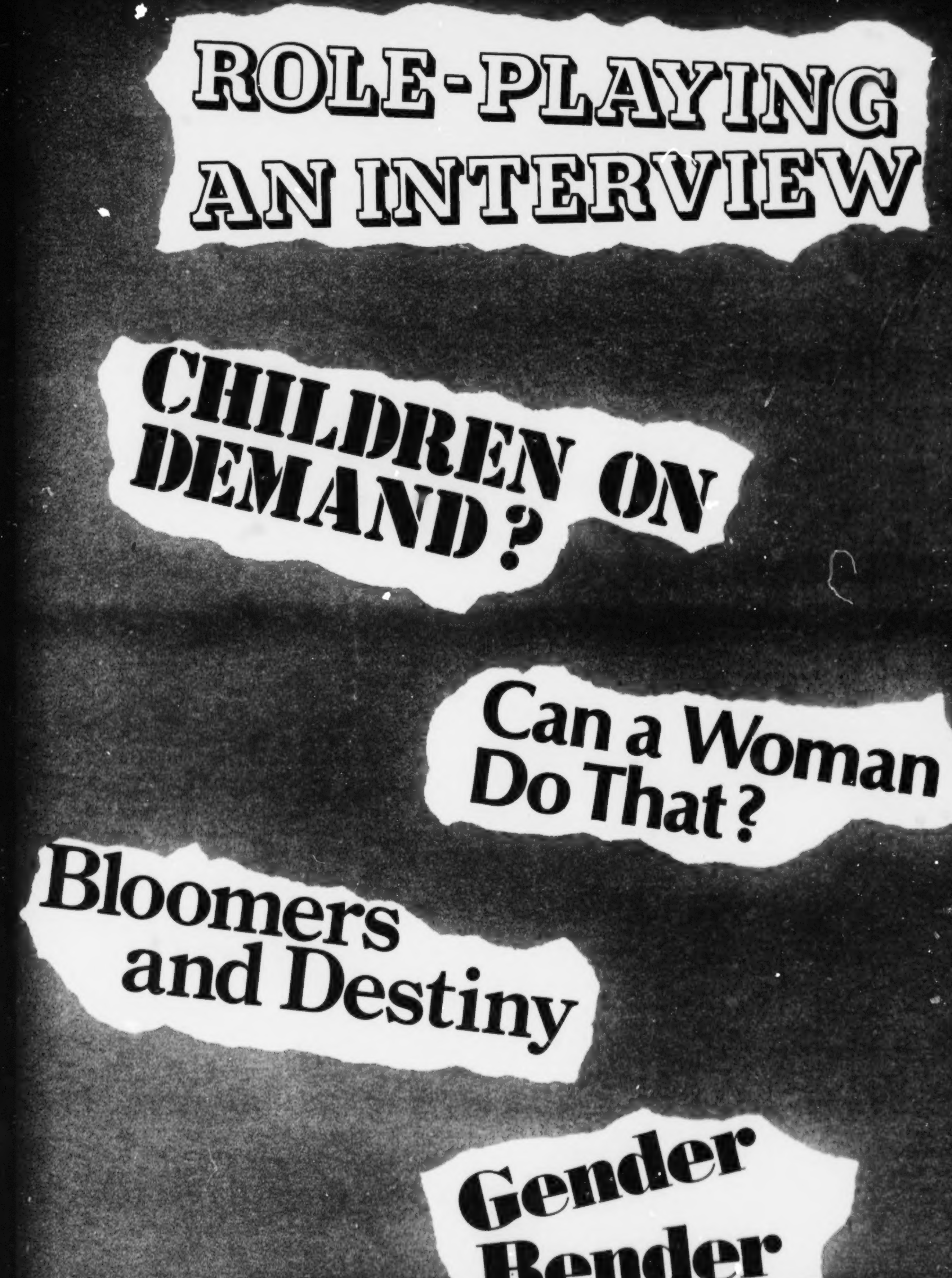
The current right to privacy is certainly broader than the older "right to be let alone." Indeed, the woman cannot logically say that her abortion decision is a private one. Either her doctor or an abortion clinic counselor consults with her, and the procedure is usually performed by a complete stranger. (Most women never learn the name of the doctor who does the abortion.) What kind of privacy is this that excludes those most vitally interested in saving the pregnancy, and includes those with solely a pecuniary interest in obtaining the abortion?

The right to abort has been expanded far beyond the Supreme Court's probable intention in 1973. Just last month, a team of New York doctors revealed that they had successfully killed an abnormal fetus in the womb of its 40-year-old mother, and saved its normal twin. The mother consented to the procedure of removing the blood from the heart of the defective fetus. In fact, she demanded either the procedure or the abortion of both fetuses, including the healthy one, even though she was "overjoyed" at this, her first pregnancy. (Reported in *Newsweek*, June 29, 1981, p. 86.) What privacy right did she exercise? Certainly not the right to be free from pregnancy, the right to an empty womb. Her choice was an affirmative act to be rid of a retarded child, one who was not wanted because he did not measure up.

Why can't the New York court ruling which protected this woman's decision be extended to eliminate a mongoloid child whose defect wasn't discovered until after birth? This is not a unique idea. Claire Thomas, a faculty member of the University of Washington Women Studies Program, believes "that death for the severely malformed infant is morally justifiable and is legally compatible with the language of the United States

(Continued on page 46)

Paige Comstock Cunningham is a third-year student at Northwestern Law School. She is currently helping establish a local crisis pregnancy center that would provide complete services for pregnant women—emergency housing, medical care, foster families—but would not provide abortion referrals.



ROLE-PLAYING
AN INTERVIEW

CHILDREN ON
DEMAND?

Can a Woman
Do That?

Bloomers
and Destiny

Gender
Bender

Carolyn Pereira

Classroom Strategies for Handling Women's Issues

"We ain't what we oughta be,
We ain't what we wanna be,
We ain't what we gonna be,
But thank God we ain't what we was."
—Martin Luther King, Jr.

Progress has been made! Times are better for women and minorities. Law and court decisions have helped. That is the good news. Women now have options they've never had before. That makes life exciting, challenging, and more complicated. All of us find ourselves in diverse roles in an increasingly complex society. As the roles and responsibilities expand, women are faced with choices that must be made. We can't be all things to all people, but in order to make wise choices we must be aware of the options and the potential consequences for selecting one over the other.

Schools can be most helpful in informing young people about what is, what has been, and what possible explanations there are, for the past and present state of affairs. Everyone should know that our history is full of examples of women striving for better lives. Much can be learned from both the successful and unsuccessful attempts. One of the earliest examples in U.S. history is Abigail Adams's attempt to influence her husband John. Her letters are classic examples of democratic theory in action: ". . . [We] will not hold ourselves bound by any laws in which we have no voice or representation." She lost. However, the Married Women's Property Acts in the late 19th century, the 19th Amendment in 1920, and the 1964 Civil Rights Act are all examples of success.

What can educators do to teach youngsters about women's issues? The strategies which follow are suggestions taken from materials and programs of the Constitutional Rights Foundation (CRF). For further information about them, contact CRF, 122 South Michigan Avenue, Suite 1854, Chicago, IL 60603, 312-663-9057.

Strategy 1.

Finding Stereotypes

Stereotyping has traditionally been a human's way of dealing with an increasingly complicated society. Therefore, an educator needs to work on strategies to challenge stereotypical thinking. Gender benders do this and also sharpen listening and questioning skills. These kinds of exercises are part of CRF's training manual.

Try one of these in your classes. Allow students to ask questions which can only be answered by yes or no until the group discovers the answer. You may wish to do this in a class period or allow students a few minutes of questioning at the beginning or end of class.

Gender Bender No. 1. A man came home early and heard his wife cry out, "John, don't do it!" A shot rang out. The man rushed into the room, saw his wife lying in a pool of blood, and three people standing over her—a lawyer, a doctor, and a chef. He ran up to the chef and said, "Why did you do it?" How did he know the chef killed his wife? (Answer: the lawyer and doctor were both women.) For follow-up, explore these professions and how to prepare for them. Ask the class to brainstorm on why women are not identified with any of these professions. List adjectives to describe lawyers, doctors, and chefs. Might these adjectives apply to women as well as men?

Gender Bender No. 2. An Indian and the Indian's son went hunting. They killed a deer large enough for a huge feast and brought it back to the village. The son ran ahead to tell everyone of their good fortune. When he arrived, he told the chief about the deer. The chief said, "We will honor your father at the tribe's feast." The boy said, "You must not." Why shouldn't the chief honor the boy's father? (Answer: the boy's father didn't kill the deer. The boy's mother did.) As a follow-up, long-term class assignment, have individuals collect data on the roles of women in other societies, past and present.

Gender Bender No. 3. A husband and wife were about to entertain the husband's parents for the first time. The wife was nervous about cooking. She had never done much, and her husband had always praised the delicious meals he had eaten at home. The wife burst into tears. She had just burned the roast. "What will your mother think," she cried. Her husband assured her not to worry about what his mother would think of her cooking. How did he know his mother wouldn't mind? (Answer: His father did all the cooking; his mother was a terrible cook.) As a follow-up, the class might list the jobs that need doing in a home and take a survey of who is responsible for those jobs in their homes. A beginning list might include earning money, purchasing food, preparing food, caring for children, cleaning, doing laundry, and making repairs. Compare and contrast results. What factors explain similarities and differences? What family members seem to be primarily responsible for the welfare of the family?

Strategy

2.

Bloomers and Destiny

The following strategy has been excerpted from "Learning to Live in Your Community: A Special Place," one unit from the *Becoming Citizens* curriculum, a joint project of CRF, the National Street Law Institute, and the Maryland Law-Related Education Program. It was designed to explore the concept of choice for third grade. It is preceded with a unit on responsibility and followed by a unit on governance. Slight modifications have been made to make it a self-contained activity focusing on women and their struggle for equal opportunity.

People, places and events make a community special. So do its problems. All communities have problems, at times, and there are often people in the communities who have different opinions about these problems and disagree on what should be done about them.

Read the class the following short story about an adult who is remembering the past, when she was not free to dress as she wished, as she is today.

Who Should Wear the Pants?

I love winter, but I remember trying to walk to school wearing all of my heaviest clothes. I couldn't run, jump, or climb trees. I could hardly move.

Stop—Ask everyone who loves to run, jump, and/or climb trees to raise a hand.

Even when it got warm, I had trouble because of the clothes I had to wear. The other girls did, too. When I was a little girl, girls always wore skirts or dresses to school. My school had a rule saying that girls could not wear slacks unless it was a very cold day. If it was a cold day, then we could wear them under our skirts and take them off at school.

Not only was there a time when girls rarely got to wear pants, but also there was a time when girls hardly ever got to run, jump, or climb trees. Even if they wanted to and their parents didn't mind, the clothes they had to wear made it very hard. Over 100 years ago, all women wore floor-length hooped skirts; some of the hoops got so big, ladies couldn't get through the doors!

Stop—Explain what a hooped skirt is and perhaps have someone do an imitation of a lady trying to walk into your class with a huge hooped skirt.

One women, Amelia Jenks Bloomer, didn't want to wear hooped skirts. She shortened a skirt to come just below her knees and made puffy pants to wear under the dress. Those puffy pants became known as "bloomers."

Stop—What do you think happened the first time she wore them? Allow a few children to guess, then continue the story.

Although what she did wasn't against the law, it was against what almost all people thought was right and proper. Both men and women made fun of her and called her names.

Stop—What do you think would happen today if Amelia showed up at school in her bloomers? Allow a few children to guess, then continue the story.

Amelia went around the country giving speeches and writing, always dressed in her "bloomers." The bloomers became a symbol for women's liberation. Women wearing bloomers could do many more things—things that "ladies" were not supposed to do.

Stop—What kinds of things does she mean, do you think? What does liberation mean? List answers on board. Continue reading.

Amelia wanted to make life better for women not just by changing what they could wear but by also changing the law. She encouraged laws to protect women both married and unmarried, help them to get a better education, and let them vote. Women can now vote, can go to public schools, and certainly can wear pants.

Just as people in Amelia's community felt that wearing "bloomers" was not proper, many people in communities today have different opinions about a variety of issues. Some of these issues may eventually lead to new laws, and the others may be solved by the community itself.

After reading, discuss:

- What was the problem for Amelia?
  Amelia wanted to dress differently.
- Was dressing differently a problem? Why would people object? It just wasn't done. People thought it was immoral and unladylike and might cause men to treat women badly.
- What are some of the reasons Amelia might have given to support her way of dressing?
  No one else's business. Not hurting anyone. It's more comfortable. It's more practical.
- What are some reasons which might explain why women no longer dress in hooped skirts?
  Roles of women changed. People became used to different dress styles.
- Are there any laws that tell us how to dress now?
  In school and public places, you must dress to protect your health, your safety, and the safety of others.

This can be used as a springboard for investigating laws that protect married and unmarried women, guarantee them equal educational opportunities and employment, etc.

Strategy

3.

Can a Woman Do That?

The following activity has been excerpted and adapted from the Constitutional Rights Foundation's *Law Today*

Carolyn Pereira is director of the Constitutional Rights Foundation in Chicago. She has taught at every educational level from kindergarten through college.

mini-unit entitled "Play Ball" (Sex Discrimination in Sports). It is intended to stimulate a class's thinking about jobs that have been traditionally male or female. Have each member of the class indicate whether he/she is comfortable (C) or uncomfortable (U) with the following situation:

____ 1. Your car will be repaired by a female mechanic.
____ 2. Your son has a male kindergarten teacher.
____ 3. The pilot of your plane is a female.
____ 4. A male friend doesn't know how to drive.
____ 5. Your priest is a woman.
____ 6. Your new neighborhood police officer is a woman.
____ 7. Your preschool children have a baby-sitter because your wife works.
____ 8. Boys' sports have a much bigger budget than girls' sports.

1. Compare male or female responses. Have each class ask their family members the same questions. Compare results.
2. What reasons can you give that some people are disturbed by men and women interchanging typical roles?
3. Review the eight items discussing how laws may relate to each situation:

1, 2, 3, 6—1964 Civil Rights Act prohibits an employer from discrimination based only on sex. Equal opportunity guidelines help to enforce this.

4—No law applies.

5—Religious doctrine may or may not prohibit this.

7—Laws have made it more possible for women to be employed outside of the home. Latest statistics indicate that mothers who work are now in the majority.

8—This may or may not be in violation of the law. In addition to the constitutional equal protection requirements, Title IX of the Education Amendment of 1972 also prohibits discrimination against girls in sports. Title IX provides, in part, that "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance." (20 U.S.C., Supp. V, Section 1681). Issues under this law would be decided on a case by case basis. The question is, do girls have an equal opportunity to participate in sports of their choice?

Strategy

4.

Children on Demand?

This is a follow-up lesson from a *Law Today* mini-unit entitled "Design for Life." The preceding lessons examined the rights of parents, mothers, and husbands in abortion cases. This lesson offers the students an opportunity to examine the rights of the government in issues concerned with abortion. The case can be analyzed more completely if the activities preceding it are done.

A Hypothetical Case

It is the year 2020. The United States has been successful in its campaign of the past 25 years to attain zero population growth. This policy had been set in the 1990s, when it was recognized that the country would be faced with a major crisis if the population continued to increase at the rate it had since the turn of the 20th century.

Envisioning critical food shortages, vast unemployment, and inadequate housing, as well as intolerable pressures on resources such as water, electricity, oil, etc., the government passed laws restricting child bearing and specifying that couples wishing to have a child must obtain a license to comply with the law. If the woman becomes pregnant without the government's approval, the government can order her to have an abortion.

Caroline and Frank Robbins have been married ten years. They have no children. They decide they want a child. They complete the necessary papers and file their application. It is refused. Caroline and Frank decide to have a child secretly and to fight the law if they are arrested.

Questions

A. If the country faces a crisis such as outlined in this situation, should the government have the right to interfere with the freedom of the individual because of the needs of the whole society? Why? Why not? Do you think your attitude would be the same if you were married and wanted a child? If you had six children and had difficulty supporting them? If you were the President of the United States responsible for the well-being of the entire country?

B. What constitutional issues are raised? (Fifth, Eighth and Tenth Amendments).

C. What arguments would you use if you were a lawyer defending the Robbinses in this case? The prosecuting attorney? Both sides should consider arguments for the mother, the father, the unborn child, the government, the society.

D. Who should have an interest in deciding abortion issues? The government, the mother, the father, the child, the medical profession, the religious community? What should their roles be? Who should protect the unborn child?

E. If you were Caroline or Frank, would you challenge a law prohibiting you from having children without a license? Why? Why not? Could such a law prevent Caroline and her child from getting proper medical care? How might the government enforce this law?

F. How might women feel who had fought for the right to have an abortion on demand? Could an alliance of "right to life" and "abortion on demand" women be formed if the government were to pass such a law?

Strategy

5.

Simulating a Job Interview

The following activity is adapted from a *Business-in-the-Classroom* unit, "Fair Employment Practices." In this unit students explore:

- The problems that face a personnel manager.
- The ways in which a government agency is involved in the employment process, particularly as it relates to a female.

Who Should Get the Job?

Parker Company needs a person to do the following job:

Position Title: Editorial Assistant

Basic Responsibility: Provides research and secretarial assistance to members of the publications staff.

(Continued on page 64)

WOMEN AND THE LAW Linda S. Wojtan

The Tug of War Between Law and Custom

To what extent do laws shape the lives of women today around the world? The societies examined here—Japan, the USSR, Egypt and Israel—all have undergone major sociological changes since World War II. Indeed, a plethora of laws dictating the status of women has been passed in all of these societies. How has codified law been transferred into actual practice?

In many ways the journey from law on paper to law in practice is a long and uncertain one. Every society, especially those examined here, has a variety of ethnic, religious or sociological traditions and customs that impinge upon formal laws, reshape them, and, in essence, dictate how they will be applied. Further, historical conditions have often fostered a number of ascribed roles for both men and women. Although devoid of any formal sanction, these practices and traditions have a strength and endurance that often surpass that of formal law.

The position of women in Japan, the USSR, Egypt and Israel has undergone tremendous change during the past three decades. The laws in these countries reflect that change. The societal practices, however, belie a problem—often there has not been a concomitant psychological change. Each of these societies, then, has some unfinished legal business. Each will respond within a framework that is still largely dictated by tradition and custom.

The following sections examine women in the political, economic, educational and marital realms. The tension or dialectic between theory and practice is the overriding concern. The legal efficacy of women is the ultimate question.

Women in Japan

Legislative mandate versus sociological reality—what is the position of Japanese women today? To what extent do Japanese laws establish or ensure legal efficacy for women, a framework within which women have control over their lives? While a variety of laws guarantee equality, change is slow in coming since each legal alteration in the lives of women must be accompanied by a concomitant sociological change in tradition, practices and ascribed roles. The result is that today Japanese women face a puzzling combination of opportunities and deprivations. Japan can be classified as a modern society, but the position of women is, and is expected to be, tradi-

798

tional. What role does law play in this paradox?

Education and Employment

The postwar period in Japan brought sweeping changes, including Article 14 of the Constitution of Japan: "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." To what extent, however, is this legislative mandate reflected in Japanese women's participation in education, employment, family life, politics and government?

The arenas of education and employment present a mixed record. About 95% of all girls who complete the nine years of compulsory schooling move on to senior high school with about 35% of those going on to colleges and universities. Yet, most female students choose a two-year junior college course rather than the four-year university course—why?

Perhaps the main reason is that equal access to education is *not* complemented by access to equal employment. No opportunities were offered to female university graduates by 78% of a total of 5,000 enterprises queried in a 1977 government survey. It is generally agreed that the situation has not really changed in the last four years, even though Japan's Labor Standards Law and international agreements stipulate the principle of equal pay for equal work. Principles of equal pay have no meaning, however, when women are not even offered equal work. Firms can simply continue to fill less-skilled positions with women who have lower qualifications than men, and thereby feel justified, if not legally sanctioned, in offering lower pay.

The next question, of course, becomes, why do Japanese companies insist on this practice? Rather than assuming malice on the part of these corporations, one must examine the rather unique Japanese corporate style and the position of employees within that framework, especially at the managerial level. The traditional Japanese business insists on a life-long commitment from its employees and promotes on the basis of seniority. Within this scheme then, women who have children and interrupt their career to care for them—"break service"—violate a taboo among employees seriously climbing the Japanese corporate ladder. Further, married career women with children confront an "ascribed" corporate life pattern that offers little flexibility for family concerns—an almost zealous commitment to overtime work and after-hours socializing. A successful and responsible Japanese businessman works long hours, both evenings and weekends, then goes out with male colleagues and business contacts for work and pleasure at some night spot. Though some women advocate legal measures to support equal opportunity in employment, it is doubtful that a law would legislate away this pervasive corporate pattern.

Family and the Law

Similarly, it is not possible to legislate away years of tradition and practice surrounding Japanese women's position in the family. Legally, the Constitution provides the following guarantees:

> Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Regardless of Japanese law, however, an estimated half of all Japanese marriages are arranged. Further, a price is asked for a bride in many cases—usually $2,000. About half of this sum is usually returned by the bride's parents as a cash gift and the other half is returned as household items. Modernization has altered this system slightly; instead of the *nakohodo*—go-betweens—being a respected couple, many arranged marriages are the result of computerized matchmaking! In general, however, the prospective bride and groom aren't obliged to bow to family wishes against their own preference.

Perhaps the crux of the issue is the unique home situation of Japanese women. Despite the docile, decorative and demure image perpetuated in the media, Japanese women have historically wielded much power within the home. Typically, the Japanese husband turns over his entire salary to his wife who doles out his daily allowance, in addition to making the major economic decisions. Women also spend a great deal of time carefully tutoring and managing the education of their children. Most Japanese children, therefore, make remarkable educational progress; many feel, however, that maternal pressure to achieve explains Japan's high incidence of child suicides.

What happens when this pervasive home pattern of Japanese women must be reconciled with modernization or, as it is sometimes described, Americanization? Three decades ago Japanese women married at 20, had at least five children, and died by age 50. Today the average life expectancy is 78, Japanese women have fewer children and many more gadgets. What does the average woman do, then, after she has had her children, cared for them into their adulthood, and still has at least four decades of her life left? Her choices seem few—participation in politics has been limited, while a meaningful job, good pay, and advancement in various business jobs have been denied to many women.

Newspaper commentaries provide telling evidence of the strength of traditional attitudes. While the situations described below are extreme, they indicate the gap between legislative standards and societal practice. One story told of a woman designer who burnt herself to death after being forced by her husband's family to leave her job and stay home to look after her child. A weekly magazine commented: "This shows the trouble that can arise from women working." A second item reported on a woman who had to work because her husband fell sick. She was unskilled; she could earn very little and semi-starved herself so that her family could have enough to eat, and died of malnutrition. The press expressed the opinion that she was "a noble, self-sacrificing lady."

The legal position of Japanese women, then, seems to converge on their home situation. A Japanese female corporate head, herself a living exception to the rule, offers this blunt assessment: "Japanese women who feel they can't combine marriage and a career are simply weak or uninterested. Of course, you have to choose your husband carefully, but if you do that, there's no problem."

Political Directions?

Home life and job status remain in limbo between law and practice. To what extent is politics a viable arena for participation of Japanese women? The 1945 revision of the election law gave equal rights to men and women in the political field for the first time. All women over age 20 were granted the right to vote in all elections, both national and local. Subsequently, almost 70% of the newly enfranchised women voted in the 1946 general election. They returned 39 women legislators to the House of Representatives.

Today, however, Japanese women play a peripheral political role. Of the 761 seats in Japan's parliament, women hold only 15. Only two women have ever sat in the Japanese cabinet, and none has done

Resources for Teaching about Japanese Women

Audio-Visual

Their Place in the Sun: Images of Japanese Women is an examination of women's varied roles in Japan. Teacher's guide ($3) and supplementary slide set ($25) are available from: Teaching Japan in the Schools, Stanford University, Room 200, Lou Henry Hoover Bldg., Stanford, CA 94305. Telephone (415) 497-1114. *Women of Modern Japan* can be obtained through a free loan on 16mm film or video cassette (Sony U-Matic KCA type) from: Japan Information Service, Consulate General of Japan, Water Tower Place, Suite 950E, 845 N. Michigan Avenue, Chicago, IL 60611. Telephone (312) 321-9560.

Print

You or your students may want to consult the following sources: Lebra, Joyce; Paulson, Joy; and Powers, Elizabeth; (eds.), *Women in Changing Japan*, Boulder, CO: Westview Press, 1976. Biographical sketches of contemporary Japanese women. Minear, Richard H. (ed.), *Through Japanese Eyes*, (rev. 1981) Vol. I *The Past: The Road from Isolation*; Vol. II *The Present: Coping with Affluence*. Student books ($4.95), lesson-plan book ($1.50). Part of the highly acclaimed *Through Asian Eyes Series*. These student materials treat the topics of marriage and family solidarity. Available from: Center for International Training and Education, 60 E. 42nd Street, Suite 1231, New York, NY 10165. Telephone (212) 972-9877. "Status of Women," *Facts About Japan Series*, Code No. 05402 (Nov. 1977), four-page pamphlet available free of charge from Japan Information Service (see address above). "Women in Japan," *Update*, No. 13, May 1981. Free Newsletter of Center for Asian Studies, University of Illinois, Room 201, 1208 W. California Avenue, Urbana, IL 61801. Telephone (217) 333-4850.

Teacher Resources

Many materials exist on women in Japan. A few of them are: Amin, Abidah, "Japanese Women: Thoroughly Modern But Not Yet Liberated," *The Asia Record* 2 (June 1981); Christopher, Robert C., "Japan's Women Wage a Quiet Revolution," *Asia* 4 (May/June 1981); "How Asians Marry—Despite Change, Arranged Marriages Thrive," *Far Eastern Economic Review* (5 May 1981); "The Women of Japan," *About Japan Series*, Foreign Press Center, Japan (July 1977).

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so since the early 1960s. This situation, many feel, will ultimately set back women's rights in Japan. For example, last year the Japanese government refused to sign a convention, drawn up at the United Nations-sponsored women's conference in Copenhagen, aimed at eliminating discrimination against women everywhere in the world. It was only after pressure from the press and women's groups that the decision was finally reversed.

How do we gauge the status of Japanese women? Regardless of legal similarities between Japan and the United States, regardless of outward manifestations of modernization that seem to indicate an inexorable process of Americanization, simple Western/US referents will not suffice. The status of Japanese women, as individuals or even as a group, must be considered in the context of the ultimate group—Japanese society. The pervasive group-oriented value system dictates that the status of women is just one ingredient in a carefully balanced cultural matrix.

Soviet Women

The role of the average Soviet woman is a complex one. Many seek to fulfill all three roles of the ideal Soviet woman in the economy, in public activity, and in the family. The Soviet woman is assisted in her quest toward the Soviet ideal by a variety of laws. Indeed, most Soviet protective legislation seeks to make it unnecessary for women to choose between family and career. Further, the Communist Party has actively recruited female membership. But what happens when reality differs from the Soviet idea? Does one criticize laws that already champion equality? Or does one criticize the sociological reality—not always a politically safe action in the Soviet Union?

Jobs and Politics

Most Soviet women work; approximately 90% of healthy, working age women are gainfully employed. The Soviets have long accepted the ideological nexus between economic independence and sexual equality. Further, full participation of all citizens in the work of the country is mandated in the Constitution: "It is the duty of, and a matter of honor for, every able-bodied citizen of the USSR to work conscientiously in his chosen, socially useful occupation, and strictly to observe labor discipline." Both law and the Constitution provide for the principle of equal wages for equal work, and the principle is now strictly enforced. Specifically, equal opportunities in employment, remuneration, and promotion are guaranteed.

Further, the Soviet Law Code (revised, August 1973) mandates for all working women:

> a paid sixteen-week maternity leave, the right to perform light duties for a time after returning to work, free prenatal, surgical and other medical services and either free nursery services or the alternate right to stay home with the child for a longer period without pay but without loss of job or seniority.

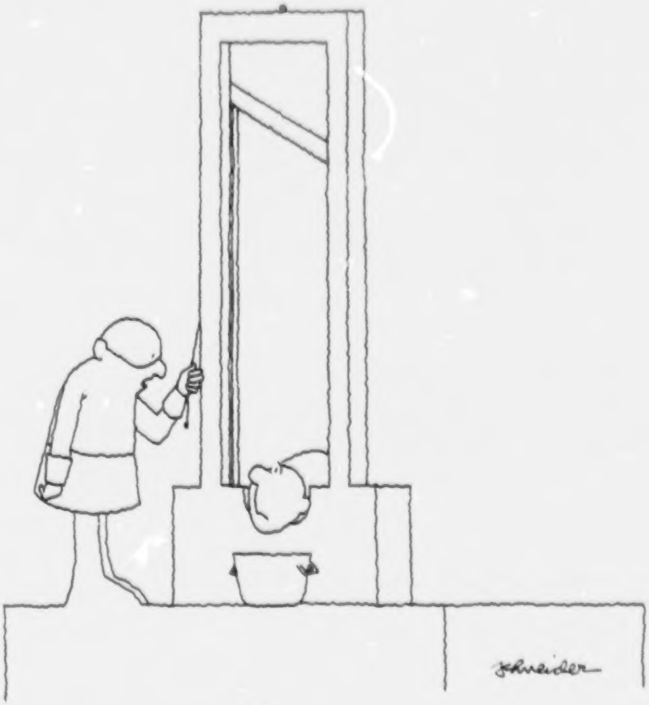
In addition, the code prohibits the employment of women on arduous jobs with unhealthy working conditions that might interfere with a woman's childbearing function. The Soviet Constitution also gives women "equal access with men to education and vocational and technical training."

Armed with these important legal underpinnings, how do Soviet women fare in the economic marketplace? Women predominate in traditional service positions such as teaching (75%), food services (91%), clerical (99%), and librarian services (95%). In general, Soviet women predominate in jobs where the pay scale is the lowest and are underrepresented in the prestigious professions and managerial and executive ranks.

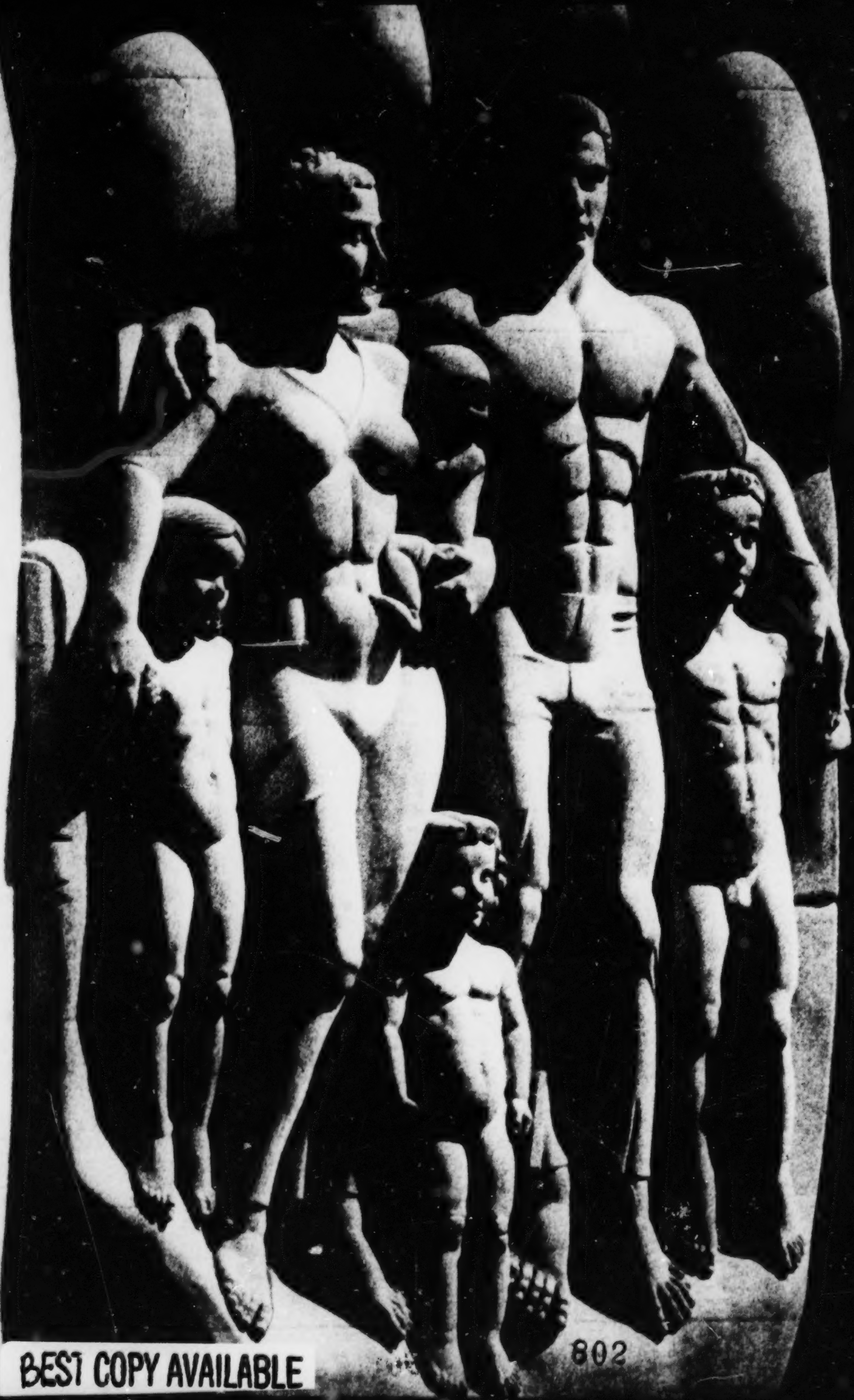
This disturbing situation exists in the political sphere, too—an important consideration in a communist state. Although women are well-represented in local governmental bodies, they are all but absent from the higher levels of power and decision-making. No woman has ever held any of the top three posts in Soviet political life, and there has only been one woman member of the Politburo (Presidium). Despite an intense recruitment campaign, less than 25% of the party members are women. Since Soviet law encourages full equality and many Soviet women daily seek to fulfill the Soviet model of public participation, what can explain their apparent lapse in the political arena?

Many have surmised that the low participation of Soviet women in Party activities is attributable to a phenomenon called the "double" or "second shift." The large percentage of employed Soviet women have a second full-time job awaiting them at home. It is estimated that most Soviet women work 16-hour days, 80-hour weeks. Shopping alone consumes about 40% of the household chore time and few electrical appliances or household auxiliary services such as take-out food shops, laundromats, cleaners, etc., are available to help save time. As a consequence, Soviet women work more and rest less than anyone else in the

(Continued on page 60)



"Now let this be a lesson to you."



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WOMEN AND THE LAW

Ellen Wilson

In Lit. Crit. circles nowadays, there is a school of Feminist Criticism. The uninitiated might suppose that critics of this school devote themselves to feminist literature; in reality, it is the critics who are feminists, but the original hypothesis is not far wrong. For a curious thing happens to authors subjected to this treatment: no matter how unmodern or acquiescent or unironical, they are transformed into milestones on the road to feminist consciousness. If they show glimmerings of rebelliousness, they are prophetic; if uneven style or undisciplined outbursts of feeling, they are frustrated and resentful; if they placidly mirror the sexual stereotypes of the day, they are storehouses of sociological data. All the vast history of literature can be gathered, summed up, and dismissed as the record of an unjust social arrangement belatedly arousing the opposition it deserved.

The uninitiated in the world of women's law is often similarly confused as to the meaning of that phrase. Are we speaking of women who study or enact or profess law? Or do we mean women as the victims of unjust laws, or the beneficiaries of enlightened ones? Or do we perhaps have in mind a method of legislating, practicing or interpreting law from a feminine perspective?

Confusion exists because these differing understandings merge in our minds. They seem to mean much the same thing; each seems to contain the meanings of the rest. But when we try to understand the mechanics of the relationship, we fall back on a confused explanation that women lawyers are after all peculiarly interested in the legal status of their sex, and feminists tend to judge society on the basis of its effort to improve that status.

But this understanding of women's law rests on a large number of unproven assumptions. It assumes that most women are (politically liberal) feminists; that most women lawyers are also feminists; that those who are not must be female Uncle Toms; that enlightened legislation will midwife a sex-blind society—well, the list goes on and on. Volumes could be written on each of these subjects, but the question I wish to isolate for consideration is how effectively the law can promote women's welfare or safeguard women's rights. What can the law do; what can't it do; and what, in the light of the answers to those questions, should we ask it to do?

Legislative Fallout

One great political truth which should be engraved on every legislator's heart is this: every law does more than it is supposed to do. Every law spills over into areas it was never intended to affect. Like St. Paul, every legislator can confess that he has done that which he would not do. One explanation for this is that a legislator, when legislating, understandably focuses his attention on that group for whom he is legislating. If he is fashioning laws for women, he will concentrate on them—on their historic injustices, their special problems. He will tend to see less clearly those groups of which women are members: families, churches, businesses, schools. In his desire to right wrongs and battle injustice, the reforming legislator may set in motion a complicated domino effect. Even good, even *necessary* laws will have some undesirable fallout, but the bad effects must at least be recognized, to keep us honest and to keep us careful—to discourage those laws not quite so necessary nor so good, which the meliorist may urge upon us.

Legislative fallout from women's law has its greatest impact on tightly-knit groups or associations of individuals that clearly differentiate between male and female roles. It is not surprising, then, that the institution most drastically threatened with change is the family: it is the most nearly universal of human institutions; it offers perhaps the greatest opportunities for intimacy; and membership is to some extent unchosen, involuntary. Of course the committed social revolutionary, or the feminist reconciled to "necessary" changes in pursuit of a sexless society, will easily accept the required sacrifices. The true revolutionary willingly forfeits a decadent social institution or two in order to achieve his goals, and those feminists who see no hope of just social relationships between the sexes until the present arrangement is dismantled will not shrink from the cost to the traditional family.

But those of us with visions less apocalyptic should consider, first, whether feminist goals can be accomplished by law and second, whether the undesirable fallout will not outweigh the anticipated benefits.

For example, when courts deny husbands a voice in the decision on whether or not their child will be aborted, the intent may be "liberating" to one party but the effect is to loosen the bonds of families and marriages. When courts treat palimony cases as variations on the theme of divorce, or when they handle divorce settlements as they would the dissolution of a business partnership, they dilute the distinctive function of marriage as an institution entrusted with the bearing and nurturing of children.

When school boards approve (and the federal government aids) sex education programs which, precisely because they "neutrally" leave decisions up to the child, contradict the values that many parents seek to instill in their children; when primary responsibility for other branches of education and other important decisions passes from parents to schools or to the children themselves; when minors have the right to negotiate an abortion without parental consent (and, until a few months ago, without parental notification), then families are necessarily weakened because their responsibilities are curtailed; their sphere of action reduced.

The Limits of the Law

Feminists and social engineers see the law as a shielding hand; others worry that it's a fist

Bureaucratic Harassment

Turn to another concern of women's law—sexual harassment on the job. Here offenses large and small are fairly widespread, and the instinctive reaction is "there oughta be a law." But a law against which offenses, on what scale, enforced how? The choice seems to lie between ineffectiveness and near-totalitarian intrusions into private business and private relations. The tendency of recent rulings and legislative hearings on the subject inclines toward the latter course, complete with debates on appropriate industry guidelines and proliferating doubts about which forms of male-female professional behavior are "merely" unpleasant and which should be illegal. This is precisely the kind of discriminative judgment that comes hardest to most feminists, but I stress it because those liberals who routinely complain about legislating morality seem to ignore the glass houses they themselves are building.

To acknowledge enormous and, in my opinion, inescapable legal complications in this area is not to align oneself with the Phyllis Schlaflies of this world. Sexual harassment does exist, on many levels and in every kind of work situation. But we should at least consider whether bureaucratic harassment is an acceptable substitute. If we design laws ample enough to catch even oblique practitioners of sexual harassment, then almost all relations are destined to become public relations; all exchanges, public exchanges; all rights, civil rights. Further, judges and juries will need broad powers of interpretation. "Hard cases make bad law" goes the old legal maxim; nowadays it is the rare job discrimination or sexual harassment suit which is not a hard case, complicated by mixed motives and biased testimony.

The recent Supreme Court decision permitting lawsuits by women who claim discrimination because they do not receive equal pay for "commensurate" work pursues the logic of earlier women's rights cases. It is a well-intentioned decision which, seemingly unintentionally, challenges the axioms of the private enterprise system and promises to strain the services of the nation's moral philosophers. For what is commensurate work, and who will agree on its definition? If government departments and courts can advise employers on which employees perform commensurate labors, why shouldn't they similarly weigh the commensurability of bookkeeping and office managing, or bank presidenting? More importantly, the question is not whether the thing can be done, or whether it should be done, but whether it can be done without doing a great many other things as well.

Law's Limits

These are ways in which laws designed to protect women's rights result in the violation of other rights. But laws can also accomplish *less* than we wish—not necessarily because of indolent enforcement or inexpert construction, but

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Ellen Wilson, a writer living in New York, is contributing editor of Human Life Review.

"Looks like a hung jury."

because there are limits to what even the most ingeniously designed and energetically prosecuted laws can achieve.

There is an analogy here with the changing legal status of blacks and other minorities over the past few decades. A long period of overt and systematic discrimination, including the denial of civil rights, is followed by the awakening of a strong sense of injury and the arousal of determined effort. There follows an active challenge to the status quo, and eventually the opportunity to exercise rights which were guaranteed in theory, but previously denied in practice.

But once the laws are on the books, once executive officials are enforcing their provisions and the courts are prosecuting offenders, the oppressed group discovers that something is still missing. What is missing is a social change of heart—an internal assent of the mind and heart accompanying the externally-enforced change of public behavior. Members of groups which have been discriminated against can then arrive at one of two conclusions: either more and better laws are necessary, or laws alone will not make men good. The first conclusion is propagated by social engineers, professional tinkerers with social mechanisms who never lose faith in a system without flaws that will produce people without flaws.

The second conclusion belongs to believers in original sin. They are aware of the Protean shapes evil can assume, and the ability of the evildoer to adapt to any legal situation; hence they seek rather to restrain evil in the public sector than to eradicate it entirely. Hence they distinguish between public and private life, between civil liberties and those to which the state is not a party, between the spheres of law and of morality—spheres which share common ground but remain distinct.

Those who insist that relations between "oppressed" and "oppressors" must be changed radically and quickly will favor either violent revolution or else the legal method which proved so effective in the first stage of the struggle for equal treatment. They will be preoccupied with the ways in which majorities or elites keep minorities in positions of social inferiority; they will focus on the inner disposition of "oppressor groups."

In this second stage of feminist activity women become conscious of all that equal pay rulings and liberalized divorce and property rights laws and credit card battles and even affirmative action campaigns cannot accomplish. They cannot alter prejudicial ways of thinking about women; they cannot transform social relationships between men and women or erase stereotypes; they cannot solve family-and-career dilemmas. Though laws do have a teaching function, their influence is not coercive, and we should remember that liberated lifestyles and the move from home to career largely preceded the great feminist political efforts of the sixties and seventies.

Second Stage Blues

At this point of retrospective dissatisfaction, feminists and fellow travelers from the ACLU school of civil liberties cross the boundary between civil liberties and private morality. The radicalized feminist rivals a Kentucky book-burner in her opposition to textbooks propagating Mommy-at-home and Daddy-at-office stereotypes. She fights sexist nouns and pronouns, and agitates for an equal financial investment in women's athletics. Anyone, whether private individual or elected official, may legitimately press for these goals. But the desire to codify them, to legally enforce them as essential elements of a society respecting equality between the sexes, bears the mark of the social engineer. It is a matter not only of form, but of content: it is the enforcement of *these* paradigms, which are precisely *un*enforced by our culture, whether traditional or contemporary, that marks the ideologically revolutionary character of the enterprise.

Affirmative action is another example of the engineering impulse seeking to impose second-stage equality: Like the arithmetical CPA approach to equality which had the '72 Democratic convention patrolling highways and byways for black Hispanic women, it favors the mosaic approach to social organization: colored bits of stone arranged in elaborate patterns of light and dark.

Now, attempting to circumvent the natural processes of conventions or elections or personnel procedures is, of course, undemocratic. If a majority of voters or, as the case may be, school board members or stockholders approved of these feminist goals, the kind of legislation and bureaucratic policy changes which feminist groups seek would presumably be unnecessary. To label them undemocratic is not automatically to condemn them: the aims of reformers, from abolitionists to suffragettes, are usually "undemocratic" until they are about to be achieved, and full acceptance may lag even farther behind.

But feminist second-stage demands are dubious not only from a majority-rule vantage point, but also from a constitutional and nontotalitarian one. They are aspects of the effort to achieve a social change of heart by dismantling and reconstructing the social structure. This is no thin-edge-of-the-wedge argument: feminists like Germaine Greer openly argue that a social revolution is necessary in order to challenge sexual discrimination and stereotyping where it starts, in the nursery.

The more numerous hangers-on share only portions of this agenda, perhaps supposing that a less drastic reworking of the system would suffice, but only failure of nerve or imagination could persuade them of this. If affirmative action is acceptable, then why stop building the better society there? On July 4, 1981 the *New York Times* saluted the Supreme Court's "commensurate work" decision. What besides intellectual timidity or philosophical inconsistency restrains the *Times* from supporting public supervision of the whole process, from job recruitment to salary specifications to federally-mandated day-care centers in every place of business? Which of these interventions is inconsistent with the preceding ones?

The intent, then, of second-stage feminist legislation is a profound alteration of the way people live, work and raise families. Because all of us have been contaminated by our culture—by the dolls that godmothers give little girls and the toy soldiers that godfathers give little boys—the fully just and "sexless" society awaits a purer generation. A break in the traditional way of rearing boys and girls will be necessary if, as feminists hope and believe, a psychologically neuter generation is to be achieved.

Here is where the law comes in. Argument and education alone will not convince all or even most of America's parents to adopt *Ms.*-approved programs of child-rearing. Oh, families may pick and choose among the feminist offerings, but that is hardly the same thing as buying the complete program. And by "progressive" standards many parents remain positively Neanderthal. Therefore it is necessary to enlist the aid of some more enlightened agency, and one with coercive powers. This, I think, explains the often stiff opposition to many supposedly neutral sex education programs.

(Continued on page 58)

WOMEN AND THE LAW

Gary Rivlin

The Last Bastion of Macho

Or, as one policewoman was asked by a male colleague, "What's a nice girl like you doing in a profession like this?"

The sergeant nods toward two likely pickpockets standing in the doorway of a crowded Chicago subway car. "I'm sure Mary notices them, too," he whispers. Mary Nash (fictitious name), one of three other undercover police officers on the train, is the decoy in this particular operation.

As if on cue, she casually strolls over to the pair under the guise of an unsuspecting commuter searching for a section of pole to lean against. She stares down at the floor and out a window, appearing tired and restless, preoccupied though bored. The role is played well. Thirty-four, attractive, slight but by no means fragile—if not the ideal victim, certainly the transit system's most common. A hand surreptitiously reaches into her purse and removes a handful of bills. Two undercover officers immediately seize the suspect. Until a pair of handcuffs are

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clasped around his wrists, he doesn't know what hit him.

After work, Mary is calm as she relaxes in a popular police hangout. Three suspects apprehended and no one injured—overall, a good day. She orders iced tea. Unlike what some policewomen report, she has not been driven to drink by the psychological pressures caused by resentful, often contentious male officers. Does she ever wonder what she, as a woman, is doing in policing? "No, not really." Any gender-related discrimination? Contrary to most newspaper reports, she says, most male officers are amicable and helpful. Another Chicago policewoman in the same precinct, Barbara Anderson (fictitous name), reports very much the same story: "Everyone's pretty tired of the whole male/female thing. After a while, everyone just looks at each other as fellow officers."

Mary Nash's sergeant, whose name must remain confidential because of the undercover nature of his work, is also tired of the issue. But unlike Anderson, he believes that there is something to it.

Clearly the sergeant is a man proud of the women working under his direction. Undercover work is often dangerous. The well-being of the decoy is completely dependent upon the abilities of her back-up. But, as he is quick to say, his women can handle it and handle it well. They're tough and they're talented. "I have complete confidence in their abilities," he says.

In between praise for Nash and her colleagues, though, the sergeant provides another side of the debate about women in policing. "I don't think it's a good idea to have women on patrol. Most women aren't big enough. . . .The dangers of their being overpowered and having their weapons taken away are too great."

"There's a place for women in police work but not on the streets," says Denver's Acting Division Chief of Patrol, George H. Buzick. "Women are not prepared for patrol work. There are certain differences between a man and a woman, God bless those differences." He stresses that there are many jobs for women in police work, such as matron duties and work with juveniles and sex-crime victims, which take advantage of women's abilities. Or, as sociologists Constance M. Breece and Gerald R. Garrett describe, roles structured by prevailing attitudes of women as "mother," "guardian of children," and "protector of the moral order."

Steadfast Stereotypes

The history of women in policing has principally been one of triumphs. Today, over 3.5 percent of all sworn officers are female, the vast majority of whom perform patrol duties. In 1971, there were less than a dozen women on patrol across the country. The experiences of most female officers are consistent with those of Nash and Anderson—if there is resistance, it doesn't seem to greatly affect them. In general, the commotion surrounding their presence has faded across most of the country.

Yet the fight for respect is an unfinished battle. Even with the aid of time, exposure, and the courts, not every officer is convinced that a woman's place in policing includes patrol work. Most male officers interviewed, though they have quietly acquiesced, are not happy with the presence of women in certain aspects of policing. The cynics, critics, and plain old chauvinists remain legion, and their basic belief that women don't belong in policing is firm.

The debate began in 1972, when women were first assigned en masse to regular street patrol in Washington, D.C. Most D.C. officers watched with skepticism. Most wondered how a woman would fare against a larger adversary, or in any violent situation. Women in uniform were in direct contradiction with a set of deeply-rooted, steadfast stereotypes which had always indicated that women weren't aggressive enough or tough enough for police work. Regardless of their opinions on other issues involving the advancements of women, many male officers genuinely felt that women were overstepping their capabilities.

Often, however, the arguments were immersed in the absurd. Wives of police officers feared that eight hours per day in a squad car with another woman would mean the breakup of their marriage. Some officers wondered whether women would be reluctant to use a gun on the days after a manicure, for fear of breaking a nail. The *New York Times* reported that Edward Davis, who in 1972 was the chief of police in Los Angeles, raised an issue of biological differences between the sexes: "In the history of my wife and two daughters there were certain times during the month when they did not function as effectively as they did other times during the month."

"At times, it was no fun at all," says Kathy Kajari, speaking of her experience as one of the first women patrol officers in Chicago. Her first day on the job, her partner entered the car without even an introduction, and proceeded to yell and curse about women in policing. That lasted a couple of minutes. For the rest of the day, he wouldn't say another word to her.

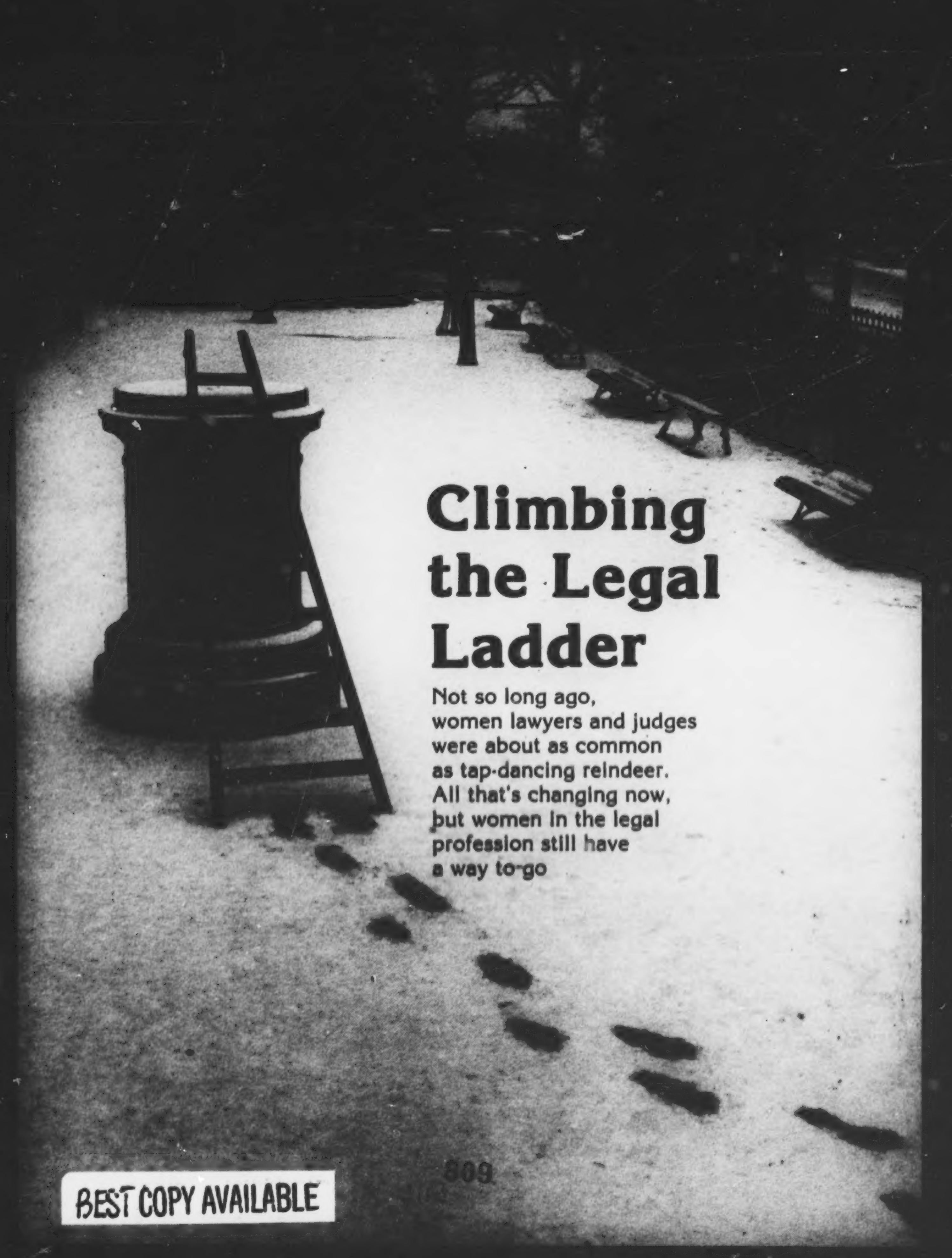
Such stories are not solely relics of the past. Certain areas of the country have only begun putting women on patrol. And, as women are finding out, the pains cities like Chicago and Washington have already outgrown have done little to eliminate similar frustrations elsewhere. Time and experience, it seems, are two elements which must run their natural course.

Nancy Macaluso has learned that lesson the hard way. In September of 1979, Macaluso became the first woman officer ever assigned to regular street patrol in the Suffolk County (NY) police department. The experience was one she describes as "a constant battle" for ac-

(Continued on page 65)

"I tried to say it with diamonds."

Gary Rivlin, though he thought it might have "been nice" to become a woman cop, has decided to remain on the Update *staff.*



Climbing the Legal Ladder

Not so long ago,
women lawyers and judges
were about as common
as tap-dancing reindeer.
All that's changing now,
but women in the legal
profession still have
a way to go

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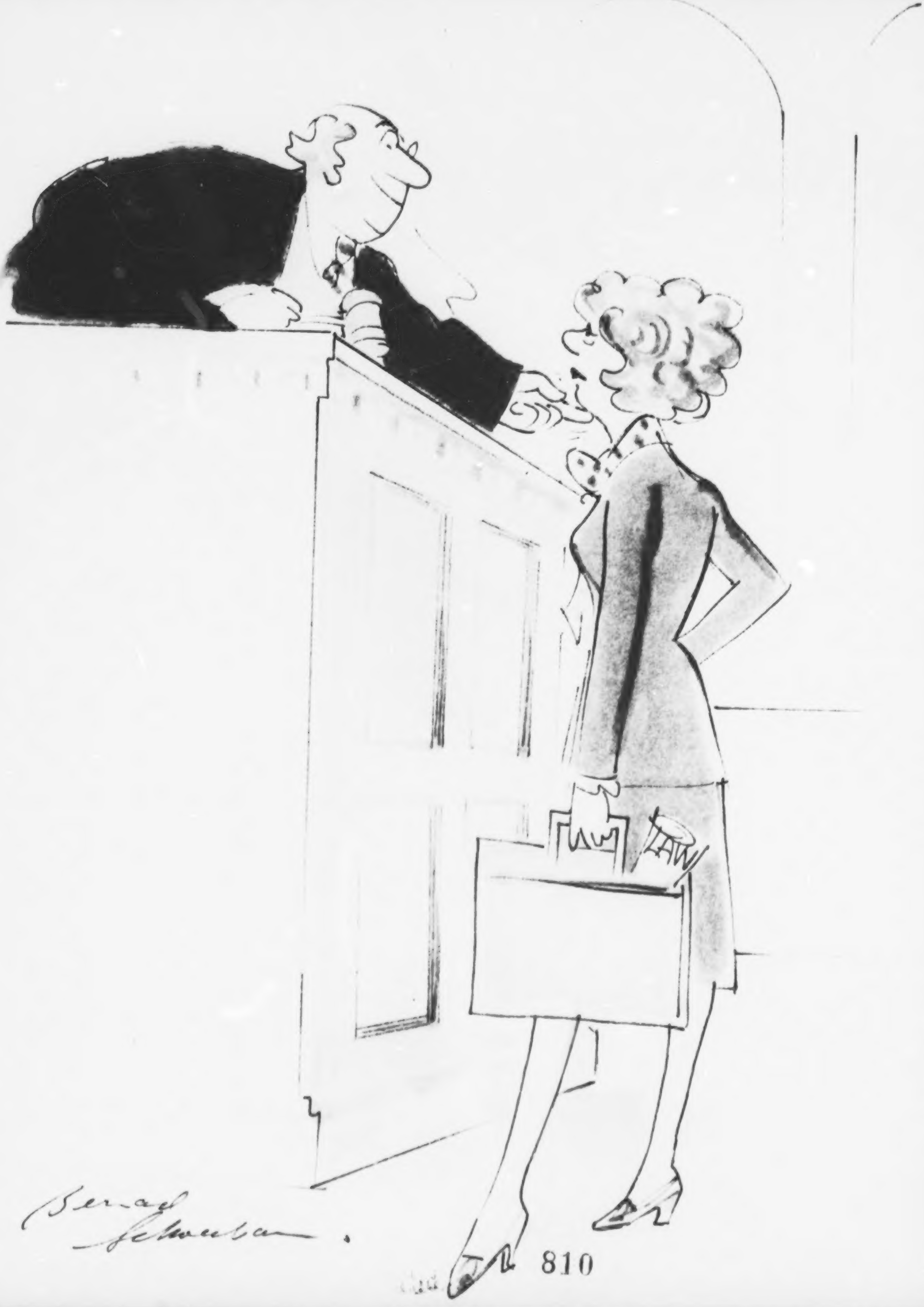
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Bernard Schoenbaum

CLIMBING THE LEGAL LADDER

"Don't Call Me Madam!"

The personal side of the law, from women who've made it to the top.

Since Snow White started whistling while she worked and Miss Muffet stepped on that ol' spider, there's been a great deal of talk about how far women have come. But ask any bright, capable, ambitious, tough-minded, hard-working woman how far a woman can go and how they got there, and you'll be treated to a very interesting story.

I have collected four such stories from women lawyers who are highly successful. Moreover, each has sought and succeeded in positions of leadership and tremendous responsibility in a conspicuously competitive environment. Margaret Bush Wilson is chairman of the National Board of the National Association for the Advancement of Colored People (NAACP) and senior partner in a St. Louis law firm. Virginia Martinez is associate counsel for the Mexican American Legal Defense and Education Fund (MALDEF) and director of the Chicago Regional Office. Phyllis Schlafly is an attorney, journalist, author, and national chairman of Stop ERA. And Joan Dempsey Klein is presiding justice of the California Court of Appeal in Los Angeles and Founding President of the National Association of Women Judges.

The patterns of women's lives are as various as patches in a quilt. Women lawyers are no more alike than women doctors, women accountants, or housewives. The point of this article, then, is not to describe some mythical representative figures, but rather to show how four very different women have experienced the study and practice of law in the United States.

The women interviewed for this article span several generations, and their stories reveal the challenges that existed for women lawyers in several decades. They also represent different races, communities, and political orientations. Each entered the legal profession for different reasons, and each has sought different goals. They resist easy stereotyping as vigorously as they've pursued their very different paths.

Yet there's no shortage of observers who persist in making generalizations about women in the law. Are women lawyers really, as Senator Howell Heflin (D., Ala.) believes, "generally a little sweeter and . . . a little more compassionate then men?" You'll have to answer that one for yourself. In the meantime, just refrain from calling them "madam"; they prefer chairman, president, director, judge, and counselor.

(Continued on page 50)

Mabel C. McKinney-Browning

CLIMBING THE LEGAL LADDER

Gary Rivlin

Some Kinds of Discrimination Die Hard

Women have made remarkable progress within the legal profession over the last decade. In every facet of the field—from representation on the federal bench to the law school classroom—women are gaining in numbers and consequently in influence.

The percentage of women law school students, for instance, has increased from approximately eight percent in 1970 to thirty-four percent in 1980. Today, about twelve percent of the nation's lawyers are female, as compared to the 2.8 percent figure of a decade ago. And with so many women studying law, most experts agree, this figure will certainly top twenty-five percent within the next ten years.

"This is the most radical shift of any of the professions," declares Bruce Zimmer, executive director of the Law School Admission Council.

But most women lawyers, judges, and law professors feel that the battle for true equality within the profession is far from over. Some degree of sexual discrimination still exists, they argue, though rarely is it displayed as overtly and maliciously as in the past. While many talented women have obtained positions of importance, a relatively low number have entered into the top ranks of the profession. A recent study found that there are few female partners among the nation's largest firms. None have been appointed an officer of the American Bar Association, and only one woman presently serves on the ABA Board of Governors.

Moreover, while the rate of change has been undeniably impressive, the raw figures still indicate discrimination. "I'm happy thus far with the progress made," states Professor Barbara Babcock of Stanford Law School, "but the fact is we have a long, long way to go."

"Benign" Discrimination

Ellen's was a foolish dream. Women didn't attend college in the 1940s to go on to law school, they went to find a husband. So she graduated with honors from an Ivy League school and found a husband.

A divorce made her dream seem less silly. She decided to go to law school. It was a rough decision but she was a woman willing to invest the extra time to be the best she could possibly be. She was a woman who knew what she wanted, a woman in control. She graduated from a top law school in the top ten percent of her class, a member of an honor society and a contributing editor to her school's law review.

Her first job seemed like a good one; it was with a medium-sized law firm in Washington, D.C., one which specialized in the area of the law which interested her most. At this point, believing that "it's no longer a man's world," she wondered how far she could go. It was also about this same point that she met with what one sociologist labels a "benign" rather than an "active" discrimination. During one meeting comprised of both novice lawyers and full partners, she was singled out to "fetch the coffee" because she was the only woman present. After a few repeats of this treatment, as well as a few similar incidents involving photocopying and work assignments, she finally confronted one of the partners, who said that she was being "too sensitive."

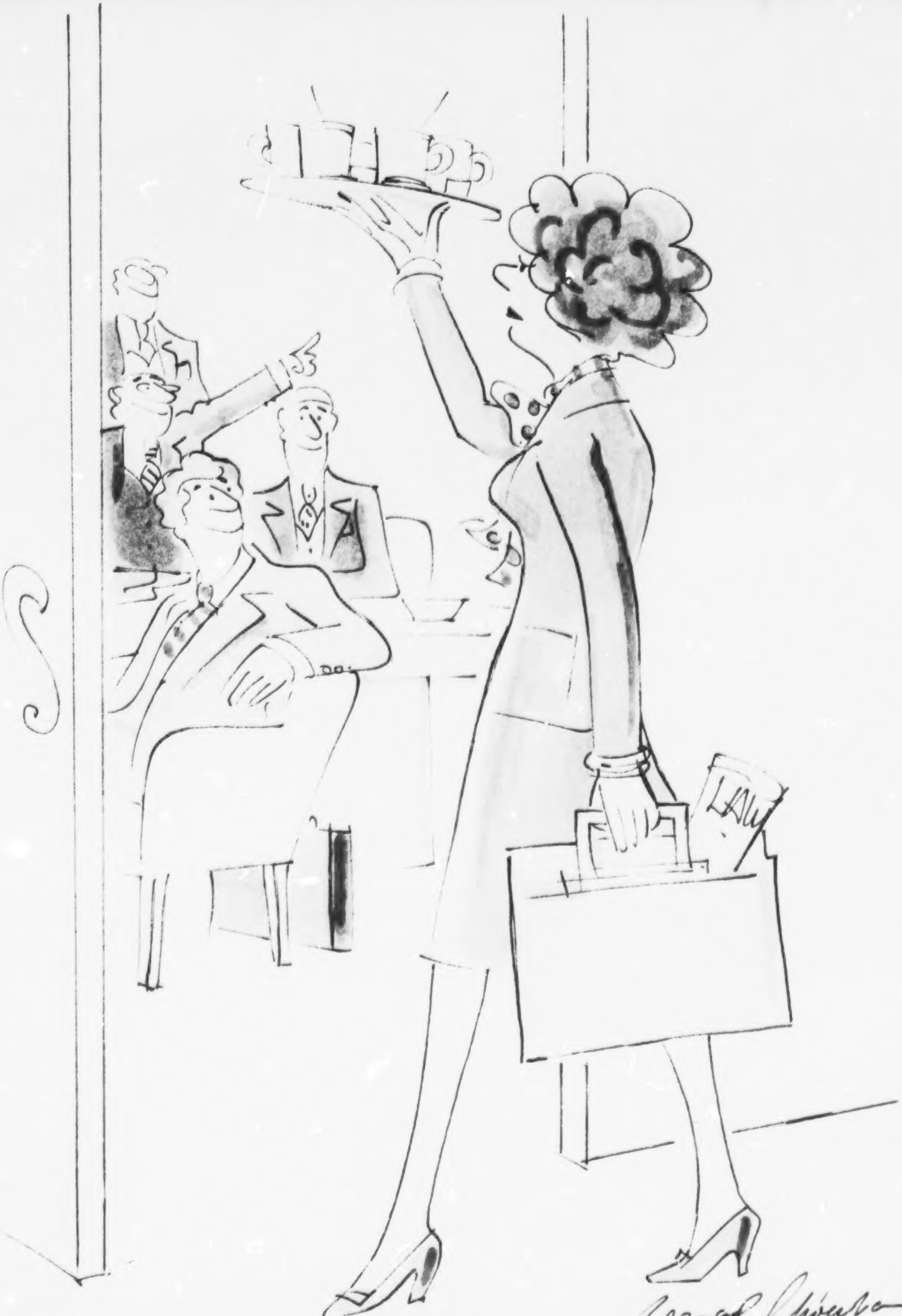
When she finally made partner—the first woman to obtain the position at this particular firm—coffee and photocopying were no longer an issue. But new forms of sexual discrimination arose. With considerable self-esteem, "like a bunch of proud fathers showing off their pretty little baby girl," her fellow partners would "parade their token woman around. . . . I was showered with attention. . . . . Of course, that was until they would start talking over legal matters."

Her treatment in the courtroom was even more unfavorable. "Whose secretary are you?" asked an occasional insensitive judge. "What's a pretty lady like you a lawyer for?" she was asked by a few opposing lawyers, a bailiff, and even her own defendant. "Admittedly, from what I've heard from friends of mine, I've been pretty unlucky."

Unlucky but not an exception. Nearly one-third of the respondents to a study of University of Illinois women law graduates reported that they had been "the targets of some form of discrimination because they are women." Most notably, and perhaps most surprisingly, discrimination is worst in the courtroom.

A lawyer from the University of Illinois survey says, "It was especially difficult during litigation, when I was treated as if I was a spoiled little girl playing lawyer. Judges would comment on how cute or how pretty I am. Opposing counsel would always assume a fatherly attitude and act accordingly.

"In one particular situation, I spent an hour arguing before a judge. Oppos-



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ing counsel, who was unable to counter my argument, turned around, put his hands on his hips and said, 'Young lady, you can't always have everything you want.' "

According to the American Trial Lawyers Association's Theodore Koskoff, as quoted in *Student Lawyer* (May, 1980): "It never ceases to amaze me that even male lawyers who accept and appreciate women as colleagues will engage in belittling or insulting behavior toward women opponents in court." Koskoff and others cite many examples of the discrimination with which women lawyers must cope. Often, to overcome these prejudices, they must be overprepared for a case.

Discrimination also exists within the firm. "Partners are more likely to look over my work more carefully and critically than they would [that of] a male counterpart," comments a lawyer from the University of Illinois study. "This need to be a 'superwoman' is tiresome."

These problems, according to one woman lawyer, are especially prevalent among small- and medium-sized firms. Firms of this size, she explains, are not as visible as the larger firms, nor are most of them recipients of federal business which would make nondiscriminatory hiring practices compulsory.

But it is not clear whether the situation is actually any better among the larger firms. One study, a 1980 survey of New York's Wall Street law firms, found that the proportion of women partners among these firms rose from one percent to eight percent over the last decade. This is primarily due to a series of lawsuits filed by various feminist groups during the mid-1970s against many Wall Street firms. Yet a study of the fifty largest firms in the country found that just two percent of the partners were female.

Governments have been the most progressive of all employers in their hiring practices, so a disproportionately high number of women work within the public sector. According to a recent study, over seventeen percent of all 1980 women law school graduates gained employment within government. Comparatively, only 12.7 percent of males were hired by government last year.

But despite the complaints and the evidence of discrimination, women lawyers generally seem optimistic. "[The] great majority of all the women in the study," write the University of Illinois researchers, "[believe] that the future for women in the law will be brighter, and will contain more opportunities, than has been the situation in the past or the present."

"An Immediate Bias"

The scene: a criminal trial in a large urban area. Not an especially significant case—"all rise," yells the bailiff—nor very complex. Witnesses one, two, and three shuffle in and out. "Will the defendant please take the witness chair." The judge is a woman. All is proceeding routinely, smoothly.

The person receiving the abuse feels put down. The hurt subtly impairs quality performance.

"I object!" The objection is overruled. Both lawyers approach the bench. Addressing the judge, one lawyer begins, "Listen, honey. . ." The judge quickly cuts the lawyer off and gives him a lesson in courtroom decorum. Then she is through, convinced that he'll never address a judge again with a condescending endearment.

Women judges are no longer a rarity. The tokenism found a decade ago has thus far been replaced with a strong, steady move toward fair representation. Unfortunately, though, episodes like the above are an all too common example of the disturbing obstacles confronting female judges today.

According to Barbara Beverly Cook, political science professor and one of the nation's leading authorities on women in the judiciary, "There's an immediate bias working against female judges . . . it's as simple as being identified as a woman." Public opinion polls indicate that this basic bias is beginning to wane, says Cook, but it is certainly not disappearing.

"Being only one of a kind sitting among a majority opens one to certain pressures and certain slights whether they are meant maliciously or are due to insensitivity," explains Judge Joan Dempsey Klein of the California State Court of Appeals. Klein, who is also President of the National Association of Women Judges (NAWJ), believes this is not only true of women but of minorities as well.

"It can't help but affect the quality of performance of the person on the receiving end of the abuse. It hurts, it's petty, and it makes the recipient feel as if he or she is a second-rate individual. It interferes with the person's ability to function as well as he or she can."

Other examples of what Klein calls "war stories" include male judges meeting for lunch at sexually discriminatory clubs, references to a particular judge as the "best looking" rather than the "most competent," and insensitive male judges ignoring a fellow judge simply because she is a woman.

What compounds the frustration of Klein and other female judges is that statistically women are doing much better on the bench. An estimated one or two percent of the judges in the 1960s were women; an estimated five percent were women during the late 1970s; and, though no one is certain of today's statistics, at least six percent of the nation's judges are now women. And women are finally represented on the U.S. Supreme Court in the person of Justice Sandra O'Connor, the Court's newest addition.

With the increase in numbers has come a fading of traditional stereotypes. Women are no longer automatically assigned to family court, as they generally were until the early 1970s. Women, the argument went, know more about family matters, what with the children and all. But family court is often considered the least prestigious court and is therefore the hardest road to a higher appointment.

Jimmy Carter is most responsible for the dramatic changes within the judiciary. The passing of the Omnibus Judgeship Act of 1978 created 152 new lower federal court judgeships. Carter took advantage of this opportunity to reverse the tokenism that has marked the federal bench. Over fourteen percent of Carter's appointees were women, compared to Ford's 1.9 percent, Nixon's .6 percent, and Johnson's 1.6 percent. By the end of the Carter Administration, the number of women judges on the federal bench rose from one percent to seven percent.

Cook describes Carter's efforts as "extraordinary." While the final results fell short of the goals set up by various women's groups, Cook feels "he certainly went beyond the call of duty and the promises he made while campaigning." She also cites the efforts of California Governor Jerry Brown and his progressive appointment policies. Under Brown,

(Continued on page 48)

Gary Rivlin is a member of the Update *staff. His tenacious efforts on the forthcoming, revised* LRE Directory *have been inspirational to all of us at YEFC.*

Patricia Huckle

Materials on Women and the Law

Film

The following films address legal issues affecting women's lives. They provide material for discussing the political process of lawmaking and the interaction of cultural values with public policy, as well as an overview of the current status of the law. All could be used in secondary and college-level classrooms.

Ain't Nobody's Business (1977) 16 mm., 52 min. Purchase: $450, rental: $75. (Tomoto Productions Inc., 1910 Weepah Way, Hollywood, CA 90046.) Documentary on female prostitution, which focuses on the attitudes and options of prostitutes, as well as interviews with vice squad officers and scenes from the First World Meeting of Prostitutes.

Being a Prisoner (1975) 16 mm.,28 min. Purchase: $600, rental: $60. (Women Make Movies, 257 W. 19th St., New York, NY 10011.) What does it mean for a woman to be in prison? Focused on a "model prison," this film explores the lives and concerns of women prisoners.

The Chicago Maternity Center Story (1975) 16 mm., 60 min. Purchase: $600, rental: $100. (Women Make Movies, 257 West 19th St., New York, NY 10011.) History of medical care for women, woven with the story of the Chicago Maternity Center, a community-based center serving primarily black, Hispanic, and white working class women. Addresses the issue of who controls health care, and discusses alternative strategies.

Hard Work (1977) 16 mm., 29 min. Purchase: $395, rental: $50. (MTI Teleprograms Inc., 3710 Commercial Ave., Northbrook, IL 60062.) The fight to decriminalize prostitution through the organizing efforts of Margot St. James and others.

Household Technicians (1980) 3/4" VT, 3/4" Sony U-matic video cassette playback, 24 min. Purchase: $250, rental: $35. (Martha Stuart Communications, Inc., P.O. Box 127, Anthony Street, Hillsdale, N.Y. 12529.) Household workers organizing through the National Committee on Household Employment, a division of the Urban League.

In the Best Interests of the Children (1977) 16 mm., 53 min. Purchase: $550, rental: $60. Lesbian mothers and children discuss their experiences. Explores society's attitudes toward lesbians, and the legal interactions and court decisions about child custody.

Incest: The Victim Nobody Believes (1975) 16 mm., 20 min. Purchase: $395, rental: $60. (MTI Teleprograms Inc., 3710 Commercial Ave., Northbrook, IL 60062.) How widespread is incest, and what impact might it have throughout life? Interviews with young women discussing what it was like, and how their lives have been affected.

Killing Us Softly (1980) 16 mm., 30 min. Purchase: $365, rental: $38. (Cambridge Documentary Films, Inc., P.O. Box 385, Cambridge MA 02139.) Analyzes the advertising industry for its impact on women's lives, using magazines, newspapers, and album covers. Excellent for examining stereotypes, and for tying cultural attitudes to legal principles.

The Life & Times of Rosie the Riveter (1979) 16 mm., 60 min. Purchase: $795, rental: $85. (Clarity Productions, Inc., P.O. Box 315, Franklin Lakes, N.J. 07417.) Interviews with five women who entered the labor force during the "manpower" shortage of World War II. Useful for setting the range of job options for women in context of equal employment laws of present.

Rape Culture (1976) 16 mm., 35 min. Purchase: $375, rental: $40. (Cambridge Documentary Films, Inc. P.O. Box 385, Cambridge, MA 02139.) Focused on the connections between cultural values and sexual assault, this discussion of rape combines powerful images from contemporary popular media with interviews with rapists, rape victims, counselors, and authors Mary Daly and Emily Culpepper.

Requiem for Tina Sanchez (1980) 16 mm., 23 min. Purchase: $405, rental: $50. (Films, Incorporated, 733 Green Bay Road, Wilmette, IL 60091.) Teenage prostitution, illustrated through the story of Tina, runaway at eleven, prostitute at thirteen, dead at fifteen.

To Love, Honor and Obey (1980) 16 mm., 55 min. Purchase: $650, rental: $85. (Third World Newsreel, 160 Fifth Ave., Suite 911, New York, NY 10010.) This documentary on domestic violence examines social, psychological, and cultural factors. Interviews with battered women and police officers responding to questions about the source of violence against women and current coping strategies.

Trial for Rape (1979) 16 mm., 60 min. Purchase: $750, rental: $100. (Women Make Movies, 257 W. 19th St., New York, NY 10011.) Tape of an actual rape trial in Rome in 1978, illustrating courtroom interaction and attitudes toward women who bring charges of rape.

Union Maids (1976) 16 mm., 48 min. Purchase: $450, rental: $60. (New Day Films, Box 315, Franklin Lakes, NJ 07417.) Industrial union organizing in the 1930s and 1940s, remembered by three lively activists and illustrated with music and film of the period. Inspirational, and conveys a sense of working class lives and work place organizing.

We're Alive (1974) 16 mm., 50 min. Purchase: $350, rental: $60. (IRIS Films, Inc., P.O. Box 5353, Berkeley, CA 94705.) A view of prison from the inside. Raises questions such as who goes to prison and why, and what functions prisons serve.

Who Remembers Mama? (1979) 16 mm., 50 min. Purchase: $550, rental: $75. (Women in Communications, Inc., 5215 Homer St., Dallas, TX 75206.) An exploration of the displaced homemaker, with touching personal reflections and a realistic dramatization of a divorce trial. Discusses national and local alternatives.

Who's There for the Victim? (1980) 16 mm., 22 min. Purchase: $430, rental: $70. (MTI Teleprograms Inc., 3710 Commercial Ave., Northbrook, IL 60062.) Follows the activities of rape victim advocates as they respond to calls from rape victims and provide support through the hospital and police procedures.

Why Women Stay (1980) 3/4" videocassette, 30 min. Purchase: $200, rental: $30. (Women Make Movies, 257 W. 19th St., New York, NY 10011.) A documentary of two battered women's lives, set in the context of social attitudes and institutional reactions to violence against women.

The Willmar 8 (1980) 16 mm., 55 min. Purchase: $700, rental: $75. (Calif. Newsreel/Media at Work, 630 Natoma St., Rm. 101, San Francisco, CA 94103.) Eight women bank workers discover the fight for equal rights is their fight. The story of their struggle, and their changes in political understanding through a strike for better wages and working conditions.

With Babies and Banners: Story of the Women's Emergency Brigade (1978) 16 mm., 45 min. Purchase: $500, rental: $75. (New Day Films, Box 315, Franklin Lakes, NJ 07417.) Women who participated in the 1937 General Motors sit-down strike reunite to share their memories of that period of activism. Their discussion, interwoven with archival footage, illuminates their strength and the relevance of their lives to our own.

Teaching Resources

The following might be used as college texts, or as resources for secondary teachers. This is only a sampler of recent materials.

Sex Discrimination and the Law, Barbara Babcock et al., eds. (1975, with Supplement by Wendy Williams, 1978) Little, Brown & Company, Inc., 34 Beacon St., Boston, MA 02106. An excellent overall resource for teachers, this text includes extensive excerpts from Supreme Court decisions, plus articles by lawyers, sociologists, and feminists. Covers constitutional issues, employment discrimination, family law, criminal law, and reproductive and educational issues.

The Chains of Protection: The Judicial Response to Women's Labor Legislation, Judith Baer (1978) Greenwood Press, 88 Post Road West, Westport, CT 06881. Extensive analysis of patterns and assumptions about women's work and efforts to improve employment opportunities.

Women's Rights and the Law: The Impact of the ERA on State Laws, Barbara Brown, et al. (1977) Praeger Special Studies, Praeger Publishers, Inc., 111 Fourth Avenue, New York, NY 10003. A detailed analysis of current state laws which are discriminatory, and a review of the possible impact of the ERA and state ERA's.

Constitutional Rights of Women, Leslie Goldstein (1979) Longman, Inc., 19 W. 44th St., Suite 1012, New York, NY 10036. Central focus on Supreme Court cases involving the Fourteenth Amendment and cases affecting reproductive rights. Includes excerpts from decisions, with discussion questions.

Take Back the Night: Women on Pornography, Laura Lederer, ed. (1980) Morrow & Co., Inc., 105 Madison Avenue, New York, NY 10016. This series of essays raises questions about the role of pornography in society, the connections between violence in por-

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"How can one get out of a record club?"

nography and violence against women, and strategies for dealing with this controversial issue. A feminist analysis.

Women Who Kill, Ann Jones (1980) Holt, Rinehart & Winston, Inc., 383 Madison Avenue, New York, NY 10017. The focus is on women who kill their spouses and others. Her concern is with the social and psychological forces which lead to murder, and the consequences under our legal system.

Women, Crime and Criminology: A Feminist Critique, Carol Smart (1978) Routledge & Kegan 9 Park St., Boston, MA 02108. Examination of the underlying assumptions of historical and recent studies of women as criminals, with American and English data on trends in women's crimes.

Spokeswoman, Washington Women's News Service, 3000 Graham Court, Falls Church, VA 22042. Brief monthly summaries of political and legal issues, often with current resources or studies currently being made.

Sex Discrimination in Educational Employment: Legal Alternatives and Strategies, Cynthia Stoddard (1981) Learning Publications, Inc., 3220 W. Michigan Ave., Kalamazoo, MI 49007. A straightforward summary of civil rights laws, elements of a violation, and recent court cases affecting educational employment. Some reference to leading decisions.

Women Studies Abstracts, Rush Publishing Co., Inc., P.O. Box 1, Rush, NY 14543. Covers a variety of fields, including some law journal articles. Most related articles are in social science or feminist periodicals.

Women's Rights Law Reporter, Rutgers Law School, 15 Washington St., Newark, NJ 07102. Excellent quarterly, which often includes bibliographic essays on women and specific areas of law. Deals with a wide range of topics, including employment, violence against women, reproductive rights, etc.

For the Classroom

The following, in part or as text, could be useful for secondary or college students. Sections from some might be adapted for use with elementary students. Obviously, with the tremendous wave of publications now available, these are only a sample.

Sexual Harassment on the Job: How to Avoid the Working Woman's Nightmare, Constance Backhouse, Leah Cohen (1981) Prentice-Hall, Inc., Englewood Cliffs, NJ 07632. In a very practical approach, this book presents interviews with employees and employers. Also includes recent legal cases and political response and action.

Women in Prison, Kathryn Burkhart (1976) Popular Library Inc., 600 Third Avenue, New York, NY 10016. Along with an analysis of the social system, Burkhart includes personal stories of women in prison, how they got there, how it feels, and issues for them as women.

The Equal Rights Handbook, Riane Tennenhous Eisler (1978) Avon Books, 959 Eighth Avenue, New York, NY 10019. Takes the myths and mystery out of the Equal Rights Amendment and its possible impact on the lives of men and women. Discusses the political strategies of supporters and opponents.

Rights and Wrongs: Women's Struggle for Legal Equality, Feminist Press et al. (1979) McGraw-Hill Book Co., Princeton Road, Hightstown, NJ 08520. Written for a high school audience, this book presents the history and present concerns of activists. Lively, with summaries of current legal issues and movement toward social equality.

The Women's Guide to Legal Rights, Jane S. Lynch and Sara L. Smith (1979) Contemporary Books, 180 N. Michigan, Chicago, IL 60601. Using examples and a question-answer format, this book addresses legal issues in the following areas: home and family; on the job; in the marketplace; and crimes against women. Practical advice on the current status of the law.

Displaced Homemakers: Organizing for a New Life, Laurie Shields (1981) McGraw-Hill Book Co., Princeton Road, Hightstown, NJ 08520. This is a lively presentation of the development of a national organization to support women in middle years who are trying to find economic and personal security. With great good humor and compassion, Ms. Shields gives the inside story of political organizing and shaping a public issue.

The Law for a Woman: Real Cases and What Happened, Ellen Switzer and Wendy Susco (1975) Charles Scribner's Sons, 597 Fifth Avenue, New York, NY 10017. Although some of the information is slightly dated, the method of presenting problems and asking students to figure out the possible solutions is a creative one. An overview of law, constitutional rights, education, employment, marriage and family, medical rights, rape, the ERA, and women as lawyers and politicians.

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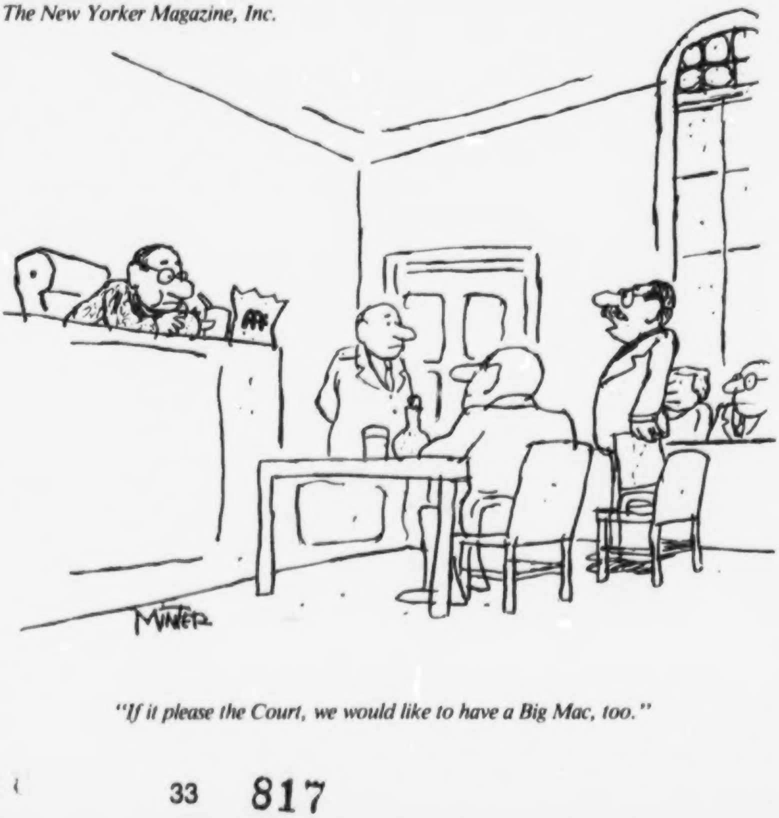

"If it please the Court, we would like to have a Big Mac, too."

"Hell, We Couldn't Agree on Lunch"

—Abbie Hoffman

The conspiracy case against the Chicago Seven best symbolized the turbulence of the sixties. But political ferment in the courts is nothing new.

Any political entity that is both powerful and mysterious inevitably attracts a cadre of specialists who try to decipher its inner workings. Kremlin watchers look at everything from the position of minor party officials in state photographs to the tiniest nuances in diplomatic communiques to determine what is really taking place in the government's inner circle. People who watch the Chinese government use wall posters, articles in state newspapers, and other clues to perform feats of divination.

There is something about our own Supreme Court that attracts this kind of almost obsessive scrutiny. But why is the Supreme Court mysterious? After all, its decisions and the reasoning behind them are announced publicly, with each justice having the opportunity to provide his own comprehensive analysis of the question.

But other aspects of the Court's perfor-

Charles White

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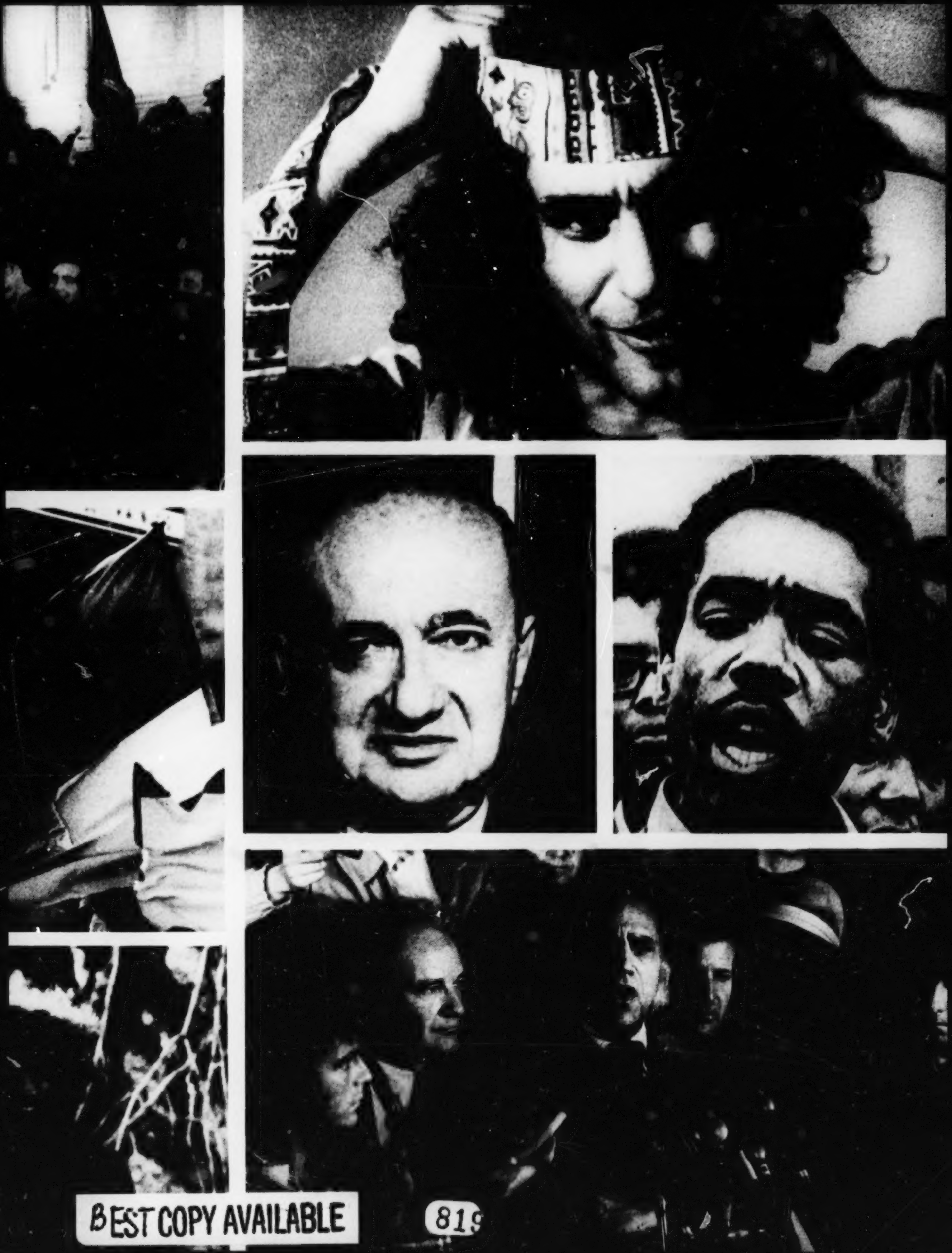

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mance are more shrouded. Only a few of the thousands of petitions for a Supreme Court hearing are granted each year, and the justices rarely provide reasons why one case was selected and one not. There is a similar mystery about how the selected cases are decided. Why are decisions in some cases rendered quickly, while others are long delayed? To what extent is the Court moved by the currents of events, not only in *what* it decides, but in *how* and *when* it decides?

Supreme Court watchers guessed that much more was going on than met the eye in early 1970, when the Court delivered its opinion in a minor criminal case called *Illinois v. Allen*, 397 U.S. 337, just a few days after the conclusion of a major conspiracy trial of antiwar protest leaders. *Allen* was an obscure enough case. It dealt with an armed robbery conviction that had taken place over a decade earlier. But the defendant's insistence on defending himself and his bitter disputes with the judge reminded observers of the situation of Bobby Seale, the Black Panther leader who was one of the defendants in a case against antiwar protest leaders that had just ended in Chicago. This resemblance, as well as the timing of the Court's decision, suggested that the Court might be implying more than it was saying, commenting on one case while deciding another.

But Bobby Seale's battle with the judge was only one of many political/legal issues at stake in that trial. Before it was finally put to rest, another appeals court had the opportunity to speak directly about the case and the questions it raised.

A Disrupted City

The conspiracy trial grew out of the turbulence that swirled around the Democratic National Convention, held in Chicago in August, 1968. The convention attracted into the city the full spectrum of the many protest movements that had sprung up in the '60s.

These included hippie radicals, under the banner of the Youth International Party (Yippies). Their idea was to have a Festival of Life (in contrast with the "Festival of Death"—the Democractic National Convention) featuring folk singers and rock groups.

The Yippies were inveterate pranksters. More serious plans were made by an antiwar group, the National Mobilization Committee (Mobe), which tried to coordinate both peace groups and black liberation groups. They outlined a plan for a funeral march to the Chicago Amphitheatre.

Among the black liberation groups that were involved were the Black Panthers, a small party that had shot to national prominence in little over a year. Militant, often armed, politically radical, the Black Panthers sent a shiver of fear through middle-class America.

Both the Yippies and the Mobe sought permits from the city for their festivals, marches, and demonstrations. The Yippies also wanted permission for their followers to sleep in Lincoln Park. After long and bitter negotiations, the city decided against granting the permits. Nonetheless, protestors began pouring into the city on the eve of the convention.

The jury pool looked like the Rolling Meadows Bowling League lost on their way to the lanes.

What followed is probably still part of the consciousness of everyone who clustered around TV sets for the week of the convention. Police and demonstrators clashed everywhere: at the parks, when the police tried to enforce the 11:00 P.M. curfew; during marches at several locations in the city; and, most unforgettably, in the streets in front of the Hilton Hotel, with demonstrators armed with rocks and bottles and police armed with billy clubs.

During the battle at the Hilton, as demonstrators were hauled to paddy wagons, often while being clubbed, the protestors chanted, "The whole world is watching. The whole world is watching." Indeed it was, but the outcome wasn't what the protestors had hoped for. They had hoped to show to the world, through television, the naked face of repression, the fascism at the core of America. In fact, however, polls taken of those who saw the violence on TV showed sympathy for the police. Many people felt that charges should be brought against the "lawless" protestors.

U.S. Attorney General Ramsey Clark asked his staff to determine if there were any grounds for indictment. Their report showed that it was the Chicago police who had rioted and that no federal indictments of the demonstrators were called for (though state charges against some demonstrators might be warranted).

Three months later, Daniel Walker's *Rights in Conflict: A Report Submitted to the National Commission on the Causes and Prevention of Violence* condemned the unrestrained and indiscriminate police violence that had occurred, particularly at night. The report said the violence was made all the more shocking because it was often inflicted on persons "who had broken no law, disobeyed no order, made no threat." The report concluded that Chicago had witnessed "what can only be called a police riot."

A few months after taking office, the Nixon Administration determined that there was, after all, enough evidence to indict some of those who may have been responsible for the convention week violence. On March 20, 1969, it indicted eight demonstration leaders and eight policemen. The policemen were charged with having violating a federal civil rights act by using excessive force against people during demonstrations.

Cast of Characters

The eight protestors whom the government chose to prosecute were a mixed lot. David Dellinger, more than 20 years older than the others, was a veteran pacifist who had been active in the Mobe. Tom Hayden had formed the Students for a Democratic Society (SDS). He and Rennie Davis had also been active in the Mobe. Jerry Rubin and Abbie Hoffman had founded the Yippies. Bobby Seale was a founder of the Black Panthers.

The other two defendants weren't really demonstration leaders. In fact, Lee Weiner and John Froines had played so little a role in the Chicago protest that neither was mentioned in the voluminous *Rights in Conflict* report. Froines, a chemist, had been an SDS member. Weiner was a doctoral candidate and teaching assistant of sociology at Northwestern.

Why were these eight men chosen? The prosecution had tapped much of the leadership of the convention protests, and had, at the same time, covered the spectrum of left-wing militants, including the old left (Dellinger), the new left (Davis and Hayden), and the antic left (Hoffman and Rubin). The prosecutors had also brought in academic dissent (Weiner and Froines) and black militancy (Seale). As usual in political conspiracy cases, however, some indictments seemed more reasonable than others. As David J. Danelski points out in his article on the case in *Political Trials*, "Seale's inclusion in the

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conspiracy charge made no sense to him or the other defendants; he had not met any of the defendants, except Rubin, before the trial. Moreover, during the convention week, he had been a last-minute speaking replacement for Eldridge Cleaver."

The defendants' two lawyers became as famous as they. William Kunstler was a 50-year-old New Yorker who had written a number of books on important trials. In his legal practice, he had defended Martin Luther King, Jr., and other civil rights leaders. Leonard Weinglass, 36, had practiced law in Newark, New Jersey, where he represented mostly the poor.

The prosecutors were headed by the U.S. Attorney for the Chicago District, Thomas Foran. He had been active in Democratic politics for years, and had been appointed U.S. Attorney by President Johnson.

The judge in that case was the 74-year-old Julius J. Hoffman. Hoffman, a Republican appointed to the bench by President Eisenhower, had developed a reputation as a law and order man, handing out long sentences and setting high bails.

Preliminaries

Controversy erupted even before the trial itself started. The defendants had intended that a West Coast lawyer, Charles Garry, head their team. Garry had defended both white and black radicals, creating successful defenses that also enabled the defendants to air some of their political views.

However, Garry, an elderly man, had been told by his doctor that his life would be in danger if he did not have his gall bladder removed immediately. That meant he would be unable to take part in the Chicago trial, scheduled to begin in September of 1969. Therefore, the defense asked Judge Hoffman on August 27 to postpone the trial until November 15, by which time Garry was expected to have recovered. Judge Hoffman denied the motion, on the grounds that several other defense lawyers had joined the case and the defendants would be adequately represented with or without Garry.

This was a particularly harsh blow to the one West Coast defendant, Bobby Seale, since Garry was his personal lawyer. Seale told Garry, "I think I'll be better off defending myself if you can't make it there," to which Garry replied that Seale had a legal right to defend himself. Seale's decision was to lead to the trial's most dramatic moments.

The trial itself began in controversy. Judge Hoffman ordered the arrest of four defense attorneys who failed to show up in court on opening day. The four had only been retained to prepare pretrial motions, and the defendants did not expect them to appear in court. The lawyers had withdrawn by telegram earlier that week, but Hoffman said that wasn't good enough in his court. Some observers speculated that Hoffman intended to hold the four until Seale dropped his demand to be represented by Garry. Lawyers from all over the country came to Chicago to protest the judge's step; 126 of them filed an *amicus curiae* brief calling the judge's actions "a travesty of justice [which] threaten to destroy the confidence of the American people in the entire judicial process." Eventually the lawyers were freed without any concession from the defense, but Judge Hoffman's order had helped set the tone that was to mark the case.

> **"Those who incite to violence should be punished whether or not freedom of speech is impaired."**

The second day of the trial saw the jury selection. In his book on the trial, *New York Times* reporter J. Anthony Lukas notes that, "When the 300 members of the September venire [jury pool] filed into the courtroom on the second day of the trial, they were so overwhelmingly white, middle-class, and middle-aged, they looked like the Rolling Meadows Bowling League lost on their way to the lanes." The defense contended that this pool, selected from the voter registration list, automatically underrepresented the young, unsettled, black, and alienated—just the sort of persons most likely to be sympathetic to the defendants. To assure a fair jury, the defense requested that Judge Hoffman ask each prospective juror 44 questions, including "Do you believe that Martin Luther King, Jr., should have come to Chicago in 1967 to lead demonstrations?" and "Have you or any members of your family ever displayed a placard or bumper sticker reading: 'Support your local police'?"

However, Judge Hoffman agreed to ask only one of the defense's questions, which sought to determine whether prospective jurors had close relatives or friends employed by law enforcement agencies.

The judge's questions to the jurors were skimpy, each side used only a few peremptory challenges, and the jury was selected in less than three hours. It consisted of two middle-aged white men, two black women, and eight white women, most of them suburban housewives or widows.

Why Prosecutors Like Conspiracy Cases

Froines and Weiner had been charged with teaching the use of incendiary devices. The other six defendants were charged with violating a federal law passed in 1967. It was widely known as the Rap Brown Law. Brown wasn't a congressman. Rather, he was a young black leader. He, Stokely Carmichael, and other black leaders were often considered, especially in the South, "outside agitators" responsible for racial unrest.

Before the Rap Brown Act, federal law had not prohibited rioting or even incitement to riot. These were state offenses and most states already had ample legislation against them. Under the new law, the federal government was empowered to punish people if they "intended" to incite a riot as they moved from state to state. The maximum penalty was five years in jail and a fine of $10,000.

In the course of the debate over the bill, Attorney General Clark had pointed out that prosecutions for intent might infringe constitutionally protected rights to freedom of speech, assembly, and movement. In response, Congressman Sikes of Florida said, "Those who incite to violence should be punished, whether or not freedom of speech is impaired." Sikes prevailed, the law was passed, and, with the reluctant Clark no longer Attorney General, the Nixon Administration pushed ahead with the first major prosecution under the new law.

There was one more charge. All of the defendants were indicted for conspiring with each other to engage in crimes for which each of them had been charged separately. The penalty for that, should they be found guilty, was an additional five years in jail and another fine of $10,000.

Jason Epstein's book, *The Great Conspiracy Trial,* points out how puzzling conspiracy law is to the layperson. At first glance, it seems that the defendant is liable for having committed two crimes, "when logically, he appears to have committed only one—if in fact he committed any at all."

Under conspiracy law, the substantive crime need never take place. As Epstein

(Continued on page 68)

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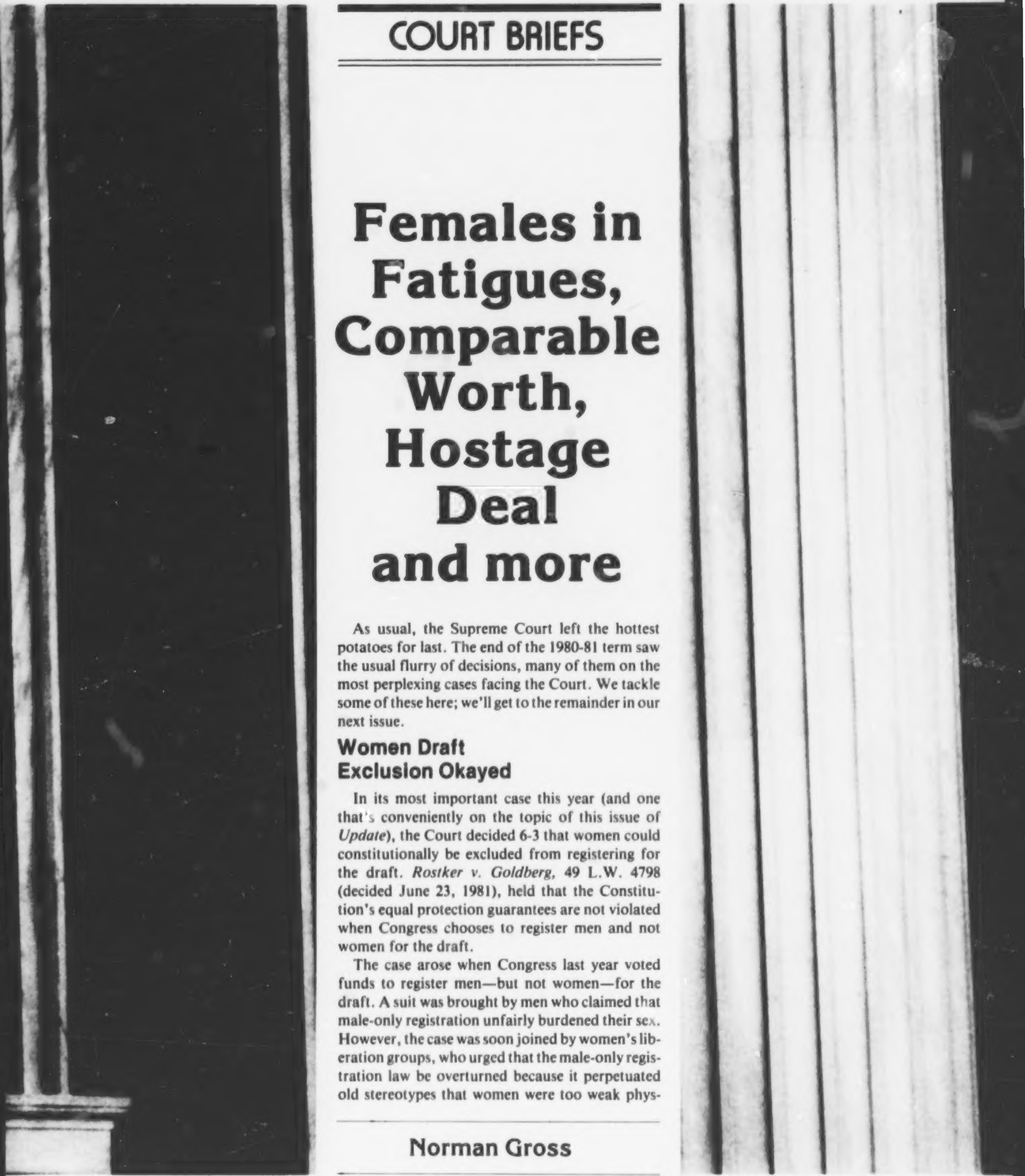

Females in Fatigues, Comparable Worth, Hostage Deal and more

As usual, the Supreme Court left the hottest potatoes for last. The end of the 1980-81 term saw the usual flurry of decisions, many of them on the most perplexing cases facing the Court. We tackle some of these here; we'll get to the remainder in our next issue.

Women Draft Exclusion Okayed

In its most important case this year (and one that's conveniently on the topic of this issue of *Update*), the Court decided 6-3 that women could constitutionally be excluded from registering for the draft. *Rostker v. Goldberg*, 49 L.W. 4798 (decided June 23, 1981), held that the Constitution's equal protection guarantees are not violated when Congress chooses to register men and not women for the draft.

The case arose when Congress last year voted funds to register men—but not women—for the draft. A suit was brought by men who claimed that male-only registration unfairly burdened their sex. However, the case was soon joined by women's liberation groups, who urged that the male-only registration law be overturned because it perpetuated old stereotypes that women were too weak phys-

Norman Gross

ically or unstable emotionally to be trusted with such important tasks as national defense. Other women's groups urged that the law be upheld. For example, Phyllis Schlafly organized a group of 16 young women to present to the Court a "pro-family" argument against drafting women.

Justice Rehnquist's opinion for the majority stresses that the Constitution accords Congress considerable powers to raise and support armies, and in this area "the lack of competence on the part of the courts is marked." Thus, courts must give a "healthy deference" to congressional powers.

Turning to the legislative history of the act, Rehnquist asserted that Congress had carefully weighed President Carter's request that women, as well as men, be registered for the draft. After months of deliberation and many hearings, Congress had determined that only men should be registered. According to Rehnquist, Congress' decision was based on the realities of a military emergency, and was not "the accidental by-product of a traditional way of thinking about women."

Justice Rehnquist noted that in deciding cases of alleged sexual discrimination, the Court has for several years applied the test first enunciated in *Craig v. Boren* (429 U.S. 190 [1976]). That test required the government to (1) show that an "important governmental interest" was served by the law in question and (2) that the sex-based distinction was "substantially related" to achieving that governmental interest.

Justice Rehnquist said that the federal government would have no trouble meeting the first part of the test, since national defense was a vital governmental function. As for the second part, he noted that both federal law and military policy specify that women cannot serve in combat. Since, according to Rehnquist, "the purpose of registration . . . was to prepare for a draft *of combat troops*," it was entirely reasonable for Congress to specify that only men need register for the draft.

"Men and women, because of the combat restrictions placed on women, are simply not similarly situated for purposes of a draft . . . Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity,' said Rehnquist.

"The Constitution," Justice Rehnquist concluded, "requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."

There were two dissenting opinions, one by Justice White, and one by Justice Marshall. Justice Brennan joined in both.

Justice White challenged the majority's contention that registration was intimately linked with filling combat positions. "I've received little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men." But if there are noncombat positions that men and women could fill equally, Justice White could find no justification for Congress' action in only registering men. Accordingly, he would find the law unconstitutional.

Barred from combat, women do not have to register for a draft of combat troops.

Justice Marshall accused the Court of placing its imprimatur on an "ancient canard about the proper role of women." Marshall pointed out that the statute in question deals with registration, not conscription. Its purpose, rather than directly drafting persons to fill combat positions, is to determine the pool of potential talent that exists to fill the military's needs.

Marshall attacked in another way the majority's thinking that combat and registration were inextricably linked. "Since combat restrictions on women have already been accomplished through statutes and policies that remain in force whether or not women are required to register or be drafted, including women in registration and draft plans will not result in their being assigned to combat roles."

Marshall reminded his colleagues that "even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions." In this case, "the question is whether the gender-based classification is itself substantially related to the achievement of asserted governmental interest . . . the government must show that registering women would substantially impede its efforts to prepare for such a draft." Not only had the government not met this test, Marshall argued, but testimony last year by Defense Department officials suggested that including women in the registration program was in the national interest.

Predictably, the case caused plenty of comment. Phyllis Schlafly hailed the decision and said that if the Equal Rights Amendment had been in the Constitution the Court would have been "compelled" to hold that women must be drafted. The *Chicago Tribune* suggested that the decision represented wise balancing of the need for strong self-defense with important principles of nondiscrimination. The *Tribune* reasoned that the Court had to uphold the draft-registration law because a sex-blind law "would have forced Congress to wait in issuing the call to arms until it was sure that the military threat was so grave . . . that the country would tolerate forcing women to fight alongside men. In other words, it would have made it even harder to mount a draft army." At the same time, by basing its ruling on the special circumstances of the military, the Court did not weaken important legal and constitutional advances in women's rights that have been made in the past decade in the civilian area.

Other commentators attacked the decision. Columnist Ellen Goodman said that the Court's reasoning was circular: "Women are barred from combat, therefore it is okay to bar them from the draft, because they are barred from combat."

An editorial in the *New Republic* said that the decision was "bad constitutional law because the high court . . . made a sham of adhering to the 'well-settled' sex discrimination test." Had the Supreme Court applied the "substantially related" test in good faith, the magazine went on, "it would have left to Congress the burden of proving that the *exclusion* of women from draft registration related closely to the goal of raising an army. Rehnquist's majority opinion argues that the *inclusion* of women is pointless, since, the Court claims, a draft is for combat troops and women are banned from combat. This . . . turns the proper question on its head." The editorial accuses Rehnquist of falsely framing the debate as one between "military need" and "equity." But why, it asks, are the two mutually exclusive? And why can't Congress be required to find a way to meet the country's

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legitimate military needs in a fashion that is equitable?

And the *New York Times* specialist on the Supreme Court, Linda Greenhouse, noted that many lawyers feared that the decision was a retreat from the Court's "substantially related" test and boded ill for future sex discrimination cases. By focusing on the question of whether men and women were similarly situated, the Court risked deferring to historical and economic factors that differentiate men and women. This analytic framework, emphasizing the differences, "places the burden on women to show why a sex-based distinction is not valid. By contrast, the earlier cases placed the burden on government to defend the distinction's validity."

Door Opened on Comparable Pay

Many women's liberation groups are passing out buttons that merely say "59¢." These buttons emphasize that, despite nearly 20 years of feminist agitation, women still earn only about 59 percent as much as men do. This is largely because they are concentrated in low-paying positions: secretaries, waitresses, teachers.

The federal equal pay law can't help because it specifies that women and men must be paid the same wages for doing *equal* work; it says nothing about being paid the same wages for doing *comparable* work. So, even though a woman teacher may feel that she has many more skills and much more education than a male truck driver, there has been no way under the law to argue that her salary should be at least as large as his.

No way, that is, until a recent Supreme Court decision. In *County of Washington v. Gunther,* (49 L.W. 4623, decided on June 8, 1981), the Supreme Court opened the door, if only by a tiny crack, to the possibility of comparable work lawsuits.

The case arose when Washington County (Oregon) paid substantially lower wages to female jail guards than it did to male guards. The jobs, however, were not equal. The female guards had only about 10 percent as many prisoners to supervise and had some clerical chores that the male guards didn't have.

The female guards sued, not under the Equal Pay Act but under Title VII of the 1964 Civil Rights Act. The question before the Court hinged on a single sentence of that law. Did this sentence, the Bennett Amendment, permit suits by those who feel that they have been denied equal pay for comparable work?

The Bennett Amendment had been hastily added to Title VII, under circumstances that permitted little debate. Just two days before voting on Title VII, the House of Representatives amended the civil rights bill to forbid discrimination on the basis of sex as well as race. When the House bill came before the Senate, a filibuster had been broken, and debate was strictly limited.

Nonetheless, Senator Wallace Bennett of Utah became concerned with possible conflicts between Title VII and the Equal Pay Act, which had been passed just the year before. In order to see that "in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified," Bennett proposed and the Senate approved this sentence to be added to Title VII: "It shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of wages . . . paid . . . if such differentiation is authorized by the provisions of Section 206(D) of title 29 [of the Equal Pay Act]."

Can courts determine who's worth more, steam fitters or secretaries?

The section of the Equal Pay Act referred to in the Bennett Amendment has two parts. The first prohibits unequal pay for equal work. The second, however, permits unequal pay that is a result of "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) differential based on any other factor than sex."

The Oregon county argued that the purpose of the Bennett Amendment was to restrict Title VII sex-based wage cases to those that could also be brought under the Equal Pay Act. By this reading, claims not arising from "equal work" are forbidden.

The guards, on the other hand, argued that the Bennett Amendment was designed merely to incorporate the four exceptions (seniority, etc.) to the Equal Pay Act into Title VII. They contended that claims for sex-based wage discrimination can be brought under Title VII for work that is comparable but not equal.

The Court split bitterly over this issue. Writing for the five-judge majority, Justice Brennan agreed with the guards and held that the Bennett Amendment only wrote into Title VII the four exceptions to the Equal Pay Act. Because the Senate debate had been so limited, Brennan agreed that "the few references by Members of Congress to the Bennett Amendment do not explicitly confirm" his interpretation of it, though he argued that these references are "broadly consistent" with his reading. He also relied on the meaning of the word "authorized" in the Bennett Amendment. What "differentiation," he asked, had the relevant section of the Equal Pay Act authorized? The first part doesn't authorize anything: it is purely prohibitory. But the second part authorizes employers to differentiate in pay on the basis of seniority, merit, and the other factors. Thus, it must be this part that the Bennett Amendment wrote into law.

Brennan argued that under the county's reading of the Bennett Amendment, "a woman who is discriminatorily underpaid could obtain no relief" unless her employer also employed a man in an equal job at a higher rate of pay. Instead, Brennan argued, Congress had intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," and so Title VII must permit suits by women performing work that is not exactly equal with that of men.

Pointing out that the county itself had determined that female guards deserve to be paid 95 percent of what male guards were paid, but that in reality they were paid 70 percent of what the male guards got, he said, "the failure of the county to pay [the women guards] the full evaluated worth of their jobs can be proven to be attributable to intentional sex discrimination."

Justice Rehnquist's opinion for the minority attacks the majority's reasoning at every turn. Speaking for Chief Justice Burger and Justices Stewart and Powell, Rehnquist argued that the only merit of the majority's opinion was its narrowness. Since the majority seemed to hold that there is a cause of action under Title VII where there is direct evidence that an employer has *intentionally* depressed a woman's salary because she is a woman, "the decision today does not approve a cause of action based on a *comparison* of wage grades of dissimilar jobs." (In this, Rehnquist echoed Brennan's comment that this decision did not write into law the "controversial concept of 'comparable' worth.")

However, Rehnquist went on to say that even though the majority's narrow decision may not ultimately cause much mischief, it is nonetheless totally without logic. Rehnquist pointed out that 18 months of deliberations on the Equal Pay Act show clearly that Congress did not intend to enact the principle that comparable work deserved equal pay. Indeed, this was specifically proposed on several occasions and voted down. Why then, Rehnquist asked, should we assume that a year later Congress, with virtually no debate, intended to indirectly enact the principle that lawsuits could be filed on the basis of equal pay for comparable work. Rather, he said, quoting Senator Bennett himself (speaking a year after the Amendment was enacted) "the Amendment means that discrimination and compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." In other words, Congress did not mean to "nullify" the Equal Pay act; quite the contrary, it intended to strengthen it by making it fully compatible with Title VII.

"In sum" Rehnquist wrote, "Title VII and the Equal Pay Act, read together, provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act insures that men and women performing the same work will be paid equally. Congress intended to remedy wage discrimination through the Equal Pay Act standards, whether a suit is brought under that statute or under Title VII."

Accusing the majority of resting its holding on considerations of "public policy" rather than law, Rehnquist argued that the equal pay/equal work standard represented "a necessary sacrifice of the rights of some victims in order that a civil rights bill could be enacted." It is, then, a "sort of political compromise" to which the Supreme Court cannot be blind.

If there is any one point on which the majority and minority agreed, it's that the holding in the case is a narrow one that by no means enacts the principle of equal pay for comparable work. Nonetheless, many observers thought it made comparable worth lawsuits much more likely.

A *Newsweek* article pointed out that feminist lawyers are elated. They'd wanted a narrow case for their first test, the magazine reported, "so that a majority of the justices would not be horrified by the prospect of wholesale salary restructuring. 'Now, where you show wage rates are affected by sex discrimination, relief will be in the cards,' says Winn Newman, General Counsel for the American Federation of State, County, and Municipal Employees."

Precisely for this reason, the decision disturbed many business people. *Fortune* magazine editorialized that supply and demand—the invisible hand of the free market—should determine pay rates, and that any meddling will involve courts in the impossible task of determining whether secretaries or steam fitters are worth more, and therefore deserve more pay. The *Chicago Tribune* added that "there are no standards of law that can properly be used to determine what is the value of a house painter's contribution to society compared to the value of a secretary's any more than there are standards that can tell government what the right price should be for a can of soup or a computer."

Is all traffic undesirable? Or does it depend on the race of the driver?

Street Closing Upheld

When can a white residential community lawfully close a street leading to a predominantly black neighborhood? That issue was raised when a white neighborhood in Memphis got city council permission to close off a street. The action was challenged as a violation of the Thirteenth Amendment and a federal civil rights statute. After contradictory opinions by the district court and court of appeals, the Supreme Court upheld the street closing in *City of Memphis v. Greene*, 49 LW 4389, decided on April 20, 1981.

Although the case centered on a relatively minor zoning dispute, it involved the critical question of whether intentional discrimination need be proven to win a claim under the Thirteenth Amendment or the Civil Rights Act of 1866 and related legislation. (Intent, rather than effect, is already the standard under the Fourteenth Amendment's Equal Protection Clause—see the Spring, 1977 *Update*). However, the justices offered different interpretations of the facts of the case and avoided the dilemma of intent versus effect, with only Justice White in a concurring opinion addressing the issue head-on.

The street in question, West Drive, became a cul-de-sac in 1973 after the all-white residents of the area (called Hein Park) had unsuccessfully sought two years earlier to close all four streets passing through this Memphis subdivision. Residents had argued that the closings would reduce "traffic pollution" and insure the safety of its children. Residents of the predominantly black area to the north of Hein Park, however, believed that the request and subsequent action by the City Council was racially motivated, and filed a class action suit against the city.

The suit alleged violations of 42 United States Code Section 1982-83, which guarantees blacks property rights equal to those enjoyed by whites, and of the Thirteenth Amendment which, while prohibiting slavery and involuntary servitude, has been interpreted to prevent "a badge or incident of slavery" and restraints on liberty as well. The district court held that the complaint "failed to allege injury to the plaintiff's own property or any disparate racial effect," but the court of appeals reversed, holding that the closing would erect a barrier between these neighborhoods and cause "an economic depreciation in the predominantly black residential area."

Justice Stevens, writing for the majority, held that the street closing was but a minor inconvenience to those challenging the decision, resulting in the "requirement that one public street rather than another must be used for certain trips within the city." Its impact, Justice Stevens continued, "is a routine burden of citizenship" and to regard it "as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom." Because neither allegation rose to the level of a statutory or constitutional violation, Stevens found it unnecessary "to confront prematurely the rather general question of whether either Section 1982 or the Thirteenth Amendment requires proof of a specific unlawful purpose."

Justice Marshall, writing for the three-judge minority, described the explanation for the closing—"protecting the safety and tranquility of a residential neighborhood by preventing undesirable traffic from entering it"—as little more than code phrases for racial discrimination. He noted that the evidence in the case, "combined with a dab of common sense," reveals the carving out of "racial enclaves" by a group of white citizens determined to "keep Negro citizens from traveling through their urban 'utopia.' "

Justice White, in a concurring opinion, chided both the majority and dissent for avoiding the central issue of intent versus effect. "Rather than becoming involved in the imbroglio [over differing interpretations of the facts]," White wrote, "I much prefer as a matter of policy and common sense to answer the question for which we took the case." After reviewing the history of the constitutional and statutory provisions in dispute, he concluded that a "racial animus" or intent to discriminate was clearly required—a test which would make it much more difficult to prove discrimination.

Double Celling Okayed

With close to 325,000 inmates in our nation's adult prisons, overcrowding poses a difficult dilemma. The situation can be eased through early release programs or the construction of new facilities—neither of which is politically popular—or through "double celling" (i.e., placing more than one person in already small cells).

The latter course was chosen by the Southern Ohio Correctional Facility in Lucasville, where about 1,400 inmates were doubled-up in cells that had only 63 square feet of floor space. Several inmates challenged the move as cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Declaring that "the Constitution does not mandate comfortable prisons," the Court denied relief in the case of *Rhodes v. Chapman*, 49 L. W. 4677, decided on June 16, 1981. The ruling overturned a district court holding in favor of the inmates.

Writing for the eight-judge majority, Justice Powell noted that "double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation." Powell also pointed out that "there is no evidence that double-celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment," thus falling short of the criteria needed to establish a constitutional violation.

Three justices who joined the majority in overturning the district court ruling wrote concurring opinions "to emphasize that today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions." This disclaimer was prompted by a statement in Powell's opinion suggesting that the courts not assume the task of running prisons. Powell wrote, "in discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system."

"Prison inmates are 'voteless, politically unpopular, and socially threatening,' " Justice Brennan argued in response. "Judicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons."

The sole dissenter, Justice Marshall, warned about the "alarming tendency toward a simplistic penalogical philosophy that if we lock the prison doors and throw away the keys, our streets will somehow be safe." Noting that the Lucasville facility provides each inmate with but 30-35 square feet of floor space, he wryly observed that "most of the windows in the Supreme Court building are larger than that."

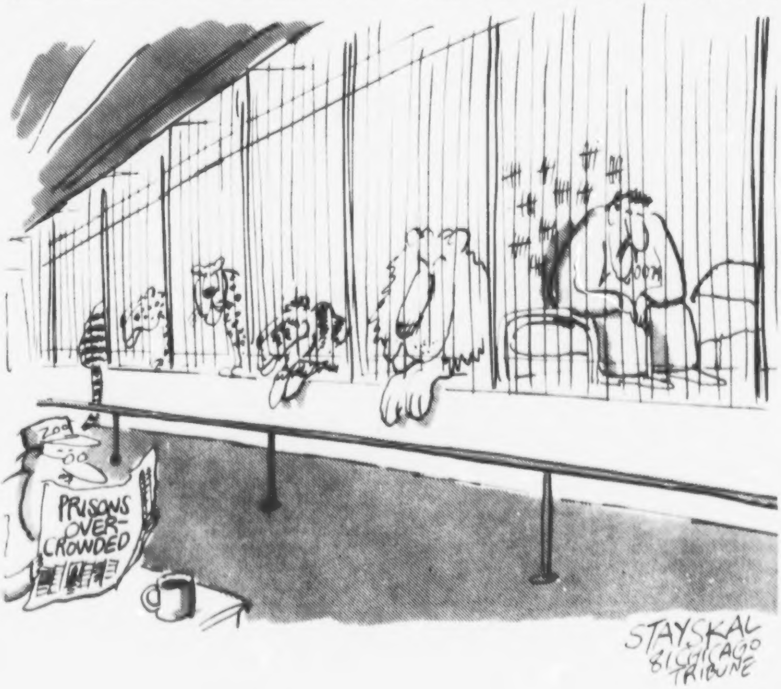
The *Wall Street Journal* notes that local courts in at least 24 states have declared prison systems unconstitutional due to overcrowding and other problems. Given the fact that more than 8,000 cases have been filed by inmates challenging prison conditions, we can expect to learn in the near future whether the "retreat from careful judicial scrutiny of prison conditions" will in fact become a reality.

Passport Revocation Upheld

Former CIA Agent Philip Agee hardly fits the mold of the dedicated super-sleuth lurking in the shadows. Instead, the highly-visible ex-agent has pursued an unrelenting campaign to discredit the CIA. Since resigning in 1969, he has written a book, *Inside the Company: A CIA Diary* (which purports to reveal the names of hundreds of undercover CIA operatives), has recruited and trained others in means of exposing such agents, and has otherwise violated his express contract with the CIA to honor the confidences he secured during his tenure with the government.

Unable to stop Agee's crusade, Secretary of State Cyrus Vance revoked his passport in late 1979, thus restricting his travels if not his effectiveness. In the case of *Haig v. Agee* (49 L.W. 4869, decided on June 29, 1981), the Court upheld the revocation on national security grounds. The decision reversed two federal rulings that Congress had never authorized State Department action on this basis.

Writing for the seven-judge majority, Chief Justice Burger emphasized "the volatile nature of problems confronting the Executive in foreign policy and national defense," and the need for the Court to defer to executive branch action in this area "unless there are compelling



indications that it is wrong." Burger based his decision on the Passport Act of 1926, which gives the Secretary of State power to grant and issue passports, as well as a 1966 State Department regulation authorizing revocation of a passport when "the secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." Since Congress had not taken any contrary action, Burger interpreted this as tacit approval of executive discretion in regulating foreign travel by American citizens. "Congressional silence is not to be equated with Congressional disapproval," Burger argued.

Burger also denied Agee's contentions that his constitutionally-protected rights of freedom to travel, free speech, and a fair hearing were abrogated. Since Agee's activities "have the clear purpose of obstructing intelligence operations and the recruiting of intelligence personnel, . . . they are clearly not protected by the Constitution." Responding specifically to the free speech claim, Burger noted that "the mere fact that Agee is also engaged in criticism of the government does not render his conduct beyond the reach of the law."

Justice Brennan, joined by Justice Marshall, dissented, arguing that the majority's "whirl-wind treatment" of the constitutional issues was based on "extreme oversimplifications of constitutional doctrine or mistaken views of the law and facts of this case." Prior Court decisions had established that Congressional approval of State Department policy can be established only if Congress has acquiesced to a "substantial and consistent practice" by the department, the dissent argued. Since the 1966 regulations were applied only once before, there was no consistent "practice" which met this test.

Many commentaries on this case, while expressing considerable sympathy for the State Department as well as considerable revulsion at Agee and his activities, expressed concern about the Court's decision. In an editorial resonating the theme that "hard cases make bad law," the *Chicago Tribune* noted two troubling aspects of the ruling. First, the editorial argued, revoking the passport on national security grounds without any formal hearing gives too great latitude to the executive branch. In addition, the *Tribune* expressed concern that the decision would "encourage Congress to pass dangerously sweeping legislation curtailing publication of information that might identify U.S. intelligence agents," resulting in possible abrogations of protected free speech activities.

Other commentators, such as Harvard Law School Professor Laurence Tribe, commenting on the cumulative effect of this decision and the draft registration and Iranian agreement rulings, warned that judicial deference to the executive and legislative actions "is inappropriate when indication of military and national security issues is just a cover to hide traditional forms of repression of political speech." Neither the *Tribune* nor Professor Tribe were reassured by the Chief Justice's statement that the passport revocation was based on Agee's conduct, not his beliefs. "The protection accorded beliefs standing alone is very different from the protection accorded conduct," Burger wrote.

Are military and national security issues covers to hide traditional forms of repression of political speech?

Hostage Deal Approved

The Iranian hostage drama was a long, painful, and frustrating experience for America. If it were acted out in pages of a novel rather in real life, book critics would have heaped scorn on its convoluted plot, strange cast of characters, and unpredictable events.

On July 2, 1981, the U.S. Supreme Court became one of the participants in the hostage saga. In the case of *Moore v. Regan* (49 L.W. 4969), the Court unanimously upheld the January 19 agreement under which former President Carter traded billions of dollars in frozen Iranian assets for the release of the 52 American captives. The decision, combined with the Court's rulings in the draft registration case and the decision involving former CIA agent Philip Agee (also discussed in this "Court Briefs"), reflects the reluctance of the Court to disrupt executive and legislative decisions in foreign affairs and national defense matters, and thus become entwined in the "political thicket."

Under the Iranian agreement, the United States is obligated:

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

In addition, the U.S. government agreed that $2.3 billion in Iranian funds and securities would be transferred to a foreign bank, $1 billion would be set aside to satisfy claims brought before an international claims tribunal, and the remaining funds would be returned to Iran.

The Supreme Court case involved the claim of a California engineering firm, Dames & Moore, for close to $4 million against the Iranian government. As a result of the ruling, Dames & Moore and the others who have claims will be forced to seek redress in the international tribunal.

Because of the July 19 deadline set by the agreement with Iran, the Court's decision was reached within a month of its filing and only eight days after oral arguments. The expedited handling of the case prompted Justice Rehnquist to emphasize "the necessity to rest decision on the narrowest possible ground capable of deciding this case. . . . We attempt to lay down no general guidelines covering other situations not involved here."

Writing on behalf of the Court, Rehnquist noted that prior congressional acts had established the president's authority to freeze, transfer, and otherwise deal with foreign assets located in the United States. Rehnquist also noted that Congress has not enacted any contrary legislation or even passed a resolution indicating its displeasure with Carter's actions. Rehnquist wrote, "crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."

Although the California company also claimed that the government's action denied it the "just compensation" guaranteed by the Fifth Amendment, the opinion declined to deal with this issue. The company could pursue its case in the U.S. Court of Claims if it is dissatisfied with the international tribunal's rulings, Rehnquist indicated.

Thus, Dames & Moore and the more than 2,000 other U.S. firms and citizens, while precluded from suing Iran in the U.S., can turn to the international tribunal to sue Iran and perhaps even to U.S. courts in suits against the federal government. Doubtless, this is not the last case the Supreme Court will hear emanating from the Iranian hostage scenario. ☐

Pro-Choice

(Continued from page 8)

"compelling" state interest.

In *Roe v. Wade*, the Court used this strict test to evaluate the state's reasons for restrictive abortion laws. The state had argued that protecting the life of the mother and the potential life of the fetus were indeed compelling state interests. But the Court refused to uphold this purported state interest when dealing with so fundamental a right as controlling one's body and reproductive system. It found the restrictive abortion laws unconstitutional.

Noting that there is no agreement among scientists or religious leaders as to when a fetus becomes a person, the Court emphasized that it could not determine when personhood began. Instead, the decision focused on the right of a woman to take into account her own personal situation in determining whether to have a baby. This included the physical and mental health of the woman, along with her economic and practical ability to raise a child. The fundamental right to control one's life, a function of the right of privacy, was central to the Court's holding in this case.

The Supreme Court did not find, however, that a pregnant woman had an unqualified right to an abortion. During the first trimester, there is *no* state interest in prohibiting abortion, for there is little risk to the woman's health and the fetus is not viable. During the second trimester, some procedural aspects may be state-regulated to protect the mother's health, but abortion itself may not be prohibited. It is after the point of viability that the Court determined that the woman's interest must be balanced against the state's interest. At this point—set by the Court at approximately 28 weeks—the state may regulate and even proscribe abortion, unless the mother's life or health is threatened by continued pregnancy.

Subsequent decisions by the Court furthered the rights of pregnant women. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Court held that where there is a conflict between the interests of the father and mother of a fetus, the woman's choice should prevail. Because she is most directly and permanently affected by the pregnancy, her decision to terminate it does not require her husband's consent. Moreover, this same case held that the consent of parents is not necessary when the patient is a minor. The Court reasoned that if the states themselves could not interfere with this decision, they could also not grant that right to third parties.

The next set of abortion decisions handed down by the Supreme Court involved Medicaid payments and federal funding of abortions. In the most recent of these cases, *Harris v. McRae*, 448 U.S. 297, the Court upheld the constitutionality of the Hyde Amendment, which denies federally funded abortions to the poor. Many argue that by upholding the Hyde Amendment, the Court turned its back on poor women. However, these decisions on federal funding, regrettable as they may be, in no way detract from the reasoning of *Roe v. Wade*. The law of the land remains that abortion *is* legal and that a woman's choice is protected by her right to privacy.

More Than a Women's Issue

The social costs would be great if the right to legal and safe abortion was denied. Unwanted pregnancies result in unwanted children, frequently subjected to neglect and abuse. Moreover, past experience has shown that women, desperate to terminate an unwanted pregnancy, will do so at all costs, often resorting to dangerous, illegal "back-alley" measures. (The statistics are sobering. While a legal abortion during the first trimester is safer than a tonsillectomy or even childbirth, an illegal abortion increases the medical risk twelvefold.) Finally, it is unacceptable to consider outlawing abortion in view of the great number of pregnancies resulting from rape or incest. The Human Life Amendment, along with many congressional bills now pending, does not provide exceptions even under such tragic circumstances.

It is estimated that one out of three couples practicing birth control will have an unplanned pregnancy within a five-year period. Until a perfect form of birth control is found, unwanted pregnancies are inevitable within all age, educational, and economic levels of society. Family life, and society as a whole, can be strengthened only when every child is wanted and can be adequately cared for, not when compulsory pregnancy is legally mandated. Thus the right to choose a safe and legal abortion must be viewed not only from the perspective of the woman's right to privacy and control over her own body, but as an issue with broad social and legal impact.

Ms. Cunningham Replies:

Splitting hairs over minor points does not strengthen a debate when there are larger questions at issue. Neither is it productive to refute an opponent's argument point by point. Therefore, I prefer to limit my reply to certain factual points on which the reader might be misled.

Ms. Hudson-Nicholas relies on the recent Yankelovich, Skelly and White survey for *Time* magazine to claim majority support for an abortion choice. Abortion advocates also frequently cite a similar 1980 poll by *New York Times*-CBS News. However, the *New York Times* itself reported that a change in the wording of the survey questions dramatically affected the results. While 29% of those polled favored a constitutional amendment "prohibiting abortions," 50% of the same group were in favor of an amendment "protecting the life of the unborn child." Any professional statistician knows that how the question is asked will determine the response. See, for example, the national surveys cited by J. Blake and J. Del Pinal in "Predicting Polar Attitudes Toward Abortion in the United States," *Abortion Parley* (J. Burtchaell, ed., 1979).

Ms. Hudson-Nicholas inaccurately depicts the development of legal protection of fetal rights. The currently pending Human Life Bill and the Human Life Amendment are alternative means of returning to a historical position of protection for the unborn. Early English cases specifically recognized the rights and privileges of the child while still in the womb. See, for example, *Thelluson v. Woodford*, 31 Eng. Rep. 117 (1798). William Prosser, in his *Law of Torts*, catalogues the legal recognition of the rights of the unborn. The unborn has been protected from its first moment of *knowable* existence. Historically, settlements for fetal injury were available only in the case of viable fetuses, because only at viability could the woman prove pregnancy. With the advent of modern medical techniques, the principle can be extended to nonviable fetuses.

A careful study of common law indicates that abortion has been prohibited for centuries. Legal commentators from Sir Edward Coke in 1628, to the eminent Blackstone, to a contemporary authority on common law crimes, Professor Perkins (who is uninvolved in abortion polemics), have stated that abortion was a crime at common law at least from "quickening" (the time the child moved in the womb). At the time the Fourteenth Amendment was ratified, nearly every state had criminal legislation proscribing abortion. The historical and legal evidence of the protection of the unborn and proscription of abortion is thoroughly documented in reputable sources. See, for example, J. Gorby, "The Right to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement," *Southern Illinois University Law Journal* (1979), for a discussion of why the unborn is a constitutional person.

While our foundation for protecting the unborn is rooted in the past, it is mandated by contemporary concerns as well. We have technological resources at our disposal to deal with every inconvenience, but our deeper needs are met through the personal warmth of the human family. The solution to overpopulation, child abuse, and unwanted children is not abortion. The quality of life in our society will not be improved by destroying unwanted human life. A quick, unobtrusive abortion does not provide a long-term solution to more fundamental societal problems. Only if we protect and affirm our weak and defenseless members will our society truly be able to value and cherish all human life. □

Pro-Life

(Continued from page 9)

Constitution and extant Supreme Court decisions." (Claire Thomas, "Potential for Personhood: A Measure of Life," 2 *Bioethics Quarterly* 164 [Fall 1980].)

Prominent biologists, ethicists, theologians and scientists agree with the "quality of life" standard espoused by Ms. Thomas. Their formula is that an infant must pass certain tests before it is declared "human." Otherwise, it should have no legal protection and be put to death, regardless of the parents' wishes. What about extending the logic of the "unwanted child" to the baby going through the "terrible two's"? It was this same logic which led doctors in Hitler's Germany to execute the bed wetters.

The right of privacy which the Supreme Court so cleverly twisted to include a woman's abortion decision can easily and subtly be extended to permit the destruction of any unwanted or abnormal person. This is what *women* are fighting for?

A Women's Issue?

The abortion procedure is itself a discrimination against women. It is a radical invasion of the woman's body. It is "a denial of one of those powers which make women women. Child-bearing is basic to them. . . . To put it bluntly, an abortion amounts to a mutilation of the woman's body and a denial of her nature." (Janet E. Smith, "Abortion as a Feminist Concern," in 4 *The Human Life Review* 62, 67 [Summer 1978].) Abortion, in that sense, *is* a women's issue. It is a women's issue because it is another manifestation of our society's discrimination against women. Women are not respected for what we, and we alone, can do: bear children. Our society does not accommodate a woman who desires both a career and a child. There is something about the pregnant woman which is rather embarrassing in the workplace.

How many women are aware of the medical consequences of abortion? Even if a woman proclaims her sovereign right to choose, or obtains an abortion for health reasons, she might have second thoughts if she knew of the medical risks. Newspapers trumpet the dangers of toxic shock syndrome from tampons—not a "controversial issue"—but ignore scientific studies on abortion hazards. Some of the documented risks are low-grade (usually undetected) infection, perforation of the uterus, premature births in subsequent pregnancies (due to forced dilation of the cervix, even in first trimester abortions), and sterility. We have a right to know this. Even those who clamor for the right to choose must agree that such choice should only be made based on full knowledge of the facts.

Abortion is also a successful means of keeping women as sex objects. Sexual freedom is guaranteed, because if through some "accident" the woman gets pregnant, her lover's response extends no further than his checkbook. He can escape the responsibility for his action. If the woman chooses to keep her child, he may answer, "Look, I'm not responsible for your baby. I offered to pay for the abortion." It is the ultimate in the exploitation of women. Abortion is in the best interests of men who want sexual pleasure without personal consequences. Why else is there an unholy alliance between the National Abortion Rights Action League and one of its large contributors, *Playboy* magazine?

The discrimination involved in abortion does not end with its implications of men exploiting women. There is the even more tragic discrimination of the woman against the fetus within her. At least when a male puts down a female, she can react and defend herself in some way. The fetus has no voice. And the fetus is not being denied equal pay for equal work. It is denied life.

Abortion seriously discriminates

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830

against the poor and minority groups. A New York black social worker discussed the reality of black genocide. While birth rates for the general population dropped 17 fewer per thousand over the last decade, they dropped by 32 per thousand for poor women, and by 49 per thousand for black poor women. (Erma Clardy Craven, "Abortion, Poverty and Black Genocide," in *Abortion and Social Justice*, T.W. Hilgers & D.J. Horan, eds., 1980.) Delaware, New York, and South Carolina have considered legislation to make sterilization *mandatory* for all welfare mothers after they have two illegitimate children. Where is their "freedom of choice"? The prevailing attitude seems to be that it is cheaper to abort the children of the poor than to deal with the more basic problems of poverty and racism.

Life v. Property

One has to look no further than the history of our Constitution to realize that abortion is more than a theological or religious issue. It is a matter of basic civil rights. The Bill of Rights was fashioned from the fundamental rights to life, liberty, and property. The essential right, the *sine qua non*, is the right to life. Without that right, the others are useless. But woman's right over her own body is a type of property right. To place her property right in a preferred position constitutionally is akin to the 1857 *Dred Scott* decision, wherein the Supreme Court held that a slave owner had property rights in his slaves which outweighed any interest the slave might have in freedom.

An argument frequently heard is that each person has the right to his or her own morality, but cannot impose that morality on others. Particularly in the area of civil rights, this logic founders. All law is based on some system of morality. Our entire criminal code is based on morality, proscribing murder, stealing, and other activities. There is no such thing as a neutral legal system. Laws sanction actions which are perceived to be harmful to society; other laws, such as tax laws regarding charitable contributions, encourage actions which are beneficial to society. The proabortionists chant, "Don't impose your morality on me." But that begs the question, since in every case, someone's morality is being imposed. What they really mean is, "We want to impose *our* morality on *you*."

Neither should a woman claim that abortion is purely a personal decision, and that no one has any reason to interfere. That refrain also is logically inconsistent. Try this one: "Personally, I'm against slavery, but I won't interfere with my neighbor's right to own a slave." Or, "Personally, I'm opposed to nuclear arms and aggressive warfare. I won't build a bomb, but if you want to kill Vietnamese children with napalm, it's your own private choice and I will support your freedom to choose."

The Nub of It

Abortion *is* a women's issue in the sense that it is the woman, the pregnant woman, who is most intimately and visibly connected with the event. It is her body that is affected by the abortion procedure. Consequently, it is easy to argue that a woman has absolute control over her own body, and whatever she chooses to do with it is her own business. Fine. But the problem is that the woman's body is not the only body involved. Like it or not, that "thing" in the womb is *not* just a mass of tissue, not a tumor or unneeded appendix. It is life, *human* life, that is being terminated in the womb. The terms "potential life" and "termination of pregnancy" are part of a clever semantic scheme to sidestep what is really going on. Once the sperm and ovum meet, that child's genetic makeup is sealed. A unique combination of traits, never to be repeated, is joined.

Yes, abortion is a women's issue. But it is more than that. It is a matter of civil rights. Our ideals have been that all should be treated fairly and without discrimination under the law. Do we now forsake those dreams for the sake of some other right? We and our foremothers have struggled hard and at great personal cost to achieve the freedoms we now enjoy. No, the goal of equal treatment of the sexes has not been reached. But is the outrage of being legally defenseless and discriminated against merely a shadowy memory?

We of all people should speak for those who have no voice. We should demand equal protection for *all* human beings, regardless of their condition. We can motivate our society to provide for girls and women facing crisis pregnancies, to enable them to bear their children. Getting rid of the people is no answer to the problems of overpopulation, hunger, illegitimacy, and poverty.

Abortion is a universal issue. It is the issue of equal protection for all our unborn sons and daughters.

Ms. Hudson-Nicholas Replies:

In the most perfect of worlds, there would be no unplanned pregnancies, no abused and neglected children, no rape, no incest. In short, there would be no need for the availability of legal abortion. But our world is not perfect, and women

"Your Honor, Mr. Allen requests that he be assigned to a correctional institution that has a large exercise yard."

do have to face the prospect of unwanted pregnancies.

Antichoice advocates have the same answer for every situation: a fetus is more important than a woman. In all circumstances. With no exceptions. This, contrary to the antichoice position, is the ultimate form of exploitation of and cruelty to women.

To force a woman to have a baby against her will is governmental interference in an area that is her most personal and private. For a woman who is physically and psychologically prepared, pregnancy and childbirth are wonderful experiences. But having children is *not* a woman's destiny; it is simply a beautiful option that should be hers to choose.

To force a female to have a child that is the product of a rape is unimaginably heartless. And yet, the antiabortion forces do not acknowledge this. In fact, their usual response is that the horror that accompanies rape acts as a natural form of birth control. But the FBI Uniform Crime Report shows that 4% of rape victims become pregnant. Can we actually force them to give birth?

To force a female to have a child that is the product of incest is equally cruel. Yet again, there are no exceptions for these women under the antiabortion acts. The possibility of pregnancy is perhaps even greater in incest cases, for the victims are usually young and not protected by any form of birth control. The antichoice proponents would legally force these young girls to give birth.

Antichoice advocates often cloud the abortion issue by comparing prochoice people with slave-owners, Nazis, child-killers, and other awful types who have no feeling for the value of life. As I see it, we hold life so dearly that we are striving to preserve one fundamental right that gives it value. The right to have an abortion does not exploit woman—it gives her the means for controlling not only the quality of her life, but also the quality of all life.

It is ludicrous to suggest that we would advocate killing two-year-olds, or any other human being. On the contrary, we value all persons; the antichoice faction vehemently champions the rights of an unborn dependent organism and ignores completely the real-life situation of the pregnant woman.

In conclusion, the prochoice position is not proabortion. We do not force anyone to have an abortion, nor do we even urge them to do so. We are simply dedicated to preserving a woman's right to control her body, and to exercise her right of privacy. Only by protecting this right can the quality of our society be maintained. □

Discrimination

(Continued from page 30)

the number of women judges in California has increased from about twenty to more than sixty, and the Chief Justice of the Supreme Court of California is a woman, Rose Elizabeth Bird.

The results of such efforts are twofold: a judiciary more sensitive to the problems faced by over half the population and one closer to the democratic ideals of representation and fairness.

Says Judge Klein: "In a democratic society, we'd like to think that all groups are fairly and justly represented. I think most of us would feel more secure if more women and minorities were on the bench."

The importance of a more representative judiciary cannot be overstated. Men on the higher courts have never experienced sex discrimination, yet they're often handing down sweeping decisions on the isssue. If women are underrepresented on these courts, then judges are missing the female input on rape, abortion, and alimony.

"In terms of proportions," says Klein, "the bench presently only reflects a tiny proportion of the cross section of people in America."

One explanation for this, according to sociologist/attorney Donna Fossum, is a "time-lag" effect. "Taken in perspective, you can't expect to look at the percentage of female law students and then ask why aren't one-third of the judges, professors, or Wall Street lawyers women. . . . There's a certain natural seasoning factor." She adds, however, that this is not to imply that the appointment of women to the judiciary has taken a natural course; it's taken the efforts of lobbyists, antidiscrimination laws, and leaders such as Carter and Brown to guarantee them their fair share.

In 1960, when one to two percent of the judges were women, an equivalent number had attended law schools during the 1950s. Similarly, the four to five percent figure found during the mid-1970s for female judges can be traced back to the law school population of the early 1960s.

Viewed from this perspective, most have a positive view about the future, but for the majority of women judges, this optimism is guarded. "Overall, it's been a good start, but obviously just a start," says Judge Klein. "Now only time will tell."

'Superstar' Searching

Professionally, Professor Barbara Babcock has only experienced good fortune. In 1972, she left her position as director of the Public Defender Service of Washington, D.C. to join the faculty of Stanford Law School. It was a time, according to Babcock, "when schools were desperate for well-qualified women." In 1978, she took a two-year leave of absence from Stanford to serve as an Assistant Attorney General under Carter. There she directed the Civil Division, heading a staff of 700 and in charge of a $23-million budget. Again, she openly acknowledges that she probably received the nomination because she was a woman.

"When I came to Washington," she said, "interviewers repeatedly asked me how I felt about getting a job because I was a woman. I developed a stock answer: It's a lot better than *not* getting it because I'm a woman."

Despite her own good fortune, Babcock believes that statistically women law professors are faring "terribly." The numbers remain suspiciously low, especially among the more "prestigious" schools. This year, the University of Chicago Law School has a total of two full-time women on its law faculty (one of whom is on leave), the University of Michigan Law School has two women on a faculty of approximately forty-two, and Columbia Law has one woman on the staff, and another on leave.

As with judges, this trend can in part be explained as a time-lag effect. But again, as Fossum points out, "that implies that all has taken its natural course . . . but without a great deal of lobbying and certain laws, the present situation would be far worse."

A 1968 executive order calling for affirmative steps towards the employment and promotion of women among all recipients of federal funding, which includes virtually every law school, greatly accelerated the hiring rate of women law professors. Between 1970, when for all practical purposes the order took effect, and 1974, there was a threefold increase in the number of women law professors around the country. Special interest groups such as the Women's Legal Defense Fund and the Women's Political Caucus spent a great deal of time generating a list of qualified female candidates for law school selection committees, as well as for those with the responsibility of judicial appointments.

"We invest a very, very large amount of time every year in searching for women and minority faculty members," according to Yale Dean Harry Wellington, as reported in *Student Lawyer* (May, 1981). Many schools complain, though, that they simply cannot find any qualified women.

Most women find this argument no more than a flimsy excuse. They question the criteria set down by law schools—which they believe only leave room for those following the most traditional of career patterns. Says Babcock: "The great emphasis is on those candidates that look like men careerwise. . . . Until recently, however, those roads were not available to women." It was difficult, if not impossible, for women to become partners in a prestigious law firm or clerks on a high court. "There has been a real unwillingness to branch out and look beyond these criteria," adds Babcock.

"They're only looking for the superstars," according to Donna Fossum. "They're waiting for the perfect male model. . . . It just won't happen for a long time." Fossum points out that New York University, considered by most a top ten law school, has disproved the excuse that qualified candidates are lacking. Thanks to an active recruitment policy, eight of its faculty of fifty are women.

The relative scarcity of full-time permanent women faculty members has serious ramifications for the law school environment. "When you have, for example, a faculty of sixty-five people and sixty-two of them are white males, the bias there is incredible on its face," says a third-year law student quoted in *Student Lawyer.* At Yale Law School, student groups publicly demonstrated their dissatisfaction with faculty hiring patterns and passed around a petition protesting the lack of diversification among the Yale faculty. Similar efforts have been undertaken at other law schools.

At the same time, though, that many students may be helping the efforts of prospective women law professors, many students (especially male) are presenting difficulties for those professors in the classroom.

According to the findings of a recent American Bar Association study, "The Integration of Women into Law Faculties," women tend to be viewed as less competent than their male counterparts and are more likely to be challenged by students. This causes problems in the classroom for both students and for the teacher, who must contend with additional performance pressures.

Over half of the sample interviewed for the ABA study, which included both men and women professors, as well as students of both sexes, indicated that law students treat women and men on the faculty differently. One woman professor said, "When a male teacher enters the classroom, competence is assumed. With a woman, competence must be proven." A male professor in the study said, after viewing a woman colleague's class, "Women undergo torture in the classroom," composed both of challenges to their authority and inattentiveness to their teaching.

"[Women professors] simply do not fit the traditional stereotype of a law school professor. . . . There's a certain hostility towards anyone not fitting a stereotype," according to one woman professor.

One male student cited in the study stated flatly, "I cannot deal with being taught by a woman law professor."

Another level of discrimination was reported in the study: "One man reported reading in a student's evaluation about a woman teacher's dirty hair, a type of comment which he felt students would not make about the men faculty. Another man said that he doubted whether the graffiti in the women's room about male teachers were as favorable as those about women teachers in the men's room."

Numbers the Key

And what about the future? The number of women lawyers must continue to grow. Only when women lawyers are well represented throughout the profession will they be able to prove their competence through what they can do. Only then will a woman be looked upon as a skillful judge rather than as a judge who is, as one Senator said referring to Justice O'Connor, "a little sweeter and I think generally a little more compassionate" than a man.

The future looks promising. Two-thirds of all women lawyers are under the age of thirty-five. The rates of change within the profession have been impressive. And despite the handwriting on the bathroom wall, the most promising statistic is the number of women now attending law school.

But Donna Fossum provides an important warning: "We've come a long way in a relatively short period . . . but only with a great deal of effort on the part of many people. The battle is far from over." ☐

PATENT
OFFICE
Schneider

Interviews

(Continued from page 27)

Margaret Bush Wilson
National Leader

"I went to college knowing I didn't want to be a teacher, or a nurse, or a social worker. I realize now that what I was doing was rebelling against the traditional stereotypes of what women do." That rebellion continues as Margaret Bush Wilson, chairman of the NAACP national board of directors, pursues a successful and wide-ranging career in the law.

Following the suggestion of a friend that she go to law school, Mrs. Wilson entered the Lincoln University School of Law in the mid-1940s. Her law school was tiny. "I think my whole class could not have been more than 15. But what we lacked in the way of the prestige that comes from larger schools we gained in the almost individual classroom attention we received."

Interestingly enough, the Lincoln University Law School had grown out of a Supreme Court case. A young black man named Lloyd Gaines sought admission to the University of Missouri School of Law, then white only. The United States Supreme Court ordered the University of Missouri to admit Mr. Gaines, but shortly thereafter, in the spring of 1938, he disappeared and has not been seen or heard from since that time. His disappearance allowed Missouri the necessary time to establish a separate accredited law school for blacks in the state.

After one week at that school, Mrs. Wilson recalls, she realized that she had indeed stumbled upon her calling. She was intrigued, she remembers, by the study of law. "I think the law opens up to those who move into that profession an incredible amount of access. You have to almost guard against the arrogance of that knowledge. Much of the power and influence lawyers exercise in this country is because of their ability to know how to find and acquire information."

Being a woman and a black aren't handicaps to her. "I'm always startled when somebody raises a question about me as a female. I had nothing to do with my sex or my race and I don't allow myself to be preoccupied with either. If I'm confronted with sexual or racial remarks, I deal with them. But I don't allow myself to be threatened by them."

She feels that it is important for women to believe that they can do whatever they want to do. And her career exemplifies that belief. Upon completing law school, she became a staff attorney in the Rural Electrification Administration of the United States Department of Agriculture. She later worked as an assistant attorney general of Missouri, as a legal services specialist for the war on poverty, as an administrator of community service and continuing education programs, and as acting director and deputy director of the St. Louis Model City Agency. Additionally, she has served as assistant director for St. Louis Lawyers for Housing and has been an instructor in civil procedures at St. Louis University School of Law's CLEO Institute. She is currently senior partner in the law firm of Wilson, Smith and McCullen in St. Louis.

I could not envision myself . . . being pitted against black men. The burden . . . they carry is an overwhelming one.
—Margaret Bush Wilson

"I suspect I was one of the early advocates of opportunities for women because my whole career has been one of reaching for opportunities that are unconventional and nontraditional." She has not, however, formally identified herself with the organized groups who are advocating for the rights of women. This is in part because she is overwhelmingly committed in terms of time and energy to her work in the NAACP. An equally important reason for her lack of involvement in organized women's groups, however, has been what she describes as "a very disturbing overcast to the women's movement."

"In the early days," she recalls, "it seemed to be a movement which pit women against men. Because I am very sensitive to and deeply concerned about the role and plight of black men in our society, I could not envision myself participating in any kind of movement which either directly or indirectly had me in a posture of being pitted against black men. The burden which they carry in this society is an overwhelming one. And I just could not get involved in that kind of dichotomy."

Mrs. Wilson for the past seven years has been a major spokesperson for the civil rights movement in this country. In her position as chairman of the national board of directors of the NAACP, she has helped to shape the priorities and directions of the civil rights movement in the 1970s and now in the 1980s. Being in such a high visibility leadership role has not always been easy for her.

"When I first took over the chairmanship of the NAACP, I found it very frustrating that those who want to make change and achieve goals which are not traditional encounter some resistance. I have mellowed now and I understand that it is not that people do not want to change, but rather that they feel threatened by things that may unsettle the way they are doing things." Although she may have mellowed, she hasn't slowed down in her continuing effort to fulfill her mother's lifelong desire to "make this a better world for our children."

Virginia Martinez
Civil Rights Litigator

Virginia Martinez was tired of school when she graduated from an inner-city Chicago high school thinking there was no way she could compete against anybody anyway. Fortunately, one of her teachers told her about a junior college program that provided an opportunity for students to work half-day and go to school half-day. After completing that program, she went to work for an insurance company as a secretary. An attorney working for the same company told her about two Latino lawyers in her neighborhood looking for someone to work on Saturdays. She decided to work for them, and they encouraged her to complete her college education.

Upon her graduation from the University of Illinois, Ms. Martinez considered pursuing a master's degree in social work. Her bosses suggested law school: "Become a lawyer and you can do anything you want to do with it." Ms. Martinez had never thought about being a lawyer until working for these two Mexican-American attorneys. "I had never known that there were any Latino attorneys in the city and had never had any contact with attorneys. After working for them, I just decided that if they could do it, I could do it." So over the objections of her parents and boyfriend, she entered law school in 1972.

The women's movement, she feels, has had a tremendous impact on law. First, because it probably was instrumental in opening law schools up for women, and second, by providing a support network—women's groups operating within the law schools that helped women to make it through.

"Our class had a lot of women [who] were very supportive of each other, although we came from different backgrounds. Some of the women were married and had children, and we watched the children grow up while we were in law school. Some were older women who had come back to school after being married and having a career before. We sort of lost that [the support system] after law school. There is not that same level of support among women attorneys."

It was assumed that I displaced some white male. . . . Females were thought to be a waste of space.
—Virginia Martinez

She recalls some resentment toward minority and women students in her law school class. "If you were not white you were considered a special admissions, and therefore not really qualified to go to law school." Although she was not admitted under a special program, she constantly felt a "resentment for my being there as a woman and as a minority. It was assumed that I displaced some white male who was more entitled to it."

Hispanic males also showed prejudice against women students. For example, during her second year she sat on a committee to screen admissions of Hispanic students. The committee was made up of both students and faculty. Whenever there was a position open for an Hispanic, the decision seemed to favor Hispanic males rather than females. "Females were thought to be a waste of space."

Becoming a lawyer was important to Ms. Martinez. "First, it's a title that people respect immediately. Second, there is flexibility in what you can do with a law degree. Third, it is a resource that is still available only on a limited basis in the Mexican-American community." She recalls that at the time that she went to law school, there were probably only 30 Latino attorneys in the Chicago area. "Maybe 15 of these were Mexican-American, but none were women." Hence one of her primary reasons for going to law school was to provide this critical resource to the Hispanic community. This goal has guided her in the career choices that she has made.

Her career as a lawyer began in a legal services office two blocks away from her home in the Pilsen neighborhood, a largely Hispanic community on Chicago's near southside. She thought this was the fulfillment of her plans to use her legal skills to assist her community. But after a year she decided to seek training in how to conduct class-action litigation, so that she could have a larger impact. She went to work for the Mexican-American Legal Defense and Education Fund on an internship in the San Francisco office. Her internship included a stipend with which to begin a private practice in her home community.

She returned to Chicago and for the next three years engaged in private practice, litigating a variety of cases. But private practice, she discovered, was not for her. "It was really difficult to charge money to people who don't have any. I had started doing a lot of battered women's cases. It's a little difficult to turn down a woman who stands before you with a black eye, desperately needing someone to represent her but not having any money." Since October of 1980, she has been Associate Counsel for the Mexican-American Legal Defense and Education Fund, supervising the Chicago Regional Office.

The combination of being a woman, being young, and being Latino has sometimes presented problems. "The first time I went to court I was waiting for my motion to be called and was told I would have to wait for an attorney to get there. I responded, 'I *am* the attorney.' 'Oh, sorry, I thought you were a secretary.' On another occasion, I was in juvenile court and they asked where my attorney was."

But the problem she feels most acutely is the pressure to be spokeswoman for the Latino community. While conceding that to some extent this is a necessary evil, "because there are so few Latino women attorneys involved in the kind of issues I'm involved in," she still balks at being the expert on the Latino community. "It shouldn't *always* be placed on me."

Phyllis Schlafly
Pillar of Conservatism

Phyllis Schlafly—best known for her role as an opponent of the Equal Rights Amendment—describes herself as an educated, intellectual woman with many interests. "I am a heck of a role model for younger women," she declares, "because I have been successful with everything I've done and I have shown [that such a woman can have] a happy marriage with successful, achieving children."

In 1967, Mrs. Schlafly began to publish a monthly newsletter, *Phyllis Schlafly Reports.* The topic of a 1972 issue was the ERA. Following this publication, she began to write, speak, and testify against the ERA at state legislatures around the country.

Her opposition is so great that she has established and is national chairman of an organization which fights passage of the Equal Rights Amendment. Her opposition to the amendment stems from her belief that it takes away from women such rights as exemption from military draft and/or military combat, support of a wife by her husband, attendance at single-sex schools or colleges and/or participation in single-sex school or college activities.

"If the Equal Rights Amendment is voted in the Constitution to be part of the law of the land," she declares, "it will be unconstitutional as law or part of any law to provide exceptions on the basis of sex." Section two of the Equal Rights Amendment, she continues, gives to the federal government not only enforcing power but preempting power. As a result, "it will transfer [from the state] to the federal government power over all those areas of law which have traditionally made a difference in treatment on account of sex—including marriage, divorce, child custody, adoption, homosexuality, and insurance regulations."

Mrs. Schlafly was well-prepared to take on the task of being a national spokeswoman. She worked her way through college, completing her bachelor's degree at Washington University in St. Louis in 1944. She received a master's degree from Harvard University in political science a year later. And after spending four years doing research in politics and economics, she married, moved to Alton, Illinois, and began her family of six children. Throughout this time, she was active as a volunteer for the Republican party and as a free-lance writer. In 1964, the first of her nine books, *A Choice, Not an Echo*, sold three million copies, gave her a national readership, and, according to Mrs. Schlafly, "was considered highly instrumental in the nomination of Barry Goldwater" for the presidency.

! value . . . highly the time I put into being a wife and mother. . . . You can't do that if you're going to put 60 hours a week into law.

—Phyllis Schlafly

In 1975, she entered Washington University's School of Law. "I was considered the country's authority on the Equal Rights Amendment, and that being a legal subject, I thought a law school degree would be advantageous. I also had a personal reason. I was trying to encourage one of my children to go to law school. I said, 'if you don't go, mother will go.' Well, I went and that child didn't. Ultimately, two of my other children did." She believes that law school offers an excellent education and is invaluable for people whether or not they practice law.

Although 43 percent of her law school classmates were women, she felt that many of them had been admitted to law school "just because they were women." Women were treated completely fairly at her law school, she feels, because "there was an absolutely blind grading system."

As for women who embark on law careers, they "should realize that our law schools are graduating more lawyers than this country needs." Further, to be successful in a law career the woman is going to have to put a great deal of commitment into it. "My opinion is that I would not want to put 60 hours a week into building a law career. I value more highly the time commitment I put into being a wife and mother and bringing up six children. You can't do that if you're going to put 60 hours a week into law. But if you don't put 60 hours a week into law, you are not going to rise, be promoted, or be paid like the man who does."

She is adamant in her assertion that the women's movement has attempted to coerce the federal government to accept its definition of women's rights. In contrast, she feels that women should be more concerned with the rights of the family. "That is the area where society has clearly defined roles for men and women. That's why one of my priorities is to fight [the women's movement] attempt throughout the land."

Mrs. Schlafly, who has maintained a close watch over the Supreme Court for years, is not enthusiastic about the recent nomination of Judge Sandra O'Connor. "Although many people," she suggests, "are upset because of the abortion, pornography, and crime decisions made by the Court, few people are upset because of the sex, race, or other personal characteristics of the judges." Basing her judgment on Judge O'Connor's Arizona record, she characterizes the appointment as one more vote for the pro-abortion majority. "I think that President Reagan owed it to the people who elected him to make that seven to two majority six to three."

Joan Dempsey Klein Woman Jurist

Justice Joan Dempsey Klein, president of the National Association of Women Judges, cites her early recognition that male and female students were treated differently as a motivating factor in her choice to become a lawyer.

"One of the manifestations of the problem," she recalls, "was the counseling that took place. Males were tested to ascertain their interests while females were automatically counseled to become school teachers."

As a result of such counseling, Judge Klein graduated from college in the early 1950s with a teaching degree. After receiving a master's degree from UCLA in education, she decided she did not want to teach. So she traveled through Europe and Mexico for a year, then entered UCLA Law School. Her class was composed of about two hundred students, eight of whom were women. By the end of the first year, four women remained. And of the graduating class of eighty students, only two were women.

Sexual stereotyping was rampant among both male students and faculty members. She recalls that male students would say, "'What are you doing here?' or 'How come you're taking up a place that a male student should have?' or 'You're not going to practice law; you're going to go home and have kids.'"

School was not the only place permeated by this attitude; it flourished throughout the workplace too. "No one came to law school and said give us your women graduates." In the forties, fifties and sixties, most women went into public law offices for starters. "We were led to believe that because government is government and, supposedly, represents all the people, and, supposedly, is more

It was women lawyers who began to perceive discrimination and to fight it by gathering facts to dispel myths about women.
—Joan Dempsey Klein

open-minded and tolerant, that maybe we had a better chance [for positions] with the public law offices."

Judge Klein's first job as a lawyer was in the state attorney general's office. There she served as a trial lawyer for the state of California. During one trial, she recalls, the judge kept referring to her as "madam." After becoming thoroughly exasperated with this breech of courtroom etiquette, she admonished "Your honor, I am not a madam. I would appreciate your referring to me as counsel just as you do my co-counsel."

In 1963, she was appointed to the Los Angeles Municipal Court. She was elected Presiding Judge of the Los Angeles Municipal Court in 1974 and, later that same year, was elected to the Los Angeles Superior Court. In 1978, she was appointed by Governor Edmond G. Brown, Jr. to the position of Presiding Justice of the California Court of Appeal in Los Angeles. She attributes her success to being bright, maintaining good health, and having a great deal of perserverance and determination.

Asked her opinion of the impact of the women's movement on women in the law, she replied, "It's kind of hard to say which came first—women lawyers or the women's movement—because I think women lawyers were an integral, basic, and beginning part of the women's movement."

"In the late fifties and through the sixties, and seventies, it was women lawyers who began to perceive discrimination and to go about fighting it by gathering facts to dispel myths about women. Some of the factual data, for instance, indicated the paucity of women accepted into law school. This helped to influence law schools to open their doors to more women."

Today, according to Judge Klein, there are approximately 50,000 women lawyers in the United States, and nearly one-third of the students in law school are female. Based on this data, she predicts that "the law will probably be the first fully integrated profession," although, she notes, it might take another 25 years for that to happen.

Recently, a member of the National Association of Women Judges was nominated to the Supreme Court. Judge Klein is enthusiastic about Sandra O'Connor. "Judge O'Connor has had the opportunity in her career to see the application of the Constitution to three branches of government: the executive branch during her tenure in the district attorney's office; the legislative branch during her time as an Arizona state legislator and as majority leader of the Arizona state legislature; and the judicial branch as a trial judge for seven years, as well as an appellate court judge."

She continues, "the fact that there will be a woman involved in the decision-making process of the highest court in the land—acting upon legislation, and, to a large extent, determining the direction that our law is going to take for the years to come—is something that women can feel very good about."

Realistically, she says, "it is going to take time [for women] to gain full participation in this society. Nobody says it's going to happen tommorrow. However, it is not something that any one group in our society can attempt to stop. It might be slowed down by some of these groups that seem dedicated to doing that, but it certainly isn't going to be stopped." ☐

Job Market

(Continued from page 5)

male-only BFOQ even though the employment of a man was required neither for authenticity nor due to the existence of tasks that were capable of being performed only by males. In *Dothard v. Rawlinson*, 433 U.S. 321, the Supreme Court said that women could be excluded from employment as guards in a violent, inadequately staffed maximum security men's prison in which many sex offenders were imprisoned. The male-only employment policy was justified primarily because of fear of sexual assaults upon female guards that would make them unable to control the prison population.

It is difficult to distinguish the Court's reasoning in *Dothard* from stereotyped views of women as seductive sex objects. The Court permitted the prison to exclude women without any evidence that the presence of women guards would in fact create any greater threat to prison security than already existed because of the generally antisocial behavior of prisoners that affects all guards simply because they are guards. The prison was permitted to deny work to women, not because women couldn't perform the job, but because of the anticipated behavior of convicted criminals. Rather than punishing the perpetrators of sex harassment, the Court punished the victims by denying them the opportunity to be considered for employment.

At the same time, the Court's interpretation of BFOQ appears to limit the exception to situations where sexual characteristics—or sexuality—rather than general assumptions about women are involved. Thus, notions about the relative strength, mechanical abilities, or absenteeism rates of women are not likely to be sufficient to support a BFOQ. Just what types of jobs will fall within the BFOQ exception because of job-relatedness of sexual traits remains for further explanation by the courts.

In any event, the BFOQ exception has limited significance in most sex discrimination situations because few employers attempt to defend excluding women on the basis of a BFOQ. In order to rely upon a BFOQ exception, an employer must openly concede that it discriminates against women.

Proving Discrimination

In most cases, the employee or applicant must prove that discrimination has occurred—that she has been denied employment opportunities or treated differently because of her sex. That proof can often be difficult. Few employers make the mistake of attributing their treatment of an applicant or employee to her sex. As a result, in order to prove intentional discrimination by the employer, the individual must try to compare her treatment with that of other employees.

In addition to showing what happened directly to her, the individual may use statistical evidence of the employer's treatment of women employees and applicants. For example, she may show that the employer has never hired women or has employed women only in lower job classifications. But statistics alone can never prove that an employer discriminated against the particular individual. In order to prove discrimination, the individual must show that *she* was a victim of the employer's employment policies or practices: that *she* applied for a job and was rejected, or that *she* worked at the same job as a man and was paid lower wages, or that *she* was denied a promotion given to a similarly situated man.

The employer's explanation. If the individual can show that she and other women have been excluded or treated differently than similarly situated men, the employer can explain that there was a legitimate, nondiscriminatory reason for the exclusion or different treatment. For example, an employer might show that a woman applicant fails to meet a legitimate job qualification. Let's say that a woman applies for a job as a chauffeur but doesn't have a driver's license. Even though employment statistics show that the employer has no women chauffeurs or even that he has never had women chauffeurs, his reason for excluding the particular woman is legitimate and nondiscriminatory. It is lawful.

Of course, most cases are more complex than the example of the would-be chauffeur without a driver's license. An employer may defend his refusal to hire a woman applicant on the basis of her lack of a specific nondiscriminatory qualification, yet examination of his employment records may reveal that he does not require that qualification of men.

The *"best qualified."* In many cases, the alleged discrimination involves hiring or promotion decisions in which the woman applicant or employee loses a job opportunity to a man with comparable qualifications. The employer will say that the man's qualifications for the job are superior. The difficulty then lies in comparing the qualifications to show that discrimination caused the employer to conclude that the male was better qualified.

For example, consider the case of a female university professor who applies for the position of director of a new job counseling program at the university. She has had several years of experience in administering a pilot project that led up to the establishment of the program. Before that, she had taught university courses for many years but had had no prior experience in counseling. All of the other applicants for the position are male. Most have degrees directly relating to job counseling and have published articles in that area.

In making its selection, the university must weigh the relative strengths of the candidates to determine the best qualified: How does the woman's experience in administering the early stages of the program compare to the men's academic knowledge of the area? Does the woman's familiarity with the procedures and personnel of the university enhance her ability to perform the job? Defining "best qualified" at all in this context may be difficult. As a result, it may be hard to challenge the university's explanation that the superior qualifications of the successful male candidate justified selecting him over the female applicant.

Subjective evaluations. It's hardest to compare candidates for professional and managerial jobs, where the qualifications are less likely to be quantifiable and are more likely to be subjective. It is relatively simple to determine who will be the best typist on the basis of typing tests or other task-related tests, but determining which applicant will be the best lawyer generally depends on more subjective considerations.

In the context of subjective evaluations, where all candidates meet the quan-

tifiable minimum qualification (e.g., possession of a law degree), a rejected woman applicant may be able to prove discrimination by showing that the person responsible for making the subjective determinations is prejudiced against employing women in the particular job category or has stereotyped views about the employment of women.

Indirect discrimination. Title VII prohibits sex discrimination whether or not the employer intends to discriminate against women. Some employment policies and practices are nondiscriminatory on their face, yet they still constitute discrimination because they have a disproportionate adverse impact on women. For example, minimum height and weight requirements exclude more women than men. That disproportionate effect constitutes discrimination unless the employer can demonstrate there is a business necessity for the policy. In other words, if an employer can show that the safe and efficient operation of the business requires a policy or practice that limits employment opportunities for women, he can continue to use it. But if the employer can accomplish that business purpose with an alternative policy that does not have a discriminatory effect, the employer cannot continue to use the discriminatory policy.

If it were possible for the employer to modify a particular task to accommodate shorter persons—for example, by providing a step stool to enable shorter persons to reach a particular machine part—even if height were shown to be job-related, it might not be justified by business necessity.

A Case History

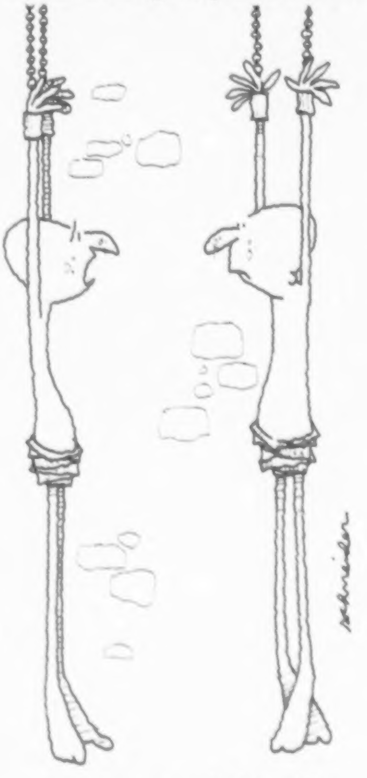
Often a situation may involve both forms of discrimination—intentional (different treatment on its face) and unintentional (ostensibly neutral requirements that have an adverse impact on women). Following is a brief history of such a case.

Rose Mary Boyd applied for a position as a pilot with Ozark Airlines. At the time, she was a professional pilot with more flight time and certificates than many of the male applicants. Her professional qualifications far exceeded the minimum requirements set by the corporation. Except one—Ms. Boyd was 5 '2" and the stated height requirement was 5 '7". But Ms. Boyd was not initially rejected because of her height, although it was obvious to all who observed her that she was shorter than 5 '7". Instead, company officials advised her to obtain additional certificates and ultimately invited her to be tested and interviewed for a pilot's position. Although she was found to be qualified, she was not offered a job.

Ms. Boyd's treatment involved elements of both intentional discrimination and adverse impact. Throughout its contacts with Ms. Boyd, the company treated her as a woman first and a serious job applicant second. When she submitted her application, she was asked to write a letter explaining why she as a woman wanted to be an airline pilot.

Ozark had never employed a woman as a pilot although women had previously applied. These women had been rejected although their qualifications were better than those of male pilots hired by the airline. Some women were dissuaded from seeking pilot positions because of their age or lack of college education, although similarly situated men were hired. Finally, Ozark employed men as pilots who did not meet the minimum height requirement. All of this pointed to the use of pretexts to mask intentional exclusion of women.

In addition, the height requirement excluded a disproportionately high number of women. A height requirement of 5 '7" excludes the vast majority of American women but less than 20% of American men. Because of the adverse impact on women, Ozark had to show that the height requirement was a business necessity for the safe and efficient operation of its aircraft.


"This is going to look terrible on my resume."

The court ordered Ozark to reduce the height requirement to 5 '5" because 5 '7" excluded women without a legitimate business reason. Ozark employed male pilots who were 5 '5" and therefore could not justify a higher limit. But the court refused to order a lower height requirement. After considering complex evidence on aeronautical engineering and human body proportions, the court concluded that safety considerations justified a height requirement of 5 '5". Thus, according to that court, the height requirement was a legitimate reason to deny Ms. Boyd a job as a pilot.

For Ms. Boyd, the lawsuit ended unhappily. But, as a result of the suit, the height requirement was lowered to 5 '5", enabling more women to meet the qualifications. Moreover, since the suit began, Ozark has hired at least one woman pilot.

The Constitution

In 1873, Myra Bradwell failed to convince the Supreme Court that her exclusion from the practice of law denied her privileges guaranteed by the privileges and immunities clause of the Fourteenth Amendment to the U.S. Constitution. Women today have had more success in claiming that employment discrimination against them violated the equal protection clause of the Fourteenth Amendment. In other words, different treatment on the basis of sex denies equal protection of the law.

The equal protection clause applies only to the states. (Through the equal protection component of the Fifth Amendment, similar requirements apply to the federal government.) Thus, generally only employees of government or license applicants like Myra Bradwell can challenge an employment practice as a violation of equal protection. A private employer has no obligations under the equal protection clause and cannot be sued for denying rights under it. (However, private employers with government contracts may lose federal moneys if they discriminate on the basis of sex.)

The type of discrimination that has been found to deny equal protection is basically the same as the practices ruled illegal under Title VII, except that the indirect or adverse impact form of discrimination is not a constitutional violation. To show a violation of the equal protection clause, one must show different treatment of male and female employees or applicants. Although the BFOQ defense does not apply, the government may justify the different treatment by showing that it is related to legitimate state objectives.

Remedies

A number of laws prohibit employment discrimination, but that doesn't guarantee that employers will not discriminate. To some employers, there are economic gains to continuing discriminatory practices until someone stops them; others continue because of stereotypes and prejudices about women workers; still others discriminate without recognizing that they do so.

In addition to prohibiting discrimination, the laws provide victims of discrimination a variety of remedies for the injuries they suffer. These remedies also act as incentives to employers to stop discriminating.

Under the Equal Pay Act, an individual may sue the employer and, if successful, recover the lost wages—the amount of the pay differential—for the previous two years, plus liquidated damages. Alternatively, the EEOC can sue on behalf of the employee to recover the lost wages or to enjoin the employer from continuing to pay unequal wages. The EEOC also has power to prosecute employers as criminals for willful violations of the equal pay provisions.

The relief available under Title VII is as broad as the types of discrimination it renders illegal. Employers who discriminate may be required to advertise job openings in particular media; to revise their recruitment or interviewing procedures; to pay an individual the wages she would have earned if she had been hired, promoted, paid equal wages, or continued in employment; to promise an individual the next available promotion or job; to use different tests or qualifications.

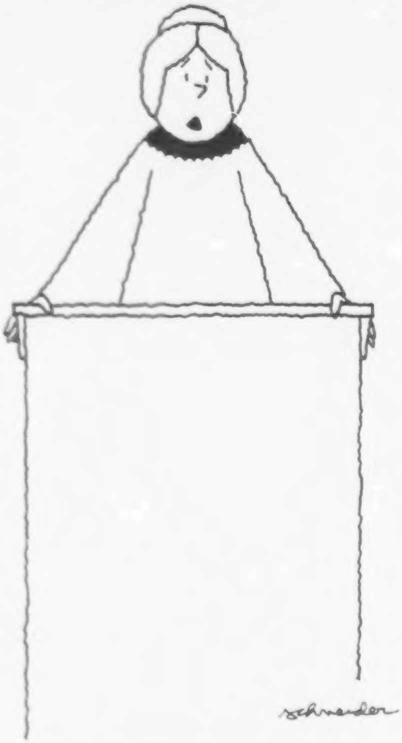
In order to obtain any relief under Title VII, the individual must follow specific procedures, beginning by filing a complaint of discrimination at the nearest EEOC office and at the appropriate state or local fair employment practices agency. This must be done within strict time periods. The EEOC or the agency will negotiate with the employer and may obtain the desired relief. In many cases, however, a lawsuit is necessary. The EEOC has authority to sue in behalf of individuals or groups of individuals, but most suits are brought by the victims of discrimination.

Employment discrimination lawsuits —whether under the Equal Pay Act, Title VII, the equal protection clause, or some state provision—tend to be complex lawsuits involving substantial amount of evidence, considerable economic and emotional expense, and a lot of time. As a result, many individuals choose not to pursue their rights in court. This often means they are simply without a remedy for unfair treatment by their employers.

Current Issues

The law relating to job discrimination is always changing, as discrimination becomes subtler, as the workplace changes, as the participants in the judicial system change. Following is a brief summary of some of the very complex issues troubling employees, employers, unions, and the courts today.

Comparable pay. Even today approximately 60% of all women workers are employed in 20 traditionally female occupations (such as librarians, nurses, salespersons, secretaries and clerks, ironers and pressers). These "female occupations" generally pay less than "male occupations," even though the employees work equally hard; the "female occupations" simply are not valued as much as the "male occupations." As a result, the average working woman earns approximately 59% as much as the average working man.



"Now I know some of you were against the ordination of women, but you must remember, when God created this earth, She made women and men equal. . . ."

The concept of equal pay cannot provide relief for the depressed wages of women in "female occupations." It is not individual women performing the same work as individual men who are paid unequal wages, but entire job groups whose wages are low relative to job groups dominated by men. Thus, feminists advocate that an employer's wages to "male occupations" and "female occupations" be compared, even though the same work is not being performed.

Employers are resisting comparable pay, claiming that it is unworkable. Are a piano player and a plumber of comparable worth? Are a basketball player and a beautician? Moreover, Congress rejected the notion of comparable pay when it enacted the Equal Pay Act, requiring that the work be "equal" before wages would be compared.

Nevertheless, supporters of women's rights remain hopeful of a remedy under Title VII. Late this spring, the Supreme Court decided that even though male and female prison guards did not perform exactly the same duties, there was a remedy under Title VII for unequal pay resulting from sex discrimination. (For more on this case, see this issue's "Court Briefs.") The Court neither adopted nor rejected the concept of comparable pay. Whether comparable pay becomes a reality remains to be seen in future decisions of the Supreme Court.

Fetal protection. In some industries, particularly those in which workers are exposed to chemicals, women are excluded from certain jobs or transferred to lower paying, lower status jobs because of the possible risk of fetal injury. Because the critical period for fetal development is the first three months of pregnancy, when many women do not yet know they are pregnant, all women—or all women of childbearing age—are excluded. Some women have chosen to assure themselves of a job by undergoing voluntary sterilization.

Employers justify excluding women by their desire to protect fetuses against possible birth defects. They claim that the cost of making the workplace safe enough for women and their future children is so exorbitant that many companies might go out of business.

Those advocating the full employment of women contend that the risk of fetal injury is just as great from exposure of male workers as exposure of female workers and that the risk of fetal injury should be eliminated by changing the workplace, not the workers.

Affirmative action. Because employers generally failed to undertake voluntary efforts to remedy past discrimination and because discrimination has been so pervasive, affirmative measures to cure discrimination have often been imposed upon them. Included in these affirmative action programs are measures to attract female applicants to traditionally male occupations, to train female employees for traditionally male positions, and to provide special opportunities for females —all because of the multitude of opportunities denied in the past.

The special opportunities reserved for females have provoked heated controversy. While many employers voluntarily undertake affirmative action plans, in certain industries, particularly construction, the Department of Labor has set employment goals that employers must achieve within certain time periods. One department goal, for example, is that women perform 6.9% of all work of federally funded construction projects.

Objection to the goals is most strenuous among white males, long the favored participants in the job market, who claim that the goals constitute reverse discrimination—that under affirmative action programs, employers select employees not on the basis of merit, but only on the basis of race or sex. Proponents of affirmative action claim that it is necessary to assure women (and blacks) a place in the job market.

"Turndown Economy." During the early years of fashioning remedies for employment discrimination, the American economy was generally healthy. A remedy that promised a victim of discrimination the next job was a real remedy. But the present state of the economy has caused many employers to eliminate jobs and stop hiring. Under such conditions, what relief can be offered the victim of discrimination? There may be no "next job." Or, the "next job" may be far off in the future. Designing a remedy for victims of discrimination in the context of a "turndown economy" is a challenge for business, labor, and the lawmakers. □

Teaching About Women and Work

Strategy 1. Title VII of the Civil Rights Act of 1964 permits employers to discriminate on the basis of sex when the sex of an employee is a "bona fide occupational qualification" necessary for the employer's business. Have students look at the following job titles and job duties and consider the following questions. For which of these do you think an employer would have a BFOQ? What are your reasons? Are there similar jobs or job duties that are performed by persons of the opposite sex? What assumptions or stereotypes might be involved?

1. Salesperson in men's clothing department
2. Midwife
3. Houseparent in girls' dormitory
4. Football coach
5. Employee who takes customers on hunting trips
6. Probation officer for male probationers
7. Police officer
8. Employee who entertains customers (dinner and drinks)
9. Juvenile officer for female offenders
10. Sheetmetal worker
11. Restroom attendant

Strategy 2. Poll your students on their career aspirations. For each choice, discuss whether the job is traditionally performed by men or by women. Record the choices on the following chart on the chalkboard:

	Traditionally Male Occupations	Not Associated with Either Sex	Traditionally Female Occupations
FEMALE			
MALE			

Examine the distribution and explore the underlying reasons for the choices. Are any of the jobs legally restricted to a particular sex?

Strategy 3. Have students write job descriptions for various types of jobs, including a statement of the qualifications for the job. Groups of students may be assigned to particular types of industries, businesses, political systems, or specific job titles may be assigned to individual students on a random basis. As a class, examine the job descriptions and qualifications: Does the job require a person of a particular sex? Do the stated qualifications exclude more women than men? Are the stated qualifications necessary for performance of the job? Will women be deterred from even applying for the job because of the way it is described? If you were the employer, how would you make sure that there was no discrimination against women?

Strategy 4. Simulate employment discrimination in the class by distributing desirable privileges on an arbitrary basis. For example, give privileges only to students whose last name begins with "P" or who have red hair or whose older brother was previously in your class. Explore what is wrong with such a system of selection. How did the "victims" feel? How did the chosen ones feel? What is a fair way to change the system without injuring the ones who have been given the benefit?

Strategy 5. Have students read the classified section of the newspaper to find help wanted ads that explicitly or implicitly seek applicants of only one sex. Ask students to evaluate the legitimacy of the employer's exclusion of one sex.

Strategy 6. Have students examine the current issues and debate the questions from the various sides involved. Some questions may involve more than two sides.

Another View: The Myth of "Women's Law"

Lori B. Andrews

Ellen Wilson's article represents a nicely stated version of an oft-expressed concern about the role of law in modern society. Like other critics of the laws that have been used to win advances for women in recent years, Wilson implies that these laws: (1) protect only women, thus creating a field of law known as "women's law;" (2) require maximum intrusiveness with minimum effectiveness; and (3) represent a novel and radical departure from traditional legal theories. But a close reading of the laws, as well as a look at legal history, raises doubts about these assumptions.

Benefits Are Sex-Blind

Even the laws most traditionally identified with women's rights issues, those governing sexual discrimination and sexual harassment, are not really women's laws. Consider the portion of the civil rights act upon which the sexual discrimination and sexual harassment cases are based: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." This provides all sorts of rights for all sorts of people. For example, men have won the right to serve in certain positions that had traditionally only been open to women. Contrary to what some people think, Congress did not pass a law saying, "Thou shalt not pinch the girls at the office."

Even the detailed sexual harassment guidelines that the Equal Employment Opportunity Commission (EEOC) developed pursuant to that civil rights act provision do not offer protection for women alone. They protect men from sexual harassment as well. The idea of men pursuing such a cause of action is not as farfetched as it may seem. "Recent surveys show that 10-15% of men have been sexually harassed on the job," says Lucille Wright, a professor of education at Cleveland State University, who has conducted such a survey. Men as well as women with valid sexual harassment claims are entitled to sue. The amendments to the EEOC guidelines adopted last November provide other protections for men as well. If, by sleeping with her boss, Susan is promoted while an equally qualified fellow employee, Jim, is not, Jim would be able to sue his employer for sexual discrimination. "Women's law" is a misnomer in an area that offers protection to people of both sexes.

Law and Private Affairs

Since discrimination and harassment inquiries focus on personal relationships, it is understandable that people would express concern about their intrusiveness. Ellen Wilson, for example, worries that discrimination and harassment cases will be unusually hard cases because they are "complicated by mixed motives and biased testimony." She also posits that if we allow the right to sue for sexual harassment, "then almost all relations are destined to become public relations; all exchanges, public exchanges; all rights, civil rights." She is not alone in her concern. One federal judge dismissed a sexual harassment case due to concern that "[a]n invitation to dinner could become an invitation to a federal lawsuit." (His opinion was reversed on appeal.)

Wilson implies such concerns are unique to civil rights cases based on sex. But trek across some of the most traditional areas of law—like probate and contract law—and you'll find the same concerns. Think about what happens when a will is challenged in probate. Private relationships and exchanges become public ones. Did Dad ever say he liked son Bob better than daugher Deborah? Should Debbie receive less because Dad bought her a car when she was in college? What do we make of Dad's deathbed musings to his doctors? In cases involving everything from contracts to auto injuries, people battle with mixed motives and the potential for biased testimony.

Critics also argue that even if sexual harassment and discrimination cases could be readily proved, there are no adequate remedies. "They cannot alter prejudicial ways of thinking about women," says Wilson. At the most basic level this observation is correct. The judicial remedy of thought

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Law's Limits

(Continued from page 21)

The unwillingness of supporters of the programs to let parents withdraw their children from sex education classes ("These are the children who need the program most" goes the argument) demonstrates how far we are from a community consensus in their favor.

What Kings Cause or Cure

We have seen that second stage feminists can accomplish a great deal. They can successfully support legal interpretations and departmental rulings that penetrate university common rooms and business personnel offices, that regulate acceptable and unacceptable demands on female employees. They can successfully "suggest" quotas for female employees at educational institutions receiving federal funds. They can accomplish a great deal—but can they accomplish what they want?

If what they want is true *metanoia*, a nationwide conversion, a rebirth into enlightened opinions regarding relations between the sexes, then I think they will be disappointed. First, because they don't have—and are not likely to gain—the numbers. The ERA battle has, I think, proved that: right or wrong, a great many people—perhaps a majority—perceived it as a *carte blanche* for all kinds of social engineering. Since polls report that the majority of Americans nevertheless oppose sexual discrimination, it seems the goals of mainstream Americans are more modest or their perception of legal complexities keener or their doubts about the perfectability of man stronger than those of the pro-ERA faction.

"How small of all that human hearts endure,/That part which laws or kings can cause or cure." If the compromised success toward which feminist efforts seem headed was likely to have only a limited effect on the rest of us, perhaps we

842

transformation is not available. But a change in social perceptions can be achieved indirectly over time. As court cases pave the way for women to ascend the corporate, union, or small business hierarchy, at least some of the discriminatory men who see women capably handling responsible positions will find it hard to maintain their prejudical stereotypes. In addition, for most plaintiffs the chance to support their families when economic discrimination is corrected means more than a guarantee of attitudinal acceptance.

Evolution, Not Revolution

We should keep in mind the historical development of law in society when we evaluate the effectiveness and advisability of any legal development. The very institutions that many people hold most dear today—marriage, the family, education for all—did not arise fullblown as the first man began to walk on two feet. These institutions, as we know them today, were created by law. Their parameters are defined by legal constructions such as marriage licenses, rules of probate that allow financial support of families to span generations, and statutes governing compulsory education. Wilson is irked by the judicial theories that sanction palimony as they would alimony. But alimony itself is not a natural part of the social order; rather, it is the creation of the legislative tinkerers of the past generation.

Yes, the law gets more involved in our daily lives as time goes by. But the increase in laws in all areas has to do, in part, with societal trends, not just a crazed minority of social engineers getting their way. When people grew their own food and worked their own land, there was not the same possibility for lawsuits about adulterated products or unsafe working conditions as there is now.

In addition, churches, family, community, and custom have generally diminished in importance in our mobile society. Since we no longer have adequate mediating structures to help us accept or resolve conflict without a lawsuit, the law has had to step in to fill the gap. Wilson herself admits that social changes come before legal ones; she says that "liberated lifestyles and the move from family to career largely preceded the great feminist political efforts of the sixties and seventies."

Wilson suggests that the area of law she calls "women's law" is unique in setting moral standards for relationships. But a look at legal history shows that these laws do not represent a radical departure. She may think that the laws represent intrusion into private relations, but so do the child abuse laws. She may feel that the sexual harassment laws represent an unprecedented potential for compensating mere hurt feelings, but what of the libel laws or invasion of privacy laws that have been accepted for years?

Wilson attempts to demonstrate the uniqueness of the law at issue by pointing to "irremediable ills" that people have to suffer daily, including "slick salesman's talk that slides over fine print," the slanders and betrayals we suffer from acquaintances, "the violation of private agreements." But the civil rights laws she disparages are not unique in their potential for redress. In fact, the very examples she gives as irremediable are themselves covered by protective laws and could serve as the basis for lawsuits.

In any number of areas, the law may have gone too far. But by viewing the issue as social engineering, Wilson fails to point out specific examples of where the law has run amuck. Should a person denied a job because of gender have a remedy? What if that person is hired, but advancement is contingent on sleeping with the boss? In addressing these questions, we might place the role of law at any number of points along a continuum. But by ignoring such specifics, she fails to answer the question she purports to address: What are the limits of law?

The law's attempt to legislate morality is nothing new. The most radical such change is not within the recent civil rights cases, but in the legal requirement adopted a century ago that said the parties to a contract had to deal with each other in good faith.

Initially, this requirement was seen as an unreasonable burden on negotiations that would lead to the death of contract. But in reality, businesses did not fall, civilization did not end. In fact, the change in contract law made life more just and more pleasant for all of us. I think the same will be true of the changes (no, advances) in civil rights law, privacy law, health law, and labor law that have erroneously been labeled as a trend in "women's law." ☐

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could afford greater nonchalance. But such massive investments of energy, such exalted expectations, affect all those whose private visions of domestic tranquillity or individual initiative or civil behavior or even grammatical propriety differ from those of the feminist.

Yes, the injustices do exist: the examples of job discrimination, the egregious assaults on fair treatment. Some of the more blatant offenses can be restrained or punished by law. But many must be endured or circumvented or fought out on a private, nonjudicial level, so long as we intend to abjure totalitarian solutions. Private morality and public justice occupy a large common ground, but there are still vast tracts of territory from which the courts must be excluded.

It is a hard truth, but one which most of us admit in other contexts, that most of the ills men suffer are irremediable by courts and constitutions: the slick salesman's talk that slides over fine print; the on-the-job favoritism that has nothing to do with one's sex and everything to do with a talent for sycophancy; the slanders and betrayals we suffer from friends, neighbors, and the people we work with; the violation of private agreements. The multiplication of such incidents, day after day, accounts for a large portion of the world's nonmaterial misery, and yet such incidents fall outside of the boundaries of the law.

Is this, then, a counsel of despair, of withdrawal from the unequal struggle to establish justice? It is, rather, a recognition that securing justice for women is an undertaking both larger and smaller than many feminists understand. The legal task is close to completion, because there is all too little that laws can ever do; the extra-legal struggle is correspondingly greater, being part of man's general struggle to pursue, in his myopic and often mistaken way, the good. That is a battle which must be fought daily, in each human heart, and meticulously structured social systems are largely irrelevant to the outcome. ☐

Law and Custom

(Continued from page 17)

family. No wonder, then, that Soviet women have little time or energy for Party activities or evening courses or training that might aid their job advancement.

Hero Mothers

The Basic Principles of Family Law state that married women are not given the obligation of providing domestic services. Yet, these household chores remain the almost exclusive domain of women. Women in the Soviet Union are expected to work and, moreover, combine work and home. They do not have the choice of work or marriage. The concept of the Hero Mother persists—with medals and money given to those having over five children. Although day-care is provided, Soviet women still must go it alone when it comes to home chores. This is an especially serious consideration in a society where there are few labor-saving devices and marketing alone becomes a part-time job.

The Soviet government is trying to rectify the disparity between the household work of men and women. Since there are already laws on the books regarding this, the task becomes one of changing customs and practice through other methods. A full-scale propaganda campaign extols the cooperation of husband and wife in family life. Evidence is found in books, pamphlets, posters, pictures, newspapers, etc. In addition, the government is providing more labor-saving consumer devices.

There is a saying that old customs die hard. The task of challenging male responsibilities within the family will not be an easy one. Unfortunately, the Soviet man speaking to an American journalist in the following quote sums up the magnitude of the tasks that lie ahead for the Soviet government:

> . . . I once asked a workingman how his family celebrated International Women's Day, a "red letter" holiday (i.e. a day off for everybody) in the Soviet Union. "Well, I usually buy the wife a little present, maybe a bunch of flowers." Did he cook dinner for her too? "What? Me? Cook dinner?" he chuckled and that ended the conversation.

It may take more than propaganda and electric food processors to overcome such ingrained patterns in Soviet society!

Women in Egypt

An overview of all women in the Middle East would be so general and include so many qualifiers that generalizations would be impossible and the task useless. Instead, this section will focus on the legal status of women in Egypt and the next section on women in Israel, where laws contain specific provisions directed toward women.

Examination and judgment about Middle Eastern women and their status require looking beyond simple outward manifestations. Koranic verse sanctions the barrier between men and women called a *hijab* (curtain). Much has been made of the traditional Muslim woman's veil in the Western press. It is usually characterized as yet one more aspect of Muslim repression of women. Most Westerners, however, fail to realize that the veil protects the wearer from intruders by concealing her identity and, in a sense, guaranteeing her freedom of movement. This more balanced assessment of the veil was echoed recently by an English woman film director: "This business about the veil is nonsense. We all have our veils, between ourselves and other people. That's not what the Middle East is about. The question is what veils are used for and by whom."

Similarly, the appearance of a Bedouin woman, bedecked in an array of jewelry, can be misleading. Many Westerners would probably mistake the finery for frivolous costuming and bemoan this woman seemingly relegated to ornamental status. Yet, the true situation is that after marriage a nomad woman wears coins of gold and silver both as ornaments and as a form of personal savings. This jewelry is her own personal property which she can dispose of as she sees fit. This economic freedom, respected by both husband and tribe, is a far cry from simple ornamentation.

Each culture must be viewed through the historical perspective of its unique cultural lens. In our look at women in Egypt, we will focus on law, reality and practice.

Egyptian Law and Women

The centuries-old tradition of women's power in Egypt brings to mind the proud,

Resources for Teaching about Soviet Women

Audio-Visual

The Russians, Learning Corp. of America, is available as a 16mm film or video-cassette. The three-part series is designed to portray the everyday life of Soviet citizens. *People of the Cities* features three lifestyles including that of a woman busdriver and her daughter. Each of the three films is available for $40 rental or $450 purchase—series price $1100. Available from: Learning Corp. of America, 1350 Avenue of the Americas, New York, NY 10019. Telephone (212) 397-9360. *Women in the USSR* is a filmstrip/cassette/guide which costs $24. The filmstrip demonstrates that although women suffered from real disabilities before the Communist revolution, they were not always as powerless as the Soviets claim. Also, the Soviets say that women in the USSR have now achieved equality socially, politically and economically. However, the filmstrip presents data that appear to at least partially refute these claims. Available from: GEM Publications, Inc., 411 Mallalieu Drive, Hudson, WI 54016. Telephone (715) 386-5662.

Print

Here are some useful references. Atkinson, Dorothy; Dallin, Alexander; Worshofsky Lapidus, Gail; *Women in Russia*, Stanford: Stanford University Press, 1977. Lapidus, Gail, *Women in Soviet Society: Equality, Development and Social Change*, University of California Press, 1978. Stites, Richard, *The Women's Liberation Movement in Russia*, Princeton, NJ: Princeton University Press, 1978. "Women in the Soviet Union," *Update*, No. 13, May 1981. Newsletter available free of charge from the Russian and East European Center, 1208 W. California Avenue, Urbana, IL 61801. Telephone (217) 333-6022. *Women in the USSR*—student book ($4.45), teacher's guide ($.95), 1978. Presents a historical survey of Russian women from the Scythians in the 5th century B.C. to contemporary Soviet women. Source materials used in the books include folklore, excerpts from diaries, travellers' accounts, memoirs, autobiographies and statistics. Available from GEM Publications, Inc. cited above.

L.W.

sculpted head of Nefertiti, queen in the Eighteenth Dynasty, 3,200 years ago. In the last two centuries, however, the status of women ebbed away from the regal positions of history. The low status of women at the end of the eighteenth century began to rise in the nineteenth, through increased contact with Great Britain and change fostered by enlightened rulers. Change came in an effort to modernize, while remaining true to Islamic tradition. Strong women's organizations in Egypt, unusual in Middle Eastern countries, strengthened this shift toward increased power for women.

The 1956 Egyptian Constitution provided women with voting rights and the right to hold elective office, and women were elected to the People's Assembly for the first time. Soon women were participating in electoral campaigns and the first woman minister was appointed. The Charter of 1962 declared the equality of Egyptian women as an ideal: "Woman must be regarded as equal to man and she must therefore shed the remaining shackles that impede her free movement, so that she may play a constructive and profoundly important part in shaping the life of the country."

Further, Egyptian law today requires that women receive salaries equal to those of men, and many privileges regarding absences for delivery and nursing. Yet, it is estimated that women who work outside the home for wages comprise only 7% of all women!

The relatively low level of participation of Egyptian women in the outside work force is disturbing when we realize that there has been a rise in women's educational opportunities, although equal access to employment and education has been a recent phenomenon. Both were initially laws on paper and will require sociological changes before they can be fully implemented.

A good example of this sociological lag was the implementation in 1952 of the 1932 Egyptian law granting free compulsory education. The new Egyptian regime in 1952 implemented the law of free compulsory education for both boys and girls equally. Still, it has not been easy to provide adequate schooling throughout the country or to provide intermediate or secondary education. In the early seventies, an estimated 90% of Egyptian women and 65% of men were still illiterate. The government of Egypt today is seeking solutions to: (1) negligence in implementing compulsory schooling for girls; (2) favoritism toward boys in laws; (3) shortages of schools for girls above the elementary level. Amendments to the 1952 law were enacted in 1976. Many feel that the doors of education have been opened to Egyptian women at last, from elementary through university levels.

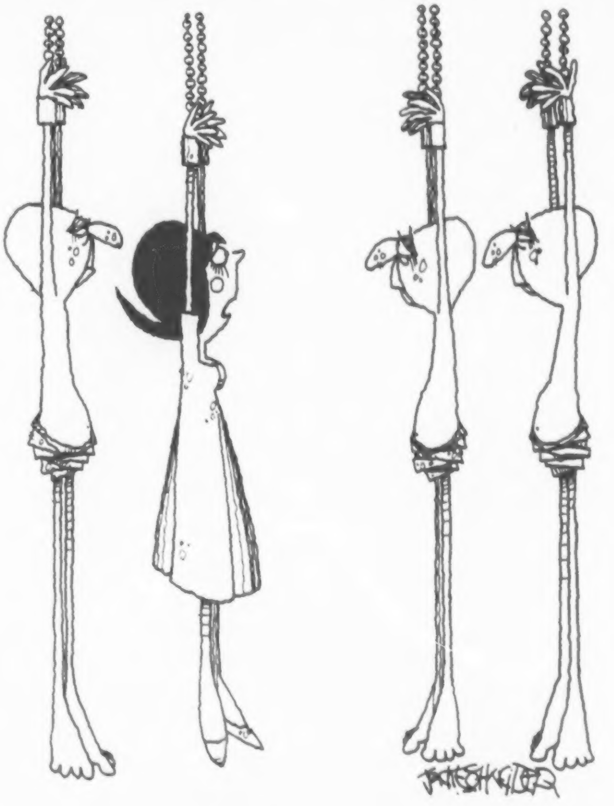
Egyptian laws, therefore, increase equal access to education, employment and political participation. Yet, few Egyptian women work outside the home and many feel prohibited from doing so. Perhaps the best explication can be found in the words of an Egyptian journalist. Her analysis pinpoints the precarious balance of old and new within Egypt's Constitution:

> If we look at the new Egyptian Constitution, which in my opinion is one of the leading documents in terms of women's emancipation, we find it rich in laws designed to assure equality between men and women except in matters relating to personal status. These laws (the *shari'ah*, or canon, laws governing the family, divorce, inheritance, marriage) were established in the time of ignorance and are based on faulty interpretations which are no longer suitable for the needs and the spirit of our present day. Since these old, harsh laws deal with the most important institution within the nation, that is, the family, the fact that they are still in operation leads to the biggest contradictions to be found in our new life. It is hard for the mind to connect these two situations: the home and family situation, in which the Arab woman's position is very weak, and the public and social situation, in which she has achieved so many victories—victories which have placed her in important cabinet posts, in positions as deputy ministers in the government, as judges in the courts, and as representatives in important economic and political conferences.

The personal status of Egyptian women within their families, therefore, has not kept pace with legislated changes. Egyptian law still allows polygamy and grants men the right to an immediate divorce without cause.

Beyond laws are attitudes—decades, if not centuries, old—that must be changed if Egyptian women are to take advantage of the opportunities afforded them. Many people still believe that work is demeaning and unworthy of women of independent means and middle class background, but men are increasingly being asked to share in the household chores as women seek employment. This has led to resistance and resentment. Further, traditional day-care, provided by servants, has become a rare commodity as servants become scarce in the new socioeconomic and cultural reality of modern Egypt.

The laws and statutes of Egypt have outlined a general *form* for the new soci-



"The hell of it is, I never even supported the ERA!"

ety; the development of its content (both personal and general) is, as yet, unfinished business.

Israeli Women

Even before Israel's formal establishment in 1948, women were active in Israeli public and communal life. For example, the Council of Working Women was established in 1914 and women were given the right to vote in the 1920 elections to the settlers' unofficial parliament. This early participation was reflected in the Declaration of the Establishment of the State of Israel in 1948 (Israel has no formal written constitution). The Declaration states: "The State of Israel will maintain equal social and political rights for all citizens, irrespective of religion, race and sex." But what is the position of Israeli women today—living in a society that is under constant threat and periodically plunged into war?

The spirit of Israel's 1948 declaration of independence (quoted above) was reiterated in the 1949 basic guidelines of the first government of Israel. "Complete and absolute equality of women will be upheld—equality in rights and duties, in the life of the country, society and economy, and throughout the entire legal system." This guideline, however, had no legal binding or enforcement mechanism.

Later, the Women's Equal Rights Law of 1951 again emphasized the equality of men and women: "A man and woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal proceedings against women as women, shall be of no effect." The 1951 law also gave married women the right to own and deal with property and gave them equality with men respecting guardianship of children. Two exceptions to the rule are significant: "This law shall not effect any legal prohibition or permission relating to marriage and divorce. . . . This law shall not derogate from any provision of law protecting women as women." In essence these two exceptions guaranteed that in the area of marriage and divorce, Israeli civil law would bow to religious law. This arrangement was solidified by the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 which awarded the religious establishment monopolistic control over marriage and divorce of all Jewish citizens.

Religious Law Prevails

A look at three of the laws in operation in the religious courts explains why some Israeli women feel that civil codes and principles are of little consequence as long as religious laws hold sway: In both the Islamic and Rabbinical Courts the

Resources on Middle East Women

Audio-Visual

A number of films and filmstrips are available to support your class work. "Modern Women of Syria," is one of a five-part filmstrip series—*The Middle East: The Arab Experience*, New York: Guidance Assoc., 1975. *A Promise Shared* is a color, 24-minute film available from the Anti-Defamation League of B'nai B'rith (purchase $225; rental $17.50). *Ramparts of Clay*, a documentary film based on the book *Change at Shebika: Report from a North African Village*, deals with social change and the role of women. Distributor: Cinema V, 595 Madison Avenue, New York, NY 10022. *Women in Egypt*; and *Revolutionary Women in Palestinian Camps* are two new films being produced by the University of Texas. They should be available for distribution by winter, 1981. *Women in the Middle East* is a filmstrip/cassette/teacher's guide available for $24.95. It suggests some of the contemporary issues that concern women in the Islamic Middle East and Israel. GEM Publications, Inc., 411 Mallalieu Drive, Hudson, WI 54016, Telephone (715) 386-5662.

Print

So you want more information on women in the Middle East? Try consulting the following recommended sources. Al-Qazzaz, Ayad, *Women in the Middle East and North Africa*, Austin: University of Texas Press, 1977. Annotated bibliography of source materials on Middle Eastern women. Al-Sa'id, Aminah, "Future Directions?" *Middle Eastern Muslim Women Speak*, Edited by Fernea, Elizabeth Warnock, and Bezirgan, Basima Qattan, Austin, TX: University of Texas Press, 1977. Hazelton, Lesley, *Israeli Women, Reality Behind the Myth*, New York: Simon and Schuster, 1977. The author, a British journalist now living in Israel, criticizes what she calls the myth of women's liberation in Israel. *Middle East Notebook*, a publication of the National Committee for Middle East Studies, is available free of charge to teachers. Vol. 2, No. 1, Winter, 1981 deals exclusively with women in the Middle East. Mikhail, Mona, *Images of Arab Women: Fact and Fiction*, Washington: Three Continents Press, 1979. Pearson, Robert P., *Through Middle Eastern Eyes*, ($9.95); teacher lesson plan book ($2.50). In Part I, the theme "Tradition and Change" is developed through 19 autobiographical or anecdotal vignettes, each carefully selected from novels, memoirs or letters of Middle Easterners, to introduce one or two fundamental values or conflicts which are part of the tradition for effecting the changes in the Middle East. Part II, "Past Glories, Future Hopes," is concerned with broader economic and political issues, past, present and future. In both sections the people of the Middle East "speak for themselves." Contact: Center for International Training and Education, 60 E. 42nd Street, Suite 1231, New York, NY 10165, Telelephone (212) 972-9877. Saadawi, Nawal, *The Hidden Face of Eve; Women in the Arab World*, London: Zed Press, 1980. An Egyptian doctor gives a first-hand account of growing up female in traditional Arab society. She is particularly critical of the rite known as female circumcision. *Women in the Middle East; Women in Islam* ($3.95); *Women in Israel* ($3.95); teacher's guides ($.95 each). *Women in Islam* presents a historical survey from ancient times to the present. Emphasis is on the Muslim Middle East. Modern concerns of Middle Eastern women, e.g., Algerian and Iranian revolutions, Egyptian feminist organizations, the dilemma of religious law, etc., are treated. *Women in Israel* presents a historical survey primarily of Jewish women in Palestine from Biblical times to the present. Contemporary concerns of Jewish women—defence force and Israelis family laws—are covered. Both publications include excerpts from diaries and autobiographies as well as statistics and government reports to present students with primary source data on women in each culture. Contact: GEM Publications, Inc., 411 Mallalieu Drive, Hudson, WI 54016, Telephone (715) 386-5662.

man "gives divorce" to his wife who "receives" it. The wife can ask for divorce and the courts can order that he give her a divorce—courts can even put him in jail—but if the husband still refuses, the court cannot grant a woman a divorce. A second instance of religious laws determining the course of a woman's life is in widowhood. According to Jewish law, if a man dies without a son, his *yebamah* (widow) must marry the husband's brother or be freed by him by a special ritual in a Rabbinical Court. The *yabam* (brother-in-law) cannot perform this ritual until he is of age (thirteen years and one day). Last, women legally married but without husbands—because the husband either deserted the wife or died without two witnesses—can never remarry. They become *agunot* or "grass widows." A man in a similar situation can get permission to take a second wife.

A number of problems have arisen in the application of some of these laws, especially regarding divorce and remarriage. Rabbinical authorities have attempted to alleviate women's dilemmas; an increasingly liberal interpretation is given to the laws of presumption of death of a missing husband to enable his wife to remarry. It should be noted that there are no civil marriages or divorces in Israel. Jews marry in Rabbinical Courts, Christians in Christian Religious Courts and Muslims in Muslim Courts. Since most Israelis are Jews, most marry in Rabbinical Courts. Some Jewish Israelis, not wanting to be held to religious laws, leave the country to marry or marry by mail from Mexico.

The question of equal access to education and employment presents a similar quandary. For, despite the existence of equity legislation, the full participation of women has, at times, been stymied. Access to education is guaranteed in the 1949 Compulsory Education Act, which mandates that every child must go to school from ages five to fifteen. Equally important, the 1964 Higher Education Rules prohibit sex discrimination in the admission of students to government-supported universities and vocational schools. Similarly, the 1964 Equal Pay for Equal Work Law, applying to both private and government employment, guarantees equal wages for both men and women. Yet, Israeli feminists cite statistics which show that women's salaries average 41% less than men's, less than 10% of managerial positions are occupied by women, and 65% of working women work in only 38 out of 352 job classifications. Some feel this situation is due to the persistent belief in "women's work." Employers tend to avoid placing women in positions of responsibility, arguing that women may get pregnant and disappear from work for three months. One feminist points out that "the fact that every Israeli working man serves anywhere from 30 to 80 days of reserve military service each year . . . does not occur to them as a reason not to employ men."

The participation of Israeli women in politics has been rather limited. Although Israel at one time had a female prime minister—Golda Meir—the number of women in the *Knesset* (Parliament) has fluctuated between eight and ten (out of 120). Few women have served as cabinet ministers or mayors of Israeli towns. Although there is one woman on the Israeli Supreme Court, only 8% of all judges are women.

Beyond these statistics is the question of the status of Israeli women in their society. Media images usually feature Israeli women in battle fatigues, playing an important role in Israel's defense. The implication is that Israeli women enjoy equality throughout all aspects of Israeli society. As we have seen, however, this is not the case. Some feel that it cannot be realized as long as religious law holds sway and as long as the war goes on. War has taken its toll on Israeli society. A psychologist has characterized Israeli women as "mostly passive in the midst of war." This passivity extends to domestic chores and family relations. War has put tremendous pressures on both men and women and has in a sense dictated what roles they will assume. Change, then, must wait. As one author, has stated, "Israeli women haven't the breathing space between wars to think of anything but keeping their families intact." □

Classroom Strategies

A variety of print and audio-visual resources has been suggested for each society examined. Much of the material in the article itself, however, can be applied to the classroom setting. For example, teachers might copy many of the various laws quoted throughout the article onto cards (be sure to remove country-specific modifiers, e.g., Soviet, Israeli) and have students try to identify the country of origin. Next, ask students to defend their choice in a paragraph outlining the legal traditions of the country they have identified as the source of the law. Following this, the true identities of the laws can be revealed and the ensuing class discussion can focus on the reasons behind the students' choices. Next, expand the discussion and examine the laws on the books and actual practice.

The magazine articles quoted in the section on Japanese women give two extreme examples and include commentaries from the Japanese press. Ask students to role play the position of journalists from feminist presses of the USSR, US, Israel, Egypt and Japan. Ask them to write a three paragraph editorial on these two incidents from the vantage point of their role and their society.

As mentioned, Soviet women daily face a "double shift." Have students design posters that the Soviet government might use in their propaganda campaign to end the "double shift" phenomenon. Students should be asked to quote the appropriate law on their poster. Encourage them to use formal law when they make their case. After examining the posters, the class might want to discuss why such a campaign is necessary. Of course, this will lead to the question of enforcement and the ultimate question—how do you enforce laws that are in essence principles, such as equality?

The material on both Egyptian and Israeli women suggests a tension between public and private life. On one hand, a number of laws exists in both nations that guarantee women equal access and equal treatment; on the other hand, religious law—both Jewish and Muslim—treats women quite differently. Many believe that this ultimate contradiction is responsible for the limited participation of women in some aspects of both societies. Teachers might want to have students research other societies where this situation exists (e.g., Iran) and then debate the merits/problems of such a situation.

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Strategies

(Continued from page 13)

Principal Tasks:

- —conducts interviews by telephone to gather information for others writing articles for publication. Reads and makes notes about articles in newspapers and magazines which are of interest to writers in preparing Parker publications.
- —composes and types correspondence related to publications.
- —maintains files on clippings, correspondence, and other needs of writers.
- —transcribes interviews, proofreads articles.

Basic Education and Experience Required: At least a high school diploma with a good background in English. College training and knowledge of public affairs is useful. Good writing and language skills. Ability to type 60 words a minute and work under deadline pressure. One to two years of related experience.

1. Divide the class into observers, personnel directors, and job applicants. Form small groups in which you have five to six people. One person is the personnel director, three people are job applicants, and one or two people are observers.

Personnel Director:

You need to hire a new staff member, an editorial assistant. The high turnover rate at Parker Company is a problem. After you have spent time and money training a new employee, you must start all over again if the employee leaves in a few months. You have found that employees who are overqualified for their jobs are dissatisfied, spend time complaining, and then quit. You need someone who is reliable, mature, and flexible enough to accomplish a range of tasks.

Job Applicants:

You may create any roles you wish. Try to vary the job applicants in your group in order to have differences in gender, age (under 30, 30 to 50, over 50), race, religion, criminal record, and marital status. Design your role so that the individual has some of the qualifications in the job description for an editorial assistant. "Related work experience" might include working for newspaper, secretarial work, or working for a company that conducts opinion polls and other research. Write a brief sketch describing the person you have created and give it to the personnel director.

Observers:

Read the EEO guidelines that follow this role description but *do not* show them to the personnel director or job applicants. You will carefully listen to all of the questions asked by the personnel director. Take notes of any questions that may violate the guidelines. When all of the interviews are complete, you will be asked to evaluate the interviews in terms of the guidelines.

2. Allow ten minutes for each to prepare the assigned role. Personnel directors should use preparation time to (1) re-read job description of editorial assistant; (2) make a list of interview questions to ask the job applicants. You are trying to find the person best qualified for this position.

Job applicants should use the preparation time to (1) make up roles; (2) re-read the job description; (3) write a brief biographical sketch. When the interviews begin, you should introduce yourself to the personnel director by name and give the director your written biographical sketch.

Observers should use the preparation time to carefully read the guidelines which the instructor will give you. Get some paper and a pencil to take notes on the interviews.

3. The personnel director begins the interviews. Observers will be silent until the interviews are over Job applicants may listen to others' interviews.

4. After the simulation, discuss what happened in terms of these questions:

A. Who did the directors hire for editorial assistant? On what basis did they make their choices? Was sex, race, or some other characteristic important in reaching a decision? Would it make any difference to you if the applicant were male or female?

B. What didn't the interviewers find out about the job applicants? Is any of the information important for the employer to know?

C. Pass out copies for everyone in the class of the EEO guidelines. Did the

Equal Employment Opportunity Guidelines

1. **In an interview or job application, do not ask about *race, religion, sex,* or *national origin* unless you can prove that these qualities are important to the job.**
2. **Questions about *marital status, pregnancy, future child-bearing plans,* and *number and age of children* are frequently used to discriminate against woman and may be a violation of law.**
3. **Information on matters necessary for insurance such as *marital status* and *number and age of children* should be obtained AFTER a person has been employed.**
4. **An employer's requirement of a *high school education* may be discriminatory and MUST be significantly related to job performance.**
5. **Request for *arrest records* is unlawful discrimination unless there is proof of business necessity.**
6. **Employers should not automatically bar individuals with *conviction* records from employment. Convictions should be considered in light of the age at the time of the offense, seriousness of the violation, and rehabilitation efforts.**
7. **Employers should not automatically reject applicants who do not have an *honorable discharge* from military service.**
8. **The Age and Discrimination Employment Act of 1967 prohibits discrimination on the basis of *age* with respect to individuals between 40 and 65.**
9. **Inquiries into an applicant's *financial status, credit rating,* and *length of residence at an address,* when used to make employment decisions, may violate the law.**
10. **Employers have an obligation to make a reasonable effort to accommodate *religious preferences* of individuals or applicants.**
11. **There can be no minimum *height and weight* requirements if these end up eliminating a disproportionate number of minority group individuals or women, unless the employer can show these standards to be essential to safe job performance.**
12. **Testing of an individual in *English language skills* when it is not a requirement for the job violates the law.**

—C.P.

observers find any violations of the guidelines?

D. Do the guidelines provide protection for the job applicants? Do they give female applicants an equal chance to be hired? Look particularly at those pertaining to females.

E. Do the guidelines help the employer? Would you want to change any of them if you were the employer?

F. How would a male react to these guidelines?

5. As a follow-up, select a variety of want ads and duplicate the simulation, paying particular attention to the guidelines pertaining to sex. In addition, personnel director(s) or the person responsible for one of the ads could be interviewed by the class on their feelings regarding the EEO guidelines. What are the advantages and disadvantages from an employee's point of view?

Women Cops

(Continued from page 24)

ceptance. "It was a full year of little things, starting from day two at the academy," she said from her home, no longer a member of the force. "It was continuous, one incident after another, week after week. . . . Some officers made it clear they simply didn't want me there."

The final indignation came the day after a local magazine ran a cover picture of Macaluso for a story on the new Suffolk policewomen. All over the station house were photocopied covers made into posters with Macaluso's face superimposed on a variety of nude female bodies. One appeared on the main bulletin board, in plain view of anyone visiting the precinct. Another was outside on the station's gasoline pump. Macaluso even found a few pictures hanging in the jail cells. Infuriated, she stormed into her supervisor's office, pictures in hand, to file a complaint. The next day, a new set of the same pictures were again hung up around the station house, and she "realized that it was a lost cause." One week later she resigned. A sexual harassment suit is now pending against the Suffolk County police department.

Officer Jaye Schroeder, also a pioneer of Chicago street patrol, provides one potential explanation for male resistance. "Police officers loathe change, whether change means a new hand-held radio, or a policewoman on the job." Police, most experts agree, are notoriously against any break with tradition.

Given male officers' reluctance, it has sometimes taken lawsuits to get women on the force. The U.S. Justice Department, primarily on the strength of the 1972 federal Equal Employment Opportunity Act, has never lost a case involving the employment practices of any given locale. Dozens of cities around the country have been sued by the federal government for discriminatory hiring and assignment practices. Most departments have elected to voluntarily comply with regulations, rather than fight what would certainly be a losing battle.

Some departments, however, have not yielded gracefully. In Bloomington, Minnesota, for instance, department officials allegedly attempted to circumvent equal employment laws by adding a six-foot fence climb to their agility test. When Linda Miller, a woman who failed the test, brought the case to court, the climbing requirement was dropped and she was admitted to the force. Other suits have involved existing police requirements which formerly served to discriminate against women, such as minimum height and weight standards, and separate entrance exams for males and females. The height minimum most commonly found around the country in the mid-1970s, for example, was five feet, seven inches. Ninety-seven percent of U.S. women would fall short of that requirement. Now, however, the height requirements have been considerably lowered in all jurisdictions where the regulations have been challenged in the courts.

Pressure to Perform

Regardless of their stance on women in policing, most observers and officers agree that the debate itself, and the negative attitudes of many men, can't help but have a deleterious effect on women officers.

"Women experience somewhat more stress than do their male counterparts, who are themselves under a great deal of pressure," says Dr. Robert T. Flint, a psychiatrist who has worked with many Minnesota and California officers. "Most typically, this additional stress comes from other officers."

The greatest source of the stress is the initial pressure placed on women to prove their competency, a theme constantly raised by most women officers, as well as by police psychologists. Says Jennifer Hunt, a sociologist who attended a police academy, worked more than one and a half years on a major urban police force on regular patrol, and spent a great deal of time as a participant-observer in another large city's police department: "When a woman rookie comes to the force, she must prove that she can handle a tough situation. A male rookie's abilities are assumed to be sound until he proves otherwise."

Most are able to manage the additional pressures. As Dr. Flint explains, successful women applicants tend to be more psychologically sound, because of a self-screening process which attracts stronger candidates.

Some, however, cannot cope. Undercover transit officer Mary Nash tells of two patrolwomen who did not make it:

"One woman played an 'ultra-feminine, I'm helpless' act. She wanted her partner to open the door for her every time she got out of the car, felt that her partner should buy her lunch. . . . Understandably, no men wanted to work with her."

"Another woman was nice enough but she had it in her head that she had to be 'one of the guys.' She got in trouble a lot making threats that she couldn't back up. . . . [She felt] she could do anything a man does. But she was trying to do things the average man would call help for."

The key, according to a Dallas policewoman who requested anonymity, is to be neither "one of the boys" or overly feminine. "What I tell the new [women] rookies I work with is, 'Keep your hair up, minimize the makeup and accessories, and keep your mouth closed until you're confident you know what's going on.'"

She adds, "If you don't keep your head about you, they [the male officers] can really get to you."

Jennifer Hunt provides one potential explanation for these different reactions to the same pressures to perform: "One group acts very dependent on men, in an attempt to conform to what they perceive to be men's stereotypes of them. They feel deprived of their femininity so they overcompensate by being silly, dependent, and acting out the familiar stereotypes. . . . In the process, they serve to lose any respect for themselves as competent officers."

She also tells of the opposite reaction: "There are some women out there who feel they have to prove themselves to be as 'macho' as the men. . . .To overcompensate, they're constantly getting into fights, walking and moving like men, and trying in any way they can to act like men."

Dr. Flint adds: "Those [macho] women are working from an erroneous perception of the men they're working with. . . . Despite their rough exterior, most male officers are pretty sensitive in private. They are also traditional, conservative people who are very turned off by a woman who swears too much or one who doesn't show the least bit of restraint."

This conservatism crops up in a different way as well, creating pressures that often go beyond the first year. "There are some men," states Dr. Stratton, "who can only see women as daughters or as sex objects rather than as equals. This creates a great deal of stress for women trying to be professional."

Many men, according to virtually all the officers and experts interviewed, are "babysitting" women officers to overcompensate for perceived deficiencies in the "weaker" sex. Primarily because of a built-in protective attitude most men have for women, they believe they must chivalrously protect their damsels in distress. A common example of this overprotectiveness is a male backup unnecessarily aiding a situation already under control, and then taking away the original officer's responsibility for the call. "This is less of a noble attitude than a downgrading, derogatory statement about a male officer's lack of confidence in women," says Flint. During the first year, according to Flin[illegible]'s only adds to the pressures to prove oneself competent.

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Sgt. Carolen Bailey of the International Association of Women Police (IAWP), who has been on the receiving end of this practice, believes "it's annoying, it's unnecessary, and its gets in the way of the job."

The overcompensation often arises in more dangerous situations, which criminal justice Professor Peter Horne believes jeopardizes the safety of both the male and female partner. "The male might be so busy protecting his partner," explains Horne, "that he is not looking after himself. The woman, on the other hand, might be more preoccupied with the fact that some guy is treating her like a child than the danger they're both confronting. Ultimately, a woman officer must stand or fall on her own."

Are Women Cops Better?

Police/community relations entered the 1970s still reeling from the tumultous, often truculent battles surrounding policing in the late sixties. The general consensus among police officials was that relations with the public were at an all-time low. A great many people, especially in the inner city, viewed police as callous, club-beating bigots willing to swing at the drop of a derogatory remark. But to the officers themselves, criticism for excessive brutality took second place to basic survival, since the number of police murdered was at a high point in the late 1960s and early 1970s.

A few more progressive police administrators saw women as one potential solution to the problem. No one believed that the female presence would be a panacea, but it was hoped that the women would have a built-in calming effect and therefore appear less threatening. This, the argument followed, would mean a less hostile reaction from potentially violent assailants. Second, it was hoped that women would be more reluctant to employ violence unnecessarily or turn an otherwise stable situation into a confrontation.

Preliminary reports confirmed these hopes. "Women in Policing," a 1972 evaluation comparing the performances of male and female officers in Washington, D.C., presented evidence from the social sciences, as well as from actual experiences of the officers studied, which suggested that "women act less aggressively and they believe in less aggression." Consequently, researchers suggested, the "presence of women may stimulate increased attention to ways of avoiding violence and cooling violent situations without the resort to force."

Stories of the mere presence of a woman officer having a natural calming effect on violent psychotics and other hostile types abound. No guns, no force, just tell the nice lady all about it.

New York City's Mabel Hicks (fictitious name) has been confronted by a number of violent people while on patrol in Bedford-Stuveysant, one of the city's most crime-ridden areas. She remembers one of her first cases, when she and her female partner responded to a complaint against a man most police in the district knew to be an extremely violent and dangerous psychotic who always put up a fight. Hicks and her partner, however, being new to the section, didn't. When they arrived, they asked if they could enter his apartment. He invited them in. The threesome began to talk. He trusted them; he didn't find them intimidating. "The two back-ups who rushed over when they heard the address couldn't believe it. . . .When they walked in he was telling us his sad story. He really opened up, something he had never done before." After ten minutes of conversation, Hicks and the man walked to the squad car, hand in hand.

Hicks and her partner also had great success handling family disputes, which many officers consider to be the least enjoyable task of policing. "We were so good that our sergeant wanted us to respond to all the family disputes in the precinct. . . . Fortunately, that suggestion never got off the ground."

According to Carolen Bailey, women are an especially valuable addition to the forces in the inner city. "Minorities feel much less threatened by women police, knowing that they're less likely to bully them around." This notion is substantiated by a New York City report which showed that there is a greater preference for women cops among minorities, as well as a greater trust.

"There's something to the whole

theory of less aggressiveness among women because of the culture and background of most men," according to Professor Peter Horne. "A burly guy gains no points with peers—in fact, it might make him look worse—if he acts tough with a female officer."

Says Dr. Flint: "Male officers, even when well trained, must override cultural sorts of temptations to meet the challenges presented by other men." Moreover, he believes that again because of societal pressures, women "tend to do more talking and negotiating, often serving to calm a potentially violent suspect."

"Because of size differences," says Jennifer Hunt, "smaller officers, whether male or female, are less likely to provoke a situation and more likely to act friendly or joke with some big, tough guy. . . . It simply makes good sense."

Second Thoughts

Hunt believes, however, that the myth of women being less violent is ridiculous. "In part as a response to all the talk of police brutality, many thought women would use less violence and more words . . . this just isn't necessarily the case."

"Another myth," Hunt continues, "is that women make better social workers and not very good crime fighters, while men are just the opposite. I've seen men and women act superbly in both situations, and I've seen both sexes provoke a simple family dispute into a riot."

She adds: "Women can be just as over-aggressive, brutal, and violent as can some men. . . . No group is necessarily more provocative than the other."

Dr. Michael Roberts, a psychiatrist with the San Jose police department, also believes that the notion that most women are less provocative is nothing more than a myth. "If someone is drunk or crazy, he won't care, if he even notices, that a cop is a woman or not. If a cop's in the way, he'll fight. What kind of chance does a 5 foot, 2 inch cop stand if the guy is 6 foot?"

Roberts' rhetorical question raises another point, one cited most often by critics of women on patrol—the issue of strength.

"The great American drive is to say we are all created equal," according to Roberts, "but in reality there are psychological and certainly physical differences between the sexes that make patrol work ill-suited for women."

He cites data compiled for a not yet published study of the San Jose police force, which finds that the average suspect is 5 foot, 9 inches, 165 pounds. "In a confrontation with a 5 foot, 2 inch, 110-pound woman, they're not even in the same ball park," he states.

"There are situations where the *average-sized* woman," according to Chicago's Sgt. Thulis, "is forced to compensate for her lack of size by using violence." Thulis uses the example of a fight breaking out between an officer and civilian over a minor traffic violation. "The woman, and I'm stressing that it's the average-sized woman, could be left with no alternative but to pull a gun."

But Deputy Chief Gertrude Schimmel, the highest-ranking officer in New York City and a long-time veteran of the force, argues that the physical aspects of policing are inflated considerably out of proportion. "Policing is just not as physical as some people think. . . . Violence is rare, and if an officer is well-trained, he or she can handle a situation regardless of sex." According to a Justice Department study of New York police, an officer responds to an average of .67 incidents per hour. Relatively few of those are even remotely dangerous.

A female rookie must prove she can handle a rough situation. A male rookie is presumed competent.

"There is no doubt in my mind," Schimmel adds, "that a woman who has passed through the academy can competently perform basic police work."

"This job is 90 percent boredom and 10 percent panic," states Chicago Officer John McNamara, a quote he says he borrowed from an interview he once read with an airplane pilot.

What about the 10 percent panic? "Foresight, rather than strength, is what makes a good cop," according to McNamara. When pressed on whether he would rather have a male or female partner when faced with a barroom fight, McNamara says, "I'd want someone beside me that was a clear thinker and could keep his or her wits in a dangerous situation." His partner, Barbara Anderson, adds that there is nothing any officer can do, no matter how big, to break up a barroom fight. "Everyone needs to call for assistance—that's the nature of police work."

Others have another important point—to speak about women as a group is ridiculous. "On this whole issue, we have to stop looking at women as a homogeneous group," says Professor Peter Horne. "Good and bad cops, competent and incompetent cops, are not things you can sort by sex."

Studies of women in policing by the Justice Department, the Police Foundation, and other groups confirm this notion. While some minor differences were perceived, most studies concluded that women were neither more or less pacifistic than their male counterparts, nor more or less able to handle the more dangerous aspects of police work. In general, the various studies indicated that women are as effective as men in all facets of police work.

But for the patrolmen working the streets, the studies and statistics are not so convincing. "I don't mind working with a woman officer until I'm in a bar trying to break up a fight," says a Chicago policeman, "I'd rather have a 200-pound partner at my side than one who's got no choice but to call for assistance."

And the argument, it seems, will only continue.

The future of women police appears bright. No matter what the critics say, or how resistant some male officers are to change, they can't slow down the element of time.

"All we have needed is a chance to prove ourselves," according to Sgt. Bailey. "In most cases, male resistance is reduced once they find out that the women they are working with are competent."

Adds Deputy Chief Schimmel, "Nothing changes a male officer's mind as much as exposure."

Moreover, many women officers point out that, understandably, the most resistance comes from the older, more traditional men. "As a great portion of the force becomes men who have never *not* seen women on patrol," states Officer Kajari, "there will be a greater respect and greater confidence in women's abilities."

But these advancements have not been without their price. As Kajari points out, "When women cops were still a novelty [in Chicago], I could walk into a bar fight and I'd have 30 seconds of surprise—everyone just had to stop and make their comments about a woman in uniform—to get the handcuffs on.

"But now everyone is used to the presence of women officers and that just doesn't work anymore." ☐

Chicago Seven

(Continued from page 37)

explains, "The so-called illegal agreement itself becomes a crime even if the harmful acts agreed upon never occur at all." Furthermore, defendants may be found guilty for acts which, in themselves, may be perfectly legal, as long as the purpose of their conspiracy is not. As Epstein puts it, "It is not a crime to buy gasoline, nor is it a crime for a second person to buy a match, or for a third person to hold an insurance policy on a house that then burns down." But each one may be guilty of the crime of conspiracy if the prosecutor can convince the jury that each defendant had "guilty knowledge" of the intention of the others.

Conspiracy indictments are often brought in political trials, because the crimes charged are often vague, and, according to Epstein, "usually less threatening to the authority of government than the existence of the alleged conspiracy that is said to have planned them." Thus it is the plot itself, not its outcome, from which the government seeks protection.

Another advantage of conspiracy charges—from the prosecution's point of view—is that the usual restrictions against hearsay evidence are suspended. Each defendant who has been found to be a part of the conspiracy may be found guilty on the basis of testimony given against the other conspirators. In a conspiracy trial, guilt is not personal, but collective—like the crime itself.

Finally, there is the doctrine of "conscious parallelism." Epstein explains that under this doctrine, the jury may infer the existence of a conspiracy from the similarity of purpose suggested by the defendants' acts. Thus the defendants need not have met in advance to plan their crime, nor have known each other personally, nor need their arrangements have been made in secret.

The Prosecution's Case

The conspiracy indictment and the charges of violating the Rap Brown law had one thing in common: both focused on the defendant's *intent*. That is, in neither case was it necessary to show that crimes had actually taken place because of the defendants' actions, but rather that the defendants had intended that such actions take place. As Lukas puts it in *The Barnyard Epithet*, his book on the trial, "if cherubim and seraphim had danced up Michigan Avenue that week, it wouldn't have affected the legal issue. What mattered . . . was not what actually happened, but what the defendants intended to happen."

Thus, much of the prosecution's case (and that of the defense) may have been beside the point. Each side presented a very different picture of what had actually occurred during the convention, the prosecution emphasizing the provocation offered by the protestors, the defense the overreaction by the police, but since the crime that the defendants were charged with occurred inside their heads—in their "intent"—did the long string of witnesses to the street battles really matter very much?

In any event, the prosecution's case was based almost entirely on law enforcement officials. Its slate of witnesses included city officials, police officers, special undercover agents, paid informers, and military intelligence men. Many of the prosecution's witnesses could only focus on their version of what had actually happened in the streets, which was more or less irrelevant. And, as Lukas points out, the prosecution's case was probably weakened by failing to find a single defector from the demonstrators' ranks. If the defendants had been so evil in manipulating sincere antiwar protestors, hadn't at least one "used" idealistic kid been willing to come forth and testify against them?

Conspiracy defendants need not have met in advance to plan their crime, nor have known each other.

Some undercover agents testified about what the defendants had said in private conversations. For example, one agent quoted Abbie Hoffman as saying, "We're going to f--- up the pigs and the convention," and Jerry Rubin as saying, "We're going to get even with those f---ing pigs." (The prosecution was particularly eager to get into the record the obscenities that had peppered the defendants' conversations.) According to one informant, Rubin once said, "We should isolate one or two of the pigs and kill them."

The prosecution had no trouble citing some strong rhetoric from the defendants' public speeches. Some speeches had even been videotaped. Routinely, the defendants referred to police as "pigs" and warned of riots if police persisted in cracking down. Bobby Seale said in a speech, "If the police get in the way of our march, tangle with the blue-helmeted m-----f-----s and kill them and send them to the morgue slab." Other defendants' speeches were not so strong but still carried menace.

The purpose of all this, of course, was to argue back from what the defendants said and did in Chicago to their state of mind—intent—when they crossed state lines. If the defendants had been on trial for violating a *state* antiriot statute, it would have been necessary to look ahead, to show that their words had created turmoil, that their ideas had had illegal consequences. Under the federal indictment, however, the prosecutors looked back, to what the words revealed of the defendants' previous state of mind while crossing state lines. Sometimes they looked far back. The prosecution introduced two of Abbie Hoffman's speeches from the fall of 1969 (more than a year after the Chicago disturbances) to show his state of mind in coming to Chicago the summer before.

U.S. Attorney Foran's summation angrily denounced the defendants, painting them as "evil" manipulators who took advantage of disillusioned kids to foment disrespect, violence, and rebellion. Noting that America was about to send a man to the moon, he said the defendants were going in the other direction, burrowing "downward toward the primitive, in obscenity, vulgarity, and hate." Pointing out that the First Amendment permits advocacy but not incitement to violence, Foran concluded with an appeal to law and order: "If this country should ever reach the stage where any man or group of men by force or violence. . .can long defy the commands of our law, then no citizen will be safe."

The Defense's Strategy

Abbie Hoffman, commenting on his co-defendants, once said, "Conspire, hell, we couldn't agree on lunch." Certainly the defendants couldn't agree on a common strategy. The defendants were aware of the recently completed trial of Dr. Spock and four others who had been accused of conspiring to counsel draft evasion. According to Lukas, Spock and the others conducted "a cautious, by-the-book defense, sticking to legal questions, eschewing the broad political issues, and making no effort to stir up support outside the courtroom. They were convicted anyway (although the convictions were later overturned on appeal)."

Lukas goes on to say that some of the Chicago defendants "wanted to concentrate on winning the case in the courtroom, which meant a relatively straight, legal defense and some respect for courtroom protocol. Others were more concerned with persuading 'the jury of the American people,' which meant emphasizing the political aspects of the case and keeping the press interested with lots of flamboyant, unorthodox behavior." And, in fact, each defendant leaned one way or the other during the trial, depending on time and circumstance. Rarely, however, did they all lean the same way at the same time. A common defense was just one of the many things they couldn't agree on.

While the prosecution was presenting its case, the defense had argued that the evidence of undercover agents should not be permitted, claiming a violation of the Fourth Amendment. Defense lawyers also argued that the defendants' public speeches could not be admitted, citing the First Amendment. The judge held that the First Amendment wasn't relevant because the speeches themselves weren't alleged to be criminal, but rather were merely evidence of the defendants' intentions. As such, they were admissible. As to the testimony of paid informers and undercover agents, Judge Hoffman pointed out that while the Fourth Amendment did generally forbid invasions of privacy without warrants, exceptions had long been made for police agents operating undercover.

The defense lawyers hammered away at the prosecution's witnesses during cross-examination. They sometimes succeeded in eliciting testimony to show that there were no dictators among protest leaders, and that the leaders were merely proposing alternatives to which demonstrators could respond if they liked. For the most part, though, the defense couldn't shake the prosecution witnesses' testimony. Apparently cross-examination was not Kunstler's or Weinglass's strong point. Garry was to have handled that part of the defense, so his loss may genuinely have hurt the defendants.

When the prosecution finally rested, after weeks of testimony, defense attorney Weinglass tried to convince the defendants that the prosecution hadn't proved its case, that there was an excellent chance for a hung jury at this point, and that the chances were not necessarily improved if jurors had to sit for two or three months of further testimony.

Despite his arguments, the defendants decided to present their side of it, in part to present their politics, in part because, as Tom Hayden put it, "we are on trial for our identity." Thus, much of the defense's case was not only to give their version of what had happened in Chicago, but to tell the jury and the world who they were and what they hoped to accomplish.

Defense Witnesses

As a result, defense witnesses were a potpourri. Like the prosecution's witnesses, most focused on specific events that they had seen. For example, James M. Hunt, assistant safety supervisor at the Curtiss Candy Company plant, had been present at a clash between demonstrators and police in Grant Park. Hunt testified that the police assaulted the demonstrators without provocation. (The next day, Hunt was fired from his job at Curtiss. The company said his discharge was unrelated to his testimony at the trial.)

Yippie testimony revealed plans to raise the Pentagon 300 feet in the air by levitation.

Some witnesses testified about the defendants' state of mind. For example, the defense put Justice Department officials and others who had participated in negotiations with the city on the stand to deny that defendants had intended violence from the first.

Other witnesses were put on the stand to educate the jury (and, of course, the whole country) about the defendants' lifestyle. Poet Allen Ginsberg spoke about Eastern religions and chanted "OM." Folk singers Judy Collins, Arlo Guthrie, and Pete Seeger testified about music and the protest movement. Country Joe McDonald half-sang his "Vietnam Rag."

Finally, some witnesses were overtly political. Men such as Jesse Jackson, Mark Lane, and Julian Bond talked about their own conversions to radical politics and tried to put the defendants' politics in the best light.

Did this ill-assorted collection of witnesses help the defense? It's hard to say. Some defense witnesses, such as Linda Morse, a gun-toting radical, may have wound up hurting their side. Her appearance on the stand enabled the prosecution to question her about many radical statements she had made in an interview in *Playboy*. Similarly, the long parade of lifestyle witnesses may have hurt the defendants with the primarily middle-aged jury.

The defense's split personality is shown in the two defendants who chose to take the stand. Abbie Hoffman, the most antic of them, began by testifying that he lived in "Woodstock Nation" and continued at great length about his lifestyle and political awakening. Among other things, Hoffman testified about plans to raise the Pentagon 300 feet up in the air by levitation and described a drug called "lace," which when squirted on a policeman made him take his clothes off and make love, "a very potent drug." He also presented some serious testimony on negotiations with the city before the convention, as well as on events that took place at the convention itself. The purpose of this testimony was to show that the demonstrators had been sincere in seeking permits and wanting nonviolent protests.

The other defendant who testified, Rennie Davis, attempted to explain the intentions of the Mobe leaders, as Hoffman had done for the Yippies. Davis, a far more sober, almost bureaucratic individual, offered polite and earnest testimony that recalled his days as a 4-H leader.

Like Hoffman, Davis testified at some length about planning for the convention, but he was not successful in admitting into evidence several documents written by the defendants themselves. These articles and papers, written before the convention, dealt with what the defendants had hoped that the protest would accomplish. They stressed that it would be "nonviolent and legal."

However, Judge Hoffman rejected the documents as "self-serving." As Lukas observes, "If [a document] proposed bomb-throwing or killing policemen, the government could certainly have introduced it as proof of the charges in the indictment. But because it urged just the opposite, it was deemed 'self-serving' and inadmissible. How, I wondered, could a defendant prove his intent if he could not introduce evidence of that intent?"

Many observers wondered how well the defense presented its case. Kunstler was under severe strain as the trial wore on. He frequently flew around the country giving speeches and press conferences, leading many to question whether he was as well prepared as he should have been.

Co-counsel Weinglass impressed observers as hard working and generally well prepared, but, for reasons that are not entirely clear, he deeply antagonized the judge, who was said to have referred to him outside of court as "this wild man Weinglass." During the trial, Judge Hoffman addressed him variously as Feinglass, Weinrob, Weinstein, Feinstein, Weinrus, Weinberg, Weinramer, and once even Mr. What's Your Name.

The judge's scarcely veiled contempt for Weinglass must have limited his effectiveness in the eyes of the jury.

In its summation, the defense argued once again that the trial was staged in order to shift the blame for the riots from the police to the demonstrators. The defense said that the prosecution had proved nothing negative about the intentions of the defendants, who had tried in good faith to secure permits and demonstrate peacefully.

The defense also attacked the government witnesses. Undercover agents and police spies, the defense said, are deceitful by profession. Furthermore, they didn't speak the same language as the defendants, and thus they were unable to understand what the defendants' speeches had actually meant. The defense concluded by citing Abraham Lincoln's speech opposing the Mexican War and urging rebellion. "History vindicated him," the defense said, "and it will vindicate each defendant."

Sentence First

Presenting the case by showing what the prosecution tried to accomplish and then providing the defense's rebuttal makes the trial seem a good deal more orderly than it was. In fact, the case was punctuated by outbursts almost from the beginning, and it is these which have stayed in the public's mind far more than the legal arguments.

Many of these outbursts sprang from Bobby Seale's insistence that he defend himself. Deprived, unfairly he thought, of his right to his own lawyer, Seale angrily demanded the right to conduct his own defense. When his name came up in testimony, Seale would stand and try to ask the witness a question. The judge would remind him that he already had competent counsel and tell him to sit down. As Lukas puts it, Seale "flatly defied the judge on many occasions; and the epithets he flung about—'fascist dog,' 'racist,' 'pig,' 'rotten, low-life son of a bitch' have rarely been heard in an American courtroom." However, despite Seale's verbal excesses, observers pointed out that by and large he spoke only when it would have been proper for his attorney to speak in his behalf and that his message was usually an appeal for his constitutional rights.

Eventually, Judge Hoffman could stand no more. He had Seale bound and gagged, so that he could be present at the trial without disrupting it.

Showing solidarity with their chained fellow defendant, the other defendants exploded with contemptuous snarls at the judge. After a few days, Judge Hoffman determined that the trial couldn't continue this way. He severed Seale from the rest, declared a mistrial for him (reducing the Chicago Eight to the Chicago Seven), and convicted him of 16 counts of contempt of court, sentencing him to four years in prison.

The other defendants were often hard to control. However, as Professor Harry Kalven of the University of Chicago has pointed out, the episodes of contempt of court tended to bunch at certain pressure points. Seale's binding and gagging was one, the last two weeks of the trial, a time of gradually building tension, was another. (At this time Hoffman and Rubin treated the judge to a symphony of Yippie epithets: "You're a disgrace to the Jews, runt" and "Tell him to stick it up his bowling ball.")

When the judge thought the defendants or their lawyers were acting up, his reaction was always to warn them that their behavior might be contemptuous and that he was taking note of it. As soon as the final statements were over and the jury had filed out to decide the defendants' guilt or innocence, the judge let the other shoe drop, citing them on count after count of contempt and handing out lengthy sentences. As Lukas points out, this is uncannily like Lewis Carroll's fantasy in *Alice in Wonderland,* when the Queen of Hearts passes sentence before the verdict.

Most of the defendants and their lawyers received between one to three years, on a variety of counts. Dellinger got six months for calling the judge "Mr. Hoffman" instead of "Your Honor," and six months for reading the names of the dead on Moratorium Day. For a "barnyard" epithet, he got five months.

Some observers wondered how Judge Hoffman's sentences could be so precise. Why, for example, did Abbie Hoffman get four days for baring his rib cage to the jury? Why 14 days for applauding? Why 15 days for laughing? Why a month for refusing to sit down?

Sentences ranged from just 2 months and 18 days for Weiner to Dellinger's 29 months and 13 days. The defense lawyers were also hit with sentences. Kunstler received 4 years and 13 days (on 24 counts of contempt) and Weinglass 20 months and 9 days (on 14 counts of contempt).

Something else happened while the jury was out. On February 17, Judge Hoffman heard motions on other cases before him. One lawyer, defending a man accused of stealing securities, asked for a six-week continuance so he could take a Caribbean vacation. Judge Hoffman smiled, made a joke about how well the lawyer must be doing, and granted the full six-week postponement. This led reporters following the case to ask whether Garry should have told the judge he was going on vacation instead of to the hospital.

. . . Then Verdict

All along, the defendants had hoped for a hung jury. The longer the jury stayed out, the more the hopes grew. However, after five days of deliberation, the jury came back with its verdict.

The jury decided that the government had not proven its conspiracy case. It acquitted all seven defendants on this count. It also acquitted Froines and Weiner of teaching and demonstrating the use of an incendiary device (a fire bomb which they allegedly wanted to explode in the Grant Park underground garage). This verdict did not surprise observers. No such explosion ever occurred, no fire bombs were ever found, and the only "accomplice" apprehended was never brought to trial.

However, the jury did convict the other five defendants of crossing state lines with intent to incite a riot (that is, violating the Rap Brown Act).

As soon as individual members of the jury began to talk, it became clear that the verdict was a compromise. Four jurors had been for acquittal on all counts; eight wanted conviction on all counts. Through tireless negotiation on the part of one young juror, the final compromise had been agreed on.

As for the defendants' hope that the jurors would come to understand them and sympathize with their lifestyle, they might have been better off if they had shaved, cut their hair, worn suits, and tried to be respectable. Many of the jurors detested the way the defendants spoke and looked. One said, "Would you like your children to grow up that way?" Another said, "When they [the marshals] told them to get their feet off their chairs, they just put them right back up again. I don't think that's nice."

An Indirect Appeal

The Chicago conspiracy case never was simple, but it became immeasurably more complicated as the trial progressed. Issues kept being added to the record like barnacles to a ship's bottom. It was to be years before they were all scraped away.

A certain amount of light—or, perhaps better said, a fitful uncertain light—was thrown on the case even before the conspiracy defendants and their lawyers began to appeal. In *Illinois v. Allen*, the Supreme Court had the opportunity to look at a case that presented many of the issues raised by Bobby Seale. Therefore, reading between the lines in its decision, one catches enticing glimpses of the justices' thinking about Seale's case.

Allen had come to trial in September of 1957. He demanded to be allowed to conduct his own defense, and, after considerable argument, the judge agreed. But when Allen began to examine the first juror during voir dire examination, the judge had to urge him to keep his questions to the point. Allen argued with him in "a most abusive and disrespectful manner," finally saying to the judge, "When I go out for lunch time, you're going to be a corpse here."

After repeated outbursts and repeated warnings from the bench, the judge finally ordered him out of the courtroom, and the trial, for the most part, proceeded without him. (A court-appointed lawyer acted on his behalf.)

Now, many years later, Allen was seeking under a *habeas corpus* writ to win a new trial. He claimed that the Sixth Amendment guaranteed him the right to be present in the courtroom and confront witnesses.

When the case came before the Supreme Court, it refused to order a new trial. Justice Black spoke for seven members of the Court. His decision emphasizes over and over again the power, dignity, and majesty of the law, as embodied in the judicial process. "The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."

The three possibilities the Court suggests for handling a defendant like Allen (and perhaps, by implication, Seale) are: (1) binding and gagging him, thereby keeping him present; (2) citing him for contempt; and (3) taking him out of the courtroom until he promises to conduct himself properly. Note that the Court didn't have to raise the issues of contempt and binding and gagging. They are not present in *Allen*. By bringing them in, was the Court showing sympathy for Judge Hoffman?

Black added the warning that accused persons must not be permitted by their disruptive conduct to avoid indefinitely being tried on the charges brought against them. (This echoes the contention of the Chicago conspiracy prosecutors that Seale's insistence on his own defense was merely a ploy to make any trial impossible.)

However, Black did say that the option of binding and gagging the defendant was a last resort, since it "might have a significant effect on the jury's feelings about the defendant, [and] use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."

Justice Brennan concurred in the decision, but his opinion has a very different tone. He did say that we cannot "allow our precious heritage of ordered liberty to be ripped apart amid the sound and fury of our time." But he also said that our nation cannot endure if it falls short of the guarantee of liberty, justice, and equality embodied in our founding documents, a hint, perhaps, of sympathy with Seale's plight. This hint was amplified later in his opinion, when Brennan spoke of the offense that shackling and gagging a defendant gives to "that respect for the individual which is the lifeblood of the law."

Justice Douglas's opinion comes the closest to outright comment on Bobby Seale's situation. For example, he notes that a criminal trial "in the constitutional sense cannot take place where the courtroom is a bedlam and either the accused or the judge is hurling epithets at the other." This reads oddly in light of *Allen* (the record shows that the judge there kept cool throughout), but it's not a bad description of the judge and the defendants scratching and snarling at each other in ***Hoffman, Judge v. Hoffman, et al., Defendants.***

But Douglas's main point seems to be that we shouldn't rush to compare the two cases, that the Court's decision in *Allen* shouldn't be taken as an indication of how Seale's appeal will go. Allen's case is an old one, Douglas says, in which the defendant appears to have been a mental case. This is a very different situation from the political trials that "frequently recur in our history." In these trials, Douglas points out, there's the possibility of a defendant, whose philosophy is obnoxious to the bench that tries him, who vehemently insists upon his constitutional rights. "Would we," Douglas asks, "uphold contempt in that situation?"

Douglas's little hypothetical accurately describes Bobby Seale's case, thus reminding readers that the facts in *Allen* are different from the facts in *Seale*, and that observers shouldn't leap to the conclusion that the Supreme Court's decision in one inevitably presages an appeal court's decision in the other. The actual appeals of the Chicago conspiracy defendants were to prove Douglas right.

Contempt on Appeal

In *United States v. Seale* (461 F.2d 345 [1972]) and *In re Dellinger* (461 F.2d 389

[1972]), the United States Court of Appeals for the Seventh Circuit took on one of the tangles that had grown up around the case, the vexing question of contemptuous behavior.

In the *Seale* case, the court held that Judge Hoffman erred by not citing Seale for contempt instantly, but rather waiting until his case was severed from the others to pronounce sentence. The appeals court reasoned that the law gives a trial judge exceptional latitude to determine contempts and pronounce sentence on the spot only because of the overriding need to preserve order in the courtroom. Since Seale's case had already been declared a mistrial and there was no further possibility of contemptuous behavior by him, there was no need for Hoffman to pronounce sentence himself. He should, therefore, have sent the contempt citations to another judge. The inherent possibility that he would be prejudiced against the defendant was too great a risk under the circumstances.

The court also addressed a related question: Should Seale be entitled to a jury hearing if the contempt case is remanded (sent back for rehearing by another judge)? A previous Supreme Court decision had held that six months is the maximum penalty that a judge may hand out in the absence of a jury trial. Judge Hoffman had apparently attempted to get around this limit by citing Seale for 16 *separate* acts of contempt, the punishment for none of which exceeded six months. However, in aggregate, the punishment totaled over four years. This, said the appeals court, really added up to a sentence of four years, and so Seale would be entitled to a jury trial if the contempt case were tried anew.

In re Dellinger echoed the finding in Seale. Judge Hoffman had erred in waiting until the end of the trial to impose the contempt citations. He either should have cited the defendants and their lawyers at the time of each contemptuous act or, having waited until the end of the trial, assigned the contempt citations to another judge rather than impose punishment himself. Like Seale, Dellinger and the other defendants who had been sentenced to more than six months would be entitled to a jury trial if brought up again on the same charges.

In arguing that a new judge should have heard the contempt cases, the court noted that certain kinds of contempt are "apt to strike at the most vulnerable and human qualities of a judge's temperament," carrying such potential for bias that the trial judge "is not likely to maintain that calm detachment necessary for fair adjudication."

Moreover, the appeals court dismissed a number of the specific contempts against lawyers Weinglass and Kunstler, noting that an attorney answering a trial judge's charge of unprofessional conduct may make a respectful answer to the charge without being guilty of contempt. The court also said that attorneys have no affirmative obligation to restrain clients (though they may not encourage disruptive behavior by them).

Finally, the appeals court suggested that some of the defendants' alleged contempts might have constituted "mere disrespect or insult" which might not be punishable if they did not involve "actual and material obstruction of court proceedings." In particular, the court said that symbolic acts of refusing to stand when court is convened or recessed might not constitute obstruction of judicial process and so might not be contemptuous.

A Due Process Appeal

The appeals on the contempt citations were, in a sense, clearing through the underbrush of the case. The real issue was whether the defendants had been tried fairly. In *United States v. Dellinger* (472 F.2d 340 [1972]), the U.S. Court of Appeals for the Seventh Circuit held that they had been deprived of a fair trial, and their convictions were overturned.

The majority of the court upheld the constitutionality of the Rap Brown Act, though one judge did submit a vigorous dissent. However, the court unanimously found that the defendants had been deprived of their due process rights on a number of occasions. Any one of these deprivations would have required a new trial.

The court held that Judge Hoffman had erred by not asking prospective jurors some of the defense's suggested questions. Noting that the questions were often "propagandistic," the court nonetheless held that there had to be some inquiry into attitudes towards protest against the war in Vietnam and attitudes towards the "youth culture." Without knowing about these attitudes, the defense was fatally hampered in using its peremptory challenges.

The court said that the defendants had also been deprived of due process when the documents they had written before the convention outlining their plans were not admitted into evidence because they were "self-serving." Rather, the court said, the question of whether the documents were deceitful was for the jury to decide.

The court also pointed out that the demeanor of the trial judge and the prosecutors required reversal. Since "numerous comments of the judge demonstrated a deprecatory and often antagonistic attitude toward the defense, and [because] prosecutors made numerous deprecatory remarks concerning the defendants and their counsel," the defendants had been deprived of their right to a fair trial.

And these are only a few of the many specific instances of due process deprivations. The court's very thorough review adds up to a rebuke of Judge Hoffman's handling of the case.

The government dropped the antiriot charges against all the defendants, but pursued the contempt citations. The year after the court of appeals struck down the contempt convictions, the U.S. government sought to convict the defendants on 52 (of a possible 141) contempt charges. The defendants did not get a jury trial, however. The government sought only terms of 177 days maximum against each of the defendants (e.g., less than six months), so the defendants were not entitled to a jury.

District Court Judge Edward Gignoux sat as judge and jury in the four-and-a-half week trial. In *In re Dellinger*, 370 F. Supp. 1304 (1973), he acquitted Weiner, Froines, Davis, Hayden, and Weinglass of all charges (the government did not pursue the contempt charges against Bobby Seale). Judge Gignoux did convict Kunstler, Dellinger, Rubin, and Abbie Hoffman of some of the charges against them. However, he imposed no sentence, noting that almost all the convictions were in response to peremptory action of the judge and that four years had already elasped since the trial.

Even though no sentences were imposed, the defendants have applied twice to have the convictions reversed. In *In re Dellinger* 502 F.2d 813 (1974), Judge Gignoux was upheld by a unanimous court of appeals. And just as this issue of *Update* went to press, the court of appeals once again refused to set aside the contempt of court convictions.

In this year's case, the defense argued that documents it had recently obtained under the Freedom of Information Act showed that U.S. Attorney Foran had held improper out-of-court conversations with Judge Hoffman during the 1969 trial. The appellate panel unanimously rejected the plaintiffs' argument that their trial was so tainted by improprieties that it had become a "nontrial" from which no contempt citations could emanate. The appeals court pointed out that because of improprieties by Hoffman and Foran already in the record the defendants had been acquitted on most counts and unpunished for the others. Noting that the defendants' conduct had been "flagrant," "disruptive," and had constituted a kind of "theater in the round," the court held that to completely vacate the convictions would be to "furnish a reward of unprecedented generosity to contumacious behavior." Thus the great conspiracy case seems to be dragging to an end anticlimactically, far from the glare of the television lights.

What of the charges against the eight Chicago policemen? They were disposed of much more readily. Charges against one were dropped; the other seven were acquitted of violating the civil rights of demonstrators and bystanders.

Past and Present

If the trial is ending with a whimper it began with a bang. Just a few days after the trial's opening, a statue commemorating the "martyred policemen" at Haymarket was blown up. The act underlined the many similarities between the trial of the Chicago anarchists in the 1880s and the contempory trial of the antiwar radicals. Among the parallels are:

- Many defendants in each case were politically prominent in radical circles, but not all prominent radicals were included as defendants, nor were all defendants prominent radicals. In each case, a small fry or two was trapped in the net with the big fish.
- Each set of defendants was charged with conspiracy. Besides the legal meaning of "conspiracy," each set had to deal with the popular meaning of the word, because both prosecutorial teams tried to paint them as truly conspiratorial, bent on subverting order and destroying society. In both cases, then, the trial presented a sharp clash of values between the existing political/moral order and an angry, disputatious minority.
- Both sets of defendants were tried while feelings were running high.
- Both cases received exceptionally heavy coverage, including pretrial publicity that may have been prejudicial to the defendants.
- In both trials, the words uttered or written by the defendants were the key evidence against them. The defense in each case argued that the First Amendment protected the exchange of political ideas.
- In both cases, many observers thought that the judge was biased against the defendants and their lawyers (in political cases, judges often seem to develop a strong dislike of the defense team, usually flamboyant practitioners from out of state).
- In both trials, courtroom theatrics and high emotion gave way to a gentle denouement, when, after feelings had mellowed somewhat, a review by a new fact-finder gave the defendants their freedom.
- And finally, all parties, at all times, were conscious of the publicity that the case was engendering, and many played to that publicity.

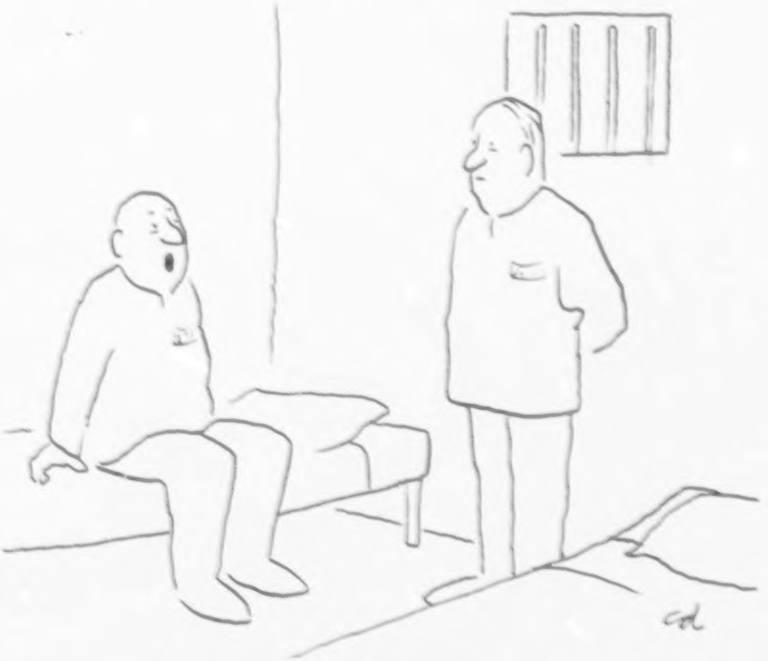
The most significant difference between the two, however, may hinge on this question of publicity. Although the earlier trial was conducted in the public eye, it proceeded for the most part with weight and dignity. Men's lives were at stake, and the trial—however it might have been flawed procedurally—proceeded with appropriate decorum. Because lives were taken, the case may even have risen to the level of tragedy.

In the modern case, on the other hand, the participants seemed more conscious of publicity than justice or dignity. Though Judge Hoffman kept saying in court that this was just another criminal case, in private he asked reporters if this would be the trial of the century. Abbie Hoffman thought it would be his generation's *Scopes* trial; Rennie Davis thought the 1960s were on trial.

And in the end, the trial only produced publicity. No one was killed, no one served time. In retrospect, it seems an empty exercise, in many ways as distorted by the presence of the press as the original demonstrations were distorted by the TV cameras.

The conspiracy trial was conducted with all of the ceremony of a kindergartner's fight in the sandbox. No one can read the records of the case without being saddened by its sordid squabbles. So pervasive was the circus atmosphere that most observers felt the blame was everywhere: on the defense side, on the prosecution side, on the judge. Of all the players, perhaps only the hard working, conscientious defense co-counsel, Leonard Weinglass, doomed to have his name forever garbled by the judge, emerged with anything like dignity.

It was a gaudy show, one which would have delighted an incorrigible cynic like H. L. Mencken, but one which ultimately came to dispirit most observers. Marx's overworked tag about history repeating itself, the first time as tragedy, the second as farce, might almost have been written to explain the difference between the Haymarket case and the conspiracy trial. ☐



"In those days, of course, we didn't have constitutional rights."

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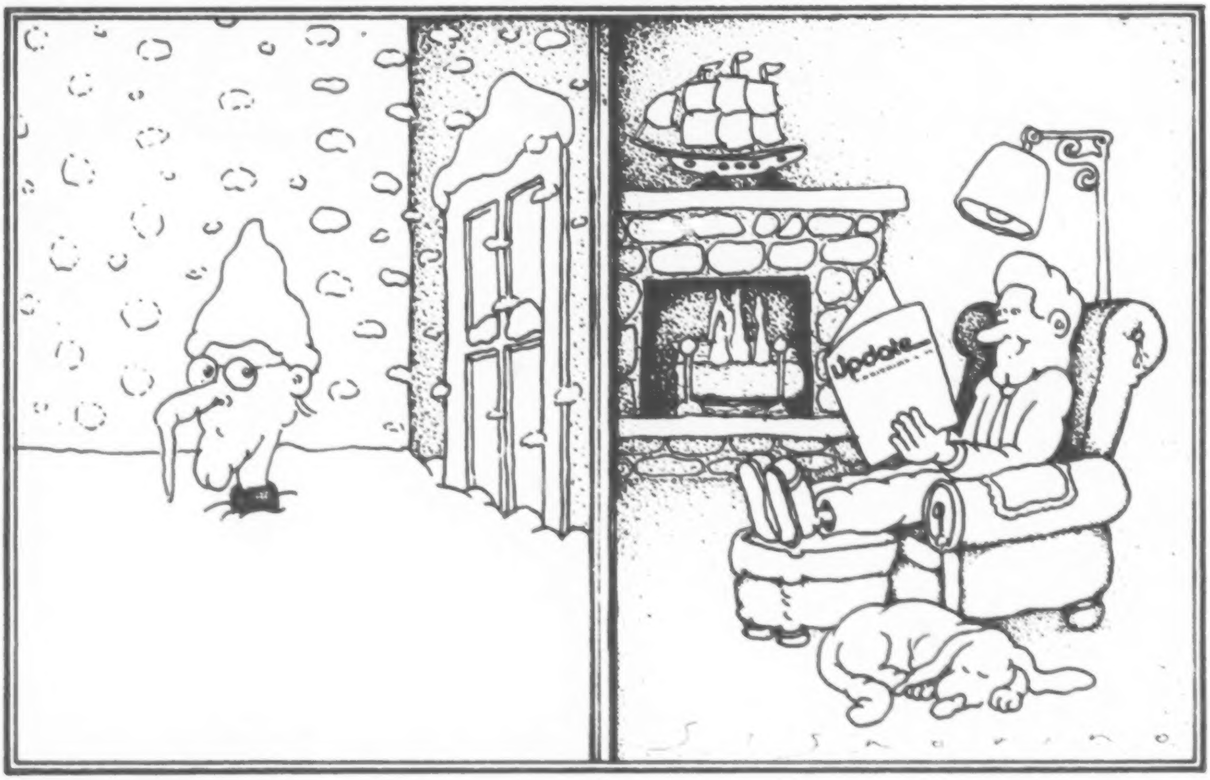

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contents

Volume 6, Number 1, Winter 1982

2
Courts at the Crossroads
Wheeling and Dealing Justice

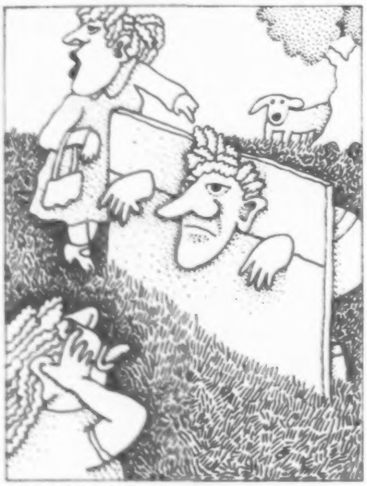
6
Courts at the Crossroads
Too Much Law?

10
Classroom Strategies
People Power in the Courts

15
Courts at the Crossroads
By Reason of Insanity

18
Courts at the Crossroads
Tailoring the Sentence to Fit the Criminal

22
Courts at the Crossroads
If I Were Dictator



25
Legal Lunacy

30
What Is Justice?
Except When Due Process Is Done In

34
Court Briefs
Keeping Krishnas in a Booth, Pollution Wars Between Cities, Search and Seizure, and More

42
Curriculum Update
New Materials for You

67
Practical Law
Ranting and Renting

Credits
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COURTS AT THE CROSSROADS

Gary Rivlin

Wheeling and Dealing Justice

The plea bargaining system?
Says a state's attorney:
"If you roll the bones and lose,
you lose big. That seven offered two
weeks ago all of a sudden
becomes twenty, minimum."

Two public defenders, a state's attorney, and a judge sit casually in the judge's chambers of a Cook County (Ill.) courtroom during a midmorning recess. The judge is talking about a fast-food franchise he's thinking of investing in. The public defender brings up the case of an alleged armed robber: "The Martineau* case—what are we going to do about this one?" "What'd he do?" asks the state's attorney. The defense replies, "A simple robbery, with only a few priors. He's not a bad guy." He adds after a pause, "The minimum's three." "How many prior robberies?" the judge asks. "A few your honor, but never a weapon." The judge laughs. "We've got to give him more than three," he says. The state's attorney recommends four. "Fine," says the public defender. "Good," says the judge. The state's attorney scribbles a note on Martineau's folder. The conversation returns to chicken franchises.

Three floors below, a public defender and his client discuss their case outside the courtroom. "The deal they're offering is beautiful. Two years is nothing when you think of what you could have gotten."

The defendant, Jason Richards, is not so sure. He says nothing. He is clearly less excited than the public defender.

"Listen, it took a lot of time to get this deal and if you don't take it this time, I don't know if the offer will be as sweet."

"I don't know," Richards says, looking down at the ground as if the answer might be there. After a pause, "What would you do?"

"It's your decision. I can't make it for you."

"It's . . . I've been there a few times before, you know. . . ." The defendant goes over his long history in jail and the troubles he faces at home. The public defender isn't interested. He looks away. He asks a passing colleague how a wedding went this past weekend.

The public defender finally doesn't want to hear anymore. He interrupts while Richards is telling of his experiences in a drug rehabilitation program: "It's a great deal, but it's your decision. Court's back in session in twenty minutes. I'll talk to you before that, and you let me know." The defendant walks down the hall to the men's room. "He'll take it," the public defender says with confidence. Twenty minutes later, the defendant is standing before the judge, listening to him explain what it means to plead guilty. He has accepted the deal.

" . . . And you understand that by pleading guilty, you are waiving your right to trial, to present all evidence," the judge asks, paying lip service to the official rules of procedure. He speaks in a persistent monotone, reciting the tired formulas of the judicial process. At one point, the defense attorney nudges his client so he'll respond when the judge asks, "Have you been pressured in any way, or coerced into entering a guilty plea?"

A case in a third Cook County courtroom involves armed robbery. Unlike the first two, this case is tried before a full jury. The state has offered the defendant, Linda Campobasso, three years prior to trial. The public defender feels it is a "real sweet deal." He explains to Campobasso that her case is a probable loser, which would mean extra years in jail. He strongly recommends accepting the deal. But she remains adamant. Campobasso wants to exercise her right to a trial, no matter what the offer. The public defendant calls her "the crazy lady."

Campobasso is found guilty and sentenced to six years. The state's attorney: "The more you tax the system, the greater the sentence." The public defender: "You pay for the time, energy, and efforts you've wasted." Campobasso? She is now serving the first few months of her sentence. She committed the cardinal sin—she held to her convictions—and now she has plenty of extra time to reflect on her mistake.

Back-Room Negotiations

Ideally, any individual charged with a crime under the American system of justice is entitled to a trial by jury. The single image, the aggrandized drama of the play or television reenactment, is familiar: the defendant is arraigned, a jury is selected, witnesses troop through the courtroom, tension builds. The climax—the foreman hands the judge a verdict. "A jury of your peers having found you guilty," gavel smash, "ten years." Or if the defense prevails, the accused rejoices while the reporters dash for the nearest phone.

But only a few criminal cases are anything like this. The judicial system in 1982 runs on back-room negotiations. Plea bargaining—the process by which a defendant is induced to plead guilty in exchange for a prearranged lower sentence—is the norm, as in the cases of Martineau and Richards. Few cases ever go to

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*All of the accused have been given a pseudonym, to protect their identity.

trial. Rather, sentences are determined by the state's attorney and a public defender, typically with little involvement by [illegible] judge. The time the accused stands before a judge amounts to only a few minutes, enough to plead guilty, listen to a series of standard questions concerning his or her rights, and have the judge place on official stamp on the process. The defendant never faces his or her accuser, and the judge only glances at the facts of the case. All conversations remain off the record.

It is estimated that on the state level, 90 percent of the cases are disposed of through such arrangements. In larger cities, figures are typically higher. Ninety-eight percent of the cases in New York City were taken care of through pretrial agreement, according to a 1979 study. In Detroit, according to a 1975 study, 99 percent of the cases were disposed of through plea bargaining.

The plea-bargaining way of justice has evolved slowly. Most experts agree that it began around the time of the U.S. Civil War but didn't take firm root until the 1920s and 1930s. During the fifties and sixties, as the crime rate soared, it blossomed into a way of judicial life. After the landmark decision of *Gideon v. Wainwright* (372 U.S. 335, 1962), in which the Court required that all jurisdictions provide indigent felony defendants with counsel at no cost, the system was forced to rely even more heavily on plea bargaining.

The Supreme Court has upheld the constitutionality of plea bargaining in a number of cases, including *Santobello v. New York* (404 U.S. 257, 1971) and *Brady v. United States* (397 U.S. 742, 1969). In the *Santobello* case, Chief Justice Warren Burger explained that plea bargaining "is to be encouraged" because "if every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."

Theoretically, plea bargaining is an option available only for guilty parties. But consider a third Supreme Court case, *North Carolina v. Alford* (400 U.S. 25, 1970), in which the Court upheld a lower court's decision to sentence without trial a defendant who told the court: "I pleaded guilty on second-degree murder because they said there is too much evidence, but I ain't shot no man. . . . I just pleaded guilty because they said if I didn't they would gas me for it. . . . I'm not guilty but I plead guilty." Justice Byron White provided the Court's rationale in the majority opinion: "The Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence."

Though many cases concerning the legitimacy of plea bargaining have reached the high court, the process is often obscured by the certainty of a jury trial for those cases which command headlines. In California, for instance, the trials of Patty Hearst, Charles Manson, and Dan White immediately come to mind. The plea-bargained case of an accused San Francisco child molester whose charge was reduced to loitering in return for a plea of guilty, or the case of a Los Angeles man sentenced to five years when a murder charge was reduced to manslaughter, remain shielded by the closed doors of bargaining sessions.

Do lawyers who want to avoid a trial for fear of losing then bargain away a client's rights by pleading guilty?

The few exceptions, the well-publicized plea-bargained cases, have left many with a tainted view of our judicial system. The most infamous plea-bargained case in recent history was that of former Vice-President Spiro Agnew. In return for his 1973 plea of "no contest" to federal charges of income tax evasion, all other possible criminal charges were dropped. Agnew was given three-years' probation. Another Maryland case involved a Catholic priest charged with fifty-nine felony counts in the mishandling of over $2 million in donations for the poor. The priest was promised probation if he would plead guilty to one felony charge and rid the court of a potentially messy case. Some observers believe the public outrage at the deal was so intense it cost Maryland Attorney General Francis B. Burch the Democratic gubernatorial nomination.

"You have a deep sense of distrust and dissatisfaction toward the legal system on the part of the public," says Professor Herbert Miller of the Georgetown University School of Law. "People feel uneasy that no judge ever looks at the evidence and says, 'I personally believe this beyond a reasonable doubt.'" Concludes an eighteen-month California study of plea bargaining: "The belief that plea bargaining helps put convicted criminals back on the streets is particularly destructive to public trust at a time when the public has demanded determinate sentencing and increased punishments for a variety of crimes."

Justice and Poker

In a Cook County courtroom, a public defender and state's attorney are negotiating sentences. Eventually, the Johnson case is raised, one that they've haggled over for weeks.

"If four is your final offer, we'll answer ready for trial today," the public defender says, not attempting to mask his frustrations. The state's attorney mentions Johnson's previous record and quotes a section of the police report. The public defender ignores the state's attorney. He's heard all this many times before.

"He's told me he'll take two, no more," he says. The state's attorney thinks. "I'll consider three, and no lower," he replies.

"I'll ask him if he'll take it," the public defender says, and they begin discussing the next case. The public defender, though, need not ask Johnson. One hour earlier, the two had discussed the case and Johnson said he would accept the three-year sentence. The two-year ultimatum was only a bluff, a way of inducing the state's attorney to lower the offer to three.

The public defender is proud of his bargaining skills. But Johnson is neither happy nor impressed. He wants a trial. Probably he would have lost. Certainly that would have meant an extra year or two in jail. But that is his right. "I'm innocent, man, and I ain't tellin' no one I done it," he said during one conversation with his counsel.

Common sense, however, eventually prevails. He decides to plead guilty in return for a reduced sentence. Extra months or years in jail seem too high a risk.

Johnson was almost certain to be found guilty. Numerous eyewitnesses had seen him attempt to rob a liquor store, and all were willing to testify. The police found Johnson hiding close to the store, with the money on his person. He had no convincing alibi.

Most cases are like Johnson's, open

Gary Rivlin is a staff writer for YEFC and a contributor to a variety of publications.

and shut, a verdict of guilty as certain as a court's decision can be. But in more ambiguous cases, the decision whether to plead or go to trial is considerably more complex. "To a certain degree, this is like playing a poker game," says a public defender. "The longer you stay in, the higher the ante."

The case of Russ Holmes was one such uncertain case. "I think I can beat this but it's not a sure thing," a public defender explains to Holmes. Holmes is charged with home invasion, under a tough new Illinois law for those suspected of illegally entering an occupied residence. Conviction means a six-to-thirty year sentence. The public defender pauses: "You realize what can happen if I lose?" he asks.

The defendant quietly nods. He understands that turning down an offer of three years now could mean six to thirty after a lost trial. "Would you take it?," the defendant asks. "It's a real good deal," replies his lawyer. Thirty seconds of silence. "Then I'll take it." After the defendant is brought back to his jail cell, the public defender says, "I was hoping he would go for a deal. This is only sixty-forty, maybe seventy-thirty in our favor, and the risk is too great to take the gamble."

The public defender's office, which handles approximately 60 percent of the felony cases in Cook County, has a backbreaking workload. A public defender, on the average, must juggle thirty to thirty-five case at a time. Even under the present system, they complain of being overworked; a significant increase in the number of jury trials would be overwhelming. "If we didn't plea bargain," says one public defender, "we'd work round the clock and still not get half our work done."

Moreover, the state's attorney exerts additional pressure on the public defender to bargain cases. "The weaker their case, the harder they'll push you to bargain," says one public defender. "Talk to any state's attorney in this building and one of the first things they'll tell you about, whether you ask or not, is their record. This one has won thirty-one of thirty-three cases this year, another hasn't lost one in ten years. . . . They hate to lose a case."

"You figure what a case is worth," says a state's attorney. "You want the bum to get five but because the case may be a difficult one, or not really worth the time, you offer three and settle for two to save everyone the trouble." Adds another state's attorney: "It's not a question of whether the guy did it or not—it can be assumed around here that if they've gotten this far, they almost certainly did it. The real question becomes how good a case we have, and then how long we can send the guy away."

According to Daniel W. Hickey, Alaska's Chief Prosecutor, "Plea bargaining is really the glue that institutionalizes many weak parts of the criminal justice system. A policeman who prepares a bad case through a not-so-thorough investigation can always count on a district attorney to bail him out by reducing a charge to a meaningless level or agreeing to a minimal sentence. District attorneys who are incapable of trying cases or afraid of trying cases can handle their problem by simply plea bargaining and avoiding a trial."

A defendant who chose to go to trial and is convicted should get the same sentence as one who pled guilty

He continues, "Too often [state's attorneys are] influenced by such things as: 1) the expense involved in going to trial; 2) the caseloads of their respective offices; 3) the quality, experience, and reputation of opposing counsel; 4) their vacation and conference schedules; and 5) a general desire to avoid going to trial—particularly if you know you don't really have to."

The state's attorney and public defender are not the only participants of the plea-bargaining process concerned with the quick and quiet disposal of cases. Judges, too, are under great stress to maintain a manageable caseload. Despite various degrees of participation in plea bargaining—some judges are intimately involved from the start, while others remove themselves as much as possible from the process—all have a vested interest in keeping the docket moving.

"The judge says he'll give you no more than fifteen minutes. He also says you guys have been in there so long, you'd better come out with something," a guard tells a public defendant and two state's attorney discussing a few cases in the jury room. Of the seven cases before the court that morning, not one had been settled. "A judge's reputation, and I suppose his ego, heavily depend on how well he can handle the docket," explains a state's attorney.

"In a sense, there are a lot of winners from plea bargaining," according to Professor John Langbein of the University of Chicago Law School: "Lawyers who don't have to try cases and still make a lot of money, judges who can flush cases rather than try them, and prosecutors who don't have to investigate the majority of cases."

Can Plea Bargaining Be Just?

Conspicuously missing from Langbein's list of winners are defendants, even though many believe them to be the true benefactors of the process. If the accused is willing to abide by the rules, and most are, then the reduced sentence is the largest pot in the game. But, as Langbein and others point out, whether the defendant is truly a winner remains a debatable point.

The key question is whether justice, as Americans would like to know it, can be duly served through plea bargaining. The answer is elusive; plea bargaining may be a process of compromise, but rarely are its proponents and critics able to reach any middle ground.

There are two fundamental arguments. The first is rooted in the familiar realties of limited funds. A dogged pursuit of justice has created, ironically, a jury system so laden with safeguards that 90 percent of criminal cases must be settled through alternative means. Our fragile court system is deluged with cases, and plea bargaining is its savior. Within budgetary limits, it is the only answer. Proponents of plea bargaining tack on additional defenses of the process, but they are offered after the fact, no more than a further rationalization for a less than ideal system.

The second argument is far more philosophical. Forget money, the subject here is justice. It's as basic an issue as there is, a concept which cannot be compromised. Presumably, a defendant who exercises his or her right to trial and is convicted should receive the same sentence as someone who pleads guilty. All agree, however, that in practice the sentence differential is what makes plea bargaining work. By penalizing those who ask for a trial, we have broken our fundamental promise that every defendant has a right to a full and impartial hearing.

"Here we have an elaborate jury system, and only 10 percent of the accused get to use it," says Colorado Law

(Continued on page 44)

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COURTS AT THE CROSSROADS

Too Much Law?

Some critics say that trying to do too much is giving the courts a case of indigestion . . .

Edward T. McMahon

Changing times bring new woes. Thirty years ago, hardly anyone worried about energy running low or law running wild. Today it is a different story. Gas tanks are on empty while law courts are overflowing.

The country keeps adding more and more judges, yet somehow the backlog of cases never seems to get smaller. Though our last two presidents were elected on platforms of cutting government down to size and reducing the number of regulations, many observers are skeptical about the ability of *any* government to slow the rising waters of law and litigation.

How did the courts get so full? And why are the courts in the 80s so different from their counterparts just a few decades ago?

Judicial Activism

Supreme Court nominee Sandra Day O'Connor, facing her first day of confirmation hearings, assured the Republican-dominated Senate Judiciary Committee that she believed in a limited role for the federal judiciary.

"I do not believe it is the function of the judiciary to step in and change the law because the times have changed," she said. "I do well understand the difference between legislating and judging."

Justice O'Connor's words serve as a new springboard for an old debate: What is "the proper role of the judiciary"?

Every student of American government has heard the aphorism that it is the function of the legislative branch to *make* the law, of the executive branch to *enforce* the law, and of the judicial branch to *interpret* and *apply* the law. Today, this maxim is no longer accurate.

During the last 25 or 30 years, the role of courts in American

(Continued on page 8)

But there may be some creative new ways to ease that overstuffed feeling

Sharon Irish

These days everyone is bemoaning the avalanche of lawsuits that is smothering the courts. Even lawyers are concerned. Is hyperlitigation a disease? Or only a symptom? If it is an illness, will it respond to treatment? Can it be cured? Are the side effects of the medication worse than the disease?

Fade in the courtroom. No—wait! Not all disputes nowadays are resolved in courtrooms, nor do they fester for years while awaiting a judge's hearing. Fade in a neighborhood justice center and other settings where disputes are settled in a variety of new ways.

But Now the Ceiling Leaks

The Carsons had been able to afford their vaguely Victorian dwelling only because the sagging house had been neglected for years. The first year, the Carsons replaced most of the wiring and tore apart the bedrooms in order to rehang windows and to plaster and paint the upstairs rooms. By the second winter, the bedrooms were snug and nicely finished; the family began to think about the major changes they wanted in the kitchen.

The old kitchen sink and cabinets looked as if they had been misplaced by a scrap metal dealer. Nobody in the family knew how to re-plumb the fixtures, so the Carsons asked friends about remodellers.

A neighbor, John, was a handyman and said he could work on the Carson kitchen after hours and on weekends. The Carsons decided to leave town the weekend that John was to do the major portion of the job, to avoid the noise and mess that would inevitably occur. Sunday evening, when the Carsons returned, they found the upstairs bedrooms soaked by water dripping through the now-cracked ceilings. John had goofed.

(Continued on page 9)

Too Much Law?

(Continued from page 7)

life has expanded dramatically. The courts are now intimately involved in lawmaking. It is well known that many of the major social reforms of the last two decades have been accomplished by the judiciary. The Supreme Court has struck down such previously acceptable practices as segregation, school prayer, and capital punishment, has legalized such previously unacceptable practices as abortion, and has involved itself in such formerly sacrosanct areas as the reapportionment of state legislatures.

Judicial activity is now common in such fields as: environmental affairs, employment policy, medical malpractice, natural resource management, professional sports, and school, prison, and hospital administration, to name just a few.

Almost as soon as Ronald Reagan's new administration began, lawsuits were filed to challenge the legality of many of the new policies. A federal court in Texas ordered the expansion of bilingual education programs in the face of the Department of Education's new policy emphasizing instruction in English. A District of Columbia court entertained suits challenging such diverse policies as decontrol of domestic oil prices, reduction in CETA funds, and the president's freeze on government hiring. A federal court in Tennessee refused to allow a reduction of outpatient visits to veterans hospitals despite congressionally imposed spending cuts. Even foreign policy—the agreement to free U.S. hostages in Iran and our relationship with Taiwan—has been the subject of litigation.

Are Courts Going Too Far?

Are the courts overstepping their bounds? Yes, says a wide array of critics—scholars, politicians, average citizens. The most common charge is that the courts are exercising too much power (often usurping the legitimate functions of the legislative and executive branches). Sociologist Nathan Glazer: "We have an imperial judiciary—intruding into people's lives in a manner unparalleled in our history." University of Chicago Law Professor Philip Kurland: "The Court has usurped general governmental powers . . . it has taken over the policy-making powers of state legislatures."

A related charge is that the courts are antidemocratic. Specifically, critics say judges seek to impose results that accord with their own political and social views, regardless of legislative intent. For example, in 1976 a U.S. district court judge held unconstitutional the system of electing three municipal commissioners by citywide election in Mobile, Alabama. The judge ordered the city to substitute a new system—a mayor elected citywide and nine councilmen elected from single-member districts.

The reasoning behind the judge's order was clear. Although blacks make up a third of Mobile's population, no black had ever been elected commissioner. Nevertheless, the majority of citizens in Mobile seemed to like the commission system and had twice voted down referenda to change it. Mobile businessman Eugene McKenzie spoke for many when he said, "the judge has disenfranchised me and every other voter in the city. If any court can come in and dictate a new form of government, we are in trouble—all of us."

On the other side, J.U. Blacksher, an attorney who helped win the ruling in the district court, said: "If there is a constitutional violation, some interference is necessary to correct it. . . . You can't let the concern [over judicial activism] swallow the whole Bill of Rights and the Constitution."

Mobile officials appealed the district court ruling, and the order to change the form of city government was eventually reversed by the U.S. Supreme Court. Despite instances like this, criticism persists. Former Solicitor General Robert Bork, an advocate of judicial restraint, explains: "Judges sometimes act because their conscience is shocked—even though the Constitution does not give them the power to act."

The 14th Opens the Door

When courts do act, their most widely used tool is the Fourteenth Amendment, which holds that "no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Ratified in 1868, the amendment has in recent years provided a justification for judicial activity of almost every imaginable sort. Many of the cases finding their way into federal courts represent attempts to use the amendment's "due process" and "equal protection" clauses to create new legal rights and remedies. The rights of welfare recipients, school students, prison inmates, and women seeking abortions are

(Continued on page 56)

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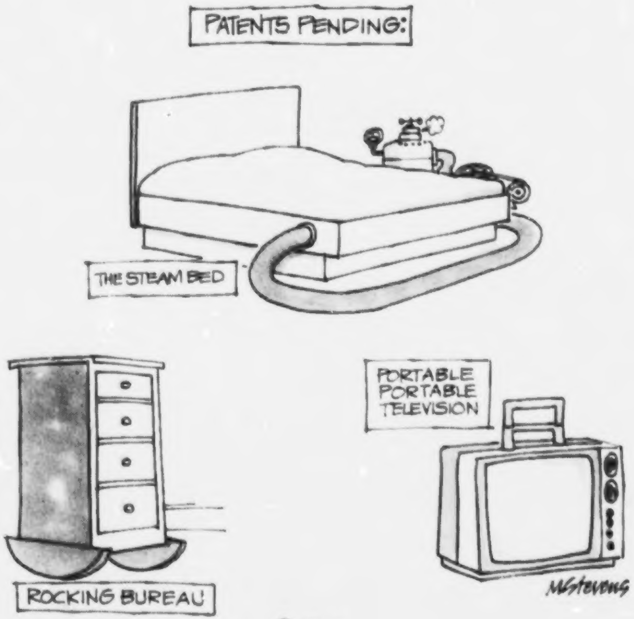

Alternatives

(Continued from page 7)

An angry Mr. Carson crossed the street to confront John. The beds, the carpets, and some furniture were all wet, but more agonizing were the memories of all the hours of plastering and painting that the family had put in that previous year—now flooded into futility.

John was horrified, said he couldn't understand what had happened, and came over right away to investigate. Half an hour later, John discovered that the old-fashioned heating system cycled water through a tank on the third floor. But John had accidentally shut off the pipes where the cooled water flowed out of the tank. It had overflowed and drenched the second floor. A mistake, but in John's eyes an understandable mistake. How could he have known that an antiquated system was still operative?

Dukes Up

Of course, most folks try not to sweat the small stuff and, like the Carsons, see red only when large problems crash, or drip (as the case may be), around their ears. What recourse do the Carsons have against their neighbor? (To simplify matters, let's assume that the insurance company doesn't bail them out, so to speak.)

Their disagreement—between neighbors over property damage—is only one type of complaint that Americans bicker, quarrel, and even come to blows over. If you cannot conjure up other instances, think of the dress that the dry cleaners ruined, or the fuchsia head of hair you got at the salon after your henna treatment, or the fender-bender that cost you $400 in bodywork. Few constitutional decisions hang in the balance here, but people nonetheless try to right the wrongs that put their lives out of kilter.

The Carsons want John to pay $1,000 to cover the costs of repairs, in addition to waiving the cost of the labor and materials he has already put in. John refuses. He wants to be reimbursed for the parts he has installed and thinks that the Carsons' demands are unreasonable. Both parties know that hiring lawyers and going to court would require time and money. Chances are that the case would move through the legal system like cold molasses.

Small Claims Court

The first option that occurs to the Carsons is to sue John in small claims court (depending on the state, also called justice of the peace, conciliation, or magistrate's court). People in urban areas can easily locate small claims courts, but they tend to be scarce in less populated areas; some states (Arkansas, Georgia, Kentucky, and New Mexico) leave it up to the municipality to establish and operate these courts. In other jurisdictions, small

(Continued on page 51)

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Justice in the Marketplace

Courts turn a profit. Claimants receive a court date within a couple of months. Expenses are reduced by keeping court records electronically and eliminating most paperwork. Unbelievable? Not to Manhattan attorney Carl E. Person (pronounced peer-son), who is laying the groundwork for a National Private Court (NPC). Sometime in 1982, if all goes well, attorneys serving as judges will deliver private justice in New York via the NPC.

"I plan to piggyback," says Person. NPC will follow federal rules of evidence and civil and appellate procedure. Judges will rely on existing government law for precedent. NPC does *not* plan, however, to imitate the congestion and inaccessibility of government courts.

Parties using NPC services will be able to count on a decision within three months for about one-third of the cost of government trials. "The NPC is simply a brokerage system," Person explained. For setting up the system and bringing the parties together, NPC will collect a portion of the judge's fee. The judge, mutually agreed upon by both parties, will be hired by the case from an NPC roster of lawyers.

Decisions by NPC judges will not make law nor provide precedents for subsequent NPC rulings. A NPC judge's ruling is like that of an arbitrator—it is legally binding and enforceable by current laws. But NPC departs from arbitration because it has an appeals procedure. The parties to a dispute select four judges at the start: one will try the case, and a three-judge panel will be available for a larger fee, should the parties wish to appeal.

In California, wealthy litigants have been bypassing crowded courts since 1976. A nineteenth century state law, dusted off five years ago, allows hired referees to settle disputes. Retired judges now rent themselves out (for $125 an hour, usually) to try cases outside the regular courts, but with all the procedures and protections of a public trial. Both sides must agree to the procedure, so renting a judge may have limited appeal where one disputant will benefit from a long delay.

A selling point for rented judges, whether in California or New York, is that they can try a case very quietly, with little publicity. All that must be revealed is the petition to seek a private trial and the final judgment.

While some Californians prefer the shadows of private justice, others are in the spotlight on a syndicated TV show called "The People's Court." The Fall 1981 season opened with rented Judge Joseph Wapner presiding. Instead of bringing television cameras into the courtroom, this new "reality" program brings small claims court into the television studio. And it turns out to be downright entertaining at times.

A defendant on one show was a restaurant owner who paid a band called the Fantastix only half its fee because they played punk rock instead of the agreed-upon country and western. He claimed he lost customers, but he also lost the case when band members fiddled for the judge.

Judge Wapner deliberates during commercial breaks, deciding two cases per show. The contestants—er, litigants—are drawn from small claims courts in the Los Angeles area. In California, the maximum amount a small claims plaintiff can seek is $750. Parties must waive their right to an off-camera, regular trial, but the show's producers make the waiver appealing by providing an $800 kitty per case. Losers receive a portion of the kitty as a consolation prize.

S. I.

CLASSROOM STRATEGIES

People Power in the Courts

Here's how you can teach that democracy is not a spectator sport

The bumper sticker on the car in front of me read: "Democracy is not a spectator sport." The slogan reemphasized for me that lessons about democracy, especially as it is embodied in the courts, should teach students how to be players, how to become involved in their government. It's too easy to sit in the stands and complain about the referee's call.

Motivating students to be the players and not just the spectators involves teaching strategies that fall into two general categories. One involves structure and procedure. Who does what, when, and how? How does a case come before the court? What is it like to be a member of the jury? Students can become involved in the processes of the court from "shadow" jury duty to mock trials and internship programs. The other strategies deal with issues confronting the courts. Students can become involved with questions of justice, impartiality, fairness. They can research and debate issues like cameras in the courtroom or methods of selecting juries. Both kinds of strategies ultimately focus on the decision making process of the courts.

Not only are Americans guaranteed the right to trial by jury in both criminal and civil cases through the Sixth and Seventh Amendments of the U.S. Constitution (applied to the states through the Fourteenth Amendment), but in most states everyone 18 or older has an opportunity and responsibility to serve on one of those juries. There are three avenues for the average citizen to participate in government: voting, military service, and jury service.

COURT BULLETINS

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Julie Van Camp

Strategy

1.

An Impartial Jury of Your Peers

Though the Greeks originated trial by jury more than 400 years before Christ, when from 100 to 2000 citizens passed judgment on the accused, the modern use of juries began with an order by Henry II of England in 1166. The king said that a litigant in a dispute about title to land could summon a royal jury. The men on the jury were called because they knew the facts in the disputed case, and were rejected if they did not. The litigant won when he got 12 oaths.

This was the origin of the requirement that 12 jurors be used and their findings be unanimous. The right to trial by jury was formally articulated in the Magna Charta, a charter of rights signed by King John of England in 1215. Procedures have changed gradually so that today a person with prior knowledge of the facts in a case probably would *not* be permitted to serve as a juror.

The jury is to decide what really happened. It weighs testimony and decides which allegations are true. The judge, on the other hand, decides which laws apply to the case and instructs the jury on the principles and application of the laws.

Over the years, courts have devised many techniques for assuring that a jury is impartial and represents the community. The right to a trial of your peers doesn't mean that you have the right to a jury of people just like yourself. A female defendant can't have all-woman jury. Rather, a jury of your peers means a representative selection of members of the community.

Most jurisdictions have elaborate procedures for creating a pool of potential jurors that accurately represents the community. However, certain persons are not eligible for jury service: aliens, youngsters under the age of majority, the aged, those who can't read and write English.

Judges and lawyers try to see that the persons chosen from this pool to serve on a jury are truly impartial. In some jurisdictions, judges conduct most of the questioning during voir dire (jury

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examination); in other states, the competing lawyers ask the questions. Prospective jurors may be challenged for cause if they exhibit bias—for example, if they are related to one of the parties or the attorneys, or if they stand to benefit directly or indirectly by a decision for one side or the other, or if they have a fixed opinion. A certain amount of challenges not for cause (peremptory challenges) are allowed each side.

Jurors are sworn to decide the case only on the evidence presented in open court. They are not supposed to research the case themselves, going beyond the evidence presented. They're not supposed to read law books or visit the scene of the crime on their own, on the assumption that their attempts to gather evidence will be incomplete and may favor one side over another. Nor, in most jurisdictions, are they supposed to take notes, on the assumption that their notes will inevitably highlight some parts of the testimony and not others, making it harder to review the whole case during deliberations.

If you want students to get a sense of what it's like to be a juror, arranged for them to visit a court. Contact the judge's secretary or the clerk at your local court. Arrange to visit court when a new jury is being summoned on a one day/one trial basis or for a traditional month-long session. Observe the juror orientation provided by the court. Is this orientation clear and complete? Does it help jurors understand their responsibilities? If attorneys can serve as resource persons for your jury study, ask them to give the students a classroom orientation prior to your court visit and see if they can accompany your class to court.

Following the juror orientation session, students should follow potential jurors to a courtroom to observe the impanelling (selection) process. The judge will briefly describe the case before potential jurors are asked questions by the attorneys. Students should take notes on the types of questions which are being asked. What type of person would the prosecutor want to sit on the jury? What type of person would defense counsel want? Is it possible to select an impartial jury of one's peers? If your attorney resource people are serving as defense counsel or prosecutors the day you go to court, observe their jury impanelling sessions and discuss with them what went on either during a recess or later in the classroom.

Some of the questions which students are likely to hear are routine ones such as:

1. Where do you work?
2. What do you like to do in your spare time?
3. Have you ever been a victim of crime?
4. Have you ever served on a jury?
5. Do you remember reading anything about this case?

The prosecution is likely to ask such question as:

1. How do you feel about circumstantial evidence, evidence which isn't direct but can be inferred by the testimony?
2. Could you convict someone for a crime of this sort?
3. Would you require an eyewitness to convict?
4. If a police officer took the stand, would you regard his testimony the same as you would that of anyone else?

On the other hand, defense counsel might ask such questions as:

1. Do you think the defendant must be guilty or he wouldn't be here?
2. Would you hold it against the defendant if he didn't take the stand?
3. If he did take the stand would you judge his credibility just as you would that of any other witness?
4. If you or someone you love were accused of a crime, would you want a person just like yourself in the jury box?

Review these sample questions with students before you go to court. Ask them why these questions would be asked. Do students believe the prosecutor and the defense attorney are trying for an impartial jury or one that's good for their cause? Are these two positions compatible?

In impanelling a jury, both sides are allowed a certain number of peremptory challenges, enabling them to dismiss potential jurors without giving reasons to the court. In some cases, lawyers for one side might try to exclude whole categories of people (the young, the old, Jews, blacks, etc.). Do students think this is fair? Is it possible to have a jury that does not represent a cross section of the community because certain people can be excluded by this process?

After observing the actual impanelling of a jury, discuss what social and psychological factors might have influenced juror selection. Ask students if they feel that such factors as career, sex, political beliefs, socio-economic status, nationality, and race influenced who was selected for the case? (In general, women are thought to be more sympathetic to the defense, men to the prosecution. The affluent are thought to be more sympathe-

COUNSELOR
BURBANK

"*And of course college is* mandatory *if you want to learn to read and write.*"

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tic to the prosecution, the poor to the defense. Ethnicity and race are thought to be important too.) Are these factors important in guaranteeing the right of the defendant to an impartial jury of his peers? Or do these factors restrict that chance?

In our system, more than 100 potential jurors sometimes pass through the jury box before 14 are chosen (12 regulars and two alternates). Does this process guarantee impartiality and a jury of one's peers or does it just waste time and frustrate the system? In England the judge calls the first 12 potential jurors and simply asks one question: "Can you give a fair hearing to both the crown and the defense?" If we practiced this procedure in the United States, would we have impartial juries of our peers?

Strategy

2.

Applying the Law to the Facts

If the students are to be players and not just spectators in the court system, they must not only understand the concepts of impartiality and community representation, but also the rules jurors must follow. This teaching strategy is designed to demonstrate some of the problems of the judge's charge to the jury following the introduction of all the evidence and arguments. Since this lesson stresses communication skills, you might use it for English classes.

A recent study by the U.S. Department of Justice found that the average juror may understand no more than half of a judge's instructions on how to apply the law to the facts, resulting in "lawless verdicts" on a defendant's guilt or innocence. Among the recommendations growing out of the study were that common language be used in legal instructions and that jurors be allowed to take written instructions with them when deliberations begin.

The judge's instructions tell the jury what must be proven in order to find the defendant guilty, or, in a civil suit, to find for the plaintiff. The state must prove a criminal case beyond a reasonable doubt and the plaintiff must prove a civil case by a preponderance of the evidence.

Discuss these two burdens of proof with your students. Ask an attorney to define these and discuss them with your class as part of your total study activities.

Traditionally, jury instructions consist of lengthy statements of abstract legal propositions accompanied by definitions of the legal terms used. There's a reason for all these legalisms. Since improper instructions constitute grounds for reversal, judges' instructions are often written to satisfy the appellate court which may ultimately review the case. Here's a part of a standard conspiracy charge. Play the role of the judge and read these instructions to your students.

> A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of 'partnership in criminal purposes,' in which each member becomes the agent of every other member. The gist of the offense, is a combination of agreement to disobey, or to disregard, the law.
>
> Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.
>
> However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.
>
> The evidence in the case need not establish that all the means or methods set forth as the indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods, which were agreed upon, were actually used or put into operation; nor that all the persons charged to have been members of the alleged conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

By this time your students will be twitching, bored and turned off (and this is less than half of the charge). Some jury charges can go on for hours. Ask your students to discuss words and phrases which they do not understand. How would they feel if they had to follow these instructions? Now read the following version of the same instructions.

> In this case, the defendant is accused of having been a member of a conspiracy to import cocaine. A conspiracy is a kind of criminal partnership; an agreement or combination of two or more people to do something unlawful. The agreement or combination is the crime; it does not matter whether it was successful or not.
>
> It is not necessary that the members of a conspiracy made a formal agreement or that they agreed on every detail of the conspiracy. On the other hand, it is not enough if you merely find that they associated together, discussed matters of common interest, acted in similar ways or helped one another. You must find beyond a reasonable doubt a joint plan to import cocaine.

Since many states call 18-year-olds for jury duty, students must understand what it's like to be a juror, whether they can understand the rules, and, if not, what they might do to change them or at least bring attention to the problem.

Have students ask a judge for a copy of one of his standard instructions for a given crime. See what they can do to make the charge more understandable for the average citizen. Ask them to rewrite the instructions in more comprehensible form, then review their changes with the judge to see if all necessary legal elements are present.

The following guidelines can be applied to this strategy.

1. Omit unnecessary words.
2. Use simple, concrete words.
3. Use short sentences.
4. Avoid negative words.
5. Present the subject matter in an orderly, logical sequence.

If students can't secure a copy of a judge's actual charge, ask them to rewrite the following forgery charge in more understandable language. Review the student's work with an attorney or a judge.

> In order to find the defendant guilty of the offense of forgery, the state must prove two things beyond a reasonable doubt:
>
> First: That the writing in question was falsely made, counterfeited, or altered by the defendant:
>
> Second: That the defendant acted with the specific *intent* to injure or defraud another party. (Emphasis added throughout this example.)
>
> In order to establish the first essential *element* of the offense, it is not necessary that the whole *instrument* be falsified or altered, but only that it have contained some material *misrepresentation* of fact. Thus, even though the signature of the instrument be the genuine signature of the *complainant*, if you find the amount was not written by the complainant, then you may find that the instrument was falsely made or altered.
>
> Intent to *defraud* is not *presumed* from the mere making of a false instrument. It may be found on the basis of some affirmative act or on the basis of other circumstances from which an intent may be *inferred*.

(Continued on page 59)

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Gary Rivlin

By Reason of Insanity

There's nothing more arcane and mysterious than the insanity laws

The show was on. Psychiatrist James Cavanaugh versus prosecutor Mike Gaggin.

The prosecutor: "Dr. Cavanaugh, if Mr. DeWit did not understand the criminality in his actions, why did he leave the scene through the fire escape?"

Dr. Cavanaugh: "This is because of the delusions he was suffering. It was typical of his psychotic actions, like swinging on a fire escape weeks before and crashing through the window of the neighbor below screaming that people were trying to kill him. On another occasion he axed down a door and accused one of his roommates of being a member of the Mafia. The way he left was very bizarre and hardly discreet. The same reason that he killed Mr. Clarke—that is, because of the threat he perceived Mr. Clarke presented—was the reason he did not leave through the downstairs lobby. He thought a policewoman was stationed by conspirators to arrest him, and that he had to elude the sharpshooters he thought were stationed on top of the building...."

On trial was Paul DeWit, accused killer. The facts of the case were clear. DeWit confessed to the fatal stabbing of his acting teacher, Everett Clarke, in a high-rise office building on Chicago's Michigan Avenue. His weapon was a pair of scissors that he had grabbed before leaving his apartment.

But not so plain was DeWit's mental state at the time of the crime, over two years prior to the trial. Despite the obvious difficulties—most notably that, in the last ten years, only two juries in Cook County (Illinois) have found a defendant not guilty by reason of insanity—DeWit was arguing that he was so deranged at the time of the killing that he could neither understand the criminality of his action nor conform his conduct to the law.

Prosecutor: "If he couldn't conform his conduct to the letter of the law, then why didn't DeWit kill Clarke when he first saw him?"

Dr. Cavanaugh: "Again, because of the delusions he was suffering...."

Cavanaugh believed DeWit to be psychotic, beset by delusions, so paranoid that he believed that half of his acquaintances, a number of strangers, and even his mother were trying to kill him. Dr. Robert Reifman, also a well-respected psychiatrist, concurred. He described DeWit as a schizophrenic, paranoid type. Or, to apply the legal terminology, criminally insane.

But the prosecution had its own highly regarded psychiatrist, Dr. Werner Tuteur. He too provided the jury with a long list of DeWit's problems. Tuteur, however, believed DeWit to be sane. The legal definition of insanity is clear: a defendant is insane only if (1) he were so ill he could not conform his conduct to the law, or (2) he did not realize the criminality in the offense. Tuteur believed neither applied in the case of DeWit. Says the prosecutor, Mike Gaggin: "there is no question that DeWit wasn't the model of mental health, but there are all kinds of people walking around this country with defects that have nothing to do with their ability to conform to the law. DeWit knew what he was doing at the time, he knew the consequences. He brought the scissors with him—the act was premeditated. He escaped secretly out the window. Would he have committed the crime with a cop at his side? Obviously not. He had opportunities with other people there. But he waited. Yes, he's sexually troubled. He was a male whore. Yes, he had his problems but that doesn't mean we should relieve him of his responsibility for committing the crime."

Family, friends, and acquaintances of DeWit were also called in to testify by both the prosecution and defense, offering what many observers believe to be the more convincing pieces of testimony for a jury in an insanity trial. They trooped through the courtroom, spending just enough time to let the jury know of some of DeWit's more unusual idiosyncrasies, providing a bit more insight into his personal life. Some provided evidence suggesting that yes, DeWit was crazy at the time of the killing. Others presented a different scenario. "Now it's up to you, ladies and gentlemen of the jury. . . ."

Legal Compromise

What to do with Paul DeWit? What to do with any defendant accused of a violent crime but mentally troubled and unable to cope? The stories repeat themselves: broken homes, alcoholic mothers, child-molesting fathers; delusions of criminal bosses plotting to rub them out, CIA agents and assassination plots.

DeWit is troubled. He's mentally ill. But he's also a killer. He had everything but nothing. Raped by a male teacher while in high school. A teenage junkie, then an alcoholic. From a wealthy family, but with parents who spent more time abroad than at home. Now what kind of life is that, ladies and gentlemen of the jury?

A regrettable life and one in need of psychiatric care, answered the jury, but not a life that made him insane in the eyes of the law. The jury found him guilty but mentally ill, a new verdict in Illinois for people who are psychologically in need of help yet not legally insane, a compromise between the verdicts of not guilty by reason of insanity and guilty. DeWit had the distinction of being the first to be convicted under the new statute. If his appeals fail, he'll eventually go to prison. He'll get beat up. He'll receive poor mental care, if any. But Everett Clarke, his victim, fared far worse—he's dead.

"We talk about Paul DeWit's rights but Everett Clarke had a right to live, a right to teach drama, and a right to turn him [DeWit] down as a pupil," says prosecutor Gaggin. "Every resident of this city has the right to be protected from DeWit. I have a right to be protected from DeWit, you have a right to be protected from DeWit. What happens a few years down the road when he's let out of a mental hospital, and his delusions take over again?"

Gaggin's superior, Deputy State's Attorney William Kunkle, goes further, attacking the insanity defense in general: "The only way to adequately protect society from these people is to get rid of the insanity defense. The criminal justice system has passed off the complicated issue of intent to psychiatrists but they've failed, they've managed only to complicate matters. The fact of the matter is, psychiatry as a science is not up to the task."

Psychiatrists should not have to make black and white legal judgments on gray areas of their client's stability

Flipping Coins

To be sure, there are problems with the insanity defense. It is called, and justifiably so, the "white man's" or "rich man's" defense. A study of the insanity plea in New York revealed that 80 percent of the women and 65 percent of the men who were found not guilty by reason of insanity were white. In contrast, only 35 percent of the prisoners in New York penitentiaries are white. Another sub-group of questionable insane status, concludes the report, "appears to be 'persons of respectability' for whom citizens can feel considerable empathy. Among this group . . . [was] a bumbling, uncertain middle class youth, rebuffed by female counterparts, who committed rape to determine whether he could, in fact, have an erection and ejaculation with a woman."

Occasionally the courtroom is visited by a psychiatrist or psychologist of dubious repute, the forensic expert willing to provide any line of defense for the right price. There's also no question that the insanity plea has been abused by defendants, employed as a desperate defense of last resort. A Cook County state's attorney provides this example: "We had one guy in here who gave an oral and written confession of his murder. Five eyewitnesses saw him kill the victim. So what does he do? He pleads not guilty by reason of insanity, claiming that he was possessed by the devil, and brings in two exorcists to try to prove his claim."

But the greatest problem is this: the law demands more of psychiatry than it can offer. The law asks that the psychiatrist go back in time and evaluate a client. Cavanaugh didn't see DeWit until three and a half months after the crime, Reifman five months, and the third psychiatrist, Dr. Tuteur, almost seven months later. During that period, the accused had either been in jail or in a mental hospital. Conceivably, a person could be perfectly normal at the time of the psychiatrist's evaluation though criminally insane months prior.

The court also requires that psychiatrists take an extra step, asking them to wander into uncharted areas and make legal as well as medical judgments. The legal profession demands black and white answers—guilty or not guilty by reason of insanity; psychiatry is a science of gray, of gentle gradations of differences, a healing art of understanding and curing.

And then, if a defendant is found not guilty by reason of insanity, an understaffed and overcrowded mental health department must determine when a person is no longer dangerous to the community.

"Psychiatric participation in the determination of legal guilt or innocence," concludes the New York study on insanity, "is premised upon false assumptions of psychiatric expertise in what are essentially legal, moral, and social judgments."

To be sure, the dubious role the psychiatrist plays in the courtroom is in part the psychiatric community's own fault. In 1964, Judge (now Chief Justice) Warren E. Burger wrote that psychiatry is at best an "infant among the family of science" and that psychiatrists "may be claiming too much in relation to what they really understand about the human personality and human behavior." But, say Bruce Ennis, staff attorney with the New York Civil Liberties Union, and Thomas Litwack, a professor of psychology at the John Jay College of Criminal Justice, the legal community deserves its fair share of the blame. They write: "Psychiatrists have bitten off more than they can chew . . . [but] the fault is not theirs alone. [T]he legislators and courts, in an attempt to shift responsibility for making the determination of who shall remain free and who shall be confined, have turned to psychiatry, seeking easy answers when there are none."

Their article, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," questions the "extraordinary power" granted to psychiatrists.

Gary Rivlin is a YEFC staff writer and a contributor to many periodicals.

Psychiatrists have no special abilities, Ennis and Litwak assert; indeed, psychiatrists are hardly more qualified than "a grocer or a clerk" to provide the answers required by law. "Unfortunately, judges and legislators are not aware of the enormous and relatively consistent body of professional literature questioning the reliability and validity of psychiatric evaluations and predictions."

Most of these problems shouldn't exist, Cook County's Bill Kunkle argues, because there's no reason to have an insanity defense: "Laws are written precisely because our impulses are often quite strong and because our judgment often needs to be constrained. The insanity defense provides a separate defense for people who knowingly committed a crime and claim that they couldn't help themselves." Quips University of Chicago law professor, Norval Morris, as quoted in the *New York Times*, "Why not a defense of 'dwelling in a Negro ghetto'? Such an adverse social and subcultural background is statistically more criminogenic than is psychosis."

Often psychiatrists themselves launch rage-filled attacks on the false expertise of some colleagues. Dr. Thomas Szasz, writing in *Inquiry* magazine, called them "hand-gun psychiatrists" and "the perverters of our justice system." He used the example of the psychiatrists who testified on behalf of Dan White, the ex-cop who killed Mayor George Moscone of San Francisco and Supervisor Harvey Milk, calling them "accomplices" to this "travesty of justice." White was found guilty of voluntary manslaughter rather than the original charge of murder because of psychiatric testimony, which the press dubbed "the Twinkie defense" because one psychiatrist said that White's compulsive diet of candy bars, cupcakes, and Cokes was evidence of a deep depression and had aggravated a chemical imbalance in his brain. Following a verdict many believed to be far too lenient, a riot erupted in front of San Francisco's city hall.

The *White* case is indicative of the outrage caused by psychiatric testimony in the courtroom. But protests against the premature release of committed patients can be as vociferous. Witness the case of George Fitzsimmons, which outraged the city of Buffalo, New York.

Fitzsimmons killed both of his parents with a series of karate chops to the neck. He was found not guilty by reason of insanity, and committed to Buffalo State Hospital. For four years, he received intense psychiatric care. Supposedly cured, he was released in the custody of his aunt and uncle. Eight months later, he stabbed both of them to death.

"The public cannot expect the mental health community to protect them from violent people," asserts Dr. Alan Stone, professor of law and psychology at Harvard Law School. "If society wants to be protected from violent people, or to punish them, we should lock them up in prisons."

A problem mental health officials face is that patients often seemed "cured" when released, but then are confronted with the same problems that created their ailments initially. An example of this is a Maine woman accused of drowning three of her children. A team of psychiatrists held that the woman was insane, and she was committed to a state mental hospital. Seven years later, once again free, she drowned three more of her children and committed suicide, leaving a note saying: "God told me to do it. They are in heaven safe from evil."

A defendant's intent is often on trial and makes the difference between life in prison or in a mental ward

These and similar cases (one need not look hard to find them) provide convincing testimony for Dr. Stone's warnings. As uncertain as their evaluation of past mental states is, psychiatrists' attempts to predict future behavior, many critics say, are even worse.

"An underlying problem is the state of the art," says Georgetown University professor of psychology Daniel Robinson. "Namely, we're not very good at predicting who is going to behave badly in the future, even among mentally ill persons.... By and large, in terms of predicting future deviant behavior, there is no body of expertise that has a high degree of reliability."

Broiling Their Brains

Why not rid the system of the insanity defense? First, the issue must be placed in proper perspective. Rarely is the insanity defense raised and even more seldom does it convince a judge or jury. The notion that abolishing the defense is critical to the war on violent crime is fallacious. In the federal system, for example, an average of 50 people per year are found not guilty by reason of insanity. Not all these defendants were involved in crimes of violence, and the vast majority will not commit a similar crime again.

It is particularly difficult to convince a jury that a defendant who has actually killed—especially those accused of heinous acts—should be acquitted. "Juries may think a guy is as crazy as they come," says a Cook County state's attorney, "but they don't look forward to seeing that guy back on the street in a few years." Of the two defendants found not guilty by reason of insanity in Cook County over the last ten years, only one was accused of murder, and he was accused of killing his wife.

"The law has been interpreted so narrowly only drooling idiots and raving madmen could be said to be legally insane," writes Dr. Richard Gambino of Queens College. "A countless number of pathetic, mentally disordered individuals have been found guilty and put into prisons with hardened criminals. Frequently, the law has also resulted in society's broiling the brains of psychotic people in the electric chair."

As a society, we have always accorded special treatment to people whose actions seem to be the result of a mental disorder. Yet at the same time we don't want to see these people turned loose. The insanity defense is our legal way out of this moral dilemma. It permits insane people to be taken off the streets and also receive medical treatment. As federal appeals court judge David Bazelon wrote in 1954: "Our collective conscience does not allow punishment when it cannot impose blame."

"I don't think society has the right to punish a person who didn't understand what he was doing, or didn't appreciate the wrongfulness of his act," says Dr. Daniel Schwartz, director of the forensic psychiatry division of New York City's King County Hospital. "The problem is that whenever someone is acquitted under the defense, the public is outraged because they think somebody has gotten away with something. But he didn't really get away with anything, because by law, he didn't do anything wrong."

"You can't just legislate out of existence 400 years of history," says attorney Barbara Weiner of Illinois' Isaac Ray psychiatric center, "especially because of a few freak accidents over the years. A person cannot be defined 'a criminal' unless he or she is capable of forming intent, which means they must engage in the psychological activity of 'meaningful choice' in regard to that act."

She continues: "There's a difference between a killer who robs a ma and pa

(Continued on page 49)

Tailoring the Sentence to Fit the Criminal

Around the country,
judges are experimenting with creative
sentences and finding imaginative
alternatives to overcrowded
prisons

Massachusetts Judge Albert Kramer considered the case of the 19-year-old accused of breaking and entering. The evidence against him was substantial; police had caught him leaving the house. But what could Kramer do with the youth? Jail would cost taxpayers much more than the $35 damage caused by the break-in. Contact with other offenders might turn this one-time delinquent to a lifelong career of crime. A fine made no sense if the youth could not afford to pay. And neither jail nor fine would aid the elderly couple whose house had been damaged.

The homeowners were called into the courtroom. The judge told them that they had the right to ask for $35, or the boy could be sentenced to perform some service for them. The woman said she was frightened and did not want to see the offender again. Her husband was more receptive. The judge supervised the making of a contract which said that the $35 obligation would be met if the youth helped to paint the victims' house.

Such contracts are common in Judge Kramer's Quincy, Massachusetts courtroom. Under the "Earn-It" program, a defendant gets the chance to make restitution to his victim. If the victim wishes to avoid personal contact, the offender is given a job with one of 100 cooperating organizations so that he can earn money to make restitution. If the crime is victimless, as in the case of disturbing the peace, the offender might be sentenced to work in a day care center or at an organization like the Red Cross.

The sentences of the Earn-It program are not unique. Across the country, trial judges feel a need for an alternative to jail or fine. Some judges think jail seems inappropriate for the youthful shoplifter or someone who commits a crime of passion. More controversially, other judges do not think businessmen should go to jail for violating complex and erratically enforced regulatory laws. Yet some control over an offender is necessary in order to steer him away from future antisocial behavior. Judges try to achieve this through novel sentencing.

The first creative sentences were one-shot affairs. In a small town, the judge, feeling that he could serve a community need, would offer a defendant a chance to avoid jail by providing volunteer services at a nursing home or painting benches at a local park. Or he would seek to impose a community-related punishment which he believed would be particularly effective in preventing the repetition of a crime. Frequently a reckless driver would be required to spend 10 hours in an emergency room. These judicially devised projects rarely permitted any supervision and some judges had no real notion of the overall needs of the community. "No self-respecting emergency room needs the help of a traffic offender" observes Barbara Morse, executive director of the Alameda County Volunteer Bureau. And most judges, plagued with overcrowded dockets, have no time to run a community-service placement bureau on the side.

The Problem with Prisons

The need for organized alternative sentencing programs became acute after a landmark Supreme Court case. In *Tate v. Short*, 401 U.S. 395 (1971), the Supreme Court declared unconstitutional a law which imposed a jail term for people who could not afford to pay the fine, such as the traditional sentence of 30 days or 30 dollars. Courts began searching frantically for an alternative to jail for defendants who could not pay.

In the decade since the *Tate* case, courts in at least half the states have used creative sentencing. It has become a viable alternative punishment in part because there is not enough prison space. Prisons are almost universally overpopulated. As a result, 28 states and the District of Columbia are under court orders to reduce the crowding in prisons. In Michigan, for example, every time the prisons exceed their capacity for 30 days in a row, the governor is required to shorten all minimum sentences by 90

FIVE-YEAR SENTENCE
Case No. 40-176A
JOHN JONES

1. graduate from high school
2. attend Alcoholics Anonymous
3. maintain full-time job
4. spend 8 hours a week in emergency room of local hospital
5. submit to periodic tests to indicate abstinence from alcohol
6. refrain from any moving violations as a driver

days, releasing hundreds of inmates before their time.

The Attorney General's Task Force on Violent Crime has advocated building more prisons, but the actual cost would be extremely high. "Can we afford to build new prisons at a per-cell cost comparable to the price of a middle-class home?" asks Donald J. Newman, dean of the School of Criminal Justice at the State University of New York at Albany. "How many prisoners should we warehouse at an annual cost per inmate comparable to the $13,500 annual cost of attending the Harvard Medical School?"

Alternatives to fine and imprisonment have taken a variety of forms. When a hunter was found guilty of killing a rare Polish mute swan, he was ordered to spend two weeks working at a state game preserve and write a report on the book, *Ducks, Geese and Swans of North America*. In Los Angeles, a meat-packing company which pleaded guilty to bribing federal meat inspectors was sentenced to hire ex-cons and train them as meat cutters. And when a New York man pleaded guilty to shouting obscenities at a policeman, he was given a choice of paying $50 or having his mouth washed out with soap. He chose the more creative punishment.

The sentence itself may have multiple components. In one case, a 20-year-old who pleaded guilty to alcohol-related manslaughter by automobile received a sentence mandating his activities for 70 to 80 hours a week for five years. Montgomery County, Maryland District Court Judge Stanley B. Frosh asked him to (1) graduate from high school, (2) attend Alcoholics Anonymous, (3) maintain a full time job, (4) spend eight hours a week in the emergency room of a local hospital, (5) submit to periodic urinalysis or blood tests to indicate his abstinence from alcohol, and (6) refrain from any moving violations as a driver.

The Legal Basis

Creative punishment is imposed in one of two ways. In some states, statutes allow a judge to postpone entering a final judgment of guilty. If the offender successfully undertakes an activity suggested by the judge, a trial finding of not guilty may be entered. In other states, judges enter a judgment and use creative punishment to impose wide-ranging conditions on probation. In either instance, judges usually have wide discretion in determining an appropriate sentence. An illustrative court opinion states, "The sentencing judge has a broad power to impose conditions designed to serve the accused and the community."

Although some of the initial uses of creative punishment were in cases involving shoplifting or juvenile offenses, it is now being used in felony, as well as misdemeanor cases. Every defendant from the pickpocket to the sniper is a potential candidate for these novel sanctions. In one case, a Florida woman convicted of murdering her husband in a domestic row was sentenced to teach Sunday School for five years.

A distributor of pornographic publications was sentenced by the judge to distribute 3,000 "clean" books.

Often a defendant's suitability for alternative sentencing is determined by his or her psychological traits, rather than the crimes committed. "Someone arrested for a ten-dollar theft may have so many problems as to be unfit for the programs, while another offender who has committed a violent crime may be otherwise well-adjusted and could benefit greatly," notes Judge Kramer. Studies have shown that except in drug and traffic cases, there is no relationship between the type of offense and the defendant's success on probation.

Judicial Reasoning

Although the extensive use of creative penance is relatively new, judges justify their novel sentences according to the traditional rationales for punishment. Proponents of novel sentences claim that they are at least as effective as jail or a fine in deterring potential offenders, protecting the community, repaying the victims or the community, and reforming the accused.

When Charles Renfrew was a federal district court judge in California he felt that novel sentences could deter. He sentenced antitrust violators to give speeches to business groups, hoping that it would prevent listeners from committing similar violations. Quincy's Chief Probation Officer Andrew Klein finds that the Earn-It program serves an important deterrent function. "When a kid is put on probation for breaking windows in his school, the other kids don't see that he's been punished," says Klein. "But under Earn-It, the punishment is highly visible since the offender spends the next two weeks working with the maintenance department to repair the damage." Phoenix Federal District Judge Charles Muecke believes that the publicity following surprising sentences will prevent crime more effectively than will jailing a particular defendant.

Judges also use novel sentences to protect the community by imposing conditions on probation that make it more difficult for the convict to commit a second offense. In one case, a pickpocket was granted probation on the condition that he wear mittens whenever he ventured into a crowd. A California man convicted of gun-running to the Irish Republican Army was prohibited from associating "with Irish Catholic organizations or groups" or visiting "any Irish pubs." An Illinois man guilty of assault and battery in a bar was forced to give up his job as a bartender.

In some cases, the offender is asked to pay back the victim—sometimes in cash, sometimes with services. "If, due to the crime, the victim can't perform certain things, the criminal may be requested to do it," says Joshua Kaufman of Creative Alternatives to Prison. "In one recent case, a defendant was sentenced to spend a day a week with the victim for 25 years and take him on a two-week vacation at Christmas."

Sometimes offenders are not asked specifically to make a reparation to their victim, but are ordered to serve the community in some other way. The sentence may relate in some way to the crime, or draw upon a particular talent or resource of the defendant. A distributor of pornographic publications was ordered by Chicago Judge Marvin Aspen to send 3,000 "clean" books to the Cook County library. An unemployed artist busted for cocaine possession and sale was sentenced to teach art in a school for mentally retarded children. And when a middle-aged attorney misappropriated over $9,000 from a client's estate, he was sentenced both to make restitution and to give 10 hours per week free legal advice to the elderly.

Reform is also a prime rationale for creative sentences. When a woman was found guilty of recklessly causing a forest

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Lori B. Andrews and Stephen Barrett Kanner spent more time working on this article than most offenders spend executing their creative sentences. They are both graduates of Yale University and Yale Law School and members of the Elizabethan Club. She's a Chicago lawyer; he practices law in Washington, D.C. and California.

fire, she was sentenced to help forestry officials with a reseeding project, compile data about forest fires in the state, and lecture at local schools on the dangers of forest fires. A California judge offered 200 misdemeanants the choice of jail or church. A 20-year-old Floridian who fired a rifle shot into the home of an interracial couple was sentenced to attend political breakfasts in a black community center. "This was so that he could learn that there is no reason to hate anybody, something he wouldn't have learned in prison," said the judge.

Often, judges attempt to reform the accused not by raising his social consciousness but by helping him get an education or a job. "Functional illiteracy is one of the most important factors in crime" says Judge Lois Forer, a Philadelphia criminal court judge. "Eighty percent of the people who come through my courtroom have committed a crime because they can't find a job." One Florida judge allowed offenders to forgo prison if they promised to attend school. The Earn-It program keeps a listing of jobs so that instead of being jailed an offender can earn money to pay his victim. The program does not place people in specific jobs, but rather allows them to be interviewed by several employers. In this way, defendants are given the opportunity to learn interviewing techniques as well as to make money.

"In about a third of our cases, the individual is asked to stay on the job full time after he has fulfilled his commitment," says Andrew Klein, probation officer in the Earn-It program. "We don't like to advertise that because we don't want people to think that the way to get a job is to commit a crime."

Beyond the Novelty

Novel sentences demonstrate judicial ingenuity, but do they actually achieve the traditional goals of punishment? Few systematic studies have examined whether novel sentences fulfill their purposes. Judge Renfrew polled the people who had heard the price-fixer's speeches to see if they would be deterred from committing similar crimes. But his "study" had many defects. Only 4 percent of the audience responded, and even these answers may have been influenced by the respondents' knowledge that the poll was being conducted by the sentencing judge himself.

If a judge tells a defendant to "give a speech about the crime," the sentence may actually backfire. Since there is no stipulation that the offender must discuss how he has been reformed or why others should not violate the law, the offender could meet the requirements of the sentence by telling audiences "crime does pay." When a Lansing, Michigan man was arrested recently by a policewoman posing as a prostitute, the judge ordered him to write an essay for the local newspaper about his run-in with the law. Instead of expressing remorse and embarrassment, he told how the arrest had improved his sex life with his wife.

The efficacy of the sentence is dubious with other types of creative punishment as well. For example, one Chicago judge told a 19-year-old woman who had been convicted of burglary to listen to the Donna Summers record "Bad Girls," hardly a mandate which strikes fear into the hearts of criminals.

Do new sentences allow white collar criminals to escape prison and thereby encourage suite crime?

An American Bar Association report points out that problems occur when courts have to take the initiative in finding placements. In one antitrust case, a federal judge in Chicago was faced with two defendants who were knowledgeable about air conditioning and heating systems. He decided the best use of the defendants' talents would be in finding out what was wrong with the federal court's ventilation system, which bathed courtrooms in tropical temperatures in the summer and arctic air in the winter. However, when the defendants tried to investigate the system, the people in charge of the building were unwilling to cooperate. The judge finally had to drop the condition of their probation as impossible to fulfill.

Most courts do not keep track of the creative sentences imposed—or whether the offender has fulfilled them. Programs that do keep statistics measure success in terms of the completion of the work rather than the reform of the individual or protection of the community. One program may even foster a revolving door of crime by letting offenders participate in the program up to five times.

There are also concerns about the suitability of defendants who perform important child care or hospital tasks without any training. The cursory screening of participants in some programs—a Maryland judge uses law student volunteers with no special training to screen the defendants—can also lead to the placement of offenders in situations where they can do more harm than good.

"Judges who have assigned drunk drivers to the emergency room of a hospital," says L.A. County Superior Court Judge Eric Younger, "are the people who end up in *Time* magazine. It's all very sexy, but in Los Angeles, our hospitals take a somewhat narrow view of that. They'd rather pick the people who work in their emergency rooms on some basis other than a bad driving record."

And where the criminal has tried to harm an animal or person, it seems a bit absurd to put the offender in charge of the care of his former victim. To put it bluntly, would you want the person who mugged you walking you home—or taking you on a Christmas vacation?

The use of creative punishment has come under attack from a variety of sources. When the Montgomery County, Maryland judge found the 20-year-old guilty of manslaughter and sentenced him to a variety of creative alternatives, the victims' families were shocked. "You call that justice," said the father of a dead 15-year-old. "He's been let off scotfree," said the victim's aunt. "I don't think [the judge] had any compassion for the families of the children who died."

In other instances, people wonder why felons should get better educations and greater job opportunities than law-abiding citizens. Some unions have protested against work release programs that might interfere with members' jobs.

Attorneys for both the prosecution and defense are also beginning to wonder if creative penance has as many bugs as the 30-days-or-30-dollars system. Many novel sentences cause legal problems relating to discrimination, appealability, and constitutional liberties.

Some prosecutors complain that creative punishment is being used preferentially to allow white collar criminals to escape prison. This, they say, further encourages "crime in the suites." When novel sentences are imposed on an ad hoc basis, often on the defense attorney's initiative, the ability of the wealthy white-collar criminal to propose a scheme of charitable activity in lieu of prison puts him at a great advantage over the petty criminal with neither contacts nor highly-valued skills.

Defense attorneys also have qualms about judicial ground-breaking in sentencing. One of the tenets of the criminal law system is the notion of "two-bits"—

(Continued on page 47)

George H. Williams

How I'd run the courts . . .

If I Were Dictator

Farewell address of the Grand Wizzar, Imperial Hall, Oz, April 1, 2016:

Greetings to you, countrymen and countrywomen!

On this the eve of our nation's return to that most precious form of government foreseen by our forefathers, it is well for me to remind you that once democracy is regained all of you must work diligently at keeping it alive and healthy. You cannot let it slip from your grasp as you did some years ago when I first became Grand Wizzar of this land.

I never really aspired to be even a Petit Wizzar, let alone Grand Wizzar—it is a thankless, lonely, exhausting position, and I am mighty glad to be rid of it. In the vernacular of an earlier age, being leader is no piece of cake. This Grand Wizzar business was forced on me by general citizen indifference to the affairs of government and inattention to the performance record of those who governed. It reached that unhappy point where no one was in charge . . . or was it that everyone was in charge? No difference, the result is the same. Finally your choice came down to leadership of the Balanced Bureaucracy Party or me. You can count your lucky stars for the choice you made.

While I am as glad as you are that our country's rule is being returned to the people tomorrow, I hope that you will think kindly of the Grand Wizzar and that our historians will deal generously with my efforts, if for no other reason than what I was able to do by way of reforming the administration of justice.

When I became Grand Wizzar, you remember, our courts were behaving like the legislature. The legislature in turn was behaving rather like the executive and the executive was rather not behaving at all. Nothing in our country seemed to be in ascendancy—except inflation and interest rates—and nothing really worked except those little imported cars. It was indeed a time of crisis, and it called for action.

As you know, I moved simply—and swiftly—to a theme of "Get Something Working Right" (GSWR), and many of you were among the millions who wore the red and blue buttons with those very letters imprinted on them. What an inspiring moment in my reign, what a novel idea—"Get Something Working Right"—and how that simple notion struck home with a nation sick of big talk, big plans, and big failures.

Armed with the absolute authority with which you had invested me, I applied GSWR by infusing our justice system with some plain common sense ideas, but not without a lot of resistance from those to whom any change was threatening. After all, the system had survived with only a modicum of common sense for a long while.

I reasoned that if I could just tidy up the courts, the people would not rest until other branches got (as the saying used to go) their acts together. My keystone was the courts, and almost any move had a strong potential for being in the right direction. Delay was rampant, cost intolerable, and even simple reforms impossible. There were so many cases waiting to be heard that by the time the average person got to court, witnesses had died or were senile or had moved away. When a case was heard it often had cost more to get it to trial than the amount of the recovery itself. No one seemed able to get a handle on the problem. The yellow brick road did indeed lead to the courthouse.

Judges were fed up with this unhappy condition, as well as with the petty politics with which many had to contend to get or keep their judgeships. This deteriorating situation accelerated popular loss of confidence in the justice system, and this further disenchanted good judges, many of whom returned to the lucrative practice of law. If the system was to be transformed and if confidence was to be restored, it required surgery, not aspirin.

It seemed that every element of our society was bringing their disputes, large and small, to the courthouse. Some suits got there just because another branch of government was reluctant to make a hard decision. Virtually every new statute or regulation had to be tested in the courts. The cost of administering justice escalated and legal fees skyrocketed. Additional judgeships and new courthouses placed an added strain on the judicial budget.

For the first time, the public began to indicate its dissatisfaction with the judicial system. This discontent was demonstrated even in our media and in

BEST COPY AVAILABLE

our public opinion polls. Citizens who had been exposed to the courts in action were the most dissatisfied of all.

The first thing your Grand Wizzar was to remove judgeships from the threat of political influence. Believe it or not, in many places judges actually had to run for office in partisan elections, like a bunch of aldermen. During their campaigns, judges had to take the stump and make all kinds of promises or statements about how they would decide a case in advance—just to get the needed votes.

They also had to get money to finance their campaigns. Most often, this money was obtained from their fellow lawyers. Many of these same lawyers who contributed heavily to their campaigns would later bring cases before the judges. At best, this put the judge in a compromising position. At worst, it allowed factors that had absolutely nothing to do with the merits of a case to influence its outcome.

By removing judges from this kind of political arena, I enabled them to address controversial issues in the courtroom and not in some smokefilled backroom. Thus decisions came to be based on jurisprudence rather than politics. This provided us better judges than before, but you would not believe the paltry salaries many were getting paid compared to entertainers and players of the national pastimes. As was inevitable, by the 1980s skilled judges with children to educate were leaving the bench in droves. So I just set new salaries myself instead of leaving that up to the legislators who were making political hay with them at the expense of our system of justice.

Another of my decrees set up very informal minor dispute resolution courts where the conflicting parties could have their say without fanfare or a lot of paperwork and get something decided without generating a whole new chain of appeals. I insisted on these courts being presided over by a nonlawyer and refused to allow the parties to bring lawyers with them into court. This was pure genius, and you would be surprised at how much this speeded things up. All over our land mole hills stopped turning into mountains.

It also left able judges and lawyers free to address more consequential and complex issues. For those who did not like or could not get used to the minor dispute resolution courts, I provided an option for many litigants to agree on a mutually compatible retired judge to hear and decide the controversy at their own expense. The retired judges liked the work and the litigants liked the prompt results. Once again delay and red tape fell victim to common sense. By now court buildings were beginning to fly red and blue pennants on which appeared GSWR.

Nonetheless, some courts that heard appeals were still clogged. They thought they had to redecide or reaffirm every case that came along. I put a stop to that. To these courts, I gave discretion to determine what cases they would hear. They began to concentrate on important substantive issues rather than every frivolous technicality. While we were about it, I designated a red-and-blue-ribbon commission to simplify the rules of evidence so that they abetted rather than hindered the search for truth at trials.

The real breakthrough, however, came when we increased citizen involvement in three areas—the creation of citizen advisory boards, the dignifying of jury service, and the inclusion of nonlawyers on committees that helped to select judges and on commissions that acted when judges misbehaved.

The advisory boards assisted the courts by letting them know how the common people felt. The judges ran the courts and had all their usual independence, but they learned a lot from talking to people other than judges. The board members became great advocates for the courts since they saw the problems close up. They also became great supporters of the ablest judges and worked, among other things, for better judicial salaries and improved retirement benefits.

Dignifying jury service was easier than I had expected. In the 1970s, jury service was something people tried to avoid. They used to make up the wildest reasons for getting excused. This was because jury duty meant days or even weeks herded into large, dirty, unpleasant rooms more suited to those charged with offenses than to those who were to deliver verdicts in important cases.

For all these discontented souls, it was endless waiting. I decreed a new and less onerous arrangement. Jurors were to be called to serve one day. If chosen, the juror stayed for the duration of the trial. If not chosen, the juror was dismissed. In the long run, this gave more people an opportunity to participate in our judicial process with minimal inconvience to them. The only ones this inconvenienced were the jury commissioners, and it was about time that they were reminded that jury service did not have to be drudgery.

(Continued on page 59)

George H. Williams is executive director of the American Judicature Society. He was formerly president of American University in Washington, D.C.

"It's a pre-nuptial agreement. You won't ask for an unreasonable divorce settlement and I won't cut off your head."

Update's 1981 Compendium of Legal Lunacy

THEY CAUGHT HIM AT LE FRANCAIS ORDERING THE PRIME RIB

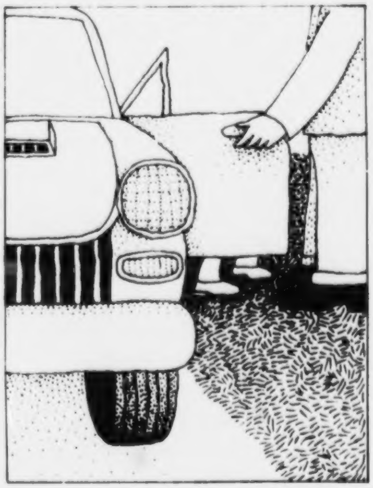
According to a Chicago woman, even man's best friend can't be trusted. Janice Miecikowski reported that a large Doberman pinscher wrapped its teeth around her arm as she got out of her parked car; it then growled savagely and tightened the grip until she dropped her purse. He then grabbed the purse and, in best mugger's style, took off down an alley.

HAVE YOU HEARD HIS SERMON—OIL ON TROUBLED SQUATTERS?

Msgr. Calliano Cavallaro of Providence, Rhode Island, became the instrument of God's wrath when he found unauthorized cars in the lot of his church. One unauthorized parker returned to find Cavallaro spraying his windshield with old transmission oil. Msgr. Cavallaro says he is not going to forgive them their trespasses until they "learn to respect people's property and not go where they don't belong."

WELL, IT DOES HAVE THAT STORY ABOUT THE NAKED WOMAN TEMPTED BY THE SNAKE

It began with an uproar over a youngster checking out the novel *Wifey* from the Whiteville, North Carolina, public library. The book chronicles an extramarital affair, and so now the library board is requiring children to get parental permission to take out grown-up books. This includes the Bible, which the library has always categorized as adult nonfiction.



HE SAID IT HELPED HIM PICK UP FOUR-YEAR-OLD GIRLS

Chad Engrebretson didn't see anything special about it, since he'd been driving for a year without an accident, but police in Bemidji, Minnesota, weren't amused. Even though Engrebretson successfully guided the family car through a 25-mile cruise around town before parking it, they said the four-foot-tall five-year-old was just too young.

AND THAT THERE'S NOT A SANTA

After he was charged with burglary, 24-year-old Glen Clark of Trenton, New Jersey, said he'd never steal again. The sudden attack of conscience came after he was pulled from the bottom of a chimney, where he'd been trapped nearly a week. "Now I know there is a God," he allowed.

BUT HIS REINDEER COULDN'T DO ANYTHING

Dan Kayes, 25, told Houston cops that he really wasn't trying to burglarize a cafe. Two guys who are angry at his wife's uncle caused all the trouble, Kayes told the cops suavely. "They told me to go up a ladder, and they pushed me down the chimney. I yelled for help all night long."

HE'S OBVIOUSLY NEVER MET BELLA ABZUG

Baltimore Police Commissioner Donald D. Pomerleau brought groans from spectators when he testified in a sex discrimination suit that "all the women are little balls of fluff." Pomerleau was being cross-examined in a suit brought against the police department by four female police officers. He said that the remark isn't sexist: "All women are little balls of fluff in the eyes of the Creator. It's an endearing term, a term I would use to describe my wife."

MODERN COMMITMENT

A Madison Avenue match made official in a Michigan Avenue art gallery displayed a bit of honest, good ole Main Street, U.S.A., sincerity. When photographer Bo Clausen was asked if he promised to love, honor, etc., publicist Irene Macauley, he answered, "I'll try."

THIS IS WHAT COMES OF LISTENING TO TOO MANY COUNTRY SONGS

The Reverend Gerald Mann opened a session of the Texas legislature with this prayer: "Lord, help these senators to remember that making laws is like a love affair: if it's easy, it's sleazy. Amen."

THANK GOD THEY WEREN'T NUCLEAR EXPLORERS

Five high school boys who were part of an Explorer post sponsored by a fire company were charged with arson in ten blazes that caused nearly a quarter of a million dollars in damages in Wilmington, Delaware. According to a fire marshal, they set the blazes so they could help firefighters: "They like being part of the excitement, part of what's going on, and being part of the official record."

UNLESS THEY HAVE *GREAT* LEGS

The federal government asked the school system in Chesterfield County, Virginia, to delete *majorette* from its student handbook on the ground that the word discriminates against young men. Calling the whole thing an "issuette," Chesterfield County officials said, "We have not had . . . any young men trying out for certain kinds of activities because most young men are very concerned about appearing in public with panties and short skirts."

NEXT THEY'LL PUT AIR BAGS IN THE GOWNS

Worried about the rowdiness of past commencements, and probably concerned about lawsuits for bloodied brows and other head injuries, Hempstead High School in Dubuque, Iowa, has come up with the ultimate nonweapon—foam mortarboards.

IN THE OLD VERSION IT WAS A GLASS SLIPPER

A 17-year-old Chicago youth was arrested for rape after his alleged victim scooted off with his pants and led police back to the scene of the attack.

NEXT TIME HE'S GOING TO BLAME CELIBACY

Twenty-eight-year-old Richard L. Gates, Jr., who told his seven hostages in a 90-minute seige that illiteracy made him unable to support his family, was sentenced by a Norristown, Pennsylvania, judge to learn reading and writing.

WE THOUGHT THEY GOT THAT WHEN THEY PASSED THE BAR

Florida lawyer Randy Ludacer has asked Congress for a letter of marque, which would make him a licensed privateer, like Jean Laffite and other colorful swashbucklers. Ludacer wants to wage war on drug smugglers in the Caribbean and enrich himself in the process by keeping a portion of the take. So far, Congress isn't jumping to reinstate the letter of marque, which has been described as a dressed-up version of the proverbial license to steal.

CRIMEFUCIUS SAY: RICHES SELDOM FOUND IN BAG WITH GREASY BOTTOM

Stickup men in Louisville watched while a Brink's guard took a bag from the A&P store, then pounced when he came out with the second bag. Bad choice. There was money in the first bag, doughnuts in the second.

TO THESE GUYS, THE DOUGHNUTS LOOK LIKE A NICE SCORE

Crooks in Lake Charles, Louisiana, clearly aren't ready to leave the wading pool. They thought they were getting away with the day's receipts at a fried chicken restaurant, but instead they grabbed a bag of chicken bones.

NOT IN SOME BARS WE KNOW OF

Chicago police figured they'd have no trouble finding Robert Thompson, a burglary suspect who slipped out of a hospital where he was being treated for a hand infection. It seems that Thompson slid down a drain pipe and escaped while wearing only a leg iron around his ankle. "You'd think he'd be easy to spot," said a Chicago cop.

M IS FOR THE MORAL WAY SHE SEES THINGS

A Chicago salesman thought he was in for a good time when he picked up four young female hitchhikers, but things went sour fast when they took him to a secluded spot and shot and robbed him. The mother of a 13-year-old girl charged in the crime put the whole thing in perspective: "There must be something wrong with that man, trying to take advantage of young girls."

O IS FOR HER OBJECTIVITY

When Virginia Kelly heard that her son had been arraigned on two counts of murder for allegedly firebombing a University of Michigan dormitory and killing two students as they fled the blaze, she mused, "I guess everybody has a temper now and then."

HIS NEW VOLUME IS *SECRETS OF MY PRISON ESCAPE*

Lots of people claim that they can help you save money on taxes, but Californian William Greene went one step farther. In his book, *Welcome to the Tax Revolt*, he boasted that he hadn't paid taxes since 1968. Is that so, said the feds. Soon after, a court found him guilty of income tax evasion and sentenced him to two years in the pen and a fine of $20,000.

THEY SAID THEY GOT TERRIBLE MILEAGE, BUT NO ONE EVER FOUGHT THEM FOR A PARKING SPACE

The case of the two Cincinnati men who violated a traffic law permitting only rubber-tired vehicles on streets will not be heard by the United States Supreme Court. The two had been found cruising around town in a Sherman tank and a seven-ton half-track.

PRAISE THE LORD AND PASS THE BALL

All hell has broken out in Tennessee over the state attorney general's ruling that group prayers by high school athletes are unconstitutional. "We'll just break the law Friday night," fumed Gallatin coach Galvin Short. "Our kids just wouldn't go out onto the field without a prayer."

AW, SHE ONLY USES THEM TO BORDER HER POPPY GARDEN

Grandma Jane Schimpff of LaJolla, California, was hauled in for growing $100,000 worth of marijuana. "They are beautiful plants," she told the arresting officer. She was shocked to hear they're illegal. Had she known, she said, "I would have done a better job of covering up. . . . I don't even smoke the damn things." She had no comment about the numerous marijuana growers' handbooks they found on her premises.

WE HEAR THOSE POOR FOLK REALLY LOVE HER OREGANO SPAGHETTI

Another California senior citizen, Mary Jane "Brownie Mary" Rathbun, has been ordered by a judge to spend 500 hours doing volunteer cooking for charity. Only this time the 64-year-old San Franciscan won't be able to add the one ingredient that made her brownies so beloved: marijuana.

WORSE, HE WAS BUYING THEM DIAMONDS AND FLYING THEM TO VEGAS

Divorce lawyers are still squirming over the Detroit case in which a woman was granted a divorce when she told the judge she was forced to support herself. Why? Her husband spent all his money on his 10,000 pet worms.

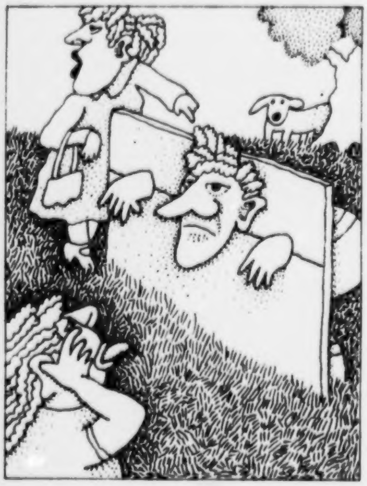
HAVE YOU LISTENED TO *HIM* LATELY?

Governor Jerry Brown did his civic duty

by serving as a juror in a case in which two Yugoslav immigrant brothers-in-law brought a family dispute to court. One of them felt bad for the governor, saying it was "embarrassing for Brown to listen to junk like that."

THEN ONE OF THE DOCTORS SPOKE ON "THE INVENTION OF THE AMBULANCE: A MILESTONE IN LEGAL HISTORY"

Lawyers and doctors in west Texas held a banquet to soothe strained relations that had developed over lawsuits between the professions. Everything was running smoothly until well-known trial lawyer Warren Burnett took the podium and remarked, "I feel moved to remind our hosts that while their professional ancestors were bleeding George Washington with leeches and teaching that the night air was poisonous, my professional ancestors were drawing up the Constitution of the United States—as noble a document as known to the minds of men or angels."



CRUEL AND UNUSUAL NOSTALGIA

The Bring Back the Pillory Committee of St. Albans, Vermont, has launched a drive to reinstate that old-time favorite of New Englanders—the public pillory, a wooden stanchion with holes in which a person's head and hands are locked so he can be exposed to ridicule. The committee, brought together by a wave of vandalism, wrote to the district court offering to build and pay for the pillory.

SEND US YOUR TIRED, BUT NOT YOUR HUNGRY

Veronique B. Talpe of Paris, France, was arrested when her tour bus had stopped in North Platte, Nebraska. Her crime: eating a grape at a grocery store. She didn't have to stand trial because the Lincoln County attorney thought it was inappropriate to give a person a criminal record for eating a piece of fruit worth less than a penny.

AND DON'T SPIT TOBACCO JUICE ON THE WITNESSES

State magistrates in West Virginia asked for a nuts-and-bolts course in judicial ethics, but Chief Justice Richard Neely may have gone farther than they intended. He told the magistrates to steer clear of the moonshine and 13-year-old girls and stay out of the "whorehouse business." Neely pooh-poohed this tempest in an old fruit jar, saying he believed in "using examples to make people sit up and listen."

EXCEPT YOU MISS YOUR MOLAR AFTERWARD

Dallas divorce lawyer Averill Sweitzer thinks he has a new world mark after wisking 40 unhappy couples through the legal mill and out of their marriages in 15 minutes flat. Says he, "I suppose it's like going to a dentist to get a tooth pulled."

HAS ANYONE TOLD MERLE HAGGARD ABOUT THIS?

They may not smoke marijuana in Muskogee, Oklahoma, but they sure know how to grow it. U.S. drug enforcement officials say that the Muskogee area is internationally famous for its high-grade weed.

SO SHE DOESN'T START WITHOUT YOU

A man being considered for jury duty in Oklahoma told U.S. District Court Judge Thomas Brett that he couldn't serve on Thursday because his wife was going to conceive a baby. "Don't you mean deliver a baby?" the judge asked. "No, she's going to conceive a baby," the man said. Brett excused the man from service. "I don't know what you mean," he said, "but in any event I think you ought to be there."

NO, WE *DON'T* WANT HER NUMBER

Michigan administrative law judge Leo J. LaPorte ruled that the family of a Michigan man who died after having sex with a co-worker is eligible for up to $250,000 in worker's compensation benefits. LaPorte ruled that the worker's assignment in England "exposed him to situations and hazards that were different in nature and degree than those found in Michigan." Because man is by nature a social creature, he continued, "It is not reasonable to expect that an employee who is on assignment to a distant land will simply stare at the walls of his hotel room after work."

AT LEAST THE THIEF LEFT THE SOAKING GLASS AND POLIDENT BEHIND

A set of George Washington's false teeth was stolen from the Smithsonian Institution, and even though three sets of Washington's teeth are still in existence, museum officials were crushed. Said a spokesman, "We are, needless to say, deeply distressed and deeply humiliated. . . .The Smithsonian holds these items in trust, and it is a very grievous and painful loss to us."

AND THEY'RE THINKING OF TAKING THE BOSTON STRANGLER OFF THE NECK RUB DETAIL

State officials in Alabama yanked Therese Burgess from her prison work-release job as a baby-sitter, on the grounds that she was in the pen in the first place for beating her own baby to death and had beaten one of the children she was baby-sitting for in the work-release program. In the understatement of the year, Deputy Prison Commissioner Joe Harper said that the baby-sitting job was "an inappropriate assignment."

A PSYCHOPATHIC PUPPY WOULD BE NICE

When Vincent Bugliosi was a prosecutor he sent the Manson family to jail. Now that he's an L.A. defense lawyer, he is looking for a client who commands headlines like Son of Sam and has the sentimental appeal of Patty Hearst. "To get known," he says, "you have to take some of the sensational cases."

WHAT ABOUT RENTING THEM THEIR CELLS AND PUTTING BREAD AND WATER ON THEIR ROOM SERVICE TABS?

Councilman John Logan of Grand Prairie, Texas, tried to raise money for the town by making crime suspects pay for their mug shots and finger prints. What if they're innocent? "You charge them anyway," says Logan. "If they raise hell, you can give the money back."

AND THEY ALL LISTED THEIR OCCUPATION AS "STARLET"

The Los Angeles Police Department reported that a three-day vice crackdown in Hollywood netted 74 suspected hookers—31 women and 43 men.

AND ISN'T HIS "BORN TO RAISE HELL" TATTOO CUNNING?

From Michael F. Colley, Columbus, Ohio, defense attorney, comes this advice: "Get each juror to think that there is a reasonable doubt because 'the defendant's a nice guy and I like him.'"

ISN'T THAT AGAINST THE DEAD MANN ACT?

More from Colley: "My clients have been trained to drag the body across the line to any state in which the rules are better."

ANSWERING THE AGE-OLD QUESTION: WHAT DO THEY DO AT THE PORK AND BEAN FACTORY WHILE THE BEANS ARE COOKING?

A Newport, Tennessee, jury ordered the Stokely Van Camp Corporation to pay $2,500 to a consumer who found a condom in a can of pork and beans. "Breach of warranty" is what the jury called the offense.

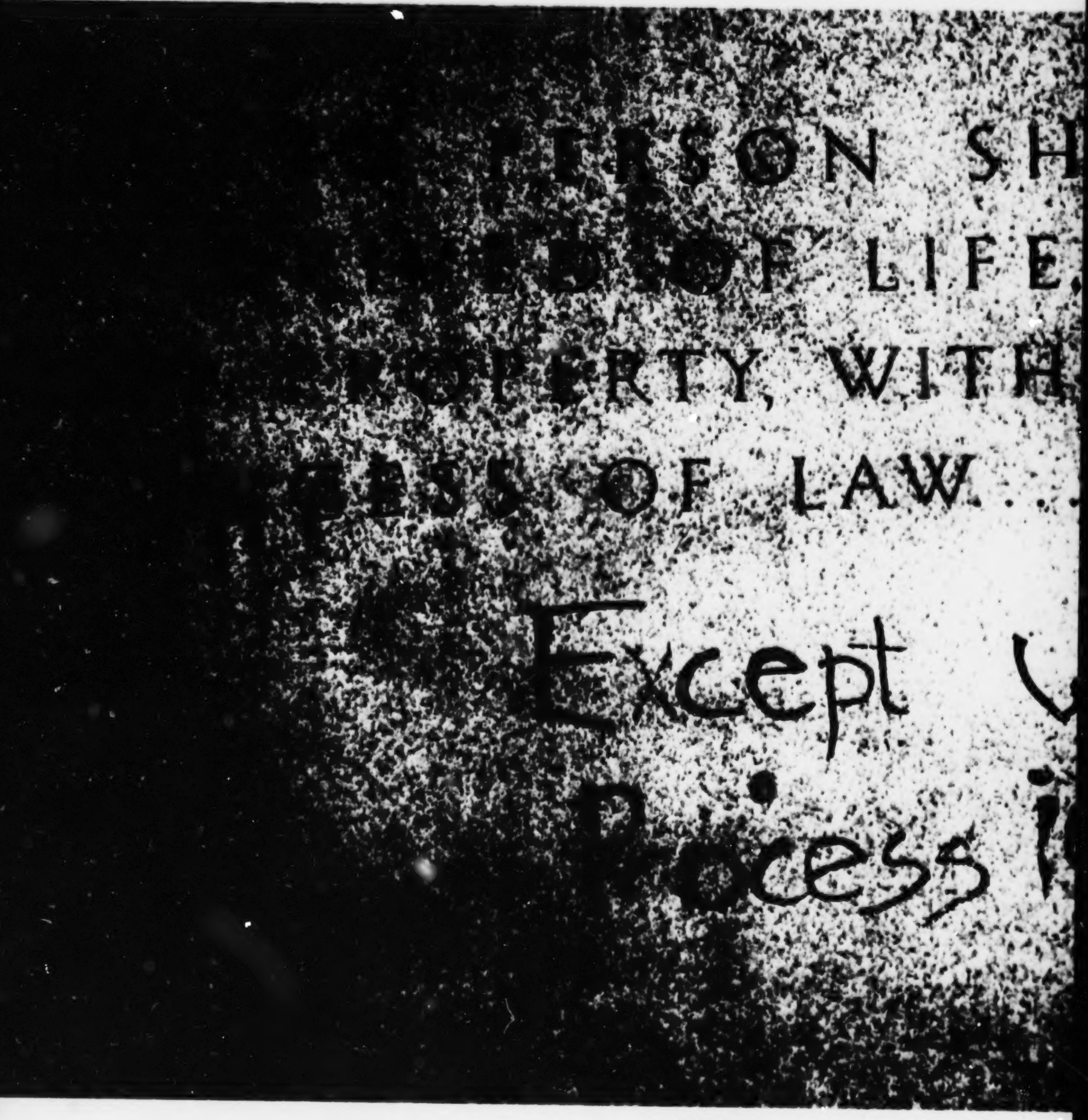
BUT THEY'RE ALL PLANNING A NICE COMING OUT PARTY FOR HIM

We're not sure who did what to whom, but it sounds like a grave injustice is taking place in Newark, New Jersey. Confessed hitman-informant John Tulley is still in jail, and his lawyer says that's just not fair. The problem? He's been there longer than the nine mobsters he snitched on.

LIKE TEACHING IT TO SAY "POLLY HATES YOUR GUTS"

In a second divorce case, a judge settled a couple's row over the custody of a parrot by granting liberal visitation rights to each. But he issued a stern warning: "Neither side is to do anything to influence this parrot against the other person."

WHAT IS JUSTICE?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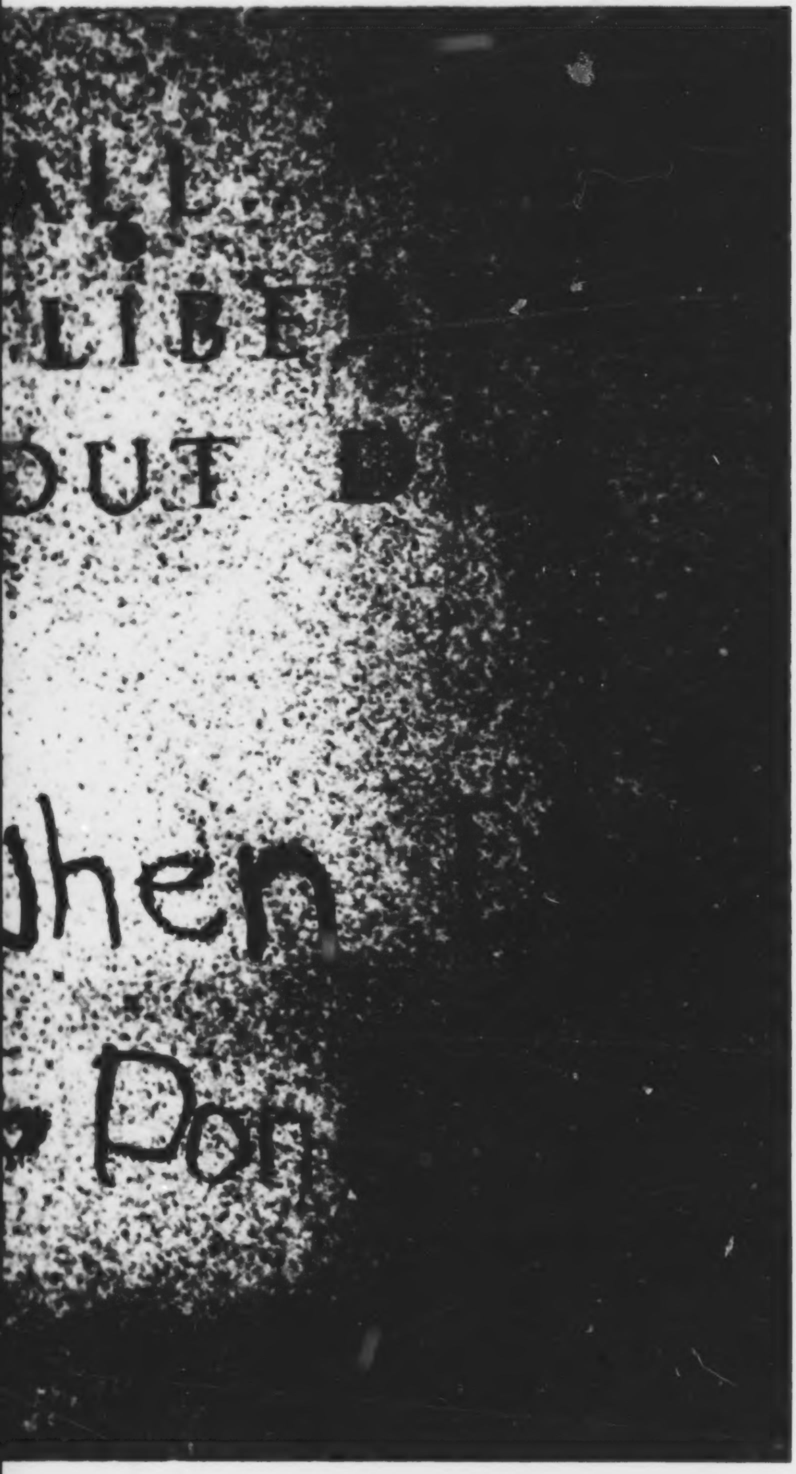
Charles White



From the Haymarket Anarchists to Abbie and Jerry, political trials have put American courts to a severe test—one that they've often failed

There's a story about Justice Oliver Wendell Holmes which may or may not be true. It seems that a friend of Holmes ended a conversation with the judge by saying, "Do justice." In all seriousness, Holmes replied, "Our job is not to do justice; our job is to follow the rules."

The story may be apocryphal, but it tells us a lot about the way lawyers think. Lawyers have been defined as people who believe procedure is as important as substance. By this definition, lawyers care deeply about *how* a case is processed through the courts, supervising the process nervously at every step to see that their client is getting the full benefit of the court's rules on evidence, testimony, jury instructions, and a host of other matters.

Lay people tend to dismiss this concern with process. Many people pick up their lead from newspaper reports which deprecate legal "technicalities." Lawyers almost never use the word "technicalities," and they never allow themselves the sneer that the word implies.

Lawyers have a good reason—or at least a good theory—for caring about process. In principle, the adversary system works to achieve justice if both parties are well represented by competent, hard-working counsel *and* if due process is followed by the courts before which they argue. Due process is an enormously wide term, covering every aspect of a legal case from police questioning of a suspect to the final sentence. At every stage, courts and legislatures have fashioned elaborate rules designed to assure that the proceedings are absolutely fair towards both parties.

The undergirding theory is that following these procedures will permit the truth to come out, will assure that justice is done. To paraphrase Holmes, justice will be done if the rules are followed. But have the rules that we know collectively as due process worked, and, in particular, have they worked in the tough cases, the ones in which the judicial system is under the most pressure?

Political trials provide good case studies of the judicial system under strain. They are among the

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few cases to escape the anonymity of routine court calendars. They bring out the crowds—curious spectators and reporters hungry for news—and they provide, in microcosm, a look at the system under trying circumstances.

One problem with looking at political trials is that there is no unanimity as to what they are. Almost every case that some call political has been defended by others who say that politics has nothing to do with it. In one of the few Supreme Court opinions to raise the possibility of political trials, *Illinois v. Allen*, 397 U.S. 337 (1970), Justice William O. Douglas identified five such cases—the 1886 trial of the Chicago anarchists for the murder of seven police officers, the 1894 proceedings against Eugene V. Debs for violating an antistrike injunction, the 1917 trial of Tom Mooney for dynamiting a parade, the 1920 trial of Sacco and Vanzetti for robbery and murder, and the 1950 trial of Eugene Dennis and other Communist leaders for advocating violent overthrow of the U.S. government. By implication, Justice Douglas included a sixth: The conspiracy trial that had just concluded in Chicago, involving charges that seven antiwar protestors had fomented a riot.

In every one of these cases, loud voices proclaimed that the system had failed, that due process had broken down. Charges ranged from biased judges to corrupt prosecutors, from intimidated witnesses to doctored evidence. While controversy still swirls around some of the cases, most observers are persuaded that at crucial points the system failed to follow the rules.

But that conclusion leaves the important questions unanswered. Can the system be made to follow the rules in such cases, or should new rules be created, or should the problem be handled by finding a way to dismiss political cases before they ever come to trial?

Defining Political Trials

The first step is to determine what makes a trial "political," what differentiates it from the run-of-the-mill case. In his introduction to *Political Trials*, political scientist Theodore L. Becker cites several varieties of cases. Political trials per se, he says, are those in which the crime is purely political—as in the case of those who deliberately break the law as a form of protest—and the impartiality of the judge applying the law is not called into serious question. According to Becker, another category consists of political "trials." In these cases, the indictment is clearly political, but the impartiality and the independence of the court is questionable. Becker says that the Chicago conspiracy case was a political "trial." He claims that political "trials" almost always end in conviction at the lower court level.

A third category consists of "political" trials. Becker says that politically motivated prosecutors can hide their true purpose behind charges that are quite unpolitical or apolitical in nature. Examples would be using minor charges (e.g., impeding traffic or possessing marijuana) or major charges (e.g., murder) to get at politically unpalatable defendants. In this category, though the charge is politically motivated, the trial itself may be fair.

Court precedent enshrines the tradition of wide-open debate; any political speech must be closely linked to an illegal action before speaking out can be made a crime

The final category, "political trials," combine hoked-up charges with unfair legal procedures. According to Becker, this category is rarer, at least in the United States, than the others.

Is there a common denominator of political trials? There is no definition that everyone agrees to. There probably never will be. But what seems involved in most of Becker's definitions, and in most of the political trials covered this article, is a kind of deflection, or perversion, of the judicial process.

Courts are supposed to see that justice is done in the specific case before them. Their task is to hear evidence, weigh arguments, see that due process is observed, and, ultimately, determine truth.

But in political cases, the sober search for truth often is obscured from the beginning. The defendants may have been chosen more because their politics are unpopular than because the evidence linked them closely to a crime. Much of the prosecution's case may be based not on logic, but on exposing the defendants' politics and lifestyle to the prejudices of the jury.

By the same token, defendants can make the distortions of political trials even worse. Sometimes they conduct straightforward defenses, designed to prove their innocence of the specific charges against them, but often they use the court as a forum, basking in the publicity, glad finally to have an audience for their social theories and personal grievances. And often political movements seize upon the defense for their own purposes. During the 1930s, for example, it was common for the Communist Party to loudly champion the rights of "political" defendants from Tom Mooney to the Scottsboro Boys. In the process, the party obviously hoped to do some good for itself.

Measure these distortions of the law with the ideal, with what the courts are supposed to accomplish and what they often succeed in accomplishing. As Professor Karl Llewellyn put it many years ago,

> Angel or devil, a man has a claim to a fair trial of his guilt. Angel or devil, he has a claim to a fair trial, not of his general social desirability, but of his guilt of *the specific offense* charged against him. . . . It is too easy to find "general" indications against one's enemies—be they Bolsheviks, or Democrats, or rivals for the Tenth Ward leadership.

Can the Problem Be Solved?

Political trials still exist, but there is reason to think they may be losing some of their sting. For example, the worst abuses are no longer possible, because the due process revolution of the past 25 years has done much to guarantee all defendants—including political defendants—a fair trial.

The Chicago anarchists and Sacco and Vanzetti failed to convince the United States Supreme Court that it had the right and duty to oversee state court proceedings to assure that fair procedures were followed.

In the process, however, the federal courts have been blamed for overly burdening state courts, for creating "too much law." Critics complain that the seemingly endless due process requirements slow justice to a crawl and open up so many loopholes that any defendant—no matter how guilty—stands a good chance of beating the rap if he has a smart lawyer.

Perhaps we have too much law now, but what can't be debated is that through much of our history we have had too little law, too few protections for unpopular

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Charles White is editor of Update *and Publications Coordinator of the ABA's youth education program. He taught at several universities after receiving a Ph.D. in American Studies from the University of Pennsylvania.*

defendants. The cases of the Chicago anarchists, Sacco and Vanzetti, and Tom Mooney suggest that traditional due process standards and the reluctance of appellate courts to act may simply not have been enough to assure fair and impartial proceedings. Deprived of many procedural safeguards, these men remind us that neither the law's majesty nor the safety of society is served by shabby approximations of justice.

In his book on Tom Mooney's case, Richard Frost notes that the Warren Court's due process revolution, had it been in effect 50 years earlier, might well have prevented a tragedy such as Mooney's.

> The Warren Court has required the prompt arraignment of criminal suspects; it has condemned incommunicado interrogation, and upheld the right of suspects to counsel during police questioning; it has ruled that evidence illegally gathered in unreasonable searches and seizures is inadmissible in state criminal courts as in federal courts; and it has found that "massive, pervasive, and prejudicial publicity" attending a state trial may constitute the violation of due process. In all of these respects, Mooney . . . had been denied fair proceedings; and it is not too much to infer that had the United States Supreme Court established the same safeguards half a century ago, there would have been no Mooney case. Certainly there would have been no Mooney case after the appellate courts had finished with it.

Other kinds of political trials have been made less likely through Supreme Court's First Amendment decisions. As noted in Part II of this series, the Supreme Court's ruling in *Brandenberg* allows political speakers to say a very great deal—and even to make threats—before they run a serious risk of conviction. Doing away with old "bad tendency" standards for judging speech, the nation's highest court now demands that political speech be very closely linked to illegal action before it can be made a criminal offense. Not only does this precedent enshrine the American tradition of robust, wide-open debate, but it makes one kind of political case—prosecution for uttering offensive words—very hard to win. (However, as the Chicago conspiracy trial shows, it is possible to use political radicals' words against them in other ways, by arguing, for example, that the words are evidence of an illegal *intention* on the part of the speakers, even if the words themselves do not constitute the crime.)

The Judge's Role

But due process safeguards and protections for political speech can only do so much. These are standards which appellate courts can apply two or three years after the trial, when passions have faded and publicity no longer distorts the issues. It's harder for trial courts—caught in the furor of tumultuous times and faced with flesh and blood defendants and witnesses—to maintain these exalted standards.

Nonetheless, many observers think trial judges must move to limit the damage caused by political trials. What steps can courts take? In *Illinois v. Allen*, Justice Douglas was vague, merely suggesting that the problem may "involve defining the procedure for conducting political trials" or "designing . . . constitutional methods for putting an end to them."

This year, California seriously considered a bill that would permit the state to request civil injunctions effectively banning the meeting of groups like the Ku Klux Klan

There isn't space enough here to do justice to the many proposals for doing something about political trials, but here is a sampling of opinion on this subject. Charles Goodell, in his book *Political Prisoners in America*, says, "The integrity of the criminal process would be much better served if judges would face the realities unique to political trials." One of these realities is that such cases aren't simple criminal matters—"just another brown envelope," as Judge Hoffman often said, referring to the criminal indictment in front of him—but are inevitably tinged with politics. Thus, it may be appropriate for trial judges to give defendants more leeway to express themselves than strict rules would allow, "while refusing to let their courtrooms become political broadcast stations" (Charles Rembar, *The Law of the Land*). On the other hand, allowing political defendants to trumpet their beliefs from the stand could prejudice the jury against them, as it surely did in the Sacco-Vanzetti case.

Goodell also suggests that judges change the rules that apply in conspiracy cases, creating a category of cases which are "political within the shadow of the First Amendment." These new rules would provide that the evidence of a conspiracy should never be comprised of speeches and other political expression protected by the First Amendment. Other changes in the rules of evidence for conspiracy trials would eliminate some of the anomalies in the law which seem to give an unfair advantage to prosecutors.

Another reform would be to permit defendants to introduce evidence as to their motive in committing a political crime. Many civil disobedients deliberately violate the law to make a political statement. As the rules of evidence now read, prosecutors can introduce evidence to show that defendants consciously intended to break the law; but defendants can't introduce evidence to show *why* they wanted to do so. Thus jurors are deprived of the key to understanding the case.

A related question has to do with the role of the jury. If defendants could tell jurors why they violated the law, then juries might decide that, irrespective of what the law says, these well-intentioned individuals don't deserve conviction. Juries can decide cases on any basis they want to (unless jury members have been bribed), but judges' charges always tell them that their role is not to interpret the law but to judge the facts. Thus juries often feel sympathy with defendants but think that the law gives them no alternative to finding the defendants guilty. Should court rules be changed so that judges tell jurors that they can apply their conscience as well as the law?

Goodell and others think that doing so would be more realistic and would restore the jury to its role as the voice of the community, occasionally standing up to what it perceives as the tyranny of the law. Charles Rembar and others point out that juries aren't supposed to rely on their beliefs but rather apply the law. Freed from the law's constraints, they might ignore the facts entirely, deciding cases because of race prejudice or religious intolerance. And why should we assume that juries would only use their power to acquit? They might instead convict innocent defendants.

In point of fact, convicting on flimsy evidence is the mark of most political trials. In *The Legacy of Sacco and Vanzetti*, Harvard Law Professor Edmund S. Morgan cites case after case to show the near impossibility of securing a verdict which runs counter to the settled convictions of the community. Morgan's examples are drawn from the 1930s, but our history is full of cases large and small that show that justice is crippled when

(Continued on page 64)

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Larry Stanton

Keeping Krishnas in a Booth, Pollution Wars Between Cities, Search and Seizure, and More

The Supreme Court usually starts its terms slowly and finishes with a bang. It hands down hardly any decisions before Christmas, but erupts with them in June, at the end of the term. So for this issue of *Update*, we're taking advantage of the Court's leisurely pace to bring you up to date on some important decisions that came down late last term.

Court Clarifies One . . .

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Larry Stanton

Keeping Krishnas in a Booth, Pollution Wars Between Cities, Search and Seizure, and More

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station wagon and then opened the recessed luggage compartment. Inside the compartment were two packages wrapped in green opaque plastic. The police opened the packages and found 15 pounds of marijuana in each.

At trial Robbins moved to suppress the evidence found in the luggage compartment, but both the trial court and the state appellate court decided that the search had been legal.

The Supreme Court disagreed. It held that the police went too far because they searched closed packages that were in the trunk. Since the plastic was opaque, police couldn't see the marijuana, so the search was not justified under the "plain view" exception.

However, the Court was badly divided in the case, with only three justices joining Justice Stewart's plurality opinion. Justices Burger and Powell concurred in the judgment but not in the opinion, while Justices Blackmun, Rehnquist, and Stevens dissented. Since the opinion did not attract a majority, it has limited value as a precedent.

Justice Stewart began the plurality opinion by explaining the general justification for auto searches. He quotes *Carroll v. United States*, 267 U.S. 132, a 1924 decision in which the Court said that "a search warrant is unnecessary where there is probable cause to search an automobile stopped on the highway; the car is moveable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." The *Carroll* rule was limited in *Arkansas v. Sanders*, 442 U.S. 753 (1979), when the Court rejected the argument that the automobile exception be extended to permit a search of everything found in the car.

That case involved a closed piece of luggage, however, and this one a closed plastic bag. The state in *Robbins* contended that the plastic bag should receive less protection than the luggage because plastic bags are not ordinarily used to transport "personal effects."

Justice Stewart goes to the language of the Fourth Amendment in rejecting the distinction: "the Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal.' Once placed within such a container, a diary and a dishpan are equally protected by the Fourth Amendment."

Justice Powell concurred in the judgment "because the manner in which the package at issue was carefully wrapped and sealed evidenced the petitioner's expectation of privacy in its contents." But he objected to the "bright line" rule that he believes is established in the case, which extends the warrant clause of the Fourth Amendment to all "closed, opaque containers without regard to size, shape or whether common experience would suggest that the owner was asserting a privacy right in the contents."

Justice Blackmun dissented, urging the broadest possible interpretation of the automobile exception. He stated that the Court should allow the warrantless search and seizure of *any* personal property found in an automobile that may be searched pursuant to the automobile exception. Justice Stevens rejected the distinction justifying the different results in *Robbins* and *Belton* and called for application of the automobile exception to allow the warrantless searches in both cases.

On their facts *Robbins* and *Belton* can be distinguished only by the location of the contraband in the car. Professor Kamisar whimsically suggests that the "hatchback" is the next problem and recommends that Detroit automobile manufacturers "produce a maximum Fourth Amendment protection hatchback" with a steel panel which would shoot up from the floor to protect luggage from warrantless searches.

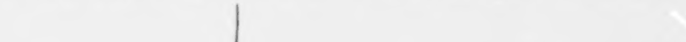
With the retirement of Justice Stewart, who wrote both opinions, and the addition of Justice O'Connor, it is likely that the law of car search and seizure will continue to be, as Justice Powell described it in his *Robbins* concurring opinion, "intolerably confusing."

The Sewage That Made Milwaukee Famous

The decade of the 1970s saw the flowering of environmental concern—and the creation of new legal tangles arising out of that concern. In *Milwaukee v. Illinois and Michigan*, 49 L.W. 4445, the Supreme Court resolved one major dispute in environmental law.

In 1972, in *Illinois v. Milwaukee*, 406 U.S. 91, the Supreme Court unanimously determined that Illinois could bring a federal common law action against the city of Milwaukee. In that suit Illinois alleged that the discharge of untreated sewage into Lake Michigan created a public nuisance for the citizens of Illinois.

But six months after the suit was filed, Congress passed the Federal Water Pollution Control Act Amendments, which established a new system of regulation making it illegal to discharge pollutants into the nation's water except pursuant to a permit that incorporated the regulations of the Environmental Protection Agency (EPA). Under the legislation, permits are issued either by the EPA or a qualified state agency. Following the new



"I'm afraid that won't do, Mr. Barnes. The human body is worth less than $75, and you owe us $6,298.74."

federal law, the Wisconsin Department of Natural Resources granted the City of Milwaukee a permit to operate its sewer system and took action to enforce compliance with the permit's requirements.

In July of 1977, after a six month trial, the federal district court decided that Illinois had proven the existence of a nuisance under federal common law. The court then went considerably beyond the permit requirements in ordering Milwaukee to stop polluting the lake. The Seventh Circuit Court of Appeals affirmed most of the district court's order.

When the case got back to the Supreme Court, the issue was whether the federal common law or the federal antipollution standards should govern the dispute. The Supreme Court decided that the federal statutes had precedence. Since these are less stringent than the common law standards, this holding was a victory for the city.

The Supreme Court based its decision on the rule enunciated in *Erie v. Tompkins,* 304 U.S. 64 (1928). "The federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." The federal common law exists only in the few instances where there is a significant conflict between a federal policy and a state law. But when there is comprehensive federal legislation or administrative standards, the federal common law is preempted.

Justice Rehnquist, writing for the majority in this case, decided that the federal Water Pollution Control Act was sufficiently comprehensive to "occupy the field" and eliminate the need for lawmaking by federal courts. Congress established a comprehensive administrative procedure for issuing permits for discharges of water, and any complaints that a state might have involving these matters must be raised through the established administrative procedure, and not through a common law action in federal court.

Justice Blackmun's dissent was joined by Justices Marshall and Stevens. He questioned whether the passage of federal legislation in an area automatically displaces the federal common law, arguing that the "automatic displacement" approach fails to take into account "the unique role federal common law plays in resolving disputes between one state and another" and ignores the fact that "federal common law may complement congressional action in the fulfillment of federal policies."

Due Process Behind Bars

The due process revolution of the past 25 years has affected no group more than prisoners. In a host of cases courts have held that the state must meet minimal due process standards in treating prisoners. But in a recent case, *Connecticut Board of Pardons v. Dumschat,* 49 L.W. 4711, the Court held that due process standards didn't apply to requests for commutation of sentence.

Under a Connecticut statute, an inmate sentenced to life imprisonment before 1971 without a specified minimum term must serve a minimum of 20 years in prison unless the state Board of Pardons commutes the sentence. But approximately three quarters of the applications for commutations of life sentences are granted by the board, resulting in "no more than 10 or 15 per cent of Connecticut's life inmates serv[ing] their 20-year minimum terms."

In 1964, David Dumschat was sentenced to life in prison after being convicted of murder. Under the state sentencing law, he was not eligible for parole until 1983 unless the state Board of Pardons commuted his sentence by reducing the minimum prison term. Dumschat applied several times for a commutation of his sentence, but the board rejected each application without explanation.

Dumschat then sued the board under the federal Civil Rights Act, alleging that the board's failure to provide him with a written statement of reasons for the denial violated his rights under the Due Process Clause of the Fourteenth Amendment. Dumschat argued that the board's frequent use of its discretion to commute life sentences gave him a constitutionally protected liberty entitlement in the pardon process, entitling him to due process rights.

Courts have often held that due process is triggered when the state deprives someone of liberty or property to which he has a legitimate expectation. For example, a teacher who is not rehired might argue that he had a legitimate expectation of continuing on his job, and thus a protected property interest under the Due Process Clause. If courts accepted his argument, they'd require the state to show that it had met due process standards in letting him go.

The key to this case, then, was whether the state's pattern of granting most requests for commutations established a legitimate expectation of commutation, and thus triggered due process. The district court agreed that it did, holding that "all prisoners serving life sentences in Connecticut state prisons have a constitutionally protected expectancy of commutation and therefore have a right to a statement of reasons when commutation is not granted." The court of appeals affirmed the decision, holding that a brief statement of reasons for the denial of a commutation is "not only constitution-

BAIT SHOP
Schneider

Let's see your money first.

898

ally sufficient but also constitutionally necessary."

However, the Supreme Court reversed the state courts, with Justice Burger reasoning in the majority opinion that the board's practice of granting commutations to most life inmates was not sufficient to create a protectible liberty interest. "The petition in each case is nothing more than an appeal for clemency. In terms of the Due Process Clause . . . it is simply a unilateral hope." He goes on to say that the ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency," concluding that in this case there is no such statute or rule.

Justice Stevens, joined by Justice Marshall, dissented because the "Court has unequivocally held that the Constitution affords protection at different stages of the post-conviction process." He points to three determinations included in the process: imposition of a sentence by the judge, commutation of the sentence by the board, and discharge of the prisoner. "Each of these decisions is a regular and critical component of the decision-making process . . . [and] in my opinion the Due Process Clause applies to each step and denies the State the power to act arbitrarily." Justice Stevens concludes that although a statement of reasons for a denial might not be constitutionally necessary, it would provide the assurance "that the board's decision is not capricious."

Are Billboards Protected?

The grave gentlemen who wrote the Constitution never heard of billboards, but nonetheless the Supreme Court had to interpret their words to see if billboards are protected by the First Amendment. The question was, can a city ban all billboards in order to eliminate traffic hazards and improve the city's appearance? And the Supreme Court answered no, at least not the way that San Diego tried to do it.

The city enacted an ordinance which prohibited billboards within the city boundaries. The stated purpose of the ordinance was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays," and "to preserve and improve the appearance of the City." The law made an exception for signs advertising goods or services on the property where the sign was located and for 12 other situations, including temporary political signs, historical plaques, and religious symbols.

Companies engaged in the outdoor advertising business in San Diego brought suit against the ordinance. Their billboards are used for both commercial and noncommercial messages.

The Court decided the case— *Metromedia, Inc. v. San Diego,* 49 L.W. 4925—on First Amendment grounds. Justice White spoke for a plurality, rather than a majority, of the Court. He began by noting the narrowness of the issue. "Each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method. We deal here with the law of billboards." Judging from the rest of the plurality opinion, the concurring opinion, and the three dissenting opinions, the "law of billboards" is anything but clear.

> ***At the Minnesota State Fair, if you sell donuts for the Democrats or pass out free books for the Krishnas, you must do so in a booth***

Justice White's plurality opinion (which included Justices Stevens, Marshall, and Powell) notes that the commercial speech included on billboards deserves some protection under the First Amendment, but he justifies these restrictions on commercial advertising because the ordinance seeks to implement a substantial governmental interest in traffic safety and aesthetics, directly advances that interest, and goes no further than necessary to accomplish the objective. Therefore, the San Diego billboard ban is constitutional insofar as it regulates commercial advertising.

But what about the ban on noncommercial advertising? Recent cases have consistently afforded greater protection to noncommercial speech than to commercial speech. The San Diego ordinance does just the opposite, making an exception to the billboard ban for on-site commercial advertising, but making no such exception for noncommercial advertising. This results in the incongruous situation in which an on-site billboard may carry a commercial advertisement but may not contain a noncommercial one.

In addition, Justice White objected to the ordinance's distinctions between various types of noncommercial advertising. By making exceptions for temporary political signs, religious symbols, and signs which tell the time or weather, the city is choosing the appropriate subjects for public discourse, thus violating the First Amendment. Because the ordinance contains these improper restrictions on noncommercial advertising, the plurality opinion ruled the ordinance unconstitutional on its face.

While the plurality opinion suggests that a new ordinance banning only commercial billboards would be constitutional, Justice Brennan's concurring opinion, joined by Justice Blackmun, makes that unclear. Justice Brennan rejects the distinction between commercial and noncommercial advertising and focuses on the substantiality of the government interests being asserted to justify the ban on billboards. He says that the city has failed to prove that a ban on billboards advances traffic safety or that the city has a substantial enough interest in aesthetics to justify a total ban. While admitting that a complete ban on billboards in Yellowstone Park would be justified, Justice Brennan notes that the urban landscape is often ugly and says that "a billboard is not necessarily inconsistent with oil storage tanks, blighted areas, or strip development."

Chief Justice Burger's dissent calls the plurality decision "the long arm and voracious appetite of federal power—this time judicial power—with a vengeance, reaching and absorbing traditional concepts of local authority." Justice Stevens, in his dissent, says that "the essential concern embodied in the First Amendment is that government not impose its viewpoint on the public or select the topics on which public debate is permissible. The San Diego ordinance simply does not implicate this concern."

Justice Rehnquist wrote a short dissent in which he says that he regrets adding more "to this judicial clangor." He then states that "the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community."

Justice Rehnquist calls the Court's opinion in this case "a vertical tower of Babel, from which no definitive principles can be clearly drawn," and it's very hard to disagree with his assessment. Although it appears from the plurality opinion that a total ban on commercial advertising could be approved, a decision on the issue will have to wait until the next case comes before the Court.

Krishnas and the Law

Members of the Krishna Society are

On the Docket

Busing. In *Washington v. Seattle School Dist.* and *Crawford v. Board of Education of Los Angeles,* the Supreme Court will decide whether state referendums that bar busing to achieve racial desegregation in public schools are unconstitutional. The California case involves Proposition 1, passed in 1979 in response to state court orders requiring desegregation and busing in the Los Angeles school system. The Washington case involves a citizen initiative banning school boards from assigning students to a school other than the one nearest their homes. Lawyers in both cases contend that these laws are specifically directed against the interest of blacks and minorities and are therefore unconstitutional.

First Amendment. Can school board officials order books removed from school libraries? In *Island Trees v. Pico,* the Supreme Court will decide whether members of the school board must stand trial in a suit by five students who contend that the removal of the books from the library violated their First Amendment rights.

The case raises the issues of local control of schools on one side and censorship on the other. The school board contends that the books—which included Kurt Vonnegut's *Slaughterhouse Five,* Bernard Malamud's *The Fixer,* and Eldridge Cleaver's *Soul on Ice*—were removed from the library because they contain, "indecent matter, vulgarities, profanities, explicit description of sexual relations, some perverted, or disparaging remarks about blacks, Jews or Christians." Civil liberties groups contend that their case will help decide "whether localities will be able to brainwash kids with their own orthodox views."

Due Process. In *Village of Hoffman Estates v. The Flipside,* the Court will consider the validity of so-called head shop laws. The laws generally limit the sale of paraphernalia associated with marijuana. The specific ordinance at issue differs from the typical head shop law in that it does not attempt to criminalize the sale or possession of drug-related devices. Rather, it required that persons selling the drug paraphernalia obtain a license, file affidavits stating that the applicant and his employees have never been convicted of a drug-related offense, and keep records, to be open for police inspection, of all sales, along with the name and address of the purchaser.

The law is being challenged on due process grounds. The plaintiffs contend that it is too vague. The municipality argues that the law only affects retailers and they should be able to recognize an "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs."

Illegal Aliens. The Court will have an opportunity to decide whether the Equal Protection Clause of the Fourteenth Amendment applies to aliens unlawfully present in the U.S. Two cases—*Plyen v. Doe* and *Texas v. Certain Named and Unnamed Undocumented Alien Children,* considers the constitutionality of a Texas statute that denies state aid for the education of undocumented alien children. The Fifth Circuit Court of Appeals held that both the statute and the local school board's policy of charging tuition for illegal alien children violate the Equal Protection Clause. Texas argues that "the lawful entry requirement in the immigration area is necessary if any other rights other than due process are to apply." Texas also argues that a decision that illegal aliens are entitled to equal protection could cause tremendous financial hardships to states already overburdened by government entitlement programs.

Death Penalty. In *Eddings v. Oklahoma,* the justices will review a death sentence imposed on an Oklahoma teenager for the first degree murder of a police officer. Sixteen-year-old Monty Lee Eddings killed a policeman while running away from home. Although Monty was a juvenile at the time of the killing, he was certified under state law to stand trial as an adult. He was charged with first-degree murder and entered a plea of *nolo contendere* (which is equivalent to a plea of guilty). The trial court, after a hearing on the aggravating and mitigating circumstances of the case, sentenced Monty to death.

He is challenging the sentence on the grounds that it is cruel and unusual punishment to sentence a person to death for a crime committed while he was a minor.

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almost as common at airports as stewardesses. They claim a First Amendment right to distribute their literature and seek donations. Do they have such a right? In *Heffron v. International Society for Krishna Conciousness*, 49 L.W. 4762, the Court provided some answers but didn't put the issue to rest once and for all.

The case started when the Krishna Society challenged a Minnesota State Fair rule limiting their solicitation to booths. They claimed that the rule violated their First Amendment right to practice and disseminate their religion. The state did not deny that the Society's distribution of the religion was protected by the First Amendment, but did assert that the rule was constitutional because it was a valid restriction on the time, place, and manner of distribution, rather than a blanket prohibition.

The Supreme Court unanimously agreed that the restrictions on sales and solicitation were constitutional, but decided by only 5-4 that the distribution of literature could be restricted. Writing for the majority, Justice White began by noting that "[T]he major criteria for a valid time, place and manner restriction may not be based upon either the content or subject matter of the speech." The state fair rule qualified because no one was permitted to solicit or distribute material except from a rental booth. Because the rule includes everyone, and because the booths are distributed on a first-come, first-served basis, the rule is not subject to the sort of abuse of official discretion which is inconsistent with a valid time, place, and manner restriction on speech.

In deciding that these regulations at a state fair served a significant governmental interest, the Court distinguished this interest from the state's interest in regulating a public street. Because the fair is a temporary event attracting huge crowds in a limited area, the state has a greater interest in avoiding congestion and fostering an orderly movement of patrons than it would on an ordinary city thoroughfare.

The Minnesota Supreme Court had ruled for the Society because it believed that the state could have eliminated congestion and crowd disorder by less restrictive means than a total ban on solicitation and distribution. It suggested that an exception to the rule be made for members of the Society. The U.S. Supreme Court disagreed because of the potentially large number of distributors and solicitors who might qualify for such an exemption. Justice White stated that "any such exemption cannot be meaningfully limited to [members of the Society] and as applied to similarly situated groups would prevent the state from furthering its important concern with managing the flow of the crowd."

Four Justices (Brennan, Marshall, Stevens, and Blackmun) thought the Court was wrong to restrict distribution of literature, as opposed to sales and solicitation. Justice Brennan distinguished the state's interest in limiting *sales* from the interest in limiting *distribution,* concluding that there was no showing that the mere distribution of material impedes the flow of traffic significantly enough to justify state interference in the exercise of First Amendment rights.

The decision is limited by its unusual facts, but will probably affect the policies of airport and public shopping mall managers trying to limit solicitation from religious and other special interest groups.

States Win on Retarded Care

In 1975, Congress passed the Developmentally Disabled Assistance and Bill of Rights Act to promote improved care and treatment for the disabled through federal financial incentives. The law contains a "bill of rights" section which speaks of the right of a retarded person to "appropriate treatment" in an environment "least restrictive of the person's liberty." In *Pennhurst State School v. Halderman* (49 L. W. 4363), the Court ruled that this bill of rights for the retarded was advisory only and did not require states to provide particular types of treatment and placement as a condition for receiving federal funding under the act.

Pennhurst is a Pennsylvania state institution that houses 1200 retarded people. Terri Lee Halderman, a minor retarded resident of Pennhurst, filed suit seven years ago on behalf of herself and all other Pennhurst residents. She complained that conditions at Pennhurst were unsanitary, inhumane, and dangerous. She asked that Pennhurst be closed and that smaller, less isolated residences be established where retarded persons are treated as much as possible like the nonretarded.

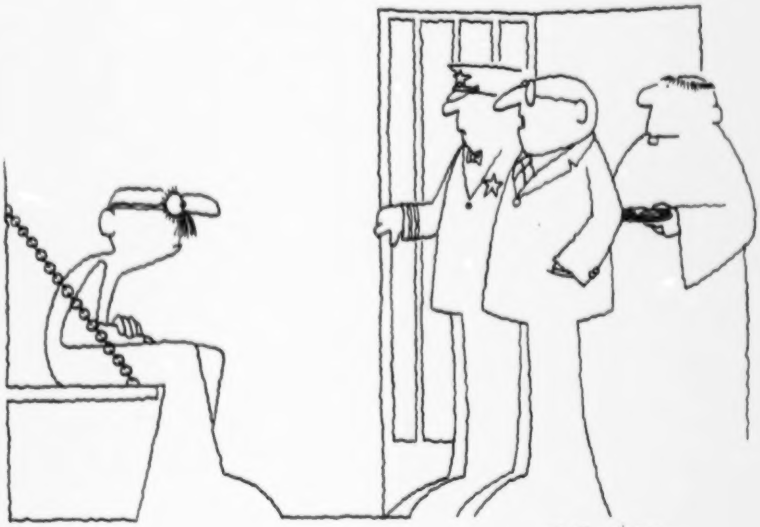
Writing for the six-judge majority, Justice Rehnquist noted that "nothing in either the overall or specific purposes of the act revealed an intent to require the states to fund new, substantive rights." The act, Rehnquist argued, "does no more than express a Congressional preference for certain kinds of treatment . . . [and to] serve as a nudge in the preferred direction."

The decision overturned a court of appeals ruling that the section in question mandated the deinstitutionalization for most, if not all, mentally retarded persons. Describing the bill of rights section as simply congressional "findings." Rehnquist called it "too thin a reed to support the rights and obligations read into it by the court below."

The dissenting justices, speaking through Justice White, had a different view of the legislative history and the language of the act. "That Congress was deadly serious in stating that the developmentally disabled had entitlements which a state must respect if it were to participate in a program can hardly be doubted," Justice White wrote. He chided the majority for treating the bill of rights section as "only wishful thinking on the part of Congress or as playing some fanciful role in the implementation of the act."

While the ruling hinders full use of the Developmentally Disabled Act as a tool for restructuring state care for the retarded, it leaves open the question of constitutional challengers in this area. This term, however, those questions may be answered as the Court has agreed to consider the constitutional rights of mentally retarded persons in public institutions.

The case involves an appeal by officials of Pennhurst, the same institution involved in this ruling. Nicholas Romeo, a Pennhurst resident, charged that officials kept him shackled to his bed and permitted other residents to attack him. The officials will be seeking to overturn an appeals court ruling that the due process clause of the Fourteenth Amendment gives the institutionally retarded the right to be free of restraints unless the state can prove a compelling necessity for such measures. ☐



"Nice try, Mulrooney."

CURRICULUM UPDATE

Mabel McKinney-Browning

From juries to cops, from jails to credit

New Materials for You

Teacher Resources

American Law Source Book for the Classroom Teacher (1981), prepared and edited for the Young Lawyers Division of the American Bar Association by Bruce A. Newman and Richard J. Drew. Secondary. Softbound, 107 pp. Teacher resource book. $12.00. (American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.) This revision of the ABA *Attorneys Sourcebook* reflects a new design and a new purpose. This book now seeks to provide secondary teachers with appropriate law-related content to use on a unit or subject basis in any part of the traditional curriculum. The book is divided into two parts: part one, "constitutional rights and responsibilities," examines issues of the First, Fourth, Sixth, Eighth, and Fourteenth Amendments; and part two, "law in American society," includes lessons in consumer law, environmental law, family and juvenile law, and real estate law. The book closes with a section on suggested teaching methods and procedures.

Beyond a Reasonable Doubt: Inside the American Jury System (1981) by Melvyn Bernard Zerman. Hardbound, 217 pp. Supplementary text and reference book. $9.95. (T. Y. Crowell, Jr. Books, 10 East 53rd Street, New York, New York 10022.) This book, written for anyone who may be called to serve on a jury, discusses the American jury system from its origins to controversies surrounding today's jury. Through hypothetical and actual trials, the author provides simple explanations of trial procedures and delineates the roles of judge, attorneys, and witnesses. A very readable book which can be used by junior and senior high students.

The Child and the Law (1981) by Roberta Gottesman. Softbound, 223 pp. Reference book. $8.95. (West Publishing Company, Inc., 170 Old Country Road, Mineola, New York 11501.) This excellent overview of children's rights issues is designed for professionals who work with children and families. It includes chapters on the juvenile justice system, child abuse and neglect, foster care, education, adoption, and medical care. The book provides an overview of the law and discusses trends and principles which might guide the practitioner in his or her work. Each chapter ends with questions and answers designed to explicate the content.

Cop Talk Series (1981). Grades 7-12. Softbound, 158 pp. $4.00. Teacher Resource Guide. (Division of Curriculum and Instruction, Utah State Office of Education, 250 East Fifth South, Salt Lake City, Utah 84111.) This resource guide is designed to accompany the videotape series *Cop Talk*, which was developed as a joint effort between the Utah State Office of Education and the Salt Lake City Police Department. The videotape of *Cop Talk* is available through A.I.T., but this guide can be readily used without it. Each chapter corresponds to the videotape and contains background information, suggested unit outlines, sample lesson plans, activities, and resources. The series includes such topics as shoplifting, vandalism, search and seizure, runaways, and the role of the police officer.

The Dynamics of Law (Second Edition 1981) by George W. Spiro and James L. Houghteling, Jr. Softbound, 229 pp. Supplementary text and reference book. $9.95. (Harcourt Brace Jovanovich, Inc., College Department, 7555 Caldwell Avenue, Chicago, Illinois 60648.) This book looks at law and the legal system from the vantage point of the lawmaking process. Chapters cover the nature and function of law, the courts and the process of adjudication, judicial lawmaking, lawmaking and adjudication by administrative agencies, and the legislative process. Each chapter concludes with suggested questions for review and study problems.

Law for Physical Educators and Coaches (1981) by Gary Nygaard and Thomas Boone. Hardbound, 160 pp. Reference book. $13.95. (Brighton Publishing Company, P.O. Box 6235, Salt Lake City, Utah 84106.) This book provides an overview of important sport injury litigation, including many guidelines for coaches and gym teachers. The book examines such issues as legal concepts in sports and physical education, the rights of students and teachers, and the supervision of physical education and sports.

Mabel C. McKinney-Browning is an assistant staff director of the ABA's youth education program. She has an Ed. D. from the University of Illinois in Curriculum and Instruction and has taught at both the elementary and college levels. She is now principally involved in elementary law-related education.

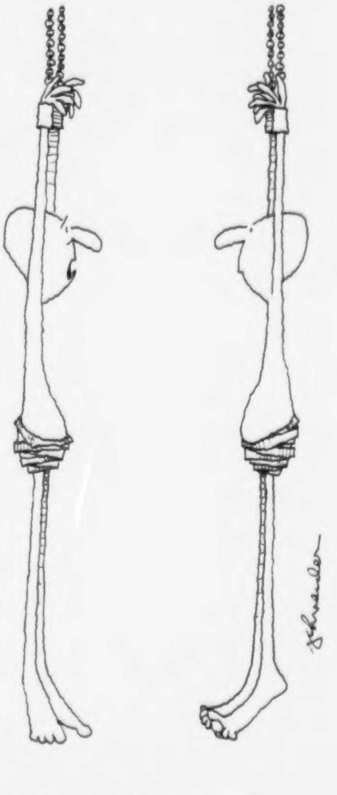
Lesson Plans in Law-Related Education (1980). Teacher Resource Guide. 113 pp. $2.50. (Division of Curriculum and Instruction, Utah State Office of Education, 250 East Fifth South, Salt Lake City, Utah 84111.) This looseleaf lesson plan handbook was designed to help elementary teachers in Utah incorporate law-related and values education into their programs in reading, language arts, and social studies. The book is divided into three sections: "teaching strategies," which reviews strategies for teaching law-related and values education; primary lesson plans; and intermediate grade lesson plans.

Newspapers and Law-Related Education: Grades 5 through 9 (1981) by Sandra Diamond and Linda Riekes. Softbound, 61 pp. Teacher resource guide. $5.00. (Contact: Sandy Diamond, *St. Louis Post-Dispatch, St. Louis Globe-Democrat*, 900 North Tucker Boulevard, St. Louis, Missouri 63101.) Teachers have often found the newspaper an excellent tool for supplementing instruction in language arts and social studies. This new guide proves that the newspaper is an important resource to teachers of law-related education. The guide is divided into two sections. The first shows how different features of the newspaper can be used in teaching a variety of LRE concepts. Section two provides lessons in four law-related areas: lawmaking, consumer rights and responsibilities, juvenile problems, and the judicial system. Strategies for supplementing lessons in those areas by using current articles in the newspaper are the focal point of this section. This guide is lively and full of useful information.

Practical Law for Correctional Personnel (1981) by Edward O'Brien, Margaret Fisher, David Austern. Softbound, 249 pp. Reference book. $7.75. Instructor's Manual, 168 pp., $3.95. (West Publishing Company, Inc., 170 Old Country Road, Mineola, New York 11501.) This book is a training curriculum and resource manual for corrections people. It is designed to increase awareness of rights and responsibilities on the job, teaching such skills as report writing, testifying, preserving evidence, and working with attorneys. The instructor's manual which accompanies the book includes chapter-by-chapter lesson plans, additional law, and tips for training and implementation.

A Resource Guide to Assist Lawyers and Law Students for Participation in Kindergarten through Eighth Grade Law-Related Classrooms (1981) Softbound, 75 pp. $4.00. ***So You Have Agreed to Help . . . A Resource Guide for Lawyers to Help Solicit Funds for Local Law-Related Education Projects*** (1981). Softbound, 16 pp. $3.00. Resource Guides. (Phi Alpha Delta Law Fraternity, International, Juvenile Justice Office, 910 17th Street, NW, Suite 310, Washington, D.C. 20006.) Two excellent guides for lawyers interested in working with teachers in law-related education programs. The first, a resource to assist lawyers and law students working in kindergarten through eighth grade classrooms, provides the lawyer with lessons for each grade level. The guide also includes helpful hints for working with exceptional children. Each lesson includes background for the resource person, previsit activities for the teacher, the lawyer's lesson, and follow-up activities for teachers. The second guide provides lawyers with strategies for soliciting funds for local LRE programs. From a chapter on locating funds in your community to a sample letter to potential funding sources, this guide contains a wealth of excellent fund-raising ideas.

Teaching About Credit Activities for Secondary Classes (1981). Supplementary Materials Packet. $1.00. (Public Affairs Department, Federal Reserve Bank of St. Louis, P.O. Box 442, St. Louis, Missouri 63166.) These instructional materials have been designed by the Federal Reserve Bank and the St. Louis Public Schools Law in Education Project. The materials are intended to provide teachers with classroom aids for teaching about credit. The package consists of eight lessons which follow a hypothetical couple through their experiences in various phases of credit transactions. Included in the packet is a teacher's guide and several activity pages which ask students to consider many decisions consumers must make when they use credit.



"Boy, that's the last time I'll try to sneak extra items through the express lane."

Teachers and the Law (1981) by Louis Fischer, David Schimmel, and Cynthia Kelly. Softbound, 495 pp. Reference book. $12.50. (Longman Inc., 19 West 44th Street, New York, New York 10036.) This book is designed to inform teachers about laws that affect them, including state and federal statutes, constitutional provisions, and court decisions. Using a question and answer format ranging from "Do I have a contract?" to "When can schools restrict personal appearance?" this book takes a giant step toward making teachers more legally literate.

Teachers Have Rights Too (1980) by Leigh Stelzer and Joanna Banthin. Softbound, 164 pp. Reference book. $7.95. (Publications Department, Social Science Education Consortium, Inc., 855 Broadway, Boulder, Colorado 80302.) What teachers need to know in order to survive in the current environment of budget cuts, student rights, and growing teacher responsibilities. Tenure, negligence, discipline, academic freedom, and lifestyle choices are only a few of the issues explored. The spotlight is on teachers' rights.

Student Materials

Jack and the Beanstalk (1981) by Joanne Greenberg. Elementary. Hardbound, 48 pp. Supplementary text. $5.75. Teacher's Manual, $1.00. (West Publishing Company, Inc., 170 Old Country Road, Mineola, New York 11501.) Using the familiar story of Jack and the Beanstalk, this book provides elementary students (grades 3 through 6) with practice in decision-making as they learn the basic principles of the legal system. Activities in each chapter are designed to help students think critically, view situations from a variety of perspectives, and form conclusions, with an emphasis on language art skills. A teacher's manual accompanies the book. □

Dealing

(Continued from page 5)

School Professor Albert H. Alschuler. "That's like solving America's transportation problems by giving 10 percent of the population Cadillacs and making the rest go barefoot."

The University of Chicago's John Langbein concurs. He believes that we've loaded our criminal justice system with so many safeguards that it's too time-consuming to provide a trial to the people who are entitled to it. "We did that out of respect for all of the values that are important in protecting the rights of the individual, but we went overboard and the result is that we have an unworkable trial system."

He likens the present system to medieval torture, where considerable pressure was applied on defendants to plead guilty. "To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash their legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with materially increased sanction if he avails himself of his right and is thereafter convicted. . . . There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive."

The key coercive ingredient is the sentence differential. A study of plea bargaining in New York revealed that offenders found guilty after a trial were likely to receive a 136 percent greater sentence than offenders who accepted a plea. A host of other studies have presented similar results, and have reported that a sentence differential of twice the number of years is not unusual.

"The plea-bargained sentence is now the norm, and I think that everybody in the system understands that," says Langbein. "The real sentence isn't twenty years; everybody understands that twenty is really five because of plea bargaining."

A 1980 California study reported that plea bargaining also serves to circumvent the legislature's judgments. California law provides that anyone who uses a gun in committing a crime must go to prison, but the study found that in three sample counties fifteen of the twenty-five "use a gun go to prison" charges were dropped when a guilty plea was entered.

According to Professor Alschuler, "the purposes of criminal law are not adequately served unless you have adjudication in most cases. I don't think you can get the right sentence, I don't think you have the right sense of public legitimacy to these proceedings, and I don't think the reformative value of the law are being served."

"What we say is in the Constitution," Langbein continues, "is that every accused person has a right to a jury trial, but then we say, so help you God if you exercise it, because we're going to punish you twice. Once for the crime, and once for having the temerity to plead your rights."

Critics of plea bargaining add that it doesn't help reform defendants, doesn't help rehabilitate them. "The guy who's coerced into pleading feels that he had a worse deal than the guy who had a trial, whether he contested the charges seriously or not," says Judge Dorothy Nelson, former Dean of the U.S.C. Law Center, who has spoken with numerous inmates at California's Chino State Prison. "They believe it's all just a game. It leaves defendants with a perverted view of a justice system they believe to be a fraud. . . . They're convinced during their stay that next time then have to get a better player, a smoother bargainer, rather than reform in their ways."

In the words of the California study, "The experienced defendant can only conclude that a skillful negotiation under the proper circumstances can produce a sentence substantially less than that prescribed for a given criminal act by the Uniform Determinate Sentencing Law."

Adds public defender Lee: "In the back of his mind, the defendant is saying, 'What kind of system is this?'"

The View from Inside

Two state's attorneys, a public defender and a judge candidly speak about the plea-bargaining process in a Cook County courtroom. Each insists his name not be used.

They all freely acknowledge the problems of plea bargaining. More information should be available to a judge prior to passing sentence. Often plea bargains are contingent on extraneous factors, such as the personal relationship of the state's attorney, public defender, and judge. There's too much guesswork about the strength of a state's attorney's case. Probably, they agree, innocent people sometimes plead guilty to rid themselves of the risks of a trial.

But overall, they believe that plea bargaining is fair. They believe it's sensi-

I'M A HARVARD GRADUATE. I'M THE CHAIRMAN OF THE BOARD OF A LARGE CORPORATION. I MAKE DECISIONS EVERY DAY THAT AFFECT THOUSANDS OF PEOPLE AND MILLIONS OF DOLLARS. THIS MORNING I FORGOT TO PUT ON MY SOCKS...
MStevens

ble. Though it does not represent a textbook example of justice in America, it is more than adequate. Contrary to public belief, a trial is usually a considerable waste of time.

The public defender tells the story of a defendant who was literally caught red-handed, blood dripping from his palm. He had entered a gas station after hours by shattering a window. The police caught him in the station, money in his pocket, searching for more valuables.

"Now what kind of case do I have with this guy?" the public defender asks. "What strategy do I use? There's no viable evidence to present, no plan of action. Why go to trial? Why should we put everyone, including twelve citizens, through the efforts of prosecuting him, when he has no case and he's willing to admit he's guilty?" According to all present, the great majority of defendants are indeed guilty, and stand little chance of acquittal.

"You get two different breeds coming in here," says one of the state's attorney. "One stands up there like a man, and in effect says, 'I'm sorry, I deserve to be punished and I'm willing to spend my time in jail.'"

"The other gets up before the judge, belligerent as hell, guilty as sin, and says, 'It wasn't me, man.' He's a no good S.O.B. with no respect for the court or the justice system, who still thinks he can beat the system. He certainly deserves more years."

Judge? "When a defendant admits he's committed a crime, it's a clear step toward rehabilitation. . . . That certainly plays an important role in the sentencing."

Adds the other state's attorney: "We are not punishing the defendant for requesting a right to trial. We are giving him a break because he earned it by admitting his guilt in front of the court."

Is the adversarial system being duly served? "I'm not going to let some bum get off too easily," says a state's attorney, a man whose tough talk and brusque style lends credence to such a claim. "I'm going to make sure he spends the most number of years in prison possible, within reason and the legislature's guidelines."

Judges are often cited as the missing ingredient during plea bargaining, but this one believes he examines each case carefully enough before sanctioning a sentence. "I look at each case closely, and if I feel a defendant has been too severely punished, or that he is getting off too easily, I wouldn't hesitate to disapprove of the negotiated deal."

Says the public defender: "Three professionals are involved, representing two opposing sides and an impartial judge."

Defenses of plea bargaining are not confined to Cook County. Supreme Court Justice Byron White wrote in *North Carolina v. Alford* that plea bargaining is not only "essential . . . but . . . highly desirable. . . . It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever the rehabilitative prospects of the guilty when they are ultimately imprisoned."

> *"If plea bargaining is indispensable, it is because an inefficient judiciary and slothful group of lawyers are convinced it is so"*

But the strongest justification for plea bargaining remains sheer necessity. "There is no viable alternative," says the public defender. He receives no argument.

"Of course it's a compromise," says the state's attorney, "nothing is black and white and of course it isn't perfect. Plea bargaining is a necessity for the simple fact that it would cost $3,000 per taxpayer [to provide jury trials to every defendant in a given year]. The people wouldn't want to pay it, even if they were able."

Trying each case under the present setup would be an awesome task. It's been estimated that ridding the system of plea bargaining would require eight times the number of judges now employed, at least two or three times the number of public defenders and state's attorneys, and half the people of Cook County each year to serve jury duty.

"If we [the state's attorney's office] answered ready today on every case now before court it would take somewhere around two years to try them all. The average case, a simple case, involves one week of courtroom time, not to mention a great deal of outside investigation."

"There are problems getting witnesses to testify," says the other state's attorney. "The great majority of crimes involve blacks against blacks. They don't want to talk to 'the man.' Seventy percent of our investigative efforts are spent just tracking down witnesses."

"You get rid of plea bargaining and you'd be, in effect, telling people don't murder, don't rape, but you'd be giving them license to steal," says the public defender, referring to the Illinois speedy trial act, which requires a case to be tried within three months of its being introduced to the court. "The state would have to start with murder, and work their way down by the seriousness of the crime. They'd probably end up dropping any case less than an aggravated robbery because of time limitations."

Some Alternatives

"Everyone has to cooperate to get things done," says Chicago public defender Robert Goodman. "If a judge stops going for deals, then we're going to stop giving him pleas. We know how to put the pressure on a judge: back up his dockets and he'll look bad. Generally, the judge will go along with a deal, or deviate very little on an agreement. In turn, the judges have their own pressures to keep us in check." If the public defenders stopped taking pleas tomorrow? "So many cases would be thrown out of court because they didn't come up in time, that the few that did would be nailed hard with stiff, stiff sentences."

Virtually all those involved remain prisoners of a system guilty of entrapment the first day a judge, a state's attorney, or defense attorney assumes his or her post. No individual, or group of individuals, are responsible for plea bargaining. "There's no Hitler at work, there's no bad guy," says Professor Langbein. "Everyone's just doing his job within the system." He adds, "Obviously you've got a bad system."

He recommends a fundamental change of the system. Anything less would be an unsatisfactory compromise.

Says Langbein: "I have been to Germany and I have seen the Holy Grail. I have seen an advanced industrial democracy, a society comparable to our own in most important respects, running a criminal justice system in which there is not one case of plea bargaining in serious kind from one year to the next.

"What do they have that we don't?" Langbein asks, and then immediately answers: "A workable trial system."

What Germany and every European nation but England also have is the continental, or investigative, system. Under this system, every case is carefully investigated before trial by either a judge or another state official. Thus the bulk of time, effort, and money is spent regardless of whether or not the case comes to trial.

Secondly, their trials are almost always far shorter than American trials. In the nonadversarial system, the chief judge, relying on information gathered in the pretrial investigation, does the bulk of the questioning, while the public prosecutor and the counsel for the defense quietly take notes. The judge's goal is not the introduction of those facts advantageous to one side's case or the other, as in the U.S. adversarial system, but rather the most objective presentation possible. Even complex criminal cases are usually disposed of in one or two days.

Since trials are only a small burden on the system, there is no practical inducement to plea bargain. The system can adequately investigate every case and give every defendant his day in court.

Others offer less radical solutions. Professor Alschuler believes the system itself need not be completely overhauled, only streamlined and tuned. He says that the laziness and wasted time among judges, state's attorneys, and defense attorneys are primarily responsible for the "myth" that plea bargaining is vital to the survival of the justice system. "The system would function well," he says, "if everyone would work as hard as they should."

Georgetown's Herbert Miller does not believe we have to eliminate plea bargaining, but only impose safeguards against its potential injustices. He recommends the presence of a court reporter at all bargaining sessions and the heavier involvement of judges in the process. He also believes the defendant should be present at all discussions concerning his or her sentencing. "Until a major effort is made to apply the rule of law to the plea negotiation process, we will not be able to determine whether plea bargaining should be abolished or whether it can be legitimized," says Miller.

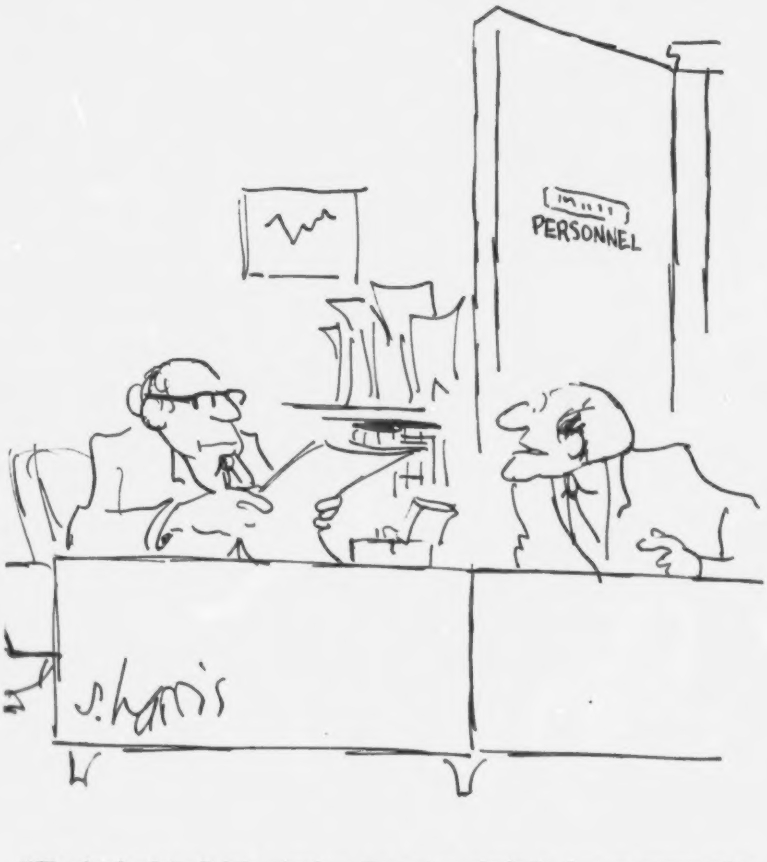
Plea bargaining has also been studied by government and judicial reform groups. Former President Jimmy Carter stated, "In many courts, plea bargaining serves the convenience of the judges and lawyers, not the ends of justice, because the courts lack the time to give everyone a fair trial." The National Advisory Commission on Criminal Justice Standards and Goals was more severe, strongly recommending in 1972 that plea bargaining be abolished no later than 1978.

But few jurisdictions have heeded such suggestions. Only a few local governments scattered across the country have seriously attempted to restrict plea bargaining. Reforms in Boulder, Colorado, and parts of Connecticut have resulted in overloaded dockets and stalled justice; other jurisdictions—such as New Orleans, Portland (Oregon), and the entire state of Alaska—have met with success. The results, according to prosecutors in all three jurisdictions: offenders are receiving longer sentences but the system is not suffering from the backlogs so many feared.

These efforts, however, may have fallen far short of the reforms critics of plea bargaining feel necessary. Their restrictions add up to no more than a token effort. The vast majority of cases are still tidily disposed of through pretrial negotiations. *Charges* are rarely lowered in these jurisdictions—i.e., convicting an armed robber for simple burglary—but the sentence differential is still raised and used to induce a guilty plea. For example, rape, which carries a six-to-thirty year sentence in Illinois, allows for considerable bargaining. "I don't consider these compromises anything more than halfway measures that do nothing to eliminate the problems of plea bargaining," says Professor Alschuler.

The only full-scale, no-compromise attempt to end plea bargaining has been confined to fiction. In James Mills's novel *One Just Man*, the public defender attempts to jar the legal system by convincing thousands of New York defendants not to accept pleas and thus force a jury trial for each. But they all are not ready for such an experiment, a point made apparent in the last chapter.

"They shoot the public defender." □



"The databank is slightly mistaken. I'm not an alcoholic. I never attempted to assassinate the Governor. I haven't been married seventeen times. I don't owe $86,000 in gambling debts. . . "

Sentencing

(Continued from page 21)

the right to have two opportunities before the court, the initial trial and the appe[illegible] Yet the techniques developed for imposing novel sentences may curtail the right of appeal.

In some of the states where novel sentences are imposed as conditions of probation, an offender cannot challenge the condition once he agrees to it. In states where the judge "postpones" sentencing for a period during which time the offender "voluntarily" undertakes community service, the latter is effectively prevented from appealing either the sentence or the charge. He is confronted with the choice of accepting the nonprison alternative or demanding that the actual sentence be imposed and taking his chances on appeal.

A novel sentence poses appeals problems to the government as well. In one price-fixing case, a federal judge permitted defendants to do charity work—serving the poor in charity dining halls—and told them he would consider the work as mitigating factors when he imposed sentence six months later. The Justice Department opposed this scheme on the ground that it was not authorized by the sentencing statute. But since the judge had not actually "imposed" a sentence, it was impossible to question or appeal the decision.

Creative sentencing may also lead to different sentences for the same type of crime. Equal protection prohibits substantial differences in penalties with no rational basis in fact. But whether a convict receives a long prison sentence or 200 hours of community work may depend on the jurisdiction where he is tried or the judge who happens to preside. These problems exist, of course, without novel sentences, but the potential disparities increase when the judge's discretion is expanded with such options.

Individual Rights

Once an individual is caught in the criminal system, it may be hard for a judge to resist purging him of qualities and beliefs of which society disapproves. Under novel sentences, offenders have been banished from the state, sentenced to go to church, and ordered to cut their hair. This is possible because of what Judge Marvin Frankel calls the "unchartered discretion" judges have in imposing duties or restrictions on offenders. A typical federal statute permits "probation for such period and upon such terms as the court deems best."

Some judges have abused their discretion by imposing clearly unreasonable conditions. The North Carolina Supreme Court overruled a novel sentence which conditioned the defendant's probation on waiving his right of appeal. However, a California appeals court upheld the condition that a person on probation submit to warrantless searches, which would otherwise have violated his constitutional rights.

In another California case, a 20-year-old unwed mother was found guilty of driving the getaway car in a robbery. The trial judge granted probation on the condition that the defendant not live with anyone to whom she was not married and not become pregnant unless she were married first.

***A** car thief spent his Sundays driving the elderly to museums*

A year and a half later, the woman was still unmarried and again pregnant. Her probation officer recommended against revoking probation since the woman continued to be cooperative, was interested in the welfare of her children, and apparently was not engaged in any illegal activities. But the judge was firm, saying "This was clearly explained at the time and this was the chance she wanted to take—of having a child outside of marriage; that if so she was going to prison. I do not intend to go back on what I said."

In reviewing the case on appeal, Court of Appeals Judge Shirley Hufstedler held that the woman did not have to go back to jail since a condition of probation that is not directly related to the crime may be invalidated. "Becoming pregnant while unmarried is a misfortune, not a crime," she said. "There is no rational basis to believe that poor, unmarried women tend to commit crimes upon becoming pregnant."

The issue of unreasonable conditions becomes acute when someone is convicted of a crime committed for ethical or political reasons. In Kansas, a man was convicted of failure to file income tax returns. Since he had for years conducted a personal vendetta against the income tax, the court forbade him from circulating materials questioning the constitutionality of the income tax and from speaking against the tax system. The appellate court revamped the restriction so that it banned him only from urging others to actually violate the tax laws. Any attempt to prevent his speaking out on the issue of constitutionality was found "on its face a violation of his First Amendment freedom of expression."

In another case, a man convicted of espionage was forbidden to participate in antiwar activities or fund-raising for a Communist periodical. Two years of litigation were necessary to remove these restrictions and to condemn such "rehabilitation" as a "process of molding the unorthodox mind to the shape of prevailing dogma." In contrast, an appellate court upheld the prohibition placed on the Irish gunrunner against visiting pubs or joining or associating with Irish organizations which "might fan his emotions or in any way cause his mind to dwell on subjects which might lead to crime again."

Proponents of judicial discretion point out that the incarcerated criminal would be forced to give up nearly all freedoms. Yet most appellate courts reviewing novel sentences have held that people on probation may be restricted in their rights only if "reasonably necessary to preserve public order and safety and to discourage the offender from committing violations again." The model citizen may be a church-goer, but courts may not constitutionally require someone to attend church as a condition of probation.

Yet some unconstitutional sentences are never appealed; in other cases, the defendant endures the restrictions for several years before a reviewing court will hear his case. An alternative means must be found to assure that the offender's rights to travel, speech and association—even if they are not equal to those of a nonoffender—are considered at the time the sanction is imposed.

On the Horizon

Judge Kramer suggests that many of the problems of judicially created sentences would be solved by legislative recognition of alternatives to prison. One guideline could be the standard developed by California courts, which hold a novel sentence invalid if it (1) has no relationship to the crime for which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality.

In addition, if community-service programs were instituted in all jurisdictions and judges were required by statute to consider them in passing sentence, much of the problem of discrimination would disappear. Definite criteria would provide guidelines for judges in deciding who should be eligible, thus reducing the need for character analysis from the bench. Work or other requirements could be explicitly established as a sentence, permitting the offender to appeal to a higher court, just as he would if he were sentenced to prison.

Creative penance clearly provides some benefits. Charities and public service groups connected with the Alameda County, California program receive about 300,000 hours of assistance each year. Provision of jobs to offenders under the Earn-It program has permitted victims to collect 90 percent of the restitution payments ordered in Quincy, Massachusetts in contrast with only 40 percent before the program was instituted. And these programs are much cheaper to administer than prisons. The cost of imprisoning someone ranges from $13,000 to $26,000 per year. Community service alternatives range in cost from as low as $50 per offender for programs which handle petty offenders and provide no supervision and little follow-up to $700 for more extensively supervised programs which handle more serious crimes.

In England, the use of organized community service programs rather than haphazard judicial invention provides the benefits of creative punishment without running roughshod over the traditionally protected rights of the offender. The English have already tried the laissez faire approach now in use in the U.S. and found it didn't work. In 1967, widespread introduction of suspended sentences in English courts without adequate guidelines was a disaster. Parliament remedied this by a provision in the Criminal Justice Act of 1972. The current law provides that if an offender aged 17 or older is found guilty of an offense punishable by imprisonment, the court may, subject to his consent, require him to perform a community service for 40 to 240 hours during the following 12 months.

Judges have little sentencing discretion under the English program. A social enquiry report assesses whether a given defendant is suitable for community service. The Probation Service, rather than a judge, has the power to specify the nature and details of the work the offender must carry out.

The results of England's "community service order" program are encouraging. In one case, a car thief was required to spend alternative Sundays driving old people to castles and museums. After serving half of his sentence, he tore up his record card, declaring that he was not interested in formalities and that he would help whenever he was needed. Once he had fulfilled his community service order, he moved closer to the group he had served so that he could continue to help out.

Lady Wooton, whose subcommittee of the Advisory Council on the Penal System was responsible for the English provision, predicted that community service orders would appeal to adherents of a variety of penal philosophies:

> To some, it would be simply a more constructive and cheaper alternative to short sentences of imprisonment; by others it would be seen as introducing into the penal system a new dimension with an emphasis on reparation to the community; others again would regard it as a means to give effect to the old adage that the punishment should fit the crime; while still others would stress the value of bringing offenders into close touch with those members of the community most in need of help and support.

The English model of creative penance deserves close scrutiny in this country. The current harebrained American sentences requiring defendants to write essays on civic virtue or complete scrapbooks produce no benefit to the community and insult both the dignity of the court and the intellect of many offenders. On the other hand, the benefits of legislatively created community service programs, like those in England, are clear. They provide concrete economic gains in the service performed or the restitution made. They are far less expensive to administer than imprisonment. And although the data are impressionistic, offenders, participating agencies, and court officials feel that the increased self-esteem of an offender who has done well on the job often eliminates his need to commit further crimes. □

"—and even if it were vacant, they wouldn't advertise for a Governor of Hawaii in the National Enquirer."

Insanity

(Continued from page 17)

grocery store, and then blows them away for good measure, and a crazy man who can't control himself, wildly thrashing a knife on a crowded downtown street, with no idea that he's doing anything more dangerous than carving a turkey."

Intent has always been a part of the law, whether the question before the court is an individual's sanity or the reason for committing a crime. For example, if a man robs a home and kills its occupants in the process, he is guilty of first degree murder. But if a woman kills while staving off her husband during a beating, then she might be found guilty of voluntary manslaughter, or judged completely innocent. Yet the results of her actions were the same as those of the armed robber/murderer—the death of another individual.

Lawyer/psychologist Donald Paull also raises another point: "Every day our prisons release people onto the streets who commit the same crimes again. But when it involves a mental patient, the public is outraged .... We can't just hold people indefinitely because we can't be confident that they won't commit crime again."

Others raise the problems of treating the mentally ill like other convicts. There is the tale of Richard Elliot (fictitious name), a slight, squirrelly young man who attempted to rob a corner bar with a butter knife. "Give me all your money," he reportedly squeaked to the burly bartender, the knife shaking. He passed out when the patron sitting at his side pulled out a gun and held it to Elliot's head. The public defender, after several meetings with Elliot, said that he was "as nutty as they come." The judge, the public defender, and the state's attorney all agreed that the last place he should go was the state penitentiary, mandatory for anyone convicted of armed robbery, but the official ruling is still pending. According to a state's attorney, "he'd be beat up sometime the first week, and maybe dead before he served out his time."

Proponents of the defense often point to the lack of decent psychiatric services in the penitentiary as a strong argument for maintaining special legal provisions for the insane. A psychiatrist from the Menard Psychiatric Center, adjacent to the Menard State Prison, provides an example of the problem inadequate facilities present: "One young man was in need of psychological services but not ill enough to require our very limited bed space. He eventually killed himself. They found a note that said, 'I need help. Please get me out of here; they're going to rape me.'" Adds John Ackerman, of Houston's National College of Criminal Defense: "If you put crazy people in prison and they're paroled after ten years, then you've really got a problem."

Ripe for a Change

Not so long ago, the insanity defense was uncontroversial. Defendants had little incentive to employ the defense and the prosecutor didn't care either way. Whether convicted or judged not guilty by reason of insanity, the accused was sure to be locked up, either in the penitentiary or in a state mental hospital. The hospital was apt to be worse than the prison, a lifetime sentence of shock therapy and maltreatment.

But now, in the post-*Cuckoo's Nest* era of mental patients' rights, mental patients are not escorted to their corner and ignored forever, save for their daily dose of drugs and their weekly hit of 1000 volts. The trend since the early seventies has been to return mental patients to their communities. "We realized that we couldn't just let them rot in the hospital," says Barbara Weiner.

At the same time, the widespread use of psychotropic drugs has helped reduce the number of years a patient must remain in a mental health facility. These drugs, it is believed, allow many to live relatively sane lives.

The results of these two trends have been shorter stays in mental institutions and, some argue, an increased use of the insanity defense. According to the New York study quoted earlier, between 1965 and 1976 there was approximately a fourfold increase in the use of the defense. At the same time, the study reports, there's been a growing outrage that patients are not spending enough time in hospitals.

No insanity cases have created more of a furor in recent years than those of two Illinois men, James O'Malley and Thomas Vanda. O'Malley was charged with murder and found not guilty by reason of insanity. After eight weeks of treatment, he was "well enough to live in society," according to his team of doctors. Within the year, he beat and kicked to death an O'Hare International Airport guard. He was arrested while singing near the body. This time, a jury convicted him of murder.

The *Vanda* case followed this same litany. He was found not guilty by reason of insanity in the fatal stabbing of a 15-year-old girl, spent 15 months in a mental hospital, and was freed only to kill again, this time a female college student. Like O'Malley, the second time he was convicted of murder.

The debate over the defense has risen and fallen in sync with the public emotion over highly publicized incidents such as these. After Vanda's second murder, the Illinois legislature reformed the state's insanity statute, stripping away the Department of Mental Health's unquestioned authority to release patients found not guilty by reason of insanity. In Illinois, a circuit judge now makes the ultimate decision to release a patient. Even if a team of psychiatrists unanimously certifies that a person is no longer a danger to himself or others, he will not be released until a court hearing upholds the hospital's decision to release the patient.

But many believe such measures are hardly more than symbolic gestures to soothe a fearful public. There is still widespread concern in Illinois, and other states with a similar check on psychiatrists, that the public is not adequately protected. The system, they believe, is too liberal. In Illinois, points out Bill Kunkle, few judges have dared to overrule the health department's psychiatrists. "No matter how good a barometer of public opinion a judge is," he says, "it is hard to stand up to a team of psychiatrists saying that a patient is 'cured.'"

The Reagan administration's war on violent crime is rekindling the debate. At least two bills are now before Congress, and many other proposals are being considered by both the federal and state governments. And despite failures in the past to change the legal definition of insanity, it seems that many new attempts are now being seriously considered.

Some legislatures are wrestling with the idea of tossing out the defense altogether. "Do away with the insanity defense in criminal cases," presidential aide Edwin Meese III told the California State Sheriffs' Association, shortly after the attempted assassination of his boss. "A good portion [of criminal trials] is taken up with hot-and-cold-running psychologists for both sides telling all the things that are wrong with the accused."

But reforms more likely to pass would only limit the insanity defense, or provide measures to complement the plea, such as the additional verdict of guilty but mentally ill (GBMI).

Guilty But Mentally Ill

"This law will ensure that those people who have mental problems, and are responsible for crimes are punished as well as treated," Illinois Governor James Thompson said recently of the newly instated GBMI verdict. Said the U.S. Attorney General's Special Task Force on Violent Crime, which recommended that GBMI be adopted by the federal courts: the new verdict "would enable federal juries to recognize that some defendants are mentally ill but that their mental illness is not related to the crime they committed or their culpability for it. It also would enable a jury to be confident that a defendant who is incarcerated as a result of its verdict will receive treatment for that illness while confined."

Though only Illinois, Michigan, and Indiana are using the GBMI verdict in criminal cases, the reform may spread fast. "I wouldn't be surprised if every state in the union has GBMI soon," says Cavanaugh, echoing what many psychiatric and political experts believe.

According to Dr. Elissa Benedek, director of the Center for Forensic Psychiatry in Michigan, where GBMI has been on the books since the mid-1970s, the program has been a great success. "The same amount of people are being found not guilty by reason of insanity," says Benedek, "but about 30 a year who probably would have been found straight out guilty are now receiving extra treatment in prison."

But critics of GBMI have their doubts. "Guilty but mentally ill is a hoax," argues attorney Barbara Weiner. "It's not going to help anyone. Defendants found guilty under GBMI are going to be sentenced as if unqualifiedly guilty, and then receive the same psychiatric treatment that they were entitled to even under the old law." Why the move then? "Politics," answers Weiner. Her colleague Dr. Cavanaugh adds: "The legislature had to do something to appease an outraged public. This is their answer . . . but it's certainly no solution."

Despite the Michigan experience, a host of legal and psychological experts feels that GBMI will, in effect, all but remove not guilty by reason of insanity from the courtroom. "With such an easy avenue of compromise, it will be even rarer that a jury or judge accepts an insanity defense," says a psychiatrist who has been providing testimony in the courts for over 20 years.

He continues: "For it to work properly, the states would have to set up sophisticated treatment centers for all these cases. And most aren't prepared to do that. Then, if a person actually does get treatment and responds, where does he go? To prison to serve out the rest of his term? Nothing could be more psychologically unhealthy."

Another controversial proposal, though one that seems to have a head of steam behind it, is a bill by Senator Orrin Hatch (R., Utah) that would greatly restrict the federal definition of insanity. Under the Hatch bill, according to its author, "An individual suffering from delusions, who believed he was throwing darts at a board instead of stabbing a victim to death, would not be guilty of murder," because he did not kill intentionally. In such a case, a defendant's insanity would be considered so extreme as to negate an element of intent. But insanity would not constitute a separate defense when defendants intentionally commit a crime, even if psychiatrists said they were unable to control their actions because of their mental condition.

> *You can't deal with an intrinsically complicated issue like the insanity of a person by a change in the law*

But many wonder whether the Hatch bill, or even the eradication of the defense completely, would remove the psychiatrists completely from the courtroom. "You would have exactly the same issues contested, you'd just have it over intent rather than insanity," said Alan Dershowitz of Harvard Law School in the *New York Times*. Says Chicago's Bill Kunkle, a strict opponent of even the most stringent definitions of insanity: "Whether or not you have the insanity defense you'll always have psychiatrists in the courtroom. The question of intent will always be a part of criminal adjudication."

Shifting Focus

The impetus behind the Hatch bill and those like it make sense—concern over the few but powerful incidents of patients being released only to kill again—but the targets of these reforms, many psychiatrists say, is wrong. Rather than take aim at the definition of insanity, they argue, we should be focusing our efforts on the post-verdict stages of treatment. The problems aren't so much that people are being found not guilty by reason of insanity—fooling a psychiatrist is extremely difficult, most observers concede—but rather that mental health officials don't know what to do with these people once they are committed.

"You can't deal with a complicated, intrinsic issue like the insanity of an individual by changing a law," says Dr. Cavanaugh. "We must deal with problems such as these by analyzing patients in a more sophisticated manner, individual by individual."

Michigan has emphasized improving the mental health facilities in prisons, placating many early opponents of the GBMI bill. "At first, I was against GBMI because there was lack of adequate provisions for these patients in the prisons," says Dr. Elissa Benedek. "The facilities have been extensively improved, and now GBMI inmates receive proper treatment."

An extensive outpatient service at Maryland's Clifton Perkins State Hospital is another seemingly successful approach. Perkins has a "graduated program of release," according to one official, where violent offenders are moved in stages from the maximum security wings of the hospital to regular wards, then to a weekend outpatient arrangement, and eventually to release upon the the provision that they return a set number of times a week for counseling and, if needed, medication. According to a study by the hospital, over the last five years none of their patients have committed a violent crime. The Isaac Ray Center in Illinois has a similar program.

The Isaac Ray Center, like a few other hospitals and universities around the country, has also been working to improve the consistency and reliability of courtroom testimony. The inherent conflict among psychologists will not be removed from our courts, concedes that center's director, Dr. Cavanaugh, "but we look at all the evidence possible, rather than basing our testimony on a few meetings." Cavanaugh points out that any psychiatric evaluation undertaken by the center involves interviews out of the office, review of police reports, and information from any other available resources. Also, when a lawyer comes to the center seeking an evaluation of a client, the center's findings are sent to both the defense and prosecution.

None of these programs are a cure. These programs can't rid the courts of the familiar dueling psychiatrists scenario or concoct some magical formula for curing patients and determining their mental state under law. But while legislators are grappling with legal definitions and devising protective legislation, they are providing some important alternatives. ☐

Alternatives

(Continued from page 9)

claims courts are part of the state court system.

Small claims courts have a variety of structures, but they are usually praised because of fast, cheap, and effective decisions. However, some critics say that the small claims courts don't measure up. For example, many courts operate only during business hours, so plaintiffs and defendants must miss work to get to court. It is hard to argue that a small claims court is effective or cheap in the face of inconvenient hours and lost wages.

The maximum dollar amount that a litigant can ask for in a small claims court differs from state to state. Amounts, now being pushed up by inflation, vary from $150 to $5,000. Connecticut legislators raised the state maximum to $1,000 last May; New York recently boosted the maximum to $1,500. Let us assume that the Carsons live in a state where the maximum is $1,000, the amount they want from John.

As plaintiffs, the Carsons fill out a form with their name and address and that of John, state their grievance, and file the form with a small fee (between five and ten dollars) at the clerk's office. The defendant (John) is notified by registered mail, and a hearing date is set.

The Carsons have to figure out what to do next. Should they get a lawyer? Forty states allow small claims litigants to hire lawyers, and over 50 percent of the parties use the option. Legal fees would add to their costs, they know, but $1,000 is a lot of money and a lawyer might help them win. If they lost, their lawyer could help them appeal. The Carsons have no idea how to prepare for their court appearance; they got no clues at the clerk's office. A lawyer's familiarity with court procedures and formalities would make it easy.

If the Carsons hire a lawyer, John should too. According to a 1977 study, small claims defendants don't fare well without lawyers, especially when the plaintiff has hired one. (Some states allow only the defendant to hire a lawyer.)

On the other hand, the Carsons don't know any lawyers, and getting recommendations and then meeting with him or her is a lot of effort. The Carsons decide that a lawyer would just complicate the issue. So they don't hire a lawyer, confident of their case and anxious to tell the story themselves.

Small claims court, after all, is supposedly a simple and direct route to a judge, free of lawyer-oriented rules of procedure and evidence. The idea is that people just stand up and receive an impartial hearing from a judge. One Manhattan small claims judge, Norman C. Ryp, believes, "These disputes are terribly upsetting to the people involved. It's very important for us just to listen. Their being able to tell their side of the argument is as important as their winning or losing."

File to Trial

How long will the Carsons have to wait to remedy their neighborly dispute? Again, observers disagree on the speed of the small claims system. Some states dispatch these disputes in six weeks, from filing to finish. Critics say, though, that litigants can wait eight weeks for their case to come to trial, and if there is a continuance, the process is extended.

The Carsons are lucky. They receive a court date two weeks from the date they file their complaint. (In some states, upon receipt of the complaint, John would have to go in to the clerk's office and respond.)

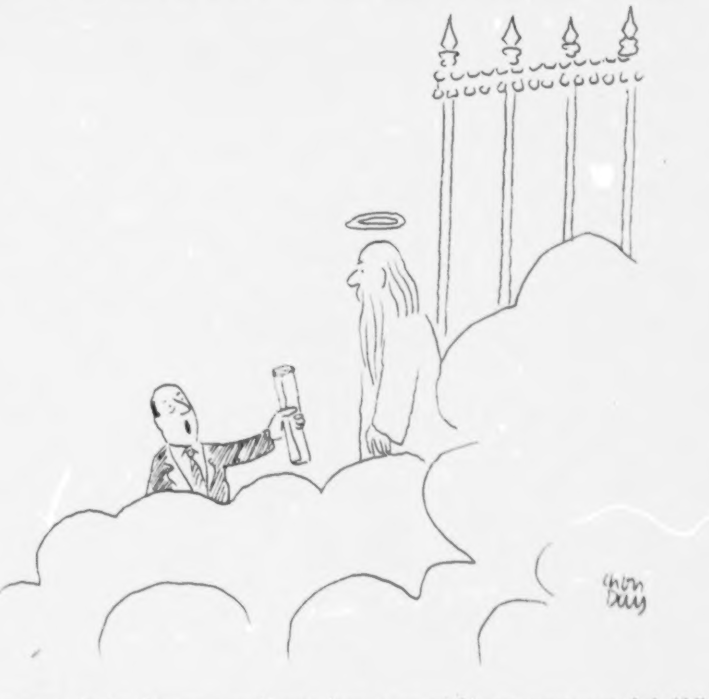
Most small claims courts are informal and free of the intimidating legalese of higher courts. (See the article, "Why I Went to Small Claims Court," in *Update,* Fall 1977.) The Carson's case was second that morning. If John had not shown up, they would have won by default, but there he was, looking as nervous as a plumber knee-deep in rising water.

The Carsons and John are sworn in together, and each side tells its story. Neither side has witnesses because no one told them that they could bring additional people to testify. Critics of small claims courts often lambaste this segment of the procedure. Plaintiffs frequently show up without relevant records and photographs that would clinch their case. Defendants, even less prepared, appear with little idea of what will transpire.

For example, a clerk or a paralegal might have told the Carsons to bring the drawings that John had made and to take photos of their bedrooms. Perhaps a friend who had seen their upstairs handiwork might have served as a witness. John, by letter or on his answer date, ought to have been informed of possibilities for his defense: witnesses might corroborate his professional responsibility; his receipts might help clarify the work he had done. (Legal advice, before the case is filed or on the hearing day, is offered more now—for instance, second-year law students provide assistance in Los Angeles.)

Bad Luck or Negligence?

The small claims judge has a difficult task. He or she must gather the facts of the dispute, apply the appropriate law, and render a decision—all in the ten to fif-



"My attorneys, Crofts, Finnegan, and Lewis, have prepared this statement on my behalf."

teen minutes that these cases usually take. A number of years ago, former Los Angeles Judge Peter Katsufrakis described small claims court in an interview: "It's a tough court. You're not dealing with lawyers to isolate the issues. You're involved. You're talking all the time. . . . Although some niceties of other courts are missing, the small claims court deals with issues that are essentially the same."

Ironically, small claims judges have low status among legal professionals. Though the cases can be challenging, judges often dislike small claims because they seem as unimportant as the monetary sums involved. The lack of prestige, coupled with judges' burnout, has prompted some states to rotate service in small claims court. Lawyers who volunteer to preside also share the task.

Without concrete evidence, small claims cases are often one story against another. If John were inarticulate, or terrified of judges and temporarily speechless, the judge's task would be difficult indeed. Since suits can be brought over oral contracts, the court is often faced with muddles similar to that of John and the Carsons.

Meanwhile, John and the Carsons have finished telling their tales. If they had brought witnesses, they would be able to cross-examine them. As it is, they depart and await the judge's decision in the mail. Many judges withhold their decisions to avoid physical confrontations, but on-the-spot decisions are also hampered by the complexity of some small claims cases. Some observers recommend that small claims judges have access to a central research office in order to get help on new developments in various subjects. For example, busy judges may be inadequately informed of the many changes in consumer law.

In the Carsons' case, though, earlier decisions and laws regarding negligence provide the judge with ample material on which to base a decision. People doing repair or construction jobs have a duty to exercise ordinary skill and competence; their failure to do so subjects them to liability for negligence. The judge must quickly assess whether John had exercised "reasonable care and competence" and make the decision as to John's negligence.

The judge could decide in the Carsons' favor but needn't award all the money that has been demanded. If John won the case, he would be found free of liability and the Carsons would probably have to pay his court costs. You might ask your students to weigh the case themselves and render a judgment. What if they favored the Carsons? How could the family collect from John? Here is another weakness in the small claims systems: collection.

Most courts do not devise payment plans, nor are defendants asked to testify under oath about their assets. Therefore, a victorious plaintiff often remains empty-handed. After a certain time period, the plaintiff can go to the county sheriff, who in turn can force the defendant's employer to garnishee wages, or can impound the defendant's property pending payment. All this hassle might be worth $1,000, but many small claims judgments (as high as 45 percent according to one estimate) end in moneyless frustration.

***A** woman who broke her lover's window was not convicted. Rather she, the man, and his wife went to mediation.*

That's one reason many people who feel gypped simply nurture their hostilities and stay at home. Others who stay away may feel that small claims courts are part of that pervasive system that's out to get them, or perhaps they cannot find the time and energy to make a claim.

States report extremely varied use of their small claims courts—and often businesses trying to collect debts are the major users. Forty-two states have laws that allow a consumer to sue for three times the damages of a merchant's fraud, but consumers rarely go to court. These "missing plaintiffs" may be explained, in part, by the lack of publicity about court services. The erratic use of the small claims court, supposedly the most accessible of the courts, makes concerned citizens wonder if this court is doing the job.

Justice Among Neighbors

The Carsons versus Plumber John might have a second ending. Rather than going to court, they could opt for mediation at a neighborhood justice center (NJC). Back in 1977, then Attorney General Griffin Bell initiated three pilot justice centers to test mediation and arbitration as alternatives to court trials.

Mediation is the process of finding common ground between two parties, who then arrive at their own resolution through the help of a third party, the mediator. Arbitration refers to the procedure that results in a legally binding decision after two disputants present their case to an impartial third person or panel.

NJCs vary in organization and the types of cases which they handle, but their general purpose is to settle relatively small disputes in an informal, noncoercive atmosphere. The NJCs apparently met a need, for about 150 of them have been established since 1977. Most centers are similar to the three pilots begun in 1977, but now are funded by local and state resources.

What will happen if the Carsons try a neighborhood justice center? Both parties must be present to work out an agreement, so the Carsons and John will have to agree to mediate. Opponents in a mediation situation sit across from each other voluntarily, as equals.

Set aside your image of courts and proofs and victims. Instead, imagine the Carsons and John around a conference table, talking to each other, with a mediator present. Not all statements need to be relevant to the grievance at hand. Mr. Carson mourns the many weekends that now seem wasted to him because of the flooded bedrooms. He reveals how he really hates repair work and was so relieved to have most of it done, until now, anyway.

His dread is equalled by John's defensiveness. John worries aloud about the Carsons' hostility and what they might do to damage his reputation, anticipating the loss of future jobs if the family were to denigrate him. He is apologetic, and at the same time he is angry. Everybody makes mistakes; why should he bear the entire cost of an accident?

The informal setting, the neutral third party who is committed to listening to both sides, and the low cost of the proceedings encourage a full hearing of the immediate conflict as well as of other gripes that add to the distrust. John, some months back, had offered to lend the Carsons his truck for hauling lumber but had never shown up at the promised time. The Carsons' son, who revved up his motorcycle every morning as he left for school, awakened John frequently. Grudges that people carry around make it difficult to find common ground and mutual understanding.

It takes over an hour for each party to express all their gripes and then meet privately with the mediator, who tries to find out where they might give a little. By the second hour, the Carsons, John, and the mediator have a tentative agreement drafted, one which they will refine at a second session.

John agrees to pay the Carsons $250 outright, which he can borrow from his aunt. In addition, he and his brother will re-plaster and paint the bedrooms, receiving thorough instructions from the Carsons. The session has cleared the air, and the Carsons realize that John is competent as a plumber; they agree to his completing the work in the kitchen, without further labor charges. The Carsons will reimburse him for the materials, and will count on an occasional use of John's truck for the big jobs they still face in renovating their house. The couple will talk to their son about his motorcycle—perhaps he could park it in the alley and wheel it to a commercial block before starting it.

In 1979, the Institute for Social Analysis reported that nearly half of all cases handled by mediators resulted in an agreement that satisfied both parties. Follow-up inquiries six months later revealed that these mediated agreements remained in effect. Other studies report an 86 percent success rate, with the remaining 14 percent arriving at partial settlements. But further studies are needed to compare the results of mediated settlements with results of similar cases settled by the courts.

Window Breaks, Love Broken

Most observers believe that mediation is preferable to court when the disputants have an ongoing relationship. Therefore, even in cases where criminal charges have been brought against a neighbor, a lover, or a family member, a judge might send the dispute to a mediator before ordering a trial. Such a case was written up in the May 1980 issue of the *New York Law Journal.*

A woman who had had a baby by her married lover threw a rock through the picture window of the house where he lived with his wife. She was arrested for reckless endangerment. A court trial could only address the issues of window breaking and rock throwing, but in mediation, the woman's anger at her lover's decision to stick with his wife, her need for child support, and the feelings of all three of them—husband, wife, and slighted girlfriend—could be considered. The criminal charge was side-stepped in favor of a resolution that dealt with underlying issues.

Mediated settlements are not legally binding; their merits lie in the active participation of both sides in arriving at an agreeable solution. If both sides recognize the advantages of a peaceful resolution, a compromise is almost always possible. Though sometimes a small business or landlord is economically better off than a consumer or a tenant, they may be more than willing to sit down at a conference table rather than lose business or drag out an eviction process.

Clients usually arrive at agreements within two weeks of their original request for mediation. Most NJCs train community members to be mediators; many of these volunteers already work in a law-related field. (See box for a unique high school mediation class.)

> *"New techniques may lead to the ventilation of complaints that are now largely suppressed."*

Still unclear is the relationship between the centers and the judicial system. Many legal professionals do not trust the process, believing that the unenforceability of the mediated agreement is a serious drawback. Others wonder what happens after an unsuccessful mediation effort. The full airing of a mediation session might add legal dimensions to the dispute if, for example, one party threatens the other in a heated moment. No records are kept of mediation sessions, but if the dispute were eventually to go before a judge, could the mediator be subpoenaed to testify? Do parties in mediation have any protection of confidentiality? These and other questions open new grounds for challenges in court.

Some cases are clearly inappropriate for mediation. For instance, when a point of law is to be determined, or when one party is lying or uncooperative, mediation may just not work. Some NJCs offer arbitration as another option.

Big Bucks

The Carsons' neighborhood may be rich in battles, but the dollar amounts fought over are quite negligible. Let's up the stakes. As fast as you can say Catfish Hunter, many Americans will think of another alternative to the courts—arbitration—because of its role in fixing the whopping incomes of baseball players. (See *Update*, Fall 1978, "Ball Players Score Big in the Legal Game.")

Arbitration, compulsory or voluntary, is most often used to settle monetary claims above $10,000. The American Arbitration Association (AAA) has spelled out arbitration procedures to guide the construction industry and insurance and commercial firms. These rules primarily derive from labor relations. The AAA is one of the agencies that provides arbitrators for a growing number of cases—about 40,500 in 1980, up 53 percent from 1970.

Most arbitrated cases involve more parties and higher dollar amounts than mediated cases. For example, a dispute over a building, like that between the Carsons and John, can quickly become complicated when it involves a larger job and more participants.

Imagine a private university that plans to build a new library on their campus. The architect they hire, Ms. Atkins, consults a structural engineer, Mr. Bigsby, on the design of certain pre-cast concrete beams. After the beams have been fabricated, Ms. Atkins suspects that they are not strong enough; she asks a second structural engineer to review the design, and he agrees that the beams are inadequate. Despite the objections of Mr. Bigsby, Ms. Atkins replaces the original beams with redesigned ones. Atkins wants Bigsby to cover the expenses of the construction delay and the manufacture of the new beams. Bigsby's refusal creates an impasse. Ms. Atkins refers the matter to her attorney.

In court, this dispute would reach trial about the time the university library celebrated its fifth anniversary. Each firm would encounter costly legal fees, time-devouring testimony, and lengthy proceedings. What might happen if the parties agreed to arbitration instead?

The process varies, of course, but generally there is little pretrial discovery (access to the other side's evidence), the rules of evidence are relaxed, and the atmosphere is informal. Each side, represented by counsel, presents its arguments to a trained arbitrator, who then delivers a legally binding determination. Arbitrators are often lawyers with additional training or retired judges.

When disputants voluntarily submit to arbitration, they waive their right to a trial and must live with the outcome. This condition encourages the parties to compromise before arbitration. As Mitchell Sviridoff, vice president of The Ford Foundation, puts it: "Once the disputants realize that other parties are also

Magnet School Attracts Student Mediators

A bell rings at three o'clock. Most of the students at Houston's Magnet School for Law Enforcement and Criminal Justice (HSLECJ) head for the buses. Twenty students weave in the opposite direction, past banging lockers and chattering colleagues, toward a former home-ec room where, in a comfortable atmosphere of sofas and stuffed chairs, they learn about mediation. More than learning about mediation, these students are becoming mediators.

Lawyer-educator Mike Guthrie, who conducts the class with a staff member from the Harris County Neighborhood Justice Center (NJC), says "In the first month of meetings, you watch these kids grow up, really." Five days a week for a semester, Guthrie's class members define values, learn effective communication and, finally, participate in mock mediations.

This fall all juniors were invited to apply for the mediation class; applicants were interviewed and selected, not necessarily for academic excellence, but rather for their ability to interact with others. The result is an exciting group of diverse people whose exchanges in class are the substance of their learning.

Students begin by identifying their own needs and values in order to recognize what they bring to a mediation situation. Mike Guthrie, or his colleague from the NJC, presents the students with hypothetical situations that prod the students to reflect on their values. The students explain their choices to the class and try to isolate the steps of their reasoning. All the while, class members learn to listen and to express complex responses.

The mediation process, often requiring shuttle diplomacy between two disputants, aims at identifying underlying problems ("hidden agendas" as the jargon goes), de-fusing those issues that contribute to the conflict, and helping the individuals to discover a mutually agreeable resolution. Mediators hope that the two parties will sign a written agreement, though that document is not legally binding.

The students are tested periodically during the semester, and at the close of the term each student directs a mock mediation. Sometimes Guthrie and another teacher simulate a conflict, or two of the students roleplay the opposing parties. After a semester's hard work (for which students receive course credit), these 16- and 17-year-olds have learned about themselves while increasing their respect for the values of others.

Participants in the mediation class last year helped to sell the class to others as they tested their newfound skills. One student worked at the Harris County NJC over the summer as a paid mediator. At the NJC, adults who were uncomfortable with a teenaged facilitator worked out their differences readily with a pair of mediators, student and adult.

The high school itself will soon be able to provide mediation services for local residents as well as handle referrals from the NJC, the Houston police department and the Citizen's Complaint Desk of the Harris County District Attorney. Students might mediate disputes at other high schools while serving the parents, teachers, and students of HSLECJ, too.

Students at the High School for Law Enforcement and Criminal Justice explore many law-related fields in addition to taking academic core courses. For more information on the mediation program, or other efforts at HSLECJ, you may contact Dr. Judy Morris through the Houston Independent School District, 3830 Richmond Avenue, Houston, Texas, 77027.

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reasonable and have reasonable needs, that these can be accommodated without great injury to anyone, and that compromising over them is much less taxing than waging holy war, then much of the breech has been mended."

Furthermore, many welcome arbitration because their case can be assigned to an arbitrator with expertise in the area under dispute. For example, an administrator of an arbitration service would assign an arbitrator with special knowledge of engineering to hear the case of *Atkins v. Bigsby* and thus ease the presentation of technical evidence.

The decision in *Atkins v. Bigsby* specifies that the questionable beams be subjected to the forces they would undergo in the building, with the outcome determining who pays whom. If Mr. Bigsby is proved wrong, his insurance company must pay for the expense of arbitration, for the new beams and the consulting fees of the other engineers, and for the cost of delays.

The grounds for appealing an arbitrator's decision are very narrow. Only if one of the parties can prove that the arbitrator has been bribed, or has clearly overstepped his or her authority, will the court overrule the arbitrated decision.

Compelled to Arbitrate

Voluntary arbitration has been used by the private sector for decades. Some states are now experimenting with compulsory arbitration to help relieve the backlog in the courts.

A number of state systems mandate arbitration for cases under $15,000. Despite good intentions, mandatory arbitration has plenty of snags. A party whose interest is served by dragging its feet can sue for $16,000 in California, for example, and still get a court trial, though a highly controversial provision of California's law allows judges to decide how much a case is worth and whether or not to send it to arbitration.

Some states don't have automatic arbitration for "small" disputes, but leave it to the judge to order arbitration in some cases. But court-ordered arbitration may well lengthen the time a case spends in the judicial system: first, by the wait for a judge to make the decision to arbitrate or not, and second, by the schedule of the arbitrator. A judge may send a case to arbitration a mere 30 days before the scheduled court date—after a five-year delay—and then an arbitrator might not be available for another three to four months.

The courts allow appeals by parties in compulsory arbitration. Any party can contest the arbitrator's decision by requesting a trial, but litigants who elect to go to trial must pay the court costs and arbitrator's fees if they do not better their position in court. The arbitrator's award cannot be used as evidence, and further discovery is prohibited. Even these conditions do not keep 40 percent of the compulsory arbitration cases in California from the courts.

Another factor working against California's arbitration program is that it confronts one of the largest logjams in any of the state courts. The *Los Angeles Times* reported on a Rand Corporation study showing that arbitration might reduce jury trials by 10 percent to 20 percent, but 72,000 civil suits remain backlogged in the Los Angeles Superior Court, with an estimated four- to five-year wait. As Presiding Judge David N. Eagleson said, "[Arbitration] hasn't helped the judiciary one iota. . . . If we sent 70 percent of the cases filed to arbitration, and we do not, we still would have more cases to try than we could try in a timely fashion. . . ."

Members of the judiciary blame lawmakers for the public's overblown expectations about alternative dispute resolution procedures. Los Angeles Superior Court Judge Richard Schauer commented: "Politicians get credit for proposing programs they say will alleviate court congestion and backlog. Many programs are introduced without assurances of success, largely from political motivation."

In other states, however, compulsory arbitration seems to be working better. The delays that characterize California's diversion program are rare in New York, for example. Further, the 1980 rate of demands for new trials after mandatory arbitration in New York was only 5.3 percent.

New York has two kinds of arbitration, depending on the sum involved. Cases involving less than $2,000 go before a lawyer-arbitrator; those between $2,000 and $6,000 are presented to a panel of three arbitrators.

Arbitrators have a fair amount of latitude in their judgments. For example, they can reduce the amount of the award, or they can devise a settlement, like the beam test in *Atkins v. Bigsby*, that will resolve the dispute. But whatever their decisions, they are legally binding on the parties.

Where Are We Going?

Arbitration, and other experimental alternatives to court trials, may provide more appropriate means to resolve differences as well as lighten court loads. Many of these programs are too young to allow any conclusions about their import for American justice. But Professor Frank E. A. Sander (author of an ABA report on minor disputes resolution) has contemplated some possible trends:

> It is important to realize . . . that by establishing new dispute resolution mechanisms, or improving existing ones, we may be encouraging the ventilation of grievances that are now being suppressed. Whether that will be good (in terms of supplying a constructive outlet for suppressed anger and frustration) or whether it will simply waste scarce societal resources (by validating grievances that might otherwise remain dormant) we do not know. The important thing to note is that there is a clear tradeoff. The price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed.

Small claims courts, mediation, voluntary and compulsory arbitration, and private courts (see box) certainly fulfill some previously unmet needs for redress. But how many new legal and ethical issues do they raise?

These alternatives give promise of delivering justice faster and more economically, but they're not going to solve all the problems of clogged courts and delayed justice. We have a population of individualists, yet we live close together in an interdependent society of chafed elbows. As long as we remain a competitive, cantankerous people, we'll go to the law to settle disputes. The growing weakness of family and churches, which used to ease many of the tensions of everyday life, will only increase our dependence on legal solutions.

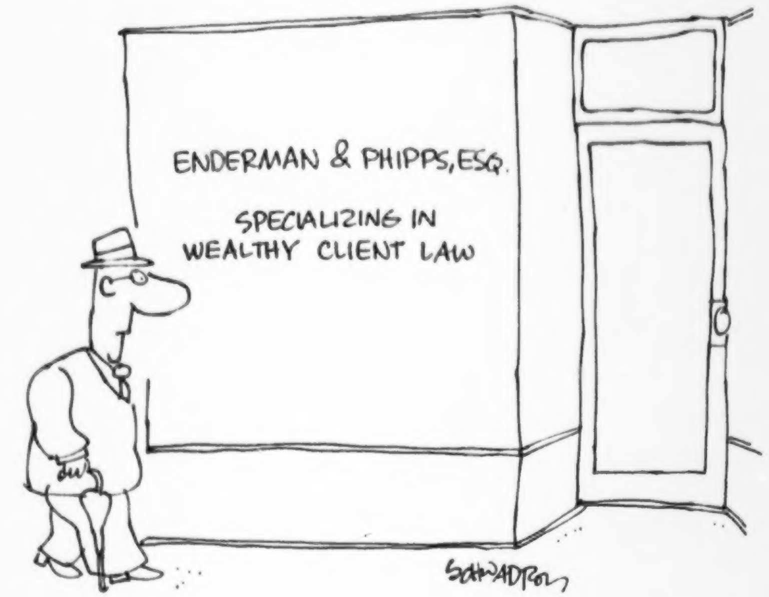
In this setting, alternative ways of settling disputes can only do so much. In fact, one school of thought holds that these alternatives will never cut down the backlog of cases, because the easier we make it for people to express their grievances and get a hearing, the more cases will come into the system. When legal proceedings are costly and drawn out, only the disputes that truly outrage us will go to *the* law. The easier it is to turn to law, the pettier the disputes that wind up there.

Other critics warn against shortcuts. Sure, they say, some disputes don't need the full panoply of legal procedures, but in some cases justice can only be achieved if there are careful rules of evidence, opportunities to appeal, and all the other due process protections. Most alternatives try to get the two parties to compromise, but sometimes one party is clearly in the right, and a compromise represents an injustice.

Another line of criticism is that the alternative forums deflect energy from organizing people with common grievances, like tenants, into groups with effective leverage.

The jury is still out on these new mechanisms, but one thing is clear: they're going to be with us for some time, and will probably be joined by yet other alternatives to traditional procedures.

Americans want just resolutions of disputes with efficiency, low cost and speed. At the same time—though the formats and settings of American trials are in flux and under fire—it is unlikely that courts will be replaced, or that lawyers will become anachronisms. A diminution in conflicts seems unlikely as well, but at least our choices of where to fight it out are increasing. And more of us have good ring-side seats. □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Too Much Law?

(Continued from page 8)

but a few of the issues that have arisen under the Fourteenth Amendment.

Critics of judicial activism such as Harvard Professor Raoul Berger say that the courts have in many cases "supplanted the unmistakable intentions of the framers of the Fourteenth Amendment with their own views of what the national welfare requires." The test of constitutionality, argues Professor Berger, "is not that we like the result but whether the given power was granted." Such criticism has not gone unheard. There are now more than 20 bills pending in Congress which are designed to nullify Supreme Court decisions on school prayer, busing, abortion, and criminal procedure.

Criticism of legal activism is not totally new. Well over a century ago, Frenchman Alexis de Tocqueville noted that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Likewise, writer H.L. Mencken once observed "that Americans seem to think that any problem can be easily solved by . . . passing a law."

Not everyone disagrees with the trend toward judicial activism. Jethro K. Lieberman, legal affairs editor of *Business Week*, sees the "growth of litigation as inevitable in a complex society." Georgetown Law Professor Charles Halpern says, "people are going to court because of a perception that other institutions for making decisions are hopeless and unresponsive." Former Watergate Special Prosecutor Archibald Cox notes that "the very function of the . . . courts is to put individual liberties beyond the reach of both congressional majorities and public opinion." Finally, in reply to the charges of "judicial usurpation," constitutional scholar Jeffrey Shaman notes that "judicial policy-making is nothing new. In fact, the first activist court was the Supreme Court headed by John Marshall."

Legislatures Fail to Act

Both critics and proponents of the judiciary agree that one cause of judicial activism is a "pass the buck" attitude on the part of legislators. Marvin Stone, editor of *U.S. News and World Report*, says elected officials at all levels of government "are abdicating their responsibilities by running away from thorny issues, thus leaving the courts to make politically distasteful decisions."

In speaking of his takeover of Alabama's state mental hospitals, U.S. District Court Judge Frank Johnson pointed a finger at the state legislature, which had refused to appropriate the money necessary to improve the deplorable conditions in the mental health system: "In an ideal society, all of these judgments and decisions should be made . . . by those to whom we have entrusted these responsibilities. . . . However . . . when governmental institutions fail to make these judgments and decisions in a manner which comports with the Constitution, the federal courts have a duty to remedy the violation."

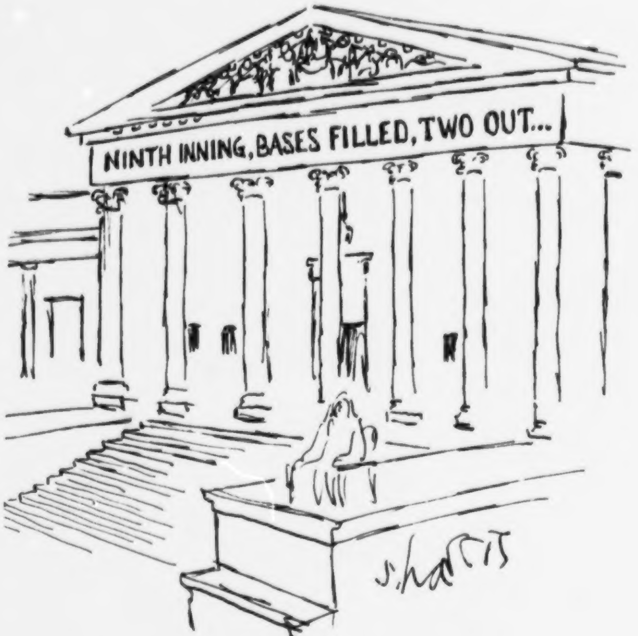
But are courts really equipped to run hospitals, prisons, or school systems? Former federal district Judge Simon Rifkind says no. "Courts are designed to decide disputes between two parties; they are often unprepared to monitor massive continuing controversies." For example, consider the Alabama mental health case. Here Judge Johnson had to solicit the help of three outside agencies. There was a lengthy trial, a ruling, proposals formulated by the disputing parties and by friends of the court, lapse of two deadlines, threats to sell state property unless the legislature appropriated more money for the mental health system, further proposals, and constant vigilance to bring "acceptable progress." This is not unusual. An analysis in the *Harvard Law Review* suggests that up to "10 years of supervision may be required in such cases."

A Surfeit of Lawsuits

Another aspect of the debate over the proper role of the judiciary is an explosion of litigation. Courts are now willing to entertain a growing array of cases on topics that would have in years past been thought unfit for adjudication. At the same time, citizens have become increasingly eager to let courts settle matters that were once settled by parents, teachers, administrators, legislators—or chance.

To illustrate the extent of this transformation, consider the following:

- Lightning struck two young men hiking in Sequoia National Park, killing one and injuring the other. In years past, the tragedy would have been blamed on bad weather and bad luck. No longer! The disabled survivor and the family of the dead hiker brought suit, charging the U.S. Park Service with negligence for "failing to warn hikers against standing where lightning might strike."
- A Colorado court entertained a case involving a troubled young man who had filed a $350,000 suit against his parents, charging them with what amounts to "parental malpractice."
- A woman in San Francisco collected $50,000 in damages from a California court after contending that a fall while riding a cable car turned her into a nymphomaniac.


NINTH INNING, BASES FILLED, TWO OUT...
S. Harris

- A University of Wisconsin student threatened litigation after *he* was turned down for a job as a Playboy Bunny.

And so it goes. The proliferation of lawsuits is everywhere apparent. This has the effect of pushing the dispute resolution function of courts to the limit. In discussing the cases before his bench, one judge commented: "We've become swamped with petty problems. People are frequently unwilling to compromise, to work things out.

"I recently had a case involving a bedroom window air-conditioner that was causing a neighbor sleepless nights.

"Any two reasonable human beings should have been able to resolve that one over a beer. But the quarrel landed before me under the guise of public nuisance. Problems that used to be fleeting arguments now have become federal cases."

One result of all the petty cases has been the threatened breakdown of the judicial system. As litigation proliferates, case backlogs stretch back many years, especially in civil matters.

How do we account for this peculiarly American phenomenon of submitting every question, big or small, to the courts? Certainly, part of the answer lies in the complexity of our society. The growth of technology is accompanied by increased governmental regulation, much of it technical in nature. This in turn gives rise to countless disputes over its interpretation.

Yet it is not moderization that alone breeds legalism. Consider Japan, for example, an urbanized industrial giant with few lawsuits and even fewer lawyers. Unlike the United States, in which people seem to resort to litigation at the drop of a hat—40 percent of our population has engaged in litigation—Japan needs only a fraction of the number of lawyers and judges that the United States has. (See insert.)

In fact, no other country in the world is so completely saturated with lawyers. There are over 450,000 lawyers in the United States—one lawyer for every 500 people. This is three times the ratio of Great Britain, four times that of West Germany, and over 20 times that of Japan, which has only one lawyer for every 10,300 people.

Some people believe that the exceptional position of American lawyers reflects our national character. Legal historian Jerold Auerbach notes that "partial as we are to size, growth, and quantity, it follows that more of anything is better. Therefore, more lawyers are as commendable as more automobiles, even if we pollute our public life (and private lives) in the process by encouraging people to act as if every human problem had a legal solution."

Courts and Judges: What's Your Opinion?

Indicate your reaction to each of the following statements by using one of the following responses.

SA = Strongly Agree
A = Agree
U = Undecided
D = Disagree
SD = Strongly Disagree

____ 1. The United States has too much law and too many lawyers.

____ 2. Courts represent the best hope for bringing about major social change in America.

____ 3. There are many kinds of disputes now handled by courts that could be better handled in other ways.

____ 4. Too many Americans are relying upon the courts to solve social problems.

____ 5. Most people obey the law because they are afraid they will get caught.

____ 6. The federal courts are now more powerful than either the president or Congress.

____ 7. The amount of justice a person gets depends on how much money he or she has.

____ 8. Access to the courts should be limited to restrict the number of appeals available to a person.

____ 9. The courts are the best hope for protecting our fundamental liberties.

____10. Judges should be elected instead of appointed.

Too many Americans, it has been said, present to the court the troubles they would have formerly attributed to the imperfections of society. Undoubtedly, we live in an age when people are less inclined than they once were to accept difficulties, frustrations, and problems as part of life. For example, consider the case of disgruntled football fans filing a lawsuit after the Washington Redskins lost a game as the result of a disputed call on a touchdown pass.

Today, the citizen pushed by the competing demands of society seeks immediate redress of real or supposed wrongs. Another result of the trend is that courts are increasingly being asked to rule on "affairs of the heart." Take the case of Shirley Brown, who sued her husband for neglecting to shovel snow off the sidewalk outside their home.

Commenting on a case such as this, Supreme Court Justice William H. Rehnquist warned that the trend "cannot but endanger even further the vitality of the family as an institution." Just as court decisions may weaken the family, so the growing weakness of the family and other traditional institutions may lead to more and more court cases. French journalist Alain Clement asks: "Would the American go to court so often if he felt better supported by a network of friends and family ties?"

Too Much Law

Is there too much law? Perhaps there is. Perhaps not. While some of the cases now before the courts might be termed frivolous, most are serious attempts to redress serious legal problems. For example, among the types of cases which have dramatically increased in recent years are: suits by prisoners attacking the conditions of their confinement, freedom of information suits seeking access to government files, litigation involving federal and state environmental laws, and civil rights cases involving race, sex, and age discrimination.

In discussing the explosion of litigation in the prisoners' rights area, Norman Carlson, Director of the U.S. Bureau of Prisons (and one of the most sued men in America), says that "on balance judicial activism has improved the prison system." Likewise, Jethro Lieberman thinks our society "is simply coming to terms with suffering, losses and limitations of rights we have too long suffered."

And finally, what of the rising feeling on the part of a large segment of our population that our society as a whole should in some way compensate people for any and every loss they sustain? Whether or not this is a proper goal of our society is questionable. Can there really be a risk-free society? Is this litigious spirit an inevitable byproduct of the modern welfare state?

As for the judiciary, it has in many cases acted rightly to redress wrongs and restore rights long ignored, but do courts really have either the time or the capacity to search for a solution in any and every type of case? Our adversary system, as important as it is to our nation, cannot substitute for the give-and-take of human relationships. Nor can law adequately substitute for societal consensus and trust in governmental institutions.

Thanks in part to the American people's love of justice and belief in the perfectability of man—to say nothing of the sometimes cantankerous and litigious American personality—we've created the most sophisticated legal system in the world. If laws and courts could make us happy, you'd think we'd be euphoric by now. The fact that we're not—that indeed Americans are increasingly dissatisfied—suggests that we may asking more of the law than it can deliver. ☐

Japan: The Land of Few Lawyers

William Chapman

TOKYO—The law office of Daikichi Shiratani is a kind of mirror of the state of Japan's legal system. There are no wood-paneled walls, no solid oak desks and no deep leather chairs. It is a small cramped room on the fourth floor of a narrow building in the unfashionable Sugamo district of Tokyo, and to find the staircase one presses through a gap between a tobacco stand and an open-air clothes market.

It is a reflection of the phenomenon that Japanese do not often resort to lawyers or courts. Shiratani has a busy, successful practice, but he is one of only 11,900 lawyers in a country of 116 million people. Japan has at least 34 certified flower-arranging teachers for every lawyer here.

Going to court with a lawyer is not very popular in Japan, Shiratani said during a conversation around the plain metal conference table.

"It's a kind of sport in the United States," he said. "People are relaxed about being sued there. In Japan, there is very heavy pressure for one's whole life to be mixed up in a court case. To sue or be sued in a court is a very heavy burden."

A study 10 years ago found that the number of civil actions filed in Massachusetts was 20 times the number filed in all of Japan. The ratio probably has not changed much since.

Japan has had a Western-style legal system, modeled on Germany's, since 1868, but for the common citizen it is something to be avoided. Disputes should be settled by mutual agreement and consensus, not by litigation, Japanese believe, and a court appearance is a painful experience, if not a confession of failure.

William Chapman is The Washington Post's *Tokyo correspondent. This article is reprinted by permission of the Post.*

The Japanese traditional value of harmony prevails, even when an emotional conflict emerges, writes Hideo Tanaka, author of *The Japanese Legal System*, and the idea of disciplined argument before a judge is distasteful.

"To their minds, settlement of disputes without arguing their points of view in a reasoned way and without fighting out their cases in court is of supreme value," he adds.

When a Japanese does wind up in court, explains a practicing lawyer, Kikuo Hosaka, the attitude is one of shock. "I am hurt to be sued," is the common reaction, he said.

Compromise-Makers

So what happens when damage is done, debts are unpaid, agreements are violated? The normal course calls for those involved in the dispute to try to agree between themselves on a remedy. If that fails, one of the parties usually enlists the mediation of a prominent person, such as a parliament member's secretary or a ward official.

"When someone comes to me, it means that all other means have failed" said lawyer Shiratani.

Even the mere appearance of a lawyer has an unsettling effect, and an attorney's first instinct is to stay in the background as much as possible. Hosaka represents real estate interests in a country where tenant rights are strong, and he is often called on to get a backsliding renter out of a residence. His initial advice usually is for the owner to attempt persuasion.

"If I go first, it would only damage things," he said. "It would be a hostile act."

In an impersonal, modern society such as Japan, however, persuasion and consensus do not always work and with relatively few lawyers at hand Japanese often have to look elsewhere. The result is increased prominence of a peculiar brand of quasi-legal specialists who, for a fee, try to work things out short of the courts. There are specialists in auto accidents and bad debt cases and a kind of general practitioner known as a "compromise-maker."

On a lower, less respectable level, gangster-style enforcers use intimidation to collect money for loan sharks or landlords. Their methods range from moderate harassment to physical assaults, and they have been known to bust up the furniture in a delinquent debtor's home. To some critics, they are the dark side of the lawyer shortage in Japan. Victims rarely retaliate with law suits.

One reason for the scarcity of lawyers is the national bar exam, one of the toughest in a country that is known for tough qualifying tests. Only 500 students, about one applicant in 60, pass it each year, thus winning admission to a government training program that lasts for two years. A Western critic calls the exam "absurdly competitive."

Although Tokyo appears to be amply stocked with lawyers, other cities have few and many rural areas are without a single attorney.

The Japanese reluctance to seek legal redress may be undergoing a change. During the 1960s and 1970s there were several celebrated legal cases in which citizens sued the government or corporations for relief when negotiations failed.

Many antipollution cases have been filed against offending companies, and their success has lessened the sense of public disapproval, authorities say.

Suing the government is a change in itself. Not until 1973 was the first suit filed to block construction of a highway.

Dictator

(Continued from page 24)

Reforms came about fast after I put jury commissioners on jury duty.

Those who were chosen to serve as jurors found the experience less frightening and mystifying. For one thing, I required the judges to explain the law to the jurors in simple, everyday language rather than the legal gobbledygook that had been the order of the day. The judges were also required to instruct the jurors on their duties and responsibilities—and on important aspects of the testimony of witnesses, and other pieces of evidence, as it was being presented to them.

As a further aid to the jurors, they were allowed to take notes and were given copies of the judge's instructions to take with them into the deliberation room. Finally, the trials were videotaped and jurors permitted to view videotaped replays of portions of the trials during their deliberations.

All our countrymen and countrywomen came to like the justice system. Their confidence in it grew as the judges and lawyers visited schools and colleges to explain how the courts worked and to answer questions and hear suggestions for improving it further. Many students went on field trips and were impressed by the way in which jury service had been elevated. Citizens competed for the chance to serve. Court personnel, generating warmth and courtesy, made visitors feel at home in the jury box.

In retrospect, I realize that all that has transpired would not have been possible without the quality of men and women who now are willing to be judges. The combination of outstanding lawyers and nonlawyers who serve on committees to recruit and screen potential judges is the key to it all. The political hacks, the marginal lawyers, and the friends no longer surface as judicial candidates, as they once did.

In the plan here devised there is not much occasion to seek removal of a judge, but in those few but critical instances where it is necessary, I established a procedure to protect the public while being fair with the judges. All judges need the independence to decide matters only on the facts before them and the applicable law. Where for any reason they cannot perform fairly and fully, they need to be called to account. Such procedures now exist but are seldom needed.

In conclusion, I must again emphasize that the critically important aspect of these accomplishments has been to expand and build upon opportunities for nonlawyer citizen participation in the judicial process. There is, of course, a bit of irony you must have discerned. Under our earlier democracy, our judicial institutions had drifted away from citizen influence, and judicial affairs were left more and more to the lawyers and judges. The judicial system is too important to be left to them alone. It took this friendly old Wizzar to bring the courts back to the people.

All this being accomplished, my job as Grand Wizzar is done. We are ready to restore full power to the people, as our forefathers always intended. And this time, my friends, in the language of the ancient Oz parable, leave us not mess it up.

For those of you who find few new ideas in this account of my stewardship—for each of the actions I took had been tried here or elsewhere—just remember the real trick in GWSR is marshalling good ideas, having them broadly accepted, and making them stick. To do this, one does not have to be the Grand Wizzar—but it helps. □

Strategies

(Continued from page 13)

Forgery is the false making or the material altering with intent to defraud, or any writing, which, if genuine, might apparently be of legal efficacy or the foundation of legal liability.

Ask students what sections, if any, do conform to the guidelines. Discuss the meanings of the italicized words. Are there other words jurors must understand to fulfill their responsibility? An attorney or a judge is an excellent classroom resource person for this strategy.

Another approach to cutting down confusion is to improve students' understanding of some basic terms. In a recent multiple choice test for jurors in the District of Columbia, over a third of the jurors did not understand three or more of the ten terms tested. Here's an example of the questions:

By the preponderance of the evidence:

1. slow and careful pondering of the evidence;
2. looking at exhibits in the jury room;
3. one party's evidence is stronger than another's.

Some suggested terms for teaching about the jury system include:

grand jury
peremptory challenge
hung jury
voir dire
arguments
impanelling
challenge for cause
sequestration
jury charge
directed verdict
jury polling
objection sustained, overruled
beyond a reasonable doubt
admissible evidence
inference
petit jury

The definitions are not provided, since students will learn and retain more if they look them up themselves. Either ask students to divide the list among themselves, research the meanings and report to the class, or develop your own multiple choice quiz, testing your students and discussing their answers.

Strategy 3.

Deliberating About the Facts and the Law

After learning about impanelling and charging a jury, your students are ready to serve as jurors on a real case. Arrange for your class to sit in on an actual case, either a jury or a bench trial (by a judge only). Students will become "shadow" jurors, hearing the evidence the real jurors do and making their own decision, if possible before the actual decision is announced in court.

You can do this several ways. Either have the entire class sit in one one case or divide the class into several groups and have each group sit in on a different case. Or you can select a publicized case in your community and have the class impanel its own members, based on the questions in Strategy One.

If you find it too difficult to "shadow" an actual case, apply these strategies to a mock trial which students have selected. (See *Update*, Winter, 1978). In either case, students will weigh the arguments and evidence, consider the judge's charge on the legal principles governing the case, then come up with their own decision.

If you are in a court for an actual trial, see if your students can use a conference room to deliberate in. If students experience the deliberation process, they will be acquiring such basic skills as analyzing, negotiating, compromising, and communicating.

Mary Timothy, the jury foreperson in

Angela Davis's trial in 1972, used the rules below in leading the jury deliberation. (She notes that the only reason she became foreperson was that when she arrived in the deliberation room the only seat left was the one at the head of the table.)

Get Organized

1. Elect a foreperson
2. Elect a secretary
3. Elect a tally counter

Prepare Topics for Discussion

1. Each juror should suggest topics
2. The foreperson and secretary should arrange them in a logical order

Discuss Topics

1. Discuss one subject at a time
2. Vote separately on the importance of each factor

Debate on the Verdict

1. Each juror should be allowed to express his/her views

Vote on the Verdict

1. Each count of the verdict must be voted on separately by a secret ballot.

These points should be used as guidelines for your students during their deliberations exercise. Chief Justice James Lynch of the Massachusetts Superior Court Department of the Trial Court, during his videotaped juror orientation, says that most judges recommend against taking a straw vote at the beginning of the deliberation process. "This might result in one or more jurors digging in their heels at the start of the deliberations, perhaps feeling that having voted they must stick to a certain conclusion before they have even had a chance to hear what other jurors think about the evidence."

The student jury should work together as a team, analyzing the evidence and deciding which allegations have been proven and which have not. After students have determined the facts, they then apply the law that the judge gave them earlier. Only then are they adequately prepared to reach a verdict.

One advantage of mock trials over shadow juries is that all of these jury teaching strategies can be incorporated in the mock trial, including impanelling and jury charging as well as the jury deliberation itself. Ask your local court if you can use an actual courtroom for the mock trial. Most judges are willing to assist. Attorneys and court personnel can be involved in the mock trial preparations and participate in debriefing discussions following the jury verdict.

As a final exercise, students can ask the mock jury or shadow jury their reactions to their service (see next strategy). Analyze with your students the various factors which they feel influenced the jury deliberations.

Strategy 4.

Quizzing the Jurors

After observing jury selection and taking part in classroom discussions, students are ready to interview jurors. Write or call a trial judge, preferably one familiar with your students. Ask him/her if your students can ask questions of former jurors, by interviewing them either in person or on the phone about the experience of being jurors. You may wish to submit your questions to the judge. You can ask the following sample questions, but be sure your students include any others which they feel are important.

1. What did it feel like to be on a jury?
2. What was the hardest part of serving on a jury?
3. Could you understand the law and apply it to the facts?
4. How did you decide what to believe?
5. Did you feel you had to deal with prejudicial feelings? Your own prejudices? Others' prejudices?
6. Did you feel your jury represented the community?
7. Did you feel your jury was impartial?
8. Did the attorneys' method of speaking influence your feelings?

After students record the results of their research, have them share their findings with the class as a whole. Compile the findings and submit them to your local paper. The project might be entitled: "Behind the Scenes of the Jury Process." The report might compare what the students observed with what the jurors said.

Strategy 5.

Decision Makers in a Democracy

Now that your students have had a chance to study the jury process, try applying it to your own school environment. In more and more schools across the country, student jurors are sitting in judgment when their peers are charged with violating laws and school rules.

In Duluth, Minnesota, a jury of senior high school students passes judgment on fellow teenagers accused of vandalism, shoplifting, and drinking under age. The charged juveniles, first-time offenders who have admitted guilt, face the youth court voluntarily, bypassing the formal juvenile court system.

Youth jury members are chosen by random selection from volunteers who sign up for the program at school. Once accepted they serve one afternoon each week for three weeks, during which time they review as many as 12 cases. The only adults present are the offender's parents and a probation officer who serves as court coordinator. He advises the offender of his/her rights.

Punishments range from 30-50 days probation to 16-32 hours of community service, restitution up to $100, or referral to alcohol and drug education programs. Cases that would take two months to process in the formal system take three weeks in youth court. "Young jurors are tough but fair," according to Michael Farrell, supervisor of the St. Louis County (Minnesota) Juvenile Division.

In Horseheads (New York) youth court, students play all roles, including the judge. Offenders are sentenced to a period of community service. The New York program requires a 20-hour training course for student jurors, judges, and lawyers, including mock trials reviewed by real judges and attorneys. The course ends with a "bar" examination.(In the Duluth program the student orientation is minimal, just a session with a probation officer to review program procedures.)

Every Wednesday in a conference room in the district attorney's office in Denver, a group of teenaged jurors, a cross-section of high school students, holds court. These students hear admissions cases for minor offenses where the juvenile has been arrested by Denver police and has agreed to be tried and sentenced by his/her peers.

Discuss these methods of dealing with juvenile offenders with your students. Review some of the rationales for such programs. Student jurors have commented that "judges see kids day in and day out, but they don't have time to find out how we feel. They can't understand a 16-year-old, but kids on the jury do. Kids aren't lenient either. If you break your contract you are not only defying authority but betraying your peers."

If your students want more information on youth courts, have them write: Duluth Youth Council, Room 317, City Hall, Duluth, MN 55802.

Student courts can also operate within the school. Northport (New York) High School has a student court which offers an alternative to suspension. For this to occur, all parties—teacher, administrator, parent, and student—must agree that the student court is an appropriate avenue, both for resolving a specific problem and for contributing to the education of the student.

Northport's court operates under the same adversary system as a real court. The process involves arraignment, preliminary hearing, jury selection, trial, and sentencing. Jurors are chosen from school voter registration lists. Student lawyers and judges are members of law classes who have qualified by passing a rigorous "bar" exam (see pp. 11-13 of the Fall, 1979, *Update* for more on this program).

Have your students study your school policies and procedures for dealing with students who break school rules. Discuss the possibility of student juries with a juvenile police officer and a juvenile probation officer to see how they feel about trying them in your community.

If students find from their discussions and research that they want to develop new procedures for dealing with problem youth in their school system, have them define clearly the goals, objectives, and rationale for the new methods. Help them develop arguments for change and request a hearing before the authority figures who determine policy in your school.

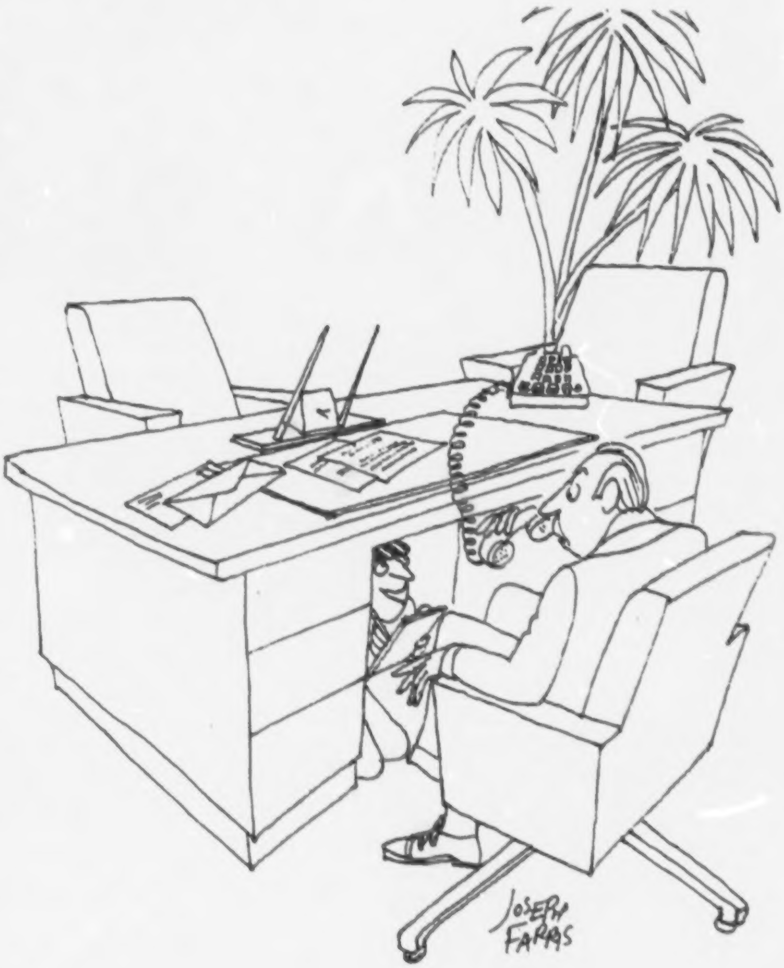
Strategy

6.

Wrestling with the Issues

The following teaching strategy is designed to measure your students' opinions on some contemporary jury-related issues. Select the statements which you feel are most relevant to your curriculum, and after each one ask your students to circle the opinion which best describes how they feel about the statement: Strongly Agree; Agree; Disagree; Strongly Disagree.

1. The jury system wastes time, money, and effort.
2. There is no such thing as a case too complicated for a jury.
3. Juries render social judgments rather than legal ones.
4. Peremptory challenges, removing potential jurors without stated reasons, prevents the jury system from representing the community.
5. If you select the first 12 people to serve, you have just as fair a jury as you do with the challenge process.
6. Jurors should be allowed to take notes during a trial.
7. In order to be impartial and fair, jurors should be ignorant of the law and have no knowledge of the issues surrounding the case.
8. Jurors should be allowed to visit the scene of the crime on their own.
9. Juries need to reach unanimous verdicts in order to be fair and impartial.
10. A six-person jury can be as fair and impartial as a twelve-person jury.
11. Special juries of impartial experts should sit on complicated civil cases involving volumes of testimony and millions of dollars.
12. Women are more sympathetic to the defense than men.
13. The press should be able to question jurors about their deliberations after the verdict is reached.
14. Expert witnesses only confuse the jury since each side presents conflicting expert testimony.
15. It is better that ten guilty persons escape than one innocent suffer (Sir William Blackstone).
16. Jury trials are not much likelier to arrive at the truth than the medieval trials by fire or combat that they replaced.
17. Jurors are more swayed by personal prejudices than by the facts given.



"Don't pay any attention to me. Our court-approved bug isn't working."

18. People should be excused from jury duty by attorneys for no reason, even if they want to serve.
19. The jurors' lack of expertise is a handicap in being fair and impartial.
20. The jury should be fully insulated from any accountability for its decisions (e.g., the press shouldn't be permitted to questions jurors and there should be no mechanism in the court for reviewing their decision.)
21. Efficiency should be a major goal of the jury system.
22. Jurors should represent the community's sense of right and wrong.

Tabulate the scores of your students. Based on these results, select the most controversial opinions. Divide students into teams and debate the issues. Select a panel of student judges to weigh the debate, based on criteria developed by the students. The panel of judges can use the jury deliberation guidelines if they seem to apply. Interview an appeals court judge for ideas for weighing issues in a debate. Do questions of law play a part in these issues?

As a follow-up teaching strategy, give the students the following statements by famous people and discuss them. Are they compatible? Which ones do the students agree with? Why?

"The jury system puts a ban upon intelligence and honesty and a premium upon ignorance, stupidity and perjury." (Mark Twain)

"Trial by jury is that trial by the peers of every Englishman which is the grand bulwark of our liberties . . . the most transcendent privilege which any subject can enjoy or wish for." (18th Century English Jurist Sir William Blackstone)

"Would any sensible business organization reach a decision as to the competence and honesty of a prospective executive, by seeking, on that question of fact, the judgment of 12 men and women, gathered together at random and after first weeding out all those men and women who might have any special qualification for answering the questions?" (Federal Judge Jerome Frank)

"The jury, which is the most energetic means of making the people rule, is also the most effective means of teaching it to rule." (Alexis de Tocqueville)

After discussing these statements, ask your students what is the fairest and most impartial process for finding the truth through the third branch of government. Ask a judge or an attorney to visit your class during the debate over these statements. Ask your resource person to discuss his/her experiences and recommendations for change.

Students have been able to experience and evaluate the jury process as it exists today. Some states are now changing the process. Three of these changes offer research topics for students who wish to do further study.

Issue One. Several states are experimenting with one day/one trial jury systems. In these systems, people are obligated to spend only a day as potential jurors. If they aren't chosen for a jury in that day, their obligation is over. If they are chosen, their obligation is over as soon as they reach a verdict on that case. The one day/one trial system works because of computerized selection, which is far faster and more efficient than the old method of hand-drawn selection of the pool of prospective jurors. More people can now be called for jury duty, representing a greater cross section of the community. Jurors have to serve for a shorter period of time, and virtually no one is exempt from serving—not even a judge.

The theory behind the new system is that it provides more representative juries, since school teachers, nurses, doctors, and lawyers can be called to serve without being exempt by virtue of their jobs. Not only is serving for a shorter period of time less disruptive to jurors' personal lives, it exposes more people to the judicial system. Under most one day/one trial systems, the state saves money because the employer continues to pay the person for the first three days. Dealing with self-employed people varies among systems.

Proponents of the traditional month-long jury duty system believe that jurors who serve a longer period of time reach fairer and more just decisions because they are seasoned and experienced, less naive and less easily misled by the language of the courtroom. Believing that it takes a week for jurors to not feel intimidated, proponents say that longer service is more educational and allows jurors to concentrate on the true issues of the cases.

Ask your students how they feel about the two systems, keeping in mind the principles of impartiality and representating the community. What system of jury service do you have in your state? Ask your jury commissioner to comment on the two methods. Ask a judge which system is the fairest. Is the conviction rate affected by the type of jury system?

Issue Two. Many experts believe that some cases are too complicated for juries. Among the judges who have worried that jury trials cannot be depended upon to produce informed verdicts are Jerome Frank, Learned Hand, Benjamin Cardozo, and, most recently, U.S. Supreme Court Chief Justice Warren Burger.

The federal courts disagree on whether the Seventh Amendment, which applies to civil trials by jury, extends to complex cases. The Ninth Circuit Court has held it does. The Third Circuit Court has held that jury trials may be denied on due process grounds where the court determines that the case is too complex for a jury to understand and decide rationally.

In the recent Japanese electronics antitrust litigation, a conspiracy case with 100 members, the evidence included 50,000 documents, 2,700 pages of expert reports, and 10,000 pages of pretrial plaintiff statements. This is the case that convinced the Third Circuit Court that some cases are just too overwhelming for laypeople.

However, in the Financial Securities case in 1979 the Ninth Circuit Court stated that "no case is so complex that it is beyond the abilities of a jury and that jury trials, if demanded, are required by the Seventh Amendment."

Ask your students to discuss these decisions in light of due process rights. Are there rights which are in conflict? How would you rule if you were the judge? What alternatives would you suggest? Should special masters, experts in the subject areas of the trial, hear these cases? Should special courts be established to hear complex antitrust cases? Should Congress, not the courts, decide the issues in these large cases?

The U.S. Supreme Court has recognized a due process dimension in the right to a competent tribunal. In a 1972 criminal case, *Peters v. Kiff,* 407 U.S. 493, the Court ruled that "it was well established that the due process clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law . . . . Without an understanding of the case before it, a jury cannot adequately function either as a fact finder or as conscience of the community."

Issue Three. Another potential change in jury procedures is being pioneered by an Ohio judge who uses videotape to produce uninterrupted trials. The jury is impanelled and immediately dismissed, free to go. Then the actual trial begins. After the trial is over, the judge edits the tapes, eliminating all improper testimony. Then the jury is called back to the courtroom. It sees the edited trial on videotaped, hears the charge from the judge, and retires to deliberate the case.

Ask your students to discuss the pros and cons of such a procedure. Opponents claim that jurors lose the atmosphere of the courtoom, that the camera can't cover everyone, and that the procedure won't work if the media is covering the actual trial. However, those in favor of the procedure claim that it saves time; that jurors hear only what they are by law supposed to hear, rather than being influenced by what they hear and are told to disregard; and that less emotional verdicts are rendered.

Strategy 7.

A True/False Test

As a means of stimulating classroom discussion, give your students this fun true/false test. If you find strong disagreement on certain answers, ask a resource person to visit your class and discuss both these issues and those in the agree-disagree exercise in Strategy Six. The answers are provided. Where necessary, a brief explanation of the answer appears. Students should be encouraged to find more information on their own.

1. Over 90 percent of all cases never come before a jury? (True—Most cases are plea bargained, settled, or tried before a judge)
2. Juries never impose sentences after reaching verdicts. (False—13 states require jurors to pass sentence on those they have convicted of crimes punishable by death)
3. Women may be excluded from jury duty solely becase of their sex. (True—11 states allow this. Rhode Island further provides that women shall be included for jury service only when court facilities permit. However, in *Duren v. Missouri* [439 U.S. 357, 1979], the U.S. Supreme Court held that a Missouri law allowing women automatic exemption from jury service, if women so requested, had deprived a murder defendant of his constitutional right to be tried by a jury composed of a cross section of the community)
4. You can be kept from serving on a jury if your hair is red. (True—peremptory challenge does not require that a reason be given)
5. All federal juries need unanimous votes. (True)
6. Judges can be called for jury duty. True—in some states, especially those using one day/one trial juries.
7. The Constitution guarantees you the right to a jury trial only in criminal cases. (False—the Seventh Amendment provides for jury trials in civil cases)
8. Television cameras can be present during a trial, even if the defendant objects. (True—if state rules explicitly permit it; see the January, 1981 U.S. Supreme Court case *Chandler v. Florida*, 101 S. Ct. 802)
9. States do not require unanimous verdicts in certain cases. (True—twenty-nine states allow less than unanimous verdicts in certain civil cases and five states in certain criminal cases).
10. In most cases, judges and juries disagree on the verdict. (False—studies have shown they agree at least 80 percent of the time)

Students who wish to research decisions relating to juries should ask an attorney to help them locate and analyze the cases. Most public libraries subscribe to publications containing reports of U.S. Supreme Court decisions. The following cases and citations for the U.S. Supreme Court represent major jury-related cases:

Ballew v. Georgia (435 U.S. 223, 1978) —no less than a six-person jury.

Johnson v. Louisana (406 U.S. 356, 1972)—not necessary to have a unanimous verdict.

Williams v. Florida (399 U.S. 78, 1970) —allows six-person jury in noncapital cases.

Duncan v. Louisana (391 U.S. 145, 1968) —right to jury trial regardless of seriousness of offense.

Apodaca v. Oregon (406 U.S. 404, 1972) —not necessary to have a unanimous verdict.

If we are to instill the principles of democracy, we need to provide students with ways of moving from spectator to participant. Through these classroom and courtroom teaching strategies, students will really experience the third branch of government. And they'll begin to realize that they can be players too. ☐

Some Good Ones on the Courts

Books

You and the Courts, Learning Activity Package, by Arlene Gallagher, Unigraph, 1482 Harvard Avenue, Seattle, WA 98122

Courts and the Classroom, Guide to Law-Related Education Programs Through the Court System, 2nd Ed., by Julie Van Camp. District Court Administrative Office, 209 Essex Street, Salem, MA 01970.

Courts and Trial, Law in Action Series, 2nd Ed., by Linda Riekes and Sally Ackerly. West Publishing Co., 50 W. Kellogg Blvd., P.O. Box 3526, St. Paul, MN 55165.

Street Law, A Course in Practical Law, 2nd Ed., by Lee Arbetman, Edward McMahon, and Edward O'Brien. West Publishing Co., 50 W. Kellogg Blvd., P.O. Box 3526, St. Paul, MN 55165.

Civil Justice, by Susan McKay, and *Criminal Justice,* by Carl Martz and Rebecca Novelli. Scholastic Book Services, Inc., 50 W. 44th St., New York, NY 10036.

The Idea of Liberty, by Isidore Starr. West Publishing Co., 50 W. Kellogg Blvd., P.O. Box 3526, St. Paul, MN 55165.

Beyond a Reasonable Doubt, Inside the American Jury System, by Melvyn B. Zerman. Thomas Y. Crowell, c/o Harper and Row, 10 E. 53rd St., New York, NY 10022.

Report: Attorney General's Task Force on Violent Crime. U.S. Justice Department, Washington, DC 20530.

Games

Jury Game: A Simulation of the Jury Selection Process. Social Studies School Services, 10,000 Culver Blvd., P.O. Box 802, Dept. 10, Culver City, CA 90230.

Films/Filmstrips

Preserving Your Rights . . . And Those of Your Neighbor (20 mins., 16mm). District Court Department Administrative Office, 209 Essex Street, Salem, MA 01970.

The Minnesota Correctional Services catalog lists many court-related a-v materials. You can get a copy of the catalog by writing the Correctional Service at 1427 Washington Avenue South, Minneapolis, MN 55454.

Due Process

(Continued from page 33)

popular passions are enflamed. Whether the specific incident in question is race-related, tied to labor strife, or linked to unpopular political groups like the KKK and the Communist Party, it is the prejudices of the community, manifested through the jury, that inevitably threaten to decide the case, irrespective of the facts.

One remedy for injustice in political cases, then, may be to give the defendant the privilege of electing trial by a judge. (Many jurisdictions already provide that the defendant can waive his right to a jury trial.) Morgan also suggests that "provision might be made allowing him to have a trial by a court consisting of three judges." Perhaps, if courts follow Justice

More on Political Trials

Richard H. Frost's *The Mooney Case* (Stanford, California: Stanford University Press, 1968) is a thorough and balanced account of the case from beginning to end.

The anti-Communist and anti-radical cases are almost always covered in books on free speech. See Jethro K. Lieberman, *Free Speech, Free Press, and the Law* (New York: Lothrop, Lee & Shepherd, 1980), Nat Hentoff, *The First Freedom: The Tumultuous History of Free Speech in America* (New York: Delacorte Press, 1980), Thomas Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966), Franklyn S. Haiman, *Freedom of Speech* (Skokie, Illinois: National Textbook Company, 1976), and Leo Pfeffer, *The Liberties of an American* (Boston: The Beacon Press, 1963).

On the Chicago conspiracy trial, see J. Anthony Lukas, *The Barnyard Epithet and Other Obscenities* (New York: Harper & Row, 1970), Jason Epstein, *The Great Conspiracy Trial* (New York: Random House, 1970), John Schultz, *Motion Will Be Denied* (New York: William Morrow, 1972), and David J. Danelski, "The Chicago Conspiracy Trial," in Becker (ed.) *Political Trials.*

Besides the cases discussed in this article, many other trials are often considered political. Very early in American history, there was the case of John Peter Zenger, who was tried by the British for publishing "seditious" articles. See Frank B. Latham, *The Trial of John Peter Zenger, August, 1735* (New York: Franklin Watts, 1970), for a brief, popular account. A more substantial book is Vincent Buranelli's *The Trial of John Peter Zenger* (New York: New York University Press, 1957).

An interesting labor/radical case was the trial of Big Bill Haywood, founder of the International Workers of the World, or "Wobblies," as they were more commonly known. See Abe C. Ravitz and James N. Primm (eds.), *The Haywood Case: Materials for Analysis* (San Francisco: Chandler, 1960) and David H. Grover, *Debaters and Dynamite: The Story of the Haywood Trial* (Corvallis: Oregon State University Press, 1964).

Many cases involving racial and ethnic minorities can be considered political, if that word is defined broadly. For example, in the South, it has been argued, many seemly straightforward criminal cases really were designed to keep blacks in their place and reinforce community (white) standards. Perhaps the most important of these cases involved the Scottsboro Boys, black youths accused of raping white women. Dan T. Carter's *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State University Press, 1969) is the definitive book on the subject. Also of interest is a book by one of the defense attorneys, Allen Knight Chalmers, *They Shall Be Free* (Garden City, New York: Doubleday, 1951). The story of one of the defendants is told by Sybil Washington and Clarence Norris in *The Last of the Scottsboro Boys* (New York: Putnam, 1979).

Another alleged black on white rape in the South, which also made it all the way up to the Supreme Court, is told from the perspective of one of the defendants in A. Roberts Smith and James V. Giles's *An American Rape: A True Account of the Giles-Johnson Case* (Washington, DC: New Republic Books, 1975.)

U. S. Representative Adam Clayton Powell's expulsion from the House is another case that many consider politically motivated. It too went all the way to the Supreme Court. See Kurt M. Weeks, *Adam Clayton Powell and the Supreme Court* (New York: Dunellen, 1971) and Andy Jacobs, *The Powell Affair: Freedom Minus One* (Indianapolis: Bobbs-Merrill, 1973).

Recent American history offers many other examples of cases which might have been political. On the Black Panthers and the law, see Donald Freed, *Agony in New Haven: The Trial of Bobby Seale, Ericka Huggins, and the Black Panther Party* (New York: Simon & Schuster, 1973) and Peter L. Zimroth, *Perversions of Justice: The Prosecution and Acquittal of the Panther 21* (New York: Viking, 1976). An Hispanic case is the subject of Peter Nabokov's *Tijerina and the Courthouse Raids* (Albuquerque: University of New Mexico Press, 1969).

For the many cases that arose out of antiwar protests, see Jessica Mitford, *The Trial of Dr. Spock* (New York: Knopf, 1969), Peter Schrag, *Test of Loyalty: Daniel Ellsburg and the Rituals of Secret Government* (New York: Simon & Schuster, 1974), Jack Nelson and Ronald J. Ostrow, *The FBI and the Berrigans: The Making of a Conspiracy* (New York: Coward, McCann & Geohagen, 1972), William O'Rourke, *The Harrisburg Seven and the New Catholic Left* (New York: Crowell, 1972), and John C. Raines, *Conspiracy: Implication of the Harrisburg Trial for the Democratic Tradition* (New York: Harper & Row, 1974).

Two general books that touch on political trials are Jonathan Black (ed.), *Radical Lawyers* (New York: Avon, 1971) and *Law, Morality and Viet Nam: Militants in the Courts,* by John F. and Rosemary S. Bannan (Bloomington: Indiana University Press, 1974).

C.W.

BEST COPY AVAILABLE

Douglas's lead and treat political trials as a separate category, a provision such as this could be part of the rules governing such trials. On the other hand, judges can be prejudiced too, and trial by judge is no panacea.

If defendants choose a jury trial, courts could establish stringent standards for keeping prejudice out of the jury box. In his opinion in *Nebraska Press Association v. Stuart* (427 U.S. 539 [1976]), Chief Justice Burger suggested several ways that trial judges could, without gagging the press, help assure an unbiased jury. Though the case in question was a sensational murder trial, the Chief Justice's ideas would apply equally well to political trials. Alternatives to gagging the press include (1) changing the trial venue to a place less exposed to the intense publicity; (2) postponing the trial to allow the publicity to subside; (3) posing searching questions to prospective jurors to screen out those with fixed opinions on guilt or innocence; and (4) using emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.

Beyond the Courts

Judges cannot solve the problems of political trials by themselves. Political trials, after all, are almost always those in which popular furor has invaded the courtroom, drowning out the quiet attempt to discover truth. Though judges might do a better job of preserving the tranquility and decorum of the courtroom, they will be hard pressed to stand alone against the popular clamor.

They will need, for example, the cooperation of the press. In many of the early political cases discussed in this article, the press was a cheerleader for the prosecution. By assuming that the defendants were guilty, the press may have made a fair trial an impossibility.

Journalistic excesses have become much less of a problem in recent years. For one thing, decisions like *Sheppard v. Maxwell* (see Winter, 1978 *Update*) have established that massive, prejudicial pretrial publicity is a due process deprivation. Press-bar conferences in many states have helped editors and reporters communicate with judges, leading to a greater understanding of how the press can avoid jeopardizing the defendant's right to a fair trial. At the same time, standards for journalism are changing on their own. As newspapers become more responsible and less judgmental, there are many fewer examples of unfavorable pretrial publicity.

Lawmakers have to cooperate, too. Some lawyers and legal scholars thought from the beginning that the Rap Brown Act would cause nothing but trouble for the courts. Many questioned its constitutionality. Others felt that it was too broad, too vague, an instrument more of harassment than of law enforcement. Had Congress heeded these warnings and not passed the bill, the nation might have been spared the futility of the Chicago conspiracy case.

Unfortunately, many political movements create such popular revulsion that it is almost impossible for legislators to stand firm. Just this year, California became the first state in the union to seriously consider a bill that would in effect outlaw such groups as the Ku Klux Klan. By providing a system whereby the state could obtain a civil injunction against the meeting of such groups, sponsors of the bill hope to avoid First Amendment problems. But history shows that such bills create, rather than lessen, problems for the courts, and they almost certainly guarantee loud and bitter political trials.

Legislators would also be well advised to be wary of conspiracy laws. Conspiracy charges often offend both logic and common sense, and juries don't like them. Even the jury in the Chicago case wouldn't convict on the conspiracy counts. Nonetheless, they are irresistible to prosecutors, and keeping them in books is an invitation to more political trials.

This brings us to two other groups who have a lot to say about political trials: the police and the prosecutors. As Goodell points out, both groups have much discretion. They shape how the law is applied by deciding which offenses to emphasize, which problems to attack. Discretionary justice is built into the system, but in times of stress, the police and prosecutors, who "share and respond to the accepted values and political prejudices of the day," may abuse this discretion and bring politically motivated actions against unpopular defendants.

Of course, it's not easy to do away with such discretion, with such "stretch points" of liberty. We don't want our law enforcement officers to be robots mindlessly applying the law. Nonetheless, if there were fewer laws on the books—and particularly if there were fewer vague laws whose main purpose is to give police officers a convenient charge to hang on "disreputable" people—then there might be fewer abuses of police discretion.

Prosecutors have even more power. The late Justice Robert Jackson, when he was still Attorney General, once remarked that the prosecutor has more control over life, liberty, and reputation than any other citizen in America.

> His discretion is tremendous. He can have citizens investigated and, if he is not that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . [A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.

Again, it's hard to know how to control this discretion. Prosecutors must be free to pursue some charges and drop others. They must be able to decide which types of crimes deserve high priority and which must receive less attention. But at the same time, we don't want prosecutors to conduct vendettas against unpopular individuals and groups.

For decades, courts have reminded prosecutors of their duty. Almost a century ago, the Supreme Court of Pennsylvania defined the duties of the prosecutor:

> The district attorney is a quasi judicial officer. He represents the commonwealth, and the commonwealth demands no victims. It seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see that no innocent man suffers, as it is to see that no guilty man escapes. *(Commonwealth v. Nicely,* 130 Pa. 261, 270 [1889])

The United States Supreme Court has used very similar language to define the special characteristics of the prosecutor. Noting that his interest should not merely be "to win a case" but "to see that justice shall be done," the Court has held that while the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *(Berger v. United States,* 295 U.S. 78, 88 [1935])

Of course, it is one thing for courts to talk and another for prosecutors to heed. As long as prosecutors are responsible to the people, and as long as the people occasionally demand that prosecutors prove that they deserve their job by how many convictions they ring up, there will always be the possibility of cases that have more to do with re-election than with justice.

The Ultimate Villain

That, in turn, brings us to the nub of the problem. Prosecutors are almost always politicians. If they're not politicians, then they're selected by politicians.

For the most part, it's good that they are in touch with the popular world and are not nameless, faceless bureaucrats. But their receptivity to the public may backfire in times of turmoil and popular outcry, when the public is incensed about something and demands that action be taken.

An almost classic example was furnished last year, when the American public was enraged by the Iranian takeover of the American Embassy in Teheran. It was a situation ideally suited to breed frustration and hatred. Our fellow citizens had been taken prisoner lawlessly, and there was almost nothing we could do about it. The press played up the story for months, insisting that U.S. officials do something, anything.

But if officials couldn't do anything directly to help the hostages, maybe they could do something to hurt Iranians. There were thousands and thousands of Iranian students in the U.S. at that time. Weren't some of them freeloaders who were abusing our hospitality and violating our immigration laws? Wasn't it time we cracked down on these ingrates?

The call went out to round up the Iranian students in the U.S. and make them prove that they were here lawfully. No matter that almost all of them had come to this country while the Shah was still in power. No matter that most of them were bitter opponents of the regime that was holding the Americans prisoners.

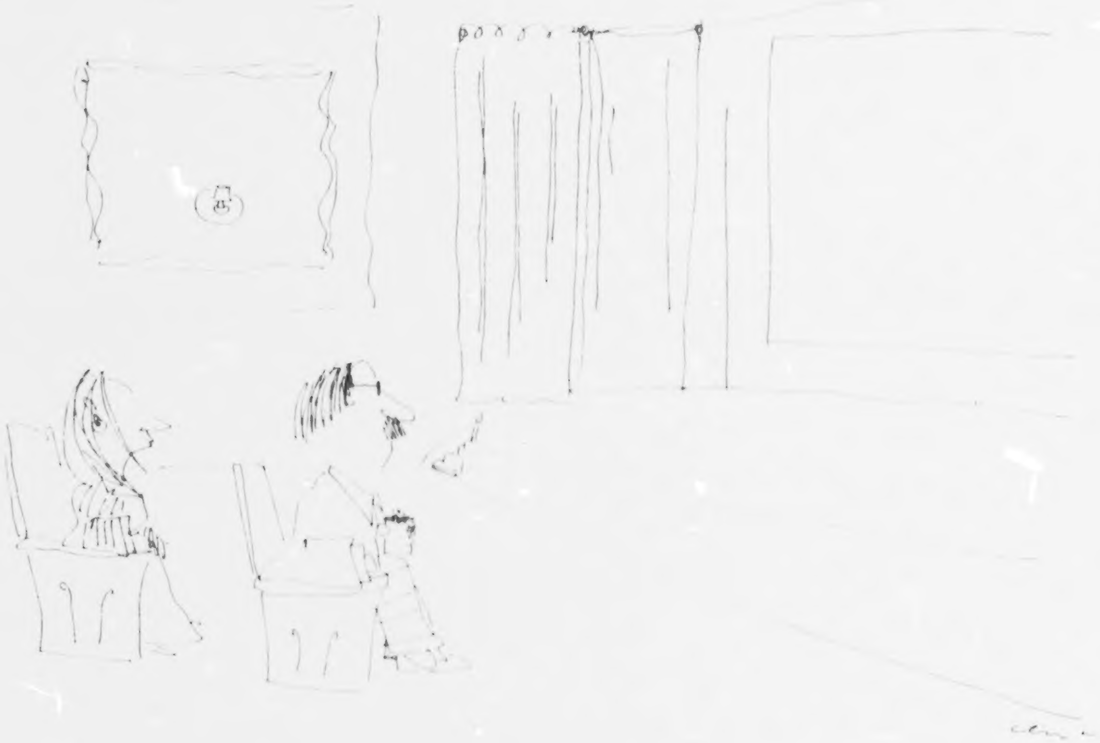
When the courts insisted that due process safeguards be followed, there was the predictable outcry that our justice system was breaking down and that the Iranians were laughing up their sleeves at the powerlessness of American law.

Sadly lacking was an understanding of the role of law and due process protections. An angry populace didn't know or didn't care that our Constitution honors fair proceedings, respect for privacy, and other values more than speed and efficiency.

In this instance, the courts held firm, due process was observed, and, after the hostages were returned, everyone seemed to forget about the great crackdown on illegal Iranians. But any time the courts are subjected to such pressure, there is the chance the fragile structure of justice will crack.

This suggests that the ultimate remedy for political trials is also the slowest and most costly. To end political prosecutions, we'll have to educate our people both to the dangers of the political trials and to the Constitution's protections for unpopular defendants. We'll have to teach about the role of dissent.

This will be a long, difficult process, one which will never entirely succeed. It's too much to hope that political prosecutions will ever completely disappear. Nonetheless, the due process revolution has probably already discouraged many such prosecutions, and appellate courts have often overturned convictions in political cases. If education can lessen public pressure on judges and prosecutors, political cases may be, if not a thing of the past, a much less prominent feature of the present. □



". . . Because of its serious nature, profane language and excessive violence, we've decided to show a Bugs Bunny festival instead."

PRACTICAL LAW

Joseph L. Daly and Jennifer D. Bloom

Chance
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GO BACK
3 SPACES

Ranting and Renting

Almost everyone will eventually be a tenant. For most high school students, that time will probably come at graduation, or a few years later. Rental agreements, along with installment contracts, are almost as certain as death and taxes.

But probably most people—and especially most young people—don't know how to save themselves from legal hassles when they rent or how to protect their rights. All prospective renters, no matter where they live, need certain basic information before they're ready to do battle with the landlord. The laws that govern each of these areas vary from state to state. However, the general steps and practical concerns are pretty much the same.

Before You Rent

Some private firms in metropolitan areas offer help in locating apartments. Some of these require a fee. Be sure to know exactly what guarantees they make and the total cost of their service. You will save money if you do your own footwork or contact a firm where the landlord pays the fee.

Once you've located a place you like, your best protection is to thoroughly investigate the premises and ask some questions:

- Talk with other tenants about the owner's reputation for making repairs and returning deposits. Ask them about any complaints they have with the condition of the building. What do they think of the landlord?
- Try to find out if the building is going to be converted into condominiums in the near future. If it is converted, you may be forced to buy or move. Low rent or a short-term lease may be an indication that the building is about to be converted.

- Ask for a written copy of the landlord's policies concerning children, parking spaces, storage of bicycles, pets, pest control, garbage service, utility payments, penalty for late rent payment, etc.

If you do decide to go ahead and make an application, the landlord may require you to pay a nonrefundable fee to cover the cost of processing the application or doing a credit check.

Rental Agreements

You're probably somewhat familiar with leases, but actually there are two basic types of rental agreements that can be made between the landlord and tenant: month-to-month tenancy (short term) and leases (usually a year or more). In addition, the law may imply the obligations of each party if they're not specified in the agreement.

Month-by-month agreements are very common. The tenant occupies the rental unit and pays the rent monthly. The agreement is automatically renewable at the end of each month and lasts until either party gives an appropriate notice to end the tenancy. The rental agreement may specify the length of notice necessary to end the tenancy; otherwise, the length of notice is *before* the first of the month at the end of which you plan to leave. For example, if you plan to leave February 1, you must give notice before January 1. Otherwise, you may have to pay an extra month's rent. These types of rental agreements are usually oral (not in writing).

Leases specify a definite duration for tenancy, usually one year. Unlike month-to-month agreements, which may be oral or written, a lease for more than a year must be in writing. With a lease, you can't be required to move during the term unless you break one of the lease's conditions. The lease also prevents the landlord from raising the rent during that period unless there is a provision in the lease that permits a rent increase with proper notice. On the other hand, you are obligated to pay rent for the full term of the lease, even if you move, unless the lease contains a provision allowing you to sublet the apartment, or unless the landlord allows you to do so in the absence of such a provision.

Some leases contain automatic renewal clauses. These say that the lease shall be automatically renewed at the end of the lease period unless you give proper notice. Many state laws provide that these clauses are ineffective unless certain conditions are met. For example, the landlord may be required to give the tenant written notice of the automatic renewal provision between 15 and 30 days before the tenant is required to furnish notice of his or her intention to leave the premises. This written notice must be served personally or by certified mail.

Many leases, upon termination of the term, have no provision concerning the tenant's staying on. They become month-to-month tenancies subject to the terms imposed by law.

Writing It Down

In general, it's a good idea to put an agreement of any duration in writing. There is no end to the disputes that may come up. Even the best intentioned landlord and the most conscientious tenant may disagree over what their responsibilities are. On top of that, there's the friction caused by all the things that can go wrong in an apartment. Perhaps the paint will flake or the floor shake; maybe the linoleum won't stay down and the faucet won't stay off. When things fall apart, whose responsibility is it to fix them?

Writing everything won't put an end to disputes, but it will at least provide some guidance on how to straighten them out. You should probably have the following information in every rental agreement:

1. The name and address of the building manager and owner or other person authorized to receive notices and legal papers for the owner.
2. Amount of the rent, date due, and where it is payable.
3. Extension or renewal of the lease.
4. List of repairs to be made before you move in.
5. Responsibility for payment of utilities, phone, garbage pick-up, parking, heater plug-in, cable TV; additional charges, if any, for garage or storage space, recreation room rental, and health club membership.
6. Special services provided by the landlord, including building and grounds maintenance.
7. Responsibility for repairs within the unit.
8. Conditions for subleasing.
9. An explanation of deposits, fees, and conditions for refunds.
10. Telephone number for building emergencies.

Read everything before signing the agreement, *especially* the fine print. Ask questions even if you think you understand. Don't forget that you can negotiate the terms of the lease, even if it is a form lease. All you have to do is write on the form any agreement you have made with the landlord and have both the landlord and yourself initial it. Don't be reluctant to cross out words that do not apply to your agreement or to fill in the blank parts with X's if they aren't applicable. For example, if the lease has a blank for the amount of security deposit you've put down but your landlord isn't requesting any, all you need do is X in the blank to show that it doesn't apply.

Deposits

The landlord may require payment of a deposit (usually called a security or damage deposit) when you agree to rent the unit. These deposits are often a big source of headaches later on. One way to avoid disagreements over whether the deposit should be refunded is for the landlord and tenant to prepare an inventory of the place when the tenant moves in. In fact, the tenant would be wise to take photographs of each room.

The inventory should include all furnishings that come with the apartment, and should note in detail the condition of

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the unit (cigarette burns in the carpet, nail holes, cracks in the plaster, chips in the ceiling, discoloration of the paint, problems with appliances, etc.) *Both* the landlord and tenant should sign and retain a copy of this inventory for comparison when the tenant moves out.

In many states the landlord must pay you interest on any amount held as a security or damage deposit. You are entitled to interest on your deposit at the statutory annual rate, even if you do not rent the premises for a full year. That is, you are entitled to the set annual rate (say six percent) for the number of months you actually occupied the apartment.

At the end of the tenancy, the landlord must return the full deposit and accumulated interest to the tenant, *except:*

1. The amount the tenant owes under the rental agreement, and
2. The amount necessary to restore the unit to its condition before the beginning of the tenancy, except for normal wear and tear.

The landlord must return the deposit and interest within a specified time period (usually three to five weeks) after the tenant leaves and provides the landlord with a new mailing address. If the landlord does not return the full deposit, he or she must give a statement of reasons within that time. If the landlord does not give a timely statement of reasons and withholds part or all of the deposit, the tenant may go to court to recover the entire deposit, even if there's been damage. In some states, if the landlord's action was in bad faith, the tenant may be awarded punitive damages.

What should you do if the landlord refuses to return you full damage deposit? You can attempt to recover it in court. You'll have the opportunity to prove your case, and as evidence you should bring along a copy of the lease and the cancelled checks showing each rental payment and the payment of the security deposit. You can also bring witnesses who will testify as to the condition of the apartment when you took possession and when you left.

Note, however, that you have to pay your rent each month. Contrary to popular belief, you can't withhold your last month's rent and tell your landlord to take it out of the security deposit.

Odds and Ends

Rental agreements and state laws typically touch on a wide variety of other considerations as well.

Landlord's Entry on the Premises. The rental agreement often specifies the conditions under which a landlord may enter. Typically, landlords may enter to make repairs or to show an apartment after the tenant has indicated that he or she is moving out. Usually a landlord must give "reasonable" notice and may enter only at "reasonable" times.

If the rental agreement does not contain an entry provision, some states provide that the landlord may not enter unless invited by the tenant, or unless there's an emergency. Entry without permission may be a trespass, subject to civil and misdemeanor actions.

Condominium Conversion. Under the laws of some states, if a rental unit is being converted into condominiums the tenant in possession must be given written notice of that conversion, along with an explanation of any option to purchase, 120 days before he or she is required to leave. In some situations, this time period is extended. For example, in one state, if the tenant, or any person living with him or her, is 52 or older, handicapped (as defined by law), or a minor child, the tenant may obtain an additional 60-day extension.

Eviction. Most states say that *during* the rental term the tenant can only be evicted for "good cause" (e.g., nonpayment of rent, violation of the terms of the rental agreement, failure to move after timely notice). If the landlord thinks that the tenant has violated the agreement, he or she may file a lawsuit to evict the tenant. This is called an unlawful detainer action. The tenant will receive notice of the suit and will be given an opportunity to appear in court.

Contrary to popular belief, evictions in winter are not prohibited by law. On the other hand, the landlord may not force the tenant out by locking him or her out, shutting off the utilities, taking the tenant's property, or forcibly ejecting the tenant. The landlord's only remedy is an unlawful detainer action; any other action is criminal. (See the final section of this article for more on unlawful detainers.)

Retaliatory Evictions. In most states, a landlord may *not* take retaliatory action against tenants who've made good faith attempts to enforce the rental agreement or any law. That means that the landlord can't retaliate if you inform governmental authority of violations of the safety, health, or building codes.

If the landlord brings an unlawful detainer action because of a tenant's complaint, the court will not evict the tenant. And if the landlord raises the rent or decreases the services provided in retaliation to a complaint, the tenant may sue the landlord.

Rent Increases. Unless you have a lease, the landlord may increase the rent at any time. However, he or she must give notice and this notice must be as long as the notice required of the tenant when he or she intends to move out. Thus, if you are on a month-to-month tenancy, the landlord must give notice at least one month prior to the increase. So if the rent is to be raised on February 1, the notice of the increase must be given before January 1.

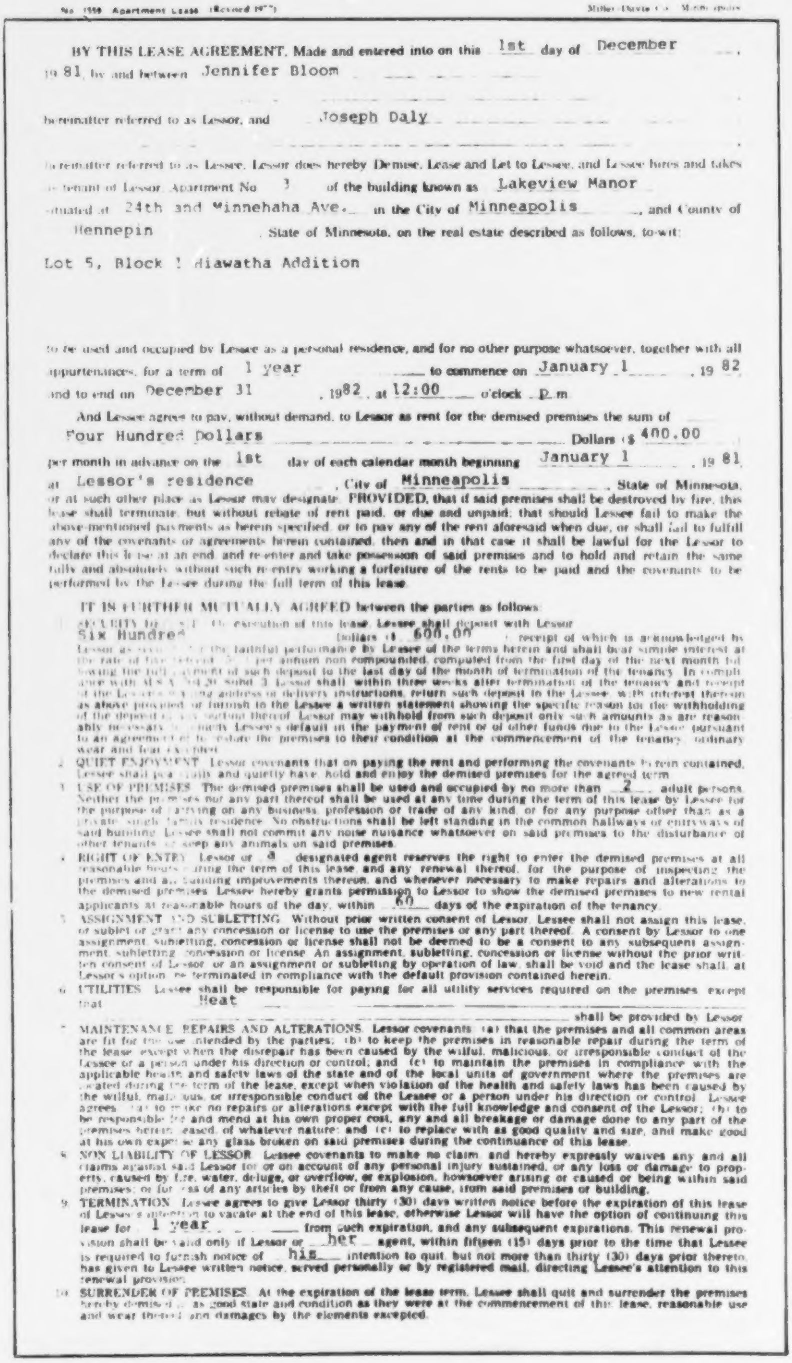
Warranties. Laws in most states provide that every rental unit must be kept in reasonable repair, fit for the tenant's use, and maintained in compliance with applicable health and safety laws. However, the law usually does not specify what constitutes "reasonable" repair. (See the next section for more on the landlord's responsibility to maintain fit premises.)

When you have a problem, you should first complain to the landlord. Only if you're having no luck remedying the problem should you move on to the next step: registering your complaint with the local health, safety, housing, building, or fire inspector. If there is a violation, the inspector can see that it is corrected.

Discrimination. Many state laws explicitly prohibit housing discrimination. Minnesota law, for example, forbids discrimination based on race, color, creed, religion, national origin, disability, marital status, status with regard to public assistance, or familial status (having minor children living with you). If you feel you have been discriminated against, contact your:

1. State department of human rights (usually located in your state capital) or
2. Local department of civil rights.

Subletting. You sublet when you allow another tenant to assume responsibility for renting the apartment. The law in most states requires the permission of the landlord before a tenant may sublet the premises. Although the states do not require a landlord to accept a subleasee, some states provide that the landlord is required to seek a suitable new tenant, and if either the landlord or the tenant finds a new renter of equal qualifications (e.g. credit risk, employment record), the landlord runs the risk of financial loss if he or she doesn't accept the new tenant. That is, if the landlord goes to court and tries to force the old tenant to continue to pay rent, the old tenant won't be required to pay if he or she can show that the landlord turned down an equally qualified substitute. However, these laws exist in only a minority of states.



No. [illegible] Apartment Lease (Revised [illegible])　　Miller-Davis Co. Minneapolis

BY THIS LEASE AGREEMENT, Made and entered into on this 1st day of December, 19 81, by and between Jennifer Bloom

hereinafter referred to as Lessor, and Joseph Daly

hereinafter referred to as Lessee, Lessor does hereby Demise, Lease and Let to Lessee, and Lessee hires and takes as tenant of Lessor, Apartment No 3 of the building known as Lakeview Manor situated at 24th and Minnehaha Ave. in the City of Minneapolis, and County of Hennepin, State of Minnesota, on the real estate described as follows, to-wit:

Lot 5, Block 1 Hiawatha Addition

to be used and occupied by Lessee as a personal residence, and for no other purpose whatsoever, together with all appurtenances, for a term of 1 year to commence on January 1, 19 82, and to end on December 31, 1982, at 12:00 o'clock p.m.

And Lessee agrees to pay, without demand, to Lessor as rent for the demised premises the sum of Four Hundred Dollars Dollars ($ 400.00) per month in advance on the 1st day of each calendar month beginning January 1, 19 81, at Lessor's residence, City of Minneapolis, State of Minnesota, or at such other place as Lessor may designate. PROVIDED, that if said premises shall be destroyed by fire, this lease shall terminate, but without rebate of rent paid, or due and unpaid; that should Lessee fail to make the above-mentioned payments as herein specified, or to pay any of the rent aforesaid when due, or shall fail to fulfill any of the covenants or agreements herein contained, then and in that case it shall be lawful for the Lessor to declare this lease at an end, and re-enter and take possession of said premises and to hold and retain the same fully and absolutely without such re-entry working a forfeiture of the rents to be paid and the covenants to be performed by the Lessee during the full term of this lease.

IT IS FURTHER MUTUALLY AGREED between the parties as follows:

1. SECURITY DEPOSIT. On execution of this lease, Lessee shall deposit with Lessor Six Hundred Dollars ($ 600.00), receipt of which is acknowledged by Lessor as security for the faithful performance by Lessee of the terms herein and shall bear simple interest at the rate of five percent (5%) per annum non compounded, computed from the first day of the next month following the full payment of such deposit to the last day of the month of termination of the tenancy. In compliance with M.S.A. [illegible] Subd. 3 Lessor shall within three weeks after termination of the tenancy and receipt of the Lessee's mailing address or delivery instructions, return such deposit to the Lessee, with interest thereon as above provided or furnish to the Lessee a written statement showing the specific reason for the withholding of the deposit or any portion thereof. Lessor may withhold from such deposit only such amounts as are reasonably necessary to remedy Lessee's default in the payment of rent or of other funds due to the Lessor pursuant to an agreement or to restore the premises to their condition at the commencement of the tenancy, ordinary wear and tear excepted.
2. QUIET ENJOYMENT. Lessor covenants that on paying the rent and performing the covenants herein contained, Lessee shall peacefully and quietly have, hold and enjoy the demised premises for the agreed term.
3. USE OF PREMISES. The demised premises shall be used and occupied by no more than 2 adult persons. Neither the premises nor any part thereof shall be used at any time during the term of this lease by Lessee for the purpose of carrying on any business, profession or trade of any kind, or for any purpose other than as a private single family residence. No obstructions shall be left standing in the common hallways or entryways of said building. Lessee shall not commit any noise nuisance whatsoever on said premises to the disturbance of other tenants or keep any animals on said premises.
4. RIGHT OF ENTRY. Lessor or a designated agent reserves the right to enter the demised premises at all reasonable hours during the term of this lease, and any renewal thereof, for the purpose of inspecting the premises and all building improvements thereon, and whenever necessary to make repairs and alterations to the demised premises. Lessee hereby grants permission to Lessor to show the demised premises to new rental applicants at reasonable hours of the day, within 60 days of the expiration of the tenancy.
5. ASSIGNMENT AND SUBLETTING. Without prior written consent of Lessor, Lessee shall not assign this lease, or sublet or grant any concession or license to use the premises or any part thereof. A consent by Lessor to one assignment, subletting, concession or license shall not be deemed to be a consent to any subsequent assignment, subletting, concession or license. An assignment, subletting, concession or license without the prior written consent of Lessor, or an assignment or subletting by operation of law, shall be void and the lease shall, at Lessor's option, be terminated in compliance with the default provision contained herein.
6. UTILITIES. Lessee shall be responsible for paying for all utility services required on the premises except that Heat shall be provided by Lessor.
7. MAINTENANCE, REPAIRS AND ALTERATIONS. Lessor covenants: (a) that the premises and all common areas are fit for the use intended by the parties; (b) to keep the premises in reasonable repair during the term of the lease except when the disrepair has been caused by the willful, malicious, or irresponsible conduct of the Lessee or a person under his direction or control; and (c) to maintain the premises in compliance with the applicable health and safety laws of the state and of the local units of government where the premises are located during the term of the lease, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the Lessee or a person under his direction or control. Lessee agrees (a) to make no repairs or alterations except with the full knowledge and consent of the Lessor; (b) to be responsible for and mend at his own proper cost, any and all breakage or damage done to any part of the premises herein leased, of whatever nature; and (c) to replace with as good quality and size, and make good at his own expense any glass broken on said premises during the continuance of this lease.
8. NON LIABILITY OF LESSOR. Lessee covenants to make no claim, and hereby expressly waives any and all claims against said Lessor for or on account of any personal injury sustained, or any loss or damage to property, caused by fire, water, deluge, or overflow, or explosion, howsoever arising or caused or being within said premises; or for loss of any articles by theft or from any cause, from said premises or building.
9. TERMINATION. Lessee agrees to give Lessor thirty (30) days written notice before the expiration of this lease of Lessee's intention to vacate at the end of this lease, otherwise Lessor will have the option of continuing this lease for 1 year from such expiration, and any subsequent expirations. This renewal provision shall be valid only if Lessor or her agent, within fifteen (15) days prior to the time that Lessee is required to furnish notice of his intention to quit, but not more than thirty (30) days prior thereto, has given to Lessee written notice, served personally or by registered mail, directing Lessee's attention to this renewal provision.
10. SURRENDER OF PREMISES. At the expiration of the lease term, Lessee shall quit and surrender the premises hereby demised in as good state and condition as they were at the commencement of this lease, reasonable use and wear thereof and damages by the elements excepted.

Locks. A number of cities have local ordinances requiring landlords to equip the premises with a certain type of lock, such as a dead bolt lock. If this kind of lock is not provided and a burglary occurs, the landlord may be liable for the stolen items. To find out what the requirements are in your locality, contact the local department of housing.

Smoke Detectors. Smoke detectors are sometimes required in apartment buildings. To find out the laws governing where they must be placed and how they must be mounted, contact either your local building inspector or the fire marshal division of the state department of public safety.

Where to Get Help. General information and advice regarding landlord-tenant problems may be obtained from:

1. Tenants' unions
2. Legal aid
3. An attorney
4. Housing information services in the community
5. Building inspector
6. Fire inspector.

So You Live in a Dump

Joe has really gotten stuck. He's leased an apartment, but as soon as he moves in he finds that there are rats in the apartment and that the roof leaks everytime it rains. His furniture is getting moldy and he jumps everytime he sees something out of the corner of his eye. What should he do? Can he withhold his rent? If he does so, what might the landlord do? Is there anything else Joe can do besides withholding the rent?

Joe's troubles can be the springboard to a lesson that can (1) explore the concept of implied warranty of habitability and (2) examine the options available to a tenant if the leased property is uninhabitable. (The next lesson included in this article—"So You're Being Evicted"—goes into another aspect of the eternal landlord-tenant battle.)

To present this material, we suggest the following methods:

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1. Read the case study to students.
2. Break them into groups of four or five students. Have one group represent the interest of the landlord, one the interest of the tenant.
3. Make copies of the lease included in this article, and have each group of students identify clauses that might be applicable to this case. Naturally, the students representing the interest of the landlord should look for clauses favorable to their side, and those representing the tenant look for clauses that would benefit them.
4. As a final step, have representatives of the opposing groups role play a trial in small claims court. (Small claims courts generally are informal and have relaxed rules of evidence. For ideas on how to present a more formal role play, see "From Classroom to Courtroom: The Mock Trial," in the Winter, 1978, *Update*.)

Dumps and the Law

The legal doctrine known as "implied warranty of habitability" is Joe's friend in this case. According to many state statutes, a landlord is presumed to promise (covenant) in every lease, whether written or oral:

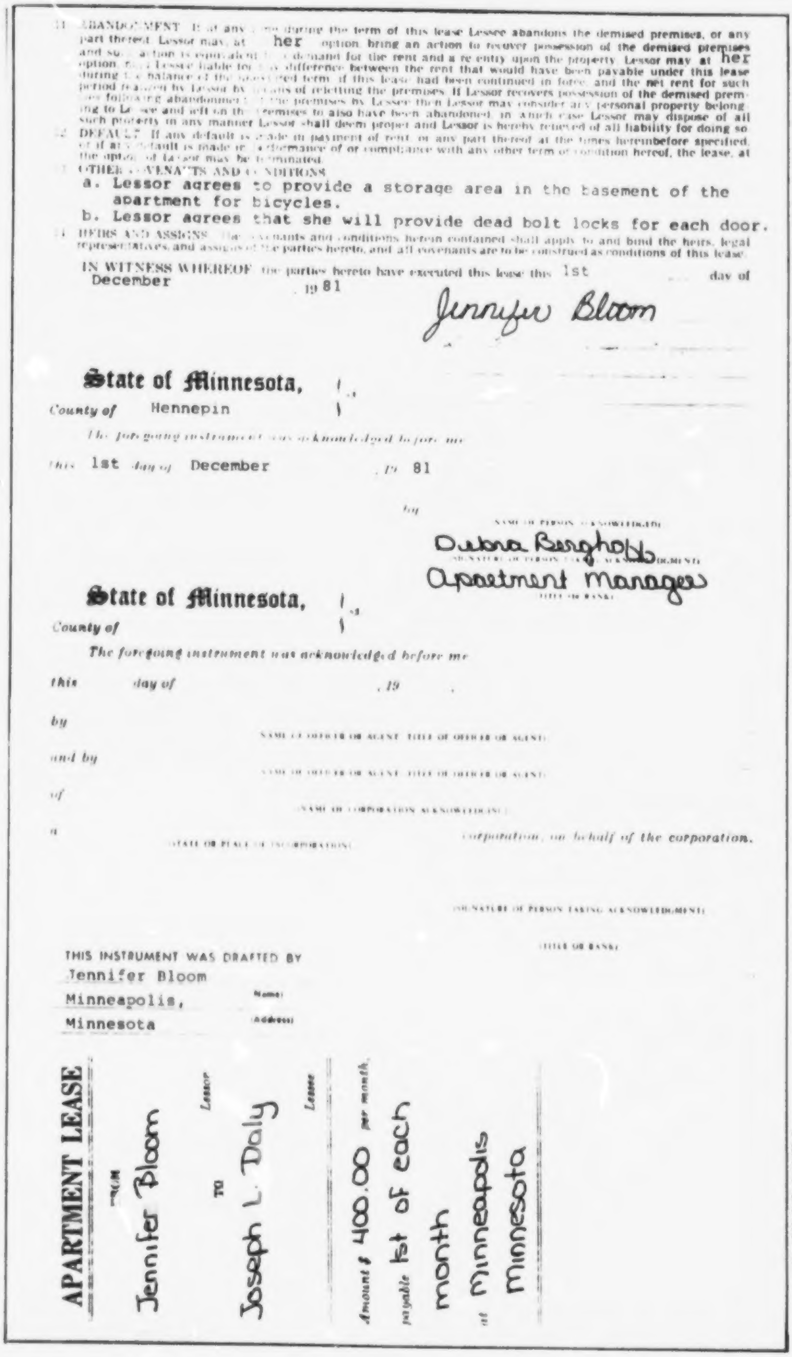
1. That the premises and all common areas are fit for the use intended by the tenant.
2. That the landlord will keep the premises in reasonable repair during the term of the lease, except when the disrepair has been willfully or irresponsibly caused by the tenant or someone else under the tenant's direction or control.
3. That the premises will comply with health and safety laws, except when the violation of these laws has been caused by the tenant or a person under the tenant's direction.

It's not necessary for these covenants to be written into the lease, since state laws provide that the parties to a lease may not waive or modify the covenants.

These covenants are generally known as "implied warranties of habitability." If a landlord leases an apartment as a residence, he or she is promising to provide an apartment that's fit to live in, is kept in reasonable repair, and complies with health and safety laws. If the landlord doesn't provide an apartment that meets these standards, the tenant is not getting what was bargained for.

Theoretically, the tenant may have a valid argument that he or she does not owe the full amount of the rent. In some recent cases, courts have held that the tenant may stop performing his or her part of the bargain (e.g., paying the full rent) if the landlord fails to comply with the implied warranty of habitability. However, nonpayment of rent will probably mean that the landlord will try to evict the tenant, and if the courts agree with the landlord the tenant will be out on the street. Therefore, nonpayment of the rent should be a step of last resort. Before that, the tenant should consider less drastic means, such as:

1. Notifying the landlord *in writing* (with a copy retained) of the repairs needed;
2. Calling in the housing inspector and asking for an inspection of the premises;
3. Offering to "repair and deduct," i.e.,



11 ABANDONMENT. If at any time during the term of this lease Lessee abandons the demised premises, or any part thereof, Lessor may, at her option, bring an action to recover possession of the demised premises and such action is equivalent to a demand for the rent and a re-entry upon the property. Lessor may at her option, hold Lessee liable for any difference between the rent that would have been payable under this lease during the balance of the unexpired term, if this lease had been continued in force, and the net rent for such period realized by Lessor by means of reletting the premises. If Lessor recovers possession of the demised premises following abandonment of the premises by Lessee then Lessor may consider any personal property belonging to Lessee and left on the premises to also have been abandoned, in which case Lessor may dispose of all such property in any manner Lessor shall deem proper and Lessor is hereby relieved of all liability for doing so.

12 DEFAULT. If any default is made in payment of rent, or any part thereof, at the times hereinbefore specified, or if any default is made in performance of or compliance with any other term or condition hereof, the lease, at the option of Lessor may be terminated.

13 OTHER COVENANTS AND CONDITIONS
a. Lessor agrees to provide a storage area in the basement of the apartment for bicycles.
b. Lessor agrees that she will provide dead bolt locks for each door.

14 HEIRS AND ASSIGNS. The covenants and conditions herein contained shall apply to and bind the heirs, legal representatives, and assigns of the parties hereto, and all covenants are to be construed as conditions of this lease.

IN WITNESS WHEREOF the parties hereto have executed this lease this 1st day of December, 19 81

Jennifer Bloom

State of Minnesota,
County of Hennepin } ss.

The foregoing instrument was acknowledged before me
this 1st *day of* December, 19 81
by
(NAME OF PERSON ACKNOWLEDGING)
Debra Berghoff
(SIGNATURE OF PERSON TAKING ACKNOWLEDGMENT)
Apartment Manager
(TITLE OR RANK)

State of Minnesota,
County of } ss.

The foregoing instrument was acknowledged before me
this *day of* , 19 ,
by
(NAME OF OFFICER OR AGENT, TITLE OF OFFICER OR AGENT)
and by
(NAME OF OFFICER OR AGENT, TITLE OF OFFICER OR AGENT)
of
(NAME OF CORPORATION ACKNOWLEDGING)
a *corporation, on behalf of the corporation.*
(STATE OR PLACE OF INCORPORATION)

(SIGNATURE OF PERSON TAKING ACKNOWLEDGMENT)
(TITLE OR RANK)

THIS INSTRUMENT WAS DRAFTED BY
Jennifer Bloom (Name)
Minneapolis, Minnesota (Address)

APARTMENT LEASE
FROM Jennifer Bloom Lessor
TO Joseph L. Daly Lessee
Amount $ 400.00 *per month,*
payable 1st of each month
at Minneapolis Minnesota

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to repair the premises at his or her own expense and deduct the cost from the rent;

4. Suing the landlord in small claims court for rent abatement. In order to do this, a tenant must prove that he or she gave notice that repairs were needed, but the landlord failed to make them, leaving the premises in disrepair for a length of time.

Under this fact situation, one of the role-played small claims trials could deal with the tenant's suit against the landlord asking for rent abatement. Or students could role play the case of a landlord who is bringing suit against a tenant who has withheld a portion of his rent. Here, the landlord would be seeking to have the full amount paid.

Another legal case that might arise out of this situation is an unlawful detainer action. This is a lawsuit by a landlord seeking to evict the tenant on the basis that he or she has not paid the rent. An unlawful detainer action is only used to remove the tenant from the premises. It cannot be used to obtain the unpaid rent.

Unlawful detainer proceedings would usually be brought in a landlord-tenant court or housing court. They wouldn't usually be brought in small claims court. Unlawful detainer proceedings are a summary remedy for the landlord. If he or she wins, the judge will issue an order permitting the landlord to evict the tenant. However, the tenant does have the right to appeal.

So You're Being Evicted

This section is designed to help students understand unlawful detainer actions and to give them ideas of what to do if the landlord is trying to evict them. As in the previous section, once students understand the law they can break into small groups and prepare role plays based on an unlawful detainer action.

A landlord can start a court case to have you evicted if: (1) you fail to pay your rent when it is due without a legal reason, (2) you fail to leave the premises after the tenancy ends, and (3) you do not perform your duties under the rental agreement.

Of course, just because the landlord sues doesn't mean that you lose. But if you don't want to move out of your place, or if you can't move before the court date listed, you *must* come to court on the date and time listed in your summons form. Having to go to work or do something else important does not mean you may miss court. And *you must be on time*; otherwise, the court might go ahead without you and order you to move.

If you don't come to court, and lose by default, the judge will order you to move immediately. If you don't move, your landlord can have the sheriff move you, your family, and your belongings out. So if you don't want to be camping on the sidewalk, go to court when the papers say. If you will be unavoidably late, call the clerk's office noted on the summons form.

If you think you have a defense, or if there are some mitigating circumstances which justify nonpayment of rent, you should recruit the help of a tenants' union, legal aid, an attorney, or somebody else who can vouch for you or represent you.

If you're served with eviction papers, you don't have to file a formal written answer. To avoid a default judgment, all you have to do is attend the hearing and answer the complaint orally.

If you go to court, you can to try to do two things: (1) prove to the judge that your landlord doesn't have the right to evict you; or (2) ask the judge to give you some extra time to move. Be ready to tell the judge why you need the extra time.

If you are "contesting" your landlord's case (trying to show that he or she doesn't have the right to evict you), you have the right to ask for a trial. You should say, "I want a trial," when the clerk or the judge calls your case.

In most states, either party may demand a trial by jury. If you ask for a jury trial, a jury fee might be charged. If you cannot pay the fee, tell the clerk. Under certain circumstances, the judge may excuse fees.

How to Get Ready for Court

Read over your landlord's court papers (the complaint). These will tell you why your landlord thinks he or she has the right to evict you.

If the court papers say you haven't paid your rent and you have, bring your receipts or cancelled checks with you to court. Or tell your landlord that you did pay your rent and show him or her the receipts, and see whether your landlord will have the case stricken so you won't have to go to court.

If you haven't paid your rent, you may pay your landlord now. Be sure to get a receipt. After you have paid the rent, call the clerk at the court to see if your landlord has had the case stricken. If the case has not been stricken, bring the receipt or, if you haven't paid yet, your rent (cash or money order) with you to court. Have some extra money with you in case the judge tells you to pay court costs.

If your apartment is in bad shape, tell it to the judge. But you must bring with you to court the whole amount of the rent (cash or money order) the papers say you owe. After hearing what you and your landlord have to say, the judge may decide that your apartment is in bad condition and reduce the rent you owe. It will help your case if you:

- Bring people along (witnesses) who know about the conditions in the apartment or know that the landlord has refused to make repairs.
- Bring pictures of the bad conditions.
- Have your apartment inspected by a building inspector. Explain that the inspections must be done right away. Look in your telephone directory for the number of the building inspector for your community.

Written Notice

If the court papers say that you were given a written notice to leave your place, *bring the notice to court*, show it to the judge, and tell the judge when you got it. The judge will decide whether the landlord followed the rules for giving you notice.

Be sure to tell the judge:

1. If the notice didn't tell you to be out of your apartment on the day before your rent is due.

2. If you didn't receive the notice at least one rental period before you have to be out. (Example: your rent is due on the first of each month, the notice says be out on August 31, but you didn't get the notice on or before July 31.)
3. If you signed an agreement or other paper to rent your place, read it to see if it says anything about how much notice the landlord must give you. If it says something, or if you didn't get a copy of the paper you signed, tell the judge.
4. If you believe your landlord is trying to evict you because of something you did to protect your rights as a tenant, tell the judge. Be specific about what you did to protect your rights, and why you think this may be the reason you're being evicted.
5. If you believe that you are a victim of discrimination, say so.
6. If the court papers say you broke some part of your lease, and you believe you didn't break the lease, tell the judge. It is helpful to bring witnesses to court to back you up.

Even if you broke some part of your lease, the lease might not allow you to be evicted for breaking it. Bring the lease to court and ask the judge to read it. If your landlord didn't give you a copy of the lease be sure to tell the judge.

If you live in public housing, you may have special rights. For example, your landlord may be able to evict you only for good reason. This reason might have to be proved in court before you can be evicted. You will also have a chance to tell your side of the story.

If you disagree with anything the court papers say, tell the judge. Again, witnesses are helpful. If your witnesses won't come to court voluntarily, you may subpoena them. Then they will be required to come. To subpoena a witness go to the clerk's office listed on your summons form and ask for assistance.

There may be other laws that protect your rights as a tenant. For example, some states have landlord disclosure acts which require that certain pieces of information be filed at the appropriate agencies or be provided to you when you rent the premises. In addition, there are procedural requirements covering how court papers are prepared and served. These must be complied with too. If you think the procedure hasn't been followed, tell the judge.

A Check List

Here is a brief list of what you should bring to court:

1. The court papers.
2. The rent money you haven't paid (in cash or money order).
3. The receipts or cancelled checks which prove that you have paid what the landlord says you owe.
4. The lease or any other paper you signed to rent your place, and the notice (if any) that your landlord gave you to move.
5. Any witnesses or pictures that can back up what you're going to say. □

Landlord-Tenant Role Plays

One good way to introduce students to the considerations they will face in renting an apartment is to ask them to role play the situation of the landlord showing the premises to a prospective renter. Share with students the first section of this article ("Before You Rent"), so that they will identify the questions a renter should ask and become aware of the inherent pressure on the renter during the situation.

It would be helpful if students gained some familiarity with reading and understanding leases. Share with them the example included here, separate them into small groups, and have each group try to interpret a different clause. Ask students to try put them into plain English. Why aren't they in plain English to begin with? Who benefits from "lawyers' language"?

Share with students some of the materials on habitability of apartments, so that they can role play a situation in which renters complain to the landlord about a needed repair. This role play is designed to help students explore how to address this grievance. You might want to bring in an actual landlord to discuss successful ways to complain about the premises. The most important lesson for students is that their goal is to get the premises repaired, not to vent their hostility.

Another role play, "Roommates Wanted," is designed to help students explore the realities of living with non-family members. Begin this one by breaking the students into groups of four. Have them identify the kinds of things that would come up if each group intended to rent a house and be roommates.

Some examples are:

1. The lease—Who signs it?
2. The rent—Who pays it? Does one person pay all and collect from others or does each pay a quarter of the rent directly to the landlord. Most landlords will require that all tenant-roommates are "jointly and severally" liable (meaning each individual roommate is liable in full, individually, if all the rent is not paid).
3. Cleaning the premises—Who does what work?
4. Repairs—Who pays how much?
5. Utility bills—How are they split?
6. Phone bills—How will long distance calls be accounted for?
7. Damages to the premises—Who pays?
8. Friends visiting—Who and for how long?
9. Parties.
10. Smoking, drug, and alcohol use.
11. Animals on the premises.
12. Stereos, radios, and other noise—Any limitations on hours?
13. Joint purchases—e.g., washing machine.
14. Neatness, cleanliness—What degree required?
15. Budgets—Will there be a petty cash box?
16. Food—Who buys, who pays, who eats, who cooks?
17. Keys—Can friends have keys?

To cap this exercise, have each group address these points in a document that everyone in the group can agree to.

One of the best ways to introduce students to the realities of being a renter is to invite some people from the community into the classroom. Ask a representative of a tenants' union and a representative of an apartment management company to come to class. Have them identify the inherent problems in the landlord-tenant relationship and the best ways of resolving those problems.

Items for discussion could include:

1. Complaints to the landlord
2. Tenant organizing
3. Rent withholding
4. Unlawful detainer actions
5. Suing the landlord
6. Complaints to government agencies
7. Rent control
8. Profit v. fairness.

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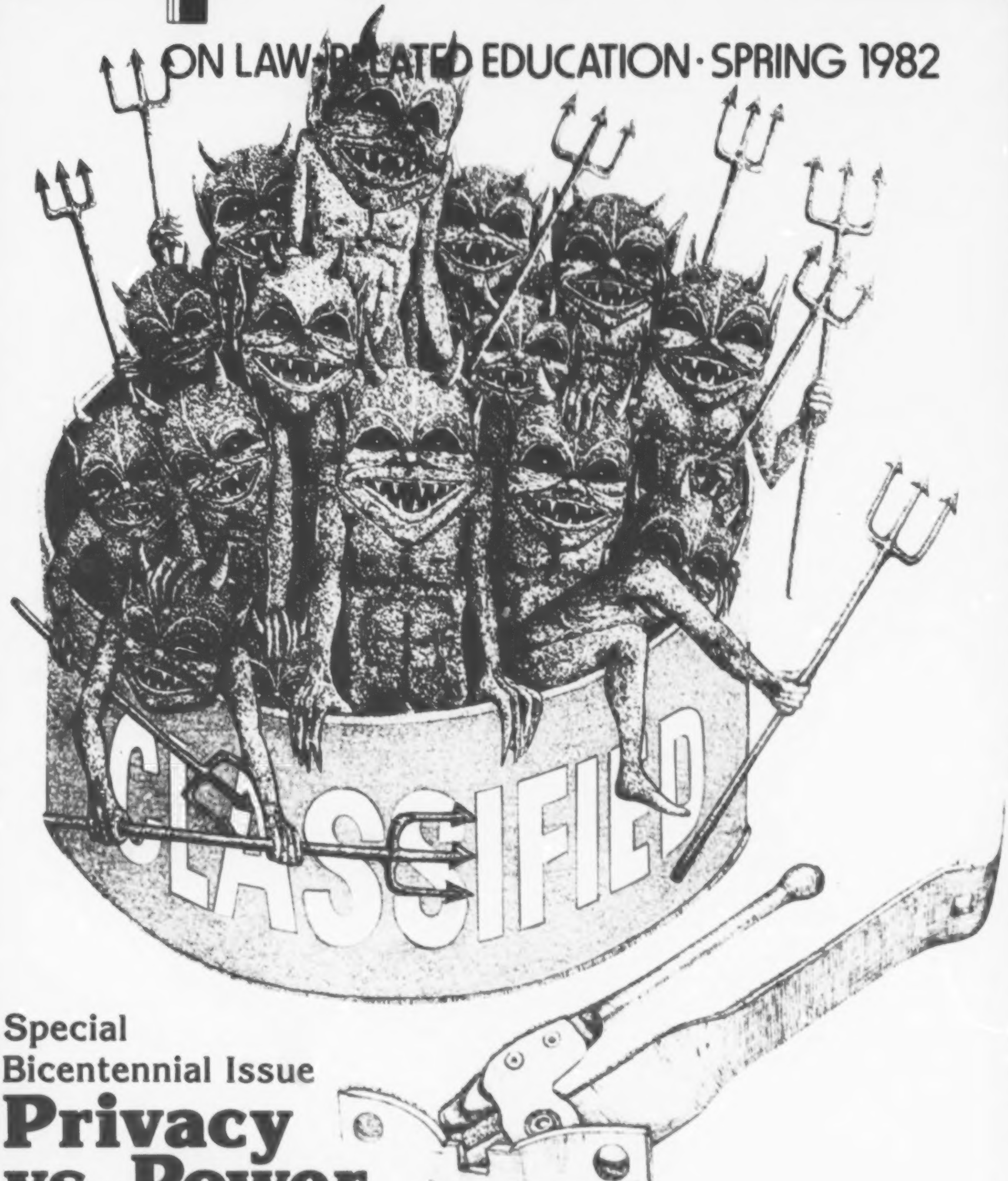

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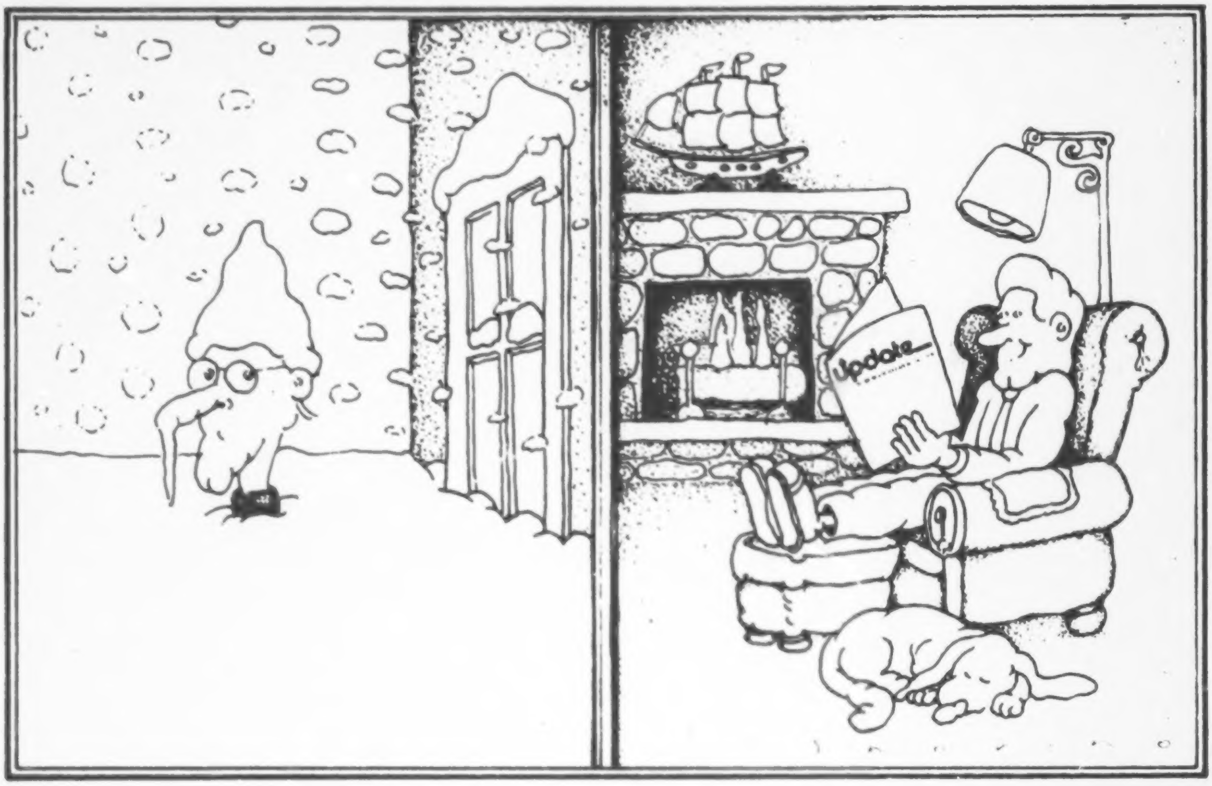

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contents

Volume 6, No. 2, Spring 1982

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2
What Is Privacy?
An American Right Unmentioned in the Constitution

6
What Is Privacy?
"Do You Sleep in the Nude?"

10
Classroom Strategies
Open Doors, Open Minds

16
What Is Privacy?
The All-Seeing Eye of the Media

20
Classroom Strategies
Privacy vs. the Media

24
Law and the Schools
Child Abuse: The Crime No One Wants to Talk About

28
What Is Privacy?
FOIA

32
The Bicentennial Decade
To Establish—and Limit—a Government

36
Court Briefs
The ERA Extension, Religious Meetings in School, Marijuana Possession and More

41
Practical Law
Teachers Do Have Rights

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The Founding Fathers never
used the word "privacy," but the Supreme Court
read their minds and found . . .

An American Right Unmentioned in the Constitution

William Preston

When the lowly contraceptive can bring to life a new constitutional doctrine, it may well deserve a revered position in the Privacy Hall of Fame. As one of the precipitating factors in the landmark case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), which established the right of marital privacy, it became one of the few technological advances that broadened rather than constricted the age old human desire "to be let alone."

Such wondrous results can't be claimed by the detectaphone, the electronic bug, the spike-mike, the wire-tap, the surveillance camera, the satellite spy, the lie detector, the Xerox machine, or the computer. The plaything of the sexually active birth-controllers finally won its revenge after years of Comstock-imposed repression, but the playthings of the investigatively active law enforcers have never suffered from similar legal restraints or moral distaste. That contrast may say something about a value system which often consigns privacy to a corner of the constitutional cellar.

All of this reminds us that the right of privacy is an evolutionary "sport" that did not possess independent recognition until nearly 200 years of constitutional interpretation had gone by. The first early warning that it was time to entertain such a right occurred in 1890 when Samuel D. Warren and Louis D. Brandeis alerted the nation in a famous *Harvard Law Review* article entitled "The Right to Privacy."

Their article followed a worrisome era of technological advance and early journalistic sensationalism. The competition between intrusion/exposure and the right to be let alone had begun, a contest of immense importance that often seemed to be played without the legal umpires having any control at all of the game, though they often blew their whistles rather vigorously. When they did get control, the outcome sometimes seemed to penalize privacy, a result that led its friends to wish they had the right to be let alone from such unwelcome interventions.

A Constitutional Orphan

It is an irony of the American system that a concept as important as privacy has always been legally regarded as an elusive and "a confusing and complicated idea," the one real foundling that never got adopted in the Bill of Rights. When the Supreme Court fails to define adequately the contours of obscenity, the results may be unfortunate, but not disastrous. When it cannot develop a decent theory of privacy, there are far more critical consequences for an open society, public decency, and political civility. What, then, is this essential condition that seems to be everywhere and nowhere, the only right that has been defined (in *Griswold*) as an "emanation," a "penumbra," a kind of radiance shining from other enumerated rights, yet also suffusing the entire Constitution with its own ghostly glow?

Dozens of definitions spring to mind that would satisfy some common sense understanding of privacy: solitude, intimacy, social and spatial distance, anonymity, quiet and repose at home, security of person and property, autonomy, confidentiality, and control over information about oneself. But the dominant symbol that has long characterized this defiant individualism is that of the house as castle, the fortress against all unjustified intrusions. It stands not only for the "sanctities of a man's home" but also for all "the privacies of life." It protects man's dignity and inviolate personality, rebukes all "coerced confessions," and resists all overly pervasive systems of surveillance and social control. People cherish privacy as an end in itself, of course, but they also value the protection it provides as they pursue their many unique definitions of happiness. They want it for themselves and for the organizations they belong to.

To say this is not to describe a nation of hermits. Privacy only means something in social settings, where it remains the counterpoint to all organized life and public interaction. Society needs to know something in order to govern effectively, has to monitor criminal deviance and provide for the national security, and almost always exercises the police power over citizens to accomplish benevolent ends. Other rights may also take precedence over privacy, a competition for priority inherent in the Bill of Rights itself.

Since privacy is one thing and its legal

Mitchell Funk

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and constitutional protection another, social dynamics may affect privacy far more than the enactments of legislatures or the decisions of any judiciary. Puritan moral surveillance, for example, had an intense voyeuristic capacity that questioned all claims to privacy, even of the elite. Yet one should never underestimate the capacity of the average citizen to activate his private life, however perverse or creative, in the many interstices most societies cannot monitor.

Privacy and the Framers

In his recent remarkable study of privacy, David M. O'Brien defined it as "an existential condition of limited access to an individual's experiences and engagements." By 1776 the colonists had surely developed the ground rules for achieving that end.

Deeply ingrained in the very act of emigration, the desire to be let alone helped precipitate the revolutionary crisis, especially in the revulsion against the general search warrants with which British customs officials abused their power. The commitments to natural rights, limited government, private property, and individualism suggested a strong pro-privacy preference, as did the common understanding that no man need accuse or defame himself.

At a less exalted level, the common law made nuisances of the eavesdropper, trespasser, and common scold. If editors maliciously exposed personal affairs, horsewhipping, dueling, and shooting offered a quick way to restore reputation.

All this was, of course, familiar to the Founding Fathers. Their constitutional script simply assumed that privacy was a principle of the open society and limited government they were creating. If privacy hovered in this sense in the background, it found a more explicitly recognized place in several enumerated rights, among them the First, Third, Fourth, Fifth, Ninth, and Tenth Amendments: Freedom to be silent, (1st and 5th), freedom of conscience and privacy of opinion (1st), freedom from an intrusive and unwanted presence (3rd), freedom from unreasonable searches and seizures (4th), freedom from self-incrimination (5th), and freedom to reserve other rights not specifically mentioned in the first eight amendments (9th and 10th). Whatever the Ninth may finally come to mean in future judicial interpretations, it certainly suggests that the founding generation did not believe it feasible to catalog every possible protection from arbitrary government. But they did want the guarantees of liberty to have "the requisite latitude" and not be confined simply to the ones on the enumerated list.

The Bill of Rights gave privacy as much protection as those times demanded; other generations would not necessarily do as well.

Privacy by Other Names

For almost a century the "brilliant framework" thus established in law and practice effectively balanced the nation's competing interests in "privacy, disclosure, and surveillance," as Alan Westin has so persuasively argued. Although the word itself barely appeared in the decisions or legal literature of the day, other concepts served as its defense. Property rights, trespass, defamation, and personal injury cases sustained a variety of rights closely linked with privacy. Legal opinions and constitutional commentaries reflected a vigorous, old-fashioned contempt for "the prying eyes of the government," the impertinence of a malicious press, the disruption of "domestic repose" by noise or nosiness, and the unauthorized invasion of confidential relationships and communications.

Publishing personal correspondence struck leading jurists as "odious," as *Woolsey v. Judd*, 11 N.Y. Sup. Ct. 379 (1855), made clear. In a comment relevant to modern electronic surveillance as well, Justice Story wrote: "It strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments, between relatives and friends, and correspondents, which is so essential to the well-being of society, and to the spirit of a liberal courtesy and refinement."

In the mostly rural confines of the new nation, massive numbers of people enjoyed the blessings of privacy, only dimly aware of the protective legal superstructure above. Loneliness must have been more of a problem for many than intrusion, an overabundance of solitude that helps explain the obsession with political parties, fraternal groups, and other associations. But even within these groups Americans sought a measure of privacy. In the intensely partisan political campaigns of the early republic, anonymity protected pamphleteers, including presidents, cabinet members, and congressmen.

Government itself guaranteed the privacy of letters in the mails even against federal searches (*Ex parte Jackson*, 96 U.S. 727 [1878]), and did away with religious test oaths that compelled disclosure of sectarian commitment. The Fourth Amendment insistence on narrowly drawn warrants restricted access to home and office. Courts resisted turning discovery proceedings into general fishing expeditions for nonrelevant information.

Yet some ominous portents were already afoot. Small town moral surveillance exposed secrets and damaged privacy. Mass communication by telegraph was accompanied by its faithful intercepting companion, the tapper. The same government that delivered the mail proved itself willing to expose the recipients of abolitionist literature throughout the South.

Two extraordinary examples of intrusion illustrated how easily privacy could be unequally distributed among the populace. The right to associate—the organization as castle—was compromised by labor spies and provocateurs whose breaches of confidence mutilated the fabric of trust. In slavery the masters could violate at will the most intimate sanctuary of all, either by assault or by sale. (A similar experience of total observation took place in the North where like-minded fanatics voluntarily abandoned all privacy in a variety of utopian communal experiments. Their failures are witness to the psychological damage inflicted by surveillance, regardless of its benign intentions.)

By 1890 more than one frontier would pass from the scene. Warren and Brandeis marked the disappearance of one notion of privacy as surely as historian Frederick Jackson Turner dramatized the passing of the physical frontier. An innocent and youthful phase in the history of privacy had come to an end. It was time, the *Harvard Law Review* article asserted, to define an independent right to privacy, to rescue privacy from its uncertain legal status in property rights and criminal procedure. It was time to exalt the right to be let alone as fundamental. Six years in preparation, this immensely important reformulation "added a chapter to the law," as Roscoe Pound was to insist. Reflecting some ravages modernization was inflicting on privacy and anticipating others, the proposal set forth a future agenda that no jurists could ignore. Yet before it surfaced, the old order bequeathed a last grand judicial finale showing how far

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William Preston is Chairman of the Department of History at John Jay College of Criminal Justice in New York.

privacy might be defended given the right context and sympathy for it on the Supreme Court.

The year was 1886, one of many rambunctious episodes in those decades of robber baron laissez-faire capitalism. Popular protest and government regulation had stimulated the High Court to restrain further legislative excess. Due process and liberty of contract had emerged to free propertied interests from control by democratic majorities or organized labor.

It would be natural, therefore, for those particular justices to be almost reflexively antagonistic when government intruded into the sanctity of the corporate office. And so privacy was the big winner. The Court's broad interpretation in *Boyd v. United States*, 116 U.S. 616 (1886), turned the Fourth and Fifth Amendments into the immensely important protective barriers against a voracious government the Founding Fathers may have imagined them to be. It was one of the few gifts to constitutional rights which that predatory world provided. Had individuals been equally blessed in the twentieth century, privacy would have an entirely different meaning today.

The *Boyd* decision overturned a law allowing the government to order suspected smugglers to produce shipping invoices. Listen to Justice Bradley react to that seemingly unremarkable quest for evidence. He lashed out at "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." What was "the essence of the offense"? Bradley asked, and easily found the answer: "not the breaking of his doors, and rummaging of his drawers" but rather "the invasion of his indefeasible right of personal liberty and private property,... [the] forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime."

The fallout for privacy was unmistakable. The Fourth Amendment prevented the search for papers "as mere evidence of a crime." Rather, a warrant could issue only for a reasonable search, namely, only "for items... already owned by or forfeited to the state." The Court also relied on the Fifth Amendment's right against self-accusation. Both amendments served sometimes independently, sometimes together, to protect an individual's reasonable expectations of privacy in his communications and keep them "in a special position beyond the government's reach."

Privacy Threatened

Even as the Bradley court was affirming privacy's good health, vast changes were underway that would rapidly endanger its survival and attack the very defenses Bradley had just erected. While most observers then and since have given priority to the insidious impact of technology, the new instruments of communication and surveillance may have been the least corrosive forces at work. They were, after all, only tools servicing much more powerful ends. The rise of the modern administrative state, with its many agencies of social improvement and control was certainly a major part of the problem. Even more important was the appearance of an entirely novel approach toward law enforcement, internal security, welfare, and personnel issues, a

(Continued on page 47)

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WHAT IS PRIVACY?

"Do You Sleep in the Nude?"

The business of prying into your personal life is big business

Damn neighbors—who is this guy Millstone anyway? It's already taken too much time to put together this report, and I've got twelve others to do before quitting time. Shrouded by protective neighbors: "Sorry, I don't know Mr. Millstone well enough to offer any useful information." "I'd rather not discuss Mr. Millstone's personal history, if you don't mind." All I'm asking for is a little basic information and they all clam up. What's he trying to hide? That Volkswagen bus of his, he's probably. . . probably a hippie. A radical. A dope smoker.

Remember The Manual: the field representative "should be sufficiently suspicious by nature to derive satisfaction from tracking down leads and developing the facts." And you've still got a chance with that old guy next door.

"I'm with the Fireman's Fund Insurance Company and have a few questions about your neighbor, Mr. Millstone." Well not really, but Fireman's Fund is the one paying for this investigation. That's not really important anyway.

The Manual: ". . . proceed from the impersonal to the personal. People do not readily talk to strangers about the personal reputation and morals of their friends and acquaintances. However, after first talking about impersonal areas, they have less hesitancy to cover more personal matters." Get with it boy, time for some chit-chat.

"Cold enough for you today, Mr. Jones?" Attaboy, that smile's a nice touch. Even got him to smile. Just a little more prattle and then go with the lance.

"Is Millstone well regard. . ." No! Never use the affirmative—know your Manual! "Excuse me, how is Mr. Millstone regarded?"

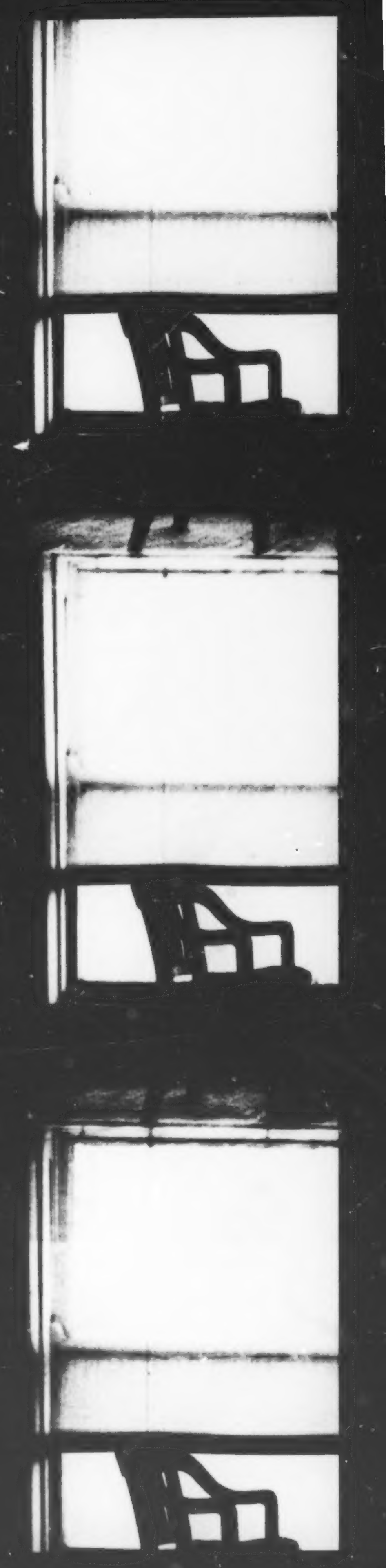
"Unreasonable? Irresponsible? People, strange people, at all hours of the night. Shoulder-length hair. Oh, long hair *and* a beard. Been evicted from three previous residences? That's what the other neighbors say?"

Finally some details. Play him boy, show a little finesse, and this will be a fine report. A fine, fine report. "How much does Millstone drink?" Now you've got it—ask those questions in the negative. Deeper, deeper, deeper. . . .

"Never did like him much? What's wrong with him, Mr. Jones? Oh, I see. Hordes of people coming in and out at all hours of the night? People say he takes drugs. Oh, people say he smokes drugs. Sounds like a pretty troublesome neighbor, Mr. Jones."

And now for the report: ". . . In addition, both assureds [Millstone and his wife] were reported to be the 'hippie' type by all neighbors and participated in many demonstrations here in Washington and also housed out-of-town demonstrators . . . . Assureds were strongly suspected to be drug users by all neighbors, however this could not be positively substantiated by any of our informants. . . . Assured is reported to have shoulder-length hair and a beard on one occasion. Assureds were also criticized in their utter lack of reasoning and judgement by all in-

Gary Rivlin



Les Klug

formants in this neighborhood."

The lengthy quote ending the above section was taken verbatim from the actual field report on James Millstone, now assistant managing editor of the *St. Louis Post-Dispatch*. The Manual, the field rep's manual, is real; the excerpts included are quoted directly. Only the actual conversations have been fabricated, though they are based on interviews with experts on these kinds of investigations.

Are They Watching?

Though it is not borne out in the actual report, the brunt of his investigation, says Millstone, was based on the testimony of a "senile old man who lived next door to us, who we had a long-standing feud with. . . . I played ball in the backyard a lot with my boys, and when the ball went into his yard, one of us would climb the fence to retrieve it. This eventually caused a strong dislike for us and a lot of nasty comments thrown back and forth."

Millstone sued O'Hanlon Reports, Inc., which performed the investigation. Said the judge, who found in favor of Millstone: "[O'Hanlon's] methods of reporting on consumers' credit backgrounds as shown at the trial were so slipshod and slovenly as to not even approach the realm of reasonable standards."

And all for a couple of hundred dollars of auto insurance. The Millstone investigation was not prompted by political activism. Nor did a seething editorial bring it to fruition—no corporation had any reason for revenge. Millstone simply applied for auto insurance when he moved to St. Louis. The investigation was a matter of course for Fireman's Fund, a part of the application process.

For as little as $10 per, an investigative company like O'Hanlon will put together a report on anyone. Or more probably, Equifax, the giant of the field, will do the investigating. They'll typically send an overworked investigator to do some prodding here, some snooping there. If the investigative firm is lucky, they'll find a gabby neighbor; if the investigatee is unlucky, the neighbor will also be vindictive. Or maybe an investigator will use phrases like "by all informed," as in the Millstone report, when he has only spoken with a single source.

Equifax compiles between 15 and 20 million of these reports per year. It employs thousands of investigators. According to testimony before a government commission, Equifax employees interview 200,000 people each day.

Insurance companies are the investigative corporation's best customers, but Equifax, O'Hanlon, and other similar outfits routinely perform similar functions for corporations checking on potential employees. Other companies snoop too. It would be safe to assume that Fireman's Fund also did a complete check of Millstone's credit history by requesting information from a credit bureau. Who uses credit bureaus? All creditors, virtually all insurance agencies, and many corporations interested in learning more about job applicants.

It is no wonder that the majority of Americans are scared. According to a 1978 Harris poll, 64 percent fear they are forfeiting too much of their personal privacy. Most Americans believe that they are asked too many questions about things no one has a right to know. And despite well-documented cases of government spying, it's not the IRS, FBI, and CIA that people fear most, but finance corporations, credit bureaus, and insurance companies, all listed as the organizations people believe collect too much personal information.

The delicate balance necessary between the individual's right to personal privacy and business's need for efficient information exchange has yet to be attained. Despite the 1970 Fair Credit Reporting Act (FCRA), which has greatly improved the private sector's handling of consumer information, files are still too often misused. Information is unnecessarily collected and disseminated, and it's often grossly inaccurate.

"These companies now call themselves service bureaus," says John Marshall Law Professor George Trubow. He pauses to take a sip of his drink, then smiles. "But no matter what their name, their service remains the same—they snoop."

A Raw Deal

In 1980, the Federal Trade Commission attacked the giant of the investigative services field, Equifax. It released a long list of Equifax's violations under the FCRA. Among the FTC's findings are charges of obtaining medical information illegally; agents not introducing themselves as Equifax employees when obtaining information; failing to properly and adequately reinvestigate disputed information; and lying to people about their reports by leaving out some of the more damaging comments in their files.

All this leaves Equifax attorney Thomas Magis upset. He feels that the FTC has hurt his company's reputation. "All these allegations are based on the thinnest of information," Magis said. "They are unable to provide specific evidence for any of these supposed violations."

If that's true, if the FTC has based its entire report on a few isolated incidents and has failed to present a rounded picture, it might be a just reward for Equifax. Critics say the company is infamous for reports omnipotent in tone, written with dogmatic assurance and detail, yet shockingly incomplete and gathered with minimal care.

But that is not the case with the FTC. Its report is hundreds of pages long and based on years of research. It is supported by the findings of the Privacy Protection Study Commission, which released in 1977 a detailed report on privacy issues in the private sector. The FTC's charges, now being appealed by Equifax in federal court, are supported by an impressive array of well-documented studies and testimony.

In contrast, consider the case of John Pontier, victim of an Equifax investigation. When Pontier applied for major medical insurance, a woman came to his house to ask some questions. She also spoke to some neighbors. All routine, she said, nothing to worry about.

When his application was turned down, he discovered that there *was* reason to worry. In his file was an Equifax report crammed with damning statements. It said that his Taco Bell franchise had been closed down by the health department for a year because he used dog food. "That's the kind of thing that could have been verified by going down to the county health department," says Pontier from his home in Boise, Idaho. "They didn't." The investigator based her report solely on the testimony of neighbors.

There was more. "At seventeen, I got a girl in trouble. The charge was statutory rape, and I was fined $50. It wasn't supposed to be public record; I have the court order sealing that record. She [the investigator] reported that I had raped someone, implying a whole lot more than had occurred."

"The report also stated that I had been dealing drugs. That my wife and I held wild parties. That we were alcoholics." The investigator also didn't like Pontier's appearance and included that in her report. "She said that I came to the door,

(Continued on page 71)

Gary Rivlin is a YEFC staff writer and contributor to many other magazines and newspapers.

The Spy in the Gray Flannel Suit

Back in the mid-1960s, General Motors took a special interest in a young Harvard law graduate named Ralph Nader, then an upstart just beginning to dream about consumer advocacy. They hired two detective agencies to tail Nader. The agencies were instructed, said one of the detectives, Vincent Gillen, to dig up anything they could about "his politics, his marital status, his friends, his women, boys, etc., drinking, dope, jobs"—anything that could tarnish his personal reputation.

GM's impetus was purely business; since Nader's book, *Unsafe at Any Speed,* accused GM of disregarding safety in favor of profits, the company wanted to protect its image. A few top-level GM officials, including the company's general counsel, set up the investigation, perhaps reasoning that discrediting Nader personally would discredit his claims. A year later, in 1967, a chagrined GM President, James Roche, who claimed ignorance of the plot, offered Nader a public apology for the investigation before a Senate committee looking into automobile safety.

Keeping Tabs on the Enemy

Nader was not the only one investigated by GM. In 1966, Gillen swore in court testimony that he had conducted more than 25 similar investigations for GM since 1959. Nor has GM been the only company guilty of hiring private investigators to combat the efforts of consumer advocates, labor unions, and radicals with potentially damning information. Other companies have been caught; many more have been suspected of devious information-gathering. Though it is not clear how often corporations resort to spying—their snooping is virtually ignored compared to the well-studied area of government spying—researchers are discovering that corporate-financed spying networks may be as extensive as those of the FBI's COINTELPRO.

Frank Donner, author of *The Age of Surveillance,* tells of one group, the Church League of America. The CLA, says its director, has a file including "every name of every person, organization, movement, publication, or subject of significance [for] American businessmen faced with a grave problem." It specializes in "troublemakers" and radicals in the work force. Donner tells of other organizations, with equally impressive files, which could provide similar services. Most investigators for the CLA and similar organizations, Donner reports, are former FBI or CIA agents.

"Perhaps the most blatant form of illegal surveillance," according to the 1981 report of a House subcommittee on security in the workplace, is the "use of undercover agents or detectives to infiltrate the workforce." Rocci Pettigrew of the West Coast Detective Agency testified before the committee that, "Anybody we overheard talking prounion, we would write their names down. If their names appeared in more than one agent's report, we would find ways to set them up, get them fired, or subsequently arrested by the Monrovia [California] Police Department . . . I was instrumental in having 46 employees terminated that were prounion, and another 16, I was in on setting them up and they were subsequently also arrested by the Monrovia Police Department."

The Silkwood Story

In the above cases, the investigators employed by private corporations have admitted to immoral, if not illegal, activity, making the burden of proof easy. But a more typical case from the private spy files is the much discussed story of Karen Silkwood, where many accusations were made but few proven.

In November of 1974, Silkwood's car crashed under suspicious circumstances while on her way to Oklahoma City to meet with a *New York Times* reporter and a union official who had flown in from Washington. She had called them about potentially damning evidence she had obtained about the shoddy safety practices of her employer, the plutonium works division of Kerr-McGee Corporation. Unaccounted-for dents were found on the side of her car, raising more questions. The evidence that she was supposedly taking to the meeting was never found.

Silkwood's autopsy revealed life-threatening amounts of plutonium contamination; investigators rummaging through her apartment discovered high levels of radioactivity, even in the food in her refrigerator. The company claimed she was smuggling plutonium out of the factory herself. Her family thought she was poisoned. Eventually they won a civil suit against Kerr-McGee, but no criminal charges were ever filed.

If Kerr-McGee had anything to do with the death of Karen Silkwood, as many contend, then of course it has broken a number of laws. But the main problem in trying to detect corporate spying is that often no laws are broken. Writes Frank Donner, "At a time when established governmental systems for monitoring subversion have been cut back, these private counter subversive operations acquire special importance. . . ." Donner and others believe that the spying by the private sector circumvents the law, because these tasks would be illegal if carried out by the government.

Many of the laws which affect the public sector do not pertain to private corporations. The Privacy Act of 1974, which curtailed the activities of governmental investigative groups, does not have jurisdiction over the private sector. So what's preventing privately hired investigators from infringing on a person's right to privacy? "Not very much," says George Trubow, general counsel for a presidential commission designed to see if the Privacy Act of 1974 should be extended to cover private snooping. "After months of work, we concluded that the Privacy Act should be amended to include the private sector."

What happened to that recommendation? It was part of an impressive study, backed by a great deal of research, but nothing ever came of it, leaving the world of private spying virtually unchecked.

CLASSROOM STRATEGIES

Open Doors, Open Minds: The Privacy Issue

Some strategies for teaching
about family privacy,
search and seizure,
and cameras in the schools

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Alita Z. Letwin

As we come nearer to 1984, the Orwellian specter looms with the possibility of a time when all thoughts will be monitored and controlled by an ever-present "big brother." Privacy as often defined—"the right of individuals or institutions to determine for themselves when, how and to what extent information about them is communicated to others"—would be nonexistent.

Such a vision is fearful because privacy is tied so strongly to freedom—freedom of belief, of thought, of expression, of action. It's essential to our creativity, our ability to develop trusting relationships, our autonomy, and our very personality. No wonder our history and our present are replete with privacy issues—search and seizure, data banks, electronic surveillance, disclosure of affiliations and finances, public access to courts and legislative activities, even abortion. Laws and rules regarding privacy are equally legion: the Fourth and Fifth Amendments, the Freedom of Information Act, postal laws, rules of ethical conduct, to name just a few. The U.S. Supreme Court has ruled that, although privacy is not explicitly mentioned in the Constitution, a certain "right of personal privacy . . . does exist."

The following activities, chosen in the main from materials on privacy developed by Law in a Free Society (LFS), were selected to help students examine what makes something a privacy issue, the role privacy plays in our lives, the benefits and costs of protecting privacy, and the conflicts between the need for privacy and the need for public information. These activities were selected to:

- reflect the scope of privacy issues;
- include a variety of activities involving the students in analysis and decision making;
- present activities that could be used at the elementary as well as secondary level;
- indicate the richness of sources that present privacy questions;
- place these questions in a multicultural setting.

I think you will discover as you try out these activities with students that they

Photo 1, Paul Conklin; Photo 2, Paul Conklin; Photo 3, Jean-Claude LeJeune

feel passionate about privacy in their own lives.

Strategy 1. Creepy Peepers?

This junior high school lesson adapts *Nineteen Eighty-Four* in order to introduce students to the Fourth Amendment to the Constitution and the values upon which the amendment is based. (The lesson is excerpted from the Law in a Free Society publication, *On Privacy: Lesson Plans*. The story, "The Telescreen," is an adaptation of *Nineteen Eighty-Four* by George Orwell [New York: Harcourt, Brace and World, 1949], taken from *Your Rights and Responsibilities as an American Citizen* [Boston: Ginn and Company, 1967], reprinted by permission.)

Have your students read "The Telescreen," which provides a good basis for discussing conflicts between individual privacy and social control.

The Telescreen

It was a bright cold day in April and the clocks were striking thirteen. Winston Smith, his chin nuzzled into his coat in an effort to escape the wind, slipped through the glass doors into the hallway of his apartment house.

The hallway smelt of boiled cabbage and old rag mats. At one end of it a colored poster had been tacked to the wall. It showed a large face, more than a yard wide: the face of a man about 45 years old, with a heavy black mustache, and ruggedly handsome features. Winston walked to the stairs. His apartment was on the seventh floor. On each level there was another poster with the same enormous face looking from the wall. It was one of those pictures that seem to be made so that the eyes follow you about when you move. Under each picture were five words, BIG BROTHER IS WATCHING YOU.

As Winston stepped inside his apartment he heard a voice reading numbers. It came from a television screen (or telescreen, as it was called) that was built into one wall. Winston turned a switch and the voice became lower, but he still could hear the words clearly. There was no way of shutting off the telescreen completely.

Outside, even through the closed window, the world looked cold. There seemed to be no color on any of the buildings, except for the large posters that were plastered everywhere. The face with the black mustache looked down from every corner. There was one on the house directly across from Winston's apartment. BIG BROTHER IS WATCHING YOU, said the sign, while the dark eyes looked deep into Winston's own. In the distance a helicopter went up and down between the rows of apartment houses. It was the Police Patrol, snooping into people's windows. These patrols did not matter, however. Only the Thought Police mattered.

Behind Winston's back the telescreen was still babbling away about how many wonderful things had been done in the country. The telescreen sent programs like an ordinary television set, but it did more. Any sound that Winston made would be picked up by it. In addition, as long as he stayed within the field of vision of the telescreen (all of his apartment except a small alcove), he could be seen as well as heard by the Thought Police. There was, of course, no way of knowing whether you were being watched at any given moment. How often the Thought Police tuned in on anyone's apartment was guesswork. It was even possible that they watched everyone all the time. But at any rate, they could watch you whenever they wanted to. You had to live—did live, as a matter of habit—with the belief that every sound you made was overheard, and, except in darkness, every movement watched.

Springboard to Discussion

Now that you and your students have read "The Telescreen," here are some questions you can use to spark their thinking.

- What is the purpose of the BIG BROTHER IS WATCHING YOU poster in the story? How would you feel about having that kind of poster in your home, on the street, at school?
- Why do you think the police helicopters constantly check home windows? How would you feel about having helicopters checking into your windows all the time?
- What do you think the purpose of the telescreen is? How would you feel about having a telescreen like that in your home?
- What do you think might be some of the disadvantages of living in a society with as little privacy as the one described in the story?
- Would there be any advantages to having a telescreen and a police force that could watch people's moves so carefully?
- Do you think that the disadvantages of living in such a society outweigh the advantages, or vice versa? Can you explain why?
- Do you think that a government should be entitled to interfere with an individual's privacy in some situations? Can you explain?
- Do you think there should be limits on governmental interference with individual privacy?
- If you were writing a constitution, how would you regulate the needs of government for intervention and the needs of individuals for privacy?

How are conflicts between the need for individual privacy and the need for social control managed in the United States? To introduce this discussion, read the Fourth Amendment of the Constitution to the students.

> AMENDMENT IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Discuss the amendment in terms of the following kinds of questions:

1. In what ways do you think the Fourth Amendment is designed to protect the privacy of individuals within the United States?
2. According to the amendment, under what conditions do governmental authorities have the right to interfere with an individual's privacy?
3. According to your understanding of the Fourth Amendment, could our government put a telescreen into your home? Your neighbor's home? The home of a suspected criminal? Why?
4. Do you think that the Fourth Amendment provides for a proper balance of privacy and the need for public information and social control? Why?
5. What changes do you think adoption of this amendment might make in Winston Smith's society? Do you think these changes would be desirable or not? Can you explain why?
6. In what ways does our Constitution provide for protection of individual

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privacy as well as allowing for governmental intervention when necessary?

Strategy

2.

Even in the Locker Room?

George Orwell's story was fictional and futuristic. There are incidents which occur every day, however, which bring his novel into the present. The real-life situations are never simple; the following news release (reprinted by permission from Eastman Kodak Company News Services, Corporate Information, Rochester, New York, February 1972) can serve as the basis for discussion, using the questions below.

Camera in the Hall

BARTOW, FLORIDA—Smiles and friendly greetings now far outnumber scowls and random left hooks among junior and senior high school students throughout Polk County, Florida.

That's because their actions are being recorded on film, and if anyone does anything to seriously disrupt school routine, the odds against establishing an alibi are far from even.

For the School Board of Polk County, plagued like 23,000 other systems in the United States with unrest, vandalism, and confusion, recently became the first in the nation to install a new automatic super 8 camera security system to monitor unfavorable situations, provide positive identification of troublemakers, and establish concrete evidence through which administrators can take remedial action.

Polk County's system employs recently marketed Kodak Analyst super 8 cameras encased in sound-absorbent boxes that are set to snap a picture every 30 seconds. A number of the cameras, costing less than $240 each, are already in operation in Polk County junior and senior high schools. More are to come.

Located in corridors, outdoor campus areas, problem classrooms, and other areas, each Analyst super 8 camera will automatically take 7,200 pictures per hundred feet of Kodak MFX film, which is contained in standard-size drop-in cartridges. The film can be processed to make conventional photographic prints, or reversal processed to show on a projector.

W.W. Read, superintendent of the Polk County School Board, emphasizes that this is by no means a snooping operation. Although the cameras operate constantly during school hours, the film is processed and viewed only when disruptions have occurred.

"We're neither interested, nor do we have the time to 'spy' on our students when they are conducting themselves in manners normal for their age levels," he explains. "We process and look at the film only when incidents have occurred that require establishing responsibility for them."

Although the super 8 surveillance cameras have been in use only a short time, Read reports that their psychological impact already has reduced disruptive incidents, and they already have had a definite effect on the total tenor at the schools.

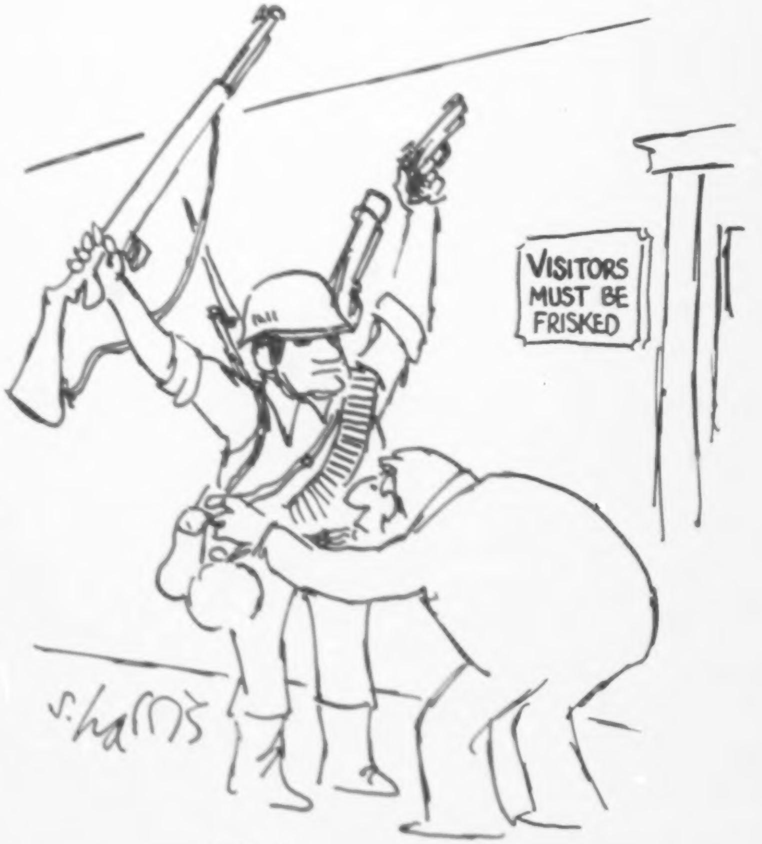
"The students have been told the cameras are there and that it is possible for us to positively identify not only those responsible for trouble, but also those who are innocent of wrong-doing," he explains. "Thus, both buck-passing and alibis are eliminated and the innocent are protected."

In addition to the mounted cameras, junior and senior high school principals also are being supplied with Analyst cameras for hand-held use to cover incidents in areas that are not monitored.

The Polk County system, with an enrollment of 60,000 students, operates more schools in more towns than any other system in the United States. It controls 58 elementary schools, 14 junior highs, 10 senior highs, and one vocational-technical school.

Some questions raised by this news item include:

- Do the students have a right to privacy from surveillance?
- Is the method of surveillance described in the press release more or less an invasion of student privacy than other possible methods, such as using closed circuit TV cameras or plainclothes officers patrolling the corridors?
- Do the benefits of security from installing the surveillance devices outweigh the costs of invading the students' privacy?
- Are there other ways of attaining the



same results without interfering with the students' privacy?

- Is this technique reminiscent of *Nineteen Eighty-Four,* or is the school a special situation in which such means are justified? Remember that students are young and may need special protection.

Strategy

3.

Trust Busting

Of course, privacy is not just a bone of contention between citizens and the government. It's an issue for friends, coworkers, and families. The newspapers—from the front page to the comics—are a constant source of privacy issues. Here is an example taken from *On Privacy: A Casebook of Readings*, published by Law in a Free Society. Ask students to put themselves in Abby's place and write their own reply to the letter below. ("Opening Daughter's Mail Damaging to Mutual Trust," by Abigail Van Buren, is reprinted through the courtesy of the *Chicago Tribune*—New York News Syndicate, Inc.) Have them read their responses to the class and, after discussion, vote on which response they prefer.

Students can then write their own "Dear Abby" letter describing a privacy conflict. They can exchange letters with a partner and write replies. In follow-up discussion students should be prepared to explain why they replied the way they did.

You Tell 'Em, Abby

DEAR ABBY: I yielded to an impulse and opened a letter addressed to my daughter. It was from a girlfriend of hers in another city whose mother was (and still is) a good friend of mine. The envelope was partially unglued so I didn't have to do much to open it all the way.

Abby, this girlfriend is 16 years old, and she wrote in the most casual manner about a sexual encounter she had had. It absolutely appalled me!

I have no intention of showing the letter to my daughter, who is a couple of years older than this girl. I found out about some immoral involvement my daughter had last year; and I told her if anything like that ever happens again she can no longer live at home. She promised it wouldn't, and I hope she is keeping that promise. If someone had told me earlier of her adventures, I might have stepped in sooner and spared us both considerable agony.

What shall I do with the letter? Should I send it to the girl's mother? (I think it would kill her.) Should I write to the girl and explain why I am not giving her letter to my daughter? You write so often that parents should trust their children. I trusted mine, and now I wish I hadn't.

PERMANENTLY DISILLUSIONED

DEAR DISILLUSIONED: Don't send the girl's letter to her mother, and don't return it to the girl. Give it to your daughter. You have no right to censor her mail or withhold it from her. The mutual trust which is essential for a good mother-daughter relationship is obviously lacking. If it's not too late, go to work on it. Trust is a two-way street.

Students might be interested in creating a privacy newspaper of their own. They could include newspaper and magazine clippings, articles they write about privacy issues at school or in the community, comics and cartoons they create, and yes, their Dear Abby letters.

Strategy

4.

Discussing Solitude with Young Students

As the previous strategy shows, the home and family are a rich source of questions about privacy. And this setting offers an excellent way to approach these questions with younger children.

Children's literature is a wonderful way to help students think about privacy. A prime example is *Evan's Corner* by Elizabeth Starr Hill (Holt, Rinehart, Winston, 1968). It is a story of a young boy who lives in a small inner-city apartment and who longs for a place he can call his own. His mother suggests that he rope off a corner of the living room as his private space. He is allowed to decorate and furnish his corner as he wishes—and he spends much time and energy doing so. But Evan finds that while there are advan-

"I appreciate your coming back to thank me, Walter, but are you absolutely certain *I was your teacher?"*

tages to having privacy, there are disadvantages as well. (A film, also entitled *Evan's Corner,* has been made out of this book by Bailey Film Associates.) The following lesson for third and fourth graders from LFS's *On Privacy: Lesson Plans* illustrates how you can use such a book or film to examine privacy issues.

After students have read the book *Evan's Corner* or have seen the film, discuss its contents using the following kinds of questions. Why do you think Evan wants a private place in his home? Are there times when you feel you need to be alone? Why do you think people need to be alone sometimes? Where do you go when you want to be alone? If you had a private corner like Evan does, what would you put in your corner to make it a good place to go to? Would this be important to you? Can you explain why?

Ask students to write and illustrate a story that expresses their ideas of a special private place and why such a place might be important to them. After the stories and pictures have been completed, ask students to read their stories and show their pictures to the class. The stories and pictures can help students list what they think might be some of the advantages of privacy. Students might mention such things as:

1. When you have privacy, you may feel freer about doing certain things and feeling certain ways.
2. When you have privacy, it sometimes makes it easier to make friends and be friends with someone.
3. When you have privacy, you might feel freer about creating things.
4. When you have privacy, you feel protected from other people's interruptions.
5. When you have privacy, it might be easier to say certain things to another person or persons.

Make one corner of the classroom a "private corner" that is screened or partitioned off from the rest of the room in some way. Over a period of a day or more, allow one student at a time to enter the corner at any time he or she chooses. A student may also be allowed to bring something into the corner.

After students have had the opportunity to spend some time in the "private corner," encourage them to discuss the experience with the rest of the class. How did it feel to be in the "private corner"? Would you like to add anything to the list of advantages of privacy? Why did those of you who went into the "private corner" decide to leave it?

Ask students, based upon their own experiences, to list what they think might be some of the costs of privacy. Students might list such things as: loneliness, boredom, insecurity, and fear.

Then after having discussed both the benefits and cost of privacy, discuss with your students possible ways of establishing a "proper balance" between privacy and other interests within their own lives.

Strategy

5.

Searching for Privacy

As Strategy Two shows, privacy issues can come up in schools as well as in homes. Most privacy disputes are settled within the school itself, but a case like the following hypothetical, taken from LFS multimedia materials on privacy (Level III, grades 4-5), could wind up in the courts, where the question would be whether the Fourth Amendment permits such a search. (Lots of cases have gone through the court system, posing similar, real-life situations. If you would like more background on this aspect of search and seizure, read "Search and Privacy in the Schools," in *Update*, Spring 1978.)

Have your students read the story carefully and then answer the questions, which reflect a procedure for analyzing and evaluating all kinds of privacy conflicts.

Seven Missing Dollars

Sandra was very happy when she came to school one morning. The next day was her father's birthday. After school, Sandra was going to buy a birthday present for him. She had decided to spend seven dollars on the present. That was half of all the money she had saved.

Before she left home, Sandra put the seven dollar bills in her purse. When she got to school, she showed the money to a group of kids in her class. They talked about some of the things she might get for her father. Then the bell rang. Everyone went into the school building. Sandra held her purse tightly.

In the afternoon, Sandra's class went outside for recess. They played softball. Sandra put the purse on the bench when she was in the field. When Sandra came up to bat, she hit a ball far out into the field. She ran all the way around the bases. She had hit a home run, and that felt good!

Back in the classroom, Sandra looked in her purse. The money was gone! She ran up to her teacher, Ms. Furrillo. She told her what had happened. Ms. Furrillo asked the children if they had seen anyone take the money. Nobody said anything. Then Ms. Furrillo told all the students to empty their pockets and purses. Some of the students didn't want to do this. They wanted to keep what was in their pockets or purses private.

A Quiz About Privacy Conflicts

Consider these questions about Sandra's story:

1. Who wanted privacy in this story?
2. What did these people want to keep private?
3. How did they try to keep their privacy?
4. Why did they want privacy?
5. Who wanted to disturb their privacy?
6. In what way did this person try to disturb their privacy?
7. Why did this person want to disturb their privacy?
8. What things might happen if this person decided not to have the children empty their pockets?
9. Which of these things are benefits? Which are costs? Why?
10. What are two different ways in which this situation might be handled? What are the benefits and costs of each of these ways?
11. Which of these ways do you think is best? Why?

You could divide the class into small groups and have them answer the questions while they develop a position on what should be done in this situation. Ask each group to present their solution to a "class meeting" where they are free to argue in favor or against presented positions. You might vary this activity by assigning a role to each group (e.g., Sandra's group, Ms. Furrillo's group, students who have no objection to being searched, students against being searched).

Your students might role play a Board of Education hearing at which rules or regulations regarding the searching of students and their desks and/or lockers is being determined. Using the small group format, have students decide their position on the subject and then present their suggestions to those representing the Board. Have the Board decide on a policy. Then have students interview the

(Continued on page 59)

The All-Seeing Eye of the Media

A lawyer looks at some
legal battles over privacy

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953

Mitchell Funk

Gary W. Kubek

What do a medical quack, a human cannonball, and a sterilized woman have in common? They all felt they were clobbered by the media, and they all sued because in one way or another they thought their privacy had been invaded. But there the resemblance ends. Two won in court and the other struck out. This kind of mixed result is happening all the time in the rapidly evolving area of privacy and the media.

The first case began in September 1963, when *Life* magazine sent two reporters to the home of one A.A. Dietemann, a plumber suspected of being a quack doctor in his spare time. The reporters told Dietemann that they had been sent by a friend, and Dietemann let them in. Inside they discovered gadgets that had nothing to do with the practice of medicine. Using a hidden camera and radio transmitter, the reporters recorded an examination which concluded with Dietemann's "diagnosis" that a lump in one reporter's breast resulted from having eaten rancid butter eleven years, nine months and seven days earlier.

Dietemann later was charged with practicing medicine without a license, and *Life* ran an article entitled "Crackdown on Quackery," which included one of the pictures taken inside Dietemann's home. He eventually pleaded *nolo contendere* (no contest) to misdemeanor charges, but all was not lost. He was able to win $1,000 judgment against *Life* for intrusion on his privacy.

Hugo Zacchini's beef against the media seems very different from Dietemann's, but it too is part of the law of privacy. Zacchini was a human cannonball, shot from a cannon into a net 200 feet away. A local TV station videotaped him while he was performing at a county fair in Barton, Ohio. The station then showed his whole 15-second act on the 11 o'clock news. The commentary accompanying the film clip described the act in glowing terms as "a true spectator sport..., a thriller... [that] you really need to see... in person."

Zacchini was appalled that his whole act had been given away free to thousands of viewers. His suit went all the way to the U.S. Supreme Court, which ruled that Zacchini could recover from the broadcaster for infringing on his right of publicity, a part of his right to privacy.

The third case also arose in the 1970s, but it has very different facts. Robbin Howard was an eighteen-year-old woman confined in a county nursing home. Her doctor described her as an "impulsive, hair-triggered young girl," and she was eventually involuntarily sterilized. Nearly five years later the *Des Moines Register* reported this and other incidents, including two deaths resulting from scalding baths, in an investigative story about the county home. Ms. Howard, whose name was published in the article, sued the *Register*'s publisher for $1 million for publication of "private facts" about her life. She was out of luck. The Iowa Supreme Court ruled that she could recover nothing.

Legal historians generally trace the right of privacy to an 1890 *Harvard Law Review* article by Samuel D. Warren and Louis D. Brandeis, later a Supreme Court Justice. It is impossible to define the right of privacy precisely, because it is a matter of each state's law, not a single federal code. In fact, some states do not recognize the right at all. However, the right of privacy generally has evolved to include four kinds of invasion of the right "to be let alone," in recognition of the various aspects of personal life that each individual has an interest in protecting. Each of these areas is loosely derived from the Warren and Brandeis article. *The Second Restatement of Torts,* an attempt to distill general principles from the decisions of courts throughout the country, describes these four torts as follows:

1. Intrusion—an intentional intrusion, "physically or otherwise, upon the solitude or seclusion of another [person] or his private affairs or concerns..., if the intrusion would be highly offensive to a reasonable person."
2. Publicity to private life ("private facts")—"publicity to a matter concerning [a person's] private life...if the matter publicized...(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."
3. False light—"publicity to a matter concerning another that places the other before the public in a false light..., if (a) the false light...would be highly offensive to a reasonable person, and (b) the [person who publicized the matter] had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."
4. Appropriation—appropriation "to [one's] own use or benefit [of] the name or likeness of another."

Even a quick reading shows that these four wrongs are only loosely related to each other. As a result, some lawyers argue that using the term "right of privacy" to refer to all of them only creates

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confusion in an already unclear area of the law.

The confusion is increased when the same phrase is used to refer to a host of other legal concepts. For example, Supreme Court cases, such as those striking down state abortion laws, have referred to a constitutional right of privacy which protects individuals against governmental interference in their lives. The Fourth Amendment guarantee against unreasonable government searches and seizures has also sometimes been termed a right of privacy. On the legislative side, Congress and many states have enacted laws to protect privacy by limiting the information collected and distributed by banks and other corporations. Each of these notions of privacy, however, has an origin separate from the Warren and Brandeis article. Therefore, courts continue to view the four privacy torts described above as part of a distinct body of law.

The right of privacy described by Warren and Brandeis does not protect against only the news media. The Watergate bugging of Democratic National Headquarters was as much an intrusion as if it had been done by the press. And an important recent court fight didn't involve the media at all, but rather centered on claims that a distributor of posters had appropriated the right to use Elvis Presley's likeness.

The news media, however, were Warren and Brandeis's primary concern. They, like some modern observers, believed that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency." Although the law of defamation (libel and slander) protected against some forms of injury, Warren and Brandeis felt that this protection was too limited. For one thing, it extended only to damage to reputation. It provided no remedy for injury to one's own feelings. The right of privacy was needed, they said, "to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons. . . from having matters which they may properly prefer to keep private, made public against their will."

Gary W. Kubek, a graduate of Yale Law School, is an associate with the New York firm of Debevoise & Plimpton. Although his practice includes representation of media clients, he hopes that he retains some objectivity about these issues.

But restrictions on the media—whether by the law of defamation or the law of privacy—require a balancing of the individual's rights against the interests of society, as reflected in the First Amendment. As the Supreme Court put it in *Time, Inc. v. Hill,* 385 U.S. 374 (1967):

> Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.

Which should have precedence, then, the media's right to investigate vigorously and pursue a story no matter where it may lead or an individual's right to lead his own life free from prying eyes? We esteem both rights highly. Both values are fundamental to our conception of democratic freedom. Yet they come into conflict time and time again. The movie *Absence of Malice* demonstrated that this kind of conflict can make good theater. Dozens of actual cases show that there's plenty of real-life drama too. How the cases come out depends heavily on their particular fact situations and on how the courts have weighed the competing interests in different contexts.

Intentional Intrusion

An outsider's intrusion into a private place strikes at the core of what we want to protect through the right of privacy. Devices such as telephoto lenses, pocket cameras, and miniature transmitters have posed an ever-increasing risk that what appears to be private may in fact be made public.

The case of *Dietemann v. Time, Inc.,* 449 F.2d 245 (1971), described at the beginning of this article, is a good example of how far our legal system will go to protect against this form of invasion of privacy. Although the *Life* reporters were voluntarily let into Dietemann's home, and although their suspicions about his activities proved to be well-founded, the court ruled that it was improper for them to record secretly what they saw and heard. The court said:

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording. . . to the public at large. . . .

Because our society places such importance on this kind of privacy, the First Amendment gives the media little protection against a claim for intrusion.

(Continued on page 65)

Privacy vs. the Media

Some tips on how you
can turn real-life battles into
exciting classroom learning

David T. Naylor and Bruce D. Smith

United Press International

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Both the right of the public to know and the right of the individual to be left alone are cornerstones of a free society. An informed citizenry is essential to a democracy. "If a nation expects to be ignorant and free in a state of civilization," wrote Thomas Jefferson in 1816, "it expects what never was and never will be." Jefferson recognized that citizens need a free flow of information and ideas for intelligent self-government.

The right to be left alone, too, has historically been a widely cherished belief. According to Kenneth Cory and George Moscone, writing in the *Rights of Privacy* by John Shattuck (Skokie, Illinois: National Textbook Company, 1977), many Americans regard privacy as "a fundamental and compelling interest [which] protects our homes, our families, our thoughts, our emotions, our expressions, our freedom of communion, and our freedom to associate with the people we choose." The citizenry needs to be left alone, they argue, and be free from unwarranted publicity.

But often these two highly valued rights come into direct conflict. The efforts of the media, the primary agents of the public's right to know, frequently clash with the individual's right to privacy. Tradeoffs must be made; neither right is absolute. For instance, during the Watergate investigations, reporters Carl Bernstein and Bob Woodward frequently reported on grand jury proceedings, which by law and long tradition are secret. In the process, they disclosed many items of intense interest—items which were relevant to public debate—but they also risked humiliating innocent people with unreliable information, to say nothing of compromising the fair trials of persons whom the grand jury would indict.

Increasingly, legislators and the courts are being asked to resolve these conflicts, and fine tune, through a case by case approach, the definitions and limitations of these two rights. As Gary Kubek's article shows, courts have evolved standards to govern many quite different aspects of the right to privacy.

As agents of democracy, teachers have the responsibility to properly prepare students for citizenship. The right of the public to know and the right of privacy are two essential legal concepts which should be taught in the classroom. Students need to understand them intellectually (e.g., what they mean and what they do not mean) and evaluate them to determine their importance to the society at large and to the individual in particular.

But how to make the transition to the classroom? Gary Kubek's article and others like it offer a rich, stimulating source of information. His article could complement and enrich units in American history (e.g., development of the Constitution; evolution of the First Amendment), in government (e.g., legal system; role of media in society), in sociology (e.g., societal values; cultural norms), and in journalism (e.g., role of the media; rights and responsibilities of the media). This article provides suggestions which would help extract information couched within Kubek's article and bring it to any of these secondary school classrooms.

Strategy

1.

A Conflict of Values

The following lesson is designed to have students weigh the right of the public to know and the individual's right of privacy. How and when should each right be limited when in conflict with the other?

Use the following chart to help students define the right to know and the right to privacy.

Questions	Public's Right to Know (Freedom of the Press)	Right to Privacy
What is it?		
Why is it important?		

After eliciting student responses by brainstorming, write their responses in the appropriate cell of the chart. The intent of this exercise is twofold: one, to focus student attention on the salient issues of inquiry, and second, to provide teachers with information about what students already know and believe about these subjects. Some important points which are likely to emerge in the bottom cells are: (1) Right to Know—needed to vote intelligently; needed to evaluate public officials' actions; needed to permit citizens to influence decisions being made and actions being taken; (2) Right of Privacy—needed to protect the sanctity of one's home; needed to permit citizens to keep aspects of their personal lives secret; needed to feel free and safe.

Distribute the following exercise and have students complete it individually.

Point out to students that there is not always a right or wrong answer. Stress that even lawyers and judges disagree over many of these issues.

Should It Be Made Public?

Directions: Below are a series of situations which illustrate the conflicts between the right of the public to know something and the right of the individual to keep personal information private. Decide whether the information in each situation should have been made public or kept private. Circle the appropriate response.

1. A newspaper publishes the name, age, and address of a rape victim in a story about the crime. PUBLIC PRIVATE
2. Just prior to an election, a TV station reports that a local judge seeking re-election is being investigated by an ethics commission for improper judicial behavior. PUBLIC PRIVATE
3. A newspaper prints a story telling where star football players from area high schools may go to college. The story reports each student's grade point average, including those whose very low grades may prevent them from going to college. PUBLIC PRIVATE
4. A local radio station reports that the mayor fathered an illegitimate child. PUBLIC PRIVATE
5. While interviewing a labor official, a reporter observes a known member of organized crime enter the office and hand a large brown envelope to the official's secretary. The secretary appears very nervous and immediately places the envelope in the office safe. The reporter later includes this observation in her story about the official and his union. PUBLIC PRIVATE
6. A local TV station shows the picture of a person that police suspect of committing a serious crime, though the person has not yet been arrested. The station also gives his name and address. PUBLIC PRIVATE
7. A national magazine publishes a feature story on schools for emotionally disturbed children. The article includes pictures of children in several classes, and the name and location of the school. The names of the children themselves are not included. PUBLIC PRIVATE
8. A national sports magazine publishes an article about a person said to be the most daring body surfer at a California beach. People interviewed for the article say the man eats spiders and other insects, can't read, and dives off steps to impress women. PUBLIC PRIVATE

When students complete the exercise, divide the class into small groups of four to six students each. Tell the students to share their responses with the group and discuss the reasons for their selections. Have one person in each group tally the group's responses.

Reassemble as a large group and have each group report its tally. Discuss items of particular interest, and provide the opportunity for students to add other points to the chart completed earlier.

At the conclusion of class, synthesize student responses in each cell. Display the synthesized responses on newsprint or butcher paper and refer to the chart as the unit progresses. (Note: This activity could be used again at the conclusion of the unit to both assess what students have learned and to reconsider attitudes that students initially expressed about these situations.)

Strategy

2.

Truthful "Private Facts"

It has been suggested that the classic *Harvard Law Review* article by Samuel Warren and Louis D. Brandeis was "prompted by Mrs. Warren's annoyance at the constant attention given by the Boston press to the social activities of her family." Warren and Brandeis argued that "the private life, habits, acts and relations of an individual" are not matters of public record.

Today, under the tort of invasion of privacy, our legal system protects a person from having true but embarrassing information revealed about his or her private life. But, as Kubek argues, changing attitudes about which private facts are embarrassing have narrowed these protections over the years.

When the public clearly has a right to know, the media may reveal truthful information about an individual, even if it is embarrassing or otherwise painful. This applies most typically to public officials and other persons deemed "public figures" rather than "private persons." In addition, the U.S. Supreme Court has ruled that the news media may disseminate, without fear of punishment, infor-

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mation about a person that was obtained from open public records (e.g., name of a rape victim or juvenile offender).

The lesson below requires students to make judgments about the newsworthiness of "private facts." The cases of *Virgil v. Sports Illustrated, Howard v. Des Moines* and *Cox Broadcasting Corp. v. Cohn*, which are cited in the Kubek article, are helpful and should be discussed with students before they complete this exercise. Other significant cases include *Sidis v. F-R Publishing Corp.* (113 F.2d 806, 1940), containing a follow-up story about a child prodigy; *Barber v. Time, Inc.* (159 S.W.2d 291, 1942), concerning a story about a woman with an unusual medical condition; *Melvin v. Reid* (297 P. 91, 1931), involving the information that a respected woman in a community had once been a prostitute; and *Briscoe v. Reader's Digest Association* (483 P. 2d 34, 1971), concerning the disclosure that a rehabilitated man had been convicted of a crime 11 years earlier.

After clarifying the private facts issue, discuss several of the cases cited above with students. We recommend the case study method. Emphasize the conflict between the public's right to know and the individual's right of privacy, and explore the distinctions between public figures and private persons.

Divide the class into small groups (four to six students) and distribute the following exercise to them.

You Be the Editor

Directions: Assume that you are the editors of a large city newspaper, and the following stories have been submitted by staff reporters. Assume that all of the facts presented are true. Your job is to determine which of the facts are within the public's right to know, and which should not be revealed because of an individual's right to privacy.

Article 1: Crash Victim in Critical Condition

CHICAGO: Marsha Johnson lies in critical condition in Stony Island General Hospital here, one of only ten survivors from Saturday's Worldway Airline plane crash.

Ms. Johnson, age 23, is suffering from two broken legs, a broken arm, multiple bruises, and a concussion.

The Child Welfare Bureau has taken custody of her three children: Leslie, age 8, David, age 5, and Arthur, age 4. Since Ms. Johnson was never married and is currently unemployed, she has no means to care for her children herself.

One of Ms. Johnson's neighbors reported that she is a poor mother and a notorious gambler. The neighbor said that Ms. Johnson was on the airplane headed for Las Vegas for a three-day gambling spree.

So far 62 people have died as a result of the crash.

Article 2: Editorial on a Conflict of Interest

Rep. Phyllis Martinson will vote next Friday with the rest of her colleagues on the controversial import restriction bill that would ban the importing of all foreign cars from Japan and Germany. Though Rep. Martinson has never graduated from high school, she will be voting on a complex bill that people with advanced degrees in economics have difficulty understanding.

Moreover, an investigation by this newspaper has revealed that Rep. Martinson is subject to conflict of interest charges if she chooses to vote on this bill. She owns 100 shares of General Motors stock and 500 shares of Chrysler Corporation stock. In addition, the personal secretary of this avowed atheist is related to one of the members of the Board of Directors of a major steel company, a company that will undoubtedly benefit from the import restrictions.

After the groups have decided which facts to include, and which facts to edit out, have each group report their decisions to the class. List each group's decisions on the chalkboard in two columns headed, "Right to Know" and "Right to Keep Private." Make a separate grouping for the two articles.

Discuss student responses. Discuss actual cases to let students compare and contrast their own criteria to those used by the courts. Invite a newspaper reporter and/or attorney to class to comment on student responses and clarify student understanding of this important issue.

Select articles from a local newspaper and ask students to examine the kinds of facts published about public and private figures. This approach will help transfer these concepts to the everyday world outside the school.

Strategy

3.

Untruths and the Law

The news media constitute an essential source of information for an informed public, writes Supreme Court Justice Lewis Powell in a dissenting opinion in *Saxbe v. Washington Post Co.*, (417 U.S. 843, 1974):

> An informed public depends on accurate and effective reporting by the news media. . . . For most citizens the prospect of personal

(Continued on page 68)

"Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth as you vaguely recall it?"

LAW AND THE SCHOOLS

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Child Abuse: The Crime No One Wants to Talk About

Even the law encourages silence, but teachers have the right—and the obligation—to speak out and protect their students

> "She gave them some broth
> without any bread
> And whipped them all soundly
> and sent them to bed"
>
> —Nursery rhyme

Educators daily face children who are abused and neglected. Children come to school bruised, burned, and sprained. Teachers greet poorly fed, poorly clothed, and physically filthy children. Some children are emotionally needy; some are severe behavior problems; some are listless and withdrawn. Child abuse and neglect presents itself to educators as a complex problem that is loaded with sensitive issues.

Every state has laws concerning child protection. Schools almost always have a procedure for reporting child abuse and neglect that is in compliance with state law. But laws vary and even the strongest law can't do much by itself. A lot depends on the training of investigators, the quality of available social service programs, and the funds allotted for intervention/treatment services.

The most important variable of all, however, is the one that's hardest to pin down—the traditions of the community that affect how the law is applied and

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Beverly Cole

Mitchell Funk

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often limit what teachers and social workers can do.

Because teachers see the same children daily, they develop a very special relationship with the children. But when teachers see signs of abuse and neglect, they often find themselves in a very frustrating position. The educator's desire to intervene is often compromised by existing social pressures not to interfere with the family unit and by the questionable support of the law.

The Problem

The number of child abuse cases is staggering. The National Center on Child Abuse and Neglect has estimated that over 200,000 cases of physical abuse and over 800,000 cases of neglect occur each year. This is considered a conservative middle-ground estimate and does not include the 60,000 to 100,000 children per year who are sexually abused.

Statistics suggest that child battering is probably the most common cause of death in children today, outnumbering deaths caused by any one of the infectious diseases, leukemia, or car accidents. Some estimates state that 2,000 children die each year because of child abuse or neglect. Many more are no doubt permanently handicapped emotionally, physically, or mentally.

Studies on the effects of abuse and neglect illustrate various kinds of consequences: depressed IQ scores, personality disorders, retarded speech, minimal brain dysfunction (learning disabilities), motoric difficulties, emotional and behavioral disorders, and delinquency. Perhaps most sickening is the finding that child abuse perpetuates itself. Many abused children grow up to become child abusers.

Law v. the Family

Our society purports to value human rights. It has defined them in our Constitution and upheld them through our judicial system. We have traditionally stated that these individual human rights belong to persons who have reached the age of majority, initially 21 and now considered 18.

In general, though, we've taken a very different approach to protecting the rights of children. Only recently have the courts extended some constitutional rights down to youngsters of 12 or 13 years old, and younger children are still generally afforded few legal rights. Instead, the courts usually see children in relation to a family unit or a guardian. Judges and lawmakers assume that the family will foster healthy growth in children. Our society is hesitant to invade family life and question its practices. Even when a child's well-being and potential development are in danger, our society is most reluctant to scrutinize the family situation.

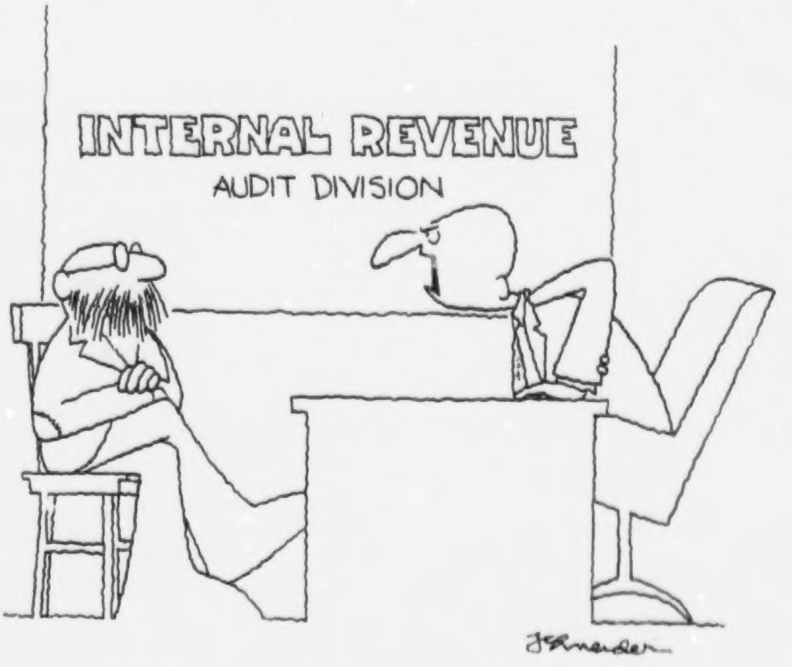
It is the family that has been recognized as the natural unit in our society. The strength of both the government and the church have traditionally rested upon it. This society's reverence for the family is also a fiber that runs deeply through common law.

Certain historical common law principles continue to influence today's family legislation and practice. For instance, the idea that parents have natural rights to custody, care, and disciplining of children has its origins in the idea that "a man's home was a domain into which the King's Writs did not run, and to which his officers did not seek to be admitted." The value of the family, engrained in our common law heritage, has a continuing influence on our societal decisions. It will not quickly erode. Yet child abuse is both a familial and a societal problem.

The Law Becomes More Active

Physical abuse and neglect of children is certainly no new development in this country. But it is something that has been ignored through most of our history. The first court case involving child abuse in the United States happened in 1875 in New York City. Little Mary Ellen was starved and beaten repeatedly. She was finally unchained from her bed by church officials, who called the case to the attention of the Society for the Prevention of Cruelty to Animals. This case resulted in a citizen's group establishing a similar society for children, the Society for the Prevention of Cruelty to Children.

In 1962, the Children's Division of the American Humane Association conducted a study which received national attention. It revealed the widespread extent of child abuse across the country. This was the impetus for the Children's Bureau of the Department of Health, Education and Welfare to conduct other studies of child abuse in this country.



"Well, maybe you can't write a line without your cat, but you still can't deduct *your cat!"*

Beverly Cole is educational consultant for the Jefferson County Public Schools in Colorado.

From 1963 to 1967, all 50 states passed child abuse reporting statutes.

The design of both national and state legislation is to protect parents when there is invalid evidence; to protect children by making it mandatory for physicians and persons in the helping professions to report cases of maltreatment; and to protect the person reporting an incident by preventing possible damage suits.

Colorado provides a good case study of how states approach the problem. Colorado revised its Children's Code in 1973, in 1975, and in 1977. Even though some of these revisions were aimed at strengthening the state's ability to defend abused children *against* their parents, the purposes of the Children's Code reflect the common law reverence for the family.

a) To secure for each child . . . such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society;
b) To preserve and strengthen family ties whenever possible including improvement of home environment;
c) To remove a child from the custody of his parents only when his welfare and safety . . . would otherwise be endangered; . . .

How does Colorado law try to fight child abuse? The Code requires certain persons who have "reasonable cause to know or suspect" child abuse or neglect to report such facts. It specifically requires the following persons to report: all medical professionals and hospital personnel, all Christian Science practitioners, and all school officials and employees. It is further mandated that the failure to report may result in: (1) filing of a Class Two petty offense (a fine not to exceed $200), and/or (2) tort liability for injuries to the child which occur following the observance of an injury not reported.

The major purpose of the reporting statutes is to prevent the repetition of abuse. The law carefully recognizes that people in certain professions must be required to report, because the first step in breaking the cycle is recognizing the problem. Once the problem has been brought to the attention of the appropriate people, the theory goes, the abuse cycle will be broken by providing needed services to the family.

Colorado legislators evidently believed that child abuse must be combatted with a wide variety of services. The law calls for the formation of county "child protection teams" that are multi-disciplinary. These teams are to include a public health officer, a mental health practitioner, a police officer, a representative of the public school district, an attorney, and a layperson from the community. This team does not necessarily deal directly with suspected child abuses. Rather, it supervises the professional staff and sees that reported cases are investigated and that necessary evidence is presented to the appropriate court with recommendations for treatment/intervention plans. Since the law seeks to maintain the family unit, the court generally holds that a variety of alternative models must be considered and tried, such as social service intervention in the home, homemaking classes, parenting classes, counseling for various family members, and temporary custodial supervision by the state.

Criminal prosecution of the parents is generally viewed as inadequate, since charges are often difficult to prove and, when obtained, the fines, probations, imprisonments, and commitments to mental hospitals often do little to alleviate the problem. The courts do not like assuming custody of a child and terminating parental rights because placement of children is difficult and state institutions are frequently overcrowded and understaffed. The courts generally regard the most effective solutions to be treatment plans that focus on strengthening the family unit and breaking the abusive cycle.

Does the Law Work?

It is this double purpose in the law, treating the family and protecting the child, that can lead to diluted applications. A compromise is often necessary between a somewhat improved family situation and what a damaged child really needs to thrive physically and emotionally. Also, when the county teams become involved, the obvious patterns of abuse tend to be supplanted by other, more subtle kinds of abuse, which are harder to document.

The strength of the existing law depends on the strength of the treatment program. But the reality is that needed services are not always available and the services that exist are often overextended and not easily monitored. Though the law

(Continued on page 61)

More on the Schools and Child Abuse

A Legal Memorandum: Child Abuse and Neglect. Reston, Virginia: National Association of Secondary School Principals, 1980.

Brenton, Myron. "What Can Be Done About Child Abuse?" *Today's Education*, (September-October 1977), 51-53.

Broadhurst, Diane D. "What Schools Are Doing About Child Abuse and Neglect," *Children Today*, (January-February 1978), 22-36.

Caskey, Owen L., Richardson, Ivanna. "Understanding and Helping Child-Abusing Parents," *Elementary School Guidance and Counseling*, (March 1975), 197-208.

Davies, Leah G., McEwen, Marylu K. "Child Abuse and the Role of the School Counselors," *The School Counselor*, (November 1977), 92-97.

Garbarino, James. "The Role of the School in the Human Ecology of Child Maltreatment," *School Review*, (February 1979), 191-213.

Griggs, Shirley A., Gale, Patricia. "The Abused Child: Focus for Counselors," *Elementary School Guidance and Counseling*, (February 1977), 188-194.

Heisner, John D. "What Are You Going to Do About Your Abused Child?," *Instructor*, (February 1978), 22-23.

Leavitt, Jerome E. "Child Abuse and Neglect," *Instructor*, (April 1979), 24-25.

Low, Alice M. "Reporting Child Abuse," HEW's National Center on Child Abuse and Neglect, (1980), 30.

McCaffrey, Mary, Tewey, Stephanna. "Preparing Educators to Participate in the Community Response to Child Abuse and Neglect," *Exceptional Children*, (October 1978), 114-121.

Mitchell, Karen L. "What You Can Do About Child Abuse," *Early Years*, (November 1977), 40-41.

Shanas, Bert. "Child Abuse: A Killer Teachers Can Help Control," *Phi Delta Kappan*, (March 1975), 479-482.

Soeffing, Marylane. "Abused Children Are Exceptional Children," *Exceptional Children*, (November 1975), 126-133.

WHAT IS PRIVACY?

F.O.I.A.

No government, liberal or conservative, would like this law

David Harris

The Freedom of Information Act (FOIA) guarantees your right to know what the federal government is doing. This law, passed in 1966, gives "any person" access to most records and documents held by federal agencies. The idea behind the FOIA is that popular self-government is possible only when the public has all the facts. To ensure that the people *do* have the facts, the FOIA makes disclosure of government-held records the rule and only allows withholding of certain limited types of information.

The FOIA has helped uncover hundreds of incidents of government mistakes, misconduct, and outright illegality. A few examples:

- The FBI's campaign to discredit, disgrace and defame Martin Luther King, Jr.
- The My Lai Massacre, in which scores of Vietnamese were murdered.
- The CIA's administration of powerful hallucinogenic drugs to unknowing human "guinea pigs."
- The dissemination of the federal tax records of people on Nixon's "enemies list."

But the FOIA has had some unintended side effects. Parties to lawsuits have used it to get information they would not be entitled to under established rules of discovery. Corporations have used it to obtain secret information their competitors must submit to the government. Foreign corporations have sometimes used the act to obtain information on technology they are forbidden to import. The FOIA also may infringe upon personal privacy, since the law might be used to uncover private information the government has about a person.

Congress is now taking another look at the FOIA. Many Congressmen support the law. Except for remedying some side effects, they would not change the basic thrust of the act—disclosure whenever possible. Others, however, propose to fundamentally change the basic philosophy and make the act the basis for *withholding*, rather than disclosing, certain records.

The Reagan Administration rode into office on the theme of keeping the regulators in check and getting government off the backs of the people. It would presumably be all for a law that exposes bureaucratic bungling. Right?

Maybe.

The Administration's FOIA reform proposals attempt to do much more than correct the side effects. For example, the Administration would like to give more protection to law enforcement and intelligence data. How? By making agency decisions against disclosure much more difficult to overturn than they are now. The proposals would also allow agencies to increase the nominal fees they now charge FOIA requesters. Public interest groups and individual citizens would be hurt most by charging a price the requester could not meet.

Other proposals go even further. Sen.

PERSONNEL FILE

John Neubauer

Orrin Hatch (R-Utah) has proposed giving extensive protection to information submitted to agencies. Sen. Robert Dole (R-Kansas) has proposed that all law enforcement files be kept sealed from five to ten years. William Casey, director of the CIA, has proposed that all CIA records (not just sensitive ones) be excluded from the FOIA's coverage.

Only one thing seems certain: The Freedom of Information Act will soon be amended. In order to intelligently assess the proposed changes, we must ask some questions. We need to know what our government is doing, but is that need a right? What purpose does it serve in our society? Should it be legally guaranteed? What's to be done when disclosure and governmental openness collide with privacy and other societal values?

FOIA's History

Before the FOIA was enacted, access to government-held records was governed by Section Three of the Administrative Procedure Act, enacted in 1946. Section Three, entitled "Public Information," justified bureaucrats who withheld information from the public. Anyone desiring access to government records had to demonstrate a proper need to know. Agencies

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could refuse to disclose information when a citizen was not "properly or directly concerned," or for "good cause." Given such broad justifications for nondisclosure, any bureaucrat worthy of the name could withhold virtually anything.

Rumblings for change were heard as early as 1954, when Harold Cross, writing for the American Society of Newspaper Editors, called for reform in his book *The People's Right to Know.* Cross decried Section Three as the major statutory excuse for withholding government records from public view. He asserted that the First Amendment rights to speak and print, without the right to know, are hollow: "Freedom of information is the very foundation for those freedoms that the First Amendment was intended to guarantee."

Cross was joined in his calls for a right to know by U.S. Representative John Moss of California. Moss's many efforts to obtain passage of "right to know" legislation in the late fifties and early sixties paid off with the passage of the Freedom of Information Act of 1966.

The Senate Judiciary Committee report on the FOIA explains its purpose:

> Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information .... Section Three of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public .... It is the purpose of this bill to eliminate such [loopholes], and to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language....

How the FOIA Works

The FOIA is structured for easy use by citizens, rapid response by government, and accountability and enforcement when necessary.

A request for records under the FOIA must be made in writing. The request need not specify *exactly* the records the requester wants, but it must "reasonably describe" them, so that the agency knows what it is looking for. The request must be sent to the right agency, at the right address, and, when required, to the right agency employee. (This information can usually be found in the agency's entry in the Code of Federal Regulations.) No special qualifications or needs must be shown to use the FOIA; "any person" (in the words of the law) may make an FOIA request.

Agencies must respond to requests within 10 working days. (Many do, but delays are not uncommon.) If your request is denied, either wholly or partially, you have a right to know what person in the agency denied it, and a right to appeal the denial to the head of the agency. The agency must answer the appeal within 20 working days. If the agency head denies the appeal, you may appeal in federal court. If the court finds that (1) records were improperly withheld and (2) there is evidence that the agency's denials were arbitrary and capricious, Civil Service Commission proceedings must be instituted against the responsible agency employees. If the court orders disclosure and the employees still refuse, the court may punish them for contempt.

Nine types of records are exempt from FOIA disclosure, generally to preserve personal privacy, protect trade secrets, or ensure national security. The agency is under no legal obligation to disclose them to a requester, but it can still do so, in most cases, if it desires. When requested records are found to be partially exempt, the nonexempt part must be disclosed.

The FOIA allows agencies to charge fees for requests, but fees can only cover costs of search and duplication. Fees may be reduced or waived entirely when an agency determines that this would be in the public interest.

Note two important limitations on the FOIA. First, it applies only to executive branch agencies, such as cabinet departments and regulatory agencies. Congress and the judicial branch are not covered. Second, the FOIA only applies to records and documents the agency actually possesses and has previously compiled. A recent case illustrates both of these principles. When Henry Kissinger left his post as Secretary of State, he left his papers to the Library of Congress. The Supreme Court ruled that the State Department need not comply with an FOIA request for Kissinger's papers, because the Department no longer held them, and was not required to get them from the Library of Congress. Since the Library of Congress is part of the legislative branch, the requester could not get the papers from the Library.

The FOIA and the First

The First Amendment guarantees our rights of free speech and press with the words "Congress shall make no law . . . abridging the freedom of speech, or of the press." Both freedom of the press and freedom of speech inform us about our government. We can thus participate intelligently as citizens, even if only to cast an informed vote.

Viewed against this background, the FOIA is just the next logical step. Free speech and a free press will indeed help make for an informed public. However, people will be informed *only to the extent that information is actually available.* The press can only report the information it has. Similarly, public discussion helps us make sound decisions only if the essential facts are known. Therefore, if we allow government to withhold information from us indiscriminately, we cripple our First Amendment freedoms and our ability to govern ourselves.

The FOIA makes sure the government cannot manipulate us by withholding important information. By making disclosure to press and public the rule—and

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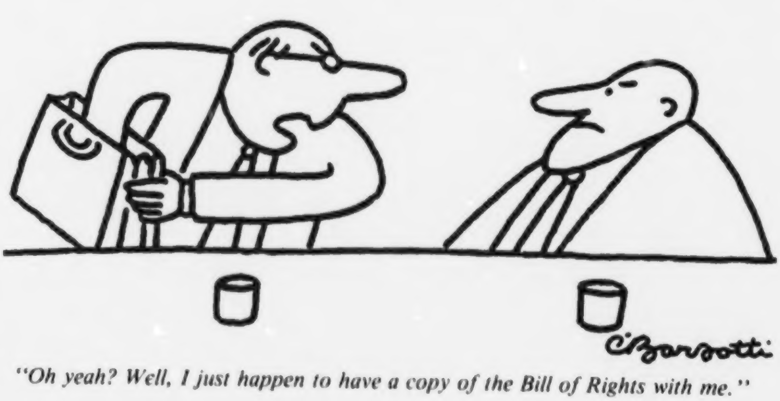

"Oh yeah? Well, I just happen to have a copy of the Bill of Rights with me."

David Harris is a second-year student at Yale Law School.

withholding the exception—the government grip on the flow of public information is loosened. Opening government records to the public makes intelligent self-government possible.

What Critics Say

The FOIA has its detractors. Critics generally point out that the FOIA does more than reinforce First Amendment values. For instance, domestic law enforcement agencies claim that their informants may be exposed by FOIA disclosure. Intelligence agencies like the CIA claim that FOIA disclosure threatens the secrecy of foreign intelligence information as well as the lives of foreign contacts providing it. Where personal privacy is concerned, one man's healthy disclosure may be another's invasion of privacy.

To take another example, confidential business information may be quite costly to develop. It retains its value to the developer only if the developer has exclusive control over it. Such information is usually considered the property of the company which developed it. We value and protect the right to private property. Indeed, protection of property is a Constitutional-level value. The Fifth Amendment reads in part: "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." Courts have determined that this language absolutely prohibits the taking of property for private use.

The federal government holds a great deal of information on individuals. While the fullest possible disclosure is often desirable, disclosure of an individual's records—personnel or medical files for instance—could be a damaging invasion of personal privacy. As the Supreme Court said in *Griswold v. Connecticut*, privacy, though not explicitly mentioned in the Constitution, is a Constitutional-level value.

Values in Conflict

As these concerns show, ours is a society of multiple and often competing values. Though few would dispute our society's commitment to free speech and free press, these are not the only ideas we value. On the one hand, society benefits when disclosure enhances First Amendment rights. On the other hand, property rights, intelligence for national defense, law enforcement, and privacy are important concerns that may be offended by disclosure.

Resolving these conflicts is the job of Congress. As representative of the diverse interests in our multi-faceted, pluralistic society, Congress is best positioned to decide which values have precedence. This is exactly what Congress has done with FOIA by explicitly exempting nine kinds of records. The nine exemptions clearly show that Congress knew that disclosure sometimes collided with other values. The statute was drafted to provide protection for these values. Since Congress put these protections in the form of exemptions, though, it is equally clear that they are meant as exceptions to the general rule, that disclosure is to be preferred.

These nine exemptions are:

1) records properly classified by an executive order in the interest of national defense and foreign policy;

2) records relating only to internal agency personnel regulations and procedures;

3) records specifically required to be withheld by another statute;

4) records that contain trade secrets or commercial and financial data;

5) inter- or intra-agency memoranda unavailable to anyone except one agency in litigation with another;

6) personnel or medical files which, if released, would invade personal privacy;

7) law enforcement records which, if disclosed, would interfere with enforcement proceedings, destroy someone's right to a fair trial, invade personal privacy, expose a confidential source of information, expose investigative techniques, or endanger law enforcement personnel;

8) records containing information collected to supervise financial institutions; and

9) records containing geological and geophysical information concerning wells.

Note that these exceptions address most of the concerns raised by critics. Protection of informants and intelligence agents, protection of personnel and medical files, protection of trade secrets—all are already granted under the act. These exceptions may be working quite well. Critics have had a hard time showing that informants and intelligence agents have even been exposed under the act, except as a result of clerical error. This suggests that the remedy for disclosure might lie with better training and supervision of agency workers, rather than a rewriting of the law.

The exemptions provide for special treatment of agency records without altering the basic structure of, or theory behind, the FOIA. In sum, Congress recognized the other values involved and made allowance for them, but the thrust of the FOIA remains the same—allowing the maximum possible disclosure.

This suggests that Congress made the informed and aware judgment that of all the values involved, disclosure was the preferred and most important one. The 1966 Senate Judiciary Committee Report on the FOIA describes this judgement particularly well:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

Less Change May Be Better

With all the FOIA reform proposals currently floating around it seems almost inevitable that there will be some changes in FOIA. But what will change, and how much change will there be?

Some adjustment of the act is needed to eliminate side effects that the authors of FOIA never foresaw. For example, use of FOIA to circumvent discovery rules should be prohibited. Congress did not intend that the act be used to help one side in litigation find out more than it is entitled to about the other side. And submitters of confidential business information should have the right to appeal an agency's disclosure decision, just as requesters of such information may.

It is clear, though, that large-scale changes should be viewed with skepticism. The FOIA's principle of favoring disclosure is intimately intertwined with our First Amendment rights; the right to know what government is doing is fundamental if we are to have participatory government by an informed and knowledgeable citizenry.

No one knows how the FOIA battle will turn out, but Congress has already fashioned a law that is workable. The Freedom of Information Act requires disclosure as a rule, but is broad enough to successfully accommodate other values when necessary. Congress can and should adjust the act so that it works better. It shouldn't change the basic idea underlying the FOIA. As the act itself shows, we can protect privacy and other values without sacrificing openness and disclosure in government. □

THE BICENTENNIAL DECADE

To Establish—and

Paul Murphy

Constitutions have been around for thousands of years, ever since the Greeks, but only a few of them have ever worked

When I was in the second grade of the Washington School in Caldwell, Idaho, my teacher, Miss Bates, had on the wall of our classroom a large poster which she had made. This poster was frequently referred to and is still indelibly engraved upon my mind. It was headed, in large letters, RULES FOR BEING A GOOD CITIZEN. And those rules were as follows:

Don't spend money foolishly [these were depression years]
Speak out for your country
Vote
Be wise (don't do stupid things)
Be friendly to your neighbors
Help people in need
Do good deeds
Stand up for your rights
Make people feel wanted and happy
Care for people
Play fair with people
Obey the law

A good many years later, former Watergate prosecutor Archibald Cox wrote of his fear that President Nixon would stick with his claims of executive privilege and deny a court order requiring him to comply with a judicial decree. To Cox's relief, Nixon did comply, and the independence of the Watergate Special Prosecution Force was assured.

But what, to Cox, was so remarkable was not the compliance, but the outrage of the American people that the President would even think twice about complying with his obligation under law. As Cox wrote: "that principle, that even the President is subject to the rule of law, is not a principle you will find in the Con-

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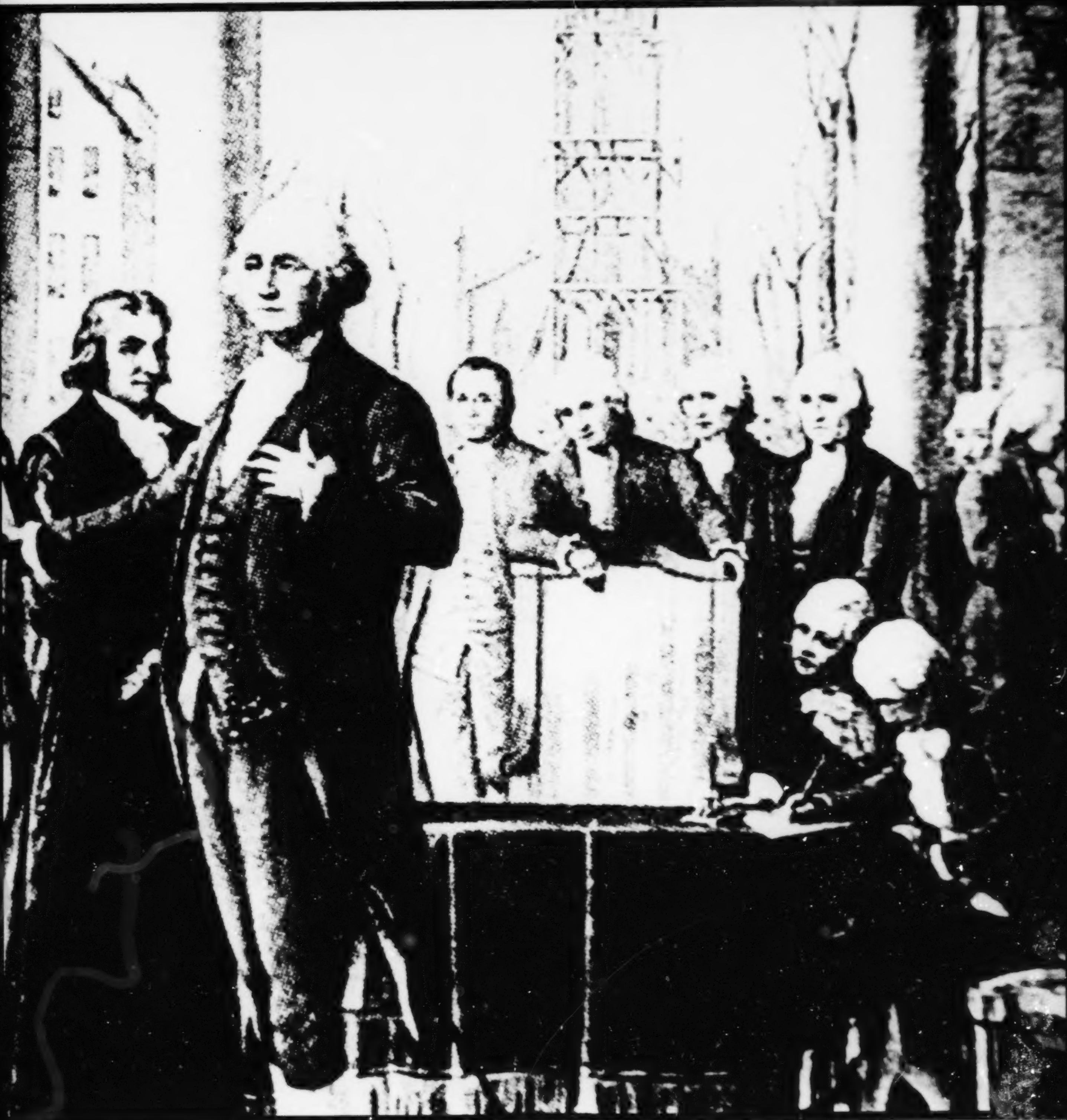

FPG/Wilson

Limit—a Government

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stitution, however carefully you read it. But it is sufficiently central to the belief system of the American people that even a Nixon was reluctant to defy it." He then goes on to ask, what are the sources and limits of the American people's attachment to constitutionalism—an attachment so strong that it forced a popularly elected President to reverse his field and comply with the order of even an inferior court?

Mr. Cox frankly admitted he could not answer that question. Why this American commitment to constitutionalism? Where does it come from and why does it in some way prevail? And what about today's skeptics who claim that this commitment has been overemphasized? Are they on solid grounds, or are they simply sour nay-sayers?

An Idea Is Born

Constitutionalism means limited government and the rule of law. It is the idea that governments exist only to serve specified ends, and properly function only according to specified rules. It comes to us from our founding fathers. They, in turn, drew heavily in their thinking upon theorists and spokesmen going back into classical antiquity. And here, as the son of a classicist, who was convinced that the human race reached its highest state of development in Periclean Athens, and that it had been downhill all the way from that point, let me say something about the Greeks and constitutionalism.

A constitution has always been a standard of legitimacy, since it has been seen as embodying the defining character of a society. Classically, the concept had to do with the components or constituents of a society—the terms "constitution" and "constituent" coming from the same root. Civil institutions were to function in accordance with the constitutional ordering of society—an ordering in which the constituents were to play a significant role.

But when people think about the kind of government they want for themselves, they think not only in terms of how it will affect them, but also how it will affect other people—both deserving and undeserving. So constitutionalism has always been thought of in terms of human nature. This is because a constitution can never be divorced from human capacities, human needs, and above all human deficiencies.

The Greeks and Romans used extensive participation to assure that constitutionalism was adhered to. They thought that if the whole citizenry (excluding slaves and women) took part in politics—or when that was impossible, if they elected representatives to speak for them—the requirements of the constitution would be met. The Greeks, for example, saw constitutions as the proper basis for assertions against independent and despotic rulers.

But there were problems here which, in time, became so serious that they undermined the concept itself. The Greeks were great believers in rationality. They rejected the absolute, the higher truth, which man, not being able to understand, should dutifully accept. Submission to a higher authority, imposed by a ruler on his own terms, was an unwarranted response, since it was an irrational response.

Man was the maker. Man could and should create his own political institutions. If men knew themselves (and the first point of wisdom was "Know thyself"), they could create a rational state in which justice, virtue, and civility could and would prevail.

In knowing themselves, however, the Greeks came also to know that people have their irrational sides as well. Man the maker could become man the unmaker. This is why, in Greek drama, the furies are always lurking on the side, ready to stir up trouble and push people to accept the security of the charismatic despot, who will solve people's problems and relieve them of the burden of their civil responsibilities.

These furies, always there to play on people's emotions, prejudices, biases, and insecurities, were one of the greatest threats to constitutionalism. If they prevailed, the people would turn to a rule of men, and not of law. Limited government, and government which did proceed by specified rules, would end as well.

But there was an answer to this also. Rational man not only had the right to resist tyranny, he had the duty to overthrow tyranny, and restore constitutionalism if things did indeed go so far as to see it temporarily eliminated.

The Modern Solution

Such a theory of constitutionalism has serious deficiencies, deficiencies which John Locke, sixteen or seventeen centuries later, also found nettlesome. It is all well and good to say there is a right of revolution, or that the way to defend the constitution is to eliminate the tyrant, but these are last-ditch remedies, and often occur after the tyranny has been in operation for some time. The question—which the Greeks never solved, and the American colonists came to realize they had not solved when the British began tightening the screws following 1763—was how to limit government *before* the tyranny succeeds, and man's irrational nature leads him to fritter away his birthright. What

"*I understand her parents are still married to* each other."

Paul L. Murphy is Professor of History and American Studies at the University of Minnesota.

frameworks should rational man erect to maintain the principle of constitutionalism on an ongoing, steady, regular, and predictable basis?

The answer that evolved was that men would have to limit the power of the state. By the end of the eighteenth century, popular sovereignty had begun to supplant absolutism, and it carried with it the notion that the state *was* the consciously contrived creature of the people. The idea became accepted that government entailed a Lockean social contract between governed and their governors—a compact with mutual rights and obligations, but above all a contract which placed limits on power and set forth designated processes to assure those limits. Hence the hallmark of modern constitutionalism is its reliance upon formal limitations—limitations which are in turn tied directly to popular sovereignty.

All of this meant that the role of a modern constitution is to define society's political institutions, and to establish standards for evaluating them. This, in turn, is expected to reflect the popular will. In this way something of the force of tradition and shared experience are captured, while, at the same time, current challenges can be dealt with through an appropriate rule of law.

Modern constitutionalism, then, infers free individuals, people with rights of their own, people with freedom of conscience and the right of open inquiry, people who realize they need, and therefore move to establish, a government which they manage and control.

But there is a further inference here—that good citizens must be prepared to throw themselves into the political process. This means manifesting civic virtue, which can be most simply defined as the willingness to subordinate selfish private interest to the general welfare. Citizen participation, then, becomes central if modern constitutionalism is to prevail.

The American Contribution

American constitutionalism is unique. It grew out of the experience of a people who had dealt with ambivalence. The colonists faced both initially loose and finally coercive centralized rule *and* a high degree of "local option" regarding the enforcement of that rule.

American constitutionalism starts with one premise—a dramatic rejection of prior British citizenship. In Britain the assumption was that one man may be over another. The English believed that government comes from some source outside the indigenous culture, or if not outside, somewhere away from its day-to-day functioning. Americans, from the outset of their American self-consciousness, insisted that rulers were *not* over the ruled. Rather, they proceeded from them and were responsive to them. The corollary to this was that any mechanisms which evolved to advance this proposition had to work, not only for governors, but for the constituency which they were designed to serve.

This is implicit in the political institutions and processes which the founding fathers, after the one false start of the Articles of Confederation, came ultimately to erect. While familiar, those principles/processes can always stand reiteration:

- Separation of powers
- Balance of powers
- Checks and balances within the structure
- A written constitution (One modern authority, for example, has argued that "the reliance upon a written constitution as the surest means of guaranteeing limited government and the rule of law is the most conspicuous attribute of modern constitutionalism and represents one of America's major contributions to western culture.")
- Federalism (as both a distribution of power and a limitation of power)
- A bill of rights (which insists there are certain basic freedoms which are guaranteed the citizen against any and all government encroachment)
- Judicial review (which may be America's most remarkable contribution to constitutionalism. All too often simply thought of as the Supreme Court's license to impose its views on the other branches, judicial review imposes constitutionalism on the legislative and executive branches. In the abstract sense, however, it is even more than that; it is an endeavor to judge positive law in the light of the ultimate values—checking the acts of administrative and legislative officials against the higher principles we have incorporated in our government structure. This is what Archibald Cox is talking about when he refers to an "attachment" to constitutionalism.)

The Idea Made Flesh

How has it worked, this unique American constitutionalism? The general answer is pretty well known. It has worked well for some people—better for males than females; better for the rich than the poor; better for whites than for blacks or Indians; better in times of stability than in periods of crisis and national emergency. (Japanese-Americans were shipped off to relocation centers during World War II, protesting that they were good citizens,

(Continued on page 61)

Didn't We Just Have a Bicentennial?

Of course we did, and it was a lot of fun too. Most of us remember fondly the tall ships and spectacular celebrations. But did all this hoopla help the American people understand and appreciate the Declaration of Independence?

Two new bicentennials—those of the Constitution in 1987 and the Bill of Rights in 1991—give our educational system a chance to do better. With the help of a three-year grant from the M.D. Anderson Foundation of Houston, the ABA is trying to help educators come up with meaningful programs to increase constitutional literacy.

We've put on a major national seminar for law-related education leaders. We've also published three special issues of *Update* on bicentennial topics—free speech in spring of 1980, due process in winter of 1981, and privacy, in the issue you're now reading.

We've highlighted bicentennial materials and activities in our newsletters, and next year we'll bring out a book-length blueprint of recommended guidelines for the future, which will stress the importance of the bicentennials throughout the 1980s.

We haven't neglected other organizations either. We've worked closely with Project '87 of the American Historical Association and the American Political Science Association, and we're urging state and local bar associations to make the bicentennials and law-related education a top priority.

We're eager to help you make the eighties a decade of constitutional understanding. The time to begin is now. Please get in touch with us if you think we can help, and by all means let us know what you're doing so we can share it with others. Just write or call YEFC Bicentennial Program, 1155 E. 60th St., Chicago, IL 60637 (312) 947-3960 or 3962.

The ERA Extension, Religious Meetings in School, Marijuana Possession, and More

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Joseph L. Daly

ERA YES!
Welcomes Yo

Even though the 1981–82 term is only half over, the Court has decided a surprisingly large number of related cases. And, as is often true, the cases that it has chosen *not* to hear also cast light on its thinking.

With this issue, "Court Briefs" introduces a new feature. Scattered throughout the discussion of cases are classroom strategies to help you bring out key concepts addressed by the Court.

ERA Resurrected

The Supreme Court has resurrected the Equal Rights Amendment (ERA) after a U.S. Federal District Judge declared it to have been dead for the last three years. The Court stayed a controversial ruling by Idaho Federal Judge Marion J. Callister that Congress acted unconstitutionally in extending the ERA ratification deadline from March 22, 1979 until June 30 of this year (*NOW v. Idaho*, 50 L.Wk. 2392).

Callister also ruled that states that had ratified the ERA could legally rescind their approval, as five states already have done. Ratification by 38 states is required to adopt the constitutional amendment, which holds that "equality of rights

Photo 1. Paul Conklin; Photo 2. Ken Love; Photo 3. Pau

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under the law shall not be denied or abridged by the United States or by any state on account of sex." Thirty-five states ratified the ERA by 1977, but since that time no state has endorsed the amendment while five states have attempted to rescind their ratification. Legislatures in at least eight states will deal with the issue in the next three months.

The Court moved with unusual swiftness in blocking implementation of the Callister order. The Court bypassed the usual requirement that a case first be heard by a United States Court of Appeals. However, the Court will not hear oral argument on the merits of the case until after June 30, the extended deadline for the ERA.

Justice Department lawyers contended that Judge Callister acted improperly in issuing any order, for or against the amendment, because courts should not be involved in the amendment process until after ratification procedure had ended. "[It] doesn't have anything to do with whether you support ERA," said Paul McGrath, assistant attorney general in charge of the Justice Department civil division, when asked why the government would appeal the case in view of President Reagan's outspoken opposition to the proposed amendment.

Pro-ERA forces contend that, although the Callister order did not prohibit additional states from ratifying the amendment, it did provide a major psychological blow to the amendment's chances.

Girl Sent to the Showers

In a second Supreme Court ruling in the women's rights arena, feminists did not emerge victorious. The Court refused to hear a case that could have permitted 12-year-old Karen O'Connor the opportunity to play on the boys' junior high school basketball team (*O'Connor v. Board of Education*, 50 L.Wk. 3447).

Without comment, the justices let stand a ruling by the Seventh Circuit Court of Appeals that separate athletic teams, equal in all "objective" respects except the level of competition, represented acceptable compliance with the 1972 federal law barring sex discrimination in school sports.

"She can play with any boys 12 years of age in the country," Karen's father, Joseph O'Connor, contended. "Karen is not being challenged in any of the games with girls." Karen had led her team to victories in each of their five games by at least 20 points, averaging 24 points a game herself. Karen also played for a boys' seventh and eighth grade park team, scoring 20 points in the boys' opening game.

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School District attorney Stanley Eisenhammer said the separate team approach is "an acceptable and constitutional manner of getting at the problem of equal access to athletic programs." He argued that separate teams were necessary to promote full participation of women in sports.

Since the Appeals Court has ordered further trial proceedings for a more complete examination of Karen's claim, she can renew her fight in federal court. Karen's father and her attorney told the *Chicago Sun-Times* that they would have to discuss the matter before deciding whether to continue the legal battle.

There is disagreement over both the meaning and the interpretation of the law in this area. Title IX of the Education Amendments of 1972 (20 A.S.C. § 1681 et. seq.) prohibits discrimination on the basis of sex by any educational program receiving federal assistance. However, regulations enforcing Title IX, published in 1975 by the former Department of Health, Education and Welfare (now the Department of Health and Human Services), specifically authorized separate-sex teams where "selection for such teams is based upon competitive skill or the activity involved is a contact sport" (45 C.F.R. § 86.41 [b]). The regulation goes on to say that where a team sport is (1) operated for one sex only, (2) doesn't have a team for the opposite sex, and (3) limits the athletic opportunities for members of that sex, then members of the excluded sex must be allowed to try out for the team unless the sport involved is a contact sport.

Obviously the law in this area is confused and confusing. What might happen if Karen is permitted to play on the boys' team? Does this mean that boys will then be permitted to play on the girls' team? If that is so will girls lose equal access to athletic programs? What does the fact that basketball is a contact sport mean to this whole problem? These and many more questions continue to be debated in the area of girls' athletic competition. The National Organization of Women has suggested that at least for the time being there be separate but equal teams.

Obscenity Revisited

What comes between Brooke Shields and her Calvin Klein designer jeans? Possibly the Supreme Court. The Court has agreed to rule on the constitutionality of a New York law that prohibits the use of children in films, photographs, and performances that depict sexual activity but are not necessarily obscene as legally defined (*New York v. Ferber*, 50 L.Wk. 3160). The case is but one of several obscenity-related issues before the Court this term. The Court has also:

- ruled that states and communities may not close stores or theatres for exhibiting sexually explicit material before proving in court that the materials are obscene (*Brockett v. Spokane Arcades, Inc.*, 50 L.Wk. 3373).
- ruled that "proof beyond a reasonable doubt" is not constitutionally required for a jury to declare materials obscene and a public nuisance (*Cooper v. Mitchell Brothers' Santa Ana Theatre*, 50 L.Wk. 3444).
- agreed to decide the constitutionality of an Idaho "nuisance abatement law" that allows the state to order a one-year closing of an establishment that sells obscene books or shows obscene films (*U.S. Marketing v. Idaho*, 50 L.Wk. 3320).

In the *Ferber* case, New York's highest court ruled last May that the state could not prohibit the production or sale of material that did not meet the legal test of obscenity, even if these materials depict the sexual activity of a child. That decision overturned the conviction of a Manhattan bookstore owner for "promoting the sexual performances of a child." The bookstore owner had sold undercover agents two films depicting children engaged in sexual activity.

"The production of such materials is exploitative and damaging to the children even if the product happens not to be obscene in the legal sense," Robert M. Morgenthau, the Manhattan District Attorney, told the Court in urging that they accept the appeal. Morgenthau argued that the present legal definition of obscenity, which he defined as "prurient appeal, patent offensiveness and lack of serious value," concerned the content of the material and not the circumstances under which it is produced, circumstances against which the legislature wanted to protect children.

Conversely, Herald Price Fahringer, lawyer for the bookstore owner, warned that nonobscene expression had become "hostage to fear" and "complicated by the hysteria surrounding the public's concern over the exploitation of children."

The Court's ruling on the merits, expected after oral arguments this spring, will have an important impact on similar laws in 21 other states. *Campagno v. Florida* (50 L.Wk. 3405) provides an early indication of how the Court is likely to decide. The Florida statute was challenged on the grounds that the Constitution requires that the child's performance be obscene before action may be taken, and that what comprises "sexual conduct" is an unconstitutionally vague standard. This argument failed to convince the Court. In *Campagno* the defendant's conviction for "using a minor in the portrayal of sexual conduct" was affirmed without opinion.

In *Brockett v. Spokane Arcades, Inc.*, the Court was confronted by a Washington state law declaring businesses to be "moral nuisances" if they exhibit "lewd films or publications" and providing for confiscation of money from sales or admissions, as well as court-imposed closing for up to one year. Did this constitute prior restraint or was it a constitutionally permissible way to deal with alleged obscenity?

The Court, without comment or oral argument, affirmed a decision by the Ninth Circuit Court of Appeals that said, "The ability of a court to close a place temporarily because obscene materials 'may' have been sold, distributed or exhibited on the premises is an impermissible prior restraint." According to documents before the Court, similar laws have been struck down in Alabama, California, Georgia, Louisiana, and North Carolina.

Chief Justice Warren Burger, joined by Justices Lewis Powell and William Rehnquist, dissented, saying that the federal courts should allow state courts to rule on the law before Supreme Court action.

The Court will soon decide if Washington's neighbors have found a constitutional way to control pornography. An Idaho "nuisance abatement" law that allows the state to order a one-year closing of an establishment that sells obscene books or shows obscene films also faces constitutional challenge. The Idaho Supreme Court has rejected the bookstore's argument that the law unconstitutionally prohibits free expression. The Supreme Court has scheduled oral argument on the appeal this spring (*U.S. Marketing v. Idaho*, 50 L.Wk. 3320).

One obscenity case the Court has decided this term will make it easier for communities to regulate alleged obscenity. In *Cooper v. Mitchell Brothers' Santa Ana Theatre* (50 L.Wk. 3444), the jury viewed 17 films which the Santa Ana City Attorney sought to enjoin as public nuisances. After being instructed that they must find these films obscene "beyond a reasonable doubt," the jury concluded that 11 of the films were obscene, four were not, and were unable to reach a verdict on two others. The city claimed that the trial court erred in requiring proof beyond a reasonable doubt, which is stricter than the "preponderance of the evidence" standard used in civil actions.

How to Get to the Supreme Court (without a map)

You've seen it on television a thousand times. The foreman of the jury solemnly pronounces "guilty." The defendant stands in shock while the scene unfolds around him: his mother cries, the prosecutor smirks, the crowd murmurs, the judge bangs his gavel for order, and newspaper reporters race for the hall phones. Then as the defendant is being led away, the voice of his attorney rises above the din: "Don't worry. We'll appeal this all the way to the Supreme Court!"

What does that mean exactly ? Can every lost case be appealed to the Supreme Court? The answer is no.

Cases come before the Supreme Court in one of two ways:

1. By right of appeal.
   Not all cases are appealable to the Supreme Court as a matter of right. In fact, very few cases can be brought to the Supreme Court as a matter of right. An example of an appealable case is one relying on a state statute which has been held by a Court of Appeals to be unconstitutional under the United States Constitution. (28 U.S.C. Section 1254)
2. Petition for certiorari.
   Literally this means petition asking the Supreme Court to call up the records of a lower court. The United States Supreme Court does not have to grant a petition for certiorari. It is a matter of discretionary review by the Supreme Court of the decision of the lower court.

Very few cases come before the United States Supreme Court under the right of appeal. Most cases come before the Court under the petition of certiorari, when the lower court loser asks the Court to hear the case as a matter of discretion. The Court may or may not, at its discretion, grant certiorari. Only if the Court grants certiorari can the case be argued before and decided by the Court.

What if the Court refuses to grant certiorari? What does that mean?

1. Obviously, if a petition for certiorari is refused it means that the decision of the previous court is upheld.
2. Some argue that denying the petition means that the United States Supreme Court agrees with the previous court, since that court's decision has now been upheld. However, others argue it means merely that the Supreme Court has refused to take the case at this time and does not necessarily agree or disagree with the previous court.
3. Why would the United States Supreme Court refuse certiorari if it did not agree with the previous court's decision? It might only mean that the United States Supreme Court thought the case:
   a. unimportant at this time;
   b. too hot a potato. For example, during the Vietnam War the Court consistently refused to hear cases alleging that Congress had illegally delegated its war-making power to the president. Even though fairly clear constitutional questions were raised during the Vietnam War, the Supreme Court consistently refused to hear such questions;
   c. best left to legislators and not to judges (it is a political question).

Therefore, it's hard to say what granting certiorari means for future cases. There are just too many reasons, other than the merits of the case, why certiorari is not granted.

The California Court of Appeals agreed with the trial court that the heavier burden of proof was required to adequately protect freedom of expression. The court cited the opinion of Supreme Court Justice William J. Brennan that "the hazards to First Amendment freedoms involved in the regulation of obscenity require that even in . . . a civil proceeding, the State comply with the more exacting standard of proof beyond a reasonable doubt" (*McKinney v. Alabama,* 424 U.S. 669 [1976] [Brennan, J. concurring]).

Reversing the California court, the Supreme Court held that proof beyond a reasonable doubt is not required in obscenity cases. "Three standards of proof are generally recognized," the Court explained, "ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proven 'beyond a reasonable doubt' in a criminal prosecution." The Court pointed out that it has never required the "beyond a reasonable doubt" standard in a civil case because it would diminish what "is regarded as a critical part of the moral force in the criminal law." Thus the Court concluded that while a state may choose to require proof beyond a reasonable doubt in state obscenity trials, it is not constitutionally required to do so.

Justice John Paul Stevens felt the Court lacked jurisdiction. Justice Brennan, joined by Chief Justice Warren E. Burger, echoed Steven's concern. Assuming that the Court had jurisdiction, Brennan reaffirmed his views that proof beyond a reasonable doubt is required in obscenity cases.

The First Amendment to the U.S. Constitution prohibits laws "abridging the freedom of speech, or of the press." Some have argued the Amendment means exactly what it says. Any speech or any printed matter is permissible. But others have argued there have to be some limits. For example, one can not shout "fire" in a crowded theater. The key seems to be what is "speech" or "press." The Supreme Court long ago decided that obscene material does *not* have First Amendment protection. That is, it is not "press," just as shouting "fire" in the theater is not "speech." Is this an example of legal double talk? (This would be a good topic of discussion with your students.)

Of course the problem has always been to define obscenity. In *Roth v. U.S.,* 354 U.S. 476 (1957), the test for obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." But in 1973 in *Miller v. California,* 413 U.S. 15, a modified test was devised: "The basic guidelines for the trier of fact [in defining obscenity] must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . , (b) whether the works depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

If the material is defined as obscene (pornographic) it will not be protected by the First Amendment. Of course, the cases indicate that first the material has to have been defined as obscene by a court before it can be restrained. *Prior restraint,* that is censorship by the police before a court adjudication, is impermissible under the First Amendment.

40 Years for Marijuana Not "Cruel and Unusual"

A forty-year prison term for possession and sale of nine ounces of marijuana is not "cruel and unusual punishment" according to a divided Supreme Court. In *Hutto v. Davis* (50 L.Wk. 3540), the Court, in a 6-3 unsigned decision, without calling for briefs or oral argument, reversed two lower federal court rulings that held the sentence was so harsh in proportion to the crime that the Eighth Amendment's prohibition against cruel and unusual punishment was violated.

The defendant Davis was charged with possession and sale of marijuana after a friend agreed to cooperate with police because of his concern over his wife's drug use and its effect on their 2-year-old daughter. Davis sold his acquaintance three ounces of marijuana for $74 and a police raid on Davis' house later uncovered an additional six ounces of marijuana, two scales, and drug paraphernalia. Davis was found guilty of both possessing marijuana with intent to distribute and distribution of marijuana. Each count resulted in a sentence of 20 years imprisonment and a fine of $10,000.

The duration of prison sentences for felonies is "purely a matter of legislative prerogative," the Court declared. The majority ruling was based on a 1980 Supreme Court decision, *Rummel v. Estelle,* that upheld the constitutionality of a life sentence for a man convicted of three felonies involving a total of $229. The defendant, Rummel, was sentenced to life imprisonment under a Texas recidivist statute, providing for life terms for habitual criminals. Rummel's third conviction was for obtaining $120.75 by false pretenses. He had earlier been convicted of fraudulently using a credit card to obtain $80 worth of goods and passing a forged check in the amount of $23.36.

In *Hutto* no recidivist statute was involved, but the Court stated that it "has never found a sentence for a term of years within the limits authorized by statute to be, by itself, cruel and unusual punishment." The Court added, "The excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make a constitutional distinction between one term of years and a shorter or longer term of years." Thus, "successful challenges to the proportionality of particular sentences should be exceedingly rare," the Court concluded.

Justices William Brennan, Thurgood Marshall and John Paul Stevens found that Davis's sentence was "grossly unjust" and noted that the average sentence for these offenses was three years and two months. The dissent stated that the "Virginia legislature has implicitly indicated that the punishment imposed on [the defendant] is too severe [because] in 1979 it reduced from forty years to ten years the maximum sentence that can be imposed with respect to each of the two offenses for which the defendant was convicted."

Brennan's opinion chastised the majority for its misuse of precedent and for the Court's "growing and inexplicable readiness to dispose of cases summarily" with "benefit of neither full briefing nor oral argument."

The dissent accused the majority of improperly extending the "narrow *Rummel* ruling" which the dissent says "rests on the understanding that, as a consequence of overwhelming state interest in deterring habitual offenders, the Eighth Amendment does not preclude a state from imposing what *might otherwise constitute a disproportionate prison sentence*" (emphasis by the Court). Since Davis was not being punished as a habitual offender, *Rummel* is inapplicable, the dissent concluded. The dissent agreed with the Court of Appeals that this is one of those "exceedingly rare" cases in

(Continued on page 52)

PRACTICAL LAW

Leigh Stelzer and Joanna Banthin

Teachers Do Have Rights

Every teacher fears suits for negligence and wants academic freedom. Good news: the law often protects you.

Many teachers and school administrators live with a growing dread that sometime in their career a student for whom they are responsible will be injured, that they will be accused of negligence, that some jury or judge will find them liable, and that all they have worked for will go down the drain.

For most these fears are unrealistic. They are based on misunderstandings of the law and horror stories passed along the grapevine. This is not to say that teachers need not be vigilant to protect the safety of their students. It is to say that, for the most part, courts have established fair standards for assessing the responsibilities of educators. Some states have also granted teachers extraordinary additional legal and financial protection.

What Is Negligence?

In layman's terms, negligence means fault. If it was your fault that damage or injury occurred, you were negligent. Liability means responsibility. To be liable means to be legally responsible.

The heart of the negligence issue is *unreasonable risk*. A negligent person is one who puts another in unreasonable risk of danger. The critical core of a negligence suit is determining whether the risk of dangerous consequences was great enough to lead a reasonable person in the same circumstances to anticipate the risk and guard against the consequences.

The phrases "reasonable person" and "acting prudently" are legal terms. When a negligence case goes to court, the judge uses these phrases in instructing the jury. Generally, it is up to the jury to make the specific determination of whether the defendant's behavior was reasonable in the particular case they are hearing. Juries being what they are, the definition—and therefore the standard—depends on what neighbors, friends, and colleagues expect of the person accused.

In considering whether a person ful-

Illustrations by Dean Mathews

978

filled his legal duty or met a reasonable standard of behavior, intentions don't count—actions count. A person may make an "honest mistake" or may not fully understand the consequences of an act. However, such explanations are not relevant to the legal assessment of negligence. If your actions put another person in danger, and the resultant risk could have been anticipated by a reasonably prudent person, you were negligent, whether or not you meant to be.

Teachers have a general duty to protect students in their care. The degree of protection and actual measures that a teacher must take vary with the circumstances. The regular classroom situation does not call for any extraordinary safety measures. There are few hazards. Life and limb are not threatened.

As students engage in activities involving physical exertion, machinery, or chemicals, the threats increase. Recess, gym, shop, and chemistry courses call for greater safety consciousness, planning, and supervision than are necessary in the regular classroom. A field trip requires extraordinary measures.

The fact that students will be exposed to greater risks as a result of some activity does not mean that the activity should be cancelled. Rather, teachers and school administrators must take more than normal care in planning and supervising the activity. When the courts consider negligence they ask whether the degree of protection given students was commensurate with the potential hazards of the situation and the degree of harm that might come to them.

An additional consideration in attributing negligence is the cause of the injury. There must be a causal connection between the teacher's action or inaction and the student's injury. The teacher must be a substantial factor leading to the injury. This is sometimes called the "but for" standard. *But for* the act of the teacher would the injury have occurred?

If an injury would have occurred despite what you did or did not do, you cannot be the cause. A teacher could not be found to be the cause of student injuries that occurred when a rock was thrown into the classroom from the street. Similarly, the teacher's absence could not have been the cause. No amount of planning or foresight would have avoided the harm to the student.

The question of avoidability invariably arises when there is a lapse in supervision. If the teacher had been present, could he have prevented or intervened in the events which led to the injury? The courts have handled this question in two ways. First, they have looked into the duration of the events: Was harm caused by the single impulsive act or was harm preceded by a series of similar dangerous acts? Second, courts have looked at the weapon. Was the weapon common—a pencil, pointer, or ruler—generally available to students and not easily identified as a potential threat? Courts have been sympathetic to teachers when student injuries have been caused by pencils, rulers, pointers, balls, fingers, or fists. Normal supervisory diligence would not lead a teacher to anticipate danger from these familiar articles, and the presence or absence of the teacher is irrelevant. However, when the injury was caused by an article that a teacher would immediately identify as dangerous—for example, a knife—the presence of the teacher becomes a crucial factor.

A final consideration in attributing liability is the role played by the student in causing his own injury or that of other students. Generally, students are children. They don't understand danger. They don't reason. Teachers must do the reasoning and exercise control. However, as students get older, develop reason, and receive instruction, they take on greater responsibility for their actions. Courts will consider the maturity of the students who injure themselves or others in combination with the precautions taken by the supervising teacher.

Some Liability Cases

One way to get a sense of these standards is to see them in action. Below we present the facts in several cases. Try to determine for each whether you think the teacher or administrator has been guilty of negligence. Then check your answers against the actual decisions.

Case I. Donald Cirillo, a Milwaukee high school student, was injured during a gym class when a basketball game became a free-for-all. The teacher was not present when the injury occurred. He had left the class of 50 boys unsupervised for 25 minutes.

Case II. Helen Thompson, 14, fell down the school stairs during class dismissal when she was pushed by a boy running behind her. The principal was accused of negligence for "allowing overcrowding to take place and to permit roughing by large boys, wholly without any supervision whatsoever."

The court record demonstrated that the principal had established class dismissal procedures. These included regular conferences with teachers, rules for teacher oversight of dismissal, regular inspection of halls and stairways, personal observation, and supervision of teachers and students.

Case III. Robert Titus, 9, was hit in the eye by a paper clip shot by another student, Richard Lindberg. The injury occurred while he was waiting for the school doors to open. Although the Fairview school did not officially open until 8:15 A.M., it was customary for students to arrive at school grounds at about 8:00 A.M. The Fairview students were joined by older students who waited to be bused to other schools.

The court record showed that the school principal "had not announced any rules with respect to the congregation of his students and their conduct prior to entry into the classrooms. He had assigned none of the teachers or other school personnel to assist him." Nor had he taken any measures toward overseeing the students' presence and activities.

Case IV. William Miller, a fifth-grade student, was cut and blinded when a detonator cap blew up in his face. Another student had brought the device to school in a tackle box and had offered to trade it for some pencils.

The incident occurred at recess, during which time students were allowed to remain in their classrooms. School rules permitted teachers to leave the classrooms during recess if they could arrange for another teacher to "look in" on the students. Another teacher had agreed and had looked in on the students.

Case V. Salvatore Caltavuturo, a 12-year-old student in a Passaic, New Jersey, elementary school, was dismissed for lunch. He and some other boys took a shortcut through a playground fence. Salvatore cut his leg on a jagged portion of the fence and eventually developed a permanent bone disease as a result of the injury.

The school playground was owned by the city. The city had installed the fence

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but had difficulty maintaining it. Children cut new holes as soon as it was repaired.

The principal had teachers stationed in the playground to observe the students as they left and returned to school. However, Caltavuturo was a patrol guard; he stayed at school longer than most of the other students. When the accident occurred, the teachers had already left their posts for their own quick lunches.

Here's what the courts decided in each case.

Case I. In *Cirillo v. Milwaukee*, 15 N.W.2d 460 (1967), the Supreme Court of Wisconsin ruled that the teacher had acted unreasonably in leaving 50 boys unsupervised for 25 minutes. There are circumstances, the court reasoned, in which a teacher could anticipate that play would deteriorate. Leaving the students unsupervised contained the seeds of unruliness. The teacher's presence probably would have prevented the roughhousing that led to Cirillo's injuries. A student testified that the students were watching out for the teacher because they expected him to come back and stop them. Thus the teacher was negligent.

Case II. This case is *Thompson v. Board of the City of New York*, 280 N.Y. 92 (1939). The Court of Appeals of New York held that the principal had "exercised such general supervision as was possible. . . . [He] could not personally attend to each class at the same time, nor was any such duty imposed upon him." He had not been negligent.

Case III. In *Titus v. Lindberg*, 228 A.2d 65 (1967), the Supreme Court of New Jersey held that the students' conduct was reasonably to be anticipated and guarded against. It concluded that inadequate supervision was a cause of the injury. The court ruled that the principal had been negligent.

Case IV. In its decision in this case, *Miller v. Griesel*, 308 N.E.2d 701 (1974), the Supreme Court of Indiana expressed its belief that, even though "persons entrusted with children, or others whose characteristics make it likely that they may do somewhat unreasonable things, have a special responsibility recognized by the common law to supervise their charges," schools are not expected to absolutely insure the safety of their pupils. The trial court dismissed the suit when Miller "failed to show the actual length of time the students were left unattended, that the activity in which they were engaged was particularly hazardous, or that any of the students in the room were of a troublesome, mischievous nature. . . ."

Case V. In *Caltavuturo v. Passaic*, 307 A.2d 114 (1973), the New Jersey Supreme Court took notice that the principal knew that children used the holes in the fence, considered it a problem, but had taken no remedial action. The court ruled that it is the duty of the school personnel to exercise reasonable supervisory care of the safety of students. The evidence in the case probably presented a triable jury question on the issue of the principal's negligence. Thus the case was remanded to lower court for trial to determine whether, in fact, the principal had been negligent.

What Can You Do?

Of course, these judicial standards are not fixed for all time. They represent the best effort of courts to weigh the various interests involved and to render justice. Each new case, each new set of facts, presents a new challenge that may require that the standards be reinterpreted.

Thus, this area of law will always be somewhat uncertain. There is no magic potion, no panacea, that will protect you against any possible liability suit.

The best general defense, however, is to act as the hypothetical reasonable person would, to show the "ordinary prudence" that is expected of professionals. And there is a way to help courts and juries to see what that standard is in the teaching profession.

Traditionally, the courts have allowed professionals to set their own standards. For example, doctors are expected to have the skill and learning commonly possessed by competent members of their profession. The standard of conduct for doctors is "good medical practice"—which is to say, whatever is customary and usual in the profession.

Teachers are expected to follow good educational and supervisory practices. Thus, it makes sense for teachers and school officials to formalize supervisory expectations rather than to leave them to common sense and custom. Once a set of guidelines has been formalized, the absence of a supervisory requirement can be used as a defense—no need was foreseen by reasonable people. In addition, if an injury occurs despite reasonable precautions, the fact that formalized standards exist suggests that the injury could not have been anticipated.

Speaking Your Mind

What does academic freedom mean for teachers in elementary and secondary public schools? Generally this. Academic freedom is the judicial system's best effort to protect a teacher when the teacher's curriculum choices represent the larger interests of the state against narrow local interests or when the teacher's choices inadvertently offend the local community.

Academic freedom is not a license to challenge the reigning ideology. It's not intended to defend the scholar who pursues truth in the face of opposition from colleagues and community or who stands in the marketplace of ideas and bravely confronts accepted wisdom. Rather, it is a shield for well-meaning teachers who out of good motives suddenly find themselves at odds with supervisors over some aspect of the curriculum.

Curriculum Conflict

American society and the courts view the public schools as a place for passing on the traditions and the perspectives of the community. Local school officials develop a curriculum that is consistent with those traditions and perspectives. Teachers are hired to teach that curriculum. Conflict may arise, however, when one attempts to identify the community of interests or to specify particulars to be incorporated into the curriculum.

Numerous groups influence what gets taught. Among the most important considerations are student interests, desires, needs; local community interests, commitments, prejudices; school board directives; departmental curricula; state curriculum mandates; and the teacher's own assessment of what belongs in the classroom. Less important but still influential are curriculum packages and textbooks, state and local groups and organizations, politicians, and the media.

The groups that influence the curriculum often tug in different directions. The local community and its representatives on the school board have the primary responsibilities for defining the curriculum. Teachers are obliged to teach what the local community wants taught. But teachers also have a professional and legal obligation to incorporate state mandated material even if this is not explicitly included in the local curriculum. Because the larger society as represented by the state is often more diverse than the local district, it has an interest in broadening the local curriculum and preventing it from being too parochial or one-sided.

Student interests and needs can contribute another dimension of conflict. Students have to be prepared to live in a future community that is not likely to resemble their present community. An education that simply passes on the values and prejudices of the past is incomplete. In some cases, students are so alienated from the present that teachers feel they must adopt unorthodox methods just to be able to communicate with them.

Occasionally the teacher's choices meet with disapproval. The teacher's presentation may reflect the broader community's perspective or a state mandate. Or the teacher may have misunderstood local mores and the constraints set by local authorities. The curriculum is general. Supervision is loose. A teacher may pursue a topic, a perspective, or a book without realizing that he or she is challenging local commitments.

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What Courts Have Said

When trouble happens and the board tries to fire a teacher for something he or she has said in the classroom, does the board have the authority or can the teacher rely on legal and constitutional support? As usual in the law, there is no crystal-clear answer. Judges have recognized the legitimate interests of both parties.

The law and the courts do recognize that the conflicting obligations of teachers make them vulnerable. Tenure laws are designed to ensure that teachers cannot be dismissed except for good cause and after fair due-process procedures. The First Amendment may guarantee a teacher's right of free speech.

One of the most eloquent and consistent defenders of academic freedom, Supreme Court Justice Brennan, wrote:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

The teacher may be a model of intellectual enterprise and reasoned choice, but school boards have the authority to determine classroom standards. However, as Judge Irving R. Kaufman of the U.S. Court of Appeals, Second Circuit, wrote, school officials must exercise restraint:

> The dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to the freedom of expression.

The curriculum is not limited to what is in the lesson book. Some judges have recognized that it may be useful or even necessary for a teacher to go beyond the formal curriculum. As Judge Thomas Fairchild of the Court of Appeals, Seventh Circuit, wrote, albeit in dissent:

> A teacher may be more successful with his students if he is able to relate to them in philosophy of life, and, conversely, students may profit by learning something of a teacher's views on general subjects. Academic freedom entails the exchange of ideas which promote education in its broadest sense.

Not all the rhetoric and reason are on one side. Judges have also argued persuasively that there are limits to academic freedom. In a concurring opinion to the Supreme Court's Epperson "monkey trial" case, Justice Hugo Black wrote:

> I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed.

And consider the view expressed by Judge Frank N. Johnson when he sat as Chief Judge on the U.S. District Court in Alabama:

> The right of academic freedom, however, like all other constitutional rights, is not absolute and must be balanced against the competing interests of society. This court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from any form of extreme propagandism in the classroom.

Some Ground Rules

How are these general and sometimes conflicting principles applied in practice? Basically the courts have established a set of ground rules for teachers. There are three limits imposed on teachers:

1. A teacher should not act so as to disrupt the school or incite students to disrupt. There is *no excuse* for disruption. The courts will not permit it.
2. A teacher should not go beyond prior clear limits in the curriculum or violate clear rules. Teachers may not substi-

tute their own judgment for the opinions of supervisors or state curriculum mandates.

3. A teacher should not use profanity. However, although the courts tend to frown upon the use of profanity in the classroom, they generally are willing to consider the context and circumstances.

Disruption, insubordination, and profanity are limiting factors in any consideration of academic freedom. Other factors—the maturity of the students, professional opinion, and the relevance of the controversial item to the course—may expand the teacher's academic freedom.

The Maturity of the Students. There is a consensus that a teacher has more discretion in exposing older students to controversial ideas. After all, 18-year-olds are legally adults in many states. Courts presume that older students are more sophisticated than younger students. They are better equipped to spot propaganda. They are better able to examine new ideas within the context of what they have already learned. Finally, the courts presume that older students have already had sufficient exposure to profanity and they will be neither shocked nor ruined by it.

The Weight of Professional Opinion. Academic freedom is a claim based on the professional judgment of the teacher. Thus the court looks to the profession to justify the claim. A teacher benefits from support of professional authorities. What if professionals can't agree on your case? That may not be fatal. Although it would certainly help any teacher to have the unanimous support of the profession, courts do not expect unanimity.

The Relevance of the Controversial Item to the Course. Every course has content and goals which are more or less specified in advance. Courts do not expect teachers to be individual entrepreneurs. Teachers are expected to stick to the curriculum outline. Therefore, there must be some legitimate link between the controversial material and the course. If there is, however, courts may be sympathetic to the teacher.

This is not a formula. These are the major considerations the courts use in attempting to balance the rights of the teacher, the needs of the students, and the interests of school officials. Few teachers who come down on the right side of these questions face serious problems. They can expect to be supported by the courts.

The Courts in Action

As usual, the best way to fully understand these ground rules is to see how courts apply them in actual cases. Below are the facts in some academic freedom cases. How would you decide each case? You may want to compare your reasoning with the court's actual decisions, which follow.

Case I. Robert Keefe, a creative high school English teacher, believed he should expose students to relevant contemporary writing.

In September 1969, he distributed copies of a recent issue of *Atlantic* magazine, which contained an article by Robert Jay Lifton entitled "The Young and the Old: Notes on a New History," to a class of seniors. The article was an analysis of the different perspectives that the young and old bring to history. One part of the article examined the origin of the rallying cry of the Columbia University rebellion, "Up against the wall, m----- f-----!" Keefe told his students that if any were offended by the vocabulary they could do an alternative assignment.

Some parents protested the use of profanity in the lesson, and members of the school board asked Keefe if he would agree not to use the word again in his class. He replied that he could not, in good conscience, agree to their request, and he was suspended.

Case II. Henry Keith Sterzing taught senior political science and civics at John Foster Dulles High School in Stafford, Texas. In September, the principal told Sterzing that he had received some parental complaints. Specifically, he had been told that in response to a student's question, Sterzing had said that he did not personally oppose interracial marriage.

In subsequent conversations, Sterzing's department head and members of the school board encouraged him to confine his teaching to the text and to avoid controversial issues. He responded that it was impossible to teach a senior class in current events and avoid controversy. School authorities gave him no definite instructions.

In February Sterzing taught a short unit on race relations, using materials cleared through and ordered by the school. Parents complained to the school board that the materials were propagandistic and biased. Sterzing was discharged immediately without a hearing.

Case III. Since 1971, Dean Wilson, a political science instructor at Molalla

Union High School in Oregon, had been inviting speakers representing a cross section of political viewpoints to address his students. In May 1975, in response to community pressure, the school board cancelled Wilson's invitation to a self-professed Communist.

The board had first tried to minimize public objections by creating special conditions for the Communist speaker. They required that students be shown the anti-Communist film *Nightmare in Red*, that anti-Communist speakers be scheduled before and after the Communist presentation, and that students not wishing to hear the Communist be excused. After additional protests, the board gave up and simply banned all political speakers from appearing at the high school.

Wilson sued in the U.S. District Court under the civil rights act to obtain judicial relief from infringement of his rights of free speech, academic freedom, and equal protection of the law.

Case IV. Frances Ahern, a twelfth-grade economics teacher, was experimenting with a new teaching method. She allowed students to make decisions customarily made by teachers. These decisions included subjects for daily discussion, course material, and rules of classroom behavior. While Ahern was away on leave for a week, her substitute attempted to impose unaccustomed discipline on the class, and slapped a student in the process.

When Ahern returned on Monday, she reacted angrily. She said, "That b----; I hope if this happens again all of you will walk out." Further, she attempted to repair the damage by discussing the incident with her students and working with them to formulate a new corporal punishment regulation.

On Wednesday, Ahern's principal reprimanded her for her intemperate language and told her to stop discussing the incident, get back to teaching economics, and use more conventional teaching methods. Despite these explicit instructions, Ahern continued to talk about the issue with her classes and asked the principal to come to class to discuss the proposed new regulations. On Friday, students engaged in a nondisruptive preschool demonstration.

Ahern was fired. She went to court and claimed denial of her right to speak, her right to teach, and due process.

Case V. For several years, William Harris had taught J.D. Salinger's *Catcher in the Rye* to his sophomore English class without incident. However, one fall, parental complaints led the superintendent of schools to question Harris's methods, particularly the use of explicit street language in the classroom. Harris and the superintendent discussed this complaint, and Harris voluntarily agreed to drop the book.

The next fall, without warning and despite the earlier agreement, Harris used the book again. He was summoned to the principal's office. After five minutes, Harris abruptly walked out, despite the principal's request that he return. Harris was fired for insubordination.

The Actual Decisions

Here's what the courts decided in each case.

Case I. In *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir., 1969), after hearing the case, the court concluded that (1) in the context of the article, the word was not obscene nor libidinous; (2) use of the word in the discussion of the article was necessary to explore the thesis of the article; (3) high school seniors are old enough to be exposed to such language; and (4) no school regulation existed which would have notified the teacher that the word was forbidden; indeed, school library books contained similar words.

Case II. In *Sterzing v. Ft. Bend Independent School District*, 376 F. Supp. 657 (S.D. Tex., 1972), the U.S. District Court concluded that the school board had denied Sterzing procedural and substantive due process. Furthermore, through its arbitrary actions, the board had denied him his right to free speech. School officials presented no evidence to suggest that Sterzing's classroom methods strayed from professionally accepted standards.

The judge wrote: "A teacher's methods are not without limits. . . . On the other hand, a teacher must not be manacled with rigid regulations, which preclude full adaptation of the course to the times in which we live. It would be ill advised to presume that a teacher would be limited, in essence, to a single textbook. . . . The court finds Mr. Sterzing's objectives in his teaching to be proper to stimulate critical thinking, to create an awareness of our present political and social community, and to enliven the educational process. These are desirable goals."

Case III. The court in *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Ore., 1976), ruled that teaching method is a form of expression protected by the First Amendment. Considered in the light of the special circumstances of the school, the restraints were unreasonable. The school board could not justify a ban on political speakers as inappropriate to high school students, especially since Oregon law mandated teaching government. Furthermore, the ban discriminated against political speakers and the teaching of politically oriented subjects by prohibiting only political speakers. Finally, in fact, the board had allowed all speakers except the Communist.

The judge concluded: "A course designed to teach students that a free and democratic society is superior to those in which freedoms are sharply curtailed will fail entirely if it fails to teach one important lesson: that the power of the state is never so great that it can silence a man or woman simply because there are those who disagree."

Case IV. In *Ahern v. Grand Island School District*, 456 F.2d 399 (8th Cir., 1972), the U.S. Court of Appeals ruled that Ahern was invested by the Constitution with no right either (1) to persist in a course of teaching behavior which contravened the valid dictates of her employers regarding classroom method or (2) to teach politics in a course in economics.

The Ahern case contains the ingredients of many of the academic freedom cases which teachers have lost. Ahern lost because she persisted in a course of teaching despite explicit instructions to desist. Discussions of corporal punishment were unrelated to the normal class subject. Her behavior was disruptive, and she encouraged disruptive behavior among her students.

Case V. In *Harris v. Mechanicville Central School District*, 408 N.Y.S.2d 384 (1978), the New York Court of Appeals ruled that the issue was not academic freedom. This was not an instance of a teacher's defending the use of a book and firmly standing ground against community pressure. Instead, there was substantial evidence that he had agreed to stop teaching the novel and subsequently violated the agreement. Further, without an acceptable excuse, he had walked out on the conference with the principal.

While Harris's misdeeds were not trivial, his punishment was disproportionate to his offenses. He had not been morally delinquent, nor were his actions consistent with a pattern of unwillingness to accept direction. A one-year suspension without pay would have been more than ample punishment, the court said. ☐

American Right

(Continued from page 5)

change in policy so significant as to merit some further exploration.

A quantum shift in the "need to know" and, of course, the desire to control seemed to take place in all management systems after 1890. In his *Privacy and Freedom*, Alan Westin described this revolution as a steady and relentless trend to "a more behavioral-predictive theory of information," meaning that everyone in charge wanted to be able to forecast whatever future concerned him by collecting many more pieces of data. This development had already been presaged to some extent in the private sector by corporate surveillance of the workplace, the South's massive invasion of black autonomy through peonage and the crop-lien system, the charity organizations' accumulation of data and dossiers on immigrant families and urban juveniles, the creation of the company town, the spread of scientific management in the factory, and the rise of private detective agencies with intensely antiradical preoccupations.

But from the late nineteenth century on, the responsibility and initiative for these information-control programs steadily passed into public hands, as the Progressive and New Deal movements illustrated. Whether doing good or preventing harm, the government agencies believed that more information would help them make better decisions. In law enforcement and national security, this meant an obsession with anticipating criminality and preventing it. This in turn required an enormous concern with discovering "bad tendencies." Anyone might be suspect, and an individual's whole life history was relevant, since only a total uncovering of the inner life could possibly discover the deviance lurking beneath the public surface.

As an employer, government needed a thorough investigation to fit the applicant to the job and to ensure his ultimate reliability. In the regulatory and welfare agencies, knowing the client became an integral part of the monitoring process, enhanced by inspections and audits that guaranteed the integrity of the program, if not the privacy of the individual. Immigration, policing, intelligence, credit, safety and sanitation, health, taxation—all topics of concern to community well-being-produced fat files that were the building blocks of the administrative state. Behind this front line of activity were the legislative investigators conducting their own probes of the agencies and the people over whom they exercised control, often in devastating public exposés.

What this meant to the citizen's right to be let alone was clear. Nineteenth century America had declared large "provinces of action and belief" to be "politically irrelevant" and "outside the realm of political concerns," a point of view that necessarily limited the need or desire for government intrusion. But in the twentieth century, intrusion became essential to the process of making scientific decisions. Citizens as information-suppliers could not also be protected "in their beliefs, their thoughts, their emotions, and their sensations," as Brandeis so eloquently argued.

The shifting moral landscape seemed seriously eroded as well by the apparent social acceptance of eavesdropping and informing. Once scorned, their hateful ancestries were forgotten because of their obvious value to the information god. Depression, economic planning, war, and Cold War further stimulated the new morality by casting people outside the boundaries of respectability. Subversives, welfare cheats, crime families, the disloyal, security risks, vice peddlers, gamblers, and tax evaders—what did their privacy mean when greater national issues were at stake? Even the Supreme Court had trouble confronting that dilemma.

At the same time, the "horse and buggy" age of privacy was giving way to the challenge of the new technology. Coming into being just as the information surveillance revolution took place, these devices made possible both a total intrusion into privacy as well as a complete profile of any targeted population.

Neither the dominant social philosophy nor the instruments promised any limits on the assault. The telephone, the microphone, the dictagraph, the electronic bug, instant photography, candid and hidden cameras, the two-way mirror, closed circuit television, infrared and laser techniques, microminiaturization, the polygraph, the computer, the data bank, and psychological-personality testing threatened privacy with extinction—unless the law kept up with the realities. By the 1960s, fifty federal agencies, 20,000 investigators, 20,000 private detectives, and hundreds of state and local police divisions had a share of the privacy invasion market.

After intrusion and surveillance came a third, less devastating attack on privacy: publicity. The same process seemed to be at work. There was immense interest in personal information for ulterior purposes, in this case, exploitation by commercial advertising, journalism, publishing, and movie-making. Publicity invaded privacy in the name of profits, sensationalism, and newsworthiness. Those whose pictures and reputations were at stake sensed all this as a kind of unauthorized seizure of their likeness and name, certainly an unwanted intrusion destroying their quiet and repose. It was this very kind of privacy invasion that led to the Warren-Brandeis article in the first place. It would be appropriate, therefore, to chronicle the outcome of this contest first, to see what protection privacy attained in the courts when balanced against the freedom of the press and the claims of commerce.

Can Fame Be Tamed?

Offhand one might assume every individual had a right to resist any unwanted fame, be it on labels, in books, or in the press. Isn't it as bad to find your face being used to sell a laxative without your consent as it is to find your private life splashed without your consent all over the paper? The courts thought otherwise. The litigation began as early as 1902 in a New York case involving "Abigail," a young lady whose portrait helped sell Franklin Mills Flour (*Roberson v. Rochester Folding Box Co.*, 65 N.Y.S. 1109). While Abigail lost in this instance, the offended public's outrage led to legislation there and elsewhere. From then on, advertisers and businesses could not legally appropriate and profit from a person's identity without permission. The individual had won the right to exploit himself commercially or choose to retain his privacy. He also won some protection early on from fictionalized film versions of events in his life (*Binns v. Vitagraph Co.*, 210 N.Y. 51 [1913]). On the other hand, the law approved newsreel reproductions and the incidental use of a person's name in fiction.

If privacy is closely related to control over information about oneself, then everyone assumes the risk of losing that in a country committed to freedom of the press. The courts will not fetter that freedom even if serious inroads into personal privacy occur. As Don R. Pember has concluded in *Privacy and the Press*, "there have been few instances in which the media have been successfully sued for publishing truthful reports about someone's private activities."

Public figures are, of course, fair game, but going public might be considered voluntarily renouncing privacy. Less clear are the instances in which persons have fame thrust upon them. Are they still private figures, deserving of the law's full protection, or are they public figures because of being newsworthy, and so deserving of less protection from the media? The distinction between public figures and private ones is important because in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and later cases the Court has held that public officials and public figures (an ambiguous category) have a heavy burden of proof in libel suits. The reason? As Justice Brennan wrote, we have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." If the press feared libel, it would be less able to criticize and castigate. As a result of this line of reasoning, public people who think they've been libeled not only have to prove that the account was false, they have to take the additional step of showing that the press acted with "actual malice... knowledge that [the story] was false or with reckless disregard of whether it was false or not."

Two landmark cases involving those with fame thrust upon them suggest the legal no-man's land that confronts anyone committed to total personal privacy. In 1937 the *New Yorker* magazine dug up the story of a child prodigy who had disappeared into obscurity and wanted to remain there. In *Sidis v. F-R Publishing Corp.*, 113 F. 2d 806 (1940), the court approved the exposure regardless of the victim's desire to escape notoriety. Sidis, the decision found, had "achieved or had thrust upon him" the status of a "public figure" by his fame years before and that indefinable condition could not be expunged even by the long passage of time. Nor did the publicity outrage "the community's notions of decency."

Twenty-seven years later the Hill family experienced a similar sense of outrage when *Life* magazine photo-dramatized their plight as hostages of escaped convicts, the story serving as publicity for a play on a similar but broader theme. The Hills won $75,000 in a lower court, but the Supreme Court sent the case back for retrial. The lower court judge had instructed the jury that it need only weigh whether the *Life* story was false. However, since "events over which [the Hills had] no control" had catapulted them into an important public event, the judge should have instructed the jury to weigh the evidence against the standard of whether *Life* had committed a "calculated falsehood." In dissent, Justice Fortas deplored an "article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal." *Time Inc. v. Hill*, 385 U.S. 374 (1967).

Apart from the fact that anyone may be randomly made public in an information-obsessed society oriented to the sensational, there is another threat to privacy in the accelerating accumulation of personal data in government hands. The press apparently has the right to print whatever the public record contains since such information is already in the public domain, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The only reason to hope is that the media rarely goes to extremes. Caution has limited it from running really offensive but truthful material on people's private lives. There has been, however, less caution elsewhere.

> *The Court was clever at coming up with ways of justifying bugging and other advances in electronic snooping.*

Electronic Snooping

If a man's home is his castle in the old-fashioned sense, what would the law say when modern technology turned it into a broadcasting studio? If the loathsome eavesdropper was considered a public nuisance at common law just by listening under a window, what would law have to say about the tapper?

Answers to these questions were slow in coming and a tremendous disappointment when they did come, which once again underlines how social values had changed. From the late nineteenth century on, electronic instruments created a revolution in surveillance that made tremendous inroads in the Fourth Amendment's definition of privacy. The new generation of snoopers violated the injunction against physical trespass by breaking and entering to install bugs. They ignored the rule that they must specify the illegal evidence to be seized by tapping for intangible words and thoughts. They brought back the general warrant by electronic fishing expeditions that recorded everything that went on. This generation threatened the extinction of privacy in ways that would have appalled the revolutionary generation. Wasn't electronic intrusion a nonviolent third degree that extracted unconscious confessions without physical force or rubber truncheons? The Supreme Court didn't think so.

In the famous 1928 case of *Olmstead v. United States*, 277 U.S. 438, involving a telephone tap, the Supreme Court forgot *Boyd*, ignored the wiretapping realities, and gave the intruders a green light that has not yet turned yellow. Using technical definitions of search ("physical intrusion") and seizure ("material objects"), the Taft Court's 5-4 majority found there had been no entry, only eavesdropping outside the premises of words projected voluntarily by the speakers themselves. Thus "nothing tangible had been seized" and the evidence was admissible in court. Brandeis's eloquent dissent argued that the Fourth Amendment should be construed "to protect... [against] every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed."

Since it was secret, bugging became the ultimate weapon for preventing crime or subversion. Its ability to confound legal line drawing proved that, in America, gadgetry would always triumph over common sense notions of justice. Privacy would be the big loser. When *Nardone v. United States*, 302 U.S. 379 (1937), banned all federal tapping under Section 605 of the Federal Communications Act, the government reinterpreted 605 to prohibit only interception *and* divulgence. As James Lawrence Fly pointed out, "no tapper acts for sheer amusement; he can't eat the information. He dictates it or its substance to another person." Certainly involuntary self-disclosure is at the heart of being tapped. That breach of privacy is the essence of the intrusion regardless of how the information may be used.

As new sophisticated devices appeared and the wiring of agents and informers became possible, the boundary between privacy and exposure was time and again redrawn. The Supreme Court approved a detectaphone (a wall mike outside the room under surveillance), since there had been no actual physical entry (*Goldman v. United States*, 316 U.S. 129 [1942]) but disapproved a "spike-mike" device that actually penetrated the wall in *Silverman v. United States* (365 U.S. 505 [1961]).

The Court was clever at coming up with doctrines sidestepping the invasion of privacy and the individual's reasonable expectation of it. One such evasion was the notion of voluntary disclosure.

Speaking to a wired undercover agent was "voluntary," according to *OnLee v. United States*, 343 U.S. 747 (1952). Another convenient doctrine was "assumed risk." The Supreme Court used it to justify snooping in *Lopez v. United States*, 373 U.S. 427 (1963). In that case, an IRS employee had been freely allowed to enter the premises and had talked with the suspects. What they didn't know was that he had a hidden tape recorder on him. Illegal invasion of privacy? No, said the Court. Talking to a wired government agent was a risk anyone assumed simply by engaging in conversation. Talking to informers symbolized "misplaced confidence," not a Fourth Amendment violation.

If the privacy oasis seemed more like a mirage at home or office, it reappeared in the public telephone booth in the 1967 case of *Katz v. United States*, 389 U.S. 347. The decision is one of the few to represent an advance in privacy. It abandoned the requirements of physical trespass and seizure of tangibles, concepts which had helped justify bugging for forty years. Electronic surveillance of the booth illegally seized the victim's conversations because "the Fourth Amendment protects people, not places" and covers their reasonable expectations of privacy even in public arenas. Standing midway between *Boyd* and *Olmstead*, *Katz* added a new dimension of interpretation that was welcome without really controlling the power of electronic devices, wired agents, or informers to compromise privacy.

As one dissent insisted, all this was "a dirty business." The question was: could the Supreme Court at least launder the results, to protect privacy by banning the forbidden fruit of intrusion?

The Supreme Court has taken steps to exclude such evidence from trials, but many of these steps have been half-hearted and easily evaded by the police. Even so, the exclusionary rule has created a firestorm of protest that the Court is "soft" on crime and is "coddling" criminals.

The controversial exclusionary rule was born in 1914, in *Weeks v. United States* (232 U.S. 383). The Court decided then that evidence illegally seized by federal officials should be excluded from federal trials. In principle, this enforced the Fourth Amendment by tossing out improperly seized material. Since there was no advantage in getting evidence by illegal means, the reasoning went, the police would be forced to follow the rules.

The problem was that in practice state and local police seized evidence illegally and handed it over "on a silver platter" to federal police, who then could lawfully introduce it in federal trials. The states weren't restrained from introducing tainted material into state trials (*Wolf v. Colorado*, 338 U.S. 25 [1949]) until *Mapp v. Ohio* (367 U.S. 643 [1961]), when exclusion was found to be enforceable against the states as well as the federal government. The Court reasoned that evidence could be excluded in state trials because the due process clause of the Fourteenth Amendment prevented "all brutish means of coercing evidence." Privacy had a new home in the "concept of ordered liberty."

When former hostages and a one-time child prodigy sued to guard their privacy, the courts quashed their hopes.

Yet exclusion also had its loopholes through which privacy might still slip away, most notably in grand jury proceedings, a sign of the priority given to information's important role in criminal prosecutions by the Burger Court, *United States v. Calandra*, 414 U.S. 338 (1974). And in recent years many commentators have argued that the Burger Court is whittling away at the exclusionary rule through a series of decisions limiting its scope.

Benevolent Invasion

If police and intelligence searches malignantly intruded on personal security, a benign process affected more people on a more regular basis. As government took on more responsibility for the health, safety, and morals of the community, it often tried to invade privacy for benevolent ends. Inspectors, supervisors, and government agents snooped without warrant to see that this or that code was enforced or that recipients of government benefits were following the rules.

In initial litigation in 1959, the Court upheld a warrantless administrative entry and civil search because no incriminating evidence was involved (*Frank v. Maryland*, 359 U.S. 360). By 1967 the justices thought otherwise. As one lower court judge had argued, "to say that a man suspected of crime has a right to protection against a search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." In *Camera v. Municipal Court*, 387 U.S. 523, and *See v. City of Seattle*, 387 U.S. 541, "the privacy and security of individuals against arbitrary invasions by government officials" received the legal protection they deserved. No door would now have to open to the government's unchecked discretion alone.

Welfare mothers knew about that door and that discretion. Midnight raids searching for the man in the bed had become a bad habit. Case workers were trying to enforce sexual continence on their unfortunate clients, adding insult to dependent injury. Protests and legal challenges forced a revision of federal regulations in 1967. The new ones demanded "respect [for] the rights of individuals" and their "privacy or personal dignity. . . ." It was an important step in making that guarantee real for "the weak, the powerless and the dispossessed." History had certainly validated Brandeis's warning in his *Olmstead* dissent that privacy would suffer most from "the insidious encroachment by men of zeal, well-meaning but without understanding."

Faking the Fifth

Other forms of encroachment dedicated to higher aims also narrowed the protection of a person's innermost thoughts and experiences. Forcing anyone to betray that vital center of autonomy had always seemed particularly repulsive. As Madison himself proposed it, the Fifth Amendment was to be a broad ban on self-accusation in *all* proceedings, civil and criminal. However, the Fifth Amendment as we know it emerged as a narrowed protection against self-incrimination alone. But the twentieth century mania for amassing facts—and the priority given to any and all information on criminals and other deviants—would rapidly threaten the sanctity of even this privilege. In time the Fifth would not be as broad a protection "as the mischief against which it seeks to guard" (*Boyd*).

Two contradictory trends of interpretation symbolized the Supreme Court's sleight of hand approach to self-incrimination, proving it a master of illusion. If one watched one set of decisions, the right seemed strengthened. The justices expanded the arenas in which the privilege could be invoked. It now covered grand jury proceedings, legislative investigations, administrative hearings, and materials held by third parties (one's accountant or attorney). In *Miranda v. Arizona*, 384 U.S. 436 (1966), it was expanded to cover arrest and station house interrogations. If that seemed to be a victory for privacy, watch another set of decisions that scorned the right in as clear an instance of judicial equivocation as the Court has ever exhibited. Thanks to the supreme bench, the privilege against self-incrimination really meant less and less in more and more places.

If the Fifth stands as a shield against forced disclosure and involuntary testimony, it should prevent *all* forms of self-accusation and exposure, otherwise personal privacy itself is violated. But that was not to be. Instead, the Court sanctioned a variety of doctrines whose impact on privacy seem devastating. Grants of immunity, for example, won Court approval, as though testimony in such cases was not "compelled." Yet something deeply personal, perhaps even defamatory, had been molested and extracted and publicized. One has only to recall the McCarthy era and un-American investigations to know the obscenity of it, "the indecent exposure of individuals by verbally stripping them in public," immunity leading to infamy.

Nor has the Fifth Amendment been held to cover the individual's self-exposure by physical evidence or bodily penetration. In other words, such things as blood samples revealing use of alcohol or drugs are not considered to be "communications" or covered by any concessions against punishment (*Schmerber v. California*, 384 U.S. 757 [1966]). The authorities have also won the right to demand handwriting and voice samples, place the accused in lineups for identification, and require other cooperative physical acts such as wearing certain clothing.

Yet in *Rochin v. California*, 342 U.S. 165 (1952), the Court drew the line against forcible stomach pumping in a search for possession of morphine. Justice Frankfurter found that "this is conduct that shocks the conscience... [and is] bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation." Does this suggest that the only certain castle of privacy is now a man's stomach?

It is most assuredly not in personal records held by others, whatever the individual may desire. Bank records and personal checks have been held to be outside the Fifth because they have already become public and the risk of disclosure already assumed (*United States v. Miller*, 425 U.S. 435 [1976]). The IRS has obtained information from papers held by an accountant, a compelled disclosure the Court will prohibit only if the owner can establish "constructive possession" (*Couch v. United States*, 409 U.S. 322 [1973]). And then there's the doctrine of "required records," those created by Congressional regulatory legislation. The Fifth won't protect private information in them, the notion being that these papers have "public aspects" (*Shapiro v. United States*, 335 U.S. 1 [1948]). If you cannot put it in your stomach, do not give it to a third party.

Even *Miranda* has been whittled down. Police may "take" a statement as long as "the free will of the witness" has not been "overborne." Information so acquired may be used to impeach trial testimony (*Harris v. New York*, 401 U.S. 222 [1971]). Noncustodial interviews, such as the IRS conducts, have fallen outside of *Miranda's* Fifth Amendment protection (*Beckwith v. United States*, 425 U.S. 341 [1976]).

And an underground of mind-penetrating practices has further eroded the inner sanctum of thought and personality, a kind of "psychological espionage" beyond the realms the Fourth and Fifth Amendments can defend. Lying somewhere between quackery and pseudoscience, the polygraph has given its practitioners a free ride into "the most private recesses of the human mind," its pretense of authority disguising the squalid blackmail privacy has had to confront. Personality testing has also paraded its scientific trappings for further covert penetration of areas once considered peculiarly personal. Questions on family, sex, religion, and politics, for example, have been justified as necessary components in the complete profile. We sanction all inroads into privacy by the social need for disclosure and by the smooth, efficient pursuit of ends serving the welfare of all.

Oasis in the Desert

Individual privacy is menaced by the "electronic garbage pail," the wired house, the involuntary testimonial, and the journalistic sensation, but some old-fashioned reflex of privacy remains, sometimes restoring the illusion that the castle is still there, still as strongly moated as ever. Maybe these victories do not count for much compared to the losses, but something is better than nothing, and any oasis looks good in a desert.

What recent claims and expectations has the law been willing to honor? They sound like nineteenth century echoes: a renewed commitment to quiet and repose, anonymity, family integrity, control of one's body, associational privacy, and autonomy within the home. It would seem that the law at its most nostalgic best hankers for those intimacies of an earlier day, long lost in the avalanche of change that has swept away so many other easy simplicities of private life.

In a widely divergent series of cases, the householder found he did have the right to be let alone, if not from electronic intrusion, at least from other invasions of his private peace. Although insistent solicitors on behalf of religion could not be restrained by municipal ordinances, the balance on behalf of First Amendment rights being too strong, commercial salesmen could be and were (*Breard v. Alexandria*, 341 U.S. 622 [1951]). The din of sound trucks, the twentieth century version of the common scold, while a part of constitutionally protected free speech, had to remain below the level of "loud and raucous noises" that plagued neighborhood repose (*Saia v. New York*, 334 U.S. 558 [1948] and *Kovacs v. Cooper*, 336 U.S. 77 [1949]). Home was also to be a place where a person could indulge his tastes for literature without state interference, since even the appetite for pornography, if quietly indulged, was no one's business (*Stanley v. Georgia*, 394 U.S. 557 [1969]).

Even more closely associated with the most intimate private choices were the newly protected freedoms to procreate or not, the bottom line issue, perhaps, of castle life. *Griswold*'s landmark impact not only reserved these decisions from state intrusion, but also promised a potential new meaning for the right of privacy and seemed to awaken the Ninth Amendment from its long constitutional slumber. The immediate beneficiaries were married couples practicing birth control, later widened to include unmarried couples in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The right also radiated outward to protect the decision to terminate a pregnancy in *Roe v. Wade*, 410 U.S. 113 (1973). This decision freed married women and, to some extent, unmarried daughters from male or parental interference with the exercise of their freedom to abort. Nor could states absolutely forbid the sale of contraceptives to minors.

Yet the very promise implicit in Ninth Amendment interpretation was itself aborted before further "emanations" and "penumbras" developed. The Court preferred to not abandon the security of the enumerated rights in the other amendments. The Ninth was an uncharted and expansively dangerous constitutional sea, so the new right of privacy remained narrowly focused on family intimacy, based on the historically active defenses the First, Fourth, and Fifth had sometimes provided privacy.

Other new areas have led to mixed results for privacy. New privacy claims have come from cases involving long hair, marijuana, sterilization, sex education, the right to die, and homosexuality. But all involved issues of individual autonomy and private choice that did not rise to constitutional status. And in the appeal of Virginia's sodomy statute, the Court upheld the state's right to control consensual sexual practices, however private, that seemed traditionally not part of family life (*Doe v. Commonwealth's Attorney*, 425 U.S. 901 [1976]).

If home-based private activity still has its limits, so does it, too, in organizational life. For many Americans, especially the joiners, the home away from home has been the group. In several important decisions, the Supreme Court strongly supported associational privacy. It upheld the right not to disclose membership to the state (*NAACP v. Alabama*, 357 U.S. 449 [1958]) even when the state claimed infiltration by subversives (*Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 [1963]). The justices clearly connected the privacy issue to effective group life and the capacity to formulate policy unimpeded by intrusion.

Anonymity is crucial to First Amendment political activity of this kind. But politics also has its equivalent to consensual sodomists, in this case the subversive or supposed violent fringe whose privacy need not be honored. Their lists had to be exposed, so their interior politics became fair game for FBI surveillance and disruption.

The Publicized Society

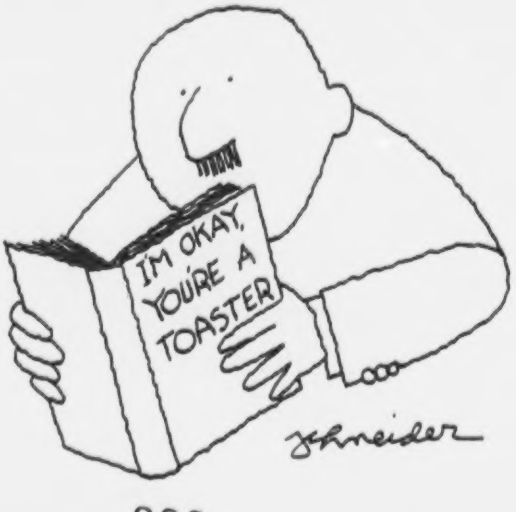
In a revealing burst of frankness some years ago, one member of the Supreme Court admitted his inability to define obscenity, but claimed he knew it when he saw it. His brethren have neither been as open nor as honest about privacy.

The average citizen may feel capable of knowing what privacy is when he loses it, but the Court seems much less responsive to the issue. Quite the opposite. One decision after another has granted access to privacy's more precarious "existential condition." A country that hated the quartering of troops in its homes has accepted the quartering of microphones. A country that was repelled by breaking and entering without warrant has accepted the breaking and entering of the mind and the theft of an individual's most private words, thoughts, and statements. A court that found itself shocked by the police pumping out the contents of someone's stomach has tolerated the pumping out of an individual's most cherished secrets. A people that despised informing, eavesdropping, snooping, and prying has seemingly endorsed betrayal as an essential tool of national security and law and order. A people once quick to punish impertinent invasions of privacy as affronts to personal honor has accepted any and all exposures not totally reckless or malicious in intent.

Those that resist these trends, meanwhile, find that they have "assumed the risk," have to prove "actual malice," have unwittingly become newsworthy and hence exposable, have to keep "required records" over which they lose control, have no right to their personal information held by third parties unless they can show "constructive possession," and have lost any privacy that government documents may have placed in the "public domain." They wonder why the nation worries more about safe streets than the safety of their homes from intrusion; why handgun control bills flourish but not electronic device legislation. They marvel at the protection of their quiet and repose from solicitation and noise but not from the silent invasion of the ever-present eavesdropper. They note the repudiation of physical conscription, leaving free the autonomy of their bodies, and contrast it with the psychological conscription compelling their mental and emotional presence in dossiers and data banks. They watch the enormous increase in government secrecy and imagine the pleasure of initiating a similar system of classification about themselves. They may even have some dim sense of the vast net transfer of privacy itself from individuals to the state and may someday ask not what the government knows about them, but what they know about the government.

A trail of records may become a trail of tears in a society obsessed by information. When people become data objects in order to serve the computers "because they are there," it has become time to question the philosophy and restrain the technology of this revolution. Surely something ominous has already transformed the nation's sense of public decency and political civility. As Justice Harlan warned in a memorable dissent against the "unrestrained use of secret agents," government intrusion of this kind "could have a chilling effect on all small group activity and interpersonal relationships."

Strange that "the right most prized by civilized man," one whose "substantial protection" is essential to the very existence of a free society, still somehow retains the status of a constitutional fringe benefit. Even if many individuals may now as before find those interstices that defy intrusion and surveillance, they deserve a better protection than that afforded by their own random anonymity. Perhaps the Supreme Court will some day rethink the right of privacy in the sense intended by the Founding Fathers. It would be a better solution than a return to dueling or publicly administered horsewhippings, although lacking the vivid and dramatic tones the defense of privacy deserves. ☐


I'M OKAY, YOU'RE A TOASTER
Schneider

Court Briefs

(Continued from page 40)

which the Eighth Amendment invalidates a sentence as disproportionate.

Sentencing has long been disputed in the law. Judge Marvin E. Frankel, a critic of the present method of sentencing, in his book *Criminal Sentences: Law Without Order* suggests:

1) *A statement of reasons* for the sentence should be required from the judges. Most inmates do not even know why the particular sentence was handed down. This is because a judge who sentences within the statutory limit will rarely be reversed if he gives no reasons. However, by giving his justifications, he gives an Appeals Court some evidence to review to determine if he acted for proper reasons.

2) *Sentencing Institutes* should bring together judges, attorneys, criminologists, psychiatrists, and penologists to discuss and formulate criteria for sentencing and corrections. A problem with these institutes, which have been used at the federal level, is that they are not binding upon judges (who staunchly defend their independence) and the recommendations are sometimes ignored.

3) *Sentencing Tribunals* could bring two judges in to confer with the trial judge. While the judge would retain the final authority to sentence the defendant, conferring with his colleagues would ensure that all aspects of the defendant's case are considered, and promote uniformity among judges in the same area.

At least by instituting such methods, it is argued, extreme disproportionate sentencing will be less likely.

Court High on Drug Cases

As usual, the Supreme Court has devoted a considerable amount of time to deciding the constitutionality of drug seizures and drug-related laws. Some of the more important cases are:

- the Court's holding that a search warrant is not required for police to accompany an arrested person into his home and to seize any contraband discovered in plain view (*Washington v. Chrisman,* 50 L.Wk. 4133);
- the Court's unanimous decision that a drug paraphernalia law is constitutional, a decision which may have a major impact on similar laws throughout the country (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 50 L.Wk. 4267);
- the Court's reexamination of whether law enforcement officers may rely upon a "profile" of suspicious characteristics to obtain the probable cause required to detain a citizen (*Florida v. Royer,* 50 L.Wk. 3051).

Call First Next Time

It's a good bet that Washington State University roommates Carl Overdahl and Neil Chrisman aren't talking to each other since Carl brought home a surprise visitor who stayed for search and seizure.

A campus police officer, observing Carl leave a dorm room carrying a bottle of gin, stopped and requested some proof of age. Overdahl's I.D. was in his room so he suggested that he go to his dorm and get it. The officer explained that under the circumstances he would have to accompany him. Carl agreed.

A nervous Neil Chrisman greeted the pair at the door. Chrisman couldn't hide the seeds and a small pipe lying on a nearby desk, spotted by the officer while he leaned against the doorjamb. The officer entered the room for a closer inspection and determined that they were marijuana seeds and that the pipe smelled of marijuana. Chrisman and Overdahl, waiving their *Miranda* rights, presented the officer with a box containing three plastic bags of marijuana and $112 cash.

After a pretrial motion to suppress the evidence failed, Chrisman was convicted of two counts of possessing a controlled substance. On appeal, the Supreme Court of Washington reversed, holding that although Overdahl had properly been placed under arrest, the officer had no authority to enter the room and seize the contraband. The Washington court reasoned that a warrant was required because the officer lacked "exigent circumstances" requiring his immediate action (i.e. there was no indication Overdahl might grab a weapon, destroy evidence, or attempt to escape).

Criticizing what it believed a "novel reading of the Fourth Amendment," the U.S. Supreme Court ruled the search valid, and said that police do not need a search warrant to accompany an arrested person into his home or to seize any incriminating evidence (*Washington v. Chrisman,* 50 L.Wk. 4133).

Chief Justice Burger's 6-3 majority opinion stated that because the police officer had the right to be at the student's "elbow at all times" after his arrest, the officer had the authority to enter his dorm room. Since the officer was allowed to be in a particular place, Burger continued, the so-called "plain view" exception to the warrant requirement allowed the officer to seize incriminating evidence clearly in sight. The Chief Justice concluded that since the seizure was lawful, there was "no difficulty [in] concluding that this evidence and the contraband subsequently taken from respondent's room was properly admitted at trial."

Justice Byron R. White wrote the dissenting opinion, joined by Justices William J. Brennan and Thurgood Marshall. He said that the arrest was made on the street and that the officer could therefore not enter the the suspect's room without his consent. The dissenters agreed that the officer could "stand in the doorway to keep Overdahl in sight" but maintained that the officer could only enter the room to protect himself or maintain control over Overdahl. "I perceive no justification for what is in effect a per se rule that an officer . . . could always enter the room and stay at the arrestee's elbow," said Justice White. Since in the dissent's opinion the officer "had no legal basis for being in the room," they would have held the seizure unconstitutional.

Head Shop Law Upheld

> After a federal judge upheld Maryland's version of a model law making sale or possession of drug paraphernalia illegal, an owner of Progressive Plastics, Inc., a manufacturer of water pipes marketed under the trade name "U.S. Bongs," committed suicide. In a suicide note, Christopher Barnhard blamed the government for taking away his business.
>
> —*Wall Street Journal,*
> November 17, 1981

In early March the Supreme Court ruled that a local ordinance banning the sale of drug paraphernalia was not unconstitutionally vague and thus a deprivation of the due process rights of store owners. Speaking for the unanimous Court in *Hoffman Estates v. Flipside* (50 L. Wk. 4267), Justice Thurgood Marshall wrote: "[W]hether these laws are wise or effective is not, of course, the province of this court. We hold only that such legislation is not overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to [those affected]."

The case began in 1978, when, like many other communities in recent years, Hoffman Estates, Illinois, passed an ordinance regulating paraphernalia "designed or marketed for use with" illegal drugs. The ordinance required vendors to obtain a license to sell paraphernalia, made sales to minors illegal, and required that a log be kept of the names of all purchasers.

Flipside Records, a business in the

Northwest Chicago suburb which sells rolling papers, water pipes, and "alligator clips," successfully challenged the ordinance. The Seventh Circuit Court of Appeals ruled that the ordinance was unconstitutionally vague concerning dual-purpose items which might fall within the reach of the new law. The circuit court concluded that there is a "genuine danger that this ordinance will be used to harass individuals choosing life styles and views different from those of the majority culture."

Hoffman Estates, represented by attorney Richard N. Williams, appealed. Williams argued that (1) a person of ordinary intelligence could reasonably be expected to understand what is being prohibited; (2) that since the statute applies only to retailers, a prudent businessman can clear any ambiguity by consulting village officials or referring to the guidelines which accompany the ordinance; and (3) that innocent suppliers of paraphernalia would not be subject to the potential $500 non-criminal fine because the words "marketed for use" with illegal drugs indicates that the law requires intent. Flipside doesn't sell rolling tobacco, medicine, or any other products for legal use with the paraphernalia, Williams noted, and they know that their products will probably be used with illegal drugs.

Other Cases of Note

Aliens May Be Excluded from Police, Teaching

A California law requiring that peace officers be citizens was upheld this term. A 5-4 Court ruled that the law did not violate the rights of resident aliens to equal protection of the laws under the 14th Amendment (*Cabell v. Chavez-Salido*, 50 U.S. 4095). The case follows recent High Court decisions upholding citizenship requirements for state police officers and teachers because each perform "functions that go to the heart of representative government." Dissenting Justice Harry A. Blackmun, joined by Justices William J. Brennan, Jr., Thurgood Marshall, and John Paul Stevens, said the decision "defies common sense" and that the majority's justification for the citizenship requirement "knows no limit," since it could not logically be restricted to jobs relating to law enforcement. The dissent noted that in 1973 the Court struck down a New York State law that imposed a citizenship requirement for all state jobs.

Citizenship Can't Challenge Government Giveaway

"Citizenship" alone is not a sufficient claim for a 90,000 member organization to challenge the federal government's gift of a 77-acre, $1.3 million former Army hospital to Valley Forge Christian College, a 5-4 Supreme Court declared in *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 50 L.Wk. 4103. Federal courts, which possess only limited jurisdiction under the Constitution, generally refuse to hear claims unless the litigants have suffered an "actual or threatened injury." Justice William Rehnquist, writing for the majority, said that the alleged damage to the plaintiffs' citizenship interest—defined as the "shared individual right to a government that 'shall make no law respecting the establishment of religion'"—was insubstantial.

Justice William J. Brennan, Jr., dissented, saying that the majority "slammed the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." The plaintiffs had claimed that the federal program, which gives away surplus property to educational institutions (about $26 million worth since 1949) violated their right as taxpayers not to have their tax dollars used for unconstitutional purposes.

Anti-Klan Act Gets New Twist

An 1871 law, passed to protect freed slaves from the Ku Klux Klan, may be used by members of the Unification Church, commonly referred to as "Moonies," to sue people who try to "deprogram" them. The Supreme Court, without comment, denied certiorari to two defendants being sued under the act, thus leaving intact a lower court ruling that allows Thomas Ward to sue 11 people for holding him captive for 35 days while trying to make him renounce his beliefs in the Rev. Sun Nyung Moon's teachings. Ward was 28 years old at the time the "deprogramming" was arranged by his parents (*Mandelkorn v. Ward*, 50 L.Wk. 3570).

Bomb Scare in Pearl Harbor

Forty years after the Japanese attack on Pearl Harbor, Hawaii is expressing fear over another bomb threat, this one from the United States. A unanimous ruling by the Supreme Court has held that "national security interests" allow the Navy to keep secret the risk of nuclear accidents in Hawaiian storage facilities, or, for that matter, whether the magazines house any nuclear weapons. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 50 L.Wk. 4027, the Court rejected a federal appeals court order that the Navy prepare a "hypothetical environmental impact statement," without disclosing the actual number and type of weapons stored at the new $8 million Oahu facility. Justice William Rehnquist's opinion cited the classified nature of nuclear weapons storage as tipping the balance against environmental interests.

Sioux Get Millions But No Land

In 1980, the U.S. Supreme Court awarded the eight Sioux Indian tribes $105 million. The money was compensation for the federal government's seizure of the Black Hills, which the Court agreed 8-1 was violative of the Fort Laramie Treaty of 1868 and thus unconstitutional (*United States v. Sioux Nation of Indians*, 100 S.Ct. 2716). In *Oglala Sioux v. United States*, 50 L.Wk. 3570, the Oglala Sioux, one of the eight tribes, renounced the monetary award and demanded restoration of the 7.3 million acres, which the Sioux regard as sacred, plus $10 billion in compensation for removal of nonrenewable resources and $1 billion additional damages for "hunger, malnutrition, disease and death." The Court, in denying certiorari, upheld a district court dismissal of the suit. The lower court had ruled that it lacked jurisdiction over claims not first brought to the Indian Claims Commission, the exclusive remedy under federal law.

Michael L. Pritzker, counsel for Flipside, attacked the law, saying that "the language of this statute does not lend itself to the degree of certainty that the Constitution requires." Pritzker also condemned the ordinance as an attempt to impose the morality of village officials on its citizenry.

Hoffman Estates may well be only the first drug paraphernalia case before the Court this term. A "litigation explosion" has accompanied passage of the Drug Enforcement Agency's (DEA) "Model Act," which imposes *criminal* penalties for *possession* of drug paraphernalia. The act has been passed in a number of jurisdictions and has withstood constitutional challenges in the Eighth and Tenth Circuits.

The Generic M-O

The third drug-related case deals with "probable cause." Police can't just search anyone they please. They have to have "probable cause" to do so, or the search will be invalid. A perennial issue is whether the profiles law enforcement agencies use of typical drug couriers are sufficient to constitute a probable cause search of someone fitting the profile. Are the profiles so specific and scientific that fitting them is cause for a legal search, or are they rather so unspecific and subjective that they could be used to harass persons who are "different."

Inbound Miami air traveler Mark Royer fit the profile that drug specialists developed based on their experiences with a great number of drug couriers. As the trial judge put it, his (1) appearance and mannerisms, (2) luggage and the way he handled it, (3) means of obtaining his ticket, among other telltale signs, "fit the profile, the details and nature of which [the court] purposely does not here state."

He was asked by police officers to come with them to a small closet-like office in the airport. Police officers noted that he appeared increasingly nervous. He was asked to open his suitcase. He did so after producing a small key from his coat. He was also asked if he would open his trunk but he told police officers that he did not know the combination. When asked by police officers if they could open it, he gave his permission. Using a screwdriver, they removed the lock and found 65 pounds of marijuana in his luggage.

He was convicted at the District Court level, and upon appeal the Florida Court of Appeals initially held that such a "profile" arrest was legal. However, after a rehearing, the same court reversed itself, declaring such arrests illegal. The state of Florida is appealing this decision to the United States Supreme Court in *Florida v. Royer*, 50 L.Wk. 3051.

Agent Orange, No, Asbestos, Yes

If the United States discovered that it had poisoned some of its citizens, should it pay them for the harm caused? Would it make a difference if the citizens were soldiers? Would it matter if the problems didn't surface for several years?

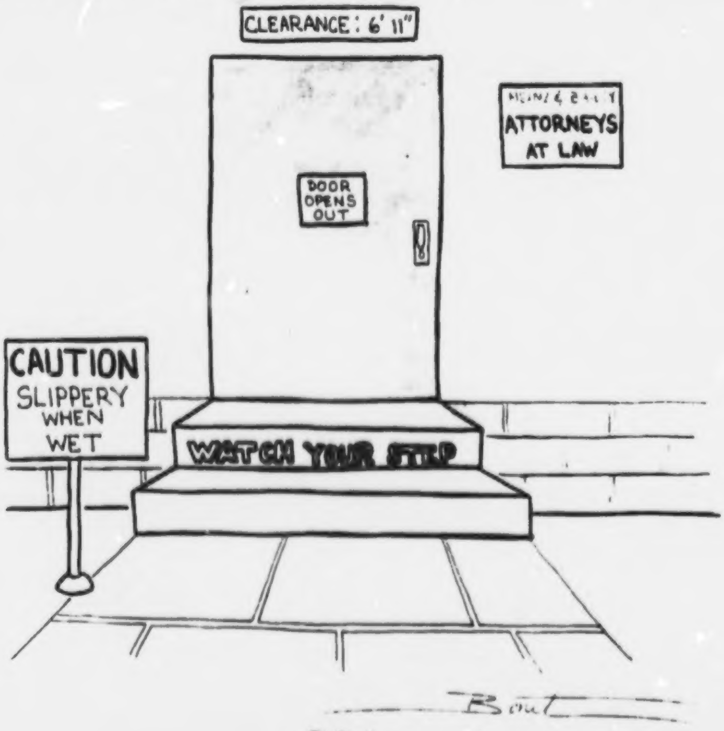
In one of the two cases involving these questions, the Court refused to hear a case, in effect preventing an estimated 600,000 Vietnam veterans from collecting damages for injuries caused by exposure to the chemical agent known as Agent Orange. In an unsigned order, the Supreme Court denied without comment an appeal from a lower court decision requiring that veterans seeking compensation had to have filed suit within the time limits prescribed in each state's statutes of limitations.

A statute of limitations is a law which requires that a law suit be brought within a certain amount of time from the date of the injury. For example, many states require the filing of suits within five years from the date of injury. These time limits have expired in 20 states, barring suits by approximately 600,000 vets. The 20 states cited are Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Maine, Mississippi, Montana, Nebraska, New York, Nevada, North Carolina, North Dakota, Rhode Island, South Dakota, Utah, Virginia, West Virginia, and Wisconsin.

It was discovered only recently that Agent Orange, a chemical defoliant used extensively in the Southeast Asian conflict, has a number of dangerous side effects, including genetic damage and serious medical problems. Some veterans didn't know about these side effects until years after exposure. More than 100 lawsuits, involving 2 million veterans, have been filed against dozens of corporations, including the present case *Chapman v. Dow Chemical*, 50 L.Wk. 3487.

A U.S. District Court held that because "harms inflicted on soldiers" by war contractors involved "federal interests," the time for filing fell under federal law. Therefore, the court said that the suits could be filed even though the statutes of limitations had expired in many states.

The Court of Appeals for the Second Circuit reversed the lower court's finding, holding that there was no "identifiable federal interest," and that the lawsuits, which are essentially products-liability actions, fall under state jurisdiction. When this case reached the Supreme Court, only Justices Harry A. Blackmun and Sandra Day O'Connor voted to hear the appeal. The votes of four justices are required before the Court will consider a case.



Where does that leave veterans? Victor John Yannacone, Jr., a lawyer for the veterans, told the *New York Times* that the main hope for veterans is to persuade state legislatures to relax their statutes of limitations. This action has already been taken in New York. Of course, veterans fortunate enough to reside in states with liberal statutes of limitations will still be able to bring action.

In *White v. Johns-Manville Corporation* (50 L.Wk. 1058), the main argument also boiled down to whether state or federal statutes of limitations should take precedence. This time, the Court concurred with an appeals court, saying that federal rules take precedence over state law, making it easier for shipyard workers to sue for injuries resulting from exposure to asbestos.

The United States Court of Appeals for the Fourth Circuit allowed suits by five former shipyard workers who claimed that exposure to asbestos caused severe respiratory diseases. The companies being sued argued that the plaintiffs' work in the shipyard did not have sufficient "effect on marine navigation and commerce" to come under federal jurisdiction and therefore the state statutes of limitations should prevail. Just as in the Agent Orange case, the company argued that such lawsuits should be barred, since the state statutes of limitations had expired. Virginia, like many states, allows plaintiffs only two years from the time of exposure to the harmful substance to file suit. Only recently has asbestos's disease-causing characteristics become known, and consequently one of the plaintiffs was filing suit some 42 years after the initial exposure.

Under the ruling, the workers can file suit under federal "admiralty" law, which gives federal judges wide discretion to decide whether plaintiffs were sufficiently diligent in pursuing their legal remedies. These federal judges can disregard state statutes of limitations if they choose. The plaintiffs had earlier been awarded a $435,000 jury verdict each, but the U.S. District Court set aside the awards because it believed it lacked jurisdiction. The case will now be remanded back to the District Court for a determination of whether, under federal law, the plaintiffs had engaged in undue delay which would bar their suit. The Supreme Court ruling is important to some 5,800 lawsuits filed by former shipyard workers whose only hope of avoiding strict state statutes of limitations is federal admiralty jurisdiction.

What is the difference between the Agent Orange case, which does not permit the Vietnam veterans to file lawsuits in states where the state statutes of limitations have expired, and the asbestos case, which allows shipyard workers to file such claims even though the state statutes of limitations have expired? The difference is that a different set of laws is applied in the asbestos case. Admiralty law allows the federal courts to disregard the state statutes of limitations and apply a basic concept of fairness. But admiralty law does not apply to the Agent Orange case, which, according to the Supreme Court, falls under state products-liability law.

Expelled from High School, God Enrolls in College

The Establishment Clause of the First Amendment to the United States Constitution says, "Congress shall make no law respecting an establishment of religion." The Madalyn Murray O'Hair case says that required religious exercises—such as the reading of the Bible and the recitation of the Lord's Prayer in the public schools—violate the First Amendment. In that case, the Court held that such exercises establish religion. But should the Supreme Court allow voluntary prayer meetings by students on the campuses of public high schools and state universities?

In two separate actions the Supreme Court has denied high school students the right to hold voluntary prayer meetings on school property while holding that state university students have the right to use campus facilities, generally open to student groups, for purposes of religious meetings and worship. Without comment, the Court refused to hear an appeal by a group of Guilderland, New York high school students who wanted to conduct prayer meetings at their school before the beginning of the official school day. The refusal sustains the decision of the Second Circuit Court of Appeals, which held that to allow the prayers would violate the constitutionally required separation of church and state (*Brandon v. Board of Education*, 50 L.Wk. 3486).

However, the High Court rejected a similar argument made by the University of Missouri, which maintained that opening its facilities for use by student religious groups would violate its obligation to maintain strict separation of church and state (*Widmar v. Vincent*, 50 L.Wk. 4062). In *Widmar* a group of fundamentalist Christian students wanted to use university facilities to hold religious meetings. These typically included prayer, hymns, Bible commentary, and discussion of religious views and experiences. The students, who had paid a $41 per semester activity fee, had previously received permission to conduct meetings at school facilities but were informed that they could no longer do so because of a university regulation prohibiting the use of the facilities "for purposes of religious worship or religious teaching."

Justice Lewis Powell, writing for the 7-2 majority, focused on the students' right of free speech and association rather than on the Establishment Clause of the First Amendment. "The question is not whether the creation of a religious forum would violate the Establishment Clause," Powell stated. Rather "the university has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech." The majority opinion requires a "compelling state interest" to justify excluding a speaker from a public forum because of the content of the speech. Potential entanglements with the Establishment Clause were not such an interest under the facts of this case, the Court said. The Court concluded that an "equal access" policy would not have the primary effect of the university advancing religion any more than an open forum would commit the university to "the goals of the Students for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities."

Justice John Paul Stevens, in a separate opinion, agreed with the result reached by the Court but saw no reason "why a university should have to establish a 'compelling state interest' to defend its decision to permit one group to use the facility and not the other." Stevens stated, "I should think it obvious . . . that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of *Hamlet*—the First Amendment would not require that the room be reserved for the group that submitted its application first." However, Stevens concluded that in this instance the university lacked a "valid" reason for excluding the students.

Justice Byron White issued a strong dissent. White agreed that a state university may permit the use of its facilities for religious services but argued that it is not constitutionally required to do so. White characterized the majority proposition as "plainly wrong." Just because religious worship includes speech it is not necessarily protected by the Free Speech Clause of the First Amendment. "If that were the case," White scolded, "the majority would have to uphold the university's right to offer a class entitled 'Sunday Mass.'" White maintained that using state university facilities for worship is "constitutionally indistinguishable from directly subsidizing such religious services." Because secular student groups are entitled to a subsidy does not establish that a religious group is entitled to the same subsidy according to White, "otherwise a state university that pays for basketballs for the basketball team would be required to pay for Bibles for a group like [the students]."

In general, the Court analyzes cases in which government may be establishing religion by applying a three part test:

1. Purpose Test
   Is the government's purpose to help establish a religion? In the *Widmar* case the answer is no. The purpose is merely to allow students to use school facilities.
2. Primary Effect Test
   Is the primary effect of the state's action to help advance and establish religion? The majority of the Court felt it was not. But can any arguments be made contra?
3. Excessive Governmental Entanglements
   Might the state and the religion become excessively entangled if students use university facilities in such a manner?

If the answer to any one of these tests is "yes," then the Court will hold that a violation of the First Amendment Establishment Clause has occurred.

Why would the United States Supreme Court distinguish between high school and college in these two cases? Are there any differences between the primary effects on students of high school age versus students of college age? Is there more potential for excessive governmental entanglement when religion is brought into the high school than when college students are permitted to use college facilities?

Teaching Strategies

Ask students these questions.

1. The *Widmar* opinion contains striking examples of how judges (and lawyers) use analogies to carry a point to its (il)logical extreme.
   a) Does the majority opinion require that a Mickey Mouse film festival take precedence over *Hamlet*, as Justice Stevens argues?
   b) Does providing an open forum for all student groups, including religious organizations, require the state to buy Bibles for religious groups if it buys basketballs for the university team?
2. What is the point of Justice Stevens's separate opinion if he agreed with the majority's result?
3. Note the tension between two First Amendment guarantees, freedom of speech and the prohibition against the state establishing (supporting) a religion. Can you think of other times the two might come into conflict?
4. Should there be a difference between colleges and high schools when it's a question of possible "establishment of religion"?

"We Ain't No Delinquents, We're Misunderstood!"

This term the Court had to decide a case in which the death penalty had been imposed on a juvenile. Here's a teaching strategy to introduce this case.

Johnny Jones is 15 years old. He has lived all his life in the worst section of Harlem: burned-out buildings, trash-pile playgrounds, junkies nodding on the curb, pawn shops, liquor stores and porno movies. He lives with his grandmother and six other people in a three-room apartment. His mother is dead, his father is gone. No one he knows has ever had a "regular" job—the success stories he has seen have been pimps, dope dealers, and thieves.

He dropped out of school two years ago, and last summer was arrested for armed robbery of a convenience store. Because of his record, he is being tried as an adult. How much should a court consider his background in passing judgment? If the young man hasn't had the opportunity to learn our society's standards, should we punish him at all when he violates them?

The actual case began in 1977, when Monty Lee Eddings and several friends ran away from their homes in Missouri and drove to Oklahoma. When the car they were driving was stopped by Oklahoma Highway patrolman Larry Crabtree, Eddings pulled out a shotgun and killed him. Crabtree was 43 and the father of three. Eddings, then 16 years old, was sentenced to death. But in *Eddings v. Oklahoma*, 50 L.Wk. 4161, the Supreme Court has overturned Eddings's death sentence and ordered the state court to re-sentence him, taking into account his "turbulent family history" and "severe emotional disturbance."

Justice Lewis Powell's carefully worded 5-4 majority opinion avoided the issue of whether the Constitution ever permits the execution of a minor. Instead, the Court ordered the sentencing judge to reconsider the case, including "all relevant mitigating evidence." This included the fact that Eddings suffered severe beatings by his father, that his mother was alcoholic and perhaps a prostitute, that his mental and emotional development was several years below his actual age.

The trial judge had stated that "in following the law" he could not "consider the fact of this young man's violent background." Justice Powell found this violated the Supreme Court's rule in *Lockett v. Ohio*, 438 U.S. 586 (1978), that the Eighth Amendment requires that the sentencer be allowed to consider all mitigating factors, including any aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death. Eddings's sentence had been handed down one month before *Lockett* was decided.

Despite the narrow opinion, opponents of capital punishment believe that the decision will sharply restrict capital punishment for youthful offenders. Of the almost 900 inmates presently on death row, 30 are under the age of 21. Seventeen of those awaiting capital punishment committed their crimes while under 18 years of age.

Sandra Day O'Connor, the newest member of the Court, cast the decisive vote and also wrote a separate opinion defending the majority decision and arguing against Chief Justice Warren E. Burger's dissent. "Extraordinary measures" have been used in the past to ensure that death sentences are not imposed "out of whim, passion, prejudice or mistake," O'Connor said. "No less can be required when the defendant is a minor."

Justices William H. Rehnquist, Byron R. White, and Harry A. Blackmun signed Burger's dissent, which reasserted their past view that the death penalty is a matter for legislatures to decide. Burger criticized the majority for failing to settle the legal question it had undertaken to resolve: whether the Eighth Amendment "Cruel and Unusual Punishment" Clause absolutely forbids the execution of a minor. "It can never be less than the most painful of our duties to pass on capital cases, and the more so in a case such as this one," Burger stated. "However, there comes a time in every case when a court must 'bite the bullet.'" The Chief Justice believed that the sentencing judge's oral statement that he could not consider Eddings's "violent background" was ambiguous and could just as easily mean that the judge had examined the mitigating factors and did not consider them to offset the aggravating circumstances.

The 5-4 result gives evidence of a Court hotly divided on the issue of capital punishment. In oral argument, Justice Rehnquist questioned why taxpayers should "have to foot the bill" for the defendant's confinement for life. Justice Marshall, a staunch opponent of capital punishment, retorted, "It would have been cheaper still to have shot the defendant at the time of arrest."

Twenty-four states presently require judges to consider the youth of a capital defendant as a mitigating factor in sentencing. Six other states—California, Colorado, Connecticut, Illinois, Nevada, and Texas—expressly forbid the execution of juvenile offenders.

Capital punishment has long been debated in the courts. In old England most crimes were punishable by death. The premise of the punishment was society's need for retribution and a hope that others would be deterred by fear of the death penalty. Later, when the concept of rehabilitation became popular, the prison alternative began. The hope was that by putting a person in prison, in a strict and controlled environment, he or she might "straighten out" and become a better person.

Today, many argue that rehabilitation does not work. Some of the strongest proponents of capital punishment argue that neither is serious crime deterred nor the criminal rehabilitated by prison. Opponents of the death penalty argue that: (1) two wrongs don't make a right; (2) the Eighth Amendment to the United States Constitution, the prohibition against cruel and unusual punishment, forbids imposition of the death penalty; and (3) there is always hope. Every person can change and become better—unless, of course, he has already been electrocuted, gassed, shot or hanged!

Since *Eddings* has been returned to the

On the Docket

Free Education for Illegal Alien Children?

Shrinking school budgets clash with the asserted right to a free public education in two cases which the Court will decide this term.

In *Texas v. Certain Named and Unnamed Undocumented Alien Children*, argued 50. L.Wk. 3457, an irate Court grilled a Texas assistant attorney general who defended a law that allows local school districts to charge tuition to illegal alien children or to bar them from school altogether. School districts receive no state aid to cover the cost of educating the children, who are estimated to number over 11,500. Among the questions hurled at the advocate was Justice Sandra Day O'Connor's comment that "the children themselves have a status over which they have no control. . . . Does the Texas statute punish children for something over which they have absolutely no control?" Justice John Paul Stevens asked, "They're going to be part of the community anyway. . . . So you'd rather have them uneducated than educated?" A decision is expected this spring.

Interpreter for Deaf Children?

The Court will also consider whether certain deaf children are entitled to a classroom interpreter at public expense. At issue in *Hendrick Hudson Central School District Board of Education v. Rowley* (cert. granted 50 L.Wk. 3351) is the interpretation of the federal Education for All Handicapped Children Act, requiring "a free *appropriate* public education" to all qualifying students. The school district argues that 10-year-old Amy Rowley, already in the top half of her class without an interpreter, is entitled to only a sufficient education to "enable the child to become a functioning member of society." A lower federal court, on the other hand, ruled that "appropriate" education means one which provides "an opportunity [for the student] to achieve full potential."

Boycotts Protected?

Twelve years ago the National Association for the Advancement of Colored People (NAACP) and 91 individuals were ruled to have conducted an "illegal conspiracy" in boycotting Port Gibson, Mississippi, businesses to protest the treatment of blacks by the all-white local government. The defendants were declared jointly and individually liable to pay $1.25 million to the businessmen.

Although the Mississippi Supreme Court ruled the amount of damages excessive, that court upheld the finding of liability, reasoning that the merchants had no control in granting or withholding the civil rights sought, thus making the boycott "secondary" and illegal.

The NAACP, on appeal to the Supreme Court, claims that this decision "violates the First Amendment's guarantee of freedom of association." It argues that "boycott campaigns have played an important role in the history of political protest in this country ever since American colonists refused to buy English-made goods in order to force repeal of the Stamp and Townsend Acts." The case is *NAACP v. Claiborne Hardware Co.*, 50 L.Wk. 3375.

Immunity for Nixon?

Last term, an evenly divided Court affirmed a judgment that high-ranking government officials, including the President, are entitled to only a qualified, good-faith immunity against lawsuits. At issue was a suit by a government employee who alleged that his superiors ordered an unconstitutional wiretap of his phone (*Kissinger v. Halperin*, 49 L.Wk. 4782).

Now the Court will consider the claim of A. Ernest Fitzgerald, a former civilian weapons system cost analyst, who testified to a Congressional committee about cost overruns on a transport plane. Fitzgerald claims that dismissal from his job, and attempts to block the reinstatement ordered by the Civil Service Commission, were in retaliation for his congressional testimony. Fitzgerald says Nixon and other defendants maliciously conspired to deprive him of his rights and that the former President should be personally liable for damages. Nixon contends he should be absolutely immune from personal liability for any actions taken as President.

lower court for the sentencing judge to reconsider the case in light of all mitigating evidence, what evidence might the judge want to know about?

Teaching Strategy

Role play the lower court proceeding. Appoint a judge, a prosecutor, a defense attorney, and someone to play the role of Eddings. At a sentencing the defendant has already been convicted and now is trying to convince the judge (in some states the jury) to impose a lesser sentence.

In the *Eddings* case he will be attempting to convince the judge to not reimpose the death sentence in light of the U.S. Supreme Court ruling. Have Eddings take the stand and have his lawyer ask him appropriate questions which might help convince the judge not to impose the death sentence. The prosecutor may cross examine after Eddings has responded to the defense lawyer's questions. Have the judge then impose the sentence, stating reasons for it.

Campaign Fund Rulings May Affect Elections

Before you can say "Nancy, I can see myself in your china," another election year will be upon us, accompanied by a colorful, exciting, and extremely expensive campaign. Two Court decisions this term have gone a long way toward filling campaign coffers from previously untapped sources. Analysts believe the holdings will give the Republican Party a major boost in both presidential and U.S. Senate campaigns.

In *Common Cause v. Schmitt*, 50 L.Wk. 4158, the justices' 4-4 deadlock left untouched a lower court decision which struck down a $1,000 spending limit on political action committees (PACs) in support of a presidential candidate. The lower court had held that the provision violated free speech.

The one-paragraph order gave no clues as to the Court's reasoning, and provided no breakdown of how the justices voted except to note that Justice Sandra Day O'Connor, who could have broken the deadlock, disqualified herself for undisclosed reasons. However, Federal Election Commission (FEC) records show that her husband gave two $150 contributions to the Republican State Committee of Arizona in 1980, an organization not involved in the case before the Court.

The Court's decision, because of the even split, is not a binding precedent on lower courts. Since critics of PACs have already announced their intention to continue the battle in lower courts, it is likely that the issue will reappear before the Supreme Court under a different set of facts.

Common Cause, which claimed that enormous expenditures by such groups destroyed public confidence in the election process, joined the Federal Election Commission in the unsuccessful attempt to curb 1980 spending by three PACs which contributed substantial sums to the Reagan campaign: Americans for Change, Fund for a Conservative Majority, and Americans for an Effective Presidency.

The PACs argued against the $1,000 limit on the ground that they were "independent" organizations not controlled by the candidate, and therefore could accept and spend unlimited amounts of money. This, they said, was part of their First Amendment right to free expression.

In holding that PACs could not be limited in their presidential campaign spending, the lower court ruled that the goal of removing potential corruption from the political process was insufficient to deprive PAC members of their right to exercise free speech through monetary contributions to a favorite candiate.

Getting Two Cents In . . . Twice

In addition to releasing a contribution-hungry PAC-man, the Court gave Republican candidates for the U.S. Senate a boost in *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 50 L.Wk. 4001.

The Federal Election Campaigns Act limits spending by political parties in elections for either house of Congress. National and state committees are each authorized to spend two cents per eligible voter in each Senate race. However, the National Republican Senate committee negotiated with state committees and received the power to spend the two cents per voter authorized to the state group, thus doubling the national group's spending power for each Senate seat.

Democrats contended that the arrangement, the largest single source of funds for Republican candidates in 1980, tipped the scales in tight Senate races in New York, Florida, Pennsylvania, North Carolina, and Georgia, helping the GOP claim majority control of the Senate for the first time in a quarter-century.

Justice Byron White's opinion concluded that congressional debate on the campaign finance law "did not differentiate between the state and national branches of the party unit." Thus the national committee was free to act as the agent of state party committees in making expenditures on behalf of the candidate.

Court Okays Unlimited Ballot Measure Contributions

In a final case concerning political contributions, the Court ruled that individuals can't be limited to the amount of money they contribute to organizations supporting or opposing ballot proposals (*Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 50 L.Wk. 4071).

Chief Justice Burger spoke for four other justices in striking down a $250 limit that Berkeley imposed on individual gifts to referendum committees. The Court said that the rights of free speech and association, as protected by the First Amendment, "overlap and blend" and that "to limit the right of association places an impermissible restraint on the right of expression." The Court went on to note that freedom of association is "diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'"

The Chief Justice condemned the ordinance as violative of freedom of association and expression because an affluent person acting alone could spend without limit to advocate his views on a ballot measure, but restrictions were placed on individuals combining their own relatively scarce resources. The Court rejected the conclusion of the lower court that the potential for corruption justifies limitations on referendums, initiatives, and other ballot measures.

The three political contribution cases will provide guidance to the lower courts, which have been struggling to apply the Court's landmark decision of *Buckley v. Valeo*, (1976).

In *Buckley*, the Court upheld statutes which limit contributions to those candidates for federal office who accept public funds. The Court balanced the First Amendment rights of those who wished to contribute to political causes against the public's interest in avoiding potential corruption. It declared that the First Amendment did not permit limiting expenditures by candidates on their own behalf, or by individuals acting outside the campaign, but it did limit contributions by others directly to the candidate's campaign. Since then, lower courts have reached inconsistent results in determining whether PAC spending should be limited, and whether restrictions on candidate contributions apply to ballot measures. □

Open Doors

(Continued from page 15)

principal, school board members, school legal counsel, and/or representatives of organizations concerned with student rights to find out how their positions compare with others. Students could reassess their position and note if they have been changed by their contact with new ideas.

Enrichment Activities

Assign your students to write a story about someone their age who becomes involved in a problem over privacy. Have them describe a few ways the conflict could be handled. Then ask them to tell how they think it should have been handled.

As a class project, make a list of the ways students in the class can respect the privacy of others. Then make a list of every student's rights to privacy.

Invite a police officer, judge, or lawmaker to visit your class. Ask that person to describe the kind of privacy conflicts he or she has faced on the job. Ask the person to explain how the conflicts were settled and why they were settled in those ways.

Strategy

6.

Moot Court Anyone?

The following case is excerpted from LFS high school multimedia materials (Privacy, Level VI). It could be used in a mock appeals court, the procedures for which are outlined in the box.

NAACP v. Alabama (1958). Throughout the 1950s, the National Association for the Advancement of Colored People (NAACP) worked in Alabama to promote civil rights laws and to improve the lot of black people within the state. Among other things, the NAACP sought money contributions, assisted black students in gaining entrance to the state university, and supported boycotts of segregated bus lines.

At this time in Alabama, there was a law which said that all corporations had to register with the Secretary of State. As part of the registration process, the NAACP would have had to supply the state with a list of its members. Though the NAACP produced a large portion of its records for state inspection, it refused to supply the association's membership lists. The state said that, unless the NAACP supplied these lists as required by state law, it could no longer operate in Alabama.

The NAACP claimed that it should be able to protect the privacy of its members and should not be required to disclose their names. It argued that in the past, every time the membership lists were made public, the members were subject to beatings, loss of employment, and public hostility.

The state argued that all other corporations had to submit lists of their shareholders and that this information was necessary to make sure that certain business regulations were being complied with.

As teams prepare their arguments, have them consider the following questions:

- Who claimed a right to keep something secret in this case? Students should identify the NAACP as the institution that had a claim of secrecy in this case.
- What object of secrecy was involved? Students should identify the NAACP's membership lists as the object.
- What were the purposes and values underlying the claim to secrecy? Students should be helped to understand that the NAACP believed that the disclosure of the membership lists would be an invasion of their members' right to privacy and might leave the members open to the possibility of beatings, loss of employment, and public hostility.
- Who opposed the claim of secrecy? Students should recall that the government of Alabama opposed the claim.
- What actions by the state of Alabama were seen by the NAACP as an invasion of its members' privacy? Students should recall that the state had demanded a list of all members as the means of intrusion.
- Why did the state government of Alabama want the names of NAACP's members? Students should explain that state government officials might have thought that the people of the state have the right to know who belongs to organizations such as the NAACP and that the state has the responsibility of enforcing business regulations which require that certain information about corporations doing business in Alabama be made public.
- Are any other considerations relevant to this conflict, such as consent by the claimant to the invasion of his or her privacy; Fourth Amendment rights; obligations arising out of confidential relationships; obligations arising out of contracts; other legal, moral, or political obligations to reveal or refuse to reveal information?
- What might be some of the consequences of recognizing the privacy of the NAACP's members by not requiring the NAACP to disclose its membership lists? When listing responses on the board, students might identify the following consequences:
    a. NAACP workers would be free to continue their work for civil rights in the state of Alabama.
    b. NAACP members might be better protected against the possible loss of their jobs, against beatings, and against fear or public hostility.
    c. The state of Alabama would not be able to enforce its registration law.
    d. The state of Alabama might be less likely to hinder the actions of civil rights workers in Alabama.
    e. More people might join the NAACP because they would feel that they would be better protected from public hostility.
    f. The people of Alabama would not know who was in the NAACP.
    g. The state government would not know who was in the NAACP.
    h. The state of Alabama might be less able to monitor the activities of corporations within the state if other corporations also claimed the right not to submit information required by law.
- Which of these consequences would you classify as benefits? Which do you think are costs? Why? Students should classify the consequences of privacy as benefits or costs. Students also should be prepared to explain the reasons for the classification. In classifying the consequences listed above, a,b,d, and e probably would be seen by students as benefits, while the rest probably would be seen as costs.

Once the moot court case is completed, you could inform the students of the actual court ruling in this case and have them compare the court's opinion with their own. In the case of the *NAACP v. Alabama*, 357 U.S. 449 (1958), the Supreme Court recognized for the first time that members of unpopular organizations did have a right to refuse to make public disclosure of their affiliation with that organization.

Other activities that could be used in the place of a moot court are a debate, a legislative hearing to decide if new laws are needed to resolve similar privacy conflicts, a legislative debate on proposed legislation, or a panel discussion in which lawyers, judges, and representatives of civic organizations might present their positions on cases of similar privacy conflicts. Guidelines for conducting these activities are found in *Teacher Training Program: Leader's Handbook* (LFS).

Enrichment Activities

The following activities can enrich the discussion of the above case.

1. Have students keep a record of the various privacy conflicts they observe on the television programs they watch and in the books they read. Have them apply the procedure they have learned to those conflicts and decide how they should be resolved.
2. Invite your school's principal to visit your class to discuss the rights and responsibilities of students with respect to privacy.
3. Have students go to the library and look through issues of newspapers and magazines to discover what privacy conflicts have been in the news during the past few months. They can use the procedure they have learned to decide how these conflicts should be resolved. They can then report their findings to the class.
4. Invite a lawyer or judge to visit your class to discuss how landmark court decisions have affected the privacy rights of individual citizens.
5. Have students select a law which significantly affects individual privacy (The Fourth or Fifth Amendments, the Freedom of Information Act, laws pertaining to credit information, etc.) and prepare a report describing its implications for citizens. ☐

Guidelines for Conducting a Moot Court

A moot court is patterned after an appeals court or Supreme Court hearing. The court, composed of a panel of judges, is asked to rule on a lower court's decision. No witnesses are called, nor are the basic facts in a case disputed. The idea isn't to retry the original case, but rather to focus on the laws and procedures used in the original case. Arguments are presented on the application of a law, the constitutionality of a law, or the fairness of the previous court's procedures. In many ways the moot court is like a debate, with each side presenting arguments for the judges' consideration.

How to Proceed

1. Select a case (actual or hypothetical) for appeal, raising questions for the concept being studied. Prepare a fact situation which includes a summary of essential evidence from the trial and the court decision to be appealed. (Attorneys may be helpful in selecting an appropriate case and writing the fact situation; a number of privacy cases are discussed in other articles in this issue.)
2. Divide the class into groups of six to eight participants; divide each group into three to four member litigant teams. One team will have the responsibility of arguing against the ruling of a lower court. The other team will present arguments in favor of the lower court's decision.
3. Give each participant a copy of "The Hearing Itself," which follows, and the fact situation.
4. Provide time to prepare oral arguments. Each litigant team should choose at least two people to present its team's arguments before the court.
5. Assign attorneys to three-member judicial panels presiding over the hearings. If possible, teams should present their arguments before attorneys who did not serve their teams as resource persons.

The Hearing Itself

Participants should consider that all of the details presented in the fact situation have been established in a trial court. Teams may not argue that any of those facts are inaccurate. Rather, the focus is on the law—whether it was applied fairly, whether a statute is constitutional, etc. Arguments do not need to be confined to existing legal precedents or recognized legal theories. Any argument thought to be persuasive from a philosophical or practical standpoint can be made. Teams may rely on principles founded on the United States Constitution.

At least two members of each litigant team should present the team's oral arguments before the three-member court of appeals. Teams may have as many spokespersons as they wish. The team arguing against the lower court decision presents its arguments first, followed by the team seeking to uphold the decision.

Litigant teams' oral arguments are limited to a specific amount of time. The court has the discretion to grant extra time, but should not normally exercise this privilege. Any extensions of the time should be for a stated number of minutes. Teams may reserve a part of their total argument time for rebuttal argument. Rebuttal should be used to counter opponents' arguments, not to raise new issues. A member of the opposing team should serve as the presenting team's time advisor during the arguments. The following intervals showing the number of minutes left may be used by the time advisor: 10, 5, 4, 3, 2, 1, ½. Time advisors should hold up cards for the team's attention and for the court to see. If arguments have not been completed, spokespersons must end their presentation anyway, when the allotted time is up, unless the presiding judge grants an extension of time.

Teams should anticipate active questioning from the judges *during* oral presentations. Spokespersons representing each litigant team are expected to respond to questions and concerns raised by the judges immediately upon being challenged. Discussions with the judges in this manner will not extend the team's time unless the court permits an extension of time for the team's scheduled presentation.

After the arguments for both teams have been heard by the court, the panel of judges should deliberate and reach a decision. Deliberation of the case may take place in private or may be conducted before the class.

After the decision has been announced, class participants and attorneys should discuss the decision, the issues raised, and moot court procedures.

Government

(Continued from page 35)

and that they had done nothing illegal. Both statements were true. It was what they were—identifiably Asiatic ethnics, associated in the popular mind with an enemy during wartime—that hurt.)

Can it be made to work better for the have-nots? Sometimes. Ask members of the NAACP or of NOW. They will tell you that citizen participation, sometimes through legal action, sometimes through legal resistance, can eventually dent the system. An unfair rule of law, a discriminatory rule of law, can be changed when the public is aroused and its conscience sufficiently touched.

Uneven application of the law has hurt constitutionalism's image in the last several decades. Further, as youthful critics of the 1960s reminded us, a limited government is not supposed to be a government that limits its largesse, and its protection, to certain groups. A government which proceeds only by specified rules loses its credibility when those rules are only applied to certain favored groups. Such developments undermine respect for constitutionalism generally. So do such factors as:

- The fact that almost every nation today has a constitution and claims to be constitutionally structured, including repressive regimes in South Africa, the Soviet Union, Libya, and Iran;
- The belief that limited constitutional government cannot provide solutions to the modern problems which plague us;
- The criticism from the other end of the spectrum, contending that liberal constitutionalism, being negative and secular, prevents the government from participating in the moral life of the citizen, prevents the government from assisting in the pursuit of virtue, prevents the government from functioning as a civic educator. This, they say, leaves us with an amoral society, in which self-centered permissiveness is the accepted pattern.

Such critics, I would argue, do not understand that American constitutionalism has never been infused with the concept of government as an activist moral agent—as God's instrument to create the City of God on earth. And this, in turn, is because in a pluralistic society, governmental imposition of morality all too often means one group trying to get the government to enforce its brand of moral behavior. (Thus, if Jerry Falwell is really the would-be American Ayatollah, he needs a good history lesson, with special units on the Protestant Reformation and the reasons Americans deliberately rejected the medieval constitutional model from the outset.)

Constitutionalism is under fire today, but I would like to think it is not in serious danger. However, if it is indeed to be protected from the furies of Ancient Greece and man's irrational nature, we are going to have to explain to young people not only why they have an important role, but how that role is to be played. Can the schools get young people to accept some level of public responsibility? Can educators help young people see government not as they but as we; not as them but as us? Here we all have a challenge to accept. But with the enhanced emphasis which the bicentennials of the Constitution and the Bill of Rights will bring, there is no more opportune time to push ahead with the task. □

Child Abuse

(Continued from page 27)

is well-intended, the goals are not easily reached.

In practice, it's extremely difficult to investigate a case and gather enough facts to establish abuse or neglect. Once an incident has been reported, the family will often move and the case is dropped. This frequently happens when the family has been in a similar position before and wants to avoid legal involvements.

There are other pitfalls for the investigative team. Abused and neglected children are often threatened by their parents. Children will lie because they are afraid of repercussions or because they are afraid of losing their family. Most children don't want to be placed out of the home and don't want to feel guilty about causing legal problems for their parents. Threatened with these alternatives, children end up denying the problem and fabricating another story. When this happens, the law is helpless.

There are many other obstacles. When parents are confronted with an incident, they might easily claim that the child was only being subjected to legitimate punishment. If no permanent damage were inflicted, and if there were no previous record, not much can be done. After all, the question of reasonable punishment is closely tied to the values of the community. If the community approves of corporal punishment, and if physical chastisement is the norm, then it may be hard to prove brutality except in the most flagrant cases.

Once a case has been investigated, some parents will agree to an intervention plan out of remorse or the desire to avoid further legal action. But if parents are not cooperative, the difficulties of proving a case makes legal pressure hard to apply.

Another problem is that services are poorly funded. If there are several cases to be investigated, they are usually prioritized by how they sound over the phone—a risky proposition. And the amount of time that can be spent investigating a case is limited by the number of cases needing attention.

Keeping the Family Together

What all this suggests is that it's very hard to establish that a child is abused and/or neglected. Intervention is a chancy proposition, but the courts won't take children from the home unless they're convinced that nothing else will work.

Since the passing of the 1973, 1975, and 1977 statutes, some precedent-setting cases in Colorado have required courts to interpret these laws. In *The People in the Interest of M.A.L.* (1976), the court found that bruises which resulted from reasonable corporal punishment (belt strap) did not constitute "child abuse." Even though a nonaccidental injury resulted, the "reasonableness" of the punishment was the question decided upon.

In *The People in the Interest of M.M.* (a 1974 case where M.M. suffered from malnutrition and a linear skull fracture), the court's view was "that parental rights are personal between each parent and child." It held that children should be taken away from parents "only where there is a history of severe and continuous neglect . . . and a substantial probability of future deprivation." The court failed to make these required findings, so the parents' rights were sustained.

In *The People in the Interest of M.B.* (1975), the parents appealed when the district court found the home injurious to the welfare of the children because of evidence of battering and physical and emotional deprivation causing stunted growth. The appeals court reversed because the district court had relied on evidence relating to the past, rather than the present or "the forseeable future." Here the court felt that the parents had the right to keep the children because there was the chance that they would change.

As these cases show, the courts' interpretation of the Colorado Children's Code has been very supportive of the family unit. It is very difficult to establish facts that will cause the court to take children from parents.

In Jefferson County, for example, teachers and other public school officials reported 811 instances of suspected child abuse in 1979-80. The district attorney acted on only 150 of these, and only about 30 parents lost custody of their children.

Although schools are mandated to report suspected abuse or neglect, teachers are often reluctant to get involved. One junior high counselor summarized a common attitude among educators by saying, "What good does it do to report it? Nothing will be done anyway and it will only make things worse for the child. Sometimes it's just best to do what you can at school."

Some teachers are afraid to report a parent. One teacher commented, "The parent can easily figure out who made the report. They'll never work with you after that and they're apt to try and get even."

Teachers also reflect the social hesitancy to usurp or question the family structure. Some teachers simply feel, "It is none of my business how the parent disciplines." This attitude is compatible with the pressure being put on schools to concern themselves only with teaching academics and not to involve the school with social concerns. But other educators would like to see the school have more involvement with families in need. One teacher states, "It's so frustrating. I want to help so much and it seems like there is so little that can be done."

Teachers Should Act

Should teachers get involved? Can they accomplish anything, especially given the pro-family stance of the law? The answer

Another View on Privacy and Child Abuse

Frank J. Kopecky

While I agree with many of the points raised by Beverly Cole, I disagree with her conclusion that the legal system has not been responsive to child abuse. Furthermore, I disagree with the general implication running throughout her article that there's something improper about the bias in the law favoring family privacy.

The law reflects the value that society as a whole places on the family. The right of parents to raise children without interference from the state is the foundation on which most of the family law in this country is built. The United States Supreme Court has ruled that family privacy is a fundamental freedom protected by the Constitution. To discuss child abuse without analyzing the importance of family privacy only presents one side of the issue. The other box accompanying this article offers some suggestions for teachers who wish to present family privacy issues while discussing child abuse with their classes.

Striking a Balance

Every state has child abuse laws which encourage the reporting of abuse and protect persons making the reports. Teachers who report abuse in good faith cannot be sued by parents for slander or wrongful interference in the family relationship. These child abuse laws represent careful attempts by legislatures to balance two very important and often conflicting values: (1) the need for society to protect children from injury and (2) the right of parents to raise children without interference from the government (the right of family privacy). Striking a balance between these two values in difficult child abuse cases poses a dilemma. Family privacy should not be interfered with unless there is some evidence of abuse, but evidence of abuse often cannot be obtained without some interference with family privacy. Child abuse laws resolve this dilemma by authorizing a limited intrusion into family privacy.

In many states, public officials can investigate charges of abuse or neglect on the mere suspicion that the child is in danger. Child abuse laws authorize an investigation on a significantly lesser amount of knowledge than police officers are required to have to make most searches.

Ordinarily, individuals have the right to be free from state interference unless a state official has probable cause to believe that a wrong is being committed. The probable cause standard requires some specific evidence that a wrong has occurred. The lower standard applicable in child abuse cases is justified on the theory that children are particularly vulnerable to harm. The lesser standard [illegible] because child abuse [illegible] place in the privacy of a [illegible] it difficult to get enough [illegible] meet the higher probable [illegible] dard.

The purpose of the investigation is to prevent abuse, not to arrest parents. That's why investigations are generally conducted by social workers [illegible] enforcement officers specializing in child protection. Unless serious injury to the child has been alleged or there is probable cause to believe [illegible] has been committed, the [illegible] ducting the search is limited to inquiring about the abuse and [illegible] family's cooperation. Further legal action can be taken only if probable cause can be established.

So child abuse laws do encourage reporting and do lower the level of evidence needed to justify an investigation, but they also take the family's right to privacy into consideration limiting the investigation.

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to both questions is yes.

First of all, it's appropriate that teachers become involved. The parent-child relationship is integrally associated with the school-child relationship. A child's ability to learn and become socially productive is directly related to her/his physical and emotional status. The children that sit in our classrooms everyday need educators to recognize problems and to become advocates to help solve them.

Second, much could be done if every school and every educator would make a consistent and strong commitment to stop child abuse and neglect. Teachers will have an impact if they're trained to recognize the symptoms of abuse and neglect and if they learn how to keep factual records on children they suspect are abused and neglected. And, of course, they have to learn that it's important to report every case. Schools must work with local child abuse and neglect centers as a team.

Educators must not despair or become cynical because of the frustrations they encounter. Instead, they need to be actively involved in developing an environment both within the school and the community where families and children can find the help they need. Educators don't have to passively reflect community values; they can help shape them.

Statistics unquestionably declare a disease exists among many families in this society—child maltreatment. Laws and customs sanction the use of physical force against children, and there exist no acceptable standards for minimal care in rearing children.

Those children who are subjected to abnormal rearing require active allies if they are to survive and thrive physically and emotionally. Schools have a natural place in the lives of children and a vested interest in them. For educators to ignore the problem simply contributes to the perpetuation of child abuse and neglect.

Educators are already obligated by law to be involved. The school's relationship to the family gives educators the chance to make a real difference in the lives of abused and neglected children. □

Borderline Cases

It would be a mistake to conclude that nothing has happened because no legal action is taken. In most states, all reports of abuse or neglect must be investigated within one or two days. Often the investigators find that abuse has not taken place, and the case is closed without further action. Does that mean that the investigations are slipshod? Not necessarily. It may just mean that many reports of abuse are wrong.

States are trying to encourage more reports of abuse, which means that they'll inevitably have to investigate lots of borderline cases. Illinois, for example, recently enacted a child abuse law establishing a statewide toll-free number to call with reports of abuse. This number is staffed 24 hours a day. The Illinois law requires persons to report abuse, and a great deal of publicity was generated within the state to encourage reporting. As one may expect, reporting of abuse has increased significantly. But almost one half of these reports are closed following the initial investigation because there is not enough evidence to establish that abuse exists.

Many invalid reports are made by people who fear that they will break the child abuse laws if they do not report. These laws encourage people to report if they're in doubt. And some reports are generated out of spite by neighbors, coworkers, and former spouses.

Most invalid reports, however, come from well-meaning persons who have a higher standard of child care than the minimal standard required by the law. Evidently, the people in this category are willing to set aside our deeply held beliefs in family privacy in order to protect children.

Even if investigators find that the child is abused, they usually don't pursue court action. The goal of the child abuse laws is not to punish parents, but to provide supportive services to help the family function better. The typical abuser is not truly sadistic and can be helped by relatively inexpensive, voluntary programs. Experience has shown that many persons who abuse their children are insecure and have unrealistic expectations of child care. Many abusers are isolated and lonely. They can be helped by programs which provide an outlet for their frustrations, increase their child care skills, and separate them from their children for a few hours a day through day care.

There is no point in going to court in most abuse cases, since the family is cooperative. Court petitions are only filed if close supervision is needed to protect the child or if the situation warrants removing the child from home. This is a drastic step which is undertaken only in extreme situations.

Home Is Where . . .

The history of caring for children outside of their own home has been dismal. State institutions are always being criticized for improper care. The current trend is to find permanent foster homes for parentless children, since institutional care, even good institutional care, is a poor substitute for a family. Raising children in institutions is very costly—financially, for the state, and emotionally, for the children. Children need attention, love, and sense of stability in order to develop properly and institutions can't deliver these intangible needs, no matter how much funding they receive.

Although foster care is the preferred option for children currently in institutions, placements with foster parents aren't the only choice for abused children. Their own home is far from perfect, but removing these children is not a good solution either. Children who are taken from their parents often feel guilty. Visits with parents are artificial and difficult. Anguishing as it is, we must choose among less than perfect alternatives. Leaving the child in the home and working with the parents generally seems best.

The goal is to protect the child *and* to support the family. This is done not because of some abstract principle called family privacy, but because the best place to raise children is in the family. The statistics on child abuse and neglect must be kept in perspective—only one American child in a hundred is abused and neglected. Most families are caring for children adequately. The presumption in favor of family privacy, reflected in the law, is clearly justified in the vast majority of the cases.

One Way to Handle a Touchy Topic

Teachers who discuss child abuse in their classrooms must emphasize that every child abuse case raises the conflicting issues of protecting children and preserving family privacy. A classroom exercise using the recent case of *Rush v. Obledo*, 517 F. Supp. 905 (1981), can illustrate these competing values. That case involved the inspection of licensed day care homes. The dilemma of preserving family privacy or protecting children's welfare can be examined in a context other than child abuse, allowing the emotional issues of injured children to be avoided. After discussing the *Rush* case, the class can discuss these same issues in a child abuse context.

The facts of *Rush* are relatively simple. Mrs. Rush was using her family home as a day care center. She was caring for her own children plus children from the neighborhood. At no time were there more than six children in her care, including her own. The State of California licensed her home. State law authorized inspections of day care centers without notice any time during business hours to determine if licensing standards were being met. Mrs. Rush objected to this inspection and refused to allow the inspectors into her home.

The issue in *Rush* was whether the Fourth Amendment, which guarantees citizens the right to be free from unreasonable search, prohibits such inspections without a warrant. The Fourth Amendment is designed to protect privacy; generally, it forbids searches without a warrant. A warrant is an order of a judge or some other impartial person who establishes that there is probable cause justifying the search before the search can be undertaken.

Arguing Pro and Con

One way to discuss *Rush v. Obledo* would be to divide the class into three groups. One group would act as attorneys for the state and present arguments in favor of allowing the inspection. The second group would develop arguments for Mrs. Rush, while the third group would act as judges.

Those students representing the state would develop the following arguments:

1. The state has the responsibility to protect children. Children could be subject to health and safety hazards without regulation of day care homes.
2. The state is already licensing day care homes. By licensing, the state is certifying that the homes meet basic standards. The inspection process is therefore needed to enforce and give credibility to the licensing requirement.
3. The Fourth Amendment prohibits unreasonable search, but the routine inspection authorized by the state is not a search and certainly is not unreasonable. Inspections are made in a regular order so that one particular home is not singled out for inspection. Furthermore the inspection takes place during regular business hours and only in those parts of the home which are used for day care.
4. A warrant requirement would just add another step in the enforcement process. If notice to the business were required before the issuance of a warrant, the surprise element would be lost.

Students arguing on behalf of Mrs. Rush and other day care homes would counter the arguments of the state in the following manner.

1. The Fourth Amendment is designed to keep government agents out of private homes so that citizens can have a sense of security and privacy. It is designed to guarantee that a person's home is inviolable and that no one shall enter without permission.
2. The fact that the home is being used for a business does not lessen the privacy interest being protected. The U.S. Supreme Court has already decided that businesses are protected by the Fourth Amendment. In *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978), the Court upheld the right of a businessman to refuse a warrantless inspection by safety inspectors.
3. The state could protect children and enforce its licensing laws by less intrusive methods than unannounced inspections. For example, as the state has done with child abuse laws, it could encourage the reporting of violations of laws and inspect only upon notice of a violation.
4. Getting a warrant before an impartial decision maker would not be costly or time-consuming. Warrants are often issued without the other side being notified or being present. This type of *ex parte* hearing would not eliminate surprise inspections.

The court in the *Rush* case heard all of these arguments. It balanced the state's interest in protecting children against Mrs. Rush's interest in privacy, finally declaring unconstitutional the law authorizing warrantless inspections of day care centers operating out of private homes. The court was influenced in its decision by the U.S. Supreme Court's ruling in *Marshall v. Barlows.*

It is interesting to speculate how the Supreme Court would rule on *Rush* if it were appealed. The *Rush* court did not mention the U.S. Supreme Court case of *Wyman v. James*, 400 U.S. 309 (1971). In the *Wyman* case the Supreme Court ruled that caseworkers could make warrantless, routine inspections of the homes of persons receiving public aid. The Court reasoned that since these inspections were announced and conducted at reasonable hours, they were not unreasonable searches when balanced against the state's need to protect children who are receiving assistance. Would the Supreme Court follow the precedent established in *Marshall v. Barlows* or the one in *Wyman v. James*?

The class discussion may be brought back to child abuse by changing the facts of the *Rush* case slightly. The class could be asked if inspectors could inspect the Rush home if they had received a report that a child had been injured or abused in the home. Or the facts could be changed by having Mrs. Rush care only for her own children, making the issues similar to the typical child abuse situation.

In a child abuse case, representatives of the state are authorized to go to the home of the child, knock on the door, and seek to obtain an interview. The crucial question, which has not been resolved in most states, is whether the representative who has only a suspicion of abuse can enter the home without permission to examine the child. Ask the class whether the state should have that right. F.J.K.

All-Seeing Media

(Continued from page 19)

Although the *Dietemann* court acknowledged the importance of news-gathering, it said that the First Amendment "is not a license to trespass, to steal, or to intrude by electronic means" into a person's home or office, even if the press has reason to suspect that person of committing a crime.

The protection against intrusion does, however, have limits. The law follows the common-sense rule that someone who allows another person to intrude on his privacy cannot later complain of that intrusion. This seemingly obvious rule can, however, prove difficult to apply. For example, consider the recent case of *McCall v. Courier-Journal* (6 Media Law Reporter 1112, Kentucky Court of Appeals, 1980).

Reporters for the *Louisville Times* were told by an alleged drug dealer that a local attorney had offered to fix her case for $10,000. The reporters arranged for their informant to return to the lawyer's office carrying a concealed tape recorder. The attorney apparently suspected that he was being taped, for he asked her if she was carrying a tape recorder. She denied that she was. The attorney thereupon continued with the meeting, during which he rejected suggestions that the case could be fixed.

Following the meeting, the attorney sued the *Times* for invasion of privacy. Although this case appears similar to the *Dietemann* case, a court dismissed the claim. It ruled that once the attorney suspected that he was being recorded, he should have ended the discussion. Because he did not, the court said that he had in effect consented to being recorded. On appeal, the Kentucky Supreme Court decided the case on other grounds without reaching this question (7 Media Law Reporter, 2118).

The case of *Pearson v. Dodd*, 410 F. 2d 701 (1969), demonstrates another limit on the right to recover for intrusion. Well-known columnists Drew Pearson and Jack Anderson wrote a series of six columns exposing the alleged misdeeds of Senator Thomas Dodd of Connecticut. The articles were based in part on information given the columnists by members of Dodd's staff, who had secretly copied documents from his files.

Dodd sued Pearson and Anderson, but not his former employees. The court tossed out Dodd's intrusion claim because, although Pearson and Anderson knew that the documents had been removed and copied without authorization, they did not assist or participate in those activities. According to the court, the columnists were in the same position as anyone who listens when approached by an eavesdropper eager to share a story.

There's another interesting aspect of the case. The columnists' publication of the information was irrelevant to the intrusion claim. Intrusion, unlike the other privacy torts, is a wrong *even without publication.* Publication is also irrelevant to the question of how the information was obtained. If the information was acquired lawfully—as in the Dodd case—it doesn't matter if it was eventually published or not.

But publication may violate some other aspect of the right of privacy. It cannot do so when the information relates to a matter of public interest. Surely the public has the right to know about the performance of a U.S. Senator, for example. But when information is not of public concern, you may be able to successfully sue the media for disclosure of private facts.

Private Facts

Although the disclosure of private facts was the focus of Warren and Brandeis's concern, it has become perhaps the narrowest of the four branches of the right of privacy. This is due, in part, to society's changing attitudes about what revelations can be considered so highly offensive as to, in the Supreme Court's words, "outrage the community's notions of decency." In 1890, Warren and Brandeis said that the press should not be free to discuss "the private life, habits, acts, and relations of an individual." In 1976, in the case of *Virgil v. Sports Illustrated,* 424 F. Supp. 1286 (1976), a court found nothing improper in a report that a champion body surfer put out cigarettes in his mouth, dove off stairs to impress women, hurt himself in order to collect unemployment, and had fought in gang fights as a youngster.

Since the standard for determining whether the material is offensive is the standard of the community—as determined through what the hypothetical "reasonable man" would think—it is hard to win such suits in as open a society as ours.

Equally important in limiting private facts claims has been the First Amendment protection of the press. Under the law of defamation (libel and slander), truth is generally considered a complete defense. And, the private facts branch of the law applies *only* to claims based on truthful but embarrassing disclosures. Is there any realistic chance, then, for a successful suit? Some legal scholars have suggested that a First Amendment privilege to print the truth may someday entirely swallow up the private facts claim. Though that day has not yet come, the First Amendment narrowly limits the

"Great news, Mr. Tutor, according to our diagnosis, the pain in your chest is not from cigarette smoking!"

kind of true report that will support a private facts claim, even if the disclosure is highly offensive.

There's yet another important limitation. No private facts claim exists when information is already public, no matter how much additional publicity the new disclosure causes. The case of *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (1979), demonstrates the scope of this rule. Robbin Howard sued because of the newspaper's disclosure of her involuntary sterilization in an Iowa county home. But the court decided against her because the facts were found to have already been in "the public record." The governor of Iowa, in response to complaints about the home where Howard had been confined, had created a file that included documentation of the sterilization. Under Iowa's Freedom of Information Act, any documents "of or belonging to" the state were public records unless they fell within certain exceptions that did not apply in Howard's case. Therefore, Howard had no right to prevent further publication of the information.

The United States Supreme Court reached a similar conclusion in the case of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In that case, the father of a seventeen-year-old who had been raped and murdered sued the owner of a television station that broadcast the victim's name. Recovery was denied because the station had obtained the name from open court records.

The Court explained at length the reason for this seemingly harsh rule. Most persons in our society rely on the press to inform them of the workings of government. Therefore, the freedom of the press to publish information—that freedom guaranteed by the First Amendment—"of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." When our representatives in government place information in the public record, they are presumed to have decided that the public interest is being served. A rule that made public records generally available but prohibited their publication when they offended the sensibilities of "the supposed reasonable man . . . would invite timidity and self-censorship and very likely lead to the suppression of many items . . . that should be made available to the public." So the individual's right of privacy must give way to the interests of society as a whole.

This same reasoning applies to disclosure of previously nonpublic matters, as long as they are of public interest. Courts have applied this defense broadly, not just to news and commentary on public events, but to all issues about which information is "needed or appropriate" to help persons deal with all facets of their lives. For example, the information in the *Howard* case fell within this, as well as the public record, exception. There was no dispute that the sterilization itself was of public interest, since it was an example of abuses in the operation of a public facility. But Howard's lawyers argued that disclosure of her identity was improper. The court disagreed, saying that although inclusion of her name may not have been necessary, it made the report more believable and, by personalizing the article, added to its impact.

The media can lawfully report the name of a rape victim, since the information is part of the open court record and is already public.

These broad constitutional protections, combined with the restraint and good judgment of most—although obviously not all—of the media, result in a very limited number of successful private facts claims. When, however, the information disclosed is not merely embarrassing but also untrue, a different set of rules applies.

False Light

When a published report contains false statements, the offended person usually turns to the law of defamation for legal protection. But what about a report that is not defamatory but is embarrassing? The law of defamation won't help, since it protects only against injury to one's reputation. But a "false light" claim may work if an untrue statement is not defamatory but merely embarrassing. Because the line between defamation and being portrayed in a "false light" is not always clear, one lawsuit may contain claims for both. The case of *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (1967), is a good example, however, of the circumstances that can give rise to a false light claim but not one for libel.

Warren Spahn, a well-known baseball pitcher, found himself the subject of an unauthorized biography aimed at young readers. The book treated Spahn very favorably, but it included numerous fictitious episodes. This fictionalization went beyond the use of imaginary dialogue, based on actual events, that might be justified to liven up a book and keep a youngster's attention. Instead, the author created entire untrue chapters of Spahn's life, such as the claim that he had been a war hero who was awarded the Bronze Star.

Spahn sued the author and the publisher under a New York statute which, although not using the term false light, allows essentially the same kind of claim. The appellate court upheld an award of $10,000. While the favorable nature of the book was considered relevant in limiting the amount of damages, it did not protect the defendants from all liability. As one judge observed, "one may have strong feelings about being portrayed in any exaggerated light," since even favorable light "may make one appear more ridiculous than a factual one, at least to those who know enough of the truth."

In false light claims against the media, as in private facts and defamation claims, the media may be able to base its defense on the First Amendment. A newspaper or TV station cannot be held liable concerning a matter of public interest unless it "had knowledge or acted in reckless disregard" of the falsity of the report. Although the scope of this test is not crystal-clear to courts and lawyers, much less to nonlawyers, two Supreme Court decisions provide some guidance.

Three escaped convicts held James Hill, his wife and five children hostage for nineteen hours in their home in the suburbs of Philadelphia. The family was released unharmed. A novel was published the following year depicting a similar experience suffered by a family of four. The fictional convicts, however, unlike their real-life counterparts, treated their hostages violently.

Two years later, a play based on the novel opened on Broadway. *Life* magazine reviewed the play, but erroneously described it as a reenactment of the Hills' actual experience. The article also included pictures, taken at the Hills' former house, of scenes from the play showing a boy being roughed up by one of the convicts and a girl biting a convict's hand to make him drop his gun.

After Hill won a $75,000 judgment against the magazine's publisher for its false portrayal of his family's experience, the case went to the Supreme Court under the name of *Time, Inc. v. Hill*. As in the *Cox Broadcasting* case discussed previously, the Court asked whether the First Amendment protected such journalistic errors. *The Court began by reviewing* the importance of a free press in providing information about all aspects of life, including entertainment as well as public affairs. The Court recognized the impossibility of verifying to a certainty every statement about a person. If the media were held to such an absolute standard, or even a standard that punished errors that were merely negligent, the resulting over-cautiousness would drastically reduce the flow of accurate as well as inaccurate information. Thus, as the Court said on another occasion, "The First Amendment requires that we protect some falsehood in order to protect speech that matters." On the other hand, the Court saw no reason to protect the press against "calculated falsehood," a statement that one knew or should have known was untrue.

Upon reviewing the evidence, the Supreme Court concluded that it was unclear whether this standard had been satisfied. There was testimony that *Life*'s entertainment editor knew the play was at least somewhat fictionalized and that his files contained news clippings describing the actual Hill incident as nonviolent. On the other hand, there was testimony that the play's author arranged to have the former Hill home made available for the picture-taking and that a free-lance photographer who knew the author had told the editor that the play was substantially connected to the incident. If the jury had been properly instructed as to the law, it would have been free to weigh the evidence and decide either way. Because, however, the trial judge's instructions had indicated that the jury need only find that the article was untrue, the award was set aside and the case sent back for retrial. The case eventually was settled out of court.

The later case of *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), was more clear-cut. When a bridge in West Virginia collapsed, killing 43 people, a Cleveland newspaper carried a prize-winning feature story focusing on the funeral of Melvin Cantrell and the impact of his death on his family. Several months later the newspaper ran a follow-up story. This article, which emphasized the family's poverty and the deteriorating condition of their home, included a number of false statements. Most notably, Mrs. Cantrell was described as still wearing "the same mask of non-expression she wore at the funeral." In fact, Mrs. Cantrell was not at home during any of the reporter's visits. The Supreme Court upheld a verdict for the Cantrells because the evidence clearly showed that the reporter knew that this and other statements in the article were untrue.

Although false light covers a broader category of false statements than does defamation, the First Amendment protection for the media is also broader here than in defamation cases. In *Time, Inc. v. Hill*, the Supreme Court said that the "knowing or reckless disregard" standard—which places the burden of proof on the person suing the media—applied to *all* "matters of public interest." Later, however, in the case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court ruled that, in libel cases, the First Amendment required only that this standard apply to cases involving "public officials" and "public figures." Thus it appears that the press has a stronger defense when it comes to "false light" cases, since all plaintiffs—not just public figures—have to show that the press acted in "reckless disregard" of the truth.

False light claims act against reporting that is not defamatory but is untrue and embarrassing; poetic license is not much of a defense.

Because of *Gertz*, some lawyers have argued that the "knowing or reckless disregard" test should be limited in false light cases to claims by public officials or public figures. The Supreme Court has not ruled on this argument, and lower court decisions have been split. It is worth noting, however, that in *Time, Inc. v. Hill* the Court commented on the differences between libel and false light cases and rejected a suggestion that it restrict its ruling to cases involving public officials. The kind of statement that gives rise to a false light claim, such as the description of the Hills' ordeal as worse than it really was, is not itself insulting or accusatory. Unlike a defamatory statement, it gives no warning that the person described may be injured if the statement is untrue. Because it is more difficult to predict what statements might result in false light claims, the First Amendment can be viewed as requiring that the media be given more room for error.

Appropriation

A person who challenges the unauthorized use of his name or likeness may be seeking compensation for (1) the injury that an appearance in a public medium inflicts on his "right to be let alone," or (2) the loss of a "property" right to capitalize upon the commercial value of his name or picture, sometimes called a "right of publicity." The fourth branch of the right of privacy deals with both of these interests.

The Right to Be Let Alone. Although some persons may find any public reference to themselves objectionable, courts generally permit the incidental use of a person's name or picture in connection with a report that is related to the picture, even if not to the person himself. For example, in the case of *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081 (1980), a couple from Pennsylvania sued because of the publication of a picture showing them standing in Miami International Airport next to a large number of boxes. The picture accompanied an article which reported that many Latin Americans were traveling to Miami to purchase large amounts of consumer goods at relatively cheap prices and, in some instances, were reselling the goods at home for large profits. The court rejected the couple's claim, noting that the picture included three other people and that the couple were not identified in either the photograph or the article.

Not all courts, however, allow the media such freedom. A television station in Salt Lake City had the misfortune of calling an unappreciative nonviewer during the course of its program "Dialing for Dollars." As is usual on such programs, the announcer gave the name and telephone number of the person being called and then let the viewing audience listen in on the following conversation:

Announcer: This is "Dialing for Dollars," do you have your TV set on?
Future Plaintiff: No, I don't.
Announcer: Oh, that is unfortunate, because you could have won $50.
Future Plaintiff: Well now I'll tell you, I'd rather have peace in my home than all that garbage on television, even for $50.

Jean Jeppson, the recipient of the call, sued the station's owner for invasion of privacy, intentional infliction of emotional harm, and "abuse of personal identity" under a Utah statute. The trial court threw out all three claims. However, in a 3-to-2 decision in the case of *Jeppson v. United Television*, 580 P.2d 1087 (1978), the Utah Supreme Court said that the statute was violated by the mere use of Mrs. Jeppson's name on the air without her written consent. Although the court based its decision solely on the statute, not on the right of privacy, the statute on its face appeared no broader than those of other states or than the nonstatutory right. The decision, which according to one dissenting judge strained "the filament of reason . . . beyond the breaking point," shows the freedom that states have to formulate their own rules in this area of the law.

The Right of Publicity. Courts generally have accepted the idea that a person has a right to obtain whatever value may attach to the use of his identity for commercial purposes. Even this right of publicity, however, like the right to be let alone, is subject to an exception for incidental uses.

Former New York Jets quarterback Joe Namath did not object (and would not have been successful had he objected) when *Sports Illustrated* used a photograph of him to illustrate an article about the 1969 Super Bowl, in which he led the Jets to victory. When the magazine reprinted the photograph in an advertisement, however, Namath sued, seeking compensation for the value of what he alleged was his endorsement. The court rejected his claim in *Namath v. Sports Illustrated,* 371 N.Y.S.2d 10 (1975). It ruled that the advertisement did not indicate Namath's endorsement of the magazine but merely showed the general nature of its contents. The advertisement was therefore protected as an incidental use.

The case of *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562 (1977), described earlier, represents the opposite end of the spectrum. There the Supreme Court ruled that a television station could not broadcast Zacchini's "entire act" without compensation. Although the First Amendment protected the media's right to report newsworthy facts about the act, broadcasting it in its entirety "[went] to the heart of [Zacchini's] ability to earn a living as an entertainer." In those circumstances, the Court held that the individual's right of publicity prevails.

Conclusion

This article has covered only a few of the issues raised by the right of privacy. Yet even this limited review shows that the "right of privacy" is not just one right; it encompasses a number of interests which can come into play in a variety of circumstances.

When a privacy claim is brought against the media, the nature and extent of the First Amendment interests at stake likewise depend on the case's circumstances. In right of privacy cases, courts must apply the general rules that have been developed, but they must do so in a way that balances the competing interests presented by the particular facts.

James Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." It is easy to recognize and understand an individual's desire for privacy. It can be more difficult to see that the interest of society in general is served by protecting the media. However, as the Supreme Court wrote in *Time, Inc. v. Hill,* the constitutional guarantee of a free press is "not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." □

Media Strategies

(Continued from page 23)

> familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.

But there is a problem when this information is misleading and false, raising several critical right to know/right to privacy issues. Take the example of Press Secretary James Brady. Two networks mistakenly reported that Brady had died of head wounds during the attempted assassination of President Reagan. Reporters do not always have the time to verify information under deadline pressures. But if complete accuracy were required, the media would be overly hesitant to report significant but controversial stories, thus impairing the public's right to know.

The legal concepts of defamation and false light are of importance here. They are based on legal compromise; while they provide some protection to the press, they do not provide complete protection from the dissemination of untruthful and misleading information.

Defamation (libel and slander) is the act of using false and malicious statements to injure a person's character, fame, or reputation. There is also the concept of false light. Though the line between false light and defamation is often unclear, as Kubek acknowledges, false light is basically information which is false and negligently drawn, but which does not seriously impair the person's reputation (though it may be embarrassing). Both concepts are of interest and value, but of the two, defamation is more relevant for classroom instruction. The lesson which follows focuses on defamation and is designed to help students understand the concept itself as well as how it has been applied in specific situations.

Public Figures and Private Persons

Develop a fact sheet for the case, *New York Times v. Sullivan* (376 U.S. 254, 1964), to be used with the excerpted Supreme Court opinions below. Here is how the case is described in Franklyn Haiman's *Freedom of Speech* (Skokie, Illinois: National Textbook Company, 1976):

> A signed advertisement in the *New York Times* criticized the government of Montgomery, Alabama, for its cruel mishandling of civil-rights demonstrations. On the basis of factual errors in the full-page ad, City Commissioner L. B. Sullivan sued the *Times* and four signers of the ad, not for seditious libel, but for *personal* libel under the State of Alabama's civil-defamation laws. The Alabama courts awarded damages of half a million dollars, but were overruled by a unanimous U.S. Supreme Court.

(An excellent source of further information is *The Idea of Liberty* by Isidore Starr [St. Paul: West Publishing Co., 1978], pp. 145-6.) Discuss the facts of the case and the issues raised.

Give students copies of excerpts from Supreme Court opinions in *Sullivan* and in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* (388 U.S. 130, 1967). Have students use these quotations to develop distinctions between "private persons" and "public figures," and then consider how the standards of defamation apply to each. Although vocabulary may be a problem for some students, the quotations are still worthy of serious consideration. Each quotation provides students with both substantive information about defamation as well as rationale in privacy versus right to know decisions. Excerpts from these cases also convey attitudes about free speech and press, criticism of public officials, and privacy.

From the majority opinion of the U.S. Supreme Court in *New York Times v. Sullivan:*

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.
>
> * * *
>
> [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive. . . ."
>
> * * *
>
> Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations. . . . [N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct.
>
> * * *
>
> Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate.
>
> * * *
>
> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

From Justice Goldberg's concurring opinion in *New York Times v. Sullivan:*

> [T]he Constitution does not protect defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

From Chief Justice Warren's opinion in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* (both cases were considered together):

> [D]ifferentiation between "public figures" and "public officials" and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. . . . This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.
>
> * * *
>
> . . ."[P]ublic figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

Two Hypotheticals

Help students clarify their understanding of defamation by presenting the following two examples, one a case of defamation, the other not. First, write the definition of defamation on the chalkboard. Then, present each case separately to the students.

After reading each situation, ask such questions as: (a) Is this an example of defamation?; (b) Why or why not? Be sure to probe each situation, using the definition and dimensions of defamation written on the chalkboard.

After discussion, present the actual judgment and explain the court's reasoning.

Situation A: The False Quote. At a meeting of the St. Louis City Council, Alderwoman Lerel Stewart stated that she had had two abortions. A reporter phoned in the statement, hoping it could be printed before the day's deadline. The quote did appear the next day, but it was incorrectly attributed to Alderwoman Dolores Glover, a strong opponent of abortion. The newspaper, realizing that it had made an error, printed a retraction. Alderwoman Glover, however, sued, claiming she had been defamed. Is this an example of defamation?

[Though false information was published, the Supreme Court of Missouri rejected Alderwoman Glover's claim of defamation (libel). The court reasoned that such errors can occur under deadline, and that there was no proof of "actual malice," which public officials suing for libel must establish.]

Situation B: The Misleading Headline for a True Story. An engineer submitted construction plans for a large state school in Louisiana. State officials, after examining the proposal, wrote the engineer saying that his plans seemed to favor products made by certain manufacturers and might unfairly exclude other companies from the bidding. The letter did not claim that the engineer did anything illegal or unethical. A reporter, given a copy of the letter, wrote an accurate story describing the state officials' concerns of possible favoritism. The story, which named the engineer, appeared on the front page of a city newspaper below the headline: "Bid Plans Report 'Rigged.'" The engineer sued the newspaper, claiming that the article and its headline had damaged his reputation. Is this an example of defamation?

[The court found that although the article had been entirely accurate, the headline was false and defamatory. It said that the accuracy of the article failed to cure the false and damaging implications of the headline. Because the engineer was a private person, actual malice did not have to be proved.]

Strategy

4.

Gathering the News

In seeking newsworthy information, journalists are likely to encounter difficulties, especially when public officials or private persons are unwilling to talk. In this lesson, students will examine some methods of obtaining information of public interest and importance. The lesson provides an opportunity for students to consider significant legal and moral issues and discern differences between what is legal and what is ethical. The two are not necessarily synonymous.

Gathering News: Rights and Limits

Directions: The ability of the news media to gather information of public interest is essential. But what limits, if any, should be placed on the methods used? Consider the situations below and decide, (1) whether you think the reporter's actions would be legal, and (2) if you believe the actions would be ethical (that is, morally right).

1. A newspaper reporter needs information for a story about an important government decision. The officials involved in the decision have refused interviews and have provided virtually no information. At night, the reporter goes to the home of one of the officials, sorts through his garbage, and finds a torn memorandum concerning

the decision. The reporter includes information from the memo in a story about the official and the decision. (Not based on a real case, though reporters searched the garbage of Henry Kissinger and J. Edgar Hoover.)

LEGAL ETHICAL
ILLEGAL UNETHICAL

2. A Congressional aide removes and copies several files from his boss's office which suggest that the Congressman has taken unethical advantage of his office. The aide gives the records to a columnist, who writes a story about this information. (See *Pearson v. Dodd,* discussed in Gary Kubek's article.)

LEGAL ETHICAL
ILLEGAL UNETHICAL

3. An insurance executive accused of involvement in an arson ring refuses to be interviewed by a TV station. Later that day, the executive is unexpectedly confronted by the reporter and a camera crew while leaving his building. The executive gives evasive answers to a few of the reporter's accusatory questions before angrily walking away. The videotape is played on the evening news. (Not based on a real case; there would seem to be no violation of the law.)

LEGAL ETHICAL
ILLEGAL UNETHICAL

4. A reporter interviews a doctor in her medical office but is secretly recording the interview and taking photographs with a hidden camera. The pictures and interview are later published along with other evidence suggesting that the doctor is incompetent. (See *Dietemann v. Time, Inc.,* discussed in Gary Kubek's article.)

LEGAL ETHICAL
ILLEGAL UNETHICAL

5. A photographer follows a popular celebrity to take pictures of her and her children, which he plans to sell to a magazine. He takes pictures of her children riding bicycles, playing tennis, horseback riding, and attending school. He takes pictures of the celebrity shopping, visiting friends, walking in the park, and attending parties. He bribes doormen to learn her schedule. After a while, she is constantly worried that the photographer will be following her or her children and taking pictures. (Based on the case of *Galella v. Onassis,* 487 F.2d 986 (1973), in which photographer Ron Galella was enjoined from keeping Jacqueline Onassis and her children under surveillance, following them, or approaching within 50 yards of her or 75 yards of either child.)

LEGAL ETHICAL
ILLEGAL UNETHICAL

Through discussion, try to determine whether the ends justify the means. Many of the important legal principles about intrusion discussed in the Kubek article can be developed during this exercise.

Strategy

5.

The Delicate Balance

In making specific judgments, individuals (e.g., reporters) and society (e.g., the courts) must decide which value takes priority. But since guidelines are not always clear, and precedents are often in conflict, legislation is necessary for future conflict-resolution. In this exercise, students are asked to consider laws which could provide greater guidance in situations when the two rights may be in conflict.

Introduce this activity by explaining that citizens in a free society have the right to express their support or disapproval of laws. Emphasize that laws often protect certain rights by limiting other rights, and that writing laws that cover all situations and protect all of our values is difficult, if not impossible. Discuss the courts as the interpreters of laws (e.g., determining if the law has been properly applied in a specific situation).

Distribute the handout, giving students sufficient time to consider each case.

Protecting Two Rights

Directions: Laws are to protect the rights of citizens. Below are a number of proposals for laws. As you read each, consider these questions: (a) How would this law affect the citizen's right to privacy and the public's right to know newsworthy information? (b) Would you support or oppose such a law? Why?

1. No limits shall be imposed on a reporter's efforts to gather information for a worthwhile story.
2. It shall be illegal to report any untruthful information about any person.
3. The news media shall have the right to report any information about any individual, whether a public or a private person, as long as the information is accurate.
4. It shall be illegal to report any unpleasant or embarrassing facts about a person without that person's written consent.
5. It shall be illegal to report untruthful information about a person if that information was known to be false at the time it was published, and if publication was deliberately intended to harm the person's reputation.

Construct a chart on the chalkboard similar to the one below to focus student discussion:

Proposed Law	Consequences for Right to Privacy	Consequences for Right to Know

Ask students to describe the likely consequences of each proposed law. Encourage student-to-student discussion. Stimulate thought by raising "what if" questions, encouraging students to consider the values involved. Have students add their own proposals to the list.

Ask students to rate each law (including any they suggest) on a scale of one to seven, with one equalling strong opposition to a law, and seven equalling strong support of a law. Have students comment on their evaluations, stressing the need for the discussion of differing opinions in a democratic society.

Conclude the unit by emphasizing the need for citizens to understand their rights and to be aware of the trade-offs that individuals and society make when cherished rights and principles are in conflict. ☐

"If you wanted to reread that newspaper article, why didn't you clip it out?"

Business Spying

(Continued from page 8)

'naked to the waist.' It was 100 degrees that day."

Eventually, Pontier won a suit in federal court; the judge wasn't impressed with the quality of the Equifax report. Pontier couldn't sue for libel under the FCRA so he sued for failure to comply with the Act. The judge upheld the suit, and Pontier was awarded $42,000 in damages plus legal fees.

Just one case, say Equifax spokespeople. Of course there are horror stories in a corporation so large, they say. But these stories are not cause enough for the FTC's damning conclusions.

But let's assume that the FTC decision is overturned on appeal. Let's say that a judge rules that Equifax did not obtain records illegally or regularly use fraudulent methods of inquiry. Let's say the judge holds that Equifax in no way violated the FCRA. All that assumed, there still remain a number of lingering doubts about the efficacy, reliability, and legitimacy of the day-to-day methods of Equifax, O'Hanlon, and corporations providing similar investigative services. That they may have broken no laws seems only to buttress the arguments of critics who assert that the Fair Credit Reporting Act is full of holes.

Slipshod Reporting

Reports are prepared by overworked investigators who have no time for accuracy. An Equifax employee may be assigned between ten and twenty reports per day. Former Equifax employee Mark Brodie, testifying before the Senate Banking, Housing, and Urban Affairs Committee, said that he was assigned an average workload of fifteen cases per four-hour day. That's about sixteen minutes per case. According to testimony in the case of *Collins v. Retail Credit Company* (now Equifax), the investigator admitted to basing his report on ten minutes with one neighbor, thirty minutes with another, and a few gossipy chats in a local tavern. Reportedly, bonuses are given each time an investigator exceeds his daily quota over a calendar quarter, prompting an even more furious day's worth of work. "This kind of schedule doesn't allow time for follow-ups," says Professor David F. Linowes, chairman of the Privacy Protection Study Commission, "or any kind of meaningful investigation."

But even fifteen minutes may be more than some employees put in. For instance, Brodie told the Senate Banking Committee about a technique many Equifax employees refer to as "zinging": "A zing means you do nothing. You do not contact the investigatee. One does not go out on the street . . . he utilizes whatever information was supplied by the insurance company, and hopefully looks up the [insured] in the phone book to assure that he lives there; then you just fill in the form."

James Langsley of Cleveland is suing Equifax for falsely reporting, among other information, his failure to pay child support payments in the late 1950s. He would have been about ten at the time. Barbara Collins of Michigan was, according to an Equifax report, an excessive drinker and a woman of low morals. "It [the Equifax report] even implied that many men stayed overnight at my house and it was never the same man," says Collins. She won over $300,000 when she sued Equifax for damages.

Daniel P. Reiter, a former supervisor, with fifteen years experience with Equifax, said in testimony before the Senate Banking Committee that Equifax employs investigators lacking the "investigative training for the types of decisions which they must make," a problem compounded by an "extremely high turnover rate." Typically, employees are students, housewives, retired persons, and off-duty police officers working part-time. According to an Equifax classified ad, all that is needed is a high school diploma and a car.

"As a reporter, I'm appalled at the reporting displayed in these reports," says Robert Smith, a lawyer and former *Newsday* staffer. "They're sloppy and full of innuendos and unsubstantiated claims." One example from the newsletter Smith edits, "Privacy Journal," is the case of a Caro, South Dakota, woman of little means. It was commonly assumed among her neighbors that the men visiting her were calling for sexual pleasure. When she one day paid $6,000 cash for a new car, it seemed clear that she was a hooker. Neighbors told Equifax employees their suspicions when she applied for her auto insurance. She was refused insurance until she proved that money was part of an inheritance. The men, she said, were just friends.

Neutral information is often cast in a preposterously nefarious light. Witness this example from the Equifax "Automobile Reports Manual": "A person who has financial problems is a debatable risk. His problems may lead him to drink or they may lead him to worry to the extent that it affects his driving. Heavy drinking may be the cause of his financial difficulty, or, perhaps, he shows instability by drifting from job to job." Pages and pages like this are provided so investigators know what dirt to dig for.

Equifax encourages employees to generate inaccurate and adverse information about consumers, says the FTC, by rewarding workers for gathering large amounts of adverse information and punishing those who fail to report their quota of damaging comments. Quotas are based upon the "average" number of reports that can be completed by the "typical" field representative. This has inspired Equifax employees, says the FTC, to in effect "misreport adverse information."

As the Privacy Commission points out, a negative bias makes business sense: "Adverse information is the inspection bureau's most saleable product. Insurance companies have little use for innocuous commentary about applicants and policyholders. They are paying to find out whether there is anything about an individual which would warrant declining him or altering the premium he would otherwise be charged." The commission says that insurance companies don't care whether negative information constitutes 10, or 30, or even 100 percent of a report—one instance of drunk driving is enough to adversely affect any policy application.

Says Professor George Trubow: "It's like if one of my friends came up to you and said, listen, 'Trubow is a jerk,' and then cites an example. Another acquaintance disagrees. He says I'm a nice fellow and provides his own anecdote. Not included in this is any sort of quantitative information—maybe I do 30 bad things but 17,000 good things. But the record doesn't bear that out. With only two pieces of evidence, who do you believe?"

What is Equifax's response to claims of bias and emphasis on negative information? As reported by the Privacy Protection Study Commission, "We have a rather homespun Executive Vice President who said that if you sent a man to a blackberry field every day with a bucket and every day he came back with no blackberries, then you would notice that something was wrong."

Better, But Problems

At this point, credit bureaus like TRW, Inc. must be introduced. TRW, one of the giants of the field, serves as a centralized compiling bureau, collecting credit information provided by an immense list of creditors. In turn, creditors (also called subscribers) have access to TRW's files for making decisions about granting credit to an applicant. Information is from legal documents and other sources of public record and becomes part of an individual's permanent record. "Consumer credit bureaus are certainly not as bad as companies like Equifax," says Robert Smith, "but there are problems with these, too, which also point out weaknesses in the Fair Credit Reporting Act."

Credit bureaus, like investigative companies, place a greater emphasis on negative data, providing a distorted picture to creditors, insurance companies, and corporations deciding on a prospective employee.

"As a matter of policy, some credit companies only report adverse information and not positive information," says June Alvord of the Chicago office of the FTC. A strong credit history, says Alvord, may not necessarily appear on a person's file, which is the most common FCRA complaint the FTC receives.

Credit reports, says Smith, commonly "draw negative inferences from neutral information. Though there may be some doubts surrounding a piece of information, these reports are written with a clear negative bias. They're crammed with a lot of vague innuendos." He provides one example: "Found court records that said there was a suit five years ago. Couldn't get more information but the clerk remembers it being a messy case."

Even the unassuming inclusion of civil suits, without such dubious and damning assertions as a "messy case," is arguably improper, especially since such basic information as the results of a civil suit and who sued whom is left out. Also questionable is the inclusion of arrest records, which many companies maintain on file unless outlawed by state laws. An arrest, however, means nothing more than suspicion of a crime. "Many of these companies started off collecting only negative information and have found it hard to get away from that," says Smith.

Or how about that time Sears overcharged you, and you ended up closing your account. Damned if you would abdicate to a computer that answered each of your carefully written letters by telling you that a one and a half percent finance charge was being accrued on your account. You know you were right, but the credit bureau records that as an R9, the worst credit rating possible. Or that criminal trespassing charge now on your record—ah, but that was ten years ago, while you were in college, at a sit-in at the dean's office when *everyone* was arrested. That explanation, however, is lost on a computer disk that permits your case to be stated in thirty-five bits or less. Well, weren't you arrested for criminal trespass? Yes, but.... Save your breath, no one is listening.

Dope Smoking Hippie

James Millstone, the *St. Louis Post-Dispatch* editor who fell prey to a nosy neighbor overly concerned with the demonstrators sleeping on his floor, presented plenty of evidence contradicting his report. His hair has never been shoulder length. He wasn't evicted from his last three residences. "I'm one of the straightest-looking guys you're going to see," he says. "Nobody who knows me would recognize me from the description in that report."

But let's say Millstone was hated by every one of his neighbors, had long hair and sported a beard, and led demonstrators down Pennsylvania Avenue. So what? What bearing does that information have on Millstone's application for auto insurance? So he harbored demonstrators. It certainly is not illegal. Some would consider it a noble act. Most would probably not make a moral judgment about it.

But some would consider harboring antiwar demonstrators immoral. It's against the national interest. You know the type—a dope smoking longhair, causing trouble for trouble's sake, a good for nothing bum spitting in the face of a country that's given him everything. Loose morals. Serious drug use, "untrustworthy," "strange," of "questionable character." And more stereotypes.

Years back, insurance companies were interested in whether an applicant was a homosexual. Why ask the question? What sociological theories substantiated the gathering of such information? Insurance companies were not able to provide answers when gay rights groups pressed the issue. But until then, it was hardly questioned. "In their minds," says Professor Trubow, who was general counsel for a privacy study commission under Vice-President Gerald Ford, "there was probably some kind of distant, arcane notion about homosexuals having a greater tendency to fall down stairs."

Trubow continues: "There's nothing anyone can do to change the way an employer or credit grantor feels about a person who belongs to certain organizations, or about an applicant's sexual proclivities, or whatever the information is before him. And there's nothing really wrong with these prejudices. But the important question is: should this information be part of a decision making process?"

There seems precious little connection between insurance risks and sexual preference. Many other factors routinely included in investigative and credit reports also seem beside the point, but under the Fair Credit Reporting Act, subscribers have virtually free access to any information an investigative company or credit bureau company is able to uncover. "Though a decision may be based on factors one through five," says Trubow, "a company has on file twenty pieces of information. Why the others? 'Goodness,' the insurance agent will answer. 'We've always collected this information.' They'll pawn it off on the great third party, the great straw man in the sky."

Trubow points out the potential danger of the other fifteen pieces of information. "That a particular piece of information is not damaging at this point in time is not the point. The information is now there and who knows what will happen to it, what purposes will be ascribed to it a couple of years down the road."

"There is no real requirement that there be a reasonable relationship between the information furnished in consumer investigative reports and the use for which the report was obtained," says FTC lawyer David Grimes. Though there are provisions governing the release of information, adds the FTC's Lewis Goldfarb, Assistant Director for Credit Practices, "anything can be rationalized as being relevant under the Fair Credit Reporting Act. The term 'legitimate business need' can legitimize virtually any request."

Many consumer documents have been illegally obtained. For example, after a consumer advocate publicly complained about the billing practices of two companies he never had done any business with, both companies took revenge by requesting his file from a consumer credit bureau. The credit bureau provided the report with no questions asked. "When the consumer requested the local credit bureau to take special steps to protect his file," says the FTC's Goldfarb, "he was told that as long as a creditor had signed a certification, the credit bureau considered its obligation satisfied." Under the Fair Credit Reporting Act, only the credit bureau furnishing the information can be held legally responsible for the reports. Yet the credit bureau in this case took a "what, me worry?" attitude.

"There's a price to be paid for the gathering and disseminating of all this material," says Northwestern University law professor Jerry Robinson, a self-described conservative. "The net result is the forcing of society toward the center. It creates a social vulnerability. The person affected isn't going to be the leader of a movement, just the guy quietly contributing to political groups, scared how someone else might judge his having a subscription to a publication someone might not like."

Rather than fight back, whether that means fighting a mistaken billing or standing up for your rights to choose the organizations to which you belong, many are resigning themselves to the Power of the System. "Society has been moving toward the center and this helps cement it," says Robinson.

Sharing the Blame

Robinson is assuming that people know about the vast network of companies out there collecting and filing personal information about their lives. A large number, however, don't modify their activities for fear of the information falling in the wrong hands because they are ignorant of the potential consequences. The public is generally unaware that all sorts of seemingly irrelevant information is being passed around with impunity.

"Consumers have the right to contest any and all information in their files," says Equifax's Magis. Before performing an investigation, an investigative company (though not a credit bureau) must let consumers know that it may be asking people about their character and lifestyle. It must also mention that consumers may find out what is in their report.

"We found that most Americans had little knowledge or understanding of what was going on in data collection by organizations," according to David Linowes, head of the Privacy Study Commission, in testimony before the Senate Banking Committee in 1980. "[Consumers are] largely unaware of what happens when they apply for credit, take out insurance, open a bank account or go to the doctor. They are unable to exercise control, or even determine if they want to exercise control over that information."

But, Linowes points out, this confusion is compounded by the immensity of the credit information exchange network. "Today. . . there is still no way for any of us to find out all the organizations that keep records about us, what records they have, and how they use them to make decisions that directly affect our lives."

There is also the hassle factor. Many investigative firms and credit bureaus prohibit subscribing companies from letting consumers see an actual copy of their report. According to the O'Hanlon Services handbook: "The important thing is to NEVER check the files in the presence of the consumer . . . . At the time of your appointment ANY and ALL information you may have relating to the consumer. . . are to be in your desk drawer out of SIGHT of the consumer" (emphasis in original). The manual goes on to say that the consumer may not "be allowed to read the statement or touch it." All this is perfectly legitimate under the Fair Credit Reporting Act, which states that a consumer bureau need only sum up the document, revealing its "nature" and "substance."

The Privacy Protection Studies Commission, in describing this aspect of the law, calls it "perhaps the most blatant weakness in the Fair Credit Reporting Act. . . ." Henry Geller, testifying before the Senate Subcommittee on Consumer Affairs, says this "makes the discovery and correction a matter of guesswork."

And again there is Equifax. The FTC charges that it places an "unnecessary burden on the individual to find out what his or her rights in fact are." Equifax doesn't clearly tell people that the information provided during one investigation may appear elsewhere, says the FTC. There have been court cases that have shown that Equifax employees did not do a follow-up reinvestigation upon the request of a consumer though that is required under the FCRA. "They conveniently leave out all sorts of important information in conversations with investigators," says the FTC's Grimes, "to make a negative report sound favorable."

But it is not only Equifax. According to the appellate judge in the Millstone case, "O'Hanlon sought at every step to block Millstone in his attempt to secure the rights given to him by the Act [FCRA]. Not only did O'Hanlon delay and mislead Millstone on the occasion of his first request, but it even did so on a second and third occasion." O'Hanlon did not tell Millstone all that was included in his file until under court order.

Even in Winter

And there is nothing people can do to dispute information that is true though, in their opinion, not for public broadcast. "There's this ridiculous argument that only those with something to hide are doing the protesting," says Trubow. He asks me if I'd answer if a stranger prodded me for my salary. I'd refuse, I told him, it's none of their business. "Are you ashamed of it? Do you have something to hide?"

Then Trubow asks me a personal question, whether I sleep with clothes on or in the buff. I answered truthfully—we had gotten quite friendly by then. But I refuse to print my response here. You never know in whose hands that crucial tidbit might end up. □

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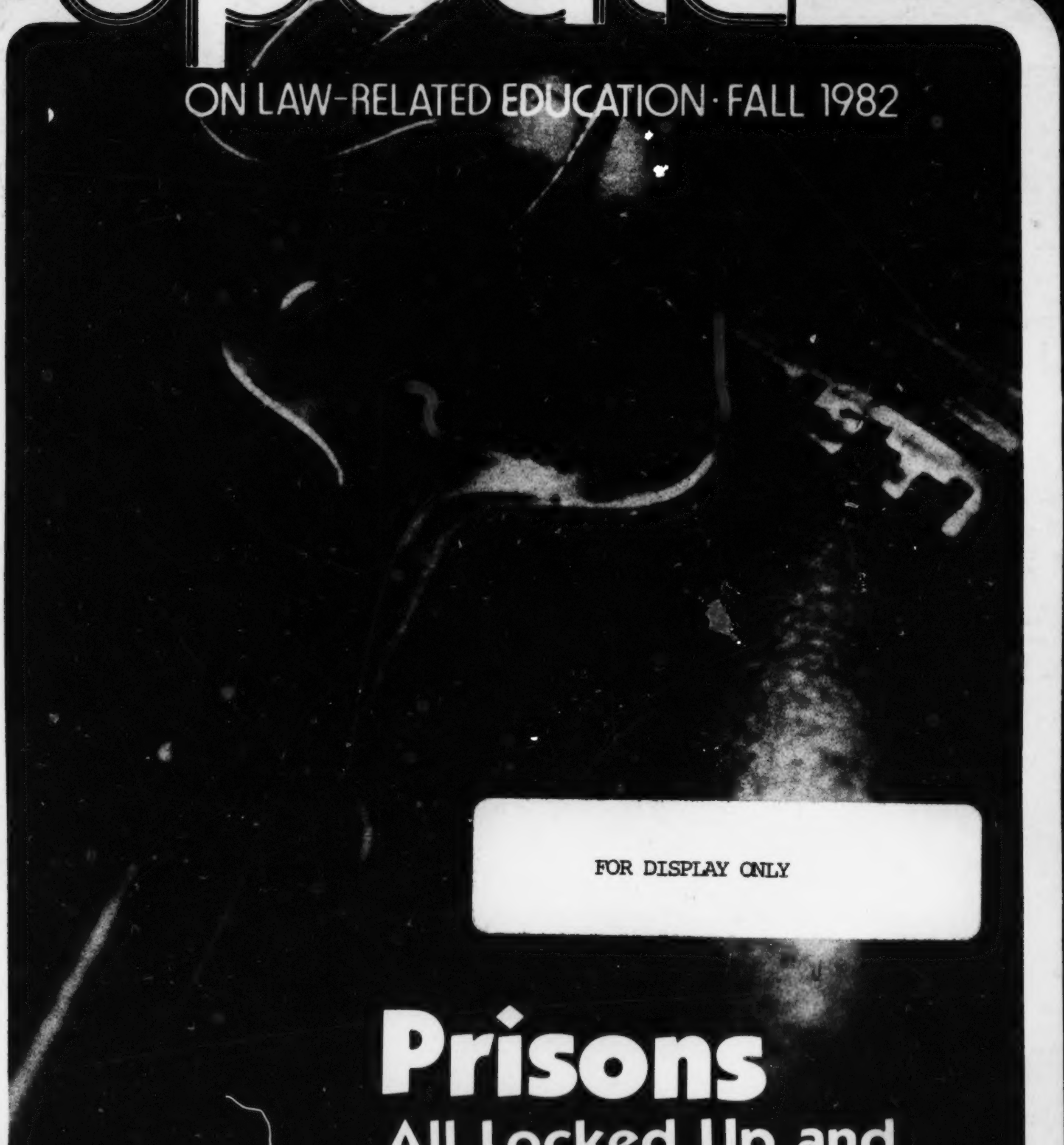

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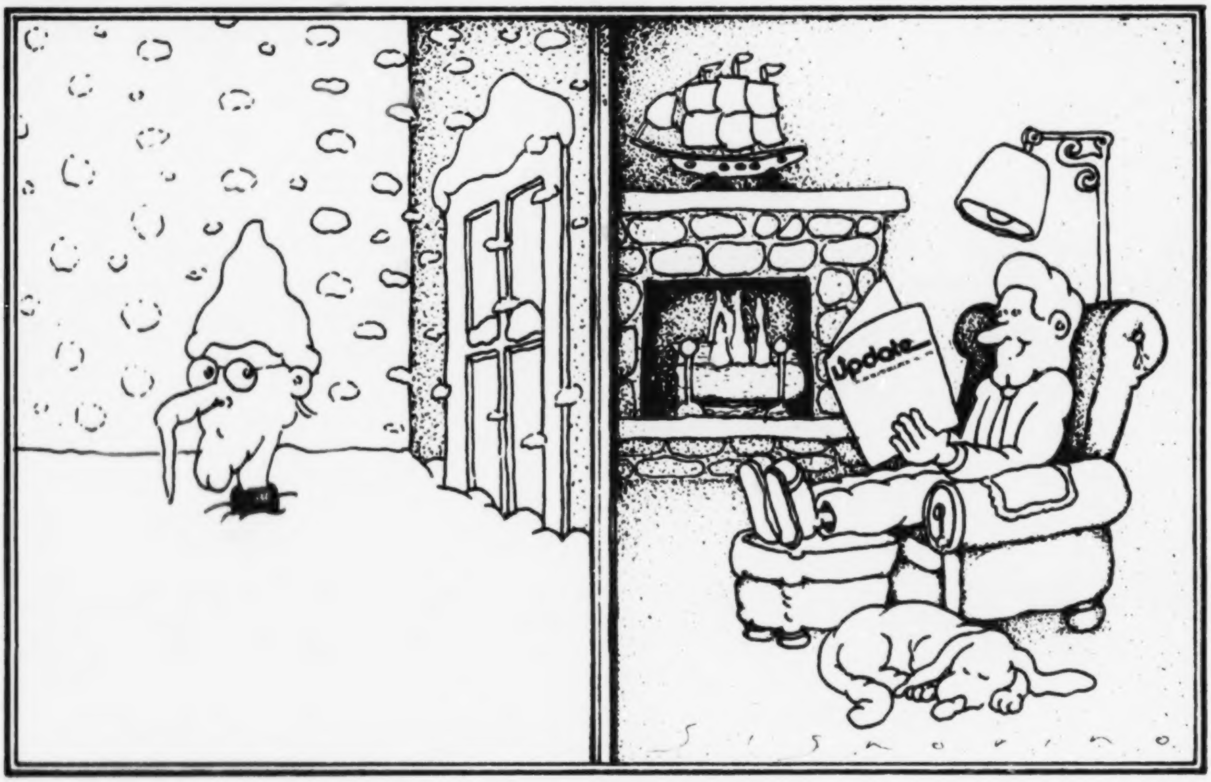

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contents

Volume 6, No. 3, Fall 1982

2
Focus on Punishment
More than Slaves; Less than Free Men

6
Focus on Punishment
The Crime of Punishment

10
Focus on Punishment
There Are Alternatives

14
Focus on Punishment
A Prison by Any Other Name

18
Focus on Punishment
What Prison Does to Women

22
Focus on Punishment
School Discipline, Round Two

26
Focus on Punishment
The Worst Kind of Discipline

29
Curriculum Update
A Grab Bag of Goodies

32
What is Privacy?
A Conspiracy Against the Inner Life

36
Law in the '80s
Assault on Rape

40
Classroom Strategies
Would Your Kids Talk?

44
Court Briefs
Immunizing Presidents, Educating Aliens, Busing Kids & More

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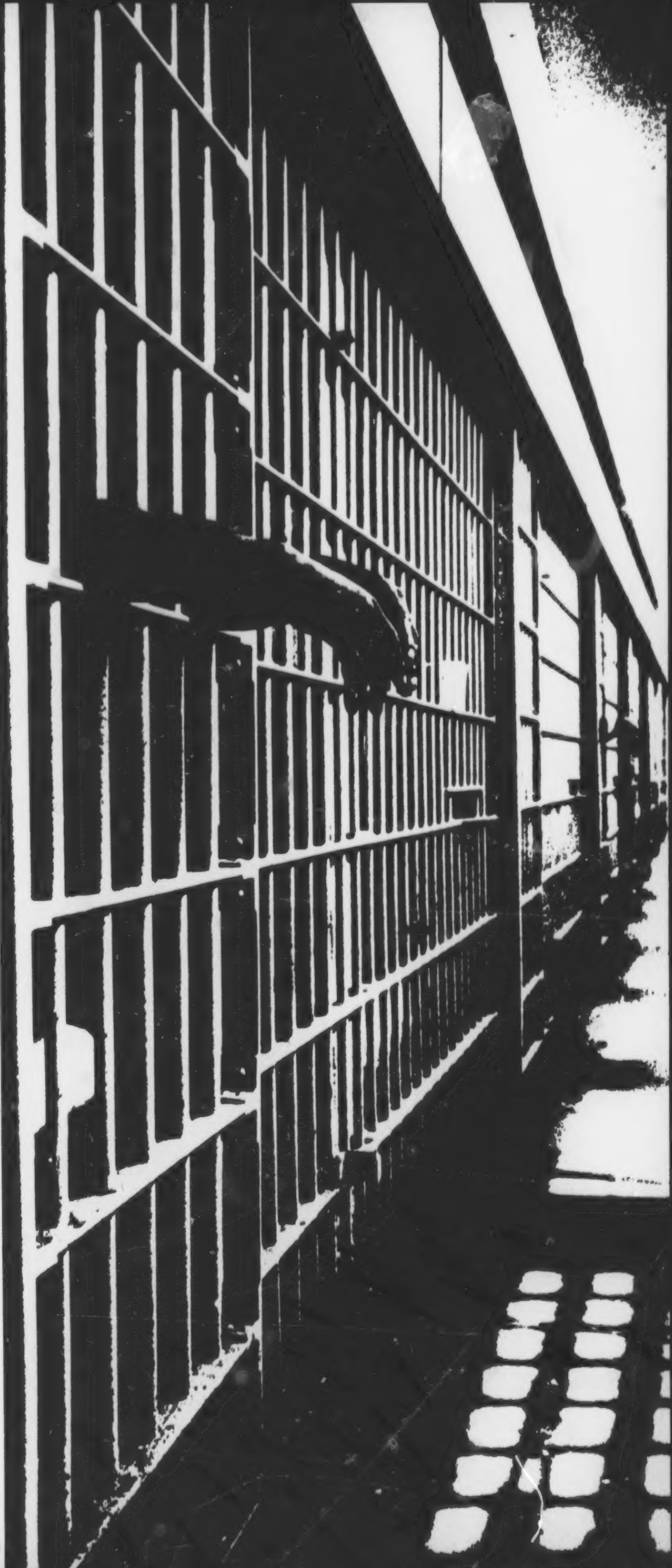
More than Slaves Less than Free Men

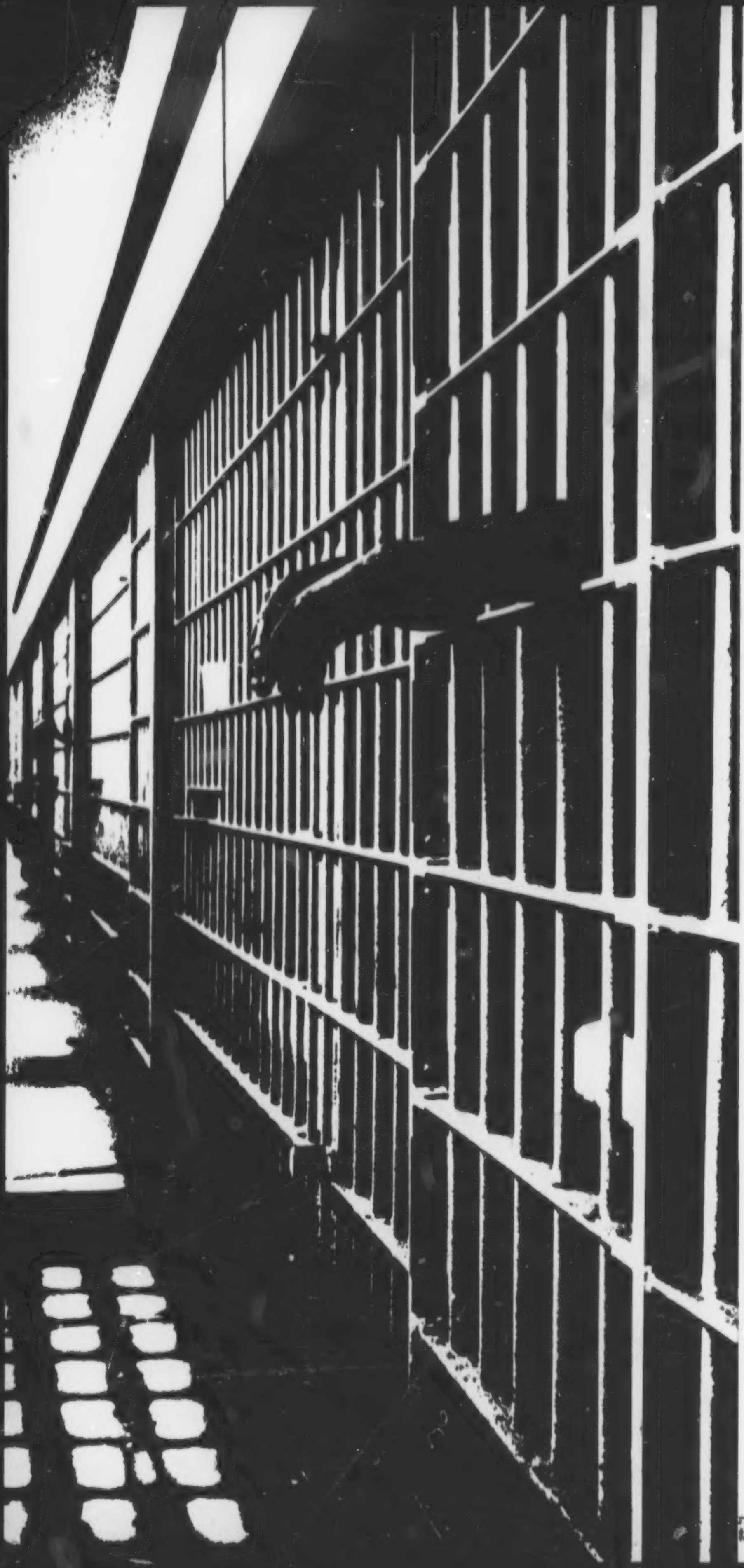
According to the Supreme Court, what rights do prisoners have?



Life isn't easy in prison. Sometimes you get it from other inmates, sometimes from the prison itself, sometimes from both. Take Nathanial Williams. In 1969 he was attacked by a fellow inmate, who cut off a large portion of his right ear with a broken jar. When he got to the prison hospital, Williams asked the prison doctors to suture the severed portion of his ear back on. "You don't need it," they told him. They threw it away and sewed up the stump with stitches. Williams later underwent plastic surgery on his ear six times.

Were Nathanial Williams's rights violated? Does a prisoner have any rights? If he does, what are they, and how can they be protected?

Prisoners do have rights. "There is no iron curtain drawn between the Constitution and the prisons of this country," the Supreme Court has said. But of course the framers did not have con-



victed criminals in mind when they drew up that document. The practical necessities of our penal system require that prisoners lose their basic liberties when they trade their civilian clothes for a uniform with a number on it. But they do retain some constitutional rights, the ones that are compatible with the basic restrictions of being jailed.

It was not always so. The Thirteenth Amendment reads, "Neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted,* shall exist within the United States. . . ." In the nineteenth century case *Ruffin v. Commonwealth,* 62 Va. 790 (1891), this amendment was read to mean that prisoners could be treated like slaves with no rights whatsoever. But over the years that interpretation was abandoned—in part because it conflicted with the Eighth Amendment's proscription that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It came to be accepted that prisoners are not slaves, though their rights are severely circumscribed. They came to be seen as men in limbo, as "more than slave but less than free men."

It wasn't until the 1960s and 1970s that the lower federal courts became receptive to prisoners' rights suits. In this period individual prisons or entire prison systems were declared unconstitutional under the Eighth Amendment in at least 24 states. Courts have ordered that prisons be either improved or closed down. They have warned that inadequate funding is not a good enough reason for unconstitutional conditions. Some courts have even suggested that the institution of prison itself is too much like slavery to be countenanced.

The lower federal courts have looked at all kinds of prison conditions. They have questioned the size of inmates' cells, fire and safety hazards, medical and mental health care, visitation rights, rehabilitation programs, and more. They have found shocking conditions in isolation cells and inadequate staffing to protect weak inmates from brutal ones.

Only a few federal courts have found a right to rehabilitation, but several have held that the lack of rehabilitation opportunities may be unconstitutional where other conditions exist which make the *debilitation* and recidivism of inmates

Janisse Lifton

Paul Conklin

likely. They have warned that prisoners may not be kept in "cold storage" without any opportunity to rehabilitate themselves.

Very few of these cases went all the way to the Supreme Court. But those that did show that the High Court under Chief Justice Burger has generally taken a much more conservative approach to prisoners' rights cases than the lower federal courts. While it has confirmed the existence of certain constitutional protections for prisoners, the Burger Court has paid only lip service to the goal of rehabilitation, calling for deference to prison officials in anything remotely related to the internal security of prisons. Indeed, the Burger Court sometimes sees prisoners as little more than the slaves they once were.

The First Behind Bars

The earliest prisoners' rights cases were brought by Black Muslims who claimed they were not allowed to practice their religion because the prison refused to serve them pork-free meals or forced them to put pork dishes on their trays contrary to their religious tenets. Several lower courts have held that prisoners have a First Amendment right to the free exercise of their religion, and the Supreme Court has supported this particular right. In the 1972 case *Cruz v. Beto*, 405 U.S. 319, a Buddhist prisoner had been refused the right to conduct religious services, although Christian and Jewish prisoners had their own chapels in which to worship. The Court—noting that religious observance advances the rehabilitation process—confirmed that all prisoners must be given a reasonable opportunity to exercise their freedom of worship.

The Supreme Court has been somewhat more cautious on the First Amendment issue of freedom of speech. In the 1974 case *Procunier v. Martinez*, 416 U.S. 396, prisoners challenged regulations governing censorship of their mail. The Court refused to decide whether prisoners retain First Amendment rights, reasoning that it could decide the case on the narrower ground of the First Amendment rights of *nonprisoners* to correspond with prisoners free of any censorship. So while the Court struck down as overly broad the regulations in question, which allowed censorship of statements that "unduly complain" or express "inflammatory" views, this decision was really not a victory for prisoners' rights. (The Court added that a regulation would be justifiable if it forbade communications discussing escape plans, since that would serve prison security interests.)

The same year, the Court decided *Pell v. Procunier*, 417 U.S. 817, which upheld a prison rule barring reporters from interviewing any willing prisoner of their choice. In addition to ruling that the regulation did not violate the First Amendment rights of reporters, the Court also held that prisoners' First Amendment rights were not violated. It said that prison officials had reasonable grounds to believe that restricting the press's access to prisoners was justified by security reasons. Moreover, the Court said, prisoners have alternative means to communicate with reporters. They can use the mail or relay their communications through visitors on their approved list.

The Court took the occasion of *Pell* to articulate its view of the three major goals of the correctional system. The Court found these to be deterrence, rehabilitation, and security, which it described as being "central to all other corrections goals." The Burger Court would come back again and again to the factor of security, though it would also devote considerable discussion to rehabilitation.

Medical Care

The Supreme Court has supported to some extent prisoners' right to medical care. It has based its reasoning on the Eighth Amendment. In the 1976 case *Estelle v. Gamble*, 429 U.S. 97, the Court ruled that acts or omissions by prison officials that show "deliberate indifference to serious medical needs" would be found to be "cruel and unusual punishments" proscribed by the Eighth Amendment. What would it take to violate the Constitution? Prison doctors indifferently responding to prisoners' needs, prison guards intentionally denying or delaying access to medical care, or staff's intentional interference with the course of treatment once it was prescribed.

None of this was much consolation to prisoner Gamble, since the Court ruled that his treatment wasn't that bad. Gamble sustained a back injury while working on his prison job. While he saw several doctors and nurses a total of 17 times in the space of three months, he argued that his diagnosis and treatment were grossly inadequate and that when he refused to work because of the pain he was put in solitary confinement. The Court held that his complaint amounted to no more than negligence or medical malpractice, which does not rise to the level of a constitutional violation. It cited the Second Circuit Court of Appeals case involving Nathanial Williams, who lost part of his ear, as a good example of "deliberate indifference" by prison doctors.

Justice Stevens dissented in *Estelle* on several grounds. In part, he felt that if the case were sent back to a lower court Gamble might be able to prove that the prison medical system *as a whole* was so inadequate as to violate the Eighth Amendment. The court had been unwilling to look at that possibility. Evaluating problems pervading the whole system has been the approach followed by most of the lower federal courts, but the Supreme Court has scrupulously avoided it. In deciding whether a prison's hospital is adequate the lower courts have looked at such factors as whether there is 24-hour emergency care, whether transportation to other hospitals is available when necessary, whether new prisoners are examined on arrival, and whether inmates with mental health problems are diagnosed and segregated. Failure to look at these basic components of health care means that only the most flagrant examples of mistreatment will rise to the level of a constitutional violation.

Stevens also dissented because he felt the Court was applying the wrong test to determine whether cruel and unusual punishment was being inflicted. The "deliberate indifference" standard requires a showing that prison officials were intentionally ignoring prisoners' medical needs, which, according to Stevens, "improperly attaches significance to the subjective motivation of the [officials] as a criterion for determining whether cruel and unusual punishment has been inflicted." Justice Stevens had said in another case that the touchstone of Eighth Amendment questions is whether the person has been treated with dignity—a question to which intent is irrelevant. And requiring proof of intent makes it that much more difficult to show that a prison medical service is unconstitutionally inadequate. Frequently corrections officials have the best intent about improving their prisons but are prevented from doing so because of lack of money or because of legislative indifference. If the medical care is bad, does it really matter what caused the breakdown?

Overcrowding

Another aspect of prison life, overcrowding, may also contribute to cruel and unusual punishment. Overcrowding

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Janisse Lifton is a lawyer in Chicago who recently graduated from George Washington Law School.

is the number one problem facing corrections officials today, and it's not just a matter of the "inconvenience" suffered by the inmate who is confined to a 30 foot cell. Overcrowding generates additional problems in a kind of rippling effect. For example, it leads to the breakdown of a prison's classification system, under which prisoners are classified according to the degree of custody they require and then are separated accordingly. This in turn causes an increase in violence, since weak inmates are being housed near aggressive ones merely on the basis of space availability. Overcrowding also makes sanitation impossible to maintain. In one Alabama case the court described how inmates were forced to sleep on mattresses spread on floors in hallways and next to urinals; in one instance over 200 men were forced to share one toilet. And overcrowding makes inadequate guard-to-inmate ratios even worse, so that basic security cannot be provided, let alone opportunities for rehabilitation.

Overcrowding has been the central concern of lower federal courts dealing with Eighth Amendment issues. The 1979 lower federal court case of *Ramos v. Lamm*, 659 F.2d 559, noted that when personal safety becomes inmates' major concern, large numbers of them request "protective custody," which allows them to stay in their cells for 20 hours a day. The court ordered that any prisoner confined to his cell for 20 or more hours per day must have a cell that is a minimum of 80 square feet, in accordance with American Correctional Association standards. The ACA standard for inmates who are able to get out of their cells for a substantial portion of the day is 60 square feet, and even that is twice what is available in some prisons.

Despite many lower court cases along these lines, the Supreme Court is holding firm. In *Rhodes v. Chapman*, 452 U.S. 337 (1981), a case involving "doublecelling" or keeping two men in a 63 foot cell designed for one, the Court held that this kind of overcrowding is not cruel and unusual punishment.

Eighth Amendment cases establish that the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." While the phrase "cruel and unusual punishment" is nothing if not vague, courts have held that it means a punishment that involves the wanton and unnecessary infliction of pain. This does not necessarily mean physical pain. Another Eighth Amendment case, *Furman v. Georgia*, 408 U.S. 238 (1972), explained this admirably:

> At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.

According to the Burger Court, doublecelling alone—without additional factors such as the deprivation of food or medical care or sanitation that "seriously threaten the physical, mental or emotional well-being of inmates"—is not cruel and unusual punishment. "To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."

Rhodes was unlike most of the lower federal court cases in that the facility involved was very modern and well-designed. Since the Court evaluated "the totality of the circumstances" in deciding the Eighth Amendment question, it found the doublecelling acceptable in this prison. The Court stated that if a prison was deficient in several different respects the Court would gauge the "cumulative effect" of those deficiencies.

Numerous experts testified that doublecelling is inhumane and creates a dangerous potential of frustration, tension, and violence. But the Court was not moved. The majority felt that public opinion—not expert testimony—sets the standard of decency in our prisons. "The District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency.... Indeed, generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as 'the public attitude' toward a given sanction .... There is no evidence in this case that doublecelling is viewed generally as violating decency."

Justice Marshall, in dissent, said that the Court shouldn't just reflect the current angry public mood about crime, which doesn't necessarily properly measure what conditions comport with human dignity: "With the rising crime rates of recent years, there has been an alarming tendency toward a simplistic penological philosophy that if we lock the prison doors and throw away the keys, our streets will somehow be safe. In the current climate, it is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health. It is at that point—when conditions are deplorable and the political process offers no redress—that the federal courts are required by the Constitution to play a role."

An Elusive Concept

Most of the prisoners' rights cases to reach the Supreme Court hinge on due process, which in essence means what the

(*Continued on page 65*)

"This is a fine resume, right up to the point where you fell off the turnip truck."

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FOCUS ON PUNISHMENT

Gary Rivlin

The Crime of Punishment

More and more judges are deciding that no one—however brutal—deserves to be in prisons like these

A lot of people felt sorry for defendant Kent Barrett. I did, and so did Judge John Crilly of the Cook County (Illinois) Criminal Courts and defense attorney Jerry Maupin, and I think even the two state's attorneys in the judge's chambers that day, though they do not commonly display those sort of sentiments, or at least not publicly.

Barrett was being charged with aggravated battery and faced a possible five years imprisonment. The problem was he was not really too bad a kid: a street urchin maybe, and a bit of a troublemaker, but relatively speaking, a decent 23-year-old who stumbled into some serious trouble.

Barrett's troubles began as a typical confrontation on Chicago's rough West Side, a place where the future is easy to misplace. His intentions, in a Victorian sort of way, were gallant enough. One April morning, a rival neighborhood kid teased his girlfriend, and Barrett stuck up for his woman, introducing his fist to the victim's face.

A twist brought the matter off the streets and into the courtroom: the victim's head, unfortunately for all concerned, landed squarely on a metal pipe sticking a few inches out of the ground. The victim is forever, says his doctor, a wheelchair-bound vegetable who can barely speak, cannot keep his left leg still for more than a few seconds at a time, and is an extreme financial burden for a family that cannot afford the medical costs.

In light of the damage he had wreaked, Barrett had to be seriously punished, but to send him to prison might have been a greater crime. The judge and lawyers appreciated this, and for a few minutes wrangled over whether or not Barrett should be jailed. They discussed the effects a prison sentence would likely have on him. They discussed the dangers of homosexual rape in prisons and the general violence. For a minute or two, they considered options to the state penitentiary.

Judge Crilly pained over the decision. It was a rough one, he said in retrospect. The kind he hates most. Barrett had no criminal record but had been laid off from his job as a mechanic. Crilly sighed. Concern in his eyes. A shrug: "You decide the time," he ordered the state's attorney and public defender, "but I've got to send him." Ultimately, he sentenced Barrett to two years, the minimum permitted under Illinois law. Assuming good behavior, he would be released within a year.

By middle-class standards, Barrett had hardly been a success in life. But in prison, he'd be a new boy with "victim" written all over him. "Within seven days, I guarantee it," state's attorney Dan Gallagher said, "Barrett will be beat up, and beat up bad. Probably raped by gangs of men. The way he looks—clean, healthy, young, white—he'll be raped constantly. Maybe if he's got the right kind of smarts, he'll manage to get out of there alive. But he won't be the same kid you were just looking at."

We confine inside a place called prison some of the most dangerous members of society. To be surprised that the institution is haunted by violence is to be surprised that water runs downhill and the sun rises in the east. The people committing rape outside prisons are among the people locked up inside prison. Most researchers agree that rapes are more a factor of power and violence than sexual desire. It follows then that rapes occur within prisons. It makes no difference that prisoners are segregated by sex. People are raped and raped all the time within prisons. Murder, battery, extortion—virtually any crime—also take place behind bars.

For victims within prisons, the punishment may be far worse than the crime. "God only knows what can happen to a person physically and to his attitudes when he is sent to prison with the conditions nowadays," says Robert Koren, a lawyer with the American Civil Liberties Union's National Prison Project and a former prison litigator in New York. "Someone can be clever, or streetwise, or whatever but they can't escape the extortion. They can't avoid trouble. You have no control. Power is the thing in prison. When there is a rape, it's never a one-on-one thing. It's a group rape."

The terrible irony of prison is that many otherwise nonviolent prisoners—who are habitually referred to in one assumptive generalization as "violent people"—may find themselves transformed into just that.

"You can't have an 18-year-old kid doing two years in the same cell with a guy serving life, but that's what's going on," says Dwight Duran, who has spent a total of 16 years in two state penitentiaries. "It

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causes, at the very least, 'bulldogging' [prison argot for extortion] and in so many cases, general abuse, sexual assault, and a very rough two years. On a number of occasions I've seen gangs of men surround a new kid and rough him up. That kid cracks pretty quick." If he did not go to prison a bad kid, says Duran, he is certain to have been transformed into one.

At the same time prison overcrowding is so rampant that corrections officials are shoehorning prisoners into their cells, judges are sending to prison a large percentage of nonviolent offenders. This costs, economically and otherwise. Some studies conclude that prison populations are growing at a rate fifteen times as fast as the U.S. population because of an influx of those who've committed crimes against property, and not because of an increase in the number of violent criminals. From 1970 to 1980, prison populations have doubled nationally. Yet according to the National Institute of Justice's study of prison overcrowding, the proportion of inmates sentenced for violent crimes dropped by about 10 percent nationally from 1973 to 1978, and by about 25 percent in the northeastern states.

In a decision holding that the Texas Department of Corrections (TDC) had maintained unconstitutionally cruel and inhumane conditions, federal Judge William Wayne Justice found that only 20 percent of the inmates in TDC were incarcerated for violent crimes. Sixty-five percent were incarcerated for property offenses, with 15 percent in prison for what was classified as "other" offenses. But under the TDC system, 95 percent of the inmates are sent to maximum security prisons because of a lack of alternative structures. When deciding which facility to send a prisoner, and which inmate to room him with, the character of the crime, the length of the sentence, and a defendant's propensity toward violence were not factored in, at least up until 1980, when the case was decided. According to a spokesperson for TDC, this has not changed much, if at all, since the case was decided (the case is still on appeal). "TDC's rudimentary system of inmate classification is totally inadequate to properly assure the peaceful compatibility of cellmates," writes Judge Justice. "In any given facility first offenders, youthful inmates, violent and nonviolent persons, handicapped offenders, [and] recidivists may be, and often are, housed in the same dormitory or cells."

"When you find a prison system with 40 percent nonviolent, nonassaultive property offenders—which you do—you really have to think something is wrong, especially if there is a coinciding 40 percent overcrowding rate," says Vincent Nathan, selected court master by judges in three states (including Texas) to monitor for the court the improvement of prison conditions. "It's a very disturbing phenomenon, and a problem in so many of prison systems. We don't have exact figures telling us how many of the 360,000 or so prisoners presently in jail are raped, or beat up, but certainly the number is much too high."

Too many prisons are not much more than cages of inhumanity.

Writes Judge Justice: "It is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within TDC prison walls—the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two, or three others in a forty-five foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick or injured who cannot obtain adequate medical care; the sense of abject helplessness felt by inmates arbitrarily sent to solitary confinement or administrative segregation without proper opportunity to defend themselves or to argue their causes. . . ."

How violent are our prisons, and what kind of danger do many prisoners face daily? There are no conclusive studies documenting these kinds of facts, but the federal case which Judge Justice presided over, *Ruiz v. Estelle*, 503 F. Supp. 1265, decided in U.S. district court, reaches some firm—and disturbing—conclusions about the Texas system. The case lasted 159 trial days and included the testimony of over 350 witnesses, and Justice believes it to be the longest prison reform case in the history of jurisprudence and perhaps the longest civil rights case ever before a federal court.

His written opinion is crawling with lurid tales of torture and violence. One example Judge Justice cites is the torture of a young inmate by two older inmates with whom he shared a cell. According to court testimony, for weeks he was beaten regularly with fists and a metal container, burnt with matches and cigarettes, forced to perform oral sex, and followed to and from the showers and mess hall and prevented from going to the day room to insure that he did not inform prison authorities. Judge Justice calls similar brutalization in Texas's system "routine."

Officials from TDC admitted under oath that the jails in Texas have been "severely overcrowded" since March of 1977, and that they have only grown worse. TDC director W.J. Estelle, Jr., the defendant in the case, reported that about 1,000 inmates slept on cell floors. These are the third persons housed in cells designed for one. The cells, most nine feet by five feet by seven feet high, contain two beds separated by about a yard, a toilet which doubles as a chair, and a tiny shelf. Sometimes, according to testimony, four or even five inmates are assigned to one cell. The day rooms, cafeterias, and other common areas are also severely overcrowded.

"If looking for causes of violence, certainly high on the list," says court master Nathan, "and maybe number one on my list is overcrowding. If you think about the problems of space and how so many people are crammed in such a small area, you tend to understand how the tensions and frustrations—and consequently violence—increase. It's that private space that you and I value, even when talking to someone face to face, that we're talking about." Nathan says there's no doubt that there are other factors too: idleness and the fight against boredom, a lack of enough well-trained officers, the frustrations of prisoners bereft of hope. "But I have no doubt that overcrowding is at the root of all flare-ups," says Nathan.

The Texas case is also "replete with credible evidence of inmates being unreasonably and unmercifully beaten with fists and clubs, kicked, and maced by the officers" which, writes Justice, "makes it apparent that brutality against inmates is nothing short of routine in the Texas prisons." In one example cited, a guard on horseback (horses were used to

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Can Courts Clean Up the Prisons?

Judges are not just sending people to prison anymore. Some are also doing something about the conditions there.

Judges in at least 31 states have ordered widespread changes in some of the country's worst prisons. Conditions ranging from inadequate medical care to fire hazards and excessive violence have been ruled so intolerable that they are unconstitutional.

For instance, a federal judge in Tennessee ruled that prisons there were seriously overcrowded and beset by sanitation and safety problems. Staff in the Georgia prison system, ruled another federal judge, have been excessively violent. An Alabama federal judge ruled that the prisons of that state were "barbarous" and "shocking" and ordered a complete overhaul of the entire state department of corrections. In the Colorado case of *Ramos v. Lamm*, a federal judge declared a prison unconstitutional "in every respect."

"I was shocked by what I discovered went on in the cells," says a judge involved with one case, who cannot reveal his name because the case is now on appeal. "It was mind-boggling. There have been few fatalities but numerous assaults and homosexual attacks."

Lawyers representing the inmates have usually filed class action "totality" suits, which attack the overall conditions of a state's entire prison system. They have generally relied on both the Eighth Amendment, which prohibits cruel and unusual punishment, and the Fourteenth Amendment, which says that no state "shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Opponents of judicial activism believe this to be one more instance of courts overstepping their authority. They consider it a prime example of how the federal judiciary has become involved in what historically had been a matter of state and local jurisdiction. They want federal judges to exercise more restraint.

"To some degree, judges are impatient and demanding, wanting to correct overnight what has taken many, many years to develop," says John Moran, director of corrections in Rhode Island, where a judge found the prisons unsanitary and too violent. "I don't think a prison official in the country will disagree that inmates should have a safe, healthy, humane, and sanitary environment. But the judges are regulating temperatures in buildings, the location and size of prisons, staff-inmate ratios, and even the number of cubic feet of air that should move through a given area. They have gone too far in trying to integrate their own philosophies, attitudes, and theories."

These critics, noting that almost all of the activism has been on the part of federal judges, applaud the restraint of state judges. Others think the state judges are shirking their duty under the Constitution. Vincent Nathan, court-appointed prison monitor in three states, points out that state judges, who do most of the actual sentencing, should be at least as involved as federal judges in assuring that the prisons meet constitutional minimums: "State and federal judges take virtually the same oath," he says, "so I don't understand why one group refuses to take responsibility."

Federal judges who have demanded that prisons meet constitutional standards think that it's fully appropriate that the courts become involved. "This Herculean task demands the healthy interplay of courts and other branches of government," says Judge Irving Kaufman, a federal judge for over 32 years, "with prison administrators and others taking the initiative within the constitutional perimeters defined by the courts."

Still, a major question remains: how far can the courts go in compelling prison reform? Prison officials have been wholly unable to create a humane system based on the theory of reform and restitution; why would the courts be any more successful? G.R.

"herd" inmates) beat an inmate so severely that he had to be hospitalized. The guard who attacked the inmate initially reported that the injuries were a result of a fight between inmates. When the guard's cover-up was discovered, he was reprimanded only for falsifying information and not for having assaulted the inmate. The evidence strongly suggests, according to Judge Justice, "that the force employed by guards was, in fact, intolerably excessive on many occasions. . . . [I]nmates must live not only in fear of their fellow inmates, but of their keepers as well."

Judge Justice concludes: "For those who are incarcerated within the parameters of TDC, these conditions and experiences form the content and essence of daily existence. It is to these conditions that each inmate must wake every morning; it is with the painful knowledge of their existence that each inmate must try to sleep at night."

"I not only have to hold my nose, I have to anesthetize my conscience to send men to the Department of Corrections," according to a judge quoted anonymously in a study undertaken by the ABA's Council on Correctional Reform.

Overcrowding and prison violence are a concern of many judges who have to decide whether to send offenders to these prisons. "If the person I was about to sentence had not been to prison before, and was young, I would hesitate a long time before sending him to prison," says one federal judge whose name cannot be used because of a pending case before him. "The way I see it, there's no rehabilitative effect anyway. They are likely to become set in criminal ways, especially if there for a long time. Sending him to prison is in effect throwing up a white flag, admitting that you give up."

Adds Judge Richard LeFevour, presiding judge of the municipal division in Cook County: "The whole thing makes me sick."

If judges consider the decision to incarcerate a sickening nightmare, why are they generally doing nothing about it? James Jacobs, professor of law and sociology at Cornell University, and the author of numerous articles on the problems of incarceration, believes that a judge should not take into account the problems inside a prison when sentencing a defendant; it is beyond his realm and capabilities. "Judges already have too many things complicating their decision," says Jacobs. "They know little

(*Continued on page 73*)

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FOCUS ON PUNISHMENT

Jerome Miller and Herbert Hoelter

Criminal justice seems to have taken a sharp turn to the right in the past decade. It's common these days to hear calls for mandatory sentences, longer prison terms, re-validation of the death penalty, and sending juveniles to adult prison. In states like California it seems that every time the members of the legislature sit together they add offenses to the list calling for mandatory sanctions, and, when not doing that, lengthen the sentences—all apparently in response to citizens' demands for "get tough" measures.

With the U.S. Justice Department predicting that we will shortly average three or more executions a week, one wonders if the body politic can ever be sated with these supposedly common sense measures for dealing with crime. The violence of contemporary corrections has a way of feeding on itself, stimulating more of the same, so it is likely that sooner rather than later we will be immersed in an unproductive morass, an even more costly prison system that does little to lessen crime in the streets. Then it is likely the pendulum will swing back and rehabilitation of offenders will be the demand, with the public naively believing that outmoded approaches will do the trick and decrease crime.

The irony is that in either case, there has been little new thought in the criminal justice field. We'd see more impressive progress if the landmark recommendations made in the late 1800s by the American Correctional Congress could simply be put into effect today.

If a "balance sheet" was presented on the cost/benefit of locking up offenders as a solution to the crime problem, the tally would shock the public and might even discourage the practice. It currently costs an average of $15,000 to lock up one person for one year in this country. In many states it's as high as $25,000. In addition, it costs over $70,000 just to build *one* new prison cell. At these prices, an offender could be sent to one of the better colleges each year and have plenty of spending money left over.

Why Prisons?

And what are the benefits of locking up these offenders? The one we hear the most is incapacitation: at least the offender will not be on the streets committing a crime. The larger question, however, is at what *total* expense? Prisons certainly incapacitate for as long as the person is incarcerated. However, recent studies have shown that even incapacitation of "career" criminals will minimally effect overall crime rates, so society is incurring substantial costs with negligible benefits.

Our reliance on prisons, and the amount of resources we give that failing system, should be a national embarrassment. We currently have over 500,000 men and women in our prisons—*excluding* jails and lockups. Our country's rate of incarceration is higher than any in the western world, and exceeded only by the incarceration rates of the USSR and South Africa, hardly admirable company for an "advanced" democracy. The question must again be posed, for what purpose?

If the argument for prisons is that they help to control crime, the data speak for themselves. We have built and filled prisons at an astounding rate for the last ten years with no effect at all on crime. A prison term is *at best* an ineffective and costly way to achieve this goal.

Prisons are what John McKnight and Ivan Illich call "iatrogenic"—the apparent solution to the problem exacerbates the situation. In his book *Medical Nemesis*, Illich argues that we are a society afflicted with illness-producing medicine, stupidifying education, and criminalizing justice, and that often the helpers hurt. It is a frightening and offensive argument, but one with particular merit where prisons are concerned.

Prisons survive because most reforms in corrections have either been short-lived or off target. An enduring and growing theme is that prison is the only choice. In its rigidity and bureaucracy, prison ensures its endurance by serving both sides of the debate. Whether we wish treatment or punishment, the prison can be presented as providing either alternative. Though the equation is inevitably skewed toward punishment and retribution, the professional correctional administrator can usually give some semblance of validity to the notion of rehabilitation in prison, whether or not objective studies support that ideology.

Liberals have pressed for rehabilitation, but their approaches to reform haven't been innovative enough. They've

There Are Alternatives

Locking them up and throwing away the key isn't the only way

Paul Conklin

sometimes advocated bringing professionals into the prison. Psychiatrists, social workers, sociologists, psychologists have set up shop there, along with their tools of treatment, training and diagnosis—"transactional analysis," "positive peer culture," psychotherapy. Unfortunately, it hasn't worked. Treatment in prison is notable by its failure. Other prison programs, like those recently advocated by Chief Justice Burger in his prison reform agenda (vocational training or education, for example), have likewise had a sad and unproductive history.

Another proposed reform is to get offenders out of institutions, through "alternative" programs like halfway houses, work-release, and probation.

Alternatives in Action

What are the alternatives that we've provided, generally to the middle-class offender? They range from fairly restrictive work-release programs and halfway houses to the more permissive options of weekends in jail, community supervision, public service stints and restitution schemes.

Work-release programs are commonly used in American corrections, and the public is probably more familiar with this alternative than any of the others. Offenders on work-release reside at an institution but are released during the day to work at a noninstitutional job. The rules and characteristics vary from state to state; in some states an offender must find a job himself before he will be admitted to a program, but in other states a job is provided to an offender who is deemed worthy of the program. Wages vary, again, from state to state. Often if an offender earns a decent wage he must then pay a percentage back to the state department of corrections; this percentage can be anywhere between 30 and 90 percent and, ironically, amounts to an offender paying to stay in prison, since the state considers its percentage as payment for room and board.

CASE I

The National Center for Institutions and Alternatives (NCIA) through Client Specific Planning, is coming up with alternatives tailored to the needs of individual offenders and the courts. In the boxes accompanying the article are some examples of creative alternatives.

Maria Campo, 35 years old, had pleaded guilty to two counts of fraud and two counts of passing bad checks. Ms. Campo had been purchasing new furniture for her apartment, paying with checks for which she knew she had no funds. She also had a previous conviction for forgery.

For this case, NCIA proposed a series of sentencing options which included:

Residence: Three options were proposed. To allow the court to maintain local control, NCIA arranged for placement in a county work-release center. NCIA also arranged for placement with her parents or with a work-release program in her parents' county. Placement with the parents could be in lieu of or subsequent to placement at either work-release program.

Social Restitution: Ms. Campo would serve as a volunteer child-care worker at a day-care center. She would perform 10-12 hours of long-term community service each week, for as long as the court ordered.

Employment: Employment would be secured through referrals from a local offender assistance organization.

Counseling: Psychological counseling would be provided weekly. Financial counseling would be provided through a local credit counseling agency. Ms. Campo would receive help in budget matters.

Financial Restitution: Ms. Campo would be required to pay her outstanding debts arising from her offenses. This restitution would be incorporated into her counseling program.

Community Supervision: In addition to being placed on supervised probation, Ms. Campo would be supervised by a third-party advocate. This advocate, provided through an offender assistance organization, would monitor all aspects of the implementation of this plan. The advocate would file periodic reports to the court.

Judge Stewart Williams sentenced Ms. Campo to two 20-year concurrent sentences, suspending all but 18 months. Ms. Campo was ordered into the local county work-release center. Upon release from that program, she was required to reside with her parents and complete all other components of the proposed plan. Judge Williams thanked NCIA for its efforts on behalf of Ms. Campo.

If an offender is lucky enough, his prison sentence will be shortened by serving the end of his time in a halfway house. Here he lives with anywhere from four to 100 other residents in a less restrictive setting, and may work in the surrounding community. Halfway houses provide supervision for an offender trying to readjust to life in the community. It is possible that an offender could be sent to a halfway house in lieu of a prison stay, but this sentencing option is rarely used.

Since halfway houses are located within the community, offenders with violent histories are usually not allowed residence in them (as is also true of work release participation). Drug and psychiatric halfway houses, however, are more likely to admit "problem" offenders since their rules are very restrictive. Generally, for the first third of their stay offenders are not allowed any visits to the community, but furloughs become more frequent as the offender undergoes more treatment. This approach to rehabilitation works best when the setting closely resembles a family, with staff showing care for individual offenders and allowing them to develop self-esteem and personal values.

Less restrictive—and much more innovative—is the weekends in jail option. An offender sentenced in this way spends from either Friday night or Saturday morning to either Sunday night or Mon-

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Jerome Miller engineered the closing of the youth institutions in the state of Massachusetts, still the only statewide reform of its kind. Since then he has worked on the staffs of the governors of Illinois and Pennsylvania. In 1977, he founded the National Center on Institutions and Alternatives (NCIA), a non-profit organization which develops and operates alternative programs across the nation. Herbert Hoelter is the co-founder of the National Center on Institutions and Alternatives and director of the Client Specific Planning program. Prior to his work at the NCIA, he was an assistant to the Commissioner of youth services in Pennsylvania, where he worked with Jerome Miller in removing youths from adult prisons.

CASE II

In a trial by jury, John Hayes, 37 years old, was convicted of embezzling $1.1 million from the firm for which he had been financial vice-president. At his trial, he admitted to being a compulsive gambler and having lost the embezzled funds in various gambling ventures. The prosecution urged the maximum sentence of incarceration for 15 years.

As an alternative, NCIA proposed that John Hayes:

- Perform long-term community service, 10-15 hours per week, with a local gamblers' assistance center and the American Red Cross;
- Make partial financial restitution to the insurance company suffering the loss (15 percent of his annual gross income for 10 years) as well as payments to the gamblers' assistance center (as "substitute victim") and to the court;
- Participate in group and individual counseling for his gambling problem;
- Reside either at home or in a community-based halfway house;
- Maintain his current full-time employment; and
- Be placed on probation for the statutory five year limit plus submit to an additional five year "extended voluntary" supervision to permit his making more substantial, long-term financial restitution.

Judge Margaret Arnow, in her decision, relied extensively on the proposed Client Specific Plan. She imposed a 10-year sentence and suspended all but three years. In lieu of incarceration with the Department of Corrections, Mr. Hayes was ordered to report to a community-based halfway house, to perform community service with the gamblers' assistance center, to participate in counseling, and to maintain employment. Judge Arnow also placed him on five years' probation, to start upon release from the halfway house, and indicated that any gambling episode would constitute a violation of probation. As for the financial restitution, Judge Arnow urged the insurance company to pursue civil action to recover its losses.

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day morning locked up, but during the rest of the week he is a community resident. The idea is that he should be punished by withholding some of his liberties, but completely pulling him out of his home is unnecessary.

Often this alternative is used in combination with another—public service work. Here the sentence calls for weekends or evenings spent volunteering in an agency or public service organization. Offenders have spent time working in nursing homes, boys' clubs, counseling agencies and any number of other settings. This option is usually reserved for misdemeanants.

The courts have also started using community supervision; offenders, in addition to having a probation officer, are placed with a third-party advocate who helps them stay on the right track. These advocates may, for example, help an offender find a job, child-care or counseling. Advocates are provided by offender assistance organizations.

One alternative currently getting a lot of public attention is financial restitution. Here an offender who is able to pay back his victim does so. Unfortunately, in the past many offenders didn't have the means to participate in this kind of plan. Currently, courts are starting to recognize the usefulness of payment schedules. Both offenders and victims can benefit when the courts allow an offender to pay his victim back on a supervised schedule.

What helps an alternative to "work," lowering recidivism, enabling offenders to function more productively and, quite possibly, ultimately affecting the level of violence which sustains the culture of crime? The ones that work are those where an offender has an advocate who works with him at least thirty hours a week, a kind of paid or volunteer buddy. In addition, there are programs that demonstrate care for the individual as well as supervising him. They are generally high risk programs willing to become involved in the Byzantine and confusing contradictions which characterize the life and perceptions of the individual offender, and programs which, because of their emphasis on the individual, do not replicate easily. The emphasis of these programs is incompatible with the "objective" responses of mandatory sentencing or the bureaucratic response of the helping social agency or program. But what about alternatives in general? Are they more successful? Are they more cost effective?

Why Alternatives Fail

The answers to these questions are mixed. The primary problem with "alternatives" is that they generally have not been tried for the population who would otherwise be in prison. The programs which work (and there are many) are reserved for populations which have the means to avoid falling into the criminal justice system abyss, generally the more articulate, interesting individuals who are able to involve friends or family in their plight—the middle-class or their mimics. In practice that means that alternative programs have actually *increased* the total number of offenders in the system. By creating dual systems—prison for "lower class" criminals, alternatives for those who rarely go to prison—we're doing nothing for most prisoners. There are isolated programs which provide the exception, such as "Client Specific Planning" (see boxes for case studies), but the norm is not to handle the "serious" offender in alternative settings. The paradox is that the diagnostic or labelling process which enables many offenders entry into alternative programs is ludicrously arbitrary.

Ronald Laing, the British psychiatrist, has commented that most diagnoses are "social prescriptions," focusing on what's best for society, not what's best for the individual. Those of us in the so-called helping professions often maintain the naive view that the diagnosis of serious offenders is a scientific exercise. At other times, when feeling less comfortable with psychiatric nomenclature or the rehabilitative ethic, we stress the legal definition of the serious or violent offender. But the most crucial aspect of this process has been neglected—namely, the bureaucratic and political considerations which call for certain prescriptions. For example, when dealing with a convicted felon, the diagnosis is more likely than not *a bureaucratic response to a political problem.* In this context, the diagnosis helps relieve strain on the system by focusing attention on an individual or class of "deviants," many or most of whom, paradoxically, are products of that very same system. The process repeats itself. Only the labels are changed to protect the guilty.

It matters little, therefore, whether the definition is one of "sinner" of the seventeenth century, "possessed" of the eigh-

(*Continued on page 64*)

A Prison by any Other Name

Reform schools and juvenile homes
are still jails and still
turn kids into criminals

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FOCUS ON PUNISHMENT

Robert Hunter

How many adults could describe the juvenile justice system? Could even those who had contact with the police as kids tell you much about how the system works? How many adults can still describe the legislative process they learned in junior high civics classes?

Most Americans lack precise knowledge, but that doesn't prevent them from having strong opinions about what they think is going on in this country. Despite the ebb and flow of problems facing the nation, they have been vocal about one issue for the past 25 years—the perceived increase in serious juvenile crime.

A survey conducted this year by the Opinion Research Corporation found that 87 percent of a national sample believe "There has been a steady and alarming increase in the rate of serious juvenile crime." Seventy-eight percent reported that they believe "The juvenile courts are too lenient on juveniles found guilty of serious crimes," and 57 percent reported that they feel "Committing juveniles to correctional institutions serves as a deterrent to other youths from committing crime."

These are strong opinions, but in the 1980s they are a consequence of misinformation and misunderstanding. The truth about violent youth crime, as well as nonviolent offenses, is that there is no evidence of a general increase. Juveniles 17 years of age or younger tend to commit crimes against property rather than against persons. Across the board, juvenile arrest rates leveled off in 1975, having peaked in 1973 or 1974 with the end of the Baby Boom. Since 1979, the rates actually appear to have begun to drop (Krisberg and Schwartz; Snyder and Hutzler). National studies show that the more serious the offense and history of offenses, the more severe the sentence in juvenile court. Contrary to public belief, juvenile courts are likely to deal *more severely* with the serious juvenile offender than do adult courts (Snyder and Hutzler).

Nor is there any substantial evidence that more severe sentences deter either youth or adults (Erickson and Gibb). Research has shown that about two percent of youth are violent. Criminologists now feel that this group must be kept out of circulation and in secure care, even though we don't know how to rehabilitate them. Public safety demands it (Dinitz and Conrad).

But the public isn't familiar with these facts and persists in reacting to the far-reaching and even revolutionary reforms in the juvenile justice system carried out in the 1960s and early 1970s. These reforms were described by LaMar Empey in 1979 as "the Four Ds"—decriminalization, diversion, due process, and deinstitutionalization. All of these emphasize treating kids through social services rather than punishment, so they go directly counter to the current mood. Though they may seem like radical reforms, most have antecendents in earlier ways of dealing with delinquent kids.

Decriminalization eliminates status offenses from the jurisdiction of the juvenile court. The general basis for decriminalization is that status offenses—running away, skipping school, and the like—are not criminal acts. No adult can be punished for such acts, and children and youth are not so different from adults that they should be deprived of their constitutional rights under the law. These violations of adult expectations of youth are seen as problems that should be dealt with by community social service agencies.

Diversion calls for "turning [juveniles] away from the court," usually to some form of social service. (See insert on next page for a diversion program using law-related education.) The logic of this reform is that the child found guilty of minor or status offenses is spared the stigma of court processing, and the time of the court is freed to concentrate on serious offenders.

Due process formalized and legalized the traditionally informal proceedings of the juvenile court. It extended to juveniles some, but not all of the constitutional guarantees provided an adult before a criminal court. The right to legal counsel, the right to be informed of charges, the right against self-incrimination, and the right to confront and cross-examine witnesses were extended by the U.S. Supreme Court in its landmark decision *In re Gault* (387 U.S. 1, 1967). Additional safeguards were extended by later Supreme Court decisions as well (see *Update*, vol. 3, no. 2, Spring 1979).

Deinstitutionalization removes youngsters from institutional settings (including training and industrial schools, detention centers, and jails), unless kids can be shown to be dangerous to themselves or the community. Empey summarizes the logic of the effort by stating,

> Deinstitutionalization has been rationalized on four grounds: (1) the destructive impact of places of capitivity on children; (2) the belief that offenders require reintegration in the mainstream of American life, not isolation from it; (3) increased attention to the civil rights of juveniles; and (4) the excessive bureaucratization of correctional programs . . . [which accounts for the fact that] treatment afforded juveniles has never approached the goals envisaged for it.

Deinstitutionalization can be a modest step, like taking status offenders out of locked jail cells and sending them to their own home or to shelter care facilities. Or it can be the genuinely revolutionary step of closing training schools for delinquent youth, as happened in Massachusetts in the early 1970s when Jerome C. Miller was Commissioner of the Department of Youth Services.

All four D's have been controversial, but deinstitutionalization is probably the one that's caused the most furor. It lets kids out when the public wants them locked up.

But 10 or 15 years ago, when the public had more faith in rehabilitation, the reform was a good deal more popular. This oscillation between trying to rehabilitate offenders and wanting them punished is nothing new. It runs throughout the American experience with prisons for adults and for juveniles. Yet in the case of youngsters this national confusion is all the sharper since it has led to juvenile facilities that promise to teach and treat but really are as harsh as—if not worse than—adult prisons.

Social Control in the Past

America didn't always rely on institutions to structure society. In *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971), David J. Rothman argues persuasively that, during the colonial period and up to the 1830s, Americans depended on the basic social institution of the family to assure social stability. Life spans were short, children assumed productive roles in their families from age five or six, and youth, awarded adult status and playing adult

Paul Conklin

roles, married and established their own families in their early teens. Families exchanged children to learn trades through apprenticeship at age seven or eight, and parents or apprentice masters provided basic education.

Orphans, widows, and the disabled—any persons unable to care for themselves, including the poor—were boarded with other families, where they could contribute to the household economy for their keep. Larger cities constructed alms houses to receive strangers in need; however, they were small, built around the family living model, and short-term.

Communities also built jails, but not for the purpose of punishment. Jails were constructed to temporarily hold persons prior to trial or after conviction until the sentence was executed. Punishment was carried out through other means. As Rothman puts it, "eighteenth-century Americans . . . would . . . warn, chastise, correct, banish, flog, or execute the offender." Though they hoped to deter misbehavior, they saw no prospect of eliminating deviancy from their midst. Crime, like poverty, was endemic to society."

That doesn't mean that they were soft on crime. By equating sin with crime, the criminal codes punished religious offenses such as idolatry, blasphemy and witchcraft, and clergymen declared infractions against persons or property to be offenses against God. According to Rothman, identifying disorder with sin made it easy to believe "the offender was destined to be a public menace and a damned sinner. This attitude underlines the heavy-handedness of the eighteenth-century, which set capital punishment "for crimes as different as murder and arson, horse-stealing and children's disrespect for parents."

Diversion: Headed in the Right Direction

Mary Curd-Larkin

At 10 on a hot Friday night Frankie and two of his best buddies stealthily enter a grocery store's warehouse. Unaware that they have triggered a silent alarm system, the fifteen-year-olds indulge in a shoplifting spree, helping themselves to three cases of candy bars. The fun stops there. On leaving they are met by two police officers and arrested.

For Frankie, this is a first arrest. The events that ensue will be crucial to his life. This shopping trip will rank either as an isolated incident in a young person's life or as the beginning of a chain of crime.

Statistics show that if Frankie goes through the formal processes of the juvenile justice system, he's more likely to become a criminal. That fact, coupled with the problem of overcrowded juvenile courts, speaks in favor of diverting first-offender youths from the juvenile justice system.

One particularly successful diversion program is based on teaching kids about law and the legal system. This D.C. project was begun in 1979 as an alternative to youngsters who would otherwise be assigned to informal probation.

Here's how it works. All first-offenders for minor crimes are eligible for a consent decree in the District of Columbia. A consent decree is a voluntary period of probation without an admission of guilt. This alternative to probation takes place before the matter is adjudicated. If kids accept the alternative they are "sentenced" to a 12-week course that meets in a courthouse two hours a week.

The course deals with law-related topics these youngsters encounter every day on the streets where they live. Parents are required to attend the first class in order to learn about the program, and are encouraged to participate in the remaining classes. Participatory learning methods—including role plays, mock trials and field trips—help kids learn about family law, school law, and the juvenile court process, with equal emphasis placed on rights and responsibilities. Within the class, the students are not labeled, segregated, isolated, or alienated by the law-related education teacher. For some, this is their first positive educational experience.

The practical law topics, coupled with effective teaching strategies, help rehabilitate because students learn about our legal system while developing the personal strength to say "no" when confronted with opportunities or invitations to break the law. One lesson, for example, addresses itself to "how not to go rob the grocery store when the gang wants to, but you don't."

Another aspect of the program includes the use of community resources in the classes. Attorneys, judges, police and social workers participate in the classes as volunteers. Even though the curriculum emphasizes accepted methods of teaching social studies, students are not actually required to master reading. Therefore, all students can comprehend the content of the lessons regardless of their reading level, and students with diverse reading abilities are at ease in these classrooms.

Thus far more than 200 youth have taken part in the District of Columbia model program. In an exit interview, one student said, "I don't hang around with the same crowd anymore 'cause I don't want to go to court." Another said, "I'd give the Street Law diversion class a grade of 'A' because they teach stuff you need to know." Parental reacation has been similarly positive. For instance, one parent reported, "This is the first time I can remember Marvin ever wanting to go to classes. He wants to keep on coming after the twelve weeks."

A 1980 evaluation, based on comparison between kids in the diversion program and a control group, showed that LRE classes, if properly implemented, resulted in reduced offense rates. Evaluators are stunned that the recidivism rate in the District of Columbia for Street Law Diversion juveniles is 15 percent, compared with a 35–40 percent recidivism rate for consent decree juveniles who do not participate in the diversion program.

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As for juveniles, they hardly existed as a category. Children were treated pretty much as adults after the age of seven and certainly before they reached fourteen.

Prison as Reform

It is fascinating to note that the first major reform to follow the American Revolution focused on changing the inhumane practices of capital punishment, mutilation, and flogging. By substituting prison for the practices of a rejected English colonial past, Americans in the 1790s created a new institution in keeping with the new world they were creating. Through prisons they hoped to meet the problems caused by growing cities and the beginnings of the industrial revolution.

The prison idea was imported from France, which, following its own revolution, was implementing the Enlightenment ideals of the Italian, Cesare Beccaria. Beccaria, father of classical criminology, rejected theological notions of the natural depravity of man. Because of man's god-given reason, he thought brutal and inhumane punishment wasn't necessary. Certainty and speed of punishment were more important than severity in controlling crime and deviance. In fact, the severe retributory punishment found in penal codes frequently encouraged an offender to commit *more* crimes to cover a minor infraction of the law. Therefore there should be a series of punishments, ranging from mild to severe, enacted by legislators to accord with the seriousness of the offense. The punishment should fit the crime.

This classical theory of deterrence was the basis for rapid revision of legal codes in the 1790s, as Americans sought to rid the new nation of its English colonial laws. Prisons were one product of the reform. As Rothman puts it,

> In this first burst of enthusiasm, Americans expected that a rational system of correction, which made punishment certain but human, would dissuade all but a few offenders from a life of crime. They located the roots of deviancy not in the criminal, but in the legal system. Just as colonial codes had encouraged deviant behavior, republican ones would now curtail or even eliminate it. To pass the proper laws would end the problem.

However, by the 1820s, doubts had set in. The public feared for national stability and worried about the loss of social order. Crime had not been eliminated, cities were larger and contained more people working in factories, and vice was rampant. The "old values" needed to be restored.

Child Saving

Rothman points out that Americans in the pre-Civil War era intently pondered the origins of deviant behavior. Philanthropists organized themselves into societies to investigate the question, hoping to devise an effective method of punishment. The answer, Rothman tells us, was found in reports prepared for state legislatures by prison administrators.

> These officials . . . attempted to understand the causes of deviancy by collecting and appending to their . . . reports to the state legislature biographical sketches of inmates about to be discharged. . . . Here, in the life stories of . . . convicts, they could discover the origins of crime. Impatient with theology and disappointed in the law, they turned to the careers of offenders for the information they wanted.

The common factor in most convict biographies was the instability of the home: corruptness or intemperance of parents; dissolution of the family due to death, divorce, or desertion; or the premature and unapproved departure of the child. In any case, an undisciplined, immature child was on his own, left to his own devices to survive on the streets.

The problem now was clear. Deviance was an outcome of early environment. The solution was early removal of the child from such corrupting environments and placement in a setting where the defects of weak or incorrect parenting could be corrected. This was the underpinning notion that led to the establishment of "houses of refuge" and later reformatories and training schools. Nor was it essential that the youth be guilty of a criminal offense to be awarded the opportunity for a safe upbringing. Rothman writes,

> Taken together the admissions policies of child care institutions were a catalogue of practically every misfortune that could befall a minor. The abject, the vagrant, the delinquent, the child of poverty-stricken or intemperant parents were all proper candidates.

And the institutional setting was now seen as the preferred solution rather than the last resort. It was during this period of the 1820s and '30s that the word "rehabilitation" entered the English language to describe the processes and goals of the reformers.

The first houses of refuge were established in New York in 1825, in Boston later that year, and in Philadelphia in 1828. Eastern cities with dense populations set the trend. By the 1840s there were refuges in Rochester, Cincinnati, and New Orleans, and in the 1850s they appeared in Providence, Baltimore, Pittsburgh, Chicago, and St. Louis. What was the justification for this new institution? The belief in the malleability of the child, and the assumption that an institutional setting could offer a benevolent course of socialization, rigorous discipline, unquestioning obedience to adult authority, Christian teaching (preferably Protestant), and good work habits.

The Law Catches Up

Alexander W. Pisciotta contends that the refuge/child-saving movement came first, followed by changes in state law. In the 1838 case *Ex parte Crouse*, a father challenged the incarceration of his daughter in the Philadelphia House of Refuge "on grounds she had been illegally detained because she had been denied the benefit of a trial on account of her age." Unfortunately for Mary Ann Crouse and her father, the justices of the Pennsylvania court rejected this interpretation of the law and rendered a unanimous decision stating that the Bill of Rights (in this case the Sixth and Ninth Amendments) did not apply to minors. The justices based their opinion on the doctrine of *parens patriae* which, heretofore, had been an English jurisprudential innovation. "May not the natural parents, when unequal to the task of education, or unworthy of it," asked the judges, "be superseded by the *parens patriae* or common guardian of the community?" Pisciotta argues:

> The justices' per curiam opinion clearly indicates that they based their ruling on the assumption that the Philadelphia House of Refuge had a beneficial influence on its charges: "The House of Refuge is not a prison, but a school, where reformation and not punishment is the end." The justices also clearly specified their reasons for assuming the Philadelphia institution was a school and not a prison. "The object of charity is reformation, by training inmates to industry; by imbuing their minds with the principles of morality and religion; by furnishing them with the means to earn a living; and above all, by separating them from the corrupting influence of improper associates."

For the next 129 years, until the *Gault* decision, *parens patriae* was the legal

(*Continued on page 62*)

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FOCUS ON PUNISHMENT

What Prison Does to Women

The brutality that leaves no bruises is often the worst

Driving downstate from Chicago to the Dwight (IL) Correctional Center for Women, I wondered what a women's prison would be like. My images came from movies like *Women in Chains*. A fence surrounding a huge brick block in the middle of nowhere. The women dressed in drab uniforms, the hours regimented, gates echoing as they slammed shut.

I was visiting Dwight with a group of women determined to provide some Christmas entertainment for the residents. We had spent 4 months planning the visit, much of that time working through the Department of Correction's red tape to arrange gifts, refreshments and visits for the residents with their children.

When we got to the prison it didn't seem so bad. Instead of the cold and cruel cellblock I had imagined, Dwight resembled a college campus. If you could ignore the wire-topped fence surrounding the grounds, it was a pleasant enough place.

But looks are deceiving. The reality is much more subtle, and more frightening than what I'd imagined. If a prison can effectively strip a resident of her initiative, turn her into an automaton, then planning an escape becomes near to impossible. The whole prison system works to this end; rules are usually arbitrary, petty and overwhelmingly numerous, making independent action—and maintaining self-respect—nearly impossible.

Yet, even with all the regimentation, real organization is nonexistent. Our group experienced this *Alice in Wonderland* style. Despite our endless negotiations with the prison administration, security hadn't worked out admittance procedures for our group, or for the two busloads of relatives and children accompanying us. We waited outside for 45 minutes, in subfreezing weather, until they found someone to authorize letting us in.

One by one we were admitted to the visiting area, a casual lounge where the residents waited for their families. For some of these women this would be their first visit with their children in months or even years. Dwight is located about 80 miles south of Chicago, the home of most of the incarcerated women, and there is no public transportation from Chicago to the prison. In the winter the drive can be torturous. This combination of location and inaccessibility means that family ties are difficult, if not impossible, to maintain.

The residents (the term preferred to "inmates") were enthusiastic about the party since this would be their major Christmas event. They had "dressed up" (women at Dwight wear their own street clothing) and were showing off their children to one another. It seemed chaotic; the visitors and about 200 residents were eating, talking, and sometimes watching the entertainment.

It wasn't as chaotic as appearances indicated, however. Each woman had been checked out of her cottage to attend the party, and no one was to leave this building. Every resident's movement out

Miriam R. Krasno

UPI

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of a building had to be monitored by a radio-dispatch unit. Women in isolation (solitary confinement) were barred from the party.

By the end of the afternoon we had gotten a taste of prison life—the arbitrary nature of the rules, the waiting for authorization, the red tape. Who attends the party, who is allowed on the resident's visitors list, who can touch or kiss whom. Three hours after our arrival we left, back through the gates, but the resident population of 425 wasn't going anywhere. They are part of what is probably one of the most ignored and oppressed segments of our society.

Who Are Women Prisoners?

Martha Wheeler, superintendent of the Ohio Reformatory for Women, gave this overview of incarcerated women:

> [T]he women who end up here are acting out of their inadequacies as individuals—not with criminal rings or real criminal intentions. They have two or three kids and nobody to help them, so they write [bad] checks. Most of our homicides come out of longstanding volatile situations—a person who had meaning to the woman and the situation blew up. It's a personal interaction kind of thing—very often a drunk and abusive man, a husband, boyfriend, next door neighbor who's been picking on the kids. . . .
>
> A woman who gets into trouble [but has] a supportive family [with] money will get sent to a shrink or to live with Aunt Suzie and the court approves. She can be diverted from incarceration. *Incarceration is for women without resources—financial and human.* (Burkhart, Kathryn; *Women in Prison*, Doubleday: 1973.)

A 1981 General Accounting Office report on female offenders points out that women in prison lack coping skills. They have no idea how to budget, apply for unemployment benefits or make use of social, medical or educational programs in their home communities.

A profile of imprisoned women shows there are approximately 15,000 women incarcerated in the U.S. They are generally 18-29 years old; 50 percent are black, 35 percent white, 15 percent Hispanic. Fifty-six percent are the sole support of their children. One-third of female prisoners who worked before incarceration made less than $5,000 per year. Reports indicate that women prisoners show poor self-esteem and dependent states of mind.

The Center for Women Policy Studies has documented the dependency of women offenders. Women depend on men, public institutions, drugs, alcohol, and on the prisons themselves. In the extreme, many women in prison have been sexually or physically abused in their early lives. A woman cannot benefit from even the best educational or vocational programs if she feels unable to achieve on her own. But in most prisons women aren't given good options. In fact, it's almost as if courts and prison officials are trying to keep female offenders weak and dependent.

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Jane Chapman characterizes prison life in her study *Economic Realities and the Female Offender*:

> Women prisoners are treated as children: rules and regulations are not regularized in an effort to prepare women to live in a legalistic society: rather, women's prisons tend to be administered in a paternalistic fashion in which arbitrariness and favoritism dictate many decisions. Told to act like a "good girl," many of the women adapt childlike behavior, a dependency that does not question policies or practices. Such passivity may be beneficial in helping to avoid confrontations that might only prolong the period of confinement, but it also may have a debilitating effect by limiting the woman's ability to assert herself to organize an independent life when she reenters society.

Paternalism and Passivity

"The word *woman* isn't in their vocabulary," commented one lawyer about corrections officials. "*Ladies, residents* and *girls* are the only words they use." Judges have the same set of stereotypes. The General Accounting Office has reported that judges think crime is unnatural in women and must be punished more severely than male crime. "A judge may sentence women to longer prison terms than a man not only as punishment for her statutory offense, but for transgressing the judge's expectations of womanly behavior," says the GAO. This attitude is rooted in the historical notion that women criminals, regardless of their offenses, were "fallen women." It follows then, that to rehabilitate a female offender one must restore her "natural" and "normal" female traits.

The women's prison reflects this approach. It rewards passivity, the characteristic most crucial to the feminine stereotype. Prison life is controlled by the administration. Of course, control is central to male prisons too, but the difference is in the degree and nature of the control. In women's prisons, for example, the level system is used far more often as a major disciplinary tool, and is applied with more pettiness.

Within this system a new resident has only the most basic "privileges" and can earn more only by avoiding a write-up for rules infractions. In the Kentucky Correctional Institution for Women, a new inmate must wear state-issued dresses, she may not wear makeup or display pictures of her family, she must be in bed by 9:30 P.M., she may place only one five-minute phone call per month. The only items allowed in her cell are a Bible, an ashtray, and a drinking cup. If she avoids write-ups for 11 months (reaching the top level) she can take medication, have 30 minutes of telephone privileges per month, and wear her own clothes.

Women are written up for the pettiest of rule infractions, such as talking out of turn at a class discussion. There are no rewards for "good" behavior, only punishment for "bad." The system encourages a woman to be passive—if she goes unnoticed she runs a better chance of avoiding write-ups. Jealousy and fighting are other side effects of this kind of discipline, since women with different "privileges" are all housed together in the dormitories.

Incarcerated women experience too much regulation and show too much dependency and too little self-esteem. It starts at the very beginning. A male warden commented on prison reception:

> Being in jail is harder on a woman than a man. Men are always together . . . they've been in the Army with other men and are used to being around each other naked or dressed. Women are taught to undress in private and be modest. . . . She comes in here and we undress her and tell her to "bend over, lady," to look for contraband. We make her bathe in front of everyone. Right off that gives them mental problems that are hard to handle. The initial shock is the toughest thing. That sort of thing can break your spirit. (Burkhart, *Women in Prison*)

All new women inmates go through complete searches and medical examinations. The most thorough reception entails the removal of a woman's shoes, socks, wig, and leather belt. Her purse is searched as well as her ears, nose, mouth, bra, and pants leg. If a woman wears dentures she must remove them for inspection. Her clothing is removed and searched as she is given a bath, and she may also be subjected to a body cavity examination.

The shock of intake often leaves a woman confused, upset, and poorly equipped to perform well on psychiatric tests administered on entry. Results from these tests will determine many aspects of her life in prison, including educational opportunities, work assignments, and counseling needs.

Teaching Bad Habits

Women's prisons offer even less opportunities for "rehabilitation" than do male institutions.

In theory, the resident's work assignment could build self-confidence and skills, particularly when combined with vocational training. But most women residents are being short-changed.

Americans believe that imprisonment should be punishment—we generally feel that prisoners should receive no gratification from their confinement, be it financial or psychological. Laws in many states forbid paying competitive wages for prison work, and rates of pay in women's correctional institutions in 1977 ranged from nothing to $1 an hour. At Dwight Correctional Center (IL) the top money possible is $65 a month, but $15 a month is the most common salary. This may be cut to $9, even though commissary items like cigarettes, soap, toothpaste, and coffee must be purchased from this amount.

The work itself is often what the institution needs, not what will benefit the prisoner. Jobs in food service, maintenance and housekeeping, laundry, sewing, clerical tasks, beauty shops and the infirmary help keep the prison going, but what do they do for the residents? The American Correctional Association has called for these criteria for vocational training and work assignments:

> a realistic vocational training program which is divorced from the maintenance needs of the institution and under qualified instructors; training should be in as many as practicable of the varied industrial, commercial and service occupations in which women are engaged today. A work program to provide upkeep of the institution [should] also provide an opportunity to teach good work habits which are essential." (*Manual of Correctional Standards*, ACA)

Trapped on the Low Rung

Female offenders do need to learn "work habits." Most incarcerated women have been employed at some time in their histories but their work lives have been unstable. This, combined with their lack of self-esteem, indicates job-readiness training is necessary if these women are going to find and keep jobs when they get out. Programs could cover topics like nontraditional job opportunities, behavior expectations in the workplace, interviewing techniques, resume preparation, childcare counseling and goal setting.

No one doubts the value of this kind of education, but it is rarely available to incarcerated women. A Women's Bureau report on their employment needs found that job readiness courses "which could appropriately be taught inside the institution are rarely offered.'

Women's prisons also fall down on vocational education. Most recent recommendations for vocational rehabilitation have emphasized preparing residents for nontraditional jobs. These women need to support themselves and, in most cases, their children, so they'll need the higher pay of nontraditional jobs. Correctional administrators often argue that women don't want these jobs because they are "men's work." Those involved in educating the female offender disagree. They say that women offenders are interested in the money and mobility of nontraditional occupations.

But this kind of training is rarely available in women's institutions.

For one thing, the cost of equipment is a major obstacle in craft or trade skill training. A complete auto repair shop could cost $55,000 and in only one women's correctional facility, Bedford Hills (NY), is this kind of training available. The shop was partly underwritten by a grant from Sears. For a truck driving course, trucks, instructors and simulator equipment are all necessary. At the Nebraska Center for Women the residents are getting this training because of another unusual offer—the Southeast Nebraska Technical Community College leased the prison the truck, provided instruction and bought the simulator equipment. These opportunities, though, are hardly typical.

Most women prisons are like Kentucky's, offering only training in traditional—and lower paying—jobs. The following chart shows the vocational training for women and men in the Kentucky prisons. The dollar amounts indicate the average weekly earning each trade/job would pay on the outside.

Kentucky Correctional Institute for Women

Training offered:	Weekly earnings on outside:
file clerk	$ 189
receptionist	199
bookkeeper	222
general clerical	222
keypunch	222
office machine operator	223
upholsterer	247

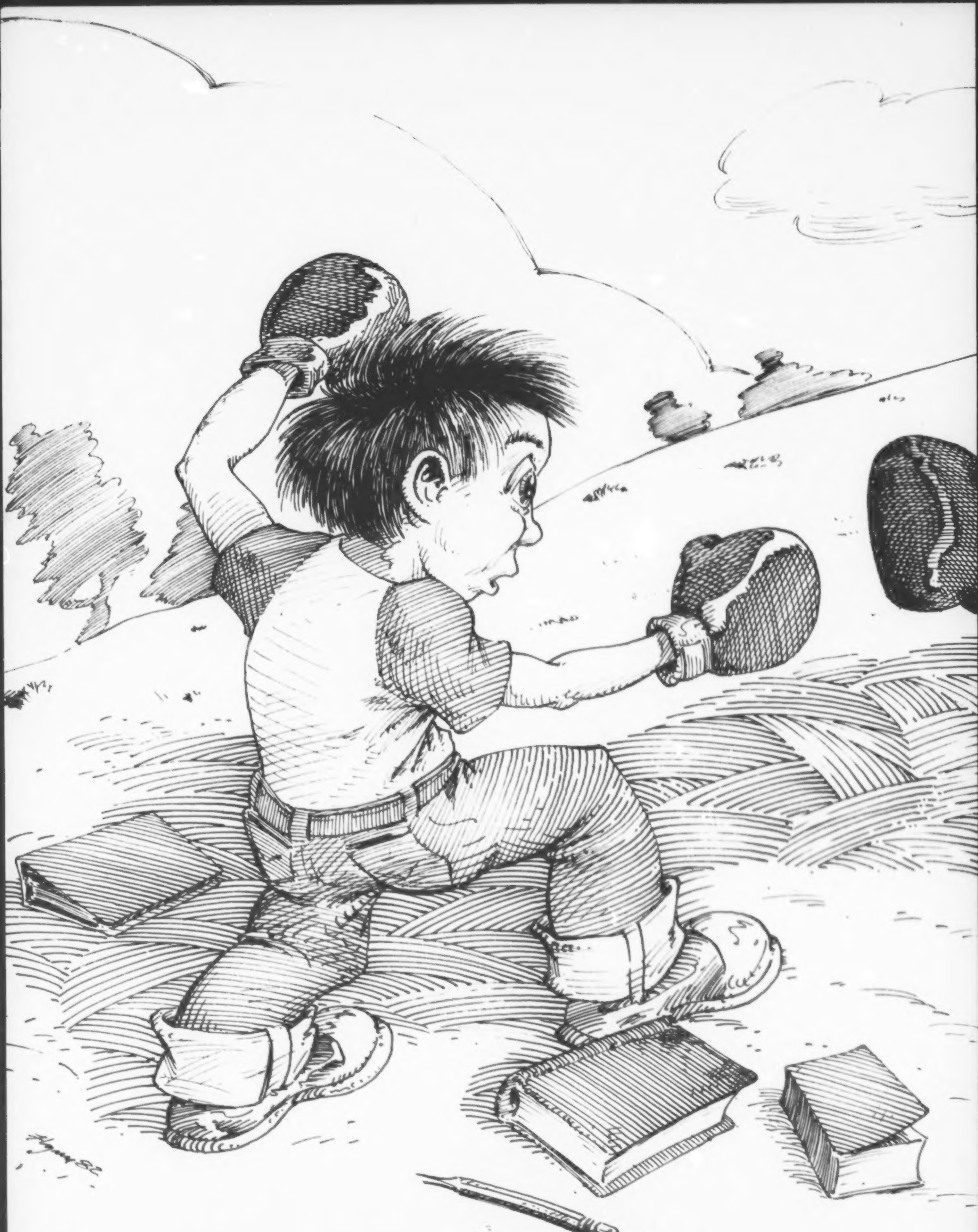
***Kentucky State Reformatory* (men)**

Training offered:	Weekly earnings on outside:
upholsterer	$ 247
roofer and slater	266
auto mechanics	286
auto body repair	294
composition and typesetter	311
carpenter	326
printing press operator	329
welder	338
brick and stone mason	401
plumbers and pipefitters	404

Women comprise only about 4 percent of the prison population, and state departments of corrections tend to virtually ignore this small female population when allocating money for training programs. In addition, since there are fewer women in prison there is an increased cost per person for programs and services. This emphasis on cost-efficiency also prevents women from participating in work-release programs which could help supplement scanty in-prison training op-

(*Continued on page 68*)

"One dozen nightcrawlers, please."



FOCUS ON PUNISHMENT

School Discipline, Round Two

Schools can discipline kids, stay within the law, and teach better, too.

David M. Schimmel and Jeffrey W. Eiseman

It's Friday night and the basketball team is celebrating its victory by downing beers at a neighborhood party. Sounds like an acceptable activity for teenage kids on a weekend. But these kids are going to get thrown off the team after their celebration, because of a school rule prohibiting athletes from drinking, smoking or using drugs. The case will go to court, and the big question is who's in the most hot water—the kids for drinking, or the school for possibly violating the kids' rights?

In another high school, a male student is told to stop kissing his girlfriend in the

James Flynn

hall because it is against the rules. He stops, protests, and is suspended from school for his attitude towards school rules. Was this an appropriate punishment or will the school itself wind up being disciplined?

Questions of school punishment come up every day, and the courts do not always support school authority. Educators are beginning to wonder if all this court attention is making it harder for them to teach students in schools that are becoming increasingly violent and disrupted. But court intervention may actually be an opportunity for schools to redesign their approach to punishment, making it less arbitrary and repressive and more in tune with educational objectives. This may also be the occasion for two groups who deal regularly with human behavior—the courts and psychologists—to provide educators with ways of bringing about constructive change in our schools.

What Are the Limits?

What can—and can't—educators do when kids act up? As is usual in our legal system, the answer depends a lot on the circumstances of each case. If you vary the facts of each case a bit, you may get a very different outcome. The Supreme Court has spoken on very few of these areas, and lower courts don't always agree.

In order to figure out the general trend of decisions, it's helpful to divide the subject up into five categories: the nature of punishable offenses, the purposes of punishment, the form of punishment, the severity of punishment and procedural requirements.

Nature of Punishable Offenses. Courts have given schools wide discretion to punish offenses, requiring only that their action reasonably connect with the educational process (*Neuhaus v. Federico*, 505 P.2d 939, 1973). This "reasonableness" test is pretty easy for schools to meet. Under it, courts have okayed punishments for using tobacco, alcohol, and drugs on the grounds that "an effort to maintain and inculcate habits designed to preserve good health among pupils is a legitimate element of an educational system" (*Randol v. Newberg Public School Board*, 542 P.2d 938, 1975).

Nevertheless, schools don't have a total carte blanche. The courts have placed four kinds of limits on the type of behavior that schools can punish. The most important is that students may *not* be punished for asserting their First Amendment rights (of free speech, press or association) unless they substantially disrupt the existing conditions for learning (*Tinker v. Des Moines School District*, 373 U.S. 503, 1969). In this landmark case, the Court served notice that schools do not possess absolute authority over students.

Second, for the most part, courts have restricted the school's authority to punish behavior occurring off school grounds, outside of school hours, and without school sponsorship. Again, however, schools have been given wide discretion in determining what to do. Courts may well okay suspension for off-campus brawls if the school authorities have reasonable cause to fear for the on-campus safety or well-being of students, teachers,or school property, or if the incident might in some other way interfere with the operation of the school. (*R.R. v. Board of Education of the Shore Regional High School District*, 263 A.2d 180, 1970). And, under certain circumstances, extracurricular organizations may punish students for off-campus behavior that violates organizational rules. For example in *Braesch v. DePasquale*, 265 N.W.2d 842, 1978, the court said school authorities could punish basketball players for violating a team rule against drinking, even though the violation occurred off campus.

Third, courts have ruled that schools can't deliver a double whammy to students. If the kids' absences result from being suspended, the school can't punish them for not being there (*Dorsey v. Balem*, 521 S.W.2d 76, 1975). And fourth, courts have restricted the school's authority to punish students with disabilities. Specifically, some courts have ruled that schools may not suspend students for disruptive behavior related to their handicap (*Stuart v. Nappi*, 443 F. Supp. 1235, 1978). Some intriguing implications of the disability ruling are discussed in a companion article by Gail Sorenson.

Purposes. Turning to intent, the courts have decided that educators can physically punish only if a kid's doing something wrong. In *Hogenson v. Williams* (542 S.W. 2d 456, 1976), a Texas court held that a coach who struck a 115-pound, 12-year-old hard enough to knock him to the ground might be liable for damages on the grounds of malice, since his only justification was "instilling spirit" in the youngster.

Form of Punishment. Probably every teacher wants to know what punishments he may legally use. There are a lot of them that the courts consider legitimate, including verbal chastisement, grade reduction, corporal punishment, expulsion from extracurricular organizations, forfeiture of athletic letters, disciplinary transfer to another school, suspension, and expulsion.[1]

But the courts have said you can't revoke earned awards. That includes not only diplomas (*Valentine v. Ind. School District*, 183 N.W. 434, 1921) but also attendance at graduation ceremonies. In *Ladson v. Board of Education Union Free School District No.9*, 323 N.Y.S.2d 545, 1971, the court allowed a student who had struck and threatened a principal to attend graduation on the grounds that she couldn't further disrupt instruction since all instruction had already been completed. However, if her attendance had posed a genuine threat to the orderliness of the ceremony, the school could have legitimately excluded her.

Severity. Not surprisingly, when considering severity the courts have decided that punishments should be reasonable and moderate as opposed to excessive. A punishment is reasonable if it is commensurate with the damage caused by the student's misbehavior (*Lee v. Macon County Board of Education*, 490 F.2d 458, 1974). Another test rests on the ability of the student to sustain the punishment. That depends on his gender, age, size, and physical and emotional condition. The court concluded in *Tinkham v. Kole*, 110 N.W.2d 258, 1961, that a jury could consider punishment excessive when it forseeably led to a permanent student injury.

Procedural Requirements. Generally, due process is required if a liberty or property interest is at stake. "Liberty" and "property" are protected by the Fourteenth Amendment's due process clause. Courts have determined that one or the other is involved in short suspensions of one to ten days, corporal punishment, transfers from one school to

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[1] *Wexell v. Scott*, 276 N.E.2d 735, 1971; *Knight v. Board of Education of Tri-Pt. Com. U. School*, 348 N.E.2d 299, 1976; *Ingraham v. Wright*, 97 S. Ct. 1401, 1977; *Braesch v. De Pasquale; Everett v. Marcase*, 426 F. Supp. 397, 1977; *O'Connor v. Board of Education*, 316 N.Y.S.2d 799, 1970; *Goss v. Lopez*, 419 U.S. 565, 1975, and *Dixon v. Alabama State Board of Ed.*, 294 F.2d 150, 1961.

"Don't worry, your majesty, the polls show that only a measley 47% want to overthrow the government."

another for disciplinary reasons, grade reduction, and expulsion from extracurricular organizations.[2]

But what does "due process" mean in practice? It varies a lot from situation to situation, with the nature and severity of the punishment dictating which procedures are needed. For example, the Court found in *Goss* that for short suspensions a student must be given an informal notice and hearing including a statement of the charges and evidence against him, as well as an opportunity to tell his side of the story.

Some courts treat expulsions and long suspensions as equivalent. Most hold that students facing expulsion or long-term suspension have the right to additional due process practices including a *written* statement of the charges, enough time to prepare a defense, and an impartial hearing on the evidence. In addition, students can present and cross-examine witnesses, appeal to higher authority and are entitled to a transcript of the proceedings. (*Dixon v. Alabama State Board of Ed.*, 294 F.2d 150, 1961).

One district court has said you may have to provide some due process before using corporal punishment. In 1975, the district court that heard *Baker v. Owen* (395 F. Supp. 294) indicated that except for offenses that are so antisocial or disruptive as to shock the conscience, corporal punishment may not be used unless the student has first been warned that further action may result in corporal punishment, and other methods have been tried to modify the student's behavior.

The *Baker* court set down two procedures to be followed during the administration of corporal punishment. First, the event is *not* to be a public flogging; rather, it is to be performed away from other students. Second, another educator must be present at the paddling, and must be told before the paddling begins and in the student's presence why the student is being punished. This procedure provides the student with an informal opportunity to protest a punishment he thinks is unjustified or arbitrary. The court also set forth a postpunishment procedure: at the request of the student's parents, the school must send them the reasons why their child was punished, a description of the punishment, and the name of the witness.

The *Baker* decision was appealed to the U.S. Supreme Court and affirmed without comment (423 U.S. 907, 1975), but the procedural requirements described above were *not* part of the portion of *Baker* that was appealed. In other words, the *Baker* procedures do not have the explicit blessing of the Supreme Court. In fact, the Court decided, when reviewing another punishment case that "the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools" (*Ingraham v. Wright*, 97 S. Ct. 1401).

The courts have demanded due process in other punishment situations. In *Knight v. Board of Education of Tri-Point Community U. Sch. District # 6J* (348 N.E.2d 299, 1976), the court implied that a rule providing for grades to be reduced whenever a student accumulated a given number of absences—regardless of the reasons for the absences, or of other mitigating circumstances,—violated due process requirements because it did not allow mitigating circumstances to be taken into account. Presumably, the court's principle that rules must provide for possible exceptions applies not only to grade reduction, but to other punishments that significantly affect the student's liberty or property interests.

If you want to expel a student from an extracurricular organization, you are required not only to provide some form of impartial hearing, but also to use any procedures required by the particular extracurricular organization involved (*Warren v. N.A.S.S.P.*, 375 F. Supp. 1043, 1974). And in *Everett v. Marcase* (426 F. Supp. 397, 1977) the court said that before a student is laterally transferred to another school for disciplinary reasons, he and his parents must be given notice of an impending hearing, and the hearing officer can't be either the principal who is recommending the transfer or someone under his control or supervision.

Whenever some form of hearing is required—regardless of the punishment being contemplated—there are three general points that educators should keep in mind. First, students can't be punished on the basis of grounds other than those stated in the written charge (*Texarkana Independent School District v. Lewis*, 470 S.W.2d 727, 1971). Second, if a student fails to participate in hearings that are procedurally sound, then, in most cases, he loses his right to seek court intervention at some later date (*Braesch v. de Pasquale*, 265 N.W.2d 842 at 847, 1978). And third, due process errors (e.g., failure to provide sufficient time to prepare a defense) usually can be corrected by a properly conducted subse-

(*Continued on page 51*)

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[2] *Goss v. Lopez*, 419 U.S. 565, 1975; *Ingraham v. Wright*, 97 S. Ct. 1401, 1977; *Everett v. Marcase*, 426 F. Supp. 397, 1977; *Gutierrez v. School District R-1, Otero County*, 585 P.2d 935, 1978; *Warren v. N.A.S.S.P.*, 375 F. Supp. 1043, 1974.

Jean-Claude LeJeune

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FOCUS ON PUNISHMENT

The Worst Kind of Discipline

Throwing students out of school makes no sense—legally or logically

As many as two million students may be missing large portions of school each year because they have been suspended or expelled. Despite the universally recognized importance of education, these children are usually completely denied an education while they're excluded.

Suspensions and expulsions are particularly difficult to justify because only 3 percent are for major offenses; the rest are for relatively minor offenses such as tardiness, truancy, smoking, and dress code violations. Interviews conducted by the Children's Defense Fund indicate that educators overwhelmingly believe that suspension has no educational value. A principal's comment is typical: "I just don't think we're helping any if we suspend a kid; we just get the kid out of our hair for a while." And it's in the most difficult cases that the continuation of education is most important. Even short-term suspension can retard educational growth, which in turn leads to increased frustration and continued misbehavior.

Excluding children has a legal dimension too. The Supreme Court has ruled that due process must be afforded to students facing exclusion. For a short suspension, the student must be notified of the charges against him and be given an opportunity to explain; for longer suspensions or for expulsion, more formal procedures may be necessary. (See the article by Schimmel and Eiseman for more on the

Gail Paulus Sorenson

Court's reasoning in *Goss v. Lopez.*)

The Court's ruling has been controversial, to say the least. While some observers applaud it as a way of assuring that youngsters won't be deprived of an education without at least having the chance to explain themselves, many educators feel that the courts are making discipline nearly impossible and encouraging misbehavior in the schools. But should punishment be a fundamental part of public education? If we believe in the educative function of the schools and not the punitive, shouldn't we see discipline as an *aspect of education* and treat it in this way? Wouldn't this kind of response, in addition to helping children finish their academic tasks, teach them to use self-control?

A recent federal court of appeals ruling has heated up the debate on all these questions.

Expelling the Handicapped

Courts have held that the federal laws protecting handicapped students give these students greater procedural due process protection, as well as assuring that they can't be completely deprived of an education. In a leading federal court of appeals case, *S-1 v. Turlington* (635 F.2d 342, Fifth Cir., 1981), Judge Hatchett explained that since the expulsion of a handicapped child is considered a change in educational placement, the procedural protections afforded by federal law must be followed. "Before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition. . . ." An underlying belief here is that a handicapped child should not be held responsible for all of his or her actions since, in some cases, the action may have resulted from the handicap. One obvious example occurs when an emotionally disturbed child misbehaves because of his handicap. Less obviously, a blind child may misbehave because he is being taunted by the other students or frustrated by his slow school progress.

According to Judge Hatchett's decision, if a group of experts decides there is a relationship between the handicap and the misbehavior, then the student must receive some kind of in-school help. If it finds, however, that there is no relationship, the judge concluded that expulsion "is a proper disciplinary tool," but added that expulsion can't mean "a complete cessation of educational services," because federal law guarantees a free appropriate public education in the least restrictive environment. Presumably, the alternative is education at home.

The *Turlington* case arose in Hendry County, Florida, when several handicapped students were expelled from school for almost two years, the maximum time allowed by Florida law. Following the court's decision, the school board of Hendry County unanimously adopted a resolution urging Congress to make clear to the courts that it did not intend to establish a dual disciplinary system in public schools, a double standard affording special treatment to children with handicapping conditions.

Hendry County's proposed solution would be to grant the handicapped only those due process protections afforded to other students, with information regarding the handicapping condition used as a mitigating factor. Students who are seriously emotionally disturbed, and whose misbehavior is related to the handicap, couldn't be denied educational services. But all other students would be fully subject to expulsion (including the complete termination of educational services), and all disciplinary decisions would be made by the school board alone.

So far Washington isn't listening. Despite some controversy over *S-1 v. Turlington*, the Department of Education has proposed no changes in the regulations governing the Education for All Handicapped Children Act.

Another Solution

The laws protecting handicapped children resulted from widespread exclusion of these children from meaningful educational opportunities. The court's conclusion in *S-1 v. Turlington* that those with special knowledge should be the ones to determine whether the misbehavior was caused by the handicap suggests that handicapped students may well need the extra measure of protection provided by those who are specially trained.

Instead of resolving the double standard problem by revoking the newly won rights of those with handicapping conditions, we should consider extending those rights to all students. Although the Supreme Court in *Goss v. Lopez* (419 U.S. 565, 1975) gave students the right to a hearing before suspension, it did not specify who should hear the students' story. Extending the *Turlington* reasoning to all students would give them the right to tell their story to an impartial decision maker.

A more far-reaching proposal would be to recognize that retribution—the justification for punishment in the criminal context—is fundamentally out of place in public education. If students misbehave their behavior could be considered relevant only to placement and

(*Continued on page 72*)

More on Exclusion and the Law

For cases in which the Supreme Court has emphasized the importance of education, see *Brown v. Bd. of Educ.*, 374 U.S. 483 (1954) and *Plyler v. Doe* (both are referred to in the article), *San Antonio Independent School Dist. v. Rodriguez*, 409 U.S. 822 (1973); *Abbington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963); and *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

For more on the requirement of equal access to education, see *Brown* and *Plyler* (exclusion of illegal alien children from school violates equal protection); *Pennsylvania Assoc. of Retarded Children v. Commonwealth of Pa.*, 343 F. Supp. 279 (1972) (exclusion of "uneducable" and "untrainable" children denies equal protection); and *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (1972) (exclusion of "exceptional children" from school unconstitutional).

For more on the extent of exclusion, see two books by the Children's Defense Fund, *Children Out of School in America* (1974), and *School Suspensions: Are They Helping Children?* (1975), as well as Kaeser, "Suspensions in School Discipline," 11 *Education and Urban Society* 465 (1979).

For more information on alternatives to exclusion see Garibaldi, "In-School Alternatives to Suspension: Trendy Educational Innovations," 11 *The Urban Review* 97 (1979) and Nielsen, "Let's Suspend Suspensions: Consequences and Alternatives," 57 *The Personnel and Guidance Journal* 442 (1979).

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CURRICULUM UPDATE

Mabel C. McKinney-Browning

A GRAB-BAG OF GOODIES

State and local LRE projects come up with plenty of winners.

Teacher Resource Materials

■ ***Law-Related Education: A Course of Study for K-6 in All Subject Areas*** (1981), edited by Harry H. Raney. Elementary. Loose-leaf, 500 pp. Curriculum Guide. ***Living under the Law: An Infusion Curriculum for K-12*** (1981), edited by Harry H. Raney. Junior/Senior High School. Loose-leaf, 372 pp. Curriculum Guide. (Department of Curriculum and Instruction, Memphis City Schools, 2597 Avery Avenue, Memphis, TN 38112.)

Under a grant from the Department of Education, the Memphis (Tennessee) City Schools developed curriculum guides for infusing LRE into the established K-12 curricula. The guides were prepared in 1981 and piloted in the 1981-82 school year. They are currently under revision and will be available for wider distribution by early 1983.

Law-Related Education: A Course of Study for K-6 in All Subject Areas identifies appropriate chapters/stories within the basal reading text for introducing law-related concepts. For grades 2-6 the guide also coordinates law-related education topics with social studies textbooks. Additionally, most suggested resources and materials are either contained within the guide or the school system's library. The guide covers consumer law, criminal law, and rights and responsibilities, classroom management, and legal thinking skills. Lessons are clearly developed, well organized, and accompanied by a pre- and post-test as well as a number of activity sheets. Teachers will find this guide accessible and useful.

Living under the Law: An Infusion Curriculum for K-12 is designed for junior and senior high school classrooms. Beginning with an infusion chart coordinating law-related education lesson concepts with textbooks used in the Memphis public schools, the guide is organized by content units. Lessons include: Why law?, Rights and Responsibilities, Consumer Law, Family Law, and the federal and Tennessee court systems. Films dealing with law-related concepts are listed, and a bibliography of other appropriate resource materials round out the guide. As with the elementary guide, teachers will find the lessons self-contained—including necessary background material as well as individual handouts.

The *LRE Resource Guide* which accompanies these curriculum guides contains a listing of resources available in Memphis city schools. It also features an excellent bibliography of materials from LRE national and local projects.

This set of curriculum guides is a good example of "infusion" being used within a school district curriculum. Since Memphis is a large urban school district, other districts of this type may use the guides as a starting point for their work.

■ ***Elementary Law-Related Education, Grade 3 through 6*** (1981), edited by Beverly Stokes Clark. Elementary. Loose-leaf, 254 pp. Curriculum Guide. (For information contact: Beverly Stokes Clark, Cleveland Public Schools, Division of Social Studies, Elementary Law-Related Education Project, Cleveland, OH 44114.)

This well-organized curriculum guide provides teachers with lessons on citizenship responsibility and its relationship to the legal structure of a democracy. It supports and enriches the existing elementary social studies curriculum by infusing law-related education concepts.

The guide is divided into four content sections—Rules and Responsibilities, The Origins of Law, Law and Influence in America, and The Court System. Each section is designed for use with students in grade 3, grade 4, grade 5, and grade 6, respectively. Lessons are accompanied by activity pages reproduced as duplicating masters. Pre- and post-tests have been developed for each content area. Guidelines for field trips appropriate to particular lessons and grade levels are also suggested.

Teachers will find a wealth of activities, from comic strips to role-play activities, for use with elementary students in grades 3 through 6. The guide is designed specifically for the Cleveland public schools and is based, therefore, on Ohio state law. The curriculum is currently undergoing revisions based on its use in classrooms over the past year.

■ ***Improving Citizenship Education, Elementary and Secondary Handbooks*** (1981), edited by Edwin L. Jackson. ***Improving Citizenship Education, Implementation Handbook*** (1981), prepared by Sheila L. Margolis. Loose-leaf. $35.00. (Fulton County School System, 786 Cleveland Avenue, S.W., Atlanta, GA 30315.)

These guides were developed through a cooperative project of the Fulton County School System and the University of Georgia. The project includes joint staff from these institutions, and is designed to improve the political/citizenship knowledge and attitudes of students. A major component has been teacher education and staff development. Teacher training workshops, conducted each year since 1977, focused on teaching strategies for citizenship education, political and legal content, and the use of project materials.

The handbooks cover national, state and local government, democratic principles, politics, law and individual rights, global international studies, and participatory skills. Each book is comprehensive, containing a variety of techniques, strategies, and activities for incorporating citizenship education into the established K-12 curriculum.

The Implementation Guide is designed to assist participating school districts. It provides information on implementing the citizenship project by using its teacher education program and procedures.

■ ***Living Together under the Law***, edited by Arlene F. Gallager. Elementary. Softbound, 84 pp. Resource Guide. $4.00. (New York State Bar Association, Public Relations Department, One Elk Street, Albany, NY 12207.)

This guide is for teachers of grades 1 through 6, and is organized around such themes as "rules and laws play an important role in our lives" and "there is a relationship

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between the values of a society and the laws of a society." Beginning with a motivator, activities in each lesson focus on content or conceptual development, providing correlations to other aspects of the curricula. They use children's literature to illustrate a concept and to encourage discussion. Other activities are designed to foster self-government.

This guide is well done, easy to follow, and an excellent contribution to the growing stock of elementary materials. Teachers will find it a useful tool in developing lessons concerned with rules and laws for young children.

■ ***The Firefighter,*** by Allan M. Petrillo and ***The Police Officer*** by Doug Hooper (1982). Elementary/Secondary. Resource Pamphlets. 25¢. (Law, Youth and Citizenship Program, c/o Bureau of Social Studies, New York State Education Department, Albany, NY 12234.)

Publications from the New York Law, Youth and Citizenship Program, *The Firefighter* and *The Police Officer* are excellent resource guides for teachers interested in bringing community resources into their LRE program or for adding a law-related dimension to their work with community helpers. These pamphlets provide teachers with practical tips on working with the community resource persons in the classroom. Suggestions of "curricular fit" range from classes in photography, chemistry or criminal justice in the high schools, to lessons in fire prevention, fire safety, and vandalism in elementary school. Follow-up activities appropriate for all grade levels and a resource materials list round out these pamphlets.

The pamphlets are a great idea, and the format provides a useful capsulization of an important dimension of law-related programs. We'll look forward to future pamphlets on other community resource leaders.

■ ***Classrooms and Community: Using Community Resources in the Consumer Education Curricula*** (1981), by Calla Smorodin, Verona Bowers, Patricia Burnett, Linda Riekes. Elementary/Middle School. Softbound, 201 pp. Resource Guide. $4.50. (Urban Consumer Education Project, St. Louis Public Schools, Division of State and Federal Programs, Law and Education Projects, 4130 Lexington, St. Louis, MO 63115.)

This guide, produced by the St. Louis Schools Urban Consumer Education Project, helps teachers incorporate the use of community resources into the consumer education curricula.

Each lesson in the guide has been designed to expand on lessons from *Young Consumer* (a text by Linda Riekes and Sally Mahe Ackerley published by West Publishing Co.) and outlines a visit to the classroom by a resource expert whose work serves the consumer.

Lessons contain consumer objectives, basic skill objectives, a list of related lessons contained in *Young Consumers*, a list of materials needed by the teacher and the resource person, activities to prepare students for the visit, an outline of the resource person's classroom visit, and suggestions for follow-up activities by the classroom teacher. An evaluation of the program's curriculum has found that students do learn from experts who visit their classroom, learn basic skills through a consumer education program, and learn to become informed, responsible consumers.

Of course, *Using Community Resources. . .* is written for St. Louis classroom teachers, but it is easily adapted to other parts of the country. Although prepared for fifth grade classes, secondary teachers will find this guide, with few modifications, an excellent resource.

■ ***Secondary Lesson Plans in Law-Related Education*** (1980), edited by Nancy Matthews. Secondary. Loose-leaf, 292 pp. Resource Handbook. $4.00. (Utah State Office of Education, 250 E. 5th South, Salt Lake City, UT 84111.)

This handbook is for teachers looking for new resources to enrich and supplement the existing curricula, and for those who are just beginning to teach law-related education. The handbook includes descriptions of teaching strategies such as brainstorming, the case study, community resources, critical thinking, and debate. While the handbook is divided into junior high and senior high lessons, topics covered at both grade levels are juvenile problems, consumer problems, student rights, and school-related crimes. A number of resource or background materials for each lesson are also included. An interesting feature of this handbook is its integration of lessons with other areas of the curriculum.

■ ***Linking Law to Learning*** (1981), edited by Alan Hoffman and Jeannette B. Moon. Secondary. Softbound, 256 pp. Resource Manual. Available at no cost in limited quantities. (Georgia Center for Citizenship and Law-Related Education, Georgia State University, P.O. Box 604, University Plaza, Atlanta, GA 30303.)

This instructional strategies manual assists secondary teachers in the Atlanta school system in preparing for individual classroom instruction, designing curriculum and conducting staff development workshops. The guide is a collation of diverse activities and materials useful in teaching law-related education. It follows the general secondary curriculum on citizenship, government and other law-related education units or courses. Included is information on teacher preparation for field trips and a variety of other teaching strategies. Topics covered by the manual include the Legal System and the Law, Criminal Law, Family and Juvenile Law, and Practical/Consumer Law.

Although focused on Georgia law, the manual does have an overview of the U.S. court system, and all of the lessons are appropriate for any jurisdiction. Student materials can be easily copied and teachers can readily incorporate suggested worksheets into their lesson plans. An excellent resource.

■ ***Ohio vs. Sex Discrimination*** (1981), by Elizabeth T. Dreyfuss. Softbound, 77 pp. Resource Guide. $5.00 (Law Materials for Schools, Street Law Program, Cleveland Marshall College of Law, Cleveland, OH 44115.)

This guide for both teachers and students is an excellent resource on sex discrimination in employment. Although most of the cited legal statutes are based on Ohio law, one section of the guide focuses on federal laws on sexual discrimination in employment practices. While the guide highlights sex discrimination issues, activities have been designed to more generally inform students of their rights and responsibilities on the job. Also included is practical information on tasks like completing job applications and requesting workman's compensation.

■ ***Richmond Court Docent Program, Richmond Public Schools, Department of Secondary Education.*** Secondary. Softbound, 53 pp. Curriculum Guide. No cost information available. (Richmond Public Schools, Department of Secondary Education, 301 N. 9th Street, Richmond, VA 23219.)

Court visitation programs have become increasingly popular in law-related education and this guide helps teachers and resource volunteers prepare and implement these programs.

The Richmond Court Program provides education and awareness of the criminal and civil justice system through actual on-site observation. Although their guide is based on Virginia law, the descriptions and definitions of legal terms are often the same across jurisdictions. Students are prepared to better observe their time in court through definitions of offenses and explanations of possible rulings. Juvenile and domestic relations court procedures, and civil and criminal court procedures are explained, as well as the roles of all individuals who will take part in the hearings.

This is a concise and readable guide which teachers and resource volunteers can use as they plan and implement court-related field experiences.

Student Materials

■ ***Consumer Law, Competencies, and Law and Citizenship*** (1982), by Mary S. Furlong and Edward T. McMahon. Secondary/Adult Education. Softbound, 107 pp. Text/Workbook. $5.95. ***Law and the Consumer*** (1982), by Lee Arbetman, Edward McMahon, and Edward O'Brien. Secondary. Softbound, 144 pp. Student Text. $6.95. (West Publishing Co., Inc., 170 Old Country Road, Mineola, NY 11501.)

Consumer Law, Competencies, and Law and Citizenship is a workbook-style text for youth and adult basic education programs. The lessons present basic legal information on consumer protection, contracts and warranties, deceptive sale practices, obtaining and using credit, and bills and debts. The text is written for youth in alternative high school programs and/or classes in which students have low reading skills. It draws on students' own experiences, and uses case studies and application exercises to improve their basic skills and knowledge about consumer law.

Law and the Consumer is an adaptation and expansion of the Consumer Law materials appearing in the 1980 edition of *Street Law: A Course in Practical Law*. Written for secondary students, it focuses on consumer issues affecting students in their daily life, including

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deceptive sales practices, contracts and warranties, and how to get and use credit. The authors pay special attention to buying and insuring a car, renting or buying a place to live, and hiring and using lawyers' services. By using case studies to highlight legal statutes, the book provides students with problem solving activities to explain each topic.

Both of these texts, written by National Street Law staff, are excellent.

■ ***Introduction to Law*** and ***Student Rights and Responsibilities*** (1982), by Robert Force and Daniel Jay Baum. Secondary. Softbound, 125 pp. Text/Workbook. $3.50. (South-western Publishing Co., 5101 Madison Road, Cincinnati, OH 45227.)

Introduction to Law familiarizes students with the basic structure of the U.S. legal system. Chapters on the origin and sources of law, the organization of the legal system, and the trial process are included. Each chapter is filled with activities stressing vocabulary development, reading comprehension, activities, and contains discussion questions.

Student Rights and Responsibilities focuses on citizenship responsibilities within the school. Discussions on free expression, discipline and search and seizure are included.

Each text presents materials attractively and provides a number of chapter activities and exercises. The books are part of a six-text series which will include Consumer Law, Family Law, Tort Law, and Criminal Law. The remaining books will be available in fall 1982.

■ ***Out of Court: A Simulation of Mediation*** (1982), by Ethan Katsh and Janet Rifkin. Secondary. Activity kit. $34.50. (Legal Studies Simulations, 42 Elwood Drive, Springfield, MA 01108.)

"Mediation is a voluntary process for resolving disputes and conflicts," and is an increasingly popular alternative to civil court hearings. Although more widely used in other countries, recently at least, "one hundred and fifty mediation programs have been established" in the United States. This simulation kit includes five cases involving a variety of personal dispute issues. In one case home abuse is dealt with, in another a landlord/tenant dispute, and in another the topic is vandalism. A student guide introduces the process of mediation and briefly reviews the upcoming classroom experience. Role guides for the director, mediator, and disputants are also included. The director's guide includes debriefing questions and a list of recommended readings.

The kit is self-contained and provides an excellent opportunity for teaching about this alternative to the adversary system.

Films

■ ***Take a Stand*** (1982). Secondary. 16mm color/sound film, 25 minutes. Film purchase: $435.00; rental: $45.00. Video cassette purchase: $350.00; rental: $45.00. (Terra Nova Films, Inc., 17832 67th Avenue, Tinley Park, IL 60477.)

The defense attorney protects the interest of the accused. The state's attorney protects the interest of the community. Who, then, is charged with protecting the victim? Why do victims feel alienated from the criminal justice system? Why do victims decide not to testify against the accused? Being the victim of a crime is a frightening experience and being a witness seems to compound this fear.

This film takes a fresh look at the criminal justice system, thoughtfully handling the victim, his/her rights, responsibilities, fears, and concerns. Viewers are introduced to a victim/witness program designed to help victims to understand that they must take an active part as witnesses for the legal system to work effectively.

The film opens with a purse snatching. The offender is caught with the victim's purse in his possession. Later, the victim is visited by a "victim advocate," a social worker whose job is to act as a knowledgeable "friend" throughout the court proceedings. Beginning with the preliminary hearing and continuing through the trial and sentencing, the victim advocate answers questions, arranges transportation, organizes briefings with the state's attorney, and encourages the victim to activate other support networks to make this experience an easier one.

The film is technically well done, avoiding stereotypes and imparting clear information. Of primary value is the highlighting of an often forgotten or underrepresented perspective, rounding out other presentations of the criminal justice system.

■ ***Under the Law II*** (1975). Junior and senior high school. 16mm color/sound film series. Titles: *Vandals!* (17 minutes); *3 Days in the County Jail* (18½ min.); *Bad Guys-Good Guys* (25 minutes); *The Matter of David J.* (16 minutes). Purchase: $1,450.00; rental: 1 week $125.00. (Walt Disney Educational Media Company, 500 South Buena Vista Street, Burbank, CA 91621.)

Each film in this series focuses on a specific youth-related crime and uses a "freeze frame" technique to involve students in the action of the film. A curriculum guide accompanying the films includes the objectives of each film, a summary of the film's content, and questions to motivate discussions at each "freeze frame" interval.

Vandals! examines school vandalism. A teenage boy and girl, frustrated at home and school, decide to vandalize their school. A police officer, alerted by a silent alarm, catches them, and the film traces the case through the juvenile court process. The "vandals" are sentenced to probation and assigned to work in a community project. The film shows how their attitudes affect their ability to act responsibly during the probation period.

3 Days in the County Jail looks at the daily routine of a county jail. It focuses on the programs conducted by jail authorities to prepare inmates for more productive lives after their incarceration. The film also shows some of the pressures hardened offenders exert on first-time offenders, and suggests that even fairly minor crimes can often result in a jail term. The central character is a young man in his early 20's who is found guilty of assault while drunk driving. Although sentenced to state prison, he is sent to the county jail because he has no prior record. With the help of corrections officers, the young man attempts to constructively change his life by using the opportunities offered in jail.

In *Bad Guys-Good Guys*, three teenage boys—Ambrose, Marvin, and Terry—commit a serious assault and robbery. The movie opens with the boys attempting to attack a fellow student for no apparent reason. The boys go on to rob a bus on which Marvin's sister, Isabelle, is a passenger. She observes the entire incident but decides not to report it to the police. Next comes a successful assault on the student in the first incident. Isabelle again is a witness, but this time agrees to testify.

(*Continued on page 71*)

"I don't know how long I can keep telling everyone you're on sabbatical."

Many psychologists and
educators are on the
values education bandwagon
Critics say this really is . . .

A Conspiracy Against the Inner Life

Jean-Claude LeJeune

Louise Kaegi

What do magic circles, value name tags, thought-feel sheets, moral maturity scales, peer-group counseling, behavior modification, and survival games all have in common? What single banner could possibly unite such different drummers as Jerome Bruner, Sidney Simon, Lawrence Kohlberg, B.F. Skinner, and Carl Rogers, and the warring creeds they uphold—learning by discovery, values clarification, cognitive moral development, behaviorism, and the human potential movement?

They are all advancing into "the affective domain." A god term to its adepts and a devil term to those opposed to the behavioral techniques it implies, the *affective* in instruction pertains to "the emotions, the passions, the dispositions, the motives, the moral and esthetic sensibilities, the capacity for feeling, concern, attachment or detachment, sympathy, empathy, and appreciation," according to a former U.S. Commissioner of Education. "Affect is not only intense feeling or emotion; it is also an expression of the basic forces that direct and control behavior," explain Gerald Weinstein and Mario D. Fantini.

It's a "Pandora's Box," announced David Krathwohl, Benjamin Bloom, and Bertram Masia in 1956 in their *Taxonomy of Educational Objectives*. But they were as eager as other educators to open it up, for it was in the affective domain, they explained, that "the most influential controls are to be found." In that dark region are contained "the forces that determine the nature of an individual's life and ultimately the life of an entire people."

Out of this affective Pandora's box swirled a succession of educational controversies in the 1970s, in which the notion of "privacy" invariably put in an appearance—and frequently along with it appeared the related notions of "autonomy" and "freedom." Americans are projecting their deepest feelings onto this privacy notion; liberals and conversatives alike now watch apprehensively as the decade slouches toward "1984"—that shared dystopic vision in which all privacy and freedom are extinguished.

The Therapeutic State

While some American guardians of privacy have been taken up with the hardware of surveillance and data collection, another group has been tracking a growing invasion of privacy in the classroom by the psychosocial techniques of guided inquiry, shared group discussions of feelings, public "voting" on values, role playing, and simulation games. According to this group, public authorities have undertaken a kind of search and seizure in the affective domain, invading the privacy both of the child's inner life and of that fundamental small group, the family. While one group of libertarians has been tilting against the national security state and the police state, this second group has been fighting against "the therapeutic state"—the whole guardian apparatus in education and health that is our "Ministry of Love" but which may in fact be operating as a kind of "Ministry of Police," if you follow the *1984* scenario.

"I have many concerns with affective education, number one being with the privacy issue," reported Robert Doiron in the *Bangor Daily News* in 1980, after having stopped such a program for fourth and fifth graders in Rumford, Maine, where he was curriculum director. "A student's attitude and values are his own, they should not be compromised or changed via a school setting. Why should a normal, emotionally sound youngster be subjected to values clarification?" asks Doiron, now principal of the Rumford Junior High School. "What is wrong with his present values? Who says they need to be changed? To what? Why should these techniques, designed primarily for mental patients, be foisted on helpless captive children in the classroom? Who are the 'experts,' decreeing that ALL children will be exposed to such techniques? For what reasons? In fact, why should such intervention in the pupil's life be a legitimate interest of the school?"

To answer Mr. Doiron, we go back a quarter of a century or so, when the behavioral technology of education was still in its incubation phase and the United States was mobilizing its educational resources to deal with the national trauma of "Sputnik." "Psychoanalysis had done some sniffing in the schoolhouses prior to Sputnik," psychiatrist Richard Jones explains in his *Fantasy and Feeling in Education* (1968). "This consisted largely in the setting up of clinical enclaves in schools. Sometimes by way of the front door though which it sought to practice preventive psychiatry.... Sometimes by way of the back door, through which a range of objectives were pursued, from improved social adjustment to the conduct of less boring English classes."

Then in the 1970s, against a backdrop of rapid social change, there arose a scandalous host of moral and social "Sputniks," from My Lai and Watergate to teen pregnancy and irrational cults. All seemed to augur a grand societal breakdown, following from a decline of the family and the church, and an incapacity for critical thinking. Along with this came pressure to launch a "survival curriculum" to respond to urgent global concerns—ecology, starvation, overpopulation, conservation, atom bombs, and nuclear power, as Arthur W. Combs itemized them in "Humanism, Education, and the Future" (*Educational Leadership*, 1978). And others have devised more extensive lists. When asked to "do something," educators reached into the affective kit bag for a variety of treatments—all techniques passing under the rubrics of values education and humanistic education.

What Mr. Doiron noticed and what the experts were prescribing, first reached the school over a decade ago. It is a multifaceted phenomenon that must be viewed from all angles to be fully apprehended. And now into that alluring territory of the child's inner life, behind closed classroom doors, where Dr. Jones himself was a privileged observer of an experiment in affective education.

New Minds Are Made

The fifth-graders in a pilot social studies project in Newton, Massachusetts, have been studying the Netsilik Eskimo. The children have learned something of the ecology of the Netsilik, of the harshness of daily life, their technology, and the family and social structure. They have watched a vivid color film about men hunting and killing a seal, and women and babies working in the igloo. "Remember, it's kill or starve," the master teacher reminds them.

But the intent isn't just to teach them about Eskimos. The idea is to explore being human, to help the children become aware of their own attitudes and values. Lesson plans, with leading questions, are designed around the children's reactions to the film. They are to categorize their own feelings, depicting in writing or art a conflict involving one of these feelings, and then compare this with the Eskimo ways of settling conflicts.

This particular sequence aims "to bring the class to thinking significantly and credibly of the effects of the harsh Arctic environment on Netsilik patterns of social organization," including confronting the Netsilik's practices of female infanticide and senilicide and thus their own attitudes toward life and death.

First the children review the film they have seen of a Netsilik family on the move, in which an old woman is barely able to keep up. Next they read the tale of Kigtaq, an old woman left behind as the Netsilik move on to find better hunting. Her son has to make the choice between helping one who is at death's door anyhow, and allowing his wife and children to starve. "This is how it is, and we see no wickedness in it." The story concludes: "Perhaps it is more surprising that old Kigtaq, now that she is no longer able to care for herself, still hangs on as a burden to her children and grandchildren. For our custom up here is that all old people who can do no more, and whom death will not take, help death to take them."

In the debriefing, the children comment: "You'd think they'd have some feelings"; "Who's more important, the old woman or possessions?"; "After all she's their mother." The teacher crosses off the lesson as a total loss: "Children's minds are elsewhere."

Later the teacher plans aloud; she will do something with the children's reactions before listing the Netsilik reactions, use an expressive medium to show the kids she was interested in them first and the Netsilik second, and she'll end with comparison exercises "requiring the children to be objective not only about the Netsilik but about themselves."

Her principal responds, "Yes. Couldn't we put a feather in our collective caps if we could set these youngsters to rationally considering *our* society's problems with overpopulation, birth control, increasing life span and old age, before they have to vote on them."

The next morning, "under protection of a 'No Visitors' sign," the teacher gathers the children: "I want you up front here with me so we can talk more freely with each other." And she draws out the children's reactions to leaving the old woman behind. Then she shows them a film on "what it's like in the igloo when the father is out hunting." Now she draws out questions about this film, in which they saw a baby—what would happen if they ran out of food, etc. The teacher corrects a child who says, "If it was just a little baby, they'd give it the last of the food." Teacher's next leading question: "Now let's suppose that the hunting isn't so good and the mother has a small child like Alexei and another little baby is born." They discuss the alternatives if the new baby were a girl.

A student: "They must leave it outside so it will cry so another family will hear and come to get it."

Teacher (timidly): "What would happen if no one came to get it?"

Students: "It would starve." "Freeze." "It would die."

Teacher (confidently): "Yes, how do *you* feel about that?"

The students give their anguished answers with some possible alternatives, ending: "Don't they have any feelings?"

Teacher: "What feelings would *you* have?"

The children give their answers, mostly showing empathy with the baby.

Teacher: "This has been a very good discussion." She confides that she had once had similar feelings, "Then I found out something else that made a difference. The Netsilik don't really like to abandon babies, but they believe a baby has no soul until it has a name. So what might they do to help their feelings out?"

Student: "Not name the baby if they're going to abandon it."

Teacher: "Right."

Students: "Then they're not murderers." "But if there is an older girl in the family . . . couldn't she mate up with a boy and take the baby?" "They could put the baby in an orphanage; *we* do that." "They could put the grandmother in an old persons' home. *We* do that."

Teacher: "Yes. What do *we* do if the mother and father cannot support the baby?"

Students: "Give it to some other people." "Put it in an orphanage." "Not have it." "Get an abortion." And there are other suggestions.

The children are invited to drop questions into a question box to go over another time. The submitted queries are dry, emotionless speculations about assigning value to various types of lives (according to age and sex) under particular circumstances.

The author-observer, apparently satisfied with the experiment on balance, concludes that evaluation of the entire sequence rests on the questions raised. "Children will share their answers with almost anyone who asks the right question; buy they will only share questions with their own teachers—and then only if they love them . . . to share a question is often to invite inspection of one's tenderer parts. Like other loving acts this is not something we do with strangers."

Captains of Consciousness

This is affective education. The sequence recreated above, a distillation of Jones's sympathetic account in his *Fantasy and Feeling in Education*, recollects the piloting of the controversial *Man: A Course of Study* (MACOS). This pro-

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HOW TO RECOGNIZE AFFECTIVE EDUCATION

- a combined didactic and therapeutic purpose ("to teach and treat")
- information gathering, charting, and record keeping of the values and "affects" of students and sometimes their relationships to their family and peers (through diaries, "Dear Granny" letters, valuing workbooks, etc)
- solicitation of emotions and persistent encouragement of full communication directly or indirectly through use of all group dynamics techniques (role playing, "Mood Masks," sociodrama, public values voting, oral projective exercises and impromptu "I learned" statements)
- "self" concepts of becoming, self-actualization, discovery, encounter, liberation, emergence, authenticity, human potential, peak experience, ecstasy, and transcendence
- steering of emotions to produce a predetermined type of inquiry
- exposure of this inquiry and accompanying emotions to the group for collective consideration and deliberation over any conflict
- channeling of the inquiry into a particular schema, usually a multistage process in which one ascends toward greater "clarity," "maturity," authenticity, or mastery (such schemas invariably call for moving beyond "conventional morality" or institutionalized codes, which are fixed below the highest level)
- appropriation of revealed emotions as part of the working materials for succeeding lesson plans and retrieval of these stored "affects" when an unplanned opportunity presents itself
- linkage of the emotions experienced by the individual or the group to all subject matter in all parts of the curriculum
- selection of literature, historical sequences or problems, and current issues to reinforce what is experienced in the group process or to demonstrate the functioning of the given ideal valuing process (literature and documents are generally wrenched out of their historical or rhetorical context and sometimes even emended to relate them to the psychosocial world of the learner, or to the ethical system that is being promoted, and to current problems in the "survival curriculum")
- "debriefing" effect in discharging and neutralizing strong or unpleasant emotions so that they can be managed (often referred to as "emotional skills")
- steering of all intellectual inquiry and group experience to establish an analogy between the conflicts and conflict resolution techniques of the school group, the individual's family, political systems (sometimes only selected ones), and the world
- demonstration of arbitrariness of given codes and cultures
- insistence on free exercise of choice among all values, conventions, and coping behaviors to suit the needs and demands of the individual.
- demonstration of the capacity to invent new codes, conventions, myths, language, forms, and art to suit the exigencies of the environment and to manage feelings
- appeal to the survival of the group as the final arbiter of all values and choices
- comprehensive planning, systematic sequencing, and perpetual testing and revising to regulate all components of the total plan
- linkage to support personnel and systems outside the teacher's classroom (guidance personnel) and outside the school (school-home coordinator, community groups)

gram was prepared under the guidance of developmental psychologist Jerome Bruner (with some acknowledgments to behaviorist B.F. Skinner in the explanatory material) and was funded and promoted by the National Science Foundation. It was proposed as a comprehensive one-year package of the "new social studies" for middle schools across the country. By its own designation, explains Jones, it was "revolutionary"—not because of its emphasis on biological evolution but because it assumed the possibility of promoting the psychosocial evolution of the species. As the MACOS manual put it, "Infant plasticity and prolonged immaturity provide us as humans with the opportunity to shape the development of our offspring and in this sense 'humanness' is a continuing human invention."

Public outcry over the sensational subject matter and the psychosocial educational techniques in the MACOS package prompted a congressional investigation. Overnight, parents' groups such as the National Congress for Educational Excellence (NCEE) sprang up to combat the whole class of education it represented.

"Will education in this country," NCEE asks, "turn our classrooms into mental health clinics where all teachers will be healers?" Will it "heal the children of the values they have caught at home?"

Some professionals have more quietly voiced concern with affective education, suggesting that more is involved than a simple conflict between uninformed parents and professional educators, or a face-off between fundamentalists and freethinkers. Some educators and social scientists originally associated with the MACOS project have questioned its underlying model of human development. They have found in the highly programmatic package an air of indoctrination infringing on both the academic freedom of teachers and the natural development of children. A clinical psychologist reported his view of MACOS and all its progeny to Congressman John B. Conlan: "We have seen an incredible expansion of school programs to include almost every aspect of the child's life, his physical health, recreation, mental health, and now his social well-being."

Following the MACOS controversy, the federal government responded to concerns that schools are invading privacy by developing funding controls and a series of acts and bill such as the Family Educational Rights and Privacy Act of 1974 (the "Buckley Amendment"). But the psychosocial techniques to "teach and treat," as Jones described them, are here to stay—and with them the continuing controversy.

When the U.S. General Accounting Office in 1976 assessed values-changing curricula in American schools, Joanne McAuley answered for NCEE that, "Concepts of freedom, privacy, and self-determination of free thought inherently conflict with programs designed to control, not just physical freedom, but the

(Continued on page 54)

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Assault on Rape

Sexual assault has been around forever. In the last decade, states have come up with new weapons against an old crime

Teri Engler

"In the time since you came into my life, there has not been a day I have not thought about it. Do you know what you have done? You have terrified me forever and changed my life forever. I was asleep on my own bed in my own home—the one place a person should be safe. What you have done is to convince me that I will never be safe again." From a letter appearing in Bob Greene's column in the *Chicago Tribune* (November 4, 1981), entitled "A Letter to the Men Who Raped Me."

Forcible rape—it's a subject that has captured a great deal of public attention in the past decade. National figures indicate that nearly 500,000 rapes are reported each year, and this figure may represent only 10 to 25 percent of the number that actually occur. Due to the outcry against the apparently epidemic proportions of the crime, some forty states have modified their existing rape laws or passed new ones since about 1974.

The proponents of these modern rape statutes were drawn primarily from four movements in the 1960s and 1970s: the civil rights and women's movements, the crime control movement, and the movement to codify state criminal laws. This nontraditional coalition drew its power from diversity, a necessary condition for success in a democracy. These movements had both overlapping interests and some special agendas, in combinations that varied from state to state, but together they radically altered traditional ways of thinking about the crime of rape.

The reforms have changed both the substance of the laws and the way rape cases are prosecuted. But while most people understand and support the purpose behind the new rape laws (i.e., to encourage victims to report the crime and to increase the conviction rate), few agree on how well they have kept pace with the attitudes and needs of American citizens and criminal justice officials.

Defining the Crime

Laws vary from state to state, but the definition of rape generally runs along the lines of "forced intercourse with a female not one's spouse." It's important to note at the outset that "forcible" doesn't necessarily mean that there is use or threat of force in every case. In fact, statistics show that most forcible rapes involve little or no violence beyond the act itself, and usually result in no physical injury. But in addition to actual or threatened force, the term refers to the psychological degradation that the victim suffers. Feminist writers thus characterize rape as a crime of assault and violence. Courts, too, have viewed rape as "forcible" because it is an act of personal outrage: "The essence of the crime is not the fact of the intercourse but the injury and outrage to the feelings of the woman . . ." (*Commonwealth v. Goldberg*, 338 Mass. 371, 381, 155 N.E.2d 187, 191–92, 1959).

Derived from the common law, most early definitions of rape in prereform statutes implied that despite the use of physical force by the man, there was no rape unless the victim resisted or was overcome by such fear as to excuse resistance. The rapist's force was thus gauged and deemed criminal according to the victim's conduct. Although some courts only required "reasonable resistance," others looked for a showing of an "utmost" or "terrific" exertion by the victim.

The penalty for rape was typically harsh—usually no less than five or ten years imprisonment. Even life imprisonment and the death penalty were not uncommon in rape cases. Prior to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), some sixteen states permitted capital punishment for rape and thirty states imposed life imprisonment. (In fact, the main reason for the interest of civil rights leaders in rape reform legislation was a suspicious discrepancy in the rape convictions of blacks and whites, particularly in southern states, and the belief that blacks were punished more severely.)

The new rape laws in most states change the definition of rape and the penalty for it. First, they focus on the assailant's use or threat of force, rather than the victim's resistance, to prove nonconsent (thereby making rape consistent with other violent crimes like assault). Second, they recognize that rape can range from brutal attacks by strangers to "half-won arguments of couples in parked cars," and that these factual distinctions can't be stuck together under a single legal standard. And third, they attempt to make rape penalties fairer by matching different types of conduct to a variety of available punishments.

In the state of Washington, for example, rape is divided into three degrees according to the force or threat involved. The basic elements of first-degree rape are intercourse with a nonspouse by force and under aggravated circumstances. Second-degree rape requires only intercourse by "forcible compulsion," and third-degree rape is defined as intercourse without consent or with threat of substantial harm to property rights. Some commentators read this statute as saying that nonconsent has been done away with as an element of the crime which must be proved. However, most see the new law as a compromise approach which emphasizes the actor's conduct but doesn't exclude the victim's resistance as one objective indicator that the crime took place.

Change in the Courtroom

Reform measures have also changed the kinds of evidence that may be introduced at a rape trial. For instance, in common law there had to be some corroborating evidence. A victim's story, for example, had to be backed up by a witness or some kind of physical evidence. This rule was based on the fear of false charges being brought by vindictive women. Lord

Richard Thompson

Matthew Hale summarized that fear like this: rape "is an accusation easily to be made. . . and harder to be defended by the party accused, tho never so innocent." Today, the corroboration rule has been abolished in almost every jurisdiction, though the attitude behind it persists in the actions of police and prosecutors. They rarely follow up on cases based solely on a victim's story.

In addition, the common law rules always permitted the defense to go into the rape victim's sexual history. There were several reasons for this rule. The first is the fear expressed by Lord Hale that it is difficult to defend against phony rape charges. Beyond that was the notion that chastity was a character trait. If a woman could be proved to be unchaste by nature, so the argument went, it could be inferred that she had consented to having sex with the accused. Third was the prevailing societal attitude that extramarital sex was immoral. Like other acts of moral turpitude, previous illicit sexual relations impeach the credibility of the complaining witness in a rape case.

This area of rape law has also changed with the times. Most states today do not automatically allow the defense to introduce the victim's previous sexual history. Rather, in the last few years forty-six states have taken steps to protect rape victims from the embarrassment of publicly disclosing the intimate details of their past sexual encounters. A majority of states has enacted "rape shield" statutes which restrict the defendant from presenting the jury with evidence of the woman's prior sexual history.

New Attitudes

Why the change? The rapidly changing moral climate in this country and increasingly lenient views on sexual relationships outside of marriage have pretty much discredited the old notion that a woman's unchastity has any material bearing on whether or not she was really raped. The new laws tend to the opposite extreme of the old common law rule—they consider evidence of past sexual conduct inadmissible except in a few circumstances.

There is, of course, a great deal of variation from state to state in the extent to which sexual history evidence is permitted. Texas simply leaves it to the judge's discretion, while the Louisiana and Illinois legislatures have barred all uses of such evidence, except for information about a prior relationship between the victim and the defendant. Other states fall somewhere in between these positions, but two instances of admissibility commonly appear in the statutes: (1) evidence of prior sex with the defendant offered to show the victim's consent, and (2) evidence of a specific sexual act with another man to provide an alternative explanation of physical evidence of the rape. For example, a rape defendant may generally rebut the prosecution's corroborative evidence of the sex act itself (e.g., the presence of semen, or a resulting pregnancy or venereal disease), by proving that it might have been due to a sexual act with another man at about the same time. Less common exceptions permit the defendant to impeach the woman's credibility in the eyes of the jury, to show a motive for fabrication, or to indicate an unusual pattern of consensual sexual activity that's similar to the defendant's version of the events.

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Do rape shield laws stop the defense from questioning witnesses?

An interesting argument against rape shield laws has been raised, though. The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." Do rape shield statutes impede a defendant's ability to fully exercise his right to confront the witnesses against him?

While the defendant clearly has the right to present and elicit testimony that he hopes will exculpate him, the scope of that right is limited under the rules of evidence set up by the states to issues involved in the case. The Supreme Court has never read either of these provisions of the Sixth Amendment to mean that the defendant may introduce any evidence that he chooses. His right is confined to evidence which has some "probative value" (able to be used as "proof"), and is not outweighed by its prejudicial effect.

The questions about rape shield laws are whether a defendant is being prohibited from introducing less than all relevant evidence, and how testimony is defined as relevant and not unduly prejudicial. There appear to be two basic approaches to these issues, based on numerous Supreme Court criminal procedure cases. The Court sometimes employs a "totality of the circumstances" test, in which it balances the state's interests in excluding the evidence against the defendant's constitutional rights. In other cases, the Court has used a standard of "strict review," under which even minor restrictions on a defendant's rights have been struck down. Those who support rape shield laws assume that the balancing test is appropriate, but so far no case on this particular point has been heard by the Court.

Some rape reform laws have had a much harder time catching on, despite active lobbying by feminists. The common law rule that, as a matter of law, a husband can't rape his wife has been codified in numerous statutes which effectively exempt a man from being prosecuted for the rape of his own wife.

The origin of the spousal immunity in rape cases can be traced to a passage from an article written in the seventeenth century by Lord Matthew Hale: "But the husband cannot be guilty of a rape committed upon his lawful wife, for by their mutual consent and contract, the wife hath given herself up in this kind unto her husband, which she cannot retract." Lord Hale's statement is the foundation upon which spousal immunity was judicially recognized in the United States in the mid-nineteenth century. In 1857 the first reported case to mention spousal rape simply relied on Hale's comment in ruling that a complaint against a defendant accused of raping a ten-year-old girl did not have to state that he was not the victim's husband. A case in 1899 in the Supreme Court of Louisiana ruled that when a husband aided or abetted the rape of his wife by another man, and the principal had been tried and acquitted, the husband could not be convicted. (*Louisiana v. Haines*, 25 So. 374). The court said that under the marriage contract consent theory, the husband could not be directly guilty of the rape of his wife, except as an accomplice.

These cases set the pattern for many years, and judicial recognition of the spousal immunity from rape prosecution was firmly established. But Lord Hale's remarks were not the only explanation of spousal immunity that the courts relied on. Professor Perkins, in his treatise on criminal law (2d ed. 1969), offered his analysis:

> A man does not commit rape by having sexual intercourse with his lawful wife, even if he does so by force and against her will. The old rationalization for this result was that she gave a consent at the time of marriage which she cannot revoke. This type of explanation by means of "double talk" is definitely out of date, and was never needed at this point. It is not necessary to pretend that the woman consented, if the facts show very clearly otherwise, because the act of intercourse is not rape, if it was by her lawful husband, for a better reason. An essential part of the common law definition of rape is "unlawful carnal knowledge" and so forth, and this is an implied part of every definition of the crime even if not expressed. And the true reason why the husband, who has sexual intercourse with his wife against her will, is not guilty of rape is that such intercourse is not unlawful. The word "unlawful" is used with different meanings. In this connection it is used within the sense of "not authorized by law." Sexual intercourse between a husband and wife is sanctioned by law; all other sexual intercourse is unlawful although the secret act of fornication is not punished, as such, in many jurisdictions.

It is the common law precedent set by Lord Hale some 300 years ago that underlies the statutes dealing with spousal rape today. Although new bills which would explicitly make marital rape a crime are pending in many state legislatures, fourteen states expressly prohibit wives from bringing charges against their husband for rape under any circumstances. Nine other states and the District of Columbia do not specifically provide for the marital exemption, but as a general rule follow the common law spousal immunity theory.

What about laws in other states? In some places a couple must be living apart, legally separated, and/or have initiated divorce proceedings before the husband can be charged with rape. At the other end of the spectrum are the four states which have greatly revised their marital rape laws to permit prosecution of the husband, even if the couple is still living under the same roof. Of this group, only New Jersey and Oregon have totally abolished the marital rape exemption.

Most of the laws which do allow for the prosecution of husbands are relatively new and untested by the courts. There are several possible reasons for this. To begin with, many respected members of the legal and academic communities are fervently opposed to laws that make it possible for a woman to prosecute her husband for rape. Their reasons range from personal disdain for such laws to a feeling that it would be harmful to the institution of marriage or the traditional family.

One outspoken opponent of Oregon's progressive statute is Charles Burt, the successful defense attorney in the highly publicized case of *Oregon v. Rideout*, No. 108,866, Marion County Circuit Court (1978). Burt, who was the president of the Oregon Trial Lawyers Association and the Oregon State Bar, commented after the *Rideout* trial that "it points out the absurdity of bringing the crime of rape as a law into marriage. It's a waste of the criminal courts' time to get into that area." He had said earlier that "a woman who's still in a marriage is presumably consenting to sex. . . Maybe this is the risk of being married, you know?" The prosecuting attorney in that case was no more sympathetic to Mrs. Rideout's claims. "If it had happened in the bedroom and he didn't beat her up, I'd agree with the other side," he said.

Critics of the new laws which sidestep the marital rape exemption most frequently argue that wives will claim that they have been raped as a means of revenge or retaliation against their husband. However, this concern over fabricated charges appears to be contrary to actual experience. As Susan Brownmiller wrote in *Against Our Will*:

> While men successfully convinced each other and us that women cry rape with ease and glee, the reality of rape is that victimized women have always been reluctant to report the crime and seek legal justice—because of the shame of public exposure, because of that complex double standard that makes a female feel culpable, even responsible, for any act of sexual aggression against her. . . and because women have been presented with sufficient evidence to come to the realistic conclusion that their accounts are received with a harsh cynicism that forms the first line of male defense.

Indeed, if the experience of some foreign countries is representative, it's not likely that floods of new prosecutions based on falsified charges will occur in the future. Several communist countries, including Russia, Czechoslovakia, and Poland, have had marital rape laws for a long time without any apparent problems of enforcement. Under the laws of these countries, an individual's right to sexual freedom is protected regardless of marital status.

Marital rape laws have recently been reformed in Sweden, Denmark, and South Australia as well. The Swedish experience is especially interesting. Their laws were revised in 1965 to include marital rape as a crime. Called "sexual assault," it carries a lesser penalty "if, in view of the woman's relationship to the man or for some other reason, the crime is considered less grave." Eleven years after the law was enacted, the criminal code was reexamined and it was concluded that the new law had not presented problems any different from those of other crimes. There had been no rash of claims of marital rape. In fact, the law had rarely been used.

Prosecutor's Power

Perhaps the greatest obstacle to the increased reporting and successful disposition of all types of rape cases is prosecutorial discretion. Incoming criminal cases are commonly screened by the prosecutor, who has almost unfettered discretion in deciding whether or not to bring charges. This exercise of discretion normally leads to too little rather than too much enforcement, since prosecutors tend to focus heavily on factors like the probability of obtaining a conviction, the victim's credibility, and the office caseload, rather than "statutory factors" (i.e., elements of the crime).

These practical and political considerations may be particularly influential in rape cases because of the unique problems inherent in rape law enforcement. Cases often have weak fact patterns (e.g., no corroborative evidence of force or injury, or a preexisting relationship between the suspect and the victim); victims, especially those who were acquainted with or married to their attacker, are frequently reluctant to report or testify even though they may be the sole witness; a community may insist on aggressive rape prosecution while, at the same time, the same community members on a jury might not convict except in the most compelling of circumstances; and, last but not least, discretionary decisions are more susceptible in rape cases than anywhere else to the prosecutor's personal attitudes about men, women, sexuality, etc.

Can rape reform legislation overcome such stumbling blocks as a conservative and sexist common law background, prosecutorial discretion, and a glutted criminal justice system? Can the reform legislation accomplish what it was designed to do? It remains to be seen. While modern rape laws clearly reflect dramatically changed societal views about men, women, sex and violence, it is still too early to tell whether rape reform laws will bring about a significant increase in the conviction rate and a decrease in the incidence of rape. □

Would Your Students Talk?

Teaching students about their Miranda rights

It happens all the time. A cop stops a kid on the street, starts questioning him about a crime, then arrests him. Does the kid understand his rights: the right to silence, the right to an attorney? Will he understand the Miranda warning when it's read to him? Does he know the relationship between the police as interrogators and himself as suspect? Will he exert his rights or waive them, in confusion or fear?

Chances are he doesn't understand his rights and will not remain silent or ask to see a lawyer. An arrest simulation study in 1970 found that 96 percent of all juveniles waive their rights. A more recent study of actual arrests in St. Louis found that 91 percent of juveniles "talked."

But would it make a difference if the youngster were studying law-related education? Would these kids be more likely to understand their rights?

Miranda v. Arizona, 384 U.S. 436 (1966), might just be the best known case in American history. Thanks to countless cop shows on TV, almost everyone knows that police have to tell you about your

Ken Love

Mary Furlong and Shavaun M. Wall

"Miranda" rights when they're interrogating you upon arrest. In *Miranda*, the U.S. Supreme Court specified the conditions necessary to make a confession valid. In order to get the evidence into court, the police must warn the suspect against self-incrimination (i.e., his right to silence and the fact that a confession could be used against him) and indicate his right to free counsel before and during interrogation.

Miranda for Youngsters

But does *Miranda* apply to youngsters? In the case of *In re Gault*, 387 U.S. 1 (1967), the U.S. Supreme Court gave to kids certain due process rights already accorded adults. In *Gault*, Justice Abe Fortas asserted that "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. . . . It would be extraordi-

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nary if our Constitution did not require due process before sentencing a child to incarceration." As a result of *Gault,* juveniles were entitled to notice of the specific charges against them, the assistance of counsel during a trial, the right to confront and cross-examine witnesses, and protection against self-incrimination.

But what about *pretrial* interrogation? Did juveniles have the same rights as adults—the right to silence and to see a lawyer—and, if so, were they capable of asserting these rights?

Adults are presumed competent to understand their Miranda rights. If, after hearing them, they talk to the police anyway, the courts will usually admit the results of the interrogation at trial, reasoning that the suspects knew their rights and voluntarily waived them.

Can Juveniles Understand?

But are juveniles capable of asserting their rights? If they waive their rights, do they know what they are doing, or are they so immature, troubled, ignorant or confused that the waiver is meaningless? Even after hearing the Miranda warning, do juveniles understand their rights and the legal concepts contained within the statement of rights? It does no good to read them the warning if they don't understand it, and if they don't understand it, then they can't really assert their rights or make a valid waiver of them.

One school of thought holds that juveniles just aren't capable of understanding their rights. According to this line of thought, an "interested adult"—a parent, probation officer, or attorney—must be present during the interrogation. Without this protection, the juvenile waiver is meaningless, and should be excluded from the evidence admitted at trial.

Another school of thought holds that you have to look at the individual case. Some juveniles are capable of understanding their rights and waiving them, and some are not. This is the approach that the courts have taken.

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In *People v. Lara,* 432 P.2d (1967), the California Supreme Court ruled that the fact of being a juvenile did *not* automatically mean that a kid couldn't waive his rights. The court said that decisions about a particular juvenile waiver should be made based on the "totality of circumstances" test. This means that a court should look not only at the kid's age, experience, or I.Q., but also at the many factors that may influence his ability to understand.

In *West v. United States,* 399 F.2d (1968), a federal court described a list of circumstances that affect a juvenile's ability to understand his rights. Two circumstances relate directly to the juvenile: (a) his age and (b) his education. The other circumstances were procedural, relating to the arrest. These include: (a) his knowledge of the substance of the charge and the nature of his rights to consult with an attorney and to remain silent; (b) whether he was held incommunicado; (c) whether he was interrogated before or after formal charges had been filed; (d) methods and length of interrogation; and (e) whether he repudiated the statement at a later date.

Kids taught about the system—in contrast to other kids—didn't give up their rights

Another federal court attempted to define the "totality of circumstances" in *State v. White,* 494 S.W.2d 687 (1973). The court listed the following characteristics: physical condition of the juvenile, his mental age or intelligence, and his previous experience with the police or the justice system. These two lists and others provide characteristics for the courts to consider when examining the defendants' comprehension of Miranda rights.

In 1979, the United States Supreme Court affirmed the "totality of circumstances" test. In *Fare v. Michael C.,* 442 U.S. 707 (1979), the Court examined the validity of a juvenile's waiver. The Court said all of the circumstances of the case should be considered, including the procedure employed (e.g., did the juvenile consult with an attorney?) and the specific characteristics of the juvenile (e.g., age and education).

While the courts have been wrestling with the problem of when a juvenile can validly waive his rights, researchers in law, psychology, and education have also looked at juveniles' competence to waive their Miranda rights. One study found that 94 percent of a sample did not fully understand their rights. A more comprehensive study of 131 kids actually arrested in St. Louis found that only 45 percent of these 10 to 16 year-olds adequately understood Miranda rights. Younger juveniles and those with lower I.Q. scores would be less likely to understand their rights. Black kids from the slums found it harder to understand the language of the Miranda warning than middle class blacks or whites in general. Unexpectedly, kids with prior experience in the juvenile justice system did not understand their rights more fully than other kids.

But what about youngsters who have studied law-related education? Street Law programs around the country attempt to provide kids with practical knowledge about the law and legal system. The largest single part of the Street Law curriculum deals with criminal law, during which kids in Street Law classes get a pretty good dose of information about their Miranda rights.

A Miranda Survey

We wanted to know whether Street Law training improves their comprehension of Miranda rights, so we looked at a sample of 48 high school students in the District of Columbia with Street Law training. This study, which we did in mid-spring of this year, also looked at the juveniles' willingness to waive their rights. The sample was predominantly black (92 percent) composed of youngsters age 16 through 18. They had studied Miranda rights in the fall, and learned about actors in the legal system and court procedures throughout the year.

In sharp contrast to the youngsters in the other studies who apparently had not had law-related education, these students did *not* want to waive their Miranda rights after they had heard the Miranda warning and were asked to complete the waiver form. Specifically, 81 percent did not wish to answer questions at all, and 92 percent said that they wouldn't answer questions without an attorney present.

On comprehension tests, the students answered simple recognition questions about their rights successfully, but had trouble defining words in the Miranda warning, scoring, on the average, about

13 out of 20 points for the 10 key words.

We also showed the kids scenes of interrogations, an attorney-youth consultation, and a courtroom proceeding. We then asked students about what should occur in each setting. On this test, students didn't adequately understand the right to silence across situations, but did show a grasp of the adversarial nature of interrogation and the helpfulness of defense counsel.

What Does It All Mean?

The research shows that most juveniles waive their juvenile rights, but students with Street Law training show a strong unwillingness to waive. This suggests that they're more aware of the importance of their rights and the consequences of waiver. But most of the research has been in simulated arrest situations. We don't know whether adolescents with Street Law training would handle the stress of

(Continued on page 72)

Understanding Miranda Rights

This teaching strategy will help juveniles comprehend their Miranda rights.

1. Reviewing Miranda

Give each student a copy of the warning and waiver statement used by your local police department. If it's unavailable, you may want to use the following warning, which is used in the District of Columbia. Read the warning aloud with the students and then have the students answer the questions that follow.

WARNING AS TO YOUR RIGHTS

You are under arrest. Before we ask any questions, you must understand what your rights are. You have the right to remain silent. You are not required to say anything to us at any time or to answer any questions. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we question you and to have him with you during questioning. If you cannot afford a lawyer and want one, a lawyer will be provided for you. If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER

(1) Have you read or had read to you the warning as to your rights?
________ Yes ________ No
(2) Do you understand these rights?
________ Yes ________ No
(3) Do you wish to answer any questions?
________ Yes ________ No
(4) Are you willing to answer questions without having an attorney present?
________ Yes ________ No

2. Roleplaying

Ask the students to roleplay the following situation. "Two boys leave the local drug store with a brown paper bag in their hands and run down the street. The police receive a call that a robbery has just occurred at the drug store and that the suspects are two boys carrying a bag. On their way to the store, the police observe two juveniles running and stop the car to question them." Assign students to play the following roles: Police Officer # 1, Police Officer # 2, Juvenile # 1, and Juvenile # 2.

Inform the two students playing the police officers that it is their responsibility to question the juveniles about the crime. If the police officers believe that there is a probable cause that the juveniles committed the crime, then they should arrest them and read them their Miranda rights. (Use the local police department waiver or the Washington, D.C. waiver listed previously.)

Inform the students playing the juveniles that they are to respond to the questions of the police in a realistic manner.

Ask the role players to enact the situation in the center of the classroom. Have the remaining students sit in a circle around the role players and assume the role of observers. Conduct the role play. Allow five to ten minutes.

Following the role play, conduct a debriefing. The questions listed below may serve as a basis for discussion.

(1) Was the role play realistic? Observers should comment on this.
(2) Should the police officers have arrested the two juveniles? Why or why not?
(3) Should the juveniles answer the questions of the police?
(4) Should the juveniles waive their rights to an attorney?
(5) What do the following words mean: right, attorney, silent, questioning, warning, waiver, arrest, afford, court?
(6) Can a police officer pressure a suspect to talk?
(7) Does the right to silence extend to court?
(8) What is the nature of the police/suspect relationship?
(9) What is the nature of the attorney/juvenile relationship?
(10) Under any circumstances, if arrested, what should a juvenile do?

Additional Strategies

The filmstrip *Juvenile Justice* (New York: Educational Enrichment Co., New York Times, Inc., 1982) presents a history of the juvenile justice system. It probes the issue of juveniles and adults who are accused of the same crime. Should they be treated the same or differently? Should they have the same rights? The same punishment? One of the objectives of this filmstrip is to help juveniles to understand their Miranda rights and the implications of their rights.

Specific teaching strategies on this issue are contained in the following curriculum materials.

Arbetman, L.P., McMahon, E.T., and O'Brien, E. *Street Law: A Course in Practical Law* (2d ed.). St. Paul: West Publishing Co., 1980.

Bender, D. *Should Juveniles Be Punished: Opposing Viewpoints: Time Magazine v. Fortune News.* Minneapolis: Greenhaven Press, 1977.

Clark, T. *Criminal Justice.* New Jersey: Scholastic Book Services, 1978.

Riekes, L., and Mahe, S. *Juvenile Problems and Law.* Mineola, New York: West Publishing Co., 1975.

White, C. (Ed.) "Juvenile Justice." *Update on Law-Related Education.* Chicago: Spring, 1979.

You may also want to adapt the Comprehension of Miranda test and Function of Rights tests to further evaluate your own students' comprehension. For additional information, consult T. Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence.* New York: Plenum Press, 1981.

Joe Daly and Deborah Strigenz

Immunizing Presidents, Educating Aliens, Busing Kids & More

The Court wraps up a busy term

UPI

The Supreme Court, like many of us, saves the best for last. Once again the Court has decided cases ranging from prosecution of a president to education of deaf children, with an auto search case thrown in for good measure.

This issue of "Court Briefs" will continue suggesting classroom teaching strategies for some of the cases discussed. If any of you have developed a particularly interesting strategy of your own, please send it along to us so we can share it with other innovative educators and lawyers in the classroom.

Censorship All Over

Censorship issues have plagued the Court for years. Three more cases may shed some light on a perennially troublesome issue, though many observers think the Court may have only muddied the water.

The Rape Victim in Court

The 16 year-old rape victim spoke in a quite, hesitant, and nervous manner. "And then what did he do to you?" asked the prosecutor. The spectators sat on the edge of their seats. "He . . . he . . . ," She began to cry. How would you feel testifying publicly to such a personal and devastating invasion of your physical and psychological privacy?

Some states have tried to preserve personal privacy by barring the press and public from such trials, but this inevitably raises concerns about the First Amendment's protections of a free press.

Paul Conklin

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In *Globe Newspaper Company v. Supreme Court* (50 L.Wk. 4759), the Supreme Court came down on the side of the First Amendment in a 6-3 decision invalidating a Massachusetts statute which required the closing of courtrooms during the trial of certain sex offenses where the victim was under 18.

Since the free press and public trials were involved, the Court required Massachusetts to show a "compelling state interest" for barring the press and public from criminal trials. Also, the state had to prove that the means used to serve this important interest were drawn narrowly, so that constitutional rights would be only minimally affected.

Two state interests were offered to justify closing such trials. First, the state sought to lessen the attention on and embarrassment of the young victims. Second, the statute was meant to encourage the reporting of sex crimes against young persons and subsequent testimony. The state reasoned that if victims got their names in the paper they would not report such crimes.

The Court agreed that the protection of a minor's mental and physical health is a compelling state interest. But the method used—mandatory closure of criminal trials—was not narrow enough according to the majority decision authored by Justice Brennan. The Court's holding allows trial courts to decide each case individually to see whether or not the state's bona fide interest could be protected by other means. If it couldn't, only then would closure of courtroom doors be acceptable.

The second ground also failed to persuade the Court. Although the statute intended to further an important state concern, it failed its constitutional test because of its broad application and faulty reasoning. No empirical data was offered to prove that the statute would result in greater numbers of young victims reporting and testifying about sex crimes. In addition, the Court cited flaws in the statute's effectiveness. The press wasn't barred from obtaining names and details from the "transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony."

Chief Justice Burger, in his minority opinion, asserted that "the Court's decision is. . . a gross invasion of state authority and a state's duty to protect its citizens—in this case minor victims of crime."

Kiddie Porn: "I Know It When I See It" and It's Banned!

No, not again! Your mother takes out your baby album to show the visiting relatives. "Isn't Maria something?" She smiles. The picture of you naked, playing in the sand by the lake, is shown once again. Can your mother be arrested for "production and distribution" of kiddie porn?

The Supreme Court is rarely unanimous about anything these days, especially regarding pornography. But by a 9-0 vote the Court upheld a New York law making commerce in child pornography illegal. The case of *New York v. Ferber* (50 L.Wk. 5077) arose from the New York legislature's intent to protect children from the exploitation associated with the business of "kiddie porn." The legislature outlawed both production and distribution of materials showing children performing sexual acts.

Paul Ira Ferber, a Manhattan bookstore owner, was convicted in a New York trial court for distributing materials which, although not legally obscene (see page 40 of *Update*, Spring 1982, for the legal definition of obscenity), did contain depictions of sexual performances by children. The First Amendment question presented to the U.S. Supreme Court centered on whether New York could prevent production and distribution of photographic material, even though it was not legally obscene.

The Court, in a decision written by Justice White, decided that the legislative purpose of protecting minors from the effects of the pornography industry outweighed Ferber's First Amendment rights in the continued sale of such material. Ferber's lawyer had argued that nonobscene expression has become "hostage to fear." But the Court decided a state's compelling interest in "safeguarding the physical and psychological well-being of a minor" provided ample reason for the Court's holding that the First Amendment is not violated by prohibiting child pornography, even when such pornography does not fit the exact definition of obscenity.

Since the law didn't intend to shield the public from such material, but rather to protect the children, the Court modified its ordinary standard for judging obscenity to fit the particular case of child pornography. The material need not appeal to "the purient interest" nor be done in a "patently offensive manner" nor "be considered as a whole." As long as a statute defines and limits the prohibited conduct adequately, the Court will uphold a child pornography law as not violating the First Amendment.

So what about those baby pictures? Not all pictures of naked children are harmful, as any parent with a photo of a baby on a beach or a bearskin rug can attest. Even though the Court recognized this, it preferred to deal with the precise limits of kiddie porn in specific cases as they develop.

Shall We Roast Some Marshmallows at Tonight's School Board Meeting?

Civil libertarians and Moral Majority members alike have been waiting months for a definitive Supreme Court ruling on whether school boards can remove unpalatable books from school libraries. The decision issued on June 25 is neither definitive nor coherent, for the plurality opinion (there was no majority) was so split that only four Justices could agree that the First Amendment might narrowly restrict school board powers in this situation.

The case of *Island Trees School District v. Pico* (50 L.Wk. 4831) arose after the Island Trees Union Free School District Board of Long Island voted to remove nine books from the high school library—books it characterized as "anti-American, anti-Christian, anti-Semitic and just plain filthy." Among them were Kurt Vonnegut's *Slaughterhouse Five*, Eldridge Cleaver's *Soul on Ice*, and Richard Wright's *Black Boy*. A group of parents sued, comparing the removal of these books to the burning of *The Divine Comedy* by the Florentines.

A lower court went along with the school board without the benefit of a full trial, concluding that though its action might "reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any constitutional right."

A federal appeals court, however, reversed this decision, concluding that a trial on a possible violation of the First Amendment was necessary. The Supreme

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Court agreed with the appeals court, remanding the case to a lower court.

This decision wasn't clearcut, though. Justices Brennan, Marshall, Stevens, and Blackmun agreed that the First Amendment did narrowly restrict the power of school boards to remove books from school libraries. Justice White went along with the decision but did not agree that this was the time for the Court to address the First Amendment question. His concerns centered on resolving the factual issues of the case and clarifying the record. Since he did not join the other justices' reasoning, it is a plurality decision. With no majority emerging on the First Amendment issue, the case has limited value as a precedent.

Instead of looking at the merits of the board's action, Justice William Brennan, who wrote the plurality opinion, considered a question he found more interesting: "Does the First Amendment impose *any* limitations upon the discretion of [school boards] to remove library books?" Phrased that way, the question could have only one answer: yes. "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books," Brennan insisted. The opinion assumes that "the Constitution protects the right [of students] to receive information and ideas." But, seeing the plain direction of this reasoning, Brennan hastened to add, "Nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools."

Citing an earlier case, Justice Brennan pointed out that "a school library, no less than any other public library, is a 'place dedicated to quiet, to knowledge, and to beauty,' " *Brown v. Louisiana,* 383 U.S. at 142 (1966). Further, his opinion quotes *Keyishian v. Board of Regents,* 385 U.S. 603 (1967), saying "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." In Justice Brennan's words, "the school library is the principal locus of such freedom."

The Justices took pains to insist that though "our Constitution does not permit the suppression of *ideas*" [emphasis added], a school board can remove books because they don't meet its standards of "educational suitability." School boards and legal scholars are left to wonder how you can look into a book's educational suitability without considering its ideas. If a book is "pervasively vulgar," Brennan declares, the board can remove it. But some ideas can't be expressed without vulgarity. Why does the Constitution permit the suppression of those ideas and not others?

The dissenting justices did not think it was the Court's place to oversee the actions of a local school board in this kind of issue. If parents are dissatisfied with the actions of their school boards, asserted the Court's dissenting voices, they should vote them out of office. Justice Burger went on to note that the students "are free to read the books in question, which are available at public libraries and bookstores. . . . Despite this absence of any direct external control on the students' ability to express themselves, the plurality suggest that there is a new First Amendment 'entitlement' to have access to particular books in a school library."

Criminal Law

As usual, the Court continued to address age-old matters of criminal law, including such perennial tangles as double jeopardy and search and seizure.

The Court Strikes Twice

To be tried twice for the same offense is a "no no." But to explain double jeopardy in two cases is quadruple trouble, as the Supreme Court found out this term.

In the case of *Oregon v. Kennedy* (50 L. Wk. 4544), Bruce Kennedy was charged with stealing an oriental rug. His first trial ended with a mistrial when the prosecutor asked one too many questions of an expert witness. The witness was a rug dealer who testified that he had earlier filed a criminal complaint against Kennedy but had never done business with him. The prosecutor then asked, "Is that because he is a crook?" Kennedy's motion for a mistrial due to prejudice in front of the jury was granted.

Despite his objections of double jeopardy, Oregon again tried Kennedy and was successful the second time. But the Oregon Court of Appeals agreed with Kennedy and reversed his conviction. The Fifth Amendment to the United States Constitution reads, in part, "No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." The Oregon court reasoned that the defendant was being tried twice for the same offense and that double jeopardy required the conviction to be reversed.

The U.S. Supreme Court disagreed, saying that before double jeopardy applies under these facts there must be *intent* on the part of the prosecutor to create a mistrial. Without such intent, a defendant cannot prevent subsequent prosecution under the Double Jeopardy Clause. Since all of the lower courts were in agreement that the prosecutor's question lacked objective intent to force a mistrial, the Supreme Court found no bar to Kennedy's second trial.

Justice Rehnquist, writing for the Court, explained in a footnote when the Double Jeopardy Clause *does* apply: "This Court has consistently held the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence."

The Court showed the correct application of the Double Jeopardy Clause in the case of *Tibbs v. Florida* (50 L. Wk. 4607). Delbert Lee Tibbs was convicted in a Florida court of murder and rape. The state had claimed that Tibbs had picked up two hitchhikers in his truck and later murdered the man and raped the woman. The woman escaped and testified for the state at Tibbs's trial.

Tibbs denied any part in the attacks, and said he had not driven a truck in Florida, didn't own a gun, and was on the other side of Florida on the date of the attacks. He was arrested several days after the attacks and his photograph was identified by the witness in a police identification procedure which may not have been entirely objective. He fully cooperated with police after his arrest.

The victim's testimony was damaged by her admission, on cross-examination, that she had a history of drug use and had used marijuana just before the attacks. She also had difficulty remembering the precise time of day or night of the attacks. The state couldn't produce the weapon used to murder the witness' companion, no truck was ever found, and Tibbs had no keys with him when he was arrested. The state also couldn't damage Tibbs's reputation for honesty, since he had character witnesses to bolster it.

The Florida Supreme Court reversed Tibbs's conviction, holding that the state's evidence was not weighty enough to support the jury's verdicts. The state then attempted to retry the case. Tibbs objected and appealed to the Supreme Court. Justice Rehnquist noted the double jeopardy concept does apply in these circumstances, since no reasonable jury could find a verdict of guilty beyond a reasonable doubt with this set of insufficient facts.

Is Nothing Sacred? The Court Swerves to the Right

Picture this scene . . . it's downtown Chicago, 1924, and Al Capone is parked along Michigan Avenue ready to make a deal with some unsavory characters in his very profitable bootleg whiskey business. Elliot Ness just happens to come on the scene and discovers an unmarked, but very evident bottle of booze lying on the back seat. Not only does he take this, but proceeds to open Capone's trunk and seizes 68 more bottles! Have they caught Scarface red-handed, or has he been the victim of an illegal search?

The general rule as to search and seizure is that the police must obtain a warrant before making a search and subsequent seizure. There are, however, numerous exceptions to the general rule. Probably the best known of these is the automobile exception.

Prior to the most recent decision concerning searching cars, the Supreme Court made decisions on a case by case basis. The cases were very confusing since the Court analyzed a variety of containers that could or could not be searched in a "car" case.

The trouble started back in Prohibition when two bootleggers were stopped in their car by federal agents who ripped out the rumble seat upholstery and found 68 bottles of gin and whiskey. The officers had obtained no warrant allowing the search, but the Supreme Court declared that because cars were mobile, warrantless searches were O.K. if the police had probable cause to believe that contraband was in the vehicle. The Court reasoned that it would be highly impractical to keep the vehicle stopped on the highway while a warrant was obtained.

But ever since, the Court has been swerving from side to side, trying to define the extent of the auto exception to the Fourth Amendment requirements of a warrant for a search. In the process, the Court has confused not only police, but judges and law professors as well, since the cases turn on minute facts and circumstances. In one case it would seem that the Court was loosening the requirements for a warrant, and yet in the next case it would apply the brakes in a car search situation.

In *United States v. Ross,* (50 L.Wk. 4580) the Justices swerved to the right but at least began to drive straighter. They also gave police greater power. By a 6-3 vote, the Court ruled that officers without warrants may search anywhere in a car and may open almost any container from a paper bag to locked baggage.

The new case involved Mr. Albert Ross, who was arrested in Washington, D.C., after an informant tipped police that Ross was selling narcotics kept in his car's trunk. A search of the trunk turned up a small brown paper bag. Inside, the police found heroin—evidence instrumental in Ross's conviction. In a similar case last term (*Robbins v. California* 101 S. Ct. 2841) a pluralty of the Justices decided the police could *not* constitutionally open a nontransparent plastic bag wrapped around two bricks of marijuana stashed in the cargo space of a station wagon.

But the plurality in *Robbins v. California* did not agree on the rationale for their decision, and the author of the prevailing opinion, Potter Stewart, has since retired. His replacement, Sandra Day O'Connor, considered a conservative, has decided that the Justices erred last July. Her vote in *United States v. Ross* swings the pendulum in the other direction by allowing the police to search virtually everything in a car.

The author of *Ross,* Justice John Paul Stevens, said "When a legitimate search is under way and when its purpose and its limits have been precisely defined, nice distinctions between glove compartments, upholstered seats, trunks and wrapped packages must give way to the interest of prompt and efficient completion of the task at hand." Stevens did note, however, that limits still remain. For example, "probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."

Justices Brennan, Marshall, and White dissented. They felt that the Court was taking the first step toward an unprecedented exception to the warrant requirement of the Fourth Amendment. They argued that police have been given too much power and therefore, there is the need to keep the brakes on them. Justice White quoted from a previous court decision on search and seizure, " 'The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. . . . This Court long has insisted that influences of probable cause be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' " (*Shadwick v. City of Tampa,* 407 U.S. 345, 1972)

Justice Delayed, Justice Denied?

Young, good-looking, a medical doctor, Army Captain Jeffery MacDonald had everything going for him. But it all came crashing down on the night of February 7, 1970. When military police, alerted by a call from MacDonald himself, arrived at the doctor's home on the Fort Bragg, North Carolina, military base, they found his pregnant wife and two daughters brutally murdered and Dr. MacDonald unconscious from multiple stab wounds. Dr. MacDonald said that four hippies had invaded his home and carried out the Manson-type slayings, but physical evidence at the scene led to the suspicion that Dr. MacDonald himself may have committed the crimes.

In May 1970, the Army formally charged him. However, later that year, the military charges were dismissed and MacDonald was honorably discharged. At the Justice Department's request, the Army Criminal Investigation Division (CID) continued its investigation of the murders. In 1972, the CID forwarded a report recommending further investigation, and the Justice Department, in 1974, finally presented the matter to a Grand Jury, which returned an indictment in January of 1975, charging Dr. MacDonald (by then a civilian) with all three murders. He was convicted in 1979, but an appellate court reversed, saying he had been denied the speedy trial guaranteed by the Sixth Amendment.

During this term the Supreme Court reinstated the murder conviction of the former Green Beret captain (*United States v. MacDonald,* 50 L.Wk. 4347). The majority overturned the appellate court's decision that Dr. MacDonald's constitutional right to a speedy trial has been violated by a delay in indicting him after the army brought and then dismissed charges against him. After the Court announced its decision, agents from the FBI took Dr. MacDonald into custody and conducted him to a prison to resume serving a life sentence. He had been free on $100,000 bond, practicing medicine in Long Beach since his successful appeal in 1980.

The Court's decision addressed only the speedy trial aspect of Dr. MacDonald's appeal. He may now raise other constitutional challenges to his conviction.

The Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused has the right to a speedy trial. Unfortunately, there is no generally accepted definition of what makes a trial adequately speedy. The question in this case was whether the Speedy Trial Clause applied at all in the five years between the dismissal of the Army's initial charges and the indictment of Dr. MacDonald for murder. The lower court reasoned that MacDonald's rights to speedy trial were set in motion when the Army charges were first brought in 1970, and, even though the Army dismissed the charges a few months later, the clause remained applicable. The Justice Department requested the Army continue the investigation of the case, and two years later the department presented the case to a grand jury. It was this period between 1972 and 1974 that the appellate court said violated the Speedy Trial Clause.

The Justice Department's appeal to the Supreme Court argued that the Speedy Trial Clause applied only while the criminal prosecution was under way, not while they were investigating the case. The Justice Department said that prosecutors often drop charges and later refile them when new evidence is discovered or when a missing witness emerges. Applying the Speedy Trial Clause in this period, the department said, would have "substantial adverse impact upon the administration of justice." Once the Army dismissed its charges against MacDonald, the department argued, the Speedy Trial Clause was in effect suspended until the 1975 indictment.

The Supreme Court agreed. Chief Justice Warren E. Burger, joined by Justices White, Powell, Rehnquist, and O'Connor, said that once the charges were dismissed, the speedy trial guarantee is no longer applicable. "At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation, Certainly, the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps certain disruption in normal life. This is true whether or not the charges have been filed and then dismissed. But with no charges outstanding personal liberty is certainly not impaired to the same degree as it is after arrest, while charges are pending."

Not all the Justices agreed. Associate Justice Thurgood Marshall wrote a dissenting opinion which was joined by Justices Brennan and Blackmun. The Speedy Trial Clause, they said, "continues to protect one who has been accused of a crime until the government has completed its attempts to try him for that crime."

Government

"Get Rid of that S.O.B." (Nixon on Tape Discussing Fitzgerald)

The Supreme Court has made yet another Nixon ruling. This time the Court has held that Nixon and other presidents enjoy absolute immunity from damage suits based on their official acts, but their top aides and advisors do not.

In *Nixon v. Fitzgerald* (50 L.Wk. 4797) the Court divided 5-4. The majority, Justices Powell, Rehnquist, Stevens, O'Connor, and Chief Justice Burger, said the uniqueness of the chief executive's office "rooted in the constitutional tradition of the separation of powers and supported by our history" requires absolute immunity. The ruling was based largely on what Associate Justice Lewis F. Powell, Jr., writing for the majority, called the public interest in permitting a president to act as he sees fit without fear of being sued. Citing policy considerations, Justice Powell wrote: "In view of the visibility of his office and the effect of his actions on countless people, the president would be an easily identifiable target for suits for civil damages. This personal vulnerability frequently could distract a president from his public duties, to the detriment not only of the president and his office, but also the nation that the presidency was designed to serve."

The ruling was based on a damage suit by a former air force budget analyst, A. Earnest Fitzgerald, who charged that he had lost his job as a result of a White House conspiracy to deprive him of his civil rights. He was dismissed after exposing cost overruns in the C5A transport plane. Fitzgerald had charged in his suit against Nixon that he was ousted as a Pentagon analyst in 1970 in retaliation for congressional testimony about cost overruns on the C5A.

Justice White noted, in a dissenting opinion, that in previous cases on the issues of immunity for federal officials the Court held "that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. . . . I do not agree that if the office of President is to operate effectively, the holder of that office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law."

Mr. Fitzgerald said he was, obviously, not pleased with the ruling, which, he said, ought to frighten anyone who loves liberty.

The ruling upholds immunity only from civil suits for damages, not from criminal prosecutions or from other types of judicial action. The majority made clear that it was not casting any doubt on the Court's 1974 ruling that required President Nixon to turn over the Watergate tapes.

In the suit Mr. Fitzgerald had also named two of President Nixon's senior aides, Bruce N. Harlow and Alexander P. Butterfield, as defendants. The aides had argued that they too were entitled to absolute immunity derivative from the president's. However, the Court rejected that argument, and ruled that Mr. Harlow and Mr. Butterfield were entitled only to the qualified immunity the Court

Teaching Strategy: Speedy Trial

Here's an exercise for students that shows why a speedy trial might be necessary.

A. You, the teacher, try to identify some prominent event which took place about two months ago.
B. Have students individually write down all they can remember.
C. Then, in small groups, compare each other's data for commonality and differences.
D. Come together as a class and discuss how many facts can be remembered, and how many details are forgotten.

Explore other reasons for speedy trial:

A. People die, move.
B. Papers are lost.
C. The victim's feeling of being wronged may lessen.
D. "Justice delayed is justice denied," basic unarticulated feeling that things must end. The need to get on with life.
E. If a person is in jail, waiting for trial, he or she should be incarcerated for as short a time as possible.

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has previously accorded to cabinet officers, governors and other officials. But in practical terms, the new definition of qualified immunity means officials that are sued will be much more likely to succeed in having suits dismissed before trial.

As a result of the Court's action, Fitzgerald's suit against former President Nixon will be dismissed. The case against Harlow and Butterfield has been returned to the appeals court for further action consistent with the opinion. Elliot L. Richardson who represented Butterfield and Harlow in the Supreme Court said he was confident that the suit against them would now be dismissed.

"Crazed Computers Walked the Frenzied Land"

"As every man goes through life, he fills in a number of forms for the record, each containing a number of questions. ...There are thus hundreds of little threads in all. If these threads were suddenly to become visible, the whole sky would look like a spider's web.... They are not visible, they are not materials, but every man is constantly aware of their existence.... Each man, permanently aware of his own invisible threads, naturally develops a respect for the people who manipulate the threads." (*Cancer Ward* by Alexander Solzhenitsyn)

Does the public have access to FBI data? Can we find out about some of these threads? The Supreme Court, in a 5-4 decision has limited access to data by interpreting the Freedom of Information Act (FOIA) very narrowly. In *FBI v. Abramson* (50 L.Wk. 4530) Justice White wrote for the majority that data which is "investigatory records compiled for law enforcement," but which was used for other purposes, can still be hidden from the public. Justice Sandra Day O'Connor dissented saying that ambiguities should be "resolved in favor of disclosure."

Discrimination Round-Up

While the Supreme Court has often indicated that education is best left to educators, as in previous terms it continues to enter the schoolhouse gate. A number of cases dealing with discrimination in the hallowed halls were decided this term.

What Does Equal Educational Opportunity Really Mean?

On March 23, 1982, with the help of a computerized video display screen, lawyer Michael A. Chatoff, who can speak but cannot hear, communicated with the nine U.S. Supreme Court Justices during oral arguments by reading their questions and then speaking back to them. "This is a tough world and it is going to be as tough for Amy as it is for every other child," said Mr. Chatoff in halting dissonant speech as the Justices leaned forward in their seats to be able to hear. "If she's going to be able to compete she must receive education equal to those of other children."

It was the first time the Court had permitted the use of special electronic equipment in the courtroom. It did so specifically for this case, in which it was asked to decide whether a Westchester, New York, school district is required by law to provide a sign language interpreter for Amy Rowley, a deaf fourth grade student who ranks near the top of her class (*Hendrick Hudson Board of Education v. Rowley*, 50 L.Wk. 4925).

The question was really one of statutory interpretation. The Education for All Handicapped Children Act of 1975 provides federal money to assist state and local agencies in educating handicapped children. In order to qualify for federal funds under the act, a state must show that it "has in effect a policy that ensures all handicapped children the right to a free appropriate public education." The "free appropriate public education" the act requires is tailored to the unique needs of the handicapped child by means of an individualized education program (IEP).

But what does this language mean in practice? What, exactly, is a school board required to do? The legislation has helped to get special education for handicapped youngsters who don't do well in regular classrooms. But a few parents have interpreted the law as meaning that a handicapped child is entitled to every possible assistance. They have pressured school districts into very expensive individual programs, including psychiatric treatment.

Amy Rowley has minimal residual hearing and is an excellent lip reader. During the year before she began attending Furnacewood School, a meeting between her parents and a school administrator resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary for her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents, who are also deaf.

At the end of the trial period it was determined that Amy should remain in the kindergarten class and be provided with an FM hearing aid to amplify words spoken into a wireless receiver by the teacher or fellow students. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first grade year. It provided that Amy should be educated in a regular classroom. She would continue to use the FM hearing aid and would receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours per week. The Rowleys agreed with this plan but insisted that Amy also be provided with a qualified sign language interpreter in all her academic classes. Such an interpreter had been placed in Amy's kindergarten class for a two-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators also concluded that Amy didn't need an interpreter in her first grade classroom.

When their request for an interpreter was denied, Amy's parents demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrator's determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. The examiner's decision was affirmed on appeal by the New York Commissioner of Education. The Rowleys then went to the United States District Court, claiming that the denial of the sign language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Education for All Handicapped Children Act of 1975.

The lower court found that Amy is "a remarkably well adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," but "that she understands considerably less of what goes on in her class than she would if she were not deaf" and thus "is not learning as much or performing as well academically as she could without her handicap." This disparity between Amy's achievement and her potential led the lower court to decide that she was not receiving a "free appropriate public education," defined by the lower court as an opportunity to achieve her full potential along with the opportunity provided to other children.

(*Continued on page 58*)

Discipline

(*Continued from page 25*)

quent hearing (*Sullivan v. Houston Independent School District*, 475 F.2d 1071, 1973).

Reviewing the courts' decisions on punishment in schools, it is clear that a common-sense approach to discipline is evolving. The schools have wide discretion in deciding when punishment is necessary and appropriate but the courts have started to outline procedures to ensure fair administration of discipline. These procedures aren't an onerous burden on school people, but rather are minimal steps that fair-minded people should afford. Do we really want schools in which violence can be used against students without their having done anything wrong? Do we want catch-22 schools where students can be suspended and then punished for not coming to school during the suspension?

Besides improving fairness in the schools, these guidelines may also help the schools do a better job of educating.

The Discipline Dynamic

Psychologists say that for punishment to work, certain conditions must be met. For these conditions to make sense, it's necessary to understand the discipline dynamic. The following explanation of the discipline dynamic is based on the work of Fritz Redl (e.g., Redl and Wattenberg, *Mental Hygiene in Teaching, Second Edition*, New York: Harcourt, Brace and World, 1959).

Punishment works by generating aggression within the student. The sensation is unpleasant and the student wishes to discharge it. When punishment works, the student harnesses the aggression; it provides the driving force for reflecting upon the events leading up to his being punished. He recognizes that he may have seemed to be in an impossible bind or unable to control his impulses when he committed the punishable offense, but he actually had a choice among options, at least one of which, in retrospect, was superior. This realization may prompt him to work on developing both new ways of analyzing the situations he encounters and new ways of interacting with others. If all goes well, when he encounters situations similar to the one(s) in which he committed the offense, he will perceive them differently, choose more constructive courses of action, and have the requisite skills to follow through on his decisions.

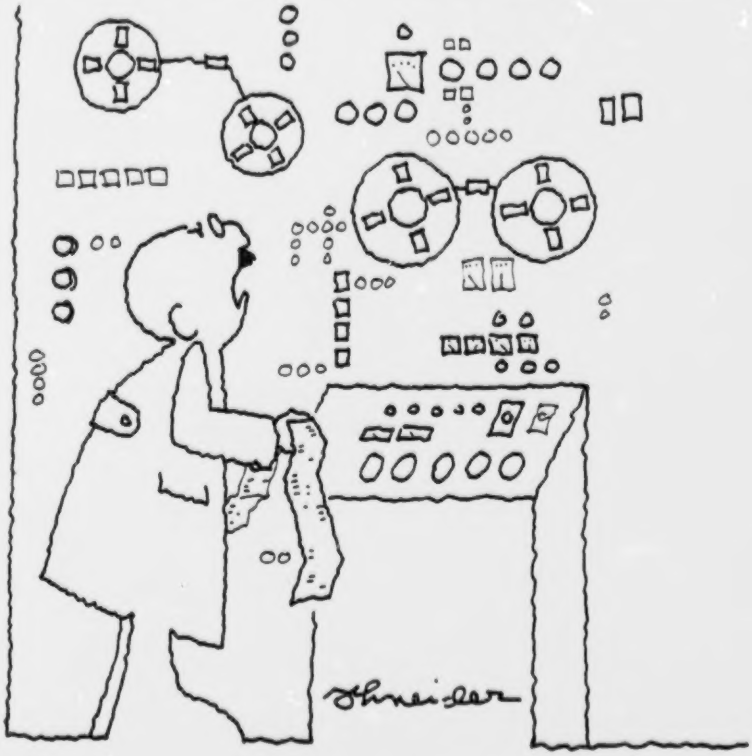
Unfortunately, punishment-generated aggression is rarely harnessed in this way. For example, it takes a lot of effort for a student to reflect upon how he has contributed to his own misery, so he is more likely to direct his aggression elsewhere. For many students with low self-esteem the path of least resistance is *against the self;* they tend to chastise themselves and emerge with intensified self-hatred. Tragically, the groups that tend to have the lowest self-esteem are also the groups that tend to be most frequently punished in schools: those who do poorly academically, members of minority groups, and those with emotional problems.

For other students with low self-esteem, and for many with high self-esteem, the path of least resistance is not inward, but *outward.* When aggression is deflected outward, the result may be intensified resentment of teachers, dislike of school, or violence against people or property. This scenario is especially likely when corporal punishment is used, because few students can constructively harness so much aggression coming so suddenly.

Educators can reduce this outward deflection, and thereby increase the chance that students will change their destructive behavior, by establishing the following four conditions. Furthermore, each of these depends in part upon the educator using some of the same procedures that courts have considered part of due process. The first condition is that the student must perceive that the decision to punish him resulted from reflection rather than anger. This perception can be encouraged by issuing a warning while the student still has an opportunity to escape punishment, trying nonpunitive techniques until it is clear that they won't work, and holding, at least, an informal hearing-like discussion about the reasons the student is being considered guilty and the nature of his punishment.

A second condition that reduces outward aggression is that a student must perceive that whoever is selecting and inflicting his punishment does so equitably. In other words, the student must believe that the educator would inflict the same punishment on anyone else who committed the same offense or who engaged in a similar pattern of disruptive behavior. Hearings play a central role in promoting fairness, and the more elements of due process included, the harder it is for the student to maintain a perception that the educator is being unjust.

Third, the more a student believes that the educator selecting and administering the punishment cares for him as a unique individual, the harder it is for the student to remain angry at the educator. And,



"What do you mean, TILT?"

Preventing Trouble

The following conditions can check disruptive behavior before it occurs. Preventive measures like these can create a climate for learning that makes a difference.

Student readiness is one of the most important factors in getting kids to learn. Of course teachers should pay attention to environmental features like classroom air quality and temperature, and to the ability of students to see and hear. In addition, a drowsy or inattentive student may be poorly nourished or not getting enough sleep, things educators should notice. Ensuring psychological readiness means increasing students' sense of belonging to a group, of being accepted as a unique individual, and of being able to influence what happens to them.

Many educators assume that these factors are beyond their control, and to some extent, each is. But, to take one example, if students participate in formulating, evaluating and modifying classroom rules, then they feel more in control of their behavior.

Students also need to feel that their tasks are clear and appropriate. They need to know what they are supposed to do, how to proceed, and how the task builds on their prior experience. It also helps if the task is challenging but manageable.

Teachers must keep the work moving. Jacob Kounin's research has shown that students act up when their sense of progress is interrupted by teachers overdwelling on simple task elements, prolonging a simple transition from one activity to another by breaking it into component parts, or shifting temporarily from an activity just started to one the class just completed.

Similarly, high rates of disruptive behavior are found in classrooms where the teacher failed to maintain task accountability, or the sense that a student may be called on at any time. Teachers should call on students in an unpredictable sequence and ask questions before they name which student is to respond, alerting listeners that they may be called on to comment on what the student reciting is saying.

Students also should know that off-task behavior will not only be detected swiftly but also dealt with justly. This means that when more than one incident of off-task behavior is occurring, the teacher focuses on the most serious behavior, or if several students are engaging in the *same* off-task behavior, the teacher addresses not the most vulnerable or most recent culprit, but rather the instigators, regardless of their status. We are not talking about dealing harshly or even prominently with students who start to slip off task. Doing so would interfere with task momentum. We have in mind teacher actions that are low key but which nevertheless communicate the message: "I know what's going on and I insist that you get on with your assigned task."

—J.W.E. and D.M.S.

although the student's perception of how much the educator cares for him will depend primarily upon pre-offense events, the way that the educator acts during and after the offense has been committed will make a difference. Again, a hearing contributes to the impression that the teacher cares about protecting the student's rights. Another way for educators to show concern is by helping a student reintegrate into the classroom.

Finally, a student should be able to tell that the punishment he received is a legitimate consequence of his actions. This implies that he see that his actions were wrong, that the *nature* of the punishment is appropriate, and that its *severity* is reasonable. An educator should explain why the offense is considered wrong and, one more time, hold a hearing-like discussion, this time focused solely on the determination of a suitable punishment. Here we have in mind telling the student what factors will affect the decision.

Alternatives

Although the best alternative to punishment is prevention (see box), no method of prevention is foolproof. But teachers who want to be educators more than cops can respond to disruptions educationally. The objective of this approach, in addition to helping disruptive kids make progress academically, is to help them have more self-control. Sometimes teachers can do this with a gesture, a facial expression, or by calling the student's name. And sometimes it can involve walking near the student while addressing the class on the subject at hand, or, if students are involved in seatwork, stopping by to ask about their work.

At times, however, the competent teacher recognizes that a disruption is caused by some environmental stimulation, such as falling snow, an enticing object, or another student behaving provocatively. Under such circumstances, the teacher should make appropriate modifications in the environment—such as facing the student's chair away from the window, temporarily confiscating the object, or separating the students—so that the student's inner controls can reassert themselves. Similarly, if the teacher thinks that the students acting up are having trouble with their schoolwork, he may help the students regain self-control by asking their classmates to give them a hand, or by temporarily shifting them to another task until he can arrange to help them himself.

If altering the environment or simplifying the task doesn't work, then it may be necessary to ask the student to take time out until he is ready to work again. Often he can do that somewhere in the classroom or right outside the door.

Sometimes a student doesn't have enough self-control to respond positively to the suggestion. Physical force may then be necessary either to restrain him or to start him on the way outside the class. The teacher may even need to call another adult on the intercom or send a trustworthy student to enlist someone. But this set of options is included under the heading "responding educationally" because the teacher's sole objective is to allow the student to regain his self-control so that he can resume his schoolwork. There is a vast difference between removing someone from the classroom so that he can regain his self-control—even using physical force to do so—and administering punishment.

One more important alternative to punishment is to encourage reflection. This includes both individual and group counseling so those involved can examine the consequences of their actions, identify alternative ways of interacting with others, and think about the possible consequences of such alternatives.

We see reflection not only as an alternative to punishment, but also as an essential concomitant to it. Although reflection can and usually should be encouraged without inflicting punishment, punishment should not be administered unless the educator makes at least rudimentary attempts—we mean something other than lecturing—to encourage reflection.

Vernon Jones in *Adolescents with Behavior Problems: Strategies for Teaching, Counseling and Parent Involvement*, has shown that the way secondary schools are organized and function frustrates most kids. Often disruptive behavior is a symptom of this frustration. Schools may be reluctant to adopt wholesale changes in their administration, but it may be useful for them to consider dealing with consistently disruptive students in new ways. These kids can be seen as behaviorally handicapped, and the schools' classroom structures may be too restrictive for them. They may be able to achieve and grow better in alternative classes that are structured for individualized learning and to meet the psychological needs of each student.

The Court's Impact

Sometimes nothing succeeds in stopping or curtailing a persistent pattern of disruptive behavior, and sometimes an offense is so noxious that is must be condemned rather than merely halted. Under these circumstances, we consider punishment a legitimate last resort technique. Moreover, if a punishment is major enough to deprive some of the student's property or liberty interests, then the procedural safeguards required by the courts are likely to be educationally beneficial.

It is not the court's job to say when punishment is necessary. But when judges and psychologists, working separately, specify procedures that educators considering punishment should follow, they find themselves in accord. Procedures that make sense constitutionally also make sense educationally. The child as student gains as much as the child as citizen.

Administrators and teachers don't need to worry that the court decisions are taking away their authority. Rather, the courts are clarifying what can and cannot be done and encouraging schools to be thoughtful rather than arbitrary and repressive. In the long run, these court decisions may induce teachers to see a discipline problem as an educational opportunity, and the due process clause as the key to making the most of it. ☐

Students and Due Process

If educators want to provide a misbehaving student with the fairest possible process, what should they do? It's useful to take a look at a typical situation and suggest responses that have educational value. For clarification, we've divided this description into five stages.

Stage One begins *before* the student commits the offense. Students are protected better if they've been warned that committing a particular offense could lead to a particular punishment. During Stage Two, which is when the offense is in progress, the same protection can be offered by warning the student that if he doesn't stop misbehaving he will be punished. However, the student's interests would be more fully protected if the teacher, coach, or playground supervisor first exhausted his or her repertoire of nonpunitive techniques (see the box on coping educationally).

Stage Three, in which the student's guilt or innocence is determined, is, from a legal perspective, probably the most important; certainly it is the most complicated. This stage can be divided into three phases. During the prehearing phase, full due process might include providing the accused student with written notice of the charges against him or her, the nature of the evidence, a list of the witnesses, and the nature of the hearing. The student would be given adequate time to analyze and evaluate the charges, prepare a defense, and gather evidence and witnesses.

During the hearing, full procedures would give the accused student the right to appear with parents or counsel, the right to present friendly witnesses, and to cross-examine hostile witnesses. In addition, the hearing would be held before officials who would examine all the evidence presented, and would determine the student's innocence or guilt solely on the basis of that evidence.

Finally, after the hearing the most extensive process would be to provide the student with the right to inspect the written findings and results of the hearing, the right to a transcript of the proceedings, and the right to appeal to a higher authority.

If a student was found guilty during Stage Three, his punishment would be determined during Stage Four. In practice, the procedures in Stages Three and Four are usually done at the same time, except in instances in which Stage Three is unnecessary because the student has either admitted his guilt or declined to contest the charges.

When contemplating a punishment, fairness calls for those involved in the hearing to determine the extent to which nonpunitive methods of securing the student's cooperation have already been tried. It also calls for providing the student with an opportunity to explain any mitigating circumstances, and his parents with the chance to express their position. If the guilty student is educationally handicapped, and the contemplated punishment would result in a change in his individualized educational plan, the school would have to follow the special procedures called for in the Education for all Handicapped Children Act for changing such plans.

Stage Five is the postpunishment phase. Since punishment is supposed to help students refocus on their schoolwork, educators should plan ways to assist student reentry. For example, in suspension cases, the school can convene a conference in which the student, his parents, and appropriate staff discuss what changes to make in his program and how to smooth his return.

Remember that the due process we've outlined provides the fairest possible procedures. Obviously, the school day is too crowded and educators are too harried to actually carry out more than some of these steps. Nor do the courts demand this full panoply in most cases.

Rather we suggest this list to provide possibilities that educators might wish to be aware of when contemplating a particular instance of misbehavior. Surely following some of these procedures—and providing an overall sense of fairness—will have educational benefits. —J.W.E. and D.M.S.

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Conspiracy

(*Continued from page 35*)

source of free thought as well."

For what is ultimately at stake is not a particular set of values but the source of all values—and their justification. Translated into privacy rights, distilled from the Bill of Rights, this means freedom of conscience and privacy of opinion. It is, in a word, a question of epistemology, the science of knowing, of trying to explain what justifies us in making claims to knowledge.

While for most kinds of knowledge there is a natural superior source, there is no agreement on what the sources of moral truths are. But all the various affective education programs think they have the source of values: it is the individual interacting with the group, and the ultimate justification is generally survival.

Assumptions about the source and transmission of values are built into the very process of affective education, as may be seen in the features common to affective education programs (see box). Feelings are solicited and displayed for group consideration, and "inquiry" is steered toward consideration of principles of conflict resolution and socioeconomic organization.

Proponents of affective education generally agree upon what should *not* be the source of values or should not serve as the vehicles for their transmission: the family, institutional religion, and the Judeo-Christian code embedded in the culture.

All the systems—Simon's seven-stage valuing process, Kohlberg's six-stage universal ethical orientation system, the dialectics of self-actualization in Rogers's seven-stage process of "becoming a person" and the encounter techniques of the other "self" theorists—call for breaking down or moving beyond "conventional morality" or institutionalized codes toward greater "clarity," "maturity," "authenticity," or "mastery." And advancement in student thinking may actually be plotted on elaborate grids such as Kohlberg's Moral Maturity Scales. Thus, as a parent observed in *Social Education* (1979), "people who belong to an organized religion would, because of their belief in an outside authority (God), be classified at Stage-Four, a stage from which Kohlberg appears to be trying to 'liberate' us."

The total effect of affective programs such as Kohlberg's, conclude William J. Bennett and Edwin J. Delattre (*Public Interest*, 1973), is to make "the individual and his life and moral relations . . . much bleaker than they actually are, or than they have traditionally been represented to be by the old to the young . . . they fail to recognize the significance of what is possible among people across generations."

David D. Stewart, chairman of the German Studies program at Trent University in Peterborough, Ontario, has given critical scrutiny to a national Moral Values Education (MVE) program proposed for Canada; for this analysis he drew on his professional interest in the forms of indoctrinative education that developed in Nazi Germany. What he found to be the main thrust of the materials used in Ontario schools—a blend of Simon and Beck's values clarification and Kohlberg's cognitive moral development—is similar to what ordinary citizens, organized parents' and educators' groups, shouting fundamentalists, professional theologians, and academic philosophers are finding in the United States. These materials encourage students to suspect parental values and authority, to be a law unto themselves in all questions of behavior, to prefer survival and comfort above all else, and to reject any absolute standard of right and wrong (*Marriage and Family Newsletter*, 1978).

A destructive tension is produced between the rules and values of the home and the pull of classroom ideology.

In the Simon-Kohlberg blend in the Canadian program, Stewart finds a destructive indoctrination at work. To force a child "to apply an abstract theoretical straitjacket to his moral sense when all the time he knows basically that certain things are simply *right* and others are wrong and unworthy, is a violation of the child's personality and sets up, at the very least, a destructive tension between the values of the home and the dogmatic position of the classroom."

In the scholarly literature, and in anecdotes, are reported many instances of a child being mocked for saying, "I know lying is wrong because Jesus says so," or the like. There are other instances when students have deliberately not publicly affirmed their adherence to a specific religious principle because they knew it would not be accepted as a good basis for behavior or resolving a dilemma, or because they feared it would subject them to ridicule.

The whole metaethic of "choice" that pervades affective education programs, from the framing of sentence completion exercises to group resolution of dilemmas, may contradict a student's religious commitments and, therefore, involve a First Amendment establishment of religion problem. As Joel Moskowitz explains (*Pepperdine Law Review*, 1978), the premise that a person should "choose freely" and "form alternative values" which happen to "best suit him and his environment . . . much as one might choose produce in a supermarket," is incorrect from a religious perspective. "As God has prescribed what constitutes good moral behavior, one's task is not to choose values from a range of alternatives, but to discover the true values, and the validity of a person's moral obligations depends not at all on whether it 'suits him,' still less on whether it suits his environment."

It's "a battle for the mind," thunders Baptist minister Tim La Haye, whose book by that title has launched the fundamentalist counterrevolution in education. And in this judgment everyone is agreed, if not with his precise interpretation.

Two different ways of looking at dilemmas, the secular humanist and the traditional religious, are compared in Germain Grisez and Joseph M. Boyle's *Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate*. For the secular humanist, it makes sense to have children discuss such dilemmas as abortion and euthanasia in a context of social interaction, for the humanist believes that all values emerge out of real human social experiences. This prepares the young to internalize the consequentialist ethic, which is the moral doctrine of secular humanism. For the religious person, this type of values clarification amounts to indoctrination in relativism, which contradicts the objectivity of moral norms and the authority of their source (e.g., God).

For the humanists the very conscience of the person is to be born in the social domain, and our survival as a species depends on this. They pin their hopes on new generations. The humanists believe that mankind is in desperate shape. Radically springing the young loose from all inherited belief systems and familial prejudices, opening up their minds and reordering their primary bonding processes, may lead them to invent the future culture that will save us all and advance the psychosocial evolution of the human species.

Honor Thy Peer Group

In confronting the problems that touch on our very survival, the method chosen for considering values in itself presupposes a given world view, a specific paradigm of society and definition of human personality, and some agreement on the sources of value and moral truths.

We can see this method operating in the widespread "who shall survive" exercises. Their forced-choice framework appears to many people to be designed to steer thinking in a certain direction, and by their appearance in the curriculum, seem to suggest the acceptability of what is still unthinkable, to some people at least: infanticide, mercy killing, calculated elimination of a type or class of person to assure group survival, and eugenics. A close look at a popular exercise in "lifeboat ethics" (reproduced below)—Simon, Howe, and Kirschenbaum's Strategy No. 48, the Fallout Shelter Problem—will show how the context for approaching a "survival" problem guides the resolution.

For this game it is suggested that the class be divided into groups of six or seven.

Your group are members of a department in Washington, D.C., that is in charge of experimental stations in the far outposts of civilization. Suddenly the Third World War breaks out and bombs begin dropping. Places all across the globe are being destroyed. People are heading for whatever fallout shelters are available. You receive a desperate call from one of your experimental stations, asking for help.

It seems there are ten people but there is only enough space, air, food, and water in their fallout shelter for six people for a period of three months, which is how long they estimate they can safely stay down there. They realize that if they have to decide among themselves which six should go into the shelter, they are likely to become irrational and begin fighting. So they have decided to call your department, their superiors, and leave the decision to you. They will abide by your decision.

So, as a group you now have a half-hour to decide which four of the ten will have to be eliminated from the shelter. Before you begin, I want to impress upon you two important considerations. It is entirely possible that the six people you choose to stay in the shelter might be the only six people left to start the human race over again. This choice is, therefore, very important. Do not allow yourself to be swayed by pressure from the others in your group. Try to make the best choices possible. On the other hand, if you do not make a choice in a half-hour, then you are, in fact, choosing to let the ten people fight it out among themselves, with the possibility that more than four might perish. You have exactly one half-hour. Here is all you know about the ten people:

1. Bookkeeper: 31 years old
2. His wife: six months pregnant
3. Black militant: second year medical student
4. Famous historian-author: 42 years old
5. Hollywood starlet: singer dancer
6. Biochemist
7. Rabbi: 54 years old
8. Olympic athlete: all sports
9. College co-ed
10. Policeman with gun (they cannot be separated)

> ***The affective domain is where those trying to replace traditional religion and the family are now hard at work.***

To the Teacher. If one of the candidates that we have provided, or that you may create yourself, gets consistently eliminated, simply give that candidate(s) more skills, or make him more attractive in some way: for example, lower his age.

The very framework of this exercise forces one to think in utilitarian, consequentialist terms—the greatest good for the greatest number of people. Utilitarianism is, of course, one commonly used ethical system, but there are also other ethical systems, for which the ingredients are missing in this exercise. To take an example of how different ethical systems lead to different results, the bombing of Hiroshima could be justified on strictly utilitarian grounds but not on a rights-based ethic of war. Or to take an example which has been argued in court, there is the English case *Regina v. Dudley & Stephens*, in which two seamen cannibalized a cabin boy in order to survive. Classic law shool discussion of this case always raises the principle of "fair lottery." Choosing lots is one solution left out by implication in the framework for the fallout shelter exercise (though it is one that anyone knowledgeable about ethics might think of). As Paul Ramsey points out in *Ethics at the Edges of Life* (1978), traditional Christian ethics would call for drawing lots, instead of using life-worthiness criteria, in any situation involving shortages.

Commenting on this exercise, which also appears in the Canadian MVE program, Stewart points out that it, and some of the suggested variations, cater to the lowest instincts for prejudice (racial, religious, or age), but "even more fundamentally immoral is the unstated assumption that is forced upon the student and thus becomes part of his unconscious indoctrination: Life is a matter of survival. In the story the strong have the right to eliminate the weak. The possibility of voluntary self-sacrifice by the strong for the weak does not even enter the discussion; it is apparently not even welcome here."

In dilemmas on the "life issues," the medium itself is the message. In *The Pennsylvania Model Guidance Program* (1980), Joan Janaro of the Pennsylvania Coalition for Basic Education explains how highly artificial dilemmas such as "The Fallout Shelter," with its built-in biases, make the student uncomfortable and lead him to rely upon the group for a decision. Peer pressure rather than principles (such as justice and mercy) determine the decision. Indeed, in such survival games the peer pressure may be structured. Kohlberg's schema for advancing to higher levels of reasoning, supposedly moving toward universal ethical principles, works because "students at a higher stage present arguments that attract lower-stage students"—but this begs the question of whether "higher" reasoning ultimately produces a "better" outcome. A program called TRIBES (Teaming for Responsibility, Identity, and Belongingness in Education Systems) mandated in the state of Kansas plan for health education, and including a forced-choice lifeboat exercise in its repertoire, is being explicitly presented as taking advantage of children's dependence upon approval from friends and structured around this peer influence. Many other peer programs work this way.

As Moskowitz has pointed out in his analysis of the legal implications of values clarification, some critics of this type of education believe that not only will students tailor their responses to please other students, but once they have taken such positions publicly, they will cling to these assumed values. "Thus inducing

"Don't get mad Kemosave, but how would it be if we took separate vacations this year?"

children to alter their beliefs in intimate areas of their lives," he claims, "is a far more serious invasion of personal privacy than inducing them to reveal those areas to public scrutiny." It was in protest against this kind of forced assimilation into a society hostile to their religious way of life that the Amish brought the case *Wisconsin v. Yoder* (1972) and won exemptions for their teenagers from compulsory school education.

Waiting for Man

The affective domain is the arena for struggle among all the secular religions, ideologies, and utopias competing to replace traditional religion and the family, and to shape and transmit values.

"We affirm that moral values derive their sources from human experience," announced the 1973 *Humanist Manifesto II*. Calling for moral values education, these humanists believe that "ethics is autonomous and situational, needing no theological or ideological sanction. Ethics stem from human need and interest." Applied to the moral education of the child, these assumptions have several implications in the classroom. Students may be forced to choose among limited options or open-ended options, or they may be forced to resolve complex dilemmas involving a conflict of values.

In a symposium on ethics (*Public Interest*, 1981), Andrew Oldenquist questions the wisdom of this approach for students. Kohlberg's premise that only difficult dilemmas can develop moral awareness may be wrong and harmful for children and youth, whose value systems may not be fully formed. "Teenagers and adults can benefit from reasoning about dilemmas and hard cases only if they have already accepted and internalized a basic core of principles," Oldenquist believes. "If students are taught dilemmas before or in place of principles, they will think that morality is nothing but dilemmas; and if they discuss exceptions to principles without first having internalized the principles themselves, the exceptions, meeting no resistance, will come all too easily."

Teachers of law-related education may find a way to respond both to the call of the humanists for rational moral education and to the objections raised here, by taking their students through the reasoning process courts have actually used in resolving real conflicts, and thereby helping students grasp the basic principles of law in a democratic society.

Attacking the Inner Man

"One cannot understand the least thing about modern civilization if one does not first realize that it is a universal conspiracy to destroy the inner life," wrote Georges Bernanos in *Tradition of Freedom* in the 1930s. In an essay on ideology and terror as a form of government, Hannah Arendt observed that "the aim of totalitarian education has never been to instill convictions, but to destroy the capacity to form any."

"Why this attack on the inner man?" asked Thomas Molnar in *The Future of Education* in 1960. Because according to the prevailing educational philosophy, said Molnar, "the ultimate meaning of existence is the interrelatedness of all human beings in the form of the *perfect society*. The self-sufficient individual not only robs the community of his share but upsets the community's sense of security and perfection. . . . The only way an indoctrinator can handle him is to purge him of his inner life and substitute for it a new, pseudo inner life. This is the aim that modern psychology achieves." Perhaps, as Maurice North put it, "the psychotherapeutic ideology is to the advanced industrialized society what discipline is to an army," although he approves of this contribution to "human well-being" for its inestimable service in giving "the individual the feeling that somebody cares—even if it is not true."

So what is to be done? The battle over the affective domain reflects a much broader crisis in our society, no mere skirmish over pedagogy or joust over political platform. The group dynamics techniques introduced into affective education, albeit by those of a solidly democratic persuasion, could easily be harnessed to the agenda of a controlling group of a quite different persuasion tomorrow.

The long-term effects will take a while to assess. Yet there is no doubt that used well by teachers who really do love their charges, many of the new inquiry, process, and simulation techniques are highly effective in teaching democratic principles and values. Those who are striving to produce a democratic classroom, model a just society, and remove prejudice may be experiencing what J.S. Talmon found to be the very paradox of freedom in his study of totalitarian democracy: "Is human freedom compatible with an exclusive pattern of social existence, even if this pattern aims at the maximum of social justice and security?"

Those struggling to balance the tension between democracy and privacy, and possibly troubled by the authoritarian temperament or the religious commitments of some of the critics of affective education, might be helped by Hannah Arendt's 1960 essay "The Crisis in Education." In it she takes a constructively critical look at our ruling educational philosophy in the light of the general crisis of authority, tracing the harmful effects of a politicization of the "prepolitical" world of childbearing and education back to assumptions in progressive learning theory. In substituting doing for learning, and in making the autonomous world of the child an absolute, modern education is destroying children by exposing them to the "public" world of a peer group, she warned, "for the authority of a group, even a child group, is always considerably stronger and more tyrannical than the severest authority of an individual person can ever be." She warned that "the more completely modern society discards the distinction between what is private and what is public, between what can thrive only in concealment and what needs to be shown to all in the full light of the public world, the harder it makes things for its children, who . . . require the security of concealment . . . to mature undisturbed."

"Our hope always hangs on the new which every generation brings," Arendt concluded, "but precisely because we can base our hope only on this, we destroy everything if we try to control the new so that we, the old, can dictate how it will look."

In the 1980s, many parents and educators are raising these same concerns, and some of them are trying to make the same kind of case for "traditional" academic education. Joan Janaro, of the Pennsylvania Coalition for Basic Education, addresses this plea to fellow educators: "Please refuse to accept the additional responsibility of using techniques and theories which seek to remake the children you teach by manipulating their feelings and attitudes and values toward the faceless goals of social expediency. Today, academic freedom may well mean the freedom to teach academically—the freedom to assist the child to open his mind and heart to knowledge and truth." □

BRUSH UP YOUR SOCRATES—AND YOUR DESCARTES, YOUR DEWEY, YOUR KOHLBERG

Do you say "I think, therefore I am"? Or do you believe "I interact, therefore I am"? To locate yourself among the many philosophies of education and to sensitize yourself to alternative modes of inquiry and ethical analysis, you may want to sample some of the following readings in politics, process, and epistemology.

These materials may enhance your judgment in evaluating and choosing law-related materials and methods appropriate for your students. And some of them may be particularly useful in preparing you to approach the current "survival" questions that your students may raise, whether or not they are suggested in your curriculum. Read these oldies along with the new scholarship for a fresh critical look at the process in your process teaching.

Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (Cleveland, Ohio: Meridian Books, 1963).

Stephen Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 *Harvard Educational Review* 76 (Feb. 1976).

William J. Bennett and Edwin J. Delattre, "Moral Education in the Schools," *Public Interest* 81 (Winter 1978, No. 50).

Daniel Callahan, *The Tyranny of Survival and Other Pathologies of Civilized Life* (New York: Macmillan Publishing Co., 1973).

Martin Eger, "The Conflict in Moral Education: An Informal Case Study," *Public Interest* 62 (Spring 1981, No. 63).

Jacques Ellul, *Propaganda: The Formation of Men's Attitudes* (Knopf, 1965).

Ethical Issues in Social Science Research, eds. Tom L. Beauchamp, Ruth R. Faden, R. Jay Wallace, Jr., LeRoy Walters (Baltimore: Johns Hopkins University Press, 1982). (Includes essays on privacy by Kelman, Warwick, Pinkard, Wallace, Boruch, & Caplan).

Germain Grisez and Joseph M. Boyle, Jr., *Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate* (Notre Dame, Ind.: University of Notre Dame Press, 1979).

Herbert C. Kelman, "The Social Consequences of Social Research: A New Social Issue" and "Manipulation of Human Behavior: An Ethical Dilemma for the Social Scientist," 21 *Journal of Social Issues* (April 1965) (special issue).

Law and Contemporary Problems: special issue on religion, Spring 1981; special issue on privacy in 1966.

Max Lerner, *Values in Education: Notes Toward a Values Philosophy* (Bloomington, Ind.: Phi Delta Kappa Educational Foundation, 1976).

Allan L. Lockwood, "The Effects of Values Clarification and Moral Development Curricula on School-Age Subjects: A Critical Review of Recent Research," 48 *Review of Educational Research* 325 (1978).

Richard McCormick and Paul Ramsey, eds., *Doing Evil to Achieve Good: Moral Choice in Conflict Situations* (Chicago: Loyola University Press, 1978).

Onalee McGraw, *Family Choice in Education: The New Imperative* (Washington, D.C.: The Heritage Foundation, 1978).

Joel S. Moskowitz, "The Making of the Moral Child: Legal Implications of Values Education," 6 *Pepperdine Law Review* 105 (1978).

David D. Stewart, "Moral Values Education in Ontario: The Crisis of Consent," 9 *Marriage and Family Newsletter* (Nos. 7-9, 1978).

Thomas S. Szasz, *The Theology of Medicine: The Political-Philosophical Foundations of Medical Ethics* (Louisiana State University Press, 1977).

Fred Weinstein and Gerald M. Platt, *The Wish to Be Free: Society, Psyche, and Value Change* (Berkeley and Los Angeles: University of California Press, 1969).

Alan Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970s," 2 parts, 66 *Columbia Law Review* 1003, 1205 (1966).

Paul C. Vitz, *Psychology as Religion: The Cult of Self-Worship* (Grand Rapids Mich.: Eerdmans, 1977).

Frederick D. Wilhelmsen and Willmoore Kendall, "Cicero and the Politics of the Public Orthodoxy," 5 *Intercollegiate Review* (Winter 1968-69).

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Court Briefs

(*Continued from page 50*)

But the High Court ruled schools don't have to provide unlimited extra services. After saying that, however, it left unclear precisely what schools must do to qualify for federal funds under the Education for All Handicapped Children Act.

In an opinion written by Justice Rehnquist, the Supreme Court noted that Amy is getting along fine without an interpreter. The opinion acknowledges that she probably would have done better with the interpreter's help, but adds that Congress had never said schools had to give handicapped children enough special help to maximize their potential or make their learning opportunities equal to those provided normal youngsters. Instead, says the Court, Congress meant only to give the handicapped access to public education and enough special services to help them get "some educational benefit" from schooling.

So how much extra service are schools required to furnish? The Court says only that the help must be individualized, free, appropriate, and "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

But, as Justice Byron H. White pointed out in a dissenting opinion, the Court's answer leaves many questions unsettled. It doesn't clarify, for example, what "appropriate" education means. It suggests that had Amy been less talented and not able to keep up with her class, her school might have been required to provide her with an interpreter. And while it does imply that there are limits to what schools are required to do for handicapped youngsters, it is so vague that it inevitably invites more school-parent disputes and more court testing.

The Fall of the Alamo

In a controversial decision, the Supreme Court tackled a Texas law which denied children who were illegal aliens a free public education. Children who were citizens or legal aliens were entitled to a free education. Their amigos not fortunate enough or literate enough in English to be "documented" or "legally admitted" were not allowed to attend public school for free.

Texas reasoned it should not have to pay for the education of the "illegals." Opponents of the law said that it violated the Constitution's equal protection guarantee.

In the case of *Plyler v. Doe* (50 L.Wk. 4650) the Supreme Court, in a 5-4 decision, opened the schoolhouse doors. Justice Brennan's majority opinion held that the Texas legislature's intent to "avoid a drain" on the state's fiscal resources by shutting school doors to illegal alien children did not comply with the equal protection of the law guaranteed by the Fourteenth Amendment. The amendment reads in part "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Court looked carefully at the words "person within its jurisdiction." Justice Brennan wrote that the state could not define the phrase to meet its own needs. Its meaning rests on broader, national concerns for the concept of fair treatment of all persons in a state, whether they are illegally there or not. "Person[s] within its jurisdiction" includes people who have moved into a state with hopes of remaining forever, even though they don't have the papers which distinguish them from "legal" aliens. The law imposed on the children of these people "a lifetime hardship [marked by] the stigma of illiteracy." To prevent children from being educated was to invite a "permanent caste of undocumented illegal aliens." Texas can not afford nor can any other state, to create an "underclass" permanently dependent upon a less than friendly system of social services for support. The state's short term fiscal gain, if any, would be outstripped by the future burden of deprived and illiterate adults who are likely to remain uneducated.

Chief Justice Burger led the dissent, stressing that the Court should not be making policy or providing leadership in areas that are more properly decided by legislative action.

Lady Doctors, Male Nurses

Denying men admission to state-supported nursing schools violates the Constitution and perpetuates sexual stereotypes, the U.S. Supreme Court ruled in *Mississippi University for Women v. Hogan* (50 L.Wk. 5068). In a 5-4 opinion written by Justice Sandra Day O'Connor, the High Court held that Mississippi University for Women (MUW) had failed to justify its single-sex policy in compliance with the Fourteenth Amendment's Equal Protection Clause.

The admissions policy was challenged by Joe Hogan, a male licensed practical nurse (LPN) who sought to obtain his nursing bachelor's degree (RN) at MUW, the only state school closed to men since 1884. Despite having qualifications otherwise sufficient for admission, Hogan was prevented from attending the school because of gender. Justice O'Connor cited statistics showing that women earned 95 percent of the state's nursing degrees and 98 percent nationwide, and said the state did not provide the "exceedingly persuasive justification" needed to sustain such a gender-based classification.

Justice O'Connor's opinion also noted that the state could justify its otherwise discriminatory classification only if members of the gender benefitting from it (women in this case) actually suffer a disadvantage related to classification. But MUW's policy perpetuates a stereotyped view of nursing. "By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men," O'Connor wrote, "MUW's admissions policy lends

Teaching Strategy: Equality in School

1. Ask the students: "What is equal educational opportunity?"
   - A. Equal dollars for each student?
   - B. Equal facilities?
   - C. Equal curriculum?
   - D. Equal textbooks?
   - E. Same extracurricular activities?
2. Separate but equal. Ask: Is separate but equal ever proper?
   - A. bathroom facilities for men and women
   - B. locker rooms for boys and girls
   - C. football for boys and field hockey for girls
3. In the racial arena, the Supreme Court seems to have indicated that separate but equal cannot be equal. But in the sexual rights arena, the courts are still struggling. Even the National Organization of Women (NOW) suggests that some separate sex teams be permitted, so that women have an opportunity to develop their skills through experience and coaching before they begin to compete with men.
   - A. Ask the students what ways they would suggest to achieve equal opportunity in athletics for girls.
   - B. Have the students do a community survey of all the sports opportunities from elementary school to high school available for girls and boys. Compare these opportunities.

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credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophency." She was joined in her opinion by Justices Marshall, Stevens, Brennan, and White.

Justice Lewis Powell complained in a dissenting opinion that the majority "bows deeply to conformity.... The Court decides today that the Equal Protection Clause makes it unlawful for the state to provide women with a traditionally popular and respected choice of educational environment," he said. Noting that nursing programs in other parts of the state offer programs for men, Powell remarked that the case was " instituted by one man . . . whose primary concern is personal convenience."

In this case, as well as in others we discuss in this issue of Court Briefs, a standard of proof becomes one of the crucial factors in deciding the case. (See our discussion of *Santosky v. Kramer* for an additional example.)

This concept may be interesting to students and important for them to understand. Our box on "Who Stole the Cookies" outlines some strategies for teaching standards of proof. This particular case touches on other aspects of proof tests.

"Exceedingly persuasive justification" mentioned by Justice O'Connor in her decision on *MUW v. Hogan,* refers to one of the kinds of tests that classifications undergo to determine their legality. Those that are gender-based are tested by their "rational relation" or their "substantial relation" (exceedingly persuasive justification) to a legislative goal. In general, to be rationally related the classification must have a reasonable connection to the law's purpose. On the other hand, to be substantially related there has to be a close, intimate connection between the classification and what the law seeks to accomplish.

(There is an even more stringent test, however—the "compelling interest" standard. In this test certain group classifications are considered "inherently suspect" because they're based on characteristics determined "solely by the accident of birth;" or they discriminate against groups of people who have been victims of a "history of purposeful unequal treatment;" or who have been "relegated to a position of political powerlessness." In these cases, the Court requires more than even a "substantial relationship" between the law and its purpose; instead, the state must show that it had a "compelling interest" in drafting the law the way it did. Sex, however, has not been considered a "suspect" classification by the Court. And it is for this reason that an Equal Rights Amendment is considered essential by its proponents. The courts do not judge sexual discrimination by the same standards as some other types of discrimination, and the ERA would put an end to this dichotomy.)

The Little Yellow Bus, Yes and No

Those waiting for the Supreme Court to hand down a sweeping indictment or vindication of busing to achieve school desegregation are still waiting. In the two school busing cases argued this term, the Court drew a delicate line between two voter initiatives, calling one a legitimate political action and the other an unconstitutional denial of equal rights. *Crawford v. Los Angeles Board of Education* (50 L.Wk. 5016) and *Washington v. Seattle School District* (50 L.Wk. 4998) each involved a state constitutional amendment to prevent desegregation of schools by busing children.

In the California case, Proposition I prevented state courts from ordering busing unless the U.S. Constitution would require the action under the Fourteenth Amendment. In other words, busing would only be permitted after de jure (by law) discrimination is shown. This made it harder for minorities to use courts to achieve integration. Nevertheless, the Court upheld the amendment. The Court reasoned that if a state may do more than the minimum in meeting federal constitutional standards to protect citizens, the state may choose without penalty to do only the minimum.

"Proposition I does not inhibit enforcement of any law or constitutional requirement," Justice Powell said for the eight-judge majority. "Quite the contrary, by its plain language the proposition seeks only to embrace the requirements of the federal constitution with respect to mandatory school assignments and transportation."

The High Court agreed with the state court of appeal that the proposition, unlike the Washington initiative, was not motivated by a discriminatory purpose. "In this case the proposition was approved by an overwhelming majority of the electorate," Powell said. "It received support from members of all races," he added, citing statistics showing that 73 percent of Los Angeles's voters approved.

The only dissenting voice was Justice Marshall's. He wrote, referring to both busing cases, ". . . I fail to see how a fundamental redefinition of the governmental decision-making structure with respect to the same racial issue can be unconstitutional when the state seeks to remove the authority from local school boards [as in the Washington case], yet constitutional when the state attempts to achieve the same result by limiting the power of its courts."

On the other hand, the Washington amendment was held to violate the Fourteenth Amendment's Equal Protection Clause. The Court's 5-4 opinion, written by Justice Harry Blackmun, was based on the demonstrated racial intent of the amendment. The dispute began when Seattle started to bus students voluntarily for racial integration. Seattle school officials supported the busing, which proceeded peacefully, but the amendment, while passed a few months after busing began, took away their authority to bus for integration. The amendment allowed all customary busing services, but denied local boards the power to bus for racial desegregation. The local school boards retained control of all student assignments and attendance plans as well as of nonracial matters like hiring and curriculum. The only authority taken away was the power to make placements to achieve racial integration.

The control of racial desegregation was thus placed in the remote state legislature, or majority electorate, far from any significant local influence. The Supreme Court held that by limiting minority efforts to ensure integration, the state redrew "decision-making authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities." This unfair treatment of racial minorities violated the Equal Protection Clause.

Justice Powell offered the dissenting opinion. "The state of Washington, the governmental body ultimately responsible for the provision of public education, has determined certain mandatory busing programs are detrimental to the eduation of its children. . . . In my view, [the Fourteenth] Amendment leaves the States equally free to decide matters of concern to the State at the State, rather than local, level of government."

Title IX—What's Good for the Goose is Good for the Gander

In *North Haven Board of Education v. Bell* (50 L.Wk. 4501), the Court, in a 6-3 vote, upheld Department of Education (ED) regulations which applied Title IX to employees as well as students. Title IX of the Education Amendments of 1972 prohibits discrimination based on gender in federally assisted educational institutions.

The school boards of North Haven and Trumbull, Connecticut, sued to have the regulations declared invalid, arguing that Title IX applies only to students and *not* to employees. The Supreme Court disagreed and found the "person" referred to in Section 901(a) of Title IX to be broadly intended by Congress to include employees as well as students.

The Court agreed that the ED regulations were consistent with Title IX's authority. However, the question of whether ED could cut off federal funds was left to the trial court. Only after a trial on the merits of the case would a trial court be able to say whether sex discrimination in employment had in fact occurred and only after this finding of discrimination could the funds be terminated.

Civil Rights—What's State Action?

In *Rendell-Baker v. Kohn* (50 L.Wk. 4825), the Supreme Court had to decide if a private school was so intertwined with the state that its action constituted state action. A vocational counselor got fired from a Massachusetts school specializing in kids who had behavior problems in high school. The case began when Ms. Rendell-Baker charged that the firing had violated her First Amendment right of free speech, since she was fired for supporting a controversial student petition. She also alleged that Fourteenth Amendment due process guarantees had been violated since she received no hearing.

But in order to sue in federal court, Ms. Rendell-Baker had to use the "Civil Rights Statute" (42 U.S.C § 1983). In part, the statute reads, "Every person who, under *color of any statute* . . . of any state [deprives any person] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ."

The Court looked at the "under color of any statute" language to see if Rendell-Baker had a valid claim. To show that a person was deprived of a right "under color" of a state law, the wrongdoing must be "fairly attributable to the state."

Ms. Rendell-Baker thought she had a good case. The private school she worked for received nearly all of its funds from state revenue. Her qualifications for the job of vocational counselor were subject to approval by the State Committee on Criminal Justice. The state imposed many regulations on the school's daily functions. The students were referred to the school from city and state agencies.

Was that enough? No, said the Court. Despite all these ties to the State of Massachusetts, the Supreme Court found the school to be a "private actor." Justice Blackmun, delivering the Court's opinion, noted that the state did not regulate the firing of personnel. Thus, even though the school fired Rendell-Baker, there was no "state action," no "color of any statute."

Justice Marshall's strong dissent found more than sufficient connections to the state to enable Ms. Rendell-Baker to pursue her lawsuit. Since the school was performing a statutory requirement for the state—providing free public education of students with special needs—it was a "state actor" in Justice Marshall's opinion.

Family Law

Mom, Set Nine More Places Tonight

Nothing is as full of emotion as cases involving parents and children. In one recent Supreme Court case (*Lehman v. Lycoming County Children's Services Agency*, 50 L.Wk. 5010), a mother whose three sons had been taken away from her by a state court tried to use a federal court to regain custody of her children from a Pennsylvania foster home. Ms. Lehman relied on the federal habeas corpus statute to bring her suit. The habeas corpus law allows federal courts to release "a person in custody" when significant personal liberty interests are curtailed.

Teaching Strategy: Who Stole the Cookies?

The object of this exercise is to gain an understanding of the different standards used to prove a fact in a court of law. The cookies are missing. With this fact in mind ask the students to characterize the following under one of three categories:

1. **Suspicion**
2. **Mere preponderance of evidence**
3. **Clear and convincing evidence**
4. **Beyond a reasonable doubt.**

A. **Your 4-year-old brother, Billy, is seen in the kitchen. What category? (Suspicion)**

B. **Billy is sitting at the table with a glass of milk and a happy face. (Suspicion.)**

C. **Billy with a glass partially full of milk, cookie crumbs on the table near his glass. (Mere preponderance of evidence)**

D. **Billy with a glass partially full of milk, crumbs on his shirt and lap. (Clear and convincing evidence)**

E. **Same, but can see cookie in his mouth. (Beyond a reasonable doubt)**

The question for the Supreme Court was whether custody in foster homes is covered under the statute. The Court determined that the "custody" referred to in the statute most often pertains to prisoners convicted of criminal offenses. The Court was firmly set against widening the scope of federal court jurisdiction by including termination disputes within the scope of habeas corpus law.

The Court explained, in an opinion authored by Justice Powell, that family law has traditionally been an area of state responsibility and experimentation. The general state interest in having final judgments not subject to federal court review and reversal, outweighs the interest of a particular parent raising a specific child.

The Court showed so much reluctance to allow federal court "intrusion" in this traditionally state-controlled area that this decision may really not involve family law as much as the relationship between federal and state power.

Legal scholars point out that this decision is part of a pattern with many others this term. Yale law professor Paul Gerwitz suggests that the Court's current trend is "limitation of access to federal courts."

Equality for Illegitimate Kids

In *Mills v. Habluetzel* (50 L.Wk. 4372) the Court struck down a Texas law which barred illegitimate children from establishing paternity after their first year of life. Justice Rehnquist writing for the Court said that the one-year limit for paternity suits was too short to satisfy the Fourteenth Amendment's Equal Protection Clause (not to mention the difficulty a one-month-old would have knowing how to sue).

The constitutional basis for deciding equality issues is found in the Equal Protection Clause of the Fourteenth Amendment, which requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." While the original purpose of this clause was to eliminate state discrimination

Sandra Day O'Connor's Rookie Season: Budding Star or Utility Player?

Justice Harry Blackmun had the label "Minnesota Twin" stuck on him for several years because he voted so often with conservative Chief Justice Burger, a fellow Minnesotan. Is Justice Sandra Day O'Connor an Arizona Twin with fellow Arizonian, law school classmate, and archconservative Justice William Rehnquist?

Wall Street Journal legal writer Stephen Wermiel says, "Degrees of conservatism are not often dramatically noticeable at the Supreme Court, particularly in only nine months on the bench. But at least statistically, Mrs. O'Connor is more squarely in the conservative camp with Mr. Rehnquist and Mr. Burger than was her predecessor, Justice Potter Stewart."

Says Professor Charles Ares of the University of Arizona Law School, "She's been . . . a bit more conservative than I thought she'd be."

Of the thirty-three 5-4 decisions this term, Justice O'Connor generally was in the majority. Her decisive votes included: vacating a death penalty for a 16-year-old killer; supporting a procedural obstacle to citizens trying to challenge government aid to parochial schools; upholding a California law barring aliens from working as parole officers; approving job seniority systems that have a disproportional impact on minority workers; and adopting a narrow view of the double jeopardy clause.

However, two decisions show her to have a decidedly liberal bent when it suits her. The Title IX case (*Northhaven Board of Education v. Bell*) and the Mississippi University for Women case (*M.U.W. v. Hogan*) indicate that she will move to the left in the area of sex discrimination.

Glen Elsasser, legal writer for the *Chicago Tribune*, noted that "she regularly sided with Justices sympathetic to states' rights. But the new Justice also displayed an independent streak and didn't hesitate to take her more liberal colleagues to task for their views in her court opinions."

The performance of the Court's newcomer has been watched carefully. Overall impressions are that she is "a quick learner," "capable," "conservative" and "gutsy." Anti-abortion groups that vocally opposed her nomination will be watching closely early next year as the High Court takes up the issue of whether several state laws interfere with a woman's right to an abortion. Since she has shown herself this term in favor of both state's rights and women's rights, it may be Justice O'Connor's thorniest test so far.

against blacks, the wording of the amendment does not restrict its application to any one group.

In deciding this case, the Court first examined children's need to sue for support from their natural fathers. It then looked into the procedure in Texas. A legitimate, though unsupported, child has the right to petition for financial support until the child reaches eighteen years of age. An illegitimate child (obviously through a guardian or its mother) had to identify the natural father within one year of birth or be barred from a later suit.

Illegitimate children therefore, had only one year in which to lay the foundation for later support, while legitimate children had another seventeen years in which to establish their rights. The Court held that the state's attempt to limit suits in this area violated the Equal Protection Clause, shortchanging an illegitimate child's need for parental support and recognition.

When Parents Can't Have Their Kids

In *Santosky v. Kramer* (50 L.Wk. 4333) the Court struck down a New York law which set the standard of proof as "a fair preponderance of the evidence" in cases where parents may lose custody of their children. Standards of proof range from very strict to a bit looser, with "beyond a reasonable doubt" as the strictest, next "clear and convincing proof," and then " a fair preponderance of evidence." In *Stantosky*, the "fair preponderance" standard was found to violate the Due Process Clause of the Fourteenth Amendment because it was the state which initiated the termination hearings to determine if a child had been "permanently neglected." Since state action was involved, a stricter standard of proof was necessary.

Justice Blackmun, writing for the Court, found that since parents' interest in their children is highly important, and since the loss of the child was permanent under the statute, a high standard of proof was required by the Constitution. Parents of "permanently neglected" children were said to be of low income and education, often minorities and thus were least effective in mustering an adequate defense to the state's charges. The state, on the other hand, has full access to public funds, experts, research and records to aid in its efforts to split up a family forever.

Termination proceedings in New York could have been as strict as those in a criminal trial, where the state must prove its case "beyond a reasonable doubt." Indeed, the Indian Child Welfare Act, the only federal law dealing with termination of parental rights cited by the Court, requires "evidence beyond a reasonable doubt" prior to allowing termination.

But rather than imposing its strictest proof standard on the states the Court chose a middle ground and cited the "clear and convincing proof" test used in thirty-one states. Since the states must now bear a higher burden of proof in their own attempt to sever familial bonds, the "clear and convincing proof" test should encourage judges to look for a quality of evidence that protects the fundamental right of parents to retain custody of their children.

Judge Rehnquist thought the Court had gone too far, though, saying that ". . . I believe that the court today errs in concluding that the New York standard of proof in parental-rights termination proceedings violates due process of law. . . . The Court finds a constitutional violation only by a tunnel-vision application of due process principles that altogether loses sight of the unmistakable fairness of the New York procedure." ☐

Juveniles

(*Continued from page 17*)

theory which justified the state in removing a child from his family and placing him in a secure (locked) institution. It justified training schools, jails, detention centers, and institutions for the mentally ill or retarded. Although probably hundreds of minor reforms were attempted during the reign of *parens patriae*, these efforts were associated with exposes of brutality, exploitation, corruption, and mismanagement in individual institutions. These conditions were seen as local, temporary aberrations to be corrected by firing some workers and hiring others. The public continued to think state institutions had the capacity to provide benevolent care for wards of the state, as long as they were properly administered and operated.

Changing Times

Except for establishing juvenile courts in most states by the end of the 1920s, a reform which separated the legal processing of troublesome youngsters from the adult criminal courts, there were no more major reforms until Justice Abe Fortas signaled the dissatisfaction of the Supreme Court with the whole juvenile justice system:

> there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children (*Kent v. United States*, 383 U.S. 541, 1966).

Gault, Kent and other decisions meant the end of the old system, or at least the end of its undisputed reign over youngsters. But it's worth remembering that the system began as a idealistic reform.

It's also worth remembering that the system never did work exactly as intended. Given the mandate of the *parens patriae* concept and the desire of the child savers to improve the early environment of *all* youth not blessed by middle-class upbringing, the sheer number of youngsters who came under the jurisdiction of the juvenile court was more than it could handle. The practical solution was to develop a community-based program of probation as an alternative to institutionalization. LaMar Empey points out that by 1925, all states, except Wyoming, had legalized it. The practice today has become so widespread that far more delinquents are placed on probation than are confined to institutions.

In short, alternatives to institutionalization are hardly new. As with most reforms in juvenile corrections, an old idea has come back under a new label.

During the 1950s and early 1960s, social science theories—strain or opportunity theory, labeling theory, bonding or social control theory—gave explanations for delinquency and provided promising ideas for controlling youthful misbehavior. They focused on giving kids opportunities for normal development. What were the barriers to normal development? Ironically, they were frequently found in the very agencies originally designed to facilitate kids' growth into productive, contributing adulthood. Social institutions such as the juvenile justice system, the social welfare system, and educational system had failed, not through incompetence or ill will, but because change occurs so rapidly in a high technology society that almost no one can keep attuned with the times. This is particularly the case with massive bureaucratic structures which generate inertia.

In general, the causes of delinquent behavior were said to be in the institutions that impinged on youth, rather than in the youth themselves. This assumption took into account the small percentage of youth who were indeed mentally retarded or mentally ill. But, even for this group, isolation in custodial settings was not seen as appropriate. Treatment in the community, in the most normal environment possible, was preferred for all save those few whose history of offenses clearly marked them as dangerous to society.

All of this was bad news for juvenile homes and other prisons for kids. They were anachronistic, and actually prevented access to normal community socialization.

These theoretical principles—and the plans for implementing them with action programs ("the Four Ds")—had come mainly from the President's Commission on Law Enforcement and the Administration of Justice, which was appointed in 1965. The commission launched studies, conducted hearings and investigations, and assembled and evaluated previous research in an effort to document what was going on in the juvenile justice system and what could be done to improve it. The 1967 report profoundly influenced the content of the Juvenile Delinquency Prevention and Control Act of 1968 (under which the new theoretical formulations of delinquency cause and control were developed) and the Juvenile Justice and Delinquency Prevention Act of 1974.

The 1974 legislation dangled a fiscal carrot in front of states to induce them to change the way they treat status offenders. As Teilman and Klein point out, the federal involvement both mirrored and accelerated changes already under way. Twelve states had deinstitutionalized status offenses prior to the federal act of 1974, and by the end of 1977 an additional thirty-two states had undertaken some form of legislation to limit the incarceration of status offenders. Similarly, diversion has been legislatively sanctified for minor offenders.

Radical Reform

The most controversial effort didn't just reform youth correctional settings—it abolished them. Massachusetts closed five public institutions between 1971 and 1973. This move has been carefully studied since 1970 by the Center for Criminal Justice of Harvard Law School. Their findings illustrate the difficulties of successfully achieving change.

Jerome Miller was appointed Commissioner of the Department of Youth Services of Massachusetts in 1969. His specific goal was to create a real balance between treatment and custodial care in the state's institutions.

After two years of attempting to develop cottage-level therapy groups "Miller was aware of the entrenched [staff] resistance reflected in many traditional cottages and was impatient with the slow pace of change. Miller finally concluded that . . . in community settings, greater professional resources would be available to provide volunteer and purchased services, and traditional expectations about juvenile prisons might no longer have force."

The answer was to close the institution! And during the next two years, that is precisely what Jerome Miller did. Closing the institutions meant a new structure of services more closely integrated with community life.

Looking back in 1981 at the consequences of the changes, Miller and Ohlin observed:

> The programs of the new community-based system were diverse. Half the youth under the care of the department remained on parole, as before. Of the rest, 10 percent were in secure care, 20 percent each in group homes and foster care and 50 percent were in nonresidential settings, the biggest innovation of all. There was much more emphasis on linking the youth and the community, and establishing more humane, normal social relationships in the living units.

It's still not clear if these radical steps worked. It appears that youth treated in community-based programs do no worse than those in traditional treatment systems, may do better, and at no overall increase in costs. So far as serious offenders are concerned (the 10 percent in secure care), there is no evidence of greater success than was the case with larger institutions of the 1960s, with their recidivism rate in excess of 70 percent. There is substantial doubt that the serious offender is receiving better treatment now than previously.

Now that the dust is beginning to settle, we can try to assess the reform efforts of the last decade and see what worked and what's needed next. Of course, the present is an era of retrenchment for all of the human services, which are under attack for ineffectiveness and inefficiency. Americans are all too ready to believe that *nothing* works. And, in truth, enthusiasm for reforming the juvenile justice system often led to faulty plans, misunderstood principles, and inadequate implementation.

Reason for Hope

But there *has* been progress. Most states have succeeded in decriminalizing status offenses, guarding the rights of juveniles, diverting nonserious offenders to community services, and getting most kids out of jail, detention facilities, and correctional settings. This progress has been achieved with far less fanfare than in Massachusetts. As a result, there has been less resistance to more modest accomplishments.

Each suicide of a 14-year-old in a detention center, each charge of brutality or sexual abuse in a correctional setting, each sadistic murder of a youth by peers in a jail, generates sufficient shock to improve conditions locally. The dilemma faced by those who want to sustain the progress is that each TV report of an elderly shopkeeper brutally killed by a 16-year-old, each 11-year-old murdered by a playmate, supports the public impression that violent youth crime is on the increase and that juvenile courts are doing nothing to prevent it. Such perceptions fire a retributive sentiment in favor of apprehending those kids, locking them up, and throwing away the key.

Nevertheless, the principles and theories underlying the juvenile justice reforms of the 1970s not only still provide the best explanation for the troublesome behavior of American youth, they direct our attention to the role of our traditional social institutions—education, family, world of work—as contexts where delinquency can be prevented. These same principles best explain the recent finding that law-related citizenship education, if properly implemented in schools, can actually reduce the number of delinquent acts students commit.

In some ways, we may have come full circle, embracing the same traditional family and community institutions to control crime as did our colonial ancestors. Yet the public is lagging behind, wary of new alternatives, hopeful—if not confident—that harsh punishment may make the streets safe.

Those of us who think the juvenile justice system could benefit from a healthy dose of these principles obviously have our work cut out for us. Unless we do some serious educating of the general public, juvenile corrections may continue to be marked by confusion, uncertainty of goals, and oscillation between alternatives. The pendulum will continue to swing, but will progress be made? ☐

More on Juvenile Corrections

DINITZ, SIMON, and JOHN P. CONRAD. "The Dangerous Two Percent." In *Critical Issues in Juvenile Delinquency*, edited by David Shichor and Delos H. Kelly, pp. 139–155. Lexington, Massachusetts: D.C. Heath and Company, Lexington Books, 1980.

EMPEY, LAMAR T. *American Delinquency: Its Meaning and Construction*. Rev. ed. Homewood, Illinois: The Dorsey Press, 1982.

EMPEY, LAMAR T. "Children's Liberation: Dilemmas in the Search for Utopia." In *The Future of Childhood and Juvenile Justice* (edited by the author), pp. 380–417. Charlottesville, Virginia: University Press of Virginia, 1979.

ERICKSON, MAYNARD L., and JACK P. GIBBS. "Punishment, Deterrence, and Juvenile Justice." In *Critical Issues in Juvenile Delinquency*, edited by David Shichor and Delos H. Kelly, pp. 183–202. Lexington, Massachusetts: D.C. Heath and Company, Lexington Books, 1980.

Ex parte Crouse, 4 Whart. 9 (Pa. 1838 [Dec.]).

KRISBERG, BARRY, and IRA SCHWARTZ. "Rethinking Juvenile Justice." Prepared for the Hubert H. Humphrey Institute of Public Affairs. Minneapolis, Minnesota: University of Minnesota, (June 9, 1982).

MILLER, ALDEN D., and LLOYD E. OHLIN. "The Politics of Secure Care in Youth Correctional Reform." *Crime and Delinquency* 27/4:449–467, (October 1981).

OHLIN, LLOYD E., ALDEN D. MILLER, and ROBERT B. COATES. *Juvenile Correctional Reform in Massachusetts*. A Preliminary Report of the Center for Criminal Justice of the Harvard Law School. Washington, DC: U.S. Government Printing Office, 1977.

OPINION RESEARCH CORPORATION. *Public Attitudes toward Youth Crime*. National Public Opinion Survey conducted for the Hubert H. Humphrey Institute of Public Affairs, the University of Minnesota School of Social Work, and the Field Institute, (April 1982).

PISCIOTTA, ALEXANDER W. "Saving the Children: The Promise and Practice of *Parens Patriae*, 1838–1898," *Crime and Delinquency* 28/3:410–425, (July 1982).

ROTHMAN, DAVID J. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Boston, Massachusetts: Little, Brown, and Company, 1971.

SNYDER, HOWARD N., and JOHN L. HUTZLER. *The Serious Juvenile Offender: The Scope of the Problem and the Response of Juvenile Courts*. Pittsburgh: National Center for Juvenile Justice, (September, 1981.

TEILMANN, KATHERINE S., and MALCOLM W. KLEIN. "Juvenile Justice Legislation: A Framework for Evaluation." In *Critical Issues in Juvenile Delinquency*, edited by David Shichor and Delos H. Kelly, pp. 27–44. Lexington, Massachusetts: D.C. Heath and Company, Lexington Books, 1980.

VOGEL, RONALD E., and EDWARD A. THIBAULT. "Deinstitutionalization's Throwaways: The Development of a Juvenile Prison in Massachusetts." *Crime and Delinquency* 27/4:468–476. (October)

Alternatives

(*Continued from page 13*)

teenth century, "moral imbecile" of the nineteenth century, or a "constitutional psychopathic inferior" of the early twentieth century. In the 1940s the label was "psychopath"; "sociopath" in the 1950s; a person was "unresponsive to verbal conditioning" in the 1960s; and a "criminal personality" or "career criminal" in the 1970s. Through all of these labels we avoid dealing with the political and bureaucratic issues which lurk somehow below our awareness, but which might enlighten the whole process.

"Just desserts" models based in mandatory sentences are no more responsive to these issues than the indeterminate sentences based in rehabilitative ethic. As George Mead commented over 70 years ago in *The Social Settlement* "the social worker may be the sentimentalist but the legalist ends up being the ignoramus."

In order for the system to change we have to admit that the system *needs* to change. In addition, authentic alternatives, as *alternatives to prison*, have been given little opportunity to succeed. The typical state corrections budget is 95 percent locked into the prison line item. Because of a tradition of dealing with light-weight offenders unlikely to be incarcerated, alternatives are thought of as luxuries rather than necessities, superfluous rather than required. When budget cuts become necessary, "alternatives" are the first to go. Had they been true alternatives to prison, reflected in lower numbers of imprisoned inmates, this probably wouldn't be the pattern.

Any Hope Ahead?

There are a few bright spots on the horizon. The public is beginning to recognize the costs and failures of the current system. In addition, many programs are responding to the offenders who really need their help. For example, the Client Specific Planning (CSP) Program has consciously and methodically focused on offenders at the "deep end" of the system. Approximately 95 percent of our work is with felons, and 40 percent of them have committed violent crimes. We say that if a program can be successfully implemented with this population it can have a significant impact on the whole criminal system, including the treatment of lesser offenders.

Many other alternative programs are also recognizing the mandate to balance the individual needs of the offender with the political needs of the courts to impose sentences that serve justice. The fundamental principles underlying CSP are relatively simple: (1) there have to be effective controls on the defendant; (2) there has to be significant restitution; and (3) there must be some type of punishment imposed by the court. These three principles dovetail closely with the court's sentencing goals of public protection, rehabilitation, and deterrence.

The important issue is not that CSP works but rather the premises which underlie it. CSP is one means of insisting we treat offenders who are strangers the way we would deal with offenders who are relatives or friends—with caution, but with concern. It is our view that demands for justice, as well as rehabilitative or reformative needs, can be met through use of this model, *provided it remains focused on those specific offenders who would otherwise go to prison.*

The issue then, becomes not one of conservative vs. liberal approach to corrections. It is not even one of getting "tough" vs. being "permissive." Rather, it is how to establish an environment in corrections where the individual matters, and to introduce this approach to the vast mass of offenders. We are talking about establishing conditions for personal responsibility and remorse, thereby opening possibilities for personal reform and change. Until now, this has happened accidentally, if at all. Simply put, it means guaranteeing that the same degree of involvement and concern is put into planning for the average offender (who is a stranger), as we would insist upon were the offender a close friend or family member.

CASE III

Dave Williams, 24 years old, pleaded guilty to "assault with intent to murder" his 19-year-old former girlfriend following the breakup of their relationship. Williams had fired several shots at the woman, wounding her in the thigh, shoulder, and buttocks. After the shooting, Williams, with his girlfriend as a captive, held police at bay for 20 minutes.

NCIA proposed the following alternative sentence:

Residence: Mr. Williams would be placed in a comprehensive community support program offering psychological counseling, vocational assistance, and training toward independent living. Mr. Williams would eventually move into a supervised apartment.

Community Service: Mr. Williams would volunteer 10-12 hours per week in a long-term community service at a local hospital.

Employment: With the help of an offender's assistance organization, he would seek full-time employment.

Psychiatric Counseling: Mr. Williams would undergo a psychiatric evaluation and enter into continuing therapy at a local, university-affiliated, psychiatric clinic.

Special Research Project: In response to the particular offense, Mr. Williams would be required to read and report on a book dealing with battered women.

Special Condition: Mr. Williams would be prohibited from any contact with the victim of his offense.

Probation/Community Supervision: Mr. Williams would be placed on probation. Additionally, to assist with the coordination of his plan, a third-party advocate from an offender aid organization would voluntarily provide supervision. NCIA also indicated to the court that Mr. Williams had scored 10 on the U.S. Parole Commission Saliency Factor Score System, making him a good probation candidate.

Judge Henry Jones imposed an 18-year sentence, suspending it all so Mr. Williams could participate in the Client Specific Plan with five years' probation and a three-year community service order.

Prisoners' Rights

(*Continued from page 5*)

Constitution requires for fundamental fairness. In a due process analysis the Court first determines whether a life, liberty or property interest is at stake, since the Fourteenth Amendment insists that a state follow due process in depriving anyone of life, liberty, or property. If one or more of these interests exists, the Court goes on to decide what process—that is what kind of hearing—is due.

The most important threshold matter in due process is the ability to take one's legal claim into court. On this score the Burger Court reaffirmed in *Bounds v. Smith*, 430 U.S. 817 (1977), that inmates have a right of "meaningful access" to the courts. According to *Bounds*, access alone is not enough. To give inmates a "meaningful" shot, states must furnish either an adequately stocked law library or legal assistance from persons trained in the law. Overcoming the practical hurdle of properly framing their legal writs assures prisoners of their day in court.

The Court noted in *Bounds* that 80 percent of state corrections commissioners believe that legal services provide a safety valve for inmates' grievances, reduce tensions from unresolved legal problems, and contribute to rehabilitation by providing a positive experience with the legal system. As will be seen, the Court seemed to forget this in some of its later due process cases.

The remainder of prisoners' due process cases consider whether prisoners are entitled to any due process before they can be made to lose something that is a liberty or property interest, and, if so, what process is due them. The Burger Court has looked closely at due process claims affecting prisoners at various stages of their confinement. After all, pretrial detainees are very different from prisoners out on parole who risk the revocation of their parole. Prisoners who face the loss of "good-time credits" are situated quite differently from prisoners whose parole board is deciding their fate. The Court has held that the stage of incarceration is crucial to whether the prisoner has a liberty interest which merits due process protection.

Not Convicted Yet

Bell v. Wolfish, 441 U.S. 520 (1979), dealt with pretrial detainees—persons who have not yet been tried but are being held in jail because they could not make bail. The detainees brought suit in *Bell* to question the constitutionality of a wide range of practices in New York City's Metropolitan Correctional Center (MCC). Two of their points related to due process.

Although they claimed that doublecelling is unconstitutional, they couldn't base this claim on the Eighth Amendment, since that amendment only protects people who have been sentenced. Instead they argued that they were being denied their liberty without due process by being forced to await trial under such conditions.

According to the district court, these pretrial detainees have the same rights as any free citizen, since they haven't been convicted of any crime and they are innocent until proven guilty. Therefore the prison had to meet constitutional standards greater than those required by the Eighth Amendment. The court of appeals agreed, saying: "...deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity,...[by] administrative convenience,...or by the cold comfort that conditions in other jails are worse." According to the court of appeals the state must show a compelling necessity for *any* deprivation of detainees' rights.

But a Supreme Court majority felt differently. It held that the presumption of innocence only protects the accused once his trial begins and that it is irrelevant to the rights of pretrial detainees. As far as the Burger Court is concerned, if you are an indigent person confined in prison while waiting for your trial, you are only protected from actions that are not rationally related to prison security. We must defer to prison administrators, said the Court; they know best what steps must be taken to preserve an orderly prison.

According to the Court's majority, the pretrial detainee's desire not to be subjected to doublecelling does *not* constitute a liberty interest that would trigger the due process clause. Nor did it view the presumption of innocence in favor of the accused as a reason to accord detainees the rights of free men. What then did the majority see as the proper inquiry here? The majority framed the legal question as whether the conditions being challenged amounted to *punishment* of detainees. In answering its own question, the majority found that doublecelling is not punishment and therefore does not violate detainees' due process rights.

The dissenting justices, on the other hand, contended that the "punishment" test was an incorrect application of due process analysis. And even assuming that it is a proper test, they said, the indignities to which pretrial detainees were being subjected are indeed punitive.

The other due process claim in *Bell* concerned body-cavity searches routinely conducted at the MCC. After every visit with a relative or friend, prisoners were required to expose their body cavities for visual inspection as part of a strip search.

Prison officials claimed that this was done to detect contraband, but the district court and the court of appeals prohibited the body-cavity searches, noting that in only one instance in the MCC's history was contraband found during a body-cavity search.

The Supreme Court saw it differently. The majority of the Court, besides holding that this procedure did not violate the Fourth Amendment requirements for constitutional search and seizure, held that neither did it violate due process. They ruled that this practice wasn't punishment but rather was justified by security. "Ensuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both."

Justice Marshall in his dissent complained of the Court's requirement of "virtually unlimited deference" to prison officials' justifications. According to Marshall, determining whether a particular restraint amounts to "punishment" is not the proper test. Rather, the Court should have looked at whether the governmental interests served by the restriction outweigh the deprivations they cause.

Moreover, Marshall argued, the Court was saying in effect that the detainees had the burden of showing that officials intended to punish them. But intent has no place in due process analysis, Marshall said: "By its terms, the Due Process Clause focuses on the nature of deprivations, not on the person inflicting them." Finally, the Court failed to consider whether there were less restrictive alternatives—for example, using fluoroscopes to detect contraband rather than making intrusive body-cavity searches.

Out on Good Behavior

Thus the Burger Court has not been sympathetic to the rights of pretrial detainees. But in cases involving prisoners at the other end of the spectrum—parolees who are conditionally free though still in legal custody and who face a return to prison if their parole is revoked—the Court has supported due process rights.

Morrissey v. Brewer, 408 U.S. 471 (1972), held that a parolee does have a liberty interest in not having his parole revoked, and therefore he is entitled to due process protections. When an alleged violation of parole occurs, a hearing officer must decide if there is probable cause to return the parolee into custody pending a final revocation hearing. That informal hearing must be held reasonably soon after the parolees' arrest (according to the Court, a two-month lapse would be reasonable). An impartial hearing officer must conduct the hearing. The parolee shall be allowed the right to confront and cross-examine witnesses against him, unless the hearing officer finds good cause for not allowing confrontation.

"Who had the dry martini with an anchovy?"

Justice Douglas and Justice Marshall agreed with the result but felt the Court didn't go far enough. According to them the parolee should remain free pending the final hearing if the alleged parole violation did not involve the commission of a new crime. They also contended that the hearing officer should not have the option of forbidding the confrontation of witnesses. The majority had acknowledged that protecting the parolee's legal rights at these hearings helps to serve the goal of rehabilitation by showing the parolee that the "system" is fair. Justice Douglas suggested that since this is true, it supports his argument that all of the due process protections should be allowed. He observed that these elements of due process may "restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men."

The Court left open the question of whether an indigent parolee would be entitled to appointed counsel at the revocation hearing, though Justice Douglas would have granted this right. But the following year, in *Gagnon v. Scarpelli* 411 U.S. 778 (1973), a case holding that a person charged with violating his probation has the same right to an informal hearing as a parolee, the Court did rule on this question of the right to counsel. It held that whether a probationer (or parolee) is entitled to free counsel must be decided on a case-by-case basis. For instance, if the probationer admitted committing a crime there would be no need for counsel, but if he claimed mitigating circumstances state appointed counsel might be deemed appropriate by the corrections board.

Still Behind Bars

The Court has showed less solicitousness for the rights of prisoners still in physical custody than it has showed for the rights of parolees. In *Wolff v. McDonnell,* 418 U.S. 539 (1974), the Court addressed itself to the rights of a prisoner who faces the loss of "good-time credits" because of serious misconduct he has allegedly committed. In this case a Nebraska statute provided that prisoners would get time taken off their minimum sentence for good behavior, with credits forfeited only for serious misconduct. A prisoner challenged the procedures Nebraska officials used to decide whether the alleged misconduct had occurred. Was a liberty interest at stake, and, if so, what process was due? The Court held that loss of good time did involve a liberty interest and that some but not all the elements of due process held necessary in *Morrissey* must be applied to these hearings.

The majority made it perfectly clear that the ordinary prisoner has fewer rights than the man who is out on parole: "Revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee." Yet some due process protections must be accorded to assure that these credits are not taken away arbitrarily: "It is true that the Constitution itself does not guarantee good time credit for satisfactory behavior while in prison. But . . . the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to minimum procedures . . . required by the Due Process Clause . . . ."

These minimum procedures were held to be advance written notice of the claimed violation and a written statement of officials' findings as to the evidence relied upon and the reasons for the disciplinary action taken. Further, the inmate must be allowed to call witnesses and present evidence in his defense if doing so will not be unduly hazardous to institutional security. The Court stated that officials must have the discretion to refuse to call witnesses when in their judgment there is a risk of reprisal.

In dissent, Justice Marshall (joined by Justice Brennan) argued that the inmate should have the right to confront and cross-examine any witness except in the rare circumstances when reprisal is a real danger. The need to keep the identity of informants confidential will exist in only a small percentage of cases, Marshall said. In most cases the adverse witness will be a guard. Marshall responded heatedly to the majority's assertion that the right to confront and cross-examine witnesses is "not universally applicable to all hearings," though it is required, for example, in a hearing where the person is subject to loss of a job: "I suppose the majority considers loss of a job to be a more serious penalty than the imposition of an additional prison sentence—on this record, ranging up to 18 months—which is the effective result of withdrawal of accumulated good time."

The majority in *Wolff* made a dramatic reversal of the argument it had made in *Morrissey*, that procedural fairness is often a valuable tool of rehabilitation. In *Wolff* it turned this argument on its head, arguing that allowing such due process elements as cross-examination of witnesses would *weaken* the disciplinary process as a vehicle for rehabilitation. It said prison officials should have wide discretion to deny these procedural protections: "With some [inmates] rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure."

Justice Marshall did not let this go by unchallenged. He stated: "By far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings, including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool." And he noted that the Court had said exactly that in *Morrissey*. Marshall noted that a majority of states do permit confrontation and cross-examination in these proceedings, with no apparent detrimental effect on prison security. And there was evidence that "some of the inmate feelings of powerlessness and frustration had been relieved."

Justice Douglas in his own dissent commented on the rehabilitative effect of enhancing the procedural protections afforded prisoners. He cited a report prepared by corrections professionals that the "basic hurdle [to reintegration] is the concept of a prisoner as a nonperson and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules . . . maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have . . . ."

Deciding on Parole

Another case brought by Nebraska prisoners dealt with the parole board's power to decide whether to grant parole. In *Greenholtz v. Inmates of Nebraska Penal Inmates*, 442 U.S. 1 (1979), the district court had concluded that the procedures used violated prisoners' due process rights because they have a "conditional liberty interest" in being granted parole once they are eligible and because the Nebraska board wasn't providing the procedural protections needed to insure that the decision was made fairly. The Court of Appeals for the Eighth Circuit agreed that each inmate eligible for parole must get a formal hearing, although it ruled there was no right to call witnesses.

The Supreme Court reversed this decision. It found that due process rights do not inhere in determining parole because a prisoner's mere hope of early release does not rise to the level of a protectible liberty interest. The prisoners had argued that they have a stake in the conditional liberty of parole just as the parolee in *Morrissey* has a stake in protecting his conditional liberty. Said the Court: "The fallacy in respondents' position is that parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." (emphasis in original)

A majority also found the two situations distinguishable in that in a parole revocation decision the factfinders are making a "retrospective" factual decision; that is, they are deciding if the prisoner has violated the terms of his parole. In a parole release decision, the factfinders make a very subjective and predictive decision as to whether the prisoner is ready for early release and is no longer a danger to the community.

The Court went on to discuss the place of parole in the effort to rehabilitate. As in *Wolff*, the Court rejected the theory that providing prisoners with due process rights will help them to rehabilitate themselves. Indeed, the Court seemed almost to regret having designated rehabilitation as one of the three primary functions of the correctional system in *Pell v. Procunier:*

> It is important that we not overlook the ultimate purpose of parole which is a component of the long-range objective of rehabilitation. The fact that anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago need not lead states to abandon hopes for those objectives; states may adopt a balanced approach in making parole determinations, as in all problems of administering the correctional systems. The objective of rehabilitating convicted persons to be useful, law-abiding members of society can remain a goal no matter how disappointing the progress. But it will not contribute to these desirable objectives to invite or encourage a continuing state of adversary relations between society and the inmate.

These statements reflect the Burger Court's tendency in such cases as *Wolff*, *Bell* and others to downgrade rehabilitation and to elevate security as factors shaping their prisoners' rights decisions.

In *Greenholtz* the Court also held that Nebraska's special statute governing parole release, which it termed "unique" in its structure and language, did create an expectancy for early release in Nebraska inmates. But the majority concluded that Nebraska's procedures provided all the process due and that it need not provide a formal hearing or inform a prisoner of the basis of a decision to deny parole.

Once again Justice Marshall dissented. Concerning Nebraska's statutorily-created right and its procedures, he agreed with the majority that a formal hearing is not always required. However, he felt due process was lacking because prisoners were not notified of the exact date and time of their hearing and so didn't have enough advance notice to prepare their case for early release.

Noting that at present the board issues a form letter citing only general reasons for its decision, Marshall would have required the parole board to provide a statement of the crucial evidence on which it relied. The majority had argued this was not necessary because it "would tend to convert the process into an adversary proceeding and to equate the Board's parole-release determination with a guilt determination." But Marshall reasoned that the Board has no legitimate interest in concealing from the inmate the ways in which he falls short of deserving parole. And the parole-release ruling does resemble an adversarial confrontation, given the high stakes for the inmate. Finally, the same rehabilitation-related consideration that applied in *Morrissey* pertains here. Marshall said: "the obligation to justify a decision publicly would provide the assurance, critical to the appearance of fairness, that the Board's decision is not capricious."

Justice Marshall emphasized that in his opinion a special statute is not necessary to establish a liberty interest in obtaining parole release. That interest stems from the state's establishment of a system of parole, under which most inmates are granted early release. As the Court stated in *Morrissey*, parole has become an "integral part of the penological system. . . . Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." Since judges in setting sentences act on the expectation that the prisoner will be released long before the maximum term, "this understanding would certainly justify a similar expectation on the part of inmates."

Citizen or Slave?

It is axiomatic that prisoners relinquish much of the liberty enjoyed by free citizens once they are duly convicted of a crime. But it has also long been clear that they retain a "residuum" of constitutional rights while behind prison walls. As Justice Stevens put it". . . the view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts."

A court's difficult task in prisoners' rights cases is to find a balance between treating prisoners like mere slaves and allowing them so many rights that the goal of deterrence is undercut. Justice Stevens and other dissenters in the prisoners' rights cases have criticized the Burger Court's proclivity to give prison officials too much discretion in restricting the rights of their prisoners, contrary to the Constitution and the vital need to promote rehabilitation. As Stevens observed, "if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the nineteenth century cases. . . . I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore." □

Women Prisoners

(*Continued from page 21*)

tions. Only two percent of all female prison inmates surveyed in 1976 were involved in work release.

Women's prisons are inadequate in other ways too. Medical care is often close to nonexistent. Most institutions have arrangements with local hospitals for emergency care, but the decision to call for it often resides with untrained personnel. Prison hospitals or infirmaries deliver varying qualities of care. Again, untrained personnel often determine whether a woman will be admitted. The GAO reports that a recent Pennsylvania study found that in one infirmary there was only one doctor available to treat over 100 women.

Gynecological care is often ignored, and women who want abortions have a hard time getting them. At the Community Correctional Institute in Cincinnati one woman was denied an abortion because neither the city nor county would assume the costs for guards at the hospital. She sued the department of corrections, arguing this refusal violated her constitutional rights, and a court ordered that the abortion be performed. In Los Angeles it took legal action to unchain pregnant inmates during their labor. During one hearing on the subject the county's attorney defended the practice by pointing out that although the women were chained to their beds to prevent escape during labor they were unchained during delivery.

A 1977 LEAA survey summarized available medical care as "intake examinations, sporadic 'routine' examinations, primarily in response to a problem or specific request; emergency care available with evening coverage by paramedical personnel; and limited dental care." According to the report's authors inmates are often controlled by being given tranquilizers and mood elevators. They added: "One can only speculate on the impact of such long term medication on inmates and the impact of psychological dependence on such drugs among inmates released from institutions and expected to assume a responsible, self-directed role in society."

Rehabilitation is also hindered by a lack of health *education*, which could improve the quality of a woman's life and that of her children. For example, the women may be sexually experienced but are often ignorant of the most basic functioning of their bodies. Although some programs on women's health are available to incarcerated women, tight budgets prevent widespread availability.

Mothers in Prison

A major source of stress for women prisoners is separation from their children. The *Los Angeles Times* has reported that "the first phone call that most men make after being arrested is to find a lawyer or a bail bondsman. . . . The first phone call that most women make is to arrange for child care."

When a woman is imprisoned her children most probably will lose their home, since only 10 percent of these women have partners who will assume familial responsibility. The children often become state wards, and in some cases, may be put up for permanent adoption without their mother's consent. Women offenders, these states assume, cannot hope to be fit mothers.

If placed in foster homes the children may find it difficult to receive permission from their foster parents to visit their mothers. Even with permission the inaccessibility of many prisons prohibits frequent visitation. Alderson prison, located in a mountainous rural area of West

Virginia, exemplifies prison isolation. The town is not served by bus, train or plane and has no motels or hotels. Only women eligible for furlough, and with enough money, can visit their children by traveling home. A Federal Bureau of Prisons task force suggested that Alderson allow children to spend long weekends in the prison with their mothers, but the director of the bureau, Norman Carlson, rejected the idea because of a potential harmful effect on the children. But separation may be even worse for children than seeing their mothers in prison. In any case, children with mothers in prisons do not have an easy time of it. According to Lt. Audrey Lehre, Assistant Warden at the Sybil Brand Institute for Women:

> Jails are not conducive to women being good mothers. Mothers in jails are not conducive to bringing up good citizens. We have about 70 percent recidivism. Yes, they come back, and their daughters come back, and their daughters, and their daughters' daughters. (Burkhart, *Women in Prison*)

What's Being Done?

Rehabilitation is almost impossible under present conditions. Most released women are not in proper physical or psychological condition to assume the responsibilities of adults in our society and to locate the necessary resources to prevent a return to prison.

For most women the world outside the prison walls has always been hostile and chaotic. As oppressive as prison life is, it does provide security. Prison becomes a concrete womb where a woman is taken care of, but from which she can never easily break out.

The women's movement has become concerned with this cycle of dependency. It has spurred reform of the women's prison system, leading to more community programs for the female offender and to changes within the prisons themselves.

Some changes in prisons have been initiated by corrections administrations. For example, more women are now employed by departments of corrections. As women move up in the corrections hierarchies, fewer men have sole authority in the women's institutions, contributing to less archaic attitudes towards the female offender. Sexual abuse and exploitation of the residents has been a major problem in certain correctional institutions, and the decreased use of male correctional officers may help alleviate this situation. It also seems logical to assume that women administrators may have less rigid views of the potential of women offenders, and may be more persistent in developing educational opportunities for residents.

Two promising new reforms are being pushed in some prisons: co-corrections and parenting programs. Co-corrections, the incarceration of men and women within the same institution, was originally a response to overcrowding and discipline problems in prisons. Now it is apparent that offenders who do their time in coed prisons return to their communities with higher expectations and increased self-esteem. Currently, nine states have coed prisons and the Federal Bureau of Prisons runs four. Their residents seem more interested in work programs, and there is less violence.

For women, however, the benefits are somewhat mitigated. Most women come from prisons with less security, and so are subjected to tighter surveillance than if they had remained in a women's institution. There is also a chance that female residents will adopt subservient attitudes to be more attractive to their male counterparts.

Critics of the program have charged that the whole idea of imprisonment is to deny the offender the pleasures of society. They're not supposed to have a good time, the argument runs, so why give them access to the opposite sex. Proponents such as Jerome Malibi, Alderson prison's administrator of research, counter that "putting men and women together won't change the fact that at this prison, like all prisons, the punishment is that you can't go out the front door."

Parenting programs are necessary because many incarcerated mothers fear returning to their children. Some didn't do so well as parents before their imprisonment. All find that separation from their children places increased strain on the relationship. Some prisons are now trying to ease the separation by facilitating contact between mother and child while the mother is incarcerated.

At Pleasanton Prison (CA), a federal institution, women inmates and volunteers operate a privately funded children's center on the prison grounds which is open for weekend visits. A prison-located center enables children to process their fears or misconceptions about

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NON BIOGRAPHY
NON HISTORY
NON DRAMA
NON MUSIC
NON ART
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prison life in a more relaxed setting than the traditional visitor's lounge.

A similar program, called Sesame Street, operates at the Dwight institution in Illinois; not only is it an opportunity for mother-child contact, but it also gives residents an opportunity to receive child-care experience. Unfortunately, supervision is not adequate to enable residents to receive day care licenses for job opportunities on the outside.

Two programs now exist which enable women to live with their children while doing their time at community based facilities. One of these, the Santa Clara County (CA) Women's Residential Center, houses 25 women and their children in a two-story apartment building. When a mother goes to school or work, her child spends the day in the nursery. There are no guards, locks or fences; there have been no escapes. In Seattle, some women who may have ended up at state prisons reside instead at the Women's Community Center located in a downtown YWCA. Children can live with their mothers full-time in this facility or come for visits. This program emphasizes independence; no day care is provided and mothers must make their own arrangements for their children. Women are only admitted to the center once they have found jobs or are placed in training programs.

Although rare, it sometimes happens that a mother and infant will live together in a traditional women's institution. In Florida, a circuit court judge granted one prison resident permission to keep her baby in prison. The child was allowed to stay for 18 months. Section 3401 of the California Penal Code allows an incarcerated mother to keep a baby under the age of two with her in the institution. Above that age prison officials decide the matter. This early contact between mother and child is crucial; children deprived of the bonding experience have difficulty developing normal relationships in later life.

Getting Extra Help

The community outside the prisons has also begun to respond to the needs of the female offender. Often community groups will volunteer to teach classes, provide entertainment or offer counseling to prison residents. Some prison officials resent outsider's interest, but change is slowly coming to women's institutions.

Thanks to NYU law students, women at the Bedford Hills facility are now getting legal help. Other programs have helped mothers in prison establish child care for their families or fight having their children put up for adoption. At the Dwight Correctional Center a successful reintegration skills workshop has been offered by a not-for-profit group (Understanding is Progress, Inc.). Women attend 40 of the six and one-half hour sessions, and 80 percent attendance is required. The first course found seven out of the original nine participants completed the required work. During the course the women learn to plan their lives through realistic goal setting, to find resources for their employment and parenting needs and to function as responsible adults. Released workshop participants will get two years of follow-up counseling and assistance, with volunteers participating as "buddies" for the released woman.

These kinds of community based programs, however, always depend on the invitation of prison administrators. Many volunteers have found that getting a course or program into a prison can take months of groundwork, and keeping it in often depends on keeping administrators happy.

That's why the most effective tool for improving the lives of incarcerated women lies with the courts. Recent legal action promises pervasive and long-lasting results.

The Courts Get Involved

A landmark decision came in October of 1979, when a U.S. district court ruled that women in state custody in Michigan lacked educational, vocational, and work programs. The state argued that cost prevented including women in the extensive educational and vocational programming provided for male inmates in Michigan prisons. The court found, however, that "institutional size is, frankly, not a justification but an excuse for the kind of treatment afforded women prisoners." The judge's view of the role of the state was particularly important. He found that the state's primary goal is to rehabilitate prisoners by providing remedies for individual deficiencies in education and skills. He rejected the state's contention that the treatment of female prisoners (even if unequal to its treatment of male prisoners) was justified because the government had set up special objectives in treating women offenders. About those objectives the judge commented they were ". . . characteristic of role and gender stereotypes rather than the product of an examination of the actual needs and interests of the women . . . ." (*Glover et al. v. Perry Johnson et al.* 478 F. Supp. 1075). The court mandated a needs assessment of women prisoners and said that the state would have to begin vocational and educational programs.

Recently ruled on by the courts was a suit under federal law alleging sex discrimination in the Kentucky penal system. At issue was sex discrimination in all aspects of prison life, including the "level" system at the women's prison which denies privileges that are a daily part of the Kentucky male prisoner's life. In addition, the suit alleged that the vocational and educational resources for women were much more limited than those for the male offender.

According to Walker Smith, an attorney with the Legal Aid Society of Louisville who first filed this case against the state, the judge in the case urged the state to settle but Kentucky refused. Although the court eventually ruled that the Kentucky state prison system was guilty of sex discrimination in its treatment of inmates, the state may well appeal. The state was forced to spend nearly $40 million in 1980 because of a settlement in a suit by men in the Kentucky state prisons which charged cruel and unusual punishment, but none of this expenditure found its way to the Kentucky Correctional Institution for Women. Now, however, the state has been given until October 15 to improve opportunities for women in the areas of vocational education, on-the-job training and prison industries.

This favorable decision in Kentucky will most likely lead to similar suits in other states. In some cases, the department of corrections is a friendly defendant, hoping that court action will force legislatures to allocate funds or services for the mostly ignored woman offender. Even without their cooperation, though, these law suits will bring about change within women's prisons. In some states just the fear of suit and the resulting costs of a long court battle provides the impetus for changes in women's facilities.

Whether through the courts, legislation, or in response to community pressure change must come. As one former warden at Dwight told a *Chicago Tribune* reporter:

> The number of inmates will continue to grow. I'd like to send those women through those gates with something other than $50 in their pocket and a bus ticket in their hand. We aren't doing them any good or doing society any good if we don't let the prisoners go with a better mind, some ambition, and something to return to other than the neighborhoods and the problems that they came from. I'd like to send them off with some hope. ☐

Curriculum Update

(*Continued from page 31*)

Delays in the juvenile hearing give Ambrose (the real "bad boy") an opportunity to threaten Isabelle and a teacher who also witnessed the assault. The teacher decides not to testify but Isabelle does. Later, Ambrose assaults her but she's saved when Terry calls the police. Because of his prior record and his consistent antisocial behavior, the Juvenile Court determines that Ambrose should be certified as an adult and the robbery trial handled by adult court. The other boys, Marvin and Terry, are treated as juveniles for the robbery since they have no previous records.

The Matter of David J. shows that a person who agrees to join in a criminal act must take responsibility for everything that happens during the crime. David is a youngster trying to raise money to pay for his motorcycle. His friend Johnny suggests that he knows how to make some money quickly, assuring David that he'll just have to drive the getaway car. When the robbery does not go off as smoothly as envisioned, Johnny shoots the owner of the shop. A night watchman notes the getaway car's license plate and both young men are arrested. Following a hearing in which his poor school and work record are revealed, David is committed to a juvenile correctional facility. Johnny, an adult, is sentenced to county jail.

Each of these films is well done. They carefully show a variety of professionals, both male and female as well as different ethnic backgrounds. Care has also been taken not to stereotype the central character in the film—not all boys are in the wrong, nor do all girls behave correctly. The films are especially useful in giving teachers and students insights into the treatment of different types of juvenile offenses. The freeze frame questions are raised at good points in the film and should generate productive discussions.

■ ***Only Losers Pay*** **(1980). Elementary. 16mm color/sound film, 10 minutes. Purchase: $250.00. (Walter J. Klein Company, Ltd., 6301 Carmel Road, Charlotte, NC 28211 or National Coalition to Prevent Shoplifting, 545 Atlanta Merchandise Mart, Atlanta, GA 30303.)**

This film about shoplifting was produced by the National Coalition to Prevent Shoplifting. It encourages students to deal directly with occasions when they might find themselves making a decision to shoplift.

The film presents four situations. *Situation I* shows how peers can pressure a student to engage in shoplifting. Two boys are in a candy store. One pressures the other to take some candy. The boys are caught and each is faced with having their parents called down to the store to pick them up. *Situation II* helps students understand the cost of shoplifting. A girl in a department store decides to take a bracelet she wants. She leaves the store undetected, but when her mother sees the bracelet at home, she brings the child back to the store to return it. The girl apologizes to the store manager, who tells her how shoplifting results in higher costs to customers. *Situation III* encourages students to carefully manage their spending money. A boy asks his father for money to buy a game. His father refuses because he feels such items should be purchased out of the boy's allowance. The boy decides to take the game and, of course, gets caught doing so. The film then shows him being disciplined by his parents. *Situation IV* points out that shoplifting is unacceptable even among peers. A young girl in a store sees a collectible she wants. She notices that there is only one of the items left and, although she does not have money with her, she decides to take it because she is afraid that it won't be there when she returns. She is caught and the store security officer takes her into his office. The film later shows two of her classmates talking among themselves wondering whether or not she is a "nice girl" since she has been caught stealing. The final scene of the film shows a judge admonishing viewers about the legal consequences of shoplifting.

Even though this film is often overly moralistic, the situations are believable. With appropriate debriefing, the film can be useful in exploring the offense of shoplifting.

Books

■ ***Teaching about the Constitution in the American Schools*** **(1981), edited by Howard D. Mehlinger. Paperback, 154 pp. Teacher Resource. $6.50. (American Historical Association, 400 A Street, S.E., Washington, DC 20003 and the American Political Science Association, 1527 New Hampshire Avenue, N.W., Washington, DC 20036.)**

In 1980 Project '87 sponsored a conference at Indiana University to assess teaching about the Constitution in the American schools and recommend new programs. This book constitutes the results of that conference.

It has two major sections. The first contains revised versions of the seven papers presented at the conference. These papers include a history of instruction about the Constitution, research into what youth and adults believe about the Constitution, and a review of the legal mandates regarding instruction on the Constitution in schools. Other papers review the treatment of the Constitution in American history, civics, and government textbooks and look at the treatment of the Constitution by nontraditional programs.

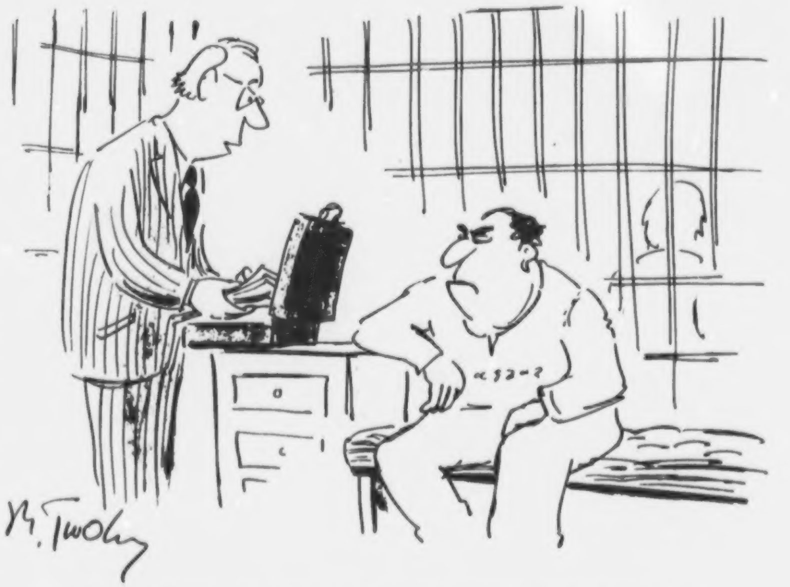
The remaining section of the book contains recommendations for improving instruction about the Constitution. The recommendations summarize discussions on such questions as: What should states and federal agencies do to encourage better instruction about the Constitution? What can professional associations do to strengthen instruction about the Constitution? What changes are needed in secondary school history, civics, and American government textbooks to improve treatment of the Constitution?

This book will be most useful to social studies teachers, curriculum planners, teacher educators, and textbook editors concerned about the attention given to the Constitution in school instruction, as well as those who are taking special notice of the bicentennial of the Constitution.

■ ***The Grass Roots Fundraising Book*** **(1982), by Joan Flanagan. Paperback, 320 pp. $8.95. (Contemporary Books, Inc., 180 North Michigan Avenue, Chicago, IL 60601.)**

Looking for funds to continue your LRE project? According to this author "most of the money raised in America comes from grass roots fundraising." The book includes ideas and advice on motivating your board of directors, planning high-profit events, getting free press, and finding volunteers to support your fundraising efforts. The book concludes with a bibliography of other how-to fundraising books and a list of organizations to contact for help.

A *must* for project directors interested in raising a little or a lot of funds. ☐



"Just between you and me, 'Laws are meant to be broken' isn't going to get us very far."

Suspensions

(*Continued from page 28*)

not subject to moral or legal condemnation.

Another issue is whether exclusion is ever the appropriate remedy, no matter how fair the fact-finding procedure may be. Throwing a child out of school because he isn't a model student is like telling a feverish patient to visit a doctor's office in the middle of a blizzard; the cure is worse than the sickness. Children who have problems in school need to work out their problems *in school*, with the help of concerned educators.

The Supreme Court said in *Brown v. Board of Education*, that education in the United States is the "very foundation of good citizenship." Through education, children develop the skills necessary to lead fulfilling public and personal lives. Because education is so important to the individual as well as to the society of which he is a member, it is essential that we provide at least some educational services to every child, along a continuum from least restrictive to most restrictive. Determining guilt or innocence may be important to the system of criminal justice, but it is much less relevant in an educational system that, as a matter of educational policy, provides some form of education to all students.

A significant percentage of school systems already reject exclusion from school as a viable option for dealing with discipline problems. Approximately 15 percent of the high schools and 60 percent of the elementary schools surveyed by the Office for Civil Rights in the 1972-73 school year reported that they did not suspend students. What are the alternatives? Referring students for individual or group counseling, informal conferences to resolve behavioral problems, class schedule adjustments, in-school "time-out" periods, and in-school suspension all have promise.

Of course, some problems can be anticipated and guarded against. Preventive measures include the use of ombudspersons, hall monitors, student problem-solving teams, work-study programs, teacher advocates for small groups of students, student buddy systems for the mutual reinforcement of acceptable behavior, and various forms of behavior modification through contingency contracting. Using these preventive measures should stop problems before they arise. Since only one percent of all students are excluded from school for offenses that involve destruction of property or threats to individual safety, there would be very few instances where prevention and in-school disciplinary measures proved ineffective. In these rare cases, home-bound instruction could be provided.

In the words of the Supreme Court, "Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child" (*Plyler v. Doe*, 150 L.W. 4650, 1982) help to make education the "most important function of state and local governments" (*Brown v. Board of Education*). As a matter of enlightened public policy, the dual disciplinary system should be eliminated—not by seeking to revoke the procedural and substantive protections of the handicapped, but by extending those protections to all students who need them. As the Supreme Court said in *Brown*, "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." ☐

Strategies

(*Continued from page 43*)

an actual arrest better because of their awareness of the criminal justice system.

Moreover, there's the troubling finding that even Street Law juveniles don't fully understand certain terms in the Miranda warning and have an inadequate grasp of how their right to silence protects them. *In re Gault* was intended to protect juveniles against self-incrimination, yet the research—including our research of students with Street Law training—raises concerns about how well juveniles can afford themselves of this protection. LRE could be a powerful weapon for kids asserting their rights, but it may be that kids need legal counsel to be fully protected.

In other words, the debate still is going on between those who think kids, by the very virtue of being juveniles, can't be counted on to understand their rights, and those who think that the circumstances—including LRE training—helps juveniles understand and appreciate their rights.

Future research might provide a way of resolving the debate. A useful study would assess students prior to and following law-related education, comparing their performance to students without LRE. Evaluations could explore the objectives of LRE (e.g., comprehension of legal concepts, ability to understand the law in our daily life) and its strategies (e.g., case studies, values clarification, field experience, moral dilemmas) to determine which strategies are most effective in meeting which goals.

Meanwhile, educators may well want to develop specific lessons to help students learn about their Miranda rights. The box below gives you one strategy that might do the trick. ☐

More on Miranda

Arbetman, L.P., McMahon, E.T., and O'Brien, E. *Street Law: A Course in Practical Law* (2d ed.). St. Paul: West Publishing Co., 1980.

Bailey, W.S., and Soderling, S.F. "Born to Lose—Waiver of Fifth and Sixth Amendment Rights by Juvenile Suspects." *Clearinghouse Review*, 1981, *15*, 127-134.

Ferguson, A.B., and Douglas, A.C. "A Study of Juvenile Waiver." *San Diego Law Review*, 1970, *7*, 39-54.

Grisso, J.T. "Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis." *California Law Review*, 1980, *68*, 1134-1166.

Grisso, J.T., and Pomicter, C. "Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver." *Law and Human Behavior* 1977, *1*, 321-342.

Grisso, T. *Juveniles' Waiver of Rights: Legal and Psychological Competence*. New York: Plenum Press, 1981.

Grisso, T., and Manoogian, I. "Juveniles' Comprehension of Miranda Warnings." In Lipsitt, P.D., and Sales, B.D. (eds.) *New Directions in Psycholegal Research*. New York: Van Nostrand Reinhold Co., 1980, Pp. 127-148.

Crime of Prison

(*Continued from page 9*)

about the prison system. The problem of prison should fall on prison officials who are responsible for conditions there, who control the situation, and who have the necessary information and expertise. A judge sitting somewhere basing his information on hearsay and rumor shouldn't be making these kind of decisions."

But judges may not even have the option in many instances. "It's not that the judges aren't concerned," says Cook County public defender Tom Carmody. "They must work within the statutes that set up minimum and maximum sentences. This limits the judge's decision-making. If a guy commits a class two offense, say a burglary, it's either probation or three to five years and nothing else. A judge might think that the guy before him won't last long in prison but the legislature wants to control things. Sometimes that may not be the right number but there's nothing a judge can do. They [the legislators] have taken as much leeway as they have been able to from judges."

"Why, I ask you, is a guy doing time for his first burglary in a maximum security prison?" asks Alvin Bronstein, director of the ACLU's Prison Project. "It's not just that there hasn't been any planning or imagination applied to the problems of prisons. It's that politicians are running around saying, 'Lock 'em up,' when, in fact, it's the most costly thing to do."

There is also the influence of the media, says Carmody. "Let's say a judge wants to give someone probation. There's a real fear of having the press splatter his name in the headlines, or on the evening news, saying that he gave someone probation who has committed such and such a crime, or maybe has committed it before. He can't give the defendant probation so he has to choose three years."

Even in cases where neither mandatory sentencing nor the press play any part, there still exists the limitations of a vast and bureaucratic criminal system where justice is necessarily meted out assembly line-style, and what may seem logical is not necessarily economically feasible. For instance, in most states there are not enough gradations and classifications within the prison system. "To have a more diverse choice of options, that takes money and that takes new prisons, and the way states are going now, that seems highly unlikely," says the ACLU's Robert Koren. In New York, for example, "there are five or six maximum security prisons in rural areas. Prison officials are given little flexibility, so they are forced to just throw everyone in together. We are left in this country with bastilles in the woods."

New Mexico Judge Gene Franchini valiantly fought the inflexibility of the law, but in the end his efforts were in vain. In November of 1981, Franchini resigned from the bench rather than send a first offender to prison. The criminal, an employed, honorably discharged Vietnam veteran, had been convicted of aggravated assault with a deadly weapon. A jury found him guilty of pulling a gun in a dispute at a traffic light. Under a mandatory sentencing law, Franchini had to imprison the man for a year. He refused, but an appeals court ordered him to sentence the man. Out of conscience, he resigned, explaining that putting this particular offender into the hellish New Mexico state prison—the scene of a bloody riot in 1980 which left 33 inmates dead, several mutilated, and at least 90 inmates and 12 guards seriously injured—would be supporting "insanity and injustice."

Looking for causes of violence? The main one is often overcrowding.

Prisons were conceived in the eighteenth century as a humane alternative to corporal and capital punishment. The logic was rather than torture or kill someone for stealing, it would be more humane to lock them up. But writes Judge Irving Kaufman, a member of the federal bench for 32 years, prisons are "often little more than cages of inhumanity."

A major challenge, and many believe the primary challenge, facing those charged with prison reform—judges, legislators, corrections officers, and others in the criminal justice system—is to keep nonviolent criminals out of prison. Only a small percentage of lawbreakers need to be isolated from society. Keeping them in and the others out would help both the dangerous and nondangerous offender. Dangerous offenders, whose condition is worsened by overcrowding, would be housed in more manageable and humane environs. Nondangerous people would be saved the experience of prison and perhaps be able to contribute something to society. We taxpayers would be saved the $12,000 it costs to house one prisoner for one year, twice the cost of tuition at a private university.

One man who advocates more creative sentencing is Charles Colson, who has, since publicly announcing that he would walk all over his grandmother to help Richard Nixon, discovered Christianity and dedicated his life to prison reform. A companion in Colson's own pen, for instance, had served on the board of trustees of the American Medical Association, got involved in an embezzlement, and was spending three years in jail. Why not instead sentence that man, argues Colson, to three years of free medical service for the needy? Or if he were a lawyer, free legal help for poor persons. Shouldn't all prisoners have access at night to their families, so as not to destroy every part of their life? By imposing other forms of punishment on certain criminals—restitution, fines, community service—won't there be fewer victims tomorrow because criminals today were punished humanely?

Society would gain from such innovations but convincing the public of this has been difficult. The simplest solutions seem most logical; public sentiment has leaned toward the building of more prisons to battle an ever increasing crime rate. Included in the Attorney General's Task Force on Crime is a proposal to spend $2 billion to build more penitentiaries.

Lindsay Hayes, director of the National Center on Institutions and Alternatives, believes that one major problem facing prison reformers is public misunderstanding. "We're not advocating that the gates of prisons be opened and every prisoner let free," he says. "Nor are we calling for a work-release program with no supervisor. But we're lumped by the press and public into the same category as those kinds of programs. We believe that prisons should be used but reserved for people too dangerous to live outside prison walls. We believe strict supervision is essential for the protection of society. The key is to be as flexible and creative as possible."

Of course, the ultimate solution—stopping crime—is harder yet. At the root of the crime problem are job opportunities and job quality. It's hardly a coincidence that every industrial society with a crime rate lower than ours has also, writes sociologist Elliot Currie, "historically had a much more effective and humane employment policy."

But it is clear that something must be done. Prison reform remains, for inmates, for judges, and for all concerned, a nightmare that lingers on. □

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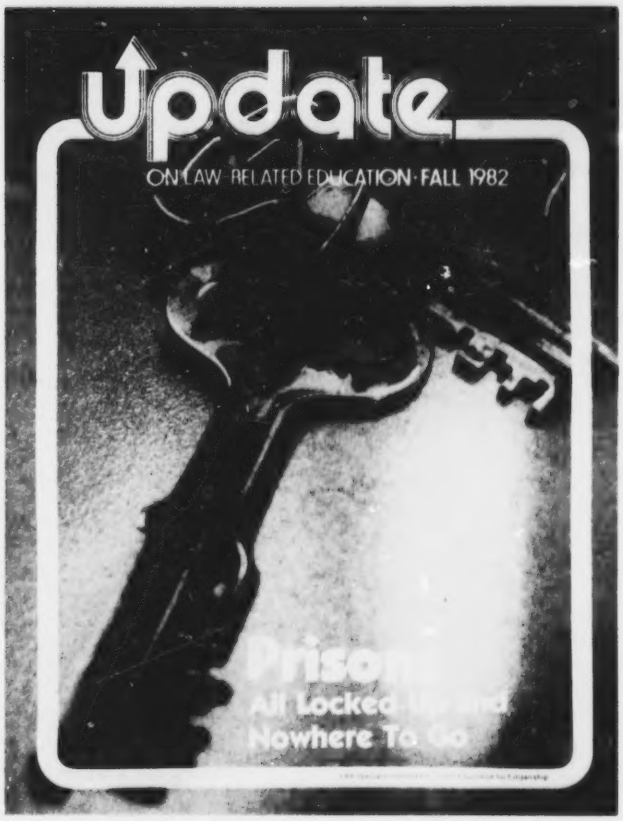
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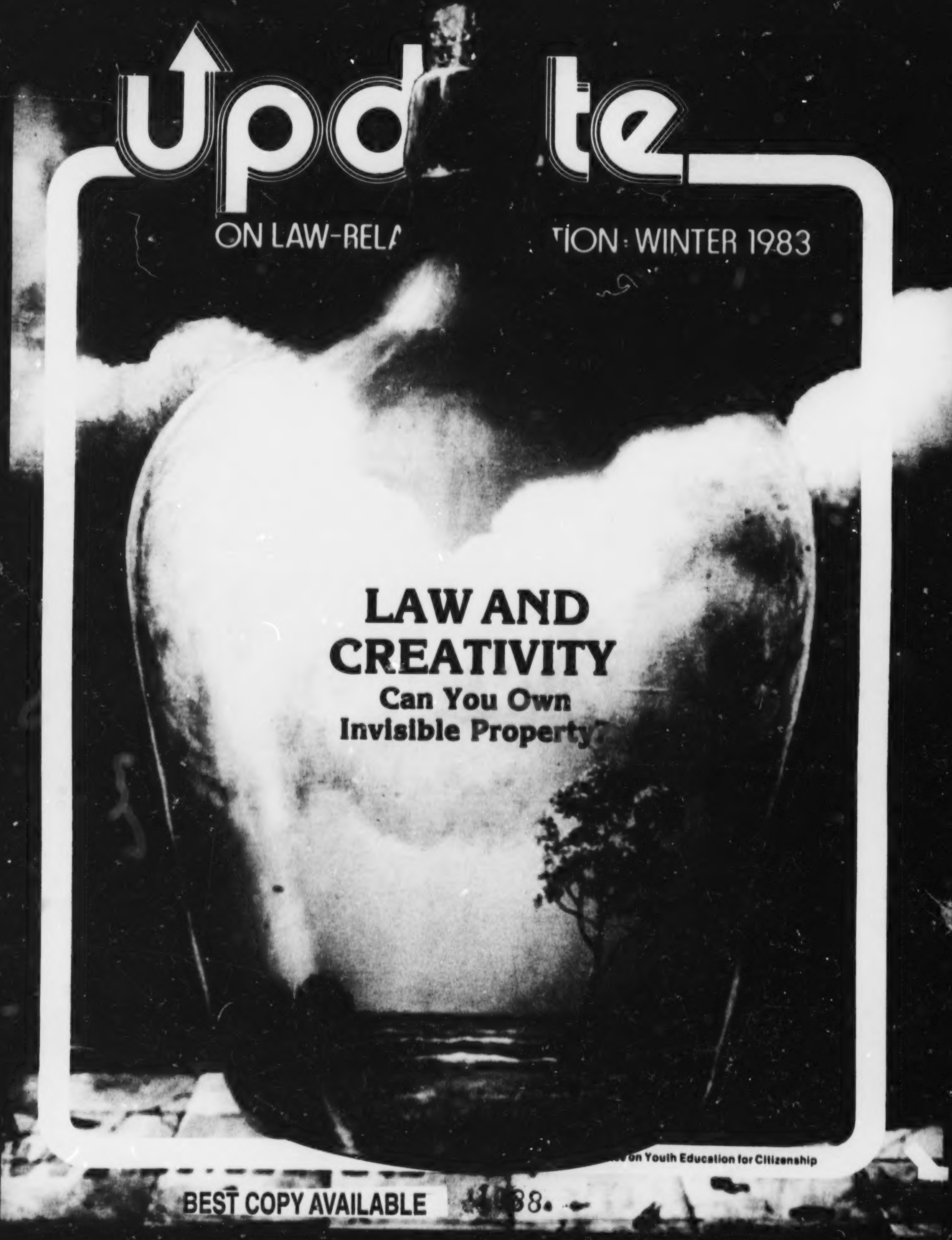

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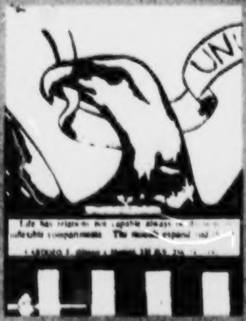

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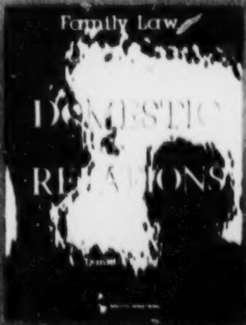
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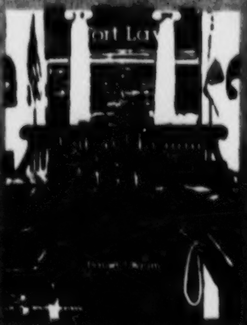

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contents

Volume 7, No. 1, Winter 1983

2
Law and Creativity
No Patent on Wisdom

6
Law and Creativity
Piracy Pays—and Pays Well

10
Classroom Strategies
Invisible Property

14
Law and Creativity
The Scene of the Crime

18
Law and Creativity
Parody: Not Always a Laughing Matter

22
Law and Creativity
Life Beyond Copyright

26
Law and Creativity
Can the Law Save Beauty?

30
Law and Creativity
Nude Encounters of the Legal Kind

34
Court Briefs
Old Issues Never Die

38
Curriculum Update
New Materials for the New Year

40
Legal Lunacy

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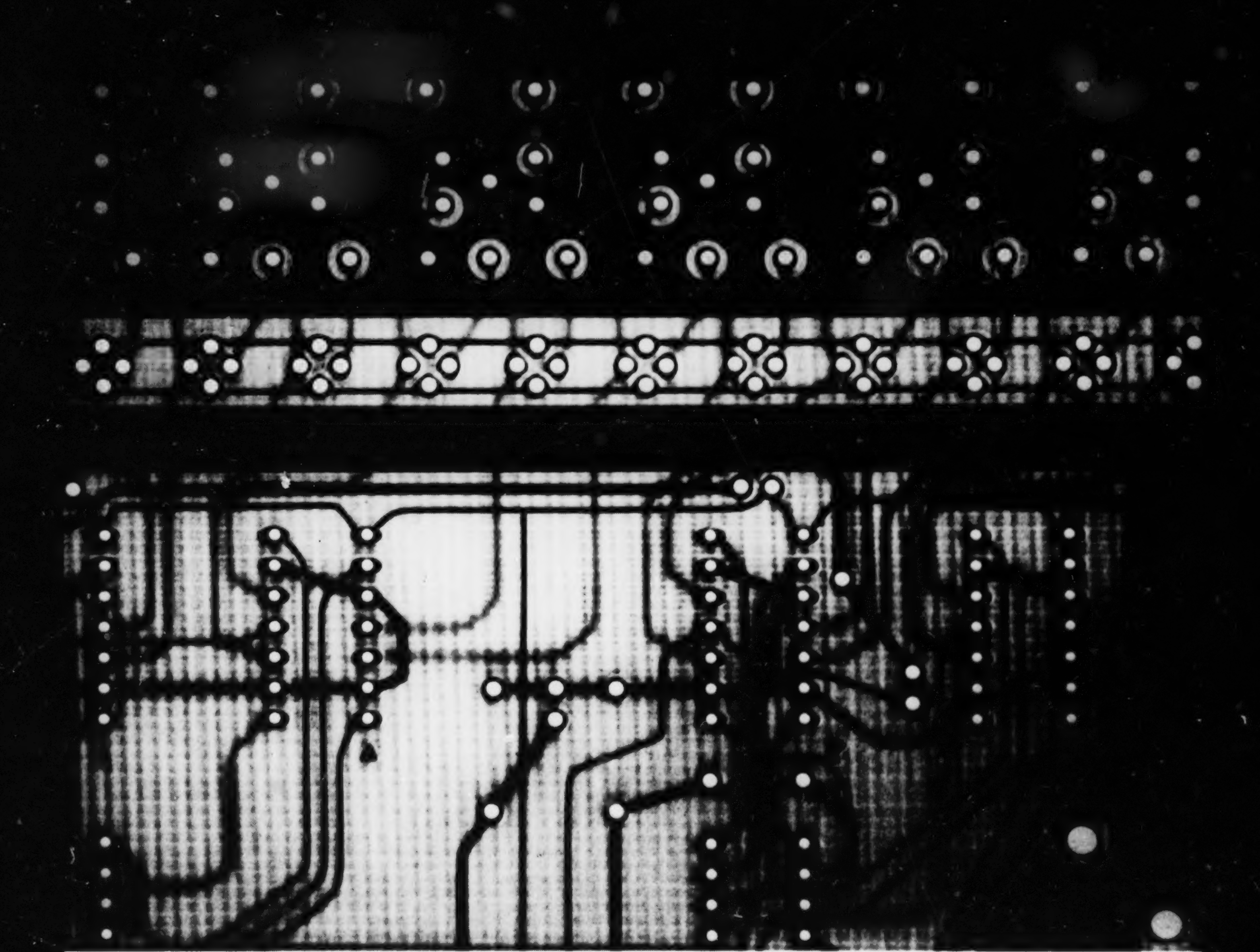

James A. Sprowl and James J. Myrick

No Patent on Wisdom

Does the Supreme Court know enough science to apply old principles to new inventions?

Imagine yourself a judge, maybe even a Supreme Court justice. Your desk is stacked with briefs, your clerks are scurrying around to research a huge number of cases. You and your eight colleagues are called upon to decide whether a new strain of life should be patented. In the past, living organisms have not been patented, but then again, inventors had not been able to design the genetic structures which define them. You're overworked. Maybe your technical expertise isn't strong enough to let you really understand the facts of the case. You certainly don't have the time to brush up on your science, but this decision will have far-reaching effects. You begin to wonder if judges, untrained in science, can reconcile the rapid changes in modern technology with long-established rules of law? Can they apply legal traditions to technical fields they know very little about? Did judges in the past have similar problems in dealing with what were then new technologies?

To even begin to answer these questions, we have to trace the development

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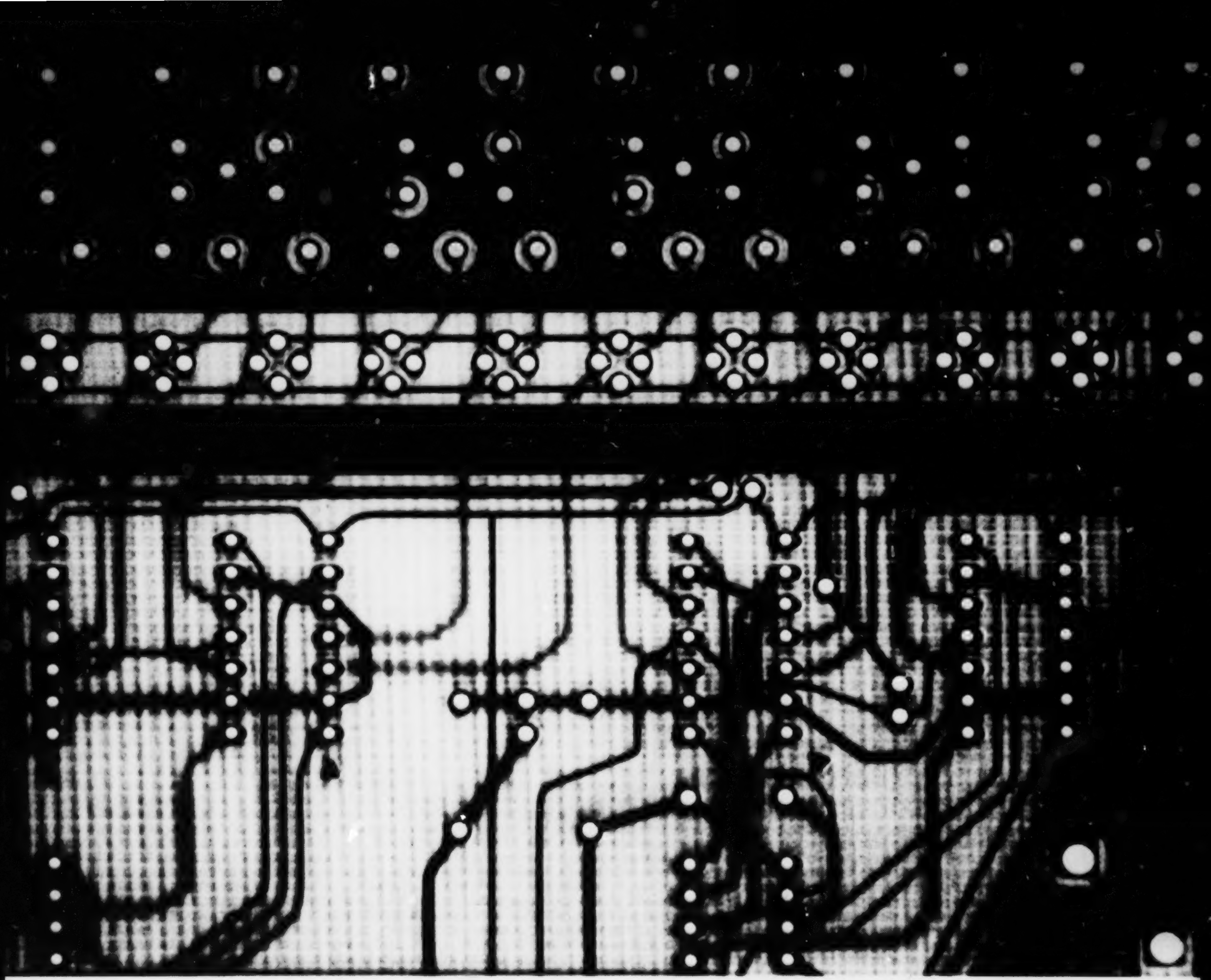

of patent law from its origins in medieval times, when patents were the prerogatives of kings, to the present, when the United States Supreme Court has actually had to decide whether patent protection should be extended to programs for computers and genetically-modified living organisms. Along the way, we'll see how the development of other famous inventions, such as the telephone and telegraph, have helped to shape the legal doctrines that the Supreme Court now applies to technologies which didn't exist when these legal doctrines were first formulated.

Odious or Beneficent?

A patent is an exclusive right to make, use, or sell a product or service. It is granted by the government, typically for a limited number of years. A patent is, therefore, a monopoly. The earliest patents, issued before the Industrial Revolution in England, were granted at the pleasure of the king to anyone for any reason. The king could, for example, grant a friend or a relative a patent that monopolized the sale of coal in London.

As the power of the kings and queens diminished and that of Parliament and the courts increased, the common law courts began distinguishing between "odious" patent grants, monopolizing previously known skills and bestowed simply as royal favors, from "beneficent" patent grants awarded for a limited time to those who developed new arts and industries. The odious grants were struck down by the courts. In 1624, Parliament enacted a law that limited the granting of patents to the "working or making" of "new manufactures" which others were not using in England at the time the patent was issued. Thus, the concept of granting patents to inventors evolved.

The natural justice of rewarding and encouraging inventors by granting them limited-time monopolies to practice their inventions became firmly established in the American colonies. Accordingly, our Constitution grants to Congress the power to "promote the progress of science and the useful arts by securing for limited time to . . . inventors the exclusive right to their . . . discoveries." In 1790, Congress enacted a law that said any "useful art, manufacture, engine, machine or device, or any improvement therein" may be patented. Despite the remarkable and unforseeable scientific developments that have occurred since then, the United States patent law has changed very little. It now says that "any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof" may be patented. Is a computer program a "process, machine, manufacture or composition of matter?" What about a living organism whose genes have been modified by modern science? These are the types of questions that the United States Supreme Court has recently been called upon to decide.

The first English patent laws restricted

Larry Keenan

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patents to "new manufactures" that were not then known in England, thus encouraging the importation of "beneficent" new industries that would contribute to the economy. Modern statutes go beyond this by requiring that an invention be both "new" and "unobvious"—not obvious to someone skilled in the relevant technology. In addition, modern law requires a complete disclosure of the invention so that anyone may use the invention after the patent expires (modern patents endure for 17 years). In addition, a modern patent always contains "claims" which are precise descriptions of the invention. By studying the claims, it can be determined exactly how much technology is monopolized by a patent. The precise wording of the claims is negotiated between the inventor (or the inventor's patent attorney) and a patent examiner who works for the government and represents the public. Naturally, the inventor usually asks for broad claims covering a wide swath of technology. It is the examiner's job to make sure the claims do not cover pre-existing technology and that the claims limit the patent monopoly to the precise technical contribution the inventor has presented to society.

The patent statutes do not precisely specify what types of new discoveries may be patented—that task has been left to the courts to decide on a case-by-case basis. When science moves into new areas, our courts, like the early English common law courts, have been particularly careful about where to draw the line that separates an inventor's patentable contribution from unpatentable public property. Naturally occurring things, for example, are not patentable in their natural form, even if newly discovered. But is a genetically modified living organism a naturally occurring thing? Printed matter isn't patentable, but is a computer program printed on paper patentable? What if the program is embedded in circuitry which controls an industrial process, like the curing of rubber?

Questions such as these have recently become so difficult and technical that for a short time, beginning in 1972, the Supreme Court gave up its historical role as the chief architect of the law of patents and concluded that Congress alone should decide whether patent protection should extend to computer programs and other recent products of modern technology. But Congress took no action, so in 1980 the Court resumed its historic role by extending patent protection to some of these new technologies until Congress rules otherwise.

James A. Sprowl, a research attorney for the American Bar Foundation, is chairman of the ABA Section of Science and Technology Committee on Automated Legal Research, Data Bases and Accessibility. James J. Myrick is a practicing attorney and member of the Patent Law Association of Chicago. This article is adapted from one that appeared in the American Bar Association Journal, *August 1982.*

Rules of Thumb

The Supreme Court's recent decisions on the patentability of computer programs and genetically modified living organisms all focused on a rule of patent law formulated in the last century. The rule holds scientific principles, laws of nature, and naturally occurring things to be unpatentable in themselves; but it permits patents for new and unobvious practical applications of any of these things.

This rule was first stated in an 1852 patent case, *LeRoy v. Tatham* (1 How. 156). Tatham had discovered that the malleability of lead was such that conventional extrusion machinery could be used to manufacture seamless lead pipe. Tatham did not invent the extrusion machinery, but he tried to monopolize its sale because he was the first to make seamless lead pipe with it. The Supreme Court said that what Tatham had discovered and attempted to claim was not the machine but the scientific principle that enabled the machine to manufacture seamless pipe. The Court ruled that such a "principle, in the abstract is a fundamental truth . . . [that] cannot be patented."

In the *Morse* telegraph case (*O'Reilly v. Morse*, 1 How. 62), decided in 1853, the Court applied this rule to invalidate one claim of Samuel Morse's patent on the telegraph. This claim would have monopolized all uses of "electromagnetism however developed for making or printing intelligible characters . . . at a distance." So broad a claim would preempt the entire phenomenon of electromagnetism, the Court reasoned. Since Morse had developed only one specific method of transmitting characters, he had claimed "more . . . than he invented."

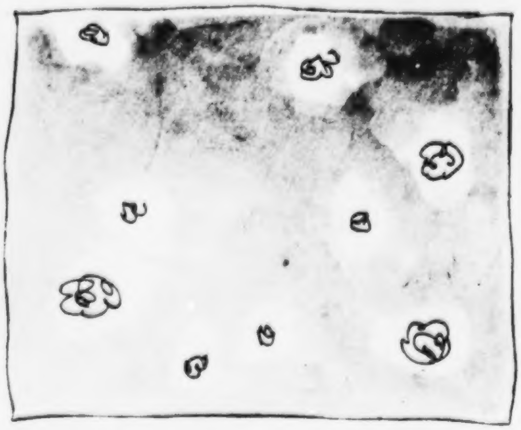
More recently, the Court relied upon this same rule in a case that related to the patentability of living organisms. In a 1948 case, an inventor attempted to patent a selective mixture of different strains of Rhizobium bacteria when used as a "crop innoculant" (*Funk v. Kalo*, 333 U.S. 127). Various individual strains of such bacteria enable agricultural crops to use air as a source of nitrogen nutrients, but the different strains work with different crops—no single strain can be used with all types of crops. Prior to this invention, attempts to mix several strains of bacteria to produce a "universal" innoculant were unsuccessful because the different strains were incompatible. The inventor finally discovered a mixture of several strains which were not naturally incompatible and which could be used to innoculate different types of crops. The Supreme Court had to decide whether a new selective mixture of naturally occurring living things could be patented. A divided court invalidated the patent because bacteria, even in a selective mixture not previously known, were still the "work of nature" and were thus unpatentable.

The rule developed in these cases appears at first to be a prohibition against patenting certain things: scientific principles, laws of nature, and naturally occurring things. But a close examination of these cases reveals that the rule isn't used to deny a patent, but only to force an inventor to narrow the scope of the patent monopoly to the breadth of the "beneficent" contribution to society. In the lead pipe case, for example, the Court suggested it would have allowed claims directed to Tatham's novel *method* for manufacturing seamless lead pipe. In the *Morse* case, the Court approved claims drawn more narrowly to cover only Morse's specific method of transmitting characters rather than all character transmission techniques employing electromagnetism. And in the Rhizobium bacteria case, claims covering the method of producing the mixture of bacterial strains were allowed by the Patent Office (but were not before the Supreme Court). In all three of these cases the Court would have granted the inventor a patent had the Court felt the actual invention was properly specified and defined in the claims.

As long as an inventor's claimed invention is no broader than his or her contribution, the Supreme Court will approve broad patent monopolies. For example, the Supreme Court allowed Alexander Graham Bell to retain a broad monopoly covering the telephone. It noted that although "electricity, one of the forces of nature, is employed," Bell did not claim "electricity in its natural state" but rather the use of electric current in a new, specified condition suited to the transmission

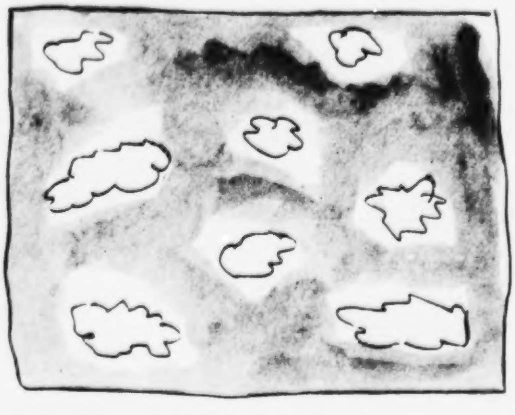
(Continued on page 65)

SUPREME COURT DECISION ON GENETIC ENGINEERING CAUSES PATENT OFFICE BOOM



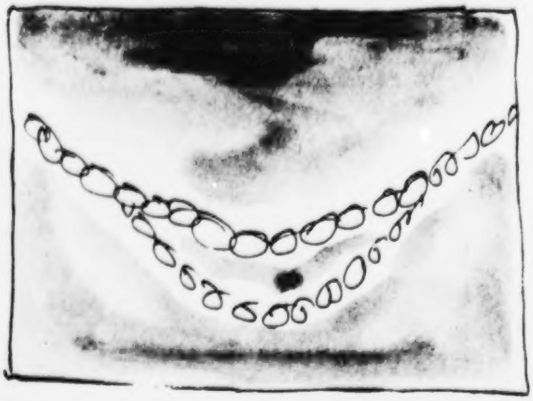
Pat. 310,437,188

Breaks down components of Supreme Court decisions and turns them into usable crude oil.



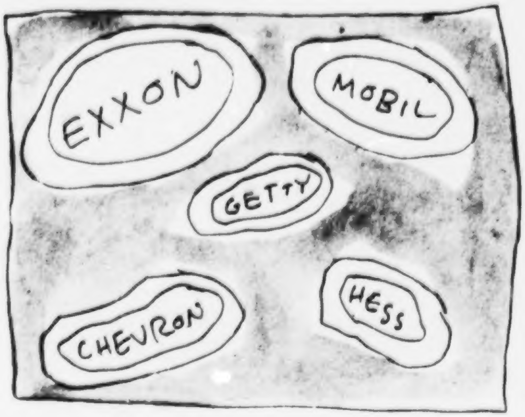
Pat. 740,039,251

By crossbreeding and fusing several strains of bacteria, it converts polyester into prune yogurt.



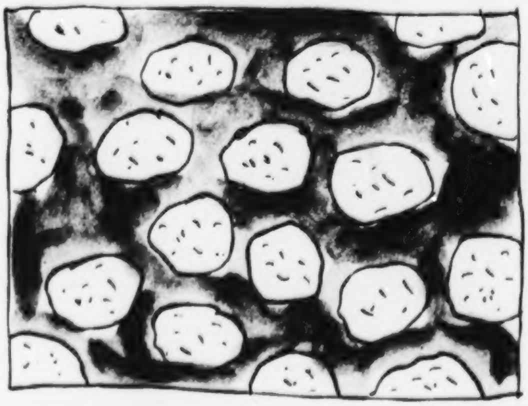
Pat. 624,471,927

Splices genes into designer jewelry of your choice.



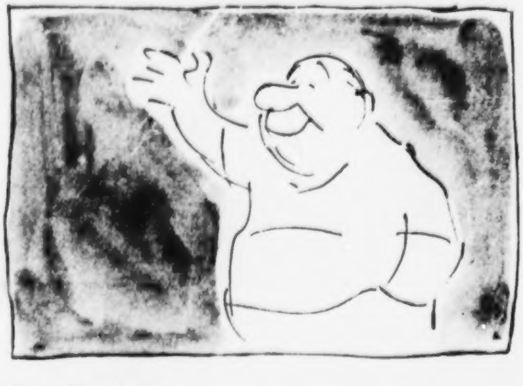
Pat. 530,662,718

After "digesting" an oil spill, it "returns" the oil to its original owner.



Pat. 105,192,270

Blends ethylene glycol and fructose to make high-speed burgers.



Pat. Pending

Charles (Chuck) Cavetti, 65, generally regarded as one of the all-time really great guys, and a lot of fun, received a patent-pending status until it is determined what it is precisely that makes him so terrific.

—James Stevenson

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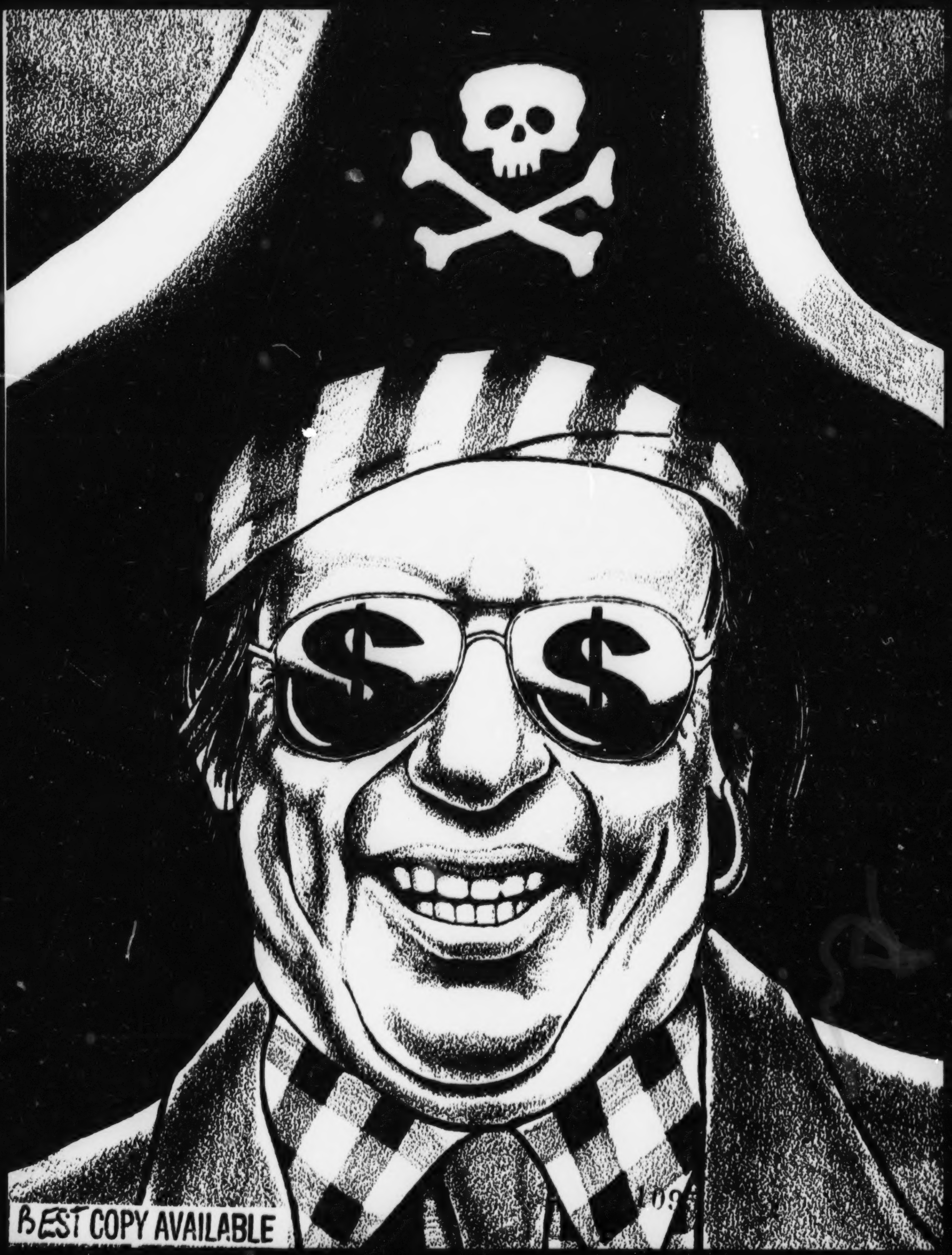

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LAW AND CREATIVITY

Charles White

Piracy Pays—and Pays Well

Stealing jean designs and bootlegging pop records and hit movies is becoming big business

Some deals are just too good to pass up. You're on vacation, strolling along the boardwalk or passing by a bunch of little shops, and some items practically leap out, grab you by the sportshirt, and drag you inside. That big E.T. doll is hard to find in the city. And at the place across the way, you can get the movie *E.T.* on videotape, and you know it's just not available back home. And how about those Calvin Klein jeans? Isn't $22.50 a terrific price for them?

Of course, we all know that there's no free lunch in this world. A lot of these great values are no bargain at all. They probably are counterfeits, carefully designed to look like the original, but nowhere near as good in quality. The toy will probably break, the videotape could well be so dark as to be almost unwatchable, and the jeans might fall apart after three or four washings.

When we think of pirates, we usually think of Captain Kidd and other buccaneers of the Spanish Main. When we think of counterfeiters, we think of guys with the printing presses in the basement cranking out wads of false $20 bills. Actually, the biggest pirates and counterfeiters these days are ripping off legitimate companies—and the public—by stealing their ideas, designs, and trademarks. This modern-day hijacking may not look like big-time crime, but it's a billion-dollar business, and one that is fast attracting organized crime and others who play for big stakes.

A Growth Industry

Almost anything can be—and has been—counterfeited. The list includes such obvious items as watches, pens, jewelry, and clocks, and such unexpected items as automobile and airplane parts, foods, and even medicine. The counterfeiting of parts and medicine obviously raises the stakes for the consumer. If the products are shoddy, he stands to lose not only his investment, but maybe even his life.

Still, the biggest rip offs are probably in the entertainment and fashion industries. Movies, records, toys, T-shirts, and jeans have been illegally copied in increasing numbers in the past few years, and have been sold in virtually every country on the globe.

In many instances, the rise of copying is due to new technology. Until a few years ago, for example, illegally copying movies was strictly small potatoes. It required hard-to-get equipment to duplicate a 16mm movie, and even when you did it, your market was quite small. After all, how many people have projectors?

All that's changed now. Video recording equipment is both a major opportunity and a major headache for the movie industry. The opportunity is the new market created by videocassettes. The headache is the ease by which videocassettes can be copied and sold illegally.

This problem shouldn't be confused with taping off the air for personal use. That may or may not be copyright infringement, but no one alleges that the individuals around the country who tape *The Godfather* for their own use are really criminals. But what about the wholesale infringers, the guys who use the new equipment to run off thousands of copies of *E.T.*, *Star Wars*, or any other big hit? They've invested none of the millions it took to make these movies. They haven't put up a penny for advertising. All they need is one videotape of the film and some inexpensive equipment, and they can run off thousands of copies, sell them to video stores and other retailers, and come out way ahead themselves.

If they make an attempt to duplicate the packaging of the real videocassette, they're engaged in counterfeiting. If they make no attempt to duplicate the packaging—as is often the case, since the legitimate videocassette may not have yet been released to the general public—then they're engaged in simple piracy, stealing someone else's labor at great profit to themselves.

How do crooks get a hold of films? From all sorts of sources: thefts from film labs, thefts of prints from projection rooms, "borrowings" from these two sources, thefts while the film print is in transit, and even tapings off the air. Wide distribution is the whole point of the film industry, so it's almost impossible to prevent prints from falling into the wrong hands.

Once the crooks have the legitimate print, they can reproduce it in several ways. Some techniques are as crude as taking a videotape of the actual movie being projected on a sheet tacked against the wall. Others lead to high-quality

Rafi Kushmir

masters from which one can make an endless supply of good duplicates.

A fake might wind up looking as if it were shot under water, but even so, people will buy it if it's the only way they can get a hot movie for their videocassette player before there's a legitimate one on the market. Other pirated copies, however, may be every bit as good as the legitimate ones, and they too will carry the advantage of being on the market well before the real cassette. (In this racket, the allure of the fake is not its low cost, but its availability before the legitimate competition is on the market. Once legitimate tapes of *Star Wars* are available, the fakes generally disappear. Sometimes a dealer will even give them away—"Buy one tape, get a tape of *Star Wars* free"—to get rid of them.)

How big is the video rip-off problem? Industry sources say that every film made in the last five years has been pirated by someone or other. No matter how bad the film is, no matter how critics may scoff and audiences may sneer, someone will rip it off and try to make a buck. Overall, the industry estimates that it loses $500 to $700 million each year.

Studios Fight Back

No industry can lose this much money and not try to do something about it. The Motion Picture Association of America, a trade organization representing major movie companies in the U.S., began its film security division seven years ago, when the video boom was just beginning to take off. The initial staff of two retired FBI agents has now grown to a worldwide force of 15 to 20 agents, with offices on both coasts and in London, Paris, Hong Kong, and Australia. It's still staffed by retired law enforcement officers from each jurisdiction.

The organization serves as a clearinghouse for complaints and a facilitator of legal actions against the infringers. Most often, complaints come from legitimate retail video dealers, who say that they can't compete with competitors down the street who are bootlegging tapes. (Industry insiders estimate that 25-50 percent of all retailers sell unauthorized copies.) Depending on the circumstances, the security division may gather evidence against the offending store by setting up buys of bootleg tapes and obtaining competent witnesses to testify against the offender. It then brings the prepared case to the appropriate authorities and offers to assist the prosecution in whatever way it can.

Other services might include gathering the evidence that would enable prosecutors to get a search warrant, accompanying them on the search and offering help in separating the legitimate copies from the fakes, and assisting officers to recognize equipment that might have been used in duplicating the illegitimate copies.

Why go to all this trouble, though, when police and prosecutors are accustomed to building cases on their own? The reason, according to Bob Mann of the security division, is that prosecutors are generally inclined to think of this kind of illegal copying as a victimless white collar crime, and one that's relatively low on the list of their priorities. "They don't see generally that theft of intellectual property is every bit as much robbery as the theft of someone's wallet," he says. Mann points out that prosecutors may feel more comfortable proceeding against someone who steals blank tapes—therefore stealing something tangible—than someone who uses his own blanks to steal an image. By bringing cases to authorities on a silver platter, as it were, the security division increases both the likelihood of criminal action being taken against infringers and the likelihood of that action being successful.

Each year the number of successful prosecutions has doubled. In 1982, the number stood at nearly 100, a figure that industry officials expect to double in '83. Often cases don't go to trial, but are resolved by a plea bargain. Typically, the infringer may pay a fine, get a one to three year probation, and lose the equipment he used to duplicate the tapes and the tapes themselves.

Criminal sanctions aren't the only alternative. Most cases are disposed of informally or through civil actions.

Generally, the idea behind these cases is not to win huge monetary damages against the infringers, but rather to get them to stop the activity. According to New York attorney Burton Hanft, whose firm has represented the movie industry for more than 35 years, civil action is preferable when dealing with small-time or "innocent" infringers. In one test case, a civil suit in Maine determined that showing videotapes in a bar constituted a public performance, and so the copyright owner would have to be compensated. The same principle applies to showings in prisons, hotels, hospitals, and ships. Similarly, fraternal organizations and other groups which show films to audiences have to pay a royalty, even though they may never even think about the copyright holder or the compensation he has coming to him. Most of these innocent infringers stop the activity after a warning letter, since they're basically law-abiding citizens who were not aware of the legal situation. For the stubborn ones, it's necessary to litigate.

Both the criminal and civil routes are basically deterrents. Even 100 convictions a year is a drop in the bucket in a country as enormous as ours, and no doubt civil suits are brought against only a small fraction of infringers. However, these legal means do gain publicity, inform the public of the rights of copyright holders, and encourage infringers, "innocent" or not, to think twice.

Renegade Records

Big trouble for the record industry started a few years before the movie industry's headaches. Audiocassettes—and the technology to reproduce them easily—sprang up in the late '60s, and the counterfeiters weren't very far behind. The Recording Industry Association of America (RIAA) began its anti-piracy push 12 years ago. Like its movie counterpart, it can't lick the problem, only hope to keep it somewhat controlled.

Industry sources estimate that about one tape in ten is counterfeited, leading to a loss of at least $350 million a year. At a time when the record industry is already reeling from flagging sales, this loss might have been fatal to some of the companies that have gone out of business recently.

The economics of counterfeit records and audiotapes are different from those of pirated movies. Movie buccaneers, for example, try to get a property onto the market before the legitimate version is released to video stores, and price is not an object either to the retailer or to the customer. In tapes and records, on the other hand, low price is the lure. Pirates can offer a tape or record to retailers for a little over $2, when a legitimate company will ask for twice that much. Retailers can pass some of the savings on to customers, or charge them the full amount and pocket a much larger profit. The packaging on fake records and tapes is good, so some retailers may be fooled into thinking they are carrying the real item. Sound quality generally isn't so good, but that doesn't matter to a pirate since none of

(Continued on page 56)

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Copyright and You

Miriam R. Krasno

Who are the copyright violators? The big companies, right? The guys that print 200,000 copies of a pirated record, or the sleazy company that exports crateloads of fake Calvin Klein jeans from some struggling Third World country. Wrong. Copyright violators—or at least potential ones—are everywhere, even in this country's schools.

If you make it a practice to photocopy things for your students, you might be one of them. A large body of law exists to determine what is fair copying and what isn't. It's a good idea to know those principles for your own sake and also to share with your students. The next time you distribute copies to your students, take the opportunity to talk about how reproducing someone's copyrighted work is regulated by the law.

What is copyright? It gives creators of works control over their reproduction and distribution. The very word "copyright" tells you exactly what's at stake. It gives authors the "right" to control the "copying" of their work.

Copyright doesn't affect at all what you, the buyer, do with a single book or record that you bought. You can give the book to your Aunt Edna, sell it at a used bookstore, or rip up the pages and use them to stuff a pillow. It doesn't matter. It's your book. The same with a record you own. You can give it to that "significant other" in your life or melt it down to make a frisby. Again it's your record.

Copyright comes in only when you try to reproduce that book or record, and there technology plays a big role. Before the advent of the photocopier, it was hard to reproduce something from a book or magazine. When teachers wanted to talk about an interesting article in their classes, they either had the school system buy enough copies to give out to their students, or they gave oral summaries of what the article contained. In neither case is there any copyright violation.

But with the photocopier, making multiple copies is as easy as pushing a button, and so some guidelines have been set up to protect an author from significant intrusions on his copyright—copying that might lower sales—while at the same time permiting the copyrighted material to be used in ways that contribute to the public good.

Courts have decided that "fair use" of copyrighted material permits someone to use the material, without the author's prior okay, for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. . . ." A number of criteria will help you determine if you've made "fair use" of a document.

Most lawyers agree that you can make single copies of published materials for research, study, and lesson planning. That's sensible. It doesn't cut significantly into the market for the books, and it saves you hours in the library taking notes.

But there are some limits on multiple copies: you can make only enough copies to hand out to your class (and only your class), and the copies should be taken back and destroyed after students are done using them.

If you teach in a nonprofit school and don't charge your students for the copies, you probably can claim fair use, but if you're part of a commercial operation charging for copied materials you may be in trouble. If you decide on the spur of the moment to copy something in order to flesh out that day's lesson you're ok, but if you plan to use copies at a later date, and have enough time to get the publisher's permission (about one month), you may need to get that permission (more about that later).

The kind of materials you're copying—and their commercial potential—also affects the legality of your actions. You can freely copy magazine and newspaper articles, unless the publication is published primarily for student use. Those periodicals are usually available at a bulk rate for students, so they are more rigidly protected, as are newsletters whose small commercial market is adversely affected by unauthorized reproduction. Workshops, tests, exercise sheets, etc. are also not supposed to be copied, since copying would reduce sales volume. In addition you have to keep in mind the length of a copy—you can copy a chapter of a book but not a whole book. Again, the likelihood of stealing a sale comes into play.

If you think you can't follow some of these guidelines then you need to get permission to copy the work from the copyright owner. One-time or single-use permission is usually easily obtained from a work's publisher, though keep in mind that publishers may refuse so that you buy more books. Write to the publisher and provide the following information:

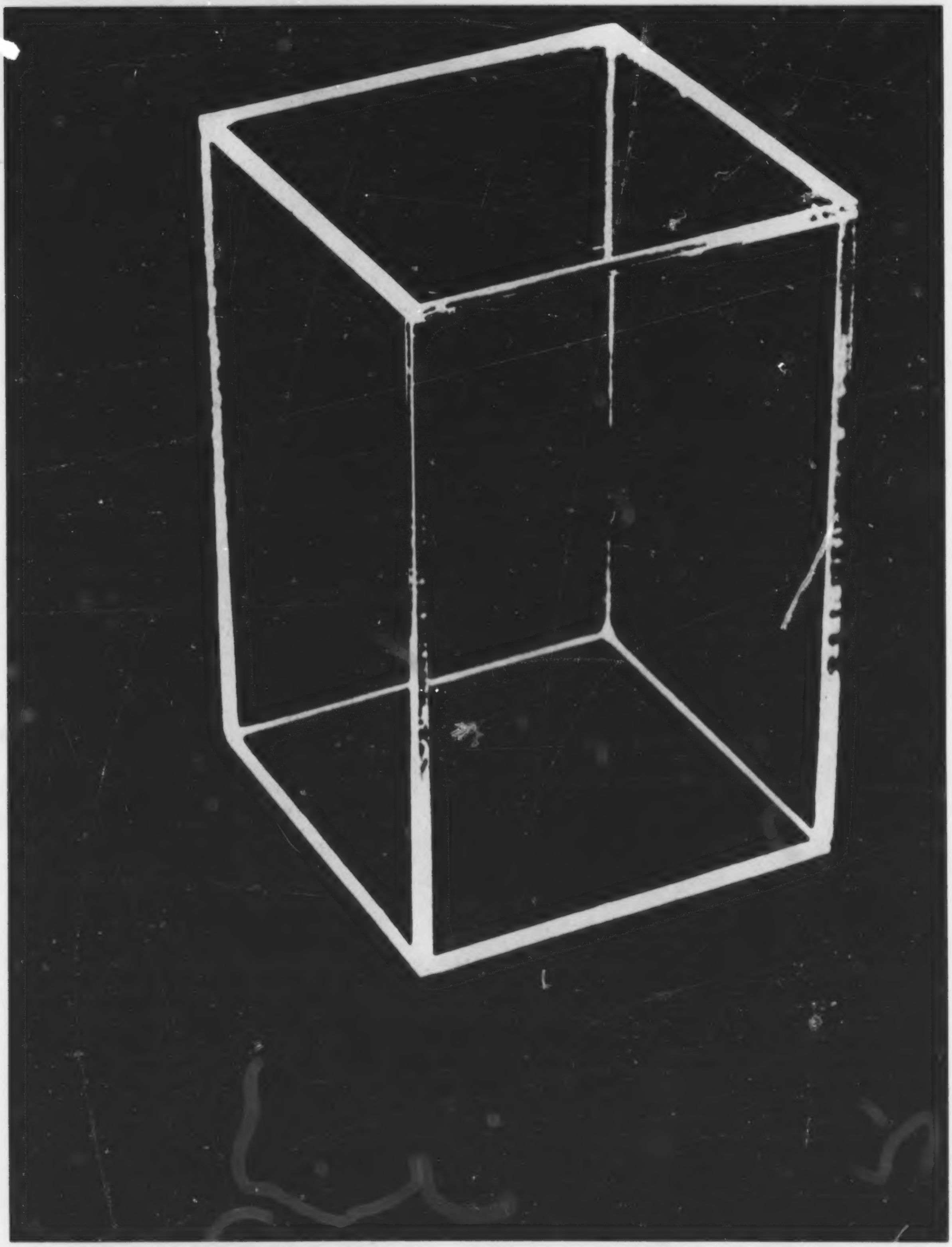
title of work
copyright owner
author
purpose of duplication
pages to be copied
number of copies
type of reproduction
who will get copies
copies will be distributed
  once and free-of-charge

Enclose a stamped self-addressed envelope and allow four weeks for reply.

If you don't get an answer on a second try you could send a check for one dollar (marked void 30 days after date issued) with your request. If your check is cashed you can assume the request is ok. This approach to getting permission may increase the likelihood of you getting the response you want.

Besides the guidelines we've outlined for copying printed documents, there are rules for using performance materials. For a discussion of these, as well as examples of educators' determining fair use of print documents, consult Jerome K. Miller's *The New Copyright Law: A Guide for Educators and Librarians* (American Library Association, 1979).

Here's to happy—and legal—copying!



David Attie

BEST COPY AVAILABLE

Alita Z. Letwin

Invisible Property

Can you own what you can't touch?

One intriguing part of learning about law and creativity is the idea of ownership—can an idea or the picture of an idea be property? Can we adapt one product's trademark or slogan to use on a different product? Can a business like the Associated Press own the news?

The following classroom strategies are a good way for students to begin thinking about what can and cannot be owned. The Law in a Free Society curriculum materials on property (from which these strategies are adapted) ask this introductory question: "Ordinarily, we think of the tangible forms of property—such as tables, chairs, houses, or automobiles—as capable of being owned. But there are less obvious forms of property, intangibles such as ideas, melodies, or airwaves capable of radio or television transmission. As our society becomes increasingly complex, additional phenomena may come to be considered capable of being owned, such as the right to welfare payments, or the right to pursue one's own profession."

Strategy 1.

Laying the Groundwork

This first set of exercises provides some basic information on property and introduces students to some questions about ownership.

Basic forms of property are:

1. tangible, e.g., automobiles, homes, land.
2. intangible, e.g., ideas, airwaves, copyrights, the right to welfare payments, the right to pursue one's own profession, the right to use public resources.

Common forms of ownership include:

1. individual
2. group
3. state

Some sources of ownership rights and responsibilities include:

1. custom and tradition [In many societies, property is held communally by custom, and/or tradition.]
2. rules [Within a family, or within a school, property may be governed by rules.]
3. law [In most Western societies, an enormous body of law exists to define and regulate property.]

By the end of the first lesson students should be able to give examples of tangible and intangible property, identify the form of ownership involved (individual, group or state), and be able to explain the source of ownership rights and responsibilities pertaining to 1) the acquisition, 2) use, 3) transfer, or 4) disposition of each example cited.

Here are some introductory lesson ideas for various grade levels.

Grades K-2

Students might be asked to give several examples of tangible property that they own individually (e.g., an article of clothing, a book, a toy), that their family owns as a group (e.g., family car, home, pet, furniture), and that their school and community own (e.g., a park or swimming pool, library books). They might then discuss each of these examples of property in terms of who owns each item, the source of their ownership, and the rights and responsibilities involved in the acquisition, use, transfer and disposition of the property.

Grades 3-5

Students might be asked to examine a work of literature which deals with issues of ownership. For example, students might read a story such as *Peter Rabbit* and analyze it by asking: 1) who owned the vegetable garden; 2) what was the source of Farmer MacGregor's ownership—custom, tradition, rules or law; and 3) what rights and responsibilities did Farmer MacGregor have as owner of the vegetable garden?

Grades 5-6

Students might watch a film which deals with an example of a form of property, e.g., *The Bike* by Churchill Films. They might then discuss some of the ways in which such property may be acquired, used, transferred and disposed of by individual, group, or state owners, and the rights and responsibilities which accompany such actions.

Grades 7-9

Students might be asked to identify some common examples of tangible and intangible property in our society and some common forms of ownership. Next, they might compare and contrast common forms of ownership in our society with forms of ownership which apply to the same examples of property in other cultures. For example, students might compare attitudes toward private and group ownership of homes and land in our society with those of members of an Israeli kibbutz, a Russian collective farm or a pre-Columbian Indian tribe. Ownership rights and responsibilities in relation to property acquisition, use, transfer and disposition might be compared and contrasted among the various cultures under examination.

Grades 10-12

Students might be asked to analyze a court case dealing with an issue of ownership of property. For example, students might read the facts of a case such as *International News Service v. The Associated Press*, 248 U.S. 215 (1918), which raises the question of whether the news can be considered property and, if so, what rights and responsibilities the owner should have in regard to the acquisition, use, transfer and disposition of news. A detailed description of this lesson appears in the next section.

Strategy

2.

Who Owns the News?

Students begin this lesson by examining some common forms of property and ownership and deciding criteria that can be used to determine ownership. After reading the facts of the case, students role-play a mock trial to decide it.

At the end of the lesson, students should be able to:

1. develop criteria for determining ownership;
2. explain the positions of the International News Service and the Associated Press in regard to whether news can be considered property and, if so, what rights and responsibilities should accompany acquisition, use, transfer and disposition of news; and
3. decide the case, and give reasons for their decisions.

As preparation for a mock trial to determine whether the news can be considered "property," you might wish to have the class think about some of the basic ideas involved in the concept of property. In order to do so, the class could be divided into small groups and asked to first define property in their own terms, and then to discuss and reach conclusions about the following kinds of questions.

To examine what forms of property exist, the groups could discuss:

1. What are some common examples of property?
2. Can non-tangible things such as ideas, music and literature be considered property?
3. Can certain skills, like those of a doctor or plumber, be considered property? [Recent decisions suggest that they can.]
4. Can natural resources such as air, water and land be considered property?
5. Are there certain rights, for example, to welfare payments, to river water or to the use of public lands that might be thought of as property? [Again, recent decisions suggest that such rights may be property.]

To examine the forms of ownership that exist, the groups could discuss:

1. Can something which is not privately owned be considered property?
2. What other forms of ownership might exist?

To decide upon criteria useful in determining ownership, the groups could discuss:

1. What role, if any, does the law play in determining ownership of property? Can you give examples of laws that relate to what is property, and who is its rightful owner?
2. Does custom or tradition play any role in determining ownership of property? Can you give examples of customs and traditions that relate to what is property, and who is its rightful owner?
3. What rights go along with the ownership of property? What responsibilities? How might these rights and responsibilities relate to:
    a. the acquisition of property;
    b. the use of property;
    c. the transfer of property; and
    d. the disposal of property?

As an entire class, discuss the conclusions each group has reached, comparing similarities and differences in their

(Continued on page 60)

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What's a work of art worth? One criterion is aesthetic. If the work makes the world more beautiful and uplifts our spirits, then it's valuable. But a work of art is also a piece of property which is bought and sold, and its monetary value is based on demand, just like a building or a car.

The career of artist Mark Rothko was a roller-coaster of shifting values. Rothko, who was born in Russia in 1903 but brought to the United States at an early age, saw both his critical standing and price of his paintings hit the peaks and the valleys. Most of his work is abstract—differing configurations of colors on the canvas—and through most of his career he met with no success with either the critics or the public. Often he sold his canvases for a few hundred dollars—if he sold them at all.

However, in the 1950s and 1960s, Rothko's career blossomed. The critics were first, hailing him as a major American artist while he was still obscure to most of the general public. In time, buyers were willing to pay more—much more—for his works, and he was finally able to sell canvases for as much as $40,000 apiece.

Was the canvas that sold for $40,000 four hundred times better than one sold for $100? Of course not. The value of the more expensive one depended on Rothko's reputation, the canvas's place in his career, the buyer's guess that it would be a good investment in inflationary times, and other subjective questions.

An Art Scandal

Normally, this would all be a matter of economics, not law. However, in *The Matter of Mark Rothko* (379 N.Y.S.2d, 1975), a very important trial for the art world, assigning monetary value to works of art was the center of a long and bitter legal dispute. Rothko commited suicide in 1970. His will arranged for a moderate sum of money to be settled on his wife. She was also to inherit their townhouse and its contents. But Rothko left the bulk of his estate (798 paintings) to a foundation he had established before his death, with an unspecified charitable function.

It Isn't Just Art, It's Property

Paula Wisotzki

Given the kind of money that was being paid for Rothko's paintings at his death, this trove was worth millions and millions of dollars. Rothko had always kept a large number of his works in his possession. At the beginning of his career this was not a matter of choice—no one was interested in purchasing them. But later on, ths hording reflected his concern about the destiny of his works. He even refused to allow his dealer to see the complete collection of his paintings, but always brought a selection of them from his storehouse and arranged them in his studio for the dealer to make his choice.

Despite the obvious concern about his works. Rothko was curiously imprecise in his instructions about the fate of his paintings after his death. Perhaps, like many of us, he refused to face up to the inevitability of his death. Perhaps he was superstitious about discussing what should be done with his paintings after he was gone. He did name as executors of his will men he considered to be his friends, and he may have felt that they knew him well enough to carry out his wishes even though they were not spelled out in his will.

Rothko's widow died just six months after him, and soon his two children, Kate and Christopher, began to suspect that something was wrong with the way the executors were handling the estate. The children felt that the executors were wasting the estate's assets by selling all of the estate paintings within months of the artist's death, at prices far below what they thought they were worth. They filed a suit against the executors, and the legal battle was on.

The central issue of the case was what Rothko's paintings were worth. The executors argued that the affect of Rothko's death on the value of his paintings was an unknown factor. They said that when the paintings were sold, the buyer—the Marlborough Gallery, a well-known and quite successful establishment with branches in European capitals as well as New York City—took a great deal of risk in acquiring such a large number of paintings by one artist. The plaintiffs countered with expert witnesses who testified that in almost every case, the death of an artist caused the price of his paintings to rise. As one gallery director testified, the death of the artist creates "a finite commodity, where there once existed an open-ended one."

The executors claimed that Marlborough Gallery paid a reasonable sum for the paintings. They quoted an appraisal of the paintings that they had solicited from a gallery they frequently did business with, and they pointed out that galleries often received a large discount when acquiring a group of works all at the same time. The plaintiffs came up with alternative valuations of the paintings at the time of the sale, but their strongest evidence were the profits that the gallery had made by reselling some of the works almost immediately after they were acquired. Documents were introduced that showed that the gallery paid $1,800,000 for 100 paintings, and in a few months sold just 17 of these for over $1,200,000.

The plaintiffs also scored heavily by pointing out that the executors faced a severe conflict of interest, since two of them had financial interests in the Marlborough Gallery, and so benefited financially if the gallery made huge profits on Rothko's paintings.

So What's It Worth?

After an eight-month-long trial and several appeals, Rothko's children were vindicated. The court found that the executors had indeed placed unreasonably low monetary values on Rothko's paintings. The court also determined that two of the executors of the estate were guilty of self-dealing because of their financial connections with Marlborough. The court's decision removed the executors of the estate and fined them and a director of the Marlborough Gallery more than $9 million. The 658 estate paintings which remained from those sold to the gallery were to be returned to the foundation.

The decision might have pleased Rothko. He was interested in preserving the integrity of his works, and the outcome of the Rothko trial made that more likely. The Rothko Foundation has worked to keep as many of them together as possible.

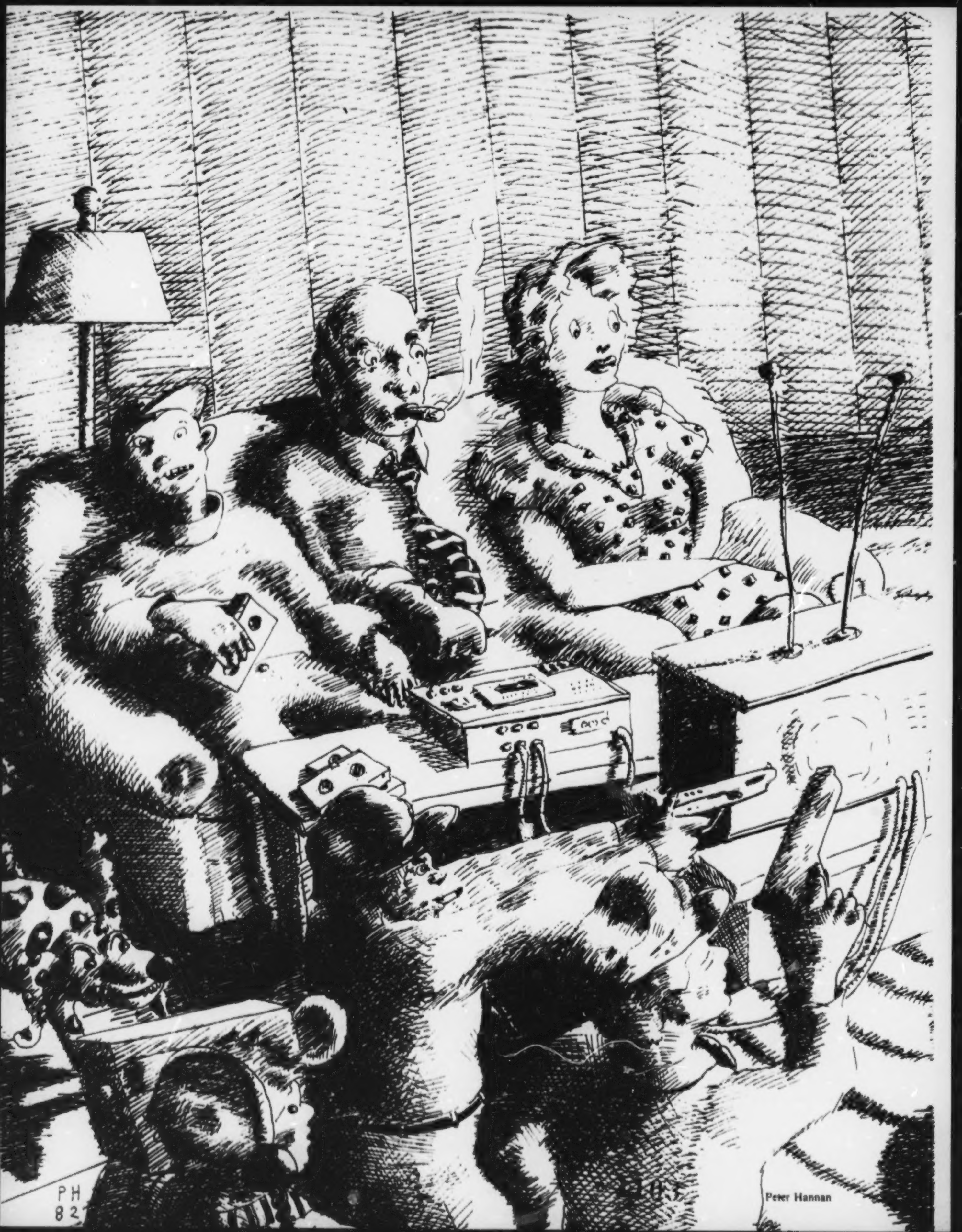
This look into the art marketplace gives an excellent example of the artificial nature of value. The materials in a painting may only cost $10 or $20, but that painting can be worth $20,000 if that fickle factor—demand—is high. The case also shows that the artist himself often plays a very small part in the valuation of his creation. His work is in the hands of dealers, museums, and the buying public, and the beauty or spirit of the piece may be less significant than a rich family's need to have a hedge against inflation.

The Rothko case also unearthed the seamy side of the art world. Art dealers have been known to drive the price of a work up by secretly bidding on it themselves at auctions. Because of the secrecy that prevails in the art world, it's often hard to trace paintings. For example, although the Rothko family won in court, many of his paintings are still missing. According to Lee Seldes, author of *The Matter of Mark Rothko* (New York: Holt, Rinehart & Winston, 1978), "Secrecy or 'discretion' are the hallmarks of each and every deal—even sales at public auction, so that rigging is not only expected, but silently condoned."

The Rothko trial may have done something to change these practices. It made artists aware that they cannot afford to be naive and uninterested in business matters, especially concerning their estates. And many artists are now looking for ways to curb the large profits that dealers are able to make on paintings without compensating the artists.

The Rothko case has a lot of lessons for your students, too. It gives them a chance to discuss how property is given a value, raises issues of the ethics of a will's executors, and suggests the greed that is so often present when a lot of money is on the line and a will is left too vague. And for any budding artists in the class, it may be their first glimpse of the business of making art.

Paula Wisotzki is a graduate student in art history at Northwestern University. She is writing a dissertation on Mark Rothko.



Peter Hannan

The Scene of the Crime

If the Supreme Court decides against Betamaxes, five million American living rooms will be off limits for legal copying.

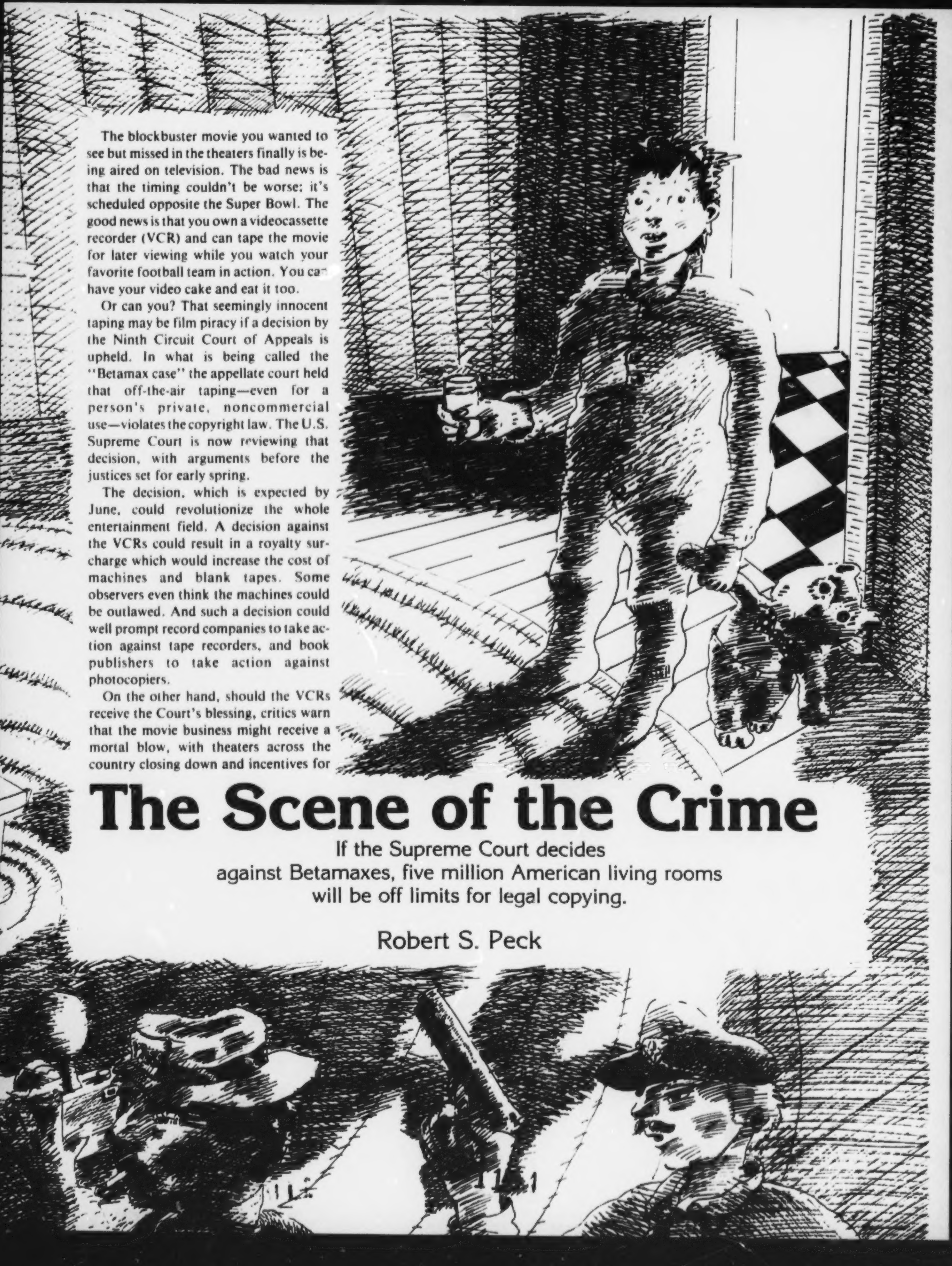
Robert S. Peck

The blockbuster movie you wanted to see but missed in the theaters finally is being aired on television. The bad news is that the timing couldn't be worse; it's scheduled opposite the Super Bowl. The good news is that you own a videocassette recorder (VCR) and can tape the movie for later viewing while you watch your favorite football team in action. You can have your video cake and eat it too.

Or can you? That seemingly innocent taping may be film piracy if a decision by the Ninth Circuit Court of Appeals is upheld. In what is being called the "Betamax case" the appellate court held that off-the-air taping—even for a person's private, noncommercial use—violates the copyright law. The U.S. Supreme Court is now reviewing that decision, with arguments before the justices set for early spring.

The decision, which is expected by June, could revolutionize the whole entertainment field. A decision against the VCRs could result in a royalty surcharge which would increase the cost of machines and blank tapes. Some observers even think the machines could be outlawed. And such a decision could well prompt record companies to take action against tape recorders, and book publishers to take action against photocopiers.

On the other hand, should the VCRs receive the Court's blessing, critics warn that the movie business might receive a mortal blow, with theaters across the country closing down and incentives for



making new movies dramatically reduced.

A High Stakes Dispute

When the Sony Corporation introduced its Betamax recorder in 1975, home entertainment suddenly changed. Television viewers could now record their favorite programs for later or repeat viewing. No longer would they have to miss shows that were inconveniently scheduled. Consumers regained control of their day by rearranging the television schedule to fit their needs.

In 1976, Universal City Studios and Walt Disney Productions brought suit, claiming that the new machines were being used to tape their copyrighted films and might well cut into their profits. They named as defendants Sony, its American distributor, certain retail stores that carried the VCRs, the advertising agency that promoted the product, and an individual Betamax owner (see related story).

Universal and Walt Disney complained that because Betamax owners taped films from their television sets, audiences would be reduced when the films were rereleased to the movie theaters or were repeated on television. Although the studios conceded that they had not yet suffered any losses at the time of the trial, when there were still relatively few sets in the country, they said that their potential losses were staggering. For example, because programs taped for later viewing are not considered in the television rating system, their audiences might be undervalued. This affects advertising revenues since the rates are set according to audience size. Furthermore, the studios claimed that VCR users skip through the commercials by using the fast forward switch. Therefore, even if the television rating services included VCR taping in estimating audience size, advertisers would get almost no value from VCR viewers.

Sony defended the recorders by saying that home recording didn't violate the studios' copyrights, as long as the tapes were not put to any commercial use. Any harm to the studios, Sony said, was both prospective and speculative.

A Clash of Values

This case vividly illustrates the conflicting principles at stake in copyright law. On the one hand, the U.S. Constitution recognizes the power of Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As the constitutional language suggests, copyright law encourages the arts by giving the creator a monopoly over the profits to be made from his or her creation.

But there's another interest at stake too. To protect the needs of the general public, the monopoly is limited somewhat. The Supreme Court has said that a certain balance must be maintained between private enterprise and public access to the arts. In *Twentieth Century Music Corp. v. Aileen*, 422 U.S. 151, 156 (1974), the Court said: "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."

The courts have attempted to promote broad public access to the arts by devising the Fair Use Doctrine. Applying a rule of reason, the doctrine allows people to freely use copyrighted material for certain limited purposes such as criticism, comment, news reporting, teaching, scholarship or research. The basic idea behind fair use is that these limited exceptions won't cut into the work's sale, and so don't really limit the copyright holder's monopoly.

What is fair use? Some fairly clear-cut examples include having a character in a movie watch a few seconds of a real TV show. Other examples would be a not-for-profit group's reprinting portions of an article, or quoting from a book in an article examining the book's subject. What all of these have in common is that

The Making of a Video Pirate

"Video pirate" may sound like a new electronic arcade game, but far more than quarters were at stake in 1976 when two major Hollywood studios brought the "Betamax" case against Sony Corporation, several of its distributors and its advertising agency. Universal City Studios and Walt Disney Productions claimed these defendants were contributory infringers of the studios' copyrights by manufacturing and marketing VCRs. However, they couldn't sue Sony for abetting copyright infringement, unless they also sued one of the 20,000 people who owned a VCR at that time and had used it to tape a copyrighted television program. William Griffiths was their video pirate.

Griffiths, the former owner of a video production company, bought a Betamax as soon as they were available in the United States. He wasn't selected as a defendant because he was shadowed by agents of Walt Disney as soon as he bought his VCR. It happened most innocently.

One evening, he invited his attorney to his home to show off the new gadget. That attorney was a member of the law firm preparing the case against Sony. When they needed to find a Betamax owner to serve as a defendant, Griffiths' name came up.

The firm promised Griffiths that it would not seek damages against him, but that they were only naming him as a symbolic defendant. In fact, Griffiths did not retain a lawyer and did not participate in the defense of the lawsuit. He attended the five-week trial only once, when the plaintiffs put him on the witness stand to testify about his taping activity.

At the time of the trial, he owned 100 tapes that included recordings of one movie and two episodes from a pair of television series, all produced by Universal. He testified that he had taped two other motion pictures owned by Universal, but had erased both, one without a playback. Griffiths also had used his Betamax to preserve other programs, as well as news, sports and political events. He had intended to use his VCR to record programs for later viewing and to build a library of tapes, but was finding it too expensive to save many programs.

Today, Griffiths is out of the video production business and works as a promoter for a women's roller derby team. He still uses his Betamax to record television programs, the only reason he is still interested in the outcome of the lawsuit. As for his old law firm, Griffiths told the *Los Angeles Times*, "I haven't been using them much lately."

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they're not attempting to duplicate the work. They couldn't be confused with the work itself, and so shouldn't cut into sales. In fact, they might add to sales.

A Split Decision

Unfortunately, not all cases are so clear-cut. The doctrine often requires a balancing of public and private interests that cannot easily be balanced. That difficulty was evident in *Williams & Wilkins Co. v. United States,* 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court,* 420 U.S. 376 (1975), where a medical publisher sued the government for copyright infringement. Two agencies of the federal government, the National Institutes of Health and the National Library of Medicine, were making photocopies of articles in their libraries available to researchers. Many of these articles came from the plaintiff's medical journals. The Court of Claims concluded that the government wasn't liable for infringement because the copying was a fair use.

Since the copying done by these federal nonprofit research institutions contributed to the advancement and dissemination of medical knowledge, the court decided that it filled a legitimate public purpose. The institutions were sufficiently cautious in using copyrighted matter, limiting copying to single requests of up to 50 pages. The court was also persuaded by arguments that library copying is common and that medical science would be hurt by a ban on copying. Besides, the publisher failed to convince the court that it was being injured economically by the practice.

When the issue came before the Supreme Court, only eight justices participated, and they split down the middle. As a result, the decision stood unchanged. The Supreme Court's inability to reach a conclusion supported by a majority demonstrates how close a call fair use decisions can be.

However, sometimes a laudable public purpose is insufficient to invoke fair use. A New York school district tried to save money and achieve greater distribution of educational audio-visual aids by setting up its own reproduction operation. Over a twelve-year period, the district had acquired $500,000 worth of audiovisual equipment capable of duplicating 10,000 tapes a year. The operation employed between five and eight full-time workers and distributed tapes to more than 100 schools throughout the county. When the producer of the educational films sued, the court found that the school district was illegally attempting to avoid paying the producer for his labor.

The court said, "The scope of [the school district's] activities is difficult to reconcile with its claim of fair use. This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use, but concerns a highly organized and systematic program for reproducing videotapes on a massive scale" (*Encyclopaedia Britannica Educational Corp. v. Crooks,* 447 F. Supp. 243, 252 (1978)). Since the program basically competed with the manufacturer, the school district's copying didn't meet the standards for fair use.

In both of these cases, new technology—photocopy machines, machines capable of copying films—made the copying possible, but for most of this century, copyright law was governed by a statute dating back to 1909. The 1909 Act provided the copyright owner with the "exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work;..." The Act quickly fell behind the times as new technologies developed new ways around the owner's exclusive control.

One type of new technology was already around when the 1909 Act was passed. However, believing that jukeboxes were toys that would quickly go out of fashion, the authors of the 1909 Act exempted them from any copyright levy unless an admission fee was charged to enter the premises. That meant that jukebox owners could purchase a copyrighted record and make back their investment many times over by playing it for a fee. The copyright owner saw none of this profit, while the recording's availability in a jukebox may have depressed record sales. Before long an industry grew up around the jukebox, and successfully opposed legislative revisions that would impose a fee on operators. It wasn't until the copyright law was finally replaced in 1976 that a compulsory licensing system was imposed on the music machines.

In 1909, most copying technology—radio, TV, tape recorders, photocopy machines—was completely unknown, yet the Act had to deal with these and other unanticipated advancements. Because the law didn't answer the copyright questions that often arose when a new invention made copying easy, the courts had to resolve the issues, mostly by using the fair use doctrine and trying to balance the artist's rights with those of teachers, scholars, and any others who copy often.

In 1976, a new copyright act was passed that attempted to incorporate the technological innovations of the past 67 years. It, too, gave exclusive authority to the copyright holder "to reproduce the copyrighted work in copies or phonorecords." It also adopted the court-created doctrine of fair use. It required almost immediate revision; in 1980, copyright coverage was extended to computer programs.

VCRs and the Law

One change in the Act turned out to be important in the Betamax case (*Universal City Studios v. Sony,* 480 F. Supp 429, 1979). In dealing with the issue of sound recording, the Act adopted the provisions of a 1971 amendment to the 1909 Act. That amendment prohibited the copying of protected works through taping systems. However, the authors of the 1971 provision had stated: "... it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it."

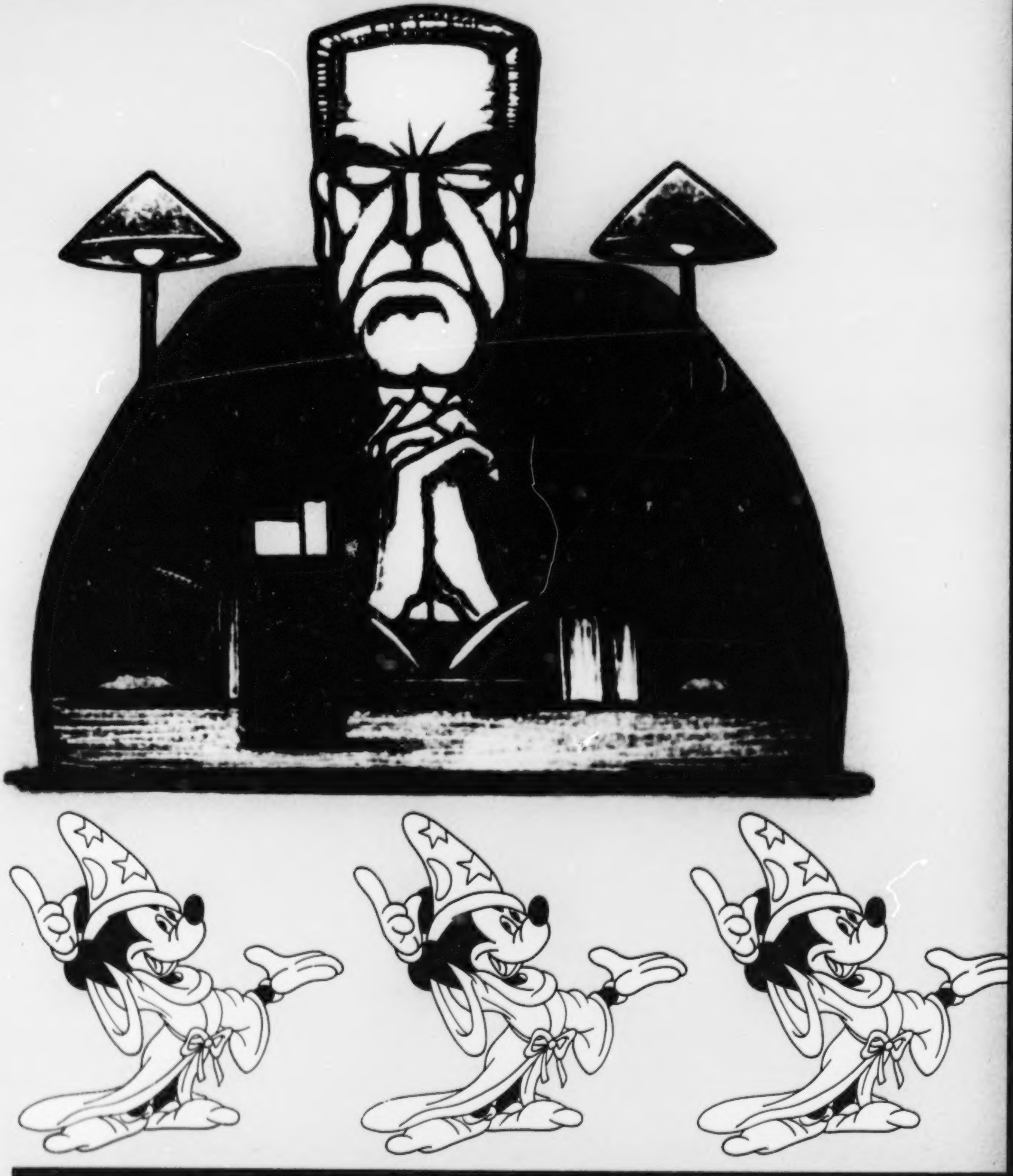
The new Act was silent on the legality of home audio-visual recording, but in the Betamax case Sony argued that a VCR should be treated the same as a tape recorder. As long as a tape was produced for the private, noncommercial use of the VCR owner, no liability should be imposed.

The trial court agreed with Sony. It found that the VCR recordings should be treated like sound recordings, and were permissible to the extent that individual off-the-air copies were made in the home for the copier's private noncommercial use. Even if videotape recording was not, by analogy, covered by this sound recording exemption, the court said home copying was a fair use. The trial court also found the VCR to be a staple item of commerce—like cameras, typewriters, and photocopy machines—having so many uses in addition to the potentially infringing one that it would be inappropriate to encumber it with copyright considerations.

The court said: "Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers [because] some purchasers on some occasions would use their product for a purpose which a court

(Continued on page 46)

LAW AND CREATIVITY



Janet Garstka

Lisa Broido Kenoe

Parody: Not Always a Laughing Matter

Judges sometimes pan lampoons of copyrighted works, but some get rave reviews before the bench

> Parodies and caricatures are the most penetrating of criticism
> —ALDOUS HUXLEY

> Parodies are the tribute that mediocrity pays to genius
> —OSCAR WILDE

What infuriates plaintiffs, makes judges write like movie reviewers, and confuses lawyers? Parodies. The ancient practice of lampooning songs and literary works does more than offend the victims—it often leads to law suits that confound the courts.

The art of parody has had a long and controversial history. Its origins date back to ancient Greece. Homer's epic poems were the targets of parody, and the works of Aeschylus and Euripides were mocked by Aristophanes. The list of authors who have tried their hand at parody includes such notables as Shakespeare, Swift, Poe, Faulkner, Hemingway, and Thurber—to name just a few.

Some artists and authors are flattered to be the subject of parody. Rumor has it that Charles Dickens was crushed when his works were *not* included in a series of parodies published in *Punch* magazine. Other artists are less enthusiastic. Some wince privately, some fight back with angry letters or parodies of their own, and some turn to the courts for help.

In the past year or so, the courts have been confronted with a *Saturday Night Live* comedy skit which used a portion of the "I Love New York" advertising jingle; an off-color ditty which was closely analogous to the nineteen-forties hit, "Boogie-Woogie Bugle Boy of Company B"; an ABC television show entitled *The Greatest American Hero*, whose central character had superhuman powers that paralleled those of Superman; and a musical comedy called *Scarlett Fever* which was, frankly my dear, quite similar to *Gone With the Wind*. In all these cases, the victim of the parody said that his copyright was violated. Whether they won or not had a lot to do with the specific facts of each case.

Court decisions involving parody have been extremely inconsistent and unpredictable. Some judges have taken a very liberal stance towards parody, while others have thrown the book at it. Parody cases are difficult because a successful parody must closely parallel an original work in order to effectively comment upon it. As one commentator has noted, "The truest parodies are those that tamper the least with the material they are spoofing. Just enough to blow them sky high." This unique characteristic of parody often puts it perilously close to copyright violation.

Both early and recent case law reveals that the law of parody is largely unsettled. The courts have not been able to come up with any quantifiable guidelines on how much can be appropriated from copy-

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righted songs, books, plays, movies and other artistic works without infringing upon a copyright-holder's rights. A host of other factors, including the purpose of the parody, its commercial potential, and its content, also come into play.

Mocking Famous Singers

The first American cases dealing with parody infringement involved song mimics. In *Bloom & Hamlin v. Nixon*, 125 F. 977 (1903), the defendant was sued for imitating Lotta Faust, a popular singer of the early 1900s, by singing the copyrighted song "Sammy." The *Bloom* court's holding raises many of the issues that later courts have grappled with. One key issue is length of the parody. The court held that "A parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced."

Another key issue is the purpose of the parody. Is it a legitimate effort to comment on copyrighted work, or is it a ploy designed to let the singer steal the work: "No doubt the good faith of such mimicry is an essential element; and, if it appeared that the imitation were a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly." In this case, however, the court accepted the defendant's good faith and found no infringement.

Green v. Minzenheimer, 177 F. 286 (1909), and *Green v. Luby*, 177 F. 287 (1909), were companion cases around the turn of the century which also involved defendants who mimicked the styles of popular singers. In *Minzenheimer*, the court found that the defendant had not infringed the copyrighted song "Redhead" because only one verse of the song was lifted. But the same court took a contrary position in *Luby* because the defendant had performed an entire copyrighted song entitled "The Queen of Vaudeville." The *Luby* court stated, "I am not satisfied that, in order to imitate a singer, it is necessary to sing the whole copyrighted song."

A few years later, the well-known cartoon characters Mutt and Jeff were the subject of a parody suit. In *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (1914), the defendant's "Cartoonland" show featured characters named Nutt and Giff who looked strikingly similar to Mutt and Jeff. The owner of the Mutt and Jeff copyright asserted that this show constituted an infringement. The defendant countered that the show was a parody which was a "fair use" of the copyrighted work. In general, commentary on copyrighted works, or criticism of them, constitutes "fair use" of the material, since it does not reproduce the work and thus does not cut down the market for it.

In this case, though, the court found that Cartoonland's characters did in fact infringe upon the Mutt and Jeff copyright. Articulating one of the major standards in parody cases, the court ruled that "a test which is ordinarily decisive is whether or not so much has been reproduced as will materially reduce the demand for the original." The *Hill* court said that Cartoonland flunked that test. It also implied that Cartoonland had not acted in good faith when it "borrowed" the plaintiff's characters.

Benny Bops Boyer

It was not until 1955, with the advent of television, that the courts were once again faced with the difficult task of balancing the social benefits of parody and the rights of copyright-holders. One of the first cases involved comedian Jack Benny and a burlesque of the classic 1944 motion picture, *Gaslight*, which starred Ingrid Bergman and Charles Boyer. Shortly after the release of this movie, Benny performed a short burlesque of the movie entitled "Autolight." That posed no problem, but six years later, when CBS announced that it was planning to produce a full-length burlesque of *Gaslight*, featuring Benny and Barbara Stanwyck, the movie company went to court to get an injunction against the production.

A Federal district court in California heard *Loew's Inc. v. Columbia Broadcasting*, 131 F. Supp. 165 (1955). It compared the TV script of "Autolight" with the original movie and found that they were "substantially similar." In rejecting CBS's assertion that the parody was a fair use of the copyrighted work, the court took an extremely restrictive view of the fair use doctrine. In words that appeared to sound the death knell for the art of parody, the California court stated that "Plaintiffs have a property right in *Gaslight* which defendant may not legally appropriate under the pretense that burlesque as fair use justifies a substantial taking." The court asserted that "a parodized or burlesque taking [should be] treated no differently from any other appropriation."

The California District Court's decision in *Loew's* was affirmed by the Ninth Circuit Court of Appeals, 239 F. 2d 532 (1956) and by a divided U.S. Supreme Court, 356 U.S. 43 (1958). Nonetheless, the decision was severely criticized. Some observers were distressed because the court placed undue emphasis on CBS's potential commercial gain from Benny's parody. Others were concerned that the case would have a chilling effect on the whole genre of parody. One judge went so far as to say that the decision "was wrong—and possibly unconstitutional."

Shortly after the Jack Benny case was decided, another parody-infringement case arose in California. This one involved TV comedian Sid Ceasar. In *Columbia Pictures Corp. v. National Broadcasting*, 137 F. Supp. 348 (1955), NBC was sued for infringing upon the copyrighted movie *From Here to Eternity* by presenting a parody entitled "From Here to Obscurity." The brief parody poked fun at the famous beach scene in the original movie. One observer described the controversial burlesque as follows:

> The famous beach scene of the movie became pure slapstick in Ceasar's skit. He made his entrance wearing a bathing suit and a huge life preserver. Throughout the scene, pails of water were thrown at him offstage. The climax of the movie scene came when "Warden" got up the courage to ask "Karen" whether or not she had had affairs with men at the base. In the parody, Ceasar mustered up enough courage to pop the all important question, "Did you bring a towel?"

The California court that heard the case was the same one that had just held against Benny and CBS, but this time it went the other way, deciding that Sid Ceasar's parody did not constitute an infringement. The court reasoned that "the doctrine of fair use permits burlesque to go somewhat further so long as the taking is not substantial." The court found that this parody was different from Jack Benny's because "here there was a taking only sufficient to cause the viewer to *recall and conjure up* the original" (emphasis added).

The Sid Ceasar case thus appears to be a complete turn-around from the Benny decision. However, the Ceasar court added the caveat that "The defense: 'I only burlesqued' the copyrighted material is not *per se* a defense."

Of course, TV is not the only defendant in parody cases. One famous case in-

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volved *Mad Magazine*, a magazine well known for its mocking treatment of everyday life. The magazine had printed a collection of song lyrics which were billed as "a collection of parody lyrics to 57 old standards which reflect the world we live in today." Unfortunately, many of the songs were copyrighted. Irving Berlin was not pleased when his "A Pretty Girl Is Like a Melody" became "Louella Shwartz Describes Her Malady," and Berlin, along with a number of other copyright-holders, sued *Mad* in the case of *Berlin v. E. C. Publications*, 219 F. Supp. 911 (1963), *aff'd* 329 F.2d 541 (1964).

This case was heard by a Federal district court in New York. The New York court's attitude towards parody was radically different from the California court's in the Jack Benny and Sid Ceasar cases. The New York court stated that "as a general proposition . . . parody and satire are deserving of substantial freedom—both as entertainment and as a form of social criticism." The New York court held that *Mad Magazine*'s satire had not infringed upon the copyrighted songs.

Mickey Gets Frisky

Walt Disney's "Mickey Mouse March" was the subject of the next significant parody-infringement action. In *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397 (1975), the owners of the copyright to the "Mickey Mouse Club" sued to prevent the use of that music in a movie entitled *The Life and Times of the Happy Hooker*. In the movie, three nude male teenagers wearing "Mouseketeer" ears sang the Mickey Mouse song while performing various sexual acts that cannot be described in this G-rated publication.

The defendants claimed that their use of this copyrighted material constituted a fair use because this was merely a "humorous take-off" of the song which was designed "to highlight and emphasize the transition of such teenagers from childhood to manhood. . . ." A Federal district court in California was not convinced by this creative defense. The court found that the defendants had improperly used the copyrighted material by appropriating a greater amount of the original work than was necessary to recall or conjure up the "Mickey Mouse March."

There's something about little Mickey that makes him an irresistible target. Walt Disney was in court for years in the 1970s in a suit against a magazine entitled *Air Pirates Funnies*. (*Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108, (1972); 581 F. 2d 751, (1978), *cert. denied*, 438 U.S. 1132, (1979)). This publication was discreetly described by the court as "an 'underground' comic book which placed several well-known Disney characters in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles, and happy endings."

The defendants in *Air Pirates* claimed that placing Mickey and his chums in markedly different settings was a parody of the original work, which they said constituted a fair use of it. A Federal district court in California rejected this contention. The court found that the defendants had borrowed more than was necessary to "recall or conjure up" the original. "Given the widespread recognition of the characters involved here," Judge Cummings reasoned, "very little would have been necessary to place Mickey Mouse and his image in the minds of the readers."

Parody Meets the 80's

Even though the decade is barely three years old, there have already been a plethora of parody cases. These recent decisions show that the courts are still struggling to balance the rights of copyright-holders and the social benefits of parody. Some Federal courts—particularly those in New York—have taken a very liberal attitude towards parody, finding it a socially-useful form of comment which deserves to be protected. But other courts have taken a highly constrictive stance towards parody, especially when x-rated or off-color humor is involved. With the courts so divided, we're far from a definitive ruling on how much one can borrow from a copyrighted work.

The popular late-night variety show *Saturday Night Live* recently got hit with a copyright suit when it did a spoof on New York City's "I Love New York" advertising campaign. In the skit, members of the SNL cast portrayed the mayor and members of the chamber of commerce in the Biblical city of Sodom. The chamber of commerce was shown discussing the need for a new advertising campaign which would divert attention from the town's reputation for gambling, gluttony, idol worship, and sodomy. The highlight of this campaign was the song "I Love Sodom," sung to the tune of "I Love New York."

The owner of the copyright to "I Love New York" failed to see any humor in the sketch and instituted an action for copyright infringement. In *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (1980), NBC admitted that its sketch and song were intended to resemble the original "I Love New York" jingle. However, NBC contended that the use of the plaintiff's melody was a *de minimis* taking and further asserted that this constituted a fair use of the copyrighted material.

The *Elsmere* court agreed that NBC's use of the plaintiff's jingle constituted a fair use which would exempt it from liability under the 1976 Copyright Act. (Fair use, which had been created by the courts over the years, was given statutory definition in the 1976 Act.) The court used the four guidelines set forth in Section 107 of the Act in determining that this was a fair use of the song. These guidelines cover:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

Looking at the first part of the test, the purpose and character of the use, the court ruled that the song "I Love Sodom," as well as the sketch, was clearly a parody of New York City's attempt to improve its somewhat tarnished image through the use of a "slick campaign" and a "catchy, upbeat tune." As such, it was clearly an attempt to comment on the campaign and not a ploy to steal the song. As to the amount and substantiality of the portion used, the *Elsmere* court held that no more was appropriated than was needed to "conjure up" the original. Finally, the court concluded that NBC's use of this song did not interfere with the marketability of the jingle.

The district court opinion in *Elsmere* was affirmed by the Second Circuit Court of Appeals in a *per curiam* opinion (623 F.2d 252 (1980)). "In today's world of often unrivaled solemnity," said the court, "copyright law should be hospitable to the humor of parody." The Second Circuit hinted at an extremely broad standard for parody in a footnote to this decision. There, it stated that "A parody is entitled at *least* to conjure up the original. Even more extensive use would still be a fair use, provided the parody builds upon the original as a known element of modern culture and contributes some-

(Continued on page 68)

LIFE BEYOND COPYRIGHT

LAW AND CREATIVITY

Miriam R. Krasno

American law protects the property value of art, but European concepts are protecting the sanctity of the artwork itself

In 1975, Monty Python's Flying Circus went to court. No, not in a skit for their TV series and not because they were being sued by some object of their unique satire. They were in court here in the United States to protect their reputation for producing a TV series that "says what it wants to say, does extraordinary things, takes all sorts of chances, is not out to sell corn plasters. . . . It is out to entertain, surprise, enlighten even, the people that are viewing it." (*Gilliam v. American Broadcasting Companies*, 538 F.2d 14, 1976). The troupe wanted to prevent ABC from broadcasting a special compilation of Flying Circus tapes that, as they saw it, ABC had hacked to bits.

Terry Gilliam, one member of the troupe, had further thoughts on the matter. "We think of each one as a show, try to interrelate all these things; so the form is as important to the name of Monty Python as the laughs." He then offerred this analogy with Manet's "Dejeuner sur l'Herbe" (in which a nude woman picnics on the grass, accompanied by two young men clothed in suits): "If one pays attention only to the nude, as ABC had done by, as it were, removing her, then you get cheap sensations out of it. You have lost the whole concept of the painting, which is the conjunction between the two things, the nude and the very bourgeois picnic setting."

According to the artists, ABC's editing damaged their vision. They're not alone in their feelings. It's common for a playwright to find his play substantially altered in production. Some film directors discover when attending a premiere that their work has been re-edited or scenes reshot without their knowledge, let alone consent.

Although most artists seem resigned to losing control of their creative work, Monty Python wasn't. They went to court to fight back—and won, in the process standing the law and arts field on its head. Before *Gilliam* American law generally failed to recognize an artist's personal rights in his creation; in this landmark decision a court implicitly made this recognition. The United States moved a little closer toward accepting a concept already widely in use in Europe—the notion of an artist's "moral rights" or *droit moral.*

Personality and Creation

When artists create they do more than just produce a work to be economically exploited. Each work of art contains the projection of the artist's personality, mind, and vision, and, because of this kind of revelation, the artist can be injured in ways other than economic. Over 62 countries recognize the artist's moral rights, which give an artist control over the production and modification of his or her creation. These rights exist independently of pecuniary interests in the work of art.

Moral rights originated in France, arising from the individualism accompanying the French Revolution. The artist was seen as a romantic character—starving in a freezing garrett—and since he sacrificed so much to give his creative genius to the world he had the right to expect his gift would be respected. Throughout the eighteenth, nineteenth and twentieth centuries, French courts saw to it that the artist's work was indeed respected, and the artist's moral rights were born.

The moral rights doctrine was embraced by other countries at the 1928 Berne Convention for the protection of Literary and Artistic Works. Article 6 *bis* of that Convention reads in part:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right, during his lifetime, to claim authorship of the work and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work, which would be prejudicial to his honor or reputation.

The doctrine, then, attaches moral rights to the artist, not to the work, and they remain vested in the artist even after a work has been sold or transferred.

The United States has not accepted the doctrine of the Berne Convention. The concept of personal property is paramount in American law and it is difficult for legal notions that compromise individual ownership to gain ground here. We tend to think a piece of artwork is property just like a chair or a toothbrush, something we own and can modify or dispose of as we please. The idea that the artist may retain certain kinds of control over a work even once it has been sold (as can happen in countries ascribing to the Berne Convention) is alien to our way of buying and selling.

What specific rights can the artist claim in countries that do ascribe to the most recently revised Berne Convention of 1971? They fall into four general categories: the right of an artist to decide when to release his work (divulgation), the right to pull a work from distribution (withdrawal), the right to be credited for a work (paternity) and the right to control the integrity of a work.

Is It Done?

The countries recognizing the artist's moral rights acknowledge that only the author of a work of art can decide when it has fulfilled its creator's original conception and is ready to be disclosed to the public. The cases in French law of Whistler and Camoin reveal some of the principles involved in the right of divulgation.

In 1898, the artist James McNeill Whistler was commissioned to paint a portrait of Lord Eden's wife. Whistler exhibited

Alfred Gescheidt

Photo courtesy of Columbia Pictures Industries, Inc.

Does this man look like a plaintiff?

the portrait in public but then argued with Lord Eden about payment for the painting. He refused to deliver it, claiming he was dissatisfied with it, and painted the subject's face out of the work. Lord Eden sued for breach of contract, demanding the portrait be delivered. A Parisian court excused Whistler from delivering the portrait because he was dissatisfied with the work, but did require the artist to pay damages to Lord Eden for his failure to perform under contract. The court clearly upheld the artist's right to remain master of his work until he was satisfied with it, even when the right of disclosure conflicted with a contractual obligation.

The Camoin case illustrates a slightly different angle. The painter Camoin had slashed and discarded some of his paintings because he wasn't happy with them. They were found, restored, and sold at a 1925 auction by the writer Francis Carco. Camoin had the canvases seized and asked that they be destroyed. The Paris Court of Appeals ordered that the works be destroyed as Camoin had wished and said:

> [A]lthough whoever gathers up the pieces becomes the indisputable owner through possession, the ownership is limited to the physical quality of the fragments, and does not deprive the painter of the moral right which he always retains over his work.

This decision has been criticized on a number of different grounds. It sets up a paradox around ownership—who really owns the art object if the artist can order it destroyed. Critics have also questioned the decision to destroy the work instead of simply deleting the artist's signature, rendering the work anonymous. As one scholar noted: "After all, if *droit moral* arises from a notion that art works somehow are more sacred than [easily replaced] property, it would be ironic for the doctrine to justify court-ordered art burnings." (DaSilva, 1980).

The French may look favorably toward the right of divulgation but its inverse, the right to withdraw a work from publication or to make modifications in it (the second moral right), has become severely restricted in practice. At first glance moral rights doctrine seems to permit a writer to interrupt publication of his work or to try to take a book of his out of circulation. It also seems to allow other kinds of artists the right to alter a work already distributed to the public. But these kinds of situations would lead to huge practical difficulties, and a recently enacted French statute has imposed limits on the theory. Artists in France must now pay the owner of the work, in advance, for losses a retraction or change could cause. This same law also states that when a work is withdrawn "if the author does publish the retracted work, he must first offer it to the original transferee [publisher, gallery, etc.] on the same terms as the original contract." These terms help protect publishers from bad faith exercise of moral rights. Additionally, changes in a work are limited, by law, to insignificant alterations and must be done with the consent of the owner since an artist can't repossess his work to perform alterations on it. Here we see the French giving way to property interests—in this area the "owner" clearly has rights to the property even if the artist is asserting his claims to the piece.

That's Mine

The third aspect of moral rights doctrine, paternity, is more generally recognized and enforced. Moral rights countries value highly the artist's right to receive credit for his work. Paternity rights apply in three different ways. First, an artist's name should appear not only on the original art object but on all copies as well (even if a contract indicates otherwise). Secondly, an artist can prevent someone else from getting credit for his work. Finally, paternity rights include an artist preventing his name from being used on work that isn't his.

Paternity rights do pose some dilemmas. One problem is the limitations placed on an artist, which forbid him to waive his rights in a contract. Although French law declares that an artist's paternity rights are perpetual, inalienable, and unassignable, one French scholar has asked: "Must we always consider authors to be nursery school children? . . . Why should we treat authors like minors, and defend them against acts permitted to every other person, regarding every other type of property and every other type of rights?" (P. Recht, 1961)

An even more important question surrounding paternity rights is whether to extend them to protect an artist's reputation or the "respect for one's name." Let's say a gallery sells an artist's work cheaply to raise money quickly. Could the artist then say the sale attacked his reputation? Commentators have warned that the *droit moral* was never meant to guarantee market prices for a work of art.

One writer summed up the problems with paternity rights by saying: "Thus, despite the utility of the doctrine, *droit a la paternite* at times may prove to be an unnecessary exercise of paternalism, which achieves no more for artists than could be secured by other, less restrictive legal principles." (DaSilva, 1980)

What Have You Done!?

The final aspect of moral rights, respect for the integrity of an art object, is clearly not a superfluous concern. Without legislated moral rights doctrine, artists have found their works decimated and their recourse either nonexistent or based on legal principles not really related to the integrity of their work of art.

In countries with moral rights the artist can count on judicial support for their creations. Again we turn to France for an example of this protection. The artist Bernard Buffet had painted the six sides of a refrigerator. Its owner was going to take the refrigerator apart in order to sell each individual panel as a separate work. Buffet opposed this action since he viewed the refrigerator as "an indivisible artistic unit." His opinion was upheld by the Paris Court of Appeals and the Cour de Cassation—the sale violated the artist's right of integrity.

Ironically, the right to prevent change or abuse of an art object doesn't necessarily prevent its destruction. As one commentator saw it:

> The doctrine of moral right finds one social basis in the need of the creator for protection of his honor and reputation. To deform his work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for a work he has not

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done; the destruction of the work does not have this result. (Roeder, 1940)

Artists' Rights in the U.S.

What happens here in the United States when an artist feels his work has been violated? Since we don't have a formal moral rights doctrine, the four aspects of the doctrine are protected (or not protected, in some cases) by a variety of federal and state laws.

The American artist's right to decide when a work is done is protected by United States copyright laws, in that an artist who applies for a copyright is signifying that a work is in final form. If he doesn't apply for a copyright, then presumably he is not ready to disclose the work. However, U.S. courts may be more willing to assess damages against an artist who doesn't perform under contract, as, for example, in situations like the Whistler case.

There are other differences in our treatment of the right to decide when a work is done. It may waived, transferred or sold. If, for instance, an artist creates a character in an unpublished work, he can then give someone else the exclusive right to use the character by contract. In moral rights countries the artist theoretically retains a perpetual right to his creation even if a contract takes it away. (In practice, however, the courts generally honor the contract.) Not surprisingly, since even moral rights countries limit their use, the United States does not recognize the problematic rights of withdrawal or modification after a work has been disclosed.

Turning to paternity, the first aspect of that right—the right to claim authorship—has been similarly neglected. Although it seems reasonable that we would value an artist receiving credit for his work, in fact this isn't always the case. In *Vargas v. Esquire, Inc.* (335 U.S. 813, 1948), the artist, creator of the famous Vargas girls, brought suit against the magazine for publishing his drawings without crediting him. The court held that unless the contract between Vargas and *Esquire* stated that Vargas would get attribution (which it did not) then Vargas couldn't claim that right.

The other two paternity categories, however, are protected here. An author can stop someone from taking credit for his work by suing for either copyright infringement or unfair competition (the practice of imitating the name or product of another company or person in order to steal its business). And in libel or invasion of privacy suits an artist can prevent attribution of someone else's work to him.

As for the last category, protecting the integrity of art work, it is much harder here than in moral rights countries and less clearcut. Until recently, preventing mutilation of a creation was virtually impossible and resulted in the loss of many pieces of American art. The sculptures of David Smith have been particularly brutalized.

While Smith was alive the paint on one of his sculptures was altered. The artist was outraged and wrote the following letter to the art community.

> This willful work of vandalism causes me to deny this work and refuse any future sale to any of those connected with this vandalism. I tried to repurchase this work but was refused. There seems to be little legal protection for an artist in our country against vandalism or even destruction. Lacking full proof, I cannot name the guilty participants; but I ask other artists to beware. Possibly we should start an action for protective laws. (*Arts*, June 1960)

After his death the executors of Smith's estate allowed more alterations in some sculptures and allowed outdoor pieces to be damaged by weather conditions. Some art critics were outraged by the action but little could be done to stop it.

Although courts have recognized that severe alteration or editing may constitute distortion of a work, without specific contractual provisions to the contrary, the changes are generally allowed (*Preminger v. Columbia Pictures Corp.*, 273 N.Y.S.2d, 1966). French courts have developed principles to determine when a work, or the adaptation of a work, no longer possesses the spirit and character of the original. But this means the courts have been called on to decide a primarily aesthetic—and subjective—matter.

Courts in the United States have generally been unwilling to inquire into these matters in this way. American law is more accustomed to dealing with property than with aesthetics, and so artists find their cases decided in a very different way in the U.S. than in European courts. Our courts tend to decide the issue by considering the law of it—what did the contract allow, who owns the copyright, etc.

But law does change in common law countries like the United States, albeit slowly. As public morality and values change, courts allow new interpretations of statutes and precedent cases. As more artists find their way into courtrooms to challenge the misuse of their work, the courts have begun to respond to their clamour for protection.

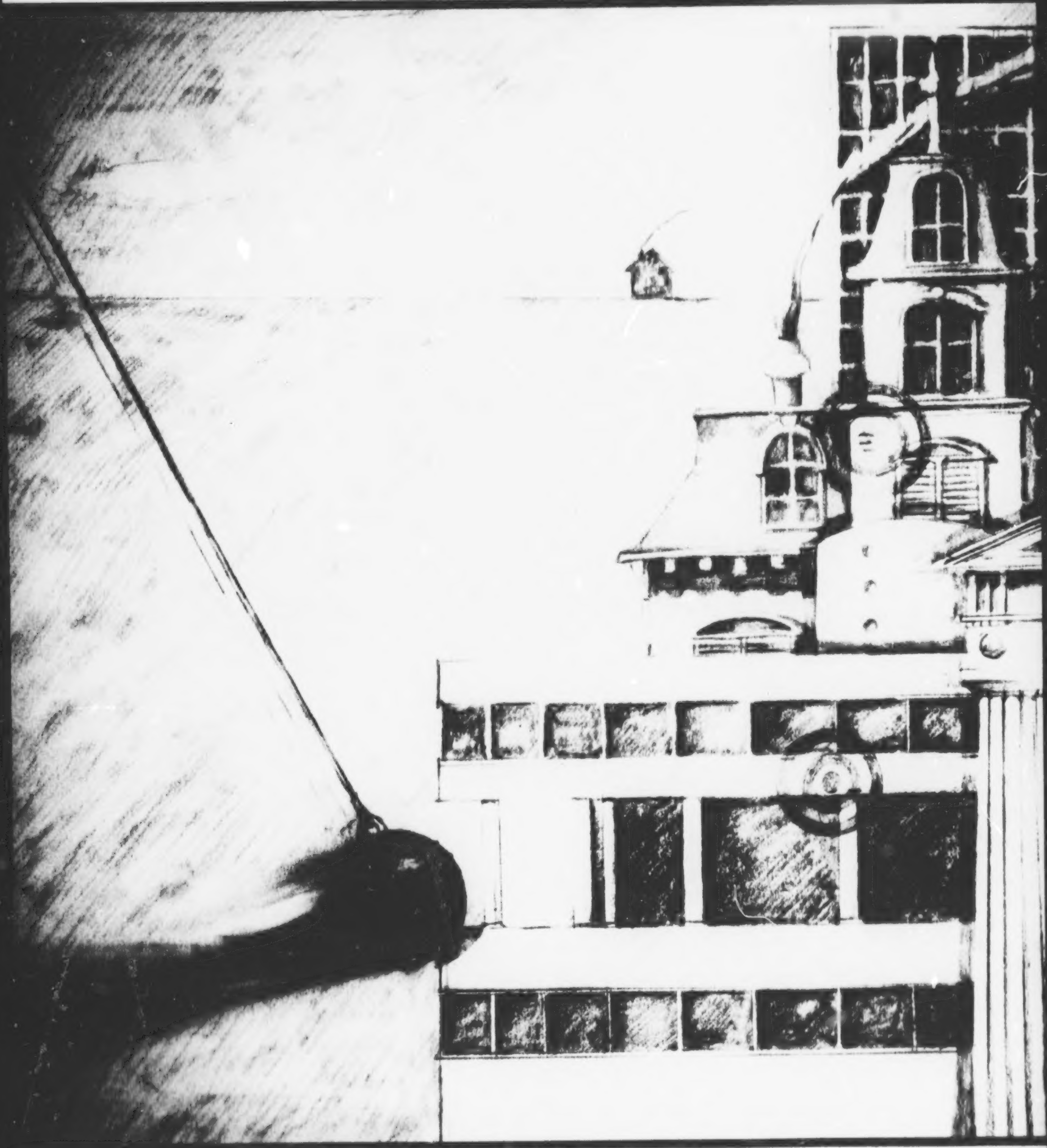
The Monty Python case (*Gilliam v. American Broadcasting Companies*, 538 F.2d 14, 1976) is considered a landmark because an American court did recognize that artists had "legally enforceable personal rights which are at least coincident with economic interest in [their] created work." (DaSilva) The case was won, though, by extending American remedies to the concept and not by some bold new finding that a violation of moral rights, by itself, would have been enough to win the suit.

The Monty Python troupe had tried to stop ABC from broadcasting two "specials" consisting of compilations of their popular TV series, which had been produced originally for the BBC. They failed in a lower court and the specials were run,

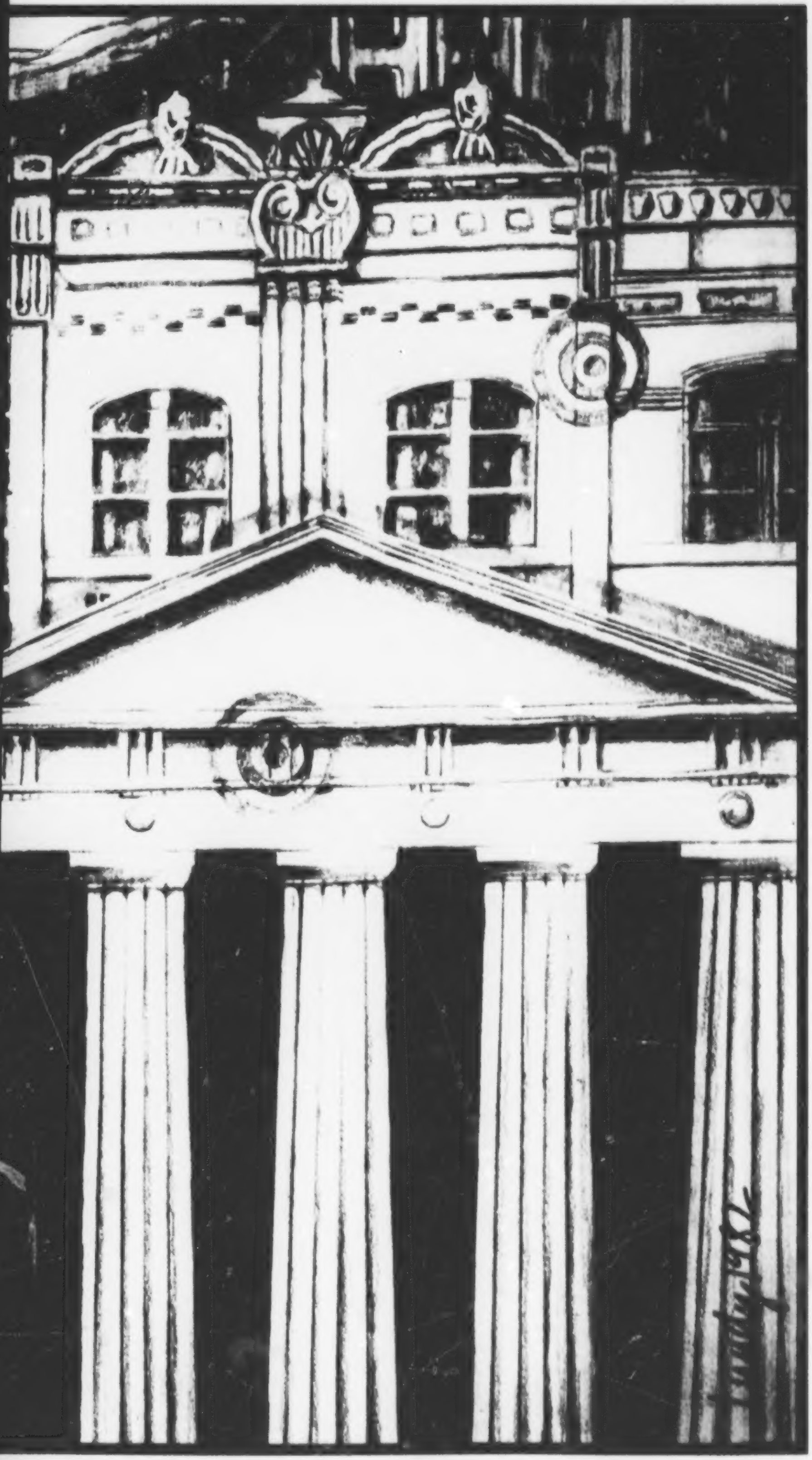
(Continued on page 51)

The Monty Python Troupe may be fools—but only on their terms.

Photo courtesy of Columbia Pictures Industries, Inc.



Larry Lundy



Sharon Irish

Can the Law Save Beauty?

Well-intentioned landmark preservation laws often miss the mark

That abandoned hotel on the corner—aren't there laws that say derelict buildings like that have to be torn down? I mean, look at the graffitti all over the walls, and the windows with jagged glass. You can even see fire damage from here.

Wait a minute! That "derelict building" is one of the best examples of Art Deco architecture in the city. Fix it up and it will be the pride of downtown. Aren't there laws that say buildings like that have to be preserved?

Most of us know what we like and don't like when it comes to beauty. But how do we convince anyone else that we're right? What if we have to convince a judge?

Because nothing is more subjective than personal responses to art, the law usually doesn't get involved in aesthetics *per se*. Rather than deciding simply on the basis of what is and is not beautiful, judges tend to look at the law of it—the specific language of a preservation statute, the legal procedures to be followed to lawfully condemn a building.

Make no mistake about it. These dry procedures can still generate a lot of passion. The point of zoning regulations and historic preservation laws is to take some action to control our built environment, but the problem is that these laws often move people out of homes, change property values, and spark messy arguments among people who own property, people who don't own much of anything but live on that property, and people who have to look at what's built on it.

Regulating the use and appearance of private property is usually sanctioned by what's called the police power.

Public safety, public health, peace and quiet, and law and order traditionally are guarded by the police power, which expands and transforms as legislative bodies see fit. In 1911, Justice Oliver Wendell Holmes attempted a definition of this catch-all phrase in *Nobel State Bank v. Haskell* (31 S. Ct. 186): "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is . . . held by the prevailing morality . . . to be greatly and immediately necessary to the public welfare."

The police power has been used by legislatures to decide which buildings should be torn down and which buildings should remain standing, which slums should be revitalized and which historic landmarks should be preserved. But controlling private property—either by restrictions on how it can be used or by eminent domain—creates controversies which keep courts busy. The goal—a more attractive community—is laudable, but there is little agreement on how to achieve it.

Values in Conflict

First of all, no one agrees on what an attractive community is. In the 1907 case of *Bacon v. Walker* (204 U.S. 311), the Supreme Court stressed that the police power is not just prohibitory: "The police power is not confined to the suppression of what is offensive, disorderly, or unsanitary. . . ." Rather than merely banning garbage in the gutters, litter along the roadside, and spittle on the sidewalks, then, the legislatures of the land can provide for parks, gardens, sewage disposal and, yes, beautiful buildings. But what is beautiful? It is never as simple as petunias in neighborhood planters.

A second dilemma in creating an attractive environment is that the police power of the legislature smacks into constitutional guarantees that protect individual rights. The Fifth Amendment, for example, guarantees that private property will not be taken without due process and will not be taken for public use without just compensation. This "taking" can either be literal, as in cases of eminent domain when the state takes over private property, or it can involve controls over private property, such as requirements that buildings in historic areas can't be changed. Aggrieved property owners have thus used the Fifth to challenge the constitutionality of legislative programs.

In two Supreme Court cases separated by more than twenty years, the Justices upheld the constitutionality of laws regulating property in the public interest. The two cases, *Berman v. Parker* (75 S. Ct. 98) of 1954 and *Penn Central Transportation Co. v. City of New York* (98 S. Ct. 2646) of 1978, show a trend toward allowing beauty a greater role in the public welfare.

Berman and Blight

In *Berman v. Parker*, a department store owner maintained that taking his property as part of efforts to eliminate blight in the nation's capital had deprived him of the Fifth Amendment's guarantee of due process of law. (The D.C. Redevelopment Act of 1945 did not define blight; the statute implied that "blight" meant obsolete and backward.)

The Redevelopment Act empowered an agency to acquire real estate by eminent domain or other means in order to carry out civic improvements. In 1950, a planning commission came up with a plan to renew an area of southwest Washington. Of the 5,012 people living in this targeted area, 97.5 percent were black. According to surveys cited by the commission, 64.3 percent of the dwellings were beyond repair and 18.4 percent needed major repairs. Over half the housing units had outside toilets, 29.3 percent lacked electricity, 82.2 percent were without laundry tubs or wash basins, and 83.8 percent lacked central heating. Not surprisingly, these conditions were deemed injurious to public health, safety, morals and welfare.

The detailed commission plan allocated land for business, industry, recreation, education, and residences, including a diversity of dwelling units, of which at least one-third were to be low-rent housing.

After a public hearing, the plan was approved and the initial steps were taken to carry out the redevelopment. Some land was to go to public agencies for streets, utilities and schools. The remainder was to be leased or sold to a redevelopment group that would carry out the publicly approved plan to the letter. Preference was to be given to private enterprise.

The plot thickens here. Not only was the government taking one person's property in order to boldly redevelop an urban area, but the regulations allowed, indeed encouraged, private interest to do the legislature's bidding. Not only was public use competing with private, but governmental action prompted competition among private parties. Gwendolyn Wright points out in her recent book, *Building the Dream: A Social History of Housing*, that by 1950 businesspeople were generally avid supporters of federally funded urban redevelopment because when a municipality decided to rebuild a deteriorated neighborhood (only 20 percent of which had to be classified as blighted), the federal government would underwrite two-thirds of the costs, enabling business to profit at little risk. Large enterprises were usually successful in obtaining contracts.

But not all businesses profited. In *Berman v. Parker*, the department store owner contended that the D.C. Redevelopment Act was unconstitutional. Since his property was commercial, his argument went, it could not be "taken" as blighted housing, and since the execution of the project was to be under private management, the use was not a public one.

A unanimous Supreme Court read the law differently. Justice William O. Douglas delivered the opinion of the Court, which, with modifications, affirmed the lower court's decision:

> The legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Aha, you say, the Court mentioned *purpose*, whereas Berman was talking about *use*. Here is a key shift in the interpretation of the police power. The transition from use to purpose signified that the purpose of the "taking," as distinguished by the Court from its subsequent use, may be what is required to fulfill a given public interest.

Certainly, in the very next paragraph, Justice Douglas indicated the Court's approbation of the areawide plan. The redevelopment had to be comprehensive in order to serve the public purpose.

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

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> ...It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.
>
> If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

The Court's opinion went on to place the dilapidated dwellings and crowded conditions in context, stressing the importance of overall planning. Lack of parks, absence of well-maintained streets and alleys, and traffic congestion compounded the housing problem and thus had to be included in a definition of a slum. That one department store did not imperil health or contribute per se to blight was not sufficient cause for it to be left alone.

> If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress....Community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

Stagnant Quo

This final judicial nod to areawide planning modified the opinion of the lower court, which had had grave doubts regarding the wholesale redevelopment of a given section of a city. The opinion of the three-judge court, written by Circuit Judge Prettyman, expressed the quandary about whose ideas of a proper environment should win out (117 F. Supp. 705, 1953). Remember, the Supreme Court said that "it is within the power of the legislature to determine that the community should be beautiful as well as healthy...." The hesitant, cautious attitude of the District Court provides an interesting contrast:

> ...[W]e have the problem of the area which is not a slum but which is out-of-date, called by the government "blighted or deteriorated"....[T]he purpose of the plan, in addition to the elimination of slum conditions, is to create a pleasant neighborhood, in which people in well-balanced proportions as to income may live. The Government is to determine what conditions are pleasant, what constitutes the "most appropriate" pattern of land use, what is a good balance of income groups for a neighborhood....
>
> Of course the plan as pictured in the prospectus is attractive....It would be difficult to think of a village, town or city in the United States which a group of artists, architects and builders could not improve vastly if they could tear down the whole community and rebuild the whole of it. But as yet the courts have not come to call such pleasant accomplishments a public purpose which validates Government seizure of private property.

The Supreme Court's decision, on the contrary, allowed the government to pursue such "pleasant accomplishments" in the name of public purpose. The broadening of the police power, the shift from structure-by-structure condemnation to overall redevelopment, was understood as the only recourse to ridding cities of slums. (Now, 29 years after *Berman vs. Parker*, many urban redevelopment structures have been erected—and many already torn down. We may look differently on ambitious cleansweeps of a whole inner-city region; the hope that updated, well-lit apartments and a few parks can repair the damage of years and years of oppression and poverty may seem outmoded.)

Berman strengthened the place of aesthetic concerns as part of the definition of the public welfare. According to the Court, the legislature *could* determine what made an environment beautiful and take steps to enhance those aspects of a town. This interpretation of the police power worked against the local storeowners in *Berman*, but favored private property interests in some cases, including the property of certain residents of Morgan Hill, California.

There, in 1971, La Confederacion de la Raza Unida sued the city of Morgan Hill because that city's zoning ordinance (called the Hillside Ordinance) regulated the housing density in a mountainous area of town. The Hillside Ordinance was intended to promote orderly and creative development while preserving the area's natural amenities, of which the scenic setting was foremost. In this case, La Raza had received approval from the federal government to develop multi-unit low-cost housing in the hilly section of Morgan Hill, but the density of the planned housing exceeded that allowed by the local ordinance. La Raza attacked the validity of the ordinance on the grounds that it precluded the development of housing for low-income families. The plaintiffs relied on earlier court decisions that had required a city and its planning officials to accommodate the needs of its low-income families.

No dice, said a U.S. District Court, finding that the overall housing plan of Morgan Hill did not discriminate against poor families. The Hillside Ordinance—which required plantings on manufactured slopes, underground utilities, and low population density in one area of Morgan Hill—did make the neighborhood off-limits to low-income people. So what? The police power of the local lawmakers sanctioned the preservation of a scenic environment, even if that made certain land expensive.

Despite the different grievances, *Berman* and *Confederacion* shared similar legal issues, involving the constitutionality of laws and the rights of the state versus those of the individual. Both decisions upheld the police power of elected bodies to act on behalf of the public welfare. The courts were loathe to tamper with legislative decisions regarding that public welfare as long as they were within broad constitutional limits. Although enhancing or preserving beauty was not a central legal concern in either case, that, in effect, was the outcome of both.

Penn Central and Beauty

What happens in cases where one party's main goal *is* to preserve the pleasing character of a small town or the regal monumentality of a century-old building? Can beauty be legislated? The words of John M. Fowler, general counsel to the Advisory Council on Historic Preservation, echo a familiar conflict: "The concepts underlying preservation legislation and litigation are not unduly complex, but the practical application of those tools often spawns surprisingly difficult problems and bitter disputes. This may be because preservation law treads on that most sacrosanct of American institutions—the rights of private property owners."

Many of the historic preservation laws date from the late sixties. By then, it was too late for a large number of structures, which were torn down after single-building battles had dissipated activists' energies. Comprehensive legislation seemed a necessary step. *The Wall Street Journal* reported in August of 1970 that over half of the 12,000 buildings listed by the federal government in its Historic American Building Survey begun in 1933 had been demolished. As architect and editor Robert B. Riley reflected in 1966: "We are not a country of simple people doing simple things carefully in traditional and honored ways—the surest way to create beauty. Neither are we a country where an elite minority can impose its ideal upon a society—the way in which traditionally beautiful cities of history have been achieved. We are a country with a historical and contemporary disregard for beauty."

Some dedicated citizens felt that the best way to preserve the remnants of

(Continued on page 63)

BEST COPY AVAILABLE

LAW AND CREATIVITY Christopher Torem

Nude Encounters of the Legal Kind

A recent California case on libeling real people in fiction may be bad news for writers and publishers

Contrary to what you hear, some people never die: They live on as fictional characters. Novels, short-stories, and plays are reflections of what the artist sees, and much of what he sees, for better or worse, is his fellow man. In the race to make characters come alive to the audience, some writers get a head start by basing them on the private lives of actual people.

Many universally acclaimed books are filled with living persons, thinly or carefully disguised as the case may be. In Robert Penn Warren's masterpiece on southern politics, *All the King's Men*, the energetic, intuitive, almost primitive politician whose ambition overcomes his idealism seems largely based on Louisiana governor Huey Long. Leo Tolstoi based many of his principal characters on his own ancestors, friends, and even his own wife. Thomas Wolfe in *Look Homeward Angel* not only faithfully reproduced many of the people who lived in his childhood town, but also immortalized his editor, Maxwell Perkins, as the character Foxhall Morton.

For the most part, artists aren't bothered by putting real people into their fiction, perceiving this transmutation as part of the craft. But real people who find themselves popping up in books are often outraged by having their private life made public. For example, Asheville, North Carolina, was up in arms about *Look Homeward Angel*, and one citizen said he'd like to drag Wolfe's "big overgroan karkus" across the city's town square in retaliation.

Another way of getting even is to sue. Many who feel victimized by a *roman a clef* have wanted their satisfaction in court and in good coinage of the realm.

Best Seller Bares All

One of the best examples of the problems caused by using real-life in a novel is the 1979 California case of *Bindrim v. Mitchell*, 155 Cal. Rept. 29, 1979.

In late 1969, a best-selling author named Gwen Davis Mitchell, under contract with Doubleday to write a novel, joined a nude therapy marathon conducted by a clinical psychologist named Paul Bindrim. Bindrim, who had pioneered this sort of encounter group, apparently gathered a number of people together to experience a close encounter in the buff. The sessions were taped.

Two years later, Mitchell wrote a novel called *Touching* about the adventures of two California women exploring alternative lifestyles, including a nude therapy encounter. *Touching* was harsh on nude therapy, and Mitchell went on the talk-show circuit to tell the people out there that nude encounters were dangerous.

More to the point from the perspective of the law, Mitchell created in *Touching* a major character who was a nude therapist. Dr. Simon Herford, as the fictional therapist was called, was portrayed as a brutal man with little of the sensitivity necessary to handle human beings at their most vulnerable. Not only did he continuously insult his patients and tell them to "shut up and listen" when they were upset, but Dr. Herford seemed to take delight in using the coarsest language for shock purposes in the most delicate situations. When a fictional minister confessed that he was having difficulty in getting his wife to participate in this communal nudity, Dr. Herford suggested several times that the minister grab his wife by the most private part of her anatomy and drag her to the marathon.

Had Mitchell intended to portray the real-life Paul Bindrim in this unsympathetic light? As court testimony later revealed, Mitchell confided to a friend that she was afraid Bindrim would sue because she had painted a "devastating portrait" of him. But Mitchell testified that she had gone to extreme care to draft her Herford character so that he would not be recognizable as any one person, but be an amalgam of many people. Beyond changing the name, Mitchell had given Herford "an extraordinary amount of hair," added years to his age, and given him "a great white beard" to make him a "Santa Clausy" figure. By comparison, the Bindrim that Mitchell had known was a lean, bald, clean-shaven man.

Before publication, Doubleday's editors were concerned that *Touching* could bring on a libel suit. Their concern increased when Bindrim's lawyer wrote a letter to both Mitchell and Doubleday demanding that the book not be printed since it distorted Bindrim's character and invaded his privacy. But when Mitchell assured her editor that there was no problem, Doubleday stopped its investigation, in keeping with the standard industry practice at the time for fictional works. *Touching*, after all, was labelled a novel, and carried the standard disclaimer that no character was intended to resemble any

Larry Keenan

persons living or dead. After Doubleday refused to stop publication and assigned paperback rights in *Touching* to another publisher, Bindrim sued for libel.

"Identification" the Key

At trial, Mitchell was not a sympathetic figure. Not only was the "devastating portrait" admission brought out before the jury, but it was revealed that she had breached a pre-marathon contract in which she promised not to "write articles or in any manner disclose who has attended the workshop or what has transpired." Although from a legal standpoint this breach of contract argument had nothing to do with whether Bindrim's reputation had been injured, it had to affect the jury's perception of Mitchell.

Perhaps far more disastrous for Mitchell's cause was the cleverness of her opponents. In preparation for trial, Bindrim had altered his appearance as much as possible to resemble his alleged double "Dr. Herford." Bindrim was now no longer slim, having added extra weight in anticipation of the jury trial. He had even grown a bushy white beard. A regular Father Christmas in the courtroom, Paul Bindrim's changed girth and physiognomy were constant reminders to the jury of how much "Dr. Herford" resembled him.

The major issue in the case rapidly became identification. To win any libel suit, the plaintiff must generally overcome a number of legal hurdles. He must show that the description published was false. He must show that the statement was not only false, but defamatory. He must show that publication of this false and defamatory item is not protected under the Constitution because of who the plaintiff is (if the plaintiff is a "public figure," there may be more latitude to say nasty things about him). He must show, in sum, . . . "a false publication which exposes [him] to hatred, contempt, ridicule or obliquy, or which . . . injure(s) him in his reputation." But there is one more factor, a threshold factor without which no libel suit may succeed. The plaintiff must show that the defamatory material is "of and concerning" him, that he is identified by the piece.

At trial, Bindrim produced three identification witnesses, all of whom were friends, two of whom had actually attended the same encounter group that Mitchell had. They testified that they recognized Bindrim in the fictional Dr. Herford. And as for the falsity of Mitchell's picture, Bindrim had the tapes of the sessions, which clearly indicated that, though prone to mild profanity, he had never been brutal or unfeeling toward his charges.

Verdict and Aftermath

After a nine-day trial, the jury decided Bindrim had been libelled. The other arguments—privacy, breach of contract and the like—fell away. The key, the jury said, was that his reputation had been hurt in the community. The jurors awarded him $50,000 as damages.

There is one threshold factor without which no libel suit can win. The plaintiff has to show the defamation is actually "about" him.

On appeal to the Second Appellate District of California, Mitchell and Doubleday lost again. Not only was Bindrim entitled to compensation for the damage to his reputation, said the court, but Doubleday was additionally guilty to the tune of $25,000 for licensing paperback rights to another publisher after being warned by Bindrim's attorney that *Touching* was libelous. Under such circumstances, the court said, Doubleday was under a "further duty to investigate" the sources of the manuscript, a duty which went beyond asking an author if a character was based on any living person. Furthermore, and this seems to have been the most radical position taken by the appellate court, there was nothing wrong with jury instructions which stated that if only one reader "reasonably understood" that the novel was defamatory to Bindrim, then identification had been proved. What this meant was that anyone, anywhere who read the book, knew Bindrim, and recognized Bindrim as the character Dr. Simon Herford, could establish identification. This easy standard of identification shocked the publishing world.

When the California Supreme Court declined to review the case, *Bindrim* became law in California. And, since California courts are well respected elsewhere, the case could become a precedent in other states.

In the meantime, Doubleday sued Mitchell for $138,000, an amount equal to the libel award, interest, and legal fees. Doubleday's argument, which seemed based on the theory that when an author submitted a manuscript he was warranting that it was not libelous, stretched the taut relationship between writers and publishers to the breaking point. As novelist Kurt Vonnegut told the press: "A publisher has abandoned his author, and nothing is more chilling than that."

The issues raised by *Bindrim* were well expressed in a pair of quotations. First, for the outraged members of literary community, *Godfather* author Mario Puzo had this to say: "If this decision stands, how is a novelist going to do anything? I don't know how you're going to be able to write a novel anymore. According to this ruling . . . anybody could [sue] anybody." Then, for the winning side, a quotation from the brief submitted on Bindrim's behalf to the U.S. Supreme Court: "Creativity is not inhibited by being required to have a modicum of respect for the rights of others, by recognition that millions upon millions of people other than authors have a right to live their personal and professional lives in peace and quiet without being subject to ridicule, obloquy, distress and damage in the name of creativity."

Devising a Test

At its heart, identification is the real issue which the courts must grapple with in these cases. The character may be as debased as Caligula, the writer may have been intending to describe in the finest detail his fifth-grade teacher, but even *Bindrim* stands for the proposition that if no one recognizes that the monster leering from the paperback cover is the plaintiff, the case is over. The United States Supreme Court stressed the importance of identification in 1909 in the case of *Peck v. Tribune Company*, 214 U.S. 185. In that case, it found for a nurse who was suing because her picture, although not her name, was being used to advertise without permission the "Great Invigorating Life-Giving and Curative Properties" of Duffy's Pine Malt Whiskey. The Court reasoned that even though she wasn't identified by name in the ad, the picture was "of and concerning" her, so identification had been proved.

But when the case is not this cut-and-

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1121

dried, how is the "of and concerning" test to be met? Most courts have said that identification is established when "the fictional character could reasonably be understood as a portrayal of the plaintiff." But who is making this reasonable judgment? In *Bindrim*, the court was comfortable if the plaintiff's friends reached conclusions on identification. This is, for lack of a better term, the "subjective" test for identification, one which almost anyone could meet. The "objective" test, favored by the majority of courts prior to *Bindrim*, would focus more on whether some average member of the community, unfamiliar with the plaintiff personally, would find enough resemblance between the fictional character on the page and the plaintiff before the bar. Under this test, courts often place some weight on the author's intent.

Under either test, it's safe to say that if the author has never heard of the plaintiff and has no reason to know him, no court will find that the fictional character was "of and concerning" the plaintiff. For instance, in *Clare v. Farrell*, 70 F. Supp. 276, 1947, the plaintiff was a newspaper writer who found his name attached to the fictional character of an aspiring writer whose "thoughts, observations, frustrations and sordid experiences" were featured in the pages of a novel. But a Minnesota court tossed the case out when testimony showed that the author had never known that a real Bernard Clare existed, and had no intention of writing his life story or of appropriating his name to a fictional character. As the court said, "the plaintiff does not even contend that any of the events in the book even remotely tend to identify him as the person about whom the author was writing . . . it would be an astonishing doctrine if every writer of fiction were required to make a search among all the records available . . . in order to determine whether perchance one of the characters in . . . a novel may have the same name and occupation as a real person."

More complex issues of proof may arise when coincidence is so remarkable as to suggest, but not prove, the intent to identify. Even so, courts have generally required a substantial similarity between the plaintiff and the character allegedly portraying him. In 1973, a newspaper reporter attended a meeting of parents concerned about drug abuse. One of the organizers was a Mrs. Evelyn Smith, who had an 18-year-old son named Randy. The reporter, who did not know Mrs. Smith's name, sought out a different organizer of the meeting and asked if he might write a story about her 18-year-old son and his drug problem, using an alias. Unfortunately, the reporter chose to name his fictionalized character "Randy Smith."

Even though the story stated that its facts were true but the names fictitious, Mrs. Smith and her son decided to sue. In *Smith v. Huntington Pub. Co.*, 410 F. Supp. 1270, 1975, an Ohio court, using the test of "whether a reasonable man would reasonably believe that the article referred to the plaintiff," declined to find identification.

The court, in an odd touch, specifically said that the intent of the author was of no significance in determining whether identification had been proved. Instead, the court focused on the resemblances (or lack of them) between the real Smith and the fictional one. Sure, the court said, there are some parallels: "A person who only knew [Smith] casually, or who had not seen him in some time might reasonably believe that the article concerned [him] on the basis of age, residence and name." But more significant, according to the court, were certain key biographical differences—the real Smith had never been in the hospital, did not use drugs, had never met any prosecutors, and had a sharp mind compared to the fictionalized Randy Smith. The court also noted that the article clearly said that the name was fictional.

> ***Who judges when the key issue of identification has been established? In Bindrim, the court let the friends of the plaintiff determine it.***

The court's reasoning seems pretty shaky. Would the "objective" reader know the real Smith well enough to know that he wasn't the subject on the basis of the facts presented? A better line of reasoning would have relied on the explicit disclaimer and the clear testimony that the writer did not intend to use the real Randy Smith as a model for his story.

"You Put *Me* In That Book?"

More difficult issues arise when the plaintiff and the author know each other. Two contrasting cases from New York show what facts may be relevant in determining identification under these circumstances.

In one case the plaintiff's name was Larry Esco Middlebrooks and the fictional character in the article "Moonshine Light, Moonshine Bright" was named Esco Brooks. The author, William Price Fox, had grown up with Middlebrooks and had already featured a character name Esco Middlebrooks in the novel *Southern Fried*. Because the real-life Middlebrooks had asked that his name no longer be used in any of Fox's writings, Fox had duly changed the name to Esco Brooks in "Moonshine Light." He said he liked the name but was not basing his fictional character directly on Middlebrooks.

In *Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141, 1969, the Fourth Circuit failed to find the necessary identification. First, the work was presented as fiction, even illustrated with cartoons, and as such would be "normally understood by all reasonable men as not intended to depict or refer to any actual living person." Second, the court found that marked dissimilarities between Middlebrooks and the character "Esco Brooks" reduced the reasonableness of any identification, these differences being: (1) age differences; (2) the absence of Middlebrooks from the city of Columbia (where the story was set) when Fox was writing the episode; (3) differences in employment; and (4) the lack of parallels between Middlebrooks' life and the character's "in any significant manner." The use of actual place names and settings by Fox did not affect the holding since "(a)uthors of necessity must rely on their own background and experiences in writing fiction."

The *Middlebrooks* "objective" standard made it hard for the plaintiff to win. But under almost any test of identification the plaintiff would have won in *Fetler v. Houghton Miflin Co.*, 364 F.2d 650, 1966. In *Fetler*, the question was never in doubt. The plaintiff was a brother of the author, who had apparently chosen to write a *roman a clef* about his family and not bothered to do a great deal of disguising of this fact. "It is obvious," said the Second Circuit, "that there are few, if any, other families with a minister father and thirteen children in which the third, fourth, and eighth are girls and the eldest a son with great responsibilities who toured Europe in a bus in the 1930s giving family concerts." To make the identification even more certain, the defendant al-

(Continued on page 52)

Joseph L. Daly and Monte Walz

Bruce Roberts/Rapho Photo Researchers

Old Issues Never Die

In this term, the Supreme Court considers abortion, racial discrimination, police choke holds, anonymous tips, and respect for the flag

Did Luke's videotaping of the *Movie of the Week* violate federal copyright laws? Must Dr. Weber inform his 14-year-old patient's parents that the girl is pregnant and wants an abortion? Must he inform the girl that the abortion may cause severe emotional disturbances? Will tiny Timothy's life be lost because the Reagan Administration didn't require automobile manufacturers to install air-bags? Will all their problems be over when the Nuclear Regulatory Commission starts up a controversial atomic power plant only to discover that popsicles aren't the only things that melt down? These and other questions will be resolved in this year's installment of *General Litigation*, the Supreme Court's answer to *General Hospital.*

Supreme Court Round-up

Abortion Restrictions Considered

In two closely related cases, the Supreme Court will have the opportunity to clarify its ruling on abortion. In its controversial 1973 decision in *Roe v. Wade* (410 U.S. 113), the Court announced three standards for judging the constitutionality of laws governing abortions. During the first trimester of pregnancy, a woman's right to privacy and free choice is presumed to be paramount unless the state can show a "compelling interest" otherwise. During the second trimester, state restrictions on abortions will be upheld if they are necessary to protect the health of the mother. During the final three months, most regulations will be permitted to protect the health of the mother and the life of the fetus, which becomes viable, or capable of sustaining life outside the womb, during that time.

While grudgingly acknowledging that *Roe v. Wade* states the law of the land, statutes in Missouri and Akron, Ohio, seek to restrict the conditions under which certain abortions can be performed. For example, the Akron law requires the attending physician to inform a woman, prior to her consenting to an abortion, that an unborn child is a human life from the moment of conception, and to describe in detail the anatomical characteristics of the particular unborn child at the time the abortion is to be performed. The law also requires the physician to state that abortion is "a major surgical procedure, which can result in serious complications" and "result in severe emotional disturbances." The law requires a 24-hour "cooling off" period after the woman has signed the consent, and forbids abortions for teen-agers under the age of 15 without the written consent of a parent, or a judge's approval.

Four major organizations of physicians and nurses, in a "friend of the Court" brief, declare that the Akron ordinance presents "a serious obstacle to sound medical practice" and requires that a doctor provide a pregnant woman with "inaccurate, baseless, or irrelevant information that might intimidate and deter her from effectuating her decision to terminate her pregnancy." The organizations, which include the American Medical Association and the American College of Obstetricians and Gynecologists, which represents 90 percent of the specialists in those fields, told the Court that abortion is a "remarkably safe surgical procedure," with the risk of death from childbirth 10 times as great as death from a legal abortion.

Conversely, in a second "friend of the Court" brief, the U.S. Justice Department advanced the Reagan Administration's belief that the Court should "give heavy deference" to the desires of state and local legislators to restrict access to abortions. The brief, authored by Solicitor General Rex Lee, chastizes the

NEVER AGAIN!
SAVE LEGAL ABORTION
NEVER AGAIN
SAVI
LOVED SIS

Sherry Suris/Rapho Photo Researchers

KILLS
A CIVILIZED SOCIETY PROTECTS ITS UNBORN

Jean-Claude LeJeune

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Court for what it calls "constitutionalization"—that is, going overboard in transforming policy questions into constitutional rights. When the Court overrides a legislative effort to restrict abortion, the brief states, "those who succeeded in persuading the legislature of the soundness of their policy viewpoint are deprived of their legislative victory." Because "the two sides will never agree" on abortion, the brief urges the Court not to choose between them but rather to "accord heavy deference to the legislative judgment." Lee argues that the constitutionality of such laws should be based on whether the law imposes an "undue burden" on the exercise of the constitutional right, with the lawmakers themselves applying the test, subject only to perfunctory review by the courts.

The cases are *Akron Center for Reproductive Health, Inc. v. City of Akron*, 50 L.Wk. 3934 and *Aschcroft v. Planned Parenthood Association of Kansas City, Missouri, Inc.*, 51 L.Wk. 3038.

Appeal Reinflates Hopes of Airbag Advocates

In 1981 the Reagan administration burst the bubble of automobile safety advocates by having the National Highway Traffic Safety Administration rescind a rule which would have required that all American-made automobiles be equipped with air bags or automatic seat belts by the 1984 model year.

A federal appeals court struck down the agency's recision of the rule, holding that it was "arbitrary and capricious" and that the agency's conclusions were not supported by the record. In its appeal, the safety administration said that the automatic car restraint rule was undesirable because it would cost the ailing car industry $1 billion a year and would provide no "significant safety benefits" because car owners could detach the devices. The safety board also told the Court that automakers cannot comply with the reinstated regulation until at least September of 1985. State Farm Mutual Automobile Insurance Company is defending the rule in the High Court, claiming that it would substantially reduce driving fatalities and serious injuries because drivers seldom use manual seat belts. The case is *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, 51 L.Wk. 3293.

Nuclear Power Companies Hope For Glowing Report From Court

The Court will consider two cases which may substantially determine whether nuclear power will continue its

Crushed by Own Case Load?

In an unprecedented declaration, six of the nine justices of the Supreme Court have held that the Court is about to be crushed by its own case load unless drastic action is taken soon. In a most unusual airing of the Court's internal problems, the justices, speaking individually during the summer recess, warned of a deterioration in the quality of judging in America because of the burgeoning Supreme Court docket and the bureaucratized federal judiciary.

The Court's docket is taxing the justices to the limit of their "human endurance," Justice William Brennan has declared. "The Supreme Court confronts a calender crisis so severe as to threaten the Court's ability effectively to discharge its vital responsibility." However, characteristic of the current Court, which has splintered dramatically in its recent decisions, the justices were unable to concur on how to resolve the problem.

Justice John Paul Stevens opened the debate when he stunned an audience of the American Judicature Society by declaring that "the Court does a poor job" of choosing which cases it should hear. "Because we are too busy to give the certiorari docket the attention it deserves, we grant [accept] many more cases than we should," Stevens explained. "I have found it necessary to delegate a great deal of responsibility in the review of certiorari petitions to my law clerks." (Certiorari petitions are requests to the Court to review a case decided by a lower court.) Stevens proposed to remedy the calender crunch by establishing a new court to handle certiorari petitions and decide which cases merit the High Court's consideration.

Two Supreme Courts?

Stevens' proposal was promptly rejected by Justice Byron White, who characterized it as "plastic surgery." White told the American Bar Association convention that the proposal "does not address the fundamental problem" confronting the Court. "Furthermore," White chastized, "for myself, I give a good deal of attention to the certiorari docket." White suggested that one possible alternative is to create two Supreme Courts—one for statutory and one for constitutional cases, or one for criminal and the other for civil cases.

Justice Lewis F. Powell was the next to join the fray, declaring that the "root cause" of the Court's case overload "is the escalating extent to which citizens turn to the courts and to administrative tribunals for the resolution of claims and controversies of all kinds." Powell warned that lower courts now "resemble business operations" and are becoming "bureaucratized." If the trend continues, Powell cautioned, "the rule of law—reduced to wholesale justice by the crush of cases—could be the ultimate victim." Powell said the case load could best be lightened by limiting the types of cases the Court will hear. Appeals to federal courts from state courts, Powell suggested, should be limited to "cases of manifest injustice—where the issue is guilt or innocence." Powell was especially critical of the Court's review of criminal convictions, stating that: "I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction."

In an important addition to the case load clamor, Justice William Brennan, the senior member of the Court, who declared in 1973 that the "Supreme Court is not overworked," reversed his stance and called for an "immediate study" of ways to reduce the Supreme Court calendar. Brennan said he was strongly opposed to Justice Stevens' suggestion of creating a new court to screen certiorari peti-

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mushrooming development. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Corp.*, 51 L.Wk. 3041, the Court will hear arguments on a California law which imposes a moratorium on the construction of new nuclear power plants until means have been found for safely disposing nuclear wastes produced by the plants. A federal appeals court has upheld the law, but the Justice Department has sided with the utilities companies on the appeal, saying that the federal government, and not the states, has the authority to regulate nuclear power.

The Court will also decide whether the

(Continued on page 47)

tions. Brennan said the notion that case selection is "only a minor and separable part" of the Court's work is "clearly, indeed dangerously wrong," because it would isolate the Court from the full range of cases, which provide it with insight into legal trends.

Brennan instead endorsed two proposals advanced by Justice White. Brennan concurred that the case load problem could be eased by establishing new appeals courts with nationwide jurisdiction over particular subjects. Such courts would resolve conflicts between the federal appeals courts, which presently constitute about half of the 180 cases the Supreme Court accepts each year. While the decisions of these specialized courts could be appealed to the Supreme Court, there would presumably be less need to accept the cases for review because the new court's decision would impose a uniform national rule. Brennan also agreed that an appeals court should be permitted to decide a legal issue in a way which would conflict with another circuit only if all the justices on that court decide the case. (Federal appeals courts usually decide cases by a panel of only three judges, rather than *en banc* with all 12 to 15 justices participating.) The proposal would mean that the first *en banc* decision would establish a nationwide rule and that other circuits would have to follow that rule unless they also issued an *en banc* decision.

Court's "Cavalier" Attitude

Meanwhile, Justice Marshall assailed the Court for what he called its "growing and inexplicable readiness" to dispose of cases summarily, without permitting the parties an opportunity to address the underlying issues. "I am disturbed by the too often cavalier treatment of the rights and interests of the parties" involved in cases before the Court, Justice Marshall said.

Justice William H. Rehnquist became the sixth justice to warn that the pillars of justice may be crumbling under the Court's workload. Rehnquist said that judges no longer have adequate time to devote to their cases and are in danger of "becoming managers" who delegate the real authority to subordinates, mostly law clerks who are recent graduates of law school.

Case Load Doubled In 20 Years

The Court appears to have a strong case for its alarm. Last term, the Court considered 5,311 cases in all, double the total 20 years before. Of these, the justices tossed out 4,200 cases and ruled on about 300 others, only half of which involved oral argument and a full opinion. The remainder of the cases were carried over into this term. Unless there's an abatement of the flood of appeals swamping the Court, those filing appeals this year may face a delay of up to two years before a case is finally decided.

Some legal commentators contend that the Court's management process is largely a result of its own doing. Paul Freund, a Harvard Law School professor, says the Court spends too little time trying to reach agreement on a decision that can be written by one justice, and too much time writing separate opinions. As decisions become less clear, "lower court judges find it harder to know what is expected," Freund says.

Some fault the justices for their increasing reliance on law clerks, who are young, relatively inexperienced, recent law school graduates. Only Justice Brennan glances at most of the petitions seeking Supreme Court review, with the other eight justices depending upon memos prepared by the clerks to select cases for review.

Pressure from the escalating case load appears to be taking its toll on the personal relationships of the justices, with recent opinions evidencing seldom-seem hostility among Court members. In one recent ruling, Justice Harry Blackmun stated in dissent that Justice Sandra Day O'Connor "simply and completely misstates the issue" and "only confirms how far removed from the real world" she is. Justice O'Connor relegated her rebuttal to a footnote in the majority opinion which defended her phrasing of the issue and pointedly concluded that she wouldn't respond any further to the "ad hominem" or personal argument by Justice Blackmun. Last fall during oral arguments concerning the constitutionality of applying the death penalty to minors, Justice Rehnquist asked if taxpayers should be made to bear the cost of jailing juvenile offenders. Referring to the defendant, Justice Marshall hotly interjected, "It would have been cheaper just to shoot him right after he was arrested, wouldn't it?"

Traditionally, the Court has muted its internal personality conflicts in scholarly terms and intellectual debate. Some experts say the internal criticisms publically aired by the justices reflect the increasingly political nature of the Court. Others wonder if the harsh words are indicative of personal tensions that may be affecting the Court's work.

Thus, the most important issue facing the Court this term is how to resolve its staggering case load, and remedy the ambiguous decisions and frayed nerves resulting from a Court with too little time to do too much work. If it fails to do so, the Court faces the prospect of another last-minute frenzy to resolve important constitutional matters, carrying over an inordinate number of cases to the next term, conducting a summer of verbal jousting, and returning next year to start the same process over again.

CURRICULUM UPDATE

Mabel C. McKinney-Browning

New Materials for the New Year

Freebies, funnies, and family affairs head the list of new resources for you.

LRE Materials/Texts

■ ***Delinquency: A Mock Trial; Custody: A Mock Trial*** (1982), Robert J. Rader. Grades 7-12. Instructional Guides. 30 pp. $15.95. (Law Instructor Publications, 203 Victoria Drive, Alexandria, MN 56308.)

Delinquency is a mock trial based on a criminal case resulting from the death of a teenager who had taken illegal drugs and drank liquor at a party. *Custody* involves a civil case in which a mother seeks custody of her children following a divorce. These mock trials handle such contemporary and sensitive issues effectively.

Included in the booklets are easily duplicated role profiles, model speeches, and sample "court" exhibits. Designed for use with grades 7-12, the instructional time needed is about five hours. Certainly these high interest materials are rich in instructional opportunities.

■ ***The Student Lawyer*** (3rd Edition, 1982), edited by Joseph L. Daly et al. Textbook—$5.95. ***Strategies and Exercises in Law-Related Education*** (1982), Joseph L. Daly, Jennifer D. Bloom, and Roger F. Wangen. Teachers Manual—Free. (Published by West Publishing Company, 50 West Kellogg Boulevard, P. O. Box 3526, St. Paul, MN 55165. Note: complimentary copies of each book are available to teachers upon request.)

The *Student Lawyer* and its accompanying supplement *Strategies and Exercises in Law-Related Education* were written by a team of educators and lawyers. They're designed for use in high school law programs. Based on Minnesota law, the book features a question/answer format for exploring basic legal issues governing personal and family affairs.

The *Student Lawyer* has several features that should be helpful to both students and teachers. Legal terms are highlighted in the text and legal definitions are placed in the margins. Throughout the book, "self-quizzes" and "what do you think?" situations are directly related to the pages on which they appear.

The supplementary teachers' manual is filled with many fresh, new activities for extending the learning content of the *Student Lawyer*. Newspaper articles, answers to self-quiz and "what do you think?" sections, and suggested lesson strategies are arranged to parallel the lessons in the textbook. Teachers will find this easy-to-follow source book an excellent resource. While the book is correlated to the content of the *Student Lawyer*, it will be useful to teachers throughout the country.

Law and Politics

■ ***The Controversial Court: Supreme Court Influences on American Life*** (1982), Stephen Goode. Grades 7-12. Student Supplement/Teacher Resource. 192 pp. $9.49. (Published by Julian Messner, Simon & Schuster Building, 1230 Avenue of the Americas, New York, NY 10020.)

A 30-year review of the Supreme Court from 1953 to the present, emphasizing de Tocqueville's remark that almost every question in America becomes ". . .sooner or later a judicial question." The book's first chapter provides a brief history of the court up to 1953 and includes a discussion on the role of the federal judiciary and controversies surrounding that role over the years.

The book suggests that the past 30 years of Supreme Court history demonstrate the contrast between a judicially activist court and one that is judicially conservative. Readers are guided through the major Warren Court decisions affecting school desegregation, voting rights, school prayer, and the rights of the accused, as well as the political controversy that marked the end of Lyndon Johnson's presidency and resulted in the withdrawal of his nominee for Chief Justice and the appointment of Warren Burger by Richard Nixon. The author's review of the Burger Court highlights its focus on the criminal justice system and its decisions regarding reapportionment, race relations, and abortion.

Touching briefly on the Court's future and the appointment of Sandra Day O'Connor, the book concludes with an analysis of the "character" of the Burger Court.

Students and teachers will find this book easy to read. It highlights the important decisions of recent decades while providing some insight into the political and social context in which the Court has ruled.

■ ***The New Congress*** (1980), Stephen Goode. Grades 7-12. Teacher Resource/Student Supplement. 222 pp. $9.29. (Published by Julian Messner, Simon and Schuster Building, 1230 Avenue of the Americas, New York, NY 10020.)

"Congress [was] envisioned by the Founding Fathers [as the] place where the pulse of the nation could be felt directly and where the public would find its complaints, desires, and wants expressed and redressed." This book examines the manner in which Congress has fulfilled that vision throughout the nation's history.

The book begins with a chapter reviewing the powers granted Congress in the Constitution, its role as a social arbiter and guidepost to the nation's social trends, and the role it has played historically in government. The major focus of the book is the reforms that have led to a more active Congress in the recent years.

The book reviews the separate but parallel histories of the House and Senate from their first assemblies to the present. Throughout this book, the author provides readers with insight into the social and political contexts in which Congress has declined and flourished. An important aspect of the book is the effect of the presidency on Congress' will to wield its own power. The last third of the book reviews congressional reforms which began in the 1960s and continued in the 1970s. These reforms have resulted, says the author, in a fragmented, divided, but spirited Congress whose problems within its own ranks have often overshadowed its organizational reforms.

An excellent and well written account of the history of Congress, this book will be an invaluable reference book for students. As with his other book, the author thoughtfully

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weaves history with the present and makes good sense when he assesses this critical institution in today's society.

■ *Law Everyone Should Know* (1982), edited by Alan M. Petrillo. Teacher Resource. 165 pp. $6.95. (Published by Charles Evans Hughes Press, New York Bar Foundation, One Elk Street, Albany, NY 12207.)

Helping the public to understand its legal rights and to be more intelligent consumers of legal services is an important public service activity for bar associations. This book, written by members of the New York State Bar Association, reviews the laws of New York state which govern personal and family affairs. It is written for the educated lay person and covers such topics as contracts, consumer protections, credit, ownership of real property, kidnapping, burglary, and hiring a lawyer. The book provides sufficient understanding of these areas without overwhelming the reader with the legal pros and cons.

Altogether a useful resource for classroom teachers as well as lawyers who may find it difficult to address legal issues in a way that students can understand.

■ *Cartoons and Lampoons: The Art of Political Satire* (1982), Samuel A. Tower. Grades 7-12. Student Supplement/Teacher Resource. 192 pp. $9.29. (Published by Julian Messner, Simon and Schuster Building, 1230 Avenue of the Americas, New York, NY 10020.)

This is a refreshing book dealing with the "cartoon of commentary" or the editorial cartoon. The author reviews the history of the cartoon and lampoon, beginning with Egyptian caricatures left in tombs and monuments to their present day position in newspapers and magazines.

Focusing most of the book on American editorial cartoons, the author provides a fresh look at American political history through the cartoons of political satirists. Many of the cartoons discussed deal with the presidency, from Jefferson's battles with the Embargo Acts to Nixon's "law and order" tactics. As one cartoonist remarks "Political cartoonists violate the rules of journalism, they often misquote, [and] trifle with the truth . . . but when the smoke clears, the political cartoonist has been getting closer to the truth than the guys who write political opinions."

An excellent book for rounding out a history lesson and providing yet another way for improving understanding of the government and the political system.

Evaluation

■ *Evaluating Social Studies Programs* (1982), G. Dale Greenawald and Douglas P. Superka. Teacher Resource Guide. 82 pp. $14.95. (SSEC Publications, 855 Broadway, Boulder, CO 80302. Note: order No. 277-6. Prepayment or an institutional purchase order is required.)

Evaluation is an essential element of every social studies program. Decreased funding and increased emphasis on accountability make this especially true today.

Yet many educators know little about effective evaluation. They are unaware of the range of evaluation techniques available and are unsure of how to use the data they do collect. The literature in the field is often difficult to translate into terms that staff and participants can apply on a day-to-day basis.

This new publication from the Social Science Education Consortium and the ERIC Clearinghouse for Social Studies/Social Science Education will help law-related educators to make more intelligent evaluation decisions and conduct more effective evaluation activities. Besides providing a general evaluation model, the book includes workshop activities to help program staff improve their own evaluation designs, use evaluation results to make program improvements, and teach others—including teachers—to develop skill in using evaluation techniques. It will be most useful to LRE practitioners, since the examples used are drawn from LRE. However, the authors hasten to point out that both the model and activities are equally applicable to other social studies programs.

This book is a thorough review of the area, including activities designed to determine evaluation priorities, reviews of testing and data collection strategies (even one for evaluating role plays!), and ways of selecting appropriate statistical procedures for analysing and reporting evaluation results. Rounding out this useful volume is an annotated listing of evaluation resources including a list of LRE projects that have developed instruments for use in evaluating LRE programs.

LRE program directors should consider it an essential addition to their professional libraries.

■ *How to Evaluate Education Programs* (1982), edited by Arlene Fink and Jacqueline Kasecoff. Teacher Resource. $61 yearly. (Published by Capital Publications, Inc., 1300 North 17th Street, Arlington, VA 22209.)

How to Evaluate Education Programs is a concise and accessible reference service designed to help educators understand basic evaluation techniques and strategies. A subscription to the service includes (1) a 200-page soft-cover book of 28 evaluation lessons; (2) two loose-leaf binders with 60 additional lessons; and (3) a lesson each month for twelve months.

Sample lessons include how to collect evaluation information, how to measure teaching performance, how to prove a program works, and how to illustrate your evaluation data. The lessons include targeted information and concise graphics, providing a brief, clear overview of the topic's content. References are given throughout the booklet, and the last page of the booklet annotates recent evaluation findings.

All in all, these timely, informative, accessible materials will prove invaluable to teachers, administrators, and others charged with providing evaluation data.

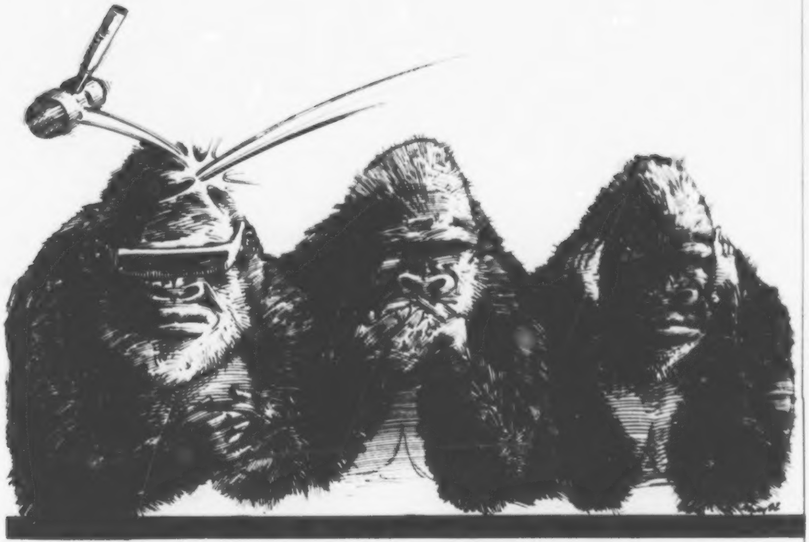
Free Materials

■ *Educators Guide to Free Filmstrips* and *Educators Guide to Free Films* (1982), edited by John Diffor and Elaine Diffor. Teacher Resource Guides. $15.75 (Filmstrip), $22.50 (Film) plus $1.55 per book for postage and handling. (Educators Progress Service, Inc., Randolph, WI 53956.)

These guides contain over 750 pages of listings of free films and filmstrips for schools. Arranged by subject, these guides contain numerous materials of interest to LRE teachers. (For example, such subject areas as consumer issues, environmental concerns, social problems, and law are included in the listing.) Each citation is briefly annotated. A source directory provides pertinent information for obtaining these audio-visual "freebies," and the guides are up-to-date.

This is another excellent addition to the school's professional library. Teachers throughout the building will find these books invaluable resources. □

"I'd say we have an airtight malpractice case against your plastic surgeon."



The 1983 Update Compendium of

Legal Lunacy

Illustrations by Jim Flynn

SO, WHAT'S SHE COMPLAINING ABOUT? THEY MOVE SLOW. SHE COULD'VE NAILED IT BEFORE IT GOT AWAY

A San Diego diner filed a $350,000 suit against a restaurant there, charging that a snail she ordered for dinner somehow survived the chef's preparations and made a getaway at the table.

Nancy Tattoli said she was "disgusted and distressed" at the sight of the gastropod making a deliberate attempt to get off the plate. As she left the restaurant, the upset Mrs. Tattoli fell down the stairs, breaking her ankle.

The suit claimed that the owner of the Limehouse Restaurant, Kwang Jung, then started calling Mrs. Tattoli a troublemaker and threatened to call police.

AFTER ALL, SHE HAS A LOT OF MOUTHS TO FEED— THE KIDS, THE THUGS

A physician who was attacked and robbed by two men apparently hired by his estranged wife was told by a San Jose judge that he must pay her $1,500 a month until the divorce is final because she has no other means of support. Dr. Dudley O. Scott Jr. had been separated from his wife, Lidija, when he was assaulted by two men in his company's parking lot. The judge hearing the case said that while Lidija Scott's hiring of the assailants was "outrageous," she was entitled to some support for herself and her two children. "I guess I'd better stick to medicine because I sure don't understand the judicial system," Dr. Scott was quoted as saying.

SHE HAD TO SWEAR— SHE COULDN'T KICK 'EM

In Tulsa, Oklahoma, they don't monkey around. A 28-year-old woman who parked in a parking area for the handicapped spent two nights in jail and says she ran up legal bills that may amount to $3,000. Apparently Debra Dillard didn't know that she needed to display a sticker on her car to park in the special area. She had gone downtown to change her voting registration and said she parked in the spot because she'd recently had foot surgery. The judge who sentenced Dillard to ten days in jail and a $100 fine said he did so because she was verbally abusive to everyone at the municipal court and he would not allow staff members to be treated like that.

THEY BROUGHT ALONG A LITTLE LADDER TO HELP REACH THE REGISTER

Cleveland, Ohio, cops say a seven-year-old boy with a "mean expression on his face" tried to rob a fried chicken franchise at knife point while his five-year-old brother stood guard outside. The four-footer, who only weighs 45 pounds, was wielding an 8½-inch blade. Employees told the child they would call his mother if he proceeded with the robbery, but he responded, "You don't know her number." Ultimately, the cops were called and the gruesome twosome were returned to their mother. Newspaper accounts don't indicate whether she was glad to have them back.

BESIDES, THE COURTHOUSE CAFETERIA WAS JUST SERVING CHIPPED BEEF ON TOAST

An unemployed man in a Chicago suburb won an immediate rehearing when he threatened to jump from a third-floor ledge of a county courtroom after receiving a $33 fine for speeding. Judge Duane Walter heard Ivan Flynn's screams that he was out of work and that the fine was a lot of money to him, and convinced the man that he would give him a new hearing, even though another judge had just found him guilty. Walter held a 30-minute trial for Flynn during the court's usual recess for lunch, and this time Flynn won. "Why not?" Walter said later. "I don't think [the other judge] will mind. I think a human life is worth thirty minutes, even if it is my lunch hour."

YOU'VE SEEN THE MOVIE, NOW READ THE PAMPHLET!

Gimlet-eyed lawyers at Universal Studios can't be fooled. Even though Professor Albert E. Millar's four-page pamphlet on parallels between the life of Jesus and the fictional character E.T. might seem, to untrained observers, to be completely different from a two-hour movie and not an infringement on the studio's copyrights, Universal's legal beagles sent Millar, chairman of the English Department at Christopher Newport College in Newport News, Virginia, a telegram accusing him of "unfair competition." Millar said of the studio's telegram, "It's like using an atomic bomb to kill a flea."

"WE'LL FIRST AMENDMENT YOU, YOU LITTLE BLEEP!"

Eleven-year-old Jonathan Simon learned the hard way that crusading journalists don't make the establishment's hit parade. When his one-boy newspaper, the *Fluke Press*, took after Little League coaches who drink and swear too much, Monmouth Beach, New Jersey, city leaders told him he was violating a zoning ordinance by conducting a profit-making business from his house. Not to be daunted, Simon moved his business to his father's accounting office in a nearby town.

In his first editorial from the new premises, he accused city officials of carrying out a vendetta against him, pointing out that a quick count showed "two building contractors and four plumbers—all at residential addresses" in the town of 2,500.

High administration officials angrily denied that they were looking into District of Columbia zoning ordinances in an effort to dislodge the *Washington Post*.

VOTE
FOR
BANANA NOSE

THE MAFIA WAS GOING TO RUN A CANDIDATE, BUT FIGURED IT COULDN'T COMPETE

It could only happen in Jersey. By a narrow margin, Newark mayor Kenneth Gibson beat president of the city council Earl Harris in the only race in the country in which both major candidates were under indictment for corruption. Although Harris and Gibson were political enemies, they are allied by having been named coconspirators in indictments for "theft by deception" and misconduct charges for allegedly allowing a former council president to collect more than $100,000 for a no-show job. Both denied wrongdoing, and a judge eventually dismissed most of the charges.

HE SAID HE WANTED A BUS, NOT A BUZZ

The morals of Reno, Nevada, are a little safer with Police Chief Robert Bradshaw and his crack vice squad around. Bradshaw said that in spite of the fact that 82-year-old Paul Tremblay is deaf and legally blind, he will be prosecuted on a charge of soliciting for prostitution. Tremblay's daughter said that her dad thought the policewoman accompanying him was leading him to a bus. She was in fact leading him to a squad car.

According to police, Tremblay gave no clear signs that he was blind, and beckoned the policewoman to come over to him. They also said that the tape made on the policewoman's hidden recorder established the incident as not a plea for help but a "clear case of soliciting for prostitution."

THEY JUST HAVE TO PASS A PHYSICAL TO MAKE SURE THEIR LEGS ARE UP TO CHASING AROUND DESKS

Insurance brokers don't get rich by ignoring lucrative trends. An enterprising broker in Illinois has come up with a plan to offer Sexual Harassment Defense Coverage to employers who fear that ungrateful employees may sue them. The insurance is backed by Lloyd's of London and covers only attorneys' fees, not judgments against employers.

HE SAID, "FIVE'LL GET YOU TEN I BEAT THE RAP"

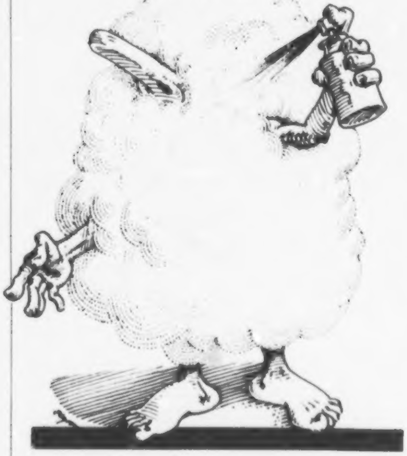
A New York City criminal court judge who decided the length of a jail sentence through the toss of a coin ran afoul of the members of the State Commission on Judicial Conduct, who seemed to feel there was something undignified and just not properly judicial about sentencing by roulette. The judge, Alan I. Freiss, was censured last year for inviting a homeless woman he had released without bail in a murder case to stay overnight with him in his home.

NO WONDER KIDS FEEL OPPRESSED—THEY CAN'T DRINK, VOTE, OR DRIVE, AND NOW THIS

In a bold development, Health and Human Services Secretary Richard S. Schweiker recently initiated a rule that children who murdered their parents will no longer be able to collect Social Security survivors' benefits. Schweiker's daring initiative came after two California cases in which youths who murdered their parents drew large sums from the system. One youth who murdered his mother and sister five years ago reaped $21,500 in survivor's benefits upon parole by the California Youth Authority. The second youth, who killed his father in 1977, was reported to have received $8,000 in benefits.

Social Security Commissioner John A. Svahn said the agency has uncovered a dozen such cases in the past year. "I think the real point is that the public has lost confidence in the Social Security system and incidents like this cause them to continue to lose that confidence," he said.

The Social Security law, like standard insurance laws, has always barred payments to those convicted of murdering a parent or any relative on whose Social Security record they claim benefits. But Schweiker said that it is impossible to convict juveniles of felony murder in some states.



WE HEAR NIXON IS BATHING IN THE STUFF

Scientists have discovered a mind-altering chemical scent that can be used to manipulate voters, according to an article in the *Readers' Digest*. "These signal scents are called pheromones, and now it seems that [this scent] acts as a social pheromone—a follow-the-leader odor command—in humans," writes Lowell Ponte, author of the article. Ponte adds that "Congress should pass a law making it a crime to use this or similar chemicals to influence voters." He speculates that the odor could be used as an aerosol during political rallies or as a fragrance in the ink of campaign literature to make the candidate seem more attractive.

AND THE INSURANCE COMPANY REPLIES, "THE CHECK IS IN THE MAIL"

"A pedestrian hit me and went under my car." A line from a surrealist farce? Uh uh, just another motorist filling out an accident report on his insurance form. Here are some others, gleaned from the State Farm Insurance Company: "Coming home, I drove into the wrong house and collided with a tree I don't have." "A truck backed through my windshield and hit my wife's face." "I have been driving for 40 years, when I fell asleep at the wheel and had an accident." "I saw a slow-moving, sad-faced old gentleman as he bounced off the roof of my car."

IT WAS A .38 SMITH-CORONA

The Los Angeles District Attorney's Office found no cause to prosecute a police officer who shot and killed a man who was threatening him with a 32-pound typewriter. Police had answered a call from a mental health worker who was trying to commit 53-year-old Martin Brantley to a hospital after he was seen near a school yard chasing children with a pickax. Trying to subdue Brantley, Officer Scott Burkhart was knocked to the ground. Hoisting a nearby cast-iron typewriter above his head, Brantley threatened to throw it down upon the officer; Burkhart drew his service revolver and shot Brantley. A spokesman for the DA's office said they found no cause to press charges against Burkhart because "the typewriter was being used as a deadly weapon . . . capable of causing significant bodily injury or even death."

HE TRIED TO CONVINCE POLICE THAT HE WAS ROBIN HOOD

Some guys just don't know how to hide out. Convicted international arms smuggler George "Gary" Korkala was captured in Madrid by police who found him at an exhibition of security devices in the Spanish capital. Korkala, who was running an exhibit booth for International Air Radio Limited when he was arrested, did not resist arrest but did deny his identity to police. Sharp-eyed officers were not convinced, however, noting a badge on his lapel that said, "Hi, I'm Gary Korkala."

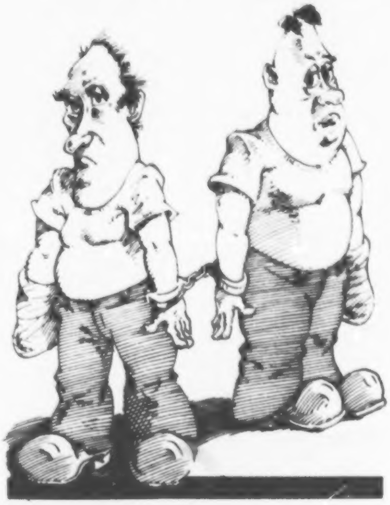
A STRONG CASE FOR REGISTERING RULERS

From the Is-Nothing-Sacred-Department: The Los Angeles District Attorney's Office filed child abuse charges against a Roman Catholic nun who was accused of throwing a nine-year-old girl against a wall and lifting an eight-year-old boy off the ground by his cheeks, punching him in the stomach, stomping on his foot, and hitting him across the knuckles with a ruler. Parents of children she really didn't like had previously accused the Catholic school teacher of discriminating against Mexican-American students.

HE'S NOW TRYING TO SELL A NEW LOCK SYSTEM TO PRISON OFFICIALS

It may have been just an ambitious man's way of drumming up business, but a Hartford, Connecticut, burglar alarm salesman found out that burglarizing the homes of people who didn't buy his alarms on the first visit was a no-no. A. Donald Fass was sentenced to 13 to 26 years for a scheme that went like this: Fass would visit a home and try to sell the residents an alarm system. If they didn't purchase the system, he'd case the home and return later to burglarize it. He sold the stolen goods in a "second-hand" shop he owned on the side. A week or so after the crime, he'd return and, usually, interest the recent crime victims in a protective system.

Fass was tripped up by a burglar alarm system installed by a competing company. His own company—before the conviction—had named him "salesman of the year."



AT LEAST THEY GOT A 2 FOR 1 RATE IN THE EMERGENCY ROOM

A pair of Welsh prisoners who were handcuffed together made a daring dash for freedom, with police in hot pursuit. They were stopped not by the police but by a lamp post when—you guessed it—each swerved in a different direction to avoid the obstruction. Both appeared later in court, broken wrists in casts, on the original charges of theft. And no one said anything about the punishment fitting the crime.

WE KNOW SOME GUYS WHO'D RATHER HAVE TWO YEARS IN THE SLAMMER

You are never too old for the healing powers of a mother's love, at least according to a Cook County, Illinois, circuit court judge, who sentenced a 51-year-old unemployed man to stay under house arrest for two years in the custody of his 73-year-old mother. After being found guilty of a burglary, Perry Cochran was given the unusual sentence by Judge Dwight McKay. Under the order, Cochran is permitted to leave the property only to take his mother to church or to the store.

Judge McKay noted that Cochran's criminal record dates back to 1947, adding, "I can't understand why this man has not been to the penitentiary before. Al Capone didn't have as many entries on his record as this fellow."

The defendant's brother said the family was delighted by the decision, but wondered whether Mrs. Cochran, who is partly blind, was up to being in charge of her son.

WILL SHE ACCEPT A MONSTROUS GUMBO AS DAMAGES?

Red-faced Granite City, Illinois, cops thought they were tearing up a marijuana patch but wound up confiscating 94 okra plants. The plants, some of which were almost four feet tall, belonged to Ida Murphy, an elderly woman who planted okra as part of her backyard garden. Granite City officials apologized and the city attorney offered damages, but at last word the okra was still at the police station.

WHAT THE HELL, IT'S PROBABLY JUST OKRA

While city officials in Garden Grove, California, were pondering a resolution urging that pot growers be punished by confiscation of their land, four little marijuana plants were growing at the city's own community center. The pot was thriving in planters filled with lush but legal foliage. City officials speculated that someone planted the goods as a protest.

THEN HE TOSSED SOME RICE AND GAVE HIMSELF A TICKET FOR LITTERING

Avram Pratt of Montpelier, Vermont, wanted a small, simple ceremony when he married Marilyn Nasuta. Since he's a justice of the peace, he performed the ceremony himself. A state official said this was probably legal since there's nothing on the books about a judge presiding at his own wedding.

IF SHE WERE A JUSTICE OF THE PEACE, SHE COULD'VE MARRIED HERSELF

Love may be blind, but it isn't stupid, and when the police came after Allen Ausman at the church on his wedding day, the bridegroom skipped out the side door of the church and hasn't been seen since.

The Edgewater, Colorado, man was wanted on charges of failing to appear in court on traffic violations. The mother of the bride said her daughter was very upset, and did not indicate whether the young woman would be interested in a rematch should Ausman decide to walk the straight and narrow.

AND THEY DIDN'T TAKE THREE-HOUR COFFEE BREAKS

Investigators for the Department of Health and Human Services and for the Immigration and Naturalization Service said that phony Social Security cards and other fraudulent documents are often sold to illegal aliens who want to establish identities as U.S. citizens. They recently cracked a ring trafficking in bogus Social Security cards because the applications for the document were too neat to pass for government workers.

MAYBE HE COULD GO STAY WITH THE COCHRANS

A Hackensack, New Jersey, court ordered a 20-year-old man banished from his family home after his parents complained that he wouldn't work and spent his days drinking beer in front of the television. Judge Sherwin Lester banned Michael A. Stott Jr. from entering his family's home after his folks told the judge that he was disrupting family life and serving as a bad example to their five younger children.

MAYBE THE COCHRANS HAVE *ANOTHER* BEDROOM

A Denver woman, Elmenia Lampley, 37, has asked a court to evict her two grown sons, claiming they smoke pot at home, are promiscuous, refuse to get jobs, and talk back to her with obscenities.

Sons Earl, 21, and Frederick, 18, say that mom "wants to get married again . . . and doesn't want us in the way." The brothers, who were at home watching television when reporters called, said they smoked marijuana in the park after their mother asked them not to smoke any more at home. As for mom's complaint about sexual promiscuity, they said, "Everyone has friends."

AND WHEN HE GOT HOME, SHE'D LEFT A NOTE FOR HIM TO TAKE OUT THE GARBAGE

Newlywed Bruce Swain probably figured he was doing the honorable thing when he volunteered to serve his pregnant bride's one-year jail term after she was convicted on a cocaine charge. Unfortunately, after serving time in the Henrico County jail in Richmond, Virginia, Swain came home to an empty bed. His wife of 15 months, Carmen Bernice Marino, had taken their one-year-old child, filed for divorce, and moved to North Carolina. Swain said he learned of his wife's departure scarcely a day before he was scheduled to be released, when she told him she wouldn't be at the jail to greet him at the end of his, er, her sentence. The judge in the case said that while he had never seen a spouse substitute for another in the 16 years he'd been on the bench, "It struck me as the best way to do justice." The disillusioned Swain had other ideas: "Why, I would love for the judge to tell her to serve all the time I served because she sure has done me rotten."

HOW ABOUT SPEED FOR CIVIL SERVANTS?

In a ruling that will disappoint secretaries from coast to coast, a Norristown, Pennsylvania, judge found secretary Debra Brown, 38, guilty of spiking her boss's cocoa with Valium each morning to calm him down. She was fined $1,200 and placed on a year's probation on assault charges. Brown testified that she was afraid her boss was going to be fired because he was excitable.

THE GOOD NEWS IS THAT THE VERDICT IS INNOCENT

Harry Douglas Seigler will have at least 12 years to rue the moment he accepted a plea bargain in which he pleaded guilty to murder to avoid a possible death penalty. Three minutes after Seigler copped the plea, jurors returned with a verdict of innocent, but Seigler's plea took precedence over the jury's decision. Seigler faces 40 years behind bars, but will be eligible for parole in about 12 years.

John E. Dodson, one of Seigler's lawyers, was philosophical about it all, as befits a man who isn't facing the slammer himself.

WE HEAR THE SUPREME COURT IS SECRETLY PRACTICING NINE-PART HARMONY

Florida attorney Steve Jerome may have set the march of justice back several centuries by introducing the sung final argument. Defending Robert Infante, accused of kicking a dent in a neighbor's car, Jerome sang "innocent or is this man guiiiiiilty? He is not guiiiiiilty" to the melody of "Vesti la giubba" from the opera "I Pagliacci."

Florida jurors apparently aren't ready for this innovation. They sat openmouthed, then snickered, then found Mr. Infante guilty. Infante, who was fined $250 in order to pay for repairs to the car he was accused of denting, told reporters he didn't think his lawyer's singing helped and said he should have stuck to his decision not to let him do it.

For an encore, Jerome said he would appeal.

NOW THE SHRINK'S TRYING TO GIVE HIM AN UNCONTROLLABLE URGE TO GO TO JAIL

Ronald Springston, 30, of Wheeler, Arkansas, was having trouble losing weight, so he went to a hypnotist at the local reducing clinic. Springston eventually was able to give up Twinkies and Big Macs; unfortunately, he also had to give himself up to police after he was arrested on charges of stealing more than $8,000 from the local bank. Springston's attorney argues that his client's hypnotic weight treatment is to blame; the therapist, he claims, told Springston that he was strong and intelligent and could even rob a bank if he wanted to. That, lawyer William Putnam said, left Springston without the urge to eat, but with an uncontrollable desire to stick up a bank.

THE KIDS'LL REALLY MISS HER BROWNIES

Social Security made them do it: Luther Beaver, 74, and Audrey, his 63-year-old wife (aka Grandma and Grandpa), tried to fight their one-to-ten-year jail sentences for drug dealing by claiming they needed the money to supplement their $381 monthly Social Security income. The plea didn't play in the Columbus, Ohio, common pleas court because a probation report on the couple, which portrayed them as repeat drug traffickers, got to the judge first.

WHO SAYS THE LAW HAS NO SENSE OF HUMOR?

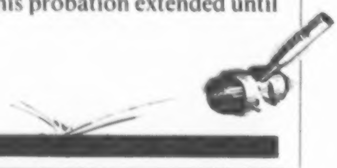
Thomas O'Donnell, who had already spent two months in jail awaiting his probation revocation hearing, simply wasn't expecting the sentence handed out by King County (Washington) Superior Court Judge Horton Smith. Smith revoked O'Donnell's probation and sentenced him to five years in prison for getting drunk and into a fight on his twenty-first birthday. Three years earlier the defendant had been put on probation and given a three-year deferred sentence for auto theft.

Minutes after O'Donnell was taken from the courtroom, Smith called the prosecutor and the defense lawyer to his chambers and told them the sentence was an April Fool's joke.

"I told the lawyers I want this young man to be very worried, very concerned," Smith said. "With their consent we continued this for thirty days."

Smith, who was later criticized for his action, defended the trick as an effective judicial tool, saying: "I wanted to scare the bejeezus out of this lad. The lad thought he was going to prison and he was sweating it. Once in a while some time in county jail with those thugs can be very good for a guy his age."

O'Donnell, meanwhile, spent 30 days in the county jail awaiting his next hearing, at which he was sent to a 28-day alcohol treatment program and had his probation extended until 1984.



Betamax

(Continued from page 17)

later deemed . . . to be an infringement."

The trial court found that no copyright violation had occurred. Two years later, the court of appeals disagreed (659 F.2d 963). It held that off-the-air copying, even for the private noncommercial use of the VCR owner, *was* an infringement and not a fair use. It concluded that a VCR was not a staple item of commerce, and the defendants were liable as contributory infringers. The court found the statutory treatment of sound recordings, so important to the holding of the trial court, was ambiguous at best and not instructive on the treatment of audio-visual recordings.

The appeals court focused on the concern, voiced in 1954 by the Supreme Court, that "the best way to advance public welfare through the talents of authors and inventors" is to encourage these creative people by assuring them a financial reward from their work (*Mazer v. Stein*, 347 U.S. 201). To accomplish that goal, Sony would have to compensate the movie studios. The appellate court instructed the trial court to determine the compensation.

Some Possible Outcomes

That determination was postponed when the Supreme Court accepted the case for review. On their decision rests the fate of more than five million VCR owners, a number expected to increase to nearly 40 million by 1990. If the appellate decision is upheld, a means would have to be devised to compensate the movie producers for their copyright interest. Under one plan, TV networks would pay an extra fee when buying a movie for its initial television presentation. The money would compensate the producers for the losses that would come about through home recording. A more probable plan would have VCR and tape manufacturers pay a percentage of their gross sales into a central pot to be divided among producers. Consumers would fund the pot through a royalty or user's tax on VCRs and tapes. Industry analysts estimate that the tax would be in the neighborhood of $50 per machine and one dollar per blank tape.

A similar approach has been used in Europe, though there is no consistency among nations. West Germany, for example, has a royalty levy on the VCRs, while Austria places a tax on tapes only. Britain bans home recording altogether, but the Netherlands permits it without any copyright payment.

Those who oppose the use of a royalty payment claim that it is unfair to the consumer. Some argue that movie producers are already adequately compensated. They receive royalties when a film is released, when it is sold to television, and again when the rights are sold to tape manufacturers for sale or rental through video centers. To require a fourth payment for home taping is unreasonable, they contend. In addition, a royalty system discriminates against the consumer who uses his machine and tapes to film original home movies, such as a child's birthday party. A user's tax would impose a royalty payment on him for purchase of the blank tapes, even though he does not copy protected material. According to Sony, this system would net $1 billion in royalties over the next five years for producers.

No one knows how the Supreme Court will rule, but Stephen Kroft, a lawyer for the studios, feels that "technology has to accommodate to the law, not the law to technology." He says that the court of appeals' decision shows that, "just because someone invents an easier way to commit copyright infringement, the court will not say it will be allowed."

If the Supreme Court rules in favor of the movie studios, the video revolution that the Betamax helped spawn may be slowed. And videophiles are not the only ones likely to be hanging on to the edge of their seats for a decision. A ruling against Sony may result in a Pandora's box of new lawsuits. Encouraged by a judgment that finds no home use exception implied in the copyright law, the beleaguered recording industry may well take action against manufacturers of audio cassette tape recorders (in which Sony may again be a likely defendant). The record companies—who claim that as many albums are taped off the radio as are bought—are alarmed by the recent rise in rent-a-record stores, which they say are a virtual invitation to tape at home without buying a record.

A final ruling from the Supreme Court could be the start of a new chapter in copyright law, one that may ultimately have to be decided by Congress. It demonstrates the difficulty that confronts even a new copyright law that must try to keep pace with advancing technology. □

"No, Figby, we're not replacing you with a computer. We're replacing you with a hand puppet."

Court Briefs

(Continued from page 37)

Nuclear Regulatory Commission must weigh the psychological stress on area residents before allowing General Public Utilities Corporation to start up the infamous Three Mile Island nuclear plant. The reactor in question had been shut down for maintenance prior to an accident which damaged a second reactor and caused the release of radiation on March 28, 1978. The utility is seeking to reopen only the undamaged reactor.

A federal appeals court ruled that in addition to weighing compliance with NRC safety criteria, the Commission must also consider the possible adverse psychological impact on area residents from starting up the plant. Siding with the utility in its appeal, the NRC said the ruling would spill over to all nuclear licensing decisions and would have "onerous consequences." The case is *Metropolitan Edison Co. v. People Against Nuclear Energy*, 51 L.Wk. 3124.

Don't Play It Again Sam

Movie buffs who want to videotape a television screening of *Casablanca* or any other film classic may be told not to play it again, Sam, if the Court upholds a federal appeals court ruling that the manufacture and use of video recorders violates federal copyright laws. Film and television companies claim that the devices are being used to steal copyrighted material off the screen without paying the required copyright fees. Sony Corporation, manufacturer of the popular Betamax recorder, maintains that the law was not meant to apply to consumers who videotape programs for their own enjoyment.

Because the question is purely one of statutory interpretation, the loser of the appeal will likely lobby Congress for reversing legislation. If the copyright act is found to apply, the videotape units will still be legal, but royalties will have to be paid to the owners of copyrighted materials, probably by a special tax on recorders and blank tapes. For more on *Sony Corp. v. Universal City Studios*, 51 L.Wk. 3032, see Robert Peck's article on page 15 of this issue.

Criminal Law Puzzles

A tough criminal line-up confronts the Supreme Court this term, with the justices' attention likely to be arrested by such issues as whether police may act on an anonymous letter accusing someone of drug smuggling and whether a potentially lethal choke hold may be used to bring a suspect into custody.

Gag Me with a Choke Hold

In 1977, Adolph Lyons was stopped by Los Angeles police for a burned-out tail light. Lyons allegedly resisted arrest and was subdued by use of a choke hold which caused him to spit up blood, defecate, and lose consciousness. In arguments before the Supreme Court in the case of *City of Los Angeles v. Lyons*, 51 L.Wk. 3316, Lyons' attorney stated that 16 deaths were attributable to the hold, which he claims has been applied in a discriminatory manner against black persons such as Lyons.

The Court is reviewing a federal district court ruling which found the L.A. Police Department had authorized use of life-threatening holds even under circumstances where no one was threatened by death or grevious bodily harm should the suspect attempt to escape. The lower court restricted use of the holds to situations where the suspect posed a threat to the public, ordering police to institute a training program in how to properly administer the hold. The court also ordered that each use of the hold by police be reported to city officials.

Assistant Los Angeles City Attorney Frederick Merkin told the Court that police should be given "full constitutional latitude" to use the holds to subdue those who resist arrest. Merkin minimized the danger of the hold, which he said caused only three deaths in the 935 times it was used in an 18-month period.

Lyons' attorney countered that the use of the hold was like a game of roulette—"If the ball should fall in your slot, you die." He maintained that death can result one out of every 200 times the hold is applied, pointing out that while black males constitute only nine percent of the population of Los Angeles, 73 percent of the fatalities resulting from use of the hold have been black men.

The Case of the Incriminating Correspondence

It was a quiet spring day in Bloomingdale, Illinois, when the police department received an anonymous letter claiming that a couple living in the town, Sue and Lance Gates, were in fact high-rolling drug traffickers. The letter read:

> Most of their buys are done in Florida where she leaves [their car] to be loaded up with drugs, then Lance flies down and drives it back . . . May 3 she is driving down there again, and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000 in drugs. Presently they have $100,000 worth of drugs in their basement. . . .

For Bloomingdale police, the postman need only ring once. After some investigating, the police learned that there was indeed a Sue and Lance Gates and that Lance was flying to Florida on May 5 on a flight terminating in West Palm Beach. A Drug Enforcement Administration agent was waiting for him and observed him take a cab to a hotel and enter a room registered in his wife's name. The following day, Gates and an unidentified woman checked out and drove a car with an Illinois license plate to Chicago and into the waiting arms of law enforcement authorities.

Based on the incriminating correspondence and their investigation, police obtained a search warrant for the Gateses' home and car. About 350 pounds of marijuana, some cocaine, and weapons were seized, but a state court threw the case out because the warrant was based on an anonymous tip. The court based its holding on the Supreme Court's 1964 ruling in *Aguilar v. Texas* (378 U.S. 108), which requires that the credibility of the informant, and the basis of knowledge for his information, be established in the affidavit supporting the request for a warrant. The decision to throw out the case was upheld by the Illinois Supreme Court, but the Illinois Attorney General convinced the Supreme Court to consider the issue of whether the detailed nature of the tip, the extent of the police corroboration, and the nature of the defendant's trip to Florida, justified the conclusion that narcotics were probably present in the Gateses' house and car.

Their attorney, Allan Abel Ackerman, whom *High Times* magazine has christened "the perfect dope lawyer," is expected to renew his attack on the credibility of such anonymous tips. Whether the Court will stamp their approval on the lower courts' decision, or create new black-letter law, remains an enveloping question. The case is *State of Illinois v. Lance and Susan Gates*, 51 L.Wk. 3300.

Court Waives Flag-Burners' Appeal

In a case that's already over, since the Supreme Court declined to review it, Old Glory once more prevailed over the fire's red glare. In *Kime v. United States*, case No. 81-6773, eight of the nine justices refused to hear a challenge to a law that makes deliberate mutilation of the

American flag a federal crime. In his lone dissent, Justice Brennan warned that while the flag may have been preserved by the decision, the constitutional principles for which the flag stands have been desecrated.

Two Communist Party members, Teresa Kime and Donald Bonwell, were convicted for burning a flag, owned by Kime, in a peaceful demonstration. They were sentenced to eight months in prison. The two sought reversal of their convictions, claiming that the burning was a form of political protest protected by the Constitution. Noting that the law punishes only contemptuous mutilation of the flag, Brennan termed the law "censorship pure and simple." Brennan observed that "one literally cannot violate [the law] without espousing unpopular political views. That is the very definition of a censorship statute."

Racial Discrimination

The I.R.S. Orphans One of its Own, the Supreme Court Asks a Friend To Adopt

When the United States Supreme Court invites a friend over to visit, its purpose is usually to start an argument, with the justices likely to make a federal case out of the dispute.

In one of the most unusual cases in the Court's history, the Court appointed former transportation secretary William Coleman Jr. "friend of the Court" to argue in a major civil rights case that the Internal Revenue Service should not be allowed to grant favorable tax treatment to private schools that discriminate on the basis of race. Coleman's appointment was necessitated by a sudden change in IRS policy just before the case was to be argued before the Court. In two lower court decisions, the IRS successfully argued that under current federal tax law, and the Constitution, it was prohibited from granting tax-exempt status to racially discriminatory schools. The two schools appealed, but before the Court could hear the case the IRS changed its position under pressure from the Reagan Administration, and announced that it would thereafter grant tax-exemptions to private schools regardless of their racially discriminatory policies.

The case, *Goldsboro Christian School, Inc. v. United States* and *Bob Jones University v. United States*, 51 L.Wk. 3295, dramatically illustrates the difficulty in balancing two conflicting constitutional principles, freedom of religion and freedom from racial discrimination, and also provides rare insight into the dynamic process by which Congress, the President, and the Supreme Court decide important policy issues.

The Controversy

Prior to 1970, the Internal Revenue Service routinely granted tax-exemptions to private schools, including those which refused admission to black applicants. However, when this policy was challenged by a group of black students and their parents from Mississippi, the IRS changed its policy and declared that it would thereafter deny tax breaks to segregationist schools. This new policy was upheld by a federal district court, and its decision was subsequently affirmed by the Supreme Court, without opinion, in *Coit v. Green* (404 U.S. 997,1971).

Under the antidiscrimination policy, the IRS refused to grant tax-exempt status to Goldsboro Christian School, of Goldsboro, S.C., because the school refused to admit black students. The Service also revoked the tax-exemption of Bob Jones University, a fundamentalist Christian college in Greenville, S.C. Bob Jones had denied admission to black applicants until 1970, barred unmarried blacks from attending the school until 1975, and continued to discriminate on the basis of race under a school policy which prohibited interracial dating or marriage.

The two schools sued the IRS, contending that the school's racially-discriminatory policies were based on a firmly-held religious belief that separation of the races is mandated by the Scriptures. The schools argued that to deny them tax-exempt status because they practiced this belief deprived them of their First Amendment right to practice their religion free of governmental interference and punishment. In two separate decisions, the U.S. Court of Appeals for the Fourth Circuit rejected the schools' arguments, and held that neither Bob Jones or Goldsboro was entitled to tax-exemption because their segregationist policies violated the Fourteenth Amendment's prohibition of racial discrimination in education. Both schools appealed to the Supreme Court, which granted review, consolidating the cases into a single action.

Normally, the Court would have issued its opinion in the case by last spring. However, in January 1982, just before the IRS was to file its brief, the Service reversed its position and announced that it would thereafter grant tax-exemptions to racially-discriminatory private schools. This abrupt about-face resulted from pressure by the Reagan Administration, which maintained that existing tax law does not give the IRS the authority to deny tax-exemptions to private schools, and that such authority could only be given by Congress.

Passing Political Footballs

The Reagan Administration's actions provoked loud protests from civil rights organizations, forcing the Administration to alter its position somewhat by declaring that it would seek legislation giving the IRS the authority to deny tax-exemptions to racially discriminatory schools. Congress refused to act on the Reagan proposal, however, apparently because it believed that existing law already bars the IRS from granting tax breaks to segregationist schools.

Congress's refusal to act placed the Supreme Court in a dilemma. Ordinarily, where the parties to a case resolve their differences before the case is to be heard, the Court will dismiss the case on grounds of "mootness," meaning that a controversy no longer exists for the Court to decide. But before the IRS could implement its post-Reagan policy and grant tax-exemptions to racially-discriminatory schools, the U.S. Court of Appeals for the District of Columbia issued an order preventing the IRS from granting such exemptions. This revived the dispute, and the IRS went back to the Supreme Court and asked the justices to decide the case after all, and to appoint an attorney to represent the orphaned IRS antidiscrimination policy. The Court responded by appointing Coleman "friend of the Court." Coleman, in addition to being a member of the Ford cabinet, has long been chairman of the NAACP Legal Defense and Education Fund Inc.

Arguments Before The Court

Two basic issues were debated before the Court, by Coleman on one side, and lawyers for Bob Jones, Goldboro School, and the IRS, on the other.

First, the parties disagreed on whether existing federal tax law prevents the IRS from granting tax breaks to private schools that discriminate on the basis of race. Internal Revenue Code Section 501(c)(3) provides that the IRS is to give tax-exempt status to entities "organized and operated exclusively for religious, charitable . . . or educational purposes."

Attorneys for Bob Jones and Goldsboro argued that their clients were entitled to tax-exemptions under the statute because they were both "religious" and "educational" organizations, within the meaning of the statute. Coleman countered that to be entitled to favorable tax treatment, "religious" and "educational" institutions must also be "charitable" organizations in the common law sense of the word. This requires that they conform to fundamental public policies. In the case of educational institutions, Coleman said, public policy requires that schools not discriminate against prospective students on the basis of race.

Coleman illustrated the importance of requiring organizations to observe public policy by positing the case of a church that requires that 10 percent of its members be sacrificed each year. Although such a church may be "religious," it should be denied tax benefits because it is not "charitable" in that it does not abide by public policy. Justice O'Connor questioned whether a church which practices racial discrimination would be denied tax benefits under Coleman's theory. Coleman conceded that the church would receive benefits because there is presently no law or public policy which condemns racial discrimination practiced by a church. However, he noted that such a policy exists against discrimination in education.

A Constitutional Dilemma

What does the Constitution regard as more important, freedom to practice one's religion as one chooses, or freedom from racial discrimination? That is the question which the Court will ultimately have to determine. However, because oral arguments before the Court focused primarily on the correct interpretation of Section 501(c)(3), the justices heard little discussion concerning whether freedom of religion or freedom from racial discrimination should be deemed paramount when the two rights are in unavoidable conflict.

In this written brief, attorneys for Bob Jones and Goldsboro argued that to deny the schools tax-exempt status would violate the First Amendment, which guarantees the free exercise of religion. Giving certain religions tax-exemptions while denying the same benefits to others, because of their religious beliefs, would also violate the "Establishment Clause" of the First Amendment by promoting one religion over another, the schools' attorneys argued. As William B. Ball, counsel for Bob Jones University, told the Court, "The theology of Bob Jones may not be yours, and it certainly isn't mine, but it is theology nevertheless."

Coleman and the IRS see eye-to-eye on the constitutional issue, both maintaining that if the IRS is found to have the authority to deny tax-exemptions to racially discriminatory private schools generally, no exception should be made for fundamentalist Christian schools such as Bob Jones or Goldsboro. Coleman argued that the denial of tax benefits would not violate their First Amendment rights because such a denial would not prohibit the schools from practicing their religious beliefs, but would only deny them certain benefits if they insisted on doing so in disregard of the constitutional policy against racial discrimination in education. Coleman told the Court that the national policy against racial discrimination is "crystal clear" and "fundamental in our history" in that a civil war was fought over it, and a constitutional amendment passed to prohibit racial discrimination.

The Court faces no easy task in resolving the seemingly irreconcilable conflict between the right of Bob Jones and Goldsboro to freely practice their religion without governmental interference, and the right of black students to be free from racial discrimination in schools which receive federal tax benefits. Either way it decides the case, the Court is likely to decrease the number of persons who can be regarded as friends of the Court. □

Balancing of Constitutional Rights: A Teaching Strategy

When there are conflicting rights involved courts must balance the rights, and the development of law is a continuous struggle to balance rights. One way to teach this principle is to have the students identify conflicts of rights in the Bob Jones case.

**Freedom of Religion-i.e.
the right to believe and practice private racial discrimination
(1st Amendment).**

vs.

**Equal Protection of the Law-i.e.,
the government should not by tax laws allow itself to be involved in treating citizens unequally based on race
(14th Amendment).**

Ask:

1. What side do you think the Court will rule for? Why?

2. Does the fact that the Supreme Court appointed Mr. Coleman as "amicus curiae" (friend of the Court) have significance? Why? Mr. Coleman is a black, highly respected attorney. Is this important?

3. If the Court rules in favor of Bob Jones and Goldsboro, can the Congress amend the Internal Revenue Code and disallow a tax-exemption for racially biased private schools? (Yes.)

4. Have the students identify other conflicts of rights which must be balanced:

A. *Safety*
drugs in a school locker
vs.
Privacy
privacy of students

B. *Free Press*
reporting all the details of a crime
vs.
Fair Trial
right to an unbaised jury

C. *A Variety of Educational Opportunities*
e.g. programs for the severely mentally retarded
vs.
Money Available
limited amount of funding must be divided among all students

D. *Girls' Use of Limited Gym Facilities*
vs.
Boys' Use of Limited Gym Facilities

Lawyers For The Creative Arts

Teri Engler

You have probably seen them in the movies and on television. They are the beautiful people, often as glamorous, trend-setting, and celebrated as their clients. They are slick professionals who lead their lives in the fast lane. They are the "lawyers to the stars."

If this image is at all accurate, it represents only a tiny fraction of the hundreds of lawyers for the creative arts across the country today. They are, in fact, quite a varied bunch, ranging from volunteer attorneys who advise artists on individual problems to those who manage every aspect of their clients' legal and business affairs. For most, their work in arts law is just an occasional case within a general corporate or labor law practice.

"Arts law" (or "entertainment law" as it is also known) covers a broad spectrum of arts-related legal matters. With the possible exception of the copyright laws, the problems of most creative artists (whether they are painters, writers, singers, or actors) are not really unique in a legal sense. They fall within such standard categories of law as contracts, labor relations, real estate, taxes, and even torts. What makes them especially interesting, though, is their application in the artistic setting.

Some Typical Cases

Matthew, a young free-lance writer, is frantic. After years of rejections from most major (and several minor) magazine publishers, he has finally sold a short article on rock climbing in Colorado. His editor, however, has cut and changed the piece extensively. Matthew is quite distressed by its new form and wants to know what, if any, rights he has.

Margaret has several pieces of her sculpture on consignment with a local gallery. She has recently heard rumors that the gallery owner is having financial difficulties and may soon be going out of business. The gallery has been closed for the past week and Margaret has been unable to find the owner. She is worried that his creditors will get her work and refuse to return it.

Mark, Robert, Tim, and Jill are musicians in a punk rock band that's beginning to succeed. An executive from a recording studio encourages them to make a demo record at his studio and test-market it. He wants the band to pay the studio the cost of cutting and promoting the demo, or to give the studio 30 percent of the proceeds from any recording contract which may result from the marketing of the demo.

The first case raises the question of whether someone who has created a work has a right to keep it free from radical alterations by whoever buys it. This is likely to boil down to interpreting the contract. Do Matthew and his publisher have an agreement giving Matthew the right to veto certain editorial changes in his work? Most publishing contracts are silent on this point unless the author has been very successful in the past, a "hot property," as it were. As Miriam Krasno's article points out, European countries have long recognized this problem and have laws acknowledging an author's "moral right," but only recently, and in extreme circumstances, has the right begun to develop in American courts. In these cases, the writers whose works were in question were already well-known for their accomplishments, and were able to prove that there was a real likelihood of damage to their careers.

In the case of the consigned sculpture, too, the initial point of inquiry for Margaret's lawyer would be the terms of her consignment contract with the gallery owner. Under section 2-326 of the Uniform Commercial Code, Margaret's work could be subject to the claims of the gallery owner's creditors. It is possible, however, that language was incorporated in the contract so that the consigned pieces in the gallery owner's possession would not be turned over to his creditors. Some states exempt the artist/dealer relationship from the operation of section 2-326, while others require that the contract state that the gallery will clearly and publicly distinguish items on consignment from items that belong to the gallery.

The punk rockers' attorney would also be concerned with the terms of a contract between the band and the recording studio. The costs of making a quality demo record are often unnecessarily high, and such test-marketing services have been criticized by experts in the industry as having little or no value to recording artists. Moreover, if the band had instead chosen to grant the studio a percentage of its earnings under a subsequent recording contract, it might find that the studio is getting too much compared to the value of what it has given the artists.

Naive Artists

Although negotiating contracts make up the largest part of the work that lawyers for the creative arts do, they may be called upon to deal with a number of other topics. "You've got to do it all for them," says Dennis Dicks, a Chicago attorney who has represented numerous artists. "They are just not attuned to the business world. The ideal goal is for the arts attorney to do everything for an artist so he or she can just focus on their art and creativity."

Writers, painters, and sculptors, for example, commonly have questions about what ideas or materials the copyright laws cover, how copyrights are obtained and registered, and what constitutes "fair use" of their copyrighted product. Some writers may seek advice about libel or censorship laws.

Lawyers may even get into housing questions, drafting leases for artists' lofts, where readings, rehearsals, and showings might be held. This calls for a knowledge of local building and zoning regulations, as well as specific laws on landlords' and tenants' rights and responsibilities.

Performing artists' contracts are frequently set by negotiations previously carried out between their employer and their union (such as AFTRA, SAG, AGVA, and AFM); federal labor laws control both union organization and the subjects and nature of collective bargaining.

There's more! Attorneys for creative artists must be able to explain to their

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clients the relative advantages and disadvantages of the different forms of business organizations. They may draft partnership agreements or help artists incorporate as profit or not-for-profit (and tax-exempt) corporations. The tax consequences of these decisions have to be analyzed and weighed, records must be kept, and forms must be prepared and filed.

In some ways, it's like any other business.

Some aspects of the tax laws are of special interest to creative artists. For example, for expenses to be deductible as business expenses, they must arise while the artist is involved in a trade or business which turns a profit. An attorney would have to be able to discern whether a client's activities constitute a "trade or business" under IRS regulations; if an artist's work is really a "hobby," his or her expenses are personal and not deductible. Also, once they have achieved some degree of financial success, artists may need advice on deferring taxable income through qualified pension plans or other tax shelters.

A familiarity with the immigration laws and U.S. Immigration Service procedures is another helpful tool for the arts lawyer, particularly since more and more foreign actors, film makers, dancers, and musicians have come to the U.S. to work (and eventually settle) in the past decade or so. "The objective," says Drew Farber, Associate Director of The Second Stage Theatre in New York, "is to find a lawyer who can help you get a green card." The so-called green card, which is issued by the Immigration Service, confers permanent resident-alien status on non-Americans living in this country. Farber, who is Canadian, has been working with his attorney for over two years to get through the plethora of paperwork and procedures needed to obtain his green card. "It's no easy task," says Farber. "My lawyer has to help me and my employer convince the [Immigration] Service that no American citizen can do the job I'm doing at The Second Stage." To date, Farber has been able to secure a "H-1" visa, which allows him to be paid for the work that he is doing and to stay in the U.S. for another year.

Who are They?

Lawyers for the creative arts come from divergent backgrounds. Some have had previous experience in the arts themselves; others have not. Notes Chicago attorney/agent Jerome Wexler: "Most of us who agent books, whether lawyers, accountants, or business people, are really not literary types. We happen to be people who like books and who read."

Many arts attorneys begin as volunteers, through special arts law committees of their local bar associations or one of the 50 or so pro bono arts groups nationwide. In addition to assisting with specific cases, volunteer attorneys help plan and conduct educational workshops and put together publications giving artists advice that will help make them legally "aware" and competent.

Clarice Hearne, Executive Director of Chicago's Lawyers for the Creative Arts (LCA), believes that attorneys' aid in developing a sense of responsibility among artists is as important as the actual legal work they perform. "Why should artists be excused?" she asks. "The excuse of 'Well, we're artists—we shouldn't have to think about that' isn't any good. Artists need to think about what they're doing and the legal and practical implications of it."

One of the aims of Hearne's organization is to provide the arts community with self-help information through regular seminars and conferences. Their latest, called "Script to Stage," was a day-long conference on theatre production. LCA has also created a resource library containing copyright kits from the Library of Congress, tax-exempt status application forms, and copies of pertinent legislation.

They may not be the rich, romantic, famous characters portrayed in the movies, but the real-life lawyers for creative artists are helping to keep the arts moving ahead in their communities. As one model/actress puts it: "Arts lawyers? They're not just indispensible to me. They're indispensible to all of us!"

Moral Rights

(Continued from page 25)

but eventually a court of appeals agreed with the troupe and ordered an injunction to prevent ABC from rerunning the specials. The finding was partly based on the Lanham Act, which states that anyone falsely using a trademark or designating goods or services in commerce is liable to civil action. The court held that a violation of the act had occurred because the show, although properly credited to Monty Python, was significantly different from the original creation. The troupe deserved relief because "[i]n such a case, it is the writer or performer . . . who suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate the work."

The decision also rested on copyright infringement, since the performers' original contract with the BBC forbade unauthorized editing. They were able to demonstrate to the ever contract-conscious American courts that they may have had sound legal grounds for asserting total control over editing, even though the BBC waived those rights (without the troupe's consent) when selling the tapes to ABC.

DaSilva's comments on the case reveal that the decision, although important, wasn't an all-out acceptance of moral rights. He points out that the court had referred to ABC's *excessive* editing of the work and asks whether moderate editing would have been acceptable. Besides, the claim was based on some contract issues—without a contract arguably giving them editing control the troupe may not have prevailed. And the Lanham Act applied because Monty Python is a recognized name, a kind of "trademark." What happens to an obscure artist's work? *Gilliam* does show, though, that American courts are becoming more interested in protecting an artwork's integrity.

Thinking Creatively

The legal profession is now seriously debating the possibility of formulating an American version of moral rights doctrine. In one camp are the proponents of adapting existing laws and remedies—an evolutionary approach like the one taken in *Gilliam*. The other camp is encouraging new statutes and approaches.

Because California is the home of so much of our entertainment industry, artists' rights are an issue of constant concern there. The state began to extend rights to artists with the 1979 enactment of the California Art Preservation Act. The law protects an original painting, sculpture or drawing and assures paternity rights to the artist. It doesn't, however, protect work contracted for commercial use, like an illustration prepared for a magazine.

It is obvious that the law's scope is much narrower than European statutes and even narrower than the American Lanham Act and the current copyright law. Not only is nonvisual artwork excluded from protection under the California statute, but only works of "recognized quality" are eligible for protection. The act is significant, however, because it is the first American law explicitly directed at providing personal rights to artists (at least some artists).

A different angle on the problem is also being discussed. For some theorists, the protection of artwork should be centered around the work itself and not the artist. This line of thinking holds that moral rights do not adequately protect the public interest in artwork. To remedy this, the process of public dedication can be used to shield worthy objects. As one commentator explains: ". . . the owner of dedicated artwork would be entrusted with a duty to prevent it from being destroyed or defaced, either negligently or willfully." (Porges, 1981)

But here again we run into the problem of protection only for "significant" artwork—what happens to works that the determining body doesn't consider important enough to protect?

Until recently Americans, unlike Europeans, saw art as just another kind of property. But as artists in the United States have gained international reputations (specifically in the post-WWII art movements), the uniqueness and value of artistic work have become more widely appreciated. Where once an artist's creation may have seemed less important than a house or a swimming pool, the artist is now seen as a valued contributor to society, and art itself one of the last refuges of the individual in a homogenated society. Artists are trying to retain control over their work both to preserve their means of personal expression and to get their share of the money changing hands in galleries, theaters, and studio boardrooms.

For whatever reason, our courts and legislatures are taking a closer look at European moral rights law and trying to decide how to best integrate its principles into our dissimilar milieus. However it all turns out, the process will be intriguing. It isn't every day that our courtrooms are the scene of exchanges like the following:

The court: I thought that was your business, being fools.

Mr. Palin [Monty Python member]: Well, on our own terms. *(Gilliam)* ☐

More About Moral Rights

DaSilva, "Artists' Rights in France and the U.S.," 28 *Bulletin of the Copyright Society of the U.S.A.* 1, 1980.

Duffy, *Art Law: Representing Artists, Dealers, and Collectors,* New York: Practising Law Institute, 1977.

Hertzberg, "Onward and Upward with the Arts: Naughty Bits," (*Gilliam v. ABC*), *New Yorker,* March 29, 1976, 69.

Gantz, "Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform," 49 *The George Washington Law Review* 5, 1980-81.

Kraus, "Changing the Work of David Smith," *Art in America,* September, 1974, 30.

Porges, "Protecting the Public Interest in Art," 91 *The Yale Law Journal* 1, 1981.

Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators," 53 *Harvard Law Review* 4, 1940.

Libel and Fiction

(Continued from page 33)

legedly admitted that the book was about his family, four witnesses claimed to recognize the plaintiff in the character, and the plaintiff himself stated that twelve of his students, on seeing a review of the book, had asked him if the book was about his family. To top it off, the fictional disclaimer was a weak defense because the original copies of the book apparently failed to carry it.

Though the author was in trouble under any standard, the *Fetler* court gave him even more grief by defining the standard of proof more subjectively than the *Middlebrooks* court: "The question is whether the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel: it is sufficient if those who knew the plaintiff can make out that he is the person meant."

One final standard for the identification should be considered, the "community identification" test used in Massachusetts. As stated in *Wright v. RKO Pictures*, 55 F. Supp. 639, 1941, the standard is as follows: "whether a considerable and respectable class in the communities where the defendant's [movie] was shown would identify the characters as these . . . plaintiffs." The test would require more than the "subjective" identification by the plaintiff's best pals, but not leave the verdict to total strangers, as a pure "reasonable man" test might require.

As applied in two cases, the test resulted in a certain rough justice. In *Wright* itself, the movie *Primrose Path* changed the names of the characters, the locale of the story, and all details identifying the family portrayed with the actual plaintiffs. Only the character of the deceased father might have provided a clue. Because no one in the community, apart from the plaintiffs, stepped forward to assert that identification existed and "was so understood generally" by the required segment of the community, the case was dismissed.

By comparison, in *Kelly v. Loew's Inc.*, 76 F. Supp. 473, 1948, the plaintiff was a PT boat lieutenant in World War Two who was identified by name in the book from which the movie *They Were Expendable* was drawn. He succeeded in his suit even though in the movie his fictional counterpart was given another name. The question, according to the district court, was not whether "the audiences knew Kelly personally, but whether they knew his reputation." The *Kelly* court pointed out that by stating in publicity that the movie was based on the book, the defendants were providing the audiences the key to identification.

Occasionally, the courts deal with suits brought by people who think a minor character is based on them. In *Wheeler v. Dell Publishing Co.*, 300 F.2d 372, 1962, Hazel Wheeler thought the author of *Anatomy of a Murder* had based the character Janice Quill on her. Quill was described as "that dame with the dyed red hair and that lurid scar on her right cheek . . . a foul-mouthed harridan," as well as the mother of an illegitimate sixteen-year old, and the wife of the murdered man. Wheeler was a real-life widow and the mother of a nine-year old. She claimed to have dyed her hair henna and said that she had attended the trial on which the book was based and had been scratching her face during it.

Impressive evidence? The *Wheeler* court didn't think so. It declined to find identification for three reasons. First, the portrait of Wheeler was so repulsive that "any reasonable person who read the book and was in a reasonable position to identify Hazel Wheeler with Janice Quill would likely conclude that the author created [Quill] in an ugly way so that none would identify her with Hazel Wheeler." Second, Wheeler had denied possessing any of the "unsavory characteristics" of the fictional character (although one may ask which plaintiffs in libel suits ever admit to them?). Third, the Quill character had played only a small role in the book and the court believed that "no average reader of the book would remember the very minor subplot."

A Current Case

As this survey of older cases shows, courts were far from agreed on tests for identification even before *Bindrim*. One recent case, *Geisler v. Petrocelli*, 616 F.2d 636, 1980, explores identification from the writer's perspective, though the case is insufficiently far along to provide many guidelines at this time.

In *Geisler*, the plaintiff is "a petite and attractive young woman" who had worked for a time as publicity assistant for a small publishing company. Another employee during the same time period was the defendant, an author named Orlando Petrocelli, who had known her casually. Petrocelli later left publishing to write a "potboiler" called *Match Set* concerning the "allegedly corrupt and corrupting world of the women's professional tennis circuit." For some reason, Petrocelli called his main character by the plaintiff's name, Melanie Geisler, and led the fictional Melanie through graphic sex and the rigging of a tennis tournament. The fictionalized Melanie Geisler was described as "young, attractive and honey-blonde, her body . . . firm and compact, though heavier than she would like," a description that fit the real Melanie.

As can be imagined, the real-life Melanie sued Petrocelli for libel, charging that, although his book was labelled as fiction, it in fact referred to her by name and physical description, and that she was the leading character. Furthermore, she said a reasonable reader would likely associate the fictional character with the real Melanie since the defendant knew her from his publishing days. The Federal district court dismissed the complaint, but the Second Circuit Court of Appeals reversed, holding that there was enough evidence to take the case to the jury.

The Second Circuit commented at length on the *Geisler* case. First, the Second Circuit reaffirmed the standard it had used in *Fetler*, which is not far different from the *Bindrim* test, but then made a bow to a more "objective" standard: ". . . plaintiff must demonstrate that third parties apprehend the similarity between the real person and her literary cognate as something more than an amusing coincidence or even conscious parallelism on a superficial plane. Rather it is required that the reasonable reader must rationally suspect that the protagonist is in fact the plaintiff, notwithstanding the author's and publisher's assurances that the work is fiction."

The court then went on to suggest that at trial evidence could be presented to show identification—testimony that plaintiff's circle of friends corresponded to characters in the book and that plaintiff had once been an athletic prodigy, or affidavits from individuals indicating that after reading or hearing about *Match Set* they believed that the Melanie of the novel was the Melanie of real life.

Finally the *Geisler* court summarized the problems inherent in this entire area, problems which it felt could only be effectively decided at trial on the facts: "This points up the disturbing wrong inherent in the scheme: the more virtuous the victim of the libel, the less likely it will be that she will be able to establish this essential confusion [that the fictional character is in fact her] in the mind of the third party. Thus, the more deserving the plaintiff of recompense for the tarnishing of a spotless reputation, the less likely will be any actual recovery."

Publishers Affected Too

The *Bindrim* decision has had big implications for publishers. Doubleday was the big loser in *Bindrim*, after all, and since *Bindrim* most of the cases dealing with libel through fictionalized characters have focused on publishers' liability.

Fortunately for the publishers, the courts have not jumped on the *Bindrim* bandwagon. The limits of *Bindrim* have been drawn in two recent and related cases, *Pring v. Penthouse Int'l., Ltd.* (10th Cir. No. 81-1480) and *Miss America Pageant, Inc. v. Penthouse Int'l. Ltd.*, 524 F. Supp. 1280, 1981.

In 1979, a free-lance writer named Phillip Cioffari wrote a humorous article for *Penthouse* about a Miss America beauty contest in which "Miss Wyoming" engaged in a variety of antics in an effort to win the contest, including certain sexual acts resulting in the levitation of "Miss Wyoming's" coach in the midst of the pageant. Cioffari, a college professor, had been a free-lance writer for 15 years and had written for *Penthouse* before. Neither Cioffari nor *Penthouse's* editors believed that the article was anything but a fictitious romp through the frivolities of beauty pageants. A real-life Miss Wyoming, however, was not amused, nor was the sponsor of the beauty contest, Miss America Pageant, Inc. Two lawsuits were filed.

In one case, a federal jury in Wyoming levied a $26.5 million judgment against *Penthouse* and a $35,000 judgment against Cioffari (*Pring v. Penthouse*, C.79-351, 1981). Apparently the jury found that Cioffari had written and *Penthouse* had published with malice "false statements" about Kim Pring, a former Miss Wyoming. (Since a beauty contestant is in the public eye voluntarily, "malice" was necessary. See box for more on the public/private distinction.) The Federal District Court in Wyoming cut the awards in half.

Miss Pring's victory against Cioffari and *Penthouse* was short-lived, however. In November, 1982 the Tenth Circuit Court of Appeals reversed the *Pring* judgment and ordered the case dismissed. In doing so, the majority provided some comfort for nervous authors and their publishers, and added a new wrinkle to the identification test. Not only must the publication identify the plaintiff, said the court, but "the story must reasonably be understood as describing actual facts or events about the plaintiff or actual conduct of the plaintiff." In this case, however, no reasonable person could believe that there is a "false statement of fact" since the events described (such as levitation during a sexual act on the stage of the Miss America pageant) clearly represent "impossibility and fantasy within a fanciful story." The key, then, is not that the story is labelled "fiction," but that no one could reasonably think that actual events were being described.

According to the *Pring* court, this "actual conduct" or "actual facts" test really was not an identification issue. No, said the court, it focuses on whether there has been made a false representation of fact, and not hyperbole. Practically speaking, however, the test, in relying on whether the reader "reasonably understood" the writing to refer to the plaintiff's life or activities (as opposed to whether the incident was in fact true), can be seen as a gloss on the "objective" standard for identification. In effect, if even the "most careless" reader knows the incidents could never have occurred, or that the setting in which the incident occurred was improbable, nobody would believe that the incident was "of and concerning" the plaintiff. Or as the court said more graphically, "It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else." In short, authors writing pure fantasy and their publishers can breath more easily after *Pring*—at least for the moment. Miss Pring's lawyer, the flamboyant Gerry Spence, has petitioned the court for an *en banc* rehearing, meaning that all the judges of the Tenth Circuit will be asked to review the case. He says he'll take it all the way to the Supreme Court.

In the heady days after the original *Pring* award, and before the Tenth Circuit reversed the lower court decision in *Pring*, a related case was decided in New Jersey, home of the famous Miss America Pageant. The pageant company sued *Penthouse*, arguing that the publisher had libeled the former Miss Wyoming, and thus the pageant company. The decision is particularly interesting because the trial court in Wyoming had already found that *Penthouse* had acted with malice in publishing its story as to Miss Wyoming. Did this mean that the pageant company could also recover? A New Jersey federal court said it could not, and in doing so cast considerable doubt on the validity of the Wyoming trial court decision, at least as to the publisher.

The New Jersey court was confronted by *Penthouse*'s claim that its editors believed the story "was not about real persons or events and thus had no reason to believe its publication would be harmful." As such, there could be no "malice," no reckless disregard of whether the story "would be reasonably understood as relating to facts and events about the plaintiff which actually took place at its beauty contest." The court, after analyzing the facts and looking at *Bindrim*, agreed that the pageant company had not made its case with "convincing clarity."

First, the court admitted that previous malice standards might not be effective in cases involving fictionalization. "It would seem too simplistic in the case of a fictional or satirical work simply to question whether the author/publisher had the subjective intent to publish a falsity, since such works are not intended to convey truth." But said the court, there was "clear and convincing evidence" of malice in *Bindrim* because (1) Mitchell had been at the nude encounter sessions and was in a position to know her fictionalized version was false and (2) at the time Doubleday assigned paperback rights, it had already received the letter from Bindrim's attorney claiming Bindrim was really Dr. Simon Herford.

By comparison, *Penthouse*'s editors and its publisher, Robert Guccione, while admitting they knew that the story incorporated "many incidents of reality" (there really is a Miss America pageant in Atlantic City, there really is a boardwalk, the contestants are labelled by state and so on), didn't believe that the article was anything other than fiction. As the editors could truthfully testify, none of them had ever heard of any half naked contestant appearing in the middle of the contest.

The court agreed with *Penthouse*'s argument that simply knowing that a real Miss America pageant exists wouldn't cause the publisher to question the fictional nature of the article. Unless otherwise alerted, the publisher would simply have no reason to believe the wild shenanigans depicted in the story had ever occurred.

Finally, since none of the "false" behavior in the article could be attributed to the contest, which was merely "backdrop" for these events, the article did not really libel the pageant company. In short, a finding of malice as to the beauty contestant did not carry to the contest itself.

Summing It Up

The law of identification is unsettled, but there are a few guidelines that aspiring authors should keep in mind. First, if the author sticks too close to the autobiographical facts, he will get into trouble. Second, the smaller the role played by the character in the overall work, the less the chance of a finding of positive identification. Third, courts look at the author's intent and his acquaintance with the plaintiff, whether they will openly admit it or not. Fourth, as the recent *Pring* decision indicates, the more unbelievable the story, the less likely the reader will believe it is about the plaintiff, and, consequently, the less likely the plaintiff is to recover.

As for publishers, the less they know about the subject of a fictional piece, the better off they are. If the publisher does know something, it is better to believe that the fictional events couldn't possibly happen. That means, from a legal if not literary standpoint, a broad parody is better than a dry satire. Finally, if the publisher gets a note in the mail claiming some piece of "fiction" libels a person or organization, he should publish only with extreme caution.

As for the courts, they must work toward a more uniform standard which will

Identification may be the threshhold issue in these cases, but once plaintiffs get through the door they have to deal with the different standards of proof for public figures and private figures who think they've been libeled.

Under current libel law, public officials and "public figures" cannot recover unless there is a showing of "actual malice." Actual malice is defined as the publication of a defamatory falsehood with knowledge of its falsity or with reckless disregard as to its falsity. Purely "private figures," however, don't have to establish actual malice to win; state law may provide for recovery if the defendant was only negligent in publishing the falsehood.

The actual malice standard originated with press cases and was designed to insure that newspaper reporters could report news about public figures unhampered by fear of litigation.

But then what is a public figure? In *Gertz v. Robert Welch*, 418 U.S. 323, 1974, the Court held that an active lawyer in community affairs, although "well-known in some circles," was not a "public figure" when representing a private client in a controversial murder case because he never discussed the case with the press or attempted to go beyond his legal responsibilities. In the case, the Supreme Court seems to have concentrated on whether the person voluntarily sought publicity.

The public/private distinction evolved in press cases, but it applies to protect people from fictionalized libel while providing authors the necessary breathing space to create. The danger of allowing a "subjective" standard—such as that used in *Bindrim* and advocated in *Fetler*—is clear. It allows the plaintiff's witnesses to control the proceedings. Bindrim was able to produce only three witnesses, all friends, one of whom admitted other therapists practiced nude techniques, yet this alone was enough to produce identification. It may be that a more objective standard might have reached the same results, but the *Bindrim* court failed to provide the necessary analysis. Moreover, in *Bindrim*, unlike *Pring*, the events described could have happened and a character like Dr. Herford could have been based on a real person. The reader simply didn't know.

Since we live in a litigation-happy society, in which privacy is more and more violated and entertainment corporations are fat and tempting targets for law suits, we'll probably see more cases brought by real people who think they've been libeled by some fictional work.

The values at stake are important on both sides: surely real people do have a right not to be publicly ridiculed in such a way that the reader believes a false statement of fact is, or could be, true. And surely writers and publishers can't do their best work if they must constantly worry about lawsuits from everyone who discerns a resemblance, however remote, between himself and someone in a book, particularly if the work is not absurd or fantastic. The courts will have to fashion objective standards of proof that permit truly libeled people to recover while establishing tests that rely on more than the testimony of the plaintiff's close friends. That should keep them busy. □

How Malice Became the Press's Friend

the fiction cases too. Miss Wyoming had voluntarily put herself in the public eye, so her case was judged under the strict standards of proof for libel of public figures. Paul Bindrim's case wasn't as clear-cut. Was he a public figure or not?

Choosing to Be Public

Given the choice, Bindrim agreed before argument of the case that he was a "public figure," a shrewd decision indeed. Although such status would mean that Bindrim would have to prove that Mitchell had acted with malice in publishing false and defamatory statements about him, what easier task is there than proving that a fictional piece about oneself is not true? At the same time, being a "public figure" had its benefits. If libel in its essence is damage to someone's reputation in the community, then more people in that community are likely to know that the fictional portrait is of the plaintiff if the plaintiff is well-known in that community.

Both Bindrim and Miss Wyoming had to show that the publications had acted with "reckless disregard" of the truth or "actual malice." What implications does that have for authors and publishers who want to avoid successful libel suits? Does that mean that the author and publisher have to investigate every item in the novel? Under the tests stated by the United States Supreme Court in *St. Amant v. Thompson*, 390 U.S. 727, 1968: "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

Under this standard of subjective awareness of probable falsity, the Second Circuit considered a book translated from Spanish into English and containing certain unpleasant personal remarks about a famous writer. The court said the publisher had no reason to doubt the truthfulness of the statements allegedly made to the author. The factors considered by the court in *Hotchner v. Castillo-Puche*, 551 F.2d 910, 1977, were that the author had established credentials for accuracy and veracity, he seemed to have been present at the occurrence of the alleged remarks, and the allegations "were not of such extraordinary nature as to suggest a high probability of falsity."

How similar was the situation in *Castillo-Puche* to *Bindrim*? If anything, a novel is more difficult to investigate than a factual work since the line between reality and the writer's imagination is blurred. Gwen Mitchell was an experienced writer who indicated she was writing fiction based on her personal experience. Even if Doubleday had investigated, what would they have found? Bindrim did not even look like his portrait in *Touching*, and only he had the tapes which could reveal the closeness of the parallels between the book and the actual marathon sessions.

The actual malice test (did the defendant have reason to doubt the truth of what was published) would be a powerful ally to journalists, but it's a much shakier friend for a novelist. The author, after all, knows that his account is false (it is fictional), and will lose if the actual malice standard is applied. In *Bindrim*, the court had judged Mitchell by journalism standards and found her "reckless disregard" of the truth of what actually happened at the marathon to be "actual malice." The fact that Mitchell was writing fiction did not impress the court at all.

By comparison, in *Pring*, the court judged Cioffari by standards a bit more suitable to fiction by requiring that the false statement be a representation of fact. If the average reader knows the story can't be true, the author wins, even if the plaintiff appears to be identified. But if the story could be seen as a representation of actual events, then the "actual malice" test makes a defense of a fictional piece very difficult if the plaintiff can be otherwise identified.

Publishers are in a stronger position, at least in suits brought by public figures, since they can argue, as *Penthouse*'s editors did, that they thought they were publishing fiction pure and simple and had no reason to suspect otherwise. Of course, it's hard to know in advance who is a public figure and who is a private figure (and thus a more formidable foe in a libel action). Given the uncertainty, some publishers may more carefully investigate all close cases, but in general publishers are under an uncertain duty to investigate beneath the veneer of fiction to the hard woodwork of the author's experience.

BEST COPY AVAILABLE

Piracy

(Continued from page 8)

the tapes are going to be returned to him anyhow.

RIAA's anti-piracy operation has scored some big successes. A case against New York's huge Sam Goody Company got headlines for nearly two years, possibly discouraging many would-be infringers, and finally resulted in a conviction. The Goody Company had brought pirated records and tapes in the New York area and shipped them to warehouses in another state. From there they were either distributed to stores as legitimate copies, or returned to the legitimate companies for refunds. A *nolo contenderi* plea (equivalent to a guilty plea) a few months ago resulted in convictions of both the company and one of its vice-presidents for interstate transportation of stolen goods and copyright infringement. The corporation got its wrist slapped with a $10,000 fine, but the vice-president, a 65-year-old man who had retired as the case wound its way through the courts, received a one-year jail sentence, much to the surprise of courtroom observers.

The pirating of tapes and records is so profitable that organized crime is now involved. According to an NBC news broadcast in 1979, "In the last three years, the Mafia has become one of the biggest producers of records and tapes in this country, turning out millions of copies of the hits on the Top 20 List. The mob's first big hit was music from the sound track of the movie, *Saturday Night Fever*, featuring the Bee Gees. RSO Records, a company that made the original legal recording, said it sold 23 million copies of the sound track from *Saturday Night Fever*. Federal investigators said that the mob counterfeiters made and sold at least that many."

Because of a quirk in the 1909 Copyright Act, the legal situation governing records and movies is very different. "Phonorecords" weren't covered by the 1909 Act, but rather were covered by copyright laws in almost every state. As of February 15, 1972, records received federal copyright protection, but records made before that date are still covered by state laws. However, this isn't as bad for the record industry as you might think. If a copyrighted song is infringed, federal law will cover the composition itself (melodies and lyrics were covered under the 1909 Act), while state law will cover the sound. In effect, that gives RIAA the option of which prosecutor to go to when an older record is copied. If one prosecutor turns them down, the other may be receptive.

Like the move industry, the record people also pursue civil action, particularly against those who don't manufacture pirated material but only distribute and sell it. These people characteristically get a "cease and desist" letter, and most of them comply. Those who don't are in for trouble. In 12 years, RIAA has never lost a civil suit. They haven't often collected damages, but they have put a lot of people out of business.

Unauthorized Jeans

Nothing can come between Brooke Shields and her Calvins—except, perhaps, a legal order to determine whether they really are expensive designer jeans or a sophisticated rip-off. In practically every country in the world people wear jeans, but are they getting what they paid for, or are they getting a good copy of the label and an indifferent copy of the jeans themselves?

The giant of the field, the Levi Strauss Company, estimates that it loses $200 to $500 million each year to fake Levis. According to Peter Phillips, Assistant General Counsel of Levi Strauss, most of the company's counterfeiting problems are felt in the overseas market. Since the company's jeans are made in this country, there are no legitimate Levis coming through customs, so it's virtually impossible for fake Levis made abroad to get into the country. But fakes can be found almost everywhere else in the world.

Many of the fake Levis come from the Far East. As one anticounterfeiting expert puts it, countries like Taiwan, South Korea, Singapore and Hong Kong are "circuses of counterfeiting." Counterfeiting is not a crime in some countries, and in many others authorities wink at it because it is a money maker.

Some knock-offs of Levis aren't bad, according to Phillips, while others are shoddy. A lot of the inferior quality is hard to spot, since many fakes are made of the same 14-ounce denim that Levi uses, but by cutting costs in the stuff that doesn't show—the stiching and sewing—counterfeiters make jeans that won't last as long.

Most fakes sell for the going rate for real Levis. According to Phillips, competition in the industry is so severe that most real jeans aren't marked up very much, and so there's not a lot of room for cost-cutting even among fakes.

Designer jeans are ripped off, too, but the problem is different there. Most of them are made abroad, so counterfeiters try to slip them through U.S. Customs. Oftentimes the fakes are *extremely* good. It's not unknown for the factories in the Far East that make designer jeans lawfully during the day, under contract with a legitimate company, to crank out nearly perfect copies at night, slap false labels on them, and merchandise them themselves. One way that legitimate companies try to keep tabs on this is to monitor closely the amount of real labels, zippers, buttons, and other sundries that are sent to the contractor. If you send him 10,000, and he gives you 10,000 jeans, then at least you know that he has to be supplying the labels and sundries himself for any fakes, and these may be different enough from the originals to enable customs officials to spot them.

Plastic Money, T-Shirts, ETc

Jeans and T-shirts go together like ham and eggs, so it's not surprising that T-shirts are often ripped-off too. The Rolling Stones, Fleetwood Mac, the Doobie Brothers, REO Speedwagon, and many other groups have registered their trademarks and then licensed rights to companies making shirts bearing their emblems. Oftentimes, however, unauthorized shirts are for sale at rock concerts, cutting down dramatically on sales of the real items. Even worse, some of the fake shirts are badly made and fall apart during the first wash, leading to angry letters and maybe even suits against the legitimate company, which has already been victimized by losing a sale and now must confront a problem not of its own making.

One of the latest entries in the counterfeit sweepstakes is the credit card. Cards issued by Visa, American Express, and Master Card have been illegally duplicated. Investigators think organized crime is behind this profitable new venture. Here's how the scam works. The counterfeiters get the name and number of a real cardholder, either through the records of a company where the credit card holder has purchased something or through collusion on the part of waitresses or sales people. The name and number are embossed on a real-looking card, then someone uses the card up to the credit limit and tosses it aside. By the time the fraud is discovered, the fake card and evidence are long gone. The credit card company will make good the loss, since it will have verified to the merchant that the card is real, but ultimately all credit card holders will pay, since the increase in the cost of doing business will inevitably be passed on to consumers.

Counterfeiting is also rampant in the toy and game industry. Anything that is popular is being knocked off, including Snow White puzzles, Stomper toy trucks, Pac-Man games, and even E.T., that little interplanetary visitor. Kamar International, which has exclusive rights to stuffed E.T. dolls, is swamped with orders —and with illegal competition. Demand for E.T. was so high last year, for example, that new orders to Kamar were often delayed for as long as three months, which encouraged retailers looking for Christmas merchandise to resort to illegitimate channels. Even worse, some of the 65 Korean factories hired to manufacture the dolls were found to be producing illegal copies for Kamar's competitors. Even though the offending factories were shut down, other counterfeiters moved in quickly and made up the gap.

Who's Hurt?

Bargain-hungry consumers may think that counterfeits are a good deal. After all, they sometimes cost less than the originals, and they are sometimes of comparable quality. Aren't they then serving a purpose in a competitive economy?

Even if quality were uniformly good, lots of people would be hurt by counterfeits. For example, the whole purpose of copyright laws, which grant a monopoly to creative people, is to encourage their creativity. Illegally taking away that monopoly cuts down on creative opportunities.

The record industry is a good case in point. The industry estimates that 84 percent of all records lose money, but companies keep going because of their hits. However, counterfeiters only rip off the hits, cutting into the profit-making end of the business and reducing the amount of capital that the companies have to finance new artists. The net result is that companies will take fewer chances on new artists, produce fewer albums intended for specialized audiences, and employ fewer musicians and creative people. This obviously hurts the creative community in music, but it hurts all of us who like music and want something more than hit records.

Also hurt are thousands of factory and office workers in these fields, and governments at all levels, which lose revenue because counterfeiters rarely, if ever, pay taxes.

But all of this is assuming that counterfeits are of good quality and are offered at a discount. Most of the time, neither assumption is true. A survey of the most ripped-off U.S. corporations shows that 75 to 80 percent of counterfeit items are being sold for as much as the real ones. Though quality varies, there is little incentive for counterfeiters to produce good quality merchandise. After all, it won't be returned to them, since their business is strictly hit and run. If you buy counterfeit goods and get your money's worth, you're just plain lucky.

Law Wars

Though they know that counterfeiting can never be completely eradicated, big corporations are fighting back, making it as tough on counterfeiters as possible. About 80 major corporations—a veritable "Who's Who" of copyright and trademark holders—have banded together to form the International Anti-Counterfeiting Coalition. Members include Levi Strauss, Cartier, Revlon, Adidas, LaCoste (owner of the famous Alligator symbol), Coca-Cola, Estee Lauder, Walt Disney, United Features, and Ford (worried about counterfeit auto parts). The Coalition is using a wide variety of weapons against the ripoff artists.

Buying counterfeits? Good luck trying to get your money's worth.

Its biggest current push is to lobby for a federal act with real sanctions against counterfeiters. There is no single anti-counterfeiting statute now, and most prosecutions treat the offense as a misdemeanor and not a crime. The Lanham Act protects trademark holders, but contains no strong criminal penalties. Attempts to use anti-racketeering (RICO) laws and federal mail fraud laws have had spotty success. As a result, counterfeiting is a game in which the rewards are huge and the risks minimal. One person caught with 200 pirated videocassettes and six video machines was given a 30-day suspended sentence. Another, arrested with 600 pirated tapes and 12 machines, was given probation and a $2,500 fine. The judge even gave him the recorders back.

Nor does current law provide adequate civil remedies. The Lanham Act gives trademark owners the right to take civil actions against alleged counterfeiters, but provides for little meaningful damages. Counterfeiters don't keep books, so there's no way of showing how much they have ripped-off a legitimate product. A defendant can always say that he just dabbled in the business and be fined a few thousand dollars. Even an injunction against him doesn't necessarily stop the business, since an injunction may only lead to a contempt of court holding, more minor fines, and the opportunity to keep reaping in huge profits. Or the counterfeiter may simply change locations and force the legal process to begin again from scratch.

The Lanham Act also contains no search and seizure provisions, making enforcement all the harder. However under the current law, some attorneys have been successful in getting "John Doe" TROs, a type of temporary restraining order that can be used to confiscate illegal merchandise. These orders don't specify the name of the alleged counterfeiter, because legitimate companies may not know the name but just know that people selling counterfeited items will be somewhere (say a rock concert) at a given time. Since the other party isn't known, it can't be represented at the TRO hearing. According to Jane Shay Wald, a New York lawyer who has represented rock groups seeking to stop sales of knocked off T-shirts, "Federal judges in more than 60 decisions in the past few years have issued orders allowing federal marshalls to seize shirts without a hearing."

But judges don't always issue the orders, because some of them "feel uncomfortable with the idea that [the other party] doesn't have a right to object on the spot." In an adversary system, it's fundamental that both sides have to be represented, but, as Wald says, "Irreparable harm will be done if notice were given so that objections could be heard. If I gave sellers of bootlegged shirts notice, they would just move all their merchandise to another location."

To clarify the legal situation, and to put teeth into the scattered anti-counterfeiting laws on the books, the Coalition is trying to convince Congress to pass an act that would codify TROs and authorize the seizure of allegedly counterfeit goods and their delivery to the courts. If the goods ultimately were found to be counterfeits, the courts would order them destroyed. The law also provides for mandatory damages against counterfeiters, fines of up to a quarter million dollars for each offense, and prison sentences of up to five years. The underlying rationale is that counterfeiting is theft—from legitimate companies and the public—and should be punished as such. Hearings have been held on the proposed act, and supporters are confident that it will be passed this year or next.

The Coalition has also been active in fighting the importation of counterfeited goods. One of its first successes, just after its founding in 1978, was an amendment to U.S. customs law mandating the confiscation of counterfeited goods entering the United States. When the goods are proved counterfeit, they are destroyed. One spectacular destruction last year in Los Angeles, in which a steamroller flattened thousands of "Cartier" watches, gained much publicity and brought the counterfeiting problem to the public's attention.

Companies seeking to protect their legitimate products alert customs officials whenever possible to the shipment of fradulent goods, providing detailed descriptions of the fakes, and photos of what they look like. They report good cooperation from customs.

U.S. diplomats are trying to persuade other countries to adopt similarly tough standards at their borders, permitting counterfeits to be seized and destroyed. In many countries, only the illegal labels are destroyed, with the fake merchandise returned to the shipper, who may fit it with new labels and send it elsewhere.

U.S. officials are also putting pressure on counterfeiting nations to clean up their act. In a country like Taiwan, counterfeiting may be big business, but since U.S. friendship is essential to the nation, Coalition officials feel that pressure will ultimately bring the Taiwanese into line.

Fighting Tech with Tech

In many cases, it's been new technology that has made counterfeiting easy and attracted so many people into the business. Now the other side is fighting back with an array of gadgets that will help retailers and even customers separate the true from the false.

According to James Bikoff, president of the International Anti-Counterfeiting Coalition, at least a dozen companies are offering new products to foil counterfeiters, among them such corporate giants as 3-M and Polaroid.

Among those being tested now are a symbol of authenticity whose color deepens when a finger is rubbed across it. This heat-activitated system faces competition from holography-based symbols and codes that become visible only when light is shone on them. Products bearing these symbols come with blurbs telling the public how to use them and urging them to send counterfeits to corporate security offices, which will try to track down the sources, beginning with the retailer and moving back along the chain of sale.

Other symbols are being used in the clothing industry. For example, a light-sensitive coding system has been designed for labels, enabling honest retailers to tell the fake from the real.

Another attempt to use technology to combat counterfeiting would bypass record stores and video outlets by enabling music, movies, video games, and other forms of entertainment to be transmitted electronically to homes and recorded by machines that would automatically be turned on to receive the transmission. The system would broadcast programs in

When We Were a Nation of Pirates

Copyright infringement is right up there with Betsy Ross's flag, George Washington's vigil at Valley Forge, and other symbols of the American Revolution. American publishers pirated books from English publishers as soon as they could, and kept this advantage until long after the revolutionary period.

Naturally, anti-English sentiment ran high throughout the colonies, a resentment which made it easy to decide that English publishers and English authors didn't deserve to get our money for their works. Furthermore, as David Kaser points out in looking at our history of piracy in his monograph *Book Pirating in Taiwan*, "The American printing community was peopled to a very large degree by immigrant Irish printers," [who delighted] "in turning things English to their personal profit."

One of the laws passed by the very first Congress, the Copyright Act of 1790, gave authors an exclusive right, for a limited period of time, to their writings. But that law, and every subsequent copyright law for 100 years, contained the explicit proviso that copyright protection applied only to citizens or residents of the United States, and that nothing in the act should in any way be construed to prevent Americans from freely printing the works of foreign authors. Right from the first, then, American publishers were allowed—and even urged—to pirate foreign works.

The Mechanics of Piracy

Throughout the nineteenth century, novels were phenomenally popular in the United States. In an era before TV and movies, when most towns didn't even have a theater, novels were the art of the masses. Some were schlocky, more like soap operas than fine art. Some were among the enduring masterpieces of the English language. Some—like the novels of Dickens and Thackeray—were both.

An entertainment-hungry public gobbled them all up in staggering numbers. American readers were so inflamed by popular foreign novels that crowds often greeted boats docking from Europe, asking travelers what had happened to the heroine of the current potboiler being serialized.

This interest created a ready-made market for English publishers, but they could only stand by and fume because they had no practical opportunity to capitalize on it. Since foreign copyrights weren't protected in the U.S., any American publisher could reprint any foreign book without having to worry about such formalities as payment to the author or original publisher.

This situation set up ruthless competition among American publishers. They schemed constantly to find ways of getting a head start on the opposition, because being the first to publish, even by a few days, could mean thousands of sales.

According to Aubert Clark's *The Movement for International Copyright in Nineteenth Century America*, the game plan was to obtain the earliest copy possible, print a huge edition in cheap form, and sell furiously before competing editions could be published. The first step was to get a copy of the latest English best-seller. Leading American publishers had agents in England and Scotland to secure advance sheets, galley proofs, or at least early reviewers' copies—anything before the general sale copy. Sometimes foreign publishers sold advance sheets to an American pirate, since this was apt to be the only money they saw from the American market and the advance sheets cost them almost nothing. Occasionally authors themselves would supply manuscripts scrambled form in the pre-dawn hours, and only subscribers to this service would have recorders equipped with special decoders to unscramble the message. The transmitted signals would automatically "awaken" the recorders, which would tape the programs and then shut off.

All this sounds swell on paper, but wherever there is money to be made, there are people scheming to make it the easy way. If almost any product can be counterfeited, why won't the anticounterfeiting devices sooner or later be copied too? Even the most advanced new technology, the kind that would beam movies and records directly into your home for taping, isn't immune. Even now, kits selling for as little as $300 promise to bring in cable TV without the tiresome necessity of sending monthly checks to the company. These kits, which include an antenna, a decoder box, and a converter, are doing a reasonably good job of ripping off cable TV signals. If movie and record go into new scrambled systems, can a new generation of modern day pirates be far behind? □

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to American publishers, but the Americans couldn't pay very much since they would have the book exclusively only until one of their rivals could pirate it—a matter of a few days at best.

American publishers could pirate a foreign edition—or one of their American rival's—with dizzying speed. As soon as copy was in hand and the compositors rounded up, the book would be divided up among as many as 30 or 40 typesetters chosen for their speed, and the whole establishment worked day and night until the book was set, printed, and bound. This method often led to shoddy books with many typos, but phenomenal speed records were achieved. One of Sir Walter Scott's books went to the compositor on Thursday and was on sale Saturday.

Once a book was printed, speed was of the essence in getting it into the stores. New York publishers had an edge, since their city had the largest American port and the greatest number of readers close at hand. A Philadelphia publisher once tried to beat the New York advantage by hiring all the seats on the Philadelphia-New York mail stage, filling it with copies of Sir Walter Scott's *Peveril of the Peak*, and getting them to New York before the competition could pirate it. His advantage was short-lived. Harper's bought one of the first copies sold and had their own edition in the stores—still half-wet from the presses—in 21 hours.

Winners and Losers

Who profited from this chaotic situation? A lot of people. Aubert Clark points out that "Not only publishers, but also all those who depended on the trade—binders, typesetters, papermakers, type founders, and booksellers—benefited. The reading public also benefited, at least to the extent that books of foreign authors were made available at extremely low prices."

Who was hurt? Foreign authors and publishers were at the head of the list. When Charles Dickens toured the United States in 1843, he made enemies by repeatedly calling for changes in the law to protect foreign authors. On one occasion, according to Clark, "He practically accused America of helping to cause the death of Sir Walter Scott through lack of a decent copyright law. He waxed eloquent over the lack of a single grateful dollar to buy a garland for Scott's grave."

But American authors were hurt too. Since the whole book trade was geared to pirating foreign works, American publishers showed little if any interest in native authors. Even though these men and women could copyright their books for the American market, what was the use of an American publisher's paying them when he could grab the latest English novel without paying anyone a penny?

Even after American publishers began to bring out their works, native authors continued to suffer from our piracy of foreign works. Pirated works could often be brought out cheaper than American works, which depressed costs across the board and kept down the royalties paid to American writers. Even worse, they themselves were pirated abroad. European nations were, one by one, giving up the practice of piracy and entering into reciprocal copyright agreements. But since the U.S. remained an international renegade, we couldn't participate in these agreements, so our writers were cut off from the huge foreign market. Mark Twain raged against the American laws, and once testified to a Senate committee that he hoped "A day would come when, in the eyes of the law, literary property will be as sacred as whiskey, or any of the other necessities of life."

As the nineteenth century wore on, every important nation in the world except the United States and Russia adhered to international copyright. The Berne Convention of 1887 formalized international copyright throughout most of the civilized world. But American authors, critics, and men of letters were still trying to persuade Congress to take the first step and extend at least some protection to foreign authors. Finally, in 1891, Congress at last provided that foreign works printed in the United States could be granted copyright protection.

Boycotting Berne

What were the consequences of this law? Clark points out that through the principle of reciprocity, American authors secured similar rights from foreign nations, and soon began to receive income from sales overseas. There were more authorized editions, with complete and correct texts edited at leisure, on both sides of the Atlantic. International literary collaboration increased. There was even a lowering of prices, since costs could be divided between two or more markets and there was no need to secure the highest possible profit on the first edition before the pirates stole the market.

Yet America continues to lag behind the rest of the world in recognizing international copyright. We still haven't signed the Berne Convention, and to receive its protections, most American publishers arrange for our books to be published simultaneously in Canada or Great Britain, which are signators of the Berne agreement.

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Strategies

(Continued from page 12)

responses. Try to examine the differences and see if there are any that can be reconciled through discussion.

The Facts of the Matter

Ask the class to read this paraphrase of Justice Pitney's summary of the facts of the case:

The Associated Press is a cooperative organization that gathers news and distributes it daily to its members for publication in their newspapers. Under the AP's by-laws, members agree that news received through the AP is to be published only in a particular newspaper specified in the Certificate of Membership. Members also agree that no other use of it shall be permitted, and that no member shall furnish its news in advance of publications to any non-member.

International News Service (INS) is a corporation whose business is to gather and sell news to its customers and clients, consisting of newspapers published throughout the United States. It serves about 400 newspapers in the United States and abroad, a few of which are also members of the Associated Press.

For the limited purpose of testing the suit, INS admitted that it has "pirated" the AP's news by copying news from bulletin boards and from early editions of the AP's newspapers and selling this, either bodily or after rewriting it, to its own customers.

AP's news matter is not copyrighted. AP has said that it could not, in practice, be copyrighted because of the large number of dispatches that are sent daily.

AP's service, as well as INS's, is a daily service to daily newspapers. Most of the foreign news reaches this country at the Atlantic seaboard, principally at the city of New York, and because of this, and the time differentials due to the earth's rotation, the distribution of news throughout the country is principally from east to west. And, since the speed of the telegraph and the telephone easily outstrip the rotation of the earth, it is a simple matter for INS to take AP's news from bulletins or early editions of its members' newspapers in the eastern cities and at the mere cost of telegraph transmission cause it to be published in the western papers issued at least as early as those served by the AP. In addition, irregular telegraph service, and the normal consumption of time in printing and distributing newspapers, sometimes results in pirated news being placed in the hands of INS's readers at the same time it appears in AP papers, and occasionally even earlier.

After the class has read these facts, have them conduct a mock trial of this case (see box for mock trial procedures). Assign a judge, members of a jury and a team of lawyers for each side.

In deciding what arguments they will present to the judge and jury, the attorneys might try to present their case in light of the following kinds of questions.

1. What does AP maintain is property in this situation?
2. What reason does AP give for this position?
3. What does AP consider to be its rights and responsibilities in regard to the news that it has acquired?
4. What does the AP consider to be the source of its rights and responsibilities in regard to ownership of the news?
5. What is INS's position in this case?
6. Upon what does the INS base its position?
7. Do you think that copyright laws are applicable in this case? Why or why not?

The jury, in its deliberations, should consider:

1. Can news be considered property?
2. If so, who should own it?
3. What rights and responsibilities should accompany the acquisition, use and disposition of the news?
4. In this specific case, should the AP be allowed to prevent the INS from using its news copy?

After the arguments have been presented and the jury has made its decision, ask the class to vote on the jury's decision to see how many would agree or disagree. Discuss their reasons for agreeing or disagreeing with the jury's decision.

What the Court Held

Students may also be interested in comparing their decision with that reached by the Supreme Court. A divided Court concluded that the AP had a property interest in the news that it had gathered, since it is a "stock in trade," gathered by "enterprise, organization, skill, labor, and money," to be distributed and sold to those who will pay money for it, as for any other merchandise.

Justice Pitney, speaking for the majority, held that the INS had been guilty of unfair competition, "unnecessarily or unfairly" injuring the AP. He said that the INS did not attempt to palm off its goods as those of the AP, as is the case in most instances of unfair competition, but bodily lifted the AP's news and sold it as its own, thus "substituting misappropriation in the place of misrepresentation."

But what remedy would be appropriate? The Court decided that an injunction against the INS—which forbade the company from taking the AP's news until its commercial value had passed away—would protect the AP's interests.

Justice Holmes concurred, but had a somewhat different view of the case. He said, "when an uncopyrighted combination of words is published there is no *general* [emphasis added] right to forbid other people repeating them—in other words, there is no property in the combination or in the thoughts or facts that the words express."

But if the AP doesn't have a property interest in its stories, it is possible that some other ground may be found to protect its interest. "One such ground is vaguely expressed in the phrase unfair trade," he said. Like Justice Pitney, Justice Holmes noted that the INS's pirating of the news gave it an unfair advantage over its competitor, by implying that pirated news had been acquired "by the INS's enterprise, and at its expense." This denies to the AP the credit of collecting the news and gives it to the INS. "The falsity is a little more subtle, the injury a little more indirect, than in ordinary cases of unfair trade, but I think the principle that condemns the one condemns the other."

Justice Holmes then turned to the question of a remedy. "It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The dose seems to me strong enough here to need a remedy from the law." However, Holmes broke rank with Justice Pitney and the rest of the majority, which had authorized an injunction against the INS's pirating of the news. Holmes felt that an alternative remedy would be simply "stating the truth." Holmes would require merely that the INS "should be enjoined from publishing news obtained from the AP for ____ hours after publication by the AP *unless it gives express credit to the Associated Press*" (emphasis added). Justice Holmes would, then, remand the case to the district court to determine the number of hours INS must wait if it did not acknowledge the AP as its source, and the form of acknowledgement that INS must give to properly credit the AP, should it choose to admit that its competitor was the source of a story.

Justice Brandeis dissented. He wrote, "the rule for which the [AP] contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonishes the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations. . . ." He added that if the AP may legally refuse to supply its items to the INS and others, even though they are willing to pay compensation for it, this is a serious deprivation of news to the public, since a large majority of the newspapers and perhaps half of the newspaper readers of the United States are dependent for their news upon agencies other than the Associated Press. Brandeis was concerned that treating news as property might limit the free flow of ideas which is so crucial in the functioning of a democracy.

Wrapping It Up

As a possible follow-up, students could do research into today's issues regarding what is property and who owns it. Such issues might include the circumstances (if any) under which property rights can or should be acquired in:

1. airways
2. credit information
3. radio and TV wavelengths
4. river water
5. airspace above land
6. welfare payments
7. a view
8. a nation's resources
9. professional skill

As part of their research, students might do a comparative study of how different societies and different social systems deal with these issues.

Conducting a Mock Trial

Role-playing a court trial can be an especially effective means of giving students direct experience with some of the ways in which our legal institutions function. In selecting a case, you may decide to use a case included here, an actual case from another source, or a hypothetical case dealing with either a civil or criminal matter. In deciding the case, students might be asked to examine and apply relevant laws or to create policies to cover the kinds of issues that will be raised during the trial.

In role-playing a court trial, the following roles should be assigned:

- — Judge
- — Court officer or bailiff
- — Prosecutor or plaintiff's counsel
- — Plaintiff or victim
- — Defendant
- — Defense counsel
- — Witnesses
- — Jury
- — Court reporter (You may wish to request that a tape recorder be available for the court reporter to use in recording the proceedings.)

The following procedures for conducting a court trial have been simplified for use with students. You can make any changes necessary for your class.

- — *Opening of the Court.* The court officer or bailiff calls the court to order. "Hear ye, hear ye, the Court is now open and in session. The Honorable Judge ________ presiding. All persons having business before the court come to order. The case of ________. Are all persons connected with this case present and prepared? Are your witnesses present? Let the record show that all parties in the case of ________ are present and prepared."
- — *Selection of the Jury.* After the court has been called to order, a jury is selected. (You may wish to include more than 12 students as jury members in order to broaden student participation in the proceeding.)
- — *Opening Instructions by the Judge.*
- — *Opening Statements by Attorneys.* Attorneys for both the plaintiff and defense make 3-5 minute opening statements to the judge, first the counsel for the plaintiff, then the counsel for the defense. Opening statements should include arguments and evidence to support these arguments.
- — *Direct Examination and Cross-Examination of the Plaintiff and His or Her Witnesses.* The plaintiff is examined first by his or her own counsel and then by the counsel for the defense. Each witness is sworn in by the court officer or bailiff as he or she takes the stand.
- — *Direct Examination and Cross-Examination of the Defendant and His or Her Witnesses.* The defendant is examined first by his or her own counsel and then by the counsel for the plaintiff. Each witness is sworn in by the court officer as he or she takes the stand. (You may wish to limit examination and cross-examination of witnesses to thirty minutes.)

Strategy

3.

That's Our Idea!

Another court case, *Chemical Corporation of America v. Anheuser-Busch, Inc.*, 306 F.2d 433 (1962), provides the focus for this lesson for junior high students on the scope and limits of ownership of property. At the end of the lesson, students should be able to:

1. identify the form of the property at issue in the case, i.e., intangible property;

2. explain the position of the two corporations involved in the case;

3. suggest several alternative policies designed to establish the scope and limits of ownership of intangible property such as an advertising slogan;

4. analyze the suggested policies in terms of:
   a. probable consequences of the policies
   b. probable benefits and costs of the policies;

5. decide upon the basis of their analyses which policy or policies they wish to adopt;

6. apply the policies they have adopted to the case in order to reach a decision on what should be the scope and limits of ownership; and

7. evaluate the decision reached in the case in order to identify and explain the values such a decision might promote.

Begin the lesson by asking students to read the following summary of the case. After students have read the case, they might discuss it in terms of the questions that follow.

"Where there's life—there's Bud!" is a phrase known to millions of Americans as the advertising slogan used by Anheuser-Busch Incorporated to promote the sale

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of Budweiser Beer.

Several years ago another company, the Chemical Corporation of America came out with a similar phrase to promote the sale of a floor wax/insecticide. "Where there's life—there's bugs!" the slogan announced.

Anheuser-Busch protested. The corporation felt that it had a property interest in the slogan which had been built up at great expense and that use of the similar phrase by the Chemical Corporation of America constituted a violation of property rights and unfair competition. Use of the slogan, "Where there's life—there's bugs!" Anheuser-Busch maintained, would confuse the source of Budweiser's product, and would create an unwholesome association of ideas by substituting the word "bugs" for "Bud." The result, Anheuser-Busch stated, would be direct financial loss to the makers of Budweiser. The Anheuser-Busch Corporation further explained that the Chemical Corporation of America had full knowledge of the property rights the Budweiser people enjoyed in relation to the slogan "Where there's life—there's Bud!" and that the Chemical Corporation Corporation of America had hoped to make use of some of the value that had been built into that phrase.

The Chemical Corporation of America argued that rights related to the phrase, "Where there's life—there's Bud!" were enforceable only in regard to products competitive with Budweiser Beer. Because the product advertised by the Chemical Corporation was a floor wax/insecticide, it was in no way a product competitive with Budweiser. Therefore, the Chemical Corporation maintained, unfair competition could not be an issue and the property rights and standards of unfair competition could not apply to this case.

According to the Anheuser-Busch Corporation, what is the property at issue in this case? Is the form of the property tangible or intangible?

Why does the Anheuser-Busch Corporation consider this to be property?

Why does the Chemical Corporation of America feel that use of the slogan, "Where there's life—there's bugs!" does not infringe upon the property rights of Anheuser-Busch and does not constitute unfair competition?

Why does the Anheuser-Busch Corporation feel that the Chemical Corporation of America's use of "Where there's life—there's bugs!" does infringe upon property rights and involve unfair competition?

After students have discussed the positions of the two corporations, ask students to suggest policies which would establish the scope and limits of ownership of intangible property such as an advertising slogan. Students might suggest policies based upon the following kinds of premises:

A business that has developed and built an interest in an advertising slogan:

1. has exclusive rights of use of that slogan under all circumstances;
2. has exclusive rights of use of that slogan only in relation to products in direct competition;
3. has exclusive rights of use of that slogan in relation to products in both direct and indirect competition;
4. has exclusive rights to specific uses of that slogan;
5. has specific exclusive rights for a given amount of time;
6. has exclusive rights of use only over that specific slogan but not over slogans that may be similar;
7. does not have exclusive rights of use.

After students have developed several policies, the class might be asked to break into small study groups with each group being assigned one of the suggested policies to analyze in terms of:

1. probable consequences of the policy;
2. probable benefits and costs of the policy.

Reassemble the class. Have each group report its findings to the class as a whole and, on the basis of their findings, students can decide which policies they wish to adopt.

The class might then role-play the case in order to reach a decision based upon the application of the policies students have developed. The attorneys for the two corporations should attempt to

Some Additional Ideas

Here are descriptions of three stories that can help teach elementary students more about ownership:

The Fence **Jan Balet, Delacorte Press (N.Y., 1969)**

Two families, one rich, the other poor, lived side by side in a Mexican city. In spite of their wealth, the rich family was not happy. They were made even unhappier by the sound of children's laughter that emanated from their poor neighbor's home. But the most infuriating thing of all was the sight of the poor children standing by the fence which separated the two properties, enjoying the smell of the food coming from the rich family's kitchen. So the rich family took the poor family to court, suing them for stealing the smell—and, therefore, the goodness—of the food. However, the poor father was not to be bested. He paid back the rich man with the clinking sound of money! And the delighted judge declared that justice was done. . . . Can something as intangible as an odor be stolen? What about ideas—can they be owned? Good questions for discussion.

Who Owns the Moon?**, Sonia Levitin, Parnuses Press, (Berkeley, 1973)**

Once there were three farmers who loved nothing better than to argue. They would argue about anything—their livestock, their wives, their land. But their biggest, longest and best argument occurred over the issue of which one owned the moon! Disgusted over their incessant bickering, the farmers' wives convinced them to have their dispute arbitrated by the town's wise teacher. He came up with a simple solution. But this book can raise an interesting question: Can the moon be "owned"? Even more fundamentally: "What can be owned?" and "What does ownership mean?"

The Woman of the Wood**, Algernon Black, Holt, Rinehart and Winston (New York, 1973)**

Ah, three men again. One is a woodcarver, another a tailor, the third a teacher. They find themselves travelling together, and in the course of their travels the woodcarver creates the life-size figure of a woman. The tailor sews beautiful clothes for the woman and the teacher teaches her to think and to speak. In no time the three men are arguing over ownership of their creation. Taking their dispute to the ever-present wise man, they are faced with the question: "Can anyone really own anyone else?" So the sage decides "she belongs to herself!" This decision pleases the woman to no end. Your students will also find a fairy tale ending to this story.

prepare arguments that will reflect their clients' positions in relation to the policies developed. If appropriate, various members of the class might appear as witnesses to testify to the effects of the slogans "Where there's life—there's Bud!" and "Where there's life—there's bugs!"

When a decision has been reached, the judge should explain his or her reasoning and application of the policies.

After the role-playing, students might discuss the judge's decision and identify and explain the values the decision could promote. Then have them re-evaluate the policies they've adopted in order to determine whether the values, benefits/costs and consequences such policies will probably promote are those which the class considers to be desirable.

What the Court Said

As the final activity, students can compare their decision with actual regulations governing property rights to advertising slogans and with the decision reached in the court case.

The gist of the decision was that Budweiser Beer had a property interest, built at great expense, in the slogan, "Where there's life—there's Bud!" and that the Chemical Corporation of America attempted to make use of the value of this slogan by using one that was deceptively similar, "Where there's life—there's bugs!" The trial court decided, with the appellate court upholding the decision, that the doctrine of unfair competition did indeed apply and that parties need not be in direct competition to be subject to such standards.

Cited were liberal trends in the equity courts of the state of Florida toward the protection of trade names and slogans from unfair attacks by others. The appellate court concluded that the Chemical Corporation of America's actions were "morally reprehensible" and "legally impermissible" and that the trial court's prohibition of continued use of unfair practices by the Chemical Corporation of America was fully authorized. The slogan, "Where there's life—there's bugs!" could no longer be used. ☐

Preservation

(Continued from page 29)

beauty was to enact laws protecting historic landmarks and neighborhoods. Thus in 1965 New York City passed its Landmark Preservation Act; the following year the National Historic Preservation Act went on the books so that "the historic and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."

All that is well and good, but were such laws constitutional or did they violate due process and cherished property rights?

In 1968 the financially troubled Penn Central Transportation Company announced plans to erect an office building atop its Grand Central Terminal in New York City. In congested areas such as midtown Manhattan, where Grand Central is located, one way for a landowner to further exploit property is to use air rights, developing the space above an existing building. These development rights are subject to governmental regulation by zoning, as they have been for the better part of this century.

Penn Central and the developer, UGP Properties, Inc., intended to rent offices in a 55-story tower above the famous Grand Central railroad terminal. The award-winning architect Marcel Breuer submitted proposals for an intentionally neutral skyscraper which met all zoning requirements and involved minimal interferences with the existing tracks and the interior. But Breuer's steel-and-glass box, dwarfing the eight-story stone facade of Grand Central Station, enraged preservationists. *The New York Times* editorialized: "As architecture, the new tower soaring from the classical Beaux-Arts terminal like a skyscraper on a base of French pastry has the bizarre quality of a nightmare."

Pastry Preservation

Grand Central Station had been designated an historic landmark in 1967 by the New York City Landmark Preservation Commission, and thus no alterations could be made to the building without approval by the commission (a landmark is usually 30 or more years old and has special aesthetic or cultural interest). Although Penn Central had opposed the designation, which restricted its control over the property, it did not seek the available judicial review of the designation decision. Marcel Breuer's initial design was therefore put before the commission, which denied permission to proceed in September of 1968. The commission bluntly stated: "To balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke."

If Breuer's first joke didn't strike the commission as funny, his next revision was not a side-splitting hit either. Breuer's revised scheme called for the removal of the "flamboyant Beaux-Arts" south facade with its statuary, archways and multi-story columns. To replace the facade, the architect proposed a 53-story steel-and-glass slab. Breuer's priorities were 1) to preserve "the last one of New York's great interior spaces"—the vaulted main concourse—which his firm planned to restore to its pre-advertisement grandeur; 2) to improve the confused traffic patterns within the huge terminal; and 3) to provide his client with the valuable office space. Ironically, the New York Landmark Preservation Law protected only the external structure, leaving Grand Central's magnificent interior spaces vulnerable to destruction. (Interior public spaces and scenic landscaping have since been included.) Breuer felt that the pleasures afforded by the exterior of Grand Central had already been considerably diminished by previous construction surrounding the terminal.

The landmark commission's priorities were different, however. Rejecting Breuer's revision, they reasoned: "To protect a landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." Penn Central had heard enough. It filed suit, claiming that the landmarks law resulted in the unconstitutional taking of property by restricting the usage of air rights above Grand Central. It said that the Fifth Amendment was violated because Grand Central's air rights were taken without just compensation and because the owners were deprived of their property without due process. Lower court decisions against Penn Central were appealed, and the case was finally heard by the United States Supreme Court in April of 1978.

Who's on the Take?

This case was the first High Court test of landmark preservation laws, but the issues were not new. The central issue was not Breuer vs. beauty, but the taking of property. In contrast to the literal taking in *Berman*—the use of eminent domain—Penn Central retained Grand Central but found the use of the property limited. Justice Brennan wrote the opinion for the six-judge majority, holding that landmark preservation was a proper exercise of police power and that Penn Central could continue to make a reasonable return on the property without the proposed changes. The laws challenged by Penn Central were derived from what the majority opinion referred to as a "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all."

The High Court was not unanimous, as it had been when confronted with the urgent needs of slum prevention and decent housing in *Berman*. Justices Rehnquist, Burger and Stevens dissented, arguing that the brunt of the public welfare should not be borne by the private landowner. Justice Rehnquist's minority opinion declared that "Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists." The minority felt that if the preservation of Grand Central would substantially advance the general welfare, then the public should pay for it.

Penn Central lost the case because it failed to convince the majority that the restrictions of the Landmark Act would result in severe economic hardship to them. After all, reasoned the majority, the terminal made money for the company, and further revenue could be had if Penn Central transferred development rights from Grand Central's air space to adjacent property, which it owned and which was not subject to landmark restrictions.

The Court approved of the private stewardship of buildings that were covered by landmark preservation laws. "Widespread public ownership of historic properties in urban settings is neither feasible nor wise . . . [as it] reduces the tax base, burdens the public budget with costs of acquisitions and maintenance and results in the preservation of public buildings as museums . . . rather than as economically productive features of the urban scene."

The Beast

Mr. Bumble in Dickens' *Oliver Twist* declares that the law is "a ass." That's a pretty good analogy. Theoretically the law is not evil, not malicious, not corrupt. More often than not, it is decent, unpretentious, and hard-working—but no more alive to aesthetics than a beast of burden.

When a case like *Penn Central* is being decided, the ostensible issue is beauty, but lawyers and judges just don't argue that this building is worthy of preservation and that one not. Instead, they argue the procedure of it: The law is or is not constitutional, due process is or is not followed, the rights of private property are or are not balanced against the public welfare. For that reason we probably shouldn't rely very heavily on the law to provide ourselves with beauty.

That's just as well. Beauty isn't easily caught and pressed into a lawbook anyway. By legislating beauty, do we deceive ourselves into thinking we have found it? By preserving beauty, do we stop trying to create it? Is our fascination with past beauty a pathetic and hopeless recognition that we no longer think we can find beauty in our present? We do not need beauty in our lives so that we can cling to it; that only stultifies us and inures us to the ugliness we escape.

We do not need Grand Central Terminal or the Grand Tetons if our preservation of them means we ignore their meanings. The first was built by a wealthy railroad and exemplifies superb engineering and far-sighted planning; the builder(s) of the second outdid us all. Yet aesthetic considerations are not a matter of luxury and indulgence; indeed, a case can be made that the arts nurture our own powers of creation and foster a faith in the continuance of this little spark called humanity. In the face of all the war-making, we need art-making. We need law and the courts too, but sometimes they miss the point. □

JUDGE'S CHAMBERS
SCHWADRON

"Mrs. Plagendorf, didn't I leave specific instructions that I am not to be disturbed while court is in recess?"

Patents

(Continued from page 4)

of vocal or other sounds and not found in nature (126 U.S. 1, 1888). Historically, the Court has understood clearly that the radically new technologies are precisely the ones Congress intended the patent system to encourage and reward.

Patents and Politics

The term "conservative" presently raises images of Ronald Reagan, big businesses growing bigger, and small businesses either growing bigger or disappearing altogether. It also raises images of individuals unfettered by government red tape striving freely against one another until some become rich and others poor, based on individual initiative, creativity, performance or good luck. The term "liberal," on the other hand, now seems to raise images of John Kennedy, government attorneys breaking up big business monopolies, and small businesses and individuals being protected from some of the harsh excesses of competition by government regulation of the marketplace.

At first glance it would seem the patent laws would have nothing to do with conservative and liberal politics. But patents are a monopoly—an exception to the antitrust laws that oppose all monopolies. Patents also reward individual initiative and creativity, and they help businesses big and small to grow bigger. So our system of patent laws must be colored conservative. Almost instinctively, liberals oppose the growth and extension of the patent system, and conservatives support it. During this year of governmental budget cutting, a conservative administration has been relatively kind to the United States Patent Office.

In 1972, the United States Supreme Court was more liberal than it is today. It would have been reasonable to predict that such a liberal Supreme Court would oppose the expansion of the patent laws into a new area of technology, and that's precisely what happened when the Court considered the first computer program invention in the case of *Gottschalk, Commissioner of Patents v. Benson* (409 U.S. 63, 1972).

With Thumbs Only

The Benson invention was a new technique for converting decimal numbers (base 10) into binary numbers (base 2). Anyone who has studied the new math knows that our decimal number system, in which numbers are formed from the ten digits 0, 1, 2, 3, 4, 5, 6, 7, 8, and 9, is only one of many possible number systems that could have been adopted. The octal number system, for example, forms numbers from the eight digits 0, 1, 2, 3, 4, 5, 6, 7 and does not include the digits 8 and 9. If man had no little finger, we might count to ten in octal ("1, 2, 3, 4, 5, 6, 7, 10") rather than in decimal ("1, 2, 3, 4, 5, 6, 7, 8, 9, 10"). The binary number system is one suitable for a race of people who have thumbs and no fingers. Numbers are formed from the two digits 0 and 1, and one counts to ten like this: "1, 10." Computers use binary numbers internally, and Benson invented an improved method of converting our decimal numbers into the computer's binary numbers.

The Benson number conversion technique can be carried out quite easily using pencil and paper (it is similar to long division but too complicated to be described here). Benson contemplated carrying out this conversion with a programmed digital computer in which the numbers are represented by patterns of electrical currents flowing through transistors. The "computer program," or set of instructions for the computer, would guide the computer through the same steps that a human would carry out when performing this conversion using pencil and paper.

A mathematician would call Benson's invention an algorithm, meaning a technique for performing simple arithmetic using digits. A computer scientist would also call Benson's invention an algorithm, but computer scientists have redefined the word "algorithm" to mean any step-by-step procedure for solving a problem or performing a task using a programmable computer. Computer scientists, therefore, consider all computer programs to be algorithms. Confusion over the meaning of algorithm has caused legal scholars considerable difficulty.

The Patent Office, on behalf of the public, asked the Supreme Court to rule that all computer programs or algorithms are unpatentable. Several justices did not participate in the decision, possibly because they owned AT&T stock (the Benson patent was owned by AT&T, so justices owning any AT&T stock would have had to disqualify themselves to avoid any possible accusation of bias). The remaining justices selected Justice Douglas, a liberal, to draft the Court's unanimous decision.

Justice Douglas concluded for the Court that Benson's technique wasn't patentable. The claimed invention was unacceptably broad because it monopolized all present and future uses of the "algorithm." Guided by the dictionaries of the day, Justice Douglas probably used the word "algorithm" in its narrow, mathematical sense to mean a primitive arithmetic procedure. But confusion over the true meaning of this term caused many commentators to indicate that the *Benson* case established a rule prohibiting patents for all computer programs.

In *Benson*, the Court broke with the past and refused to issue patents to the pioneers in a new field of technology. It did so by extending the rule prohibiting the patenting of scientific truths, laws of nature, and naturally occurring things to cover "algorithms," whatever that term means, as well. But the Court's use of this rule is very different here. Instead of using it to force an inventor to narrow his or her claims as in the *Morse* case, the *Benson* Court used the rule to deny all patent protection to computer program inventions (or at least to those that may be properly characterized as "algorithms"). Faced with technical complexity beyond what it thought it could handle, the Court asked Congress to decide whether patent protection should extend to computer programs. This was a break with the Court's historical role as the chief architect of the law of patents.

Benson's Effects

The *Benson* Court was strongly influenced by the report of a presidential commission that had concluded patents should not be issued to those who invent computer programs. The commission indicated the Patent Office simply could not process the requests for such patents. The Court may have also been influenced by the IBM Corporation and other computer circuitry or "hardware" manufacturers, who asked the Court to rule that computer programs or "software" was not patentable. These hardware manufacturers probably wished to improve the marketability of their machines by having the Supreme Court prevent the issuing of software patents. Then the purchasers of these machines would be free to program them any way they wished without fear of infringing someone's software patent.

The *Benson* decision greatly discouraged inventors from requesting patents on inventions using computer programs. Since unpatented programs can be kept secret, the inventors of computer programs have done just that, and have contractually required purchasers to keep them secret as well. You can go to the Patent Office and find patents that disclose the technical details of the wired or hardware portions of computers. But relatively few patents can be found disclosing the software portions, so the public has been denied access to the technology embedded in most computer programs.

The *Benson* decision also discouraged computer program companies from sharing their technology. The modern silicon chip circuits were developed over several years by engineers working at Texas Instruments, Westinghouse, and Fairchild—three different companies. Because these companies all applied for patents and felt their rights were protected by those patents, they permitted their engineers to share ideas at technical conferences. Patents thus facilitated the sharing of ideas. But computer *program* companies must rely on secrecy and cannot permit their engineers to share ideas with competitors.

On the other hand, the absence of patent protection for computer programs has apparently not discouraged individuals and companies from developing such programs. The computer program industry is doing very well. Copyright protection for computer programs has emerged recently and appears to be working, and small companies have flourished in the computer programming industry without the benefits of patent protection. Does this indicate that society would be better off without patents in other fields as well? Or does it indicate that software companies have benefitted unfairly by copying the work of creative programmers without compensating them for their creative ideas?

Six years after *Benson*, in *Parker, Commissioner v. Flook* (437 U.S. 584, 1978), the Supreme Court considered the patentability of a computer program used to monitor a commercial process for manufacturing petroleum distillates (gasoline, etc.). With three conservative justices dissenting, the Court once again refused to issue a patent. Justice Stevens, speaking for a majority of the Court, pointed out that the only new thing in the claimed invention was a formula or equation for computing alarm limits. This formula was used in combination with other components that were well-known to petroleum engineers. Justice Stevens began by ruling that the formula was an algorithm which was unpatentable. Treating the formula as if it were old and well-known, since it was unpatentable, Stevens said the combination of such a "well-known" formula with other components could form a patentable invention, but in this case the combination did not merit the award of a patent. Stevens thereby laid down guidelines on how inventions constructed in part using unpatentable "algorithms" should be examined by the patent examiners. Stevens reaffirmed that Congress, and not the courts, should decide whether computer programs should be patentable.

Because both the *Benson* and *Flook* decisions of the Supreme Court appeared to have refused to allow "formulas" to be patented, the patent examiners started rejecting requests for patents covering inventions that appear to reside in mathematical formulas. Unfortunately, this development has discouraged inventors and their attorneys from using the precise language of mathematics to describe and claim their inventions.

A New Direction

By 1980, the Supreme Court had become more conservative. Nixon and Ford appointees began to dominate the Court. Besides being somewhat more sympathetic to patents than a more liberal court, a conservative court can also be expected to adhere to established doctrines of law and to resist changing the law without legislative action.

That was the year when the case of *Diamond, Commissioner of Patents v. Chakrabarty* (447 U.S. 303) reached the Supreme Court—the first and only case relating to genetic engineering that has ever been decided by the Court.

Chakrabarty had developed a new strain of bacterium for use in cleaning up after oil spills. This new bacterium was literally able to consume the oil as a source of food. But before explaining how Chakrabarty created this new strain of bacterium, it is necessary to explain genetic engineering briefly.

In living cells, genetic information is represented by sequences of four different chemical "nucleotides," much like the sequences of zeros and ones which represent information in a computer program. Long sequences of these nucleotides are assembled into molecules of deoxyribonucleic acid (or "DNA"). These DNA molecules contain all the information necessary to guide the cell through all of its activities. DNA molecules are to cells what computer programs are to computers: they are instruction sets that control and define the structure and operation of the cell.

Some naturally occurring bacteria contain DNA molecules that enable them to break down specific components of crude oil. The genetic DNA code for this capability may be recorded in circular DNA molecules called plasmids, which are molecular parasites living within and reproducing along with the bacteria. Some plasmids enable naturally occurring bacteria to degrade camphor, for example, while others allow them to degrade octane.

Previous attempts had been made to produce stable bacteria containing multiple plasmids that could degrade multiple petroleum components, but these attempts were unsuccessful. Chakrabarty combined the DNA molecules from several different plasmids into a single new plasmid DNA molecule. He thereby achieved stable strains of bacteria that could metabolize more than one component of the oil. One strain, for example, could consume camphor, octane, salicylate, and naphthalene. And these strains grew more rapidly in crude oil than did actually occurring strains.

The fact that Chakrabarty was seeking to patent a living organism itself, rather than a method of using the organism to clean oil spills, concerned the Court. Should anyone be able to monopolize a living creature? Would the strong monetary incentives of the patent system encourage commercially minded genetic scientists to rush their work in an effort to be the first to produce a given product and therefore the one to whom the patent is awarded? If they rushed too fast, might they grow careless and unleash some terrifying organism that could destroy the world? These types of concerns must have troubled the members of the Court. Rationally, if computer programs were too new to be considered patentable without action by Congress, then surely the patentability of new life forms should also await reasoned action by Congress.

But logic and consistency are not always the basis for new developments in the law. The Supreme Court had become more conservative since 1972, and the thought of encouraging the development of a whole new genetic engineering industry by authorizing its patents must have appealed to some members of the Court, even while others were undoubtedly appalled at the prospect of granting patents on living things. After reviewing the *Morse* and *Alexander Graham Bell* cases, which clearly indicated that new areas of technology are to be granted patent protection if properly claimed, a majority of the justices decided, until Congress said otherwise, the Court had no choice but to issue patents covering the products of genetic engineering. On this difficult case, however, the Court did not split along the traditional lines—some conservative justices dissented and some liberals went along with the majority.

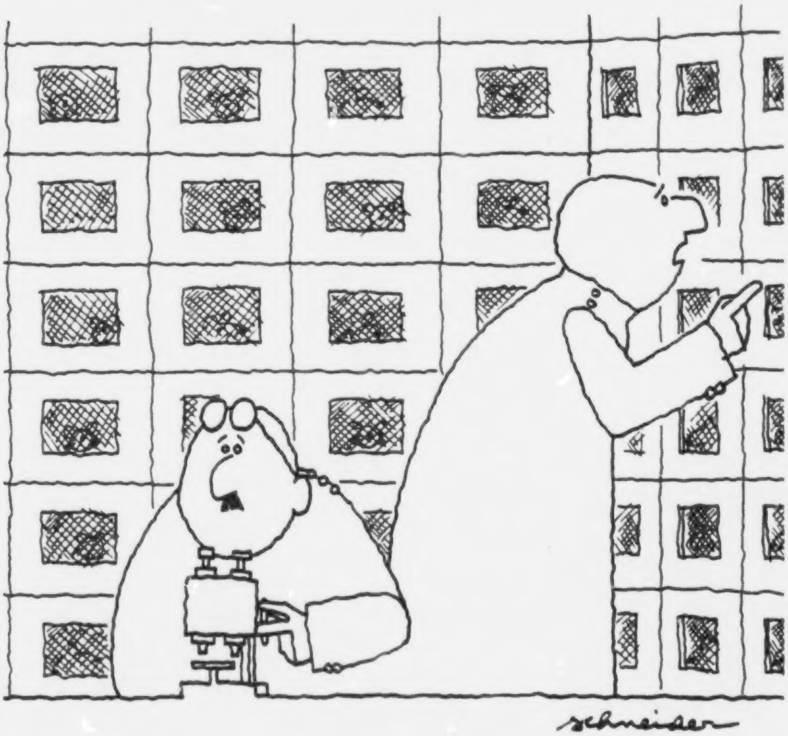
In its *Chakrabarty* opinion, the Court refused to follow the logic of the *Benson* and *Flook* cases, where the Court decided not to issue patents until Congress requires them issued. The Court, in this case, ordered the patents issued because Congress had not forbidden them from being issued. The Court thus interpreted Congress's silence in a dramatically opposed way. In doing so, it resumed its historical role as the chief architect of patent law, and it may have signalled a change in the way it perceives inventions which include information represented in a code, such as the genetic code or the instruction code used in computer programs.

Software Revisited

In 1981, another computer program case, *Diamond, Commissioner of Patents v. Diehr* (450 U.S. 175) came before the Court. As in *Flook*, the Court found itself badly split, but this time a conservative majority of five favored the patent. Unlike *Flook*, *Diehr* disclosed in his application for a patent precisely how he used a computer programmed with a previously known mathematical formula to achieve a concrete, practical objective: improving the operation of a rubber-curing process. Justice Rehnquist, speaking for the conservative majority, who ordered the issuance of the patent, said there was more to the Diehr invention than a mere mathematical formula.

Diehr shows that an invention which includes at least some novel elements in addition to a computer program may be patentable. But what if all the novelty falls within the computer program itself? Justice Stevens, speaking for the more liberal dissenting justices, reasoned that the *Benson* rule prohibiting the patenting of algorithms would apply, since the computer science community considers all computer programs to be algorithms. Justice Rhenquist, speaking for the more conservative majority, reasoned that *Benson* barred only the patenting of algorithmic solutions to simple mathematical problems, such as Benson's method of converting decimal numbers into binary numbers. By defining algorithm so narrowly, the majority left open the question of whether a computer program can be patented all by itself. This question remains open to this day.

The effects of these two recent decisions are perhaps already being felt. Recently, corporations have begun to sink a lot of money into university laboratories, particularly those researching biotechnology and genetic engineering. In 1982, Washington University accepted $23.5 million from Monsanto Chemical Corporation. Massachusetts General Hospital, an affiliate of Harvard Medical School, accepted $70 million from a West German chemical giant. According to the *New York Times*, corporations are reluctant to make such grants to universities unless they get an exclusive right to market any useful *patentable* products that result. These agreements, the *New York Times* notes, ". . . go right to the heart of academic freedom by eroding the fine line that separates university laboratories that search for knowledge, and corporate ones that search for profits." Is it just a coincidence that these large grants to university research organizations in return for exclusive marketing rights have occurred shortly after the Supreme Court's *Chakrabarty* decision that held genetically modified life forms were patentable? Probably not. The initial benefactors of the patentability of modified living organisms appear to be university research laboratories.



"Here's an unexpected development—number 391 has started doing Cagney impressions."

This increased flow of money from private industry into university-based genetic engineering research projects was probably not anticipated by members of the Supreme Court when they debated the merits of granting Chakrabarty his patent. They simply ordered the patent to issue, leaving it for Congress to intervene later on if Congress felt such patents were harmful. Congress has, for example, forbidden patents in nuclear weapons technology as part of its statutory scheme to exert complete government control over this dangerous field.

Would society be better served if the courts were supplied with more technical expertise? Would we be better off to set up special science courts with technically trained judges to consider cases such as those discussed above? Recently, a special new Federal court has been set up to hear patent matters that used to be heard by the nine different Federal Circuit Courts of Appeals. Called the Court of Appeals for the Federal Circuit, this new court will be able to recruit clerks who are skilled in both law and technology. Its judges will become highly skilled in patent law as well, since they will hear all the patent cases. This new court will have much to say about the extension of the law of patents into the many new fields of technology that will undoubtedly arise as we enter the twenty-first century. ☐

Parody

(Continued from page 21)

thing new for humorous effect or commentary."

The liberal treatment of parody enunciated in the *Saturday Night Live* case was echoed in *Warner Brothers v. American Broadcasting Co.*, a 1981 case decided in New York. It is reported in volume seven (page 1595) of the *Media Law Reporter*. In this case, the owners of the Superman copyright sought to enjoin ABC from airing its new series *The Greatest American Hero*. This television drama tells the story of California schoolteacher named Ralph Hinkley. One night, while Hinkley is wandering around the desert, unidentified aliens provide him a leotard-type red suit and black cape which, when worn, endows him with superhuman powers. Unfortunately, Hinkley loses the instructions to this magical suit and winds up bungling his attempts to act like a superhero.

The Greatest American Hero shares many of the same attributes as Superman. When Hinkley dons his magic suit, he suddenly possesses x-ray vision, long distance hearing, the ability to resist bullets, and the power to fly. The controversial TV series also made a number of references to the original Superman in its pilot show. When Hinkley squeezed into his magic leotard for the first time, he gazed in the mirror and said, "it's a bird, it's a plane, it's Ralph Hinkley."

Although ABC's Greatest American Hero shares some of the same traits as Superman, the *Warner* court held that this new show was not "substantially similar" to the original work. The court found a number of differences between the two characters. The judge said that Hinkley "is the antithesis of the Superman character image." He noted that Hinkley "is slight of build, non-muscular, informally dressed, weak chinned, and has long blond corkscrew curls." He further noted that Hinkley's personal life "is in an unmanly shambles whereas our Superman is a 'square'." The *Warner* court concluded that "Ralph Hinkley cannot measure up to Superman."

The *Warner* court held that ABC could continue to air the show even if it were substantially similar, since it constituted a fair use of the copyrighted work. The court reasoned that the television show satisfied the four criteria set forth in the 1976 Copyright Act. In general, the court found that the purpose of this show was "to poke fun at Superman and other characters in the superhuman genre."

As usual in parody cases, it's hard to see a trend. Even the Federal courts in New York seem to retreat from their liberal treatment of parody when x-rated material is involved. In a 1981 decision in *MCA v. Wilson* (as yet, still unreported), the Second Circuit Court of Appeals ruled 2–1 that the well-known musical hit, "Boogie-Woogie Bugle Boy of Company B," which achieved notoriety through the Andrew Sisters and Bette Midler, had been infringed by an x-rated ditty which was written for the off-Broadway play *Let My People Come—A Sexual Musical*.

X-Rated Plagiarism?

The defendant contended that his song was a "fair use" of the original, but the Court of Appeals rejected this defense. It said that:

> We are not prepared to hold that a commercial composer may plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism.

Judge Mansfield was the sole dissenter in the *MCA* decision. Mansfield maintained that even "offensive" parodies are permissible and that the court should not "act as a board of censors outlawing x-rated performances." He found that the defendants had made a fair use of the plaintiff's copyrighted work by "putting a comic or humorous twist on the more conventional Bugle Boy and parodying the Andrew Sisters' style."

One of the most recent cases also shows that courts continue to examine the parody defense with great care. In a Georgia case, *Metro-Goldwyn-Mayer v. Showcase Productions, Inc.*, (1981, unreported), the court was confronted by a musical spoof of *Gone With the Wind* entitled *Scarlett Fever*. The musical shared many of the same attributes as *Gone With the Wind*. *Scarlett Fever* also used many of the same scenes and dialogues as the copyrighted work. And backdrops from the original work—including the plantation house at Tara and the train depot in Atlanta with the city burning in the background—appeared in the musical. Both productions opened with a scene at the Tara plantation on the day of the Wilkes barbeque and ended with Rhett "frankly" telling Scarlett off.

Scarlett Fever was performed by a small cabaret group which added a number of original songs and dances. And the names of the characters and places were altered. Katie Scarlett O'Hara became Shady Charlotte O'Mara; Ashley's Twelve Oaks became Thirteen Elms; Scarlett's beloved plantation, Tara, became Tiara, and so on.

When MGM discovered that the defendants were planning to perform *Scarlett Fever*, they brought a motion for a preliminary injunction in the Northern District of Georgia. Although the court found that the defendant's production contained "some elements of parody," it issued a restraining order. Judge Evans noted that:

> In order to constitute the type of parody eligible for fair use protection, parody must do more than merely achieve comic effect. *It must make some critical comment or statement about the original work which reflects the original perspective of the parodist*—thereby giving the parody social value beyond its entertainment function [emphasis added].

Judge Evans found that most of the characters in *Scarlett Fever* did not add any new dimensions or comment upon the original screenplay. The judge concluded that "the concept or form of parody which justifies protection under the copyright law, and exemption from liability for infringement . . . consists of an original expression which has social value by commenting upon the work being parodied."

Some Guidelines Emerge

The recent parody-infringement cases shed some light on how much one can borrow from a copyrighted work in order to create a parody or burlesque capable of meeting the standards of the fair use test. Although no hard and fast rules can be drawn, a few general conclusions may be made:

1. The courts do not like x-rated parodies. Parodies involving pornographic subject matter, such as the "Boogie-Woogie" case and the Mickey Mouse decisions, were all held to constitute infringement;

2. The courts often consider whether the parody is for commercial use or nonprofit, educational purposes. Adapting a portion of a song for an informal school auditorium show is probably safe, but a parody on an entire movie or play where the audience is charged an admission price may constitute an infringement; and

3. The courts frequently consider the amount of the work borrowed in determining whether the parody incorporates more than is necessary to "recall or conjure up" the original.

Although the courts appear to consider

all these factors, decisions concerning parody infringement are generally unpredictable and somewhat inconsistent. Some courts have espoused a very pro-parody stance while others are highly restrictive. Some judges are extremely subjective in parody-infringement opinions and sound more like movie or theatre critics than members of the judiciary.

Balancing the rights of parodists and copyright-holders is difficult. Parody and burlesque play an important social function in our society, yet at the same time we want to protect the artist's property interest in their creations, so that they'll be encouraged to do further artistic endeavors and create new works.

With the growth of the entertainment industry—to say nothing of the huge sums of money that are often at stake in disputes over copyrighted works—the courts will probably continue to be deluged with parody-infringement suits. No one knows how it will all come out, but stay tuned to this magazine for further developments in this hotly-contested area. □

Learning About Copyright Infringement: The Case of the Two Newspapers

Janisse Lifton

College students can learn a lot by working on their school newspaper, but students at Daley College in Chicago learned an unexpected lesson last fall. While changing the name of their free school newspaper, the editors decided to display their wit by christening it "The Daley Planet"—a pun on "Daily Planet" that would remind their readers of where their childhood hero Superman, a.k.a. Clark Kent, had worked as a cub reporter. But soon after the first issue came out, they were shocked to find that their cleverness provoked not just mirth but a lawsuit as well. The owners of the Superman comic strip, D.C. Comics—a subsidiary of Warner Communications, a Fortune 500 company—brought suit against the tiny student newspaper, circulation 5,000.

D.C. Comics offered the students $500 if they would drop the name "Daley Planet." When they refused, the offer was raised to $1,000. It may seem odd that the party bringing the lawsuit is the one offering money to settle it, but don't forget that the company's goal is not to get monetary damages from the student newspaper but to get it to stop the alleged copyright infringement. Hence the carrot and stick approach: we'll pay you money to stop infringing (carrot) but if you don't we'll pursue the legal action (stick).

At first the students stood their ground. Later, after going through the preliminary stages of litigation such as the taking of depositions, the two sides agreed to settle the lawsuit. The students agreed to change the name of their paper from "The Daley Planet" to "The Daley College Planet." They also agreed to drop the slogan "Truth, Justice, and the American Way," lifted from the fictional paper, which they had been using as their front page logo. They had also adorned their front page with a drawing of a ringed planet, which they had also lifted from the Superman comic strip. D.C. Comics agreed that they could keep the drawing of the planet if they dropped the rings that surrounded it. However, the editors ultimately decided to drop the planet altogether. And the presses roll on.

A name adopted from a famous newspaper source got another establishment in trouble for copyright infringement in Madison, Wisconsin. There an entrepreneur named Jerome Mullins opened a restaurant that he called "The Washington Post." The whole restaurant had a newspaper motif, from menus to wallpaper. The style of the lettering on the sign outside was the same as that used by the nationally known newspaper. It wasn't long before the company that owns the *Post* brought suit against Mr. Mullins for copyright infringement. After 20 months of legal sparring, they arrived at a settlement that both parties viewed as a compromise. Mr. Mullins agreed to change his restaurant's name from "The Washington Post" to "The Washington Host" by November 1982. But he was allowed to keep the same lettering on his sign carrying the new name.

For the class that is struggling to learn what copyright infringement is all about, these two cases offer several bases of comparison:

—Are these two cases different?

—If the cases had not been settled and had gone all the way to the Supreme Court, how do you think they should have been decided?

—Why is the name "Daily Planet" and the motto "Truth, Justice, and the American Way" valuable to the company D.C. Comics?

—Why is the name "Washington Post" valuable to the newspaper of that name?

—What is the policy behind the law of copyright infringement?

—Does it really damage the property interest of D.C. Comics if a student newspaper read by a few thousand college students copies their Superman comic strip?

—Were the students right to maintain that since their spelling of "Daley" was different than "Daily" they didn't commit copyright infringement?

—Should there be a different result in the two cases because one involved a small nonprofit newspaper and the other involved a commercial enterprise known throughout the city of Madison?

—Is there no place in the law for a sense of humor? You be the judge.

Janisse Lifton is a lawyer in Chicago who recently graduated from George Washington Law School.

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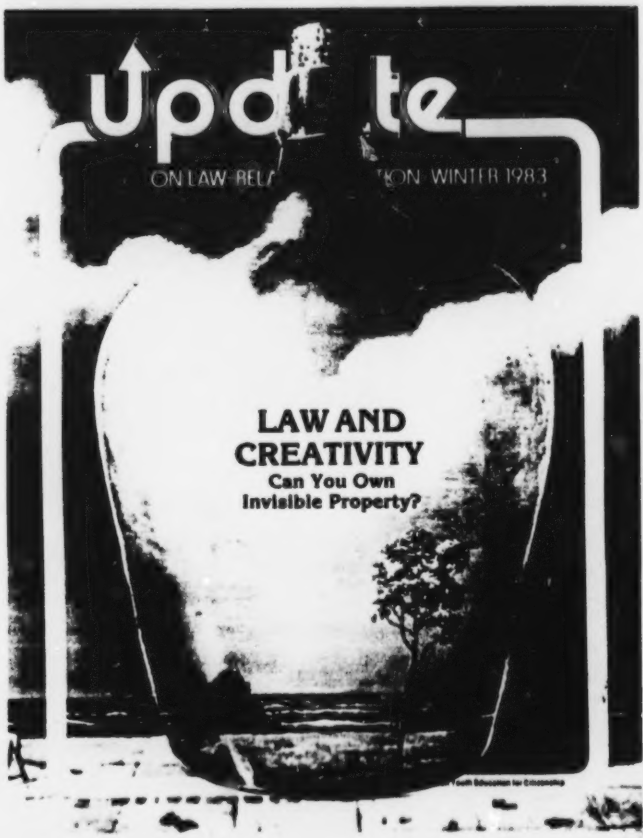
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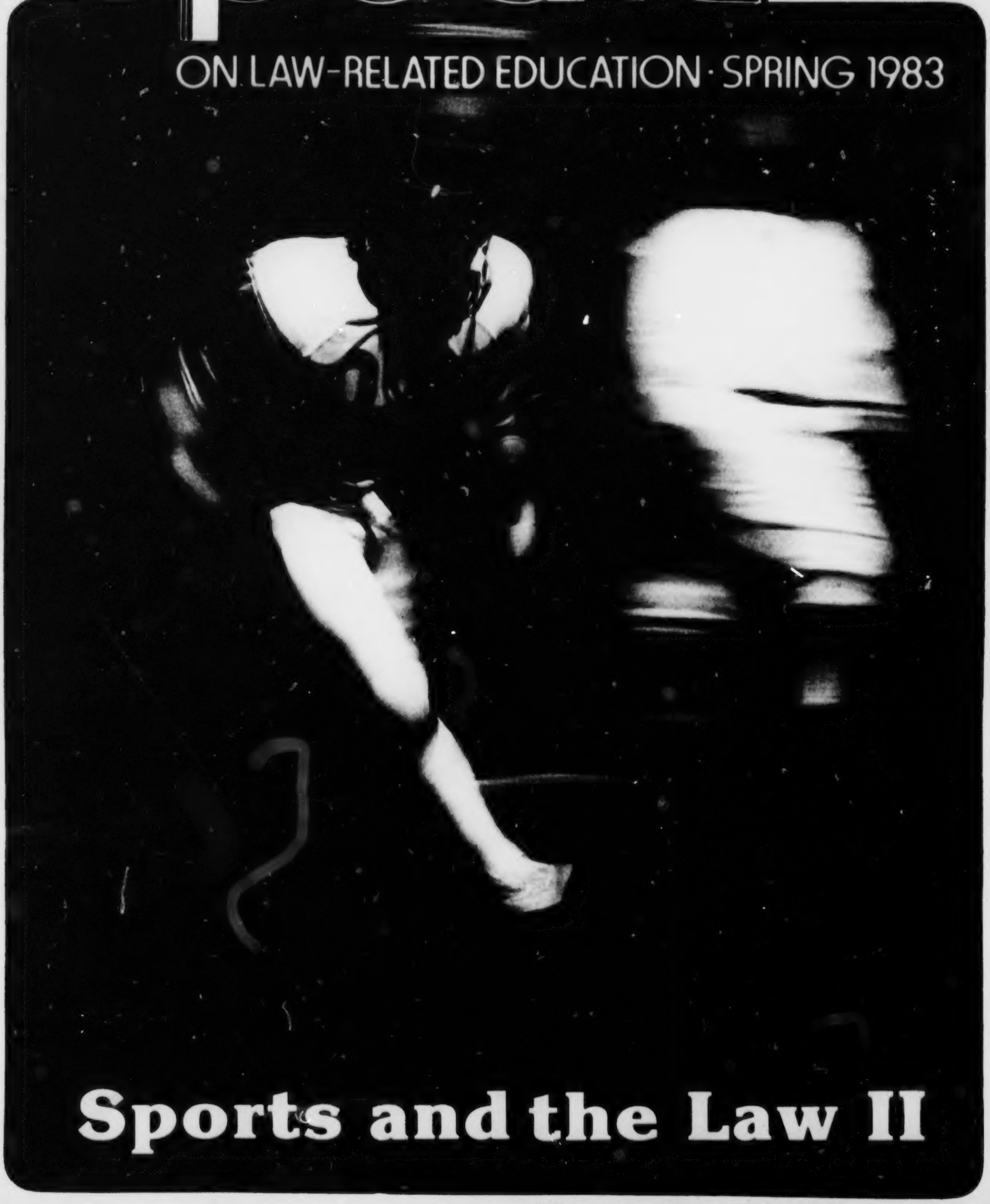

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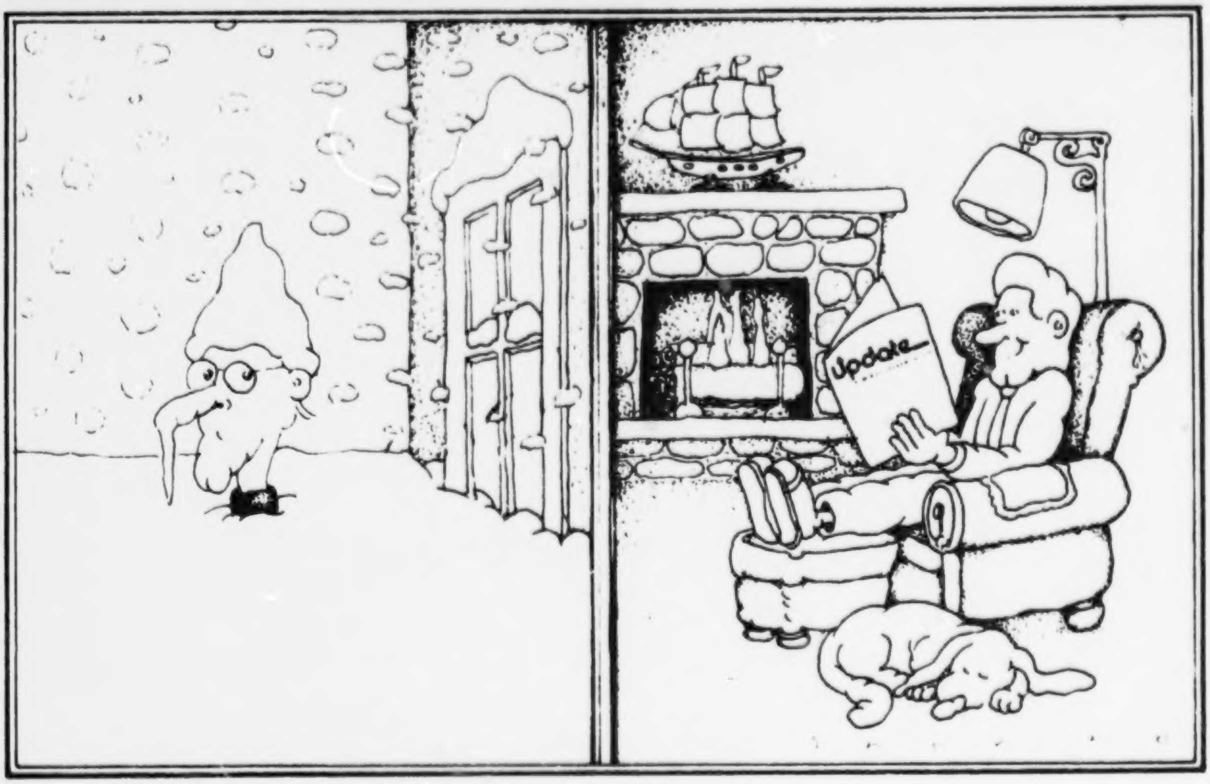

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contents

Volume 7, No. 2, Spring 1983

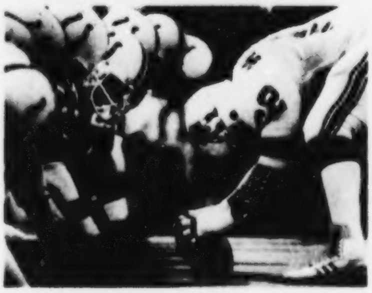
2
Sports and the Law
Kill 'Em!

6
Sports and the Law
Is Student Athlete a Contradiction in Terms?

10
Classroom Strategies
Sports News You Can Use

16
Sports and the Law
The Sexist Underground in Sports

20
Kickoff
Getting in the Pits with Players and Owners!



22
Kickoff
Solidarity Forever

26
Kickoff
Solidarity for What?

30
Kickoff
Keeping Owners and Players from Maiming Each Other

34
Kickoff
Can the League Cope with a Renegade Owner?

38
Sports and the Law
Blessed by a Bandage of Cold Cash

42
Court Briefs
Supremely Hot Potatoes

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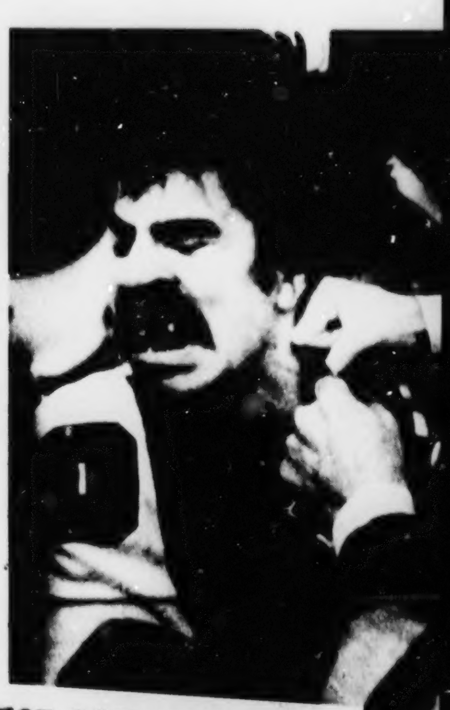

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SPORTS AND THE LAW

All photos UPI

Kill 'Em!

Sports violence and the law

> "I went to a fight the other day and a hockey game broke out."
>
> —Rodney Dangerfield

> The game started out all right, but before long it got rather bloody. This is when both [my English visitors] started asking questions.
>
> "Is the object of the game to injure as many players on the other team as possible?" the husband asked.
>
> "No, that is not the object of the game," I said. The wife said, "Do you get more points for breaking a man's leg or his neck?"
>
> "You don't get points for breaking either his leg or neck. You get penalized for it."
>
> "Oh," said the husband. "What is the penalty?"
>
> "Your team is penalized 15 yards."
>
> "Do you mean to say that if you break an opponent's leg, you only get 15 yards against you?"
>
> "What do you think he should get?" I said, trying to hold my temper.
>
> "In England, I believe it's three years in prison," the wife replied.
>
> "It's a game!" I said. "The men who play expect to have their legs broken. That's what makes it so exciting."
>
> "How civilized," the wife said. I couldn't keep my temper any longer. "What do you think we are—barbarians?"
>
> "Quite," the husband said.
>
> —Art Buchwald, "Beginners Watching Football," *Atlanta Journal and Constitution*, October 23, 1977

Americans turning to the sports section or tuning in to TV news are likely to run across enthusiastic accounts of violence on playing fields and rinks around the world. The images are enough to make a tender-hearted nonathlete (and even some seasoned jocks) squirm with discomfort: football players ramming their helmets into their opponents' bodies or batting them with their taped-up forearms...hockey players maiming each other with their sticks...baseball players sliding into base with their spikes intentionally aimed at the infielders... fans streaming out of the stands for mass assaults on officials, players, or other fans. Most of these incidents take place in the professional arena, but school and amateur sports have become increasingly violent too. Violence, some contend, is becoming a part of the game, just as it is becoming a part of our everyday life.

Is Winning Everything?

Sports used to be appropriately rugged, but now they've slid over to being too violent. Why? Although several social and psychological theories have been advanced, most commentators agree on at least two factors: (1) a greater emphasis on winning than on sportsmanship, and (2) a surge in spectators' demands for brute force.

Our society values winning because it represents a reward for skill, work, and commitment. But that's a far cry from the "winning is everything" attitude that has become prevalent in sports. How many times have you heard well-known and respected sports figures touting the need to win at all costs? "Winning isn't everything; it's the only thing." "Defeat is worse than death because you have to live with defeat." "Nice guys finish last." Sound familiar? Most of us were raised on questionable sports truisms like these, and many of us have probably repeated them to others—children, students, colleagues—at some point in time. The late Vince Lombardi, revered coach of the Green Bay Packers football team (and known as the "high priest of competition"), is often quoted as having said, "To play this game you have to have fire in you, and there is nothing that stokes that fire like hate." Jerry Kramer, one of Lombardi's best players, had a football fantasy that's a good case in point: "I see myself breaking [my opponent's] leg or

Teri Engler

knocking him unconscious, and then I see myself knocking out a couple of other guys, and then I see us scoring a touchdown. . . ."

Coaches and parents play a big part in inculcating the "winning is everything" attitude that can ultimately lead to brutality in sports. "Violence is learned," says Dr. Keith Henschon, a noted sports psychologist and associate professor of health at the University of Utah. "Kids don't come into this world violent. They learn it from you and me. And we reward that violence in many substle ways." Henschon believes, for instance, that coaches and parents often show youngsters that they care more about the product—winning—than the process of learning about a sport and developing the skills necessary to play and enjoy it to the fullest.

Part of the problems is the reverence coaches and parents have for extreme competitiveness. Their rationale is generally that competitiveness goes hand-in-hand with other "positive" personality traits, but as Thomas Tutko and William Bruns trenchantly observed in *Winning Isn't Everything and Other American Myths:*

> One of the strange beliefs that underlie competition is the assumption that if a person is competitive, he also possesses other positive characteristics.
>
> The athlete can throw a racquet, start fights, use "gamesmanship" to disrupt his opponent, throw tantrums, deliberately roughhouse a player or curse the officials, and it's dismissed because "He's a hell of a competitor. He wants to win."
>
> The athlete can be immature or childish or destructive, but because he "wants to win," this excuses his behavior.
>
> We surely wouldn't give the same consideration to a bank robber who beat up a teller and three customers, if his legal defense was: "He's a hell of a competitor. He really wanted to rob that bank. He's the number-three ranked bank robber in Colorado."

Henschon claims that a new set of sports heroes should replace the "anti-heroes" currently highly visible as a result of slanted media coverage. Fierce professional athletes like Jack (*They Call Me Assassin)* Tatum get too much attention for being violent. This, says Henschon, elevates their status in the eyes of young sports fans who are likely to follow the examples their "heroes" set.

The Chicken or the Egg?

Though it's the focus of renewed attention, spectator violence is hardly new. As far back as 70 A.D., spectators at the games in Pompeii broke into wild sword fights which resulted in many deaths. The Roman Senate responded by banning all gladiator events for a decade. Five centuries later, thousands of people were killed when rival chariot-racing groups set off a series of riots that nearly destroyed Constantinople. In the early 1900s, a soccer match between the Scottish Football Association's Glasgow Rangers and the Glasgow Celtics became mayhem when the game ended in a draw and officials refused to allow any overtime. Clubhouse buildings were set afire by rampaging fans, who then cut the hoses as firemen attempted to fight the blazes. Fifty-eight policemen and hundreds of others were injured.

Some observers suspect a link between violence on the field and that in the stands, though there is no hard evidence to support a causal connection. It also remains unclear in which direction the relationship between spectator and player violence runs—does spectator violence promote hand-to-hand combat amongst players, or is fan rowdiness fueled by player violence?

Michael Smith of York University in Toronto has written extensively on the sociological aspects of sports violence. In a study he conducted of some 3,000 issues of the *Toronto Globe and Mail* between 1963 and 1973, Smith found 100 incidents of sports violence reported. Twenty-seven of those incidents were fan violence, most of which were sparked by player violence, according to Smith.

But Smith and others are quick to point out that many other factors can play a part in spectator violence at sports events. Says Dr. Stanley Cheren of the Boston University School of Medicine: "An angry, drunken sports fan, aggravated by the difficulty of getting to the event, parking, dealing with crowds, stirred up by a support group of pals, is easily provoked to violence by the very presence of other violent behavior, namely that on the field." Although psychologists once thought that spectators could release their own aggressive urges simply by watching contact sports, some research shows just the opposite. Cheren says, "As people become experienced with violence the need grows for more extreme violence to satisfy the wish for violent stimulation." ("The Psychiatric Perspective: Psychological Aspects of Violence in Sports," *Journal of Sport and Social Issues,* February 1981.)

Courts as Referees

Whatever its cause, sports violence—like so many other modern issues—has collided head-on with the law. Because of more and more dramatic instances of this growing violence, people are asking whether that law should intervene on the playing field. Consider, for example, the devastating case of the New England Patriots' young Darryl Stingley, who was permanently paralyzed as a result of a hit by Jack Tatum of the Oakland Raiders. Tatum has been quoted as saying that

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BONER'S ARK
THE HIPPOPOTAMUS WAS KICKED OFF OUR TEAM FOR UNNECESSARY ROUGHNESS!
GOOD! THERE'S TOO MUCH VIOLENCE IN SPORTS! WHICH TEAM WAS IT?
THE CHESS TEAM!
FRANK JOHNSON 2-22
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"intimidating" receivers by knocking them senseless is a legitimate part of the game of football. Should he have been criminally prosecuted? Should the courts be used to make a public declaration that this kind of savagery will not be tolerated in our society?

"I just inspire . . . I don't proofread."

State criminal laws (assault and battery, disorderly conduct) generally prohibit spectator violence to other spectators, coaches, and game officials. As for violence among the participants, a few states have specific laws covering attacks at sports events. In Oklahoma in 1980, an assistant baseball coach was convicted of "assault on a sports officiary." In that case, the home plate umpire had just finished calling a ball game and was preparing to change his uniform for a second game when several players from the losing team surrounded him in the parking lot. Their assistant coach joined them and began exchanging words with the umpire, then suddenly struck the umpire in the jaw with his fist.

The coach was found guilty under a statute which provides:

> Every person who commits any assault and battery upon the person of a referee, umpire, timekeeper, coach, player, participant, official, sports reporter or any person having authority in connection with any amateur or professional athletic contest is punishable by imprisonment in the county jail not exceeding six months or by a fine not exceeding $500, or both such fine and imprisonment. 21 O.S. Supp. section 650.1 (1979).

The case was affirmed on appeal and the coach was sentenced to pay $425 and court costs (*Carroll v. State*, 620 P.2d 416 [Okla. 1980]).

Criminal prosecutions against athletes for violence during the games are something else though. They're hard to prove, and thus are rarely undertaken. Before a person can be convicted of a crime, the prosecution must show that he or she not only committed the act but also consciously intended to do it. This is extremely difficult to prove. In sports like football, hockey, soccer, and basketball, there inevitably is hard contact between players without any specific intent to injure. Most of the time players are acting merely reflexively. Since the standard of proof in criminal cases is "guilty beyond a reasonable doubt," the prosecutor has a nearly impossible job.

But, says Harvard University Professor Arthur Miller, "possibly the greatest impediment to a criminal prosecutor is the reluctance of a jury to stigmatize a player with a criminal conviction, let alone a jail term. We are so accustomed to roughness on the field that the player who engages in it is seen as merely doing his job. A jury might hesitate to make him a scapegoat for the entire system—especially if he's a hometown hero." ("Personal View," *Chicago Sun-Times*, October 7, 1980, page 33.)

Two cases show just how hard it is to get a conviction for on-field violence. In one of the earliest recorded cases of this type (*Regina v. Bradshaw*, 1878), an English soccer player was charged with manslaughter for the death of an opposing player. A soccer player was dribbling the ball toward his opponents' goal, and when an opposing player appeared in his path he kicked the ball out of the opposing player's reach. Meanwhile, during this action the side-stepped opponent charged, jumped into the air and struck the first player in the stomach with his knees. The blow ruptured the player's intestines and he died the next day.

The court identified the main issue as intent. It said, "if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury." That would imply that there's been no crime as long as there's been no violation of the rules. But, the court went on, if, "independent of the rules, [the athlete causing the injury] intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, the act will be unlawful." In this case, there wasn't enough evidence to show that the player intended to do harm. Because it was unclear whether the action took place before or after the deceased player had kicked the ball away, the court ruled that the accused player should be acquitted.

More recently (1975), during a professional hockey game between the Boston Bruins and the Minnesota North Stars, Dave Forbes (of the Bruins) attacked Henry Boucha (of the North Stars) and both were assessed a first period penalty. Later, Forbes pounded on Boucha from behind, pummeling him with his fists and hockey stick. A local state's attorney who witnessed the incident from the crowd

(Continued on page 61)

Is Student Athlete a Contradiction in Terms?

How Universities Deny Student Athletes an Education

C. Thomas Ross

1167

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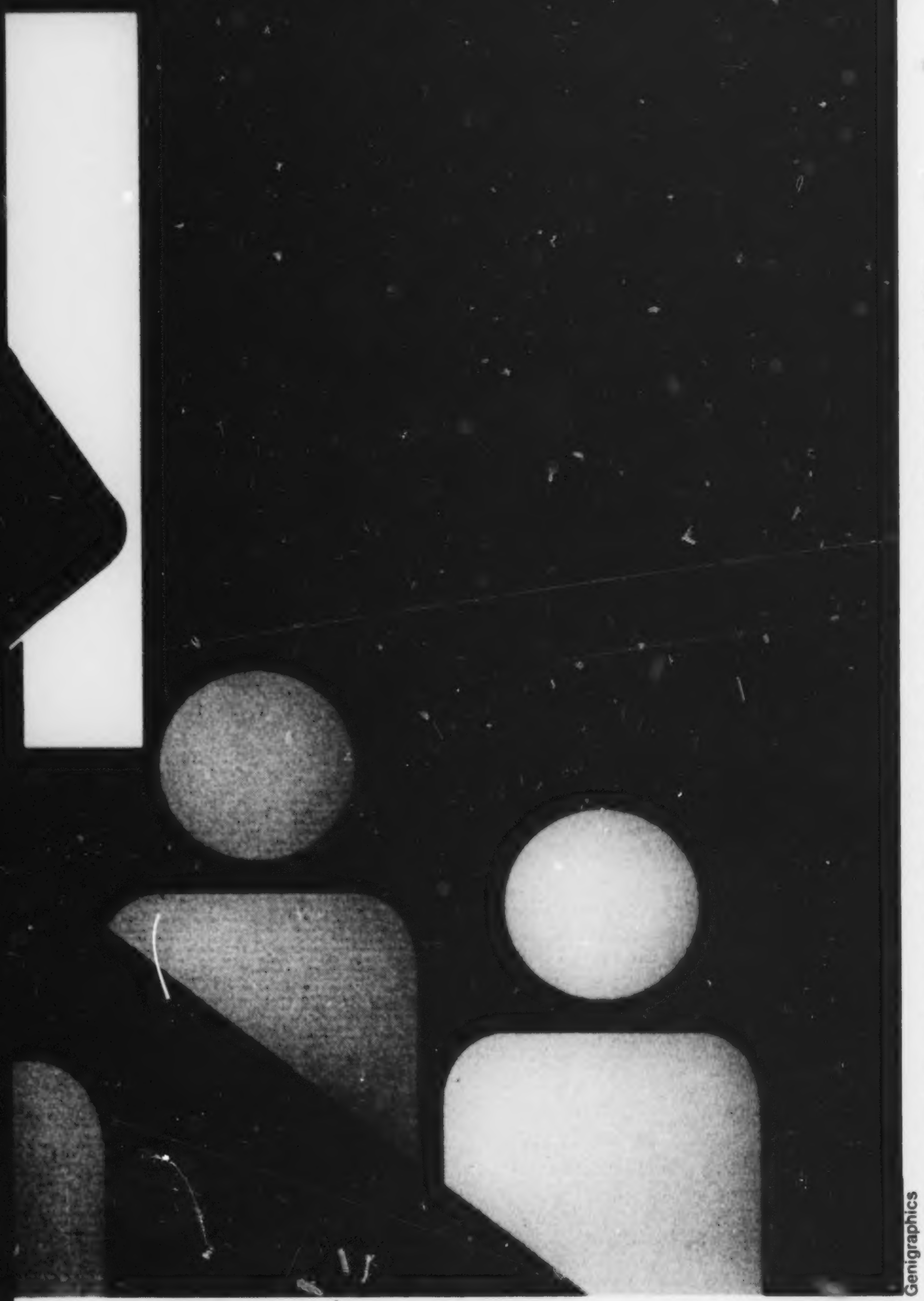
SPORTS AND THE LAW



Genigraphics

The age of sports litigation has reached full stride. Even a casual reader of sports pages must be aware of the multitude of legal issues which have invaded the sports domain. At the professional level, there are strikes (labor law), relocation of franchises (antitrust), hiring and firing of coaches and players (contracts), increasing violence (torts, criminal law, and administrative law), and escalating salaries (agency, business law, and taxation).

Some of these issues, and many new ones, also affect college and high school sports. Constitutional issues—such as whether a player's right to participate in sports constitutes a property right under the Fourteenth Amendment or whether players have been provided due process—are galloping into the case reports of many states. Schools belonging to conferences and voluntary organizations such as the NCAA (National Collegiate Athletic Association) are challenging the powers of these bodies to regulate their activities. Injured college atheletes are suing to receive workers' compensation benefits.

Athletes at all levels are becoming much more aware of the effect that law may ultimately have on their career. Lawyers are becoming aware that the legal issues are not new, but the focus is. The days when courts left disputes to the schools and conferences are over. Athletics no longer enjoy immunity from the legal system. As a consequence, courts are being asked to struggle with old legal concepts in the new context of sports.

Educational Exploitation

One such area is educational exploitation, using students for their athletic skills without regard to whether they are learning anything. This concept must be distinguished from the related theory of educational malpractice.

Some students, parents, and lawyers propose educational malpractice as a way of getting redress from the educational system when students fail to learn. Relatively few of these cases have been argued, and to date none have been successful. (See, for example, *Hunter v. Board of Education of Montgomery County*, 439 A.2d 582 [Md. 1982], *D.S.W. v. Fairbanks North Star School District*, 628 P.2d 554 [Alaska 1981], and *Hoffman v. Board of Education of City of New York*, 400 N.E.2d 317 [N.Y. 1979].) Generally, the courts are deciding these cases on the theory that public policy would not be served by opening the floodgates of litigation. There are just too many disaffected students and parents, too many injuries, real and imagined. Courts recognize that the "science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—" have emphatic views on the subject. The courts recognize that literacy is achieved by the convergence of many variables, some of which are outside and beyond the scope of the educational systems. Finally, some courts have stated that legislative and administrative remedies are better in these cases than court-ordered solutions.

Educational exploitation is different. It has to do with a specific kind of failure to learn, the failure of the student-athlete. It is complicated by big money for the school and coaches, if not for the players. It's complicated by school

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politics, since the interest of alumni and the pressure they can exert can help bend academic standards. And it's complicated by race and class, since the athletes who feel most exploited often come from segments of society that may not typically attend college—or be considered capable of doing college work.

Why are we hearing more and more these days about exploited student-athletes? Many critics claim that the increased pressure to win has caused a lessening of academic standards in both high schools and colleges. Winning programs make more money, through increased gate receipts, extended seasons, and bigger television payments. Winning also generates better public relations and is a great tonic for recruiting.

All this makes it easy to overlook the student in the student-athlete equation. Colleges rarely recruit student-athletes because they are honor roll students. High schools sometimes quietly promote kids because they are good athletes rather than because they have earned the grades. In neither case is the educational system fulfilling its obligation to society or the student-athlete. In neither case are schools producing useful citizens capable of fending for themselves when they enter the real world.

Neither athletes nor schools are blind to the problem. Athletes are filing suits alleging that schools and coaches have caused them injury by exploiting their athletic abilities and ignoring their educational needs, thus leaving them unprepared to deal with the practical problems of the real world. And the NCAA, at its January 1983 convention, voted to raise academic standards for student-athletes who attend Division I and I-AA schools, the large universities where pressures to win are the greatest.

Going to Court

The courts have indicated that high schools and colleges have a duty to educate student-athletes, and that they may enforce rules that help them maintain the primacy of education. For example, in the early 1970s, an Indiana court addressed the problem of recruiting high school athletes (*Sturrup v. Mahan,* 290 N.E.2d 64 [Ind. 1972]). In that case, the court was confronted by a young man who had transferred from a Miami high school to one in Bloomington, Indiana, and wanted to play varsity football without waiting a year to become eligible, as specified in the rules of the Indiana High School Athletic Association. The athletic association passed the rule to limit excessive recruiting of talented high school athletes. Though the court ultimately decided for the young man, on the grounds that the regulations in question were more broadly drawn than is necessary to prevent recruiting or school-jumping, it left no doubt that the principle at stake was an important one, and one that appropriately merited the protection of groups like the athletic association:

> Schools are for education. There is no doubt that extracurricular athletic competition may add to the educational process, but the extracurricular activities should not take precedence over the curricular activities of the school. The sideshow may not consume the circus. The prevention of recruiting and school-jumping are both fitting and proper goals by which the Indiana High School Athletic Association (IHSAA) maintains the amateur standing of high school athletics. This we deem to be a compelling state interest.

In a more recent case, Curtis Jones is suing his high school coaches and the University of Michigan for $15 million, claiming exploitation of his basketball skills to the detriment of his education. He alleges that learning disabilities kept him from keeping up academically and that he was moved from school to school to capitalize on his basketball talents. Recruited by the University of Michigan, he was sent to a junior college in North Dakota. Jones alleges that he was criticized, taunted, and insulted, that he was unable to cope with the humiliation and emotional pressure, and that he suffered severe psychological injury, has been in and out of hospitals since 1970, and lives on welfare.

In an article in the *Athletes' Rights Bulletin* (Vol. 1, No. 1, 1982) Maria Ironside states:

> Coach after coach, teacher after teacher, school official after school official ignored Curtis Jones's educational needs and personal well-being in favor of advancing his basketball stardom. . . . If Curtis Jones had ever known just one school administrator, one advisor or coach, or anyone with the clear-headedness and courage to stand up and speak for his educational rights, he might have stood a chance for something better than what he got. He, and all of us, deserve better.

Recently, the wire services reported that eight athletes sued California State University at Los Angeles for $14 million for depriving them of a legitimate education. They were admitted under a special program for minorities and claim they wasted their careers on courses designed only to keep them eligible for basketball. The university and its basketball coach say the charges are 180 degrees wrong.

One other case is worthy of mention before moving on to a discussion of what can be done to strike a balance between the rights of the student, the rights of the athlete, and the responsibility of the educational system. Mark Hall played basketball at the University of Minnesota. He had passed 90 hours of work in the university's nondegree program. Under Big 10 Conference rules, he had to enter a degree program or lose his eligibility. However, he was denied admission for his senior year because of academic problems and unspecified allegations concerning his conduct.

Hall brought suit seeking an injunction against the school. He alleged he had been denied due process and said he should be permitted to play (*Hall v. University of Minnesota,* 530 F. Supp. 104 [D. Minn. 1982]). Noting that the Fourteenth Amendment prohibits state agencies (including a public university) from depriving anyone of "life, liberty, or property" without due process of law, the court held that he had a constitutionally protected property interest in participating in athletic programs because of his legitimate expectations of securing a professional contract if he played college basketball during his senior year. As a result, the court said, Hall was entitled to a hearing.

In analyzing the case, the court concluded that Hall was the victim of a "tug of war" between the university's academic wing and its athletic department. The judge showed little sympathy for either group, but much sympathy for Hall as a pawn in this game:

> The university's academic wing argues that if this court orders [Hall] into a degree program, its academic standards and integrity would be undermined. [Hall] and his fellow athletes were never recruited on the basis of scholarship and it was never envisioned they would be on the Dean's List. Consequently we must view with some skepticism the university's claim regarding academic integrity. This court is not saying that athletes are incapable of scholarship; however, they are given little incentive to be scholars and few persons care how the student-athlete performs academically, including many of the athletes themselves. The exceptionally talented student-athlete is led to perceive the basketball, football, and other athletic programs as farm teams and

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C. Thomas Ross attended the University of Georgia on a football scholarship and was a sprinter on the track team. He is now a trial lawyer in Winston-Salem, North Carolina, and co-editor and co-publisher (with Herb Appenzeller) of Sports and the Courts *quarterly newsletter.*

"I accept the 4000 years in Limbo with the understanding that it in no way constitutes an admission of wrongdoing."

Drawing by Lorenz; © 1983
The New Yorker Magazine, Inc.

proving grounds for professional sports leagues. It well may be true that a good academic program for the athlete is made virtually impossible by the demands of their sport at the college level. If this situation causes harm to the university, it is because they have fostered it and the institution rather than the individual should suffer the consequences.

The NCAA Tightens Standards

At its January 1983 convention, the NCAA gave positive proof that educational exploitation is a valid issue. Unfortunately, it's not a simple one, capable of easy solution, but the NCAA's action is a major positive step.

Beginning in 1986 student-athletes must total at least 700 on the verbal and the math parts of the Scholastic Aptitude Test or 15 on the American College Testing exam. Neither figure is high. The SAT scale runs from 200 to 800. Since you could total 700 by scoring just 350 on each part, you could well be eligible and still be far below the median.

The NCAA also specified that student-athletes must have a 2.0 or C average in a high school core curriculum which must include three years of English, two of math, two of social studies, two of science (including a lab science) and academic electives totalling 11 units.

A student-athlete who does not meet these requirements may still attend and play for a Division II or III school in the NCAA or any school in the NAIA (National Association of Intercollegiate Athletics). Or he may attend a Division I school but not play sports his freshman year. If he passes 12 hours as a freshman, he may join the team as a sophomore and play three years. Or he may attend a junior college for two years and transfer with two years of eligibility remaining. Finally, he may attend a Division II school for a year and play. If he has 12 hours of credit, he may then transfer to a Division I school, sit out a year, and have three years of eligibility remaining.

As Fred C. Davison, President of the University of Georgia, puts it,

> The new standard says that young people with a burning desire to compete athletically will have to apply that drive to the classroom as well. And it says that teachers and coaches who now strive to develop a student's athletic potential will have to work harder in developing a student's academic potential.

President Davison notes that many black leaders have argued that the standards discriminate against the black athlete, but he says

> These critics are wrong. Their criticism demonstrates a lack of confidence in the ability of black athletes, or any others, to perform academically. Those who have the dedication and drive to perform athletically at the college level can also perform academically, if they know they are expected to attain a certain academic standard.

Will the NCAA Plan Work?

The passage of these higher academic standards places the responsibility for education of student-athletes exactly where it should be—on the shoulders of the educational system. No well-intentioned high school administrator, teacher or coach can plead ignorance. They can no longer promote student-athletes because of political expediency. Easy passes will no longer do their student-athletes any good, since if student-athletes at their school can't meet the minimum standards, they won't be admitted to a Division I school. However, the standards alone won't do the job—the NCAA must enforce these standards on their member institutions. Otherwise, we will perpetuate the double standard of the past.

If we are to maintain our athletic traditions while attempting to raise academic standards, then the burden is on the teachers and coaches to motivate student-athletes to better cope with the educational process. Most student-athletes with bad grades are not ignorant or illiterate, merely insufficiently motivated to learn. Their problems aren't helped by faculty members who hold to irrational and invalid stereotypes of the "dumb jock." The fact is that many times the "dumb jock" just happens to be more interested, and better, in sports than English. Do we deny student-athletes the opportunity to learn merely because their interests are not the same as other students?

High schools are theoretically supposed to prepare a certain number of their students to attend college, and to prepare the remainder, who for one reason or another do not attend college, to be useful and productive citizens in our society. Clearly schools should have academic standards that both groups must meet. They need to have the same standards for student-athletes too, to ensure that they are not discriminated against merely because they are highly skilled athletes.

Colleges and universities have to do their part too. They must support the integrity of this single standard by not admitting student-athletes who do not meet admission standards. They must also im-

(Continued on page 64)

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CLASSROOM STRATEGIES

Sports News You Can Use

The newspaper's sports section and sports fiction for kids can make the law come alive for your students

Competition has become an American symbol. Nowhere is it more evident than in the frenzied adult push for kids' competitive sports. Now there are organized teams even for very young children, and winning and attempting to be "number 1" has become an obsession. Some youth programs extend even far beyond the local neighborhood or community. Many children are spirited all over America on super jets full of accompanying adults for the purpose of crowning regional, national, and, in some cases, international champions.

This article will attempt to provide teachers with a variety of classroom strategies for teaching law, values, sportsmanship and citizenship using the popular and appealing vehicle of sports.

While sports could be adapted to many teaching strategies or approaches, this article will focus on the print media—sports fiction for youngsters and the sports pages of the newspaper. Sidebars accompanying the article provide some other ways to involve kids.

Nancy N. Mathews

Larry Lundy

Strategy

1.

Sports Fiction

Literature is an extremely effective way to introduce and reinforce good sportsmanship skills and an interest in sports generally. Sports novels for kids are replete with questions of authority, responsibility, citizenship, conflict/conflict resolution, justice, fairness, discrimination and the rights of others.

Sports law and sportsmanship themes can be found in many of these works. For example, striking a balance between an intensive competitive spirit and a concern for players' safety makes an interesting theme. Chaim Potak's *The Chosen* begins with an exciting baseball game between two teams of different Jewish sects, with a serious injury to a main character caused by the prowess and intense competitive spirit of another player.

The authority of coaches, umpires and local sports heroes are frequent subjects. *A Shining Season*, by William Buchanan, is a case in point. In the remaining time John Baker has left in his young life, he makes a tremendous impact on the students he coaches and the people he comes in contact with. John has been diagnosed as having cancer, and his courageous fight is an example to all the athletes he works with.

Thomas Dygard's recently published novel for young people, *Rebound Caper*, takes an interesting twist on the contemporary separate-but-equal co-ed sports question. Chief clown and cut-up with his high school basketball team, Gary Whipple is benched by his coach. Gary's solution—join the girls' team. The school board is in an uproar and the principal annoyed, while Gary's personal life is in a shambles.

Other books present sportsmanship or sports law dilemmas to young people in grades four through nine. They include:

Matt Christopher, *Johnny Long Legs* (1970). Simple plot, good game descriptions, emphasis on good sportsmanship and team effort.

Scott Corbett, *The Baseball Bargain* (1970). A book with real depth in which the protagonist is tempted to steal a mitt but strikes a bargain with the storekeeper to earn it by working in the store.

Alfred Sloat, *Hang Tough, Paul Mather* (1973). A poignant first-person story by a leukemia victim who tries to keep up with his greatest interest—playing ball. The book has good characterizations and a genuine concern with ethical values.

John R. Tunis, *The Kid from Tomkinsville* (1942). A real drama showing baseball as it is—a game of endurance and suspense. This is a story of a boy's physical and social development from being a rookie to becoming a giant.

Robert Weaver, *Nice Guy, Go Home* (1968). An Amish boy is drawn into a civil rights conflict in a town where his team plays; the book represents a tension between Johnny's Amish ideals and his need to become actively involved in the larger community to combat injustice.

Until recently, sports literature has ignored girl athletes. However, since Title IX many more sports novels for girls are beginning to appear. The issue of sexism is one theme in the novel *Not Bad for a Girl* by Isabella Taves (1972). This book is based on a real case of a girl who is put on a little league team by a sympathetic coach. The girl plays well enough, but there is such abuse and persecution by local residents that both the coach and the young girl are expelled. As is often the case in sports stories, the realistic ending gives more impact to the exposure of sexism than any formula happy ending could.

Sports literature can expand a student's understanding of many issues. And in a day when positive heroes are hard to come by, sports stories can offer some legitimate role models.

Strategy

2.

Sports Strips

Newspapers and sports thrive on each other. Studies show that the sports section is one of the very best read parts of the paper, satisfying readers at the same time it gives priceless publicity to sports teams. Sports heroes become media personalities, as newspapers spend time and money to cover games all over the country (if not all over the world) and to follow athletes' careers on and off the field, in and out of the limelight.

Sports and newspapers also go together well in the classroom. We've all seen the slow reader who can't be bothered with his school work but pores over the sports pages. And lots of kids can't do any math at all—except, of course, figuring batting averages and earned run statistics in their heads.

Here are some tips on how to turn this interest into lively law-related lessons.

Sports-related cartoons appear regularly in the sports section of the newspaper, in magazines like *Sports Illustrated*, in youth sports publications, and in the daily comics. These cartoons can be used as grabbers to stimulate discussions. The box contains examples of sports-related cartoons and accompanying discussion questions.

You might also encourage kids to develop their own cartoons, individually or in groups. Visual analysis is a critical skill in today's world. Many students who are not eager writers are willing to express themselves through cartoon figures or in short, comic-strip phrases.

Many sports sayings could be used to stimulate student cartoons. The teacher could give the students the first part of a familiar saying, and let students fill in the rest. For instance, "It is not whether you win or lose, but . . ." or "Winning isn't everything, it's. . . ." Maybe the school paper would appreciate some of these cartoons as contributions to its own sports page.

Strategy

3.

Teaching about Contracts

There are two kinds of contracts almost all kids know at least a little about—sports contracts and entertainment contracts. Of the two, they probably hear more about sports contracts. This makes sports a natural vehicle for teaching about basic contract issues.

The newspapers are filled these days with stories about contracts: Joe Glunz gets six million dollars even though he can't turn a double play and runs like his Aunt Clara; Sleepy Smith finally gets fired after years of dozing in the bullpen, but the team still has to pay him because he has a no-cut contract; Zippy T. Hogg, football's fastest back, claims that he can make more playing almost anywhere else,

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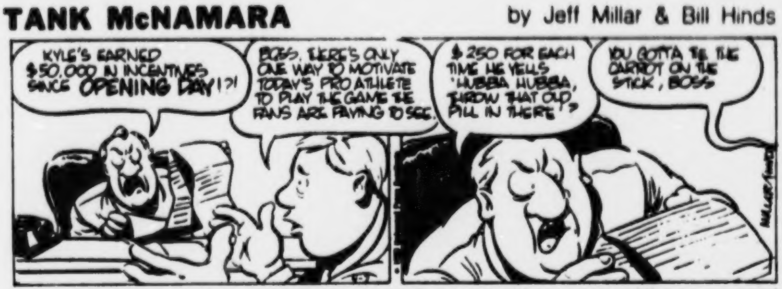
Nancy N. Mathews is Director of the Utah Law-Related Education Project.


TANK McNAMARA
by Jeff Millar & Bill Hinds
KYLE'S EARNED $50,000 IN INCENTIVES SINCE OPENING DAY!?!
BOSS, THERE'S ONLY ONE WAY TO MOTIVATE TODAY'S PRO ATHLETE TO PLAY THE GAME THE FANS ARE PAYING TO SEE.
$250 FOR EACH TIME HE YELLS 'HUBBA HUBBA, THROW THAT OL' PILL IN THERE'?
YOU GOTTA TIE THE CARROT ON THE STICK, BOSS

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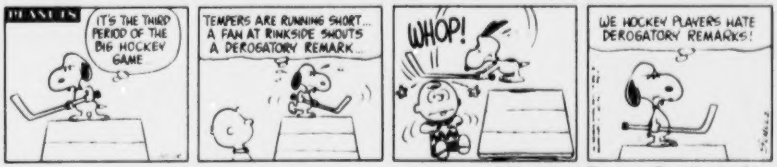
In the eternal war between the labor and management, who is winning in this cartoon?

Why has the team agreed to a contract giving so much to the player? (Hint: see Frank Kopecky's articles in this Update *and the first* Update *on sports and the law [Fall 1978] for the background of how players improved their bargaining position.)*

Are incentive clauses common in sports contracts? In all contracts?

Do incentive clauses usually work to the advantage of the team? If so, why? (and why is the owner so upset in this cartoon?)


PEANUTS
IT'S THE THIRD PERIOD OF THE BIG HOCKEY GAME
TEMPERS ARE RUNNING SHORT... A FAN AT RINKSIDE SHOUTS A DEROGATORY REMARK...
WHOP!
WE HOCKEY PLAYERS HATE DEROGATORY REMARKS!

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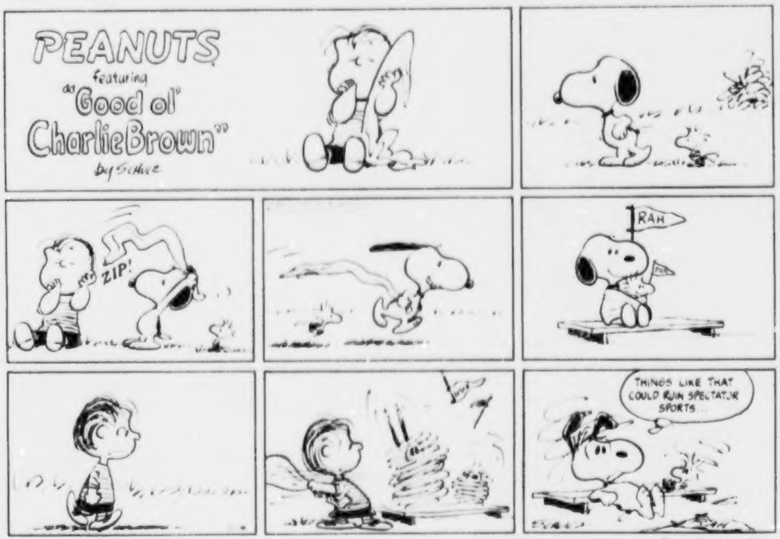
Does this cartoon illustrate good sportsmanship? Why or why not? What obligations of good sportsmanship do spectators have? How do spectators influence players? How are they influenced by them?

Is violence ever an appropriate response to a derogatory remark? What does the law say? Have there been any cases of players going into the stands to fight with spectators? If a player does fight with a fan, is his team liable at all, or is he acting strictly on his own? What evidence would a court consider in making its decision (has the player ever attacked fans before? was he responding to a verbal taunt or was something thrown at him, etc.)?


PEANUTS
featuring "Good ol' CharlieBrown"
by Schulz
ZIP!
RAH
THINGS LIKE THAT COULD RUIN SPECTATOR SPORTS...

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Was Snoopy simply a "spectator"? What "rules" should most spectators follow? What happens when spectators fight each other? What obligations does the sports arena have to spectators (providing guards, trying to limit drunkenness, etc.?) Why does there seem to be so much violence among spectators? How do spectators influence national sports events? school events and local sports events?

but he can't get out of his contract.

Here's a story that focuses on one of the most common contract situations in sports today—the star who threatens to walk out (or maybe sulk all year) if the team won't renegotiate his contract. This is a fictional story, but there are dozens of real ones like it every year. (For this story, and the ones that follow, I am indebted to the American Bar Association and American Newspaper Publishers Association, who have given me permission to reprint from *Law Day Extra*, a newspaper supplement for the schools which is available on Law Day. Charles White of the ABA staff wrote the stories and the background; Sandy Diamond of the *St. Louis Post-Dispatch*, Linda Riekes of the St. Louis Public Schools, and Steve Jenkins of the Bar Association of Metropolitan St. Louis wrote the strategies. For a complimentary sample copy of this year's *Law Day Extra*, just write YEFC, 1155 East 60th Street, Chicago, Illinois 60637.)

"Joe Superstar Threatens Walkout"

Joe Superstar, slugging Tornado outfielder, says that he'll leave the team next week unless the team owner Albert G. Oilman agrees to renegotiate his contract.

The young Tornado flycatcher is in the second year of a five-year contract. Superstar claims that the contract is among the lowest in the league for a player of his caliber. "Even with incentive clauses, I'm making less than guys who can't carry my glove," he said. "Last year I had more than 30 homers and more than 100 RBIs. I stole 26 bases and led the league in throwing runners out. What do I get for it? A contract that you might give a .250 hitter with adequate defensive skills."

Superstar claims that Tornado General Manager Slug Sikorski promised him when he signed that the team would be willing to renegotiate if he had a good year, but Sikorski hotly denies it. "What's a contract for? We consider ourselves bound by it, irrespective of what kind of years Superstar has. If, God forbid, he got hit by a car and broke a leg, we'd pay him even though his value to the team would be nil. Sure he had a good year, and sure he wants more money, but if he wanted to renegotiate at the end of the year, he could've just signed a short-term contract. He wanted security, and so he went for the five-year package, and now he wants to have it both ways."

Sikorski says that there's no need to drag owner Oilman into it, since he didn't negotiate the contract with Superstar in the first place. Sikorski adds that Superstar will be fined $500 a day for every day he misses, and warned that a prolonged walkout could jeopardize his career. "We got a lot of pretty good young kids in our farm system. Is Superstar walks, we'll bring one of them up, and if after two or three weeks he's hitting around .300 and playing the field, then maybe Joe won't get his job back. But I guess if he wants to sit home losing more than $3,000 a week and watching somebody else take his job, that's up to him."

In a related development, sources close to the ball club said that Superstar's agent, Harvey Percento, has been urging his client to walk out. "Superstar's mad as the dickens at Percento, because he thinks that Percento negotiated a lousy agreement for him. If he doesn't get his way, he's going to can Percento, and maybe even sue him. Percento's behind the walkout, trying to save his cut and his skin."

Background

A contract is the central issue here. A contract is basically an exchange of promises. One party promises to perform certain acts (like selling a car or renting an apartment) in return for some form of compensation from the other party. A contract can be as simple as buying a movie ticket, in which there is an implied contract between the purchaser of the ticket who plunks down his money, and the theater which promises that it will show him a movie. Or contracts can be hundreds of pages long, with all kinds of provisions and contingencies.

Joe Superstar exchanged a promise that he would perform to the best of his abilities over the five years of the contract in return for the club's promise to pay him a sum of money each year. To what extent, if at all, can or should these promises be changed if circumstances change? This is one of the perennial issues raised by contracts. Let's say that a dress manufacturer promises to deliver a thousand blouses to a department store, but is unable to comply because his warehouse burned down. Can he be held to the original contract? Should the parties renegotiate? Turning to this story, is it unethical for Joe to break his promise to continue performing because he's had a good year and feels he deserves more money? How important is the team's promise to renegotiate, assuming that it actually made such a promise? Is walking out like this an accepted practice in the sports and entertainment world? If so, how does the practice affect the public perception of contracts?

There are no hard and fast answers to these questions. In certain instances, the language of a contract may specify what happens when circumstances change. Maybe the dress manufacturer and the department store have a clause in their contract which specifies that there is no liability if distribution is interrupted by an act of God. If there is no such language, it may still be in the interest of the parties to either renegotiate or to interpret the contract's language flexibly.

A great deal depends on what sort of relationship the parties have had in the past, and what sort of relationship they want to have in the future. If the department store wants to continue doing business with the dress manufacturer, it probably shouldn't hold him to the strict letter of the contract. Perhaps the same reasoning applies to the ball club, which, after all, hopes that Joe will be a happy and contributing player for the next four years. On the other hand, the ball club has many other athletes under contract, and if they see that Joe has bettered his position by insisting on renegotiating, then why wouldn't they insist too?

This is a rich area, full of legal and moral dimensions. It should lead to good discussions.

Strategies

After completing the activities that follow, students will be able to:

A. Define the term "contract."

B. State the rights and responsibilities involved in entering into a contract.

Ask students to describe all the situations that they can think of in which a contract is involved. List on the board the examples. Have students develop a definition of the word "contract." Then compare their definition to one in a dictionary.

After looking at the definition, ask students to go back over their list and identify rights and responsibilities of each party involved in the contract. Then ask students to read the "Joe Superstar Threatens Walkout" article and identify the rights and responsibilities of each party. Discuss with the students whether it is fair for Joe to break his promise to continue performing because he has had a good year and feels he deserves more money. Ask students if they can think of any situations in which there were good reasons for breaking a promise.

In expanding on the article, ask students:

Why do some parties seek to renegotiate? Why do some parties object?

Will the law enforce contracts? If so, why is walking out ever effective?

Strategy

4.

Should This Be in Court?

Sports officials have a really tough job. They have to keep the game going, maintain order, interpret rules that are getting more and more complex every day, and make quick decisions on who should and should not be penalized—all in front of thousands and thousands of fans who are ready to yell for their hide if they don't like the decision. In some sports, it is traditional that players and coaches can complain about a decision. We've all seen baseball managers come storming out of the dugout to yell at officials, kick dirt on the base, point to the foul line, jump up and down, and generally put on a real show in an attempt to get a decision overturned. Most of the time, however, it's just a show—the umpire almost never changes his mind.

Some fans aren't satisfied with this tradition. They want more than a show. They want a real chance to get the decision overturned, and if their manager can't do it on the field, they'll try to do it afterwards in court. The following fictional story (which is based on a real case) is symptomatic. Fans everywhere are trying to find ways of moving the action from the sports field into the courts.

"Basketball Outcome Challenged"

The game was over a week ago, but players and fans of St. Michael's and Cooney High will have to wait at least another day to find out who really won the game. Judge James Campbell will decide shortly which team emerged victorious in the case of the contested hoop.

The trouble all goes back to the waning moments of the first half. St. Michael's thought it scored at the buzzer, but Cooney maintained that the buzzer went off several seconds *after* the clock had run out. The refs said the basket counted, and when the final score was St. Michael's 67-Cooney 66, the Crusaders thought that they had won a thriller. After the game, however, the officials decided that the first-half basket shouldn't have counted, and so reversed the score, making the Crusaders a one point loser.

Sports Grabbers

Law-related lessons tend to be some of the most motivating of topics, yet even they benefit from a beginning "grabber." Grabbers are provocative questions, quotes, puzzles, or surprises which can be used to whet the appetite of the learner, narrow the focus, and get the class on task.

Grabbers are also effective because they require little prior knowledge of the subject to succeed. They are easy to create or discover if the teacher keeps in mind the education maxim: "Make the strange familiar and the familiar strange." They should be constructed so that the learner has a beginning point of reference and so that all or most of the students can take part, regardless of their familiarity with the subject.

An important component of a successful grabber is time. Grabbers should take 7-10 minutes or less.

A lesson on sports and the law could begin with one of the following questions drawn from Weintraub and Krieger's *Beyond the Easy Answer*:

1. A man is afraid to go home because another man is waiting for him with a mask on.
   Question: Why is he afraid to go home?
   Answer: The man is a baseball player attempting to score a run. He is afraid to go home (home plate) because the catcher is waiting to tag him out.
2. A father drives his son to a football game. On the way they are involved in an automobile accident and the father dies. An ambulance is sent for the son, and he is taken to a nearby hospital. He is admitted to the emergency room, but the doctor on call refuses to operate.
   Question: Why did this doctor refuse to operate?
   Answer: The doctor on call is the mother of the boy and is prevented from operating on her son. Hospital rules do not permit doctors to operate on their relatives, as it might interfere with their personal judgment.

Or share this letter with students and explore their reactions:

Dear Mr. Cannon, Principal:
I really want to play baseball. I have played baseball and have practiced hitting and fielding with my three older brothers since I was old enough to understand the rules and not be afraid to catch a fly ball. Because I am a good, experienced player and especially a speedy shortstop, I want to play on the boys' varsity team. The coach has let me practice with the junior varsity team for two years. I am the fastest player he has, but no, he says reluctantly, that girls can't play competitive varsity sports. I won't be satisfied with playing on the girls'team. Please justify this separate and unequal rule to me.
Sincerely,
Susan Leake, Student
South High School

Have the students respond to Susan's problem as the school principal. Would responses be different if Susan wanted to play varsity football? Wrestle? Encourage them to fairly address both the student's and the school's concerns.

Or begin the class with a provocative sports quote. You'll find plenty in Bert Randolph Sugarman's *The Book of Sports Quotes* (1979).

Sources for other grabbers (not necessarily sports-related or law-related) include:

1. *Update* magazine's section on "Legal Lunacy." Begin a class occasionally by selecting several examples to share with the students.
2. An amusing book titled *Murphy's Law*, which collects the postulates and axioms that flow from the painful, yet humorous, truth. Have a selection on the board when students enter the room.
3. Burns, Marilyn, *The Book of Think*, Boston: Little Brown, 1976.
4. Gardner, Martin, *Perplexing Puzzles and Tantalizing Teasers*, New York: Archway, 1971.
5. Weintraub, Richard and Richard Krieger, *Beyond the Easy Answer*, Washington, D.C.: Zenger Publications, Inc., 1978.
6. Rosenbloom, Joseph, *Monster Madness, Riddles, Jokes, Fun*, Sterling Publishing Co., Inc., 1980.
7. Stark, Judith, *Priceless Proverbs*, Price/Stern/Sloan Publishers Inc., 1982.

Use your imagination to discover and create grabbers. Encourage your students to do the same. You won't be sorry.

—NNM

St. Michael's took the case to court, seeking a ruling requiring the second half to be replayed. They argued that they had every reason to think that the first half basket would count, and that their strategy in the second half, and especially at the close, was dictated by what they thought was a narrow lead. As coach Jim Stuart said, "If we'd known we were behind at the end we could have tried to score. As it was, we sat on what we thought was a lead."

Cooney's attorneys and coach feel just the opposite. They say that the basket shouldn't have counted in the first place, was clearly an error, and that to perpetuate the error through the second half makes a mockery of the game. As coach Ernie Fowler put it, "The clock must have run out two or three seconds before the basket. Just because someone forgets to hit the buzzer, or because the buzzer doesn't work, that doesn't mean that the basket should count. We won the game fair and square."

St. Michael's is asking for a decision before Friday, when the first round of the statewide tournament begins, and Judge Campbell is expected to rule by then.

Background

The issue here is frivolous use of the courts. Many Americans have complained in recent years that our courts are being deluged with too many inconsequential suits. Examples are all over the place—a young man who sues a woman for standing him up on a date; a son who sues his parents for "malparenting;" two men who sue a restaurant for sex discrimination because its "ties only" rule applies to men and not to women.

All over the country, disgruntled fans of both professional and amateur sports have filed suits seeking to overturn the final score. Some observers see this as symptomatic of a growing trend in our society to go to law and the courts to redress grievances that might be better resolved through established procedures—compromise, conciliation, negotiation, or some other informal means. For example, most leagues have some established

(Continued on page 52)

Has Title IX done its job in fighting . . .

The Sexist Underground in Sports

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Marianne Pogge-Strubing

When the Women's Liberation Movement was just getting started, assuring a fair break for female athletes was probably way down on its agenda. After all, discrimination in the work place, unequal rates of pay, and many other examples of unfair treatment affect millions and millions of women every day. It's ironic

Baseball photo UPI

Basketball photo Tom Camfield/Port Townsend Leader

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then, that one of the bitterest controversies spawned by the movement is the law's attempt to give women athletes equal opportunity. In a lot of colleges and universities around the country, "Title IX" is practically a fighting word.

It all began back in the late 1960s and early 1970s, when women began to demand, louder than ever before, the opportunity to participate in every facet of society. Education was one of the keys to reaching that goal. Concern for equal opportunity prompted congressional hearings in 1970 on the status of women in education.

Those hearings showed that discrimination was everywhere in education—in admissions, allocations of funds, and treatment in the classroom. Congress responded with Title IX of the Education Amendments of 1972. Title IX tries to assure that women will be treated fairly in any educational program that receives federal financial help. The specific language is that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any education program or activity receiving federal financial assistance." And this law has some teeth in it. Congress gave the Department of Health, Education and Welfare (HEW) authority to cut off federal money for schools that violate Title IX.

Senator Birch Bayh illustrated the stereotype which this broad provision sought to alleviate:

> We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again. The desire of many schools not to waste a man's place on a woman stems from such stereotypical notions.

Nowhere was this stereotype of women as "pretty little things" more prevalent than in athletics, where women's major role had been to cheer men on to victory. And nowhere did Title IX arouse more controversy than in its effect on high school and college athletic programs.

Clearing the First Hurdle

Initially, it was unclear whether Title IX applied to athletics. Congress touched on the question only twice in the hearings. John Underwood's article in *Sport Illustrated* ("An Odd Way to Even Things Up," February 5, 1975) argued that "Title IX was not originally written with sports in mind, but in the '70's activities for women's athletics made the statute applicable to sports."

But if Title IX was not intended for women's sports initially, then how could it be made applicable to them? Men's sports and women's sports had traditionally been completely separate. Moreover, in most sports it seemed unlikely that women could successfully compete with men. How then could Title IX's goal of equal opportunity be reached?

In 1974, Congress decided that Title IX did indeed cover sports, but it passed the buck to HEW by asking the agency to come up with regulations that would enforce equality in athletic programs. Senator Tower of Texas attempted to exclude revenue-producing sports such as football and basketball from the regulations. Congress rejected this approach in favor of the broader provisions of the Javits Amendment. This version permitted regulation of all athletic programs but contained the qualification that any regulations issued by HEW "include with respect to intercollegiate athletic activities, reasonable provisions concerning the nature of the particular sport."

HEW issued regulations governing athletic programs but gave schools until 1978 to comply. The deadline came and went. Schools complained that the regulations were too vague and that they had no idea how to comply. Consequently, HEW issued a proposed set of new guidelines in 1978.

Tangled Guidelines

HEW intended the guidelines to serve two purposes—to eliminate the inequality existing between men and women in athletic programs and to alleviate the effects of past discrimination. As to the first goal, HEW required that institutions provide equal per capita funding in scholarships, recruitment, equipment, supplies, living and travel expenses, publicity, and all other financially measurable benefits. For example, if a school had 500 male varsity athletes and spent $500,000 on scholarships (an average of $1,000 per male athlete), it would have to spend $200,000 on scholarships for its 200 female varsity athletes to average $1,000 per female athlete.

To alleviate past discrimination, HEW required that institutions encourage female participation in athletics, increase the number of sports offered to women, publicize athletic opportunities for women, and elevate the scope of women's intercollegiate competition.

The proposed regulations produced an uproar from both sides of the issue. The National Collegiate Athletic Association (NCAA) adopted a nearly unanimous resolution calling the HEW per capita formula "unreasonable and unworkable." The NCAA feared the result of including revenue-producing sports such as football and basketball in the calculations. For example, the per capita formula required a university to spend its athletic scholarship money for men and women in proportion to the total number of athletes. A major university may have as many as 95 football players on scholarship at any one time. No other sport has more than a few. But if the school uses most of its scholarship money on football players, it must provide a proportionate amount of the total for female athletes. This leaves little scholarship money for nonfootball male athletes unless the university cuts down on its football players.

Women's groups, on the other hand, were disappointed because HEW's guidelines chipped away at Title IX's clear mandate for equality. HEW allowed unequal spending, despite the per capita regulation, if a school could demonstrate that the nature of the sport required greater funding. For example, some sports require more expensive equipment or more extensive travel than others. The women's groups saw this as an opening for schools to justify spending more on football, basketball, and hockey (with their expensive equipment and travel needs) and thus perpetuate traditional discrimination against female athletes.

Due to heavy criticism of the proposed guidelines, HEW substantially revised its final policy interpretation. The final form still mandates equal per capita funding for male and female athletic scholarships, though discrepancies in funding are allowed if they result from nondiscriminatory factors such as higher tuition costs for out-of-state students. Thus if a greater percentage of its male athletes came from other states, a university would be justified in paying more per capita to its male athletes than its female ones.

Equal per capita funding is not required in areas other than scholarships. HEW rewrote the final interpretation completely in this area. It calls only for equivalency in kind, quality, and availability in the athletic services extended to male and female athletes.

The final policy interpretation also ad-

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dresses Title IX's applicability to football and basketball. It cites the "reasonableness as to the particular sport" language of the Javits Amendment and permits nonequivalent funding in spectator sports provided that the difference results from nondiscriminatory factors. In the case of football, these include the rules of play, the nature and replacement of equipment, the ratio of injuries resulting from participation, the facilities required for competition, and the maintenance and upkeep of those facilities. Since all these factors make football expensive, schools are justified in spending more on this traditionally male sport.

The final policy interpretation also deals with accommodating the interests and abilities of male and female athletes. An institution complies if it can show that its sports opportunities are proportionate to its enrollments for men and women and it fully accommodates the interests and abilities of each sex. If opportunities for one sex in a particular sport have historically been limited, institutions are required to meet the interests of that sex and to encourage that sport's development.

The Contact Controversy

The final policy interpretation also considers the controversial topic of contact sports. Basically, the regulations make a crucial distinction between contact and noncontact sports. In the case of contact sports, such as basketball, football, wrestling, and ice hockey, the school may operate single-sex teams. The rationale seems to be that in these rough sports, it just isn't reasonable to expect boys and girls to compete equally. Therefore, if a girl wants to play one of these sports, the school doesn't have to let her try out. Her only recourse would be to gather enough women to form a team, which the school would be bound to support, as long as

1. the opportunities for members of the excluded sex have historically been limited, and
2. there is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

The situation is quite different in noncontact sports. Schools can offer separate teams for noncontact sports, such as tennis, golf, swimming, and track. If there are teams for boys and girls in all these sports, then there is no problem. If, however, a school fields only one team in a noncontact sport, the excluded sex must be permitted to try out for this single-sex team. So if there is only a boys' tennis team, and there is no girls' tennis team, then a girl tennis player who thinks she has talent must be given the opportunity to try out for the boys' team. Of course, if enough females are interested, the school is bound to support a separate women's team in the sport.

Enforcing Title IX

The future of the Title IX is uncertain. Lax enforcement hasn't helped, nor have ongoing attacks in both courts and the legislature. Despite an estimated 124 complaints against 80 schools, the federal government did not begin serious investigation of alleged Title IX violations until the Fall of 1980. Elizabeth Wheeler, in her article "Is There a Future for Title IX?" (*Ms. Magazine*, March, 1981), characterized this delay as being "partly intentional and partly bureaucratic." HEW issued no guidelines until 1975 and then gave schools an "unprecedented three year phase-in period to bring programs into compliance." The final policy interpretation, issued in 1979, handed over enforcement to the Office of Civil Rights (OCR). The newly created Department of Education took over the program from HEW in 1980.

Enforcement under the current administration has been "bleak," according to Charlotte West, an athletic administrator at Southern Illinois University. West says that investigations by OCR continue, and seem to be conscientious efforts to gather facts, but she sees nothing to indicate any commitment to actually enforcing Title IX by the Reagan administration, "not even lip service."

There is an alternative to enforcing Title IX through the federal government. The United States Supreme Court, in *Cannon v. University of Chicago* (1979), recognized an individual's right to bring suit under Title IX. But such suits are slow and costly, and the single most powerful tool of enforcement, the cutoff of federal funds, remains in the hands of the federal government.

This cut-off power has been the focus of an NCAA suit to halt enforcement of Title IX. The NCAA argues that equal per capita funding of scholarships may be illegal as applied to football. The NCAA suggests that the limitation in the Javits Amendment requiring HEW to consider the nature of the particular sport means that revenue-producing sports should be exempt from any equal per capita funding, since the requirement is unreasonable as applied to these sports.

The NCAA suit is not the only court challenge to Title IX. At lease one judge disagrees with the Department of Education's most recent policy interpretation extending the coverage of Title IX to *every* program of an institution receiving federal funds.

According to that interpretation, even if there's no link between the federal grant the chemistry department got and the programs of the athletic department, sports at that school must adhere to Title IX. The most striking blow leveled at the government's enforcement powers struck at this interpretation. A father sued an Ann Arbor, Michigan, school board alleging that his two daughters had been denied equal opportunity because their high school sponsored a boys' golf team but not one for girls. The father (joined by the U.S. Government) contended that Title IX applied because the Ann Arbor school system received federal funds for some of its programs, though none of the funds went directly to athletics. The Board argued that Title IX didn't apply because the athletic program itself got no federal money.

Judge Charles W. Joiner agreed with the Board. "The reach of Title IX," he wrote, "extends only to those education programs or activities which receive direct federal financial assistance." If other courts follow this decision, its effect on Title IX could be disastrous, since no interscholastic athletic programs receive direct federal aid. An institution wishing to get around Title IX could funnel federal funds into programs which are not likely to be challenged as sex discriminatory, while seeing to it that questionable programs are funded only by other money.

What It's Accomplished

While the future of Title IX is uncertain, its past is terrific. Billye Cheatum, professor of health, physical education and recreation at Western Michigan University, credits Title IX with making major changes at her school: "As recently as 1976, more money was spent on men's hockey sticks than on any one women's sport." But now, even though female athletes at her school still get only one pair of sneakers to the men's three pairs, there's been enormous improvement.

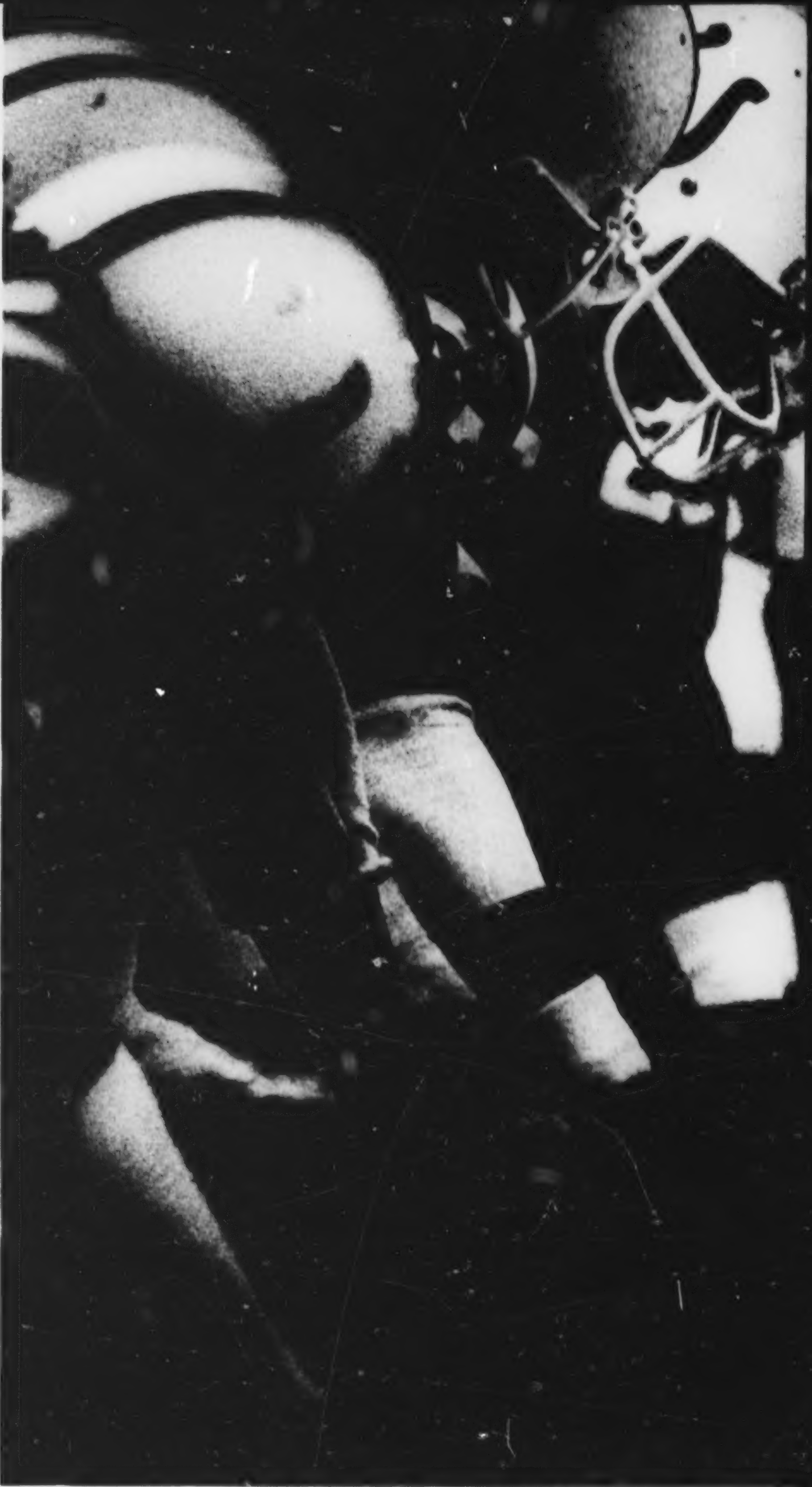
Cheatum sees the situation for female athletes improving all over the country. For example, the women's sports budget at the University of Minnesota has

(Continued on page 63)

KICKOFF

The battle between football's owners and players did more than set a record for the longest sports strike. It set off shock waves that are still being felt all over professional sports. In this special section:

- Frank Kopecky says that football is different from other games, and the players were on the right track in striking for a percentage of gross income.
- Sargent Karch, one of the management negotiators, says that percentage of the gross is a bad idea that only prolonged the strike.
- Betty Southard Murphy, former head of the NLRB, looks at how this labor relations board affects the sports world.
- For good measure, Bob Peck looks at a struggle between the owners, the three-ring legal circus caused by the Raiders' move to L.A.



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Getting in the Pit wit

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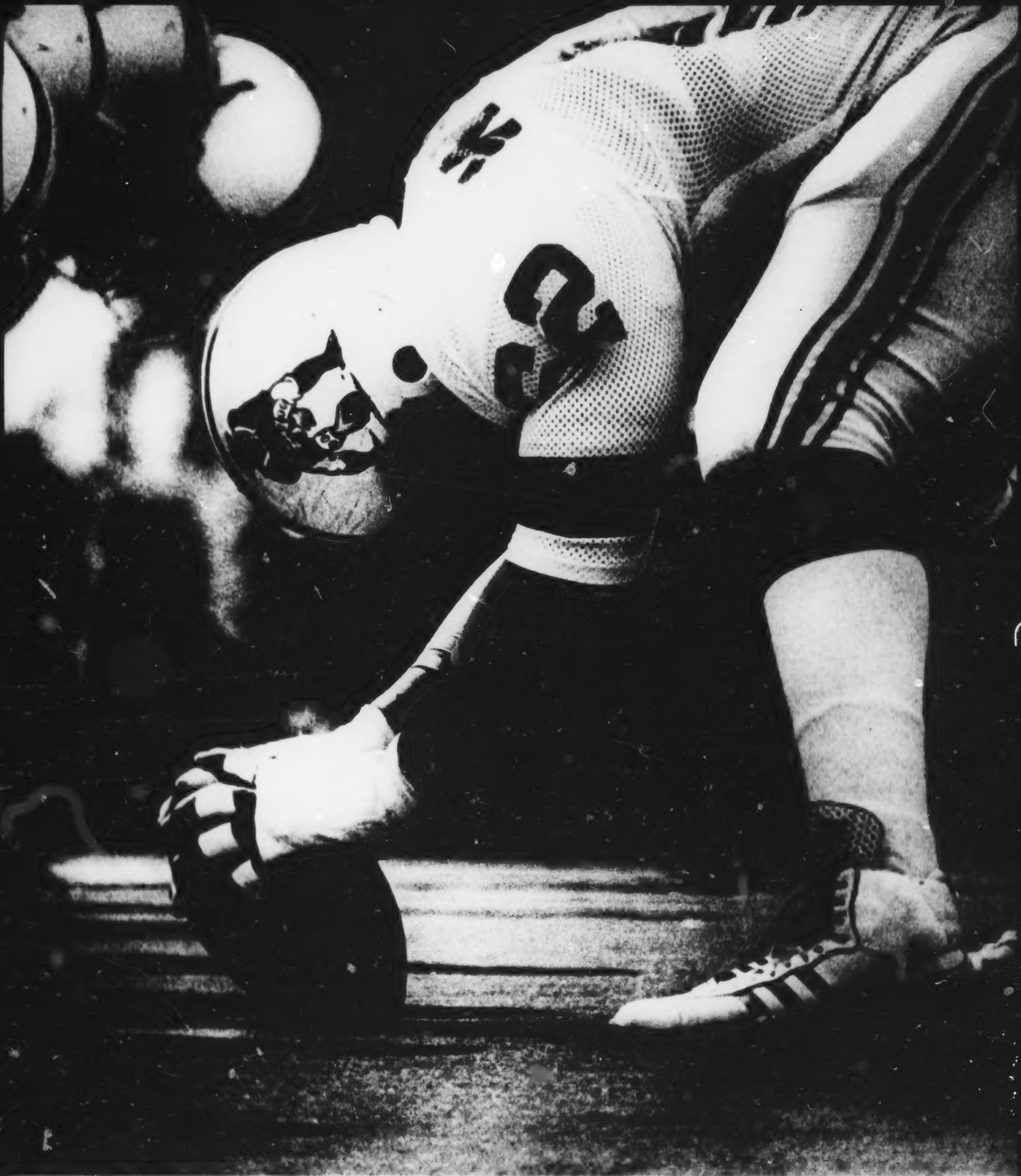

h Players and Owners

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KICKOFF

The 1982 National Football League season will be one long remembered by the American football fan—but not for close games, sensational plays, or superlative statistics. It will go down in history as the season that almost didn't happen, the season where off-the-field news dominated the sports pages. The top three pro football stories were clearly the players' strike, the Raiders' move to Los Angeles, and, finally, the play of the Washington Redskins. If any sports fan still believed that professional sports were played for fun and competition, this season should have removed any lingering doubts. Sports are a business—and a big business at that.

Sports are supposed to be an escape from the cares of the real world, but the season began with issues that were far from fun. The Raiders' antitrust litigation became the first big football story of the 1982 season. (See Bob Peck's article for a full discussion of the case.) Raider owner Al Davis wanted to move his franchise from Oakland to Los Angeles. He planned to use the Los Angeles Coliseum, which had been vacated by the Rams two years earlier when they began playing their games in Anaheim, California. The Raiders had been a successful team on and off the field in Oakland, but the grass, as well as the cash, looked greener in Los Angeles, with its larger population and national media outlets.

The National Football League refused to allow the move. Davis, who is not known for his love of league Commissioner Pete Rozelle, challenged the league's decision on the basis that the league was violating antitrust laws. Davis argued that the other owners and the league were conspiring to limit competition in football, which constituted an illegal restraint of trade.

A federal court jury agreed with his

Solidarity for What?

Young players, old players, the committed, the uncommitted—neither the press, the fans, nor the owners could shake the men of the National Football League. Here's why.

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Genigraphics

arguments and the Raiders moved to Los Angeles, but the litigation is far from over. Appeals and suits brought by the city of Oakland are still pending, though it is unlikely that the decision to move the team will be reversed.

The second off-field story to win headlines was the players' strike. The football schedule was canceled for seven consecutive weeks as the players and owners argued over who should control the profits generated by a multimillion dollar television package. The negotiations between the National Football League Players Association (NFLPA) and the owners' bargaining team were closely followed by a horde of reporters. Almost daily there were interviews with Gene Upshaw, the President of the NFLPA; Ed Garvey, the Executive Director of the NFLPA; and Jack Donlan, the chairman of the owners' bargaining committee. In addition to following strike news, football fans desperately tried to entertain themselves on Sunday afternoons by watching old movies, Canadian football, highlights of previous NFL seasons, and an assortment of substitute sports. Eventually the strike ended with both the owners and the players claiming victory, and the strike-shortened season resumed.

Frank C. Kopecky

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Every sports fan knows that the law had a lot to do with both stories, but what may not be clear is that the two areas involved—labor law and antitrust—strongly affect each other.

100 Years of Sports Strife

Labor disputes are nothing new in pro sports. As long ago as 1885, professional baseball players formed a union known as the Brotherhood of Professional Baseball Players. In the late 1880s, the Brotherhood negotiated a basic contract with the owners but could not reach an agreement on salaries. The players threatened a strike and in 1890 formed their own league, known as the Players League. Competition for fans was fierce between the Players League and the National League (at that time the only established major league). Because the Players League did not have sufficient financial backing and because individual players were attracted back to the National League by higher salaries, the strike and the new league failed.

Management may have defeated the baseball players' union in the 1890s, but labor strife in pro sports continued. At the beginning of each season many players held out for more money in their contracts. There are classic stories of superstar athletes refusing to play unless their contract demands were met. In 1930, Babe Ruth was holding out for a six figure contract. A reporter supposedly asked Ruth if he felt bad in the midst of a depression seeking a salary greater than that of the President of the United States. "No," Ruth replied, "I had a better year than he did."

While superstars had the economic

Why Labor Laws Exist

Any discussion of labor law in this country must begin with the National Labor Relations Act, or the Wagner Act as it was more commonly called, passed by Congress in 1935. This law ended decades of labor strife and dramatically changed the rules which govern the labor-management relationship. Virtually all labor law is based upon this statute and its subsequent amendments.

The National Labor Relations Act requires that employers recognize unions and enter into collective bargaining. Prior to this law, there was no requirement that employers bargain with unions, and many employers refused to deal with them at all. This refusal often led to organizational strikes, which were designed to force management to bargain with the union.

Many of the more violent strikes in the nation's history were organizational strikes, including the Homestead Strike against the steel mills in Pittsburgh in 1892 and the Pullman Strike against the Pullman railcar company in Chicago in 1894. Many organizational strikes led to violence as workers set up picket lines and attempted to keep nonunion workers out of factories. Management countered with union-breaking techniques such as blacklisting strike leaders, importing nonunion labor, and employing private detectives whose purpose was often to create violence rather than prevent it. Labor leaders such as Eugene V. Debs in railroading, John L. Lewis in mining, and Walter Reuther in auto manufacturing earned much of their reputations as a result of organizational strikes. Oftentimes, criminal charges would be brought against strike leaders, and Clarence Darrow gained much of his early fame as an attorney by representing labor leaders charged with crimes stemming from violence during such strikes.

What the Act Does

After the National Labor Relations Act, employers could no longer refuse to recognize unions representing the interests of the workers. Under the Act, if a majority of the workers in a bargaining unit wish to be represented by a union, the employer is required to bargain with the union. If an employer refuses, the company could be subject to fines or even closed down by court order or injunction. The law applies only to companies engaged in interstate commerce, but in recent years interstate commerce has been interpreted so broadly that the Act covers virtually all businesses, whether they are manufacturing, commercial, retail, or service businesses. It also covers businesses which market entertainment or sports. The Act does not cover public employees, employees in very small firms, and many agricultural workers.

The National Labor Relations Act established the National Labor Relations Board (NLRB) to hear charges of unfair labor practices and to monitor elections to determine if a majority of employees want to be represented by a union. An employer may oppose the creation of a union, but the nature of this opposition is limited by law. An employer, for example, may not fire workers for union activities or prohibit workers from distributing union literature at the work site. These actions by the employer would be considered as an unfair labor practice and would be prohibited by the NLRB.

Also, if the majority of employees elect to organize a union, the employer must not only recognize the union but must enter into good faith collective bargaining with the union. Many lawsuits have attempted to define what is meant by good faith collective bargaining. Basically it means that both the union and the employer must submit their differences to the bargaining process and must make an honest effort to reach a mutually acceptable agreement. Neither side is required to meet the other side's demands or to reach a compromise. Both sides, however, must listen to the other's position and make an effort to reach an agreement. (See Betty Southard Murphy's article for more on the NLRB and its jurisdiction over sports.)

To Strike or Not

If an agreement cannot be reached during the bargaining process, a strike is likely to follow. The outcome of a strike is largely determined by who is in a better position to endure the economic loss generated by the strike. The workers lose their salary and employers lose their profits. As the economic losses mount, reaching a compromise or agreeing to the other side's position may seem like a better alternative.

A strike is a costly venture. As the football strike demonstrated, in the short run all parties lose. Nevertheless, a strike is the weapon which makes the parties willing to reach an agreement. Unless there is the real threat of strikes or the parties are willing to submit their disputes to an outside arbitrator, collective bargaining just won't work.

—FK

power to bargain individually with owners, the other players did not. Any player could threaten to not play at all, but this threat was meaningful only if the player could not be replaced. Most professional athletes just were not of the stature of a Babe Ruth, a Red Grange, or a Wilt Chamberlain. Their threats were empty, and usually they had to accept what management offered.

In every sport, and in every decade, the players' problem has been the same—how to pry more money out of the owners. Generally, athletes have tried two approaches—an antitrust effort, which boils down to permitting players to sell their services to the highest bidder, or a collective bargaining approach, in which players bargain as a unit over wages, fringe benefits, and other matters.

Fighting for Free Agency

Becoming a free agent is the key to the first approach. A free agent is a player who is free to negotiate with any club for his salary. If players with undeniable skills can bargain with a variety of owners, they can very effectively play owners against each other to bid up salaries. Many baseball players such as Reggie Jackson of the Angels, David Winfield of the Yankees, and Steve Garvey, now with the San Diego Padres, have used free agency to achieve multi-year contracts worth millions.

But the owners, naturally, don't want to permit players to become free agents, and players have been able to achieve free agency only after fierce battles with owners. Players went to court under antitrust law—or, in the case of baseball, pursued the matter through labor arbitration—to gain the right to be free agents. (See my article in the first *Update* on sports and law [Fall, 1978] for more on antitrust litigation.)

Owners fought like wildcats to prevent free agency because without it a player can negotiate only with the team that holds the rights to his contract. And that means the player's bargaining power is limited because he cannot sell himself on the open market.

The owners gain the rights to a player through a draft and reserve clause system. In its simplest form the draft and reserve system work like this. Teams draft promising players throughout he country. The player must deal only with the team that drafted him, since the other owners have agreed not to negotiate with a player they have not drafted. The contract which the player signs contains a clause giving the team an option to renew the contract. The other teams will not negotiate with a player who has signed a contract with an option to renew. To further limit the ability of a player to negotiate, the club creates a "reserved" list of players, those with whom the club reserves the right to renew.

It is easy to see why the players have repeatedly battled the owners over the reserve system and free agent status. Without free agency, a player is bound to the club that originally drafted him unless he is traded, and then he is bound to the new club.

In addition to challenging the reserve system, players have encouraged the formation of new leagues to increase competition for athletes and drive up salaries. Professional football and basketball players saw their pay shoot up with the bidding wars that followed the development of the American Basketball Association and the American Football League in the 1960s. The new United States Football League is likely to have the same results. The players have also jumped leagues by playing basketball in Europe, baseball in Japan, and football in Canada, with the hope of returning to this country with free agent status and the ability to negotiate higher salaries.

While the players have tried a variety of techniques to increase competition for their services, the owners have tried just as hard to limit this competition. The owners have sought legal exemptions from antitrust laws, worked to destroy or merge with new leagues, and engaged in a variety of blacklisting devices to discourage contract jumping.

NFLPA Tries a New Tack

What distinguishes the most recent sports labor disputes from disputes in the past is the emphasis on unionism and collective action rather than individual negotiations. In the past, even when collective action is used, the players used it to gain bargaining power for the individual. For example, baseball players struck in 1981 primarily to protect the free agent status they had achieved in earlier labor negotiations. The owners wanted to change the rules which gave the players the ability to negotiate with other teams after five years in the majors. The players were unwilling to give up these rights and struck to preserve them.

In contrast, football players struck primarily because free agency was not working for their benefit. (The so-called "Rozelle Rule," promulgated by NFL Commissioner Pete Rozelle, awards high draft choices to teams losing a player through free agency. This means that the team signing a free agent must give up something of value, so the free agent really isn't free.)

In football, the players stuck together to gain sufficient economic power against the owners. In true union fashion, the rights of the superstars were subsumed into the rights of the entire group. The players union really did achieve the ideal of solidarity.

Unionism was without a doubt the main issue in the 1982 NFL strike. The players were seeking to negotiate salaries collectively, in the same way that the steelworkers' union bargains for wages. The owners wanted to retain the right to bargain with players individually, because without real free agency they hold most of the cards.

The players' original request was that the owners turn over 55 percent of the gross revenue obtained by the National Football League. The players would divide this money among players according to a complicated formula based on seniority, performance statistics (number of tackles, passes caught, etc.), and playing time.

The owners refused to give the NFLPA this much control over salaries. The lines were drawn between the two sides, and the bitter strike followed. Ultimately, the players gave in on the demand to control salaries, but they did demonstrate to the owners that they were a force to be reckoned with in the future. (See Sargant Karch's article for the perspective of one of the management negotiators.)

Many football fans were confused and embittered by the strike. Not only did the strike interfere with their Sunday afternoons, but the union's insistence on true collective bargaining didn't fit the image of rugged individualism which sports have fostered. The public has a hard time working up the same degree of sympathy for a striking football player who makes an average of $90,000 per year as for a striking factory worker making much less and striking for a few cents an hour.

But focusing on relatively high salaries obscures the issue. Professional athletes are as economically weak in relation to team owners as factory workers are in relation to factory owners. The only difference between the two is that the professional athlete is seeking a greater economic reward through collective bargaining than the typical laborer. However, the

(Continued on page 55)

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SPORTS AND THE LAW

Solidarity Forever

Football, like all sports, rewards excellence of individual play. This author, one of the management negotiators in the recent strike, says the decision to bargain through a union was a betrayal of that individualism.

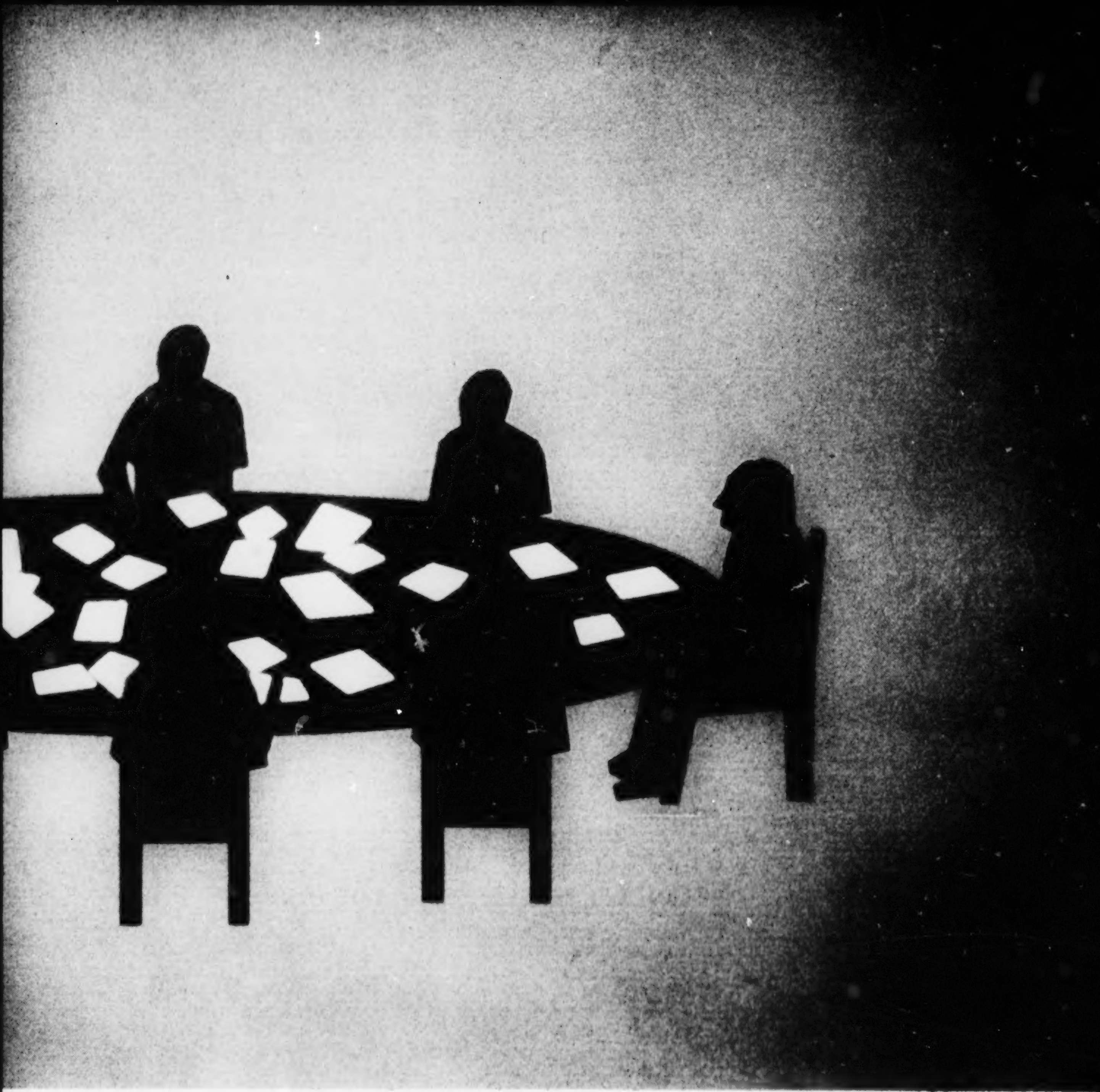
A large stone with the number "55" etched upon it decorates a shelf in the Washington office of Ed Garvey, Executive Director of the National Football League Players Association, the professional football players' union. That stone represents the union's notorious slogan that its early demand for 55% of the NFL's gross revenues was "etched in stone." The stone remains, but the demand had eroded to sand by the time the new collective bargaining agreement was signed on December 11, 1982, after the longest strike in professional sports history. The 57-day strike, seven days longer than baseball's 1981 strike, wiped out half of the regularly scheduled NFL season.

Did the strike have to last that long, or even have to occur at all? A reflective look at the negotiations, taken through the infallible lenses of hindsight, indicates "no" to both questions.

Opening Gambits

The negotiations opened in Miami, Florida, on February 16, 1982. On one side of the table sat Jack Donlan, Executive Director of the National Football League Management Council and former negotiator for National Airlines; Vince Lombardi, Assistant Executive Director and son of the great coach; Steve Gutman, Treasurer for the New York Jets and present at the table to provide accounting expertise; Jim Miller, Information Director for the council and former *Baltimore Sun* sports writer; and myself. Each NFL team is a member of the NFL Management Council. It acts as the collective bargaining representative for all clubs.

Aligned across the table were Ed Garvey, Executive Director of the union since



Genigraphics

1971; Dick Berthelsen, the union's in-house lawyer; Chip Yablonski, son of the murdered United Mine Workers leader and special labor counsel to the NFLPA; Gene Upshaw, NFLPA president and long-time offensive guard for the then Oakland–now Los Angeles–and perhaps again Oakland–Raiders; Stan White, a newly graduated lawyer and Detroit Lions linebacker; Tom Condon, another newly graduated attorney and Kansas City Chiefs guard; Mark Murphy, the Washington Redskins' strong safety and son of a management labor consultant; as well as numerous other lawyers and players. The Management Council was outnumbered at the table by at least 3 to 1 and out-weighed by much more.

The opening of negotiations had been heralded with much publicity. The NFLPA's bargaining position had received wide public notoriety—much of it based on the polemic published by the union entitled "Why a Percentage of Gross?—Because We Are the Game." This document, which the union during negotiations disclaimed as its bargaining proposal, had nonetheless set forth the key NFLPA proposals. The concepts were revolutionary in their scope:

1. A specified percentage of gross rev-

Sargent Karch

1188

enues would be allocated to the players.
2. The dollars generated by the percentage would be paid to a central fund.
3. Players would be paid on a seniority scale from the fund, resulting in a fifth year starting quarterback for a Super Bowl team earning the same base pay as a fifth year second-string guard for a last place finisher.
4. Incentive monies would be distributed out of the fund based on offensive, defensive, and special teams statistics and players' votes.
5. The teams would pay to players additional portions of revenue, over and above the 55%, from their remaining share.

The plan was billed as giving the players "55% of the golden egg and joint control of the goose."

The traditional method of compensation in the NFL, as well as in every other professional sport and the entertainment industry generally, was one of individual merit compensation. The player and the team historically would negotiate salary on the basis of the player's value to the team. The union negotiated minimum salaries and players' agents normally negotiated the bulk of players' salaries.

The Miami session began with a typical discussion of the ground rules for the negotiations. Then the union representatives commenced a verbatim reading of an 11-page document which they provided to the council's representatives. This remarkable document was not a typical union proposal for a new collective bargaining agreement. It was devoid of specifics and was devoted in large part to a history of NFL labor relations as seen through the NFLPA's tinted glasses. The council provided the union with a more typical "opener," keyed to changes desired in the present collective bargaining agreement.

The negotiating sessions which followed can be divided into five phases: (1) the 55% of gross revenues phase, which ran until September 17, 1982; (2) the 50% of television revenues phase, which finished off the balance of September; (3) the Sam Kagel phase, which covered October; (4) the Paul Martha phase, culminating in tentative agreement on November 16; and (5) the wrap-up phase, ending with execution of an agreement on December 11.

On the Road to a Strike

For the first seven months the negotiations were deadlocked on the percentage of gross revenues concept and a central fund from which to pay player salaries. The council made it clear throughout this period that both concepts were unacceptable. The teams were willing to substantially improve the economic benefits received by players but were not willing to accept the union as their business partner. By the conclusion of this initial phase, the clubs had offered, among other things, a 43% increase in minimum salaries, a 60% increase in playoff money, a 67% increase in life insurance, and a doubling of major medical coverage.

In an unusual move for an employer, a new benefit called Career Adjustment Pay was proposed by the council. It basically provided each player with $10,000 for each season already played to a maximum $60,000, to be paid when the new contract was signed, and an additional $10,000 per year through 1986, to be paid when the player left the game. The concept was to reward the player for past service as well as assist the player in his transition to a new career at the conclusion of his playing days. Professional football, like other professional sports, is not lifetime work, with an average career of about five years. All too often the professional football player leaves college ill equipped for a postfootball life.

During this initial period, both the union and the council filed a series of unfair labor practice charges with the National Labor Relations Board. Both sides said that the other side had failed to bargain in good faith and had tried to restrain employees from exercising their rights. Additionally, the union charged that certain clubs had discriminated against players in an effort to discourage membership in the union, while the council alleged that the union had tried to cause clubs to discriminate against employees in an attempt to encourage union membership. Events at the NLRB were later to play a pivotal role in the negotiations.

The next phase began on September 17 with a union proposal which abandoned the 55% of gross revenues concept. This was the first move away from its previously "etched in stone" position. It was, however, more significant as a gesture than as a matter of substance. The new proposal demanded that 50% of television revenues be allocated to a fund out of which players would be compensated. It also called for an extremely high wage scale. If we didn't agree to these principles, the NFLPA promised a strike.

The new proposal was in fact more costly than the percentage of gross revenues proposal. However, having abandoned the percentage of gross revenues proposal, the NFLPA could more easily move to address the issues.

The Players Walk Out

On September 21, the union made good on its threats and struck. The NFLPA's leadership, even before the negotiations began, had been talking strike, and that prophecy was self-fulfilling. President Gene Upshaw made clear the reason for the strike when he stated to the press that the issue was money. For legal reasons, however, the NFLPA sought to dress the strike up as an unfair labor practice one. (In an unfair labor practice strike, an employee is entitled to reinstatement upon an unconditional offer to return, but an economic striker may be permanently replaced, since he or she is only entitled to placement on a preferential rehire list.)

The strike was effective. Except for a few small pockets of resistance, such as the Pittsburgh Steelers, where Lynn Swann and a few other players reported and suited up on the first day, the union's solidarity was complete. The clubs had no option but to suspend operations.

The NFLPA began preparing its alternate season concept. The newspapers were full of publicity concerning the union's faltering efforts to obtain players for its strike league. A number of the clubs went into state courts seeking to enjoin their players from playing football for anyone else. These actions were based on the individual contract that each player signs giving to his team the exclusive rights to that player's football playing services. Temporary restraining orders were obtained in St. Louis, Buffalo and Dallas. In Buffalo, one of the orders was nailed to a player's door which, under New York law, was a proper method of service. The player then sued the team for damage to his door.

When Ted Turner agreed to broadcast the "All-Star," referred to by some journalistic wags as the "Some-Star," football games, a lawsuit was also brought by two clubs, the Buffalo Bills and Atlanta Falcons, against Turner Broadcasting for

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interfering with the contractual relations between players and the teams.

The union had anticipated these efforts by filing suit in federal court in Washington, D.C. They sought a declaration of the players' rights to participate in the games. They also asked for an injunction against the NFL teams which would prevent them from filing suits against participating players in any court other than federal court in Washington, D.C. On October 6, 1982, Judge William Penn, while not deciding whether or not the players had the right to play in such games, breathed life into the NFLPA's "Some-Star" alternate season by enjoining the clubs from filing suits against players in any court other than Washington, D.C.'s federal court.

Kagel Steps In

Meanwhile, negotiations were moving into the third phase. Sam Kagel, a noted labor mediator from San Francisco, was brought into the negotiations by the parties. Kagel was somewhat familiar with the football industry, having served for the past year as one of the permanent arbitrators. The NFLPA had been reluctant to use the Federal Mediation and Conciliation Service, a federal agency whose purpose is to mediate labor disputes, because Jack Donlan had been employed by the agency some 20 years earlier.

As is typical in mediation, Kagel initially met with each side individually. He asked the union to provide him with a list of all items which remained open. The NFLPA produced a list, but its failure to include everything it deemed unsettled was later to become a stumbling block. Kagel suggested that the noneconomic items be attacked first. The parties then proceeded into intensive, around-the-clock negotiations.

While the parties were locked away with Kagel in Cockeysville, Maryland, two outside events had a dramatic impact on the negotiations. On October 20, the United States Court of Appeals for the Washington, D.C. Circuit heard oral arguments, on an expedited basis, of the NFL clubs' appeal from Judge Penn's decision. Less than three hours later it issued an order summarily reversing the lower court. This decision permitted the clubs to try in state courts to enjoin their players from participating in the "Some-Star" games, two of which had already been played. With an almost audible sigh of relief, the NFLPA cancelled the remainder of its alternate season. The two games had been played before virtually empty stadiums in Washington, D.C. and Los Angeles, and the NFLPA had been forced to fill out its rosters with some players who were not even on NFL rosters at the time of the strike.

The following day, National Labor Relations Board General Counsel William Lubbers, in an extraordinary press release, announced that he would be filing a complaint against the NFL teams alleging that they had failed to bargain in good faith as required by law. What was extraordinary about this press release was that it preceded the actual issuance of the complaint by six days, a marked departure from the General Counsel's normal practice.

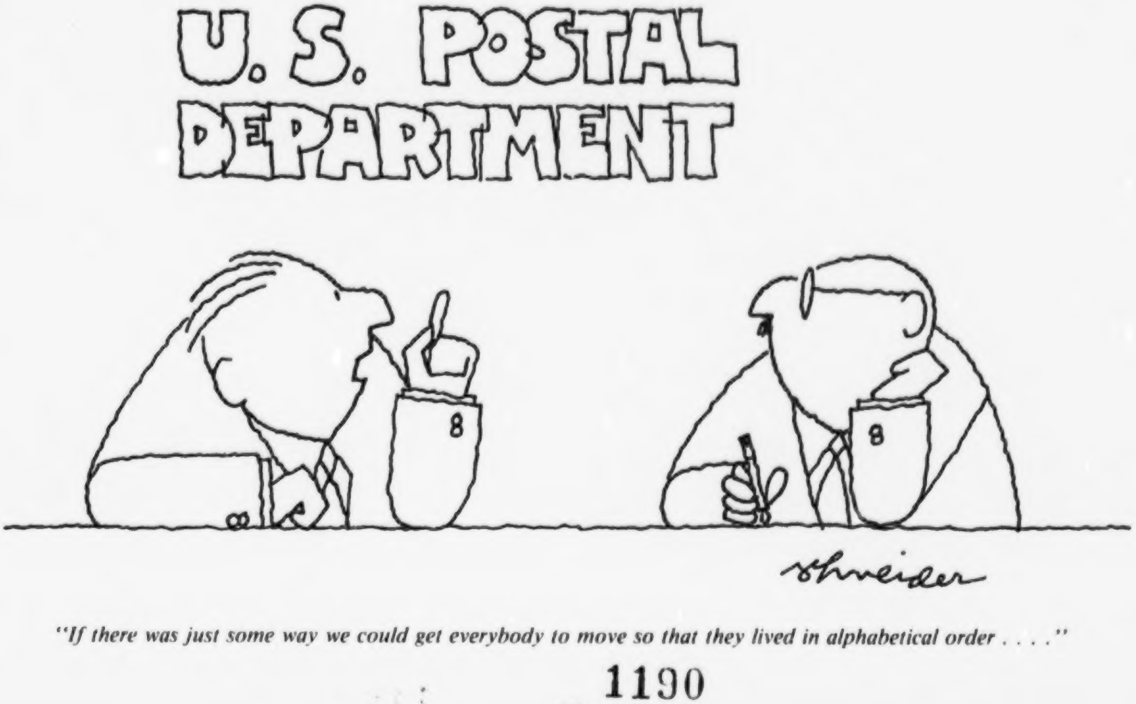
The General Counsel announced that his complaint would claim that the council had failed to bargain in good faith by, among other things, failing to provide the union with relevant information, changing terms and condition of employment without bargaining, and bypassing the union to deal directly with the players.

The General Counsel's press release, along with the union raising new issues which it had omitted from its list but now claimed were open, had the effect of bringing the negotiations to a screeching halt. The parties left Cockeysville as the talks broke off after 11 days and nights of meetings.

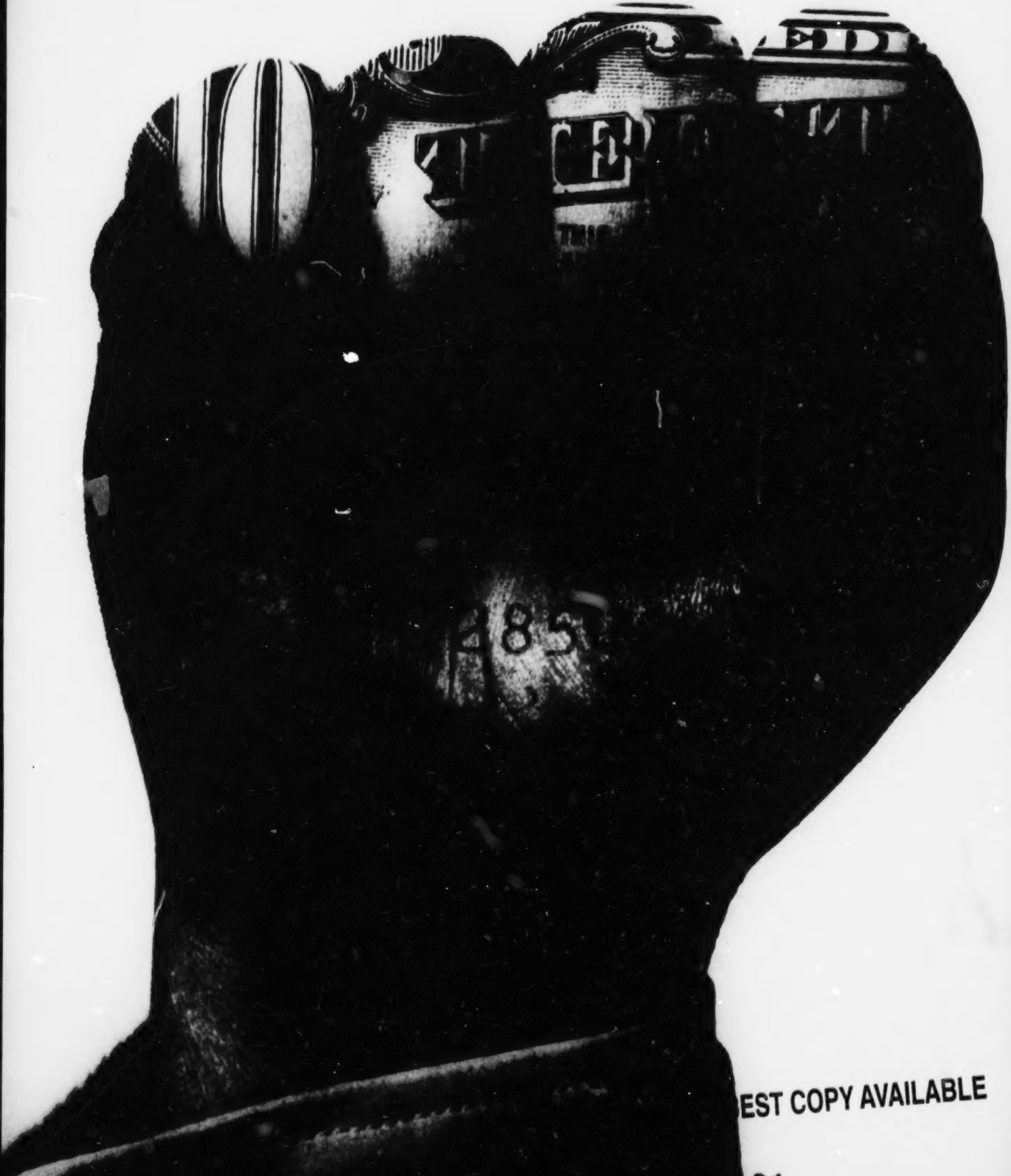
A Legal Blunder

On October 24, 1982, the union made probably the pivotal mistake of the negotiations. In an *ex parte* (from one side only) communication to each NLRB member—which the clubs later argued was in violation of NLRB rules—the player representatives from each team

(Continued on page 60)



"If there was just some way we could get everybody to move so that they lived in alphabetical order . . . ."



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KICKOFF Betty Southard Murphy

The NLRB as a referee

Keeping Owners and Players from Maiming Each Other

Professional sports occupy a treasured place in the minds and hearts of millions of Americans. In the last couple of years, however, there has been almost as much action off the playing field as on. The 50-day strike of major league baseball players in 1981 and the 57-day walkout of National Football League players in 1982 produced headlines across the country.

Sportswriters shifted their beat from press boxes and locker rooms to hotels and courtrooms. "Negotiations," "unfair labor practices," and "NLRB" replaced "home run," "touchdown," and "won-loss record" in the sports fan's lexicon.

For many fans, the overriding question was not what caused the labor strife but how the disputes could be stopped so that the games could resume. In the major lawsuit emanating from the baseball dispute, United States District Court Judge Henry Werker eloquently articulated the dilemma he faced in denying a court injunction sought by the General Counsel of the National Labor Relations Board.

> [I]n struggling with a temptation and even compulsion to prevent a strike in the public interest, I am bound by the law. The possibility of a strike, although a fact of life in labor relations, offers no occasion for this Court to distort the principles of law and equity. The resolution of the . . . issue [in dispute] is left to the parties through the negotiation process . . . . PLAY BALL!! (*Silverman v. Major League Baseball Player Relations Committee, Inc.*, 516 F. Supp. 588 [S.D.N.Y. 1981].)

Judge Werker's conclusions illustrate that—in labor matters—professional sports are subject to the same legal principles and limitations that apply to any business. Yet, because of the venerable status of sports in American society and the very nature of professional sports leagues, the labor laws must be applied with extreme care in the sport setting. As Judge Werker concluded, ultimately the players and owners must resolve their differences themselves, and in both baseball and football they did.

This article focuses on the legal framework—and some of the legal problems—of collective bargaining in football, baseball, and other professional sports. Just as baseball has its umpires and football has its referees, collective bargaining negotiations has the General Counsel of the National Labor Relations Board (NLRB) and the five-member Board itself. Under the National Labor Relations Act (NLRA), the General Counsel and the Board can have a profound impact on labor negotiations, and labor negotiations in professional sports are no exception. (See box for more on the NLRB.)

Are Sports Covered?

Professional sports leagues have been in existence for many, many years. The National League in baseball goes back to 1876; the National Hockey League began operations in 1917; the National Football League, originally conceived as the American Professional Football Association, began to take shape in 1920; the National Basketball Association dates back to 1946.

Unions representing professional athletes in these leagues, however, are of fairly recent vintage, dating back to the

Tracking Down the Elusive F. Supp

Lawyers are always being accused of gobbledegook, of hiding behind obscure jargon and thickets of technicalities. That may or may not be true, but one bit of style that may confuse or exasperate lay readers is really crystal clear if you have the code. All legal citations follow the same basic form. The first item listed is the name of the case. For example, *Federal Baseball Club of Baltimore, Inc. v. National League* means that the Federal Baseball Club of Baltimore and the National League were the litigants in the case. The rest of the cite—259 U.S. 200 (1922)—means that the case was decided in 1922 and reported in Volume 259, page 200, of the United States Reports. Since the United States Reports deals with Supreme Court cases, we know that this case was decided by the High Court.

In general, then, the first number cited in a case refers to the volume of the legal reporter system in which the case appears; the acronym (*e.g.*, U.S., N.L.R.B.) tells you which reporter system it is in; and the second number cited refers to the page of the volume on which the case begins.

In this article, most of the cases were decided by the NLRB and so were reported in volumes pertaining to that agency. (In NLRB cases and other cases decided by administrative agencies, only the name of the party being sued is cited.) Other cases mentioned here can be found in the Federal Reporter, Second Series (F.2d) and the Federal Supplement (F. Supp).

Citations for decisions of other federal as well as state courts use the same format, the only difference being the reporter system in which the case appears.

Of course, a law school library is often the best place to research a case, but most bar associations, county or city governments, and law firms have at least the Supreme Court reporters. Establishing contacts with law librarians, practicing attorneys, and others who have ready access to such resources can thus be especially valuable for you and your students.

—BSM

late 1950s and 1960s. It was not until the late 1960s that the first sports collective bargaining agreements were signed. While problems frequently cropped up and litigation often ensued between individual players and clubs, until the late 1960s federal labor law questions in sports were virtually nonexistent.

Until 1969, it was unclear whether the NLRB even would exercise jurisdiction over professional sports. Not all labor disputes are of sufficient magnitude under the Constitution's commerce clause to warrant NLRB review. The key question, then, was whether the impact of professional sports on interstate commerce was great enough to warrant the Board's intercession.

The test case, which made clear that the Board *would* take jurisdiction over labor disputes in professional sports, was brought, ironically, not by the athletes themselves, but by major league baseball umpires. (*American League of Professional Baseball Clubs,* 180 N.L.R.B. 190 [1969].)

In persuading the Board to assert jurisdiction, the umpires faced a major problem peculiar to baseball. In 1922, the Supreme Court concluded, in a famous opinion by Justice Oliver Wendell Holmes (*Federal Baseball Club of Baltimore, Inc. v. National League,* 259 U.S. 200), that baseball did not involve interstate commerce and was not subject to federal antitrust laws.

The Court did not conclude, as is commonly thought, that baseball was outside the scope of the antitrust laws because it was a sport. Rather, in Justice Holmes' view, exhibitions of baseball games "were purely state affairs. . . . [T]he fact that in order to give the exhibitions, the League must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. . . . The transport is a mere incident, not the essential thing." To Justice Holmes, baseball teams crossing state lines were no more involved in interstate commerce than lawyers who crossed state lines to argue a case.

Holmes' narrow reading of interstate commerce soon became obsolescent. In the 30s and 40s, the Supreme Court upheld the constitutionality of New Deal legislation by finding that the commerce clause covered many kinds of businesses (*See, e.g., United States v. Darby,* 312 U.S. 100 [1941]; *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 [1937].) Did that mean that baseball was now covered too? No. In 1953, some 31 years after Justice Holmes' decision, the Court reaffirmed that baseball was still outside the ambit of the antitrust laws. In a case brought by a disgruntled minor leaguer who thought he could make it to the majors if he had the freedom to sign with another club—*Toolson v. New York Yankees, Inc.,* 346 U.S. 356 (1953)—the Court did not base its decision on the commerce clause but relied primarily on principles of *stare decisis* (a legal doctrine under which courts normally follow their prior decisions) and the failure of Congress to enact legislation specifically repudiating the Court's earlier decision. Nearly 20 years later, the Court ruled the same way in a case brought by outfielder Curt Flood. (*Flood v. Kuhn,* 407 U.S. 258 [1972].)

Thus, as of 1969—when the umpires came before the Board—the Board could have followed the lead of the Supreme Court and effectively exempted baseball from federal labor laws.

In the baseball umpires case, however, the Board concluded, over the dissent of Member Jenkins, that baseball was an industry subject to Board jurisdiction. Relying on antitrust cases in which the Supreme Court had held that pro football and boxing were in interstate commerce and were generally subject to the antitrust laws, the Board ruled that sports, baseball included, are subject to NLRB jurisdiction under the commerce clause. The Board concluded that nothing in congressional deliberations of the labor laws indicated that sports in general, or major league baseball in particular, enjoyed a special status.

To the contrary, the Board indicated that employees in baseball "or any other professional sport" are entitled to all the basic rights protected by the National Labor Relations Act—the rights to organize, designate representatives of their own choosing, and bargain collectively.

Betty Southard Murphy is a partner in the national law firm of Baker & Hostetler and a former Chairman of the National Labor Relations Board. Mrs. Murphy expresses her appreciation to Evan Jay Cutting and David Grant, attorneys at Baker & Hostetler, for their help in preparing this article.

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Today, the Board has asserted jurisdiction over professional sports of all sorts. At one time or another, the Board has dealt with pro football, basketball, soccer, and even "major league rodeo" and jai alai.[*] Clearly, Board jurisdiction over sports is the rule now, not the exception.

As we head into the mid-1980s, technological wonders such as cable television, satellite television, video discs and video cassettes have spawned new sports ventures like the United States Football League.

Along with these new leagues will come new teams, not just in the United States, but in Canada, Mexico, and who knows where else. Baseball and soccer have already begun the process. Will the Board attempt to extend its jurisdiction across national borders to regulate clubs and players outside the United States? If so, will there be limits on that jurisdiction and how extensive will these limits be? The NLRB has not answered these questions yet, but professional sports may well play a pivotal role forming future transnational and multinational collective bargaining, as foreshadowed in my dissenting opinion in *The North American Soccer League*, 236 N.L.R.B. 1317 (1978).

Why does Board jurisdiction matter? The Board's oversight helps shape negotiation on all manner of issues. Topics include not just the obvious one of wages (see p. 59), but also what the law refers to as the "terms and conditions of employment." In sports, that's apt to mean everything from artificial turf to new league rules on running back punts.

Battling Over Bargaining

Although wages are critical to any collective bargaining negotiation, the sports-labor law controversies litigated before the NLRB have centered around noneconomic subjects or subjects that are only indirectly related to wages. Distilled to their essence, the legal issues in many of these controversies concern what the parties are obligated to discuss at the bargaining table. In labor law parlance, the question is what is and is not a mandatory subject of bargaining—what the law requires the parties to bargain about.

Both unions and employers have a duty to bargain with each other, as explicitly stated in the NLRB. This general duty to bargain, however, is limited by the Act to "wages, hours, and other terms and conditions of employment." Why is it important that a subject is or is not mandatory? If one party demands that a mandatory subject of bargaining be included in a collective bargaining agreement, the other party must at least discuss it. (*See e.g.*, *NLRB v. Katz*, 369 U.S. 736 [1962].) Although the parties are under no obligation to come to an agreement, "both employer and union may bargain to impasse over those matters and use the economic weapons at their disposal [i.e.,—a strike, a lockout, etc.] to secure their respective aims." (*First National Maintenance Corp. v. NLRB*, 452 U.S. 666 [1981]. *See generally NLRB v. American National Ins. Co.*, 343 U.S. 395 [1952].)

Any matter that is not "wages, hours, and other terms and conditions of employment" is characterized as a permissive subject of bargaining. Both parties are free to raise and bargain about a permissive subject of bargaining (as long as it's not illegal), but a permissive subject "need not be discussed at the bargaining table, and one party may not compel the other to address it as a condition of executing a collective bargaining agreement."(*Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720 [3d Cir. 1978].)

In a provision that's especially important in the sports world, an employer does

(Continued on page 57)

The NLRB Team

The relationship between unions and employers is governed primarily by the National Labor Relations Act (NLRA). Enacted by Congress in 1935 and amended several times since, the NLRA guarantees that employees have the right to form labor organizations and to bargain collectively with their employer through representatives of their own choosing. The NLRA also ensures that employees have the right to refrain from the vast majority of activities attendant to unions and collective bargaining.

The NLRA says that employers or unions interfering with the rights of employees have committed "unfair labor practices." But what is an unfair labor practice? Congress has left that decision to an administrative agency of the federal government—the National Labor Relations Board (NLRB). The NLRB also conducts elections for employees deciding whether or not they should join a union, assesses the legality of electioneering by unions and employers, and determines the appropriate size of the election and bargaining unit.

The five-member Board is appointed by the President for five-year terms, one each year, with the advice and consent of the Senate. The Board itself deals with only a minute percentage of the election petitions and unfair labor practice charges that are handled by the agency as a whole. (The NLRB does not seek out cases on its own; an election petition or unfair labor practice charge must be filed by a private party before the agency can take any action.) Long before a case ever reaches the Board, it must go through the channels of the General Counsel of the NLRB.

The General Counsel is not appointed by the five-member Board. Rather, like the Board members, the General Counsel is appointed by the President and confirmed by the Senate. In the unfair labor practice setting that this article focuses on, the General Counsel functions separately from the Board. The General Counsel has the *sole* authority to investigate and prosecute unfair labor practice charges. As a testament to the power and importance of the General Counsel, if the General Counsel determines that a charge is not meritorious, or for any reason should not be prosecuted, that decision is final. Indeed, no decision of the General Counsel not to prosecute has ever been overturned in the courts.

If the General Counsel determines that an unfair labor practice charge *is* meritorious, an unfair labor practice complaint is issued. This complaint is then litigated before an NLRB administrative law judge. Only after the administrative law judge issues his or her decision will a case go before the Board, and then only if one of the parties objects to the judge's decision.

That's not necessarily the end of it. The decision of the Board in turn is subject to review in the federal courts of appeal and in the Supreme Court.

—BSM

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[*] *E.g.*, National Football League Management Council, 203 N.L.R.B. 958 (1973), *enforcement denied in part*, 503 F.2d 12 (8th Cir. (1974); American Basketball Association Players Association, 215 N.L.R.B. 280 (1974); The North American Soccer League, 236 N.L.R.B. 1317 (1978); Major League Rodeo, Inc. 246 N.L.R.B. 743 (1979); Volusia Jai Alai, Inc., 221 N.L.R.B. 1280 (1975); *see* Florida Board of Business Regulation v. NLRB, 686 F.2d 1362 (11th Cir. 1982).

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Robert S. Peck

Can the League Cope with a Renegade Owner?

The NFL says yes. The courts say no—so far.

For the Los Angeles Raiders, it has been a year of great ups, but even greater downs. In the strike-shortened football season, they streaked to the best record in the American Football Conference and were co-favorites to reach their fourth Super Bowl. Instead, they were upset in the second round of the playoffs.

The football field was not the only place that the Raiders did battle. They took on the whole National Football League in court to win the right to move from their longtime home in Oakland to Los Angeles. The Raiders won that contest, but they still face an appeal by the NFL and a separate lawsuit by the city of Oakland to send them back to the Bay area.

Football's Veeck?

The Raiders announced their intention to quit Oakland for the sunnier clime of Southern California in 1980. When they moved in the fall of 1982, the Raiders were turning their backs on fans who had given them 12 consecutive sellout seasons. However, the team couldn't just pick up and leave.

The first obstacle to the move was Rule 4.3 of the NFL Constitution. It requires approval by three-fourths of the clubs (21 of 28) before a team can move. A similar rule exists in each of the professional sports leagues. It keeps individual owners from arbitrarily moving their teams to new locations as well as from invading another's territory. It is also subject to abuse by a bloc of owners intent on punishing the maverick in their midst who wants permission to relocate.

In 1953, for example, owner Bill Veeck was twice denied permission by baseball's American League to move his St. Louis franchise to Baltimore. Two days after he sold his club that same year, a unanimous vote let the new owner head east to Maryland.

Raiders' owner Al Davis had always been a burr under the saddle of the NFL establishment. In part, the NFL denied permission for the move because they tagged Davis an "anarchist." A lawsuit was brought in Oakland, where the NFL applied for a receivership of the club—that is, control and possession—to solve the Davis problem. The Raiders accused NFL Commissioner Pete Rozelle of writing threatening letters to Los Angeles banks that might lend the team money and of interfering with stadium negotiations by siding with the city of Oakland, a departure from past practice and an affront to owner Davis as one of Rozelle's bosses.

The Raiders struck back with an antitrust lawsuit, charging the NFL with unfair dealing and a lack of good faith. The Sherman Antitrust Act, passed in 1890, prohibits businesses from operating together in order to limit competition. It has been used primarily to stop manufacturers from agreeing not to compete with each others' products in certain geographical areas in order to keep prices artificially high.

Antitrust Strikes Out . . .

The first use of the antitrust law in sports occurred when the National League absorbed a rival baseball league, except for a franchise based in Baltimore. The Baltimore club alleged that the merger violated the Sherman Act. In 1922, the U.S. Supreme Court rejected the allegation, finding baseball to be a purely state concern, outside the reach of federal statutes. The Court reasoned that the interstate travel involved in teams from different states playing each other was inconsequential.

Though modern courts would not agree with that assessment, the decision, *Federal Baseball Club v. National League,* 259 U.S. 200, gave baseball a permanent exemption from the antitrust laws. In 1953, when a minor league player who refused to report to his assigned farm club challenged his inability to play for another club, the Supreme Court said

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"Judge Wilcox just loves plea bargaining."

that the *Federal Baseball* decision of 31 years earlier had created a reliance on the part of baseball that it was outside the antitrust laws. The Court went on to say, in *Toolson v. New York Yankees*, 346 U.S. 356, that only congressional action could change baseball's status. Congress has allowed the exemption to stand.

If baseball has relied on being beyond the reach of federal antitrust laws, could a state's antitrust rules apply to what the *Federal Baseball* court called a state matter? A negative answer to that question came in 1966. The Boston Braves had moved to Milwaukee in 1953, where they enjoyed almost immediate success. They won two pennants and increased their attendance tenfold. Hard times hit the team in 1965 as they fell to fifth place and attendance dropped 70 percent from their glory days.

The Braves planned to move to Atlanta, but Wisconsin invoked the state antitrust law to prevent the relocation. The trial court held that the league had conspired to monopolize professional baseball in Wisconsin. The planned departure of the Braves without replacement, the court reasoned, was an unreasonable exercise of monopolistic control. Since baseball business activity in Wisconsin would cease, the move was a restraint of trade. The court enjoined the playing of home games outside Milwaukee until the Brewers or another suitable Milwaukee applicant was issued a franchise. (Ironically, the St. Louis Cardinals prevented the Braves from meeting their replacements, the Brewers, in last year's World Series.)

The Wisconsin Supreme Court reversed the trial court in *State of Wisconsin v. Milwaukee Braves, Inc.*, 31 Wisc. 2d 699, finding that baseball enjoyed an exemption under *Federal Baseball.* The Supremacy and Commerce clauses of the U.S. Constitution, giving exclusive priority to federal law, kept Wisconsin law from applying.

But Wins in Other Leagues

Other sports have not been exempted as baseball has. In *Radovich v. National Football League,* 352 U.S. 445 (1957), football came under antitrust scrutiny. Bill Radovich, an all-pro guard for the Detroit Lions, had jumped leagues to play for the Los Angeles Dons of the All-American Conference in 1946. Several years later, he was offered a slot as player-coach with the San Francisco Clippers of the Pacific Coast League, affiliated with the NFL. The offer was withdrawn when the NFL warned the team it would suffer severe penalties if Radovich was signed. In this case, the Supreme Court found that football was interstate commerce and subject to the antitrust laws. It instructed the trial court to determine if the alleged blacklisting constituted an antitrust violation.

In *Blalock v. Ladies Professional Golf Association,* 359 F. Supp. 1260 (1973), golf was subjected to antitrust regulation. Jane Blalock was one of the top women golfers on the tour. After she was accused of illegally moving her ball to be in a better position during a tournament, the LPGA voted to suspend Blalock from play for one year. She denied the allegation and sued on antitrust grounds. The court agreed with her claims, holding that her fellow players exercised unfettered discretion in deciding the punishment and benefitted from the reduced competition brought about by the suspension. No rules existed to guide the LPGA in selecting a punishment. In essence, by choosing suspension, the players conspired to restrain trade by eliminating a prize money competitor. (Blalock celebrated her judgment of $13,000 in damages and $95,000 in legal fees by winning a $10,000 tournament purse the next day.)

In 1982, the NFL itself lost an antitrust suit. In *North American Soccer League v. National Football League,* 670 F.2d 1249, the Sherman Act was used by a soccer league to overturn the rule prohibiting NFL franchise owners from owning teams in another sports league. The soccer league successfully argued that team owners were in limited supply because ownership required substantial capital and special skills. Thus, the bar on dual ownership was a restraint of trade.

The NFL ran into similar problems in the Raiders' lawsuit. The jury found Rule 4.3, requiring 21 clubs to approve any move, to be arbitrary and unreasonable. It contained no considerations, such as economic impact or geographic concentration, to guide owners in the approval process. It therefore allowed permission to be denied in restraint of trade, or for selfish reasons. The jury decision, now under appeal, allowed the Raiders to play

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Robert S. Peck recently left New York for Chicago to become director of the ABA's adult education program. He somewhat dejectedly reports no attempts by the Big Apple to fight the move in court.

And in This Corner . . . The Denver Yankees

Home team loyalties bring out a unique brand of provincialism in American sports fans. Some diehards in Brooklyn still refuse to acknowledge the continued existence of professional baseball in their city and will forever hate Los Angeles because their lovable "bums," the Dodgers, left for sunny southern California some 25 years ago.

Given that experience with the Dodgers and a similar one with the Giants moving to San Francisco, New Yorkers now move quickly to protect their interests. When cracks in the expansion joints of Yankee Stadium threatened to delay the 1983 home opener against the Detroit Tigers, the New York Yankees made arrangements to play their first three home games in Denver's Mile High Stadium.

New York, which leases Yankee Stadium to the team, immediately ran to court. In ruling in the city's favor, the court fell victim to a familiar malady. Somehow, America's pastime tends to bring out injudicious remarks. When a challenge to baseball's reserve clause landed in the Supreme Court, Justice Harry Blackmun waxed poetic about the "thrills" of the sport and its place in American culture.

In the New York City lawsuit, the state court declared: "The Yankee pin stripes belong to New York like Central Park, like the Statue of Liberty, like the Metropolitan Opera, like the Stock Exchange, like the lights of Broadway, etc. Collectively, they are 'The Big Apple.' Any loss represents a diminution of the quality of life here, a blow to the city's standing at the top. . ."

The lawsuit was based on the stadium lease that requires the Yankees to play all their home games there through the year 2002. Yankee owner George Steinbrenner made the Denver arrangements only after being notified by the city's parks department that the stadium might not be ready. "That was our only mistake," said Steinbrenner, "thinking they knew what they were doing."

The judge, however, saw Steinbrenner as the villain," . . . grabbing a pretext to take his team to greener pastures, i.e., a larger stadium and a populace with an unfulfilled yearning for major league baseball."

The court concluded, "Taking major league baseball on tour, Mr. Steinbrenner, is an idea whose time has not yet come."

Apparently, no one told the judge about away games. —R.P.

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in Los Angeles this past season.

The Raiders were not the first professional sports team to challenge its league for denying them permission to move. In *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (1974), a hockey team wishing to move to Vancouver, Canada, sued under the Sherman Act. The court decided, however, that the Seals and NHL were not competitors, but acting together in a single business enterprise that competes with other similarly organized professional leagues. The Seals tried to argue that the NHL was keeping it in San Francisco to discourage a rival league from entering the market because the city had an established team. The court said that even if that argument was true, it resulted in no harm to the Seals. Another league could sue to assert that claim, but not the Seals.

In winning the case against the NFL, the Raiders won more than the right to play in Los Angeles. They also won $34.5 milion in damages. In a separate 17-day trial, the Raiders asked for more than $20 million to cover losses in the 1980 through 1982 seasons caused by the NFL's refusal to let them play in the more lucrative Los Angeles Coluseum. A six-woman jury awarded the team damages of $11.5 million, which are automatically trebled in antitrust cases as a punitive measure to deter potential violators. The jury also awarded $4.8 million, trebled to $14.4 million, to the Coliseum.

The NFL is expected to appeal the judgement. If it's upheld, the judgement could cost the NFL still more, since the Raiders would be entitled to about $10 million in attorney fees and almost $5 million in interest.

The NFL is also pursuing another legal tack. Hearings will begin soon on the NFL's appeal of the original antitrust verdict. The NFL has asserted that newly-discovered evidence should change the result. If the original antitrust holding is reversed, the NFL would automatically be cleared in the other suit as well.

Condemning the Raiders

Another party entered the dispute between the Raiders and NFL when the city of Oakland brought a separate suit to win back their team. They did not assert antitrust grounds, but used a novel theory of eminent domain. Eminent domain is the power given to states and other governmental units to take private property for public use. It has been used to condemn land for the building of public roads, bridges, railroads and airports. The U.S. Constitution, in the Fifth Amendment, requires that the owners of private property receive fair compensation for property taken under eminent domain.

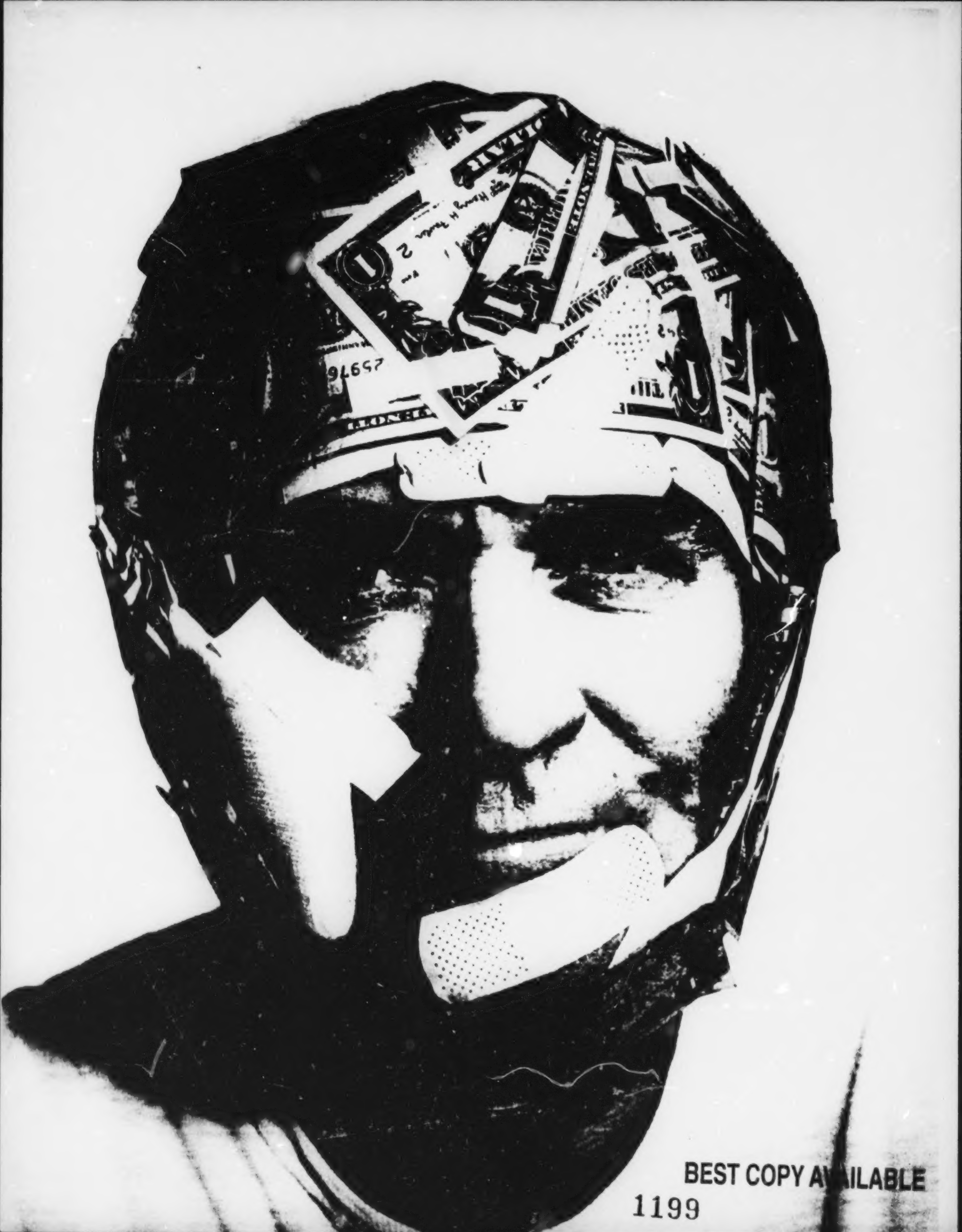
In *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (1982), the California Supreme Court held that the city of Oakland could take over the team if the city could prove that it was for a public purpose. California law allows a city to "acquire by eminent domain any property necessary to carry out any of its powers or functions." Property is defined to include real property such as land, personal property or intangible property. A valuable NFL franchise certainly comes within that broad definition.

The franchise's future turns on whether Oakland can convince the courts that ownership of the Raiders would further the public good. Oakland intends to sell the club to a more community-oriented owner if it gets title to the team. The California courts have said that to prevail it must be "a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." To do that, "[i]t is not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement in order to constitute a public use."

For example, public recreation and enjoyment is a legitimate public use. Oakland has argued that if is permissible for them to condemn land to build a municipal stadium then it is appropriate for them to do the same to a team that would play in that stadium.

California Supreme Court Chief Justice Rose Bird agreed with the result, but found it troubling nonetheless. The decision, she said, gives the city the power to condemn a viable, ongoing business and sell it to another party merely because the original owner announced his intention

(Continued on page 60)



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Harry M. Shooshan

Whatever the legal problems, the marriage of sports and cable TV is

Blessed by a Bandage of Cold Cash

Would it surprise you to learn that the Atlanta Braves have a fan club in Oklahoma City? Did you know that the network which carried last year's Liberty Bowl game between Alabama and Illinois was not ABC, CBS or NBC, but a 24-hour sports network? And is it possible that the most important issue dividing labor and management in professional sports may soon be not option clauses and free agent status, but the rights to pay television revenues?

All of these items make sense if you stop to think about pay TV's impact on sports. Atlanta's Ted Turner can rightfully boast of owning "America's Team" because his baseball Braves are seen on over 4,900 cable television systems across the country, reaching 25 million subscribers. ESPN, the 'round-the-clock sports network, is rapidly approaching the point where it can bargain economically for major sporting events with the established networks. In fact, games of the new United States Football League are being televised by both ABC and ESPN. As cable penetration increases and as cable revenues grow, sports interests are at the bargaining table—and often at each other's throats—coveting their piece of the pie.

A Troubled Relationship

Cable television and sports seem to be made for each other. Cable systems with dozens of channels need hundreds of hours of programming to fill up those channels and to attract subscribers. Sports programming is abundant, relatively cheap to produce, and very popular.

The marriage of cable and sports provides viewers with greater choice. Fans have access not only to more telecasts of major sports such as baseball and football, but also to coverage of sports that rarely, if ever, make it on to network television, such as rodeo, collegiate wrestling, and indoor soccer.

However, as sports and cable work out the nature of their relationship, legal problems have multiplied. Some of these problems are new and are the result of cable's recent entry into the entertainment marketplace. One running debate is over how the cable industry should compensate sports interests for the sports carried by "superstations" such as WTBS (Atlanta) or WGN (Chicago) to viewers in cities far beyond a team's home market. This one has already led to nasty disputes in the courtroom and in the halls of Congress. On the other hand, some of the problems are not so new, but have been simmering for years. For example, who controls—or should control—the rights to sporting events sold to cable, and how should revenues from cable be divided?

With millions of dollars at stake, these legal problems are not likely to be resolved easily. The outlook is for more negotiation, litigation, and legislation.

There are actually several types of pay television which have become attractive for sports programming. Three of these involve the use of cable television.

How Pay TV Works

First, there are the cable networks which acquire programs and distribute them by way of satellite to cable systems. Like the traditional television networks (ABC, CBS and NBC), these cable sports networks are supported primarily by revenue from advertisers.

Then there are the "superstations." Superstations are local television stations that transmit over the air locally but whose signals are picked up by satellite and distributed throughout the nation to cable systems which relay them to their subscribers. The superstations operate very much like cable networks; however, they create some distinct legal problems, as we will see.

Pay cable services also deliver sports into the home. These services are available only to cable subscribers and require an additional monthly payment. There are no full-time national pay cable sports networks, but there are a growing number of regional and local networks.

A fourth type of pay television involves the use of over-the-air, rather than cable, transmission. The most prevalent form is subscription television or STV. STV is delivered like regular television signals except that the signal comes "scrambled" and customers are required to use a decoder to receive the true picture.

Each of these technologies presents a somewhat different set of legal considerations. However, taken together, they are rapidly changing the sports television picture.

Until recently, federal regulations limited cable's access to sports programming. The objective of these rules, adopted by the Federal Communications Commission in the early 1970s, was to control cable's growth so that it would not threaten traditional broadcasters or siphon off sports from "free" television. Ultimately, most of these rules were either overturned by the courts or repealed by the FCC.

The FCC still requires a cable system to black out games in cities where the games are being played unless they are already being televised locally. For example, if the Dodgers are playing the Cubs in Dodger Stadium and the game is being televised in Chicago on WGN, but not in Los Angeles, L.A. cable systems that carry WGN's signal would have to delete the telecast of the game.

With the elimination of most of the FCC rules affecting cable's use of sports and with the advent of communications satellites as a means of distribution, sports programming has become a staple commodity on cable systems. In fact, the appeal of the most successful superstations lies in sports and old movies. Yet when these superstations—and their sports programming—are carried by cable systems, bitter debates usually erupt.

Dividing the Dollars

Of course, cable TV companies don't get their programming for free. They have to pay for the sports events they transmit, but how much should they pay?

In 1976, Congress decided that cable systems were obligated to pay copyright fees for the programs they carried by retransmitting television broadcasts. Payments are made based on the number of distant television signals carried by a cable operator and on the gross revenues of the system as established by a fee schedule in the law. These fees are then divided among the copyright owners, including sports interests, according to a formula established by the Copyright Royalty Tribunal based in Washington.

Sports interests have consistently argued before congressional committees that cable systems should be paying more for the rights to carry sports telecasts. In a controversial decision last November, the Tribunal itself stepped in to increase the percentage of revenues that cable systems are obligated to pay for carrying distant television signals. This decision has touched off a bitter series of court battles and an intense lobbying campaign in Congress as the cable industry and the Turner Broadcasting System seek to stay or reverse the Tribunal's action. Ted Turner's concern is that cable systems will drop his superstation, WTBS, rather than pay the increased copyright fees.

So far, efforts to reverse the decision have been unsuccessful. A federal district court refused to issue a stay of the Tribunal's order, and Congress agreed only to push back the effective date from January 1, 1983, to March 15.

While some superstations are being dropped by cable systems as a result of this ruling, the more popular one such as WTBS will probably remain attractive. Also, cable operators who drop the superstations may decide to affiliate with cable networks such as ESPN or USA, both of which provide extensive sports coverage.

Some sports interests have argued that these types of networks, as opposed to superstations, will provide expanded viewing options without undermining the ability of a sports team or league to control the distribution of its product. The reason? The team or league negotiates directly with the network, enabling it to restrict the number of broadcasts, protect certain markets, or otherwise control the televising of its product. This control is lacking with the superstations. For example, when Ted Turner, as owner of the Braves, negotiates with his own WTBS station for local television rights to the Braves games, these telecasts are then retransmitted all over the country without any control exercised by the other clubs or the league.

"That's My Turf!"

Cable's use of distant broadcast signals threatens the very foundation of sports TV packages—territorial exclusivity. Both amateur and professional sports leagues strictly limit the number of games that can be televised into a particular market in order to protect both the live gate and the local television rights of the teams involved.

For example, Major League Baseball provides for a "game of the week" which is carried by network TV to stations in all markets except those of the two teams playing in the game. Those cities receive a back-up game. The fees paid for this network package are then divided equally among all teams. Otherwise, the rights to telecast baseball games are left with the individual teams. While each team can put together networks within its region (for example, the Red Sox in New England), a team is prevented from televising games into markets or regions of other teams.

Is this cozy set-up legal? A policy to divide markets and limit competition would normally constitute an illegal combination in restraint of trade. However, in 1922, the Supreme Court held that baseball was not subject to the antitrust laws.

Cable is changing this picture dramatically, and again Ted Turner is right in the middle. The games of Turner's Atlanta Braves are televised on WTBS. But WTBS is more than just Channel 17 in Atlanta. It's seen on all 4,900 cable systems, making it more like a national network than a local TV station. As a result, the Braves have a national following and, arguably at least, cut into the markets which baseball has reserved for its other teams. WGN with the Cubs and WOR with the Mets are having the same effect on a somewhat lesser scale.

Baseball and other sports have argued that the sports telecasts spawned by superstations threaten weaker teams and will ultimately undermine the financial stability of sports leagues. While fans served by cable systems have welcomed the additional telecasts, there is no question that Turner is benefiting from what might be called a "legal fiction." The fiction is a copyright law that treats what amounts to a network as a local television station. As a network, Turner would have to negotiate directly with the leagues or with the teams for program rights and would be bound by the same exclusivity restrictions that apply to ABC, NBC or the USA Network. Yet without all those "network" baseball telecasts, Turner's superstation loses much of its appeal.

The Big Boys Fight Back

The broadcast networks have not been standing idly by watching their position erode. Last year, ABC went to court in a successful effort to bar WTBS from carrying the Atlanta Braves playoff games. ABC argued that, because WTBS's local telecasts are carried on cable systems around the country, these telecasts would violate Major League

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"I want to say, Rob, that it's a great feeling to be out there serving on the Supreme Court, hearing cases of really national significance about stuff that really does make a difference. I mean, isn't that what it's all about, Rob?"

Baseball's exclusive contract with ABC for national television rights to the National League Championship Series. Ironically, as a result of the court's action, WTBS was unable to carry the telecast even within the Atlanta market.

ABC also challenged WTBS's contract with the National Collegiate Athletic Association, claiming that the NCAA had granted exclusive broadcast rights to ABC. The ABC contract with the NCAA gave the NCAA certain ancillary rights, but these traditionally had been limited to a few regional games which could be televised to an area where interest in the teams was high. But when Ted Turner offered $17 million for those rights, ABC said that selling the games to him would create conflicts all over the country with ABC games. ABC claimed that its primary contract with the NCAA did not contemplate a second contract with another broadcast network. In effect, ABC argued, Turner's $17 million offer caused the NCAA to change the rules in the middle of the game to take advantage of WTBS's superstation status. ABC also alleged that WTBS's telecasts would harm the network's Atlanta affiliate, which had relied upon the exclusive contract. The court refused to issue an injunction to block the telecasts but voiced its concern about the NCAA's good faith in reaching the agreement with WTBS.

Exclusivity for sports has also been raised in Congress. While sports lobbyists were successful last year in getting language guaranteeing broad sports exclusivity included in a major cable bill introduced in the Senate, they lost the provision after fierce opposition by the cable industry. This legislative battle is likely to resume when Congress takes up cable legislation again this year.

Who Can Sell Rights?

The growth of cable and the lure of its revenues have raised other legal issues for sports. The thorniest of these centers on the question of who owns or controls the rights to sporting events sold to cable television or other forms of pay TV such as subscription television (STV).

There is a lot of money involved. Consider these numbers. In 1979, ESPN was carried by 300 cable systems reaching only 2.4 million subscribers. Last year, over 5,000 cable systems offered ESPN and subscribers were estimated to be 20.3 million. While ESPN generates its revenues by selling advertising time to sponsors and, to a lesser extent, from fees charged cable operators, it is just a matter of time before ESPN or some other entity forms a national pay television sports network comparable to the Home Box Office (HBO) movie service.

And while the national market for pay TV sports has potential, so has the local or regional market. The New York Yankees recently signed a fifteen-year, $100 million deal with a Long Island cable television company which will broadcast 100 games a year. Other clubs are putting together their own cable and pay TV packages. For example, the owner of the Chicago White Sox has set up a sports network that includes White Sox games as well as other sporting events. The Seattle Supersonics of the National Basketball Association have leased channels on area cable systems and are televising their entire 80-game schedule to about 20,000 subscribers. In Minneapolis, the Minnesota North Stars hockey club, Twins baseball club, and Spectrum STV have created a joint venture offering 120 hockey and baseball games for a monthly subscription fee of $19.95.

With so much money involved, there are bound to be disputes over who should control the cable and pay TV rights to these events. Should the rights belong to the league on behalf of all teams? If each team retains the rights, should other teams have any right to share in the revenues? When the rights to a home game are sold, should the visiting team retain any interest in the proceeds, as it does

(Continued on page 65)

COURT BRIEFS

Supremely Hot Potatoes

An alien starts a fight, male employee claims sex discrimination, God gets "expelled" from school

Joseph L. Daly and Monte Walz

One of life's three certainties—death, taxes, and being asked to donate to a worthy cause or candidate—may become less certain after this term of the Supreme Court. Already the Court has sharply curtailed fund-raising activities of certain Political Action Committees (PACs), and it will soon rule on a state law that bars solicitation of funds by charities which spend more than 25 percent of their income on additional fund-raising.

Court Curbs Fund-Raising

In *Federal Election Commission v. National Right to Work Committee,* 103 S. Ct. 552, the Court took a chomp out of the budget of a PAC organization which was set up by the National Right to Work Committee. A unanimous Court ruled that PACs set up by corporations and labor unions are not free to raise money from all those who sympathize with their causes, but rather must restrict fund-raising to those who have direct ties to the corporation or union.

Federal law prohibits corporations and labor unions from giving money to candidates or spending money on federal elections, but does permit them to set up PACs which solicit noncorporate or union funds to elect sympathetic candidates. The law specifies that such PACs may only solicit contributions from corporate stockholders, executives and their families, or employees and members of labor unions. The Right to Work Committee, which opposes compulsory unionism, has no formal members but had been soliciting funds from anyone who supported its goals. The Federal Election Commission ruled that the Committee had gone too far in seeking contributors, listing as its members 267,123 persons who had either contributed money or answered Committee questionnaires. The U.S. Circuit Court disagreed, holding the Committee could count all 267,123 as members under the federal campaign law.

In an opinion written by Justice William H. Rehnquist, the Supreme Court reversed the lower court, finding that if its position were upheld it would "open the door to all but unlimited solicitation."

The Court's decision is expected to have a dramatic impact on fund-raising

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Alpha/Slocozta

by the powerful PACs formed by unions and industry. It will not effect the "independent" political action committees—those not established by corporations or labor unions—which are free under federal law to solicit funds from any individual.

In a second case before the Court, charities which spend a substantial portion of their income from fund-raising to raise more money may find themselves in the poor house if a Maryland law is upheld. In *Maryland v. Munson Co.*, 51 L.Wk. 3515, the Court has agreed to hear Maryland's appeal against a lower court decision which declared its charitable solicitation law unconstitutional. The law bars solicitation by charities that spend more than 25 percent of income on fund-raising, and is similar to laws in other states including New Jersey and Connecticut. The Maryland Court of Appeals ruled that the law violated the charities' free-speech rights, but the state contends that the statute is necessary to protect the public from charities whose favorite cause is raising more money.

Court Considers the Inconceivable

An 1873 law outlawing unsolicited mailed advertisements for contraceptives has been challenged in *Youngs v. Bolger,* 51 L.Wk. 3032, by the Youngs Drug Products Corp. The company claims that the postal law, orginally sponsored by morals crusader Anthony Comstock, is based on outdated moralistic presumptions, constitutes an unconstitutional infringement on corporate free speech, and denies many persons "essential knowledge" in making decisions "about sexual matters and protection from unwanted pregnancy or disease." Justice Department lawyers representing the Postal Service contend that the law is necessary so that offensive advertisements won't "fall into the hands of children against their parents' wishes."

Youngs Drug, which manufactures Trojan-brand condoms, had planned a mail advertising campaign in 1979 but was deterred by the law, which carries a maximum penalty of five years in jail and a $5,000 fine for the first violation and up to 10 years imprisonment and a $10,000 fine for subsequent infractions. The company successfully challenged the statue in Federal District Court in Washington. The court declared the law unconstitutional, saying it was more restrictive than necessary to serve the government's goals. The court allowed Youngs to mail the materials only in envelopes which conceal the contents and contain a notice that the contents are "promotional material for contraceptive products." The court ruled that the envelope must also contain a notice that the recipient may ask to be removed from additional mailings by the company.

In arguments before the Supreme Court, attorneys for the Postal Service contended that the law was constitutional because it serves two "substantial" goals: preventing the materials from falling into the hands of children, and protecting the "privacy of individuals in their homes" from mailings which are "likely to offend some sensitive" recipients.

The government came under heavy fire from the Justices. Questioning whether the law protected children from obtaining objectionable materials, Justice Thurgood Marshall said, "You're assuming children open their parents' mail. I don't think a child has the right to look at the mail" addressed to an adult. Justice John Paul Stevens asked whether requiring the ads to be mailed in sealed envelopes wouldn't be a less restrictive means of protecting children.

Jerold Solovy, the lawyer for Youngs, condemned the law as a vestige of Victorian morality. Solovy called Comstock, the sponsor of the original bill, "the mortal enemy of the birth-control movement" whose views are not shared by many today. Comstock in fact had himself appointed a special postal agent and, as chief enforcer of the several "obscenity" laws, personally made more than 3.000 arrests and seized more than 155 tons of "obscene literature."

Seven family-planning organizations have entered the case on the side of Youngs, citing the need to dispel "public ignorance" about conception. A brief filed by the organizations states: "The cost to consumers of the ban on contraceptive advertising is millions of unintended pregnancies, hundreds of thousands of unwanted children, millions of abortions and a venereal disease epidemic."

In its past decisions, the Court has consistently struck down rules prohibiting the sale or advertisement of contraceptives. In 1965, in *Griswold v. Connecticut*, 381 U.S. 479, the Court struck down a state law preventing married couples from using contraceptives. In 1972, in *Eisenstadt v. Baird*, 405 U.S. 438, the Court extended *Griswold*, saying that states couldn't bar the use of contraceptives by unmarried couples.

Most recently, in 1977, the Court overturned a New York law which prohibited the sale of prophylactics to persons under 16, permitted the sale to older persons only by a licensed pharmacist, and barred their display for advertising purposes. In *Carey v. Population Services International*, 431 U.S. 678, the Court held the first two provisions violated a couple's constitutional right to privacy, while the advertising ban interfered with merchants' First Amendment rights. The Court rejected the government's claim that such advertising might be offensive and embarrassing, and could encourage illegitimate sexual activity by minors. "These are classically not justifications [for suppressing] expression protected by the First Amendment," the Court declared.

Whether the Postal Service's ban on mail advertising of contraceptives also violates the First Amendment will not be resolved until the Court renders its decision, which is expected by July.

An Alien Starts a Fight

Sometimes the law moves in mysterious ways. A 10-year-old case involving an immigrant, a case which is now moot anyhow, has brought on a major battle over the separation of powers, involving all three branches of the federal government.

The case began back in 1966, when Jagdish Rai Chadha, an East Indian native of Kenya and citizen of the United Kingdom, was lawfully admitted to the United States on a nonimmigrant student visa. Chadha overstayed the visa, which expired in 1972, and the government tried to deport him two years later. Chadha admitted that he was subject to deportation but claimed that he would suffer "extreme hardship" if deported. He requested a suspension of deportation and adjustment of his status to that of a permanent resident alien.

The Immigration and Naturalization Service (INS) conducted a character investigation, which, coupled with evidence introduced at a hearing, prompted an immigration judge to order that Chadha's deportation be suspended. The judge found that Chadha had resided continuously in the country for seven years, was of good moral character, and would suffer "extreme hardship" if deported because it would be "extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation."

Pursuant to Section 244(c)(2), the "legislative veto" provision of the Immigration and Nationality Act, a report of the suspension of Chadha's deportation was transmitted to Congress, where Representative Joshua Eilberg introduced a resolution disapproving Chadha's suspension of deportation and that of five other aliens. Eilberg, chairman of a subcommittee dealing with immigration, said that Chadha and the others did not meet the statutory requirement of hardship. The House passed the resolution, and the INS reopened Chadha's deportation proceeding, resulting in the immigration judge ordering that Chadha be deported to the United Kingdom.

After unsuccessful administrative appeals, Chadha convinced the Ninth Circuit Court of Appeals that the congressional veto provision is unconstitutional. The court held that Section 244(c)(2) "violates the rule of separation of powers by usurping a necessary power of another branch." The court reasoned that the Attorney General, in deciding whether to suspend deportation proceedings, was exercising executive power, with which Congress could not interfere.

When the case reached the Supreme Court (*U.S. House of Representatives v. Immigration and Naturalization Service*, L.Wk. 3453), the INS argued that this section of the law did not truly delegate enforcement to the Attorney General, but rather said "we'll wait to see how you enforce, and if we don't like it we'll overrule you." The INS argued that, in effect, Congress was usurping authority from the executive branch by keeping the power to enforce the law. The INS contended that the veto power also usurped authority from the judiciary because it was Congress and not the courts which determined whether the statute permitting sus-

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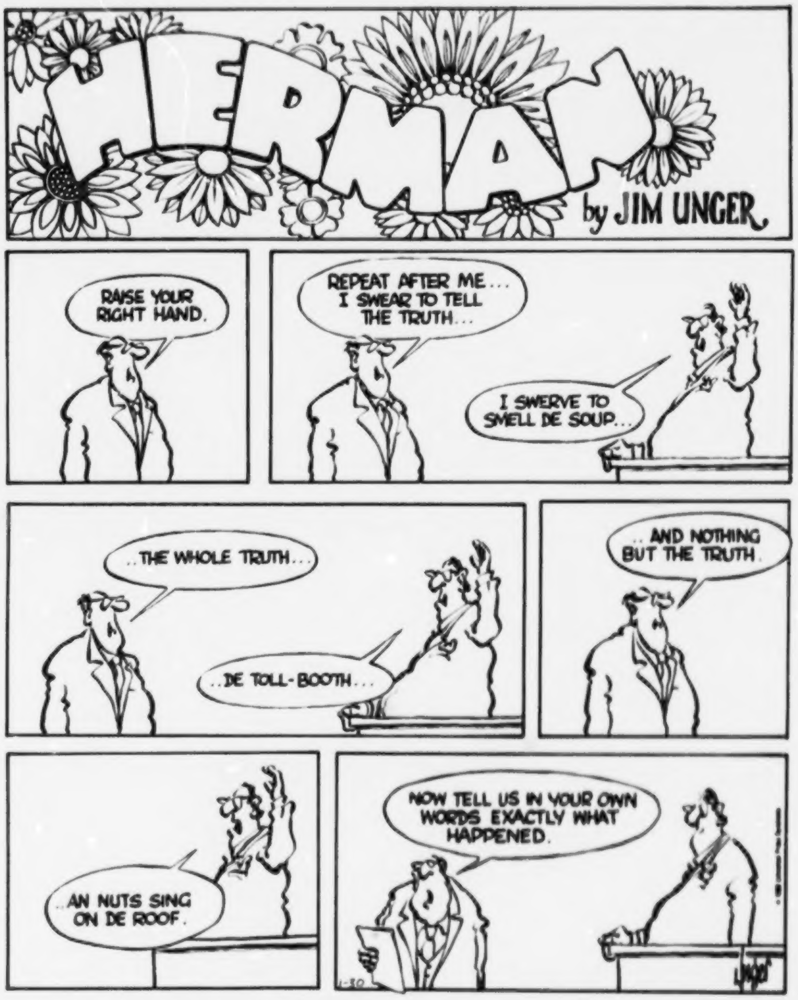
pension of deportation was correctly applied. The INS also claimed the veto provision violated the bicameral requirements of Article I, Section 7 of the Constitution because it permits one house to legislate without approval by the other house.

On behalf of the House of Representatives, Special Counsel Eugene Gressman told the Court that the veto provision does not violate the bicameral requirement because it is "non-legislation." Gressman emphasized the "negative character" of the veto power, which he said "does not order Chadha's deportation, does not alter his legal status quo, and does not alter any personal or individual rights." (Chief Justice Burger took issue with Gressman's statement that the veto power does not affect an alien's rights.) Gressman further asserted that veto power over suspensions of deportation is an exercise of power vested exclusively in Congress, and thus does not violate the separation of powers principle.

This is the second time the Court considered the case. Nearly 11 months ago the Court heard argument, but it failed to resolve the issue last term. The Court's decision may have important consequences beyond the immediate question of alien deportation because there are similar legislative veto provisions in other federal laws and the case requires the Court to define the respective powers of the President, Congress, and the courts regarding immigration and naturalization. As to Chadha, however, the result will be largely moot. He married an American citizen in 1980 and is now eligible for permanent residence as a spouse of a citizen.


HERMAN
by JIM UNGER
RAISE YOUR RIGHT HAND.
REPEAT AFTER ME... I SWEAR TO TELL THE TRUTH...
I SWERVE TO SMELL DE SOUP...
..THE WHOLE TRUTH...
..DE TOLL-BOOTH...
..AND NOTHING BUT THE TRUTH.
..AN NUTS SING ON DE ROOF.
NOW TELL US IN YOUR OWN WORDS EXACTLY WHAT HAPPENED.
1-20

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E.T. Only U.S. Alien Who Wants to Go Home

Unlike Steven Spielberg's earth-bound extraterrestrial in *E.T.*, most aliens in the United States are of the human variety and want desperately to remain in this country—even when the Immigration and Naturalization Service (INS) believes they should not.

In the first decision of the 1982-1983 term, the Supreme Court ruled that even aliens with a permanent home in the United States can be locked out of the country at the border if they are found to have broken immigration laws. In *Langdon, District Director of the INS v. Plasencia,* 51 L.Wk. 4001, the Court ruled that these aliens are entitled only to a brief "exclusion hearing" and not the more elaborate "deportation hearing" to which they would be entitled had they been in the United States at the time of the crime.

Maria Plasencia, a native of El Salvador who legally lived with her American husband in Los Angeles since 1970, was arrested in 1975 for trying to bring six illegal aliens into the country after a trip to Mexico. In an exclusion hearing held almost immediately at the port of entry, Plasencia was denied admission back into the United States. A federal appeals court subsequently ruled that Plasencia should instead have been given a deportation hearing, which provides more safeguards to the accused alien.

However, a unanimous Supreme Court reversed, and in an opinion written by Justice Sandra Day O'Connor said Congress intended that an alien detained at the border receive only the less extensive exclusion hearing, even if she is already an American resident. The decision does not necessarily settle the case of Plasencia, however, because the Justices concluded that they lacked sufficient evidence to determine whether the exclusion hearing was fair and the constitutional rights of Plasencia adequately protected. Therefore, the Court sent the case back to determine whether due process guarantees such as adequate notice of the charges and a right to be represented by a lawyer had been honored. Among the questions O'Connor posed to the lower court was whether notice of less than 11 hours before the exclusion hearing was adequate, and whether the alien had a constitutional right to be informed that free legal counsel would be provided upon request.

Justice Thurgood Marshall parted company with his colleagues on their decision to send the case back down, declaring that adequate evidence was presented to conclude that the government "stacked the deck," against Plasencia, thus depriving her of due process

Separation of Powers: A Teaching Strategy

Have each student look at a copy of the U.S. Constitution.

Ask—What are the three separate branches of government in the federal Constitution.

- Article I - Legislative = Congress;
- Article II - Executive = President;
- Article III - Judiciary = Supreme Court and lower federal courts.

Ask—What powers are given to each by the Constitution? Have the students examine each Article and discuss some of the powers. Here are some examples:

- Congress declares war (Article I, Section 8);
- The President is Commander in Chief of Armed Forces (Article II, Section 2);
- The Supreme Court and inferior courts handle cases in law and equity arising under the Constitution (Article III, Sections 1 and 2);

Ask—What is the basic problem in the *U.S. House of Representatives vs. INS?*

- The Congress (see Article I, Section 7) says it can veto a decision by the INS to grant the right to live in the U.S., but the INS says it is part of the Executive Branch.
- Congress can't veto a power the President has. In other words, the question is, which branch of government controls the INS?

Note that this is a hard case because it is so technical, but it is a good case to introduce the ideas of "separation of powers" and "checks and balances," which are difficult concepts themselves to grasp.

even under the lesser standards of the exclusion hearing.

The Court took care to limit its decision, stating that it does not apply to an alien seeking initial entry into the country because such aliens, according to the Court, have "no constitutional rights" regarding their claim for admission. The ruling is viewed as a victory for the Immigration and Naturalization Service, which objected to readmitting alien violators, pending a full deportation hearing, because of the chance they might flee and never report for the hearing.

The Exclusionary Rule: Legal Loophole or Constitutional Cornerstone?

In what may be the most important case in criminal law in the last 20 years, the Supreme Court surprised observers by announcing that it will reconsider the controversial "exclusionary rule" that prevents unconstitutionally obtained evidence from being used against a defendant in a criminal trial. In *Gates v. Illinois,* 51 L.Wk. 3415, the Court restored a previously argued case to its argument calendar and instructed attorneys to address the issue of whether the rule should be modified so that evidence obtained by authorities in the "reasonable belief" that it was consistent with the Constitution would not be excluded, even if it actually was found to violate constitutional strictures. We talked a bit about this case in the Winter 1983 issue of *Update,* but its importance requires further discussion.

Critics of the rule, including President Reagan, see it as a legal loophole through which obviously guilty criminals go free. In the words of former Supreme Court Justice Benjamin N. Cardozo, the rule commands that "the criminal . . . go free because the constable has blundered." Arguing that the Court should adopt a "good faith" exception to the rule, Solicitor General Rex Lee said in the government's brief that the exclusionary rule "contributes significantly to the nation's crime problem," has a "chilling effect on legitimate police activities," and "lessens public respect for the judicial system."

However, civil libertarians view any erosion of the rule as a prelude to repeal of Fourth Amendment protections against unreasonable searches and seizures, and as an invitation for police misconduct—including perjury regarding a "good faith" belief—in order to secure a conviction. William Greenhalgh, a law professor at Georgetown University who is leading the fight by the American Bar Association against any erosion of the rule, said the Court's decision to consider a "good faith" exception is "upsetting because the Court five times over the past 104 years specifically rejected the 'good faith' exception, including just last June." Greenhalgh also points to a study by the General Accounting Office which he says demonstrates that the rule frees criminal defendants less often than critics claim. The study shows that in federal courts, the rule required exclusion of evidence in just 1.3 percent of 2,804 cases studied. Greenhalgh acknowledges, however, that this percentage might be higher in state courts, where the great majority of criminal cases are tried.

In *Gates v. Illinois* the police obtained a search warrant from a judge for Lance and Susan Gates' home and car. Drugs were found. Later the warrant was thrown out, thus making the search itself illegal even though the police searched in "good faith" thinking they had a legal warrant.

Purposes of the Rule

The primary purpose of the exclusionary rule is to *deter* police and prosecutors from engaging in illegal acts by making it impossible for them to benefit from their unconstitutional actions.

By excluding illegally seized evidence, they will have no incentive to go too far in building a case against a defendant. Advocates of the present rule fear this deterrent effect will be eroded by a "good faith" exception. A *Chicago Tribune* editorial warned: "The problem of [a good faith exception] is that it makes the operation of constitutional protection of individual liberty dependent upon the knowledge of those who might violate it. If a police officer could claim that he did not appreciate the requirements of the law or the application of the law to the facts before him, he could misbehave with impunity. The 'good faith' defense puts a premium on ignorance of the meaning of the Constitution."

Solicitor General Lee contends, however, that a "good faith" exception would not diminish the deterrent value of the rule. In his brief to the Court, Lee wrote: "It is readily apparent as a matter of logic that the deterrent potential of the rule is drastically reduced, if not wholy eliminated, when it is invoked to suppress evidence obtained by a reasonably well-trained police officer in the belief that his conduct did not violate the Fourth Amendment."

Another purpose served by the exclusionary rule is to maintain respect for the criminal justice system. Put simply, justice should not condone a violation of the Constitution to catch a criminal. University of Michigan law Professor Yale Kamisar, in a recent issue of *Human Rights,* an American Bar Association publication, argues that "if the government is supposed to honor . . . the right of people to be secure . . . against unreasonable searches and seizures and the government violates that right, it should not be able to benefit from it."

Supporters of the "good faith" exception counter that the public appreciation of justice is hindered and not enhanced by the present rule, and that the major effect of modification would be to convince the public that the guilty will not be allowed to go free because of a legal "technicality."

Exception Already In Effect

Because of a 1980 decision by the Fifth U.S. Circuit Court of Appeals, a "good faith" exception is already in effect in federal courts in six Southern states. Legislative acts have adopted the exception for state courts in Colorado and Arizona. No cases from these courts have yet reached the Supreme Court, however.

Colorado changed its law because of a confession suppressed from the accused murderer of a nine-year-old girl who was raped and killed at a country club. During routine questioning of country club employees, one employee was asked: "Do you know why you are here?" The man replied, "I thought you would get to me before." Although the officer then gave the employee the "Miranda" warning, and the suspect signed a statement waiving his rights, a subsequent confession was thrown out by the Colorado Supreme Court because the defendant wasn't properly advised of his rights before the officer asked the first question.

Denver District Attorney Dale Tooley says the case is an example of the need to modify the exclusionary rule. Defenders of the rule disagree, saying the rule was misapplied in the case and the legislative response was unjustified.

Decision May Already Be In

Legal commentators believe that the Court's unusual action in scheduling a new round of arguments may indicate that a majority of the Justices has already concluded that some modification of the rule is needed. The Court's action is surprising because the Justices earlier rejected a plea by the Illinois attorney general to enlarge the issues to include a "good faith" defense. Furthermore, the "good faith" argument was never raised in any of the lower appellate courts, and it is extremely unusual for the Court to permit, much less request, argument on an issue not argued in the courts below. In fact, three of the nine Justices vigorously objected to rehearing the case. Justice John Paul Stevens, writing in dissent, said "it is not only a flagrant departure from [the Court's] settled practice, but also raises serious questions concerning the Court's management of its own jurisdiction."

Nonetheless, according to Professor Kamisar, "It sounds like there is finally a group of Justices, perhaps as many as six or seven, who want to adopt some sort of exception. It may be that although there is agreement in the Court for some modification, there may be disagreement on how far they should go."

Kamisar's theory is supported by public statements made by a majority of the Justices. Chief Justice William Burger and Justice William Rehnquist have openly called for abolition of the exclusionary rule, while Lewis Powell and Byron White have expressed reservations about it. Justice Sandra Day O'Connor, in her Senate confirmation hearings last year, called for an exception based on the "good faith" actions of police officers. Meanwhile, only Justices Brennan and Marshall appear committed to saving the rule as it exists. The views of John Paul Stevens and Henry Blackmun are unclear.

* * * * *

Somewhere between the present border of the Fourteenth Amendment's Equal Protection clause and the distant shore of the Equal Rights Amendment lies a

Aliens Among Us: A Teaching Strategy

The recent tide of Asian refugees into the United States has stirred feelings of resentment in some Americans. Nowhere is this ethnocentrism better evidenced than in the schools, where "alien" children are treated as outcasts by their peers.

Objective

The following teaching strategy helps to identify the reasons, good and bad, that cause Americans to fear these "aliens" among us. By identifying the causes of hostility, and attempting to address them on a rational level, students will be better equipped to deal with the multitude of "unknowns" confronting them in the world.

Methodology

Assign students to play these rules and stage a debate, with the class firing questions at the commentators:

Libby Wrell: **Libby believes that the Immigration and Naturalization Service should be abolished, and the borders of the United States opened to all who wish to enter. Libby believes the declaration on the Statute of Liberty ("Give me your tired, your poor . . .") must be taken literally if America is to continue to be "the great melting pot" of many nationalities, races, and beliefs. Libby is particularly incensed that present immigration laws favor admitting wealthy immigrants, such as foreign doctors and businessmen, while excluding vast numbers of refugees who are looking for a home but have been turned away by other countries. Libby's grandfather was an immigrant laborer, her father a blue-collar worker, and Libby has a college degree and an administrative position.**

Wright Winger: **Wright believes that the borders should be sealed off and *no* immigrants admitted (except, of course, for wealthy tourists). Wright cites the high rate of unemployment as evidence that there are no jobs for aliens, and says that jobs that do open up should go to Americans. Wright is particularly disgruntled that the United States opens its doors, on occasion, to refugees. Such persons, Wright contends, have no money, no job skills, and "don't even speak the language good." Wright is genuinely concerned about people—particularly unemployed Americans but also refugees, who appear to him to be unhappy and out of place in the United States. Wright is himself of immigrant stock. His grandfather homesteaded a farm after arriving from the old country. But Wright is quick to point out that when his grandfather immigrated "there was plenty of room."**

After the debate, have the class identify which arguments they consider valid and invalid. Then, open the floor to develop a new set of immigration rules for the United States, voting on each proposal after discussion. (Consider, for example: should there be a minimum amount of money an immigrant must bring into this country? Who should be given priority, refugees or foreign professionals?)

desolate "no-person's land" where discrimination cases are being fought.

Three Skirmishes in the Battle for Sexual Equality

This term the Supreme Court will hazard into this contested territory to resolve three skirmishes in this 2,000-year war between the sexes. The conflicts which the Court will lay to rest include: (1) whether women, because of their longer life expectancy, may be paid smaller monthly pension benefits than men under similar circumstances; (2) whether an unwed father may block the mother's decision to place a child up for adoption, and himself claim parental rights; and (3) whether an employer who provides full medical insurance coverage for female employees and their husbands, including full pregnancy benefits, discriminates against male employees by limiting coverage for their wives' pregnancies.

Although the Court's decisions may not be determinative in the gender war, its holdings may indicate how the tide of battle is turning.

Females Not "Retiring" in Demand for Equality of Benefits

Although American women tend to live longer than their male counterparts, many women find that living more may mean enjoying it less because of the system commonly used in calculating pension benefits.

In an important sex discrimination case this term (*Spirt v. Teachers' Insurance and Annunity Assn.*, 51 L.Wk. 3427), the Justice Department has challenged the use of sex-based actuarial tables in calculating monthly retirement benefits, arguing that the use of such tables illegally discriminates against women by paying them lower benefits than men simply because they live longer. The American Academy of Actuaries estimates the life expectancy of women born in 1981, for example, as 78.3 years, while men born that same year are expected to live to only 70.7 years of age on the average. Because women tend to live longer, and thus receive more monthly payments than men on the average, pension plan operators argue that women's monthly benefits should be smaller. This system is fair, claim the operators, because the women's total benefit is about the same as men's when viewed on a group basis.

Solicitor General Rex E. Lee told the Court in a brief that the system is not fair to individual retirees, however. Lee says the practice of varying monthly pension benefits based on sex violates Title VII of the Civil Rights Act of 1964. "Title VII protects individuals, not groups; it is not satisfied simply by showing that the challenged policy is fair to the group as a whole," Lee charged.

The Justice Department's brief was filed on behalf of Diana Spirt, a Long Island University professor who challenged her retirement plan because it paid women monthly benefits 11.3 percent below those provided to men with equal service and equal contributions. Spirt's case won in federal district court and was upheld by the U.S. Court of Appeals for the Second Circuit. That decision, however, conflicts with a 1982 decision by the Sixth Circuit Court of Appeals which held that the use of sex-based actuarial tables in the pension plan at Wayne State University did not violate the Civil Rights Act.

James W. Paul, a lawyer for the association which manages the Long Island University plan, among others, said in an interview that if the use of sex-based actuarial tables is struck down by the Court, the association would have to transfer $2 billion in benefits from males to females over the next 25 years. The association, known as the Teachers' Insurance and Annuity Association and the College Retirement Equities Fund, manages plans which cover 650,000 employees at over 3,400 colleges and universities. The Court's decision could affect millions of other American workers and billions of dollars in pensions.

Can Unwed Fathers Claim Custody?

The Supreme Court has agreed to hear the appeal of an out-of-wedlock father who seeks to raise the child he fathered and block the decision of the 17-year-old mother to place the child for adoption.

Kirkpatrick v. Christian Homes, 51 L.Wk. 3447, challenges the constitutionality of a Texas law which says that a man who wants to be declared the legal parent of his illigitimate child over the mother's objection must prove that such a decision would be in the "best interests of the child." In contrast, a child's natural mother automatically has legal parent status, and a child's married parents cannot be stripped of custody unless the state proves "by clear and convincing evidence" that they are not fit parents. (In some states, such as New York, an unwed father has the same legal rights as the child's mother, if he maintains a "substantial and continuing relationship" with the child.)

The father is arguing that the "virtually standardless burden of proof" placed by Texas law on unwed fathers who want to assume their parental duties violates the fathers' constitutional rights to both equal protection and due process. Representing the father is the American Civil Liberties Union, which contends that a state may not terminate the parent-child relationship between a concerned and competent parent, even if the child is born out of wedlock, without first demonstrating parental unfitness or some potential harm to the child.

In this case, the mother, who was 15 when the child was born two years ago, gave birth at a home for unwed mothers, Christian Homes of Abilene, Texas, and relinquished the baby to the Home for adoption. The father, then 23 years old, unsuccessfully sought to block the adoption. A Texas trial court denied his request to be declared his daughter's legal parent, ruling that the declaration was not in the child's best interests. The Texas Court of Civil Appeals upheld the denial.

Company in a Pickle Over Pregnancy Benefits

Under the Pregnancy Discrimination Act of 1978, employers must give employees the same coverage for medical expenses of pregnancy as they provide for other medical expenses. But lower federal courts have disagreed on whether an employer can provide only limited coverage for pregnancy loss incurred by male employees' wives, while providing full coverage for female employees.

To resolve this conflict in the lower courts, the Supreme Court has agreed to rule in a dispute involving the Newport News Shipbuilding & Dry Dock Company and its employee John McNulty. The firm pays in full for the hospital costs of women employees who become pregnant, but will pay only $500 of the hospital costs of wives of male employees. McNulty, along with the United Steelworkers of America and the Equal Employment Opportunity Commission (EEOC), challenged the policy, claiming that it discriminates against the rights of male employees under the Pregnancy Discrimination Act (*Newport News Shipbuilding and Dry Dock Company v. EEOC*, 51 L.Wk. 3311).

A federal district court dismissed the suit, but the Fourth Circuit Court of Ap-

The Exclusionary Rule: A Teaching Strategy

Ask these questions to your students after talking about *Gates v. Illinois:*

1. **Should the criminal go free because the constable has blundered?**
2. **What policy does the exclusionary rule promote?**
3. **Is the cost of excluding evidence too great relative to this goal? (Note that the person may still be convicted upon other evidence obtained in a manner that did not violate the Constitution. But in the *Gates* case that might be hard since they are charged with possession of the drugs.)**
4. **The "good faith" rule has already been adopted by the Fifth Circuit Court of Appeals in *U.S. v. Williams*, 622 F.2d 830 (1980), when it held that evidence seized without a warrant would not be excluded so long as police acted in "good faith." In *Williams*, an agent of the Drug Enforcement Administration mistakenly believed he had the authority to search a person who was released pending appeal of her drug conviction. When she attempted to board a plane at Atlanta International Airport, he discovered heroin in her coat pocket, which the district court excluded on the grounds that the search was illegal. On appeal, the Fifth Circuit reversed the district court. Should the experience of that circuit under the rule be considered by the Supreme Court in reaching its decision? Would statistical evidence from that circuit over the recent past help the Court as it considers *Gates*, or should the Court ignore such evidence, on the ground that the Constitution's great principles can't be reduced to statistical evidence, which is always subject to change.**

peals held that the policy discriminated against male employees by decreasing the value of their benefits. A female employee, the court reasoned, received as a benefit full coverage for any illness of her husband, while a male employee was denied the same benefit for his wife's pregnancy. In support of the appeals court decision, the Justice Department and EEOC told the Supreme Court that an insurance plan limiting pregnancy benefits for spouses of male workers amounts to sex discrimination because: "Such a plan forces a male employee, unlike his female counterpart, to finance himself some of the expenses resulting from his spouse's disabilities."

In rebuttal, the Newport News firm argues that it is not engaging in sex discrimination because it is treating male and female employees the same—neither are entitled to pregnancy benefits for their spouses. The U.S. Chamber of Commerce has alligned itself with the company, saying the case is "of substantial importance" to American businesses because the costs of paying pregnancy benefits for the wives of male workers could escalate a single company's costs hundreds of thousands of dollars each year. Newport News and the Chamber contend that the pregnancy law applies only to female workers, and not the wives of male employees.

God's "Expulsion" Upheld

In his recent State of the Union Address, President Reagan vowed to fight for "a constitutional amendment to permit voluntary school prayer," declaring that "God never should have been expelled from America's classrooms."

Despite this threat of political upheaval, the Supreme Court refused to reconsider its previous rulings which prohibit prayer in public schools, and let stand a lower court decision barring the Lubbock, Texas, school system from allowing student religious groups to use public school facilities for meetings before or after school hours (*Lubbock Independent School District v. Lubbock Civil Liberties Union*, 51 L.Wk. 3460). In doing so, the Court rejected an unprecedented plea from 24 U.S. senators who filed a friend-of-the-court (amicus curiae) brief urging consideration of the case. The senators warned that unless the Court reconsidered its position, Congress will be considering both a constitutional amendment to permit prayer in public schools and legislation to remove prayer disputes from federal courts.

The dispute in Lubbock dates back to 1971, when some parents and the local chapter of the American Civil Liberties Union complained that the city's public schools were permitting teachers to lead classroom prayers, that Bible passages were being read on school public-address systems, and that Bibles were being distributed to elementary school students. Lubbock school officials promised to change these policies, but eight years later a federal appeals court found that the practices were still continuing. Prompted by the ACLU lawsuit, the school board adopted a new policy in 1980 which permitted student religious groups to use school facilities for meetings "so long as attendance at such meetings is voluntary."

The federal appeals court struck down the policy on voluntary meetings, stating that it was "clearly designed to allow the meetings of religious groups." Interestingly, in 1981 the Supreme Court ruled that public universities may not exclude student religious groups from use of campus facilities open to other groups on the grounds that such exclusion would interfere with the students' right of free speech and association. However, the Court pointed out in that case that university students "are less impressionable than younger students" (*Widmar v. Vincent*, 50 L.Wk. 4062).

The Court's most recent ruling is likely to provide but a brief moment of meditation for the Justices since Sen. Mark Hatfield (R-Oregon) has stated that he is "disappointed and saddened" by the decision and will promptly introduce a bill to permit Bible studies and prayer groups in classrooms during off hours. Soon, the Court will also be confronted with recently-enacted state laws permitting silent meditation or voluntary prayer in classrooms.

Point for Discussion

In their friend-of-the-court brief, 24 U.S. senators told the Justices that if the lower court decision were allowed to stand, it would "place the judiciary at odds with the people it serves and the Constitution it interprets." In fact, a recent poll by the *Minneapolis Star and Tribune* indicates that two of three adults surveyed favor an amendment permitting school prayer. On the other hand, a suit was brought against three Mobile, Alabama, school teachers recently on behalf of two students who claim they were ridiculed for refusing to participate in prayer. Should the Court be more concerned about the right of the majority to pray, or the right of a minority not to pray? Does the Bill of Rights provide a clue?

The Court May Taketh Away

A Minnesota statute allowing taxpayers to claim state income tax deductions for their dependents' tuition, textbooks, and transportation may have answered the prayers of parents with parochial school students. These parents face many educational bills, in addition to paying taxes to support public schools. But a lawsuit before the Court this term charges that such tax breaks are a legislative "blessing" which the state may not constitutionally confer (*Mullen v. Allen*, 51 L.Wk. 3461).

In 1973, in the landmark case of *Committee for Public Education v. Nyquist*, 494 U.S. 646, the Court struck down two New York laws which provided tuition reimbursement and tax credits to parents of parochial school students. The Court held that the provisions violated the Establishment Clause of the First Amendment, which prohibits the government from advancing religious interests, because the tax breaks represented government aid to church schools. The First Amendment reads in part "Congress [interpreted to mean both federal and state lawmaking bodies] shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Nyquist, however, was silent as to the constitutionality of a statute which provides tax benefits to parents of public and parochial school students alike. Under the Minnesota law, parents of both public and private school dependents are eligible. Thus, while a tuition deduction may be claimed for parochial school attendance, parents of public school students may claim a deduction for summer school, driver education, private tutoring, and tuition charged for students who attend public schools outside of their designated school district. Similarly, a deduction for school bus transportation can be claimed for either public or private school students, provided the service is not supplied free of charge. Textbook deductions are available to both groups of parents for secular texts and school equipment.

In upholding the constitutionality of the Minnesota tax deductions, a federal district court relied upon the fact that the statute provides benefits to parents of both public and private school dependents, unlike the benefits struck down in *Nyquist*, which applied only to parochial school parents. The district court rejected the argument that the Minnesota law was unconstitutional under *Nyquist* because parochial school parents were the primary beneficiaries of the tax deduction, in that most public school parents do not pay tuition as such.

In justifying its conclusion, the district court relied on the 1970 Supreme Court decision of *Walz v. Tax Commission* (397 U.S. 664), which sustained the constitutionality of a law exempting churches from having to pay property tax. The *Walz* court said this type of tax benefit was permissable under the Establishment Clause, which prohibits the state from either advancing or inhibiting religion, because taxing church property might create an excessive burden and thus inhibit religion in violation of the First Amendment. The Court also noted that the church-related institutions were only part of a broader class of nonprofit organizations exempted from property tax because of their benevolent nature. Applying the *Walz* rationale, the district court held that just as the property tax exemption was necessary to prevent government coercion of religious institutions, the tax deduction was needed so that parents of parochial students would be relieved of paying both taxes for public education and parochial school tuition. This heavy financial burden on parents of parochial students, the court concluded, might coerce them to abandon religious instruction for their children, in violation of the Establishment Clause. The Eighth Circuit Court of Appeals affirmed the district court decision.

The Supreme Court granted certiorari to review the case in part because the decision conflicts with a decision by the First Circuit which declared a tax deduction statute virtually identical to Minnesota's to be unconstitutional. The First Circuit struck down a Rhode Island statute under statistical evidence that parents of parochial school children were the overwhelming beneficiaries of the tax benefits. The First Circuit held that *Nyquist* and not *Walz* was the controlling case.

In resolving this conflict between the federal circuits, and the important First Amendment issues involved, the Supreme Court may determine that while the state may giveth a tax benefit to parents of parochial students, the Court may nonetheless taketh it away.

Socialists in the Pink

The Socialist Workers Party, which advocates "abolition of capitalism" and establishment of socialism through peaceful means, has scored two decisive Supreme Court victories this term.

By a unanimous vote, the Court ruled that states cannot force unpopular political parties to make public disclosure of financial *contributors*. By a separate 6-3 vote, the Justices ruled states also cannot force public disclosure of the *recipients* of campaign expenditures from such minor parties. The unaninmous decision affirms the Court's 1976 decision in ***Buckley v. Valeo*** (424 U.S. 1), which said that the First Amendment protection for political association and belief required that minor parties be free from disclosure requirements if they could show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either government officials or private parties."

The Court's decision in ***Brown v. Socialist Workers***, 51 L.Wk. 4061, extends the 1976 decision one step further, protecting the names of both campaign contributors and the recipients of campaign funds if the minor political party can show a "reasonable probability" that persons identified will be subject to "threats, harassment or reprisals." In support of extending protection to recipients of campaign funds, Justice Thurgood Marshall noted that suppliers of services could be "deterred by public enmity" if their names were disclosed, and that could "cripple a minor party's ability to operate effectively and thereby reduce the free circulation of ideas."

Justice Sandra Day O'Connor, joined by Justices William Rehnquist and John Paul Stevens, dissented from the majority's conclusion that the party was entitled to shield the name of those who received its campaign disbursements. O'Connor argued that the Socialist Party failed to prove that such disclosure would result in harassment of campaign fund recipients and further contended that "the strong public interest in fair and honest elections outweighs any damage done to the associational rights of the party or its members by application of the . . . disclosure law."

The effect of the Court's decision will be to grant the Socialist Workers Party a constitutional exemption from the Ohio disclosure law, which requires candidates for public office, and their parties, to file public statements identifying the full name and address of each person who makes a campaign contibution or receives a disbursement from campaign funds.

Suggested Discussion Questions

1. Should a political party that advocates abolishing the Constitution be permitted to use the Constitution to protect its members from threats and harassment?
2. Nanci Raygun is a "closet" Democrat. Her friends, co-workers, and boss are staunch Republicans, and, to avoid trouble with them, Nanci has pretended to be a Republican too. Nanci wants to make a contribution to a local Democratic Party committee but is afraid her name will turn up on campaign disclosure statements. Should she be protected under the Supreme Court's decisions ***Buckley v. Valeo*** and ***Brown v. Socialist Workers?*** (These decisions are expressly limited to unpopular minority parties but an argument can be made that the rationale of the cases should apply.)
3. Disclosing spending helps make elections cleaner. Why should any party be allowed to keep secrets?

Supreme Court Briefs

In other action this term, the Supreme Court broke up the most famous Monopoly in history, sought to reduce the number of DOAs on America's highways by upholding a tough DWI law, and resolved a brewing contoversy between churches and neighboring eateries.

Monopoly in Name Only

Parker Brothers' 50-year monopoly on the "Monopoly" boardgame trademark was broken when the Supreme Court refused to review a lower court ruling that the company can no longer claim exclusive rights to the name. The Ninth Circuit Court of Appeals had ruled that Parker Brothers had lost its legally protected trademark on the word "Monopoly" because it has become a generic term, denoting the product and not the producer.

The legal principle here is that a word which has passed into the language to describe a product—like elevator and zipper—ceases to be a trademark. That's why a company like Xerox makes a big effort to prevent its product's name from becoming synonymous with "photocopier." If it were synonymous, then "Xerox" would no longer be a trademark worthy of legal protection.

The winner of the Monopoly contest is Ralph Anspach, a California economics professor who invented and marketed a board game called "Anti-Monopoly" ten years ago. Anspach sold an estimated 500,000 Anti-Monopoly games in the last nine years, though litigation with Parker Brothers barred him from marketing the game in five of those years. Parker Brothers will not only be refused the right to pass "Go" and collect $200, it may find itself sued for $5 to $10 million by Anspach, who is seeking compensation for the business he believes he has lost as a result of the litigation.

In refusing to hear the case (*CPG Products Corp. v. Anti-Monopoly, Inc.* 51 L.Wk. 3539), the Supreme Court ignored arguments by lawyers for Parker Brothers that if the Ninth Circuit decision was allowed to stand it would "sow chaos in the manufacture and merchandising of brand name products." Monopoly was patented in 1933, and about 85 million sets have been sold to date. The game continues to be the largest selling brand name board game in the world.

Churches May Not Veto Liquor Licenses

In *Larkin v. Grendel's Den*, 51 L.Wk. 4025, the Supreme Court struck down a Massachusetts law that gives churches and schools veto power over the issuing of liquor licenses within 500 feet of their property. In an 8-1 opinion the Court declared that the law violated the constitutionally required separation between church and state by giving churches a "unilateral and absolute power" over an important governmental function, the issuing of liquor licenses.

The decision is a victory for the self-described "quiche-and-salad crowd" at Grendel's Den, a Harvard Square restaurant in Cambridge. The business was denied a liquor license when the nearby Holy Cross Armenian Catholic Church exercised its veto. Under the Massachusetts law, the Church was not required to explain why it objected to the issuance of a license.

Although holding that a church's veto over liquor licenses is unconstitutional, the Court strongly implied that a flat ban on liquor licenses within a specified distance from churches and schools would be constitutional because it would not delegate the decision-making power to the churches themselves. The Court also indicated that it would be permissible for a governmental licensing authority to consider objections by nearby schools and churches.

Court Targets Highway Holocaust

South Dakota v. Neville, 51 L.Wk. 3459, the Supreme Court gave states a weapon to fight the "carnage caused by drunk drivers." In a 7-2 decision written by Justice Sandra Day O'Connor, the Justices said a motorist's refusal to take a sobriety test may be used as evidence of guilt at trial. The ruling reverses a decision by the South Dakota Supreme Court, which had held that such a refusal is protected by the Fifth Amendment privilege against self-incrimination.

"The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our nation's highways," declared Justice O'Connor. The Justice noted that about 25,000 Americans are killed each year in accidents caused by drunken drivers. The Court has previously ruled that states may force suspected drunken drivers to take sobriety tests, and suspend their license should they refuse to take them.

Strategies

(Continued from page 15)

procedure to adjudicate disputes of this sort. Should it be referred to the appropriate league officials or committees? Should there be a right of appeal from their decision? On the other hand, if an obvious injustice has been done and hasn't been righted through league procedures, isn't it better to right it through the courts than to let it fester?

Strategies

After completing the activities that follow, students will be able to:

A. Discuss alternatives to court action such as compromise and negotiation.
B. Examine the problem of whether the courts are being used for frivolous issues.
C. Recognize the time and resources it takes for courts to resolve disputes.

Ask students to describe any sports event in which there was a disagreement on the process, ruling or call by the official in charge. What was the problem? Who argued for each team? What was the final outcome? Who makes the final decision on what should be done? If either side disagreed with the final decision, where could they go to appeal the decision?

Then ask students to read the article "Basketball Outcome Challenged." What was the problem? Why did St. Michael's take the case to court? What other alternatives did St. Michael's have? Can compromise play a part here? What do you think Cooney High would say? What do you think St. Michael's would say? How could this be negotiated?

Ask students to develop a plan that would enable this problem to be handled without taking the case to court.

Students might discuss the cost in time and resources in taking a case to court. What is involved? Who is involved? What is the cost involved? What are the human and material resources involved? Why are these resources necessary? How could taking a case to court affect the court docket?

Strategy

5.

Sports Strife

Teri Engler has an article in this issue on the growing problem of sports violence. One proposed solution is hauling athletes into court if it is alleged that they have been too rough on the field. These may be criminal actions, but more commonly they are civil suits. The following fictional story is based on a number of real examples.

"Jury Reviews Rink Ruckus"

A jury of three men and nine women is now in its second day of deliberations in the case of a high school hockey player who is suing an opposing player for injuring him in a fight on the ice. Seventeen-year-old Biff Blankstrom, a reserve forward for the Spring Valley High Spiders, is suing Robert Lapointe, a center for the Easton High Eskimos, and his school for $500,000 in damages. Blankstrom claims that he has limited mobility in his neck and recurring headaches as a result of a fight with Lapointe in a game nearly two years ago.

Blankstrom claims that during a melee between the two teams he had dropped his stick and gloves and was trying to break the fight up when Lapointe attacked him from behind and knocked him to the ice with his stick. Blankstrom charges that his high school hockey career suffered because of the injuries, which kept him out of action for the rest of that year. According to Blankstrom, this inactivity, when professional scouts observed

Sports Has a History Too

There are plenty of good sports-related research projects. Sports is big business today. The link between the growth of sports and technological advances over the last 100 years is in no way accidental. As a review of history, students could explore the roles the following have played in the growth of sports.

1. **Printing and mass media.**
2. **Development of the telegraph and telephone.**
3. **Growth of railroads and airlines.**
4. **New machinery and methods of production.**
5. **New attitudes about exercise and health.**
6. **New attitudes about women's roles.**
7. **More leisure time.**

On a more personal level, students could interview members of their family and ask them to describe their favorite sports when they were children, changes they have seen in attitudes towards sports, or differences in rules and equipment.

Another approach for teaching history is to trace the origin of individual sports or sporting events like football, hockey, archery or the Olympic Games. Students could research where the sport began and why. How has the equipment changed, how have rules evolved, and what is the emerging role of women in sports? Sources for this kind of information include *The Encyclopedia of Sports* by Frank G. Menke and *Sports Roots* by Harvey Frommer. Both of these books are reliable ready references containing the origin of various sports, as well as historical highlights, rules, legends, and champions. The are found in most libraries.

As an example of what can be done with these books, the section on the Olympic Games in *The Encyclopedia of Sports* discusses sports history's view of women. One of the strictest rules of the Olympic Games barred women, as spectators as well as participants. Those women who were overcome by curiosity, or sneaked a look and were caught, were usually put to death because the games were regarded as religious ceremony.

Taking a more sociological approach, it would be interesting to explore and discuss how attitudes about sports and athletes are evolving—Is baseball still the national sport? Is professional football too violent? Should young athletes leave college to play professional sports for enticing salaries and benefits? Can and should young superstar athletes gifted in several sports be allowed to make and break contracts with no effect on sports generally or on their careers? Are superstar athletes still national heroes? What is the effect on sports when athletes turn advertisers? Should and could men and women play professional sports together?

—NNM

league play, destroyed his hopes of a career in professional hockey.

In testimony at the trial, Lapointe denied that he attacked Blankstrom. Rather, he said, Blankstrom punched him and then skated away. Lapointe said he simply defended himself, and that to do nothing would have made him a future target of every player in the high school league.

Attorneys for Lapointe said that any hockey player knows that fights are a common part of the game, and all of them assume that risk when they decide to play hockey. Blankstrom's attorney has argued that Lapointe's actions were a blatant, unprovoked, and intentional violation of the rules, well beyond what Blankstrom could have reasonably expected when he donned his high school uniform to play against the Eskimos.

Background

Many people are concerned about violence in sports. The concern extends from such professional sports as football, hockey and auto racing to college and high school sports where bodies collide and tempers flare. One way to limit sports violence is through self-regulation: stiff penalties assessed by referees and league officials against those who are unnecessarily rough.

Another approach is to use the courts, through suits seeking monetary damages from those who allegedly deal out serious injuries intentionally. The defense in these cases usually stresses the legal doctrine of "assumption of risk." That concept holds that athletes know that sports are possibly dangerous, and consent to that risk when they agree to participate. However, both on the field and off, consent is not unlimited. Courts have ruled that one can't assume the risk of being injured because of blatant and intentional violation of safety rules. In one case, for example, a court assessed monetary damages against a base runner who deliberately ran five feet out of the baseline to mow down the second baseman. (See Teri Engler's article for more on sports violence and the law.)

Strategies

After completing the activities that follow, students will be able to:

A. Discuss the problem of violence in sports.
B. Analyze the different ways of regulating violence in sports, including self-regulation and courts.

Ask students to read the article "Jury Reviews Rink Ruckus." Divide the class into groups. Assign a sport to each group—basketball, football, baseball, boxing, soccer and other popular ones in your area. Ask the students to provide five new rules that they feel should be made for each sport and the reasons for each rule. Then as a class, discuss each rule and try to have students who are knowledgeable about those sports assist in providing accurate information. Also, discuss who regulates each sport and who is in charge of enforcing the rules for each sport.

In reviewing the article itself with students, discuss these questions:

- Why were the courts involved?
- How can sports regulate themselves?
- In what cases should the courts be used?
- What are the criteria for deciding when courts should be involved?
- Does this article raise similar issues to "Basketball Outcome Challenged?" Why or why not?

Strategy

6.

Sports Equality

Everyone has heard of "Title IX," but hardly anyone knows for sure what it means. The principle behind the Title is simple enough: neither men nor women should be discriminated against by any educational institution receiving federal funds. As Marianne Pogge-Strubing points out in her article in this issue, the real battles have come over interpreting the Title as it applies to sports, coming up with regulations that satisfy both sides of the controversy, and finding ways of enforcing it.

There has been a lot of litigation under Title IX. The following fictional story presents a typical case.

"Girl Denied Tryout for Boys' Team"

Lynn Andrews, a 16-year-old junior at Lincoln High School in Springville, brought suit Monday against the Springville Board of Education, asking the court to stop the board from denying her a tryout for the school's all-boy soccer team.

Both Andrews and Raymond Hartley, coach of Lincoln's soccer team, agree that she was denied a tryout on account of her sex. Andrews, who transferred to Lincoln this year from a Boston high school, was a soccer standout on the girls' team at the school, and hoped to play on the girls' team at Lincoln. However, Lincoln does not have a girls' soccer team.

"The only way I can play soccer is to play on the boys' soccer team. I was hoping to continue to play soccer in college, and get a scholarship based on my high school record. But I know my chances of getting a scholarship will be wiped out if I'm kept from playing my last two years of high school," Andrews said.

Coach Hartley, however, claims that soccer is too rough for girls, and that team morale will suffer if she is allowed to play on the team. "I've been coaching for twenty years, all sorts of sports, both boys and girls, and I know that boys play a rougher game. I think that even if Lynn is a superior player, she'll take a battering on the field. If the team had a girl player on it, the guys could expect to take a lot of razzing from other teams because of it," Hartley said. Hartley and the board have suggested that Andrews try out for Lincoln's girls' field hockey team. But that suggestion has been turned down by Andrews.

"Field hockey is not soccer, even though it uses many of the same skills as soccer. But I have five years experience in soccer, and I know that soccer is a bigger and better funded game than field hockey at the college level," Andrews said.

Andrews' father Robert said that his daughter has had to work hard to become as good at soccer as she is today. "Soccer has been Lynn's way of triumphing over adversity. When she was eight, she was in an accident that broke her leg in several places. She went through four operations in two years to be able to walk again. I don't want her self-esteem to suffer because she's denied the opportunity to try out for the team now," he said.

The judge is expected to make a decision in the Andrews case this week.

Background

Historically, the American woman's place in athletics has been much the same as her position in the working world. She's been a cheerleader, or the girlfriend of a football player, but not an athlete herself. Female athletes have to contend with centuries-old prejudices which, many women argue, have become institutionalized in the educational system. Muscle and physical strength have been thought admirable in males but ugly and undesirable in females. Even female educators in the not too distant past have argued that "girls are not suited for the same athletic programs as boys. Under prolonged and intense physical strain, a girl goes to pieces nervously."

Many women now argue that the athletic development of females has been held back by these attitudes, and that with proper coaching and a stronger emphasis on sports, women can perform quite well athletically.

The legal issue here hinges on the interpretation of Title IX of the Elementary and Secondary Education Act. This title prohibits any college or public school system from receiving money from the federal government if it discriminates against either sex in athletic programs. Since the vast majority of colleges, universities and school systems accept federal money, this law has put real teeth into the demand of many women to be treated equally.

For a full discussion of Title IX, see Marianne Pogge-Strubing's article in this issue of *Update*.

Strategies

After completing the activities that follow, students will be able to:

A. Recognize that individuals can initiate court action to resolve disputes.
B. Identify the facts, legal issues and arguments in an alleged sex discrimination suit.
C. Simulate the process of judicial decision-making.

Ask students to read the article "Girl Denied Tryout for Boys' Team." (This activity may be done individually or in small groups.)

Ask students to answer the following questions and as students answer the questions write the important information on the chalkboard.

1. What are the important facts in this case?
2. Who are the parties in the case?
3. Who initiated the suit and what do they want the court to do?
4. Why was Lynn Andrews denied a tryout for the soccer team?
5. Briefly summarize the arguments for both sides in this case:

Arguments for the Plaintiff (Lynn Andrews)	**Arguments for the Defendant** (Coach Hartley and the Springville Board of Education)

Explain the legal issue involved in this case. Identify the legal issue by writing "Title IX" on the chalkboard. Give students the following information to highlight the legal issue raised by Title IX:

> The regulations give women's sports "separate but equal" status. The educational institution may operate separate single-sex teams in such contact sports as basketball, football, wrestling and ice hockey. Schools can also offer separate teams for non-contact sports, such as tennis, golf, swimming and track. If, however, a school fields only one team in a non-contact sport, the excluded sex must be permitted to try out for this single-sex team.

After discussing the facts and the legal issue raised in Title IX, have all the students roleplay judges. Ask the students, "If you were the judge in this case, what would you decide and why?" Remember that judges' decisions are based on the facts in the case and the legal issue involved. If the students are working in small groups, then they should issue a group opinion, and, if necessary, give majority and minority opinions.

Strategy 7.

Wrapping It Up

This by no means exhausts the possibilities of sports and the law lessons derived from sports fiction or the sports pages. To follow up on these lessons, you might ask kids to write their own newspaper stories about actual or fictitious sports events that raise legal considerations. Or you might ask kids to write a little short story about something connected with sports. The topic need not be strictly law-related, since sports can be used to explore all kinds of attitudes and feelings connected with citizenship. For example, you could ask kids to write about the experience of choosing up teams during recess. How does it feel to be the last one chosen? How does it feel to know that you have been put in a position where you can do the team the least harm? Is there a better way to pick teams? Could teachers handle the situation differently? Are there other ways of deemphasizing competition and still letting sports be fun?

Another possibility would be to create a sports and the law question and answer column, either within the classroom or for the school paper. Here are a few questions to get it started:

1. If a girl wants to play on an all-boys team, are her constitutional rights violated if she is required to play on the all-girls team?
2. Is the separate but equal concept of boys' and girls' athletics constitutional?
3. Do girls have the right to play on a high school football team?
4. What is the school district to do if a pregnant girl wants to participate in sports or be a cheerleader? Are there any laws that apply?
5. Can or should handicapped students be precluded from participating in sports?
6. When sports injuries occur, are schools responsible?

And this just scratches the surface. Sports are an enormous part of the news, and of vital interest for many students. For better or worse, the law is having more and more to do with sports. Just keeping an eye on the sports section for a few months should give you lots of other ideas for your classes. ☐

Solid Forever

(Continued from page 25)

athlete is in a position to seek these rewards because the owners are able to make large amounts of money.

Labor Meets Antitrust

The players' strike and the Raiders antitrust case—the major off-field football stories last year—are related from a legal standpoint. Throughout the history of labor negotiation in professional sports, the players have used antitrust litigation to gain bargaining power. Since all sports except baseball are subject to antitrust laws, and even baseball's exception is frequently endangered by suits, players can force concessions from management by threatening to bring legal action that will cause the whole house of cards to collapse.

Ironically, collective bargaining provides one possible way of minimizing antitrust problems for the beleaguered owners, which is one reason the owners have not been completely opposed to the growth of unions and collective bargaining. A labor exemption has developed to antitrust law which exempts agreements reached with labor unions from normal antitrust standards. For example, an agreement to restrict free agency would violate antitrust if made between the owners. What could be more in restraint of trade than an agreement among owners not to compete for workers? But the same agreement would probably be legal if made between the owners and the players as part of the collective bargaining process.

If the owners can get the players to agree to some anticompetitive measures—and, as the antitrust box suggests, there may be good reasons for them to do so—then owners can get rid of at least some of their antitrust problems. (Unfortunately for the owners, the labor exemption to the antitrust laws does not apply to the playing location of teams. The labor exemption is limited to those subjects which must be discussed as a part of good faith collective bargaining. Salaries, draft procedures, free agent compensation and even rule changes are subjects that are appropriate for collective bargaining, but where the team plays isn't. Without the help of the labor exemption, the owners' efforts to block the Raiders' move from Oakland to Los Angeles was held to be a conspiracy in restraint of trade and therefore a violation of antitrust laws.)

Sports and Trustbusting

As the NFL was reminded in 1982 with the antitrust litigation involving the Raiders' move, professional sports, with the exception of baseball, are subject to the antitrust law. Breaking up monopolies and the large corporate trusts was a major part of the progressive reform movement at the beginning of the twentieth century. President Teddy Roosevelt is probably America's most famous trust buster.

The idea behind antitrust law is to increase competition. The theory is that competition will result in better and cheaper products as well as salaries that represent the real worth of employees. Under antitrust laws, businesses are not allowed to engage in practices which limit competition between them. It is a violation of antitrust for businesses to set prices, to divide up markets, or to limit incentives to improve the quality of the product.

Applying antitrust principles to professional sports has been difficult. While teams in a league compete against each other on the field, the teams are all part of the same league. A strong argument can be made for agreements which create uniform rules, uniform ticket prices, revenue sharing within the league, and geographic control over where teams play. Also, although the players in many sports have successfully challenged contracts which bind them to clubs for long periods of time, an argument can be made that a system which limits a player's ability to transfer from team to team is essential for the total growth of the sport.

If leagues did not have some control over television revenue, the share of gate receipts, and player mobility, it is entirely possible that the game as a whole would suffer. Both the owners and players recognize that limiting competition in the business aspect of sports improves competition on the field. The key to understanding this position is the concept of competitive balance. In order for a sport to be successful the teams must be relatively evenly matched. It simply is not very exciting to watch a game where one side is beating the other by a lopsided score.

If teams were allowed to compete without any league effort to control competition, the wealthier teams might soon dominate the sport. They'd buy up all the contracts of the better players, and a cycle would be created where the rich would get richer and the poor would get still poorer. The wealthier teams would most likely be located in the largest cities, whose populations would purchase more tickets and provide larger television markets. Fans in the smaller cities would lose interest, and perhaps total fan interest would drop as a result of a small number of teams dominating the sport.

In an effort to provide balance, the leagues have found a variety of ways to divide revenues among all clubs and to limit the ability of players to move between clubs. The NFL, for example, shares television revenues equally between all clubs.

Interestingly, players in all sports have been willing through the collective bargaining process to limit somewhat their free agency or ability to transfer between clubs. They have negotiated limits on free agency because they recognize that the arguments concerning competitive balance are valid. They have been willing to negotiate much of free agency away to insure competitive balance and to secure higher salaries for the group as a whole. They have not, however, given up free agent rights completely. Players in most sports may still become free agents every few years, which gives them an opportunity to bargain for significantly higher salaries periodically during their careers. —FK

The relationship of the two stories from an economic standpoint is even clearer. The Raiders' move to Los Angeles illustrates clearly the importance of money in sports. The Raiders' owners wanted to move to Los Angeles because they felt that playing in L.A. would be more profitable. They were willing to incur the wrath of Oakland city officials and fans as well as the anger of their fellow owners in order to enhance their profits.

Players who see the owners making large sums of money simply want their share of the action. They contend, with a great degree of justification, that the game cannot be played without their talents. The quality of the game and the appeal of the game to the fans depends primarily on their skills, their efforts in practice, and their willingness to risk injury.

Why Football Is Different

Professional football players probably need collective bargaining more than other professional athletes. First, football by its very nature is a team sport. While there are superstars in the game, individuals are generally less important than in other sports. Baseball, while also a team sport, provides greater opportunities for individual achievement. Pitching, hitting, and (for the most part) fielding are performed by individual players. A player can excel on an otherwise poor team. In football, however, in order for a player to stand out, his teammates must also play well. A quarterback or running back needs a strong offensive line. A passer needs good receivers. A defensive back needs a strong pass rush. The game simply requires that the players perform as a unit.

All but the most avid fans associate with playing units rather than individual stars. The Purple People Eaters of the Minnesota Vikings, the Doomsday Defense of the Dallas Cowboys, and the 1982 Super Bowl collection of Hogs, Smurfs, and Killer Bees are good examples.

And the individual athlete is less important in football for reasons other than the rules of the game. The typical playing career in football is only 4.3 years. Injuries can end a career at any moment. Teams must substitute regularly and must be prepared to replace injured players at any time throughout the season.

The teams carry large rosters of players and have several more in reserve on taxi squads, and the very size of the team works against individual importance. In basketball one player in five can make quite a difference. One superstar on an otherwise poor football team won't make much difference.

Finally, a large number of potential players are generated each year from the nation's college ranks. The apparent success of the new U.S. Football League in fielding competitive teams points out the size of the available labor supply. All these factors tend to weaken an individual's ability to bargain for himself and encourage collective action.

The nature of the football business and the character of the owners also encourages unions. Baseball owners such as George Steinbrenner of the New York Yankees, Gene Autry of the California Angels, and Ted Turner of the Atlanta Braves are willing to spend millions signing free agent ballplayers, but football owners won't compete with each other for star athletes. In part, this is because individual stars are less important in the game. In part, it's because money is divided so evenly among the teams there is simply little financial incentive to seek high-priced free agents. The nature of the game minimizes the importance of one or two individual athletes and the economics of the game also reduces the importance of additional players. If a team is maximizing profits with the payroll it already has, why should it add expensive free agents?

The NFL players obviously are quite aware of the economics of the sport and have rightly focused on collective action. Although they did not achieve their principal goal of gaining control over 55 percent of gross revenues, they did make several important gains through collective bargaining in 1982. First and foremost, they demonstrated that the NFLPA was strong and that there was sufficient solidarity to sustain a lengthy strike. There was relatively little public sniping by the superstars who had the least to gain by the strike, and very few players were willing to cross picket lines. When you consider that the players gave up seven paychecks—approximately 10 percent of the paychecks a player will receive in a typical career—the support given to the strike becomes even more amazing.

The players were able to significantly increase the minimum wage. First-year players will receive a minimum of $30,000. The minimum salary increases with seniority up to $200,000 for the player with 18 years of experience. In another gain, players will receive severance pay when they retire. The severence pay increases with years of experience. For example, a four-year player would receive $60,000. This benefit is particularly important in the light of the likelihood of career-ending injury. And an individual player may now designate NFLPA as his representative in negotiating his individual contract. This provision may further enhance the power of the union if it is used by many of the players.

Power to the Smurfs

Many sports fans are upset by the strike. Record numbers of no-shows and unsold tickets at the close of the 1982 season are evidence of the fan rebellion. Both the owners and players are betting that the fans will soon forget the strike-shortened 1982 season (after all, baseball came back stronger than ever the season after its strike), but no one knows for sure.

If fans are truly disgusted with the growth of big money in modern spectator sports, their remedy is simple. They should quit watching. You can't maintain a spectator sport without spectators. Alternatives are available on a Sunday afternoon. Read a book, take a walk, or, for the really ambitious, try playing sports yourself.

Addicted fans who can't give up pro football will just have to forget about the business end of the sport and concentrate on the game. After all, that's what sports are all about anyway. Sports are to be an escape from the real world. The players and the game are what that should attract attention, not the revenues that the team is making or the salaries the stars are bringing down.

A new contract won't be negotiated until 1987. Labor peace will prevail for a while. Maybe it's time to sit back and enjoy the last story of the 1982 season—the Redskins march to the Super Bowl. Hail to the Skins! □

"Hi! I'm selling antibiotic insurance. . ."

NLRB as Referee

(Continued from page 33)

not violate the Act by instituting unilateral changes in matters which are permissive subjects of bargaining. (*E.g., Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 [1971].) That means, for example, if playing rules are permissive subjects of bargaining, sports leagues could change them without first bargaining with the union.

Of course, the problem that labor lawyers and negotiators always face in distinguishing between mandatory and permissive subjects is "that most matters that might be discussed in collective bargaining are likely to bear some relation, even if tenuous, to 'wages, hours, and other terms and conditions of employment'." (*NLRB v. Davison,* 318 F.2d 550 [4th Cir. 1963].)

On the other hand the Supreme Court recently reiterated in the *First National Maintenance* case that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." The Court emphasized that "[s]ome management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements" must be regarded as having "only an indirect and attenuated impact upon the employment relationship." They are not mandatory subjects of bargaining.

The NLRB Cases

The first major NLRB sports case touching on mandatory bargaining subjects was decided in 1973. It involved a charge by the NFLPA that the NFL Management Council had refused to bargain in good faith over the use of artificial turf—an increasingly popular type of playing surface. The NFLPA opposed the installation of artificial turf. It cited a study indicating that the turf—called "fuzzy concrete" by many players—might be responsible for an increasing number of football injuries. The union insisted that the council discuss artificial turf in collective bargaining.

While denying that it had an obligation to bargain about whether players played on an artificial surface or regular grass, the council did discuss the matter with the NFLPA and did not alter the status quo without first consulting with the union. In *National Football League Management Council,* 203 N.L.R.B. 958 (1973), (*enforcement denied on other grounds,* 503 F.2d 12 [8th Cir. 1974]), the NLRB concluded that, although artificial turf was a condition of employment and was a mandatory subject of bargaining, the council met its obligation of good faith bargaining.

Another aspect of this case involved an NFL rule which laid down a $200 fine for any player leaving the bench while a fight was in progress on the field. The Board, reversing the findings of an NLRB Administrative Law Judge (ALJ), held that the bench-fine rule had been imposed by the Commissioner under his long-recognized authority to impose fines for conduct detrimental to the game and need not have been the subject of bargaining with the union. The Eighth Circuit Court of Appeals reversed this ruling and held that, in fact, the rule had been unilaterally promulgated and implemented by the club owners, in violation of the Act. The impact of the court of appeals decision was that the bench-fine rule was a mandatory subject of bargaining.

Several years later, in the aftermath of the 1974 NFL players strike, an ALJ struggled with two alterations of NFL rules by NFL owners. The first was the "sudden death" overtime rule. That rule provides that if a game is tied at the end of regulation playing time, play should continue for one 15-minute period. If a team scores in that overtime period, that team wins and the game is over. The purpose of the "sudden death overtime" rule was simple: to eliminate tie games.

The second rule in question was the adoption of a new punt rule restricting most members of the kicking team from going beyond the line of scrimmage until the ball had been kicked. The purpose of this rule was to encourage more runbacks of punts.

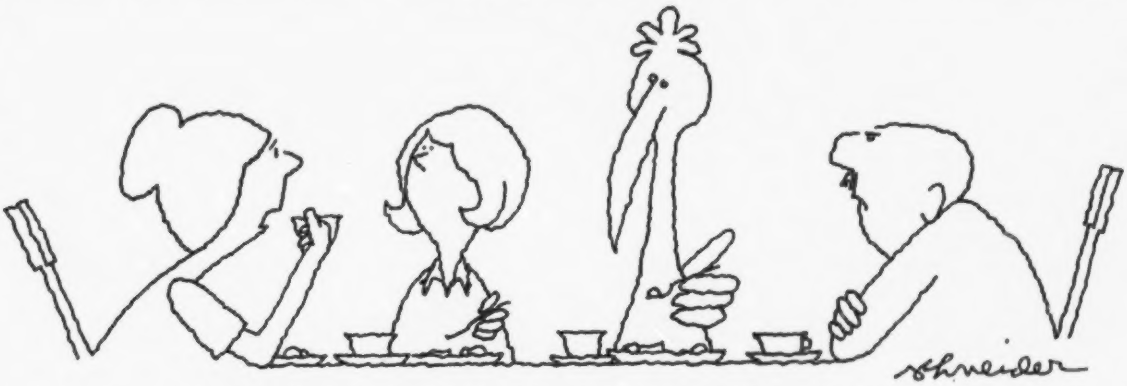
The NFLPA opposed both rules. The union contended that they subjected players to undue risk of injury. The union argued that these changes in playing rules were changes in working conditions which should have been discussed with the union beforehand.

On its side, the council argued that the playing rules were not subject to bargaining. In essence, the rules changes were the "design" of the game, similar to the design of a product, the interpretation of a symphony, or the choreography of a ballet.

The council, however, did invite the union to submit its views when the new rules were enacted before the 1974 season. Thus, the ALJ found that the council's offer to discuss the rules changes satisfied its "obligation to bargain in good faith" over the changes.

The ALJ also concluded, however, that the overtime and punt rule changes were mandatory subjects of bargaining since they might increase the possibility of player injury. Although he conceded that the council's position was "not untenable" since "[t]he basic form and direction" of the game was "unquestionably a creative function," the ALJ concluded that nothing "destructive of creative impulse [was] likely to flow from a decision requiring bargaining about a punt or sudden death rule. . . ."

The question of the mandatory or per-



"Actually, dear, when you said 'mixed marriage,' we naturally assumed . . . ."

"The doctor says you almost died, so we're canceling your life policy."

missive nature of the punt and sudden death overtime rules never reached the Board itself. The case was settled in 1977 when the NFLPA and the council reached a new collective bargaining agreement.

The Antitrust Cases

In sports, however, the most important decisions on mandatory subjects of bargaining have come not from the Board, but from the courts. Why? Because of the large number of antitrust cases in the 1970s brought by players. In these suits, the players argued that restrictions on player mobility between clubs were "illegal restraints of trade."

The most important of these antitrust cases was the *Mackey* case. (*Mackey v. National Football League*, 407 F. Supp. 1000 [D. Minn. 1975], *modified*, 543 F.2d 606 [8th Cir. 1976], *cert. dismissed*, 434 U.S. 801 [1977]). It involved, once again, the NFL and its so-called "Rozelle Rule," named after NFL Commissioner Peter Rozelle. In a nutshell, the Rozelle Rule permitted a player whose contract with an NFL club had expired to sign with another NFL club. However, the signing club was required to provide compensation to the player's former club. If the two clubs were unable to agree on satisfactory compensation, the Commissioner had the right to award compensation in the form of one or more players—including draft choices for players not yet in the league—which he deemed fair and equitable.

The purpose of the Rozelle Rule—like rules limiting total and unbridled freedom of movement in all sports—was to maintain competitive balance among NFL teams and to protect the clubs' investments in scouting, selecting, and developing players. The players and the union took the position that the rule impacted upon a player's right to play for the club of his choice and move from one club to another.

In *Mackey*, the key question involved an exception to the antitrust laws. This exception—known as the "non-statutory labor exemption"—basically insulates certain matters from antitrust attack when they are the product of bona fide arm's length bargaining and when the alleged restraint on trade primarily only affects the parties to the collective bargaining relationship. But, in the Supreme Court's words, the subject must be "intimately related to wages, hours, and working conditions." (*Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 [1965].) That is to say, a subject must be a mandatory subject of bargaining in order for this exception to the antitrust laws to apply.

In these antitrust cases, then, the position normally taken by owners and players on mandatory bargaining subjects was turned around. The owners contended that the restrictions *were* mandatory subjects of bargaining; the players contended the restrictions were permissive and/or illegal subjects.

Stated another way, the players attempted to use antitrust litigation as a sword in collective bargaining. They wanted the courts to declare that certain issues arising in bargaining were illegal, and thereby be relieved of all bargaining obligations on those illegal issues.

Although the district court in *Mackey* held, as the players contended, that the Rozelle Rule was an illegal and nonmandatory subject of bargaining, the Eighth Circuit Court of Appeals rejected that conclusion. Whether the rule was a legal, mandatory subject of bargaining, the court stressed, was a matter to be determined solely under federal labor laws, not antitrust laws. No federal labor principles operated to nullify the Rozelle Rule. And, since the Rozelle Rule operated to restrict a player's ability to move from one team to another and had an impact on player wages, the court concluded it was a mandatory subject of bargaining.

In a later case, the Eighth Circuit went even farther in approving a new form of compensation between clubs for players moving from team to team. In *Reynolds v. National Football League*, 584 F.2d 280 [8th Cir. 1978], the court concluded that "complete freedom of movement would result in the best franchises acquiring most of the top players. Some leveling and balancing appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades." Thus the subject of restricting player movement was "a proper one for resolution in the collective bargaining context."

The Sixth Circuit has since followed the Eighth Circuit's lead and held that the reserve system in the National Hockey League was a mandatory subject of bargaining and could be insulated from antitrust attack. The reserve system in question was a "modified Rozelle Rule." (*McCourt v. California Sports, Inc.*, 600 F.2d 1193 [6th Cir. 1979].)

And the district court of the District of Columbia has also indicated that the NFL college draft system is a mandatory subject of bargaining. (*See Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 743 [D.D.C. 1976], *aff'd in part and rev'd in part*, 593 F.2d 1173 [D.C. Cir. 1978].) Thus, the courts have been quick to decide sports issues when the parties could not, just as the courts do in other areas of labor law.

The Future

The new collective bargaining agreements in hockey, baseball, and football are good news for sports fans. For the next few years, labor peace and tranquility should reign. The focus of America's attention will again return to the exploits of players on the field, where it belongs. Sports will again assume its place as America's favorite pastime.

The new agreements also augur well for the next round of negotiations between players and owners in professional sports. The concilatory stance of both players and owners brings with it the hope that the labor disputes of 1981 and 1982 are indeed things of the past. All signs point to increased mutual respect and understanding. With this new outlook, the continued success of professional sports is assured. As the learned judge said, PLAY BALL! ☐

What's the Best Way of Determining Fair Pay?

Professional athletes have been willing to join unions but have been reluctant to embrace the underlying principle of collectivism. Most unions negotiate salaries collectively—auto workers doing the same work are on the same salary scale—but professional athletes have guarded the concept of individually negotiated salaries.

Individual salary negotiations pit the bargaining power of the individual against that of the club. In the sports field, like the entertainment field generally, the bargaining power of the individual is often substantial. The power of the individual athlete is reflected in the number of multiyear contracts which are renegotiated to keep the professional athlete content. There is a practical reason for this phenomenon—fans attend games not just to root their team to victory but to watch the running artistry of Walter Payton, the awesome dunks of Julius "Dr. J." Erving, or the excitement of a Ricky Henderson steal.

Bargaining in Sports

As a result, unions in sports tend to bargain collectively over other issues than wages. Athletes' unions seek expanded fringe benefits and greater control over working conditions for all players—journeymen to superstars—while the bread and butter of traditional unionism—wages—has been until recently essentially omitted from the bargaining process.

In baseball, the collective bargaining agreement specifies a flat minimum that all players, regardless of length of service, must be paid. The collective bargaining agreement also provides for salary arbitration covering players with certain seniority. The arbitrator must choose between the club's final offer and the player's final demand. He or she cannot split the difference. Arbitration, coupled with free agency, has had the effect of raising salaries dramatically.

Salary arbitration in baseball is held shortly before the opening of spring training camps. Both the player and the club present evidence concerning the value of the player. The arbitrator then selects one of the two figures. This procedure has created a significant practical problem for the clubs. At a time when a club's publicity people are hyping the teams and the players, and fan interest is high, a club must go into the arbitration and argue why the player is worth less.

Another problem with salary arbitration is deciding who the grieving player should be compared to. For example, should a player in his fourth year, when he is not eligible for free agency, be compared to a player who has gone through free agency?

Under the previous collective bargaining agreement in football, which expired in 1982, there was a specified minimum salary, as in baseball, but it went through essentially five years. The new football contract extends the salary minima out over 18 years. There was not, and is not, however, any provision for salary arbitration in football.

Bargaining Over Agents

As a corollary to the emphasis on *individual* salary negotiations in professional sports, players' unions have traditionally waived their right to be the exclusive representative of the players. Not only have the players been permitted to negotiate directly with owners, but they've also been permitted to retain their own agents. Many player agents perform a variety of services for the individual player. They negotiate salaries, file income tax returns, establish tax shelters, and even put players on an allowance.

Could athletes' unions act as agents? Could they both represent players who are seeking individual salaries and represent the players as a whole, who are seeking a basic wage structure? There is no case law precisely on point. But Marvin Miller, the recently retired Executive Director of the Major League Baseball Players Association, thinks a union may lawfully insist upon negotiating premium rates for individual players. He recently said in the *New York Times:*

> Baseball players deprived of a free market for their services may well decide that the most effective antedote to the loss of individual bargaining power is substitution of the bargaining power of the players as a group; in short, the negotiation of all salaries by the players' own organization. This does not mean the institution of a salary scale; it is within the area of practicality for the Players Association to represent each player in salary negotiations. Agents' fees for such services, carried on necessarily in a scattered unorganized fashion, approximate $7 million a year. For a considerably lesser sum, the Players Association in baseball could easily perform the job on an extremely effective basis.

In line with Miller's remarks, the NFL Players Association (NFLPA) will assume a greater role in individual salary negotiations under the new collective bargaining agreement in football. The agreement states that the "NFLPA or its agent" will negotiate compensation behalf of individual players. As a practical matter, this means that while salaries will continue to be determined on a player-by-player basis, the NFLPA will certify agents and play a far more active role in those salary negotiations than any union has ever played in professional sports. The NFLPA's increased participation should benefit both players and owners. Indeed, to flourish under this new arrangement as they have in the past, player agents may have to perform increasingly sophisticated personal and financial services for the athletes they represent.

—BSM

Oakland Move

(Continued from page 37)

to move to another city. "For example," she wrote, "if a rock concert impresario, after some years of producing concerts in a municipal stadium, decides to move his productions to another city, may the city condemn his business, including his contracts with the rock stars, in order to keep the concerts at the stadium?"

A similar result in New York City might allow that municipality to take over a hit Broadway show that was about to go on national tour and keep it in New York for the public purposes of civic enjoyment and boosting tourism.

To succeed in its suit, Oakland must now satisfy a trial court that the takeover would promote the public good. "Personally, I'm in a state of disbelief," said Howard Daniels, an attorney who represents the Los Angeles Coliseum, new home of the Raiders. "The decision lets a city take over a football club, just because the owners want to move it away." He said that even though there will be a new trial, the California Supreme Court decision, as a practical matter, decides the case.

There is a precedent for municipal ownership of a professional sports team in Visalia, California, which owns a Class A baseball team. While the NFL Constitution bars city ownership of a football team, Commissioner Rozelle certified to the court that the league would not object to a brief interim ownership before the city sold it to a league-approved, Oakland-based owner. Raiders' attorney Joseph Alioto accuses the NFL of conspiring with Oakland to get rid of Davis. He claims that Rozelle waived the NFL city ownership ban in return for the right to name the buyer to whom Oakland sells the team. The Oakland lawsuit, Alioto said, was instigated by the NFL.

Back to Congress

The NFL is not relying solely on the city of Oakland's suit against the Raiders. The football league has brought the battle to yet another front. As a result of the Raiders' lawsuit, the NFL has again gone to Congress to end certain coverages under the antitrust laws. More than a decade ago, Congress granted the league a limited antitrust exemption to permit it to negotiate television contracts for all its clubs.

"The litigation pursued in Los Angeles over the relocation of the NFL's Oakland Raiders franchise," Pete Rozelle told the Associated Press, "simply underscores what has been apparent for years—Congress must act to provide for the consistent and sensible application of antitrust rules to sports leagues." Rozelle said that uncertainty is created when the NFL cannot "assure that a team will stay in the city chosen."

The legislation sought would give professional sports leagues the right to prohibit a club from moving from a community where it has been operating successfully. However, even if Congress passes the NFL bill, it is up to the courts to decide whether the Raiders hail from Los Angeles or Oakland. ☐

Solid for What?

(Continued from page 29)

urged the NLRB to authorize the General Counsel to seek a Section 10(j) injunction against the management council. A 10(j) injunction is sought in federal district court and enjoins the party against whom it is obtained from committing specified acts, pending the Board's ultimate determination of whether the conduct complained of is in fact an unfair labor practice.

In an unprecedented move, because of the union's alleged *ex parte* communication, the Board permitted the NFL clubs to submit reasons why the Board should turn down the request for a 10(j) injunction. Normally the Board hears only from its own lawyer, the General Counsel, who is seeking the authorization. Thus when the General Counsel seeks such authority from the Board, the NLRB does not have before it argument from the other side as to why an effort to obtain a 10(j) injunction would be inappropriate. By attempting to influence the Board through an *ex parte* communication, the union created an opportunity for the council to argue against this injunction—an opportunity which would not have otherwise existed.

On November 15, 1982, after reviewing the positions of both the General Counsel and the management council, the Board by a 3 to 2 vote turned down its own lawyer's request for authorization to seek a 10(j) injunction. The NFLPA now faced the prospect of time-consuming proceedings before the Board and an uncertain result on its legal position. At this same time the NFLPA was beginning to take seriously the warnings from the clubs that if there was not a settlement soon, the 1982 season would be totally lost. The union knew that even if it ultimately prevailed before the Board, its victory would come too late to save the 1982 season. Accordingly, it became more realistic in its demands. Late on the following evening, Tuesday, November 16, 1982, a tentative agreement was struck between the parties under the auspices of Paul Martha.

Martha, a former Pittsburgh Steeler running back and now General Counsel to the San Francisco 49ers, had recently become actively involved in the negotiations in a mediator role at the request of Ed Garvey.

Wrapping It Up

The tentative agreement, ratified the following day by the clubs, continued the NFL's system of individual merit compensation. The 55% of the gross concept was dead. The clubs would continue to bargain individually with players and their now NFLPA-approved agents. The contract did contain two significant additions. A minimum salary schedule on a seniority basis was extended through 18 years of service instead of the five years provided for in the previous contract. Additionally, a percentage of the projected total amount to be expended by the clubs in player costs over the last four years of the agreement was guaranteed, with the precise terms of the guarantee to be negotiated at a later date. In terms of dollar commitment the final agreement did not vary significantly from the last prestrike offer made by the Council.

The final phase of the negotiations, until December 11, 1982, when the final documents were signed, consisted of the union seeking better terms than those which it had agreed to and the clubs clarifying certain language.

Did the strike have to happen? It might have been avoided had the union adopted a more realistic position at the outset. The initial demand for a percentage of gross revenues and the NFLPA's unwillingness to recede from this unrealistic position delayed meaningful negotiations for seven months. Furthermore, the negotiations were affected as much by what occurred away from the table as by the give and take of bargaining. The law was particularly important. The NLRB General Counsel prolonged the negotiations by his extraordinary press release and the Board itself provided a framework for settlement by declining to authorize the General Counsel to seek a 10(j) injunction. ☐

"Kill 'em!"

(Continued from page 5)

took the case to a grand jury and got an indictment against Forbes for aggravated assault with a deadly weapon. As it turned out, though, the jury could not agree upon a verdict and a mistrial was declared.

Enforcing Civility

Of course, civil actions for sports injuries may be brought regardless of the success of criminal actions. Civil suits are, in fact, brought far more frequently and have a greater chance of success, since the "preponderance of the evidence" standard of proof of a civil case is easier for plaintiffs to meet than the "beyond a reasonable doubt" standard in criminal actions. In the Forbes-Boucha incident, for example, after the jury failed to reach a verdict in the criminal case, Boucha filed a $3.5 million suit against Forbes, the Bruins, and the National Hockey League. The suit was ultimately settled out of court.

Many other civil lawsuits on violence in sports events have gone to trial, and so far the message from the juries has been crystal clear: extreme violence in sports is unacceptable.

In 1979 a federal court jury awarded Houston Rockets basketball player Rudy Tomjanovich $3.3 million in actual and punitive damages for disfiguring injuries he sustained from a punch thrown by Kermit Washington (then of the L.A. Lakers) during a 1977 NBA game. (The suit was brought against California Sports, Inc., the owner of the Lakers.) The jury found that Washington had acted as an employee of the Lakers and that the team had failed to train him adequately to avoid such violence. Knowing of his "dangerous tendencies," the club did nothing to prevent the violence which occurred. The jury deemed Washington's acts to be battery and a reckless disregard for the safety of another person.

Similarly, a federal jury awarded $850,000 last year to Dennis Polonich, formerly of the Detroit Red Wings, who suffered a broken nose, a concussion, and several cuts when Wilf Paiement, then of the Colorado Rockies, struck him with his hockey stick in October 1978. The decision marked the first civil penalty ever levied against a hockey player for violence on the ice, and the jury of five women and one man took only three hours to hand down the verdict (which included $350,000 of exemplary damages). The most alarming part of the judgement to some observers is that the Rockies' insurance coverage may only provide $500,000. If the appeals are unsuccessful, Paiement could therefore be personally liable for the rest. Bill Waters of Toronto, the agent for Paiement, says: "You can't buy personal liability insurance for an athlete. There is not adequate coverage for an athlete. It's going to change the game."

How Much Risk to Assume?

In many suits involving sports violence, the primary defense is "assumption of risk." This defense is not unique to sports. It is an old defense, derived from the common law, which may be used by defendants in any negligence suit who claim that the plaintiff knew about the danger and yet voluntarily exposed himself to it. If you know I'm a terrible driver and nontheless ride with me, then you've assumed the risk of an accident and probably can't collect if one occurs. The underlying rationale is that no one should be held liable for injuries that another essentially consented to.

But how can we apply this old principle to contact sports? For one thing, the player does not assume *all* risks. Courts have ruled, for example, that a person does not assume the risk of being hurt as a result of flagrant and intentional violations of safety rules. Consequently, a baserunner who purposely ran five feet outside of the baseline to smash into the second baseman found himself on the losing side of a court case (*Bourque v. Duplechin*, 331 So. 2d 40 [La. App. 1976]).

A federal appellate court reached an analogous conclusion in the now-famous case of *Hackbart v. Cincinnati Bengals*, 435 F. Supp. 353 (1977), *rvsd* 601 F.2d 516 (10th Cir. 1979). The plaintiff in the case, Dale Hackbart of the Denver Broncos, was a veteran defensive back in the NFL. Just before Hackbart was injured, Charles "Boobie" Clark, a rookie running back, had run a pass pattern on the right side of Broncos' end zone. The pass was intercepted by Billy Thompson, a Denver free safety, who returned it to mid-field. Hackbart's injury occured in the aftermath of this pass play.

Because of the interception, the roles of Hackbart and Clark suddenly changed. Hackbart, who had been defending, instantaneously become an offensive player, and Clark had to try to make the tackle. Acting as an offensive player, Hackbart attempted to block Clark by throwing his body in front of him. Afterwards, he remained on the ground and turned, with one knee on the ground, to watch the rest of the play. The summary of facts from the court case on the incident tells what happened next. Boobie Clark, "acting out of anger and frustration but without specific intent to injure," stepped forward and struck the back of Hackbart's head and neck with his right forearm. The force of the blow caused both men to fall forward to the ground. Both players, without complaining to the officials or to one another, returned to the sidelines since the ball had changed hands and new offensive and defensive teams took the field.

Since the officials didn't see the incident, no foul was called. However, the game film showed very clearly what had happened. Hackbart did not report the incident to his coaches or to anyone else during the game. Next day he felt so much pain that he couldn't play golf. He did not seek medical attention, but the continued pain caused him to report the injury and the incident to the Bronco trainer, who gave him treatment. Although Hackbart played the next two games, his usefulness was limited, and he was then released on waivers. He sought medical help, and only then was it discovered that he had a serious neck injury. Hackbart felt the blow shortened his career, as well as causing him pain and suffering, so he sued Clark and the Bengals.

Though Clark admitted that the blow had not been accidental, the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game. The court recognized that many fouls are overlooked, that the game is played in an emotional and noisy environment, and that incidents such as the one in this case are not unusual. Indeed, said the court, the very character of professional football suggests that a player's conduct can't be judged by standards of reasonableness.

The court also said it was wrong to apply personal injury law to professional football, noting the unfairness of holding that one player has a duty of care for the safety of others. According to the court, the concepts of assumption of risk and contributory fault applied because as a professional football player, Hackbart had been trained to disregard injury to himself and opposing players. Hackbart had in effect accepted the risk that he would be injured by an opposing player during an emotional outburst.

Finally, the court ruled that earlier cases which had imposed liability did not apply because, since they involved injuries in amateur contests, their theory of recovery depended on the notion that players had a duty to each other, and thus an objective standard of conduct could be derived, based on what a hypothetically reasonable and prudent person would do in a given situation. This was not applicable in professional football, since training does not include regard for safety of others. The court held that professional football must regulate itself.

On appeal, the Tenth Circuit reversed, holding that tort principles are not suspended simply because an injury takes place during a game, even a professional football game. The court looked to recklessness, rather than assault and battery, as the proper basis for liability.

Although acts of violence might be common in other professional games, the court added, this was irrelevant to the present inquiry. Noting that the trial court went beyond the evidence in determining "that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn," the appellate court took the view that this was not a proper issue for determination and that "the plaintiff was entitled to have the case tried on an assessment of his rights and whether they had been violated" (601 F.2d at 526).

Though the appellate court sent the case down for a retrial, it never came to court again. The Bengals and Hackbart agreed on a settlement.

"I Didn't Mean It"

A new trend is also emerging for *nonintentional* injuries that athletes cause by failing to act reasonably in a given situation. Away from the sports arena, the key to liability is usually how foreseeable the risk of injury was. If it was a pretty clear possibility and you did nothing to forestall it, then you may be liable. So if you didn't shovel snow off your sidewalk and someone falls, watch out, but if a piece of the roof blows off without warning and hurts someone, you may be in the clear.

This standard means that if the player who commits the action that led to an injury should have foreseen that someone would be hurt, he may be liable. The same question, pretty much, is pertinent on the other side. How foreseeable was the injury from the injured player's perspective? Sports are inherently risky anyhow, and courts recognize that opponents may not always adhere to the rules. The idea is that since it is reasonably foreseeable that in the heat of action some procedural and safety rules will be broken, players effectively consent to the risk of injuries caused by rule infractions.

A much-publicized Illinois decision has apparently put a kink in these traditional concepts, and courts sometimes refer to this case to express their opposition to sports violence. The case, *Nabozny v. Barnhill*, 332 N.E.2d 258 (Ill. Appl. 1975), began when two amateur soccer teams of high-school boys squared off one afternoon. Julian Nabozny, the goalkeeper of a Winnetka, Illinois, soccer team, was severely injured when a forward from the opposing team rushed towards him while he was crouched in the penalty area hugging the ball to his chest. The forward did not turn away and accidentally kicked Nabozny in the head, causing a fractured skull and permanent brain damage.

The appellate court ruled for Nabozny on the theory that players have a legal duty to every other player on the field to refrain from conduct that is forbidden by safety rules, as long as (1) all teams involved in an athletic competition are trained and coached by knowledgeable personnel; (2) a recognized set of rules governs the conduct of the competition; and (3) safety rules are included which are essentially designed to protect players from serious injury (e.g., in *Nabozny*, the *Federation Internationale de Football's* rule prohibiting any contact with the goalkeeper in the penalty area.) Thus athletic participants will be liable for injuries they cause if their conduct is either "deliberate, wilful or with a reckless disregard for the safety of another player." *Nabozny* and its progeny (see, e.g., *Oswald v. Township High School District No. 214*, 406 N.E.2d 157 [Ill. App. 1980]) are important because they point out that even though players assume the *normal* risks of the sport, they do not assume the risks of unintentional but *negligent* conduct.

Statutory Control

Despite these well publicized cases, there is more and more violence in sports, and it does not seem to be deterred by court actions. Some influential people think that the federal government should intervene.

The most interesting of their suggestions came in 1980 in the form of a proposed bill to Congress co-authored by attorney Richard Horrow, chairman of the ABA Task Force on Sports Violence, and Representative Ronald Mottl (D-Ohio). Basically, the "Sports Violence Act of 1980" would have barred excessive violence during professional sports events and imposed penalties of a $5,000 fine and/or one year in jail for violations. "This bill seeks to draw a line between the kinds of natural physical contact that are a normal part of any rugged physical

S
SCHWADRON

"My parents are staying together for my sake. I just signed a multimillion dollar pro basketball contract."

sport, and the kinds of vicious, dangerous contact that a civilized society should brand as criminal, whether it occurs inside or outside the sports arena," said Mottl. "You can play rough and hard, but you cannot play to deliberately or recklessly hurt someone."

The bill would have made a player liable only if the alleged act fit six criteria:

- It is inflicted in circumstances that showed a definite resolve to harm another, or negligent, reckless, deliberate or wilful disregard for the safety of another;
- It is in violation of a safety rule of the game designed to protect players from injury;
- It occurs either after play is stopped or occurs without any reasonable relationship to the competitive goals of the sport;
- It is unreasonably and excessively violent, and beyond the generally accepted nuances and customs of the particular sport;
- It could not have been reasonably foreseen by the victim as a part of the normal risk in playing the sport; and
- It results in contact that causes a significant risk of serious injury to the victim.

Some of the most publicized sports violence acts might not fit all these criteria, Horrow has noted, and prosecution might occur only once or twice a year, if at all. However, he favors the "symbolic effect" that would follow if the federal government took a strong stand on the issue. "It will make the game safer for everyone," he said. "This defines unnecessary violence, while the present law is confusing."

Horrow contends that athletes, former athletes, player representatives, and player associations would benefit from a statute that would symbolically criminalize the most repugnant conduct. He also points out that society as a whole would benefit because young athletes and sports fans who look to professionals for examples "must be taught that repugnant violence is intolerable and illegal." No segment of society, says Horrow, can be licensed to break the law with impunity. As he puts it, "The operation of the law does not stop at the ticket gates of any sporting event."

Despite all the publicity it gained, the bill never left the House Judiciary Committee's subcommittee on crime. Several congressmen complained that in light of important pending legislation, the proposed Sports Violence Act was totally frivolous. Others rejected it as an unnecessary expansion of federal criminal jurisdiction into an area that could adequately be handled by state laws.

In addition, NFL Commissioner Pete Rozelle, NHL President John Ziegler, NBA Deputy Commissioner Simon Gourdine, North American Soccer League Commissioner Philip Woosnam, and James Reynolds of the Justice Department all spoke in opposition to the bill. The commissioners, and Baltimore Orioles General Manager Hank Peters, representing Baseball Commissioner Bowie Kuhn, were unanimous in their view that each sport has the means within its rules to police violence.

Looking Ahead

As with all socio-legal problems, the legal questions related to sports violence are easy to identify but difficult to address. Few would disagree that violence in sports is bad, but how can the problem be solved? Whether we devise new approaches to train young athletes, develop stricter game rules against excessively rough conduct, or continue to rely on the law to deal with violence in sports, the games and everyone involved in them will lose out unless something is done about excessive violence. □

Women's Sports

(Continued from page 19)

jumped from $7,366 in 1971 to $1.8 million in 1982. In 1970-71, 300,000 women (constituting 7.4% of all members of high school athletic teams) participated in interscholastic sports. That proportion increased in 1980-81 to 31.7%, and the number of female participants increased to 1,853,789.

Cheatum attributes the progress "implicitly and explicitly to Title IX." As Ann Northrum put it in *Ms. Magazine* (Sept., 1979): "Progress like this is reported everywhere, evidently out of fear that [the federal government] might someday exercise the power and actually take away sorely needed federal dollars from some schools."

At its annual convention in 1981, the NCAA decided to sponsor women's championships in nine sports beginning in 1982. *Newsweek* magazine attributed this move to a $1 million NBC television deal in 1979 to broadcast such championships as women's basketball and swimming. In *Newsweek*'s words, "the TV deal highlighted the progress that women's athletics have made under Title IX."

Women's Sports Matter

Title IX reached its tenth anniversary in 1982. It has grown, changed, progressed, and digressed in that decade, but through it all its effect has been significant.

Title IX's importance is far greater than mere equality for equality's sake. Many have long considered athletics to be a meaningful part of a young man's education. Sports develop competitive skill, discipline, and a sense of confidence which men take with them when they graduate.

The United States Supreme Court in 1872 agreed that Illinois could deny Myra Bradwell a license to practice law because she was female. Justice Bradley, in his concurring opinion, stated, "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." Sandra Day O'Connor took a seat on that Supreme Court 109 years later, evidencing the evolution of social thought on women's fitness "for many of the occupations of civil life."

Much of society now recognizes that women, as well as men, have a place in all areas of the human social structure. Women must, therefore, be allowed the same opportunities as men to prepare for this responsibility. Kathryn Clarenback, Professor of Political Science at the University of Wisconsin, says that athletics is a key to preparing women. "Women who have had the regular experience of performing before others, of learning to win and to lose, of cooperating in team efforts, will be far less fearful of running for office, better able to take public positions on issues in the face of public opposition. By working toward some balance in the realm of physical activity, we may indeed begin to achieve a more wholesome, democratic balance in all phases of our life." □

Exploitation

(Continued from page 9)

pose severe punishment against those who encourage violation of the rules by doctoring transcripts, abusing the core curriculum requirements, or in any otherway evading the clear requirements of the standards.

I would also suggest, as others have, that colleges and universities give some consideration to adding a major degree in "Athletics" for those student-athletes who attend school on athletic scholarships or play varsity sports. If you analyze this suggestion rationally and practically, it is not as radical as you might assume. Many fine institutions offer degrees in Physical Education and Health, Recreation and Sports Studies. Students obtaining such degrees must satisfy minimum academic requirements before graduation. Why wouldn't a similar degree in Athletics be feasible, assuming these students would have to meet the same minimum academic standards?

I recognize that such a degree would be open to a limited number of student-athletes. But selectivity is a part of graduate school, law school and medical school. Only those possessing the requisite skills and aptitudes can be admitted. Let's be realistic—everyone can't be a neurosurgeon or practice before the Supreme Court. By the same token, everyone can't run 100 meters in 10 seconds, make a vertical leap of 40 inches, or break par regularly.

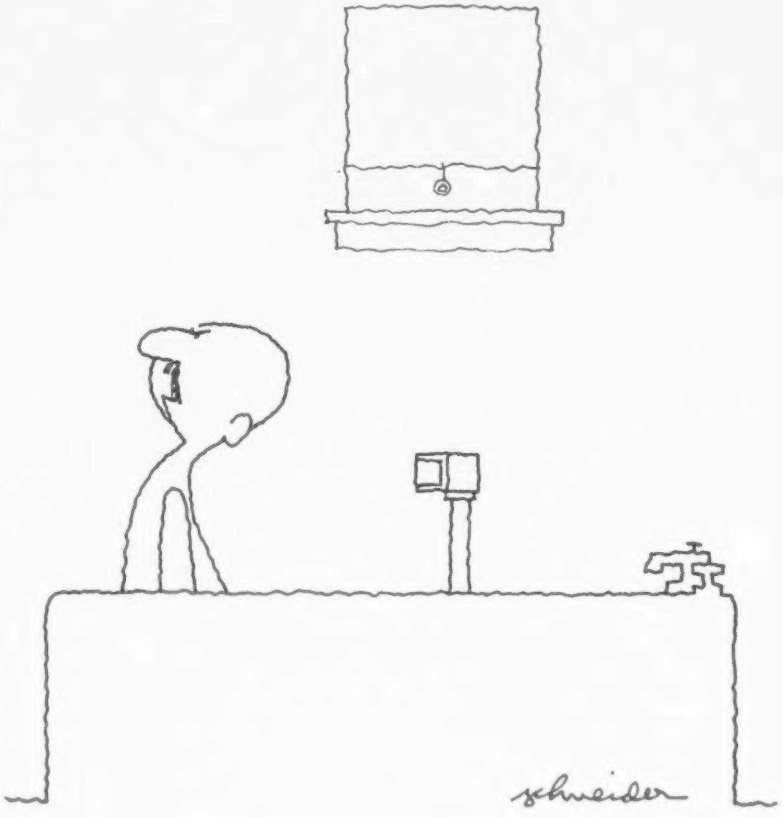
If the purpose of higher education is to prepare students to pursue their chosen occupation and to become financially self-supporting, why should student-athletes be discriminated against? My suggestion would reduce the opportunities for educational exploitation, while legitimizing the athlete as a co-equal citizen in our society. It would also acknowledge what almost everyone already knows—that professional athletes generally demand better starting salaries than most of their contemporaries. Why should it be legitimate for schools to prepare some students to be engineers but illegitimate to help other students be professional athletes? Finally, the athletic major would tend to diffuse the hypocrisy that currently exists in many colleges and universities around the country. Why should a student receiving an academic scholarship for possessing exceptional intellectual skills be considered more worthy than a student-athlete receiving an athletic scholarship for possessing exceptional physical skills?

Educational exploitation of student-athletes will continue unless society or the courts demand otherwise. Only the hopelessly naive believe that the future will bring a perfect educational system, where all problems confronting the student-athlete will be solved. Coaches will still want to win, athletic directors will still want to sell every seat for every sports event, and alumni will still want the star athlete to go to their school. Competition will continue to be keen, as it should be.

Law-related education has proven that we can teach students and teachers about the legal system. Perhaps the time has arrived when we should begin teaching that student-athletes do not have to be exploited in order to have a successful athletic program, that they can be both students and athletes.

The goal of education has been, and should continue to be, to help every student attending school—regardless of background, economic status, race, sex, or national origin—to reach a basic minimum competency. Whether we like it or not, the failures of that system are most often illuminated when the marginal student is an athlete of above average physical skill and development.

Teachers, coaches, and administrators must continue to emphasize academics to student-athletes, not only to meet their charge to society but to aid students in their quest for continuing personal development, whether as students, athletes or both. The new standards of the NCAA, as well as the militancy of athletes who are willing to go to court to protest their lost opportunities for a true education, should help educators do the right thing. □



"Ethel, call the Pentagon and tell them the Russians are at it again!"

Cable TV

(Continued from page 41)

with the live gate proceeds in some leagues? And how can territorial exclusivity be maintained in the face of tenuous antitrust immunity which clearly did not contemplate the development of cable television?

Control of cable television rights was one of the issues in the antitrust suit filed against the NCAA by the University of Oklahoma and the University of Georgia. Last September, in a landmark decision, a federal district court judge ruled in favor of the two schools on a number of counts and held that the NCAA had "commandeered" the cable rights of the schools. Responding to the decision, the NCAA predicted it would result in "anarchy" and would mean the end of national network telecasting of college football.

These disputes may involve parties other than the leagues, amateur associations, the individual teams and the various television interests. Professional players union are eyeing a share of cable and pay TV revenues—revenues which may, in time, far exceed those obtained from the current lucrative broadcast television network contracts.

Cable companies are often not content to buy just a team's television rights. In some instances, they decide to buy the team itself. Warner Communications, which already owns the New York Cosmos soccer team, announced recently that it has agreed to buy 48 percent of the Pittsburgh Pirates baseball team. Warner and American Express own the cable system in Pittsburgh and have already signed a five-year agreement to carry 60 Pirate games a year and to purchase 100,000 tickets annually. Warner is also helping defray the costs of maintaining Three Rivers Stadium, where the Pirates play their home games.

These relationships have spawned legal complications. A cable system in Tulsa, Oklahoma, has filed a $5.7 million lawsuit against a Dallas, Texas, sports network for breach of contract. The cable system claims that the network has failed to provide the service promised, which includes telecasts of Texas Rangers baseball games. Complicating matters is the fact that the owner of the network also owns the Rangers and has reportedly sold the cable rights to another cable company.

In New York, an antitrust suit has been filed by a Long Island cable operator who claims that a competing cable company is trying to drive him out of business by obtaining the exclusive rights to a package of five New York and New Jersey professional teams and refusing to deal with him. The complainant alleges that the competing company has made the package available to other area cable systems and that the telecasts are essential to the viability of his system.

Another County Heard From

Then, too, there are the arena owners. Up to now, most cable packages have been assembled by teams or by arena owners who also happen to own the teams that play in those arenas. The best known of these packages is put together by Madison Square Garden (MSG), which owns the NBA New York Knicks and the NHL Rangers. MSG has sold its package, which also includes other events at the Garden, to USA Network. In Los Angeles, Jerry Buss, who owns the Forum, the NBA Lakers, and the NHL Kings, has sold a TV package to a local pay television group. And the owners of the Spectrum in Philadelphia have built a package around the Flyers hockey club, which they also own.

Earlier this year, the New Jersey Sports and Exposition Authority, which operates the Meadowlands Sports Complex, indicated that it was interested in putting together its own cable network. Presumably, the Authority would rely on college sports, horse racing, tennis tournaments, rock concerts, and other special events held in the Complex as the staples of such a network.

But the Meadowlands is also home to the New York Giants of the National Football League, the NBA New Jersey Nets, the NHL New Jersey Devils, the Cosmos of the North American Soccer League, and the New Jersey Generals, the New York entry in the new United States Football League. The potential exists for a very attractive package involving these professional sports too, especially now that the Generals have snagged Georgia star Herschel Walker. However, the individual teams—or the leagues involved for that matter—probably won't allow the Authority to negotiate cable rights for their games. If the Authority requires the teams to surrender those rights as a condition of their leases to use the facility, a messy legal situation is likely to arise.

The argument is often made that pay television hurts marginal teams, but, ironically, the weaker teams might benefit by having their games packaged by the Authority rather than attempting to sell them on their own. For example, the Devils must compete in a television market where the Rangers and Islanders are already well established.

Even where teams are not required to give up their rights to cable revenues, they may be required to share the revenues with stadium and arena owners. Under many leases, the rent is a percentage of gross receipts at the box office. But what about teams that extend the "box office" into the home by using pay television? Stadium and arena owners may want to share those revenues, especially since the fan who can watch at home is less likely to buy a ticket. And what about a situation where the stadium or arena had been built with tax breaks from local governments? Can these governments claim a portion of the pay TV revenues or extend their entertainment tax to include the electronic box office?

Even High School Games

The issue of who controls—or should control—television rights is not a new one. However, the emergence of cable and other forms of pay television as lucrative outlets for sports programming is forcing renewed debate and may well result in new arrangements among all of the contending parties.

Despite this welter of complex legal questions and the often bitter disputes between the cable and sports industries, both have benefited from their relationship. The sports world knows the importance of cable. Realizing how important television exposure and revenue was to the old American Football League in the 1960s, the new USFL picked the head of ESPN, Chet Simmons, to be its first commissioner. One of his first tasks was to negotiate the league's television contract with ESPN.

And cable is likely to become even more dependent on sports as its need for popular programming increases. The appeal of sports programming seems to be unlimited. While locally produced cable programming has not generally attracted many viewers, cable systems in Massachusetts recently reported healthy advertising revenues from the cablecast of a traditional Thanksgiving Day high school football game.

And while the relationships surrounding cable and sports are contentious, the legal complications have spilled over into viewers' lives. According to one cable trade magazine, a man in Austin, Texas, recently confessed that his wife had divorced him because "I just watched ESPN all the time. . . . I mean *all* the time." □

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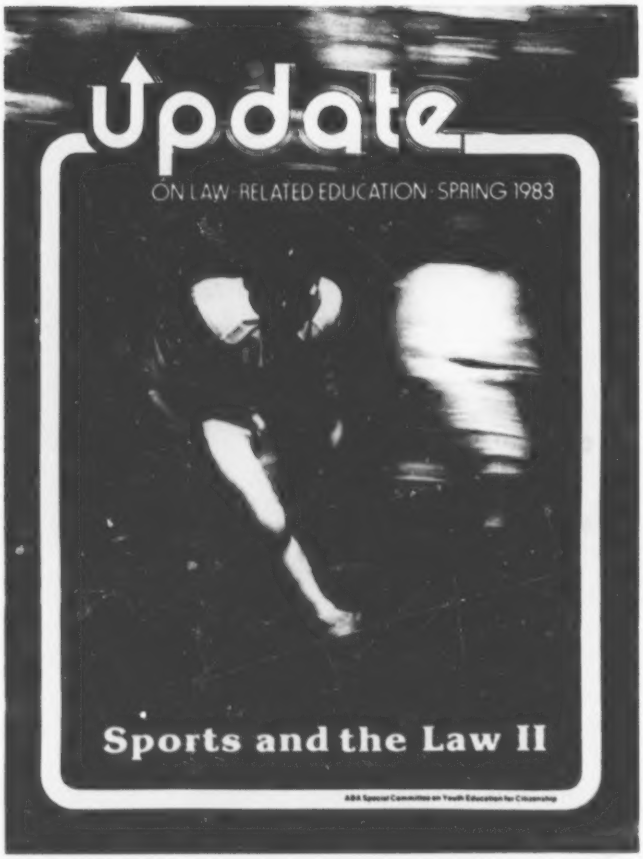

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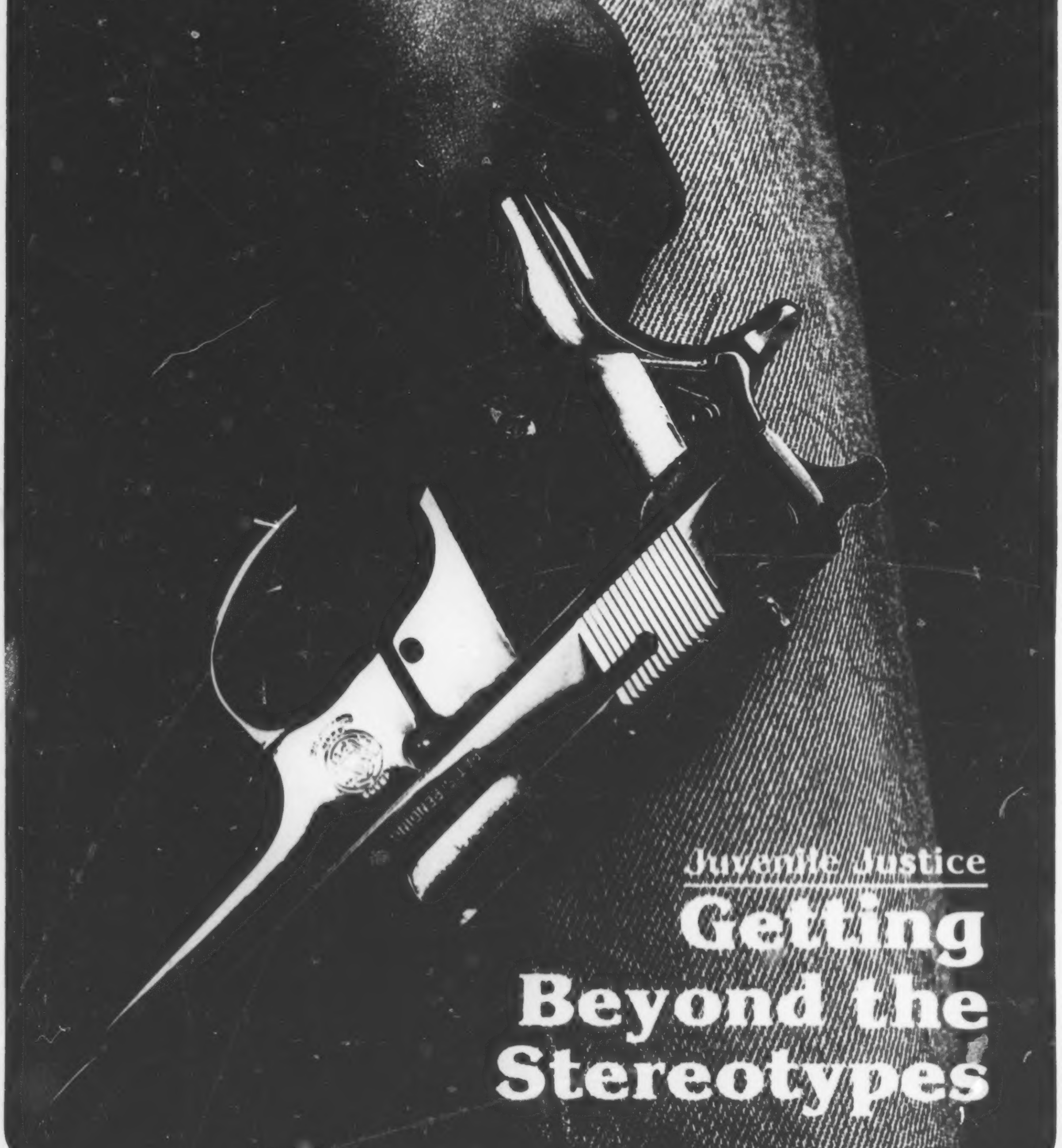

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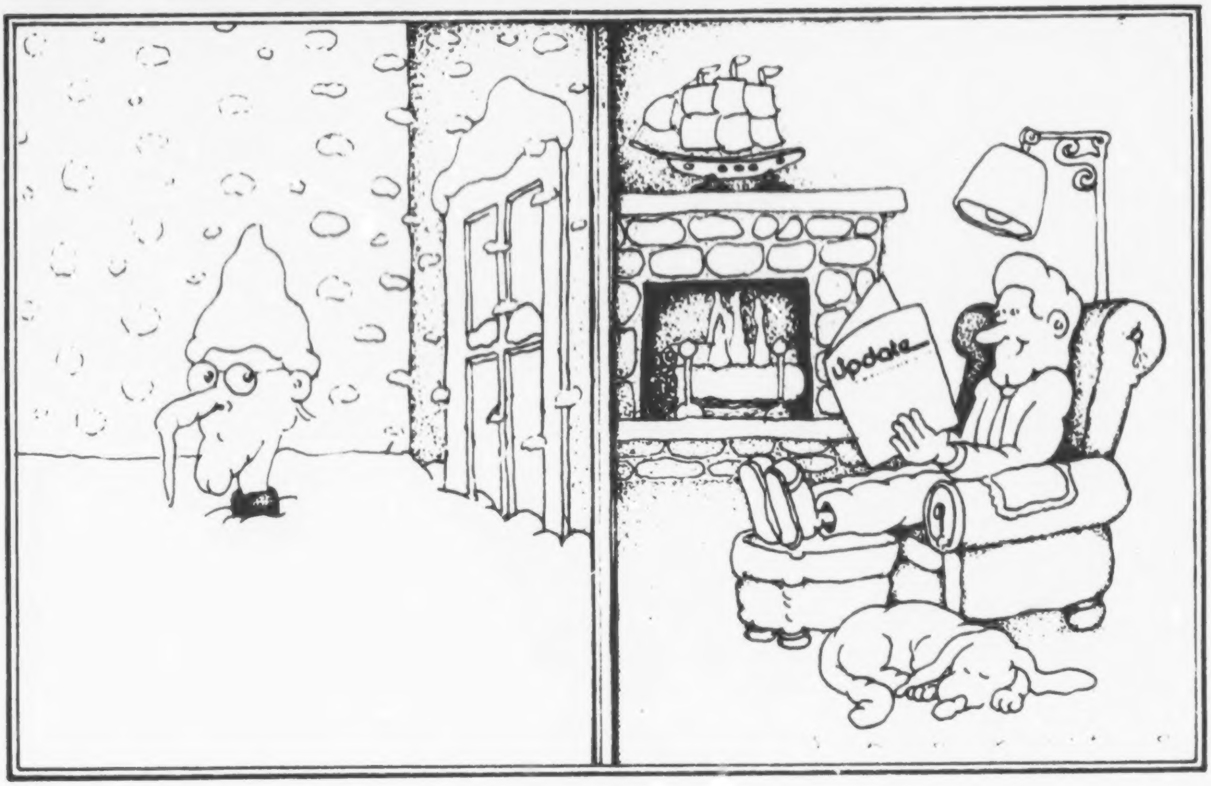

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contents

Volume 7, No. 2, Fall 1983

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2
Kids and the Law
Once an Adult, Always an Adult

6
Kids and the Law
When Tortured Children Strike Back

12
Classroom Strategies
The Ins and Outs of Juvenile Crime

18
Kids and the Law
Aging Youngsters Before Their Time

Chapters 1-37
GENERAL PROVISIONS TO COURTS
STATE BAR ASSOCIATION EDITION

22
Kids and the Law
New Ideas for Disturbed Youngsters

26
Kickoff
Playing with Pain

32
Curriculum Materials
The Rite of Autumn

36
Court Briefs
Searches, Sex Discrimination, Sentences, and More

42
Sports and the Law
Is the Law Ruining Sports?

cover by Herbert Jackson

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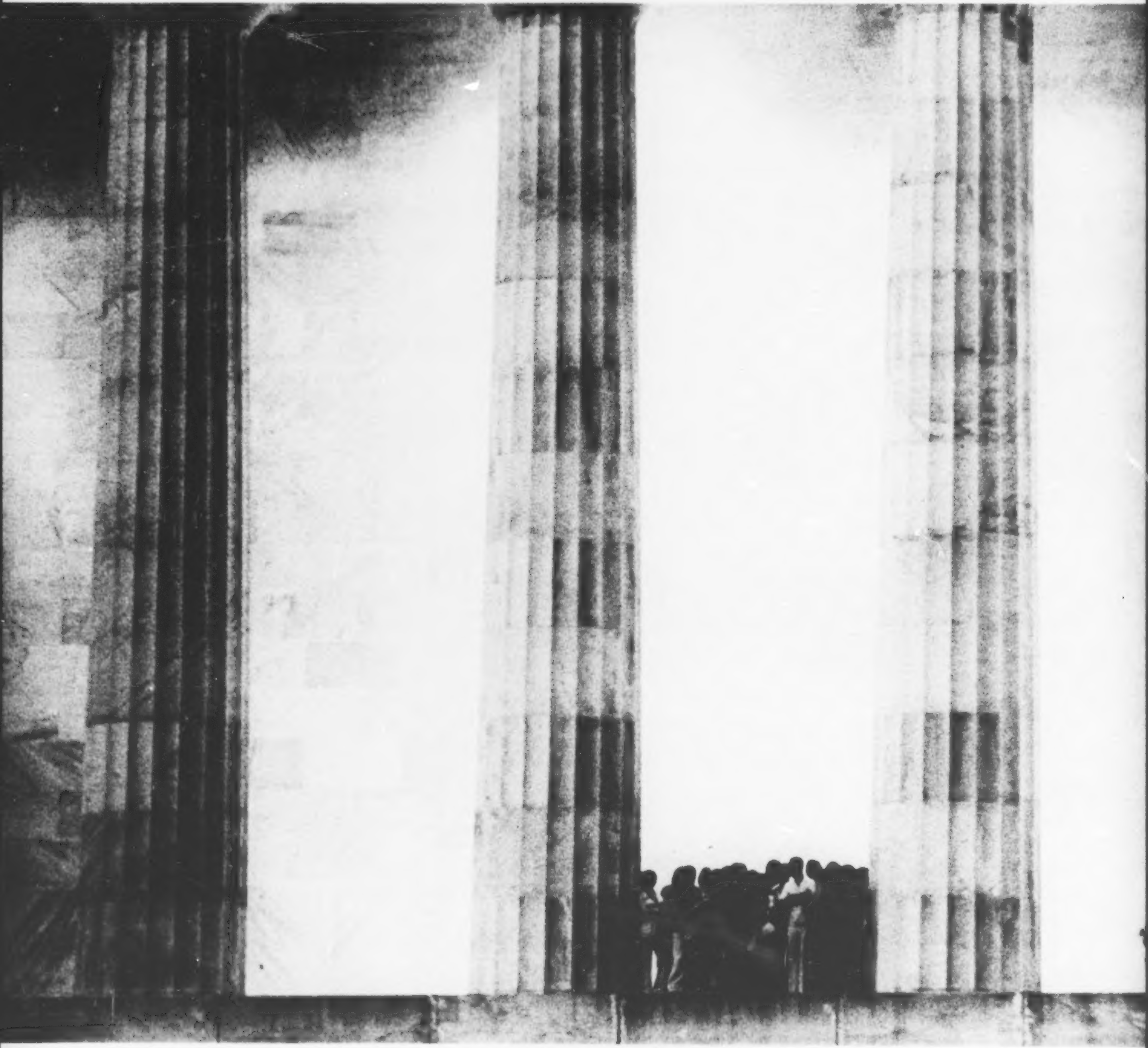
Once an Adult, Always an Adult

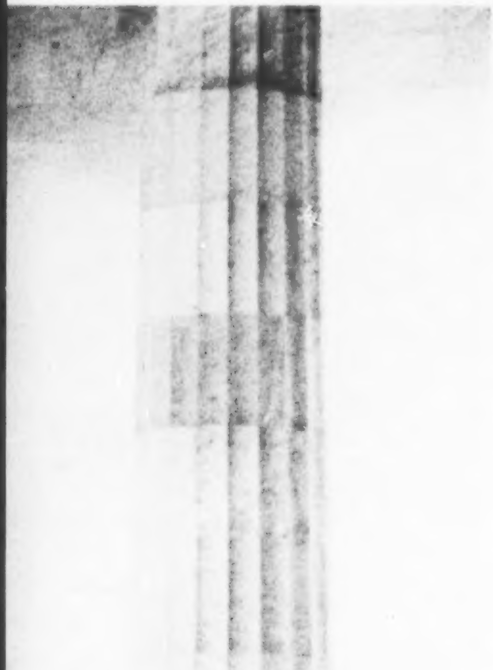
Recent cases show that the Supreme Court won't back down from giving kids the due process protections once reserved for adults



1231

Robert Clayman

In the early days of Anglo-American law, children were considered a form of property and were typically dealt with harshly for even the most minor offenses. Though conditions gradually improved for youngsters, historically state legislatures and courts were given relatively free rein in their treatment of juveniles. Until 1967, the Supreme Court gave tacit approval to the states' attitudes toward juveniles by avoiding the issue of a juvenile's constitutional rights. *In re Gault* changed all that. At the same time that our nation's youth gained the right to vote at the age of 18 and were being drafted to fight in the Vietnam War, the Supreme Court agreed to consider whether juveniles have some of the due process rights of adults.



John Neubauer

Along with *Gault*, *Kent v. U.S.* (1966), *In re Winship* (1970), and *McKeiver v. Pennsylvania* (1970) opened state juvenile court proceedings to many of the same due process protections afforded adult defendants. For the first time in history, juveniles were given the right to appointed counsel, the right to confrontation of witnesses, the right to notice of charges, double jeopardy protections, and a standard of proof equal to proof beyond a reasonable doubt. Today, all standard due process rights, except the right to a jury trial, are viewed as protected for juveniles, by the Bill of Rights and the Fourteenth Amendment.

Ironically, as the legal system has moved to accord youth their due process rights, the distinctions between juveniles and adults have become blurred, and many of the protections built into the juvenile system are being ignored or contested. The courts are unresolved about many issues. For example, when a 16-year-old is convicted of a capital offense, should the court be required to consider his youth and family background as mitigating factors in sentencing? Are there instances in which juveniles should not be shielded from pretrial publicity? Should a young rape victim be protected from the media during her testimony? Do the police have to stop questioning a juvenile who asks to speak with his father or his probation officer, rather than to a lawyer? What happens when a mother gives the police permission to arrest her son? Finally, what courts are responsible for making decisions such as these? A look at some recent Supreme Court decisions shows the Court grappling with these questions.

Sixteen, Facing Death

On April 4, 1977, 16-year-old Monty Lee Eddings shot and killed a highway patrolman. With that act, young Eddings effectively ended his adolescence and started a controversy that ended only with a Supreme Court ruling in 1982.

At the time of the killing, Eddings was running away from his brutally violent father. He'd stolen his brother's car and three guns from his father; one of the guns was a shotgun with a barrel that the youth shortened to make it more lethal and easier to conceal. With his sister and two friends in the car, Eddings headed for Oklahoma City. After stopping to pick up a hitchhiker and some food, Eddings dropped a cigarette as he drove back onto the highway, which caused him to lose control of the car. A witness reported his erratic driving to the Oklahoma Highway Patrol.

When told by one of his passengers that he was being followed by the police, Eddings reportedly replied, "If the F—— cop harasses me, I'll shoot him." The passengers took it as a joke. It wasn't. Within minutes, Officer Crabtree was dead from a shotgun blast fired by Monty Lee Eddings.

Eddings was captured and charged with first-degree murder. The juvenile court found that there were "merits to the complaint and that Eddings was not amenable to treatment as a juvenile." So Eddings was tried as an adult, which made him eligible for life imprisonment or the death penalty.

There was no jury trial. Through his lawyer, Eddings entered a plea of nolo contendere, which is equivalent to a guilty plea. Under Oklahoma law, after a defendant is convicted of a capital offense, the court is required to hold a separate proceeding to determine the sentence. During this proceeding the court is to consider all aggravating and mitigating factors.

The trial court found, and the Oklahoma Appeals Court agreed, that in the case of Monty Lee Eddings, the murder fit the definition of "especially heinous, atrocious or cruel, that the crime was committed for the purpose of avoiding or preventing lawful arrest, and that there was a probability that the defendant would commit criminal acts of violence that constitute a continuing threat to society." At this point, Eddings's lawyer brought in the expert testimony of psychiatrists, sociologists, and social workers, who reconstructed the youth's life for the judge.

According to their testimony, Eddings was not provided with any "supervision or guidance" for the nine years he lived with his alcoholic mother after she and his father separated. At the age of 14, totally out of control, he went to live with his father, who "overreacted and used excessive physical punishment," a probation officer reported. Considered an incorrigible child by both his parents, Eddings became frightened, bitter and angry. A chronic runaway, he also became involved in several violent incidents—both as an offender and as a victim. Soon after the murder, he was heard to say, "I would rather have shot an officer than go back where I live."

The psychiatrist who testified at the sentencing hearing told the judge, "I believe that given the circumstances and the facts of his life, and the facts of his arrested development, that [Eddings] acted as a seven-year-old seeking revenge and rebellion. . . . [H]e did pull the trigger, he did kill someone, but I don't even think that he knew that he was doing it."

"Eddings would no longer pose a serious threat to society," said the psychiatrist, if he was given psychotherapeutic treatment over a 15- to 20-year period. However, the sentencing judge ultimately decided not to consider this evidence. Although he took the defendant's youth into account as a mitigating factor, the judge found that it did not outweigh the aggravating circumstances and sentenced the sixteen-year-old boy to death.

The Oklahoma Supreme Court agreed with the lower court and upheld the death sentence. However, his lawyer continued to use every avenue of appeal and, on January 19, 1982, the U.S. Supreme Court handed down its decision in *Monty Lee Eddings v. Oklahoma* (50 L.W. 4161), a holding that brought Eddings one step closer to a life sentence.

Justice Powell, delivering the opinion of the Court, used the rule stated in another death penalty case, *Lockett v. Ohio* (438 U.S. 586 (1978)). The Court ruled in part that "the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . as a basis for a sentence less than death." The Court declared that family background and emotional instability are particularly relevant, especially when the defendant is sixteen-years-old. "It is a time and condition of life when a person may be most susceptible to influence and psychological damage," Powell wrote, adding that even though the circumstances of the defendant's life must be considered, they do not justify or excuse his actions.

The majority opinion was concerned with the circumstances in which the death penalty can be imposed, and not with the issue of capital punishment per se. (Justice Brennan, in his dissent argued that the death penalty "under all circumstances is cruel and unusual punishment and violates the Eighth and Fourteenth Amendments.") The majority held that the death penalty must be "imposed fairly and with reasonable consistency or not at all. . . . [T]he sentencer and the reviewing court may determine the weight to be given relevant mitigating evidence but may not give it no weight by excluding it from their consideration," as the Oklahoma court had when sentencing Eddings.

Chief Justice Burger, who was joined in his dissenting opinion by Justices White, Blackmun, and Rehnquist, said that the Court must leave the balancing of all factors to the state courts. Having stated that he probably would not have imposed the death penalty, the Chief Justice questioned whether the Court's decision would serve any "useful purpose." In his view, the Oklahoma courts had considered the evidence, but it was simply insufficient to outweigh the aggravating factors.

Fortunately for Monty Lee Eddings, the majority rules, and there is finally a Supreme Court precedent for what a court should consider mitigating factors when the death penalty is involved in juvenile cases. Eddings now awaits resentencing.

Anonymity Upheld for 14-Year-Old Murderer

In February 1978, a 14-year-old junior high school student shot and killed a 15-year-old classmate in the small town of St. Albans, West Virginia. Shortly after the incident, the police made an arrest based upon substantial eyewitness information.

Reporters and photographers heard the police broadcasts over their police monitors and went to the defendant's school. There, according to the court record in *Smith v. Daily Mail Publishing Co.* (50 L.W. 4759 (1982)), the reporters were able to "legally obtain" the juvenile defendant's name by interviewing witnesses and the authorities.

The Charleston *Daily Mail*, in its original coverage of the shooting, did not publish the child's name. Two radio stations broadcasted his name on February 9 and 10, however, and another local newspaper published a story that included the defendant's name and picture on February 10. The *Daily Mail* then published the 14-year-old's name in an editorial in the afternoon edition of February 10.

Both newspaper companies violated a West Virginia statute that requires a newspaper to obtain court approval before printing the name of a juvenile who is within the jurisdiction of the court. When indicted for printing the juvenile's name, the newspapers argued that the statute restricted the First Amendment right of freedom of the press. The West Virginia courts upheld the newspapers' right to print the boy's name, and the case was appealed to the Supreme Court.

The West Virginia legislature wanted to "protect the anonymity of the child to further his rehabilitation." Throughout the history of American juvenile law, juveniles have been afforded a cloak of anonymity. Protecting the adolescent offender's privacy serves many rehabilitative purposes, while public exposure may result in irreparable harm. The Supreme Court agreed that publicity, via print or electronic media, may bring "undue embarrassment to the families, or may cause the juvenile to lose employment opportunities." For the hard core recidivist offender, the publicity may feed the status system in which he lives and "thereby encourage him to commit further antisocial acts," the Court said.

However, the Supreme Court held that this was not an interest of sufficient weight to "punish the truthful publication of an alleged juvenile delinquent's name, lawfully obtained by a newspaper." The Court's main objection was that the state was attempting to punish a newspaper for carrying out a valued public service and constitutional duty, while it did not restrict radio or television. Thus, the Court ruled, it was not possible for the state to protect the juvenile's anonymity.

Though all 50 states protect a juvenile offender from public scrutiny in one form or another, the Court's ruling in *Smith v. Daily Mail* should only affect the four states with similar statutes. The Court did not directly state that the juvenile courts should continue this longstanding tradition of shielding juveniles

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from publicity, but recognized that cooperation between juvenile authorities and the press may provide a solution when public disclosure of a juvenile's identity seems warranted. When a murder is committed, for example, the courts may be less willing to protect the juvenile's name and reputation and more apt to promote disclosure for the sake of public safety.

No More Closed Doors For Rape Victims

An adult defendant was charged with forcible rape and forced unnatural rape in Massachusetts. The victims were two 16-year-olds and one 17-year-old. When they were called to testify during pretrial hearings and during the trial, the judge ordered the courtroom doors closed to reporters, following a Massachusetts law that requires closed-door proceedings when the victims of certain crimes are under the age of 18.

The *Boston Globe* objected to being barred from the court. Even after the defendant in the rape case was acquited, *The Boston Globe* pressed its claim that the statute's mandatory closure rule restricted the press's access to criminal trials and violated the First Amendment, as it is applied to the states through the Fourteenth Amendment.

Just prior to this case, the Supreme Court, in *Richmond Newspapers, Inc. v. Virginia* (448 U.S. 555 (1980)) had "established . . . that the press and the general public have a constitutional right of access to criminal trials," based on a long history of openness and tradition that fosters public scrutiny of the judicial process. Thus, the state in *Globe Newspaper Co. v. Superior Court for the County of Norfolk* (50 L.W. 4759 (1982)) had to present convincing arguments to overcome that tradition. The state also had to show that the restriction was "necessitated by compelling governmental interests and narrowly tailored to serve those interests." They were unable to pass that Constitutional test.

The Court ruled that "safeguarding the psychological well being of a minor is a compelling interest," but this same goal could be accomplished by restricting the public on a case-by-case basis: the decision to exclude the press and public should be left up to the judge, rather than being mandated by the state. According to the Court's ruling, a judge could consider the "minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim and the interests of the family." In *Globe*, the victims' names were a matter of public record and the girls may have been willing to testify in public. These facts gave the Court good reason to rule that a discretionary approach would serve both the state interest and protect the public's right to a free and open press.

The state argued that the statute served another state interest: it encourages minors who are victims of sex crimes to testify. Delivering the opinion of the Court, Justice Brennan pointed out that although this purpose depends on secrecy, the statute does not effectively provide for secrecy because the minor victim's testimony is available to the press through "transcripts, witnesses, and court personnel." Therefore, the Court ruled, statute does not serve its purpose and cannot be upheld.

Chief Justice Burger and Justice Rehnquist dissented, maintaining that the state interest is essential if minors are to be protected and victims of rape encouraged to report the crime and testify. The dissenting justices also point out that the families of minors should have some assurance that the experience will not further traumatize the victim. The dissenting justices, however, may be disguising their distrust and dislike of the press by using the language of paternalistic protection for minors.

The result of the *Globe* decision is that the states cannot mandate restrictions to public access to the courts, though statute that permits the judge to decide when the minor victim needs judicial protection and the press is to be restricted will be upheld. It's possible, however, that sometime in the future when the media is excluded from the court and access to transcripts, witnesses, and court personnel is also denied, the Court will hear another case similar to *Globe*.

Probation Officers and the Client-Defendant

In two recent cases, juvenile suspects accused of murder asked for adults who weren't lawyers to be present during their interrogations. One youth asked to have his probation officer present, and the other asked to have his father present. Does the youth of the accused mean that these requests should be honored as a constitutional right in the same way as a request for an attorney? No, ruled the Supreme Court in *Fare v. Michael C.* (442 U.S. 707 (1979)) and when it refused to review *Riley v. Illinois* (364 N.E. 2d 306, 435 U.S. 1000, *cert. denied* (1978)).

Michael C., a teenager with a long history of delinquent activity, was arrested for murder on January 16, 1976. The transcript of the taped interrogation shows that before questioning him, the police read Michael C. his rights and asked him if he understood them.

> Q. Do you understand all of these rights as I have explained them to you?
>
> A. Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A. What murder? I don't know about no murder.
>
> Q. I'll explain to you which one it is if you want to talk to us about it.
>
> A. Yeah, I might talk to you.
>
> Q. Do you want to give up your right to have an attorney present here while we talk about it?
>
> A. *Can I have my probation officer here?*
>
> Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.
>
> A. How I know you guys won't pull no police officer in and tell me he's an attorney?
>
> Q. Huh?
>
> A. How I know you guys won't pull no police officer in and tell me he's an attorney?
>
> Q. Your probation officer is Mr. Christiansen.
>
> A. Yeah.
>
> Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?
>
> A. Yeah.
>
> Q. Okay, will you talk to us without an attorney present?
>
> A. Yeah I want to talk to you.
>
> [Emphasis added by the court.]

Michael C. went on to make incriminating statements and provide the police with sketches that clearly implicated him in the murder; these statements and sketches were the basis for his conviction.

According to *Miranda v. Arizona*, the police must cease questioning a defendant when he expresses a desire to remain silent until counsel is present. If the police continue their interrogation, a confession given at that point will not in most cases be admissible at trial. In this case the trial court ruled that under the circumstances,

(Continued on page 45)

KIDS AND THE LAW

Barry Siegel

When Tortured Children Strike Back

How do the courts react? How should they?

Late last year, 16 days apart on opposite sides of the country, two sons shot and killed their fathers.

On the evening of Nov. 16, Richard Jahnke, 16, watched from inside the garage as his father climbed out of his blue Volkswagen Beetle in front of the family home in Cheyenne, Wyo. Then the son raised a 12-gauge shotgun and fired six times, four of the shots slamming into his father's upper torso.

Shortly after midnight on Dec. 2, George Burns Jr., 17, slowly and methodically approached his father from behind as he sat watching television in the

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family's living room in this northern Florida coastal city. Without a word, the son pumped six bullets from a .357-magnum revolver into his father's chest and back.

"I just couldn't handle it anymore," Richard Jahnke explained in Wyoming.

"The boy just could not take it anymore," said Mary Burns, George Jr.'s stepmother in Florida.

Both boys, it would emerge from statements and testimony by their mothers, other family members and counselors, had for years been victims of vicious beatings and other forms of abuse at the hands of their fathers.

But their fates after the killings differed greatly.

In February, George Burns Jr. was placed on 15 years' probation and set free. In March, Richard Jahnke was sentenced to five to 15 years in prison.

The big difference in the sentences dramatizes the vagaries of the legal system and the complex ambivalence involved in passing judgment in situations like these. The cases also raise questions about the role of public agencies in handling the more than 1 million child-abuse reports filed each year in the nation.

Why did these shootings happen? Why were the boys' fates so different? Which sentence was more appropriate?

Circuit Judge L. Page Haddock, in placing George Burns Jr. on probation on Feb. 16 in Jacksonville, said, "I do not want you to think in any way that what you have done has been condoned by society. (But) I believe that the chain of violence and abuse that led to this end were brought about by your father's actions rather than by yours."

In contrast, District Judge Paul Liamos, issuing his sentence March 18 in Cheyenne, said, "I'm sure we all have compassion for Richard Jahnke. (But) regardless of the circumstances . . . no one should be permitted to act as prosecutor, jury, judge, court of appeal and executioner without being called to account to society."

There are differences in the details of the cases that partly explain the divergent outcomes.

Legally, the biggest difference is that George Burns Jr. shot his father immediately after an argument, whereas in the Jahnke home an hour-and-a-half elapsed between the argument and the shooting. That time to think and plan introduced the crucial element of premeditation.

But another difference may have played an equal role in shaping the two boys' fates.

Both father and son in the blue-collar, lower-middle-class Burns family had a long history of trouble with the law and contact with assorted public service agencies because of family problems. The father, a boilermaker by trade, was often unemployed. Jacksonville authorities had no difficulty believing reports of abuse inside the family home on Redwood Avenue. George Jr.'s pattern of juvenile delinquency actually helped his case, because it indicated problems at home.

The turmoil within the white-collar upper-middle-class Jahnke family, by contrast, was a closely guarded secret behind the walls of the Jahnkes' meticulously decorated $120,000 house in affluent north Cheyenne. The father was a $38,500-a-year Internal Revenue Service investigator and the son had a spotless record, with no problems in school or with the police. This fact hurt him more than it helped.

Some Cheyenne officials—both before and after the shooting—had difficulty believing that serious abuse could exist in the Jahnkes' home on Cowpoke Road.

Late in the afternoon on Dec. 1, George Burns Jr. and Sr. began a long evening of arguments, a common occurrence. At 15 minutes after midnight, George Jr. found his father's pistol in his bedroom, walked into the living room and fired six shots. Then he put the gun down on the dining room table, walked outside, beat his hand repeatedly against a telephone pole and waited tearfully for the police.

George Jr.'s first contact with Florida's Department of Health and Rehabilitative Services was in 1976, at the age of 10, when he was arrested for shoplifting a yo-yo from a 7-Eleven store. In the next four years, he accumulated a long record of minor offenses, including petty theft, trespassing, damage to property and criminal mischief. At Landon Junior High School, he had an extensive history of truancy, academic and behavioral problems.

The police had also been called to the Burns home on several occasions to break up family fights.

Authorities who dealt with the family over the years heard a litany of horror stories about the father's behavior. Many of these were listed in the pre-sentence report that state social worker Pat Marsh eventually wrote for Judge Haddock.

The father had an arrest record in several states, beginning with auto theft at the age of 17, for which he served two years in the Ohio State Reformatory. Burns claimed to have connections with the Mafia and the Ku Klux Klan. He was bisexual and spent time at homosexual clubs.

At 240 pounds and 5 feet, 10 inches, he was stocky and frighteningly rough looking. He beat George Jr. and his daughter, Donna, 19. He beat the children's mother, Lillian, who divorced him in 1979. He beat his second wife, Mary.

He forced his wives to watch some of his homosexual encounters. He held guns to the mouth of his stepson, Robert. When Donna was a baby, he smothered her cries with a pillow. When she was 8, he abandoned her one day in downtown Newark, N.J. When she was 12, he forced her to play Russian roulette.

To punish his children, Burns made them stand barefoot on tiptoe with tacks under their heels, often with heavy objects in their arms. If they tired, they had to step on the tacks.

George Jr. once broke several vertebrae in his neck by jumping out of a window after a fight with his father. Twelve police officers were required to subdue Burns during another family brawl. Burns once settled an argument among family members about the family dog by taking the animal outside and shooting it.

Mary Burns' son by another marriage, Robert Wright, later told authorities that the "only difference between me and George was that George had enough guts to shoot his father."

Marsh, the social worker, first began dealing with the family when George Jr. was 14. It soon "became apparent," she said, "that an alternative home environment was needed."

George Jr. was taken from the family and placed in the Sheriff's Boys Ranch at Live Oak in October of 1980. Although he was supposed to stay at the camp until he turned 18, he was released in June, 1982. In the following months he moved back and forth between his mother's and father's homes.

George Jr. told Marsh that his intention was to work toward a better relationship with his father. He said he had always wanted a loving relationship with him.

During the last week in November, Gloria Emerson, a counselor at the boys ranch, paid a follow-up visit to the Burns home. Afterwards, she said she left with

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"good feelings" about the situation.

But a week later, the phone rang at Marsh's home in the early morning hours of Dec. 2. "My husband thought someone in my family had died," Marsh said later. "I always thought Burns Sr. would get it. I just didn't think it would be by his son."

She also thought to herself: "They're going to throw the book at this kid."

Homicide Detective John Bradley reached the Burns home about an hour after the shooting. Bradley is a beefy veteran known for his tough, no-nonsense attitude. The case looked obvious to him: A guy had been shot six times in the back.

But he saw no evidence of a physical fight or elements of self-defense. Why, he wondered, would a kid pump six bullets from a .357 into his father? To Bradley, George Burns Jr. seemed "scared, upset, emotional, but he also seemed like a hard emotional load had been lifted off him."

In the next few hours, Bradley began getting some answers to his question.

Marsh called him. So did Emerson from the Sheriff's Boys Ranch. Both had much to tell. Bradley expanded his investigation.

When defense attorney Stephen Parker was asked three days later by Lillian Burns to defend George Jr., his first thought was that this would be a tough case. There had been angry words exchanged but no physical threats, so Parker thought he had little chance of claiming self-defense. The attorney hoped only that the mitigating circumstances would help reduce the severity of the charges and sentence.

But the information Detective Bradley was accumulating had an effect. Normally, he said, "If the prosecutor asks for my recommendation, I always say to give 'em the maximum. I'm kinda tough. But I think my attitude changed from the time I arrived that night to the end of the investigation. It went from, 'Here we have a guy shot six times in the back,' to, 'Here we have a guy shot six times in the back by an abused child.' "

An assistant state attorney, Alban Brooke, was assigned the task of prosecuting the Burns case because he is director of his office's Family Justice Department. He describes his attitude toward law enforcement as "somewhat to the right of Genghis Khan. I believe in law and order. I believe in the death penalty."

When he first heard the case, Brooke contacted Bradley.

"I put a lot of weight on what Bradley felt," he said. "John was very much persuaded that this case should be looked at from an unusual point of view. He told me the details . . . I didn't agonize long over my decision. I made it fairly quickly."

The prosecutor called the boy's attorney, Parker, and told him that it did not seem that the boy should be in jail. If he would plead guilty to second-degree murder, Brooke offered, the prosecutor's office would recommend straight probation.

Parker was surprised. "Prosecutors are not known for letting killers out of jail. It's not politically smart. It's not what you expect."

Judge Haddock was also surprised.

"It's highly unusual for a crime of this gravity to be handled in this way," he said. "The state of Florida is known as a hanging state. We've executed people."

Just as Brooke credited the homicide detective, the judge called the prosecutor the key. "He knew all the details. Brooke is not noted for his leniency. That made the recommendation surprising—but it also gave it some credibility," Haddock said.

The judge would not agree to probation until he received a pre-sentence report, to be written by Marsh.

She wrestled over it. She had never thought she would find herself asking probation for a killer. But in the end she worded her recommendation strongly.

"While this counselor does not condone the act of one human being taking the life of another human being, there are mitigating circumstances that lead up to this tragedy . . .," she wrote. She noted that all the family members, at one time or another, had tried to leave the home, but that the father had tracked them down and harassed them until they returned. "This writer strongly believes that placing this youth in a prison environment could very easily recreate the behavioral patterns and life style exhibited by the victim (father)."

Haddock reread Marsh's report a number of times over a two-week period.

"These are the types of cases that really make judges do their job," he said. "You'll sit here for weeks on cases where everyone knows from the outcome what you're going to do. A housewife on a bad check charge gets the minimum; a six-time felon gets the maximum."

The night before the sentencing, he still had not decided.

"I got the report out again and read it to my wife. We discussed it for a long time. Talking it over made me reduce the volume of stuff down to a comprehensible level you can verbalize. Only then, by that way, can you learn how you really feel."

How he felt, however, depended somewhat on how others felt. If the prosecutor had wanted a jail sentence, the judge acknowledged later, that would have "greatly diminished" the chances of probation. And the prosecutor could not have recommended probation, he added, "if the victim's wife was yelling murder and demanding revenge."

On Feb. 16, Haddock announced that he would grant probation, but for 15 years, not the 10 years the prosecutor recommended. The judge wanted to retain control into the period when George Jr. might have his own children, because

I THINK I'M LOSING THEM.
Sawyer

he knew that many abused children become abusive parents. During probation, George Jr. had to undergo psychiatric counseling and hold a job or attend school. If he violated probation, he could still be sentenced on the murder charge.

"I am treating you as an abused child today," Haddock said. "If I ever have to see you again, I won't be treating you that way. I will be treating you as a person who is an adult who committed murder."

The judge added a final thought. "It is a rare person that takes another human life that doesn't at least go to prison, if not the electric chair . . . . You have a chance to turn your life around."

Events unfolded differently in Wyoming. When Richard Chester Jahnke, 38, came home the evening of November 16, he learned that his wife, Maria, and Richie had been arguing that afternoon. He stomped into Richie's room and began beating him, using fists against his son's head. Richie's sister, Deborah, 17, tried to break up the conflict.

Soon after, before the parents left for dinner at a restaurant, Jahnke pushed his son against a wall. "I'm disgusted with the shit you turned out to be. I don't want you to be here when I get back," he said, according to testimony.

After they left, Richie changed his clothes to dark shades of blue. He lined up a .38-caliber pistol, a Marine knife, an Army belt and a 12-gauge shotgun. The shotgun had been loaded with what is called "candy-cane mix"—bird shot, buckshot and slugs. Richie changed to all slugs. He had decided to kill his father.

Deborah, the prosecutor would later charge, stayed in the living room cradling a .30-caliber carbine—backup in case Richie missed.

When his parents' car pulled into the driveway, Richie later told a jury, he felt scared and thought he couldn't do it. But Richie said he worried about what his father would do when he saw the arsenal he had assembled. The youth said he fantasized about dropping the shotgun and rushing to hug his father, but remem-

Teaching Strategy: Part of an American Tradition?

In a sense, both George Burns, Jr. and Richard Jahnke were vigilantes. They took the law into their own hands, and carried out their own version of justice in a situation where no other authority had taken any action. They saw evil—or convinced themselves that's what they saw—and acted to punish it.

Vigilantism has a long tradition in the United States, from the "Regulators" of Illinois Territory in the early 1800s to the Guardian Angels in the subways of 1983. Were the two boys simply acting in the vigilante tradition? Were their crimes precipitated by an attitude of "independent justice" and free access to firearms, an attitude that pervades American history?

These are questions that high school students could explore in a history course or a law course. This activity provides some concrete material to compare with the Burns and Jahnke cases, and to help students search for answers to those questions.

Students, in groups of two or three, should read the six cases that follow—four from the 19th century and two from today. As a class, discuss briefly the similarities and differences among the cases, then assign each group to rank-order the cases in terms of *fairness*: Which case was most fair to all concerned? Which least fair? Encourage students to discuss and argue among themselves the relative rankings of the cases, and challenge them to explain the reasons for them.

When all groups have done their rankings, engage the class in a discussion of fairness. Have one group explain their reasons for ranking a case "most fair"; another group can explain their "least fair" reasoning. Lead the discussion toward the ideas of "mitigating circumstances" and "moral necessity," as well as toward "individual rights" and "fairness." Look especially carefully at where the Burns and Jahnke cases ranked, compared with the historical cases. End the discussion with the question, "Is taking the law into your own hands ever justified?"

Six Cases of Vigilantism

Case 1: The San Francisco Mob

By 1851, San Francisco was a relatively well-established city with an official justice system. Joseph Cannon, a popular citizen, broke into the sleeping quarters of a Mexican woman named Juanita. She sprang from her bed and stabbed the drunken intruder. She was seized by a band of vigilantes, who took her out to the public plaza for a "trial." A jury of 12 men was selected from among the crowd that gathered. During the "trial," the mob several times tried to seize Juanita and kill her. The jury found her guilty and sentenced her to hang at sundown, a half hour later. Down at a nearby bridge, a rope was put up over a crossbeam, with a noose attached. A wild mob had gathered as Juanita climbed up a ladder and put the noose around her own neck. At the sound of a pistol shot, the ladder was removed and the woman hanged. The mob then proceeded to chase away one of the local citizens who had tried to defend Juanita at her "trial."

Case 2: The Fearsome Father

Richard C. Jahnke beat and abused his wife and two children in their home. The family feared him, his cache of guns and other weapons, his constant vigilance over their behavior, and his frequent psychological and physical abuse. The legal system was made aware of the situation, but no effective action was taken. So Mr. Jahnke's son and daughter in 1982 took the law into their own hands. The younger Jahnke shot his father to death when he returned from dinner at a restaurant. After the shooting, Jahnke's wife said, "My son has freed me. He has freed all of us."

Case 3: Their Brand or Yours?

Billy Downs and "California Ed" were suspected of stealing horses and selling whiskey to the Indians in Montana. The local vigilante group ordered them into town, where they pled guilty only to stealing horses from the Indians, which was not a crime in those days. But when the vigilantes—local citizens intent on law and order—went to Billy and Ed's corral, they

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bered that when he had tried that once before, his father had beaten him even harder, for being a sissy.

As an ROTC officer at Central High, Richie had a command sergeant major's whistle. He suddenly blew it. "I used it for courage. At the last second I became a battalion command sergeant major," he told the jury. Then he opened fire. His father started up the driveway toward Richie, but fell, mortally wounded. "He was stomping toward me just like he always did," Richie said. "This time I stopped him."

Courtroom testimony by Richie and his mother later would describe a lengthy history of abuse dating back to when the boy was 2.

Jahnke, a husky 5-foot, 8-inch, 190-pound gun buff and former career Army sergeant, kept an arsenal of 60 rifles and guns throughout the house and usually had one firearm in his possession. He had an explosive temper.

According to courtroom testimony, at times he beat his wife and both children, with fists and a leather belt, when they left tub faucets leaking, chewed food with an open mouth, scraped silverware on their dinner plates, broke a toy or coughed excessively.

While the others ate at the kitchen table, he sat 10 feet away in the living room, watching for violations. The children took to using plastic forks to avoid making noise. Richie, who suffered from asthma, learned to hold his breath or smother his coughs with a pillow.

As a youngster, Richie watched as his father pinned his mother to the ground, his knees on her head, and hit her repeatedly. He saw his father fondle his sister's breast and push his hands inside her pants. One night he looked in his sister's room and saw his father lying on top of her. Once, in the middle of the night when Richie was 10, he climbed out of bed, walked in the dark to the refrigerator and heard a click. His father was holding a gun eight inches from is face.

After the shooting, Richie's mother confirmed these stories under oath. She

(*Continued on page 61*)

found 26 horses and a bale of cattle hides, all of which had other people's brands on them. The two men were immediately taken to a grove of trees and hanged.

Case 4: The Rock Valley Regulators

The outlaws seemed to have taken over the Rock River Valley in northern Illinois in the late 1830s. Bands of horse thieves and counterfeiters kept the law-abiding settlers on their toes. The outlaws controlled county elections, and at one point burned down a newly constructed courthouse. No police or militia was available in this frontier area to control the criminals who were running roughshod over the citizenry. So, in 1841, a group of upstanding farmers and businessmen got together on their own and formed the Rock Valley Regulators, whose purpose was to rid the area of outlaws. By capturing criminals, trying them, and punishing them with whipping, hanging, or shooting, the Regulators were able to civilize the valley in a few years' time.

At one of their "trials," two men were accused of stealing horses and of murder. The trial was conducted by 120 members of the Regulators, in the presence of 500 citizens. One Regulator acted as judge, though he was not trained in law nor was he officially appointed or elected by the government. The defendants were allowed to have a lawyer, to question witnesses, and explain their side of the story. At the close, the prosecutor argued for the immediate execution of the defendants. The crowd voted. Their verdict was unanimous: guilty; death sentence. After an hour (for prayer), the two men were hanged.

Case 5: Violence Subdued

George Burns, Sr. had come before the legal system many times. He was violent, physically abusive, large, and threatening. He had spent time in prison, but it had not changed his behavior. It once took 12 police officers to subdue him during a brawl. His son was removed from the home by the state, but soon returned to be beaten along with the others. George Burns, Jr., after a particularly severe beating, took the law into his own hands and shot his father dead in the living room. Most people who knew the elder Burns felt that this punishment was deserved.

Case 6: Knives and Whips

In 1846, the Donnor party was traveling west by wagon train, over land that was far from any town or settlement. It was rough going, and tempers were high. A man named Snyder whipped Reed. Reed pulled out his knife. Mrs. Reed tried to intervene, and was caught by the whip. In the mess of blood, whip, and knife that followed, Reed stabbed Snyder, who later died. Reed, sorry for what he had done, used boards from his own wagon to make a coffin for his victim.

The members of the party held a trial of sorts. None of them was a lawyer or judge; they had no lawbooks and no courtroom. Reed explained that he acted in defense of his wife. The people discussed the case, and decided that Reed was in the wrong, but justified. They felt he deserved to be punished, but that hanging or shooting was too harsh a sentence, so they banished him from the wagon train instead. Luckily, his daughter sneaked him some weapons and supplies, and he was able to survive and make it to California

Method

As homework or an in-class assignment, have students place each of the six events on the following continua:

Taking the law into your own hands was absolutely necessary	Transgressions could have easily been handled by legal authorities
Punishment fit the crime	Punishment unusually severe
Victims had a chance to tell their side of the story	No opportunity for explanation or defense
Charges against the victim are made clear	No notice of the charges
Inaction would lead to worse injustices	Actions not necessary at all
Victim has chance to appeal	No chance for appeal
Judgment is by nonprejudiced peers	Judgment made by prejudiced person(s)

CLASSROOM STRATEGIES

The Ins and Outs of Juvenile Crime

How to teach your students what juvenile justice really means

In a crime study conducted in the mid-1970s, half of the Americans polled admitted that they were afraid to walk alone at night in their neighborhoods, and nearly one-fifth did not feel safe in their own homes. The 1980s have not brought a greater sense of security. In 1981, for example, someone in America was the victim of a violent crime every 31 seconds, according to the FBI's Uniform Crime Reports; another study points out that it is more likely that a child born in 1974 will be murdered than that an American soldier fighting in World War II would die in combat.

Much of the nation's fear of crime focuses on juvenile crime, which costs an estimated $16 billion a year nationwide and, in 1981, accounted for 43 percent of the burglaries, 29 percent of the robberies, 15 percent of the rapes, and 20 percent of the total crime in America. Self-report studies, in which youngsters respond anonymously to a series of detailed questions, show that 90 percent of all young people commit at least one offense for which they could be charged. Another study has shown that the majority of adult offenders were first arrested as juveniles.

Albie Davis and Peter Delacey

Paul Conklin

But this is only part of the story. The heightened awareness of juvenile crime has led to an exaggeration of the actual extent of the problem and a failure to recognize and deal with the problems unique to young people.

Youngsters are at least as often victimized as victimizers. Several startling statistics attest to these problems. For example, suicide is the third leading cause of death among youth 15-24 years old; the

Paul Conklin

number of teenage suicides has doubled in ten years. In 1980, there were 788,844 official reports of child maltreatment involving a total of 1.2 million children, and it's estimated that between 2,000 and 5,000 children die each year as a result of child abuse; 70 percent of adolescent drug addicts and 75 percent of adolescent prostitutes were sexually abused by a parent or relative. There are an estimated 3 million teenage problem drinkers. Each year, one of every ten girls 15-19 years old becomes pregnant, mostly out of wedlock, and, in 1981, 5.5 million young people under the age of 18 lived with a divorced parent.

Finally, it is worth noting that the rate of juvenile crime *decreased* 9 percent between the years 1977 and 1981. And while the fact that juveniles accounted for 20 percent of all crime in 1981 may seem high, it should be noted that that figure is down from almost 26 percent in 1975.

There is no doubt that there are violent young people from whom society needs to be protected, but the media and legislative attention given "problem youth" too frequently focuses on misbehavior and crime while it ignores the chaos and abuse in these children's lives that is often the source of their violence. In the meantime, get-tough attitudes have led several states to change their laws to make it legal to try as adults 13-, 14-, and 15-year-olds charged with certain violent crimes, and nontraditional rehabilitation programs for youth are being eliminated in favor of more traditional custodial and punitive facilities.

Strategy

1.

A backward glance at juvenile courts

From the founding of the first juvenile court in Cook County, Illinois, in 1899 to the rendering of the *In re Gault* decision by the Supreme Court in 1967, certain assumptions dominated the workings of the juvenile system.

1. The state should intervene in the lives of young people.
2. Young people should be treated differently from adults.
3. Young people can be rehabilitated and should not be punished.

These assumptions resulted from a unique mixture of the social activism and legal customs of the 19th century. The common law principle of *parens patriae* was the justification for the courts intervening on behalf of all children. Public dismay with the existing adult correctional facilities and legal procedures served as a reason to separate juvenile offenders from adult criminals. Finally, the progressive movement assured the early "child savers" that rehabilitation was possible, especially with young people.

The debate over the validity of those assumptions continues, even as their effects have a daily impact on the juvenile justice process. According youngsters due process protections makes juvenile courts much more like adult ones. Is there, then, a role for the juvenile court? The Supreme Court recognized this tension in *McKeiver v. Pennsylvania* (403 U.S. 528 (1971)):

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

At the same time, many reformers have suggested that the juvenile court become less involved in noncriminal offenses (see next strategy). This too would have the effect of limiting the court, rendering its continued existence problematical.

In order for your students to understand the issues underlying the current juvenile justice system, they need to appreciate its historical development. What follows is an introductory exercise using a timeline to focus students' attention on this historical progression in handling juveniles. This strategy can help make that history come alive, as well as show your students their role in shaping the future.

Juvenile Court Timeline

- 1400s The principle of *parens patriae* develops in England, allowing the state to act as a parent in the case of neglected children.
- 1500s In England, children under the age of seven are pardoned for all acts. Those between the age of eight and 14 are treated as adults if they are judged mentally and morally competent. All juveniles over the age of 14 are treated as adults.
- 1600s In colonial America children under the age of 16 are regarded as the property of their parents, with no recognized power and virtually no legal status. Any child over the age of 16 who strikes his parents or is "stubborn or rebellious" can legally be put to death.
- 1642 Massachusetts Bay Colony enacts compulsory school laws.
- 1700s Depending on what state you live in, children over the age of either seven or ten are dealt with as adults.
- 1825 The House of Refuge founded in New York, with the purpose of reforming youngsters and separating them from adult institutions. It and other reform schools operate in an authoritarian manner, stressing rigid discipline, strict religious instruction, and hard work.
- 1870 Massachusetts enacts a law requiring that children's cases in Boston be heard separately from adult cases.
- 1899 First juvenile court established in Illinois for children under the age of 16. Its purpose: "Children as far as practicable . . . shall be treated not as criminals but as children in need of aid, encouragement, and guidance."
- 1967 The Supreme Court's decision in *In re Gault* marks a movement toward providing certain due process safeguards in juvenile court. In some states the jurisdictional age limit of the juvenile court is 16; in others it is as high as 18.
- 1990 ???

Discussion questions

1. Discuss the timeline in terms of the themes running through the juvenile reform movement (e.g., legal principles and practices, social beliefs). Be sure to stress the notion of individualized justice and the unique organization of the juvenile court.
2. Ask for students' comments regarding each historical event: Why do you think people did this? Was this a good idea? What might they have done instead?
3. Divide the class into groups and present them with a hypothetical situation involving a juvenile crime. Explaining that the year is 2000, ask each group to develop a scenario of how the juvenile court (if it exists) will deal with the juvenile offender.

Strategy

2.

Rights and Responsibilities

In most states, juvenile courts have jurisdiction over conduct that ranges from the intentional commission of a criminal act to status offenses like truancy and running away from home. (For an effective teaching strategy on runaways, see *Update*, Spring 1979.) Offenses such as these raise the question of how to treat children who have not committed a violent act and whose conduct would not be considered a crime if it were committed by an adult. Given the "protective" nature of the juvenile court, its response to status offenses traditionally has been based on the belief that such conduct was detrimental to the child's welfare; children of this sort are referred to in many states as Persons (or Minors, Children, or Juveniles) in Need of Supervision, abbreviated PINS (or MINS, CHINS, or JINS).

Early advocates of the juvenile court believed such children had to be saved

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from their own "wicked acts," a posture that has been criticized in recent years as unconstitutional, overly paternalistic, and outside the court's function, which is to enforce the law, not to teach manners to unruly children. In 1967, the President's Commission on Law Enforcement and Administration of Justice proposed changes in public policy so that:

> [a]ny act that is considered a crime when committed by an adult would continue to be, when charged against the juvenile, the business of the juvenile court, . . .but. . .serious consideration should be given to the complete elimination of the court's power over children for non-criminal conduct.

Implicit in the question of status offenders is the issue of how old children should be before they're allowed to make their own choices about such things as where and with whom to live, quitting school, and the extent of their sexual activities. Do laws that are designed to protect youngsters from responsibility they are not ready to handle actually limit young people's actions unnecessarily? At what age and to what extent should teenagers be held accountable for their own actions? Is a 14-year-old who is considered too young to drive a car nonetheless to be treated as an adult if he commits murder?

The Age of Reason

1. Distribute a copy of the matrix (see p. 17) and have students fill it out.
2. Compile the responses for the entire class on the blackboard.
3. Discuss these results, asking students
   a. the reasons they used to select the age category for each section (i.e., knowledge, emotional maturity, physical capability);
   b. the rights that attach to each responsibility; and
   c. who determines and who should determine the appropriate age for each category (i.e., federal or state law, parent(s), or the child).
4. Use results of this discussion as a lead-in to investigating the treatment of status offenders.
5. This activity lends itself to many activities:
   a. Have students ask their parents to complete the matrix. The student can compare his parents' responses with each other's and with his own.
   b. Have students investigate the legal age in your state for such responsibilities as signing a contract, getting married, driving a car.
   c. Research how your state defines status offenders.
   d. Explore the issue of truancy. When should a student be permitted to drop out of school?

More on Juvenile Justice

Books

Arbetman, Lee P. (ed.), *Street Law (2nd edition)*, West Publishing Co., 1980.

Bortner, M.A., *Inside a Juvenile Court*, New York University Press, 1982.

Davis, Samuel M., *Rights of Juveniles*, Clark Boardman Company Ltd., 1983.

Demos, John A., *A Little Commonwealth: Family Life in Plymouth Colony*, Oxford University Press, 1970.

Editorial Research Reports, *Youth Problems*, Congressional Quarterly Inc., 1982.

Elkind, David, *The Hurried Child*, Addison-Wesley Publishing Co., 1981.

Feldman, Ronald A., *The St. Louis Experiment: The Effective Treatment of Antisocial Youths*, Prentice-Hall Inc., 1983.

Paulsen, Monrad G., *The Problems of Juvenile Courts and Rights of Children*, American Law Institute, 1975.

Rosenheim, Margaret K., *Pursuing Justice for the Child*, University of Chicago Press, 1976.

Sarri, Rosemary (ed.), *Brought to Justice?*, National Assessment of Juvenile Corrections, 1976.

Silberman, Charles E., *Criminal Violence, Criminal Justice*, Vantage Books, 1980.

Articles

Chamelin, Neil C., *Police and Juvenile Court Relations, Juvenile Justice;* National Council of Juvenile Court Judges, February 1975.

Fox, Sanford J., *Juvenile Justice Reform: An Historical Perspective*, Stanford Law Review, Vol. 22, No. 6 (June, 1970).

Mack, Julian B., *The Juvenile Court*, Harvard Law Review, Vol. 23 (1909).

Wellborn, Stanley N., *Troubled Teenagers*, U.S. News and World Report, December 14, 1981.

Reports and Studies

President's Commission on Law Enforcement and Administration of Justice, "Juvenile Delinquency and Youth Crime," 1967.

U.S. Department of Justice, Federal Bureau of Investigation, "Uniform Crime Reports for the United States —1982."

U.S. Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, "Task Force: Police-Juvenile Operations", 1977.

Strategy

3.

Pressure on Youth

Today's young people face what many consider to be far greater pressures than those of previous generations. David Elkind, chairman of the Eliot Pearson Department of Child Study at Tufts University and author of *The Hurried Child*, observes, "Today's child has become the unwilling, unintended victim of overwhelming stress—the stress born of rapid, bewildering social change and constantly rising expectations." How young people cope with this stress has become a major concern, especially in light of the widespread use of alcohol and drugs, the dramatic rise in youth suicide, and the increasing numbers of runaways. Even for the majority of young people who make the transition to adulthood without permanent damage, coping with stress is a considerable challenge.

American society encourages its adolescents to grow up rapidly, forcing many to enter the adult world before they are ready. Elkind points out,

> As a society, we have come to imagine that it is good for young people to mature rapidly. [W]e dress our children in miniature adult costumes with designer labels, we expose them to gratuitous sex and violence and we expect them to cope with an increasingly bewildering social environment. . . . Many adolescents feel betrayed by a society that tells them to grow up fast but also to remain childlike.

Degrees of Stress

Each of the following situations is a potential source of stress. Ask your students to indicate to what degree each is a problem in their own life by circling the appropriate number.

	major problem			minor problem	
Doing well in school	5	4	3	2	1
Being popular	5	4	3	2	1
Success with opposite sex	5	4	3	2	1
Pleasing parents	5	4	3	2	1
Coping with parents' arguments	5	4	3	2	1
Coping with parents' divorce	5	4	3	2	1
Death of a parent	5	4	3	2	1
Drug or alcohol abuse in parent	5	4	3	2	1
Drug or alcohol abuse in self	5	4	3	2	1
Physical violence within the family	5	4	3	2	1
Sexual abuse within the family	5	4	3	2	1
Money	5	4	3	2	1
Fear of unwed pregnancy, or of getting someone pregnant	5	4	3	2	1
Fear of the future —college	5	4	3	2	1
Fear of the future —job	5	4	3	2	1
Competing in sports	5	4	3	2	1
Physical appearance, weight	5	4	3	2	1

Discussion

Students should fill in the chart before discussing it. Because many of the categories involve sensitive areas, students should complete it without putting their names on it. If it is completed at the end of class, the teacher can compile averages of the class's responses for each stressful situation and distribute the results to class members the following day.

1. Which of these pressure points are externally controlled (i.e., by agents such as the government, and so on)?
2. Which are internally controlled—by the individual?
3. Identify which of the stressful situations might lead to crime. What kind of crime? Would some pressures in combination with others be more likely to lead to crime?
4. Not everyone deals with stress in the same way. Why might some kids be more susceptible to it than others? Why do some react by harming other people, and some by harming themselves—perhaps through drug or alcohol abuse, or by suicide?
5. Do you think some of the things that are stressful at this time in your life may cause less stress as you get older? What will change? Why?
6. Do you think the stresses and pressures in an individual's life should be taken into account by the courts?
7. Are some responses to stress likely to add new forms of stress to your life?

"Put 'em up! This is a home box office stick-up!"

Strategy

4.

The Role of the Police

To most students, the police are the most real and recognizable representation of the juvenile system. Prior to *In re Gault* and its progeny, the role of the police was assumed to be the same as the juvenile court: they were to play a protective, almost paternalistic role when dealing with juveniles. In a majority of states, police do not "arrest" juveniles, they "take them into custody." (For a comparison of the vocabulary used in juvenile and adult courts, see *Street Law; A Course in Practical Law*, West Publishing, Second Edition, 1980).

While the *Gault* decision did not apply to the preadjudicative stages of the juvenile process, its emphasis on juvenile rights and due process called into question the arbitrariness with which police often handle juveniles.

Police have a very wide discretion in many cases involving adults. They can choose between ignoring infractions and thus giving tacit approval, warning people of infractions, or treating infractions as a serious matter and arresting someone. For example, if drinking is forbidden in the park and you're picnicking and sharing a bottle of wine, police have all these options, as they do in the case of a wino who's swigging from a pint in the same park. They are apt to be a lot tougher on the wino than on the middle class couple, but either way they're exercising their discretion.

Their range of options is larger yet for juveniles, since the existence of status offenses, as well as laws such as curfews and minimum drinking ages that apply only to youngsters, greatly increases the number of offenses a kid might seem to be guilty of. At the same time, the public is calling for police to crack down on juvenile crime and to cease treating juvenile offenders with kid gloves. All this adds up to a volatile situation—and great uncertainty about the proper role of police in dealing with juveniles.

There are three common schools of thought regarding the role of the police. Some people argue that police should act in strict accordance with their function as a crime-control agency. Others believe that they should concentrate on preventing juvenile delinquency, functioning as quasi-probation or social workers. The most widely accepted position calls for the adoption of a balanced law enforcement/preventive function. The President's Commission on Law Enforcement and Administration of Justice (1967) endorsed this latter position, recommending "conserving the juvenile court for dealing with repeat and more serious offenders."

One approach to start students thinking about the role of the police is to focus on the discretion accorded to police by the juvenile system. As Neil Chamelin succinctly notes in *Juvenile Justice;* "Police discretion is neither unneeded nor undesirable. It is very real. It is also an important tool in maintaining the viability of the concept of justice in American society. But discretion can also be dangerous if allowed to be exercised indiscriminately and without some controls."

Responsibility Matrix

Direction: Decide at what age you think you should be allowed to do each of the following. Place an X under the corresponding age.

ACTION	AGE: 1-6	7-10	11-12	13-15	16-18	18 +
1. To decide what foods to eat.						
2. To decide what clothes to wear.						
3. To decide what friends to have.						
4. To decide what books to read.						
5. To decide what T.V. shows to watch.						
6. To decide when to go to bed.						
7. To decide whom to date.						
8. To clean your own room.						
9. To decide how to decorate your room.						
10. To decide when to leave school.						
11. To earn your own money.						
12. To spend your money as you please.						
13. To drink alcoholic beverages.						
14. To seek out medical care.						
15. To drive a car.						
16. To be held accountable for breaking the law.						
17. To be sexually active.						
18. To be responsible for taking care of any offspring produced by self.						
19. To help make the rules of the school.						
20. To help support the family as a unit.						
21. To vote.						
22. To run for office.						
23. To be on a jury.						
24. To live on your own.						
25. To sign a contract.						

The dilemma of police discretion raises difficult questions in the juvenile justice system. For example, what should be the scope of police authority to arrest and detain juveniles? Should the scope of authority be different in situations where the police view their actions as protecting juveniles? If police are given discretionary powers in their interactions with juveniles, how can that be controlled? The following exercise requires students to evaluate different responses to a situation through role playing. Subsequently students are asked to draft what they consider fair legislation defining the role of the police in their encounters with juveniles.

Role Play: Police and Juveniles

Assign students to play the following roles: Police Officer 1, Police Officer 2, Youth 1, and Youth 2. Distribute a copy of the role play to the assigned students, or you may choose to give all students copies.

Role Play 1

Police Officer 1: There has been a rash of vandalism in the local park. At 7:30 P.M. you receive a call, instructing you to investigate a disturbance at the park. You arrive at the park and find the trash cans turned over and the drinking fountain broken. You notice a young person sitting on a picnic bench. He/she appears very nervous.

Youth 1: You are new in the neighborhood. You have just arrived at the park where you are to meet some kids to go to a party. While you are in a good mood, you are very nervous about making a good impression on your new friends. You noticed that the park was littered, and the water fountain broken, but you really didn't think about it. Out of nowhere a police officer comes towards you. Even though you haven't done anything wrong, this makes you even more nervous.

(Continued on page 47)

Aging Youngsters Before Their Time

The motive: to throw the book at kids. The technique: allowing adult courts to handle teen-age crime.

A 24-year-old man worked in Chicago as a VISTA volunteer and was about to be married to his childhood sweetheart. After work one evening he headed to his fiancee's home. He was observed getting off the train by three young men, all members of the Latin Kings street gang. Two were minors—aged 14 and 16; the third was an adult.

When the man left the train station, the three Latin Kings followed him for several blocks. Finally, they stopped him and demanded that he turn over his wallet. When the man refused, the 14-year-old pulled out a knife and stabbed him in the heart. The wounded man ran another block to his fiancee's home and banged on the door. When she answered he collapsed at her feet and died.

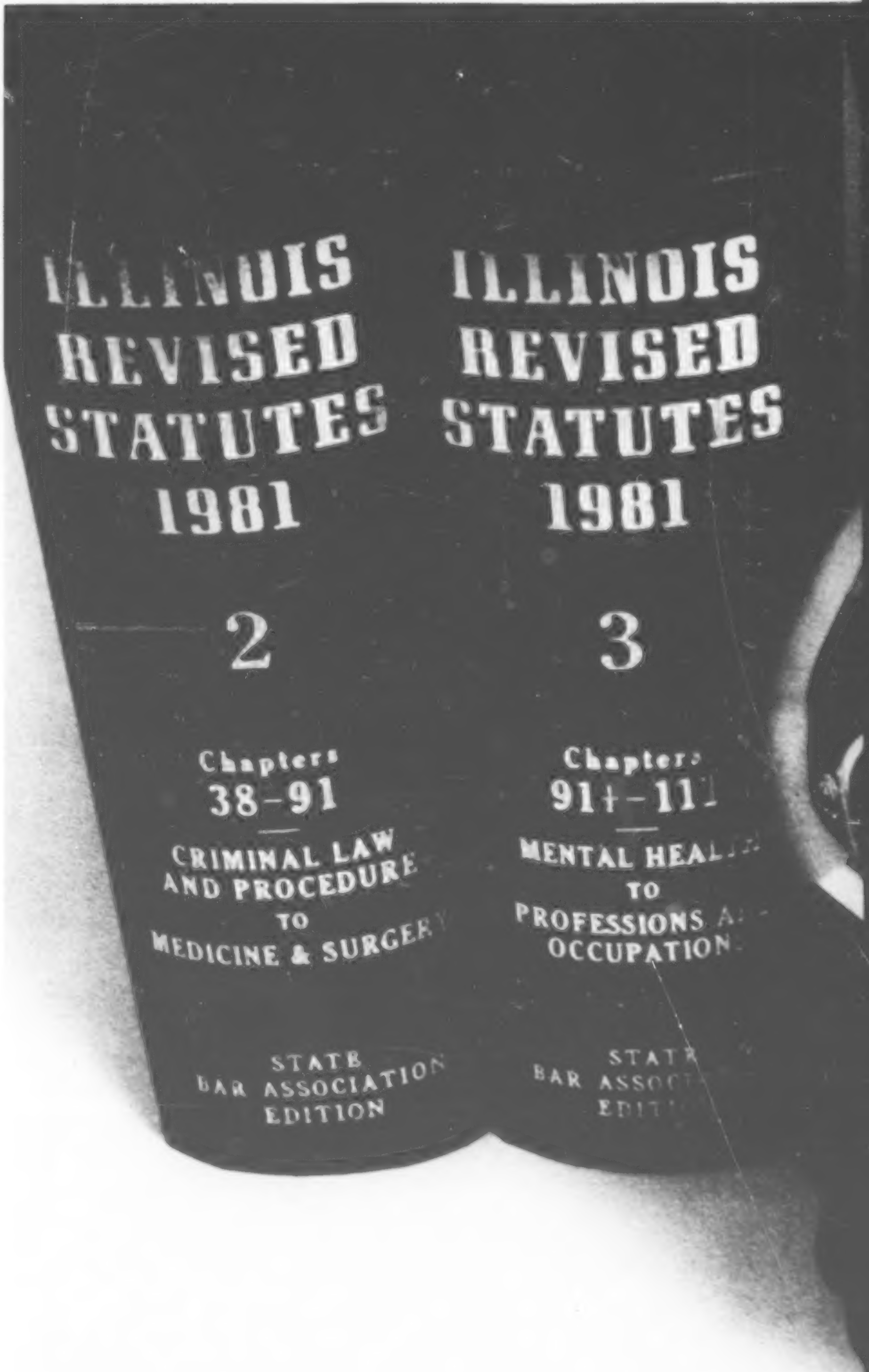
* * * * *

An 18-year-old boy was out riding his bicycle one afternoon when he saw two youths approaching on the sidewalk. One was on a bike, while the other walked alongside of him. The two boys stopped the victim and announced that they wanted his bicycle. When he resisted, the 14-year-old pulled a gun out of his pocket, hit the victim on the head, then passed the gun to his 15-year-old crony. The older boy shot the victim in the stomach. After extensive abdominal surgery, the victim survived the attack.

* * * * *

A 27-year-old woman, manager and

Teri Engler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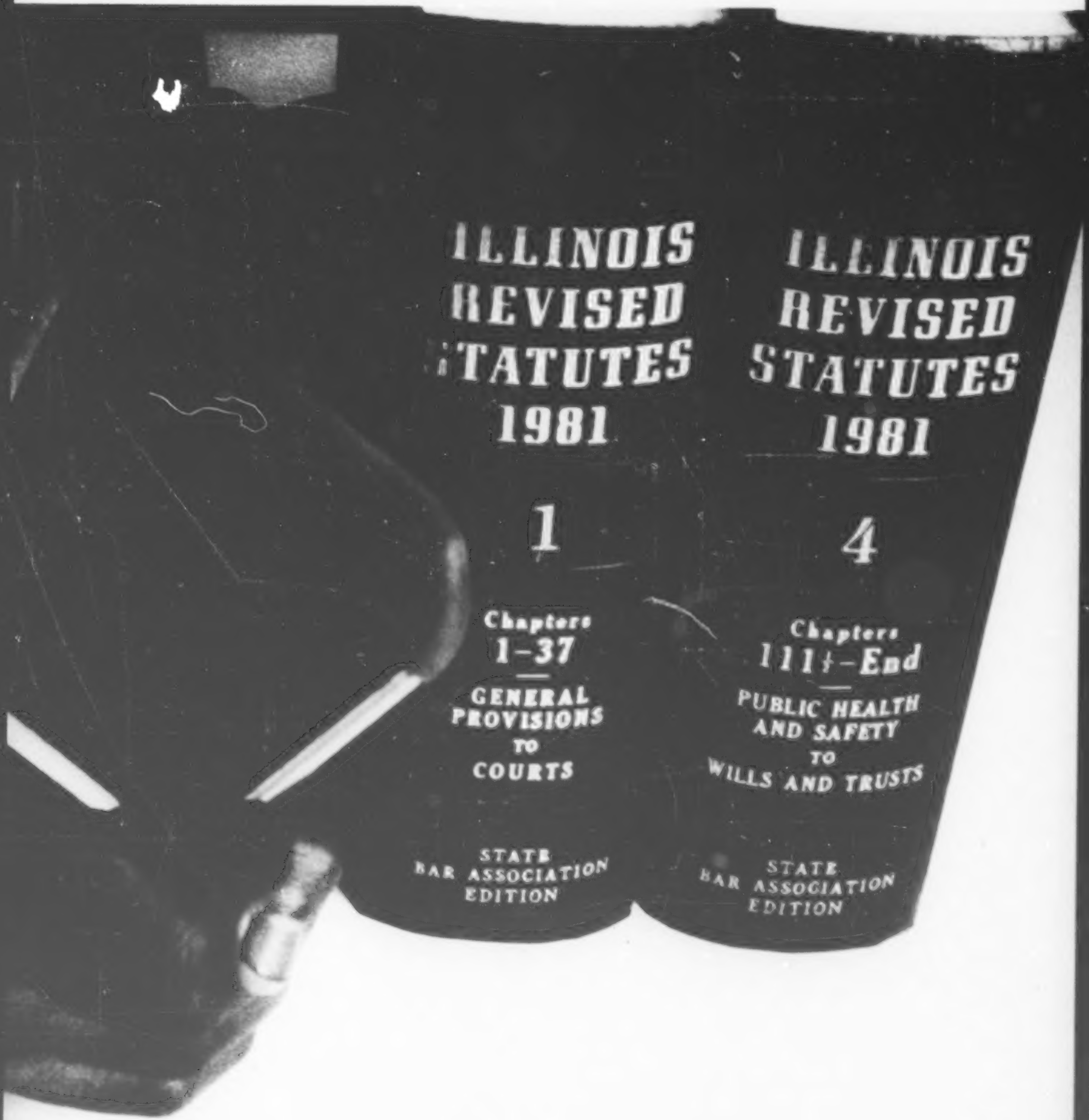
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EDITION

Herbert Jackson

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part-owner of a plant store, was tending shop one day when a 15-year-old boy with a huge hunting knife walked in and threatened to rape and kill her. The woman, whose baby was playing in the back room of the store, fought her assailant and ran screaming into the street. The boy with the knife chased her down the middle of the thoroughfare with the knife poised in mid-air until he was tackled by a pedestrian.

* * * * *

Two teenage girls were grabbed in front of a suburban shopping center by a 16-year-old and his adult companion. The girls were taken a short distance away, ordered to disrobe (it was December) and pile their clothes on the curb, and repeatedly raped by both men.

These actual cases have some frightening similarities. First, they all involve vicious criminal acts committed by young people. Second, they all took place in broad daylight and in locations which we'd think of as "safe."

Unfortunately, stories like these are becoming more and more common. Reports of random and violent juvenile crime are alarming people across the nation. From inner cities to small towns, people are questioning the effectiveness of the modern juvenile justice system and demanding new measures to stem the tide of juvenile violence.

In response to increasing public concern about juvenile crime, legislators, prosecutors and others have begun to reexamine both specific provisions of their state's juvenile codes and the general philosophy of the juvenile justice system. One mechanism for dealing with juvenile violence—the transfer of young offenders from the supposedly more benign juvenile court to the supposedly more punitive world of the adult criminal court—is becoming the focus of renewed attention.

As greater numbers of youths are transferred to criminal courts for trial and the scope of transfer laws is expanded, many observers wonder what is happening to the fundamental framework of the juvenile and criminal justice systems. Has current thought about the appropriate treatment of juvenile offenders moved a full 180 degrees from the beliefs underlying the establishment of the first Juvenile Court back in 1899? Have our problems and needs as a society changed so completely in just one century? The practical answer to these questions—notwithstanding the claims of modern-day reformers—is a resounding "yes."

Special Handling for Kids

Just as adults have always violated the rules and laws of their particular social groups, so have young people misbehaved throughout the course of history. In the last 200 years, however, the illegal acts of children have come to be viewed in Western civilization as being distinct from adult crimes.

Medieval Europeans had no concept of a separate and distinct stage of life called "childhood." Kids, once they had survived past infancy, were viewed as miniature adults and treated accordingly. In the 1700s, this perception began to change, and by the 1800s young people were seen as vulnerable, defenseless, in need of great care and guidance, and capable of reformation and rehabilitation.

Over the years, three major assumptions developed regarding children's capacity to form the *mens rea* necessary to hold them responsible for their actions. At common law, kids under seven years of age were deemed *doli incapax*—incapable of felonious intent. Between the ages of seven and fourteen, children were presumed to lack capacity to form the requisite criminal intent. However, this presumption was rebuttable in individual cases. At 14 years old, young people had arrived at the age of full responsibility and were held to the same standards as adults.

Besides bringing English common law with them, the early American colonists brought Western European attitudes about children to the New World. Many state statutes, for instance, were specifically directed at youthful misbehavior. Playing ball on public ways was prohibited in some places. So was sledding on the Sabbath. In 1646 Massachusetts enacted a law making it a capital offense for anyone 16 or older to "curse or smite" his parents.

Such laws proliferated, and punishments for violators were harsh. Both adult and juvenile offenses often ended in capital punishment, corporal punishment (such as branding or public exhibitions by stocks or pillories), prison (an increasingly common practice after the 1820s), and apprenticeships.

INTERNAL REVENUE SERVICE
schneider

"We're not allowed to accept gratuities, Sir . . . We just work on the bounty system."

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In the 1800s, life in the United States underwent a vast transformation. It was a time of great social ferment, an age of reform. Institutions like penitentiaries and mental hospitals sprang up for adults. Prior to this time, most criminals and mentally ill individuals had been sent to jails or almshouses. The new penitentiaries were designed to give convicts an opportunity to regret their wrongdoing and reform. The new institutions for the mentally ill were based on the belief that mental illness was curable with proper care in a hospital setting.

A similar revolution took place for young people. Special institutions were created in many states to handle kids who had committed crimes or presented other problems to their parents or the community—such as running away or skipping school—that most states would today identify as status offenses. The first of these institutions was New York's House of Refuge, established in 1824.

These houses of refuge (or "houses of reformation" or "reform schools" as they were also called) attempted to improve children's lives after they had come into contact with the courts. In other reforms, juveniles began to be confined separately instead of with adult criminals, and juveniles often received separate court hearings and the supervision of probation officers as an alternative to confinement.

Justice, Truth and Love

Initially, the reformers' attention was directed to doing something for children after conviction, not to preventing juvenile prosecutions. Slowly, however, the emphasis shifted. Children began to be viewed not as criminals but as individuals who needed special care and protection within the legal system. It was within this context of compassion and enthusiasm for reform that the first juvenile court came into existence in Chicago in 1899.

Thirty years later nearly half of the states had juvenile courts in operation. Herbert H. Lou, in a 1927 article, described the philosophical underpinnings of the new juvenile courts like this:

> The juvenile court is conspicuously a response to the modern spirit of social justice. It is perhaps the first legal tribunal where law and science, especially the science of medicine and those sciences which deal with human behavior, such as biology, sociology, and psychology, work side by side . . .
>
> In place of juries, prosecutors, and lawyers, trained in the old conception of law and staging dramatically, but often amusingly, legal battles, as the necessary paraphernalia of a criminal court, we have new probation officers, physicians, and psychiatrists, who search for the social, physiological, and mental backgrounds of the child in order to arrive at reasonable and just solutions of individual cases. In other words, in this new court we tear down primitive prejudice, hatred, and hostility toward the lawbreaker in that most hide-bound of all human institutions, the court of law, and we attempt, as far as possible, to administer justice in the name of truth, love, and understanding.

Today there are special juvenile courts in all 50 states and the District of Columbia. However, the vast majority of jurisdictions and the federal courts have always prosecuted certain "hardcore" young offenders in adult courts. The statutes allow for a process—variously described as transfer, waiver, removal, referral, certification, or bindover—by which the courts are permitted to determine whether juveniles who are above a certain age and charged with serious offenses should be tried in juvenile or adult courts.

Thus, in addition to the question of what should be done with juveniles, the courts must also decide what type of court is appropriate in a given set of circumstances. Transfers have been treated as a sort of nexus between juvenile status and adulthood. They are ceremonies which notify youths that something significant is happening in their lives—a rite of passage, in a sense.

The differences between adult and juvenile courts cannot be minimized. Just charging children in an adult court strips them of many of the valuable protections that would have been available to them as juveniles. Even if they are ultimately acquitted, they will have undergone a fully public trial. Gone are the shields of confidentiality and tight time restrictions of juvenile court hearings.

The differences between the juvenile and adult courts are even more notable if juveniles are tried as adults and convicted. As juveniles, the harshest disposition of their case would be a relatively short period of confinement in a juvenile corrections institution. At least theoretically, such institutions are designed for the reformation and rehabilitation of minors. Within the adult system, however, a convicted criminal faces the prospect of imprisonment for a substantially longer period. Furthermore, a large number of states now provide for capital punishment. The ultimate consequence of sending a child to the criminal courts may be a death sentence. In a very real sense, these considerations have brought juvenile justice full circle, back to the earliest debates that accompanied the creation of the juvenile court nearly a century ago.

Who Decides?

Criminal courts take jurisdiction over juveniles in four ways: lower age of jurisdiction, judicial waiver, concurrent jurisdiction between the juvenile and criminal courts, and excluded offense provisions. These legal mechanisms are not necessarily mutually exclusive; two or three of them may exist in a single state.

Lowering the age of jurisdiction sends all accused kids above a certain age to criminal courts. State laws generally specify juvenile court jurisdiction as being up to the age of 16, 17, or 18. In most states, kids who are 17 or younger are initially subject to the jurisdiction of the juvenile courts. All of these states can keep (once obtained) juvenile court jurisdiction of kids until a particular birthday (usually 18 or 21) or for purposes of probation, confinement, or parole.

Judicial waiver statutes give juvenile court judges the power to waive their jurisdiction of certain youths in favor of the criminal courts. For the most part, legislatures have restricted judges' discretion in this area by requiring them to take into account such factors as age, offense, prior record, amenability to treatment, and security of the community. While it is frequently up to prosecutors to begin waiver proceedings, it is juvenile court judges who possess the final authority to make transfer decisions.

Concurrent jurisdiction statutes basically delegate to prosecutors the nonappealable discretion to file charges (typically only against juveniles over a certain age who are charged with felonies) in either juvenile or adult court. Prosecuting attorneys have, in effect, the power to exclude juvenile courts in these cases.

Excluded offense provisions are also known as legislative waivers because state legislatures expressly waive specific offenses from the juvenile court's jurisdiction. Under these statutes, trials of youths in adult courts are automatic for certain offenses. Neither judges nor prosecutors have any discretion in the matter.

Over 30 states have excluded certain offenses from juvenile court jurisdiction, but most of these exclusions tend to be for only traffic, watercraft, or fish and game violations. A handful of these same states exclude specified serious offenses, too. However, many jurisdictions are thinking about adding to these "automatic transfer" laws to stem the number of serious juvenile offenses in the community.

(Continued on page 60)

KIDS AND THE LAW

Deborah Strigenz and Doug Marek

New Ideas for Disturbed Youngsters

How does the rest of the world fight juvenile crime? Is prison the only way?

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Jean-Claude LeJeune

Raul was born in a quiet rural area 16 years ago. He remembers his early childhood as a happy time spent playing with his four brothers and sisters and helping around the house. When Raul was five years old, however, his mother ran away with another man, taking only the youngest child. Raul's grandmother moved in to take care of Raul and the other children. She died when Raul was eight, and his father decided he could not take care of four children by himself. The oldest boy found a job, the two girls went to live with an aunt, and Raul was placed in a home for abandoned and orphaned children.

Raul lived in the orphanage for six years, when his mother was located and he was sent to live with her and his stepfather. Raul and his stepfather did not get along well, so Raul began to stay out late to avoid him. He eventually joined a gang and, with fellow gang members, began breaking into houses and stealing.

Now at the age of 16, Raul is before the juvenile court charged with two separate incidents of assault and battery and with six robberies. Because he plans to cooperate with the court and assume responsibility for the offenses, he decides to plea bargain and is only found guilty of one theft. The judge places him on probation for an indefinite period of time and Raul is released in his mother's custody.

Raul's is a familiar story, of course—one that might get an inch or two of coverage on a slow news day in the *New York Times*, *Des Moines Register*, or the *Albuquerque Journal*. Except Raul lives in Sao Paulo, Brazil.

We are all familiar with the continued controversies about how children in our country should be treated when they get into trouble. Should they be prosecuted as adults for certain crimes? What about plea bargaining, or the merits of alternative programs such as diversion and restitution?

Rarely, however, do our discussions of juvenile justice turn to what happens to problem children in other cultures. Yet, similar discussions take place in countries all over the world, and the strategies developed in those countries for dealing with these children are worth examining. We need to know how well they work and whether they can be adapted to our nation's juvenile justice problems.

From Farm to Factory

In the early days of our country, when our society was largely agricultural, children played an important role as family workers. Typically their chores included tending to animals and planting and harvesting crops—all activities that took place close to home.

With the Industrial Revolution in the middle 1800s, however, came new jobs for children. Cities grew larger and factories, mines, and shops needed young, strong workers: children became an even more important part of the economy. Simultaneously, abuse of the child workforce became widespread, with children sometimes working 12- and 14-hour days.

Outrage over these abuses led social reformers to look closely at child labor in particular and the status of children in American society in general. In 1899, a group of Illinois women joined lawyers and social workers to push through a statute that established the first independent juvenile court, one that emphasized rehabilitation rather than punishment. By 1929, all but two states had some version of a juvenile court act.

These new juvenile courts were based on the doctrine of *parens patriae* established by the English courts, which viewed children both as subjects of the king and as dependents in need of supervision; if a child's parents failed or were unable to provide adequate care and supervision, it was up to the king, through the mechanism of the court, to provide that care and to decide what was in the child's best interest.

Under this reasoning, a juvenile court judge in the United States was not judging or punishing children, but rather acting in their best interest in order to save them from a criminal career or moral degradation. The "saved" child did not need lawyers to challenge the court's authority, for the court was there only to protect, to provide training and control. If a 13-year-old runaway was destined by the absence of a distinction between criminal and noncriminal acts to spend the next five years in an institution for an offense that, at the court's discretion, was labelled a delinquent act—well, that was the price to be paid.

Gault Calls for Due Process

In 1967, the *parens patriae* doctrine and attitudes toward the rights of juveniles in general underwent radical changes.

In June 1964, 15-year-old Gerald Gault and a friend were accused by a neighbor of making an obscene phone call to her. Gerald was taken into custody by the Gila County, Arizona, Sheriff's Department—the second time he had been in trouble with the law.

At the time Gerald was picked up, his mother and father were both at work. They had not been contacted before their son was taken into custody, nor were they contacted immediately afterward. Mrs. Gault arrived home at 6 P.M. and learned her son was in the detention home; she was told a hearing would be held in juvenile court at 3 P.M. the next day.

No transcript or recording was made either during or after the hearing. No witnesses were sworn in. Other discrepancies followed at another hearing later that month, yet, "after a full hearing and due deliberation the court finds that said minor is a delinquent child. . . ."

The Arizona Supreme Court, on appeal of Gerald's disposition, held that the state Juvenile Code included requirements of due process and that Gerald Gault had been denied these requirements.

When the case came before the United States Supreme Court, Justice Fortas, delivering the opinion for the Court, ordered that in every state or federal case in which a juvenile is charged with a criminal offense for which he or she can be incarcerated, the juvenile court must provide: (1) timely written notice of the specific charges; (2) the right to appointed legal counsel; (3) the right to confront sworn witnesses and cross-examine them; and (4) the constitutional privilege against self-incrimination. In *In re Winship* three years later, the Supreme Court ruled that a juvenile's guilt must also be established beyond a reasonable doubt.

Thus, starting with *In re Gault*, the pendulum has gradually swung away from the doctrine of *parens patriae*, with the juvenile being "protected," to a system that became much more adversary in nature and, hence, more like the adult criminal system. New issues have risen as a result of these changes. Should the juvenile court system remain separate from the adult system? Are juvenile courts in the United States becoming overly concerned with due process considerations and the adversarial system? Is it possible to involve social and educational agencies in the juvenile justice system without forfeiting juvenile rights?

Finally, what can we learn from how other countries handle issues such as these?

The Soviet Solution

Nadia climbs wearily up the steps of the cannery where she works. The past two days have been difficult for her: her son has been apprehended by the police, and during several meetings she has had with them, Nadia has suffered humiliating lectures about her failures as a parent; she's passed two sleepless nights worrying about the actions that the Juvenile Affairs Commissioner might take against her and her son. Nadia had been aware of her son's late-night roaming, and she had been suspicious for some time that some of his friends were a poor influence. Now, though she is tried, Nadia looks forward to the noisy boredom of the cannery as an escape from the tension of the past days. At the doorway, Nadia pauses to scan the bulletin board for notices of interest. With a sudden sickening awareness, she feels the stares of her fellow workers. There on the Board of Dishonor, is Nadia's picture and a summary of her son's problems with the police.

The Russian system of tightly controlled state-run day nurseries, kindergartens, and schools suggests that that nation would experience less juvenile misbehavior than democratic nations, but the truth is quite the opposite. The social upheavals and wars of the recent Soviet past, along with industrialization and urban migration, have left in their wakes homeless and abandoned children. Single-parent families are common. Frequent relocation of families accompanies changes in political and economic climate. As in other industrialized nations, urbanization and the disruption of traditional family life correlate with increased juvenile delinquency. Figures are not available to indicate the extent of juvenile delinquency in the Soviet Union, but the Soviets themselves consider it a serious problem.

Juvenile offenders in the Soviet Union typically commit thefts and other property crimes or engage in a variety of acts lumped together under the term "hooliganism." Organized street gangs are virtually unknown, but much of the juvenile crime is committed by groups of juveniles. As in most Western societies, a high proportion of juvenile crime is attributable to youths not attending school. Those youngsters who neither work nor study have the greatest likelihood of becoming involved in the Soviet juvenile justice system.

All Soviet citizens 16 years of age and older are eligible for criminal prosecution in the People's Courts. A 14- or 15-year-old accused of a serious crime may also face prosecution in a criminal trial, although the criminal sanctions applied to adults would not be imposed. For younger juveniles and for those between the ages of 14 and 17 whose cases are remanded by the People's Court, jurisdiction is exercised by a Commission on Juvenile Affairs. Juvenile proceedings conducted by both the courts and the commissions are designed to be educational as well as adjudicative. Teachers, psychologists, and social workers are present to give advice to parents and children. Lay judges may sit along with a legally trained judge to help present the views of the public. Courts may impose punishment ranging from public censure to deprivation of freedom, but the commissions are limited to the imposition of "measures of influence" that may be custom tailored to fit the needs of each offender.

Deprivation of freedom is the most popular sentence imposed on serious offenders. Labor colonies for juveniles provide a controlled environment where juvenile residents perform socially useful labor, continue their schooling, and attend programs of political indoctrination. Visits from family members are limited to one visit every three months, and packages may be received only once

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every two months. These isolating features of deprivation increase the juveniles' susceptibility to conforming influences.

A Commission of Juvenile Affairs considering the case of a 14-year-old accused of hooliganism chooses from a grab bag of "measures of influence" designed to reform the offender. Corrective influence might involve the commission's monitoring the juvenile's school progress and leisure activities. For a young repeat offender or an offender with poor academic skills and unstable home life, the commission is likely to order enrollment in a special technical school. Placement in such a school is not viewed as criminal punishment, but rather as a preventive measure that may be ordered without the need for a criminal trial and sentencing.

While Soviet juvenile corrective measures may seem mundane, if a bit severe, it is in the area of prevention of juvenile delinquency that the Soviets have fashioned some innovative methods. Identification of high-delinquency-risk children and adolescents—those with "deviant attitudes" and a lack of parental control—leads to early intervention by a Commission of Juvenile Affairs. Because juvenile delinquency is viewed by the Soviet Union as a failure of institutions to accommodate the self-assertiveness and independence of the adolescent personality, preventive measures are directed at institutional weaknesses.

The Soviets view the prevention of juvenile delinquency as the responsibility of the entire society. Parents' committees, usually organized by Communist Party activists, cooperate with school personnel to provide seminars in child-rearing practices. Peer pressure is intense in these committee meetings, where parents are lectured and problem children are openly identified and discussed.

The grandparent generation involves itself in youth supervision and, to a large extent, is responsible for organizing leisure activities for juveniles. After-school recreational programs and child care for older children are largely run by retired "pensioners" who volunteer their time to this socially beneficial activity.

The reputations of workers' children follow the parents to their work sites. Bonuses and awards may be withheld from a factory worker because a check of the school performance of the worker's children indicates poor progress. When parental negligence appears to be a cause of a child's delinquency problems, as in the case of an alcoholic parent, a public reprimand even more devastating than a Board of Dishonor notice might be imposed.

When truancy or vandalism indicate that an adolescent is predelinquent, a Commission on Juvenile Affairs might order the adolescent to be monitored by adult volunteers. These unpaid auxiliary workers might act as tutors, investigate and report to the commission on the family situations of the predelinquents, and organize excursions or other leisure activities. This type of volunteer work is especially encouraged among professionals, whose status in the community is increased by their participation.

> ***The Soviets have taken some creative steps to prevent youth crime. They identify kids who are likely to become delinquents, apply peer pressure, blame parents.***

In extreme cases—when a young probationer is released into an unstable family situation, for example—an individual wardship might be established. In this instance, the auxiliary worker acts as a Big Brother to the delinquent youth, visiting two or three times a week and monitoring the child's scholastic and social progress.

All of these Soviet measures designed to prevent juvenile delinquency indicate a high degree of public awareness of and involvement in what the Soviets perceive to be a serious social problem. Preventive measures are aimed at increasing the material security of children, inculcating better attitudes in both parents and children through the educational system, improving the process of adjustment of children to adult life through work training and improved work conditions, and providing structured leisure activities for youth.

The separation of criminal procedures from social welfare programs, as indicated by the separate provinces of the People's Courts and the Commissions on Juvenile Affairs, demonstrates the Soviets' awareness of the complex problem of rebellious children. The American public would never tolerate the governmental intrusions into their personal lives that are common in Soviet society, but the Soviet juvenile justice system does illustrate some interesting alternatives to the American system of juvenile justice.

Tradition and Transition in India

A common joke in American legal circles is that juvenile proceedings are those in which there are more lawyers present than people. The cynics notwithstanding, it is difficult for Americans to imagine a juvenile proceeding where no lawyers are in attendance. In many juvenile hearings in India, however, lawyers are allowed only upon special permission of the court.

Like the United States, India has a past closely tied to England and the English legal system. Unlike the United States, however, India possessed an ancient cultural tradition upon which the English legal system was superimposed, resulting in an admixture of familiar Western principles and purely Indian traditions.

The traditional scheme of child-rearing in India involved a graduated scale of responsibility: under five years of age, a child was considered not responsible and was not chastised; between the ages of five and 16, a child was partially responsible and advice, rebuke, and mild chastisement were appropriate; when older than 16, a child was treated as a friend. The system had a basis in sacred scripture, as well, where it was specified that the *prayascitta*—or cosmic effects in afterlife—were only half as severe for a 16 year old as they would be for an adult committing the same offense.

In a crowded country where more than two-thirds of the people live in small village communities, how could a national system of juvenile justice function? The diverse cultural environment of the Indian sub-continent demanded local control, even if it meant keeping juvenile justice out of the superimposed British legal system. On the village level, caste councils were—and to a large extent still are today—the agencies of social control. Juvenile delinquency was dealt with as a problem affecting related families. Solutions evolved in the form of joint and extended families, who viewed problem children as shared responsibilities. If a father and mother could not control their child, perhaps the aunts and uncles could help. Informal guardianships were established. Sickness or death of a parent led to a shift in a problem child's home. The system was flexible, successful, and completely separate from the legal system.

As in the United States and the Soviet Union, the dramatic increase in juvenile delinquency in India in recent decades is associated with industrialization and urban migration. Although the Indian juvenile justice system operates more for-

(*Continued on page 46*)

Mabel C. McKinney-Browning

Playing with Pain

What can you do about a sport where everyone gets injured?

All photos UPI

Millions of Americans spend Sunday afternoons watching professional football. On Monday morning, enthusiastically or disgustedly, they analyze the game—damning or praising the quarterback and questioning the capabilities of the coach. For these Americans, football is the "All-American" game. But for the men who play football it represents the culmination of years of training, practicing, and conditioning. For them, football is a lucrative job, a challenging career, and a competitive business. It is also an intense, emotional, and sometimes dangerous game.

Thousands of athetically talented young men in excellent physical condition compete for the 1600 player positions available in the National Football League (NFL). With an injury rate of 100 percent, it is almost assured that these players will suffer—in many cases long after their playing careers have ended—from the repeated physical abuse the job demands. This uncommonly high injury rate has given rise to a range of sports-related legal issues. These include compensating players for injury, providing prompt injury care, providing equipment that minimizes the potential of serious injury, and protecting them from the unnecessary, reckless and illegal behavior of fellow players.

Players have sought to deal with the certainty of injury through provisions in their own contracts (individual bargaining), through the union's contract with the league (collective bargaining), and, when necessary, through the courts. The most recent contract between the NFL and the NFL Players Association makes strong progress in this area by streamlining injury grievance procedures, clarifying and improving medical care and treatment guarantees, and instituting changes in game rules and enforcement.

To learn more about the positions taken by management and the players (individually and through the NFL Players Association), we asked three football professionals and two lawyers specializing in related legal areas to discuss the issues with us in a round-table discussion. Dan Jiggetts, a player for the Chicago Bears, was unable to attend that discussion. He consented to a subsequent interview in which he responded to questions addressed during the initial session.

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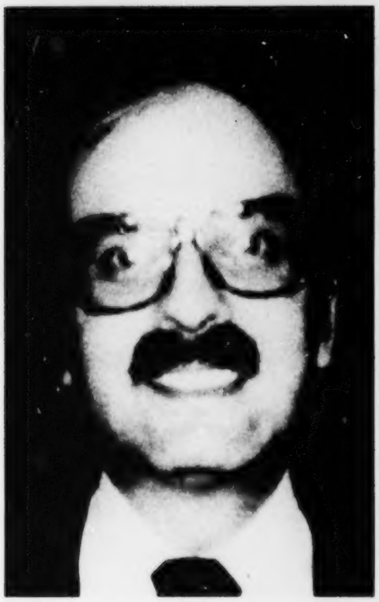
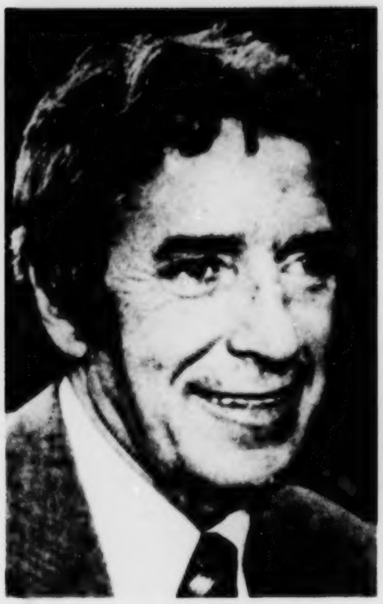


Michael Cohen is a Chicago attorney in private practice specializing in the area of workers compensation. He has an M.A. in communications from the University of Iowa and is an honors graduate of DePaul University College of Law.



Jim Finks served for nine years as vice-president and general manager of the Chicago Bears. He resigned from the Bears after this interview was conducted. A former player, his career spanned the years 1949-1955. He is currently president of the Chicago Cubs baseball team.

Dan Jiggets played offensive tackle for the Bears for seven years, leaving the team before the current season. He has served on the executive board of the NFL Players Association. He is a graduate of Harvard University.

His comments have been edited into the text as they might naturally have occurred. As you will see, a wide-ranging, thoughtful, and fact-filled discussion resulted.

MMB: Cyril, whenever I think of football I think of the excitement—the crowd screaming and the thrill of a terrific play, no matter which side makes it. Is there a play that you made during your professional career that, even now, thrills you to remember?

CYRIL PINDER: The play I remember best happened just after I was traded to the Bears from the Philadelphia Eagles. We were playing the Redskins. There were 42 seconds or so left in the game. We were losing by six points. It was third down and we were on the 45 yard line. We ran a play between the guard and the center called 21 mouse. It's usually a short yardage play, a quick trap, and we were hoping to get a first down. So I got the ball and things just opened up! I broke and ran for daylight, tying the game with a touchdown. (The first touchdown I had made at such a critical point in a game since high school.) Now all we had to do to win was kick the extra point. The quarterback, Bobby Douglas, bobbled the snap so the kick couldn't get off. Douglas got to his feet and started looking for a receiver—you can pass or run the ball over for the point too. Dick Butkus, our great middle linebacker, had lined up as an outside blocker on the play. Luckily he realized that he was an eligible receiver. He went into the end zone and made the catch for the point. We won the game 17-16. My run set a Soldier Field record that's still in the books. Probably a lot of people remember the pass to Butkus and have forgotten that I was the guy that made the whole thing possible.

MMB: Dan, offensive linemen don't get much of the glory. Could you describe your work as a professional football player?

DAN JIGGETTS: Well, professional football now is really a twelve-month-a-year job. In the off season, you're active in your job doing weight training, working out, and that kind of thing. It takes a lot of time—probably two or three hours a day, four or five days during the week. In season, we start in the morning at 9:00 reviewing the film and going over our offensive and defensive schemes and the game plans. We hit the field after that and practice until 3:30 or 4:00. Then after we finish lifting weights, we watch more film on our next opponents to familiarize ourselves with them and their playing style. And that's every day right up until the ballgame. Of course, there are travel days where you fly out Saturday night, play the ball game on Sunday, and return Sunday evening. So football is a very time-consuming job. During the season, almost every waking hour of the day is spent somehow or another focusing on your job.

MMB: When we get into the legal situation regarding injuries, a lot will depend on interpreting contracts. Jim, when are players considered to be part of the Chicago Bears organization?

JIM FINKS: If you would accept the concept that players are individual contractors, then the minute we reach agreement on the contract, sign it, and get approval by the league office, they are officially members of our organization. The contracts are not guaranteed contracts—the player must make the team Unless a player is gifted enough to negotiate a no-cut or guaranteed contract, he is subject to being released at any time prior to the first league game.

DAN JIGGETTS: The standard player contract has never been agreed upon in collective bargaining. It is really a contract of adhesion in the sense that it binds the player to a club. It does not, however, bind the club to the player. A player can be released at any given time. But until the

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Cyril Pinder is vice-president of S-R Associates, a financial planning firm located in Chicago. He played in the National Football League from 1968–1976 for the Philadelphia Eagles, the Chicago Bears, and the Dallas Cowboys.

Mabel C. McKinney-Browning is an educator on the staff of the American Bar Association's Special Committee on Youth Education for Citizenship. She coordinates a program for elementary and secondary schools funded by the National Endowment for the Humanities.

club says that they release the player, he is bound to the club for the duration of his career. Our contracts are one-year contracts. When you hear that someone has signed for three years, they signed three one-year contracts. There is no continuity between one year and the next.

MMB: If a player is injured sometime between the signing of the contract and the first official league game, what is his status?

JIM FINKS: If it was a football-related injury—occurring in practice, in the conditioning room or anything pertaining to football—his contract would be honored by the club just as if he were playing. It is the club's reponsibility to provide medical attention and rehabilitation facilities. Once the player is healthy enough to play, he either goes on the squad or he can be released.

MMB: How are players classified for the period in which they are injured and cannot play?

DAN JIGGETTS: A player is placed on the injured reserve list when he has sustained an injury that prevents him from playing for 21 or more days. If a player is injured during preseason and put on injured reserve, he can't play unless he is released by the club or put through waivers. If the team wants to put the player back on the roster, he has to go through procedural waivers during which other teams can pick him up. [Editor's Note: When a player is waived, his current club makes him available to any NFL club in return for draft choices and/or cash.] This procedure discourages clubs from stockpiling players and bringing them in during the season. Generally if a valuable player gets injured during preseason, the club doesn't try to bring him back during the season because of the risk of another team getting him while on waivers. If a player is injured during the regular season, he's already made the team and may return to play at any time.

MMB: What percentage of player contracts have clauses in them relating to injury compensation?

JIM FINKS: All standard player contracts have the same clause, that in the event a player is injured in performing his duties as a football player, he will be paid 100 percent of his contract. Every player has the right also to negotiate other medical guarantees. My job is to make sure that I use good judgment in who I offer those to. It's a quid pro quo in negotiations. That is, we will entertain disability insurance providing we can get something back in negotiations from our players.

DAN JIGGETTS: There is a 100 percent rate of injury of the NFL. A player assumes, then, that at some point in his playing career he will incur an injury. Any time you take the field, you recognize that you could be injured. You also realize that it's one of the risks you take as a player. You ask to be compensated because of the very high risk factor involved.

MMB: Do most players negotiate injury insurance as part of their contract?

DAN JIGGETTS: Not really. There is some injury insurance included in the collective bargaining agreement. If a player is injured in one year and can't play the next year due to that injury, he is paid his normal salary for that year. If it's a career-ending injury—the player cannot pass the physical the next year—then he gets $65,000 compensation payment.

JIM FINKS: Most injuries that occur in football are injuries that might prevent a player from playing a game or two, and he's covered under the contract for that.

KATHERINE LAUDERDALE: There are many instances in which players who should be covered by additional disability insurance are not. In fact, in most instances only the superstars are able to negotiate additional coverage. That's logical—since they are the most valuable

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players to the team. How, if not via the team, might players who are not superstars get extra insurance coverage?

CYRIL PINDER: I've had several athletes come to me who are interested in disability insurance, but we have a problem insuring professional athletes because of their occupations. I work for a commercial company and we do not insure occupations that we consider hazardous. Policemen, firemen, airplane pilots, as well as football players fall into this category—based on the likelihood that they may become disabled in the line of work. Other occupations—CPAs, doctors, attorneys—are better risks for the company because even if they become disabled, in most cases these guys could continue to perform their duties. A disabled football player can no longer perform—if he's not able to play the game, he's considered disabled for insurance purposes. So it is difficult, and in most cases impossible, to insure a football player for disability. Most commercial companies are just not willing to stand that high a risk of having to pay.

JIM FINKS: The definition of disability, as it relates to a football player, means essentially that he incurs a career-ending injury. Rarely do you ever have a total and permanent disability case such as Darryl Stingley of the New England Patriots. [Editor's Note: Darryl Stingley suffered a broken neck while playing in a 1978 preseason game. He is confined to a wheelchair as a result of the injury.] It is a more usual circumstance for a player to develop a problem like an arthritic knee. He can function with it, but not play football.

DAN JIGGETTS: On the NFL-NFLPA retirement board the monthly payment for permanently disabled players was raised two years ago. Neither the Players Association nor management realized when we first entered into negotiations how many players were in this category. We said "Well, probably two or three—not that many." Management said "Okay, fine. That's not that big a cost." Then we discovered there were something like eight totally and permanently disabled players. They receive $4,000 monthly. However, from the vantage of players like Darryl Stingley, that amount is not substantial enough when you consider the cost of living expenses they must incur.

MICHAEL COHEN: What happens in the case of permanent *partial* type of disability. For example, if a player injured his knee and arthritis set in, in addition to ending his football career, he would lose part of the use of his leg. That's one thing that workers compensation law is designed to address. Is there anything in the contract or in the players agreement that might compensate a person for partial disability?

JIM FINKS: Define partial disability as it relates to football. I can understand the term as used in industry. But a player who has a partial disability as defined by the workers compensation laws can leave football and go to work earning an income commensurate with his ability to do that job. It's hard for me to come to grips with the fact that he should be entitled to additional compensation.

MMB: Let's take the case of Gale Sayers for example. [Editor's Note: Sayers was a Chicago Bears running back from the mid-sixties to the early seventies.] He had several knee operations which, I'm sure, diminished his effectiveness as a player. While no one injury could be defined as career-ending, he probably did not play as long as he would have under healthier circumstances. Shouldn't Sayers have been compensated for this?

JIM FINKS: Well, I cannot argue that the two knee injuries Gale had did not shorten his career. I don't think, however, you can look upon a professional athlete's career in the same vein as you look at careers in sales or industry. Football is a very short period. [Editor's Note: The average career spans 4.2 years.] It was never intended to be a full career in the traditional sense. Case in point, if you play three years and three games into your fourth year, you're fully vested on the pension. We provide severance play—$10,000 for every year a player plays in the league. These are some of the unique benefits that come with playing professional football. Yet, under workers compensation, football clubs are treated the same way as Standard Oil.

MICHAEL COHEN: Jim, I'd like to explore a little more the rationale of the Bears regarding their coverage by the Workers Compensation Act. The Act states that "extra-hazardous occupations are automatically covered." Would it be the Bears' position that football is not a hazardous activity or that it has some kind of special status?

JIM FINKS: I think our position would be that football deserves a special status. As you know, we're almost defenseless the way the laws are being interpreted now. We don't think it applies to professional sports as it does to a person who works in industry. A case in point, if during his career Cyril had incurred any kind of an injury he could move to California tomorrow and, under the continuing trauma clause of the California Workers Compensation Act, file a claim against the last team for which he played. He could also file claim against the Chicago Bears and probably would be successful.

So what does partial disability mean? Does it mean the fact that a player is unable to work, or does it mean he's unable to play football? Our position is that each player is an individual contractor. When a player sits down and negotiates a contract with the Chicago Bears, he negotiates his own salary and any other benefits he's gifted enough to negotiate. These might include insurance to cover injuries. We feel that the fact that players are individual contractors sets them aside from regular workers.

MICHAEL COHEN: Even though a contract that somebody signs may designate them as an independent contractor and not an employee, the courts will look at the actual work being performed. The standard the court will use is the right to control the means of performing the work. Would you have any thoughts on this standard, Jim, based on the fact that the coach is responsible for telling the athletes what to do and guiding their performance during the game?

JIM FINKS: Where workers compensation law should apply is the real key and it's up to us to try to get the laws changed if possible. I think workers compensation is desirable provided it is used properly, but the abuse of workers compensation is a real concern not only to the professional sports teams, but to all of industry, at least in Illinois.

MMB: An important area dealt with during the negotiation of the recent collective bargaining agreement was the player's rights to medical care and treatment. Who makes the judgment as to the fitness of a player?

JIM FINKS: The team doctor. Dr. Clarence Fossier, team doctor for the Chicago Bears, has total authority as to who plays, who's healthy and who isn't healthy. He is an independent contractor under contract to the team. If he says a fellow is not ready to play, then that answers the question.

MMB: At the time you played, Cyril, did you feel confident in the decision of the team doctor?

CYRIL PINDER: If the injury was related to football, the team doctor was acceptable to me. At the time I was playing, Dr. Ted Fox was team doctor for the Chicago Bears. I thought he was a good doctor, other players didn't. I was fortunate, however; I never really had a lot of injuries. Dr. Fox was the kind of guy that if he said you were fit, even if you felt you weren't, you had no choice—you would go out and play. I was such a team-oriented person, that if he said go, that was good enough for me.

JIM FINKS: My own experience with team doctors was identical to Cyril's. The team doctor was the last word. We never had any funds to go to another doctor. Going to another doctor, getting a second opinion never crossed our minds. That's how naive we were at the time. But things have changed, and I think for the better. If a player goes to the team doctor and he's not comfortable with his decision for one reason or another, the player has every right to get a second opinion—at the club's expense. Case in point, although Walter Payton has never been seriously injured, he had some fluid on his knee at one time and was a little concerned about it. He requested permission to go down to Jackson, Mississippi, and see his personal physician. It was perfectly okay with us. The doctor agreed with Dr. Fossier's opinion and reassured Walter.

MICHAEL COHEN: What happens if the two opinions conflict—for example, if the second doctor says a player can't play and the team doctor says he can?

JIM FINKS: We would get a third opinion.

MICHAEL COHEN: Would that be a "neutral" opinion?

JIM FINKS: Yes. There is a panel of neutral physicians that have been approved by the League and the Players Association. There is at least one neutral physician in every city who functions under that circumstance.

DAN JIGGETTS: Whenever I get an injury, I call my personal physician and my college roommate, who is an orthopedic surgeon. Regardless of how minor or severe the injury, I think it's important to get a lot of different opinions in order to feel your way through the medical process. None of us really knows what's going on with our bodies except for what we feel. So you've really got to get other opinions.

One big question the association asked was whether or not the doctor-patient relationship is really being adhered to in the "team-doctor" relationship. When you go to see a doctor personally, there is a relationship between you and the doctor in which everything that you say is confidential. His responsibility is to you first and to inform an employer, if something is seriously wrong, second. We've had a problem with team doctors in the past who feel that in terms of information flow they have a responsibility to the club first, and the player second. Under the new collective bargaining agreement, the doctor-patient relationship is more well defined. Information flows first between doctor and patient, then to the club.

MMB: Have there been any malpractice suits brought against team doctors?

JIM FINKS: This happened before I joined the Chicago Bears, but I believe the basis of the Dick Butkus suit was malpractice as much as it was anything else. [Editor's Note: Dick Butkus was a middle linebacker for the Chicago Bears from the mid-sixties through the early seventies.] I think Butkus brought suit not only against the Chicago Bears but Dr. Fox as well. The case was settled out of court, however, and never went to trial.

CYRIL PINDER: Dick was very valuable to the team, the coaches felt he had to play. I think Dick was being injected to get him out on the field, and it helped to deteriorate his knee. As a matter of fact, he asked me to testify in the event of a trial because I used to watch them work on his knee. He wouldn't practice during the week, but he'd play the game on Sunday. The physical deterioration was obvious. I guess Dr. Fox should have been the guy to declare Dick unfit to perform. That was the reason he was charged with malpractice.

MMB: Why do players continue to play under circumstances which are obviously deleterious to their health?

CYRIL PINDER: Well, I'll tell you from a ballplayer's viewpoint. If you stay out of the game too long, somebody's going to take your spot. On any given day, most players are pretty much equal in talent. So you're going to go out with a crutch if need be to keep your job. I know I would, and I'm sure that was the case with Dick. He was an important player. They told him, "We need you to play. Don't worry about working out during the week. Just come on in and play on the weekend." As Jim said, players didn't really have much choice in those days.

I never met a guy who was playing during my time who said, "I'm not going to play because my knee is bothering me." When I was in Philadelphia playing for the Eagles, I pulled a hamstring muscle very badly. During the game, I went to the trainer and told him I was having a hard time running. He told me to take a break; my leg would be okay. Later, I went back out and tore the ligaments in my leg some more. That was my decision. I had to play because I wasn't going to give another guy a chance to come out and take my position.

DAN JIGGETTS: Fears still exist about losing your job—if you're not out there playing, somebody else is. However, I think you have to make a fundamental decision that your long-term health is more important than winning the ball game.

JIM FINKS: When Cyril played, when I played, we never considered football anything other than a means to an end. Now the stakes are big and the benefits are so great that survival is the key in this business.

DAN JIGGETTS: Players now, more so than before, recognize the value of longevity. Longevity means more money during your football career. You've made an investment in your body and your time playing this game, so you have to try to maximize the amount of time you can play. Taking good care of yourself is one way of accomplishing that.

JIM FINKS: Let me tell you about a case that illustrates how things have changed in the league. Doug Plank, who has been with us for seven years and is known as a very fierce competitor, detected some numbness in his left leg last season. Well, he went to the team doctor who sent him to a specialist. The specialist didn't like what he saw but couldn't put a handle on it. Doug asked if we would have any objections to his going over to the University of Michigan to see another specialist. We sent him over—at our expense. The specialist at Michigan said, "There's no problem. The chances of the numbness reoccurring are very remote."

Doug came back and although the numbness had left, he didn't want to play football the rest of the year. We didn't insist that he play. My point simply is this: Athletes are different today and we, management, have to approach them differently. It's sometimes hard to tell whether a player is leveling with you or looking for a copout, but we have to give them every benefit of a doubt. [Editor's note: After this interview, the Bears declined to offer Doug Plank a new contract because some of the doctors who had seen him believed that he risked permanent disability if he continued to play. Plank felt he could play without danger, but Mr. Finks noted that "it's our liability as well as Doug's."]

(Continued on page 57)

The Rite of Autumn: Women's Rights, Gay Rights, Prisoners Rights. . .

Each issue of Curriculum Update sends us looking for new materials to sharpen our skills, whet the appetites of students and teachers, and inform us of developments in our field. With this edition of Curriculum Update, we introduce an exciting new dimension—reviewers who are practicing teachers. Because teachers are the primary users of the texts, guides, and audio-visual materials reviewed here, we value the informed perspective and instructional insights which they bring to this section. Our reviewers for this issue are:

- *Richard A. Davis*, who teaches high school social studies at Roycemore School in Evanston, Illinois, and advises in the Illinois YMCA State Youth and Government program. An undergraduate political science major, he has an M.A.T. degree from Northwestern University.
- *Diane Farwick*, a teacher at Lincoln Park High School in Chicago who has taught LRE classes for the past 14 years. Formerly director/teacher/coordinator of a Title IV-C Project—Law and the Administration of Justice—she is a member of the Teacher Advisory Board of the Constitutional Rights Foundation/Chicago Project and recently received the CRF's annual Citizenship Award.
- *Faye Terrell-Perkins*, an elementary educator and curriculum developer currently teaching at Hope Middle School in Chicago. She co-wrote the Chicago Public School's Career Education Community Resource Data Bank Curriculum Guide and recently received a grant from the school system to develop and implement an LRE program.

Mabel C. McKinney-Browning of the YEFC staff edited their contributions and coordinated work on this section.

Controversial Issues

Teaching about controversy and classroom discussions of controversial issues are certainly not new to LRE teachers. The materials reviewed in this section cover controversy from several perspectives. *Taking Sides: Clashing Views on Controversial Issues*, by Ethan Katsh, provides teachers with a balanced view of a wide variety of timely issues ranging from affirmative action to prayer in public schools. It suggests an excellent format for informing students of varying perspectives on each issue. The rights of women, gays, prisoners, and the critically ill are discussed in a series of paperbacks produced by the American Civil Liberties Union. These books provide in-depth background information regarding these sometimes controversial special interest groups. They should prove to be invaluable resource materials for students and teachers. Finally, two not-so-new but nonetheless timely books focus on the impact of the juvenile justice system on teenage women; each offers informative views of the system that frequently escape attention.

■ ***Taking Sides: Clashing Views on Controversial Issues*** (1983), Ethan M. Katsh, Ed. Teacher resource/student supplement. Paperback, 343 pp. $8.95. (Dushkin Publishing Group, Inc., Sluice Dock, Guilford, CT 06437)

This book is part of a six-volume series that aims to provide students with opposing viewpoints and to stimulate critical thinking. This particular volume focuses on a series of controversial issues involving law and the legal system. The issues are treated in three sections: Issues in the Operation of Legal Institutions (Should the adversary system be abolished? Should Congress restrict the Supreme Court's power to review constitutional rights cases?); Issues in Law and Social Values (Should prayer be permitted in public schools? Are laws prohibiting sexual harassment needed?) and Issues in Law and Crime (Should the death penalty be abolished? Should handgun regulation be relaxed?).

The editor presents a brief, interesting introduction to the role of law in our society and provides background information for each of 16 issues, pro and con arguments written by legal scholars and commentators such as Harry Blackmun, William Brennan, and Thurgood Marshall, and postscript summaries suggesting further readings.

High school teachers of Law and American history whose students read at or above grade level will find *Taking Sides* a useful source of research and debate topics and an effective springboard for balanced discussion of controversial and important issues.

—D.F.

■ ***Rights of Women*** (an American Civil Liberties Union Handbook, 1983), Susan Deller Ross and Ann Barcher. A teacher/student resource. Paperback, 406 pp. $3.95. (Bantam Books, 666 Fifth Ave., New York, NY 10103)

All you ever wanted to know about women's rights! A revision of the ACLU's 1973 *Guide to Women's Rights*, this comprehensive, up-to-date handbook provides advice and legal solutions for problems women face in protecting their rights and gaining equality under existing law. It also explores unresolved issues and analyzes the difference the Equal Rights Amendment would have made. Constitutional rights, the concept of the equal protection clause, and the tests used to determine whether state laws violate this clause are explained in detail. A general chapter explains the American legal system.

A question/answer format is used to cover topics that include the problem of name change through marriage, employment, education and Title IX, mass media, crime and juvenile delinquency, and family-related issues. Background information and court citations are included. The appendices include charts covering state laws dealing with discrimination against women, sources of legal assistance, women's organizations, and publications.

—D.F.

■ ***The Rights of Prisoners*** (an American Civil Liberties Union Handbook, 1983). David Rudovsky, Alvin J. Bronstein, and Edward I. Koren. A teacher/student resource. Paperback, 145 pp. $3.95. (Bantam Books, 666 Fifth Ave., New York, NY 10103)

"With very little correlation to crime rates, the United States incarcerates more persons per capita than any other country in the world with the exception of Russia and South Africa, and we send people to prison for far longer periods of time," asserts the revised edition of this ACLU handbook, a useful resource for anyone concerned about America's burgeoning prison population and the treatment of prisoners from pretrial confinement to parole. Given the recent proliferation of prisoner's rights suits, this revision is particularly timely for anyone studying the American criminal justice system.

An easy-to-read question-and-answer format focuses on prisoners' due process rights, freedom from cruel and unusual punishment, problems of prison censorship, religious and racial discrimination, political rights, issues of privacy and personal appearance, medical care, rehabilitation and physical security, pretrial confinement, parole, and remedies and procedures. The book reflects changes in the courts' attitudes toward prisons as they seek to eliminate major abuses suffered by prisoners. The courts, however, continue to ignore what the authors consider to be the central evil of prison life—"the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners."

—R.D.

■ ***The Rights of Gay People*** (an American Civil Liberties Union Handbook, 1983). Thomas B. Stoddard, E. Carrington Boggan, Marilyn G. Haft, Charles Lister, and John P. Rubb. Resource for teachers and mature students. Paperback, 195 pp. $3.95. (Bantam Books, 666 Fifth Avenue, New York, NY 10103)

This revised edition of the ACLU *Guide to a Gay Person's Rights* offers concise, up-to-date information on legal rights and remedies.

The book's readable question/answer format cites cases where possible. Present law is explored and the development of new legislation is considered. Although progress has been made, particularly in the area of freedom of speech and association, the authors suggest there is still much to be done in the areas of equal employment rights for gays, occupational licences, the armed services, security clearances, immigration and naturalization, housing and public accommodations, family considerations, and criminal law.

An updated state-by-state review of criminal statutes relating to consensual homosexual acts between adults, a list of groups willing to assist gays in securing legal help, and a bibliography round out this informative book.

—D.F.

■ ***The Rights of the Critically Ill*** (an American Civil Liberties Union Handbook, 1983). John A. Robertson. A teacher/student resource. Paperback, 171 pp. $3.95. (Bantam Books, 666 Fifth Avenue, New York, NY 10103)

This book, a revision of the ACLU's *Rights of Critically Ill and Dying Patients*, describes the legal rights and duties of patients, families, and health-care providers in situations of critical illness. It examines the laws that determine a patient's rights, but it also includes the rights and duties of those interacting with patients.

The first seven chapters look at the rights of critically ill patients; specifically, this includes the right to know the truth and to have their confidences kept, the right of treatment and control of medication to commit suicide, the right to refuse treatment, the right to have treatment stopped in the event of mental incompetence, and the right to not be resuscitated. The rights pertaining to critically ill children are also explored. Other chapters concern advance directives and living wills, brain death, organ transplants and autopsies, experimentation, costs and allocation of scarce resources, and hospices. An appendix provides state-by-state information on laws allowing therapeutic use of laetrile and marijuana, brain death statutes, and living will forms. A listing of organizations involved with the legal rights of the critically ill is also included.

This handbook should be in every secondary school library to assist the student who may have a personal need for its information. It is also hoped that the book's bioethical issues will find their way into the curriculum of a number of disciplines within the secondary school.

—R.D.

■ ***Teenage Women in the Juvenile Justice System, Changing Values*** (1979). Ruth Crow and Ginny McCarthy, Eds. Paperback, 169 pp. $6. (New Directions for Young Women, Inc., 738 N. 5th Ave. Tucson, AZ 85706)

This work is a collection of 24 edited speeches and papers presented by experts in the fields of juvenile justice and women's studies, by public policy makers, and by social activists at the first National Conference on Teenage Women in the Juvenile Justice System held in November 1977 in Tucson. They reveal the societal bias and individual attitudes toward women that have an impact on the legal system and on the teenage women who come in contact with that system. Believing that an understanding of the position of young women in the justice system rests upon the legal, social, historical, and economic status of all women in society, the editors establish this foundation in the first two sections of the book. A third section spells out alternatives and possibilities for reform.

Several of the speeches and papers discuss the treatment of the female status offender who, in many cases, is treated more harshly than her male counterpart who has committed a far more serious offense. (The American Bar Association reports that 50 percent of the females in state institutions are committed for status offenses, compared to only 18 percent of the males.)

This text will serve as a valuable supplementary text and teacher resource in any sociology course, women's studies course, or law-related education class studying the juvenile justice system.

—R.D.

■ ***Justice for Young Women, Close-Up in Critical Issues*** (1982). National Female Advocacy Project. A teacher/student resource. Paperback, 141 pp. $5. (New Directions for Young Women, 738 N. 5th Ave., Tucson, AZ 85706)

This book illuminates the conditions that lead girls into the juvenile justice system and examines the sexual bias that pervades that system and makes the women both victim and offender. It contains well-documented, well-written, and scholarly articles on teenage prostitution, the realities of incest, the historical background of reform schools for girls, new trends in research on young female offenders, and strategies for overcoming the inequitable treatment of young women. It also has a first-person account by a young female offender.

After presenting the history and condition of young women involved in the juvenile justice system, this book provides analysis and theory from a feminist perspective and explores ways of responding and acting from that perspective.

A follow-up to *Teenage Women in the Juvenile Justice System*, this too will serve as a valuable supplementary text/teacher resource in any sociology course, women's studies course, or law-related education class studying the juvenile justice system.

—R.D.

LRE Projects

LRE project leaders are an important source of new materials for LRE teachers. We are delighted to share with readers several new project-developed materials. The *Educating for Citizenship* series for elementary grades K-4 was developed by the Law-Related-Education Program for the Schools of Maryland in cooperation with the Constitutional Rights Foundation and the National Street Law Institute. *Law, the Language of Liberty*, a guide to Alabama law, was developed by the Alabama Administrative Office of Courts, the Alabama Education Association, and the Alabama Council for School Administration and Supervision. *Street Law: A Student's Guide to Practical Law* is a series of filmstrips teachers can use independently or as supplements to the *Street Law* text. The filmstrips were produced by Educational Enrichment Materials, a division of the New York Times, in cooperation with the National Institute for Citizens Education in the Law (NICEL). Finally, from Phi Alpha Delta Law Fraternity comes *A Resource Guide on Contemporary Legal Issues*, which is designed to help lawyers and law students prepare effective high school presentations.

■ ***Educating for Citizenship Series*** (1982). Constitutional Rights Foundation, Law-Related Education Program for the Schools of Maryland, and National Street Law Institute. A set of five books for K-4. Paperback; $124.95 complete, $25.95 for each book. (Aspen Systems Corporation. Rockville, MD 20850)

Educating for Citizenship, a curriculum series for grades K-4, was funded with a grant from the Maryland State Department of Education and was piloted in the Maryland public school system. The series focuses on three aspects of citizenship: (1) Responsibility, (2) Choices, and (3) Governance. These concepts are developed into instructional units for each grade level. Each unit includes an introduction to one of the three concepts, topical questions, well defined objectives, and an estimated number of required class sessions. Units also consist of five or more learning experiences to aid youngsters in mastering objectives. These experiences involve active student participation and employ techniques such as simulations/role playing, brainstorming, gaming, and problem solving. Activities run the gamut from analyzing ways to solve disagreements (kindergarten level) to participating in and analyzing a lobbying effort to affect the outcome of a hearing on a specific law (fourth grade). High-interest stories that compel students to draw parallels with their real-life experiences are used throughout the series. Students will certainly be motivated by the varied activities and teaching techniques.

Each unit ends with a resource guide, film references, bibliography, and worksheets that can be easily reproduced. Worksheets are cross-referenced to assure effortless use with the text. *Educating for Citizenship* units may be taught in any order to encourage integration with the total school curriculum.

—F.T.-P.

■ ***Law, the Language of Liberty*** (1981). Supplemental materials for Alabama social studies teachers, elementary and secondary. Looseleaf. (Direct inquiries to: Allen L. Tapley, Administrative Director, Administrative Office of Courts, 817 S. Court St., Montgomery, AL 36130)

This supplement to Alabama's statewide social studies curriculum is a cooperative project by the Administrative Office of Courts, the Alabama Education Association, and the Alabama Council for School Administration and Supervision. *Law, the Language of Liberty* is a concise, creative collation of information. The supplements provide educators with a wealth of facts about Alabama laws, judicial procedures, and courts. A resource booklet, *Guide to Alabama Court Procedures*, also accompanies the eighth- and twelfth-grade materials. Suggestions to the teacher on effective use of law-related resource persons are provided at the beginning of each level.

This series illustrates an excellent sequential development of LRE concepts that begins with the topic of "Rules" in grades K-1 and progresses to activities like "This Is a Jury" at grade four. It also builds a strong foundation in the elementary grades, so that by grade twelve students are proficient in presenting mock trials and analyzing historical case studies. *Law, the Language of Liberty* is an excellent supplemental series that encourages integration with other subject content areas. Teachers will find a wide variety of activities that are easy to implement.

—F.T.-P.

■ ***Street Law: A Student Guide to Practical Law*** (1982). Six filmstrips and cassettes for high school students; includes a teacher guide and *Street Law* text. $149 complete; $28 for individual filmstrip with sound. (Educational Enrichment Materials. Bedford Hills, NY 10507)

The titles in this filmstrip series are "Child Custody," "Juvenile Justice," "Employment," "Student Rights and Responsibilities," "Gathering and Use of Evidence in Criminal Trials," and "The Role of Religion in the Public Schools."

The issues, historical perspectives, legal precedents, court cases, and discussion questions are presented in the six

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12-15 minute filmstrips. The objective is not to present an in-depth analysis of the issues but rather to encourage students to think about the controversies, formulate opinions, and be motivated to further exploration.

The filmstrips are correlated to the revised *Street Law* text, but they may also be used to complement social studies courses that treat law, government, civics, or social problems. Each filmstrip begins with pertinent questions on the topic and attempts to present a balanced view.

The teacher's guide summarizes the content of each filmstrip, lists key words and phrases, and suggests additional discussion questions, activities, and further readings. Teachers may find this series especially helpful for initiating new uints.

—D.F.

■ ***A Resource Guide on Contemporary Legal Issues . . . for Use in Secondary Education*** (1981). A resource for lawyers and high school teachers. Paperback, 198 pp. $6. (Phi Alpha Delta Law Fraternity, International Juvenile Justice Office, 910 17th St. NW, Suite 310, Washington, DC 20006)

This excellent guide, funded by a grant from the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice, is designed to assist lawyers and law students who act as resource persons in high school classrooms. The booklet contains general introductory how-to-materials and an appendix that provides helpful hints and practical suggestions for working with the classroom teacher. It is also a very useful guide for high school teachers.

Part I of the guide consists of background summaries and a variety of case studies focusing on seven topics: the criminal justice system, criminal procedure, free expression, equal protection, religious and constitutional law, family law, and consumer law.

Part II contains eight lesson excerpts taken from current LRE publications used by high school students. These more lengthy lesson topics include settling disputes and lawyers, contracts, corrective justice, the right to petition, students and the bill of rights, due process in public schools, and the case study method.

The guide's objective—to suggest methods and materials that the resource person can employ to provide worthwhile classroom experiences—is commendably accomplished.

—D.F.

Interface With History

Editors' note: We recently received notice of these new computer programs. They have not been reviewed, but are included for your information.

James G. Lengel's ***American History, Computer Programs*** consists of seven interactive computer programs for the study of American history. They cover the seventeenth century through the present day and involve a variety of approaches to instruction. Lengel, who conceived and programmed the series, is a former state social studies specialist and coauthor of *Law in American History*. The programs include:

The Case of Peter Goodman, an exercise to stimulate students' reasoning skills, is drawn from the history of Plymouth colony in New England in the 1630s. Concepts of religious freedom and social control are presented in a problem-solving format; students' reasoned responses are stored and printed out for the teacher.

Intolerable Acts is a tutorial designed to help the student understand the role of British laws enacted in the pre-revolutionary period. Students apply the laws to actual situations that are presented to them by the computer. Students' explanations of the events are printed out as a record for the teacher.

The Bill of Rights program presents the student with a series of actual cases from throughout American history, each involving one of our constitutional rights. The students can access the Bill of Rights through a computer database and use what they find to explain each of the 20 cases. A complete printout of student work is provided at the end of the lesson.

Vigilante Mock Trial is a complete, computer-managed simulation of a trial held in 1859 in the American west. Students form two teams, one for prosecution and one for defense; each team interviews witnesses, puts them on the stand, and asks questions in court. The computer judges the statements of all the witnesses and comes up with a verdict at the end of the trial. This simulation takes at least two class periods to complete.

Case Study: Brown v. Board of Education presents students with the facts of this landmark case and leads them through the classic case-study method: they identify the legal issues involved, relate them to the Constitution, examine precedents, and finally render an opinion. A database of relevant constitutional phrases and precedents is available for research by the students. A complete printout of student reasoning and choices is provided to the teacher.

Case Study: Tinker v. Des Moines is similar in form to the Brown case, but involves constitutional rights in school. A research database and complete printout are accessible through the computer.

Sex Discrimination Mock Trial is a modern case taken from a federal appeals court and arranged as a computer simulation for two teams of students. It is similar in format to the vigilante mock trial described above.

These programs are available to operate on Radio Shack Model III or IV, or on Apple II or III microcomputers, with or without a printer. A master disk and a backup copy containing all seven programs will be mailed first class upon receipt of a check or school purchase order for $45. For more information contact: James G. Lengel, RFD #1, Williamstown, VT 05679, 802/433-6022.

Law and American History

All of the materials reviewed in this section can be used to enrich American history classes. *Equal Justice Under Law* is a historical review of the Supreme Court providing insights into the legal and sociological impact of the Court on American life. The filmstrip series on Martin Luther King offers an excellent review of this famous civil rights activist's life and work. *Law in American History* is a text designed to help teachers infuse LRE into the study of American history. Finally, *Computer Programs in American History* (see insert) is based on important legal cases from the 1630s to the present. The seven computer programs are an exciting and innovative supplement for American history lessons.

■ ***Equal Justice Under the Law: The Supreme Court in American Life*** (1982). Mary Ann Harrell and Burnett Anderson. A teacher resource and student supplement. Paperback, 157 pp. $3.

(*Continued on page 65*)

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John Neubauer

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COURT BRIEFS

Joseph L. Daly and Monte R. Walz

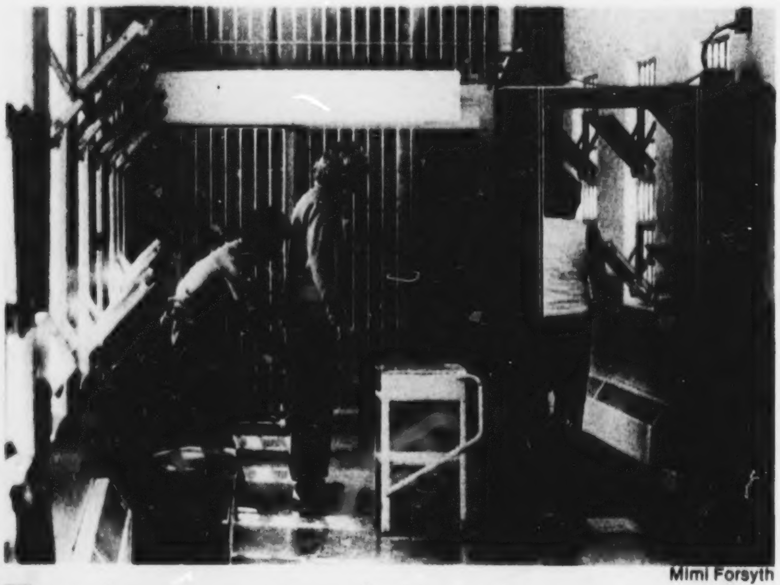
Searches, Sex Discrimination, Sentences, and More

The Court wraps up a busy term

Almost one-third of the major cases decided by the Supreme Court in its most recent nine-month term (Sept., 1982 to June, 1983) were handed down in the final three weeks.

As the dam of cases broke, the word "damn" was heard more often in the halls of Congress even when non-water bills were being discussed.

In one of its most important cases, and in an unexpected but pleasant surprise to President Reagan, the Court altered the balance of power between the Executive and the Legislative branches.



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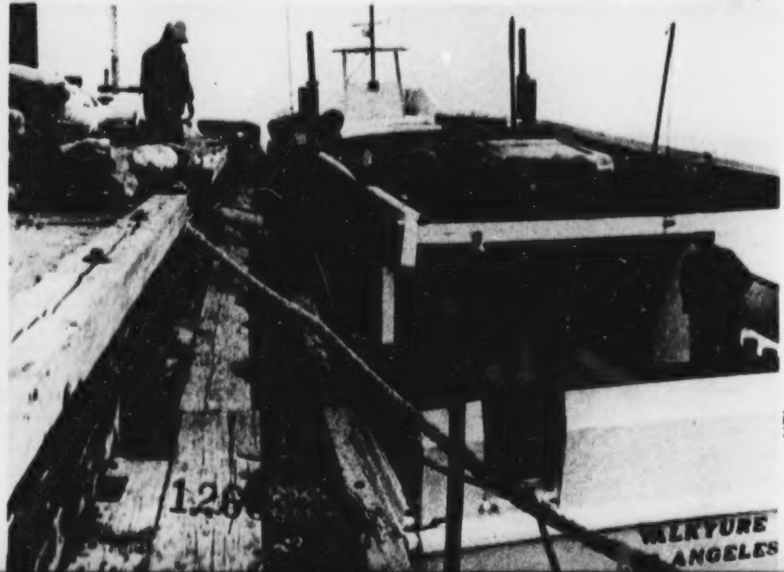

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Legislative Veto Dumped

In the Spring 1983 *Update* we discussed the case of *Immigration and Naturalization Service (INS) v. Chadha*, 51 L.Wk. 4907. In the most important separation of powers case in many years the Court rewrote one of the checks and balances which Congress uses on the Presidency. But the case had humble beginnings.

Ten years ago Jagdish Rai Chadha, an East Indian native of Kenya, and a citizen of the United Kingdom, was lawfully admitted to the U.S. under a student visa. Though he overstayed, he was eventually granted permanent alien resident status by the INS judge after a hearing.

But pursuant to Section 244(c)(2), the "legislative veto" provision of the Immigration and Nationality Act, Congress disapproved, requiring Chadha's deportation.

Chadha appealed, arguing that the "legislative veto" provision is unconstitutional because it "violates the rule of separation of powers by usurping a necessary power of another branch" namely the Executive branch. The Court agreed in a far reaching 7-2 decision. (However, two justices in the majority, Lewis Powell and William Rehnquist, said that they would have decided the case on other legal grounds and did not pass judgment on the validity of the legislative veto.)

The Court held that since the Executive branch is empowered to enforce the laws, the INS operates under the direction of the Executive branch. Chadha's grant of resident status by the INS, which is part of the Executive branch, could not be vetoed by Congress.

The case has implications far beyond immigration. There are more than 200 statutes in jeopardy, ranging from military aid to foreign countries to laws governing energy. For example:

- 1973 War Power Act: unless there is a declaration of war, the President may be directed by concurrent resolution to remove U.S. armed forces engaged in foreign hostilities.
- 1975 Defense Appropriations Law: applications for export of defense goods, technology or techniques may be disapproved by concurrent resolution.
- 1975 International Development and Food Assistance Law: foreign aid to countries not meeting human rights standards may be terminated by concurrent resolution.
- 1976 Energy Conservation and Production Law: proposed sanctions involving federal aid and the energy conservation performance for new buildings must be approved by resolution of both Houses.
- 1980 Federal Trade Commission Law: FTC rules may be disapproved by concurrent resolution.

Senator Henry Jackson, D-Wash., predicted that the decision "will make partnership between the branches in foreign policy more difficult."

But Lloyd Cutler, White House Counsel for former President Carter, said, "In the short run, the main effect is going to uphold executive authority in the foreign affairs field. But in time Congress will find other ways to block Presidential action. It may not be such a cosmic change after all."

In fact, "among students of government and constitutional scholars," reported Jim Mann of the *L.A. Times*, "a surprising number said the presidency might ultimately be the loser from the Court's efforts to protect its prerogatives." The experts echo the warning of Justice White's dissent that rather than "abdicate its lawmaking function to the executive branch and independent agencies," Congress may "refrain from delegating the necessary authority" for future administrations to do their job.

Justice White again dissented two weeks after *Chada* in *United States House of Representatives v. Federal Trade Commission*, 51 L.Wk. 3935.

The FTC passed a series of consumer protection rules concerning the sale of used cars. For example, one of the rules specified that the true mileage must be provided. The "legislative veto" provision of the Federal Trade Commission Improvements Act says that any FTC final rule will become effective 90 days after submission to Congress *unless* both Houses of Congress adopt a concurrent resolution disapproving the rule.

Congress did so. But the Court, without oral argument in light of *Chadha*, overturned the "legislative veto."

Justice White in dissent said, "These cases illustrate the constitutional myopia of the Chadha reasoning as applied to independent regulatory agencies and cast further light on the destructiveness of the Chadha holding."

He said, "I cannot agree that the legislative vetoes in these cases violate the requirements of Article I of the Constitution."

He went on to give his dissenting view of how the ideas of "separation of powers" and "checks and balances" work in our Constitution. "Congress, with the President's consent, characteristically empowers the agencies to issue regulations. Those regulations have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law they make. The President's authority to control independent agency lawmaking, which on a day-to-day basis is non-existent, could not be affected by the existence or exercise of the legislative veto. To invalidate the device, which allows Congress to maintain some control over the law-making process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of government not subject to the direct control of either Congress or the Executive branch. I cannot believe that the Constitution commands such a result."

Can a Court Divided Against Itself Long Stand?

Abraham Lincoln once warned that a house divided against itself cannot stand, and a nation divided against itself cannot long endure. Had Lincoln observed a session of the current, quarrelsome Supreme Court, he may have slated it for immediate self-demolition.

This term the badly fragmented Court failed to arrive at majority opinions in two important cases defining the powers of police to make arrests and conduct searches without first obtaining warrants. In the two decisions, as the Court managed only fragile "plurality" opinions, the jurisprudential pendulum swung indecisively between granting police expanded authority and protecting the privacy of citizens.

Just Because He Looks Like a Drug Courier, and Acts Like a Drug Courier, Doesn't Mean He's a Sitting Duck . . .

In *Florida v. Royer*, 51 L.Wk. 4293, a divided Court ruled that while narcotics

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officers who suspect an airline passenger of carrying illegal drugs may stop and question him briefly, they may not detain him for prolonged questioning based upon their mere suspicion.

On January 3, 1978, two detectives observed college student Royer at the Miami International Airport. Royer was "visibly nervous," he was carrying two heavy suitcases, and paid cash for a one-way ticket to New York, which the officers knew to be a "target city" of narcotics traffic. Royer's behavior fit the Federal Drug Administration's "drug courier profile," a composite of characteristics typical of persons smuggling drugs. The composite was developed for use at airports. The officers approached Royer, identified themselves, and asked for identification. His airline ticket bore the name Holt, his driver's license the name Royer. He said a friend named Holt had made the reservations but could not explain why he used the name Holt on the luggage.

The officers asked Royer to accompany them for further questioning and escorted him to a room 40 feet away. Royer's bags were retrieved, and when the officers asked to search them he told them to "go ahead." Over 65 pounds of drugs were found in the suitcases.

A Florida court threw out Royer's narcotics conviction, ruling that the search violated his Fourth Amendment rights. On appeal, five justices agreed, albeit on different grounds. A plurality of four justices joined in an opinion written by Justice Byron White. It said that while the officers were justified in stopping Royer briefly to ask a few questions, their suspicions were insufficient to justify taking him to a small room, holding his ticket and driver's license, retrieving his luggage without his consent, and searching it.

Justice White declared: "What had begun as a consensual inquiry in a public place escalated into an investigatory procedure in a police interrogation room." White added that "any consensual aspects of the encounter had evaporated." The plurality concluded that "as a practical matter," Royer "was under arrest" when he was asked to accompany the officers into the room. Because the officers lacked the "probable cause" required to make the arrest, and because Royer's consent to the search was invalid, their search of the luggage was deemed illegal. The plurality suggested that the officers could have avoided the constitutional pitfall by returning Royer's ticket and license and telling him that he was free to leave.

Justice William Brennan, Jr. cast the decisive fifth vote for the holding that Royer had been subject to an illegal arrest. However, Justice Brennan disagreed with the rationale advanced by the plurality, arguing that even the initial stop of Royer was illegal because Mr. Royer's behavior was "perfectly consistent with innocent behavior and cannot possibly give rise to any inference supporting a reasonable suspicion of criminal activity."

In a sarcastic dissent, Justice William Rehnquist, joined by Chief Justice Warren Burger and Justice Sandra Day O'Connor, disparaged the plurality's opinion. Justice Rehnquist said the plurality opinion "betrays a mind-set more useful to those who officiate at shuffleboard games . . . than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent."

In holding that the arrest was illegal, the plurality did not reach the broader constitutional issue of whether the "drug courier profile" is itself an adequate grounds for the "reasonable suspicion" necessary for a brief "stop" of a suspect, or the "probable cause" required to arrest. The *Royer* decision was the Court's second opportunity in three years to resolve the constitutional implications of the drug courier profile. In 1980, in *United States v. Mendenhall*, 466 U.S. 544, the Court also failed to reach a majority opinion. The profile is currently in use at some two dozen airports and, according to a study of its use at LaGuardia Airport, is about 60 percent accurate.

Balloon Bursts for Second Drug Suspect

Like sands through the hourglass, so shifts a plurality of the justices of the Supreme Court. After ridiculing Justice White's plurality opinion in *Royer*, Justice Rehnquist was nevertheless able to recruit the justice with the "shuffleboard mindset" to form a new plurality in a second search and seizure case, *Texas v. Brown*, 51 L.Wk. 4361. Joined by Chief Justice Burger and Justice O'Connor, who had dissented in *Royer*, the new plurality substantially broadened the "plain view" doctrine, which permits the warrantless seizure of evidence by law enforcement officials under certain conditions.

For Clifford Brown, the party was definitely over when his car was stopped by police at a routine driver's license checkpoint in Fort Worth, Texas. A police officer shined a flashlight into Brown's car, asked him for his license, and observed an opaque green balloon, knotted near the tip, drop from Brown's hand to the floor of the car.

Based on his experience in drug offense arrests, the officer believed that the balloon may have been used as a package for narcotics. While Brown searched his glove compartment for his driver's license, the officer shifted his position to obtain a better view of the contents of the car. In the glove compartment, he observed small plastic vials, loose white powder, and an open bag of party

Majority or Plurality Decisions

Although almost one-third of last term's decisions were issued in the last three weeks of the term, the Court *was* doing its homework.

Here's how the process works. The senior justice on the majority side, or the chief justice if he is a member of the majority, assigns one of the justices on that side to write the decision. A tentative draft is circulated to the other majority justices—and sometimes passed around for months—each either agreeing with or making suggested changes to the wording of the decision.

Sometimes a majority of five justices cannot be gathered to support a particular rationale, though they may agree that the case should be decided in a particular way. For example, in a search warrant case, five of the justices might agree that the search was legal, but all five might not agree on the reasoning. If they write separate opinions arriving at the same result but for different reasons, then there is a "plurality" decision.

The effect of such a decision is that the basis of the law is debatable although the search is sustained.

Lawyers, police and law professors try to glean a common rationale from every case. But in a "plurality" decision it is not possible. They usually have to wait for a similar case, hoping that the Court can pull together a majority decision of at least five justices who agree on similar reasoning.

—JLD & MRW

balloons. The officer ordered a deflated Brown out of the car and conducted a search of the automobile. The balloon which Brown had dropped to the floor was found to contain a powdery substance which laboratory tests determined to be heroin.

A state trial court upheld the search. The Texas Court of Criminal Appeals reversed, however, holding that the officer "had to know" what incriminating evidence was before him if the search were to be valid under the "plain view" exception to the search warrant requirement. The court based its ruling on the Supreme Court's 1971 decision in *Coolidge v. New Hampshire,* 403 U.S. 443. In that case, the Court said that police may seize contraband and evidence which is within their "plain view" if three conditions are met: (1) the police must be lawfully in a position from which to view a particular area; (2) the officer must discover the evidence "inadvertently"; and (3) it must be *immediately apparent* to the officer that the item observed is evidence of a crime or contraband. Because the officer did not know whether the balloon contained narcotics, the Texas court concluded the third requirement of *Coolidge* was not satisfied.

On appeal, the Supreme Court reversed the Texas decision. Justice Rehnquist, with a new-found plurality of four justices, said the use of the phrase "immediately apparent" in *Coolidge* was "very likely an unhappy choice of words, since it can be taken to imply that a high degree of certainty as to the incriminating character is necessary for an application of the plain view doctrine." Justice Rehnquist restated the plain view rule, saying that if, "while lawfully engaged in an activity in a particular place, police officers perceive a *suspicious object,* they may seize it immediately." The Rehnquist plurality concluded that "this rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property."

In two separate opinions, the remaining five justices agreed that the seizure of the balloon was permissible under the plain view doctrine, but strongly objected to Justice Rehnquist's rewriting the rule by deleting the "immediately apparent" requirement. The justices argued that the evidence would be admissible under the *Coolidge* test because the appearance of a balloon, a commonly used piece of drug paraphernalia, meets the "immediately apparent" test.

Justice Lewis Powell, Jr., in an opinion joined by Justice Harry Blackmun, warned that the plurality opinion "appears to accord less significance to the warrant clause of the Fourth Amendment than is justified by the language and purpose" of the amendment.

In yet another opinion, Justice John Paul Stevens, joined by Justices William Brennan and Thurgood Marshall, also concurred that the seizure of the balloon was constitutional. However, the justices chastized the plurality for giving inadequate consideration to recent Supreme Court decisions which hold that while police may seize a closed container believed to contain evidence without first obtaining a warrant, that container may not be opened without a search warrant.

The Court's diversity of views, and inability to field a majority opinion in either *Royer* or *Brown,* is indicative of the justices' indecision about Fourth Amendment doctrine, Court observers say. (See accompanying article: "Death Knell for the Warrant Requirement?")

Criminal Law Round-Up

In addition to the Court's opinions in *Royer* and *Brown,* eight other cases last term had a major impact on criminal law and procedure. Many of these also dealt with the vexing problems of search and seizures and the controversial exclusionary rule.

Court Won't Bar Police Use of Chokeholds . . .

At 2 o'clock one night in 1975, Los Angeles cops stopped Alfred Lyons for a traffic violation. Lyons claims that

Texas v. Brown: Death Knell for the Search Warrant Requirement?

It is a scene often replayed in B-grade movies. An American visiting a banana republic is awakened in the middle of the night by a loud pounding on the door. A weasel-like constable accompanied by several unpleasant-looking desperadoes demands to search the room for no particular reason. The American responds that he won't let them in unless they first produce a search warrant. "Warrant? I don't need no steenking warrant!" the constable retorts as he kicks in the door and his small army of inquisitors invades the room.

To most Americans, the search warrant is a national symbol separating the United States from lawless dictatorships where the rule of the rifle supercedes the rule of law. However, whether the Constitution actually requires search warrants is a question which has long confounded legal scholars and Supreme Court justices alike.

On first reading, the language of the Fourth Amendment is deceptively clear: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and specifically describing the place to be searched, and the person or things to be seized."

A more careful examination of the Fourth Amendment demonstrates, however, that it does not specify *when* a search warrant is required. This ambiguity has resulted in a constitutional furor whose ultimate resolution may determine whether Americans should fear local constables proclaiming that they "don't need no steenking warrants" either.

Supreme Court justices and legal scholars have split into two sharply divided camps in interpreting the Fourth Amendment. Some maintain that a warrant is a constitutional requirement for any search or seizure (arrest), unless there is a compelling showing that obtaining a warrant would be impractical. The other camp argues that the Fourth Amendment merely requires that a search be "reasonable." Under this view, a search warrant is not required but is only an option available to the police should they desire to make sure in advance that the court will agree that the search was indeed "reasonable." In *Texas v. Brown,* the competing Fourth Amendment interpretations split the Court and turned brethren against brethren.

Traditionally, the Supreme Court has adopted the position that the Fourth Amendment imposes a *per se* requirement that police obtain warrants prior to conducting searches. Thus, searches conducted without a warrant are presumptively unconsti-

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although he offered no resistance, the officers, without provocation or justification, seized him and applied a "chokehold," rendering him unconscious and causing damage to his larynx. In addition to suing the City of Los Angeles for money damages, Lyons asked a federal district court to issue an injunction against the use of such holds, except in situations where the suspect reasonably appears to be threatening the immediate use of deadly force. The district court granted the injunction, noting that police use of the restraint has killed 16 suspects in recent years in Los Angeles. The court of appeals affirmed.

However, in a 5-4 decision, the Supreme Court ruled that Lyons was *not* entitled to an order prohibiting use of the hold because he could not show that police would ever again use the hold against him. In *City of Los Angeles v. Lyons*, 51 L.Wk. 4424, the Court disposed of Lyons' claim on the technical grounds of jurisdiction, holding that he did not present the Court with an actual "case or controversy" as required by the Constitution, because the threat of injury to Lyons in the future is "conjectural" and "hypothetical." However, the ruling does not affect Lyons' pending suit for money damages.

Fear of Walking! Police Can't Require Persons to Produce Identification . . .

Edward Lawson is not your conventional San Diego stock broker. A black man, Lawson prefers to wear his hair in tight, shoulder-length braids, and enjoys walking—often in the middle of the night—through distant neighborhoods. As a result, Lawson has been arrested 15 times and convicted once for refusing to identify himself under a California law which gives police officers the discretion to arrest a person who fails to provide what the officer considers "credible and reliable" identification.

In a majority opinion written by Justice Sandra Day O'Connor, the Court ruled that the statute was unduly vague and thus unconstitutional under the due process clause of the Fourteenth Amendment. The so-called "void-for-vagueness" doctrine requires that a penal statute define the criminal offense with "sufficient definiteness that ordinary people can understand what conduct is

(Continued on page 48)

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tutional, and the evidence seized inadmissible, "subject only to a few specifically established and well-delineated exceptions" (*Katz v. United States*, 389 U.S. 347 [1967]). Justice Frankfurter eloquently stated the basis for the interpretation, writing in dissent in *United States v. Rabinowitz*, 339 U.S. 56 (1950):

> One cannot wrench "unreasonable searches" from the text and context of the historic content of the Fourth Amendment . . . . When [that] Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all clarity and gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

Thus, a majority of the justices on the Supreme Court has traditionally held that the Constitution "requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police" (*Katz v. United States*, 389 U.S. 347,357).

Recently, however, the Court has seen fit to erode the search warrant requirement with an ever-expanding list of exceptions which do not qualify as "absolute necessities." For example, in 1925 the Supreme Court created a special exception to the warrant requirement to permit officers to stop and search a moving vehicle if they had probable cause to believe that contraband (bootleg liquor) would be found in it. The justification used by the Court in *Carroll v. United States*, 267 U.S. 132 (1925), was that the vehicle could be moved out of the locality before a warrant could be obtained.

In 1970, the Court dramatically expanded the "motor vehicle" exception to the warrant requirement to permit a search of the car even where the driver and passenger have been taken into custody *and the car impounded* in a police lot. In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court concluded that the Constitution did not require that the police seize the vehicle and wait to search it until after a warrant had been obtained.

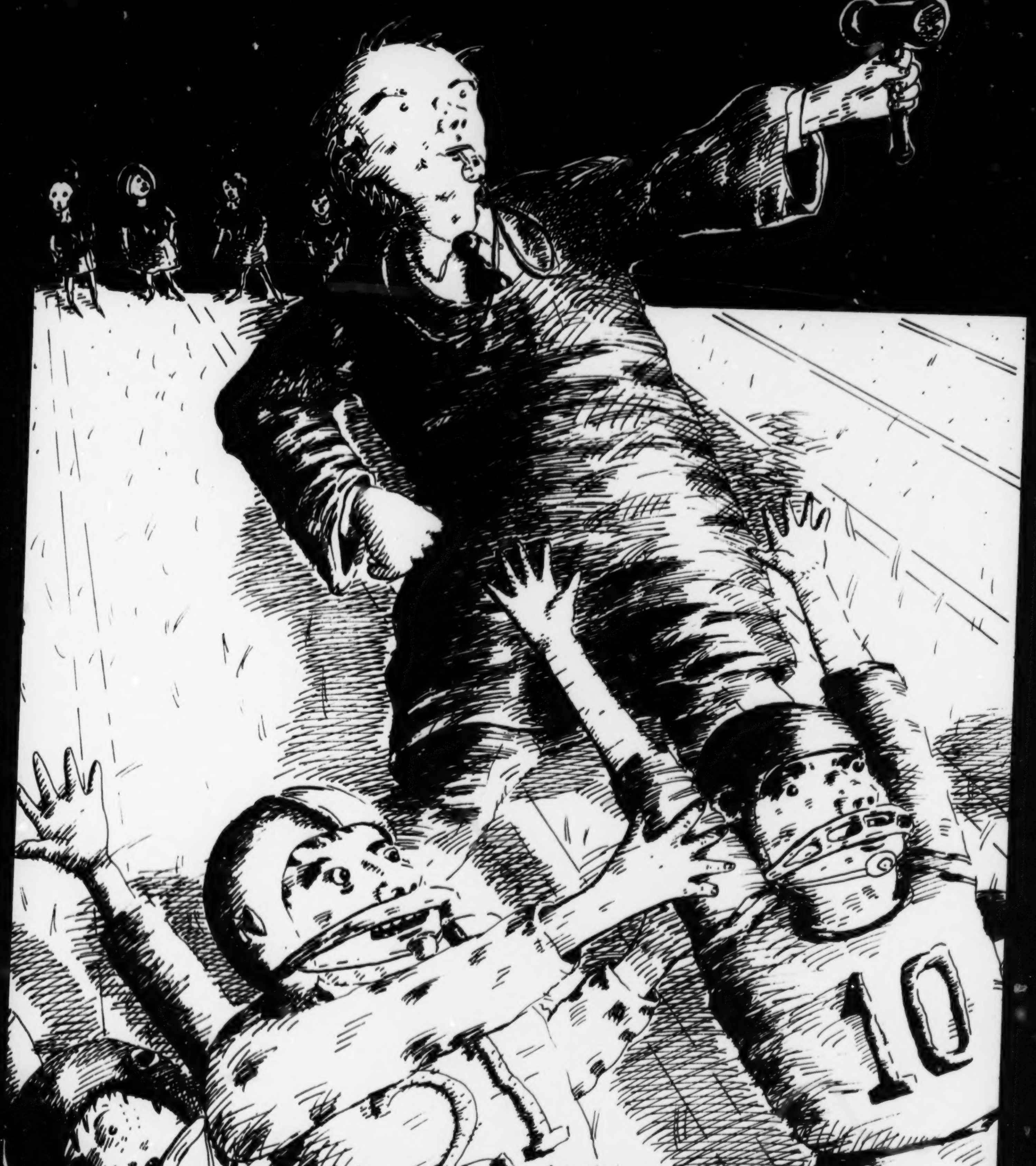
Finally, last year, the Court reversed prior law by holding that police officers who have probable cause to believe contraband is concealed somewhere in a car may conduct a warrantless search of the vehicle as thorough as a magistrate could authorize by a warrant, including opening containers within the car and searching them. (*United States v. Ross*, 50 L.Wk. 4580 [1982]).

Thus, rather than limiting exceptions to the search warrant requirement to cases justified by "absolute necessity," the Court has substantially eroded the warrant clause by granting exceptions where police have ample opportunity to obtain a warrant but merely find it inconvenient to do so. Eventually, the exceptions may have swallowed the rule and rendered the Fourth Amendment warrant clause a nullity.

The death of the warrant requirement may be expedited by the Court's decision last term in *Texas v. Brown*. In *Brown*, a plurality of the justices indicated, for the first time in the Court's history, that the "central requirement" of the Fourth Amendment is "reasonableness," and not the requirement of a search warrant. Although Justice Rehnquist was careful not to trumpet this important philosophical shift too loudly, it did not go unnoticed by his fellow justices. In particular, Justices Powell and Blackmun warned that the plurality accorded the warrant clause considerably "less significance than is justified by the language and purpose" of the amendment, and the previous decisions of the Court.

Whether Justice Rehnquist will ultimately win a majority of the Court, and relegate the search warrant to a procedural nicety rather than a constitutional safeguard, remains to be seen. Concededly, should Rehnquist prevail, the warrant clause would no longer protect criminals from zealous law enforcement efforts. No longer would police be required to seek out a magistrate and obain a warrant before making a seizure. However, should the Rehnquist view prevail a new question arises—what will protect law-abiding citizens from the police?

—JLD & MRW



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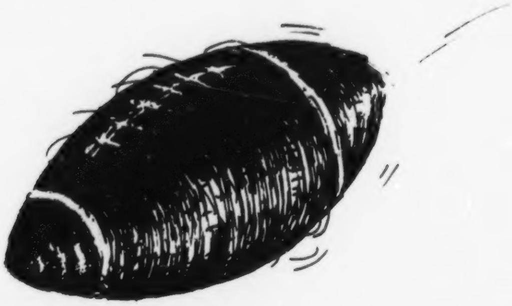
SPORTS AND THE LAW

Herb Appenzeller

Is the Law Ruining Sports?



There is widespread disagreement today over the effect litigation is having on sports. Critics of sports litigation bitterly deplore the unprecedented rise in the number of lawsuits, with enormous awards becoming the rule and not the exception. These outspoken critics insist that lawsuits are out of control and, if allowed to continue, will inevitably destroy sports.

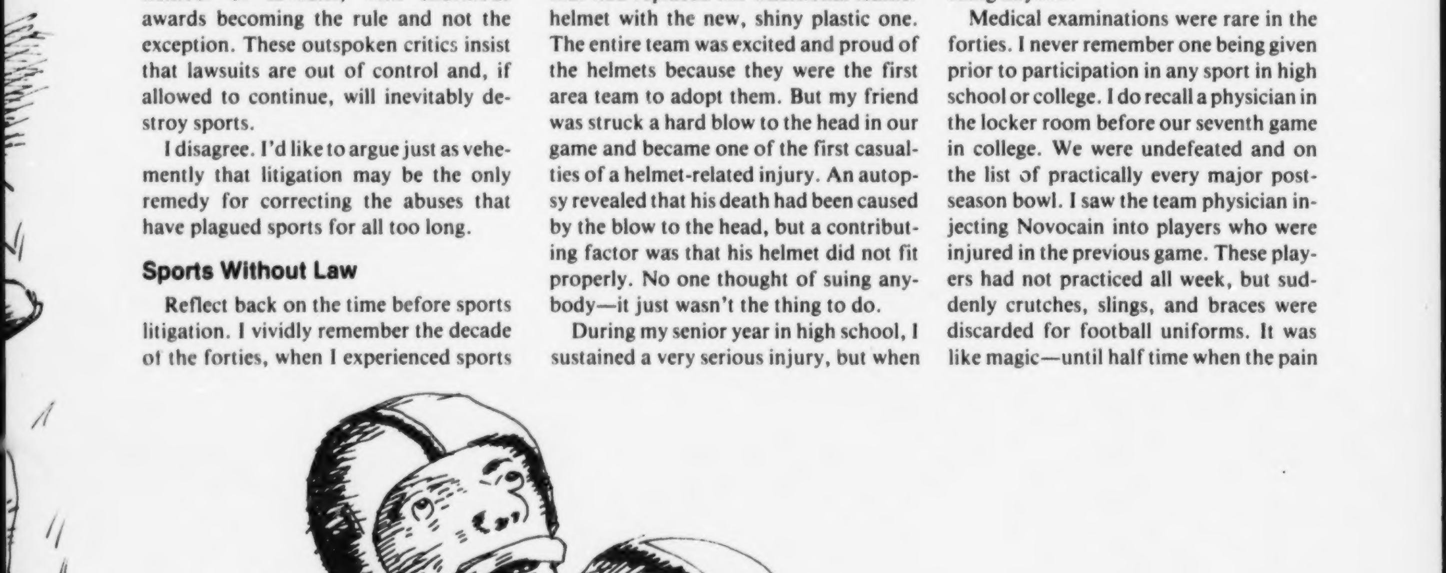
I disagree. I'd like to argue just as vehemently that litigation may be the only remedy for correcting the abuses that have plagued sports for all too long.

Sports Without Law

Reflect back on the time before sports litigation. I vividly remember the decade of the forties, when I experienced sports as a high school and college athlete and later as a young and inexperienced high school coach. One of my friends played on an opposing high school football team that had replaced the traditional leather helmet with the new, shiny plastic one. The entire team was excited and proud of the helmets because they were the first area team to adopt them. But my friend was struck a hard blow to the head in our game and became one of the first casualties of a helmet-related injury. An autopsy revealed that his death had been caused by the blow to the head, but a contributing factor was that his helmet did not fit properly. No one thought of suing anybody—it just wasn't the thing to do.

During my senior year in high school, I sustained a very serious injury, but when a popular assistant coach advised me to wait until the end of the season to see a doctor, I agreed. I paid the price later in life, but once again no one thought of suing anyone.

Medical examinations were rare in the forties. I never remember one being given prior to participation in any sport in high school or college. I do recall a physician in the locker room before our seventh game in college. We were undefeated and on the list of practically every major post-season bowl. I saw the team physician injecting Novocain into players who were injured in the previous game. These players had not practiced all week, but suddenly crutches, slings, and braces were discarded for football uniforms. It was like magic—until half time when the pain



killer wore off. But even the players who were injected and reinjured considered it all part of the game, and never thought of a lawsuit.

There were other abuses too. A well known college football coach failed to honor his scholarship commitments to over a dozen players. He terminated their scholarships by a penny postcard that wished them well—somewhere else. The disappointed athletes stoically accepted their fate as a hazard of the sport, and once again no one thought of pursuing the matter in court.

As a novice coach I witnessed the agony of a young teacher when a student under his care died from a baseball injury that safety precautions could have prevented. Just weeks later a fellow coach went through the torture that accompanies a fatal accident when one of the students in a group he was supervising drowned in a muddy lake. No qualified lifeguard was present, yet no one thought of litigation. After all it was 1950 and lawsuits against teachers and coaches just weren't in style.

Nor was I blameless. As a young high school coach I allowed the trainer to pass out pregame "pep pills" to eager athletes who firmly believed that these pills gave them an edge over their opponents. And how many times did I misjudge a broken bone for a mere sprain and simply tape it, encouraging the athlete to continue in practice or in the game since after all, "When the going gets tough, the tough get going." My poor judgment concerned me, but I never thought it would lead me to the courtroom. In those days, a special bond existed between the athlete and the coach.

Not only didn't we go to court in the forties and fifties, but we had no sympathy for the few who did dare to sue. A popular football player was injured during an intersectional game and left unattended on the sideline for the remainder of the game and during the long train trip back to campus. He sued his coach because he felt that he had been an outstanding prospect for professional baseball until his injury. He demanded compensation for his injury, which he blamed on the negligence of the coach. We sympathized with him until we learned he was suing the coach. Once again you just did not sue for a sports injury in those days.

These attitudes prevailed, in my opinion, until the mid-sixties, when a New Jersey court found a school district guilty of negligence in a gymnastic case and awarded the injured student in excess of a million dollars. Soon after, a California court awarded a crippled athlete injured in a football scrimmage over $300,000. These two cases received national attention and launched a new era in sports, often referred to as the "injury industry" or the "sue syndrome." Not only did injury cases reach the courts in record numbers, but cases were brought that involved the rights of athletes, due process, discrimination and just about any other reason for suit. The defendants became the athletes themselves, coaches, officials, spectators, administrators, team physicians, athletic trainers, manufacturers of sports equipment, and owners and operators of sports facilities. Truly no one associated with sports is now immune from litigation.

Suits Lead to Safety

As a participant in sports, a former coach (baseball, basketball, football, and track) and an athletic director for 34 years, I've never wanted to be involved in a lawsuit. As a result, I work extremely hard to prevent situations that might result in litigation. And I'm not the only one. Legitimate litigation and the awareness that negligent conduct can lead to a lawsuit has brought about dramatic changes that are beneficial to sports.

In recent years the manufacturers of football helmets have borne the brunt of injury-related lawsuits. The crisis among the manufacturers caused many to give up the production of helmets. But those who continued to produce helmets have come up with an approved helmet that offers the coach, player, and manufacturer some feeling of security. The National Operating Commission on Standards for Athletic Equipment (NOCSAE) has formulated safety standards intended to decrease the number of head injuries in football and reduce the number of helmet-related lawsuits.

Now the attention is beginning to turn from the helmet to the coach who teaches the techniques of blocking and tackling. To avoid a day in court, the coach must now abide by the rules and avoid teaching butt blocking and head tackling. The athlete has become the beneficiary of such improvement, which came about, in part, because lawsuits threatened the very existence of the game of football.

The lack of a thorough physical examination or any examination has been a deep concern to many people. Today we are providing more physical examinations prior to participation in sports than ever before. This is progress! Medical experts advise physicals prior to participation to protect the athlete from serious problems. They point out that the black athlete is particularly susceptible to certain diseases—especially hypertension—and needs a careful examination because these diseases can be alleviated with treatment, enabling the athlete to participate in sports with safety. More and more physicians are beginning to specialize in sports medicine, and today legislatures in many states are passing laws designed to provide medical safety for the athlete. North Carolina recently passed a law requiring by 1984 a qualified athletic trainer for all schools that sponsor interscholastic athletic teams. Once again, the athlete benefits from the change.

One additional example is noteworthy. When the American Academy of Pediatrics urged the curtailment of the trampoline it shocked educators everywhere. Legal authorities supported the action of the Academy because they felt that no one could successfully win a trampoline injury case after the Academy's stand on the issue. Because of the threat of litigation, many schools locked up their trampolines and discontinued their use in physical education activities and competitive sports. But that wasn't the end of it. Many sports organizations joined with the American Alliance for Health, Physical Education, Recreation and Dance on a position paper setting definitive guidelines for using the trampoline. It pointed out that the major problem often came from incompetent instructors and spotters, not defective equipment. As a result the trampoline has been restored to most programs—but with safety guidelines designed to protect the participant.

Sports and Courts

It is the courts that accentuate the importance and welfare of the individual, it is the courts that attempt to end discrimination of every sort in sports, and it is the courts that curb the rising violence that often takes place in the sports arena.

The courts are making sports participation better. Participants now enjoy the safest equipment, finest facilities, and best medical care and coaching ever—thanks to litigation. ☐

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Once an Adult

(Continued from page 5)

Michael C. made a "clear waiver" of his right to remain silent. The court noted that the interrogation was short—seven minutes—and that the waiver came at the beginning of the questioning. The judge also pointed out the defendant's experience with the legal system: "He's a sixteen-and-a-half-year-old minor who has been through the court system before, has been to [probation] camp, has a probation officer, [and is not] a young naive minor with no experience with the courts."

In reversing the trial court's decision, the California Supreme Court held that Michael C.'s request for his probation officer was a *per se* invocation of his right to remain silent, having the same *per se* power as a request for a lawyer. The court recognized that the probation officer "held a special position in the child's life" and "was required [by law] to represent the child's interest."

However, the California Supreme Court was subsequently overruled by the U.S. Supreme Court in *Fare v. Michael C.* (442 U.S. 707 (1979)). Michael C.'s probation officer may have hit the *Miranda* criterion of "protective [device] . . . to dispell the compulsion inherent in custodial surroundings," but the Court ruled, as much as the probation officer might have wanted to work with Michael C. and help him, he was not in the best position to protect the youth's constitutional rights. A probation officer is also charged with the duty to arrest and charge a juvenile who violates probation terms and therefore cannot provide the same impartial advice as a trained attorney. Counsel can insure that the defendant's Fifth Amendment rights are not violated, that the police to not "push" the defendant, and the police accurately report the defendant's statements. Defense lawyuers play a unique and trusted role in our adversarial system of justice, a role the Court believes cannot be delegated to a probation officer who has conflicting interests.

The Supreme Court's decision meant that Michael C. would have to serve his prison term. For future juvenile defendants, it means that requesting the presence of a probation officer during police interrogation will not be taken as an invocation of the juvenile's right to remain silent. Only a request for an attorney will be taken by the police to mean that the juvenile does not wish to answer any further questions.

Because of the juvenile courts' long-standing *parens patriae* role, it seems reasonable to argue against the Supreme Court's ruling in *Michael C.*: if a juvenile requests the presence of someone he trusts, questioning could be halted until both the trusted adult *and* a lawyer are present, so that the nonlawyer would not be put in the position of acting as a legal advisor. This would protect the juvenile's Fifth Amendment rights without holding him to a strict adult standard.

Fathers and Sons

Thomas Riley was convicted of murdering three men when was 16 years old and sentenced to 75 to 225 years in an Illinois state prison. Riley's lawyers fought to have his conviction reversed because he was not allowed to speak with his father before he confessed, but the U.S. Supreme Court refused to review *Riley v. Illinois.*

Justices Marshall and Brennan disagreed with the majority. It was time to consider "whether an accused child's request to see a parent must be honored by the police before they continue interrogation, at least when the parent is available at the police station and interested in speaking to his child," wrote Justice Marshall. The dissent pointed out that the conflict between the states on this issue emphasized the need for a Supreme Court ruling. The California Supreme Court, for example, ruled in *People v. Burton* (491 P.2d 793, 798 (1971)) that a child's request to see a parent indicates his desire to remain silent and the police must terminate the questioning. Indiana, Missouri, and Pennsylvania have gone further, requiring that a juvenile always receive adult advice before the police accept his confession, regardless of whether he asks to speak to an adult. Three other state courts, including Illinois, have upheld the use at trial of confessions obtained after juveniles' requests to see parents had been ignored by police.

The refusal of the Court to rule on an issue like the one presented in *Riley*, bodes ill for young defendants. Without a parent present, a child may succumb to his own ignorance, "adolescent fantasy, fright, or despair," wrote the Court in *In re Gault* (387 U.S. 1(1967)). A parent, at the very least, can see that the child is silent until advised by counsel.

Mothers and Sons

"W." was thirteen when his mother ordered him to get out of bed, get dressed, and to go with the police for questioning. W. was handcuffed, taken to the police station, and interrogated. During the interrogation, W. confessed to a burglary. The police, however, not only didn't have an arrest warrant, they also lacked probable cause to arrest W. for the crime. Lacking these, there had to have been a knowing and voluntary waiver of the constitutional protection against unreasonable searches and seizures. Could W.'s mother waive that right so the police could arrest W. without probable cause or a warrant?

The California Court of Appeals held that W.'s constitutional rights were not violated because both W. and the police officers "complied with his mother's request. . . ." California case law recognized and acknowledged the "supervisional authority and control of parents over their children."

The U.S. Supreme Court, refused even to hear *W. v. California* (49 L.W. 3424 (1980)). Justice Marshall dissented: that the police had no probable cause and no warrant would have been held unconstitutional if the defendant were 18, and the tainted arrest would have rendered the confession inadmissible, wrote Marshall.

Because the Supreme Court refused to decide this delicate waiver issue, the states are left to flounder and experiment with the rights of juveniles. Until the Court is willing to step in, it may be that the fact of parenthood will give a mother or father the right to waive their children's constitutional rights.

What's in Store?

The state courts will continue to provide due process protections mandated by Supreme Court decisions. It seems, however, that the Court is less willing to shield juveniles from the realities of the adult criminal justice system when juveniles commit crimes of violence. In addition, when the Court denies certiorari, it is returning the decision-making power to the states, which may reflect the "new federalism." If so, numerous inconsistencies are likely to develop as the individual states decide pivotal constitutional issues.

Only after numerous petitions came before the Court and decades passed did the Court decide to make its first rulings on the due process rights of juveniles. The Court cannot avoid forever issues such as those raised in *Riley v. Illinois* and *W. v. California*. The question is, how many more cases will it take before the Supreme Court mandates consistency among the states in order to further uphold the constitutional rights of juveniles? □

New Ideas

(*Continued from page 25*)

mally in cities than in rural areas, elements of the traditional methods of dealing with children's problems, such as the absence of lawyers from juvenile hearings, distinguish the Indian system from others that are based on the laws of England. The Children's Welfare Act of 1960 created child welfare boards and children's courts, the first to deal with abused or neglected children and the latter to deal with delinquent children. The children's courts proceed informally. A conviction might lead to an admonition from the court, a period of supervised probation, a fine if the offender is over 13 years old, or a commitment in a penal-educational institution for youths.

Because of the Indian tradition of joint and extended families, in which family responsibilities are shared even by distant relatives, the legal problems of juvenile family members greatly affect the social status of the entire extended family. The shared responsibility also is reflected in the juvenile codes, which provide for contributions from parents to defray the costs of their children's institutionalization. Similarly, if a family's situation and the nature of a child's crime seem linked—as when the crime is a violation of a food rationing law—the fine may be assessed against the parents rather than the child.

Social conditions and cultural traditions are reflected in the patterns of juvenile crime in India. The rigidity of caste restrictions in marriage, making acceptable marriage partners sometimes difficult to find, correlates with a high rate of elopement and sex crimes among juveniles. The large numbers of homeless and destitute Indians make the common juvenile crimes of petty thievery, ticketless travel on buses and trains, and violations of food rationing rules understandable. Similarly, the fact that India's social standards impose rigid restrictions on girls makes the low incidence of juvenile delinquency among females less than surprising.

Anand, the son of a sandal maker, is arrested for selling stolen light bulbs in the marketplace. The owner of a nearby estate identifies the bulbs as those stolen from his entryway the prior night. Anand can offer no explanation of how he acquired the light bulbs. What happens to Anand, a 15-year-old who rarely attends school?

Teaching Strategy

Ask each student to imagine that a brother or sister in the family is a troublemaker and is accused of a crime, such as shoplifting. Have each student rank the following preventive and corrective measures according to the effectiveness each would have in the student's own family situation. Compare answers, and have students explain why the answers might be different.

1. Board of Dishonor (U.S.S.R.)
2. Sentencing to a juvenile work army (Cuba)
3. Home visits and investigations by probation officers (India)
4. Lectures at parent-teacher meetings (U.S.S.R.)
5. T.V. programs about young troublemakers and family discipline (Cuba)
6. Placement with a guardian or in a foster home (India)
7. Fining the parents (India)
8. Awards to exemplary parents (Cuba)

Ask students if any of these corrective or preventive measures seem unfair to the children, their parents, or the public. Who might object to each corrective measure? Why?

After booking, Anand is sent to a remand home. The home provides Anand with care and protection from peer and family influences during the period of investigation, and it allows time for court officials to observe Anand in a different setting. School records are searched, and juvenile officers interview family members to obtain a more complete picture of Anand's life.

Since Anand has no defense to the charge, he decides not to attend the trial. No lawyers are present, either, but after the state's evidence is presented Anand's father makes a plea for leniency. The sandal business is poor, he explains, and Anand has no money for the cinema or other diversions. A conviction is entered, and the judge considers the recommendation of investigators familiar with Anand's behavior, school performance, and family situation. Anand is ordered released from the remand home and placed on a year's probation. During that time the probation officer will visit Anand weekly in Anand's home to discuss school progress. Sai Ram, an uncle of Anand's, offers a job to Anand for an hour or two each day after school. For a few rupees each week, Anand will clean up in Sai Ram's bicycle repair shop. The judge warns that smoking bidis, buying betel nut to chew, or gambling with cowrie shells will be considered violations of the probation terms. Anand rejoins his family, and all seem content with the outcome of the trial and sentencing.

Cuban Innovation

Since the time of the Cuban revolution, more than 50 percent of all crime in that country has been attributed to youngsters. An epidemic of juvenile crime has accompanied political turmoil, scarcity of consumer goods, and disruption in traditional social values in recent times. The problem has increased exponentially in the cities, with the incidence of juvenile crime in Havana 50 times the national rate.

Cuba has responded to the crisis—which represents an embarrassing failure of the revolution—by channeling money into education, prevention, and correction of juvenile delinquency. Nearly 10 percent of Cuba's gross national product in the last decade was directed to education (only three countries direct more dollars to education), and the Cuban government funded programs to urge the relocation of unemployed city-dwellers to rural areas.

Cuba relies extensively on public awareness to prevent crime. Mass youth organizations attempt to provide leisure activities for youngsters. Almost all children belong to the organizations, which are sponsored by the Union of Young Communists or the Ministry of Education. Neighborhood patrols and health services have been established on a local basis by grass-roots organizations called Committees for Defense of the Revolution. The Federation of Cuban Women sponsors programs of education in child-rearing practices. All of these organizations emphasize the role of the Cuban family in the socialization process.

The family theme is furthered by the Ministry of Education, which organizes block meetings for discussions of child-rearing practices and discipline. Radio and television dramas portray family crises leading to juvenile crime; an analysis of the discipline techniques that should have been practiced follows the dramas.

The legal system is also directly involved with the problem of juvenile delinquency. Limited criminal responsibility begins for Cuban children at the age of 12. At 16, an offender may be tried as an adult. Stiff criminal penalties are meted out to adults who involve youngsters in their criminal activities. Punishment for juvenile offenders may involve sentencing to a work army or to an isolated training school.

Many young troublemakers are never seen by the legal system. The Ministry of Education tries to identify dangerous or precriminal activities and then channel the offending youths to highly structured school settings where opportunities for crime are reduced.

Educational personnel complete academic, biological, socioeconomic, personality, and political evaluations of Cuban students. These evaluations comprise cumulative student profiles, which follow children from school to school and teacher to teacher and which eventually go into the young adult's work dossier. Without any involvement of the criminal justice system, the Ministry of Education can order troublemakers to enroll in special vocational schools. Since the Cubans consider work to be necessary and purifying, a school where agricultural work is performed represents the best of two worlds. Residential schools in the countryside provide an escape for urban troublemakers, who are allowed to return to their city homes only on weekends.

Ideas for the Future?

In Russia, India, and Cuba, juvenile justice practices are influenced by cultural, economic, legal, and historical factors, resulting in systems that are peculiar to each cultural setting. Measures aimed at the prevention of juvenile delinquency vary to a great extent, depending on the society's perception of the causes of rebelliousness among its youth. Because none of the juvenile justice systems examined incorporates the constitutional protection inherent in the American system, it would be difficult to borrow them in total, but perhaps there are common trends important to the future of juvenile justice in America.

Other cultures acknowledge that parental and family responsibility is the key to prevention. Is that perhaps an idea that should be more emphasized in the United States? Similarly, public awareness of and involvement in diversion and prevention receive a great deal of attention in these countries. Finally, preventing juvenile delinquency through the educational system is being tried in Russia, India, and Cuba, and may already be starting to take place in the United States. Through law-related education and the involvement of a new cadre of professionals, agencies other than the courts are concerning themselves with the problems of rebellious youth. This may indicate that the pendulum is swinging once again away from the stringent standards set out in *Gault*.

This does not necessarily mean, however, that the constitutional protections of *Gault* must be forsaken. Rather, we can provide due process for youngsters at the same time we involve the family, the public, and educational and social institutions. Working together, we can improve delivery of juvenile justice in the United States and ultimately enhance the quality of the lives of our children. ☐

Strategies

(Continued from page 17)

The second role play looks the same at first glance but really presents a whole different situation.

Police Officer 2: Same scenario as in role play 1.

Youth 2: You are mad at the world. Your boy/girl friend has just broken up with you. You have been drinking. You enter the park and kick over the trash cans and smash a water fountain. You sit down on the picnic bench, then you notice a police officer approaching. Although you would like to, it's too late to run.

Procedure

Ask students to play their roles as realistically as possible, while the rest of the class observes. Allow five to ten minutes to conduct the two role plays. Ask for students' comments and opinions on the role plays. Write on the blackboard students' arguments in favor of or against police discretion. Ask the class to brainstorm other ways the police officer could have handled the situation.

Draft a Bill

Divide the class into small groups. Have them role play members of a special committee on juvenile justice of their state legislature. The committee is drafting a bill defining the scope of police discretion in dealing with juveniles. Allow students 15-20 minutes to draft their bill.

As an alternative, you may want to hold a mock legislative hearing before drafting the bill. To do this, organize your class into three groups: (1) a legislative committee, (2) proponents of police discretion, and (3) opponents of police discretion. Have proponents and opponents present testimony to the committee, who then draft the final bill.

Finally, have representatives from each group write their proposed bill on the blackboard. Allow the class, acting as the whole legislature, to vote on each proposed bill.

As a debriefing exercise, distribute copies of the following statutes for students to compare with those developed in class. The first statute ignores the role of police discretion, the second implies the use of police discretion, and the third presents an interesting alternative.

> The chief and other police officers of all cities and towns shall have all the powers and duties of constable except serving and executing civil process. They shall suppress and prevent all disturbances and disorder. . . .
>
> *Mass. General Laws, ch. 41, sec. 98*

> No child may be taken into immediate custody except . . . (b) when in the presence of the officer who takes the child into custody a child has violated a county, town or municipal ordinance or a state or federal law and the officer *believes* that such action is necessary for the protection of the public interest.
>
> *Wis. Children's Code, sec. 1(b), ch. 48.28 (repealed in 1977)*

> To respect family autonomy and to minimize coercive state intervention, law enforcement officers, when dealing with juveniles, should be authorized and encouraged to use the least coercive reasonable alternatives consistent with preserving public safety, order and individual liberty.
>
> *Proposal of the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention.*

Ask students how these statutes compare with the ones they have developed. How are they better/worse? What problems do they foresee in enforcing the statutes? If they were police officers, which statute would they prefer? Why?

In the absence of statutory guidance, many police departments establish their own guidelines for exercising discretion with juveniles. Students may wish to research the laws of their own state regarding police duties and the particular police guidelines of their community.

This would be an ideal time to have a police officer visit your class to discuss police-juvenile relations. ☐

Court Briefs

(Continued from page 41)

prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Justice O'Connor concluded the California law failed that test because it "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." She conceded that the discretion left to the police officer "necessarily entrusts lawmaking to the moment-by-moment judgment of the policeman on his beat," but concluded that this law "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure."

The case is *Kolender v. Lawson,* 51 L.Wk. 4532.

Use of Electronic Beepers to Track Suspects Upheld

Fans of Marlin Perkins and his "Wild Kingdom" television series know that electronic beepers are helpful to track the flight of migratory waterfowl or chart the wanderings of amorous water buffalo during mating season. Police officers, however, have found the tiny radio transmitters equally well-suited to track and corner their prey. Thanks to a recent Supreme Court decision they'll probably make even greater use of the beepers in future years.

In a unanimous decision, the Court held that use by police of electronic beepers to trail a suspect to a secluded drug laboratory in the wilds of rural Wisconsin did not violate the suspect's right to privacy. Police installed the beeper in a 500-gallon drum of chloroform that they believed was going to be used to manufacture amphetamines. The drum was sold to Tristan Armstrong, who placed it in his trunk. Officers then followed Armstrong, relying on the beeper signal after losing sight of the truck. The tracking lead police to a secluded cabin in Wisconsin. After three days of surveillance, the officers obtained a search warrant and discovered a laboratory producing illegal drugs.

Writing for the Court in *United States v. Knotts,* 51 L.Wk. 4232, Justice William Rehnquist said that trailing a suspect visually while he was driving on public streets and highways was clearly permissible under the Constitution since a suspect has no reasonable expectation of privacy regarding such movement. Use of a beeper, he said, merely augmented "the sensory faculties bestowed upon [police] at birth with such enhancement as science and technology afforded them in his case." Justice Rehnquist was careful to note that the legality of installing the beeper without a warrant was an issue which was not raised in the case.

Cops Can't Be Sued for Perjury

Police officers who commit perjury in criminal trials have absolute immunity from damage suits brought by the criminal defendant whom they helped to convict, the Supreme Court declared in *Briscoe v. La Hue,* 51 L.Wk. 4247.

In a 6-3 decision written by Justice John Paul Stevens, the Court ruled that Section 1983 of the 1871 Civil Rights Act, which permits persons to sue government officials for violating their constitutional rights, does not authorize a private cause of action against police perjurers, even when defendants have succeeded in vindicating themselves in other courts.

Stevens emphasized that when Section 1983 was enacted in 1871, *all* witnesses enjoyed civil immunity from damages for their trial testimony. (They could, however, be criminally prosecuted for lying on the stand.) "When a police officer appears as a witness," Stevens reasoned, "he may reasonably be viewed as acting like any other witnesses sworn to tell the truth—in which event he can make a strong claim to witness immunity."

The majority opinion also suggested that police may enjoy a special immunity for their "critical role in the judicial process," similar to the absolute immunity given judges and prosecutors. Stevens stressed that police officers guilty of perjury are nonetheless subject to criminal penalties.

Justices William Brennan, Thurgood Marshall and Harry Blackmun dissented, stating that witnesses generally did not have absolute immunity for perjury at the time the 1871 law was passed, and that public policy does not support a grant of such immunity to officers who perjure themselves on the stand.

"Canine Sniff" Is Not a Search, But 90-Minute Stop Is Unreasonable

"Canine Narcs" are not new to Kennedy International Airport. The dogs are specially trained to sniff out luggage which is toting drugs.

Raymond J. Place was intercepted after a flight from Miami to LaGuardia Airport in New York. But because there were no barking narcs at LaGuardia, federal agents had to get his luggage to Kennedy. The Feds took the luggage from Mr. Place when he refused to allow them to search it. The process took about 90 minutes.

Justice O'Connor, writing for the Court in *United States v. Place,* 51 L. Wk. 4844, said the search was illegal because 90 minutes was too long to stop under *Terry v. Ohio,* 392 U.S. 1 (1968), a landmark decision which permitted police who "reasonably suspect" illegal activity to briefly detain a person on less than probable cause. The Court said it would refrain from putting a "rigid time limitation" on a *Terry* stop but concluded that 90 minutes was unreasonable in this case. All nine justices agreed.

However, a portion of Justice O'Connor's decision drew protests from Justices Brennan, Marshall and Blackmun when she went on to say that the canine sniff "is much less instrusive than a typical search" and requires no previous suspicion of wrongdoing. They felt that since the Court agreed that the "seizure" was unconstitutional, there was no need to discuss the validity of the sniff. In other words, such discussion was "dicta" to the case.

Custom's Fishing Expedition Catches Pot

Mr. Villamonte-Marquez's beautiful 40-foot sailboat is no longer his. It now belongs to U.S. Customs ever since customs officials boarded it to check its documents, smelled something fragrant, looked through the hatch, and saw 5,000 pounds of marijuana wrapped in burlap bales.

In a 6-3 decision, Justice Rehnquist wrote for the Court that the Constitution does not require customs officials to have even reasonable suspicion that a crime is being committed before boarding a ship to check its documents.

Justice Brennan, in a dissenting opinion joined by Justice Marshall and partially joined by Justice Stevens, called the decision "a blatant departure from solid and constitutional precedent." In every other context, the Court has required police officials to have at least a "reasonable suspicion" of criminal activity before allowing a brief detention. For example, Justice Rehnquist conceded that if the ship had been an automobile "the stop would have run afoul of the Fourth Amendment." But, Rehnquist continued, the key question is "the reasonableness of the type of governmental intrusion involved." Here the mobility of ships, the impracticality of roadblocks, and the "modest intrusion" makes the search "reasonable" under the Fourth Amendment.

The boat had been at anchor in the Calcasieu River ship channel, which connects the Gulf of Mexico with Lake Charles, Louisiana, the customs port of entry for Houston. The case is *United States v. Villamonte-Marquez*, 51 L.Wk. 4812.

Physical Area Police May Search Is Expanded

When a police officer stops a car on the road it usually is for a traffic violation. But police are always a little bit wary. Each year we read about officers shot by drivers pulled over for a broken tail light.

The Court has fashioned a "search incident to a lawful arrest" rule which permits the police to search the arrested person and the area within his immediate control in order to protect the police officer from being assaulted with a dangerous weapon.

In *Michigan v. Long*, 51 L.Wk. 5231, the Court in a 6-3 ruling expanded the physical area a police officer may search when he suspects danger after stopping a criminal suspect.

David Long was lawfully stopped by a police officer because he had been speeding and weaving on the road. Police noticed a hunting knife on his car's floor. While the police officers continued their investigation to determine if the disoriented driver would be permitted to reenter the car to obtain the vehicle's registration paper, they decided to lift the front seat's center armrest to investigate an article protruding from it. There they found marijuana.

Writing for the majority, Justice O'Connor noted that the leading "stop and frisk" case, *Terry v. Ohio*, 392 U.S. 1 (1968), upheld the validity of protective searches even in the absence of probable cause to arrest, since it is unreasonabe to deny a police officer the right to "neutralize the threat of physical harm" when he suspects that an individual is armed and dangerous. In this case, the majority agreed that the search of the "passenger compartment" of the car was reasonable—and thus constitutional—because of the legitimate need to protect police officers, particularly in "roadside encounters" that are "especially dangerous." Though a balancing test—weighing the defendant's cherished personal privacy against the need to protect police officers—is appropriate, in this case the balance is clearly struck in favor of protecting the officers.

In an angry dissent written by Justice Brennan and joined by Justice Marshall (Justice Stevens dissented on separate jurisdictional grounds), the minority castigated the majority for "distorting *Terry* beyond recognition" and departing from the Fourth Amendment's "fundamental requirement that searches and seizures be based on probable cause." The dissenters noted that the majority's

Justice O'Connor's View on Abortion Now Known

Justice Sandra Day O'Connor steadfastly refused to express her views on abortion during her 1981 Senate confirmation hearings, saying she might be required to pass judgment on this subject.

She did that in three separate cases this term, dissenting in two of them. In the most important case, Justice O'Connor, Justice Rehnquist, and Justice White launched an all out attack on abortion but fell short.

The government has a "compelling" interest in protecting "potential human life" at all stages of a women's pregnancy, said O'Connor in dissent.

But in the Court's most important pronouncement since *Roe v. Wade*, 410 U.S. 113 (1973), a six-justice majority strongly reaffirmed that women have a constitutional right to end their pregnancies.

In *City of Akron v. Akron Center for Reproductive Health*, 51 L.Wk. 4767, Justice Powell's decision for the majority held that:

1. **Government officials may not require that all abortions after the first trimester be performed in a hospital;**
2. **Government officials may not require a 24-hour "cooling off" period after a woman has signed a consent form;**
3. **Government officials may not require that the attending physician give the woman counselling beforehand.**
4. **Government officials do not have "unreviewable authority" to decide what a woman must be told before she consents to an abortion.**

In a separate ruling, *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 51 L.Wk. 4783, the same majority again struck down a requirement that all abortions after the first trimester of pregnancy be performed in a hospital. But, on other issues raised by the case, the three-justice minority picked up the votes of Justice Powell and the chief justice, enabling them to form a majority to uphold three restrictions.

These require a pathologist's analysis of tissue removed in clinic abortions; a second physician's assistance at third-trimester abortions; and parental or judicial consent before an abortion can be performed on a teenage girl who is not "emancipated" or mature enough to make her own choice. The majority on these issues concluded that the state has a "compelling" interest in protecting the lives of viable fetuses (the second physician requirement); that the pathology-report requirement imposes no undue burden on the right to an abortion; and that the state has a legitimate interest in protecting immature minors (the consent requirement).

In the third abortion case (*Simopoulos v. Virginia*, 51 L.Wk. 4791), Dr. Chris Simopoulos' criminal conviction was upheld 8-1. Simopoulos had been sentenced to 30 days for violating a Virginia law prohibiting doctors from performing second-trimester abortions outside a licensed hospital or outpatient facility. He had operated on a 17-year-old girl at his unlicensed clinic in Falls Church, Virginia. The majority held that the licensing requirement is a reasonable way for the state to further its legitimate interest in protecting the woman's health.

Commenting on *Akron*, Faye Wadleton, President of the Planned Parenthood Federation of America, praised the Court for reaffirming "its unyielding commitment to abortion choice and reproductive rights."

But Stephen Chapman, editorial writer for the *Chicago Tribune*, called the *Akron* case "contemptuous of the powers of state and municipal governments, contemptuous of the value of fetal life, contemptuous of the Constitution." He wrote, "the only reasonable course left to the right-to-life movement is the pursuit of a constitutional amendment banning abortion."

—JLD&MRW

broad language—permitting searches of locations in passenger compartments where weapons "may be placed or hidden" virtually invites full scale searches of the entire compartment, including containers within it.

Excuse Us Says Court

The Court could have used Emily Latella, the "Saturday Night Live" character who always used to say "never mind," to announce its decision in *Illinois v. Gates*, 51 L.Wk. 4709. With "apologies to all," the Court announced it would not, after all, use the narcotics case to review the exclusionary rule.

In the course of 15 confusing months, the Court first rejected a request to address the exclusionary rule issue in the Illinois case; heard argument on the issue of search warrants; changed its mind and ordered a rehearing on the controversial exclusionary rule; and finally said "never mind."

The Court did, however, abandon the guidelines it established 20 years ago, saying it was no longer necessary for judges and magistrates to double check the truthfulness of tips by anonymous informants.

Police in Bloomingdale, Illinois, received an anonymous letter in May, 1978 accusing Lance and Susan Gates of trafficking in drugs. The letter said the couple would be traveling to Florida and then would be driving back with their car trunk loaded with drugs.

Authorities arranged for surveillance.

Police in Bloomingdale presented the anonymous letter and some of their corroboration to a local magistrate, who issued a warrant to search the couple's home and car upon their return. Three hundred and fifty pounds of marijuana, weapons and other contraband were found. The Gateses challenged the search as unconstitutional, and the legal circus was on.

The final result was bad news for the Gateses. Though the exclusionary rule still stands, at least temporarily, the Court okayed the search by overturning the precedents established in two earlier cases. The tests required in *Aguilar v. Texas*, 378 U.S. 108 (1964), and expanded on in *Spinelli v. United States*, 393 U.S. 410 (1968), said that magistrates must (1) be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed and (2) know the underlying circumstances from which the officer concluded the informant was credible. Since the informant in this case was anonymous, these tests would have made it impossible for the police to verify his credibility.

However, Justice Rehnquist, writing for the majority (6-3), said "rigid legal rules" and specific tests "are ill-suited" to the task of evaluating the information. "Informants' tips come in many shapes and sizes, from many types of persons."

He said those who issue warrants should use "common sense" and weigh the "totality of circumstances" when judging credibility.

Justice Brennan, joined by Justice Marshall, strongly dissented. "Words such as 'common sense' as used in the Court's opinion are but code words for an over-permissive attitude toward police practices in derogation of the rights secured by the Fourth Amendment," he said.

Justice Rehnquist in a dissent in another case may have best expressed the sense of futility regarding the exclusionary rule issue: "The King of France, with forty thousand men, marched up the hill, and then marched down again." And march again they did in *Illinois v. Gates*.

However, three cases are already slated for next term which will allow the Court to march back up "Exclusionary Hill."

Benefits Equalized

Equal rights made important strides in two cases. The struggle for sexual equality took two giant steps forward in a health benefits case and a pension plan case.

Sex Bias in Health Benefits Illegal

In a 7-2 decision, the justices said that an insurance plan was illegal because it offered full hospitalization benefits to the husbands of female workers, but excluded pregnancy from the full coverage offered to the wives of male workers.

In *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 51 L.Wk. 4837, the Court said the company violated the 1964 Civil Rights Act, which prohibits sex discrimination in employment.

Justice John Paul Stevens, writing for the Court, said under the Newport News Shipbuilding Plan, "the husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage except for pregnancy-related conditions."

Since Congress amended the 1964 Civil Rights Act in 1978 to make clear that a ban against sex discrimination in employment included bias against pregnant employees on job applications, "The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." The company's plan "unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees." (See Spring, 1983 *Update* for further discussion of the case).

Female Employees No Longer Pensive Over Pensions

In a 5-4 decision, the Court barred pension payments based on sex. Yet both Ms. Nathalie Norris, who sued the state of Arizona when she realized she would receive $34 a month less than a man who had put aside the same amount, and the insurance companies, who claimed a decision in favor of Ms. Norris would ruin them, claimed victory.

Justice Thurgood Marshall, writing for the Court, said that Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination on the basis of both race and sex, requires employees to be treated as individuals rather than as members of a group. The insurance company which provided the "annuity-based" retirement plan for Ms. Norris had argued that since women live longer than men (for people born in 1981, life expectancy is estimated at 78.3 years for women and 70.7 years for men), women should receive less each month to make the retirement payments fair.

But Justice Marshall wrote, "Even a true generalization about a class cannot justify class-based treatment" under the law. "An individual woman may not be paid lower monthly benefits simply because women as a class live longer than men."

The vote on the remedy was a different story and a different 5-4 coalition of justices. On the Civil Rights Act question Justices Brennan, Stevens, White and Marshall were joined by Justice O'Connor. However, on the question of what to do about the discrimination, Justice O'Connor switched sides and joined with Chief Justice Burger and Justices Powell, Rehnquist and Blackmun in holding that the remedy of equalization will begin August 1, 1983.

This means that starting that date, insurance companies will presumably abandon the current male and female actuarial tables and substitute for them a single actuarial table based on the average expected longevity for all the plan's participants. According to John Turner, President of Northwestern National Life Insurance Company "the fact that the Supreme Court did not make it retroactive probably strengthens the position of industry as far as the issue of unisex pricing is concerned. We believe that insurance policies should be based on the costs of providing benefits" he said. And because women, on the average, live longer it costs more to provide benefits.

But Ms. Norris, although she will not get any more money each month because of the ruling regarding the remedy, says she is "elated by the decision. It is a beginning."

The Court's ruling was limited to employment and doesn't wipe out gender-based differences in life, health and auto policies. But according to Daniel Forz, a consulting actuary for Deferred Compensation Administrators, it is quite possible that the ruling could affect other sex-distinct premium classifications. Congress is considering several bills to calculate all rates and benefits without regard to sex, whether or not in the context of employment.

The case is *Arizona Governing Committee for Tax Deferred Annuity and Compensation Plans v. Norris*, 51 L.Wk. 5243.

Teaching Strategy for Pension Plan Equality

"Statistics can be used to prove anything" goes the adage. For example, a Coke bottle can be one-half empty or one-half filled depending on how you look at it.

If women are now to receive equal retirement benefits, does this mean that men will receive less?

1. Draw a pie-graph on the board. Show Ms. Norris's piece of the pie as smaller than that of a male colleague who retired the same time. Ask the students if there are other mathematical methods to express this.

2. Explore ways to rectify this problem:
   a) Move $18.50 from the men's to women's side of the pie.
   b) Bring in $37 more to the women's side of the pie.
   c) Is there any other way?

3. Discuss what is likely to happen and the impact it will have on the students when they retire?

4. Ask:
   a) Do you think this case is fair if women live longer?
   b) If whites live longer than blacks, should whites receive less?

5. Explain that although people can be divided into many types of classifications (e.g., tall-short, black-white, heavy-light, male-female), some classifications are illegal to use when making decisions even though statistically facts can be shown about them which are true (e.g., women live longer than men).

6. Explore some possible ramifications of this decision:
   a) Car insurance—will the price go up for women and down for men. As every teenager knows, insurance for young women is cheaper than for young men since their accident rate is less.
   b) Other.

—JLD & MRW

Bad Times in the Big House

As every movie-goer knows, a trip up the river to the big house is no Love Boat cruise. Food is so bad that inmates feel compelled to pound the table with tin cups. Recreational and work opportunities are scarce, and many prisoners become so bored they literally try to climb the walls.

In reality, actual prison conditions are even worse. Inmates are isolated from family and friends, and exposure to rape and assault is a standard part of prison life.

In the 1983-84 term, the Supreme Court will hear several cases concerning the rights of persons held in this nation's prisons. In cases decided last term, the Court considered whether prison guards are liable for permitting prisoners to be raped or assaulted; whether prisoners can be sent to prisons thousands of miles away from their homes; and whether prisoners are entitled to a hearing before being placed in "administrative segregation." The Court also decided the constitutionality of "recidivist" statutes which permit life sentences for repeat offenders, even those who have not committed a violent crime. The prison cases deal with whether persons may be denied bail to prevent them from committing additional offenses prior to trial (see insert), and whether last-minute appeals by death row inmates may be substantially restricted.

Guards Liable for Prison Rapes

In a narrow 5-4 decision the Court ruled that prison and jail guards can be held liable for substantial punitive damages if their indifference to a prisoner's safety results in the rape or assault of the inmate.

In *Smith v. Wade*, 51 L.Wk. 4407, Daniel R. Wade was assigned to a Missouri reformatory for youthful first offenders in 1976. Because of disciplinary violations he was transferred to "administrative segregation" in the facility. On the evening of Wade's first day in segregation, he was placed in a cell with another inmate. Later, when guard William H. Smith came on duty in Wade's dormitory, he placed a third inmate in the same cell. According to Wade, his cellmates harassed, beat, and sexually assaulted him.

Wade brought suit against Smith and four other guards and correctional officials, alleging that his Eighth Amendment right to be free from "cruel and unusual punishment" had been violated. The suit was brought under Section 1983 of a federal civil rights law enacted in 1871, which gives citizens the right to sue government officials personally for violations of civil rights.

At trial, the evidence showed that Wade had a history of being assaulted by other inmates, and that the third prisoner whom Smith had added to the cell had been placed in administrative segregation for fighting. Smith had made no effort to find out whether another cell was available, and in fact there was another cell in the same dormitory with only one occupant. Further, only a few weeks earlier, another inmate had been beaten to death in the same dormitory during Smith's shift.

The trial judge instructed the jury that Wade could recover if Smith was guilty of "gross negligence" in failing to protect Wade, and that the jury could also award punitive damages if the guard's conduct was in "reckless disregard" to the rights and safety of Wade. Punitive damages are awarded in addition to damages that simply compensate the plaintiff in order to punish the defendant and serve as a deterrant against similar wrongdoing. The jury awarded Wade compensatory damages of $25,000 plus $5,000 in punitive damages. The court of appeals affirmed.

On appeal, the Supreme Court upheld the punitive damages award in a 5-4 decision. The decision was written by Justice Brennan and joined by Justices White, Marshall, Blackmun, and Stevens. It was the first time the Court has expressly held that punitive damages may be awarded under the widely used civil rights act, and is also significant because it permits punitive damages not only when public officials *intentionally* violate a citizen's rights, but also when they act with *indifference* or reckless disregard to another's constitutional rights. The ruling also has major implications beyond prisons because the civil rights statute applies to misconduct by any government official who violates civil rights.

Justice William Rehnquist, joined by Chief Justice Warren Burger and Justice Lewis Powell, Jr., disagreed vehemently with the decision. Rehnquist argued that "at least some degree of bad faith or improper motive" should be required before punitive damages are awarded.

In a brief but significant separate dissent, Justice Sandra Day O'Connor criticized both the majority and the Rehnquist dissent for an overreliance on "musty cases" in attempting to interpret the 1871 statute. Justice O'Connor wrote that she disagreed with awarding punitive damages for the recklessness of public officials because the threat of such awards "will chill public officials in the performance of their duties."

Ship Him Danno. . . Banishment from Hawaii Upheld by Court

Delbert Kaahanui Wakinekona is the kind of guy Steve McGarrett would have loved to say "Book'm Danno" to on the old "Hawaii Five-O" television show. Wakinekona is serving a life sentence, without possibility of parole, after having been convicted of murder in a Hawaii state court. He also is serving sentences for various other crimes, including rape, robbery, and escape. Hawaii prison officials have identified Wakinekona as "the most dangerous and assaultive inmate in the Hawaii prison system" and have concluded that no facility in the islands is suitable for him.

Prison officials arranged to have him transferred to Folsom State Prison in California, some 4,000 miles from Hawaii. The federal district court in Hawaii upheld the transfer but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that Wakinekona had a constitutionally protected interest in not being transferred.

The Supreme Court disagreed, and by a 6-3 vote held that states are free under the Constitution to transfer prison inmates to prisons in other states, even if the transfer severs a prisoner's ties with his family. Writing for the majority, Justice Harry Blackmun said: "Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State."

Three years ago, in *Vitek v. Jones*, 445 U.S. 480, the Court held that the transfer of an inmate from a prison to a mental hospital brought about "consequences . . . qualitatively different from the punishment characteristically suffered by a person convicted of a crime" and thus triggered the procedural protections of the Due Process Clause. Wakinekona argued unsuccessfully that confinement of a Hawaii prisoner on the mainland was also punishment "different in kind" than that characteristically given, thus entitling him to due process protection.

Writing in dissent, Justice Thurgood Marshall, joined by Justices William Brennan and John Paul Stevens, said that Wakinekona "has in effect been banished from his home, a punishment historically considered to be among the severest." Marshall continued: "For an indeterminate period of time, possibly the rest of his life, nearly 4,000 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders." Marshall concluded that because the transfer "represents a substantial qualitative change in the conditions of his confinement," Wakinekona should have received a hearing prior to the decision. The case is *Olim v. Wakinekona*, 51 L.Wk. 4491.

No Adversarial Hearing on the Way to the Hole

In a second decision concerning the disciplinary power of prison authorities, the Supreme Court held, 5-4, that a prison inmate is not entitled to an adversarial hearing before being transferred out of the general prison population and placed in "administrative segregation," more popularly known to prisoners as simply "the hole."

In *Hewitt v. Helms*, 51 L.Wk. 4124, the majority opinion written by Justice Rehnquist reversed a ruling of the Third Circuit, which held that Pennsylvania prison officials violated an imnate's constitutional right to due process by holding a brief, informal hearing at which the inmate was not present. According to Rehnquist, this brief hearing was enough

Court Preserves Other College Draft

The National Football League waits until a player is in his senior year of college before drafting, but the selective service wants colleges to help on draft registration for all four years.

On June 17, 1983, federal judge Donald Alsop issued a permanent injunction against the federal government and ordered that a law requiring male students to disclose their draft registration status when applying for college financial aid not be enforced.

Judge Alsop ruled that the "Solomon Amendment" singled out non-registrants for punishment without a trial (known in constitutional law as a Bill of Attainder) and forced them to incriminate themselves in violation of the Fifth Amendment.

Colleges around the country breathed a sigh of relief and threw away their forms that included a draft registration statement. But on June 29, 1983, the U.S. Supreme Court, in *Selective Service System v. John Doe*, 51 L.Wk. 3932, issued a one-sentence ruling temporarily setting aside Judge Alsop's decision and sending college financial aid officers scurrying around in the hopes that the garbage hadn't been hauled away yet.

The case was appealed directly to the top court because it involved the constitutionality of a U.S. statute.

Under the law college officials began compliance July 1, 1983.

The ruling means the law will remain in effect at least until the Supreme Court returns from its summer recess in October, when it may decide whether to hear arguments on the constitutionality of the law.

Selective service officials indicate that 263,000 young men born in the years 1960 through 1964 had failed to register. Another 146,000 born in 1965 have failed to register as required this year.

—JLD & MRW

to satisfy the minimal due process requirements, since the prisoner had been given notice of the charges against him and had the opportunity to present his views through a written statement.

The dissent, authored by Justice Stevens and joined by Justices Brennan, Marshall, and Blackmun (in part), argued that the Due Process Clause is supposed to protect against arbitrary actions of government, but Pennsylvania's procedures are too informal to assure a fair decision based on a full review of the facts.

Court Tames a Paper Tiger. . .

Clovis Carl Green has perhaps filed more federal court appeals than any living person—which is an unusual accomplishment considering that Green is not a lawyer but rather makes his residence in federal prison at Bastrop, Texas. Green, who has been christened "the most prolific prisoner-litigant in recorded history" by a U.S. court of appeals, has inundated the Supreme Court with 66 petitions and motions in the last decade, including 22 last term alone. But Green's reign as the "paper tiger" of the judicial jungle appears to have come to a close as the Supreme Court refused to let him file his latest petition for free.

The Court took the unusual step of denying Green's motion to file his petition "in forma pauperis," or as a pauper. "Pauper" status is routinely granted prisoners to permit them to file appeals without paying the required $200 filing fee and without having to submit 40 properly bound and printed copies of their appeal.

Green has been in various prisons most of his adult life for crimes ranging from forgery to rape, and by his account has filed more than 700 appeals and lawsuits of various kinds. His most recent suit is for $1 million against a Missouri state prison warden, accusing the official of denying Green his constitutional right to practice his religion. Green is the founder and sole pastor of the Human Awareness Universal Life Church, whose tenets include the right to be served a banquet on religious holidays designated by Green, and the right to be put on the prison payroll as a chaplain.

Needless to say, courts targeted for his paper barrage are not always sympathetic with his filings. In fact, a panel of three federal appellate court judges attempted to restrict his voluminous filings, writing in 1981 that Green's "pattern of repetitive, malicious, and frivilous filings constitute a flagrant and serious abuse of the judicial process and must come to a stop."

For the time being, anyway, Green's mail bag to the Supreme Court will be empty. The order denying him pauper status applies only to his current petition, however, and he is free to attempt to claim the status in future cases.

Life Sentence for Bad Check?

Had Jerry Helm decided to become a policeman rather than a petty criminal, he undoubtedly would have been assigned to the Keystone Cops. Nothing Helm does seems to go right. Court documents describe Helm as an alcoholic who has spent most of his adult life in prison for relatively minor felonies, ranging from three burglaries and drunken driving to stealing more than $50. His most recent felony, cashing a forged $1000 check, looked like it would be his last. Under a South Dakota "recidivist" statute, which imposes penalties against "habitual offenders," Helm received a life sentence without possibility of parole.

However, in *Solem v. Helm*, 51 L.Wk. 5019, the Court for the first time in its history invalidated a prison sentence because it was too long. Writing for the five justice majority, Justice Lewis Powell said that the South Dakota law authorizing a life sentence for a repeat offender was in violation of the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The ruling was all the more surprising because three years ago, in another 5-4 decision, *Rummell v. Estelle*, 445 U.S. 263 [1980], the Court upheld a mandatory life sentence imposed on a Texas man who had committed three thefts involving a total of $230.

Justice Powell distinguished the South Dakota case by saying the repeat offender law was "fundamentally different from the Texas law because it completely barred the possibility of parole."

Chief Justice Warren Burger, in a blistering dissent joined by Justices Rehnquist, White, and O'Connor, wrote that the decision "cannot rationally be reconciled" with *Rummell v. Estelle.*

The justice who switched sides between the Texas case and the South Dakota case was Harry Blackmun.

For now on it is clear that punishment must not be disproportionate to the crime. "We hold as a matter of principle," said Justice Powell for the majority, "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."

The Court set out a three step procedure for analyzing whether the prison sentence is disproportionate.

1. "Look to the gravity of the offense and the harshness of the penalty."
2. Compare the sentences the state metes out for other crimes.
3. Examine how other jurisdictions treat the same crime.

Court Says Death Row Inmates Cannot Drag Feet in Walking the Last Mile

In *Barefoot v. Estelle*, 51 L.Wk. 5189, the Court showed that it, like much of the public, is impatient with the seemingly endless delays in carrying out death sentences.

Attorneys for the State of Texas had told the Supreme Court that too many death row inmates are being granted last-minute stays of execution and urged the Court to sustain a lower court policy that denies such twelfth-hour postponements unless the inmate's federal appeal raises "substantial issues."

After exhausting their appeals to the state court, inmates may petition federal courts for a writ of habeas corpus to challenge the constitutionality of any aspect of their conviction or confinement. Often these petitions are still pending on the scheduled execution date, and inmates may be put to death although their cases are technically unresolved. Thus, prisoners apply to the federal court for stays of execution which will permit consideration of their habeas corpus petitions prior to their executions.

Troubled by the growing number of last-minute requests for stays, the Fifth Circuit Court of Appeals instituted a policy last year which denies a stay unless the inmate can show that his pending appeal raises "substantial" issues. The Fifth Circuit has jurisdiction over Texas, Louisiana and Mississippi. Last December one Texas inmate was executed—although his habeas corpus petition was still pending—after the Supreme Court refused to grant a stay, in effect refusing to review the Fifth Circuit policy. A month later, the justices had an abrupt change of heart and granted a stay to another Texas inmate, Thomas A. Barefoot, just 11 hours before Barefoot was to be given a lethal injection.

Attorneys for Barefoot argued that inmates should be given a stay of execution so long as the issues raised are not "frivolous"—a standard much easier for inmates to meet than the Fifth Circuit's requirement that the issues be substantial. Essentially, the not-frivolous standard would require a stay when any issue raised in the habeas corpus petition is not clearly foreclosed by controlling Supreme Court precedent and has some basis in fact.

A brief filed by the Legal Defense Fund of the National Association for the Advancement of Colored People urged the Court to give inmates the benefit of the doubt because most habeas corpus petitions in death penalty cases have merit and eventually succeed in getting death sentences overturned. The brief noted that since 1976 federal appeals courts have decided 41 habeas corpus petitions from death row residents and ruled in favor of the condemned persons 73 percent of the time.

In response, Texas law enforcement officials argued that the lengthy delays by the courts in processing death penalty appeals has eroded confidence in the criminal justice system and given the public the impression that "the laws can't be carried out."

In a 6-3 vote, the Court agreed with Texas and the Fifth Circuit Court of Appeals, holding that federal judges may use expedited, speeded-up procedures to handle appeals by death row inmates, and saying that stays will not be granted once the lower court has reviewed the case and determined that the death row inmate has no chance of winning.

In setting guidelines for the federal courts, Justice Byron White said a death penalty inmate should not be allowed to pursue a new round of appeals unless he can present strong evidence that his constitutional rights may have been violated in state courts.

Court Considers Preventive Detention: Guilty Until Proven Innocent?

Should persons who pose a potential danger to the community be held without bail prior to their trials? Or does the time-honored adage that a person is innocent until proven guilty prohibit such "preventive detention"? That is the issue the Supreme Court must grapple with this term in *Schall v. Martin*, 51 L.Wk. 3654.

Under New York law, juveniles charged with delinquencv may be confined prior to their delinquency hearing to prevent them from committing additional offenses. Under federal law, and the laws of most states, neither juveniles nor adults may be held prior to their trial just because the state considers them to be dangerous. Most statutes direct judges to set bail for accused persons only for the amount necessary to ensure their appearance at trial; the supposed danger the defendant may pose to the community is not to be taken into consideration. The *Schall* case has the potential to produce a landmark decision, since the Court has never ruled on the constitutionality of such "preventive detention."

The Second Circuit Court of Appeals ruled that the New York law was unconstitutional under the Due Process Clause because pretrail detention was being used "to impose punishment for unadjudicated criminal acts." Under the challenged law, a juvenile is entitled to a judicial hearing to determine whether there is a serious risk that the juvenile will commit a crime if released. If the judge decides to detain the offender, he is entitled to a formal "probable cause" hearing within six days.

Proponents of preventive detention argue that potentially dangerous persons should be detained prior to trial, so they can't commit additional crimes while they are out on bail or other pretrial release. Critics maintain that such a practice would violate the presumption of innocence, and, in any event, future dangerousness simply cannot be accurately predicted.

Discussion Questions: In a second case before the Court, *Barefoot v. Estelle*, a brief filed by the American Psychiatric Association stated that psychiatrists lack the ability to predict long-term future dangerousness and are wrong in two out of three predictions. How could this be used in the *Schall* case? Should someone like Charles Manson be given bail, thus risking the possibility he will commit more crimes before trial? (State statutes generally permit judges to deny bail in murder cases.) Statistics indicate that relatively few murderers will ever repeat their offense, while those charged with crimes such as passing bad checks have a high rate of recidivism. If the threat that the person might commit additional crimes while released on bail is used as a standard for pretrial detention, does this fact indicate murderers are better candidates for release than bad check writers? Why or why not?

—JLD & MRW

The *Barefoot* ruling reflects the Court's concern with how much time these appeals are taking. The decision will make it harder for the 1,167 inmates on the death rows of 31 states to drag their feet.

In dissent, Justice Thurgood Marshall called the decision "a travesty of justice."

In a separate dissent, Justice Blackmun protested that the Court was permitting "false testimony" by psychiatrists when it approved for the first time as part of the *Barefoot* ruling the practice of letting psychiatrists testify for the prosecution at death penalty trials on how dangerous the defendant might be if the jury spares his life.

Court Decisions Split on Atomic Power

In the 1982-83 term, the Supreme Court attempted to contain the mushrooming controversy over the future of nuclear power by deciding two cases which get to the core issues of the dispute. In the first case, the Court held that states may ban the construction of new nuclear power plants provided they do so on economic grounds and not because of a fear of their safety. In a second decision, the Court concluded that federal regulators need not consider "psychological health and community well-being" before allowing one of the reactors at Three Mile Island to resume operation.

Budget-Drain But Not Melt-Down May be Used to Justify State's Ban on New Nuclear Plants . . .

A unanimous Supreme Court upheld a California law declaring a moratorium on the construction of nuclear power plants in the state. Rejecting a lower court ruling that federal law pre-empts states from regulating nuclear power, the Court held that federal law clearly gives states authority "over the economic question whether a particular plant should be built."

Justice Byron White, who wrote the Court's opinion, said that states and the federal government have dual authority in regulating the nuclear power industry:

"The federal government maintains complete control of the safety and 'nuclear' aspects of energy generation;

and states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking and the like."

Thus, under the Court's holding, a state would not be permitted to ban construction of nuclear plants based on its judgment that nuclear power is not safe, because such a decision would directly conflict with the countervailing judgment of the Nuclear Regulatory Commission that nuclear construction should proceed notwithstanding safety concerns. However, the Court concluded that the California law, which was prompted by concern over disposal of high-level nuclear waste, was properly motivated by economics and thus was a permissible exercise of state power.

Justice White conceded that in practical terms, the distinction between safety and economics is a slippery one:

"There are both safety and economic aspects to the nuclear waste issue: First, if not properly stored, nuclear wastes might leak and endanger both the environment and human health; second, the lack of a long-term disposal option increases the risk that the insufficiency of interim storage space for spent fuel will lead to reactor shut-downs, rendering nuclear energy an unpredictable and uneconomical adventure."

The Court made it clear that it was willing to take at face value the state's claim that its own motive was economic rather than safety-related. "We should not become embroiled in attempting to ascertain California's true motive," Justice White stated.

The ruling was surprising both in its scope and unanimous vote. Recently, the Court's decisions have been characterized by fission rather than fusion, and most legal commentators expected a divided Court with the outcome in doubt. Instead, not only did all nine justices vote to uphold the California ban, but Justices Harry Blackmun and John Paul Stevens, writing in a concurring opinion, said that the Court did not go far enough, arguing that states should be permitted to prohibit construction of nuclear power plants solely for safety reasons. "A ban on construction of nuclear power plants would be valid even if its authors were motivated by fear of a core meltdown or other nuclear catastrophe," the concurring justices wrote.

The immediate impact of the decision is slight, since no new reactors have been ordered since 1978, due to high construction costs and dampened demand. However, the long-term effect may deal a death-blow to the nuclear power industry. Since California passed its moratorium, six other states have enacted similar laws. They include Connecticut, Maine, Maryland, Massachusetts, Oregon, and Wisconsin. In its Supreme Court brief arguing for exclusive federal regulation of the industry, the Justice Department warned that this trend "poses a serious obstacle to the development of nuclear power" and is likely to grow.

The case is *Pacific Gas and Electric Co., v. State Energy Resources Conservation & Development Commission,* 51 L.Wk. 4449.

Fear of the Known Won't Prevent Start-up of Three Mile Island Plant

No doubt when Franklin Delano Roosevelt stated that "there is nothing to fear but fear itself" he was not living next to a nuclear power plant. In a second unanimous decision regarding nuclear regulation, the Supreme Court ruled that the Nuclear Regulatory Commission (NRC) need not consider possible adverse psychological injuries to persons living close to the Three Mile Island nuclear power plant before permitting the controversial plant to resume operations.

In an opinion written by Justice William Rehnquist, the Court said that the National Environmental Policy Act requires the NRC to consider only the *environmental* impact and any adverse environmental effects before restarting the plant, and that the Act does not require NRC to consider every impact, including psychological stress to nearby inhabitants caused by the risk of an accident.

The decision is a victory for Metropolitan Edison, which owns two licensed nuclear reactors at the Three Mile Island site, near Harrisburg, Pennsylvania. On a day when one reactor (TMI-1) was shut down for refueling, the other plant (TMI-2) suffered a serious accident which critics say nearly resulted in a catastrophic meltdown. The present controversy concerns the utility's attempt to start-up TMI-1, which was not damaged in the incident.

The start-up was opposed by a group of Harrisburg residents who formed a coalition called the People Against Nuclear Energy (PANE). PANE contended that restarting the reactor would cause both severe psychological damage to persons living in the vicinity, and serious damage to the stability, cohesiveness and well-being of neighboring communities. PANE argued that the National Environmental Policy Act requires federal regulators to consider the effects of the proposed operation of nuclear power plants on "human health" and that this should require consideration of both physical and psychological health.

The Court rejected this argument, stating that the Act was intended to protect the physical environment and that psychological harm "is simply too remote from the physical environment to justify requiring the NRC to evaluate the psychological health damage to these people that may be caused by renewed operation of TMI-1."

The case is *Metropolitan Edison Co. v. People Against Nuclear Energy,* 51 L.Wk. 4371.

In God We Trust, But Not if He Discriminates

"We're in a bad fix in America when eight evil old men and one vain and foolish woman can speak a verdict on American liberties," Rev. Bob Jones III told students after the Court in *Bob Jones University v. U.S.*, 51 L.Wk. 4593, held that racially discriminatory private schools are ineligible for federal tax exemptions. "Our nation from this day forward is no better than Russia insofar as expecting the blessings of God is concerned. You no longer live in a nation that is religiously free," Jones said.

We discussed the background of this case in the Winter, 1983 *Update*. The IRS had maintained, until 1970, a policy of routinely granting tax-exempt status to private schools, even those which racially discriminated. When a group of black parents from Mississippi challenged the policy, the IRS reversed field and said that it would no longer give tax breaks to segregationist schools.

In this case, two Christian schools in the South challenged the revised IRS policy, arguing that their religious beliefs—as protected by the Religion Clauses of the First Amendment—compelled the separation of the races, and thus the so-called segregation was constitutional.

A seven-person majority of the Court disagreed. In a decision written by Chief Justice Burger, the majority reasoned that Section 501(c)(3) of the IRS Act accords tax-exempt status to "charitable" organizations, but common law standards of charity—"namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy"—exclude these two schools because "racial discrimination in education is contrary to public policy."

As for the schools' reliance on the Religion Clauses of the First Amendment, Burger held that the Free Exercise Clause does not prevent the government from regulating all conduct that is motivated by religion. "Overriding" or "compelling" government interests in preventing child labor were held sufficient in an earlier U.S. Supreme Court case to justify a state law against using children to sell printed materials in the streets, even if some youngsters affected were Jehovah's Witness children selling religious pamphlets (*Prince v. Massachusetts*, 321 U.S. 158 [1944]). In the current case, the Court held that the "compelling" need to eradicate racial discrimination justifies the policy, pointing out that while denying tax benefits to the schools places a burden on them, nothing in the decision prevents them from carrying on as before without the tax breaks. In other words, the decision preserves religious freedom and permits the schools to cling to their religious tenets, but it says that if they continue to do so they must forego the societally conferred tax-exemption.

Justice Powell concurred in part and dissented in part, leaving Justice Rehnquist the sole justice to dissent totally. Rehnquist agreed that "there is a strong national policy in this country opposed to racial discrimination. I agree with the Court that Congress has the power to further this policy by denying 501(c)(3) status to organizations that practice racial discrimination. But as of yet Congress has failed to do so. Whatever the reasons for the failure, this Court should not legislate for Congress."

If *Bob Jones* angered at least some religious leaders, another case probably gave them satisfaction. In *Marsh v. Chambers*, 51 L.Wk. 5162, the Court permitted the Rev. Robert E. Palmer, a Presbyterian minister who serves as Chaplain of Nebraska's legislature, to continue receiving his salary of $319.75 per month for each month the legislature is in session. Rev. Palmer has been paid since 1965 for beginning each legislative session with a prayer.

Chief Justice Warren Burger, in an opinion joined by Justices White, Blackmun, Powell, Rehnquist and O'Connor, held that the Nebraska legislature's chaplaincy practice does not violate the Establishment Clause of the First Amendment. He wrote, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."

Even the "Continental Congress, beginning in 1774, adopted the traditional procedure of opening its session with a prayer offered by a paid chaplain," said Burger. Even the first Congress in 1789, as one of its early items of business, authorized the appointment of paid chaplains. "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."

So "in light of the unambiguous and broken history. . .opening legislative sessions with prayer has become part of the fabric of our society."

According to the Court religous schools that discriminate are not entitled to tax breaks, but they have the right to be biased if they do not use our money.

Justice Brennan, joined by Justice Marshall, respectfully dissented. He was troubled by the new "unique history" test which the Court used to exempt legislative prayer. "The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause," said Justice Brennan.

The traditional formal tests are to ask: (1) what is the purpose of activity; (2) what is its primary effect; and (3) does the activity foster excessive governmental entanglement with religion?

Justice Brennan said "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."

Justice Stevens also dissented. He argued that "designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for 16 years constitutes the preference of one faith over another, in violation of the Establishment Clause of the First Amendment."

In another ruling that was probably popular with religious leaders, the Court permitted school tax deductions even though 96 percent of the people who benefit are parents of students being sent to private, mostly religious, schools. The Court held that "an educated populace is essential to the political and economic health of any community, and a state's efforts [in granting tax exemptions for tuition, books, and transportation] to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated."

In a narrowly worded 5-4 decision, Justice Rehnquist, writing for the majority, ruled that such tax benefits do not violate the First Amendment provision which forbids laws that establish religion. Justice Rehnquist noted that the tax benefit is available to all Minnesota parents, not just those who send children to private or parochial schools. Even parents of public school students could benefit from the tax deductions, though in practice tuition, books, and transportation are usually free for public school students.

In this way, Rehnquist distinguished his ruling from the 1973 case of *Committee for Public Education v. Nyquist*, 413 U.S. 756, which struck down a similar New York law that allowed tax deductions to parents who send their children to private and parochial schools. The difference in the Minnesota law, Justice Rehnquist said, is that in Minnesota tax benefits are available to all parents and that such "neutrality" cannot be said to advance religious aims.

Writing for himself and the dissenters —Justices Brennan, Blackmun, and Stevens—Justice Marshall said that the Court ignored the actual impact of the Minnesota law. There is no real difference between the New York law that the Court struck down 10 years ago and the Minnesota law, he wrote.

"The Minnesota tax statute violates the [Constitution] for precisely the same reason as the statute struck down in [New York]" he wrote. "It has a direct and immediate effect of advancing religion." The case is *Mueller v. Allen*, 51 L.Wk. 5050.

Looking at these cases together, it is probably correct to conclude that the Court views both religion and education favorably, but will not permit religion to use societal benefits, such as tax breaks, to achieve evil ends like racial discrimination. ☐

NFL Injuries

(Continued from page 31)

KATHERINE LAUDERDALE: I think there are a number of reasons for the change in the perceptions of players and management regarding injury. The first is probably the technological and medical advances. Second is the abundance of malpractice suits. Doctors are publicly much more willing to say: "Are you sure you feel okay?" And the third, I think, is just a change in climate in this country. People are no longer awed by the authority figure. If a player thinks that he doesn't feel the way the doctor says he should feel, he's probably much more likely to speak up.

JIM FINKS: The union certainly has been a very vital factor in getting changes—calling to the attention of management and to the league the shortcomings as they see them. They've done a very good job in this area.

MMB: Within the collective bargaining agreement is a section describing the Chemical Dependency Program. How extensive is the use of pain killers and other drugs on the field, or more generally, in football today?

JIM FINKS: Distribution of any narcotic that a club has in its possession must be approved by the team doctor. The league demands that each month an inventory of drug dispersal is kept. Our records and our inventory must be accurate at all times. If it isn't, our trainer is in real trouble. The opportunities for players to freely get pain killers or other chemicals from our club is a thing of the past. In view of the major problems the NFL has had with drugs generally, the league is very, very, very thorough in checking on it.

MMB: Were drugs prevalent when you were a player, Jim?

JIM FINKS: We weren't gladiators and if drugs had been available, we would probably have tried them. They weren't available at the time.

CYRIL PINDER: Drugs were available during my time. I'm sure that was partially the reason why guys were able to play and not realize they were hurt. I always stayed in shape, so I didn't need them. Drugs weren't really that prevalent, although it wasn't unheard of for a trainer to offer a player something to help them get through the heat or run a few extra plays.

DAN JIGGETTS: I'd say probably 20 to 30 percent of the people who are playing take a painkiller before a game. Usually for a bump or a bruise or something that's just aggravating and you don't want to know about it during the ball game. As for drugs more serious than Tylenol or Darvon, generally there's not much of that going on any more. There are times when players will take shots just to be able to play. But everyone's gotten pretty smart about what that means in the long run.

MMB: Are players examined for potential drug dependency now when they come in for yearly physical examinations?

JIM FINKS: First of all, when players come in, we are allowed to give them a complete physical including a urinalysis. If we detect any foreign substance, or any chemical that is taboo, we have the right to confront the player. We also have the right to demand that they go in for an analysis to see if they have a problem.

We've had a couple of meetings, as part of our employees assistance program, involving our coaching staff, trainers and others who come into contact with the players on a day-to-day basis to alert them to the symptoms displayed by a person having a chemical problem—erratic behavior, mood swings, and things of this nature. If they recognize a problem, then they're supposed to come to me. It's my responsibility to confront the individual, from a positive rather than punitive standpoint, and strongly recommend that they see a professional counselor. It's a very, very delicate area, as you know, but it's something I think everybody is feeling more confident about.

MMB: The reason I asked the question was to determine the club's liability if, in fact, a player was on the field under the influence of drugs, and caused serious injury to a fellow player.

JIM FINKS: We are liable for the actions of our players on the field. Case in point, coaches who coach techniques of blocking or tackling are constantly reminded by management that under no circumstances are they to teach anything illegal such as spearing with the helmet. If Doug Plank of the Chicago Bears injures Jimmy Giles of the Tampa Bay Buccaneers and it can be proven that he did it illegally, Doug Plank and the Chicago Bears can be sued by Jimmy Giles of Tampa Bay. We're constantly aware of our responsibility, which includes drugs, for our players.

DAN JIGGETTS: The Players Association is totally opposed to players being given a blood test or urinalysis to determine drug use or dependency. It would be an invasion of the player's privacy.

MMB: Are such tests an invasion of the player's privacy if the team is to be held responsible for the actions of their players on the field?

DAN JIGGETTS: The Association's position is based on our inability to determine what is done with the information regarding drug dependency once management has it. There have been many cases in which people have rehabilitated themselves from a drug problem. Some teams, in the past, have stated that they would fire a player if they found out he used drugs. If a guy is really trying to get his life and his family back together, the worst thing that could happen to him is to be released from the team, then his positive feelings and motivations for rehabilitation are gone. Not only is he going to have to worry about his drug problem and his family, he doesn't have a job.

Prior to beginning the collective bargaining discussions, professionals in the area of drug rehabilitation recommended that the Association take the position that confidentiality was imperative in these cases. If players are to step forward and feel positive about doing so, they must have confidentiality.

The clear danger in drug dependency for a player of professional sports, as I see it, is that (a) the media will find out about it eventually, (b) it can lead to associations with nefarious characters who will at some point get you into something you can't get out of, and (c) you can just lose your job because you can't perform at your best level.

MMB: An area of injury litigation we haven't touched on is player versus player suits. Cyril, how do you feel about suits of this nature?

CYRIL PINDER: When I played, a good hit was fair play. I can't imagine anyone suing because I hit him or suing anyone for hitting me. It's just an occupational hazard. But when you're on the field playing football, there are certain guidelines that you should follow. We are taught to tackle and run, block and play hard. There are some areas that are kind of "grey" in my eyesight. For example, when Darryl Stingley was injured, I thought it was a very flagrant, uncalled for hit. Sometimes a guy will tackle you and while you're on the ground—twist your ankle or gouge at your eye—and that kind of play has an almost criminal element that should be addressed. On the other hand, if a good fair hit results in an injury, then I have a problem with suing. The way I look at football is that if a guy happens to block and hit harder than I, then he is the winner and I'm not. That's the way the game is played.

JIM FINKS: Player versus player suits have happened, but rarely. The case that comes to mind involved Dale Hackbart, who was then playing for Denver, and Boobie Clark of the Cincinnati Bengals. The irony of it was that Dale Hackbart was a real hatchet man in this league, probably more so than anybody. But Boobie Clark hit Dale when he was down, and Dale filed a lawsuit against the Cincinnati Bengals and Boobie Clark for intent to injure and won.

DAN JIGGETTS: How do you go about proving that somebody has hit with malicious intent? Unless a hit is obviously violent, it would be hard to prove. I think a player does have a legal responsibility not to do something moronic out on the field.

MMB: How are malicious and illegal hits handled by the league?

DAN JIGGETTS: Generally, players are fined, suspended or both by the league and sometimes by the team. I think that helps players not to do something foolish.

MMB: Another important area of concern in sports injury and the basis for a number of suits is product liability. Who is liable for product safety—the manufacturer, the team, or both?

JIM FINKS: Helmets have been fair game for many years now. If a player has sustained a head or neck injury, he has sued the manufacturer of the helmet. As a matter of fact, many companies have been forced out of business. As recently as a year ago, the president of Riddell spoke to our league meeting, pleading with us to do something to help them stem the tide of lawsuits. While manufacturers of helmets are constantly looking for ways to improve the equipment, they haven't had very much success at this point in limiting their liability.

MMB: There seems to be a great deal of controversy surrounding the use of artificial turf on playing fields. Do you feel that playing on artificial turf increases the likelihood and/or degree of injuries?

JIM FINKS: I don't think it's ever been proven that artificial turf causes more injuries. There is an ongoing study by a doctor out in Seattle, Washington, to monitor football injuries. The clubs send film clips to him every year on injuries to knees and things of that nature for him to analyze how it happened, where it happened—on synthetic or natural turf—and so on. The study has not been conclusive about whether more injuries are caused on synthetic than natural turf. But I don't think a player would be precluded from suing if he felt like he had a case against the manufacturer of a synthetic turf.

CYRIL PINDER: From a management point of view, it's advantageous. Can you remember looking at games when we were playing in all of that mud? You have to consider the cost of maintenance—the money that they have to pay to get those fields back in shape for the next Sunday. With artificial turf, they have a machine that acts like a vacuum cleaner and just sucks the water off. It's much less expensive to maintain.

But from a player's viewpoint, I think the use of artificial turf ended my career a year or two sooner than I would have liked. Falling on artificial turf is like falling on concrete with a carpet on top of it—it's very hard on your joints. Can you imagine getting tackled by a 285-pound guy and falling on something that doesn't have any give. That can be a very, very rough situation. Even now, I've got burns all over my body from sliding and falling on artificial turf. Players get burns and infections because that stuff just rubs right down to the bone.

It's also particularly hard on you when you're running the ball because when you cut, your ankles roll. With grass you would dig in and just kind of follow the range of motion through. With the artificial turf the motion is restricted. You roll your ankles and there is just no give. This causes a lot of ankle injuries. I think grass ought to be the surface on which football is played.

DAN JIGGETTS: I think artificial turf has changed the complexion of injuries a great deal. The original reason for artificial turf was that it would reduce knee injuries. Doctors said grass cleats were getting stuck in the grass and knees were taking severe blows to the side. Theoretically, you can't stick into artificial turf, so there's no binding of the knee from side to side causing injury.

But in fact the injuries incurred playing on natural grass were a lot less severe than what you see on artificial turf. We have a great deal of information based on a study conducted by the union that more contusions, concussions and staph infections occur from playing on artificial turf. The older fields like Candlestick in San Francisco—we called it Candlestone because that's what it felt like—are just terrible.

The union has really tried to change the artificial turf on most of the fields that are indoors. We can't believe that with modern technology, a grass can't be developed that grows indoors in stadiums.

Well, who is liable? You can't turn to the manufacturer in the case of artificial turf because they have a warranty on the product for X number of years which has probably been exceeded two or three times over by the usage of the thing. Players just have to consider artificial turf as another risk of playing the game.

MMB: What changes do you think can be made in the game of football that would make it safer, with fewer injuries, for players?

JIM FINKS: I'm not too sure that it needs to be changed to make it safer. We have 1,600 football players playing every year in the NFL, and the number of catastrophic injuries is very small.

First of all, we have exceptionally conditioned athletes who receive the best medical attention possible. They're coached by experts. They wear the finest equipment. We have a rules committee, the Competition Committee, that con-

Journalists covering last year's NFL strike decided that players got the worst of it, but the union insists that it made gains in many important areas. Some of its proudest accomplishments deal with injuries.

According to Buck Briggs, one of the NFLPA's lawyers, one of the biggest advances in the recent collective bargaining agreement is that now players have the right to consult their own physician or to have surgery performed by their own doctor, with reimbursement provided by the club. In the past, players were forced to go to the team doctor, who, the union alleges, often kept them completely in the dark as to what was wrong with them, what the long-term prognosis was, and what the possibility was of reinjuring themselves if they continued to play.

Abuses under the old agreement, according to the union, include the case of Raphael Septian, of the Dallas Cowboys, who had a hernia for a whole season but was not told of his condition by the team doctor. At the end of the season, the doctor finally informed him of the magnitude of the injury and recommended that he be operated on right away.

A similar situation involved Ed Flanagen of the Detroit Lions. He played all year with a crushed vertebra, in great pain, but was not informed of the nature of his condition until the end of the season, when the team doctor recommended that he get stantly monitors rule changes and safety procedures. For example, a recent change is that the minute the quarterback is in the grasp of the defensive player, they blow the whistle. Previously, they let him get the hell beat out of him from all directions.

I don't think that you're ever going to completely eliminate injuries in our game. On the other hand, I don't think that the amount of publicity that a major injury gets is consistent with what occurs in our industry.

CYRIL PINDER: If you keep taking certain things out of the game, then it's not going to be football. There's only so much you can do. For example, a change that I think dilutes the game is doing away with the bump and run. When I played, the defensive back could bump and shadow you all over the field—just follow you from place to place—constantly hitting you. Now it's just one bump and then who can run the fastest.

KATHERINE LAUDERDALE: I think a lot of the rule changes have been good. I think the seriousness with which the officials are approaching the game and enforcing rules also helps. I think the attitudes of the players have changed a lot and while there is still that "Let's go get one for the Gipper" mentality, there's a lot of mutual respect between players and management, too.

JIM FINKS: Katherine and others have alluded to the officiating, and I appreciate that. There has been one official added, a seventh guy, not necessarily for safety, but it does give them more coverage. For the past three years, the commissioner's office has had the right to fine and/or suspend a player for action that they detect on the film that wasn't declared a foul during the game. Case in point, Mike Singleterry, our fine young linebacker, got a letter from the commissioner after this past season notifying him that he had been fined $500 for hitting a player with his helmet when the player was down. This foul went undetected in the game and there was no penalty, but they caught it back in New York as they reviewed the film. That's another step in assuring as much monitoring of our game as humanly possible.

Things have changed dramatically in the last 10 years in the area of injury protection, health care, and approach to the game of football. I think most of it has been for the best.

Negotiating Over Injuries

surgery immediately.

Of course, injuries will continue no matter what, and the union says that it is trying to help on a number of points. For example, the union encourages all players to file a workers compensation claim when they have been injured. Even if a player's career doesn't end until ten years later, it is important to get the injury on the record, since some states have laws which permit recovery for injuries which occurred far in the past. The union periodically gets calls from old players who say, "I wrecked my knee with the Chargers in 1974, and now I need an operation." If they have not filed, they have a slim chance of the team's picking up the bill. Also, if everyone files, it's harder for the team to take disciplinary action to discourage the practice. Because state law on workers compensation varies so much, the union refers players to designated attorneys in their state to give them specific guidance.

The new agreement provides for disability payments through the pension system. If players are totally disabled, they are entitled to a monthly payment in addition to the workers compensation they may receive.

Another component of the agreement involves compensation for a player who is injured in one season and unable to play the next. These severely injured players may receive one-half of their salary for the next year, up to $62,500. Players who are injured before the last year of a multi-year contract, or who have the option year to go on their contract (about half the players in the league) will be able to collect under this provision. However, players having a one-year contract without an option, players in their option year, or players in the last year of a multi-year contract that does not contain an option are unprotected against severe injuries.

Another provision of the contract continues the traditional injury grievance procedure, which has been for some time part of both the standard player's contract and the collective bargaining agreement. That provision prohibits a team from releasing a player who is injured. If a team says a released player is not injured but the player believes that he is injured and unable to perform, there is a two-tiered process that he can follow. He first goes to a previously agreed-on neutral physician, and both parties will abide by the physician's decision. If the physician says that he truly is unable to play, then the matter goes to arbitration between the club and the player (or more precisely between the club and the union, since the union represents 95 persent of the players who have an injury grievance). It is the arbitrator's job to determine how long the injury would have prevented the player from playing. If the arbitrator determines that the injury would have lasted eight weeks, then the player receives eight game checks.

In a typical year, the union will receive 100 to 150 phone calls from players claiming that they have been released while injured. Forty or fifty of these will go to the neutral physician, and in about half of the cases the physician will determine that the player truly is injured. Then the matter will go to arbitration. Either between successful arbitration or settlement, most of the players released while injured ultimately prevail.

According to the union, the major problem in this procedure is the long backlog of injury grievances. Since the players played without a collective bargaining agreement in 1974, 1975, and 1976, when an agreement was signed in 1977 there was a backlog of many claims. The agreement specified that all claims that had been raised between 1974 and 1976 would be addressed under the new agreement. They were, creating a backlog that still exists. As a result, it takes several years to process the claims, and, though injured players generally prevail, there may be considerable delay.

Recently, however, the union has been able to schedule about one case a week and is cutting into the backlog. Dealing with cases throughout the NFL season—the union argues that the teams can address these matters on off days—could eventually eliminate the backlog entirely.

One thing both sides agree to, though. Nothing will ever eliminate injuries.

—CJW

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Aging Kids

(Continued from page 21)

The revisions of Illinois' Juvenile Court Act are an interesting case in point. Until 1973, transfers were at the discretion of the state's attorneys of each of the 102 Illinois counties. At that point, the legislature shifted responsibility for the decision to juvenile court judges. As violent crime continued to climb in the 1970s and early 1980s, particularly in the city of Chicago, a "get tough" attitude prevailed among politicians and the public. State's Attorney Richard Daley, for example, directed his attention to the transfer of juveniles to criminal courts in Cook County.

How Has It Worked?

In the years since Illinois adopted the judicial waiver model, many believed that motions to transfer were being used by prosecutors merely as a plea bargaining tool. Under Daley's new orders, it became clear that when Cook County prosecutors filed their transfer motions, they intended to pursue them fully. A dramatic jump in statistics bears this out. In 1981, for example, 129 motions to transfer juveniles were filed in Cook County, and 71 were granted. In 1982, 106 out of 236 transfer motions were granted in the Cook County Juvenile Court.

In addition, the Cook County State's Attorney's Office was the main force behind a 1982 amendment to the Juvenile Court Act which provided for the *automatic* transfer of 15- and 16-year-olds who are accused of murder, rape, deviate sexual assault, or armed robbery with a firearm. Catherine Ryan, an assistant state's attorney and Supervisor of the Juvenile Division of the State's Attorney's Office, explains the goals of the new automatic transfer law:

> The question today is *where* we should have procedures for chronological juveniles who commit adult offenses. Take a typical scenario: You have a murder. In the juvenile system, theoretically and practically, a judge has the option of giving the juvenile accused of this murder supervision, probation, up to 30 days in the Audy Home, or commitment to the Department of Corrections (DOC). Even here, DOC has the option of releasing that juvenile the next day or soon after. This is not the right response to the juvenile's act, not the right signal to give.
>
> The goals of the automatic transfer law are to provide definiteness, determinate sentencing, and an "aura" of seriousness and responsibility in cases like this.

The new Illinois law has frequently been criticized. One of the most outspoken opponents of the law has been the John Howard Association (JHA), a private organization dedicated to ensuring humane treatment for prisoners and advocating for prison and justice system reforms. Donald Jensen, a juvenile justice expert with JHA, objects to the law for two reasons. First, he claims, it represents a real departure from the philosophy of the Juvenile Court Act. "It removes discretion for the transfer decision away from the juvenile court judge and in effect places it with the arresting police officer. As in all cases, the arresting officer has flexibility in how he or she charges a juvenile suspect. The officer would actually be determining the transfer decision by utilizing this flexibility, and thus the potential for abuse or misuse of this authority is tremendous. The officer cannot replace a judge who is an expert in law and is supplied with facts concerning all aspects of the case."

Supporters of the law vehemently disagree with Jensen's analysis. They point to the law's specific provisions giving special protections to automatically-transferred juveniles whose charges are ultimately reduced in the adult court. To take away the incentives for police officers or prosecuting attorneys to purposely overcharge juveniles just to send them into the adult system, the Illinois law requires that there be an initial finding of probable cause in juvenile cases, as there is for adults. If prosecutors are unable to obtain a finding of probable cause, the youth is sent back to juvenile court for processing. If, later in the criminal court proceedings, the state has its finding of probable cause but agrees to reduce the charges in exchange for a guilty plea, the juvenile has three options. He or she may accept the plea agreement, refuse the plea agreement and proceed to trial, or decide to go back to the juvenile justice system. In such cases, the choice of forums belongs to the juvenile—not the judge, police officer, or anyone else.

The John Howard Association's second major argument is that automatic transfer laws are a vehicle for tacking on more and more categories of crimes that will result in automatic transfer. "Once the law is in place, there is the possibility of a 'Law of the Month Club,' " says Jensen. "This is precisely what came about after Illinois carved out the Class X felony classification in the 1970s. Since then, more and more crimes have been added without much public debate."

Jensen's prediction on this score may well pan out. Since the mandatory transfer provision was added to the Juvenile Code and went into effect in September of 1982, the state legislature has, on its own initiative, passed another measure which would add the crime of aggravated battery to the list of four other excluded offenses. The bill is presently awaiting the Governor's signature.

How Is the Decision Made?

In 1966, in *Kent v. United States*, 383 U.S. 541, the U.S. Supreme Court held in a landmark decision that waiver of juvenile court jurisdiction was a "critically important" stage in the judicial process. Because it is so important, the Court ruled that the Fourteenth Amendment requires that this decision must be based on procedures meeting at least minimal standards of due process and fair treatment.

Morris Kent's first contact with the District of Columbia police occurred in 1959. At the age of 14, Kent was apprehended for several housebreakings and an attempted purse snatching. For these offenses, the juvenile court placed him on probation. Except for routine visits by a probation officer, Kent had no further court contact until 1961 when, on the basis of fingerprints left at the scene of a crime, Kent was picked up and interrogated by D.C. police for entering a woman's apartment, taking her wallet, and raping her. After two days of questioning by police and almost a week in the D.C. Receiving Home, the juvenile court entered an order waiving jurisdiction to adult court where, ultimately, Kent was indicted, tried and convicted.

In ruling that Kent's rights to due process and assistance of counsel had been violated, the Court set forth four basic requirements for cases of juvenile waivers:

1. If the juvenile court is considering waiving jurisdiction, the juvenile is entitled to a *hearing* on the question;
2. The juvenile is entitled to representation by *counsel* at such hearing;
3. The juvenile's attorney must be given access to the juvenile's *social history record* on request; and
4. If jurisdiction is waived, the juvenile is entitled to a *statement of reasons* in support of the waiver order.

Kent has also had a significant impact on the factors that go into making discretionary transfer decisions. In an appendix to its opinion, the Court repeated criteria which had been previously developed, ironically, by the District of Columbia Juvenile Court. Deciding whether to send juveniles to adult courts involves such factors as:

1. The seriousness of the alleged offense to the community and whether the

protection of the community requires waiver;

2. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner;
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a grand jury may be expected to return an indictment;
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime;
6. The sophistication and maturity of the juvenile as determined by consideration of his home, enviromental situation, emotional attitude, and pattern of living;
7. The record and previous history of the juvenile; and
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services and facilities currently available to the Juvenile Court.

In 1977, the Institute of Judicial Administration and the American Bar Association published a set of recommended standards to be applied in making waiver determinations. These standards, which are similar to those enumerated in *Kent*, have guided states which have revised their judicial waiver statutes in recent years.

Judges vary in how they apply these statutorily itemized factors. Harry B. Aron, a Cook County Associate Judge who has been handling transfer cases for nearly two years, describes his decision-making as an attempt to ensure that the youths who come before him have had every opportunity to avail themselves of juvenile court facilities.

"If a kid has [already] had a chance to take advantage of juvenile court services and is from a good home, he or she is more likely to be transferred," he said. "The closer cases are those in which the juvenile has had no previous history in the court and is from a broken home . . . even if the crime is a fairly violent one." Judge Aron customarily studies a child's social report (done by a probation officer) and any clinical report involving medical or psychiatric evaluations of the child that have been done prior to the transfer hearing.

Once his decisions are made, however, Aron does not agonize over cases. "I can't worry about turning the kids back into the streets. I *do* worry about institutionalizing them [in the adult system]. They can't support themselves and they can't become productive members of society while they are incarcerated. That's what we're trying to do in juvenile court. That's what is in the back of my mind all the time."

As the juvenile and criminal justice systems are reviewed and refined in the 1980s, it will be interesting to follow the twists and turns of debate over the future of the juvenile courts. That future is already somewhat suspect. The jurisdiction of the juvenile courts has been curtailed at both ends in recent years. Minors and status offenders are handled most often by public and private social service agencies; violent and serious juvenile offenders are increasingly being referred to the criminal courts.

Does this whittling away at the role of the juvenile court mean that this noble experiment has been a failure? Or does it mean that the juvenile court may have tried to do too much, and, with some skillful pruning, might still have a vital role to play? Everyone has an opinion, but in the end only time will tell. □

Tortured Kids

(*Continued from page 11*)

said her husband was "sick and got worse and worse." She said, "My son has freed me. He has freed all of us."

But it was only after the shooting that she admitted all this. Unlike the Burns family in Jacksonville, the Jahnkes did not reveal their troubles to the outside world. Theirs was an isolated existence. The children were expected to be home most of the time. Neither they nor their mother were allowed to hold jobs.

Maria Jahnke testified that her husband did not like or trust outsiders, had no friends and did not want people to visit. He avoided his children's birthday parties, graduations and awards ceremonies because he could not stand crowds.

After the Jahnkes had lived on Cowpoke Road for a year, their neighbor across the street, George Hain, walked over one day and knocked on their front door to introduce himself. When Jahnke answered and Hain began to say hello, Jahnke slammed the door in his face.

Some Jahnke neighbors later wrote letters to the court saying that they had met Maria, but that whenever her husband appeared, they left because they felt tension. No one indicated knowing what was going on in the house. Hain's family said they had heard "blood-curdling screams" several times, but never could tell which house they were coming from.

"I was taught not to talk about family problems with others," Richie said later. "I was told they're private. I also was embarrased. And scared that dad would get mad if I did."

At 5 feet 6 inches, and 135 pounds, Richie is slightly built and soft-spoken. With an IQ of 120, he managed to get adequate if not outstanding grades. He held a prestigious position in Central High's ROTC unit. He planned to attend college.

The facade cracked only once.

On May 2, 1982, Jahnke became enraged because Richie had not yet completed a weekend job, cleaning the basement. According to testimony, at noon on Sunday, Jahnke stormed into Richie's room, slapped him, dragged him by the hair to the basement stairs and pushed him down. In the basement, Jahnke pounded his son with his fists on his head, face and back, yelling, "You bastard! You bastard!"

Richie broke away from his father and ran out the back door barefoot, sneakers in hand.

He ended up in front of the home of his ROTC teacher at Central High, Maj. Robert Vegvary. Even then, he could not bring himself to reveal the family's problems. He sat crying on the curb for three hours, until Vegvary stepped outside and found him.

When Vegvary finally heard Richie's story, he called the Laramie County Sheriff's Department.

Deputy Sheriff Robert Bomar and Pat Sandoval, a social worker with the Laramie County office of Wyoming's Division of Public Assistance and Social Services, took Richie to the DePaul Hospital emergency room, where Dr. J. R. Hillman examined him and concluded that the extensive bruises on Richie's back were the result of a severe beating. The doctor wrote that the "amount of force was excessive."

But Bomar decided that they did not "have enough to prosecute Mr. Jahnke for child abuse. We didn't feel the case was that severe . . . This is a very minor child-abuse case . . . compared to other ones we have investigated."

Sandoval did make an effort to place Richie in a temporary foster home for a "cooling-off period," but the three homes on her emergency list were full. Richie had the option of spending the weekend in jail or in a private group foster center called Attention Home. At first he agreed to the group home. Then he said no.

Sandoval thought Richie was "embarrassed" and "ashamed" by the idea of going to Attention Home. Later, Richie said he also did not want to leave his mother and sister alone with his father.

Although he begged them not to, the authorities had to call Richie's parents. The Jahnkes came and, after a brief, tense meeting, took Richie home.

Sandoval thought that the situation was "volatile and there could be repeat problems." In her report, she recommended follow-up family counseling. The case was assigned to Frank DeLois in the department's Children's Services Unit. Sandoval made a point of speaking to him and urging that he keep an eye on the family.

It is DeLois' handling of the case that has drawn the most criticism.

He visited the family in their home May 24 for about 45 minutes. He told Jahnke that if anything like this happened again, he would be in court charged with child abuse. But he gave his card to Jahnke, not Richie, and never spoke alone with the boy.

DeLois would later describe the evening as "pleasant and cordial . . . just very nice." He also indicated appreciation of the home's appearance. He did not transcribe his notes or write a report about the visit until five months later—on the day after the shooting.

After DeLois left, Richie later said, his father "came back into the house smiling. He knew he had won. Things would be worse now. I felt trapped."

DeLois waited five months before making his only other direct contact with the Jahnke family. On Oct. 28, he placed a phone call to the home and talked briefly to Maria Jahnke.

In an interview, DeLois said the case "seemed like nothing unusual . . . It just didn't look serious. It looked like the boy had somebody to talk to—Maj. Vegvary at school. I watched the family together and didn't notice any real anxiety or tension. In most bad cases you can see indications of the problem elsewhere. Delinquency. Problems in school. Running away. Some kind of acting out. The fact is, kids usually signal what's happening.'

Although Vegvary and Central High's school nurse, Caryl Marion, made inquiries in the following weeks and encouraged him to contact authorities if he was abused again, Richie never again sought outside help.

Richie later said that the way his May 2 complaint was handled destroyed his trust in going to authorities.

Vegvary, Richie said, had "embarrassed" him by telling others about his problems. And the authorities "minimized everything," he said. "They swept it under the rug. I don't know if they believed me."

Speaking quietly one recent afternoon in his lawyer's office, he said, "I wish instead of calling my dad, they had just kept contact with me, encouraged me to call. I wish they had talked privately with me. It's very hard for me to open up. I was taught not to show emotions. My dad would hit me harder if I cried when he was beating me. Basically, I was brought up to believe there was no love out there in the world, no one to trust.

"I know what I did was wrong. I should have done something different," he said. "But that night, I just didn't think what would happen. Basically, I didn't care. It didn't matter. There was nothing there for me."

Richie's failure to show signs of a troubled child would greatly color the judicial proceedings.

Looking at the details of the case, Laramie County Dist. Atty. Tom Carroll thought it highly damaging that Richie did not turn to people who could have helped him. Moreover, Carroll reasoned, the May 2 beating, though reprehensible, was not severe. There were no marks on him on Nov. 16. He wondered if perhaps some of the abuse stories might be exaggerated.

What Carroll saw was a premeditated homicide. "As bad as these cases are," he said, "if it happens, it usually is during a fit of passion. I can understand that. But this was a deliberate, carefully thought out, classic premediation. Homicides I take seriously. No one but the state itself has the right to take a human life."

On the other hand, James Barrett, Richie's attorney, felt that "a kid like Richard Jahnke doesn't do what he did out, classic premeditation. Homicides I take seriously. No one but the state itself has the right to take a human life."

He and others in Cheyenne, a town of 53,000, began to contend that the authorities had dropped the ball and failed to protect Richie.

"Richard asked for help. The investigation done by (the social services agency) was inadequate," Central High's school nurse, Marion, wrote the court. "It angered Richard's father to the point of threatening Richard never to draw attention . . . again. What is a minor to do in this type of situation?"

Richie's defenders also cited national experts in arguing that although the youth did not fit the preconceived notion of an abused child, his was not at all an abnormal pattern. Barrett, in fact, received phone calls from counselors and lawyers throughout the country who were handling similar cases. The calls and his research taught him that most abuse goes unreported and most children do not tell others what is happening or display the obvious indicators.

"Anyone who thinks that most abused kids signal their troubles to outsiders simply has no idea of the realities," said one of the callers, Paul Mones of Juvenile Advocates, a private nonprofit agency in Morgantown, W.Va.

Barrett first offered to plead guilty to any charge if the case were transferred to the juvenile system. When this failed, he tried to make a deal with prosecutor Carroll. He would plead guilty to manslaughter if the prosecutor would, informally and off the record, ask the judge for probation.

Unlike his counterpart in Jacksonville, Carroll refused.

"I'm not free to indulge my own personal feelings, be they compassion, disgust or anger," the prosecutor explained later. "It's not the prosecutor's right to indulge. He has to discharge duties as he sees them."

On Nov. 18 Carroll filed a complaint charging Richie with first-degree murder.

The case was assigned to an out-of-town state district judge, Paul Liamos, 58, from Newcastle, a small town of 4,000 in northeastern Wyoming.

Liamos is known to be pleasant, conservative and hard-working, willing to keep lawyers in court late into the evening to finish cases. One night, he did not stop a hearing until 3 a.m. While in Cheyenne, he enjoyed walking the two miles each morning from his motel to the courthouse.

Liamos is also known as a judge who sticks strictly to the letter of the law.

The trial began Feb. 14 and lasted six days. The jury, by all accounts, was greatly affected by Richie's three-hour testimony during which he described his history of abuse. One juror later reported that seven of them initially favored acquittal, two were undecided, and three wanted a murder conviction.

A compromise apparently was struck inside the jury room. On Feb. 19, after seven hours of deliberation, the jury found Jahnke guilty of the reduced charge of voluntary manslaughter.

Liamos' sentencing options ranged from straight probation to 20 years in prison. He also could have sentenced young Jahnke to serve his time in the Wyoming Industrial Institute, a juvenile home.

Public response to Jahnke's conviction and the matter of his sentence was overwhelming. Liamos received 1,500 letters. A citizens group called the Committee to Help Richard Jahnke circulated petitions asking for leniency. Debates raged in the local letters-to-the-editor columns.

Although opinion was not unanimous, most pleaded for probation. The defense attorneys also submitted a report from the National Center on Institutions and Alternatives that proposed a program much stricter than simple probation—a foster home residency involving community service, psychiatric counseling and intense supervision.

Liamos did not open or read all the letters he received. After about 200, he saw the trend. He also did not particularly agonize over his decision. In fact, as he listened to the trial, he thought there was plenty of evidence to convict Jahnke on a first-degree murder charge. He thought that the jury had showed great compassion in coming in with a manslaughter verdict. He worried that granting probation would be the equivalent of declaring open season on parents.

Liamos announced his decision March 18. Everyone has the right to voice his own opinion, he said. But a judge "should be unswayed by partisan interest, public clamor or fear of criticism."

Liamos said, "This is a serious crime, a homicide, the taking of a human life. That life was taken without anybody speaking in behalf of the victim .... Regardless of the circumstances, in this court's opinion, this cannot be treated in a manner to depreciate the violence that was used." He had decided against probation to "satisfy trust in public justice, as opposed to private justice."

Saying that he believed the adult penitentiary handled "those of tender years" with appropriate care, Liamos sentenced the boy to five to 15 years there.

As the judge uttered the sentence, the courtroom filled with shocked wails and gasps. "They don't know the pain, they don't want to know!" Jahnke's mother cried.

Apparently, some of the jurors who had convicted Jahnke also were surprised. One, Chrisanne Medlock, later called the sentence "the cruelest thing they could ever do to him." Other jurors phoned Jahnke's attorney to say that they never expected such a sentence.

Soon after the trial, Gerald Bryant, acting head of Wyoming's social services department, ordered an administrative review of the division's laws and procedures.

But prosecutor Carroll had no second thoughts. "I don't feel good. I don't go have victory celebrations when I leave the courtroom," he said. "But I do feel satisfied that justice has been served. There's been a fair trial. I've made a decision. The judge has made a decision. Justice as we know it has been served."

Currently, George Burns Jr. lives with his mother in Orange Park, outside Jacksonville, while he studies for his high school equivalency exam, looks for a job, and gets counseling from a local mental health center. He plans to get married soon. He often has nightmares about his father.

Richard Jahnke, free on $50,000 bond pending appeals, has a job doing clerical work at his defense attorney's law office. He lives in the foster home of Dan Munn, the staff psychologist for the Cheyenne school district.

In a separate three-day trial that ended March 10, Deborah Jahnke was found guilty by a jury of "aiding and abetting" a voluntary manslaughter. On April 27, District Judge Joseph Maier sentenced her to three to eight years in the Wyoming Center for Women. Free on $25,000 bond while her case is appealed, she lives in a second foster home.

The public outcry about the Jahnke case has not abated. Petitions and appeals have flooded Wyoming Gov. Ed. Herschler's office, begging him to commute Jahnke's sentence. The three-term Democratic governor has not indicated what he plans to do.

By contrast, the decision in Florida to set Burns free on probation has attracted almost no attention, although it is more unusual than the Wyoming judgment. The local newspaper did not report the sentence for more than a month after it was issued.

There most certainly is more than one reason for the different ways in which the two cases were handled.

One of those reasons may be that George Burns Jr. happened to shoot his father in a region of the country that for some time has been particularly aware of child abuse.

In 1962, Florida became only the third state in the nation to pass a child-abuse statute. There have been several notorious abuse cases in Jacksonville, in-

"Thanks for providing a lawyer, your honor. I also am unable to afford a Cadillac."

cluding one in 1974 in which Ernest Dobbert killed two of his four children, despite more than 20 child abuse reports to authorities and eight visits by the police in the two years before the murders. The two surviving children filed a civil lawsuit against the city, charging authorities with negligence. The case was settled out of court for $1 million in 1978.

While explaining their decisions in the Burns case, more than one person here mentioned the Dobbert case, and linked it to what they agreed was the area's heightened awareness.

"In this town," said William Gentry, the Dobbert children's lawyer, "if you take a kid into the hospital with a broken arm after he fell off a bicycle, you're going to get the third degree."

But in the end, the differences in the fates of Richard Jahnke and George Burns Jr. may also have as much to do with the caprice of the legal system as with the nature of the two cases or of the regions in which they took place.

Stephen Parker, George Jr.'s attorney, thinks that he and his client, in some ways, were simply lucky.

"I got everyone's cooperation. Everyone lined up, which is so rare. I was lucky that (assistant state attorney) Brooke works with the family justice department and knows the juvenile scene. I was lucky that (social worker) Pat (Marsh) was there from the start and able to give Brooke background on the family. I was lucky that (detective) Bradley didn't look at this as just another murder, but went out and investigated the type of man the father was. Finally, the last key was the victim's family. It would have been very difficult if relatives were banging on the door wanting revenge or justice. With different people—for example, a young, ambitious or narrow prosecutor who didn't understand—George could be serving 20 years."

Parker shrugged. "Lots depends on where you are and who you're in front of. I've always felt that way. The random uneveness, the capriciousness of justice, is frightening. Justice is just not evenhanded. People get widely different treatment." □

Classroom Strategy: How Much Process Is Due?

Were the Burns and Jahnke boys treated fairly by the legal and social system? The answer to this question tends to focus on the difference between their sentences. But this is really only a small part of the story. Fairness under the law involves much more than the nature of the punishment.

Both boys and both families received quite a bit of "process" from the legal and governmental systems of their respective states, both before and after they committed their crimes. The specifics of this process deserve further study.

Have students, in groups of two or three, read carefully the article with an eye to this process. Have them list each instance of contact between the boys and the legal and governmental system. Their lists will look something like this:

George Burns, Jr.

- **— 1979—Arrested for shoplifting: Soc. Svcs. contact**
- **— 1976-80—Miscellaneous crimes**
- **— Police called to Burns home to break up fight**
- **— Social worker deals with family**
- **— George placed at Boys Ranch by State**
- **— Gloria Emerson visits Burns home**
- **— Dec. 1, George Burns, Sr., is killed**
- **— Det. Bradley responds to crime**
- **— Bradley in contact with social workers**
- **— Marsh compiles pre-sentence report**
- **— Stephen Parker assigned as counsel to Burns**
- **— Prosecutor contacts Bradley**
- **— Lawyers discuss plea bargain**
- **— Judge Haddock receives pre-sentence report**
- **— Feb. 16, Burns placed on probation, ordered to counseling**
- **— Burns lives at home, gets counseling**

Richard Jahnke

- **— May 1, 1982, Vegvary contacts police about Jahnke**
- **— Social Services helps Richie**
- **— Richie declines out-of-home placement**
- **— Social worker recommends follow-up**
- **— De Lois visits Jahnke's home**
- **— Nov. 16, Jahnke is killed**
- **— Defense attorney attempts to move case to juvenile court; to plea-bargain**
- **— Nov. 18 Jahnke charged with first-degree murder**
- **— Feb. 14, trial begins**
- **— Richie testifies for three hours**
- **— Feb. 19, jury finds Richie guilty**
- **— Judge considers sentence, with lots of advice**
- **— March 18, judge sentences Richie to 5-15 years**
- **— Richie appeals; placed in foster home**

When students have completed their lists, ask them to identify some similarities and differences between them. They may identify the similarity in crime, and the fact that both boys received attention from state social service agencies both before and after the killings. They may also note the difference in the amount of state contact, and its nature; the guilty vs. the innocent plea; the different ways the prosecutor treated the cases; and of course the difference in sentencing. Close this discussion with an overview of the various ways the legal and governmental systems dealt with the boys.

Now ask the students to consult the Bill of Rights and the list of "elements of due process" that were generated in the first strategy. Which of the items on the list are elements of the due process of law? Where in the Bill of Rights are they listed? Assign the small groups to determine which of the items on their list are due process elements, and which of the first 10 amendments applies.

This should engender some good discussion in the groups, and much consultation of the Constitution. Students will find that few of the items are hard-and-fast elements of due process, and that, in fact, these boys were "processed" in a variety of ways by the state. They will discover that most of the standard elements of due process—right to counsel; to confront witnesses; trial by jury; notice of charges; right to appeal; etc.—were afforded to both boys.

End this lesson with a discussion of *fairness*. Was the treatment of George by the legal and governmental system fair? Was Richie's treatment fair? In what ways? Does treatment have to be identical to be fair? How could George or Richie have been "processed" more fairly?

JGL

Rite of Fall

(Continued from page 35)

(Supreme Court Historical Society, 1511 K St. NW, Suite 612, Washington, DC 20005, and the National Geographic Society.)

Does the mention of a book about the Supreme Court make your students groan? They may change their minds when they page through this beautifully illustrated and interestingly written volume, the fourth edition of a very readable book that uses quotations, anecdotes, and landmark cases to trace the history, development, and impact of the Supreme Court from its inception to the present. The reader is taken on a fascinating journey through the annals of the Court that starts with an era when justices traveled cross-country by stagecoach to preside at circuit court cases.

Among the cases and decisions the authors look at are *Chisholm v. Georgia* (1793), which led to the creation of the Eleventh Amendment; *Plessy v. Ferguson* (1896) and its "separate but equal" ruling that remained a rule of law for years until the court unanimously overruled the decision in *Brown v. Board of Education* (1954); and *Diamond v. Chakrabarty* (1980), in which the Court had to decide whether a new manmade life form could be patented.

Of most interest to students and teachers will be the wealth of primary source materials—photographs, portraits, paintings, cartoons, newspaper articles—used to illustrate the cases. These documents alone make this a worthy addition to any school library and offer teachers a way of introducing reluctant students to the rich history and tradition of the Supreme Court.

■ ***Martin Luther King*** (1981). Four extended-play filmstrips/cassettes, a paperback, and a study guide for high school students. $136.50. (Media Basics, Inc., Larchmont, NY 10538)

Paul Winfield portrays Martin Luther King, Jr. in this filmstrip version of the television docudrama that also starred Cicely Tyson, Ossie Davis, and Yolanda King. The emphasis is on King's philosophy, visions, achievements, and impact on the civil rights movement. More than 450 stills and the original soundtrack, which includes King's moving speeches, make this a very dramatic presentation. Each filmstrip is approximately 20 minutes long.

The study guide includes a synopsis of each filmstrip, suggested background questions, vocabulary terms, additional questions that can be used for discussion or written assignments, and a bibliography for further reading.

Materials in the study guide are correlated to the filmstrips. A paperback copy of King's very readable book, *Why Can't We Wait?*, accompanies the set: published in 1964, it traces the history of the fight for equality, from King's experiences in Alabama to the White House lawn. This series could be used in a variety of social studies and English classes.

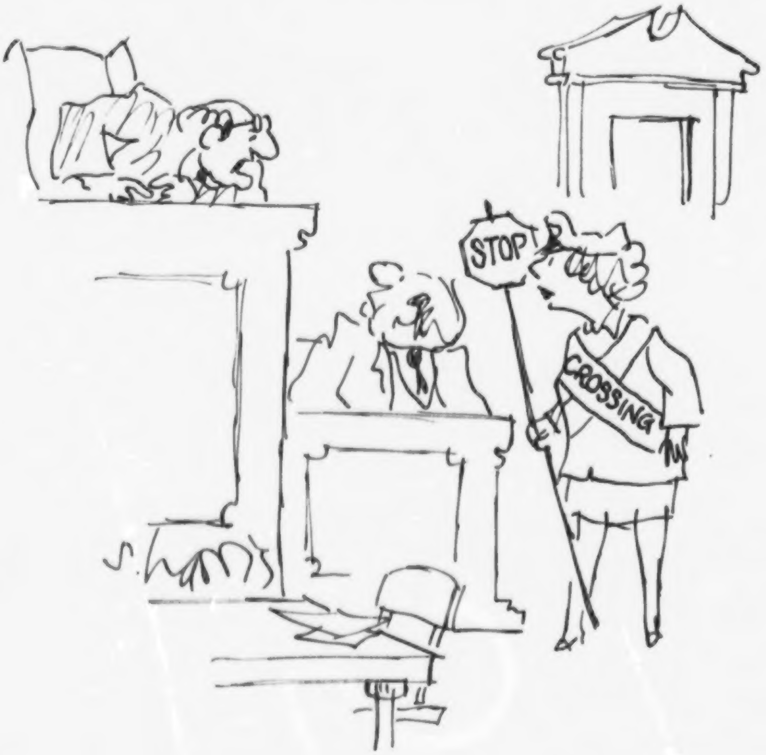
—D.F.

■ ***Law in American History*** (1983). Gerald D. Danzer and James G. Lengel. Grades 7-12. Paperback text, 263 pp. $6.10. Accompanying teacher's guide, 62 pp. $2.66. (Scott, Foresman and Co., 1900 E. Lake Ave., Glenview, IL 60025)

This text, designed to supplement basic secondary courses in American history, presents American legal history chronologically from the Mayflower Compact of 1620 and our colonial origins to futuristic lunar law of 2001. Throughout the ten-chapter text, the authors emphasize the legal concepts of liberty, equality, authority, due process, and the need for law; their approach employs case studies role plays, a mock trial, small-group work, and reasoning exercises. Chapter reviews include summaries, activities, and a self-check that includes definitions and thematic questions. The text's appendix includes the Declaration of Independence, an annotated United States Constitution, instructions for a mock trial, and a glossary and index.

One of the strengths of this book is the way in which it integrates historical case studies with modern-day cases, tackling the same theme to demonstrate how law has changed and how modern disputes have their roots in earlier times. The authors have included time lines in the student text and a chart in the teacher's guide that outlines when to teach the various topics to facilitate infusion into 8th- and 11th-grade curriculums. Another strength of this book is that it should prove to be both challenging to junior high students and of interest to their high school counterparts. This text could stand alone in a government, law, or civics course and is invaluable to any unit on the Constitution.

—F.T.-P.



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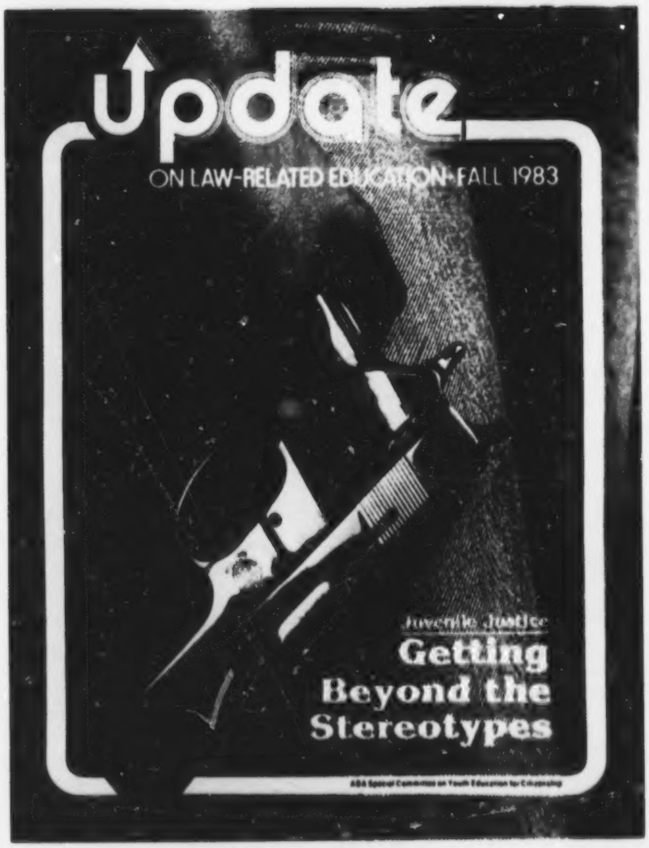
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contents

Volume 8, No. 1 Winter 1984

2
The Constitution in Crisis
Attacks on the Courts

6
The Constitution in Crisis
When Small Disputes Make Big Differences

10
The Constitution in Crisis
Who Shall Declare War?

16
The Constitution in Crisis
New Life in Times of Strife?

20
The Constitution in Crisis
Privacy and Prosecution: Can We Have it Both Ways?

24
The Constitution in Crisis
Does the Constitution Protect the Despised?

28
Legal Lunacy

34
Sports and the Law
Using Sports to Teach Torts

38
Kids and the Law
Junior is Heading for Jail

42
Court Briefs
Can the Courts Cope with Alcoholism?

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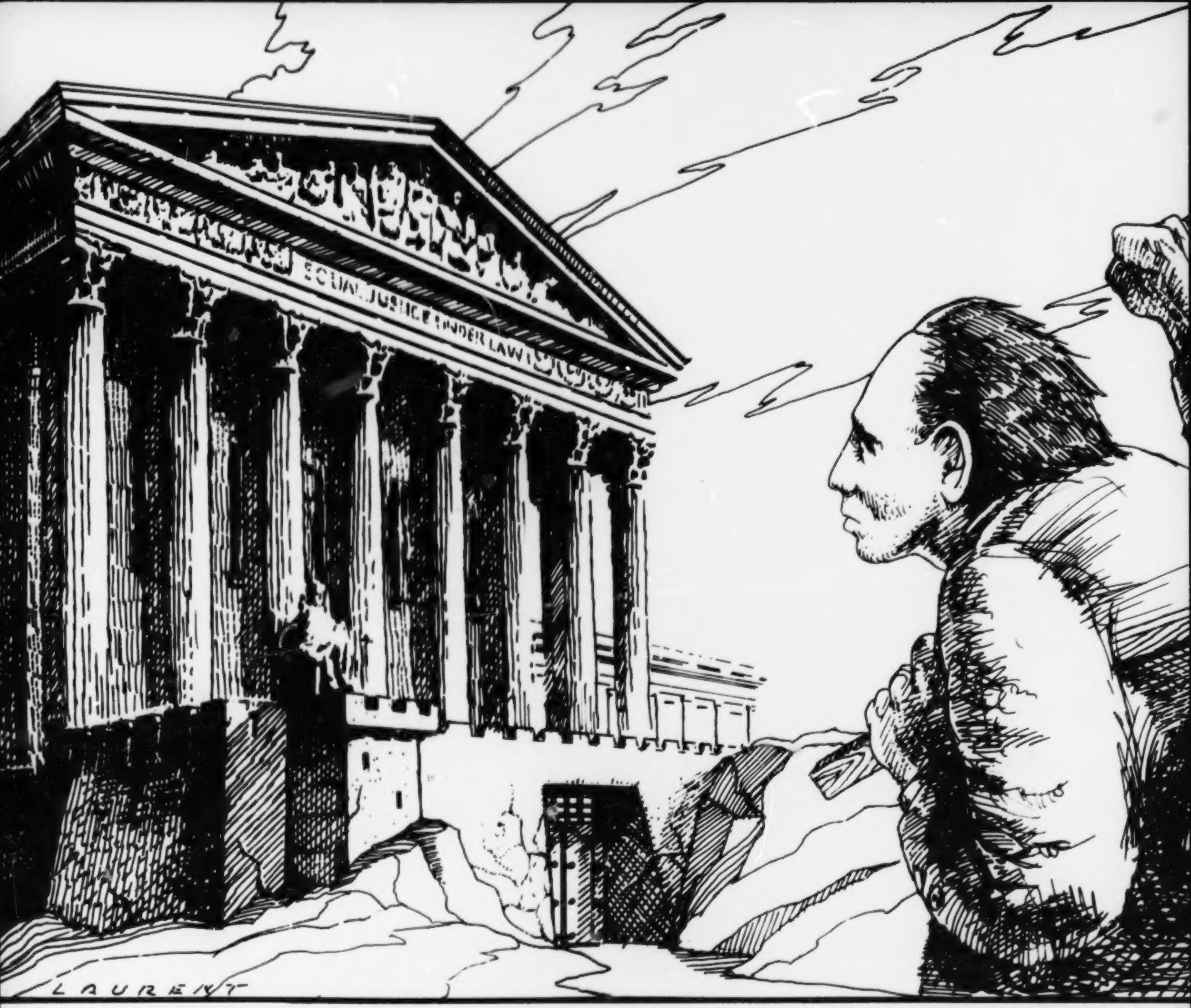
EQUAL JUSTICE UNDER LAW
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THE CONSTITUTION IN CRISIS Isidore Starr

Attacks on the Courts

The Constitution has been put to the test—
sometimes brutally—
during both wartime and peacetime.

1299

The law wends its way through American history like a powerful magnetic force attracting to its institutions important political, ecomomic, social and intellectual issues. Alexis de Tocqueville recognized this phenomenon almost 150 years ago when he wrote "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Anyone who is familiar with his *Democracy in America* knows that he is using the word "political" in its broadest sense.

The educational implications of this observation are reflected in the warning by the late Professor Hocking of Harvard that "to teach the social studies without the law is like teaching vertebrate anatomy without the backbone."

The intimate relationship between the law and the social studies is recognized today in the educational mandates of most of the states. The requirement that instruction be given in the Constitution and the Bill of Rights, citizenship, American ideals, rights and responsibilities, morality, loyalty and voting is almost universal in state educational laws.

A long-standing criticism of social studies instruction in general, and of American history teaching in particular, has been that "we tend to cover too much and to uncover too little." Various reasons have been advanced to justify this situation. Curricular mandates and courses of study, it is contended, are so overloaded that any additions would be hazardous to the health of education. To underscore the role of law in American society would involve teachers and students in a thicket of legal and constitutional technicalities which only lawyers can handle with expertise. And finally, textbook coverage of the law is adequate to meet the needs of the curriculum.

For more than 20 years, instructors and participants in the law studies movement have demonstrated in workshops, institutes, and through a wide variety of publications and other materials that the law as a topic of inquiry can be effectively "uncovered" by teachers in American history courses. This has been accomplished by educating classroom teachers and supervisors in content and teaching methods which highlight the centrality of legal and constitutional issues.

Tantalizing cases, captivating simulations, landmark legislation, episodes involving moral and ethical dilemmas, mock trials of historic issues and the role of judicial giants in interpreting the Constitution can intrigue the mind, arouse the emotions and encourage the quest for principled decisionmaking. A dose of law-related education properly administered in American history courses can transform bored students into lively citizens.

Where Law Fits In

From the moment when the explorers set out in the fifteenth century to seek new worlds until today, when astronauts and cosmonauts range the skies, the law has been and continues to be their constant companion. Questions of ownership, sovereignty and governance were and are inescapable.

The chronology of American history is, in part, the story of covenants, compacts, colonial charters, constitutions and conflicts. Opposition to the laws of England brought colonizers and settlers who, in turn, resorted to laws which evoked opposition. When the framers of the Mayflower Compact promised "to enact just and equal laws," teachers and students are justified in comparing the promise with the practice. This nexus of idealistic promises and actual legal practices is a major theme worthy of pursuit in the annals of American history.

There are several frames of reference for "uncovering" the role of law within the traditional American history course of study. The first is the chronological approach. Two recent publications pinpoint ways of enriching it. James G. Lengel and Gerald A. Danzer in *Law in American History* juxtapose historical and modern day case studies (*Dred Scott* and *Brown v. Board of Education*), while Melinda R. Smith, Kenneth Rodriguez, and Mary Louise Williams have produced *Law in U.S. History: A Teacher Resource Manual*, a compilation of lesson plans ranging from the colonial times to the modern era.

For this issue, Lengel and Danzer have prepared an article on who shall interpret the Constitution, comparing and contrasting *Marbury v. Madison* and *United States v. Nixon*.

Smith, Rodriguez and Williams have contributed two articles to this issue of *Update*. One focuses on dissent in times of war, the other on the power to make war. Each of these articles provides more detail on some of the cases discussed here.

The second organizing principle is to focus on a small number of historic ideas whose roots reach out and weave their way through contemporary controversies. Great ideas are rallying points for giving meaning to the mass of details. The following ideas wend their way through our history like strands in the fabric of national life: liberty (First Amendment freedoms), justice (Amendments four, five, six, eight and fourteen), equality (Amendments thirteen, fourteen, fifteen, nineteen, twenty-three, twenty-four and twenty-six), property (private property versus public necessity), and power (separation, division and denial of powers).

Among the publications which focus on the great ideas are Isidore Starr's *The Idea of Liberty: First Amendment Freedoms* and *Justice: Due Process of Law*, and The Trailmarks of Liberty Series, *Great Cases of the Supreme Court* and *Vital Issues of the Constitution*, prepared by the Law in American Society Foundation and published by Houghton Mifflin.

A third path is to pause at landmark cases and major legislation to take inventory of their place in the lives of the American people. Important political, economic, and social events coalesce into legislative and judicial issues which take on significant and even heroic dimensions. The most recent publication dealing with this theme is *Great Trials in American History* by Richard L. Roe, Lee Arbetman and Rick Morey. Material on the Scottsboro Boys from this book and its teachers' guide appears in slightly different form in this issue of *Update*.

As the theme of this *Update* issue indicates, there is a fourth way of looking at the law in American history, and that is by focusing on the Constitution in times of crisis. Dramatic episodes in times of war and peace add a special fillip to the daily classroom situation. Crisis is a portmanteau term which carries events to forks in the road to the future. Using John Dewey's metaphor of climbing the tallest trees at crossroads to view the lay of the land, teachers and students can take stock of decisionmaking in times of predicament and ask themselves what might happen "if" the other road to the future had been taken. To approach citizenship education from this perspective is to encourage critical evaluation of one's role in a constitutional democracy.

This theme is worthy of a book. It is certainly too much for an article. However, I hope this brief treatment of some major crises will at least indicate some recurring dilemmas in American history and point the way to new ways of presenting familiar materials.

The ultimate test of the rule of law is wartime. With Congress as the institution which declares war and with the president as commander-in-chief of the armed forces in a national emergency, can the Supreme Court continue to play its traditional role of the interpreter of the Constitution in time of war?

Wartime Crises to the Civil War

In his opinion in *Ex Parte Milligan* (71 U.S. 2 (1866)), immediately after the Civil War, Justice David Davis declared that:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

This principle is more easily pronounced than practiced. Hot wars and cold wars breed crises. When a nation goes to war, the price of victory involves heavy costs in lives, in sacrifices and in restrictions on individual rights. The irony is that this is so even when we are fighting to preserve human rights.

Many examples in our history illustrate this dilemma. The first occurred during our undeclared war with France in 1798-99, when the Federalist Party pushed through Congress one of the first laws which interfered with freedom of expression in this country. The Sedition Act of 1798, framed in the name of national security, provided severe penalties for anyone who uttered or published any "false, scandalous, or malicious" statement concerning the president or the Congress, or attempted to bring them into "contempt or disrepute." Under this law, 25 persons were arrested and 10 were convicted and punished. The law lapsed in 1801. When Jefferson became president in that year, he pardoned all who had been convicted and eventually the fines were remitted.

Was this the type of crisis that called for so extraordinary a repression of expression? One of the leading authorities on freedom of expression, Professor Thomas I. Emerson, has noted:

> There was a consistent tendency to overestimate the need for restriction upon freedom of expression. No one now questions that the Alien and Sedition Acts were not required to preserve internal order or to protect the country against external danger.

We know, of course, that the Alien and Sedition Acts were designed by the Federalist Party to weaken, if not destroy, the Republican Party. Why, then, did not the Republicans challenge the constitutionality of this legislation in the Supreme Court? Was it because *Marbury v. Madison* had not yet established judicial review? Was it because the Court was staffed with Federalist justices? Or was it better strategy to pass the Kentucky and Virginia Resolutions in order to delineate states' rights, the compact theory and state nullification of federal legislation? In any event, sedition legislation to confront national crises was to play an important role in the future.

Civil War Crises

The Civil War created, inevitably, a number of constitutional crises. Was our Constitution a compact among the states or a social contract made by the people? The Virginia and Kentucky Resolutions, the South Carolina Ordinance of Nullification, and the speeches of Webster, Calhoun and Clay speak to that issue. Was the Civil War an insurrection or an actual war between two belligerents? Was an actual declaration of war required to impose a blockade of the south? And, perhaps most important, what was the power of the president to prosecute the war?

The Civil War brought widespread violation of human rights. Newspapers were suppressed; the writ of habeas corpus was suspended by the president; and many civilians were arrested and imprisoned by military authorities.

Milligan, a civilian, was arrested in 1864 by the general in charge of the military district of Indiana. Martial law had been declared and the writ of habeas corpus had been suspended there. A military commission found him guilty of insurrec-

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Author of many books and articles, lawyer-educator Isidore Starr is widely regarded as the founder of the law-related education movement.

tion and treason, and sentenced him to be hanged.

After the war, President Andrew Johnson commuted the sentence to life imprisonment. Milligan then obtained a writ of habeas corpus from the United States Circuit Court of Indiana. He argued that his military trial had been illegal; that he should have been granted a jury trial as provided by the Constitution; and, finally, that it had been illegal for the president to suspend the writ of habeas corpus and to substitute military for civilian trials in areas outside the field of military operations.

Just as sedition legislation raises a classic confrontation between the state's police power and civil liberties, so military control over civilians in wartime poses a classic confrontation between military and civilian jurisdictions. The Milligan case confronted this issue, and the Supreme Court in a unanimous decision declared that a military commission established by a president without congressional approval had no power whatsoever in areas remote from the theater of war.

Although the decision was unanimous, four justices disagreed with Justice Davis' sweeping statement that martial law cannot be invoked when the courts were open and functioning. They took the position that Congress had the power to establish military commissions in those emergencies when the open civilian courts were inadequate to the task of trying and punishing those who threatened the war effort.

One United States senator attacked the ruling as more dangerous than the *Dred Scott* case; a second recommended that the Court's appellate jurisdiction be abolished and even went so far as to propose the abolition of the Supreme Court. And a third demanded that in cases involving interpretation of the Constitution the Court's opinion be unanimous. These attacks have a familiar ring.

The Milligan case was decided after the war was over. It is interesting to conjecture what might have happened if the ruling had been made during the war years. The military-civilian jurisdictional confrontation recurs during World War II in the Japanese evacuation cases, the trial of Nazi saboteurs, and the post-war trial of Japanese before an international military tribunal. These cases suggest that the time of decision is indeed critical in this category of cases.

Even the most popular wars evoke dissent, and dissent produces restrictive legislation. In 1917, during World War I, Congress passed the Espionage Act. It provided fines and imprisonment for anyone who was found guilty of obstructing the draft, interfering with military operations, or causing insubordination in the armed forces. An essential element was the intent of the accused. The following year the Sedition Act was passed, making it a felony to "utter, print, or publish disloyal...or abusive language" about the government, the Constitution, the flag, the uniforms of soldiers and sailors and the war effort.

Historians Prepare Bicentennial Materials

The American Historical Association is preparing a comprehensive program to improve the teaching of constitutional history in the schools. The project has brought together university teachers specializing in several areas of constitutional history and more than 200 high school history teachers. Out of this dialogue has come 18 lessons on various aspects of the Constitution in American history. Evaluations are currently being conducted of the pilot materials, and there's hope that they will soon be available to enrich your classroom.

The project, which is under contract to the National Endowment for the Humanities, has focused on three distinct areas of constitutional history. Lessons have been developed for the 18th century on the development and ratification of the Constitution, for the 19th century on the Civil War as a constitutional crisis, and for the 20th century on equality, civil rights, and the Commerce Clause. Materials in each of these areas were developed by teams of two university historians and three high school history teachers. The materials were previewed at conferences in Philadelphia, St. Paul, and Austin in the fall of 1983, and in Los Angeles in early 1984.

For more about the Constitutional History in the Schools Project, and for information about the materials that are expected to come out of the project, contact Jamil Zainaldin, American Historical Association, 400 A Street, S.E., Washington, D.C. 20003, 202/544-2422.

In addition to this project, the American Historical Association is co-sponsor of another major effort to improve teaching about the Constitution, Project '87. For more on this effort, see the article on page 49 of this issue of *Update*.

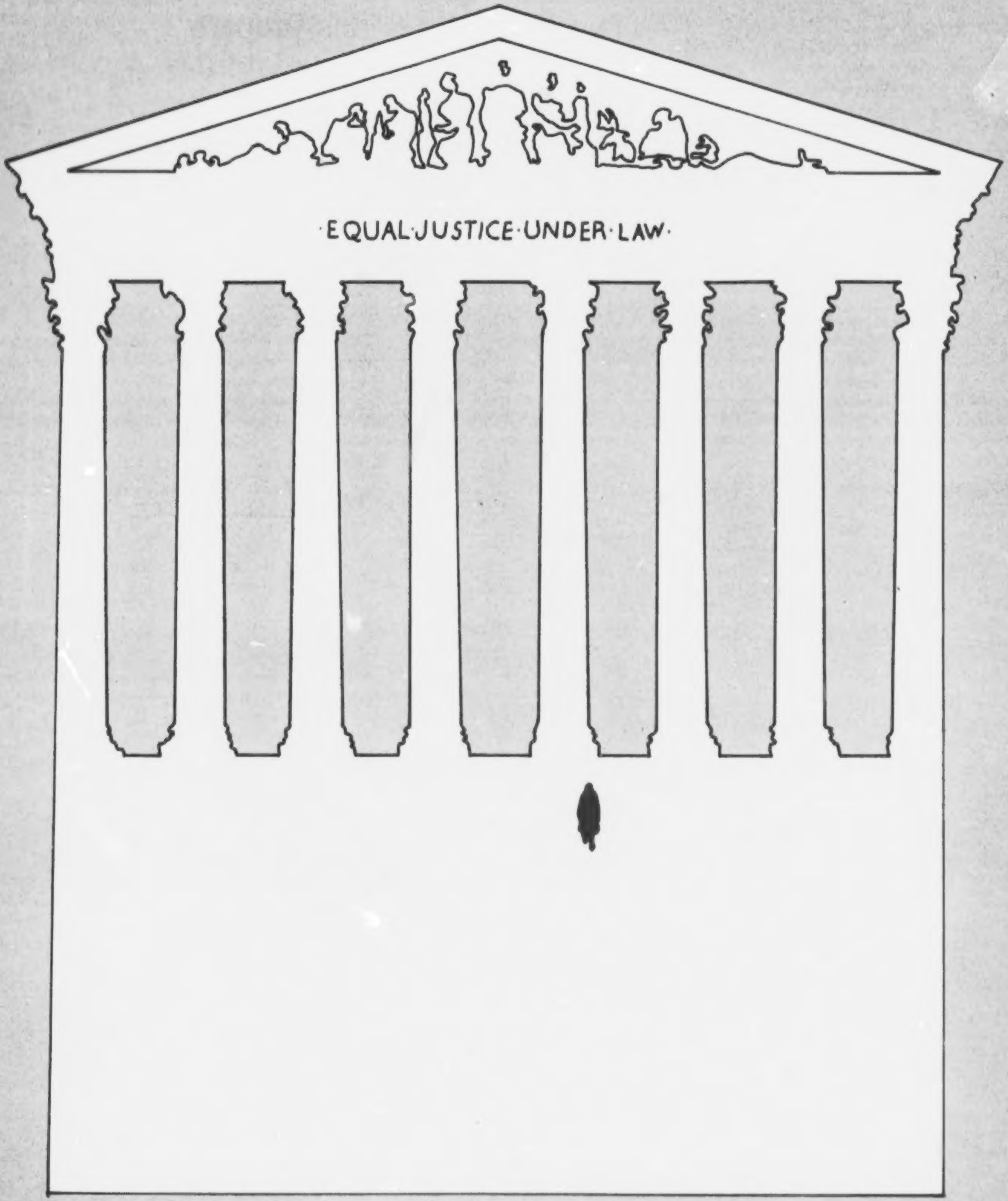
Wartime Crises: World War I

In a sense, this legislation created a constitutional crisis because it raised a big question. If this was a war to save democracy, did the Constitution protect freedom of expression during the war? In three cases, the justices wrestled with the dilemma, enunicating two principles and three rulings siding with the government.

In *Schenck v. United States* (249 U.S. 47 (1919)), Justice Holmes, speaking for a unanimous Court, delineated the "clear and present danger rule" and found the accused guilty of trying to cause insubordination in the military forces by sending newly drafted men circulars and pamphlets denouncing the draft and urging them to refuse to comply with the conscription orders. In *Pierce v. United States* (252 U.S. 239 (1920)), the Court in a seven to two decision developed "the bad tendency rule" when it held that a Socialist antiwar pamphlet had violated the espionage law because it had "a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States." Justices Holmes and Brandeis dissented, arguing that "the clear and present danger rule" was less restrictive. In the third case, *Abrams v. United States* (250 U.S. 616 (1919)), the Court upheld the conviction and sentence imposed on defendants for distributing pamphlets condemning American intervention against the newly established Soviet regime and for calling a general strike of munitions workers. Once again, Justices Holmes and Brandeis saw no clear and present danger. It was in his dissent that Justice Holmes made the oft-quoted observation that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Observe that these decisions were handed down after the war was over.

While these cases were moving through the judicial process and getting the headlines, there were more than 1,500 arrests under the espionage and sedition laws; many persons were convicted and

(Continued on page 47)


·EQUAL·JUSTICE·UNDER·LAW·

Jeffrey Gelick

THE CONSTITUTION IN CRISIS

James G. Lengel and Gerald A. Danzer

Like so much in history, constitutional crises are often easier to see after the fact than at the time. To be sure, some of them came with all the panoply of major drama—a nation torn apart by conflict, presidents and other powerful people as disputants, major constitutional issues at stake. But others were quieter, involving small disputes in tranquil times. Even the most practiced observers might not have seen their full significance until years later.

The reason humble litigants and minor complaints sometimes make major law is that courts can't initiate action. They can only react to the cases brought before them. People have to confront the law, argue with each other and sometimes argue to have laws changed if laws are to remain effective forces. As the authors of the *Federalist Papers* put it: "Laws are dead letters without courts to expound and define their true meaning and operation."

In four historic cases, the justices of the United States Supreme Court were faced with a broad range of disputes—some major, some seemingly minor—but with one overriding issue: Who shall interpret the Constitution? Is it to be the president? The Congress? The states?

Nothing could be more diverse than the kind of cases that were the springboard to these great decisions, but in the end the justices grappled with remarkably similar issues, and the decisions showed a remarkable similarity.

But before examining the great cases in which the Court carved out its empire, it's worth looking at its predecessor—a meek, inoffensive institution that few noticed and no one feared.

A Feeble Court

The man seemed disappointed; a certain bitterness flavored his words. The system, he reported, was "so defective, it would not obtain the energy, weight and dignity" that it needed to do its job. Hard as it is to believe now, he was talking about the Supreme Court of the United States.

John Jay was a person who should know. He had become, after all, the nation's first chief justice in 1789. He resigned his post in 1795 to become governor of New York. On December 19, 1800, President John Adams nominated him once again to his old post. Jay, however, declined the appointment, citing the reasons listed above as well as "the neglect and indifference" with which federal judges were treated.

Because his own term as president only had a few months left, John Adams hurriedly appointed John Marshall as the new chief justice. On that very day, January 20, 1801, the Senate received another bit of information—one that seemed to confirm Jay's opinion of Marshall's new job. The commission in charge of building the new national capital reported to the Senate that they faced a problem. The Supreme Court was scheduled to hold its first session at the new capital in two weeks, but no building had been built for the federal courts.

The original plans for the capital city had proposed an executive mansion for the president, a national capitol building for the Congress and a federal courthouse in a similar grand design. But no one had planned the courthouse. Indeed, it was not until 1935 that a separate Supreme Court building was finally erected.

Marshall Paves the Way

The Senate, which supervised the federal city, quickly gave the Court one of its rooms. The Senate Clerk's Office, also used as a janitor's closet, thus became the temporary home of the Supreme Court. This move hardly corrected the original oversight; it seemed to confirm Jay's feeling of neglect.

When John Marshall became the na-

When Small Disputes Make Big Differences

Both the most trivial and most profound cases have turned on how the Constitution is interpreted—and who interprets it.

tion's fourth chief justice, the Supreme Court was far from its potential. When Marshall died 34 years later, the Court had become an important force in American government and the foremost institution in American law. How did this come about?

"The judicial power of the United States," says the Constitution, "shall be vested in one supreme court" (and in whatever "inferior" courts the Congress sets up).

Article III of the Constitution goes on to state that "the judicial power shall extend to all cases . . . arising under this constitution . . ." including:

- cases based on federal laws;
- cases involving treaties or ambassadors or ships at sea;
- cases involving the United States government;
- controversies between one state and another;
- cases between a state and a citizen of another state;
- cases between citizens of different states; and
- cases between United States citizens and foreigners.

This seems like quite a bit of power for the Court. But in the early years of the federal government, this power was seldom used. The Supreme Court met only once a year. And, having recently been formed by the Judiciary Act of 1789, the rest of the court system was still in its infancy. The power to appeal cases all the way to the Supreme Court had not yet been fully explored. As a result, the Court heard few cases. It had little opportunity to flex its muscles.

Moreover, both the executive and the legislative branches felt that they shared in the powers of the Supreme Court. Just because the Constitution was the supreme law of the land did not necessarily mean that the Supreme Court would make the final decision on what it meant. The states also sometimes claimed to have the authority to interpret the Constitution.

John Marshall probably understood all these obstacles better than anyone else. For more than 30 years, he kept on building a vital place for the Supreme Court in the American system of law. Brick by brick, decision by decision, he worked with his fellow justices to create an independent, dominant and powerful role for his bench.

Some of the great cases that helped him create that role involved everyday people and not terribly earthshaking disputes. However, out of this unpromising material, Marshall forged judicial principles that have stood until this day.

LOST COMMISSION

William Marbury was appointed by President John Adams to be a federal justice of the peace. Adams would soon be succeeded by the newly-elected Thomas Jefferson; he had used his last hours in office to appoint his fellow Federalists to government posts. Time was short. Most letters of appointment were delivered to the appointees. But some were still on the secretary of state's desk the next day when the new administration took over. Marbury expected to receive his commission (official letter of appointment) from James Madison, Jefferson's new secretary of state. But Madison had been told by Jefferson *not* to deliver the commission to Marbury.

Marbury, thinking this was unfair, filed a suit in the United States Supreme Court against Madison. A clause in the federal Judiciary Act of 1789 gave the Supreme Court the power, under its original jurisdiction, to force the executive branch to carry out its duties, so Marbury figured the Court could help him get his way.

The case presented Marshall and the other justices with enormous political problems. The Supreme Court was composed of Federalists, and this dispute was, at heart, a naked partisan dispute between the Federalists—trying to appoint as many office holders as possible in the waning moments of Adams' regime—and the newly powerful Republicans, trying to solidify their hold on the political reins.

If the deciding justices allowed themselves to be brought into this partisan dispute, they ran the risk of fatally weakening the Court. As one of the few institutions still controlled by the Federalists, the Court had little political power and could not hope to prevail in a purely political fight. A way had to be found to lift the dispute above politics, to give the Court the moral and legal authority to enforce its decision.

It was Marshall's genius to use the unpromising case of *Marbury v. Madison* (1 U.S. 368 (1803)), to assert the Supreme Court's most important power—its ability to declare a law constitutional.

In reviewing the case, John Marshall realized there was a problem with that clause in the 1789 Act. It conflicted with the United States Constitution.

According to Article III, section 2, of the Constitution, the Supreme Court has original jurisdiction in cases "affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a Party." Marbury was not an ambassador, public minister, or consul, and his case did not involve a state. To issue the court order that Marbury requested would have expanded the Supreme Court's original jurisdiction. That would have gone against the Constitution. So Marbury's request was allowed by a federal law but was not allowed by the Constitution.

Thus, the Supreme Court unearthed the buried problem: ***Who decides*** whether a law is in keeping with the Constitution? In its long decision in Marbury's case, the Court declared that from here on in that 1789 law was null and void; further, it held, the Supreme Court had the power to decide whether or not a law passed by Congress was "unconstitutional."

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an Act of the Legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society . . .
>
> It is emphatically the province and duty of the judicial department to say what the law is. . . . Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . The Constitution is superior to any ordinary act of the legislature; the Constitution, and not such any ordinary act, must govern the case to which they both apply . . .
>
> Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions.

In essence, Marshall handed Jefferson and the Republicans a hollow victory. They were able to deny Marbury his commission, and keep one more Federalist out of office. And the Supreme Court denied itself a power granted to it by the

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federal law. But the case was later used to claim a far more major power for the Court—one that would ultimately make it an independent branch of government of equal importance to Congress and the presidency.

Marbury v. Madison established the Court's power to overrule a federal law that was not in keeping with the Constitution. Two other cases, also arising from relatively small disputes, established corollary powers.

BANK TAX

McCulloch was the cashier of the Bank of the United States at its office in Baltimore, Maryland. One day, he received a bill from the Maryland state government for $14,000. This bill was for taxes the Maryland legislature had recently decided to levy on newly opened federal banks in the state. Although these banks handled the federal government's banking business, they were privately owned. Thus, they were in direct competition with state banks.

McCulloch refused to pay the tax bill. He and other bank officials felt that Maryland had no right to lay a special tax on the federal goverment's bank—they thought that the Constitution did not allow a state to pass a law that would impede the federal government.

Maryland sued McCulloch in state court, and won. McCulloch appealed to the Maryland Court of Appeals, but the state won there too. He then appealed to the United States Supreme Court.

In *McCulloch v. Maryland* (4 U.S. 415 (1819)), the Court held that McCulloch did not have to pay the bank tax to Maryland because the law that levied the tax was unconstitutional. The Maryland legislature had no right to pass a law that violated the Constitution. The Maryland tax law, according to the Court, was thereafter null and void. The decision further declared that the United States Supreme Court had the power to declare *state* laws unconstitutional.

> In discussing this question, the counsel for the State of Maryland . . . deemed . . . the Constitution . . . not as emanating from the people, but as an act of sovereign and independent states. [He says] the powers of the general Government . . . are delegated by the *States*, who alone are truly sovereign; and . . . who alone possess supreme dominion.
>
> It would be difficult to sustain this proposition. [The Constitution] was submitted to the *people*. They acted upon it . . . by assembling a convention . . . of the people themselves. From these conventions, the Constitution derives its whole authority. The Government proceeds directly from the people. . . . The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . .
>
> . . . The Constitution, and the laws made in pursuance thereof, are supreme; . . . they control the Constitution and laws of the respective States . . . and cannot be controlled by them. . . . The power to tax involves the power to destroy. . . . If the States may tax one instrument, . . . they may tax any and every other instrument. They may tax the mail, . . . the mint. . . . They may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.
>
> . . . The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the Constitutional laws enacted by Congress. . . . We are unanimously of the opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the U.S., is unconstitutional and void.

The federal government did have the right to set up its own banks. The last clause in article 1, section 8, of the Constitution says Congress can "make all laws . . . necessary and proper for carrying into execution its . . . powers. . . ." Two of its powers are to tax and borrow money. The Supreme Court interpreted this clause broadly to mean that setting up banks was "necessary and proper" for Congress to carry out its functions.

LOTTERY TICKETS

The third of Marshall's great cases has the humblest origins. Virginia had passed a law that made selling lottery tickets illegal. The federal Congress, meanwhile, had passed a law that allowed selling lottery tickets in the District of Columbia. P.J. and M.J. Cohen were arrested in Virginia for selling lottery tickets. At their trial, they argued that the federal law superseded the state law. They were, nonetheless, convicted by the Virginia courts.

They appealed to the United States Supreme Court, which has appellate jurisdiction in cases involving federal law. The Cohens argued that the Court could properly hear the case on the ground this case was a conflict between state and federal law. But the state of Virginia aruged that the Supreme Court had no authority to review state court decisions, even if they did involve federal law. According to Virginia, it was the right of a state, not the Supreme Court, to decide whether its laws were in keeping with federal law or the Constitution.

This case is known as *Cohens v. Virginia* (5 U.S. 82 (1821)). The Cohen brothers, according to the Court, were wrong in all respects. But the main point, the Court reasoned, was that Virginia *could not* tell the United States Supreme Court which cases it could consider and which it could not. The Court had the power to take appeals from any court, state or federal, if the Court wanted to and if the Constitution permitted it.

> That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the America people are one, and the Government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a union: and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all the powers given for these objects it is supreme. It can, then, in electing these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.
>
> This [Supreme Court] was created . . . [for] the preservation of the Constitution and laws of the United States . . . Therefore we find this [court] invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this . . .
>
> [The Supreme Court] can decide on the validity of the Constitution or law of a state. . . . It should also be empowered to decide on the judgment of a state [court] enforcing such unconstitutional law. . . . The exercise of the appellate power over those judgments of the state [courts] which may [contradict] the Constitution . . . is, we believe, essential. . . . The court of the nation [has] the power of revising the decisions of local [courts] . . .

The Court believed that it must be the supreme judge, or there could be as many interpretations of the Constitution as there were states. Furthermore, the Court held, it had the authority to hear appeals from state courts when the cases involved questions of federal law or involved the United States Constitution.

Thus, the *Cohens v. Virginia* decision provided for similar judgments in the whole court system. All courts had to agree in their rulings on federal questions. If they did not, their decisions could be appealed and overturned by higher courts.

Notice also that in this case, as in *Marbury*, the Court gave a powerful litigant an empty victory. It is true that the Court permitted the conviction of the Cohens to

(Continued on page 63)

THE CONSTITUTION IN CRISIS

Who Shall Declare War?

When fighting starts . . . who decides whether that hostile action becomes a war?

Thousands have been killed recently in Grenada, El Salvador and Lebanon, including several hundred American service people. And the deaths are no less real because these areas are not deemed officially at war.

Renewed focus on such undeclared wars reminds us that all fighting does not have the legal and constitutional dimensions of a war.

Who has the power to declare war? It is a question that has been debated for over 120 years. The nature of that debate turns on the balance between the war powers vested in the executive and legislative branches of government. Questions about the use of these powers in undeclared wars suggest that the executive branch often treads perilously close to violating the separation of powers and usurping authority granted to Congress.

Just how the legislative branch of government has responded to this ongoing debate has varied with the political and social climate and with the personalities in power.

This article offers a classroom activity that helps teach students about the constitutional and historical underpinnings involved in the age-old yet still current war powers controversy. We begin by presenting background materials and resources for two case studies, then show you how you can use them with your students.

Resource 1.

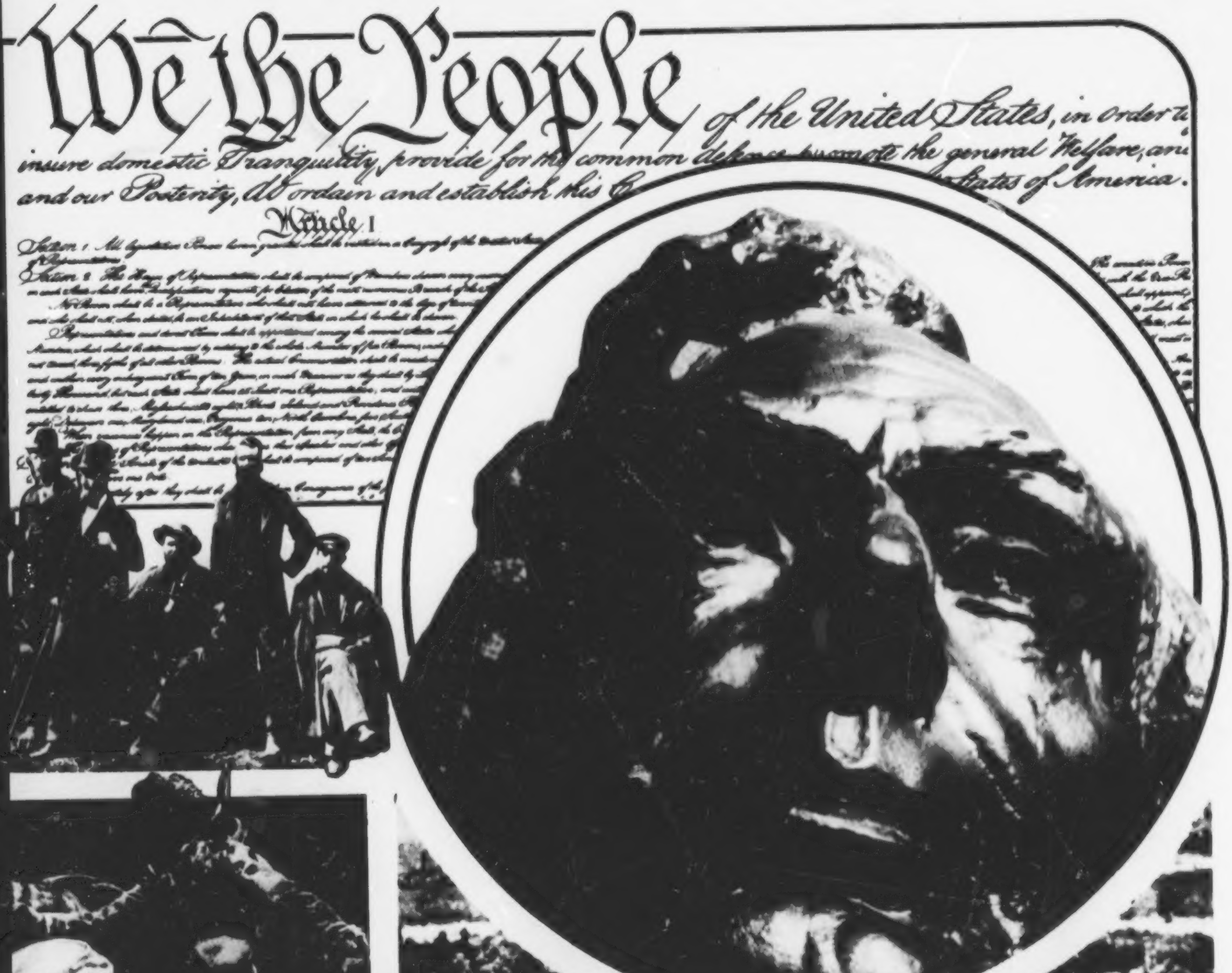
Background on the War Powers Act

For all Students

Supreme Court Justice Robert Jackson wrote in 1948 that the power to make war "is the most dangerous one to free government in the whole catalogue of powers. It is usually invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular, and, worst of all it is interpreted by the judges under the influence of the same passions and pressures."

It is no wonder the framers of the Constitution divided this "most dangerous" power between the executive and the legislative branches of the federal government. They gave Congress the power to declare war and the president the power to conduct it. Relevant parts of articles I, II and IV of the Constitution are listed in the box. They allocate very specific powers to each branch regarding war. Exam-

Melinda Smith, Ken Rodriguez & Mary Louise Williams


We the People of the United States, in Order to
insure domestic Tranquility, provide for the common defence, promote the general Welfare, and
and our Posterity, do ordain and establish this C… States of America.
Article 1

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ine the excerpts from these three articles and list the powers given to the president and to Congress.

More than once in United States history, a president has engaged the country in war without a formal declaration of war from Congress. Both the Civil War and the Indochinese War were initiated without congressional authority and both raised important constitutional issues which the judicial branch of government was called upon to interpret.

When hostilities became apparent just before the Civil War broke out, President Lincoln responded with bold measures which pushed presidential war making powers to their constitutional limits. In April, 1861, with Congress in recess at the start of the hostilities, he mobilized the Army and Navy, blockaded southern ports, called for 75,000 volunteers and ordered that *habeas corpus* be suspended in certain areas of the country.

When the congressional sessions again resumed, in July of 1861, President Lincoln seemed eager to have his executive conduct of the war presented for its ratification or repudiation. Congress responded by ratifying his actions.

The Supreme Court two years later confronted the issues of Lincoln's expansion of wartime powers in a number of decisions—including what are known as the Prize Cases. These cases challenged executive authority to order the blockade.

Similar war powers issues arose a century later, during the Indochinese conflict.

On March 29, 1973, the last known American prisoners held by North Vietnam were released, and the United States at last withdrew its remaining 2,500 troops from South Vietnam. One month earlier, the agreement for a cease fire in Laos had been signed. Still, President Nixon, without congressional authorization, ordered continuous heavy bombing of Cambodia.

His actions were opposed by a strongly defiant Congress in two key votes. An inability to override the presidential veto prompted one member of Congress, Elizabeth Holtzman, to ask the judiciary to resolve the conflict. Congress held firmly to the view that the president had acted beyond his delegated war powers without justification. The controversy came to a

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head in *Holtzman v. Schlesinger*, one of the cases presented in this activity, where Congresswoman Holtzman, along with certain air force officers, brought suit against then-Secretary of Defense Schlesinger, questioning the constitutionality of the combat operations in Cambodia.

These two cases, though a century apart, raise many of the same questions about executive assumption of broad war powers.

ISSUES

1. To what extent did the presidential initiative derange the separation of powers in the conduct of war?
2. What constitutes congressional authorization of war?
3. What role should the judiciary play in conflicts between the executive and legislature over the exercise of war powers?

Resource

2.

The Prize Cases (1863)

For Group One Only

April 15, 1861, the day after the fall of Fort Sumter, President Lincoln proclaimed a blockade of confederate ports.

This was an attempt to stop all maritime commerce in the south as well as southern preying on northern merchant vessels. Vessels were given notice in blockaded ports. Neutrals had 15 days to leave; otherwise, they were liable to be captured as prizes—ships and goods taken in the course of the blockade.

Congress confirmed the president's actions by legislating the blockade into law in August, 1861, in a special session.

In international law, to blockade and to take prize are generally recognized as rights of *belligerents*. Belligerency is the status of a legally recognized war; it automatically calls into play the protections and controls of wartime law. Yet the north, having blockaded the south, refused to recognize secession and insisted that the south was engaged in an insurrection, not a war, and thus had no belligerent rights.

Foreign and American ships, attempting to run the blockade, were seized as prizes. The courts were asked to hear the cases. The Prize Cases involved four such ships captured with their cargoes between May 17 and July 10, 1861. The United States government filed charges against their owners in United States district court, and won decrees of *condemnation* (forfeiture by judicial decrees) in each case. The owners appealed to the United States Supreme Court. These four cases were heard and decided collectively as the Prize Cases.

ISSUES

The Court had to consider the following issues:

1. Can a state of actual war exist without a formal declaration by Congress?
2. If a civil war exists, can it be legally prosecuted the same as if those opposing the government were foreign invaders?
3. Can the president legally blockade hostile ports and order that a prize be taken without a declaration of war by Congress?

The following are some of the argu-

Warmaking and the Constitution

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States . . .

Section 7. (2) Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it with his Objections to that House in which it shall have originated . . . If after . . . Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent . . . to the other House . . . and if approved by two thirds of that House, it shall become a Law.

(3) Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . .

Section 8. (1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and excises, to pay the Debts and provide for the common Defence . . . of the United States; . . .

(10) To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations:

(11) To declare War . . . and make Rules concerning Captures on Land and Water;

(12) To raise and support Armies; but no Appropriation of Money to that Use shall be for a longer Term than two Years;

(13) To provide and maintain a Navy;

(14) To make Rules for the Government and Regulation of the land and naval Forces;

(15) To provide for calling forth the Militia to execute the Law of the Union, suppress insurrections and repel Invasions;

(16) To provide for organizing, arming and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States . . . the appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

(17) To exercise exclusive Authority over all Places for the Erection of Ports, Magazines, Aresenals, Dock Yards and other needful Buildings;

(18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. (2) The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.

Section 10. (1) No State shall enter into any Treaty, Alliance, or Confederation;

(3) No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. (1) The Executive Power shall be vested in a President of the United States of America.

Section 2. (1) The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .

(2) He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . .

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them . . .; he shall take Care that the Laws be faithfully executed . . .

Article IV

Section 4. The United States shall guarantee every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ments that can be made for each side in this hearing.

ARGUMENTS FOR SHIPOWNERS

Issue 1: Constitutionality

To justify condemning these four ships there must have been a war during the capture, since, by definition, the country could only be involved in the legal consequences of war by Act of Congress. But Congress had not declared war. Nor had Congress *acted in such a way* to recognize the need for the exercise of war powers. Therefore, a state of war did not exist until recognized by Act of Congress on July 13, 1863. The blockade was illegal, as was the taking of the four ships and their cargoes as prizes with subsequent condemnation by the courts.

There is a question of the scope of the war powers of the president and his powers in general. It has been maintained that the Acts of Congress passed in the July, 1861, special session "recognized and validated a previous state of war." Retroactive approval was given to the president's order to blockade and take prize. This is inconsistent with the idea of a government based on a written Constitution with a "careful and scrupulous distribution of powers."

To be sure, powers were granted to the president through Acts passed by Congress in 1792, 1795, 1807 to use the militia, army and navy when "the laws. . . shall be opposed or the execution thereby obstructed . . . by combinations too powerful to be suppressed. . ." But in this case, for the president to exercise the power of the legislature and for Congress to subsequently give validation to that exercise is to subvert the intent and effect of constitutional government with separation of powers. It makes the president, in some way, the embodiment of the country, and invokes for him the power and right to use all the force he can command to "save the life of the nation." To take this offensive reasoning one step further, one could assert that the Constitution contemplated and tacitly provided that the president should be dictator and all constitutional government be at an end whenever he should think that the "life of the nation" is in danger. Congress cannot validate unconstitutional acts made by the president; they cannot give away their constitutional powers.

Issue 2: Political or Judicial Issue

Blockading southern ports and taking prizes, belligerent acts taken by the president without a congressional definition that a war existed, can only be properly decided in a court of law.

These acts belong to a belligerent status under international law. But since there was no war, there could be no belligerent status. If there was no belligerent status, blockading and taking prizes were clearly illegal. The determination of illegality is the proper function of the courts and not of the political systems.

ARGUMENTS FOR THE UNITED STATES

Issue 1: Constitutionality

Nothing in the Constitution states that the exercise of war powers by the president can take place only after a declaration of war. The president, acting as commander-in-chief of the army and navy, used his war powers to order a blockade of ports and the taking of prize. There are two parties to a war, which must be considered a state of things and not an act of legislative will. If the president cannot act immediately to use war powers to repel an invasion or insurrection when it is thrust upon the nation, then there is no protection for the nation in an immediate crisis.

It is an executive function to use the army and navy to suppress an invasion. Because of the specific silence of the Constitution on the matter, Congress passed the Acts of 1792, 1795 and 1807 giving the president the power to use the militia, army and navy when the laws . . . shall be opposed or the execution thereby obstructed . . . by combinations too powerful to suppress . . ." Shouldn't this be considered an attempt to give the president the authority needed to suppress an invasion or insurrection? If the president deems it important to blockade hostile ports and to take prize in order to suppress in insurrection, must he get even more specific congressional authorization? If so, then Congress will have to sit in perpetual session to give authority to each action the president must take as the war changes day by day.

As it was, Congress recognized the validity of the proclamation of the blockade and the orders concerning the taking of prize in an Act of August 6, 1861. This was done because the president himself wanted congressional authorization. In fact, how the army and navy should be used is a decision that lies with the president. How he uses them, as long as the uses conform to the laws of civilized warfare and those established by Congress, must be left to his discretion in the absence of any congressional act.

Issue 2: Political or Judicial Issue

The courts do not have a right to determine the legality of taking prize. That is a political issue involving rights of belligerents at war. War is the use of force to coerce the other side. The means and methods are belligerent powers. One of the methods used by the United States government was capturing ships and cargoes going to or from the south. The capturing is a political decision. If the government wishes to simply detain the ship, or compensate the owner after the war, that is a political question the courts do not have authority to examine. But if the government wishes to have the ship or cargoes adjudicated as lawful prize, then the courts have authority. The choice to adjudicate, however, is a political choice made by the government engaged in war.

The United States has determined that taking prize is necessary to win the war. What is politically deemed necessary to win a war is not a question that is *justiciable*. This means it is not proper for examination in a court. The Supreme Court should not be deciding these cases; they are not justiciable.

Resource

3.

Holtzman v. Schlesinger (1973)

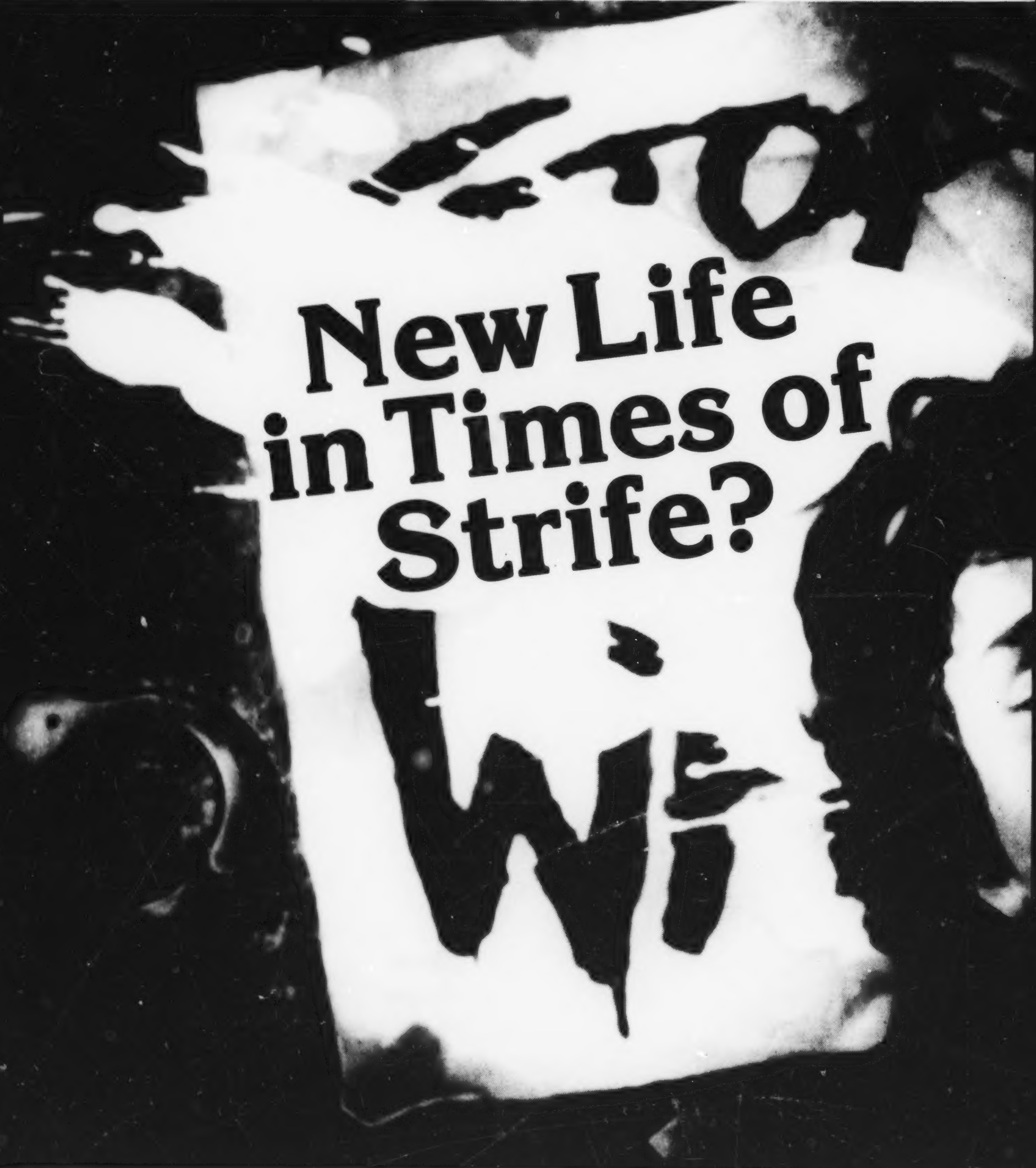
For Group Two Only

During the Vietnam War, President Nixon authorized secret air raids on neutral Cambodia in 1969. In April of 1970, he ordered American soldiers in South Vietnam to invade Cambodia. These military operations were considered necessary to destroy supply centers and military positions used by the North Vietnamese in their war against the South Vietnamese government. President Nixon said that air missions to stop the movement of enemy troops and supplies would continue in order to safeguard the lives and security of American soldiers.

Congress attempted to limit military action in Cambodia by passing the Fulbright Proviso, which, with amendments, stated that no funds could be used for military activity except to support the safe withdrawal of United States forces or releases of prisoners of war.

(Continued on page 51)

New Life in Times of Strife?



THE CONSTITUTION IN CRISIS

The Constitution's guarantee of free speech is put to its severest test during wartime. Can it bend without breaking during those times?

The First Amendment says, in no uncertain terms, "Congress shall make no law . . . abridging the freedom of speech. . . ." Yet, almost from the very beginning, Congress has enacted legislation which appears to violate this constitutional prohibition. For example, one of the very first Congresses passed the Sedition Act of 1798, which punished criticism of the government.

The Sedition Act was passed during a period of international tension, in which the French—at that time at war with England and most of the rest of the European continent—began to seize American ships.

During other periods of perceived threat—either wartime or times when the threat of war was especially grave—Congress also passed laws which limited speech. For example, during World War I the Espionage Act of 1917 forbade certain types of speech. In 1940, after war had broken out in Europe, but before the United States was drawn into the conflict, Congress passed the Smith Act, which contained restrictions on certain kinds of political speech.

These periods of grave national threat were also times when the courts seemed more willing to uphold limitations on individual freedoms. The recurring question posed by the cases arising from these legislative acts, then, is how the courts can justify these laws when the First Amendment seems to speak so clearly. In this lesson, students will examine the laws, the legal challenges, and the court decisions arising from this question. Students will compare the intent of legislation and the courts' interpretation of sedition during three historical periods. The lesson can be used when studying the Federalist Period, World War I, the Cold War, or the First Amendment.

We begin by providing case studies on these three instances of alleged sedition, then discuss how the materials may be used in the lesson.

Case Study: Sedition in the New Nation

The Alien and Sedition Act of 1798 constitutes America's first major constitutional crisis. Historian Mary K. Bonsteel Tachau of the University of Louisville argues that the crisis grew out of two events: the development of political parties and the outbreak of an undeclared war with France.

The development of political parties pitted Thomas Jefferson's Republican Party against the reigning Federalists. The Federalists believed that the opposition party threatened the existence of the new republic. As Tachau points out, the Federalists had never witnessed the peaceful transference of power from one party to another, and the contemporaneous blood-letting in France confirmed their fears. Because French immigrants usually sided with the Jefferson Republicans, the Federalists became even more certain that the Republicans were a menace to the nation.

The running naval battles between the American government and the French stirred further fears, and contributed to an atmosphere of crisis.

By 1798 the Jefferson Republicans were gaining in numbers, but the Federalists still had the majority in both houses and John Adams was a Federalist president. Tachau writes: "In an effort to end domestic dissent and cripple the opposition, they passed four Acts that were signed into law by Adams." Three of these were directed against aliens and were never enforced, perhaps because Adams, like the Republicans, believed they violated due process of law. The fourth statute was the Sedition Act, and it was vigorously enforced by the president and by Federalist judges.

Melinda Smith, Ken Rodriquez & Mary Louise Williams

The Sedition Act of 1798

. . . That if any person shall write, print, or utter or publish any false, scandalous and malicious writing or writings against the government of the United States, either house of Congress, or the President, with intent to defame, or to bring either of them into comtempt or disrepute; or to excite against either of them the hatred of the good people of the United States, or to stir up sedition within the United States for opposing or resisting any law of the United States, or any act of the President, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile design of any foreign nation against the United States, then such person, being thereof convicted before any Court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years. . . .

. . .That this Act shall continue to be in force until March 31, 1801, and no longer. . .

Tachau continues: "The Sedition Act reinstituted the English law of seditious libel, which had been believed by the Republicans to have been repudiated by the First Amendment. Under the concept of seditious libel, the government was considered injured by criticism which tends to defame it or to cause disaffection among its people. Truth is not a defense; the only question at issue is whether the accused did or did not utter or publish materials upon which the indictment was drawn. The Federalists' defense of their statute was an assertion that the First Amendment only prohibited prior restraints; in other words, that the right to publish was protected, but not the publication itself if it tends to defame or cause disaffection."

David Brown: The Priest of Sedition

Nothing might seem more innocent than the raising of a liberty pole. However, when topped with the French flag, liberty poles were regarded by the Federalists as symbols of sedition and revolution.

Such a liberty pole was raised in Dedham, Massachusetts, with a sign reading:

NO STAMP ACT,
NO SEDITION AND
NO ALIEN ACTS,
NO LAND TAX:
DOWNFALL TO
THE TYRANTS OF AMERICA:
PEACE AND RETIREMENT
TO THE PRESIDENT:
LONG LIVE THE
VICE-PRESIDENT

The local Federalists marched upon the pole to cut it down. The Republicans massed to defend it.

It was soon determined that this liberty pole was the work of David Brown. Brown was a drifter who had fought in the Revolutionary army, traveled around the world on a merchant ship, and wandered around the United States going from job to job. His reading and observation led him to conclude that all government was a conspiracy of the few against the many for the benefit of the rich and powerful. He said that the Federalist government imposed taxes to enrich the few.

Brown found admirers wherever he went. But in the eyes of some people he was considered only a vagabond who was against the government because he was a failure and an outcast. He might have lived and died a harmless radical except that the Federalists branded him a public menace and named him the "Priest of Sedition." Raising a liberty pole in Dedham was an invitation to disaster.

An attempt was made to arrest Brown in Dedham, but he had left town before a warrant could be issued. The law, however, caught up with him and he was arrested on a charge of sedition and held in the Salem jail under $4,000 bail. Brown was tried in June of 1799 in the Circuit Court of the United States, where he was found guilty and sentenced to a prison term.

The Case of Matthew Lyon

Matthew Lyon was a Republican member of Congress from Vermont. He was born in Ireland and came to America as a poverty-stricken young man. He managed to accumulate a large amount of property and married the daughter of the governor of Vermont.

One day in a conversation with friends, Lyon was criticizing the people from Connecticut because they didn't understand the ideas of Thomas Jefferson. Their politicians only presented the point of view of the Federalists. These remarks were overheard by Roger Griswald, a Federalist leader in the House of Representatives from Connecticut. Griswald interrupted Lyon with an insult, and Lyon retaliated by spitting in Griswald's face.

Soon after, when both were seated in Congress, Griswald attacked Lyon with a cane. They ended up in a scuffle on the floor, and Griswald had to be pulled off Lyon by the legs.

The Federalists were outraged by Lyon's behavior and demanded that he be expelled from Congress. He was a nasty, spitting animal, an Irishman, and no gentleman.

After 14 days of debate in Congress, the Federalists failed to gain enough support to expel Lyon.

Lyon continued to enrage Federalists. He published an article in the *Vermont Journal* containing speeches he had made in Congress. He also published an article urging Congress to commit President Adams to a madhouse. For this he was arrested under the Sedition Act. At his trial Lyon argued that the Sedition Act was unconstitutional. The jury did not agree.

The Espionage Act of 1917

SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisionment for not more than twenty years, or both.

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He was sentenced to four months' imprisonment and fined $1,000.

The Federalists hailed Lyon's conviction as a triumph of law over opposition to the government and a victory over the excesses of the press.

Case Study: The Schenck Case

In 1917 the United States entered World War I. Her allies seemed in great danger. British and French troops had been stalled and the Russian government had been overthrown by Communist revolutionaries.

Charles Schenck was the general secretary of the Socialist Party, and was opposed to the draft. He had printed 15,000 leaflets and distributed some of them through the mails to men drafted into the military. "Assert your opposition to the draft," the leaflets said, "do not submit to intimidation." The leaflet called the draft a "monstrous wrong against humanity that aided Wall Street's chosen few." Supporters of the draft were "cunning politicians." The leaflet charged that the draft violated the Thirteenth Amendment's ban on slavery. Draftees were "little better than convicts."

Schenck was arrested and accused of violating the Espionage Act of 1917 by interfering with recruitment and by stirring defiance of military authority. He was found guilty in a federal district court and eventually his case reached the United States Supreme Court. Schenck claimed there was not enough evidence to convict him of printing and mailing the leaflets. Besides, he argued, the leaflets should be protected as free speech.

The government argued that copies of the leaflet had been found in Schenck's office along with authorization to spend $125 on postage for mailing the leaflets. The government also argued that the Espionage Act was a valid limitation on free speech. Schenck, when the country was at war with Germany, had broken the law.

Decision

In *Schenck v. United States*, decided in 1919, the United States Supreme Court upheld Schenck's conviction. Justice Oliver Wendell Holmes wrote for the Court:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

The Smith Act of 1940

SEC. 2. (a) it shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof. . . .

(b) for the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

SEC.3. it shall be unlawful for any person to attempt to commit any of the acts prohibited by the provisions of this title.

Case Study: Cold War and Dissent

The period following World War II was filled with international tensions. The United States and the Soviet Union had entered a period of hostility called the Cold War. Fear and suspicion of Communist activity in the United States led to investigations and prosecutions. One such trial in 1949 involved the leadership of the Communist Party.

The leaders, 11 in all, were accused of violating the Smith Act of 1940, which made it a crime to "knowingly advocate or teach the overthrow of the United States government by force or violence; to organize, become a member of any group or assembly of persons who teach, advocate or encourage the overthrow of the United States government by force or violence, or to conspire to commit such acts." The leaders of the party had earlier gained control of an organization called the Communist Political Association, which advocated peaceful cooperation with the United States and its economic and political structure.

The new leaders of the Association transformed it into the Communist Party of the United States and changed its philosophy to one which worked for the successful overthrow of the government. The leaders of the party, the government argued, did willfully conspire to overthrow the government by force and violence in violation of the Smith Act.

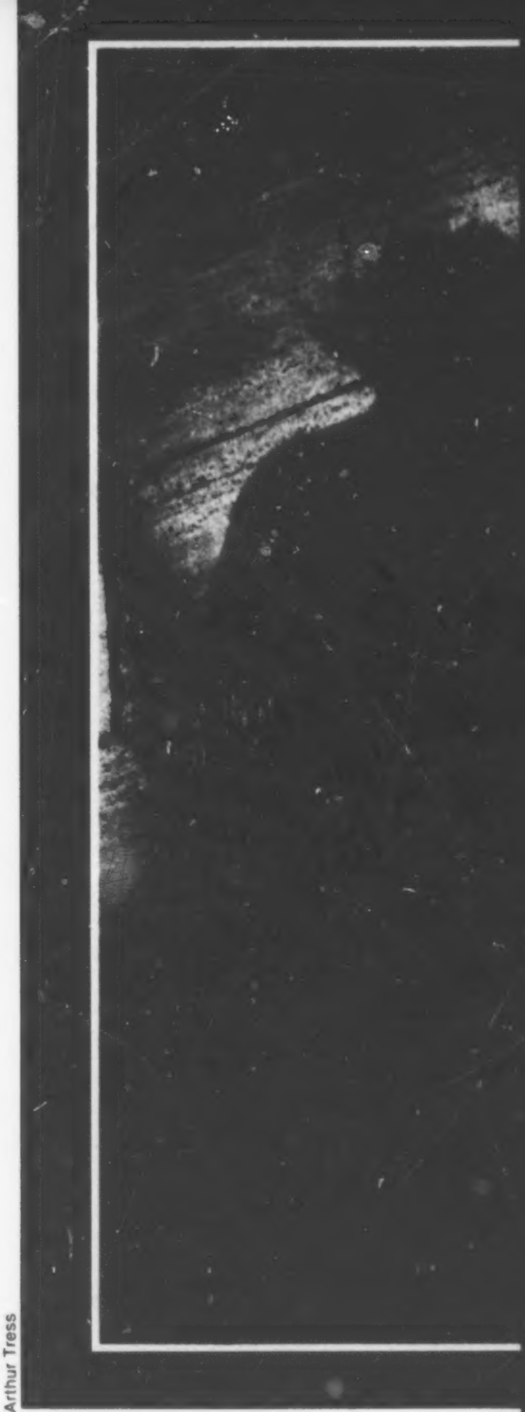
The district court trial lasted nine months. The defendants were found guilty. The case eventually went to the United States Supreme Court. The defendants claimed that the Smith Act as applied to their case was a violation of their First Amendment rights of speech, press and assembly. The defendants further claimed that the Smith Act violated the First and Fifth Amendments because its language was vague and did not require the government to prove the accused "intended" to overthrow the government.

Decision

In *Dennis v. United States*, decided in 1951, the Supreme Court upheld their convictions. The majority reasoned:

> The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the *power* of the

(Continued on page 58)



Arthur Tress

Privacy and Prosecution: Can We Have It Both Ways?

We want to feel secure in our own homes— and are guaranteed that right. But we also want criminals to be arrested and prosecuted.

Edward T. McMahon and Lee Arbetman

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> —Fourth Amendment

The *Washington Post* calls it "the most hotly contested issue in law enforcement today." It is hailed as a safeguard against oppression and condemned as a travesty of justice. It is unique among the nations of the world. At issue here is the exclusionary rule.

Just what is the exclusionary rule? Where did it come from? How does it work? What are the arguments for ard against it?

Simply put, the exclusionary rule is a procedure created by judges. It says that any evidence illegally seized by law enforcement officials cannot be admitted in a criminal proceeding. Even if the evidence is pertinent, even if it helps establish the defendant's guilt, it cannot be used at trial if police acquired it illegally.

In operation the rule is used by criminal defense lawyers at a pretrial proceeding known as a "suppression hearing." At this hearing defense attorneys ask the judge to suppress any evidence (either physical or testimonial) which may have been illegally obtained. If the judge agreed that the evidence was illegally obtained, it will be thrown out. This means it will not be allowed at trial; it does not mean the evidence is returned to the

defendant. For example, if police illegally seize contraband such as marijuana, the marijuana could not be used at trial, but neither would it be given back to the defendant.

In some instances the case must be dropped if the defendant is successful in suppressing evidence. For example, a prosecution for possesion of narcotics could not proceed if the narcotics (the basis of the accusation) could not be presented as evidence at trial. In some cases this means guilty people will go free, but not always. For example, in *Miranda v. Arizona*, 389 U.S. 426 (1966), a storm of controversy broke when the Supreme Court ruled that Miranda's confession could not be used at trial. However, Miranda was later retried and convicted using other evidence.

The exclusionary rule was born out of concern for citizens' right to privacy. The Fourth Amendment to the United States Constitution protects our right to privacy by limiting government's power to search and seize. However, the amendment does not say what will happen if its provisions are violated.

It wasn't until 1914 that the Supreme Court decided on a means for making the Fourth Amendment effective. To put "teeth into the amendment," the Supreme Court adopted the exclusionary rule. This occurred in the case of *Weeks v. United States*, 232 U.S. 383.

Weeks was suspected of using the mails to conduct an illegal lottery. During a time when Weeks was absent, the police, acting without a warrant, broke into his home. They searched his entire house and seized some incriminating papers. Weeks asked the court to throw out the evidence, saying that it had been seized in violation of his rights. The trial court refused, saying the evidence was admissible no matter how it was obtained.

Weeks was convicted but appealed to the United States Supreme Court, which reversed his conviction. The Court held that the evidence obtained by the police could not be used against Weeks because it had been seized without a warrant in violation of the Fourth Amendment. Writing for the majority, Justice William Day reasoned that "if letters and private documents can be thus seized and used in evidence against a citizen accused of crime, the protection of the Fourth Amendment is of no value." In other words the Fourth Amendment is a *right* and the exclusionary rule is the *remedy* for its violation.

New Rule, New Players

The *Weeks* decision only prohibited the use of illegally seized evidence in federal court. The Supreme Court explicitly rejected the idea that the rule should apply to violations by the state and local police.

In the years after *Weeks*, however, the rule stirred controversy and involved new actors. Seventeen states, on their own, adopted the exclusionary rule between 1913 and 1949.

In addition to the state decisionmakers and the United States Supreme Court, law enforcement people—both federal and state—played an important role in interpreting the rule and determining its practical effect.

Because the *Weeks* case only applied in federal court, federal officials soon found a way around the decision. If federal agents wanted to conduct a warrantless search they would simply contact the local or state police and have them conduct the search. The local police could then hand over any evidence they found on a so-called "silver platter." The results pleased the law enforcement community, but civil libertarians called it a blatant end run which could only decrease respect for law and the Constitution.

In 1949, the Supreme Court again refused to extend the exclusionary rule to the states. In the case of *Wolf v. Colorado*, 338 U.S. 25, the Court held that the Fourth Amendment was binding on the states but the remedy for its violation should be left up to each state. During the next decade several other states joined the 17 which had voluntarily adopted the rule.

National Uniformity

In 1961, the Supreme Court was presented with another opportunity to extend the decision in *Weeks* to the state courts. This case, *Mapp v. Ohio*, 367 U.S. 643, has proved to be one of the Supreme Court's most important and controversial decisions.

The case began in May of 1957, when Cleveland police arrived at the home of Dollree Mapp. They had received information that a person wanted for questioning in connection with a recent bombing was hiding in her house. They knocked and demanded entrance. Ms. Mapp immediately phoned her lawyer, who advised her not to let them in. Several hours later, the police returned with additional officers. Again they knocked, and again she refused them entrance. This time the police broke down the door.

Once they were in her home she demanded to see a search warrant. One officer held up a paper, claiming it was a warrant. She quickly snatched the paper from him and placed it beneath her clothing. A struggle ensued during which the police recovered the paper.

A thorough search of the house revealed no sign of the bombing suspect but the police did find "some allegedly pornographic literature" in a trunk located in her basement. Although the police had not, as it turned out, obtained a valid warrant prior to the search, Ms. Mapp was tried and convicted for possession of these materials.

Mapp appealed to the Ohio Supreme Court, which upheld the conviction, noting that even though the evidence had been "unlawfully seized during an unlawful search of the defendant's home. . . , it could be used at trial."

The case eventually reached the United States Supreme Court, which reversed Mapp's conviction and its earlier decision in *Wolf*. The Court, in a 5 to 4 decision, held that "all evidence obtained by search and seizure in violation of the Constitution is, by that same authority, inadmissible in a state court." The Court was no longer willing to accept a separate standard for federal and state court prosecutions. In their decision, the justices noted that "a federal prosecutor may make no use of evidence illegally seized, but a state's attorney may, although he supposedly is operating under the enforceable prohibition of the same amendment. Thus the state, by admitting evidence unlawfully seized, serves to encourage disobedience to the federal Constitution which it is bound to uphold. . . ."

The Court had previously been criticized for the exclusionary rule. For example, in the 1920s, New York State Judge Benjamin Cardozo warned that under the exclusionary rule "the criminal is to go free because the constable has blundered." In extending the rule to the states the Court admitted that in some cases, regrettably, this would be true, but found that "there is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

A Continuing Debate

As the crime rate shot up in the 1960s and 1970s, this decision was subjected to intensive political criticism. "Law and Order" became a political catch-word, and *Mapp* was often singled out as a decision that had weakened law enforcement in the country and permitted criminals to go free.

The *Mapp* decision proved to be enormously controversial, and over the years the controversy has not gone away. It has involved politicians of both parties, the current president and Justice Department (who have urged its abolition), and members of Congress (many of whom are also on record against it, through some support it). Several members of the present Supreme Court have also gone on record as favoring an abolition or a modification of the rule. However, the rule remains.

The exclusionary rule is today the subject of wideranging debate. Some people ask whether the balance between the rights of the accused and the security of the public has shifted too far toward the accused. Police often claim that the exclusionary rule is a legal loophole which results in the release of countless criminals. Civil libertarians, on the other hand, claim that abolition of the rule will result in widespread misbehavior by the police.

In support of the rule, two major arguments have been advanced: "judicial integrity" and "deterrence." In 1928, Justice Oliver Wendell Holmes stated: "For my part, I think it is a lesser evil that some criminals should escape than that the government would play an ignoble part." Holmes's statement sums up one of the two primary arguments in support of the rule—"the imperative of judicial integrity." In a democratic system, the government must scrupulously obey the law because it serves as a model for the people. When the government breaks the law and is allowed to profit by it (*i.e.*, by using illegally seized evidence), this breeds contempt for the law.

Another statement of the judicial integrity argument was made in 1974 when the Supreme Court decided a case that allowed the use of some illegally obtained evidence in a grand jury proceeding. The dissent in that case argued that the exclusionary rule's purpose was to serve "the twin gods of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."

The second major argument used to support the rule is that exclusion of illegally seized evidence will deter law enforcement officials from engaging in unconstitutional tactics to gain information. The argument for the deterrent effect on the rule rests on the assumption that prohibiting the use of illegally obtained evidence will reduce the incentive to violate a citizen's rights and will, for example, encourage the use of search warrants.

Critics of the rule say that it does not deter misconduct because the police simply don't understand the complexities of the Fourth Amendment. Evidence is excluded whether or not the police thought they were acting within the limits of the law. Moreover, critics say the rule doesn't deter the police because it doesn't really punish their misconduct. John Wigmore, former Dean of Northwestern Law School, summed up this point of

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"Do we really *know he's in there, or are we just saying that?"*

view by saying: "Our way of supporting the Constitution is not to strike at the police officer who breaks it but to let off somebody else who broke something else."

The simple truth is that police are often more concerned with arrests than convictions. Police frequently make arrests with no intention of securing a conviction. They do so to seize contraband, gather information and intelligence, disrupt criminal activity, or simply to harass suspected criminals. The exclusionary rule doesn't effect any of these situations. Further, a law-abiding citizen searched by overzealous police can't suppress evidence, for there is none.

"Good Faith" the Answer?

Much of the recent criticism of the rule has focused on a so-called "good faith" exception. To understand what this means, assume that a police officer with some evidence of a crime went to court to obtain a search warrant. The court examined the application for a search warrant, agreed there was probably cause to conduct a search and granted the warrant. Acting on the basis of the warrant, the police conduct a search, find evidence of crime and charge the suspect. However, another court later decides that the warrant was for some reason defective, and therefore the evidence seized pursuant to it must be suppressed. Critics ask: How could the deterrent rationale possibly be served by the exclusion of such good faith evidence?

In 1981, the Reagan Administration called on Congress to modify the exclusionary rule. The Reagan proposal would allow "illegally seized evidence to be used in court cases where law enforcement officers seized the evidence pursuant to a search warrant or when they were acting in good faith." The attorney general's report on this proposal emphasizes the issue of proportionality. According to the report, "the fundamental and legitimate purposes of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law—have been eroded by actions of the courts barring evidence of the truth, however important, if there is any investigatory error, however unintended or trivial." In other words, the smallest, most inadvertent error can result in the exclusion of the most trustworthy, probative evidence.

To fashion a remedy proportional to the violation, the report urges that evidence not be excluded if obtained by an officer acting in good faith. The reasoning behind this recommendation relates directly to the deterrent rationale of the exclusionary rule.

The Court Speaks

The Supreme Court has contributed to the debate over the viability of the exclusionary rule. In 1980, it refused to review the United States Fifth Circuit Court of Appeals decision in *Williams v. United States*, 622 F. 2d 830 (1980). In this case, the court of appeals permitted use of evidence seized illegally but in good faith.

Many people expected the Supreme Court to modify the exclusionary rule this past session. In the case of *Illinois v. Gates*, 462 U.S. __, 51 L.W. 4709, decided on June 8, 1983, the Court eased criteria for approval of search warrants but did not address the controversy over the exclusionary rule. Instead, "the Court took the unusual step of expressing apologies to all for doing nothing about it."

However, less than a month after it disappointed critics of the rule by deciding not to consider changing it in the *Gates* case, the high court announced that it will review four new cases involving the rule.

Each of the four cases—from California, Michigan, Colorado and Massachusetts—involves lower court rulings barring evidence because police made errors in conducting searches. And in each case, law enforcement officials argue that the evidence should be admitted anyway because the police acted in a good faith belief that their actions were lawful.

What the Studies Show

Both sides in the debate have used empirical research to buttress their arguments. However, the research findings are inconclusive and tend to temper the claims of both critics and proponents.

Studies suggest that the rule does not have much affect on police misconduct. The rule *does* remove the incentive for police to gather information wrongfully in *support of a conviction*, but it does not deter police who simply want to make an arrest, seize contraband, or disrupt some illegal endeavor.

This research is confirmed by studies which show that the police incentive systems reward arrests rather than successful prosecutions. Police care about arrests; prosecutors care about convictions. For example, one study concludes: "The rule is well tailored to deter the prosecutor from illegal conduct. But the prosecution is not the guilty party in an illegal arrest or search and he rarely has any control over the police who are responsible."

Another study found that, over a period of 20 years in a major American city, the proportion of cases in which there were successful motions to suppress evidence allegedly obtained illegally increased significantly. Such an increase is contrary to what one would expect if the rule were having a deterrent effect.

The best evidence regarding deterrence

(Continued on page 54)

Does the Constitution Protect the Despised?

The Constitution provides that all people and causes get a fair day in court. But can there be a fair trial in an unfair community?

The crime shocked the south—the trial shocked the conscience of the country and the whole world.

The story of the Scottsboro nine begins obscurely in a small town in Alabama, with ugly allegations of black-on-white rape and the threat of lynching. It ends many years later—after numerous trials and two appeals that made it all the way to the United States Supreme Court—with an ambiguous result and an enduring judicial legacy.

Thanks to Scottsboro, the Supreme Court made several landmark decisions that changed the face of criminal law in our nation. Scottsboro began a major shift in the relations between the federal government and the states, and the trials were important too in our long, and not yet completed, struggle to exorcise racism from our law and our land.

Law in a Racist Society

The roots of the Scottsboro case go deep into American history. The federal government ended Reconstruction of the south in 1877 when it returned control of state and local governments to the former Confederate states. This meant that the people of those southern states were again free to elect their own officials and govern themselves. It also meant that the enforcement of federally granted civil and voting rights for the newly freed slaves was left to the states.

These new state governments rapidly became dominated by the white majority. Blacks participated less in state and local governments throughout the south. Despite the Fifteenth Amendment's guarantee of the right to vote for former slaves, the number of blacks able to vote was sharply reduced because of literacy tests and poll taxes. Disadvantaged educationally and economically because of slavery, blacks were affected more severely than whites by these measures. By the turn of the 20th century, only a handful of black office holders and few voters remained.

Blacks also lost their role in law enforcement in the southern states after Reconstruction. Since there were few eligible black voters, blacks were rarely elected as judges, sheriffs or district attorneys. White officials seldom appointed blacks to these positions. Jury selection was controlled by white of-

Richard L. Roe, Lee Arbetman and Rick Morey

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ficials, who almost always kept blacks from serving.

Blacks were generally at the mercy of the white-controlled governments and law enforcement systems. Because of their poverty, most blacks could not afford lawyers for their defense when they were accused of crimes. Although the Sixth Amendment to the United States Constitution guaranteed persons accused of a federal crime "the assistance of counsel for their defense," this didn't help many people. The Supreme Court said that this amendment meant only that a person had a right to hire a lawyer, not that the trial judge had to provide one free. In addition, this amendment did not apply to state courts, where most criminal trials took place. In fact, the Supreme Court rarely interfered with any decision in a criminal case made by state courts.

But if blacks did not have access to perfect justice in the courts, there was one practice which was worse. "Lynch law," where a mob of people punished a person suspected of a crime without resorting to the courts, was especially violent toward blacks. Of the 21 persons who died by lynching in 1930, for instance, 20 were black. Lynching not only denied blacks the protection of the law, but also created an atmosphere of violence which deterred blacks from asserting their rights.

A Kangaroo Court?

The day in 1931 when nine young black men were arrested and charged with raping two white women created an explosive situation in the town of Scottsboro, Alabama. A mob of angry citizens waited outside day and night while the nine were brought swiftly to trial.

Inside, there was not an empty seat in the courtroom. Outside, National Guard troops were on duty around the courthouse doors and at other key places. The guardsmen looked out at a crowd of thousands of men, women and children. Some of the people had traveled as much as 100 miles to be a part of the noisy crowd. Music and announcements blared out from loudspeakers, and the whole atmosphere seemed more like that of a state fair than of a legal proceeding.

United Press International

Victoria Price remained unshaken and accusing in her courtroom testimony.

Inside the courtroom, however, everyone was deadly serious. Nine youths, all black and ranging in age from 12 to 19, were on trial for their lives. Witnesses for both the prosecution and for the defense had testified, and the trial was winding down to its close.

A lawyer summing up one case for the prosecution looked directly at the jury and said bitterly: "Guilty or not guilty, let's get rid of these niggers."

In some ways the nine accused youths could probably consider themselves lucky just to be in that courtroom and on trial. The year was 1931, in the middle of the great depression. The place was in the poverty-stricken rural south where black people were generally treated as inferior to whites. The nine youths were accused of raping two white girls, perhaps the most horrid of crimes in the mind of the average white southerner at that time. All those things combined to create a very dangerous situation. Lynching as an unofficial "punishment" of blacks accused of crimes against white people and their property was common in the south during those days. The armed national guardsmen surrounding the courthouse were grim reminders of the possibility of violent mob action.

Although the guardsmen were there to protect the nine black youths from a lynch mob during the trial, the *kind* of trial that they would get could not be guaranteed by military force. The right to a fair trial is supposedly guaranteed by the United States Constitution, but minority groups and the poor have sometimes been deprived of the right in one way or another. The Scottsboro Boys, as the nine came to be called, fell into that unfortunate category. Their case was to become one of the truly disgraceful examples of an unfair trial in American history.

Lynching Narrowly Avoided

The story of the Scottsboro Boys began in March, 1931. At that time, hoboes and other unemployed wanderers were a common sight all over the country. There were so many that the railroads all but gave up trying to keep them from hitching rides on freight trains. A freight train traveling through northern Alabama had its share of these nonpaying passengers, and at one point a fight broke out in a boxcar between some white youths and a group of young blacks. The blacks won the fight and forced the white youths off the moving train. But the whites complained to a local stationmaster and said

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This article is adapted from a chapter of the forthcoming book Great Trials in American History *and from its teachers' guide, both to be published soon by West Publishing Company. The description of the Scottsboro trials appeared in slightly different form in* Famous Supreme Court Cases, *by Andrew David, published in 1980 by Lerner Publishing Company of Minneapolis, MN.*

Acme Newspictures Photo

Ruby Bates, alleged victim, turned defense witness by changing her story.

they wanted to file legal charges for assault. The stationmaster wired ahead to a local sheriff with information about the complaint.

When the train pulled into the small town of Paint Rock, Alabama, it was met by a large group of armed men. Most had been hurriedly "deputized"—designated as sheriff's officers—while they were waiting for the train. They swarmed onto the freight train and began going through it, boxcar by boxcar. When they finished, nine black boys, a white boy, and two white girls, all dressed in dingy coveralls and work clothes, had been taken off.

The three white youths were left to themselves. But a deputy sheriff saw to it that the nine blacks were roped together and loaded on a truck to be taken into Scottsboro. As the truck was about to leave, one of the white girls approached a deputy sheriff and calmly told him that she and her friend had been raped by the black youths. All the deputies standing near the truck were first stunned, and then enraged. Fortunately, some common sense prevailed, and the truck started off to Scottsboro with its nine prisoners. The deputy sheriff in charge realized that he had a very explosive case to handle. He put the two girls in a car, and they also headed into Scottsboro.

Once there, the girls were sent to a doctor to be examined, and word spread through the town about the supposed rapes. The Scottsboro nine were locked up in the jail, and the sheriff and his deputies settled down to see how the people would react. By nightfall, several hundred people had gathered in front of the jail, and their mood was far from calm. The situation soon became difficult to control—lynching was a real possibility. From behind the barricaded doors, the sheriff called the governor of Alabama and asked for National Guard troops to protect the nine prisoners and help keep order.

A Predictable Verdict

Still under the protection of a National Guard, the nine black youths—Haywood Patterson, Olen Montgomery, Charley Weems, Clarence Norris, Willie Roberson, Ozie Powell, Eugene Williams, and Roy and Andrew Wright—eventually went on trial. The judge in charge of the case gave the defendants little chance to contact their families or friends or to hire their own lawyers. Since they couldn't afford a lawyer, the nine were to be represented by a lawyer from Chattanooga, Tennessee, sent by concerned black ministers from that city who had heard about the case, and a volunteer attorney from Scottsboro. These lawyers were assigned by the judge on the very morning of the trial.

When the case was brought to trial, the two girls who had been on the train, Victoria Price and Ruby Bates, went to the witness stand and described in detail how they had been ravished. There were, however, many contradictions in what they said. Moreover, statements by the two doctors who had examined the girls did not back up their claim that each had been raped six times. Another fact brought out in court was that one of the accused men was so disabled by venereal disease that it would have been almost impossible for him to have committed the act.

In such trials in the south at that time, however, a verdict of "guilty" was surely predictable and not long in coming. Eight of the nine were found guilty and sentenced to death. One, Roy Wright, also was found guilty, but because he was just 12 years old, the prosecution asked that he only be given a life sentence. Still, seven members of the jury refused to accept any sentence less than death, so a mistrial was called in the case of the 12-year-old.

The white citizens of Scottsboro and the surrounding countryside were satisfied: they had "gotten those niggers," guilty or not guilty. Soon, however, protests began coming into Alabama from people not only in all parts of the United States but also in foreign countries. Individuals, organizations, and institutions claimed that justice had not been done. They demanded new trials and, this time, they insisted, *fair* trials. In Alabama, the reaction to these protests could only be described as puzzlement. "What's all the fuss about?" was the question some Alabamans were asking.

Politically Charged

When the time came for an appeal of the case, the International Labor Defense (ILD), which was a branch of the Communist Party in the United States, and the National Association for the Advancement of Colored People (NAACP) fought over which organization would represent the Scottsboro nine. The ILD won out and appealed to the Alabama Supreme Court in early 1932. But the appeal was rejected.

The ILD then took the case of the Scottsboro nine to the United States Supreme Court. The organization's lawyers claimed that the nine boys on trial in a capital punishment case had not been granted fair trials because their lawyers did not have enough time to prepare their cases. In other words, the Scottsboro nine did not have "effective assistance of counsel." In addition, they argued that the conduct of the trial could be considered unconstitutional because blacks were automatically kept off all Alabama juries. The Court agreed to review the

(Continued on page 60)

LEGAL LUNACY

The law takes its lumps for 1983

David Lee Csiscko

THEY RELOCATED AFTER THREE DEFENDANTS PLEADED "EXTRA CRISPY"

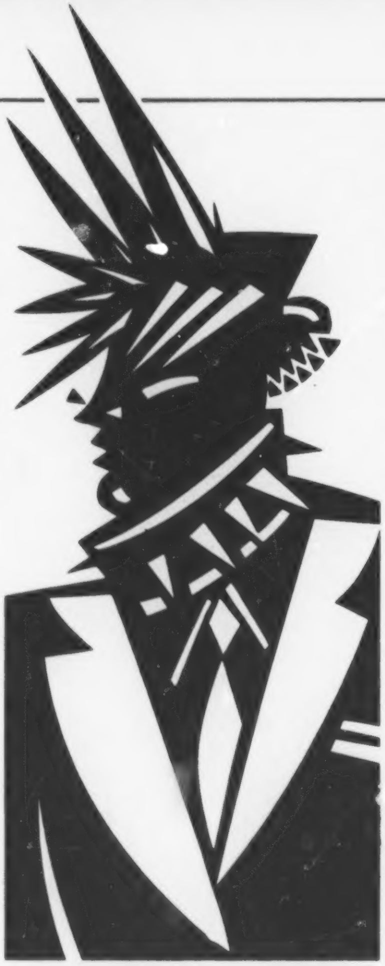
Allyn Z. Lite thinks the federal General Services Administration doesn't know the first thing about courts. Lite, clerk of the U.S. District Court for New Jersey, says GSA's solution to court crowding was to create a space where no court had ever been before: "To get to the space, you entered the Kentucky Fried Chicken restaurant, made a right turn at the salad bar, and headed up the stairs. That is where they want to locate the United States Court."

AND THE MAN DOES SUFFER—SOMETIMES HE GETS TUNA CASSEROLE THREE NIGHTS IN A ROW

A man filed suit against the city of Murray, Utah, after he was dismissed from the city's police department for having three wives. Royston Potter claimed his lifestyle was "living the principle"; he maintained three separate households which he visited, he said, "on a rotation-type thing, normally one night at each place." Potter's lawyer charged the dismissal was an invasion of privacy and a denial of due process for practicing polygamy without criminal charges being brought against him—"We felt that he had a religious guarantee to practice plural marriage."

AND WHAT ABOUT THAT THEORY TO GET RID OF EVERYBODY'S RELATIVES?

When Albert Einstein died in 1955, the FBI had compiled a 1,500-page file on him. The FBI file on the German-born physicist, obtained this year through a request under the Freedom of Information Act, included documented investigations that Einstein was instigator of a Communist plot to take over Hollywood. The report also shows Einstein was investigated for possible involvement in the kidnapping of the Lindberghs' baby son, designing a "destructive ray" and inventing robots capable of reading human minds. The source of at least one charge of Communist activities was traced to an occasion in the 1930s when Einstein refused to stand for the playing of the German national anthem while on a visit to the United States.



AND OTHER EMPLOYEES WERE MISTAKING HIM FOR A HUBCAP

Peter Mortiboy was fired by Britain's Rolls Royce Company because of his hairdo. A matter of taste? No, safety. Company officials said the four-inch spikes of his hairdo endangered the eyes of co-workers. Mortiboy, who wears 18 earrings, a studded dog collar, steel armlets, and a stud through his nose, was told by the company that his appearance was not up to company standards.

YOU SEE, HE CAN'T TOE THE LINE ANY MORE

A Benson, Minnesota jury ordered Michael Clemens to pay $75,000 to a man he shot in the foot—after Clemens caught him burglarizing his car. Francis Rakowski was shot in 1977 after he broke into Clemens' car. Clemens, his father, and his brother, who were sleeping at the time, awakened when they heard noises outside, chased Rakowski and caught him two hours later. Clemens fired a warning shot, which hit Rakowski's foot. Rakowski later pleaded guilty to the burglary and was given probation. "I don't think it was too unjust for what they done to me," said Rakowski. "They ruined the rest of my life, because I'm a crippled person now. For the $150 or so worth of merchandise, it wasn't worth ruining a guy's foot for life." Clemens' attorney pointed out that Rakowski was convicted of stealing a car two years after the shooting and managed to walk more than a mile.

IF THE GUN HAD BEEN REAL, HE WOULD'VE SHOT HIMSELF FOR TRYING TO ESCAPE

The police had no trouble arresting Paul Bernier on bank robbery charges. Bernier, of Fall River, Massachusetts, fainted while he was trying to hold up a bank with a toy gun. Police said Bernier wouldn't have gone far anyway; he also locked his keys in his getaway car.

FOR HIS NEXT JOB, HE'S TEAMING UP WITH THE GUY WITH THE TOY GUN

A Chicago man wearing a bright red T-shirt, a bright red jacket, and blue jeans secured by a chain and padlock apparently felt he wasn't conspicuous enough, so he also donned a patch over his right eye and crawled across the bank lobby on his hands and knees. Then he stuck the joint up, ran down the street with the loot, and gave it to the first policeman he saw. Patrolman William Woitowich said, "Stickup guys don't usually do that. We usually have to chase them."

NEXT WEEK THEY'LL RULE ON GOSSIPING BY THE LOCKERS

Junior high school principal Richard E. Phillips of Gowrie, Iowa, fumed, "I really do not believe that our forefathers, when they wrote the First Amendment to the U.S. Constitution, had in mind a seventh-grade girl passing notes in school." But it did him no good. The State Department of Public Instruction ruled that a school regulation prohibiting note-passing among students is unconstitutional because it violates the right to free speech. As a result, suspended note passers will be reinstated.

ACTUALLY, HE THINKS HE'S BO DEREK

Owner Ronald Testa says that Wally, the 400-pound lion, is no threat at all to the people of Warren, Ohio. Testa, owner of the cat, said the three-year-old lion cub has never seen another lion and doesn't even know he is one. But neighbors didn't agree, and Judge Mitchell Shaker decided that Wally would have to go (though his order was stayed pending an appeal). Shaker says, "I don't think allowing Wally to remain is in his best interest. He has no freedom to roam and is just caged up."

THE BEGONIA LINE-UP WAS A DISMAL FAILURE

Chicago used to be famous for gangsters, machine guns, and shootouts between the mob and the feds. A rash of greenery thefts from people's backyards suggests that the city of broad shoulders has become a city of little wimps. Some things don't change though—the cops still can't do anything. As Edward Tansey, a Chicago detective, put it, "We've made some arrests, but they usually beat the charge. It's pretty hard to identify a plant."

IT WAS THE JUDGE IMPERSONATED BY A BEGONIA THAT GOT THEM SUSPICIOUS

Operation Corkscrew, an FBI sting, was true to its name—the FBI turned out to be the victim and red-faced agents had a lot of explaining to do.

The FBI decided to catch Cleveland judges in the act of taking bribes, so they set up an elaborate trap, tricking a court bailiff into being their middleman in setting up secret meetings with judges.

But the FBI forgot one small detail—finding out what the judges looked like—so the bailiff got some friends to be the judges (including a 34-year-old man who impersonated a 69-year-old judge) and he just pocketed $85,000 of the bribe money. The FBI didn't realize that they'd been stung by their own sting until a year later, when agents noticed that one of the judges being interviewed on television looked nothing like he had when they had nailed him.

Meanwhile, municipal judges in Cleveland are furious because the fumbled operation has drawn attention to charges of corruption against them. One says he no longer trusts FBI testimony in his courtroom, and he adds that he is trying to find a lawyer willing to sue the FBI.

ON THE WAY TO THE CAR, HE TRIED TO CONVINCE POLICE THAT HE WAS NIPSEY RUSSELL, JANE RUSSELL, RICK REUCHEL, AND FINALLY, A BEGONIA

A woman in Natchitoches, Louisiana, recently got a telephone call from a man claiming to be former NBA star and coach, Bill Russell. He asked her for $2,500 to help finance a new restaurant he was planning to open. No foolhardy investor she, the woman demanded first a personal interview in her home—while police investigators were invited to listen in a nearby room. The man who arrived to negotiate was 6-foot-4—a full five inches shorter than Russell. Ah—that's because, he told her, he had just had leg surgery in which doctors removed ten inches of bone "so he could fit in his Mercedes Benz." And the man's face, while a close resemblance to Russell's, was not an exact duplicate. The surgeons again, claimed the would-be restaurateur: a recent auto accident had necessitated plastic surgery. The woman wrote out a check and handed it to her visitor. And the waiting authorities stopped him on his way out the door—thereby blocking his fast break. But what a setup.

JUST BUYING THEM

Six Baltimore jailers were arrested on drug charges when officers found them with cocaine, marijuana, and drug paraphernalia. Police did say that there were no indications that the guards, who had just finished the evening shift at the jail, had been selling drugs inside the facility.

HE THOUGHT IT WAS "THE FAMILY THAT PAYS TOGETHER STAYS TOGETHER"

These things never happen on *Father Knows Best*. A judge in London granted Thelma Broadhurst a divorce from her husband William for economic reasons—he was a cheapskate. The retired bricklayer refused his wife a honeymoon after their wedding 36 years ago, and things haven't gotten much better since. He charged her $7.50 to paint the living room ceiling. He charged his daughter eight cents to use the shower when she visited. He never gave his wife a birthday present and he charged the family 75 cents a week to pay for the electricity to watch the telly. "He had very peculiar ideas about family finance," said the divorce judge.

SHE'S GOING TO SUE WITH THE HELP OF A LABOR LAWYER

When 30-year-old Karen Daskam gave birth to her son in a Denver hospital, she did it chained to the hospital bed. Daskam was in police custody, being held on bond on a fugitive warrant after allegedly abducting her six-year-old daughter from the home of her former husband. A shame-faced city official later arrived at the hospital, laden with flowers and apologies for the new mother and the acknowledgement that deputies "didn't use a great deal of discretion." A less contrite sheriff maintained deputies were only doing their jobs. "Any prisoner in the hospital will be chained," he said. "It's been that way for 21 years."

HE SMELLED TOO MUCH LIKE PEANUTS

Judges in the town courts of Rochester, New York, are experimenting with creative sentencing. One man, convicted of drunken driving, was ordered to clean the elephant cages at the Seneca Park Zoo. The man took the bus to get to the zoo, but had to walk home afterwards because the driver wouldn't let him on the bus.

AND FLYING THEM TO PARIS FOR CROISSANTS WAS NIXED

One Iowa prosecutor's office makes a practice of giving free coffee to jurors. A blatant attempt to curry favor? No, said the Iowa Court of Appeals. Ruling against a burglar who sought to have his conviction reversed because of the appearance of impropriety, the appeals court said there was no evidence that the coffee influenced the jurors. It did tell the prosecutor's office to be more careful in the future about serving free java.

JUST BEFORE HE DROPPED, HE HUNG SOME CHINTZ CURTAINS

Milford, New Hampshire, Police Chief Steven Sexton tries to keep up with the times. After watching a TV documentary on how colors affect moods, he repainted his jail cells pink. It worked. One belligerent prisoner was put in a pink cell and, within minutes, was fast asleep.

OR SEE THE MOVIE "ONE MILLION YEARS B.C."

It was a contest to top them all, but bar owner Jim Smith will probably think twice before sponsoring one like it again. In 1980, Smith, owner of Bullwinkle's Saloon in Tallahassee, offered $25 to any patron wearing a T-shirt bearing a date prior to 1977 and $5 extra for every year before 1976. When Jeanne O'Kon stepped up, Smith's jaw went down. O'Kon was wearing a T-shirt commemorating the 900th anniversary of the Tower of London—1078-1978. With $4,490 at stake, Smith came forward and said "a few choice words" and "made it clear that he had no intention to pay that kind of money," according to O'Kon's lawyer. The lawyer claims Smith fought "tooth and nail" about paying O'Kon, but a jury this year awarded O'Kon the full amount plus attorney fees. "Thank God," said Smith, "she didn't visit the Sphinx or something."

DOESN'T THE FIRST AMENDMENT COVER THE RIGHT TO FREE EXPECTORATION?

Garden City, Kansas, got its reputation as a tough town for hanging the two killers later immoralized by Truman Capote in *In Cold Blood*. Now the town has come down hard on sauntering and spitting. Its ordinance against loitering "includes the concept of spending time idly; to linger; to saunter. . . ." Brushing aside objections that John Wayne sauntered, Commissioner Frank Schmale said, "Don't walk like John Wayne then." Schmale also came down hard on spitting. "Sidewalks don't bother me so much," he said of the ordinance, "But if somebody just wants to stand around and spit on a building, I think we ought to nail him."

ACTUALLY, THE THREE ELEPHANTS WERE NO PROBLEM—THE JAIL HAS A FOLD-OUT BED

When Beeville, Texas, troopers stopped a caravan of trucks loaded with circus animals, they discovered eight of the drivers did not have valid drivers' licenses, and their rigs had no Texas license plates. The troopers immediately issued traffic citations—which required the drivers and their cargo be detained until a hearing the next day before the local justice of the peace. At the hearing, the drivers and circus owner were slapped with nearly $5,000 in fines and with the dictate the caravan would not be allowed to carry on before the necessary licensing paperwork was processed. During all this deciding, processing, and detaining, the obvious was overlooked: the Bee County jail was not big enough to house ten lions, three elephants and fifty circus performers. Bee County law enforcement settled on voluntary detention. Queried one sheriff's deputy: "What do you do if an elephant decides it doesn't want to stay?"

THEN HE SLAMMED THE GAVEL DOWN AND TICKETED HIMSELF FOR VIOLATING NOISE ORDINANCES

District Judge Oliver Kitzman of Hempstead, Texas, won't show favoritism to *anyone*. He doesn't tolerate tardiness and chews out lawyers who keep him waiting. Then, one day last summer, he discovered he'd arrived for work a full 12 minutes late. He held a contempt of court hearing, found himself in contempt, and set a fine of $50. Kitzman said, "I didn't watch my clock close enough."

OF COURSE, THE MOST SEVERE PUNISHMENT WAS SOLITARY CONFINEMENT WITH THE MEATLOAF

Food fights in the cafeteria of Grosse Pointe North High School—located in an affluent suburb of Detroit—were occurring at the rate of four a day when Principal John Kastran laid down the law: Any student caught throwing food was to be suspended for three days and required to bring his or her parents to school for a conference. Another punishment probably didn't strike students as so severe—exclusion from the cafeteria for two weeks.

JUST ANOTHER IRRESPONSIBLE WHINER

David Jackson's favorite song is not *Lawyers in Love.* Jackson, convicted of two felonies and sentenced to five years in prison in California, asked for a new trial after he discovered that his defense lawyer was dating the prosecutor during the trial. Jackson did not find out about the relationship between his lawyer, James Lang, and Tehama County Deputy District Attorney Christine McGuire until after the trial was over. But Lang said at the new hearing that he never considered his dating McGuire "constituted any sort of conflict of interest." Jackson hired a new lawyer, Henry Zall, to appeal the case. "Sometimes I've suspected the defense to be figuratively in bed with the prosecution," said Zall, "But I've never seen a case where it seemed to be literally true."

NOT SURPRISINGLY, A LOT OF THESE GUYS ARE GETTING CORDLESS PHONES

The gritty ball and chain of the chain gangs has moved into the '80s. Criminals in Albuquerque convicted of minor offenses have a choice—they can go to jail or they can wear an electronic anklet that alerts police when they are more than 200 feet from their home phones. Whenever the wearers leave home or try to remove the device, a transmitter planted in their telephones sends a signal to a probation department computer. Critics have charged that the anklet smacks of Big Brotherism, but the New Mexico Civil Liberties Union defended the device, saying that it relieved jail crowding. The judge who developed the device is pleased too; he says he got the idea from a Spiderman cartoon.

BUT NOW THOSE CRITICS MIGHT JUST BE IRRESPONSIBLE ENOUGH TO SAY HE'S LYING

A U.S. congressman decided to remain on a congressional committee despite the fact that a company affected by the committee's decisions had hired his wife as a lobbyist. Rep. Norman Lent (R-New York), a member of House Commerce Committee, was voting on telephone legislation which would affect Nynex Corporation, one of the regional spinoffs of AT&T. Nynex hired Barbara Morris Lent, wife of Rep. Lent, as its legislative liaison. The House Ethics Committee told Lent to follow his conscience in deciding whether to continue voting on the legislation; Lent decided to stay. The congressman called the whole controversy "a tempest in a teapot." "Because we're cognizant that some irresponsible persons might suggest our marriage poses a conflict," Lent said, "my wife and I make it a practice not to discuss legislation that affects Nynex. Also, she doesn't lobby my office."

THAT'S WHY LADY JUSTICE IS BLINDFOLDED

A Highland Park, Michigan, woman, in court for a traffic case, was sent to jail for three hours because she refused the judge's demands to remove a campaign button supporting his long-time political foe. Mildred Combs, 53, was jailed after the judge found her in contempt of court. Combs said, after her release, "If this is what the judicial system is all about, I don't care to be a part of it. I'd rather be in Russia, where I know what dictator government is all about." Judge Kalem Garin said the political feud had nothing to do with his decision.

AND CAROLERS WILL HAVE TO STOP SINGING ABOUT THAT LITTLE TOWN IN PALESTINE

Halloween gets harder every year. First there's the scare over razor blades and rat poison; now someone's upset over trick-or-treating for UNICEF. The city council of Milford, New Hampshire, refused to grant permits for the annual collection, charging that UNICEF money goes to communist governments. "We have a very conservative town here, and some people just don't like the United Nations," said a local minister. However, the New Hampshire Civil Liberties Union asked a judge to lift the ban, arguing that it violates First Amendment rights. "Besides," said Patricia Quigley, an attorney for the group, "we don't want to see seven-year-olds in ghost costumes . . .busted for carrying a UNICEF box."

TRICK OR TREAT

FORGET UNICEF— CHARLIE BROWN'S THE REAL SUBVERSIVE

Snoopy and his pals better shape up their attitude about school. The Peanuts cartoon character was featured on a poster along with Woodstock and several bird friends, having a root beer and pizza party and claiming that school was "a nice place to party, but I wouldn't want to study here." Thirteen school board members, principals, and teachers across the country complained about the poster. Hallmark officials said they were surprised by the reaction but would probably change the message which "was offered with a great deal of innocence. I think it's a college level of humor that did not translate down to parents," a Hallmark spokesman said.

THEY WOULD CHECK THE "NYAH, NYAH, TRY AND MAKE ME PAY" BOX IF THERE WERE ONE

Down in Albuquerque, prisoners in the City and County Detention Center have taken to sending in the subscription cards that fall out of magazines. They check the "bill me later" box, but fat chance of getting them to pay. When the subscriptions ultimately are canceled for lack of payment, they just send in another card. Prison officials say they can't do anything about the scam, suggesting that it's a matter for postal inspectors.

AIR TRAFFIC CONTROLLERS REPORTED SEVERAL PILOTS NOT INTERESTED IN LANDING

In the '60s, they were called burnouts. But a flame by any other name still smokes the same. While much of the Midwest toiled at conventional harvesting this fall, authorities announced sole responsibility for searching and destroying domestic marijuana growing in open fields. And after seeking, authorities found a huge crop of the illegal leafy green stuff in a county just north of Milwaukee. Chopped and derooted, the crop yielded three truckloads—all of which were taken promptly to a lakeside beach and incinerated. This made some nearby birds fly crooked. Quipped an attending deputy: "This is simply a case of no tern left unstoned."

AT LEAST THEY CAN SPIT ON BUILDINGS

Cops in Roselle Park, New Jersey, decided to crack down on wild bike riding by imposing fines of $15 to $60 for biking through stop signs or taking passengers on handlebars. Kids said the fines would take months to pay off. Frankie Gural told the Roselle Park Borough Council that it should "lower your prices. . . .Us ten-year-olds can't afford $60." The council asked the legislature to adopt more "realistic" fines for the youngsters.

IS IT TRUE THAT MOTHERS-IN-LAW CAN GET THAT TRAINING?

A district judge in Norfolk, Virginia, sentenced a dog to be destroyed for excessive barking, but at the last minute, Max, a three-year-old mixed breed, was snatched from the jaws of death. A Circuit Court judge granted a reprieve to the dog who had been ordered destroyed after neighbors complained that he barked too much. Max's owner, Tom Atkinson, settled his differences with his neighbors out of court, and Max—who did not appear in court—at last report was undergoing training to keep him quiet.

WHY *DO* YOU THINK THEY CALL IT DOPE?

A Florida tourist reported $1,000 worth of cocaine missing from his hotel room and demanded that hotel security find the stuff or pay him $1,000. The hotel got right on the case, phoning the local sheriff's department, who—somehow—recovered the cocaine that night. The hotel's security chief and two sheriff's deputies returned to Gregory Mershad's room, introduced themselves, and showed him the recovered bag of the drug. "It's mine," said Mershad, "but a lot's missing." The deputies asked Mershad to sign a property receipt, which he promptly did. They then reminded him that they were policemen and could arrest him—which they promptly did. The hotel security chief found the whole incident a little strange, but said, "I couldn't believe it when the goofy signed the receipt." No truth at all to the rumor that Mershad's attorney won the office sweepstakes for the worst client of the year.

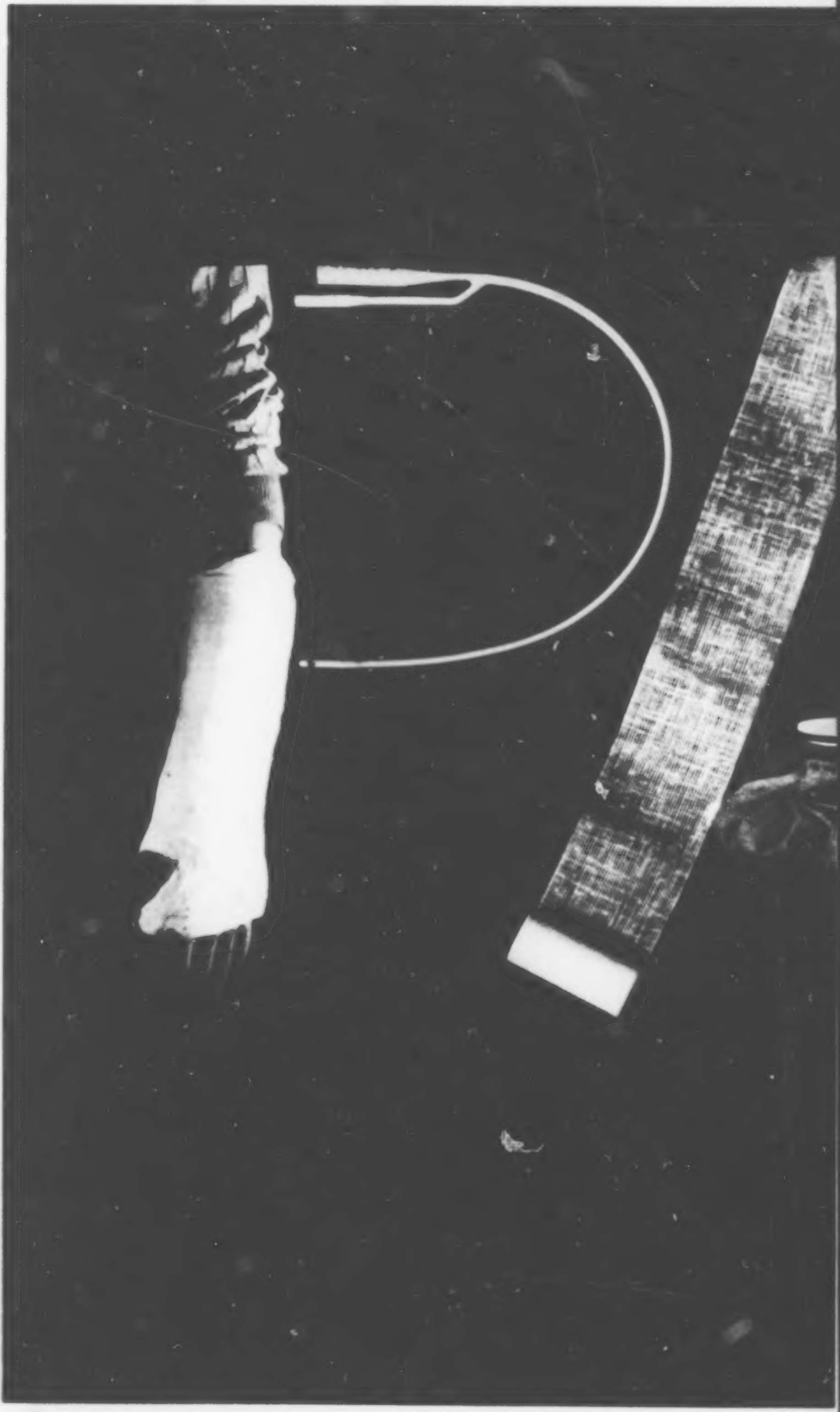
MOM NOW ORDERED TO RAP HIS KNUCKLES AND SEND HIM TO BED WITHOUT SUPPER

Here's the latest on Perry Cochran. (See "Legal Lunacy," *Update*, Winter, 1983.) Cochran, if you'll recall, was ordered in 1982 to serve a two-year burglary sentence in his mother's Chicago home; he was allowed to go out only to take his mother to church or to the store. Cochran was arrested in July after stabbing a man with a penknife during a quarrel over a card game in a vacant lot. "He was a mile and a half from his home, and he certainly wasn't going to church or to the store," said an assistant state's attorney after Cochran's arrest. Cochran claimed he was innocent; even though his mother was not with him, he said he'd intended to go to the store to buy aspirin.

ANOTHER HEARTWARMING DOG STORY

A boy's best friend is his dog. That is, of course, until the kid decides to break the law. Then it's every, uh, man for himself. A Salt Lake City homeowner returned home to find jewelry and a stereo missing—and a strange dog in the house. When police arrived, they let the pit bull out of the house and followed it as it wandered around the neighborhood. It finally decided to return home, where police found its owners—two boys, ages 11 and 13—and the stolen loot. The boys apparently didn't realize that the dog had followed them when they entered the house, and when they left, they locked the dog inside. The kids confessed, and the goods were returned. No reward for the pooch; you'd think his owners would be *happy* he found his way back.

Using Sports to Teach Torts



David Attie

Close your eyes for a moment and create a mental collage of the world of sports. If you were asked to go back and make a list of descriptive words to accompany your palate of images, you might include "colorful," "action-packed," "vibrant," "lively," "energetic," "fun," or "noisy." And these words would only begin to pinpoint the reasons why people find sports so exciting.

Sports have an almost universal appeal, especially to youngsters. Consequently, they are a natural vehicle for introducing and reinforcing a variety of law-related concepts in the classroom. The law that applies to sports is not unique. Rather, it falls into such standard categories as contract law, labor law, antitrust law, insurance law, and even criminal law in some instances. But because sports cases, stories, and hypotheticals tend to stir students' interest, they can serve as a particularly useful tool for LRE teachers to add to their bag of strategies for teaching about law and the legal system.

Teachers often say that tort law is one of the driest and most difficult law-related subjects, while lawyers frequently comment that tort cases are among the most common and thus important for students to understand. Sports can bring tort law alive for students. The following are just a few ideas for using sports to teach torts. Although the concepts can be addressed at nearly every age level, the information and activities in this article are designed for use with secondary students. Keep in mind that these strategies represent only a small sampling of possibilities for teaching torts through sports; you

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Teri Engler

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may wish to add or delete lessons to meet your class's particular needs and interests.

Strategy

1.

Elements of a Tort

A tort, you will recall, is a civil wrong or injury that is not related to a contract. The torts that students are already somewhat familiar with are those which may also constitute crimes. A person who is criminally prosecuted for battery or rape, for example, may also be sued by the victim in a civil court for the tort of battery, regardless of the outcome of any criminal case. Likewise, state and federal kidnapping cases are similar to what a plaintiff must prove in a tort case for false imprisonment. Students are also generally aware of tort actions that the media stresses. Carol Burnett's successful suit against the *National Enquirer* for libel is just one example; reports of other cases appear regularly on television and in the newspapers.

However, despite their awareness of things like the basic differences between civil and criminal law and the place of torts within the domain of civil law, students often don't know the legal theory that is the basis for the overwhelming majority of tort actions: negligence. The definition of negligence is not hard to grasp. Negligence is any breach of a legal duty to protect others from unreasonable risks of foreseeable harm. It is the failure to do something that a reasonable, prudent person would have done under the circumstances, or the doing of something that a reasonable person would not have done.

A plaintiff in a negligence suit must establish the following four elements in order to win:

1. the defendant had a legal duty to act as an ordinary and reasonable person to protect the plaintiff against unreasonable and foreseeable risks of injury;
2. the defendant breached that duty, either by acting or failing to act;
3. the plaintiff sustained damages or an injury; and
4. the defendant's breach of his or her legal duty was the proximate cause of the damages or injury.

Some Actual Cases

Rough and tumble sports and physical education classes make it easy to see why there is an endless supply of sports-related personal injury cases that can be used to demonstrate the elements of negligence. For instance, loads of cases deal with injuries sustained from sports equipment and facilities. These often turn on the question of whether defendants met their duty to instruct or supervise (either the plaintiff or their own employee) sufficiently or to properly select the equipment and inspect it for defects.

Have your students read a few of these cases and, working in pairs, identify:

1. Who are the potential defendants in this case—i.e., who might be held legally responsible for the injuries? (Remember that a person might be held directly responsible for his or her own actions or, under the old doctrine of "respondeat superior," for the actions of his or her agents or employees.)
2. What legal duty did they have to the injured person?
3. How did they breach that duty?
4. How was the breach of that duty the proximate (or "legal") cause of the injuries? (To determine whether proximate cause exists, courts apply what is known as the "but for" test: if the injured person would not have been hurt but for the defendants's action or inaction, the defendant is liable.)

(NOTE: An attorney who had experience in handling negligence [personal injury] cases would be most helpful in discussing students' answers with them and describing some negligence cases outside of the sports setting.)

Case #1. Kim, a native of Tucson, Arizona, was a student at the Brigham Young University (BYU) in Utah. Since so many of the BYU students went skiing in their free time, Kim decided to take a class in skiing.

Her first class consisted of a demonstration film and some oral instructions from the teacher on skiing. Later, the class hit the slopes to begin practicing. On her instructor's advice, Kim rented her skis for the class from the BYU bookstore. A part-time bookstore employee fixed the bindings on her skis but forgot to have her twist and turn to see if the bindings would release like they were supposed to at the proper time. The employee knew that Kim was from the Arizona desert and had never been on skis before.

On her second day out, during a free period in the class, Kim made a sharp turn on her skis. The bindings did not release and she sustained a painful injury to her leg.

Case #2. Alan (whose father was a master sargeant in the U.S. Air Force) and his family lived at the Minot Air Base in North Dakota. The base had a Youth Recreation Center that was quite popular. One day Alan and a friend headed over to the center to play on the trampoline. Alan had been on the trampoline before and was considered to be a good performer.

The Youth Center had a rule against doing flips and certain other stunts on the trampoline. However, the supervisors at the center rarely stopped Alan or anyone else from doing them. (In fact, one supervisor had even instructed Alan to tuck in his chin while doing flips.)

Alan warmed up for a while, then tried to do a one-and-a-half forward flip. He was unsuccessful twice in a row. The third time, Alan suffered a terrible injury to his neck, which was aggravated when his friends pulled him off of the trampoline after his fall. Today, he is a permanent quadriplegic.

Case #3. Kenny was a member of the high school track team. As he was jogging on the school's track one afternoon, he fell on a piece of glass and cut himself.

Case #4. Tom, a tenth grader, had had a deficiency in his right eye since he was in kindergarten. Over the years his mother had kept school authorities informed about Tom's condition.

In his gym class one day, Tom and the other students were playing floor hockey. Several students were crowded into the small playing area. Tom was hit in his right eye by a hockey puck, and his eye eventually had to be surgically removed as a result.

The gym teacher told Tom's parents that safety equipment to protect against such injuries had been available on request (as it always was), but that Tom hadn't asked to use it that day.

How They Came Out

In case #1, Kimberly sued the university for her injury. She claimed that the bookstore employee—as an agent of BYU—was negligent in his failure to properly instruct her in the use of the skis. The trial judge, sitting without a jury, agreed with this argument and found that this was the proximate cause of her injury. BYU ap-

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Teri Engler is an attorney-educator who currently consults for various national, state and local LRE projects. The strategies appearing in this article are adapted from a new book, Sports and the Law, *co-authored by Teri Engler and available from West Publishing Company.*

pealed to the Supreme Court of Utah, contending that Kim knew of the risks involved in skiing and had assumed them voluntarily. This risk, said the university, was similar to the risk "confronting one in a toboggan ride, or watching a football game along the sidelines, or using one's head as a battering ram in football."

The court, however, disagreed, holding that Kim didn't know the danger of skiing. It recognized that skiing is an inherently dangerous sport, but noted that so is driving a car when "the negligence of others becomes involved in the circumstances of the moment." Kim was awarded over $14,000. (*Meese v. Brigham Young University*, 639 P.2d 720 [Utah 1981].)

In the second case, Alan sued the U.S. government for more than $2 million, claiming that the government had failed to provide him with proper supervision for this dangerous apparatus. The court agreed. This lack of supervision, said the court, was the proximate cause of Alan's injuries. He was awarded slightly more than $1 million after the court emphasized that "the rules of the Youth Center against flips were only honored by their breach." (*Meharey v. United States*, Civil No. A4-80-54, U.S. D. Ct. [N.W.D. No. Dak.] 1981.)

The athlete in case #3 sued his coach, the school's athletic director, the supervisor of grounds, and the school board for negligence. He argued that the defendants had a duty to inspect the track and supervise the custodial staff to ensure that the premises were safe. He said that their failure to do so resulted in his injury.

The school board invoked the doctrine of "governmental immunity," which many states still allow, and the lower court ruled that this immunity from liability extended to the other defendants as well because they "were acting in a supervisory capacity." The Supreme Court of Virginia upheld the governmental immunity claim as to the school board but sent the case back for retrial as to the other defendants. At the new trial, however, the plaintiff lost again when the same trial court judge granted the remaining defendants' motion for a directed verdict in their favor. (*Short v. Griffiths*, 255 S.E. 2d 479 [Va. 1979].)

In the last case, Tom charged that his teacher and the township board of education were negligent due to the teacher's failure to provide him with protective equipment and properly supervise the game. The trial court found that the defendants had no obligation to supervise the floor hockey game to the extent that the plaintiff claimed. As a result, the judge found in their favor in a summary judgment. However, the appellate court ruled that this was an issue to be decided by a jury and remanded the case for trial. (*Sutphen v. Benthian*, 397 A.2d 709 [N.J. 1979].)

In examining these cases with students, be sure to have them use specific facts in identifying the elements of negligence. In the first hypothetical, for example, Kimberly claimed that a reasonable and prudent bookstore employee would have provided her with more complete instructions about the release mechanism of the bindings on her rental skis. Thus, the employee had a legal duty which he breached when he forgot to have Kim move around in the skis to test the bindings.

Similarly, the issue of proximate or legal cause can be easily highlighted in these cases. Students might think that the cause of the young man's injury in case #2 was his doing a bad flip on the trampoline or his friends' unfortunate attempt to pull him off of it afterwards. But in the eyes of the law, the proximate cause of Alan's accident was the government's failure to provide him with the necessary supervision. "But for" the government's failure to make sure that someone would oversee the youngster's activities at the center, Alan would not have been hurt.

Were the risks of harm to the plaintiffs in these cases foreseeable? You might also have students informally argue both sides of this issue.

Strategy

2.

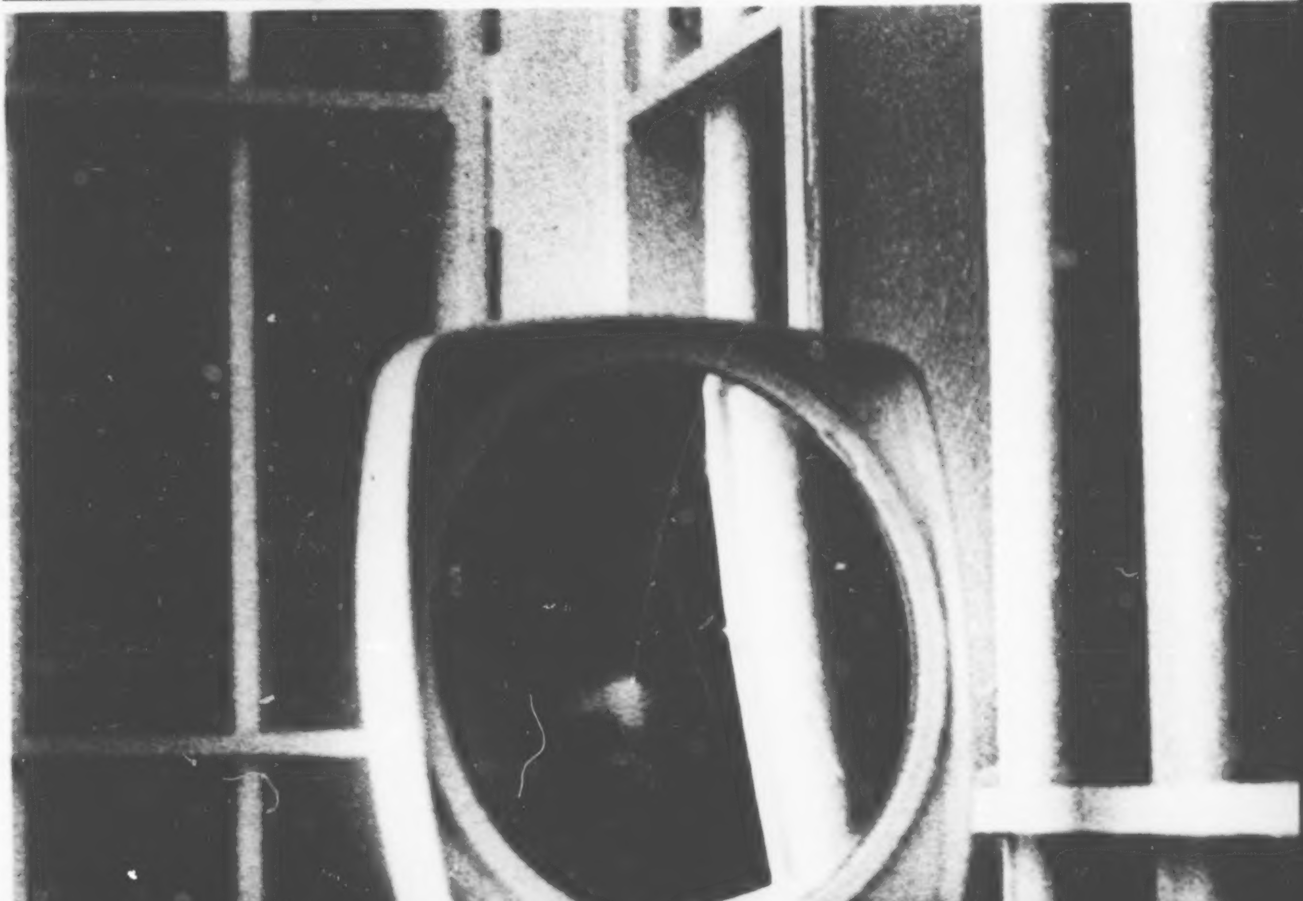
Legal Duties

In March 1983, newspapers and magazines across the nation reported the shocking story of a gang rape of a woman in a New Bedford, Massachusetts, bar while a crowd of drinkers stood by. Police said that no one came to the victim's aid, not even a man who brushed off her clutching arm as he tried to get by the attackers. Did the bystanders have a legal

(Continued on page 57)

Drawing by Lorenz; © 1979, The New Yorker Magazine, Inc.

"Mr. Wendell may continue to smoke. Mr. Wendell is a friend of the court."



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Donna Wulkan

Mimi Forsyth

JUNIOR IS HEADING FOR JAIL

Yesterday's victims become today's predators. We may be able to prevent the transition from troubled child to angry criminal—but first we must identify the troubled child.

Only human beings among all life forms torture their young—and the damage lives on and hurts still others. Yesterday's battered child grows up to wreak violence upon society. The victim of early sexual abuse matures into today's prostitute. And the juvenile runaway forced from home because of abuse and neglect becomes the mugger on our city streets.

The newspaper headlines sound alarm at the national rise in reported child abuse on page one and complain of the soaring juvenile crime statistics on page three and see no connection. It is time to realize that the media is reporting on the same child only at different stages of development.

Who are these nine to eighteen-year-old thiefs, rapists, prostitutes, runaways and truants who plague America's streets? What causes these children to graduate from toddler on tricycle to "incorrigible child" to "out of control" youth to "juvenile delinquent" to "violent offender?"

The causative factors are not singular and the child should not be seen in isola-

Can the Law Protect Children?

Howard Davidson

In the little world in which children have their existence, whosoever brings them up, there is nothing so finely perceived and so finely felt as injustice.

—Charles Dickens

The so-called "children's rights movement" of the 1960s and 70s, supported by a number of Supreme Court decisions, emphasized the need for children to receive the same freedom and treatment enjoyed by adults. Rights to liberty, free speech and due process of law for children became key issues over which major legal battles were fought. "Youth liberation" and "overcoming adult oppression" of young people became a new element of social activism; the words "child advocacy" took on a special progressive meaning. Lawyers were at the forefront of this movement, starting important organizations like the Children's Defense Fund, National Juvenile Law Center, National Center for Youth Law and the ACLU Children's Rights Project.

Not surprisingly, many parents, government leaders, judges, attorneys and even child welfare professionals viewed these new activities as threatening. A few criticized the movement for encouraging new standards which limited the suspension and expulsion of school children— blaming the standards for the breakdown of school discipline. Some criticized the modern juvenile court reforms' emphasis on the care and solicitous treatment of delinquents, claiming that these reforms replaced swift punishment for juveniles who commit serious crimes. And the creation of new juvenile emancipation laws and programs for runaway youths have evoked concerns that "parental rights" and authority have been undermined.

The major judicial victories of what some have pejoratively named the "kiddie libbers" have, in reality, been few. The Supreme Court has also issued decisions that have reasserted the authority of parents over their children (if indeed, it was ever in doubt)—and have justified the denial of constitutional safeguards to children accused of delinquency. What has, however, replaced the children's rights movement in the public consciousness is a more important and, presumably, permanent development—the expanded use of government policy and the legal system to protect children from maltreatment and exploitation by parents and other adults.

Howard Davidson is director of the National Legal Resource Center for Child Advocacy and Protection, a program of the Young Lawyers Division of the American Bar Association. He is co-editor of Legal Rights of Children, *to be published in 1984 by Shepard's McGraw-Hill.*

In fact, there are now several programs which foster awareness and reform in children's rights. With close to a million officially reported child maltreatment cases each year, and an actual incidence rate that many believe is much higher, there is a clear need for teachers, lawyers, judges, social workers, physicians and mental health professionals to understand and work together in responding to child maltreatment.

In response to this demand, the American Bar Association began the National Legal Resource Center for Child Advocacy and Protection (the Center) in 1978 as a program of its Young Lawyers Division. Work at the Center focuses on the legal and judicial aspects of child abuse and neglect—specifically, protecting children from maltreatment by their caretakers, protecting children from "foster care drift," and protecting them from harms inflicted in custodial disputes. Since 1978, the Center has published over twenty books and monographs, held several national conferences and funded the educational programs of over forty state and local bar associations.

Important written materials developed through the Center have included the first child abuse litigation manual for judges, a series of five publications on the legal aspects of child sexual abuse and exploitation and an analysis of criminal and civil liability actions against child welfare workers. It has also produced an instructional videotape for public child protective agency attorneys, entitled "Representing the State in Child Abuse and Neglect Proceedings." Two Center child abuse projects have resulted in the publication of the first state instructional manual (for Illinois) on the conduct of child abuse investigations and the development (for Indiana) of a videotape for social workers explaining the state's juvenile code and a pamphlet for parents whose children have been placed in foster care.

The Center's research and programs have yielded several more publications of special interest to teachers as resources to which they can turn when they encounter a child they know or suspect is troubled or abused and as background information for those who wish to become more actively involved in the burgeoning movement against exploitation of children.

- *Protecting Children Through the Legal System*: a 972-page manual for child advocates.
- *Foster Children in the Courts* (Butterworth Legal Publishers, Newton Upper Falls, Mass.): a comprehensive book for educators, social workers, lawyers, psychologists, and others interested in the legal aspects of foster care system improvement.
- *The Legal Framework for Ending Foster Care Drift*: a self-assessment manual to help attorneys, advocates and policymakers evaluate and improve state statutes, regulations and procedures affecting children in foster care.
- A collection of materials on "child snatching," including relevant federal laws such as the Parental Kidnapping Prevention Act of 1980, state statutes, explanatory articles and a parental assistance directory.
- A practice manual co-authored and published by the Legal Services Corporation, detailing procedures and concerns for interstate and international custody disputes.
- A book co-sponsored by the ABA Special Committee on Dispute Resolution on Alternative Family Dispute Resolution which suggests methods for mediation and conciliation in reducing legal conflicts in family dissolution.

For pricing and ordering information, contact the Center at 1800 M Street, NW, Washington, D.C. 20036; telephone (202) 331-2250.

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tion. Certain types of family environments breed a wide variety of child and youth problems. They are families under stress or in crisis, families that have a whole range of problems which produce violence—including alcoholism, drug abuse, mental and emotional impairment, criminality of parents, and economic depression.

Some of our young murderers have been identified in the system years before the crime. They were weaned in violent families where they had been victims of remorseless physical brutality at the hands of their parents.

Violence Begets Violence

Millions of alcoholics are responsible for raising children. Their drinking leads to unpredictable mood swings and physical violence. Their children are denied normal parental help, creating at least a neglected home but more likely an abusive environment. Similarly, drug abusing parents exhibit muted or violent emotions producing a high degree of intrafamily violence. The point is that violence begets violence, and abuse and neglect precede juvenile delinquency.

The child of a punitive and rejecting family, where the use of violence is a normal technique, learns at an early age that those who love him or her most use physical brutality to deal with family problems. It becomes justifiable behavior. Richard Jenkins, a psychiatrist who studied the behavior of abused and neglected delinquents at the Institute for Juvenile Research, called this kind of child an "unsocialized aggressive." And it is this kind of child who, if properly treated and identified as an abused child, might never have appeared on the delinquent ledger.

We need to understand, then, how our system produces a delinquent from a child who has been brutally abused. The system chooses whether or not to bring a case of child abuse and neglect by considering the best interests of both parent and child. If no case is filed, the child gets the message loud and clear that abusers are correct in their behavior and that society approves of their conduct.

Children cannot look to the state or the courts for protection and so they thrive in their destructive medium, waiting to wreak havoc upon a family and a society that turned its back. The victim of the crime becomes the criminal.

Unfortunately, the crimimal justice system reacts to this child abuse continuum by creating abuse and neglect statutes and regulations unrelated to the delinquency laws. It is these very statutes that reinforce rather than quell the situation. Although most abused and neglected children in the early years are referred to the juvenile court because they are victims, years later they are still in the system but have metamorphosed into delinquents. Children of violence are more likely to exhibit a pattern of criminal behavior that runs deeper and is more difficult to rehabilitate than nonabused children.

Family separation, years in foster care and juvenile institutions set the pattern for repeated separations and attachments and failures to plan for kids. This constant psychic turmoil and flux only exacerbates the situation, which does not improve for an abused and neglected youth who is labeled and placed in a juvenile institution. In fact, the problem is likely to become worse by institutional abuse.

A Portrait of Rejection

William O is one such child. William entered the system in 1974 as a child waiting for foster care placement. Today, he is detained in maximum security in a juvenile institution—the latest in a series of institutions he has had to call home for most of his life. The social services agency is offering him another chance at rehabilitation—this time by placing him in still another institution, a residential school for troubled youths. William resents any further attempts by the system to intervene in his life. He says he just wants to be left alone to do his time.

William O's story is a portrait of rejection. He was rejected in turn by his mother, his family, and his former foster parents. At 17, he harbors deep mistrust for the adult world. He is hurt, angry and chronically depressed—a condition that has been "nurtured" by years of emotional deprivation and parental neglect.

William's mother was neglected and abused in her own childhood. She was a chronic drug abuser and repeatedly incarcerated. She neither fed nor supervised her six children and they were taken from her because of this neglect. William's father and stepfather are incarcerated and have no contact with him.

A family friend cared for William until the age of seven, when he was turned over to the Social Services Agency for placement in foster care. In 1974, William was transferred to the first of four foster homes. He remained with one foster family for six years until they requested his removal because they could no longer handle his problems. They complained that 13 year-old William was destructive, disobedient, had poor hygiene and was disrespectful of adults (charges that might well be leveled against a million other adolescents).

Following this latest rejection, he moved to a group home for boys where his initial adjustment was promising. William had no contact with his mother or sisters until 1981. At that time, Mrs. O was participating in a drug rehabilitation program and she contacted her son. After initial resistance, William agreed to meet his mother and began visiting her weekly. However, William's behavior at the group home began to deteriorate. He had fights with other boys, did not observe curfews, and was involved in some neighborhood thefts, none of which resulted in charges being filed.

Meanwhile, the leader of the group home and William had repeated confrontations. Shortly therafter, the supervisor recommended to the courts that William be transferred to the state mental hospital for a 21-day evaluation. The system called it rehabilitation. William saw it as punishment. Even though forensic psychiatric reports concluded that inpatient evalutation was inappropriate, the judge ordered William hospitalized.

He was released fourteen days early. The psychological evaluation revealed that because of prior abandonment and rejection, William finds it difficult to establish nurturing relationships and is extremely sensitive to rejection, but does not require hospitalization.

Anger on the Outside

William's anger led him to the streets. He embraced the drug culture of his mother and sisters and it was rumored that he began trafficking heroin for them. He was arrested for possession and distribution of heroin in 1982. A trial date was set and William was assigned an attorney.

William's first and only brush with the criminal justice system was memorable. Unfortunately, his attorney was convinced of his guilt and cajoled him into pleading

(Continued on page 46)

Donna Wulkan, a high school teacher for remedial youth for ten years, graduated from Antioch School of Law in Washington, D.C. She now practices law and serves as a clinical professor at the law school, where she directs the juvenile law clinic. Her specialities are delinquency and child abuse.

COURT BRIEFS

Can the Courts Cope with Alcoholism?

Or is the problem better left to others?

Joseph L. Daly and Rosemary Kassekert

True or False: There are always two points of view on every issue. False; there are often many more than two. Usually there are as many views as there are people thinking about the issue. Take, for example, the case of *Welsh v. State of Wisconsin,* which was heard by the United States Supreme Court in October, 1983.

Drunk Driving v. the Sanctity of the Home

Lying naked in his bed in his own home, Ed Welsh thought he was having an alcohol-induced nightmare. A policeman was demanding he get out of bed and go downtown to blow into a machine. But when he pinched himself, it was all too true. He was under arrest for driving while under the influence, even though his car was stuck in the mud in a field near his home and he was in bed in a stupor.

On a cold, rainy night in April, 1978, outside of Madison, Wisconsin, Randy Jablonic saw Edward G. Welsh driving his eastbound car erratically down the left lane, and as a car approached from the east, Welsh's car swerved left to avoid a head-on collision and drove into an open field, stalling in the mud.

Jablonic pulled up behind Welsh's car to keep it from returning to the road and told the person who had been forced to stop to hurry and call the police. Jablonic said that Welsh unsteadily approached Jablonic's truck and asked for a ride home, but Jablonic refused. Jablonic testified at Welsh's trial that Welsh's speech was slurred and that he seemed concerned that Jablonic would call the police. After again asking for a ride, Welsh walked away.

Officer Daley, a policeman who arrived a few minutes later, testified that a license plate check on the vehicle revealed that it was registered to Welsh, who lived nearby. The officer recalled that a week or two earlier, he had arrested Welsh at his home for an alcohol-related disturbance which didn't involve driving. About 9:00 p.m., a half hour after the incident, Daley and another officer knocked at Welsh's door. According to Daley's testimony, one of Welsh's stepdaughters opened the door and beckoned them toward the stairs. The officer also testified that Mrs. Welsh consented to their entry, although she later testified at trial that she did not give her consent.

The officer said that he saw Welsh lying naked in bed with muddy pants at the side of the bed. He ordered Welsh to get up and put on his pants. The room, according to the officer, smelled of alcohol, and Welsh's speech was slurred. Daley arrested Welsh for operating a motor vehicle while under the influence of intoxicants and brought him downtown to administer a breathalyzer test, which he refused to take.

In a pretrial hearing, Welsh challenged

David Attie

the warrantless in-house arrest. The court ruled that the warrantless arrest was valid because there was probable cause to make the arrest, and because of the special factors of exigent circumstances and hot pursuit.

A second hearing was held before the same judge to determine whether Welsh's refusal to take the breathalyzer test was reasonable. The judge concluded that the refusal was unreasonable and ordered that Welsh's operating privileges be suspended for 60 days.

Welsh then appealed the order of suspension to the Wisconsin Court of Appeals, where he again argued the arrest was invalid because it violated the Fourth Amendment. The court of appeals applied a balancing test and ruled that the need to arrest was not so compelling as to justify an intrusion into the home.

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The Wisconsin Supreme Court, however, reversed the decision of the court of appeals and affirmed the circuit court's order suspending Welsh's operating privileges. The court held that there was sufficient information to establish probable cause and that also the immediate need for a blood alcohol test justified both a pursuit and a warrantless nonconsensual entry into a home to make the arrest. The court stated that exigent circumstances existed because of: 1) the hot pursuit of the defendant; 2) the imminent threat to public safety, and 3) the urgency involved in arresting the suspect in order to preserve evidence of a statutory violation—the alcohol content of the blood.

Various Points of View

On reading the facts of this case, some may feel, as the defendant argued, that the need to preserve evidence of a minor offense can *never* justify a warrantless nighttime entry into a home. Others may feel that the state of Wisconsin was correct in stating that Welsh was an imminent threat to public safety.

Before you form your opinion, look at other views of this case . . .

The Civil Libertarian

How would a libertarian view the plight of Edward Welsh? Perhaps the same as the Wisconsin Civil Liberties Union Foundation. The W.C.L.U. submitted an *amicus curiae* or "friend of the court" brief supporting Welsh and arguing that the police are never justified in entering a private home at night without a warrant and without consent. The argument is all the stronger in this case because the only evidence presented of Welsh's past involvement with the law was one arrest five years before for a non-criminal traffic offense. Another and contrasting libertarian view might be that all citizens have the right to travel the roads freely without the fear of being endangered or the threat of being disturbed by a drunk and disorderly driver.

Family Members

What about the wife and children of an

alcoholic? Alcohol is often at the root of family breakups—and at the very least may lead to financial, emotional and psychological problems in the family. Still, alcoholism itself is a problem rarely confronted or acknowledged publicly. For family members, then, alcoholism may be a mixed source of concern and embarrassment. For some families, fear that the police would break in to rout out the husband and father in the middle of the night would surely add to a generally disrupted homelife. Other families—either overtly or covertly—may view the intervention by an outside source as a godsend.

The Neighbors

Consider Ed Welsh's neighbors. They had, in this case, been disturbed by his loud and drunken behavior a number of times. Having such ruckus nearby must have made them frightened or angry; it is likely some welcomed Welsh's arrest as a solution to their noisy neighbor problem. Some people, though, view any police action as a threat; those with a distrust of police authority would probably prefer a noisy neighbor to a neighborhood "intrusion." And suppose that Welsh had managed to drive his car home, but the witness had given the police the wrong license number—perhaps off by one digit. Welsh's neighbors might justifiably become concerned about protecting their own homes from a wrongful entry by police.

Consumer Advocacy Groups

A faction likely to be single-minded in lacking sympathy for Ed Welsh's plight would be those involved in targeted consumer advocacy groups, such as Mothers Against Drunk Drivers (MADD) and Remove Intoxicated Drivers (RID). Most members of these groups have initially become involved after having a loved one killed, severely injured or permanently disabled by a drunk driver. Their stance is an emotional one: an invasion of the privacy of the home is a small price to pay for safeguarding the lives of the innocent on the streets and highways. Such groups lobby legislatures nationwide to focus attention on the complex human issues involved in drunk driving—with the goal that stricter laws against driving while intoxicated be enacted.

Legislators

Groups such as MADD and RID have just had their best year yet. In 1983, 40 states passed new, tougher statutes on drunk driving. At least nine passed laws requiring jail terms for second offenders; a total of 39 states now have such laws. And eight states—most recently Wisconsin—passed laws last year raising their legal drinking ages. According to the National Safety Council, the new laws have helped to drastically reduce the death toll in alcohol-related traffic fatalities, from 28,000 in 1980 to 25,600 in 1982. In addition to the laws raising drinking ages, the Safety Council credits tougher police action regarding the new laws for the lower fatality rates—most notably, an increased number of traffic check roadblocks and other enforcement tactics. According to one Council official, much of the recent improvement is due to "the increased perception by the public of the risk of arrest from drunken driving."

The Physician

Let's look at the situation from the viewpoint of a physician. Even here there will be disagreement. A witness might be mistaken as to Ed Welsh's condition. The erratic driving, slurred speech and request for a ride home could also be characteristic of someone who has been stricken with a sudden illness while driving and needs help. If such a person did manage to reach home and the police broke in on him or her a few moments later, the shock would likely worsen the condition.

A physician might look at the situation from this view and feel that what occurred should never be allowed to happen. Another doctor might have a patient who has chronic problems with alcohol and feel that nothing less than a shock like this would provide the needed impetus to seek professional help with the addiction.

The Chemical Dependence Counselor

A counselor who works with those who are chemically dependent might also feel that the person being counseled needs just such a jolt to finally begin to come to terms with the condition. Another counselor might feel that alcoholism is a disease and alcoholics should be treated no differently than anyone else with a disease.

The Police Officer

What about the officer whose job it is to attempt to keep the streets and highways safe from intoxicated drivers? The officer's rationale may be: "If I cannot arrest drunken drivers before the alcohol is dissipated from their blood, they will continue to be a menance on the highway . . . always managing to escape arrest."

You Be the Judge

The Welsh case may be most interesting because of its very rarity. Driving while drunk is all too common; thousands of drunk drivers are on American roads each day. Most go unnoticed. Still, many show up in alarming statistics. Every year, many thousands of people are killed in traffic accidents. According to a recent study by a pathologists' organization, as many as 9 out of every 10 accidents causing these deaths involve drunk drivers.

Of this relatively small number of "noticed" incidents of drunk driving, only a tiny fraction will ever reach the courts. Criminal charges are surprisingly rarely pressed by the distraught families of those killed or injured by drunk drivers. Most often, the driver receives probation and the order to watch a film on the perils of mixing drinking and driving. At most, the driver's license may be revoked for a short time. Others may be compelled by court decree to undergo alcohol therapy and counseling.

While the vast majority of drunk driving cases are resolved in some way other than legal avenues, the law is clearly what enables and compels those involved to confront the problem. Public policy is the human side which may temper how most drunk driving incidents are resolved, but the Supreme Court will be constrained to base its decision on "the letter of the law."

The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Because there is a warrant requirement, police officers do not have the power to conduct searches and seizures at their discretion. Most Americans view the Fourth Amendment as a safeguard that separates them from the fear that besets millions of others in various parts of the world who cannot sleep easily lest they hear a knock at the door in the middle of the night or, worse, hear the door being broken down by "the authorities." But the warrant safeguard can pose a dilemma for the police in their effort to enforce the laws.

Human life is as important as privacy. The slaughter on our highways caused by drunk drivers has become a national concern. It is difficult to pick up a daily newspaper without reading about a new tragedy caused by this problem. However, Americans have traditionally placed high value on *both* life and liberty. How would you decide the Welsh case?

Here Are Some Answers

The answer is not only stricter laws but stricter enforcement of those laws. Many new approaches to the problem are being tested in the various states. A judge in Illinois recently used the innovative approach of offering drivers convicted of driving while under the influence of alcohol the choice of jail or taking antabuse—a drug which diminishes a person's desire for alcohol by causing severe illness if alcohol is ingested while on the drug.

The President's Commission on Drunken Driving, in its report presented to President Reagan on December 13, 1983, urged a number of steps to combat drunken driving, including harsher punishment and mandatory penalties. One of its strongest recommendations was that Congress deny federal highway aid to states that have set their minimum legal drinking age at lower than 21 years.

Alcohol-related accidents are the leading cause of death for people ages 16 to 24. A report by the National Highway Traffic Safety Administration found that the eight states that had raised their drinking ages showed an average 28 percent annual reduction in nighttime fatal accidents involving 18- to 21-year-old drivers. Nearly half the states now set 21 as the minimum legal drinking age for alcoholic beverages.

The Reagan administration does not favor federal pressure on the states. But with drunk driving rapidly becoming one of the top domestic issues and with more concerned citizen groups such as MADD and RID applying pressure to state legislatures, it is likely that the states will come into line without federal intervention.

The final solution may be in laws against drunken driving as strict as those in Sweden and other foreign countries where caution concerning drinking and driving is a way of life. People rarely drive when they have been drinking because the penalties are so high. If those who drink know that if they drive while under the influence of alcoholic beverages they will not just be fined or given a second chance, but will permanently lose their license to drive or will face jail or prison terms, then chances are good they will be extremely careful to stay within the law.

When this ideal situation comes to pass, not only will citizens be safe on the streets and highways, but the Ed Welshs of the country will also be safe in the privacy of their bedrooms.

What do you think of these solutions? Do you have other ideas? What are the good points of the solutions discussed? What are the bad points?

How the Court Decides

The accompanying article looks at a wide variety of views on drunken driving and the sanctity of the home. Clearly, the "legal" point of view is only one way of confronting either issue. For example, there are laws that deal with alcohol addiction, but more often, the problem is "swept under the rug"—unacknowledged and untreated by the alcoholic and those "protecting" him or her. In the relatively rare cases where alcoholism is recognized and confronted, it is usually considered an illness and treated by doctors or social workers. Similarly, the law does protect privacy, but in the vast majority of cases—disputes over privacy between family members, co-workers, neighbors—we define and protect privacy informally, by custom and negotiation.

Nonetheless, the Welsh case will be decided by only one of these points of view—the legal one. You and I may think that Ed Welsh obviously needs help and that this legal case doesn't really get at the fundamental issues of his drinking problem, but the fact is that the nine justices of the United States Supreme Court will determine his fate—at least regarding this conviction and his attempt to guard his privacy.

Here is a brief look at the legal issues and arguments raised in the case, drawn from an article by Joseph L. Daly appearing in *Preview of U.S. Supreme Court Cases* (see page 54 for an explanatory introduction to *Preview*; also, beginning on page 55, there is an actual excerpt reprinted from the publication).

Issue

Whether police, without a warrant and without consent, can enter a suspect's home at night to arrest him or her for a misdemeanor.

Background and Significance

From both the legal and public policy standpoints so pervasive here, Welsh questions whether a drunk at home in bed is really a public threat. The state counters that the police prevented the driver from returning to his car or another automobile and posing a continuing danger to himself and the public.

The broad significance of this case lies in the collision between society's need to control the slaughter on the nation's highways caused by drunk drivers and the need to protect the sanctity and privacy of the home. Undeniably, both goals are valid.

The Supreme Court is likely to hand down its final decision on *Welsh v. Wisconsin* around June of 1984. A decision in favor of the state will signal the Court's concern over drunk driving and will be seen as giving the police more latitude. A decision for Welsh will be seen as strengthening the protections of the Fourth Amendment.

Arguments

For Welsh

Welsh argues that the need to preserve evidence of a minor offense can *never* justify a warrantless nighttime entry into a home, and that the holding of the Wisconsin Supreme Court conflicts with the common law and is an unprecedented invasion of the privacy of the home. Also, an entry at night to arrest for a minor offense should be "per se" illegal.

Welsh's brief ends by arguing that a decision favoring Welsh would foster rather than hinder effective law enforcement practices, because it would supply a "bright line" rule: "that police must never, without a warrant, enter a home to arrest a suspect whose only offense is minor." This would provide useful guidance to the police.

For the State of Wisconsin

Wisconsin argues that Welsh's rule is impractical and dangerous, since, if it would not permit a warrantless arrest in the case of minor offenses, it would apparently not allow the police to enter a home to stop a battery that in Wisconsin is a misdemeanor.

The state asserts that Welsh was incorrect when referring to the offense as "non-jailable," because Welsh had previously been arrested in his home for operating a motor vehicle while under the influence of an intoxicant. Under Wisconsin law, the first offense of drunk driving is not criminal because it is punishable only by a forfeiture, but each subsequent conviction within five years is a crime, because it is punishable by a fine or imprisonment or both.

Heading for Jail

(*Continued from page 41*)

guilty. William refused. He ran away from the group homes he was placed in pending trial but continued to show up for court dates. His attorney asked for a total of five continuances over six months. Yet William was in court each time ready for trial. On the sixth court date William did not appear for his trial because no one woke him. A custody order was issued (the equivalent to an adult arrest warrant) and William O was arrested and incarcerated and later found guilty of the charges. He has been detained in maximum security for five months.

While incarcerated, a psychiatrist's report predicted that unless intervention was immediate and intense, William would deteriorate into serious involvement with drugs or criminal behavior. As for William, he believes there are people "tricking him" and "looking for him." He hears noises saying "look out" when no one is actually present. He sometimes thinks he is going crazy. One prominent psychiatric researcher says that this paranoid thinking is present in many incarcerated juvenile delinquents. Incarceration reinforces alienation, anger, and negative self image and makes it easier to identify with and accept a criminal way of life.

Other countries have begun to understand that early childhood victimization often leads to apathy, disaffection, increasing institutionalization and eventually criminal activity. Sweden has addressed this problem with innovative alternatives. It has reduced the number of juveniles in jails from 1,000 to 400 in 10 years by increasing noncoercive and noncompulsory measures for delinquents. Children under fifteen cannot be punished but must be dealt with by child welfare boards. The law requires the police to turn over 15- to 18-year-olds not only to the prosecutor but also to a child welfare committee. These committees, made up of lay people elected by the local government, look after the welfare of the children. The committee investigates the home and the school and then recommends to drop the matter on first offenses, or to provide aid and financial support or to supervise the juvenile, or as a last resort to send him or her to an approved school. (See *Update*, Vol. 3, No. 2 Spring 1979.)

Alternatives Overlooked

In the United States, officials in the juvenile justice system rarely use other viable alternatives to incarceration. Cases are now litigated in juvenile courts in an adversarial milieu when they could be handled in a nonjudicial manner. For example, first offenders could be screened and referred to community agencies for needed services. Mediation between the victim of crime and the offending youth could be used to establish restitution and community service requirements in lieu of institutionalization. Lay hearing panels could ease the judicial caseload crunch and involve the community in the juvenile criminal process.

It is the communities, the neighborhoods, the schools and the families of these children that are responsible for rearing them and for neglecting or brutalizing them. The child then comes under the purview of the court and social services systems which complete the transformation from victim to victimizer. The neglect process with its attendant supportive services for the child get subsumed by the delinquency process. The child's life history of deprivation and humiliation recorded in a neglect case jacket is closed by delinquency prosecutors and a new unrelated criminal case jacket is opened. The transformation from victim of crime to criminal is complete.

To prevent this metamorphosis, the court and social services must guarantee that any child involved in the delinquency system is not excluded from receiving services from the child welfare or neglect system. If neglect and abuse is the root of delinquency, then a unified approach to referral and delivery of services such as financial support, medical care, job training, educational help or psychological aid is essential. Currently, there is little communication and coordination between these two systems. But cooperation is possible.

In the District of Columbia, an interagency policy agreement has been developed to ensure that *all* delinquents and persons in need of services (PINS) be referred from court to child protective services for thorough review where a child is under the age of twelve. When examining delinquency cases in the District of Columbia, care and attention is placed on finding factors that might be linked to earlier neglect or abuse. These factors include:

1. Parental problems, such as alcoholism, drug addiction and mental health problems;
2. Child living with other than natural parents;
3. History of truancy;
4. Poor or questionable physical condition of child as evidenced by the need for medical care and signs of physical abuse;
5. Social history of family involvement with either neglect or delinquency systems;
6. Physical condition of home, *e.g.*, no heat, etc.;
7. Frequency of referrals to either system;
8. History of domestic violence;
9. Mental health of child or unusual circumstances of offense.

The Washington, D.C. policy agreement suggests that in dealing with the connection between delinquency and child neglect and abuse, cooperation and not competition between youth systems can and should be mandatory.

Generation upon generation of young victims of society have been mishandled by institutions and bureaucracies. They inevitably become victimizers of the next generation. To break this cycle, we must acknowledge that institutionalization is the opposite of nurturing, and nurturing begins with the community's involvement. ☐

"For my next verdict, I'd like to pronounce one of my favorite sentences . . . .
I hope it's one of yours, too. And it goes something like this . . ."

Court Attacks

(*Continued from page 5*)

sentenced to long prison terms; more than 4,000 conscientious objectors were rounded up, and more than 400 served their terms in miltary prisons.

World War II

During World War II, the Japanese evacuation cases posed the historic democratic dilemma of respect for individual rights in the face of the drive for national self-preservation and victory. Of the 112,000 Japanese who were placed in relocation centers, 70,000 were United States citizens by birth. The fear, however, of widespread espionage, sabotage and "Fifth Column" activities caused the president to issue an executive order and Congress to pass laws which authorized the army to set up military areas subject to military control anywhere in the United States.

The racial nature of this action troubled some Americans, but was probably popular with many in view of the Pearl Harbor tragedy. Government spokesmen conceded that the relocation program was drastic, but invoked military necessity as their defense. The Supreme Court upheld most of the government measures on this basis.

In *Hirabayashi v. United States* (320 U.S. 81 (1943)), the justices supported the curfew regulation (8:00 p.m. to 6:00 a.m.) on the ground that, when the military security of the nation is at stake, the military can exercise control over civilians, even to the extent of discriminating against a particular group. *Korematsu v. United States* (320 U.S. 81 (1944)), sustained the constitutionality of the evacuation order as a security measure necessitated by an actual national emergency. Although it was conceded that the entire Japanese-American population was not disloyal, the majority of the Court declared that it was impossible to isolate the dangerous elements within the time available. This time three justices dissented.

In the third case of the war relocation controversy, *Ex Parte Endo* (323 U.S. 283 (1944)), a unanimous Court declared that an American citizen of Japanese ancestry whose loyalty to the United States had been investigated and upheld could *not* be detained against her will in a relocation center.

Although the facts and circumstances in the three cases differed, the underlying issue must have troubled some of the justices. Why were the Germans and the Italians exempt from drastic military-security measures? The movement of the justices from a unanimous ruling in the *Hirabayashi* case upholding the curfew regulation to a unanimous decision in favor of a Japanese-American citizen in the *Endo* case is a subject worthy of inquiry. Might one of the factors be the turn in military events in favor of the United States?

Korea and Vietnam

The Korean and Vietnamese conflicts raised constitutional questions of the highest order. Congress has the power to declare war, but does the president as commander-in-chief have the inherent power to make war? Merlo J. Pusey in *The Way We Go to War* explores the dimensions of this critical constitutional issue and warns of the consequences of postponing a resolution of the problem. The recently enacted War Powers Act was a response to what Pusey describes as "the yawning abyss of unrestrained power to make war."

During the Korean conflict, there occurred an historic controversy involving the very nature of our governmental system of checks and balances. It began innocently enough as a labor-management disagreement between the major steel companies and the United Steelworkers of America over the terms and conditions of a new collective bargaining agreement. When the union gave notice of nationwide strike, President Truman issued an executive order directing the government to take possession of and operate certain steel companies.

At the time the nation was engaged in a cold war with the Soviet Union and in a hot war on the side of the United Nations in Korea. President Truman's order declared a national emergency and ordered the secretary of commerce to seize and operate most of the steel mills by virtue of the authority vested in him "by the Constitution and the laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces of the United States." This approach to presidential power is based on the principle that the chief executive is the "steward" of the nation who has the "inherent power" to do everything that the needs of the nation demand, except for that which was specifically forbidden by the Constitution or Congress

The steel companies immediately attacked the president's move as an unconstitutional exercise of lawmaking power. The seizure was illegal because it had not been authorized by Congress.

In a classic exposition of the powers of the president vis-a-vis private property, the Supreme Court in *Youngstown Sheet and Tube Company v. Sawyer* (296 U.S. 661 (1952)) put the stewardship theory at rest—for the time being.

Each of the six justices of the majority felt impelled to write an essay on the nature of the presidential office. Justice Black, writing the opinion of the Court, declared:

> . . . Even though "theatre of war" be an expanding concept, we cannot with faithfulness

ACADEMY
OF
ASSERTIVENESS
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to our constitutional system hold that the Commander in Chief of the Armed Forces had the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the nation's lawmakers, not for its military authorities.

Chief Justice Vinson's long dissent attacked the "messenger-boy" concept of the presidency. When confronted with an emergency, the president must have the power to do more than "confine himself to sending a message to Congress recommending action." The history of the presidency, he emphasized, had been the story of executive leadership on many important occasions. From Washington to Franklin D. Roosevelt, presidents have acted "with or without explicit statutory authorization," to enforce the will of the legislature or to establish programs "until Congress will act."

In this ruling, the Supreme Court acted in time of crisis to reaffirm our system of checks and balances and to protect the right to private property. Since this crisis was a limited one compared to a world war, it is interesting to conjecture what the decision might have been under more trying circumstances. In any event, President Truman obeyed the Court's opinion.

The Vietnam crisis raised a number of important constitutional questions. Since there had been no congressional declaration of war, was the war constitutional? Were the Gulf of Tonkin Resolution and subsequent congressional military appropriations equivalent to a declaration of war? Was the Vietnam War another example of the use of the president's inherent powers in foreign affairs?

It is always possible, of course, to have a crisis within a crisis. The Rand Corporation, a think tank, produced for the Pentagon a 47-volume *History of U.S. Decision-Making Process on Vietnam Policy*. Although classified as top secret, photocopies of 18 of the volumes found their way into the newsrooms of the *New York Times* and the *Washington Post*. As soon as the newspapers started to publish copies of the documents, the government sought an injunction on the ground that exposing top secret documents would injure the war effort, as well as strain relations among the United States and its allies. The newspapers responded that the First Amendment prohibits censorship of the press, especially prior restraint.

In *New York Times v. United States* (403 U.S. 713 (1971)), the Court, in a six to three decision and with nine opinions attesting to the critical nature of the controversy, ruled in favor of the newspaper. The opinions offer important insights into the thinking of the justices on the fundamental role of the press in time of stress in a nation's history. As in previous cases during crisis, the justices seek to equate the demands of war with the power of the press, and this time censorship is condemned.

Cambodia and the Court

The publication of the *Pentagon Papers* brought to the attention of the American people aspects of the war which had not been widely known. This added to the growing opposition to the prosecution of the war. When President Nixon announced to the nation on April 30, 1970, that our military had been ordered to launch an invasion of Cambodia in order "to clean out major sanctuaries on the Cambodian-Vietnamese border," the opposition took the form of a lawsuit initiated by Congresswoman Elizabeth Holtzman of New York and several Air Force officers serving in Asia. They sought an injunction against continued American air operations over Cambodia.

The record of the judicial proceedings in this case is illuminating in its insights into the delicate relationships between Congress, the president and the judiciary in times of crisis. A United States district court granted a permanent injunction against the secretary of defense and other administration officials, prohibiting them from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia." The injunction, however, was delayed pending an appeal before the court of appeals. This court vacated the injunction, and the applicants for the injunction then carried their case to Justice Marshall as circuit court justice, since the Court was not in session at the time. The justice declared that, if he could decide this case on his own, he would probably declare the Cambodia operation unconstitutional. However, "the proper response to an arguably illegal action is not lawlessness by judges charged with interpreting and enforcing the laws." The applicants, he ruled, should appear before the court of appeals on the date assigned and present their case on the merits.

Undaunted, the applicants took their case to Justice Douglas as circuit justice, and he decided to reinstitute the injunction because, he said, we are dealing here with a matter of life and death for Cambodian farmers and American pilots. As expected, the government requested Justice Marshall, in turn, to overrule Justice Douglas. Justice Marshall phoned the other seven justices, and they agreed with him to stay the injunction until the case was heard before the court of appeals.

By this time, the matter was moot because the troops had been withdrawn and Congress had acted on a measure to cut off funds for the operation. The story of these rather unusual proceedings is found in *Holtzman v. Schlesinger* (414 U.S. 1304 (1973)).

The issue of the Constitution in times of war or military action will continue and the president, Congress, and the judiciary will have to wrestle with these complications affecting the health of the American commonwealth.

Peacetime Crises: Before the Civil War

The founding fathers were deeply concerned with the idea of power. They divided it between the federal government and the states, and they separated it among the legislative, executive, and judicial branches. Inevitably, when powers are divided and separated, disagreements and disputes arise which may at times emerge as crises. The Kentucky and Virginia Resolutions, the Hartford Convention, and the South Carolina Ordinance of Nullification in 1832 illustrate critical differences concerning the nature of the union and the persistence of the states' rights position.

American history textbooks handle in greater or lesser detail "the Great Case" and "the Great Chief Justice"—*Marbury v. Madison* (5 U.S. 137 (1803)) and John Marshall. The drama of this crisis concerning the ultimate arbiter of the meaning of the Constitution cries to be lifted out of the confines of the textbook and transmuted into living theatre. By declaring unconstitutional a congressional law and then state laws, as well as overruling the highest courts of the states, Marshall established judicial review and, by implication, judicial supremacy. Thus, in transforming *Marbury v. Madison* into a constitutional crisis, Marshall set the stage for future crises involving the Supreme Court vis-a-vis the president and Congress.

If Jefferson and the Republicans attacked John Marshall and the Supreme Court for "usurping" constitutional power, it was mild compared to the congressional reaction to the *Dred Scott* case, in which the justices declared unconstitutional a law of Congress for the second time. By voiding the Missouri Compromise and by relegating slaves to the legal category of property, the majority of the justices contributed to "the impending

Project '87 to Commemorate Bicentennial

The 1976 bicentennial of American independence was commemorated by events like the International Brick and Rolling Pin Throwing Contest at Stroud, Oklahoma; Spirit of '76 caskets in red, white and blue; a 907-foot banana split in Anchorage, Alaska; and a 69,000-pound birthday cake in Baltimore.

These, along with the tall ships and firework displays, were a lot of fun, but what did they add to our understanding of the Declaration of Independence and of the revolutionary era in American history? James MacGregor Burns and Richard Morris decided to see to it that the next bicentennial—that of the Constitution in 1987—had a more meaningful commemoration. Burns, who was at that time president of the American Political Science Association, and Morris, at that time president of the American Historical Association, proposed a joint effort to strengthen the teaching of the Constitution. That effort, Project '87, officially began in 1978. It has sponsored a wide variety of activities, including materials, a magazine, media efforts, and workshops.

The materials—*Lessons on the United States Constitution*—were developed by John Patrick of the Social Science Development Center of Indiana University and Richard Remy of the Mershon Center of Ohio State University. The book contains 65 separate lessons, including materials for students and instructions for teachers. The lessons cover all areas of American constitutional history and key concepts in the constitutional design of American government. They are designed as supplements for the American history and government textbooks now being used by secondary school teachers and students. They'll be available this summer. The price for the more than 400-page book is not yet determined, but the project is committed to keeping it as low as possible.

Project '87's magazine is *this Constitution*. This quarterly contains three types of features: articles by specialists written in a lively and accessible manner, documents relating to the Constitution, and information about other bicentennial programs, thus providing a clearinghouse of bicentennial events. Subscriptions are free to institutions planning bicentennial programs. Individuals pay $10 a year, and institutions $16 per year, with a bulk rate of $1.75 each for ten or more copies.

Workshops are being held for university faculty and have been held for teachers abroad. There is a possibility of TV and radio programs associated with the project, as well as televised community forums in cooperation with groups such as the League of Women Voters.

Project officials stress that they are exploring how they can best serve the needs of teachers, and they urge *Update* readers to inform them about activitites (workshops, demonstrations, creative programs) that will assist their teaching.

For more information on any aspect of Project '87, contact Sheilah Mann, Director, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036, 202/483-2512. The Deputy Director, Cynthia Harrison, available at the same address and phone number, is a historian who may also provide assistance.

The National Endowment for the Humanities, which has also funded the Constitutional History in the Schools project of the American Historical Association (see page 5), has provided significant funding to Project '87. Other grantors supporting Project '87 include the William and Flora Hewlett Foundation, the Rockefeller, Ford, and Mellon Foundations, and the Lilly Endowment.

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crisis," the Civil War. The attack on the Taney Court was as sharp and prolonged as any in American history. Once again judicial review survived the darts and arrows of influential critics, but it did become a contributing cause of the Civil War.

FDR Takes on the Court

In the tradition of Jefferson, Jackson, and Lincoln, Franklin D. Roosevelt attacked the Court for its dismantling of his New Deal program designed to save the nation from the worst depression in its history. The litany of laws declared unconstitutional is mentioned in most textbooks, and it is easy to understand, as one reads the record, why a strong president can find the Court a constitutional obstacle to his plans for the country.

When re-elected by one of the greatest electoral sweeps in our history, President Roosevelt decided that the people had given him a mandate to continue New Deal policies. As he saw it, his first task was to reorganize the judiciary and convert it from an enemy to an ally. On February 5, 1937, he sent his court reform plan to Congress, and it was immediately attacked as a "court packing" scheme. The much-debated bill provided that, whenever any federal judge who had served 10 years or more did not retire after reaching his seventieth birthday, the president could appoint an additional judge to the court upon which the judge was serving. If passed, the president could have appointed six additional Supreme Court justices and up to fifty judges in the federal judicial system.

The attack on the plan by newspapers, the bar, and members of Congress took on the dimensions of a constitutional crisis. Although the size of the Court had varied from five to ten, and although there was nothing sacred about the number nine, the Court reform plan was attacked as "an utterly dangerous abandonment of constitutional principle," as an attempt to "destroy the independence of the judiciary," and as a violation of "every sacred tradition of American democracy." Regarded by opponents as a presidential attempt to subvert the Constitution and our system of checks and balances, the plan had little chance of passage in the form in which it had been submitted. When the Court in a series of five to four rulings in March to May, 1937, upheld the National Labor Relations Act, the social security law, and the Washington state minimum wage law, the "court packing" issue passed into the limbo of history. It was said at the time that a switch in time (by Justice Roberts and Chief Justice Hughes) had saved nine.

Post-War Crises

The nature of radicalism in American history has created problems for state legislators, Congress, the president and the Supreme Court. For example, suspicion and hatred of Socialists, Communists, pacifists and aliens at the end of World War I led more than 20 states to pass sedition and criminal syndicalism laws which prohibited advocacy of the overthrow of the government and forbade any program of force and violence to change our political, economic, or social institutions. It was during this period that Attorney General Mitchell Palmer staged many raids on the homes of labor leaders, aliens and other persons suspected of radical leanings. It was also at this time that the New York state legislature expelled five members of the Socialist Labor Party, although the party was legal in New York.

The same atmosphere prevailed after World War II due, in large part, to the Cold War between the United States and the Soviet Union. Suspicion and fear of the Communist Party and "fellow travelers" as a threat to the security of the United States led to President Truman's loyalty order of 1947, the passage of the Internal Security Act of 1950, state loyalty programs and congressional and state investigators of subversion. It was a period in which Senator Joseph McCarthy dominated the news with his crusade against those he considered disloyal.

Those who were affected by this legislation, as well as those who saw in these developments a crisis in civil liberties, turned to the Court for protection. Although the rulings during this period did not satisfy all parties, in the main the Court handed down a number of decisions which protected individuals against capricious, arbitrary and unreasonable procedures.

In addition to civil liberties issues, the post-World War II era brought to center stage the persistent historic problems of civil rights for blacks. The war which had just been won for the preservation of democratic values carried with it the message of equality on the home front. With its unanimous ruling in *Brown v. Board of Education* (349 U.S. 294 (1954)), the Supreme Court exploded a bombshell over the nation, and the fragments hit every state and every institution of government—national, state and local. The civil rights issues which followed the Civil War into the Reconstruction Period had now become a civil rights crisis. There ensued what can only be described as "orgiastic declarations of defiance" throughout the south.

In his classic study of the Brown cases, *Simple Justice*, Richard Kluger summarizes the southern response. A *Southern Manifesto*, signed by 101 Congressmen from the 11 southern states, condemned the rulings and vowed defiance. Governor Faubus used the National Guard to prevent a small number of black children from enrolling in a Little Rock high school. There were pictures of governors standing at the university gates preventing black students from entering. And Prince Edward County closed its public schools rather than desegregate.

Presidents Eisenhower and Kennedy, the former somewhat reluctantly, acted to carry out the Supreme Court decisions. And Congress eventually took the initiative in enacting the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

The chain reaction set up by the Brown cases and their progeny has set up flares which continue to illuminate the dilemma of equality in the face of custom and tradition. Affirmative action is a case in point.

The chain reaction set up by the *Brown* cases and their progency has set up flares

A History and Law Bookshelf

Because the law weaves its way through virtually every aspect of American history, a comprehensive law and American history collection would fill a huge building. Here is a brief sampling of some books of special interest.

Rationale

Freund, Paul, "The Law and the Schools," in *On Law and Justice*, Cambridge: Harvard University Press, 1968.

***Social Education*, Vol. 36, No. 6, October, 1972, especially articles by Richard C. Remy and by Judith A. Gillespie and Howard E. Mehlinger.**

Curriculum Materials

Croddy, Marshall and Suter, Coral, *Law and World History: Of Codes and Crowns—The Development of Law* and *Major Issues in American Government: The Crime Question—Rights and Responsibilities of Citizens*, Law-in-Social Studies Series, Los Angeles: Constitutional Rights Foundation, 1983 and 1984 respectively. The next entries in the series will focus on U.S. History.

Lengel, James G. and Danzer, Gerald A., *Law in American History*, Glenview, Illinois: Scott Foresman & Company, 1983.

Ratcliffe, Robert (ed.), *Great Cases of the Supreme Court* and *Vital Issues of the Constitution*, Trailmarks of Liberty Series, Boston: Houghton Mifflin, 1975.

Roe, Richard L., Arbetman, Lee, and Morey, Rick, *Great Trials in American History*, St. Paul, Minnesota: West Publishing Company, 1984.

Smith, Melinda, Rodriguez, Kenneth, and Williams, Mary Louise, *Law in U.S. History: A Resource Manual*, Boulder, Colorado: Social Science Education Consortium, 1983.

Starr, Isidore, *The Idea of Liberty: First Amendment Freedoms* and *Justice: Due Process of Law*, St. Paul, Minnesota: West Publishing Company, 1978 and 1981, respectively.

Resource Materials

General

Pusey, Merlo J., *The Way We Go to War*, Boston: Houghton Mifflin, 1969.

Steamer, Robert J., *The Supreme Court in Crisis: A History of Conflict*, Amherst, Massachusetts: University of Massachusetts Press, 1971.

Berman, Harold, *Law and Revolution*, Cambridge: Harvard University Press, 1983.

First Amendment

Chafee, Zechariah, Jr., *Free Speech in the United States*, Cambridge: Harvard University Press, 1954.

Emerson, Thomas I. *Toward a General Theory of the First Amendment*, New York: Random House, 1963.

Smith, J. M., *Freedom's Fetters: Alien and Sedition Laws and American Civil Liberties*, Ithaca: Cornell University Press, 1956.

Racial Discrimination

Kluger, Richard, *Simple Justice*, New York: Alfred A. Knopf, 1975.

Watergate

Jaworski, Leon, *The Right and the Power: The Prosecution of Watergate*, New York: Pocket Books, 1977.

Sirica, John J., *To Set the Record Straight*, New York: New American Library, 1979.

The Watergate Hearings: Break-In and Cover-Up, edited by the staff of the *New York Times*, New York: Bantam Books, 1973.

Woodward, Robert and Bernstein, Carl, *All the President's Men*, New York: Simon and Schuster, 1974.

which continue to illuminate the dilemma of equality in the face of custom and tradition. Affirmative action is a case in point.

Watergate as Crisis

In the early 1970s, the civil rights controversy was overshadowed by the Watergate episode, probably the most serious constitutional crisis in this century. This is not the place to detail the story of the plumbers' break-in, the cover-up, the "Saturday Night Massacre," and "the smoking gun." What distinguishes the Watergate crisis from all the others is that it posed a serious confrontation between the president and the Supreme Court and, at the same time, involved the Congress. Not only were presidential aides convicted of crimes and imprisoned, but even the president was named an unindicted co-conspirator.

The presidential-judicial confrontation took the form of a landmark ruling in *United States v. Nixon* (418 U.S. 683 (1974)), argued on July 8, 1974, and decided on July 24, 1974. This, in and of itself, conveys the critical nature of this controversy. The fact that the decision was unanimous (Justice Rehnquist abstained) may have been a response to the president's comment that he would obey only a definitive ruling.

Could the Supreme Court force the president of the United States to turn over tapes and transcripts in his possession to the special prosecutor? If so ordered, would he obey? The president pleaded executive privilege and the need for confidentiality between him and his advisors. The Court rejected this argument and sided with the special prosecutor, who argued that the tapes and transcripts were required to prosecute the Watergate conspirators. A key paragraph from the Court's opinion conveys the constitutional priorities of the justices:

> We conclude that when the ground for asserting [executive] privilege as to subpoenaed materials sought for use in a criminal case is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

The president turned over the requested material to special prosecutor Jaworski. But that compliance did not end the story. The House Judiciary Committee initiated impeachment proceedings on grounds of obstruction of justice, abuse of power and defiance of subpoenas. On August 9, 1974, Nixon resigned.

The constitutional crisis was over.

Conclusion

This panoramic view of the United States Constitution in times of crisis may have overlooked some important episodes and included others which may not seem to be of overarching historical importance. In any event, what has been presented is an agenda for discussion and consideration. The conclusion to be drawn is that the Constitution has survived. The question that remains to be answered is what are the factors which contributed to survival?

In 1987, Americans will be celebrating the bicentennial of the drafting of the Constitution of the United States—the oldest written constitution of a nation-state. And, in 1991, we shall be commemorating the ratification of the Bill of Rights—that precious treasury of our historic rights. These landmark events on the historical horizon will be marked by floats and parades, fireworks and speeches and special T-shirts and memorial tokens. But how will educators communicate these bicentennials in their classrooms? Will they continue with their routines and remain bystanders, or will they bring new life to their American history courses of study?

Declare War

(Continued from page 15)

On June 26, 1973, Congress attempted to end the bombing of Cambodia by passing a bill cutting off funds for Cambodia military activities, but the president vetoed it; Congress did not have sufficient votes to override the veto. Congress then passed a bill that Nixon did not veto. It cut off funds for American air strikes as of August 15, 1973. The bill stated:

> Notwithstanding any other provision of law on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by the United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

At this point, Congresswoman Holtzman and the air force officers filed suit against Schlesinger, in his capacity as Secretary of Defense, challenging the actions in Cambodia and charging that the president had no authority under the Constitution to conduct military operations there.

ISSUES

The Court had to consider the following issues:

1. Did the president lack the authority to bomb Cambodia with no explicit authorization from Congress to do so or was this military action within his authority under the war powers provisions of the Constitution?
2. Was the use of executive power to order the bombing of Cambodia an issue on which the judiciary could properly make a decision? Or was this a political question beyond the range of the decision making power of the courts?

The following are some of the arguments that can be made for each side in this hearing:

ARGUMENTS FOR HOLTZMAN

Issue 1: Constitutionality

Military activity had not been authorized by Congress, therefore the bombing of Cambodia violated article I, section 8 of the Constitution.

The bombing violated the spirit of the Fulbright Proviso because Congress did not authorize military activity in Cambodia after American troops were withdrawn. The actions in Cambodia represented a step-up in military operations which were never authorized by Congress.

Issue 2: Political or Judicial issue

The propriety of military operations in Cambodia is a question within the courts' purview because there was a radical change in the character of the war without proper congressional approval.

The Cambodian bombing was not just a political or military decision; it involved the use of power which raises constitutional questions that need to be decided judicially.

ARGUMENTS FOR SCHLESINGER

Issue 1: Constitutionality

The president acted within constitutional limits because Congress gave the president implied authority to continue the military operations in Cambodia by imposing a deadline for the operation to stop.

It was within the president's authority to continue the bombings because important security interests were being protected and foreign policy objectives furthered.

Issue 2: Political or Judicial Question

The issue of presidential authority in the Cambodia bombings was a political and military one, on which the courts have no power or ability to rule.

How the executive decides to disengage the United States from the conflict is outside the expertise of the courts. These decisions should be left to the president as commander-in-chief, and to his military advisors and generals.

Resource

4.

Decision in The Prize Cases

For all Students

The Supreme Court handed down a decision favorable to the position of President Lincoln: "We are of the opinion that the president had a right . . . to institute a blockade of ports in possession of the states in rebellion, which neutrals are bound to regard."

The Court supported Lincoln's definition of the conflict, giving approval to how he met the challenge of "armed hostile resistance." The Court stated: "It is not the less a civil war, with belligerent parties in hostile array, because it be called an 'insurrection' by one side and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged to constitute a party belligerent in a war according to the law of nations. . . ." The Court was acknowledging the president's right to call it an insurrection—thus denying belligerent status to the south—and at the same time use the blockade and take prize legally, belligerent acts under international law.

As to whether an actual war existed without a formal declaration by Congress, the Court held that it did.

> The greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections . . . it nevertheless sprung forth suddenly from the parent brain, . . . in the full panoply of *war*. The president was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact. . . .
>
> If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every Act passed at the extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency. . . .

If an actual war existed without a formal declaration by Congress, can the president expand his war making powers as a *political-military* necessity in meeting the crisis without fear of each decision being presented as a *justiciable* question? "Justiciable" means an issue which is proper for examination in a court. The Court seemed to imply in this case that there were war making powers which had to be deemed political and were outside the courts' purview.

The Court held:

> Whether the president in fulfilling his duties, as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. He must determine what degree of force the crisis demands.

Resource

5.

Decision in Holtzman v. Schlesinger

For all Students

The federal district court agreed with Holtzman and issued an injunction against the bombing. Secretary of Defense Schlesinger took the case to the United States Court of Appeals for the Second Circuit, asking the court to stay (or hold) the injunction on the bombing until a full hearing could be held on the case. The appeals court ruled in favor of Schlesinger.

A hearing was set, but in the meantime, Representative Holtzman appealed to Justice Thurgood Marshall of the Supreme Court to reinstate the injunction against the bombing and reverse the court of appeals stay. Justice Marshall declined to make a decision of such gravity without the full Court, which was not in session. Holtzman then appealed to Justice William O. Douglas, who agreed to reinstate the injunction against the bombing. That same day, Schlesinger returned to Justice Marshall, who polled the rest of the Supreme Court justices and ruled to uphold the stay.

The court of appeals, in reversing the injunction, stated:

> It is true that we have repatriated American troops and have returned American ground forces in Vietnam but we have also negotiated a cease fire and have entered into the Paris Accords which mandated a cease fire in Cambodia and Laos. The president has announced that the bombing of Cambodia will terminate on August 15, 1973 and Secretary of State Rogers has submitted an affidavit to this court providing the justification for our military presence and action until that time. The situation fluctuates daily and we cannot ascertain at any fixed time either the military or diplomatic status. We are not in the position to determine whether the Cambodian insurgents are patriots or whether in fact they are inspired and manned by North Vietnam Communists. While we as men may well agonize and bewail the horror of this or any war, the sharing of presidential and congressional responsibility particularly at this juncture is a bluntly political and not a judicial question.

By upholding Nixon's action, the courts forced Congress to resort to legislation. Thus, the War Powers Act of 1973 came into being—and was enacted with sufficient support to override the presidential veto. Some of the congressional support for overriding the veto, however, was clearly based on party politics and symbolic value rather than the contents of the Act. Some members of Congress voted to override the veto, for example, because they were strongly opposed to the message Nixon expressed in his veto statement. Others voted for the override as a way to reassert congressional power in making legislation, as Nixon had vetoed other proposed legislation eight times before during that congressional session.

The War Powers Act sets forth three main requirements seen as blatant limitations on executive warmaking powers:

1. presidential consultation with Congress,
2. presidential reports to Congress, and
3. congressional termination of military action.

Specifically, the Act provides that, in the absence of an express declaration of war, the president is authorized to conduct limited military action with troop deployment for up to 60 days, with an option to act for an additional 30 days. Congress retains the power during that period to remove any troops—a power which is no way limited by the possibility of presidential veto. The president must also report in writing within 48 hours after hostilities are initiated.

It is still unclear whether this Act will be effective in resolving the conflict between Congress and the executive branch over the nature and limit of the executive war powers.

Here's How to Do It

OBJECTIVES

This class exercise will help students understand the war powers within the executive and legislative branches of government—how they work together and how they conflict. More specifically, students will explore in small groups and as a class the constitutional implications of the executive use of war powers during the Civil and Vietnam Wars. The position of the judiciary on executive and legislative war-making powers will also be examined.

The exercise as written is best suited to the eleventh grade, although it can easily be adapted for other levels. From start to finish, the exercise, which includes a roleplaying session, will account for nearly two class periods. All background materials are provided here—including the five resources to be copied and shared with students. An attorney, historian or political scientist specializing in the Constitution are recommended as good resource people, but don't worry if such a person is not available—you'll be able to handle the exercise by yourself.

DISCUSSION

War Powers and the Constitution

Distribute the background on War Powers (Resource 1) to all students. Ask students to work together either in pairs or as a whole class—identifying the war powers of the executive and legislative branches as set out in articles I, II and IV of the Constitution. Read the Resource and discuss with the class the war powers issues raised in the Constitution.

ROLEPLAYING

Roleplaying will be the main activity of this two-day class study. Divide the class into two groups. Group one will receive the background on the Civil War and discussion of the Prize Cases (Resource 2). Group two will be assigned the background information on the Indochinese War and the case of *Holtzman v. Schlesinger* (Resource 3). Explain that each group will be responsible for putting on an appellate hearing of their assigned case—acting as the judges and as attorneys for each side while the other group observes. After distributing the assigned resources, select four students in each group to be an attorney team representing the plaintiff and four to represent the defendant. The students remaining in both groups will act as a panel of judges and make the final decisions on which side should win.

Familiarization: First, have the groups read the facts of the cases. Ask students to restate the main facts involved, list them on the board and encourage the whole class to discuss those facts. Then, ask students to write the issues on the board so that the whole class can compare the two case issues side by side.

Hearing Procedure: Explain to students that the hearing will be conducted the same as a real-life trial. First, attorneys for the plaintiffs will present their arguments, followed by defendants' attorneys' arguments. Each of these argument sessions should be 5 to 10 minutes long. Then, attorneys for the plaintiffs will have a short time (2 to 4 minutes) for rebuttal. Judges may question the attorneys both during and after delivery of the arguments.

Preparation: Allow at least 30 minutes of class time to prepare for the hearings, or assign the preparation as homework. The attorney teams should prepare by practicing the arguments they will make for the plaintiffs and defendants. In this work, they can use the arguments set out in the resources, but should also be encouraged to think up some of their own. The panel of judges should prepare a list of questions they might ask the attorneys making the presentations.

Case Presentation: Deliberation by the panel of judges will be delayed until arguments in both cases have been presented. Have group one conduct the simulation of the Prize Cases first, while the rest of the class observes. Ask observers to take notes on the arguments for both sides. Then conduct the simulation of *Holtzman v. Schlesinger.*

Judges' Deliberations: Have both panels of judges deliberate at the same time at opposite ends of the room. Allow the rest of the class, situated near the center of the room, to listen to the deliberations. Have each panel appoint a spokesperson to take notes and deliver the opinion and reasoning of the court.

DEBRIEF

As a whole class, discuss the two opinions. Then distribute Resources 4 and 5 to all students and compare the actual court opinions with those of the student judges. The following are some questions you may want to pose during the debriefing session:

- Do you agree or disagree with Supreme Court Justice Robert Jackson that the power to make war "is the most dangerous one to free government in the whole catalogue of powers . . ."? Why or why not?
- In both cases here, the Supreme Court determined that there are certain uses of war powers which are political rather than judicial questions. When do questions of the conduct of a war involve both political and judicial concerns?
- What is an "undeclared war?" What is required for Congress to authorize a war?
- In both cases here, the courts seem hesitant to rule against actions taken by the president in his conduct of the war. Can you explain this?
- What role should the judiciary play in conflicts between the legislative and executive branches over how war powers are exercised?
- Why did Congress feel it was necessary to pass the War Powers Act of 1973? Will the War Powers Act in any way change the way the president enters into the decision of whether to conduct a war? Do you think the War Powers Act will work?

"Gentlemen of the jury and mother . . ."

Introducing *Preview*

The American Bar Association's *Preview of United States Supreme Court Cases* is a unique publication that can help classroom teachers instruct about hot legal topics. Pages 55 and 56 of this issue reprint a *Preview* article which will show you how.

Preview is published weekly and covers every case orally argued before the U.S. Supreme Court—about 150 to 170 cases each year. Law professors analyze each case in articles of 1,500 to 2,000 words. Each article provides insight into the issue to be decided, the facts of the case, its significance and background, and the arguments of the opposing sides. The articles come out, in most instances, months before the cases are decided by the Court.

Preview is primarily intended for journalists covering the U.S. Supreme Court, so that their articles about the oral arguments, as well as about the decisions when they are finally rendered, will be more accurate and understandable. In keeping with this goal, articles are written in lay people's language, with special attention to making them readable and highlighting the cases' human interest and importance to society.

Teachers around the country have found *Preview* to be a useful teaching tool. Since the cases have yet been decided, it's a natural for moot courts, debates, and other classroom activities which pit one side against another in focusing on controversial issues.

Many of the cases covered should fit neatly into standard law-related curricula, since they deal with the First Amendment,criminal law (Fourth, Fifth, and Sixth Amendments), and due process of law.

Subscriptions are $50.00 per year (for from 20-30 issues, adding up to more than 400 pages). There are no restrictions on copying the material, however, and teachers have gained access to the publication by asking that their libraries order it.

To order, or for further information, contact: Order Fulfillment, American Bar Association, 1155 East 60th Street, Chicago, IL 60637.

Both Ways

(*Continued from page 23*)

may, however, be unavailable. Some would argue, for example, that the real issue is whether police misconduct regarding the Fourth Amendment has been reduced in the years since *Mapp*. Researchers have no baseline data (*i.e.*, data from the pre-*Mapp* years) and, as noted, since *Mapp* the rule has applied nationwide. Therefore, the deterrent effect of the rule, as compared to other remedies or no remedy at all, cannot be fully evaluated.

The conventional wisdom regarding the social cost of the rule seems to be that "countless guilty persons are set free to continue their criminal activities." However, the research tells a different story. The high social cost argument assumes: 1) motions to suppress of those charged with serious offenses are often granted, and 2) granting the motion releases the defendant.

The best evidence on social cost is a General Accounting Office (GAO) study which concluded that the exclusionary rule has had no major impact on the criminal justice system. The GAO found that federal judges barred evidence in only 1.3 percent of the cases studied. The GAO only investigated federal courts, which limits the impact of the study, since the vast majority of criminal prosecutions occur in state court. However, it seems clear that "the image of police handcuffed by the courts may be overdrawn."

Looking Ahead

Are there any alternatives to the exclusionary rule?

Yes, a number of other options are under study. The options suggested to date fall into two categories: internal discipline and external control.

Police disciplinary boards (some already exist) could be established for state and federal law enforcement agencies. Internal discipline against police charged with misconduct could be instituted by the individual police department or by individual complainants. A procedure would have to be established to determine whether or not a constitutional violation occurred. Where such violations were found to exist, disciplinary boards could provide a penalty for the officer and government compensation to the victim. However, critics of this system doubt that police departments will ever effectively punish their own officers.

Under the category of external control, some have suggested that a mini-trial of an offending officer follow a criminal trial in which the defendant alleges an illegal search and seizure. The evidence in question would be admitted at the trial. At the mini-trial that followed, the judge and jury could determine, when appropriate, the penalty for the officer and damages for the defendant.

Two other forms of external control already exist. Under the Federal Tort Claims Act, a citizen can sue a federal law enforcement agency (*e.g.*, the FBI) for an unlawful invasion of privacy. Section 1983 of the Civil Rights Act of 1871 allows a citizen to sue state and local police for violating constitutional rights. However, police can defend against such suits by demonstrating that they acted under a good faith belief that their action was constitutional and that such belief was reasonable. In the past, it has been often difficult (and expensive) for citizens to win section 1983 actions against the police.

The proposed options tend to focus on mechanisms while ignoring the extremely difficult issue of what standard of proof should be required in an action against the police.

Conclusion

We have now had 65 years of experience with the exclusionary rule in federal courts and at least 20 years of experience in state courts. The debate over the rule's continued viability continues to intensify. Many observers think the verdict on the exclusionary rule—to reaffirm, modify or abolish—will soon be in.

But even more interesting—and perhaps ultimately more important—than the fate of the rule is the *process* by which its fate is being decided. It was adopted at first by judges, acting alone, with no advanced notice and little fanfare.

As it entered into the national consciousness and into national debate, more and more people became involved: state decision-makers (many of whom adopted it), researchers, lower court judges, presidents, members of Congress—and, of course, the people themselves, who have expressed strong opinions on the rule. All of these actors will play a role in the final disposition of the rule, when and if that decision is made by the Supreme Court. (After all, presidents appoint and Congress approves justices, and no court can long function if it totally ignores public opinion.) Whatever happens to the rule, the controversy over it tells us a good deal about how decisions—even over the Constitution—are arrived at in our democracy. □

"Good Faith" and the Exclusionary Rule

Edward T. McMahon

Michigan
v.
Raymond Clifford and Emma Jean Clifford
(Docket No. 82-357)
To be argued October 5, 1983

Michigan v. Clifford is the first of many important search and seizure cases scheduled by the Supreme Court this term. It deals with an area of law that is under fire for allegedly placing too many restrictions on law enforcement people and thus contributing to the high crime rate, and the two major issues it raises—when a warrant is required to conduct a lawful search and whether there should be a "good faith" exception for police officers who illegally seize evidence on the mistaken belief that they are not violating the law—go to the heart of the controversy between crime control and the right to privacy.

Issues

The specific legal issues raised by the case are:

1. Whether the case should be dismissed for want of a properly presented federal question.
2. Whether a warrantless entry of private home to determine the cause of a fire violated the Fourth Amendment, when there was ample time to obtain a warrant and when there were no exigent circumstances justifying a warrantless search.
3. Whether evidence seized by criminal investigators during an unlawful search of a private home should nevertheless be admitted into evidence under a "good faith" exception to the exclusionary rule.

Facts

Early on the morning of October 18, 1980, a fire broke out at the Cliffords' home while Mr. Clifford was out of town. The fire was extinguished a little over an hour later, at 7:04 a.m., and the firefighters reported it to be of suspicious origin. At 1:00 p.m., arson investigators arrived but did not enter until 1:30 p.m. because water was being pumped from the basement. They discovered, upon entry, three empty cans of fuel, an electric crock pot, and a timer with a cord in the basement.

The Cliffords moved to suppress the evidence under the exclusionary rule, since they alleged that the warrantless search was illegal. The trial judge denied their motion and admitted the evidence. However, on March 29, 1982, the Michigan Court of Appeals reversed. The appeals court held that a policy of entering burned dwellings without a warrant where the owner is not present and the building is open to trespasss is unconstitutional. The court found the entry in this case unconstitutional because the investigators arrived six hours after the blaze was extinguished and could have obtained a warrant during that time. The Michigan Supreme Court upheld the appellate court decision on June 29, 1982.

Background and Significance

This case may be decided on either procedural or constitutional grounds. As a general rule, the Surpeme Court will not decide federal constitutional issues not raised in state courts, where these issues could have been decided on independent state law grounds.

Under Michigan law, a warrantless search and seizure is "unreasonable per se" and violates the federal *and* state constitutions unless it falls within one of the exceptions to the warrant requirement. Moreover, the Michigan courts have rejected the so-called "good faith" exception to the exclusionary rule as a matter of state law in 1982.

The Supreme Court may therefore decide that because the constitutional issues could have been decided based on state law, the case is not properly before the Supreme Court. If the Court jumps this procedural hurdle, the case presents two constitutional issues which lie at the heart of the debate over how to balance the rights of the accused against the rights of society.

The first issue before the Court is the proper interpretation of the Fourth Amendment. The Fourth Amendment protects citizens' right to privacy by limiting government power to conduct searches and seizures. However, the Fourth Amendment was never meant to prohibit all searches and seizures, only those which are unreasonable.

Historically, the Court has held that searches and seizures are presumed to be unreasonable unless authorized by a valid warrant. However, the Court has also recognized a number of situations (i.e., exceptions) when searches may be legally conducted without a warrant.

Both sides agree that the search of the Clifford home does not fall within a recognized exception to the warrant requirement. However, the state argues that even though there were no exigent circumstances justifying a warrantless search, the search was nevertheless reasonable.

The state contends that "reasonableness should be the ultimate gauge of government conduct under the Fourth Amendment." It contends that the Fourth Amendment contains two separate, distinct and equal clauses: the reasonableness clause and the warrant clause. The Fourth Amendment reads: "The right of the people to be secure in

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their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Michigan argues that this amendment consists of two independent clauses—the first, which ends at the word "violated" and protects against unreasonable searches, and the second, which specifies the requirements for a warrant. Putting the two clauses on equal footing allows Michigan to argue that there "exists a number of generic classes of searches which are reasonable without a warrant not as exceptions to the warrant clause, but as falling within the first clause."

The Cliffords counter by urging the Court not to abandon "the well established primary of the warrant clause." They also point out that the Court has twice rejected the view that reasonableness be considered separate and apart from the warrant requirement *(U.S. v. U.S. District Court* (1972) and *Chimel v. California* (1969)).

Just what does the Fourth Amendment mean? Does it permit *any* search deemed reasonable whether or not the police have a warrant? Or does it allow warrantless searches *only* when the search falls within one of the recognized exceptions to the warrant requirement.

The judicial preference for searches conducted under the authority of a warrant is well established. If the Supreme Court accepts Michigan's view that reasonableness is the ultimate test of a search, it will have to overrule a long string of cases. It would also give law enforcement officials wide-ranging discretion to conduct searches without warrants and would undoubtedly require, in the words of the Cliffords' brief, "the development of an entirely new and untested body of Fourth Amendment principles."

In the second major issue presented by the case, the Supreme Court will have another opportunity to modify what has become the most controversial issue in law enforcement today—the exclusionary rule.

Less than six months after the Supreme Court surprised observers of the rule by deciding not to change it in a case of a midwestern drug dealer, *Illinois v. Gates* (1983), the Court will again hear arguments regarding the validity of the rule.

Simply put, the exclusionary rule is the legal doctrine that throws out any evidence illegally seized by law enforcement officials. Over the last several years, some members of the Court, led by Chief Justice Burger, have been critical of the exclusionary rule. Critics argue that the rule excludes truth from the fact-finding process and fails to deter improper searches because the police simply don't understand the complexities of the Fourth Amendment.

The "good faith" exception to the rule would allow the use of evidence seized by police in the "good faith" belief that their search was legal.

The Fifth Circuit Court of Appeals adopted a "good faith exception" to the rule in *Williams v. United States*, 622 F.2d 830 (1980), and many observers expect the Supreme Court to eventually do likewise. This term the Court will hear arguments on at least four cases—from California, Colorado, Massachusetts, and Michigan—where police argue that illegally seized evidence should be admitted because it was seized in the good faith belief that the police action was legal. In other words, the exclusionary rule should not operate to exclude evidence seized by police who thought their conduct was lawful.

If the Court accepts a good faith exception to the exclusionary rule, the *Clifford* case will be a landmark decision. If the Court rejects the proposition, it will preserve the rule, at least until the Court finds the right case to change it.

Arguments

For the State of Michigan

1. A warrantless entry to determine the orgin of a fire made within a reasonable time after the flames have been extinguished does not violate the Fourth Amendment.
   a. The Court should overrule those cases *(Camara v. Municipal Court of the City and County of San Francisco, See v. City of Seattle, Marshall v. Barlows,* and *Michigan v. Tyler)* which give primacy to the warrant clause.
   b. The reasonableness clause of the Fourth Amendment is separate, distinct and equal to the warrant clause.
   c. Applying the reasonableness clause of the Fourth Amendment, rather than the warrant clause, this Court should recognize that an investigation to determine the origin of a fire, conducted within a reasonable time after the flames are extinguished, is a search not requiring probable cause or a warrant.
2. Even if the Court rejects the reasonableness clause of the Fourth Amendment as a basis for a warrantless search, the facts of the case should be viewed as falling within *Michigan v. Tyler,* which allowed continuation of an initial entry to determine the cause of a fire.
3. The exclusionary rule should not be mechanically applied in situations where the governmental conduct, even if viewed as improper, was in good faith.

For Raymond Clifford and Emma Jean Clifford

1. The issues presented by the state are not properly before the Court because the state failed to raise these issues in the state courts, where the Cliffords could have defended on independent state law grounds.
2. The warrantless search of the entire Clifford home violated the Fourth Amendment regardless of whether it is viewed as an administrative search or more properly as a warrantless search for criminal evidence.
   a. The Fourth Amendment's standard of reasonableness cannot be isolated from the more specific commands of the warrant clause.
   b. The scope of the search exceeded any determination of the cause and origin of the fire and is therefore controlled by the probable cause standard of the warrant clause.
   c. The warrantless search of the Clifford home was clearly detached from the original firefighting activities and cannot be sustained under the Court's holding in *Michigan v. Tyler.*
3. The proposed good faith exception to the exclusionary rule is bad policy that cannot excuse a violation of settled law, which holds that warrantless searches of private dwellings are presumptively unreasonable under the Fourth Amendment

Teach Torts

(Continued from page 37)

duty to rescue the woman or, at the very least, call "911" and request help? Isn't that what an ordinary, reasonable and prudent person would have done under the circumstances?

Stories like these make an excellent follow-up to lesson #1 in that they broaden students' understanding of a particular legal theory by asking them to consider its application in different settings. In the New Bedford case, for instance, the bystanders had no legal duty to the rape victim and are therefore not liable to her for the injuries that she suffered in the attack. Hard as this is to justify ethically, it is a generally accepted rule of tort (and criminal) law that people have no duty to rescue strangers. Jerome Leitner, a Brooklyn Law School torts specialist, explains: "Take this case. A baby slips off a dock into three feet of water. All an adult has to do to save him is get his feet wet. Can he stand there with impunity? Yes. Is he his brother's keeper? Anglo-Saxon law says no."

Discuss with students why the legal duties were recognized in the sports cases but not in the New Bradford case. (Hint: The answer lies in the differences in the relationships between the injured parties and the defendants, not in the severity of the injuries suffered.) How are the cases alike? How are they different? Should exceptions be made to the "no-duty-to-rescue-strangers" rule? If so, in what instances? You might also have students write a short composition on these questions following the class discussion.

Strategy

3.

Defenses

As discussed in an article on sports violence and the law (see *Update*, Spring 1983), a primary defense in negligence cases—particularly in sports, is assumption of risk. Try the case study approach with one of the cases described in that article to raise the point with students. (For more on this method, see Isidore Starr's "The Case for the Case Study Approach" in the Fall, 1977 *Update*.)

The theories of contributory and comparative negligence may also adversely affect a plaintiff's chances of recovery. They work like this: In negligence cases, the court may require the defendant to pay all or part of the requested damages. However, where the plaintiff's acts are proven to be the major cause of the injury, it is possible that he or she may be found contributorily negligent and receive no damages. Realistically, though, clear-cut, all-right or all-wrong situations seldom end up in the courts. Usually, both parties have been a "little bad." If the jury finds that both parties helped cause the injury, damages may be awarded by percentage (comparative negligence).

Read the next case, in which the themes of assumption of risk and contributory and comparative negligence are raised, and follow the directions afterwards:

> Ricky Little, 15 years old, was an avid football fan. He played on a community team, which was part of the Athletes for Youth League. Ricky fractured his thumb when he was playing in the yard with some friends one day and his arm was placed in a cast. He kept attending football practices, although he did not scrimmage or take part in any contact work. Three weeks later, Ricky was allowed to play again, even though his arm was still in a cast. During the game he was seriously injured when he tried to tackle an opposing football player. Ricky and his parents sued the team's coach and the Athletes for Youth League. They claimed that his helmet, which was supplied by the league, did not fit properly and was the main cause of his injuries.

1. Select six students to play the jurors. Have them read the facts of the case while the others prepare their presentations.
2. Divide the rest of the class into two groups and assign each group the role of plaintiff's or defendants' attorneys. Students in these groups should spend approximately ten minutes (working alone or in groups of no more than three) developing arguments on behalf of their clients.

   Plaintiff's Lawyers: Using the facts of the case to your best advantage, convince the jury that your client should receive $200,000 for his injuries.

   Defendants' Lawyers: Using the facts of the case to your best advantage, convince the jury that the plaintiff was at least partly responsible for his own injuries.
3. Have several students from each group stand up and present their arguments to the jurors, then ask the jurors to discuss (fishbowl style) and vote (by a show of hands) on how much, if anything, the plaintiff should be awarded for his injuries. Discuss with the entire group the factors weighed in their deliberations. Ask: Were Ricky or his parents acting negligently when they let him play football with a cast on his arm? Does it matter that the coach let him play without having practiced for three weeks? Would your decision have been different if Ricky had been 10 instead of 15 years old? What if he had been 30? Explain.
4. The court in this case (*Little v. Bay View Area Red Cats, Inc.*, No. 80-1801, Wisconsin Court of Appeals, June 15, 1981) found that the coach was negligent because he had failed to give Ricky any instruction on playing with a cast. Also, the coach was responsible for Ricky's loose-fitting helmet. The defendants had argued that Ricky assumed the risk of the game of football, but the court disagreed. It declared that "not every conceivable risk of injury is assumed when one engages in football." The jury found the plaintiff 20 percent negligent, his father 30 percent negligent, and his coach 50 percent negligent for putting the boy in the game; Ricky could therefore recover only 50 percent of the damages he had originally requested.

   Have students compare their jury's decision with that of the jury in the real case and comment on their reactions to the actual award.

Strategy

4.

Product Liability

Sports cases also provide a backdrop for teaching about another commonly misunderstood tort action—product liability.

Manufacturers of everything from skis to barbells have a duty to see that they produce equipment that is not negligently made. But what happens in cases where a player is hurt while using equipment that was not negligently constructed? Take the case of a young Indiana boy who became a quadriplegic after being tackled in a high school football game. The boy was a good athlete. He had been taught how to play football and how to properly use his helmet by his coach. The player who hit him was acting well within the rules of the game. And the helmet was not broken or made carelessly. Nevertheless, the helmet did not protect the boy well enough and he was severely injured.

Should the helmet company have to pay hundreds of thousands of dollars for the young player's medical bills if it was not negligent in making the helmet? What used to be a purely ethical question is now being considered in the courts. In cases where someone is hurt from using a product that is "defective" and "unreasonably dangerous"—even if it was made with the utmost care and attention—the maker may be held liable. (In the Indiana case, the football player claimed that the helmet was defective and unreasonably dangerous because it could not withstand the force of a normal blow during the course of a game.)

This idea of being liable for someone's injuries without being legally "at fault" is called strict liability (or "product" liability in cases involving manufactured items). It is based on the notion that when someone is badly hurt by using a product, the manufacturer is in a better financial position to pay the costs of the injury than the hurt individual is. Some call this "distributive justice." Ask students to explain why it sometimes has this name.

Although the concept of strict liability seems just, it does create big problems for businesses and consumers. In sports, there are only a handful of companies that make football helmets, and a lawsuit against any one of them could be economically disastrous. When a company is sued for thousands or even millions of dollars, it may be forced out of business if it loses the lawsuit. Then even if the injured person is taken care of, other players may find it hard or even impossible to get helmets to protect them from injury. In other words, an entire company and product line could be wiped out if an injured athlete were to bring a successful product liability case.

How would you balance the interests of someone who has suffered a catastrophic injury against those of the helmet manufacturers and football players? What do you think should be done?

Pose these questions to the students, then have them brainstorm ideas for how to solve the problem. Select the two best proposals, then have the class write a letter to a few of the football helmet manufacturers. (Your school's gym teachers or team coaches should be able to provide you with names and addresses.) Describe the two proposed solutions that your class felt were best and ask what they are planning to do to deal with the problem. Post their responses on the bulletin board and discuss.

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For more information on sports cases and legal issues, the following books by Herb Appenzeller are particularly helpful:

- *From the Gym to the Jury* (Michie Co. 1970)
- *Athletics and the Law* (Michie Co. 1975)
- *Physical Education and the Law* (Michie Co. 1978)
- *Sports and the Courts* (Michie Co. 1980)

In addition, any good law-related text can fill you and your students in on the principles of tort law and court procedure.

New Life

(Continued from page 19)

> Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change.
>
> Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected.
>
> . . . If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent.
>
> We hold that . . . [the provisions of the Smith Act] do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act.

Here's How to Do It

The lessons arising out of these materials will help students develop an understanding of First Amendment free speech, examine the conflict between free speech and the need for national security, and analyze the courts' interpretation of free speech and the national security issue during these three periods of American history. It will, at the same time, reinforce critical thinking and communication skills.

These lessons are appropriate for eleventh grade, and will take about two or three class periods. Everything that you'll need for these lessons is contained in this article.

Begin by writing the First Amendment on the board. Underline "Congress shall make no law" and "abridging the freedom of speech." Discuss:

- The meaning of these phrases.
- What was the intent of the prohibition?
- Is the prohibition absolute? Why or why not?

Explain to the class that they will be divided into three groups representing three historical periods: the Federalist Period, World War I and the Cold War. Within their groups they will be legislators, individuals accused of committing a crime, and courts interpreting the meaning of the First Amendment phrases they just discussed. Explain there will be two rounds to this lesson. In Round One they will examine laws and court cases relevant to this issue. In Round Two they will meet with students in other groups to compare and contrast their case materials.

Divide the class into three groups:

- Group 1—1798;
- Group 2—World War I;
- Group 3—The Cold War.

Round One:

Once the groups are in place, ask them to sub-divide into three sections representing:

- Section A—Legislators;
- Section B—The Accused;
- Section C—The Courts.

Explain that each section will be given a set of materials and a set of questions. They are to read their materials and collectively, in their sections, formulate responses to the questions. When this has been completed they will then report to the rest of their group (legislators, first; accused, second; courts, third).

Distribute materials as follows. The legislators (Section A) in each group will get the actual law appropriate for their period. The students playing the accused and the courts (Sections B and C) will get the case studies appropriate to their time period.

" . . . *At least learn to write your name or you'll have to go through life paying cash for everything.*"

In addition, give each group the following study questions.

Section A—Legislators

Examine the law which you enacted during your historical time period. With the other members of your section, respond to the following questions:

1. What does the law say?
2. Why did you pass this law?
3. What did you expect this law to accomplish?

When you have finished, report your answers to the other members of your group. You will report first.

Section B—Accused

Examine the facts only in the case which you have been given. With the other members of your section, respond to the following questions:

1. Of what crimes were you convicted?
2. What did you do to get convicted?
3. Why do you think you are not guilty?

When you have finished, report your answers to the other members of your group. You will report after the legislators.

Section C—The Courts

Examine the facts and the decision in the case which you have been given. With the other members of your section, respond to the following questions:

1. What are the key questions in this case?
2. For whom did you rule in this case?
3. What specific reasons did you give for your ruling?

When you have finished, report your answers to the other members of your group. You will report after the accused.

Allow time for students to read, respond to the questions, and report to their group. It is recommended that students use their textbooks to gain more information about their time period.

Round Two:

Explain to students that they will now compare their materials with other time periods so they can understand what has happened with sedition laws in other historical times. They are now to form new groups:

- All Section As form a group;
- All Section Bs form a group;
- All Sections Cs form a group.

If they have not already done so, they should now consult their textbooks for background information on their historical period.

Distribute Round Two Study Questions as follows:

Section A Group—Legislators

1. Explain to the other legislators the law you passed during your historic period.
2. Explain to the other legislators what events during your historic period made your legislation necessary.
3. Explain to the other legislators what your law was supposed to accomplish.
4. After all the legislators have reported, develop a chart which illustrates how your laws were *different* and how they were *similiar*.

Section B Group—The Accused

1. Explain to the others accused of crimes what you did and what happened to you.
2. Explain to the other accused individuals the events that were happening during your historic period.
3. Explain to the others why you did not think you were guilty of the crime.
4. After all the accused have reported, develop a chart which illustrates how your crimes were *different* and how they were *similiar*.

Section C Group—The Courts

1. Explain to the other courts the events that were happening during your historic period.
2. Explain to the other courts the key questions in the case you studied.
3. Explain to the other courts how you ruled in the case and give specific reasons why.
4. After all the courts have reported, develop a chart which illustrates how your decisions were *different* and how they were *similiar*.

Wrapping It Up

Debrief the entire class. Select members of each group to explain their law, their case, and their decision. Use the following questions as a guide:

A. *Legislators*
  - Give a brief background to the historic period.
  - Explain your law.
  - Explain the intent of the law.
  - How were the laws similar and different?

B. *Accused*
  - Of what crimes were they convicted?
  - Why did they feel they were not guilty?
  - Why did the 1798 group receive no judicial review? What is the role of judicial review? What are the political effects of judicial review?
  - How were their cases similiar and different?

C. *Courts*
  - Explain the decision in the case.
  - What is the meaning of sedition?
  - What does the Court mean by "clear and present danger?"
  - How does the clear and present danger standard relate to the First Amendment?
  - Did *Dennis* satisfy the clear and present danger standard? Why or why not? How does the Dennis decision relate to the First Amendment? ☐

Protect Despised

(Continued from page 27)

case, but only on the subject of the defendants' right to counsel. Lawyers for Alabama argued that, under the United States Constitution and prior Supreme Court decisions, states should not be restricted in the way they conduct trials so long as they do not discriminate or act in an arbitrary manner. Alabama, they said, gave the defendants a trial, as well as attorneys who did the best they could.

In its majority opinion in the case of *Powell v. Alabama,* 287 U.S. 45 (1932), the Supreme Court held that the Constitution *did* guarantee the right to counsel in state proceedings where capital punishment could be the sentence. The Fourteenth Amendment, the Court noted, provided that a state "shall not deprive any person of life, liberty, or property without due process of law. . . ." The Court ruled that the trial judge did not give the defendants a reasonable time to hire lawyers and that, when the judge finally asked lawyers to volunteer, there was not enough time to prepare a defense. Because of that, the defendants had in effect been deprived of their right to "due process of the law." The Court then ordered new trials.

A Second Trial

The ILD obtained Samuel Leibowitz, probably the finest criminal lawyer in New York at that time, to defend the nine young men. Leibowitz agreed to take their case free of charge, but demanded it be known that his taking the case in no way meant that he subscribed to the social or political views of the ILD. He said that the case was basically one of human rights, and that he was undertaking the defense only because of his commitment to these rights.

The new trials were scheduled to take place at Decatur, Alabama, under a new judge, James E. Horton. The time was set for March,1933, two years after the alleged rape incident. Samuel Leibowitz, the defense lawyer, was clever and intelligent, well known for his dramatic courtroom performances and for the power of his relentless cross-examination of witnesses. From the beginning, he felt that there was one major issue in the Scottsboro case that would eventually have to be settled. Because black people were kept off jury lists in Alabama, they therefore would never be called to sit on a jury. Leibowitz believed this was unconstitutional and, more appropriate to his present task, grounds for appeal if he lost the Scottsboro case in Alabama. He tried to prove this point in the selection of a jury, even though he knew no blacks would be allowed on the jury.

The main witness for the prosecution was once again Victoria Price, the young woman who, at the first trial, had been presented not only as an innocent victim of a horrible crime but also as a proud example of white southern womanhood. Again, she told the story of how she and Ruby Bates had been assaulted on that fateful day some two years earlier. Leibowitz succeeded in bringing out the contradictions and errors in her testimony, even though Victoria Price was a determined and stubborn witness who was not easily rattled by his questions.

Leibowitz then presented evidence in court that Miss Price and her friend Ruby Bates were not quite the pure blossoms of southern womanhood that the prosecution had portrayed them to be. Instead, they had been prostitutes who had bestowed their favors for money on white and black men alike. Victoria Price had, in fact, been jailed in Huntsville, Alabama, for the crime of adultery.

There was no question in this second trial about whether the Scottsboro nine were receiving adequate counsel. They were, in truth, receiving the best defense available. Leibowitz went after each witness until the story was told straight and understandably. He even showed some witnesses to be outright liars by proving that their "eyewitness" testimony was physically impossible. He methodically chipped away piece by piece at the prosecution's case, but he was saving his blockbuster until the end.

As his last witness for the defense, Leibowitz brought into court the other alleged victim, Ruby Bates.

"Did any rape take place on the Chattanooga-to-Huntsville freight train on the day in question?" he asked.

"No. Not that I know of," was her answer.

When she was asked if there was somehow a possibility that Victoria Price might have been raped, she replied, "No. I was with her the whole time."

Her testimony was indeed startling, but Ruby Bates was not much better on the witness stand than her former friend. Again there were contradictions, and there were certainly some questions as to whether she had been influenced, or even bribed, to change her testimony. Ruby did not come off as a thoroughly believable witness.

After Ruby Bates' testimony, the trial, for all practical purposes, seemed to be over. The case presented to the jury did not appear to come even close to establishing "guilt beyond a reasonable doubt." Leibowitz was stunned as he listened to a member of the prosecution summing up their case. The lawyer for the prosecution pointed directly at Leibowitz and another lawyer at the defense table but kept his eyes on the jury as he said: "Show them that Alabama justice cannot be bought and sold with Jew money from New York."

Leibowitz objected strongly to such an ethnic slur in the court, but it did no good. He realized suddenly and correctly that the case would not be decided on the evidence that had been presented.

The case was finally turned over to the jurors, who after a short while returned their verdict: "Guilty as charged . . . the punishment, death in the electric chair."

Judge Horton, a man of honor and integrity, was appalled at the verdict. Later, after much thought, he announced that because the jury had reached a verdict so contrary to the evidence in the case, he was throwing out the jury's decision and calling for a new trial. It was a brave act and a costly one. Judge Horton was voted out of office shortly afterward, mainly because of that decision.

The trials went on, now with a new judge who quite clearly was partial toward the prosecution. At the end of one trial he instructed the jury on how to reach a "guilty" verdict, but "forgot" to tell them how to arrive at a "not guilty" verdict. The findings in the new trials continued to be "guilty" and the sentence death.

Another Round of Appeals

Leibowitz appealed the case to the Alabama Supreme Court again. There he argued that the state of Alabama consistently kept blacks from sitting as jurors by never placing their names on the lists from which jury members were drawn. The Alabama Supreme Court, however, upheld the trial judge, who had found as fact that blacks were not denied a chance to serve on juries on the basis of their race.

Leibowitz appealed to the United States Supreme Court, which in April, 1935, reached its decision. In *Norris v. Alabama,* 294 U.S. 587, Chief Justice Charles Evans Hughes pointed out that the Court had previously ruled that state laws excluding blacks from jury duty denied a black defendant the "equal protection of the laws" as required under the Fourteenth Amendment. Although Alabama law did not keep blacks off juries, Alabama *practices* did. That, said the Court's opinion, was unconstitutional also. The Court's ruling helped put an end to this form of discrimination by opening jury service to all citizens. It also overturned the verdicts against the Scottsboro nine and ordered new trials to be held.

Back to the Alabama courts they went. Over the next two years new trials were held, new verdicts of guilty for five of the nine were found, and new appeals were drawn up. More important, however, serious behind-the scenes bargaining was going on between the defense and the prosecution. Both sides wanted to end this seemingly endless case. Finally, in 1937, more than six years since the time of the alleged crime, charges on four of the defendants—Olen Montgomery, Willie Roberson, Eugene Williams and Roy Wright—were dropped. The remaining five went to jail for their convictions and lost their final appeals.

It was not until six years later that three of those jailed—Charley Weems, Clarence Norris, and Andrew Wright—were freed. They were refused permission to leave the state, and when Wright did leave, he was put back in jail. Ozie Powell was released in 1946, and in 1948 Haywood Patterson escaped. Finally, in 1950, the last of the Scottsboro nine, Andrew Wright, was released after serving a total of 19 years in prison.

Legal Issues

There are a number of ways to correct an unfair conviction. One way is for the trial judge to declare a "mistrial," set aside the jury's verdict, and order a new trial. This happens if the judge believes that the verdict is so contrary to the weight of the evidence as to be unjust or if the winning side gained by an obviously unfair or illegal act. Judge Horton declared a mistrial at the end of the second set of Scottsboro trials. In Horton's view, the facts did not support a finding of guilt "beyond a reasonable doubt," and the prosecution's appeal to the prejudices of the jury in its closing statement was grossly improper.

The more common way to change a verdict is to appeal to a higher court. Higher courts rarely overrule the findings of fact of a judge or jury unless there is simply no evidence in the record to support the finding of fact. Higher courts do change the outcome of trials if they find that errors of law or deprivations of constitutional rights affected the outcome of the trial.

Wide World Photos, Inc.

Judge Horton was voted out of office after throwing out the jury's guilty verdict.

In their appeals, the Scottsboro defendants claimed that they were denied due process of law and equal protection of the law in violation of the Fourteenth Amendment to the Constitution. They claimed, first, that they were denied the right to counsel; second, that they were tried before juries from which qualified blacks were systematically excluded; and third, that they were not given a fair and impartial trial. In 1932, in *Powell v. Alabama*, the Supreme Court ordered new trials upon agreeing with their first claim, and in 1935, after subsequent convictions, ordered retrials based on their second claim. (*Norris v. Alabama*, 294 U.S. 587) The Court never reached the underlying issues raised by the third claim, leaving unanswered the question of whether the Scottsboro defendants could ever get a fair trial in the deep south in the economic and social climate of the times.

The Supreme Court's decision that Alabama denied the Scottsboro defendants effective assistance of counsel in violation of the Fourteenth Amendment was a judicial milestone. It extended to the states a right that previously had applied only to the federal government. The decision opened the door for other rights of the Bill of Rights to be applied to the states.

The Court declared that the right to counsel was of such "fundamental character" that to deny it would deny due process of law. Even intelligent and educated laypersons have little skill in the "science of law," such as the rules of evidence, examination of witnesses and preparation of cases and trial strategy. But what if a defendant could not afford a lawyer?

The Court determined from the trial record that the defendants' right to effective assistance of counsel was violated on two grounds. The defendants were young, had little education, low mental capacity, no money to provide for their own defense, and were charged with a capital offense. Second, the trial judge's ambiguous and hurried appointment of counsel did not provide sufficient time for preparation and consultation. The Court's decision not only established a constitutional right to *access* to counsel as a matter of due process of law but also to such access that did not deny *effective assistance* of counsel. In its opinion, the Court did not define "effective assistance of counsel," and only indicated that the appointment of counsel on the morning of the trial constituted its denial. While the Court said that its extension of the right to counsel to defendants in state prosecutions was limited to the narrow circumstances of the case (*i.e.*, uneducated defendants charged with a crime punishable by death), its reasoning laid the groundwork to expand the right to counsel in the future. (*Powell v. Alabama*, 287 U.S. 45 (1932))

Following the second set of convictions of the Scottsboro defendants, their lawyer, Samuel Leibowitz, appealed on the ground that blacks were systematically excluded from jury lists because of their race, and this denied the defendants equal protection of the law as guaranteed by the Fourteenth Amendment.

Leibowitz had carefully prepared a record for possible appeal by including testimony on the process of selecting jurors in the county where the trial was taking place. This testimony showed, among other facts, that blacks were systematically kept off lists from which potential jurors were called. The trial judge ignored this evidence and found that blacks were not excluded. On appeal, the Alabama Supreme Court supported the trial judge's finding of fact.

At the time of the Scottsboro case, it was clearly unconstitutional for a state to exclude blacks from jury service by law. The Supreme Court had decided years earlier that such a law would violate a person's equal protection rights under the Fourteenth Amendment. (*Strauder v. West Virginia*, 100 U.S. 303 (1880)) Alabama's laws did not explicitly exclude blacks from juries, but Leibowitz's evidence showed that Alabama excluded blacks in practice. In an unusual step,the United States Supreme Court reviewed the facts in the record, agreed with Leibowitz, reversed the trial judge, and ordered new trials. Preventing blacks from jury service in practice became as unconstitutional as doing it directly by law. (*Norris v. Alabama*, 294 U.S. 587 (1935))

The Issues Applied

The Court's decision did not mean that black defendants could not have a fair trial unless there were blacks on the jury trying the case. The law requires only that the process of selecting jurors must call on a broad sample of the community to make up a pool from which actual jurors are selected. This process cannot intentionally or systematically exclude any particular classification or group of potential jurors. However, the law does not require that the actual jury which tries a case be comprised of any representative mix of racial, ethnic, gender, age, educational or economic elements of a community.

Powell v. Alabama, the first Supreme Court case arising from the Scottsboro trials, became the first of a series of right-to-counsel cases for indigent defendants in state criminal prosecutions. *Powell* established the right to counsel in state criminal prosecutions for capital offenses for indigent defendants incapable of defending themselves. Subsequent cases expanded the right to counsel so that any indigent state criminal defendant charged with a misdemeanor or felony would be provided a lawyer. *Gideon v. Wainwright*, 332 U.S. 335 (1963), is the leading case on an indigent's right to counsel.

Norris v. Alabama did not end the exclusion of blacks from juries in Alabama or elsewhere in the south. Although later Supreme Court cases found unconstitutional certain jury selection practices, such as putting the names of blacks and whites on different color cards and using tax records to maintain racially segregated juries, in many localities blacks were still not permitted to serve on juries. One way Alabama continued its practices was to allow unlimited peremptory strikes, where a juror can be eliminated from a jury without cause or explanation. Since peremptory challenges have been used historically to secure fair and impartial juries by eliminating potentially unfavorable jurors, they have been upheld as constitutional. A common practice under the Alabama rule was to challenge, or eliminate, all the blacks. This practice has been changed by Alabama laws, which now require that jury service should represent a "fair cross section of the area served . . . .and that all qualified citizens have the opportunity to be considered for jury service." Unlimited peremptory challenges are no longer allowed. (See *Code of Alabama*, Title 12, chapter 16.)

Other minorities or groups have been shown to be underrepresented in jury selection following *Norris*. By first establishing that a group was a recognizable class that has received different treatment under the laws, either as written or applied, and, second, showing substantial underrepresentation on juries, defendants have required both Mexican-Americans and women to be added to jury lists. (See, *Hernandez v. Texas*, 347 U.S. 475 (1954) and *Casteneda v. Partida*, 430 U.S. 482 (1976); see also *Taylor v. Louisiana*, 419 U.S. 522 (1975).)

Enduring Law

The trials of the Scottsboro nine were a sad commentary on the injustices that can exist within the judicial system. They were a legal disgrace, and they were never justly resolved. It was not until 1976 that the state of Alabama finally made some effort to redress the wrongs done to the Scottsboro nine. In that year, Clarence Norris, the last of the nine known to be still alive, was granted a full pardon by the state, on the grounds that there was proof of his innocence. After receiving the pardon, the 64-year-old Norris told reporters that he felt no malice toward anyone even though "I do feel bad . . . because I was accused wrong." The pardon had come 45 years too late for this victim of legal injustice.

The Supreme Court had made two important decisions as a result of the Scottsboro trials—one guaranteeing a defendant's right to counsel for a crime punishable by death or life in prison and the other preventing states from excluding blacks from jury duty because of race. The Court by its actions contributed to saving the lives of the Scottsboro nine, even though it did not keep them from spending many years in jail. More importantly, it established important precedents for criminal law and the rights of minorities.

The Still-Evolving Process

But the most enduring legacy of Scottsboro may be in a process it began. Before Scottsboro, the Supreme Court had been extremely reluctant to overturn a state criminal trial. But the facts of Scottsboro gave the Court an uncomfortable choice. At the heart of the Scottsboro trials was the issue of whether the United States Constitution established standards of justice in *state* criminal trials.

In terms of federalism and constitutional law, the Supreme Court found itself in a dilemma: if the Court granted the Scottsboro nine new trials based on constitutional claims of denial of due process of law, the Court would be extending federal authority via the Due Process Clause to a domain previously left exclusively to the states. If the Court denied the Scottsboro nine's appeal from such a blatantly unfair trial, then the Court's position as ultimate arbiter of constitutional values and justice would be eroded.

By applying the United States Constitution to the Alabama courts in these cases, the Court began a process that has not ended yet.

In the 1950s, 60s, and 70s, there was a progressive extension of rights to the states through the Fourteenth Amendment. Protections against unreasonable searches, cruel and unusual punishment and all manner of other deprivations of due process have been extended to state court defendants in case after case. This process has made the Bill of Rights protections far more widespread—and it all began with the Scottsboro case.

Small Disputes

(Continued from page 9)

stand, but that was not the real issue. By asserting that the United States Constitution permitted the Supreme Court to review the decisions of state courts, the Court added considerably to its arsenal of power. (In a whole spate of criminal law decisions since the 1960s, the Court has used this power to overrule state court criminal practices and revolutionalize criminal law in this country.)

An Equal Branch

These three decisions were the cornerstone of the Court's claim to be an equal and independent branch of government. It could declare acts of Congress null and void; it could declare state laws unconstitutional; it could decide to hear whatever appeals it wished from state courts. In the space of a few decades, the Court went from a weak institution with little respect to one that had the power to nullify not just the work of the other two great branches of federal government, but the work of the state governments and state court systems.

Some of Marshall's accomplishments during his 34 years on the Court are:

1. *Judicial independence:* He freed the Court from undue dependence on the other branches of government. Only when the judiciary was considered a separate and distinct branch of government could it really play a role in the system of checks and balances.
2. *Judicial review:* He established the Court's ability to declare that the acts and actions of the other branches, and of the states as well, were contrary to the Constitution and therefore null and void.
3. *Judicial sovereignty:* He established that within its sphere of authority the Supreme Court would be accepted as the highest authority and the other branches of the government would accept its decisions as binding.

Before John Marshall became chief justice, each member of the Court wrote a separate opinion on each case. Marshall changed this. Under his leadership, one justice usually wrote the decision for the majority point of view. Each justice could, however, enter a separate concurring or dissenting opinion. Through the force of his personality as well as his position as chief justice, Marshall was often able to get the whole Court to follow his own opinion.

A few years after Marshall became chief justice, the Supreme Court moved to new and more imposing quarters in the capitol building. The move was symbolic. The Court's star was on the rise. At the end of Marshall's career a quarter century later, it had become the strong, independent and respected third branch of the federal government.

"If America was to live and grow as a nation," a historian observed a century after Marshall's death, "if conflicting sectional interests were to be reconciled, if natural forces, both geographic and economic, which were making for nationalism, were to prevail, then no trivial and constricted construction of the Constitution should stand in the way." (Andrew C. McLaughlin, *Constitutional History*, 1935) The achievement of the Marshall Court was, in a series of decisions, to interpret the Constitution broadly. Marshall and the other justices used its provisions to defend individual property rights and the power of the federal government, usually at the expense of the states.

The Historic Tendency

In this, Marshall and his colleagues swam with the larger historical currents of the nineteenth century. Throughout the world, the tendency was toward larger and more powerful national governments. Marshall, by his decisions, was often unpopular in his day. But people came to agree with his approach as time went by. His successor tried to reverse direction and swim against the current. One result was a Civil War.

News of Marshall's death reached an editor in New York City—one who had defended states' rights and the "democratic principle" that people should decide issues on a *local* level. He had violently objected to many of the Supreme Court decisions. Although holding "a proper sentiment for the death of a good and exemplary man," the *Evening Post* was glad to see Marshall's absence on the nation's highest bench:

> The Philadelphia papers of yesterday bring us intelligence of the death of Chief Justice John Marshall, of Virginia, in the eightieth year of his age. He retained his faculties to the last, and a few days before his death is said to have composed an inscription for his own tomb.
>
> Judge Marshall was a man of very considerable talents and acquirements, and great amiableness of private character. His political doctrines, unfortunately, were of the ultra-federal or aristocratic kind. He was one of those who, with Hamilton, distrusted the virtue and intelligence of the people, and was in favor of a strong and vigorous general government, at the expense of the rights of the states and of the people. His judicial decisions of all questions involving political principles have been uniformly on the side of implied powers and a free construction of the Constitution, and such also has been the uniform tendency of his writings.

Constitutionalism and the Court

When John Marshall and the other justices met to decide *Marbury v. Madison*, or the *McCulloch* case or the *Cohens* case, what criteria did they use? What did they look to for guidance as they tried to figure out which way to go?

From reading their decisions, it is clear that they looked to the United States Constitution for all of their legal authority. They quoted Article III of the Constitution to justify their decision in the Marbury case. In *McCulloch*, they claimed that ultimate governmental authority rested in the people's Constitution. In *Cohens*, they used the Constitution as the standard against which all other laws must be measured. The Constitution was, for Marshall's Court, the one and only source of legal authority. So when a case was to be decided, the justices looked not to personal feelings, not to ideas of right and wrong, not to philosophy or politics—they looked to the Constitution. In its words, the Supreme Court found its wisdom.

Marshall infected the Court with a kind of "constitutionalism" that has persisted for two centuries. The Supreme Court's reliance on the Constitution extends to all areas, to all kinds of disputes: disputes between branches of government; disputes between individual citizens; and disputes between criminals and police. And it extends also to all times and places: as the country grew from 13 agrarian states huddled along the shore to a modern industrial nation of more than 200 million people stretched across a continent, the Constitution has been extended to cover new situations and changing times.

As these changes occur in society, the words of the Constitution often need reinterpretation: it is not always immediately clear what the 18th century words mean when applied to a modern situation. And who makes these interpretations? As John Marshall said, "It is the province of the judicial department [the Court] to *say what the law is*."

The Court's interpretation of the Constitution has often formed the basis for turning points in American history. In the *Dred Scott* case of 1857 (19 U.S. 393), the Court interpreted the "due process" clause of the Fifth Amendment to "constitutionalize" slavery, a decision that helped bring on the Civil War. The interpretation of the Fourteenth Amendment's "equal protection" clause in *Brown v. Board of Education* (394 U.S. 294 (1954)), changed the way most of the states ran their schools, and started the civil rights revolution that tranformed American society.

The Court has even reversed its own interpretations of the Constitution. It ruled in 1942 that the Sixth Amendment did *not* guarantee the right of every criminal defendant to a lawyer (*Betts v. Brady*, 316 U.S. 455); 21 years later, it reinterpreted a clause of the Sixth Amendment (". . . to have the assistance of counsel for his defense") to mean that accused persons *did* have a right to a lawyer (*Gideon v. Wainwright*, 372 U.S. 335 (1963)).

So when a Court makes a decision, even in the most ordinary disputes between citizens, it is also interpreting the Constitution and the law. The United States Supreme Court goes well beyond the dispute at hand: it makes public policy; it determines how the legal concepts of authority and liberty shall be applied to our everyday lives.

And the guiding force behind all this, 200 years later, is the Constitution—today's Supreme Court quotes it in its decision just as Marshall's Court quoted it in 1803.

A Modern Day Link

By the 1970s, the United States Supreme Court had long won its title as final arbiter of the law and the Constitution. It had held its place as an equal third branch of government for more than a century. But in 1974, the authority of the Court was challenged, not by an ordinary criminal, but by the executive branch of its own federal government. In the Watergate affair, the Court, the Congress and the president of the United States locked horns in a battle over just which branch should interpret the Constitution.

* * * * * *

The small black and white television in Potter Stewart's office was often left on all day to blare out the news and keep the office aware of what was happening in the world. Justice Stewart usually didn't pay much attention to it. Recently, though, his interest in the television was aroused. For the last several months the news was full of stories about the "Watergate" affair.

The first story told how five men were caught inside the Watergate office complex in Washington while installing hidden microphones and stealing papers from the office of the Democratic National Committee. Later the news revealed that several of the burgulars worked for the "Committee to Re-Elect the President," a Republican organization with close ties to Richard M. Nixon, the president of the United States.

This news set teams of investigators to work. A special committee of the United States Senate was set up to look into the events. A special federal prosecutor was appointed (by President Nixon himself) to determine whether or not any crimes had been committed. And an excited squad of newspaper and TV reporters swarmed over Washington in search of scandal and newsworthy wrongdoing by high government officials.

Evidence accumulated quickly. The burglars were brought to trail and convicted. After their trial, one of the defendants, James McCord, revealed to trial judge John Sirica that they were acting under orders from several White House aides who were close advisers to President Nixon. Soon, several of Nixon's appointees were charged with federal crimes, including his attorney general, John Mitchell. The press called for the Congress to impeach the president. Senators and members of Congress were shocked by the mounting pile of evidence that the chief executive was directly involved in the Watergate break-in and in trying to cover up after it was discovered. Finally, the television broadcast that the House of Representatives had ordered its Judiciary Committee to investigate whether to impeach the president.

Potter Stewart wondered whether the Supreme Court would become involved in this conflict. It didn't take long for his question to be answered.

Television cameras picked up the testimony of a White House aide who explained how most of Nixon's telephone calls and office conversations were routinely tape-recorded by automatic equipment. The Senate committee was interested: perhaps these tapes contained the evidence they needed to get to the bottom of this affair. The special prosecutor was also interested: he wanted the tapes as evidence in his trial of the Watergate conspirators. And the House Judiciary Committee thought the tapes might contain information that would help them decide whether to impeach the president.

Archibald Cox, the special prosecutor (an employee of the executive branch) subpoenaed the tape recordings he wanted as evidence in the trial: he got a court order from Judge Sirica requiring Nixon to give him the tapes. The president immediately filed a motion in Sirica's federal district court to quash the subpoena. Nixon's motion was denied. So Nixon, as head of the executive branch, fired Cox.

The new special Watergate prosecutor, Leon Jaworski, pressed on with the subpoena, and asked for 64 additional tapes. The president refused to surrender the tapes and fought the subpoena in court. By a special procedure the case was immediately appealed to the U.S. Supreme Court. Potter Stewart and his colleagues would finally have their chance to render a judgment.

Nixon's Day in Court

On July 8, 1974, the case of *United States v. Nixon, President of the United States* (418 U.S. 683) was called for oral arguments. The spectator's gallery was full. No TV cameras were allowed inside the courtroom.

Leon Jaworski, representing the United States Department of Justice, spoke first. He explained how the tapes were necessary for him to carry out his prosecution of the Watergate conspirators and how the federal court had the constitutional authority to order the president to release them for evidence.

James St. Clair, the president's lawyer, then argued his side of the case. He claimed that the Court had no authority in the case, because the special prosecutor was an employee of the executive branch of government; therefore any dispute between him and the president was a matter to be settled within the executive branch. St. Clair also argued that the Court could not tell the president how to carry out his constitutional duties, that the president has an "executive privilege" to conduct his business without harassment or review by the judiciary branch. If the courts could poke their noses into the president's private conversations and phone calls, then the whole balance of powers in the federal government would be put out of kilter.

Jaworski, in his final argument, summed up the question before the Court:

> . . . this case really presents one fundamental issue. Who is to be the arbiter of what the Constitution says? . . . Now the President may be right in how he reads the Constitution. But he may also be wrong. And if he is wrong, who is there to tell him so? . . . This nation's constitutional form of government is in serious jeopardy if the President, any president, is to say

> that the Constitution says what *he* says it does, and that there is no one, not even the Supreme Court, to tell him otherwise.

The president had interpreted the Constitution to say that he had an executive privilege to withold private documents and tape recordings as he saw fit. The special prosecutor argued that only the Supreme Court could interpret the Constitution. Who was right? And what if the president ignored the Court's final decision? Is the president above the law?

The Court's Decision

Just 16 days after the oral arguments, the Supreme Court made its decision. There were three main issues in the case, and the Court answered each in its opinion. *Issue 1:* Was this a matter the Court could decide, or was it simply a dispute within the executive branch that the Court had no right to interfere with? In legal jargon, was this a *justiciable* case?

The High Court held that it was.

> Here at issue is the production or non-production of specified evidence. . .relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. . . . These issues are of a type which are traditionally justiciable. . .
>
> The independent Special Prosecutor. . . is opposed by the President. . . .This setting assures that there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". . . It is within the traditional scope of Article III power. . . . [Thus] the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. .

Having ruled that the judicial branch had the power to hear this case, the Court decided *Issue 2*: Was the special prosecutor's subpeona legal? Were these tapes really necessary to the trial of the Watergate conspirators? Or was this simply a "fishing expedition," designed to publicize material damaging to the president?

In federal courts, a subpeona can only be issued if it meets certain standards. The subpeona must be relevant to the case being tried; the materials requested must be impossible to obtain in any other way; and the subpeona must specifically state the exact material being requested. The Supreme Court used this standard to decide whether or not Jaworski's request was legal.

The Court realized the sensitivity of this particular case: "In such a case as this . . . where a subpeona is directed to a President of the United States, [we must] in deference to a coordinate branch of Government, be particularly meticulous to ensure that the standards . . . have been correctly applied." But they decided in favor of the prosecutor: "We conclude . . . that the Special Prosecutor has made a sufficient showing to justify a subpoena . . . that at least part of the conversations relate to the offenses charged in the indictment."

The subpoena was legal and proper, but did the president have to obey it? This was the third and biggest question posed by *Issue 3:* Does the president have an "executive privilege" to protect his private conversations from judicial review?

First, the Court explained that the president *did* enjoy a measure of confidentiality in his executive business:

> Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest is related to the effective discharge of a president's powers, it is constitutionally based.
>
> The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

But, said the Court, the privilege of the president is *not* absolute:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law.
>
> . . . The allowance of the privilege to withold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts . . . [Executive privilege] cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.
>
> . . . neither the doctrine of separation of powers, nor the need for confidentiality . . . can sustain an absolute unqualified Presidential privilege of immunity from judicial process under all circumstances.

The president, like every other citizen, is subject to the rule of law. Any other reasoning, said the Court, "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Article III."

Finally, the eight justices (Justice Rehnquist, a recent Nixon appointee, excused himself from this case) explained which branch had the authority to be the final arbiter of the Constitution:

> In the performance of assigned constitutional duties each branch of government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President. . .reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this court (including this one), however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, that" it is emphatically the province and duty of the judicial department to say what the law is."

The television news announced the decision: by unanimous vote the Supreme Court ordered Nixon to surrender the Watergate tapes. The president obeyed the law. The tapes were released. The nature of Nixon's conversations on the tapes led the House Judiciary Committee to bring articles of impeachment against the president. Richard M. Nixon resigned the office of president of the United States on August 9, 1974.

The True Meaning of the Constitution

The Watergate affair tested many aspects of the Constitution, but most clearly tested the impeachment procedure. After the president resigned, the presidential succession clauses were tried out for the first time. And with the case of *United States v. Nixon*, the principle of separation of powers came up for review.

These tests came suddenly, in an atmosphere of crisis, and demanded quick action. People wondered in 1974 whether or not the Constitution and the rule of law would prevail, whether 200-year-old principles and phrases were sufficient to solve modern problems.

Throughout the Watergate events, the Constitution itself was not questioned. Both sides in *United States v. Nixon* quoted the document in support of their arguments. The president thought the Constitution was on his side; the special prosecutor thought likewise.

The essential disagreement came over which branch of the federal government had the authority to decide what the Constitution really means. The president thought that he, through the law enforcement and general executive powers granted to him by Article I, had the authority to decide what's proper in prosecuting a federal crime. The Supreme Court thought that it, and only it, had the authority to decide whether or not the president's interpretation was the right one.

Nowhere in the Constitution does it state that the Court has the power to interpret the document. It was only through John Marshall and his fellow justices, in the *Marbury* decision, that the Court took this power onto itself.

The Court exercised this interpretive power throughout the 19th and 20th centuries, and in the *Watergate* case had a chance to reaffirm its position. The United States Supreme Court emerged as the final arbiter of the law, as the keeper of true meaning of the Constitution. ☐

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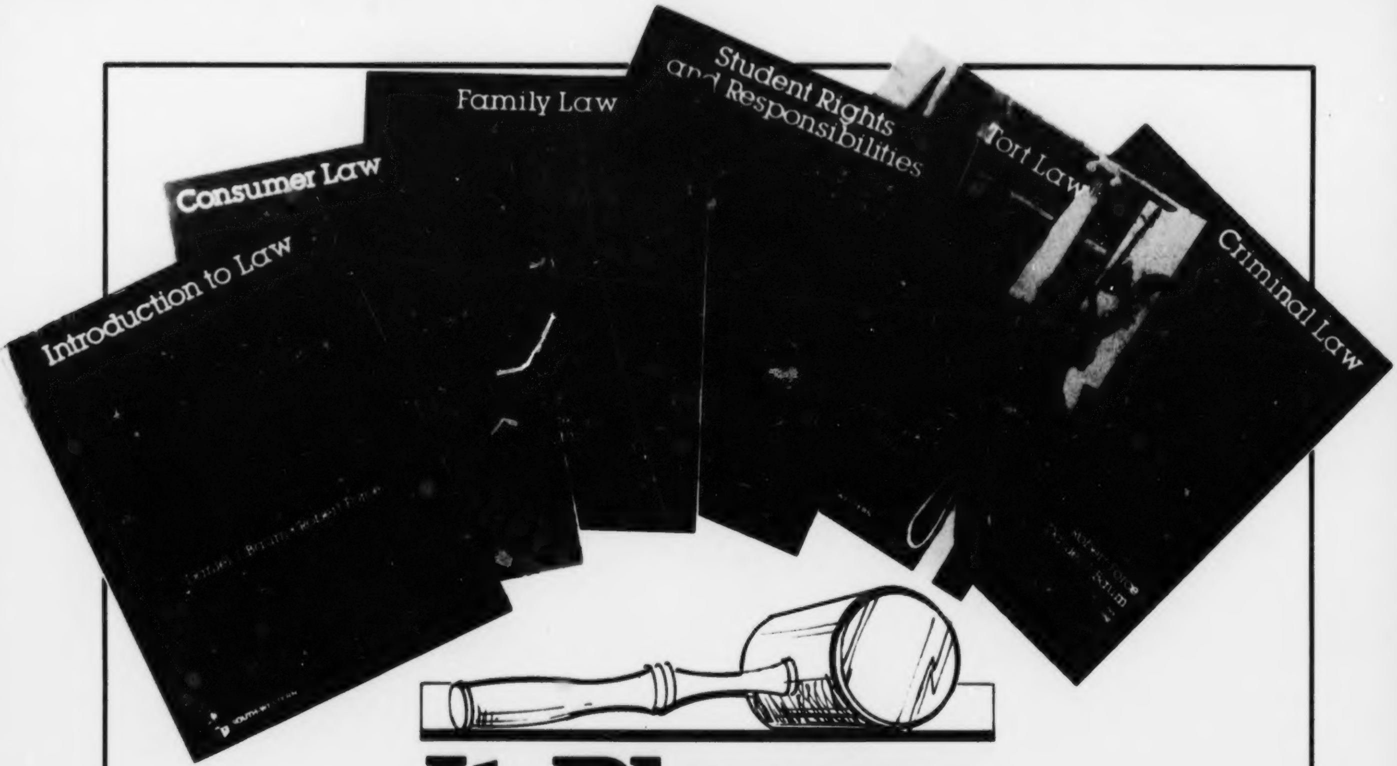
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contents

Volume 8, No. 2, Spring 1984

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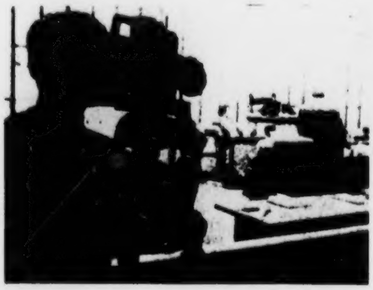
2
New Directions in the Law
Is Hypnotism a Weapon Against Crime?

6
New Directions in the Law
When Judges Throw Gibberish at Jurors

8
Classroom Strategies
How to Present the Latest in the Law

12
New Directions in the Law
Can Presidents Pack the Court?

16
New Directions in the Law
What Do Your Students Know About Crime?



20
New Directions in the Law
Do Cameras in the Courtroom Hurt the Cause of Justice?

24
New Directions in the Law
When Is a Sentence Fair?

28
Court Briefs
Bizarre Murder Case Resparks Controversy Over Death Sentence

31
Curriculum Update
Materials to Help You Plan Ahead

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NEW DIRECTIONS IN THE LAW

Is Hypnotism a Weapon

On October 25, 1978, a little after 5:00 p.m., three men entered an Indianapolis pharmacy; two pulled shotguns on the cashiers, and the third man walked to the rear of the store. There he ordered the store's stockboy, Gary Szesycki, and the pharmacist, John Stockdale, to lie on the floor. Then he shot and killed Stockdale.

Szesycki, questioned by police later, could recall the details of the robbery and murder, but he could not give police a description of the killer. A session with photographs and a lineup failed to jog his memory.

The police then called in a Marion County deputy sheriff trained in hypnosis. The deputy hypnotized Szesycki and, shortly after being hypotized, Szesycki identified Anthony E. Peterson as the killer.

In the last several years, a number of spectacular crimes have been solved by hypnotically enhanced memory. Witnesses and victims whose memories had been blocked by the trauma of the crime found their memory freed after hypnosis. The bus driver of the hijacked schoolbus in the Chowchilla kidnapping case in California, after hypnosis, was able to give police a partial license plate number that led to the capture of the kidnappers. A college woman, under hypnosis, placed Theodore Bundy at the scene of a murder and rape, leading to his conviction. It looked as if the Indianapolis pharmacy murder would join that list.

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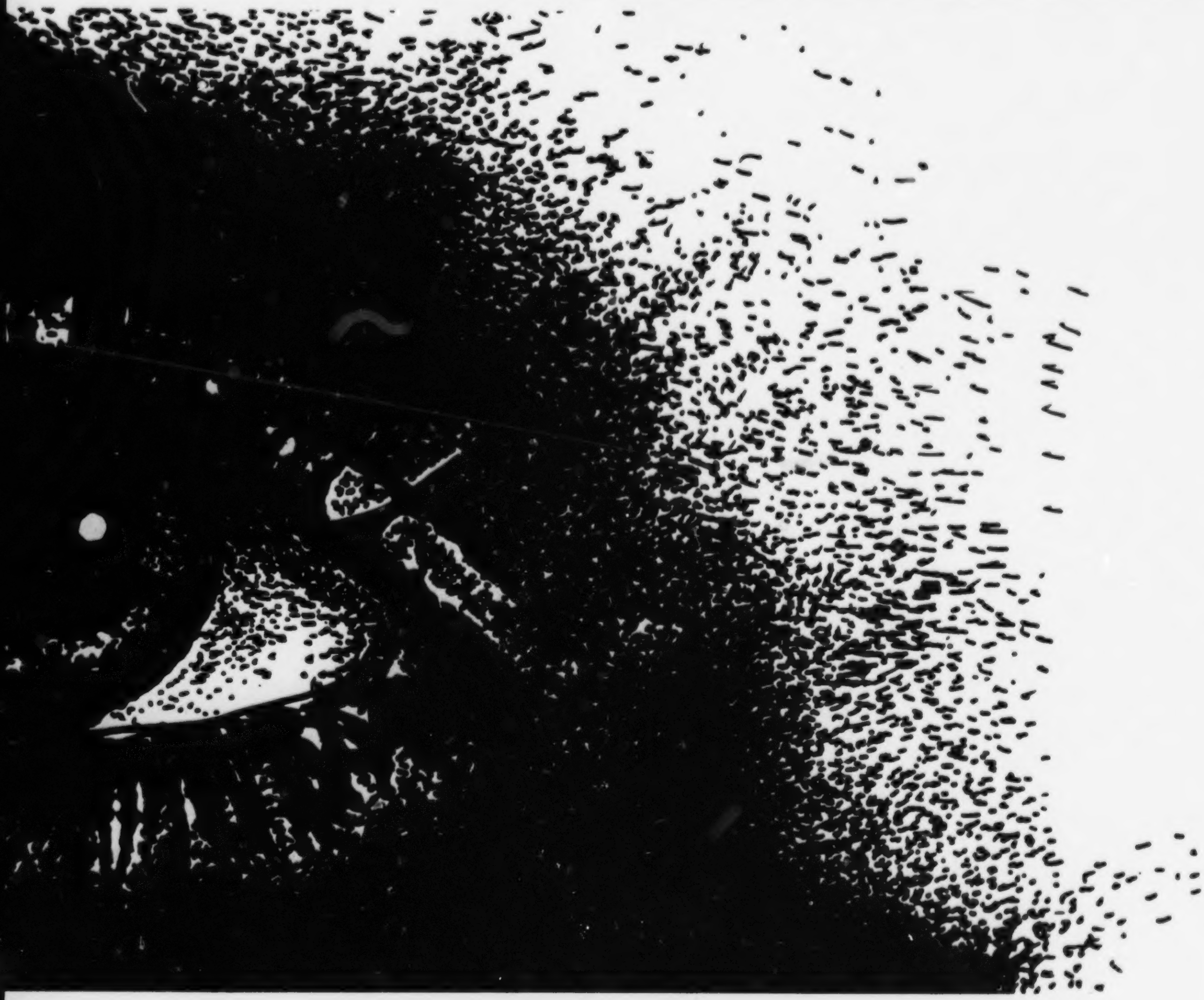
Robert Yates



Geoffrey Gove

Against Crime?

Or does it actually destroy evidence?

But this time the script changed.

The Indiana Supreme Court threw out the stockboy's identification of Peterson and ordered a new trial. Hypnosis, the court said, made Gary Szesycki's testimony unreliable and inadmissible as evidence.

His "identification testimony," the court said, "cannot by supported by any factual basis independent of his hypnotic session. Szesycki could not explain how and why he was suddenly able to identify Peterson. . . . The nature of Szesycki's testimony, as to Peterson's identification, however, was such that it was impossible for Peterson to exercise his due process rights to confront and cross-examine" (*Peterson v. State*, 448 N.E.2d 673 (1983)).

Discredited Darling

The Indiana high court's critical view of hypnosis is now the standard in courts around the country. Hypnosis, just a few years ago the darling of law enforcement, is on the verge of being thoroughly discredited as evidence in trials.

Starting in the late 1960s, hypnosis quickly gained acclaim as an unusual and powerful tool for law enforcement agencies. It has not lived up to that early promise. In fact, it is becoming apparent that even those courts that allow testimony from hypnotized witnesses are troubled by it. Five states have completely banned any testimony from a witness who has been hypnotized; the majority of states now limit a hypnotized witness' testimony to matters divulged before hypnosis. At the very least, most courts believe that hypnosis taints a witness' credibility.

What happened to hypnosis?

The simplest answer may be that law enforcement agencies, in their headlong rush to take advantage of a new crime-fighting technique, outstripped the confidence of courts in hypnosis.

The history of hypnosis stretches back to ancient Egypt, and maybe further beyond. Ever since Franz Mesmer induced trances in eighteenth century Vienna, hypnosis has been dogged by the "look-into-my-eyes" image of an occult form of entertainment. But in 1958, the Ameri- Medical Association recognized it as acceptable in medical treatment. Police began to use it as an investigative tool, and in 1975, when Dr. Martin Reiser, a clinical psychologist, founded the Law Enforcement Hypnosis Institute in Los Angeles, the hypnosis boom started.

Reiser has trained hundreds of law enforcement officers in four-day-long training sessions, creating a small army of "hypno-technicians," available for use in large and small police agencies. The Marion County deputy sheriff who hypnotized Gary Szesycki was a hypno-technician. These technicians have caused great problems for the courts—their lack of medical or scientific background and the obvious interest they have in solving crimes bothers scientists as well as judges.

Courts, in general, are cautious about admitting new kinds of scientific techniques as evidence. The rationale that most courts use in deciding on new scientific tests is *Frye v. United States* (293 F. 1013 (1923)).

Essentially, *Frye* held, before the new scientific method can be accepted by courts as evidence, there must be proof that the technique has been generally accepted as reliable in the scientific community in which it developed. Under this standard, hypnosis has run into difficulty.

Injuries through Inexperience

In 1978 and 1979, the Society for Clinical and Experimental Hypnosis and International Society of Hypnosis issued identical resolutions indicating their concerns about the growing use of hypnosis by police departments.

"[We] view with alarm the tendency for police officers with minimal training in hypnosis and without a broad professional background in the healing arts employing hypnosis to presumably facilitate recall of witnesses or victims privy to the occurrence of some crime," the organizations said. "Because we recognize that hypnotically aided recall may produce either accurate memories or at times may facilitate the creation of pseudo memories, or fantasies that are accepted as real by subject and hypnotist alike, we are deeply troubled by the utilization of this technique among police. . . . It must be emphasized that there is no known way of distinguishing with certainty between actual recall and pseudo memories except by independent verification."

What is wrong with hypnosis, according to nearly all the experts on the subject, is the very thing that gives it value: it places the subject in a highly suggestible state. While it is not the "mesmerized" trance of novels and bad movies, it is a state of hypernesia, said Robert Scigalski, a hypno-technician for the FBI, interviewed in the late '70s when hypnotism usage was in its heyday. Hypernesia is the opposite of amnesia—a state that allows a person to remember far more than he or she could normally.

While this may sound benign or even helpful to someone who wants to remember something, in criminal cases a person hypnotized by a police officer is open to suggestions from the hypnotist to remember suppressed experiences and observations that support the officer's theories about a case.

"The experts on hypnosis seriously doubt if a suggestion-free hypnotic session can be conducted," said the Arizona Supreme Court in *Collins v. Superior Court* (644 P.2d 1266 (1982)). The subjects can react to the hypnotist's tone of voice, body language, the place where the session is conducted, the presence of a police officer at the session, an accidental remark about a suspect's appearance, or nearly anything.

A look at one of the most popular hypnotism techniques makes more clear how the power of suggestion can enter into the process. There are a number of ways to hypnotize someone. A popular method used by many hypno-technicians is a process known as "progressive relaxation." The subject is told to sit in a comfortable chair with feet placed firmly on the floor. He or she is then asked to breathe deeply and to gradually relax while concentrating on the hypnotist's voice. Once the subject is in a state of deep relaxation and heightened awareness, most hypno-technicians will use a method called the "TV technique" to enhance recall. The subject is asked to imagine looking into a special screen watching a television show about the crime. This way, police officers say, the subject can stop the picture, play it back, zoom in on the details, or, if the image is upsetting, simply turn it off.

Reiser, the clinical psychologist who, more than anyone else, is responsible for the widespread use of hypnosis by police, popularized this technique.

"There is in everybody," Reiser says, "an ability to tap into your memory. All hypnosis does is guide you into your natural ability. It's an altered state of consciousness, with heightened relaxation and attention." In essence, he says, the hypnotic state is an everyday state of deep concentration, not unlike daydreaming.

Is it Live . . . Or is it Memory?

Reiser has come to grief in court and in scientific circles for this image of memory as a television set or a tape recorder. In *People v. Shirley* (641 P. 2d 775 (1982), arguably the most influential opinion in the country on the subject of hypnosis, the California Supreme Court went out of its way to criticize Reiser for suggesting the tape recorder as a model for memory.

Reiser, for his part, denies using the TV or tape recorder model as anything but a simple, convenient image to give nonscientists a sense of what memory is. Still, his concept of memory is too certain for most scientists.

"There is little clear agreement as to how hypnosis works," says Dr. Elizabeth Loftus, a psychology professor at the University of Washington. "In fact, the difficulty of defining it has caused many to doubt whether it's a unique state . . . . Memory is a fluctuating, constantly changing thing," Loftus says. "In the extreme suggestible state, it's easy to cause the creation of memory, and then the subject believes in the new memory even more strongly.

"People think hypnosis is a special technique that will allow memory recovery," she says, "but the truth is that the recollections can be accurate or inacccurate, but you can't tell."

The whole aura of suggestibility leads to the phenomenon of confabulation—what Loftus calls the "creation of a new memory." The Minnesota Supreme Court, in rejecting hypnosis for witnesses, put the matter of confabulation into a succinct form: "The hypnotized subject is influenced by a need to 'fill gaps.' When asked a question under hypnosis, rarely will he or she respond, 'I don't know.'" (*State v.*

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Mack, 290 N.W.2d 764 (1980)). Instead, the subject will make something up. Even law enforcement proponents of hypnosis recognize this danger.

"If I convince a subject that he lives in the year 2001," the FBI's Scigalski says, "he can draw upon everything he knows about that time period to give a compelling and emotional tale that is completely false." In the same way, if a person is given the slightest bit of information about a crime through police contacts, he or she can transform this while hypnotized into a convincing but untrue story.

The intriguing part of confabulation is that the hypnotized person, having invented observations to fit into a story he or she thinks the hypnotist wants to hear, does not know the new observations were invented. The subject, in short, loses the ability to distinguish between fact and fantasy in confabulation.

And the experts can't tell, either. Dr. Bennett Braun, a Chicago psychiatrist, says, "You're dealing with a double-edged sword. Research shows you can get more information with hypnosis, but you also get more confabulation. You can't tell one from the other."

In the courtroom, confabulation takes on an ominous note. Dr. Bernard L. Diamond, a psychiatrist and law professor in Berkeley, argues in the *California Law Review* (March 1980) that hypnosis of witnesses is "tantamount to the destruction or fabrication of evidence." After hypnosis, Diamond says: "The subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert or the trier of fact."

Diamond's view of hypnosis was adopted by the California Supreme Court in *Shirley*. "The hypnotic process does more than permit the witness to retrieve real but repressed memories," the court said. "It actively contributes to the formation of pseudo memories, to the witness' abiding belief in their veracity and to the inability of the witness (or anyone else) to distinguish between the two."

After a witness is hypnotized, its opponents argue, the defendant has lost the ability to cross-examine the witness. "The basic problem," the Arizona Supreme Court said in *Collins*, "is that if a witness sincerely believes that what he or she is relating is the truth, they become resistant to cross-examination and immune to effective impeachment to ascertain the truth."

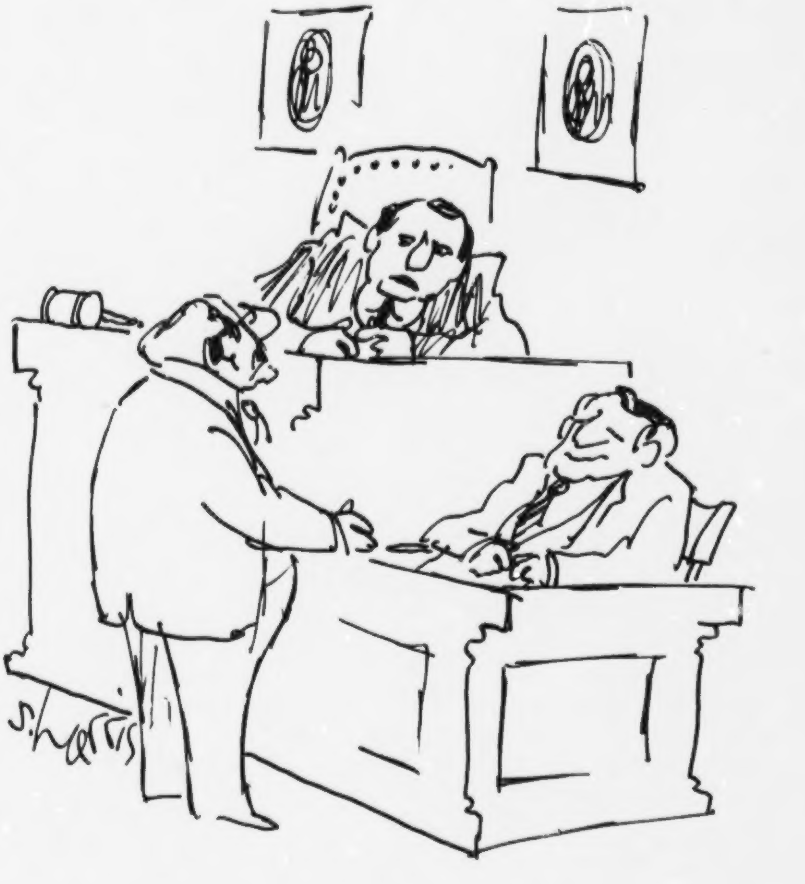
Four Conflicting Views

The state courts have divided into four camps over their acceptance of admissibility of testimony from a witness who has been hypnotized. California (with the *Shirley* decision), Michigan, Nebraska, Minnesota and Pennsylvania flatly reject any testimony from such a witness. Three states—Wyoming, Illinois and North Carolina—admit such testimony in the same way that any other testimony is admitted, subject to the weight of evidence about hypnosis and the credibility of the witnesses.

New Jersey set out guidelines to prevent the dangers posed by the hypnosis setting in *State v. Hurd* (432 A.2d 86 (1981)). The court said the hypnosis session must be conducted by a psychiatrist or psychologist experienced in hypnosis and independent of the prosecution or defense; any information given to the hypnotist before the session must be recorded; the hypnotist should obtain from the subject a detailed description of the facts before the subject is hypnotized; all contacts between the hypnotist and the subject must be recorded; and only the hypnotist and the subject should be present. If the police follow these guidelines, the states that use the *Hurd* theory will allow testimony from the hypnotized witness.

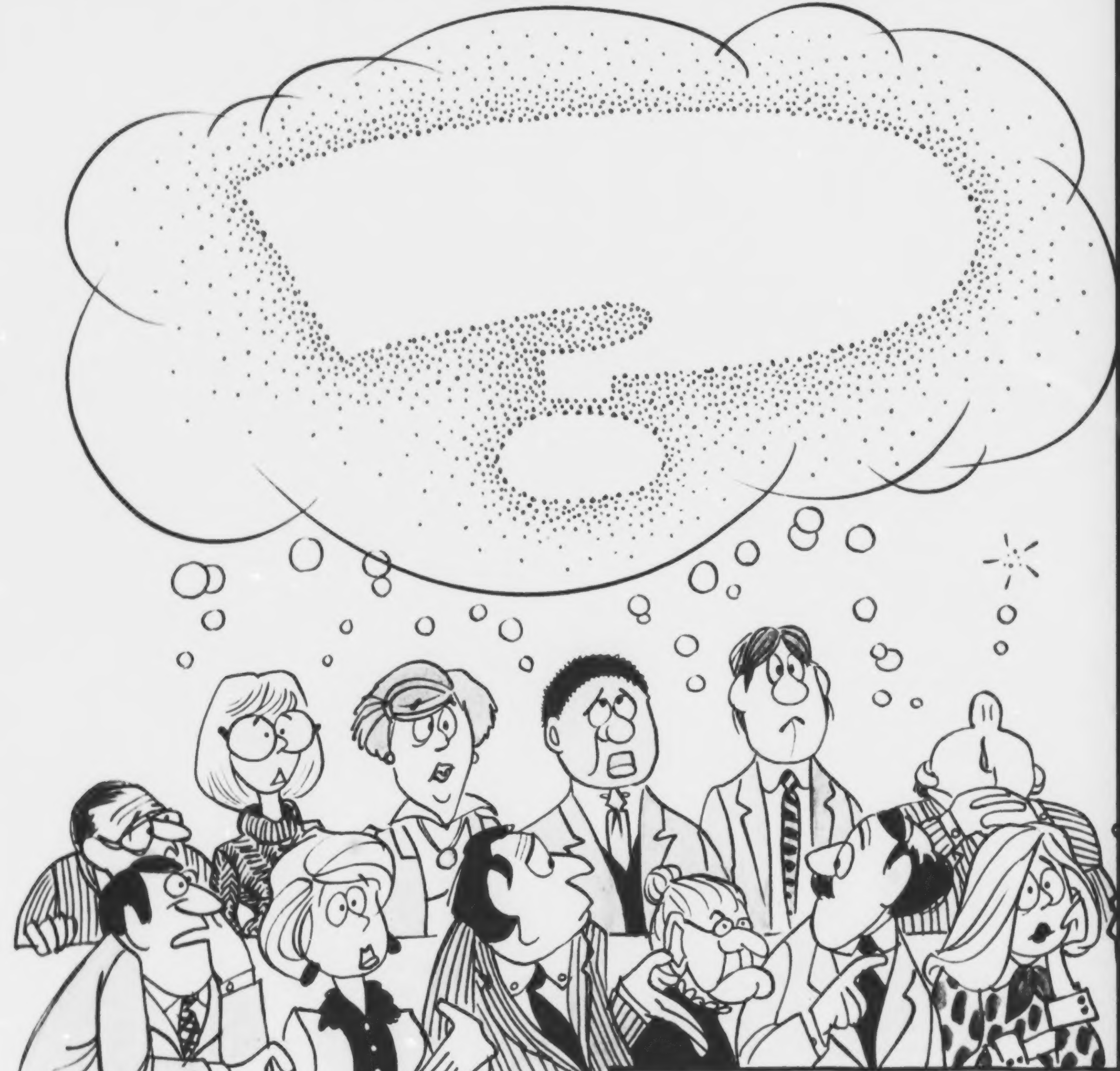
But the majority of states try to avoid the problem by allowing the witness to testify only to matters he or she disclosed before hypnosis. If this is the middle ground, it means that, at best, hypnosis won't completely disqualify a witness, but will not help the prosecution, either.

If there is any place in criminal cases for hypnosis, it appears to be in the investigation process—and not in the courtroom. If it can be helpful in developing leads that can be verified, as in the Chowchilla kidnapping case, then hypnosis has a place, maybe its proper place in law enforcement. For now, in most courtrooms, it's little but trouble. ☐



"The witness has barked, meowed and given us five minutes of baby talk. I'd say hypnosis is not the answer."

NEW DIRECTIONS IN THE LAW



Editors' Introduction: Most nonlawyers—and honest lawyers—will admit that one of the most confusing things about the law is the language so often used in legal documents and when speaking about the law. The big words and phrases commonly used are so strange to most people that they are jokingly called a "foreign language"—Legalese.

One writer went so far as to suggest that the nursery rhyme "Jack and Jill went up the hill" might begin like this if written by a lawyer: "The party of the first part, hereinafter known as Jack . . . and . . . the party of the second part, hereinafter known as Jill . . . ascended or caused to be ascended an elevation of undetermined height and degree of scope . . . hereinafter referred to as hill . . . . "

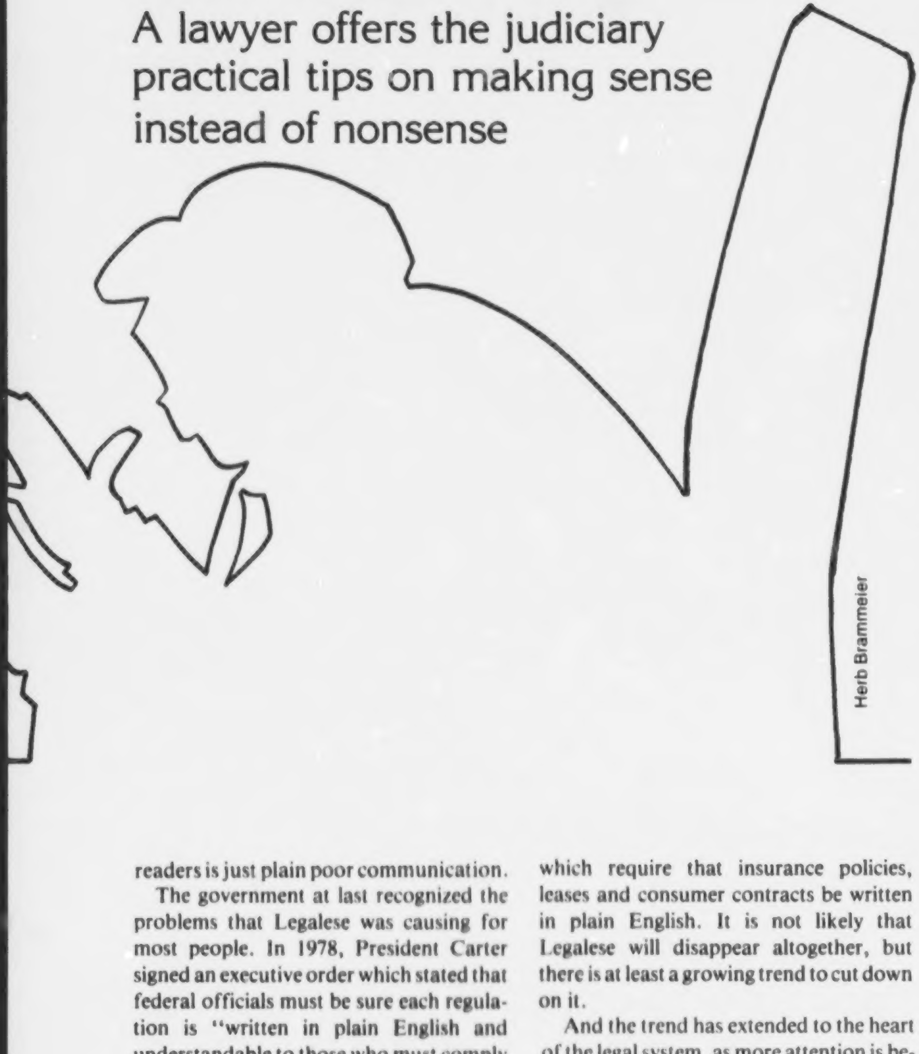
Do we really need Legalese? Yes, sometimes. In some cases, lawyers and others trained in the history and effect of legal words can actually use them as a kind of shorthand to get across a complicated idea. Still, too many go too far.

A sentence or document which can be understood by very few of its listeners or

Anthony Partridge

When Judges Throw Gibberish at Jurors

A lawyer offers the judiciary practical tips on making sense instead of nonsense


Herb Brammeier

readers is just plain poor communication.

The government at last recognized the problems that Legalese was causing for most people. In 1978, President Carter signed an executive order which stated that federal officials must be sure each regulation is "written in plain English and understandable to those who must comply with it." Also, many states now have laws which require that insurance policies, leases and consumer contracts be written in plain English. It is not likely that Legalese will disappear altogether, but there is at least a growing trend to cut down on it.

And the trend has extended to the heart of the legal system, as more attention is being paid to how judges communicate with jurors. There is now a strong focus on how jury instructions can be made more easily understood and how they can be expressed in plain English.

The following remarks were made last year before a joint meeting of the Seventh Circuit Judicial Conference and the Bar Association of the Seventh Federal Circuit. The speaker is Anthony Partridge, a member of the Research Division of the Federal Judicial Center in Washington, D.C. (Opinions expressed in these remarks are solely those of the speaker, and do not represent statements of policy of either the Federal Judicial Center or its Board.)

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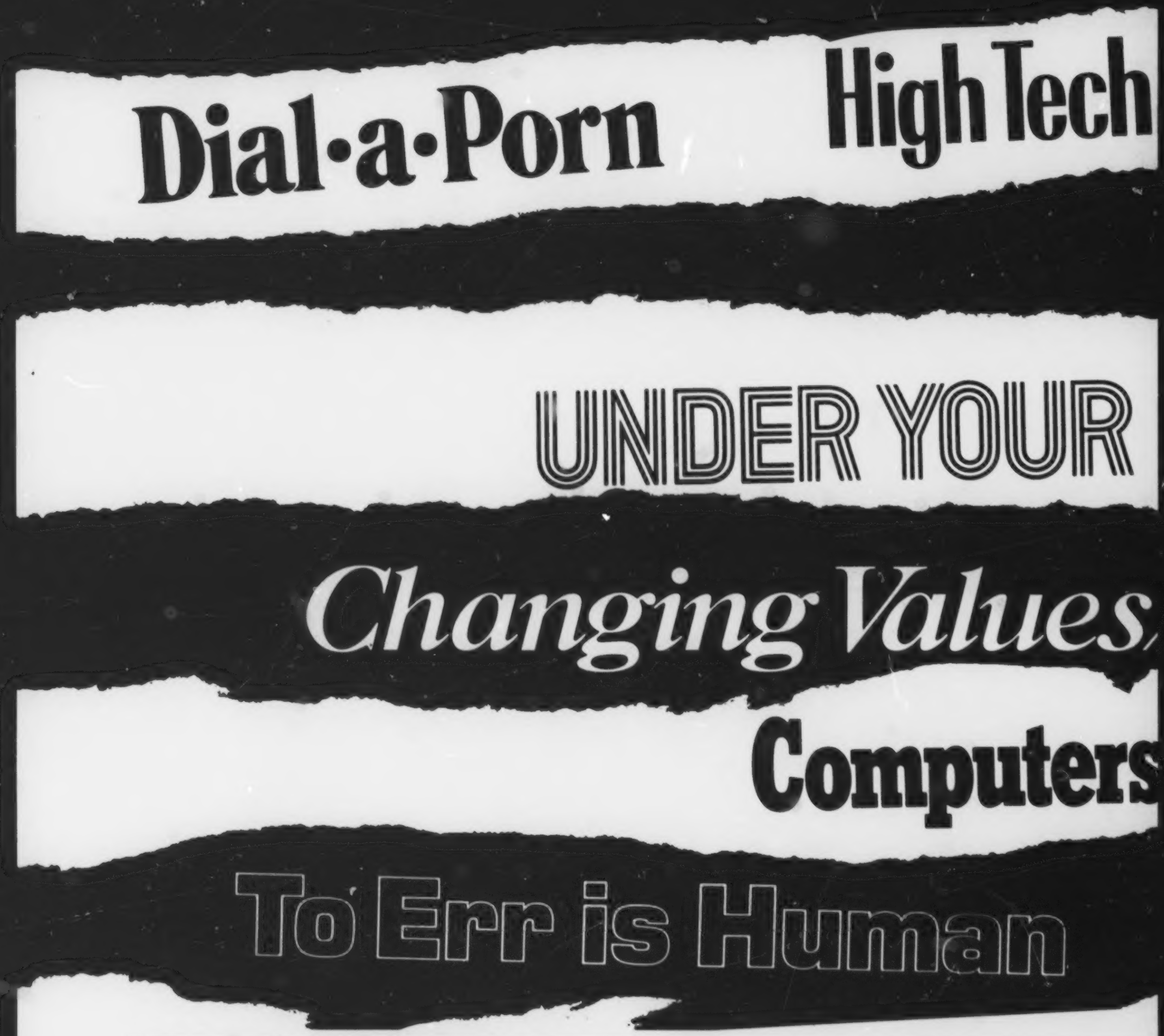
Several groups of researchers have studied the extent to which pattern jury instructions are understood by jurors and have tested ways of making the instructions more understandable. This kind of research is referred to in the trade as psycholinguistic research. In working with the Marshall Committee (the Federal Judicial Center Committee to Study Criminal Jury Instructions), Allan Lind and I tried to synthesize the findings of these studies and offer some suggestions for drafting pattern jury instructions. Our paper is published as an appendix to the Marshall Committee's report.

In broad terms, the advice that is derived from the psycholinguistic research is the same advice your high school English teacher would have given you if you had turned in a few pages of pattern jury instructions as an English theme. It mostly comes down to things like don't use double negatives, keep your sentence structure simple, don't load you sentences up with dependent clauses and don't use highfalutin', unfamiliar words.

Lind and I made one original contribution, which is the rule that you shouldn't tell the jury things they don't need to know. It was quite surprising to me to discover how often the commonly used pattern instructions include discussions of whether evidence is admissible. It was also surprising to find that it is apparently customary to draw a careful distinction between direct evidence and circumstantial evidence as a prelude to telling the jury that this distinction is wholly without importance.

But the point I want to emphasize is that the guidance that comes out of the

(*Continued on page 46*)


Dial-a-Porn
High Tech
UNDER YOUR
Changing Values
Computers
To Err is Human

CLASSROOM STRATEGIES

How to Present the Latest in the Law

Law is as old as humankind—although we cannot cite a specific originator, we know that law has existed since the dawn of early humanity. Like humanity, it has been in a state of constant flux, as mores and beliefs change. Law offers a challenging dilemma: how to remain responsive to the changing needs and values of society, yet protective of civil liberties belonging to all individuals.

Justice On the Prowl

SPELL AGAIN

Changing Law

Privacy, and Limbo

Hope Lochridge and Tom Powers

Unlike the closed, controlled world of Oceania depicted in Orwell's *1984*, neither law nor courts operate in a vacuum but are influenced by what occurs in society. The judicial pendulum swings between poles of conservatism and liberalism, as the needs and values of society change. The ongoing debate over the exclusionary rule reflects such responsiveness to the public's desire for justice. New procedures in police investigations and trials—polygraph tests, hypnosis, video equipment, handwriting analysis, and the like—attempt to create a more efficient and effective criminal justice system. However, the failure to protect individuals' personal data from corporate and governmental computers indicates that our system is sometimes slow to adapt to new legal challenges.

It's easy to spot flashy changes in the law—new technology, gimmicks of all kinds—but harder to discern major trends in our approach to law. However, as society returns to a more traditional value system, a renewed focus on responsibility emerges in our legal system. Accountability for one's actions, whether it is measured by standardized tests in the classrooms or by breathalyzer tests on the highways, is a current demand voiced by many concerned citizens. The classroom offers a training ground for helping youth to act responsibly.

The activities and strategies in this article are designed to encourage students to understand, respect, and act responsibly in our legal system. The materials are intended to be illustrative of the changing nature of law, not a comprehensive treatment of these issues. Previous editions of *Update* may provide a more complete background on the laws and concepts mentioned in these strategies.

Strategy 1

Changing Values/ Changing Laws

It's difficult for students to learn that law is an ever-changing phenomenon. Most would agree that a function of law is to do justice. But what is justice? The root word is "just," meaning fair and right, but what is fair and right is dictated by time, place, and circumstance. What is considered "just" in one society is not necessarily considered "just" in another; and what is just in a given society today may not be considered just or fair in that same society at another time in history.

The strategies in this section are adapted from materials by the Law in a Free Society project. They encourage students to identify the relationships between the law and the changing needs and values of society.

Procedure

1. Present students with the following propositions and ask them to explain them and give an example of what each generalization means.
   - Law evolves as a result of the changing needs and values of the people.
   - Laws and values of a society are interrelated. Values are reflected in laws, and laws reinforce the values.
2. On a transparency or handout, discuss with students anachronistic laws and ask whether they once reflected the needs and values of the people. The ones listed below were discovered in 1971 by Dick Hyman and published in *It's Against the Law* by the Readers Digest Association. Hyman found that it's illegal:
   - for people in South Carolina to crawl around in the public sewers without a written permit from the "proper authorities;"
   - to roller skate down a street in Quincy, Massachusetts;
   - for milkmen to run while on duty in St. Louis, Missouri;
   - to use the same finger bowl with a friend in Omaha, Nebraska;
   - to push baby carriages down a sidewalk two abreast in Rockville, Maryland;
   - for women in some jurisdictions to stand nearer than five feet away from bars when drinking in public;
   - for more than eight rabbits to reside on the same block in Tuscumbia, Alabama;
   - to advertise on tombstones in Roanoke, Virginia;
   - to hunt or shoot camels in Arizona;
   - to poke a turkey in a Los Angeles meat market to check for tenderness;
   - to allow a rain puddle to remain in your frontyard for more than twelve hours in Lake Charles, Louisiana;
   - for people to appear on a street in Bradford, Connecticut, unless covered from shoulder to knee.

   Ask students:
   - What values are reflected in these laws?
   - What was probably the historical setting in which these laws were written?
   - Do values and laws change rapidly? Why or why not?
3. Brainstorm with the class what laws exist today that reflect our values (for example, laws regarding gambling, prostitution, pornography, alcohol and drug use). Write the student responses on the chalkboard.
4. To demonstrate the range of values within the class, stage a "mock referendum." Explain to the students that in a referendum the electorate actually votes on proposed laws or ordinances. The purpose of this mock referendum is to determine whether the local government will continue to regulate morality. Instruct students to answer yes or no to the following propositions:
   a) The state will no longer regulate the sale or distribution of alcohol.
   b) All laws prohibiting horse racing, roulette, blackjack, craps and other forms of gambling shall be repealed.
   c) The use and sale of marijuana will be decriminalized.
   d) State and municipal governments will repeal all laws penalizing prostitution.
   e) Pornographic materials may be sold and distributed without interference from the law. (On these last two points, see pp. 7-8, 48-50 of the Winter, 1980, *Update*.)

   Discuss with students the range of values within the class after tallying the vote. Ask students to explain why such diversity exists in our society.
5. Review the list of laws and values stated in #3. Which of these laws may change by the year 2000? Which will change first: the law or our values?

Strategy 2

On the Prowl

Society maintains order through rules and must rely on its members to comply with rules designed to protect the community. While not a popular concept, reporting crime is a responsibility of citizens. Many states require witnesses to report a crime. In Texas, for example, a person commits a misdemeanor if he or she fails to report child abuse or neglect. Many towns have developed "Crime Stoppers" or "Neighborhood Watch" programs to encourage citizens to report crime. This activity, also adapted from materials put out by the Law in a Free Society project, is designed to help elementary students tell the difference between tattling and reporting a crime. It can be easily adapted for secondary students by changing the names and incidents.

Procedure

1. Draw a continuum on the chalkboard or bulletin board and give each student a name tag and a piece of tape or thumbtack.

______________X______________

Secretive Sam — Timmy Tattler

Hope Lochridge is the Coordinator for Law-Related Education at the State Bar of Texas. Tom Powers is a classroom teacher at L.B.J. High School in Austin, Texas.

2. Read the following descriptions and ask students to determine where they themselves should be placed on the continuum.

   At one end is *Secretive Sam*, a person who never tells what he has seen. Even if a witness to a serious crime, such a person would not tell what he or she saw or knows to be the truth about the crime. At the other end is *Timmy Tattler*, a person who tells continually what he or she has seen or imagines to have seen. No incident is too small for Timmy to omit telling about.

3. Discuss with students:
   a. **What is the difference between tattling and reporting a crime?**
   b. **Does the seriousness of the act have anything to do with it?**
   c. **When should you decide to take part in other people's affairs?**
   d. **What is the difference between "sticking your nose in other people's business" and "helping in the administration of justice?**

4. Hand out a copy of "Reporting a Crime" to students. Ask them to check the incidents that need to be reported to their teacher or parents. Compare their answers and discuss which incidents should be reported.

REPORTING A CRIME

___ 1. Your babysitter grabs your pillow as you are watching T.V.
___ 2. Your older brother takes your allowance from your billfold.
___ 3. A friend grabs your potato chips at lunch and spills them on the floor.
___ 4. You see two members of the class copying each other's homework.
___ 5. You find someone looking over your shoulder during a test.
___ 6. You see a strange person climbing out of your neighbor's house with a television set.
___ 7. You continually see a group of students "gang up" on another student.
___ 8. Another student purposely marks your new notebook with ink.
___ 9. You see the person delivering the mail kick your neighbor's dog.
___ 10. Your uncle touches you when no one is looking.

5. Ask students what they think of the following guidelines for reporting a crime to the authorities.
   a. Search for as much information as you can before accusing someone.
   b. When possible, confront the suspect and hear his or her explanation.
   c. Can the dispute be handled privately?
   d. Is it serious or trivial?

Strategy

3

To Err is Human

In 1961, in the *Mapp v. Ohio* case (367 U.S. 643) the Supreme Court extended the exclusionary rule to state criminal justice systems. This rule provides that if the police make a legal blunder in the search or seizure of evidence of a crime, the evidence is to be suppressed and not used in court. Whether or not the evidence is relevant to the suspect's guilt is immaterial. The purpose of the exclusionary rule is to deter the police from making unreasonable search and seizures, as required by the Fourth Amendment. (See the entire Spring, 1978, *Update* for more on search and seizure.)

There are many tales of how this ruling has straight-jacketed the police. One such case occurred in California when a man and woman were arrested for possession of narcotics. Heroin was found in the diapers of their nine-month-old daughter, who was with them at the time of the arrest. The heroin found in the diapers was suppressed because the baby was too young to consent and there was no warrant authorizing the search (*People v. Padilla & Corona*, California Municipal Court, 1970).

During the 1983–1984 term, the United States Supreme Court is reviewing several cases that would allow evidence to be used if the officer was acting in "good faith." Examples of "good faith" situations might include: 1) technical errors in issuing the warrant, such as typographical mistakes in the date or street number; 2) a warrant based on a statute that was later found to be unconstitutional; 3) an officer who in "good faith" makes a reasonable interpretation of a statute that a court later decides is contrary to the legislative intent.

The Reagan administration is leading the battle to stop "letting the guilty go free" by urging that Congress allow such "good faith" exceptions to the exclusionary rule. Critics of this legislation believe that such an exception would permit ignorance of the law to be a police officer's defense for wrongdoing and give unlimited license to prosecutors and police to ignore the Constitution.

Students will enjoy discussing the following case study, which is based on one of the "good faith" cases before the Court this year. It raises the question of where the balance should lie between protecting the accused and protecting citizens. As Chief Justice Warren E. Burger stated in 1981: "We have established a system of criminal justice that provides more protection, more safeguards, more guarantees for those accused of crime than any other nation in all history. The protective armor we give to each individual when the state brings a charge is great indeed. . ." Many victims think we provide too much protection to the accused, questioning the soundness of Sir William Blackstone's statement: "It is better that ten guilty persons escape than one innocent suffer."

Case Study Procedure

1. Reprint this abridged version of *Massachusetts v. Sheppard*, 441 N.E. 2d 725 (1982), for students to read. (For more on the case, see the excerpt from *Preview of U.S. Supreme Court Cases*, **pp. 49-50.**)

   In 1979 the badly beaten and burned body of Sandra Boulware was found in a vacant lot. The Boston police wanted to search her boyfriend's home in the murder investigation, since Sheppard had stated that he and Sandra had purchased some marijuana and gone to his home early in the evening. Probable cause was established by the bloodstains found in the car Sheppard had borrowed from a friend.

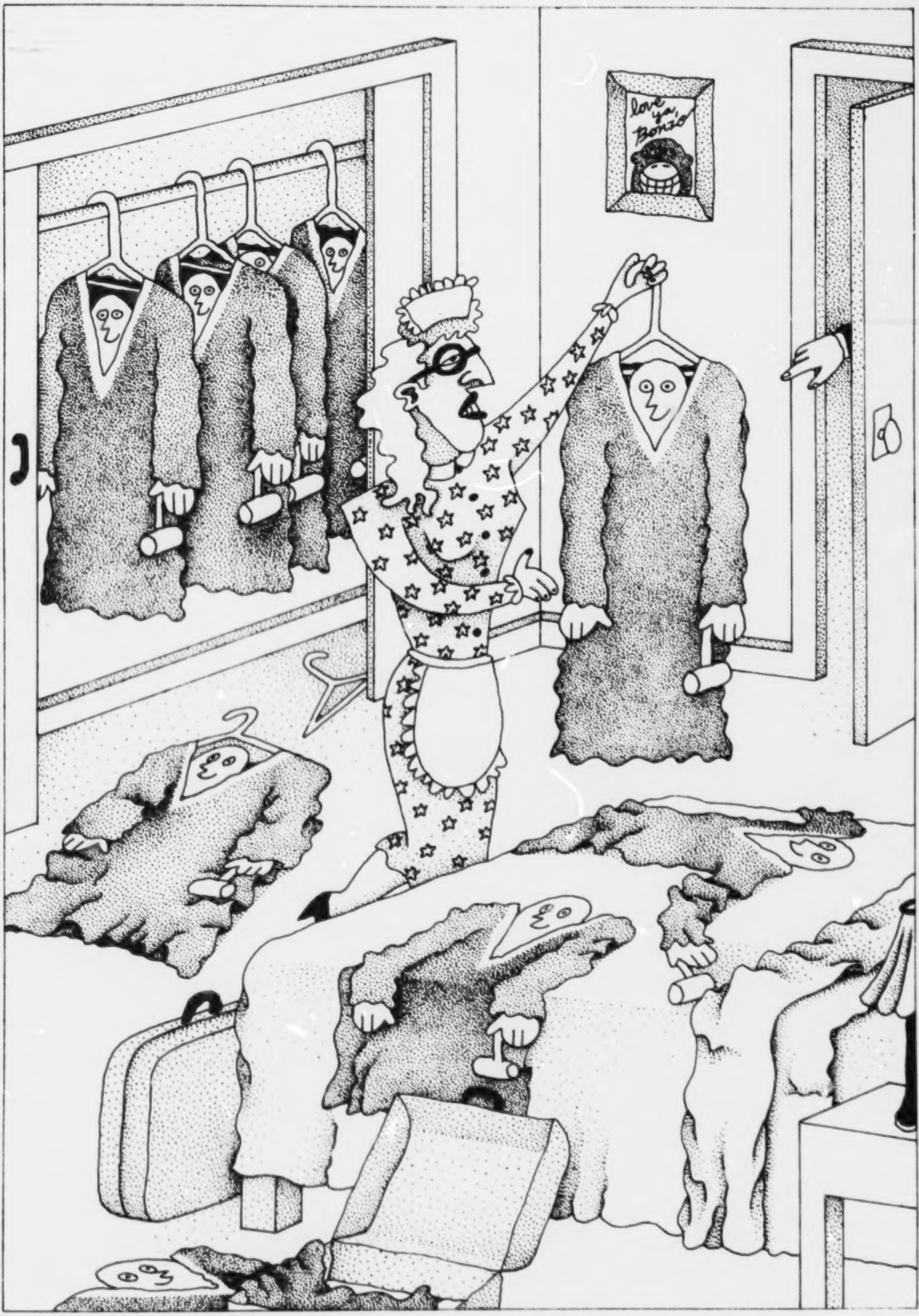
   However, the police detective, Officer O'Malley, could not locate the proper search warrant form. In haste, he filled out a municipal court search warrant used for drug investigations. The officer listed on the affidavit the specific, nondrug items for which they wanted to search, but failed to include this information on the actual warrant. When the officer presented the warrant to the magistrate, the judge signed it and promised O'Malley he would make the necessary changes and would attach the affidavit of items to be seized. However, as it turned out, the warrant was in fact defective. Columnist James J. Kilpatrick called it "a mishmash of wrong terms and unreferenced data."

   Upon searching Sheppard's home, police found Sandra's bloodstained clothing. Sheppard was convicted when this was used as evidence in the trial court, but the Massachusetts Supreme Judicial Court ordered a retrial because the search warrant was not valid. The legality of the search is now before the Supreme Court.

2. Instruct students to read the case. Begin the inquiry process by asking students to identify the facts and circumstances of the case.

3. Ask students to orally identify the issues before the Supreme Court. Write the issues in the form of questions on the chalkboard.

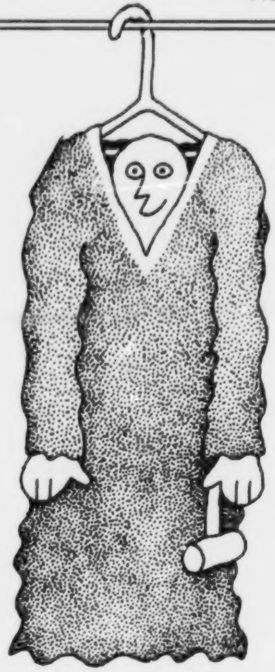
(Continued on page 47)


love ya, Bonzo

Dean Matthews

NEW DIRECTIONS IN THE LAW

Robert S. Peck



Can Presidents Pack the Court?

The answer is yes, no, and maybe

Before the appointment of Justice Sandra Day O'Connor, the United States Supreme Court was often well-described as "nine old men." Attorney General-designate Edwin Meese, echoing others before him, has said: "The Supreme Court is a tribute to longevity." The proof of his statement is in the history of the Court. Justice Oliver Wendell Holmes served until he was ninety; seven others served past their eightieth birthdays. Today, five justices are over the age of seventy-five.

"There will be changes soon," Justice Harry Blackmun recently told a college audience, "I certainly must assume that in the next presidential term, the Court will change considerably."

The importance of that change has not been lost on the presidential hopefuls this election year. Republican and Democratic candidates alike have pointedly told voters that this election will decide the composition of the Court for years to come. The candidates recognize that the constitutional standing of politically potent issues like school prayer, abortion, the death penalty and busing are at stake. Whether we like it or not, in interpreting the Constitution, the Supreme Court necessarily decides social policy, and the membership of the Court influences those policy choices.

So in one sense, it is right that political pundits and the politicians themselves thunder warnings during this election. It is only natural in an election year to exhort the faithful to bestir themselves so that the Court for the rest of the century reflects *their* positions on these critical issues.

But in another sense, the Court as a political issue may be blown out of proportion. For one thing, the Supreme Court is not a legislative body, and men and women don't run for it as they do for Congress. Justices serve for life—the longest congressional term is the Senate's six years—and the justices' beliefs, the values of society and the issues before the Court can change dramatically over the years.

Voters usually have a pretty clear idea of how a candidate may perform in Congress, but presidents are often surprised by the people they put on the Court. The Marshall Court's ability to confound a long series of presidents provides the best example of a judiciary successfully removed from political pressures. John Marshall was appointed by John Adams, the last Federalist president. He served thirty-four years under a succession of presidents who represented the opposition party, and his own party had been out of existence for twenty years by the time of his death. Presidents continued to appoint non-Federalist justices to the Court throughout these thirty-four years, only to have them vote with Marshall on issue after issue.

More recently, President Harry Truman was chagrined when the Supreme Court, including a majority of the justices he himself had appointed, went against him in the crucial Youngstown Steel case. "You can't pack the Court," he confessed, "I know—I tried."

"The Warden's Friend"—And Some Others

How do justices weild such extrordinary power? Why do they often differ so sharply, and why does it matter so much which justices are serving?

While the justices are guided in their decisions by precedents, there remains considerable latitude in deciding whether the law used in a previous decision is precisely applicable to the facts in a new case. Distinctive new facts can make all the difference in how the Court decides a case, even though the legal issue may have seemed settled.

The job of the Court, Justice Felix Frankfurter said, is to "breathe life, feeble or strong, into the inert pages of the Constitution and of statute books." How that is done depends greatly on each individual justice and the experiences and perspectives each brings to the job. The justices cannot help but follow "the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function," according to Justice Louis Brandeis.

His colleagues agree. "Our system faces no theoretical dilemma," wrote Chief Justice Earl Warren, "but a single continuous problem: how to apply to ever changing conditions the never changing principles of freedom." No two justices bring the same body of experiences, preferences and even prejudices to those decisions. Justice Blackmun recently revealed, for example, that one of the brethren is jokingly called "the warden's friend" by his colleagues because he always votes against the prisoner.

A change in membership on the Court can substantially change the Court's constitutional outlook. Of the cases decided in the term that ended in 1983, twenty-one percent were decided by five-to-four votes. Even though all the decisions were not based on constitutional law, just one change of voting inclination nevertheless would have changed the law of the land in each of these cases.

This year, *Lynch v. Donnelly* (52 U.S. L.W. 4317 (1984)), was decided by a slim five-to-four majority. Here, the Court held that the city of Pawtucket, Rhode Island, did not violate the First Amendment's prohibition against governmental sponsorship of religious activities by displaying a city-owned nativity scene in a downtown park along with other Christmas season decorations. Writing for the majority, Chief Justice Warren Burger said the creche was a passive seasonal symbol used to celebrate and depict the origins of a recognized public holiday, not improperly to promote any religion.

Four justices disagreed, claiming that the city sponsorship of the creche violated all three of the tests used to determine if there has been an unconstitutional establishment of religion: to be constitutional, the activity in question must have a secular purpose, cannot have a primary effect of advancing or inhibiting religion and cannot cause excessive governmental entanglement with religion. A situation that fails any one of these tests violates the First Amendment.

The precedent for using this three-part test is well established, yet the Court has avoided precedents when the justices decide a different result is preferable. For example, last year in another "establishment of religion" case, *Marsh v. Chambers*, (103 S. Ct. 3330 (1983)), the Court chose not to use the three-part test and upheld the practice of employing a chaplain for an opening prayer before the Nebraska state legislature as "part of the fabric of our society." Clearly, such a practice—here involving the employment of the same Presbyterian minister since 1965—advances religion and could not be said to have a secular purpose, and so would seem to fail the test. Yet the Court found use of the chaplain benign because of tradition.

In still another religion case last year, the Court upheld a Minnesota statute that created tax deductions of $500 to $700 for parents who pay the costs of transportation and tuition in sending their children to nonprofit schools, whether public, private or church-related, as well as the cost of textbooks and equipment that are not used to teach religion. What made this decision so unusual is that it appeared to go directly against a prior precedent.

The case, *Mueller v. Allen* (77 L. Ed. 2d 721 (1983)), was not very different from one decided ten years earlier, *Committee for Public Education & Religious Liberty v. Nyquist* (413 U.S. 756 (1973)), in which the Court invalidated a New York tax credit provision for parents of private schoolchildren because the principal benefit went to those attending parochial schools. *Nyquist* found that the credit amounted to a direct aid to religious teaching. Said Jesse Choper, the law school dean at Berkeley, "I think most informed observers believed that statute [in *Mueller*] was going to be held invalid under existing precedents."

Why were the "informed observers" wrong? The Court distinguished the *Nyquist* decision by saying that the *Mueller* statute made the tax advantage equally available to parents of public schoolchildren and to private schoolchildren, while the prior New York statute did not. The plaintiffs, however, argued unsuccessfully that since public schools don't charge tuition, the tax credit really only helped the private schools, which are overwhelmingly church-related.

As Time Goes By

The simple explanation for the Court's seeming turnaround was a change on the part of the justices. The three dissenters in *Nyquist* were still on the Court and became the core of the new majority in *Mueller*. Justice Lewis Powell switched sides, and Justice Potter Stewart had been replaced by Justice O'Connor, who joined the old dissenters to create a new majority.

Justice Powell's shift illustrates why justices are hard to predict and suggests how difficult it is for any president to assure that a given position dominates.

Powell had previously retreated from the majority position he had fashioned as the author of *Nyquist*. In a separate opinion in *Wolman v. Walter* (433 U.S. 229 (1977)), he found a "wholesome competition" between parochial and public schools. This competition, he said, provided tax relief to the community-at-large because the education of students choosing the private alternative was not paid out of tax dollars. Therefore, a slight return on the tax dollars paid by parents of children in private schools (for books and other items) ultimately prevented a rush on the public schools that society was unprepared to finance.

Moreover, Powell wrote: "At this point in the twentieth century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even deep political division along religious lines—is remote, and when viewed against the positive contribution of sectarian schools, such risk seems entirely tolerable. . . ."

When *Mueller* came before the Court, Powell was ready to accept aid to parochial schools. In addition, Powell was well-courted by the new majority. Justice William Rehnquist's opinion in *Mueller* took pains to distinguish *Nyquist* and went out of the way to quote Powell favorably. Some legal observers have called it an obvious attempt to win Powell's vote.

While it is unusual for a justice to switch sides on an issue, it does happen. For Powell, the fears of governmental entanglement with religion had receded, permitting a relationship that might have been unconstitutional in another era. Chief Justice Burger, in *Lynch*, the nativity scene case, expressed a similar view: "The Court has acknowledged that the 'fears and political problems' that gave rise to the Religion Clauses in the eighteenth century are of far less concern today. . . . We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially

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recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed."

The dissent in *Lynch* also recognized the influence of time on the majority decision. Justice William Brennan attributed the majority's view to the fact that "the Christmas holiday seems so familiar and agreeable."

Society Matters, Too

Normally, this change in attitude occurs over time and manifests itself when new justices bring new visions to constitutional law. It took nearly sixty years for the Supreme Court to reverse *Plessy v. Ferguson* (163 U.S. 537 (1896)), and its sanctioning of "separate but equal" facilities based on race with the controversial decision in *Brown v. Board of Education* (347 U.S. 483 (1954)).

There may indeed be some truth to Mr. Dooley's streetwise philosophy that the Supreme Court follows the election returns. Though it is often denied, events and headlines do influence the justices, and this is often good.

For example, in *Hoyt v. Florida*, 368 U.S. 57 (1961), the Court declared that because a "woman is still regarded as the center of home and family life," a law could constitutionally exempt women from being placed on the list for jury duty except by special request. The Court determined that jury duty might interfere "with [the woman's] own special responsibilities." The decision was not effectively overruled until 1975, but would be an unthinkable result today simply because of the revolution in thinking about on women's rights, not because of any change in the language of the Constitution.

The impact of outside events is only one reason presidents generally have a bad record of predicting the behavior of those they appoint to the Court. The justices, insulated from the political process by life tenure, are encouraged to be independent. President Dwight D. Eisenhower recalled his appointment of Earl Warren to the position of Chief Justice of the United States as his "worst presidential decision." When Richard Nixon appointed Harry Blackmun to join his boyhood friend Warren Burger on the Supreme Court, he and many other Court watchers expected the two Minnesotans to vote alike. They were quickly dubbed "the Minnesota twins." However, it has not worked out that way, and Blackmun, appointed as a conservative, has often joined the Court's liberal wing on votes. In addition, the supposedly conservative Burger Court has been responsible for many liberal decisions—expecially in the areas of women's rights and abortion.

Perhaps the president most successful in choosing justices who reflected his own philosophy was William Howard Taft. Taft appointed uniformly conservative justices to the Court as president and then joined them as Chief Justice after his own appointment by Warren G. Harding. Four Taft appointees—known as the "Four Horsemen"—plagued Franklin D. Roosevelt's presidency, and were responsible for leading the charge that invalidated most of the New Deal's early social legislation. It was in response to his frustrations with the Court that FDR proposed his ill-fated court-packing scheme. After scoring a large reelection victory in 1936, FDR hoped to increase the number of justices on the Court to fifteen, giving him a comfortable majority. In a rare instance of miscalculation on his part, Roosevelt suffered a resounding defeat on the plan.

Still, FDR outlasted his judicial opponents, nominating eight justices during his presidency and filling the Court with New Dealers. His friend and appointee, Justice William O. Douglas, later lamented some of Roosevelt's appointments for being shortsighted. While every Roosevelt justice supported the constitutionality of the New Deal, Roosevelt did not seek out their views on the host of civil liberties issues that were soon to engulf the Court. Douglas believed that many would not have been appointed if FDR had known the full range of their views.

Past and Future

The lessons of history prove that with a turnover of justices there is often a substantial change of philosophy on the Court. Prior to 1937, the Court showed a substantial interest in protecting property rights, often at the expense of social legislation. The Court of Chief Justice Harlan Fiske Stone was an activist body that advanced the cause of individual rights. The Frederick Vinson Court that followed slowed that process, only to be followed by the activist Warren Court that blazed new trails in civil rights and the rights of the accused. The Burger Court has proven more difficult to characterize— liberal on some issues and conservative on others. It has had both elements of judicial activism as well as judicial restraint.

Given the importance of the Court and the impact of the individuals chosen to serve on it, the candidates are right to warn that this election will shape the legal future of the nation for many years to come. A substantial turnover will bring a new outlook on constitutional issues that a president who chooses wisely can help shape.

Still, it is difficult to predict that legacy. "When an old Court is suddenly reconstituted," observed Justice Douglas, who served on the Supreme Court longer than anyone else, "there will be unsettlement until the new judges have taken their positions on constitutional doctrine. During that time—which may extend a decade or two—constitutional law will be in flux. That is the necessary consequence of our system."

"The message of my next song is the message of our rights and freedoms. I'm going to sing the 7th, 10th, 19th and 24th amendments to the Constitution."

NEW DIRECTIONS IN THE LAW

What Do Your Students Know About Crime?

Before you answer, test yourself

1. Statistically speaking, you have relatively little reason to fear homicide. ____ True ____ False
2. The overwhelming majority of robberies involve the use of a weapon. ____ True ____ False
3. The vast majority of household burglaries occur as a result of forced entry. ____ True ____ False
4. Larceny (theft) is about as common as robbery. ____ True ____ False
5. Convenience stores are a big hit with robbers too. ____ True ____ False
6. White-collar crimes are viewed much more tolerantly by the public than violent crimes. ____ True ____ False
7. Violent crimes are about as common as property crimes. ____ True ____ False

Who Are the Victims?

8. The elderly are the greatest victims of crimes. ____ True ____ False
9. In 1981, almost a third of all households were victimized by violence or theft. ____ True ____ False
10. Households are the prime targets of robbers and burglars. ____ True ____ False
11. Victims of crime are more often men than women. ____ True ____ False
12. Younger people are less likely than the elderly to be victims of crime. ____ True ____ False
13. Blacks are no more likely to be victims of violent crimes than whites or members of other racial groups. ____ True ____ False
14. The divorced and the never-married are more likely to be victims of crime than the married or the widowed. ____ True ____ False
15. Violent crime rates are lower for lower income people. ____ True ____ False
16. Theft rates are highest for people with low incomes (less than $3000 per year) and those with high incomes (more than $25,000 per year). ____ True ____ False
17. Young black males have the lowest rate of being victimized by violent crimes; elderly white females have the highest rate. ____ True ____ False

What Are the Trends in Crime?

18. Crime rates are shooting up in recent years. ____ True ____ False
19. The homicide rates are higher now than they have ever been in this century. ____ True ____ False
20. The warmer months are the peak season for many types of crime. ____ True ____ False
21. Cities tend to be high-crime areas; the very rural areas tend to have little crime. ____ True ____ False
22. If you want to avoid violent crime, it is better to stay home. ____ True ____ False
23. Crime is rising at a higher rate in smaller cities and suburban areas than in major cities. ____ True ____ False
24. Terrorist groups accounted for more than 100 bombings in 1980. ____ True ____ False
25. Robbery victims run a higher risk of injury from unarmed strangers than from armed one. ____ True ____ False
26. When people worry about crime, they worry most about being injured by strangers—and they are right. ____ True ____ False

The Risk of Crime

27. The chance of being a violent crime victim, with or without injury, is greater than that of being hurt in a traffic accident. ____ True ____ False
28. Young offenders appear to be singling out the elderly as victims of robbery and assault. ____ True ____ False

Michael Sullivan

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29. You are less likely to be hurt if you use force to resist a criminal than if you try to talk yourself out of the predicament. ____ True ____ False

30. You are more likely to be victimized by someone of another race than of your race. ____ True ____ False

31. If victims reported every crime against them, the crime rate would be three times what it is now.
____ True ____ False

Who Are the Criminals?

32. At least 15% of the total United States population has arrest records for nontraffic violations.
____ True ____ False

33. Half of all crimes are committed by persons under age 20.
____ True ____ False

34. Property crimes are more typical of older offenders than youths, while youths are more associated with violent crime.
____ True ____ False

35. Most juvenile offenders continue on a life of crime.
____ True ____ False

36. Violent juvenile offenders and adult felons have a lot in common.
____ True ____ False

37. Career criminals, though few in number, account for most crimes.
____ True ____ False

38. Most chronic repeat offenders are fulltime criminals.
____ True ____ False

39. There's a strong link between crime and drug and alcohol abuse.
____ True ____ False

The Response to Crime

40. Crime is primarily a federal matter.
____ True ____ False

41. Law enforcement is the major role of police. ____ True ____ False

42. The growth in police forces is more or less keeping up with the growth in crime. ____ True ____ False

43. Serious crimes—the ones that end up on crime indexes—account for most arrests. ____ True ____ False

44. The sooner the crime is reported, the better chances that the criminal will be apprehended.
____ True ____ False

45. Police make arrests in more than half of the cases reported to them.
____ True ____ False

In the Courts

46. The decision to file charges is solely at the prosecutor's discretion.
____ True ____ False

47. Witness problems often occur when there was a prior relationship between a victim and a defendant.
____ True ____ False

48. Drug cases are very often dropped because of improperly obtained evidence. ____ True ____ False

49. Bail is designed to assure the defendant's appearance at trial.
____ True ____ False

50. As many as 20% of people released on bail are arrested for new crimes.
____ True ____ False

51. Little or nothing can be done to assure community safety from defendants out on bail.
____ True ____ False

52. Most cases in state court are criminal cases. ____ True ____ False

53. Most cases brought by prosecutors result in a plea of guilty.
____ True ____ False

54. Most cases that go to trial result in conviction. ____ True ____ False

55. Most criminal cases take a year or more to be resolved.
____ True ____ False

After Conviction

56. Both convictions and sentences may be appealed. ____ True ____ False

57. Most people convicted of crimes and currently under correctional sanction are in prison. ____ True ____ False

58. More Americans are currently in prison than ever before.
____ True ____ False

59. Within three years after release on parole, more than half the parolees are likely to be returned to prison.
____ True ____ False

60. After age 30, many repeat offenders begin to drop out of crime.
____ True ____ False

(*Continued on page 34*)

"But first, your honor, the jury would like to tell their side of the story."

This article is based on information contained in Report to the Nation on Crime and Justice, *published in 1983 by the Bureau of Justice Statistics, a part of the United States Department of Justice. Single copies are available free of charge from the National Criminal Justice Reference Service (NCJRS), Box 6000, Rockville, Maryland 20850 (301/251-5500).*

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Who says you can't have your cake and eat it, too? If you fill in this form right away, you will have a chance to both help yourself and help *Update*.

We're looking for ways to improve the publication, and we'd like your ideas. The first fifty people to fill out this questionnaire and return it to us will get a year's extension to their *Update* subscriptions absolutely free. And if you're not among the first fifty, you still have a chance. We'll put all the other responses in a hat and draw out one in ten, so you still may receive a free one-year extension.

Now here's your chance to tell us about *Update*.

FORMAT

1. Articles in *Update* are:
   - __ too long
   - __ too short
   - __ just right

2. Articles in *Update* are:
   - __ too technical and "legalistic"
   - __ do not contain enough legal details
   - __ just right

FEATURES

3. I would like __ more/ __ fewer classroom strategies.
4. I would like __ more/ __ fewer articles devoted to practical law (e.g., daily law for people, like landlord-tenant, driving law, etc.).
5. I would like __ more/ __ fewer reviews of recent Supreme Court cases.
6. I would like to see __ more/ __ fewer opposing views on critical issues.
7. I would like to see __ more/ __ fewer articles on how history has affected the law.
8. I would like to see __ more/ __ fewer articles comparing American law with law in other cultures.
9. I would like to see __ more/ __ fewer reviews of recent curriculum materials.

THE FUTURE

10. Would you like to see us add a section reporting on recent lower court decisions? __ yes __ no
11. Here is a list of topics *already* handled by *Update*. Would you like to see any of them covered again in new articles? If so, pick the *three* you would most like to see covered and rank them in order of preference ("1" most preferred, etc.)

    - __ Discipline and due process in schools
    - __ Freedom of press
    - __ Focus on search and seizure
    - __ Sports and the law (two issues)
    - __ Religion and the law
    - __ Juvenile justice (two issues)
    - __ Law goes to school
    - __ Law in the '80s
    - __ Speech: The first freedom
    - __ Law around the world
    - __ What is justice?
    - __ Women and the law
    - __ Courts in crisis
    - __ What is privacy?
    - __ Focus on punishment
    - __ Law and creativity (copyrights, art law, etc.)
    - __ The Constitution in crisis (law and U.S. history)

12. Which of the following *new* topics would you like to see us handle in future *Updates?* Again, pick the three you would most like, and rank them in order of preference.

    - __ Environmental law
    - __ Medical/bioengineering law (test tube babies, euthanasia, etc.)
    - __ Immigrants/refugees: the worldwide flow
    - __ Law and the disadvantaged (handicapped, victims of racial or religious discrimination, etc.)
    - __ Children's rights
    - __ Violence and terrorism
    - __ Consumer law
    - __ Torts
    - __ Property
    - __ Law and psychiatry
    - __ Police
    - __ Behavior modification and the law
    - __ Law as a career
    - __ War law/war crimes
    - __ Literature and the law
    - __ Media and the law
    - __ First Amendment freedoms: The forgotten trio right to petition, right to assembly and right of association)
    - __ Law and business/free enterprise
    - __ Other ______________________________
    - __ Other ______________________________

13. Any other comments/suggestions for improving *Update?*

I am a __ Teacher/Administrator 1-6
__ Teacher/Administrator 7-9
__ Teacher/Administrator 10-12
__ University Professor
__ Lawyer/Judge
__ Other ______________________________
____

Name: ______________________________

Address: ______________________________
____
____

Please mail your completed form to: American Bar Association, Attn: Jane Koprowski, 1155 East 60th Street, Chicago, IL 60637. The ABA's offices are moving soon. After June 15, mail this and other correspondence to: 750 Lake Shore Drive, Chicago, IL 60611.

NEW DIRECTIONS IN THE LAW

Do Cameras in the Courtroom Hurt the Cause of Justice?

Or do they help? After years of experiments, the answer in some states is becoming clear.

Paul Conklin

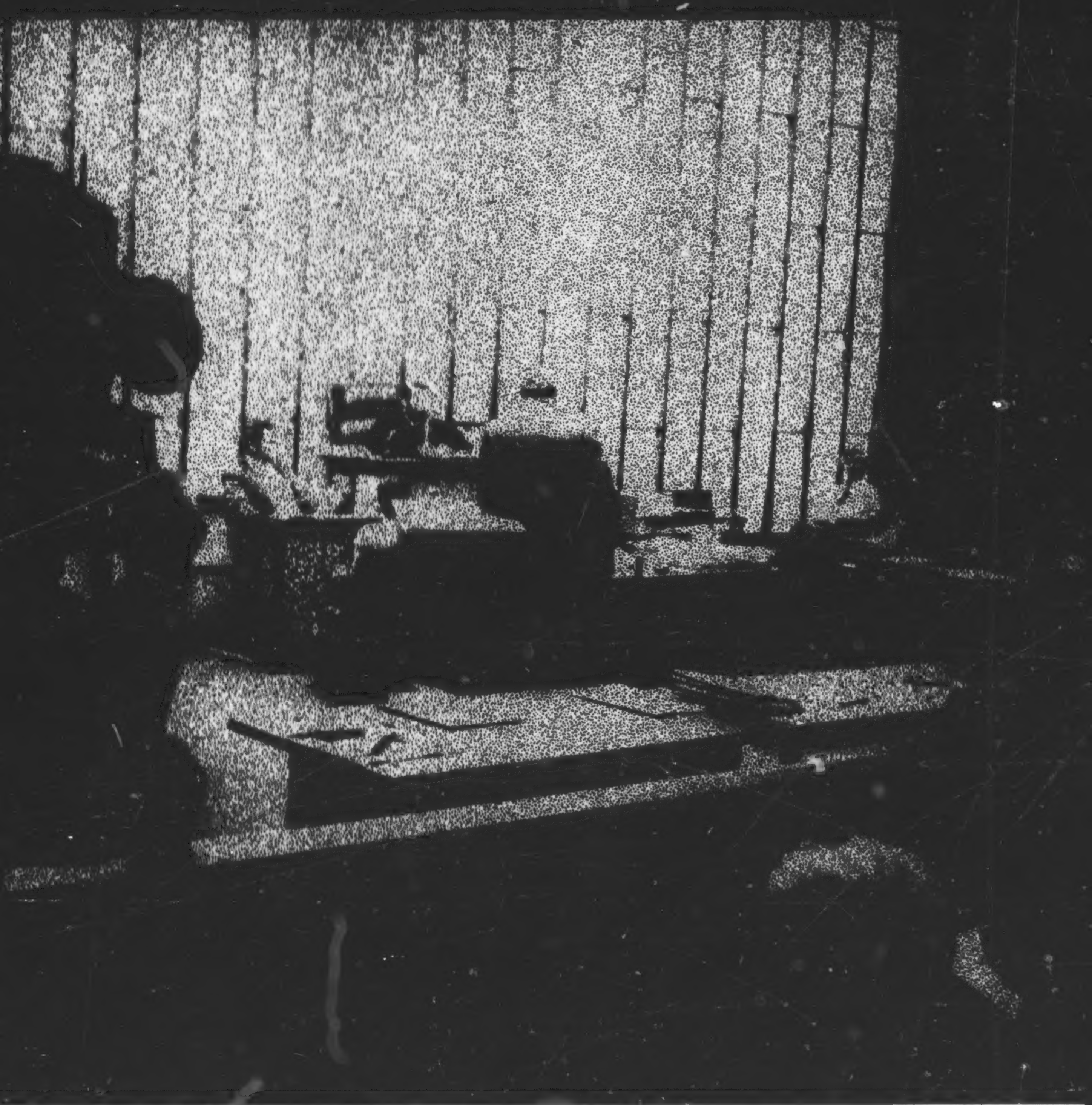
Audrey Pinkham Benson

Not long ago, radios, televisions and cameras were strictly banned from every austere courtroom in America. The media coverage that was permitted—hastily sketched artists' drawings and reporters' verbal descriptions—soon paled in comparison to the vivid news accounts allowed of all other places and things.

In 1981, the United States Supreme Court in *Chandler v. Florida* (449 U.S. 5460 (1981)), took a drastic step toward changing the historical view of the media and its function in reporting. The Court ruled that all states were free to experiment with television broadcasts of trials. More astounding from a legal standpoint, the Court also ruled that television broadcasts of trials did not, in themselves, deny due process to a defendant and that a complaining defendant had the burden of proving that a broadcast compromised the fairness of a trial. This bold holding did little, however, to still the public debate over whether cameras should be allowed through courtroom doors.

Those supporting open coverage of legal proceedings cited the First Amendment as their ally. The public, they said, has a constitutional right to know; the news media has a similarly rooted right to gather and deliver information. They claimed that nowhere is this right to know and report more strongly felt than in America's courtrooms.

Those opposed argued that much more would be lost than gained by allowing such public scrutiny through media reporting. They painted a chaotic picture of a carnivorous press and strained justice—



complete with witnesses as clams and judges and jurors as hams. Those whose words and actions were being recorded, claimed the naysayers, would surely suffer from either stage fright or an inability to act. In the end, justice in a courtroom would be impossible.

Forty-two states now permit some form of extended media coverage of their courts. (Throughout this article, the terms "extended media coverage" and "electronic coverage" are used synonymously to mean coverage by radio, television and still photography equipment.) Forty states permit radio, television and still photography in court proceedings, while Utah permits still photography only and Texas allows only audio coverage.

Despite these drastic changes, the controversy over how and whether to allow "cameras in the courtroom" is surfacing anew—as the remaining states are now considering initiating coverage and present programs are reevaluated. And the same questions are being asked: What effect do courtroom cameras have on jurors and witnesses? Should the consent of a reluctant witness be required before the film or tape is allowed to roll? Do cameras help or hurt the truth-seeking process? . . .

Calculated Distraction? The Ban Began

Using cameras and other electronic tools of the media in our courts is not a new concept. The ban against extended media coverage of trials and other proceedings can be traced to the mid-1930s.

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At that time, Bruno Hauptmann was on trial for kidnapping Charles "Lucky Lindy" Lindbergh's baby son. The public clamored for lurid details of the crime and of the victims' famed family—and the details poured out in newspaper and radio accounts. The trial was conducted in a concededly "circus atmosphere"—one in which it was clear that both the defendant and victims were tried by the public.

In response to this coverage of the Hauptmann trial, the American Bar Association adopted a new rule in 1937—Canon 35 of its Canons of Judicial Ethics. (The canons are suggested guidelines drafted by the ABA.) This canon lashed out against photographing and broadcasting in courtrooms, advocating that legal proceedings "should be conducted with fitting dignity and decorum." It warned that photographs and broadcasting in the courtroom "are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions" in the mind of the public.

Canon 35 was later amended to prohibit television coverage of most proceedings, but it specified that televising and broadcasting certain ceremonial occasions, such as naturalization ceremonies, should be permitted. In 1965, this prohibition on cameras and microphones in the courts was reinforced by the United States Supreme Court's decision in *Estes v. Texas* (381 U.S. 532 (1965)). Estes had been indicted by a Texas grand jury for swindling. There was massive publicity both prior to and during the trial, creating a nationwide near-obsession with the trial. Estes objected to coverage of his trial.

In its five-to-four decision, the Supreme Court agreed that televising court proceedings had jeopardized Estes's right to a fair trial and ruled that freedom of the press under the Fourteenth Amendment was subordinate to maintaining absolute fairness in the judicial process. The proliferation of electronic and photographic equipment during Estes's pretrial proceedings, not to mention personnel operating that equipment—and the psychological disturbance allegedly caused by these intrusions—influenced the Court's decision.

The Court's opinion was documented with a seven-page appendix of pictures showing the intrusiveness of the media at the trial. One picture was a paradoxical shot of Estes surrounded by several looming cameras at his "hearing to exclude cameras from the court." For several years following the *Estes* decision, only Colorado allowed broadcast and photographic coverage in its courtrooms.

The Tide Turns

In November, 1973, the Supreme Court of the state of Washington flaunted decades of popular unacceptance and authorized an experiment with extended media coverage in all of the courts in the state. The first coverage under this experiment was in late 1974, and a small number of states followed suit in the next few years. Momentum toward allowing extended media coverage increased—with thirty-three states initiating programs for coverage in their courts from 1978 through 1982.

Why, after decades of opposition, were cameras suddenly permitted in courtrooms? There are two basic reasons—grounded in social and technological changes over the years—which together resulted in electronic media coverage becoming acceptable. One was a change in the public's perceptions of the media. From the early 1950s to the mid-70s, television grew from a phenomenon into an aspect of daily life. The Roper Organization, Inc., reported in a 1979 study ("Public Perceptions of Television and Other Mass Media: A Twenty-Year Review 1959-1978") that most Americans now receive most of their news from radio and television. In addition, technological advances in the equipment used for television and radio recording and broadcast and still photography makes extended media coverage far less obtrusive than it had been in the 1930s and 1960s. The equipment functions with less noise, and photographs and film can generally be taken with existing courtroom lighting—eliminating the inconvenience and distraction of bright lights. With the change in the public's attitude toward mass media coverage and technological improvements in equipment, state courts began to appreciate the value in permitting broadcast and photographic coverage of their proceedings so that a great number of people could observe court proceedings first-hand through television and radio.

Furthermore, the new attitudes and equipment address the concerns expressed by the United States Supreme Court in *Estes v. Texas*, so that decision is no longer perceived as prohibiting all audiovisual coverage of courtroom proceedings. Television coverage of news events was accepted as an ordinary, daily occurrence by the 1970s, and so the fact that a particular trial is being covered by the broadcast media does not create any notoriety, in and of itself. Many also now feel that coverage by television and radio has no greater effect upon jurors, witnesses, judges and other participants than the coverage by the print media and artists of earlier days.

A review of the ground rules reveals great differences in both the technological specifications such as type and placement of equipment and the legal preconditions for coverage. Most states introduced extended media coverage in the courts with a short experimental period—usually one or two years. Of the thirty states which currently have permanent rules permitting extended media coverage, twenty-three states put those rules into place only after an experimentation period.

However, in all states, the judge has retained explicit authority to maintain control of the courtroom. If the judge determines that electronic coverage is disruptive or will threaten the fairness of the proceeding, then he or she may terminate coverage. Placing such discretion within the judge's authority creates a safety net, protecting the American judicial process should the need arise.

Still, it is up to the state to decide whether there is any possibility of courtroom media coverage. Two basic issues with which a state must deal in its decision to permit electronic coverage are the levels of proceedings it wishes covered and whether any consents will be required.

Drafting Coverage Programs

In most cases, a coverage program begins when the top-level court (usually "supreme court") of the state suspends or amends the court rules or Code of Judicial Conduct which prohibits extended media coverage. The suspension can be either temporary, if an experiment is ordered, or permanent, and set forth specific provisions for coverage. Sometimes, the court will take this action in response to a petition filed by the broadcast media or other organizations. While

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states have adopted different standards for media coverage, the most significant fact coming out of the experience of all of the states is that no state which has permitted coverage in its courts has ever rescinded that general permission.

The question of whether to allow coverage of trial proceedings is important for several reasons. First of all, it is at the trial level that many key factors come into play —it is here that witnesses and a jury may be involved. In the *Estes* case, the Supreme Court was concerned about the possible influence of electronic coverage on the testimony of witnesses and the decisionmaking ability of the jury.

At the present time, thirty-one states out of the forty-two which permit electronic coverage allow coverage of both trial and appellate proceedings—with ten states permitting coverage of appellate proceedings only and one state, Pennsylvania, allowing coverage of noncriminal trials only.

When trials are covered, consent becomes a question. Should the consent of the witnesses and jurors be obtained for coverage? What should the court do if a witness objects to being covered by the broadcast media? A trial is a sensitive stage in the legal process; it is where the factual questions are answered and guilt or innocence is determined. It is imperative that the proceedings be fair and free of any improper influence. Some states have chosen to avoid questions regarding the extended media's possible effect on a trial and permit coverage of appellate proceedings only. At an appellate proceeding, legal argument alone takes place. No exhibits or testimony are introduced, and the parties to the case frequently do not attend, while they often do at a trial. But most states have taken Florida's lead—reinforced by the Supreme Court's decision in *Chandler*—and allow cameras and microphones into trial proceedings.

Since the states are free to devise their own programs to carry out electronic coverage in the courts, they can address any concerns about such coverage in several ways in addition to those just mentioned. For instance, Illinois and Hawaii require that the clothing and equipment of media personnel not bear any insignia of their network or organization. Many states' rules include lists of approved brands and models of equipment which can be used in the courtroom, and any equipment not listed must be demonstrated for the judge before he or she may authorize its use. Most states set forth some sort of pooling procedure for using film and video and audio tapes taken at proceedings to reduce the number of cameras, microphones and personnel in court. North Carolina has gone so far as to require that personnel and equipment be located in a booth or behind a partition, with appropriate openings to permit coverage, so that they cannot be seen or heard by others inside the courtroom. All of these measures are devised to ensure that coverage will not disrupt or detract from the dignity of a proceeding and that it will be as unobtrusive as possible.

Lights! Camera! Consent?

In some states, if any party or participant in a trial objects to media coverage, the court must hear evidence on that issue and decide whether the trial should be closed. In a few states, if all parties do not approve of coverage, it is blocked. Still other states use a piecemeal approach—a party, witness, lawyer, judge or juror may object and block coverage only of themselves.

Bearing in mind that judges will make the final determination as to whether to allow coverage of a proceeding, there are several players who still must be considered: the parties to the lawsuit, the parties' attorneys, witnesses, jurors, and in criminal cases, defendants and prosecutors. The great majority of states do not require the consents of the parties or their counsel to cover a proceeding. Most states allowing extended media coverage of criminal trials do not require the defendant's consent. Six states require the consent of the prosecutor to cover a criminal trial, with these six states including the four (Alabama, Arkansas, Louisiana, and Tennessee) which require the counsels' consent in civil cases and criminal appeals.

As to witnesses, the states are fairly closely split between those which do not require any consent and those which have consent as a limited condition: that is, if a witness objects to electronic coverage, then coverage of that witness is prohibited, although the rest of the proceeding may be covered. In Alaska, if a witness or victim of a sexual offense objects to electronic coverage, then coverage of any portion of the trial is forbidden.

There is great diversity as to requiring the jurors' consents to being covered. Eight states do not require the consents of the jurors. Seven states have the jurors' consent as a limited condition, the same principle as was just described for witnesses. Nine states have rules specifically stating that the jury is not to be covered deliberately and that no close-ups or other photos may be taken which would permit a juror to be recognized. Arkansas, Hawaii, Minnesota, New Mexico, North Carolina and Ohio specifically forbid audio-visual coverage of the jury. These measures are taken to protect jurors from outside influence or harassment.

Some states—including Connecticut, Arkansas, Maryland and Rhode Island—have provisions in their extended media coverage rules which prohibit or in some way limit coverage of certain types of proceedings viewed as particularly sensitive. Of these categories, the greatest number of states are concerned about child custody, divorce and juvenile proceedings. Covering adoptions, motions to suppress evidence, sex crimes cases and jury selection procedures may also be forbidden in some states—as is covering proceedings involving police informants, undercover agents, trade secrets or minor witnesses.

Florida Sets the Stage

Consent requirements have concerned courts and the media since this type of coverage of judicial proceedings began. In Florida, controversy over the consent issue led ultimately to the United States Supreme Court and the landmark decision in *Chandler v. Florida*. That decision affected the approach later taken by many other states on consent requirements.

Florida was among the first few states experimenting with electronic coverage. It authorized experimental coverage for certain areas of the state in January, 1976 and required the consent of all parties, jurors and witnesses to cover the trial. Because the court could not get the required consents, not a single case was covered by the electronic media during that experiment. The Florida Supreme Court revised the experimental rules and, in April, 1977, ordered a one-year experiment which did not require any consents. During the experimental period, Chandler and others were on trial in Florida for burglary and related charges. The defendants attempted several times to prevent electronic coverage of the trial. When they were found guilty by the jury, the defendants requested a new trial on the grounds that television coverage had prevented them from receiving a fair and impartial trial; however, they did not supply any evidence of specific prejudice to their case resulting from television coverage.

(*Continued on page 53*)

When is a Sentence Fair?

A good question . . . but are there good answers?

Fear has stalked our streets for at least two decades. Fear of robbery and theft, to be sure, but even more fear of mugging, home invasion and other forms of violence.

At the same time, many if not most Americans have become convinced that the criminal justice system is not working. Rightly or wrongly, they think the system is a joke, a revolving door that sends young punks and hardened criminals right back to the streets.

In such a climate, it's inevitable that everything about the system would come in for a long hard look, and sentencing is no exception. The '70s and '80s have seen countless attempts to "do something about sentencing," to devise systems that would both be fair *and* protect law-abiding citizens.

This ferment for change isn't over yet, but it's been going on long enough for us to ask some questions. What's being tried, and why, and is it working?

We were fortunate to find a national expert on sentencing to help us answer these questions. Jay Casper is a political scientist who has studied the American legal system for his whole career, which encompasses stints at Yale and Stanford, as well as his present position at the University of Illinois. He talks candidly about sentencing in this interview, conducted by *Update* editor Charles White.

Update. How did you get interested in sentencing trends?

Jay Casper. My speciality is the American legal system, and for the last fifteen years or so I've concentrated on criminal courts. For many years I worked on defendants' attitudes toward courts, such as whether they were treated fairly, and their perceptions of what judges and especially their own defense attorneys were up to. My interest in sentencing came first from a project done from 1978 to 1981 on the implementation of California's determinate sentence law, and then from a panel on sentencing I served on at the National Academy of Sciences.

Mandatory Minimums

Update. Sentencing criminals is something the public cares a great deal about. Several reforms in the last ten years or so have been hotly debated. Can you say which reform has been the most widespread?

Jay Casper. Not really. The three most popular were determinate sentence laws, sentence guidelines and mandatory minimum sentencing laws. In terms of the actual occurrence of legislation, the most common is mandatory minimum sentence laws, and indeed, many such laws predate the reform movement of the last ten years. Nearly every jurisdiction has one form or another of such laws, which attempt to limit the judges' discretion in certain cases, saying that some classes of offenders must be sent to prison. For example, there are laws that say that if you sell a certain amount of narcotics, you get sent to prison. Such legislation has spread in the last ten years, so that's the most common. It's the least important in many senses of the three, in terms of the actual effect on the sentencing process.

Update. Why do you say that—the least important?

Jay Casper. Because mandatory minimum sentence laws are typically honored only in the breach. The usual form of the law is that everybody convicted of a certain offense, such as everyone convicted of armed robbery or everybody convicted of sexual assault, or everyone convicted of other specified offenses with certain prior records, must be sentenced to prison, removing the judge's discretion to

Alfred Gescheidt

impose lesser terms like jail, probation or whatever.

The common finding about the implementation of such laws is that often it lags initially, and sometimes for extended periods of time. Courtroom participants don't like such laws. Judges tend to dislike restrictions on their discretion because they prefer to be able to tailor sentences to their perceptions of the actual characteristics of the defendant. Prosecutors often don't like such laws. They make the plea bargaining process more difficult because defendants are less likely to plead guilty if they know that they're going to go to prison and their prison term is essentially determined by the statute.

A common adaptive mechanism involves the plea bargaining process. For example, if the law says a person who commits armed robbery must go to prison, a way of adapting is the charge bargain, where the charge of armed robbery becomes a charge of simple robbery, in which case the statute is no longer applicable.

Update. Is it correct that a lot of the mandatory laws have involved gun possession?

Jay Casper. Yes. They are often called "use a gun/go to prison" statutes.

Update. And the same results have been found there as well?

Jay Casper. Yes. There's a very nice study of the implementation of the Michigan Felony Firearms statute. The law says that defendants using a gun in the course of committing a felony: 1) shall be sent to prison, and 2) will be given an additional two-year term tacked on to the underlying offense. But sentencing involves much more than the judge. At the court stage, it's a decision that involves the active participation not only of the judge, but also of the prosecutor and defense attorney. The Michigan study shows that courts seem to develop going rates for common offenses. These are sets of expectations on the part of participants about how serious certain crimes are and what appropriate sentences for them may be. In Michigan, for example, armed robbery often gets you a five-year term. So what the judges basically did after this law was passed was to continue sending armed robbers to prison, but not for an extra two years. They would essentially soak up the two years by reducing the underlying term. So where they were going to send a guy away before for five years, they now sent him for three years in order to make up the two extra years that the law requires.

It's the same story in cases where prior to the passage of the law defendants were not routinely sent to prison. For example, consider disorderly conduct offenses. Neighbors might get involved in a quarrel and someone might discharge a gun, although no one is injured. These are primarily perceived by the court system as relatively trivial cases, even though they involve weapons. So courts didn't start sending people to prison for felonious assault when there were no injuries, but rather they adopted a charge bargaining procedure in which they would convict the person of misdemeanor assault. In that way the law was irrevelant since it only applied to those who used guns in the course of a felony.

A common finding about mandatory minimum laws is not that they make no difference, but that it's difficult for legislatures to significantly affect in a short period of time the sentencing behavior of courts.

Update. Does this mean that mandatory minimum sentence laws make *no* difference?

Jay Casper. My view of the matter, and this is not a view that everyone would share, is that they're largely symbolic in character. The main purpose of such laws is to assuage public concern about a certain class of crimes and to generate political support for legislatures or whoever passes the law. These laws "succeed" simply by their passage, not their actual implementation.

Their main proponents are not really concerned with their crime control effects, but with appearing to do something about a problem. So if not much happens, they pass another law. Since a lot of it is largely symbolic, to understand whether it succeeds or fails requires that you look at a lot more than simply the terms of the legislation and what happens after it.

Determinate Sentencing

Update. How about determinate sentencing? Can you explain the principles of that?

Jay Casper. Yes. All jurisdictions in the United States up until the early 1970s had what's called indeterminate sentencing. The legislature specified a maximum term for an offense. It said robbery shall be punished by no more than twenty years in prison and authorized the judge to impose a sentence within the legislative maximum. Sometimes it authorized the judge to set ranges, so that in an indeterminate sentence for robbery, the judge could sentence a person to probation, or to prison for a lesser term, or for up to twenty years. The judge might say: "I sentence you to a term of not more than twenty years" or might set a term of from six to fifteen years.

The crucial feature was that the actual length of the prison term was determined not by the judge, but by the administrative authority of the parole board. The decision about when to release the defendant—that is to say how long a person should spend in prison—was not made on the day of sentencing; it was basically made later on by an administrative authority.

In California, which had the most extreme form of indeterminate sentencing, three-quarters of people sent to prison were sent there with a life maximum. So the term for armed robbery in California was five years to life, one year to life for burglary.

Determinate sentencing differs basically in the following way. The legislature again specifies either a maximum term or a set of ranges as in the California model, but the judge actually imposes a specific term of years on the day that he or she sentences the defendant, and then the defendant is released after serving that term, minus time off for good behavior. In Illinois, it's one day off for each day of good time served. Say you're sentenced by a judge to ten years in prison. If you earn your good time, you'll get out in five years. In many states you have a third off for good behavior.

The crucial thing about determinate sentencing is the abolition of parole, the abolition of discretionary authority by an administrative body that basically determines the sentence length.

Update. What's the philosophical basis for these changes?

Jay Casper. It runs something like this. There has been a historical cycle in sentencing policy in the last hundred years. Up until the latter part of the nineteenth century, we had a determinate sentence system in nearly all jurisdictions—one in which there was no parole. The judge set the term and the person served it out and was released. That's the kind you see in cowboy movies where somebody is sentenced to break rocks for thirty years at Leavenworth.

Toward the end of the nineteenth century, there was a change in sentencing philosophy. Partly because of the development of disciplines like psychiatry, social work, psychology and the like, there was a movement toward a medical model for imprisonment and indeterminate sentencing. There was a sense that individuals who committed crimes were motivated by individual attributes like psychological problems, lack of job skills, drug abuse, or whatever. The idea was that we would treat people in prison, rehabilitate them and then release them after they were rehabilitated.

That model suggests that the terms of individuals convicted of similar crimes ought to vary. One person might be rehabilitated very quickly, so he, for example, might be released from a robbery term after only two years, and another person in for robbery might be "cured" in a much longer time. A crucial part of the rehabilitative philosophy and medical model is that the judge on the day that he or she sentences defendants can't know how long the appropriate term is. The appropriate term is determined by the changes that are worked on the defendant, now prisoner, subsequent to incarceration.

Update. And who supported this innovation?

Jay Casper. People who believed in rehabilitation, of course. They liked an indeterminate system where the judge and legislature set a maximum and some other body would watch prisoners, regularly review their actual behavior and rate of change and decide whether they're rehabilitated. But this system also tended to be supported by those who are less interested in rehabilitation and more interested in crime control, because indeterminate sentences tended to be long and gave the potential for keeping certain kinds of offenders in prison for a long period of time.

It was also supported by correctional authorities because it gave them a very important means of controlling the behavior of inmates, to the extent that the parole board's decision about the rate at which a prisoner has been rehabilitated depends on information provided by the prison authorities about what the guy has been doing in prison. The threat was: "If you don't behave and follow rules in prison, then we won't let you get out." So indeterminate sentencing was adopted by nearly every jurisdiction in the United States by the late 1920s.

Update. And why did this support wane?

Jay Casper. During the '60s and '70s, there was a growing discontent with the indeterminate sentence system. A curious coalition of interests and groups which normally disagree with each other on criminal justice problems came together to support the abolition of indeterminate sentencing and the movement to determinate sentencing. (The same phenomenon of an odd coalition appeared in the early twentieth century and helped create indeterminate sentencing.)

The strange bedfellows phenomenon of law enforcement interests and due process liberals came together in many states, including Illinois, to agree that we ought to get rid of indeterminate sentencing and move back to determinate sentencing. Again though, the sentence "reform" was to be the "solution" to quite differently perceived problems.

A very important piece in the puzzle was research which asked the question "does rehabilitation work?" Can we say that there's a lesser risk of inmates committing crimes on release if they participate in various rehabilitative programs—for example, psychological counseling, drug abuse programs, job skills training, increased educational opportunities—during their imprisonment? A study that appeared in the mid-'70s said there wasn't any evidence that rehabilitation actually worked, that people who participate in such programs were less likely to commit crimes after their release than those who didn't. Liberals had supported indeterminate sentence laws because we were keeping people in prison in order to improve them. The "nothing works" conclusion about rehabilitative programs undermined that support.

At the same time, liberals were concerned about a variety of other aspects of indeterminate sentencing systems. For example, one argument which was very prevalent in the late '60s and early '70s was that under indeterminate sentencing people being held in prison don't really know how long they're going to be there until relatively shortly before their release. You knew in a state like Illinois that if you were sentenced to twenty-five years in prison you were going to get out before, but how much before? The uncertainty of indeterminate sentencing led to frustration and anxiety on the part of inmates, and that might have contributed to prison violence.

In addition, another feature of parole decisionmaking under indeterminate sentence laws is that the decision about release is basically made, as I say, by a combination of the prison authorities who provide information to the parole board and by the parole board itself. It's done in a very low visibility environment behind prison walls. Nobody pays much attention to parole decisionmaking. It's not subject to media attention except in extraordinary cases. Some people worried about the arbitrariness of this low-visibility decisionmaking, and about the chance that the system might be affected by such things as racial bias, bias against

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individuals and the like.

Another feature that made many supporters of indeterminate sentencing increasingly uncomfortable was that the system actually embraces socio-economic discrimination. A poor white or a poor member of a minority group often has a very low education level and no job skills. Compare that person convicted of a crime like burglary with a middle-class white kid convicted of burglary. The indeterminate sentence system with its rehabilitating model actually says it's appropriate that one of them serve a longer term than the other. And if you're focusing on the likelihood of future law violation, it's reasonable that the ghetto kid is more likely to commit a crime in the future if you let him go than the middle-class kid because the middle-class kid has resources available to help him make it on the outside without criminal behavior. So it's not only that it produces socio-economic discrimination because poor people are more likely to serve longer terms than middle-class people, it is that the system actually embraces it and says it's desirable if you're looking mainly at the likelihood of future behavior.

All this made a lot of people who previously supported indeterminate sentencing—due process liberals, prisoners' union people, prisoner support groups and the like—become increasingly discontented. Once its main theoretical premise was undermined—this notion that you indeed could rehabilitate people—a lot of liberals came to say that the indeterminate sentencing was not defensible.

A lot of people on the law and order side also became increasingly skeptical about indeterminate sentences, but for quite different reasons. They were quite concerned about high recidivism rates and the inability of parole boards to pick out inmates who were unlikely to commit crimes again. So they were concerned about it not in terms of such things as arbitrariness or racial discrimination, but because it just didn't seem to be working—in the sense that we weren't holding people until they were no longer dangerous.

They also believed that determinate sentencing might deter criminals, because criminals might react to knowing the certainty of sentences, especially compared with the uncertainty of sentences that might turn out to be very long or very short. They also felt in many jurisdictions, Illinois and California included, that if they passed the determinate bill, judges would send more people to prison.

So that produced a kind of coalition that led about a dozen states thus far, including many of the major states—New York just passed it last year—to move from indeterminate to determinate sentencing.

Update. Does the indeterminate system then remain in the other states besides these twelve?

Jay Casper. Yes. Somewhere around a dozen states have passed determinate sentence laws, and the other thirty-six or thirty-eight have maintained indeterminate sentence laws.

Parole and Good Time

Update. Are parole boards generally abolished where there is determinate sentencing?

Jay Casper. That's basically the defining characteristic of it. They often retain parole boards only to deal with prisoners who have been sentenced under the prior law. If you've got a bunch of guys in prison sentenced under the old law, you still have to decide when to release them.

Parole remains in many jurisdictions—that is to say, a period of supervision subsequent to release—but determinate sentencing removes the parole board's authority to decide when people are released.

Update. If prisoners get a certain amount of time off for good time, it then becomes an administrative decision on the part of prison authorities as to what constitutes good time in their case.

Jay Casper. Yes. That's a good point. There are two ways of handling good time. Illinois and California differ substantially on that. Under the California model, good time is earned every year and it's vested. In the first year, if you behave nicely, you know that you've knocked a half year off your term, and they can't take it away from you later. So that means that although they still have some discretion, once you've earned it, it can't be taken away.

Under the Illinois model, it's not vested and they can take away this year the good time that you earned last year or the year before. Some people say that under the Illinois model, an enormous amount of discretion still remains not with the parole board, but with the prison authorities, as you suggest.

But good time does have rules governing its earning and taking away. It's not entirely at the behest of prison officials. They have to go through a hearing to take it away. There's appellate procedures and the like, so even though there may be a fair amount of discretion, it's not totally discretionary, the way parole was, in the sense that parole boards never were obliged to offer any reasons as to why they either granted or refused to grant parole.

Guidelines for Judges

Update. How about the third major reform—sentencing guidelines?

Jay Casper. Basically, the problem is this. Usually the legislatures allow judges a great deal of discretion about two issues: 1) Should you send somebody to prison or give him or her a short jail term or probation? That's the so-called in-out decision, and 2) What should the length of term be?

Judges should have a lot of discretion both over in-out and over term length. But people became concerned because there may be substantial differences within a jurisdiction or across judges. One judge may sentence robbers to prison routinely and another may not, and there may be substantial variability like the kind of classic urban/rural split in which rural jurisdictions are said to be harsher than urban jurisdictions. So the sentence guideline movement has come as a means of channeling judicial discretion to try and produce what appears to be less "disparity" across judges, whether across judges within a city or across judges in one city as opposed to another city. The trick is knowing what's unwarranted disparity, because one person's unwarranted disparity may be another person's individualized justice.

The systems usually involve a two dimensional grid with offense seriousness on the vertical axis and an index of prior criminal record across the horizontal axis. This produces cells and the judge is instructed—with varying degrees of legal compulsion—that if a person is convicted of a crime and has the following attributes, then the sentence shall be found on the appropriate cell of that grid. It's a guideline designed to channel judicial discretion and produce more equal sentences.

A lot of jurisdictions have adopted them. Sometimes they're voluntary, as in the case of the Denver judicial guidelines; sometimes they're semi-voluntary, as in the Massachusetts and Pennsylvania guidelines; and sometimes, as in Minnesota, judges are obliged to follow some very elaborate procedures for indicating why they engaged in a so-called departure from the norm of a sentence.

Update. Are there any studies of whether these have had the effect of mak-

(Continued on page 55)

Bizarre Murder Case Resparks Controversy Over Death Sentence

Criminal Concerns Prevail This Term

Killed the Kids, Then Ate Their Hamburgers

Robert Alton Harris is no one's idea of a nice guy. On parole from a homicide conviction, he and his brother decided to steal a car. Harris kidnapped two teenage boys from the parking lot of a hamburger stand, forced them to drive to a secluded spot and shot them to death. He finished this job by eating the boys' hamburgers at the scene of their death. He and his brother then robbed a bank but were caught.

Harris appealed his death sentence on the ground that the highest court of each state must review each death sentence and compare it with the sentences imposed in similar capital cases to determine whether it is proportionate with those cases.

After the state courts denied habeas corpus relief, Harris sought habeas corpus in federal district court, contending that he had been denied the comparative proportionality review "required" by the Constitution. The district court denied the writ, but the court of appeals held that comparative proportionality review was constitutionally required. That decision was reviewed by the United States Supreme Court. In *Pulley v. Harris* (52 U.S.L.W. 4141), the Court gave Harris the thumbs down sign.

The Court stated that it had acknowl

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edged in the past that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." (*Zant v. Stephens*, 51 U.S.L.W. 4891 (1983), quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).) However, the Court held that the Eighth Amendment does not require in every case that a state appellate court compare the sentence in the case with the penalties imposed in similar cases before it affirms a death sentence. Even if there were a capital sentencing scheme so arbitrary that it would be unconstitutional without comparative proportionality review, the California statute involved in this case is not of that sort.

Capital punishment is one of the hottest topics in the United States today, with supporters greatly outnumbering those who are opposed. Thirty-seven states have death penalty statutes and hundreds of convicted prisoners are on death row. The execution of these death sentences is progressing more rapidly than at any time in recent years.

Solo Dance or Pas de Deux?

When Carl Wiggins was convicted of armed robbery, the conviction was set aside because the state's indictment had been defective. At his second trial, he decided that he wanted to represent himself, but the judge appointed two legal attorneys to give "standby" support. Wiggins claimed that one of the attorneys "assisted" so well that Wiggins was convicted and sentenced to life in prison.

Wiggins filed a habeas corpus petition in federal district court, claiming that standby counsel's conduct had deprived him of his right to present his own defense. This constitutional right was recognized in *Faretta v. California* (422 U.S. 806 (1975)). However, because most defendants lack courtroom skill, the Court in that case granted trial judges permission to appoint standby counsel but did not clearly define the precise role of such counsel. The district court denied Wiggins' petition, but the court of appeals reversed, ruling that court-appointed standby counsel are "to be seen, but not heard." In other words, a standby counsel is not to compete with the defendant in presenting the case.

In *McKaskle v. Wiggins* (52 U.S.L.W. 4169), the Supreme Court rejected this rule of the court of appeals and held that Wiggins' Sixth Amendment right to conduct his own defense was not violated and that his standby counsel's unsolicited involvement was held within reasonable limits. The Court felt that most of the incidents of which Wiggins complained occurred when the jury was not in the courtroom. It did admit that some of the incidents were regrettable. One such regrettable incident occurred when Wiggins attempted to take over voir dire questioning in mid-stream, despite his earlier,

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agreement to have Graham do that portion of the trial. Exasperated, Graham swore and directed Wiggins to sit down.

The Court recognized "that a pro se defendant may wish to dance a solo, not a *pas de deux*." Nevertheless, Wiggins was given ample opportunity to present his own position to the court on every matter discussed, and all conflicts between Wiggins and Graham were resolved in Wiggins' favor.

The Court did set some guidelines for standby counsel: 1) The pro se defendant is entitled to preserve actual control over the case and 2) standby counsel's participation should not be allowed to destroy the jury's perception that the defendant is representing himself or herself.

Balloons Add Up to More Than a Party

Reliable secret informants or "snitches" are valuable resources to the police; they give cops information that is helpful in obtaining search and arrest warrants. The police officer signs the warrant as the "affiant," and lists the information given by an unnamed "reliable informant."

The police are reluctant to reveal the names of these informants, even in court, since it would be dangerous to the informant and would close off the source of much valuable information.

In *Colorado v. Nunez* (52 U.S.L.W. 4219), the police searched the house and person of Antonio Guadalupe Nunez after obtaining a warrant based on information given by their "reliable informant." The search uncovered fifteen balloons containing heroin in Nunez's pockets, and he was charged with possession of heroin.

Nunez filed motions both to suppress the evidence seized from him and requesting the court to order the prosecution to disclose the name of the confidential informant. The trial court, with the Colorado Supreme Court agreeing, found that disclosing the secret informant's identity was necessary to resolve the motion to suppress the evidence. These courts ordered the prosecution to reveal the name of the informant.

In arguments before the Supreme Court, the prosecution said that because the Fourth Amendment was written only to control the excesses of government, it does not apply to the wrongdoing of private citizens, such as informants, and the credibility of the affiant police officer was not in question here. In *McCray v. Illinois* (386 U.S. 300 (1967)), the Supreme Court had recognized that the purpose of a suppression hearing that involves a confidential informant is to determine if the *police* have violated the Fourth Amendment. Also, in *Franks v. Delaware* (438 U.S. 154 (1978)), the Court held that the accused could attack the veracity of the *affiant* (police officer) to assure that the police did not mislead a reviewing magistrate and to protect the Fourth Amendment rights of citizens.

Nunez relied heavily on *People v. Daily* (639 P. 2d 1068 (1982)), in which the Colorado Supreme Court held that disclosing confidential informants is not limited to situations in which the veracity of the affiant-police officer is successfully attacked. All that is needed is a showing of a "reasonable basis in fact to question the accuracy of the informant's recitals."

In a per curiam (unsigned) decision, the Court held that it had been mistaken in hearing the case. Since the decisions of the Colorado courts rested on independent and adequate state grounds, the United States Supreme Court should not have become involved. (52 U.S.L.W. 4219)

However, three justices—the Chief Justice and Justices O'Connor and White— did file an opinion on the case. They stated that *Daily* conferred on trial courts in Colorado discretion to do far more than the federal Constitution required. These justices reiterated the Court's holdings in *McCray* and *Franks* to the effect that an informer's identity need not be disclosed and that the impeachment applies only to the affiant, not to any nongovernmental informant. This suggests that the case would be resolved very differently under federal law.

Miranda Warnings Only Necessary When "In Custody"

Minnesota v. Murphy (52 U.S.L.W. 4246), is one of many cases this term on the exclusionary rule and the Miranda warning. The facts in this case seem designed to whip up public sentiment against both of these rules, which are constantly criticized by citizens upset by "soft" treatment of criminals.

Marshall Murphy confessed a rape and murder to his probation officer (P.O.) while meeting with her in her office. The Minnesota Supreme Court ruled that his confession was inadmissible under the exclusionary rule because the P.O. did not give a Miranda warning to Murphy.

If the Supreme Court had upheld the Minnesota Supreme Court's decision, Murphy would have gone free, since there would not have been enough evidence to convict him without the confession. This would surely have caused a great public outcry at a time when there is so much criticism of the justice system. However, by a six to three margin, the Court reversed.

The Miranda rule requires that the defendant be in custody to receive Miranda protection. The Court said it was clear that Murphy was not in custody, since there was no formal arrest or restraint on his freedom of movement of the degree that is associated with formal arrest. He was free to leave the P.O.'s office—the door of which was unlocked.

Therefore, the Court held that because Murphy had not been compelled to incriminate himself, he could not successfully invoke the privilege to prevent the confession. Thus, the words he volunteered could be used against him in a criminal prosecution.

"Post-Fire" Search Requires Warrant

Michigan v. Clifford (52 U.S.L.W. 4056), is yet another case dealing with the controversial exclusionary rule. Here the issues are when a warrant is required to lawfully search a private home and whether the evidence obtained in a warrantless search should be admitted into evidence under a "good faith" exception to the rule.

While Raymond and Emma Jean Clifford were out of town, their home was damaged by an early morning fire. Five hours after the blaze was extinguished and the police and firefighters had left, a team of arson investigators arrived at the scene for the first time to investigate the cause of the blaze. They found a crew boarding up the house on the instructions of the Cliffords, who had notified their insurance agent to do so. In spite of this, the investigators entered the residence and conducted a search without either the consent of the Cliffords or a warrant.

The investigators discovered empty fuel cans, an electric crockpot and a timer with a cord in the basement. They found additional evidence of arson in the upper portions of the house. They seized and marked the evidence. The Cliffords, who were charged with arson, moved to suppress all the evidence seized in the warrantless search on the ground that it was obtained in violation of their constitutional rights. The Michigan trial court denied the motion on the ground that exigent circumstances justified the search,

(*Continued on page 51*)

Rosemary Kassekert is a second-year law student at Hamline University School of Law. Joseph L. Daly is a professor of law at Hamline.

Materials to Help You Plan Ahead

Since many of our readers will spend the summer planning new classroom activities for next year, we thought this curriculum review should include materials that may be used in formulating those plans. As with our previous curriculum section, the following materials were reviewed (and even classroom tested!) by practicing teachers. Our guest reviewers for this month are:

- *Diane Farwick*, a teacher at Lincoln Park High School in Chicago who has taught LRE classes for the past fourteen years. Formerly director of a Title IV-C Project—Law and the Administration of Justice—she is a member of the Teacher Advisory Board of the Constitutional Rights Foundation/Chicago Project and recently received the CRF's annual Citizenship Award.
- *Faye Terrell-Perkins*, an elementary educator and curriculum developer currently teaching at John Hope Academy in Chicago. She co-wrote the Chicago Public School's Career Education Community Resource Data Bank Curriculum Guide and recently received a grant from the school system to develop and implement an LRE program.

Mabel C. McKinney-Browning of the YEFC staff coordinated work on this section.

Getting Students Involved

One of the most important aspects of law-related education is the opportunity it affords students to interact directly with their classmates and with the community. The materials in this section will challenge teachers to consider new ways to assure this interaction.

Every teacher spends time working through minor (and sometimes major) disputes between students, as well as between students and teachers and others in the school. Of course, LRE is an excellent vehicle for testing and learning more about strategies for dispute resolution. Albie Davis's *Mediation: An Alternative That Works* is full of ideas, strategies and resources for introducing students to this exciting concept.

Since the newspaper is such a rich community resource for the LRE teacher, we thought a reminder of this excellent source of information was appropriate. *Citizens on Assignment*, written by Julie C. Morse and Carolyn Pereira, is available through the American Newspaper Publishers Association Foundation. It will spark any teacher's imagination and interest in using the newspaper as a source of fresh content and current ideas on a variety of LRE topics. Newly available is a simulation designed by Ethan Katsh—*Freedom of the Press: A Simulation of Legal Issues in Journalism*. Our reviewer told us that her class "loved it"—so did she!

Also student tested and teacher approved is *The Law Game*, developed by Bob Spearman of the Legal Services Society of British Columbia. Based on civil and criminal law content, the game allows students to test their decisionmaking skills.

Elementary teachers will find the review of the Sears Roebuck Foundation's Officer Friendly program interesting. This excellent program can be used as a supplement in primary classrooms. If your last experience with this program was some time ago (as was mine) you will find the program expanded and broadened. It's worth a second look.

■ ***Mediation—An Alternative That Works*** (1983), Albie Davis. A teacher resource. Booklet, 31 pp., no charge. (Law-Related Education Program, Administrative Office of the District Court, Holyoke Square, Salem, MA 01970)

Those interested in mediation and its use will find this booklet provides a number of resources—including projects, general information and a bibliography.

Mediation has become an integral part of our legal system as an alternative means of dispute resolution. The booklet briefly defines, compares and contrasts mediation with other forms of dispute resolution. It suggests benefits, use, how it works, training and skill involved and issues that must be considered in setting up mediation programs. —D.F.

■ ***Citizens on Assignment*** (1980), Julie C. Morse and Carolyn Pereira (offered by ANPA Foundation). A teacher/student resource. Twenty lessons on 73 glossy sheets, $8.00. (ANPA Foundation, The Newspaper Center, Box 17407, Dulles International Airport, Washington, DC 20041)

In response to a joint proposal by the American Newspaper Publishers Association Foundation and the American Bar Association's Special Committee on Youth Education for Citizenship, the *Chicago Sun-Times* and Constitutional Rights Foundation developed a unique citizenship education curriculum guide. *Citizens on Assignment* effectively uses the daily newspaper as a tool to help students learn to become active citizens.

The guide is divided into three sections, each designed to teach specific skills. Section one, "Citizens' Beat," teaches students to critically analyze news stories and current issues. The second section, "What Can You Do About the News?," encourages students to become involved in problem solving based on community issues identified in the news. Students are directed to: 1) identify a need, problem or conflict, 2) identify possible causes and solutions, 3) identify community resources, 4) develop and implement an action plan, and 5) evaluate accomplishments. The final section, "See It in Print," contains guidelines for various student writing projects.

Citizens on Assignment offers well-defined lesson plans including supplemental worksheets and suggested follow up activities. This curriculum could most effectively be integrated into any high school language arts or social studies courses and will certainly add new dimensions to traditional classroom experiences. —F.T.-P.

■ ***Freedom of the Press: A Simulation of Legal Issues in Journalism*** **(1983), Ethan Katsh. A high school supplement or unit of study suitable for eleventh and twelfth grades. Kit for thirty-five students, $34.50. (Legal Studies Simulations, 42 Elwood Drive, Springfield, MA 01108)**

Law and journalism and their conflicts and coordination are recurring topics of heated debate. In this simulation, students have the opportunity to play the roles of reporters, editors, lawyers and citizens who have access to material that will raise legal and ethical issues. The exercise lasts from two to four hours and involves from one to thirty-five players. Alternative solutions, decisionmaking, negotiating and compromising are all part of the game that forces students to confront issues in both law and journalism.

The kit includes a director's manual, thirty-five student guides, six legal codes, identification cards and instructions for players. The simulation will ultimately lead the students to a discussion and better understanding of the following issues: access to the courts, prior restraint, confidential sources, use of stolen documents, privacy, libel and right of reply. The simulation allows for individual, small group and total class discussion, use of interviewing techniques and writing skills in diverse areas of interest to students. —D.F.

■ ***The Law Game*** **(1983), Bob Spearman. A supplement for high school students. $15.00 plus shipping and handling. (Legal Services Society of British Columbia, ATTN: Publication Dep't, Legal Services Society, P.O. Box 12120, 555 W. Hastings Street, Vancouver, BC. VGB 4N6)**

The Law Game is really two games in one: the first is the criminal law component; the second consists of tort law. The main parts include a gameboard similar to Monopoly and cards listing questions that relate to criminal or tort procedures, cases and vocabulary words.

Students at the Lincoln Park High School Law Career Development Center tested the game and enjoyed playing it. Rules are clearly written and students were soon playing on their own even though many of the legal terms, sentences and case studies are based on the laws of British Columbia. It was decided that if the areas of law discussed were similar to our own, the question would be counted. If the material was unfamiliar, the correct answer would be read orally and discussed. This proved to be an interesting activity in itself. This might also be of interest to teachers and students in reviewing comparative studies or international law. —D.F.

■ ***National Officer Friendly Program*** **(1983), The Sears-Roebuck Foundation. A resource program with guide for grades K through three. Paperback, $76.00/program kit. (National Program Director, The Sears-Roebuck Foundation, Sears Tower, Chicago, IL 60684)**

The Officer Friendly Program sponsored by The Sears-Roebuck Foundation was originally launched in Chicago in 1966 and has grown to involve 233 communities nationwide. It is designed specifically for primary children (grades K-3) to acquaint them with law enforcement and instill positive attitudes about uniformed police. The program's success is due to the cooperative efforts of citizens, parents, police officers, educators and local officials.

The program curriculum is divided into a suggested three-phase teaching progression: Phase I–Orientation, Phase II–Demonstration and Phase III–Follow Up. Each phase is an instruction period of approximately thirty to forty-five minutes. Worksheets which may be easily reproduced are included. Activities are varied and encourage students to actively question and discuss the lessons with their Officer Friendly.

Finally, the program guidebook incorporates a unique feature. Chapter 5, "How to Propose a New Officer Friendly Program," gives specific guidelines and helpful hints on writing a program proposal. —F.T.-P.

Career Day Supplements

Students are encouraged to begin to explore career options at increasingly younger ages. Included in this section are books that are excellent resources for youngsters considering the law as a career. *Careers in Law* by Charles Rose and *Opportunities in Law Careers* by Gary Munneke suggest the range of potential careers in the law and include some information about education requirements. *The Judge's Chambers* by Lowell Komie moves the reader from the abstract assessment of the field to an examination of some "real" experiences encountered in the working lives of law professionals. Students reading Judith Bentley's book entitled *Justice Sandra Day O'Connor* will have a firsthand look at this woman's rise to the High Court. All of these selections will be interesting and informative to both students and teachers.

■ ***Careers in Law*** **(1983), Charles Jules Rose. A high school/prelaw supplement. Hardcover, 165 pp., $9.29, plus $1.00 for shipping. (Julian Messner, A Division of Simon & Schuster, Inc, Simon & Schuster Building, 1230 Avenue of the Americas, New York, NY 10020)**

The author attacks the problem of the many and sometimes confusing roads a lawyer can take by using interesting cases to illustrate the work each involves. He covers the gamut from public prosecutor to legal counsel for the elderly. He also includes interesting chapters on court administrators and paralegals.

The book gives insight into the varied roles the lawyer and those in the legal field play as well as the "spiritual satisfaction" that can be derived from such careers. This is a very readable book that provides students with both a better understanding of the law and the many people who are a part of it. —D.F.

■ ***Opportunities in Law Careers*** **(1981), Gary A. Munneke. A high school student/prelaw student supplement. Hardcover ($8.95)/Paperback ($5.95), 152 pp. (VGM Career Horizons, 4255 W. Touhy Avenue, Lincolnwood, IL 60646)**

This book, is one of the VGM Career Horizon Series, is available in both paperback and hardcover editions. It is a comprehensive book that explores pertinent information and answers questions that anyone considering a legal career should contemplate.

The author piques the readers' interest by introducing them to some of his former law school classmates who have followed different directions in the law. Seven chapters are devoted to the options available for the private practitioner, corporate lawyer, government lawyer, public interest lawyer, lawyer in academia and other specialists.

Munneke discusses admission to law school, elements of a legal education, getting a job in and out of the field, rewards within the profession, alternatives to law school and future careers in law. He gives very practical suggestions and helpful hints throughout these chapters.

Included in the book are appendixes listing 170 law schools accredited by the

ABA along with the standards for accreditation, attorney/population ratios per state, a proposed set of rules of professional conduct and an excellent bibliography for further reading. —D.F.

■ ***The Judge's Chambers*** (1983), Lowell B. Komie. A law student/lawyer supplement. *Paperback*, 83 pp., $9.95/$6.95 for law students. (American Bar Association, Order Fulfillment, 1155 E. 60th Street, Chicago, IL 60637)

This book is comprised of nine short stories written by a noted Chicago attorney and writer. Many of the stories have previously appeared in the *Student Lawyer* magazine.

In very well written prose, the author explores various characters who live and dream in the legal arena. The reader can empathize with the various characters as they experience a myriad of human emotions from humor to pathos.

While the book will be of particular interest to law school students and lawyers, it would be enjoyable reading for any short story devotee. Selected stories could be used at the high school level. —D.F.

■ ***Justice Sandra Day O'Connor*** (1983), Judith Bentley. A teacher resource and student supplement. Hardcover, 125 pp., $9.29, plus $1.00 shipping. (Julian Messner, A Division of Simon & Schuster, Inc., Simon & Schuster Building, 1230 Avenue of the Americas, New York, NY 10020)

This biography of the former Arizona state senator and judge who became the first female Supreme Court justice is entertaining as well as informative. The author traces the evolution of O'Connor's life, her early days on the Lazy B Ranch in Arizona, her determined pursuit of education in Texas, successful law school days at Stanford and her illustrious legal career. The reader will gain new insight into Sandra Day O'Connor's personality and in the process will learn more about the inner operations of the Supreme Court. This book is highly readable and would serve as an excellent supplemental text or teacher resource for junior high or high school social studies classes. —F.T.-P.

For Teacher Reference

Teachers will find the selections reviewed in this section of special interest. *Before the First Day: Teaching Law for The First Time* is an excellent resource for the teacher or the community resource leader who is struggling to develop an appropriate lesson for a first-time classroom experience with LRE. Also designed to provide help with classroom implementation of LRE is a resource guide— *Explaining the Courts: Materials and Sources*— prepared by the Judicial Administration Division of the American Bar Association. And for your information . . . *The Rights of Teachers* by David Rubin with Steven Greenhouse and *Child-Guard Data Center*—a pamphlet from the American Federation of Police—explore the roles, rights and responsibilities of which teachers should be mindful as they meet the challenge of a demanding profession.

■ ***Before the First Day: Teaching Law for the First Time*** (1982), Canadian Law Information Council. A teacher resource. Information kit. Paperback, available at no or small charge in Canada, and approximately $15 in the United States. (Canadian Law Information Council, Legal Information Secretariat, Suite 201, 2409 Yonge Street, Toronto, Ontario, M4P 2E7)

This information kit was designed to assist those teaching law-related education courses for the first time. The kit contains two booklets: *Teaching Tips* and a *Bibliography*. Although the content is based on Canadian law, the teaching tips are excellent and useful to educators regardless of locality.

Creative suggestions such as using "The Desert Island Role Play" to introduce the study of law and "Word Bingo" to comprehend legal terms makes this an excellent resource guide for law-related education professionals. The kit might well serve as a model for individual states interested in providing similar information. —F.T.-P.

■ ***Explaining the Courts: Materials and Sources*** (1983), Lawyers Conference, Judicial Administration Division, American Bar Association. A resource guide. Paperback, 102 pp. (American Bar Association, Judicial Administration, Lawyers Conference Office, 33 West Monroe Street, Chicago, IL 60603)

This resource guide was compiled with the double-pronged goal of demystifying the court system for the public and disseminating useful information. *Explaining The Courts: Materials and Sources* contains catalogued public information materials used by courts, judges, lawyers, government agencies and national organizations. Books, videotapes and other materials are listed on a multitude of court-related topics. The guide is easy to use and is cross-referenced by subject and state. It is an excellent resource that provides a wealth of quick information for law professionals and educators. —F.T.-P.

■ ***The Rights of Teachers*** (An American Civil Liberties Union Handbook, 1983), David Rubin with Steven Greenhouse. A teacher/student resource. Paperback, 351 pp., $4.95. (Bantam Books, 666 Fifth Avenue, New York NY 10103)

This book is one of the continuing series of handbooks published in cooperation with the ACLU. This revision of the 1972 version makes it a very comprehensive, up-to-date guide that provides advice and legal solutions to problems teachers face.

The book deals with the constitutional rights of teachers in their relationships with public educational institutions. Principal federal laws, contract rights, collective agreements and state provisions are considered.

Rights of Teachers focuses on constitutionally protected activities in the classroom and outside of the school with parents and students. It includes vital information on suing under the Civil Rights Acts.

Case citations are used extensively to give a general guide to developments in the law rather than provide answers to specific problems. While the questions posed are important ones, the answers may sometimes be frustrating and confusing to teachers who will not always find those answers clearcut for local situations. —D.F.

■ ***Child-Guard Data Center*** (1983), American Federation of Police (a nonprofit, tax exempt, educational organization). A parents' manual. Paperback, 16 pp., $25 annual family membership. (Child Guard Data Center, 1100 N.E. 125th Street, North Miami, FL 33161)

Child-Guard Data Center is a program developed as the result of nationwide concern about missing children. The parents' manual provides specific information about the program and tips on safeguarding children. Chapters such as "Safety at School" and "What To Do if Your Child Is Missing?" provide invaluable information for parents. The program, sponsored by the American Federation of Police, offers its members an important service—registering children's fingerprints and issuing means of instant identification. Parents receive: 1) fingerprint cards for each child, 2) a personal identification number, 3) identification tags, 4) insurance coverage, 5) information on the availability of National Missing Children's Bulletin, and 6) Child-Guard publications including the parents' manual. Child-Guard is the only program of its type and may alleviate the uncertainty experienced by many parents of missing children. —F.T.-P.

True/False

(*Continued from page 18*)

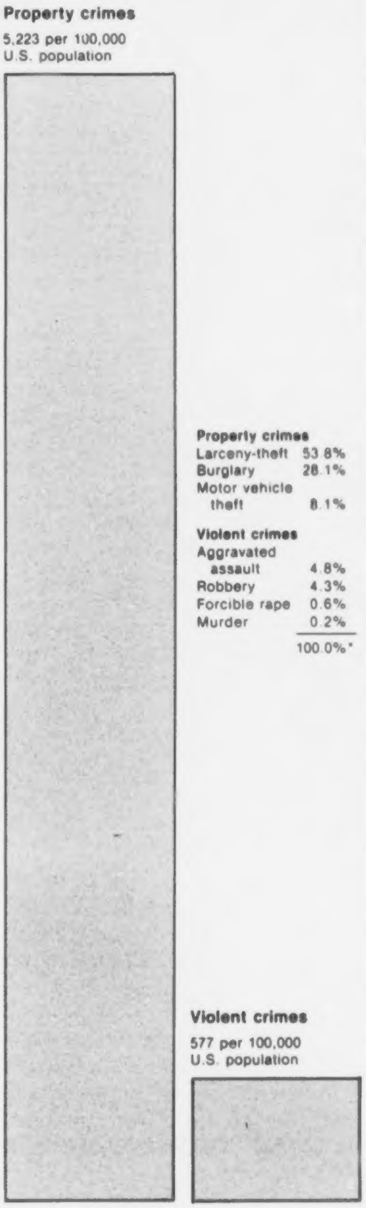
1. Homicide—defined as "causing the death of another person without legal justification or excuse"—is the least frequent violent crime. (This definition and those that follow are taken from the *BJS Dictionary of Criminal Justice Data Terminology.*) Most homicides (93%) involve just a single victim, and at least 55% of the murderers were relatives or acquaintances of the victim, and police think 24% of all murders occurred as a result of some sort of criminal activity. Adding these two figures together, you learn that if you don't get involved in crime yourself, and if you choose your friends carefully and treat your relatives well, you have very little chance of being murdered.

2. ***False.*** Even though robbery ("unlawful taking of property by force or threat of force") is defined as a violent crime, in slightly less than half of the robberies no weapon was used. In about half of the robberies more than one offender is involved. (By the way, less than 5% of commercial robberies and less than 2% of all robberies reported to the police were bank robberies.)

3. ***False.*** A surprising 42% occurred without forced entry. In the burglary of more than three million American households, the offenders entered through an unlocked window or door or used a key (for example, a key "hidden" under a doormat). Statistics suggest that burglars like to work when no one is on the premises. Three-quarters of the burglaries of businesses take place at night.

4. ***False.*** Larceny—defined as "unlawful taking of property other than a motor vehicle from the possession of another, by stealth, without force and without deceit, with intent to permanently deprive the owner of the property"—is more than ten times more common than robbery (see chart on top of third column of this page). Examples of larceny are pocket picking and purse-snatching.

Property crime outnumbered violent crimes by 9 to 1



*Percents do not add to 100% because of rounding

Source: FBI Uniform Crime Reports, 1981.

41 million victimizations occurred in 1981

Personal crimes	
Crimes of violence	
Rape	178,000
Robbery	1,381,000
Aggravated assault	1,796,000
Simple assault	3,228,000
Crimes of theft	
Larceny with contact	605,000
Larceny without contact	15,258,000
Household crimes	
Burglary	7,394,000
Larceny	10,176,000
Motor vehicle theft	1,439,000
Total	41,455,000

5. ***True.*** Convenience stores were hit by 25% of all the robberies of commercial establishments. That's 1.5 times the number of gas station robberies and 5 times the number of bank robberies.

6. ***False.*** Though there's a widespread perception that white collar criminals get away with just a slap on the wrist, surveys show that the public views white-collar crimes—such as fraud against consumers, cheating on income taxes, pollution by factories, pricefixing, and accepting bribes—more seriously than many of the conventional property and violent crimes.

The National Survey of Crime Severity, conducted in 1977, described 204 illegal events, ranging from playing hooky from school to planting a bomb that killed 20 people. Respondents felt that a company's paying a bribe to a legislator to vote for a law favoring the company was a more severe crime than stealing property worth $10,000 from outside a building or hitting a victim with a lead pipe. A public official's expropriation of $1,000 for his personal use was judged more severe than robbing a victim of $10 at gunpoint. Pricefixing was judged more severely than threatening a victim with a weapon or breaking into a department store and stealing $1,000.

7. ***False.*** Property crimes greatly outnumbered violent crimes in the FBI's Uniform Crime Reports for 1981. (See graph.)

Who Are the Victims?

8. ***False.*** Actually, the elderly are affected by crimes less than other groups. Pocketpicking and pursesnatching are two of the few crimes which affect them as much as other groups.

9. ***True.*** Nearly 25 million households were victimized by at least one crime of violence or theft.

- Almost 18 million households, or 21% of those in the nation, were victimized by at least one theft during the year.
- Six million, or 7%, were burglarized at least once.

10. ***False.*** In 1980, businesses were robbed at a rate ten times higher than the rate for private persons. In the same year, businesses were burglarized at a rate more than five times higher than the rate for households.

11. ***True*** (see chart for more on answers 11 through 17).

12. ***False***—they are more likely to be victims. However, the elderly have a greater fear of crime and may restrict their lives in a way that will reduce their chances of being victimized.

13. ***False.*** As the chart shows, blacks are more likely to be victims of personal crimes of violence, but in general no more likely to be victims of crimes of theft.

14. ***True.*** These differences may result in part because of the age differences of people in various marital status groups.

15. ***False.***

16. ***True.***

17. ***False***—the opposite is the case.

Victimization rates per 1,000 persons age 12 and over

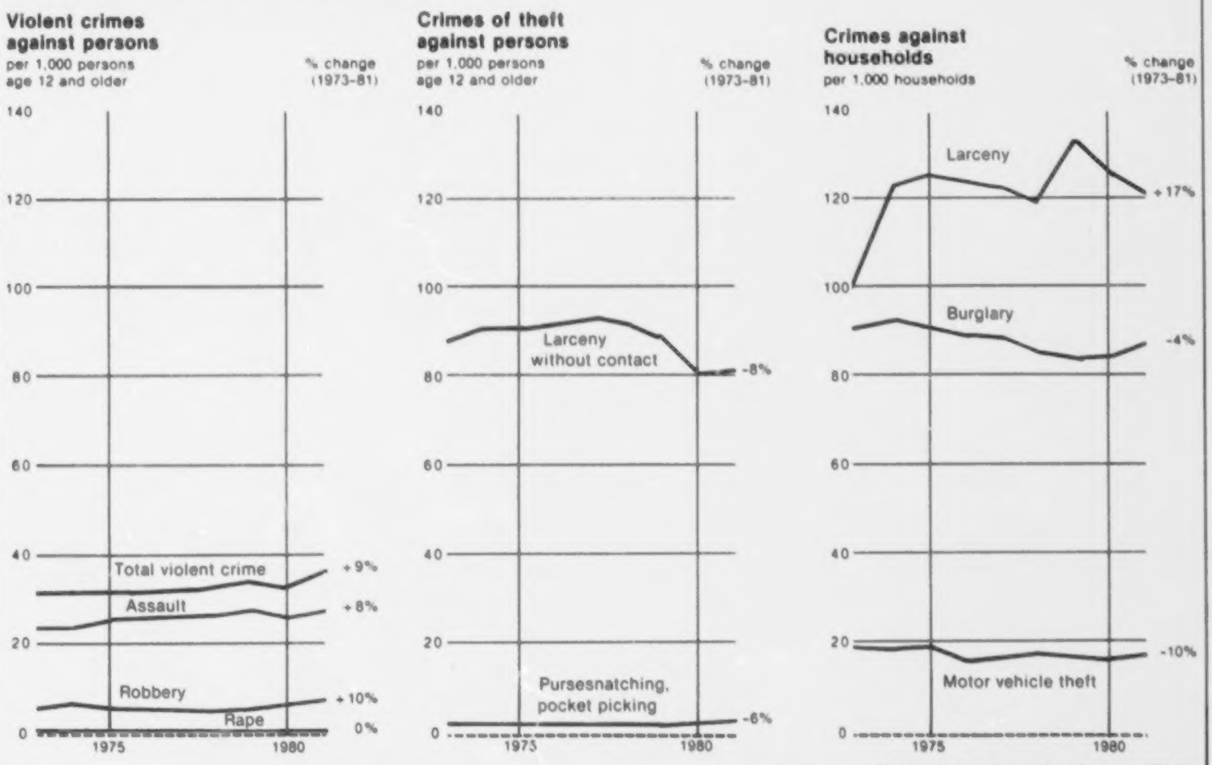
	Personal crimes of . . .	
	violence*	theft*
Total (U.S.)	35	85
Sex		
Male	46	91
Female	25	80
Age		
12-15	59	128
16-19	68	132
20-24	68	133
25-34	44	101
35-49	23	78
50-64	13	51
65 and over	8	22
Race and origin		
White	33	85
Black	50	85
Other	38	81
Hispanic	39	86
Non-Hispanic	35	85
Marital status by sex		
Males		
Never married	80	137
Divorced/separated	68	133
Married	26	63
Widowed	15	40
Females		
Never married	42	120
Divorced/separated	65	112
Married	13	64
Widowed	11	34
Income		
Less than $3,000	67	106
$3,000-$7,499	45	66
$7,500-$9,999	43	71
$10,000-$14,999	40	82
$15,000-$24,999	31	84
$25,000 or more	28	104
Education		
0-4 years	14	26
5-7 years	19	28
8 years	13	29
9-11 years	25	46
High school graduate	20	63
1-3 years college	36	94
College graduate	27	105
Employment status		
Retired	10	27
Keeping house	15	41
Unable to work	24	26
Employed	37	97
In school	56	121
Unemployed	76	118
Residence		
Central city	52	101
1,000,000 or more	64	113
500,000-999,999	54	106
250,000-499,999	45	91
50,000-249,999	42	93
Suburban	33	94
Rural	24	60
Race, sex, and age summary		
White males		
12-15	69	139
16-19	95	144
20-24	91	145
25-34	52	104
35-49	28	76
50-64	14	50
65 and over	8	26
White females		
12-15	40	133
16-19	37	133
20-24	44	124
25-34	35	95
35-49	16	80
50-64	10	55
65 and over	6	18
Black males		
12-15	95	92
16-19	112	111
20-24	86	164
25-34	57	124
35-49	35	85
50-64	28	40
65 and over	28	38
Black females		
12-15	69	90
16-19	49	81
20-24	61	88
25-34	40	103
35-49	36	80
50-64	27	37
65 and over	12	28

*Personal crimes of violence include rape, robbery, and assault. Personal crimes of theft include larceny without contact, purse snatching, and pocket picking.

Source: BJS National Crime Survey, 1981

What Are the Trends in Crime?

The National Crime Survey shows relatively little change in victimization rates between 1973 and 1981



Source: BJS National Crime Survey, 1973-81.

18. ***False.*** The National Crime Survey (NCS) shows a fairly steady rate of crime in these years. (See graph.) In 1981, 30% of all United States households were touched by crime. Each of these households was victimized by at least one burglary, larceny, or motor vehicle theft, or one or more of its members were victims of a rape, robbery, or assault by strangers. This was only slightly lower than the 32% touched by crime in 1975. This small overall drop resulted from a decrease (from 16% to 13%) in the proportion of households touched by personal larceny without contact. Taken together, the percentage of households touched by other NCS-measured crimes—violence, burglaries, household larcenies and motor vehicle thefts—remained virtually unchanged in these years.

19. ***True,*** but just barely. The homicide rate has risen sharply since 1960, but the homicide rate has only recently surpassed the previous high point reached in 1933.

From 1903 to 1933, the rate rose from 1.1 to 9.7 homicides per hundred thousand people. Between 1934 and 1958, it fell to 4.5. From 1961 through 1980, it rose again to 11.0.

Some major factors in the fluctuations include:

- World War II, which affected the homicide rate with a sharp decline during war years and a short-term rise immediately after the war's end, when most of the soldiers returned home.
- The postwar baby boom generation, which began to reach age 16 in the early 1960s, at the same time the homicide rate began to rise sharply.

Violent victimization is most prevalent among people under age 30. Therefore, when the baby boom, representing a large proportion of the population, reached the victimization-prone ages, the homicide rate would be expected to increase.

When and Where Does Crime Occur?

20. ***True.*** Some crimes, such as robbery, vary almost not at all during the year, whereas there are fluctuations of roughly 60% for crimes such as household larceny of $50 or more. Almost all types of personal and household crimes are more likely to occur during the warmer months of the year. Data show that the number of rapes reported to police also peaks during the summer months.

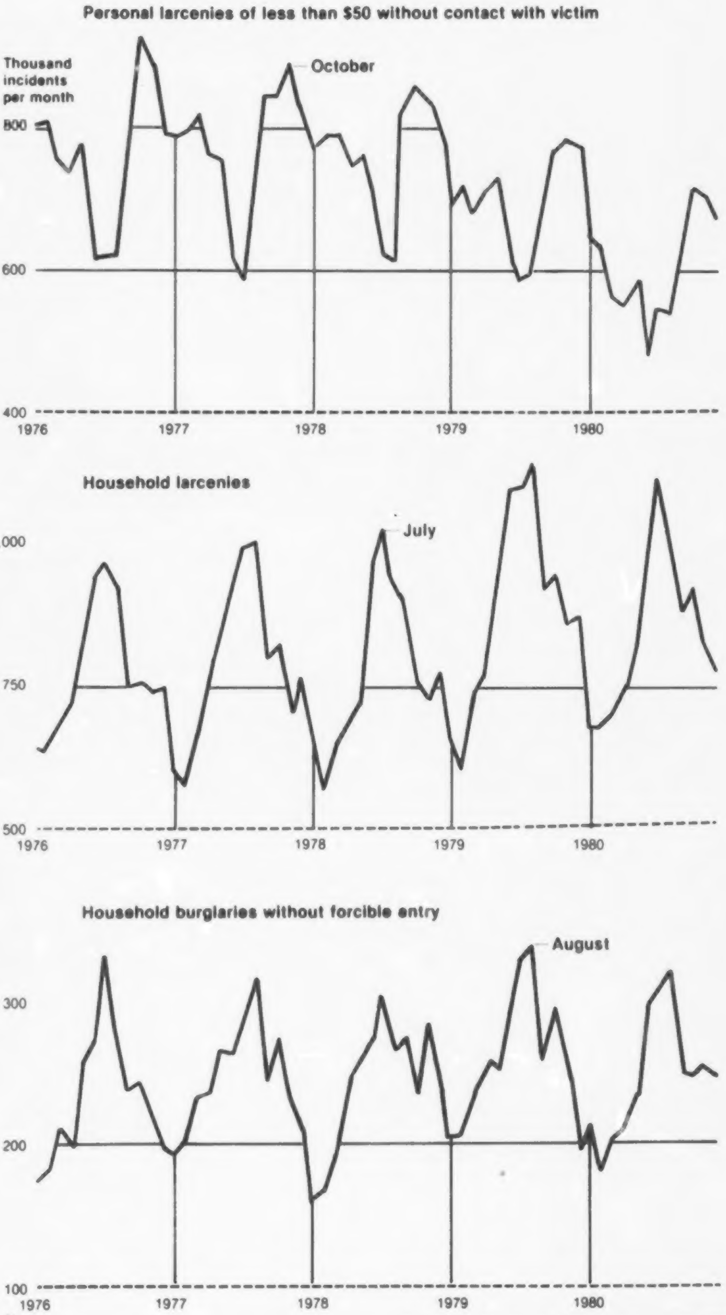
Among the possible explanations for this warm weather trend, the most probable ones are:

- People spend more time outdoors during these months, making them more vulnerable to some crimes.
- Individuals leave their homes more frequently during this time of the year, or leave doors and windows open, making a residence more vulnerable to property crimes.

A notable exception to this trend is personal larceny of less than $50, which shows a drop during the summer months. Most likely this results from a decline in school-related thefts during the summer. (See graph for further details.)

21. ***True*** in both cases. Counties with extremely high crime rates are usually urbanized, independent cities, such as Baltimore and St. Louis, or resort areas that have a high number of transients relative to their resident population (Atlantic County, New Jersey; Nantucket, Massachusetts; and Summit County, Colorado). Because crime rates are computed on the basis of the resident population, these findings for resort areas are not surprising. Countries with very low per capita crime rates tend to be rural. Such areas may genuinely experience less crime, but it is also true that these areas often have small police or sheriff departments, many of them with parttime staff. These staffing patterns may partially depress the number of crimes detected.

Some types of larceny and burglary show strong seasonal trends



Source: BJS National Crime Survey, 1976–1980

Weapons and Violence

22. *True.* Even though murder most often involved a friend or family member, only about 13% of the total number of violent crimes occurred in and around the victims' homes. (See chart.)

Place of occurrence	% crimes of violence (rape, robbery, assault)	% larceny without contact
On street, park, playground, schoolground or parking lot	41%	44%
Inside nonresidential building	15	21
Inside own home	13	*
Near own home	11	*
Inside school	5	16
Elsewhere	15	19
Total	100%	100%

*By definition, personal larceny without contact cannot occur in these locations.

23. *More or less true.* As the chart shows, smaller (non-SMSA) cities did show a greater growth of crime than large cities from 1973 to 1981. Suburban areas reported increases in violent crimes at a higher rate than that of the major cities, but their rate of increase in property crime was actually somewhat less than the rate for major cities.

24. *False.* Terrorist groups claimed responsibility for only 20 of the 1,249 bombing incidents in 1980. Fifteen of these twenty were actual explosions. The three most common motives attributed to nonterrorist bombings in 1980 were animosity, mischief and revenge. Half of all bombings were done for unknown motives.

25. *True.* You are more likely to lose money to someone wielding a weapon, but more likely to be hurt by someone who isn't.

The likelihood that a victim will lose property in a robbery attempt by a stranger is:

- 80% if the robber wields a gun;
- 60% if the robber wields a knife;
- 54% if the robber is unarmed or threatens the victim with a stick, bottle, club or other such weapon.

However, the likelihood that a robbery victim will be injured by a stranger is:

- 53% if the robber displays a stick, bottle or such weapon;
- 34% if the robber is unarmed;
- 25% if the robber is armed with a knife;
- 17% if the robber is armed with a gun.

One possible explanation for this is that victims may be more willing to resist offenders armed with sticks, bats, etc. than they are those armed with knives or guns.

26. *True.* The fear of crime generally is the fear of a random unprovoked attack or robbery by a stranger. In 1967, the President's Commission on Law Enforcement and Administration of Justice concluded that: "The fear of crimes and violence is not a simple fear of injury or death or even of all crimes of violence, but, at bottom, a fear of strangers."

As measured by the National Crime Survey, most violent crimes except murder are committed by strangers. Though more than half of all homicides are committed by someone known to the victim, three of every five of all other violent crimes are committed by strangers.

- Acquaintances commit more than 38% of all homicides but only a fourth of all other violent crimes.
- Relatives commit 17% of all homicides, but only 7% of other violent crimes.
- Robbery is the violent crime most often committed by strangers (76%).
- However, almost all assaults are committed by acquaintances or relatives.
- It is widely believed that a very large proportion of crimes committed by relatives are not reported to police and are not revealed to crime survey interviewers.

Metropolitan areas have the highest rates of reported crime

	UCR Index crime rates per 100,000 population			
	Violent crimes	% change* 1973-81	Property crimes	% change* 1973-81
Standard Metropolitan Statistical Areas (SMSA's) Urbanized areas that generally include at least one central city of 50,000 or more inhabitants, the county in which it is located, and contiguous counties that satisfy certain criteria of population and integration with the central city	691	+ 37%	5,913	+ 37%
Non-SMSA cities Cities that do not qualify as SMSA central cities and are not included in other SMSA's	330	+ 49%	4,834	+ 55%
Suburban areas Suburban cities other than central cities and counties within metropolitan areas	373	+ 50%	4,503	+ 36%
Rural areas	173	+ 17%	2,004	+ 51%

*This period was chosen for comparison, as 1973 was the first year for which the current crime classification was used in FBI tabulations of UCR Index crimes.

Source: FBI Uniform Crime Reports, 1981

The Risk of Crime

How do crime rates compare with the rates of other life events?

Events	Rate per 1,000 adults per year*
Accidental injury, all circumstances	290
Accidental injury at home	105
Personal theft	82
Accidental injury at work	68
Violent victimization	33
Assault (aggravated and simple)	25
Injury in motor vehicle accident	23
Divorce	23
Death, all causes	11
Serious (aggravated) assault	9
Death of spouse	9
Robbery	7
Heart disease death	4
Cancer death	2
Rape (women only)	2
Accidental death, all circumstances	0.5
Motor vehicle accident death	0.3
Pneumonia/influenza death	0.3
Suicide	0.2
Injury from fire	0.1
Homicide/legal intervention death	0.1
Death from fire	0.03

These rates are an approximate assessment of your chances of becoming a victim of these events. More precise estimates can be derived by taking account of such factors as age, sex, race, place of residence, and lifestyle. Findings are based on 1979-81 data, but there is little variation in rates from year to year.

*These rates have been standardized to exclude children (those under age 15 to 17, depending on the series). Fire injury/death data are based on the total population, because no age-specific data are available in this series.

Sources: *Current estimates from the National Health Interview Survey, United States, 1981*, Vital and Health Statistics Series 10, no. 141, October 1982. *Advance report of final divorce statistics, 1979*, Monthly Vital Statistics Report, vol. 30, no. 2, supplement, May 29, 1981. *Advance report on final mortality statistics*, Monthly Vital Statistics Report, vol. 31, no. 6, supplement, September 30, 1982, National Center for Health Statistics, U.S. Public Health Service, Washington, D.C. *Preliminary estimates of the population of the United States, by age, sex, and race, 1970 to 1981*, Series P-25, no. 917, U.S. Bureau of the Census, Washington, D.C., 1982. "Fire loss in the United States during 1981," Michael J. Karter, Jr., *Fire Journal*, vol. 76, no. 5, National Fire Protection Association, Quincy, Mass., September 1982.

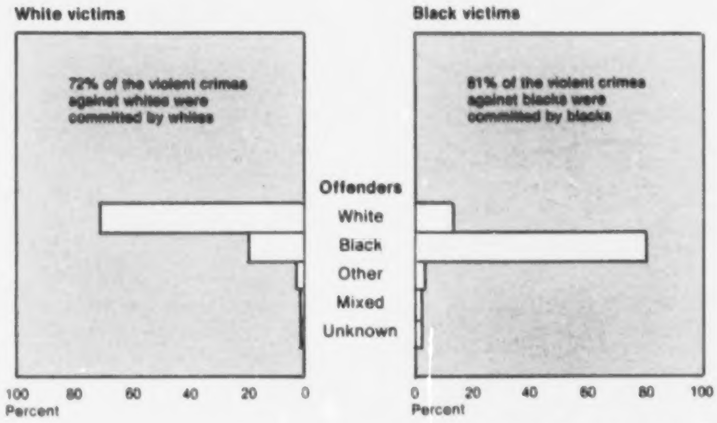
27. ***True.*** As the chart shows, the rates of some violent crimes are higher than those of some other serious life risks. For example, the risk of being the victim of a violent crime is higher than the risk of being affected by divorce, or death from cancer, or injury or death from a fire. Still, a person is much more likely to die from natural causes than as a result of a criminal victimization.

28. ***False.*** Though there's a widespread perception that young toughs prey on the elderly in their neighborhoods, during 1973-1977, there was little difference between persons age 65 or over and the rest of the population as to the rates at which they were robbed or assaulted by youths under age 21.

29. ***False.*** Of all responses reported by a victim, physical force, trying to attract attention and doing nothing to protect oneself were found in the highest proportions of seriously injured victims (16%, 14%, and 12%, respectively). On the other hand, those who tried to talk themselves out of trouble or took nonviolent evasive action were less likely to incur serious injury (both 6%).

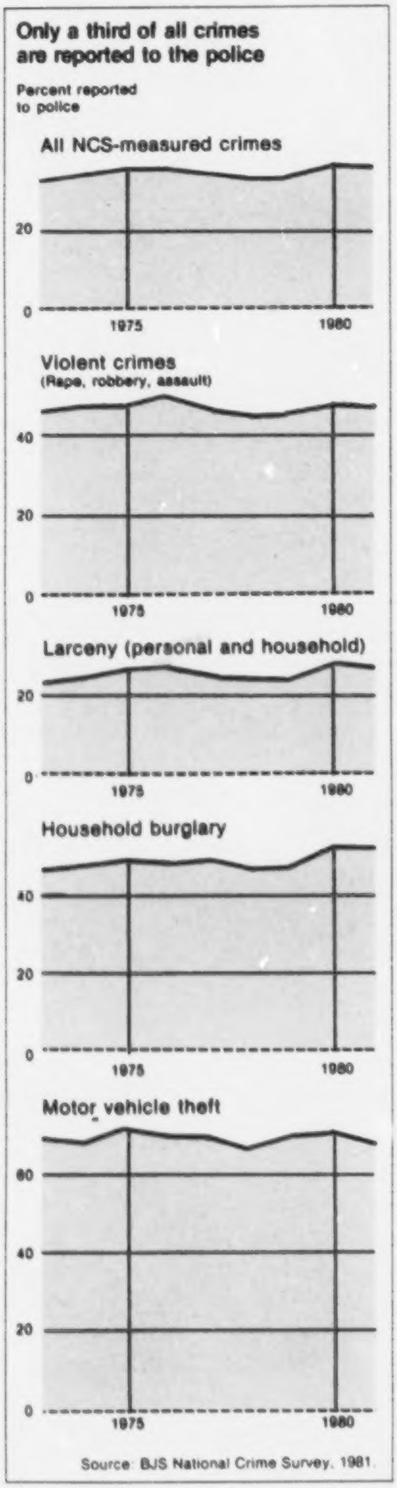
30. ***False.*** Most of the time victims of violent crimes and offenders are of the same race. (See graph.)

Victims and offenders are of the same race in 3 out of 4 violent crimes



Source: BJS National Crime Survey, 1981.

Most Crimes Are Not Reported to the Police



Only a third of all crimes are reported to the police

Source: BJS National Crime Survey, 1981.

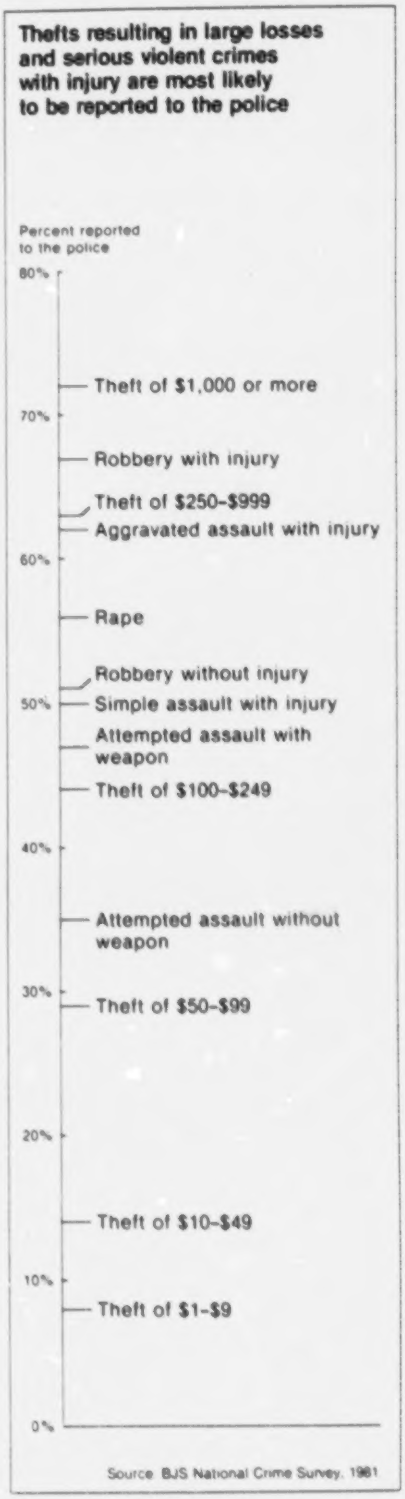
31. *True.* Victims report only a third of all crimes to the police (see graph). It has long been known that many crimes have not come to the attention of the police, but it was only with the development of victimization surveys that systematic information became available on crimes that are not reported. These surveys show that reporting rates vary by type of crime and by sex and age of victim—but not by race. In 1981, the rate of reporting to the police was higher for:

- Violent crimes than for personal crimes of theft (47% versus 27%);
- Female than for male victims of violent crimes (52% versus 44%);
- Older than for younger victims. Whites, blacks, Hispanics and non-Hispanics reported both violent crimes and personal crimes of theft at more or less the same rates.

Reporting rates were higher for motor vehicle theft than for burglary and for household larceny. In 1981, the rates reported to the police were:

- 67% for motor vehicle theft;
- 51% for household burglary;
- 26% for household larceny.

The highest income group is more likely than the lowest income group to report household crimes to the police. People making $25,000 and over were more likely than people making under $3,000 to report household burglary (59% to 43%), household larceny (31% to 25%) and motor vehicle theft (71% to 47%).



Thefts resulting in large losses and serious violent crimes with injury are most likely to be reported to the police

Source: BJS National Crime Survey, 1981

Who Are the Criminals?

32. ***True.*** Thirty-six to 40 million persons—16-18% of the total United States population—have such arrest records. The proportion of offenders who are male and nonwhite (blacks and other races) are considerably higher than their proportions in the general population.

33. ***True.*** Half of all persons arrested for crimes covered by uniform crime reporting indexes were youths under age 20, and four-fifths were males. By far the highest *rate* of offending, according to a study by Michael Hindelang, occurs among young black males age 18 to 20, a fact suggested by arrest data and confirmed by eyewitness reports from crime victims. This does not mean that persons commit crimes *because* they are young, male and black, but these characteristics are probably associated with other factors in crime.

34.***False.*** Arrest records for 1981 show that youths under age 18 were more likely than older persons to be picked up for property crimes (36% versus 14%); about equal numbers of each age group were arrested for violent crimes (4% versus 5%). Arrests, however, are only general indicators of criminal activity. The great numbers of arrests of young people may be due partly to their lack of experience in offending and also to their involvement in the types of crimes for which apprehension is more likely—for example, pursesnatching versus fraud. Moreover, since youths often commit crimes in groups, the resolution of one crime may lead to several arrests. (See graph for more on property crime and violent crime among youths.)

35. ***False.*** Except for a minority of offenders, the intensity of criminal activity slackens, perhaps beginning after the mid-20s. Repeat offenders serve increasingly longer sentences, thus incapacitating them for longer periods as they grow older. Also, habitual offenders have less success avoiding apprehension as their criminal careers progress.

36. ***True.*** While the subclass of chronic violent juvenile offenders is small, there is a strong probability of progression from serious juvenile to serious adult criminal careers. Serious juvenile offenders, like adult felons—

- Are predominantly male;
- Are disproportionately black and Hispanic;
- Are typically disadvantaged economically;
- Are likely to exhibit interpersonal difficulties and behavior problems both in school and on the job;
- Often come from one-parent families or families with a high degree of conflict, instability and inadequate supervision.

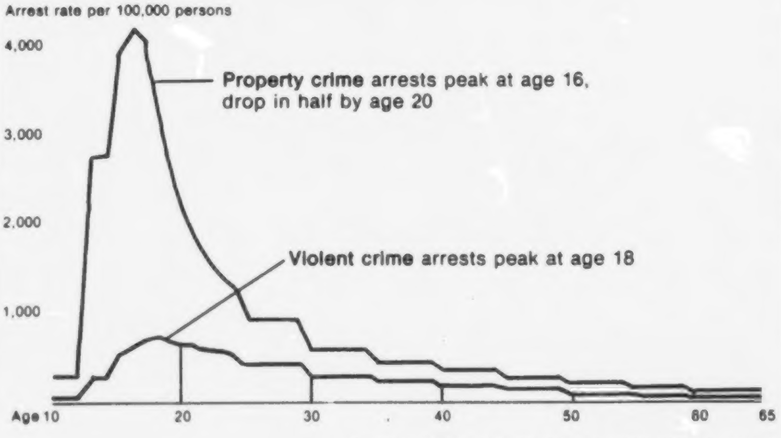
37. ***True.*** Even though chronic repeat offenders (those with five or more arrests by age 18) make up a relatively small proportion of all offenders, they commit a very high proportion of all crimes. In a Philadelphia study, chronic offenders accounted for 23% of all male offenders in the study, but they had committed 61% of all the crimes, including:

- 61% of all homicides;
- 76% of all rapes;
- 73% of all robberies;
- 65% of all aggravated assaults.

38. ***False.*** Few chronic offenders can be considered "career" criminals in the sense that crime is their full-time occupation. A recent Rand Corporation study showed that most repeat offenders had other regular sources of income and used periods of unemployment to commit crimes.

Most criminals engage in several types of crime:

- Repeat offenders tend to switch between misdemeanors and felonies and between violence and property crimes, often engaging in related types of crimes such as property and drug offenses.
- It appears that juveniles, even more than adults, are generalists. This may be due to the random, unplanned nature of juvenile crime.



Serious crime arrests highest in young age groups

Source: FBI Uniform Crime Reports, 3-year average, 1978-80.

Drug and Alcohol Abuse Is Common Among Offenders

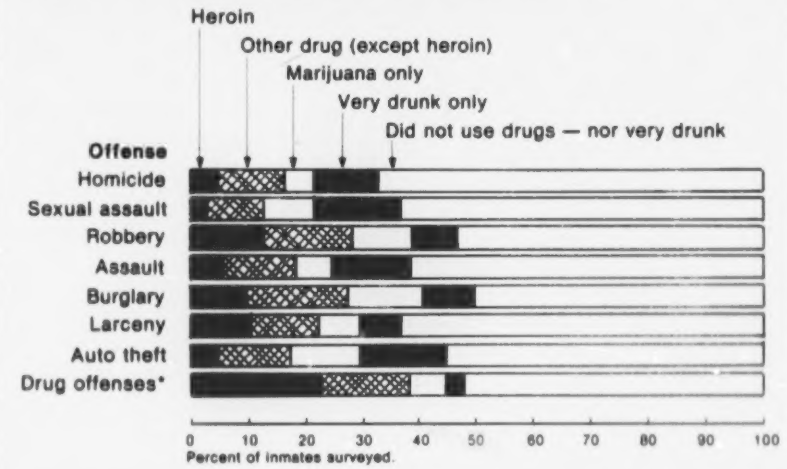
39. ***True.*** According to findings of a 1979 survey of prison inmates, more than 75% of all state prisoners had used one or more illicit drugs in their lifetime, about double the rate of the United States population.

Specifically, 28% had used heroin, most of them at least once a week before they entered prison. Forty-one percent had used cocaine, about 40% amphetamines and barbituates.

More than a third of all inmates drank heavily before going to prison. In any one drinking session, a typical inmate reported drinking the equivalent of eight cans of beer, seven four-ounce glasses of wine or nearly nine ounces of 82-proof liquor. During the year before their arrest, two-thirds drank heavily everyday.

As the graph shows, two out of five prison inmates said they they were drugged or very drunk around the time of the offense.

2 out of 5 prison inmates reported they were under the influences of drugs or were very drunk around the time of the offense



*Includes trafficking and possession.

Source: *Survey of State prison inmates, 1979*

Police and the Response to Crime

40. ***False.*** Very few crimes are federal cases. The responsibility to respond to most crimes rests with state and local governments. Police protection is primarily a function of cities and towns, while corrections are primarily a function of state government.

41. ***False.*** A study of citizen complaints radioed to police on patrol showed that:

- Only 10% required enforcement of the law;
- More than 30% were appeals to maintain order;
- 22% were for information gathering;
- 38% were service-related duties.

42. ***False.*** State and local police employment per capita rose by 56% in 20 years, from about 1.6 officers per thousand residents to 2.5 officers. However, around the same time, the reported crime rate rose 436% (from 1.1 crime per 1000 population in 1962 to 5.9 in 1980).

43. ***False.*** As the chart on page 43 shows, of 32 crimes for which persons were arrested in 1981, only seven were UCR index crimes. Many were so-called victimless crimes.

44. ***True.*** The probability of an arrest declines sharply if the incident is not reported to the police within seconds after a confrontational crime. However, police response time is important in securing an arrest only when they are called while the crime is in progress or within a few seconds after the crime was committed. And when the crime is discovered after the event (as when someone returns home to discover a burglary), very few arrests may result even if citizens report the crime immediately—by this time, the offender may be safely away.

45. ***False.*** Actually, they make about one arrest for every five offenses reported to them. However, the rate of clearance for crimes of violence—murder, forcible rape, aggravated assault and robbery—is nearly 43%, as compared with 17% for such property crimes as burglary, larceny and motor vehicle theft.

This wide variation is largely due to the fact that:

- Victims often confront perpetrators in violent crime incidents.
- Witnesses are more frequently available in connection with violent crimes than with property crimes.
- Intense investigative methods are used more frequently with crimes of violence, resulting in a greater number of arrests.

In the Courts

46. ***True.*** Once an arrest is made and the case is referred to the prosecutor, most prosecutors screen cases to determine whether the case merits prosecution. The prosecutor can refuse to prosecute, for example, because of insufficient evidence. The decision to charge is not usually reviewable by any other branch of government. Some prosecutors accept almost all cases for prosecution; others screen out many cases.

47. ***True.*** One study found that problems with a complaining witness accounted for 61% of refusals to prosecute violent crimes by nonstrangers. Conviction rates are lower in cases involving family or acquaintances. For example, in New Orleans, the conviction rate for crimes by strangers in one typical year was 48%, but only 30% by friends or acquaintances, and only 19% for crimes by family members.

48. ***True.*** A recent study shows that 70% of all felony cases rejected in California were drug cases. In two local prosecutors' offices in California, 30% of all felony arrests for drug offenses were rejected because of search and seizure problems.

49. ***True.*** In medieval times, the accused was bailed to a third party who would be tried in place of the accused if the accused failed to appear. As the system evolved, the guarantee became the posting of a money bond that was forfeited if the accused failed to appear. In the United States, the Eighth Amendment states that bail shall not be excessive, but does not grant the right to bail in all cases.

50. ***True.*** One study shows that 16% of all released defendants were rearrested. Other studies have shown a rate between 10% and 20%.

10.8 million arrests were reported by law enforcement agencies in 1981

Rank	Offense	Estimated number of arrests
1	All other offenses (except traffic)	1,908,700
2	Driving under the influence	1,531,400
*3	Larceny-theft	1,261,600
4	Drunkenness	1,155,400
5	Disorderly conduct	787,100
*6	Burglary	518,900
7	Simple assaults	494,200
8	Liquor law violations	483,500
9	Marijuana violations	400,300
10	Fraud	295,100
*11	Aggravated assault	283,270
12	Vandalism	242,600
13	Weapons: carrying, possessing, etc.	179,700
*14	Robbery	153,890
15	Runaway	153,300
16	Stolen property: buying, receiving, possessing	129,500
17	Motor vehicle theft	129,200
18	Prostitution and commercial vice	106,600
19	Curfew and loitering law violation	94,800
20	Forgery and counterfeiting	86,600
21	Opium or cocaine and their derivatives	72,100
22	Sex offenses (except forcible rape)	72,000
23	Other dangerous drug violations	67,500
24	Offenses against family and children	56,500
25	Gambling	40,700
26	Vagrancy	33,000
*27	Forcible rape	31,710
*28	Murder and nonnegligent manslaughter	21,590
*29	Arson	20,600
30	Synthetic or manufactured drug violations	20,000
31	Suspicion	16,200
32	Embezzlement	8,700

*UCR Index Crimes

Source: FBI Uniform Crime Reports, 1981

In the Courts

51. ***False.*** Though there is considerable disagreement over the constitutionality of some provisions, about 60% of the states have provisions that try to assure the safety of the community. (See chart.)

52. ***False.*** In 1981, 82,000,000 cases were filed in state and local courts, of which about 67% were traffic-related cases, 16% were civil cases (torts, contracts, small claims, etc.), 15% were criminal cases and 2% were juvenile cases.

53. ***True.*** As the following chart shows, rates are over 50% in almost all typical jurisdictions.

Jurisdiction	Cases resulting in a plea of guilty	Number of cases filed
Rhode Island	79%	3,367
Kalamazoo, Mich.	79	710
Milwaukee, Wis.	74	2,689
New Orleans, La.	70	3,894
Indianapolis, Ind.	67	1,491
Louisville, Ky	66	1,496
St. Louis, Mo.	64	3,388
Manhattan, N.Y.	63	25,233
Los Angeles, Calif.	61	22,258
Salt Lake City, Utah	56	1,852
Washington, D.C.	51	6,857
Golden, Colo.	49	1,739
Geneva, Ill.	48	913

Most guilty pleas are the result of plea negotiations, in which the defendant pleads guilty with the reasonable expectation that the state will give some consideration, such as reducing the charges and/or giving a more lenient sentence. By the way, the predominance of guilty pleas in not new in the criminal justice system. A study in Connecticut shows that between 1880 and 1910, 95% of all convictions came as a result of guilty pleas. In another study of 13 jurisdictions in 1979, the proportion of guilty pleas in all convictions ranged from 81% in Louisville to 97% in Manhattan Borough, New York.

About three-fifths of the States have one or more provisions to ensure community safety in pretrial release

Type of provision	States that have enacted the provision
Exclusion of certain crimes from automatic bail eligibility	Colorado, District of Columbia, Florida, Georgia, Michigan, Nebraska, Wisconsin
Definition of the purpose of bail to ensure appearance and safety	Alaska, Arizona, California, Delaware, District of Columbia, Florida, Hawaii, Minnesota, South Carolina, South Dakota, Vermont, Virginia, Wisconsin
Inclusion of crime control factors in the release decision	Alabama, California, Florida, Georgia, Minnesota, South Dakota, Wisconsin
Inclusion of release conditions related to crime control	Alaska, Arkansas, Delaware, District of Columbia, Florida, Hawaii, Illinois, Minnesota, New Mexico, North Carolina, South Carolina, Vermont, Virginia, Washington, Wisconsin
Limitations on the right to bail for those previously convicted	Colorado, District of Columbia, Florida, Georgia, Hawaii, Michigan, New Mexico, Texas, Wisconsin
Revocation of pretrial release when there is evidence that the accused committed a new crime	Arkansas, Colorado, Illinois, Indiana, Massachusetts, Nevada, New York, Rhode Island, Virginia, Wisconsin
Limitations on the right to bail for crimes alleged to have been committed while on release	Colorado, District of Columbia, Florida, Maryland, Michigan, Nevada, Tennessee, Texas, Utah
Provisions for pretrial detention to ensure safety	Arizona, California, District of Columbia, Florida, Georgia, Hawaii, Michigan, Wisconsin

Source: Updated as of December 1982 from *Typology of State laws which permit consideration of danger in the pretrial release decision* by Elizabeth Gaynes for the Pretrial Services Resource Center, Washington, D.C., 1982.

54. ***True.*** The conviction rate at trial varies, but as the chart shows, it is rarely below two-thirds.

	Felony cases tried (1979)	
Jurisdiction	Resulted in conviction	Number tried
Geneva, Ill.	96%	24
Salt Lake City, Utah	84	137
Louisville, Ky.	77	296
Indianapolis, Ind.	77	226
Los Angeles, Calif.	73	1,966
Milwaukee, Wis.	73	198
New Orleans, La.	70	690
Manhattan, N.Y.	70	675
Washington, D.C.	68	629
Kalamazoo, Mich.	68	68
St. Louis, Mo.	64	157
Rhode Island	64	111
Golden, Colo.	64	63

55. ***False.*** Most criminal cases are disposed of in six months or less. Cases resulting in trials generally take longer than ones that end in dismissals or guilty pleas. In the fourteen jurisdictions studied in one survey, most felony cases were disposed of within four months of arrest, but cases that went to trial took more than six months.

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After Conviction

56. ***True.*** Defendants appeal their convictions on grounds that rights were allegedly violated during the criminal justice process. The reversal of a conviction on appeal only sets aside the prior conviction. Defendants may be retried. In many states, criminal appeals are a matter of right, and some states provide for an automatic appeal in death sentence cases.

A sentence may be appealed on the grounds that it violates the constitutional prohibition against cruel and unusual punishment.

57. ***False.*** Despite the public's concern over crime, and despite its strong preference that dangerous criminals be incapacitated by keeping them off the streets, three out of every four persons found guilty of a crime are currently out in the community under some kind of supervision. The chart below provides more detail.

More than 2.4 million persons are estimated to be under some form of correctional care, custody or supervision

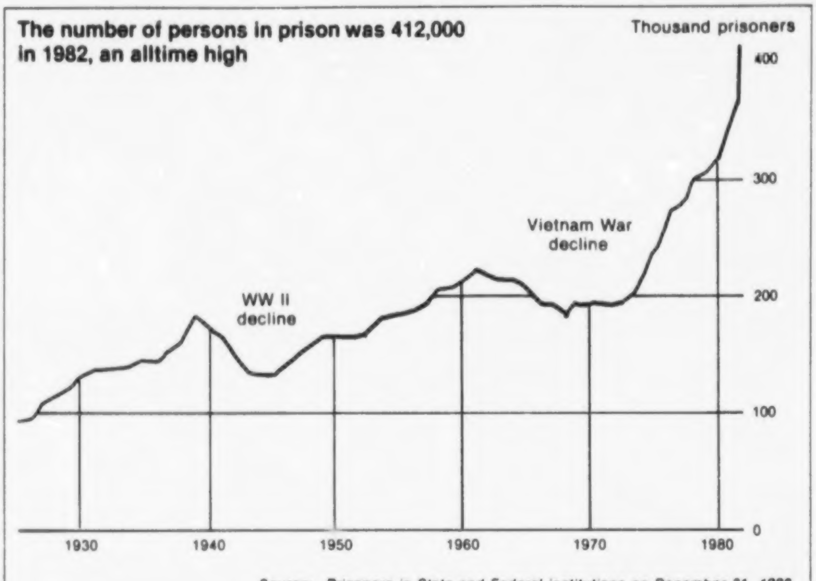
- 1.2% of all adults over age 18
- 1 in 45 adult males
- 1 in 441 adult females
- 1.5% of all eligible juveniles (age 10-17)

Adults (total)	1,973,000
Prison	369,000
Jail	158,000
Parole/other	224,000
Probation	1,222,000
Juveniles (total)	455,000
Detention*	74,000
Parole/aftercare	53,000
Probation	328,000

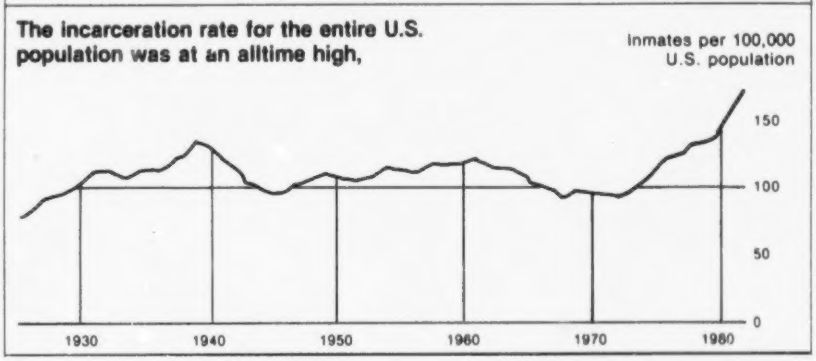
*In public and private facilities.

58. ***True.*** Even though three out of four convicted defendants are currently out of prison, the prison population is larger than it has ever been.

Indeed, one of the reasons so many convicted persons are out in the streets is that prisons are full in many states, forcing early release of convicts or the use of alternatives that don't involve imprisonment. (See the graphs for more details.)


The number of persons in prison was 412,000 in 1982, an alltime high

Source: *Prisoners in State and Federal institutions on December 31, 1982.*


The incarceration rate for the entire U.S. population was at an alltime high,

59. ***False.*** Only about 24% of them are returned to prison. Of these, half (12% of the total) are returned in their first year. Moreover, most of them return to prison within three years because of technical violations of supervision requirements. Only a minority of the returnees go back for new, major convictions.

60. ***True.*** Prisons report declines in the number of admissions after age 30, and an increase in the proportion of persons serving their first confinement after age 40, indicating a substantial dropping out from imprisonable criminal activities occurring among repeat offenders as they enter middle age (40 or older). Recent research based on interviews with middle-age men who are criminally active suggests that the justice system, in effect, physically wears down offenders. The process of repeatedly being arrested, appearing in court, and adjusting to prison life came to be perceived by these offenders as an exhausting ordeal. This suggests the possibility that a deterrent effect may be age-related—that is, as persistent offenders age, the cost of crime becomes greater, discouraging many from continuing their criminal careers. □

Gibberish

(*Continued from page 7*)

research is not highly technical. It is, in its important features, the same guidance you would get from *Strunk & White* or from a good writing teacher. Indeed, it is an embarrassment to the legal profession that talented researchers have found it appropriate to devote significant portions of their careers to demonstrating that pattern jury instructions can be improved upon.

I think there is a much more interesting study for those interested in linguistics and psychology. That would be a study of how the dialect of jury instructions developed and why many judges continue to use it in spite of the obvious difficulties of comprehension on the part of people who are accustomed to standard English.

And a dialect it is—characterized by its own idioms, vocabulary and unique grammatical structure.

Consider idioms such as "an abandoned and malignant heart"—a phrase used to explain the meaning of malice aforethought. Researchers found that some jurors thought the judge was talking about cancer of the heart.

Another idiom of the dialect is the phrase "exclusive province," as in: "It is your exclusive province to decide . . . ." If I didn't know better, I would think it was a region in France that doesn't admit Jews.

And then there is "the court"—an idiom used by trial judges to mean "I" or "me."

And sometimes judges refer to someone as a "competent witness" when they don't intend to comment at all on the person's skill at witnessing.

The dialect also makes liberal use of words that are almost unknown in standard English, such as "corroborate" and "veracity" and "thereto."

And the characteristic sentence structure is inverted, as in the following excerpt from a commonly used jury instruction:

> If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

There is a lot of suspense in that one. There are sixty-five words in that sentence before you get to the subject or predicate.

Clearly, most judges know how to speak standard English. They don't talk that way at cocktail parties. The problem seems to be that many judges don't regard standard English as an appropriate language for instructing jurors. I also suspect that the dialect is so familiar by the time a judge reaches the trial bench that many judges who would like to use standard English, find it hard to do in this environment.

Let me add that the argument that there is a trade-off between precision in stating the law and comprehensibility of the instructions is largely a phony one. The dialect is used regularly in instructions that do not involve statements of the law—that merely involve such issues as how to consider the testimony of a witness.

So I would like to suggest a set of rules wholly without support in empirical research that might help judges break out of this pattern.

Here they come.

Partridge's Rule Number One is don't deliver a jury instruction that you don't understand yourself.

I was privileged to sit on a jury in the District of Columbia once and I was the recipient of the following instruction from the D.C. pattern criminal jury instructions: "A person who knowingly does an act which the law forbids may be found to act with specific intent."

I submit that the judge who delivered that instruction didn't understand it. Nobody could understand it. It is exquisitely ambiguous on the question of whether the person must know that the law forbids the act. More recently, I had the pleasure of attending a meeting of district judges at which there was substantial debate about whether specific intent requires that the defendant know that an act was illegal. It is pure speculation, but I wouldn't be surprised if many of them are delivering instructions that simply don't answer the question.

Partridge's Rule Number Two is don't deliver an instruction that you wouldn't have understood before you went to law school. That's a somewhat harder proposition. Many of us have a hard time remembering what parts of our vocabulary and speaking style were picked up in law school. But I think it is helpful to try to put yourself back in the pre-law school state when looking at a proposed jury instruction, whether drafted by yourself or someone else. After all, if you can succeed in doing that, you can probably be pretty comfortable that you will be understood by any jury you happen to have that consists entirely of college-educated people.

Partridge's Rule Number Three takes you back a little further: Don't use vocabulary that your teenage children wouldn't understand—or better yet, the teenage children of friends who aren't lawyers. People in high school and junior high school have reasonably good vocabularies and have had as much formal schooling as many jurors will have had. If you are using vocabulary that is unfamiliar to them, many jurors are likely to have difficulty with it.

Finally, we come to Rule Number Four: Don't use sentence structures that you wouldn't use in talking about day-to-day affairs with your family and friends.

After I had spent several days reading pattern jury instructions in connection with my work for Judge Marshall's committee, I had a dream one night. In the dream, my wife had come home from Garfinckel's with an expensive new dress and couldn't decide whether she liked it or whether it fit right or even if the hem was even. She asked for my advice, and I said to her:

> My dear, whether the garment you bought this afternoon is unbecoming to you and whether it doesn't fit properly and whether the workmanship is defective are matters that are within your exclusive province to decide. If you should conclude that the garment is not unsatisfactory for any of the above reasons, then and only then may you retain it in your wardrobe.

If you don't talk that way at home, I suggest you shouldn't talk that way to juries, either.

In closing, I would only say again that the problem is not one of following abstruse technical rules known only to people who do psycholinguistic research. The problem is that the legal profession—and trial judges in particular—have acquired some bad habits. The need is for judges to find a way to return to the language they spoke before they began the study of law. □

Strategies

(*Continued from page 11*)

4. Students should then role-play the state of Massachusetts, the accused (Sheppard) and the Supreme Court. Give the state and the accused a large sheet of butcher paper to write down three to four arguments which can be made for their point of view. Meanwhile, the Supreme Court group should review the case to develop a set of questions to ask each side during oral argument. (The teacher should appoint a Chief Justice.) The butcher paper "briefs" are submitted to the court and hung on a wall for all to see.
5. The Supreme Court will then convene and call upon each group to make its oral argument. The justices may interrupt either argument with questions. (The teacher may choose to set a ten-minute limit to oral argument, use a timekeeper, and set the classroom up like a courtroom to enhance the role play.)
6. The Supreme Court group will deliberate and discuss the issues with the rest of the class listening. Ask the Chief Justice to report the majority opinion after calling for a vote of the associate justices. If there is a minority holding, ask one of justices to report on it.
7. The teacher will then debrief the class, comparing the arguments of the student attorneys. The teacher will summarize and elaborate upon students' reasoning.
8. Students will write a majority, concurring, or minority opinion as a follow-up activity.
9. Upon the official decision of the United States Supreme Court, the teacher will share the actual opinion and reasoning of the Court.

Strategy

4

High-Tech Justice

New developments in technology and electronics promise to create a more efficient and effective justice system. Polygraph tests, although not admissible in court, can assist law enforcement officers in police investigations. (For more on crime-fighting technology, see Winter, 1980, *Update* pp. 9-11.) Handwriting analysis may help attorneys select fair, impartial juries. While many courts will not allow testimony from witnesses whose recall was enhanced by hypnosis, law enforcement officers are using hypnosis with victims and witnesses to reestablish the facts of a crime (see article in this issue).

Other forms of technology are giving the courts headaches. Supreme Court standards governing obscenity may be challenged by improved telecommunications such as "Dial-a-Porn"—a telephone pornography service.

Students will enjoy debating current issues and police procedures through role playing. The cases described in this activity are hypothetical ones, based on real issues. The teacher should examine community newspapers to incorporate local changes in police and trial procedures in the class discussion.

Role Playing Procedure

1. Divide the class into groups containing no more than three students. Have each student decide upon a role—judge, attorney for the plaintiff/prosecutor or defendant's attorney. They will rotate roles each round.
2. Give each group a fact statement for one of the cases. Have students role play within their individual groups. Each side will identify the issue in their statement. The plaintiff speaks first, then the defendant. The judge may ask questions before making a decision.

CASE 1: The Dr. Smith Show: Will It Ever Play in Court? FACTS: In a complicated medical malpractice suit, the defense wants to introduce a high quality videotape deposition, instead of the traditional written deposition. The expert witness is a physician (Dr. Smith) who is unable to appear at the trial. The videotape will allow both attorneys to question the witness. The plaintiff's attorney objects because he wants to cross-examine the doctor in front of the jury and his client (the patient). Should this videotape be allowed in court? What standards should be set?

CASE 2: To Tell the Truth. FACTS: When a firefighter applied for a job with a local fire department, he was given an extensive interview and polygraph test. Questions were asked concerning drug use and sexual preference. The man was told that he failed the polygraph test and would not be hired. He filed a lawsuit against the city, stating that the polygraph test violated his rights of privacy and due process. (See p. 54 of the Winter, 1980, *Update* for more on this question.)

CASE 3: Put Your John Hancock Here. FACTS: In the voir dire process of a criminal case, the defense attorney requests samples of the jury panel's handwriting which will be analyzed to reveal personality traits of the jurors. Angular writing, for example, is said to indicate stubbornness or an uncompromising nature. The prosecuting attorney argues that graphoanalysis is a violation of the juror's right to privacy.

CASE 4: A Pair of Shackles to Go. FACTS: In order to reduce crowding in county jails, nonviolent offenders are sentenced to confinement in their homes on weekends. "Electronic shackles" are used to signal the sheriff's department whenever the wearer tries to leave the home. At the sentencing hearing, the district attorney argues against such a sentence as being too lenient.

CASE 5: Lust on the Line. FACTS: A federal agency (FCC) is brought to court for regulating "Dial-a-Porn"—a service which provides recorded messages decribing sexual activity. The government has forced the company to remove its most popular message, which was determined obscene by agency investigators. Supreme Court precedent states that obscenity is measured on community standards. With calls coming from across the nation, what community standards should apply?

CASE 6: Under Your Spell Again. FACTS: A woman is killed in a "hit and run" accident. Her husband is suspected of foul play, however, because the truck that hit her was sold to a man using an alias. The used care dealer was unable after two interrogations to identify the husband, until he was hypnotized by the California police. The defense attorney argues that the testimony should not be admissible in court.

Strategy

5

Computers: Privacy in Limbo

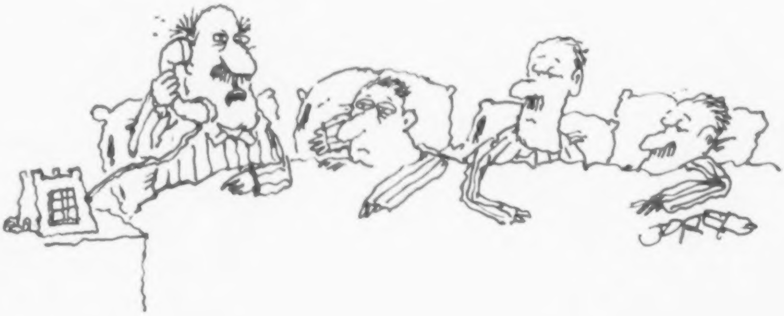
While Orwell's fear that we would lose control over every shred of our privacy has not proven true, computers and technology pose an enormous threat. Agencies of the government or institutions where we all bank and shop routinely collect information concerning our private lives.

According to an article by Dennis Holden in the December, 1983, issue of *Student Lawyer*, information on an average American can be found in 39 government and 40 corporate computers. In 1976 the Supreme Court ruled in *United States v. Miller* (425 U.S. 435) that personal bank records belong to the bank. The Court held that the individual was not entitled to notice of subpoena when the government sought bank records pertaining to him or her; nor could an individual challenge the subpoena in court. Does the same standard apply to credit records? Medical forms? Telephone billings?

Unless there is legislative or court action, this may become a more severe problem. Increasing amounts of information are stored in computers to which many organizations, and sometimes even unauthorized personnel, have access. Big Brother? Big Business? In either case, the use of computers threatens to put us much closer to Orwell's world without privacy. (For more on this subject, see pp. 6-9, 71-73 of the Spring, 1982, *Update*.)

Procedure

1. Brainstorm with students what records exist with data on their family's history or activities. (For example, census records, passport records, credit card purchases, telephone calls, social security records, medical and insurance forms, school records, driver's license photographs, magazine subscriptions.)
2. List all of the possible ways that computers might be used to make law enforcement more efficient (pre-sentencing reports, violation of probation/parole, failure to report income).
3. In Orwell's *1984*, the Ministry of Truth controlled information in order to control the people. Discuss with students the following questions:
   - Why is information power?
   - How does the Constitution specifically protect us by offering access to information?
4. Write the following quote from *1984* on the blackboard: "We change our behavior when we think we are being watched." Ask students to list all of the electronic devices that may be designed to protect our physical safety (electronic eyes in banks and supermarkets, security systems connected to cable television, video monitors in department stores). Will any of these lead to a loss of privacy?
   - How might computers monitor the private lives of individuals more efficiently than Orwell's telescreen?
   - What would be the advantages of comprehensive record keeping? Disadvantages?
   - Define privacy. Do you think the government should be allowed to interfere with one's privacy? Cite examples.
   - What limits should there be on government interference?
   - Under the standards described in the Fourth Amendment, when does the government have the right to intervene in privacy?
   - In what way might the Fourth Amendment be interpreted to protect citizens from computerized searches?
5. Divide the class into five to six groups of five students each. Ask them to select one of the following statements and develop three statements in support of or in opposition to the idea. Each group will report back to the class. Compare the groups' findings.
   - A computer search of your credit record is no different than seizure of your checkbook; such a search should require a warrant.
   - An invasion of your personal records by private business should be treated as criminal trespass or theft.
   - Computerized arrest records and fingerprints should be destroyed by local authorities and the FBI once the defendent is acquitted.
6. Contact your legislator for information on the following acts, or research them in a law library. Assign individuals or teams of students to report on the protection each law offers to different individuals.
   - Privacy Protection Act of 1980
   - Right to Financial Privacy Act of 1978
   - Tax Reform Act of 1976
   - Privacy Act of 1974
   - Family Education Rights & Privacy Act of 1974
   - Crime Control Act of 1973
   - Fair Credit Reporting Act of 1970
   - Freedom of Information Act of 1966 (See pp. 28-31 of the Spring, 1982, *Update*.)
7. Review the following proposed recommendations for a national policy concerning private, personal information. (Source: David Linowes, *Personal Privacy in an Information Society*) Suggest that students write their legislator in support or opposition of these, making appropriate modifications:
   - Personal information may be used only for the purposes for which it is collected. Data subjects have the right to be informed about all uses of information concerning them. No new uses may be made without the consent of the subject.
   - Organizations should collect only the minimum information necessary.
   - No secret records or data banks should be permitted.
   - Individuals should have the right of access to all data about them. If the data is incorrect, incomplete or otherwise faulty, it either must be corrected to the subject's satisfaction or a statement or rebuttal must be permanently attached.
   - Misuse or abuse by an individual of data entrusted to him or her should be subject to civil penalties of from $1,000 to $10,000. Theft of data and certain other abuses should be criminal violations.



"Hello, Gorton, Manheimer, Sullivan, and Penn—do you realize what time it is?"

Good Faith Exception to the Exclusionary Rule—Is the Court Ready Now?

by James P. Manak

Commonwealth of Massachusetts
v.
Osborne Sheppard
(Docket No. 82-963)

To be argued January 17, 1984

ISSUE

Over the past several years, pressure has been mounting in state and federal courts, legislatures and in law enforcement circles for easing the strict application of the Fourth Amendment exclusionary rule first applied to the states by the United States Supreme Court in *Mapp v. Ohio* (367 U.S. 643 (1961)) Under that rule, evidence obtained by the police in violation of a defendant's Fourth Amendment rights pertaining to arrest, search and seizure is not admissible against the defendant in a criminal prosecution.

In 1980, the federal Fifth Circuit Court of Appeals in a fragmented decision took the position that, "... when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence." (*United States v. Williams*, 622 F. 2d 830, 846-7 (1980))

Williams opened the floodgates of a debate over the adoption of the good faith exception—a debate that may culminate with the present case. The issue presented to the Court is whether exception to the exclusionary rule should be applied upon a search warrant to seize items specified in his *application* for the warrant, where the warrant was subsequently invalidated by a state appellate court because the issuing magistrate failed to specify in the *warrant* the items to be seized.

FACTS

The beaten and burned body of Sandra Boulware was discovered in Boston, Massachusetts, at approximately 5:00 a.m. on Saturday, May 15, 1979. Lengths of wire were attached to one leg and near her body. Police attention ultimately focused on Osborne Sheppard. As a result of inconsistent statements given by Sheppard, statements given by individuals whom he said he was with from Friday night, May 4, to the early morning hours of the next day, and evidence of bloodstains, hair and wire found in and around the trunk of a car Sheppard had borrowed in the early morning hours of Saturday, May 5, the police determined on Sunday, May 6, that they should obtain both an arrest warrant for Sheppard and a search warrant for his home at 42 Deckard Street in the Roxbury neighborhood.

Detective O'Malley of the Boston Police Department prepared and typed an affidavit to be used in applying for a search warrant. By this time, it was Sunday afternoon and a clerk of the Roxbury Division of the District Court was unavailable. Moreover, the police were unable to locate a suitable form of search warrant. Detective O'Malley did find a printed warrant form formerly utilized by the Dorchester District Court for searches for narcotics. O'Malley attempted to adapt this form by crossing out the words "controlled substance" on the cover side, replacing the word "Dorchester" with "Roxbury" and inserting a reference to "2nd & Basement" of 42 Deckard Street as the place to be searched. However, he failed to take out the reference to controlled substances in the portions of the form that constituted the actual application for the warrant.

At 2:45 p.m., O'Malley, other officers and a representative of the Suffolk County District Attorney's office appeared at the home of a judge to present the affidavit and applications for arrest and search warrants. The judge took O'Malley's oath and signed the affidavit to that effect. The judge tried to find an appropriate form of search warrant, but to no avail. Finally, he tried to make the appropriate changes in the "controlled substance" form, dated and signed the warrant. However, the judge made no change in the main portion of the warrant form, which still authorized a "search for any controlled substance. . . ."

Detective O'Malley left the judge's home with the affidavit and a search warrant that he reasonably believed, on the advice of the judge and the district attorney's office, was adequate to justify a search of the designated premises for the items listed in the application for the warrant. At about 5:00 p.m., O'Malley and other officers, armed with the affidavit and search warrant, were admitted to 42 Deckard Street. O'Malley spoke with Sheppard's mother and sister and told them the police were going to look in defendant's room and the cellar for items implicated in a homicide. Apparently, neither woman requested to see the search warrant.

The items seized and introduced at Sheppard's trial were what appeared to be bloodstained boots taken from his bedroom. In the cellar, O'Malley seized pieces of bloodstained concrete; women's earrings; an apparently bloodstained envelope; men's jockey shorts; women's leotards, later determined to be bloodstained; three types of wire; and a woman's hairpiece.

On May 14, 1979, Sheppard was indicted by a grand jury for murder in the first degree. Prior to trial, a hearing was

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held on his motion to suppress the physical evidence seized pursuant to the search warrant. The motion was denied with written findings of fact and conclusions of law. The trial judge found "... the search was within the limits that O'Malley understood the warrant to permit."

After trial by jury, Sheppard was found guilty of murder in the first degree and sentenced to life imprisonment. On appeal, the Supreme Judicial Court of Massachusetts reversed judgment, holding "... we conclude that solely on the basis of opinions of the Supreme Court of the United States, the exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant."

BACKGROUND AND SIGNIFICANCE

The traditional argument in favor of the adoption and retention of the exclusionary rule has been that the rule deters police misconduct and that there is no more effective means of achieving that goal.

Deterrence is generally defined as "specific deterrence" and "general deterrence." In the case of the former, the police officer whose case is dismissed after evidence is suppressed by a court because of a Fourth Amendment violation is presumed to learn from the experience that his or her conduct did not conform to the Fourth Amendment and to avoid such conduct in the future. In the case of the latter, it is presumed that other police officers who learn of the exclusion of the evidence will likewise be more careful in adhering to the requirements of the Fourth Amendment. Another argument in favor of the rule has stressed "judicial integrity"—that is, if illegally obtained evidence is considered by the courts, the judicial process will be tainted as a result.

The Williams case seemingly undercuts the deterrence argument by reasoning, in effect, that if a police officer acts in objective good faith in making an arrest, search or seizure, he cannot be deterred by a subsequent judicial suppression of the evidence because he—or any other reasonable officer in his shoes—would theoretically do the same thing under the same circumstances again, since such conduct would be "reasonable and in good faith." Such good faith would not be the result of ignorance of the requirements of the Fourth Amendment, but would be the product of a reasonable and objective assessment of what conduct is required to conform to the Fourth Amendment, albeit found mistaken by a court in retrospect. The good faith concept is akin to the "reasonable person" concept used in tort law to determine whether a person violated a duty of care towards another.

Subsequent to *Williams,* several state appellate courts have echoed *Williams'* contention that strict application of the rule is no longer justified and have adopted the good faith exception. The good faith exception has also been enacted into law by the legislatures of Arizona, Utah and Colorado, and adopted by popular referendum in California.

Probably no criminal justice issue has generated more controversy in recent years. Law enforcement interests have argued vigorously that the rule has outlived its usefulness, is no longer effective, is no longer necessary because of great improvements in the training of police, and that the strict application of the rule results in a windfall for criminals—a "cost" that society can no longer afford. Civil libertarians have argued just as vigorously that the rule is constitutionally required, that it is necessary and effective, and that at any rate "cost effectiveness" has no place in protecting the rights of citizens subjected to illegal police conduct. Civil rights interests have also argued that the exclusionary rule is an effective deterrent against police overreaching directed against urban minorities.

The Reagan administration and Congress have not been sitting on the sidelines during this animated debate. The White House-appointed Attorney General's Task Force on Violent Crime recommended the adoption of a good faith exception to the exclusionary rule in its *Final Report of 1981,* the President has spoken in favor of the exception at law enforcement association meetings and several administration-backed bills have been introduced in Congress for adoption of the good faith exception in federal trials.

It was thought that the Supreme Court would end the debate in the last term of Court in the case of *Illinois v. Gates* (103 S.Ct. 2317 (1983)). The Court, in an extraordinary move, had scheduled argument in that case on the issue, even though it had not been raised in the courts below and had not even been included in the original petition for certiorari filed by the state of Illinois. Ultimately, however, the Court invoked a "prudential" rule of jurisdiction in deciding not to reach the issue—taking the position that since it had not been raised in the courts below it was not appropriate for the Supreme Court to consider it for the first time. Many Court watchers, however, believe that at least five of the nine Justices now favor adoption of the good faith exception in an appropriate case.

In *Sheppard,* the issue seemingly cannot be avoided. The Supreme Judicial Court of Massachusetts made it clear that suppression of the evidence in spite of the good faith of the police officers was mandated by the federal exclusionary rule and on no other basis, such as a state constitutional equivalent to the federal Fourth Amendment. The case is especially appropriate for adjudication of the good faith issue, since here the police acted pursuant to a search warrant and did virtually everything that could be expected of them in conforming to the requirements of the Fourth Amendment.

The courts have always taken the position that warrants are preferred and that deference is to be paid to the magistrate's decision to issue a warrant. The Attorney General's Task Force Report went so far as to recommend that where the police have acted pursuant to a warrant, that fact alone should constitute "prima facie evidence of ... a good faith belief." Thus, it seems that if a good faith exception can ever be allowed, *Sheppard* presents the appropriate factual setting for adoption of the new rule.

Similar issues involving a search warrant are raised in this year's Supreme Court case of *United States v. Leon* and in third case involving a warrantless arrest and search, *Colorado v. Quintero.* The *Quintero* case was dismissed by the Court on December 12, 1983, due to the death of Quintero while the case was pending. Thus, *Sheppard* and *Leon* are the cases that will likely shake the legal profession this term in deciding whether the strict application of the exclusionary rule is to remain, or whether the rule is ready for a major overhaul.

Court Briefs

(*Continued from page 30*)

but the Michigan Court of Appeals found no exigent circumstances existed and reversed the lower court.

The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Although the Court has generally held that searches and seizures in private homes require a warrant, there are exceptions to the rule, such as exigent circumstances. Both the Cliffords and the state agreed that there were no exigent circumstances in this case, but the state argued that the search was reasonable. They maintained that the Fourth Amendment has two distinct clauses—the reasonableness clause (ending at the word "violated") and the warrant clause (the rest of the amendment). By seeing the amendment as two separate clauses, they argued that a warrant was not required in cases where the search was reasonable. The Cliffords urged the Court to consider that it had previously rejected the "separate clause" view.

The second issue here is the exclusionary rule, which has come under much criticism over the last several years from members of the Court, particularly Chief Justice Burger, and from President Reagan. The state argued a "good faith" exception to the rule which would allow the use of evidence when the police or administrative officials believed that their search was legal.

In a 5 to 4 decision, the Supreme Court held that the evidence discovered in the house was the product of the unconstitutional post-fire search of the Cliffords' home and that the court of appeals' decision to exclude that evidence should be upheld, except as to one fuel can which was discovered in plain view in the driveway.

The dissent, in which Chief Justice Burger joined, saw the basement inspection several hours after the fire was extinguished as "an actual continuation" of the original entry to fight the fire. They stated that the requirement to obtain a warrant to search the grounds following a fire has such limited utility that the incidental protection of an individual's privacy interests does not justify imposing a warrant requirement. The search of the basement to determine the cause and origin of the fire was reasonable.

However, the Chief Justice and the other dissenters indicated by their disproval that a clearcut "good faith" exception to the exclusionary rule will have to wait for another case.

First Amendment

The Nativity Scene Ranks Right Up There with Santa and His Reindeer

Thanks to a closely divided Supreme Court, the city of Pawtucket, R.I., can continue its tradition of a Christmas display in a park which includes a nativity scene among figures of Santa Claus, his reindeer, an elephant, a clown and a teddy bear. In *Lynch v. Donnelly* (52 U.S.L.W. 4317), the Court overruled a lower court and held that Pawtucket has not violated the Establishment Clause of the First Amendment.

But this may not be the end of the controversy, according to the four dissenters in the case. The Christmas display may increase in size because Jews and other non-Christian groups can be expected to press for inclusion of their symbols, and the various demands would have to be accommodated.

Writing for the majority, Chief Justice Burger said that the Constitution does not require complete separation of church and state but rather mandates accommodation and not merely tolerance of all religions. Based on the record in this case, the majority stated that it could not discern a greater aid to religion from the inclusion of the nativity scene than from other benefits previously held not to violate the Establishment Clause. An example of one of these benefits was the establishment of Thanksgiving Day—a day celebrated to give thanks for gifts from God—as a national holiday more than a century ago. That holiday, says the Court, has not lost its religious significance any more than has Christmas.

The majority said it would be ironic if including the nativity scene as part of the celebration of an event acknowledged in the Western World for twenty centuries and in this country for two centuries would so "taint" the exhibition as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol while hymns and carols were sung and played in public places including schools, and while Congress and state legislatures open public sessions with prayers, would be an overreaction contrary to our history and the Court's holdings.

The dissent in the case was written by Justice Brennan and joined by Justices Marshall, Blackmun and Stevens. The dissent argued that this display of the nativity scene violated the criteria set out in *Lemon v. Kurtzman* (403 U.S. 602 (1971)): "First, the practice must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, it must not foster 'an excessive government entanglement with religion'."

The Establishment Clause: A Teaching Strategy

The Establishment Clause of the First Amendment is a good vehicle to promote classroom debate.

The following teaching strategy will not only help students to sort out the various interpretations that have been given to the Establishment Clause but will let them see that there are many plausible viewpoints on issues.

Methodology

Assign students to play the following roles and afterwards have a class discussion on the various ideas that were presented.

Mayor of Pawtucket, R.I. **Have the mayor explain why the city has included the nativity scene in its annual Christmas display for more than forty years. The display brings people into the central area of the city and serves commercial interests and benefits merchants and their employees. The citizens of the town look forward each year to the display.**

A Christian. **Have this student explain why the nativity scene should be included because it is symbolic of the celebration of an event which has been recognized for hundreds of years.**

A Non-Christian. **Wants to have his or her own symbols included in one of the biggest displays that the city puts on during the year.**

A Non-Believer. **Feels that any display of religion by a public institution promotes the feeling that his or her beliefs are not worthy of recognition.**

The dissenters were convinced that the city's inclusion of the nativity scene in its Christmas display simply does not reflect a "clearly secular purpose." They felt that the city's interest in celebrating the holiday and promoting retail sales and goodwill are fully served by displaying Santa Claus and the other figures.

As far as "advancing" or "inhibiting" religion, they argued that the effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition.

The "excessive government entanglement with religion" would be brought about by the government attempting to accommodate the requests by other groups for recognition in public displays of their beliefs.

The dissent termed the decision "careless" and saw it as a step toward establishing the sectarian preferences of the majority at the expense of the minority. This fear is perhaps unfounded since the issue in this case has appeared before the Court in many forms and will continue to be debated because religion, or the opposition to it, is an important and highly emotional subject.

From Atomic Energy to Immigration

Plutonium and Punitive Damages

While the name of Karen Silkwood is known to almost everyone today, the issues in *Silkwood v. Kerr-McGee Corporation* (52 U.S.L.W. 4043) are not the stuff of which movies are made. However, the case is of extreme importance not only to the heirs of Silkwood's estate but to industrial workers in nuclear plants seeing an individual remedy and a tool to improve plant safety.

Karen Silkwood, a laboratory analyst at a nuclear plant in Oklahoma owned by Kerr-McGee Corporation, was contaminated by plutonium. After Silkwood was killed in an unrelated, but mysterious, automobile accident, her father, as administrator of her estate, brought an action in federal district court to recover for the contamination injuries to her person and property. The jury returned a verdict in his favor, awarding punitive damages of $10 million in addition to actual damages of $505,000. The court of appeals reversed the punitive damages award on the ground that such damages were preempted by federal law.

Before the Supreme Court, Kerr-McGee Corporation argued that the federal government occupied the field of regulating radiation safety in nuclear facilities. Kerr-McGee said the comprehensive licensing and regulatory scheme created by Congress and administered by the Nuclear Regulatory Commission preempts any state regulation of radiation hazards, including the punitive damages award. Such awards, they argued, would impede industry development.

By a narrow 5 to 4 margin, the Supreme Court held that the award of punitive damages is *not* preempted by federal law. There is ample evidence, the Court said, that Congress had no intention, when enacting and amending the Atomic Energy Act of 1954, to forbid the states from providing remedies for those who suffered injuries from radiation in a nuclear plant.

Kerr-McGee Corporation also argued that the award was preempted because it would frustrate Congress' desire "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes." However, said the Court, Congress disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate remedies for those injured by exposure to hazardous nuclear materials.

Voting Rules—No Changes Without Attorney General Approval

The Fifteenth Amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the U.S. or by any State on account of race, color, or previous condition of servitude."

Over a hundred years after the adoption of this amendment to the Constitution, vestiges of discrimination remain in some areas of the country.

In 1965, the Voting Rights Act was enacted by Congress as a response to the "unremitting and ingenious defiance" of the command of the Fifteenth Amendment for nearly a century by state officials in certain parts of the country. (*South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).) At issue in this case was the "preclearance" requirement of the Act. This prohibits jurisdictions which had engaged in certain violations of the Fifteenth Amendment from changing election practices until federal officials have scrutinized the changes to determine whether they are racially discriminatory.

Local government in Edgefield County, South Carolina, consisted of a county supervisor and a board of county commissioners. One member of the three-member board was elected at large for a four-year term and the other two were appointed by the governor. There were no residency requirements for these commissioners.

In 1966, the state legislature enacted a statute which created a new form of government for the county and altered its election practices. The county was divided into three residency districts and a three-member county council was established, to be elected by voters throughout the county casting votes for a candidate from each district. The 1966 statute was not submitted to federal officials, as required by section 5 of the Voting Rights Act.

In 1971, the statute was amended, increasing the number of residency districts and number of council members, resulting in new district boundaries. This statute was submitted to the United States Attorney General for his approval, and he stated he did not object to the change.

Black voters in the county brought a class action in federal district court against county officials, alleging that the at-large method of electing the council diluted the voting strength of black voters. They also said the residency districts were malapportioned. They challenged the county's election practices on the grounds that the 1966 Act had never been submitted to federal officials for approval and that the 1971 amendment was therefore unconstitutional.

The district court held that since the 1971 amendment retained the changes in the 1966 statute, the lack of objection to the 1971 submission constituted approval of those changes. However, in *McCain v. Lybrand* (52 U.S.L.W. 4195), the Supreme Court held that the attorney general's lack of objection to the 1971 submission cannot be deemed to have that effect. In light of the structure, purpose and history of section 5 of the Voting Rights Act, the Court said, the purpose of the Act would be subverted if the attorney general could be deemed to have approved a voting change when the proposed change was neither properly submitted nor evaluated by him.

This decision should clarify the responsibilities of both the attorney general and state governmental units under section 5 of the Voting Rights Act.

A Blow to Sexual Equality?

Grove City College v. Bell (52 U.S.L.W. 4283), was carefully watched by those interested in ending all traces of discrimination based on sex in education. They probably do not like what they saw. Grove City College is a private, liberal arts college that has sought to preserve its autonomy by consistently refusing state and federal financial assistance. It not only declined to participate in direct institutional aid programs but also refused to participate in federal student assistance programs by assessing students' eligibility for these programs. Instead, the students submitted forms directly to the Department of Health, Education and Welfare, which then made the awards directly to the students.

The college enrolled a large number of students who received Basic Educational Opportunity Grants (BEOGs), and the Department of Education concluded that the college was the "recipient" of "federal financial assistance" as those terms are defined in the regulations which implement Title IX, a major tool in the battle against sexual discrimination. The Department requested that the college execute the assurance of compliance required for recipients of this assistance. But if the college signed the agreement, it would have agreed to comply with Title IX, which requires that no person be subjected to discrimination on the basis of sex under any education program or activity for which the college benefits from federal financial assistance.

Grove City College refused to comply, maintaining that neither the college nor any "education program or activity" of the college received any federal financial assistance simply because some of its students received BEOGs.

The Supreme Court disagreed with the college on this point but agreed that receiving federal funds in one department does not subject the whole school to Title IX. Thus, the Court's decision subjects *only* the college's financial aid program to Title IX, not the entire institution. This considerably weakens Title IX.

The irony in this case is that Grove City College in its long history since 1876 has never discriminated on the basis of sex.

Continuous Physical Presence Means Exactly That

Immigration is a hot political issue. The flood of legal and illegal aliens into this country each year is causing great concern in American society. *Immigration and Naturalization Service v. Phinpathya* (52 U.S.L.W. 4027), concerns yet another aspect of the immigration issue.

The Immigration and Nationality Act authorizes the attorney general to suspend deportation of an alien who "has been physically present in the United States for a continuous period of not less than seven years" and is a person of good moral character whose deportation would result in extreme hardship to the alien or his family.

Padungsri Phinpathya, a native of Thailand, first entered the United States as a nonimmigrant student in 1969. She was authorized to remain in the United States until July, 1971. However, she remained after her visa expired without obtaining permission from the immigration authorities. In 1977, when the Immigration and Naturalization Service commenced deportation proceedings against Phinpathya, she applied for suspension pursuant to the Act.

In January of 1974, she had returned to Thailand and three months later improperly obtained a nonimmigrant visa from the United States consular officer in Thailand. An immigration judge concluded that Phinpathya had failed to meet the "continuous physical presence" requirement and denied her application for suspension. The Board of Immigration Appeals affirmed, but the court of appeals reversed, holding that an absence can be "meaningfully interruptive" only when it increases the risk and reduces the hardship of deportation.

The Supreme Court's decision in this case centered around the meaning of the "continuous physical presence" requirement. The Court stated that the court of appeals ignored its plain meaning and extended eligibility to an alien whom Congress clearly did not intend to be eligible. Congress meant what it said—aliens must show that they have been physically present in the United States for seven years. □

Cameras

(*Continued from page 23*)

The Florida court of appeals ruled against the defendants, finding there was no evidence that the television cameras had hindered the defendants in presenting their case, caused the jury to be impartial or impaired the fairness of the trial (*Chandler v. State*, 376 So. 2d 1157 (Fla. 1979)).

The Supreme Court agreed, holding that the earlier case of *Estes v. Texas* did not set out a constitutional rule that all radio, television and photographic coverage of criminal trials is inherently a denial of due process—particularly in light of the evolving technology in broadcasting and photography. The Court declared that it could not rule that Florida's experiment was unconstitutional, since extended media coverage as practiced under Florida's rules hadn't deprived the defendants of their constitutional rights of due process. By this decision, the Supreme Court sent a clear message to the states that there was no constitutional bar to extended media coverage and that strict consent requirements were not necessary to protect the right of due process.

While Chandler's case was pending in the courts, the Florida Supreme Court amended the Florida Code of Judicial Conduct to adopt permanent rules for covering state trial and appellate courts—subject only to certain standards of conduct and technology and the presiding judge's authority to control the proceedings, prevent distraction, maintain the dignity of the courtroom and assure a fair trial.

In addition to *Chandler*, Florida's rules have been the catalyst for another standard—the "qualitative difference" test. In *In re Post-Newsweek Stations, Florida, Inc.* (370 So. 2d 764 (Fla. 1979)), the Florida Supreme Court held that the electronic media may be excluded from the courtroom when it is shown that coverage will have an effect upon a particular participant that is qualitatively different from the effect on the public in general. This type of "qualitative difference" could likely occur with witnesses who may need some special protections—children, victims of sex crimes, some informants and even the very timid.

Thanks to *Chandler* and *Post-Newsweek*, attention sharply focused on Florida's approach to courtroom coverage. The requirement of only a judge's discretion and control and the "qualitative difference" test have come to be known throughout the country as "Florida standards" which have been used subsequently by many states in formulating their own rules.

In response to the growing movement toward camera coverage in the states' courtrooms, the American Bar Association in 1982 changed its canon prohibiting coverage. In place of the old canon is a much changed Canon 3A(7), which recommends that a judge authorize broadcasting, televising and recording trials—as long as it is done unobtrusively, will not distract the trial participants and will not otherwise interfere with the administration of justice.

The Jury's Still Out On Federal Courts

It seems that electronic coverage is in our state courtrooms to stay. In fact, a committee of the National Conference of Trial Judges is now working on a model coverage rule to be recommended for use by all of the states.

At the moment, it is not certain whether extended media coverage will enter the federal courtroom. In early 1983, the United States Court of Appeals for the Eleventh Circuit in *United States v. Hastings* (695 F.2d 1278 (11th Cir. 1983)), upheld a lower court's decision denying a criminal defendant's explicit request for broadcast trial coverage. The court stated that federal rules prohibiting extended media coverage of trials do not violate the First or Sixth Amendments. However, there is pending currently before the Judicial Conference of the United States a petition submitted by a group of twenty-eight news, educational and citizen organizations urging that the Conference amend Canon 3A(7) of the United States Code of Judicial Conduct to allow extended media coverage of federal judicial proceedings in accordance with guidelines which would be set by the Conference.

Reactions to Coverage

What do the participants think about having cameras in the courtroom in those forty-two states which now permit some form of extended media coverage? For the most part, their response has been favorable. Jurors and witnesses do not feel they are influenced by the coverage, and judges and attorneys see no adverse effects. It may be helpful to examine the results of studies performed in Florida, Massachusetts and Connecticut on their experiences in this developing area.

Florida surveyed trial participants about their experiences with coverage ("A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978"). The survey was prepared by the Judicial Planning Coordination Unit, Office of the State Courts Administrator and evaluated Florida's one-year experiment. Generally, the participants in proceedings which were covered felt that television, radio or photographic coverage had not affected either their ability or the ability of the various other participants to perform their responsibilities, nor did the majority feel that coverage was disruptive or detracted from the dignity of the court. In addition, the Florida Supreme Court reviewed numerous briefs, comments and studies, including a separate study made of the Florida Conference of Circuit Judges. It also evaluated the experiences of the sixteen other states which had by that time either implemented rules for coverage or were conducting experiments.

Based upon all of this information, the Florida Supreme Court concluded "that on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage." The court also felt that broadcast coverage gave the people of Florida a better understanding of the judicial process and resulting decisions. The favorable experiences of the experiment led to the "Florida standards" being made permanent.

Massachusetts' initial experience with extended media coverage was also favorable. In "Report of the Advisory Committee to Oversee the Experimental Use of Cameras and Recording Equipment in Courtrooms to the Supreme Judicial Court," dated July 16, 1982, the committee concluded that the two-year experiment had not been subject to any severe adverse incidents and had enhanced the public's "awareness of the skill and dignity with which justice is administered in the Courts of the Commonwealth." A survey of jurors and witnesses showed that coverage was not perceived as distracting jurors or intimidating jurors and witnesses, nor was it seen to interfere with the conduct of the trial. One interesting effect of the experiment noted by the committee was that newspapers were giving detailed accounts of trials and verbatim testimony of key witnesses. The newspapers apparently were playing a complementary role to television and radio coverage.

The experiment in Connecticut's trial courts received approval as well and has been extended through September, 1984. The Honorable Maurice J. Sponzo submitted his "Report to the Chief Court Administrator on the 'Cameras-in-the-Court' Experiment of the State of Connecticut" to the judges of the Superior Court in May, 1983. The Office of the Chief Court Administrator approved of the experiment, which provided an opportunity for residents of Connecticut to learn more about the judicial proceedings in their state, fulfilling an objective of the Judicial Department. The report stated that extended media coverage had been introduced in Connecticut without threatening the rights of the parties and without interfering with the orderly disposition of cases.

The judges surveyed felt that cooperation between the judges and media personnel was excellent and that extended media coverage benefitted both the public and the judicial system and was not distracting. The report also noted that comments from the media, prosecutors, public defenders and other interested parties were extremely favorable toward the experiment. During the first eleven months of this one-year experiment, fourteen cases were covered. The report's final recommendation was that the experiment should be extended so that more coverage could occur and experience be gained before making permanent rule changes. The report also included some suggestions on resolving certain controversial situations. A suggestion that the media police itself in matters of taste and decency arose from the publication of a medical examiner's photograph depicting the deceased victim.

Balancing Fundamentals

The diverse ways by which the various states have implemented extended media coverage of judicial proceedings reflects a concern with balancing the dignity of judicial proceedings and the sacred concept of a fair trial in the American judicial system with the equally fundamental concept of a public trial to which all of society has access. Thus far, most people who have participated in trials and hearings covered by the extended media have been satisfied with the coverage.

The studies performed after experimenting with coverage reflect that coverage can be done unobtrusively and without influencing the persons involved with the proceeding or detracting from the dignity of the event. Moreover, each state is free to address any concerns about coverage in the best way it sees fit by drafting whatever rules are deemed necessary and imposing as few or as many restrictions or conditions as it wants to ensure that extended media coverage will be compatible with our constitutional guarantees. So far, wherever extended media coverage has been tried, it has been successful. Someday we may see it happening in the courts of every state in the nation and in the federal courts as well. □

Sentencing

(*Continued from page 27*)

ing sentences more uniform?

Jay Casper. There's a fair amount of research. The finding is that in part it has a lot to do with the guidelines themselves and the administrative mechanism designed to implement them.

Some guidelines weren't intended to alter existing policy—just codify it. Some were intended to depart from existing practice—and often increase prison terms—and they may accomplish that if there are some sort of enforcement mechanisms—appellate review of sentences or close monitoring by a guidelines commission.

The sentence guideline movement actually came initially out of parole guidelines developed in the late '60s to develop guidelines to help parole authorities decide how to exercise their discretion, in order to remove some of parole's arbitrariness. Since the mid-'70s, there have been many attempts to adapt the same approach to judicial sentencing.

Update. Have these reforms had the effect of making decisionmakers more accountable? For example, if there are standards that the decisionmakers have to adhere to, and if they have to explain their decisions, then one can measure their decisions against these standards and see if indeed they have done what they were supposed to.

Jay Casper. The answer is in theory, yes, but you always have to keep in mind issues of compliance. For example, the sentence guideline system looks at prior record and the conviction offense. The judge is then accountable for giving a person with those attributes the guideline sentence. But notice that if you change the charge, if you take an armed robbery and by virtue of charge bargaining make it into a simple robbery, then you move the case from a presumptive prison case to a case where you can sentence a person to a local jail for a period of months. Charge bargaining enables the judge to do what he or she is supposed to do but also retain discretion.

Another thing is that sometimes these guidelines will have very wide ranges—the judge can give plus or minus 35%. So it's easy for a judge to comply.

Judges are, as you suggest, obliged to give reasons for their decisions. But all judges have to do is come up with some articulable standard in favor of mitigation or a harsher sentence. And they sometimes begin to engage in a ritualistic behavior. They'll talk about the youth of the defendant, or they'll talk about the special circumstances of the crime. They can justify the outcome produced by bargaining.

It's relatively easy for participants to comply with systems that appear to make them more accountable without necessarily changing their behavior markedly.

Courtroom Bargains

Update. How about plea bargaining? We've touched on that several times and there's a lot of controversy about it. Obviously, it greatly affects the sentencing process. There's talk of limiting it. Some jurisdictions—the whole state of Alaska, for example—are said to have done away with it.

Jay Casper. Alaska alleged to have abolished it. It's not clear they did. In 1982, California passed the Victims' Bill of Rights, which alleged to abolish plea bargaining in all cases involving certain violent felonies. It's real hard to do.

Adaptive mechanisms tend to develop. A common one, for example, is a prosecutor doesn't engage in plea bargaining, but a judge begins to engage in sentencing bargaining as a way of taking up the slack.

The bottom line of criminal courts is there are lots and lots of defendants and we as a society have not invested a very large amount of resources there. A typical prosecutor may be working on fifty cases at a time. A public defender may have a case load of seventy-five clients. A judge may have a sentencing calendar during a week which has thirty-five or forty cases on it. I'm one who doesn't like plea bargaining at all and would like to see it gotten rid of, but the ability to do so is grossly constrained by the fact that the participants perceive it as absolutely necessary to keeping up a very heavy caseload.

The idea that we could do away with plea bargaining without investing substantially greater resources in criminal court, I think, is simply implausible.

Update. What are your reasons for objecting to plea bargaining?

Jay Casper. Plea bargaining is designed to induce defendants not to exercise their right to trial because heavy caseloads put pressure on busy courts, which don't have time for lots of trials. But essentially what it does is burden the basic constitutional right of defendants to have a trial. It offers them inducements to forego their right.

A common offer would be to plead guilty and get six months in the county jail. But prosecutors also say: "If you get a trial on this burglary case, then you're going to go to prison." So it essentially produces sentence differentials. Of defendants with similar attributes, similar crimes charged, similar prior records and similar levels of evidence, defendants who plead guilty get substantially lighter sentences than identical defendants who go to trial. That's the engine that drives plea bargaining, the sentence differential or a concession offered to the defendant. I don't think it's fair. It makes a mockery of the right to trial.

There are many other consequences as well. For example, it limits the ability of the court to oversee the behavior of police by the exclusionary principle. The idea is that if a police officer engages in misconduct like an illegal search or interrogation or entrapment or some questionable conduct, the mechanism that's supposed to vindicate the rights of defendants and to deter such police conduct is that illegally obtained evidence or confessions aren't admissible at trial. The police are deterred because they know they can't use the evidence.

But many of these rights become chips in the bargaining process. The prosecutor wants to get the conviction. Let's say it's a contraband case where you know the guy's guilty, but there's a problem with the search. One of the main functions of plea bargaining is to suppress legal issues like that. The weaker the prosecutor's case, the more lenient the sentence they'll offer.

Defendants like plea bargaining because they get off with lighter sentences. By removing the principled component of the criminal law, it makes the criminal justice system essentially an extension of their life on the street, a resource for an exploitation game in which you play around and if you have more, you get more.

Update. What about some of the other alternatives to traditional sentencing? I'm thinking of so-called restitution sentencing and other types of creative sentencing.

Jay Casper. There's been a lot of talk about that, but it's not been very successful. It's traditionally put forth as an alternative to incarceration. The idea is you've got a defendant on a forgery charge or petty theft charge or burglary charge. Instead of sending Joe Smith to jail for six months or to prison for two years, let's sentence him to 500 hours of community service or to restitution where he's got to pay back the victim of his crime.

There's been a lot of research on how

this program operates in practice, and what tends to happen is that judges use them as add-on penalties rather than as alternatives. You sentence Joe Smith to six months in jail *and* say he's got to do 200 hours of community service, or you sentence him to jail and you add on the restitution program. They tend to be used in practice as additional penalties mainly because judges are politically responsive and are extremely worried about doing anything that appears to be more lenient.

Update. What about gadgetry like beepers that courts have used as an alternative to imprisonment?

Jay Casper. Well, I don't know. I would imagine this technology is getting more impressive and attractive and I'm sure it will be tried more and more. For someone of my values, I find that kind of offensive, having this guy wearing ankle bracelets that trigger an alarm if he goes more than a hundred feet away from his phone.

Update. Why are these alternatives attractive now?

Jay Casper. The main crisis that's facing us in our criminal justice system is prison overcrowding. Judges may be induced to engage in alternatives because there simple isn't going to be space to send people to prison.

Overcrowding in the Big House

Update. Has the move from indeterminate to determinate sentencing affected prison overcrowding?

Jay Casper. Perhaps the major impact of determinate sentencing has been to exacerbate the crowding problem. The manifest function of parole release under indeterminate sentence law is essentially to review the progress of the prisoner to decide when he or she had been rehabilitated. But the major latent functions of parole are quite different. It has two major latent functions: 1) social control within the prisons, a means for prison authorities to maintain order by threatening to prevent releases, and 2) a backend solution to prison overcrowding.

If you've got more prisoners coming in the front door, sent there by judges, then you can use parole as a sort of backdoor mechanism, letting people out at the other end. One of the main functions of parole is to maintain prison population roughly at the same level as prison capacity. Now when you abolish parole, you remove the safety valve. You've got people coming in the front door, but you don't have a way of letting them out the back door.

So that means that determinate sentencing tends to worsen prison crowding. It's not by any means the major cause of it, because prisons are crowded all over the United States now in states that adopted determinate sentencing and those that haven't. Indeed, the prison population has doubled in the United States in the last ten years.

Update. If sentencing reforms don't account for overcrowded prisons, what does?

Jay Casper. It could be because judges are sending higher percentages of people convicted to prison— where they used to send 30% of the burglars to prison, maybe all of a sudden they started sending 50% of the burglars to prison. Or it could be because they are sending people to prison for longer.

But the best evidence is that the extraordinary increases in the last ten years are not so much the product of changes in sentencing as they are a demographic phenomenon. There are very large birth cohorts making their way through society now. The baby boom generation consists of a series of very large birth cohorts year by year from about 1947 to about 1962. So there's something like fifteen years when there were abnormally large numbers of children born. In moving through the population structure, these cohorts caused the building of schools during the '50s and '60s, and we can now see that they're closing schools because births since 1962 have been way down.

That same sort of phenomenon has also had a very strong impact on the criminal justice system. It appears that people who choose to commit crimes begin to become active in their early teen-age years, and the crime rates rose quite markedly during the 1960s and well into the '70s. Now these kids of the baby boom generation, the large birth cohort, are moving through their prison-prone years. People don't get sent to prison in our society until they've accumulated a history of law-breaking—unless they've committed very serious crimes like murder or armed robbery right off the bat—and so what happened during the 1970s is that the baby boom generation began to get into the mid-'20s, which is the time at which people start getting sent to prison. The number of "eligibles" in the population was abnormally large, and that's what accounts for the rise in prison population.

Notice that in the last three years, the crime rate in the United States has gone down. Again, that was predicted by the demographers, because people burn out after a while. People don't start committing crimes at twelve or thirteen and keep going the rest of their lives. Lots of people stop naturally. So the crime rate is turning down because the high crime years are now being occupied by smaller birth cohorts than they were during the '60s and '70s. So again, in brute demographics, you can expect the prison population to continue to rise through the decade of the '80s and then top off about 1990 and begin to decline.

Update. Do you think that will happen?

Jay Capser. Yes and no. Even if we do build a lot of prisons, one theory says, populations will decline because judges will have a smaller pool of defendants to deal with, and hence fewer defendants will go to prison.

Another theory is that if you build them, you'll fill them—public sentiment in favor of prisons is relatively strong and if the capacity is there, the prisoners will be there. We'll continue to fill them even though we have fewer serious criminals by simply lowering the threshold. So if today, for example, we don't have room to send most second-time burglars to prison because prisons are filled up with robbers and assaulters and rapists and murderers, if in the 1990s we've got fewer robbers, assaulters, rapists and murderers, we'll begin to send people to prison whom we wouldn't now. That's my view of what's likely to happen.

Stress and Rehabbing

Update. What problems does prison overcrowding cause the prisoner?

Jay Casper. Basically, it imposes very great costs on two groups. It creates very wretched living conditions for prisoners—crowded into small spaces never intended for these great numbers of people—and it also imposes burdens on staff because they also have to live with that kind of crowding—and the anxiety, the anger and the frustration produced by crowding.

There are a lot of studies on animals that suggests that crowding produces violence. I don't think there's been sufficient work as yet that has been able to attribute increased prison violence to increased crowding, but it's a plausible hypothesis. Violence is not only directed against other prisoners, it's directed against staff as well.

As for building more prisons because the existing ones are crowded, that's a very expensive proposition. They cost $50,000 for a maximum security cell in capital costs, and then maybe $15,000 or $20,000 per year to run each cell. One of the real tricky things about prison over-

1421

crowding now is that if the demographic hypothesis is correct, and I think it is, we run the risk in prisons of doing what we did with schools—overbuilding in response to a short-term phenomenon. My own view would be that if we built new prisons and closed older prisons, that would be desirable because a lot of inmates in the United States are in very old prisons. In Illinois, something like 72% of all inmates are in facilities that are more than forty years old, many of them in facilities built before 1900. But we tend to build new facilities *and* keep the old ones open.

Update. To the extent that the rehabilitative model is still in existence—and most states still have indeterminate sentencing laws—then prison overcrowding would be a great handicap to rehabilitation, would it not?

Jay Casper. Yes. It means that the rehabilitative programs are overtaxed and there aren't enough facilities. Rehabilitation is an extremely neat idea and it sounds highly civilized. It sounds good to say to ourselves and society that we're locking these people up for their own good—not to protect us, but to better them. I think most Americans and most judges continue to think that rehabilitation is an extremely desirable goal. But I think most people who know anything about it don't take it very seriously. The vast evidence says that rehabilitation as we've tried it has not been successful.

That's not to say that it's impossible to do; it is to say that we haven't invested enough resources and haven't seriously tried to do it—for one thing, the facilities are extremely limited. If you look at the kind of programs that have been available to inmates, they're not very extensive, and they're also traditionally under indeterminate sentence law, offered in a particular context which would lead one to be suspicious about their effectiveness. What we say to inmates is not: "Here's a program where you can go and get a GED for a high school diploma." Nor is it: "Here's a program where you can get psychological counseling or Alcoholics Anonymous or counseling for drug abuse." We haven't said: "Here's an opportunity for you to deal with some problems that you encountered outside."

Instead we've said: "Here's a program you've got to participate in, and if you don't, then you're not going to get out." Simple learning theory would suggest that when you're coercing people to engage in activities in order to get something that they want, you're increasing the likelihood that they're going to take it as a game, saying "I've got to do this" rather than "I want to do it." This makes people go through rituals of participating rather than taking it seriously.

Many people would prefer a combination of determinate sentences—in which the inmates knew that they were going to get out regardless of what they did—and the opportunity to participate if they wanted to. It's much more likely to produce meaningful participation than a system that forces people to do it. The counterargument is, of course, if you don't make them do it, then they won't do it. And there is a little evidence, very small but suggestive, that determinate sentence states have lower participation rates in rehabilitation programs.

The Future

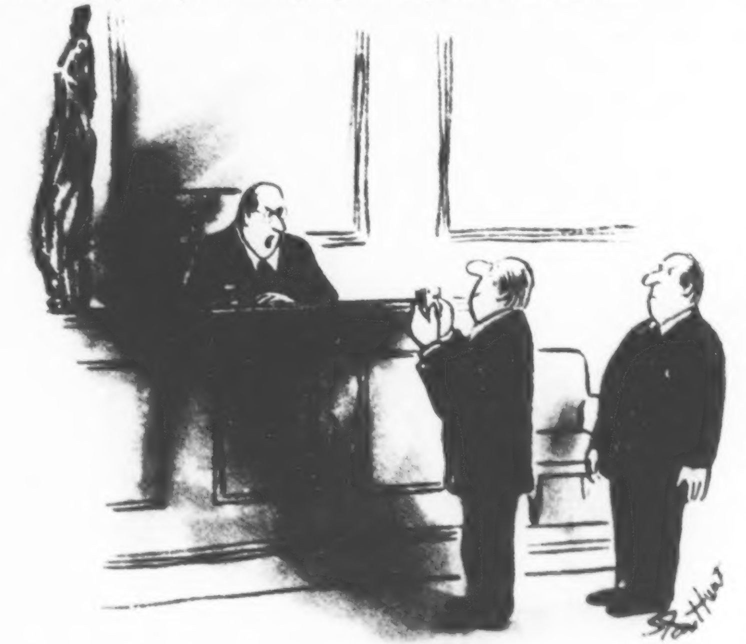
Update. What kind of trends do you see in sentencing reform in the next decade?

Jay Casper. I'm not sure. Right now we're clearly in a law enforcement dominated political climate, and there's also a very dangerous thing on the horizon. The crime rate peaked in about 1980 and has gone down for the last three years. At the same time, the prison rate has been going up very markedly. The best explanation for that is demographics—the movement of the baby boom cohorts from their high crime years to their high prison years. But if you just look at those two curves, people are likely to say to themselves—and entrepreneurial politicans are not going to miss the opportunity to point this out—Why is the crime rate going down? Because we're sending more people to prison! The demographers say that that's essentially a spurious relationship—the lower crime rate is not the product of higher imprisonment rates but the product of this sort of demographic phenomenon.

I'm afraid people are going to infer that the way to continue to reduce the crime rate is to send more and more people to prison. So my expectation is pessimistic in the next few years. We're going to see increasingly higher imprisonment rates, more crowding and a lot more expenditure on prisons.

But there are cycles, too. I wouldn't be surprised—indeed I predicted this in 1981—if states that have adopted the determinate sentence laws decide to go back to indeterminate sentence laws. I anticipate it will take a long time, but Colorado is a state that passed a determinate sentence law in the late '70s and they're moving to abolish it.

The problems are hard and today's solution becomes tomorrow's failure. There is historically a movement from determinate to indeterminate and back to determinate sentencing. In the last hundred years this has been confirmed. I expect we'll see a move back toward the rehabilitative model in the future, but maybe not in the short run.



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"The accused will kindly be seated, and no, I would not care for a little game of three-card monte."

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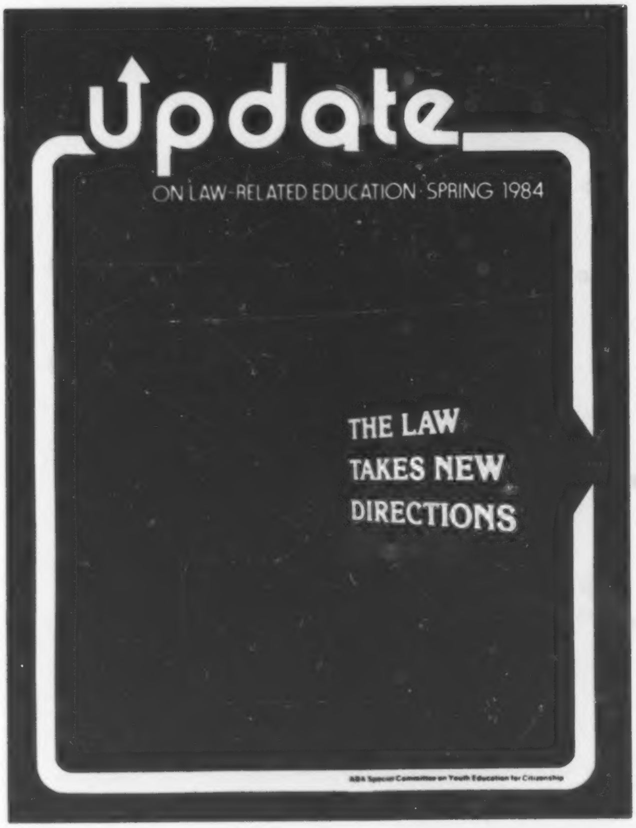

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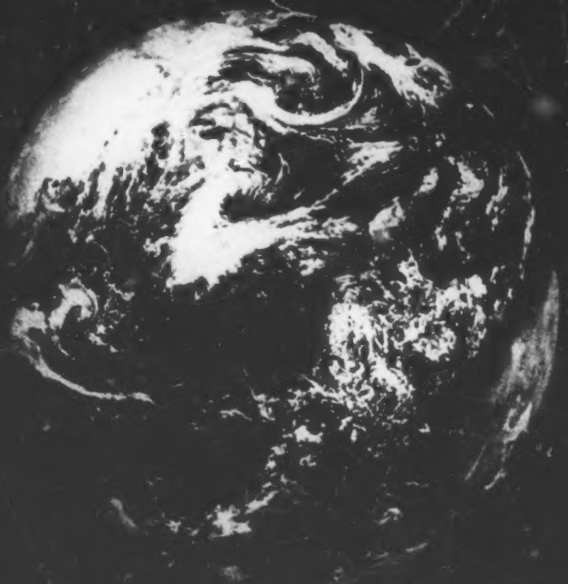

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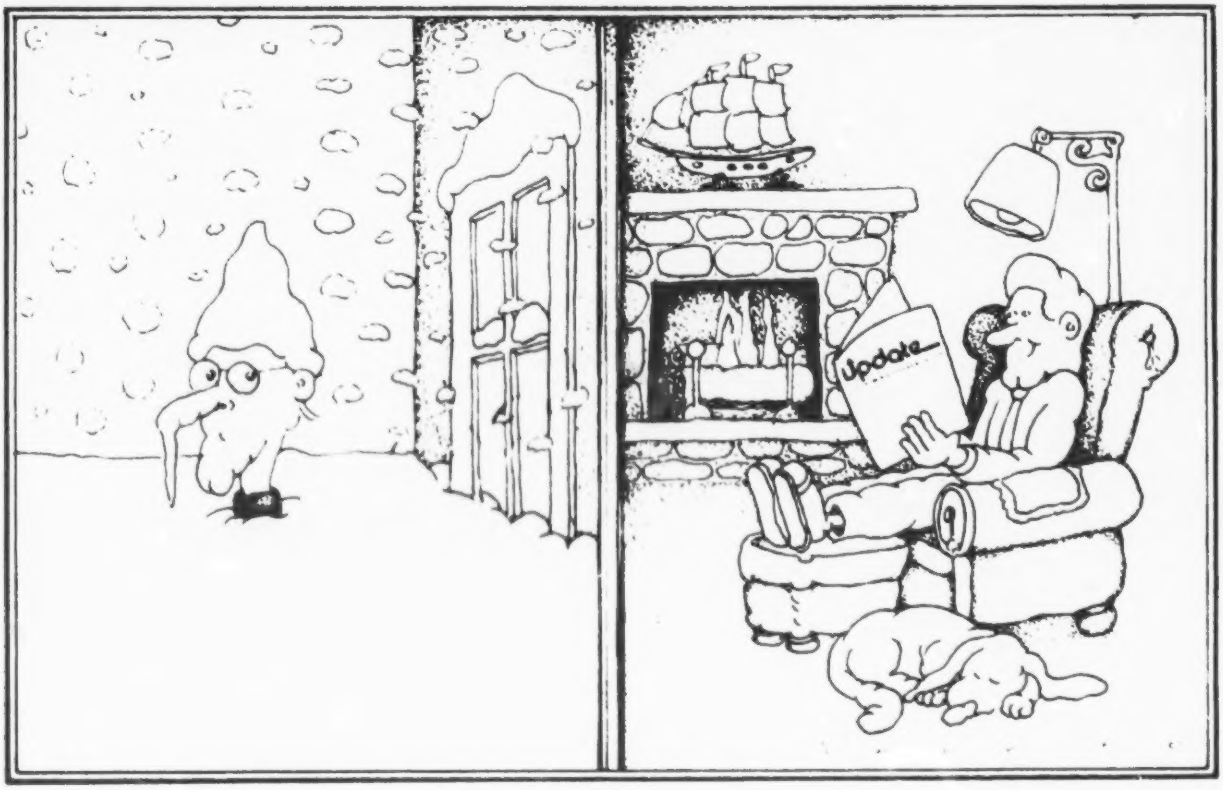

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contents

Volume 8, No. 3, Fall 1984

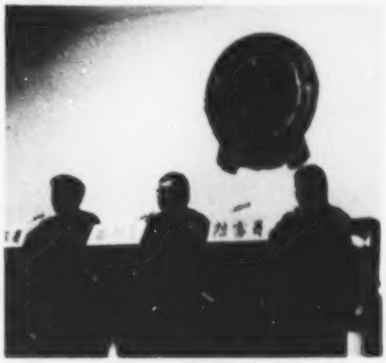
2
International Law
Can One Court Reach Around the World?

8
Aliens and the Law
Decisions and Revisions

12
International Law
Refugees: The Problem Without a Solution

16
Classroom Strategies
Making Human Rights Come Alive

22
International Law
Lawyers in the Street



26
Teaching about the Law
A Tale of Two Gates

30
Court Briefs
Whatever Happened to the Fourth Amendment?

34
Law in the 80s
Justice Without Judges

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INTERNATIONAL LAW

CAN ONE COURT REACH A

The International Court of Justice has heard only thirty cases in the forty years it has existed. Is the world ready for international justice?

When Julius Caesar crossed the Rubicon and advanced toward Rome his opponents sent emissaries to "talk." They hoped that words and not short swords would be the only weapons necessary to stop Caesar. The negotiations failed—as they have so often throughout human history—but the fact that they took place at all demonstrates a persistent hope that disputes can be resolved peacefully. And, in a further bow to the principle that words can make peace, Caesar allowed the emissaries to return to Rome unharmed.

From Genghis Khan to Pearl Harbor negotiations between belligerents have taken place. "Parlementaires" are persons bearing white flags who go behind enemy lines to negotiate directly with the enemy commander.

Not to kill or capture the emissary has been customary international law from Biblical days. Both belligerents and nonbelligerents have found it necessary to send ambassadors, diplomatic agents, and emissaries across walls of hate in order to talk with one another. "Customary" international law has required that such emissaries and diplomats receive safe conduct in and out of the countries they visit. So on December 8, 1941, the day after the "Day of Infamy," the United States government permitted Japanese diplomats to leave the United States even though half the United States Naval Fleet lay wrecked in Pearl Harbor.

Throughout history most peacemaking has been a response to a particular crisis—efforts of two countries to solve a dispute by treaty or to negotiate the end of a war. But as the instruments of war have become more and more horrible, as wars have come to take an ever increasing toll on civilian populations, world leaders have tried to establish a structure for peace, a permanent way of avoiding con-

Joseph L. Daly

OUND THE WORLD?

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flict by appealing to reason, not to weapons. Our century has hoped that some sort of international tribunal—a world court—would decide disputes on enduring principles of justice, not on the size of batallions.

Skeptics look at the meager results of these efforts—the current International Court of Justice issued less than one judgment a year in its first 35 years of existence—and wonder whether the world is ready for international law. Defenders point out that war is unthinkable in a nuclear age and that international justice offers the best hope for peace.

A Quick History

The idea of international "talk" rather than "war" as the instrument for the resolution of disputes between governments originated in modern times with the Czar of Russia, Nicholas II. George Elian, in his book *The International Court of Justice*, reports that in August of 1898 news of great significance travelled around the world. Nicholas II had proposed to all the countries of the world a great conference for the purpose of discussing arms limitation and the prevention of war. Nicholas himself was concerned about an article written in the Siberian village of Susenskoe by a man named Lenin. Entitled "The Development of Capitalism in Russia," it gave a theoretical basis to the mission of the ordinary person in the approaching revolution. The Czar was frightened and hoped that an international conference on arms limitation and peace would prevent an uprising in Russia.

Countries such as Germany and Russia praised the idea of an international meeting. The Hague, in the Netherlands, was chosen as the place for such a lofty conference, thus avoiding the capitals of the great powers. Although the great objective of disarmament failed to gain the support of the 26 participating countries at the conference held from May 18 to July 29, 1899, a commission was set up to study the problems.

In 1907, the Second Hague Conference was called. Forty-four states eventually signed "The Convention for Pacific [Peaceful] Settlement of International Disputes" on October 18, 1907, at the Hague. The two Hague conferences are often considered the first attempts to codify the vast domain of international law and justice.

The Second Hague Conference organized the Permanent Court of Arbitration (PCA) to permit countries to voluntarily place their disputes before an impartial court for resolution. Obviously, the PCA was unsuccessful in resolving a major international dispute, World War I. In fact, said Kaiser Wilhelm, "The Convention for Pacific Settlement of International Disputes," to which Germany was a signatory, "was simply a scrap of paper."

After World War I, "the war to end all wars," the League of Nations was created. World leaders hoped that through the League, war would no longer be used to resolve disputes. The League recognized that a totally *voluntary* court of arbitration was not sufficient to resolve disputes. Consequently, the League established the Permanent Court of International Justice (PCIJ). The PCIJ during its existence from 1922 to 1939 settled 83 cases involving different countries through decisions, advisory opinions and injunctions. But just as the Permanent Court of Arbitration was not able to resolve disputes leading to World War I, neither the League of Nations nor the Permanent Court of International Justice were able to prevent the outbreak of World War II.

After World War II, nations looking at the horror of world war recognized that the League of Nations had to be made stronger. They felt that a new international organization should be established. Such an organization would base its activity on the principle of the sovereign equality of all peaceful states and would be open to all states, big or small. A major conference at San Francisco (April 25-April 26, 1945), with 50 participating nations, approved the Charter of the United Nations and the Statute of the International Court of Justice. The Permanent Court of Arbitration continued to exist for the voluntary resolution of disputes through the arbitration process. But now a new International Court of Justice with expanded powers was established by participating nations. While part of the United Nations, both were headquartered at the tree-lined, peaceful atmosphere of The Hague in order to allow for judicial and reasoned settlement of disputes and to avoid the political nature of the United Nations in New York. The International Court of Justice (ICJ) was conceived as a powerful instrument for everlasting universal peace.

How the Court Works

According to its charter, the U.N. attempts to maintain peace by settling disputes "in conformity with the principles of justice and international law." The document goes on to speak of "negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement" as means of maintaining peace.

The members of the United Nations are automatically parties to the "Statute" establishing the International Court of Justice and are to "undertake to comply with the decisions of the [court]." If one party to a suit fails to comply, the other may ask the Security Council to "make recommendations or decide upon measures to be taken to give effect to the judgment."

Either the U.N. General Assembly or other agencies of the U.N. may request "advisory opinions" of the International Court. This is one of the major differences between our Supreme Court and the International Court. Contrary to popular opinion, the Supreme Court does not go charging off on its own to give opinions on all manner of cases. It has to be presented with a genuine legal case or controversy requiring adjudication. The International Court, however, can give a legal opinion, even if there is no formal case before it.

The ICJ consists of 15 judges elected by the General Assembly and the Security Council of the United Nations from countries which are members of the United Nations. The judges possess qualifications required in their respective countries for the appointment to the highest judicial offices. The ICJ judges represent the main forms of civilization and the principal legal systems of the world. There are judges from developed and Third World countries and judges from capitalist and socialist systems. The judges serve full-time for nine years. The judges have diplomatic privileges and immunity when engaged in court business. They meet at The Peace Palace in The Hague, continuing the tradition of the First Hague Conference of 1899. The ICJ is permanently in session except during vacations. Judges with the same nationality as one of the parties do not have to disqualify themselves, but the opposing party can then choose a judge of the same nationality from a list of qualified candidates. Since 1976, the salary for justices of the International Court of Justice is $50,000 per year, $12,200 special allowance, plus travel and subsistence payment. The salaries, allowances and compensation are all free of the taxing system of any nation.

Problems

Jurisdiction has been one of the major disputes since the establishment of the court in 1945. Only countries may be parties in cases before the court. An individual who has a dispute with a nation cannot go before the ICJ for a resolution of the dispute. And a corporation which has a dispute with a nation may not go before the International Court of Justice unless the company persuades its own government to represent its interests.

Twenty-five states have agreed to compulsory jurisdiction of the court in all legal disputes concerning:

1. the interpretation of treaties;
2. any question of international law;
3. the existence of any fact which, if established, would constitute a breach of international obligation; and
4. the nature or extent of the reparation to be made for the breach of an international obligation.

However, the vast majority of countries—including the United States and Russia—have not agreed to the compulsory jurisdiction of the International Court of Justice. In fact, the United States, by the Connally Amendment of 1946, which was inspired by John Foster Dulles and passed by the U.S. Senate, maintains certain reservations as to the International Court of Justice's jurisdiction. The U.S. refuses to subject itself to the jurisdiction of the court when the U.S. deems that the dispute is essentially domestic or where the U.S. deems that the dispute arises under a multilateral treaty. (See box on pages 38-39 for more on the U.S. Senate's role in amending treaties.)

The Connally Amendment doesn't mean, however, that the court can't assert jurisdiction in a case involving the United States. In fact, the court has the power to decide questions of its own jurisdiction. In this, it is like American courts, which can hear and decide a case even if one of the parties doesn't agree.

Unlike American courts, however, the

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International Court can't be sure of *enforcing* its decrees. Lacking the normal apparatus of a nation-state, such as police forces and other agencies of government, it is forced to go into the political arena—the Security Council—to compel obedience to its decisions. The rules of the Security Council (the vote of any one of the permanent members can veto action) and the realities of world politics make it unlikely that vigorous action will take place in any truly controversial case.

Here is where self-limiting provisions like the Connally Amendment come into play. The United States is on record as being committed to world peace through justice, and in the absence of a shield like the Connally Amendment, our country might find it difficult to ignore a decision of the International Court or to veto its implementation in the Security Council. With the amendment, however, we feel justified in asserting our independence of the court.

A good recent example involves the United States and Nicaragua. Nicaragua contends that a fishing trawler sank in the Pacific port of Corinto, Nicaragua, after striking a mine that was laid by CIA-directed operatives. Nicaragua contends this was part of a program sponsored by the Reagan administration to harass Nicaraguan shipping.

The government of Nicaragua requested the International Court of Justice to declare that such activities are in violation of international law, since war has not been declared by the United States against Nicaragua, and requested an assessment of damages and an injunction ordering the United States government to stop supporting such activities.

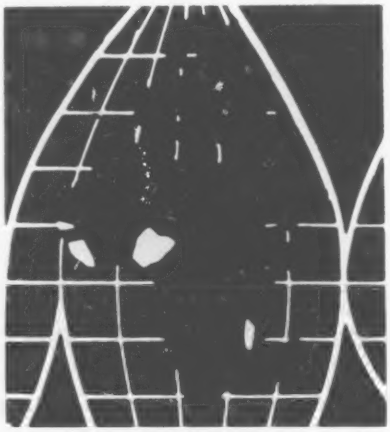
The Reagan administration publicly announced in May of 1984, shortly before the Nicaraguan government filed the complaint with the International Court of Justice, that it would not subject itself to the jurisdiction of the ICJ concerning any matters in Latin America for a period of three years. Decision in the Nicaragua case is pending at the writing of this article.

(It's interesting to note that Nicaragua recognizes "unconditionally" the jurisdiction of the world court, in a declaration dating back to 1929. The United States reserves the right not to accept jurisdiction of the court in several instances, and it reserves to itself the power to decide when conditions apply that will warrant rejecting jurisdiction.)

On the Other Foot

In the Iranian hostage case, the tables were turned and it was the U.S. seeking the court's jurisdiction and its opponent denying it. In *The United States Diplomatic and Counselor Staff in Tehran* case the United States government voluntarily requested the ICJ to rule on the occupation of its embassy in Tehran.

Judge Taslim O. Elias, President of the ICJ, reports in his 1983 book *The International Court of Justice and Some Contemporary Problems,* that on November 4, 1979, in the course of the demonstration outside the United States Embassy compound in Tehran, the Embassy premises were attacked and there was no effective intervention on the part of the Iranian security forces to relieve the situation, despite repeated calls for help from the Embassy. The United States filed a memorial (a legal written document more commonly referred to as a complaint in U.S. courts) before the International Court of Justice, asking that the government of Tehran immediately release all hostages, clear the premises of the United States Embassy, ensure that all persons attached to the U.S. Embassy be accorded full diplomatic and counselor functions, not place on trial any person attached to the Embassy, and ensure that no action be taken which might prejudice the rights of the United States.



The hearing was set for December 10, 1979, before the International Court of Justice. The Iranian government refused to recognize the jurisdiction of the International Court of Justice, but on December 8, 1979, the Iranian government sent a long telegram stating that Iran wished to express its respect for the International Court of Justice and its distinguished members and requested that "the court cannot and should not take cognizance of the case which the government of the United States has submitted to it." Iran asserted that the question of the "hostages of the American Embassy in Tehran represented a marginal and secondary aspect of an overall problem, one which could not be studied separately and which involved more than 25 years of continual interference by the United States in the internal affairs of Iran, a shameless exploitation of Iran and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms."

Iran emphasized that the problem involved in the conflict was not one of interpretation and application of treaties, but one which resulted from an overall situation containing much more fundamental and much more complex elements. Therefore Iran failed to appear before the International Court to argue its case.

Nevertheless, the International Court took jurisdiction of the matter and delivered a judgment on May 24, 1980, that Iran had violated and was still violating the obligations owed by it to the United States under long-established rules of general international law. The court also ruled that no member of the U.S. diplomatic or counselor staff should be kept in Iran and that Iran should make reparations to the U.S. government for injury caused to or at or by seizure of the Embassy, consulates, and the diplomatic and other personnel.

The court, in one of its concluding remarks, said:

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraints of hardship is in itself manifestly incompatible with the principles of the United Nations, as well as the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict of the Iranian state and its obligations to the whole corpus of the international rules of which diplomatic and counsular law is comprised, rules the fundamental character of which the court must here again strongly affirm. . . .

Thus the United States obtained a pronouncement from the International Court of Justice that Iran had broken international law, even though the Iranian government refused to accept the jurisdiction of the court. As Judge Elias admits, "it is a sad fact to note that the Order of the Court in this case was flouted and remained unheeded." Elias goes on to note that the United States itself violated an earlier order of the court to refrain from action which might further aggravate tensions between the two countries. According to Elias, the American incursion into Iran to rescue the hostages, however understandable in view of the immense frustrations inherent in the situation, was an action "calculated to undermine respect for the judicial process in international relations."

Ultimately, the hostages were released, though as a result of negotiations, not of the court decision.

International Law

The ICJ function is to decide cases in accordance with international law. How does the International Court of Justice determine what is international law? Article 38 of the Statute of the International Court of Justice refers to the bodies of law which the court uses in the resolution of disputes between and among countries. First are international conventions. These are treaties entered into between and among countries. Second is international custom as evidence of the general practice which has been accepted as law. For example, diplomatic immunity has been accepted as international custom. Third are general principles of law recognized by civilized nations. For example, the concept of individual freedom, the denial of which is forbidden without due process of law, has become a human rights principle of law recognized by all civilized nations and by the International Court of Justice. Deprivation of freedom without a fair trial should not be permitted by civilized nations. Finally, the court looks to judicial decisions and the teachings of other jurists of the various nations as a subsidiary means of determining rules of law. Consequently cases of a similar nature which have been heard in the highest courts of other countries will be studied by the International Court of Justice for whatever precedential value such cases may have. Of course the International Court of Justice is not bound by such decisions. In fact the court is not even bound by its own previous decisions in such matters.

Procedure in the ICJ

The official languages of the court are French and English.

The actual proceedings at the International Court of Justice have similarities both to trial courts and to appeal courts. The procedure is in two parts, written and oral. The parties file memorials, counter-memorials and, if necessary, replies. The oral proceedings consist of a hearing in which there are first witnesses and then arguments to the court by the advocates. As noted in the discussion of the Iranian case, even if one of the parties does not appear before the court, the court can take jurisdiction of the matter if the court itself determines it has jurisdiction. If a third country feels that its interests are involved it can submit a request to intervene in the case. All questions are decided by a majority of the judges present, and written decisions are rendered by the judges. The decision has no binding force (even precedential force) except between the parties in respect to the particular case. Once a decision is rendered by the International Court of Justice there is no appeal.

The International Court of Justice from 1945 up to the Iranian hostage case in 1980 issued only 30 judgments in cases in which two parties in dispute argued the case before the ICJ. (It has issued only 17 advisory opinions and 44 substantive orders.) All 30 cases involved either 1) jurisdiction over persons, 2) jurisdiction over property, 3) treaties or, 4) responsibilities (liability) for acts.

"How about stars instead?"

Strengths and Weaknesses

A listing of some of the strengths and weaknesses of the International Court of Justice may help you formulate your own ideas as to whether the International Court of Justice is worth the effort.

Strengths

1. "Although 'peace under the law' has been an unattainable ideal, peace without the law is unimaginable," writes R.P. Anand, Professor of International Law at Jawaharlal Nehru University, New Dehli, India. "In the present dangerous thermonuclear age, mankind needs peace and needs it desperately. It is generally acknowledged that law in some form is an indispensable means. One of the necessary conditions for a more effective law is to strengthen and improve the institutions and processes for law's administration."
2. There is a universal need for peaceful settlement of disputes. The International Court of Justice provides an opportunity to intervene in disputes and to resolve them short of armed warfare.
3. The International Court of Justice enhances the role of an international legal order.
4. The International Court of Justice provides an opportunity to lessen the role of national interest and create a more global consideration. Each of us who has looked at pictures of earth from satellites recognize we are all in this together.
5. The court can act in an advisory capacity as a teacher, pointing out the ideals of mankind to be achieved through the rule of law.
6. The court can be a source of law.
7. The court provides a hope for a world built on law and justice.
8. Law provides the opportunity for stability and security.
9. The ICJ permits an opportunity to de-politicize decisions.

Weaknesses

1. The political and ideological divisions of world society cause a crisis of confidence in the court.
2. Only a small minority of the member states have accepted compulsory jurisdiction.

3. Countries are reluctant to make use of the court. There seems to be a preference for nonjudicial means to resolve disputes rather than by the court applying positive international law. For example, negotiation, mediation, conciliation, and even warfare seem to be the preferred methods of dispute resolution. Unlike the Islamic and the Christian West, Asian countries—Confucian China, Hindu India and Buddhist nations of Southeast Asia—because of their intuitive philosophies and religions have great reluctance to settling disputes by recourse to law and the processes of litigation.
4. Independent states are jealous of their sovereignty and skeptical about leaving control over their affairs to third parties.
5. With the growth of new nations arising out the decay and destruction of colonial rule, different sets of cultural and legal values operate globally. There is concern that the International Court of Justice reflects a Western tradition of dispute resolution.
6. It is argued that there are structural deficiencies of the International Court of Justice. Although the impartiality of its decisions and the integrity of its judges are unquestionable, many newly independent countries of Asia and Africa argue that traditional international law is Euro-centric and is biased in favor of European and American states.
7. What is customary international law? Some states feel that customary international law is law which came into custom because it was imposed by eight or nine of the most powerful countries. (Article 38 of the Statute of the International Court of Justice calls for the general principles of international law "accepted by civilized nations.")
8. Is there really a common law for all mankind?
9. Although the International Court of Justice seems to be a good idea, is the fact that it is so little used recognition of its impotence? Nations seem not to have given whole-hearted support resolving disputes by the International Court of Justice.
10. The International Court of Justice itself has no enforcement authority. Enforcement power lies only through the United Nations. Of the United Nations, Professor Leo Gross of the Fletcher School of Law and Diplomacy of Tufts University, has said, "In my view the performance of the United Nations in dispute settlement as distinguished from stopping hostilities is very unsatisfactory."
11. "Only countries may be parties in cases before the court." (Article 34 of the Statute of the International Court of Justice.) This then precludes private parties involved in international disputes, companies and businesses, from using the ICJ. It also prevents guerilla groups and insurgents alleging violations of human rights by their own governments from using the ICJ to settle grievances.

Unique Procedures

How does the International Court of Justice compare with an American trial court and with the U.S. Supreme Court? Article 43 of the Statute of the ICJ describes the procedure and proceedings. This chart provides a simple comparison.

American Trial Court	*U.S. Supreme Court*	*ICJ*
Complaint/ Answer	Appellant's Brief/ Respondent's Brief	Memorial/ Counter-memorial
testimony of witnesses	no testimony	testimony of witnesses
jury	no jury	no jury
closing argument by lawyer to jury	argument to the court	argument to the court
judge	9 justices appointed by president	15 judges appointed by United Nations
guilty or not guilty	Written opinion; no advisory opinions	Written opinion; advisory opinion
individuals and governments as parties	individuals and governments as parties	only nations as parties

Conclusions

A number of the strengths and weaknesses have been discussed in this article. Ultimately, there seem to be three schools of thought concerning the International Court of Justice. The first accepts the compulsory jurisdiction of the International Court concerning the resolution of disputes with other state members. This school trusts in the ability, integrity, and rationality of the justices to peacefully resolve disputes among global neighbors. Such states necessarily yield some sovereign decisionmaking power. However, less than a third of the member states have accepted compulsory jurisdiction, and more than half of these maintain some reservation limiting the scope of the jurisdiction accepted.

Countries following the second school of thought, including the United States, have declared acceptance of jurisdiction by the International Court but include "self-judging reservations." The United States has declared in the Connally Amendment that it will not accept the jurisdiction of the International Court of Justice when "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*" (emphasis added). Six other nations, including France, have such "self-judging" reservations.

The third school involves countries like the Soviet Union which are totally opposed to the normative character of international law itself. Consequently no matter what improvements could be made in the composition of the court and in the application of international law, such member states would not be induced to change their conduct. Although the Soviet Union has had judges sitting on the International Court of Justice, it has never subjected itself to the jurisdiction

(Continued on page 38)

Decisions and Revisions

Is the Supreme Court leading the crackdown on immigrants?

ALIENS AND THE LAW

Barbara Kate Repa

Photos by United Nations, Paul Conklin, UPI and Milt Mann.

Across America, people are talking about The Immigration Problem. While so many of our own citizens are poor, hungry and homeless, immigrants pour through the country's leaky borders and may further depress the economy, deplete the resources, crowd the streets.

Still, we cut our teeth on the adage that America is the land of opportunity and liberty. We boast that anyone who is willing to work hard can succeed. All but a very few of us are descended from immigrants, and it seems hypocritical at the very least to deprive others of the blessings our ancestors claimed.

All this concern over immigration has inspired federal legislation—the Simpson-Mazzoli bill—which, after over four years of debate, may soon become law. Simpson-Mazzoli tries to please both sides. It attempts to attract those worried about uncontrolled immigration by making it harder for illegal aliens to get jobs in the United States. It attempts to win the support of immigrants already here by making it easier for them to stay. In the process, it may please no one, but parts of the country to which newcomers are most often drawn are already anticipating its effects.

In Texas . . .

According to a University of Texas study conducted this year, the state pays about $85 million each year to educate children of illegal aliens. The winner of the Texas Senate primary proclaimed that: "Sixty-five Americans lose their jobs for every 100 undocumented workers who are here."

In Brownsville—a city separated from Matamoros, Mexico, only by the waters of the Rio Grande—85 percent of the population of 89,000 is Mexican-American. It is a city where the "legals" and "illegals" are clearly neighbors, coworkers, friends and relatives. Brownsville would likely be hardest hit of all by any change in immigration policy or legislation. This would be especially true if federal authorities live up to their claim that they will crack down first and hardest on businesses and farms with a "history" of employing illegals should Simpson-Mazzoli become law.

In Mexico, at least half of the labor force is unemployed or working only parttime. It is not hard to understand why a short trip across the river holds so much promise for so many. According to a shopowner in Brownsville, it is clear that "something" must be done about the illegal aliens, but he is torn about what to suggest. "It's hard for me to say too much bad about them," he said. "I've had relatives who came here illegally and made their place. I am of Mexican descent. It's my raza—my race—you're talking about. It's a paradox."

So is the city's motto: "Crossroads of the Hemisphere."

In California . . .

In Los Angeles, in anticipation of the Simpson-Mazzoli bill's passage, several factories have already begun to lay off workers they suspect may be in the U.S. illegally. This sudden fervor is somewhat surprising since California (along with ten other states) already has laws penalizing employers who hire illegal aliens. And if statistics are any indication of effectiveness, the existing law has little preventative value. Last year, federal agents apprehended over 432,000 aliens along the Tijuana border alone.

Los Angeles is said to house one-tenth of the nation's illegal immigrants now. According to a recent survey, its public hospitals are paying over $100 million each year in free medical services for them—including two-thirds of the hospitals' childbirths.

In New York . . .

Employers' fear of getting in trouble for hiring illegal aliens outweighs their fear of lawsuits by rejected minority applicants who claim they were discriminated against. "Let 'em sue," says Arnold Schwedock, executive director of the New York-based Ladies' Apparel Contractors Association. "Concern about penalties comes first."

The panic in New York extends to more than employers. The Immigration and Naturalization Service (INS) there estimates that if the new legislation becomes law, as many as 450,000 aliens could be eligible to apply for some type of changed legal status in the district covering New York City, Long Island and seven counties upstate. And the district to which this workload would be added already handles the largest volume of immigrant claims and problems in the country—and does so with a skeleton staff who work with an outdated manual filing system.

In Florida . . .

An ordinance still on the books in Dade County, Florida, prohibits the county from transacting business in any language but English—and a move is afoot there to pass a constitutional amendment declaring English to be the official language.

The vehemence toward too many newcomers is none too thinly disguised in the state. A recent Florida newspaper headline reads: "Haitian Refugees Take Away Jobs". . . .

A National Problem

Though the recent wave of immigration has hit some states harder than others, immigration is a national issue. It is impossible to know just how many people now living in the United States are doing so in violation of the immigration laws. As a veteran border patrol agent wryly observed: "If we could count them, we could deport them."

Some trained guesses put the number of illegal residents at six million; as many as 400,000 in the Houston metropolitan area, 1 million in the rest of Texas, 1.1 million in California and over 1 million concentrated in the New York metropolitan area. Most are Mexican, although there are relatively large immigrant populations of others—Filipino, Yugoslav, Salvadoran, Bangladeshi, British and Japanese.

Others maintain the number of illegal residents is closer to 12 million—most of whom are likely to stay undercover. Even if given the chance to attain citizenship in the country to which they chose to flee, many will be understandably hesitant to suddenly come forward and trust the American legal system they have come to fear.

Simpson-Mazzoli

Tucked way back at the end of the dictionary, there's a word that no one likes to hear: xenophobia—"fear and hatred of strangers or foreigners." If today it cannot be called a fear or hatred, The Immigration Problem is, at least, an extreme discomfort. The Simpson-Mazzoli bill is designed to ease the malaise.

Simpson-Mazzoli (so named for its coauthors, Republican Senator Alan Simpson of Wyoming and Democratic Congressman Romano Mazzoli of Kentucky) is the first major revamping of the nation's immigration laws in over thirty years. In 1952, the McCarren-Walter Act limited immigration to 150,000 persons annually, apportioned among countries according to a quota system. The first half of each country's quota was reserved for "skilled and educated" people; the second half was stringently limited to close relatives of U.S. citizens who qualified. The Act was passed in response to a now-familiar concern over The Immigration Problem, then expressed by one of the Act's cosponsors, Senator Pat McCarren: The United States, he feared, was afflicted with "hardcore, indigestible blocs" that could leave the country "overrun, perverted, contaminated or destroyed."

This year's Simpson-Mazzoli bill, now in a conference committee so that the versions passed by the Senate and the House can be reconciled, seems to have been spurred on by the feeling that the United States has somehow lost control of itself. President Reagan, who pushed for passage of the bill from the start, lamented during a news conference in mid-June: "We have lost control of our borders, and no nation can do that and survive."

The Two Prongs

Whatever the impetus, the bill itself has two main provisions, both of which are criticized, praised or puzzled over—amnesty and employer penalty.

The amnesty prong of the bill ensures that aliens who have lived continuously in the United States before a certain date can claim legal status, first as temporary, and then as permanent residents of the United States. The rationale for amnesty seems to be that there are already millions of people living in the United States "illegally." Since the situation is unlikely to change, no matter what laws are passed, those already living here should at least be able to do so with the benefit and protection of the country's laws.

The version of the bill accepted by the Senate specifies the cutoff date of January 1, 1980 and requires a two-step process for complete amnesty. Given this procedure, the Immigration and Naturalization Service estimates that 1.6 million aliens might qualify.

The House version of the bill is less strict in most ways. It sets a cutoff date of January 1, 1982—a cutoff the INS believes would allow about 2.9 million immigrants to claim legal status here.

The second main prong of the bill requires most employers to demand that job applicants produce documents proving they are legal United States' residents. This provision is intended to curtail the flow of illegal immigrants to this country by punishing employers who hire them without the proper documentation. While there is an exemption provided for those hiring three or fewer workers, no other employer would theoretically escape from complying.

Those caught hiring undocumented workers could be fined up to $2,000 for each such employee. Repeat offenders, under the Senate version, could be jailed for up to six months.

Pro and Con

Taking or Making Jobs

Those who support Simpson-Mazzoli because it would cut down the number of foreign workers coming to the U.S. see the issue as one of dollars and cents. Immigrants, they claim, increase unemployment by displacing American workers, especially those workers who can least afford to be out of work—the untrained and unskilled.

Others disagree just as fervently. They claim immigrants do not add to the unemployment woes of those who are already citizens. Increasing the immigrant population, say the yea-sayers, will be a boon to American economy; as the new citizens' incomes increase, so will their contribution to the economy. Many of them may start up new businesses—hiring some of those U.S.-born citizens who are now out of work.

And finally, they cite studies which support the hunch that the jobs being "taken" by immigrants are those that no one here wanted in the first place. For example, two years ago, the INS staged a one-day, nationwide series of raids in which it apprehended about 5,000 illegal aliens—most of them Mexican. The aliens were sent home.

The apparent goal was to open the American job force to American workers, but that goal was missed. While some of the jobs were taken over by Americans, subsequent news service surveys revealed that most of native workers soon quit—complaining of the low pay and poor working conditions. In the end, the majority of the jobs were filled by the same illegal workers who had been taken from their positions in the first place.

Enforcement Woes Abound

Critics also raise the common argument that the legislation is toothless.

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Although one of the major thrusts of the proposed legislation is the punishments imposed on employers who violate it, the punishments attach only to "knowing" violations. Also, under the House version, employers would not even need to keep records until an illegal alien had been found on the job.

Enforcement would fall most heavily on the already overburdened INS. Each year, the immigration service receives at least 1.9 million applications and petitions. It now has a backlog of over 150,000 asylum applications—and over 175,000 naturalization and citizenship certificate cases.

And some of the provisions would be curiously difficult to enforce. The House version, for example, requires that aliens seeking status as permanent residents must be "satisfactorily pursuing a course of study in English." But what would constitute "pursuing?" And who would decide what is "satisfactory?"

What Cost, Citizenship?

Another resurfacing objection is that legalizing aliens would also necessitate paying them costly welfare benefits. The House version attempts to deal with this issue by mandating a waiting period of five years after people are recognized as having legal status in this country before they will qualify for most federal benefits (although some benefits, such as aid to pregnant women, will be available immediately). This allays the fear of many that legalizing aliens would mean intolerable expense—a projected $8 billion in federal benefit payouts over five years.

Again, the tempest surfaces from a teapot. If a recent study by the U.S. Department of Labor is right, then the projections of welfare strain are wrong. According to the study, about three-quarters of all illegal aliens working here now have Social Security and income taxes deducted from their paychecks. The use of phony documents has, in fact, helped the Social Security Administration collect a fund of more than $80 billion in contributions that will never be claimed.

Forms over Substance

Paperwork is a real problem. Complying with Simpson-Mazzoli, or some form of it, would mean that immigrants would need to present some fitting identification or documentation to the INS to prove the length of their residence—rent receipts, bank passbooks or pay stubs. Forced to

(Continued on page 40)

Discrimination in Immigration?

Last year, Richard John Longstaff was barred from becoming a naturalized American citizen by his own truthful statements that he was a homosexual.

A federal law bars homosexual aliens from becoming United States citizens—along with "psychopaths and those with mental defects." In 1965, Longstaff was admitted to the United States as a permanent resident. But before he arrived here, he was asked to fill out several forms. One of these forms, an Application for Immigrant Visa and Alien Registration, posed the question:

> Are you now or have you ever been afflicted with a psychopathic personality, epilepsy, mental defect, fits, fainting spells, convulsions or a nervous breakdown?

Longstaff answered "No."

Longstaff, a Briton, lived in the United States for fifteen years as a permanent resident before seeking naturalization as a U.S. citizen. His petition was denied.

On appeal before the immigration board in 1982, Longstaff's petition was again denied on the basis that he had entered the country illegally. The finding of illegality was based on the fact that, when he first sought admission to the country in 1965, he had not "admitted to being a psychopathic personality."

The court in Longstaff's appeal held that when Congress passed the Immigration and Nationality Act, it intended to include homosexuals as "psychopathic personalities"—and thus, among those who must be denied naturalization as U.S. citizens. (Tellingly, there is no evidence in the record that Longstaff knew or had any reason to know that "psychopathic personality" included homosexuals in the eyes of the law.)

The case was reopened after Longstaff persuaded a congressional representative to intervene. At subsequent INS interviews, Longstaff recalled: "I was interrogated on how many times I had sex, where and how long and how long between intervals. . . . I felt it was none of the government's business." His citizenship application was again denied—this time because of "lack of candor, moral turpitude and violation of a Texas sexual conduct law."

Longstaff took his appeal out of the hands of the immigration board and into the courts. In *In re Longstaff* (716 F.2d 1439 (1983)), a United States court of appeals again held that Longstaff, as a homosexual, was within the banned class of psychopaths and thus had never been "lawfully admitted" to the country.

On May 29, 1984, the United States Supreme Court refused to hear an appeal of the case. As a result, the Immigration and Naturalization Service (INS) will begin immediate deportation proceedings against Longstaff, who is now forty-four years old and owner of a thriving business in Dallas, Texas.

"The law is on the books, and we're merely enforcing that law," according to Ron Chandler, director of the immigration service in Dallas. "We don't discriminate against anyone."

It's not likely Longstaff would agree, but he is not embittered enough to leave here on his own accord. "This is the most fabulous country in the world and I wanted to be a part of it," he said. "If I didn't apply for naturalization, and had stayed a permanent resident, this never would have been a problem. . . ."

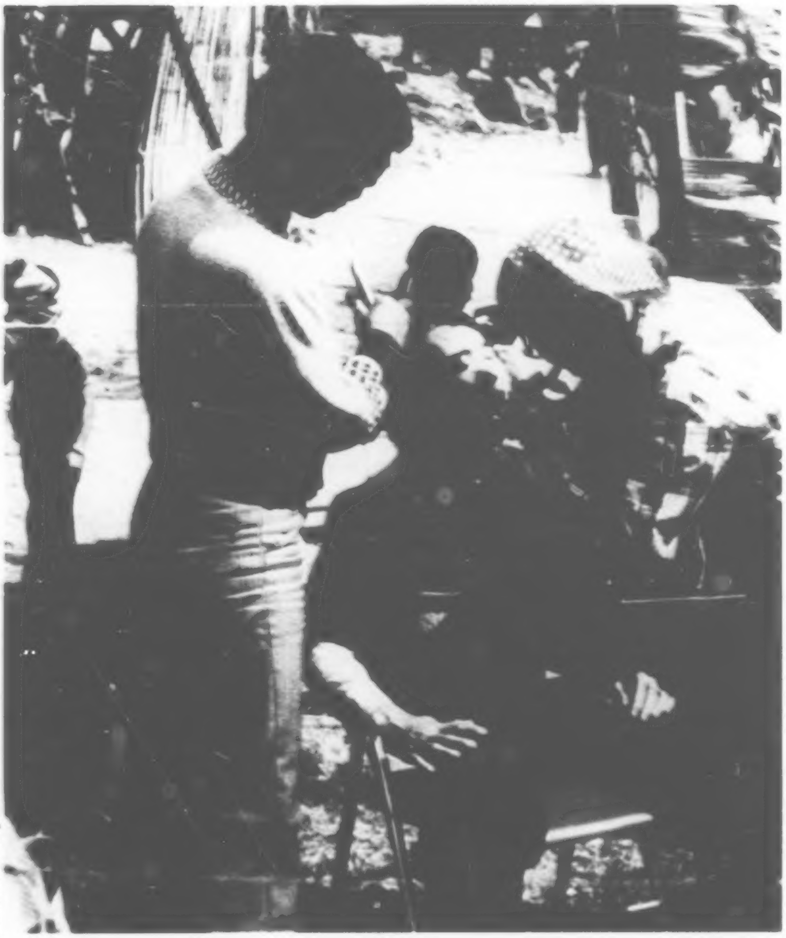
There is no solution to such problems on the near horizon. As the court brutally reasoned in its decision in *Longstaff*: "Congress has unbounded power to exclude aliens from admission to the United States. Our national immigration policy was for many years based on national origin quotas that reflected racial and ethnic prejudice. Congress can bar aliens from entering the United States for discriminatory and arbitrary reasons, even those that might be condemned as a denial of equal protection or due process if used for purposes other than immigration policy to draw distinctions among people physically present within the borders of the United States." —BKR

INTERNATIONAL LAW

Kathleen Daly

Refugees: The Problem Without a Solution

Some surprising observations about how families survive in a Thai refugee camp



Kathleen Daly

In some ways, Ban Vinai looks and feels like a typical town in southeast Asia. Slash-and-burn agricultural techniques create a smoke that makes your eyes water and throat burn. The sun, made red and hazy by the smoke and dust, rises hot in the mornings, leading to days of tropical lethargy and listlessness. Happy children play everywhere; the smell of overripe latrines is inescapable; rain pounds hard on the tin roofs in the late afternoon. In the background is a beautiful song sung by the women and the sound of the khene, an elaborate bamboo wind instrument.

It is only when you look beneath the surface that you realize that Ban Vinai is a refugee camp. For one thing, it's bigger and more crowded than most Thai villages. Forty thousand refugees are housed in bamboo and thatched buildings with tin roofs, either single room dwellings or long houses on stilts that furnish one room for each eight-to-ten-member family. And the inhabitants can't go past the perimeters. Many of the men sit around, aimlessly marking time.

To see them is to understand what it means to be a refugee—to flee from your homeland and wait to go back home, to a new home in a third country or, if you can do neither of these, to simply wait.

The Uprooted

I worked in Ban Vinai for three months during early 1980, one of the Westerners working as medical technicians for the American Refugee Committee and other private organizations.

The camp is for the Hmong, hill tribe people who used to live in small villages in the highlands of southeast Asia and China.

During the war in southeast Asia, many Hmong Laotians fought against the Vietnamese and Pathet Lao. They were armed and advised by the CIA and were effective guerrillas because they knew the jungles and the mountains of Laos.

When Vietnam fell, retribution came quickly, and the Hmong were systematically exterminated in many Laotian villages. Refugees in Ban Vinai told stories of low-flying planes that gassed entire Hmong villages. Those who had fought against the new regime were executed as their familes watched.

So in 1975, many Hmong began fleeing for their lives. (Others chose not to flee, since flight from enemies also meant separation from the extended families and clans which are central to Hmong society.) The journey to the Mekong River, the natural border between Laos and Thailand, was arduous and dangerous. They traveled at night, staying away from roads and trails to avoid land mines or discovery by military patrols. The heat of the jungle and lack of food and water left them weak and susceptible to disease. Some died along the way; others were killed by soldiers.

Even those who reached the Mekong faced another perilous obstacle. They had to cross the river silently in the dark to avoid the military patrols. They lashed together bamboo poles to support them during the crossing, but some drowned in the swift current of the river. And even after crossing the river, they weren't safe. The less fortunate were greeted by bandits who relieved them of their possessions.

In Thailand, the Hmong were safe from execution but not free to travel at will. Instead, they were taken to a holding center at Pak Chom. They spent from a few days to a few weeks there. After clearing the holding center, they were trucked or bused to a refugee camp.

A People Apart

Hmong family life is very different from ours. The extended family includes parents, grandparents, sons and their wives and unmarried daughters. Families live together and the elders have great importance, their advice readily sought for family problems. A Hmong man may have more than one wife. Indeed, because so many men died during the war, leaving an excess of women, polygamy is common.

Children are valued in Hmong society, and because of the high mortality rate—as many as half of the children do not survive—families are large so that parents will have somebody to care for them in their old age. Children care for younger brothers and sisters at an early age, so that mothers can concentrate on the newest arrival.

In the camps, fathers participate in child care, but this may be a result of the refugee experience in which men cannot pursue their usual occupation of farming. Women and children do much of the work necessary to maintain the house. They carry water, gather wood, garden, cook and sew.

East Meets West

The Hmong lack confidence in western medicine, largely because of their religious beliefs. As animists, they believe that good and evil spirits inhabit humans, animals and plants, as well as inanimate objects. Offended spirits and evil spirits are responsible for misfortune. Sickness is a direct result of the spirit leaving the body of the ill person. Shamans perform religious healing ceremonies to appease offending spirits and to induce them to return to the body of the afflicted person.

In addition to shamans, the Hmong also rely on traditional folk medicine to treat their ailments. And medicines available only with prescription in the U.S. can be bought for a few baht in the marketplace. Injectionists also do a thriving business. Only if none of these approaches work will a family bring a patient to the camp hospital. By that time, the illness is often advanced.

While in Thailand, we were faced with diseases that are uncommon or nonexistent in the U.S., such as malaria, leprosy, parasite infections, dengue fever, tuberculosis and goiter. Childhood diseases were also very common, since most of the children had not been immunized. In this atmosphere, the public health approach that stresses prevention rather than treatment was a tremendous challenge. Years of effort to encourage the American public to adopt healthy habits—giving up smoking, eating a low-fat diet, and using seat belts—had met with limited success. How could we change the habits of a lifetime in just a few months, especially since the Hmong had no understanding of the germ theory.

Our attempts to skin-test children for tuberculosis show what we were up against. At one school where we attempted to test, whole classrooms of children fled as we approached. One of our Hmong lab assistants reported parents were upset because after recent immunizations some children became ill. To respond to parents' fears, we undertook an educational program. However, lack of knowledge of the Hmong language made us dependent on translators and interpreters. It's very frustrating to not know if your thoughts are being communicated accurately, or if you're receiving an accurate interpretation of the other person's ideas.

In the midst of the skin-testing controversy, I met with a Hmong leader to discuss the benefits of the TB test to his people. After I finished, the interpreter translated what I had said for the Hmong leader. He responded at length, and I anx-

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iously awaited the translation. At the end of his discourse, the translator turned to me and said "He said it is okay." I replied, "But what else did he say?" "Nothing else. He said it's okay."

The ability to really communicate, to learn what reservations this man had about skin testing, was limited severely because I couldn't speak the Hmong language. Some problems in translation occurred because our interpreter did not have a thorough knowledge of English. Another obstacle to communication was the Hmong desire to avoid conflict, to refrain from offending us by telling us what we wanted to hear.

Our fledging attempts at health education were improved somewhat by our ability to demonstrate organisms on the laboratory microscope. We ran tours through the lab whenever we found some interesting parasite. The viewers were suitably impressed, but I was never sure how much they could relate what they saw on the microscope to their own illnesses, how much knowledge they would retain once we were gone, and how valid it was to try to replace their culturally based understanding of the disease with our Western notions.

Daily Life in Camp

The Hmong are small people, but not strikingly undernourished like the Cambodian refugees one sees pictured in magazines back in the U.S. In the camps, some men wear customary Hmong attire, wide-legged black pants and black jacket-length shirts. Others wear Western-style clothes and even carry large portable radios. Women are dressed in black shirts and dark batique skirts or colorful blouses and sarongs. Many women wrap their heads in scarves or more traditional black headdresses. Children dress similarly or, if they are very young, wear nothing at all.

Gardens spring up in the camps in the most unlikely places, including pails and tin cans. They offer some color to the otherwise unrelieved red dirt and drab dwellings.

Markets sell green beans, tomatoes, fried or hard-boiled eggs, rice, bananas, oranges, pineapple and watermelon. Flies are fond of the food at camp restaurants and crowd thick on the water buffalo meat for sale at the markets. Merchants also sell food, clothes and household items. Shoppers are expected to barter. (It was a source of great amusement if you paid the initially quoted price.) Camp-grown produce is a staple, along with chicken and ducks. Traditional Hmong medicine—roots, leaves and powders—are also for sale, as are more familiar drugs, vitamins and antibiotics.

The camp also has other businesses. There are barbers, tailors and a dentist. Woodworkers fashion crossbows and arrows; blacksmiths forge knives; jewelers shape fine silver necklaces. Seamstresses create intricate embroidery and applique hats, bedspreads and belts.

Surprisingly, people seem happy. They are friendly, though shy. (We communicated only in the universal language of smiles and nods.)

Medical workers from all over the world were in the camp when I was there. Americans, Filipinos, Finns, Australians, and other foreigners often disagreed with each other and presented a bewildering panorama of Western cultures for the Hmong.

The refugees were intensely curious about Westerners and being a nonrefugee confers instant celebrity. Wherever we walked, we were observed. For the Hmong, this is an acceptable way to learn about foreigners. Working in the lab, eating breakfast, having a meeting, we always attracted a small crowd that watched us through windows and doors. It was unnerving at first, but we grew accustomed to being watched.

We learned to gauge how interesting our activities were by the size of the crowd that gathered. The premier attraction was the farewell dinner for those who were ending their stay at camp. We attracted observers three deep at all available doors and windows.

Most of us Westerners ate at the Ban Vinai Restaurant, a small thatched building about two blocks from the hospital complex. Food was soup, chicken, fried eggs, vegetable omelets, fried rice, fried peanuts and spicy Thai noodle dishes, washed down with soft drinks and Singha beer. A small dish of hot green chilis was served with every meal for those who wanted a fiery experience.

A Problem Without a Solution

Refugees are considered "illegal immigrants" by the Thai government, who reluctantly tolerate their presence. They are not allowed outside the camp, and there is a great deal of friction between the refugees and the Thai villagers. We even heard reports of villagers beating up the Hmong men who strayed from camp.

The camp is in one of the poorer provinces of Thailand, and the locals resent the influx of food, clothing and medical care for the refugees while their own needs are ignored. When I was there the Hmong were allowed to plant rice in the area surrounding the camp, but when it was time to harvest they were restricted to camp and the rice was stolen. To try to alleviate some of the tensions, a Thai outreach medical program brought medical care to some of the surrounding villages. But tensions always remained high.

On the other hand, conditions may not be particularly bad at Ban Vinai, especially considering the hardships that refugees elsewhere must bear. For example, at about the same time I was in Ban Vinai, Cuban refugees were housed in camps in the United States. U.S. high-security camps had fences all around and plenty of armed guards. In contrast, Ban Vinai has no fences, and, though there are armed Thai personnel in the camp, enforcement of the rules is rather lax.

Life in the camps mainly consists of waiting. Most of the refugees want to go to either Canada or the United States, where many have relatives. (A delegation from China came to the camp to urge immigration there but met with little success.) Some who made the journey to Ban Vinai don't want to immigrate to other

(Continued on page 29)

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CLASSROOM STRATEGIES

Dorothy J. Skeel

Making Human Rights Come Alive

Five strategies for teaching about a worldwide problem

Generally students do not stop in the middle of their daily routines to ponder their basic human rights. For the most part, students assume that their rights are inherent, have always been around, and will continue to be so.

What about those rights? Will they be around for future generations? What about rights abroad? Why are there so many refugees in the world? Why have so many refugees chosen to come to the United States?

First, students need to understand the rights that are guaranteed to them in the U.S. Constitution. They need to be aware that the framers of the Constitution were most perceptive in recognizing the needs of the people in the new nation.

Second, students need to be aware that people in other countries of the world have documents that outline the rights that are afforded them in their country. A comparative study will demonstrate whether other countries have similar views on the rights of their people or whether their history has caused them to place particular emphasis on economic, social, or political rights.

Further, it is important for students to recognize the universal desire for human rights. A human right is a valid claim arising from a human need. Humans all over the world have the same basic needs.

However, students also need to be aware that not all nations protect the basic rights of their people. The violation of those rights may be so severe that people are forced to flee their countries to avoid death and/or persecution.

The lesson plans that follow will provide opportunities for students to consider their own rights, compare them to the rights of people in other countries, and develop an international perspective on basic human rights.

Strategy 1

Determining Basic Rights

Documents such as the Declaration of

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Human Rights Include
- Survival
- Individual Freedom
- Human Dignity

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Independence and the Universal Declaration of Human Rights set forth what is considered to be the basic rights of human beings. However, rights are not self-executing. They won't be realized unless these documents are interpreted to protect rights, and unless the documents are enforced.

Students need to consider what they think should be identified as basic rights. Philosophers of law specify that in terms of human rights, physical survival or the right to life most obviously must take precedence over all competing claims. They continue that the right not to be subjected to torture or other physical violence causing bodily harm is almost as basic as the right to life. Individual freedom requires social recognition and acceptance. One is treated as an intrinsically worthy subject, not just as an instrument, a means to an end. The right to have rights is essential to what we call human dignity. Another aspect of the most basic human rights is access to the means of survival, for self and others, access to air, water, food, medicine, and shelter.

Lesson Plan

Concept: Basic Human Rights
Strategy: Simulation
Procedure:

1. Divide class into small groups (5–7). Move groups to separate areas of room or in different rooms if possible.
2. Give each group a copy of the handout describing the situation.

Handout: You are traveling with some 80 other passengers on board a ship which has encountered a very bad storm. The communication system has been disrupted—no messages can be relayed or received. Suddenly, an island looms ahead. The ship's engines are cut, but too late, and the ship runs aground on the beach. Passengers are thrown about. Some are injured and will require medical attention. Nothing can be done until the storm subsides.

Later that night, the storm is finally over. The captain surveys the damages and reports to the passengers. Twenty-four people have been injured; none is in danger of dying. There is enough food for

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Human Rights Include
- Physical Security
- Social Recognition
- The Right to Rights

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10–15 days, depending upon the amount consumed each day. There are no other inhabitants of the island. The storm has thrown the ship way off course and there was no S.O.S. radioed. There is no certainty that the ship will be discovered soon. Since supplies are limited, some rules must be established. What rights are basic? What rights should everyone on the island expect to be afforded?

Assignment: Make a list of what each person's basic rights should be. After each group has completed its list, compare them and devise a consensus list.

The second aspect of the lesson is to return to the small groups and consider ways in which the individuals on the island can have those rights protected. What must be done to assure them? Should each person have equal access to the same protection of rights?

As a follow-up, students should compare their list of basic rights to documents such as the U.S. Bill of Rights and the Universal Declaration of Human Rights, as well as unwritten guarantees such as those found in Britain's constitution.

Strategy
2
Basic Rights in Conflict

Even though the government of the United States was founded on the belief that government should secure and protect the rights of its citizens, conflicts inevitably arise. Even though the U.S. has been a strong supporter of the United Nations and a promoter of international human rights, there are times when solutions to problems are not easily found. The following lesson will introduce such a situation.

Lesson Plan

Issue: Conflicting Rights
Strategy: Cartoon Analysis

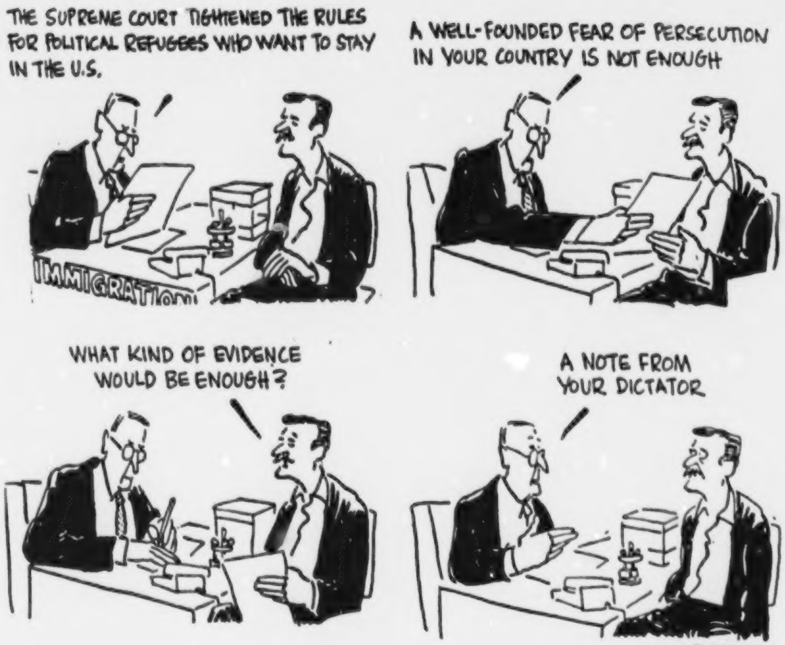
Procedure: Give each student a copy of the cartoon or make an overhead transparency of it.

Questions: What idea is the cartoon trying to convey? (The U.S. is making it more difficult for refugees to remain in this country.)

Why would the U.S. Supreme Court tighten the rules for political refugees? (Large numbers, cost of resettlement, unemployment, difficulty in educating, language and cultural differences.)

What rights are in conflict? (Economic rights of U.S. citizens, not enough jobs, right to life of refugees.)

What do you think the U.S., which has been a strong supporter of human rights, should do in these situations? (Students can research background information to determine what precipitated the Supreme Court ruling. Article on pages gives more information on the case.)


THE SUPREME COURT TIGHTENED THE RULES FOR POLITICAL REFUGEES WHO WANT TO STAY IN THE U.S.
IMMIGRATION
A WELL-FOUNDED FEAR OF PERSECUTION IN YOUR COUNTRY IS NOT ENOUGH
WHAT KIND OF EVIDENCE WOULD BE ENOUGH?
A NOTE FROM YOUR DICTATOR

By Wasserman

Strategy

3

Comparing Human Rights

Limited research exists on instruction in human rights education, but related research suggests that cooperative activities enhance the learning outcomes which are important to human rights education. Thus, in introducing a comparative study of human rights it might be most appropriate to use several learning centers where small groups of students can work together.

Lesson Plan

Concept: Universality of Human Rights
Strategy: Learning Centers
Procedures: Any comparative study of human rights should include some background information about the comparative cultures, so that the rights documents are studied in context. The first of the learning centers should contain books, artifacts, filmstrips and maps that will introduce the comparative culture. The second learning center should introduce the major rights documents of the culture. The last learning center should present experiences that provide for the comparison.

Let's use the Republic of China (Taiwan) as an example. First a thumbnail sketch. Today there are two chinas—the People's Republc of China, which is controlled by the Communists and located on the mainland, and the Republic of China, reestablished on the island of Taiwan.

China was once a mighty empire, then a weakened giant largely controlled by foreign governments.

In 1900, a rebellion occurred as the Chinese attempted to regain the control of their country. Under the leadership of Dr. Sun Yat Sen, the Republic of China was finally established in 1911. Democracy was difficult to implement in China. After Sun Yat Sen's death in 1925, Chiang Kai Shek took over, but another leader, Mao Tse Tung, who believed in Communist ideals, challenged the democracy. A civil war raged—with the exception of the World War II years—until 1949, when Chiang Kai Shek and the Nationalists were defeated and moved the Republic of China to Taiwan. The People's Republic of China was proclaimed on the mainland.

Taiwan is located in the Pacific Ocean 90 miles off the southeast coast of China. The nation is made up of fifteen major islands and over sixty smaller ones. The main island, Taiwan, is long and narrow, with an area of 36,000 square kilometers and a population of 17 million people.

Taiwan's economic growth has been referred to as a miracle. After agricultural reform, the Chinese developed light industries. Then they turned their attention to industries that required technology and precision. Textiles are the leading export, followed by electrical products like transistors, stereos, TVs, and radios.

Family life has been important for centuries to the Chinese. Several generations live together. The elder members of the family bring honor or disgrace to the family by their actions. However, with people moving to the cities and factories to live, the strong ties of the family are in danger. The Chinese place importance and value on education. Through education, they continue the traditions of their culture and help the country to grow.

Modernization is most evident in the cities and industrial areas. One of the most modern steel mills in the world can be found in Taiwan. Shipbuilding has become an important industry in the country.

Taiwan is a mixture of the old and the new. The people have preserved many of their rich traditions while helping to build a modern society.

After acquiring some understanding of the culture of the country, students should analyze the basic rights documents. Within this learning center should be a copy of the "Three Principles of the People" formulated by Sun Yat Sen and a copy of the Constitution. Those documents can be found in the *China Yearbook*.

The principles are incorporated in the Constitution. The Constitution became

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effective on December 25, 1947. Remember that the Constitution was written at the end of World War II and adopted on the mainland. The government was moved to Taiwan in 1949 after the Communist takeover of the mainland.

"Three Principles of the People"

The Principle of Nationalism seeks to liberate the Chinese nation from foreign invasion and oppression and make it permanently free and independent. It also is designed to give equality to all racial groups within the country.

The Principle of Democracy is intended to end all internal political inequalities so that every citizen can exercise democratic rights. The people have the power of election, recall, initiative, and referendum. The government has five divisions: executive, legislative, judicial, examination, and control.

The Principle of Social Well-Being is to assure the economic independence, freedom and happiness of the people. The means include: (1) equalization of land ownership, and (2) prevention of the concentration of private capital so that the wealth of the nation will not be monopolized by a few.

Assignment: Some sample questions that will help students analyze the principles follow:

1. What are the goals of the Principle of Nationalism?
2. Why do you suppose there was so much concern over foreign invasion and oppression?
3. What does the Principle of Democracy ensure?
4. What basic rights are included in the Principle of Social Well-Being?
5. Examine the responsibilities of each of the five divisions of government. Remember this document was written with the intention of governing the largest nation in the world.

"Rights and Duties"

The "Rights and Duties of the People" are contained in Chapter II of the Constitution and are stated below. Some explanatory information is omitted in Article 8.

Article 7. All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law.

Article 8. Personal freedom shall be guaranteed to the people. . . .

Article 9. Except those in active military service, no person shall be subject to trial by a military tribunal.

Article 10. The people shall have freedom of residence and change of residence.

Article 11. The people shall have freedom of speech, training, writing, and publication.

Article 12. The people shall have freedom of privacy of correspondence.

Article 13. The people shall have freedom of religious belief.

Article 14. The people shall have freedom of assembly and of association.

Article 15. The right of existence, the right of work and the right of property shall be granted to the people.

Article 16. The people shall have the right of presenting petitions, lodging complaints, or instituting legal proceedings.

Article 17. The people shall have the right of election, recall, initiative and referendum.

Article 18. The people shall have the right of taking public examinations and of holding public offices.

Article 19. The people shall have the duty of paying taxes in accordance with the law.

Article 20. The people shall have the duty of performing military service in accordance with the law.

Article 21. The people shall have the right and duty of receiving citizens' education.

Article 22. All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.

Article 23. All the freedoms and rights enumerated in the preceding articles shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.

Article 24. Any public functionary who, in violation of law, infringes upon the freedom or right of any person shall, in addition to being subject to disciplinary measures in accordance with law, claim compensation from the state for damage sustained.

Assignments: One activity to use with this document would be for small groups of students to rewrite each article in their own words. Give examples of the rights that are permitted by each article.

Other questions that might be used follow:

1. Which of the articles do you think relate to events in their history?
2. How would you explain personal freedom in Article 8?
3. What is meant by the right of existence in Article 18?
4. What might be other freedoms and rights that are referred to in Article 22?
5. What might be some examples of situations where freedoms and rights would be restricted?

The third learning center should follow after the other two and should include activities that provide for comparison of American rights documents with those of Taiwan and possibly the Universal Declaration of Human Rights (1948).

Copies of the Declaration of Independence and the Bill of Rights should be available. It is assumed that these have been analyzed before.

1. What if any similarities are there between the "Three Principles of the People" and the Declaration of Independence?
2. Use the table below to compare each article.

Questions: Are these rights included in the U.S. Bill of Rights? Why?

Are there rights in the U.S. document not included in either of the other two documents? Why might this be?

What do you think was the emphasis on rights in each of the documents? political? economic? social?

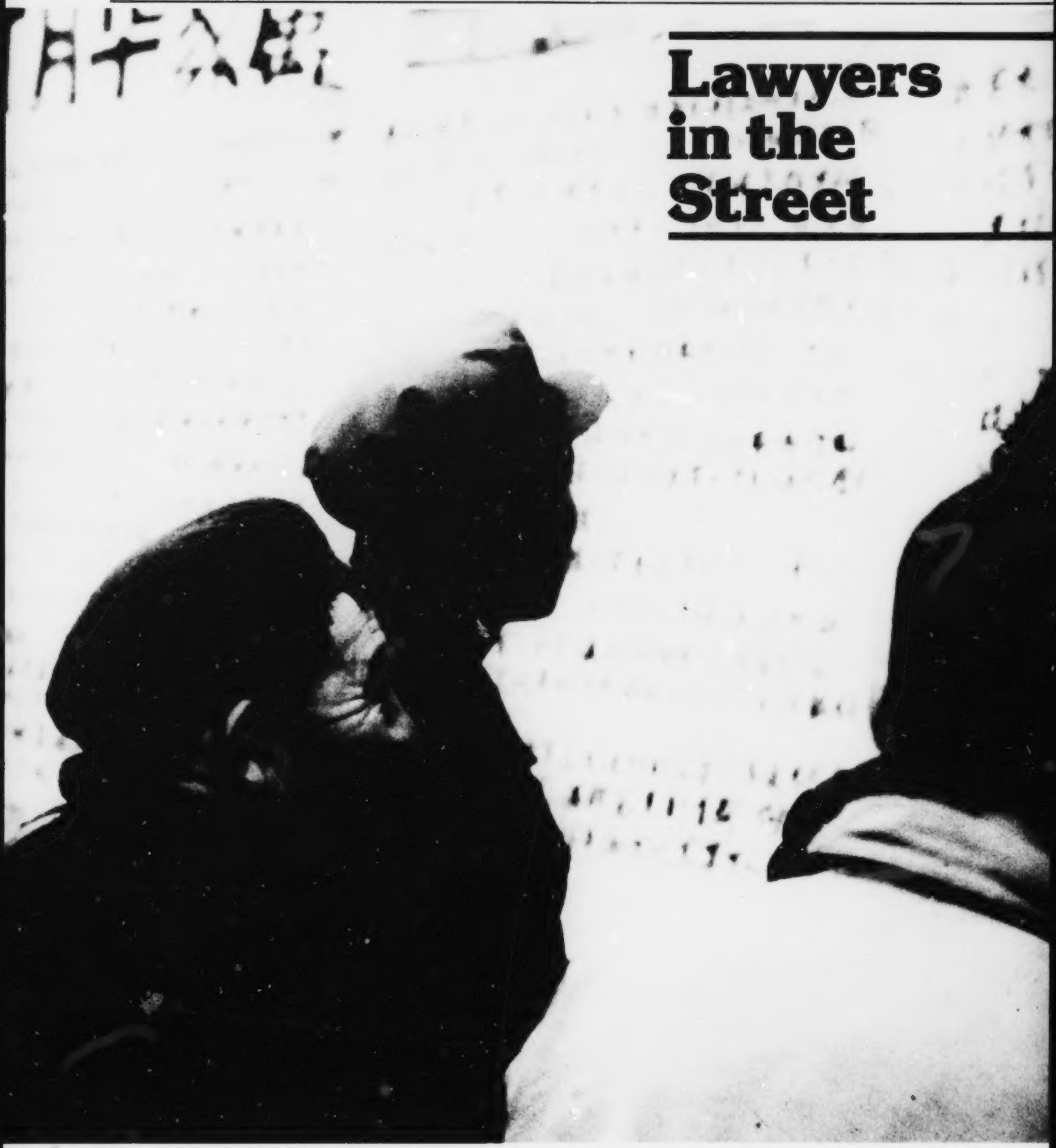
How does the time in history when these were written affect their content?

Are there any generalizations you can draw about all of these documents?

1947: Rights & Duties Republic of China (Taiwan)	1791: U.S. Bill of Rights	1948: Universal Declaration	Rights that are specified
Article 7	Fifteenth Amendment Nineteenth Amendment	Article 2	all are equal regardless of race, color, sex
Article 8	Fourth Amendment	Article 3	security of person
continue with other articles			

(*Continued on page 44*)

Lawyers in the Street



David Schimmel

The Chinese have big plans for bringing law – and education about the law – to the people

A decade ago, during the Cultural Revolution, Chinese leaders proudly proclaimed that theirs was a land of "law without lawyers." Today, however, the People's Republic of China has rejected the "errors" of the Cultural Revolution. The Chinese now view lawyers as essential to their national development, and they have adopted a new constitution emphasizing individual rights. In addition, the Chinese are undertaking a vigorous campaign to educate the people about their new rights and the new rule of law.

Much of this recalls our own revolutionary period. Lawyers and legal processes were often suspect in colonial America, since law was associated with arbitrary standards imposed by the English. But when the new nation was founded, many Americans saw the law in a new light—it could protect precious rights and represent the national will. Indeed, it could be one of the pillars of democracy, and many leaders such as Thomas Jefferson and James Wilson called for law-related education as a means of strengthening the new republic.

Constitutionally protected rights—and education about those rights—make sense in a democracy. Do they make sense—or are they even possible—in a one-party dictatorship? Is the Chinese constitution an empty promise, or will the Chinese somehow find a way to accommodate both dictatorship and democratic guarantees?

During the Cultural Revolution

From 1965 to 1976, during the Cultural Revolution, most of the law schools were closed, the private practice of law was abolished and lawyers were sent to work in communes to be "re-educated by the people." The few law schools that remained open cut the study of law from five years to three. Individual rights were of little concern. Law was seen as a "tool of the dictatorship of the proletariat," as a means of serving "the people"—the peasants, the workers and the army. Intellectuals were suspect. Therefore, law

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Sheldon Slaybod

students were not chosen by faculty on the basis of their academic record; rather, they were selected by fellow workers on the basis of their "sincere desire to learn for the benefit of the people . . . and their enthusiasm for Communist goals and methods."

Lawyers were viewed as unnecessary parasites. According to a law professor of the time, criminal defendants could speak for themselves and facts favorable to the defendant would be taken into consideration by the judges. Since courts would "stick to the laws" and hear cases "according to the facts," defendants had no need for lawyers. And most civil disputes were resolved through mediation.

In recent years there has been a revolutionary change in the government's attitude toward lawyers, law schools, and law students. According to the *China Daily*, lawyers whose work was "suspended" during the Cultural Revolution are re-establishing themselves as "guardians of the people's democratic rights." Today, China's lawyers are "not only helping to stamp out criminal frame-ups and wrong verdicts" but are also "educating criminals to plead guilty and return spoils." Last year, Zou Yu, China's Minister of Justice, praised lawyers for "protecting individual rights," for "strengthening the people's unity" and for "publicizing laws, government policies and morality."

Government officials are now committed to increasing the quality and quantity of legal education. Existing law schools are being expanded and new ones are being opened. Last year, for example, a headline proclaimed: "Top Law University Set Up in Bejing." Its goal, according to a spokesperson for the Communist Party Central Committee, is "to alleviate China's critical shortage of legal workers."

Furthermore, law students are no longer selected by co-workers or on the basis of "high political motivation." On the contrary, there is a "back to basics" trend in China. Each year, about two million high school graduates take a three-day National Entrance Exam to compete for about 400,000 college and university openings. Thus, law school administrators now select their students from among those who score highest in these objective national exams, and who have the best high school grades.

Lawyers in the past were publicly criticized for "causing social disorder" by using technical rules to "interfere with justice" and "protect the guilty." But government newspapers today print stories supporting lawyers who aid the accused against overzealous bureaucrats—for "defending the principles of law courageously and without favor."

Individual Rights

While civil liberties were seen as unimportant during the Cultural Revolution, individual rights are now a central feature of China's new constitution, which took effect on December 4, 1982. In words similar to our First Amendment, the Constitution of the People's Rebublic of China guarantees its citizens "freedom of speech, of the press, of assembly, of association, of procession, of demonstration . . . [and] freedom of religious belief."

As our Bill of Rights was a reaction to the deprivations that American colonists suffered under British rule, so the Chinese Constitution is designed to guard citizens against the "errors" and excesses of the Cultural Revolution. Thus, the constitution protects "the personal dignity" of citizens against "insult, libel, false charge or frame-up" and guarantees citizens "the right to criticize and make suggestions" to government officials.

In an analogue to section 1983 of our Civil Rights Act, the Chinese Constitution gives citizens "who have suffered losses through infringement of their civil rights by any state organ or functionary . . the right to compensation." The Chinese need no Equal Rights Amendment since their constitution states that: "Women . . . enjoy equal rights with men in all spheres of life, political, economic, cultural and social."

Other sections of the Chinese Constitution are very different from our own. Thus, article 42 states that citizens have "the right as well as the duty to work" and that "work is the glorious duty of every able-bodied citizen." Article 49 states that: "Both husband and wife have the duty to practice family planning." Not only does their constitution note that parents have the duty to rear and educate their children, it also states that children "have the duty to support and assist their parents."

Other provisions would also be out of place in our Constitution. Article 6 is designed to protect the socialist economic system (which supersedes the capitalist "system of exploitation") and applies the principle "from each according to his ability, to each according to his work." Article 10 proclaims that individual citizens have the right to own "lawfully-earned income, savings and houses," but the "land in the cities is owned by the state" and "land in rural areas is owned by collectives."

While Chinese leaders are proud of the expansion of individual rights recorded in their new constitution, they are defensive about westerners who emphasize China's lack of political and economic freedoms. In response, they argue that the right capitalist critics are most concerned about is the freedom to own private property and "to exploit laborers as much as possible." Western politicians, writes the *Beijing Review*, "place undue emphasis on personal human rights and advocate absolute individual freedom." To the Chinese, "class exploitation is the greatest social inequality" and their constitution's emphasis on the economic rights for *all* citizens—the right to a job, to free education, to health benefits, to old age care—is more important and valuable than the "bourgeois" emphasis on individual freedom to increase one's personal wealth.

How It Works

What is the role of lawyers under the new constitution? In China, the goal of lawyers for the defense and the prosecution is similar—"to seek the truth from the facts." Almost all Chinese lawyers work for the government that pays their salary. Therefore, citizens only pay a small service charge for legal assistance. In criminal cases, some defendants ask for lawyers; others get a friend or relative to speak for them. Many people go to a lawyer to make a will or to get help with questions of inheritance. But most civil matters are handled through mediation.

How does mediation work? In every district there is a mediation committee composed of older, "high-status" residents. Anyone who has a problem can go to the mediation committee. In a typical Peking district, the mediation committee last year solved 600 disputes. In the few they couldn't solve, such as difficult marital conflicts, the couples went to court and got divorced. In most districts, mediation is not voluntary. If the committee asks a citizen to talk with them, few citizens decline their invitation.

Mediation committees handle a great variety of disputes. One case, for example, concerned a resident with a quick temper who played his radio so loudly that it disturbed his neighbors. Mediators

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called all of the neighbors together and explained the need for quiet at night. The offending resident got the message and changed his behavior—"without confrontation and without losing face."

Another case concerned a husband who suspected his wife of having an affair because she came home late at night. The wife asked the mediators for help. She was an active member of the Communist Party who talked with fellow workers on Party business after work. The mediators met with the husband and wife. After hearing both sides, the committee criticized the husband for being too suspicious, the husband confessed his errors, and now, according to the committee, the husband and wife are living together in harmony.

Newspapers and LRE

In China, newspapers are an important vehicle for law-related education (LRE). First, they are a forum for citizens to protest discrimination and the violation of their rights. In most societies, there is a gap between what the law says and what citizens and bureaucrats do. This is certainly true in the People's Republic of China, where the gap is often reflected in the letters to the editors section.

In one letter, for example, a writer complained that despite government slogans, "Men and women are still treated unequally." Citing two examples that may not sound very foreign, the letter stated:

> When a university was choosing teachers from among its graduates, not a single female student was chosen. When recruiting workers, a factory required an extra ten points in job exams for female candidates. Their reasons are that women are physically weak, take maternity leaves, and have much housework to do.

Since the notion of sexual equality reflects a sharp break with long-established tradition, it is not surprising to find a gap between law and practice.

A second area of continuing conflict concerns the current official position that all types of "honorable labour"—both physical and mental—should be equally valued. But one writer complains that the "disastrous prejudice" of the cultural revolution—that only physical labor is honorable—still persists. For example, "young workers who study in their spare time or often visit libraries are criticized for not engaging in 'honest work.' In some cases part of their pay is deducted." The writer concludes that such actions and attitudes are wrong because "intellectuals are part of the working class and all workers need to have knowledge." Another writer defends professors who are criticized for criticizing Communist Party officials. He attacks "the old policies of discrimination against intellectuals" and concludes that "every person has a share of the responsibility for our country's fate, so why not intellectuals?"

Another way the government uses its newspapers to educate citizens about the law is through the publicity it gives to certain trials. To show the evil that comes from perpetuating bourgeois social distinctions in a "classless" Communist society, the newspapers gave extensive coverage to the trial of a college instructor who opposed her son's marriage to a less educated woman. Unable to convince her son not to marry someone beneath his status, the mother slandered the woman. As a result, the woman committed suicide, the mother was put on trial, found guilty and sentenced to jail for several years. In front page stories and editorials about the sentence, newspapers emphasized the justice of the verdict and the importance of enforcing the laws equally.

Street Corner Counsel

One interesting government effort to promote law education is taking place in the streets. Last year, the Ministry of Justice instituted two Legal System Publicity Weeks—one in January and another in May—in China's major cities. The main purpose was to explain the new constitution and "the requirement for government officials to abide by the law." The Ministry of Justice told all urban legal workers to participate.

The results were dramatic. In Peking, for example, more than 1,200 legal workers established dozens of free street-side legal counselling centers and set up over 140 legal education exhibits. According to the *Beijing Review*, they talked with over 500,000 citizens and answered over 7,000 specific questions. Most questions concerned property, marriage, inheritance and support of parents. For questions they could not answer immediately, law workers gave people appointments for later consultations.

In addition to Semi-Annual Legal System Publicity Weeks, the government teaches law to its citizens where they work through regular political study meetings. Currently, every work unit (which includes all schools, hospitals, factories, stores, communes, and government offices) devoted several hours per week to political study. A major focus of such study is an intensive examination of the 1983 constitution and other new laws as they are passed. For members of the Communist Party, additional study of the constitution and laws is usually required.

The most promising law-related education activities in China are in the teacher training colleges. During my visit there last year, I spent a day interviewing Ms. Tan Jun, a lawyer and professor at Beijing Teachers' College, who is one of the pioneers of LRE in China. We talked about her personal background, her goals and teaching methods, and her attitudes toward mediation, crime and rehabilitation.

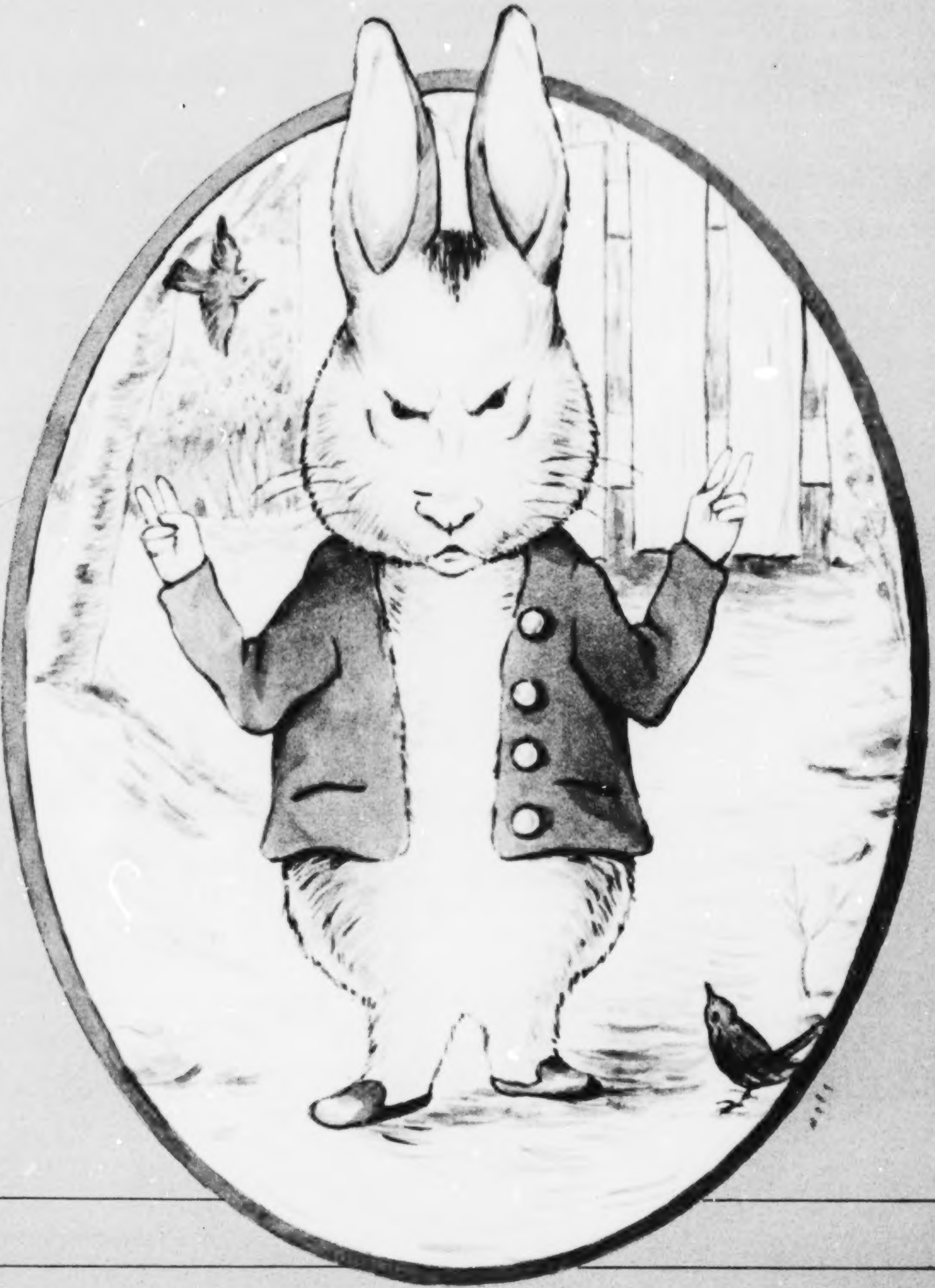
Before 1965, Tan Jun had worked as a lawyer in the prosecutor's office. During the Cultural Revolution, "leftists" dismissed her and all the lawyers in her office. They were replaced by loyal party members who decided who to investigate, arrest and prosecute. Their decisions were based on political ideology, not law. According to Tan Jun, "we suffered a lot during the Cultural Revolution because leaders invaded your home, sent people to jail and paid no attention to the law." In order to prevent another period of legal chaos, she believes it is important to educate all of China's children about the need for a rule of law. The problem is that most teachers do not know much about Chinese law. That s why the Ministry of Education now requires all normal schools to provide a basic knowledge of law to all prospective teachers. The next step is to introduce a course called "Basic Knowledge of Law" in the ninth grade of all middle schools.

How do you teach teachers about the law? Tan Jun explained that the text they used is entitled "A General Description of Law for College Students." It is a new book, based on the texts used by law students, "but a little less technical." There are chapters on constitutional theory, criminal law, civil law, domestic relations law, and criminal and civil procedure. Future texts will include sections on commercial and international law. There are no cases in the texts, but Tan Jun gets a few cases for her students from the courts. Since there are not many qualified law teachers, the courses are often taught by faculty from the political science departments. Most Chinese law teachers use the lecture method and allow students to ask questions.

Most teachers don't leave the classroom. But Tan Jun is an exception. When she teaches criminal law, she takes her students to visit a reform school and there they discuss the reasons for crime among

(*Continued on page 46*)

TEACHING ABOUT THE LAW



Judith Friedman

A Tale of Two Gates

Mr. McGregor and Mr. Magruder have a lot to teach us about law-related education

Why do we have law-related education? Why is it important? What's so good about it? How can it be done best?

Sometimes, in school and in the world, fables provide the best answers. I have called this article "A Tale of Two Gates" because two very different gates illustrate what law-related education is.

Gate #1

My first "gate" is Mr. McGregor's gate, the gate to his garden. You see, this garden was fenced in all the way around. The only way to get in was through the gate. And *who* was it that had a run-in with Mr. McGregor and his garden gate? Peter Rabbit! To remind you:

> Once upon a time, there were four little rabbits, and their names were Flopsy, Mopsy, Cotton-Tail and Peter. They lived with their mother in a sandbank, underneath the root of a very big fir tree.
>
> "Now, my dears," said old Mrs. Rabbit one morning, "you may go into the fields or down the lane, but don't go into Mr. McGregor's garden; your father had an accident there; he was put in a pie by Mrs. McGregor."

Now this is clearly a problem of right and wrong, of rules and transgressions. While it does not deal with constitutional rights or federal law, it does present essential concepts of law. Law-related education can use the case of Peter Rabbit. With it we can deal with what I call "personal" or "family" citizenship—instances close to home, where values compete, or fairness is in question; where someone's ideas of right and wrong are in conflict. Law-related education connects these little instances with the larger law and turns even Peter Rabbit into an opportunity for teaching.

Peter Rabbit could be used in lots of ways. Consider:

- What kind of accident did father have?
- Was it fair for Mr. McGregor to punish father so harshly? What could have been a fairer punishment?
- What rule did Mrs. Rabbit make for her children?
- Did Mrs. Rabbit have the authority to make this rule? Why?
- What reasons did she have for making this rule?
- Is it a good rule? Why?
- Do you think the four children will obey? Why?

And so on, almost indefinitely. The point is to link up very different levels—the concrete (Peter and Mr. McGregor), the personal (the experience that kids bring to the questions), and the abstract (large questions of principle; glowing, but hard-to-define concepts like justice). Even Peter Rabbit helps kids learn how to think.

Gate #2

My second "gate" is larger, newer and much more complicated, but it too can help students reason by providing a link between the concrete and the abstract.

> Once upon a time, there were four sneaky burglars, and their names were Haldemann, Erlichman, Magruder, and Hunt. They worked for the CREEP in Washington, underneath the cellars of a very big White House.
>
> "Now, my dears," said old Mr. President one morning, "you may go into their offices or down the lane, but don't go into the Democrats' garden. You might have an accident there that would put us all into a pickle."

Now you're all familiar with this story—it's become a major event in American history, and a story that each of us has lived through and vividly remembers. My second gate is Water-gate.

To most of us, the Watergate incident, and the long series of events that followed, was at the same time a shock, a revelation and a comfort.

- It *shocked us* to realize that we had elected a man as president who had to keep reminding us that he wasn't a crook.
- Watergate *revealed* to us the deep and inner workings of our legal system—at its highest and most abstract levels.

James G. Lengel

BEST COPY AVAILABLE

- Many of us were *comforted* that it all worked out—the crooks were brought to justice, even those who thought they were above the law; the legal machinery operated smoothly; 200-year-old constitutional principles were confirmed.

But how many citizens really understood the message and the meaning of Watergate? When Leon Jaworski reached back to the Constitution for his arguments in front of the Supreme Court; when he quoted from a previous decision of the Court, written by John Marshall in 1803; when the disputes between the three branches of the federal government came so clearly to the fore. How many of our students, or of the general public, knew the significance of these events for our republic?

Look at the answers some high school students gave.

We were talking with them about "*what the law is*" (the same question that John Marshall's and Watergate's Supreme Court were wrestling with). Here are some of their answers:

> "Law means cops going around and arresting you for jaywalking or every little thing you do. When you go to jail it means justice."
>
> "Law is a thing that people obey. It is a thing that if a person doesn't do what this law says then they are breaking the law and either get a warning or get sent to jail."
>
> "Law is a rule made up by government. You have to obey it or you get in trouble."

Now I ask you: Can people who reason and understand in this mode ever hope to make sense out of events such as Watergate?

Researchers have found that people go through three distinct stages as they grow in their understanding of the law and the legal system. The first stage—based on fear of punishment and employing simple, personal, selfish "cost-benefit analysis" to describe what's right and what's wrong—is exemplified by the students just quoted.

The second stage sounds something like this:

> "I think law is a well-organized way of keeping most people on the better side of life. Law is a way of protecting the people of the world."
>
> "Law is rules of obedience. Laws are made up for people to follow so there won't be so much violence. The world would be a mess if there weren't any laws."
>
> "Law is basic rules that society has set up to keep men from becoming animals."

These people have, at least, a social perspective, one that considers more than just their personal well-being. But note that they still see the law as negative—a necessary constriction on our tendency to "become animals." For them law is a restrictive, controlling force. But aren't you glad that force was there to control Nixon and Watergate, and to preserve the governmental order?

The final stage conceptualizes the law as a *positive* force—one that frees us, allows for social progress, helps us to live by higher principles.

Not too many kids, even in college, reach this level—but listen to their reasoning:

> "Law is a contract between citizens and the 'government,' used as a trade-off to protect individual rights and at the same time uphold order."
>
> "Law is a code set up ideally to enable society—and its individual members—to function most effectively. It must account for individual differences; its purpose is for progress."

The kinds of law-related education activities you see today in schools—case studies, roleplays, discussions of right and wrong, confrontations with controversial issues—have been a help in leading students on to this higher-level thinking. Law-related education stimulates development of more mature conceptions of the law—the kind necessary for a full understanding of Watergate, for instance.

But that's not all we're after. Most of us believe Richard Nixon understood Watergate—only too well! We believe he knew what was going on. But we want our students, the voters and presidents of the future, to have more than just sophisticated thinking. We *don't* want them, like Nixon, to fully understand, and then do the wrong thing. The preparation of good citizens is really our chief intent as educators.

The laws that set up schools in Vermont, and most other New England states, were put on the books in the 1700s and remain with us today. Those laws do not justify public schools in terms of reading or writing or math or even higher-level thinking skills. Vermont's original school law—still on the books—speaks of schools as places to teach "virtue and morality." It doesn't even mention the three Rs. And the earliest supporters of public schools—Thomas Jefferson, Horace Mann—saw them as "training camps for democracy," an essential element of the American experiment in self-government. They didn't give a hoot about SAT scores or the Dale-Chall readability formula.

The essence of the founders' citizenship is in *the law.* All of the principles that Jefferson and the others wanted Americans to understand, all of the concepts of government, can be illustrated best through legal cases and controversies. In fact, you *can't* understand government without understanding the law.

And through law-related education, we can teach these abstract principles through *concrete* cases and examples. From Clarence Earl Gideon, to Ernesto Miranda, Linda Brown, Dred Scott and even Richard Nixon—the simple cases of real people—we can teach the most complex notions of fair and unfair, right and wrong, just and unjust, equal and unequal—ideas that every citizen in this country should understand.

Through the Gates

Through all this—through both Mr. McGregor's gate and Watergate—law-related education breeds a spirit of *rationality*—a method for examining emotionally loaded questions in an orderly fashion; a way to move students from very human and controversial issues to larger concepts and principles. It is by the practice of this method that higher-level thinking skills are developed.

Law-related education can provide these methods to help us be more effective teachers. And they work—they have been known to have a positive effect on higher-level thinking and on juvenile delinquency.

We've talked about the *why* and *what* of law-related education. Now let's look at *how* it should be done.

First, we must begin with *concrete cases* of real people, police, defendants, plaintiffs. Use cases that are emotionally loaded; let the students' juices flow; have them identify with both sides of the issue.

Second, students must *analyze* the details of the case—pick it apart; identify the facts, the issues, the events and see it from all sides; coldly and rationally examine it.

Finally, they must be led to *connect* the case with others like it; with parallel cases in history; with their own personal experiences; with the Constitution, the Declaration of Independence and with larger legal concepts such as fairness, freedom, equality, authority and justice. We cannot, with kids, begin with the abstract. At the same time, we cannot stick with the factual and personal either. Successful law-related education moves them through all three steps. ☐

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Ban Vinai

(Continued from page 15)

countries. For example, one of the interpreters for the public health clinic was staying in Ban Vinai because his grandparents did not want to leave, and he was responsible for their care.

When refugees in Ban Vinai immigrate to the United States, families separated by hundreds of miles become separated by thousands of miles. Familes are often deprived of the leadership the elders provided and of the security of the extended family.

Another kind of family separation is imposed by U.S. immigration laws. According to these laws, in order to immigrate a man may only have one wife. Those who want to immigrate and have more than one wife are forced to choose one and divorce the others. These "castaway" wives are in a very difficult position. When a woman marries, she becomes a member of her husband's family. If he divorces her, she loses her status in the community.

U.S. immigration people are in the camp, giving refugees information about our country, talking to them of relatives who have already come to the United States, trying to inform them of our laws and how they affect their chance to immigrate. Mostly, the immigration people listen well and are sympathetic. Many of them are ex-Peace Corps workers in their early to mid-20s. They have had other experiences in the Third World and seem to do their best to help.

For example, to avoid breaking up families they sometimes suggest to men with several wives that one of the wives be listed as "spouse" and others as "cousins" so that all can immigrate together.

Other officials visiting the camp come from the United Nations High Commission for Refugees.

Some of the refugees may want to return to Laos, but it is not safe for them to do so. However, there are rumors of an active underground making periodic excursions back and forth across the Mekong.

Saying Good-Bye

The problems and traumas of immigration are different for each family. Those who cannot or will not immigrate watch other family members leave for the U.S. and wait anxiously for news of relatives still left in Laos.

For those who do immigrate, uncertainty lies ahead. I watched refugees board buses for Bangkok and the long trip to the U.S. Family members wept as some of them got on the bus and others stayed behind, the final and perhaps irreversible separation. Would they fit in, find work in a new land? Would they be safe? Could they cope with a technological and totally alien society thousands of miles away? What would happen to their intricate family structure?

Many refugee camps in Thailand are now closed, and most people who passed through there have gone on to new homes. They are making the same hard trip that millions of immigrants have, but in their case, it's a trip in time as well as space, a journey to a world totally different from the one they know.

No matter where they ultimately arrive, they face many uncertainties. But all in all, their time in camp was a positive experience, providing medical care, giving an introduction to the West and its ways and preparing them—at least in small part—for what is ahead. □

Dazed and Alone

The hot sun seemed relentless after Minnesota in January. The semi-sweet odor of decay was everywhere. In Bangkok, cars, taxis, samlars, motorcycles and buses jostled noisily for position on the street. Ornate temples stood near crowded shops and markets, and the Chao Phraya River was crowded with boats of all sizes, even a floating market. Beggars mingled in the streets with impeccably dressed Thai men and women.

About ten days earlier, with the blessing of my husband and children, I'd hastily made the decision to work in Ban Vinai as one of a team of medical volunteers. I'd been immediately caught up in preparations: getting shots, shopping for clothes, borrowing mosquito netting from a friend who was an avid camper.

The American Refugee Committee had assembled this medical team, and we had been through two days of orientation in Minneapolis, but nothing could have prepared me for what I was about to experience, for the confusion and uncertainty I felt.

After an all-night bus to northern Thailand, we took a van to Ban Vinai. My introduction to life in Ban Vinai was a sign on a latrine door: "Instructions on Asian toilets for farangs" (the Thai word for foreigners). Even the simplest actions would now be complex. I couldn't take anything for granted any longer.

The camp's hospital did not offer sterility, privacy, clean white sheets or abundant medical supplies. Patients lay on bamboo mats placed on wooden platforms. They were covered with dingy blankets. The windows had no screens, so there were more flies than patients in the hospital. Sometimes, because family members came to stay with the sick person in the hospital, there was more than one person in a bed.

For much of my stay, my home was the end room in a bamboo and thatched long house about a half mile from the hospital. The other rooms were inhabited by Hmong families. Our next-door neighbors were Ghia Vang and his family. Ghia Vang had a son living in the Twin Cities and hoped to join him soon. We spent evenings on the porch visiting with his family, teaching the children American songs, listening to them sing Hmong songs, and getting to know about their culture while they learned about ours.

One of my first mornings in the camp I was awakened by a strange, high-pitched wailing inside the building in which I slept. When I arose, I learned that a nearby family was mourning the death of a 14-year-old girl.

Later that day, another volunteer and I went to pay our respects. The dead girl lay on a litter in the middle of a one-room house. She was dressed in Hmong ceremonial clothing—an ornate multi-colored skirt and black blouse and a heavy silver necklace. A bowl of rice, a few eggs and a crossbow, necessities for her journey to the afterlife, sat near her on the floor.

In my world, 14-year-old girls grow to be women, and death is reserved for the elderly. Throughout the day, the sound of the death gong reminded me of the death of the girl, only two years older than my own daughter.

Whatever Happened to the Fourth Amendment?

Last term, the Supreme Court handed down decisions which drastically change the legal meaning of search and seizure

In what is likely to be a watershed term, the Burger Court has finally taken its long awaited turn to the right. In granting the requests of the Reagan administration in the fields of law enforcement, civil rights, and assorted areas of constitutional law, many observers feel that the Court loudly proclaimed its liberation from the legacy of the Warren era. In so doing, it issued decisions that prompted a storm of controversy with potential political ramifications. Relations within the Court itself appear to be strained, with several justices publicly criticizing their colleagues for broad, ill-considered opinions in cases that could have—and should have—been decided more narrowly.

It's been a long time since the Supreme Court was a hot political issue, but it is one now. With the elections upon us, and at least four justices approaching retirement, the future of the Supreme Court may be in the hands of the next president. And, as this term clearly shows, the choice of justices will—sooner or later—make a difference.

Robert Hayman

Criminal Law

Good Faith Exception to the Exclusionary Rule

O for the exclusionary rule . . .

Perhaps no rule of law has generated as much controversy as this much-maligned doctrine, which forbids the use of evidence obtained as a result of unconstitutional government conduct. The rule, first fashioned for the federal courts in 1914 and applied to the state courts since 1961, has suffered a stormy history that may be unrivaled in jurisprudence.

The idea was never such a bad one. By prohibiting the use of illegally obtained evidence, the Court sought to deter official misconduct; a zealous law enforcement officer had nothing to gain from an illegal search if the evidence would be inadmissible. But almost from the start, the rule was assailed by critics who envisioned hordes of criminals returning to the streets by exploiting legal loopholes. As a result, the rule was blown out of proportion, cut down to size, riddled with exceptions, crippled by caveats, and misunderstood by everyone from Archie Bunker to the President of the United States.

As the creator of the rule, the Supreme Court has not been unaware of the controversy surrounding its progeny. Thus, from time to time, the Court has responded to the demands of—and for—law enforcement by limiting the impact and application of the exclusionary rule. But like parents disciplining an only child, the Court's actions always seemed to reflect the belief that the rule was basically a good one, just a bit ornery. To its impatient critics, the Court seemed to say: "trust us; just give it some time, and some space for growing pains, and you'll come to appreciate it, too."

Appreciation, however, has come slowly, and the rule's defenders have grown increasingly self-conscious. With the gradual turnover on the Supreme Court, the rule lost its strongest supporters; doting parents were replaced by pragmatic guardians that had no fondness—and little patience—for the unpopular ward.

Still, the combination of respect for the past, and some palsying doubts about the future, kept the Burger Court from reining in the rule in any major way. But, to most observers, it was just a matter of time . . .

Last term, the time may finally have come. On the final day of the term, the Court rendered its long-awaited and much-ballyhooed decisions on the "good-faith exception" to the exclusionary rule. In the sensational cases of *United States v. Leon,* 104 S. Ct. 3405, and *Massachusetts v. Sheppard,* 104 S. Ct. 3424, the Court held that the exclusionary rule does not bar the use of evidence obtained in violation of the Fourth Amendment if the police acted in objective good faith reliance on a warrant that later proved to be defective.

The facts of both cases were compelling. In *Leon*, federal officials had obtained evidence of a major drug operation; the trial court, however, held that the search warrant they relied on was not supported by probable cause. In *Sheppard*, evidence of a murder was obtained in a search based on a warrant that was technically defective: the magistrate had used the wrong form.

With facts like these, the Court had little difficulty justifying the need for its good faith exception. The exclusionary rule, the Court claimed, was a judicially created remedy for Fourth Amendment violations; it was justified by expediency, not mandated by the Constitution. Its continued vitality required a showing that its benefits outweighed its costs. In these cases, the Court held, that showing could not be made.

The costs, the Court noted, are tremendous: under the rule, criminals go free. Although many researchers have concluded that "the impact of the exclusionary rule is insubstantial," their conclusions are based on the small percentages of court cases which are affected by the rule, percentages "which mask a large absolute number of felons who are released [before trial] because the cases against them were based in part on illegal searches and seizures."

As for the benefits, they are purely speculative, and wholly absent in cases like these. The rule is traditionally justified by its deterrent effect on police misconduct; for three reasons, that rationale fails here. First, the police here are guilty of no misconduct; it was the magistrates who erred, and the rule was never intended to punish the errors of magistrates. Second, there is no evidence that magistrates have ignored or subverted the Fourth Amendment, and no reason to worry that they will. Finally, there is no reason to believe that the exclusionary rule could deter any misconduct by magistrates since, unlike police, they have no interest in securing convictions; why, then, should they care whether evidence is admitted or not?

The Court concluded that the exclusionary rule affords no benefits as a deterrent in cases where the police acted in the good faith—albeit mistaken—reliance on the erroneous decision of a magistrate. As a result, evidence obtained as a result of their actions should be admissible in court.

The decision was not unanimous. Justice Brennan, joined by Justice Marshall, declined the majority's invitation to enter their "curious world, where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with the wave of a hand." Brennan maintained his belief that the exclusionary rule was not a rule of expediency, but was constitutionally required to protect Fourth Amendment rights. With its contrary ruling, Brennan declared in a compelling if overstated summary, "it now appears that the Court's victory over the Fourth Amendment is complete."

Brennan mockingly referred to the new caveat as the "reasonable mistake" exception. He predicted a new wave of Fourth Amendment violations for two reasons. First, he said, by rewarding the officers' "good faith" mistakes, the Court's decision placed a premium on "police ignorance of the law." Second, the Court was now inviting magistrates to be "rubber stamps" or worse for warrants, since their decisions—and their mistakes—would from now on be insulated from review by higher courts.

In a separate dissent, Justice Stevens observed that the new good faith exception was wholly unnecessary; the evidence in both cases may have been admitted under existing law. "It is disturbing," he wrote, "that the Court chooses one case in which

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there was no Fourth Amendment violation, and another in which there is grave doubt on the question, to promulgate a 'good faith' exception. . ."

Moreover, Stevens maintained, even if the issue were properly before the Court, the majority's decision was unacceptable. He acknowledged the public's growing dissatisfaction with the exclusionary rule, as well as the legitimate needs of law enforcement, but maintained that there were overriding concerns. He concluded as follows:

> We could, of course, facilitate the process of administering justice to those who would violate the criminal laws by ignoring the commands of the Fourth Amendment—indeed by ignoring the entire Bill of Rights—but it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency. In a just society, those who govern, as well as those who are governed, must obey the law.

Controversy over the new good faith exception has not been limited to the Court; indeed, it has revived arguments over the merits of the exclusionary rule that many had assumed had been long settled. Whether the new exception will make a real difference is difficult to say. Perhaps, as with the exclusionary rule itself, the verdict can come only with time. As Justice Blackmun wrote in his concurring opinion to *Leon*:

> If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

Miranda Revisited . . . and Revised

At some point, every television police drama features the same scene: the grizzled police sergeant chases down the young hood, pins him to a chain link fence, handcuffs him, and holds him captive until his rookie partner arrives. "Read him his rights," the sergeant instructs the rookie, as he spits on the ground, adjusts his cap, and limps into the sunset in search of a beer or another young hood.

What the rookie cop reads to the young hood is not, of course, a complete list of the suspect's rights; that would take all of prime time. What the rookie actually reads are the Miranda warnings, (or the TV version thereof), a limited summary of the rights of the accused formulated by the Supreme Court in the famous case of *Miranda v. Arizona.* We all know the Miranda monologue:

> You have the right to remain silent; anything you say can be used against you in court.
>
> You have the right to an attorney, and to have your attorney present during questioning.
>
> If you cannot afford an attorney, one will be appointed for you before any questioning begins.

If the rookie forgets to read the Miranda warnings, the sergeant's work does not go down the drain. Failure to inform a suspect of his Miranda rights does not invalidate an arrest, but it does preclude legal interrogation. Thus if the rookie fouls up, the arrest still stands, but under the Miranda rule, the rookie cannot question the suspect—and expect to use the answers in court—until the warnings have been read. Otherwise, the answers would be obtained in violation of the Fifth Amendment prohibition against compelled self-incrimination (the "right to remain silent"), and the Sixth Amendment's guarantee of counsel (the "right to an attorney").

The Miranda rule has generated a fair amount of controversy over the years. Critics say it caters to the accused at the expense of efficient law enforcement. Still, for seventeen years, the rule has remained intact, unencumbered by the exceptions and fine distinctions that pervade other areas of criminal law.

That record may have ended this term. In the case of *New York v. Quarles*, 104 S. Ct. 2626, the Court held that the Miranda rule was subject to a "public safety" exception: questioning can proceed without the Miranda warnings—and the answers will be admissible in court—if the public safety demands immediate action.

In *Quarles*, New York police officer Frank Kraft had traced a rape suspect, Benjamin Quarles, to a Queens supermarket. There, Kraft, with assistance from three other officers, cornered Quarles and placed him under arrest. After cuffing the suspect, and in the course of frisking him, Kraft discovered an empty shoulder holster. "Where's the gun?" the officer asked, and Quarles told him. After retrieving the gun, Kraft read Quarles his Miranda rights.

Quarles was charged with illegal possession of the gun (the rape charges were not pursued). That case fell through when the trial court held that the gun—and the statement leading to its discovery—were inadmissible since they were obtained in violation of the Miranda rule.

The Supreme Court reversed this decision, holding that the gun posed a risk to the public safety, and that "concern for public safety must be paramount to the literal language of the rules enunciated in *Miranda*." Where public safety is at stake, the Court held, officers can ask questions first, and give the Miranda warnings later.

The majority opinion drew dissents on three grounds. Justice O'Connor lamented the decision to blur *Miranda*, and subject it to the "hair-splitting distinctions that plague Fourth Amendment law." Justice Marshall, in an opinion joined by Justices Brennan and Stevens, warned of a "new era of post-hoc inquiry"; the public safety, he warned, will be used as a post-hoc (after the fact) excuse for all sorts of police misconduct. Moreover, he wrote, the decision reflects "a serious misunderstanding of *Miranda*" in which the protections of the Fifth and Sixth Amendments are sacrificed to the "public safety" as the result of a "judicial balancing act." The sad result, he concluded, is that the Court had now endorsed "the introduction of coerced self-incriminating statements."

. . . and Reaffirmed

As if to balance the controversy generated by the *Quarles* decision, the Court soon followed with an apparent affirmation of the continuing vitality of *Miranda*. In *Berkemer v. McCarty*, 104 S. Ct. 3138, the Court reaffirmed the well-established proposition that "a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards of *Miranda*" even where the suspect is in custody only for a misdemeanor or other minor offense. In rejecting the argument that *Miranda* should only apply to serious, felony offenses, the Court declared that it was "unwilling so seriously to impair the simplicity and clarity of the holding of *Miranda*."

The Court went on to find, however, that simple traffic stops do not ordinarily constitute "custodial interrogations" for Miranda purposes. The Court held that a person is "in custody," and entitled to the Miranda warnings, only when their

(Continued on page 48)

1459

LAW IN THE 80s

Albie Davis

Justice Without Judges

New ideas on conciliation come out of a decade of conflict

It's 2:30 in the morning. You have finally fallen asleep in spite of the noisy party upstairs. Suddenly you are jolted awake by a crashing sound on the stairs. You go out into the hall. Nancy Chaney, 19, daughter of the upstairs tenant, is there with her boyfriend. Both are drunk and laughing loudly. You yell at her and tell her she's thoughtless and good-for-nothing. She screams some obscenities at you. You push her away from your door and tell her that she's a bad influence on your children. She tells you that you are old and don't know what it means to have fun. You shove her away again and say that you will call the police if she doesn't quiet down. She tells you to keep your hands off of her, and she picks up a broom and hits you with it, at the same time breaking the glass on your front door. You are furious. You call the police. The police arrive, survey the scene, tell Nancy to go upstairs, and send her boyfriend home. They suggest that you file a complaint the next morning at your local court.

At the court, you tell the clerk your story. If you persist in pressing your complaint, your dispute will be given a name, for crimes cannot be invented on the spot; they must be defined in advance. You choose from Assault and Battery with a Dangerous Weapon, Disturbing the Peace and Malicious Destruction of Property. If Nancy is found guilty of one of these crimes, she has offended the state and the state could fine or imprison her, keeping the money for itself. You are angry at Nancy, and even more angry at her mother, who you feel is too lax in discipline, but you don't want Nancy in jail. You want her to make an apology. You want your window fixed, and you want to be able to live in your apartment in peace. You feel stuck.

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Herbert Jackson

Don't Litigate—Mediate

In communities with neighborhood justice centers, you might have another option. You could ask that your case be mediated. Instead of having attorneys present your dispute to a judge in a formal court setting, you and Nancy Chaney could work with trained community mediators in an informal setting to come up with a settlement that is agreeable to both of you.

In those centers which are affiliated with the courts, the clerk or even the police might be on the lookout for cases which would be better served by mediation than by adjudication. In making this recommendation, the clerk will use as a primary criterion the nature of the relationship between the parties to the dispute. Are they family members, neighbors, landlord and tenant, employer and employee? Will they have to live together or work together after the dispute has been processed?

A second criterion is the seriousness of the crime. Is the offense so serious that the state has an interest in prosecuting the potential defendant in order to protect the public or establish a precedent? Some dispute resolution centers set this criterion by definition; they only handle misdemeanors. Other centers make the determination on a case-by-case basis. Many are successfully mediating cases which could be designated as felonies.

In Brooklyn an experimental center has been established to mediate felonies only. It was initiated in response to a study by the Vera Institute of Justice, which found that in New York felony cases among acquaintances were generally not successfully prosecuted, although such cases comprise a large proportion of the court's caseload (56 percent of violent crime cases). Most were dismissed because victims wouldn't cooperate. In Washington, 75 percent of assault cases involve persons with prior relationships, and nearly 90 percent of these cases are also dismissed.

Why is the nature of the relationship a criterion for deciding if a case should be mediated? People who have been in each other's lives in the past usually will remain so. The win-lose outcomes obtainable in court do little to improve the way in which they will treat one another in the future. If Nancy Chaney is indeed found guilty of Assault and Battery with a Dangerous Weapon and is placed on probation, you and she will still have to go in and out the same front door. She may be holding a grudge against you because you filed the charges. The next noisy party could lead to an even more violent outburst. Certainly every meeting will be strained and unpleasant. She may pay a fine to the state, but you will have to pay to fix your own window. You will both be feeling bitter.

(Continued)

Additionally, the roots of many family and neighborhood disputes often go beyond a particular incident. If a stranger hits you over the head and grabs your wallet, the story is simple, and you may feel that he or she should be put in jail as punishment and as a way of protecting others from the same fate. But when your neighbor kicks in your taillight because you've been parking in front of his house, you may remind him of the time that his dog dug up your geraniums, and he will tell you that the people who used to live in your house kept it up better than you do, and so on. If such a dispute is handled in court, strict rules of evidence prohibit the parties from uncovering and dealing with what may well be the actual causes of the controversy.

Take the case of Nancy Chaney. The following information is essential to truly understand—and deal with—the situation. The woman who filed the complaint, let's call her Mary Dombrowski, had been bitter about the upstairs neighbors for three years. The landlord had promised her that he would not let anyone move in who had children, because Mary was trying to study to get a college degree and she needed quiet. She was horrified when she saw Sally Chaney, Nancy's mother, move in with four children. Although Mary was a single mother with two children of her own and understood how hard it was to find a suitable apartment, she was angry that the Chaneys had moved in upstairs. Furthermore, Mary's own teenage years had been rough ones, and she was afraid that Nancy Chaney was going down the same path. She felt that Sally Chaney should do something about Nancy's behavior immediately, before it was too late.

Sally Chaney, on the other hand, could never understand why Mary was so unfriendly. She felt since they both had young children they had a lot in common. When she first moved in she had hoped to become friends, but she found Mary hot tempered so she kept out of her way and encouraged her children to do the same. Sally was also worried about her daughter but didn't know how to handle her. Nancy, the nineteen-year-old, was frustrated. She wanted to move out of the apartment into a place of her own, but she didn't have the money. She was tired of always walking on eggshells to keep from irritating Mary Dombrowski.

Preliminaries

When Mary Dombrowski told the clerk about her complaint, the clerk suggested that Mary try mediation, giving her a brief explanation of how it worked and directing her to the neighborhood justice center. At the center, a caseworker talked with Mary to find out more about the dispute and to obtain the information necessary to make contact with Sally and

Defining the Terms

The strength of a society can be measured in its ability to respond to change by modifying outdated institutions and inventing new ones. During intense periods of institutional change, vocabulary becomes fluid as practitioners and the public search for appropriate new words and develop novel definitions for old words to accurately describe an emerging field. For example, to some, mediation means any effort by a third party to reconcile two people in conflict. To others, it connotes a precise process and a set of learned skills. Some of the newer words growing out of the contemporary movement include "Rent-a-Judge" to describe a private variation of the adjudicative process or "Med-Arb" to highlight a hybrid combining mediation and arbitration. The following definitions of terms used in mediation and dispute resolution appear in *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, a January 1984 report available from the U.S. Department of Justice. Here are some of the words you need to know.

Alternative Dispute Resolution mechanisms or techniques generally are intended to mean alternatives to the traditional court process. They usually involve using of impartial intervenors who are referred to as "third parties" (no matter how many parties are involved in the dispute) or "neutrals."

Alternative dispute resolution is not a new concept to the judiciary. Many states encourage diversion programs which remove less serious criminal matters from the formal administration of justice system. Most civil cases are settled before going to trial by using a variety of techniques to bring about voluntary settlements, including pretrial settlement conferences, mediation by magistrates and, at times, mediation in chambers by the judge.

Arbitration, widely used in commercial and labor-management disagreements, involves submitting the dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is less formal and less complex and often can be concluded more quickly than court proceedings. In its most common form—binding arbitration—the parties select the arbitrator and are bound by the decision, either by prior agreement or by statute. In last offer arbitration, the arbitrator is required to choose between the final positions of the two parties. In labor-management disputes, grievance arbitration has traditionally been used to resolve grievances under the provisions of labor contracts.

Conciliation is an informal process in which the third party tries to bring the parties to agreement by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally, or, in a subsequent step, through formal mediation. Conciliation is frequently used in volatile conflicts and in disputes where the parties are unable, unwilling or unprepared to come to the table to negotiate their differences.

Fact Finding is a process used from time to time in public sector collective bargaining. The factfinder, drawing on both information provided by the parties and on additional research, recommends a resolution of each outstanding issue. It is typically nonbinding and paves the way for further negotiations and mediations.

Mandated Settlements and Negotiated Settlements. Alternative dispute resolution techniques involving the use of neutrals are often divided into two categories: 1) settlements negotiated by the disputants, and 2) settlements mandated by a third party. A more recent development has been the merging of the two; if the parties are unable to resolve their differences voluntarily, the third party is authorized to dictate the settlement.

Nancy Chaney. A call was made to the Chaneys, and, after some questioning of their own, they agreed to mediate. A mutually agreeable time was set, 7:00 p.m. on a Wednesday evening two weeks away, so no one would have to take time off from their jobs.

The caseworker looked over the list of trained volunteer mediators, people of all backgrounds, to see who would be available on Wednesdays and which two mediators would best "mirror" the parties. (Although it is not always possible to select mediators from the same background as the parties to a dispute, in many multi-cultural neighborhoods some attempt is made to assure clients that their point of view will be understood. For example, in a conflict between a black family and a white family, a black mediator and a white mediator will work together as a team. In male-female disputes, a male and a female mediator will most often be used. Many use two mediators. Some programs use a single mediator and others, such as the San Francisco Community Boards, as many as five.)

On the evening of the mediation session, the mediators—a 20-year-old man, Matthew Johnson, and a 35-year-old woman, Pat Feeney—arrived fifteen minutes early in order to agree upon their roles and prepare the mediation setting. They were purposely given little information about the case, no more than, "This is a dispute between Mary Dombrowski and Nancy Chaney. They are neighbors. Mary accused Nancy of Assault with a Deadly Weapon. Nancy has brought along her mother. The clerk wants to hear from the mediation unit within two weeks." Many centers prefer to give their mediators only a bare framework of the dispute, so they can demonstrate to the parties convincingly that they enter the case free of preconceptions.

Prior to working on their first case, the mediators had participated in a forty-hour course which prepared them to handle this kind of neighborhood dispute. (Training programs vary from 20–60 hours, with the average being between 30–40 hours.) During their training, which consisted primarily of simulations of actual mediation sessions, they played three roles, each several times—mediator, party to a dispute, and active observer of the entire process.

Mediation looks deceptively simple, until it is tried. Certain habits must be unlearned. Multiple skills must be mastered and applied simultaneously. Novice mediators learn first to put the parties at ease and to gain their trust. Active, empathic listening is essential, as are the abilities to frame questions well in order to identify issues and interests; to tease out the positives; to know when and how to transmit information and terms and to generate options. Mediators also must know how to eliminate extreme positions, reduce defensive behavior and manage conflict. All the while they must work to build the will to settle and to help the parties shape the settlement. Finally, the agreement must be put in writing. In programs that use more than one mediator, team work becomes paramount.

The lessons learned while playing the role of a party to a dispute are less obvious at first glance, but equally as important. As disputants, mediation trainees become the litmus paper for how well a mediator is able to demonstrate that he or she is handling a case effectively, is not giving advice, showing shock, cross-examining, patronizing, letting one party take control, moralizing, counselling, buying one side's story, psychoanalyzing, dominating or doing anything else which shuts down communication and diminishes or destroys trust.

In the role of observer, the trainee is free from the tension of acting as a mediator or the emotional involvement of playing a person involved in a conflict. The trainee can observe the interaction between mediator and the parties and can note how well the mediators work together in their planning sessions. This opportunity for distance is also a critical aspect of mediation training.

A Case to Mediate

From the outset, the mediators did all they could to set Sally and Nancy Chaney and Mary Dombrowski at ease. In court,

(*Continued on page 53*)

Med-Arb is an innovation in dispute resolution under which the med-arbiter is authorized by the parties to serve first as a mediator and, secondly, as an arbitrator empowered to decide any issues not resolved through mediation.

Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach a settlement but is not empowered to render a decision.

Neighborhood Justice Centers (NJC) now exist in about 250 localities throughout the country, under the sponsorship of local or state governments, bar associations and foundations. NJCs deal primarily with disputes between individuals with ongoing relationships (landlord-tenant, domestic, backyard conflicts, etc.). Many draw their caseloads from referrals from police, local courts or prosecutors' offices with which they are affiliated. The dispute resolution techniques most often offered by the centers are mediation and conciliation. Some centers employ med-arb. Referrals to other agencies are a common feature. Many centers earn some income providing training and technical assistance services. They are also known as community mediation centers, citizen dispute centers, etc.

An *Ombudsperson* is a third party who receives and investigates complaints or grievances aimed at an institution by its constituents, clients or employees. The ombudsperson may take actions such as bringing an apparent injustice to the attention of high-level officials, advising the complainant of available options and recourses, proposing a settlement of the dispute or proposing systemic changes in the institution. The ombudsperson is often employed in a staff position in the institution or by a branch or agency of government with responsibility for the institution's performance. Many newspapers and radio and television stations have initiated ombudsperson-like services under such names as Action Line or Seven on Your Side.

Rent-a-Judge is the popular name given to a procedure, presently authorized by legislation in six states, in which the court, with the agreement of the parties, can refer a pending lawsuit to a private neutral party for trial with the same effect as though the case were tried in the courtroom before a judge. The verdict can be appealed through the regular court appellate system.

World Court

(*Continued from page 7*)

of the court.

Judge Taslim O. Elias of the International Court of Justice has noted a number of contemporary questions needing resolution. He says the International Court of Justice could serve a valuable role by elucidating human rights, diplomatic law, the law of the sea, wars of national liberation and humanitarian law, and the legal aspects of the new international economic order.

It is certainly valid to ask whether the International Court of Justice can be a force for peace. International justice is an ideal obviously not yet achieved. Nevertheless, justice is as dear to mankind as is the idea of peace among peoples.

Although neither the United Nations nor the International Court of Justice have achieved their ultimate purposes "to save succeeding generations from the

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Dustbin of History Clogged with Rejected Treaties

Charles White

The story of Woodrow Wilson's struggle to win ratification of the Versailles Treaty has become part of American political mythology. Faced with a Senate demanding reservations that seemed likely to doom the treaty that would establish the League of Nations and create a new world court, Wilson embarked on a cross-country speaking tour, appealing to the people directly over the heads of the senators. Exhausted, pushing himself beyond endurance, he fell to a massive stroke which at once incapacitated him as a political leader and ensured defeat of the treaty.

This struggle is just the most dramatic example of a conflict between branches of government that is almost inevitable under the Constitution. By requiring that all treaties by approved by at least a two-third majority in the Senate, the founders guaranteed bitter controversy between a succession of presidents and the Senate.

The requirement has resulted in the defeat of scores of treaties, in some periods permitting only the most innocuous, routine documents to be ratified. Other treaties have been substantially amended because of Senate demands. (Technically, the Senate does not amend treaties, but rather expresses reservations, which are then conveyed to the negotiators and added to the document if the other side is amenable.) The Connolly amendment, which limits U.S. participation in the current world court, was a reservation expressed by the Senate while considering the treaty by which the U.S. became a member of the United Nations. Recent debate over arms limitations treaties have seen the Senate demand clarifications, new language, stronger guarantees.

A Flaw in the Charter?

American history texts usually speak in glowing terms of the founders and treat the Constitutional Convention like a New World version of an ancient Greek symposium—a gathering of wise, foresighted men who created a document that has stood the test of time amazingly well.

The treaty provision may be one of the exceptions to this idealized picture. Though it has served several important goals, such as assuring that important treaties will be thoroughly debated and will require the support of a large majority of the people if they are to pass, all too often partisan wrangling has made the adoption of any treaty—good or bad—virtually impossible.

The cause of bitter debates in later years, the treaty provision was little debated at the time. James Madison's record shows that the question of who was to make treaties for the new government was discussed for only a small part of three days.

According to W. Stull Holt (*Treaties Defeated by the Senate*, Baltimore: the Johns Hopkins Press, 1933), the founders were not bothered by the question of "whether the treaty-making power was executive or legislative, or by contests between the two departments over control of that power, because under the Articles of Confederation, Congress was both legislative and executive." An early draft gave treaty-making power solely to the Senate: "The Senate of the United States shall have power to make treaties, and to appoint ambassadors, and judges of the Supreme Court." However, Madison "observed that the Senate represented the states alone, and that for this as well as other obvious reasons, it was proper that the President should be an agent in treaties."

As Holt points out, men representing large states, partisans of the strong executive and nationalists did not want the Senate alone to have the treaty-making power, but the insistence of those from the small states and the prevailing distrust of executives precluded the possibility of giving it solely to the President. Thus was struck the compromise of the President making treaties and the Senate concurring in or rejecting them. (Moves to include the House of Representatives in the treaty-making power were defeated both for reasons of secrecy in the treaty-making process and because of the need for quick action.)

The founders were well pleased with this arrangement, since they believed strongly in a system of checks and balances. Indeed, to the extent that they voiced any criticism, it was that it might be too easy to make treaties with two-thirds of the senators concurring, not that it might be too difficult.

The founders did not envision the development of political parties (in themselves a powerful check on unrestrained government) and thus did not foresee that treaties might fall victim to partisan squabbles. If treaties only required a Senate majority, they would be no more affected by politics than any other legislation. But the two-thirds provision—which has the laudable result of checking hasty action—also greatly increases the likelihood of partisan stalemate, as well as embarrassment to the government which cannot bring the political apparatus into line behind agreements it has negotiated.

Working Out the Wrinkles

At first, it was uncertain what the precise role of the Senate should be. Should it review treaties after they were agreed to, or should it take part in the negotiations? George Washington closely involved the senators in negotiations of one treaty, with an unfortunate—if predictable—result. According to John Quincy Adams:

scourge of war" (first sentence of the Charter of the United Nations), it is easy to agree with George Elian, former Vice-President of the Supreme Court of the Socialist Republic of Romania and Ambassador to the United Nations, when he says: "We nourish the hope that the problems regarding the improvement of the activity in this domain should find their solution in the not too distant future."

The reality of thermonuclear war leads us to recognize "that we live in a jungle world imperfectly ameliorated by humanity's continuous struggle against unreason," according to Professor Anand. With this reality in mind, it is certainly worth our effort to continue attempts to resolve disputes in a reasoned and legal manner. The International Court of Justice may still be one of the world's best hopes to resolve conflicts between and among nations in this imperfect jungle world. □

> They debated and proposed alterations, so that when Washington left the Senate-chamber, he said he would be damned if he ever went there again. And ever since that time treaties have been negotiated by the Executive before submitting them to the consideration of the Senate.

In the early years of the republic, the United States was an isolated, minor power, and most of the treaties negotiated were routine and of small importance. All but a very few were approved by the Senate, although often after partisan maneuvering. Beginning in the 1840s, more and more treaties were negotiated, and more rejected. After the Civil War, treaties became a part of the bitter struggle between President Andrew Johnson and Congress, and even after Johnson had left office, the Senate was, according to historian Holt, "engaged in a constant campaign, sometimes marked by spectacular events and sometimes passing unnoticed, to establish itself as the dominant part of the government." From the Grant administration to the end of the Spanish-American War, the Senate approved only one major treaty and defeated all others of significance. Even the treaty ending the Spanish-American War was approved only by a narrow margin, after a tough political fight.

Under the next three presidents—Theodore Roosevelt, William Howard Taft, and Woodrow Wilson—the Senate engaged in bitter contests over treaties, causing one Secretary of State, John Hay, to grumble:

> Now the irreparable mistake of our Constitution puts into the power of one-third plus one of the Senate to meet with a categorical veto any treaty negotiated by the President, even though it may have the approval of nine-tenths of the people of the nation.

This era culminated in the defeat of the Versailles Treaty, quibbled to death by dozens of reservations added by the Senate.

Maneuvering Around the Obstacle

Almost since the beginning, presidents have attempted to find a way around the need to persuade two-thirds of the Senate that a treaty should be approved. At times, presidents have labeled international agreements "protocols," on the theory that these agreements would not require congressional approval.

A similar stratagem is much used today. Presidents routinely make "executive agreements" with foreign powers, which do not require two-thirds approval by the Senate. Even if they require expending money, they can be approved as any other legislation, by a simple majority of the House and Senate.

Perhaps the most important means of limiting the potential harm of the two-thirds requirement is not a matter of law or semantics, but an unspoken understanding. Since World War II, a tradition of bipartisanship has dominated the foreign affairs of the United States. Gone are the days of open warfare by one party on the foreign policy positions of the other. Though individual foreign policy decisions—such as the war in Vietnam—may be unpopular, support or opposition tends to be personal, not partisan. Now the parties at least give the appearance of statesmanship when considering agreements between nations, and thus it is far less likely that one party will use its strength in the Senate to defeat, delay, or amend a treaty prepared by the opposition.

Nonetheless, the treaty provision remains, and presidents have often found it advisable, especially for truly important international agreements, to label them treaties and to submit them for formal Senate approval. This political necessity led to the bitter fight over the treaty ceding American dominance of the Panama Canal—finally approved by the narrowest of margins—and the failure to ratify the Salt Treaties. (The United States and the Soviet Union voluntarily adhere to the provisions of the agreements, another way around the constitutional requirement.)

Pro or Con

As countless political scientists and historians have observed, the Constitution was made for a fundamentally different nation, in a fundamentally different time. The United States no longer stands on the fringes of world politics, but at the very center. Foreign affairs dominate our hopes and fears as a people.

Detractors of the two-thirds requirement argue that treaties require the mechanisms of the 18th century to resolve the problems of today. Supporters point out that a variety of mechanisms have sprung up to minimize partisan wrangling and allow the United States to proceed expeditiously in making and carrying out most international agreement.

Ask your students:

- Is the strategem of labelling most international understandings "executive agreements" a wise way of adapting the Constitution to contemporary needs? Or is it an evasion that weakens respect for our institutions?
- Is it a good idea to voluntarily adhere to agreements which the Senate has refused to ratify? Is this a compromise which recognizes both national security needs and a divided Senate (and public), or does it frustrate the Constitution?
- Should the two-thirds requirements be scrapped by constitutional amendment, or does it still serve a purpose?

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Aliens

(*Continued from page 11*)

learn to live in anxious anonymity, many have no such documents.

For those who do, such verification could mean self-confessed violation of tax or other legal regulations—violations which, when known, could paradoxically invite deportation.

In addition, under the bill, businesses would be required to have every job applicant produce a U.S. passport, birth certificate or Social Security card and one other document such as a driver's license or work permit before hiring him or her. There is now talk of a computerized "hotline" which employers could call to validate workers' Social Security numbers.

First Step to a Police State?

Those opposing the legislation—particularly groups of Hispanics outraged in a rare show of unity—are concerned that Simpson-Mazzoli would lead inevitably to discrimination in that employers would hesitate to hire any worker who is "foreign-looking." Representative Robert Garcia, a Democrat from the Bronx, argued that the bill would increase the likelihood of discrimination against "persons who are black, brown, yellow or white and speak with an accent."

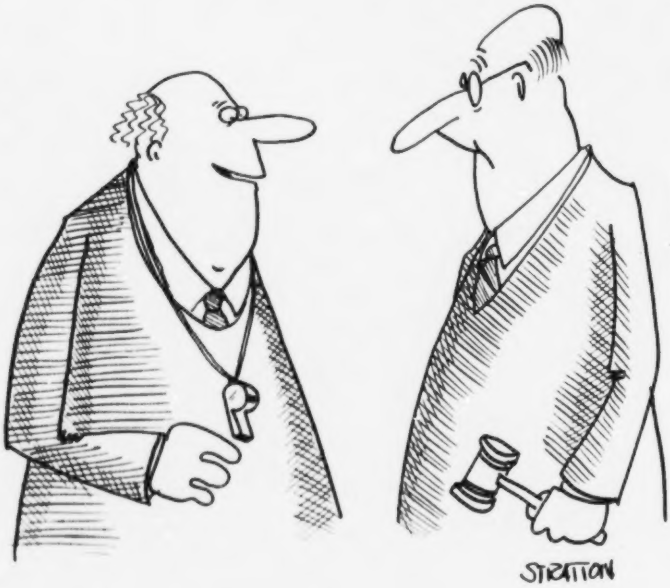
Critics sound the alarm that requiring such documentation would clearly invite an outrageous, Orwellian national identification system. Perhaps they remember too well the mass roundup of illegal immigrants of 1954—"Operation Wetback"—which most agree resulted in an atrocious blow to civil liberties that accomplished little.

If the issue of personal intrusion can be set aside, many also find the idea of documentation droll. For a fee, aliens can already get a phony copy of any document they need.

No Hospitality for the Guests?

One of the most controversial provisions of the bill deals with so-called "guest workers." It is also one of the major differences between the two proposed versions. The House has endorsed—and the Senate rejected—an expanded "guest worker" program which would allow as many as 500,000 foreign laborers each year to harvest perishable crops in the United States. This provision would permit farmers, mostly in California, to hire migrant workers to pick crops that would otherwise rot for lack of such farming help. The outcry to this proposal comes from both supporters and critics of the bill; in fact, the provision is opposed by Senator Simpson himself.

Opponents, perhaps top among them Cesar Chavez, president of the 40,000-strong United Farm Workers, charge that such a provision would mean only exploitation for the "guest workers" involved.



"There's no rule that says we have *to use a gavel."*

The House's plan would also allow expanding an existing program, known as "H-2," in which foreign workers are given temporary visas to fill jobs for which no American workers can be found. The version now being considered would also allow the temporary workers on the perishable crops to be used as strikebreakers.

To many, the plan smacks of the Bracero program which, from 1954 to 1972, brought large numbers of Mexican workers to America to work under near-intolerable conditions. Both Chavez and another staunch opponent, Democratic Representative Henry Gonzalez from Texas, have dubbed it the "rent-a-slave" amendment.

Muddy Waters

The debate over the bill makes clear that The Immigration Problem is not one which will go away quickly or easily. There is vehement controversy packed with emotion on both sides of any of the issues raised by the bill. But the debate is a muddy one. Simpson-Mazzoli may cost a lot, and worse than that, it may not work. All that is crystal clear is that no one is telling us—alien or citizen—what the legislation says or what it may finally mean. Worst of all, no one seems to know. As New York Republican Bill Green, who voted in favor of Simpson-Mazzoli, remarked recently: "It's hard to get a handle on the facts."

The Court Affirms a Tough Policy

And, with this legislative tangle so clearly in the nation's public conscience, issues involving aliens, immigration and deportation have also been before the courts of the country. The United States Supreme Court, undeniably a barometer of our social and political pressures, has not avoided the chance to give some shape to the immigration policy to come. In fact, there may never before have been a term in which the Supreme Court addressed and evaded "the immigration issue" so many times and in so many ways. A lot can be learned through a closer look at the cases involving immigrants which were decided by the Court this year.

The Exclusionary Rule Takes a New Twist

Many commentators forewarned that *Immigration and Naturalization Service v. Lopez-Mendoza* (103 S. Ct. 3479 (1984)), could well signal another legal victory for the INS and another setback for immigrants and ethnic Americans. It seems that both signals hit their mark when the Court ruled that the exclusionary rule need not apply to deportation proceedings.

According to the controversial exclusionary rule, evidence of people or things wrongfully seized by police cannot be admitted in later legal proceedings. The rule, which was first fashioned by the U.S. Supreme Court in 1914 and extended to the states in 1961, is bitterly resented by law enforcement agencies like the INS, which invariably claim that it permits guilty individuals to go unpunished because a legal "technicality" invalidated a search or arrest.

The case concerned two separate incidents—both involving Mexican citizens. In one, Elias Sandoval-Sanchez was seized by INS officers as he waited in line to begin work at a potato processing plant in Pasco, Washington. The officers had stationed themselves at the main entrance of the plant, "looking for passing employees who averted their heads, avoided eye contact, or tried to hide themselves in a group." Spotting Sandoval-Sanchez and branding him as being "very evasive," the INS officers grabbed him by the seat of the pants and the shoulder, forced him from the workline and locked him in the men's room of the plant.

He was later transported to a nearby jail, where he was asked and where he voluntarily answered questions about his immigration status. His answers were used nearly four months later at a deportation proceeding to establish that he was an alien. At the hearing, Sandoval-Sanchez argued that the evidence offered by the INS should be suppressed as it was gathered only after an unlawful arrest.

In the other related action, Adan Lopez-Mendoza was arrested by the INS in San Mateo, California, where he worked at a wholesale transmission shop. On the strength of a "tip" from an informant they had not known before, the INS had come to the shop in search of illegal aliens they heard were employed there. Although Lopez-Mendoza was not named by the informant as an illegal, INS officers questioned him at once about his ancestry and later interrogated him further at INS offices. Like Sandoval-Sanchez, his responses were used to establish that he was an alien at later deportation proceedings.

By a narrow five-to-four vote, the Court held that the various protections afforded defendants in criminal trials, including the wide-ranging protection of the exclusionary rule, do not apply in deportation proceedings. The Court denoted four factors it claims would render the exclusionary rule ineffective in deportation proceedings. First, deportation is still possible based on evidence other than that derived from an arrest. In fact, all the government need establish at such proceedings are the identity and alienage; the respondent then must prove the time, place and manner that he or she entered the country.

Second, the Court cited statistics. In the course of a year, an average INS agent arrests almost 500 illegal aliens; of these, nearly 98 percent agree to voluntary deportation without a hearing. Since the allegations of wrongful arrest are very few and very far between, the Court reasoned that arresting officers would be unlikely to change their conduct—no matter how wrongful—in an attempt to comply with the exclusionary rule.

Third, the Court stated that the INS already has a working system for making sure arrests are conducted in accord with the Fourth Amendment, which forbids unreasonable searches and seizures. Notably, the INS regulations require that no one may be arrested unless there is first an admission or "strong evidence" of illegal alienage.

Finally, the Court mentioned that while it is important to protect the Fourth Amendment rights of all, there is "no convincing indication" that applying the exclusionary rule in deportation proceedings would aid this goal. The Court painted a dismal picture of an already-overburdened immigration administration whose burden would become all the more unbearable should it be required to compile the more detailed, more accurate documentation necessarily required at a Fourth Amendment suppression hearing. In the meantime, the mere "unregistered presence" of those here illegally would remain an ongoing crime.

The dissenters (Justices Brennan, White, Marshall and Stevens) argued simply that deportation hearings are not merely collateral to an arrest. Justice Brennan urged that the exclusionary rule must apply to deportation hearings as well as criminal trials, finding little difference between the roles of arresting police officers and arresting INS agents. He also pointed out the impracticality of the majority's reliance on "alternative remedies" available to aliens to redress constitutional violations. He noted that, unlike criminal defendants, "once the government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts."

Surveys or Raids?

In *Immigration and Naturalization Service v. Delgado* (104 S. Ct. 1758 (1984)), the Court also addressed the issue of the Fourth Amendment as it relates (or does not relate) to illegal aliens. In *Delgado*, the Court was asked to decide whether the common practices of immigration agents in conducting broad scale "factory surveys" are permissible in keeping with the Fourth Amendment.

The *Delgado* case involves three factory surveys near Los Angeles during 1977. In each survey, which lasted from one to three hours, several INS agents were stationed at the exits to the factory while other agents, armed and displaying badges and walkie-talkies, approached factory employees and posed targeted questions: "Where are your papers?" or "Where were you born?" Four of those stopped for questioning brought this case initially, claiming that the surveys were a "seizure" of the workforce within the meaning of the Fourth Amendment. They said that the INS should be prevented from questioning individual workers unless the INS had a reasonable suspicion that the employee to be questioned was an illegal alien.

The Supreme Court, which agreed to hear the case because of its serious implications for the enforcement of immigration law, held that the surveys were neither a "detention" nor a "seizure" within the meaning of the Fourth Amendment. The Court first reviewed the evolution of the meaning of the Fourth Amendment. It noted that a "consensual encounter" between a police officer and a citizen is "transformed" into a seizure or detention raising potential constitutional issues only if: "In view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." The Court made much of the fact in this case that the agents "were only questioning people" and did not prevent the workers from moving about the factories, concluding that "most workers could have had no reasonable fear that they would be detained upon leaving."

Justice Powell filed a separate concurring opinion in which he likened the factory surveys to the warrantless traffic stops at the Mexican border, seven years earlier held not to violate the Constitution as being necessary to "control the flow of illegal aliens into the interior of our country."

Justice Brennan wrote a lengthy and well-reasoned dissent which was joined by Justice Marshall, in which he chastised the majority for its "studied air of unreality." Brennan opined it was "plain beyond all cavil that the manner in which the INS conducted these surveys was a 'show of authority' of sufficient size and force to overbear the will of any reasonable person." He faulted the Court the hardest for failing to distinguish between the intimidating group roundup investigations involved in this case and the "isolated encounter between the police and a passerby on the street."

Finally, Justice Brennan, in criticizing the *Delgado* holding, hit upon many of the same fears expressed by opponents of the Simpson-Mazzoli bill. Brennan noted that, after *Delgado*, virtually no protection would be afforded lawful American citizens working in a factory where a survey was being conducted. The holding opened the door to allowing a dangerous "unfettered discretionary judgment" to INS agents.

In Brennan's view, there could be only two alternatives which would provide the necessary safeguards to Fourth Amendment values; both alternatives involved some overt revamping of federal policy. The INS must either adopt a firm policy of questioning only those workers reasonably suspected of being illegal aliens or must develop a factory survey program "predictably and reliably less intrusive than the current scheme."

Turning in the Staff

It is not surprising that the Court decided still a third case this term involving a thorny issue of immigrants and labor; after all, jobs are the usual impetus for immigration.

In *Sure-Tan, Inc. v. National Labor Relations Board* (104 S. Ct. 2803 (1984)), the Court was asked to decide whether a company which reported illegal aliens to the immigration service for discriminatory reasons violated the federal labor statute.

There is a strange loophole in the Immigration and Naturalization Act—a loophole which allows and may even foster victimization of immigrants. One provision of the Act makes it illegal for aliens who entered the United States unlawfully to look for a job without first getting proper certification; but nowhere in the Act are companies forbidden to hire "illegals." Thus, it is convenient and even cost-efficient for many to load their workforces with illegal aliens. (The Simpson-Mazzoli bill proposes to change this dichotomy by mandating fines or prison terms for employers with such hiring practices.)

Sure-Tan involves two leather tanning companies in Chicago staffed mostly by undocumented Mexican aliens. Eight of the eleven employees signed cards authorizing a union to act as their collective bargaining representative, and the union won a board election conducted soon afterward. Two hours later, the company president called the employees together and swore at them for voting for the union. Then he used his ace in the hole: he asked the workers whether they had valid immigration papers. Many, of course, did not. The president's inevitable letter to the INS asking for a status check of the employees was followed soon after by a visit by INS agents "to investigate the immigration status of all Spanish-speaking employees." By the end of the day, five of the workers had been arrested and were on a bus bound for Mexico.

The Supreme Court here was asked to decide whether the undocumented aliens were protected from these unfair labor practices under the National Labor Relations Act. The Court took a hard look at the language of the statute and found that it forbids such discrimination against "any employee." There are only a few types of workers who are not covered under the Act (such as agricultural laborers and domestic workers)—and those excluded are specifically mentioned. The Court noted that, "counterintuitive though it may be," Congress has not adopted a statute making it unlawful for an employer to hire an alien present or working without proper authorization. The Court then held that the undocumented aliens qualifed as "employees" within the meaning of the Act.

While, at first blush, this holding seems to mark some headway for the immigration cause, many observers believe the holding in fact skirts several issues and leaves the inherent conflicts between the immigration and labor laws unresolved.

Indeed, while agreeing that the aliens were wronged as "workers," the Court in *Sure-Tan* also held that the lower court was improper in awarding them six months' back pay as a remedy. Instead, the Court instructed that the issue of a proper remedy be ultimately decided by the National Labor Relations Board. In a biting dissent joined by Justices Marshall, Blackmun and Stevens, Justice Brennan found the Court guilty of creating a "disturbing anomaly" by, on the one hand, holding that undocumented aliens are entitled to bring an unfair labor practice claim under the Act, but on the other hand, holding these same employees are "effectively deprived of any remedy. . . ."

Plain Language Upheld

The Immigration and Nationality Act says that the Attorney General has the discretion to suspend deportation of an otherwise deportable alien who satisfies three requirements:

1. he or she must have been physically present in the United States for a continuous period of not less than seven years,
2. he or she must be of good moral character, and
3. a deportation must result in extreme hardship to the alien or his or her spouse, parent or child.

On the surface, the Court in *Immigration and Naturalization Service v. Phinpathya* (104 S. Ct. 584 (1984)), was asked to decide the very narrow and technical issue of whether an alien who left the country for three months could be deported as failing to meet the "continuous physical presence" requirement of the statute.

Padungsri Phinpathya, a native and citizen of Thailand, entered the United States as a nonimmigrant student a year after her husband, who was also a Thai native. Although authorized to remain in the U.S. until July of 1971, both remained well past that time. In January of 1974, Mrs. Phinpathya traveled to Thailand along with her two children to visit her sick mother. Three months later, she returned to the U.S. after obtaining a new visa as the wife of a foreign student even though she was well aware that her husband's visa had in fact expired three years earlier.

Ultimately, the Court held here that Phinpathya's three-month absence from the United States negated the continuous physical presence requirement, and thus her deportation should not be suspended. While the results are a sad misfortune, surely, from Mrs. Phinpathya's standpoint, the decision does not raise or evade The Immigration Problem as clearly as many of the others decided this term.

What will undoubtedly have a more wide-reaching effect is the subtler issue also decided by the case: whether the courts will show deference or skepticism toward the administrative decisions of the executive branch. The Court held that to construe the Act to broaden the Attorney General's discretion would ultimately and impermissibly shift the decisionmaking in immigration cases to the courts. Thus, by the seemingly innocuous decision in *Phinpathya,* the Court sent the clear message that it will strictly construe and apply the immigration laws as they are written.

Stemming the Tide

In *United States v. Mendoza* (104 S. Ct. 568 (1984)), the Court touched upon the immigration issue only briefly and tangentially. The facts in this case would seem to beg for some Court determination of whether the United States denied due process to Filipino servicemen during World War II. However, that perplexing consideration was avoided as the case was decided instead on grounds of civil procedure.

In 1942, Congress passed the Nationality Act, which provided that noncitizens who served honorably in the United States armed services could be exempted from some of the usual requirements for naturalization. In particular, such veterans did not need to be U.S. residents, nor did they need to be literate in the English language. The specified cutoff date for such naturalization petitions was December 31, 1946.

Sergio Elegar Mendoza, who is now about seventy-five years old, served during World War II as a doctor in the Philippine army. He was captured by the Japanese in 1942 and survived the notorious Bataan Death March. After his release in 1945, he spent several months in the Philippines and then worked in Pennsylvania at an army school. Mendoza filed a petition for naturalization in 1978, relying on an earlier case, *In re Naturalization of 68 Filipino War Veterans* (406 F. Supp. 931 (1975)), as the basis for why his petition should be granted. The war veterans brought the action in *68 Filipinos* in an attempt to force the American government to grant them citizenship. The court held that veterans who had been eligible in 1945 could take advantage of the wartime legislation because the United States had violated due process by refusing for such a long time to implement the statute in the Philippines.

This year, in *Mendoza,* the Court held the United States was not barred by the legal doctrine of "collateral estoppel" from contesting the issue once again. (The doctrine holds that a person who has litigated an issue unsuccessfully in one legal action is barred or "collaterally estopped" from raising that same issue in a later action.) This ruling overturns the court below, which had found no "record evidence" indicating that there was a "crucial need" in the administration of the immigration laws for a redetermination of the due process question decided in *68 Filipinos* and presented again in this case. Also, by its decision, the Court inferentially cut off similar claims by other Filipino veterans who could have been seeking American citizenship.

When Is a Refugee *Really* a Refugee?

In *Immigration and Naturalization Service v. Stevic* (104 S. Ct. 2489 (1984)), the Court appears to have once again tightened the legal reins for incoming immigrants and loosened them for the American deportation authorities.

Stevic's case is rooted in the provisions of the Refugee Act of 1980. That statute attempted to open our borders to political refugees. It set out that deportation would be withheld to countries where there was a "well-founded fear of persecution" among the citizens. Those who were likely to be persecuted upon return to their homelands were spared from being deported.

Against this backdrop plays the drama of Pedrag Stevic, a Yugoslavian citizen who came to the United States in 1976 to visit his sister in Chicago. From that time on, his life was beset by a series of personal tragedies. Stevic overstayed his visa, but had married a United States citizen while in the country. The immigration benefits he gained through his marriage were revoked after his wife died in an automobile accident shortly after their marriage. He did not leave the United States, but became progressively more active in the "Ravna Gora"—an anti-communist organization. When Stevic's father-in-law, a U.S. citizen and himself a member of the Ravna Gora, visited his native Yugoslavia in 1974 as a tourist, he was imprisoned for these dissident activities and committed suicide shortly after his release three years later.

Stevic in this case sought to have his deportation withheld on the ground that he feared immediate persecution and imprisonment upon his return to Yugoslavia. The Supreme Court agreed to hear the case because it presented an opportunity to clear up the conflicting opinions over the proper standard of proof that must be presented before an alien could avoid deportation under the Immigration and Nationality Act.

In its decision, the Court sharply curtailed the generous provisions of the 1980 Act. It held that, for an alien to avoid deportation under the Act, there must first be proof of a "clear probability" of persecution if he or she returned home. According to Justice Stevens, who wrote the opinion in *Stevic* for a unanimous Court, the 1980 Act "literally provides for withholding of deportation only if the alien's

"My case fell apart when I pleaded the Seventeenth Amendment—it has to do with the the election of senators."

life or freedom 'would' be threatened in the country to which he would be deported; it does not require withholding if the alien 'might' or 'could' be subject to persecution."

Clearly, providing such before-the-fact evidence with such a strict degree of certainty sets up a difficult, if not insurmountable, barrier to those aliens seeking to remain in the country.

You Can't Lose Them All

And finally, there was one small victory for the immigrants' cause. In *Bernal v. Fainter* (104 S. Ct. 2312 (1984)), the Supreme Court held that a Texas statute requiring notaries public to be citizens of the United States violated the equal protection clause of the Fourteenth Amendment.

As mentioned earlier, discrimination based on citizenship is permitted under the Constitution. The immigration laws may distinguish between groups seeking to get into the U.S., favoring citizens of one nation and making it harder for citizens of another. However, once immigrants are in our country, they are protected by the Constitution, and it becomes very difficult to lawfully distinguish between aliens and American citizens.

As evolved through decades of decisions, classifications which differentiate based on alienage are "suspect classifications" and will be strictly scrutinized by the courts to make sure they are legally valid. This legal scrutiny is a tough standard to pass. Where a court uses strict scrutiny, a law is found invalid unless it can be shown that it is necessary to a compelling governmental objective. The result is that a law is invalidated in virtually every case where the classification would burden some people merely because of their status as members of a racial or national origin minority.

To date, the only time explicit race discrimination was upheld when subjected to strict scrutiny was in the case of *Korematsu v. United States* (323 U.S. 214 (1944)). There, the Court allowed wartime incarceration of United States citizens of Japanese ancestry on the West Coast. The Court based its reasoning in this unique and timebound case on the constitutional war powers, and reasoned that: "Korematsu was not excluded from the Military area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the moment demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily. . . ."

Eventually, there evolved an exception to the strict scrutiny standard. That is, if a position involves a "political function," aliens may be forbidden from holding it. Under this exception, courts have held that police, teachers and probation officers must be United States citizens—all on the basis that they "routinely exercise discretionary power, including a basic governmental function, that places them in a position of direct authority over other individuals."

This, then, has become the focus when a court must decide whether a particular position involves a "political function:" whether it involves broad discretionary power over formulating or executing public policies.

Efrem Bernal, a native of Mexico, has lived in the United States since 1961 as a permanent resident. He works as a paralegal for Texas Rural Legal Aid, helping migrant farm workers on employment and civil rights matters. This work requires that he go into the fields to interview and take sworn statements from the workers to be used in later litigation. Since it was difficult for him to get notaries to go along with him on these interviews, Bernal applied to become a notary public. His application was denied—on the basis that a Texas statute required that all notaries must first be citizens of the United States.

The Supreme Court reversed this holding, finding that a notary's duties are "essentially clerical and ministerial" and thus applying the political function exception to this position would be inappropriate. The decision may have more impact than imagined: Texas alone has over 350,000 notaries operating within its borders. Also, statutes throughout the country require citizenship before a particular office may be held, and seventeen states now require citizenship for the job of notary.

The comparative gain for immigrants in *Bernal* are small, but may speak loudly to the future. If this narrow case can be considered the start of a trend in decisions, perhaps those coming to this country to work will one day be afforded more of the protections of the American worker. ☐

Strategies

(Continued from page 21)

Strategy

4

Why Refugees Leave

Consider the plight of the ten million or more people in the world who are refugees. These are people who have left their home country illegally. If they remained, they feared loss of freedom or death. Some have been forced to flee due to their beliefs about and actions toward their government. Some governments have deprived people of their basic rights. Once they leave their home country, what about their rights? What are the values that cause people to leave?

Lesson Plan

Issue: Decision to Become a Refugee
Strategy: Valuing
Procedure: After discussing some of the refugee problems in the world and considering the background reasons for people leaving their home countries, give the students the following handout:

Jose hides among the trees as he watches the soldiers march by to his village. His country has been involved in a civil war for a long time. He is fearful the soldiers are going to his village looking for people, particularly young men who speak out about the government in power. This has happened in other villages and he is not sure what has happened to the people who have been arrested. There have been rumors of killing. Others have been placed in jail. He knows that not all of the people arrested supported the opposing forces. He has not spoken out against his government, but will that matter? Should he try to leave his country and seek asylum in another country? If he leaves now, he cannot notify his parents or sisters. He must leave without any clothes other than those he is wearing and without food. What should he do?

Questions:

1. If Jose remains in his country, what are the possible consequences of that choice?
2. What basic right is Jose being denied?
3. If he leaves, what problems confront him?
4. How must Jose be feeling? How will he

feel if he leaves his country?

5. What will it be like to live in another country where you are not a citizen?
6. What will be your rights?

You may want to follow this lesson with research on a specific refugee problem in the world. Students may want to write a diary of a refugee leaving his/her home country and chronicle the events that are encountered.

Strategy

5

International Human Rights

Repeatedly nations deprive people of their basic human rights. How should other nations respond? Their actions will often depend on the relations that have been established between the countries. Do they have full diplomatic relations? Are they dependent upon one another economically, politically, militarily? Often it is a matter of diplomacy, where talks are established between the nations to discuss the infractions and what possible solutions exist. Or a nation may publicly chastise another nation for its human rights action. Depending on the number of nations that join this chastisement, such action may be sufficient to solve the problem.

One of the most common actions of a country is to place economic sanctions on the nation in violation, such as those the U.S. placed on Poland when that country declared martial law in 1981, arrested political prisoners and banned the free union movement headed by Solidarity. The economic sanctions imposed by the U.S. included the following: banning all regularly scheduled commercial flights to the U.S. by LOT, the Polish airline; stopping American-financed scientific exchanges; banning fishing privileges by Poland in American waters; ceasing discussion of Poland's $15.2 billion debt to the West; depriving Poland of normal tariff status; and placing a ban on all American government credits for the purchase of food and other commodities. Polish officials indicate that the sanctions have cost them $13 billion in production.

Another sanction may be to cease military aid to that country. The aid may have been in the form of military equipment or military advisors.

In addition to economic sanctions by governments, the United Nations can act as a court of appeals. Anyone with human rights grievances is required to exhaust all domestic remedies before appealing to this international body. The General Assembly of the United Nations may only recommend to members the action to be taken in any situation, but it may direct the Secretary General to establish a particular office to deal with the problem.

Other private organizations such as the International Red Cross, Amnesty International, and individual church groups can often alleviate human rights tensions where others have failed. These groups are supported by private donations. Private citizens have also been known to tackle human rights problems.

Lesson Plan

Issue: Violation of International Human Rights

Strategy: Role Playing

Procedure: This handout describing a human rights violation should be given to each member of the class.

There have been repeated reports of killings and woundings of civilians by government troops in Oswasha. These incidents have spread to several areas of the country.

A description of the roles that members of the class should portray are given below:

U.S. Ambassador Jones—you have been assigned here for three years and have always maintained a good relationship with government officials. The U.S. has depended heavily on Oswasha for trade and oil imports. Oswasha has relied on the U.S. for economic and military aid. What steps should you take to stop the violations? What will you say to the president when you meet with him?

U.S. Senator Martinez—you have been in Congress for 12 years and have been a strong supporter of human rights. You are a member of the Foreign Affairs Committee. You recently traveled to Oswasha to determine whether there have been violations of human rights. Have the violations been confirmed? What sanctions would you consider against the country? Are there other steps that should be taken before sanctions?

U.S. Businessman Kowenwald—you have lived in Oswasha for 20 years and have maintained a profitable hotel business. You have always had good relations with the government. Should you continue to maintain your business in the country? Are there any other steps you can take?

U.S. citizen Martha Wright—a teacher traveling in Oswasha. You have strong feelings about supporting human rights. You are a member of Amnesty International. How can you help the people? Should you cut short your trip? Is there any group that can help the people?

News Reporter Inez Jackson—you have been an overseas reporter for ten years and have seen too many incidents of human rights violations. You would like to expose these latest happenings. How should you write the story? Will your news editor print a report of the killings?

President Othome—you have been president of Oswasha for three years. It was a difficult struggle to achieve this office. You had many opponents. There are still members of the opposition party who are attempting to overthrow the government. Your government troops have been seeking out those opposition members. How serious is the opposition to your government? Are the troops acting beyond your orders? Should you stop them if they are?

Each person should carefully study his/her role and decide what action will be taken. Other members of the class can play additional roles such as a member of the Foreign Affairs Committee and Amnesty International.

A number of role-playing situations can be established, such as a

- Meeting between ambassador and president
- Meeting of Foreign Affairs Committee
- Meeting between businessman, reporter, and U.S. citizen
- Meeting of Amnesty International

An important aspect of role playing is the debriefing, which gives students an opportunity to consider their feelings in the role and the reasons for their actions. More than one person should play each role so that different views may be expressed.

Conclusion

The value of a study of human rights can never be fully measured. In addition to learning more about one's own rights and the desire to protect them, students learn about the way others in the world view human rights. The development of critical thinking skills occurs as students participate in the learning experiences. This is important, as is the opportunity to be actively involved in the learning process and assume responsibility for one's own learning. □

China

(Continued from page 25)

young people. When she teaches criminal procedure, she takes her students to court. But she admits that "my students are more interested in finding out the sentence given by the judge than in issues of procedure or substantive law." Like many Americans, Chinese students prefer to discuss crime and punishment than issues of civil or constitutional law.

Do teachers learn about law that affects them directly as educators? There is no subject called "School Law" in China. Each school has rules about student conduct and faculty responsibilities. In high schools, for example, rules require students to respect teachers and care for school furniture. Can students influence the rules? "Yes," said Tan Jun. In colleges, after the rules have been in force for a year or two, administrators may ask students their opinion of the rules, and "sometimes rules are changed because of student opinions."

Her Questions

After questioning Tan Jun for several hours, it was her turn, and she had dozens of questions about school law, law-related education and the American legal

How Independent Are Chinese Courts?

As this article points out, there are many differences between our Constitution and that of the Chinese. One major difference is found in how the constitutions are amended and interpreted, and how the judiciary is selected. As shown by the following excerpts from the Chinese constitution, the National People's Congress and its Standing Committee function in some ways as a superlegislature, in some ways as a supercourt. Have students read these provisions, then ask them the questions that follow.

Article 60. **The National People's Congress is elected for a term of five years.**

Two months before the expiration of the term of office of a National People's Congress, its Standing Committee (see Article 67) must ensure that the election of deputies to the succeeding National People's Congress is completed.

Article 61. **The National People's Congress meets in session once a year and is convened by its Standing Committee. A session of the National People's Congress may be convened at any time the Standing Committee deems this necessary, or when more than one-fifth of the deputies to the National People's Congress so propose.**

Article 62. **The National People's Congress exercises the following functions and powers:**

(1) to amend the Constitution;

(2) to supervise the enforcement of the Constitution; . . .

Article 64. **Amendments to the Constitution are to be proposed by the Standing Committee of the National People's Congress or by more than one-fifth of the deputies to the National People's Congress and adopted by a vote of more than two-thirds of the deputies to the Congress.**

Statutes and resolutions are adopted by a majority vote of more than one-half of all the deputies to the National People's Congress.

Article 65. **The Standing Committee of the National People's Congress is composed of the following:**

the Chairman;
the Vice-Chairman;
the Secretary-General; and
members.

Minority nationalities are entitled to appropriate representation on the Standing Committee of the National People's Congress.

The National People's Congress elects, and has the power to recall, all those on its Standing Committee.

No one on the Standing Committee of the National People's Congress shall hold any post in any of the administrative, judicial or procuratorial organs of the state.

Article 66. **The Standing Committee of the National People's Congress is elected for the same term as the National People's Congress; it exercises its functions and powers until a new Standing Committee is elected by the succeeding National People's Congress.**

The Chairman and Vice-Chairman of the Standing Committee shall serve no more than two consecutive terms.

Article 67. **The Standing Committee of the National People's Congress exercises the following functions and powers:**

(1) to interpret the Constitution and supervise its enforcement;

(2) to enact and amend statutes with the exception of those which should be enacted by the National People's Congress;

(3) to enact, when the National People's Congress is not in session, partial supplements and amendments to statutes enacted by the National People's Congress provided that they do not contravene the basic principles of these statutes;

(4) to interpret statutes;

(5) to examine and approve, when the National People's Congress is not in session, partial adjustments to the plan for national economic and social development and to the state budget that prove necessary in the course of their implementation;

(6) to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate;

(7) to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statutes; . . . .

(11) to appoint and remove Vice-Presidents and judges of the Supreme People's Court, members of its Judicial Committee and the President of the Military Court at the suggestion of the President of the Supreme People's Court. . . .

Article 124. **The People's Republic of China establishes the Supreme People's Court and the local people's courts at different levels, military courts and other special people's courts.**

The term of office of the President of the Supreme People's Court is the same as that of the National People's Congress; the President shall serve no more than two consecutive terms.

The organization of people's courts is prescribed by law.

Article 125. **All cases handled by the people's courts, except for those involving special circumstances as specified by law, shall be heard in public. The accused has the right of defense.**

Article 126. **The people's courts**

system. Some questions reflected our differences in perception and values. "When the rich commit crimes in America," she asked, "can they still pay money instead of going to jail?" I said that in most cases if a rich and poor man, who had the same record, were convicted of the same crime before the same judge, they would probably get similar sentences. The major difference, I explained, was that the rich man could pay for a more skilled and experienced attorney who could spend more time on his case. With better defense counsel, a rich man was less likely to be found guilty.

shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.

Article 127. **The Supreme People's Court is the highest judicial organ.**

The Supreme People's Court supervises the administration of justice by the local people's courts at different levels and by the special people's courts; people's courts at higher levels supervise the administration of justice by those at lower levels.

Article 128. **The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at different levels are responsible to the organs of state power which created them. . . .**

Questions

1. **Is the Chinese constitution easier to amend than ours? If so, is that a good idea?**
2. **How much power seems to be lodged in the National People's Congress? In its Standing Committee? What checks may limit their power? Is concentration of power healthy in a democracy?**
3. **How are judges of the Supreme People's Court selected? How, if at all, is their independence assured? How does our Constitution attempt to ensure an independent judiciary? Who is our Supreme Court responsible to?**
4. **What factors other than the constitution might influence the Chinese government? What effect might the Communist Party have? What factors other than our Constitution affect the way government is carried out? Discuss the role of political parties, government bureaucracies, etc. —D.S.**

"But why," she asked, "does it make a difference if a lawyer is more experienced or spends more time on your case if the facts are established?" In China, it is assumed that people are not brought to trial until their guilt is established. Therefore, the question before the court concerns the severity of the penalty, not whether a person has committed the crime. On the other hand, the confession is an extremely important factor in Chinese criminal procedure. Criminals whose confessions are "sincere" usually get lighter sentences since they regret their behavior and are easier to "re-educate."

"What," asked Tan Jun, "is the cause of crime in the U.S.?" Again I responded with a long, complex answer and concluded that there was no single cause. "In China," she commented, "we know the cause of crime. It is caused by the contradictions between the old ways of private property and our new socialism. Not everyone has been re-educated to socialist values. There are still capitalistic influences. When these are eliminated, we will eliminate crime."

Do American prisons and reform schools deter crime? I confessed that our prison system had only limited success in rehabilitation. In China, Tan Jun noted that reform schools and prisons were very successful. The reason, she explained, is that in China, after a prisoner is set free, he has a guaranteed job and close supervisions; and equally important, he does not want to bring greater shame on his family.

Implications and Issues

A visit to the People's Republic of China provides only a glimpse of the revolutionary legal changes that are taking place in that vast Communist nation. But even a partial view of these changes raises provocative questions for students of the American legal system—questions that could easily be the basis of classroom exercises.

Lawyers. What is the "right ratio" of lawyers for a country? China today has fewer than 9,000 fulltime and 2,500 part-time lawyers. The country plans to double or triple that number. But even if they increase it ten-fold, China would have only a fraction of the number of lawyers we have in the United States. Do we have too many? Will China have too few? What are the advantages and disadvantages of a large or small number?

Mediation. Should most civil disputes be handled through mediation? Chinese lawyers believe they should. Most American attorneys are skeptical. Should American law be changed to require more mediation? Should American law schools require courses in mediation? Should mediation methods and materials be incorporated in all of our law-related education courses? (See Albie Davis's article in this issue of *Update* for more on mediation.)

Rights and Duties. Should every citizen have a legal "right" and "duty" to work? Should the government provide a job for those who can't find one? Are the Chinese correct in saying that adult children should have a legal, as well as a moral, obligation to support their elderly parents? Should every qualified student have a constitutional right to a college education—without regard to ability to pay? Is free health care as important as freedom of speech?

Political Freedom. Are the individual rights proclaimed in the new Chinese Constitution compatible with a one-party government? If a Communist government can allow greater economic freedom, can it also allow greater political freedom?

Looking Ahead

Most Chinese I spoke with believe that the legal chaos of the Cultural Revolution will not return. Why? Because, they reply: "Our new constitution protects us." They say that the rule of law has replaced the "cult of personality," under which leaders frequently sent citizens to prison because of their "incorrect beliefs." Chinese students and teachers are proud that their new constitution clearly guarantees the "right to criticize" government officials. But how effective are these rights? Can they be protected with only a few independent lawyes and without a politically independent judiciary?

In 1791, when we ratified our Bill of Rights, many Americans were skeptical that freedom of speech, press and religion could be maintained in a new democracy. However, during most of our history, these freedoms have expanded and endured. Will the Constitution of the People's Republic of China be able to protect its people against arbitrary government action? Many Chinese believe it will. They believe their constitution reflects the hopes of current government leaders as well as the people. But individual rights are fragile—especially in Communist countries. Will the new Chinese Constitution endure? Historically, the odds are poor. But the improbable has happened in history. ☐

Court Briefs

(Continued from page 33)

freedom is "curtailed to a degree associated with formal arrest."

Hello . . . Is It Me You're Looking For?

Ed Welsh's step-daughter was a little surprised when she heard the knock on the door at 9:00 on a rainy April night. She was a lot surprised when she answered the door and found two Wisconsin policemen standing on the doorstep. But her surprise was nothing compared to Ed's shock when the police marched into his bedroom where he was lying naked on his bed. Ed didn't feel any better when he realized that his unexpected visitors weren't making a social call; he was being arrested for driving under the influence of alcohol.

In the case of *Welsh v. Wisconsin*, 104 S. Ct. 2091, the Court held that the warrantless entry of the police into Ed Welsh's home—and Ed's subsequent arrest for a minor traffic violation—violated the Fourth Amendment prohibition against unreasonable searches and seizures.

As a general rule, the Court noted, warrantless searches and seizures are per se unreasonable. They may be permitted only when some exigent circumstance excuses the failure to get a warrant. In the past, the Court has found that such exigencies exist where, for example, the crime or the contraband are in plain view, or where the police are in hot pursuit of a fleeing felon.

In the *Welsh* case, the Court found no such exigency. The Court observed that the gravity of the alleged offense should be an important factor in determining the need for an exigency exception; "this," the Court found, "is the best indication of the state's interest in precipitating an arrest." Since, under Wisconsin law, Ed Welsh was arrested for only a civil traffic offense, no exigency could justify the failure to get a warrant.

In dissent, Justices White and Rehnquist maintained that the "need to prevent the imminent and ongoing destruction of the evidence"—*i.e.*, the alcohol in Ed Welsh's body—supplied the necessary exigency for the warrantless arrest. The justices also noted their belief that important constitutional questions "should not be decided in a case like this." Chief Justice Burger, in a cryptic separate statement, also expressed his belief that resolution of the constitutional question should be deferred to "a more appropriate case."

Of Snoops and Finks

The Fourth Amendment protects individuals from the excesses of governmental action; it does not restrict the behavior of private individuals. Thus the ban on unreasonable searches and seizures does not apply to the curious forays of your friends and relatives. The Fourth Amendment, in other words, does nothing to prevent your Aunt Kitty from searching your home for evidence of wrongdoing. Constitutional problems arise, however, when Aunt Kitty turns over her findings to Uncle Sam; when the private search ends, and the government's investigation begins, the Fourth Amendment must be reckoned with.

FOOD & DRINK
Ed Fisher

Drawing by Ed Fisher © 1984

"I can tell you this much. If we admit Vermont and Kentucky, we'll have to find a bigger place to go for lunch."

In *United States v. Jacobsen*, 104 S. Ct. 1652, the Court was called on to decide the limits of the "private search" doctrine. In that case, Federal Express employees had opened a damaged package and observed that the contents looked suspiciously like narcotics. They contacted the Drug Enforcement Administration, which—without securing a warrant—reopened the package and chemically tested its contents. They identified the substance as cocaine.

The Supreme Court held that the DEA search was permissible, since it did not significantly exceed the scope of the private search. Since the package had already been opened by a private party, the Court reasoned, the owner of the package could have had no reasonable expectation of privacy for its contents when the DEA agents replicated the search. Since there was no infringement of privacy, there was, accordingly, no Fourth Amendment violation.

A pair of dissents decried the implications of the Court's decision. "Until now," wrote Justice White, "we have never intimated that an individual who reveals that he stores contraband in a particular container or location to an acquaintance who later betrays his confidence has no expectation of privacy in that container or location and that the police may then search it without a warrant." Justice Brennan wrote that "it is difficult to understand how [the accused] can be said to have no expectation of privacy in a closed container simply because a private party has previously opened the container and viewed its contents."

From now on, in other words, watch out for your Aunt Kitty.

Behind Bars

In *Hudson v. Palmer*, 104 S. Ct. 3194, Chief Justice Warren Burger, who just recently made a rare television appearance calling for prison reform on "Nightline," held that the Fourth Amendment does not apply "within the confines of the prison cell." In upholding the actions of a prison official who seized and destroyed a prisoner's legal materials and letters for the sole purpose of harassment, the Chief Justice concluded that "we are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security."

Justice Stevens, writing a dissent on behalf of four justices, declared that "this rather astonishing appeal of the Fourth Amendment is unprecedented."

. . . and Throw Away the Key

Dealing with juvenile offenders has not been easy. Burdened by mixed emotions (affection and anger, fear and sympathy), conflicting motives (punish and rehabilitate, deprive and instruct), and an as yet imperfect understanding of human behavior, we have struggled to identify ways to make our bad kids good. Our failure to arrive at a concensus approach is apparent in the controversy over New York's preventive detention laws, a controversy that came to a head in *Schall v. Martin*, 104 S. Ct. 2403.

In *Schall*, the Court upheld New York's procedures for the pretrial detention of alleged juvenile offenders. New York's law allows the detention of alleged offenders who present "a serious risk . . . that they may commit a crime." The Court, through Justice Rehnquist, defended the law against charges that it lacked the procedural safeguards and specific guidelines necessary to prevent arbitrary detentions of alleged offenders.

The law, Rehnquist noted, provided for notice, a hearing, and a statement of facts and reasons explaining the detention decision (the last to facilitate meaningful review on appeal); these procedures were sufficient. As for the guideline, a standard that the juvenile present a "serious risk" of criminality, it is not too vague; "from a legal point of view," Rehnquist wrote, "there is nothing inherently unattainable about a prediction of future criminal conduct." The law, he concluded, was reasonably necessary to protect "both the juvenile and society from the hazards of pretrial crime."

The dissenters—Brennan, Marshall and Stevens—were not persuaded. The juveniles, they noted, have vital interests at stake; detention brings stigmatization, a loss of freedom, exposure to adjudicated delinquents who may be guilty of serious offenses, and the risk of assault, including sexual assault. As such, the state should be exceedingly careful in exposing juveniles to these risks; the overbroad New York law reflects no such care.

The New York law, they wrote, utilizes an impossibly vague standard that ignores our lack of understanding of human behavior (and the impossibility of predicting it with reasonable certainty), provides no guidance to decision-makers (and thus invites arbitrariness), and fails to differentiate among first offenders and recidivists, young children and mature offenders, and those accused of petty offenses and those suspected of serious crimes. All are lumped together, they concluded, in an unconstitutionally broad category of "criminal risks."

The Media Scores . . .

Law enforcement wasn't the only big winner this term; the media also fared well. In the course of the term, the Court granted favorable decisions to representatives of both the electronic and print media.

. . . in Print . . .

The media in general, and *Consumer Reports* magazine in particular, scored a major victory in *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949. In *Bose*, the Court reversed a decade-long trend of press losses in libel suits, and reaffirmed the First Amendment rights of the press to make some mistakes—in the absence of actual malice—in their discussions of public figures.

In their May, 1970, review of loudspeakers, *Consumer Reports* magazine cautioned that the music from the new Bose 901 speakers "tended to wander about the room." In fact, the engineer for the magazine would later testify, the music did not wander "about the room," but rather seemed to drift "along the wall" between two speakers; the engineer could not explain what made him choose the language that eventually appeared in print.

Bose sued, claiming that they—and their product—had been libeled by the erroneous report. Under the Supreme Court's landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the First Amendment requires that the press be afforded some reasonable latitude in their discussion of "public figures." Simple errors, then, cannot be the basis for recovery in a libel suit by a public figure; rather the injured party must show "actual malice," *i.e.*, that the press either knew that its statements were false, or acted with reckless disregard for the truth or falseness of its statements. Bose, as a public figure, was held to this "actual malice" standard.

The trial court found that the engineer's failure to explain the discrepancy between what was reported and what was actually observed was sufficient to establish a reckless disregard for the truth; the court found "actual malice." On appeal, the federal court of appeals reversed; after an independent examination of the record, it found no substantial evidence of "actual malice."

The issue before the Supreme Court was twofold: first, did the court of appeals have the right to conduct an independent review of the facts of the case, and second, was it right in concluding that there was no actual malice. On both counts, the Court answered in the affirmative.

Ordinarily, courts of appeal are limited in their review of a case to reviews for errors of law and "clearly erroneous" findings of fact. Full independent reviews are extraordinary. The Court, however, held that the First Amendment interests at stake demand such an extraordinary review, and upheld the appeals court's independent determination on the malice issue. The effect of the holding is to safeguard the First Amendment rights of the press by subjecting the "actual malice" determinations in libel cases to a second—and perhaps third—stage of scrutiny.

. . . via Cable . . .

Cable television systems also scored a major victory this term with the Court's decision in *Capital Cities Cable v. Crisp*, 104 S. Ct. 2694. The state of Oklahoma prohibits advertising for alcoholic beverages over the state's airwaves; the Oklahoma Attorney General determined that this ban applied not only to local television stations, but also to those signals which originate out of state and are retransmitted to Oklahoma viewers via cable systems. A local cable operator sued, claiming infringement of its First Amendment rights to commercial expression, and the case found its way to the Supreme Court.

The Court did not address the First Amendment claim, but held instead that Oklahoma's regulation of cable TV was preempted by federal law. The Federal Communications Commission, the Court noted, had developed a comprehensive regulatory scheme for cable television; the FCC regulations could not be frustrated by separate regulatory schemes in the states.

. . . on the Gridiron . . .

Cable systems, independent stations, and, to a lesser extent, the three major television networks, should also benefit from the Court's decision in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948. The big winners in the case, however, should be the nation's major college football programs, and their TV-viewing fans.

The NCAA case was the rarest of rarities in jurisprudence: an antitrust case that normal people really cared about. The facts were really quite simple. The NCAA had entered into exclusive television contracts with ABC and CBS. Some of the NCAA-member schools were not too thrilled with the deals; they entered into a contract of their own with NBC. The NCAA was not too thrilled with its renegade schools; it threatened the schools with sanctions. The schools did what we expect true American institutions to do when they've got a gripe—they sued.

The University of Oklahoma and the other disgruntled schools claimed that the NCAA's exclusive television contracts violated the Sherman antitrust laws. The Supreme Court agreed. The NCAA's agreements, the Court concluded, were self-evident restraints on competition, and amounted to illegal price-fixing. The effects of the exclusive agreements, the Court noted, were to raise the price paid for broadcasting rights, and to reduce the output of services, "both of which are unresponsive to consumer preference." The NCAA contracts were thus invalidated; individual schools may now sell the broadcasting rights to their games by negotiating deals on their own.

The decision was not unanimous. Justice Rehnquist joined the dissent by the six foot two, one hundred and ninety pound All-American from the University of Colorado, Byron "Whizzer" White. Justice White, the 1938 National Football League Rookie of the Year, maintained that the NCAA should not be held to strict compliance with antitrust laws due to its special role as the not-for-pofit guardian of the integrity of college football. The Court erred, according to White, in treating the NCAA as a purely commercial venture in which schools participate solely—or primarily—in pursuit of profits.

. . . and Over the Airwaves

Public broadcasting stations earned a big First Amendment victory in the case of *Federal Communications Commission v. League of Women Voters of California*, 104 S. Ct. 3574. Public broadcasting stations often receive substantial funding from the Corporation for Public Broadcasting (CPB), a nonprofit organization created by Congress in the Public Broadcasting Act of 1967. That Act forbids CPB grantees from editorializing; enforcement of this prohibition is charged to the Federal Communications Commission.

In April, 1979, the FCC was sued by the League of Women Voters, which sought to enlist editorial support from educational radio stations; by the Pacifica Foundation, which sought to editorialize over its five educational radio stations; and by Congressman Henry Waxman, who sought to hear the editorial opinions of the educational stations. Their suit alleged that the ban on editorializing violated the free speech provisions of the First Amendment.

The Supreme Court upheld their claim. The Court noted that the restriction was content-based, the most serious form of free speech restriction. Moreover, the restriction was on editorial opinions, the very heart of First Amendment concerns. Such restrictions could pass constitutional muster only if they were narrowly tailored to achieve substantial government interests, and these restrictions were not.

The government's rationale for the ban—that the restriction on editorializing would protect the balanced presentation of public issues by preventing stations from becoming vehicles for government propaganda or private interest groups—failed on two counts. First, the Public Broadcasting Act contains ample safeguards against undue government influence: the Corporation for Public Broadcasting, for example, is a private bipartisan entity, and both it and its grantee stations are insulated from the political processes. Second, if the government were truly concerned with promoting balance in the presentation of public issues, it could achieve this goal by far less drastic means than an outright ban on editorial opinions. A government enforced silence, after all, is the ultimate parody of balance on the airwaves.

Four justices dissented from the ruling. Justice Rehnquist, joined by Burger and White, lamented the mentality of a decision that portrays the government as "the Big Bad Wolf" preventing "Little Red Riding Hood" from taking some food to her grandmother. Some of that food, Rehnquist observed, was purchased with money from the not-so-bad wolf himself. Justice Stevens, in a separate opinion, urged more deference to congressional wisdom:

> Members of Congress, not members of the Judiciary, live in the world of politics. When they conclude that there is a real danger of political considerations influencing the dispensing of this money and this provision is necessary to insulate grantees from political pressures in addition to other safeguards, that decision is entitled to our respect.

Like the Rodney Dangerfield of the three branches, however, Congress didn't get much respect in this case, and public broadcasting stations, as a result, are now free to criticize that Congress—or praise it—as they see fit.

Free Speech Losers

Not everyone fared as well as the media in the struggle for First Amendment protections. In *Los Angeles City County v. Taxpayers for Vincent*, 104 S. Ct. 2336, the Supreme Court upheld a city ordinance that prohibited the posting of signs on public property. A number of parties, including some local political candidates, had challenged the ordinance on the grounds that it unreasonably restricted their right to free speech, but the Court was not persuaded.

The Court noted, first of all, the city's substantial interests in preventing visual pollution, minimizing traffic hazards, and preserving public property. Second, the Court observed that the restriction itself was reasonable; it was content neutral (*i.e.*, it prohibited certain manners and places for speech without regard to its content), and it was narrowly tailored to the city's objectives. Finally, the Court noted the availability of other forums and modes of communication for the aggrieved parties.

The Court upheld another restriction on free expression in *Clark v. Community for Creative Non-Violence*, 104 S Ct, 3065. In that case, a religious organization sought a permit to stage a demonstration with homeless Americans in Washington, D.C.'s memorial parks. As a part of the demonstration, the group sought permission to sleep in makeshift shelter communities in the dead of winter. Sleeping in the elements, in a conspicuous public place, was, the group contended, homeless America's most poignant, indeed their only, real form of expression.

The United States Park Service granted the permit to construct the symbolic communities, permitted the group to conduct twenty-four hour vigils throughout the demonstration, and decided that feigned sleeping would be permissible. The Service, however, then took the apparently anomalous position that real sleeping would not be allowed under Park Service regulations.

The Supreme Court upheld the Park Service's decision and the underlying regulations. The right of free expression, the Court held, may well include the freedom to symbolically sleep, but that right is subject to reasonable government restrictions in furtherance of legitimate governmental aims. Here, the Court held, the restriction is justified by the government's interest in preserving the memorial parklands by forbidding sleeping in the parks.

The freedom of sleep case may be less important for the decision than for the way it was decided. The Court's analysis included very little discussion of less drastic alternatives to the government's outright ban on sleeping—normally a staple of First Amendment analysis—and no real discussion of the alternative means of expression available to the demonstrators. This is due, in part, to the nature of the restrictions at issue. Restrictions on the time, manner, or place of speech are subject to a lesser degree of scrutiny than restrictions on content. As this term demonstrates, that now seems to mean that content-neutral restrictions will always be sustained.

But in the freedom of sleep case, another, more subtle feature seemed manifest. Justice White's majority opinion suggested that the demonstrators lacked "common sense" for pursuing their action, and the Chief Justice, in a separate concurring opinion, blasted the demonstrators for wasting judicial resources on a "frivolous" claim. As Justices Marshall and Brennan noted in dissent, the Court was "either unwilling or unable to take seriously the First Amendment claims" of the demonstrators. In a footnote to his dissent, Justice Marshall suggested one possible explanation for the Court's behavior. "The disposition of this case," the justice wrote, "lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas." The proposition is not a particularly novel one, but such volatile notions rarely find expression in the justices' opinions. The truth of the charge will be proven or rebutted in the terms to come.

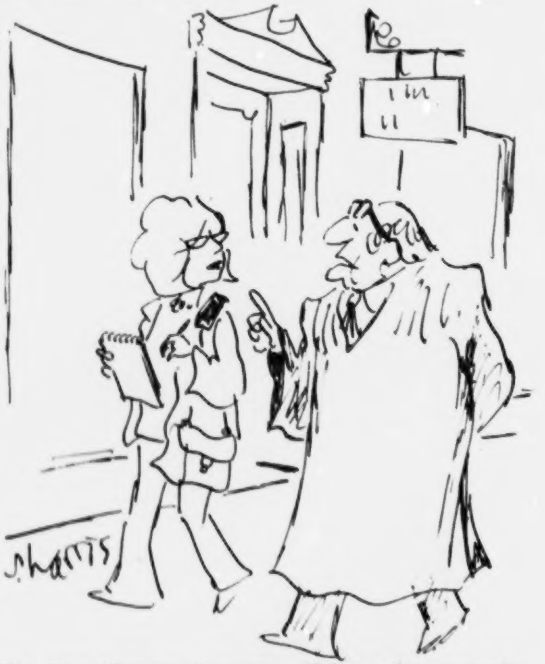
The Court in School

On the frantic last day of this term, the Court announced three opinions involving education. In the first, *Selective Service System v. Minnesota Public Interest Research Group,* 104 S Ct. 3348, the Court upheld a federal law which denied Title IV federal assistance for higher education to male students between the ages of eighteen and twenty-six who fail to register for the draft. The Court rejected the charge that the law, by punishing those who failed to register without affording them a trial, acted as an unconstitutional bill of attainder, *i.e.*, a law that legislatively determines an individual's guilt and inflicts punishment without the benefits of a judicial proceeding. The law, it noted, allowed for late registration, whereas a bill of attainder punishes an individual for a status that cannot be changed. Moreover, the Court noted, neither the intent nor the impact of the law was punitive; it simply permitted the denial of government benefits in furtherance of a valid non-punitive public purpose, *i.e.*, to promote compliance with draft registration laws.

Justices Brennan and Marshall dissented from the Court's holding, claiming that the law violated the Fifth Amendment by compelling self-incrimination (financial aid applicants are required to indicate their compliance or noncompliance with the registration laws), and that it violated the Equal Protection clause of the same amendment by discriminating against the needy. The majority had addressed this equal protection argument by observing, like a modern day Anatole France, that the law "treats all non-registrants alike, denying aid to both the poor and the wealthy."

The other two cases both involved the Education of the Handicapped Act, the federal law which requires grantee school districts to provide a "free appropriate public education" to students with recognized handicaps. In *Irving Independent School District v. Tatro*, 104 S.Ct. 3371, the Court reaffirmed the vitality of the Act, an issue that had been cast into doubt by some earlier Court opinions. In *Tatro*, the Court gave a broad reading to the legislative requirement that school districts provide "supportive services . . necessary to a special education"; such services, the Court held, properly include regular catheterization procedures for an eight-year-old girl born with spina bifida.

Much of *Tatro's* impact, however, may be limited by the Court's same day opinion in *Smith v. Robinson*, 104 S. Ct. 3457. In that case, the parents of Tommy Smith, a student with cerebral palsy,



"Yes, I'm well aware of my responsibility to the community. Thus, I speak in carefully constructed sentences, I look serious at all times and I try my utmost never to appear to be a jerk."

spent six years and over $30,000 in attorneys' fees to secure services for their son from a reluctant school district. In a narrow reading of a series of federal statutes, the Court ruled that the parents were not entitled to recover the attorneys' fees as a part of their successful suit against the school district.

That decision prompted a vigorous dissent from Justices Brennan, Marshall and Stevens, who maintained that the Court's interpretation of the laws undermined the intent of Congress to guarantee access to free educational services. "Congress," Brennan wrote, "will now have to take the time to revisit the matter, and until it does, the handicapped children of this country whose difficulties are compounded by discrimination and other deprivations of constitutional rights will have to pay the costs."

"No Gerls Aloud"

No one would deny Americans' First Amendment right to freely associate with the people of their choice—to choose their spouse, their friends, their business associates, and their social club members. And no one—well, almost no one—would deny any individual's right to be free from discriminatory treatment. Problems arise, however, when these rights come into conflict, as they did in *Roberts v. United States Jaycees*, 104 S.Ct. 3244.

In *Roberts*, the Court was called on to review the constitutionality of Minnesota's Human Rights Act, which, among other things, makes it an illegal discriminatory practice to "deny any person the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex." In 1974, the Minneapolis chapter of the United States Jaycees began admitting women as regular members; the St. Paul chapter followed suit the next year. The national organization promptly imposed sanctions on the two chapters; its bylaws limited regular membership to "young men between the ages of 18 and 35." The chapters responded by filing complaints with the Minnesota Department of Human Rights, and the national organization followed with a lawsuit. Eventually, the case made its way to the Supreme Court. The issue: would enforcement of Minnesota's human rights law deny the national Jaycees their First Amendment freedom to associate with—and limit association to—the people of their choice?

The Court upheld the law; the Jaycees' desire to limit their membership must yield to the paramount state interest in preventing discrimination. The Court acknowledged that the law did limit the freedom of the Jaycees to associate with the people of their choice, but maintained that the limitation was reasonable. The Court was not dealing, after all, with highly personal relationships; surely, the Court noted, there were differences between decisions like choosing a spouse and selecting employees. The differences, the Court reasoned, were of constitutional dimensions; the state's powers to limit marriage are extremely limited, but it has much wider discretion in regulating the choice of employees. Noting that the Jaycees were "neither small nor selective," the Court held that their relationships were less like the intimate attachments of marriage, and more like the attenuated personal attachments of a commercial venture. As such, the Constitution would not protect them from laws like this one, which "plainly serve compelling state interests of the highest order."

On its surface, *Roberts* represented the second straight major victory for women, coming hot on the heels of *Hishon v. King & Spalding*, 104 S Ct. 2229, in which a unanimous Court held that law firms may not discriminate on the basis of sex in deciding which lawyers should be promoted to partners. Both decisions, however, should lessen discrimination against minorities as well.

Racial Discrimination

From Biracial Custody to Affirmative Action

The Court had a number of opportunities to directly address issues involving racial discrimination. The results were predictably mixed. In *Palmore v. Sidoti*, 104 S. Ct. 1879, a unanimous Court took an unequivocal stand against the consideration of race in a child custody decision. A Florida judge had ruled that a four-year-old girl should not be allowed to grow up in an interracial household: "Melanie will, if allowed to remain in her present situation, and when she attains school age and thus is more vulnerable to peer pressure, suffer from the social stigmatization that is sure to come." The Court, through Chief Justice Burger, rejected such reasoning. "The Constitution," Burger wrote, "cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." In the end, the most remarkable feature of *Palmore* may have been that, in 1984, this case had to be decided at all.

The Court was confronted with a much closer question in *Hobby v. United States*, 104 S. Ct. 3093, in which a criminal defendant sought to overturn his conviction by alleging racial discrimination in the selection of grand jury foremen. The Court was understandably reluctant to "embark upon the course of vacating criminal convictions because of discrimination in the selection of foremen." "Less draconian measures," the Court concluded, "will have to suffice." The Court emphasized that it did not "countenance the purposeful exclusion of minorities or women from appointment as foremen of federal grand juries," but, absent evidence that the discrimination had directly and adversely affected the individual defendant's case, the Court felt that reversing the conviction was too extreme a remedy. "We are fully satisfied," the Court wrote, "that the district judges charged with the appointment of grand jury foremen will see to it that no citizen is excluded . . . on account of race . . ."

The dissenters maintained that the discrimination demanded reversal for two reasons. First, the injury done to the public confidence in the integrity of the judicial process demands reversal where there is evidence of discrimination. Second, there is inherent harm to the individual defendant in the unconstitutional selection of foremen, since foremen play both substantial and symbolic roles in the grand jury process. The dissenters were not satisfied that the district judges would not discriminate; such assurances, they wrote, are "completely nonsensical" because it was precisely that discrimination that gave rise to the case.

The Court was faced with an even more difficult dilemma in *Allen v. Wright*, 104 S. Ct. 3315. In that case, parents of black public school children had filed a nationwide class action alleging that the IRS was not enforcing regulations which deny tax-exempt status to racially discriminatory private schools.

As a prerequisite to any federal suit, the "case or controversy" requirement of the Constitution demands that the complaining party allege some personal injury fairly traceable to the defendant's allegedly unlawful conduct. In *Allen*, the parents alleged two injuries: first, that IRS practices amounted to effective grants of aid to segregated private schools, and second, that IRS practices foster the operation and expansion of segregated schools while hampering the effort to desegregate. The Supreme Court, in a 5-3 decision (Justice Marshall did not participate), held that these allegations were not enough. The first claim, the Court held, did not allege any injury to the parents, and the second claim alleged an injury that, judging from the evidence presented, was not "fairly traceable" to IRS conduct. There was no evidence, the Court concluded, that improperly granted tax exemptions hampered desegregation. The suit, as a result, could not stand.

The dissenters were displeased with the way in which the majority mixed the preliminary "case or controversy" inquiry with a review of the merits. Justice Brennan charged that the Court had used the "case or controversy" inquiry as "a poor disguise for the Court's views of the merits of the underlying claim." Meanwhile, Justices Stevens and Blackmun thought the Court should "deal with the question of the legal limitations on the IRS' enforcement discretion on its merits, rather than by making the untenable assumption that the granting of preferential tax treatment to segregated schools does not make those schools more attractive to white students and hence does not inhibit the process of desegregation."

The most difficult issue of all was presented by *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576. The procedural history of the case was complex, and presented serious questions of the propriety of Supreme Court involvement. In 1981, the city of Memphis announced that it would be forced to lay off employees using its seniority system. Black employees sued, maintaining that the dismissal of black employees would violate a consent decree between the city and the black employees entered into as a result of an earlier discrimination suit filed under Title VII of the Civil Rights Act. The federal district court agreed, and issued a temporary injunction barring the dismissal of black employees in a manner that would decrease their percentage representation in the work force.

Within a month, the city's fiscal crisis was alleviated, and all employees were restored to their jobs. Still, the Supreme Court agreed to hear the case, and it chose to review the merits of the claim that led to the temporary order. Its actions prompted three justices to observe that "after taking jurisdiction over a controversy that no longer exists, the Court review[ed] a [final] decision that was never made."

What the Court said was even more controversial than what it did. In dismissing the temporary injunction, the Court held that the black employees would be entitled to judicial relief only if they could demonstrate that they had been "actual victims" of discrimination; mere membership in the disadvantaged class was not sufficient to forestall dismissal. Moreover, even if the individual employee could show that actual discrimination had forced his dismissal, the minority employee is "not automatically entitled to have a non-minority employee laid off to make room for him." The Court said "no," in short, to affirmative action.

Justices Blackmun, Brennan and Marshall dissented, insisting that the Court had needlessly confused cases involving individual relief and those involving Title VII "race-conscious class relief." The Court's decision relied on cases involving individual relief, and it had treated this case as if the black employees had requested—and the district court had granted—individual awards of retroactive seniority. In fact, the employees had sought class relief, the district court had granted only class relief, and there was ample support both in case law and the legislative history of Title VII for the type of relief afforded. It was regrettable, the dissent concluded, that the Court had insisted on taking this case, and even more regrettable that its zeal had produced such a misleading—and misguided—decision. □

Mediation

(*Continued from page 37*)

those present must rise when the judge enters the room in respect for his or her position. In this mediation session, the mediators rose when the parties entered the room and shook their hands as the first signal that they too deserved respect. Matthew explained mediation, in particular the ways in which it differs from court. "Mediators are not judges," he said. "We are not here to decide who is right and who is wrong. We are not counsellors; we will not tell you what we think you should do. We are not going to settle your dispute. We are trained to help *you* reach that settlement. We will take responsibility for seeing that the mediation process moves along effectively. You are responsible for coming up with the terms of agreement."

Pat Feeney then explained the procedure fully. "First, each of you will have a turn to tell us how you view this situation. After that, we will take a brief break to discuss what we have heard and to decide upon the next steps. We will probably call each of you in for a private session. At these private sessions, you may tell us things that you don't want shared in general. We will continue this process until it is clear that an agreement satisfactory to all of you has been reached. At that time, we will all come back together and read and sign that agreement. You may see us taking notes during the mediation session. We do that only to assure ourselves that we have remembered all important points. At the end of this session, we will tear up those notes. The only record will be the agreement which we have all signed. What you have said to us will be held in confidence. You have paper and pencil in front of you also. If you hear something that you want to respond to, make a note of it and you will have a chance to talk about it during your turn."

Although Mary Dombrowski was agitated at the beginning of the session and Sally Chaney clearly nervous, both soon began to relax when they realized that they really would have their turn to speak in full. Nancy Chaney remained aloof.

It is at this opening session, with all parties present, that the nature of the dispute begins to unfold. Emotions may run high, but the mediators are trained to deal with these natural expressions of feelings. If information and insights are being exchanged during emotional outbursts, mediators will usually allow them to continue and die out on their own. If, on the other hand, the outburst is a replay of old destructive material or leading to unproductive hostility, it will be cooled down. Perhaps the underlying feelings will be allowed expression in a private session.

Through artful questioning, Matthew and Pat assured themselves that they had a full and complete understanding of what the parties were willing to discuss before one another about the factual and emotional history of the dispute. Mary Dombrowski complained about the noisy party, the noise in general when she tried to study, the rudeness of Nancy Chaney and the broken window. Sally Chaney said that she was doing the best she could to raise her children by herself and that she wanted to live in peace with her neighbor. Nancy Chaney neither confirmed nor denied anything that was said by Mary, but merely sat sullenly.

Private Caucuses

The mediators closed the opening session and went into a brief mediators' caucus to talk over what they had heard, what they still needed to know, whom they should see in private first, and what they wanted to ask that person. In this case, the mediators called in Nancy to see if, during the private caucus, she would begin to open up.

Usually private caucuses are held with each of the parties. Mediators may begin with the question, "Would you like to tell us more about this situation?" or "Is there something you would like to tell us privately that you did not feel comfortable discussing with everyone present?"

In this case, during her private caucus, Nancy told of her desire to move out of the house, of her resentment of always being so careful of Mary Dombrowski's feelings. Yes, she was drunk and she did use foul language and she did pick up the broom and swing it at Mary and she was sorry about that and she was willing to pay to fix the window.

In her private session, Mary recognized that it was not Sally's fault that the landlord had rented the apartment to the Chaneys. She also acknowledged how difficult it was for both her to raise two children and for Sally to raise four children, especially teenagers, and that she had given her own mother a very hard time.

Sally expressed considerable admiration for Mary, who she knew was raising two children, working and going to college, although she wished that she were more friendly.

Throughout the process, the mediators worked to identify the issues that were important to each party. They encouraged Mary, Sally and Nancy to think up a variety of ways to bind the wounds of the past and make things better in the future. Gradually (mediations range from one hour to four hours or more) options agreeable to all parties were found and extreme positions were eliminated through techniques such as the use of the hypothetical. For example, at one point, while she was still angry, Mary insisted that Sally should make all of her children stop walking around in their living room, which was over the place where Mary studied, after 6:00 p.m. "If you lived upstairs with your two children, would you be able to carry out such a request?" asked Pat, with no hint of sarcasm. Mary agreed that she would not be able to enforce such a rule and decided to move her study area into a place she knew to be more quiet.

Eventually, Mary and the Chaneys came to an agreement covering several points. The written agreement which resulted from the mediation session read as follows:

1. All parties regret that the incident took place.
2. All parties agree to use respectful language when they talk with one another in the future and to enter and leave the house quietly.
3. If either Sally Chaney or Mary Dombrowski are upset by the activities of each other's children, they will talk to one another first about the matter before any disciplinary action is taken.
4. Sally will help Nancy look for an apartment and will loan her the deposit, which Nancy will pay back within one year.
5. Nancy Chaney will pay Mary Dombrowski the $35.00 repair bill for the window on her front door.

The terms were those of the parties, but the words were those of the mediators. Matthew and Pat made a special effort to see that the agreement was balanced and that it was expressed in clear, positive language. The agreement was signed by the parties and the mediators. Any remaining court-related obligations were explained. The mediators thanked the parties for their hard work and the session ended.

Classroom Strategy: New Techniques, New Questions

Mediation and other forms of dispute resolution may well lead to better, faster, and more humane delivery of justice, but the movement is so varied—and so new—that many basic issues have yet to be settled.

Here is a set of questions culled from the reports of several national groups which have studied alternative dispute resolution. There are no right or wrong answers to these questions. Rather, they set an agenda for researchers in this new field, and as such, present an opportunity to involve students in gathering evidence, conducting interviews, weighing various options, and other steps in the truth-seeking process.

At present, readily available mediation publications suitable for the general public or the younger student population are scarce. However, materials are being produced at a rapid pace and teachers interested in this field should see that their names are on the mailing lists of those groups now carrying on informational and networking services. See the boxes on pages 56 and 57 for readings and agencies.

Most general libraries and court or bar association libraries will have articles and journals that discuss some of the contemporary issues surrounding the field. You could assign your students to research specific issues. Research, however, can take students well beyond the library. A letter or a call to one of the networking or professional societies in the field should help you identify practitioners who live in or near your area. These resource people could be visited by individual students or teams of students or they could be invited to the school to talk with the entire class.

Even if you don't have innovative dispute resolution formally in place, judges, prosecutors, private attorneys, labor arbitrators, law professors/students, and many other people in the community will have a perspective on these questions. Remember that very few cases are litigated to conclusion in the traditional justice system. There is enormous pressure to resolve cases informally, whether through plea bargaining (criminal) or negotiated settlement (civil). These existing alternatives should be explored as well.

Once students have done the research and made their reports, the classroom applications should be plentiful. If different students/groups of students have researched the same question and come to different conclusions, a debate would help put the positions in focus. Perhaps they could use the reports to design model alternative dispute resolution programs. It is important to remember that community mediators usually receive forty hours of training to help break habits that block successful mediation as well as to learn new skills. If you plunge your student into mediating disputes

Does It Work?

In 80-90 percent of the cases that are mediated, an agreement is reached. A great majority of these agreements hold over time.

Although the field of mediation is new and evaluation techniques still experimental, researchers generally agree that when people design their settlements, they are more committed to honoring those agreements. For example, in a study of small claims mediation in the Maine district courts, it was found that 73 percent of the defendants whose cases had been settled through mediation felt that they had a legal obligation to pay their settlement. In comparison, only 31 percent of the defendants whose cases had been decided by the judge felt the same legal obligation. These feelings translated directly into results: over two-thirds of the mediated cases resulted in defendants paying settlements in full, compared to only one-third of tried cases.

The History of the Movement

On one level, mediation has been in practice since there were three people on earth—two in a fight and the third intervening to bring about a reconciliation. Certain societies—Chinese, Japanese, African—and certain groups and institutions in our own society—the Jewish Conciliation Board, the early and contemporary Quakers, the Chinese Benevolent Association and the Christian Conciliation Service—provide precedents.

And many legal practitioners have long recognized the costs and delay of litigation. In 1850, Abraham Lincoln advised fellow lawyers to "discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time."

Despite these early precedents, however, it was in the 1960s that mediation took on a particular character and strength that allowed it to capture the minds of many. It was seen then as a powerful tool for humanizing justice and correcting flaws in the system.

In that decade, people became convinced by what had been suspected for years—our justice system (less a system and more a conglomeration of people and institutions working towards sometimes disparate goals) had reached a crisis point in its development. The court system was clogged, perhaps beyond repair. By the 1980s, influential critics, including even Chief Justice Warren E. Burger, lamented that "our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. . . ."

The search was on for alternatives to the adversary approach. Many of the early alternative dispute resolution (ADR) efforts borrowed heavily from collective bargaining models of mediation and arbitration. In some early mediation programs developed in the late sixties and early seventies, law professors and law students served as mediators for programs housed in prosecutors' offices. A smattering of community-based programs, some sponsored by the American Arbitration Association with support from private foundations, were established on the East Coast. These programs often trained and used lay people as mediators. Later, in 1977, federally funded Neighborhood Justice Centers (NJCs) were founded in Atlanta, Kansas City and Los Angeles. Since then, the community-based dispute resolution model has spread across the United States. Today, there are almost 250 such centers and that number is growing daily.

These programs differ in many ways—the nature of the community served, the type of sponsoring agency, the kinds of cases that are heard, the background and training of the mediators and the specifics of the mediation process, to name a few. But they do share a form peculiar to the times in which they were spawned.

Conflict was a growth industry in the '60s: consider the civil rights movement,

without a sense of the skills involved, you could stir up frustration and undo skepticism about whether the process does indeed work. (Materials and strategies are being developed and tested to help teachers learn and share dispute resolution skills. The winter and spring editions of *Update* will give more information on the state of the art.)

Whatever possibilities you choose, remember that this is more than an academic exercise—it's a chance for young people to take part in research that's genuinely needed.

1. **How do mediation and other private, less formal means of dispute resolution interface with the public, formal justice system?**
2. **What kind of agencies should be sponsoring mediation/dispute resolution projects? The courts? Community groups? District attorneys?**
3. **Who should be conducting mediation? Trained community volunteers? Lawyers? Academically trained experts?**
4. **How should mediators be trained? Who should do the training? Should there be standards by which to judge dispute resolution practitioners? If so, who should set the standards and who should enforce them?**
5. **What is the proper caseload for a neighborhood dispute resolution center? If some projects are underutilized, what can be done to increase usage?**
6. **What is the impact of the dispute resolution movement upon the legal profession? Is it an important option to help them serve clients better? Is it a threat to their livelihood?**
7. **What kind of cases should go to each dispute resolution option and who should decide?**
8. **Are there some kinds of cases that should not be sent to alternative dispute resolution centers, but which should be litigated? What kind of cases? for what reasons?**
9. **How should mediators be evaluated?**
10. **How will dispute resolution options be funded?**
11. **If dispute resolution options are successful, can they avoid the problems of mature bureaucracies?**
12. **How should dispute resolution programs be evaluated? What research needs to be done? Why?**
13. **In states where there are no statutes protecting mediator confidentiality, how should that issue be handled?**
14. **How do differences in power and cultural background affect the ability of the parties in a mediation to negotiate for themselves?**
15. **Does the mediator have an obligation to consider the interests of those who are not at the table?**

the women's movement, the antiwar movement. A generation of young people got its on-the-job training in confrontational politics.

Although the '60s seemed to value confrontation for its own sake, there was another side to the picture. As the initial exhilaration of combat gave way, activists wanted resolution and even reconciliation. In the end, movement politics generated a certain self-confidence in the ability of common people to address problems together. This was the small-is-beautiful, do-it-yourself generation which had gained experience organizing, teaching in free schools, developing food co-ops, and building their own homes. To them, self-help justice was a comfortable, attractive concept.

The process they chose, mediation, seems to reflect the dynamic tension between these two characteristics of the '60s—confrontation and cooperation. Perhaps another dynamic is reflected by the way in which some mediation programs have borrowed, in varying degrees, from both the shuttle diplomacy strategies of labor/international disputes on the East Coast and the human potential movement developed on the West Coast.

The federal government also played an important role in instituting mediation programs. The U.S. Community Relations Service (CRS), established in the sixties to help communities amicably resolve racial and ethnic disputes, expanded its conciliation services in the seventies to include mediation. It successfully mediated scores of disputes involving schools, police, prisons and other units of government. Through heavy doses of federal funding, the U.S. Department of Justice encouraged alternative dispute resolution experimentation on a grand scale until the winds of political change blew away that source of dollars in the early '80s.

Resource Listings

For more information

American Arbitration Association (AAA), 1730 Rhode Island Avenue, N.W., Washington, DC 20036, (202) 296-8510.

American Bar Association Special Committee on Dispute Resolution, 1800 M Street, N.W., Washington, DC 20036, (202) 331-2258.

Community Board Center for Policy and Training, 149 Ninth Street, San Francisco, CA 94103, (415) 522-1250.

National Institute for Dispute Resolution (NIDR), 1901 L Street, N.W., Suite 600, Washington, DC 20036, (202) 466-4764.

Society for Professionals in Dispute Resolution (SPIDR), 1730 Rhode Island Avenue, N.W., Suite 509, Washington, DC 20036, (202) 833-2188.

Publications

Paths to Justice: Major Public Policy Issues of Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, (NIDR) January, 1984. (Available at no charge while supply lasts from National Criminal Justice Reference Service, National Institute of Justice, U.S. Department of Justice, Washington, DC 20531.)

Mediation: An Alternative That Works, Albie Davis, March, 1984. (Available at no cost while supplies last from District Court Department of the Trial Court of Massachusetts, Holyoke Square, Salem, MA 01970.)

Alternative Methods of Dispute Settlement: A Selected Bibliography, Frank Sander and Fred Snyder, (Write to ABA Special Committee on Dispute Resolution, above.)

Conflict Resolution Skills: A Trainer's Manual, Lonnie Weiss, Illinois Coalition Against Domestic Violence, 931 South Fourth Street, Springfield, IL 62704.

Getting to Yes: Negotiating Agreement Without Giving In, Roger Fisher and William Ury, 1981, Houghton Mifflin Company, (1983, Penquin Books, paperback.)

Justice Without Law: Resolving Disputes Without Lawyers, 1983, Jerold S. Auerbach, Oxford University Press.

Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation, Jay Folberg and Allison Taylor, Jossey-Bass Publishers, 433 California Street, San Francisco, CA 94104.

Out of Court: A Simulation of Mediation, 1982, Ethan Katsh and Janet Rifkin, Legal Studies Simulations, 42 Elwood Drive, Springfield, MA 01108.

Peace and Change, A Journal of Peace Research, Special Issue, Conflict Resolution, Summer 1982, Special Editor, Marie A. Dugan, Kent State University, Kent, OH 44242.

Peacemaking in Your Neighborhood: Mediator's Handbook. Revised Edition, July, 1982, Jennifer Beer, Eileen Stief and Charles Walker, Friends Suburban Project, Box 462, Concordville, PA 19331.

Mediation Today

The honeymoon is ending for the alternative dispute resolution movement. Some early oversell, particularly around the ability of mediation to significantly reduce court case loads, has made the field vulnerable to criticism. In some places where mediation has been mandated, it faces the same bureaucratic limitations that the courts contend with—lack of time, impersonality, and backlog. Each year a growing number of law schools add dispute resolution courses to their curricula. While these courses can modify the adversarial thinking of future lawyers, they also may alter the conciliatory nature of dispute resolution options.

And there is a growing recognition among advocates that mediation can never entirely replace traditional legal processes. Although we can fault our courts for being expensive, mysterious and time-consuming, and although we can express frustration at the way in which the adversarial system redefines and narrows issues, antagonizes the parties and offers a limited range of remedies, we still must recognize the courts' historic role in applying public norms, setting precedents, protecting and extending rights and acting as deterrents.

In the same vein, although we may find mediation a more humane, flexible, and effective approach toward many disputes, we need to understand that the very private nature of the process may not be appropriate for all conflicts. Some disputes need to be aired publicly in order to develop public standards on emerging issues.

Still, the very fact that the movement is attracting criticism is an indication that it is growing up, that it is having an impact and deserves to be taken seriously. Each day the movement becomes more powerful. One national report, published in 1984, listed the advantages of alternative dispute resolution: it may be "less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. [It] may dispense better justice, result in less alienation, produce a feeling that grievances are actually heard, and fulfill the need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system." These qualities help it attract advocates from both the lay and legal community.

The growth in the use of mediation extends beyond the 250 neighborhood justice centers. In Maine, California and states in between, courts are recommending, and sometimes requiring, that divorcing couples try to resolve property and custody issues through mediation rather than in the courts. Massachusetts has placed a special mediation unit for consumer complaints in its attorney general's office. Four states—Alaska, Massachusetts, New Jersey and Wisconsin—are creating statewide mediation offices to help resolve complex public policy disputes. Many states are exploring mediation as a means to resolve some of the long-standing, sticky issues involved in status offenses by young truants and runaways. Over 16 states have passed legislation that allows or encourages mediation programs.

Advantages/Disadvantages of Dispute Resolution Mechanisms

Advantages

1. *Court Adjudication*
    - announces and applies public norms
    - precedent
    - deterrence
    - uniformity
    - independence
    - binding/closure
    - enforceability
    - already institutionalized
    - publicly funded
2. *Arbitration*
    - privacy
    - parties control forum
    - enforceability
    - expeditious
    - expertise
    - tailors remedy to solution
    - choice of applicable norms
3. *Mediation/Negotiation*
    - privacy
    - parties control process
    - reflects concerns and priorities of disputants
    - flexible
    - finds integrative solutions
    - addresses underlying problem
    - process educates disputants
    - high rate of compliance
4. *Ombudsperson*
    - not disruptive to ongoing relations
    - flexible
    - self-starting
    - easy access

Disadvantages

1. *Court Adjudication*
    - expensive
    - requires lawyers and relinquishes control to them
    - mystifying
    - lack of special substantive expertise
    - delay
    - time-consuming
    - issues redefined or narrowed
    - limited range of remedies
    - no compromise
    - polarizes, disruptive
2. *Arbitration*
    - no public norms
    - no precedent
    - no uniformity
    - lack of quality
    - becoming encumbered by increasing "legalization"
3. *Mediation/Negotiation*
    - lacks ability to compel participation
    - not binding
    - weak closure
    - no power to induce settlements
    - no due process safeguards
    - reflects imbalance in skills (negotiation)
    - lacks enforceability
    - outcome need not be principled
    - no application/development of public standards
4. *Ombudsperson*
    - not enforceable
    - no control by parties

Source: *Paths to Justice: Major Public Policy Issues of Dispute Resolution.*

These are indicators the movement is here to stay. How it will fit into our existing system and how it will be funded remains to be determined. Meanwhile, debate now centers on both fundamental and fine points. (See pp. 54–55 for a classroom strategy which identifies some of those issues.)

Controversy is growing over whether mediation centers should be "courts of the first resort," using volunteers to reach out into their neighborhoods and find conflict at an early stage, or whether they should make use of the clout of the formal justice system, getting cases through court sponsorship. Proponents of the community conciliation system point out that they can receive disputes before they become so emotionally charged or intractable that they require justice agency attention, while also increasing community dispute resolution skills and reducing tension. Proponents of the court-affiliated route are willing to forego the "luxury" of voluntary community conciliation programs to gain the volume of cases possible with the (implicit or explicit) compulsory nature of their own programs. They feel they need such volume to make a significant impact.

Divorce mediation has become a strong part of the movement, but a hot debate centers on the use of mediation in spouse abuse or child abuse cases. Some believe that there is a role for mediation, once protection has been guaranteed. Others, such as the Center for Women and the Law, believe that mediation is never appropriate when there is even a suspicion of violence.

It is important to note that mediation has an impact on the schools as well. A growing number of dispute resolution practitioners work with educators to promote mediation programs and dispute resolution curricula in elementary and high schools. These are lifetime skills, they say; let's teach them to our children while they are still young. This new trend deserves to be watched. The extension of the movement into our education system could have a profound impact on the way in which future generations perceive and shape our justice system. ☐

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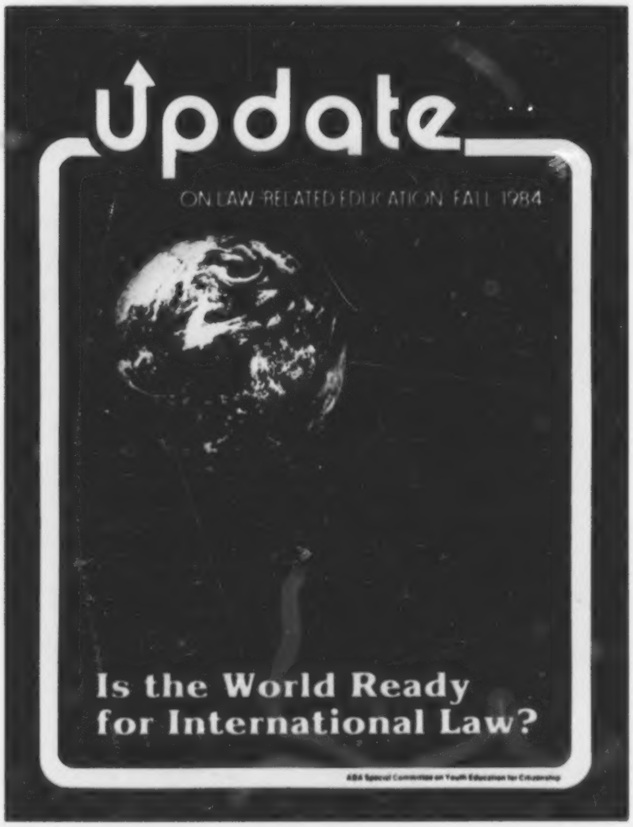

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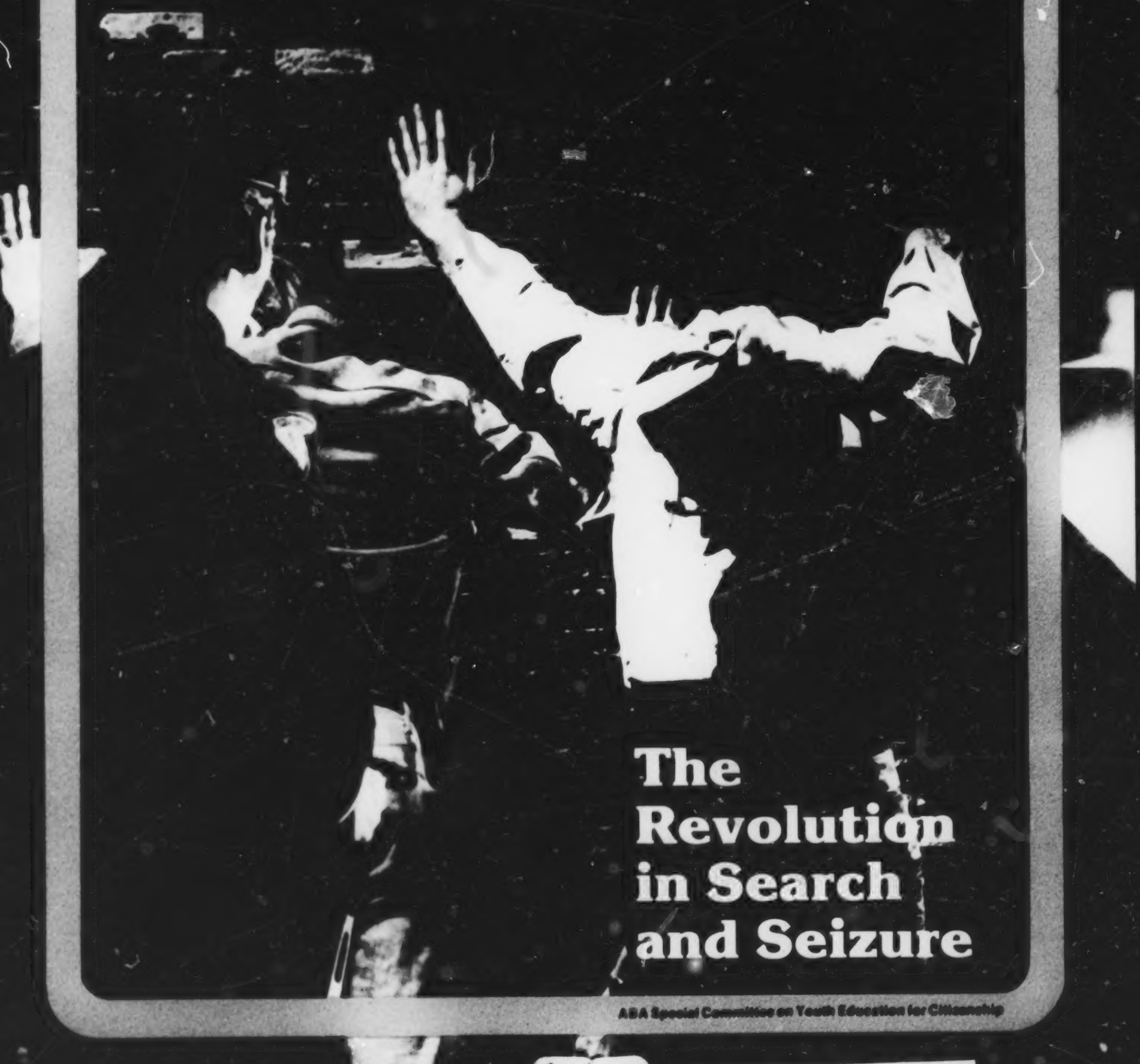

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contents

Volume 9, No. 1, Winter 1985

2
Court Briefs
The High Court Goes to School

6
Search and Seizure
The Revolution in Search and Seizure

10
Search and Seizure
Should Students Have Rights?

16
Law in the 80's
Trial by Cassette?

CONFLIC
MANAGE

20
Mediation in the Schools
Tales of Schoolyard Mediation

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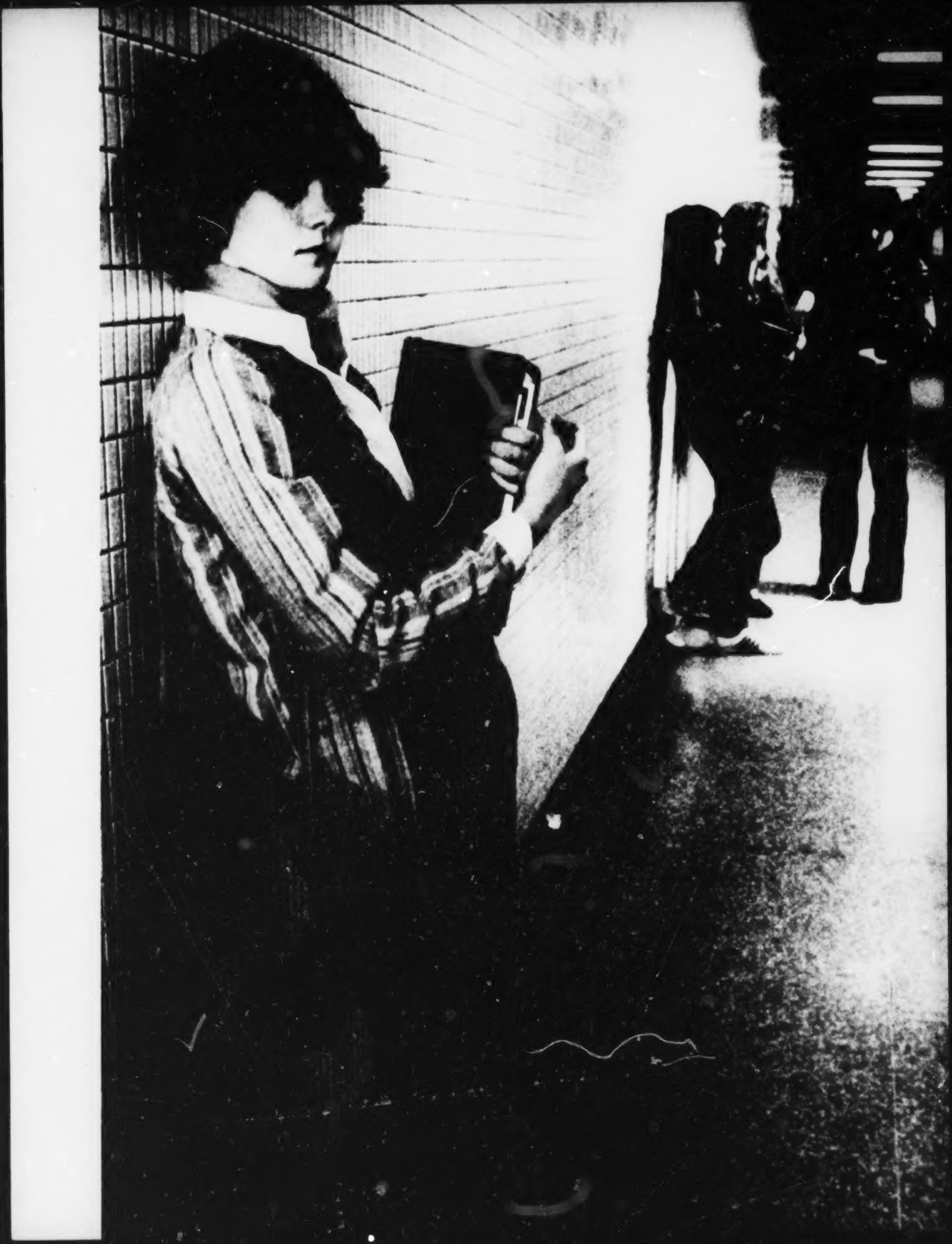

COURT BRIEFS

Robert Hayman and George Kassouf

The High Court Goes to School

And finds itself immersed in gay rights, student searches and renewed controversy over religion in the schools

> That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedom of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.
>
> —The United States Supreme Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

The state of New Jersey invited the Supreme Court to its schools well over a year ago. The Court accepted. It visited not once—but twice. And the second time it didn't even wait for an invitation. The result of all this is a controversial decision whose effects will be debated for a long time to come.

In *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985), New Jersey requested the Court's assistance in expelling the exclusionary rule from school. That rule—which prohibits using illegally seized evidence in proceedings against those accused of crimes or other improper activities—has been the Court's most troublesome progeny in recent years. According to New Jersey, it had also become a major nuisance in the schools—a threat to the order and security of the schools, their students and their teachers. The Garden State was not unmindful of the general controversy surrounding the rule; it seized the moment to ask the Court for a ruling that the exclusionary rule—whatever its merits in other contexts—had no business being in schools. The specific issue New Jersey raised was whether the exclusionary rule should apply to juvenile delinquency proceedings resulting from in-school searches and seizures by school officials. Early last year, the Court agreed to resolve the issue.

Later in the year, the Court changed its mind. In an unusual move, the Court invited itself back into the New Jersey schools to resolve a larger, more fundamental issue: whether—and to what extent—the constitutional protections against unreasonable searches and seizures applied in school. Forget about the exclusionary rule: the Court was going to examine the entire Fourth Amendment as it applies to the schools.

Smoking in the Girls' Room

The *T.L.O.* case arose from a most innocuous incident. (See article by Marilyn Cover in this issue for more on the facts of this case.) A fourteen-year-old freshman at Piscataway High School had been caught smoking in the girls' lavatory. A search of her purse by the assistant principal, who was initially looking for cigarettes, disclosed evidence of marijuana dealing. Lower courts refused to suppress the evidence, but the Supreme Court of New Jersey reversed them both. The search, that court concluded, was indeed unreasonable under the circumstances; the evidence it produced was not admissible in the juvenile proceedings.

When the state of New Jersey first appealed this decision to the United States Supreme Court, it sought only a ruling on whether the exclusionary rule should apply. The state had conceded that Assistant Principal Choplick's search was unreasonable; that was simply no longer an issue . . . at least, it wasn't an issue among the parties to the case. But the Supreme Court wasn't so sure. The Court heard arguments on the exclusionary rule issue last March, only to take the unusual step of ordering reargument in the case, this time on the underlying premise that the search of T.L.O.'s purse was unreasonable. The ultimate question then before the Court: To what extent do public school students enjoy Fourth Amendment protection against unreasonable searches and seizures by school officials?

Protection for Students

On January 15, the Court announced its decision. The vote was six to three, with five separate opinions offered by the justices. Are our public school students protected by the Fourth Amendment? "Yes," the Court said, "at least sort of." The state had argued that teachers and school administrators act *in loco parentis*

Photo by Cosimo Scianna

(in place of a parent) in their dealings with students; their authority, then, is that of a parent, and not of the state, and is thus beyond the purview of constitutional limitations. The Court, through a majority opinion written by Justice White, rejected this argument. It held that the Fourth Amendment's prohibition against unreasonable searches and seizures *does* apply to searches conducted by public school officials. In so holding, the Court explicitly rejected the argument that school officials are exempt from the constraints of the Fourth Amendment by virtue of their special authority over schoolchildren.

The Court noted that prior cases had held that public school officials were constrained by the First Amendment (free speech) and the Fourteenth Amendment (due process) in their dealings with their students; it would be difficult to hold, the Court concluded, that the Constitution did not apply when officials were conducting searches of their students. More generally, the Court observed, the doctrine of *in loco parentis* assumes that school officials are acting in accordance with voluntary delegations of power by individual parents—an assumption not entirely consonant with modern compulsory education laws. Public schools are creatures of the state; public school officials, no less than other state officials, are subject to the limitations of the Bill of Rights.

A New Student Standard

For T.L.O. and her peers, however, it was all downhill from there. The Fourth Amendment, the Court said, prohibits only "unreasonable" searches and seizures. The Court announced that the issue of the "reasonableness" of a search was to be resolved by a series of balancing tests. After one such test, the Court held that the traditional Fourth Amendment warrant requirement is "unsuited to the school environment." After another test, the Court concluded that "strict adherence to the (Fourth Amendment) requirement that searches be based on probable cause" is inappropriate in a school context. The better rule, the Court held, is that "the legality of a search of a student shall depend simply on the reasonableness, under all the circumstances, of the search." This question of reasonableness in turn involves a twofold inquiry: first, was the search "justified at its inception;" and second, was the search reasonable "in scope"? The Court elaborated as follows:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

The Court then applied its new "reasonableness" test to T.L.O.'s case. Predictably, it upheld the validity of the search. Choplick's initial search of T.L.O.'s purse was justified at its inception; a teacher's report that T.L.O. was smoking in the girls' room gave Choplick "reasonable grounds" for suspecting that she might be carrying cigarettes in her purse. Admittedly, possession of the cigarettes was not an infraction of school rules, but it would be evidence—however circumstantial—that the infraction of "smoking" had in fact occurred. Once Choplick discovered some rolling papers—and he couldn't help but notice them in his search for the cigarettes—he had reasonable grounds for suspecting that the purse might also contain marijuana. When he discovered marijuana and a peculiar quantity of cash, he had reason to suspect T.L.O. might be involved in marijuana trafficking. When his further search revealed a list of names and two letters, the evidence of trafficking was substantial enough to justify examination of the private correspondence. In sum, it was a reasonable search.

Other Voices

No fewer than six justices felt compelled to make additional statements in the case. Justices Powell and O'Connor joined in a concurring opinion, generally supporting Justice White's analysis, but urging greater emphasis "on the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a non-school setting." "Familiar constraints in the schools, and also in the community," wrote Justice Powell, "provide substantial protection against the violation of constitutional rights by school authorities." In addition, the justices noted, the "special relationship between teacher and student" warrants some consideration. Teachers are decidedly distinct from law enforcement officers who function chiefly as 'adversaries of criminal suspects.' "Rarely," they concluded, "does this type of adversarial relationship exist between school authorities and pupils." (One can't help but wonder if the justices have recently visited any schools.)

Justice Blackmun also offered a concurring opinion, joining in the judgment of the Court, but sharply criticizing its analysis. The school environment, he concluded, does present certain special needs that justify exceptions to the warrant and probable cause requirements. This result, however, should follow only after the traditional, sound Fourth Amendment analysis, and not after a newly contrived, and highly suspect, "balancing test."

Finally, Justices Brennan, Marshall and Stevens lent their names to two dissenting opinions. Their opinions decried both the results and reasoning of the majority view, and lamented the respective futures of the Fourth Amendment and the public schools. Their opinions were replete with these questions:

- Whatever happened to probable cause?
- Just what is meant by all this "reasonableness?"
- If legal minds can't agree on what is "reasonable," how can we ever expect school officials to tailor their conduct to such a nebulous standard?
- Where do all these balancing tests come from, and can we really pretend that they will yield a fair, unbiased and just result?
- And just what are we doing deciding this issue anyway?

The Fourth Amendment: New and Improved?

The Court's *T.L.O.* decision does indeed raise some interesting questions about the future of the Fourth Amendment. Perhaps the most significant involve the Court's treatment of traditional Fourth Amendment requirements. The search and seizure provision of the Fourth Amendment actually consists of two clauses:

1. "the right of the people to be secure . . . against unreasonable searches and seizures shall not be violated, and
2. no warrants shall issue, but upon probable cause . . ."

The Supreme Court has consistently held that the two clauses are not independent, but rather that the second clause was intended by our Founders to give

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meaning to the first. Thus, the Court has deduced two principal tenets of Fourth Amendment law:

1. that absent special circumstances, warrantless searches are *per se* unreasonable; and
2. that full-scale searches—with or without warrant—must be supported by probable cause.

In recent years, the dual requirements of a warrant and probable cause have become increasingly discretionary with the Court. More and more, the Court has discerned special needs of law enforcement that outweigh the traditional protections of the warrant. More and more, the Court has balanced competing interests to loosen the rigorous requirements of probable cause. The trend seemed to reach its pinnacle two terms ago, when, in the case of *Illinois v. Gates*, 459 U.S. 1028 (1982), the Court abandoned the certainty of its traditional probable cause requirements in favor of the flexibility afforded by a "common-sense" approach to probable cause. Under *Gates*, probable cause became a "nontechnical," "practical" "fluid" and "flexible" standard whose application depended upon an evaluation of the "totality of the circumstances."

Gates, however, has proven not to be the pinnacle of flexibility, for *T.L.O.* carries that trend to new heights. The school may well constitute a special setting for Fourth Amendment law, but the dissenters point out that the *T.L.O.* opinion disregards the traditional constraints of Fourth Amendment analysis. The new rule it announces is one of reason—with a premium on intuition and ambiguity. Thus it is that the legal distinction between a search and a seizure—long a staple of Fourth Amendment law—can be dismissed by the Court in one footnote: "such hairsplitting [distinction]," the Court wrote, "has no place in an inquiry addressed to the issue of reasonableness." Similarly—and most importantly—the traditional requirements of a warrant and probable cause can be made to disappear with hardly a word of explanation. No need to examine for "special needs" for an exception to the warrant requirement, no need to examine the "totality of circumstances" to assess conformity with the probable cause requirement. Instead, with little precedent in its prior opinions, and with almost nothing to offer in factual or theoretical support, the Court abandons its traditional prescriptions in favor of a more general standard—a standard of "reasonableness." And in the process, decades of Fourth Amendment analysis are apparently subordinated to a new methodology—a balancing test, which weighs the interests of the competing parties to produce a result that is fair, just and reasonable.

Whether this new victory for "flexibility" and pragmatism is good or bad depends in part on one's perspective and in part on events yet to unfold. It is certainly true that the new standards afford great discretion to school officials in their efforts to maintain order and security. It's a fine line, however, between discretion and capriciousness, and the Supreme Court may not have provided sufficient guidelines to keep the distinction clear. In a peculiar way, the ambiguous nature of the Court's new standard may actually have a palsying effect on school officials. Uncertain of what is actually permissible under the rule, officials may be apt to take an unnecessarily cautious approach to the problems in their schools. And finally, those who decry judicial interference may find themselves victims of this new flexibility; it is true that the officials are afforded much room to exercise their judgment, but then, so too are the courts.

Some Early Returns

Interestingly enough, the *T.L.O.* opinion has already prompted some surprisingly diverse reactions. Early reviews from the legal profession have not been favorable; attorneys seem confused and disappointed—partly with the result, partly with the Court's analysis. Law enforcement officials, on the other hand, were predictably pleased with the decision. While the result does not affect their actions directly (it applies only to the actions of school officials), it does offer them some hope in their constant and frustrating struggle against crime in the schools. Moreover, the decision bodes well for future cases involving Fourth Amendment problems.

Among educators—teachers, building administrators, and other school officials—the reaction has been surprisingly mixed. Some public school officials have joined the chorus of praise coming from the law enforcement community. They appreciate the flexibility offered by the Court in deference to their struggles to maintain order in the schools. They appreciate the power, and they appreciate the trust. Other officials seem less thrilled with their present; their message to the Court: "thanks, but no thanks." They point out that schools are intended to be halls of learning, where the curriculum in-

(Continued on page 29)

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SEARCH AND SEIZURE

Joseph L. Daly

Photo by Paul Conklin

The Revolution in Search and Seizure

How new law is being made every day

For most practicing lawyers and teachers of law, Fourth Amendment search and seizure law is one of the most technical and difficult areas in all of law to understand. The entire area of search and seizure is composed of superfine distinctions, of exceptions to the rules and exceptions to the exceptions. Since the stakes are high—evidence which courts say the police seized illegally is excluded from trial, resulting in the occasional acquittal of someone who society thinks is clearly guilty— key cases often generate a lot of controversy.

Are the landmark cases based on a consistent pattern and unified philosophy of jurisprudence, or are they just based on a series of technicalities—strung together by the Supreme Court in its attempt to interpret the Constitution? The difficulty arises because the Supreme Court in past cases seems to have been in conflict with itself. Like an accordion, one time the search is "reasonable" under the Fourth Amendment, even when a search warrant is not obtained, while in the next term a search is "unconstitutional," even when a search warrant has been obtained.

When a guilty defendant is "let off the hook" because of a "technicality," the average person wonders at such a criminal justice system. Another criminal escapes justice through a legal loophole!

On the other hand, others view such an occurrence as being in conformance with traditions and legal guarantees of our Constitution. Just such a divergence of views over the Fourth Amendment was highlighted in the United States Supreme Court during the term ending June 1984.

For the majority—Chief Justice Berger and Justices Rehnquist, O'Connor, Powell, and White, in most cases—the Supreme Court's 1983-84 term produced "common sense" decisions regarding the Fourth Amendment. For them it made sense to loosen up the exclusionary rule with a good faith exception, to tell prisoners they have no reasonable expectation of privacy in their cells, and to announce that the Fourth Amendment simply asks police to be reasonable in searching and seizing. These justices saw their Fourth Amendment decisions as building respect for law and doing what society wants: getting rid of some of the legal loopholes that prevent truth and justice from being advanced.

For the dissenters—Justices Brennan, Marshall, Stevens, and sometimes Blackmun—Fourth Amendment protections and rights crumbled during the term. They characterized the majority's decisions in Fourth Amendment cases as "idiosyncratic," "nihilistic," and "contrary to both legal and ethical traditions of our great Constitution."

What Fourth Amendment cases caused this strong rhetoric? Before we look at some of the most important, consider this dilemma. It may help you clarify your own thoughts as to whether last term's Fourth Amendment cases represented crumbling constitutional cornerstones or the closing of legal loopholes.

Could You Defend Someone You Know Is Guilty?

Suppose you were a lawyer and were called to the jail by Osborne Sheppard.

Mr. Sheppard, in the privacy of the attorney's interview room, tells you he has raped and murdered his girlfriend. He further informs you that the police invaded his home with what he thinks is an improper search warrant. They found bloodstained boots, women's earrings, one with bloodstains, and a pair of bloody men's jockey shorts and women's leotards. Sheppard wants to exercise all his legal rights, Can you defend him? Would you?

At parties when people discover I am an attorney who has represented criminal defendants, invariably they will ask, "How can you defend someone you know is guilty?" It's a common question, but not an easy one to deal with. Being a complete person with both an intellect and emotions, can I be true to myself in answering this question? I usually explain that the Sixth Amendment to the United States Constitution grants everyone a right to a lawyer in criminal prosecutions. (Having been involved in complex litigation myself as a plaintiff, I can attest to the fact that even a lawyer needs a lawyer's help during these most stressful times. The adage that "a lawyer who represents himself has a fool for a client" is true especially in criminal cases.)

Next, I say the Fifth Amendment to the United States Constitution protects individuals from having to incriminate themselves in criminal cases. This leads us to the realization that a defendant has a right—an absolute right—to remain silent in the face of criminal accusations. A further corollary of this right is that the burden of proof is on the government to show the defendant is guilty, not on the defendant to show he is innocent. By case law, the courts have determined that that burden on the government is "proof beyond a reasonable doubt."

The lawyer who is asked by a guilty client for defense has to ask him/herself whether these constitutional principles are worthy of application. Remembering the history of our country, we know that people were willing to risk lives and fortunes over these principles.

Finally, when the lawyer studies the Fourth Amendment—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized"—he/she again remembers that this right is applied to a defendant who is presumed to be innocent until proven guilty by the government in a fair trial.

Are these principles loopholes or cornerstones of our legal system? Most, but not all, attorneys would conclude that they are cornerstones. Consequently, if the police have violated one of the constitutional protections, the defense attorney will defend based on those facts. So, in the Sheppard case, if the police did not have a valid search warrant because the warrant was issued without "probable cause" the attorney will ask for the exclusion of the bloodied shorts and leotards and all the rest from evidence. If the attorney is successful, the jury will never have the opportunity to know that such evidence was found in the defendant's home.

How does such a method of defense make *you* feel? If you are like the majority of the Supreme Court justices last term in Fourth Amendment cases, you are concerned about letting Osborne Sheppard off the hook because of a "technicality." Those justices feel that excluding evidence that is clearly relevant will "generate disrespect for the law and the administration of justice."

On the other hand, if you are like the dissenters, you are gravely concerned that if the evidence is not excluded, it would be a sharp break with established law and a blow to freedoms granted to all of us under the Constitution.

What the Court Said

Essentially, the Court developed a new line of reasoning last term when interpreting the Fourth Amendment. Now the Court uses a cost/benefit analysis in search and seizue rulings. Let's look at some of the important cases and see how the Court applied this analysis.

Exclusionary Rule Takes a Beating. The most hotly contested and controversial issue in criminal law enforcement over the last five years finally was resolved by the Court in its recent term. A good faith exception was added to the exclusionary rule. Even more important, the basis for the exclusionary rule was clarified. In 1961, *Mapp v. Ohio*, 367 U.S. 643, told us that the exclusionary rule was "part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual liberty." But now, according to *United States v. Leon*, 104 S.C. 3405 (1984), "the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search and seizure 'work[s] no new Fourth Amendment wrong.' " The Court now teaches that the exclusionary rule is simply a judicially created remedy to deter illegality—which means that the rule can be altered by the courts if they see fit.

In both *Leon* and a companion case, *Massachusetts v. Sheppard*, 104 S.C. 3424 (1984), well meaning and diligent police officers honestly presented their affidavits requesting search warrants to judicial officers before conducting searches for criminal evidence. Higher courts found that the paper work failed to conform to the commands of the Fourth Amendment. So the drugs in *Leon* and the blood-stained clothing in *Sheppard* were ruled inadmissible.

According to Steven S. Trott, an assistant attorney general in the criminal division of the Department of Justice, "in both cases, no reasonable person could find fault with the conduct of the police. To do so would be to exalt technicality over substance, and to frustrate the cause of justice." The majority of the court, including Justices White, Blackmun, Powell, Rehnquist and O'Connor and Chief Justice Burger, agreed. They said that because the police operated in "good faith," deterrence of police illegality would not be achieved in these situations. Exclusion of the evidence may well "generate disrespect for the law and the administration of justice."

But police officers beware! Justice Blackmun, in his concurring opinion in *Leon*, stressed that because the judgment of the majority is an empirical one about the effect of the exclusionary rule, if it should emerge from experience that "contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here."

Justices Brennan and Marshall issued a strong protest. They have "no doubt that these decisions will prove in time to have been a grave mistake." Justice Brennan did not agree that the exclusionary rule is simply a "judicially created remedy." Rather, he said, the exclusionary rule and the right to be free from the initial invasion of privacy "are coordinate components of the central embracing right to be free from unreasonable searches and seizures."

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He also took aim at the Court's cost/benefit analysis by pointing out that using that analysis properly would lead to an opposite conclusion. He pointed to recent studies demonstrating that the "cost" of the exclusionary rule—calculated in terms of dropped prosecutions and lost convictions—is quite low, whereas the benefit of privacy to society is quite high.

Justice Brennan characterized the majority's decision by saying "it now appears that the Court's victory over the Fourth Amendment is complete. . . . Today's decision represents the *pièce de résistance* . . . for today the Court sanctions the use in the prosecution's case-in-chief of illegally obtained evidence against the individual whose rights have been violated—a result that had previously been thought to be foreclosed."

Easier to Search for Illegal Aliens. In a third exclusionary rule case, *Immigration and Naturalization Service v. Lopez-Mendoza*, 104 S.C. 3479 (1984), the Court held "there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to [protection of the Fourth Amendment rights of all persons]." In applying the cost/benefit analysis, the Court concluded that "the social costs of applying the exclusionary rule in deportation proceedings is both unusual and significant." Because the violation of immigration law is continuous by allowing a defendant to remain in the United States, the Court felt that the objective of deterring Fourth Amendment violations by use of the exclusionary rule cannot be achieved. A constable's blunder may allow the criminal to go free sometimes, "but we have never suggested it allows the criminal to continue in the commission of an ongoing crime."

Looking at *Leon, Sheppard,* and *Lopez-Mendoza,* together, it is clear that the exclusionary rule has been narrowed and its basis has become judicial, not constitutional. The test is now a cost/benefit analysis: the cost of using the rule against the benefits achieved.

What Constitutes A Seizure?

Most pollsters are happy with a 50 percent response rate to a survey. But when the Immigration and Naturalization Service does a survey, it gets a 100 percent response. How? By blocking the exits.

In *INS v. Delgado*, 104 S.C. 1758 (1984), the Court decided that the entire work force was not seized for the duration of the survey, although INS agents were placed near the exits of the factory site while other agents dispersed throughout the factory to question most of the "foreign-looking" employees at their work stations.

The Court decided that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment "seizure." Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, questioning does not result in detention under the Fourth Amendment. The Court concluded, "If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more seizure when it occurs at the exit."

Justice Brennan, with whom Justice Marshall joined, strongly dissented, finding a "studied air of unreality" and a "feat of legerdemain" in the majority opinion. The dissenters scorned the Court's "sleight of hand" at being able to conclude that these were "consensual encounters" and posed no threat to the defendant's personal security and freedom. Justice Brennan declared, "nothing could be clearer than that these tactics amounted to seizures of respondents under the Fourth Amendment. . . . To say that such an indiscriminate policy of mass interrogation is constitutional makes a mockery of the words of the Fourth Amendment."

No Privacy in Prison

The Court made clear this term that a prison cell is not a "home away from home." In *Block v. Rutherford*, 104 S.C. 3227 (1984), Sheriff Sherman Block of Los Angeles County was permitted to forbid pretrial detainees from having contact visits with their spouses, relatives, children, and friends. He was also permitted to practice random, irregular shakedown searches of cells while the detainees were away at meals, recreation, or other activities. These practices, the Court felt, were entirely reasonable, nonpunitive responses to legitimate security concerns consistent with the Fourth Amendment.

Another case also must have pleased corrections officers all over the country. Inmate Russell T. Palmer makes his home at the Bland Correctional Center, under the auspices of the Virginia Department of Corrections. Palmer alleged that during the search of the cell, some of his property was intentionally destroyed by corrections officer Ted S. Hudson, in an effort to harass him. Hudson argued that he was merely conducting a "shakedown search" to find weapons, drugs, contraband, and other items that could be misused by Palmer. Hudson did not deny that some of Palmer's property was intentionally destroyed, but he said that this was necessary to find possible contraband.

The Supreme Court made it quite clear in *Hudson v. Palmer*, 104 S.C. 3194 (1984), that a prisoner simply has no "reasonable expectation of privacy in his prison cell entitling him to protection of the Fourth Amendment against unreasonable searches and seizures." The unpredictability that attends random searches of cells renders those searches perhaps the most effective weapon the prison administrator has in the fight against the proliferation of weapons, drugs, and other contraband. Even if Hudson intentionally destroyed some of Palmer's personal property during the search, the Court held there was no Fourth Amendment protection because there were adequate state remedies.

The Court also rejected inmate Palmer's argument that the objective of rehabilitation in prison would be frustrated by such searches. Chief Justice Berger wrote, "prisons, by definition, are places of involuntary commitment of persons who have demonstrated proclivity for antisocial, criminal, and often violent, conduct," so prison officials must have an ability to control and conform prison behavior.

Justice Stevens chastised the majority for permitting intentional harassment of even the most hardened criminals. He felt this conduct should not be tolerated in civilized society. "Sociologists recognize that prisoners, deprived of any sense of. . . individuality devalue themselves and others, and therefore are more prone to violence toward themselves and others," said Justice Stevens. He took aim at the majority, writing that the "nihilistic tone of the Court's opinion—seemingly assuming that all prisoners have demonstrated the inability 'to conform and control their behavior to legitimate standards of society by the normal impulses of self-restraint' . . . is consistent with its concept of prisons as sterile warehouses, but not with an enlightened view of the function of the modern prison system."

Home Gets More Protection

While the exclusionary rule was softened by the Supreme Court during the last term, protection for homes was tough-

(*Continued on page 33*)

SEARCH AND SEIZURE

Marilyn Cover

Should Students Have Rights?

For many, including the Supreme Court, the Bill of Rights has a whole different meaning in school

A bitter battle is raging about student rights in the schools. Polls show that most adults feel that schools are not doing a good job of educating, and that one of the problems is that there is not enough discipline. For these people, student rights are just one more frill distracting students and teachers alike from the main business of schools—getting an education.

On the other side are a smaller number of adults and some (but by no means all) students. Some have the visceral feeling that school is too much like prison. Some argue that preparing citizens for democratic citizenship is one of the main goals of schools, and that kids learn about the responsibilities as well as the rights of citizenship if they are given a model within the schools that is more like the society they will confront as adults.

Both sides feel strongly about the issue, and discussion about it can degenerate into finger-pointing and name calling.

It's instructive, then, to look at how the law deals with the question of, "Should students have rights in school?"

First of all, courts tend to define this question much more sharply. What rights are we talking about? In what situations? For what age group of students?

A look at one specific area of possible rights in the schools—the question of searches of students by school officials—illustrates the slow, dispassionate, careful process of judicial decision-making, with decisions of courts high and low across the country gradually creating a more settled body of law and sets of guidelines governing school people. This process is by no means complete, but a Supreme Court decision which came out just this winter clarifies somewhat the respective rights and responsibilities of students and administrators.

Beginning with Precedents

Courts will begin by looking to previous decisions for guidance. Decisions of all courts have value as precedents, but none have more authority than decisions of the U.S. Supreme Court. Prior to this year, there had never been a Supreme Court decision directly on this issue, so a leading precedent became a case in another area of student rights: free speech. The Supreme Court in the case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), stated that students are persons under the Constitution and that state-operated schools are not havens for totalitarianism. The Court noted: "It can hardly be argued that . . . students shed their constitutional rights . . . at the schoolhouse gate." As long as no material or substantial disruption results in the school's educational process, the free speech rights of the students wearing black armbands are to be protected.

But to say generally that students have constitutional rights in school is merely to begin the inquiry into their possible rights against unreasonable searches. In the area of student searches, it is useful to look first at that complex area of law as it applies to adults.

The basis for the constitutional protection against unreasonable searches and seizures is found in the Fourth Amendment. (See article by Joseph L. Daly for more on the Fourth Amendment at work in criminal cases in adult society.)

The Fourth Amendment applies only to governmental action. Unreasonable searches and seizures by private individuals do not violate the Fourth Amendment. However, if a search is conducted by a private citizen at the direction of a law enforcement officer or other agent of the government, then the search and evidence obtained will be scrutinized using Fourth Amendment standards.

The key to the rationale underlying the Fourth Amendment is the expectation of privacy that individuals have in their homes, persons and effects. Because our society values heavily this privacy, it has placed certain restrictions on the ability of governmental officials to conduct searches. In order for a search and seizure to be legal it must be (1) reasonable and (2) a warrant must be issued or the circumstances must meet an exception to the warrant requirement—*e.g.*, evidence in plain view, evidence found while searching an arrested person for a weapon, etc. When a warrant is issued by a magistrate, it must be based on probable cause, be supported by oath or affirmation by the officer and particularly describe what is to be searched and seized. The officer requesting the warrant must be able to articulate sufficient facts to enable a reasonable person to conclude that the seizable evidence would be found on the person or premises at the time of search. This is called probable cause. Courts have determined that for a search and seizure to be reasonable, an officer must have probable cause before obtaining a warrant or

Photo by Arthur Tress

making a warrantless search. Reasonable suspicion or a hunch of illegal activity is not enough for a legal search.

If evidence is obtained without meeting these requirements, the courts have held that the evidence may not be used at trial. This exclusionary rule was first only applicable in federal cases, as determined in 1914 in *Weeks v. U.S.*, 232 U.S. 383. But in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court extended the exclusionary rule to actions of state law enforcement officers.

Searches in the School

When the Fourth Amendment has been applied in school cases, the fundamental question raised time after time is whether school officials are agents of the state. When searching students are they acting more like law enforcement officers or are they acting more like parents? And if school officials *are* acting as agents of the state, are they to be held to the same Fourth Amendment standards as police officers?

Historically, school officials disciplining students have been viewed as standing in the place of parents exercising control over their children. The doctrine of *in loco parentis* holds that parents are private persons, and educators standing in the place of parents in supervising students are regarded as private persons carrying out a parental function. Since a parent may search a child without probable cause or a search warrant, the argument has been that a principal also has these privileges. An important distinction arises, however, when we consider that a parent may not have a legal obligation to give illegal evidence seized from a child to the police but a school official may have a duty to inform and assist police when evidence from a search uncovers questionable material or information.

As is so often the case in the law, the standards applied are vitally important, for they will often dictate the final result. For example, under the less restrictive standards of the *in loco parentis* doctrine, where a hunch is enough, the only kind of search to be found unreasonable would be one based on wild speculation or a gross abuse of authority on the part of the school official. Under the more restrictive standards of the Fourth Amendment, however, school officials might have to meet the same tough burden of proof the police officers do.

Lower Courts Divide

State courts have varied from requiring full Fourth Amendment protections of probable cause before school people can conduct a search to the lesser standard of only a reasonable suspicion or a little more than a hunch that the student possesses something in violation of school rules to the least restrictive standard of acting in good faith on a hunch that the student possesses something illegal.

In Louisiana in the case of *State v. Mora*, 307 So.2d 317 (1975), a divided court held that students in public schools have full Fourth Amendment protections in situations where the fruits of the search are sought to be used as evidence in a criminal proceeding (*i.e.*, not a school disciplinary action). That case began when a physical education teacher noticed the suspicious conduct of a 17-year-old high school senior placing his wallet in a valuables bag. When the student was in the gym, the teacher opened the bag, inspected the contents of the wallet, and found marijuana.

Was this a valid search under the Constitution? The Louisiana court said no. The court held that teachers are agents of the state and must have probable cause before searching a student. In addition to the probable cause requirement, the court reasoned that warrantless searches are *per se* unconstitutional absent one of the specific exceptions to the warrant requirement, and since searches by school personnel are not listed as one of the specific exceptions, a warrant must be issued for the search to be valid.

At the other extreme, the Georgia Supreme Court in *State v. Young*, 234 Ga. 488 (1975), held that a principal of a public school is not a state agent and followed the doctrine of *in loco parentis*. In this case the principal observed three students with their hands in their pockets. Without any information other than this observation, the principal ordered the students to empty their pockets and discovered marijuana. The court upheld the search by the principal, so the evidence was admissible in the students' trial for possession of contraband. The court reasoned that as long as the school official acted in "good faith," a search of a student may occur and the exclusionary rule does not apply. In order to maintain a safe and secure school environment, the court stated, school officials must be permitted to search students with considerably less than probable cause. The court concluded that the exclusionary rule, like probable cause, only applies to law enforcement officers, and thus declined to apply the Fourth Amendment standards to school officials. A strong dissenting opinion disagreed with all major points of the majority, contending that the opinion "places no limits on the nature and extent of searches a school official may make," other than imposing "minimal standards."

School officials have a peculiar dilemma in Oregon, where two different courts have rendered inconsistent decisions on the Fourth Amendment. In *State v. Walker*, 528 P. 2d 113, the Oregon Court of Appeals in 1974 was presented the following facts. An assistant principal was given a tip from a student that John Gregory Walker had hard drugs in his possession and was selling them at school. The school official discussed the matter with the police and was told that he had the right to search Walker. The assistant principal went to Walker's classroom and invited him to the office. Once in the office, Walker was ordered to empty his pockets and remove his sweatervest. As he did so, the assistant principal noticed a bulge in Walker's shirt pocket. The assistant principal reached in and found three bags of amphetamines. The police were called and drugs turned over to them.

At the trial Walker argued in vain that the evidence should be excluded on the grounds that the search was illegal. He was convicted of criminal activity in drugs. On appeal, however, the court of appeals held that the assistant principal was acting as a public official, stating that "school districts are governmental agencies." The assistant principal was employed by the school district and conducted the search in his official capacity during school hours on school property. Therefore, the court held that the search and seizure were subject to Fourth Amendment limitations, providing students with full Fourth Amendment protections.

The question was then raised whether the school official had probable cause as required by the Fourth Amendment to conduct the search. Since information about the drugs was provided by an informant, the court remanded the case back to the trial court for evidence on the question of probable cause and the informant's reliability. At this point, the district attorney dismissed the case against Walker.

In 1979 the United States District Court in Oregon heard arguments on a

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class action case questioning a school district's search and seizure policies as unconstitutionally vague. The policy allowed a search of a student's person when there was probable cause that a student was concealing evidence of an illegal act or "school violation." In *Bilbrei v. Brown*, 481 F. Supp. 26 (U.S. Dist. Oregon, 1979), the court held for the school district, stating that the school district policy actually employed a higher standard than was required. Under the *in loco parentis* doctrine, the court reasoned, only the lesser standard of reasonable cause is required and no warrant is needed for a school search. The school's actions were justified if the school was pursuing its legitimate interest in maintaining order and discipline and protecting the health and safety of their students. Requiring a search warrant would hamper the effectiveness of school officials in performing their duties.

Federal Courts Disagree

The debate on whether a school official is an agent of the state has continued in the federal courts, where the doctrine of *in loco parentis* has been interpreted in two leading decisions—*Doe v. Renfrow* and *Jones v. Latexo Independent School District*.

In *Doe v. Renfrow*, 475 F. Supp. 1012 (Dist. Ct. Indiana, 1979), the school had a history of drug problems, and school administrators suggested that police dogs be used to "sniff" each student for drugs. The police were invited in and agreed not to file criminal charges against students found to be in possession of drugs; discipline would be handled by the school's officials. One morning, police and school officials secured the halls while a dog sniffed each student. Fifty times the dog "alerted" to students, and the students were required to empty their pockets and purses. If nothing was found, a body search was made. The plaintiff, a 13-year-old girl, was strip searched without any drugs being located. School officials later determined that her dog at home was in heat, which caused the police dog to alert.

The court held that under the *in loco parentis* doctrine the school could enter each class with the dogs in order to protect the health and welfare of the students. School officials only needed reasonable cause to believe a student possessed drugs in order to conduct a valid search. No warrant to search was needed. However, the court did hold the strip search to be an unreasonable invasion of the student's privacy. In determining reasonableness, the court looked at three characteristics—the student's age, her history and school record, and the seriousness of the problem.

A federal district court in Texas in *Jones v. Latexo Independent School District*, 499 F. Supp. 223 (1980), held that school administrators are state officials under the Fourth Amendment. Although the doctrine of *in loco parentis* places the school in the role of parent for some purposes, it does not allow school officials to transcend basic constitutional rights of students. In this case the school board hired the services of a private company to use dogs to sniff the students for drugs. The students were warned about the impending search by the dogs in a school assembly. Following the dogs' search of classrooms, a dog walked through the student parking lot and "alerted" at plaintiff's car. When the car was searched, roaches from marijuana cigarettes were found. The plaintiff was then asked to empty his pockets and evidence against him was found.

The court held that a dog sniff is a search in itself under the Fourth Amendment. Before school officials can search students wholesale, there must be specific information that leads the school officials to think an individual student is suspicious. Too great an invasion of the privacy of all students would occur by allowing dogs to search the entire student body. However, the court did not require probable cause or a warrant for a valid search. Reasonable suspicion would be enough to subject a student to a search by the trained dog. In this case, in balancing the state's interest against the individual rights of students, the court determined that the school had no reasonable basis to search the students' cars, and thus this search was held to be unreasonable.

The court went on to state that if a school violates a student's Fourth Amendment rights by conducting an unreasonable search and seizure, the exclusionary rule will apply *even to school disciplinary proceedings*.

In this case, since the school had no other information to suggest the plaintiff possessed drugs, and the sniffing search of the plaintiff was not made on reasonable belief of possession of drugs, the fact that drugs were found on the plaintiff could not be used to discipline him.

A Slightly Different Mix

All legal cases present different circumstances and new facts, and so each case presents a slightly different puzzle for courts. A recent case ultimately decided by the New Jersey Supreme Court focused on another element of probable cause, the reliability of an informant.

In *State v. Engerud*, 94 N.J. 331 (1983), a high school student's locker was searched and drugs found. The case began when a police detective met with a vice-principal on January 27, 1980, to explain that a person claiming to be a father of a student at the high school had phoned to report the name of a student who was selling drugs at the school. In discussions with the other administrators at the school, the principal learned that the student in question, Engerud, had been rumored to be selling drugs. The principal and assistant principal opened the student's locker, and in searching all of the contents of the locker they found two plastic bags containing packets of methamphetamines (speed) in a coat pocket. The student was then called out of class and asked to empty his pockets. A small quantity of marijuana and $45 was disclosed. Engerud was charged with unlawful possession of a controlled dangerous substance with intent to distribute. Engerud pleaded guilty and was sentenced to an indeterminate term not to exceed five years.

He fared better on appeal. The Supreme Court of New Jersey held that the information provided by the anonymous tip was not sufficient evidence for a reasonable search of Engerud's locker. The court held that even within the school, certain Fourth Amendment standards must apply. The court stated that following the United States Supreme Court guidelines for determining the reliability of an informant, there was not sufficient corroborative information to support the "tip" and the subsequent search of the locker. Engerud had an expectation of privacy in his locker which was protected by the Fourth Amendment as a "home away from home" for storing personal effects. (The court did state as a caveat that if the school had "carried out a policy of regularly inspecting students' lockers an expectation of privacy might not have arisen.")

The court held that school officials may conduct warrantless searches to maintain discipline. But for a search to be reasonable the school official must have "reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, and the search itself [must be] reasonable in scope." The court went on to hold that the exclusionary rule applies to evidence obtained illegally in administrative school searches and thus is not admissible in criminal proceedings against students.

The High Court Speaks

In the many state and federal school search cases, as we have seen, a wide variety of approaches have been taken to the legality of such searches.

The Supreme Court has now spoken, but many questions still remain unresolved. The January 15th opinion by the Supreme Court in the case of *New Jersey v. T.L.O.*, 53 L.W. 4083, provides some insight into how the Fourth Amendment should be interpreted in school search cases but at the same time raises new uncertainties. (For another view of the case, see the article by Robert Hayman and George Kassouf in this issue.)

The *T.L.O.* case began on March 7, 1980, when Ms. Chen, a teacher at Piscataway, New Jersey, High School walked into the school's restroom and found two students—T.L.O. and another girl—holding lit cigarettes. Since smoking in the lavatory was an infraction of the school rules, Chen took the girls to the office of the Assistant Vice Principal, Theodore Choplick. When he asked the girls whether they had been smoking, T.L.O. denied it and further claimed that she did not smoke at all. (In all of the case briefs and arguments, the student is identified only by the initials T.L.O. Because she is under eighteen, using only her initials keeps her name out of the record and protects her reputation from any lasting bad effects of the lawsuit.)

Choplick then asked T.L.O. to come into a private office and requested her purse, which she handed to him. When he opened it, he saw a package of Marlboro cigarettes and, in plain view next to the Marlboros, a package of rolling papers for cigarettes. The juvenile denied that these items belonged to her. On the basis of his experience, Choplick knew that rolling papers indicated marijuana use, and when he looked further into the purse he found marijuana, drug paraphernalia, and forty dollars in one-dollar bills. Even more suspicious now, Choplick unzipped and searched the pockets of the purse, where he discovered an index card with a list of "people who owe me money" and two letters. Choplick then read the private letters, both of which implicated T.L.O. in marijuana dealing.

Choplick then called T.L.O.'s mother and also notified the police. Upon questioning at police headquarters, T.L.O. admitted to selling marijuana in school. A delinquency complaint was drafted and filed that day. (A "delinquency procedure" is commonly used for those under eighteen who commit offenses. Those declared "juveniles" or "delinquent" by a court will usually be sentenced to some type of supervision by the court or sometimes placed in foster care or a juvenile detention center.) At the juvenile hearing, T.L.O.'s attorney moved to suppress the evidence found in the purse, on the grounds that it was seized in violation of her Fourth Amendment right to be free from unreasonable searches and seizures. The juvenile court disagreed, and T.L.O. was subsequently tried, found guilty and adjudicated delinquent. Later she was sentenced to probation for one year.

T.L.O. appealed her case, first to the Superior Court of New Jersey, Appellate Division. That court also held that the evidence seized in the search of her purse should be admitted. She then appealed to the Supreme Court of New Jersey, which agreed with her that the Fourth Amendment exclusionary rule applied to searches and seizures of students by school officials in public schools. The court held that the evidence should not have been admitted.

The Supreme Court of the United States came down with a decision which gives something to people on each side of the student rights debate. It held that the Fourth Amendment prohibition on unreasonable searches and seizures *does* apply to searches conducted by public school officials as representatives of the state. The Court recognized that students have legitimate expectations of privacy while they are under the supervision of school authorities.

However, a balancing test was used to determine whether the requirements of probable cause and a search warrant for a reasonable search are appropriate in school searches. The outcome of the balancing test in this case surely pleased school officials. The Court reasoned that because of the responsibility of school administrators and teachers to maintain discipline and order, necessary to create an environment for learning, the reasonableness test for a valid search does *not* require obtaining a search warrant or probable cause.

Thus, in the T.L.O. case, the fact that a teacher had informed the principal that she thought T.L.O. had been smoking in the lavatory in violation of school rules was sufficient information to lead the principal to suspect that T.L.O. had cigarettes in her purse. Since the search of her purse for cigarettes was reasonable at its inception, the additional evidence of marijuana possession and sale was admissible in the juvenile court delinquency proceeding. The fact that the full contents of the purse had no bearing on the original accusation of possession of cigarettes was not an issue. The Court stated that the principal, using common sense, would reasonably suspect that T.L.O. might have cigarettes in her purse. Once the cigarettes were identified and then drug paraphernalia seen, a thorough search of the purse was reasonable.

Providing Guidance

The Supreme Court had originally been asked to decide the narrow question of whether the New Jersey Supreme Court erred in holding that the exclusionary rule applies to evidence illegally seized by school officials. The Supreme Court requested that reargument on the constitutional question of whether the principal's search of T.L.O.'s purse violated the Fourth Amendment. As a result of this request, the Court placed itself in a position to settle a factual dispute and broadened the scope of the question to what limits, if any, the Fourth Amendment places on school authorities.

According to a long article on the case in *Education Week*, in determining the proper standard for school searches, the Court explicitly (and unanimously) rejected the argument of attorneys for the state of New Jersey that Fourth Amendment protection does not apply at all to searches conducted by school officials.

Writing for the Court, Justice White noted that "some courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over school children" but "such reasoning is in tension with contemporary reality and the teachings of this court."

White wrote: "We have held school officials subject to the commands of the First Amendment and the due-process clause of the 14th Amendment. If school authorities are state actors for the purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students."

White also rejected the state's claim that school officials' pervasive supervision of students means that children have no legitimate expectation of privacy in articles of personal property that they bring to school with them. White wrote: "Schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."

Left open was the question of whether a student has a legitimate expectation of privacy in lockers and other storage areas provided by the school.

But if the Court convincingly rejected *in loco parentis* as a justification for school searches, the standard of reasonableness which the Court advanced took note of the special characteristics of the school and gave school officials a good deal of latitude in conducting searches.

In balancing the privacy interests of students against the substantial interest of teachers and administrators in maintaining discipline in the classroom and order on the school grounds, the Court took note of the need for flexibility in school disciplinary procedures. The Court realized that disciplinary matters frequently require immediate attention. Thus the Court concluded that the warrant requirement is unsuited to the school environment.

The issue that arose with the new tack taken by the Court was how to define reasonableness as required by the Fourth Amendment. The Court held ". . . that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law." The legality of a search of a student should only depend on the reasonableness, under all the circumstances, of the search. Thus the Court concluded that in most instances ". . . a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." A search under these conditions will be valid so long as the measures used are "reasonably related" to the objects of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. The Court did not determine if individualized suspicion is required under the "reasonableness" test.

In applying the reasonableness standard to the facts, the Court found that the search of T.L.O.'s purse was in no way unreasonable for Fourth Amendment purposes. The principal's suspicion that he might find cigarettes in the purse was sufficient to meet the reasonableness test and to justify opening the purse and reaching into it to remove the cigarettes. And thus the New Jersey Supreme Court's decision to exclude the "fruits" of the search from the juvenile delinquency proceedings was erroneous.

The primary problem raised by this decision, identified by Justices Brennan, Marshall and Stevens in their dissenting opinions from portions of the decision, is the vagueness of the new "reasonableness" standard. The only guideline offered by the Court is that the standard is not the same as the probable cause test used in most Fourth Amendment cases. In past cases the Supreme Court has held that, in order to protect an individual's privacy from governmental arbitrariness, probable cause has been the minimum requirement for a lawful search. Therefore, using a balancing test to arrive at a new standard is a potential weakening of the Fourth Amendment. In his dissent, Justice Brennan called the majority position an "unclear, unprecedented, and unnecessary departure" from Fourth Amendment standards. The "reasonableness under the circumstances" standard, he said, has the potential to create even greater uncertainty among teachers and administrators who are concerned about arbitrary intrusion into the privacy of students.

In their dissent, Justices Stevens and Marshall explicitly noted that the decision might well be contrary to the exalted notions students are learning about democracy. "The schoolroom is the first opportunity most citizens have to experience the power of government. . . . The Court's decision today is a curious moral for the nation's youth."

T.L.O. and LRE

In conclusion, what are we to tell our students about their rights as citizens under the Constitution? Schools are regarded as the institutions responsible for teaching students the rights and responsibilities of citizens in a self-governing democracy. But when adult role models disregard the fundamental principles underpinning constitutional freedoms, the lesson of good citizenship is too hypocritical for students to embrace. Were these great principles ignored in *T.L.O.*?

The *T.L.O.* decision marks the first time that the Supreme Court has held that the Fourth Amendment applies to school searches. Thus students do acquire an additional constitutional right of privacy, but the safeguards protecting this right appear weak.

Although this case may seem the final word on the matter, a number of state supreme courts have recently begun to interpret state constitutional provisions which provide similar Fourth Amendment protection in lieu of strictly applying federal search and seizure law. In determining the reasonableness of a search, some state courts may interpret their state constitution provisions to require probable cause.

Moreover, individual schools remain free to set their own standards as long as they are not unconstitutional. Nothing prevents schools from adhering to standards which are higher than the constitutional minimums identified by the Court in *T.L.O.*

In schools where probable cause is currently the standard used in searches, will the policy be changed to reasonableness or will probable cause merely be reinterpreted to mean reasonable suspicion? Will the lesser standard of reasonableness—all that is now required under the Fourth Amendment—be adopted? The debate will continue, and will illuminate the role of schools and the rights and responsibilities of school people. □

Role-Playing Reasonableness

Imagine that you are judges weighing whether the *T.L.O.* search was "reasonable."

- **She was accused of smoking in the lavatory and denied that she smoked.** ***Is a search of her purse for evidence of smoking reasonable?***
- **The vice-principal not only sees a package of cigarettes in the purse but rolling papers.** ***Is it reasonable for him to continue the search, this time looking for evidence of marijuana?***
- **He finds marijuana and $40 in one-dollar bills.** ***Is it reasonable for him to unzip the pockets of her purse to look for more evidence?***
- **In the pockets he finds an index card listing "people who owe me money" and two private letters.** ***Is it reasonable for him to read the letters?***

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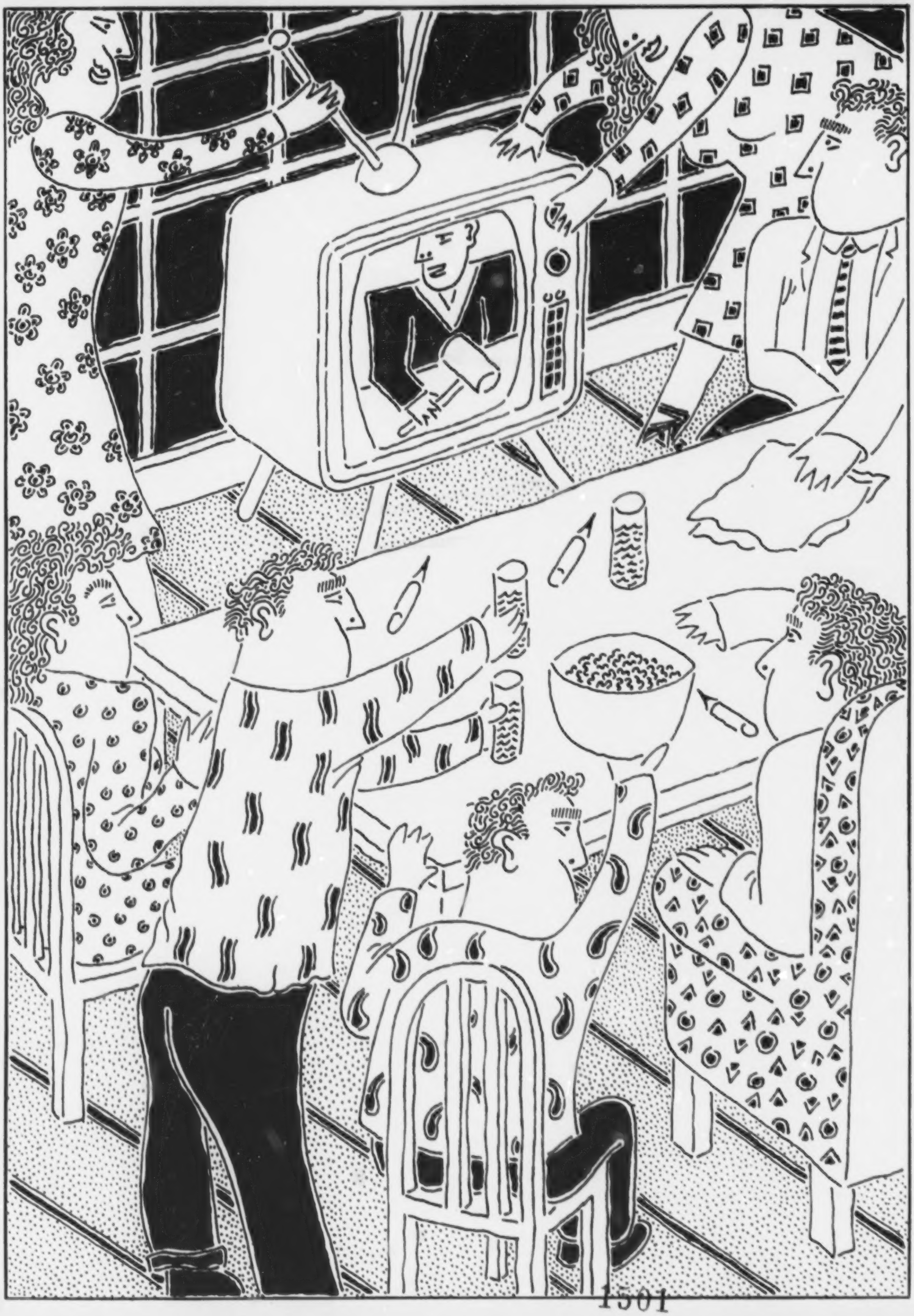

Drawing by Dean Matthews

LAW IN THE 80's

Gerald R. Miller

Trial by Cassette?

Videotaping trials may be the wave of the future, but only if jurors watch the monitor as well as they'd watch live action

Several years ago, the local paper in Lansing, Michigan, informally surveyed jurors' reactions to jury duty. "It's boring!" exclaimed one of those interviewed. "We're down here for almost a month and most of the time we aren't involved in anything in the courtroom."

"What do you do with your time?" asked the interviewer.

"I can't speak for everyone," responded the juror, "but I spend a lot of time watching TV in the jury room."

In the past two decades, some jurors have had the chance to watch television in the courtroom itself. A number of states have permitted videotaped depositions of individual witnesses in otherwise live trials. And several states allow videotaping of full trials to be presented later to juries. One outspoken advocate of taped trials, Judge James McCrystal of Sandusky, Ohio, maintains a docket of cases to be heard on videotape.

Pros and Cons

What potential benefits have led to this courtroom invasion by the television monitor? Videotaping individual witnesses may increase flexibility and decrease costs. Consider, for instance, the plight of expert witnesses—those whose particular specialities cause them to be called frequently to testify. Under typical circumstances, these busy professionals can wait hours, or even days, to be called to the witness stand. By putting their depositions "in the can" (a term used by some media professionals to refer to videotaping), testifying experts need not be present at trial and their testimony can be presented to judge and jury at the appropriate point.

During Lynette Fromm's trial for the attempted assassination of President Ford, the President's testimony was videotaped in Washington and transported to the trial in California. The taped deposition illustrates both of the potential advantages mentioned earlier: the flexibility provided by tape enabled President Ford to testify without a lengthy absence from his official responsibilities, and the opportunity to depose the President in Washington eliminated the need for him to make a costly coast-to-coast trip.

Videotaped trials offer the major potential advantage of cutting down on the backlog of cases. Presently, the dockets of most courts in the United States are jammed with cases, and litigants sometimes wait years for their day in court. Videotaped trials can do something about the law's delays. For instance, in 1975, then Chief Justice O'Neill of the Ohio Supreme Court assigned 180 highway and urban renewal appropriations cases to Judge McCrystal with the instruction to use prerecorded trials. Though many of these cases had been pending from *three to six years*, 53 were terminated by prerecorded jury trials in 1976, and the remaining cases were settled without trial. (Before then, the largest number of appropriations cases tried during a year in that jurisdiction had been 25.)

Why does taping result in such a dramatic increase in the number of cases that can be tried? During a live trial, much time is lost by bench conferences, chamber retreats and recessed time. The absence of even a single witness can markedly delay proceedings. By contrast, when a prerecorded trial is brought to the jury, everything is in place: the opening and closing remarks of the contesting attorneys, the examination and cross-examination of witnesses and the judge's instructions to jurors. Moreover, the judge will have previously ruled on objections, so that no time need be spent discussing the merits of an objection. When all of these time savings are added up, the length of a trial is reduced dramatically.

The handling of objectionable materials is another potential advantage of both the prerecorded trial and the prerecorded deposition. Not only is the time used to discuss objections saved, but the jury is spared from learning objectionable materials. Almost everyone has witnessed the following exchange, either during an actual trial or a courtroom drama:

Attorney: "I object, your Honor; the question is irrelevant and prejudicial."

Judge: "Objection is sustained and the jury is instructed to disregard the previous question."

No matter how seriously they take their task or how carefully they listen to the judge's instructions, can jurors actually purge objectionable material from their minds or prevent it from playing a role in their decisionmaking? Videotaping eliminates concern for this issue, since objectionable material can be eliminated *before* jurors see or hear it.

Given these advantages, you may wonder why videotapes are not more widely used. Courts have been cautious for several reasons. Some critics have argued that inertia prevents the judicial system from embracing innovations. Judge McCrystal is fond of saying: "Jurists and lawyers are 100 percent in favor of progress and 1,000 percent opposed to change." Still, though a few legal professionals may strike a "resistance for resistance's sake" stance, more moderate people argue that there are good reasons for a bit of foot-dragging. Suppose that wider use of videotapes creates more problems than it solves. Perhaps jurors watching taped trials or depositions would be less interested in the testimony, or would take their important role as jurors less seriously. Perhaps judges and attorneys would indulge in more "grandstanding" if they were performing for a camera. Perhaps witnesses would be more timid about testifying if their remarks were being committed to tape. These as well as other concerns cause some jurists and lawyers to counsel against excessive technological tinkering with a court system that, despite some admitted problems, still works relatively well.

Measuring the Impact

With the support of two grants provided by the National Science Foundation, communication researchers at Michigan State University undertook a four-year study of how the use of taped depositions and trials affected jurors.

We compared the retention of jurors exposed to live versus taped testimony: Did one or the other retain more of the important information presented by witnesses? We asked jurors who watched tapes about their interest in being jurors and compared their responses with a group of jurors who watched the same trial materials live. We checked to determine whether the medium of presentation, live versus tape, influenced the way jurors perceived major trial participants, particularly the contesting attorneys. We set up situations where individuals lied sometimes and told the truth sometimes and tested to see whether jurors spotted the liars better in a live presentation or on tape. We prepared versions of trials which differed only in the number and type of objectionable materials they contained and examined whether the objectionable material had an impact on jury deliberation. In short, we attempted to identify important juror responses that *might* be influenced by substituting taped for live trial materials, and we then tested to see if, and in which direction, these responses actually *were* influenced.

Most of the studies began by selecting transcripts of actual trials dealing with various civil issues—criminal trials were out because videotape has been used almost exclusively in civil cases—and then recreating them with professional actors and actual judges and bailiffs. These reenactments of trials usually occurred in actual courtrooms before panels of jurors who were led to believe they were viewing a real case and that their verdicts would be binding. We felt this approach offered the best features of both research control and realism. Since we wanted to "create" trials which varied only on one or two crucial features and which were identical in all other ways, it was difficult to use actual trials. Moreover, we wanted to ask the jurors many questions about their reactions to the trial, and quite understandably the courts do not permit such grilling of jurors participating in actual trials.

On the other side of the coin, we wanted to use real jurors in actual courtroom settings, and if possible we wanted them to believe their decisions would have significant consequences for the litigants. Failure to use such a realistic setting would have caused many members of the legal community—and many social scientists—to question the validity of our findings.

This middle ground strategy worked well; not only did almost all jurors indicate that they accepted the authenticity of the trial, but a number of legal professionals, even some who were skeptical about videotape, granted that the trial situations seemed very realistic. Naturally, since we had deceived the jurors by telling them the trial was real, the presiding judge debriefed them thoroughly after the studies were done and explained why the subterfuge was necessary.

Memorex May Be Better

Before looking at specific results, let me set the stage with an important general conclusion: *In no case did we observe a situation where videotaped trial materials were inferior to their live counterparts, and in several instances, videotape was superior to the live presentation.*

One of the most interesting findings concerned jurors' retention of information. Jurors who watched taped testimony retained more than a comparable group who watched the same testimony live *and* this advantage was somewhat more pronounced for black-and-white than for color tape. Since this was an important—and somewhat surprising—outcome, a second and yet a third study were conducted to check the finding, and each produced the same results.

How can this superiority be explained? Though our research procedures do not permit an unequivocal answer, I favor the following explanation: as testimony shifts from live, to color tape, to black-and-white tape, more and more potentially distracting peripheral behaviors are screened out. Freed from these distractions, the juror can focus more intently on the important testimony and can thus retain more of it. Because possessing relevant information is (or at least should be) a crucial part of jurors' decisionmaking, this apparent advantage of videotape cannot be taken lightly.

The findings regarding the ability to detect deceptive testimony were intriguing, yet also discouraging. Regardless of the medium of presentation, people were not very effective in judging whether a relative stranger was telling the truth. The average accuracy of judgments ranged from about 40 percent to 60 percent, with most of the averages falling around 50 percent. In most of our studies, the witnesses were lying and telling the truth with equal frequency; hence, the mean accuracy levels were not much better than would be expected by chance.

Though jurors were often wrong about who was telling the truth, they consistently reported a high level of confidence in their judgments. This does not augur well

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for fair verdicts based heavily on witnesses' credibility.

Finally, there was no evidence that nonverbal information—looks, gestures, pauses—helped detect deception; if anything, the opposite was true. We became so fascinated with this problem that we not only showed people lying and telling the truth live, on color tape and on black-and-white tape, we also committed their truthful and untruthful messages to audiotape and written transcript and had people make judgments for these two media. As indicated, no groups were remarkably successful in any medium, but in two of the studies, the groups who based their judgments on *written* transcripts had the highest mean accuracy —around 60 percent. Written transcripts provide the least nonverbal information, casting some doubt on conventional notions that nonverbal behavior is a clue to deceptive intent.

Turning to the issue of objectionable material, the results revealed, not surprisingly, that jurors sometimes could heed the judge's admonishment to ignore objectionable material and sometimes could not. In one study, we planted a member of the research team in each deliberating jury with instructions to be a silent jury member—we did not want the team member's comments to influence the path of the deliberation—and to jot down any references made to objectionable material. Sure enough, objectionable material was brought up during many of the deliberations. But two encouraging points were also noted: first, on many occasions when a jury member introduced objectionable material into the discussion, other members quickly reminded the offending juror of the judge's instructions. Second, even when deliberating juries talked for a time about the objectionable material, their verdicts did not differ from those of comparable juries which did not broach the objectionable material while deliberating.

Still, logic implies that tape's ability to expunge objectionable material is advantageous. Juries may or may not ignore the material, but since it is impossible to know what they will choose to do, the most prudent course is to avoid the issue by eliminating the material from testimony.

Often there were no differences between jurors exposed to live and taped trials or depositions. Jurors tended to perceive important trial participants, including the contesting attorneys, similarly in the live and taped conditions. Jurors reported being as interested in live trials as in taped trials, though, interestingly, a number of jurors indicated that if they were litigants in a trial they would prefer to have the proceedings taped.

Verdicts also didn't seem to be affected by tapes. Jurors watching tapes found for the plaintiff and defendant about as often as live jurors, and both groups of jurors finding for plaintiffs awarded similar amounts of money.

This was just as well, since differences in verdicts would have been hard to interpret. Suppose, for instance, jurors watching the taped trials tended to find for the plaintiffs and to bestow large dollar awards on them, while jurors viewing the live trials did just the opposite. Should this difference be considered a plus or a minus for videotape? The answer depends mostly on one's values; judicial liberals might argue that it is a plus, but conservatives might consider it a minus.

Explaining the Findings

Considerable work remains in assessing how videotaped trials influence jurors. Although we conducted several simple studies dealing with the effects of camera angle and shot selection on perceptions of witnesses, this important issue had hardly been touched. In addition, it appeared throughout the project that there are tape and live "types"—some people come across better on tape than they do in the live courtroom, while others fare well in the live setting but do not function effectively on the TV monitor.

Some opponents of videotaped trials and testimony construe this as an argument against using tape in the courtroom. Through some mysterious leap of logic, they assume that the live setting should be used as the standard for comparison. Even if it can be shown that some people don't fare well in this setting but do perform effectively on tape, taping their testimony should not be permitted.

Just because live trials preceded videotape technology by several hundred years, it does not follow that the live courtroom is somehow fairer and judicially superior, for it could just as well be argued that some litigants and witnesses are unjustly penalized because they communicate ineffectively in face-to-face encounters. What would be useful to investigate, however, are the factors which go into forming these contrasting impressions. Why are some persons more attractive and credible in person whereas others have a greater impact on tape?

Finally, remember the wisdom of any large-scale innovation depends upon a complex mix of factors. Our research looked at just one issue associated with videotaped trials and depositions: whether jurors would respond differently to live and taped presentations. Introducing videotaped trials on a larger scale also raises other economic, social and legal questions. For example, how much will it cost to install videotape capabilities in the many courtrooms throughout the United States? Although the results of this research bode well for the effectiveness of taped materials within the domain of juror responses, other crucial tests must be applied and passed.

If our research has contributed to a more informed dialogue about this policy issue, it has made a contribution. With this modest assertion, I turn off my cameras and rest my case.

"Would it be okay if we added a bill of rights?"

MEDIATION IN THE SCHOOLS

Tales of Schoolyard Mediation

Youngsters are solving problems without breaking heads

The nine-year-old had been the terror of the school. He was at the center of most fights, and trips to the principal's office didn't seem to do any good at all.

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Photo courtesy of School Initiatives Program

Albie Davis and Kit Porter

But he had received the most votes from his schoolmates to be trained as a mediator. The teachers wondered how he would do. Would he catch on? Would it take more than five days to train him? They watched as he made his first trip to the playground in his orange "conflict manager" T-shirt. A student yelled, "dummy!" He responded as he always had, by putting his fists up to fight. Gradually, however, he put his fists down and said to his tormentor, "I don't like it when you do that and I want you to stop."

Another student was the best player on the girl's basketball team. Everyone knew her. Her boyfriend, however, was not doing so well on his team and could not handle his girlfriend being the center of attention. He told her to get off the team. She refused. He said he would "say bad things about her." Upset and worried, she went to the mediation center at her school and asked to have her situation mediated. Her boyfriend agreed.

Two student mediators were called from their study halls to the center. There, in a room especially set aside for such sessions, the boy and the girl told their sides of the story. The mediators, using a variety of conflict resolution techniques they had learned in their training, helped the two to listen to one another and to come up with an agreement which allowed them to be friends in the future.

These two stories are a sample of how

some American schools are providing students with conflict resolution skills as part of their education. In a world weary of competition, strife and violence, this simple method of dispute resolution, one that draws upon the cooperative side of the human spirit, has a singular appeal.

"Justice Without Judges," the first article in this series, discusses mediation and the growth of the mediation movement. Although contemporary mediation became popular in the late sixties, a time when many alternative social forms developed only eventually to fade or die, mediation has demonstrated staying power. In the eighties, mediation and other forms of nonadversarial dispute resolution are finding their way into many of our fundamental institutions—courts, prisons, hospitals, housing projects, governments, and, in the last few years, schools.

Because the use of mediation in the school setting is so new, there is no full picture of the current state-of-the-art. What is becoming increasingly clear, however, is that the demand for information about mediation in the schools is growing daily.

This article will highlight three school-based programs in the United States, programs which offer mediation as an alternative to "going to see the principal," a form of discipline which depends on adults to make judgments about who is right and who is wrong. In these three programs, students don't place blame for past activities, but develop mechanisms to improve future relationships. Students, teachers, staff, and sometimes parents are trained to help the parties to a dispute shape an agreement that's right for them. Because the parties have constructed the agreement to their own satisfaction, they usually feel a commitment to honoring its terms.

The programs studied for this article are based in Hawaii, New York and California. The Hawaii and New York programs currently serve intermediate and high school students, while the California program centers on elementary students but includes a conflict resolution course in high school. We didn't do a scientific study of these programs, but rather gathered information as journalists. Therefore, we will not be drawing many conclusions but will raise questions and engage in speculation.

Albie Davis is director of the Massachusetts District Court Mediation Project. Prior to assuming her current position, she was statewide coordinator of law-related education for the district court. She is a community mediator in Dorchester, Massachusetts. Kit Porter is currently a doctoral candidate at Harvard University studying Educational Administration Planning and Social Policy.

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Hawaii Builds on Its Unique Culture

The Hawaii mediation program is the oldest of those being covered in this article. It began in the spring of 1981, sparked by one person, Mel Ezer of the University of Hawaii, and moved forward by the efforts of many. For some time before 1981, Ezer had been concerned with desegregation and related issues affecting minorities. In 1979, while attending an institute on juvenile delinquency sponsored by the School of Public Administration at the University of Southern California, he heard the director of conflict management of the Los Angeles Unified School District talk about a new program addressing youth gangs and violence in the schools. The program, which capitalized on the energy of trained gang leaders to be "facilitators" in resolving conflicts, had lowered the number of students hurt and killed. While watching a demonstration of the conflict resolution style used in the Los Angeles program, Ezer was struck by its similarity to mediation as practiced in Hawaii, both informally within the many culture groups residing there and formally in the newly developed neighborhood dispute resolution centers.

He returned to Hawaii sure that such a program could benefit Hawaiian schools. The following summer, as part of his work with the Department of Educational Foundations at the University of Hawaii, he held an exploratory workshop on the Los Angeles program for 40 to 50 teachers and members of the neighborhood justice center of Honolulu.

That year, a school mediation program began with the cooperation of the university and the neighborhood justice center. An urban high school of 2,300, Farrington High, became the pilot site because of the administration's concern about ethnic hostility and racial tension. Farrington is in Kahili, an area that was historically populated by Hawaiians and has had an increasing number of immigrants from the Philippines and Samoa in the last fifteen years. There are small numbers of Koreans, Japanese, and Chinese and a few Caucasians.

Using dollars from community education funds, the university and the neighborhood justice center offered mediation training to 60 students, teachers, administrators, counsellors and parents. After the first training, 15 students, seven teachers, one counselor and five parents were selected to participate in the project.

In subsequent years, these pioneers were followed by new recruits trained for both the Farrington Project and projects which now operate in twelve Hawaiian high schools and intermediate schools. Student mediator candidates are chosen by having the entire school—students, staff, custodians—name three people they perceive to be leaders. These students are all assembled, the program is explained, and they decide whether or not to take part in the program. From those who do, a group is selected which is balanced among boys and girls and represents the ethnic population of the school as well as a mixture of grade levels.

Training takes place in two intensive days. With Ezer's *Training Manual for School Mediation* in hand, trainees experience mediation personally by rotating between playing mediators and the parties to a dispute. The manual explains mediation, outlines the program, describes the process, contains mediation skill exercises and simulations, and offers practice in communicating, asking questions and writing agreements.

Administrators the Key

When offering the project to a new school, Ezer insists that the administration hold the training on school time and pay for substitutes so that teachers can be released: "If they won't commit some dollars to the project in the form of substitutes, I refuse to do the training. The school has to show some kind of commitment, or the program won't work." He tries to have the principal or the vice principal, who is usually in charge of discipline, attend the full two days of training: "If they go through the training, then they really come to understand mediation and become advocates."

Ezer singles out the support of principals and vice principals as crucial to the success of these programs. On the other hand, it is also crucial to build a core of teachers who, through experiential training sessions, are both interested in and knowledgeable about mediation. That's why Ezer offers faculty regular mediation simulations in which participants role-play resolving disputes typical to the school setting. To build student support for the program, similar demonstrations are presented to kids in their classes.

All who come to mediation are informed that it is a voluntary option. In the beginning, teachers, counsellors and administrators made referrals. As knowledge of the project spread, students came on their own accord to have their conflicts mediated.

Students mediate during free periods. Originally, student mediators received grades and credit for their service. Since the back-to-basics movement, credit has been dropped, but students do report that they gain a special status in the school community. A routing slip allows students in conflict to come directly to the mediation center unless an actual physical fight has taken place, in which case they are sent to a counsellor or assistant principal who can then send them to the center. Cases involving weapons, aggravated assault or drugs are referred to the police.

The mediation sessions, while extremely flexible in dealing with each individual case, generally take the following form: an opening statement by the mediator; statements by each disputant; caucuses and joint sessions designed to elicit information and influence future conduct among the disputants; and, in most cases, a final written agreement. Periodic follow-up by the project coordinator, usually a counsellor or teacher released half-time, determines the adequacy of the agreement and adherence to it. The coordinator reviews agreements to make sure they don't violate school policy or state law. So far, all agreements have been upheld.

The program has improved the school climate, minimized conflict and provided a peaceful means of resolving disputes. Many students come from cultures which value conciliation skills, and in some instances entire families have been involved in mediations. In one successful case involving two girls of Samoan background, 20 family members from both sides participated in a mediation conducted by four or five mediators.

A Successful Evaluation

If there is any hesitation among administrators toward fully embracing the program, it is fear that it might take up too much staff time. The counter-argument is that less staff time will be used on discipline if conflicts are resolved through mediation. And as more parents take part in the training, they will be able to provide support to the staff and free time for teaching responsibilities.

In a report to his Board of Education, the Hawaii superintendent of education has recommended that more attention be given to worthwhile—rather than prohibited—behaviors and cited the Farrington mediation project as an example. Kenneth Andrew Meehan, the project's evaluator, noted that the student mediators felt that their participation had made them "less biased," gave them "a feeling that [they] can make a difference in the school and the community," allowed them to learn more about other people, made them "want to help people even more," and taught them "how to look at people for what they are."

The Meehan evaluation noted that *all* students who had been in mediation as disputants, mostly for fighting, felt it was a successful program and should be continued. They expressed their belief that the project "gives a place for talking about your problems" and said "the mediators are understanding and don't get mad" or "very rough when talking." They said the program "calms the students down and makes them face the problem" and "helps students not to become trouble makers."

Students apparently underwent significant changes during mediation. They typically described themselves as being angry, stupid, nervous, and uncertain before mediation, but after mediation said they were calm, relaxed, or feeling better. In addition, most students who had been in mediation indicated that they would like to become mediators themselves.

Thanks to results like these, the superintendent recommended that all secondary schools be informed about mediation and all principals encouraged to consider establishing such projects.

School mediation has become part of the curriculum on other islands in the Hawaiian chain. One new program located on Maui reported that in its first two years the number of fights dropped from 83 to 19. The program received 59 cases in 1982-83 and reached 45 agreements. In the 1983-84 school year, the program handled 76 cases and reached agreements in 63.

In another Maui school, which includes both elementary and secondary grades, high school students are mediating disputes for the elementary students. Soon the high school students will train the elementary students to conduct their own mediation sessions. Michael Nazama, Executive Director of the Mediation Services of Maui, says in 1985 they hope to see a model for an elementary school developed, focusing on some of the basic elements of conflict management: "We feel the need to create a higher level of awareness on the part of all students, beginning at the kindergarten level, that the use of power need not be the way to resolve disputes in all cases; that, in fact, it very often serves to escalate the problem rather than resolve it."

Recently, the various school mediation programs in Hawaii set up the Hawaii School Mediation Alliance, a statewide network linking the seven islands. HSMA will publish a newsletter and bring together students and staff from time to time to share information, improve their programs and encourage projects in new schools.

San Francisco Has Strong Community Base

The Community Boards of San Francisco, founded in 1977 by Ray Schonholtz, an attorney and professor of law at the University of San Francisco Law School, is one of the older dispute resolution centers in the United States. It commands special attention because of its well-articulated philosophy and ability to attract sizable funds from private foundations. Community Boards, which now operates in 22 San Francisco neighborhoods, sees itself as the "court of first resort" and, unlike most neighborhood justice centers, does not deal with cases that come from the formal justice system. Rather, it trains community members not only to mediate, but also to seek out cases, perform intake, carry out follow-up and participate in training, management and evaluation. Continuous education builds skills of community members. With this special emphasis on community education, it was a logical step for Community Boards to reach out to the schools, as they did in 1982 when they received a planning grant to design a school-based program.

Helena Davis, who had considerable experience in multicultural education and public school teaching, was hired to direct the School Initiatives Program. Like Mel Ezer in Hawaii, she decided to begin by working in schools where the principals showed strong interest in the program. One principal had been a party in a case; another had been trained as a neighborhood mediator.

The program that Davis designed has three major components—a conflict resolution course in high schools and classroom meeting and conflict manager programs for elementary schools.

The elementary classroom meeting program takes place in grades kindergarten through five and involves 20 minutes of classroom meeting, usually after lunch, when alternative conflict resolution methods are taught through discussion of the problems, role-playing and structured experiences. The high school program is offered in a module which includes experiential exercises, reading, and discussion, as well as specific activities on interpersonal communication, assertiveness, one-to-one conflict resolution skills and conflict mediation skills for third parties. The module must be tucked into the regular curriculum since San Francisco, like Hawaii, is concerned with the basics and has left no room for electives.

Training the Younger Ones

In designing her program, project director Davis attempted to find the earliest age at which students could absorb conflict resolution training and put their new skills to practice. She settled on the fourth and fifth grades. Students are selected by their peers based on leadership and ability, both negative and positive. According to Davis, they show "the ability to think well on their feet, like to try new things, and are trusted or followed." The students selected also represent the gender division and racial/ethnic identity of the school as a whole.

Students receive 15 hours of training before donning their "Conflict Manger" T-shirts and going to the playground in pairs during lunch and recess to assist students in resolving disputes. The training is designed to build skills in active listening, problem solving, critical thinking, teamwork, assertiveness, open communication and the conflict management process.

Teachers are trained by Community Boards staff so that they can train students, and, after a period of experience as a Conflict Manager, students help train their fellow students. A day-to-day conflict resolution curriculum is laid out in a 135-page teacher training manual.

All Conflict Managers must follow these guidelines: 1) Conflict Managers must not thrust themselves into a dispute. Talking to the Conflict Managers is the students' choice. If students decide to accept help from the Conflict Managers, they must agree to work hard to solve the problem. 2) Conflict Managers are helpers, not police. If there is physical fighting, Conflict Managers do not get involved. 3) The Conflict Managers' job is not to solve problems for other students but to help other students think of ways to solve problems for themselves.

Students who become Conflict Managers agree to the following duties: 1) Wear your Conflict Manager T-shirt only when on duty. Put it away when you are through. 2) Report for duty on time. 3) Make up any class work missed. 4) Fill out a report on each conflict the day it happens. 5) Attend all meetings with the Conflict Manager Coordinator. 6) Be a Conflict Manager until the end of the school year.

The conflict resolution process for playgrounds has 14 stages. Condensed, these stages are as follows: If you see a conflict brewing, introduce yourself and ask both parties if they want to solve their problem. If they do, go to the area designated for solving problems. Explain and get agreement to the four basic rules: 1) Agree to solve the problem, 2) Don't call names, 3) Do not interrupt, and 4) Tell the truth. Decide who will talk first. Ask that person what happened and how he or she feels, repeating back what is said using active listening skills. Do the same with the other party. Ask the first party and then the second party for alternative solutions. Work with the students to get a solution that they both think is good. After the agreement, congratulate them both and fill out a Conflict Manager Report Form.

Like their adult counterparts in community mediation programs, the student Conflict Managers are trained to look for agreements that meet certain criteria, asking such questions as, Will the resolution solve the problem? For good? Can both disputants really do what they promise? Is the agreement specific enough? Does it tell when, where, how and who? Is it balanced? Do both disputants share responsibility for making it work?

A New Fourth R

What is the impact of the program? Evaluations in San Francisco show that conflicts in the schools decrease. The principals of four schools housing the Conflict Manager program wrote a letter to the school superintendent praising the program and stating that "conflict managers make significant contributions to a calm, friendly atmosphere on the playground." They also noted that "what students learn about resolving conflicts on the playground is carried into the classrooms. Thus, our teachers can spend more time educating students instead of referring their disputes. Conflict Managers teach what they have learned to parents, siblings and friends. Indeed, many students who are not Conflict Managers learn the conflict management process and use it too. We feel that conflict resolution should be the "fourth R" in public school curriculum at all grade levels."

Changes are even seen in the home. A husband and wife called the school to report that their child had stepped in and mediated a fight they had been having the night before. Students in the program enjoy increased status. There has even been a "phantom conflict resolver" seen on the school yard in a hand printed T-shirt with a clip board, a third grader unable to wait until he is in the fourth grade and can become an official mediator.

The goals of the School Initiatives Program in many ways mirror those of the Community Boards. At each school site, both students and teachers are not only taught conflict management skills but learn to be trainers themselves, so the program can replicate itself from year to year. Davis has developed two comprehensive manuals—one for the Conflict Manager Program and the other for the high school curriculum.

Rather than let the back-to-basics mentality be an obstacle, the School Initiatives program actively promotes the idea that its efforts are tied closely to basic skills. In a *Nation at Risk*, the report of the President's Commission on Excellence in Education, listening, problem solving, oral language expression and critical thinking—all skills which are sharpened during conflict resolution training—are listed as essential for academic excellence. In May of 1984, at the request of the Community Boards, Assembly Member Vasconcellos of the California Legislature introduced a resolution which would "commend the Community Board School Initiative Program and would request the State Board of Education to explore the incorporation of conflict resolution learning programs as part of the basic school curriculum in kindergarten and grades 1 to 12, inclusive." The resolution was passed and could represent the first step in making mediation a basic in California schools.

New York Program Spinoffs for Schools

"Get SMART" may be nostalgia for most of us, but it has a special meaning to students and staff at the William Cullen Bryant High School in Queens, who can be seen wearing "Get SMART" buttons.

The School Mediators' Alternative Resolution Team (SMART) was started in the fall of 1983 by the Victim Services Agency (VSA), today one of the largest dispute resolution centers in the state of New York. VSA is a relatively young agency, established in 1978 by the mayor of New York City to provide free assistance to victims of crime. VSA director Chris Whipple took this mandate broadly and initiated a wide range of programs such as victim and runaway hotlines, help in the courts, counseling for domestic violence victims, assistance to families of homocide victims, and workshops in high schools on personal safety, the criminal justice system and the emotional consequences of being a crime victim.

In 1981, VSA moved into dispute resolution. It established the Brooklyn Mediation Center and a year later opened another center in Queens. The combination of its involvement with mediation programs, its experience conducting educational programs in the schools, and its participation in the Mayor's Inter-Agency Task Force on School Safety, led the agency to consider mediation as a means of alleviating some of the problems facing New York City high schools—crime, vandalism, violence, truancy and dropouts.

Bryant was selected as a pilot site because of its size (just under 3,000), the diverse ethnic background of its students (42% white, 29% Hispanic, 17% black, 12% Asian, 1% American Indian), and the principal's interest in the innovative program. VSA asked the school to provide office space and a commitment to including mediation as an official part of the school's discipline system. Other expenses, such as the coordinator's salary and training costs, were borne by the New York City Youth Bureau.

From the beginning, goals were balanced between decreasing violence and teaching students new skills in communication and conflict resolution. Emily Jonas, a young college graduate and VSA mediator who was selected to coordinate the SMART program, expressed the goals this way: "We decided to try to stop disciplinary problems where they start . . . in the school. We also believed that students need an alternative to fighting and respond better when not told what to do by an adult authority figure. Here they have input into the solution and are guided by someone their own age." The program also builds a stronger sense of community and cooperation among students, parents and faculty.

Mediation Training

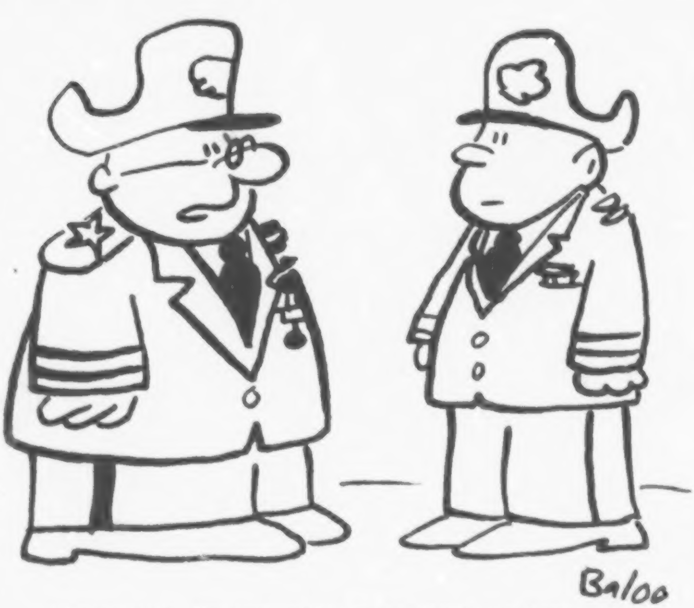
These goals are carried out in three primary ways—ongoing classroom outreach seminars, mediator training and the actual mediation of disputes. Although SMART is relatively new, careful planning and attention to detail have enabled it to serve as a model for several emerging school programs.

The classroom outreach seminars publicize the program, attract new mediators and encourage support by faculty. The project coordinator conducts them over two days during regular 40 minute periods, in lieu of regularly scheduled classes in such subjects as mathematics, english, science, social studies, music, art, special education and health. Often the content of the role plays or exercises is adapted to meet the academic goals of a particular class.

Each begins with exercises asking students to associate all the words they think of when they hear the word "conflict." Students then tell about some of their own fights and reflect upon such questions as, "What makes me fight?" "Do I like to fight?" "Do I like to watch a good fight?" and "Have I ever fought because I felt I had to?" From there the seminar moves along to common methods of resolving conflicts (from avoidance to physical fighting) to the consequences of fighting and hurting someone (for both yourself and the person hurt) to the option of mediation, negotiation and compromise. The role of the mediator is explained and illustrated through role plays. The People's Court, a televised version of small claims court which enjoys considerable popularity among young people, is used to illustrate the difference between judging and mediating. By the end of the two class seminars, students have been both exposed to mediation and Project SMART.

How well do the students get the mediation message? When asked on an evaluation questionnaire "Would you consider resolving a dispute through mediation?", a ninth grader responded, "It's one way two people can agree on a solution and neither one of them gets hurt." A tenth grader felt, "It is more mature if you talk it out—not fight." An experienced eleventh grader noted, "I've been in the Dean's office often enough to know that it's not fun being suspended." And a twelfth grader came forth with an analysis that would make any advocate of mediation proud: "A problem is made to be solved, and mediation is a positive way to solve problems."

SMART was fortunate to attract one of the key mediation trainers in the United States to design its training. Three times during the school year, Joseph B. Stulberg (Conflict Management Resources, Inc.) conducts training for students, school personnel and parents. Although the SMART manual uses examples of disputes that occur in the high school setting, the conflict resolution skills have not been watered down.



"Strategically, I'm overweight, but tactically, I'm hungry."

Students learn that a mediator must *always* do the following: 1) Use words and phrases that are impartial and nonjudgmental; 2) Establish and maintain fair procedures; 3) Act as a fact-finder; 4) Serve as a teacher to make certain that each disputant understands the other's point of view; and 5) Force disputants to be realistic about possible solutions to their problem.

Mediation training requires concentrated periods of time, perhaps five to ten sessions of three to four hours each, to carry out realistic simulations of mediation sessions. Scheduling blocks of time was difficult for the SMART program. Some trainees couldn't meet in the evenings, others on the weekends. Many felt too tired after the school day. In the end, the afternoon time slot was selected, although it was not considered ideal by the trainers. A total of 20 hours was devoted to teaching such skills as setting up a hearing, gaining trust, gathering facts, questioning, note-taking, identifying and prioritizing issues, and writing up an agreement.

Each training program is limited to 25 participants. Initially anyone who wanted to become a mediator was invited to join these training sessions. In the last year, the advisability of adding some criteria has been discussed—for example, passing grades, an essay or references. Those who complete the training receive a mediation certificate and are considered eligible to be a mediator. They also receive school service credit and citizenship notation. Many students find their mediation activity to be useful on college applications. Sophomores and juniors are most apt to take part in the program, perhaps because ninth graders feel too new and seniors are thinking about moving on.

Interestingly, mediators are usually average or below average academically and have a tendency to cut classes. Once they become mediators, however, the mediation coordinator encourages them to improve academically, and they are prohibited from mediating if their attendance does not improve. They also tend to be both "positive and negative leaders," classified by the first coordinator as "reforming trouble makers," "doers," and "joiners." A side effect of the program, as noted by the principal, has been that "some of our 'trouble makers' are now serving as mediators." All in all, the program seems to have " 'reformed' several of our most difficult students."

Recently, SMART mediators echoed the sentiments of the principal. At a New York state conference of mediators held in Albany in December, 1984, three student mediators conducted a workshop. One commented, "I was a pretty bad kid. I wasn't going to my classes. I just hung around on the street with my friends. The people at the school didn't understand that I had a rough scene at home. I found out about mediation because I was one of the parties to a mediation. I walked out shaking hands with the guy. I wanted to become a mediator. After the training, I felt more clear about what I wanted to do. I started to attend my classes. Now I go to my classes and I'm even teaching two gymnastic classes."

Another student told of the impact of mediation upon her life. "All I ever wanted to do was to fight. If someone said something to me I didn't like, I didn't think about talking, I just thought about fighting. I came into a mediation session as a disputant with four girls on the other side. I thought, 'Who needs this? What am I doing here? I just want to punch these girls out.' I figured that the mediator would tell me what I was going to have to do. But she didn't. Instead she drew me out, listened to me. It felt so good to let it all out; then I wasn't angry anymore. I thought, 'Hey, if this can work for me, I want to learn how to do it.' After my training, the atmosphere around me changed. Mediation pulled me out of the hole that I was in; I'm a better person. It's helpful with my family and my friends. It even helps me walking down the street. Imagine me up here speaking before all of you! My mother wants to become a mediator. She says, 'Elizabeth, if mediation can make you so good, I want it too!' I say, 'Mom, I can train you to be a mediator'!"

Why It Works

What is it about mediation that proved so attractive to these two students? Before the SMART program, if a fight occurred security officers would be called, students would be sent to the dean's office, two- to five-day suspensions would be given which would be recorded on the students' permanent records, parents would be called and there would be student/parent conferences. The students would return to school after the suspension, behind in their courses, still hostile to the other party, possibly ending up in another fight. In mediation, mind rather than muscle is used for solving problems, and the cycle of revenge is short-circuited. Records stay clear, suspension is avoided and a mutually agreeable solution is reached.

Beyond these positive outcomes rests the power of the process itself. As we heard from Elizabeth, once students are freed from the need to be defensive, once they know they are not being judged and become confident that they are being listened to carefully, they discover their innate ability to let go of their anger and to begin to think more constructively. The nitty-gritty nature of students' agreements attests to their ability to come up with practical terms. For example, at the conclusion of a mediation session between a male student and a female student concerning alleged gossip, the parties stipulated that 1) Juan agrees that the incident that he heard about involving Alicia could have been a case of mistaken identity; 2) Alicia agrees that people are upset if they hear that someone else said nasty things about them, but that people should not listen to hearsay and they should approach others in a polite manner in order to work things out; 3) Juan agrees not to call Alicia any names or talk about her behind her back; 4) Alicia agrees not to call Juan any names or talk about him behind his back; 5) Alicia and Juan agree not to fight physically; and 6) Juan and Alicia agree not to involve any of their friends or family members in this matter.

The mediation program enjoys the support of the deans, who are responsible for directing many cases to the project. Other referral sources include teachers, security guards, counsellors and the students themselves. All cases are processed by the coordinator, who interviews the parties to determine if the case is appropriate for mediation and, if it is, calls in one or two mediators for a session as close to the time of the incident as possible. Of the 134 cases referred to the program last school year, 116 were mediated, and 93 resulted in a formal written agreement. The bottom line, according to one assistant principal, is that suspensions are down 50 percent.

Raising Questions

Much can be learned from the sharing of experiences. Fifty people from 15 states gathered at Craigville Beach, Massachusetts, in August, 1984, to learn what they could about mediation in the schools. They engaged in this kind of sharing as they watched two staff members from the Institute for Mediation and Conflict Resolution of New York conduct a mediation simulation. The case involved a principal who had brought charges in court against a student for "malicious destruction of property." He claimed she had painted an obscenity on a school wall. The principal, the student and her mother were parties to the mediation, which started in a session with all of them and two mediators, then split into private sessions with each of them, before concluding with the parties coming together and reaching an agreement.

The reaction from the audience was diverse and instructive.

"Why are you using two mediators?" asked the director of a southern dispute resolution center. "I have enough trouble lining up one mediator; why make more trouble for yourself?"

"I like the two mediator model," said an upstate New York mediation staff member, "but in our program we use a lead mediator who does all the talking and a support mediator, who takes notes and is available for advice if asked. It's a system that works great."

"Why restrict it to two mediators?" asked a west coast participant. "In our program we use panels of three to five people. But we don't use private sessions. How can you keep the trust of the parties if you talk with them individually? Won't they wonder what you've said to the other people? I think the mediation should all be done in front of the full group of disputants."

"I can't imagine my principal even participating in mediation," said a vice principal of a small rural high school. "I think he would feel that he was giving up too much power."

"Our principal wouldn't even want to admit that we had problems. She would think that setting up a mediation program was an admission that she couldn't do her job," added a Massachusetts teacher.

"I'm a principal and I don't feel that way," said another participant. "I would love to have a mediation program in my school. I think it would take off some of the heat and would improve the school atmosphere tremendously. I'm going to start one when I return home."

A teacher from a tough city school said, "I see mediation and it looks appealing, but I wonder to myself, 'can this work in my school?' Vandalism's nothing. In our school students carry guns and knives and disputes are over drug deals and people get killed."

The discussion could and did continue with as many attitudes as people participating. Mediation has proven itself to be a humane and effective way of resolving disputes, but how does it fit into the school setting?

Suggesting Answers

Questions remain, but some conclusions are emerging. Collaboration between neighborhood dispute resolution centers and the schools seems to be an effective partnership. Mediation requires considerable training that the centers can offer. Many community dispute resolution centers are beginning to mediate cases involving Children in Need of Service (CHINS) or People in Need of Service (PINS). Young mediators have an important role to play in such cases because they relate well to participants their own age and offer an important perspective.

The three projects described in this article all chose to place their programs in multicultural, urban schools where the administrators were looking for ways to reduce violence. Since the programs were able to succeed in these settings, the concept may spread to all kinds of schools. In fact, all three projects are expanding to additional schools. The San Francisco Community Boards School Initiatives Program is being adopted in other states, and New Mexico has received funding from the Office of Juvenile Justice and Delinquency Prevention to run programs adapted from the Community Boards model in four schools.

Although approval by the superintendent or school board may be helpful, hav-

TEN REASONS FOR INSTITUTING A SCHOOL-BASED MEDIATION PROGRAM

A review of program descriptions reveals that the following reasons most commonly motivate those who wish to promote mediation in the schools.

1. Conflict is a natural human state often accompanying changes in our institutions or personal growth. It is better approached with skills than avoidance.

2. More appropriate and effective systems are needed to deal with conflict in the school setting than expulsion, suspension, court intervention and detention.

3. The use of mediation to resolve school-based disputes can result in improved communication between and among students, teachers, administrators and parents and can, in general, improve the school climate as well as provide a forum for addressing common concerns.

4. The use of mediation as a conflict resolution method can result in a reduction of violence, vandalism, chronic school absence and suspension.

5. Mediation training helps both young people and teachers to deepen their understanding about themselves and others and provides them with lifetime dispute resolution skills.

6. Mediation training increases students' interest in conflict resolution, justice, and the American legal system while encouraging a higher level of citizenship activity.

7. Shifting the responsibility for solving appropriate school conflicts from adults to young adults and children frees both teachers and administrators to concentrate more on teaching than on discipline.

8. Recognizing that young people are competent to participate in the resolution of their own disputes encourages student growth and gives students skills—such as listening, critical thinking and problem-solving—that are basic to all learning.

9. Mediation training, with its emphasis upon listening to others' points of view and the peaceful resolution of differences, assists in preparing students to live in a multicultural world.

10. Mediation provides a system of problem solving that is uniquely suited to the personal nature of young people's problems and is frequently used by students for problems they would not take to parents, teachers or principals.

BEST COPY AVAILABLE

ing an interested, supportive principal is vital. When principals and vice principals are personally familiar with mediation, they are apt to be even more supportive. Teachers, other school staff, students, parents, and community members also must support the programs. Awareness seminars, posters, buttons, newspaper articles and television coverage are some of the ways these programs promote greater school and public understanding.

While both community and school mediation programs use volunteers to mediate disputes, both require a strong administrator. An assistant principal at the Bryant school said it for all when he remarked, "Without a director, mediation would probably fizzle out within six weeks. It's not because the interest is not there, but no one else would have the time to devote to working with mediators, supervising hearings and following up on disputes." Also, project directors have played a vital role in compiling evaluation data. Some project directors are full-time employees hired by an outside agency. Others are school employees who have been released from a percentage of their conventional duties as teachers, counsellors or administrators.

Many people who are first exposed to mediation find that not only are new skills learned, but old ones must be unlearned. Trainees come to see the ways that conflicts start and the kinds of attitudes which keep them going. "I don't care if I never mediate a dispute," said a 17-year-old girl trained in a Boston program. "These are lifetime skills and I've put them to use already." A mediation program in the school leads to an interest in including mediation skills training in the curriculum so that all students can benefit.

As an outgrowth of the meeting last summer at Craigville Beach, NAME (the National Association for Mediation in Education) was formed. NAME is housed at the U/Mass Mediation Project at the University of Massachusetts in Amherst. This fledgling organization set as its immediate goals the development of a central clearinghouse on mediation in education, including a directory of school-based mediation projects (to be published in cooperation with the ABA's Special Committee on Dispute Resolution), the dissemination of information on the subject through a quarterly newsletter and articles in other publications, and planning for a second annual national conference in 1985.

NAME hopes, in time, to conduct systematic research in current school-based mediation programs, to experiment with new models and to give technical assistance to those who wish to start programs in their own school systems.

Conclusion

School mediation programs have proved themselves beneficial to students, the school community and the community as a whole. Does this emerging field relate to existing law-related education programs? Have we been placing too much effort into teaching about the courts as a principal means of solving disputes? Should we be investing some of our energy and resources into providing teachers and students with exposure to nonadversarial means of dispute resolution? Many law-related education leaders answer these questions with a yes. □

Getting Help

The following organizations can provide information about mediation in schools.

National Association for Mediation in Education (NAME): **NAME is a new organization formed to encourage sharing information about model programs and dispute resolution curriculum. NAME publishes a periodic newsletter and will be holding a second annual conference in August, 1985, at the Craigville Conference Center in Massachusetts. Membership: $10.00. Contact: Janet Rifkin or Ann Gibson, NAME, Mediation Project, 127 Hasbrouck, University of Massachusetts, Amherst, MA 01003, (413) 545-2462.**

ABA Special Committee on Dispute Resolution, School Mediation Clearinghouse: **The Special Committee on Dispute Resolution is publishing a *Mediation in the Schools Directory* which will also contain information about curriculum materials. They also have a directory of community-based mediation projects. Publications are sold at cost. Contact: Lawrence Freedman, ABA Special Committee on Dispute Resolution, 1800 M Street, N.W., Washington, DC 20036, (202) 331-2258.**

School Initiatives Program, Community Boards: **Community Boards has developed program models and materials at the elementary and secondary level. They conduct teacher training and offer technical assistance in curriculum and program development. Their models have been replicated in other locations. Contact: Helena Davis, Director, School Initiatives Program, Community Boards, 149 Ninth Street, San Francisco, CA 94103, (415) 552-1250.**

Project SMART (School Mediators' Alternative Resolution Team), Victim Services Agency (VSA): **VSA operates SMART in conjunction with the William Cullen Bryant High School in Queens. In 1985 additional school programs will be developed. VSA can send a program summary including sample cases to those wishing more information. Contact: Judith Thompson-Rubel, Director, Project SMART, Victim Services Agency, 2 Lafayette Street, New York, NY 10007, (212) 557-7700.**

Hawaii School Mediation Alliance: **The Alliance was formed recently to encourage the ten or more school-based mediation programs on the Hawaiian island chain to share information about their programs through a periodic newsletter and occasional meetings. Contact: Mel Ezer, HSMA, College of Education, University of Hawaii at Manoa, West Hall Annex 2, Room 222, 1776 University Avenue, Honolulu, HI 96822. (Cable address: UNIHAW).**

Conflict Resolution and Mediation Service, New York Board of Cooperative Educational Services (BOCES): **The BOCES Mediation Service is one of the earliest school-based programs and has served as a model for many other programs, including Project SMART in Queens. The program has been approved as a "shared aidable expense," which means that schools in the BOCES districts are eligible to have 60-70 percent of their costs refunded at the end of the school year. Contact: Barbara Brodsky, Mediation Coordinator, BOCES 2, Suffolk, Eight 43rd Street, Centereach, NY 11720, (516) 467-3610.**

Court in School

(Continued from page 5)

cludes instruction in the rights and responsibilities of citizenship. This decision, they maintain, threatens the mutual trust and respect critical to the educational experience. Moreover, their best efforts at citizenship education may be seriously impaired by the perception created by the Court's decision: that of an unruly mass of students, finally stripped of their rights, and subject now to arbitrary exercises of power by unbridled school officials. The Court, these officials maintain, has done schools and students alike a great disservice.

What Next?

What does this all really mean for our schools? For now, we can discern some very general guidelines. We know from the Court's opinion that students do have some Fourth Amendment rights, but that those rights are substantially less expansive than those afforded most citizens. We know too that those rights are not violated by warrantless searches or by searches unsupported by probable cause, when those searches are properly conducted by school officials on school grounds. Finally, we know that searches by school officials will not violate the students' Fourth Amendment rights as long as they are:

1. reasonable in their inception (*i.e.*, as long as there are reasonable grounds for believing that the search will reveal some evidence of criminality or other improper conduct), and
2. reasonable in scope (*i.e.*, as long as they are not excessively intrusive in light of the age and sex of the student and the nature of the alleged infraction).

Beyond this, though, we can only speculate. The *T.L.O.* opinion, after all, answers some questions, while raising many more. (See "What Does It All Mean?" on this page.)

Will the decision really have much effect on our schools and our students? That, too, remains to be seen. Much will depend on individual school administrators and teachers; they can wisely use—or horribly abuse—the considerable discretion afforded them by the Court. And much, too, will depend on the Court itself, as it clarifies and amplifies the *T.L.O.* opinion in future decisions. The *T.L.O.* majority, in recognizing the Fourth Amendment rights of students, felt compelled to distinguish schoolchildren from convicted criminal offenders. "We are not yet ready to hold," the Court noted, "that the schools and prisons are to be equated for purposes of the Fourth Amendment." It was, perhaps, an attempt at self-deprecating humor; to some readers, however, it seemed more than a little sinister. Not yet? Not yet . . .

The Court Looks into the Teacher's Closet

For the first time ever, the Supreme Court this term will confront the issue of homosexuality. In *National Gay Task Force v. Board of Education of Oklahoma City*, the Supreme Court will decide whether an Oklahoma school board can fire or refuse to hire any teacher who has engaged in "public homosexual conduct" and who has "been rendered unfit, because of such conduct," in the words of a state statute. The National Gay Task Force (NGTF) brought this constitutional challenge to the statute on behalf of all present and prospective NGTF members who are public school teachers in Oklahoma. Although the Court will not decide the criminality of homosexual acts, it will determine the degree of protection that gays have expressing themselves, specifically in connection with schools.

The clear intent of the Oklahoma law is to shield schoolchildren from homosexuality, and the statute attempts to do this by punishing displays of homosexual orientation by teachers. To the extent that the

What Does It All Mean?

Some questions and answers about the *New Jersey v. T.L.O.* decision.

Q. I'm going to college at Georgetown. Does this mean I can be searched without a warrant?

A. No. The *T.L.O.* decision only applies to public institutions of elementary and secondary education.

Q. Can police now search high school students without a warrant?

A. No, not unless the search falls into some other exception to the warrant rule. The *T.L.O.* decision applies only to searches by school officials on school grounds. The Court does not say how the decision may be different if there is some evidence of collaboration between the police and school officials; in all likelihood, searches resulting from such collaborative efforts will be governed by the general law on search and seizure.

Q. Can male teachers now pat down—or strip search—female students?

A. Almost certainly not, though the Supreme Court is not as clear on this point as it could have been. Justice O'Connor frequently raised this issue during oral arguments, and her concerns are addressed to some extent by the "reasonable in scope" restrictions announced by the Court. Still, in its effort to ensure maximum flexibility, the Court allowed some room for maneuvering. Theoretically, under certain circumstances, even fundamental rights of privacy can be violated.

Q. Suppose school officials receive a tip that there are drugs in the school. Can the entire student body be searched?

A. This is one of the issues the Court expressly refused to address. Generally, searches must be based on an "individualized suspicion;" *i.e.*, the information that suggests illegal or improper activity must point to the particular individual being searched. Thus, the entire student body could not be searched *en masse* unless the informant implicated each and every student. However, in some cases, the Court has waived this requirement of "individualized suspicion." The Court refused to say whether the requirement would be appropriate in the schools.

Q. Does the *T.L.O.* decision apply to school locker searches?

A. No. The opinion is premised entirely on the Fourth Amendment rights of students to limited protection from personal searches. The Court expressly refused to say whether the students would have any protection against searches of their lockers, desks, or the like. Certainly, students will be afforded no greater protection in these areas (thus warrants and probable cause will be unnecessary); quite possibly, they will have none at all.

Q. Whatever happened to the exclusionary rule?

A. In a word, nothing. Since the Court decided that the search was constitutional, there was no basis for excluding the evidence. The exclusionary rule issue thus became moot. The Court deferred consideration of the issue to another case on another day.

statute punishes sexual solicitation of schoolchildren (regardless of the sexual orientation of the offender), few would criticize it. However, constitutional problems arise if this would-be shield becomes a sword that cuts into freedom of expression rights guaranteed by the First Amendment.

"Marketplace of Ideas"

The First Amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . " The Supreme Court has long considered the freedom of expression a fundamental right and has made the above prohibition not only applicable to Congress but to the states as well, through the Fourteenth Amendment Due Process Clause.

The First Amendment's guarantee of freedom of speech is meant to ensure that individuals have access to "the marketplace of ideas," which means both to "sell" (express) and to "buy" (listen). Over the years, the Court has delineated many kinds of expression and the degrees of protection to which they are entitled. Political speech is given the highest regard because it is an essential ingredient in the American political system. Obscenity, "fighting words" and defamation are thought to be of so little value that they receive no First Amendment protection at all.

The Court has also distinguished between verbal and non-verbal expression— between "speech" and conduct." Symbolic conduct may be more freely regulated than speech, but only if the regulation has an important governmental interest and is unrelated to suppressing free expression. For example, a federal statute prohibiting destroying draft cards had an important governmental interest, unrelated to suppression; thus, the Court affirmed the conviction of the draft card burner.

A state can still regulate the "time, place or manner" of protected speech or conduct—even of a political nature—but it cannot attempt to control the *content*. Moreover, any "time, place or manner" regulation of political expressions receives close judicial scrutiny. During such scrutiny, several doctrinal concepts may come into play, such as whether there are less restrictive alternatives, whether the statute is vague, and so on.

The Statutory Language

The controversial Oklahoma statute in *Gay Task Force* defines "public homosexual conduct" as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees. . . ." Homosexual *activity* refers to sexual acts—specifically, oral and anal intercourse—between persons of the same sex. Whether in public or private, homosexual activity is illegal in Oklahoma. Homosexual *conduct* includes advocating such activity.

Whether a teacher is rendered "unfit" by this conduct is determined by looking at several factors outlined in the statute: 1) the likelihood that the public homosexual conduct may adversely affect students or school employees; 2) how close in time or place the conduct may be to the teacher's official duties; 3) if any extenuating or aggravating circumstances exist; and 4) if the conduct is of a repeated or continuing nature which tends to encourage or dispose schoolchildren toward similar conduct.

The Law Goes Too Far

The Court Appeals for the Tenth Circuit looked at the statute and found it overbroad. When analyzing a statute for overbreadth, a court looks to see if the regulation goes too far and has the potential for punishing constitutionally protected expression. The Tenth Circuit found that the Oklahoma law did indeed go too far in interfering with protected speech. Thus, the court invalidated the law on overbreadth grounds.

The court noted that the First Amendment protects "advocacy"—even of illegal conduct—except when advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action. (The illegal conduct in this case is sexual activity between persons of the same sex.) According to the court, the words "advocating," "encouraging" and "promoting" do not necessarily imply incitement to *imminent* action. A person may "advocate" illegal conduct for some indefinite future time and still remain protected by the First Amendment. The same applies to "encouraging" and "promoting" illegal conduct. In balancing the state's interest in protecting schoolchildren and the individual's rights in political expression, the court of appeals came down on the side of the teacher.

In doing so, the courts overturned the trial court's decision. The lower court had found that the statute reaches protected speech, but had upheld its constitutionality by reading into it a "material and substantial disruption" test, borrowed from another famous Supreme Court "school" case, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). A teacher's interests may be outweighed by a state's interest only if the expression results in a "material and substantial disruption" in the normal activities of the school.

However, the court of appeals felt that the statute gave little guidance in determining what is a material and substantial disruption. The statute contains only factors for determining "unfitness," and only one factor relates to school activities—whether the conduct is likely to *adversely affect* students. But the court noted that many adverse effects are not material and substantial disruptions. Moreover, an adverse effect is apparently not even a prerequisite to a finding of unfitness. And finally, the statute does not require that the teacher's public expression take place in the classroom, so the connection to normal school activities is tenuous at best.

Was the Appeals Court Too Sure?

The Oklahoma statute is undoubtedly broad. But the Tenth Circuit's decision invalidating the statute is not without its own problems. One problem is that the National Gay Task Force is making a *facial* challenge to the constitutionality of the statute, meaning that the Task Force is challenging the law without a factual record, without an actual showing of harm resulting from the law. Essentially, the argument is that the law *theoretically* will hinder protected speech. Such challenges are generally put through the wringer so as not to unnecessarily strike down an act of the legislature. This is especially so where the facial challenge is based on overbreadth grounds. The Supreme Court has cautioned that such challenges are "strong medicine" and should be used "sparingly and only as a last resort."

The Task Force could have waited until a teacher was punished under the statute and then challenged the law *as applied*. The advantage is that the Court would then be working with a factual record showing actual harm. The Court would be dealing with real people and real issues, instead of stick figures. Such a case would avoid the necessity of the court of appeals having to conjure up hypothetical illustrations. But the danger of this kind of challenge (and this is probably how the Task Force saw it) is that someone will be harmed in the meantime. Moreover, it would be impossible to measure the statute's "chilling effect"—how many individuals would refrain from expressing themselves for fear of punishment?

. . . And Too Quick?

The other problem with the decision of the court of appeals is also connected to the case being a facial challenge. The state of Oklahoma argued that the Tenth Circuit should have deferred—or abstained—until state courts constued the statute. According to abstention doctrine, federalism is promoted when the federal judiciary abstains or defers because a state statute that seems too broad may be narrowed by the state courts; state sovereignty is not infringed. As it stands now, the courts of that state have not spoken on the issue. On the other hand, the Task Force maintained that waiting for state court construction of the statute would create a period of uncertainty about what acts are prohibited. The Tenth Circuit apparently agreed with the Task Force, stating that the statute must be struck down if its "deterrent effect on legitimate expression is both real and substantial."

Before the Supreme Court, the Gay Task Force (represented by Laurence Tribe, the well-known constitutional law professor at Harvard Law School) and the Oklahoma City Board of Education made arguments similar to those discussed above. They focused entirely on the freedom of speech and abstention issues, and omitted any discussion of the equal protection and right of privacy challenges which had been rejected by the Tenth Circuit. The Court held oral argument on January 14, with decision expected later this term.

The Oklahoma Case: A Teaching Strategy

The court of appeals offered a hypothetical illustration to show the unconstitutional reach of the statutory terms.

A teacher goes before the Oklahoma legislature or appears on television to urge the repeal of the Oklahoma anti-sodomy statute. He or she says, "I think it is psychologically damaging for people with homosexual desires to suppress those desires; they should act on those desires and should be legally free to do so."

- **Under the Oklahoma statute, is the teacher "advocating," "promoting" or "encouraging" homosexual activity?**
- **Is the teacher doing so in a way that creates a substantial risk that his or her speech will come to the attention of schoolchildren?**
- **Now consider, what is the purpose of the teacher's statement? Is it aimed at legal and social change? Does it qualify as political expression?**
- **How would you balance the state's interest against the individual's?**
- **How could the hypothetical facts be changed so as *not* to invalidate the Oklahoma statute?**
- **How could the statute be changed so as to allow the teacher in the hypothetical above to speak without fear of job loss, yet still fulfill the state's goal?**

Class! Be Quiet and . . .

It is the beginning of the first class of the day. The teacher quiets the students down and announces that the class will observe one minute of silence—for either voluntary prayer or meditation. As the minute passes, teacher and students look down or look up or stare ahead (no other activity is allowed). Is the First Amendment to the Constitution being violated?

That's the question the Supreme Court faces in *Wallace v. Jaffree* when it decides whether an Alabama statute allowing for the minute of silence violates the Establishment Clause of the First Amendment. Argued in December, 1984, *Wallace v. Jaffree* is one of the most controversial cases in recent terms because some twenty-three states have enacted similar statutes requiring or allowing daily moments of silence in public schools.

The issue has become the latest battlefield in the voluntary school prayer conflict, with many other participants. The United States government has filed an amicus curiae ("friend of the court") brief in support of the Alabama statute, along with the States' Attorneys General, The Freedom Council, the National Association of Evangelicals and the state of Connecticut. Also, about 600 teachers and parents supporting the statute intervened in the court below and filed an appellate brief. On the other side are the ACLU, the American Jewish Congress, the National Coalition for Public Education and Religious Liberty and Senator Lowell P. Weicker (R-Conn.).

Groups favoring voluntary prayer have fought and lost previous battles over other statutes that either mandated a prayer at the beginning of class, or included the actual prayer with which a teacher might lead the class. What makes the Alabama statute different from these past attempts is that it allows for silence. Any talking or other activity is forbidden. So, the new battle centers on the minute of silence and whether it runs afoul of the Establishment Clause.

The Wall and the Leaks

The First Amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Court, in deciding that these prohibitions are fundamental, has applied them to states as well. In the words of Thomas Jefferson, the Establishment Clause was intended to erect "a wall of separation between Church and State." The Supreme Court went further in *Everson v. Board of Education,* 330 U.S. 1 (1947), stating that the purpose was "not to strike merely at the official establishment of a single sect, creed or religion," but "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."

Over the years, the Court has developed an analytical framework which it uses to determine whether a governmental action violates the Establishment Clause. The governmental action: 1) must have a secular legislative purpose; 2) must have a principal or primary effect that neither advances nor inhibits religion; and 3) must not foster an excessive entanglement with religion. The Court ritually applies the three-part test, but the results are less coherent than the above-quoted language would seem to indicate.

For example, the Supreme Court has decided that church property is exempt from real estate taxes, and that states may provide parochial school students with bus transportation and loans of certain textbooks. However, loaning equipment to parochial schools and providing field trip transportation to destinations chosen by parochial teachers have been found unconstitutional. And yet, last term the Court came down with the controversial *Lynch v. Donnelly* decision, 104 S.Ct. 1355 (1984), which allows government sponsorship of Christmas nativity scenes. The overall result is a wall that is less than complete.

Silence Is Golden, But Is It Constitutional?

In their own way, these cases (except for *Lynch*) were messy—entangled with such practical considerations as standardizing education for public and parochial schoolchildren alike. On the other hand, the Alabama "silence" statute case, *Wallace v. Jaffree*, is a *clean* case, in which the issues are sharply defined. The focus is entirely on a short phrase in the statute.

The Alabama statute provides:

> At the commencement of the first class of each day in all grades and all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer and during any such period no other activity shall be engaged in.

The phrase: "or voluntary prayer" is crucial because the original statute did not contain these words when it was enacted in 1978. But the state legislature in 1981 amended the statute to add these three words, plus the final phrasing prohibiting other activity during the minute of silence. (The amendment also extended coverage to all grades and made it a nonmandatory function of the teacher.) Each side has attempted to show somehow that the three-part test, when applied to this statute and particularly to these three words, favors its position.

Meditating, Praying and Vegetating

Governor Wallace, in his brief urging the Court to find the statute valid, argued that the test cannot be applied so rigidly that the Free Exercise Clause is then abolished. He argued that the two religion clauses must be read together to accommodate this exercise of religion. The Governor also argued that the statute avoids the evils of prior school prayer cases because it does not require prayer or affirm beliefs, but rather implements neutrality.

In oral argument before the Court, the counsel for the Governor noted that the phrase "or voluntary prayer" was added simply to assert what is already constitutionally permissible (meaning a student can pray on his or her own, but a teacher may not lead the prayer). Furthermore, "no one student knows what another is saying, meditating—or whether he's simply vegetating." According to counsel representing the Governor, the phrase served an "informational" purpose—informing students of their right to pray.

Hey, Court! You Messed Up!

The brief for the 600 intervenors, besides offering arguments similar to the Governor's, took a highly unusual approach. They argued that the Supreme Court over the years has misread constitutional history. The intervenors viewed the Establishment Clause as prohibiting only the establishment of a national church. According to their reading, the Establishment Clause was never meant to be applied to the states. The trial court agreed, but was chastised by the court of appeals for disobeying Supreme Court precedent, stating that only the Court can change its precedents.

Neutral or Suggestive?

Jaffree, in challenging the statute, ran it through the three-part test. According to his analysis, the silence statute was enacted with the express purpose of advancing collective prayer. He pointed out that even the trial court recognized this, and that the sponsor of the bill in the state legislature said that he introduced it to bring prayer back to public schools. Applying the test's second prong, Jaffree argued that the statute advances religion through the guise of silence, and thus failed the test. This was the position of the court of appeals.

In oral argument, counsel for Jaffree pointed out the reason for believing the statute to be defective: the state, through the teacher, *suggests* what the students are to think about during the minute of silence. To impressionable young children, the statute will promote prayer. According to Jaffree's counsel, the government did not need to take this extra step—that is, suggesting voluntary prayer—because the moment of silence adequately serves the needs of those who want to pray.

The brief for the American Jewish Congress (AJC) addresses the "accommodation" argument put forth by the Governor. The notion of accommodation merely seeks to reconcile the two religion clauses. According to the AJC brief, before the accommodation doctrine can be invoked, there must be some conflict between religious and government practice. Then, the government will bend the rule to accommodate the preexisting religious choices of its citizens. Here, however, the state *created* a religious choice where before there was none.

Arguments using the third prong of the test mostly rehash the prior arguments. This is probably so because the third prong—about whether the governmental action fosters "excessive entanglement" with religion—is really the conclusion the parties and the Court are seeking.

Whatever the outcome, the "moment of silence" case is one of those momentous cases on which the Court usually announces its decision near the very end of its term. It is quite possible that the case will have a companion case in *Estate of Thornton v. Caldor, Inc.*, which also concerns the interplay between the Establishment and Free Exercise Clauses, but there in the area of employment. In that case, the state of Connecticut enacted a statute requiring employers to honor their employees' observance of their religion's Sabbath, as required by Title VII of the 1964 Civil Rights Act. The Connecticut Supreme Court struck down the statute as violating the Establishment Clause, but the Supreme Court will have the final word. □

Teaching Strategy: Minute of Silence

Suppose the Alabama "minute of silence" is the law of your state—every public school class begins its day with this ritual. Roleplay the statute—that is, request one minute of silence from your students. *Tell them* that they may meditate or pray silently, just as the statute says. After the minute is up, ask them the following questions.

- **What was the first thing you thought of doing after the teacher's remarks?**
- **Did you follow your impulse?**
- **Did you look around to classmates, to see what they were doing?**
- **Did that affect what you chose to do?**
- **Did you feel that you were expected to pray?**
- **If you didn't pray, did you think you were going against the teacher's wishes?**
- **Could you tell if others were praying?**
- **Did you sense that others were looking at you to see if you were praying?**
- **How can answers to these questions be used as arguments in support of or against the constitutionality of the statute?**

Revolution

(Continued from page 9)

ened. *United States v. Katz*, 389 U.S. 347 (1967), told us that the "Fourth Amendment protects people, not places," that when people have a "reasonable expectation of privacy" they will be protected by the Fourth Amendment. Now the Court makes clear that certain "places" are very special.

United States v. Karo, 104 S.C. 3296 (1984), said "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."

The Court also strengthened home protection in another case, *Welsh v. Wisconsin*, 104 S.C. 2091 (1984). The case began when Ed Welsh, lying naked in his bed in his own home, felt he was having an alcohol-induced nightmare. A policeman was demanding he get out of bed and go downtown and blow into a machine. He was, in fact, under arrest for driving under the influence, although his car was stuck in the mud in a field near his home and he was in bed in a stupor. Welsh had staggered from his car and walked several blocks to his home. When a Madison, Wisconsin, police officer arrived at the car and ran a license plate check, it revealed registration to Welsh who lived close by. About a half-hour later, Officer Daley and another officer entered Welsh's home, without a warrant and possibly without consent.

The case balanced the right of privacy in one's home against the public interest in being protected from drunk drivers. "A man's home is his castle" is a traditional underpinning of the special sanctity of the home. What is more private than the bedroom of a home? The Court held that the warrantless nighttime entry of Welsh's home to arrest him for a civil, nonjailable traffic offense—the Wisconsin statute provides that a first offense for driving while intoxicated is a noncriminal violation subject to a maximum fine of $200—was prohibited by the special protection afforded by the Fourth Amendment to an individual in his home.

But Fields Are Wide Open

In *Oliver v. United States*, 104 S.C. 1735 (1984), the Court sharply distinguished between fields and homes. The Court held that because open fields are accessible to the public in ways that a home, office, or commercial structure would not be, and because fences and "No Trespassing" signs do not effectively bar the public from viewing open fields, then the "expectation of privacy in open fields" is not one that society recognizes as reasonable. As a result, the conviction of marijuana farmers was allowed to stand.

Justice Marshall in dissent asked about *Katz v. United States*, in which the Court said the Fourth Amendment "protects people, not places." He felt that if a person has not marked the boundaries of his land in a way that informs passersby that they are not welcome, he cannot object if members of the public enter the property. But a very different case is presented when the owner of undeveloped land has taken precautions to exclude the public. "The Fourth Amendment properly construed, embodies and gives effect to our collective sense of the degree to which men and women, in civilized society, are entitled to be let alone by their government." He cited examples of how privately owned woods and fields not exposed to public view are regularly employed in a variety of ways that society acknowledges deserve privacy. For example, many landowners like to take solitary walks on their property, others conduct agricultural businesses, some use their secluded spaces to meet lovers, others gather with fellow worshipers and still others use their land to engage in sustained creative endeavors. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind.

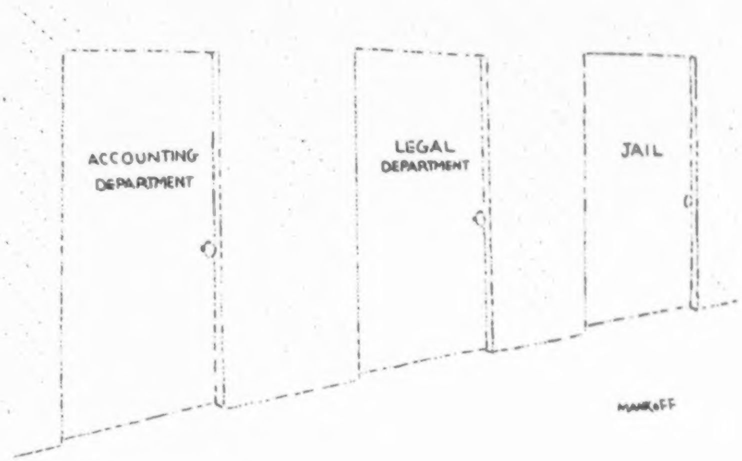
Cases Generate Strong Feelings

In the 1983-1984 term, the Court seemed to be developing a unifying principle in this area of law. The majority is clarifying the Fourth Amendment, but many of the clarifications will not be appreciated by civil libertarians.

The majority means to interpret the Fourth Amendment in a "common sense" manner, taking into account the view the public has about letting criminals go free because of a "technicality." The majority feels that excluding evidence that is clearly relevant will generate disrespect for the law and the administration of justice.

On the other hand, the dissenters are gravely concerned that Fourth Amendment protections have ended and that the majority of the Court has broken not only with constitutional precedents but also with ethical traditions.

How do you feel about these cases and about the Fourth Amendment? If the results of these cases generate strong feelings in you, you are not alone. Whether you are for or against the conclusions of the Supreme Court, it seems clear that a majority has been forged that should bring together a more unified jurisprudence for the Fourth Amendment—for better or worse.



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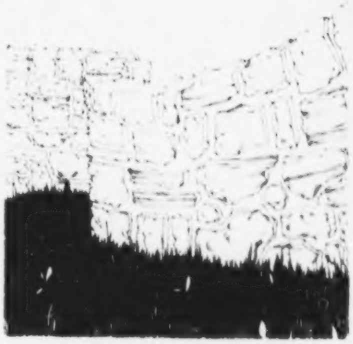
contents

Volume 9, No. 2, Spring 1985

2
Updating the First
My Pilgrimage to the Wall



6
Updating the First
Has the Pen of the Press Become a Weapon

10
Updating the First
What is the Status of Free Speech in America?

14
Updating the First
Going Beyond Darwin

17
Curriculum Materials
Picking the Right Ones

20
Classroom Strategies
Resolving Disputes— The Choice is Ours

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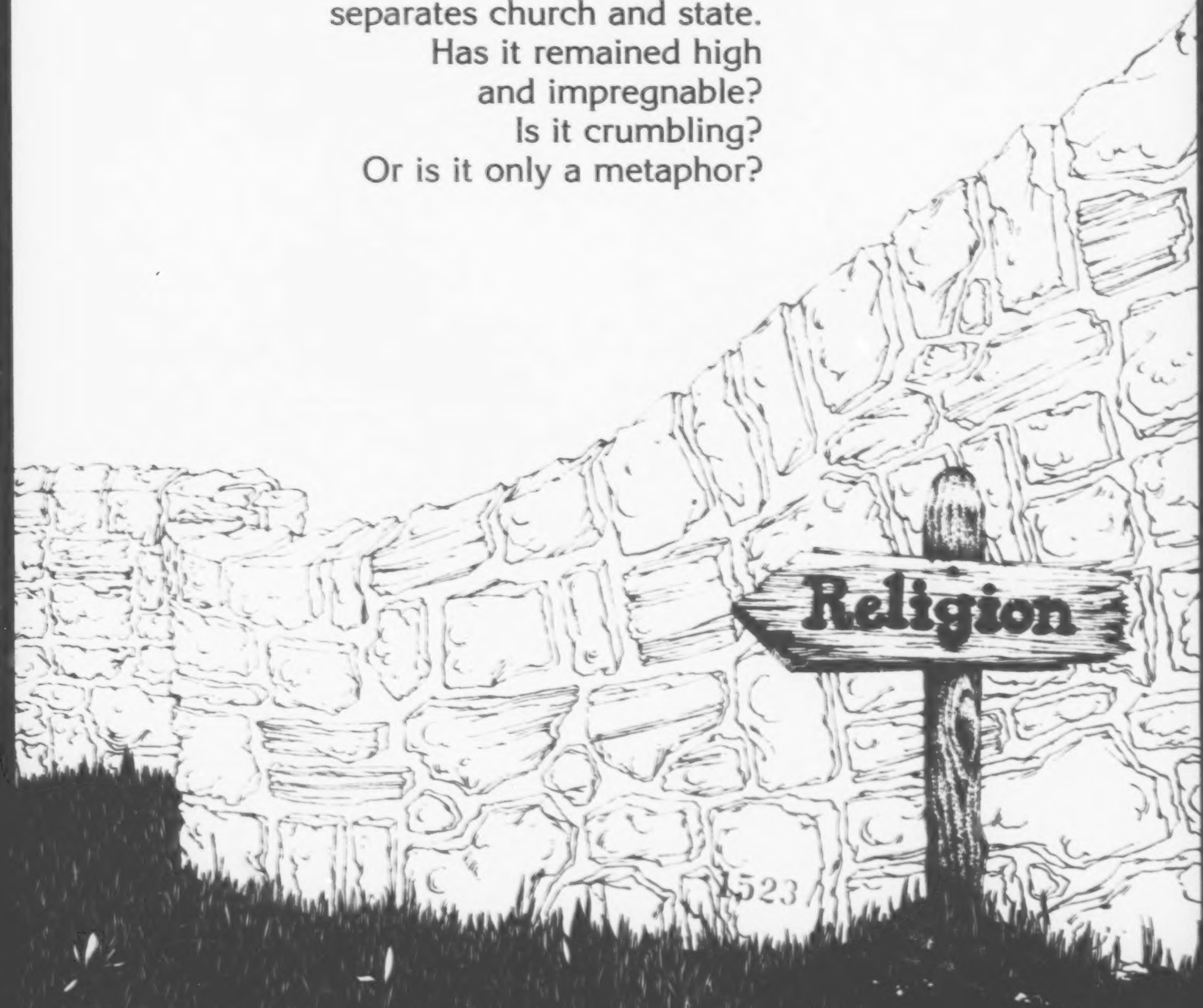
My Pilgrimage to the Wall of Separation . . .

. . . The wall that
separates church and state.
Has it remained high
and impregnable?
Is it crumbling?
Or is it only a metaphor?



Isidore Starr

> . . . We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.
>
> —Justice Wiley Rutledge, *Everson v. Board of Education*, 67 S.Ct. 504 (1947)

Periodically, I make my pilgrimage to the Wall of Separation. By this time, the scene is a familiar one. The Nine Guardians are sitting atop the Wall listening to the pleadings below: raise the Wall, lower it, fill in the gaping holes, and look, it is not really a wall, it's only a figure of speech.

Responding to these pleas, the Guardians have posted along The Wall many judicial pronouncements which, in turn, have evoked such graffiti as:

> I think that it is important for us, if we're going to maintain our constitutional principles, that we support Supreme Court decisions even when we may not agree with them.
>
> —John F. Kennedy

> We're in a bad fix in America when eight evil old men and a vain and a foolish woman can speak a verdict on American liberties.
>
> —Rev. Bob Jones III

My last visit was in 1979 (see *Update*, Winter, 1979) when I found The Wall in pretty good shape. Now a new cast of actors has appeared in the pleadings, with the President of the United States in the starring role. President Reagan's plea to the American people, in general, and to the Congress and the Supreme Court, in particular, is to restore traditional American values, with special emphasis on prayers in the public schools, public financial assistance to parents who send their children to private and parochial schools, and equal access of religious groups to public school facilities.

Are the Guardians listening? Let us see.

The Ground Rules

The Constitution contains the commandment that "no religious Test shall ever be required as a Qualification to an Office or public Trust under the United States." Since this means *never*, this is one of the provisions of the Constitution which cannot be amended. It is a point of historical interest that this command is rarely invoked to discern the thoughts of the Founding Fathers on the role of religion in government.

The second commandment in the Constitution relating to religion is found

Susan Wise

in the first sixteen words of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." The first ten words are referred to as the Establishment Clause and the remainder as the Free Exercise Clause.

Often these two clauses are invoked against each other. For example, there are those who argue that their freedom to exercise their religion extends to the classrooms of the public schools. Their opponents counter that the Establishment Clause has priority because it sets up a wall of separation between church and state (Jefferson's famous metaphor) and negates sectarian practices in the public schools. A second example of these two constitutional clauses on a collision course deals with an individual who is transferred in his plant to work in the armaments division. He refuses because of his religious beliefs, and he leaves his job and requests unemployment insurance. If the state grants his request, is it aiding in an establishment of religion? There are, of course, numerous other examples, as we shall see.

Although the two religion clauses of the First Amendment are a limitation on the powers of Congress, the Supreme Court has decided in a number of rulings that they are also binding on the states. The Court has used the Fourteenth Amendment's mandate that no state shall deprive a person of liberty without due process of law as the basis for the extension of these principles. This interpretation of the Fourteenth Amendment has not gone unchallenged by those who accuse the Court of judicial legislation or judicial activism run riot.

In interpreting the thinking behind the religion clauses, two schools have taken center stage in recent years: the Separatists and the Accommodationists. Neither school is monolithic in its views, and there are gradations of opinion. In general, however, the Separatists would like to see a high and impregnable wall, while the Accommodationists believe that the Framers were opposed only to a national religion and the preference of one religious group over another. They take the position that in all other respects the Framers intended no hostility toward religion because they respected traditional religious values.

In grappling with the contemporary contending positions of the Separatists and the Accommodationists, as well as with the historical record, the Justices have formulated a guideline in *Lemon v. Kurtzman*, 91 S. Ct. 2105 (1971), which they tend to follow, even though some of them protest regularly that they are not bound by any hard and fast rules. Chief Justice Burger wrote the opinion in that case, in which he declared that in Establishment Clause cases a governmental law or conduct will be held to be constitutional only if it meets *all* of the following three criteria:

1. The purpose of the law or conduct must be secular, not sectarian.
2. The principal or primary effect of the law or conduct must be neither to advance nor inhibit religion.
3. The act or conduct must not create an excessive governmental entanglement with religion.

As will be seen in the cases which follow, the Justices tend at times to invoke a second guideline, which is referred to as the strict scrutiny rule. When this is done, the Justices require the national or state governments to show a *compelling interest* to justify any legislation or conduct which impinges on religious beliefs and practices. In addition to this requirement, the governments must also show to the satisfaction of a majority of the Justices that they have used the least restrictive measures in dealing with religious matters.

A third guideline which the Court followed in past parochaid cases but seems to have dropped for the time being is the child benefit test. This idea was used to justify appropriating public funds to reimburse parents who bused their children to parochial school and, in addition, to support lending secular textbooks purchased with public funds to parochial schools.

An especially interesting feature of all religious clause cases is the invocation of Clio, the muse of history, as an expert witness for each side. As expert witnesses go, Clio, like Janus, can face in opposite directions at the same time.

Creches Attain Tenure

The Christmas season, with its secular holiday from work and its sectarian call to worship, also brings with it nativity scene confrontations. Especially in recent years, cities, as well as the national government, find themselves enmeshed in controversies which lay claim to historic customs and traditions, constitutional principles, and community practices.

Is it constitutional when a government purchases a creche and erects it on privately owned land during the Christmas season? Does it make a constitutional difference if the creche is owned by a private group but displayed in a public park? The following two cases explore these issues.

The Rhode Island Creche Case. For forty years, the city of Pawtucket, Rhode Island, had erected a Christmas display in a privately owned park in the downtown business sector. This observance of the holiday season included a nativity scene in addition to the usual ornaments: reindeer, Christmas tree, Santa Claus house, sleigh, animals, and a large banner proclaiming "Season's Greetings."

The city had originally purchased the creche, which was now worth about $200. It cost the city $20 to erect and to dismantle the creche and a nominal expense in lighting the scene.

Pawtucket residents and the local affiliate of the American Civil Liberties Union challenged the constitutionality of the creche on the ground that it violated the Establishment Clause of the First Amendment, which is binding on the state under the Fourteenth Amendment. The city lost in the federal district court, and in the court of appeals, taking its case to the Supreme Court in *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). The government of the United States submitted an *amicus curiae* brief on behalf of the city.

To read the opinions of the majority and minority is to sense that the debate among the Justices was intense. What is especially interesting about the opinions is their appeal to history to undergird their positions.

Writing for the majority, Chief Justice Burger emphasizes that the nativity scene, commemorating "a particular historic religious event," has been recognized in the western world for twenty centuries and in our country for two centuries. The Chief Justice reasons that our nation has always recognized the pervasiveness of religious belief. For example, in the very week that Congress adopted the Establishment Clause in the Bill of Rights, it passed a law providing for paid chaplains in the House and Senate to conduct prayers. Some of our national holidays, such as Thanksgiving and Christmas, have their origins in religious practices. Public employees are paid out of public funds, even though they do not work on these days. "In God We Trust"

Isidore Starr is a lawyer-educator who is widely recognized as the father of law-related education.

and "One Nation Under God" are additional examples of the government accommodating its policies to religious beliefs and practices. Our motto as a nation, says the Chief Justice, is "accommodation of all faiths and all forms of religious expression and hostility toward none."

Justice Brennan, writing for himself and the other dissenters (Justices Marshall, Blackmun, and Stevens), offers his own version of the uses of history in judicial reasoning. The mere fact that a particular practice has been around for a long time does not give it constitutional tenure. In addition, he points out, Justice Burger has not researched adequately the particular religious practice that is central to this case. In colonial days, there was widespread hostility to the celebration of Christmas as a "Popish" practice. Some sects incorporated Christmas in their celebrations; others did not. This deeply divisive matter was not resolved until the middle of the nineteenth century, when some states and the national government gave public recognition to Christmas by declaring it a public holiday. The creche itself seems to have been introduced by German immigrants in the early eighteenth century, and it was not until the twentieth century that its use became widespread.

Justice Brennan then summarizes his view of the majority's use of history.

> In sum, there is no evidence whatsoever that the Framers would have expressly approved a federal celebration of the Christmas holiday including public displays of a nativity scene. . . . Nor is there any suggestion that publicly financed and supported displays of Christmas creches are supported by a record of widespread, undeviating acceptance that extends throughout our history. . . . Contrary to today's careless decision . . . the "illumination" provided by history must always be focused on the particular practice at issue in a given case. Without that guiding principle and the intellectual discipline it imposes, the Court is at sea, free to select random elements of America's varied history solely to suit the views of five members of this Court.

In turning from history to the law in the case, Chief Justice Burger, speaking for the majority of five, condemns an absolutist approach as simplistic. Total separation of church and state is impossible because religion is intertwined in the fabric of American cultural and political life. The Founding Fathers intended accommodation toward religion, not hostility, and presidential proclamations and congressional practices attest to "acknowledgment of our religious heritage."

In applying the *Lemon* criteria, the Chief Justice concludes that the nativity scene is constitutional. As to the first criterion, the creche, he says, must be viewed "in the context of the Christmas season," and, as such, the entire display was secular in its objective. Its purpose was to celebrate a national holiday, and the creche simply focused attention on the historical origins of this traditional observance. There was nothing in the display that indicated Pawtucket's support for Christianity or hostility or disapproval of other religions.

The Chief Justice also finds that the creche meets the second *Lemon* criterion. The display did not have as its primary effect the endorsement or disapproval of religion. The benefit to the Christian faith in this display of the secular and the sectarian is "indirect, remote, and incidental."

Finally, there was no excessive entanglement—the third criterion—between church and state. The governmental expenditure to maintain the display was minimal and there was no church intervention. Nor was there evidence of political divisiveness or political friction over the creche during the forty years of its tenure.

But wasn't the display designed really to serve commercial interests and to bring shoppers into the central city? Why was it necessary to include the creche? Chief Justice Burger answers that it serves as a reminder of the religious origin of the holiday. It is a "passive symbol," like a religious painting, which should cause no offense.

"We're in for window-peeping. What about you?"

Justice Brennan's dissent invokes the three *Lemon* criteria with different results. He finds the creche a sectarian intrusion into a secular exhibit. With the exception of the creche, the display used traditional secular figures to attract people into the downtown area in order to promote preholiday sales. The nativity scene introduced a distinctively religious element, which served a distinctively sectarian purpose. The record in the district courts showed that the city government reflected the views of the majority that it is a "good thing" to "keep Christ in Christmas."

The primary effect of the nativity scene was to aid the dominant religious group at the expense of the minority. Christianity was singled out for special treatment. "It was precisely this sort of religious chauvinism," says the Justice, "that the Establishment Clause was intended forever to prohibit."

As for excessive entanglement between church and state, it is evident that much has happened since the inception of this case. Since the mayor has promised the Jews to include a Menorah in future displays, it is reasonable to anticipate that other religious groups will make similar demands. What limits will there be on accommodation? As the Justice notes, religious differences generate powerful emotional reactions, and the result does

(Continued on page 37)

UPDATING THE FIRST

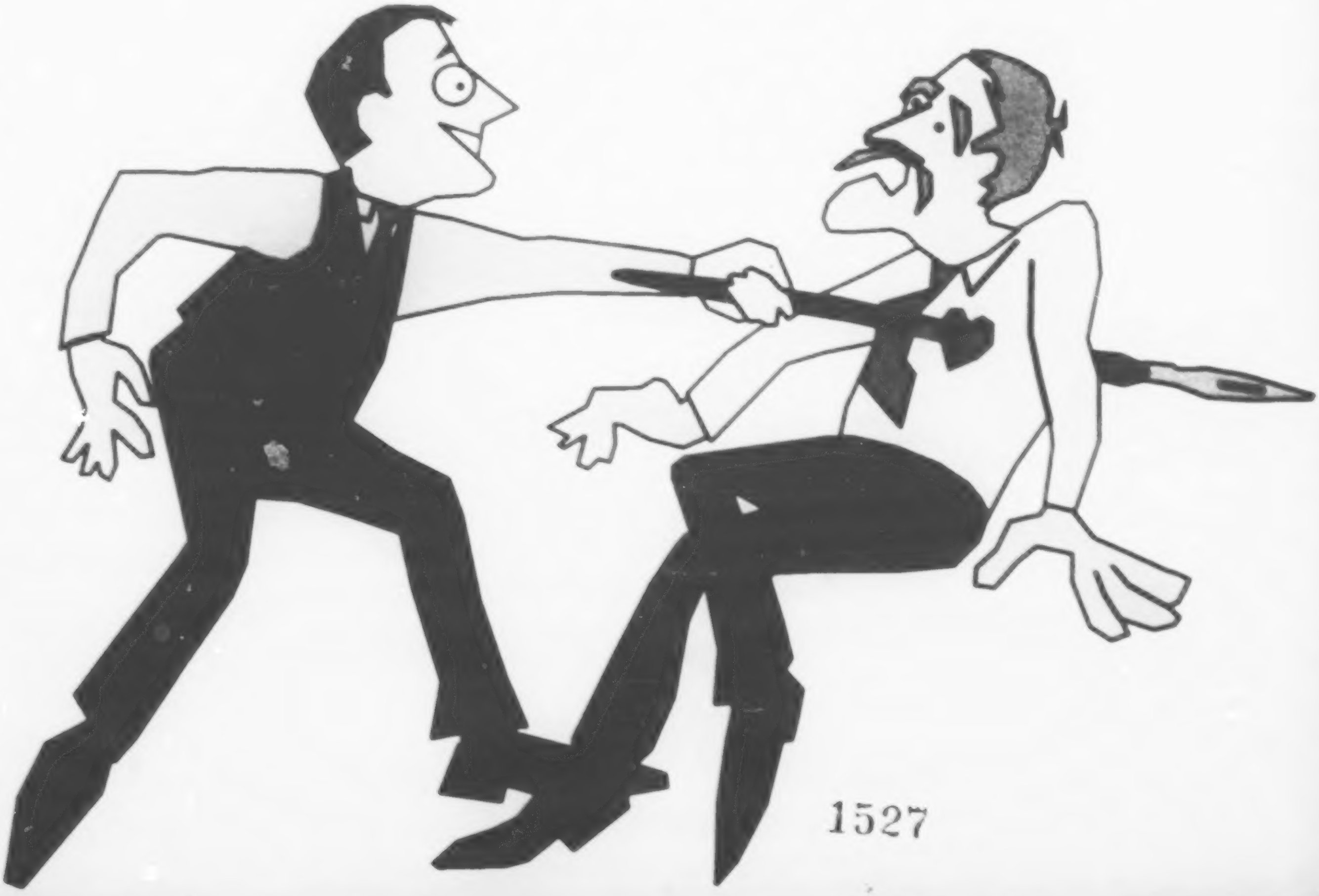
Has the Pen of the Press Been Turned into a Weapon?

Are reporters' privileges creating a fourth estate responsible to no one, or are they necessary to protect press freedoms?

by Mary Manemann

The score was two-to-nothing in a three-inning ballgame, announced *New York Times* columnist Anthony Lewis during a breather in a Chicago conference that had centered around the U.S. Constitution. His listeners' interest was piqued, particularly since it was the middle of January and the Cubs were not yet back at Wrigley Field.

That three-inning contest was not a game of sport, but a battle between former Israeli Defense Minister Ariel Sharon and *Time* magazine in federal district court in Manhattan: a battle that ultimately turned on the Supreme Court's interpretation of the Constitution. By Lewis' count—based upon headlines freshly splashed across late afternoon papers—Sharon was winning. The jury had just ruled that the prestigious newsweekly had (1) defamed Sharon by (2) publishing a false report, but it had yet to determine whether *Time* published its report with "actual malice" and "reckless disregard" for the truth—the third tier of the test needed to establish libel of public officials and public figures under U.S. law. The news report in question implied Sharon was directly responsible for the 1982 massacre of 700 Palestinian civilians in Beirut.



By the end of January, the jury found *Time* staffers had shown "negligence" and "carelessness" in publishing the story, but not the "reckless disregard" needed to constitute actual malice. Thus the libel suit failed. While Sharon lost his case, he claimed his reputation was cleared: "We managed to prove they lied." Said his attorney, "We're very happy with the results. Sharon didn't come here for any money. He came here for vindication. Money is the only thing we didn't get."

So Sharon returned to Israel, sanguine sans the damages he had sought—and despite the legal fees incurred. Yet some who remain in the United States do not feel quite so settled about the current state of U.S. libel law. Charged Hoover Institution economist Thomas Sowell in a February 1985 article: "The right to smear remains intact. . . . You and I could live a lifetime of decency and honor, and see it all smeared away with one paragraph in a publication that reached millions of people around the globe. And most people on the receiving end of the smears cannot do anything about it—not even carry on a lawsuit like Sharon's."

Sowell articulates a fear that nibbles at the edge of our consciousness in an age when information can be disseminated in a startling array of arenas. While we might voraciously consume the gossip of supermarket tabloids, we jealously guard our own privacy as advanced computer technology creeps into our lives. We worry that our words and actions may be misinterpreted or misreported, threatening our comfort and reputation. Does the news media represent as great a threat to personal privacy and liberties as the specter of Big Brother? Or is a free press our best guardian against Big Brother?

Debate about freedom of the press—and the extent of constraints upon that freedom—is hardly new.

For example, Thomas Jefferson bemoaned what he sometimes termed a "vicious" press. Yet as a defender of liberty when the republic was being formed in 1787, he would admit, "Were it left for me to decide whether we should have government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." That same year, the former revolutionaries did institute a government, a government that attempted to preserve basic freedoms while providing enough stability for the nation to prosper. Most recognized the nexus between a free press and good government, as did Jefferson: ". . . no government ought to be without critics and where the press is free no one ever will. If [the government] is virtuous, it need not fear the free operation of attack and defense. Nature has given man no other means of sifting out the truth, either in religion, law, or politics. . . ."

The First Amendment to the U.S. Constitution codified a promise of press freedom: "Congress shall make no law . . . abridging the freedom of . . . the press. . . ." But does this amendment give the press other constitutional prerogatives, such as a privilege for newspeople against being compelled to testify, a right to protect confidential sources, an immunity against newsroom searches? The press views these privileges as necessary protection for its role as guardian of our liberties, the American people's representative in a continuing struggle to keep its government efficient and honest. Others aren't so certain.

How far does a reporter's privilege go before it impinges on other citizens' rights? How do changing federal law and state statutes mitigate the press's position? Do some of our concerns with the media transcend law and beg for other responses?

Reporters at Large

"The 1970s was the decade of media rights; the 1980s is one of media responsibility," says Bruce Sanford, general counsel for the Society of Professional Journalists, Sigma Delta Chi.

In the 1970s, the unpopular Vietnam War was often attacked in newspapers and other publications. The Watergate fiasco also popularized the "investigative journalism" practiced by the *Washington Post*'s Robert Woodward and Carl Bernstein. Reporters used the Freedom of Information Act (FOIA) to uncover government excesses and abuses. Readers, incensed and unsettled by what they viewed as violations of the public trust, welcomed the information and ammunition they could glean from news accounts.

But as the 1970s ended, some Americans seemed disenchanted with what they saw as negative attitudes and faltering leadership. In part, the national news media was blamed. According to surveys done by the Gallup organization, the public's confidence in newspapers as an institution dropped from a high of 51 percent in 1979 to 35 percent in 1981.

In 1980, Americans elected Ronald Reagan to the White House—a man who could speak of a shining city on the hill and of old-fashioned patriotism. Reagan embodies the country's ambivalent attitude toward the press: he has used it skillfully as the Great Communicator, but his administration continues to receive generally poor marks from the media on issues of press freedom and government openness. The President has held few news conferences, the White House has adopted policies designed to stem the flow of news leaks—even using lie detector tests to trace them—and the Administration has restricted journalists' access to government documents under the FOIA.

Perhaps the most vocal brouhaha between the Administration and the press developed when the media was barred from reporting on the early days of the Grenada invasion in 1983. Interestingly, a Lou Harris poll two months later indicated that action galled even a sometimes antipress public: by an 83-to-13 percent margin, respondents said "in a free country, such as the United States, a basic freedom is the right to know about important events, especially where the lives of American fighting men are involved." Even a 53-to-36 percent majority said the country was "better off, not worse off, for having full complete coverage of the Vietnam War on television and in the press."

Readers thus might appreciate press freedom—particularly regarding such weighty government powers as that to make war—but they do seem increasingly frightened by the burgeoning bigness of national media. The small-town, small-time newspaper is dying, replaced by media "chains" that own more than 1,000 of the approximately 1,750 newspapers in the country. Ellie Abel, a communications professor at Stanford University, addressed this concern while accepting a "First Amendment Defender" award from Catholic University in early 1985: "Americans on the right and left, together with the vastly larger number who live in the middle, tend to look upon the media as large, immensely profitable corporate enterprises that deserve no special consideration because they are perceived as having become insensitive, remote, even arrogant in the exercise of their power." Some see that power as an insidious ability to shape an unaware nation's mind. In addition, Abel says everyday Americans are suspicious of media moguls' steadily amassing wealth: the national media's "owners and managers en-

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joy a degree of affluence and high status beyond the wildest dreams of those ink-stained wretches whose freedom the First Amendment was written to protect."

Libel Explodes

Nowhere is distrust of the media more widely evidenced than in the current spate of libel lawsuits meant to force accountability for inaccurate or misleading news stories. Recently, two cases have grabbed the biggest headlines, both involving former warriors' battles against bastions of journalism: Sharon versus *Time* and General William Westmoreland versus CBS.

With all four parties in these two disputes claiming victory, their outcomes are ambiguous. The Westmoreland case ended before the jury could even render a verdict. At the eleventh hour, the general agreed to drop his lawsuit in exchange for a CBS statement saying it had not meant to imply he was "unpatriotic or disloyal in performing his duties as he saw them" while commander of ground forces in Vietnam from 1964 to 1968. The general claimed this was tantamount to a network apology for its accusation that he had suppressed information on the troop strength of the Vietcong. CBS denied it had apologized, standing by its story as broadcast. In fact, many observers felt the truth of the broadcast had been buttressed by two wartime Westmoreland aides who testified for the network. In the end, both sides agreed to let history judge what had happened in Vietnam.

Both sides also claimed victory in the Sharon case, as federal trial judge Abraham Sofaer dramatized the tripartite libel doctrine by having the jury announce its findings as they were reached. In March 1985, a *National Law Journal* article by David A. Kaplan explored various viewpoints on the Sharon case. For the press, *Time* Managing Editor Ray Cave said most people tended to view the case in Anthony Lewis' baseball score format. " 'Sharon won two. *Time* won one' was the perception. . . . Had there been one verdict, there would have been one press conference and one public perception." However, Sofaer countered, "My job was to attain a just result. Public perceptions were not important." Besides, "Sharon did win two significant victories."

Mary Manemann is a recent graduate of Northwestern University and a staff writer for the ABA's Public Education Division.

The verdict in *Sharon* was based upon *New York Times v. Sullivan*, 360 U.S. 254 (1964), which established the three conditions needed to prove libel of a public official. The *Sullivan* case pivoted around a signed advertisement in the *New York Times* that criticized Montgomery, Alabama, officials for their cruel mishandling of civil rights demonstrators. In the racially-polarized climate of the times, Alabama courts awarded the officials damages of more than $500,000.

Overturning the lower courts' decision, Supreme Court Justice William Brennan wrote that "debate on public issues should be uninhibited, robust, and wide open" and "may well include vehement [and] caustic . . . attacks on government and public officials." Recognizing that ideas had to be allowed to percolate in public debate, the Court ruled that a public official cannot recover damages for libel unless the statement in question was proved to be false, defamatory and "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

After *Sullivan*, the Court extended the burden of proving actual malice to plaintiffs who were not public officials but "public figures," a status it awarded on a broad variety of grounds at first. But by 1976, the Court was beginning to pivot a bit from its previous broad definitions of public figures. In *Time v. Firestone*, 424 U.S. 448, it declared that a Palm Beach socialite was not a public figure—despite the press conferences she gave about her divorce proceedings. The Court continued to impose narrower constraints upon the "public figure" category in the companion cases *Hutchinson v. Proxmire*, 443 U.S. 111, and *Wolston v. Reader's Digest Association*, 443 U.S. 157 (1979). All of these plaintiffs thus had an easier burden of proof as private figures.

To be a public figure now means someone has "thrust" himself to the forefront of a particular public issue or controversy to influence it. Public figures also have to have regular and continuing access to the media, not merely the means to rebut a specific defamatory attack. Both Ariel Sharon and William Westmoreland were classified as public figures in their libel lawsuits.

Although *Sullivan* provides the basis for modern libel law, some observers maintain that it has done more harm than good. While applauding Abraham Sofaer's handling of the Sharon case, University of Chicago law professor Richard Epstein claims the decision it was based on should be thrown out altogether.

Saying *Sullivan*'s "actual malice" rule was adopted "against the backdrop of organized resistance by Southern segregationists," Epstein wrote in a February 1985 *Chicago Tribune* op-ed piece that it had systematized "errors of its own that go far beyond the civil rights arena." He advocated a return to a pre-*Sullivan* standard: false statements of facts would be strictly actionable for monetary damages, "tightly controlled by the courts." In addition, journalists' "state of mind" would no longer be probed to prove malice.

The Supreme Court approved those mental probes in another case involving Vietnam, a military officer and CBS' "60 Minutes." In *Herbert v. Lando*, 441 U.S. 153 (1979), it declared that journalists had no First Amendment privilege to withhold information about their editorial process, since that information could be crucial to proving malice.

According to those unhappy with *Sullivan*, the need to prove malice has opened a can of worms. "Both defamed parties and the press lose out under the new order," wrote Epstein. "One hidden strength of the now discarded defamation rules is that they looked to externals—truth and falsity. Liability never turned on the motives or knowledge of the speaker. Abandoning that rule has not brought media peace, but has given birth to legal extravaganzas. . . . Plaintiffs bent on personal vindication have free rein to probe reporters and editors with written and oral questions on their innermost thoughts."

The measures he advocates would "only prohibit special restrictions on the media," wrote Epstein. "They do not require immunizing the media from ordinary principles of civil responsibility."

Epstein's sentiments are echoed by Michael McDonald, head of the recently established Libel Prosecution Resource Center in Washington. The Center will provide legal backing to plaintiffs in libel suits, paralleling the four-year-old Libel Defense Resource Center in New York.

According to McDonald, the *Sullivan* ruling should be changed, allowing plaintiffs to prove only negligence to recover damages. He blames the actual malice standard for making journalists "more advocacy-oriented."

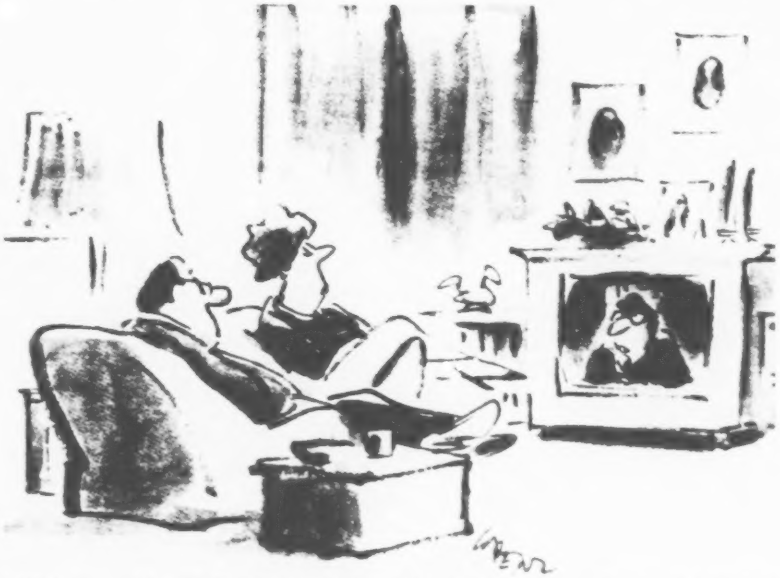
Writing in a November 1984 issue of the *New Yorker*, Anthony Lewis also discussed the shortcomings of U.S. libel law. He pointed to the European example of using a legal forum to check the truth of a challenged statement—"just its truth, not the recklessness or negligence that may have been involved in publication, with all the detours that such considerations involve." Lewis noted that Supreme Court Justices as ideologically disparate as William Brennan and William Rehnquist have suggested such an alternative, but that "given the agitated state of feelings on both sides of the libel issue . . . no such solution is likely."

Although those unhappy with the current state of libel law talk of the need to amend the *Sullivan* standards—or overrule them entirely—most journalists celebrated the ruling's twentieth anniversary by toasting a Supreme Court case they say reaffirmed the standards set forth in 1964. *Bose Corporation v. Consumers Union*, 52 U.S.L.W. 4513 (1984), involved stereo speakers unfavorably reviewed in *Consumer Reports* magazine. The unfavorable review said that one of Bose's speaker systems made individual instruments sound as if they were wandering about the room. A federal district court found the article libelous and had awarded Bose more than $200,000 in damages. After conducting a full review of the facts of the case, a federal appeals court reversed the lower court's opinion, finding no "reckless disregard" for the truth in the review. That the appeals court conducted such a factual review is itself unusual. Appellate judges almost always accept the factual findings of lower courts, ruling only on interpretations of law.

Amid media fears that *Bose* might be used to curtail press protection, the Supreme Court upheld the right of the appeals court to conduct such a review. Justice John Paul Stevens wrote for the 6-3 majority: "The requirement of independent appellate review reflects a deeply held conviction that judges—and particularly members of this court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."

Although Bose's lawyer complained that two full trials would now be needed to win a libel case, media watchers cheered the Bose decision. "[It] demonstrates that the *Sullivan* doctrine is alive and well," said Bruce Sanford, general counsel for the Society of Professional Journalists, in its 1984-85 report. "[It] should continue to give the press at least a measure of 'breathing space' to disseminate news reports concerning public officials and public figures."

Media lawyer Floyd Abrams also commented on the case: "What this decision preserves is very important. It avoids sending signals to the appellate courts to relent in their searching review of libel judgments."



"With us tonight are Ray Barris, hiding behind the First Amendment in Chicago; Cathy Tole, hiding behind the First Amendment in San Francisco; and Charles Romero hiding behind the First Amendment in Detroit."

Drawing by Lorenz *Copyright © 1985, The New Yorker Magazine*

If the 20-year-old *Sullivan* ruling is here to stay, then the approach used in the seriatim *Sharon* findings may survive too. Columnist Lewis says, "I believe other judges will follow Sofaer's lead. It's an effective device to apply the *Sullivan* doctrine."

The Sharon case may well have an effect on future libel cases, according to Burt Neuborne, legal director of the American Civil Liberties Union. It may even have helped end the legal imbroglio between Westmoreland and CBS. "Each side figured they had something to lose, Westmoreland on falsity and CBS on recklessness," the *Law Journal* quotes Neuborne as saying. If a one-shot verdict had been issued in *Sharon*—with a strict demarcation between winners and losers—"each side [in *Westmoreland*] would have taken their chances."

New Directions

The Sharon and Westmoreland cases have generated comment from all sides, as well as suggestions on how to improve the way the press deals with issues of accuracy and ethics in its reporting.

At one pole, the two cases have fueled the fervor of Senator Jesse Helms (R-N.C.), who has proposed an as-yet-undefined "Responsible Free Press Act of 1985." The act would curb the excesses of what Helms calls an "arrogant" media and overturn by statute the 1964 *Sullivan* decision. Helms says *Sullivan* is "an impossible standard of justice for victims of libel who just happen to be public figures," and made both Westmoreland's and Sharon's trials "an exercise in futility for both of them going in."

Helms is also associated with a group called Fairness in Media, which recently counseled conservatives to buy CBS stock to get them on the network's board of directors and end its "liberal bias."

General Westmoreland himself, speaking at the March opening of the First Amendment Center in Washington, D.C., suggested that a forum like the now-defunct National News Council be set up to field complaints about the accuracy of news stories. He said this could be a half-way point between massive libel litigation and letters to the editor.

New York Times columnist Lewis concedes the news council is "a fine idea, but it didn't work last time. Big institutions—like the *Times*—wouldn't cooperate because they didn't want an outside body regulating them. They saw it as a foot in the door for government control." However, Lewis says, "I tend to take the other view, that it would forestall government action."

Lewis says such views undoubtedly make him a minority within the profession, but that the media must be mindful

(*Continued on page 26*)

UPDATING THE FIRST

A year after Orwell's prophecy . . .

What is the Status of Free Speech in America?

Franklyn S. Haiman

In the five years since *Update* last reviewed the state of the law regarding freedom of speech in the U.S. ("Carving Exceptions Out of the First Amendment," Spring, 1980), significant developments have occurred in some aspects of the subject while little has changed in others. Since this survey will focus on that which is new and different, a brief prefatory note about what has remained the same seems in order.

The most important continuing and unaltered principle of First Amendment law concerns speech which advocates illegal action. It was enunciated by the Supreme Court in 1969. The unanimous holding of the Court, which still remains in force today, was that such advocacy may not be prohibited or punished unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio*, 395 U.S. 444, 1969).

Also untouched is the Court's firm doctrine that prior restraints on publication require an extraordinarily heavy burden of justification and are acceptable only as a last resort. In *New York Times v. U.S.*, 403 U.S. 713, 1971 and *Nebraska Press Association v. Stuart*, 427 U.S. 539, 1976, the Court refused to approve prior restraints on the publication of material alleged to be harmful to the national security or to the conduct of a fair trial. Furthermore, the Court has not changed the parameters it set for restrictions on speech which is allegedly obscene (*Miller v. California*, 413 U.S. 15, 1973), which constitutes "fighting words," (*Gooding v. Wilson*, 405 U.S. 518, 1972), or which is said to intrude on rights of privacy or on captive audiences (*Time v. Hill*, 385 U.S. 374, 1967; *Rowan v. Post Office Department*, 397 U.S. 728, 1970; *Lehman v. Shaker Heights*, 418 U.S. 298, 1974).

Finally, in libel law, by far the most active arena of First Amendment litigation, very little has changed. Widely publicized suits by Carol Burnett against the *National Enquirer*, Ariel Sharon against *Time* magazine, and William Westmoreland against CBS produced a lot of sound and fury but nothing new in the way of legal principles. The Supreme Court's requirement that public officials and public figures, in order to prevail in libel suits, must prove not only that what was said about them was false and was damaging to their reputations, but also that the media defendants *knew* what they said was false or said it with reckless disregard for whether it was true or false (*New York Times v. Sullivan*, 376 U.S. 254, 1964) remained the test in all of these cases. It was a test which Carol Burnett was able to pass but which proved too high a barrier for Sharon and Westmoreland to hurdle. In other libel trials around the country, lower courts struggled with such questions as who is or is not a public figure and the difference between a false statement of *fact* (which is potentially subject to punishment) and an unfavorable *opinion* (which is protected by the First Amendment), but the Supreme Court stayed largely on the sidelines, intervening only to clarify procedural matters (*Calder v. Jones*, 104 S. Ct. 1482, 1984, and *Bose Corporation v. Consumers Union*, 104 S. Ct. 1949, 1984).

Arguing over Access

In sharp contrast to its relative inactiv-

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ity in the libel area, the Supreme Court has, for the past five years, been busily engaged in adjudicating cases in which the public's right to know (a prerequisite to the right to speak) has been pitted against the right of public officials to withhold information. Out of a plethora of decisions in this arena have emerged some important new First Amendment principles. Most of these cases have involved efforts by journalists to gather information about court proceedings and competing efforts by judges to ensure that the right to a fair trial is not jeopardized through prejudicial disclosures of material.

In the first and most significant in this series of decisions—described in Justice John Paul Stevens's concurring opinion as "a watershed case"—the Supreme Court found in the First Amendment a presumptive right of the press and public to witness criminal court proceedings. "Absent an overriding interest" which is explicitly spelled out by the presiding judge, said the Court, "the trial of a criminal case must be open to the public" (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 1980).

Two years later, the Court struck down, as violative of the First Amendment, a Massachusetts statute which excluded the press and public from courtrooms during the testimony of juvenile rape victims (*Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 1982). Although the Court recognized that such exclusions might sometimes be justified, and thus permissible, it objected to the blanket assumption that this would always be the case.

After yet another two years, the Supreme Court held that the process of selecting a jury for a criminal trial is an integral part of that trial and, as such, is presumptively open to the public (*Press Enterprises Company v. Superior Court of California*, 104 S. Ct. 819, 1984). In that same year, it held that pretrial hearings on the admissibility of evidence must also be open unless there are overriding interests to the contrary (*Waller v. Georgia*, 104 S. Ct. 2210, 1984). And in early 1985 the Court declared that the First Amendment prohibited an Indiana statute which provided punishment for anyone who publicly disclosed the existence of a sealed indictment prior to the arrest of the suspect in question. (*Westhafer v. Worrell Newspapers of Indiana*, 53 U.S. Law Week 3586, 1985).

When it came to public access to judicial proceedings, the clear trend was consistently toward greater openness, but just the opposite was true of decisions involving requests made under the federal Freedom of Information Act (FOIA) for information held by government agencies. Five times in as many years the Supreme Court broadly interpreted the categories of information which are exempted by the FOIA from public disclosure. Thus the Court upheld the government's rejection of requests for material such as the records of Henry Kissinger's telephone calls while serving as National Security Advisor to President Nixon and as Secretary of State (*Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 1980), Census Bureau lists of addresses (*Baldridge v. Shapiro*, 455 U.S. 345, 1982), an F.B.I. memorandum to the White House concerning persons on President Nixon's so-called enemies list (*F.B.I. v. Abramson*, 456 U.S. 615, 1982), the question as to whether two Iranian officials with militant anti-American views were holders of American passports (*U.S. Department of State v. Washington Post*, 456 U.S. 595, 1982), and legal memoranda in the possession of the Federal Trade Commission (*F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 1983).

The Court also supported broad government authority to keep information secret by sustaining the validity of C.I.A. contracts that required all its employees to promise that they will never disclose anything learned during their C.I.A. employment without prior clearance from the agency (*Snepp v. U.S.*, 444 U.S. 507, 1980), and by upholding the power of the Secretary of State to revoke the passport of an individual who had publicly divulged the names of U.S. intelligence agents (*Haig v. Agee*, 453 U.S. 280, 1981). Encouraged by the first of these two decisions, the Reagan administration has extended the CIA-type contract requirement to a wide range of employees in other federal agencies. Encouraged by the second of the two decision, the U.S. Congress has since passed an unprecedented federal law imposing criminal penalties on *anyone*, employed by the government or not, and securing the information legally or not, who engages in a pattern of revealing the identities of intelligence agents.

Where Speech Occurs

In an entirely different realm of First Amendment law, the Supreme Court has handed down a number of decisions during the past five years refining rules governing the use of public and quasi-public property for speeches, assemblies, leafletting, picketing or other communicative activities. The Court has held, for example, that the federal law which prohibits the display of flags, banners and signs on the Supreme Court grounds cannot, in keeping with the First Amendment, be applied to the public sidewalk in front of the Court building (*U.S. v. Grace*, 461 U.S. 171, 1983). On the other hand, it has signalled its approval of local or state laws which ban picketing on public sidewalks of private residences, so long as such laws do not discriminate among picketers on the basis of the content of their messages (*Carey v. Brown*, 447 U.S. 455, 1980).

A ruling with far-reaching constitutional implications was also handed down in 1980. It is particularly important in an era when some state supreme courts are taking the lead in protecting freedom of expression. The California Supreme Court, mindful that the U.S. Supreme Court had refused to grant the protections of the First Amendment to speech which occurred in privately owned shopping centers, had relied on the free speech clause of the *California* constitution as a basis for extending protection to such activities. The shopping center owner appealed to the U.S. Supreme Court, claiming that the California decision violated his property rights under the federal constitution. The U.S. Supreme Court rejected that claim, holding that the state supreme court could, if it wished, give a more expansive meaning to its own state constitutional provision on free speech than the U.S. Supreme Court had given to the First Amendment, so long as it did not, as it had not done in this case, unreasonably infringe on other rights (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 1980). In the wake of that decision a number of state supreme courts have also interpreted their respective state constitutions as granting a right of free speech in quasi-public places such as shopping centers (e.g. *Alderwood Associates v. Washington Environmental Council*, Wash. Sup. Ct., 50 U.S. Law Week 2271, 1981, and *Batchelder v. Allied Stores International*, Mass. Sup. Jud. Ct., 51 U.S. Law Week 2467, 1983) and otherwise open private university campus grounds (*New Jersey v. Schmid*, N.J. Sup. Ct., 49 U.S. Law Week 2409, 1980).

But the U.S. Supreme Court, further pursuing its own recent tendency toward a *non*expansive interpretation of the First Amendment in close questions involving public and quasi-public facilities, has upheld as reasonable restrictions: (1) a requirement by a state fair that the Hare Krishnas and all other such solicitors confine their distribution and sale of literature to designated booths rather than circulating freely throughout the fair grounds (*Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640, 1981); (2) a federal law which prohibits the placing of unstamped literature in residential mailboxes (*U.S. Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 1981); (3) a labor contract between public school authorities and a teacher's union which excluded from access to the teachers' school mailboxes any competitors to the bargaining agent that had been duly elected by a majority of the teachers (*Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 1983); (4) a city ordinance which totally prohibited the posting of signs on public property (*Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118, 1984); and (5) a National Park District rule against sleeping in certain parks in Washington, D.C., as applied to a protest demonstration whose participants wanted to sleep in tents as a symbolic statement

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"When we're talking sacred rights, whose sacred rights?"

to dramatize the plight of the poor and homeless (*Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 1984).

In each of these decisions, as dissenting Justice Thurgood Marshall repeatedly complained, the Court's majority gave shorter shrift to freedom of expression than to the competing interests advanced in opposition to it. Justice William Brennan, Jr., also dissenting in four out of the five cases, went so far as to describe the balance struck by the majority in the Los Angeles opinion as reflecting "a startling insensitivity to the principles embodied in the First Amendment."

Unanimity Regained

It seems that the Court needed to get away from these public forum issues in order to recapture unanimity, which it managed to do in two precedent-setting decisions of 1982. In *New York v. Ferber* (458 U.S. 747), the Supreme Court, for the first time since its famous obscenity ruling a quarter of a century earlier (*Roth v. U.S.*, 354 U.S. 476, 1957), found another entire category of expression—so-called child pornography—to be outside the protections of the First Amendment. Child pornography had been defined by a New York statute as any material depicting sexual performances involving children under sixteen years of age. Clearly recognizing that this law swept beyond obscenity and encompassed material that might have some serious educational or scientific value, the justices felt that the state's interest in preventing the exploitation of the children used in these pictures was sufficient to justify not only criminalizing the manufacture of such material but even its dissemination by persons who had not participated in its production.

The Court's second rare display of unanimity came in *N.A.A.C.P. v. Claiborne Hardware Company* (458 U.S. 886, 1982), a case involving a boycott organized many years earlier by the N.A.A.C.P. and directed against the white merchants of Port Gibson, Mississippi, as a means of bringing pressure on the town for an end to racial discrimination. The Mississippi courts had assessed huge monetary damages against the N.A.A.C.P. for the business losses of the merchants. Overturning that judgment, the U.S. Supreme Court announced the principle that the advocacy, picketing, in-person solicitation and other peaceful ingredients of a political boycott such as this one are "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." Justice John Paul Stevens, speaking for the Court, even went so far as to find constitutional the social pressure and threats of social ostracism which were used by boycott leaders to secure unified support from the black community: "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."

Other Kinds of Speech

The past five years have also seen the continued playing out of a process set in motion during the previous five years, when the Court began to extend First Amendment coverage to the realm of commercial speech. Indeed, 1980 provided a significant turning point, when the Court spelled out in explicit detail the ground rules for determining whether a particular instance of commercial speech is or is not protected by the First Amendment. To be protected, said the Court, the speech must, in the first place, concern lawful activity and must not be misleading (unlike political and religious speech which can be misleading and still protected). Beyond that, the government's interest in restricting any form of commercial speech must be a substantial one, and the mode of regulation it chooses must directly advance that asserted interest and must be no more extensive than necessary to serve that interest (*Central Hudson Gas and Electric Company v. Public Service Commission of New York*, 447 U.S. 557). Applying these criteria to a variety of circumstances, the Court found a San Diego, California, ban on free-standing commercial billboards to be permissible—though striking it down on other grounds (*Metromedia v. City of San Diego*, 453 U.S. 490, 1981); invalidated a set of Missouri rules governing advertising by lawyers because they were far too restrictive (*In re R.M.J.*, 455 U.S. 191, 1982); and flatly declared an old federal law against the mailing of contraceptive advertising to be unconstitutional (*Bolger v. Youngs Drug Products Corporation*, 463 U.S. 60, 1983).

In the 1980s, the Supreme Court has continued its inclination to reject free speech claims by military personnel who have been denied opportunities to express themselves in ways that would clearly be protected were they civilians. Two parallel decisions dealt with circulating petitions to members of Congress. In both, the Court upheld regulations of the Air Force, on the one hand, and of the Navy and Marines, on the other, which require prior clearance from higher authorities before petitions can be circulated on military bases (*Brown v. Glines*, 444 U.S. 348, 1980; *Secretary of the Navy v. Huff*, 444 U.S. 453, 1980).

The Court has also continued into the 1980s its ambivalence about the free speech rights of public employees. With its left hand it decided, by a 6-3 vote, that dismissing two assistant county public defenders in New York solely because of their political party affiliations violated their First Amendment rights because their political affiliations were irrelevant to the effective performance of their jobs (*Branti v. Finkel*, 445 U.S. 507, 1980). But with its right hand, by a 5-4 vote (Chief Justice Warren Burger and Justice Bryon White switching sides), it upheld the firing of an assistant district attorney in New Orleans for circulating a questionnaire among the

(Continued on page 29)

Marshall Croddy

The new wave in teaching evolution. . . .

Going beyond Darwin

> And the LORD God formed man of the dust of the ground, and breathed into his nostrils the breath of life, and man became a living soul.
>
> —Genesis 2:7

There hasn't always been a dichotomy between the teachings of God and the teachings of man. In the early days of American education, religion and secular subjects went hand in hand. Biblical accounts of creation and Noah's Ark were treated as actual fact. One of the earliest textbooks used in America, the *New England Primer*, included this question and answer:

Q: What is the work of Creation?

A: The work of Creation is God's making all things of nothing, by word of His power, in the space of six days, and all very good.

Religious teaching was deemed not only an appropriate, but a necessary part of a child's education.

When mid-nineteenth century trends—industrialization, immigration and compulsory public education—began to erode the homogeneous nature of America's classrooms, Protestant religious teachings declined. Then in 1859 the English naturalist Charles Darwin published his germinal work, *The Origin of the Species*. Darwin's theory of evolution spurred an intellectual revolution and contributed to a religious counterrevolution led by Christian fundamentalists.

The fundamentalist movement has had a number of manifestations over the years, but central to all have been the literal interpretation of the Bible and the conviction that the Scriptures contain no errors. These doctrines place fundamentalists in mortal struggle with all those who advocate non-Biblical explanations for the creation of earth and humanity. American classrooms became and remain a major theater in this ongoing struggle.

Round One: Anti-Evolution Legislation

Throughout the 1920s fundamentalists actively pushed for state laws prohibiting the teaching of evolution in the public schools. During this period, bills to this effect were introduced in 20 states, setting the stage for one of the most publicized trials in American history.

In 1925, Tennessee adopted its famous "monkey law," making it a crime to teach in the state's public schools ". . . any theory that denies the story of the Divine Creation of Man as taught in the Bible, and to teach instead that man has descended from a lower order of animals. . . ."

John T. Scopes, a biology teacher from Dayton, Tennessee, was soon prosecuted under the statute. After a sensational trial punctuated by the histrionics of Clarence Darrow for the defense and William Jennings Bryant for the prosecution, Scopes was convicted and fined $100. National headlines blared the results; both sides in the debate claimed victory. In a later decision the Supreme Court of Tennessee overturned the Scopes conviction on procedural grounds: it should have been the jury, not the judge, that set the fine (*Scopes v. Tennessee*, 289 SW. 363, 1927). Because Scopes was no longer employed by the state, the court directed that an order not to further prosecute be entered, in the interests of "the peace and dignity of the state." Nevertheless, the court sustained the constitutionality of the Tennessee law.

Three years later, Arkansas passed by popular initiative a similar, if somewhat muted law. Its version removed the reference to "the story of the Divine Creation of man" but still banned the teaching of evolution in any institution supported by public funds. In addition, it forbade public schools to use any "textbooks that teach the doctrine or theory that mankind descended or ascended from a lower order of animal." Violation of the law carried misdemeanor penalties.

For nearly 40 years the law stayed on the books, never enforced and never challenged.

In 1968 the case of *Epperson v. Arkansas*, 89 S. Ct. 266, reached the U.S. Supreme Court.

Susan Epperson, a Little Rock Central High School biology teacher, had initiated action to declare Arkansas' anti-evolution statute a violation of the First and Fourteenth Amendments. The U.S. Supreme Court agreed.

"Government in our democracy, state and national," noted the Court, "must be neutral in matters of religious theory, doctrine and practice. . . . The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion."

The Court ruled that the state's right to prescribe the curriculum does not carry with it the right to impose criminal penal-

John Cannois/Black Star

1536

ties for teaching a scientific theory for the sole reason that it is deemed to conflict with the beliefs of a particular religious doctrine. To do so conflicts with ". . . the constitutional prohibitions respecting an establishment of religion or prohibiting the free exercise thereof."

Round Two: Scientific Creationism

Although the *Epperson* decision settled one legal question, it did not end the controversy. Faced with the widespread teaching of Darwinism in schools, fundamentalists adopted a new approach. In the late 1960s and early 1970s several organizations were formed to promote the idea that the Book of Genesis presents a theory supported by scientific evidence. The terms "creation science" and "scientific creationism" were adopted as descriptive of these studies. The creationists argue that the scientific record of fossil gaps proves that plants and animals did not evolve over millions of years. Instead they had been completely formed by God and were frozen in time by the deposits caused by Noah's flood as reported in the Bible. Creationists claim that Darwinian evolution is also a "religion"—one invented by the secular humanists. Furthermore, creationists generally have adopted the view that there are only two positions on origins: one believes in Genesis or in evolution.

A number of groups have organized to promote creationism. Perhaps the leading creationist organization is the Institute for Creation Research (ICR) in San Diego, California. ICR is affiliated with a fundamentalist church and college and actively tries to affect public policy. ICR and others lobby for legislation and administrative rules which will give "equal time" for creation science in the public schools. Creationists maintain that it is unfair to teach only one scientific theory of earth's origins. Evolution theory should be taught, argue the creationists, only if creation science is taught along with it.

Although the U.S. Supreme Court has not yet ruled on this issue, the following case summaries give an indication of how this approach has fared with the lower courts.

The Tennessee "Genesis" Law. In 1973, Tennessee passed a law which banned textbooks dealing with evolution unless they disclaimed it as a "theory" and not "scientific fact." Any textbook that did deal with "the origin and creation of man" also had to give an equal amount of emphasis on other theories including, but not limited to, the Genesis account in the Bible. The act excluded the necessity of teaching any "occult or satanical beliefs of human origin" and defined the Bible as a "reference work," not a text. Furthermore, the Bible was not required to carry the disclaimer.

Applying the three-part "Lemon Test" (see article by Isidore Starr in this issue), the U.S. Court of Appeals (Sixth Circuit) found the statute violated the Establishment Clause of the First Amendment. It failed the first and second tests (demonstrating a secular legislative purpose) because its only basis was to give preferential treatment to the Bible. It failed the third because it fostered "excessive governmental entanglement" with religion. The court found it would be impossible for Tennessee textbook authorities to determine which religious theories were "satanical or occult" without seeking to resolve impossible theological debates on an ongoing basis. The case is *Daniel v. Waters*, 515 F.2d 485 (1975).

Creation Science Law Cases. The *Daniel* case did not settle the matter. In 1981 Arkansas passed a new law which mandated that "Public Schools within this state shall give balanced treatment to creation science and to evolution science." The statute was shorn of all references to Genesis, the Bible or religion. Instead, it defined creation science in terms of its doctrines: the sudden creation of the universe from nothing, the belief in a worldwide flood, separate ancestry for man and ape and perceived failings in the theory of natural selection. Still the law was challenged on First Amendment and due process grounds.

After a lengthy trial in U.S. district court, Judge Overton issued a scholarly 38-page memorandum in the case of *McClean v. Arkansas Board of Education*, 5297 F. Supp. 1255 (1982). In effect, he found that creation science is not science, it is religion. He noted the similarity between the Genesis stories and the statute-defined tenets of creation science. He described the role of fundamentalist/creation science advocates in developing the legislation. He demonstrated that creation science fails to employ the most basic scientific methods or concepts.

"Since creation science is not science," ruled the judge, "the conclusion is inescapable that the only real effect of Act 590 is the advancement of religion. The Act therefore fails both the first and second portions of the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." Furthermore, Judge Overton held that the statute would impossibly entangle the state with religion because of the necessity of screening creation science texts for religious references.

The Texas Textbook Controversy. Judge Overton's decision has had even wider impact. It was cited with authority in the opinion of the attorney general of Texas, who had been asked by the Texas legislature to evaluate the constitutionality of textbook adoption standards requiring that texts treating evolution identify it ". . . as only one of several explanations of the origins of humankind." Because Texas is a leading buyer of texts, these requirements were having an effect on the coverage evolution received in texts throughout the United States. Attorney General Jim Mattox concluded that the standards were clearly motivated by "religious considerations" rather than a dedication to scientific truth ". . . and therefore violated the Establishment Clause of the First Amendment."

Creation Science After *Lynch*

How will creation science fare after the U.S. Supreme Court "nativity scene" decision in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984)? That decision departed from the three-part *Lemon* test in finding no violation of the Establishment Clause. Though not one of the creation science cases has yet reached the Supreme Court, one federal district court case suggests an answer.

The U.S. District Court for the Eastern District of Louisiana weighed a Louisiana statute requiring "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction." The law: (1) applied to texts and lectures, and (2) defined creation science and evolution science in identical language: ". . . the scientific evidence for creation (evolution) and inferences from those scientific evidences." No school was required to give any instruction on the "subject of origin" but if it did, both must be taught and with "balanced treatment."

In spite of the legislative attempts to avoid the constitutional flaws of previous statutes, the district court struck down the law, holding:

> Whether one applies the "three-pronged" test of *Lemon*, the less rigid analysis of *Lynch*, or the views of those who contend that the

(*Continued on page 48*)

Marshall Croddy is Director of Publications for the Constitutional Rights Foundation.

Picking the Right Ones

Good new materials abound

One of the best things about law-related education is that it can be taught in so many ways. Almost any event, almost all situations, involve the law and can be springboards to learning about law and legal processes.

But this very strength is sometimes a problem. If you can start anywhere, don't you risk starting nowhere? If you have so many good choices, don't you risk choosing none?

Fortunately, excellent new materials are appearing all the time to guide you through the possibilities, to give you a head start on new ways to get across timeless lessons.

In this issue, we cover materials on the rights of teenagers, tips on legal research, good new videotaped mock trials (and a mock trial guide), and handbooks to new areas such as law about sports and the family.

Mabel C. McKinney-Browning of the YEFC staff coordinated work on this section.

Our guest reviewers are:

- *Diane Farwick*, a teacher at Lincoln Park High School in Chicago who has taught LRE classes for the past fourteen years. Formerly director of a Title IV-C Project—Law and the Administration of Justice—she is a member of the Teacher Advisory Board of the Constitutional Rights Foundation/Chicago Project and recently received the CRF's annual Citizenship Award.
- *Faye Terrell-Perkins*, an elementary educator and curriculum developer currently teaching at John Hope Academy in Chicago. She co-wrote the Chicago Public School's Career Education Community Resource Data Bank Curriculum Guide and recently received a grant from the school system to develop and implement an LRE program.

Legal Resources

Since most teachers are not lawyers, resource tools that help explain the legal process or that provide information about specific areas of law are welcome additions to resource libraries. Reviewed here are four books that teachers (and students) will return to again and again in the coming year: *Supreme Court Highlights* (a review of the 1982–83 term); *Protect Your Legal Rights* (a legal guidebook for teenagers); *The Rights of Employees* (a comprehensive examination of laws affecting the world of working); and *The Legal Research Manual* (a "how-to" guide to legal research).

■ *The Rights of Employees* (an American Civil Liberties Union handbook) (1983), Wayne N. Outten with Noah A. Kinigstein. A teacher/student resource. Paperback, 369 pp.; $3.95. (Bantam Books, 666 Fifth Ave., New York, NY 10103)

This book provides a comprehensive and up-to-date guide to legal rights for nongovernment employees. These laws, discussed in question/answer format, are complex and vary from state to state. Topics covered include employer-employee relations, discrimination, labor laws and income substitutes. The appendix contains legal resources for victims of discrimination, states with laws on age discrimination, and a state-by-state listing of workers' compensation laws.

Of particular interest are sections related to recent company practices concerning lie detector tests and psychological stress evaluators, as well as another section on safety and health issues. The book includes important information on social security, workers' compensation and unemployment insurance. This book should be available in school libraries for student and teacher use. —D.F.

■ *The Legal Research Manual—A Game Plan for Legal Research and Analysis* (1983), Christopher Wren and Jill Robinson Wren. A pre-law/law student resource. Paperback, 197 pp.; $8.95. (AR Editions, Inc., 315 Gorham Street, Madison, WI 53703)

This is a "how-to" book for those who do legal research. The game plan is to complete research tasks quickly, efficiently and thoroughly by breaking down legal research into an easily comprehended process.

Part I sets law and legal research into an easy-to-follow analytical framework and tells the reader when to use different law resources.

Charts, diagrams, tables and checklists of research, and analysis steps are designed to take the student from reading about legal research to actually doing it.

Computerized legal research, an overview of civil procedure, a briefing of the *Brown v. Board of Education* case, case digest topics, a glossary of terms, and translations of foreign words and maxims encountered in legal research are included in the appendices. —D.F.

■ *Supreme Court Highlights* (1984), Dave Bushman. A teacher/high school student resource. Paperback, 104 pp.; $4.45 each for up to 24 copies, $2.25 each for 25–100 copies, and $1.95 each thereafter. (West Publishing Co., 170 Old Country Road, Mineola, NY 11501)

As the author states, "Law changes daily. . . . New Supreme Court decisions change, reverse or modify existing law." This book helps to fill in a gap in law-related educators' knowledge by providing comprehensible information to keep courses current.

Ten important Supreme Court cases from the 1982–83 term are fully covered. The presentation of the ten cases includes background notes concerning the basic constitutional issues involved in each case and summaries of related cases. The author provides questions intended to raise key issues and stimulate discussion.

A glossary and brief summaries of 21 other cases decided by the Court in the 1982–83 term are included. Teachers will find this book to be a welcome addition to their resource materials. —D.F.

■ *Protect Your Legal Rights—A Handbook for Teenagers* (1983), Edward F. Dolan Jr. A teacher/student resource for junior high/high school. Hardbound, 155 pp.; $9.29. (Julian Messner, a division of Simon and Schuster, 1230 Avenue of the Americas, New York, NY 10020)

This book would be an asset to the school library. It is a guidebook written in a question/answer format. The author explains the law that affects teenagers in their relationships with family, school, employer, the police and courts, as well as other legal problems they may encounter.

The questions raised will interest teenagers, and the answers are written in plain, readable language that students can easily comprehend. The book includes a brief introduction to law, along with ways young people may check out their own local laws. Students of all levels would find this an enjoyable and thought-provoking book to read. —D.F.

Bar Favorites

Bar associations are often a good source for law-related materials; two excellent bar-supported video programs are reviewed here. The first, *Law in Action: A Criminal Trial,* was developed by the Seattle-King County Bar Association in Washington. The second program presents two "trials," *B.B. Wolf v. Curly Pig* and *State v. Gold E. Locks.* It was developed by the Ohio State Bar Association. An important feature of each video program is its clear view of the trial process and the roles that lawyers, judges, and the jurors fill.

■ *B.B. Wolf vs. Curly Pig* and *State vs. Gold E. Locks* (1984), the National Exchange Club and the Ohio State Bar Association. Videotapes for elementary students, with teacher's guide. Teaching packet, $40 (VHS or Beta VCR format). (The National Exchange Club, 3050 Central Avenue, Toledo, OH 43606)

The videotapes *B.B. Wolf vs. Curly Pig* and *State vs. Gold E. Locks* use the classic fairy tales "The Three Little Pigs" and "Goldilocks" to create entertaining civil and criminal trials.

B.B. Wolf vs. Curly Pig is a 28-minute video with fifth grade students playing all of the participants' roles. The audience assumes the role of jurors in this civil trial. *State vs. Gold E. Locks* is a 22-minute video using second graders to play the various parts. An introduction to the second video explains the difference between civil and criminal law. This video then gives students the opportunity to learn about the criminal trial process. The accompanying teacher's guide contains a script for each videotape, suggested teaching strategies, follow-up, and enrichment exercises that may be reproduced. These videotapes demonstrate a motivating and creative approach for teaching younger students about the civil and criminal legal processes. —F.T.-P.

■ *Law in Action: A Criminal Trial* (1982), Seattle-King County Bar Association. 40-minute videotape, $95. (Seattle-King County Bar Association, 320 Central Building, Seattle, WA 98104)

This videotape follows a Washington state trial in which the state prosecutes an elderly man for the shooting of a juvenile. The objectives, explained in the introduction, are (1) to show the stages of the criminal prosecution process, (2) to provide insight into the roles of the judge, attorneys, and witnesses, and (3) to show how the legal process is conducted in a true case. The viewer is seated as a jury member and is addressed at various points in the film. The judge pauses periodically to "debrief" the audience on what has occurred. The film has an ambiguous ending, which asks the jury to deliberate and reach a decision. *Law in Action* is an excellent teaching instrument that would enhance any junior high or high school law-related education course. —F.T.-P.

Off the Track

Through the legal "looking glass," we often see areas of law that are of high interest to students, but which have seemingly few materials readily available to help teachers capitalize on that interest. Two books presented here fulfill that need: *Sports and Law* and *Family Law.* Both are activity-oriented, readable, and, of course, tap into the interests of many young people.

■ *Sports and Law* (1984), Herb Appenzeller, Teri Engler, Nancy N. Mathews, Linda Riekes, C. Thomas Ross. Junior high text. Paperback, 174 pp.; $6.50 each for fewer than 25 copies, $5.60 each thereafter; teacher's guides are furnished with every 25 copies but cost $2.35 individually. (West Publishing Co., 170 Old Country Road, Mineola, NY 11501)

Sports and Law, a curriculum supplement, adopts a unique approach to teaching about the law. This text uses sports as a tool to understand the need for rules, competition, and cooperation. It draws parallels to the general need for rules in society by using real life cases.

Sports and Law is comprised of nine chapters with discussion questions interspersed throughout. An exemplary chapter on contracts teaches students how to analyze a sports contract to locate specific information. The last chapter, "Contemporary Sports Issues," examines three current controversial issues: (1) sports violence, (2) educational exploitation of athletes, and (3) sports injuries. "Extra Innings," sections found at the end of the chapters, provide enrichment activities that challenge students to apply the concepts they have learned. The accompanying teacher's guide lists instructional objectives, suggested teaching strategies, additional information, and review tests for each chapter.

Sports and Law offers an interesting, challenging approach to teaching about the law. It is an effective supplement to junior high social studies curricula or to an elective course of study. Coaches, too, may find it a useful tool in working with sports teams, as it highlights the importance of understanding rights and responsibilities in the sports arena. —F.T.-P.

■ *Family Law: Competencies in Law and Citizenship* (1984), Mary Furlong and Ed McMahon. $5.95. (West Publishing Company, 170 Old Country Road, Mineola, NY 11501)

Family Law, a highly readable text, is the second in a series of practical, easy-to-understand law materials. It emphasizes problem solving, decision making and legal survival skills and offers an array of legal information in a concise, simplified manner.

Family Law consists of seven chapters: (1) Law and the Family, (2) Parents and Children, (3) Teenagers and the Law, (4) Resources for Families, (5) Family Problems, (6) Older Adults and the Law and (7) Answer Guide and Family Resources. Each chapter begins with well-defined objectives and a "Use Your Experience" section that motivates the reader to become personally involved with the subject matter. Review sections found throughout the chapters emphasize vocabulary development and critical thinking skills while providing instant feedback via the answer guide at the end of the text.

Family Law offers a wealth of information from cover to cover. The appendix alone is an excellent resource that cites laws on marriage, divorce, voter registration, driver's license requirements, and parental liability in individual states. No doubt this text can be a rich supplement for any law-related education studies from the high school to adult levels.

—F.T.-P.

Contemporary Issues

More and more, our morning begins with a newscaster's summary of a state directed execution. In the past few months, this controversial practice has taken on almost macabre proportions. We reviewed two videotape films treating this topic. Both are shocking, appalling, and nearly barbaric in content, but nevertheless, richly thought provoking.

■ *The Sentence* (1983) 10-minute visual for high school students; available in 16mm film ($100, purchase; $30, rental*), 3/4-inch VHS tape ($45, rental*). (K.S.M. Concepts, Incorporated, 5148 West Roscoe Street, Chicago, Il 60641) (*Prices subject to change)

In a remote location a young woman screams in terror as she is repeatedly stabbed. This film opens with the graphic representation of murder in progress. There are many things remarkable about this film, not the least of which is the speed with which it all takes place. Beginning with the murder of the victim to the execution murder of the criminal—in a flash—we find ourselves acknowleging the obvious guilt of the aggressor, but pondering the punishment, which remains the unanswered question as the film unfolds. This is a very well done film. The treatment demands a response and will keep students talking about the pros and cons of capital punishment. The film takes no stand—for or against—but it will be hard for viewers to remain objective. Teachers are cautioned to review this film before showing.

—M.M.-B.

■ *Dead Wrong: The John Evans Story* (1983). 45-minute visual for junior high and senior high students; available in 16mm film ($750), 3/4-inch and 1/2-inch VHS tapes ($600), Beta 1-inch and 2-inch videocassettes ($600), and for film and video cassette rental ($70). (American Educational Films, Inc., Box 8188, Nashville, TN 37207)

In the past few years, a great deal of study has tried to profile criminal behavior and provide a clear view of the conditions that produce such behavior. *Dead Wrong* traces the story of John Evans, a convicted murderer who was electrocuted by the state of Alabama in 1983.

Four days before his electrocution, Evans made a videotape aimed toward young people. It chronicles how a boy from a law-abiding, supportive, middle-class family could begin a criminal career at age 13 that would end in a violent, state-imposed death at age 33. The film interweaves this dramatic autobiography with a reenactment of Evans' life. It ends with a graphic, heartrending portrayal of the execution.

Most important, the film's message is that young people must be responsible for their own actions and consider the consequences of their behavior. Focusing on such issues as peer pressure, human rights, and responsibility to one's self, family, and society, as well as the efficacy of the death penalty, this film can generate discussion on many topics.

Dead Wrong steers clear of intentional moralizing. It would make an excellent addition to a law-related film library, but teachers should definitely review it before using it.

—M.M.-B.

Mock Trials

Another addition to help students understand and take part in the trial process is the *Street Law Mock Trial Manual*. Our reviewer was excited about this new resource, which includes cases and instructions for putting on an effective mock trial program.

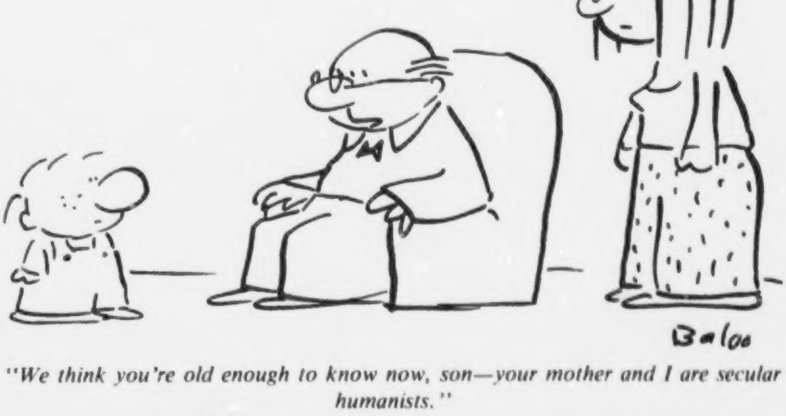
■ *Street Law Mock Trial Manual* (1984), Patricia McGuire, ed. High school student/teacher manual. Paperback, 36 pp.; $10.95 manual, $4 per case; $20.95 complete manual and 3 cases. (National Institute for Citizen Education in Law, Georgetown University Law Center, 605 G Street, N.W., Washington, DC 20001)

For the novice or the experienced social studies teacher, this manual is a wonderful tool. It will be very much appreciated by those who have had to piece together materials to try to develop a mock trial unit.

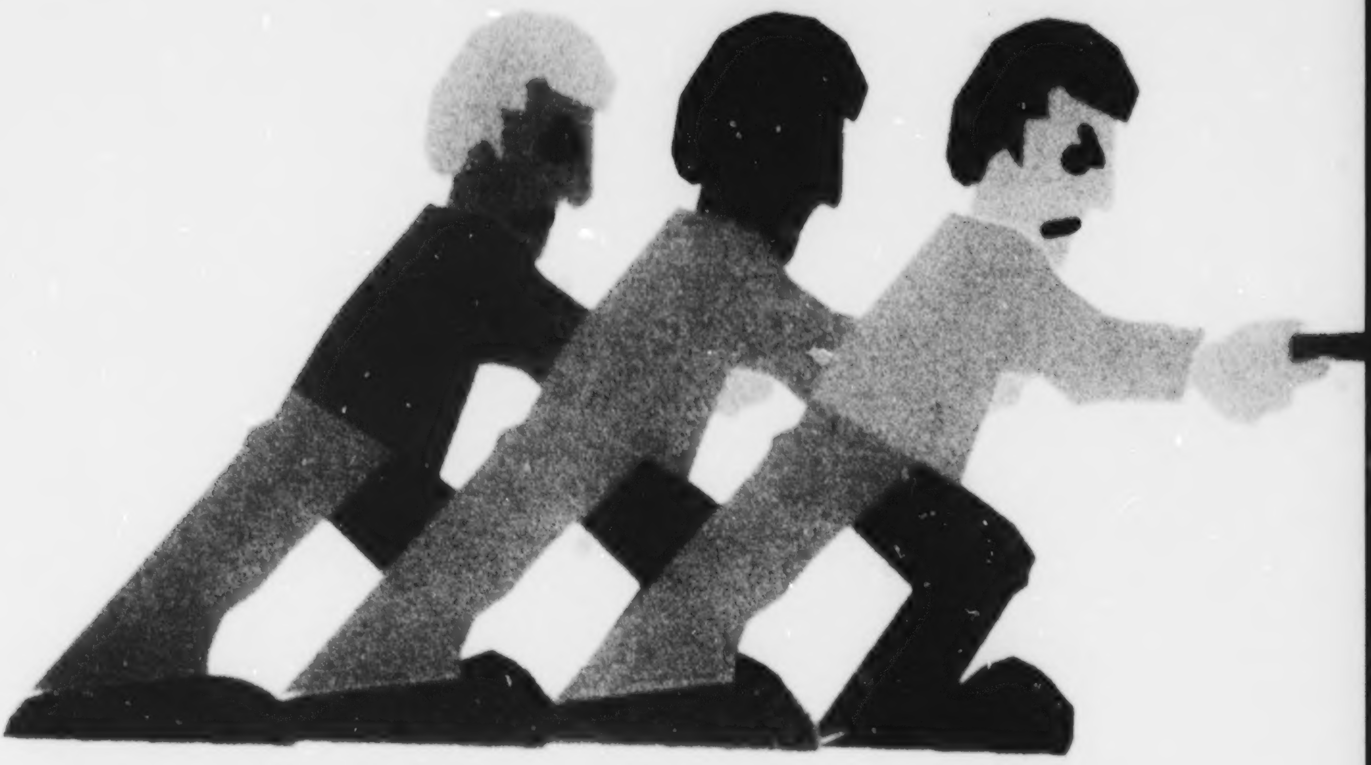
The manual is divided into two sections: (1) The teacher's guide contains a clear, concise rationale for using mock trials in the classroom and instructions for preparing a trial. While the time invested in mock trial programs may vary, the manual provides lesson plans for a two- to three-week mock trial unit; (2) The students' guide contains perforated sheets that can be duplicated for additional use. Three areas are covered, including the trial process, steps in a trial, and simplified rules of evidence.

Three mock trial situations, which run from three to four pages in length, can be obtained either with the manual or separately. The cases are *St. Clair v. St. Clair* (family law, a custody case), *Floyd v. Baldwin* (consumer law, a liability case), *Thomas v. Nomade* (small claims court, an auto accident case).

This manual will be appreciated both by teachers who prepare simple class cases and by law programs that have extensive intra-school competitions. Lawyers who assist classroom teachers will have uniform, precise materials to work with. The material is easily divided to facilitate a step-by-step approach that will not overwhelm teachers, lawyers, and, most importantly, students. —D.F.



"We think you're old enough to know now, son—your mother and I are secular humanists."



CLASSROOM STRATEGIES

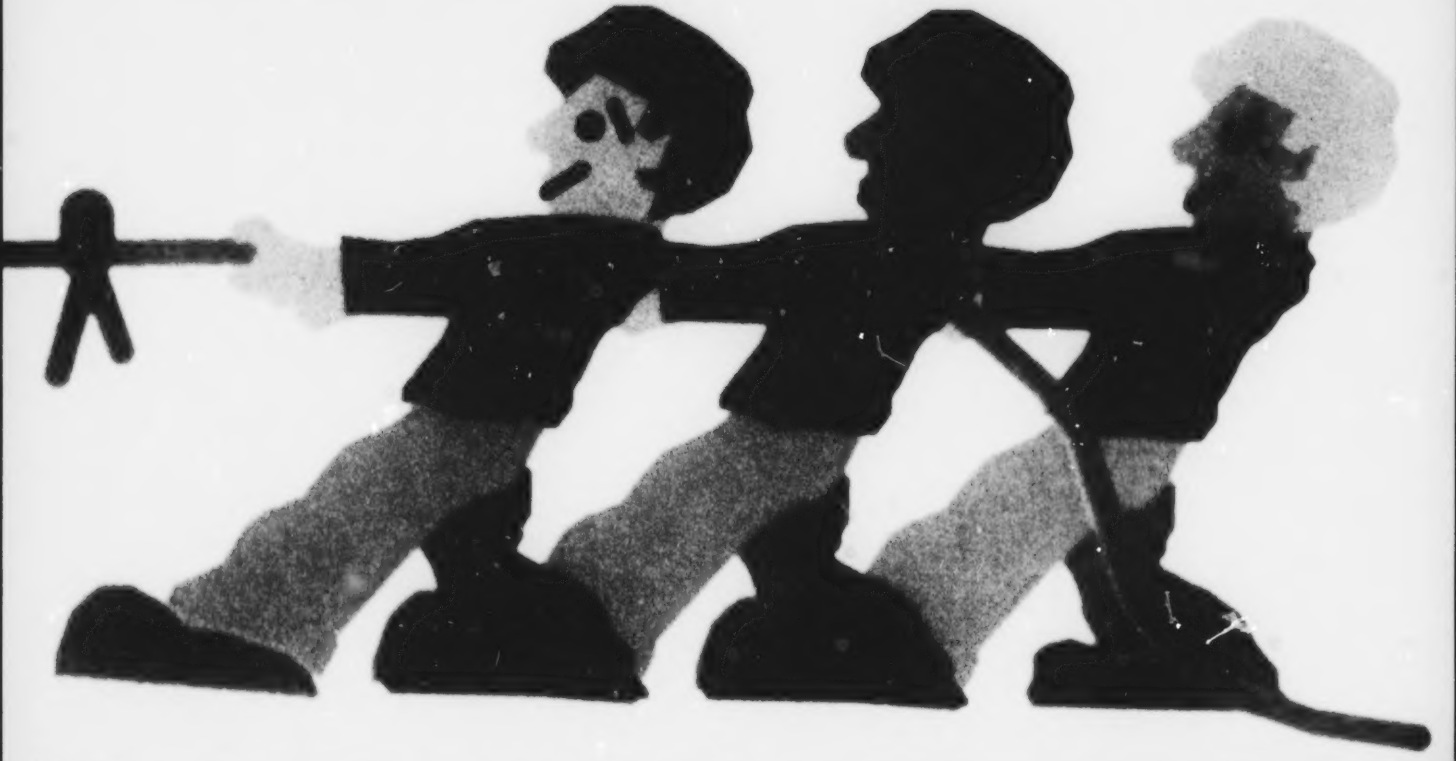
Resolving Disputes The Choice Is Ours

Sometimes competition is necessary, but let's not forget to teach youngsters about mediation and other ways to solve problems

Who can resist the excitement of tension-filled mock trial competitions? Mock trials are one of the most popular law-related education activities. Teachers report gains in student self-confidence and willingness to work hard; attorneys are impressed with the intelligence and perceptiveness of young people; judges enjoy the opportunity to deal with adolescents who are not in trouble; and parents and community members turn out in large numbers to watch their children with pride.

Yet, in spite of its appeal and all its benefits, an increasing number of LRE educators are expressing concern about the mock trial's innate adversarial nature and the overemphasis they feel it places on a small part of our justice system.

In fact, only a miniscule number of disputes get to court. And even those which do find their way to trial are often settled before a decision is made. Both common sense and statistical evidence indicate that an overwhelming majority of disputes are dealt with through self-help strategies,



Albie Davis and Richard A. Salem

whether by "lumping it" or through private negotiations.

It is in this very area of "out-of-court" resolutions that the average citizen most needs guidance. Each of us is faced daily with conflict, and we need to know how to address our differences. Little in our schooling has prepared us for such challenges. A review of social studies curricula shows that in both elementary and high schools teachers camouflage conflict and avoid controversy in the classroom. This hidden lesson in apathy robs students of the chance to experiment with ways of managing conflict in the relative safety of the academic setting. As a result, their repetoire of responses is limited and often inappropriate.

In this article we offer a set of introductory exercises designed to increase high school students' awareness of conflict and of mediation and negotiation as conflict-resolution skills. Ideally students would have learned these skills in elementary school along with their ABCs, but we know this is rarely the case.

If you like the mock trial, you may well be even more pleased with conflict-management training, for the lessons and the here and now of students' lives reinforce one another so well. If you teach in the younger grades or wish to offer a more complete secondary course, you'll find help in the special section on curriculm resources (see page 23).

Based on Experience

The exercises are drawn from the authors' experience. Albie Davis has used some to train high school students and teachers as well as community mediators. Others are drawn from an Alternatives to Litigation course Richard Salem designed and teaches, with John W. Cooley, at the School of Law at Loyola University of Chicago. The Loyola course is reflective of a growing national trend to include dispute resolution and negotiation as part of the law school curriculum. Activities similiar to those which follow are used early in the fourteen-week Loyola course to help students, who are used to a highly competitive law school environment, to experiment with cooperative as well as adversarial negotiating techniques. Simulations designed to replicate the actual negotiation situations which lawyers face in their practice provide opportunities for students to test a variety of behaviors.

Before presenting these strategies, we would like to put our own assumptions on the table. Conflict is natural. Conflict is inevitable. Conflict can often be constructive. It often improves our institutions and supports individual growth.

There is no one right way to respond to conflict. The purpose of teaching about conflict resolution is not to suppress controversy, but to allow it to be expressed constructively and to benefit from the energy which can flow from that expression. If students become aware of the various ways that conflict can be addressed, they will be better equipped to develop flexible, innovative responses.

Genigraphics

Learning to be a mediator is one of the best ways to master negotiating and problem-solving skills, but it is not possible to offer such training through this article. Mediation courses call for 30 or more hours of in-depth, intensive, and personally supervised practice. Teachers interested in seeking out such training should contact the Special Committee on Dispute Resolution of the American Bar Association (1800 M. Street, Washington, DC), for information about local mediation centers. The mediation simulation that we offer in this article is just a sampler.

Alongside our assumptions, we put on the table our recommendations for teaching about conflict resolution. These exercises won't work if they are taught in an atmosphere charged with tension, competition and judgment. Before you begin to teach this subject matter, we suggest that you do the following:

1. Recognize that you are a role-model for your students. Reflect upon your own conflict resolution style, your own ability to suspend judgment, to listen with care and to demonstrate respect for the dignity of others. Be a learner alongside your students. Your openness to experimentation and change will be a signal to your students to do the same.
2. Balance your attention so that each student's needs are met. Recent studies have confirmed what some have long suspected. Most teachers—elementary, high school and college—treat male and female students differently. A study of more than a hundred diverse fourth, sixth and eighth grade classes in four states and the District of Columbia showed that:

   If a boy calls out in class, he gets teacher attention, especially intellectual attention. If a girl calls out in class, she is told to raise her hand before speaking. Teachers praise boys more than girls, give boys more academic help and are more likely to accept boys' comments during classroom discussions.

   Studies of college classrooms and of adults in both social and professional situations confirm that the patterns continue into adulthood. These are hard habits to identify and to break. We ask you to be aware of your own behavior and to give all your students a fair shake.
3. Read as much as you can about communication and conflict resolution. Share this article and the two previous ones in this series with friends or colleagues. Test out the strategies with them and discuss how you might use our suggestions for your teaching.
4. Provide your students with a safe setting so they'll feel free to take risks and to discuss their personal perspectives. (See strategy #1.) Our activities are designed to encourage involvement by all students, but some inhibitions are deeply rooted and difficult to overcome. Respect an individual student's decision about when to participate and when to hold back.
5. If you give grades for the unit, take the emphasis off competition. At Loyola, law students in the Alternatives to Litigation course are graded primarily on exercises, class discussion and journal entries written after each class. Some activities which could become part of a grading structure include developing role plays, locating newspaper and magazine articles which might be used as material for discussion, and conducting research on the forms of conflict resolution used in your local community.
6. We highly recommend the use of journal-keeping both for the sake of your students and for your own use in evaluating your teaching strategies. At Loyola, the journals are confidential between the individual student and the instructors and prove a powerful communication tool. Many students who find it difficult to participate actively in either simulations or discussions often demonstrate through the journals that they are absorbing the experience. Further, they show that they are practicing new behaviors in their own lives.

Here are a series of exercises sequenced to open communication, expose students to mediation as an alternative to litigation, and encourage them to develop a "mediation-negotiation" style to resolve their own conflicts.

Strategy 1

Setting the Stage

Few of us want to risk having our ideas rejected or ridiculed. It's easier to talk freely when we feel that our ideas will be respected. Several stages build that atmosphere of respect, including:

1. Seeing each other as three-dimensional human beings. Spend some time with your students at the beginning of the unit doing introductory "icebreaker" exercises. Go beyond having students say their names and use techniques that draw out more information. For example, pair up students with others they don't know well and ask them to spend a few minutes interviewing their partner. Bring the group back together and have each person introduce the person they interviewed to the full group. This is a good preliminary listening activity. For many people it is easier to talk about someone else in front of a large group than it is to talk about themselves. Also, students often learn things about each other they might not have otherwise come to know.
2. Introduce basic brainstorming or "no-criticism" techniques of identifying solutions to a problem. Brainstorming is an easy, effective and proven way of generating ideas. The benefits are many. The rules are simple:
   a. Generate as many ideas as possible in the time allowed.
   b. Do not initially discuss, comment on or criticize any idea, no matter how zany.
   c. Immediately, quickly and in full view, record *every* idea mentioned.

   After writing these rules on the blackboard and discussing them with your students, give students an opportunity to test brainstorming out through an activity such as "The Belt."

The Belt

1. Divide the class into groups consisting of up to six persons each. Designate a recorder who will write on newsprint every single idea generated by the group.
2. Announce that each group has been

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shipwrecked on a deserted tropical island. They have lost everything but the bathing suits they are wearing. All they have left is a leather belt with a metal buckle. Tell them that they have seven minutes to generate as many ideas as possible about how they might use the belt. Remind them of the no-criticism rule and tell them not to worry about the quality of their lists; concentrate on quantity.

3. After seven minutes announce that each group has another ten to fifteen minutes to select and circle its three best choices. The no-criticism rule is lifted at this time. Give a two minute and one minute warning as the time limit nears.
4. Collect the newsprint and post it at the front of the room. Ask a spokesperson from each group to read its list and to note the top three choices.
5. Conduct a discussion of the experience. Ask the students how they felt during the brainstorming process and what they noticed. What was the impact of the no-criticism rule? Did anyone find it was difficult to abide by it? Did the no-criticism rule encourage people to participate who normally didn't? Did the acceptance of the zany ideas make it easier for some to participate? Ask them if they might apply the process to their own lives. Find out how they selected the three best ideas. Did some of the best ideas appear toward the bottom of the list, suggesting that the zany ideas stimulated good ones?

Such discussions usually confirm that because of the no-criticism rule, (1) longer lists are generated than would otherwise be possible, (2) more students offer ideas than usual, (3) students are willing to take risks and put forth more outlandish ideas, and (4) wild ideas often generate sound ones. Encourage students to try out the approach of withholding criticism in their own lives and to report back through their journals or class discussion on the results.

Now that your students are familiar with brainstorming techniques, you might want to ask them to help develop a set of guidelines for encouraging open and creative classroom discussions. Ask them to brainstorm a list of the irritating things people do to one another during hot discussions. What sort of things shut people down or result in their uttering rash statements? You will usually end up with a list that includes such items as, "I hate it when someone doesn't listen to me," or "I don't like it when my ideas are called stupid," or "It bugs me when people don't let me finish what I'm saying," or "I can't stand it when someone says I said something that I didn't say."

Next, ask the class to brainstorm a set of guidelines that will soften some of the shutdowns listed above, such as, (1) listen to each person carefully, (2) let people finish their thoughts, but share time, (3) disagree with the ideas and give reasons, but do not call people or their ideas stupid, (4) if you are not sure what someone said, ask them to clarify their thoughts.

As issues arise, work with your students to invent new guidelines. In a high school program dedicated to promoting cross-cultural understanding as well as open exploration of controversial issues, Boston students invented a special rule which went something like this: "If members of our class use words that feel insulting, we will assume that they did not do so intentionally, and we will see it as our obligation to educate one another about the words that we would like to see used in similiar situations."

Strategy

2

What is Conflict?

Our world is populated with millions of distinct individuals, each with an ever-evolving set of real and perceived needs. In the process of trying to meet these needs, we bump up against one another as individuals, groups or even nations. As we take steps to meet our needs, our values enter the picture and shape how we view what is, what should be, and the proper means to bring about the "correct" result. The possibilities for conflicting interpretations are endless. If we are able to recognize both our own and others' interests clearly and to communicate openly about

Curriculum Resources

***Conflict Resolution Teacher's Guide*, by Helena Davis, Community Boards, 149 9th Street, San Francisco, CA 94103 (1982).**

***Communication and Conflict Management Skills*, by Neil H. Katz and John W. Lawyer, Henneberry Hill Publishing Co., 2844 Henneberry Road, Pompey, NY 13138 (1983).**

***Creative Conflict Solving for Kids*, by Grace Contrino Abrams, Peace Education Foundation, Inc., Box 19-1153, Miami Beach, FL 33119 (1983).**

***Managing School Conflict, A Role-Playing Simulation*, developed by Todd Clark and Mary Furlong, Constitutional Rights Foundation, 601 South Kingsley Drive, Los Angeles, CA 90005 (1978).**

***Conflict Management: A Curriculum for Peacemaking*, by Elizabeth Loescher, Cornerstone—A Center for Justice and Peace, 940 Emerson Street, Denver, CO 80218 (1983).**

***Mediation Primer: A Training Guide for Mediators in the Criminal Justice System*, by Dean E. Peachey, Brian Snyder and Alan Teichroeb, Community Justice Initiatives of Waterloo Region, 27 Roy Street, Kitchener, Ontario, N2H 4B4, Canada (1983).**

***A Mediator's Manual for Parent Child Mediation*, by Geraldine W.K. Zetzel, Children's Hearings Project, 99 Bishop Allen Drive Cambridge, MA 02139 (1984).**

***Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher and William Ury, Penguin Books, Ltd, 625 Madison Avenue, New York, NY 10022 (1981).**

***Listening: The Forgotten Skill*, by Madelyn Burley-Allen, John Wiley and Sons, Inc., New York, NY (1982).**

***"I Hear You:" Listening Skills to Make You a Better Manager*, by Eastwood Atwater, Prentice-Hall, Inc., Englewood Cliffs, NJ 07632 (1981).**

***A Handbook of Structured Experiences for Human Relations Training*, edited by J. William Pfeiffer and John E. Jones, University Associates, 7596 Eads Avenue, La Jolla, CA 92037 (1970–1984).**

***Out of Court: A Mediation Simulation*, by Janet Rifkin and Ethan Katsh, Legal Studies Simulations, 42 Elwood Dr., Springfield, MA 01108.**

***Thomas-Kilmann Conflict Mode Instrument*, by Kenneth W. Thomas and Ralph H. Kilmann, Xicom, Sterling Forest, Tuxedo, NY 10987.**

them, we will be best able to tap into the creative potential of conflict.

Your students form a well of experience. Like most people, each faces conflicts about needs (a fifteen-year-old wants a room of his own; he must share it with his brother), or about values (one friend believes that abortion is a sin, another believes in a woman's right to choose), or about the means to an end (the school board sees that the way to prepare students for the future is to increase the length of the school day; the student council believes that students need more out-of-school opportunities in order to learn real skills). Draw upon your students' experiences to develop an overview of the conflict. Try one or all of the following:

1. Conflict Causes Master List: Ask your class to brainstorm a list of conflicts that might arise in their homes, schools, communities, and the world. Looking at this list, ask them to pull out what they think are the causes of these disputes (for example, competition for limited resources, aggressive nature of human beings, misinformation, cultural influence, semantics, habit, clashes of values, resistance to change). Post this initial master list and add to it or change it as the unit proceeds.
2. Newspaper Review: Ask several of your students to bring newspapers to class. Divide the class into small groups and give one newspaper to each group. Each group is to go through the newspaper looking for examples of disputes, picking one to discuss among themselves, asking the following questions:
   a. Who are the parties to the conflict?
   b. What is the conflict about according to the article?
   c. What additional information would be helpful?
   d. What do each of the parties want?
   e. What is the conflict over? resources? values? beliefs? preferences? ends? means? etc.
   f. What techniques were used, are being used, or might be used for resolving the dispute?

   Ask a spokesperson for each group to report back to the class about the chosen dispute. Record their key points on the blackboard or chart paper. After all groups have reported, work with the full class to see what generalizations can be made about conflict. As a variation on this exercise, select an historical conflict, such as the Civil War, or a famous legal case, such as the *Gault* case, and ask your students to analyze it in the same way.
3. Observation Homework: (Adapted from *Conflict Resolution*, a teachers' guide produced by Community Boards, San Francisco). Ask your students to observe a conflict carefully *without trying to decide who is right and who is wrong*. They should answer these questions about the conflict:
   a. What was the conflict about?
   b. How did the people feel?
   c. What must be changed to resolve the conflict?
   d. Did change happen? If yes, what happened and how?
   e. If there was no change, why not?
   f. Was there a different way to resolve the conflict?

   Ask for volunteers to talk about the disputes they observed. Encourage them to discuss how easy or difficult it was to

(Continued on page 30)

Improving Update—Your Way

A few issues ago, we asked you to tell us about our magazine—what you liked about it, what you didn't like, and what features you'd like to see us add.

The form on the facing page summarizes what you, the readers, told us. We're glad to report that you liked the magazine and generally wanted more of the same. Accordingly, we don't plan a major face-lift, but we do plan to make changes that will make the magazine even more useful for you.

***Format*. A strong majority of you liked both the length and the approach of *Update* articles. We'll try to provide greater depth where possible (see Isidore Starr's article in this issue), but generally we'll keep doing what you tell us you like.**

***Features*. Three quarters or more of you wanted more articles on classroom strategies, curriculum materials, and—most of all—recent Supreme Court decisions. We've already started to oblige.**

To give you more on the Court, the last issue featured an extended look at current Supreme Court cases dealing with the schools. The next issue will contain an in-depth look at the term's most important decisions. And we'll be previewing some of the next term's most hotly contested cases in a style and level of detail that will permit you to use them for classroom discussions or moot court competitions.

As for classroom strategies and reports on recent materials, this issue has one extended strategy article plus another article which includes classroom applications. And we take a look at more than a dozen new materials.

Next year, look for more practical law, more quick one or two day simulation activities, more articles featuring true-false or multiple choice questions on the law, and more first-person stories about lawyers, judges, and famous cases.

***Future Topics*. You gave us a lot of good ideas for topics. We've already taken one of your number one choices—focus on search and seizure—and used it as the basis for the winter issue. That issue also took a long look at due process in the schools—another one of the topics you wanted.**

For next year, we'll try to devote attention to torts—your surprising number one choice for topics we've never handled before—the law that affects children, due process and justice, and the police. And, last but not least, we'll remember the human side of the law, through legal lunacy and other bits about the adventures and misadventures of our legal system.

We're still listening. Let us know what you think of our recent issues and tell us anything else you'd like to see us handle.

***Comments/Suggestions*. More than half of you had additional comments to make.**

Several of you complimented us on our cartoons, but one reader didn't like the art that begins stories.

Some of you asked for materials that could be easily detached and Xeroxed for classes, such as law crossword puzzles and court diagrams, and two readers requested that articles not be jumped from the front of the magazine to the back (makes Xeroxing harder).

Odds and ends: more business law, more Canadian law, and more articles by favorite authors (mothers get *Update* too).

Readers Talk Back

Here's a copy of the questionnaire we offered a few issues ago, filled out to indicate your responses.

The numbers indicate percentages of readers expressing an opinion, except in the responses to questions 11 and 12, in which we listed your top five choices for topics already handled by *Update* and your top five new ones. "1" indicates most favored topic, "2" your second choice, etc.

Two-thirds of the respondents were secondary educators, with almost all the rest active in either junior high schools or colleges. This break-down is quite representative of the overall profile of *Update* readers.

FORMAT

1. Articles in *Update* are: 11% too long
8% too short
81% just right

2. Articles in *Update* are: 6% too technical and "legalistic"
25% do not contain enough legal details
69% just right

FEATURES

3. I would like 78% more/22% fewer classroom strategies.
4. I would like 79% more/21% fewer articles devoted to practical law (e.g., daily law for people, like landlord-tenant, driving law, etc.).
5. I would like 90% more/10% fewer reviews of recent Supreme Court cases.
6. I would like to see 71% more/29% fewer opposing views on critical issues.
7. I would like to see 60% more/40% fewer articles on how history has affected the law.
8. I would like to see 50% more/50% fewer articles comparing American law with law in other cultures.
9. I would like to see 75% more/25% fewer reviews of recent curriculum materials.

THE FUTURE

10. Would you like to see us add a section reporting on recent lower court decisions? 70% yes 30% no
11. Here is a list of topics *already* handled by *Update*. Would you like to see any of them covered again in new articles? If so, pick the *three* you would most like to see covered and rank them in order of preference ("1" most preferred, etc.)

4 Discipline and due process in schools
__ Freedom of press
1 Focus on search and seizure
__ Sports and the law (two issues)
__ Religion and the law
3 Juvenile justice (two issues)
__ Law goes to school
__ Law in the '80s
__ Speech: The first freedom
__ Law around the world
2 What is justice?
__ Women and the law
__ Courts in crisis
__ What is privacy?
__ Focus on punishment
__ Law and creativity (copyrights, art law, etc.)
5 The Constitution in crisis (law and U.S. history)

12. Which of the following *new* topics would you like to see us handle in future *Updates?* Again, pick the three you would most like, and rank them in order of preference.

__ Environmental law
__ Medical/bioengineering law (test tube babies, euthanasia, etc.)
__ Immigrants/refugees: the worldwide flow
__ Law and the disadvantaged (handicapped, victims of racial or religious discrimination, etc.)
2 Children's rights
__ Violence and terrorism
5 Consumer law
1 Torts
__ Property
__ Law and psychiatry
4 Police
__ Behavior modification and the law
__ Law as a career
__ War law/war crimes
__ Literature and the law
__ Media and the law
3 First Amendment freedoms: The forgotten trio right to petition, right to assembly and right of association)
__ Law and business/free enterprise
__ Other ____________________
__ Other ____________________

13. Any other comments/suggestions for improving *Update?*

I am a 4% Teacher/Administrator 1-6
13% Teacher/Administrator 7-9
66% Teacher/Administrator 10-12
15% University Professor
2% Lawyer/Judge
__ Other ____________________

Name: ____________________
Address: ____________________

Please mail your completed form to: American Bar Association, Attn: Jane Koprowski, 1155 East 60th Street, Chicago, IL 60637. The ABA's offices are moving soon. After June 15, mail this and other correspondence to: 750 Lake Shore Drive, Chicago, IL 60611.

Press

(*Continued from page 9*)

of public animosity toward a press it sees as unresponsive. "The public feels the press has a degree of power these days that gives the need for *some* kind of mechanism for control: a news council, the right of reply."

The Sigma Delta Chi's Bruce Sanford agrees that the prognosis for a new National News Council is not hopeful, given what he called the "inglorious history" of the first. But he agrees that the Westmoreland case points out the need for "forums other than libel lawsuits."

Yet, it is not General Westmoreland's case that troubles Sanford the most, since such public personages have access to the media and the public's ear to give their side of the story. Sanford maintains many private persons are hurt by news coverage that may be "superficial, incomplete, or just plain wrong." For example, a news story may say a young man was alone at the time of his violent death, implying he had committed suicide. Later reports reveal he had been murdered. The victim's family is justifiably upset. "Redressing the complaints of these everyday, ordinary citizens is a lot more difficult to do," says Sanford. "They don't have the access to a soapbox that Westmoreland did."

But legal theatrics aren't necessarily the answer, as the highly-publicized, highly-politicized Westmoreland trial showed. "These are disputes that the law cannot cure," says Sanford. "We've seen unbridled litigation in the last 15 years, and now we're seeing that not everything has a legal solution." Looking at disputes like that of Sharon and Westmoreland, Sanford says, "When the issue involved is speech, the way to resolve it is through more speech and discussion."

Sanford says programs to foster a healthy dialogue between the press and the public now exist. Television stations air letter-to-the-editor spots similar to those on "60 Minutes." Editors appear on local radio stations to answer complaints. Newspapers have always had the best record in following up on errors, according to Sanford, but some have recognized room for improvement by retooling the concept of ombudsmen.

Perhaps the most innovative of these ombudsmen programs is that of the *Washington Post*. The *Post*'s ombudsman differs from others around the country in that each person appointed receives a nonrenewable two-year contract.

"Other papers use senior editors and then put them back in the harness when they're through," says Samuel Segovia, the *Post*'s current ombudsman. "With our setup, there's no point in being soft on reporters and editors."

Segovia, who has experience in both journalism and governmental bodies like the Consumer Products Safety Commission and the National Labor Relations Board, has a number of duties as the *Post*'s liaison to the public. He fields readers' complaints, ranging from 100 to 150 each week, writes a weekly column that appears on the paper's editorial page, and serves as an in-house critic for the *Post*.

Although such programs would seem to fulfill a vital role, "only 35 of the 1,708 daily newspapers have them," according to Segovia. "Some of the bigger papers don't recognize the need, and some of the smaller papers don't have the funds for such a program."

The complaints Segovia receives fall within three general categories: claims of inaccuracy, unfairness, and insensitivity. "The nuances of language are important" in maintaining sensitivity, according to Segovia. For example, the words "guerrilla" and "terrorist" may both be used to refer to the same actors in the Mideast conflict, but each gives entirely different impressions to the reader.

While "reporters don't welcome requests for changes" and "editors are more concerned with what's in tomorrow's paper than in the one published the day before," Segovia says his work fulfills a need. "It diminishes journalists' arrogance and self-importance. It forces them to take human frailty into account."

The Sigma Delta Chi's Sanford concedes programs like the *Post*'s have a place, but they are not the only answer: "The organizations themselves have to come up with a better mechanism. There is some resistance to any kind of change, but I do think it's coming." Segovia suggests we are entering "an era of higher standards generally that will involve some re-education of journalists."

Confidentiality of Sources

"Public" plaintiffs' need to prove actual malice has not only led them into involved inquiries into a journalist's state of mind, but has also threatened to expose reporters' confidential sources. Determining the identity of such sources and the veracity of their information can determine the truth or falsity of an allegedly defamatory story.

Journalists are understandably reluctant to release the identity of their sources, fearing the "chilling effect" that will have on the flow of information. Reporters claim a testimonial privilege protects their relationship with confidential sources—a reprieve from testifying like that which protects the relationship between priest and parishioner, doctor and patient, lawyer and client.

A recent case questioned press claims to confidentiality of sources in libel suits. Last July, an unseasonable shiver went through the press nationwide when a reporter was jailed in a libel case for the first time since 1958. Downstate Illinois journalist Richard Hargraves spent three days in jail for refusing to divulge the source of an editorial that a county board official claimed libeled him. Hargraves was released only after his sources came forward themselves.

As a footnote, Hargraves' troubles didn't end with his imprisonment for contempt. In March 1985, Judge Roger Scrivner leveled a libel judgment of more than $1 million against Hargraves and the *Bellevue News-Democrat*, accusing them of "cavalier" reporting. The defendants vowed to appeal. *News-Democrat* publisher Darwin Wile said, "The right of a newspaper to criticize a powerful public official is absolutely essential to a democratic society. We will continue to fight for that right."

Statistically, Hargraves and his newspaper stand a good chance of winning their appeal. According to a 1984-85 Sigma Delta Chi report, 80 percent of libel awards against the press are reversed by appeals courts. Even if the plaintiff wins, the astronomical damages juries sometimes award are usually greatly pared by judges. Henry Kaufman, general counsel for the Libel Defense Resource Center, told the *National Law Journal* recently that the average libel award affirmed on the appellate level is $100,000 or less.

A Shield Will Do

The 1958 case that Hargraves' resembled likewise involved an allegedly libelous article. Actress Judy Garland sued *New York Herald Tribune* columnist Marie Torre for reporting that an unnamed CBS executive said Garland had an alcohol problem. Torre refused to name her source in a deposition, marking the first time a journalist attempted to claim privileged status under the First Amendment. While Torre's contempt citation was affirmed since the testimony she refused to give went "to the heart" of Garland's claim, the wording of the decision implied that certain situations might give reporters a qualified privilege to avoid testimony (*Garland v. Torre*, 259 F.2d 545 (2nd Cir.), *cert. denied*, 358 U.S. 910 (1958)).

In 1972, the Supreme Court agreed to consider the issue of reporters' privilege in a trio of cases consolidated as *Branzburg v. Hayes*, 408 U.S. 665. The three cases dealt not with libel but with reporters who were called to testify before grand juries about criminal activity they had witnessed and written about. Justice Byron White's majority opinion struck down journalists' claims to an absolute testimonial privilege. However, Justice Lewis Powell's concurrence in the 5-4 decision has been used by media lawyers to lodge him with the dissenters in awarding a qualified privilege to newspersons. Powell observed:

> . . . if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash [a subpoena] and an appropriate protective order may be entered.

Powell went on to say that jurists have to strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." These "vital constitutional and societal" concerns were to be considered on a case-by-case basis.

The ambiguity of the *Branzburg* ruling has created rather murky case law that deals with disputes case-by-case, court-by-court. Some states, accepting Justice White's invitation in *Branzburg*, have enacted "shield" laws to afford journalists greater privileges against a compulsion to testify. Twenty-six of the 50 states now have such laws, and one state—California—has adopted a specific constitutional provision that protects newspersons.

State shield statutes vary as to how much protection they offer journalists. Courts have often construed them somewhat narrowly. In 1976, the New Mexico Supreme Court even declared its statute violated the state constitution "separation of powers" clause.

Two years later, in the highly-publicized case of *New York Times* reporter Myron Farber, New Jersey's highest court declared that the state's shield legislation violated the state constitution when the statute was applied to confidential sources, whose information the defense needed in a criminal trial. Farber's investigative reporting unearthed 13 unexplained deaths in a New Jersey hospital and led to a doctor's indictment for murder. When Farber refused to divulge his sources during the doctor's trial, both he and the *Times* were cited for contempt. The state supreme court upheld the contempt citations, declaring the shield as applied violated both the Sixth Amendment, which gives defendants a right to a fair trial, and the state's constitutional provision that gives the accused in criminal prosecutions the right "to have compulsory process for obtaining witnesses in his favor." The U.S. Supreme Court denied *certiorari* in the case (*In re Farber*, 78 N.J. 259, *Matter of Farber*, 394 A.2d 330, *New York Times v. New Jersey*, 439 U.S. 997 (1978)).

In the aftermath of the Farber case, New Jersey amended its shield law in 1980. The amended shield specifically allowed newspersons to refuse to disclose information in any judicial, legislative or administrative proceeding and protected journalists from contempt citations like Farber's. Farber, who spent more than a month in jail, was also pardoned. The New Jersey shield as it now stands is one of the broadest in the nation.

The New York shield statute, also conceded to be fairly broad, was used in a recent case to quash a subpoena that would have required a television reporter to divulge the confidential source of a leaked grand jury report. Judge Sol Wachtler's concurring opinion in *Beach v. Shanley* (New York Court of Appeals, 1984) outlined how a state can go beyond federal dicta in protecting freedom of the press:

> The fact that the Supreme Court has held the First Amendment applicable to the states does not eliminate the right or need of this state to provide a distinct guarantee of freedom of the press under the state constitution. It is often forgotten that diversity is the essence of federalism and that the federal constitution only guarantees minimum protections, leaving to the states the task of affording additional or greater rights under their constitutions, tailored to the special needs and traditions of the various states.

According to Donald Shanley, the original prosecuting attorney in the case, the *Beach* ruling was designed to protect New York's publishing and media enterprises. "New York sees itself as the media capital," says Shanley. "The court went out of its way to be favorable to the media; I don't know if any other state court would have gone as far."

While reporters' ability to quash subpoenas and limit testimony is variable and ambiguous, the press' privilege seems more firmly entrenched in another area.

Newsroom Searches

The federal Privacy Protection Act of 1980 was meant to stop a spate of newsroom searches directed primarily at the student and underground press during the turbulent 1960s and early 1970s. The 1980 Act requires law enforcement authorities in most situations to request subpoenas for information they want—actions journalists can challenge—instead of using search warrants to enter the newsroom. The Act barred government authorities who are investigating or prosecuting a criminal offense from searching or seizing any "work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" except in certain specified circumstances—if the newsperson were directly involved in the criminal offense, if the materials sought were relevant to a case where someone was threatened with death or serious injury, or if national security were involved.

Although it protects reporters to some extent, the Privacy Protection Act emphatically avoided giving journalists blanket protection: if authorities suspect that a subpoena could lead to the destruction of evidence, they may proceed without waiting for more than a warrant. An officer's "good faith" is also a complete defense for a civil action brought by complaining journalists in such a case.

The 1980 Act—even with its glaring loophole for law enforcement—was designed to counter the Supreme Court's latest word on newsroom searches, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), and placate a press "left angry because it was so vulnerable," according to Jack Landau, director of the Reporters Committee for Freedom of the Press.

Zurcher, the most recent of about a dozen Supreme Court cases dealing with physical searches of media newsrooms, originated in a demonstration at the Stanford University Hospital in April 1971. Reporters from the student newspaper photographed the melee while rioters assaulted and injured police officers called in to quell the disturbance. Believing the newspaper's files would help identify those responsible for its officers' injuries, the Palo Alto police department obtained a warrant to search the *Stanford Daily*'s newsroom. After rummaging through the *Daily*'s photo laboratories, filing cabinets, desks and wastepaper baskets, the police left empty-handed.

A month later, the *Daily* filed a lawsuit that charged its First Amendment rights had been violated. The district and appellate courts agreed, saying that in cases where the party holding evidence is not a suspect, subpoenas should suffice. Requiring a subpoena instead of a warrant would allow the press to monitor what information it released and prevent it from becoming a mere investigatory arm of government. However, the district court conceded the Fourth Amendment allows newsroom searches in specified cases, but "only in the rare circumstance where there is a clear showing that important materials will be destroyed or removed from the jurisdiction, and a restraining order would be futile."

The Supreme Court reversed the lower courts' decisions when it ruled on the case in 1978. Justice Byron White, writing the 5-3 majority opinion in *Zurcher*, declared that strict requirements for subpoenas to obtain information from news organizations would be a "severe burden" on law enforcement. A proper search warrant—one that specified what was to be searched and seized and that was based on a reasonable suspicion of illegal activity—would be an "adequate safeguard" against encroachment on First Amendment liberties.

In fact, Justice Lewis Powell's concurring opinion clearly stated that journalists should be treated just like anyone else under the Fourth Amendment. According to Powell, the amendment's requirement of search warrants based on probable cause had been prompted in part by conflict between the colonial press and the Crown and was thus written expressly with the press in mind: ". . . Hence, there is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press, as to every other person."

Dissenting, Justice Potter Stewart claimed the First Amendment protected journalists from such searches:

> Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgements by government. It does explicitly protect the freedom of the press.

Since police officers would have to "ransack" an entire newsroom to find the information they wanted—while reading everything they ran across—Stewart said the Fourth Amendment's provision that a warrant "particularly" describe "the persons or things to be seized" could not be adhered to: "I fail to see how the Fourth Amendment would provide an effective limit to those searches."

Stewart also cited Powell's own opinion in *Branzburg* to stress the importance of confidential reporter-source relationships, saying promises of confidentiality would be compromised by newsroom searches:

> It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed. . . . Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's access to information, and thus the public's, will thereby be impaired.

Understandably, the journalistic world was inclined to agree with the dissenters. *Zurcher* was "an aberrational decision," says Sigma Delta Chi's Sanford. "The incident was not very courteous of law enforcement. This kind of thing doesn't happen very often. Respectable law enforcement doesn't use search warrants when subpoenas would suffice."

"Law enforcement officials have a way of picking on those least likely to defend themselves," says Sanford. "Or more charitably, they don't suspect that the *Washington Post* will destroy evidence. They fear the student or underground press will."

According to Justice Powell's concurrence in *Zurcher*, the Stanford University paper had just that in mind:

> [The *Daily*] had announced a policy of destroying any photograph that might aid prosecution of protesters. While this policy probably reflected the deep feelings of the Vietnam era, and one may assume that under normal circumstances few, if any, press entities would adopt a policy so hostile to law enforcement, [the *Daily*'s] policy at least illustrates the possibility of such hostility. Use of a subpoena, as proposed by the dissent, would be of no utility in the face of a policy of destroying evidence. And unless the policy were publicly announced, it probably would be difficult to show the impracticability of a subpoena as opposed to a search warrant.

Justice White's majority opinion was confident these circumstances would remain rare. Since there had been very few cases of newsroom searches since the 1971 Stanford incident, White argued that "this reality hardly suggests abuses. . . . Nor are we convinced, any more than we were in *Branzburg v. Hayes*, that confidential sources will disappear and that the press will suppress news because of fears of unwarranted searches."

A Balancing Act

At its worst, the idea of police searching newsrooms invokes images of a totalitarian state, suppressing all information that runs counter to the regime. But the Supreme Court said in *Zurcher* that even such drastic measures may sometimes be necessary to maintain order in society. The Justices used a *Branzburg*-like balancing test to weigh First Amendment claims against the legitimate law enforcement needs of the police.

In other cases, reporters' privilege has been weighed against a defendant's right to a fair trial, or against the extra-constitutional rights to privacy and of reputation.

Jaundiced observers complain journalists sometimes refuse to consider these other interests. They charge the press is so caught up with the First Amendment that it overshadows all else.

Although journalists will deny they are that cavalier, the press certainly will not deny a special love for the First Amendment. "A graphic representation of the press' idea of [the First Amendment and] the Constitution would resemble Steinberg's *New Yorker* drawing of the United States," said *Washington Post* columnist Edwin Yoder recently. That famous cover depicted the Big Apple looming over the rest of the country, transcending all else in size and importance.

This analogy illustrates the press' belief that the First Amendment—and the free press it makes possible—undergird American life as we know it. While the press might recognize other concerns, it jealously guards its freedom as the wellspring of the intellectual vitality of our society. In this view, a free press is no less critical to a democratic ideal than is free speech or free thought.

The debate over how to balance other values with a free press touches jurists, journalists and society at large. It involves rapidly evolving technology and age-old ethical issues. Much of the debate does ultimately come back to interpretations of the First Amendment of the U.S. Constitution. The principal architect of that Constitution, James Madison, recognized both the transgressions of the press and its contributions to society. He commented in 1799, "To the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been obtained by reason and humanity over error and oppression." □

Speech

(*Continued from page 13*)

other employees in her office seeking to ascertain their feelings about various aspects of their working conditions (*Connick v. Myers*, 461 U.S. 138, 1983).

Do students in a public school have First Amendment rights to a variety of points of view? A slim majority of the Court was willing to entertain the possibility that there are constitutional limits to the authority of a school board to remove books from its school library (*Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853, 1982). The five-person majority voted to send to trial the question of what the motives of the Long Island school board were in removing nine books from their school's library (including Kurt Vonnegut's *Slaughterhouse Five*, Richard Wright's *Black Boy*, and Eldridge Cleaver's *Soul on Ice*). Four of of the five were willing to go further and suggest some guidelines for that trial—which never occurred, because the school board then backed down. Among those precepts were that, although a school board may exercise broad discretion in transmitting community values to its students, it may not do so "in a narrowly partisan or political manner." It would not violate the First Amendment right of students to receive ideas, said the four-man plurality, if books are removed because they are pervasively vulgar or educationally unsuitable, but schools must be mindful of their responsibility to prepare students "for active and effective participation in the pluralistic, often contentious society in which they will be adult members."

The Broadcast Beat

In the realm of radio and televison broadcasting, the most significant free speech developments of the past five years have not occurred in the courts but around the conference table of the Federal Communications Commission (FCC). Starting on January 14, 1981, six days before Ronald Reagan's first inauguration as president, the agency has handed down a series of rulings designed to move gradually in the direction of deregulating the electronic media. Its first, pre-Reagan step, taken in recognition of the fact that radio stations in the U.S. had become so numerous and competitive that federal regulations to ensure diversity were no longer necessary, was to eliminate the requirements that radio stations devote a minimum percentage of air time to news and public affairs programming and that they maintain a maximum limit on the amount of time allotted to commericials. The record keeping that had been necessitated by those requirements was also eliminated. Three and a half years later, on June 24, 1984, these same obligations were lifted from television stations. In July of that year, the FCC decided to increase the number of radio and television stations that a single individual or company is permitted to own from seven to twelve, and to end all restrictions on station ownership in the year 1990.

In the meanwhile, the U.S. Supreme Court has intervened only twice in the broadcast regulation field—the first time to uphold a government restriction, the second time to strike one down. The regulatory power which it upheld was a decision by the FCC that the question as to what constitutes "reasonable access" to the airwaves for political candidates seeking to buy time for campaign advertising (a right guaranteed to them by an act of Congress in 1971) is a matter that is ultimately adjudicated by the FCC, on a case by case basis, and not by the unfettered discretion of a broadcaster (*CBS v. FCC*, 453 U.S. 367, 1981). The particular incident at issue was CBS's refusal to sell time to President Carter to launch his presidential re-election campaign an entire year before the election. The FCC found that decision violated the "reasonable access" law and had countermanded it.

The restriction which the Supreme Court invalidated was a section of the Public Broadcasting Act of 1967 which prohibited any station receiving government funds from carrying any editorials by the station management. A five-person majority of the Court felt that the government interest allegedly advanced by this legislation—namely to prevent the government from using public television as a progaganda tool—was sufficiently protected by organizational and funding structures that insulated stations from government control. The Court held that public broadcasting, like commercial broadcasting, was entitled to the widest possible journalistic freedom (*FCC v. League of Women Voters*, 104 S. Ct. 3106, 1984).

Political Speech and Campaign Dollars

The last area of First Amendment law which the Supreme Court has addressed since 1980, albeit somewhat peripherally, is that of election campaign financing—a hornet's nest of difficult and complicated problems which are some day going to have to be solved if we hope to preserve even a modicum of sanity and equity in the way we elect our public officials. Meanwhile the Court continues, on a patchwork basis, to pick up the loose ends left by its 1976 decision in *Buckley v. Valeo* (424 U.S. 1) and by the underlying Federal Election Campaign Act Amendments of 1974 which that decision sought to bring into conformity with the First Amendment.

In *Buckley*, the Court had approved a $1,000 limit on contributions to individual candidates. In a 1981 case, it sustained the limit of $5,000 the law imposed on anyone's contributions in a single year to a political committee which supports several candidates (*California Medical Association v. Federal*

"Any resemblance in today's sermon to any member of this congregation was purely coincidental and in no way leaves me open to a libel suit."

Election Commission, 453 U.S. 182).

On the other hand, in contrast to the *Buckley* finding that limits on contributions to candidates are an acceptable way to prevent the corruption or appearance of corruption of a candidate, the Court has ruled that limiting contributions to campaigns on local referendum issues is impermissible under the First Amendment. This is because such restrictions curb the extent to which would-be contributors may express themselves on the issue without the countervailing interest of preventing the possible corruption of a human candidate (*Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 1981).

Finally, in a case decided this Spring, the Court has addressed the question of the $1,000 limit which federal law imposes on the spending of political action committees in presidential elections. This limit, which applies to PACs even if their spending is independent of and uncoordinated with a presidential candidate's official campaign operation, was held to be in conflict with the First Amendment. In *Democratic Party v. National Conservative Political Action Committee*, 105 S. Ct. ____ (1985), the Court held that the First Amendment guarantees of speech and association are violated by the limit even if the candidate is receiving the public funding which is made available to presidential candidates on the condition that they limit themselves to spending no more than that amount.

Writing for the majority, Justice Rehnquist said the law was a "fatally overbroad response" since if affected equally "multimillion-dollar war chests" and "informal discussion groups" that raise money through neighborhood solicitations.

Rehnquist wrote that allowing the presentation of views but forbidding the expenditure of more that $1000 to present them "is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."

Thus, the allegedly independent political action committees that are spending hundreds of thousands of dollars to support their favorite presidential candidates have, in effect, gutted the purposes that Congress had in mind when it adopted public funding as a mechanism for putting a reasonable lid on what is spent to get elected president.

Yet no one seems to have found an entirely satisfactory rationale for restricting truly independent and uncoordinated spending in support of one's favorite candidate without seriously intruding on that supporter's rights of free speech and association. Only if one accepts the proposition, advocated by some, that spending money for speech is not the same as speech itself—at least in the context of a political campaign—can one envision restrictions on such spending that are compatible with the First Amendment.

* * * * *

The wide range and variety of free speech developments surveyed in this article do not lend themselves to any short and simple summary. Suffice it to say that 1984, the year for which George Orwell predicted the onset of Big Brotherism, has come and gone with the First Amendment still basically intact, if a bit frayed here and there around the edges. ☐

Strategies

(*Continued from page 24*)

not decide who was right or wrong. Save time at the end of the student reports to draw some generalizations about the barriers to change.

Strategy

3

Responding to Conflict

A number of instruments have been designed to help people understand their own responses to conflict (see box on curriculum resources on page 23). One of these, the Thomas-Kilmann Conflict Mode Instrument (TKI), is a self-administered questionnaire in which participants answer 30 forced-choice questions and then give themselves a rating in each of five modes of response.

Two basic dimensions of behavior are identified. Assertiveness/unassertiveness is the extent to which we attempt to satisfy our own concerns. Cooperativeness/uncooperativeness is the extent to which we attempt to satisfy the other person's concerns. When these dimensions are considered together, five ways of responding to conflict emerge. They are described by the TKI authors as:

1. Competing is assertive and uncooperative. When we compete, we pursue our own concerns using whatever power or strategies seem necessary to win. Competing can be useful during emergencies, when quick, decisive action is vital, or when unpopular courses of action have to be followed. Sometimes we compete to protect ourselves against those who take advantage of noncompetitive behavior.
2. Accommodating is unassertive and cooperative. When we accommodate, we neglect our own concerns to satisfy the concerns of others. Accommodating can be useful when the issues at stake are more important to others and goodwill is important to us. We might also accommodate when we are outmatched and losing or even to let others experiment and learn from their own mistakes.
3. Avoiding is unassertive and uncooperative. When we avoid, we do not immediately pursue our own concerns or those of others. Avoiding can be useful when an issue is trivial or when we perceive no chance of accomplishing our objectives. It's also useful to give others time to cool down or even to use the time to gather more information for later action.
4. Collaborating is both assertive and cooperative, the opposite of avoiding. When we collaborate, we attempt to work with the other person to find some solution which fully satisfies our concerns and theirs. (We try to "expand the pie.") Collaborating can be useful when we want to find solutions which meet everyone's concerns, when we are open to learning from people with different perspectives or to gain commitment from those we are working with.
5. Compromising is intermediate in both assertiveness and cooperativeness. When we compromise, we try to find some expedient, mutually acceptable solution which partially satisfies both parties. (We try to "split the pie.") Compromising can be useful when our goals are only moderately important, but not worth the time or the disruption which competing or collaborating might entail. We also can use compromising when our goals are in high contrast with an equally strong opponent or when we want to arrive at temporary solutions to complex or time-sensitive issues.

Although the TKI is relatively new, we have observed some fairly predictable trends in our use of the instrument, trends which may have applications for young people. Many score high on competition, avoidance and accommodation. Some score high on compromise. Most score low on collaboration. It would appear that we are conditioned to compete, accommodate and avoid, but seldom are we taught collaborative skills. Hence, in our training design, after heightening interest in and awareness of conflict, we begin to help students build collaborative problem solving skills through a series of absorbing exercises, often starting with a brainstorming one, such as the Belt.

Conflict Resolution Inventory

Conduct this exercise (adapted from *Conflict Resolution*) before carrying on a discussion of the conflict resolution styles mentioned above. Give your students a copy of the eight scenarios printed below. Ask students to read each paragraph, think about it for a minute and then write, in a sentence or two, what they would do. Save their papers. Administer the inventory again near the end of the unit and let students compare their two papers to see if their responses have changed.

1. Your new math teacher speaks very quickly and you have difficulty understanding what she says. You are afraid you will miss a lot of important information and you may get a bad grade. What would you do?
2. Because your older brother and sister were considered wild when they were your age, your parents have given you very strict rules for going out at night. You have never given them a reason to mistrust you. You want greater freedom. What would you do?
3. Your two best friends often borrow small amounts of money from you but never remember to pay you back. Now, you want to buy a gift for your mother and you don't have enough money. What would you do?
4. You have been active in the multicultural program at your school. At a party, two people spend half an hour telling race jokes, trying to see who gets the most laughs. What would you do?
5. Your father thinks you watch too much TV. He has threatened to take the TV away if you don't cut down on your viewing. One day you come home and the TV is missing. You feel certain that your father took it away. What do you do?
6. A friend of yours wants to go off for a weekend to spend time in the city. He wants you to tell his parents that he is staying with you. His request makes you uncomfortable. What do you do?
7. The two people who share the locker next to you are always arguing about things that seem stupdid to you. They push and shove one another and call each other names. What do you do?
8. You are the only one in your crowd who drives a car. You often give your friends rides home from school or sporting events. They help pay for gas and you are starting to resent putting out all the money. What do you do?

Conflict Resolution Styles

Explain the five conflict resolution modes—competing, accommodating, avoiding, collaborating and compromising—to your students. Discuss when each might be useful. Give the following information to your students: Two students are both new to the school. They have met one another and both think they would like to be friends. Student A likes football and is thinking of suggesting that they both go to the football game and then to McDonalds to eat. Student B loves the movies and is thinking of suggesting that they both go to a movie and then to Taco Bell.

Divide the class into five groups. Assign each group one of the conflict mode categories—competing, accommodating, avoiding, collaborating, and compromising. Ask each group to develop a brief simulation of how these students might respond to one another if they both were operating in the conflict mode assigned to their group. (For example, the competitors probably would insist on their original suggestions and not budge; the compromisers might decide to go to the football game and Taco Bell; the collaborators might discover that they really want to get to know each other and decide to do something they will both enjoy; the accommodators might do whatever was suggested first; the avoiders might change the subject at the very first sign of conflict.)

As a followup activity, you might ask each group to come up with a situation in which they might best use the conflict mode assigned to them. This will reinforce the notion that there is a time and place for each type of response and it is helpful to be able to use them all. (These two activities could spread over several class periods.)

Ask students if the exercise deepened their understanding of various modes of responding to conflict. Did any particular mode stand out as particularly appropriate to this conflict?

Strategy

4

Introducing Mediation

Now that your students have had an opportunity to think about the causes of conflict and the varying ways that individuals respond to conflict, introduce the concept that societies also respond to disputes in a variety of ways. Some societies lean toward formal adjudication, while others prefer informally negotiated or mediated settlements. Whatever the preference, most societies provide their citizens with a range of dispute resolution options ranging from voluntary to coercive, from adversarial to coopertive.

Dispute Processing Options

One way of looking at the options in the United States is to divide them into three main categories—(1) actions taken by one party alone, (2) actions which lead to contact between the disputing parties, and (3) actions which call for the help or judgment of someone not a party to the dispute. The sub-categories of these dispute resolution categories are as follows:

1. Actions on the part of one party.
   a. Inaction (do nothing).
   b. Active avoidance (move, retreat, terminate relationship, etc.).
   c. Self-help (correcting the perceived problem on one's own).
2. Actions which lead to contact between the disputing parties.
   a. Coercion (threats and use of force).
   b. Negotiation (attempt settlement directly with other party).
3. Actions which call for a third party, not a party to the dispute, to help settle or todecide the issues.
   a. Conciliation (bringing parties together for negotiation).
   b. Mediation (structured communication leading to a decision shaped by disputing parties).
   c. Arbitration (advisory or binding decision by third party).
   d. Fact-finding (third party recommends settlement after an investigation).
   e. Administrative Procedures (akin to adjudication, but less formal).
   f. Adjudication (after formal process, judge or jury passes judgment which has full coercive power of the state).

Each of these forms of third-party dispute resolution is worthy of exploration on its own. It is important to note that the language in the field is fluid; there is no universal agreement on definitions. Missing from the list above is the ombudsperson, a person usually hired by a government agency, corporation or other organization to respond to complaints from its employees, customers or constituents. An ombudsperson is authorized to bypass normal channels, intervene as a third party and, after gathering information, attempt to bring about a solution that all parties agree is fair.

As mentioned earlier in this article, students are socialized to avoid conflict or respond to it by being accommodating, and they are exposed to competitive behaviors. But they learn little about joint problem solving or collaborative modes of conflict resolution. The adversarial system, which is essentially competitive, receives wide attention. Mediation, which requires collaborative skills, is much less well-understood. While disputants may choose any mode of conflict response to resolve their differences, the successful mediator relies solely on the collaborative model.

For the purposes of this unit on conflict resolution, we are recommending that you introduce your students to mediation by comparing and contrasting it to the adjudication of criminal matters. In fact, mediation, like adjudication, is used to resolve a wide range of criminal and civil disputes both within and outside the courts.

Mediation and Adjudication

In order to decide when it is appropriate for people to settle their own disputes with the assistance of a mediator and when it is appropriate for a judge or a jury to make a decision about the matter, it is helpful to understand the ways in which mediation and adjudication differ.

Adjudication is a familiar alternative. Mediation requires a brief explanation. Mediation is a process in which an impartial "third party" helps disputants negotiate a settlement to their differences. Mediators usually enter a dispute when negotiations have broken down or the parties are not communicating effectively. The mediator often works for an agency affiliated with the court. He or she must help the disputants work through their distrust, anger, or other emotions so they can identify the issues that concern them and generate new options from which they can shape an agreement.

1. Who defines the dispute and identifies the issues? A crime is considered an offense against the state and all crimes must be defined in advance, for the Constitution prohibits the passage of *ex post facto* laws (Article I, Sections 9 and 10). When an alleged crime comes to the attention of the court, someone, usually a clerk, must decide if there is sufficient cause to justify a complaint and, if there is, find the best match between the description of the incident and the existing crimes on the book. The dispute is given a name, for example, "assault and battery with a dangerous weapon" or "malicious destruction of property." If the state decides to prosecute, it must determine what law has been broken and it must narrow down the issues to coincide with the definition of the crime.

   In mediation, the dispute is seen as a matter between the two parties and the parties define the dispute. The issues are allowed to emerge as they seem relevant to the disputants.
2. What due process is provided? Once people are accused of a crime, and their life, liberty or property are at risk, they must be offered certain due process protections. They must have the assistance of an attorney to defend their interests. They have the right to a speedy trial (often a problem in some jurisdictions), which must be held in public and must be conducted by an impartial jury. Evidence used during their trial must comply with strict rules of admissibility (Amendments 4, 5, 6, 7, 14).

   Mediation sessions are generally considered voluntary private matters. The parties speak for themselves. They may, but usually do not, have an attorney present. What they say to one another and to the mediator during the course of these private negotiations is usually considered confidential. The mediation process is usually offered in a timely fashion and is designed to allow for informal, but structured, communication about the dispute and the underlying conflict. There are no rules of evidence to limit what may be discussed. The mediation session should be conducted in an impartial manner. (There are numerous codes of ethics or sets of standards to guide mediators in various fields, but there is no universal code guiding the entire field.)
3. Is the orientation toward the past or the future? Blame or no blame? By design, trials focus upon the past in order to make a determination of the facts so that the law may be applied to the facts. The purpose of the trial is to place blame upon or to relieve blame from a party accused of an infraction of the law.

   In mediation, the focus is on the future. The past is explored only as it is helpful in allowing the parties to express anger and frustration, to clarify the issues and their own interests, and to anticipate the behavior of the parties in the future. The facts are what the parties both accept as true. The purpose of mediation is to assist the parties in reaching a mutually agreeable settlement that defines their future behaviors.
4. Who decides? The judge or jury decides what to accept as fact and whether to find the defendant guilty or not.

   The mediator works with the parties to find a way to resolve issues in a way that will last over time. The parties to a mediation decide what to include in the terms of their settlement.
5. Whose interests are served? By successfully prosecuting a person of a crime, the state accomplishes several goals: (1) punishing the person, (2) protecting society from someone considered dangerous, (3) announcing and applying public norms, (4) setting precedents, and (5) deterring others from committing similiar crimes.

   By successfully mediating a case, the parties accomplish several goals: (1) clarifying their relationship, (2) improving their relationship, (3) satisfying their interests, (4) setting groundrules for future interactions, and (5) maintaining privacy.
6. Who enforces agreements? The weight of the state is available to see that the judgments of the court are enforced. (Historically, however, enforcement by the state is often difficult and/or costly and recidivism rates among offenders are high.)

   In general, mediated agreements are seen as private settlements. The parties themselves would have to take action to see that they are honored. (Recent research indicates that the rate of compliance among those who have reached agreements through mediation is generally higher than those who have had judgments imposed by the court.)

When Is Mediation Appropriate?

Given the differences outlined above, when is it appropriate to mediate a dispute and when is it appropriate to take it to trial? This question is receiving considerable attention among the justice community, and your students are entitled to enter the debate. This activity will help sharpen their thinking about the benefits of adjudication and mediation.

1. Expose your students to as much information as possible about mediation. Ask them to read the Fall and Winter editions of *Update on Law-Related Education*, which contain articles about mediation within the justice system and mediation in the schools. If you are located near a neighborhood justice center, invite the staff in to talk about mediation to your students. If possible, ask them to conduct a mediation simulation. The mediation process is so unlike other dispute resolution processes that many people do not fully understand its power until they see it in action.
2. Spend a class session reviewing the differences between adjudication and mediation as outlined above. Pay particular attention to item five, which focuses upon the question of whose interests are served. Locate the appropriate sections of the Constitution that guarantee certain due process protections. Explain to your class that mediation is often offered by the courts as an alternative to pursuing a case through the criminal route.
3. Read, distribute or have your students act out the brief accounts of various disputes which are given below. As a full class, or in small groups, your students should discuss each case and address these questions: Should one or the other of the parties to the dispute be punished? Is one or the other party dangerous to society? Is it important to announce to society that the behavior in the dispute is inappropriate? Is it important to set a precedent about such behavior? If one or the other party is punished, will that act as a deterrent to others? Do these parties have a past relationship? Will they have to relate to one another in the future? Is mending and maintaining that relationship important? Are they entitled to a private resolution to this matter? If the parties to the dispute reach an agreement on their own, without using court resources, will there be a benefit to society as a whole? Which of the two dispute resolution options—mediation or adjudication—is apt to lead to a settlement that will work over time? After the students have discussed these issues, ask them to weigh their thoughts and to come to a collective decision about whether they believe mediation or a court trial would be most appropriate.

a. The Sanchez family and the Sawyers have lived next door to one another for ten years. They have gotten along well for nine of those years. Last year the Sanchez family put up a trellis along the property line shared by the two families in order to grow roses. The Sawyers thought it was ugly and that it blocked out the sun for their own vegetable garden. The Sawyers cut the roses occasionally in order to let the light through to their side. This made the Sanchez family furious. One day, when both families were working in their gardens, a fight ensued over the trellis and roses. Angry words were followed by punches and other neighbors called the police. The police suggested that both families could file assault and battery charges at the local court.

b. Roy Anderson is 16. He has been found delinquent by the juvenile court on three separate occasions in the past—once for hitting a teacher, once for shoplifting at a local grocery store and once for driving a car without the permission of the owner. Roy is on probation. His next door neighbor claims that he saw Roy break into his home and take away his television set. Another neighbor says she also saw this happen. The police suggest the two neighbors file charges against Roy.

c. Vera Jefferson was riding home from work on a crowded subway. A stranger approached her and asked her the time. When she went to look at her watch, he grabbed her purse, pushed her away and ran to get out the door. Some other riders caught him and called a security guard. Vera made a statement to the police about what had happened. Charges were filed against the man.

d. Stanley Young has been raising his four teenagers alone since he was widowed two years ago. His youngest daughter, Jessica, who is 14, has run away from home four times. Most recently, she took his car, without his permission and without a license, and drove to her aunt's home in another city. Stanley called the police, explained the situation and asked them to pick her up. She was picked up by the police and charged with being delinquent.

Trying Mediation Out

If your students have read many legal cases or have participated in mock trials, they may have a sense of the skills lawyers use to prepare for a case. They may be much less familiar with the skills a mediator uses to successfully mediate a dispute. These skills are not gained through the study of legal cases or books on psychology, but rather through concentrated periods of practice, first through simulations and later in actual cases. One way to help your students understand the difference between litigation and mediation is to give them a chance to experiment with the mediation model.

They will first need to understand three aspects of mediation—the goals, the process, and the skills required.

Mediation Goals. Emphasize to your students that the goals of mediation are quite different than those of a trial. Mediators do not try to decide who is right and who is wrong. They do not cross-examine or put people on the spot. They do not take sides. They do not tell people what they ought to do. They try to do the following:

1. Help people relax and feel comfortable.
2. Help people tell their story and define the problem in their own way.
3. Demonstrate that they are listening and are interested in the problem.
4. Help people identify their own interests.
5. Help people communicate more clearly.
6. Help people see one another's perspectives.
7. Help people clarify how they would like to relate to one another in the future.
8. Help people generate ideas for resolving their differences.
9. Help people frame a set of realistic terms for settling a dispute.
10. Direct people to appropriate resources.

The Mediation Process. We suggest that you try the mediation model which calls for full-group sessions with all parties present; mediators' meetings or caucuses, when mediators plan strategies; and private sessions where mediators meet with one party and agree to keep certain information confidential from the other parties, if so requested. Two mediators work on a case as a team. (Some centers use the single mediator model; a few use more than two.) The standard flow of this kind of mediation session goes as follows:

1. *Mediators' meeting*. (Mediators decide who will explain mediation, confidentiality, and the process to the disputants.)
2. *First full group session*. (Mediators greet all parties, explain mediation, the process and the guidelines, draw out the story from the parties' perspectives, and gain a general sense of how each party would like the situation to be resolved.)
3. *Mediators' meeting*. (Mediators talk about what they have heard, what they need to know, who they will see next, and what they will ask that person.)
4. *First private session with party one*. (Mediators talk with party one to find out if he/she has anything to add and to discover his/her interests and ideas for resolving the dispute.)

5. *Mediators' meeting*. (Mediators plan strategy as above.)
6. *First private session with party two*. (Mediators talk with party two to find out if he or she has anything to add and to discover his/her interests and ideas for resolving the dispute.)
7. *Subsequent mediators' meetings and private sessions or full group sessions with the parties*. (Mediators work with the parties to identify interests, to generate ideas for solving issues, to test out ideas, to learn responses to offers and to shape the terms for a settlement.)
8. *Final Full group session*. (Mediatiors read final settlement to parties; fine tune it, if necessary; and ask all parties to sign the agreement.)

Mediation Skills

Mediation skills can be described in many ways. In this article we have broken them down into ten areas. In fact, these skills must be practiced in tandem. Experience has shown that students, when properly trained, make good mediators. Unless you have access to mediator trainers, however, it may be difficult to do more than demonstrate to your students that being a good mediator requires training and skill.

Suggest to students playing the role of mediators that they try to do the following:

1. Set the parties at ease; stand when they enter the room; shake their hands; make them comfortable; make the process clear; ask if they have any questions; work at earning the parties' trust.
2. Listen carefully, attentively, and empathically to everything that is said. Let the parties know you are listening and are interested through nonverbal behavior (e.g., eye contact, nodding, facial expression, open body position) as well as verbal behavior. Try to draw out perceptions and feelings first. Let the parties educate you about the dispute. Ask open-ended questions that invite a response ("What happened next" or "Is there anything else you want to say") and don't interrupt. Model the good listening behavior you would like the disputants to use with each other.
3. Suspend your own judgment. Remember, it is the parties who must live with the agreement, not the mediator. Resist the temptation to determine who is at fault, to give advice, or to moralize about the parties' behavior.
4. Do not put the parties on the defensive by grilling them or cross-examining their statements or actions.
5. Learn to be comfortable with a certain amount of conflict. Let the parties know that you will guide the session so that open communication takes place, but the unproductive exchanges will be interrupted.
6. Tease out the positives. Listen carefully for anything that could become the basis for a positive relationship between the parties, such as a shared value (being a good neighbor, acting fair, raising honest children) or a shared problem (getting by on scarce funds, working and raising children) or past attitudes ("he used to be friendly," or "she once took care of the kids while I was sick"). Identify these positives ("You both seem to really care about the neighborhood") and use them to frame a better relationship.
7. Help the parties identify their own interests and generate options for settling their disputes. Test out various alternatives by using hypotheticals, such as, "If she turned down the stereo after 10:00 p.m., would that allow you to get enough sleep?" If you can relax the disputants, help them express their feelings and help them listen to each other, it is likely they will begin to generate their own problem-solving options.
8. Build the will to settle. Focus on the positive aspects of settling the dispute and the progress made so far in the mediation and, if necessary, help people see the consequences of not settling. If they are holding to unrealistic positions, help them see their positions in a realistic light. For example, ask "How do you think the court will stop the baby from crying?"
9. Write up an agreement in language that is balanced, positive, clear, doesn't assess guilt or blame, gives timelines, and provides for future inevitabilities. For example: (1) Both Mary Smith and Ralph Johnson agree that they want to live peacefully as neighbors. (2) Mary Smith agrees to park her car in her driveway. (3) Ralph Johnson agrees to park his car in front of his house. (4) Mary Smith agrees to pay $200 to repair Ralph Johnson's car window by June 30th. (5) Ralph Johnson agrees to talk with his children about not playing on Mary Smith's lawn. (6) If a problem arises between Mary Smith or Ralph Johnson, each agrees to call the other to discuss the matter on the phone prior to calling the police.
10. Work cooperatively as a team. Be aware of your own and your co-mediator's strengths and weaknesses. Plan strategies together. Listen to each other's ideas. Keep up each other's morale.

The flip-side of these attributes are a list of habits that must be avoided: advice giving, patronizing, cross-examining, judging, psychoanalyzing, dominating, counselling, showing shock, letting one person take control, pushing one's own values, buying one side's story.

Mediation Role Play

The graffiti case is adapted from *Out of Court* by Janet Rifkin and Ethan Katsh.

The simplest way to conduct this role play is to select five students, a day or more in advance to give them time to study their roles. You will need two students to play the mediators and three students to play the parties.

The mediators should be given as much information as possible about mediation, in particular the material above which outlines the mediation process, mediation goals, and mediation skills. The only information they are given about the case is that the school principal, Lester Daniels, has taken out a complaint of malicious destruction of property against Susan Holbrook, and that the principal, Susan Holbrook, and Susan's mother, Mary Holbrook, are attending the mediation session.

The parties should be given the summary of the situation as well as the information about their individual roles. They should be asked to develop a feeling about their character; think about what their character would want from the process; try to focus on what might be gained from reaching an agreement; avoid over-playing their roles in order to make resolution impossible; and refrain from discussing their role with the other role-players.

The rest of the class should play the role of active observers. They should be given no more information about the role play than the mediators receive. They should take notes about what they see, watching for things that the mediators do which open up the parties and lead toward settlement, as well as things they do that make the parties defensive and inhibit settlement. Remind the class how difficult it is to try out a new role in front of the full group and ask them to focus first upon the positives.

Set up a table in front of the classroom with two chairs for the mediators on one side of the table and three for the parties on the other side. When the simulation is ready to begin, bring the disputing parties into the room and introduce them to the mediators. The mediators should then begin with step one in the mediation process. When the mediators are having a meeting of their own or meeting only with one party, the other parties should be outside of the room.

The role play could take several classroom sessions. The mediators may help the parties reach a settlement, or the parties could become stuck in their positions. Let your students know that the value of the simulation comes from examining the feelings of the parties when they have an opportunity to talk about their perspectives in full, as well as looking at the strategies which the mediators used to help the parties see one another's perspectives and to think up solutions which would be satisfactory to everyone. Conduct a full discussion of the mediation. If you wish to give each student a chance to mediate, divide up the class conduct the same role play again or ask your students to develop some role plays based on their own experiences.

The Graffiti Case

Summary of Situation: Susan is a sophomore at Central High School, a school that has been plagued with vandalism. She is in the secretarial program. For the past two years, Susan has constantly been in trouble for such things as bad grades, tardiness, skipping school, skipping classes, and disrupting classes. She has spent a great deal of time in the office of Lester Daniels, the school principal.

Last week, Susan was suspended for smoking in the girls' locker room after school. When she came back the next day to get something from her locker, she took a can of spray paint from the art room and sprayed an obscenity on the wall across from the prinicipal's office. She was caught by a teacher. The principal took out a complaint, on behalf of the school, for malicious destruction of property.

Susan Holbrook's Perspective: You hate school and especially the secretarial course. Your mother made you take it because she was a secretary and beause she thinks that college is just a waste of time and money for a girl. You are in trouble all the time, but this is the first time you've ever damaged school property. You did it because you were so angry at being suspended. You weren't the one who was smoking (you don't even smoke), but they blamed you. They always blame you. Your mother just makes everything worse. All she does is scream at the teachers and the prinicipal, embarrassing you. Then when you get home, she screams at you. She never lets you talk, and when you do talk, she doesn't listen.

Mary Holbrook's Perspective: You are fed up with the whole situation. Ever since your husband left you, you've had problems supporting and controlling your children. They don't listen to you and they ignore your demands. You are especially worried about Susan. She is constantly in trouble. The principal is always calling and bothering you about every little thing Susan does. She's actually a good child at heart. You know she doesn't do half of what she ends up getting blamed for. A good example of this is her getting suspended for smoking when she doesn't even smoke. You wouldn't be surprised if she had painted the word on the wall! Susan is doing poorly at school and wants to drop out. You keep telling her to stick it out so that she can become a good secretary, like you, and have the financial independence and security a person needs these days. You don't know what mediation is all about, but you are not going to let the principal bad-mouth your daughter.

Lester Daniels' Perspective: Susan Holbrook is a student whom you know well because she is in your office two or three times a week. Nothing you say to her and no punishment you give her has any effect on her. She is disrepectful to you and her teachers. You've tried speaking to her mother, but she treats you with no more respect than her daughter does. You're sick of trying to deal with them. You agreed to mediation reluctantly. You think she needs the court to teach her a lesson, but you would rather avoid the bad publicity a court case might generate. You try to make this school a decent place to be, and then a few students like Susan ruin it for everyone with their vandalism. It's costing the town a lot of money, and it's time to start cracking down. You insist that Susan make some kind of reparation for what she did.

Strategy

5

Negotiating Like a Mediator

Your students will have more opportunities to negotiate on their own behalf than they will to mediate on someone else's. The collaborative skills of the mediator—empathetic listening, suspending judgment, inventing options, searching for positives, reality testing—can all be used to enhance one's own personal negotiating performance and to bring about results beneficial to both parties.

In *Getting to Yes*, Roger Fisher and William Ury offer four simple but effective guidelines for negotiating collaboratively rather than competitively. Their formula for "principled negotiations" resembles the techniques used in mediation. We have found this book to be an especially useful tool and recommend that high school teachers consider assigning all or parts of it to their students.

The four guidelines are as follows:

1. *Separate the People from the Problem*: Many negotiations take place in the context of on-going relationships. Both the substance of the negotiation and the nature of the relationship become important. It is best to deal with the issues around the relationship directly, rather than to try to solve them through the substance of the negotiation. For example, Chris and Jan have been friends for some time. Recently Jan met a new student and has become friends with that person also. Chris feels somewhat threatened by the new friend and fears that Jan may lose interest in their own friendship. In the process of deciding how to divide the money they earned from painting a neighbor's fence, Chris's unexpressed fears cloud the decision-making process. Chris and Jan cannot agree on anything. At some point the two friends need to talk about their friendship—how important it is to both of them, whether Jan's new friendship will change the way they relate, whether they want to take some special action to make sure their friendship is preserved. They need to have this conversation separate from the issue of deciding how they will spend the immediate weekend.

2. *Focus on Interests, not Positions*: Most of our early training has led us to express our interests as positions. A parent who wants some quiet at home in the evening ends up saying, "You can never listen to the stereo again," instead of "I need to have some quiet time." A teenager who wants to go to the weekend dance says, "I *must* have the car Saturday night," instead of "I need a ride to the dance Saturday." When two people bargain from positions, they often lose sight of their own interests. Fisher and Ury cite the example of two sisters who are fighting over an orange. They end up cutting it in half. One squeezes the juice out of her half and throws away the rind. The other grates the rind of her half for cookies and throws away the juice. It they had communicated about their interest in the orange in the beginning, they both would have doubled their gains. Lis-

tening skills become crucial when we are trying to determine someone's interests. And it is often important that we consider our underlying interests before broadcasting our position.

3. *Invent Options for Mutual Gains*: In order to be creative about problem solving, it is important to suspend judgment on many levels. Do not assume that there is a fixed pie. Do not assume that the role of the negotiator is to narrow the gap between positions. Think in terms of broadening the options available. Be wary of both premature criticism and premature closure. Don't look too early for the single best answer, for you are likely to short-circuit a wiser decision-making process in which you select from a large number of possible answers. Brainstorming techniques are extremely useful during the option-inventing stage of negotiation.

4. *Agree upon Objective Criteria*: Quite often differences can be settled if the parties can agree upon some criteria against which to measure their settlement, criteria which they both believe would be fair. For example, if one student wants to sell a car and another is interested in buying it, the two might agree that the Blue Book price of the car would be fair or that the average of the prices listed in the Sunday classified ads would be acceptable. Or maybe something could be worked out if the seller would produce the original purchase slip, plus the receipts for any improvements and repairs.

The collaborative principles in *Getting to Yes* may be overly complex for simple negotiations, such as the one-time purchasing of an antique at a flea-market. On the other hand, in situations where there will be an on-going relationship between the parties, it's well worth the investment in time to consider each party's interests and the most mutually beneficial terms for a settlement.

Warm-Up for Negotiation

Review Fisher and Ury's four criteria for "principled negotiations" with your students. Ask them to share times when their relationship with a family member, friend, or teacher had interfered with their ability to communicate clearly. Encourage students to think of times when they have become stuck in their own positions to the detriment of their own interests. (You might "prime the pump" by starting off with some of your own examples.) Ask one student to share a real interpersonal dispute in his or her life. Ask another student to play the role of the other party to the dispute. Have the two students brainstorm solutions to the problem together, following the no-criticism rule. Discuss when students might need to find some mutually agreeable criteria in order to reach a settlement.

The New Wave Negotiators: This simulation is designed to give students practice trying out their new skills in an integrated fashion.

1. Divide your class into pairs and give each person in the pair either the band leader or the night club owner role.

Band Leader. You recently organized a five-person rock band, the Negotiators. You think your group is going to make the big time some day, but as of yet, you have only played for school dances. You very much want to play in a night club so that you can get some visibility and some publicity. You have a friend who likes your music and writes music criticism for a local paper. She has agreed to cover your band if you play at a regular club rather than at your school. One of the biggest problems for you is transportation. If you play on Friday night, you can borrow your father's van, but if you play on Saturdays or Sundays, you can't use the van, because he needs it for his work. None of the other band members has access to a van. If you have to rent a van it will cost you $50/day. You would be willing to play for free just to get the publicity, but you want to get the best deal possible. Your friends are counting on you. The owner of the New Wave Night Club called and asked you to stop by.

Night Club Owner. You have been operating the New Wave Night Club for the past two years. You are just starting to make money. It has been a long-time dream of yours to discover a major new group. You've heard good things about the Negotiators from some local young people and would be willing to give them a chance to play if they would agree to a time on Sunday afternoons. You're not ready to give them a prime time spot until they prove themselves. If they attract a large enough crowd, say fifty on a Sunday, you would be willing to pay more and to shift them to a Friday or Saturday slot. You feel that at your current level of income, you could afford about $200 a week to invest in new talent, but of course you want to get the best deal possible while you are looking for a new group. You called the leader of the Negotiators and suggested a meeting at the club.

2. Give each student five minutes to read and reflect upon his or her role.

3. Give student pairs fifteen minutes to try to negotiate an agreement.

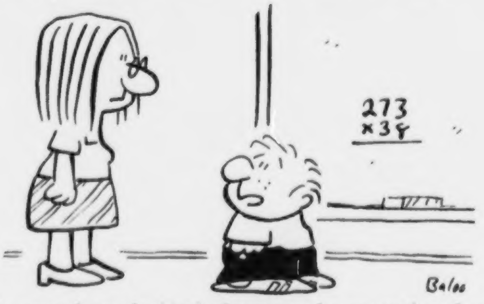
4. At the end of fifteen minutes ask the various pairs to talk about their negotiations. Did they reach agreement? What were the terms? How well were they able to identify and respond to one another's interests? How well were they able to invent options for mutual gain? To establish criteria?

New wave variations are always possible. Ask students to create their own negotiation simulations. Carry them out as above, giving students a chance to negotiate with a variety of their classmates in order to experience different styles.

Conclusion

The rewards of teaching about conflict management, mediation, and negotiation are many. Students give almost instant feedback. They report using their new skills in a matter of hours, and they are able to bring concrete examples back to class for further sharing and growth.

The challenge for the teachers becomes setting the right tone and selecting the best combination of experiences. The goal, in the end, is to encourage students to formulate individual opinions, to express their ideas freely, to listen with respect to one another's views, to defend their views when they believe it appropriate and yet to be willing to change their opinions in the light of new information or compelling arguments. When conflicts arise, students should have the skills to identify the issues and interests of the parties, and to see the possibilities to be gained through collaborative problem-solving. ☐



"You know, I've never been the kind of person who pretends to have an answer for everything. . ."

Wall of Separation

(*Continued from page 5*)

not bode well for future controversies of this nature.

Justice O'Connor wrote a concurring opinion in which she agreed with the majority that the display did not represent an endorsement or disapproval of religion. It was simply a traditional symbol used in a secular setting to celebrate an important public holiday.

Justice Blackmun wrote a separate dissenting opinion, in which Justice Stevens joined. He warns that the city has won a Pyrrhic victory because the creche "has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part . . . This is a misuse of a sacred symbol."

The Scarsdale (New York) Creche Case. The Scarsdale case differed from the Pawtucket case in several respects. In the Pawtucket case, as we have seen, a publicly owned Christmas exhibit which included a creche had been displayed on privately owned property in the center of the business district for forty years. In the Scarsdale case, a group of citizens had been displaying a privately owned creche in a public park where celebrations of Christmas had been held for twenty-five years. Do these factual differences constitute constitutional differences?

The village of Scarsdale had no specific ordinance relating to the use of its public parks and no standards for granting or denying permission. The governing board permitted its parks to be used for demonstrations, speeches, silent vigils, and the distribution of petitions. In 1956, the board was asked by and granted permission to the Creche Committee, a private organization of Catholic and Protestant churches, to place a creche in Boniface Circle, a public park, during the 1957 Christmas season. These requests continued until 1982 and were granted, at first with unanimous approval. Beginning in 1973, there was a gradual escalation of disapproval on the board, with minority votes or abstentions. Suggestions were made by the mayor and others that in the future the creche be placed on private property. When the board voted 4 to 3 to deny the Creche Committee's request for 1982, the issue was joined in the United States district court. At this time the Pawtucket case had not been decided by the United States Supreme Court.

In its thorough opinion, the district court ruled that Boniface Circle was a traditional public forum. As such, it was open to all types of speech—religious and nonreligious. On the precedent of the Widmar case (equal access of college students, discussed below), the court noted that a government cannot normally deny access to public forums based on the content of speech. Such content-based denials usually violate the Free Speech Clause of the First Amendment as applied to the states under the Fourteenth Amendment. However, declared the court, in this instance Scarsdale had a compelling state interest to avoid violating the Establishment Clause. Scarsdale won, and the Creche Committee appealed.

Before the appellate court, Scarsdale took the position that the village must be nonpartisan in religious matters; that its park was not a public forum for disseminating sectarian or partisan positions; that alternative private sites were available to the Creche Committee; and that, unlike the Pawtucket case, the issue here involved a privately owned creche and a public park, not a publicly owned creche in a private park. Since many in the Scarsdale community were conscientiously opposed to the display, argued Scarsdale, the controversy generated divisive political confrontations which have led to excessive entanglement between church and government.

The Creche Committee saw it differently. Using the Widmar equal access case, it argued that the creche display was protected by the First Amendment. The display was an example of religious speech, and since Scarsdale had no ordinance limiting public displays in its public parks, there was no compelling governmental reason for it to discriminate against this type of speech.

By the time the United States Court of Appeals decided the case, the Supreme Court had handed down its Pawtucket ruling. Would it make a difference?

The issue here, said the appeals court, is reconciling the Establishment Clause with the Free Speech Clause of the First Admendment, *McCreary v. Stone,* 739 F.2d 716 (1984). With these two important rights on a collision course, one way to resolve the dilemma is to subject the facts in the case to the *Lemon* criteria. The three appellate judges agreed with the district court judge that the secular purpose prong had been met. By accommodating a privately owned creche in a public park that is a traditional public forum, Scarsdale was not engaged in any sectarian activity.

Would Scarsdale's permission to exhibit the creche advance religion? No, said the court, because Scarsdale's role was only "indirect, remote, and incidental" so far as aid to religion was involved. The prestige, power, and influence of the village were nowhere evident. As a matter of fact, since 1976 a disclaimer sign had been required as a condition for the authorization to display the creche which read: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization."

Was there excessive entanglement between government and religion? No, replied the judges, because no subsidies were involved and potential or future political divisiveness cannot invalidate an otherwise permissible display.

An interesting sidelight in the court's ruling is the discussion of the size of the disclaimer sign. The district court judge took the position that children viewing the creche might conclude that the village supported the religious symbol. Although the appeals court found little evidence to support this conclusion, it did instruct the lower court to see to it that future signs will be sufficiently large and visible so that the disclaimer can be clearly seen and read.

Obviously, the Pawtucket case had made a difference. Scarsdale lost. It then turned to the court of last resort.

On appeal to the Supreme Court of the United States, Scarsdale lost again, this time on a 4 to 4 vote. On March 27, 1985, in *McCreary v. Stone,* the divided Court upheld the appeals court in a one sentence ruling. There was no opinion, nor any indication as to how the Justices voted, although one might infer from the Pawtucket case how they stood on the issues. Justice Powell, who had missed the hearing because of surgery, did not participate.

Chaplains Are In: Politics and Prayer

James Kilpatrick remarked in one of his columns that 200 years of tradition count for more than the three-part *Lemon* test. This was true in the Pawtucket and Scarsdale creche cases and, as we shall see, it carried weight in the Nebraska chaplain case, *Marsh v. Chambers,* 103 S. Ct. 3330 (1983).

Like most state lawmaking bodies, the Nebraska legislature begins each session with a prayer offered by a chaplain paid out of public funds. Since 1965, their chaplain has been the same Presbyterian minister, who is paid a monthly stipend for each month the legislature is in session. Chambers, a member of the legislature and a Nebraska taxpayer, protested the practice as a violation of the Establishment Clause.

Chief Justice Burger begins his opinion for the majority by confessing that "historical patterns cannot justify contemporary violations of constitutional guarantees." Having said this, he immediately launches into the historical background of the "unique history" of the issue before the Court.

He takes the position that two centuries of national practice and one century of state practice call for judicial notice and respect. He notes that the practice of opening legislative sessions with prayers is deeply embedded in "the history and traditions of this country." Although the Constitutional Convention did not open with a prayer (was it Hamilton who objected invoking the assistance of an alien power?), both houses of the first Congress agreed to have paid chaplains open their sessions with prayers. Since three days later, this same Congress reached final agreement on the wording of the First Amendment, it is reasonable to infer, he concludes, that the Framers of the Bill of Rights saw no conflict between legislative prayers and the First Amendment.

What we have here, declares Chief Justice Burger, is "simply a tolerable acknowledgment of beliefs widely held among the people of the country." The prayers, a part of the fabric of American society, have become embedded in the history and tradition of this country, and cannot be construed as a "proselytizing activity." Legislators are adults who, unlike the young, are not susceptible to religious indoctrination.

Granting that this religious exercise has been secularized by historic tradition and custom, doesn't this practice violate the other tenets of the *Lemon* guidelines? For example, a clergyman from one Christian denomination has presided for sixteen years and his prayers have been rooted in the Judeo-Christian religion. Doesn't this practice aid religion? No, replies the Chief Justice, because there is no evidence of proselytizing on behalf of one

How Can You Hit a Home Run if You Can't Get to Bat?

We are a litigious society and we take to the courts more often than people in other countries. It is a fiction, however, to believe that our courts are open to all litigants at all times. There are two limitations on the use of our federal courts. In the first place, the issue must involve an actual *case* or *controversy*. You cannot come into a federal court seeking an advisory opinion. Secondly, the party initiating the lawsuit must have *standing to sue*. This means that the plaintiff must be able to show the court that he or she will suffer an actual injury unless the court intervenes to rectify the situation.

This background helps explain another Establishment Clause case, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 102 S. Ct. 752 (1982). This controversy differs from the ones described in the article because it involves a conveying of government property allegedly in violation of the Establishment Clause.

Under the Constitution (Art. IV, Sec. 3, cl. 2), Congress has the power to dispose of government property. After World War II, Congress authorized federal agencies to inventory and dispose of surplus property to private or other public entities. The legislation directed the Department of Health, Education, and Welfare to sell or lease surplus property to nonprofit, tax-exempt educational institutions for school, classroom or other educational use. In contracting for the sale or lease, the agency could deduct "a public benefit allowance" for any advantages which may accrue to the United States from this transaction.

Under the terms of this statute, the Valley Forge General Hospital, an Army installation for thirty years, was declared to be surplus property and was turned over in 1976 to the Valley Forge Christian College, a sectarian institution operated by the Assemblies of God. This religious order trains Christian leaders for church-related ministries. Although the property was valued at $577,500, the college was not required to make any payment because it was discounted at 100% in anticipation of the benefits that would accrue to the public. In its application, the college promised to strengthen its secular offerings in the humanities, psychology, and counseling, and to provide services to the inner city.

Americans United for Separation of Church and State (AU) learned of this conveyance in a news release and immediately challenged the propriety of this transaction under the Establishment Clause of the First Amendment. It argued that each of its 90,000 members was a taxpayer and "would be deprived of the fair and constitutional use of his (her) tax dollars for constitutional purposes in violation of his (her) rights under the First Amendment." They sought to have the conveyance declared null and void and to have the property returned to the government.

It has been said that the Supreme Court has never handed down a unanimous ruling in an Establishment Clause case, and this was no exception. Writing for the majority of five, Justice Rehnquist begins with the proposition that, under Article III of the Constitution, the judicial power is limited to "cases" and "controversies" which are "real, earnest, and vital." He goes on to say that our courts are not merely institutions for "the ventilation of public grievances" or "judicial versions of college debating forums." In addition, as we pointed out above, a party must have standing. The plaintiffs in this case, he finds, do not meet this requirement.

Justice Rehnquist's affinity for strict construction is clearly demonstrated in his reasoning here. Our constitutional system of separation of powers, he points out, calls for mutual respect and self-restraint by each branch in the use of its powers to limit or avoid confrontations with the other branches. Therefore, in evaluating the plaintiffs' position in this case, the Court must first determine whether the taxpayer has a legitimate grievance against the Congress. Taxpayers who allege that Congress has made unconstitutional use of their tax dollars must show that the legislature has abused its tax and spending powers. Since the property was transferred by a cabinet department under the Property Clause and not under the taxing and spending powers of Congress, the tax-

faith and the disparagement of others. The chosen chaplain apparently was acceptable to the legislature "because of his performance and personal qualities." In addition guest chaplains were used on occasion.

The Chief Justice goes on to reassure us that there is no real threat to the Establishment Clause "while this Court sits." We shall see.

Writing for himself and Justice Marshall, Justice Brennan asks: What happened to the *Lemon* criteria? Why didn't the majority truly apply them? Was it because such application might prove fatal to their position?

Applying the *Lemon* criteria, he finds that the practice of paid chaplains violates the letter and spirit of the Establishment Clause. In the first place, the purpose of the prayer is primarily religious, not secular. To claim a secular purpose for a religious prayer is an insult to those who believe seriously in invoking Divine guidance. If, on the other hand, the purpose of the prayer is to get the legislators to quiet down and to inspire them to high purpose, surely, suggests the Justice, there are secular means available for that purpose.

In the second place, the primary effect of legislative prayers is "to impose indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion." The prayer creates "a linkage of religious beliefs and state power resulting in a symbolic benefit to religion."

Finally, the practice leads to excessive governmental entanglement with religion. Choosing a chaplain and monitoring his voluntary prayers is entanglement. Differences between the Nebraska legislator and his colleagues over the practice, as well as differences over the content of some of the prayers, has introduced unacceptable political divisiveness over religious matters.

Justice Brennan concludes with a shot that must have left a wound or two.

> In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayers, they would nearly unanimously find the practice to be unconstitutional.

Not satisfied with observation about the majority's lack of skill in applying the

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payer-plaintiffs have no standing to sue.

How does Justice Rehnquist handle the plaintiffs' contention that they have standing to sue because they have suffered an injury in fact because Congress has violated the Establishment Clause? He responds that an injury to a "personal constitutional right" is a generalized grievance and is not acceptable. To do so would be to open a Pandora's box of litigation. The focus should be on the party, not on the issue. All that the plaintiffs can contend is that they have experienced "psychological consequences" resulting from an alleged breach in the wall of separation between church and state. That consequence, declares the Justice, is not sufficient to rise to the status of injury in fact and confer standing. He then tries to nail down the plaintiffs with this resounding observation:

> **Their [plaintiffs'] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsman of the general welfare.**

Justice Brennan's dissent, joined by Justices Blackmun and Marshall, lashes out at the majority in language not ordinarily found in judicial opinions. He accuses them of deciding serious "substantive" issues "obliquely" through the standing rule, thereby obfuscating, rather than clarifying, rights under the law. By using the rhetoric of the standing rule "to slam the courthouse door against plaintiffs," the majority denies them full judicial consideration of the merits of their claims. To do so is a "dissembling enterprise and simply turns the Constitution on its head." The majority has become so hypnotized by the standing rule in this case that "not one word is said about the Establishment Clause right that the plaintiff seeks to enforce."

He goes on to say that Article III with its "cases and controversy" limitation does not override other provisions of the Constitution. Quite the contrary, it "was designed to provide a hospitable forum in which persons enjoying rights under the Constitution could assert those rights."

Both history and past rulings of the Court, according to the Justice, support the standing of the plaintiffs in this case. The history of church-state relations in the period before the Constitution shows that the Establishment Clause was designed to prevent the use of tax money for religious purposes. In addition, it was the taxpayer who "was the direct and intended beneficiary of this prohibition on financial aid to religion." Since the Establishment Clause prohibits Congress from using tax money to support a church or to encourage religion, the taxpayer has standing "to challenge a federal bestowal of largesse as a violation of the Establishment Clause." As a matter of fact, concludes Justice Brennan, "every federal taxpayer suffers precisely the injury that the Establishment Clause guards against when the Federal Government directs that funds be taken from the pocketbooks of the citizenry and placed in the coffers of the ministry." In such cases the taxpayer has standing in order "to halt the continuing and intolerable burden on his pocketbook, his conscience, and his constitutional rights."

In conclusion, the dissent brushes aside the distinction drawn by Justice Rehnquist between the Property Clause and the spending and taxing power of Congress, as well as the distinction between an act of Congress and that of a cabinet department. The First Amendment, states the dissent, binds the government as a whole, and the breach of the Establishment Clause is a breach in the wall of separation, no matter which constitutional provision was used.

In his separate dissent, Justice Stevens charges the majority with trivializing the standing doctrine by drawing a difference "between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause." Such a tenuous difference is not of fundamental jurisdictional importance when the Establishment Clause is involved. The plaintiffs met the standing rule when they invoked the Establishment Clause.

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Lemon guidelines, he then takes them to task for their "betrayal of the lessons of history." The Framers of the First Amendment may have approved prayers in both houses of Congress because of "the passions and exigencies of the moment." The bandwagon effect of the moment was repudiated by Madison, when he had time to reflect in later life. The Constitution is not a static document, observes the Justice, and to be truly faithful to the Framers, the "uses of the history of their time must limit itself to broad purposes." The two foundation stones of the Establishment Clause are separation of church and state and neutrality in matters of religious doctrine and practices. Prayer is religious worship and it belongs in the private domain.

The brief dissent by Justice Stevens concludes that the long tenure of the official chaplain in this case is evidence of religious preference in violation of the Establishment Clause. What the majority has failed to do is to "parse" the content of some of the prayers given by the chaplain. Had they done so, they would have found clearly sectarian invocations unacceptable under the First Amendment. Is his tenure, asks the Justice, in some way related to the approval of this content by the majority of the legislators?

The Decalogue Is Out

The Ten Commandments have been with us for thousands of years, much longer than nativity scenes and legislative prayers. However, when Kentucky tried to post the Decalogue in the classrooms of the public schools, the Court refused to grant this historic document tenure.

In 1978, Kentucky passed a law requiring the posting of the Ten Commandments in each public classroom. At the bottom of each display was a religious disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the common law of the United States." The copies were purchased with private contributions.

The state trial court sustained the statute under the *Lemon* criteria, and the state supreme court affirmed by an equally divided vote.

The Supreme Court of the United States granted *certiorari* and decided the case on the record without oral argument, *Stone v. Graham*, 101 S. Ct. 192 (1980). In a 5 to 4 *per curiam* opinion, it overruled both Kentucky courts and held this practice to be a violation of the first criterion of the *Lemon* guidelines. The purpose of posting the commandments, declared the majority, cannot be construed as secular, even though the state says so. "The Ten Commandments," emphasizes the opinion, "are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposedly secular purpose can blind us to that fact."

It would be another matter if the commandments were integrated into the school curriculum, "where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." In this case, however, the mere posting served no such educational purpose. Quite the contrary, it might encourage students "to read, meditate upon, perhaps to venerate and obey, the commandments." This is not permissible under the Establishment Clause.

The fact that voluntary private contributions were involved does not change the constitutional implications. What is determinative of the issue is the posting under the auspices of the state legislature.

The Chief Justice and Justice Blackmun dissented on the ground that the Court should have accorded this case the treatment is deserved. Instead of a summary reversal, the parties should have been accorded a full scale hearing before the Court. Justice Stewart agreed and indicated that, in his judgment, the Kentucky courts had applied the correct constitutional criteria.

In contrast to the brief three and four line dissenting comments of his brethren, Justice Rehnquist elaborated on his disagreement with the majority. In Establishment Clause cases, he points out, the Court as a rule looks to "legislative articulation of a statute's purpose." The majority's rejection of the state's declared secular purpose—accepted by the state courts—"is without precedent in Establishment jurisprudence." The fact that the Ten Commandments include secular and religious provisions does not render the law unconstitutional.

Justice Rehnquist agrees with the Kentucky legislature that this historic document has had an important influence on the development of the legal codes of the western world. It is impossible to insulate from the public sector the many aspects of our lives which have their origins in religion. After all, "religion has been closely identified with our history and government" and "the history of man is inseparable from the history of religion." He concludes by condemning the Court's summary reversal of Kentucky's highest court as "cavalier."

If You Don't Succeed, Try, Try Again!

For years, supporters of public financial aid to parochial schools have been searching for a magic formula to win over the Supreme Court to their position. In the *Everson* case (67 S. Ct. 504, 1947), they won reimbursement for transportation costs in busing their children to public schools. In the *Allen* case (88 S. Ct. 1923, 1968), they succeeded in persuading the Court to uphold the New York state law authorizing the loan of textbooks purchased with public funds to parochial schools, as well as public schools.

They lost, however, when they tried to obtain state financial assistance to supplement teachers' salaries in parochial schools. Nor did they succeed when the Court struck down a New York state law providing for tuition reimbursement and a tax relief program for those who sent their children to parochial schools, *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955 (1973).

They finally seem to have found the formula in the Minnesota law which permits parents of *public and parochial* students, in computing their income taxes, to deduct from gross income expenses incurred in providing "tuition, textbooks and transportation." Deductions were limited to $500 per child in grades K-6 and $700 in grades 7-12.

Two facts are worth noting. Of the 820,000 students attending school in Minnesota, 91,000 attended private schools. Of these, 95% were enrolled in parochial schools. The second fact is that the lower courts, in interpreting the nature of "tuition, textbooks, and transportation" deductions, included summer school tuition, Montessori School tuition (K-12), the cost of tennis shoes and sweat shirts for physical education, costs of pencils and special notebooks, rental fees for cameras and musical instruments, and costs of supplies needed in special classes.

Does this law violate the *Lemon* three-part test? We have in *Mueller v. Allen*, 103 S. Ct. 3062 (1983), another 5 to 4 donnybrook.

Writing for the majority, Justice Rehnquist finds that the Minnesota law meets all the criteria of the *Lemon* guidelines. It has a secular legislative purpose because it applies to all educational expenses incurred by parents who send their children to public and parochial schools. He argues as follows:

> An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies.

In the second place, the Minnesota statute does not have the primary effect of advancing the sectarianism of the parochial schools. The pivotal point is that the deduction is available to *all parents* who send their children to school, whether public, private, or parochial. In deciding on tax deductions, legislatures have wide latitude, and the deduction in this case is comparable to medical and charitable expenditures. An additional constitutional consideration is that the aid in this case is directed to the parents and not to the school.

To the contention that the law was aimed directly at aiding sectarian schools because most public school parents do not pay tuition while the other deductible expenses are negligible compared to the benefits derived by parochial school beneficiaries, Justice Rehnquist seems to say that statistical evidence cannot be used to determine the constitutionality of this type of legislation. What seems to be controlling here is that parochial schools provide wholesome competition through an educational alternative. In addition, "they relieve substantially the tax burden incident to the operation of the public schools."

Finally, Justice Rehnquist concludes that the Minnesota law does not involve the state in excessive entanglement with religion. State supervision of the selection of textbooks for parochial schools to determine which ones do not qualify for deduction creates no problem for experienced educators.

Justice Marshall wrote the dissent, in which Justices Brennan, Blackmun, and Stevens joined. The opinion wastes no time in branding the Minnesota law as a violation of the Establishment Clause. What a state cannot do directly, warns the Justice, it cannot do indirectly. What the *Nyquist* decision had outlawed in 1973 (direct grants to parochial schools or tax benefits to parents of parochial school children), Minnesota cannot reinstate. By whatever name you call it, whether "tax credit" or "tax deduction," what we have here is "a subsidy of tuition masquerading as a subsidy of general educational expenses."

Justice Marshall is willing to grant that the law in question serves a secular purpose. It can promote "pluralism and diversity among the State's public and nonpublic schools." But the law fails the constitutional test because its primary purpose is to aid sectarian education by subsidizing tuition payments. It has "a direct and immediate effect of advancing religion."

As for the majority's qualms about using statistical evidence to measure the impact of legislation, Justice Marshall sees no reason why empirical data should be avoided. His assessment of the situation is that in 1978-79 the parents of the 90,000 students attending nonpublic schools charging tuition were entitled to the tax deduction. At the same time, only 79 public school students paid tuition because they went to schools outside their district. That meant that the parents of the other 815,000 students who attended public schools were not entitled to receive the tax benefit. With tongue in cheek, Justice Marshall suggests that the latter can obtain full tax benefits, if they can buy $700 worth of pencils, notebooks, and bus rides for their children.

Although on its face the Minnesota law grants tax deductions to parents of public and nonpublic students for certain specified expenditures, Marshall writes that the impact of the law is to offer an incentive to send children to parochial school, and it requires the taxpayers in general to pay for the cost of parochial education.

Another Parochaid Victory

The tactic of trying again if you don't succeed also proved successful in a prior case and may become the strategy of the future. When the Supreme Court nullified in the 1973 Nyquist case, a New York state law providing reimbursement to parochial schools for expenses of tests and examinations, New York tried again and won in 1980 in *Committee for Public Education v. Regan*, 100 S. Ct. 840 (1980).

The later attempt authorized cash payments to private and parochial schools as reimbursement for performing certain testing and reporting services mandated by a new state law. The services which were compensated were grading of state-prepared examinations by parochial school personnel and annual reports relating to the student body, the faculty, support staff, physical facilities, and the curriculum of each school.

The New York law barely survived in a 5 to 4 confrontation. Justice White wrote the majority opinion, concluding that there is nothing in the *Lemon* criteria to cast the pall of unconstitutionality on this legislation. The purpose of the testing, record keeping, and reporting is secular and related to the state's educational goals. Any religious intervention is minimal, since the state education department can review the procedures. The fact that the state is paying for these services of the parochial school faculty does not invoke the specter of excessive entanglement. The state is required to audit the services, and it can be trusted to detect any deviance from the secular mandate of the law. There is no need, declares Justice White, to impute bad faith, nor is there any basis for concluding that the funds will be used to enhance religion.

Somewhat troubled, however, by the attack of the minority, Justice White concedes that cases in this murky area do not furnish "a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools." The Court, he concludes, will have to muddle along from case to case until it finds a "more encompassing construction of the Establishment Clause."

Justice Blackmun, speaking for Justices Brennan and Marshall, accuses the majority of "taking a long step backwards" in the continuing controversy over providing public aid to parochial schools. Agreeing that the purpose of the New York statute is secular, he concludes that the direct subsidy aids religion by covering some of the operating costs of the sectarian school and, in this way, aids the school as a whole. The excessive entanglement criterion is also involved here because, to make certain that the public funds are not used for religious purposes, the state is obligated to engage in "ongoing surveillance."

Justice Stevens wrote his own dissent, charging that the majority approval of a direct subsidy to parochial schools opens a Pandora's box of possible future expenditures to reimburse staff for conducting fire drills or for constructing fireproof premises. He concludes his very brief opinion with these words.

> Rather than continuing with the Sisyphean

task of trying to patch together the "blurred, indistinct, and variable barrier,"... I would resurrect the "high and impregnable wall" between church and state constructed by the Framers of the First Amendment.

The asides, or to use that old-fashioned phrase "obiter dicta," of Justices White and Stevens convey the frustration that inheres in trying to wend one's constitutional way through the tortuous path of church-state relationships.

Parochaid—No!

Technically, the next case does not fall within the traditional category of parochaid. In reality, however, since it deals with tax exemption for sectarian institutions, it does come within the umbrella of public aid to religious schools and colleges.

Prior to 1970, the Internal Revenue Service (IRS) had interpreted the Internal Revenue Code as extending tax exemption to private schools, even to those which discriminated in their admissions policy against blacks. Tax exemption relieved the institutions from the payment of Social Security and unemployment taxes, and it treated gifts to the schools as charitable deductions. A group of black Mississippi parents and students challenged this policy in federal courts, and the IRS reversed itself. This new

Religious Gerrymandering: Making Laws for Some Sects

Gerrymandering is not limited to the political arena. The Supreme Court has invoked the term "religious gerrymandering" to describe the practice of drawing lines separating favored denominational groups from those disadvantaged by legislation. *Larson v. Valente*, 102 S. Ct. 1673 (1982), is just such a case.

To discourage deception and fraud in the solicitation of charitable contributions, Minnesota passed a law requiring all charitable organizations to register and to file extensive annual financial reports detailing income from all sources, fundraising, costs of management, and transfers of property and money within the state. Until 1978, all religious organizations were exempted from the law. In that year the law was amended to include a "fifty percent rule" which provided that only those religious organizations which received more than 50% of their total contributions from members or affiliates would continue to be exempt from the registration and reporting requirements.

Apparently, the law was worded in such a way as to exclude the Catholic Archdiocese, but to include those groups which solicit on the streets and other public places, as well as by direct mail. The Court's opinion quotes one state senator as saying: "I'm not sure why we're so hot to regulate the Moonies anyway."

When the state informed the Unification Church that it had to register, it refused and invoked the religion clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The state simply could not make up its mind as to how to proceed. First, it maintained that the church was not a religious organization and, therefore, that it had no standing to sue. Then it argued that the church had to register under the 50% rule, seeming to concede that the church was a religious organization.

In another one of its 5 to 4 decisions, the majority decided that the state could not have it both ways. The church had standing because, if it failed to register, it would violate the law and lose its right to solicit contributions in the state. (However, in a footnote at the end of his concurring opinion, Justice Brennan declares that there is nothing in the majority ruling which prevents the state from requiring the Unification Church to prove that it is a religious organization within the meaning of the law.)

Proceeding on the assumption that the Unification Church is a religious organization, Justice Brennan, speaking for the majority, concludes that the 50% rule was designed as a religious gerrymander and, as such, violated the Establishment Clause. The rule granted preference to some religious groups and discriminated against others, thereby disregarding the principle of denominational preference.

Justice Brennan then applies the strict scrutiny scalpel to the case. If Minnesota passed the law because of a compelling governmental interest, the Court will sustain the law only if it is closely fitted to further that interest.

The 50% rule was apparently based on the assumption that members of organizations who contribute to their treasuries have a greater interest in and control over the financial matters of their organizations than do nonmembers, and therefore such organizations are also less likely to fall prey to fraud and deception. The majority ruling finds no justification for this position. There is no evidence in the record to show that members who contribute more than half of the solicited income control and supervise effectively the financial operations of their organizations. Nor is there evidence to show that members who control their organizations are effective in combatting abuses in solicitation. What evidence is there, asks Justice Brennan, to show that members of religious organizations exempted from the rule will have any greater incentive to protect their members than those which have to register? Finally, the Court finds no evidence that supports the state's contention that the need for public disclosure rises in proportion to the percentage of nonmember contributions.

Having applied the strict scrutiny scalpel to the facts of the case, the majority concluded that the 50% rule is not closely fitted to further a compelling governmental interest. The Court's opinion then proceeds to buttress its case by applying the [illegible] *Lemon* criteria, although Justice Brennan states that it is not necessary for the disposition of the issue. What is especially relevant to this case is the third criterion, which deals with excessive governmental entanglement with religion. As was noted earlier, the 50% rule involved the risk of politicizing religion. The history of the law shows that it was the explicit intention of the lawmakers to favor some denominations over others, an action that cannot be tolerated under the Establishment Clause. For this reason, as well as the others summarized above, the Unification Church is not required to register because the 50% rule is unconstitutional.

Justice White's dissent, in which Justice Rehnquist concurred, focuses on the secular nature of the Minnesota law. The state, he says, had a compell-

policy was upheld by the federal court and affirmed by the Supreme Court without opinion.

Under this new policy, tax exemption was denied to both Bob Jones University and to the Goldsboro Christian Schools because of their discrimination against blacks. Both institutions appealed to the courts and lost.

In January 1982, the IRS reversed itself again, because of pressure from the Reagan Administration, which took the position that tax exemption in these cases was the business of Congress and not within the jurisdiction of the IRS. Confronted with widespread public protests, the Administration announced that it would ask Congress to empower the IRS to deny tax exemption to institutions which discriminate on racial grounds. Congress did not act, but the court of appeals prohibited granting an exemption to the two institutions and they appealed their case to the Supreme Court.

In arguing their cases before the High Court, both institutions appealed to the Free Exercise of Religion Clause of the First Amendment. The Goldsboro Schools maintained that their interpretation of the Bible required them to exclude non-Caucasians from their institutions. Bob Jones University contended that its policy was no longer discriminatory. It now allowed all races to enroll with the stipulation that there must be no interracial dating or marriages or advocacy of such practices.

Bob Jones University also invoked the Establishment Clause on the ground that the IRS action against it preferred religions which do not discriminate racially over those which believe that the Bible forbids racial intermarriage.

In its 7 to 1 ruling in *Bob Jones University v. United States*, 76 L. Ed. 2d 157 (1983), the Supreme Court enunciated the principle that sincerely held religious beliefs do not justify practices which contravene public policy proclaimed in congressional enactments, judicial rulings, and Executive Orders. Writing for the Court, Chief Justice Burger focuses on the authority of the IRS to interpret the Internal Revenue Code in this case. He reasons as follows: The Internal Revenue Code provides that "corporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes are entitled to tax exemption." The "charitable" concept must conform to that common law standard of charity, which requires an institution seeking tax exemption to serve "a public purpose and not be contrary to established public policy." Racial discrimination in education has been condemned by Supreme Court rulings, by the Congress in such enactments as the Civil Rights Act of 1964 and the Emergency School Act of 1978, and by Executive Orders, such as those of Eisenhower and Kennedy.

The following quotation summarizes the first line of argument and prepares us for the second: Few social or political issues in our history have been more

> vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of *Plessy v. Ferguson*, it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," or should be encouraged by having all taxpayers share in their support by way of special tax status.

Did the IRS overstep its lawful authority by revoking the tax exemption of the institutions based on its interpretation of the Internal Revenue Code? Isn't it the province of the Congress to alter the law to conform to public policy?

The reply of the Chief Justice is that Congress has expressly authorized the IRS commissioner to make the required rules and regulations for the enforcement of the tax laws. It is too much to expect the Congress to attend to the day-to-day oversight of so complex an operation. The interpretation by the IRS is consistent with established public policy that "discrimination on account of race is inconsistent with an *educational institution's* tax exempt status."

Doesn't this policy of the IRS interfere with the free exercise of sincerely held religious beliefs of those who have established Bob Jones University and the Goldsboro Christian Schools? The majority replies as follows:

> The governmental interest at stake here is compelling. . . . The Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no "less restrictive means" . . . are available to achieve the governmental interest.

As for the argument that the denial of tax exemption violates the Establishment Clause by preferring religions which do not discriminate racially over those that do, the Court offers two answers. The IRS policy is based on a "neutral, secular basis" and, therefore, does not violate the Establishment Clause. In addition, the IRS rule applies to *all religiously operated schools*, thereby negating the need to inquire whether racial discrimination is the result of sincere religious belief.

Although Justice Powell joined in the opinion of the Court, he warned that the "contours of public policy should be

ing interest in preventing fraudulent solicitations, and it accomplished this important objective by concentrating on the source of contributions, not on the content of religion. He finds no factual basis for the conclusion of the majority that there was intentional preference of one religious group over another. The state was justified in basing its exemptions on the percentage of contributions from members as safeguards against fraud. The Court, he concludes, is not sufficiently omniscient in matters of this type to substitute its judgment for that of legislators on the firing line.

Justice Rehnquist's own dissenting opinion, concurred in by the Chief Justice, and Justices White and O'Connor, describes the majority opinion as an "advisory constitutional pronouncement." What we have here, he says, is a case in which the Unification Church has no standing. To have standing to sue, a party must show that it has a personal stake involving "a distinct and palpable injury." There must be a cause and effect relationship between the challenged action and the injury. In this case, however, there has been no decision on whether the church is a religious organization within the meaning of the Minnesota law. Until this issue is resolved, the church cannot come into a federal court and maintain that it has been injured by the 50% rule.

The case should have been remanded to the lower courts to determine whether the church was a religious organization. The majority, by rushing into a decision, has, in reality, handed down an advisory opinion, contrary to past precedents and procedures of the Supreme Court.

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determined by Congress, not by judges or the IRS." He was simply unwilling to accept the majority's dictum that the IRS had the authority to decide which public policies are so fundamental as to deny tax exemption.

Justice Rehnquist's dissent held that the IRS had no authority to decide on its own that private schools practicing racial discrimination are not entitled to tax-exempt status. This is the central responsibility of Congress, and the Court, he concluded, should not legislate for Congress. The schools in the case fit into the category of "educational institutions" as defined by the Internal Revenue Code, and they are entitled to tax exemption.

Pending Parochaid Cases

Two potentially important opportunities to rewrite the constitutional principles of recent years are before the Court. *Grand Rapids School District v. Ball* poses the constitutionality of sending public school teachers into parochial school buildings to teach parochial school students. The courses ranged from remedial instruction to music and physical education. In Grand Rapids, public expenditures for this program rose from modest beginnings to $3 million in 1981-82, involved 11,000 parochial students, and included payment of rent to the parochial schools for use of their rooms. The program was enjoined and the case is pending before the High Court.

The second pending case, *Aguilar v. Fenton*, involves the constitutionality of a New York policy which permits local school boards to send public school teachers into private schools to offer remedial math, reading, and English instruction to assist low-income, underachieving students. The money for this program comes out of Title I of the Elementary and Secondary Education Act of 1965.

In both cases, parochial school classrooms which were used for publicly funded courses had to be designated as public school classrooms and all religious symbols had to be removed or draped.

Equal Access for College Students?

There apparently is no limit to the variations possible under the religion clauses. In *Widmar v. Vincent*, 102 S. Ct. 269 (1981), we enter the thicket of equal access.

The University of Kansas City provided facilities for meetings of officially registered student organizations. Under this policy, Cornerstone, an organization of evangelical Christian students, met from 1973-1977, when it was informed that it could no longer meet in the university buildings. The reason given was that Cornerstone meetings violated a 1972 university regulation prohibiting the use of its buildings "for purposes of religious worship or religious teaching."

Although twenty students formed the core of the club, its meetings were open to the public and attracted up to 125 students. These meetings included prayers, hymns, Bible commentary, and discussions of religious views and experiences.

The Cornerstone students invoked the First and Fourteenth amendments against the university's change in policy. They appealed to free exercise of religion, freedom of speech, and equal protection under the law.

The university responded by arguing that its action was dictated by the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, and by provisions of the Missouri Constitution, which required stricter separation of church and state than the provisions of the federal Constitution.

With only Justice White dissenting, the Court supported the position of the students. Justice Powell's opinion for the Court emphasizes that the university created a quasi-public forum by opening its buildings to registered student organizations. In such a forum and university atmosphere devoted to education, students have the right to freedom of speech and association. In this case, remarks the Justice, the university "has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." These are forms of speech and association protected by the First Amendment.

What we have here, points out the opinion, is the exclusion of a student group from this forum because of the religious content of its expression. The only justification for this is "a compelling state interest." Missouri argued that the compelling state interest is the separation of church and state mandated by the First Amendment and the Missouri Constitution.

However, says Justice Powell, when measured by the *Lemon* three-part rule, the university's open-forum regulation meets all three tests. Its purpose is secular because it provides a forum for religious and nonreligious speech; there is no excessive entanglement between government and religion; and the benefits that Cornerstone would receive from this forum, which is open to all forms of discourse, would be incidental. In other words, the primary purpose of the university regulation is not to advance religion. The university student handbook disclaims any approval by the university of views of the student organizations meeting there. Furthermore, in this case we are dealing with young college adults, not impressionable secondary school students. The college students should be able to understand that the university's policy is one of neutrality to religion. In addition, the Cornerstone meetings are open to religious and nonreligious students.

Therefore, continues the Justice, the university's invocation of the Establishment Clause is blunted by the Free Exercise of Religion and the Free Speech clauses of the amendment. He can find no compelling state interest in discriminating against the students on the basis of the religious content of their speech. An equal access policy, he concludes, is not incompatible with the Establishment Clause, if the policy meets the *Lemon* criteria.

The concluding paragraph of the opinion declares:

> The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of *religious speech*. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

In his concurring opinion, Justice Stevens agrees with the judgment of the Court, but finds that the reasoning unduly interferes with the right of the university to allocate its scarce resources as it sees fit. For example, the Court's use of such terms as "public forum" and "compelling state interest" complicate the case needlessly. He then resorts to examples that one does not ordinarily find in judicial rulings. The following quote illustrates this.

> Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—

one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first. Nor do I see why a university should have to establish a "compelling state interest" to defend its decision to permit one group to use the facility and not the other. In my opinion, a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like "compelling state interest."

In this case, however, the university's refusal to allow the Cornerstone students to engage in religious worship on the campus cannot be justified constitutionally. Since the activity was voluntary and, since the university had dissociated itself from sponsoring any particular religion, the university's fear of violating the Establishment Clause is "groundless."

For Justice White, the sole dissenter, the red flag is "religious speech." There is a world of difference, he points out, between religious speech and religious worship. The fact that religious worship uses speech does not bring it within the umbrella of First Amendment protections. Surely, there is a difference between religious services and worship, on the one hand, and talk about religious beliefs and religion, on the other, and a line must be drawn between them.

The university applied its regulation to Cornerstone only after it was informed by the students that they planned to offer prayers, singing of hymns, reading scripture, and teaching Biblical principles. Cornerstone students conceded that religious worship was an important part of their activities.

Has the state, through the university, imposed an unacceptable burden on the students' opportunity to practice their religious beliefs by denying them access to university facilities? By their own admission, the students indicated that, since they would now have to meet one and a half blocks from the campus, they would be less comfortable and more inconvenienced. This burden, indicates the Justice, is so minimal as to be inconsequential.

Equal Access for High School Students? It Ain't Necessarily So

The case of *Widmar v. Vincent* does not end the story of equal access; it simply raises the curtain on the drama in the secondary schools. In *Widmar*, the Court remarked that college students are sufficiently mature to understand that equal access does not reflect a university's approval of religious speech or religious worship. Did that mean that the *Widmar* rule did not apply to secondary school students? The test was not long in coming.

As a matter of fact, the test actually began before *Widmar*. *Brandon v. Board of Education*, 635 F.2d 971 (1980), dealt with the same type of issues. In September 1978, a group of high school students, calling themselves "Students for Voluntary Prayer," asked their principal for permission to conduct prayers at their high school before the official start of the school day. The principal of Guiderland High School, the superintendent of schools, and the board of education denied their request. The reason given was the Establishment Clause, which sets up a wall of separation between church and state. To grant the request, the authorities said, would be to violate the Constitution of the United States.

As is becoming customary in these types of cases, the students resorted to litigation. They argued that their case involved the Free Exercise of Religion, the Free Speech, and the Freedom of Association clauses of the First Amendment. To add greater weight to their balance in the scales of justice, they threw in Equal Protection of the Laws Clause of the Fourteenth Amendment. All that they wanted, declared the students, was the right to engage in a voluntary student activity, to which other students were entitled, without the benefit of faculty sponsorship or faculty advisors.

A United States district court dismissed the complaint of the students, and that ruling was affirmed by a United States court of appeals in 1980. The ruling pointed out that the public schools cannot be compared to a public forum, or a park, or a street corner where religious groups can air their views. A public school is a special institution of the state, and the state is required under the First and Fourteenth amendments to respect the wall which separates the church from the state. The students are free to exercise their religion, but not in the school setting which they request. Since access to voluntary school prayer was denied to all religious groups, there is no merit to the claim of discrimination.

Since the Supreme Court refused to hear the appeal, the ruling of the court of appeals was sustained. However, other cases confront directly the issue as to whether public school officials can ban meetings by religious clubs in public secondary schools.

In *Bender v. Williamstown School District*, school authorities banned such meetings, and the response was as anticipated. In June 1982, several students and their parents sued on the grounds of free speech, right of association, free exercise of religion, and equal protection under law. They took no chances. Unimpressed, the school authorities informed them that the school rule was necessitated by judicial decisions prohibiting religious activities in public schools.

The students won in the federal district court. School authorities appealed and were supported by the Court of Appeals in the First Circuit, 741 F.2d 538, (1984), which ruled that the Widmar case did not apply to high school students because they are at an impressionable age and because clubs in school buildings require faculty supervision. Since this will lead inevitably to excessive entanglement between church and state, the Widmar rule does not apply. Free speech in this type of case will have to give way to the Establishment Clause.

The Supreme Court has agreed to hear the case, and the Reagan Administration has filed an *amicus* brief on behalf of the students. The Bender ruling by the court of appeals was handed down in July 1984, shortly after Congress passed an equal access bill which requires public schools to provide all student organizations or student-initiated groups with equal access to school facilities. The bill was signed into law in August 1984.

Since the Bender case did not involve the equal access law, both the students in the case and the Reagan Administration felt that an adverse ruling might weaken the law. It is for this reason that the Administration intervened.

Another case, in Lubbock, Texas, emerged gradually as an equal access case. For a number of years during the 1970s, the Lubbock School District permitted teachers to lead students in classroom prayers and Bible reading over the school public address systems. Bibles were distributed to elementary school children. When challenged in the courts, school officials promised to change this policy. When the case came before the United States Court of Appeals for the Fifth Circuit eight years later, it was found that the practice had not been stopped. In order to avoid the continuing controversy in this case, school board officials adopted a policy permitting student groups to use school facilities for meetings "so long as attendance at such meetings is voluntary," *Lubbock Independent School District v. Lubbock ACLU*, 669 F.2d 1038, (1982).

The federal court of appeals declared this policy unconstitutional under the Establishment Clause and prohibited the use of public school facilities for meetings of student religious groups before and after school hours.

The case was appealed to the Supreme Court, and twenty-four Senators filed an *amicus* brief urging the Court to support the Lubbock School district policy. Implicit in this intervention was the threat of the Senators' supporting a constitutional amendment to overrule a decision regarded as unsatisfactory.

Apparently unimpressed, in 1983 the High Court refused to take the case, thereby permitting the court of appeals ruling to be the final word—for the time being.

Churches, Schools, and Liquor Establishments

Grendel's Den, a restaurant in Cambridge, Massachusetts, applied for a liquor license. The Holy Cross Armenian Catholic Parish objected under a Massachusetts statute which empowered churches and schools to oppose such licenses to establishments located within a 500-foot radius of schools and churches. Would you regard this as another Establishment Clause case?

Eight Justices did and one did not. Chief Justice Burger, speaking for the majority in *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505 (1982), concluded that the statute had delegated to schools (secular institutions) and to churches (religious institutions) a veto power over the granting of liquor licenses. This grant of zoning power to a church implicates the Establishment Clause. The fact that schools are included does not create a secular purpose. Since the church's power here is "standardless," and since there is no guarantee that the churches will not favor "liquor licenses for members of their congregations," the statute has the primary effect of advancing religion. In addition, this type of legislative veto in the hands of religious institutions tends to fuse governmental and religious functions, inviting excessive entanglement between church and state.

Justice Rehnquist's annoyance with the majority shows itself in his first paragraph. "Hard cases" and "great cases" make "bad law," but so do "silly cases," such as this one. What the majority has done, he complains, is transform "a quite sensible Massachusetts zoning law" into "some sort of sinister religious attack on secular government reminiscent of St. Bartholomew's Night."

The original statute, he points out, was a flat ban on alcholic beverage licenses to any establishment within 500 feet of a church or school. What the legislature decided to do was to make the law more flexible by amending it to give churches or schools the opportunity to object. This type of legislative refinement and elimination of elaborate administrative agency hearings ought to be encouraged, rather than struck down. It is unnecessary, he concludes, to use "heavy First Amendment artillery" to shoot down a sensible statute which in no way transforms churches into "third houses of the Massachusetts legislature."

Moments of Silence

At this time (mid-April, 1985), the Wall Watchers are awaiting the judicial thunderclap in the Alabama moment of silence case. More than twenty states have passed a variety of statutes mandating voluntary prayers or moments of silence at the start of the school day. Some of the legislation focuses on silent meditation or reflection; others offer the option of prayer or meditation; and one even includes a disclaimer that "the moment of silent meditation shall not be intended or identified as a religious exercise."

In *Engel v. Vitale*, 82 S. Ct. 1261 (1962), the Court ruled 6 to 1 that the New York State Board of Regents had no business writing prayers for public school children. The following year an 8 to 1 decision in *Abington v. Schempp*, 83 S. Ct. 1560, outlawed required prayers and Bible reading in the public schools. Now the Court is about to answer the question of whether states can require students to engage in voluntary prayers or in moments of silence at the start of the school day.

The Alabama case before the Court, *Wallace v. Jaffree*, began with a lawsuit filed by an attorney who opposed the practice of prayers and grace before lunch initiated by teachers in the elementary schools attended by his children. The governor responded by calling the legislature into special session, and a law was passed permitting the use of a state-composed prayer at the start of class sessions (shades of *Engel v. Vitale!*). Jaffree included this prayer statute in his lawsuit and for good measure added another Alabama law, which apparently had never been implemented, permitting teachers to announce at the beginning of the first class of each school day a moment of silence or voluntary prayer. (This interesting story and the impact of these events on the life of Jaffree and his family is told in an article in the *ABA Journal*, April 1985, Vol. 71, pp. 61-64.)

Jaffree's lawsuit combined three causes of action: the constitutionality of the practice of teacher-led vocal prayers in the public schools, the governor's prayer law, and the moment of silence statute. Jaffree lost in the United States district court on all counts, but won in the court of appeals. Although the court granted a permanent injunction against vocal prayers, according to local observers the practice still continues in some schools. (One is compelled to wonder what kind of educators knowingly disobey a court injunction, while teaching their students to obey the law.) When the case came before the Supreme Court, the Justices summarily overturned the statute allowing public school teachers to lead students in spoken prayer. After all, this had been banned 22 years ago! At the same time, the Court agreed to review only the Alabama moment of silence law. Alabama had not appealed the permanent injunction which had originally led to the lawsuit.

Jaffree's lawyers argued before the Court that the statute violates the secular purpose and advancing religion parts of the *Lemon* trinity. Alabama pleaded for a "modest accommodation" of the Establishment Clause to religious beliefs and practices.

Siding with Alabama, the Deputy Solicitor General of the United States took the position that the Alabama law was merely "informational" as to how the students can act during the silence.

Will the Court respond with a bang or a whimper? Will the Court, in view of the inflammatory nature of this controversy, engage in a hit-and-run tactic? That is, will it wait until the end of the present session, hand down its ruling on the last day, and run for cover? The losers in the case will not take their defeat lightly.

Free Exercise of Religion

Up to this point, we have concentrated on the implications and ramifications of the first ten words of the First Amendment. We now turn to the next six words, which spell out freedom of religion.

"Draft registration doesn't mean that you'll be drafted—It's just in case of Armageddon."

In the Winter 1979 issue of *Update*, the article on religion explored the ripple effect of the Free Exercise of Religion Clause on the Mormons (polygamy), Amish (compulsory secondary education law), Jehovah's Witnesses (flag salute), and Seventh Day Adventists (Saturday sabbath).

We now examine briefly several recent cases. The first is *Heffron v. International Society for Krishna Consciousness (ISKCON)*, 101 S. Ct. 2559 (1981). The state agency operating the annual Minnesota state fair required all who distributed any merchandise, including printed or written materials, to do so only from a rented location on the fair grounds. The rule was designed, under the state's police power, to facilitate crowd control; to safeguard fairgoers from deceptive solicitations; and to protect them from annoyance and harassment. ISKCON protested that the rule was an unconstitutional infringement on their practice of Sankirstan—a religious ritual which requires them to go into public places to distribute religious literature and solicit donations.

The Court's decision was a 5 to 4 ruling. Justice White, speaking for the majority, declared that the state was justified in promulgating this rule, which served several important state interests, especially that of crowd control. Any state, he declared, has the power to impose reasonable time, place, and manner restrictions, provided they do not censor the content of speech. In addition, the rule in question is fair because it applies evenhandedly both to religious and nonreligious organizations and because the rentals are to be made on a first-come first-served basis.

The four dissenters agreed with the majority on the sale of materials and solicitation of funds, but felt that the Minnesota rule went too far with regard to distribution of literature. Speaking for Justices Stevens and Marshall, Justice Brennan dissented on the ground that the Minnesota rule should have been less restrictive, exempting the distribution of literature, a First Amendment right: "If fairgoers can make speeches, engage in face-to-face proselytizing, and buttonhole prospective supporters, they can surely distribute literature to members of their audience without significantly adding to the State's asserted crowd control problem." Justice Blackmun filed a separate dissent.

In view of these differences of opinion, it is difficult to assess how the Justices will react to airport and shopping malls issues.

Religious Beliefs and Unemployment Insurance

Let us suppose that a member of a religious sect quits his job rather than make turrets for military tanks. Can he get unemployment insurance?

This is exactly what happened to Thomas, a member of Jehovah's Witnesses, when he was working for a company in its roll foundry plant. When that plant was closed down, Thomas was transferred to the department which built turrets for military tanks. Opposed to war because of his religious beliefs, he refused to work in this department. Since all the work at the company now involved the production of military weapons, Thomas quit and applied for unemployment insurance.

The state refused to pay on the basis that Thomas did not have "good cause," as required by state law. The Supreme Court of Indiana agreed that Thomas had quit voluntarily for personal reasons and was, therefore, not entitled to benefits.

Had Thomas' right to exercise his religion under the First Amendment been violated by the state? Yes, said Chief Justice Burger, speaking for all of his brethren except Justice Rehnquist. In *Thomas v. Review Board of Indiana Employment Security Division*, 101 S. Ct. 1425 (1981), Burger concluded that Thomas had terminated his employment for religious reasons because he had been forced to make a choice between his religious belief and the loss of his job.

Did the state have a compelling reason to deny Thomas his benefits? It had argued that the "good cause" condition for unemployment insurance was enacted to prevent widespread unemployment for personal reasons and to avoid probing by employers into the religious beliefs of job applicants. Although these reasons are acceptable, says the Chief Justice, they do not justify in any way interference with or imposing burdens on the religious beliefs of workers.

However, if the state is required to pay benefits to Thomas, isn't it by implication advancing his religious faith and violating the Establishment Clause? Not so, says the Chief Justice, because in this case the government is assuming the stance of neutrality in the presence of religious differences. It is not singling out any religion and advancing it.

Justice Rehnquist begins his dissent with the charge that the majority "adds mud to the already muddied waters of the First Amendment." If, he says, there is tension between the Establishment Clause and the Free Exercise Clause, it is the "Court's own making." If the majority had applied the *Lemon* criteria, he points out, they would have concluded that the Indiana unemployment law conformed to all three guidelines. In essence, what we have here, he concludes, is a High Court ruling which requires a state "to provide direct financial assistance to persons solely on the basis of their religious beliefs."

No Photo, No Driver's License

Free exercise of religion cases do not reach the courts as often as do Establishment Clause cases, perhaps because the free exercise cases deal with very small idiosyncratic sects, while the establishment cases generally involve powerful religious organizations with considerable resources. As in Establishment Clause cases, the Court is constantly seeking to formulate a principle or rule of law which will help it resolve dilemmas of individual conscience and state power. Such a case is *Holly Jensen v. Frances J. Quaring*, argued on January 7, 1985, and not decided as of the time this article was written.

Frances Quaring had been driving for

twenty years when the state of Nebraska denied her a driver's license because she refused to have her picture taken, as required by law. She explained that she believed in the literal interpretation of the Second Commandment: "Thou shall not make unto thee any graven images . . ." The issue was joined, and Quaring won in the federal district and appeals courts.

Before the Supreme Court, the state took the position that the right to drive is a privilege and not a right. It also based its case on the police powers of the state—the power to assist police officers with necessary identification; the power to stop the sale of alcoholic beverages to minors who drive; and the power to facilitate identification in financial transactions. In addition, the argument was made that to grant an exception in this case is to violate the Establishment Clause by aiding religion.

Quaring's response was that the photo requirement was a serious burden on her right to follow her religious beliefs. The state, she argued, can achieve identification by other means without interfering with religious beliefs. Finally, driving a car has become a necessity, and in certain areas it is the only mode of mobility. This development raises driver's licenses to the level of a constitutional right which cannot be denied unless the state has a compelling reason, and, in this case, the state's position is untenable.

The Solicitor General of the United States intervened on behalf of Nebraska because, in part, the government is concerned about the growing refusal of some religious groups to use Social Security numbers.

Conclusion

Despite the length of this article, it is not possible to do justice to all the important rulings of the last six years. For example, a 5 to 4 Court held in 1979 that the National Labor Relations Board had no jurisdiction over unions of lay teachers in church-operated secondary schools (*NLRB v. Catholic Bishops of Chicago*, 99 S. Ct. 1313). And pending before the Court now is the constitutionality of a Connecticut statute requiring private employers to give religious employees whatever day off they designate as a Sabbath. And then there are all those interesting decisions in the lower courts.

What is the condition of The Wall in mid-1985? It is not as high and impregnable as the Separatists want it to be, nor is it as low and vulnerable as the Accommodationists would like to see it. The Wall is still there and for some it continues to be a wailing wall, while for others it is a hailing wall. Built into the soil of history, it continues to stand as a reminder of our past and as a guide for our future.

The coming bicentennials of the drafting of the Constitution of the United States in 1987 and the ratification of the Bill of Rights in 1991 offer one of those rare historical opportunities to take inventory of where we have been as a nation, where we are, and where we should be heading. An important component of these national celebrations should be school-centered and community-wide dialogues, discourses, and discussions on the history, the philosophy, and the jurisprudence of the religion clauses as they have influenced our thinking about our unity and our diversity. □

Darwinism

(*Continued from page 16*)

First Amendment does not prohibit neutral state activity of a religious nature, the Louisiana statute violates the Establishment Clause. Because it promotes the beliefs of some theistic sects to the detriment of others, the statute violates the fundamental First Amendment principle that a state must be neutral in its treatment of religions. The First Amendment, as applied to the state by the Fourteenth, provides that the state "shall make no law respecting an establishment of religion." The Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act is a law respecting an establishment of religion. (The case is *Aguillard v. Treen*, U.S. District Court, E.D. of Louisiana, Civil Action No. 81-4787 (1985)).

Whether the U.S. Supreme Court will follow this reasoning remains to be seen. Only one thing is certain. The societal debate started in 1859 with the publication of the *Origin of the Species* is not over. Neither is the legal debate. Future courts will be called on to evaluate future laws cleverly crafted. Yet, teachers, in the words of Clarence Darrow, will continue to "teach that the earth is round and that the revolution on its axis brings day and night, in spite of all opposition."

For Classroom Use

1. Texas Attorney General Mattox in his legal opinion to the state senate suggested that the only way to avoid First Amendment infringments would be to draft a statute of "general application to all scientific inquiry which does not single out for its requirement of a disclaimer a single theory of any one scientific field" or mandate "inquiries which lie totally outside the realm of science." Given the reasoning in *McLean* and *Aguillard*, would this suffice? What other constitutional problems might be raised?

2. Most of the evolution/creation cases have been decided on the basis of the Establishment Clause of the First Amendment. What about a Free Exercise issue? Consider the following:

Mary Ridgeway has been raised in a devoutly fundamental Christian home. She, her parents and their church believe that "Darwinism" is a product of Satan's work on earth. Mary is an honors student at her high school and wants to major in computer studies in college. Her college prep major requires one year of high school biology, which provides a significant focus on "natural selection." Mary asked to be excused from these readings and discussions. Her biology teacher agreed, but warned her that the materials covered would be tested and her final grade would suffer. School district policy backs the teacher's position. Mary and her parents want the school board to adopt a policy that will accommodate their religious beliefs and not penalize Mary. They are willing to file a lawsuit, if necessary.

Activity. Have your students imagine that they are members of a law firm consulted by the Ridgeways. Working with other members of the staff, it is their job to advise the Ridgeways of their legal rights in this matter.

- Divide the class into groups of three or four students.
- Present and/or review the materials covered in this article and the one by Isidore Starr. (Emphasize "free exercise" standards.)
- Have students complete and make class presentations on one or more of the following:
  1. Discuss and draft a one-page memorandum listing legal reasons in favor of the Ridgeways' position.
  2. Discuss and draft a suggested school district policy that would accomodate the religious views of the Ridgeways.

Discuss each of the student presentations in terms of the First Amendment issues raised. □

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contents

Volume 9, No. 3, Fall, 1985

2
Free Press in America
Down with Tyranny

6
Free Press in America
The Universal Urge to Censor

10
Free Press in America
The Curious Case of the Student Press

14
Free Press in America
Putting a Lid on Dissent

18
Classroom Strategies
Should the Press Ever Be Limited?

24
Court Briefs
Religion and Crime Head the High Court's Decision List

33
Previewing the Law
Three First Amendment Cases

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FREE PRESS IN AMERICA

Down with Tyranny

John Peter Zenger's trial has all the elements of great theater—and it's true

As I begin to write this article in mid-August, 1985, certain thoughts persist in passing through my mind. It was 250 years ago, this month, that Zenger was tried for seditious libel in a court in New York City. It was in that very same city where I spent more than 25 years of my life teaching American history to high school students. What did I teach them about that historic confrontation between the pulse of liberty and the force of tyranny? What did they learn about one of the most stirring episodes in colonial times, which took place in their home town?

My memory tells me, uncomfortably, that I simply covered the skimpy textbook account without uncovering the pageantry of the proceedings and the dramatic collision between the conscience and courage of individuals and the ideology and power of rulers. If only I could turn the clock back and teach it again the way it should be taught! Better yet, what an exciting experience it can be to teach the Zenger case today against the backdrop of the coming bicentennials of 1987 and 1991. In popular terms, we have here a story of heroes and villains; in media terms, we have here a newspaper war verging on yellow journalism; and in constitutional terms, we have here the never-ending struggle to define the dimensions of liberty.

Cast of Characters

We begin with the arch-villain **William Cosby**, governor of New York and of the Jerseys. His connections to nobility through marriage and friendship brought him important governmental assignments, while his defects of character brought him needless troubles and misfortunes. In British governmental service, he was a prime example of the Peter Principle. His dishonesty as governor of Minorca led to his advancement to governor of New York, a more appropriate stage on which to practice his venality and ineptitude. He arrived in New York on August 1, 1732, and before his death, according to historian Peter Buranelli, "he had insulted the Assembly, tampered with the courts, divided his Council into venemous cliques, frightened property owners with his claims to their land, and treated leading citizens with cavalier disdain. He practiced nepotism, tried to rig elections, and violated his instructions from London." As the climax to his career, he started and lost the Zenger case. When he died in office in 1736, he was an ill, disappointed, defeated man, saved from oblivion only by the Zenger trial.

Francis Harison, flatterer-in-chief to Governor Cosby and prime wheeler and dealer. He was the real editor of the *New York Gazette*, printed by William Bradford, the official paper of the governor and his clique, which became known as the Court Party. As was to be expected, under his guidance the paper specialized in fulsome praise of the governor in everything he said and did and vituperative attacks on the governor's critics.

Isidore Starr

1576

Chief Justice James Delancey presided over the Zenger trial. A member of a distinguished colonial family friendly to the governor, he became embroiled in the Zenger controversy. Despite his education and ability, he became the governor's acolyte and, as we shall see, followed the governor's scenario. His subsequent career perhaps reflected his character in a more favorable light when he became lieutenant-governor and then governor of New York.

Richard Bradley was the attorney general in the Zenger case and is referred to in the trial as Mr. Attorney. It was he who filed the information against Zenger when the grand juries refused to indict. Apparently, that was his custom, because the colonial Assembly charged that "he was in the habit of filing informations on his own motion with a view rather to squeeze money from those he prosecuted than from any just cause." He held that office until his death.

So much for the Court Party.

We turn now to the Popular Party led by James Alexander, William Smith, Lewis Morris and Lewis Morris, Jr., Rip Van Dam, Philip Livingston, and Cadwallader Colden, a member of the Council for 50 years.

If it was Cosby who started the events which led to the trial, it was **James Alexander** who choreographed the scenario which led to victory. He was the editor of Zenger's paper, wrote many of the articles, and was chief of staff of the Popular Party's war against the governor and his Court Party.

Alexander was born in Scotland and came to New York in 1715. After studying law, he began a successful career as a lawyer and politician, holding public office as attorney general and member of the Assembly and Council. He was a man of many interests, being one of the founders of the American Philosophical Society and a leading advocate of freedom of the press. He represented Zenger until he was disbarred.

William Smith, who also represented Zenger until he was disbarred, came from England, and was a prominent lawyer in New York. During his career, he held such public offices as recorder, attorney general, member of the Council, and justice of the supreme court from 1763 to 1769.

John Peter Zenger was born in Germany in 1697 and came to this country in 1710. At the age of 13, he was apprenticed for eight years to William Bradford, the only printer in New York at the time. The irony of this relationship is that Bradford's *New York Gazette* became the organ of the Court Party, while Zenger's *New York Weekly Journal* became the voice of the Popular Party.

After traveling around for a while looking for opportunities to ply his trade, he settled in New York. There he married Anna Catherine Maulin, his second wife. Little is known about his first wife except that she died. In 1727 he started his own printing business, and fate then tapped him for a unique role in the history of freedom of expression. James Alexander and his supporters, in their campaign against Cosby's machinations and chicaneries, decided that a newspaper could be a powerful weapon in arousing public indignation and hostility toward the ruling clique. It was they who came to Zenger and suggested that a newspaper printed by him could serve as a useful tool in the campaign and as an important foil to the opposition press. Zenger agreed, and the first issue appeared November 5, 1733.

Anna Catherine Zenger plays a rarely recognized role in this story. She is the unsung heroine who, while her husband was in jail, published the newspaper each week. The only issue which failed to appear was the one following the arrest. While in jail, the only way Zenger was able to communicate with his wife was "through the hole of the door" in his cell. In his apology to his readers for missing the one issue, he explained that, despite this punishment, he, his wife, and their servants were able to keep the *Journal* alive.

Andrew Hamilton, a Scot like Alexander, was as gifted in his way as was his younger associate. He studied law in England and was, according to one account, "the only American who was ever admitted a bencher of Gray's Inn" (an organization of British barristers). When he came to this country, he became the lawyer for the Penn family and held a number of important public offices. In time, his reputation as a lawyer and orator raised him to the status of dean of the colonial bar.

When Hamilton was invited by Alexander to take over the Zenger defense, he was suffering from gout and was "nearly 80 years of age," according to historian Livingston Rutherford. More recent comments put his age as closer to 65. In any event, it was not an easy assignment for an old man suffering a debilitating illness to travel from Philadelphia to New York and step into a highly publicized trial at the last minute.

John Chambers, a young lawyer, was appointed by the court to defend Zenger when his attorneys, Alexander and Smith, were disbarred. Although he seems to have been associated with the Court Party, he acquitted himself very well until Hamilton assumed the role of chief counsel.

The Facts

Prior to the first edition of Zenger's *New York Weekly Journal,* a series of events took place in New York which explains the reasons for the paper and the nature of its articles. When William Cosby arrived in this country to assume the governorship of New York, he apparently decided to show at the earliest opportunity that he was in complete charge. He demanded that Rip Van Dam, one of the most respected men in the colony and the acting governor pending Cosby's appearance, turn over to him half of the salary which the Council had voted for Van Dam. When the latter refused to go along, Cosby decided to sue. To ensure his victory, he arbitrarily transformed the provincial supreme court into a court of equity so that his case would not have to be tried before a jury. It was widely known at that time that juries were not very sympathetic to royal governor's actions against local citizens who were popular and respected. In addition, he appointed the three justices to this new equity court "at his pleasure" instead of the legally prescribed "during good behavior."

James Alexander and William Smith represented Van Dam and pointed out the legal irregularities to the three justices. When Chief Justice Morris agreed with them and refused to support the governor, he was summarily dismissed and the second justice, James Delancey, was promoted to chief justice. The court now had two justices instead of three, each subservient to the governor. Justice Delancey is reported to have said at the time that he accepted his new post for fear that, if he did not, Cosby would appoint his lackey and unscrupulous factotum, Francis Harison.

Cosby's critics were quick to respond in the columns of the *Journal.* Numbers

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Isidore Starr is a lawyer-educator who is widely recognized as the father of law-related education.

4 and 5 condemn the governor's action in this fashion:

> A supreme Magistrate may be conceived to injure his Subjects, if in his Dealings with them, he treats them either not as Subjects, or not as Men. The Duty of a supreme Magistrate respects either the whole People, or particular Persons; and thus much he owes to the whole People, that he procures the Good and Safety of the Community, according as Laws direct and prescribe. Therefore, he injures the whole People, if he evades or suffers these LAWS to be evaded to their hurt.

The following reference was to Cosby's devious plan to deprive Van Dam of a jury trial.

> Deservedly therefore is Trial by Juries ranked amongst the choicest of our fundamental Laws, which whosoever shall go about openly to suppress, or craftily to undermine, does ipso facto, ATTACK THE GOVERNMENT, AND BRING IN AN ARBITRARY POWER, AND IS AN ENEMY AND TRAYTOR TO HIS COUNTRY.

To keep the Van Dam case alive and to counter the laudatory articles in support of the governor's actions written .by Francis Harison in the *Gazette*, James Alexander and his allies responded by lampooning Harison in the *Weekly Journal:*

> A Large Spaniel, of about Five Foot Five Inches High, has lately stray'd from his Kennel with his Mouth full of fulsom Panegericks and in his Ramble dropt them in the NEW-YORK-GAZETTE; when a Puppy he was mark'd thus FH, and a Cross in his Forehead, but the Mark being worn out, he has taken upon him in a heathenish Manner to abuse Mankind, by imposing a great many gross Falsehoods upon them. Whoever will strip the said Panegericks of all their Fulsomness and send the Beast back to his Kennel, shall have the Thanks of all honest Men, and all reasonable Charges.

The attack is continued in number 9 (Dec. 31, 1733).

> The Spaniel strayed away is of his own Accord returned to his Kennel, from whence he begs Leave to assure the Public, that all those fulsome Panegirics were dropt in the New York Gazette by the express Orders of His Master. That for the gross Falsehoods he is charged with imposing upon Mankind, he is willing to undergo any Punishment the People will impose on him, if they can make full Proof in any Court of Record that any one Individual Person in this Province (that knew him) believed any of them.

Unrelenting in their determination to bring the governor into disrepute, the Popular Party resorted to every kind of strategem. For example, Lewis Morris wrote an article in which he interviews a magician who assures him that you can determine the character and predict the conduct of a governor by merely noting the first letter of his surname. Governors whose name begins with a C "have always proved unhappy, either to the Government, or to themselves, or both."

This lively, satiric, scandalous, and irreverent approach to the issues of the day proved very popular among the readers of New York. Zenger's newspaper in all probability played a significant role in persuading Cosby to drop his lawsuit against Van Dam.

If you don't succeed, try, try again. Undaunted, the governor decided to take on the *New York Weekly Journal* with a view to driving it out of existence. Acting through his chief justice, Cosby tried to obtain a grand jury indictment against Zenger and "The Authors" for spreading seditious libels against His Excellency and His Administration. He failed on January 15, 1734, and then again on October 15, 1734. Perhaps one of the reasons for his failure was the custom at the time of clothing one's authorship with the anonymity of Roman names or pseudonyms. A grand jury sympathetic to the Popular Party could easily feign ignorance of the identity of the authors of the condemned articles. A second reason for failure to indict could have been the refusal to associate themselves with the governor's chant of "horribles."

When the grand juries proved to be uncooperative, the governor resorted to another strategem: Burn several of the issues publicly! Two days after the grand jury refused to indict for a second time, the supreme court handed down an order directing the sheriff to have four numbers of the *Weekly Journal* (7, 47, 48, and 49) burned publicly at the city hall by the hangman, an accepted practice at the time. The Council approved and requested that the Assembly join in the decision, but it refused. When the court of quarter sessions, consisting of the mayor and the other fifty magistrates, was directed to participate in the burning, they protested. Undeterred, the ceremony was performed by the sheriff, who had his "Negroe" light the flame in the presence of the notorious Harison and some officers of the local garrison.

His patience exhausted by the obstacles of due process of law, Cosby, true to character, arranged for the Council to order the arrest and imprisonment of Zenger. This was done on

(Continued on page 38)

Zenger Book Contemporary Resource

Does a series of community forums for adults have anything to do with secondary school law class? Sure, if the forums in question are part of the book entitled *Speaking & Writing Truth*.

This book will be the basis of community forums put on this fall and winter in almost every state in the nation. It contains six different role-plays of contemporary free speech/free press issues. Included are:

- "Litigating Libel: A Modern-Day Zenger," a mock trial of a case arising from an article in a student [illegible].
- "There's Trouble Right Here in River City," a role-play of a city council meeting called to consider the proposed ordinance on pornography.
- "A Case of Confidentiality," a mock appellate hearing dealing with a reporter who refuses to disclose her notes and sources even though they have been subpoenaed by the defense in a criminal trial.
- "Nazis March on Libertyville," a mock city council meeting dealing with a planned demonstration by an American Nazi group and the town's response.
- "Controlling What Goes on School Library Shelves: Censorship or Selectivity?", a role-play of a school board meeting dealing with proposals to establish a citizens' review board for the library.
- "Publishing the Nation's Secrets," a mock trial of the Stealth case, summarized in the classroom strategies articles of this issue of *Update*.

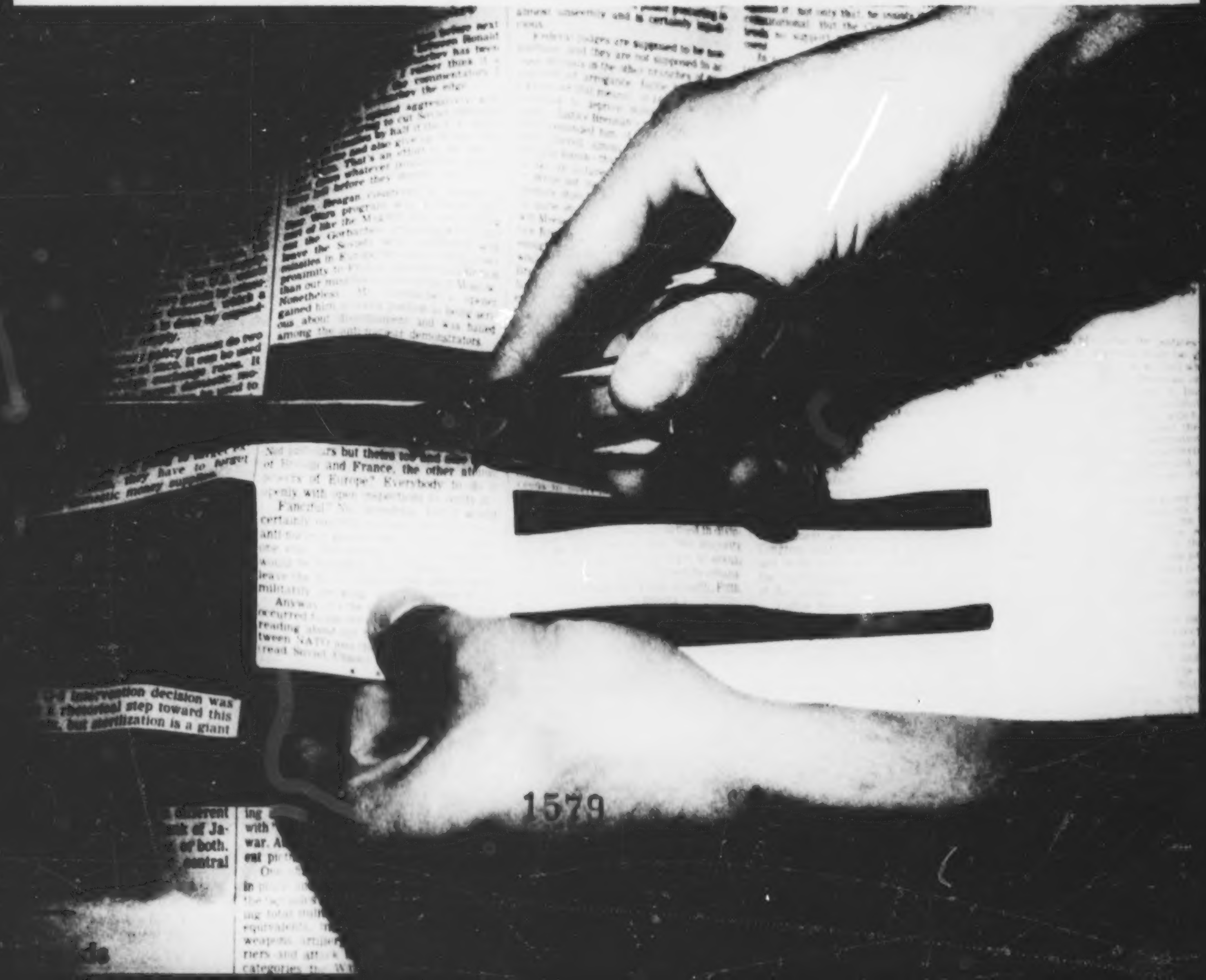
Also included are an introduction on using the forums, legal memos on each area, and a concluding essay on the Zenger trial and its role in the evolution of American free speech.

Copies are $4.95 each, and may be ordered from Order Fulfillment—468, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611. Please specify No. 468-0004.

FREE PRESS IN AMERICA Judith Krug

In all eras, in all societies,
some people will try to make things better
by limiting information

The Universal Urge to Censor



The popular perception of a "censor" is that of a blue-haired, blue-blood who blue-pencils blue movies. The role of "censor," is in fact, an equal-opportunity calling—the desire to censor appears to be common to all groups and types.

The opposite of censorship is intellectual freedom. It is the right of all persons to believe what they want on any subject, and to express their opinions orally or graphically, publicly or privately, as they deem appropriate. But freedom of expression is a hollow right unless there is someone to hear what is said and read what is written. The First Amendment has come to mean not only the expression, but access to that expression, and the second part of the definition by necessity includes access to *all* information and ideas, regardless of the medium of communication used. People must have something to think about—raw material, if you will—in order to fashion their own opinions and decisions. Once an opinion has been formed, the individual is free to express it, and the process comes full circle. The circle breaks if either the ability to produce or access to the production is stifled.

This definition of intellectual freedom is most similar to Justice William Brennan's "right to know" view of the First Amendment. This perspective says that because First Amendment expression is a primary ingredient of self-government, there must be an absolute freedom to disseminate information on issues of public importance.

Our form of government envisions a marketplace of ideas and the Constitution guarantees it. This same Constitution, and particularly the First Amendment, leads us to expect that the marketplace will work through a tug and pull of competing ideas. The main concern is that the mechanism works fairly, and permits varying ideas, concepts, information, and perspectives to compete on their own merits.

Government Secrecy

The first source of censorship is usually the government in power, as evidenced by attempts to restrict the amount of information and the range of ideas available to the public.

This is only natural, and is more a matter of who is and is not in power, rather than political ideology. The party out of power can't censor, so it is often critical of the attempts of the party in power to limit the flow of information. When it has its turn at power, the responsibilities of office often change its views, and it too attempts to limit at least some information.

Under the current administration, there have been attempts to limit the use of the Freedom of Information Act, broaden the definition of what can be classified as secret information, censor former government employees, license foreign publications, bar travel by Americans to some countries, refuse entry visas to foreign scholars, and control scientific research publication. All of these actions seriously affect the public's access to information.

Many observers argue that government efforts to control information and ideas have recently increased dramatically. In a report entitled *Free Speech, 1984*, ACLU Executive Director Ira Glasser said that "the new tactic of suppression . . . is nothing less than a covert action against the First Amendment and, ultimately, democracy itself. . . . The procedural rights to speak, publish, hear and read remain intact. But what we are permitted to speak about, publish, hear and read is increasingly limited to what the government wants us to know."

Glasser went on to say that ". . . the Reagan administration . . . seems to regard restrictions of information as a central strategy of government."

Such sentiments were echoed by noted First Amendment lawyer Floyd Abrams, who pointed out that the administration's information policy is "unique in history—clear, coherent and, unlike that of some recent administrations, not a bit schizophrenic. More important, it seems at odds with the concept that widespread dissemination of information from diverse sources furthers the public interest. In fact, it appears to be hostile to the basic tenet of the First Amendment that a democracy requires an informed citizenry to argue and shape policy."

While their contentions certainly appear Stygian, the facts support the gloominess of their comments. During the 98th Congress, the government attempted to sharply limit the scope of the Freedom of Information Act, claiming that it weakened law enforcement and intelligence gathering operations, and had become administratively burdensome. The government sought to totally exempt the CIA from the Act's provision, even though the agency had won every case in which it had sought to avoid disclosure of properly classified information.

The Act is important because it is used by authors. The files of the CIA, the FBI, and other federal agencies are invaluable resources for scholars who write textbooks, historical accounts and other works of nonfiction.

For instance, if not for FoIA access to agency records of the State Department, the Justice Department, the CIA, the FBI, and various congressional committees, Allen Weinstein's *Perjury: The Hiss-Chambers Case* (Alfred A. Knopf, 1978) would never have been written. The book is a thorough investigation of the perjury trial of Alger Hiss, the events and activities which led to his being accused of spying for the Soviet Union, and his long and contradictory relationship with his chief antagonist, Whittaker Chambers. It is considered the definitive work on this controversial subject.

In writing *Bodyguard of Lies* (Harper & Row, 1975), Anthony Cave Brown made considerable use of American and British military and intelligence files. The work is a reconstruction of the Allied efforts during World War II to deceive Hitler and the German armed forces as to when and where the D-Day invasion of Europe would take place.

Michael L. Kurtz used documents solely obtainable due to the existence of the FoIA, from the CIA, FBI and congressional committees to help form the basis for certain of his conclusions in *Crime of the Century: The Kennedy Assassination from a Historian's Perspective* (University of Tennessee, 1982). The work is a scholarly treatment of the assassination of President Kennedy which attempts to show why the prevalent theories regarding the assassination do not fit the facts as they are presently known.

It is impossible to calculate the number of books and articles that have been written as a result of information secured through the Freedom of Information Act. Regardless of the number, however, the books and the information contained in them have contributed to a more robust public debate and a more open government.

The 98th Congress, although rejecting the administration's attempt to totally exempt the CIA from the provisions of the Freedom of Information Act, did exempt the operational files of both the CIA and the National Security Agency from disclosure.

Controlling Officials

On another front, the government has tried to institute lifetime pre-publication review. On March 11, 1983, President Reagan issued National Security Decision

Herbert Jackson

Directive 84, which contained a provision requiring officials to obtain clearance from the government before publishing material that *might* be classified.

The provision is unprecedented in our nation's history, and due to political pressure has not yet been implemented. Under the agreement, all government employees with access to high-level classified information, would—for the rest of their lives—have to submit for pre-publication government review everything written by them for the general public, including newspaper and magazine articles, books, lectures, and fiction. It has been estimated that if the directive were implemented today, it would affect as many as 128,000 people, including senior officials and senior military and foreign service officers. How many it would affect in the future is open to speculation, but the number could reach into the millions.

The purpose of the directive was to prevent unauthorized disclosure of classified information; its effects would go far beyond that. The directive gives those in power a new and powerful weapon to delay or even suppress criticism about subjects of overriding national concern, by those people most knowledgeable about the issues.

This is not to say that articles and books dealing with politically sensitive issues would not eventually be published, but the publication could be delayed under terms of the review provision. If that happens, the information is no longer timely and, therefore, any debate on the topic suffers as well. In more than a few instances, the materials might never be published. The loss under the First Amendment could be incalculable.

Recently published books by authors who would likely have been subjected to a pre-publication review process include: Henry A. Kissenger's *Years of Upheaval* (Little, Brown Company, 1982); Jeane J. Kirkpatrick's *Dictatorships and Double Standards* (Simon and Schuster, 1982); Richard M. Nixon's *The Real War* (Warner Books, 1980); Spiro Agnew's *Go Quietly . . . Or Else* (William Morrow and Company, 1980); James Bamford's *The Puzzle Palace* (Houghton Mifflin Company, 1982); and Joseph A. Califano, Jr.'s *Governing America: An Insider's Report from the White House and the Cabinet* (Simon and Schuster, 1981).

Certainly, no guarantee can be made that classified information was not included in these and other writings by past or present government officials. The real question appears to be whether or not the nation was endangered by their publication. There is no doubt that each of the books listed above made a substantial contribution to public debate and public understanding of recent historical events.

Fortunately, the U.S. Senate, acting upon the belief that this provision is unconstitutional, voted to block its implementation. President Reagan then announced that he was suspending the provision, due to a lack of understanding by Congress, and promised to seek a compromise with the legislative body.

Relief at the suspension, however, was short-lived, for on June 11, 1984, the General Accounting Office (GAO) reported that, notwithstanding the White House statement, pre-publication review requirements had already been systematically imposed on thousands upon thousands of government employees.

The GAO report revealed that hundreds of thousands of federal employees already had signed lifetime pre-publication agreements; that more than three million employees are potentially covered by such procedures; that through their review procedures, numerous agencies of the federal government have become self-appointed "publishers" (more than 15,000 books and articles reviewed during 1983 alone); and that all of those measures had been implemented without evidence of any injury to the national security arising out of unauthorized disclosures of classified information.

Closing the Border

On another front, the government has intensified its use of the Immigration and Naturalization Act of 1952, popularly known as the McCarren-Walter Act, to deny visas to controversial foreign speakers. One provision of the McCarren Act directs consular officers to deny visas to those whose activities would be "prejudicial to the public interest" or "subversive to the national security." Enacted over the veto of President Truman during the height of the McCarthy era, the McCarren Act was intended to exclude those who would engage in acts of espionage, illegal incitement to violence, or who would otherwise threaten our national security. The Reagan administration has frequently invoked it to bar dissident foreign lecturers, artists and scientists from entry into the United States.

For instance, Mrs. Hortensia Allende, widow of slain Chilean president Salvador Allende, was denied a visa in 1983. She had been invited to the San Francisco area by the Roman Catholic Archdiocese, Stanford University, and the Northern California Ecumenical Council to speak to California church groups on women's and human rights issues. Application for an entry visa was denied because her stated topic would be "prejudicial to U.S. interests."

Dr. Ernest Mandel, a prominent Belgian journalist and Marxist theoretician (but not a member of the Communist Party), was denied a visa to participate in a series of academic conferences. Although Mandel's visa was denied, he subsequently was permitted to address one of his scheduled audiences by transatlantic telephone.

Dario Fo, an Italian playwright, actor, and director who is internationally recognized for his political satires and farces, and his wife, actress France Rame, have been denied visas several times, including late 1983 and October, 1984. Fo's play, *Accidental Death Of An Anarchist*, opened on Broadway November 15, 1984; it was only at the last moment—and after an extensive letter-writing campaign—that Fo and Rame were permitted entry into the U.S. for rehearsals and the opening performance. Their visas were limited to these activities.

Both had previously had been denied visas on the grounds of their alleged support of the Red Brigade and other terrorist groups, despite the fact that they publicly have denounced terrorism. Fo, however, belongs to an organization which provides legal counsel and aid to political prisoners, some of whom are accused terrorists.

In some instances, individuals are denied the right to enter the United States to personally present their particular views, but their publications are permitted to cross U.S. borders. They are sometimes permitted to speak with colleagues via transatlantic telephone.

In other instances, the government has sought to restrict information—not just people—from abroad. Under certain provisions of the Trading with the Enemy Act (TWEA), American citizens are severely impeded from receiving information, regardless of its form, from certain countries. Currently restricted are materials from Cuba, Vietnam, Cambodia and North Korea.

Sometimes material is permitted into the country, but is identified in such a way as to undermine its effectiveness. For example, in 1983, the Justice Department labeled as "political propaganda" three films on nuclear war and acid rain pro-

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Judith Krug is Director, Office of Intellectual Freedom, American Library Association.

Controlling Materials in the School

Battles are raging in many parts of the country over books in the schools. Not all of these fights are over censorship. After all, schools cannot teach every idea and school libraries cannot contain every book, so some of these disputes are really about selectivity rather than censorship. Some are in the best democratic tradition of community decision-making over the direction of one of society's major institutions.

However, many cross the line into ugly wrangles that really are about censorship. This is particularly the case when people are attempting not to set general directions for the school and school library, but singling out particular materials and demanding that they be removed from courses or the library.

The people leading this fight believe the materials contain ideas and information that are inaccurate, untrue, harmful to society, degenerative, or improper for some other reason, and should not be publicly available. These incidents will continue as long as schools and libraries maintain a semblance of their current structure and operation. In addition, censorship of library material will continue to be highly visible and be the focal point for defense of First Amendment principles.

During the last years of the 1970s, approximately 300 censorship attempts were reported to the Office for Intellectual Freedom each year. Beginning in 1980, the number of complaints skyrocketed, reaching an annual number between 900 and 1,000. These figures reflect only those incidents that can be verified. It's safe to assume that the office learns about 20 to 25 percent of the incidents that occur in the country. If that is the case, the number of censorship incidents since the fall of 1980 might well reach as high as 4,000 to 5,000 each and every year.

The censorship attempts in local libraries and schools come from every state in the union and touch on almost every area of human knowledge. Complaints come from those on the political left as well as on the right; members of the fundamentalist religious groups and patriotic organizations; teachers and librarians; and most often parents of schoolchildren.

The reasons for attacking specific titles remain the same today as they have been during the last few years. The materials as seen as unAmerican, communistic, or immoral; they handle sex in too frank or too adult a manner; or they present members of minority groups or women unfavorably.

To be more specific, the targets of current censorship pressures are adolescent novels such as those by Judy Blume, Gertrude Samuels, and Norma Klein; best sellers by writers such as Evan Hunter, Judith Guest, Harold Robbins, and Sidney Sheldon; sex education books; modern classics by John Steinbeck, Alexander Solzhenitsyn, John Knowles and Kurt Vonnegut; elementary school social studies and reading textbooks; frank descriptions of ghetto life by authors such as Richard Wright, Gordon Parks, and Claude Brown; and materials dealing with witchcraft or the occult.

While censorship from the right of center has received the most media attention in the past few years, similar efforts by people holding other social and political views are also continuing. Groups like the Council on Interracial Books for Children advocate the adoption of "guidelines" to weed out allegedly racist and sexist materials. Women Against Pornography seeks to ban all materials that, in its opinion, degrade women. And special interest groups of an apolitical, ethnic, or religious character are also active. The urge to censor is the exclusive property of no particular political or social trend, be it right, left, or center.

—JK

duced by the pretigious National Film Board of Canada, including the Academy Award winning *If You Love This Planet*. A federal judge in Sacramento subsequently said that the "political propaganda" disclaimer required by the Justice Department violated First Amendment guarantees of freedom of speech, and unfairly stigmatized the films and those who exhibited them as distributors of distorted information on behalf of foreign governments.

Less well known is the fact that American-made documentary films have not escaped censorship efforts by our own government. Under a 1948 U.N. agreement, distributors and filmmakers who disseminate their product outside of the United States pay no American export or import duties if the United States Information Agency (USIA) certifies that their films are primarily "instructional" or "informational" in nature rather than propagandistic. In making its decisions, the USIA relies on relevant government agencies.

On October 17, 1984, the USIA denied a certificate of educational character for *What Ever Happened to Childhood* on the grounds that the film "is intended primarily for American audiences, and does not present a sufficiently balanced report of the subject lending itself to being misinterpreted or misunderstood by foreign audiences lacking adequate American points of reference." Although experts consulted by the USIA acknowledged that the " 'material is representative, authentic and accurate,' " they were disturbed because in their view the film describes only "a small portion of the U.S. society . . . only an estimated 3-5 million children/youth are considered by authorities as troubled or delinquent. . . . The film would have been greatly improved if a more balanced view had been provided by showing children and families that are coping and managing in a very healthy way. . . . In summary, the material distorts the real picture of the universe and youth in the U.S."

The film is a recipient of an Emmy award for Best Information Special, a Red Ribbon at the American Film Festival, a Bronze Hugo at the Chicago International Film Festival, an AV Award from Learning Magazine and first prizes at the Information Film Producers of America Film Festival and the International Film & TV Festival of New York.

Also denied certification was the film *Soldier Girls*, first prize winner at the U.S. Film Festival. The documentary, which follows the day-to-day progress of a platoon of female army recruits going through basic training, was denied a certificate on the grounds that it contained sequences "which may lend themselves to being misunderstood or misinterpreted."

Officials of the Society of Photo-Optical Instrumentation Engineers

(Continued on page 48)

BEST COPY AVAILABLE

FREE PRESS IN AMERICA

J. Marc Abrams

The Curious Case of the Student Press

Journalism teachers may have fewer First Amendment rights than the kids they advise

As advisor to the *Pikes Peak News*, Judith Olson didn't mind criticism of the student newspaper. After all, that's what the First Amendment is all about: the freedom to express opinions, whether orally or in print.

What Olson could never accept was the day in June, 1979, when the student senate of the Pikes Peak Community College, acting with the approval of the school's administrators, eliminated the paper's entire $12,456 budget. As one senator put it, "They never printed any happy news."

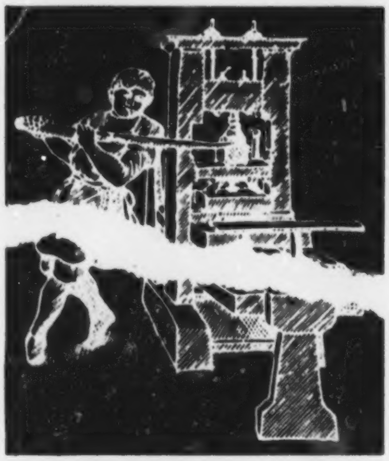
In subsequent years, Olson would fight for the right to sue the college to restore that funding—a fight that would take her to the Colorado Supreme Court and end with a precedent-setting decision that has potential impact upon the entire realm of student press law in this nation.

More than 15 years ago, the U.S. Supreme Court first recognized that public school students enjoy First Amendment protections. After that ruling in *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503 (1969), more than 200 judicial decisions have applied free speech principles to cases involving the student press at the high school and college levels.

These cases established that students newspapers have the same protection against censorship as their big brothers of the press. Just as no mayor or governor can censor the *New York Times*, so no principal or superintendent can censor the *Wilson High Bugle*. Specifically, cases have held that

- if a student paper serves as a "forum" for student expression, the First Amendment prohibits state officials—including school administrators—from interfering with it because of its content (*Gambino v. Fairfax County School Board*, 429 F.Supp. 731 [1977]);
- any student newspaper which is distributed outside the journalism classroom and publishes news, student editorials, or letters qualifies for constitutional protection from administrative censorship (*Bayer v. Kinzler*, 383 F.Supp. 1164 [1972]);
- this is so even though the school provides funds and facilities and students receive credit for their work. "The state is not the unrestrained master of what it creates and fosters." (*Antonelli v. Hammond*, 308 F.Supp. 1329 [1970]).

(See strategies article on page 18 for more on these student press cases.)



But until Olson fought for her right to sue, no court had addressed whether an advisor has a First Amendment right in the student newspaper or, alternatively, whether the advisor could represent absent students in defense of their right. The question of standing is an important one because deciding who has the right to sue will determine the shape of the lawsuit and, eventually, the shape of a body of law. Nowhere does this question have more potential impact than in the field of student press law.

The rights of student journalists do not exist in a vacuum. They exist in high schools and colleges where, all too frequently, administrators are more concerned with the maintenance of peace and quiet than with the constitutional guarantees of the students.

A nationwide survey has shown that censorship occurs almost annually in more than half the high schools in the United States.

The situation has not changed in the past decade. A 1974 survey found that the subject matter in nearly two-thirds of the high school papers in America was censored. Students were restricted on the subjects they were allowed to cover.

Control of funding and control of the campus disciplinary mechanisms are only two of the more obvious tools which can be brought to bear by administrators. Harassment of the editors or advisor and even dismissal of the advisor are not uncommon.

In only a small percentage of student

press censorship cases are students willing to pursue their rights in court. Some may have graduated and no longer want to pursue the struggle. They may lack the support of their peers and family, or be unaware of their rights to redress. They may also be unable to afford counsel or to obtain volunteer counsel.

Judith Olson understood that and fought for her ability, as the advisor, to maintain the suit. She knew that advisors will remain with institutions after the students involved have graduated, are in better financial shape, and may have a deeper commitment to the pursuit of the right to a free press.

A Fuse Is Born

Olson did not exercise control over the editorial content of the newspaper. Instead, she reviewed each article for libel and obscenity, holding to the belief that the students were ultimately responsible for the content of their own newspaper. She was their journalism instructor, guiding them along.

Although she was on hand during the senate debate and offered repeated attempts at compromise between the paper and the administration, Olson was unable to restore the funding. During the 1979-80 school year, the *News* did not publish.

Instead, Olson and her students scaled back to a magazine-format publication called the *Pikes Peak Fuse*, which was given $950 from the college's operational budget. Because of the magazine's size and lack of money, the students were able to print only 10 percent of the news-editorial content they formerly printed in the *News*.

In August, 1979, Olson and three of her students filed suit against the two-year college, alleging that their civil rights had been violated. The district court, however, granted the defendants' motion for summary judgment on the grounds that none of the plaintiffs had standing to sue.

The court reasoned that two of the students had graduated that June, and therefore the funding cut had no impact upon them. The third student worked for the *Fuse*, and therefore suffered no injury because she could still exercise her First Amendment rights through that "substitute forum."

The students did not appeal the summary judgment, but Olson did. In its decision, the Colorado Court of Appeals ruled that Olson did have standing in her own right to challenge the funding cut because of a constitutional right to choose her method of instruction, which included the *News* as one of her tools.

The State Board for Community Colleges and Occupational Education appealed that decision to the Colorado Supreme Court, which agreed to consider two issues: whether the funding cut denied Olson's constitutionally protected interest and whether, as advisor, she had standing to sue.

In order to resolve the issues, the court sought answers to two questions: whether Olson suffered actual injury, and, if she did, whether the injury was legally protected or cognizable.

The court accepted the argument that since the *News* had been eliminated as one of her teaching tools, Olson did, in fact, suffer an injury. However, the court ruled that the injury was not legally protected because the college administrators had the right to decide where financial resources would be allocated.

In the opinion, *Olson v. Board for Community Colleges and Occupational Education*, the justices said, "Olson's claim on her own behalf, as alleged in her complaint . . . does not demonstrate any injury to her First Amendment right to teach . . . The publication of the *News* . . . was not part of the official curriculum at Pikes Peak Community College."

Furthermore, the court denied Olson's request that she be granted personal standing to sue and rejected her argument that the college interfered with her right of freedom of association.

However, the court was willing to grant her request that she be allowed third-party standing in order to defend the rights of the students. Since Olson had already established that she used the *News* as an instructional tool, the court said she would have standing if she could prove one of these three factors:

- A substantial relationship had to exist between her and her students.
- Her students would have to have a difficult time in asserting their own rights, or
- The rights of other students would be diluted if the standing were not allowed.

The court felt that all three factors were present. It agreed that Olson's role as faculty advisor gave rise to a substantial relationship between herself and the students.

It further agreed that since Pikes Peak Community College is a two-year institution, the students would not have enough time to successfully assert their own rights. Also, it felt that denying standing would dilute the rights of other students "to exercise their speech and associational rights through the medium of the student newspaper."

By a vote of 4-2, the justices concluded that third-party standing should be permitted. Having overturned the decision

Drawing by J.B. Handelsman Copyright © 1985 The New Yorker magazine

"You would rather let a guilty man go free than punish an innocent one? How do you figure that?"

of the Court of Appeals, the Supreme Court remanded the case for further proceedings. A new decision in that case has not yet been reached.

The ruling in *Olson* applies only to the law within Colorado. Yet it has impact in the entire realm of student press law because reported case law in that First Amendment area is relatively scarce.

Consequently, decisions from any jurisdiction are watched closely. Judith Olson's fight will stand as a building block for future lawsuits because hers is the first case to answer whether an advisor has any First Amendment right in a student newspaper and whether the advisor can assert the rights of absent students.

However, the decision in Olson's case is clearly a double-edged sword. While third-party standing was granted by the Colorado Supreme Court, personal standing for advisors was denied.

If broadly adopted, the court's decision could limit litigation where the only question at stake was the First Amendment rights of an advisor to use the newspaper. It could have the peculiar effect of permitting an advisor to go to court to assert the rights of his/her students, while prohibiting advisors to do so on their own behalf.

Could Olson file suit if the administration sought retribution for something she herself wrote in the student newspaper? Would she have personal standing to file suit if the administration tried to transfer her into another department or relieve her of responsibility for advising the newspaper?

While the student press is recognized as having First Amendment rights, the *Olson* case makes it less than certain whether the forum of a student paper enjoys its rights on behalf of all connected with it or merely those who are students.

Nonetheless, *Olson* does assert an important principle. A basic theory in the study of government is the theory of elites. It states that those who "play the game" and lose still gain greater benefits than the people who do not play at all. Regardless of the results of future cases in the area of scholastic press law, *Olson* has redefined the language of legal rights in a field affecting millions of students by redefining who is allowed to play the game. ☐

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How Can You Win if They Won't Let You Sue?

The *Olson* decision is important becaust it may help open the courtroom doors to other advisors who sue on behalf of their students.

In our system of government, Congress is supposed to solve continuing policy problems affecting large classes of persons, while the courts are supposed to solve problems dealing with specific people and specific controversies. To assure that courts stay away from making policy, the Constitution confines courts to resolving actual "cases" and "controversies." If the standing to sue is restricted to people who are directly affected by a controversy, litigants won't be lobbyists in disguise, pushing for change through the judiciary rather than the legislature.

That's all well and good in theory, but in practice it's often hard to draw a line between an issue that's suited for the courts and one that should be resolved elsewhere. The Supreme Court has grappled with this question in many cases, and has come up with a number of formulations without ever resolving the issue once and for all.

In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court demanded that a litigant must have sustained or be immediately in danger of sustaining "some direct injury as the result of [a law's] enforcement, and not merely [argue] that he suffers in some indefinite way in common with people generally."

More recently, the Court has faced a long series of tough questions about standing, as membership organizations, civic groups, and activist organizations have attempted to make their voices heard in the courtrooms of this nation. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court stated that the key question was whether a party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adversariness which sharpens the presentation of the issues."

In a later case, *Duke Power Co. v. Carolina Environmental Study Group*, 483 U.S. 59 (1978), the Court seemed to toughen the requirements for standing, holding that the plaintiff must show that he or she suffered a "distinct and palpable injury" and a "'fairly traceable' causal connection between the claimed injury and the challenged conduct."

All of these cases deal with direct or first-party standing, where the litigant alleges that he or she has been personally injured in some way. Naturally, it's harder yet to convince a court that one who is not personally injured should be given standing to sue on behalf of others.

Nevertheless, the Supreme Court has recognized that, in certain instances, it's legally sound to allow litigants to assert the civil rights of others even when their own rights are not at stake. The three considerations for asserting third-party standing are (1) a relationship between the litigant and the people whose rights are being asserted, (2) the difficulty of absent parties asserting their own rights, and (3) the risk that the absent parties' rights will be diluted if third-party standing is not allowed. (*Carey v. Population Services International*, 431 U.S. 678 [1977], *Craig v. Boren*, 429 U.S. 190 [1976]). These requirements assure that the third party truly represents the absent party, and that there is no other way for the absent party to gain redress through the courts. Judity Olson's case is a textbook example of how a third party can meet these criteria.

Naturally courts are reluctant to grant third-party standing, but they are far more apt to do so when an important constitutional question is presented, and particularly when free speech might be inhibited if standing weren't granted. If the third party "can reasonably be expected properly to frame the issues and present them with adversarial zeal," and if there's a societal interest in having a governmental practice challenged (as there is when free speech is at stake), then courts may open their doors wide enough even to let third parties in.

Bicentennial/First Amendment Resources

Many organizations can provide help and materials on the bicentennial and First Amendment issues. Here's a brief sampling.

American Bar Association Commission on Public Education About the Law (PUAL). The adult education arm of the ABA has an ambitious program of books, conferences, and radio and television broadcasts for the bicentennial. Its book *Speaking & Writing Truth* commemorates the Zenger trial with community forums on six contemporary freedom of expression issues, including a fuller version of the "Stealth" roleplay adapted by Dale Greenawald for the classroom strategies section of this issue of *Update. Speaking & Writing Truth* contains excellent summaries of the legal issues raised in each free expression scenario. It is available for $4.95 from Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611. For more on the bicentennial program, contact PUAL at the above address, 312/988-5728.

The American Bar Association Special Committee on Youth Education for Citizenship (YEFC). The ABA's youth education program has a wide-ranging bicentennial program and has published a number of materials on the First Amendment. See especially two special issues of *Update*: "Freedom of Press on Trial" (Winter, 1978) and "Speech: The First Freedom" (Spring, 1980). Each is available from Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611, for $2.50 for single copies, $1.65 for two to three copies, and $1.25 for four or more copies (add $2 for handling on orders over $5). A bicentennial packet of nine past issues of *Update* is available for $10.50.

American Library Association (ALA) publishes the *Newsletter on Intellectual Freedom* and each year sponsors Banned Books Week—Celebrating the Freedom to Read, with an activities packet ($10) that lists challenged books, and contains a history of the Zenger trial, posters, and suggested activities. Contact ALA at 50 E. Huron St., Chicago, IL 60611. The ALA has also sponsored a film, *The Speaker*, about a free speech controversy on a campus. It is available for rental ($50) from Karol Media, 22 Riverview Drive, Wayne, NJ 07470.

American Newspaper Publishers Association (ANPA). Newspapers are naturally most concerned with freedom of expression, and this group coordinates the efforts of hundreds of newspaper-in-education programs around the country. It can put you in touch with your local paper and provide such resources as free newsletters on teaching about the First Amendment with newspapers; a free bibliography of teacher's guides and curriculum materials; and a book entitled *Free Press & Fair Trial* ($2). Order these materials from ANPA at Box 17407, Dulles International Airport, Washington, DC 20041.

Two other ANPA-sponsored materials are available from other sources. The book *Free Speech & A Free Press: A Curriculum Guide for High School Teachers* contains worksheets for students and an excellent guide to a wide range of materials. It is available for $4.50 from Thomas Eveslage, Communications Department, Temple University, Philadelphia, PA 19122. The film *A Question of Balance*, which is about free press /fair trial, is available to preview for $25 and rent for $75 from Vision Associates, 665 Fifth Ave., New York, NY 10022.

Constitutional Rights Foundation (CRF). This educational foundation has prepared a number of diverse First Amendment materials. Among the Bill of Rights in Action Student Pamphlets ($.50 each; $10 for class set of 35 copies) are *First Amendment: Back to Basics*, *The People Speak*, and *The Power of a Free Press*. Among the business and law mini-units (complete three to five hour lessons) are *Advertising and Free Speech* and *Students Are Also Citizens* ($4.95 each). Books (with teacher's guides) include *Fair Trial/ Free Press* ($3) and *Freedom of Expression* ($2.40). Order from CRF at 601 S. Kingsley Drive, Los Angeles, CA 90005.

The Law in a Free Society (LFS) Project of the Center for Civil Education is launching a national bicentennial competition. This will involve elementary, junior and senior high school classes, competing as teams, in school systems in each of the nation's congressional districts. Classes will use specially prepared study units on the Constitution and Bill of Rights. In addition, the project's [illegible] materials often touch on questions involving freedom of expression. For more information, contact LFS at Suite I, 5115 Douglas Fir Road, Calabasas, CA 91302.

The *Supreme Court Historical Society* has published the book *Equal Justice Under Law: The Supreme Court in American Life*. Both it and its instructor's guide discuss a number of landmark free speech/free press cases. The Supreme Court Historical Society, 111 Second Street, N.E., Washington, DC, 20002, can provide complete ordering information.

Materials

Probably more good materials are available on the First Amendment than on any other law-related topic. Here's a very brief sampling of commercially-available materials.

Haiman, Franklyn S., *Freedom of Speech* (1983). This sourcebook contains excerpts from cases as well as commentary on the free expression guarantees of the First Amendment. Available for $10 from National Textbook Co., 4255 W. Touhy, Lincolnwood, IL 60077.

Lengel, James G. and Danzer, Gerald A., *Law in American History* (1983). This secondary text [illegible] a number of landmark First Amendment cases. Available for [illegible] from Scott, Foresman and Co., 1900 E. Lake View Ave., Glenview, IL 60025.

McMahon, Ed, Arbetman, Lee and O'Brien, Ed, *Street Law: A Course in Practical Law* (1985). The third edition of this secondary text includes a revised and considerably expanded section on First Amendment issues, including a number of landmark free expression cases. [illegible] available from West Publishing Company, 170 Old Country Road, Mineola, NY 11501. Call 1(800) 328-9352 for complete pricing and ordering information.

Starr, Isidore, *The Idea of Liberty* (1978). A book about the First Amendment, noting many landmark cases. Available for $[illegible] from West Publishing Company, 170 Old Country Road, Mineola, NY 11501.

BEST COPY AVAILABLE

fective weapon against freedom of expression. It is the capability of using protected litigation to harass, intimidate and punish the press and private citizens alike for views and reportage that officials do not like. The weapon has been there for some years now. The trend toward using it has been growing steadily.

The recent litigation by General William Westmoreland against CBS and Ariel Sharon, the former Defense Minister of Israel, against *Time* Magazine simply spotlighted the trend. In the area of the country I know best, the Philadelphia area, 15 public officials have sued or are now suing in 20 separate libel cases against newspapers, magazines, television stations and, at least, one private citizen who served on a state judicial inquiry and review board and was critical of a state supreme court justice. The officials include two former mayors, five judges, three former prosecutors, three state legislators, one Philadelphia councilman and one member of Congress. And every single one of these officials is himself immune from being sued for libel or slander for anything he said or wrote or did while exercising his role as an official.

Decision Boomerangs

How did this alarming imbalance occur? How did we get to this dangerous junction in American democracy?

It started, of course, 21 years ago, with with the *Times v. Sullivan* decision by the U.S. Supreme Court (360 U.S. 254).

In 1960, a group of civil rights activists published an ad in *The New York Times* outlining a "wave of terror" against Dr. Martin Luther King, Jr. and other blacks fighting openly against segregation. The general tenor of the ad was correct, but the ad contained at least seven errors of fact. Although he was not mentioned by name, L.B. Sullivan, a city commissioner who supervised the police department in Montgomery, Alabama, sued, and an Alabama jury ruled against the *Times* and the authors of the ad and awarded Sullivan $500,000.

In 1964, U.S. Supreme Court overturned the verdict. Writing for the majority, Justice Brennan said:

> We consider this case against the background of a profound national commitment to the principle that debate on public issues should be unihibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

And the Court went on to say that

> erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they need . . . to survive.

If the Court had stopped there, we might be free of the problems posed by the Westmoreland and Sharon cases and the many other suits filed in recent years by public officials. But the Court did not stop there. It went on to delineate what it obviously thought was broad latitude for public discussion of government and its officials. The Court said,

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Although the majority of the Court clearly thought it was ratifying wide-open criticism of government, three justices—Goldberg, Black and Douglas—recognized that the Court had undermined the very freedom it sought to protect by putting even the slightest qualification on it.

The three justices homed right in on the "actual malice" test and warned, in the words of Justice Black, that it provided at best "an evanescent protection" for the right to be critical of public affairs and public officials.

Justice Goldberg was just as alarmed about the "actual malice" loophole the Court had created. He immediately recognized that the Court had created an imbalance in freedom of expression in favor of public officials. He argued that if officials were going to have absolute immunity from libel and slander suits for anything they said or wrote about private citizens or the press, it was essential that private citizens and the press have absolute immunity when discussing public officials and public issues.

"If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no citizen can safely utter anything but faint praise about the government or its officials," Justice Goldberg said.

> The vigorous criticism by press and citizen of the conduct of government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.

Here we are 21 years later, and it is clear that the worst fears of Justices Black, Douglas and Goldberg have come true. If anything, they are proving to be conservative in their foreboding. Public officials, indeed, are using litigation and friendly juries to mute their critics, whether they be in the press or just ordinary outspoken American citizens.

Two Decades of Confusion

The good intentions of the Supreme Court in the *Times v. Sullivan* case have been distorted. The very decision which was designed to protect the press and the public's right to robust criticism of public officials on public issues has become a weapon aimed at the heart of criticism. One of the developments was a footnote by Chief Justice Warren Burger in a 1979 court opinion. In it, he told trial judges that they were issuing too many summary judgments in libel cases. The impact of this is that increasingly juries, rather than judges, are wrestling with such highly refined legal concepts as "actual malice"—which is, by court definition, totally different from the standard dictionary definition of malice. In court terms, it means—in the words of Judge Pierre Leval of New York—"defamatory publication either in the belief that it is false or with reckless disregard of the truth."

And to complicate the problem even further for juries, the Supreme Court ruled six years ago in the case *Herbert v. Lando*, 441 U.S. 153, that people who bring libel suits are entitled to inquire into journalists' notes, rough drafts, internal memos, and—in the case of television—raw outtakes of unused film.

The result is that journalists often find themselves on trial as much for what they didn't say as for what they did say—all of this causing confusion among juries. More and more critics of officials are losing jury trials and the awards are climbing to staggering sums. True, the jury verdicts are reversed in an overwhelming majority of the cases, but the critics are put to heavy expense and trouble, to the point that it becomes easy to rationalize staying quiet instead of speaking out.

Meanwhile, lower courts, becoming accustomed to jury trials, malice tests and discovery into states of mind in cases involving journalists, are extending the same doctrines to private citizens.

Unfortunately, there are no clearinghouses that keep count of public official libel cases against the press or slander suits against private citizens, but there are powerful indications that the movement toward them has gathered such

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Eugene L. Roberts, Jr. is Executive Editor of The Philadelphia Inquirer. *This speech is reprinted from* Vital Speeches of The Day.

FREE PRESS IN AMERICA

Eugene L. Roberts Jr.

Putting a Lid on Dissent

Politicians are using libel laws to squelch criticism

Raymond S. Henderson was used to making speeches, but he never expected the reaction he got when he protested the dismissal of a black secretary and demanded that the Town Council of Braddock, Penn., reinstate her.

As president of the local chapter of the National Association for the Advancement of Colored People (NAACP), Henderson charged that the woman's ouster was "racially motivated."

It seemingly was just another chapter in American democracy—the head of a citizen's group angrily denouncing government officials for their actions. The episode, or something similar, had been acted out thousands of times before in thousands of towns all over America. It is, in fact, what many of us think America is all about. But this time there was a difference, a major menacing difference.

A few days after his appearance before the town council, a process server banged on Raymond Henderson's door and served him with a lawsuit. Five members of the town council were suing him for $100,000. They charged that he had defamed and slandered them by describing their dismissal of the secretary as racially motivated.

Today, Henderson is wondering what sort of democracy it really is when government officials can use a lawsuit to intimidate their critics.

"The lawsuit really keeps you tied up," he said. "The suit made a lot of people scared about being active. It took a lot of time for me to convince people that the national branch (of the NAACP) would come to our aid." These members, according to Henderson, were afraid that, if they lost the lawsuit, they would be held personally liable and driven to financial hardship.

As for Henderson, he is "chilled," to use a word frequently employed by the press to describe the debilitating effects of libel suits. "Whenever something controversial comes up," Henderson says, "I go to my lawyer to check what I can say without getting myself into trouble. You have to be darn careful these days."

Henderson, in fact, has made an interesting discovery—one that more and more private citizens are going to discover, to their alarm, all across the nation.

The same series of court decisions that has opened the American press to intimidating libel suits by public officials, simultaneously has opened average people to legal harassment by those who govern them. (See strategies article on p. 18 for more on this case and other alleged libels.)

All of us are going to learn in the months and years ahead, if we haven't learned it already, that freedom of expression is not the peculiar province of the press or of any special interest group. Either we all have the right to criticize government and its officials with impunity and without running the risk of financial disaster, or none of us has it. And, as long as the courts fail to realize —and then correct—the mayhem they have wrought with libel decisions, none of us has it.

An Uneven Contest

We, in short, are in the midst of a genuine First Amendment crisis. Government officials, who are totally immune from libel or slander suits for anything they write or say or do in office, are free to sue the people they are supposed to serve.

Here is the situation in America today:

Members of the U.S. Congress are immune from libel or slander suits under Article 1, Section 6 of the U.S. Constitution.

Members of the federal judiciary are immune under the "doctrine of judicial immunity"—that is, case law.

Federal agencies are immune from libel or slander prosecution under an Act of Congress.

All states have constitutional, statutory or judicially mandated immunity for judges.

Most states also give legislators immunity and give public officials "executive privilege," thus shielding them from lawsuits for actions taken in performance of their official duties. Depending on the state, that can go right down to township supervisors and councilmen. In Pennsylvania, for example, district attorneys are protected from libel and slander suits, even when they hold press conferences.

In short, the framers of constitutions, the elected legislative assemblies and the courts of this nation have spoken as one: There are officials whose functions are so important to society that their right to speak freely must be protected.

But if that is true, if these officials are so powerful, so influential and so important to society that they merit immunity, then they, above all others, are deserving of—and, indeed, require—the most intense public scrutiny and criticism. By newspapers. By radio and television. And especially by citizens and citizen groups.

Instead, what we have today is a severe imbalance where we ought to have a balance. We have a situation where the town councilmen of Braddock, Pennsylvania, can say anything they wish at their meetings about Raymond Henderson, the NAACP leader, or any other citizen without fear of being sued. But Henderson can be and, in fact, is being sued for criticizing them.

It all boils down to this: We, as a society, have now delivered into the hands of government officials the nation over—indeed, the world over—a simple but ef-

Herbert Jackson

momentum that it threatens to become an avalanche.

Bruce W. Sanford, a First Amendment lawyer who is doing a book on the libel/slander problem, believes that as libel litigation against the press has grown there has been an explosion in the number of defamation suits filed against private citizens and public interest groups. "The number of these cases was probably a few hundred a year in the '70s," he said. "But now they are approaching 1,000 or even more that that."

And Ira Glasser, Executive Director of the American Civil Liberties Union, told *The New York Times*:

> I've been seeing these kinds of cases in recent years, whereas I never saw them before. Public officials and others are telling themselves, "Hey, this is a way we can put a price on dissent that our tormentors won't be able to meet."

A classic example of putting a price on dissent occurred on Long Island, New York. A Policeman's Benevolent Association there proclaimed it would file suit against every citizen filing a misconduct complaint that was found to be unsubtantiated by the police department's civilian review board, which, by the way, dismisses 95 percent of citizen complaints. After the threat of mass libel and slander actions, the number of complaints—as you might imagine—dropped drastically.

First Amendment Against Itself

These days, even such a basic democratic exercise as circulating a petition can get average citizens in trouble—real trouble. In Washington County, Virginia, Sally Sparks and Bob Stevenson led a drive to recall two county supervisors who had voted for a utility tax without first holding a public hearing. They followed the law to the letter, drawing up petitions, circulating them in the community, gathering hundreds of signatures, then presenting the recall request to a judge.

Last August, the judge turned them down—but that hardly was the end. Supervisor Ken Matthews filed a $250,000 libel suit against the leaders of the recall drive saying that their petition—a petition written by voters, signed by voters and presented by voters to a court—had defamed his reputation. Once again, a leaf appears to have been taken from the newspaper libel litigation. The supervisor contends that malice was involved because the husband of one of the leaders of the drive had been fired from his job by the Board of Supervisors.

It also can be dangerous for average citizens to exercise another American tradition—writing a letter to the editor of a newspaper.

There have been suits against letter-to-the-editor writers in such widely scattered parts of the country as San Lorenzo Valley, California; Bristol, Tennessee; Keene, New Hampshire; and Philadelphia and Bethlehem in Pennsylvania.

In North Carolina, Robert McDonald, a staunch Republican who operates day-care centers, didn't write to his newspaper. He wrote to Ronald Reagan, then president-elect, with copies to Edwin Meese III, FBI Director William H. Webster and members of Congress.

He wrote charging that a former judge who was being considered for U.S. Attorney did not have the character or competence for the position.

A citizen's right, you say, to involve himself vigorously in debate over who will hold public office? Well, thus far, it hasn't turned out that way. The former judge sued for $1 million, contending that McDonald's two letters had defamed him and had cost him the U.S. Attorney's job.

McDonald contended that citizens must be free to "communicate candidly with federal officials concerning the qualifications of people for federal office—without fear that they will have to defend a costly libel action if they do so." Two separate federal courts have disagreed, and McDonald has had to fight all the way to the U.S. Supreme Court. (Editor's note: The Supreme Court ruled this Spring on the case of *McDonald v. Smith*, 53 L.W. 4789. By an 8-0 vote, the justices rejected the letter-writer's argument that the petition clause of the First Amendment supplies an absolute shield against libel complaints. In an opinion by Chief Justice Burger, the Court reasoned that the standards advanced in *New York Times v. Sullivan* adequately protect those who write letters.)

And we can expect suits by public officials against private citizens to grow and grow and grow in the wake of an ever-increasing number of libel suits against newspapers and television stations. Each time a big-name public figure sues a major publication and generates widespread publicity, it almost inevitably lures other public officials to try libel and slander suits against their critics—often small newspapers or private citizens or public-interest groups that can ill afford to defend themselves.

In Massachusetts, former Governor Edward J. King and former gubernatorial candidate John Lakian are both suing the *Boston Globe*. Lakian filed a $100 million suit challenging an article that portrayed him as misrepresenting his background. (Editor's note: In August of this year, a judge dismissed all charges against the *Boston Globe* in the Lakian case after a jury had (1) found that the article as a whole was neither false nor defamatory, (2) found that three of its fifty-five paragraphs were false and defamatory and had been published with knowledge of their falsity or serious doubt of their truty, but (3) refused to award even nominal damages, though its findings in regard to the three paragraphs conform to the definition of actual malice in Massachusetts.)

From the *Globe*, King seeks $3.6 million, claiming that he was defamed by political columns and editorial cartoons that held him to ridicule.

When Jane Shoemaker, a fellow editor on *The Philadelphia Inquirer*, heard of the King suit, she was incredulous. "A political cartoonist holding politicians up to ridicule?" she mused. "That's not libel. That's a job description."

And so it goes on. Sen. Paul Laxalt of Nevada has filed a $25 million suit against the *Sacramento Bee*. One state supreme court justice is suing my paper, *The Philadelphia Inquirer*, for $7.7 million, and another supreme court justice is seeking unspecified punitive and compensatory damages. William Janklow, the Governor of South Dakota, is suing Viking Press and Peter Mathiessen, the author of a book critical of Janklow, for $25 million and *Newsweek* magazine for $10 million.

Little Papers, Big Suits

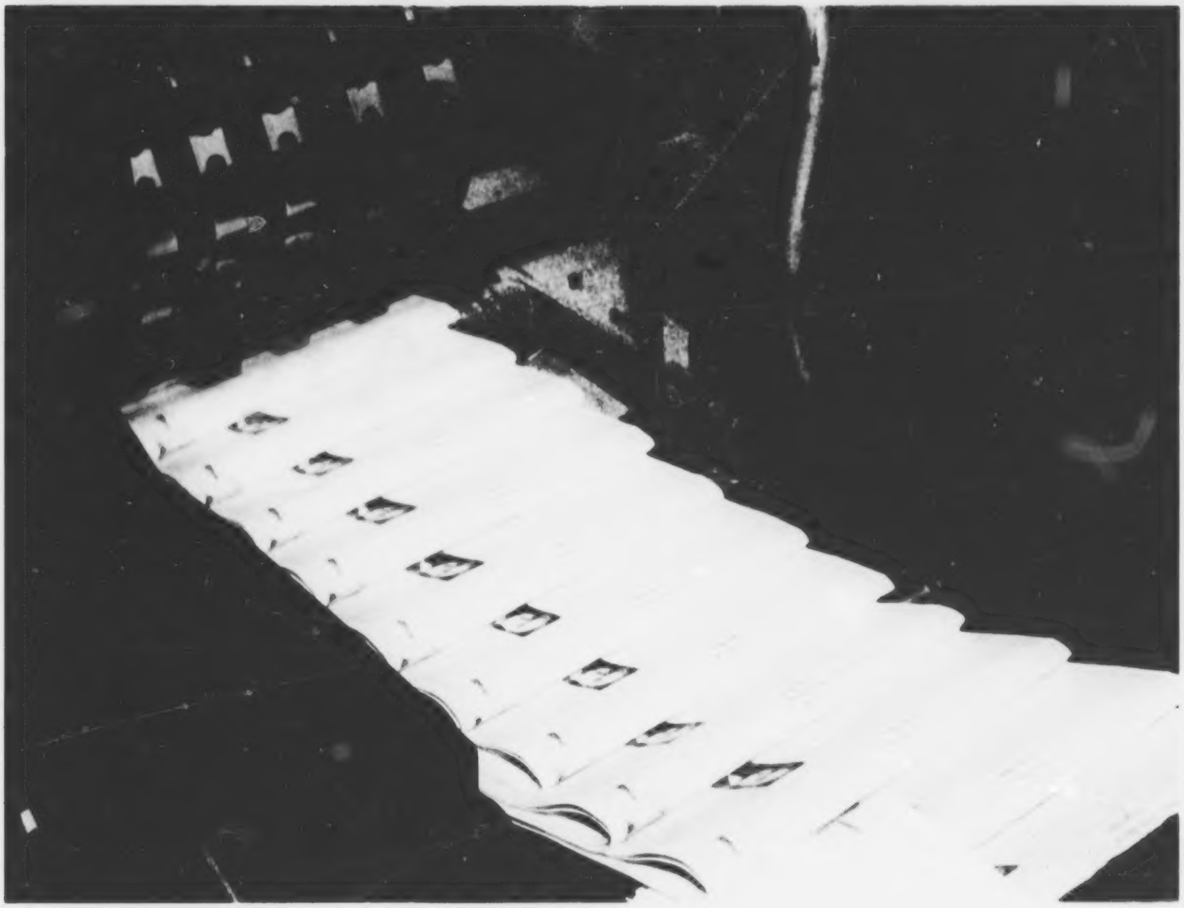
These cases involving large newspapers and publishing firms are the merest tip of the iceberg. Almost everywhere you turn in America today you hear of an embattled smaller paper.

Take, for example, St. Mary's County, Maryland, where Larry Millison, a county commissioner, has been feuding with the local newspapers for years.

The weekly *St. Mary's Beacon* published a story about changes made in the flight patterns for the Patuxent River Naval Air Station. The paper noted that overflying aircraft would cut the value of property and that the pattern routed planes around land owned by Millison. The story neglected to point out that land

(Continued on page 46)

Dale Greenawald



H. Armstrong Roberts

Should the Press Ever Be Limited?

Disputes over the press usually present
a conflict of values.
Libel, national security, and the student press
can put the issues in focus.

1591

The Founding Fathers staunchly believed that the success of their fledgling democracy depended upon an informed citizenry. They reflected the Enlightenment conviction that rational people would make wise and virtuous decisions if they had sufficient information. Free and open exchange of ideas, therefore, lay at the very heart of their concept of democratic government. First Amendment protections of speech and press sought to guarantee that citizens would have access to the knowledge necessary for them to make wise and responsible decisions.

While most citizens support the theoretical rights protected by the First Amendment, applying those rights to specific situations has sparked controversy for many years. Conflicts between freedom of expression and the right to privacy, the need to maintain social order, and requirements of national security represent only a few of the areas which have provoked spirited debate. Other articles in this issue amply demonstrate that that debate has not diminished.

First Amendment issues continue to demand attention by the Supreme Court. Efforts to limit freedom of the press and speech have taken many forms. The government seeks to limit access to what it considers to be sensitive documents. Citizen groups loudly protest the presence of school texts and library selections. Public officials claim they have been libeled. School officials attempt to censor what school newspapers may or may not publish. Virtually every day brings new efforts to legitimately and illegitimately limit public inquiry and access to information.

The centrality of freedom of the press and speech to the American political process and its continuing controversial nature demand that schools provide our young citizens with at least a basic grasp of the purpose, scope, and limitations of First Amendment rights. Simply knowing that freedom of the press and speech are guaranteed by the First Amendment is insufficient. Students must understand how central these freedoms are to the American political process. They must recognize what types of expression are protected and under what circumstances. Finally, they must thoughtfully analyze situations where rights are in conflict in order to understand that there are limits to freedom of expression. By carefully considering selected current controversial First Amendment issues, students have an opportunity to develop a substantive understanding of important principles underlying our government. In addition, they can refine their critical thinking and civic participation skills.

Articles in this issue focusing upon recent controversial First Amendment issues are useful teacher resources. The book *Speaking & Writing Truth* (see inset on p. 5) can also be used for both background information and instructional ideas While these *Update* articles and this book are informative and provide a comprehensive examination of their selected topics, they may not be the most appropriate instructional tool. The following instructional activities provide interactive strategies for examining some important issues. These activities suggest only one approach to addressing the issues, and you should modify them to fit the needs of your classes. Although it may require additional preparation time, using lawyers, judges, or other community resource persons in each of these activities can greatly enhance student learning. Therefore, please try to include a role for resource persons in any modifications which you may make. Each activity has been carefully structured to promote student gains in knowledge, problem/solving/critical thinking, and participatory skills.

Strategy

1

Public Officials, Citizens and Libel

Introduction: Using a landmark Supreme Court decision and recent libel cases students will work with a community legal expert to explore the benefits of and limits to freedom of the press and speech as they relate to government officials and their critics.

Objectives: Students will

1. identify benefits of freedom of the press/speech in a democratic society,
2. identify limits imposed upon freedom of the press and speech,
3. express support for constitutional guarantees regarding freedom of the press and speech,
4. determine if an imbalance exists in freedom of the press/speech rights accorded to government officials and their critics, and if so, how it might be corrected, and
5. develop problem solving, critical thinking and analytical skills.

Grade level: 9–12

Time Required: 2-3 three class periods

Materials:

- Community legal expert, e.g., judge, lawyer, law professor.
- Readings from James Madison and Thomas Jefferson.
- Readings about *New York Times v. Sullivan*, 376 U.S. 254 (1964).
- Worksheets for each of the readings.

Indicate to students that during the next several classes they will be working towards a clearer understanding of the meaning of freedom of the press and speech, why they are important, and limitations upon them. Review the goals of the activity with students.

Have students work in pairs to complete the worksheet on p. 20. Ask students to briefly read each quotation and ask for definitions if they encounter words they don't understand. After reviewing the vocabulary, each student should assume primary responsibility for paraphrasing one of the two quotations. They should work cooperatively to complete the tasks.

When all pairs have completed work, use their responses as the basis for a class discussion. It is important when discussing questions five and six to indicate that freedom of the press and speech is *not* an absolute. Obscenity, libel, statements creating a clear and present danger, false advertising, and statements which pose a serious threat to competing governmental interests are a few examples of unprotected print or speech.

After completing the discussing of the Madison and Jefferson quotations, tell students that for the remainder of this activity they are going to focus on limitations on a particular type of expression, libel, especially as it applies to public officials and their critics. Have students read the *New York Times* reading on page 21, and form them into groups of four. Each student should assume primary responsibility for answering one of the accompanying questions and leading group discussions of his/her question. Once a group response to the question has been determined, the group should move on to the next question. Minority views on each question should also be recorded and presented during the class discussion which follows. Invite a lawyer to critique student responses and to help in debriefing the case.

When all groups have completed their

work, use the questions as a basis for class discussion. It is important to focus upon the Court's view that because wide dissemination of information is necessary in a democracy, public officials inevitably face criticism. Justice Brennan, in the majority opinion in *Sullivan*, wrote:

> We consider this case against the background of a profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

Regarding the errors in the ad, the Court concluded that erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space that they need . . . to survive." In addition, the Court felt that some protection should be accorded public officials. The majority opinion concluded that public officials had grounds for a suit if they could prove that the statement was made with "actual malice"—that is, "with the knowledge that it was false or with reckless disregard of whether it was false or not."

During the Debriefing:

- compare the Court's reasoning with that presented by the students,
- consider the fairness of exposing public officials to public criticism,
- consider the consequences of shielding them from public criticism, and
- discuss what behaviors helped groups to work well together and complete their task and which ones inhibited group performance. How can groups work more efficiently the next time we do group work?

Critics contend that the Sullivan case opened a Pandora's box by allowing public officials to sue for libel under certain circumstances. Some observers contend that public officials have used this loophole to silence their critics by bringing frivolous suits which are costly to defend. Rather than incur the risk of a costly defense, watchdog citizens simply remain quiet. To examine this issue, have students read The Case of Raymond Henderson (see inset on p. 22), when they have finished, have students work in pairs to respond to the questions. Use the questions as a basis for a class discussion. If possible invite a local political leader to critique student responses.

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Worksheet 1

James Madison wrote:

> A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

Thomas Jefferson commented:

> I know of no safe depository of the ultimate powers of the society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

Instructions:

Work together with one other student to complete the tasks on this page. Compliment your partner when he/she has a really good idea. For the first task each of you should take one of the quotations above and rewrite it in your own words. When you are done, share your statement with your partner and ask if he/she agrees that your statement is accurate.

1. James Madison: ____________

2. Thomas Jefferson: ____________

3. Do you agree with Madison and Jefferson? Why or why not?

4. Madison and Jefferson felt that if citizens could listen to all of the ideas and arguments on both sides of an issue they could select the best idea. Why is freedom of the press and speech important if Madison's and Jefferson's opinions are to succeed?

5. Does the idea that citizens need to learn all of the possible opinions about an issue mean that anyone can print or say anything at any time? Why or why not?

6. Too much information can be confusing. Should we let experts decide issues and support their decisions? Why or why not?

7. If you feel that what people can print or say should be limited, what kinds of limits would you impose? Give some example of what you would prohibit. How can you impose these limits and still be certain that everyone has access to all of the opinions on a topic?

Strategy

2

A Threat to National Security or Information for the Public?

Using a hypothetical case based upon several recent Supreme Court cases, students will develop a personal position regarding the appropriate balance between the public's right to know and the need for national security.

Objectives: Students will

1. explain how national security needs and freedom of the press and speech can be in conflict,
2. recognize that public decision-making requires access to information,
3. identify appropriate limits upon freedom of the press and speech with regard to national security, and
4. develop critical thinking and analytical skills.

Grade level: 9-12

Time Required: 2-3 periods

Materials:

- Student Reading #1 Case Background
- Student Reading #2 "Stealth Sees the Light of Day" (see inset)
- Student Reading #3 Group Tasks
- Student Reading #4 "National Security v. Free Press: You Decide the Balance"
- Legal Memorandum (For use by teacher or resource person during debriefing).

A lawyer, judge and a newspaper reporter would provide excellent resources to critique student responses and to help with debriefing.

Student Reading #1 Case Background

On August 8, the monthly magazine, *Masses*, published an article that described the operation of the Stealth Missile program. Officials of the U.S. Defense Department seized all copies of the edition and obtained an injunction to stop its publication. They contended that it revealed classified military secrets. *Masses* filed suit charging that the government's action was unjustified prior restraint (seizing a publication before it is released to the public), which violates the First Amendment of the U.S. Constitution. The editor felt that citizens need to have accurate information for making decisions.

While attorneys for both sides were preparing for a courtroom battle, another magazine, *The Guardian*, acquired a copy of the original article and published it. Copies were widely distributed. The government decided to file criminal charges against the author of the Stealth article and the editors of both magazines, although it admitted that the material in the article did come from public domain sources. The government countered, however, that although the information in the article was available to the public, it was still classified information and, as such, was subject to the same protection accorded any other classified material.

(Student reading #2 is the inset on page 23.)

Student Reading #3 Group Tasks

1. What are the major tasks in this case?
2. What issues are in conflict?
3. Review the U.S. Code concerning espionage (see Reading #2). Do you think that it applies in this case, or does it just apply to individuals who directly transmit sensitive information to enemy agents?
4. Carefully reread all of the readings and list as many arguments as possible in favor of convicting the author and editors.
5. List as many arguments as possible in

Libel Student Reading 1: New York Times v. Sullivan

Libel is publishing a false statement which damages someone's reputation. Most public officials are fully protected by the Constitution, acts of Congress, or state constitutions and statutes, for any statements which they may make in an official capacity.

While acting as public officials, most cannot be sued for anything they may say or write. While public officials cannot be sued for libel, their civilian critics *can* be sued, but only if public officials can prove that the statements about them were made with either malice or reckless disregard for the truth.

The standards regarding libel or public officials derive from a Supreme Court case, *New York Times v. Sullivan*. In March of 1960, *The New York Times* ran a full page advertisement calling for support of blacks protesting civil rights issues in the South. It described specific abuses and activities in Montgomery, Alabama. For example, it said that blacks faced an "unprecedented wave of terror," and went on to describe police harassment of Dr. Martin Luther King, Jr. No specific names were mentioned. The ad cost $4,800 and was placed by a gentleman who was known to the *Times* as a responsible person. However, the ad contained numerous inaccuracies. For example, police had been called to a college campus, but had never surrounded it, and the campus dining hall had never been locked.

L.B. Sullivan was a member of the County Commissioners in Montgomery. His group supervised the police department. He said that some of the incidents described happened before his tenure in office. In addition, he contended that people who knew him associated him with the ad. Some had indicated that his activities threatened their friendship and that if it were their choice he wouldn't be retained in his office. Sullivan sued the *Times* for libel.

Student Questions:

1. What are the important facts in this case?
2. What issues must the Court consider?
3. What difference, if any, is there between writing a letter to the editor saying derogatory things about a citizen of your town and criticizing the police chief for not doing his/her duty?
4. Do you feel that Sullivan and other public officials relinquish some of their rights when they become public servants? Should they be less protected from criticism than other citizens? Why or why not?
5. Should newspapers be required to prove that all ads, articles, and editorials are true? How might such policy influence freedom of the press?
6. Should Sullivan win his suit? Why or why not?

favor of acquitting them.

6. Should the press have an unlimited right to print information about the military? Why or why not?
7. Should the government have an unlimited right to prohibit publication of any information about the military? Why or why not?
8. What criteria would you use to help you to decide how to balance the right of citizens to have access to information versus the right of the government to maintain national security? How can you decide what should be printed and what should not?

Student Reading #4
You Decide the Balance

Below is a list of topics which might be published. Which one would you allow the press to publish, and which ones would you prohibit. Why? Be certain to explain why you feel national security or freedom of the press is more important in each case.

1. ______ The location of U.S. troops during wartime.
2. ______ The location of U.S. bases overseas during peacetime.
3. ______ A description published in the 1980s of U.S. government policies and action in Vietnam during the 1950s and 1960s. This document is classified because it reveals that our government did many things to which most citizens would object.
4. ______ A classified description of how U.S. missiles are targeted.
5. ______ A classified government document describing shoddy equipment and training being provided to U.S. troops.
6. ______ A classified document explaining why a major weapons system had huge cost overruns that totalled millions of dollars.
7. ______ An explanation of how to build a nuclear weapon. All information came from interviews or other public sources which were not classified. Government leaders said publication of this information was a threat to U.S. security.
8. ______ Publication of an autobiography describing a CIA agent's life as a spy five years ago. The book describes how U.S. agents operate.
9. ______ A list of the locations of U.S. nuclear bomb plants and the amount of radioactive compounds they release into the air. Some of these plants are near major cities.
10. ______ Notes taken at a closed congressional hearing into the failure of the U.S. intelligence community to be prepared for an attack upon a U.S. military base overseas.

Procedures

Ask students to read Student Readings #1 and #2. Respond to any questions and clarify vocabulary as necessary. Assign students into groups of four with each person being responsible for answering two of the questions on Student Reading #3. Distribute Student Reading #3 and provide sufficient time for each group to complete its task. Although each student is primarily responsible for two questions, each group should try to reach a consensus answer for each. If that is impossible, minority opinions should be included when groups present their responses to the class. Move from group to

Libel Student Reading 2: The Case of Raymond Henderson

As leader of the local National Association for the Advancement of Colored People (NAACP), Ray Henderson was involved in cases of discrimination in a gloomy Pennsylvania mill town. He had irritated a lot of community leaders by his vigorous efforts to protect what he felt were minority rights. The current situation seemed like a lot of the others. The town council had recently fired a black secretary. Ray thought that there was only one reason for the firing—racial prejudice. At the first council meeting after the firing, Ray told the council members in no uncertain terms that he felt that the firing was "racially motivated" and he demanded that the town rehire the secretary.

This incident seems to be another example of democracy in action. An irate citizen was expressing his views to local political decision-makers. However, Ray's angry speech in the council chambers was not the end of the story. Shortly after his presentation, Ray Henderson faced a libel suit. Five members of the town council contended that Henderson had defamed their characters by using the term "racially motivated." They were suing him for $100,000.

Questions to Consider:

1. Briefly describe the major events in this story.
2. List as many reasons as possible why the town council might have sued Ray. Are there any reasons for suing Ray even though you have a weak case and may not win? If so, what are they?
3. Why do you think the council sued Ray?
4. Which of the reasons in question 2 seem to be appropriate and a proper use of the legal system? Which do not?
5. If you were Ray, how would you feel? How might this suit influence your behavior? Why?
6. How might this suit influence other people who are involved in criticizing actions of the town council?
7. How might the right of public officials to sue their critics influence public debate on political topics?
8. In the 1970s, cases like the one against Ray numbered several hundred each year. Now they are over a thousand. Many of these cases involve newspapers. How might this change influence what newspapers say about political figures? How might this influence what the public knows?
9. What are possible consequences of abolishing the right of public officials to sue their critics for libel? Consider consequences for both the public and for public officials.
10. Should there be changes in the right of public officials to sue newspapers and other critics? If so what are they? If not, justify current practices.

group to make certain that they are on task and to respond to any questions.

After all groups have responded to the facts of the case and the issues in conflict (questions 1 and 2), discuss these as a class. It is important that students have a grasp of these fundamentals before progressing to the remaining questions. When all groups have completed their work, debrief the activity by discussing each question. Solicit input from each group. Students should recognize that freedom of the press and national security can be in conflict. In addition, they should be aware of the dangers of both total freedom of the press as well as total governmental control of information. Finally they should begin to develop criteria for deciding how to balance these conflicting issues. A judge or lawyer and a newspaper person should critique student responses.

Student Reading #4 can be completed by individuals or pairs of students. A general class discussion of each question should follow, and a lawyer, judge and newspaper person might make a valuable contribution by commenting on each situation. After examining all of the situations, ask students to analyze their responses in order to develop some general guidelines for determining what should and should not be censored.

National Security and Freedom of the Press: Legal Memorandum

Cases involving national security and freedom of the press have established some guidelines in this area, but much ambiguity and controversy remains. The Stealth scenario has some similarities with the 1979 case of *United States v. The Progressive Inc.*, 486 F. Supp. 5 (D. Wisc. 1979). In that case, the *Progressive* published an article, based upon public domain documents, describing how to build an H bomb. The *Progressive* was making a statement about the proliferation of nuclear knowhow. The government sought and obtained a temporary restraining order, and the U.S. Department of Energy initiated civil litigation under the 1954 Atomic Energy Act. While the case was in the courts another newspaper published a letter to the editor which contained much of the information which had been in the original *Progressive* article. At that point the government dropped its suit, leaving unresolved a variety of constitutional and legal questions.

A major issue in the *Progressive* case involved prior restraint—whether publication of a paper or magazine could be halted prior to distribution. In *Near v. Minnesota*, 283 U.S. 697 (1931), the Supreme Court recognized that prior restraint could be exercised only in extreme cases. These included: restricting obscene publications, avoiding incitement to acts of violence or overthrow of the government, and preserving national security. The majority opinion indicated that greater latitude for prior restraint would be granted during wartime.

New York Times v. United States, 403 U.S. 713 (1971), also dealt with the balance between national security and freedom of the press. Although the documents released in this case were top secret, they did not endanger national military security. They did, however, embarrass the government for engaging in questionable practices and policies in Southeast Asia during the 1950s and 1960s. In this case two justices indicated that prior restraint was never appropriate, four felt that it was admissible under certain conditions which were not met in this case, and three might have restrained publication in this case if a fuller record of the facts were available.

In *U.S. v. Heine*, 151 F. 2d 813 (2nd Circuit, 1945); *cert. denied*, 328 U.S. 833 (1946), a judge decided that gathering information *entirely* from public sources was not a crime. Two other cases considered transmission of classified informa-

(Continued on page 37)

National Security Student Reading #2

Stealth Sees the Light of Day

The Masses

August 8, 19____

Stealth's radar-evading technology was aptly named. It can dodge detection, allowing missiles to make out-of-nowhere entrances and exits that surprise the enemy. But the real secret of Stealth is that it relies upon mechanisms similar to the "fuzz buster" used by speed demons on every interstate in the country.

The information in this article was gathered entirely from sources readily available to anyone. It was obtained from U.S. Air Force magazines and employee brochures, from assembly-and-maintenance instructions for a fuzz buster, from books, from articles, from interviews, and from logical deductions. I am writing this article to show that no scientific technology can remain secret for long. We cannot restrict knowledge about what is basically a natural phenomenon. The secrecy around the Stealth project only allows the Pentagon to continue the arms race. American defense strategists offer Stealth as an Obi-Wan-Konobi-like miracle. They would protect us from the Malevolent Empire by restricting information, hoping to convince us that this military miracle will save us.

The truth is that Stealth is only an application of relatively simple laws of physics. The secrecy surrounding this program only hides cost overruns and keeps from the public information which would reveal our prized defense system as little more than an overgrown fuzz buster. What we should learn from this article is to become more active in promoting world peace, to keep a closer watch upon the Pentagon and its big buck spenders, and to realize that military secrets aren't secrets for long. Anyone who wants can find most of the information on most programs in easily available places.

(The remainder of the *Masses* article is devoted to a detailed description of how the Stealth system operates).

The key elements of espionage, according to the U.S. Code are:

- "Gathering, transmitting or losing defense information" with the "intent or reason to believe" that the information would be used to the injury of the United States, or to the advantage of any foreign nation;
- "unauthorized" possession of, access to, or control over any material relating to the national defense which could be used in a similar manner; and
- disclosure of classified information, "specifically designated by a U.S. government agency for limited or restricted dissemination or distribution."

COURT BRIEFS

Religion and Crime Head the High Court's Decision List

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Paul Conklin

1597

It was the "Angels With Dirty Faces" term for the Supreme Court, as religion and crime emerged as the dominant motifs. And like the old Warner Brothers movie, it delivered some real suspense, a few laughs, some tears, and a lot of surprises.

The biggest surprise of all, perhaps, was the centrist tenor of the term. The radical swing to the right that many observers saw in the Court's last term looked more and more like just another bend in a crooked road. The Warren era is over, that much remains certain, but the Burger era remains one more of retrenchment than of outright reversal. Thus when the curtain came down on the 1984-85 term, the wall which separates the church and state was still standing; the accused still had a litany of constitutional rights; and the nation's conservatives were blasting the Court with as much fervor as the nation's liberals. Everyone, it seems, is a critic, but the show had barely ended when the people started hollering for more. So stay tuned; the sequels should be great.

Religion and the Court

"Congress shall make no law respecting an establishment of religion." The first ten words of the First Amendment to the United States Constitution, known commonly as the Establishment Clause, have proven to be a lawyer's dream and a teacher's nightmare: they are profoundly important to an understanding of contemporary constitutional law, but they defy real comprehension. The Supreme Court, of course, has done its share to perpetuate the status of the Establishment Clause. For the past three decades the Court has kept the clause both "hot" and confusing. This term, the Court issued a series of controversial decisions that—while superficially consistent among themselves—clearly indicate that the precise dictates of the Establishment Clause are destined to remain elusive.

It was some 180 years ago that Thomas Jefferson first praised the Establishment Clause for "building a wall of separation between church and state." Jefferson's metaphor was constitutionalized by the Supreme Court in 1879, and has stood—on a more or less sound foundation—ever since. The wall, however, has not proved impenetrable; recent opinions of the Court have described it with such awe-uninspiring adjectives as "blurred," "indistinct," "variable," and "dimly perceived." The rhetoric of our most recent presidential campaign led some observers to posit that the wall was, in fact, ready to come tumbling down. But vague, shadowy and ill-defined though it may be, the wall of separation still stands. This past term, no less than four pieces of major legislation ran smack into the "dimly perceived" wall—with constitutionally fatal results.

Silence, Prayer, and the Wall

The most controversial casualty of this past term was Alabama's "minute of silence" law. At least 25 states have laws which authorize a moment of silence in their public school classrooms. Alabama's, however, was unusual; it expressly authorized the minute of silence for "meditation or voluntary prayer." The reference to prayer proved to be a fatal infirmity; on June 4, in the case of *Wallace v. Jaffree*, 53 L.W. 4665, the Supreme Court struck down the Alabama law for violating the Establishment Clause.

In reviewing the legislation, the Court applied a three-pronged test first announced in the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under that test, legislation can survive scrutiny under the Establishment Clause only if: (1) it has a secular purpose; (2) its principal effect is to neither advance nor inhibit religion; and (3) it does not foster "an excessive government entanglement" with religion. Like the wall of separation itself, the continued viability of the *Lemon* test had been cast in some doubt. In recent opinions, the test had been modified, criticized, and—in one Establishment Clause case—completely abandoned. (See *Marsh v. Chambers*, 463 U.S. 783 (1983).) Even the author of the test, Chief Justice Burger, had discredited his three-pronged formulations as no more than "signposts" for review. But despite the clamor, the *Lemon* test survives, and its continued efficacy spelled doom for the Alabama minute of silence law.

The Alabama law didn't get far under the Court's three-pronged analysis. It failed at prong one. The Court could find no secular purpose for the minute of silence law. All evidence, in fact, indicated that the law was solely intended to return prayer to the public schools, a legislative goal long ago voided by the Court. The sponsor of the bill, State Senator Donald Holmes, inserted into the legislative record a statement indicating that the legislation was an "effort to return voluntary prayer" to the schools. When questioned at trial whether he had any other goal in mind, Senator Holmes candidly—if ungrammatically—responded that "no, I did not have no other purpose in mind."

The record in the case also indicated that the law was achieving the desired results. The seven-year-old child of Ishmael Jaffree, the plaintiff in the case, had indeed been engaging in "voluntary" prayer—out loud, in unison, and following the lead of the classroom teacher. Jaffree had repeatedly—and unsuccessfully—requested that the "devotional services" be stopped. In the end, they were stopped only by the intervention of the Supreme Court.

The Court's opinion, of course, was not a unanimous one. No less than five separate opinions supplemented the decision of the Court—two in concurrence (by Justices Powell and O'Connor), and three in dissent (by Justices White and Rehnquist and Chief Justice Burger). Perhaps the most provocative was the thoughtful opinion of Justice Rehnquist. Rehnquist mixed historical analysis with his singular brand of judicial conservatism to conclude that the Establishment Clause prohibited nothing more than (1) the designation of a "national" religion and (2) discrimination among religious sects. Many of the other justices made a point of thanking the Court's most consistently conservative member for his contributions to their understanding of the First Amendment; none, however, expressed more than a mild inclination to join in his views at this date.

Wallace v. Jaffree appears now to be one of those cases that is less important for what the Court decides than for how the Court decides it. Despite many expressed reservations, the Court's analysis in *Jaffree* confirms both the existence of the wall of separation and the viability of the *Lemon* test for measuring it. Absent a change in personnel, both are likely to endure throughout the foreseeable future.

The Court also offered some surprisingly explicit views on what types of minute of silence legislation would pass constitutional muster—views not always necessary to the resolution of the Alabama case. Parts of some opinions, in fact, read like a how-to manual for state legislatures. The Court indicated, for example, that a state law which does no more than protect the student's right to engage in voluntary prayer during a moment of silence—a right guaranteed by the Free Exercise Clause of the First Amendment—is constitutionally distinguishable from a law that is actually intended to encourage or endorse that prayer. In this regard, the Court noted that Alabama already had a law which authorized a minute of silence "for meditation." The Court indicated that this law was appropriate, and that the students were constitutionally entitled to use this minute for voluntary prayer. The additional Alabama law—which included the authorization for "voluntary prayer"—was thus wholly unnecessary to secure the student's "free exercise" rights. Unless this later statute was meaningless, its only purpose could be to "convey a message of State endorsement and promotion of prayer"—an impermissible state objective. The difference between protection and promotion is thus the difference between a valid and invalid minute of silence law.

What, then, will be the fate of the remaining minute of silence laws? According to the Court, the answer is to be found in their purpose. Laws which are intended to return prayer to the schools will clearly not pass constitutional muster—and the justices have indicated that they are willing to look beneath the surface when this religious purpose is disguised. Laws, however, with a "clearly secular purpose"—the creation of a time for reflection, or even the preservation of an otherwise threatened right to freely exercise religious beliefs through voluntary prayer—will survive scrutiny. Hairsplitting? Perhaps. Confusing? Undoubtedly. But no one ever said that a constitutional democracy was easy.

Parochiaid and The Wall

Two other pieces of education-related legislation were shattered at the wall of separation this term. Both involved "parochiaid"—public aid to parochial schools. In *Grand Rapids School District v. Ball*, 53 L.W. 5006, the Court struck down Michigan's "community education" and "shared time" programs. And in the same-day decision in *Aguilar v. Felton*, 53 L.W. 5013, the Court invalidated New York City's use of Federal Title I funds to pay public employees who teach in parochial schools.

The *Grand Rapids* decision was not unexpected. In the school district's community education program, part-time public school employees (usually full-time parochial school instructors) were hired to teach "enrichment" courses on premises (usually parochial schools) leased for the occasion. The classes were held at the conclusion of the regular school day. In the shared time program, full-time public school teachers taught classes in nonpublic schools that were intended to supplement the "core curriculum" courses that Michigan requires for accreditation. The classes were held during the regular school day. Although the students in the two programs had been deemed "part-time public school students" by the school district, they were, in fact, the same students who otherwise attended the nonpublic schools where the programs were offered.

The Court found that the Grand Rapids programs failed the second prong of the *Lemon* test: the programs impermissibly advanced religion. The Court cited three ways in which the programs had the effect of promoting religion.

> The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

Five justices joined in the opinion of the Court. Justice O'Connor and Chief Justice Burger agreed that the community education program violated the Establishment Clause, but disagreed as to the shared time program. The difference, for them, was that the shared time teachers were not parochial school employees, so they were unlikely either to be perceived to advance religion or to have that actual effect. Justice White, long at odds with the Court's interpretation of the Establishment Clause, dissented completely from the ruling. He was joined by Justice Rehnquist, who reaffirmed the strict constructionist views he articulated in *Wallace v. Jaffree.*

The *Aguilar* decision was more surprising. Title I of the federal Elementary and Secondary Education Act of 1965 authorizes financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families. The city of New York had used Title I funds to pay public school teachers to teach parochial school students on the premises of parochial schools. The city carefully organized and monitored the teachers to ensure that the instruction was devoid of religious content.

The Court invalidated the New York program. In an almost apologetic opinion, the Court held that the Title I program could not pass the last two prongs of the *Lemon* test. The Court praised the efforts of the city to monitor the religious content of the Title I courses, but held that those efforts—even if effective—would only result in the "excessive entanglement" of church and state. "Even where state aid to parochial institutions does not have the primary effect of advancing religion," the Court noted, "the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid." Such was the case here. Because the aid was provided in a "pervasively sectarian environment," and because ongoing inspection was required to ensure that the instruction included no religious message, "the scope and duration of New York's Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid."

Justices White, Rehnquist and O'Connor and Chief Justice Burger all filed dissents. The Chief Justice professed particular dismay over the "human cost" of the decision: countless schoolchildren would be denied desparately needed remedial teaching services funded under Title I. The Chief Justice concluded:

> The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.

The crucial vote in *Aguilar*, and perhaps the most poignant opinion, was delivered by Justice Powell. Justice Powell provided the swing vote in a number of significant cases this term; it was his vote which ultimately decided all the major Establishment Clause cases. The justice recognized the "difficult dilemma" created by the Court's Establishment Clause analysis, and regretted that the Court was forced to invalidate "these two educational programs that concededly have done so much good and little, if any, detectable harm." But the First Amendment demanded no less. "The risk of entanglement," the justice wrote, "is compounded by the additional risk of political divisiveness stemming from the aid to religion here." This "risk of con-

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tinuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental aid" could, if unchecked by constitutional limits, "strain a political system to its breaking point."

Sabbaths and The Wall

If the state of Connecticut had declared Sunday "the state Sabbath," and adopted a law that no employee should be forced to work on the state Sabbath, its actions would clearly violate the Establishment Clause. Such a law would constitute official governmental promotion of religion, and, moreover, would entail the discriminatory advancement of a particular religion—Christianity—over all others. Mindful of these restrictions (and reminded of them by the Connecticut Supreme Court), the Connecticut legislature instead adopted the following "pick a Sabbath" law:

> No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such a day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.

"No good" said the U.S. Supreme Court, in holding this term that the "pick-a-Sabbath" statute fails the *Lemon* test for Establishment Clause violations. In granting workers an absolute and unqualified right not to work on their Sabbath—regardless of the convenience or interests of the employer or other employees—the state went far beyond what was necessary to merely protect the "free exercise" rights of Sabbath observers. By failing to

A Round-Up of Other Cases

■ *City of Cleburne v. Cleburne Living Center*, 53 L.W. 5022—Advocates of the rights of mentally retarded persons gave mixed reviews to the Court's decision in this case. On the one hand, the Court held that mental retardation is not a "quasi-suspect" classification for purposes of analysis under the Equal Protection Clause. After reviewing historical, sociological, political, and scientific data, the Court found insufficient evidence to afford mentally retarded persons the same special constitutional status that is afforded women, for example, in reviewing discrimination claims. On the other hand, even utilizing the minimal level of scrutiny for equal protection claims, the Court could not justify the actions of a Texas city in requiring— and then denying—a special use permit for a group home for mentally retarded adults. "Irrational prejudice," the Court held, led to the denial of the permit; the group home posed no threat to any legitimate governmental interest. Lacking even a "rational basis" for its actions, the city was held to have violated the rights of the mentally retarded adults to equal protection of the law. In the end, then, the mentally retarded persons did not get all they wanted or even, perhaps, all they deserved. But, for now, at least, they got what they needed, and thirteen mentally retarded adults in Cleburne, Texas, finally found a place they could call home.

■ *Garcia v. San Antonio Metropolitan Transit Authority*, 53 L.W. 4135—This is, arguably, the most important decision of the term; for many it is also the most uninteresting. In attempting to define the limits of congressional authority in the federal system, the Court held nine years ago that Congress could not supersede the authority of state or local governments "in areas of traditional governmental functions." (See *National League of Cities v. Usery*, 426 U.S. 833 (1976).) This term, in the wake of nine years of confusion generated by *National League of Cities*, the Court overturned its decision. Justice Blackmun, who delivered the swing vote in a concurring opinion in *National League of Cities*, this term rejected the "traditional function" rule as "unsound in principle and unworkable in practice." The decision prompted vigorous dissents from four justices, displeased with both the substance of the decision and the Court's abrupt reversal. It also prompted cries of derision from states righters throughout the country; many conservatives considered it their greatest setback of the term. For them, Justice Rehnquist offered these words of solace: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."

■ *Dun & Bradstreet v. Greenmoss Builders*, 53 L.W. 4866—The free speech and free press provisions of the First Amendment demand that speakers and publishers be afforded some latitude when addressing matters of public concern. The rationale is that in a democracy it is in the public's interest that debate be robust and uninhibited. Thus it is that false and defamatory statements involving public figures or public concerns are protected by the First Amendment; libel suits based on such statements will not bring damages unless there is "actual malice," *i.e.*, unless the speaker made or published the statement with knowledge of its falsity or reckless disregard for the truth.

The issue in *Dun & Bradstreet* was whether the "actual malice" requirement applied to a commercial, non-media publication—here, a credit reporting agency which published a false and damaging credit report. The answer, apparently, is no; five justices, in three separate opinions, held that the credit reporter was not protected by the "actual malice" requirement. It would thus be more vulnerable to libel suits.

The plurality of opinions—compounded by the vigorous dissent of four justices—makes the lesson of *Dun & Bradstreet* rather murky. For now, the bottom line appears to be that purely commercial speech does not involve matters "of public concern," and as such, receives [illegible] protection against libel and slander suits. But stay tuned for further developments. *Dun & Bradstreet* still looks like a watershed case; its just hard to figure which way the law will flow.

■ *Board of Education of the City of Oklahoma City v. National Gay Task Force*, 53 L.W. 4408—*Update* readers anxiously awaited the opinion in this case after its preview in the Winter 1985 issue. They're still waiting. The Court deadlocked 4-4 on the issue whether a state law which prohibits teachers from "advocating homosexual activity" violates the First Amendment. Justice Powell's absence and the resultant stalemate, means that the decision of the Tenth Circuit Court of Appeals still stands: the law is declared unconstitutional.

make allowances for competing secular interests, the state of Connecticut adopted a law which has the primary effect of advancing religion. The Court quoted federal Judge Learned Hand, who once observed that "the First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." Moreover, the Court noted, the Connecticut law impermissibly advanced a particular religious practice—the observation of a Sabbath—a practice not universal in the religious world. Thus the law not only promotes religion, but it does so in a discriminatory fashion.

Only Justice Rehnquist dissented from the Court's holding in *Thornton v. Caldor*, 53 L.W. 4853. Justices O'Connor and Marshall joined in a concurring opinion to emphasize that the Court's decision did not invalidate laws which require employers to make "reasonable accommodations" for the religious practices of their employees.

A Creche and The Wall, Part II

A fifth Establishment Clause battle was declared a draw on March 27, when an equally divided Court affirmed the lower court's opinion in *Village of Scarsdale v. McCreary*, 53 L.W. 4431. *Scarsdale* was expected to be a follow-up to the Court's decision last term in *Lynch v. Donnelly*, 465 U.S. ____, upholding the right of a municipality to include a nativity scene in a Christmas display. In *Scarsdale*, the city sought to *prohibit* a nativity scene, maintaining that such a display would violate the Establishment Clause. Unlike the display in *Lynch*, the village noted, the Scarsdale display was designed to be wholly religious in content. The Scarsdale Creche Committee protested the village's decision, and eventually received a favorable decision from the Second Circuit Court of Appeals, which held that the display would not violate the Establishment Clause, and that prohibiting the display impermissibly violated the creche committee's First Amendment right of expression. That decision stands as a result of the Supreme Court's 4–4 stalemate. Justice Powell, who was ill during a part of the term, did not participate in the review of the *Scarsdale* case.

The Second Commandment and the First Amendment

The flip side of the freedom of religion coin—the Free Exercise Clause—also produced a deadlock when the justices split on *Jensen v. Quaring*, 53 L.W. 4787. (Justice Powell, again, could not participate in deciding the case.) In *Jensen*, the state of Nebraska had refused to issue a photoless driver's license to a woman who believed that photographs violated the "graven images" proscription of the Second Commandment. The woman claimed that the state's actions violated her right to the free exercise of her religion. The Eighth Circuit Court of Appeals agreed, finding no compelling state interest to outweigh the individual's free exercise rights. The state of Nebraska appealed to the Supreme Court, where it was joined, in an amicus brief, by the United States. Concern for preserving the social security identification system thus produced something of an irony: the Reagan Justice Department arguing against freedom of religion before the Supreme Court. It was all for naught, however, for as a result of the 4–4 stalemate the appellate court's decision still stands.

Criminal Law Highlights

In a case of first impression, the Court was called upon to adjudicate between the government's interest in effective law enforcement and a fleeing felon's interest in self preservation. At issue in *Tennessee v. Garner*, 53 L.W. 4410, was the constitutionality of the Tennessee "fleeing felon" statute. The statute provides that "if, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

One night in October, 1974, Officer Hymon of the Memphis Police Department responded to a report that a burglary was in progress. Upon arrival at the scene, Hymon tracked the suspect, Edward Garner, to the backyard. After determining that Garner was unarmed, Hymon called out, "police, halt." Garner ran for the six-foot high fence but was stopped by a bullet to the head. Garner died on the operating table. Ten dollars and a purse taken from the house were found on his body.

The Supreme Court found the statute unconstitutional where it authorizes the use of deadly force against an unarmed fleeing suspect. The Court stated that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect is armed and dangerous. Under the circumstances, wrote Justice White, Officer Hymon had no reason to believe that the suspect—"young, slight and unarmed"—posed any threat. Such an act was clearly an unreasonable seizure of Garner under the Fourth Amendment, he concluded.

Justice O'Connor, writing for the justices in dissent, felt that the public interest in the prevention and detection of crime was more compelling than the individual's interest. She concluded that the suspect could have avoided risk to his life by merely obeying the order to halt.

Searches or Seizures

The Fourth Amendment requires that the police obtain a warrant based on probable cause before they can conduct a legitimate search or seizure. There are times, however, when it would be impractical to obtain a warrant because the evidence might disappear while the officer tries to locate a magistrate. Recognizing this fact, the Court has carved out special exceptions to the warrant requirement.

In *United States v. Ross*, 456 U.S. 758 (1982), the Court announced what is now popularly dubbed the "auto exception." The *Ross* Court found that the inherent mobility of vehicles, and the lessened expectation of privacy held by the owners, warranted an exception in the case of autos. Thus, where the police have probable cause to believe that a vehicle contains contraband, they may conduct a warrantless search of the vehicle and all packages and containers found within.

This term, the Court was asked in *United States v. Johns*, 53 L.W. 4126, to assess the scope of the auto exception. In *Johns*, Drug Enforcement Administration (DEA) agents—acting without a warrant—opened packages found in trucks, three days after the trucks were impounded. The Court upheld this search as reasonable within the meaning of the Fourth Amendment.

Justice O'Connor, writing for the majority, reasoned that the occupants' suspected involvement in a drug smuggling operation, their later exchange with two small aircrafts at a private airstrip, coupled with the smell of marijuana coming from the trucks, established probable cause to believe that the vehicles contained contraband. As a result, the officers could conduct a full scale search of the vehicles and any packages found within. The fact that the officers chose to remove the packages and conduct the search three days later did not render the act unconstitutional. Under *Ross*, concluded Justice O'Connor, there is no requirement that packages be searched on the spot.

Justices Brennan and Marshall filed dissents. They felt that the officers only had probable cause to search the packages and not the entire trucks. Since the packages were seized, the officers should have obtained a warrant before examining the contents.

It would seem from the dissent in *Johns* that there is a separate requirement for closed packages and containers found within a vehicle. That is correct. In *Ross*, the Court also established a "container specific" condition, to cover situations when the police believe a *particular* container in a vehicle holds contraband. The *Ross* Court held that the police can seize the container but must obtain a warrant before they can search it.

Oklahoma v. Castleberry involves interpretation and application of the "container specific" condition spelled out in *Ross*. In *Castleberry*, police received a tip about illicit activity. Under the watchful eyes of police officers, the suspects took suitcases and placed them in the trunk of a car. Subsequently, an officer opened the car trunk and then the suitcases—and discovered narcotics.

The Court of Criminal Appeals of Oklahoma held that the search of the suitcase should have been conducted with a warrant. The officers' suspicions were focused upon the suitcases—the informant revealed that the suspects had narcotics in blue suitcases. Thus, the court concluded, the facts fit the "container specific" condition of *Ross*, requiring the police to seize the suitcases, take their information to a magistrate, obtain a search warrant and then open the suitcases. That decision stands as a result of the Supreme Court's 4–4 stalemate. (Justice Powell, again, could not participate in deciding the case).

Though warrants are not needed to search vehicles stopped on the streets, they are definitely needed to enter a home. After all, a man's home is his castle, and the home is accorded a great deal of respect by our legal system. But what happens when a man's home is not only his castle, but also his vehicle? With the advent of motor homes, a hybrid category is created —motor homes have the mobility qualities of autos and the privacy characteristics of houses. Thus, controversy has arisen as to which category motor homes fall in for Fourth Amendment purposes. For the first time, in *California v. Carney*, 53 L.W. 4521, the Supreme Court was asked to settle the controversy.

In *Carney*, a man in a motor home gave a youth marijuana in exchange for sexual acts. Armed with this information—but without a warrant or consent—a DEA agent entered the motor home, seized marijuana in plain view, and then arrested its occupant, Charles Carney.

A 6–3 decision written by Chief Justice Burger held that the warrantless search of Carney's motor home in a public parking did not violate the Fourth Amendment. The chief justice reasoned that the motor home met the two justifications for applying the vehicle exception to the warrant requirement. First, the motor home is readily mobile, and without the prompt search and seizure it could have been moved out of the reach of the police. Second, there is a reduced expectation of privacy because it is a licensed vehicle subject to police regulation as it travels the streets. Since the DEA agents had "fresh, direct and uncontradicted" evidence that Carney was distributing drugs from the vehicle, concluded Burger, there was "abundant" probable cause to enter and search.

Not all the justices agreed with Burger. Justice Stevens, joined by Justices Brennan and Marshall, did not see any exigency to justify use of the "auto exception" because the motor home was parked across the street from a courthouse where a warrant could easily be secured. The dissenting justices saw the motor home as "the functional equivalent of a hotel room, a vacation and retirement home, or a hunting or fishing cabin," all locations which traditionally have been accorded more protection from searches.

In *Winston v. Lee*, 53 L.W. 4367, an armed robber, Lee, confronted a store owner. Both exchanged gunfire and were wounded. Both were rushed to the same hospital, whereupon the store owner identified Lee as his assailant. To controvert Lee's story that he was also a robbery victim, the state of Virginia sought court approval to remove a bullet from Lee's chest.

When it comes to an individual's body, privacy and bodily integrity are paramount. "Pat downs" of an individual's outer garments during an investigative stop and even search of inner garments after a lawful arrest may be permissible under the Fourth Amendment, but the Court has not been eager to sanction any search beyond the skin surface. In affirming this view, the Court this term unanimously held in *Lee* that surgery to remove a bullet planted in a robbery suspect's chest would be an unreasonable search under the Fourth Amendment.

The Court found the *Schmerber v. California*, 384 U.S. 757 (1966), to be dispositive. In *Schmerber*, the Court devised a test to weigh the interests at stake in cases involving the search of a suspect's body.

Teaching Strategy: You Be the J[illegible]

The following cases all [illegible]ernment action and religio[illegible] each case, determine whether: (a[illegible] involves the Establishme[illegible] Free Exercise Clause, or bo[illegible] (b) the government action [illegible] First Amendment. (See pa[illegible] 31 for the actual decisions.)

1. **A state government pa[illegible]plain to open each legisl[illegible] session with a prayer.**
2. **A state law allows tax d[illegible]ctions for tuition and schoo[illegible] for the parents of stud[illegible] both public and parochial [illegible]**
3. **A state unemployment [illegible] refuses to given une[illegible]ment benefits to a Jehova[illegible] who left his job wit[illegible] contractor for religio[illegible].**
4. **A state law authoriz[illegible]minute period of silence [illegible]ublic schools for meditatio[illegible]untary prayer.**
5. **The federal Internal [illegible] vice refuses to gra[illegible]mpt status to a priva[illegible] which does not permit interracial dating for religious [illegible]**
6. **A city erects a C[illegible] which includes a S[illegible] Christmas tree, r[illegible] Creche (nativity scen[illegible]**
7. **A state law requires th[illegible] Ten Commandments be [illegible] in each public school cl[illegible]**
8. **A state motor vehicle d[illegible]ment refuses to grant a p[illegible] free driver's license [illegible] who believes that p[illegible] are forbidden by [illegible] Commandment.**
9. **A state law allows [illegible] to refuse to work on th[illegible] week they select as th[illegible]**
10. **A state university [illegible] available for all stud[illegible] except religious gr[illegible]**

(Strategy by Hayman[illegible] from Arbetman, M[illegible] and O'Brien, *Street Law: A[illegible] Practical Law*, 3rd Ed., [illegible] from West Publishing Co.[illegible]

Under that test, it upheld the extraction of blood to convict a drunken suspect in *Schmerber*, but here concluded that removal of the bullet was a "severe intrusion on Lee's privacy interest and bodily integrity." The uncertainty about the medical risks figured prominently as the Court balanced the individual's privacy interest against society's interest in collecting evidence for determining guilt or innocence. The state prosecutor, the Court concluded, had no significant need for the bullet to establish Lee's identity as the robbery assailant, because it had ample independent evidence on that issue.

"Terry" Doctrine Assessed

In *United States v. de Hernandez*, 53 L.W. 5048, the Court upheld a 16-hour detention at the border of a woman suspected of smuggling contraband in her alimentary canal. Ms. de Hernandez entered the United States from Bogota, Columbia. She had $5,000 in cash, one small valise, no hotel reservations despite having no relatives in the United States, and could not recall how her airline ticket was purchased. Customs agents concluded that she fit the description of a "balloon swallower" or alimentary canal smuggler. Ms. de Hernandez was detained incommunicado for 16 hours before the agents got a warrant ordering a pregnancy test and x-ray and rectal examinations. During the detention she refused to use the toilet facilities. A rectal examination obtained 88 cocaine-filled balloons that had been smuggled in her alimentary canal.

It is established law that "a police officer may stop and question an individual if the police have specific articulable facts which reasonably warrant suspicion of criminal conduct." (See *Terry v. Ohio*, 392 U.S. 1 [1968].) In *Terry*, the Supreme Court warned, however, that "a search

Answers to You Be the Judge

1. **This is an Establishment Clause case. Strict application of the three-pronged *Lemon* test to this example may lead students to conclude that the state government is violating the Constitution. In 1982, three justices of the Supreme Court came to this conclusion. Six other justices, however, found that "the practice of opening legislative sessions with prayer has become part of the fabric of our society," and that this historical pattern justified the continuance of the practice. Some observers feel that this decision created an "historical pattern" and "tradition" exception to three-pronged requirement of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The case is *Marsh v. Chambers*, 463 U.S. 783 (1983).**
2. **This is an Establishment Clause case. In 1973, the Supreme Court struck down a law which gave tuition assistance only to parents of children in nonpublic schools. Ten years later, the Court held that a tax deduction which was available to the parents of all school children did *not* violate the Establishment Clause. The vote in the 1983 case of *Mueller v. Allen*, 103 S.Ct. 3062, was 5–4. The dissenting justices noted that 96 percent of the parents eligible for the deduction sent their children to religious schools; they therefore felt that the law had the effect of advancing religion.**
3. **This is a Free Exercise case. Most state unemployment laws provide that employees who quit their jobs are not eligible for benefits unless they quit for "good cause." In the actual case described here, the unemployment office and the state courts held that the employee did not have "good cause" for quitting. The state supreme court even cited testimony from other Jehovah's Witnesses who maintained that a Jehovah's Witness could work for the defense contractor without violating his faith. However, in an 8–1 decision rendered in 1981, the U.S. Supreme Court held that the denial of benefits did violate the First Amendment rights of the employee. "Courts are not arbiters of scriptural interpretation," wrote Chief Justice Burger. The chief justice further noted that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." The case is *Thomas v. Indiana Employment Security Division*, 101 S.Ct. 1425.**
4. **This is an Establishment Clause case. This law was struck down by the Supreme Court in the 1985 case of *Wallace v. Jaffree*, 53 L.W. 4665. The Court held that since the expressed purpose of the law was to permit voluntary prayer, the law could not pass the "secular purpose" requirement of *Lemon v. Kurtzman*. The Court's opinion indicated that a law providing for a moment of silence would be permissible if there are no references to prayer or other religious conduct.**
5. **This is a Free Exercise case. Most private universities receive tax exemptions because they are considered charities. In this case, the I.R.S. held that Bob Jones University could not be considered a charity as long as it discriminated. Charities, the I.R.S. noted, must serve the public interest, and discrimination is clearly contrary to the public interest. The university protested. It admitted that it did discriminate by prohibiting interracial dating, but insisted that the discrimination was motivated by religious reasons and was thus protected by the First Amendment. In 1983, the Supreme Court upheld the I.R.S. decision. The Court acknowledged the free exercise interest of the university, but held that the government's compelling interest in eliminating racial discrimination overrode the First Amendment interest in religious conduct. The case is *Bob Jones University v. I.R.S.*, 76 L.Ed.2d 157 (1983).**
6. **This is an Establishment Clause case. In 1984, the Supreme Court upheld the city's right to erect the display. In *Lynch v. Donnelly*, 465 U.S. ____, the Court held the nativity scene was permissible as a part of a display commemorating "a particular historic religious event." The creche was just a**

reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Thus, in determining when the intensity and scope are reasonable, courts have considered the duration of the stop, the extent of questioning of the suspect, the use of physical force during the stop, and other factors.

Following *Terry*, Justice Rehnquist conducted a two-pronged test in his majority opinion in *de Hernandez*. First he assessed the reasonableness of the detention at its inception. At the border, the government's interest in effective law enforcement takes precedence over the privacy right of the individual, acknowledged Rehnquist. Consequently, reasonable suspicion is the applicable standard, especially since it is so difficult to detect alimentary canal smuggling. The justice reasoned that this standard was met because of the facts and their rational inferences known to trained customs inspectors who had encountered many alimentary canal smugglers on prior occasions.

As to the length of the detention, the Court maintained that the detention was "not unreasonably long." Though de Hernandez's detention was "long, uncomfortable, indeed humiliating," the Court added that she was solely responsible for the duration and discomfort because of her chosen method for smuggling the cocaine. Moreover, it was her evasive actions of suppressing any bowel action that led to a prolonged detention.

Justice Brennan and Marshall decried the majority's opinion and concluded:

> The nature and duration of the detention here may well have been tolerable for spoiled meat or diseased animals, but not for human beings held on simple suspicion of criminal activity.

The issue the Court confronted in

"passive symbol," a reminder of the historical origins of a national holiday. The decision in this case was a close (5–4) and controversial one; the dissenting justices objected because the inclusion of the creche turned a secular exhibit into a religious one. They found this sectarian intrusion no less objectionable simply because the religious group aided was the dominant one, or because the particular practice had been around a long time. The tenor of the Court's divided opinions in the creche case indicates that the controversy over Christmas and the Constitution is far from settled.

7. This is an Establishment Clause case. In 1978, Kentucky passed the law at issue. At the bottom of each poster of the Ten Commandments was the following notation:

   > The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western civilization and the common law of the United States.

   Despite this disclaimer, the Supreme Court invalidated the Kentucky law. "The Ten Commandments," the Court noted, "are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposedly secular purpose can blind us to that fact." The Court indicated that it might reach a different result if the study of the Ten Commandments were integrated into the curriculum "in an appropriate study of history, civilization, ethics, comparative or the like," but that the mere posting of the decalogue served no such educational purpose. The clear purpose of the policy was to encourage students "to read, meditate upon, perhaps to venerate and obey, the commandments," a purpose clearly inconsistent with the separation of church and state. The case is *Stone v. Graham*, 101 S.Ct. 192 (1980).

8. This is a Free Exercise case. The actual case reached the Supreme Court in 1985 and produced a 4–4 deadlock. (Justice Powell was ill and did not participate in hearing the case.) The lower court had held that the photo requirement violated the applicant's First Amendment rights. This decision was affirmed by the tie vote. The case is *Jensen v. Quaring*, 53 L.W. 4754.

9. This is an Establishment Clause case. In 1985, the Supreme Court invalidated a Connecticut law like the one described. The Court held that the law had not secular purpose, but rather served the obvious purpose of advancing a particular religious practice, *i.e.*, the observation of a Sabbath. Only Justice Rehnquist dissented in the case of *Thornton v. Caldor*, 53 L.W. 4853.

10. This is both a Free Exercise and an Establishment Clause case. While almost all religious cases reflect to some extent the tension between the Free Exercise and Establishment Clauses, the "equal access" cases pit the interests in particularly stark opposition. Consider the plight of the university president. Open up the facilities to the religious groups and you appear to be fostering religion in violation of the Establishment Clause. Close the facilities to religious groups and you appear to be denying them their free exercise rights.

    The Supreme Court confronted this dilemma in 1981 in the case of *Widmar v. Vincent*, 102 S.Ct. 269. In this case, the Court held that the University of Missouri's refusal to grant "equal access" to religious groups violated the First Amendment *speech* and *association* rights of the students. The Court did not base its holding on the Free Exercise Clause. However, it did address the Establishment Clause issue by observing that college students were sufficiently mature that the simple act of opening facilities to religious groups was unlikely to have the effect of promoting religion among the student body. Such may not be the case with younger students, and the Supreme Court may soon decide whether the "equal access" rule can apply in secondary schools as well as institutions of higher learning.

1604

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United States v. Hensley, 53 L.W. 4053, was whether police officers may stop and briefly detain a person who is the subject of a "wanted flyer" while they attempt to find out whether an arrest warrant had been issued. In all its previous decisions grounded in *Terry* doctrine, the Court faced stops by the police based on suspicion that the suspect was *about* to commit a crime. This is the first time the Court examined the effect of *Terry* on a stop to investigate a *completed* crime.

In a unanimous decision by Justice O'Connor, the Court held that since the flyer was issued based on reasonable suspicion, an objective reading justified a brief stop "to check Hensley's identification, pose questions, and inform the suspect that the St. Bernard police wished to question him." The Court maintained that reasonable suspicion arose at the time a reliable informer implicated Hensley. Justification for the stop did not "evaporate" when the armed robbery was completed, Justice O'Connor added, but extended to a brief stop at the earliest opportunity. She cautioned, however, that if the flyer had been issued in the absence of reasonable suspicion, then an objective reliance on it would violate the Fourth Amendment.

In *Hayes v. Florida*, 53 L.W. 4382, the Court was asked to determine the constitutionality of detaining a suspect for fingerprinting on less than probable cause. In *Hayes*, police went to the suspect's home without a warrant to get fingerprints. Hayes refused to accompany the officer to the station, but was forced to go when his only option was to get arrested. Hayes' fingerprints matched those taken at the scene of the crime.

In an opinion written by Justice White, the Court held that the detention at the station for fingerprinting violated Hayes' rights under the Fourth Amendment. The Court reasoned that the act of forcibly removing Hayes from his home without probable cause or a warrant and detaining him at the station for fingerprinting was "sufficiently like an arrest." As a result, probable cause was needed, as it is to make a constitutional arrest. The Court concluded, however, that the Fourth Amendment would permit seizures for purposes of on-site fingerprinting.

Justices Brennan and Marshall in concurrence saw that part of the decision sanctioning on-site fingerprinting as the Court's "strained effort" to return to its "regrettable assault" on the Fourth Amendment by considering an issue not before the Court.

Right to a Shrink

Just as an indigent defendant is entitled to appointment of an attorney, he is now also entitled to a psychiatrist. This new right was announced in *Ake v. Oklahoma*, 53 L.W. 4179, where the Court upheld an indigent defendant's right to a psychiatrist as long as it is determined that his mental state at the time of the offense is a substantial issue.

Ake was charged with first-degree murder and shooting with intent to kill. Ake's attorney informed the trial court that he intended to raise an insanity defense and therefore needed the court to provide a psychiatrist. The petition was denied. Ake proceeded through trial and sentencing without any examination as to his state of mind at the time of the offense. As a result, Ake was unable to rebut the testimony produced by the other side as to his future danger to society.

In determining the importance of a psychiatrist in a case, wrote Justice Marshall for the majority, there are three factors to consider: 1) the accused's interest; 2) the state's interest; and 3) the probable value of having a psychiatrist against the risk of one being denied. The Court found Ake's interest in a fair trial compelling, while the state's interest in denying the psychiatrist as "not substantial." Without the aid of a psychiatrist in this case to help in preparation and to testify at trial and at the sentencing stage, "the risk of an inaccurate resolution of sanity issues is extremely high," concluded Justice Marshall. Thus, denial of a psychiatrist in this case deprived Ake of due process under the Constitution.

Miranda Revised

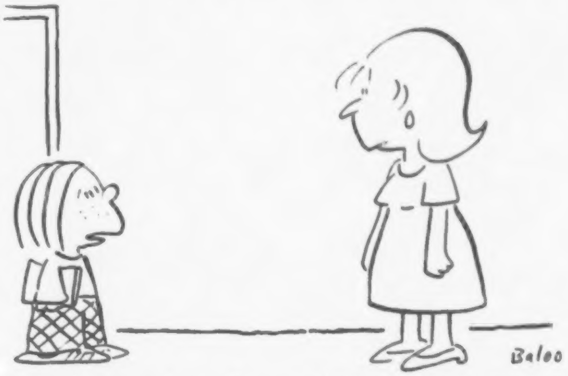
The familiar Miranda doctrine requires police to advise detained suspects of their rights to remain silent and to obtain a lawyer. Unlike the Fourth Amendment, the Miranda rule has been a relatively stable tenet of criminal law. This stability was disrupted only nine months ago when the Court carved out a "public safety" exception in *New York v. Quarles*, 467 U.S. ____, (1984). The majority in *Quarles* said police could dispense with the warning before questioning a suspect if there was a threat to the public safety.

This term the Court again chipped at Miranda in the case of *Oregon v. Elstad*, 53 L.W. 4244. The Court held that the Fifth Amendment does not require the suppression of a confession, made after proper Miranda warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the suspect.

In *Elstad*, an 18-year-old from Salem, Oregon, was accused of involvement in a $150,000 burglary. When initially questioned, Michael Elstad blurted out, "Yes, I was there." Taken to the sheriff's headquarters, Elstad was given Miranda warnings for the first time, then asked about the crime, whereupon he signed a full confession.

The majority reasoned that there was no Fifth Amendment violation in the first statement, only a "simple failure" of the police to administer Miranda warnings. The subsequent warnings made the waiver valid and the signed confession admissible. This decision was written by Justice O'Connor, whose dissent in *Quarles* had cautioned against subjecting Miranda to similar "hairsplitting exceptions that currently pervade the Fourth Amendment."

A vigorous dissent by Justices Brennan and Marshall saw this decision as threatening "disastrous consequences." They felt that advising the accused that his earlier statement may not be admissible was the "most effective means" to ensure voluntariness. Warnings were not sufficient to cure the "taint" that had already attached. ☐



"*Can a teacher* really *sue a kid for malpractice?*"

1605

PREVIEWING THE LAW

Editors Note

Want to teach about the latest issues, the burning controversies that are before our highest court right now and haven't yet been decided? *Preview of U.S. Supreme Court Cases* provides accurate, detailed analyses of every Supreme Court case awaiting oral argument.

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Summary Judgments in Libel Suits: Which Standards Apply?

by Richard L. Roe

Anderson
v.
Liberty Lobby
(Docket No. 84-1602)
To be argued Dec. 1985

Issue

Under modern rules for bringing lawsuits, a party has an opportunity to ask the judge to rule in its favor prior to trial. When this "motion for summary judgment" is made, the judge examines the evidence in the light most favorable to the opposite party. The issue the Supreme Court has undertaken to resolve in *Anderson v. Liberty Lobby* is how much evidence a plaintiff bringing a libel suit should be required to show at this early stage in the litigation process in order to defeat the defendant's motion for summary judgment.

Facts

In 1981, *The Investigator*, a magazine published by columnists Jack Anderson, printed three articles about Willis Carto, the founder and treasurer of a non-profit citizens' group called the Liberty Lobby. The articles, written by Anderson and members of his staff, asserted that Carto was racist, anti-Semitic and an admirer of Hitler. Carto sued Anderson for libel in federal district court, alleging thirty specific instances of defamation in the articles.

During the next phase of the lawsuit, known as discovery, Anderson and his staff submitted affidavits describing in detail the sources of information upon which the articles were based. Anderson, the defendant, then moved for summary judgment against the plaintiff Carto.

The federal district court judge examined the evidence in the light most favorable to Carto. The judge ruled that the evidence submitted by Carto would be insufficient to prove the claim of libel and awarded summary judgment to Anderson. In this ruling, the judge found that Carto was a "public figure" because of his public statements on behalf of Liberty Lobby. As such, Carto would have to meet several legally-imposed hurdles to prove that Anderson had libelled him. First, Carto would have to prove the statements were false and defamatory. Second, he would have to prove that Anderson acted with malice. Both of these elements would have to be proved by "clear and convincing evidence," a higher standard than required for plaintiffs who are not public figures. (See the *Hepps* case, on pp. 34-36 for a discussion of these higher standards in libel cases.) The judge based his ruling on the "clear and convincing" standard that Carto would have been required to meet at trial.

Carto appealed, arguing that the district court judge applied too high a standard of proof at the summary judgment stage. Since part of the proof regarding malice would have to be based on Anderson's state of mind, Carto asserted that this was an issue of a fact that the jury should decide after hearing testimony of witnesses.

The court of appeals agreed with Carto on this last point. The appeals court found that, while most of Anderson's statements about Carto were supported by interviews and previously printed articles from reputable sources, some were possibly not checked very well. The appeals court thought that the "clear and convincing" standard was too high for the summary judgment stage. Judged in terms of the lower "preponderance of the evidence" standard, the facts could possibly show that Anderson acted recklessly in printing nine of the thirty statements Carto claimed had libeled him. The court of appeals reversed the district court and denied summary judgment with respect to those nine statements.

Anderson appealed to the U.S. Supreme Court. The

Court granted a writ of *certiorari* to review the decision of the court of appeals.

Background and Significance

Summary judgment serves as a mechanism for courts to put an end to lawsuits in which there is insufficient evidence for one of the parities to prevail at trial. When one party believes that the evidence is not enough to prove the legal ingredients of the claim, the party moves for summary judgment. In effect, a plaintiff says that even if what the defendant says is accurate, the defendant has not set out a sufficient defense to my claim. A defendant moving for summary judgment says that even if the plaintiff's assertions are correct, taken along with defenses his claims do not prove I did anything wrong.

Summary judgment is not proper if the judge believes there is any "genuine issue as to any material fact." At the summary judgment stage, each party may submit evidence, such as documents and affidavits, supporting its position. This process works because prior to summary judgment parties are allowed to question each other, to "discover" what evidence the other side has in its possesion. As a result of discovery, the parties should know most or all of the evidence that can be expected at trial.

The *Anderson* case is significant because it will establish whether the judge should weigh the evidence at summary judgment at the same level that the evidence would be weighed at trial. Anderson argues that the Liberty Lobby and other plaintiffs in libel claims should be required to meet at summary judgment the same level of proof that they must at trial—falsity and malice by "clear and convincing" evidence.

Anderson notes that the purpose of summary judgment—to prevent unworthy lawsuits from going to the jury for reasons of judicial economy and to avoid jury errors—would be served by requiring the higher standard. The Supreme Court set a high burden of proof in "public figure" libel suits intentionally, Anderson asserts, and this should be required at all stages of proof. Many complex lawsuits involving years of litigation are appropriately resolved by summary judgment. Moreover, in areas of the law other than libel, such as fraud, antitrust, and civil rights, courts may use summary judgment even though issues involve states of mind or higher burdens of proof.

The American Newspaper Publishers Association and other individual publishers submitted an *amicus* brief in support of Anderson. They assert that most public officials seeking to prove libel would be expected to lose at summary judgment. In their view, this would be consistent with the purpose of these high burdens, as well as with the goal of protecting freedom of the press.

Carto argues that free speech and press are protected enough by these high standards without at the same time denying plaintiffs their day in court. Although discovery allows evidence to be presented at the early stages of a lawsuit, documents and affidavits should not substitute for the opportunity to observe the credibility of witnesses on the stand and to cross-examine witnesses. The imposition of a "clear and convincing" standard would, as the court of appeals concluded,

> change the threshold summary judgment inquiry from a search for the minimum facts supporting the plaintiff's case to an evaluation of the weight of those facts . . . It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions. . . .

Richard L. Roe is a assistant professor at Georgetown University Law Center, where he teaches in the Street Law Clinic.

Who Must Prove What in Libel Actions?

by Peter deLacy

Philadelphia Newspaper, Inc.
v.
Hepps
(Docket No. 84-1491)
To be argued Dec. 1985

The Supreme Court this term will decide a pivotal procedural issue concerning libel lawsuits. In *Philadelphia Newspapers, Inc. v. Hepps*, the Court will be asked to decide essentially "who must prove what" in libel cases involving private plaintiffs.

For twenty-one years since its landmark libel decision in *New York Times v. Sullivan* 376 U.S. 254 (1964), the Supreme Court has attempted to define the proper balance between the free speech interests of publishers and the protection of individual reputations. *Philadelphia Newspapers v. Hepps* is certain to have an important impact, making it either easier or more difficult for private individuals to win libel lawsuits against publishers. The case will also provide insights into how the Court balances the interests of publishers and the individuals who are the subjects of news stories.

Issue

The specific issue before the Supreme Court is as follows: When a private individual claims that a publisher printed false information about him that damaged his reputation, which side has the burden of proving the falsity of the publication? Must the news media prove that a story was true, or must the person claiming the harm prove that a story was false?

Facts

The case revolves around a series of articles published in the *Philadelphia Inquirer* a decade ago allegedly connecting a chain of Pennsylvania beer distributorships to organized crime figures. In the early 1960s, Maurice Hepps developed a new concept for selling beer through large self-service stories. The idea was a commercial success and grew into a franchise chain of distributorships called "Thrifty Beverage." Between May 5, 1975, and May 2, 1976, the *Philadel-*

phia Inquirer published a series of five "investigative" articles which attempted to link Hepps, Thrifty Beverage, and a management company to specific underworld figures and to organized crime generally.

As a result of these articles, Maurice Hepps filed a libel suit against Philadelphia Newspapers, Inc. (P.N.I. hereafter), publisher of the *Philadelphia Inquirer*, and the two reporters who had written the series of articles. In his complaint, Hepps claimed that the articles had defamed him, damaging both his personal and business reputations and exposing himself and his family to ridicule and humiliation.

Following a six-week trial, the jury returned a verdict for P.N.I. Hepps requested a new trial, asserting that the trial judge erred in declaring that a Pennsylvania state law violated the First Amendment. The law would have required the newspaper to prove that the articles were true. Instead, the trial judge had instructed the jury that Hepps bore the burden of proving that the articles were false.

On appeal, the Pennsylvania Supreme Court agreed with Hepps, holding that the trial court had acted incorrectly. The court concluded that the Pennsylvania state law did not violate the First Amendment and therefore ordered a new trial with proper jury instructions. P.N.I. appealed this ruling by filing a petition for a writ of *certiorari* in the United States Supreme Court. On June 24, 1985, the Court agreed to hear the case.

Background and Significance

Of central importance at common law was an individual's reputation. The reputation of an individual was *presumed* to be good. If that reputation was damaged by what someone wrote, the remedy was a libel suit. Not surprisingly, in these libel suits the burden was on defendants to demonstrate that what they had written was true. Behind this standard was the notion that an individual's reputation must be protected against any words that might harm it. To the extent that a defamatory statement invaded this protected reputation, the defendant had to show that the invasion was justified.

In *New York Times v. Sullivan*, the Supreme Court analyzed the law of defamation in terms of the First Amendment's protection of free speech and the press, and changed the law to diminish the favored position of plaintiffs, at least when they were "public officials." Seeking to assure a "breathing space" for First Amendment freedoms, the Court established several hurdles that these officials have to jump through to recover damages. First, contrary to the common law, they have the burden of proving that the statement was false. Second, they have to show that the publisher acted with *malice*. The Court defines malice as either knowing the statement was false or printing the statement with reckless disregard as to its truth or falsity. Additionally, public officials have to prove this with "clear and convincing evidence,"a more difficult standard to meet than the usual "preponderance of the evidence."

In *Gertz v. Welch*, 418 U.S. 323 (1974), the Court drew a distinction between private individuals and public figures. This distinction concerns the second hurdle—malice—and allows the states to set their own standards for liability in cases involving private individuals. The Court held that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

No longer did private individuals have to show that publishers had printed statements with malice. Rather, states could allow recovery on a lesser showing (*e.g.*, negligence). The reason for this lower standard for recovery, the Court said, was the fact that private individuals were in a different position from public figures. Private individuals did not voluntarily expose their reputations to public scrutiny, nor did they have access to the media and other forms of communication to rebut defamatory statements. The Court concluded, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."

While *Gertz* did not directly address the issue of which party has the burden of proof, how the present Court interprets *Gertz* may determine the outcome of the case at hand. The Supreme Court of Pennsylvania held that the *Gertz* decision's concept of fault did not require Hepps to prove that the articles were false. Stressing the U.S. Supreme Court's desire to allow individual states to establish standards of liability, the Pennsylvania court concluded, "it would not offend the principles articulated [in *Gertz*] to place the burden of proving truth upon a defendant as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's . . . negligent conduct."

P.N.I., on the other hand, argues that the concept of fault in *Gertz*, implicitly places the burden on Hepps to prove that the articles were false. They contend that fault cannot be established without reference to the falsity of the statements: "(B)efore plaintiffs can even focus on defendant's fault in failing to discover truth, they will necessarily have to establish the truth that defendants carelessly failed to discover."

In deciding *Hepps* the Supreme Court will be faced with the practical effects of placing the burden of proving falsity on the defendant or the plaintiff. The main reason identified by the Pennsylvania Supreme Court to justify placing the burden on P.N.I. was that a contrary rule would be unfair to Hepps and other plaintiffs. Falsity, the lower court argued, would be too difficult for the plaintiff to prove. P.N.I. counters that the plaintiff has better access to information regarding his own conduct and therefore is in a better position to rebut the published statements. Moveover, P.N.I. claims that placing the burden on publishers would have a "chilling" effect on the proper reporting of news. Publishers would be inhibited from printing controversial stories because even true stories could give rise to successful libel suits if publishers could not later prove that they were true.

The Supreme Court may base its decision on whether the newspaper articles involves matters of "public concern." A guiding principle of the Supreme Court's free speech decisions has been to provide special protection to speech involving public affairs. Even some false speech about public affairs is protected to allow publishers to fulfill their role as sources of public information. Last year, in the important case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (U.S. Sup. Ct. June 26, 1985), the Court upheld a $350,000 libel verdict, in part because the speech involved was not a matter of "public concern." If the Court applies this analysis to *Hepps*, it would appear to benefit P.N.I., in that the articles revolved around alleged political corruption in Philadelphia.

The *Hepps* case is important because it presents a situation in which neither the First Amendment interest nor the countervailing reputational interest appears to be superior. As such, the issue of burden of proof becomes more than merely a procedural tool; it becomes society's way of tipping the scale of justice in support of, or in opposition to, a particular interest. If the Court rules in favor of Hepps, thereby placing the burden on P.N.I. to prove the articles are true, the Court will be saying that private individuals' reputations are to a degree more important than the potential chilling affect on free press. Likewise, if the Court rules for P.N.I., it will be saying that a vigorous and active debate on public issues overshadows the value of individual reputations. The choice is not attractive and it certainly will not be easy.

Peter deLacy is a clinical fellow at the Street Law Clinic in Washington, D.C.

Zoning, Porno, and The First Amendment

by Naomi Cahn

City of Renton
v.
Playtime Theaters, Inc.
(Docket No. 84-1360)
To be argued Nov. 1985

Issue

The right to freedom of speech in the First Amendment gives the public the right to receive information, including access to "adult movies." Does the First Amendment prevent a municipality from restricting the locations of adult movie theaters to particular locations in the community?

Facts

Renton, Washington, is a small city of about 32,000 people, located within a few miles of Seattle. Until January, 1982, Renton had no adult movie theaters. Nevertheless, Renton decided to consider the impact of adult-use businesses before such a business actually located there.

So, in October 1980, the Renton City Council placed a moratorium on licensing business which sold or showed "sexually explicit materials." When this resolution expired in April, 1981, the city council passed an ordinance restricting the location of adult movie theaters.

Playtime Theatres, Inc. leased two movie theaters in Renton in January, 1982, intending to show adult movies at either or both theaters. It sued Renton in federal court to prevent enforcement of the zoning ordinance restricting the location of adult-use theaters.

The district court upheld Renton's ordinance. The Ninth Circuit Court of Appeals found that the ordinance violated the First Amendment.

Background and Significance

The issue here centers on the constitutionally permissible basis of zoning ordinances restricting adult movie theaters. The First Amendment guarantees freedom of speech. Yet freedom of speech may be validly limited by reasonable time, place, and manner regulations if they do not have a "substantial impact" on freedom of expression and are not based on the content of the speech. The Renton zoning regulation might substantially affect the availability of adult theaters, a constitutionally protected form of speech, or it may be valid regulation of the place of adult theaters.

Since the early twentieth century, the Supreme Court has recognized the legitimacy of local zoning regulations. The Court's seminal decision on the legality of a municipality's regulating the location of adult theaters was *Young v. American Mini Theatres*, 427 U.S. 50, decided in 1976. In *Young*, the Court considered the constitutionally of a Detroit "anti-Skid Row" ordinance which required the dispersal of adult theaters. Adult theaters could not be located near two other "regulated use" establishments, nor near residential areas.

Although the Court held that the ordinance did not violate the First Amendment, there was no clear-cut majority. Justice Stevens, writing for a plurality of four of the nine justices, found that the content of speech could legitimately be used to limit the location of adult movie theaters. The limitation was based on Detroit's findings of adverse secondary effects, including increased crime and deterioration, caused by concentrating these theaters in one area. In his concurring opinion, Justice Powell looked to the effect of the ordinance on freedom of speech. He found that Detroit had placed only "incidental and minimal" restrictions on people's opportunity to see adult movies.

The Renton ordinance differs from Detroit's because it specifies where adult theaters can locate—there may be five adjacent to one another, if they are not near, among other limitations, a residential area or a church. And, unlike Detroit, Renton had no first-hand experience with adult theaters; it relied on the experiences of other cities.

An additional issue in *Renton* is what type of inquiry a court must make into the legislative motive behind an ordinance's impact on First Amendment freedom of speech. Suppose the legislature in fact intends some form of censorship—are restrictions permissible so long as the record reflects legitimate motives?

This case has generated considerable interest. For example the National League of Cities filed a brief in support of Renton, asserting that the case is critical to community planning efforts. The American Civil Liberties Union filed a brief in support of Playtime Theatres, asserting that the ordinance in effect barred adult theaters from the city because the restrictions severely limited the land that would be available for this use.

Naomi Cahn is a clinical fellow of The Harrison Institute for Public Law at Georgetown University Law Center in Washington, D.C.

Strategies

(Continued from page 23)

tion. In *U.S. v. Scarbeck*, 317 F. 2d 546 (D.C. Cir. 1963), *cert. denied*, 374 U.S. 856 (1963), a court ruled that a jury could only consider whether a document was classified, not whether it should have been. *Gorin v. United States*, 312 U.S. 19 (1941), however, indicates that a jury must determine whether the transmitted information related to national security and whether those who transmitted it acted in bad faith: *i.e.*, had "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation."

Student Press Cases for Discussion

Case I

Antonelli v. Hammond. Joe Antonelli, the editor of the Boo Hoo University *Gazette*, decided to change the format and direction of the paper. He wanted to focus upon issues of social concern and make students more aware of current social issues. As a step in this direction, he published an article by a well known black author. The printer called the university president when he received the *Gazette*'s copy for printing. He and his daughter, a college student, objected to some of the language in the article. They refused to print it because of the "obscene" language.

The university president also became upset after reading the article, because he agreed that it was obscene. He announced that in the future all articles would have to be approved by a faculty advisory board before they could be printed. If this procedure was not followed, he would refuse to release the funds which had already been allocated for the newspaper.

Antonelli sued the president, contending that the withholding of funds was unjustified prior restraint, a clear violation of First Amendment freedom of the press. The university president countered by saying that he was acting within his rights as president of the university to stop publication of an obscene article which contained innumerable four-letter words. He argued that suppression of obscenity was clear justification for prior restraint, as established in *Near v. Minnesota*.

Case II

Gambino v. Fairfax County School Board. The Fairfax County School Board issued an order which prohibited any sex education programs in the district until the board completed its review of a proposed sex education program. While this decree was in effect, the editor of the student newspaper followed usual procedures and submitted an article which discussed contraception and abortion. The principal felt that the article was a clear violation of the board's order, and he denied permission to print it. The school district's advisory board and the superintendent of schools upheld the principal's decision. The editor sued, contending that the district's behavior was a violation of freedom of the press. The board countered by contending that it feared that the loss of editorial control would result in irresponsible student journalism.

Case III

Eisner v. Stamford Board of Education. The Stamford Board of Education had established a policy as follows:

> No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration. No material shall be distributed which . . . will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.

Eisner, who felt that the school policy was a violation of her First Amendment right to freedom of the press, sued the school district to have the policy abolished. The school district countered that the policy was clearly constitutional since it adhered to the prior restraint guidelines developed under *Near v. Minnesota*, which approved prepublication limitations on the press in certain circumstances. Among these was obscenity or situations which would present a clear and present danger.

Strategy

3

Freedom of Press in the Schools: Yes But . . .

Using landmark Supreme Court and other federal cases students will explore the dimensions of freedom of the press and speech as they apply in the schools. While the general standards are similar to those that apply to the wider community, there are important differences.

Objectives: Students will

1. recognize that freedom of the press and speech apply within the school,
2. identify the unique constraints which apply to freedom of the press and speech within the school, and
3. express support for constitutional guarantees of freedom of the press and speech.

Grade level: 9–12

Time Required: 1-2 class periods

Materials: Overviews of

- *Antonelli v. Hammond*, 308 F. Supp. 1329 (1970);
- *Gambino v. Fairfax County School Board*, 429 F. Supp. 731 (1977);
- *Eisner v. Stamford Board of Education*, 440 F. 2d 810; and
- (if possible) community resource person—lawyer, judge, constitutional law professor.

Procedures

1. Divide the class into three equal-sized legal memorandum groups.
2. Choose three students from each group to comprise the nine-member "Supreme Court."
3. Divide each of the three groups in half, with one half representing the plaintiff and one half representing the defendant.
4. Assign each of the three groups one of the three cases (see inset):
   Antonelli v. Hammond
   Gambino v. Fairfax County Board of Education
   Eisner v. Stamford Board of Education
5. Give each team an overview of its case. The justices should get overviews of all cases.
6. Provide each group with time either

in class or as a homework assignment to develop the best arguments for both the defendant and plaintiff. Justices should be developing questions which they want to ask each party in each case.

7. Seat the justices in the front of the room and appoint or elect a chief justice.
8. Each group should have team members speak for the plaintiff (the first name in each of the above cases) and present their best arguments. The defendant's team members should then present their arguments.
9. During or after all arguments, the justices should pose whatever questions they wish to ask.
10. After all arguments have been presented the justices should discuss the pros and cons of each party's case and render a decision by majority vote. Representatives of each party cannot address the court during the deliberations.
11. Conclude by discussing the actual court decision, using the resource person to explain the technicalities of the case.
12. Students should discuss during debriefing:
    a. What are the important facts in each case?
    b. What issues are raised? What rights may be in conflict?
    c. Is freedom of the press in school settings absolute? If not, when is it limited?
    d. Should freedom of the press be absolute in school settings? Why or why not?
    e. Compare publication policies in your school with those established by these court cases. How are they similar or different? Are your district's policies constitutional? Why or why not?
    f. In addition to the limitations on freedom of the student press described in these cases, are there other criteria which should be used to limit freedom of the press? Give examples of additional circumstances which you feel might justify limiting freedom of the press. Justify your position.
    g. Do you feel that existing limits on freedom of the student press are too restrictive? Should they be abolished? Why or why not?

Legal Memorandum: Freedom of Press in the Schools

In all these cases it is important to note that the freedom of the press is not absolute. If it conflicts with, or disrupts to a substantial degree, the educational process or the environment necessary for that process, school officials can restrict distribution.

Antonelli v. Hammond. The court rejected the university president's argument, but ruled that freedom of speech had some restraints in a school setting.

> Free speech does not mean wholly unrestricted speech, and the constitutional rights of students may be modified by regulations reasonably designed to adjust these rights to the needs of the school environment. The exercise of rights by individuals must yield when they are incompatible with the school's obligation to maintain the order and discipline necessary for the success of the educational process. [However], the state cannot control what is communicated [unless it meets these guidelines]. [Unrestricted] control . . . is inconsistent with the basic assumptions of First Amendment freedoms. A campus newspaper [cannot] be simply a vehicle for the ideas the state or college administration deems appropriate.

Gambino v. Fairfax County School Board. The court found for the student editor. It agreed that the school district had the right to control the curriculum, but it held that the newspaper was not a part of that curriculum. While First Amendment rights of children were "not co-extensive with those of adults," there was no justification in this case for limiting the free exchange of ideas. Since the paper was clearly a vehicle for expression, it was protected by the First Amendment.

In addition, the school district's argument concerning irresponsible journalism was invalid because there was no evidence to support such a contention.

Finally, the court found that since the newspaper was not part of the curriculum it was more akin to a school library, and therefore deserved First Amendment protection.

Eisner v. Stamford. The court found that the policy as written could not be enforced. While the guidelines were clearly acceptable because they met the standards necessary for prior restraint, the procedures for implementing them were suspect. Specifically, the board needed to clarify how materials would be submitted, who would be responsible for reviewing them, and how much time would be allocated for the review process. The court stressed that material could be rejected only if it constituted a substantial danger to the educational process, and that the distribution had to be of a substantial number. Otherwise student notes passed in the hall would fall under the policy, and that was not appropriate. □

Zenger

(Continued from page 5)

November 19, 1734, the warrant reading as follows:

> It is ordered that the Sheriff for the City of New York, do forthwith take and apprehend John Peter Zenger, for printing and publishing several Seditious Libels dispersed throughout his Journals or News Papers, entitled, *The New York Weekly Journal, containing the freshest Advices, foreign and domestick;* as having in them many Things, tending to raise Factions and Tumults, among the People of this Province, inflaming their Minds with Contempt of His Majesty's Government, and greatly disturbing the Peace thereof, and upon his taking the said John Peter Zenger, to commit him to the Prison or Common Gaol of said City and County.

Why weren't Alexander and the other writers associated with Zenger's paper arrested at the same time? The editor of the 1954 edition of *Zenger's Own Story* offers three explanations. In sedition trials, printers were prosecuted more often than authors because they were immediately responsible for the dissemination of libels. A second reason was that taking on Alexander and his associates was too much of a calculated risk in a trial. Finally, it could be proven more easily that Zenger published the paper than that Alexander authored the articles.

Alexander and Smith, representing Zenger, obtained a writ of habeas corpus with a view to having their client released on bail. The court set bail at 400 pounds, ten times more than Zenger's assets at the time. Why didn't his friends bail him out? One conjecture is that Zenger jailed was more powerful to their cause than Zenger freed. The *Gazette* pointed out that Zenger was a propaganda pawn in a game against the government. Zenger declared that he had faith in his friends and that he knew that they would stand beside him in this time of troubles. That they did, taking care of his wife and children during the imprisonment and trial.

If the justices and Cosby had hoped that the excessive bail would stop the

Zenger press, they were doomed to disappointment. His wife and assistants kept the press rolling.

Since the term of the court ended on January 28, 1735, and since there had been no indictment by the grand jury, Zenger and his lawyers expected that he would go free. Attorney General Bradley then decided to keep the case alive with his usual ploy of charging by *information*. Zenger was accused of printing and publishing two numbers of his journal (13 and 23) which were "false, scandalous, malicious, and seditious." Note the word "false," as it will play an important role in the trial.

Zenger's Lawyers Disbarred

When the court convened, Zenger's lawyers, Alexander and Smith, once again raised several exceptions to the commissions which empowered the two justices, Delancey and Philipse, to sit in judgment of Zenger. They argued that Cosby had granted the commissions without the approval of the Council; that Cosby had appointed them "during pleasure" rather than the statutory requirement of "during good behavior"; that a justice of the civil court cannot sit in a criminal trial; and finally that the form of the commissions were not in conformity with the common law or any other British or New York act.

Not only did the justices take umbrage at this seeming lack of respect, although the exceptions were well taken, they disbarred both attorneys from practicing as counselors or attorneys before the court.

The chief justice's judicial demeanor can be sensed in this comment from the bench:

> . . . you thought to have gained a great deal of applause and popularity by opposing this Court, as you did the Court of Exchequer, but you have brought it to the point that either we must go from the Bench, or Mr. Alexander from the Bar.

Thereupon, Zenger petitioned the court to appoint him an attorney (shades of Clarence Gideon) and John Chambers was assigned to the case. Rutherford describes him as "a young man without much experience in the law" and affiliated with the Court Party. He entered a plea of "not guilty" but did not pursue the exceptions to the commissions of the justices which had led to the disbarment of Alexander and Smith. He did seem to be interested in the case and succeeded in thwarting the Cosby clique in its plan to seat a biased jury.

Concerned about the nature of the defense which Chambers might develop, Alexander and Smith began to seek someone who could transform the case into a cause célèbre. They succeeded in winning over to their cause the dean of the American bar, Andrew Hamilton. To prevent their opponents from countering this brilliant move, they decided to keep this strategy secret until the first day of the trial. In any battle, court or war, surprise may ensure a victory. In this case, it did.

Choosing a Jury

One other technical matter remained to be decided: the composition of the jury. With the two justices and the attorney general determined to "get him"—this was a kangeroo court, if ever there was one—Zenger's hope had to rest with the composition of the jury. His counsel, Chambers, moved for a struck jury, and on July 29th the clerk of the court produced a panel of 48 names of freeholders, instead of producing the Freeholders Book as was the custom. The term "a struck jury" meant the selection of a jury from a pool of 48 names. Each side could strike out those names to which they objected until only 12 were left to be impaneled. In examining the names of those who had been selected, Zenger's friends discovered that some were not freeholders; others were holding positions or commissions at the pleasure of the governor; and some were office holders who had lost their jobs because of exposés in Zenger's paper. Among the other names were the "Governor's Baker, Taylor, Shoemaker, Candlemaker, Joiner, etc."

This outrageous connivance was protested by Chambers and even the justices must have been appalled by the clerk's strategem. They ordered that the customary procedure be followed, and a jury of 12 men satisfactory to both sides was chosen. Of the 12, one had served on the grand jury that had refused to indict and at least seven were of Dutch ancestry and perhaps still harbored ill feelings toward the British. This mix could not hurt the accused.

To appreciate the proceedings and the arguments in the trial, it is desirable to pause for a moment and examine the law under which Zenger was tried. The crime of seditious libel, a misdemeanor under British law, was directed against those whose writing brought the government, its officials, its institutions, and its laws into disrepute in the eyes of the people through ridicule, satire, hatred, scorn, or criticism adjudged to be harmful. Governments, then as well as now, prefer law and order to tumult and disorder.

It is not surprising that British monarchs and their supporters managed to design a procedure to control those who persisted in finding fault with rulers and their representatives at home or in the colonies.

When the crime of seditious libel was incorporated into the common law, it carried with it three accepted procedural principles. The jury's sole responsibility was to determine whether the words or the article had been printed or published. The judges had the power to decide whether the writing was seditious. Most important of all, the truth of the substance of the article could not be used as a defense. The reasoning behind this startling rule was that false libels could be easily disproved, disparaged, or even disregarded, but a true libel was very dangerous because it could arouse the populace to the point of factions, cabals, conspiracies, and even rebellion. The maxim that encompassed this principle was: "the greater the truth, the greater the libel." With this as background, we are ready to enter the courtroom.

The Curtain Rises

Imagine the scene! It is August 4, 1735, and the courtroom in the old city hall building is crowded with spectators. The elaborately white-bewigged and red-berobed justices James Delancey and Frederick Philipse are on the bench, and the 12-person jury with its foreman have been impaneled. The prosecutor, Attorney General Richard Bradley, is at his place and John Peter Zenger and his counsel, John Chambers, are at theirs.

The attorney general, hereafter referred to as Mr. Attorney, began the prosecution's case with the following opening statement (reproduced here from Peter Buranelli's modernization):

> MR. ATTORNEY. May it please Your Honors and you, Gentlemen of the Jury. The information now before the Court, and to which the defendant, Zenger, has pleaded "Not guilty," is an information for printing and publishing a false, scandalous, and seditious libel in which His Excellency, the Governor of this Province, who is the king's immediate representative here, is greatly and unjustly scandalized as a person that has no regard to law or justice; with much more, as will appear upon reading the information. Libeling has always been discouraged as a thing that tends to create differences among men, ill blood among the people, and oftentimes great bloodshed between the party libeling and the party libeled. There can be no doubt

> but you, Gentlemen of the Jury, will have the same ill opinion of such practices as judges have always shown upon such occasions. But I shall say no more at this time, until you hear the information, which is as follows:
>
> That John Peter Zenger, of the City of New York, printer (being a seditious person; and a frequent printer and publisher of false news and seditious libels, both wickedly and maliciously devising the administration of His Excellency William Cosby, Captain General and Governor in Chief, to traduce, scandalize, and vilify both His Excellency the Governor and the ministers and officers of the king, and to bring them into suspicion and the ill opinion of the subjects of the king residing within the Province), on the twenty-eighth day of January, in the seventh year of the reign of George the Second, at the City of New York did falsely, seditiously, and scandalously print and publish, and cause to be printed and published, a certain false, malicious, seditious, scandalous libel entitled *The New York Weekly Journal.*
>
> In which libel, among other things therein contained, are these words, "They (*the people of the City and Province of New York meaning*) think, as matters now stand, that their liberties and properties are precarious, and that slavery is like to be entailed on them and their posterity if some past things be not amended, and this they collect from many past proceedings." (*Meaning many of the past proceedings of His Excellency, the Governor, and of the ministers and officers of the king, of and for the said Province.*)

Bradley cited another allegedly libelous article in Zenger's paper, in which an unnamed resident of New York complained that moving from New York to New Jersey was like going from the frying pan into the fire, and the only safe course was to move to Pennsylvania. Bradley said that this was libelous since the reference was clearly to Cosby as governor of both New Jersey and New York.

Bradley went on to construe more of the unnamed New Yorker's complaints:

> "You, says he, complain of the lawyers, but I think the law itself is at an end. We (*the people of the Province of New York meaning*) see men's deeds destroyed, judges arbitrarily displaced, new courts erected without consent of the legislature (*within the Province of New York meaning*) by which it seems to me trial by jury is taken away when a governor pleases (*His Excellency the said Governor meaning*), and men of known estates denied their votes contrary to the received practice, the best expositor of any law. Who is there then in that Province (*meaning the Province of New York*) that can call anything his own, or enjoy any liberty, longer than those in the administration (*meaning the administration of government of the said Province of New York*) will condescend to let them do it? For which reason I have left it, as I believe more will."
>
> These words are to the great disturbance of the peace of the said Province of New York, to the great scandal of the king, of His Excellency the Governor, and of all others concerned in the administration of the government of the Province, and against the peace of the king, his crown, and his dignity.
>
> Whereupon the said Attorney General of the king prays the advisement of the Court here, in the premises, and the due process of law against the said John Peter Zenger.
>
> To this information the defendant has pleaded "Not guilty," but we are ready to prove it.

Mr. Chambers then rose and made his opening statement stressing the components of a seditious libel action: men do have the right to speak and write; a libel must be directed against a particular person; and there must be no doubt as to who that person is and what the alleged libel meant. He went on to say that he hoped that the prosecution would not be able to prove its case.

The Great Surprise

At this point in the trial, to the surprise of the justices, the prosecutor, Mr. Chambers and many people in the audience, "the tall and bent figure of the old patriot rose from among the spectators, advanced to the small enclosure in front of the bench, and introduced himself to the court." Then, "with an air of dignified authority," Andrew Hamilton addressed the justices:

> MR. HAMILTON. May it Please your Honour; I am concerned in this Cause on the Part of Mr. Zenger, the Defendant. The Information against my Client was sent me, a few Days before I left Home, with some Instructions to let me know how far I might rely upon the Truth of those Parts of the Papers set forth in the Information, and which are said to be libellous. And tho' I am perfectly of the Opinion with the Gentleman who has just now spoke, on the same Side with me, as to the common Course of Proceedings, I mean in putting Mr. Attorney upon proving, that my Client printed and published those Papers mentioned in the Information; yet I cannot think it proper for me (without doing Violence to my own Principles) to deny the Publication of a Complaint, which I think is the Right of every free-born Subject to make, when the Matters so published can be supported with Truth; and therefore I'll save Mr. Attorney the Trouble of examining his Witnesses to that Point; and I do (for my Client) confess, that he both printed and published the two News Papers set forth in the Information, and I hope in so doing he has committed no Crime.
>
> MR. ATTORNEY. Then if Your Honour pleases, since Mr. Hamilton has confessed the Fact, I think our Witnesses may be discharged; we have no further Occasion for them.
>
> MR. HAMILTON. If you brought them here, only to prove the Printing and Publishing of these Newspapers, we have acknowledged that, and shall abide by it. (Here Zenger's journeyman and two sons—with several others subpoena'd by Mr. Attorney, to give evidence against Zenger—were discharged, and there was silence in the court for some time.)
>
> MR. CHIEF JUSTICE. Well Mr. Attorney, will you proceed?
>
> MR. ATTORNEY. Indeed, Sir, as Mr. Hamilton has confessed the Printing and Publishing these Libels, I think the Jury must find a Verdict for the King; for supposing they were true, the Law says that they are not the less libellous for that; nay indeed the Law says, their being true is an Aggravation of the Crime.
>
> MR. HAMILTON. Not so neither, Mr. Attorney, there are two Words to that Bargain. I hope it is not our bare Printing and Publishing a Paper, that will make it a Libel: You will have something more to do, before you make my Client a Libeller; for the Words themselves must be libellous, that is, false, scandalous, and seditious, or else we are not guilty.

At this point, we ought to pause for a moment and raise some obvious questions. Why did the justices permit Hamilton to push aside their court-appointed attorney, Chambers, and assume control over the defense? Perhaps they thought it would be too risky to challenge a legend. Perhaps they were so sure of victory that they did not foresee the possible consequences of their casualness. They certainly could have refused to let him argue Zenger's cause.

When Hamilton conceded that Zenger had printed and published the two numbers (13, reportedly written by Alexander, and 23, reportedly written by Lewis Morris), why did not the justices direct the jury to find Zenger guilty as charged? They might even have discharged the jury. They then could have ruled the articles seditious as a matter of law and imposed punishment. It is not easy to conjecture about the distant past and to pass judgment on those whose thoughts are hidden to us by the veil of history. It could very well be that Delancey and Philipse were hypnotized by Hamilton's rhetoric and intrigued by his insistence that the attorney general prove what he had inserted unnecessarily in his information, that the words were "false, scandalous, and malicious."

From this point on, since the witnesses had been excused, the attorney general and Hamilton confronted each other with the customary courtroom strategies of the day: quoting authorities, precedents, the Bible and, more importantly, using their rhetorical skills to persuade judges and the jury of the justice of their cause.

The Attorney General Attacks

Mr. Attorney then launched into a vigorous attack on those who libeled their rulers, citing English common law and the Gospel. Governments, he pointed out, are established to protect "our Lives, Religion, and Properties." For this very reason, "scurrilous libels" against the government, but especially against the Supreme Magistrate (did he mean the king or the governor?) cannot be tolerated. Authoritative legal texts, as well as precedents dating from the Court of Star Chamber in the early seventeenth century, support punishment of those who libel in writing, printing, signs, or pictures the reputation of the living or the memory of the dead.

He buttressed his argument by offering quotations from the Bible, such as, "It is written that Thou shalt not speak evil of the Ruler of the People" (Paul).

Proclaiming that under the law of God and the law of man, it is "a very great Offense to speak evil of, or to revile those in Authority over us," Mr. Attorney presented the following quotations to prove that Zenger had scandalized the governor, the Council, and the Assembly, "in a most notorious and gross Manner":

> . . . as Matters now stand, their Liberties and Properties are precarious, and that Slavery is like to be entailed on them and their Posterity. And then again, Mr. Zenger says, The Assembly ought to despise the Smiles or Frowns of a Governour; That he thinks the Law is at an end; That we see Men's Deeds destroyed, Judges arbitrarily displaced, new Courts erected, without Consent of the Legislature; And That it seems Tryals by Juries are taken away when a Governour pleases; That none can call any Thing their own, longer than those in the Administration will condescend to let them do it . . .

If these were not libels, concluded the attorney general, then he did not know what one was. By these libels Zenger was stirring up sedition and discontent among the people, thereby defaming His Majesty's government and disturbing His Majesty's peace. It was the opinion of the governor and the Council that these scandalous and wicked practices had to be stopped.

Chambers then arose—this was his last appearance, apparently—and to his credit responded that the prosecutor had failed to show that the writings were false, malicious, or seditious and that therefore the jury could not under its oath find Zenger guilty.

Hamilton Responds

Hamilton then arose and attacked the attorney general's role in the proceedings. It is not libel, he proclaimed, for people "who suffer under a bad Administration" to voice their just complaints. At best, what we have here is an indiscretion resulting "from an extraordinary Zeal for Liberty." However, since the governor and the Council had directed this prosecution, the cause before the court had taken on dimensions which transformed the nature of the case.

How could the attorney general, continued Hamilton, at this time and place, try to resurrect the notorious Court of Star Chamber, "the most dangerous Court to the Liberties of the People of England, that was ever known in that Kingdom." (It was that court which had ruled that truth was not a defense in seditious libel.) That court has been discredited and was now defunct.

Furthermore, he pointed out, the attorney general tended to confuse the allegiance owed to the king with the respect owed to the governor. The cases cited by the prosecutor deal with libels against the king, not against governors. This line of argument is demeaning to the sovereign.

The law does change depending on the time and place, cautioned Hamilton, and what was acceptable in the past and in England may not be appropriate in New York at this time.

Then Mr. Attorney arose to say that all this was not relevant to the case and that Zenger had confessed to the publication which was plainly "scandalous, and tends to sedition, and to disquiet the Minds of the People of this Province." Quick to notice the failure to include the word "false" in this litany, Hamilton, perhaps with a sly glance at the jury, remarked that he was not going to comment on whether this had been done with design or not. The prosecutor replied that he did not think the word had been omitted, but that in any case, a libel was a libel, whether true or false.

Hamilton's Challenge

At this point in the trial, one gets the feeling that a cat and mouse game is taking place. Hamilton practically caresses the word "false." That word, he declaims, must have some special meaning, or why was it included in the charges against Zenger? It is not there by chance, and it is the very nature of a libel. Scandal *and* falsity create a libel. And then Hamilton challenges the attorney general:

> And to shew the court that I am in good earnest, and to save the court's time and Mr. Attorney's trouble, I will agree, that if he can prove the facts charged upon us to be false, I'll own them to be scandalous, seditious, and a libel. So the work seems now to be pretty much shortened, and Mr. Attorney has now only to prove the words false in order to make us guilty.

The prosecutor refused to pick up the gauntlet and the chief justice sustained him, reminding Hamilton that a libel cannot be justified under the law. Undaunted by this rebuff, Hamilton persisted at length in his argument, citing cases where the courts had permitted defendants to offer proof of truth in libel cases. Also, if one follows the prosecution's argument that the greater the truth, the greater the libel, and truth is not permitted as a defense, how could judges differentiate true libels from false ones, so as to apportion the appropriate punishments?

After examining the authorities cited, the chief justice overruled Hamilton's arguments and urged him to proceed. When Hamilton expressed dismay that the chief justice was basing his ruling on a citation from the Court of Star Chamber, he was reminded that good manners did not permit arguing with the court.

Hamilton Sets a Trap

Hamilton, realizing the futility of arguing with the court on rulings of the Court of Star Chamber, a practice which he hoped by this time had been relegated to the limbo of legal history, turned to the jury with this plea:

> MR. HAMILTON. I thank Your Honor. Then, Gentlemen of the Jury, it is to you that we must now appeal for witnesses to the truth of the facts we have offered, and are denied the liberty to prove. Let it not seem strange that I apply myself to you in this manner. I am warranted by both law and reason.
>
> The law supposes you to be summoned out of the neighborhood where the fact is alleged to be committed; and the reason of your being taken out of the neighborhood is because you are supposed to have the best knowledge of the fact that is to be tried. Were you to find a verdict against my client, you must take it upon you to say that the papers referred to in the information, and which we acknowledge we printed and published, are *false, scandalous, and seditious.*
>
> But of this I can have no apprehension. You are citizens of New York. You are really what the law supposes you to be, honest and lawful men; and according to my brief, the facts which we offer to prove were not committed in a corner. They are notoriously known to be true. Therefore in your justice lies our safety. And as we are denied the liberty of giving evidence to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases that the suppressing of evidence ought always to be taken for the strongest evidence; and I

> hope it will have that weight with you.
>
> But since we are not admitted to examine our witnesses, I will endeavor to shorten the dispute with Mr. Attrorney, and to that end I desire he would favor us with some standard definition of a libel by which it may be certainly known whether a writing be a libel, yes or no.

When the attorney general responded with a lengthy explanation, Hamilton inquired how one can know the meaning of the words he had used, such as, "malicious," "scandalous," "in an ironical and scoffing manner." Graciously, he also offered the explanation that, since the authorities had not laid down any rules, the only rule concerning their meaning was how the words are *understood*. The chief justice obliged him by agreeing that all words are libelous or not, depending on how they are *understood*. Although the chief justice qualified his comment with the proviso that those who are to *judge* the words are the final arbiters of their meaning, Hamilton simply thanked the justice for agreeing with him. He then went on to conclude that the jury must understand the words "to be scandalous, that is false." Only if they do so can they find the accused guilty.

When the chief justice protested and reminded Hamilton that the jury determined the facts (who printed and published the paper) and the judges applied the law (seditious or not), Hamilton seemed not to hear. He decided to explain to the jury what the law really is. Juries, he explained, have the right to determine the facts and apply the law in this case. If it were otherwise and judges were the only ones who were authorized to decide whether the words were libelous, juries in effect in such cases would be deemed useless. With this advice to the jury, Hamilton seemed to turn his back on the court and the attorney general, and he proceeded to deliver his closing arguments to the jury—a speech, long and detailed, which has been enshrined in the annals of liberty.

Hamilton Begins His Oration

Hamilton's oration before the jury on the nature of liberty and its relation to freedom of the press remains so impressive to this very day that it deserves to be known in its entirety. It represents a voice from the past warning us of the responsibilities of citizens, as well as the responsibilities of the press, when confronted by those who use public office for private gain and who use public power to diminish or abridge the rights of the people. However, constraints of space prevent the reproduction of the speech. What follows is a combination of paraphrase, summary, and quotation.

Hamilton begins by professing his loyalty and allegiance to the king and expressing his gratitude for the blessings the people enjoy under his rule. He then proceeds to make his first important point. When officials in high office in the colonies abuse the power with which they have been entrusted for the public good, several recourses are available for those who have been wronged. They can take their complaint to the king's court in England, but that is too inconvenient, too costly, and too difficult for those who would have to leave their families for a long period of time. They could take their case to the legislature or to the Assembly, but it is no secret that governors have the ways and means of winning legislators over to their side through "Craft, Caressing, and Cajoling."

The third option available to confront injustices is a historic and natural right:

> No, it is natural, it is a privilege, I will go farther, it is a right, which all free men claim, that they are entitled to complain when they are hurt. They have a right publicly to demonstrate against the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.

He then proceeds to discourse on human nature and the role of law as a brake on the arbitrary and capricious uses of power. Once again, he praises the king who wants peace among his people and justice administered impartially. The king, however, rules through governors, some of whom exceed the bounds of the authority granted in their commissions. Among the citizenry, he points out, are the "detestable and worthless" who will side with such governors because of their malice, envy and even hatred of those who have been singled out for punishment. There are also those who will silently support the governors, but hope that the rights and privileges of their fellow citizens will not be affected. And finally, there are always "those Men of Honor and Conscience" who, when they see liberty endangered "will like Englishmen . . . freely make a Sacrifice of any Preferment of Favor rather than be accessory to destroying the Liberties of their Country, and entailing Slavery upon their Posterity." It is these citizens who make the difference.

There are risks in opposing arbitrary power and the law is not as clear in this area as it ought to be. But the time has come, insists Hamilton, to clarify the law of seditious libel once and for all. In the following passage, he once again develops his main theme of truth as a defense and then slyly casts a reflection on the objectivity of the justices hearing the case.

> But to proceed. I beg leave to insist that the right of complaining or remonstrating is natural; that the restraint upon this natural right is the law only; and that those restraints can only extend to what is *false*. For as it is truth alone that can excuse or justify any man for complaining of a bad administration, I as frankly agree that nothing ought to excuse a man who raises a false charge or accusation even against a private person, and that no manner of allowance ought to be made to him who does so against a public magistrate.
>
> *Truth* ought to govern the whole affair of libels. And yet the party accused runs risk enough even then; for if he fails in proving every tittle of what he has written, and to the satisfaction of the court and jury too, he may find to his cost that when the prosecution is set on foot by men in power it seldom wants friends to favor it.
>
> From thence (it is said) has arisen the great diversity of opinions among judges about what words were or were not scandalous or libelous. I believe it will be granted that there is not greater uncertainty in any part of the law than about words of scandal. And it is no small reproach to the law that these prosecutions were too often and too much countenanced by the judges, who held their places "at pleasure" (a disagreeable tenure to any officer, but a dangerous one in the case of a judge). To say more to this point may not be proper.

The law is administered by judges, and judges often differ in their understanding and application of the law. This is especially true, emphasizes Hamilton, in the area of libels. In addition, the law keeps changing, and today we tolerate what yesterday was condemned as heresy in religious belief. As a matter of fact:

> There is heresy in law as well as in religion, and both have changed very much. We well know that it is not two centuries ago that a man would have been burned as a heretic for owning such opinions in matters of religion as are publicly written and printed at this day. They were fallible men, it seems, and we take the liberty not only to differ from them in religious opinions, but to condemn them and their opinions too. I must presume that in taking these freedoms in thinking and speaking about matters of faith or religion, we are in the right; for although it is said that there are very great liberties of this kind taken in New York, yet I have heard of no information preferred by Mr. Attorney for any offenses of this sort. From which I think it is pretty clear that in New York a man may

> make very free with his God, but he must take a special care what he says of his governor.
>
> It is agreed upon by all men that this is a reign of liberty. While men keep within the bounds of truth I hope they may with safety both speak and write their sentiments of the conduct of men in power—I mean of that part of their conduct only which affects the liberty or property of the people under their administration. Were this to be denied, then the next step may make them slaves; for what notions can be entertained of slavery beyond that of suffering the greatest injuries and oppressions without the liberty of complaining, or if they do, to be destroyed, body and estate, for so doing?

A Lesson in History

Hamilton reminds the jurors that when some of the English kings and their supporters tried to subvert the "Liberties and Privileges of the People of England" their temporary successes were eventually blunted by the opposition of those who clearly saw the danger. For example, the Court of Star Chamber, which was staffed by "Men of the First Rank," functioned without a jury, and it was realized that such procedures represented a danger to the people.

What makes the jury so critical a factor in the administration of justice is that jurors are more knowledgeable about the events in their neighborhood and more experienced in evaluating the testimony of the witnesses, whom they know, than are judges. It is for this very reason that the jury in this case should decide both the law and the facts.

To support this position, Hamilton cites the famous case of Penn and Mead, who were indicted for preaching to their followers in a London Street. They had been shut out of their meeting house. The judge instructed the jury to find them guilty of disturbing the peace. The jury responded by reaching a verdict of not guilty. The judge fined the jury and committed them until payment of the fine. One of the jurors appealed and won on the principle that judges have no right to punish a jury for not rendering a verdict ordered by a judge. This great case, concludes Hamilton, affirms the principle: "That Jurymen are to see with their own Eyes, to hear with their own ears, and to make use of their own Consciences and Understandings, in judging of the Lives, Liberties or Estates of their Fellow Subjects."

Remembering that Mr. Attorney had quoted the law of man and the law of God, Hamilton, not to be outdone, turned from the law books to the Holy Scriptures. The prosecutor, he reminded the jury, had defined libel in such vague terms and was so skillful in using innuendo to transform anything which is written into a libel. If one were to adopt this technique, few people could escape being charged with libel. With cleverness and satire, he offers the following examples: it could be said that Moses libeled Cain, and who has not libeled the Devil? More seriously, however:

> I sincerely believe that were some persons to go through the streets of New York nowadays and read a part of the Bible, if it was known to be such, Mr. Attorney (with the help of his *innuendos*) would easily turn it into a libel. As for instance Isaiah 9:16: "The leaders of the people cause them to err; and they that are led by them are destroyed." Should Mr. Attorney go about to make this a libel, he would read it thus: The leaders of the people (*innuendo, the Governor and Council of New York*) cause them (*innuendo, the people of this Province*) to err, and they (*the people of this Province meaning*) that are led by them (*the Governor and Council meaning*) are destroyed (*innuendo, are deceived into the loss of their liberty*), which is the worst kind of destruction.
>
> Or if some person should publicly repeat, in a manner not pleasing to his betters, the 10th and 11th verses of the 56th chapter of the same book, there Mr. Attorney would have a large field to display his skill in the artful application of his *innuendos*. The words are: "His watchmen are blind, they are all ignorant, . . . Yea, they are greedy dogs which can never have enough." To make them a libel there is, according to Mr. Attorney's doctrine, no more wanting but the aid of his skill in the right adapting of his *innuendos*. As for instance: His watchmen (*innuendo, the Governor's Council and his Assembly*) are blind, they are all ignorant (*innuendo, will not see the dangerous designs of His Excellency*). Yea, they (*the Governor and Council meaning*) are greedy dogs which can never have enough (*innuendo, enough of riches and power*).
>
> Such an instance as this seems only fit to be laughed at; but I appeal to Mr. Attorney himself whether these are not at least equally proper to be applied to His Excellency and his ministers as some of the inferences and *innuendos* in his information against my client. Then if Mr. Attorney is at liberty to come into court and file an information in the king's name, without leave, who is secure whom he is pleased to prosecute as a libeler?

To make sure that no stone would go unturned in arousing the thoughts and feeling of the jury against the governor, the attorney general, and even the justices, Hamilton decided to uncover one more grievance. Prosecuting by information, he declaimed, after a grand jury has refused to indict, "it a national Grievance and greatly inconsistent with that Freedom which the Subjects of England enjoy in most cases."

We come now to the peroration of this great speech, which has quoted widely in numerous publications.

> Gentlemen: The danger is great in proportion to the mischief that may happen through our too great credulity. A proper confidence in a court is commendable, but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of the opinion that there is no falsehood in Mr. Zenger's papers, you will, nay (pardon me for the expression) you ought, to say so—because you do not know whether others (I mean the Court) may be of that opinion. It is your right to do so, and there is much depending upon your resolution as well as upon your integrity.
>
> The loss of liberty, to a generous mind, is worse than death. And yet we know that there have been those in all ages who, for the sake of preferment, or some imaginary honor, have freely lent a helping hand to oppress, nay to destroy, their country.
>
> This brings to my mind that saying of the immortal Brutus when he looked upon the creatures of Caesar, who were very great men but by no means good men. "You Romans," said Brutus, "if yet I may call you so, consider what you are doing. Remember that you are assisting Caesar to forge those very chains that one day he will make you yourselves wear." This is what every man (who values freedom) ought to consider. He should act by judgment and not by affection or self-interest; for where those prevail, no ties to either country or kindred are regarded; as upon the other hand, the man who loves his country prefers its liberty to all other considerations, well knowing that without liberty life is a misery.

What follows in the speech is a change of pace and a change in emphasis. One can almost hear the sonorous tones ringing out into the courtroom and sounding the alarm of impending danger. For having appealed to the minds of the jurors with legal precedents, historical episodes, and Biblical references, Hamilton now begins his appeal to the heart strings, to the instinct for self-preservation, and the love of liberty.

He starts with a pictorial metaphor:

> Power may justly be compared to a great river. While kept within its due bounds it is both beautiful and useful. But when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If, then, this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition the blood of the best men that ever lived.

He follows this with a familiar analogy:

> I hope to be pardoned, Sir, for my zeal upon this occasion. It is an old and wise caution that when our neighbor's house is on fire we ought to take care of our own. For though (blessed be God) I live in a government where

> liberty is well understood and freely enjoyed, yet experience has shown us all (I am sure it has to me) that a bad precedent in one government is soon set up for an authority in another. And therefore I cannot but think it my, and every honest man's duty that (while we pay all due obedience to men in authority) we ought at the same time to be upon our guard against power wherever we apprehend that it may affect ourselves or our fellow subjects.

And to encourage them to do their duty, he points to himself. Despite being very old and suffering from great "Infirmities of Body," he will go anywhere and do everything necessary to confront and defeat the "Men in Power" who oppress the people.

> I am truly very unequal to such an undertaking on many accounts. You see that I labor under the weight of many years, and am bowed down with great infirmities of body. Yet, old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land where my services could be of any use in assisting to quench the flame of prosecutions upon informations, set on foot by the government to deprive a people of the right of remonstrating (and complaining too) of the arbitrary attempts of men in power.
>
> Men who injure and oppress the people under their administration provoke them to cry out and complain, and then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say that there were no instances of this kind.

And now comes that famous last paragraph when Hamilton exhorts the jury to think of the historic dimensions of the case they will decide. It is not a local issue; nor is Zenger's fate, important as it is, their prime concern. They are now actors on the stage of history and their decision will long be remembered in the never-ending duel between the lovers of liberty and the wielders of tyranny.

> But to conclude. The question before the Court and you, Gentlemen of the Jury, is not of small or private concern. It is not the cause of one poor printer, nor New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under British government on the main of America. It is the best cause. It is the cause of liberty. And I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny, and by an impartial and uncorrupt verdict have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right—the liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth.

Rebuttal and Decision

After Hamilton rested his case, the attorney general presented his closing arguments. Since Richard Bradley had declined to share his notes on the trial with Zenger and Alexander when they were preparing their narrative of the proceedings, they presented the following brief summary in their book.

> Here Mr. Attorney observed that Mr. Hamilton had gone very much out of the way, and had made himself and the people very merry; but that he had been citing cases not at all to the purpose. All that the jury had to consider was Mr. Zenger's printing and publishing two scandalous libels that very highly reflected on His Excellency and the principal men concerned in the administration of this government—which is confessed. That is, the printing and publishing of the journals set forth in the information is confessed. He concluded that as Mr. Hamilton had confessed the printing, and there could be no doubt but they were scandalous papers highly reflecting upon His Excellency and on the principal magistrates in the Province—therefore he made no doubt but that the jury would find the defendant guilty, and would refer to the Court for their directions.

The chief justice then charged the jury as follows:

> MR. CHIEF JUSTICE. Gentlemen of the Jury: The great pains Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of judges, and his insisting so much upon the conduct of some judges in trials of this kind, is done no doubt with a design that you should take but very little notice of what I might say upon this occasion. I shall therefore only observe to you that as the facts or words in the information are confessed, the only thing that can come in question before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt, and which you may leave to the Court. But I shall trouble you no further with any thing more of my own, but read to you the Words of a learned and upright judge in a case of the like nature [Chief Judge Holt in Tutchiy's Case]: "To say that corrupt Officers are appointed to administer Affairs, is certainly a Reflection on the Government. If People should not be called to account for possessing the People with an ill Opinion of the Government, no government can subsist. For it is very necessary for all Governments that the People should have a good Opinion of it. And nothing can be worse to any Government, than to endeavor to procure Animosities; as to the Management of it, this has always been look'd upon as a Crime, and no Government can be safe without it be punished.
>
> Now you are to consider, whether these words I have read to you, do not tend to beget an ill Opinion of the administration of the government? To tell us, that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices, to men out of a particular regard to their interest, and not to their fitness for the places; this is the purport of these papers.

Sensitive to the implications of the chief justice's remarks and the impact they might have on the jury in its deliberations, Hamilton arose to explain his position:

> MR. HAMILTON: I humbly beg Your Honours' Pardon; I am very much misapprehended, if you suppose what I said was so designed. Sir, you know; I made an apology for the freedom I found myself under a necessity of using on this occasion. I said, there was nothing personal designed; it arose from the nature of our defence.

The jury withdrew to deliberate and within a short time came in with its verdict. When asked by the clerk whether John Peter Zenger was guilty of "Printing and Publishing the Libels in the Information," foreman Thomas Hunt answered "Not Guilty."

Thereupon, there were three "Huzzas" in the crowded courtroom, and the next day Zenger was freed.

That evening a dinner in honor of Andrew Hamilton was given at the Black Horse Tavern. When he departed for home on the next day, he was once again honored by a gun salute from ships in New York Harbor. The following month, on September 16, 1735, the Common Council voted him the Freedom of the Corporation and presented him with "a Gold Box of five ounces and a half Inclosing the Seal of said Freedom and engraved with the Arms of the City of New York." This gift was purchased with voluntary contributions to honor a man for a defense he undertook *pro bono publico*, or, in the words of that day "refusing any fee or reward."

Epilogue

What happened to our two protagonists after the trial? In jubilation, was the printer remembered? In 1737, Zenger became the Public Printer in New York and the following year he was appointed to the same post in New Jersey. He continued printing his *Journal* until his death on July 28, 1746, when his wife took over the publication. In December, 1748, she turned the business over to John Zenger, the son of his first marriage, and he printed the paper until 1751.

As for Hamilton, widespread praise was not the only response to his great forensic performance. Several members of the bar charged that he had misused and misquoted precedents. Even William Smith, who had supported and represented Zenger, is reported to have joined the chorus of critics in his later years. To Hamilton's defense came his good friend, James Alexander, who has been described as "our first and greatest colonial theorist of the rights of free expression." In a series of articles criticizing the critics, he reminded them that they were living at a time when the old precedents of the common law were on a collision course with new ideas of liberty with ancient roots. He recalled for them martyrs who had been persecuted and prosecuted under laws which were no longer defensible. He went on to proclaim a principle which has reverberated to this very day: "But a free constitution and freedom of speech have such a reciprocal independence on each other that they cannot subsist without consisting together."

A writer in Benjamin Franklin's *Philadelphia Gazette*, in defending the verdict, by implication supported Hamilton when he stated: ". . . if it is not law, it is better than law, it ought to be law, and always be law wherever justice prevails."

The Verdict of History

In its time, the Zenger case was a bolt of lightening and a roll of thunder seen and heard in New York, Philadelphia, Boston, and London. As the editor of the English reprint remarked: "the trial had made a great noise in the World." Reprints of *Zenger's Own Story*, which was published in 1736, appeared in the colonies and abroad, and they must have evoked much discussion. Then, for a while, there was an eerie silence on the political landscape. There was no rush to change the law. Why?

The Zenger trial represented an example of jury nullification—a refusal by jurors to abide by the instructions of the judge because they find them offensive to their sense of fairness or justice. A jury's verdict does not create a legal precedent, but it can set a trend. And so, for a while the law of seditious libel remained the same, but change was in the air. Future juries might follow the actions of the Zenger jury, and then the law might have to respond to this voice of conscience of the community.

In the short run, the Zenger case did have some impact, although very limited. It did discourage those in power from resorting to the use of grand juries and the courts to punish *printers* for publishing criticism. The case had no impact, however, on legislative assemblies, which had no qualms in peremptorily holding in contempt and punishing those who had the temerity to criticize their actions.

In the long run, the Zenger case did set a trend. Patriot Gouverneur Morris described the case as "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America." Historian Livingston Rutherford concluded at the beginning of this century that the trial "first established in North America the principle that in prosecution for libel, the jury were the judges of both the law and the facts." Another commentator (F.L.M., the modern editor of *Zenger's Own Story*) declared that the case "is to be regarded first, as a landmark in the history of civil liberty in the colonies and, second as a basis (in part, at least) for a legal doctrine which was to be adopted many years later." Vincent Buranelli, a contemporary writer, has found that "The trial was the first, and most important, step toward freedom of the press in America." Finally, as Leonard Levy points out, in a recently published book, it was "a watershed in the evolution of freedom of press, not because it set a legal precedent, for it set none, but because the jury's verdict resonated with popular opinion."

Gradually, the message of that triumphant triumvirate—Zenger, Hamilton, and Alexander—found its way into the law of Great Britain and of the United States. In this country, Pennsylvania's new Constitution in 1790 paid homage to the Zenger precedent by incorporating its two great principles: truth as a defense and the jury as judge of facts and law in seditious libel cases. Even the repressive Sedition Act of 1798 accepted these two principles. It was not until 1805 that New York made truth a defense. In Great Britian, juries were given the power to decide the law and the facts in 1792, but it was not until 1843 that British law recognized truth as a defense.

Americans have a penchant for criticizing governmental institutions, government officials, governmental policies, and governmental laws. They regard it as their inalienable right. No member of Congress is free from the darts and arrows of investigative reporting. No president is immune from criticism, caricature, and satire. No Supreme Court ruling can escape editorial ridicule or condemnation. Sometimes this criticism is justified; sometimes it is not.

If it had not been for John Peter Zenger, we might have had to wait much longer than we did for this right to expose villany, venality, and immorality and unconstitutionality. We Americans owe a vote of thanks to that colonial printer and to his wife and friends. Individuals like Cosby and Delancey play an important role, too. It is public officials like them who evoke the Zenger counterpoint to their power.

Today, as in the past, there are holders of public office who tend to confuse their private vices with the public interest. The Zenger trial established the right of the press to criticize those who have no place in the centers of political power. It proclaimed the principle that the cacophony of criticism so essential to a democratic state is preferable to the symphony of sycophancy demanded by authoritarian and totalitarian rulers. ☐

The Printer in Print

Anyone who writes on this great historic drama is indebted to the basic source: *Zenger's Own Story: A Brief Narrative of the Case and Trial of John Peter Zenger—Printer of The New York Journal*, printed by Zenger in 1736. A literal reprint of the original pamphlet was produced in December, 1954, by the Press of the Crippled Turtle, Columbia, Missouri. It is assumed that, although the pamphlet was printed by Zenger, it was largely written and edited by James Alexander.

The second important and essential source is Livingston Rutherford's *John Peter Zenger: His Press, His Trial, and a Bibliography of Zenger Imprints* (New York: Dodd, Mead and Company, 1904). I have drawn freely from each of the above.

I have also culled freely from Vincent Buranelli's excellent summary of the background of the case and the presentation of the trial in contemporary language. *The Trial of Peter Zenger* (New York University Press, 1957) is authentic and very easy reading. It is the source of most of the extended quotations used here.

Leonard Levy's *Emergence of a Free Press* (New York: Oxford University Press, 1985) is a revised and enlarged edition of his *Legacy of Suppression*. The English and colonial background of the issues of that time is described in scholarly detail and is essential to an understanding of the Zenger case and its aftermath.

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Libel

(Continued from page 17)

also owned by the commissioner would be adversely affected. A second weekly, the *Enterprise*, picked up the piece.

Commissioner Millison filed an $8 billion—yes, with a "b"—lawsuit, not just against the two papers but against specific editors and reporters. He claimed the omission was libelous and had caused him particular pain and suffering. He said it was responsible for a heart attack and that, as a result of the article-induced heart attack, he could not attend to his horse breeding business.

But there is more. He sued a reporter who had left the paper before the article appeared—but who had asked him some probing questions once at a news conference. He sued a former editor who had nothing to do with the story and had moved to another city.

In court documents, the papers have contended that Millison threatened hitting reporters with libel suits as far back as 1979 and 1980 should they write articles which he might deem unfavorable to him. These threats were made at meetings of the commissioners, at press conferences and on other occasions.

"Millison encouraged reporters to believe that he would file such suits by pointing out to them that other elected officials had benefitted by the filing of such suits by receiving more favorable coverage after such suits were filed," said attorney Ted Sherbow in one of the scores of court documents.

The case was dismissed on grounds that the pieces were not defamatory. It never even reached the point of considering the issue of malice. But consider the effects. Legal fees, paid for under libel insurance, amounted to more than $300,000. The reporter had moved on to another paper, and her career was rising —until the suit was filed and she was

Some Libel Alternatives

Eugene Roberts' spirited article does an excellent job of delineating the current libel crisis. He presents a chilling picture of lawsuits stifling criticism of public officials. It's a skillful piece of advocacy, raising the banner of free expression in a democracy.

But, as always in the law, there's another side. Dale Greenawald's classroom strategies article in this issue uses the Sullivan case and the example of Raymond Henderson to suggest some of the values at stake. The following activities may help students see other aspects of a complex question.

What About Lies?

During oral arguments on the Sullivan case, Supreme Court Justice Arthur Goldberg asked the *New York Times'* lawyer what the remedies should be for a public official who is falsely and maliciously called a bribe taker. Should he have a cause of action for libel, or must he be satisfied that his access to media and the voters will give him a platform from which to maintain his innocence?

The *Times'* lawyer answered that "corrective speech"—his opportunity to rebut the charges—would be the best "avenue of retaliation." This is the position that Eugene Roberts asserts in this article. It may be the best possible solution for a complicated problem.

But it in effect nullifies *all* libel laws as they relate to public officials. It goes well beyond nullifying the old doctrine of seditious libel—which held that any criticism bringing the rulers into disrepute was a crime—and in effect opens public officials to any lie, any charge, any falsehood, without giving them a recourse in law.

Ask students to research the Zenger case (see Isidore Starr's article in this issue) and the Sedition Act of 1798 to ascertain the difference between seditious libel and libel *per se*. Then ask them what values are *protected* by libel laws. The following quotations may help them begin to formulate their thinking in the issue: Justice Potter Stewart, in one of the early cases after *Sullivan*, noted that reputation, the value protected by the libel laws, reflects

> our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

Noting that lawsuits for libel often served as an alternative to dueling, appeals court judge Harold Leventhal commented:

> The rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes.

Ask students to role-play a mayor and her family in a situation where she is falsely accused of corruption. What would her recourse be if the First Amendment is held to permit *any* charge against her? If no libel law at all protects her? Are charges like this merely part of the price of politics? If so, would that deter people who are otherwise qualified from running for office and exposing themselves to this sort of criticism? What might the results of this policy be for our political life?

Invite a government official to class to discuss his/her views on these questions.

The Uses of History

Eugene Roberts' article ends with an emotional salute to the men who framed the First Amendment, preserving the right to vigorously criticize the government.

Roberts argues that the First Amendment means exactly what it says: Congress shall pass no law inhibiting the freedom of the press. This position has had some influential advocates over the years, including Supreme Court Justice Hugo Black.

Ask students to research the debates over the scope of the First Amendment, noting the positions advanced over the years. Ask them what protection the courts have accorded obscenity? Publication of military secrets, especially in wartime? Restrictions on the time and manner of expression (as opposed to its content)?

In particular, ask them to research the law of libel before the *Sullivan* decision in 1964. Was it a matter left frozen in place pending resolution. The editor tried to buy a radio station but had to list the suit as a contingent liability—and was turned down.

No sooner had the case been dismissed—in the spring of 1984—than Millison filed another lawsuit against the *Beacon* for another article, this one even milder. That case is now making its way through the legal system.

And in Mississippi, there is a case that tells you much about the fallibility of juries.

In 1979, there was a nasty fight going on in Harrison County, Mississippi, about roads. Some residents were charging that Supervisor Hue Snowden was showing favoritism in paving decisions and trading asphalt for votes.

On June 20, 1979, the *Daily Herald*, on Mississippi's Gulf Coast, reported the flap. It specifically reported that Snowden had widened and paved Hill Top Road, which provided access to a subdivision being developed by two other politicians, Circuit Court Clerk Webb Lee and State Representative Tommy Gollott.

The story contained an error. The county, in fact, did widen and pave a road, and it was a road to the development. But it was called Russ Road, not Hill Top Road. The *Herald* printed a correction.

But on that error—the misnaming of the road—Clerk Lee and Rep. Gollott sued the *Herald* for "malicious libel." Not only did they sue—but they won. A jury awarded them $300,000.

The *Herald* appealed, and on May 25, 1983, the Mississippi Supreme Court ruled in its favor. The court noted that neither man had been accused of dishonesty, or even impropriety, and no reflection had been made on their morals or characters. The court went on:

> The most which can be made of [the article] was that these public officials were recipients

to the states? If so, what were the standards governing defense of libel suits in the various states? (In Alabama, the state where *Sullivan* originated, untrue statements were libellous per se, general damages need not have been alleged but were presumed, and punitive damages could also be awarded.) Did these standards favor libel plaintiffs or defendants? Was allegedly libellous speech protected at all by the First Amendment? (The Alabama Supreme Court, in upholding the initial judgment in *Sullivan*, held that "the First Amendment of the U.S. Constitution does not protect libellous publications.") How did *Sullivan* change the law of libel? If the decision made it easier to *defend* libel suits and harder to win them, then why does Roberts think that it helped spur the current onslaught of libel suits?

Ask students to debate the proposition that it is the current climate of opinion in the country that accounts for the unprecedented number of libel suits, not the standards governing libel, or any ferocity of press criticism. (An article by Anthony Lewis in the *New Yorker* [Nov. 5, 1984] asserts that criticism of public officials is far tamer than it was in the first century of the republic, when Jefferson was called an atheist and libertine and even George Washington was reviled for "political iniquity" and corruption.) What factors might account for this climate of opinion? Consider hostility to the press, a general feeling that the media is too powerful and arrogant, and perceived excesses of investigative reporting after Watergate. (For other possibilities, see Mary Manemann's article in the Spring, 1985, *Update*, and the Lewis article cited above.)

Hold That Jury

A related point is the role of juries in contemporary libel cases. Roberts points out that they are often sympathetic to those who claim to have been libelled, and often award very large judgments against the media. He says that libel suits may be too complicated for juries.

Ask students to research the role of the jury in the Zenger case and the prosecutions under the Sedition Act of 1798. How were these juries different from or similar to contemporary ones? Is it true, as one commentator suggests, that historically juries have been a bulwark of press freedoms? If so, then why aren't they now? Are certain types of cases too confusing for jurors? Are libel actions in this category? What is the role of the jury in a democracy? If juries represent the conscience of the community, then shouldn't they have a role in cases dealing with reputation and the criticism of government officials?

Alternatives

Roberts suggests a bold, simple remedy for the current libel crisis—a finding that the First Amendment prohibits *any* infringement on criticism of government officials.

Ask students to weigh the costs and benefits of several other proposed remedies. Who would benefit from each change? Would each change enhance press freedoms? The right to a good name for those who allege libel? The societal interest?

Limiting Awards. As it stands now, libel plaintiffs can seek compensatory damages—actual losses, which can include mental suffering as well as monetary losses—*and* punitive damages. It's been suggested that the constitutional limits of such awards be sharply defined, including, perhaps, eliminating punitive damages entirely.

Countersuing Libel. In several recent cases, the media has fought back by countersuing the libel plaintiff. For example, the McClatchy Newspapers of California, faced with a $25 million suit by Senator Paul Laxalt of Nevada, have turned around and sued the senator for $6 million, claiming that his suit infringes their constitutional rights.

Truth-Finding Forums. Anthony Lewis writes, "Some European countries have changed their law to give the individual who feels wounded a way to vindicate his honor more easily but not to gamble for a huge financial windfall. This system does away with libel damages altogether but provides a legal forum to test the truth of a challenged statement . . . . If the courts find the statement false, the publisher may be required to print a retraction."

After the class has researched these alternatives and weighed their pros and cons, invite media representatives, public officials, and lawyers and/or judges to comment on both the present system and these proposed modifications.

of favored treatment by Mr. Snowden—namely, that he had widened and paved a road leading to their subdivision. This, of course, was true, except the road was incorrectly named.

Suits like the Maryland and Mississippi cases and the countless suits involving average Americans are being overshadowed by the big cases—*Westmoreland v. CBS* and *Sharon v. Time Magazine*. These cases leave the impression that it is large and powerful news organizations that are the targets of public officials' libel suits.

And many media critics will tell you that libel suits are an essential counterbalance to "media giants" and that, in the end, libel suits promote democracy and diversity of opinion by using courtrooms as forums in which opponents can fight back at a press grown too powerful.

Stifling Dissent

Nothing could be farther from the truth. The largest and wealthiest press and television organizations—with ample funds, and insurance, and determination to fight back—will not be curbed easily by libel suits. Indeed, in the end, if current trends of litigation continue, they will be the only ones who can afford to speak out—they, and of course, public officials who are totally immune from libel and slander litigation. It is the alternative voices—the ones without ample treasuries or insurance or sophisticated legal help—that will be stilled: small newspapers, journals of opinion, private citizens, public interest groups, writers of letters to the editors. In short, individuals and small new organizations that do not have, or cannot afford, the protections of expensive legal help or of libel insurance—which, of course, is growing steadily more costly as libel and slander suits grow even more numerous.

Make no mistake. Libel suits by public officials do not promote diversity, criticism or dissent. To the contrary, they put a heavy price on it. They enforce the power of those who govern. They reduce the power of those who are governed.

The libel problem is real. It is frightening. It is menacing to a nation that has thrived and flourished on vigorous dissent and unfettered criticism of government and its officials.

We have turned a precious right—freedom of speech—over to lawyers who, with their qualifying, quibbling and quarreling, are pricing it out of existence.

There was a very good reason our founding fathers went back to the Constitution only four years after it was written and added the First Amendment. They looked around them at the rash of conflicting viewpoints flying about the political landscape of the first democratic republic on the face of the earth since ancient Greece—and they decided they liked the babble of those many voices, those polemical broadsheets cranked out on hand presses. . . much more than they would like the chilling alternative—a silence enforced by a central government.

Now, 200 years later, the babble, if you will, threatens to grow quieter. . . and quieter.

What is eroding here, and eroding fast, is one of the most fundamental rights of a free people—fully as fundamental as the right to vote, or own property, or travel without restraint.

And if we lose that right, what kind of country will this be? And what then will we lose next?

There is only one solution. It is not a radical one. It is a tried and true solution that stood as well until the recent wave of court action. It is the First Amendment, which says quite simply, and absolutely, that speech is free. The time has come to return to basics. The time has come to return to the First Amendment. The time has come to recognize that you can't have free speech and qualify it. Justices Black, Goldberg and Douglas saw that clearly 21 years ago.

It is time that the justices now on the U.S. Supreme Court—and, indeed, the judges on all the other courts across the nation—see it just as clearly.

Censorship

(Continued from page 9)

(SPIE) recently received word from the Defense Department that 43 of the 219 papers scheduled to be presented at a meeting could not be given in open sessions. Thirteen of the papers, the government said, contained classified information, and the rest, although unclassified, were judged to be militarily sensitive. Many of the disapproved papers dealt with lasers, which could apply to "Star Wars" research.

Faced with a potential disaster, the conference organizers worked out an extraordinary arrangement with the Pentagon's Office of Research and Advanced Technology—28 of the papers were presented in restricted sessions, and those attending agreed not to divulge the contents to unauthorized people.

Writing in the *Washington Post*, George Lardner, Jr. said that under a 1982 executive order spelling out new rules for defining government secrets, more documents have been classified and "far fewer" declassified. According to Lardner, the annual report of the Information Security Oversight Office cited a nine percent increase in the total number of "classification decisions" in 1984 over 1983, while the 1983 total was three percent higher than 1982.

In addition, the use of public access laws is becoming prohibitively expensive, nuclear information once in the public domain is now being restricted, declassification of historical documents and other information no longer warranting classification is being deemphasized, and perhaps, most important, government efforts to manage the news—such as barring press coverage of the Grenada invasion—have increased.

Past and Future

Censorship isn't a problem of left or right, of this era or that, of one party or the other. You find it in all periods of American history, wherever people try to solve problems by cutting back on someone else's expression.

Pressures to censor are always greatest in wartime, and we have been fighting a particularly harrowing cold war for 40 years now. Moreover, the particular issues we deal with are complex, and it's unwise (and unproductive) to insist on simple solutions.

Still, the fight against limiting ideas goes on, with James Madison's words of over 150 years ago providing the rationale:

> A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

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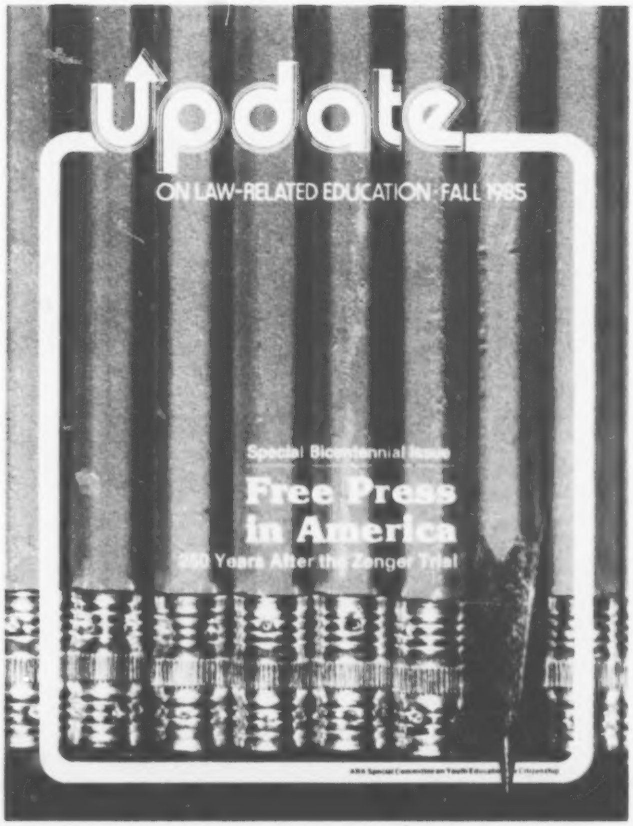
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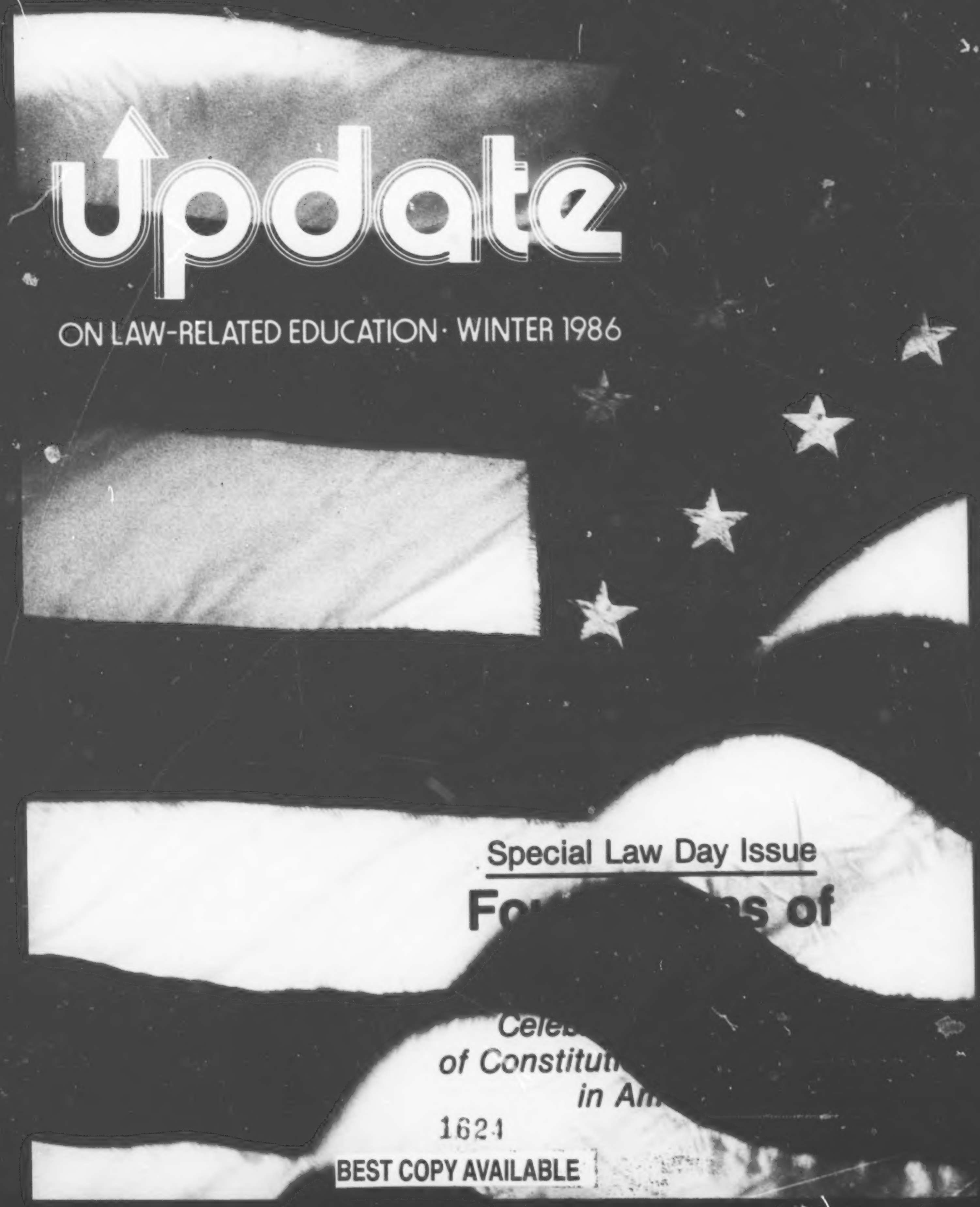
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contents

Volume 10, No. 1, Winter, 1986

3 Opening Statement

ELEMENTARY SCHOOL

4 Lawyers in Elementary Classrooms

K-3 STRATEGIES

8 Problems in Green Valley (Democratic Decisions)
10 The Case of the Professional Tap Dancer (Dispute Resolution)
11 Teaching About Contracts (Legal Procedure)
13 People Who Make Courts Work (Due Process)
14 Using Facts to Solve Mysteries (Due Process)

4-6 STRATEGIES

15 Using Facts to Solve Mysteries (Due Process, advanced lesson)
16 Mini Mock Trials (Due Process)
18 Elementary Mock Trial (Due Process)
19 Mediation and the Adversary Process (Alternatives)
20 Freedom of Speech (Fundamental Freedoms)

MIDDLE SCHOOL

22 Making Government Play by the Rules

MIDDLE SCHOOL/SECONDARY STRATEGIES

27 Teaching About Habeas Corpus (Foundations of Freedom)
28 What Is Procedural Justice? (Due Process)
31 Criminal Law Mock Trial (Due Process)

SECONDARY SCHOOL

32 Building Blocks of Freedom

SECONDARY SCHOOL STRATEGIES

37 You Decide: A Jury Simulation (Due Process)
38 Historical Foundations of Individual Liberties (Foundations of Freedom)
41 Teaching About Search and Seizure (Fundamental Freedoms)
44 Our Freedom to Assemble and Associate (Fundamental Freedoms)
46 Right to Counsel (Fundamental Freedoms)

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For Law Day...Or Any Day

Update to the Rescue

Even the most articulate, forceful professsional can be turned into quivering jelly by a request to speak to a second grade class. Addressing older students can also be a white-knuckle experience.

For the first time, *Update on Law-Related Education*, an award-winning publication of the ABA's Special Committee on Youth Education for Citizenship, has done an entire issue on helping lawyers and other community resource persons make the "Foundations of Freedom" come alive in the classroom.

Since Foundations of Freedom is also a Law Day theme, this issue of *Update* is a natural for any lawyer interested in helping youngsters understand our heritage of law.

The "Foundations of Freedom" issue mixes substance and strategy, providing solid background and exciting teaching ideas that add up to sure-fire lessons.

Articles in this *Update* feature:

- do's and don'ts for lawyers making classroom presentations,
- "Using Facts to Solve Mysteries," one of several activities that help elementary students understand legal procedures,
- a bargain about candy bars that helps little kids learn about contracts,
- mock trials as a way of teaching legal procedure,
- jury simulations that teach secondary students about the right to trial by jury and show how juries reach decisions,
- role-plays on the development of habeas corpus,
- school search cases that teach about search and seizure.

And these are only a sampling of more than 20 activities specially tailored for lawyers in the classroom.

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opening statement

Whether teacher or attorney, old hand or newcomer to working with students on Law Day, this *Update* is designed to smooth the way and make that experience more meaningful. We have focused this issue on this year's Law Day theme "Foundations of Freedom" and chocked it full of teaching ideas and informational pieces you can use to present facinating lessons for students.

Classroom Strategies. This *Update* features:

- do's and don'ts for lawyers making classroom presentations
- a bargain about candy bars that helps little kids learn about contracts
- "Using Facts to Solve Mysteries," one of several activities that help elementary students understand legal procedures
- mock trials as a way of teaching due process to elementary and secondary students
- jury simulations that teach secondary students why trial by jury is a democratic right and how juries decide
- school search cases that teach about search and seizure
- case studies on the freedom to associate
- historical simulations on the development of habeas corpus

And this is only a sampling of the more than 20 activities that are included.

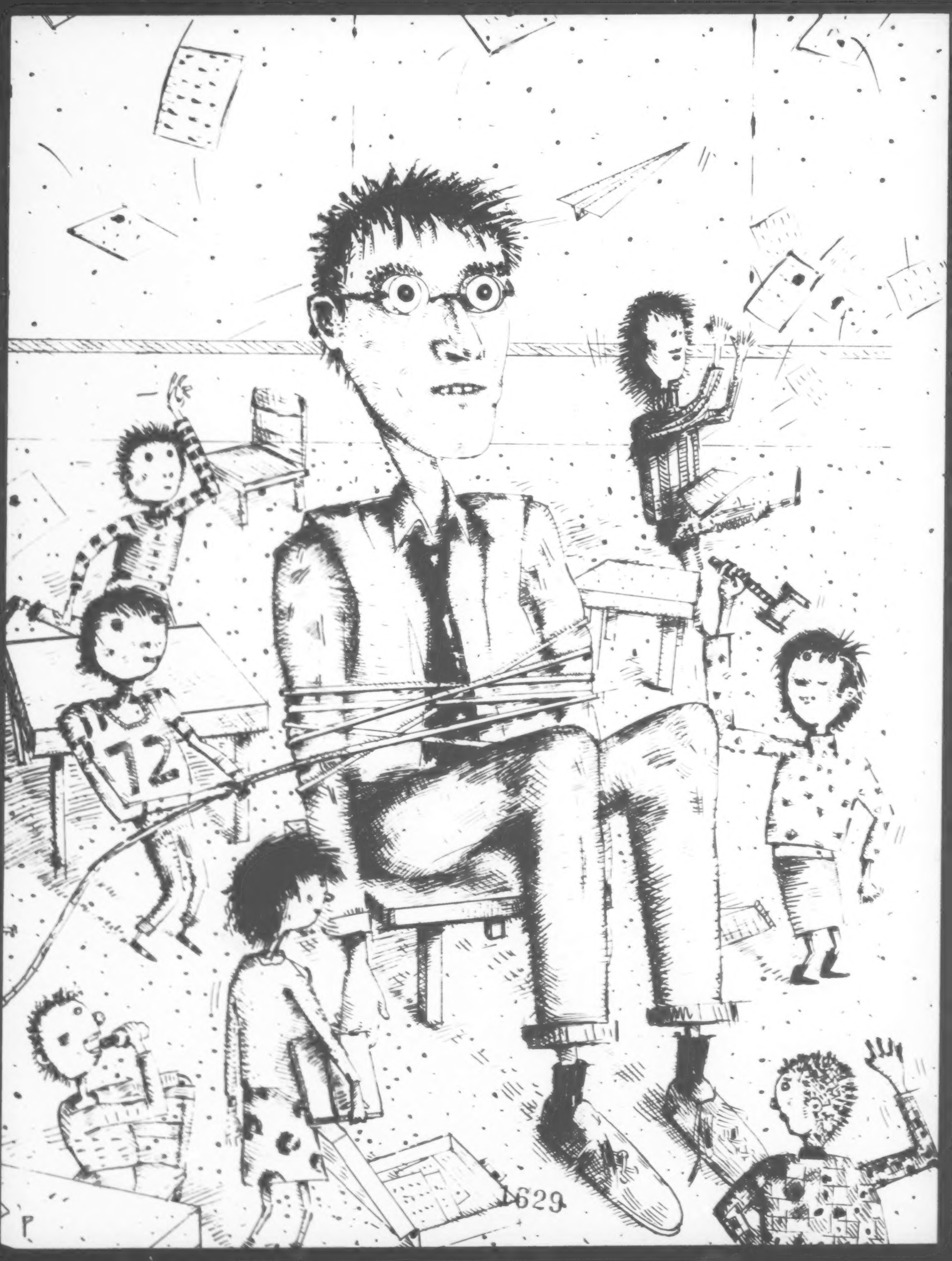
The approach of this "Foundations of Freedom" issue is to mix substance and strategy, providing both the background and the lively teaching ideas to help either lawyers or teachers to present a sure-fire activity on any of these topics.

This issue of *Update* is part of a special effort to commemorate the bicentennial, with constitutional/Bill of Rights issues of the magazine scheduled right up to the official 200th birthday of the Constitution in September of 1987.

In Fall of 1985 we published a bicentennial issue of *Update* on free press in America. In Spring of 1986, our bicentennial *Update* looked at both the federal and state constitutions, and examined such topics as equality, due process, and constitutions and the spirit of liberty. In Winter, 1986, we will again put out a Law Day *Update*, this one on the theme "We the People."

The Special Committee on Youth Education for Citizenship is pleased to bring these issues of *Update* to help you to enrich law-related education programs. In states and communities throughout the country, there are many other law-related education projects, with exciting Law Day and other LRE materials and resources, which stand ready to assist. To find out about projects in your area, contact your local or state bar association or contact us. We are here to help.

For futher information, contact Charlotte C. Anderson, Director of Youth Education for Citizenship, at 750 North Lake Shore Drive, Chicago, Illinois 60611, 312/988-5733


72

FOUNDATIONS OF FREEDOM

Arlene F. Gallagher

Lawyers in Elementary Classrooms

The purpose of this article is to give lawyers who are planning to work with elementary school students some practical suggestions that will make their presentations more effective. These "tips" should be helpful whether you are planning to visit a school one time on Law Day or will be going several times. Many of the following suggestions came from classroom teachers who have had extensive experience working with lawyers in elementary classes. Other suggestions came from lawyers who have found that discussing the law with elementary students can be a rewarding and exciting experience.

Getting to Know Your Client(s)

If possible, meet with the classroom teacher before you go to the school, or at least have a telephone conversation to discuss your presentation and the class you'll be visiting. You might consider sending this article to the teacher and use it as a basis for your discussion. More than likely the teacher will have additional suggestions or might want to modify some of these depending on the class you'll be visiting.

An initial meeting is usually about what the lawyer plans to do but you will be even more effective if you also get some information about the class. Classes, as well as students, have a kind of personality. Ask questions about the class. Are they quiet? Active? Noisy? How is their attention span as a group? Are there certain students who always speak up or others who never do? It's easy to get monopolized by the very bright, verbal student and ignore the quiet child who may have an interesting point to make or question to ask.

The classroom teacher can be very helpful to you during your presentation, so don't hesitate to ask for assistance. You don't have to "be the teacher." Pat Jarvis, a fourth grade teacher in Rhode Island, says she feels free to interrupt a class discussion to clarify a student's question or suggest that the lawyer spend more time on a legal point. The teacher can work with you and handle any management or discipline problems. If you want students to sit on a rug with you, the teacher knows how to get them there. Inviting 30 nine-year-olds to come to the front of the room can cause a stampede.

Pacing the Presentation

Children can't sit and listen as long as adults, so consider the students' attention span. Work out some hand signals with the teacher ahead of time so that you can get cues if you're going too fast, or if you need to alter the pace. Judy St. Thomas, Director of the Rhode Island Legal/Educational Partnership Program, recommends that if you have the time it would be very helpful to visit the class and observe before you do your session. Ask to see a law-related or social studies lesson, or one in which the students will be discussing something that touches on law or citizenship. This will give you a chance to hear their vocabulary level and how they verbalize their thoughts. It will also give you a chance to observe the teacher's style. All teachers are different, and their styles vary just as much as lawyers'.

Finally, ask the teacher to have name tags either on the students or on their desks. You will be amazed at how much more effective you will be when you use a child's name. Imagine how clients would feel if you didn't know their names.

Peter Hannan

Whatever topic or plan you come up with, try it out. Borrow some children if you don't have any of your own, but use children close to the age of the students you'll be meeting in school. Three years age difference doesn't matter much when you're thirty-five, and the difference is even less if you're sixty-five, but a seven-year-old is *very* different from a ten-year-old. Fifteen minutes with a small sample of children will be time well spent.

Time: The Limited Resource

Everyone's time is valuable. You want to make the best use of time possible, and scheduling a trip to an elementary school can be a problem. Most teachers are willing to be as flexible as possible, and they'll rearrange their teaching schedule to fit your availability if they can. However, don't agree to go during recess or lunch, two very important activities to children – and adults. Remember that when you're calling to schedule a visit the teacher probably won't be able to talk to you while class is in sesson. Try to call before or after school, or ask if you can call the teacher at home.

Thirty to forty-five minutes is about the maximum length of time to spend with elementary students, and that should include as much participation by them as possible. Once you have made the appointment, try very hard to keep it. Even twenty minutes late might mean that there's no point in going because the class is by then scheduled for something else. If you have to cancel, call as soon as you know that you can't make it. If you have to call that day, even a couple of hours warning will make it easier for the teacher to plan another lesson.

Your Place or Mine

Most lawyers think working with elementary students means going to the school. Marj Montgomery, a teacher in Newton, Massachusetts, says not to overlook the glamour of having students come to your office, or meeting them in court. While you may think that a lawyer's office would be boring, it won't be to the children. Sitting at a lawyer's desk, or in a jury box, or taking the judge's chair for even a minute does a lot for a student's perspective.

Marj says that a big treat for her eighth graders is to go to Jay Flynn's office at Parker, Coulter, Dailey and White to discuss a mock trial they're preparing. They go in small groups or four or five, and this saves Jay's time because he doesn't have to travel to and from the school. Sixth, fifth and some fourth graders are perfectly capable of taking a mini field trip on their own. If you have students come to your office, don't have your calls held. They'll understand more about what you do all day if they see you doing some of it.

Choosing Your Topic: How Much Can You Cover

You probably know the story about the six-year-old girl whose mother was an engineer and father was a lawyer. One day she asked her mother a question about the law. "Why are you asking me," her mother said. "Daddy is the lawyer. Ask him. I know he'd love to talk to you about the law." "Yes," said the six-year-old, "but I don't want to know *that* much about the law."

Accept the fact that you won't be able to tell the class everything about the law. Try to focus on one or two legal principles or procedures and be satisfied that you will probably only be able to introduce these ideas, not cover them with any thoroughness.

A good topic is often one that relates to what students are currently studying, or one that interests them, or one that they can apply to their own lives. The classroom teacher may not give you a topic, and in that case you have the luxury, and the difficulty, of selecting one. This issue of *Exchange* has several ideas. If you are reading a photocopy of this article given to you by a colleague, coerce that friend into letting you borrow the whole issue. Be sure to read the article by Lloyd Shefsky (p. 5) which describes a classroom experience in vivid detail.

In Shefsky's strategy, the prop is inspired: chocolate bars. Candy will always capture a child's interest. Shefsky uses the prop very effectively, but you can use all kinds of props to enhance your presentation. The everyday trappings of your trade such as law books, contracts, or wills can be used to illustrate the point that laws are written down. A visual picture of the problem you are discussing will help children focus on the facts, identify the parties involved and consider the location of the problem.

Don't hesitate to use real anecdotes. Children like to hear about real things that happen to real people, so anytime you can make a point with an anecdote, do it. You

---

Arlene Gallagher is an associate professor of education at Elms College in Chicopee, Massachusetts, and a lecturer at Boston University. She is an elementary specialist who has written many books and articles on law-related education for younger students.

can "borrow" your colleagues' anecdotes if you can't think of any interesting ones. Be ready to be open and frank with children, and don't be surprised if, when you say "Any questions," they ask you some personal ones. A favorite is: How much money does a lawyer make?

Modifying the Socratic Method

Use your education and training as a lawyer. It will enable you to ask questions in a way that leads students to think through a problem, analyze it, generate potential solutions, and consider the consequences of those solutions. Your skills as a negotiator can lead students to resolve conflicts in a manner that considers various viewpoints and results in consensus decision-making. If you can help children to acquire these skills, they can use them in their daily lives. Using this problem-solving approach, a legal principle or procedure can be explained in a context, not as an abstract idea.

The same principle or procedure can be illustrated in a number of contexts. For example, due process and our common law heritage contain basic ideas even small children can readily understand:

1. There should be rules made in advance, and there should be fair procedures to enforce them;
2. There should be a role for the people in determining the rules and in enforcing them.

After selecting the problem, try to think of ways in which you can have the students apply these or other basic points. This will make your time with a class much more valuable because the teacher and students can continue to apply the ideas you have presented in other contexts.

The example included on page 4 shows how one lawyer works with a class of second graders. The activity can be done with older students, but a younger class has been chosen here to demonstrate that the law can be discussed with very young children. They may use simpler vocabulary, but young children can deal with complex ideas such as equality and justice.

Interaction: Rolling up Your Sleeves

Strive for some informality in the classroom so that children will feel comfortable talking to you. All of the teachers I spoke to said, "Tell the lawyers not to talk down to the children but tell them to talk on the children's level." Good advice but hard to know how to follow.

Try to take the students' perspective. You will probably be taller than most of them and you'll look like a giant to first graders. It's hard to interact with a giant. You can make them more comfortable by being physically on their level. Sitting on the floor or on a chair in a circle helps a lot with young children. Sitting on a desk helps with older students. Try to position yourself so that your eye level is the same as theirs'.

A Rolling Stone (Or Ham) Gathers No Moss

If the students are seated at desks and it's obvious that you are going to have to stand, don't stay at the front of the room. This position encourages you to fall into a lecture style which is ineffective with children, except for very short periods of time. Move around. Go up and down the aisles. Make direct eye contact with the student who is speaking. If you're a person who can "ham it up," do it.

Use the chalkboard, the oldest teaching tool. Don't be afraid to use a legal term like "habeas corpus," especially with older students. They'll love it. Just be sure to write it (print it for young children) on the chalkboard and define it.

A good way to break out of the lecture mode is to get the students talking. You will need to direct the discussion, though, or you might find yourself listening to endless stories about pets, new babies and favorite TV shows. You want to encourage discussion but keep to the topic. Don't be afraid to politely interrupt a child or to ask children to put their hands down while you're making a point.

Most interaction in classrooms goes from teacher to student and student to teacher, but with little student to student communication. You can encourage this very easily. A simple, "Jimmy, what do think of what Mary just said?" will help.

Have the children role play whenever possible. Lloyd Shefsky uses this technique very effectively with the chocolate bar problem. In the activity I've presented on page 4 the teacher and lawyer have the students pretend to Harry and Bill. Ask the class what they would decide if they were one of the parties involved, or if they were a judge or a member of a jury. After they have expressed one viewpoint tell them to switch. For example, "All of you who were Harry the Tap Dancer, now you're poor Bill who can't sleep at night because of all the tapping above him."

The Price of Success

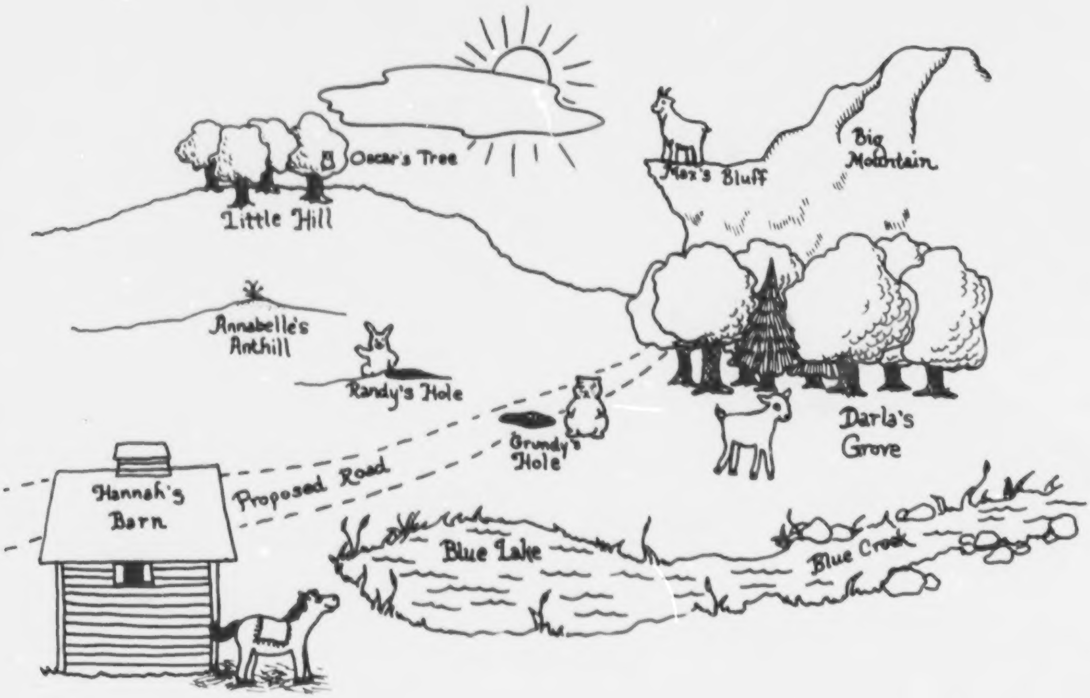
If your visit goes well, you will probably be invited to come back. The good news is that it will take less time to prepare for your second appearance and you can use the same plan if you're meeting with a different group of children. Using the same plan several times gives you the advantage of being able to modify and improve based on your experience. I know several lawyers who would like to be able to try a case a second time, and this is your chance.

The not-so-very-bad news is that all of this does take time, but the compensation comes in the form of satisfaction and the thank you notes you'll receive from children, fees well worth the effort.

Democratic Decisions

Problems in Green Valley/Early Elementary

Arlene Gallagher



This activity was conducted by Ted Occhialino, a law professor in Albuquerque, New Mexico, with Sally Gosnell's second grade at Osuna Elementary School.

(The New Mexico Bar Association has an unedited videotape of Ted Occhialino working with second graders. Ted has the children discussing some very important ideas about the law, but the best part is that he makes it look easy. To borrow the tape write to: New Mexico Law-Related Education Project, State Bar of New Mexico, P. O. Box 25883, 1117 Stanford Avenue, NE, Albuquerque, NM 87125.)

Ted joins the class after Sally has presented the problem. Sometimes the children do the problem as a play and sometimes Sally simply reads it to them. The source of the activity is cited at the end of the article.

This is a simple story about seven animals who live in a valley: a gopher, a deer, an ant, a rabbit, a goat, a horse, and an owl.

Do We Want a Road?

Grundy Gopher snuggled into his big easy chair. He looked around him at the cupboard he had built in the corner, the round rug on the floor, and his little bed by the fireplace. On the walls were the pictures of his cousins, aunts, and uncles, all smiling at him. Grundy loved his little home. It felt so safe and cozy. Everything was just the way he liked it.

Grundy picked up his favorite book and began to look at the pictures. Shortly, he heard a knock. Grundy put down his book and scrambled down the little tunnel that led to his front door. He opened it. At first all he could see was a giant nose. Then Grundy recognized that the nose belonged to his friend, Hannah Horse. Grundy climbed outside into the sunshine.

"Hi! What's new?" asked Grundy.

"Well, Grundy I have some news for you," Hannah said slowly. "Some of us animals have decided to work together to build a wonderful road through our valley, so that it won't be so hard to get from one side to the other."

"Oh," said Grundy. "I guess that would be helpful!"

"I'm glad that you feel that way because the road is going right over your house. I'm afraid you'll have to move, Grundy."

"What! Over my dead body! Who do you think you are, telling me that I have to leave my house! I've lived here for years!"

Grundy was so mad that he called a meeting of all the animals in the valley to discuss the building of the road. It seemed that everyone was there and almost everyone had something to say.

Randy Rabbit said, "How am I going to keep all my children off the road? A road can be a dangerous place with a lot of little rabbits playing nearby. They don't always remember to look before hopping."

Annabelle Ant said, "But think how I feel. A road would make it possible for me to visit my cousins over

on Big Mountain. As it is now, by the time I crawl over this and under that, it takes me over a day to get there, and I don't have that much time to spare."

Max the Mountain Goat said, "I like being by myself a lot. If we build a road, lots of valley animals and maybe even strangers will go right through the middle of our valley. Then hot dog stands and billboards will go up. And our beautiful valley will become noisy and cluttered. I say no road!"

Darla Deer said, "But if we have a road, when the grass at this end of the valley gets short, I can get to the pastures on the other side."

The other animals started to chime in their opinions, all at once, until no one could hear anything. Finally, Oscar Owl, who had been very quiet, rang a giant gong. This so surprised everyone that it became quiet again.

"We'll never solve anything this way!" he said. "We need a better way to decide what to do."

"What should we do?" everyone asked.

"I think this is a very hard problem, and that we should think about it very carefully. I think we should listen hard to what each animal thinks. Then we can make a good decision."

Pinpointing the Facts

The problem is whether or not to build a road through the valley; three of the animals want the road, three of them don't and one doesn't care.

Ted opens the discussion by asking the children to describe the problem.

- What did Grundy want? (His cozy home, not to have the road.)
- What did Hannah want? (The road.)
- What did the other animals want? (Have children identify various animals and how they felt about the road.)
- Did they all want the road? (No.)

He gives hints, such as the following:

- The road would go over Grundy's house. Does he want the road?
- Hanna likes a place to run fast. Does she want the road?
- Randy is worried about his children getting hurt. Does he want the road?
- Annabelle wants to go across the valley to her cousins. Does she want the road?
- Max doesn't like visitors. Does he want the road?
- Darla likes to move her family to new grass. Does she want the road?

1634

He listens to make sure that all of the viewpoints are expressed.

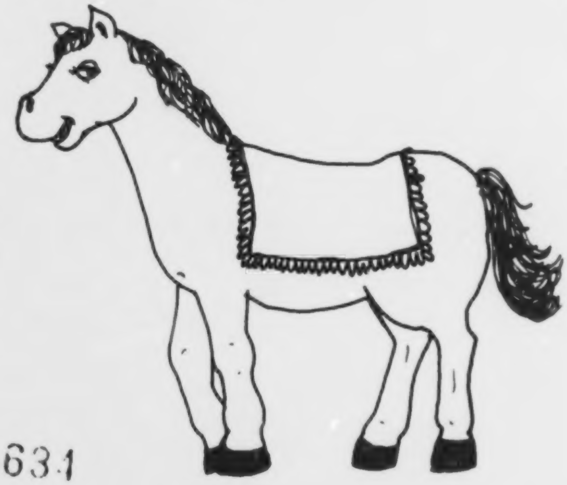
Ted then asks for suggestions on how to solve the problem, encouraging the children to come up with as many ways as they can and adding a few bizarre ones of his own. The children then evaluate each of the solutions to decide if they are fair to all of the parties involved. They discuss having the strongest animal decide and whether or not that would be fair. They suggest flipping a coin, playing musical chairs, having the oldest decide or having the animal who doesn't care decide.

Ted encourages them to try to deal with everyone's concerns, emphasizing compromise. The children come up with very creative ways to solve the father rabbit's concern about his children who might get hurt on the road; the goat who wants to maintain his privacy; and the gopher who is worried that the new road will destroy his home.

In Green Valley there were no rules about whether or not a road could be built. The children discuss making rules and actually participate in making various rules and enforcing them. For example, they discuss what to do about Max the Mountain Goat's concern about his privacy. Max didn't want the road because he believed it would bring more animals to his home and interfere with his privacy. One child suggested making a sign with a rule: "No coming near Max's house because he likes his privacy." Another child said that some animals might ignore the rule. A third child suggested a means of enforcement: put a snake in a cage and place it next to the sign. The children thought this would scare people away until another child pointed out that everyone isn't afraid of snakes.

Essentially these second graders were experiencing the rule making process and the need for enforcement. Throughout this discussion Ted's role is that of a participant in the process. He sits on the floor with the children and together they solve the problem.

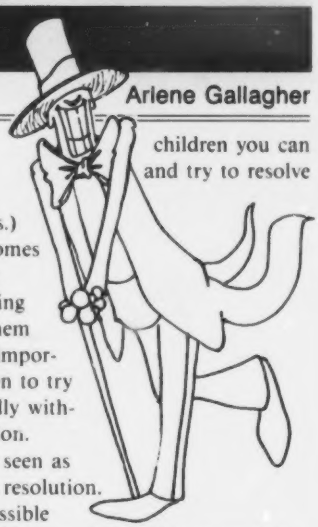
"Problems in Green Valley" from Educating for Citizenship Book 1. *(1982) Authors: Constitutional Rights Foundation, Law-Related Education Program for the Schools of Maryland, and National Street Law Institute. Publisher: Aspen Systems Corporation, 1600 Research Boulevard., Rockville, Maryland, 20850.*



Dispute Resolution

The Case of the Professional Tap Dancer/Early Elementary

Arlene Gallagher



Here is another lesson law professor Ted Occhialino does with second graders. Here too he usually joins the class after the teacher has presented the situation to the kids.

In this case two friends, Harry and Bill live in an apartment building. Harry lives on the second floor, directly over Bill. Their friendship is in trouble when Harry becomes a professional tap dancer but can only practice late at night, which keeps Bill awake.

Rights in Conflict

Harry and Bill lived in an apartment building. Harry's apartment was directly above Bill's. They were pretty good friends. Sometimes they went bowling together. Their friendship ended when Harry decided to become a profssional tap dancer.

"I don't have anything against tap dancers. Harry," Bill said. "But do you have to practice *every evening*. The noise is driving me crazy."

"Sorry," said Harry. "But I have to practice if I'm going to be a pro. Besides, it's a free country, and I can do whatever I want in my own home. My home is my castle, as they say."

"Sure," said Bill. "But what about my rights? You're disturbing the peace. *My peace*."

Harry and Bill have a problem. Their rights are in conflict. Conflicts are a natural part of human relationships. Everyone gets into fights or arguments once in a while. Sometimes people can resolve their conflicts but sometimes they cannot. A third person can often help to resolve the conflict between two people. That person has to be someone who can see both sides of the argument and come up with a solution that's fair to both people. In a court that "third person" is a judge.

Sorting It Out

Ted's strategy as a resource person is to help youngsters think clearly about the situation. He ask them to:

- Identify the problem;
- State some possible solutions;
- Consider the consequences of each solution;
- Make a decision that is legal and fair to all.

In this case, what are the two rights that are in conflict?

1. Harry's right to practice his profession in his own home. Many people do this.
2. Bill's right to have peace and quiet in his own home. People have a right to a reasonable amount of quiet in their home.

There are many ways to resolve this conflict and some solutions are better than others because they are fairer to the people involved.

Ted uses a role play to state these points. He tells half of them to pretend to be Bill and the other half to be Harry. He leads a general discussion, calling on Bills and Harrys. (For older children you can have them pair up and try to resolve the problem in a way that satisfies both parties.)

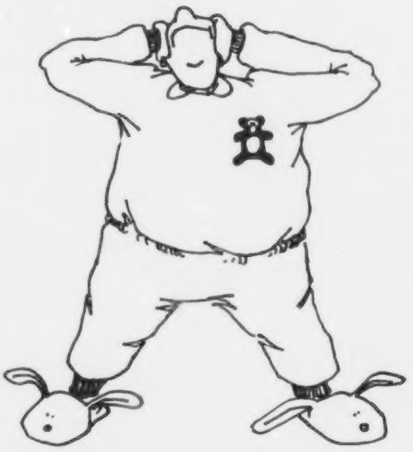
Sometimes the class comes up with some interesting solutions, such as carpeting Bill's ceiling or having them switch apartments. It is important to encourage children to try to resolve conflicts initially without third party intervention. The court should not be seen as a first resort for conflict resolution.

Or you can present possible solutions and ask the children to decide if they are fair.

This problem can also be used to discuss the basic point that "there should be rules made in advance and fair procedures to enforce them." There was no rule in this apartment against tap dancing. Would it be fair for the landlord to make one after Harry started tapping? What if there was a rule against pets and Bill got a huge dog that barked every time Harry tapped? What about Bill's right to a certain amount of peace and quiet? How can this be balanced with Harry's right to practice his profession?

Encourage children to discuss why it is important to know the rules ahead of time. Ask them about games they play and the rules for them. What happens if someone breaks or changes a rule?

"Rights in Conflict: The Case of the Professional Tap Dancer," from Living Together Under the Law: An Elementary Education Law Guide. *Author: Arlene F. Gallagher, 1982. Publisher: Law, Youth, and Citizenship Program of the New York State Bar Association and the New York State Department of Education, Albany, New York, 12234.*



Teaching About Contracts/Grades K-4

Lloyd E. Shefsky

Slug Signorino

Can little children understand contracts? Should they be taught to understand contracts? You bet! My personal experience shows that certain rudimentary principles of contract law are understood intuitively by many, if not all, five-year-olds.

Here's a step-by-step outline for introducing lower elementary students to some of the main concepts involved in contract law as the "stuff" of attorneys' work. This material is introduced in a way that youngsters find exciting and interesting. The strategy is a role-play in which elementary students participate in negotiating a contract and resolving a dispute from knowledge they already possess and experience they already have.

The genesis of the plan presented below was an announcement by my five-year-old son that the parents of his kindergarten class were invited to explain what they did for a living. Parents were to be scheduled individually on different days.

How was I to explain to kindergartners the working world of an attorney? If few adults fully understand the legal issues of business law, how could I explain them to a class of five-year-olds, in spite of their above-average intelligence, sophistication, and positive orientation to the law?

Choosing a Topic

The teacher of my son's class had recommended that I limit my presentation to a maximun of 30 minutes, preferably less. Because the attention span of elementary students is short, the presentation had to be both stimulating and concise. For this reason, I quickly rejected a description of a day in my working life as well as a description of a complicated and/or unusual case. (I am pleased to report that at the end of my 30-minute exercise, when attention spans were indeed beginning to show signs of waning, the teacher informed me that I had held class attention far longer than those parents relying on oration.)

There are additional constraints when addressing K-4s in contrast with older students. Limited life experience and substantive knowledge dictate a teaching exercise set up ahead of time within tight limits.

Contractual arrangements permeate our society, and disputes over these arrangements are everyday occurrences for attorneys and laymen. Children, too, enter contractual relationships whenever they go to a movie or borrow library books. Children negotiate simple contracts whenever they promise to relinquish one comic book for another or trade baseball cards.

Disputes may arise after contracts are consummated for a variety of reasons—one party cannot or will not fulfill the agreement or is perceived as not living up to all or part of the terms of the contractual agreement. In the example of the children's exchanged promises, a comic book may have missing pages.

A complex legal issue that frequently arises is known formally as a "mistake of fact." According to Black's Law Dictionary, a "mistake of fact" is an unconscious ignoring or forgetting of a fact relating to a contract, or a belief that something material to the contract exists or has existed when, in fact, it does not nor ever has existed. It is not, however, a mistake caused by a party's neglecting a legal duty. A "mistake of fact" can be mutual or not, each with differing legal results.

Negotiating a contract and then resolving a dispute over a mistake of fact was the focus that I chose for explaining my work as an attorney. This is a legal situation arising again and again in the real world of business and, indeed, everyday life. The next step was devising and planning an appropriate situation for "acting out," so that I could instruct my kindergartners by allowing them to participate.

Planning Ahead

When legal professionals accept requests to contribute to law-related education projects, careful preparation is perhaps the most important prerequisite, just as it is for trial, or negotiating a transaction. No matter how short and simple the instructive session is to be for the K-4s, *careful* preparation is vital. An ill-prepared speaker can fall back on *ad hoc* discussion and "thought" questions when facing high school students; you can't disguise lack of planning when instructing K-4s.

My preplanning for my son's class involved asking him about the "sweet-tooth" preferences of his classmates. I discovered that at least two of them were very fond of chocolate bars, but that one was devoted to plain chocolate and the other strongly preferred chocolate with nuts. It is advisable to know the likes and dislikes of several classmates ahead of time in case substitutes are needed.

Bringing Props

The next step is to bring props. You should bring your own to class rather than assume an elementary school is prepared for all contingencies. My props were few and very easy to assemble:

1. A black crepe-paper "robe" suitable for a kindergarten-size judge. A sheet of black crepe (or tissue) paper available at most variety stores works quite well once a hole is cut in the center to go over a child's head.
2. Enough chocolate bars for the entire class, some plain and some with nuts. Only one of each kind will be used initially and shown to the class; the rest should be hidden from view. Unknown to the class, however, one of the two bars in full view is actually an empty wrapper made to look like an actual candy bar. (Substitutions can be made here so long as there are two items similar in intrinsic value but variable in their preferred value.)
3. A dictaphone. This was originally for my own later enjoyment, but recording the class exercise can also serve as a useful learning device for the entire class. Children love to hear their recorded voices, and the teacher can play back the classroom activity, perhaps on the following day, for a short discussion or a question/answer period about simple kinds of contracts the children would understand.

Involving Students as Active Participants

Although much has been written about the value of role-playing as a teaching device, there is some reluctance in using it with lower elementary students. My experience will hopefully dispel this reluctance.

As soon as I arrived in class, I assigned one child to be the judge (in my case my son), followed by "hands up" voting on preferences for chocolate bars (with or without nuts). I then asked for two volunteers, one to represent each candy-bar preference, with my selection guided by what my son had told me in the planning stage.

A single bar of each of the two types of chocolate bars was placed on the "judge's" table in front of the class, and each of the two volunteers was asked to stand behind but not touch the bar he *least* preferred. I then told these two students that, even though each had received the kind of bar he did not particularly like, they were both free to talk to each other and work out an arrangement to exchange the assigned bar if they wanted to do so. The one condition I specified was that each must speak into the dictaphone, one at a time. The two volunteers quickly discussed an exchange of chocolate bars to satisfy each other's preference. When both were satisfied that a "deal" had been reached, I suggested each pick up the candy bar he had obtained in the "negotiated" exchange.

If the negotiating session was consummated quickly, the concluding portion of the exercise involved a more complicated legal issue. In a business deal, one party does not always get what he thinks he bargained for. Thus, in the classroom, one of the children was very surprised and chagrined to discover that he had received an empty wrapper and not the chocolate bar he assumed was there. When I asked the "cheated" child to express his feelings into the tape recorder, he expressed every legal concept of "mistake of fact." Interestingly, at no time did he resort to an allegation of fraud, since it was clear that the child who had received a real candy bar knew nothing of my deception.

The child with the candy bar, of course, had quite different opinions about what constituted a fair resolution, saying that "fair is fair" and "a deal is a deal." Having exhausted all of his logical arguments, the child with the empty wrapper then suggested that perhaps they should split the candy bar. The owner of the bar promptly rejected this suggestion, commenting that he couldn't understand why his classmate would want to split the bar since the other boy didn't even like that kind of bar in the first place.

During all of this discussion, it should be noted that neither child became belligerent or teary. My role as attorney-leader involved some directing, but directing should be minimized as much as possible to allow the children to handle their own bargaining and dispute settlement. Once assignment of roles had been made and the few instructions given, I found my main job was to act as occasional prodder when talk bogged down.

Ultimately, the judge was called upon to decide the dispute in a brief, "mini mock trial." He concluded, in five-year-old language, that while there was merit on both sides, he felt his two classmates should split the sole candy bar. No doubt, a judgment based on fairness, although one cannot ignore the fact that he was concerned about his ability to coexist with classmates. (Is that very different from our common law tradition?)

Once the verdict was handed down and accepted, without any adult coaching, I then distributed my surprise supply of hidden candy bars to the entire class, including the child with the empty wrapper.

Concluding

The happy class listened to a brief word about what I do for a living and the role of deals and disputes in this work. I explained very simply that people constantly get into arguments, because one person thinks that a situation, not necessarily another person, has been unfair, like the child who had expected a candy bar but got only paper. When someone feels hurt at losing to another what he thinks should rightfully be his, he and the other each hire an attorney to solve the problem. Because lawyers are experienced and know the rules, they can make a deal for the person each represents (the client) and then help decide a fair result if the deal later turns out differently than expected. Because lawyers are not so involved – they do not get the candy bars from the agreement – they can more easily reach a bargain or deal and resolve a later dispute. Finally, if even the lawyers can't agree or persuade their clients to agree, the lawyers and clients can go to court and allow a judge to make a decision.

A major value of this little exercise was its revelation about the capacity of lower elementary students to apply certain concepts of fairness and common sense which, after all, underlie law in general. The arguments made by the two student participants sounded amazingly familiar to anyone who has witnessed lawyers arguing the merits of a disputed transaction on behalf of clients. Although the language and presentation of lawyers are more sophisticated, the youngsters' reasoning process was very similar to theirs. The judge's verdict, too, was very like the verdicts in numerous court cases following meetings of counsel in the judge's chambers.

The children began to learn about the system of formal rules and informal practices which institutionalize the same rules of fair play that most of them have already begun to internalize. A definition of what is just may vary among this age group, as it does among a group of adults, but it exists nonetheless. The brief exercise in contracts reinforced the children's understanding that even though events may seem unfair to one party, there *is* something that can be done to rectify them in a reasonable way.

The ability to exercise control within the rules was another valuable lesson. Although I had set up the rules of "our" game ahead of time, the student-volunteers, representing the entire class, were allowed to negotiate their own deal without outside interference. Only when the bargain struck by them was found lacking an expected element – a candy bar for each – was it necessary to rely on formal "rules" for achieving a fair, if not totally satisfactory, resolution. In their ensuing arguments, this class learned firsthand some of the rudimentary skills of conflict management.

The final lesson is that deals and business arrangements of many types may not always be completely satisfying to every party, but a sense of fairness and justice can be achieved within the limits imposed by factors outside the control of anyone. And that, after all, is the purpose of law.

Lloyd E. Shefsky is a senior partner in the Chicago law firm of Shefsky, Saitlin & Froelich, Ltd. He specializes in tax, financial, and business law matters, and is the author of numerous published articles.

Due Process

People Who Make Courts Work/Grades K-3

Dale Greenawald

Beginning with a situation centering on a person accused of committing a crime, students identify the various types of persons (roles) which must be present for due process (fair procedures) to occur in determining the person's guilt or innocence.

The teaching time is approximately 30 minutes, and you'll need signs for students to wear: Judge, Defense Attorney, Prosecuting Attorney, Court Reporter, Jury (enough for all the rest of the class).

Procedures

Begin by telling students that a hypothetical person, Maggie (don't use the name of a student in the class), has been accused of throwing a rock through a school window. Remember, a person is believed to be innocent until he or she has been proven to be guilty.

Courts try to find the truth by using processes that assure that the accused person has a fair chance to defend him/herself.

Many people have important roles to play in a court. They make certain that we all do things that are fair when the court tries to decide if someone broke the law or not. Who do we need to be in charge of making sure that everyone does things the fair way? (Answer – judge)

Class Discussion: What do judges do? Resource person guides this discussion and adds any important information which students may not know. At the end of the discussion ask for volunteers to be the "judge." Select one student, have him/her wear a sign saying "Judge" and take a seat up front.

Next, ask who do we need to help Maggie tell her side of the story? This person needs to know all about the law and the rules of the court. (Answer – lawyer or defense attorney)

Class Discussion: What do lawyers do? Again, the resource leader leads this discussion, sharing additional information which the students may not know. At the end of this discussion a child puts on a sign "Defense Attorney" and sits facing the judge.

Who do we need to represent the school and tell the school's side of the story? They also need to know the laws and rules of the court. (Answer – prosecuting attorney)

Class Discussion: What does a prosecuting attorney do? Again discussion is led by the resource person. At the end of the discussion a child puts on a sign "Prosecuting Attorney" sign and sits facing the judge across the room from the defense attorney.

Who do we need to keep a record of what happens to check for mistakes and make sure that everything that happens is fair? (Answer – court reporter)

Class Discussion What do court reporters do? Resource leader explains importance of a written record, then appoints a child to be court reporter.

The law says that people accused of crimes can choose to have people like them decide if they are innocent or guilty. These people are the jury. You will be the jury (rest of children put on signs saying "Jury.")

Class Discussion: What does a jury do? How does it find defendants guilty or not guilty? How does it decide?

Conclusion

Conclude by describing all of the roles discussed and explain that they are important if everyone is to be treated fairly. Point out that

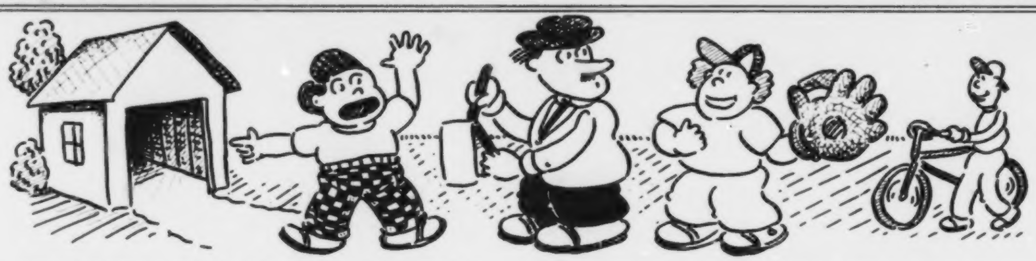
- both sides have the chance to tell their story
- the judge does not take sides
- the jury decides on the basis of what it hears in court

Is this a fair way to decide cases? Why or why not?

Due Process

Seeking Facts to Solve Mysteries/Grades K-3

Dale Greenwald



Slug Signorino

This scenario about a missing bicycle will help students distinguish between facts and opinions, and then use the facts to solve the mystery.

This lesson helps students recognize that legal personnel use facts much more than opinion, as they themselves use a series of facts to draw a reasonable conclusion when determining the innocence or guilt of an individual.

The teaching time of this exercise is approximately 30 minutes. A community resource person from the justice system—a lawyer, judge or police officer who uses fact to develop an argument—is an invaluable asset to this lesson.

Scenario and Evidence

Read through the scenario and testimony, stopping periodically to provide students with a definition of fact and opinion appropriate to their level. Ask students to distinguish facts from opinion. Have the class respond to questions at the end of each person's testimony.

On May 15, 198__, John's red ten-speed Schwinn bicycle disappeared. Detective Jim Shoes was assigned to investigate the case.

Detective Shoes: "When did you last see the bicycle?"

John: "I rode home after delivering my papers yesterday, May 14th, at about 6:30 p.m. I parked the bike in the corner of the garage. I didn't put the lock on because it was in the garage. When I got up to ride it to school, the bike was gone. I think Lou took it because he wanted a bike like mine and I don't think he likes me."

CLASS DISCUSSION:

1. What are the facts?
2. What are the opinions?

(If no response, re-read the situation and John's testimony and ask the questions again.)

Detective Jim Shoes interviews a neighbor:

Detective Jim Shoes: "Did you see John's bicycle yesterday?"

Neighbor: "Yes, I was cutting grass about 6:30 and I saw John ride his bicycle into the garage. About 9:30 I let my dog out and saw a suspicious shadow moving in the garage. I think it was Lou. He's always in trouble."

CLASS DISCUSSION:

1. What are the facts?
2. What are the opinions?

Detective Shoes interviews Lou.

Detective Shoes: "John's bike is missing. Where were you and what were you doing about 6:30 p.m. on May 14, 198__?"

Lou: "I was just having fun. I was pitching for the Highland Park Champs. After the game the whole team went out for hamburgers. My folks picked me up about 10:30 p.m. at the Big Shake restaurant and we went home together. I had a really good evening. My brother John and I had a pillow fight which really made a mess. Then we went to sleep. I think Harvey took the bike."

Once again, have the class review the testimony and distinguish fact from opinion.

Sorting It Out

At this point conduct a pro se court:

The pro se court may be organized in a variety of ways, depending upon the maturity of the students. The simplest way is to divide the class into three groups. One group will represent John and try to present all of the reasons why he thinks Lou should pay him for the bicycle. A second group represents Lou and should present all of the reasons why he should not have to pay. A third group represents judges, and they decide what should be done based on the evidence.

It is also possible to form a series of groups of three students. Each student will play the role of either John, Lou, or the judge. When all groups have completed their role play, ask each judge how they decided the case and why.

When a decision has been reached debrief the activity by discussing:

1. What are the arguments in favor of finding Lou responsible for taking John's bike?
2. What arguments can be made in support of Lou?
3. How strong is each argument?
4. Are other arguments possible?

The resource person might explain a case he/she was involved in and indicate what were some of the facts and opinions in that case. Let students try to identify which statements were facts and which were opinions.

Discuss why facts are usually more important than opinions in trials.

The Mystery Solved

John's bike was returned by Mike, who had asked John two weeks before if he could borrow it on the 14th. John had simply forgotten that he had given permission.

Dale Greenawald is an educator in Boulder, Colorado. This lesson was originally prepared for last year's Law Day.

Due Process

Seeking Facts to Solve Mysteries/Grades 4-6

Dale Greenawald

Using role play techniques, students will distinguish between facts and opinions and discuss why courts rely upon facts more than opinion. This exercise should help students develop critical thinking skills. This exercise will take about 45 minutes.

Getting Started

Brainstorm with the class what a fact is. List all of the responses and discuss them. Develop an acceptable definition of what is a fact.

Brainstorm with the class what an opinion is. List all of the responses and discuss them. Develop an acceptable definition of opinion.

Have student volunteers assume the various roles and conduct a mock trial of James Phillips v. the Radio Shop. After each person has testified, review the testimony, distinguish between facts and opinion, and list each under a separate heading on the board.

After all of the testimony is given, review all of the facts. Review all of the opinions and discuss how important and influential each may be. Discuss why facts are more reliable than opinion. After examining the facts and opinions, discuss the legal issues raised and what arguments might be presented for each.

As either a class or in small groups discuss what you would decide and why. After the class discusses how it would decide the case, the resource person can explain how a real judge would probably decide the case and why.

Mock Trial: James Phillips v. the Radio Shop

Facts. In this case James Phillips purchased an inexpensive radio from the Radio Shop and later attempted to exchange it because it did not work. The date of the sale was November 14; the return was made ten days later. The sales slip has the following language typed at the botton: "This product is fully guaranteed for five days from the date of the purchase. If defective, return it in the original box for credit toward another purchase."

The store refused to make the exchange and James brings this action in small claims court.

Evidence. James has (1) the sales slip for twenty-five dollars paid to the Radio Shop and (2) the broken radio. He claims to have thrown away the box the radio orginially came in.

Witnesses. For the plaintiff: 1. James Phillips, 2. Ruby Phillips, James' sister. For the defendant: 1. Al Jackson, the salesman, 2. Hattie Babcock, store manager.

Procedure

The judge should provide an opportunity for James to make his case and should give the representatives of the store a chance to tell the court why the money should not be returned. Both sides should call their witnesses.

At the end the judge should decide the case and provide reasons for the decision.

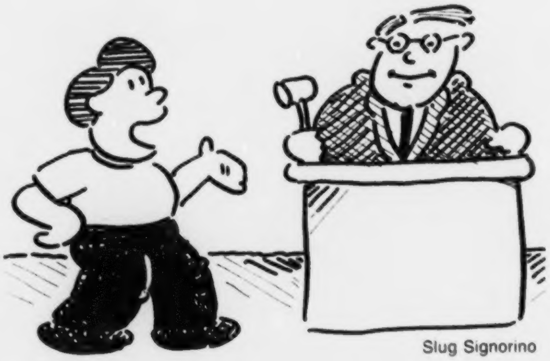
JAMES PHILLIPS: I went into the Radio Shop to buy a transistor radio. I looked at a few different radios but the salesman talked me into buying the Super Electro Model X-15. I paid him the twenty-five dollar price and he gave me the radio in a cardboard box. When I got home to listen to the radio, I found that it didn't work. I went back to the store to get my money back, but the salesman wouldn't return it. He said I should have brought it back right away. I explained to him that my mother had been sick and I'd been busy. Here's the broken radio and the receipt as proof. I want my money back!

RUBY PHILLIPS: All I know is that when James got home the other day he was all excited and wanted to show me something. He called me into the kitchen to show me his new radio. I said, "Let's hear how it works." He turned it on and nothing came out but static. He moved the dials around but couldn't get it to play. Was he ever mad! I told him that he ought to take it back to the store and demand his money back.

AL JACKSON: I sold the kid the radio, but as far as I know it worked OK. All the table models worked well enough, so why shouldn't the one boxed and straight from the factory? I'll bet what really happened is that he dropped the radio on his way home. Or maybe he broke it during the ten days he had it. That's not my fault, is it?

HATTIE BABCOCK: As Jackson said, all the other X-15's have worked fine. We've never had a single complaint about them. We have a store policy not to make refunds unless the merchandise is returned within five days in the box we sold it in. Also, the guarantee on the radio says that the radio must be returned in the original box. That's the reason Jackson didn't give the kid his money back. Otherwise, we'd have been more than happy to give him credit toward a new purchase. After all, pleasing our customers is very important to us. Personally, I agree with Jackson. The kid probably didn't bring back the box because it was all messed up after he dropped it.

(This role play is developed by The National Institute for Citizen Education in the Law and is reprinted by permission from *Street Law*, pp. 116-117.)



Slug Signorino

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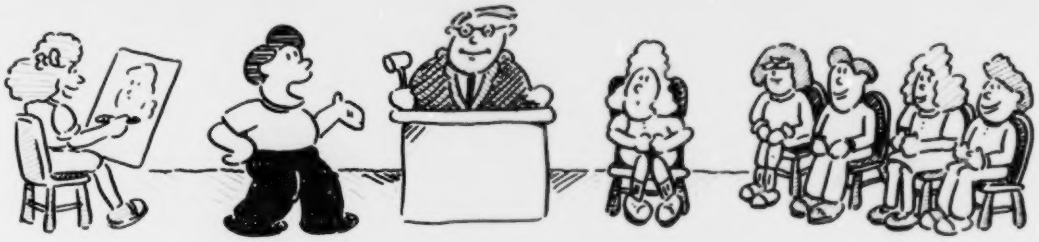
Due Process

Mini Mock Trials/Grades 5-12 **Jennifer Bloom**



Mock trials conducted within one or two class periods help students learn about courts and trials in an interesting and enjoyable way. Although students obviously will not be as polished as they are in more lengthy mock trial programs, their abilities to quickly become familiar with trial process, to learn their roles, and to discuss rules of evidence and constitutional protections will surprise even the most seasoned observer.

In addition to the value of the learning experience for students, mini mock trials are an excellent activity for lawyers who want a "guaranteed" success. With only little advance preparation, a lawyer can guide the students through the mock trial experience, helping them develop appropriate questions and then serving as the judge for the trial. Most lawyers are so comfortable with this activity, and find the positive student response so rewarding, that they are usually willing to schedule return engagements.

Use the procedure in this lesson with the situation included on p. 18, or use it with a more complex situation given on p. 31 for older students.

The time needed for conducting a trial is only 1½ to 2 hours. (If time is short, omit or greatly shorten the discussion in the next section.)

Beginning

Begin the class session by discussing trials. Because most students have seen television programs such as "People's Court" and "Divorce Court," they already have some basic information. Ask them if they watch these programs. Then ask them to list the people who are present in the courtroom. This list will include:

- lawyers
- judge
- jurors
- bailiff
- police officers
- clerk
- witnesses
- defendant
- plaintiff
- court reporter
- public
- sketch artist

Discuss what these people do in the courtroom. Depending upon the sophistication of the audience and the time available, short discussions of the following topics can be conducted: trial by judge or jury; civil v. criminal trials; the need for a court reporter and court record; the constitutional right to a public trial; the controversy surrounding cameras in the courtroom; the reason for courtroom decorum.

Preparing

Read the one paragraph summary of the facts of the case with the students (see page 18). Ask the students to volunteer for the parts in the mock trial. Four students should be assigned to be the lawyers for each side of the case. One student may present the opening statement, one the direct examination, one the cross examination, and the other the closing argument. Reserve discussion of objections for later.

Students are also assigned to roleplay the witnesses, bailiff, court reporter, media representatives and sketch artists (these students can write articles and prepare drawings for the articles), and members of the jury and audience.

Before the start of actual trial preparation, briefly describe the steps of a trial. Remind students that they will be helped through the process by the judge and that confusion at this point is expected. If students have sufficient background and understanding of the trial process, explain the reasons and grounds for objections. (I recommend using only a limited number of objections.) If they lack knowledge, reserve discussion of objections until one occurs during the trial. (No matter what age the students are, one will object to a question during the trial. The objection might be made in the form of "She can't do that, can she?" or "This isn't fair!" Regardless of the language used, the students usually have made the objections at appropriate times. They are now ready to learn about objections.)

Role-Playing

Students are given approximately 15 minutes to review their statements and develop questions and opening and closing statements. Although this is a short period of time, the facts of the cases are simple and a longer period of time would result in a restless jury and audience. Quickly review the parts with the other "actors."

1641

Begin the trial. The trial will take 45 minutes to 1 hour. Remember the goal of this activity is to increase the students' knowledge of courts and trials. Do not expect them to sound like experienced trial lawyers. You will enjoy watching them develop their questions and arguments on objections and listen to the answers with great care.

Instruct the jury at the end of the trial. Juries usually require only a few minutes to reach a verdict. After they have announced the verdict, ask them to explain how they decided on it.

Debrief the trial. Encourage all students to participate in the discussion of the trial. Questions that facilitate discussion include: Who was the most important person? Could the trial take place without the judge? (Yes, another judge could be used.) Without the lawyers? (Yes, other lawyers could be used.) Without the witnesses? (No.) Did any of the students change their minds during the trial? When and why? Who was the most believable witness? Why? Are there other ways that the problem could have been settled? What would have been the advantages or disadvantages?

Complete the activity with a short discussion of the need for citizens to participate in the process. Ask them what they will remember to do if they witness an action or are asked to serve on a jury.

Objections

Either the prosecutor or the defense counsel may object to a question or the admission of an exhibit. The judge will usually ask the person objecting "on what rule of evidence are you relying?" Then the judge either allows the objection, preventing the evidence from being introduced, or overrules the objection, allowing the question or exhibit to be admitted as evidence.

Reasons for objections (also known as grounds for objections or the rule of evidence being relied upon) include:

1. Leading question. Prosecutors must allow their witnesses to tell their own story; they must not lead their witnesses through the story. Defense attorneys must follow the same rule when questioning their witnesses.
2. Hearsay. The questions must limit witnesses to facts they know from personal knowledge. Other information they have is hearsay evidence.
3. Immaterial and irrelevant. The information is not closely related to the case, and is therefore not important.
4. Opinions and conclusions. Unless the witness is an expert, he or she should not give opinions or conclusions.
5. Nonresponsive answer. The witness is not answering the question asked.

These are only a few objections. They are probably the most common ones used. They will adequately serve your needs.

Jennifer Bloom is a lawyer and director of the Minnesota Center for Community Legal Education at Hamline University School of Law in St. Paul, Minnesota.

Mock Trial Procedures

PARTICIPANTS

- Judge
- Prosecution (in criminal cases), or plaintiff's attorney (in civil cases)
- Defense attorney
- Witnesses for prosecution or plaintiff's attorney
- Witnesses for defendant
- Bailiff
- Jury

Opening of Trial. Bailiff enters and says: "Please rise. The Court of __________ is now in session, the Honorable __________ presiding." Everyone remains standing until judge is seated. The judge asks that the calendar be called and the bailiff says, "Your honor, today's case is ______________ v. ______________." Judge asks if both attorneys are ready.

TRIAL

Opening statement – prosecution or plaintiff's attorney introduces himself or herself and states what their side hopes to prove. State what facts on your side will show and ask for the verdict that you want.

Defendant's attorney then introduces herself or himself and explains the evidence on her or his side that will deny what the prosecution is attempting to prove. State the decision you hope the jury will reach.

Direct examination – prosecution calls its first witness.

Witnesses should have reviewed their statements. Witnesses may testify to additional facts that logically follow from their statements but should not contradict the given facts. Prosecutor asks clear and simple questions that allow the witness to tell his or her side of the story in his or her own words.

Cross examination – defense attorney questions witnesses for the prosecution to try to discredit their testimony. Ask leading questions and emphasize portions of testimony that favor your side.

After all of the prosecution witnesses have been questioned and cross-examined, the defense calls its witnesses and questions them under direct examination. Then the prosecutor cross examines.

Closing statement – prosecutor speaks to the jury and tries to convince them that the evidence presented during the trial has proved his or her side of the case. Then the defense attorney does the same.

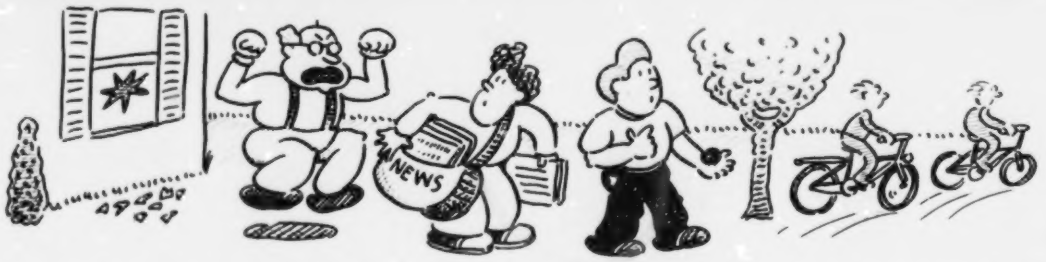
Jury instructions – judge instructs the jury as to the law that applies to the case and then directs them to retire and decide upon a verdict.

End of trial – jury deliberates and reaches a verdict. They report the verdict to the judge after returning to the courtroom.

Due Process

Elementary Mock Trial/Grades 5-6

Jennifer Bloom



Here is the fact pattern for a mock trial that works well with elementary youngsters. See the article on mini mock trial procedures (pages 16-17) for steps in implementing any mock trial in the classroom.

Facts: Tony and several of his friends were riding their bikes around the neighborhood on Friday, March 15, 1985. At about 6:00 p.m. a few kids from a different neighborhood rode by Tony and his friends. They teased Tony and his friends and dared them to throw stones at Mr. Wiley's windows. Mr. Wiley is an old man who often tells the children to stay off his property. Several windows were broken, and when Mr. Wiley ran out of his house to stop the children, he recognized Tony. The State has now charged Tony with the crime of vandalism.

Issue: Did Tony throw the stones that broke Mr. Wiley's windows?

Witnesses: For the prosecution, Mr. Wiley, Leslie the paper carrier; for the defense, Tony, Sandy.

Witness Statements

MR. WILEY: I have lived in this neighborhood for 47 years. My wife and I built our little house when we were married. My wife died five years ago. Since then, I have been a victim of many attacks of vandalism. On Friday evening, March 15, 1985, I was watching the 6:00 p.m. news when I heard glass breaking in my front porch. I ran out my back door and around the house to see what was going on. I saw lots of kids. I recognized Tony because he lives down the block and often rides his bike past my house. It was clear to me that this group of kids was responsible for breaking my windows. In fact, Tony had a rock in his hand and was getting ready to throw it.

LESLIE, THE PAPER CARRIER: I have delivered newspapers in Mr. Wiley's neighborhood for three years. On Friday, March 15, 1985, I was delivering a newspaper to Ms. Crowley, who lives three houses away from Mr. Wiley, when I heard kids screaming and then I heard breaking glass. I ran over to Mr. Wiley's house. I saw about 10 children on the front yard. Tony and another kid were pushing each other. It looked to me like the other kid was trying to stop Tony from throwing a stone. I did not see anyone throw stones.

SANDY: Tony and I were out riding our bikes with some other friends on Friday, March 15, 1985. We were riding up and down Tony's block when a bunch of kids we didn't know rode up to us and started teasing us. They dared us to throw stones at grouchy old Mr. Wiley's windows. We tried to ignore them. They threw a stone and hit a front porch window. Then they threw some more stones. I think a couple of windows were broken. Tony and I and our friends stood and watched. When one of the other kids picked up a stone to throw, Tony tried to stop him. Then Mr. Wiley came around the house. The other kids said they didn't throw the stones, they said that Tony did. I think they were mad at Tony because he tried to stop them. Tony is a real nice friend, he wouldn't try to break Mr. Wiley's windows.

TONY: I was riding bikes with my friends on Friday, March 15, 1985. It was almost getting dark when a bunch of kids we didn't know rode up to us and started bugging us. They wanted us to throw rocks with them. They were going to try to break some of Mr. Wiley's front porch windows. Even though I don't like Mr. Wiley very much, we said we wouldn't do that. I saw one kid standing next to me pick up a rock. I tried to take it out of his hand so he wouldn't throw it. That's when Mr. Wiley came around the corner. Leslie the newspaper carrier also showed up. I did not throw any stones.

Instructions. The prosecution must set out such a convincing case against the defendant that the jury believes "beyond a reasonable doubt" that the defendant is guilty.

Sub-issues

1. Was it too dark to see clearly?
2. Was Tony throwing stones or stopping someone else from throwing stones?
3. Was Mr. Wiley "out to get Tony" because he rides his bike around his house?
4. Did Tony dislike Mr. Wiley enough to break his windows; was there motive?
5. Which witnesses should be believed?

Concepts

1. Circumstantial evidence vs direct proof,
2. Credibility of witnesses,
3. Burden of proof: beyond a reasonable doubt.

Law

Whoever intentionally causes damage to physical property of another without his or her consent is guilty of a misdemeanor and will be sentenced to imprisonment for not more than 90 days or payment of a fine of not more than $500 or both.

Alternatives

Mediation and the Adversary Process/Grades 5-8; 9-12

Melinda Smith

Because law-related education focuses on the judicial system, and because mock trials are an appealing strategy, we often overlook nonadversarial methods of conflict resolution.

The following strategy is intended to contrast mediation with the more familiar adversarial process. It can be used with students in grades five through high school. The cases used can be changed according to the age and sophistication of students.

The Two Cases

CASE 1 (GRADES 5-8)
Plaintiff: Tony
Defendant: Jody

Jody was sick and couldn't go on her paper route, so she asked Tony to do it for her. She agreed to pay him $2. Tony delivered the papers, but didn't put plastic bags on them. It rained and the papers were ruined. Jody refused to pay Tony the $2.

CASE 2 (SECONDARY)
Plaintiff: Cecil Jackson
Defendant: Sarah Miller

Sarah Miller moved into a house next door to Cecil Johnson, a retired man who spends his time landscaping his yard. Mr. Jackson had grown an eight-foot hedge between the two houses. According to Sarah, the hedge blocked her view of the street when she backed out of the driveway, so she asked Mr. Jackson to trim it. After several weeks with no response from Mr. Jackson, Sarah cut down the hedge because she believed it to be a danger to her. Mr. Jackson is furious and wants Sarah to replace the hedge at a cost of $435.

Adversarial Action

Explain to students that they will experience two different methods of resolving disputes: the adversary process of the court, and the mediation process, which takes place in neighborhood justice centers in cities throughout the country.

Divide the class into groups. Explain that the groups will first role play a case using the adversary model. One person in each group should play the plaintiff, a second the defendant, and a third the judge.

Explain the court procedure as follows:

1. Judge asks plaintiff to give his side of the story.
2. Defendant then gives his side of the story.
3. Judge can ask questions, during and/or after hearing from the parties.
4. Judge makes a decision and delivers it.

Conduct simultaneous role plays. They should take about 10 minutes. Then with the entire group ask the following questions:

1. Was the role of judge difficult? What did they like or dislike about being judges?
2. Did the plaintiff and defendant think they were treated fairly. How did they feel about the judge's decision?

Mediation in Action

Explain that students will next mediate the same case. Allow at least 15 minutes for this role play. The judge will become the mediator, and plaintiff and defendant will now be called the disputants. Have the plaintiff and defendant switch roles from the first role play. Explain that the mediator does not make a decision in the case. His/her role is to help the disputants reach an agreement. The procedure is as follows:

1. Mediator explains that in mediation the two parties will make their own agreement. They must not interrupt each other. If the need arises, the mediator will talk to each party separately.
2. The mediator asks each disputant to define the problem as he or she sees it and express feelings about it.
3. Each disputant defines the problem and expresses feelings about it.
4. The mediator restates views of both disputants. The mediator asks questions to clarify issues.
5. The mediator asks disputant #1 if he or she has a proposed solution for the problem. The mediator then asks disputant #2 if he or she agrees. If not, the mediator asks disputant #2 for a proposed solution and asks disputant #1 if he/she agrees.
6. If there is an agreement, the mediator restates the agreement to make sure both disputants approve.
7. If no agreement is reached, the mediator talks to each disputant separately, asking each how he or she is willing to solve the problem. Then the mediator brings them together and asks them to offer their solutions. The mediator will repeat step six if an agreement is reached

Making Comparisons

After the allotted time, bring the class back together and debrief with the following questions:

1. How did being a mediator compare with being a judge? Was it easier or more difficult?
2. Did disputants think they were treated fairly? How did they feel about the process?
3. Was a solution reached? How did it compare to the judge's decision?
4. What are the advantages and disadvantages of each method of dispute resolution? What kinds of conflicts are best suited for each method?

Melinda Smith is a trained mediator and directs a school mediation program in which students are trained to mediate school-related disputes. She also directs the New Mexico Law-Related Education Project.

Fundamental Freedoms

Freedom of Speech/Grades 4-6

Dale Greenawald

This activity will help students identify why freedom of speech is important in a democracy and how their life would be different without it. They will also recognize that there are limits on freedom of speech and that this freedom demands responsibility in its use. This exercise, which will take approximately 45 minutes, will also develop analytical skills.

Procedures

Have each student make a list of how his or her life might be different if there was no freedom of speech. For example, their favorite TV show might be cancelled because someone in the government didn't like it. Share the answers with the class and briefly discuss each.

Discuss why it is important to have as many ideas about an issue as possible. The major point to be made here is that the more ideas that are discussed the higher the likelihood of a good one being selected.

Indicate to students that a long time ago men wrote a set of rules or guidelines describing how our country ought to be governed. These rules are called the Constitution and its amendments. The First Amendment guarantees that all of us have freedom of speech. Think about the following situations and decide if you think that there should be a right to say or print these kinds of things.

- lies; things that aren't true
- things that may cause damage, such as printing or saying something false about a person that causes him or her to lose the respect of the community and suffer financial consequences
- fighting or threatening words, such as threatening to hurt people if they don't do what you want them to do
- saying something that may be dangerous, such as creating a panic by spreading a false rumor
- saying things that people find offensive, such as nasty words.

Looking at Some Cases

From thinking about these examples, do students think that people have a right to say whatever they want all of the time? Why or why not? In what kinds of situations may there be limits on what people can say?

Depending upon the maturity of students they may work in groups or individually to use the criteria developed above to consider what might happen if freedom of speech allowed people to do the following: (They should think about what might happen in each instance and whose rights would be in conflict.)

- shout fire in a crowded place when there was no fire
- take out an ad in a local paper and say that a business has terrible products when, in fact, the products are very good
- criticize the police or the president in a TV speech
- send letters to other people with insulting language
- send a letter to an editor of a newspaper supporting an unpopular group such as the communists

Discuss each of the cases with the entire class. Use the discussion of these issues—and especially the discussion of criticism of the president and the letter to the editor—to help students recognize what kinds of activities are protected and which ones aren't.

A Supreme Court Case

Read or have students read the brief description of the Tinker case and consider if the Tinkers should have been allowed to wear their arm bands. Ask students to list reasons why the Tinkers should be allowed to wear arm bands; ask them to list reasons why they shouldn't be allowed to wear arm bands. The resource person should critique student responses and at the conclusion explain the Court's reasoning in allowing the Tinkers freedom of expression.

The Tinker Case

John and Mary Beth Tinker felt that the war in Vietnam was wrong. Many people around the country were wearing black arm bands to express their belief that the war was wrong. John and Mary Beth decided to wear black arm bands to school. The principal told them that they couldn't do that, although students were allowed to wear political buttons.

The Tinkers wore the arm bands to school anyway. Some students outside of the school got angry with John and Mary Beth for wearing the arm bands. The principal sent John and Mary Beth home and told them not to come back until they had taken off the arm bands.

Should the Tinkers be allowed to wear the arm bands? Whose rights are in conflict here? Do you think that the First Amendment should be applied to allow the Tinkers to wear the arm bands? Why or why not?

THE COURT DECIDES

The Supreme Court held 7-2 that the First Amendment permitted the wearing of arm bands to school as a protest.

Justice Fortas held for the majority that neither students nor teachers "shed their constitutional rights of freedom of speech at the schoolhouse gate. . . Students. . . are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect."

As long as the protest would not "materially and substantially interfere with school discipline," it is permitted.

Justices Harlan and Black dissented, arguing that the widest possible latitude must be accorded school officials to maintain appropriate discipline. As long as the principal's order was not intended to prohibit an unpopular point of view while permitting majority opinion, it should be permitted.

Twelve Hints for Lawyers

by Leslie A. Williamson, Jr.

During the past several years, I have addressed several hundred Connecticut public school students on student rights and responsibilities. My discussions with these students have been an educational experience for me and, I trust, for the students.

Based upon my "hit and run" classroom experiences, I was asked to prepare some hints for members of the Connecticut bar on talking to public school students. The following, not in any particular order, are my suggestions.

1. *Know Your Subject*
   This is an obvious hint but nonetheless an extremely important one. Spend some time reviewing material prior to addressing students. Don't underestimate the breadth of their knowledge, their awareness of the law and their interest in the law.
2. *Have a Plan but be Prepared to Vary from It*
   Before you walk into the classroom, you should know what you want to say and how you are going to say it. Establish a presentation outline. (See suggested procedures for teaching search and seizure, pages 41-43.) However, the more interest you generate, the more probable it is that you will get "off track." Don't be afraid of this but don't put yourself in the position where you are unable to get back on track.
3. *Stress Responsibilities as well as Rights*
   You are a guest of the local board of education. The role of your host is to provide students with an education. Your discussion will be integrated within the general goal of the board. Therefore, remember that you are in the school as a lawyer-educator, not a student advocate. Your presentation should stress responsibilities as well as rights. Don't forget to highlight the responsibilities of a board of education.
4. *Control the Classroom*
   Don't expect a teacher to control the classroom for you. When you are in front of the class, you will be tested – on you knowledge of the subject and your management of the students. If a student misbehaves, do something – don't ignore the situation. Don't wait for the teacher to act because, oftentimes, the teacher won't.

5. *Talk with the Students, Not at Them*
   Most students are interested in the law. They will engage in meaningful discussion if given the opportunity. Give them that opportunity! While you may want to spend the entire period lecturing, it is strongly recommended that you don't.
6. *Don't Act Like a Lawyer*
   Certainly you should not take this hint too seriously. However, remember you are not addressing a judge but rather a group of students. Talk with them in words they can understand and take time to explain words or concepts which might not be readily known to your audience. Integrate concepts.
7. *Don't "BS" the Students*
   If you know the answer to a question, answer it. If you don't, tell the students that you don't. If you try to "BS" the students they will know it very quickly and your credibility will be lost.
8. *Use Hypotheticals*
   Use examples to illustrate points you are trying to make. Develop hypotheticals from your imagination or from recent court decisions.
9. *Watch Your Time*
   As interesting as you will be, most of the students' attention span will parallel the class schedule. When the bell rings, they want out! Know when the class is over and time your presentation accordingly.
10. *Work the Class and Work with the Teacher*
    I never lecture, nor do I stand in one place. Move around, interact with students, get each one involved.

    Talk with the teacher before class to determine which material should be emphasized, the background of the students, and what will be done with the subject matter once you leave.
11. *Don't Accept What "Is" – Discuss Why It "Is"*
    Students will often base answers on personal experiences or school policy. What "is" may not be correct. Challenge students to determine why something "is" and ask whether what "is" is appropriate.
12. *Don't Get Caught in the Middle of a School Controversy*
    Students will often ask you to determine whether actions by a teacher or administrator are appropriate. Don't get placed in the position of making a judgment on the appropriateness of action taken by an educator or on a pending issue. Try to articulate both sides of the issue.

Judy Friedman

1647

FOUNDATIONS OF FREEDOM

Richard L. Roe

Making Government Play by the Rules

Habeas corpus is an ancient protector of individual liberties that is still very much with us

The writ of habeas corpus stands out among the many fundamental principles of English law that serve as the foundations of our Constitution. The writ of habeas corpus is one of the few important protections for criminal process guaranteed in the original seven articles of the Constitution written in 1787, as compared to the more ample protections added by the Bill of Rights in 1791. In Article I, dealing with the powers of Congress, the Constitution declares that "(t)he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

William Blackstone in his *Commentaries* called habeas corpus "the great and efficacious writ." Blackstone's *Commentaries* was the major source of knowledge of English law in the early decades of the American republic and a significant influence on early American legal practice.

The real significance of the writ of habeas corpus is not as a right in and of itself, but as a remedy. It is an instrument for compelling government to adhere to basic constitutional and legal principles as they have evolved over the centuries, both in England and the United States. Through the writ of habeas corpus, defendants have been freed from illegal imprisonment, fundamental rights such as the right to a lawyer have been more fully realized, and the powers of kings and governors have been subjected to the rule of law.

The history of the writ of habeas corpus reflects the struggle against arbitrary and self-interested government. It puts an idea—rule of law—against force and might in the hands of rulers and governments.

Throughout history, rulers have been able to bend individuals, and sometimes entire societies, to their will by their power to imprison or punish persons who resisted their commands. In England and the United States, the writ of habeas corpus has been the legal response to the use of coercive power. It allows a prisoner to compel the officials who detain him to release him if the reasons for detention do not fully comply with the law. As a document, a simple piece of paper, backed up not by physical authority but by principles and precedents, the "great writ" symbolizes the essence of the rule of law: government by justice and right rather than might.

How the Writ Operates

The writ of habeas corpus is an order by a court to a person having custody of another, requiring the custodian to bring the person in his care before the court for some specified purpose. The term "habeas corpus" literally means "to have the body." The writ is addressed to persons who have the physical custody of another person.

There have been numerous varieties of the writ, some extinct and some still operative. The writ of habeas corpus *ad testificandum*, for instance, is used to bring a prisoner from the place of detention to the court to testify at another person's trial. Other forms of the writ have been used in civil rather than criminal matters, such as to bring a minor and his custodian into court for family or estate matters.

The most famous and important version of the writ, the one commonly understood as the writ of habeas corpus, requires a warden to justify to the court the legality of a prisoner's incarceration. The writ works as a remedy by forcing the government to show that it has not violated rights in detaining the prisioner.

Initially, the writ came into play early in the criminal process. It often functioned to question the jurisdiction of the custodian to arrest a person. It was also used to require the arresting authority to file charges against the prisoner. If there were no legal grounds for arrest, the court would release the prisoner. If the arresting authority could show some "probable cause" that the prisoner violated the law but the offense entitled the prisoner to bail, the court might release the prisoner on his promise or with some security that he would return to the court for trial.

Today in the United States, the writ usually comes into play very late in the process. It is most often used as a last resort after all rights at trial and appeal are exhausted. As such, it requires the state to show that due process was observed in the prisoner's trial and appeals. Occasionally, it is still used as a rapid means of contesting a prisoner's initial detention.

The operation of the writ is complicated because it involves at least three parties: the person detained, the custodian, and the court.

The first step is the *petition* for the writ, done by the prisoner or someone acting for him. A person chained to the wall in the Tower of London, for instance, would not have been able to prepare a petition himself. The petition alleges that the arrest or detention has violated the law in some way, and almost always requests release of the prisoner.

The petition is sent by the prisoner to an appropriate judge, who then decides whether to *issue* the writ. The judge issues the writ by directing an order to the person who "has the body" of the prisoner, requiring this person to show the legal cause for the detention. This step is sometimes confusing, since the prisoner's real complaint is not against the warden but the governmental agency that ordered the imprisonment. For instance, in the famous case of *Gideon v. Wainwright*, Gideon was complaining that the state of Florida deprived him of his right to an attorney, a matter that Wainwright, the prison warden, had nothing to do with.

While the jailer has custody over the body of the prisoner, he is usually acting as agent for another government official who has brought about the detention. The jailer, then, must notify the higher official, who completes the next step.

The persons responsible for the detention of the petitioner for the writ must file a *return* with the court, explaining the grounds for detention and specifying certain elements. According to Blackstone, "the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful." This information must be set out in the return.

After the return is filed, the court looks into the validity of the commitment of the prisoner. As Blackstone notes, the court "according to the circumstances of the case may discharge, admit to bail or remand the prisoner" to custody.

As in the other steps, matters are not so simple as they might at first appear. Critical issues determining whether the court will grant the prisoner's petition have arisen in the course of adjudicating the writs over the centuries. For instance, how closely will the court examine the petition and the return? If the return indicates that the detention is at the special command of the king but no specific crime is cited, will the court discharge the prisoner? What can the prisoner or court do if the jailer ignores or delays the return?

Early Origins

The earliest writs in English law were simply written documents setting forth royal orders or commands. The writs became formalized and specific, so that a particular writ would serve only for a specific function. Individuals who desired intervention by the government into some personal or commercial matter would apply to an official of the crown for the necessary writ, for which a fee would usually be charged.

In those medieval times, it was in the interests of both government and individuals to shift resolution of disputes from private remedies to the courts. Peace and stability were promoted when a person brought his grievance to the authorities to settle rather than trying to settle the dispute himself, perhaps with violent means. Initially, the writ of habeas corpus was part of the process of bringing persons physically into court, either for private or governmental matters. When William the Conqueror came from France in the year 1066 and subjected the feudal Anglo-Saxon society to a more centralized Norman rule, it was already established that complete justice could not be done to a person unless he appeared in the proceedings.

There were various courts to choose from. Depending on the remedy sought, a person could seek justice in many different royal courts, local feudal courts operated by feudal lords, or church-affiliated courts. As writs of habeas corpus were developing to question the legality of an individual prisoners' detention, the writ also served to assert the superiority of the king's courts over the other lesser courts and correspondingly strengthen the central authority of the English government. This happened to the degree that individuals preferred the effectiveness of the royal writs to the remedies available in the other forums.

The legal theory for the king's authority to issue the writ of habeas corpus was that the king, as highest authority in the land and responsible for the operation of the system of justice, could look into the legality of anyone imprisoned in the system. Habeas corpus was a "prerogative" writ, stemming from the sovereign power of the king and subject to no restriction.

Later, once royal central authority was established, the writ helped establish the superiority of the common law courts, such as the King's Bench, over competing courts, such as the Chancery or the Exchequer. Judges of the King's Bench used the writ to examine the legal sufficiency of procedures in the other courts.

Enforcing the "Rights of Englishmen"

The history of the individual rights enforced through the writ of habeas corpus is an important legacy of the writ. The Magna Carta is commonly viewed as the ultimate source of these rights. In the year 1215, following years of poor government, troubles with the Church and defeat in wars with France, King John was confronted by a large group of armed barons opposed to further wars and determined to limit John's authority. Under the feudal system, the barons were heads of the families controlling huge tracts of land under charter from the king, to whom they owned allegiance.

On the grassy plain of Runnymede, on the banks of the Thames, these powerful lords forced John to agree to a long list of concessions. Among the most important principles were the limitation of the king's authority, certain taxation only with the consent of a common council of barons and other powerful officials, and a guarantee of the rights to "legal judgment of [one's] peers or by the law of the land." The concepts embodied in the Magna Carta have been expanded by developments over time.

Although the principles of the great charter were confirmed by successive kings over the next four centuries, the struggle for authority continued among the king, the nobility, the church and the emerging commercial interests. The concessions in the Magna Carta were only grudgingly granted, if at all. King Richard II, for instance, in the last years of the 14th Century, took control of Parliament and attempted to rule England as an absolute monarch. In the 17th Century, Parliament finally asserted its supremacy over the monarchy. The writ of habeas corpus played an important role in that victory.

The Five Knights Case

Soon after Charles I became king in 1625, he disolved Parliament after it did not support his war against Spain. Without the approval of Parliament, however, Charles I could not impose the taxes needed to raise money to conduct the war. Rather than convene another Parliament, he attempted to raise money through forced loans from affluent subjects. The system for collecting the loans included imprisoning persons who refused to pay. The forced loans and imprisonment "caused great murmuring among the king's subjects."

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Evidently anticipating legal challenges, Charles I removed the chief justice of the King's Bench, who did not favor the loan, and replaced him with another chief justice of his own choice, Sir Nicholas Hyde. At the time, the tradition of an independent judiciary was not yet established. The King's Bench was considered to be the king's court. During the subsequent proceedings, Hyde tells one of the knights

> for it is the king's pleasure his laws should take place and be executed, and therefore do we sit here. . . Whether the commitment be by the king or others, this Court is a place where the king doth sit in person. . .

Among the many noblemen imprisoned for failing to make loans to the king, five knights contested the legality of their detention by petitioning for writs of habeas corpus to the judges of the King's Bench. In the action known as Darnel's case after one of the knights, Sir Thomas Darnel was imprisoned by a warrant signed by the king's attorney general. Through his lawyer, Darnel petitioned for habeas corpus on November 3, 1626. The judges issued the writ, returnable on November 8th, but the warden of the Fleet prison delayed the return. A second copy of the writ, called the "alias," was issued on November 10th, returnable on November 15th. The warden's return indicated that Darnel was detained "by the special command of the king." The other knights were treated similarly.

The fact that the king was justifying the detention of Darnel and the others by his "special command," without citing a specific violation of the law, conflicted directly with the knights' sense of the meaning of the Magna Carta's reference to "the law of the land." The knights believed that this phrase meant "due process of law," which in turn implied the guarantee of being charged with a specific violation of the law and a warrant specifying length of imprisonment. John Selden, the noted attorney for one of the knights, went so far as to suggest that an indictment or presentment was needed, even by the king.

The attorneys for the knights argued that the return "by the special command of the king" was too general to show sufficient cause for imprisonment. If no violation of the law was given, the prisoners could not offer a defense. The attorneys then cited numerous precedents to show that commitments under the king's special command were bailable. A number of technical defects in the form of the return were also claimed. Moreover, if such a rationale in the return could suffice to justify detention, habeas corpus could not free such a prisoner. Since habeas corpus was the only remedy in such a situation, the imprisonment could be perpetual, even if the king did not prosecute.

The attorneys for the knights did not argue the underlying issue, that incarceration for nonpayment of a forced loan may have constituted an illegal attempt to avoid the prohibition against taxation without Parliament's consent and be a violation of other laws prohibiting loans extracted against a person's will. To do so was inappropriate in a habeas corpus proceeding, since the legal issue in the writ was whether due process had been followed, not whether the laws or policies in question were valid. Specifically, the issue was whether the king's response on the return—that imprisonment was by his "special command"—was legally sufficient. This apparent violation of the knights' due process of law may have seemed to them even more serious than the coerced loans.

The king, through the attorney general, disputed the precedents cited on behalf of the five knights. The attorney general claimed that when a commitment under the king's special command did not also express a specific cause for detention, the court's practice was to remand the prisoners back to prison. He justified this practice on the king's sovereign power and reasons of national security, stating that if the claim of special command of the kings is used to justify commitment, "it is to be intended for a matter of state, and that it is not ripe nor timely for [the specific grounds for detention] to appear."

In an opinion delivered by Lord Chief Justice Hyde, relying on the arguments of the attorney general, the court found that the incarceration was legal and sent the five knights back to jail. This result created much resentment, and Parliament soon overturned it in the Petition of Right.

The Petition of Right

A few months after the decision in Darnel's case, Charles I convened another Parliament in order to approve additional taxes he needed to raise. One of the first tasks the new Parliament addressed was to pass a resolution overturning the result in Darnel's case. Besides condemning the practice of forced loans, imprisonment for nonpayment, and commitment upon "special command," the Petition of Right also prohibited taxation "without common consent by act of Parliament," quartering of soldiers in private homes, and use of martial law during peacetime.

During the debates, the Parliament also called upon the judges of the King's Bench who rendered that opinion in Dar-

From the "Petition of Right" (June 7, 1628)...

III. And where also by the statue called the great charter of the liberties of England [the Magna Carta], it is declared and enacted, that no freeman may be taken or imprisoned, or be dispossessed of his freehold or liberties, or his free customs, or be outlawed or exiled, or in manner destroyed, but by the lawful judgment of his peers, or by the law of the land. . . .

IV. That no man of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law:

V. Nevertheless against the tenor of the said statutes, and other the good laws and statues of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause shewed; (2) and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus, there to undergo and receive as the court should order, and their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your privy council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law.

VI. And whereas of late great companies of soldiers and mariners have been dispersed into divers countries of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people. . .

From the Abolition of the Star Chamber (July 5, 1641)

VIII. And be it provided and enacted, that if any person shall hereafter be committed, restrained of his liberty, or suffer imprisonment, by the order of any such court of star-chamber, . . (2) or by the command or warrant of the King's majesty, . . (3) that in every such case every person so committed, restrained of his liberty, or suffering imprisonment, upon demand or motion made by his counsel, unto the judges of the court of the of King's bench or common pleas, in open court, shall without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of habeas corpus, to be directed generally unto all and every sheriffs, gaoler, minister, officer or other persons in whose custody the party committed or restrained shall be, (4) and the sheriffs [and others] . . . shall at the return of the said writ, and according to the command thereof upon due and convenient notice given unto him . . . , bring or cause to be brought the body of the said party so committed or restrained unto and before the judges . . . of the said court from whence the same writ shall issue, in open court, (5) and shall then likewise certify the true cause of such his detainer or imprisonment, and thereupon the court, within three court-days after such return made and delivered in open court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing or remanding the prisoner; (6) and if any thing shall be otherwise wilfully done or omitted to be done by any judge, justice, officer or other person aforementioned, . . . then such person so offending shall forfeit to the party grieved his treble damages . . .

nel's case to explain their decision. The judges appeared with permission of the king, and explained that they did not make a judgment that enlarged the king's powers or limit "the Right of the Subject." They reasoned that if they ruled that the king's special command did not constitute a legal cause for the knights' imprisonment, they would

> have judged the king had done wrong; and this is beyond our knowledge, for he might have committed them for other matters than we could have imagined . . . if we had [admitted them to bail], it must needs have reflected upon the king, that he had unjustly imprisoned them.

It was difficult for the judges both in theory and in practice to question the motives of the king in his own court. Greater independence of the judiciary would be necessary for a different ruling.

Parliament's perspective on the legal issue of Darnel's case was quite different. Many of the persons imprisoned for not submitting to the king's demand for loans were elected to that Parliament. As the petition puts the issue:

> . . . divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command . . . and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to law.

The problem with the "special command" was that it kept the power of detention in the hands of the king, rather than subjecting this power to "due process of law" that the barons believed was guaranteed by the Magna Carta.

In 1628, the king reluctantly agreed to the Petition in order to obtain consent of Parliament to his tax plan. Advised by his legal counsel that the Petition would limit his powers, he maintained that he was agreeing to nothing different than the ancient laws of the realm, which he claimed he always had obeyed. Parliament also maintained the theoretical position that the Petition restated ancient laws, except that its view of these ancient laws was quite different from that of Charles I. According to Parliament, the sovereign authority was the Magna Carta, not the king.

The "Six Members" Case

Charles I did not wait long to reassert his authority over Parliament. In early 1629, learning that the House of Commons was about to vote to limit his power regarding customs duties, he instructed the Speaker not to let the matter come to a vote. When the members of the House called for a vote, the Speaker refused on the grounds "that he was otherwise commanded by the king." The Parliament adjourned in an uproar, and when it reconvened several days later its members called for a vote again. The Speaker again refused and said the king commanded the House to adjourn. When the Speaker tried to leave the chair, signalling the end of the session, the members physically restrained him and returned him to the chair until the House voted on the matter.

The king immediately dissolved the Parliament and issued warrants for the rebellious members of the House to appear before him the next day. When these members refused to discuss outside of Parliament what had happened in Parliament, they were committed to the Tower of London and other prisons. The members were asserting the independence of Parliament from the king, a very real threat to his authority.

The members petitioned for writs of habeas corpus, and the returns indicated that there were two different warrants for their detention. The first was simply based upon an order of the king's Privy Council "at his majesty's pleasure and commandment." The second was directly from the king, "for notable contempts . . . committed against our self and our government, and for stirring up sedition against us."

Attorneys for the members argued that the first warrant was insufficient as contrary to the Petition of Right. The second warrant was claimed to be too general, for "sedition" was not at the time a defined crime. On the day the King's Bench judges were to give their opinion, the king would not deliver the prisoners to the court, saying that he moved them from different prisons to the Tower. The king explained to the judges that

> none [of the prisoners] shall come before you, until we have cause given us to believe they will make a better demonstration of their modesty and civility, both towards us and your lordships, than at their last appearance they did.

The attorneys for the imprisoned members asked the judges to render their opinion, but they refused, since "the prisoners, being absent, could not be bailed, delivered, or remanded." The prisoners remained in jail through the long Easter vacation until the court reconvened.

Prior to reconvening, the judges met with the king and discussed the matter. A compromise was offered in which the prisoners would be allowed bail, since the offenses were not considered capital (i.e., punishable by death). Additionally, the members would have to give sureties for their good behavior. The judges offered this as their opinion in court.

(continued on page 49)

Foundations of Freedom

Teaching About Habeas Corpus/Grades 7-9

Richard Roe

When constitutional concepts such as due process of law are first introduced to junior high students, students may understand the concepts better if they examine the English antecedents and early American usages

The teacher or resource person can present the significance of these antecedents in ways that appeal to students' imagination, comparing and contrasting the historical practices to the present day and using analogies to situations the students encounter in their own lives. The following suggestions could be used by classroom teachers or guest attorneys.

Analogy/Simulation

One way to introduct habeas corpus review of a person's detention is by analogy to one form of detention all students are familiar with—after-school detention.

As a result of the activity, student interest should be stimulated, students should be able to describe various kinds of unfair treatment that could take place in the process of a person's detention, and should be able to discuss how a writ of habeas corpus could work as a remedy in those situations.

The activity consists of a role play in which the teacher or resource person pretends to unfairly "accuse" a student of commiting a violation of school rules and then requires the person to come to after-school detention.

You can either do this as a little play or surprise the class by something with more punch. You could, prior to this class activity, select two students as "volunteers" to participate in a surprise simulation that the rest of the class will be led to believe is real.

Describe the simulation to these two students as follows: Student #1 will be accused of an unnamed offense and, after the student protests his/her innocence, the teacher will require detention without specifying the reason or how long the detention will last. Student #2 will protest that student #1 is being treated unfairly, and will also be required to remain after school. The two students should be encouraged to act as if this were really happening to them.

At a point in the class hour, you will proceed to single out student #1, accusing him of violating unnamed school rules and imposing punishment without giving him a chance to defend himself. Student #2 then jumps in to defend student #1. You then require both students to come to after-school detention.

The dialogue may go something like this:

TEACHER: Ok, Student #1. I saw what you did. That kind of behavior is against school rules.

STUDENT #1: But what did I do?

TEACHER: You know what you were doing, and I saw it and I didn't like it. Don't pretend you weren't doing it.

STUDENT #1: I wasn't doing anything wrong. I don't know what you mean.

TEACHER: Yes you do. I don't have to remind you. For doing that kind of thing, you're going to have to stay after school for a while.

STUDENT #1: I can't stay after school. I have a job.

STUDENT #2: I didn't see Student #1 do anything wrong. I was watching the whole time.

TEACHER: You stay out of this. It's none of your business.

STUDENT #2: You shouldn't keep Student #1 after school unless you tell him what he did wrong and give him a chance to explain.

TEACHER: I'm the teacher here and what I say goes. Just for that, you can stay after school too.

At that point, you ask the rest of the class to describe in detail what happened. This can be done by asking for a brief paragraph in writing, or a brief description orally. You should get general agreement of the main points of the dialogue by writing a summary on the board.

You then ask the students what, if anything, was unfair about giving the detentions (e.g., students not charged with an offense, not given opportunity to explain, not given "assistance of counsel," and not given a specific duration of punishment).

Next, you ask how could a student go about questioning the appropriateness of the detention. Whom should a student talk to? Possible answers include other students, other teachers, counsellors, the principal, and parents. The discussion should bring out that to be effective, they should complain to a person who is the equal of the teacher/"jailer" or is greater in terms of authority.

What should the student say? This could be done as a written exercise or orally. A good "petition" describes why the detention is unfair. If there are any applicable school rules, they should be applied to the situation. The analogy to habeas corpus should continue, indicating that the person complained to should notify the teacher and require the teacher to justify the detention.

The point should be made that the writ of habeas corpus developed as just such a remedy. It is a special form or process designed to allow a person to question the legality of his detention. For instance, if the student were suspended or expelled instead of given detention, the common law would have another form of writ to deal with the situation.

You could then vary the sitation by posing a few different hypotheticals. For instance, what if:

1. The action complained of was not an offense. For instance, what if you detain a student for wearing an article of clothing the color of which the teacher doesn't like?
2. The detention is ordered without any other reason than "by special order of the principal."
3. You impose detention to coerce the student, for instance, to join the teacher's Checkers Club.
4. You impose a punishment, such as forcing the student to stand in a corner holding a heavy book in each hand.

What Is Procedural Justice/Middle/Secondary

Law in a Free Society

The following lessons are taken from several Law in a Free Society K-12 curriculum units on *procedural justice*, or due process. They are concerned with the fairness of the procedures used to gather information and make decisions.

The opening portion of the exercise could be used with students at any grade level 7-12. It introduces the concept of procedural justice with relatively simple examples.

For more advanced students (say those in high school) you might want to use the case of Sir Walter Raleigh (1603), which is included in this lesson, to illustrate how due process developed, and why the framers of the Constitution considered it vital. For younger students, use the case of John Lilburne (1637), in the box on page 30, and ask students to answer the same questions as follow the Raleigh case.

Introduction

Give students the following situations and ask them if they are fair.

- You are accused of having done something wrong and are punished immediately without having had an opportunity to tell your side of the story.
- You and several friends have planned to meet to go together to see a motion picture. When you arrive at one of the friends' homes to discuss which show the group should see, you are irritated to find the group has already made the decision to see a film in which you have no interest, without waiting to give you an opportunity to express your opinion.
- A city council holds a hearing during which it decides how to spend five million dollars of tax money. Notice of the hearing is published so that interested individuals and groups from the community may attend the meeting and express their opinions on how the tax funds should be used.
- A suspected terrorist is tortured for five days before confessing to having participated in several bombings in which a number of people were killed.

Each of the above situations involves an issue of *procedural justice*. Procedural justice refers to the fairness of the *ways* certain things are done. More specifically, procedural justice refers to: (1) the fairness of the *ways* information is gathered, and (2) the fairness of *ways* decisions are made. (It *does not* refer to the fairness of the decisions themselves.)

The goals of procedural justice are: (1) to increase the chances that all information necessary for making wise and just decisions is gathered, (2) to ensure the wise and just use of information in making decisions, (3) to protect the right to privacy, human dignity, freedom, and other important values and interests such as distributive justice and corrective justice, and (4) to promote efficiency.

The "Keystone of Liberty"

Scholars and others who have studied the subject of procedural justice often claim that it is the "keystone of liberty" or the "heart of the law." Observers of world affairs have sometimes claimed that the degree of procedural justice present in a country is a good indication of the degree of freedom, respect for human dignity, and other basic human rights in that country. A lack of procedural justice is often considered an indication of an authoritarian or totalitarian political system. Respect for procedural justice is often a key indicator of a democratic political system.

People who are not familiar with the subject often place less importance on procedural justice than on other values or interests. To the average person it is sometimes difficult to believe that the way information is gathered and the way decisions are made are as important as the outcome. Some might claim, for example, that it is not so important how the Congress or the president or the courts make their decision as what decisions they make. It is sometimes difficult to be as concerned about how the police gather evidence on a suspected murderer or what procedures are used in the trial of such persons as about making right decisions and punishing guilty persons and/or putting them in a place where they cannot hurt anyone else.

WHAT DO YOU THINK

1. What situations have you observed in your home, school, and community in which issues of procedural justice have arisen?
2. Why might adherence to the goals of procedural justice be important in the private sector?
3. What might be the differences in adherence to the goals of procedural justice among democratic, authoritarian, and totalitarian political systems? What examples can you give from recent or historical events?

Fair Procedures: The Trial of Sir Walter Raleigh (1603)

Ask students to read the following account of the arrest and trial of Sir Walter Raleigh. Then ask them the questions that follow.

Sir Walter Raleigh (1554?-1618) was one of the most colorful figures in English history. Soldier, sailor, explorer, poet, statesman, scientist – Raleigh seemed to do well in almost everything he tried.

As a young man, Raleigh caught the attention of Queen Elizabeth I of England, who was impressed by his handsome appearance, sharp wit, bold advice, and daring exploits. A fierce fighter and expert seaman, Raleigh rapidly became one of the queen's favorites.

When Elizabeth died in 1603, Raleigh had the bad luck to anger her successor, James I. This gave Raleigh's enemies, and he had made many over the years, a chance to plot against him. They told the new king that Raleigh had plotted to overthrow him and put Lady Arabella Stuart on the throne. They claimed that he had planned this rebellion with the help of a man named Lord Cobham.

On the night of July 20, 1603, as Raleigh stood on the terrace of his home talking with friends, there was a loud knock at the door.

"In the name of his majesty, James I, open up," rang out a familiar voice.

Suddenly the door was flung open and Sir Robert Cecil, First Secretary to the king and Raleigh's sworn enemy, burst in. With him were several members of the king's guard.

"In the king's name I place you under arrest," Cecil said. "On what grounds?" Raleigh asked.

But Cecil would not reply and Raleigh was taken away. His friends dared not protest.

Raleigh was questioned by Cecil in private. He had no chance to know the full charges against him or to confront his accusers. He was not permitted the help of a lawyer. Instead he had to rely only on his quickness, and wit, and basic knowledge of law and the current political situation.

During the time that he was being questioned by Cecil, Raleigh learned that the First Secretary had tricked Lord Cobham into bringing charges of treason against him by telling Cobham that he, Raleigh, had accused Cobham of that crime.

A wave of hopelessness swept over Raleigh. If the king wanted him dead, there was little he could do. Judges had lost their offices and juries had been put in jail for acquitting prisoners that the king wanted found guilty.

There was almost no evidence against Raleigh. While he may have known something about the plot against the king, he was not a conspirator.

Raleigh was brought to trial on November 17, 1603. The proceedings, which were directed by a group of commissioners, took place behind locked doors.

Among the commissioners at Raleigh's trial was Lord Thomas Howard, who had fought with Raleigh as a soldier and hated him. There was Lord Henry Howard, who later admitted that he had actually started the plot against the king for which Raleigh was now being tried. Sir Robert Cecil, the man who had trapped Raleigh in the first place, was also one of the commissioners.

Raleigh had prepared himself as well as possible. But since he did not have the help of a lawyer, this was a difficult task. All Raleigh was allowed in the way of a defense was ink and paper with which to take notes. He could not speak until he was given permission to do so, and this permission was almost never given. Whenever Raleigh rose to protest a point in the prosecution's story against him, or to tell his own version about what his involvement in the plot actually was, he was silenced immediately.

The "confessions" written by Lord Cobham were the most important evidence used against Raleigh. Raleigh asked that Lord Cobham be brought to court so that he could face and question him.

Lord Cobham was alive and could have been brought to the trial. But the commissioners were afraid that in this way Raleigh could prove his innocence. They refused to let Raleigh face his accuser.

The commissioners took just fifteen minutes to find Raleigh guilty. He was sentenced to be executed but, on the day his sentence was to be carried out, Raleigh's punishment was reduced. He spent the next thirteen years, until 1616, as a prisoner in the Tower of London. Whenever Raleigh would ask to speak with the king, in order to have his case reopened, his request was always denied.

Evaluating Whether Procedures Are Fair

1. Information Sought or Decision to be Made
   - What is the information being sought? (Evidence of whether Raleigh was involved in a plot to overthrow the king.)
   - What is the decision being made? (Whether Raleigh was guilty of treason.)

2. Discovery and Use of Information

   a. *Comprehensiveness*
   To what degree does the procedure being used increase the chances that all information necessary for a wise and just decision is discovered?
      - What steps furthered this goal and how? (None).
      - What steps did not further this goal and how? (Raleigh was denied the right to speak at his trial, to have witnesses on his side, to have a lawyer help him answer the accusations, or to confront and cross-examine his accuser.)

   b. *Public Surveillance*
   To what degree do the procedures used allow interested members of the public to observe how information is being gathered and/or used in the making of decisions?
      - What steps furthered this goal and how? (None)
      - What steps did not further this goal and how? (The trial was held in secret "behind closed doors.")

   c. *Effective Presentation*
   To what degree do procedures enable interested persons to effectively present information they wish to be considered in the decision making process?
      - What steps furthered this goal? (None)
      - What steps did not further this goal and how? (Raleigh was denied the right to speak at his trial, to have a lawyer help him present his side of the case, and lacked enough knowledge of the law to have witnesses on his side and to cross-examine witnesses against him.)

   d. *Impartiality*
   To what degree has there been impartiality in gathering information and/or making decisions?
      - What steps furthered this goal and how? (None)
      - What steps did not further this goal and how? (Several of the commissioners hearing the case were Raleigh's enemies and were responsible for his arrest and trial. Also, judges and juries knew that if they set free someone the king wanted found guilty, they could be put in prison.)

   e. *Reliability*
   To what degree do the procedures insure the reliability of the infomation gathered?
      - What steps furthered this goal and how? (None)
      - What steps did not further this goal and how? (The person who had brought charges against Raleigh had been tricked into doing so by one of the commissioners in order to save himself from prosecution. Raleigh was not allowed to confront and cross-examine this person.)

   f. *Notice*
   To what degree do the procedures provide interested persons adequate notice of the reasons for

gathering information and/or the time of a hearing to enable them to make adequate preparation?
  - What steps furthered this goal and how? (None)
  - What steps did not further this goal and how? (Raleigh was not informed of the charges against him until long after his arrest or of details until his trial.)

h. *Detection and Correction of Errors*
To what degree do the procedures enable interested persons to review what was done in order to detect and correct errors?
  - What steps furthered this goal and how? (None)
  - What steps did not further this goal and how? (Raleigh was imprisoned for 13 years and his requests to speak with the king to have his case reopened were all denied.)

3. Protection of Related Values and Interests

a. *Privacy and Freedom*
To what extent, if any, does the procedure protect the right to privacy or freedom?
  - What steps furthered this goal and how? (None)
  - What steps did not further this goal and how? (Raleigh imprisonment)
  - Did the procedure endanger freedom for the individual or society? (The lack of procedural safeguards endangered Raleigh and all of society.)

b. *Human Dignity*
To what extent, if any, does the procedure protect the right of each person to be treated with dignity no matter what his beliefs or actions may be?
  - What steps furthered this goal and how? (None)
  - What steps did not further this goal and how? (All of the procedures used violated basic rights to proper procedures, protection of the innocent, etc.)

c. *Distributive Justice*
To what extent, if any, does the procedure protect basic principles of distributive justice?
  - What steps furthered this goal and how? (None)
  - What steps did not further this goal and how? (Burden of imprisonment without being deserving of such treatment)

d. *Practical Considerations*
To what degree, if any, are practical considerations important in deciding whether or not a procedure is proper?
  - What steps furthered this goal and how?
  - What steps did not further this goal and how?

What Do You Think

Were the procedures used for gathering information and making a decision fair? (Why)

What suggestions would you make, if any, for improving the procedures used? (Why)

This article adapts lessons found in three levels of the Law in a Free Society curriculum, a set of written and audio-visual materials containing six levels of sophistication for students from kindergarten through high school.

The Trial of John Lilburne (1637)

Ask students to read the following historical incident. Use the questions that follow the Raleigh case (pp. 29-30) to evaluate the procedures used in this incident.

During the 17th century in England, the kings created a court called the Court of the Star Chamber. The judges on this court were royal ministers. The Star Chamber had the authority to require any citizens to attend its sessions whether they were suspected of a crime or not. Persons brought before the court were often not accused of a crime or told why they were being questioned. Many times they were questioned at length in secret, even though there was no evidence against them, just on the chance that they might give information on themselves or others that would indicate a criminal act. Often people being questioned were tortured or threatened with cruel punishments if they failed to say what the judges or prosecutors wanted them to say.

John Lilburne was a Puritan. The Puritans were a group of people who criticized the official Church of England and had established their own church. They were unpopular with many of the people and, in particular, with some of the most important people in the government.

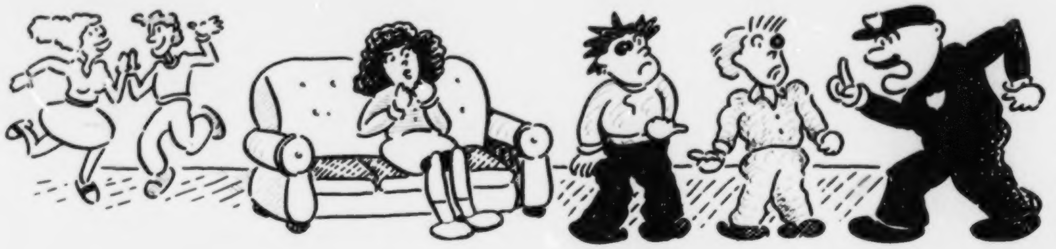
In 1637, John Lilburne was brought before the Star Chamber. He had just returned to England from Holland and was accused of sending unpopular and scandalous books from there to England. Lilburne said that he had the right to a trial in a regular court of law, to be given notice of the charges against him, to be formally charged with a crime, to have a lawyer help him answer the charges, to have witnesses on his side, to confront and cross-examine witnesses against him, and not to be forced to testify against himself. He was not given any of these rights.

For refusing to answer questions asked by the judges of the Star Chamber, Lilburne was fined, tied to a cart and whipped as the cart drove through the streets of London. He was then placed in a pillory in a public square with his back bared to the noon sun for two hours. He told everyone who would listen to resist the tyranny of the Church of England. Since he refused to be quiet, he was gagged so cruelly that his mouth bled. He was then placed in irons in prison for ten days without food.

After he was released, the English Parliament voted that he had been treated illegally, that he be paid to compensate for what he had suffered, and that the Star Chamber be abolished.

Due Process

Criminal Law Mock Trial/Middle/Secondary **Jennifer Bloom**



Slug Signorino

(See article on pp. 16 for full run-down of this steps in conducting a mock trial. The same procedures can be used here.)

Facts

Mike and Diana are at a party. They are sitting on a couch talking. Nick approaches them. Saying he knows Diana, he tries to talk to her. Mike gets angry and asks Nick to go away. They argue and a fight breaks out. The police are called, and they arrest Nick for assaulting Mike. Nick claims that Mike caused the fight and that he was only defending himself.

WITNESS STATEMENTS

Witnesses for the prosecution are Mike and Diana. Witnessess for the defense are Nick and Jess, another partygoer. .

MIKE: I was minding my own business, sitting with Diana at this friend's party, when this guy walked up and started hassling Diana. I asked her if she knew him and she said "No." So I told him to leave. The guy kept bothering her. He wouldn't leave. So I stood up and told him I'd have him thrown out of the party if he didn't leave. He squared off like he wanted to fight, and when I turned to walk away he hit me.

DIANA: I was sitting with my boyfriend Mike in the basement of a friend's house when an old friend Nick came over to the couch we were sitting on. Nick grabbed my arm and told me to dance with him. Mike asked me if I knew him and I said "No" because Mike is very jealous. Nick wouldn't leave after Mike told him there would be trouble if he didn't. Mike stood up to argue with him and the next thing I knew, they were fighting.

JESS: A boy and girl were sitting on the couch when Nick approached them. I've known Nick in school for a few months. I came with him to the party. Nick motioned to the girl to dance, and then he held her arm to help her up. The boy she was with got mad and began speaking loudly. Nick smiled and told him to be cool. The guy jumped and grabbed Nick. Nick hit him back and they both started swinging. After that, the cops came.

NICK: I was talking to Jess at this party when I saw Diana. I had been going with her for a couple of years, but I hadn't seen her in a few months. I went over to see how she was doing. I asked her to dance and the boy she was with gave me a funny look. I know Diana well, and I figured she wanted to dance with me, so I took her by the arm. Then this guy started to confront me. I told him I didn't want any trouble. Then he jumped up and suddenly grabbed me and hit me.

Instructions. The prosecution must set out such a convincing case against the defendant that the jurors believe "beyond a reasonable doubt" that the defendant is guilty.

Objections

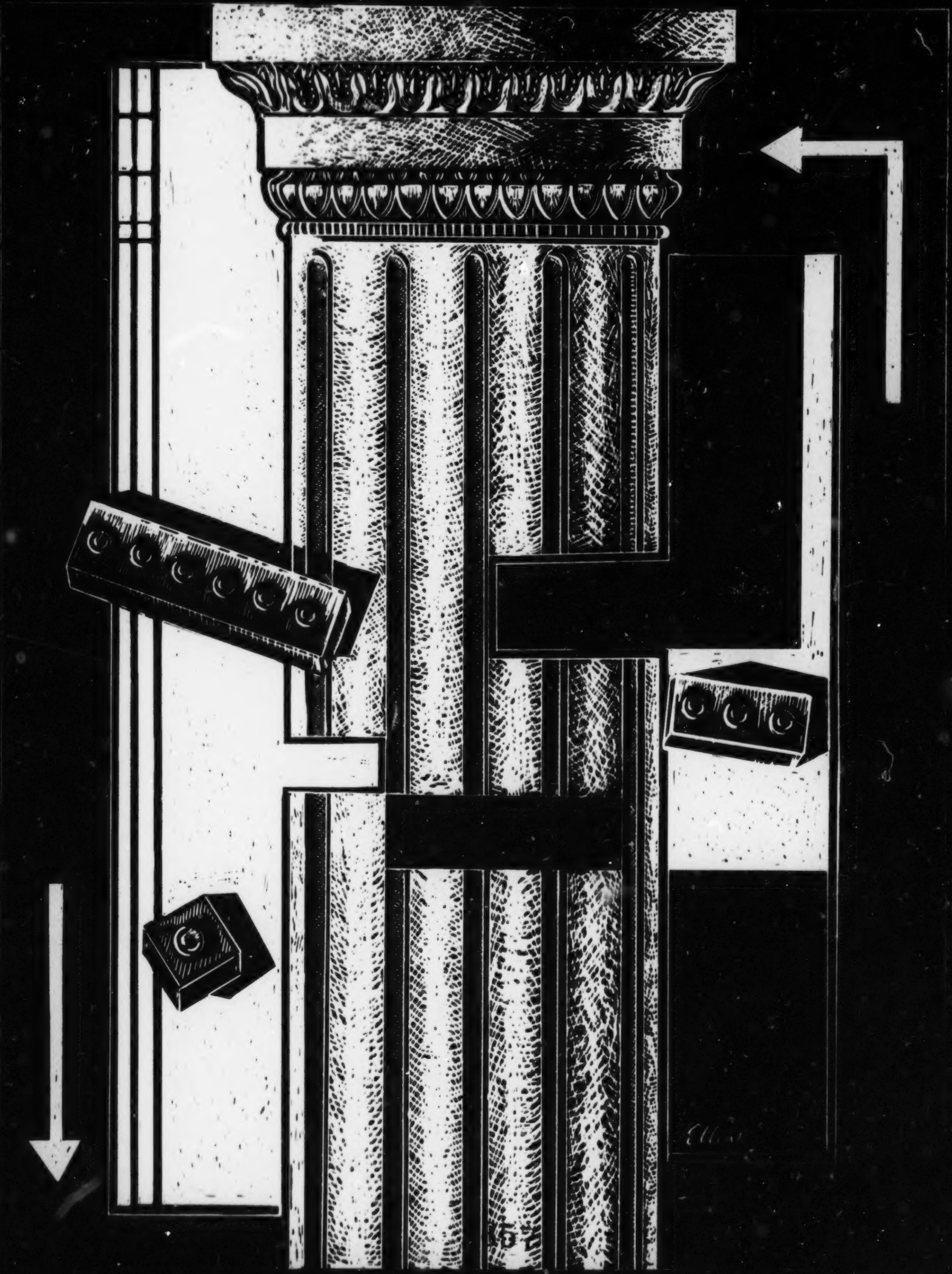
Either the prosecutor or the defense counsel may object to a question or the admission of an exhibit. The judge will usually ask the person objecting "on what rule of evidence are you relying?" Then the judge either allows the objection, preventing the evidence from being introduced, or overrules the objection, allowing the question or exhibit to be admitted as evidence.

Reasons for objections (also known as grounds for objections or the rule of evidence being relied upon) include:

1. Leading question. Prosecutors must allow their witnesses to tell their own story; they must not lead their witnesses through the story. Defense attorneys must follow the same rule when questioning their witnesses.
2. Hearsay. The questions must limit witnesses to facts they know from personal knowledge. Other information they have is hearsay evidence
3. Immaterial and irrelevant. The information is not closely related to the case, and is therefore not important.
4. Opinions and conclusions. Unless the witness is an expert, he or she should not give opinions or conclusions.
5. Nonresponsive answer. The witness is not answering the question asked.

These are only a few objections. They are probably the most common ones used. They will adequately serve your needs.

Jennifer Bloom is a lawyer and director of the Minnesota Center for Community Legal Education at Hamline University School of Law in St. Paul, Minnesota.



FOUNDATIONS OF FREEDOM

Lucinda J. Peach

Building Blocks of Freedom

The Constitution was built on foundations laid many centuries before

With the Bicentennial of our U.S. Constitution rapidly approaching, much will be said about the drafting, signing and implementation of our national charter. Yet many of the underlying values and principles in the Constitution have their origins in a time far earlier than 1787.

The rights and guarantees which we have enjoyed for almost 200 years now were not dreamed up by the Constitution's framers as they sat in Philadelphia at the Constitutional Convention. While much credit must be given to the intelligence, imagination and foresight of the men who wrote the charter for our national government, they were not working in a vaccuum, but had hundreds of years of history and experience in lawmaking to reflect on.

What are the key concepts and principles which have served to protect our freedom? Which documents were influential in suggesting the guarantees that were included in the federal Constitution?

The Great Documents

The most notable sources are the Magna Carta, written in thirteenth century England, and various state charters and constitutions, written before the federal Constitution was drafted.

The Magna Carta or "Great Charter" was drafted in 1215 by British feudal barons as a written summary of their grievances against King John, who had been extracting money and services from them without their consent. When John attempted to lead the barons into war with France, they rebelled and formally renounced their allegiance. In order to regain it, the king agreed—at a historic meeting which took place on June 15 at Runnymede—to accede to the demands set forth in the Magna Carta.

Although John was not sincere about abiding by the guarantees set forth in the charter, the document survived and was reissued several times after his death. The final version, which we refer to today, was reissued in 1225 and contains many changes from the original. Although it was written for the very practical purpose of compelling the king to recognize certain specific rights which he had violated, and does not contain any broad statements of principle or political theory, the Magna Carta played an essential part in the history of American constitutional development. It was considered by the framers to have established limits on the authority of government to wield its power arbitrarily. (See page 34 for the key sections of the Magna Carta.)

The first document which can properly be considered a direct forebearer to the U.S. Constitution was the British "Agreement of the People."

The agreement was drafted in 1647 during a period of English history when there was no king. James II had fled to foreign soil and William and Mary had not yet been invited by the Parliment to serve on the throne. Although the agreement is not itself a written constitution, it is the closest British equivalent. It directly preceded the constitutions and bills of rights which were later drafted in the American colonies and provided the basis for much of what was included in the federal Constitution.

The agreement included guarantees of the right against self incrimination, imprisonment for debt and religious disabilities, as well as the right to trial by jury and punishments equal to offenses. Yet the agreement's guarantees were only empty promises, since there was no enforcement mechanism to guarantee the rights it announced. It was never implemented as a working constitution since in 1653, Oliver Cromwell, head of the Parliament, announced that he intended to rule in accordance with the Instrument of Government which, in effect, established a limited monarchy without a figurehead to wear the crown.

The British Declaration of Rights, written in 1689, is also an important predecessor of some of the fundamental rights included in our American Constitution. It set forth the conditions upon which the throne of England was offered to William and Mary. It remained a declaration without binding force or effect, however, and was thus unable to protect the rights it established.

Many of the British antecedents of our constitutional guarantees were not contained in any written document. Instead, they were part of England's customary law and came to America in the memories of the colonists. These included the rights of free speech and free press, the right to a grand jury indictment, and protections against unreasonable searches and seizures, double jeopardy, excessive fines, cruel and unusual punishment and self-incrimination.

Because these rights were not written, their enforcement in England was only af-

Christy Ellis

From the "Magna Carta" (June 15, 1215)

20. A free man shall not be fined for a small offence, except in proportion to the measure of the offence; and for a great offense he shall be fined in proportion to the magnitude of the offence saving his freehold; . . . and none of the above fines shall be imposed except by the oaths of honest men of the neighborhood. . . .

38. No bailiff for the future shall place any one to his law on his simple affirmation, without credible witnesses brought for this purpose.

39. No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

40. To no one will we sell, to no one will we deny, or delay right or justice.

forded at the whim of those in power. Perhaps it was with the knowledge that unwritten rights could not be depended upon that the American drafters of our constitutions and bills of rights were careful to include in writing what they regarded as fundamental liberties. In this regard, almost all of the rights protected by the federal Constitution were first set forth in the state constitutions and bills of rights adopted during the revolutionary period. (See, for example, the excerpt from the Virginia Constitution on page 36.)

Some of the fundamental concepts embodied in the U.S. Constitution and the background leading to their inclusion in our national charter follow.

Due Process

The Fifth Amendment to the federal Constitution provides: "No person shall be. . .deprived of life, liberty, or property, without due process of law."

The Magna Carta is generally cited as the first written reference to this most fundamental of constitutional legal principles, although its origins extend back to twelfth century English lawbooks and eleventh century documents of the Holy Roman Empire. The aspect of the Great Charter most often quoted as the forerunner of the due process clause is contained in chapter 39. It provides that no freeman shall be imprisoned, dispossessed, banished or destroyed "except by the legal judgment of his peers or by the law of the land." The notion that power must be exercised in accordance with due process – the law of the land – is the most important of the limitations on arbitrary power which is set forth in the charter.

Since the fourteenth century, "the law of the land" language has been equated with "due process of law." After the Magna Carta was written, the notion of due process was expanded. It came to encompass the principle that judgments must be rendered in accordance with the Magna Carta and that no criminal charges would be brought other than by indictment or presentment rendered by the accused's neighbors.

The British Petition of Right, enacted in 1628, reflects Sir Edward Coke's concept of due process as it had developed since the time of the Magna Carta's signing. The petition strengthened due process in England by condemning the use of court martials for trying civilians. (See Richard Roe's article on page 22 for more on this document and the evolution of due process.)

The right to due process is contained in most of the colonial founding documents, beginning with the Maryland Act for the Liberties of the People, written in 1639. The Act provides that no colonist shall be adversely affected in his person or property except "according to the Laws of this province." Due process language is also present in the 1683 Charter for New York, which states – in language marking the transition from the Magna Carta to the due process clause of the U.S. Constitution – that no injury to person or property would occur "without being brought to answer by due Course of Law." Similarly, the Virginia Bill of Rights, written in 1776, contains the Magna Carta's language in the proviso that "no man be deprived of his liberty, except by the law of the land or the judgment of his peers."

As a result of the War for Independence, the framers gave due process an elevated status in their political thinking. The war erupted as the result of a conflict with British authorities over the "right" of the colonists to the control of their property. Although the British people had fought against taxation without representation as far back as the Magna Carta (by requiring that Parliament approve levies requested by the crown), the British authorities nonetheless proceeded to tax the colonists without their consent.

The colonists rejected the concept of "virtual representation" forwarded to justify such taxation. Due process, in the minds of the colonists, meant more than the notion that since they were British subjects, they were "virtually" represented in Parliament.

Trial by Jury

Article III, Section 2 of the Constitution states that "the trial of all crimes, except in cases of impeachment, shall be by jury. . ."

The concept that no person should be convicted of a crime except by a jury verdict – in accordance with the judgment of his or her peers – is based on the ancient principle of English law that if a man is to be judged, he is entitled to be judged by his equals. The jury trial right appears in the Magna Carta as the right to have a trial proceed "by a judgment of one's peers."

The dimensions of this right have changed tremendously over the years. At the time of the Magna Carta, it meant only the right to have a jury determine, prior to trial, what form of "trial" the parties were to be put, whether trial by combat, by ordeal or one of the several other forms which then existed.

The modern concept of the jury trial right – to have a jury independently determine the outcome of a trial – has roots in the prerogative of Norman Dukes to compel the sworn testimony of reliable men of the neighborhood to answer questions. William the Conqueror carried this original jury procedure to England, where he used it to collect the laws and customs of the people he had conquered.

As the law evolved, the function of the jury came to be to extract a truthful answer from the accused, who was a member of their community and someone they were familiar with.

However, early English juries were not independent. They could be heavily fined for returning a faulty verdict. And the judge could order that they be locked up until a unanimous verdict (or one directed by the judge) was returned.

Though the jury trial right changed over the years, by the sixteenth century Sir Edward Coke and other legal scholars

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agreed that it was one of the cornerstones of liberty and traced it back to the Magna Carta. The jury trial right also appears in the British Agreement of the People of 1647, described above, and is expressly set forth in the British Declaration of Rights of 1689.

Jury independence and autonomy was finally advanced in England as a result of a trial involving William Penn. *Bushnell's Case*, decided in 1670, established the right of a jury to return a verdict contrary to that ordered by the judge in criminal cases. The king had outlawed all religious observances except that of the "official" Church of England. Contrary to this law, William Penn and his fellow Quakers met, even after their meeting house had been closed by the king's soldiers, and were subsequently arrested. At their trial, the judge ordered the jury to find that the Quakers had breached the peace by violating the king's order. The jury agreed that the meeting had occurred, but refused to reach agreement that the meeting constituted a breach of the peace.

The case became a landmark decision in the common law, establishing the prerogative of juries to decide cases in accordance with their independent convictions. It was also greatly influential in making the jury a powerful force in the British judicial system.

Bushnell's Case was cited by attorney Andrew Hamilton years later in his defense of the colonial printer John Peter Zenger. In 1735, Zenger was on trial for having committed libel by printing defamatory remarks in his newspaper about the corrupt New York Governor William Cosby. Hamilton successfully argued that, based on *Bushnell's Case*, the jury was entitled to determine the truth of Zenger's statements.

From his own experiences, Penn provided for the right to a jury in *all* trials when he drafted the Pennsylvania "Frame of Government" of 1682. Pennsylvania was not the first colony to extend the right to trial by jury, however. The right was introduced to Plymouth Plantation as early as 1623, just a few years after the Pilgrims landed in North America in 1620. The Massachusetts Body of Liberties, enacted in 1641, included the jury trial right among its guarantees, all of which were deemed fundamental by colonists eager to have their rights in the new world spelled out in written form.

An example of how the jury trial right was originally set forth in a colonial charter document is the Virginia Bill of Rights, drafted in 1776, which provides that "in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty." The jury trial guarantee is repeated several provisions later, with the following language: "That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."

Habeas Corpus

Article 1, Section 9 of the Constitution provides: "The Privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The "Great Writ," establishing the right to have one's body liberated from unlawful imprisonment, has indirect origins in the Magna Carta's general guarantee protecting the liberty of the freeman. The writ had occassionally been issued in the early medieval period to order a sheriff or private person to produce a person in his custody or to summon a jury to serve. It was principally used, however, by the common law courts to expand their jurisdiction over persons in other tribunals. By issuing a writ of habeas corpus to the detaining court, the courts were able to obtain the release of persons claimed to be subject to their jurisdiction.

Use of the writ of habeas corpus expanded during the seventeenth century, as the common law courts used it to release prisoners committed by order of the crown. The theory was that such imprisonments were illegal unless they conformed to due process as specified in the Magna Carta, the common law, and statutes enacted by Parliament. Motivated in part because it provided an opportunity to expand their jurisdictional authority vis a vis the crown (just as they had done earlier with rival courts), the courts were willing to hold that imprisonments not meeting these requirements violated the common law. Even with these expanded circumstances of application, however, habeas corpus was still of limited availability.

An attempt by King Charles in 1625 to obtain loans from his subjects without the approval of Parliament was the beginning of events leading to the establishment of the writ of habeas corpus as a general right. The king had dissolved Parliament the year before for its failure to grant him the funds he demanded to wage war against Spain. Five of the many people imprisoned for their failure to pay the forced loans brought an action to challenge the king's authority. These "Five Knights," as their case came to be known (alternatively known as *Darnel's Case*), moved the justices of the King's Bench to grant them a writ of habeas corpus to show cause why they were being detained.

The court in the *Case of the Five Knights* determined that the imprisonments were legal. It accepted the argument forwarded by the crown's attorneys that such incarcerations could not be challenged if requested by the king, who, as sovereign leader, could do no wrong. The prisoners were returned to jail, but were subsequently released the next year upon a pardon by the king. Many of them were present when the House of Commons met the next year. The decision in the *Five Knight's Case* was, not surprisingly, central to the grievances raised there.

Although the Commons unanimously adopted three resolutions during that session to establish the right of every subject to the writ of habeas corpus, the writ was not fully enforced for years. The king continued to impose unfair and arbitrary demands and punishments upon his subjects. It was not until the Habeas Corpus Act of 1679 was passed that effective means for the writ's enforcement were enacted. The Act did not establish any substantive right to liberty but did provide for a speedy judicial inquiry into the justice of any imprisonment on criminal charges and speedy trial of any accused who was waiting in prison. (The Act also established the practical deterrent of imposing a fine of five hundred pounds upon any judge who delayed habeas corpus.) Later, common law decisions expanded the applicability of the Act to noncriminal imprisonments, such as those of slaves, insane people and minors.

Some of the American colonies adopted the Habeas Corpus Act of 1679 even prior to the Declaration of Independence. The writ was later incorporated in the federal Constitution and became a significant part of that document's safeguards against arbitrary governmental infringements on individual liberties.

Guarantee Against Unreasonable Searches & Seizures

The Fourth Amendment of the U.S. Constitution assures the right of all citizens "to be secure. . .against unreasonable searches and seizures."

This guarantee has direct beginnings in the Magna Carta's oft quoted pronouncement that "no free man shall be taken or

From the "Constitution of Virginia"

(June 12, 1776)

A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

SECTION 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

SECTION 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, or abolish it, as shall be judged most conducive to the public will. . . .

SECTION 8. That in all capital or criminal prosecutions a man has a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgement of his peers.

SECTION 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

SECTION 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

SECTION 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

SECTION 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

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imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land." Beginning with the ancient maxim that "a man's house is his castle," and reinforced by animosity toward the "writs of assistance" which gave British revenue officers blanket authorization to search the colonists' homes for contraband smuggled from overseas, the prohibition against unreasonable searches and seizures found firm rooting in American soil.

The writs of assistance were used by British authorities in an effort to enforce trade tariffs that had originally been imposed on the colonists only infrequently and sporadically. Because of this and because the writs of assistance were so broad and arbitrary in scope, the colonists responded with vehement opposition to stepped-up efforts by the British to employ the writs to collect unpaid tariffs.

In 1760, the Superior Court of Massachusetts was directed to issue new writs of assistance in the name of the new King, George II. A group of colonial merchants petitioned the court not to allow the writs, contending that only the British Court of Exchequer had jurisdiction to issue new writs. In 1761, James Otis, representing the merchants, gave a brilliant argument against the validity of the writs in *Paxton's Case*, describing the colonists' rights as coextensive with those of Englishmen and stating that "[o]ne of the most essential branches of English liberty is the freedom of one's house."

Although Otis' eloquent defense of the colonists' right to be free of the writs of assistance did not persuade the court, his defense of privacy made such an impression on his fellow citizens that it was included in the Massachusetts Constitution of 1780:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. . . and no warrant ought to be issued but . . . with the formalities prescribed by the laws.

The guarantee is also found in a more limited form in the Virginia Bill of Rights, drafted in 1776, as follows:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

These developments provided the impetus for including the Fourth Amendment in the Bill of Rights when the Constitution was amended in 1791.

Privilege Against Self Incrimination

The Fifth Amendment to the Constitution provides, in part, that "No person . . . shall be compelled, in any criminal case, to be witness against himself . . ."

In contrast to the privilege of the American defendant to be silent, persons in thirteenth century England who chose not to speak after having been accused of committing crimes were presumed to be guilty. Tortures and other methods of coercion were employed to compel the accused to confess.

In later years, a jury was called to determine whether the accused was silent out of "mute of malice" or "mute of the visitation of God." Trial by jury could proceed if the silence was because of God. But if the accused was deemed "mute of malice" and the accusation involved a felony, the defendant was condemmed to be tortured. Torture was originally accomplished by starving the accused in prison and later by "pressing," which involved placing greater and greater weights on the prone prisoner's chest until he or she was suffocated.

These punishments were not finally abandoned until 1772. Even after this date, however, silence in felony and piracy cases continued to be considered an admission of guilt, warranting conviction for the crime charged.

The British Agreement of the People

(continued on page 49)

1661

Due Process

You Decide: A Jury Simulation/Secondary

Joseph O'Brien

A jury simulation is an effective and exciting learning activity for students. When confronted with the facts and evidence that the two opposing sides might introduce during a trial, the students engage in a lively discussion as they try to determine whether or not the defendant is guilty or not guilty.

Only after they reach a verdict and realize no one is going to provide them with the "right" answer or with "what really happened," do the students begin to grasp the magnitude of a juror's responsibility. This simulation allows students to begin investigating such legal concepts as "guilt beyond a reasonable doubt" and "innocent until proven guilty," as well as gain some insights into the role of a juror.

In this activity the teacher or resource person reads the "Judge's Instructions to the Jury," in which the students are informed of the charges against the defendant, the definition of first-degree murder, and a definition of "innocent until proven guilty" and "guilt beyond a reasonable doubt."

Then students review the facts of the case in small groups and reach a verdict of either guilty or not guilty. After each group reaches a verdict, the "jury foreman" fills out the jury form and reads the verdict to the entire class. Also, the foreman explains how the group members reached the decision, which facts swayed them the most, and what questions they felt were left unanswered.

The teacher or resource person can conclude the activity with a discussion of the role of a juror in the trial process and concepts like "innocent until proven guilty."

In order to simplify the simulation, the students only are asked to determine if the defendant is guilty of first degree murder.

Judge's Instructions to the Jury

Ladies and Gentlemen of the Jury, this case comes to you by way of indictment which reads as follows:

State of Virginia (*County/City*) To Wit: The grand jurors for the State of Virginia, in and for the body of the country/city of ______________, upon their oaths present that David Jones, on the day ______________ in the county/city of ______________ feloniously did kill and murder one Jane Doe against the peace and dignity of the Commonwealth.

The burden of proof is on the State of Virginia. The state must prove the defendant guilty beyond a reasonable doubt and to a moral certainty, but not beyond all possible doubt, nor to a mathematical certainty.

Reasonable doubt may be defined as a doubt for which a reason may be given. That is not a mere possible doubt or mere imaginary doubt, but a reasonable doubt. Moral certainty is that degree of certainty which you would use in deciding matters of utmost importance to yourself.

The defendant in this case comes to you clothed with the presumption of innocence, and this presumption attends and shields him throughout the course of this trial until such time as you are convinced beyond a reasonable doubt and to a moral certainty that he is guilty. At that time the presumption ceases.

The defendant is chared with murder in the first degree. That is intentional, malicious, willful, deliberate and premeditated killing of another person without a valid reason or excuse for self defense.

- Intentional means simply that the defendant meant to do the act which he did.
- Premeditated means that the defendant made a decision to kill before he did the act which caused death.
- Malicious means the defendant had an evil intent and no valid reason or excuse.

I ask you to retire and consider your verdict, ladies and gentlemen. I remind you that whatever decision you reach must be a unanimous one, with all jurors concurring with the verdict. You should appoint one of your members as a foreman, and upon reaching a verdict, it should be written on a piece of paper from which the foreman will read your decision.

JURY FORM

We, the members of the jury, find the defendant *(guilty/not guilty)* of first degree murder.

Information Accepted as Fact by the Court

The defendant, David Jones, is accused of murdering his business partner, Jane Doe, and is charged with murder in the first degree. Below is the information introduced by the prosecution and defense and accepted as fact by the court:

PROSECUTION'S CASE

1. David Jones owns a .38 caliber Smith and Wesson handgun registered in his name.
2. Jones' pistol was found by the investigating officers at the scene of the shooting with his fingerprints on the gun.
3. Balistics matched the bullet in his business partner with Jones' gun.
4. The neighbor of the victim testified that the shots were fired on August 1, 1985, at 7:35 p.m. The neighbor then called the police.
5. Another neighbor of the victim saw a man about 6 feet tall, about 175 lbs., brown hair, and dressed in black pants and jacket, leaving the victim's house at 7:40 p.m., August 1. The man drove away in a 1965 Mustang. The neighbor saw the man's face and picked Jones out of a police lineup.
6. A 1965 Mustang is registered in Jones' name.
7. Jane Doe's husband testified that his wife and Jones got into a heated argument shortly after Jones arrived at Doe's home at 5:30 p.m. The husband also testified that while he was in another room he overheard Jones threaten to destroy his wife. Shortly after the argument, the husband left for a public speaking engagement.

8. The husband testified that in a previous argument, Jones struck his wife.
9. Aside from the killing, the rest of the house was undisturbed.
10. Jones' next door neighbor testified that Jones left his home at 7:00 p.m. on August 1, in a 1965 Mustang, dressed in black pants and jacket.

DEFENSE'S CASE

1. Jones testified that his gun was stolen while he was on vacation during the last week of July. Having just discovered it missing, he had not yet reported it to the police.
2. Jones testified that he was having dinner with his girlfriend from 6:30 p.m. until 9:00 p.m. and never left his home.
3. Jones testified that he had argued with Jane Doe, his partner, earlier in the evening, but claimed that when he said he would destroy her, he meant financially, not physically.
4. The girlfriend said she brought dinner over to Jones' house about 6:30 p.m. She testified that the evening was unpleasant because all Jones talked about was pulling out of the business. She testified that Jones was with her the entire time.
5. The company secretary testified that Doe often failed to keep accurate records of her business transactions. This often resulted in the loss of contracts with some of the company's most profitable clients. The secretary testified that Doe had lost a contract on August 1, 1985. She testified that Jones had approached her about working for him if he set up a business on his own.
6. The attorney retained by Jones testified that Jones already had initiated the legal proceedings which were necessary to dissolve the partnership.

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Foundations of Freedom

Historical Foundations of Individual Liberties/Grades 9-12

Steve Jenkins

This exercise will help students understand how the historical antecedents of the Bill of Rights affect their daily lives by protecting fundamental freedoms.

As a result of this lesson, students will be able to:

1. Recognize fundamental freedoms and understand why they're important.
2. Analyze and apply the historical antecedents to the Bill of Rights, matching various sources of liberties to the freedoms expounded in the Bill of Rights.
3. Look at some contemporary cases to see how these fundamental freedoms are applied today.

A World Without Liberty

Have students read the story "A Day in the Life of James and Jane Justin" on p. 40. After reading the story, ask students to compile a list entitled "Fundamental Freedoms Denied James and Jane Justin." In the list, students should identify each action by the guards, or supervisor, that denies what they believe to be fundamental freedoms, and briefly describe each freedom that is being denied. You may wish to do this as a brainstorming activity listing the denied freedoms on the chalkboard.

For each denied freedom, ask students to explain the purpose and importance of the freedom as a fundamental right of every individual. You may have students answer this question in small groups.

If there is time, ask students to review the boxes in this issue of *Update* highlighting sources of our fundamental freedoms (i.e., the historical antecedents of the Bill of Rights). After they have reviewed the historical material, have students match the specific sources of our liberties with the freedoms denied to the Justins in the state of Tyranny. Due to the extensive list of liberties, you may wish to have this as a small group activity, assigning different specific sources or historical periods to various groups.

Applying Freedoms to Specific Cases

Have students read each case. Ask them to use materials from boxes elsewhere in this magazine and the amendments to the U.S. Constitution to answer the questions following each case.

CASE 1

The police received information from a reliable informant that Peter Pusher was selling narcotics. The police then went to the building where Pusher lived. The police forced open the door to Pusher's bedroom. On a nightstand beside Pusher's bed, the police saw two capsules. Pusher grabbed the capsules and swallowed them. The police jumped on him and tried to get the capsules out of his mouth. When that failed, Pusher was handcuffed and taken to city hospital. At the direction of the police, the emergency room doctors pumped Pusher's stomach. Among the substances pumped out of Pusher's stomach were two capsules containing morphine (a drug that is prohibited by state and federal law). Pusher was charged with illegal drug possession. Based on the evidence introduced during Pusher's trial, including the morphine capsules, Pusher was convicted of illegal drug possession and sentenced to prison.

Pusher appealed his conviction. He claimed that the morphine capsules should not have been used as evidence in his trial because they were taken from his body against his will. Pusher said this was a violation of his constitutional right to be free from self-incrimination. Pusher asked the appeals court to reverse his conviction.

1. What, if any, fundamental freedoms are involved in this case?
2. Identify at least one source supporting the fundamental freedoms involved in this case.

Suggested Answers. Students' answers to point one may vary, but appropriate responses may include:

- freedom from unreasonable search and seizure
- freedom from self-incrimination
- right not to be deprived of life, liberty, or property without due process of law

Note: This case is based on *Rochin v. California*, 342 U.S. 166 (1951). In this case, the U.S. Supreme Court concluded that freedom from self-incrimination applies to evidence taken by forcible invasion of a suspect's body. The government cannot use evidence taken by forcible invasion of the body because the suspect was forced to testify against himself or herself.

CASE 2

Ward Wanderer was charged with breaking and entering into a pool room with intent to commit petty larceny. These charges were felonies in Florida, where Wanderer lived. Unable to afford an attorney, Wanderer asked the trial judge to appoint an attorney to represent him. The judge refused, informing Wanderer that state law only permitted court-appointed attorneys to represent a defendant when that person was charged with a capital crime (that is, crimes that are punishable by the death penalty or life imprisonment). Wanderer was left to conduct his own defense in his trial. The jury returned a verdict of guilty. Wanderer was sentenced to serve five years in the state prison.

While in prison, Wanderer appealed his case. He claimed that the state's refusal to appoint an attorney was a violation of the due process quarantees of the Fifth, Sixth, and Fourteenth Amendments of the Constitution. He also claimed that due process included the right to the assistance of an attorney for his defense. Wanderer requested the appeals court to reverse his conviction. He asked that the court order a new trial with an attorney appointed to represent him.

1. What, if any, fundamental freedoms are involved in this case?
2. Identify at least one source supporting the fundamental freedoms involved in this case.

Suggested Answers. Students' answers may vary, but appropriate responses to question one may include:

- right not to be deprived of life, liberty, or property without due process of law
- right to be informed of the nature and cause of the accusation
- right to have the assistance of an attorney

Note: This case is based on *Gideon v. Wainwright*, 372 U.S. 335 (1963). In this case, the U.S. Supreme Court held that persons accused of felonies have the right to an attorney, and that if the accused is unable to hire his or her own attorney, then the judge will provide the accused with an attorney at the state's expense. This right was expanded in the case of *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In that case, the U.S. Supreme Court held that persons accused of any crime, including a misdemeanor where a jail term may be imposed, have the right to an attorney. If the defendant cannot afford to hire an attorney, the state must appoint an attorney to represent the defendant at the state's expense.

CASE 3

Carla, a five-year-old child, was in a serious accident. She lost a lost of blood. Witnesses to the accident brought her to the nearest hospital. The doctors at the hospital agreed that Carla would die in a few hours unless she was given blood. Carla parents were called, but they refused to give their permission for a blood transfusion because blood transfusions were against their religious beliefs. The doctors asked a judge to issue a court order giving the hospital temporary custody of Carla. This would allow the doctors to give Carla a blood transfusion and other medical treatment necessary to save her life. The parents told the judge that they were Carla's legal guardians and that only they could decide how to properly care for her. The parents believed their religious faith would provide for Carla. The doctors insisted that Carla needed immediate medical treatment in order to save her life.

1. What, if any, fundamental freedoms are involved in this case? (freedom of religious beliefs)

Note: This is based on the case of *People ex rel. Wallace v. Laberenz*, 344 U.S. 824 (1952). The U.S. Supreme Court upheld a lower court ruling that freedom of religion includes the freedom of a parent to refuse medical treatment for a minor child because of religious beliefs about treatment, except where the treatment is necessary to save the minor's life or to treat a serious medical condition. In this example, then, the doctors would have the right to give her a transfusion, since her life was threatened. In a less serious case, the rights of the parents would prevail.

Steve Jenkins is law-related education director of the Bar Association of Metropolitan St. Louis. He was assisted by Nancy Eschmann of the bar association in preparing these activities for publication. The three cases in this exercise are excerpted from Excel in Civics: Lessons in Citizenship *(1985) by Steve Jenkins and Susan Spiegel, and reprinted by permission of West Publishing Company.*

A Day in the Life of James and Jane Justin

Two young adults, James and Jane Justin, arrive in the nation of Tyranny on a rainy Friday morning. A road sign warns, *"Entering the state of Submission, United States of Tyranny: All Persons Entering Must Obey Tyranny's Authority—Violators Will Be Punished."*

The Justins stop their camper at a checkpoint where there are security guards. James Justin also notices security cameras that are aimed at their camper. The guards are well armed with what appear to be automatic rifles. Some of the guards have on green fatigues with the initials NGOT (National Guard of Tyranny); other guards wear brown uniforms with the initials SS (State Security).

One of the national guard asks the Justins for identification. The guard also asks them to step out of their camper and give keys to another national guard standing by. The guard reviews their driver's licenses, and then, without returning them, tells them to step inside the national guard headquarters. The guard with the keys has opened the rear door of the Justin's camper and has removed their luggage. The guard has also set a magazine and newspaper aside that was taken from inside the vehicle.

Meanwhile, James and Jane Justin have been separated—James Justin taken into a room by a male national guard and Jane Justin into a different room by a female guard. Both James and Jane Justin are searched. Afterwards, they are told to report to the main office of the national guard's headquarters. Upon entering the main office, the Justins observe a pile containing some of their t-shirts, some books, a religious pamphlet, a daily newspaper, and a hunting rifle. A supervisor of the guards informs the Justins that these materials are being confiscated by the state security for Tyranny because they contain subversive messages.

Jane Justin protests, asking what is subversive and threatening. She is told to shut-up. The supervisor holds up a t-shirt from the luggage that has a large question mark in the center with the words "QUESTION AUTHORITY" printed under the question mark. The supervisor says such expressions are not permitted in Tyranny, and that the other items confiscated were not on the approved reading list of the Ministry of Information. Only approved items may be read or spoken publicly in Tyranny.

The national guard supervisor then asks about the religious pamphlet. Jane Justin boldly proclaims, "Look, our religious beliefs are personal, and they are none of your business!" The supervisor calls her a "sacrilegious swine." A state security guard informs the Justins that there is only one religion in the state of Submission, and that is total obedience to Tyranny.

Jane Justin is forcibly pushed onto a chair by guards, and the supervisor tells her to shut-up and learn to obey authority or she will be bound and gagged. James Justin protests the treatment of Jane and demands the return of their property.

The supervisor calls in two other guards and tells them to place the Justins in separate detention rooms until a more thorough investigation can be done. Again, the Justins protest, asking why they are being detained and demanding the right to call an attorney. The supervisor laughs as the Justins are led off by the guards. James Justin asks the state security guard to help them. He asks, "Who can we appeal to in the state for help?" The state security guard soberly explains that there are no state rights—the only right is the absolute authority of Tyranny to control all lives.

The Justins are held in isolation for hours—no food, no sanitary facilities, and no communication with anyone. Meanwhile, the state security and national guard officers confiscate the Justin's camper. The officers eat food and drink beverages from the refrigerator, and they sleep in the bunks. When the Justins find out about the use and abuse of their camper, they are again outraged. The Justins are told that in Tyranny the people have to share their homes to help shelter and feed state and national guard officers. James Justin begins to cry. Jane Justin stares in anger at the guards. The journey into Tyranny had become a nightmare.

LIST AND EXAMPLES

After reading "A Day in the Life of James and Jane Justin," ask students to make a list of the fundamental freedoms they believe were denied James and Jane Justin. For each freedom they identify, ask them to briefly explain why they believe this is a fundamental freedom.

Ask them where these rights come from. Have them review the Bill of Rights and/or the excerpts from the great documents highlighted in this issue of *Update*. After reviewing this material, have them identify at least one source for each fundamental freedom denied James and Jane Justin.

Here's an example. The Justins are denied freedom of movement; they are detained and taken into custody without being informed of any charges against them.

The Justins were imprisoned without the legal judgment of their peers. This action denies a fundamental freedom that is recognized in the following from the Magna Carta:

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

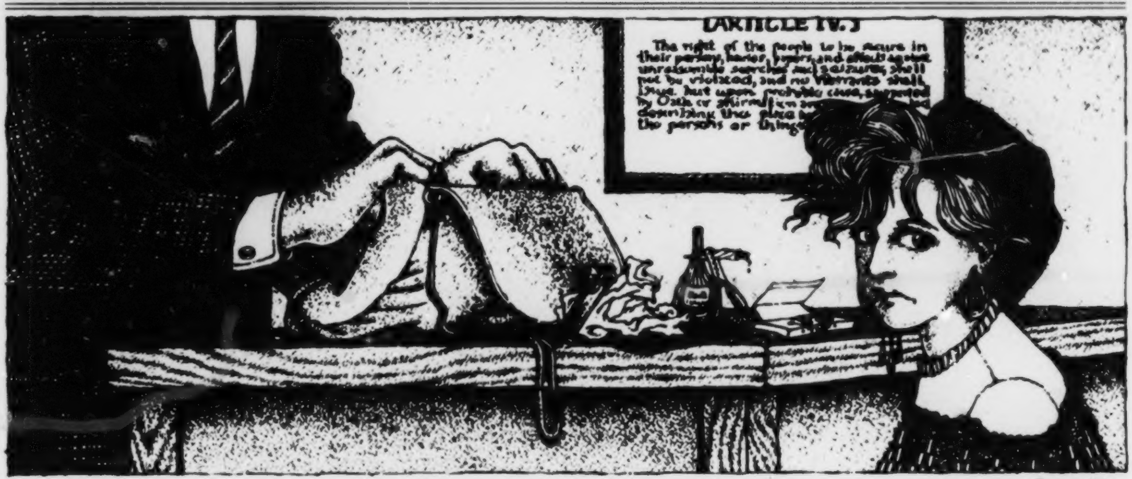
Their imprisonment also violates the Fifth Amendment to the U.S. Constitution:

> No person shall. . . be deprived of life, liberty, or property, without due process of law.

You may identify more than one source for each freedom denied the Justins.

Fundamental Freedoms

Teaching About Search and Seizure/Grades 9-12


[ARTICLE IV.]
The right of the people to be secure in
their persons, houses, papers, and effects against
unreasonable searches and seizures, shall
not be violated, and no Warrants shall
issue, but upon probable cause, supported
by Oath or affirmation
describing the place
the persons or things

Susan Wise

Here is a "model" class on the Bill of Rights, search and seizure and student rights and responsibilities.

Before going to class, get to know the subject. Review the brief description of *New Jersey v. T.L.O* on page 43.

Why You Are Here

- To introduce to students the meaning of the Fourth Amendment's protection against unreasonable search and seizures and the source of that protection in the constitutions of the United States and your state.
- To have students apply their Fourth Amendment protections to situations which arise within a school setting.
- To have students understand the reasons why limitations exist to students' Fourth Amendment protections.
- To have students recognize how the responsibilities of school administrators may conflict with students' Fourth Amendment protections.
- To give students the opportunity to discuss constitutional issues which directly affect them.

Procedures

Classroom activities can be performed within the 45 minute time period.

Questions to start you out include

- "Do you have any rights?"
- "What are they?" (This can produce a myriad of variations.)
- "Where do they come from?" (Here you can start from the particular [school rules] and go all the way to the Constitution.)
- "Where does it say in the Constitution that you have a right not to be searched?" (Here you get into the Fourth. Use concrete examples: Find a student with a purse, gym bag, etc. and ask if you can look into it. If not, why not?)

Following are four hypotheticals, any of which you can use to spark discussion of rights and responsibilities in a school search situation. (One way to relate the situations more directly to the students you're talking with is to change the names of the students in the hypotheticals to names of students in your class.)

You can either read the hypothetical to the class or summarize it for them before getting into the suggested questions.

Whose Locker Is It?

Dwayne's high school had been having many problems with vandalism. In the past week there had been a fire in the girls' rest room, four windows broken, and a small explosion caused by three cherry bombs in the boys' locker room in the gym. Rumors were running all through the school as to who caused the explosion. One such rumor made it to the principal's office when two students told the principal that they had heard that Dwayne had a bag of cherry bombs in his locker.

The principal called Dwayne into his office and asked him if he had any cherry bombs in his locker. Dwayne said he did not, but the principal was not convinced. He told Dwayne that if he did not have the cherry bombs in his locker, then he would not mind the principal's opening the locker to make sure. Dwayne said he did not want anybody going through his locker and would not open it up for the principal.

The principal became angry and said he would open it anyway and called the custodian to bring the master key. Dwayne became very upset and yelled at the principal that he knew his rights and that the locker was his and no one could open it without his permission. Disregarding what Dwayne said, the principal went to Dwayne's locker, opened it with the master key and found all kinds of art supplies which had been missing from the art room, but found no cherry bombs.

SUGGESTED QUESTIONS FOR DISCUSSION

Do you think the principal had good reason to open and search Dwayne's locker?

Do you think the principal had a responsibility to the students and teachers to follow all leads in order to find out who set off the explosion in the boys' locker room?

Who do you think owns the lockers in schools?

Can you think of how use of a school locker may be different from use of a locker in a bus station, or a post office mail box?

Do you think a principal should have the right to open and search a student's locker without that student's permission?

Can you think of any situations where you might open and search a student's locker without permission if you were a principal?

Did Dwayne know his rights?

May a principal open and search a student's locker without the student's permission?

Do you think Dwayne set off the explosion in the boys' locker room? Why? Why not?

Did the principal find in Dwayne's locker what he was looking for?

Do you think a policeman can open a student's locker without that student's permission?

What does a policeman need to have before he/she could open a student's locker?

What is a search warrant? When is one used? Who uses search warrants?

Warriors v. Giants

The past two weeks at the high school had been terrible. Four students were sent to the hospital, two students arrested, and all the students frightened about their safety as a result of a gang war between the Warriors and the Giants taking place not only in the school but also in the community. The two gangs began warring when the Warriors blamed the Giants for slashing the tires on the car of one of its members. The Giants denied having done it, but soon tempers began to rage and within two weeks there was a near riot in the school cafeteria resulting in the injuries and arrests.

In order to insure the safety of the students and the staff, the principal decided that each student would be frisked upon entering school to check for weapons. Many of the students thought this was a good idea, but others believed the principal had no right to frisk them and would not allow themseves to be frisked. Some of these students were not members of either gang. When they refused to be frisked, they were not permitted to enter the school.

SUGGESTED QUESTIONS FOR DISCUSSION

Why did the principal decide to frisk each student as he/she entered school?

What exactly takes place when a person is frisked?

Does a principal have the responsibility of maintaining a safe school?

Do you think that by frisking each student as he/she enters school the students and teachers will be safe? Why? Why not?

Do you think the principal has the right to frisk students before they enter the school?

Why would a student object to being frisked before entering school?

Would you mind being frisked each morning before you entered school? Why? Why not?

Do you think a policeman instead of the principal should be the person doing the frisking at the school?

What if a parent had a meeting at the school? Would the principal frisk the parent?

Do you think the principal frisked each teacher before he/she entered the school?

Do you think the teachers would object to being frisked before they entered the school each morning?

Missing Books

The school librarian, Mr. Richland, informed the social studies department faculty that three expensive books on ancient Greece, which had been purchased recently by the school for reserve use but had not yet been checked in, processed, and labeled by the library, were already missing. Miss Sullivan, a world history teacher, said that she had recently given her students a term paper assignment and that she knew that one boy had decided to write about the government of Athens. She suggested that the librarian check with the boy, Bruce Dandridge.

Because of a rash of book thefts during the past year (hundreds of dollars worth of books had "disappeared"), Mr. Richland decided to take the information directly to the school principal. He asked that Bruce's locker be inspected to search for the books.

The principal, in the librarian's presence, opened the boy's locker while Bruce was in class. They discovered the new ancient history books, which had not been checked out from the library. When confronted with the evidence, Bruce admitted that he had taken them, but argued that his right to privacy had been violated by the locker search. Because he had been in some disciplinary trouble before in school, and in view of the strict school rules against misappropriation of school property, a suspension hearing was called, and Bruce came with his parents' and their family lawyer.

Questions. What are the main issues raised in this case? How does the interest of Bruce's privacy balance out against the school's interest in preventing theft? If this case were to come before a court, how do you think it would be decided?

Police Called In

Frank Perkins had a free period plus his lunch period back to back on Monday. Since school rules permitted students to leave the grounds when they did not have class commitments, he went downtown to the Sound and Fury record store. The store owner, Jack Maloney, was sure that he had seen Frank put one or more albums under his coat and leave the store without paying for them, but he was unable to catch up with Frank.

As an independent businessman, Mr. Maloney was concerned about the increased costs of shoplifting. He thought he recognized Frank as a student from nearby River View High School, and upon checking with the school over the phone he was able to ascertain his name.

Later that afternoon, Detective Shableski of the local police came to the school following a complaint from Maloney and asked the school principal whether he could have permission to search the boy's locker for the records. Consent was given.

Questions. If stolen record albums are found, are they legally admissible evidence? A police search without a warrant is valid only if consent has been given. Who has the authority to give consent? Only Frank Perkins?

If you are a student in school, do you give to the administration the right to consent to a search of your locker when it issues you a locker? If a locker is protected from warrantless search, can you be forced to give up that protection by signing a release?

An Actual Warrant

Another way of initiating a discussion of search and seizure with students is to pass out copies of a sample search warrant (see page 12 of the Spring, 1978 issue of *Update on Law-Related Education*) and discuss its contents and its use. (Make sure to have enough copies for everyone made ahead of time.)

After students have examined the warrant and shown that they understand the terminology, you can use its various components to illustrate such concepts as the need for probable cause, a specific description of the place to be searched and property to be seized, etc.

AFTER LEAVING THE CLASSROOM

If you said you would send students or the teacher material, don't forget to do so.

A letter to the class thanking them for the opportunity to discuss a very important subject is a nice touch.

This exercise was written by Denise Merrill, Margaret Richards, and Joseph Shortall, and is based in part on Phi Alpha Delta's A Resource Guide on Contemporary Legal Issues.

New Jersey v. T.L.O.

On January 15, 1985, a divided United States Supreme Court issued a decision on a school search and seizure issue, *New Jersey v. T.L.O.*, 53 U.S.L.W. 4083.

FACTS

A high school principal searched the purse of a 14-year-old female student after the student denied an accusation by a teacher that she was smoking cigarettes in a nonsmoking area, a violation of a school rule. The search resulted in the discovery of cigarettes and rolling papers, the latter item, in the experience of the principal, being associated with marijuana. The discovery of the rolling paper prompted a more thorough search of the purse which revealed marijuana, a pipe, and other items implicating the student in marijuana dealings.

The principal notified the authorities and subsequently turned over the seized evidence to the police, who on the basis of the evidence and a confession, filed delinquency charges. At her delinquency hearing, T.L.O. sought to suppress the evidence and the confession because the former was alleged to have been seized in violation of the Fourth Amendment while the latter was alleged to have been tainted by the alleged unlawful search.

DECISION

The Court was asked to determine whether the Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by school officials." A majority of the Court held that it did.

The majority reasoned that school officials, in carrying out searches, were representatives of the state and not merely surrogates for the parents.

Having determined that the Fourth Amendment was applicable to school officials, the Court was faced with a determination as to the standards governing such searches. In so deciding, the Court had to strike a "balance between the school child's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." The majority held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."

The reasonableness of a search is determined by (1) "whether the search was justified at its inception;" and (2) "whether the search was reasonably related in scope to the circumstances which justified the interference in the first place." The Court held that "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school" the search is justified at its inception.

The Court noted that the search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."

The extent of a student's protection from unreasonable searches and seizures usually depends upon whether (1) a school or a police official conducted the search, and (2) the search is of one's person or of a place.

Although it is clear that the Fourth Amendment protects people and not places, the nature of the place may determine whether the person had a reasonable expectation of privacy. Thus, courts have upheld warrantless searches of lockers by school officials where it was known that school officials had a master key and reasonable grounds existed for the search. An authorized and voluntary consent to a search by a student will usually validate a search that would otherwise be illegal.

Courts have found that a student has no reasonable expectation of privacy in his/her school locker but have usually provided minimal safeguards where a student's clothing or body has been searched. A recent court ruling upheld a decision that dragnet sniffing of children by dogs (to search for drugs) was impermissible, but noted that such sniffing of cars or lockers by dogs was permissible.

BEST COPY AVAILABLE

Fundamental Freedoms

Our Freedom to Assemble and Associate/Grades 9-12

Ann Blum

"Congress shall make no law. . .abridging. . .the right of the people peaceably to assemble" states the First Amendment to the Constitution. But there has been less attention devoted to this right to assemble, or the related right to associate, than to the First Amendment's rights to freedom of press, speech, and religion.

It is not that these are new rights. The right to assemble is closely associated with the right to petition, which is provided for in the Magna Carta (1215). In the case of *U.S. v. Cruikshank* (92 U.S. 542 (1876)) Chief Justice Morris wrote, "The right of the people to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been, one of the attributes of citizenship under a free government."

It is not that the rights of assembly and association are lesser rights. The slowness is emphasizing these rights has undoubtedly been due to their close relationship to the right of free speech. But the importance of giving them attention cannot be understated. As Chief Justice Hughes stated for the Court in *DeJonge v. Oregon* (229 U.S. 353 (1937)), a case which expressly extended the "liberty" guaranteed by the Fourteenth Amendment to include freedom of assembly, "The right of peaceable assembly is a right cognate to those of free speech and is equally fundamental."

It is not that these rights are not vital to our form of democracy. DeToqueville, early in the 19th century, commented on the propensity of Americans for forming associations and on the importance of associations in democracies as safeguards against the "tyranny of the majority" and abuses of political power. Indeed, without the right to form and associate in political parties, it is hard to see how we could have a democratic government at all.

Yet it was not until the 1958 decision of *NAACP v. Alabama* (357 U.S. 449 (1958)) that the Supreme Court proclaimed, in clear terms, a freedom that had been latent in many years of constitutional development. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

Can Government Do This?

Through this exercise, students will be able to:

- identify and discuss government actions that are said to limit freedom of association
- solicit opinions about limitations to this freedom with a questionnaire and analyze the findings, particularly in terms of awareness of issues
- cite ways to make citizens more aware of the importance of protecting their First Amendment rights

Procedures

DISTRIBUTING THE QUESTIONNAIRE

The courts have said that governments can limit the right to assemble for redress of grievances to preserve order and safety. Associations for criminal activities are held illegal. Can the right to associate be limited legally in other ways?

The questionnaire "Do These Government Actions Restrict Our Right to Join Associations?" poses controversial actions of recent decades that some have argued unconstitutionally restrict freedom of association. To sample current feelings on these questions, use the questionnaire in one of two ways:

- If you have just one class period, distribute it to the class and let each member fill it out privately. Collect these and tally responses for later discussion.
- If you have two class periods, provide each class member with four questionnaires to be filled out by persons outside of class. The only requirement is that the persons interviewed be in different age groups: 10-20 years old; 21-35; 35-50; and over 50, and that the age group be marked on the questionnaire. These should be collected and tallied the next day, before the discussion of questions.

Note that this is not in any way intended to be a controlled scientific survey. It is only to obtain opinions on the issues.

DISCUSSING THE RESULTS

After the results of the class and outside-the-class questionnaires are tallied, report the results to the class. Begin discussion by examining the questions (and responses) in pairs. Consider how the class voted on each set. How did their votes compare with respondents outside of class? How did the different age groups compare in their votes on the two questions being considered? Did age make any difference? Was there general agreement on the responses?

After the initial discussion of each pair of questions, report to the class what the Supreme Court decisions were on the issues posed (see below). Note that questions are included to encourage further student discussion.

Court Decisions

Questions 1 and 2. Loyalty oaths have been primarily directed against the Communist party. The courts have wavered in decisions on cases challenging the constitutionality of loyalty oaths. The oath in question 1 was held unconstitutional in *Cramp v. Board of Public Instruction* (368 U.S. 178 (1961)) as being overbroad. And courts have come to hold that people should not be penalized simply for being members of the Communist party unless there is evidence of their knowing and furthering its unlawful activities (*Elfbrandt v. Russell* 384 U.S. 11 (1966)). The oath in question 2, less direct in its thrust at Communist party membership, was upheld by the U.S. Supreme Court (*Cole v. Richardson* 405 U.S. 676 (1979)).

Issues at stake in loyalty oaths are right to freedom of association and national security. Ask students if they work as security measures? Will all dedicated Communists refuse to sign them? Or do the oaths serve to harass more than they do to protect? Does it make a difference if oaths are demanded of university professors or Department of Defense members?

Questions 3 and 4. *NAACP v. Alabama* (357 U.S. 449 (1958)) is the landmark case on the issue of question 3. The Supreme Court ruled that the NAACP did not have to disclose its membership list to the state. It said such a requirement to identify people could lead to "economic reprisals, loss of employment, physical coercion, and other manifestations of public hostility."

Do These Government Actions Restrict Our Right to Join Associations?

The freedom to join and participate in associations, political or otherwise, is one of the rights granted you by the Bill of Rights. Would you object to any of the following government actions because they would restrict your right to join in associations?

1. __Yes __No To be employed, you must sign an oath saying "I have never lent aid, support, advice, or counsel, or influence to the Communist party."

2. __Yes __No To be employed, you must sign an oath saying "I will oppose any attempt to overthrow the government by force, violence, or unconstitutional means."

3. __Yes __No The state government requires a controversial political group to supply the state with a list of its members and their addresses.

4. __Yes __No The city council requires all public school teachers to submit a list of all the associations to which they belong or contribute every year.

5. __Yes __No The sheriff records the license numbers of cars of members attending the meeting of a generally unpopular political group.

6. __Yes __No An undercover police officer joins a political protest group to observe its activities.

Shelton v. Tucker (364 U.S. 479 (1960)) concerned an Arkansas law requiring public school teachers to annually report the names and addresses of all associations to which they belonged, contributed to, or paid dues to in the past five years. The Supreme Court declared it unconstitutional (question 4).

In discussing these issues, students might consider what legitimate reasons there might be, if any, for a government knowing an organization's members? Or would there be any legitimate reasons for a government's knowing what organizations any of its employees—school teachers, judges, office workers, police, roadworkers, etc.—participated in? How do government requirements for such information limit freedom of association, if they do?

Questions 5 and 6. Groups protesting segregation laws, the Vietnam War, nuclear power and weapons, etc., have all reported "harassment" in terms of law enforcers photographing members or recording the license numbers of their cars at gatherings. Members of nuclear power protest groups have reported having their organizations infiltrated by undercover law enforcers or power company employees. The constitutionality of these actions has not been established. The class should discuss their views: Should such "harassment" be legal? In all instances? Does it matter that such actions are standard in more repressive nations? Do they limit freedom of association? In what ways?

Wrapping It Up

Finally, with the class examine the responses in terms of the whole questionnaire. On which questions was there the greatest consensus? On which the least? How might this be explained? Which age groups, if any, seemed most concerned about protecting the right of association? Why might this group (these groups) show more concern? Have the courts been more solicitous, or less, about protecting this right than the poll-responders?

Ask students if they agreed or disagreed with the majority view on the questions. Have them explain their stands. Ask students, also, if after discussion, they would alter any of their questionnaire responses. What would be their reasons?

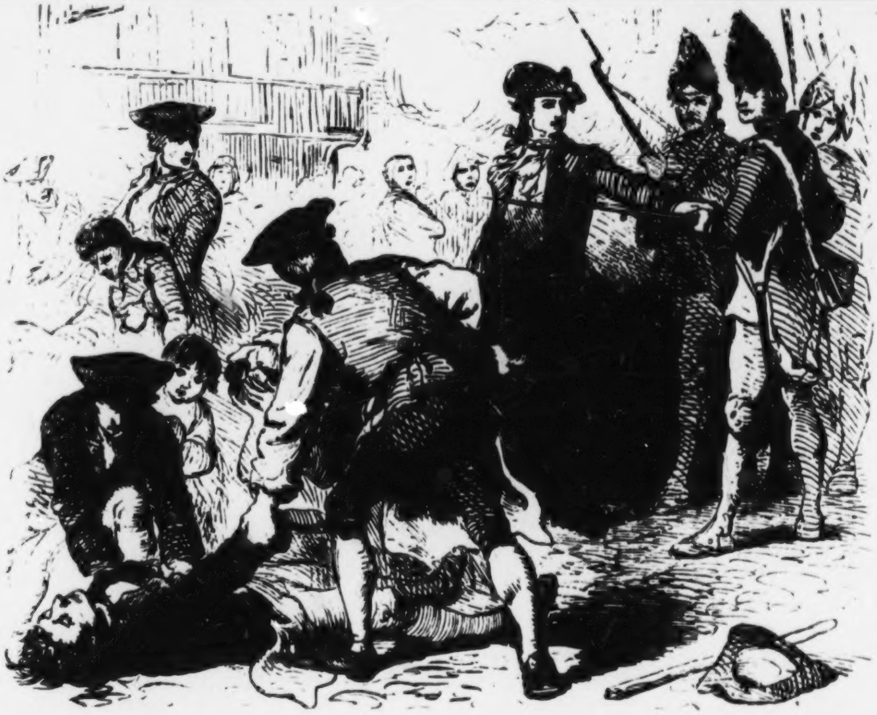
Have class members consider how to make citizens more aware of their rights and the importance of protecting them. What could be done in schools? In the community? By local organizations? Using the mass media? By students themselves? List the suggestions—and, if feasible, implement one.

Ann Blum is Law Education Coordinator, Governmental Education Division, of the Carl Vinson Institute of Government at the University of Georgia. This strategy is adapted from the teachers manual for An Introduction to Law in Georgia *by Ann Blum and Jeannette Moon, Athens: Vinson Institute of Government, University of Georgia, in press. The strategy was reviewed by Paul Kurtz, a professor of law at the university, for legal accuracy.*

Foundations of Freedom

Right to Counsel/Grades 9-12

Alan L. Lockwood and David E. Harris



Historical Pictures Service, Inc.

This activity will help students explore three important points:

- the role of the lawyer in helping assure due process of law
- the difficulty of maintaining respect for law and for the rights of unpopular defendants in turbulent times
- the ethical dilemmas that have faced lawyers for many years

One of the great dramas of revolutionary history is provided by the Boston case of British soldiers accused of murder. The story of John Adams's difficult decision about whether to defend the soldiers provides a richly human element. But his decision has much wider ramifications. It encapsulates many of the themes that have run through this *Update:* the struggle to solve problems through law rather than force, the growing respect for due process and legal factfinding, and the vital role of the lawyer.

A Lesson for One Class Period

1. Students are assigned to read the episode (see below) and discuss the facts of the case.
2. Students then discuss the ethical issues.
3. The teacher/resource person leads a group discussion of one item from the Expressing Your Resoning activity.
4. The teacher/resource person guides the students in summarizing the main ideas raised during the discussion.
5. The resource person may wish to focus particularly on some of the ethical dilemmas for lawyers suggested by the Adams case. Should a lawyer accept the case of someone he or she knows is guilty? Should he or she accept the case of unpopular defendants, even at some personal risk? The resource person might use some examples from American history (the trials of the Haymarket anarchists, Sacco and Vanzetti, and the Scottsboro Boys) or use personal examples.

A Young Lawyer's Dilemma

The decade of the 1760s was a period of growing tension between England and its American colonies. Attempts to tax the colonists triggered events that led to revolution.

The colonial reaction to one of many taxes, the Stamp Act, was swift and violent. On August 14, 1765, Andrew Oliver, the Crown-appointed stamp collector, had his effigy hung on a huge tree in central Boston that became known as the Liberty Tree. That evening a mob dragged the effigy to Oliver's elegant town house where they broke down the door and forced their way in. His furniture was destroyed and his family terrorized.

Twelve days later a raucous crowd made its way to the mansion of the colonial governor, Thomas Hutchinson. Hutchinson was dining with his wife and children. The crowd split the door with axes, plundering and gutting the house. They destroyed what they could not take away—china, rugs, clocks, furniture, and family portraits. Nothing remained but the roof, bare walls, and the floor.

Some of these protesters, led by Sam Adams, organized a group called the Sons of Liberty. Their aim was to turn street violence into political action.

British soldiers, in their bright red coats, were the visible objects of Boston's bitterness. The redcoats marched up

King Street in Boston with drums beating, fifes playing, and colors flying.

THE HORRID MASSACRE

The climactic conflict came in Boston the night of March 5, 1770. It was a chilly moonlit evening with a foot of packed snow on the ground. Down King Street, Private Hugh White of the Twenty-ninth British Regiment walked his solitary post. As Private White stood near his sentry box a group of rowdies jeered at him until he lost his temper and knocked one of them down with his musket butt. The commotion drew a crowd. White became a target for snowballs, chunks of ice, and lumps of coal. Frightened, he hurried to the Customs House. He found the door locked as the surging crowd shouted, "kill him, kill him!"

The crowd threatened to overcome the lone redcoat. Captain Thomas Preston, officer in charge, heard the uproar and led a relief party of seven soldiers to the rescue. At bayonet point Preston's group forced its way through the throng to reach White. Forming a line alongside White, the soldiers were showered with flying objects, catcalls, and taunts.

Some of the soldiers' faces were bloodied. One private, clubbed into the gutter, scrambled to his feet, shouted out, "Damn you, fire!" and pulled the trigger of his musket. The shot hit no one, but the other soldiers began firing. When the smoke cleared, five men lay sprawled in the snow, three dead and two others mortally wounded. The stillness was then broken by the thud and rattle of rammers as the soldiers loaded their guns once again. Captain Preston then ordered his men to withdraw across the street. The wounded and dead were carried away.

LET THE LAW DECIDE

Suddenly, all over the city, bells began to ring the alarm. An angry crowd of men appeared on the streets carrying any weapons they could find. Cries of "To arms!" echoed through the streets. Governor Thomas Hutchinson came immediately to King Street.

The governor struggled through the throng until he reached the State House. He appeared on the balcony, facing in the moonlight a seething, roaring, angry mass that filled the square below. Governor Hutchinson stood a moment and waited. "Go home," he said at last. "Let the law settle this thing! Let you also keep to this principle. Blood has been shed; awful work was done this night. Tomorrow there will be an inquiry." The crowd slowly dispersed. By three o'clock in the morning it was over.

Before sunrise a court of inquiry issued warrants for the arrest of Captain Preston and the eight soldiers. They were jailed to await their trial for murder. Sam Adams, leader of the Sons of Liberty, had already dubbed the incident the Horrid Massacre. Events of the night have survived in history as the Boston Massacre.

John Adams, a young lawyer, had heard sounds of violence the night before in the streets. He hurried home concerned about the safety of his family. The next morning he was met at his law office by a stranger named James Forest, a loyalist and friend of the accused British officer, Captain Preston.

Mr. Forest had just been with Captain Preston in jail. "Why are you here?" asked John Adams. Breathing hard, Mr. Forest begged Mr. Adams to undertake Captain Preston's defense. "His life is in danger," claimed Mr. Forest. "He has no one to defend him. Mr. Adams, would you consider – will you take his case?" Mr. Forest almost sobbed. The words came out in a rush. He had come to John Adams for two reasons: he could find no other lawyer to take the case, and Mr. Adams had a reputation for being a fair and decent man.

ADAMS MUST DECIDE

The implications of the decision facing John Adams staggered him. All other lawyers in the city had refused to defend Captain Preston or the other eight soldiers. They feared for their own lives if it became public that they were defending the redcoats. John Adams pondered the importance of having due process of law and impartial justice in the colonies. He expected that this trial would prove as important a case as had been tried in any court of any country in the world.

Walking home to dinner that night John Adams was thinking about his dilemma. A group of Sons of Liberty stopped him on the street and warned him against defending "those murderers." Tories (those loyal to the crown) urged him to take the case. "Nine Tories out of ten," John told his wife, Abigail, gloomily, "are convinced I have come over to their side." He was greatly disturbed at the thought that his own friends, the liberty group, would scorn him and that the loyalists would regard him a hero if he decided to take the case.

John learned that Governor Hutchinson was determined, should a jury convict, to urge a king's pardon for all eight men. On the other hand, John Adams' skill might actually persuade the jury to bring a verdict of not guilty. The governor preferred a verdict of not guilty to a royal pardon. If John Adams took the case, he wondered whether he would be viewed as a loyalist sympathizer doing the bidding of King George III.

Arriving at home one evening, he found a window broken. Abigail showed him two rocks she had picked up in the room. It was clear to John that if he accepted the case, his house and family would be placed in jeopardy.

The case would be difficult to win. It soon became known that of the 96 witnesses prepared to testify, 94 made it appear that the fault lay entirely with the soldiers.

It would take a defense lawyer a great deal of time to prepare to challenge their testimony. If John took the case, the months before the trial would be wholly taken up in preparation. The trial itself would last a long time. John feared bankruptcy if all his time were taken up with this trial. Little time would be left for other legal work and the handsome fees collected for it. Clearly, accepting the case would require financial sacrifice for John Adams.

John Adams wanted to make an honest fortune for himself and his family, to improve his small farm, and to educate his children. Were he to take on the harassing job of defending the redcoats he would be taking a different course. Besides, his family had special need of him at home these days.

Another thought occurred to John. In the back of his mind he had considered a career in politics. What chance would he have of being elected to the legislature if he accepted the unpopular job of defending the British soldiers?

England certainly, and perhaps all Europe, would be watching the trial. John said to his friend Josiah Quincy, "It will serve our enemies well if we publish proof that the people's cause in America is led by a mere mob, a riotous and irresponsible waterfront rabble."

If John Adams took the case, most townspeople would think he was trying to screen murderers from justice. Yet, were the British not entitled to be defended against the charge of murder? John Adams struggled to reach a decision.

Reviewing the Facts of the Case

1. Why did James Forest seek out John Adams to serve as the defense lawyer for the British soldiers accused of murder? (No other lawyer would take the case, and John Adams had a reputation for being a fair and decent man.)
2. Why did Adams think this trial would draw attention in other parts of the world? (He believed the handling of the trial would be viewed as a test of the American colonists' commitment to legal justice.)

Expressing Your Reasoning

1. Should John Adams have accepted the job of defending the British soldiers? (In deciding whether John Adams should have defended the British soldiers, students might consider the obligations he may have had. Some possibilities include an obligation to himself, his family, his profession, the other colonists, the British government, or the principle of justice. Students could be asked which obligation, if any, was greatest, and they could be asked to state their reasons for ranking the obligations. Reasons supporting the position that Adams should have taken the case include: by accepting the case he would gain favor with the crown, the governor, and the Tories; under English tradition of law, an accused person is innocent until proven guilty and therefore entitled to a lawyer to wage a defense; due process of law would be set as a precedent in the colonies.)
2. Which would be the best reason for Adams *not* to take the case?
   - By accepting the case John would have risked being attacked by angry townsmen or having his house vandalized
   - John would have lost a lot of income by spending so much time preparing and trying the case
   - John might have hurt his political future by becoming known as the lawyer who tried to get the crown's soldiers off the hook
   - The liberty group in Boston was emerging as the chosen leaders of the people. As a faithful member of that group, John ought not to have done anything to undermine their influence
   - The troops were in Boston by order of the king and Parliament. Local citizens considered the soldiers unlawful foreign occupiers. The colonists did not consent to have the troops stationed in the city. Therefore, the soldiers were not entitled to the protection of the colonial courts, or a lawyer to defend them
3. After students have identified some reasons either for or against as better than others, they should be asked to explain why they made their selections. After eliciting their explanations, you may wish to list the following ways in which reasons may be characterized:

   A reason that emphasizes revenge against an offending party
   A reason that stresses the self-interest of one party in the dispute
   A reason that stresses the need to show compassion for one or more of the parties involved
   A reason that emphasizes following custom or tradition
   A reason that shows respect for legitimate authority
   A reason that shows concern for the welfare of society as a whole
   A reason that attempts to take into consideration the rights of all parties concerned

   Students may be asked if any of the above characterizations fits the reasons they selected. You may then discuss whether some of these types of reasons should be preferred over others. For example: Is a reason that shows respect for rule of law better than one that focuses on revenge?
4. Before the trial began John Adams came to believe that the soldiers were innocent of the charge of murder. Suppose John had believed that the soldiers were guilty as charged. Should he still have accepted the case? (In discussing students' answers, some considerations that might be raised are: A lawyer who believes a client is guilty may not be able to provide a good defense; one should not try to help a seemingly guilty suspect avoid punishment; if accused persons are acquitted by the work of clever lawyers, the victims of crime will be unprotected; a lawyer's professional obligation is to make the best possible case, regardless of personal opinions about a prospective client; if all lawyers refuse a case because they believe an accused person is guilty as charged, the accused will be denied the right to an attorney; under the law, no one is guilty until convicted in court.)

Historical Note

John Adams did take the case of the British soldiers. All eight of them were found not guilty of murder, though two were convicted of the lesser charge of manslaughter.

The case had no detrimental effect on Adams's career—he was a revolutionary leader and ultimately the second president of the United States—but the case was a landmark in the development of due process of law in this country.

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Habeas Corpus

(continued from page 26)

The six members unanimously rejected the offer to give sureties for good behavior, although they would give bail. They insisted that bail was the issue before the court, that sureties were unusual even for cases of treason, and that agreeing to good behavior would be a "great offense to the Parliament." Chief Justice Hyde responded with the threat that "perhaps we afterwards will not grant a habeas corpus for you, inasmuch as we are made acquainted with the cause of your imprisonment."

Prolonged imprisonment was a serious matter. Although affluent persons could usually continue to conduct their affairs from prison, and could pay for good quarters and food, the members had already been in prison a number of weeks. In fact, in order to avoid disease, several members asked the court for and received permission to move to the prison gatehouse.

The members were eventually convicted of the sedition charges. The alleged ringleader, Sir John Elliot, was imprisoned in the Tower of London and the others were sent to different prisons. They were ordered imprisoned until they gave "security . . . for good behavior, and made submission and acknowledgment of the offense." They were also fined substantial amounts.

After Charles I convened another Parliament in 1640, this case was discussed and a resolution passed in 1641 stating that the commitments were breaches of Parliament and that the king's agents and judges committed offenses against Parliament. The resolution also gave the imprisoned members reparations for damages and sufferings against the offending agents and judges. Later, another resolution awarded substantial payments to the members and, in one case, to a member's heirs. (Sir John Elliot had died, apparently as a result of his imprisonment in the Tower.)

The Habeas Corpus Act

In 1679, the Habeas Corpus Act firmly established the writ as the major remedy for violations of individual freedom in English law. The Act was intended to remedy many of the problems encountered in use of the writ, such as delays in returns and the practice of sending prisoners overseas, out of reach of the jurisdiction of the English courts. The Act specified that prisoners charged with noncaptial crimes must be brought to court within three days after service of the writ, and that courts must proceed with the writ during vacation times. The Act spelled out these rules in great detail.

Although the writ of habeas corpus was in effect in the American colonies, the Habeas Corpus Act did not extend there. The colonist were aware of the importance of the development of the writ in England, however, and attempted to include the most progressive provisions regarding habeas corpus in colonial laws. The writ of habeas corpus was also guaranteed by a number of state constitutions.

More significant, however, was a further innovation by the colonists. In their constitutions they spelled out the fundamental rights which the writ of habeas corpus was used to remedy. These included the rights: to counsel, to demand the nature and cause of an accusation, to a speedy trial, to an impartial jury, to confront witness and to call for evidence in one's favor. Many of these liberties were also written into the Bill of Rights in the U.S. Constitution, and are still the subject of habeas corpus petitions by prisoners to this day.

Foundations

(continued from page 36)

contained a guarantee of the right against self-incrimination, but this document was short-lived and its guarantees were never actually enforced in England. In America, however, the privilege found its way into many state constitutions, and later into the federal Bill of Rights. (A presumption of innocence was finally installed in the British criminal justice system in 1827, after which time the court was required to enter a "not guilty" plea when the defendant refused to plead.)

Separation of Church and State

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The first colonial governments had no separation of church and state, but were founded on the principles of the Bible and the laws of God. Many of the first colonists came to America to escape religious persecution for following a faith other than Anglicanism, the religion of the official Church of England. Although they sought religious toleration for themselves, the colonists, particularly those who settled in Massachusetts, tended to be intolerant of the religious beliefs of others. The Puritans, for example, were particularly intolerant of religious diversity and regarded those having divergent beliefs as heretics.

The colony begun in Maryland was an exception, however. The Charter of Maryland (1632) contains no guarantee of religious liberty, but Lord Baltimore, who founded the colony and was himself a Catholic, practiced religious toleration from the beginning. Only those who sought to impose religious conformity upon others were subject to prosecution for their religious beliefs. Many of the colonists who came to Maryland were attracted there by its tolerance for different religious faiths.

Religious liberty was also a central concept in the founding of Rhode Island. Roger Williams had fled to sanctuary there from Massachusetts in 1635 after having been banished by the Puritans for his unorthodox beliefs. He established the settlement of Providence upon the foundation that "no person . . . shall be molested or questioned for the matters of his conscience." Some colonial charters were likewise founded on principles of religious liberty. William Penn drafted the Pennsylvania Charter of Privileges (1701) to provide for freedom of religion "[b]ecause no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences."

Though the concept of separation has clearly discernible roots in the bitter experiences of the colonists in the mother country, the early Americans appear to have initially been more concerned with establishing the right of the individual to religious liberty than with preventing government establishment of religion as an interference with that liberty. The first explicit separation of church and state in a colonial governing document appears in the New Jersey Constitution of 1776. One article guarantees the right of worship according to the dictates of conscience, and the next provides that "there shall be no establishment of any one religious sect."

Evolution Continues

Due process, trial by jury, and the other rights discussed here appear in our U.S. Constitution and have roots extending back into early England. These fundamental rights evolved, from the time of the Magna Carta to the framing of the Constitution, to adapt to changing circumstances. This process continues. Each of these rights has been shaped and defined by the events which have occurred since the Constitution's ratification. As such, they are part of an unbroken history, a fabric of liberty that began almost a thousand years ago.

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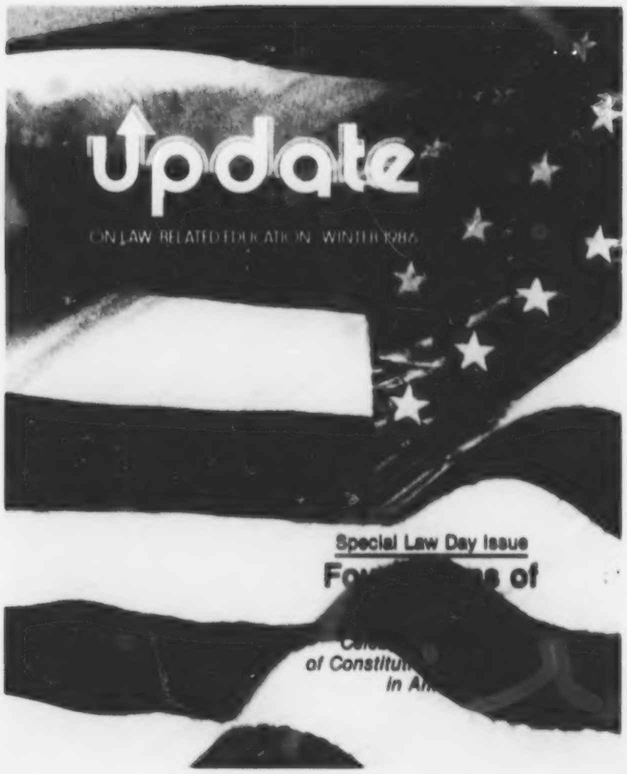
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contents

Volume 10, No. 2, Spring, 1986

2 Constitutions and the Spirit of Liberty

STRATEGY

5 Come to the First Amendment Fair

8 Making Government Fair

STRATEGIES

11 The Need for the Fourth Amendment
12 Giving Meaning to "Probable Cause"
13 Examining an Affidavit for a Search Warrant
14 Examining a Search Warrant

16 Equality: The Forgotten Word

STRATEGIES

21 Sex Discrimination
22 Discrimination and the Law

26 When the Constitution Isn't Enough

STRATEGY

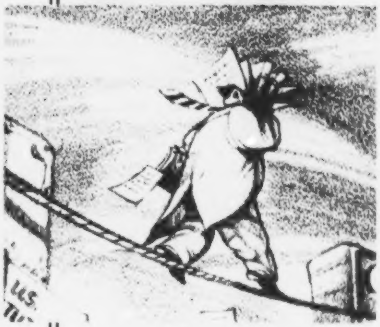
30 Comparing State and Federal Constitutions

34 Eternal Issues and Eternal Questions

38 Drink, Drank, Drunk

STRATEGY:

45 Searches Without a Warrant



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CONSTITUTIONS AT WORK

Constitutions and the Spirit of Liberty

Constitutions are just
"parchment barriers" if we don't have
the will to make them work

The time has come to celebrate the Constitution, and suddenly, as Jimmy Durante used to say, "Everybody wants to get into the act." Here's a small sampling of the large number of groups planning bicentennial programs.

- Project 87 is a scholarly effort under the joint auspices of the American Historial Association and the American Political Science Association. It proposes a thoughtful reexamination of the Constitution, complete with materials for the schools.
- The American Enterprise Institute wants to celebrate the fact that the Constitution produced a free market economy and a healthy capitalist system.
- The Daughters of the American Revolution are planning activities for Constitution Week, 1987, in the hope of educating citizens to become emotionally involved, to learn more about the Constitution, and to assume responsibility for preserving it as the framers were inspired to write it.
- The federal Bicentennial Commission plans a wide variety of activities, including a newsletter and calendar full of historical information, and sponsorship of an essay contest.

Asking the Right Questions

My concern is that in all of this great celebration of the glories of the document and glories of its history, we may forget that the document has a mixed history. It has worked sometimes and has not worked very well other times. It is a document at which we should look critically and about which we should ask some very tough questions during this bicentennial era. How well has the constitutional system worked in this country? Where and why has it failed? Who has benefited most from the Constitution?

It has worked, for example, far better for males than for females. It has worked far better for the rich than for the poor. It has worked far better for whites than for blacks or Indians, and it has worked far better in times of stability and placidity than in times of national crisis.

Another question which I would raise is, what constitution are we celebrating? Howard Meyer, author of a book on the Fourteenth Amendment, stresses that the original Constitution was a complete failure. The original Constitution, even with the Bill of Rights, did not deliver liberty and justice to all. It denied rights to blacks, it denied rights to women, it denied rights to Indians, it denied rights to political and religious dissenters, to minorities, and to immigrants. It led to a Civil War. It completely failed in terms of protecting domestic tranquility, which is one of the promises of the Preamble.

Mr. Meyer suggests that the Constitution we should celebrate is the Constitution with the addition of the Fourteenth Amendment, which eventually made it into a document which had the potential for solving the problems which the original Constitution had failed to address. He also asserts that it was only in the days of the Warren Court that the Constitution became what the founders had in mind.

This raises the question of whose Constitution should we celebrate? Should we celebrate the original document of the founders? Should we celebrate the Constitution of our own time? It's a constitution which has led to governmental intervention into practically every aspect of our lives from day to day.

Even more serious is the question of what this celebration should result in. What are we trying to do with this celebration of the Constitution? Is this to give us a new respect for the document? Is this to salvage a highly endangered constitutional system? Is it an occasion to write a totally new Constitution, one which will be better adapted to serve the 20th-Century world in which we live? Or is it an occasion to remove from current constitutional practice what a number of observers are calling "constitutionally-suspect additions" which the Supreme Court has added to that document.

The Living Constitution

So what should young people and old people know about constitutionalism and the constitutional process? My first principle would derive from John Marshall, who said 166 years ago, "The Constitution is to be adapted to the various crises of human affairs."

The accent in teaching the Constitution should be on teaching it as a living instrument of free government, as concepts, ideas, and a basic structure to which we turn to get back to our moorings and values. In trying to establish these principles, it's well to go back to the whole concept of constitutionalism itself.

Constitutionalism is as ancient as the Greeks. Its American version can best be explained, I think, as a commitment to limited government and the rule of law – nothing more, nothing less. The idea is that government only exists to serve specific ends and properly functions only according to specific rules. Above all, constitutionalism places limits on power and sets forth designated processes to assure those limits. Therefore, the hallmark of American constitutionalism is reliance upon formal rules and limitations.

But those limitations are tied very clearly to popular sovereignty. A modern constitution is expected to define society's political institutions and establish standards for evaluating those institutions. This, in turn, is expected to reflect the popular will. In this way something of the force of tradition and shared experience is captured, while at the same time current challenges can be dealt with through appropriate rules of law. But citizen participation becomes absolutely central if modern constitutionalism is actually to prevail.

How do we get these concepts into concrete forms so that young people can understand them?

How can we get them to say, "Well, now, what am I supposed to do about this? Concretely, what does this mean as far as I'm concerned?"

Can we help students see this as something which affects them personally? It's well to point out that even before the days of the Magna Carta a principle of Anglo-American law has been that no man is above the law. It's better to use some recent examples.

A recent president, Richard Nixon, learned about the importance of the role of law only in retrospect, after he had been virtually impeached for violating that general principle. It's a principle which all administrations should restudy. For example, some observers, such as

Lawrence Tribe, think the Reagan Administration scoffs at the law by refusing to enforce civil rights provisions.

A recent Congressional study released in 1984 tabulated violations of 21 separate acts of Congress by the current Administration in carrying out its Central American policy. For example, when Congress passed a bill requiring the President to certify El Salvador's progress on human rights as a condition of further military aid, the White House said it would not obey that particular provision.

These examples—and others from almost all eras in our history—provide a good deal of material for teaching. Who is above the law? What's going on here? Young people feel that the government is supposed to play by the rules, and these examples are a natural way to explore constitutional guarantees.

Classic Balancing Acts

The men who met in Philadelphia in the hot summer of 1787 were extremely well aware of what was before them. They were students of comparative government. They had read books going clear back to the Greeks and all the way up through Montesquieu and a variety of other leading political theorists. These talented men saw that the problems that they were confronting in Philadelphia were universal problems, which they weren't going to solve. Every generation would have to manage them in one way or another.

The founders were particularly concerned with three central problems.

- *Balancing Liberty and Authority.* Too much liberty—anarchism, violations of law and order. Too much authority—police state, repressions of individual freedom. But striking that balance is an ongoing problem to be confronted by every generation.
- *Liberty vs. Equality.* This is a problem which de Tocqueville spent a lot of time writing about in *Democracy in America.* How much equality can we have without interfering with people's individual liberty to get above the crowd and to succeed in personal ways? On the other hand, how much liberty do we allow without having liberty used to trample on poor or weak people, on the have-not of society? Every generation has had to try to work out that balance, and this will go on for time immemorial.
- *Majority Rule vs. Minority Rights.* What can the majority do, how far can the majority go, what happens when the minority gets its rights trampled? What recourse does it have? What agency of government is supposed to step in at that point? If the courts no longer monitor questions of state infractions of civil liberties and civil rights, as some national leaders now advocate, who is going to protect a great many people at the state level, particularly minorities?

Making Government Play by the Rules

The essence of Constitutionalism is the rule of law, which is above any leader and minimizes the possibility of tyranny.

Part of the problem of the English system prior to the American Revolution, as John Locke wrote in one of his famous treatises on government, was that when tyranny occurred, it had to be accepted as an inconvenience incapable of a remedy. The founders didn't think that was good enough. You don't just put up with tyranny; you build a system, with a variety of kinds of ways of checking abusive power.

The founders were students of human nature. They knew that establishing a democratic government would not prevent a particular kind of tyranny, the tyranny of the majority. They knew perfectly well that men were not angels, as Madison said in one of his Federalist papers. If men were angels, he said, we wouldn't need any government. Yes, people tend on many occasions to be decent and wholesome, but on many others they are selfish, self-seeking, and even cruel. How do we then deal with this varied human nature? What happens when the majority actually begins to injure citizens within our constitutional structure?

The federal system is one of the devices for checking the majority. Federalism is hard for students to understand. Let me suggest one approach which may be useful to help them think about it.

Dividing power between the states and the federal government, which is, after all, the essence of federalism, suggests that the states have very important roles within the federal system. But what are the states supposed to do, and are they doing that job? Under the concept of state police power, the states are responsible for the health, the safety, the morals, and the welfare of their citizens. This is a cornerstone of American democracy. But if the students look at whether or not the states are actually looking out for their health, safety, welfare, morals and education, they can begin to see that there's a constitutional issue here. The states have an obligation. Are they fulfilling that obligation?

James Madison once said that to understand the Constitution, people must look to "the evils to be remedied and the objects to be secured." What are we trying to remedy and what are we trying to obtain? Majority abuse of power was an evil to be attacked and contained by the process. Americans looked at the Constitution as a way of dealing with problems which basically were injuring people's rights. When we talk about legislative power, executive power, judicial power, the old familiar saws about separation of powers and checks and balances, we have to see them as aspects of checking power, limiting government, and protecting people's rights from the abusive power of any one branch. This can put some meat on the bones, rather than being another recitation of familiar slogans.

Toleration and Others

I feel very strongly about several other points. A fundamental principle underlying our Constitution, in my estimation, is the principle of toleration. Thomas Jefferson had stated in the Declaration of Independence that men were born with inalienable rights and that the purpose of government was to secure those rights. People were to be protected from government to ensure that tolerance for different views was respected. Government was thus to respect diversity, not to quash it. Then the First Amendment made that explicit in its provisions for guaranteeing freedom of religion, freedom of speech, freedom of press, freedom to petition, freedom to assemble.

Less overt but I still think implicit in the Constitution is the principle that class, wealth, and status should have no role in the application of those guarantees. Not free speech for the rich, not fair trial for only the powerful, but for all.

As far as the justice dimension of those inalienable rights—amendments four through eight—different considerations clearly come into consideration. Here arise questions of balancing the rights of the individual against those of society and the nation. In the justice area, it is balancing the rights of the accused, on the one hand, versus the principles of protection of the community on the other. Thus, the rule of law in America has come to be expressed largely in terms of due process of

(continued on page 48)

Paul Murphy is a professor of history at the University of Minnesota and a member of the Advisory Commission of the Special Committee on Youth Education for Citizenship. This article is based on a speech he gave at an LRE leadership seminar last November.

Come to the First Amendment Fair/Secondary

Ann Blum

Of course the right to assemble and speak out is a right of citizens, but we shouldn't forget to look at the other side of the coin, and see it as a *limitation* – on government. As Paul Murphy's article (page 3) points out, constitutions preserve the rule of law by preventing government from taking certain actions. This strategy will convey the point by focusing in on the standards that may limit government in the free speech area. The strategy will take one or two class periods. It will help students

- identify the issues posed in major Supreme Court cases pertaining to the First Amendment rights of free speech and freedom of assembly and association
- explain the protections given to and limitations allowed on these rights by the courts
- explain that governments must follow certain rules in dealing with speech and assembly issues
- develop skill in reasoning by analogy and in decision-making
- discuss the importance of freedom of association

Procedures

Distribute both handouts (pp. 6-7) to students. Handout 1, "Decisions for the Fair Director," explains the activity. The second handout, "Relevant Court Cases," provides the students with information for decision-making. Students can do the exercise individually, with written responses, or in small groups with a reporter for each group.

After completing the "Decisions for the Fair Director" activity, students should discuss and evaluate their decisions. Use the "Commentary on Decisions for the Fair Director" for this discussion/evaluation. An attorney versed in constitutional law could contribute greatly to the discussion of the situations, cases, and issues.

After the review of student decisions, ask the class

- What are the main issues in these cases and situations?
- What limitations have the courts allowed on the rights to associate and assemble?
- What protections have the courts clearly given for the rights to assemble and associate?
- Some of the situations evoke what is called the "heckler's veto." Ask students if they think it is right to give way to threats by canceling events. What should be done?
- What rules, if any, might the director have established beforehand to regulate the problems confronted?
- Should any of the groups have been excluded? Why or why not?
- Why is freedom of association so important? What are some threats to it?

Commentary on Decisions for the Fair Director

1. The decision in *Hague v. CIO* suggests that this is not good advice. The city ordinance appears to be a vague one, without narrow standards, that the courts would probably hold unconstitutional. Without such standards, any action to abridge rights taken by a fair director would be arbitrary and also unconstitutional.
2. Decisions on the "public enemy" laws suggest that the director could not turn down the request of the Super Sniffs without proof that they were going to use their booth to plan or commit a crime. People have a right to associate as long as their purposes are not criminal or disruptive.
3. The decision in the Skokie case indicates that this action would not be accepted by the courts. What if the director required such a bond of each exhibitor? This would probably be accepted by the courts if the amount of the bond were reasonably set – but the issue is still an open one. Note that governments have sometimes canceled events rather than hold them when associations like the Klan, held to be undesirable, want to take part.
4. Definitely not. Although the cases are more extreme, note decisions concerning right to assembly in *Edwards v. South Carolina, Feiner v. New York, Gregory v. City of Chicago*, and the Skokie cases. The director should instead act to alert police to assure protection for the union exhibitor if it is necessary.
5. The director should not close the booth. As cases indicate, it is not illegal per se to be a member of the Communist Party. In regard to the pamphlets, note that the courts have held that abstract recommendations for political violence, like these, are protected by the First Amendment. See decisions in *DeJonge v. Oregon* and Communist Party membership cases.
6. There do not appear to have been any grounds – except dislike – for refusing this group a booth (see *Nietmotko vs. Maryland*). It is wiser to allow them to stay even though they had been turned down. This is a very complicated legal issue – the courts would want to examine the procedural scheme set up for the permit procedure, the time available for judicial remedies, etc. Under the circumstances, the director couldn't assume *Poulos v. New Hampshire* would be a precedent.
7. *Edwards v. South Carolina, Feiner v. New York*, and *Gregory v. City of Chicago* are all relevant to the issues posed. The cases indicate that the first responsibility of the police is to protect the speakers and control the hecklers. If all else fails, then the speaker can be removed.

Ann Blum is Law Education Coordinator, Governmental Education Division, of the Carl Vinson Institute of Government at the University of Georgia. This strategy is adapted from the teachers manual for An Introduction to Law in Georgia *by Ann Blum and Jeannette Moon, Athens: Vinson Institute of Government, University of Georgia, in press. The strategy was reviewed by Paul Kurtz, a professor of law at the university, for legal accuracy.*

Decisions for the Fair Director (Handout 1)

You are one of the directors of a fair of local associations to be held in the park in front of your city's courthouse. The purpose of the fair is to celebrate our American rights to the First Amendment freedoms of expression and association. There is no thought or provision for excluding any organization. Through advertisements, you invite associations to apply for space for fair exhibition booths. Associations can use the booth spaces for displays or simple programs explaining and touting their organizations.

Unfortunately, problems about participation arise almost immediately. You are faced with a series of dilemmas. Obviously, you don't want to step on the rights of any group. On the other hand, you don't want the fair to be a series of disturbances. In dealing with the situations described below, use the handout "Relevant Court Cases" to guide your decisions. For each situation, record your decision and your reasons for making it. Cite any relevant cases.

Situations

1. The American Nazi Party imediately requests a booth. Because of the Jewish population of the city, you are very uneasy. A fellow fair director suggests you refuse the party a booth on the basis of a city ordinance that says permits for street meetings or similar gatherings can be refused "to prevent riots and disturbances." Should you follow her advice?
2. The Super Sniffs, a group widely suspected of being drug smugglers and dealers, requests a booth. This is another group you don't want to participate. What can you do, if anything, to refuse them space?
3. A request from the Ku Klux Klan for space makes you wonder why you accepted this job. You are advised to ask them to post a bond of $100,000 to participate, because this will surely keep them out. Should you do this? Why or why not?
4. A major issue in your town is the unionization of the local hat factory. The union requests a booth—and you receive several threats by phone that there'll be trouble if those union blankety-blanks are there. Because of these threats, can you refuse them space?
5. You receive a request for a booth from the local chapter of the Communist party. You allow them space and then, immediately after the fair opens, a man bursts into fair headquarters shouting that you should go to jail for allowing the Commies to participate. He says they even have pamphlets—he waves a handful of dull-looking papers at you—that indicate the overthrow of the government may be necessary to attain their ends. Those, too, are illegal, he shouts. Is he right? Should you close the booth?
6. You refuse a booth to what you regard as a very pushy religious group. They are particularly offensive because they never bathe and rarely change clothes. They come anyway and set up a booth. You ask them to leave; they refuse. You try to decide whether to ask the police to eject them. Should you do this?
7. A hostile crowd gathers around the booth of a pro-choice group. They become loud and jostling. Police advise you that trouble may result. You ask the pro-abortion group to leave. When they refuse, the police arrest them for breaching the peace. Was this the way to handle the situation? Would it have made a difference if the crowd had begun to throw bottles and rocks?

Relevant Court Cases (Handout 2)

COMMUNIST PARTY MEMBERSHIP CASES

The question of whether membership in the Communist Party can be made illegal by a statute was confronted by the Supreme Court in the late 1950s and early 1960s. In *Yates v. United States* (354 U.S. 298 (1958)), the Court marked a difference between advocating abstract doctrines to overthrow the government and advocating action. The former was held to be permissible but not the latter. (Or, as the Court said in *Brandenburg v. Ohio* (395 U.S. 444 (1969)), a case concerning a Ku Klux Klan speaker, the "mere abstract teaching" of a moral need to resort to force and violence is not the same as "preparing a group for violent action and steeling it to such action." Such teaching is protected by the First Amendment.)

In *Scales v. United States* (367 U.S. 203 (1961)), a divided Court struggled with the recognition that the party has both legal and illegal aims. Being a "knowing" member in an organization advocating overthrow of the government by force could be a felony, the Court said. But being a member "for whom the organization is a vehicle for the advancement of legitimate aims and policies" should not be a crime.

DEJONGE V. OREGON 229 U.S. 353 (1937)

In 1934 Dick DeJonge spoke at a meeting of the Communist Party in Portland, protesting actions used to break a longshoreman's and seaman's strike. He was arrested and convicted for "assisting in the conduct of a public meeting" held under the auspices of the Communist Party. His action was said to violate an Oregon law that prohibited advocating violence as a means of political reform.

The Supreme Court reversed the decision, holding the state law unconstitutional. The Court said that "peaceable assembly for lawful discussion cannot be made a crime." Nor can persons assisting in the conduct of such meetings be "branded as criminals on that score."

Relevant Court Cases (Handout 2)

EDWARDS V. SOUTH CAROLINA 372 U.S. 229 (1963)
In early 1961, about 190 black students marched to the park-like grounds of the state capitol in Columbia to protest segregation laws. Law enforcement officers told them as they entered the grounds that they had a right to do so as long as they were peaceful. The demonstrators marched, listened to a speaker, and sang—all in an orderly way. There was no obstruction of traffic. Onlookers gathered, but no one actually caused trouble. However the police and city manager were uneasy. The demonstrators were warned they would be arrested if they didn't disperse in 15 minutes. They refused and were arrested and convicted under the state breach-of-peace statute.

The Supreme Court, in a 8-1 decision, held the state statute vague and indefinite, upholding the demonstrators' rights under the First and Fourteenth Amendments to protest peaceably on public grounds.

FEINER V. NEW YORK 340 U.S. 315 (1961)
Feiner, a Syracuse University student, was addressing a crowd of 70 to 80 people on a city sidewalk. Some of the audience were hostile, and the police, summoned by a complaint, asked Feiner to stop talking after at least one threat of violence. Feiner refused and was arrested and convicted for violating the state's disorderly conduct law.

The Supreme Court, by a 6-3 margin, upheld the conviction. The majority opinion made clear that Feiner was not arrested for making his speech but because of audience reaction. His speech had created a clear and present danger of riot or disturbance. The police, the Court said, could act in such circumstances.

GREGORY V. CITY OF CHICAGO 394 U.S. 111 (1969)
Accompanied by police, Dick Gregory led about 85 marchers to the home of the mayor to protest delays in desegregation of public schools. Crowds gathered and began to hurl not only threats and obscenities but rocks and eggs. The marchers remained orderly. The police asked the protesters to disperse. When they refused, they were arrested and charged with violating Chicago's disorderly conduct ordinance.

On appeal, the Supreme Court overturned the decision. An orderly protest march, it said, falls under protection of the First Amendment. The city's ordinance, the Court held, was too vague.

HAGUE V. CIO 307 U.S. 496 (1936)
Frank Hague, mayor and political boss of Jersey City, New Jersey, was anti-union. When the Committee for Industrial Organization (CIO) requested a permit for a street meeting, it was refused under a city ordinance, which said a permit could be turned down to prevent "riots, disturbances, or disorderly assemblages."

In a 7-2 ruling, the Supreme Court declared the ordinance void. The reasoning was that without narrow standards (or guidelines), it allowed one person to suppress the rights of free speech and assembly in a public place solely on the basis of his or her opinion that the activity might cause a disturbance.

NIEMOTKO V. MARYLAND 340 U.S. 168 (1951)
A group of Jehovah's Witnesses were refused a permit to hold Bible discussion meetings in the town park. There was no ordinance, but local custom required a permit be obtained from the park commissioner, with appeal on refusal to the city council. The Jehovah's Witnesses held the meeting without a permit. They were arrested and convicted for disorderly conduct.

The Supreme Court reversed the decision. It said that a permit requirement is invalid as a prior restraint "in the absence of narrowly drawn, reasonable and definite standards for the officials to follow." The only apparent reason for refusal of the permit in this case was dislike.

POULOS V. NEW HAMPSHIRE 345 U.S. 395 (1953)
Like *Niemotko v. Maryland,* this case concerned denial of a permit for a park meeting for a group of Jehovah's Witnesses. This group also held their meeting anyway.

In this case, the Supreme Court, however, upheld the conviction and fine of Poulos. It held that the ordinance was valid, but the decision to deny the permit was arbitrary. However, Poulos, it said, had judicial remedies available to question the council's decision. He did not use them. To take the law into one's own hands, it said, is a dangerous course of action.

PUBLIC ENEMY CASES
In the 1920s and 30s, faced with very visible gangsterism, several states enacted so-called "public enemy" laws. These declared persons gangsters who belonged to groups consisting of people who had been convicted of crimes or ordinance violations. The courts found the basic terms of these laws too vague. In its ruling on a New York law, the New York Court of Appeals said that a state must prove that an association of "evil-minded people" are planning or doing something unlawful. "The consorting alone is no crime." (*People v. Pieri*, 269 NY 315, 199 N.E. 495 (1936)).

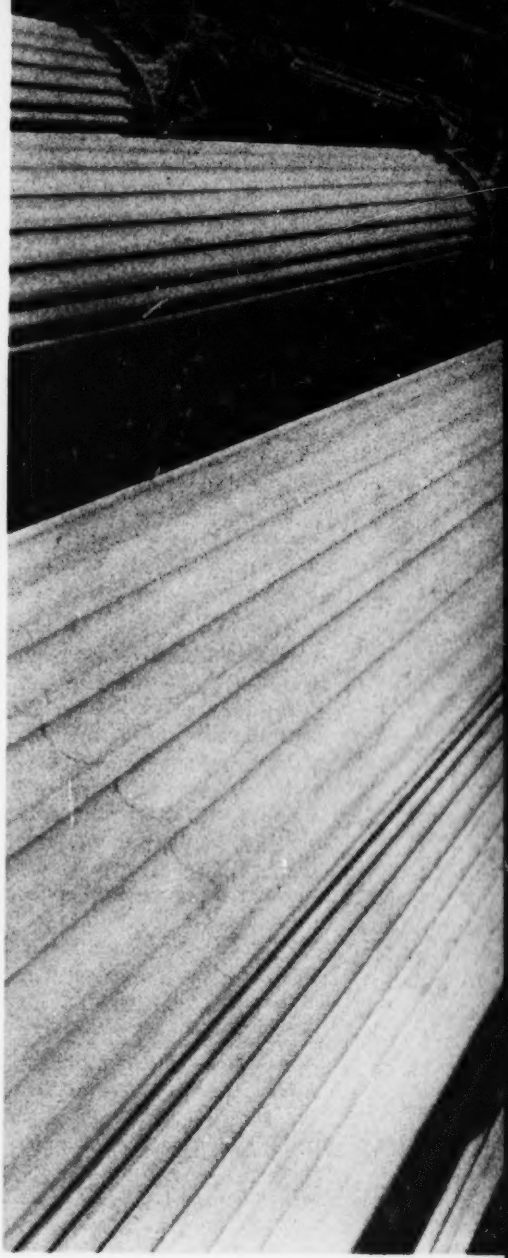
AMERICAN NAZI PARTY V. VILLAGE OF SKOKIE 373 N.E.2d. 21 (1978)
In 1977, the city of Skokie, Illinois, sought to prevent a march of the American Nazi Party through the predominantly Jewish community. It tried to do this by requiring them to post $300,000 bond for a parade permit. A federal appeals court said that a community could not use its parade-granting power as a means of suppressing free speech and assembly. They said the Nazis could march without posting the bond. Having gained the right, the Nazis decided not to hold their demonstration in Skokie.

CONSTITUTIONS AT WORK

Making Government Fair

The due process clause is slow and sometimes inefficient, but it demands that government play by the rules

George Galland



John Neubauer

I was asked to discuss the subject of due process. Asking a lawyer to talk about due process in just a few minutes is like asking a theologian to talk for 20 mintues about God. It's vitally important to lawyers, in many ways the very stuff of our work, and whole volumes can be and have been written about its smallest nuances.

But beneath all the words is one simple idea – that due process helps keep government accountable, helps it play by the rules. It's a major – if little-understood – part of the Constitution's arsenal.

Two Little Clauses

There are two due process clauses. The one in the Fifth Amendment to the Constitution has been with us from the adoption of the Bill of Rights. It applies only to the federal government.

The other one is in the Fourteenth Amendment, adopted after the Civil War. The Fourteenth Amendment contains a grab-bag of provisions. In one of those provisions is a sneaky little phrase which says, "no state shall deprive any person of life, liberty or property without due process of law." That is stuck in almost as an afterthought in the Fourteenth Amendment, which had many more important purposes at the time. This amendment applies to the states – and by extention to local government – so it's used more often than the Fifth Amendment.

For the first 80 years or so, the due process clause of the Fourteenth Amendment had a history substantially different from its current use. It was used by courts in a *substantive* way. That is to say, it wasn't just a matter of what procedures ought to be followed – it was a matter of what the substance of the enactment was. Some statutes were held to be so unfair as to violate the very substance of due process.

The due process clause, for its first 70 or 80 years, was a weapon the courts used to get rid of legislation that interfered with what they thought was good and proper.

For example, courts often used it to get government off the backs of big business. That was done notoriously during the Depression, when many New Deal laws were struck down before Roosevelt scared the Court into shifting course. The courts used the due process clause to strike down all sorts of legislation which in their view unfairly limited the right to own and control property. For a while it was used to strike down anything that looked like social security.

The courts did a number of other things with the due process clause in its first 80 years. For example, starting in the 1920s, the courts used the due process clause of the Fourteenth Amendment as a way of imposing the Bill of Rights on the states. Very few of the rights guaranteed there apply to the states at all. The First Amendment doesn't mention the states; it just applies to Congress. But the courts have incorporated the guarantees of the Bill of Rights and made them applicable to the states because they have decided that due process of law somehow or other means that you have to have those guarantees. So the due process clause, in that respect, has become a very important substantive source of rights that people enjoy against state and local government.

That's not what happened to the due process clause, though, in the last 20 years, when there has been a complete shift in the meaning of the clause. For the last 20 years the name of the game with the due process clause has been procedure.

Making Government Fair

As we all know, every day the government does all sorts of things to all of us that affect us in one way or another. And in the Fifth and Fourteenth amendments

this clause says that the states and Congress shall not deprive any person of life, liberty or property *without due process of* law. Now that suggests to lawyers that you *can* deprive somebody of life, liberty or property but you have to use something called due process to do it. And the issue then became what kinds of procedures do you have to follow as a government when you're going to do those things to people.

What was responsible for the transformation of the due process clause? I don't know, and nobody else knows either, but I have some nonprovable theories. Two important events woke the country up to using the due process clause to impose some limits on governments.

The first was the experience of McCarthyism. McCarthyism demonstrated dramatically the unfairness of government. It showed that a government left unchecked to follow whatever procedures it wanted could be quite dangerous. When the reaction to McCarthy set in, people saw how many reputations had been ruined and how little had been achieved when legislators and governmental procedures rode roughshod over people. The public began to believe that some sort of check was necessary.

And so we began to get the courts looking at the procedures of bureaucratic agencies and asking, "Is this fair?" "Are these agencies doing what their own regulations say they are supposed to do?" "Are they giving people an opportunity to give their side of the story before the agencies act?"

If the excesses of the McCarthy period got it going, what put it into full gear was the war on poverty. In the 60s, lawyers began to start asserting the rights of the poor. The due process clause became an absolutely spectacular tool for them.

A lawyer who is representing somebody poor can't really do much about that person's poverty. You can't generate income if the person doesn't have any. What you can do, though, is get in the way of efforts to take away what the person has. If there are procedures which give some sort of entitlement to a poor person, you can use those procedures to try and make it tougher for the government to deny that person the things that the law apparently entitles him to.

When the war on poverty got into full gear, lawyers, in name of due process, managed to persuade the courts to impose quite stringent procedures on the government whenever the government wanted to take some sort of action that could be prejudicial. For example, back in the late 1960s, the Supreme Court decided that you couldn't garnishee a person's wages before judgment.

It may seem obvious that you have to sue somebody in a law suit and win before you can garnishee their wages, but that wasn't the case before. In a decision called *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), the Supreme Court decided that this procedure violated the due process clause. Then the Court decided that you couldn't attach somebody's property before you got a judgment against him. That was a decision called *Fuentes v. Shevin*, 405 U.S. 67 (1972). And in a real high watermark of due process, the Court decided, in *Goldberg v. Kelly*, 397 U.S. 254 (1969), that a person on welfare couldn't have his or her welfare grant taken away without a prior hearing, with a lawyer present and all sorts of procedural protections. This was a typical example of how, during the war on poverty and in the spirit that prevailed at the time, lawyers were using the due process clause to slow down the government when it wanted to take something away. That produced a body of cases in the Supreme Court, back in the Warren Court era and the very early Burger Court era, which didn't have to be limited at all to poor people or poverty programs.

The lower courts began to take up the cudgel, and for a while just about everything the government was doing was declared unconstitutional under the due process clause. Those were great days to be a plaintiff's civil rights lawyer, I can tell you. You charged into court and you showed them what the procedure was and you said that doesn't give us an adequate opportunity to be heard before it happens to us, and the judge said you're right, it's unconstitutional, next case.

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The Tide Turns

I can tell you from personal experience how that era began to come to an end, because my law firm represented the plaintiffs in the case. It's possible to pinpoint the high watermark of due process and when the tide began to flow out.

The case was called *Arnett v. Kennedy*, 416 U.S. 134 (1974). It was a great case. Wayne Kennedy worked for the Office of Economic Opportunity. He was a disciple of Saul Alinsky at the University of Chicago. He had his office organized to the teeth and was a tremendous thorn in the side of the administrators. At some point he gave a press conference where he all but called his boss a crook, said the program wasn't running as it should, and made a lot of other accusations—all of which, incidentally, I think were entirely true. The government fired him. He came to us and said, "I've been fired." And we said: "Did they give you a hearing before they fired you?" and he said, "No, we're not entitled to one under the federal regulations."

I was just a kid then, but my partner said, "That doesn't sound constitutional to me. They've got to give you hearing before they fire you." He charged in to court with his affidavits and said: "We didn't get a prior hearing before he got fired, and that is unconstitutional." A very good judge agreed that the statute was unconstitutional, and the government appealed to the Supreme Court.

The case had wrapped up in it everything that is important for you to know about how the due process clauses are being interpreted now. In the Supreme Court the issue was a federal statute which goes back to the days of Fighting Bob La-Follette. It says that a civil service federal employee can be discharged only for such cause as promotes the efficiency of the service. He or she has to be fired for cause; there has to be a reason. But the statute did not give you the right to a hearing before you were fired. In fact, the statute didn't really give you the right to any particular kind of hearing. So the question was, "Do you have to get a hearing under the due process clause before you are fired?" Another way of looking at it was, "Do you have to have any kind of hearing at all?"

When the Supreme Court got into that issue, they went back to the words of the due process clause, which they generally hadn't done in the cases up to then. It says that "no person shall be deprived of life, liberty or property without due process of law." The first question that Justice Rehnquist asked was, "Where is the property?" It's clear that nobody was depriving Wayne Kennedy of his life. Nobody was depriving Wayne Kennedy of his liberty. But were they depriving him of his property? So then the next question was, from a lawyer's point of view, "What is 'property,' what does property mean?" We said: "Property doesn't just mean your bank accounts. Property under the due process clause means any sort of entitlement that the law gives you. Whether it's the entitlement to hold on to your suit and tie or the entitlement to have welfare benefits or the entitlement to be fired only for cause." But does the fact that this statute gives you the right to be fired only for cause give you a property right under the due process clause?

What Process is Due?

After that issue, the next question was, supposing that it is property, what process is due for the government to deprive you of that property? Do they have to give you a hearing? If they give you a hearing what kind of hearing does it have to be? Do we have to have lawyers involved? When does the hearing have to take place? Can it take place before they fire you, or is it ok if they give it to you within a reasonable time after they fire you? If they give you a hearing, who has to make the decision? Can the guy who decided to fire you be the hearing officer to decide whether your case is meritorious or not?

So you can see that this one case bound up all of the issues that go into an analysis under the due process clause.

Here's how they decided the case in the Supreme Court. There were five opinions produced by the Arnett case. The Court went completely to pieces. No opinion got more than three votes. It was one of those watershed cases where all of sudden the Court confronts a bunch of difficult issues for the first time and no consensus is possible in any one of them.

Justice Rehnquist had his response to the property issue. He said, look at this statute. You're saying that this statute gives you a property interest because it gives you the right to be fired only for cause. But this statute also gives you no right to a hearing. How can you say on the one hand that you've got a property interest not to be fired and on the other hand rely

(continued on page 47)

Foundations of Freedom

The Need for the Fourth Amendment/Grades 9-12

Steve Jenkins

Have you ever heard the phrase, "My home is my castle?" Respect for the sanctity and privacy of a person's home was well expressed, more than two hundred years ago, by the Englishman William Pitt, Earl of Chatham, when he said:

> The poorest man may in his cottage bid defiance to the Crown. It may be frail – its roof may shake – the wind may enter – all his force dares not cross the threshold of the ruined tenement!

English history, as well as the history of the early English colonies of North America, demonstrate that William Pitt's sentiments were not always respected and observed by those in power. The following cases illustrate this problem.

Ask students to read each of the cases and answer the questions following each case. The cases examine the historical conflicts that gave rise to the Fourth Amendment.

Case 1

In the 1760s, John Wilkes published an unsigned pamphlet, the *North Briton,* that attacked the government of England. The government's secretary of state issued a general warrant to government law enforcement officers, commanding the arrest and search of anyone involved in writing, printing or circulating Wilkes' pamphlet. In a three-day period, forty-nine persons were arrested, including John Wilkes and his printers. Wilkes was taken to jail. The law enforcement officers broke into his home and confiscated all of his personal papers.

John Wilkes and the printers filed separate civil suits against the law enforcement officers and secretary of state, alleging false arrest and illegal search.

Ask students to answer the following questions:

1. In your opinion, should the government officials in this case have the power to issue general warrants and authorize such searches and seizures? Why or why not?
2. Do you believe this type of general warrant could be issued in the United States today? Briefly explain your answer.

Students' answers will vary, but should reflect First and Fourth Amendment protections of individual liberties (i.e., the First Amendment protection of freedom of speech and freedom of the press and the Fourth Amendment protection from "unreasonable search and seizure").

Note to Teacher/Resource Person: This is based on the case *Wilkes v. Wood,* 98 Eng. Rep. 489 (K.B. 1763). John Wilkes won his civil damage suit against the government officials who issued and carried out the general warrants. The English Chief Justice Charles Pratt declared that the use of general warrants by government officials was "totally subversive of the liberty of the subject."

Case 2

In the English colonies, government officials used writs of assistance (a type of warrant) to authorize searches for smuggled goods. These writs commanded all officers of the crown to assist law enforcement officers with carrying out the searches. The writs empowered authorities to "enter into any vessel, house, warehouse, or cellar, and search in any trunk or chest" to seize smuggled goods. The writs did not identify the persons or places to be searched, and they did not describe the goods that were being sought. In addition, the writs had no date or time reference. The writs were, therefore, powerful instruments in the hands of colonial authorities.

The only hope of ending the writs of assistance came with the death of King George II in October of 1760. All outstanding writs had to be renewed within six months or the authority to use them would expire. If the colonists could prevent new writs from being issued, they could tie the hands of customs agents.

In February of 1761, a group of Boston, Massachusetts, merchants challenged the writs in the Superior Court in Boston. James Otis, Jr., an attorney for the merchants, argued that writs of assistance were "instruments of slavery on the one hand and villainy on the other." In a powerful argument, Otis went on to say:

> It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English lawbook.... In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses and so on specifically set forth in the writ.... In the same manner I rely on it that the writ prayed for in this petition, being general, is illegal. It is a power that places the liberty of every man in the hands of every petty officer.... In the first place, the writ is universal, being directed "to all and singular Justices, Sheriffs, Constables, and all other officers and subjects," so that, in short, it is directed to every subject in the King's dominions.... In the next place it is perpetual; there is no return.... In the third place, a person with this writ, in the daytime, may enter all houses, shops, and so on at will, and command all to assist him.... Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle, and whilst he is quiet he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way; and whether they break through malice or revenge, no man, no court can inquire. Suspicion without oath is sufficient.... Had this writ been in any book whatever, it would have been illegal. All precedents are under the control of the principles of law.... No acts of Parliament can establish such a writ; though it should be made in the very words of this petition, it would be void. An act against the [English] constitution is void.

The colonial government's attorney general claimed that citizens did not have a right to privacy from the king. The attorney general said, "Everybody knows that the subject has the privilege of house only against his fellow subjects, not versus the king...in matters of crime."

The Boston merchants lost their challenge, and new writs of assistance were issued. But James Otis, Jr., has prepared the principal foundation of the Fourth Amendment to the U.S. Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Adopted, 1791]

Ask students to answer the following:

1. Briefly describe a "writ of assistance."
2. List at least three reasons given by James Otis, Jr., to explain why, in his opinion, writs of assistance should be declared void (unconstitutional).
3. Review the arguments of James Otis, Jr., and the colonial government's attorney general. Whose argument do you agree with, and why?
4. How does a "writ of assistance" differ from the "warrant" described in the Fourth Amendment?

ANSWERS FOR CASE 2

The following would be appropriate responses based on the information provided in case 2.

1. Answers may vary slightly but should contain the following information: A writ of assistance is a type of warrant that permitted government officials to authorize the search and seizure of smuggled goods. It was called a writ of assistance because it commanded all officers of the crown to assist law enforcement officers with carrying out the searches and seizures.
2. James Otis, Jr., presented several arguments against writs of assistance. Any three of the following would be appropriate responses:
   - a writ of assistance is "the worst instrument of arbitrary power";
   - a writ of assistance is "a power that places the liberty of every man in the hands of every petty officer";
   - the writ is not specific, it is "universal. . .directed to every subject in the King's dominions";
   - the writ has no time restraints, "it is perpetual";
   - a person with a writ "may enter all houses, shops, and so on at will, and command all to assist him";
   - this writ annihilates the long-recognized principle that "a man's house is his castle";
   - menial servants of custom-house officers "may enter our houses when they please. . .may break locks, bars, and every thing in their way."
3. Answers will vary and students should give reasons to support their position.
4. Answers may vary but should include the following distinctions: A writ of assistance was general. The writs did not identify the persons or describe the place to be searched; they did not even identify or describe what goods were being sought. Under the Fourth Amendment, a warrant is specific and can only be issued upon probable cause that is supported by an oath. A warrant must specifically describe the place to be searched, and the person(s) or thing(s) to be seized.

Foundations of Freedom

Giving Meaning to the Phrase "Probable Cause"/Grades 9-12

Steve Jenkins

Review the Fourth Amendment (included in the preceding activity). According to the Fourth Amendment, when may a warrant be issued? (Students' answers should include the phrase "probable cause.")

The judicial branch of government is sometimes asked to interpret the law. The interpretation gives meaning to the law. The Fourth Amendment provides many examples, since the U.S. Supreme Court has been called upon in hundreds of cases to interpret various aspects of this amendment.

In order to obtain a search warrant, law enforcement officials must first present a judge with an affidavit, which is a sworn statement describing the facts and reasons justifying the issuance of a search warrant. The facts and reasons must be based upon "probable cause."

But what is "probable cause"? The words are simple enough, but what do they actually mean in practice? Can the phrase be defined with enough clarity to provide guidance to police officers and judges throughout the country?

In 1925, the U.S. Supreme Court issued the following definition of "probable cause":

> To establish probable cause, the government must present to the judge sufficient facts to permit an independent determination as to whether the government agent or police officer had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant. (*Dumbra v. United States*, 268 U.S. 435, 439-441 (1925))

Using this opinion, ask students to write a definition explaining the meaning of "probable cause." Before writing their definition, they may wish to consider the levels of proof often cited by judges. These range from the least sufficient to the most sufficient level. (See scale at bottom of page.)

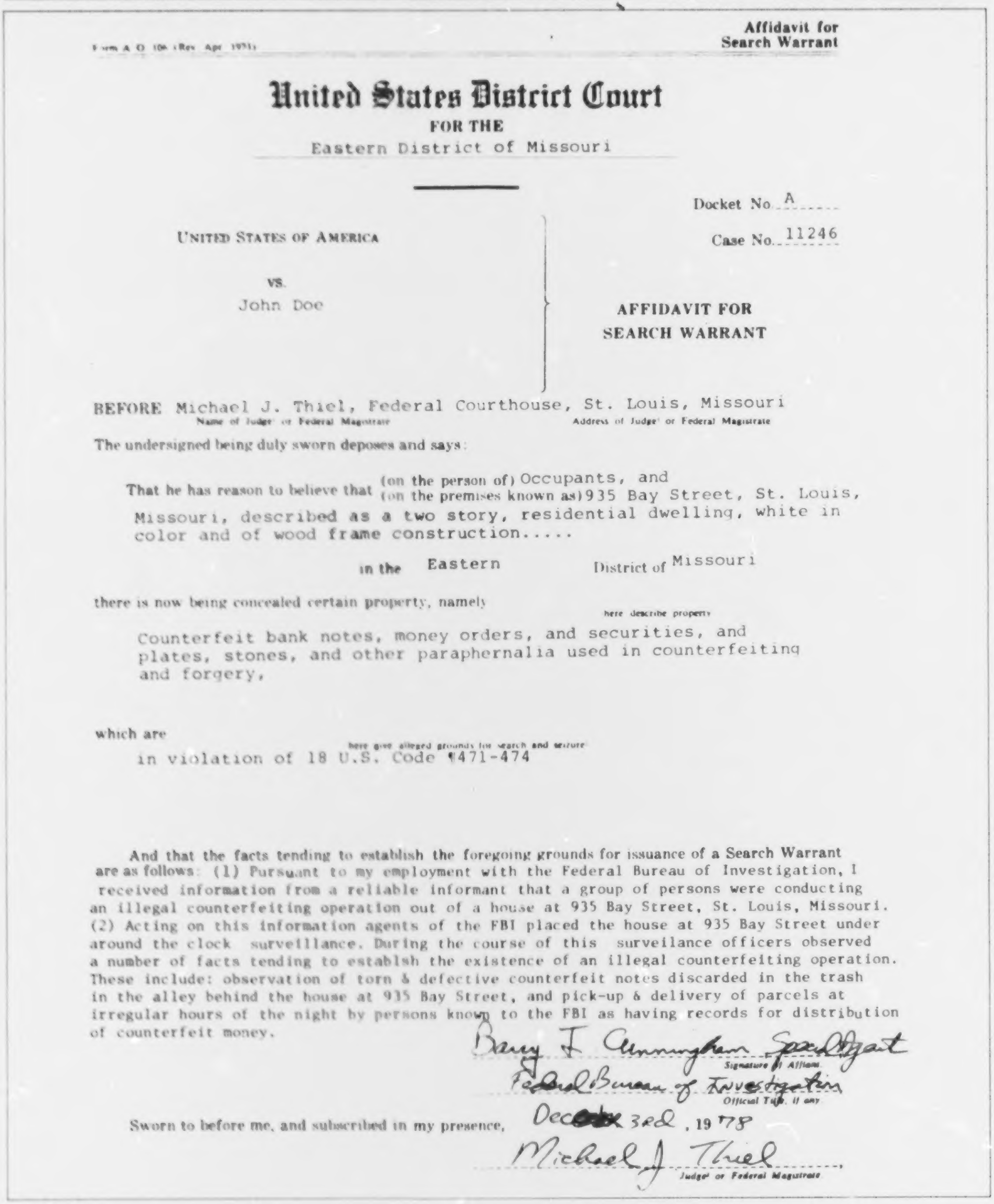
Students' definitions will vary, but should include the following information: Probable cause exists when there are enough facts to persuade a reasonably prudent person to believe that a crime is being committed.

Least Sufficient Proof				Most Sufficient Proof
Guess or Hunch	Reasonable Suspicion	Probable Cause	Preponderance of Evidence (Burden of proof in civil trials)	Beyond a Reasonable Doubt (Burden of proof in criminal trials)

Foundations of Freedom

Examining an Affidavit for a Search Warrant/Grades 9-12

Steve Jenkins



Form A O 106 (Rev. Apr. 1971)

Affidavit for Search Warrant

United States District Court

FOR THE

Eastern District of Missouri

Docket No. A

Case No. 11246

UNITED STATES OF AMERICA

vs.

John Doe

AFFIDAVIT FOR SEARCH WARRANT

BEFORE Michael J. Thiel, Federal Courthouse, St. Louis, Missouri
Name of Judge or Federal Magistrate — Address of Judge or Federal Magistrate

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the person of) Occupants, and (on the premises known as) 935 Bay Street, St. Louis, Missouri, described as a two story, residential dwelling, white in color and of wood frame construction.....

in the Eastern District of Missouri

there is now being concealed certain property, namely here describe property

Counterfeit bank notes, money orders, and securities, and plates, stones, and other paraphernalia used in counterfeiting and forgery,

which are here give alleged grounds for search and seizure

in violation of 18 U.S. Code ¶471-474

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: (1) Pursuant to my employment with the Federal Bureau of Investigation, I received information from a reliable informant that a group of persons were conducting an illegal counterfeiting operation out of a house at 935 Bay Street, St. Louis, Missouri. (2) Acting on this information agents of the FBI placed the house at 935 Bay Street under around the clock surveillance. During the course of this surveilance officers observed a number of facts tending to establsh the existence of an illegal counterfeiting operation. These include: observation of torn & defective counterfeit notes discarded in the trash in the alley behind the house at 935 Bay Street, and pick-up & delivery of parcels at irregular hours of the night by persons known to the FBI as having records for distribution of counterfeit money.

Barry J. Cunningham Special Agent
Signature of Affiant

Federal Bureau of Investigation
Official Title, if any

Sworn to before me, and subscribed in my presence, Dec[illegible] 3rd, 19 78

Michael J. Thiel
Judge or Federal Magistrate

Examining the Request

1. Who is requesting the search warrant, and who and where does he or she wish to search?
2. What property are the law enforcement officers looking for?
3. What law, or laws, do the law enforcement officers allege are being violated?
4. What facts are included in the affidavit to support the issuance of a warrant?
5. Does the affidavit appear to comply with the "probable cause" requirement of the Fourth Amendment?

1690

6. If you were the judge in this case, would you issue the warrant based on the affidavit? Briefly explain your answer.
7. Who is the judge in this case? Is the judge a federal, state or local judge?

Answers

1. The United States of America, represented by Barry I. Cunningham, Special Agent, of the Federal Bureau of Investigation, is requesting the search warrant. Cunningham is asking that law enforcement officers be permitted to search John Doe and the occupants and home at 935 Bay Street, St. Louis, Missouri.
2. The law enforcement officers are looking for counterfeit bank notes, money orders, and securities, and plates, stones, and other paraphernalia used in counterfeiting and forgery.
3. The F.B.I. claims that John Doe and the occupants are in violation of 18 U.S. Code, paragraphs 471-474.
4. F.B.I. Special Agent Barry Cunningham claims that he received information from a reliable informant that a group of persons were conducting an illegal counterfeiting operation out of the house at 935 Bay Street. Based on this information, the F.B.I. placed the house at 935 Bay Street under around the clock surveillance. During the surveillance, law enforcement officers observed the following facts supporting the claim of an illegal counterfeiting operation:
   - observation of torn and defective counterfeit notes discarded in the trash container in the alley behind the house;
   - pick-up and delivery of parcels at irregular hours of the night by persons known to the F.B.I. as having records for distribution of counterfeit money.
5. Answers may vary, but the appropriate response is *yes*. There seem to be enough facts to persuade a reasonably prudent person to believe that occupants at 935 Bay Street are engaged in an illegal counterfeiting operation.
6. Answers may vary. Students' reasoning should reflect compliance with the conditions of the Fourth Amendment. That is, the request appears to be for a reasonable search warrant based upon probable cause supported by an F.B.I. Special Agent's sworn affidavit, and particularly describing the place to be searched, and the persons or things to be seized.
7. The judge is Michael J. Theil, a federal magistrate of the United States District Court of the Eastern District of Missouri.

(Both the affidavit for a search warrant and the search warrant (page 15) are reprinted with permission from *Street Law: A Course in Practical Law*, Second Edition, West Publishing Company, 1980.)

Foundations of Freedom

Examining a Search Warrant/Grades 9-12

Steve Jenkins

Review the search warrant on page 15 and answer the questions that follow:

Questions

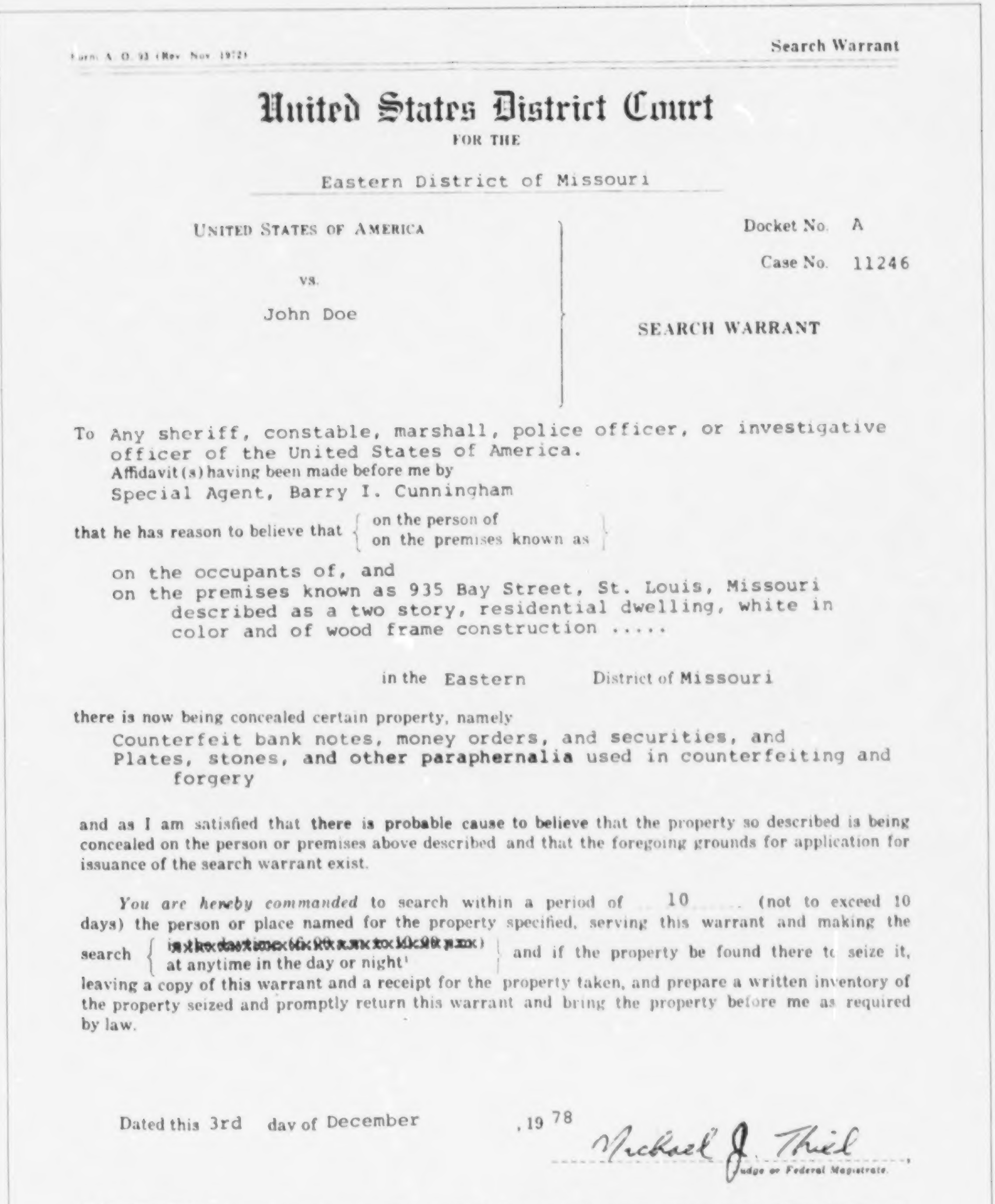
1. Who issued the search warrant?
2. To whom was the search warrant issued?
3. Who had filed the affidavit requesting the search warrant?
4. Is there a time limit on the search warrant? If yes, what is the time limit? Can the law enforcement officers search anytime—day or night?
5. Who is to be searched and what can the law enforcement officers search for?
6. What are the law enforcement officers supposed to do with the property if they find it?
7. Who received the seized property?
8. According to the Federal Rules of Criminal Procedure, at what time of day are search warrants supposed to be served?

Answers

1. Federal Magistrate Michael J. Thiel issued the search warrant.
2. The search warrant was issued to any sheriff, constable, marshal, police officer, or investigative officer of the United States of America.
3. Special F.B.I. Agent Barry I. Cunningham filed the affidavit requesting the search warrant.
4. The search must be conducted within a period of ten days. This particular warrant authorizes the search to be conducted at anytime in the day or night.
5. The occupants and premises known as 935 Bay Street, St. Louis, Missouri, are the targets of the search. The law enforcement officers are authorized to search for counterfeit bank notes, money orders, and securities, and plates, stones, and other paraphernalia used in counterfeiting and forgery.
6. The law enforcement officers are authorized to seize the described property if found. The officers are supposed to leave a copy of this warrant and receipt for the property taken.
7. The law enforcement officers are required to return the warrant and seized property to the federal magistrate, Michael J. Thiel.
8. The Federal Rules of Criminal Procedures provide the following guidelines regarding time of day for searches: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime."

Steve Jenkins is law-related education director of the Bar Association of Metropolitan St. Louis. He was assisted by Nancy Eschmann of the bar association in preparing these activities for publication.

1691



Form A. O. 93 (Rev. Nov. 1972)

Search Warrant

United States District Court

FOR THE

Eastern District of Missouri

UNITED STATES OF AMERICA

vs.

John Doe

Docket No. A

Case No. 11246

SEARCH WARRANT

To Any sheriff, constable, marshall, police officer, or investigative officer of the United States of America.

Affidavit (s) having been made before me by

Special Agent, Barry I. Cunningham

that he has reason to believe that { on the person of
on the premises known as }

on the occupants of, and
on the premises known as 935 Bay Street, St. Louis, Missouri
described as a two story, residential dwelling, white in color and of wood frame construction .....

in the Eastern District of Missouri

there is now being concealed certain property, namely

Counterfeit bank notes, money orders, and securities, and Plates, stones, and other paraphernalia used in counterfeiting and forgery

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search within a period of 10 (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search { ~~in the daytime (6:00 a.m. to 10:00 p.m.)~~
at anytime in the day or night[1] } and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before me as required by law.

Dated this 3rd day of December , 19 78

Michael J. Thiel
Judge or Federal Magistrate.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(C))

BEST COPY AVAILABLE

Equality—the Forgotten Word

For generations, you needed a code book to decipher what the Constitution said—and didn't say—about equal rights in a diverse society

My focus is the equal protection clause of the Constitution and equality.

As we approach the bicentennial of the Constitution, it is important to recall its precursor: the Declaration of Independence. During the bicentennial of the Declaration of Independence, England lent to the American people one of the four signed copies of the Magna Carta. When it was put on display in the Capitol Rotunda, Britain's Lord Chancellor told the audience: "People not familiar with our ways have thought it a trifle paradoxical for the British to be joining in the celebration of the bicentenniary of what was, after all, the loss of the American colonies. They overlook our traditions of compromise. We in fact now regard the events of two centuries ago as a victory for the English-speaking world."

Similarly, the United States Constitution received great praise from the British Prime Minister, William Gladstone, who wrote in 1878 that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

Compromises of Principle

While it is the oldest living written constitution in the world, and while we continue to live under a political structure that flows from its original clauses, as we approach the bicentennial of the Constitution it is important to note the compromises it contains. It has been called a timeless document with one grievous flaw—it did not abolish slavery. The forerunners of the compromises in the Constitution were in the Declaration itself.

The Declaration was a product of the

Third Continental Congress. A committee of five men were to be the drafters. Of those five, Thomas Jefferson was delegated the task of coming up with the first rough draft. In that original draft, he inveighed against the king of England for fomenting the slave trade, making the king the scapegoat for what has been called "that peculiar institution." One of his colleagues, John Adams, remarked that Jefferson's "flight of oratory" about slavery would never become part of the final document, and of course he was right.

The compromises continued into the drafting of the Constitution. Jefferson himself was away in France and so he did not have an opportunity to engage in flights of oratory about slavery, but in the Constitution of 1787, under the prodding of James Madison, the makers agreed that it would be wrong to admit in the Constitution that there could be property in man. One commentator noted "they were successful to the extent that they not only avoided use of the term slave or slavery but masked their references to the subject so skillfully that today laymen cannot identify the compromise clauses without the guidance of lawyers or historians." So let me be your guide.

The Constitution of 1787 created a governmental structure designed to solidify the Declaration's assertion that government derives its just power from the consent of the governed. Thus Article I, Section II, provides that the House of Representatives is to be composed of members chosen by the people and that those representatives are to be apportioned among the several states "according to their respective numbers which shall be determined by adding to the whole number of free persons three-fifths of all other persons." Translation: 'all other persons' means slaves.

At the time the Constitution was drafted there were about 50,000 free blacks in the United States but 700,000 slaves, most of whom were in the South. So this compromise led to the ironic fact that the slaves had no personhood but whites were entitled to representation in the legislature on the basis of the slaves' presence.

The second compromise is in Article I, Section 9, which prohibits Congress from interfering with the foreign slave trade before 1808. That section refers to the migration or importation of such persons. Translation: 'persons' is a euphemism for black slaves.

In another section of the Constitution, Congress is empowered to lay and collect taxes. A fear rose that a head tax on slaves might become so steep that slavery would be driven out of existence. Not to worry. There was a third compromise. Article I, Section 9 provides that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken." (Of course, the amendment which gave us income taxes makes this section obsolete.)

Yet another fear arose. Perhaps these compromises would be eliminated by a constitutional amendment. Not to worry. Article V contains a proviso that no amendment could be made prior to the year 1808 which would undercut the second and third compromises.

Then we have the final compromise, which was fueled in part by a decision of

England's Lord Mansfield. He had held that a slave who set foot on free soil gained permanent freedom. Under the Northwest Ordinance, the Northwest Territory of the United States was free soil. So the Constitution drafters were worried about fugitive slaves setting foot on free soil and becoming free. Not to worry. The fourth compromise, in Article IV, Section 2, undermined the Northwest Ordinance by stating: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall be discharged from such service or labor but shall be delivered up on claim of the party to whom such service or labor may be due." Translation: 'person' is a euphemism for black slaves.

Dred Scott and the Court

Later, slaves and their abolitionist allies tried to infuse some life into the Constitution. They went to courts and went to the U.S. Congress and said: "But we are persons." Those attempts failed. William Lloyd Garrison, the abolitionist publisher, admonished "The compact which now exists. . .is a covenant with death and an agreement with hell."

The compromises clearly foreshadowed the failures of the Constitution as well as the necessity for a Fourteenth Amendment and its equal protection clause. No place in the 1787 document – nor in the Bill of Rights appended immediately thereafter – was there even any guarantee of equality or any mention of the concept.

It literally took an act of Congress to deal with the question of equality, particularly between blacks and whites. The Missouri Compromise of 1820 allowed Missouri admission to statehood provided that certain territories north of a line were to be free.

Then along came Dred Scott. Born a slave in Missouri, he was purchased for $500 by a Dr. Emerson, an Army surgeon. When Dr. Emerson was transferred from Missouri to Rock Island, Illinois (a free state), he took Dred Scott along. There Dred struck up an acquaintance with Harriet, who was a slave of another army officer, a Major Taliaferro. Dred's wife had been previously sold off to slavery to someone else. So he and Harriet got together and had a child, Lizzie. Fortunately, both Dr. Emerson and Major Taliaferro were transferred to Fort Snelling, which was then in the Northwest Territory in what is now Minnesota. So Dred, Harriet and Lizzie are then in free territory. Eventually, Dr. Emerson was transferred back to Missouri, and Dred, wife Harriet, child Lizzy go along. Back in Missouri, Dr. Emerson died. Scott then tried to buy his freedom, offering Emerson's widow his $300 savings, but she said "No." So he took his $300 and went to see a lawyer. He filed suit in a Missouri court seeking his freedom, saying, in effect, "I am free because I have been in free territory."

Scott lost, but filed a new suit when widow Emerson married Calvin Chafee, a Massachusetts antislavery congressman who did not want to be involved in slaveholding. So the widow transferred responsibility for her husband's estate, which included Dred Scott, to her brother John Sanford and went off to the North to live happily ever after with her antislavery husband.

The Supreme Court heard the case twice. In the meantime a presidential election intervened, and President-elect Buchanan became involved. In fact, he had private correspondence with a number of the justices so he knew which way the Court was going to rule before he gave his inaugural address, in which he asked the nation to be calm and to accede to whatever the Supreme Court said about Dred Scott.

The decision, what Chief Justice Taney said in *Dred Scott v. Sandford* [sic], 60 U.S. 393 (1857), was devastating to the proponents of equality. In sum, he stated that: (1) the Declaration's phrase "all men are created equal" does not include blacks; (2) the compromise clauses in the Constitution "point directly and specifically to the Negro race as a separate class of persons and show clearly that they were not to be regarded as a portion of the people or citizens"; (3) Free blacks were regarded the same as black slaves and were not even in the minds of Constitution's framers; (4) blacks were not citizens of the states in which they resided whether the state was on free soil or not, nor were they entitled to any protection from the federal government; (5) unlike native American Indians, blacks could not even be naturalized citizens of the United States and could not get a passport identifying them as such; and (6) finally, in the language that is usually quoted from *Dred Scott*, Justice Taney said that descendants of Africans who were imported into this country as slaves have "no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit."

Under Taney's decision, Dred Scott remained a slave because he had no national citizenship, and because the Missouri Compromise, making a portion of the United States free territory, was ruled invalid.

In the aftermath, Dred Scott might well have recalled the moral of the slave folk tale of the goose and the fox. One day, brother fox caught brother goose and tied him to a tree. "I am going to eat you brother goose," he said, "you have been stealing my meat." "But I don't even eat meat," brother goose said. "Tell that to the judge and jury," said brother fox. "Who is going to be the judge?" asked brother goose. "A fox," said brother fox. "Who is going to be the jury?" brother goose inquired. "They are all going to be foxes," said brother fox, grinning so that all his teeth showed. "Guess my goose is cooked," said brother goose. In other words, if you are a goose, you are in trouble if your citizenship is to be decided by a fox.

The Dred Scott decision created an uproar. The Supreme Court was lambasted on some sides, hailed on other sides. In the midst of all this, Dred Scott himself contracted consumption and died. But *Dred Scott*, the case, has been linked to the beginning of the Civil War and, in an indirect way, to the beginning of the Fourteenth Amendment.

Changing the Constitution

After the Civil War, the radical Republicans launched a legislative program to rectify the centuries of slavery and to overturn *Dred Scott*. In addition, they promoted the Thirteenth, the Fourteenth and the Fifteenth amendments.

What is interesting about the Fourteenth Amendment, and particularly its equal protection and due process clauses, is that the radical Republicans believed that they were not needed. They operated under a political theory which said that men had natural rights and it was not the function of the federal government to interfere with those rights but rather to protect them, and thus, a Fourteenth Amendment would be unnecessary.

But, it was argued, you have to factor in a Supreme Court which might undo the legislative agenda represented by civil rights statutes passed after the Civil War. Remember that the Missouri Compromise, in which the Congress tried to make part of the nation free, was viewed as unconstitutional in *Dred Scott*. So the effort of the radical Republicans was to solidify in the Fourteenth Amendment their view of their legitimate rights as federal legislators.

Joyce A. Hughes is a professor of law at Northwestern University School of Law. This article is based on a speech she gave at an LRE leadership seminar in November of 1985.

Three very important concepts come out of the Fourteenth Amendment, and particularly the equal protection clause. Although they were intended to benefit black slaves primarily, they have benefited every citizen of these United States.

First was the concept of national citizenship under Section One's declaration that "All persons born or naturalized in the United States. . .are citizens of the United States." Before this amendment, one was considered to be a citizen only of the state of residence. Second was the express constitutional guarantee of a right to equal protection. Nowhere in the original Constitution was that concept to be found. And third, the Fourteenth Amendment led to a federalization of civil rights. William Lloyd Garrison noted, "When I said I would not sustain the Constitution because it was a covenant with death and an agreement with hell, I had no idea that I would live to see death and hell secede."

What was the result of the Fourteenth Amendment? For blacks it meant slavery was abolished, and equal protection and due process were made available. But as one commentator has said, one of the ironies of legal history is that although the Fourteenth Amendment turned out to be an excellent shield for protecting expanding capital from government restraints, it proved of little practical help to the emancipated slaves. By the turn of the century, equal protection had been reduced to a mere slogan for blacks, because in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court said separate but equal satisfied the Constitution.

Unintended Benificiaries

Looking at what the Fourteenth Amendment and equal protection have meant to everybody else, it's a very different story.

At first, it was thought that the amendment applied only to blacks. *The Slaughterhouse Cases*, 83 U.S. 36 (1872), the first Fourteenth Amendment cases to come before the Supreme Court, held that granting a private slaughterhouse and stockyard monopoly by Louisiana did not violate the amendment. Justice Miller, writing for the majority, said, in effect, that it was doubtful whether the amendment could ever be held to apply to anyone but blacks.

The irony is that the original intention was to benefit blacks, to get blacks on a par with the rest of the country. But the amendment quickly was applied to other groups and *not* to blacks.

Even a corporate entity received the benefits at an early date. In 1886, the Court had before it *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, a case involving the distinction between taxing corporations and people. The lawyers had briefed the question of whether a corporation was a person within the Fourteenth Amendment. At the beginning of oral argument, the Chief Justice announced that the Court did not wish to hear argument on the question of whether the provision in the Fourteenth Amendment which forbids a state to deny to any person the equal protection of the laws applies to corporations. He said, "we have the opinion it does."

Other groups have also gained from the presence of the Fourteenth Amendment, particularly its equal protection clause. Let's look at the case of *Wick Yo v. Hopkins*, 118 U.S. 356, (1886). Wick Yo was a Chinese laundryman in San Francisco, who needed a license to operate. Almost any Caucasian who applied for a license in San Francisco got one. To be precise, seventy-nine of eighty Caucasians applying for a license were granted one, but none of the 200 Chinese applying for licenses were given them. The Supreme Court held that this inequity violated equal protection of the laws. So *Wick Yo v. Hopkins* was one of the first cases to apply the Fourteenth Amendment to non-black racial groups.

One racial group initially not protected (and most people believe the original decision was wrong) were the Japanese-Americans who were put in concentration camps during World War II.

Korematsu v. U.S., 323 U.S. 214 (1944), upheld the constitutionality of the original relocation program, but recently claims for compensation by interned Japanese Americans have been honored.

How did the Fourteenth Amendment come to be applied to situations other than discrimination against blacks? One reason is that the radical Republicans had control of the Congress but they did not have control of the people's biases, nor could they direct the imagination of the country. Once the Fourteenth Amendment was there, the natural impulse was to co-opt the measure for the benefit of those with more leverage than blacks. At the same time, powerful social forces, in the South and elsewhere, created a climate for limiting the rights of blacks. After *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidating a state law excluding blacks from jury service, the amendment was rarely used to help blacks. The *Civil Rights Cases*, 109 U.S. 3 (1883), struck down the federal civil rights statutes of the reconstruction Congress, and *Plessy v. Ferguson*, 163 U.S. 537 (1896), instituted the notion that separate could be made to be equal.

Thus it is that a legal historian observed that if, at the mid point of the twentieth century one were to have tried to reconstruct American constitutional history by inspecting Supreme Court opinions, one could readily conclude that the Civil War and the amendments it spawned were concerned with freedom for the possessors of capital, perhaps the liberties of newspapers and periodicals and possibly the rights of criminal defendants. "Only in some kind of obscure way would the war be understood to have any bearing on the legal, political and social capacities of the forcibly expatriated African slaves."

Not until *Brown v. Board of Education*, 347 U.S. 483 (1954), was the promise of equality for blacks resurrected. However, as in the past, the Fourteenth Amendment and equal protection continued to expand to accomodate other interests.

Equal Protection Today

The equal protection clause provides the basis for a person to go before a court and complain about unequal treatment. What groups and what causes rely upon the concept?

Aliens. Recently, in *Pyler v. Doe*, 457 U.S. 202 (1982), the Court held that Texas could not deny undocumented alien children the same free public education available to other children residing in the state. The issue in these cases has been whether the state could show some legitimate reason for treating aliens different from citizens. Since the Fourteenth Amendment protects persons – not just citizens – only with a substantial state purpose can there be a difference in treatment.

Age. In *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), the Court considered an equal protection case involving age. Could a state regulation forcing state police officers to retire at 50 pass constitutional muster? The Court said yes. It held that the objective of assuring physical fitness of police officers is rationally furthered by a state regulation requiring uniformed state police officers to retire at age 50.

Welfare rights. A New Jersey program paid benefits to families in which the mother and father were married, but denied benefits when they were living in a common law relationship without a formal marriage. Although the state claimed an interest in promoting formal marriage relationships, the Court invalidated the distinction on equal protection grounds.

Long-time residents v. newcomers. A recent interesting case is from the state of Alaska, which has a permanent income fund from which it distributes money to its citizens. But Alaska treated new arrivals to the state different from those with a longer residence. Because this distinction denies equal protection of the law and penalizes the exercise of a person's right to travel, the Alaska scheme was struck down in *Zobel v. Williams*, 102 S. Ct. 2309 (1982). Here again, equal protection was a key concept.

Gender. In most challenges to sex-based classifications, equal protection has been the major thrust. In Idaho, a minor child of estranged adoptive parents had died, leaving an estate of less than a thousand dollars. The mother, Sally Reed, petitioned the Idaho courts to allow her to administer the estate; but Cecil Reed, the father, was chosen under a state law that gave preference to men over women when other qualifications of eligibility were equal. In *Reed v. Reed*, 404 U.S. 71 (1971), the Court held that a state statute could not prefer men as administrators of estates over women.

Orr v. Orr, 440 U.S. 268 (1979), addressed the question of whether a statute could deal with alimony differently depending on whether the female was paying the male or the male paying the female. The Court struck down the Alabama statute in question, which imposed alimony obligations on husbands but not on wives, on the grounds that it violated the equal protection clause.

What these cases illustrate is that the equal protection clause has been the focal point in constitutional claims of inequality where persons allege they are being treated differently from someone else. But equal protection is not the same as "equality" because some differences in treatment are condoned by the law.

Equal Protection Standards

One of the current issues for the women's movement is how the law should deal with those differences between men and women that do in fact exist. Because of those differences can we treat them differently? For example: A statute permits you to sell 3.2% beer to girls at age 18, but not to boys until they reach age 21. The rationale for the difference is that girls are involved in fewer offenses relating to drinking. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court held that the Oklahoma statute in question could not pass constitutional muster. The Court reasoned that the statistical evidence (that .18% of females and 2% of males in the 18-20-year-old age group were arrested for driving under the influence of liquor) "does not warrant the conclusion that sex represents an accurate proxy for the regulation of driving and drinking." The Court called such evidence "loosefitting generalities" that were insufficient under the equal protection clause to justify a gender-based classification.

Similarly, in *Arizona Governing Committee v. Norris*, 103 S.Ct. 3492 (1983), the Supreme Court required that retirement benefits be calculated without regard to the beneficiary's sex, despite the fact that women, on average, live longer than men. Thus mortality tables had to be done on composite gender-merged or "unisex" basis. No longer would it be permissible to provide women with lower benefits per month, on the assumption that they would live longer.

How does one determine whether equal protection has been violated by treating persons differently? There are three basic approaches that the Supreme Court uses.

One issue the Court has to determine is whether or not there is any rational connection between the classification and the result sought to be achieved. If there is any kind of *rational* connection, that classification or that difference or that distinction is permissible unless you are dealing with what has been referred to as "discreet and insular minorities." If that is the case, when a classification or difference in treatment burdens – not advantages but burdens – a discreet and insular minority, then the distinctions are subject to the second standard, known as "strict scrutiny," under which the government must show a *compelling* state interest in order for the classification to stand.

The compelling interest test to determine whether classifications discriminate views laws as "inherently suspect" if they are based upon characteristics determined "solely by the accident of birth." Here the Court requires more than a "substantial" relationship between the law and its purpose – a showing that the state had a "compelling interest" in drafting the law as it did. (This standard was advanced in the majority opinion in *Korematsu*, which

(continued on page 44)

"I just remembered – we're probably forfeiting our security deposit."

Equality

Sex Discrimination/Grades 7-12

Dale Greenawald

By analyzing a series of situations based upon landmark sex discrimination cases, students will identify some of the legal principles concerning this topic. At the end of the 45-minute activity they should be able to explain legal reasoning in sexual discrimination cases; to support equality of opportunity; and to develop critical thinking skills.

Procedures

Provide students with the readings in the box on page 25 (constitutional provisions and laws dealing with equality). Tell students to apply these guidelines as criteria for determining if illegal discrimination has occurred or not.

Have students form groups of four or five and assign each student a case to consider (divide the cases among the groups). After each person has come to a conclusion with regard to his/her case, share their answer and reasons with the group. Each group should discuss each of its cases and seek to reach a group consensus for each one.

After each small group has analyzed each of its cases and developed a response, discuss each case as an entire class. The teacher or resource person should explain the reasoning behind each case and respond to student questions. It is extremely important to explain each decision in sufficient detail for students to grasp the principles underlying that decision.

At the conclusion, the entire class should consider:

1. Are there ever any justifiable reasons to treat men and women differently?
2. Can different treatment be fair and just?

Sex Discrimination Cases

Consider each of the following situations and decide if you think it is an example of illegal discrimination or not. Also consider for each situation some reasons for treating women differently from men and reasons for treating them the same.

1. Congress passes a resolution requiring all males – but not all females – to register for the draft.
2. Two sisters, one 5 foot 6 inches weighing 170 pounds and one 5 foot 9 inches weighing 212, decide to try out for their high school football team because there is no girls' team. The State Interscholastic Athletic Activity Association declares the girls ineligible.
3. Alice Keene is refused a job because the job description requires the employee to lift bags weighing about 30 pounds.
4. The Gravel Hill Glass Company pays an all-women day shift less than an all-male night shift which does the same work.
5. JoCarol Lafleur is a teacher in a junior high school. School board policies force her to take an unwanted leave without pay five months before she expects a child.
6. The Widget Manufacturing Company has 150 assembly-line employees, all of whom are men. The company doesn't hire women for its production jobs because it says its male workers would be distracted and productivity would decline.
7. Joyce finds out that her employer is requiring her to pay more per month for pension benefits than it requires male employees to pay. The company says this difference reflects the fact that women as a group live longer, so she will probably live longer than the males and, therefore, receive more benefits.
8. Nancy Oaks-Johnson applies for a credit card from the local department store. She uses her maiden name, Nancy Oaks. The store will not issue a card in that name, but it will issue one for Nancy Oaks-Johnson.
9. Harvey Miller works at Fred's Fast Foods. He is told to get a shorter haircut, although all of the women who do the same work have longer hair than Harvey. They wear hair nets.

Teacher/Resource Person Background

1. The U.S. Supreme Court decided the case of the all-male draft. In *Rostker v. Goldberg*, 453 U.S. 57, the Court held that the male-only requirement did *not* violate the due process clause of the Fifth Amendment. (The Fifth Amendment is involved, rather than the Fourteenth, because the draft is a federal matter.) The Court reasoned that Congress was acting well within its constitutional authority to raise and regulate armies. The Court said that it customarily deferred to congressional judgments regarding military affairs, and should so defer in this case, since Congress had extensively considered the constitutional implications of its actions. The Court noted that the arguments pro and con were extensively aired in congressional hearings, and it is not for courts to reconsider this evidence and substitute their judgment for that of elected representitives.
2. In this hypothetical, the language of the controlling statute – Title IX of the Education Act Amendments of 1972 – would require the school either to begin a girls' football team or permit the girls to try out for the boys' team.
3. In *Weeks v. Southern Bell Telephone and Telegraph*, 408 F.2d 228 (1969), the Court considered the case of a woman who filed suit under Title VII of the Civil Rights Act of 1964 when she was denied the job of switchman because the company labelled the work "strenuous" and said that it was unsuitable for a woman. The Court held that the company had the burden of proof of showing that its gender-related classification was a "bona fide occupational qualification." The Court said this exemption from the normal rule was intended to be narrow, and that the company had not met the burden of proof.
4. The Equal Pay Act of 1963 requires employees doing equal work to be paid the same. Unless the employer could convince a court that workers on the night shift were facing different working conditions from those facing the day shift, the two shifts would have to be paid equally.

5. In *Cleveland Board of Education v. Lafleur,* 414 U.S. 632, the Supreme Court held that regulations such as this one are arbitrary and violate the due process clause of the Fourteenth Amendment. Such a rule creates a conclusive presumption that every teacher who is five-months pregnant is physically infirm, whereas in actuality the woman's health is an individual matter.
6. In this hypothetical, the company would clearly be required to hire women. The language of Title VII of the Civil Rights Act of 1964 is clear on this point.
7. In *City of Los Angeles Water and Power Department v. Manhart,* 435 U.S. 702 (1978), the Supreme Court decided a class-action suit brought by women employees under Title VII of the 1964 Civil Rights Act. The Court held that requiring them to pay more into the pension fund violated the law, since it resulted in "treatment of a person in a manner which but for the person's sex would be different." The statute focuses on fairness to individuals rather than classes, precluding a justification which rests on generalizations about one of the sexes.
8. In this hypothetical, the store's action seems clearly to contravene the Equal Credit Opportunity Act of 1974.
9. This seemingly simple hypothetical has several layers of interpretation. Much depends on why Fred wants Harvey to get a haircut. If long hair is a safety or health hazard, he would certainly be within his rights to require Harvey to do something about his hair. Indeed, he might have no choice but to insist that his hair be controlled in some way. However, if he requires a male to get a haircut while permitting females to wear hairnets, he could be in trouble with the law. An even-handed approach would be to establish gender-neutral standards for hair, which would meet the health and safety standards without imposing stereotyped solutions on either gender. Thus he might require all employees to have no unsecured hair longer than x inches, which would leave them the option of getting haircuts or wearing hairnets.

Equality

Discrimination and the Law/Grades 9-12

Dale Greenawald

Some types of discrimination are not only legal, but morally defensible. For example, four-year-olds cannot obtain a driver's license. This 45-minute activity examines discrimination in a variety of contexts. By analyzing cases students will recognize the standards used when deciding discrimination cases, interpret major sources of civil rights legislation, and support the extension of civil rights to all.

Procedures

Ask students how many think that all discrimination is illegal. Discuss why. Then provide a definition of discrimination, "The classification of people into different groups according to some criteria."

Ask students to think of some legitimate examples of discrimination, e.g., driver's licenses only for those of a certain age who have passed a test; police officers able to carry arms while others may have to meet certain criteria; only those with special training permitted to be air traffic controllers. Ask students why these types of discrimination are acceptable. (The key response is that they are rationally defensible).

Explain that the courts use three primary tests to determine if an example of discrimination is legal. List these "tests" on the board and explain each:

1. *Rational Basis Test:* This is the most commonly used test to determine legal discrimination. It simply asks if there is a rational relationship between the classification and the law in question. For example, it is permissible for a law to deny a blind person a driver's license because it is rational to assume that a totally blind person cannot drive safely. There is a rational relationship between the law and the placing of blind persons in a special category with regard to driving.
2. *Substantial Relationship Test:* This test applies primarily to sex discrimination cases. It is more stringent than the "rational basis" test and effectively shifts the burden of proof on to the government, which must prove that the law in question serves important govermental objectives and that there is a close connection between the categories established by the law and the purpose of the law. For example, let's look at a law permitting the sale of alcoholic beverages to women at an earlier age than males because women are arrested less often for drunken driving. Does this example of discrimination (1) serve an important objective and (2) achieve the objective? In fact, in an actual Supreme Court case, *Craig v. Boren,* 429 U.S. 190 (1976), a similar law in Oklahoma was rejected under this test because it failed to achieve its objective. The Court reasoned that the statistical evidence was insufficient to justify establishing categories based on gender. Besides, the law might well not have achieved its objective anyhow. It wasn't against the law for boys 18 or 20 to *possess* beer, so women 18 to 20 could purchase beer and provide it to males, thereby undermining the intent of the law.
3. *Compelling Interest Test*: A law that discriminates on the basis of race, national origin, or alienage is viewed as "inherently suspect." That means that laws or practices discriminating on the basis of race, national origin, or alienage will be examined very critically by the courts, and that this test is the most stringent. These laws or practices will be declared unconstitutional unless the government can demonstrate that it has a *compelling* interest which demands such classification. Moreover, the government must show that there is no less offensive means to achieve its goal. For example, under this test the relocation of Japanese-Americans during World War II was upheld because of the extraordinary wartime need for national security. Very few other laws singling out a racial group for special treatment could pass constiutional muster. It is very hard to imagine, for example, sufficient justification

for a law prohibiting a particular national group from obtaining driver's licenses.

Divide the class into groups of four students and provide each group with one of the following cases and with the summary of the major civil rights laws on page 25. Several groups can independently analyze the same case. Ask students to analyze the cases according to the applicable laws and the three tests given above.

Each student should be primarily responsible for answering one of the four questions below. After each student gives his/her response to the question, the small group should discuss it and attempt to reach a consensus opinion. After each group has reached a conclusion regarding their case, debrief each and respond to the questions which they generate.

Student Questions for Each Case

1. Who is discriminating against whom?
2. What are the results or possible results of this discrimination?
3. What would be the effect upon individuals and society if this discrimination were prohibited?
4. Should this discrimination be prohibited? Why? Why not?

Case Studies

CASE 1

Brian Weber is a white male employed by the Kaiser Aluminum Company in a plant in Louisiana. He applies for a training program to learn a skilled trade, but is rejected by Kaiser because the company and the union have agreed that 50% of the training positions will be for whites and 50% for blacks. The company and union instituted this policy because blacks were 40% of the workforce, but only 2% of the skilled employees. Weber feels that he is being discriminated against because of his race. He sues the company on the basis of Title VII of the Civil Rights Act of 1964.

CASE 2

K. Leroy Irvis, a prominent Pennsylvania politician, is refused admission to the Harrisburg Moose Club, a private club. Although he is the guest of a member, the club refuses to serve him because he is black. Irvis sues the club, reasoning that since the state licences the club to sell liquor, state action to discriminate is involved, in violation of the Fourteenth Amendment.

CASE 3

Diane Rawlinson recently completed a college program in correctional psychology. She passed all of the college courses and wants to work as a prison guard. She applies for a guard position but is rejected. The state rejects her because she does not qualify under height and weight requirements (she is less than 5'2" and under 120 lbs). Diane sues the state, claiming that she is being illegally denied the position. While her case is pending, the state promulgates a second regulation, this one explicitly stating that females are barred from being prison guards at maximum security prisons. This in effect limits severely the number of openings Diane can apply for. On the height and weight issue, she presents evidence that 42% of all women would be excluded from the job because of the height and weight requirements, but only 1% of males would be ineligible. She argues that neither regulation can meet the criteria established to determine whether discrimination is constitutionally permissible.

CASE 4

Officer Murgia is in excellent physical condition. He runs, lifts weights and maintains a strenuous program to keep his body in shape. For the last ten years he has passed every police department physical and been given an excellent bill of health. However, upon reaching his fiftieth birthday, the state forces him to retire because of a state law requiring all officers to retire at age 50. Murgia sues the police department, claiming that he is being denied equal protection of the law, as guaranteed by the Fourteenth Amendment, because of his age.

CASE 5

Francis Davis has a very serious hearing impairment. Although she has a hearing aid, she cannot understand speech unless she can lip read. She applies for a federally funded program in order to become a nurse. During her application interview, her hearing problem is obvious and the school rejects her, claiming that she cannot safely participate in the program or later care for patients in a safe manner. She sues the school, claiming discrimination against the handicapped.

Lawyer/Teacher Background

CASE 1

In *United Steel Workers of America v. Weber,* 443 U.S. 193 (1979), Weber lost his case. The Supreme Court held that there was no constitutional issue here since the equal protection clause does not apply to hiring policies of private companies. The majority felt that an employer and union might jointly develop programs to eliminate the vestiges of past discrimination and segregation. In the plant, for example, blacks held a substantially smaller percentage of the skilled jobs than their percentage of the population in the surrounding community. Although the Court had earlier held that federal civil rights laws protected white as well as minority persons, neither did they prevent employer and union from entering into an agreement to expand opportunities for historically disadvantaged minorities. That was all the parties had done here, so the Court had no need to define the outer limits of these laws.

CASE 2

Decision of the United States Supreme Court

In *Moose Lodge No. 107 v. Irvis,* 92 S.Ct. 1965 (1972), the Court held that the state licensing of a private club does not significantly involve the state in the discriminatory practices of the club in order to establish a violation of the equal protection clause.

Reasoning of the Court

The equal protection clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to state actions only; that is, a state must in some way be involved in the denial of equal protection.

Justice Rehnquist stated in the opinion for the majority that discrimination by private bodies does not violate the equal protection clause unless the state is significantly involved with the discrimination. He found no signifcant involvement by the state of Pennsylvania in the discriminatory practices of the private lodge. He stated that the mere licensing of the private lodge for the purpose of selling alcoholic beverages in no way involved the state in fostering or encouraging racial discrimination because the State Liquor Control Board played no part in establishing the club's guest policies nor was it a "joint partner" in the racial discrimination.

Justices Douglas, Marshall, and Brennan dissented, finding that since the availability of liquor licenses was restricted by the state, the ability of black people to obtain liquor was being restricted by the state. Therefore, there was sufficient state action in the pattern of regulations used by the state to control the sale of liquor.
(Used by permission from *A Resource Guide on Contemporary Legal Issues. . . For Use in Secondary Education,* a publication of Phi Alpha Delta Law Fraternity, International.)

CASE 3

The Supreme Court's Reasoning

The Supreme Court faced this sex discrimination problem in the case of *Dothard v. Rawlinson,* 97 S. Ct. 2720 (1977). Diane Rawlinson was denied a job as a prison guard because of her physical size and because of a regulation explicitly denying women the chance to be prison guards at maximum security installations. She sued the prison for illegal discrimination under Title VII of the Civil Rights Act of 1964 and asked that she be given the job.

Addressing the height and weight requirement first, a majority of justices said there had been improper discrimination because of the disproportionate impact of the height and weight regulations on women. The reasoning behind this conclusion was that height and weight requirements were not job related, and to the extent that they denied women the opportunity to compete for jobs as prison guards they established an improper pattern of discrimination. They felt that the only reason to require prison guards of a certain size was to guarantee that the guards be strong. This, they said, could be done without unevenly affecting females. They suggested giving strength tests: "Such a test," they concluded, "would be one that 'measures the person for the job' and not the person in the abstract." (If, however, "appearance of strength" was the requirement, two justices said that this would convince them to rule that the regulations were reasonable and necessary.)

As to the regulation explicitly denying women the opportunity to be prison guards, the majority cited the "rampant violence" and "jungle atmosphere" that prevails in Alabama's prisons. In view of the fact that 20% of the inmates were sex offenders, the Court concluded that this regulation was lawful, since it was a bona fide occupational qualification of that job.

The dissenters said that the regulation officially banning women was based on old myths. Women, they said, should not continue to be looked upon as "seductive sexual objects." It is their choice if they want to subject themselves to this potential danger. Furthermore, the dissenters said, what better way to train these sex offenders to live in society than to expose them to a more natural environment with guards of both sexes.

Questions

1. Which arguments would you accept as the most valid in this case?
2. How paternalistic should society be? In other words, do you feel it is right to tell women, or anyone, that they cannot do something because it is too dangerous? How would you balance this with freedom of choice? What about the balance this makes with equal protection under the Fourteenth Amendment?
3. The dissenters used this quote in their argument: "Once again 'the pedestal upon which women have been placed has. . .upon closer inspection, been revealed as a cage.' " What did they mean by this? Do you agree?
4. Reflect on the physiological differences between the sexes and ask yourself to what degree these affect equal treatment under the law.

(Used by permission of the Constitutional Rights Foundation and adapted from the *Bill of Rights in Action.*)

CASE 4

The Court ruled *Massachusetts v. Murgia,* 427 U.S. 307 (1976), that rationality, rather than strict strutiny, is the proper standard, since strict strutiny is required only where a legislative classification interferes with a fundamental right or works to disadvantage a suspect class. Since Murgia was not a number of such a class and working for the government is not a fundamental right, Massachusetts prevailed by showing that it had acted reasonably in assuming that there is a relationship between age and physical fitness. The Court went on to add that "drawing distinctions is. . .a legislative task and an unavoidable one. Perfection in making the classification is neither possible or necessary." Therefore, it was reasonable to draw the line at some age, and the Court upheld the retirement standard.

CASE 5

In *Southeast Community College v. Davis,* 442 U.S. 397 (1979), the Court decided in favor of the school. The case hinged on the definition of the phrase "otherwise qualified handicapped person" in the Rehabilitation Act of 1973. Did the lawmakers intend to protect persons who were qualified but happened to be handicapped, or did they intend to protect those whose handicap rendered them unqualified? Applying the first definition, the federal district court held that since Davis was unqualified for the program because of her handicap, the law didn't apply to her. Applying the second definition, the appeals court disagreed. It held that the words "otherwise qualified" meant that the school should have looked to her other qualifications, her "academic and technical qualifications." If she was qualified under these standards, then the school might be required to engage in "affirmative conduct" to accommodate her. A unanimous Supreme Court overruled the appeals court. It found that the Rehabilitation Act does not require educational institutions to use affirmative action policies to accommodate persons whose handicaps render them unqualified to meet the normal standards of the profession.

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Major Federal Civil Rights Laws

Amendment V: No person shall...be deprived of life, liberty, or property, without due process of law...(applies to the federal government; a similar provision in Amendment XIV applies to state governments)

Amendment XIV: No state shall deny to any person within its jurisdiction the equal protection of the law.

Equal Pay Act of 1963

- Requires equal pay for equal work, regardless of sex
- Requires that equal work be determined by equal skill, effort, and responsibility under similar working conditions at the same place of employment
- Requires equal pay when equal work is involved even if different job titles are assigned

(Enforced by the Wage and Hour Division of the U.S. Department of Labor or by private lawsuit)

Civil Rights Act of 1964 (amended in 1972)

- Prohibits discrimination based on race, color, religion, or national origin in public accommodations (e.g., hotels, restaurants, movie theaters, sports arenas). Does not apply to private clubs not open to the public.
- Prohibits discrimination because of race, color, sex, religion, or national origin by businesses with more than fifteen employees or by labor unions. This deals with hiring, recruitment, wages, and conditions of employment. (This section is commonly referred to as Title VII).
- Permits employment discrimination based on religion, sex, or national origin if it is a necessary qualification of the job (a "bona fide occupational qualification")
- Prohibits discrimination based on race, color, religion, sex, or national origin by state and local governments and public educational institutions
- Prohibits discrimination based on race, color, national origin, or sex in any program or activity receiving federal financial assistance, and authorizes termination of federal funding when this ban is violated

(Enforced by the Equal Employment Opportunity Commission or by private lawsuit)

Age Discrimination in Employment Act of 1967 (amended in 1978)

- Prohibits arbitrary age discrimination in employment by employers of twenty or more persons, employment agencies, labor organizations with twenty-five or more members, and federal, state, and local governments
- Protects persons between the ages of forty and seventy
- Permits discrimination where age is a necessary qualification for the job

(Enforced by the Equal Employment Opportunity Commission or similar state agency)

Title IX of the Education Act Amendments of 1972

- Prohibits discrimination against students and others on the basis of sex in educational institutions receiving federal funding
- Prohibits sex discrimination in a number of areas, including student and faculty recruitment, admissions, financial aid, facilities, and employment
- Requires that school athletic programs effectively accommodate the interests and abilities of members of both sexes. Equal total expenditure on men's and women's sports is not required.
- Does not cover sex-stereotyping in textbooks and other curricular materials

(Enforced by the Department of Education's Office of Civil Rights)

Rehabilitation Act of 1973

- Prohibits private and government employers from discriminating on the basis of physical handicap
- Requires companies that do business with the government to undertake affirmative action to provide jobs for the handicapped
- Prohibits activities and programs receiving federal funds from excluding otherwise qualified handicapped persons from participation or benefits

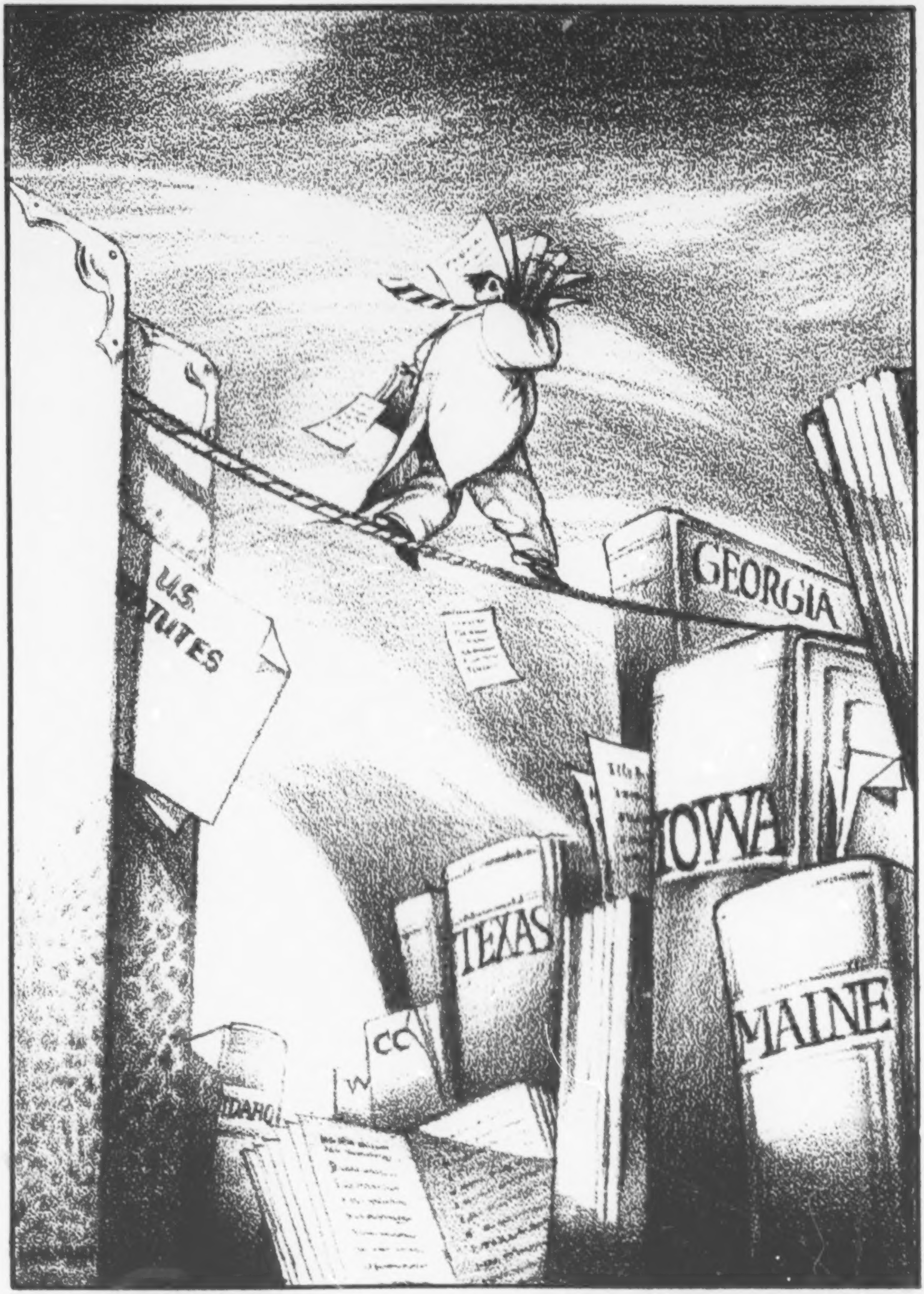
(Enforced by lawsuit in federal court or, in some cases, state or local human rights or fair employment practices commissions)

Equal Credit Opportunity Act of 1974

- Requires all financial institutions to make credit equally available to credit-worthy customers, regardless of sex and marital status
- Prohibits creditors from: asking the sex of the credit applicant; asking about the use of birth-control procedures or the applicant's child-bearing plans; differentiating between male and female heads of households; insisting a married woman's charge accounts be in her husband's name; terminating credit based on change of marital status; and requiring a credit cosigner of a woman when one would not be asked of a man

(Enforced by civil suit against the violator for as much as $10,000 in damages or by complaints filed with the Federal Reserve System (banks) or the Federal Trade Commission (all other institutions))

(Most of the above is used by permission from *Street Law: A Course in Practical Law,* Arbetman, McMahon, and O'Brien (St. Paul: West Publishing House, 1980) pp. 306-308.)



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Richard Laurent

CONSTITUTIONS AT WORK

Robert S. Peck

When the Constitution Isn't Enough

The Bill of Rights guarantees a lot, but state charters sometimes guarantee even more

When David stepped onto the battlefield to face Goliath, he carried only a slingshot. That choice of arms had not occurred to other soldiers; it was a mere child's toy, not a weapon of war. When David's slingshot succeeded where arrows and spears had failed, legend was born.

In many ways, state constitutions have become the slingshots of battles taking place in the judicial arena. They are often considered quaint necessities that, to the extent they are acknowledged at all, are mere miniaturizations of the federal charter.

But today, state constitutions are being rediscovered. They're undergoing a surge of development and examination that is likely to lead to the enunciation of previously unrecognized state-based constitutional rights. We could be heading into a period of unfettered experimentation and activism among the state courts, with important ramifications for the future of constitutional law.

Warren Court Lives – in the States

Many Supreme Court watchers have characterized the Burger era as a retrenching period. Its predecessor, the Warren Court, saw its mission, in part, to champion the rights secured under the Constitution against the abuse of governmental power. When the Court was defining a previously unrecognized set of constitutional rights, state constitutions were relegated to a position of relative insignificance, ignored by lawyers and judges as subservient (if not irrelevant) to the federal Constitution. To the extent that courts, both state and federal, considered state constitutions, their analyses merely aped federal developments.

During the Warren era, constitutional cases involving civil liberties and civil rights naturally flowed to the federal bench. State courts were commonly thought hostile to the constitutional claims plaintiffs were making. In the 1961 James Madison Lecture at New York University School of Law, Justice William Brennan said, "Far too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel, and downright brutality."

To Justice Brennan, perhaps the current Court's most liberal member and one who finds himself more frequently in the minority than the majority, the abuses that once rose up from the states are now being better addressed by the state courts. Justice Brennan's view probably results from the fact that many of the state courts have picked up the Warren Court's philosophy at the same time the U.S. Supreme Court has abandoned it. Brennan accused the Court, in a speech to law students at Mercer University last fall, of having "condoned both isolated and systematic violations of civil liberties." He observed that advocates are avoiding the Court as a result.

"This increasing resort of using the state constitutions and state courts," he said, "has been accompanied by a decline in the number of cases [involving individual rights] being brought to the Supreme Court."

"During the Warren era," University of Virginia law professor A. E. Dick Howard explains, "states could hardly keep up. Today, they're simply being more active and more visible."

There is no simple explanation for the seeming role reversal of the state and federal courts. One factor, though, may be the increasing professionalism of state court judges. Through programs like the National Judicial College in Reno, Nevada, continuing judicial education has become a major factor in familiarizing state court judges with the latest legal developments and providing an opportunity for judges from different states to share acquired wisdom.

Says Professor Howard, "There has been a coming of age of a generation of state judges who are more aware of state constitutions and because of the U.S. Supreme Court's change in direction have an opportunity to develop state constitutional claims."

"By dusting off our state constitutions," former New Hampshire Supreme Court Justice Charles G. Douglas III wrote for the *Suffolk University Law Review* in 1978, "judges can be 'activists' in the best sense of the word and breathe life into the fifty documents."

The result is that state courts, rather than those in the federal system, may be the more receptive forum for exploring new constitutional terrain. While both state and federal claims can be litigated in the state courts, the federal courts will generally not explore state constitutional requirements. As a result, more and more cases that would have gone to Washington, D.C. in the past are now headed to state courts for decisions based, in part, on state constitutional provisions. And increasingly, state supreme courts are interpreting their constitutions as providing citizens with greater protections than have been found available under the parallel federal provisions, even those provisions that are phrased identically.

New Safety Net

It may seem surprising, but there is nothing wrong with state constitutional provisions that go beyond the national provisions. It is inherent in our federal system of government that state constitutions can provide better protection in some cases than does the U.S. Constitution. The federal charter, as "the supreme law of the land," provides the safety net of constitutional rights that must be accorded to individuals. No state constitution can provide for less than the federal one does. To the extent that state constitutions provide less protection, they are superseded by the federal provisions. However, states individually have the authority to raise that net to provide for greater rights. State constitutions thus can provide more protection than the federal Constitution against governmental interference with people's lives.

State decisions can establish significant rights because state supreme court decisions based on *state* constitutional provisions are not reviewable by the U.S. Supreme Court. Just as the U.S. Supreme Court is the final arbiter of questions under the federal Constitution, state supreme courts have the last say about their constitutions. The test of whether the state decision is reviewable by the U.S. Supreme Court is whether the decision rests on grounds that are adequate to the decision reached and independent of any federal law.

The U.S. Supreme Court laid out the guidelines for reviewability in *Michigan v. Long*, 463 U.S. 1032 (1983). There, the Court reversed a state court decision that excluded evidence from a criminal trial based on considerations under both the Fourth Amendment and the Michigan Constitution. The Court determined that "when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

In *Long*, the Michigan Supreme Court determined that police conducted an unreasonable search of the defendant's car after stopping him on suspicion of drunk driving. The police were searching for weapons in the car after having spotted a hunting knife on the floorboard; they found a pouch of marijuana. The Michigan court held that protective searches under the Fourth Amendment were permissible only where there was a reasonable danger of harm to the police officers. Because the police had control of the suspect outside of his vehicle, the court determined that there was no danger to the officers. Without further analysis, the court also found the police conduct proscribed by the Michigan Constitution. The U.S. Supreme Court reversed, finding that the Fourth Amendment was misconstrued by the state court and that no clear justification for different treatment under the Michigan Constitution was articulated.

The *Long* decision clearly changed longstanding practice. Since 1890, the Court has generally deferred to state decisions when the opinion could reasonably be said to rest on a state ground, or even when the grounds for the judgment were ambiguous. In *Long*, the Court declared that only a clear statement and analysis of state law would support an adequate and independent ground. Merely coupling a state constitutional ground with its federal counterpart would no longer be sufficient.

Justice John Paul Stevens dissented, suggesting that a flood of cases like this one would reach the Court precisely because the Court had reversed the presumption in favor of adequacy and independence.

Stevens noted: "Until recently we had virtually no interest in cases of this type. . . . Some time during the past decade. . .our priorities shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens."

But according to New Hampshire's Justice Douglas, what *Long* said is "stand up and be counted." He believes state court judges have been "lazy," using the U.S. Supreme Court as an excuse. "It has often been a cop-out for some appellate judges to say that the Supreme Court has said what to do," he says. "They don't have to think the problem through *de novo*. They don't have to study the history and debate [of the state constitutional provisions]."

Professor Howard agrees. "Where the state [constitutional] provision is different – clearly not an echo – there are obvious grounds for distinguishing [the decision from federal precedents]," he said. "The burden on the state court is to advance a principled basis for its decision. Too often state courts are not too articulate. *Michigan v. Long* may oblige them to take this obligation more seriously."

"Simply because a state constitution uses the same phrase does not mean it relies on federal precedents," he adds. "They are free to make an independent choice, but must explain that choice."

New Activism

In recent years, Washington Supreme Court Justice Robert F. Utter believes, "the attention of state courts has been directed to their own constitutions as an intellectually honest way to deal with problems. There has literally been an explosion of state awareness of state constitutions."

Robert S. Peck is an attorney who directs the American Bar Association's project, We The People, *celebrating the 200th anniversary of the U.S. Constitution. A somewhat different version of this article appeared in the ABA's* Student Lawyer *magazine.*

Examples of state supreme court activism come from virtually every state, though some have emerged as leaders. One has been the New Jersey high court, which recently held that the state constitution's due process clause requires communities to permit construction of needed low-cost housing. The impact of the remedies endorsed in the innovative 1983 decision will not only affect exclusionary local zoning decisions in New Jersey but, quite possibly, land use policies throughout the nation as zoning boards consider the possibility that their courts might follow suit. It is another instance of a state court taking the lead in constitutional development. This same New Jersey court considered the first constitutional "right to die" case, *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), where it found the parents of a terminally-ill patient could terminate the extraordinary medical measures that were keeping her alive.

A Different Approach

When the state of Washington was admitted to the union a century ago, its leaders examined the U.S. Constitution closely to guide them in writing a state charter. The drafters of the state constitution specifically rejected language that would have mirrored the Fourth Amendment's prohibition against unreasonable searches and seizures in favor of an explicit right of privacy, something that the U.S. Supreme Court has said is implied in the federal Constitution but has had difficulty in justifying. A court asked to construe the Washington provision would be justified in concluding that it affords broader privacy rights than does the U.S. Constitution.

Other state constitutions similarly establish more extensive rights than does the federal document. Though its advocates have been unsuccessful in adding an equal rights amendment to the U.S. Constitution, seventeen states guarantee equal rights for women in their constitutions. The federal Constitution does not recognize education as a fundamental right; a plaintiff in a school case thus is forced to prove that an allegedly discriminatory practice furthers no rational state interest under equal protection standards set by the U.S. Supreme Court. However, since the end of the last century, the New York Constitution has guaranteed a free public school system in the state. A New York court is thus likely to give a civil rights question in the schools stricter scrutiny – requiring that the practice be necessary to carry out a compelling or overriding governmental interest – because of this constitutional provision.

Generally, state constitutions are longer and more detailed than their federal counterpart; only Vermont's is shorter. Though the federal Constitution has 26 amendments, the average state charter has over 90. As a result, issues that are the subject of statutory law at the federal level are often elevated to constitutional status in the states. Education and environmental protection are frequent examples of this phenomenom.

Many modern constitution-based understandings had their origins in the state experiences. "State supreme courts were the first to develop a number of doctrines that were later put into the cornerstones of our legal framework," Justice Utter notes. "Ten states preceded *Marbury* [*v. Madison*, 5 U.S. 137 (1803) the U.S. Supreme Court decision confirming the power of the Court to declare a statute unconstitutional]. If state courts were discouraged in analyzing and commenting on federal constitutional principles, the U.S. Supreme Court would be deprived of a rich source of analysis."

Oregon had an exclusionary rule with respect to illegally obtained evidence before the U.S. Supreme Court established the federal rule in *Weeks v. United States*, 232 U.S. 383 (1914); Wisconsin's supreme court anticipated the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), by over a century.

The state courts continue to grapple with modern constitutional dilemmas. In 1976, for example, the California Supreme Court faced a case involving whether a defendant in custody must have his rights under the Fifth and Sixth Amendments explained before he could be considered to have waived any of those rights. In *People v. Disbrow*, 16 C.3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), the court held that statements made by a suspect prior to being read his rights could not be used to impeach his testimony at trial. In doing so, the California court rejected a conflicting 1971 U.S. Supreme Court decision as "not persuasive" and relied instead on "the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens. . ." The supreme courts of Hawaii and Pennsylvania have taken similar positions on this issue.

State supreme courts often face questions of immediate concern before they have become a national trend. In that way, they must deal with certain types of issues before they might reach the U.S. Supreme Court. The decisions of the state tribunals provide a persuasive authority for other supreme courts in addressing the same issue.

"The U.S. Supreme Court must pick the lowest common denominator," Utter observes, "for it covers 50 states. State supreme courts must look to the problems in their own part of the country and consider the intent of their drafters. That factor alone makes a different interpretation possible."

That states have a different history behind the development of their constitutional provisions and different governmental interests and traditions to maintain explains how they reach different conclusions, even on similar issues. Alaska has a decision that guarantees the right of individuals to smoke marijuana at home. The decision is based on a concept of privacy and freedom that takes to heart the idea of the home as a private keep, where individualism and adventure can reign relatively free. While the Alaskan decision is not likely to be followed in very many states, it provides an example of how a state interprets its laws in terms of its unique environment and traditions.

The new attention given state constitutions has reopened old issues. Some lawyers are relitigating in state courts causes that were lost at the federal level. In 1972, for example, the U.S. Supreme Court held that the First Amendment didn't require shopping malls to permit access to citizens engaged in expressive activity. In California, the supreme court voted to allow access to malls to political expressions under the state constitution. Courts in Massachusetts and Washington have reached similar results, while Pennsylvania and New Jersey have limited their decisions to free expression at private universities, not shopping malls. The Connecticut Supreme Court and New York Court of Appeals have also found that no free speech rights exist in a mall under those states' constitutions.

Judges are sensitive to the charge that they are simply using the state constitutions to avoid undesirable U.S. Supreme Court precedents.

"What has happened," Utter says, "is states are examining the language of their constitutions and have a proper role in defining its meaning. This is responsible jurisprudence, not result-oriented."

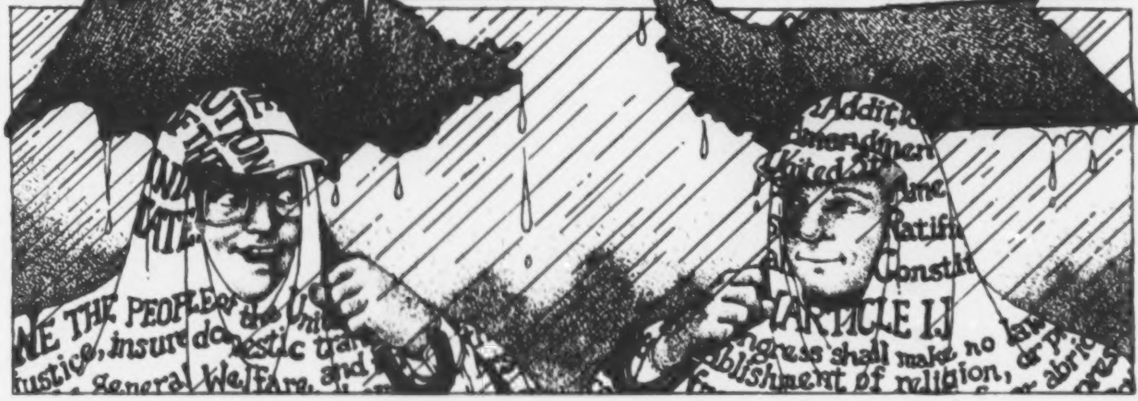
The new emphasis on state constitutions may also have some unintended consequences. State constitutional changes are not as difficult to achieve as federal amendments. Many states have redrafted

(continued on page 48)

Limiting Government

Comparing State and Federal Constitutions/Secondary

Lucinda J. Peach



Many state constitutions limit government and protect individual rights with provisions very similar, if not identical, to those in the federal Constitution. This is not surprising, since many state constitutions were modelled directly upon the federal one. As the prior article demonstrates, however, state constitutions may provide very different protections for individual rights than does the federal document. In drafting their constitutions, some states looked to the documents of their sister states as models and ignored the federal Constitution.

The Supreme Court has interpreted the U.S. Constitution to provide only the minimum – or basic floor – of individual rights. Although states cannot provide less protection than the federal Constitution guarantees, they may provide *greater* or different protections. The following activities are intended to make students aware of three important ways in which state and federal constitutions may differ and how these differences may affect individual rights:

1. In the first situation, the state constitution may contain language which expressly protects some individual right. The federal Constitution does not state that such a right exists, either expressly or by judicial interpretation. This occurs, for example, in the area of environmental protection, described below.
2. In the second situation, the state constitution may contain language which expressly protects a particular right. Although the federal Constitution does not expressly protect that right, the courts have *implied* such a right through interpretation. This situation occurs in the area of privacy, discussed below.
3. In the third situation, both the state and the federal Constitution may have provisions which guarantee a particular right, but the courts have interpreted those provisions differently. The right to distribute leaflets at shopping centers, discussed below, illustrates this difference.

Suggested Activity 1

Objective: By exploring the subject of environmental protection, students will learn that their state's constitution may provide greater protection for individual rights than does the federal Constitution.

Materials: A handout containing the Bill of Rights to the federal Constitution, as well as the provisions from state constitutions and hypothetical included in the box on page 31.

Activity

1. Have the class read the handouts.
2. Divide the class into small groups, each to be "residents" of one of the states listed on the handout and one to be residents of the nation as a whole.
3. Give each group up to twenty minutes to discuss and decide what arguments it can make up for a right to a clean and safe environment based on the provisions of the constitution they have been assigned.
4. Select a representative from each group to present their arguments to the class.
5. After the arguments have been completed, ask the class to vote on which group had the best argument.
6. Questions for a follow-up class discussion:
   a. Which constitution was the best support to argue that the chemical plant was violating the constitutional rights of citizens in the community?
   b. If you were a judge deciding this case, would you be more persuaded by arguments made under a state or the federal Constitution in favor of a right to a clean environment? Why?
   c. What are some of the costs and benefits of having specific, rather than general, constitutional rights set forth in a constitution?
   d. Can you think of any advantages or problems with general constitutional provisions, such as the Fourteenth Amendment's guarantee of "equal protection," which may not address specific situations, such as whether citizens have a right to a clean environment?
   e. Aside from constitutions, what other ways can you think of to ensure a pollution-free environment?
   f. Do you think laws other than constitutions might be better ways to ensure a clean environment? Why?

Suggested Activity 2

Objective: Students will understand that an individual's rights to privacy may be given different protection depending on whether the federal or a state constitution is used to enforce those rights.

Privacy has been defined as freedom from observation or intrusion in a person's private affairs; the right to protect certain personal information from being disclosed to others; and the freedom to act without outside interference.

1. Explain to the class that the federal Constitution does not have specific language guaranteeing a right of privacy, although the Supreme Court has interpreted it to protect privacy. Some state constitutions, by contrast, do have an express right of privacy. (These states are Alaska, California, Florida, Hawaii, Louisiana, Massachusetts, Montana, South Carolina and Washington.) The difference may have important consequences, as the following exercise will show.
2. Divide the class into small groups and have them spend five minutes or so brainstorming areas of their lives where privacy is important, like the contents of their lockers, the books they read at home, their medical records, etc. Ask someone from each group to make a list of the ideas generated.
3. Distribute the handout on page 33 describing Supreme Court rulings on the implied right of privacy under the federal Constitution and the express privacy provisions of some state constitutions.
4. After reading the handout, have the groups discuss whether they think each right on their brainstorming list would be protected by the privacy guarantee as defined by the Supreme Court rulings on the handout list, and why. Have them record their answers on the brainstorming sheet. Then have them go through the list a second time to decide whether each of the items on the list should be among those protected by the privacy rights contained in the state provisions.
5. Have each group draft a "model" privacy provision, to be implemented in their state's constitution.
6. After each group has completed its model provision, and written it on a large sheet of poster paper, pin the provisions up around the classroom.
7. Reconvene the class. Record some of the privacy rights and responses of each group's brainstorming session on the blackboard.
8. Subjects for class discussion:
   a. After reviewing the results of your work, do you think the federal Constitution is an adequate source of protection for privacy rights? If not, why not?
   b. If your state is not among those that have express constitutional protections for privacy rights, do you think it should? If your state's constitution does protect privacy, do you think it goes far enough?
   c. Discuss the similarities and differences between the model provisions. Ask members from each group to report on the reasons for certain aspects of the provisions. Ask the class which of the models best protects the privacy rights that are most important to them. Why?
   d. Discuss whether the language of a constitutional privacy provision should be very general, such as "citizens of this state have the right to privacy as well as to liberty, property, the pursuit of happiness" or define specific situations it is designed to cover, such as the right to have medical information protected from being turned over to police or the FBI? General language may be more readily interpreted by courts to cover new situations not contemplated at the time the provision was drafted. For example, the vast information-sharing possibilities created by computer technology could not have been contemplated at the time the federal Constitution was drafted, even assuming it contained an express privacy provision. On the other hand, specific provisions assure that the right in question will be applied by the courts to the specific situations the legislature determined were important.
   e. Which of the items from the brainstorming sessions are protected by the model provisions? Are some of the important privacy rights left out? If so, how could the language of the model provisions be altered to cover these rights?

Protection of the Environment

Illinois (Art. XI, Section 2): "Each person has the right to a healthful environment" and "[e]ach person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation."

Pennsylvania (Art. I, section 28): "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment."

Virginia (Art. XI, section 1): "The General Assembly may undertake the conservation, development or utilization of natural resources, the acquisition and protection of historic sites and buildings, and the protection of the Commonwealth's atmosphere, lands, and waters from pollution, impairment, and destruction."

New York (Art. XIV, section 4): The "policy of the state shall be to conserve and protect its natural resources and scenic beauty."

Rhode Island (Art. I, section 17): The people "shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values."

Hypothetical: Imagine that there is a chemical plant located near your school. The plant is polluting the environment through smokestacks which spew poisonous gas into the air and through burying toxic wastes in the ground, which have seeped into the underground wells and infected the neighborhood's drinking water. Many of the residents in the neighborhood surrounding the school have gotten sick recently and you suspect that the pollution from the plant is to blame. Complaints to local, state and federal government authorities, as well as to management of the chemical plant, have brought no response. You decide to sue the owners of the plant, as well as the county, state and federal governments, for their failure to take actions to stop futher pollution and remedy the harm that has already taken place.

1708

f. Since your state's constitution is for the benefit of the citizens of your state, can you think of reasons why your model provision should or should not also protect non-residents of the state?

Suggested Activity 3

Objective: Students will learn that courts may interpret the same constitutional provision differently, leading to different protections.

Distribute the following information to the class in a handout. It contains constitutional provisions and case summaries.

CONSTITUTIONAL PROVISIONS

The First Amendment to the U.S. Constitution provides, in part: "Congress shall make no law...abridging the freedom of speech..."

Many state constitutions, including California's, state that its citizens "shall have freedom of speech..."

The Fifth Amendment to the U.S. Constitution provides, in part: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation...."

CASE SUMMARIES

Lloyd v. Tanner, 407 U.S. 551 (1972). In this case, the Supreme Court decided that it is permissible under the federal Constitution for a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling does not relate to the shopping center's operations.

Pruneyard Shopping Center v. Robins (447 U.S. 74, 1980)). This case involved a shopping center's refusal to allow a group of high school students to distribute leaflets in the mall. One Saturday afternoon, a group of students set up a card table in the corner of the shopping center's central courtyard, where they distributed pamphlets opposing a United Nations resolution against Zionism and asked passers-by to sign petitions, which were to be sent to the president and members of Congress. A security guard told them they would have to leave because the activity violated shopping center regulations prohibiting any visitor or tenant from engaging in any publicly expressive activity that is not directly related to the center's commercial purposes. The group immediately left the premises and later brought suit against the shopping center and its owner seeking the right to circulate their petitions. The Supreme Court held that, even though the First and Fourteenth amendments to the U.S. Constitution permit private shopping centers to prohibit such activities on their property, state constitutions might provide expanded rights of free speech and association.

Since the time the *Pruneyard* case was decided, California, Washington, Massachusetts, Pennsylvania and New Jersey have allowed leafletting at shopping malls and private universities. New York, Connecticut and Michigan have upheld the rights of owners to prohibit such activities on their property.

In a very recent case decided by New York's highest court, two anti-nuclear groups had been barred by security guards from distributing literature opposing the Shoreham nuclear power plant at the Smith Haven Mall in Long Island, New York. The groups had not blocked the entrances to the mall nor had they disrupted its operations. The mall had always permitted events that related to consumer interest but had uniformly barred all political activities. The court held that the free speech and assembly guarantees of the New York Constitution only protected people against government action, not restrictions imposed by private property owners. The mall was permitted to retain its ban.

ACTIVITY

1. Divide the class into small groups, and divide these in half, one-half to play the owners of shopping malls and the other to play groups wishing to distribute leaflets. Assign each group a state of residence, based on those listed in the handout above.
2. Give each side 5-10 minutes to determine their "identity" (for example, what those leafletting are protesting or concerned about; where the shopping center is located and what its reasons are for not wanting the protesters on its property are) and their arguments in favor or in opposition to allowing the leafletting.
3. Have the groups debate whether the "leafletters" should be allowed to distribute their handbills under the law of the territory in which they "reside."
4. Reconvene the class and have each group present its arguments in front of the class. Ask how they think the case would be decided under the federal Constitution and then under the constitution of the state where the group "resides." Why?
5. Questions for discussion:
   a. Which constitutions provide the greatest protection for the freedom of speech?
   b. Which consitutions provide the greatest protection for the rights of property owners?
   c. Why doesn't the federal Constitution protect the right of protesters to distribute their pamphlets in shopping centers?
   d. Should the right of free expression mean different things, depending on what constitution the guarantee is found in?
   e. Is it fair that citizens of one state have greater or lesser protection for their individual rights than citizens of another state?
   f. Should there be a difference between state and federal constitutions in the level of protection given to the same individual rights?
   g. Should the federal and state constitutions give different levels of constitutional protections to individual rights or should there just be one uniform standard given to all rights, regardless of what constitution they are found in?
   h. Should shopping centers be considered public places, which would require that they permit free expression, such as the right to leaflet on the premises?

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Privacy Under the Constitution

The oldest privacy right in the federal Constitution is contained in the Fourth Amendment's protection against unreasonable searches and seizures. This guarantee is very specific, however, and is most often used to challenge police searches in criminal cases. The Supreme Court has extended the right to privacy far beyond this express guarantee against unreasonable searches and seizures, yet it has stopped short of saying that the federal Constitution contains a general right to privacy. The late Supreme Court Justice Louis Brandeis once expressed the right to privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man" (dissent in *Olmstead v. U.S.,* 227 U.S. 438 (1928)), but the justices have been selective in finding this right under the Constitution.

They have only found a constitutional right to privacy in certain, specific areas, as the following cases reveal.

Family Matters: The Court has held that the Constitution prevents states from passing laws requiring schools to teach only in English (*Meyer v. Nebraska,* 262 U.S. 390 (1923)); requiring students to attend public rather than private schools (*Pierce v. Society of Sisters,* 268 U.S. 510 (1925)); requiring Amish children to attend school after the age of 14 (*Wisconsin v. Yoder,* 406 U.S. 205 (1972)); prohibiting persons from different races from getting married (*Loving v. Virginia,* 388 U.S. 1 (1967)); requiring poor people to pay a court fee before being able to get a divorce (*Boddie v. Connecticut,* 401 U.S. 371 (1971)); or restricting the ability of poor people to get married (*Zablocki v. Radhail,* 434 U.S. 374 (1978)). On the other hand, the Supreme Court upheld a state zoning law which prohibited non-family members from living together in a residential, suburban community (*Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974)).

Sexual and Reproductive Matters: The Supreme Court has invalidated laws which require that persons sentenced to prison more than twice for "morally offensive" crimes be sterilized (*Skinner v. Oklahoma,* 316 U.S. 535 (1942)); statutes prohibiting abortion in all cases except where the mother's life was in danger (*Roe v. Wade,* 410 U.S. 113 (1973)); statutes requiring parental consent for all abortions of women under aged 16 (*Planned Parenthood v. Danforth,* 428 U.S. 52 (1976)) and restricting the right of both married persons (*Griswold v. Connecticut,* 381 U.S. 479 (1965)) and unmarried persons to obtain contraceptives (*Eisenstadt v. Baird,* 405 U.S. 438 (1972)). Although the Court has interpreted the constitutional privacy right to protect the sexual activity of married persons, it has refused to extend this protection to cover private homosexual conduct between consenting adults (*Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976)). It has upheld the right of individuals to read pornographic materials in the privacy of the home (*Stanley v. Georgia,* 394 U.S. 557 (1969)), although not in public places (*Paris Adult Theatre v. Slaton,* 413 U.S. 49 (1975)).

Informational Matters: The Court has ruled that the federal Constitution does not provide individuals with a right of privacy in the records, checks and deposit slips kept by their banks (*United States v. Miller,* 425 U.S. 435 (1976)). Banks can be required to record information about their customers and their banking activities and hand such information over to state and federal authorities (*California Bankers Ass'n v. Shultz,* 416 U.S. 21 (1974)). Doctors can be required to give state authorities the names of all patients receiving prescriptions containing certain narcotics (*Whalen v. Roe,* 429 U.S. 489 (1977)). The Supreme Court also upheld as constitutional a search by police (with a warrant) of a newspaper's offices to look for photographs of demonstrators who had severely beaten police officers (*Zurcher v. Stanford Daily,* 436 U.S. 547 (1978)).

STATE PRIVACY PROVISIONS

ALASKA (Art. I, Section 22): "The right of the people to privacy is recognized and shall not be infringed." The Alaska Supreme Court has interpreted this provision to protect the right of an individual to smoke marijuana in the privacy of the home (*Ravin v. State,* 537 P.2d 494 (1975)).

CALIFORNIA (Art. I, Section 1): "All people are by nature free and independent and have an inalienable right to . . . pursuing and obtaining . . . privacy." The California courts have decided that this provision does not guarantee its residents the privilege of smoking a possibly harmful drug such as marijuana, even in the privacy of their homes (*National Organization for Reform of Marijuana Laws v. Gain,* 100 Cal. App. 3d 586, 161 Cal. Rptr. 181 (1979)).

FLORIDA (Art. I, Section 23): "Right of Privacy—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."

MONTANA (Art. II, Section 10): "The right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest."

Other states which have express protections of privacy in their state constitutions include: Arizona, Hawaii, Louisiana, South Carolina and Washington. Privacy rights which have been upheld under state constitutions include informational privacy, sexuality, bodily integrity (for instance, the right not to be given tests for alcohol or drug use without consent), refusal of life-saving medical treatment for chronically or terminally ill patients, and individual choice for decisions relating to abortion.

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1711

Robert L. Hayman, Jr.

Eternal Issues & Eternal Questions

Under our Constitution, man and God play ever-changing roles

School prayer and "moments of silence;" tuition vouchers and aid to parochial schools; evolution, creationism and textbook censorship; "open forums" for religious speakers and "equal access" for religious groups—all major topics on the agendas of America's educators and "educationalists." From William Brennan to William Bennett, from Norman Lear to Ronald Reagan, America's leading citizens have openly debated the issues that may hold the key to the future of American public education. These issues, of course, are not just "school" issues, they are also issues of great social, political, and legal significance—all rooted in the religious guarantee of the Bill of Rights.

The First Amendment to the United States Constitution contains two guarantees of religious liberty. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Both the "Establishment Clause" and the "Free Exercise Clause" operate to protect religious freedom in their own way, and the courses they dictate are not without certain tensions.

Constitutional Dilemmas

Consider, for example, the very elementary issues of school prayer: the "Establishment Clause" would seem to prohibit the government from promoting the religious objectives embodied in prayer; the "Free Exercise Clause" would seem to mandate some governmental accommodation of those same religious objectives. How then, do we resolve the dilemma? It is, as we all know, a question for the courts, a question of constitutional interpretation.

The key to resolving many constitutional dilemmas lies in the history of the document itself, in an inquiry into the origins of the provision at issue. At least one school of thought—one recently revived by the attorney general of the United States—holds that the answers to constitutional questions can often be found in the "intentions" of our founding fathers. As a general prescription, this course has much to recommend it; the Supreme Court, in fact, makes extensive use of history in resolving constitutional disputes. Taken too literally, however, the search for the founding fathers' "intentions" can be unrewarding and even misleading; it not only ignores the entire national experience of the past two centuries, but assumes—often mistakenly—that clear "intentions" ever existed in the first place. The religion clauses of the First Amendment well illustrate these points.

The religion clauses defy any analysis for clear "intentions" primarily because the goals envisioned in the clauses were so varied. The intentions of the founding fathers in drafting these provisions seem in fact to have been as diverse as the colonial experience itself. It appears as if no less than three distinct concerns—not all of which are compatible in specific applications—prompted the adoption of the twin provisions: first, the desire to guarantee the "freedom of conscience;" second, the desire to "separate" church and state; and third, the desire to preserve the rights of the several states to regulate religious affairs in such manner as they deemed appropriate.

Freedom of Conscience. This concern was an integral part of the American consciousness almost from the start. Religious tolerance is in many respects an original American concept. It first formally appeared in Maryland in the Toleration Act of 1649, but Lord Baltimore is known to have been an advocate of religious tolerance as early as 1634. Roger Williams elevated the principle to a fundamental tenet of colonial law in 1663, when Charles II memorialized Williams' tolerance in the Rhode Island Charter. The Quakers of Pennsylvania, meanwhile, came to embody the concept of "voluntarism"—the complete freedom of personal choice in religious matters—and both the Pennsylvania Frame of Government of 1682 and William Penn's charter of Privileges of 1701 contain landmark guarantees of religious freedom.

Religious tolerance, however, was far from uniform throughout the colonies, and even within the most tolerant colonies the protection of religious freedom was rarely absolute. Many colonial charters—and later state constitutions—guaranteed the "freedom of conscience" only for monotheists, and many others limited their protection to Christian sects. The practical effect of these limitations was not substantial, since nearly all of the enfranchised colonists were Christian, but formal discrimination against "persons of the Romish religion" did have a substantial practical application and in fact persisted in many colonies until after the American Revolution.

In any event, the foregoing illustrates the twin dangers of searching for our founders'

Tania Kleid

Teaching Strategy #1

Many Establishment Clause cases involve the public schools. The Supreme Court has held that the Establishment Clause prohibits, among other things, the recital of prayer, Bible readings, and the posting of the Ten Commandments in the classroom. The reason for all of these decisions is that the activities were motivated by religious purposes – and not educational or other "secular" purposes – and that the activities tended to promote religion in the minds of the students.

For each of the following problems, decide whether the school would violate the Establishment Clause by permitting the activities described. Don't forget the "three-pronged test" used by the Supreme Court.

- A class in "Comparative Religions" studies the Bible, the Koran, and other great religious works. Occassionally, the studies involve reading passages from the works aloud in class. [probably permissible; see *Abington School District v. Schempp*]
- **School administrators notice that their elementary school students are a bit boisterous after recess. They decide to calm them with a brief period of silence after each recess. Students must remain in their seats and observe "a minute of silence for meditation, contemplation, or silent prayer."** [probably permissible, though a close question; compare ***Wallace v. Jaffree***]
- **A teacher in Oregon is a follower of the Bhagwan Rhajneesh. The Bhagwan's portrait is posted throughout her classroom, and she wears his likeness on a large medallion around her neck. She does not discuss her religion in the classroom. [probably impermissible, without an extraordinary disclaimer from the school; see *Stone v. Graham*]**

– RLH

"intentions:" First, that religious "freedom" meant different things in different colonies; and second, even the broadest declaration of religious tolerance was limited to the needs of a relatively homogenous citizenry.

Church/State Separation. The second concern of the founding fathers was also present from very near the beginning. The Pilgrims who fled to America in 1620 felt compelled to leave England to avoid the established state church. Like all Separatists, the Pilgrims fervently desired a clear separation of church and state. Interestingly, the Massachusetts Body of Liberties of 1641 takes great pains to distinguish civil and ecclesiastical authority, while the criminal code it sets forth makes liberal reference to biblical sources.

By the time of the Revolution, separation of church and state had become accepted notions in many northern colonies. The New Jersey Constitution of 1776 expressly provided that no religious sect should be established in preference to others, and New York formally disestablished the Church of England in its constitution of 1777.

The greatest advocates of separation, however, would come from the South. The Pilgrims' predecessors at Jamestown had come to America largely for commercial reasons, but Virginia would still be the spawning ground for the most distinguished spokesmen for religious tolerance. The Virginia Bill of Rights of 1776 contained sweeping protections for the "freedom of conscience," yet was silent on the issue of an established church. It was two Virginians though – Thomas Jefferson and James Madison – who picked up the gauntlet and led the battle for disestablishment.

Madison's "Memorial and Remonstrance" against Virginia's tax for the support of the established church argued forcefully that no person "should be taxed to support a religious institution of any kind." Ultimately, it was the Virginia experience that was at the forefront of his mind when Madison penned what would eventually become the First Amendment. Jefferson, meanwhile, coined what may well be the most famous metaphor in constitutional history when he urged the maintenance of a "wall of separation" between church and state.

Absolute separation of church and state, however, was far from the concensus in the states at the time of the adoption of the Bill of Rights. Some state constitutions barred the establishment of a specific sect but permittted a tax "for the support of the Christian religion" (e.g., Maryland); others provided support for "the protestant church" (Massachusetts) or for the payment of "public protestant teachers" (New Hampshire and Vermont). Still other states maintained an established state church (e.g., South Carolina); such established churches actually persisted until the 1830s. For these states, the Establishment Clause of the First Amendment guaranteed nothing more than freedom from federal intervention; its proscription, after all, applied only to "Congress."

Preserving States' Rights. This leads, quite conveniently, to the last of the founders' concerns and one of the first great problems of interpreting the religion clauses: their application to the states through the Fourteenth Amendment. That amendment provides, among other things, that the states shall not deprive their citizens of "life, liberty, or property without due process of law." Through a series of Supreme Court decisions earlier this century, Fourteenth Amendment "due process" was held to protect the interests embodied in the Bill of Rights; these rights were, in effect, "incorporated" under the Fourteenth Amendment. The right to the "free exercise" of religion was among the individual "liberty" interests which – with little controversy – were held to be "incorporated" in Fourteenth Amendment due process.

The Establishment Clause, however, would seem to pose more problems. Textually, it is difficult to conceive of the protections it embodies as "liberty" interests. Historically, as we have seen, some of the founding fathers may have been more concerned with protecting the right of the states to establish churches than with prohibiting those establishments. Still, without much fanfare – and with no real resolution of these difficulties – the Supreme Court held in the 1947 case of *Everson v. Board of Education,* 330 U.S. 1, that the Establishment Clause was indeed incorporated in the Fourteenth Amendment and that, as a consequence, its prohibitions applied to the states as well as the federal government.

It was up to Justice William Brennan to explain some sixteen years later how this "incorporation" had been achieved. The textual argument, Brennan maintained, "underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty." "The framers," he continued, "did not en-

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trust the liberty of religious beliefs to either clause alone." As for the historical argument, Brennan noted that it was the Fourteenth Amendment – and not the First Amendment – that should be the focus of the historical inquiry. Significantly, he observed, the last of the established state churches had disappeared some 30 years before the adoption of the Fourteenth Amendment (*Abington School District v. Schempp,* 374 U.S. 203 (1963) (Brennan, J., concur)).

Where's the Wall?

The "incorporation" problem, of course, was hardly the last problem to arise from efforts to apply and interpret the religion clauses of the First Amendment. The *Everson* case, for example, not only incorporated the Establishment Clause, but also constitutionalized Jefferson's metaphor, the "wall of separation between church and state."

For the past quarter century, the Supreme Court has struggled to define the nature and boundaries of this barrier. The wall, which once seemed to impenetrable, has lately been described as "blurred, indistinct and variable," and the Chief Justice has characterized the metaphor as "useful" but "not . . . wholly accurate."

What then is the intent of the barrier between church and state erected by the Establishment Clause? The Supreme Court regularly struggles with this question. Last term, the Court was called on to decide no less than five cases raising signficant Establishment Clause issues. This term it has heard arguments on two more.

Both of these cases have already been decided. In *Witters v. Washington Commission for the Blind,* No. 84-1070 (see *Preview of U.S. Supreme Court Cases,* November 1, 1985, p. 71 for a detailed predecision analysis of the case), the Court was asked to decide whether the expenditure of vocational rehabilitation funds on ministerial training for a blind man would violate the Establishment Clause. The Court, in an unanimous opinion delivered by Justice Marshall, held that it would not.

The Court resolved the question using a three-pronged test first articulated 15 years ago in the case of *Lemon v. Kurtzman,* 402 U.S. 602 (1971). That test – which has recently drawn criticism from some members of the Court – requires that governmental actions 1) have a secular – as opposed to religious – purpose; 2) have a primary effect which neither advances nor inhibits religion; and 3) not foster an excessive governmental entanglement with religion.

In *Witters,* the Court held that the vocational rehabilitation program was "neutral" toward religion, since funds are offered to qualified participants regardless of their secular or sectarian interests. As a result, the Court observed, "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the state." Since the program did not otherwise encourage the pursuit of religious vocations, since relatively small amounts of money were eventually paid for sectarian education, and since the government's administrative involvement in the selection of religious vocations was not significant, the Court concluded that the program results in "no state support of religion prohibited by the Constitution."

In the other closely watched case, the Court declined to rule in *Bender v. Williamsport Area School District,* No. 84-773, (*Preview,* October 18, 1985, p. 47). Citing procedural difficulties with the case, the Court returned the case to a lower court for reconsideration. The issue in *Bender* was whether the Establishment Clause requires a public secondary school to prohibit meetings by student religious groups during school hours and on school premises.

In *Widmar v. Vincent,* 454 U.S. 263 (1983), the Court held that meetings by student religious groups on a state university campus were not barred by the Establishment Clause, but were in fact protected by the free speech provision of the First Amendment. In *Bender,* the court of appeals held that secondary school students may well enjoy similar free speech rights, but that the state has a compelling interest in prohibiting their religious speech. The interest: the need to preserve the separation of church and state envisioned in the Establishment Clause.

The court of appeals distinguished *Bender* from *Widmar* on three grounds: first, that the high school meetings would take place in a closed, controlled environment; second, that the meetings would take place under school supervision; and third, that high school students are less mature and more impressionable than college students. The net effect of these differences, the court ruled, was the appearance – at least in the minds of the high school students – of a state imprimatur on the religious objectives of the meetings.

This conclusion, interestingly enough, is completely at odds with the underlying rationale of the Federal Equal Access Act of 1984, which prohibits federally aided public schools from denying student groups access to an otherwise open forum solely because of the "religious, political, philosophical or other content" of the group's meetings. The constitutionality of

(continued on page 48)

Teaching Strategy #2

It is not always easy to reconcile the competing interests in religion cases. Consider the following example:

Mr. Green owns a pizza parlor, where he and his daughter Ellen work. Mr. Green employs five other people besides his daughter. Two of his employees are Jewish, and refuse to work on Saturday, their Sabbath. One of his employees is a Seventh Day Adventist, who refuses to work from sundown Friday until Monday morning. The other two employees are Christians who refuse to work on Sunday, the day they consider their Sabbath. Mr. Green needs at least four employees (besides himself) to operate the pizza parlor on any given day.

Mr. Green's Jewish employees have requested that the city council pass an ordinance declaring Saturday the Sabbath and providing that no employee shall be forced to work on Saturdays if his or her religion prohibits it. Meanwhile, Mr. Green's Christian employees have requested the adoption of a similar ordinance declaring Sunday the Sabbath, and excusing employees from working on Sundays if it is contrary to their religion. The Seventh Day Adventist has urged the adoption of both proposals. Finally, Mr. Green and Ellen – who recently left a lucrative legal practice to help her father with his business – oppose both proposals, arguing that the city cannot grant special privileges based solely on religion.

What are the competing concerns in this case? Which religion clause protects them?

What should the city do? [to see how the State of Connecticut – and later the Supreme Court – handled this issue, see the discussion of *Thornton v. Caldor,* in the last issue of *Update;* one additional note: some accommodation of an employee's religious beliefs is required by federal – and many state and local – laws.]

– RLH

1711

CONSTITUTIONS AT WORK

Drink, Drank, Drunk

Can we stop highway slaughter without infringing individual rights?

Drunk driving has never been more in the news than it is now. States across the country have made preventing drunk driving a high priority, often backed up with major efforts and new equipment to detect drunk drivers *before* they hurt somebody.

Yet this effort inevitably raises questions for the rest of us. Can the police check for drunk drivers without impinging on the rights of all motorists? Should the police be allowed to randomly stop motorists? What evidence should they have before subjecting someone to a breath test or some other means of determining drunkenness? In the clash between safety on the roads and the rights of motorists, where should the lines be drawn?

The answers to these questions go back to men who never saw an automobile. The authors of the Bill of Rights didn't know cars were coming, but their words in the Fourth Amendment are still the starting point for inquiries into whether an automobile stop and search is lawful.

Of course, many standards have been developed over the years to apply to the special situation of cars. The automobile

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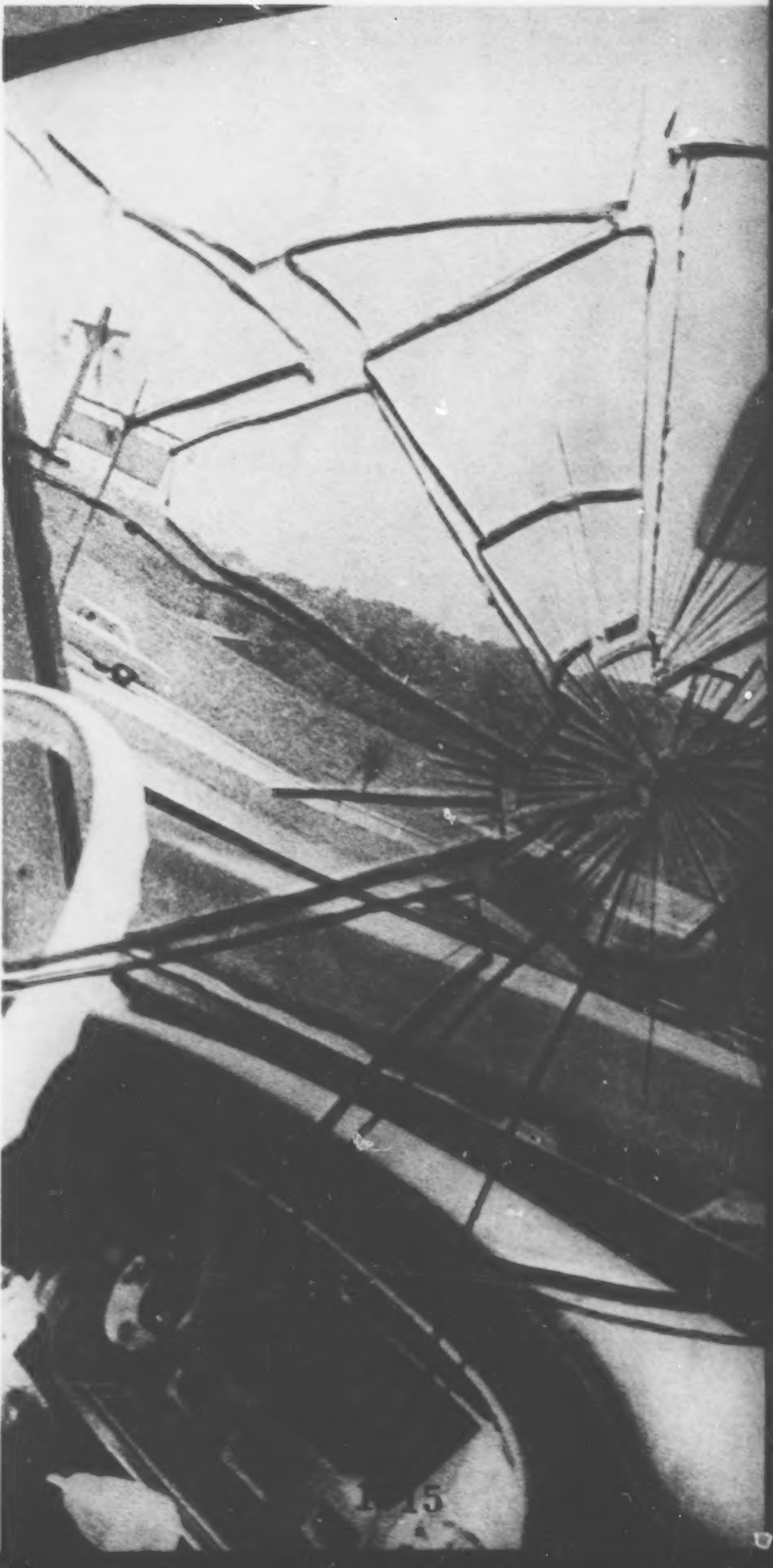

David Attie

716

has been with us for a long time now, and a whole area of law has grown up around the kinds of searches of motorists that are—and are not—lawful. But the answers are rarely perfectly clear, and new technology to detect drunk driving, however welcome it may be, inevitably raises new questions about what constitutes a constitutional search under the Fourth Amendment.

The First Link

Before any fancy equipment can come into play, before the new technology can even have a chance, a police officer, mostly going on experience and intuition, has to start the process going.

Detecting, arresting, and convicting a drunk driver is not easy. It requires the successful execution of a chain of events, and each step along the way has to be done right. The first person involved is the police officer in the field, who is responsible for detecting the possible presence of alcohol in a driver by what may only be subtle changes in driving performance. Once the officer has stopped the vehicle on suspicion that the driver is intoxicated, the officer needs to confirm that the unusual behavior is indeed alcohol related. This confirmation is critical, since it is the basis of a decision to arrest the driver, requiring him or her to be taken to the police station for a blood alcohol concentration (BAC) test and further processing.

This first step is in many ways the hardest. Identifying a driver as intoxicated is one of the most difficult tasks that a police officer can perform on the street. How can he tell that a driver has actually been drinking? In one test, even trained emergency room physicians were able to correctly diagnose only about 38% of subjects they examined as being drunk under the standards used in most states. A police officer has to make the same decision with far less training.

One approach that has been studied during the past several years would give the officer help in making this tough call. Several devices are being developed to passively test suspected offenders' breath for the presence of alcohol. It appears that in the near future these devices will have the capability of passive testing with a high degree of reliability.

However, the new technical devices for measuring BAC on the spot may bring legal problems. Let's look at some of the issues that may arise in using the new breath teasting devices as law enforcement tools.

The Fourth Amendment requires generally that "probable cause" be shown before a search can be lawfully conducted. That means that police officers can't stop people merely on a hunch, or because they don't like their looks. They have to have a certain level of proof before they can lawfully search someone.

To put it a different way, if a search is conducted, police officers can't later justify it on the grounds that incriminating evidence is discovered. The true test is whether the arresting officer had adequate cause *before* he or she conducted the search.

Standards for Searches

Courts all over the country have held that the devices used at station houses to measure drunkenness are searches because they test blood or urine or deep lung air—all of which are taken from suspects by procedures that involve entering their body. Because they provide evidence that can be introduced at trial, they are called evidentiary tests (ETs). (See inset for more on ETs.)

Since the tests back at the station house measuring BACs clearly are searches, then they can't be applied indiscriminately. The officer will have to show that he or she had adequate reason to suspect that the driver was drunk.

In making that determination, officers can go beyond what they saw, smelled or heard if they have a preliminary breath testing device (PBT). These devices can provide legal grounds to make an arrest and conduct a full-scale BAC test. They can provide the legal requirement of "probable cause"—that is, solid facts to convince an officer that a person has committed a crime.

PBTs are portable, usually hand-held, devices that can be used by the officer when he stops a motorist. They measure the presence of consumable alcohol in a driver's breath and the approximate quantity of the alcohol. Common devices include the Alcolyzer, which uses chromate salt in acid and gives an indicator response of color change; the A.L.E.R.T. Model J3A, which uses a Taguchi Mos Conductor and gives an indicator response of a light for pass, warn or fail; and the Alco-Sensor II, which uses a fuel cell and gives an indicator response by a digital readout. Some of these devices are calibrated at a particular BAC, such as .05% or .1%. They are said to give a "pass-fail" reading in the sense that the indicator response is below or over a calibrated setting. Some devices, like the Alco-Sensor II, give a numerical BAC reading, but this is not as accurate as the numerical BAC reading of an ET.

Unlike ETs, the results of these devices are not admissible in court on the factual issue of blood alcohol concentration in a prosecution for driving while intoxicated. The devices are used for screening purposes—that is, to determine whether a driver has consumed alcohol and his approximate BAC. The results, along with other facts known to the officer, such as driving behavior, slurred speech, obvious alcohol breath, etc., may give a police officer probable cause to make an arrest and the right to request an ET under an implied consent statute. But although the result of the PBT will not be admissible at trial as evidence of the BAC of the driver, it may be admissible at a *preliminary* hearing or motion to supress the evidence of the ET, where the issue is not guilt or innocence under the DWI law, but whether the officer had probable cause to make the arrest.

The Fourth Again

One of the major legal issues surrounding the use of the PBT is whether it is a "search" for Fourth Amendment purposes, or merely a minor investigatory procedure. If it is the former, full probable cause for an arrest would be required even before a police officer could make a person take the PBT (a person can always consent, which eliminates the probable cause requirement). If it is the latter, then a lesser standard such as the "stop and frisk" standard of "reasonable suspicion" would be sufficient for requiring a person to take the test. A third legal alternative is that the PBT is neither a search nor a minor investigatory procedure under the Fourth Amendment—that is, that its use is more like gathering evidence already in plain view.

No final answer can be given to this legal issue, which is being debated at length by legal scholars, because as of now few courts have considered its use. However, the third legal alternative—not a search or a minor investigatory procedure—is probably unfounded. Using the device requires a person to blow into it in order to give a sample of his breath. This fits the classical definition of a Fourth Amendment search—a going into a closed compartment or area—although it is a limited search at best. This is why the PBT is frequently referred to as an "active" device (it requires the driver to do something—for example, blow air into a tube). Balancing the important governmental interest in detecting drunk driving against the rela-

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tively minor invasion of a driver's right to privacy, it is most likely that the courts will accept the PBT as a relatively nonintrusive device requiring no more than a "reasonable suspicion" for its use, the same standard used to stop a person to investigate a possible crime.

In the meantime, 23 states have passed PBT laws setting forth guidelines for their use. Although most of these laws provide for a "probable cause" standard for their use, rather than "reasonable suspicion," it is likely that the courts will ultimately rule that the constitutional standard for their use is the lesser standard. This would permit states having the probable cause standard to change their laws to adopt the lower standard.

Passive Alcohol Screening Devices (PASD)

The Passive Alcohol Screening Device (PASD) represents the frontier of preliminary alcohol detection devices. It is used to detect the presence of ethyl alcohol in the breath of persons simply by sampling the air around the person, which includes air exhaled by the person. In this sense it is a true "passive" device, since it does not require the person to perform an act such as giving a sample of body fluid or blowing into a tube to produce a sample of deep lung air. Although the procedure may require the person to stay in a particular place while the sample of air is taken – which itself may raise certain legal questions – in its ordinary usage the person remains passive and undisturbed.

A prime researcher on the PASD is Robert B. Voas, who gives this description of the device:

> The Passive Sensor is a simple but highly sensitive alcohol detector. It has the appearance of a large flashlight. The fan in the front end pulls expired air from the driver (mixed with some of the external air) past a sensor which is specially designed to react to alcohol. Power for the device comes from four D-cell batteries which are stored in the handle. Only one control is provided – an "on" button, which starts the fan and heats the sensor. The presence of alcohol is shown by the activation of a red light.

The PASD is in the experimental state and not presently available for general use, so its practical impact can only be speculated on at this time. But its legal implications center around the issue of whether it constitutes a search under the Fourth Amendment, and if so, what standard will be required for its use – "probable cause" or "reasonable suspicion." In the meantime, it seems clear that the device will not produce evidence of BAC that can be used at a DWI trial, since it is essentially a pass-fail device, giving rough estimates only. As such, it will not be reliable enough to be considered evidence at trial where the prosecution's burden of proof is "beyond a reasonable doubt," not merely "probable cause" or "reasonable suspicion." Its chief utility will be that of a screening device producing information which, when taken with other facts known to the police officer, will give probable cause to make a DWI arrest.

What, then, are the legal issues that affect using PASD as a screening device to give officers probable cause to make an arrest? These issues have to do with the operation of the Fourth Amendment and begin with the all-important question of whether the use of the device constitutes a search under that constitutional provision.

Is the PASD a Search?

The first question in any consideration of the PASD is whether it constitutes a "search" for Fourth Amendment purposes. If it is a "search," the next consideration would be under what specific circumstances it can be used.

A search was defined by the United States Supreme Court in 1967 in the case of *Katz v. United States,* 389 U.S. 347, as an intrusion upon an individual's "reasonable expectation of privacy." The Court declared:

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The question of what constitutes an "intrusion sufficient to constitute a search" turns upon the *Katz* definition of "reasonable expectation of privacy," which itself has two elements: the individual must have a subjective expectation that a thing or activity will be kept private, and society must objectively recognize the reasonableness of that expectation.

The PASD technology is so new – it has not become available to police except on a limited experimental basis – that no court decisions have yet come down on the legal issues involved in its use. But two law enforcement techniques that operate in similar ways might provide possible clues as to how the courts will deal with the legal issues involving the PASD. They are drug-sniffing dogs and sensory enhancement devices such as flashlights and binoculars.

What About Drug-Sniffing Dogs?

Of the two types of techniques, drug-sniffing dogs present the closer analogy to the PASD. The similarities are striking. In the typical dog-sniffing scenario a specially trained dog is brought next to a traveller's luggage at an airport. The dog smells (or "sniffs") the air surrounding the luggage and gives an "alert" (usually some form of agitation) if it detects the odor of marijuana or other drugs coming from within the luggage. The PASD is placed four to six inches from the person's mouth and nose and pulls a sample of expelled

Courtroom Tested

The quantity of alcohol present in a person's blood is expressed as "blood alcohol concentration," or "BAC." Most state laws set the "legal limit" at .1% BAC. That is, a BAC of .1% is considered to be proof of driving while under the influence of intoxicating liquor. These laws are also sometimes referred to as "illegal per se" laws; that is, it is illegal in itself to drive or operate a vehicle while your BAC is .1% or higher.

Evidentiary Tests (ETs) are scientifically oriented tests that measure not only the presence of consumable alcohol in a person's blood, but also the quantity (BAC). Analyzing body fluids such as blood, urine or saliva is commonly used to measure the BAC.

In addition, some tests measure the BAC by taking samples of deep lung air produced by the driver, rather than a body fluid. Common machines for this purpose are the Breathalyzer, which uses wet oxidation and photometry; the Alco-Analyzer, which uses gas chromatography, and the Intoxilyzer, which uses the absorbance of infrared light. Although these methods use deep lung air (referred to as "alveolar air"), their measuring techniques are still related to the concentration of alcohol in the blood (BAC).

Most states have what are called "implied consent laws," under which ETs are administered *after* a person has been arrested for driving under the influence of alcohol.

The ET is usually consented to by the driver; if he refuses to consent, his license to drive can be suspended or revoked under the provisions of the implied consent law of his or her state.

ETs are considered legal evidence in court on the factual issue of BAC. Their admissibility is established by case law and/or explicit provisions of DWI statutes.

– J.P.M.

breath into the device. A red light flashes on the device signaling the presence of alcohol.

One of the first dog-sniffing cases that relied upon the "plain view" doctrine to dispose of the Fourth Amendment issues was *United States v. Bronstein,* 521 F.2d 459 (2d Cir. 1975). The court held that where a specially trained dog sniffed the air around the defendant's luggage, and alerted to the presence of a controlled substance, this was a plain view seizure (or "plain smell seizure"), not a search:

> If the police officers here had detected the aroma of the drug through their own olfactory senses, there could be no serious contention that their sniffing in the area of the bags would be tantamount to an unlawful search. . .We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constitutionally suspect.

Other state and federal courts reached the same result, most of them holding that the sniffing of a trained dog is either not a search at all, but simply a plain view seizure, or if it is a search, it is a "reasonable search." For example, in *People v. Mayberry,* 644 P.2d 810 (1982), the Supreme Court of California adopted the "plain smell" doctrine, using a direct analogy to the dog handler's own nose:

> In our view, the escaping smell of contraband from luggage may be likened to the emanation of a fluid leaking from a container. The odor is detectable by the nose, as the leak is visible to the eye. We discern no constitutionally significant difference in the manner of escape into the surrounding area. Given Corky [the dog's] training, our conclusion is not altered by the fact that it is his nose and his handler's which detected the odor.

In *State v. Morrow,* 625 P.2d 898 (1981), the Supreme Court of Arizona adopted a similar rule, noting also that the police officer who uses a drug-sniffing dog must be in a place where he has a right to be, such as having lawfully stopped a traveller and detained him and his luggage on reasonable suspicion to believe that a crime has been committed. This can be compared to a police officer's stop of a motorist after observing unusual driving behavior or an accident, i.e., a "reasonable suspicion" to believe that a crime involving alcohol impairment or some other traffic offense has been committed. If the stop itself is lawful, there would be no need for additional suspicion to believe that the motorist had been drinking, just as there would be no need in the dog-sniffing scenario for reasonable suspicion that the luggage contains drugs, since the use of the dog – or PASD – would not itself constitute a "search" for Fourth Amendment purposes. The *Morrow* court stated:

> In the instant case, there was no preknowledge of suspicious activities which persuaded the law enforcement personnel to bring in the dog for further investigation. We do not believe, however, that this fact is important. If a dog's sniff is not a search, then it is immaterial whether there was pre-sniff knowledge. As long as the officer had a right to be where he was, he could see what was in "plain view," and his dog could smell anything in "plain view."

The High Court Speaks

In 1983 the United States Supreme Court settled the issue of search/non-search in dog-sniff cases in *United States v. Place,* 103 S. Ct. 2637. The defendant's strange behavior at the Miami International Airport aroused the suspicion of law enforcement officers prior to his departure to New York. The Miami agents notified federal Drug Enforcement Administration (DEA) authorities in New York. The DEA agents approached the defendant in New York and advised him that they had reason to believe he was transporting narcotics.

After the defendant refused to consent to a search of his luggage, the agents seized it and took it from LaGuardia Airport to Kennedy Airport, where the luggage was subjected to a sniff test by a trained narcotics dog. The dog reacted positively to two of the three bags. This procedure took 90 minutes and was done late on Friday afternoon. The agents kept the bags until the following Monday morning when they obtained a search warrant and discovered a quantity of cocaine.

The Court held that the 90-minute detention of the luggage made the seizure "unreasonable" and their tardiness in getting a warrant made matters worse. However, *Place* held that the detention of the luggage was unreasonable only because of the time factof. The Court went on to support the *use* of the drug-sniffing dog, stating:

> A "sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of luggage. Thus, the matter in which information is obtained through this investigative technique is much less intrusive than a typical search. . . . Therefore, we conclude that the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine – did not constitute a "search" within the meaning of the Fourth Amendment.

While *Place* has been often quoted with approval for sustaining the use of drug-sniffing dogs as a "non-search," others have criticized it as an unwarranted statement because it was not necessary for the Court in *Place* to reach the "canine sniff" issue once it had held that the detention of the luggage was unreasonable because of the time factor. However, one year later in the case of *United States v. Jacobsen,* 104 S. Ct. 1652 (1984), the U.S. Supreme Court laid any doubt to rest by stating that "the Court [in *Place*] held that subjecting luggage to a 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment" and clearly directed the lower courts to follow its pronouncement. And in *United States v. Beale,* 736 F.2d 1289 (9th Cir. 1984), the influential Ninth Circuit Court of Appeals, after first declining to treat the *Place* pronouncement on the dog sniff as binding, decided in light of the clear statement in *Jacobsen* that the "no search" pronouncement of the Court in *Place* is indeed the law of the land.

In the normal DWI enforcement procedure a police officer will have *at least* a reasonable suspicion of a law violation before an investigatory stop is made of a motorist. Even if some courts *did* require a reasonable suspicion before permitting an involuntary (no consent) use of a device such as the PASD, getting the very slight amount of information needed for reasonable suspicion is not difficult in most street stops of motorists. Also, the existence of an accident, and a reason to believe that a motorist was involved in it, could constitute an element of reasonable suspicion necessary to justify the use of the PASD.

What About Flashlights?

Another group of court decisions that can be applied to the PASD deal with "sensory enhancement devices" such as flashlights and binoculars. The most recent case from the U.S. Supreme Court reaffirms the long-standing rule that the use of such devices does not constitute a search under the Fourth Amendment.

In *Texas v. Brown,* 103 S. Ct. 1535 (1983), Police Officer Maples stopped the defendant's automobile at night at a routine driver's license checkpoint, asked him for his license, shined his flashlight into the car, and saw a green party balloon on the seat next to the defendant. From his past experience Maples recognized the party balloon as the type of container frequently used by dope peddlers to carry narcotics, so he seized it. The Court approved the seizure under the so-called "plain view doctrine," stating:

> . . . our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. Applying these principles, we conclude that Officer Maples properly seized the green balloon from Brown's automobile. The Court of Criminal Appeals stated that it did not "question . . . the validity of the officer's initial stop of [Brown's] vehicle as part of a license check," and we agree. (*Delaware v. Prouse*, 440 U.S. 648 (1979)). It is likewise beyond dispute that Maples action in shining his flashlight to illuminate the interior of Brown's car trenched upon no right secured to the latter by the Fourth Amendment. The Court said in *United States v. Lee*, 274 U.S. 559 (1927), that "[The] use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.

A reasonable comparision can be drawn between "sensory enhancement devices" such as flashlights and the PASD. In both cases the technique permits a police officer to be aware of the presence of contraband items such as drugs or excessive BAC that he would not otherwise be aware of with his unaided sense of sight or smell.

Courts will probably never require more than "reasonable suspicion" for the stop of a motorist. As in plain view seizures, "reasonable suspicion" is all that is needed to provide a legitimate basis for the officer's being in the place where the observation is made. Besides "reasonable suspicion," the officer would have reason to be where he was pursuant to a road-block procedure or an automobile accident. In any case, whether courts conclude that the PASD is not a search, or that it is a limited search requiring less than "probable cause" – i.e., "reasonable suspicion" – the legal conditions that courts may place on its use will not be burdensome.

In short, the search issue will probably not be a legal hindrance to using the PASD as a screening device for detecting the presence of alcohol on motorists. When alcohol is detected by use of the device, that fact in combination with other observed facts at the roadside, including driving behavior or an accident, should give full probable cause for a DWI arrest and the right to request an evidentiary test like the Breathalyzer under an implied consent statue.

So How Will the PASD Be Used?

What are some typical procedures that can be expected with the use of a PASD by police officers?

1. *Normal DWI Enforcement Stop.*

Such a stop is usually triggered by a police officer seeing a driver display some unusual behavior. It may be a moving violation such as speeding, changing lanes without signaling, or weaving, or it may be behavior that is not itself a violation of a specific traffic law, such as stopping slightly short of a red light, a slightly delayed start from a green light, or unusually slow driving. It can also involve nonmoving traffic violations, such as a headlight or brake-light that does not work, a mutilated or missing license plate, etc. Even unusual but not illegal actions by a driver can give a police officer "reasonable suspicion" to pull him over for investigation.

The facts of each case will be different. But keep in mind that the facts known to a police officer *at the time of a stop* control a court's later determination of whether a "reasonable suspicion" existed. As the U.S. Supreme Court noted in the case of *Adams v. Williams,* 407 U.S. 143 (1972), "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable *in light of the facts known to the officer at time.*" When a police officer stops a car that is being driven erratically or in apparent violation of traffic laws, he has made a reasonable seizure of the person and his vehicle.

Once a valid stop of a motorist is made, it's usually easy to spot alcohol use. Several telltale signs are well known to trained law enforcement officers and recognized by the courts. In the case of *State v. Clark,* 593 P.2d 123 (1979), the Supreme Court of Oregon took judicial notice of the usual signs that are readily recognizable as evidence of alcohol use by drivers, including breath odor, flushed face, instability of motor coordination, slurred or indistinct speech, disorderly conduct, bizarre behavior, visual disorders, sleepiness, dizziness, nausea, and muscular tremors. These observations will give a trained police officer at least a "reasonable suspicion" to believe that the driver has been using alcohol, and this should be enough to justify use of the PASD device if such device is considered to be a "search" for Fourth Amendment purposes.

2. *Accident Investigation.*

When a police officer responds to a traffic accident, or stops to aid a driver at the roadside, he is in a lawful position to make a plain view observation of the driver's physical and mental condition. The accident, or need for help, provides justification for the officer's presence. The police officer is in a place where he has a right to be, a place from which he can make plain view observations. If he observes any of the signs of alcohol use and impairment, this, in combination with the accident, would be legally sufficient to give "reasonable suspicion" to justify the use of the PASD.

Suppose, for example, a police officer on routine patrol receives a call of a two-car accident at a particular location. He immediately proceeds to the scene and finds the cars in the middle of an intersection controlled by a traffic light. Both cars have suffered moderate front end damage.

Driver A is sitting behind the wheel of his car in a dazed condition. When approached by the police officer he shouts that the driver of the other vehicle went through a red light and hit him. His speech is slurred, he has alcohol breath, his eyes are bloodshot and his face is red. Would the officer have a reasonable suspicion that would justify the use of PASD under these circumstances? The answer should be "yes."

Driver B is found standing alongside his vehicle. His speech is clear, his appearance neat and trim. He calmly tells the police officer that Driver A was "driving crazy" and went through the red light. When asked to hand over his license, Driver B moves to the open door of his car but slips on some ice and almost falls. Would the officer have a reasonable suspicion that would justify the use of a PASD here? The courts would probably say "yes." In both cases, the combination of an accident and some unusual behavior *that could be alcohol-related* would be enough to give the officer justification to use the PASD.

3. *Roadblock/Checkpoints.*

In 1979, in the case of *Delaware v. Prouse,* 440 U.S. 648, the United States Supreme Court held that the police do not need either "reasonable suspicion" or "probable cause" to conduct a roadblock to check drivers and their vehicles. In a properly established and operated roadblock or vehicle checkpoint, the law enforcement procedure itself supplies the justification for the initial stop. If while conducting a roadblock a law enforcement officer observes the recognized signs of recent alcohol use by a driver, this is a "plain view" observation for Fourth Amendment purposes.

Let us imagine a particular scenario. A properly established roadblock is in operation. Driver A pulls up and rolls his window down. The officer immediately smells alcohol on the driver's breath. The officer is justified on the basis of reasonable suspicion in using the PASD.

Driver B pulls up. He produces his license and shows no sign of unusual behavior until the officer tells him that he may move on, whereupon the driver shouts an obscenity at the officer. This may be a close case, but such behavior would probably be considered sufficiently related to one of the signs of alcohol use to justify using the PASD.

Finally, Driver C follows much the same factual pattern as Driver B, except that as he is about to leave he compliments the officer and states that he has "learned a lesson" now that DWI roadblocks are being used in his community. Would the PASD be justified in his case (assuming again that it is considered a limited search for Fourth Amendment purposes)? Probably not, although some might argue that the driver's statement borders on an "admission of guilt" sufficient to give a "reasonable suspicion."

This examination of existing legal decisions leads to the following conclusions concerning the legal future of the PASD:

1. It is likely that the courts will not consider the involuntary use of the PASD to be a "search" under the Fourth Amendment. Most of the courts will probably follow the lead of the U.S. Supreme Court in the *Place* case, where the Court said that the use of drug-sniffing dogs was not a search under the Fourth Amendment. These courts will probably take the position that the use of the device simply enhances or extends the sense of smell of the police officer, leading to a plain view seizure of evidence.

2. For those courts that do not follow the *Place* reasoning, but rather choose to consider the PASD a "search," it is likely that they will recognize the minor intrusiveness of the PASD and will not require "probable cause" but merely "reasonable suspicion," a lesser standard.

3. Courts that follow either of these approaches will probabaly require at least "reasonable suspicion" to start the investigatory confrontation with the motorist, whether it is on the basis of driving behavior or an accident. The use of roadblocks or traffic checks will in some circumstances eliminate the need for "reasonable suspicion" for the initial confrontation, since the U.S. Supreme Court in *Delaware v. Prouse* approved the use of roadblocks without the necessity of "probable cause" or "reasonable suspicion," and most courts since *Prouse* have also approved the use of properly conducted roadblock procedures.

So, if you drink and drive you can reasonably expect that in the not-too-distant future you may be stopped and given a PASD or similar test. If you're over the legal limit, expect to find yourself under arrest.

Equality

(continued from page 20)

found that the order excluding the Japanese did indeed meet the test.)

A third and intermediate standard between "rational basis" and "strict scrutiny" is that which effectively shifts the burden of proof to the law-making body, which must show that the classification is not only rational, but also a necessary element in achieving an important legislative objective. Using this standard, the Court struck down the Oklahoma law I mentioned before that allowed 18-to 20-year-old females to buy beer when males the same age could not, on the grounds that the law violated the equal protection clause of the Fourteenth Amendment.

Thus, a critical issue in equal protection cases is method of proving that one has been discriminated against—that is, that you have been treated differently from others similarly situated and thus denied equality.

When *Korematsu* and *Strauder v. West Virginia* were decided, discrimination was more blatant. The Black Codes and the Jim Crow laws were all very specific about race. But once you move away from a statute which on its face classifies by race or sex, then how do you prove that you are being treated differently?

One method is disproportionate impact. That is, a law impacts more heavily on one group, so it must be discriminating to their detriment. The disproportionate impact method of proof is on the wane. The Court is moving toward a position of saying you must now prove that the lawmakers were animated by a purpose, a motivation, a specific *intent* to discriminate. That makes it extraordinarily difficult, since in the 1980's inequality and discrimination have become more subtle.

Many people are saying that moving toward a proof of specific discriminatory intent is foolishness given that we are in the year 1986 and people have had more than 200 years to learn how not to discriminate on the face of an enactment. It is clear that the only way that you can move from equal protection to true equality is to look at what is real rather than what is assumed, and what is real is the disproportionate impact of statutes, decisions, practices on blacks, aliens, the poor, or other groups that do not have the political or economic ability to protect themselves from inequality.

The Future

The future of equal protection and equality is closely tied to the question of whether or not one can deal with people as a class rather than individually. What equal protection has meant throughout history is that people must be treated individually. And yet, if we go back to the origins of the Fourteenth Amendment, the major thrust of the amendment was to deal with class-based discrimination. So the argument now goes on between those who say that if the original discrimination was class-based, the remedy must be class-based, and those who argue that we deal only with individuals in this country.

The bottom line, of course, is that the equal protection clause is a legal doctrine that looks at whether or not a state has treated people who are similarly situated the same and which permits classifications—even burdensome ones—when a rational basis or a substantial state interest can be found. It says nothing about the ultimate results of the distribution of society's benefits and burdens. And while the amendment which houses it has been hailed far and wide as being a significant innovation of the American Constitution, it clearly does not automatically dictate a results-oriented equality, even though theories are available to permit benificent results under equal protection.

Current equal protection analysis often fails to look beyond the appearance of neutrality and therefore facial equality to get to the inequalities lurking behind the law's facade. To achieve actual equality of life results, the dispossessed are still at the mercy of legislative, political, and economic processes, and not the courts.

Notwithstanding these faults, I believe the equal protection clause is a the most significant part of the Constitution. Without the Fourteenth Amendment, according to *Dred Scott*, none of us would be citizens of these United States. Being national citizens, with some guarantee of equal protection, helps diverse people to come together as a society, and as a nation to work toward perfecting the vision embodied in the American Revolution and the Preamble to the United States Constitution.

Foundations of Freedom

Searches Without Warrants/Grades 9-12

Steve Jenkins

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . ." Does this mean that all searches are prohibited? (No, persons are only protected from "unreasonable searches and seizures.")

What is a reasonable search? Can a search without a warrant ever be reasonable? Brainstorm students' responses to these two questions. By brainstorming, the students will probably identify several situations in which they believe warrantless searches are reasonable (e.g., searches by metal detectors at airports).

Although the Fourth Amendment generally emphasizes the warrant requirement for legal searches, the courts have recognized certain circumstances where warrantless searches are considered legal. The following are examples of legally recognized warrantless searches:

- *Consent to Search.* If a person gives permission to law enforcement officers to search him or her, and his or her property, then such a search may be conducted without a warrant. Generally the courts have only recognized a person's right to consent for that which a person has control (that is, the person and the person's property). The courts have recognized a few circumstances where a person may give consent to search a third party (for example, a parent giving consent to search his or her minor child).

- *Border and Airport Searches.* These searches involve a type of implied consent (that is, everyone choosing to travel by air, or choosing to enter the country, is aware of the search that may be conducted). Specifically, the courts have recognized the right of customs officials at U.S. borders to examine vehicles, baggage, purses, wallets, or similar belongings.

- *Search Incident to a Lawful Arrest.* If a police officer arrests a person, the courts have recognized as legal the police officer's search of the arrested person and the area immediately surrounding the person. The courts have recognized this warrantless search in order to protect the officers from hidden weapons that the arrested person may have, as well as to prevent the arrested person from destroying evidence.

- *Stop and Frisk.* Much like the recognized warrantless searches incident to a lawful arrest, the courts, in order to provide additional protection for police officers, have upheld the right of a police officer to conduct a warrantless search if the officer believes that a person is acting suspicious. An officer is also permitted to conduct a warrantless search if he or she has reasonable suspicion that a person may be carrying a concealed weapon.

- *Vehicle Searches.* The courts have recognized a police officer's authority to search a vehicle for illegal substances (often referred to as contraband). However, the police officer must have probable cause to believe the vehicle contains contraband.

- *Plain View.* The courts have held that if an object connected with a crime is in plain view of a police officer acting lawfully, then the object can be seized without a warrant. For example, if a police officer is patrolling in a neighborhood and right in plain view observes several marijuana plants growing in someone's yard, the police officer may seize the marijuana plants without a warrant.

- *Hot Pursuit.* The courts have said that police officers in hot pursuit of a criminal suspect are not required to obtain a search warrant before entering a building that they have observed the suspect enter.

- *Emergency Situations.* The courts have upheld warrantless searches in the following emergency situations: searching a building following a telephoned bomb threat; entering a building after smelling smoke or hearing screams; and other emergencies involving preservation of life or health.

Ask students to consider the following cases and determine if, in their opinion, the warrantless searches were reasonable.

Case 1

Railroad officials in San Diego, California, observed two persons loading a brown footlocker onto a train bound for Boston, Massachusetts. The officers became suspicious when they noticed that the footlocker appeared to be unusually heavy for its size. They also observed that talcum powder was leaking from the trunk. Talcum powder is often used to hide the odors of marijuana and hashish. The railroad officials reported these suspicions to the federal agents in San Diego. The federal agents relayed this information to federal agents in Boston, Massachusetts.

When the train arrived in Boston, several days later, federal narcotics agents were waiting. The agents had a police dog with them. The dog had been trained to detect marijuana. The agents did not have a search warrant. When the footlocker was removed from the train, the police dog reacted such a way that the agents had even greater suspicion that there were illegal drugs in the footlocker. A man drove his car up to the loading dock, and when he and some companions heaved the footlocker into the trunk of the car, the agents moved forward and arrested the man and his companions. An hour and a half later, the agents opened the footlocker and found a large quantity of marijuana.

The agents did not have a search warrant or the consent of the footlocker's owner. The agents claimed that the warrantless search of the footlocker was reasonable because it was incidental to an arrest. In addition, the agents claimed that the footlocker was in plain view in the car trunk when it was seized. The footlocker owner claimed that the warrantless search of his private property was a violation of his Fourth Amendment

protection against unreasonable search and seizure.
What do you think?

1. What arguments might the federal agents make to justify this warrantless search?
2. What arguments might the footlocker owner make to justify suppressing the evidence seized during what he claims was an illegal search?
3. In your opinion, did the federal agents conduct a lawful, reasonable warrantless search? Briefly explain your answer.

ANSWERS TO CASE 1

1. Student answers will vary but may include the following: The federal agents might argue that the warrantless search was legal because it was a search incident to the lawful arrest of the footlocker owner who was suspected of possession of illegal drugs. The agents might also claim that the search and seizures fall under the "plain view" circumstances. That is, if the object (i.e., the footlocker) connected with a crime is in plain view of a police officer (i.e., federal narcotics agents) acting lawfully, then the object can be seized without a warrant.
2. Answers will vary, but may include the following: The owner of the footlocker might argue that a search incident to a lawful arrest only permits the federal agents to search him and the area immediately surrounding him. The footlocker was not within the immediate area, and besides, the owner was under arrest and in the police custody, and the footlocker did not pose a threat of hidden weapons; so if the federal agents wanted to search the footlocker, they should have presented their facts to a judge and asked for the issuance of a search warrant. After all, the federal agents actually had at least two days to take the information from the San Diego federal agents and apply for a search warrant based upon the facts presented by the railroad officials.
3. Answers may vary and students should give reasons to support their answers.

NOTE. This case is based on *United States v. Chadwick*, 433 U.S. 1 (1977). The U.S. Supreme Court held that the footlocker owner's Fourth Amendment rights had been violated. The Court ruled that placing personal effects in a footlocker protects them from unreasonable governmental invasions of privacy. The Court also agreed with the footlocker's owner that the federal agents should have applied for a search warrant. The Court said it was unreasonable for the government to search without a warrant when the agents had over two days and sufficient facts to obtain a search warrant from a judge.

Case 2

A high school security guard noticed a student walking down the hall with large bulges in the rear pockets of the student's jeans. The security guard thought that the bulges appeared to be in the shape of pocket knives. The guard stopped the student and and asked him what he had in his pockets. The student told the guard that the bulges were pencils and he walked on. The guard asked to see the pencils, but the student continued to walk away. The guard shouted to the student to stop, but the student acted as though he didn't hear the guard. The guard caught up with the student, patted him down, and removed two knives from the student's pants pocket. Later that day, after being advised of his rights, the student admitted to police that he owned the knives.

The student was placed on probation by a juvenile court for possessing knives on public school grounds in violation of the California Penal Code. The student appealed his conviction, contending that the school security guard had violated the student's Fourth Amendment protections against unreasonable search and seizure; and therefore, since the knives had been seized illegally, the knives should have been suppressed as evidence against the student. School officials claimed that the security guard was fulfilling his duties under the California Education Code to ensure "the security of school district personnel and pupils and the security of the real and personal property of the school district."

1. What arguments might the security guard make to justify his warrantless pat search of the student?
2. What arguments might the student make to justify his claim that the seized knives should be suppressed as evidence?
3. In your opinion, did the security guard conduct a lawful warrantless search of the student? Briefly explain your answer.

ANSWERS TO CASE 2

1. Answers will vary but might include the following arguments: As a security guard he was responsible for protecting school personnel and pupils, as well as real and personal property of the school district. This duty is much like that of a police officer, and like a police officer, the security guard should have the right to stop and frisk a student for weapons if the guard reasonably believes that the student is behaving suspiciously and is likely to be armed. The courts have upheld these types of warrantless stop and frisk searches.
2. Answers will vary but might include the following arguments: The student might claim that the security guard did not have reasonable suspicion to stop him, let alone search him. Therefore the security guard's action was unreasonable and a violation of the student's Fourth Amendment protection from unreasonable searches and seizures.
3. Answers will vary and students should give reasons to support their answers.

NOTE. This case is based on a recent California case (181 Cal Rptr 856). The California Court of Appeal held that the security guard for the school was properly exercising his duties of employment. The guard was acting properly to protect the security of the school's personnel. Therefore, the security guard conducted a proper stop and frisk search.

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Due Process

(continued from page 10)

on the very same statute that doesn't provide for a hearing? Congress didn't have to pass a statute giving you any right to be fired for cause at all, but it did pass this law, and you've got to take the bitter with the sweet. Maybe it said for cause, but if it doesn't give you a hearing right, you've got no property right at all. He got three votes for that proposition.

Everybody else said no, you've got a property right, the right not to be fired unless for cause. And then the question was, what process is due? Five justices out of nine decided that you had to have a hearing, a fair hearing, but the hearing can come *after* you were fired. It didn't have to come before. That is not much of a consolation to a person who is out of work and has to depend on the Civil Service Commission to get back to work, but they said that was due process.

And that in a nutshell is the Kennedy case. From that point on, it was no longer easy to get in the way of what the government wanted to do. First you had to show that you had a property right, then you had to show that the procedures that had been given to you were not what were "due." And as time has gone on, for the last 11 years, it has become harder and harder to prevail on both of those issues. It used to be that the courts would find a property right almost anywhere you look. Now it's getting harder to demonstrate that anything other than what you actually physically own is indeed a property right. And the courts have become much more conservative about what kinds of procedures are necessary in order to give you due process.

How Judges Decide

The due process clause is a very complicated piece of law to unravel. There are a million subquestions, and lawyers make a fine living doing nothing but arguing due process cases, although they are all on the defendant's side now. But underneath all of the lawyers' arguments about the meaning of this and that, what is going on is quite simple. The due process clause, in a sort of inefficient, slow way, does represent the general fairness requirement that the Constitution imposes on the government.

I believe that when all is said and done, judges decide due process cases by saying, "Was this fair?"

Fairness, as all of these developments show, is an incredibly unstable concept in our society. Things that we regarded as absolutely fair for 100 years, all of sudden became entirely unfair. Things that we regarded as unfair have become fair.

The pendulum has been swinging back and forth, and will continue to swing back and forth. For example, back in the 1920s, a substantial number of people thought it wasn't unfair for the state to involuntarily sterilize someone, with procedures which I think today would be regarded as laughable. (See *Buck v. Bell*, 274 U.S. 200 (1927.).)

During the McCarthy period, neither the Supreme Court nor any substantial number of people thought it was unfair to summarily take a fellow off of his job in the cafeteria of a Navy installation because somebody had alleged he was a security risk. (*Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).)

Old Standards

For a hundred years, most people thought it was fair to garnishee a debtor's wages before you got a judgment as to whether he or she owed you the money. Most people in this country thought it was fair that when you had a lawsuit against somebody you were able to attach the person's property before you got a judgment, because you were afraid that the person might scoot out of the state and avoid having to pay you if you won.

People didn't think about these practices. If you told them that those things were unfair, they would have said, "What are you talking about? Here is a nitwit, can't you sterilize him? Here is a person somebody said is a communist, can't you fire him summarily? Here is a person who owes me money, can't I attach his wages? Can't I seize his house? What are you talking about?"

But times change. These things begin to be regarded as unfair. At the height of the due process revolution, if you want to call it that, we were able to come within one vote of convincing the Supreme Court that it was unfair to fire a federal employee and not give him a full-fledged lawyer's-type hearing before you fired him. A lot of people thought that the Supreme Court's decision in that case was unfair.

And then the pendulum began to move the other way. Our notions of what is fair have begun receding. People who assert that government ought to have checks on it and hearings before it takes these kind of actions are on the defensive. A new kind of argument is surfacing in the courts and in academia, which says that these procedures get in the way of government efficiency. Having all of these due process protections before a government can act is making it hard to run the government, and is leading to economic inefficiency.

What is Fair?

In back of those kinds of arguments, I think, are questions about fairness. Is it all that unfair to cut somebody off of welfare before you give him a hearing? Why can't we give him a hearing in the next week or two? Isn't that good enough? Is it all that unfair to fire an employee if we give him a hearing in the next five or six months and give him his job back with back pay if he happens to win?

All of these illustrations, and many, many more, show that one of the least stable notions in a society is what particular things are fair and what particular things are unfair. What is going on with all of the lawyering under the due process clause, all of these categories and subcategories and fine points and nitpicking, is that there is some general notion that fairness is required on the part of the government. If we get too far away from that, according to current notions, courts will strike it down. If we're within some reasonable distance of what seems to be fair by judges as they dimly reflect the general attitudes of the population, it will be sustained.

Summing It Up

Is all this due process worth it? What would we be like if we didn't have a due process clause? That is like saying what would my uncle be like if he were my aunt.

In some form or another, a system which allows courts to review government action the way ours does will always impose some sort of fairness requirement. What is unique and wonderful about the due process clause is that that's what it is explicitly for. The world is full of governments that don't have any requirement of fairness. Those governments tend to run more efficiently than ours does – and they are a lot worse.

The people who want to cut back on the scope of the due process clause are really asking to get the people off the backs of the government. But the fact of the matter is that we have a due process clause, and as long as we have judges who are authorized in law suits to interpret it, they're going to interpret it. Whether they say they are intepreting it in with regard to the intent of the framers, or whether they say they are interpreting it in light of contemporary standards, they will be doing the same thing. They will be taking their current notions of what is fair and they will be applying them. □

Spirit of Liberty

(continued from page 4)

law. When you focus on due process of law and see all of the guarantees that that includes, you get an impression of how complex the question is, how important it is in seeing that free government continues.

Other principles that I would stress go back, for example, to Abraham Lincoln, who in the Gettysburg Address said that government should be "of the people, by the people and for the people" – a phrase which has very important constitutional meaning. In that regard I would stress that the civilian authority should be over the military, something we seem to forget in recent years. The government's authority to make war ultimately lies in decisions by the people's elected representatives. Also, martial law should not occur in peacetime. One branch of the government should not be delegating its powers to another branch of the government and giving away its authority. Law enforcement is not to be carried out through police state methods, even when major civil crises arise.

The Hearts of Men

The Constitution is a set of sensible general rules for achieving national values and principles – the ones we talk about in saluting the flag with liberty and justice for all or singing "America, sweet land of liberty." Establishing principles is the way to implement values, and institutions are structures for achieving these principles.

But we can never repeat too often that constitutions only work if people want them to. And healthy ones only work the way the people want them to. Judge Learned Hand gave a very interesting little speech during WWII. He was talking to a noonday crowd in at a park in New York City in the depth of the war, when we were struggling to defeat Hitler and the Axis powers.

Hand said, "Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it. No constitution, no law, no court can even do much to help it. But when it lies there, it needs no constitution, no law, no court to save it."

Thomas Reed Powell, who taught constitutional law at the Harvard Law School for many years, made the same point by focusing on what happens when the spirit of liberty flickers out. Writing after World War One, when we had practically eliminated free speech and press for the wartime period, he said "Nine men in Washington cannot hold a nation to ideals it is determined to betray."

What both of these people are saying is that constitutionalism is a frame of mind. It is an attitude. And how do we teach attitudes? How do we instill in students a sense of the importance and value of a particular document? How do we say to young people, you should think this way, you should appreciate that a free society is a precious thing? My own children got this idea very clearly planted in their young minds by living nine months in a military dictatorship, where every morning you went to school and passed by armed policemen. Every morning the other children didn't know if their father would come back at the end of the day. My kids came back to this country patriotic about the glories of living in a free society.

We can't take our youngsters to live for a year in Nigeria, but we can at least try to convince them of the values of good constitutionalism and the importance of their playing a role in preserving and protecting that constitutionalism. No one says it will be easy – but everyone agrees that it is vital. □

States

(continued from page 29)

their constitutions within the last thirty years. In five states, constitutional amendments can be made through the initiative process.

States may *again* become the laboratories for federal amendments that have been proposed but not yet mustered the necessary support to become the law of the land. □

Religion

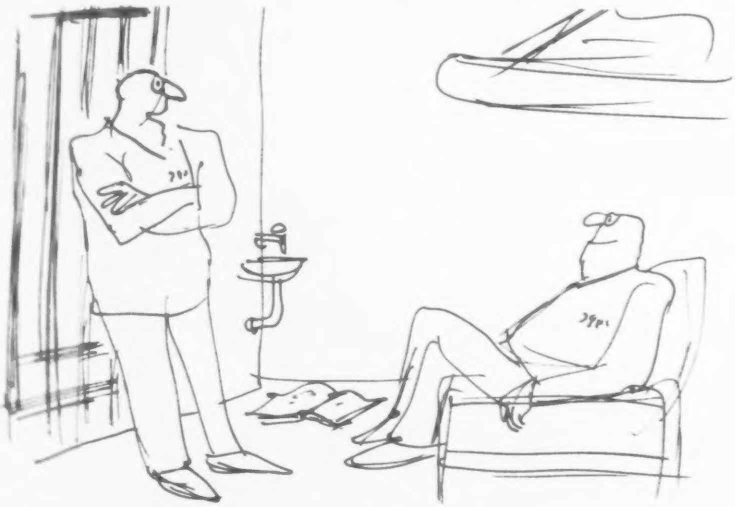
(continued from page 37)

this legislation was not an issue in *Bender*, but at some point in the future a Court decision may well forebode the Act's ultimate fate.

A Free Exercise Puzzle

Cases involving the Free Exercise Clause appear with somewhat less frequency on the Court's docket than do Establishment Clause cases. Last term, the one significant Free Exercise case resulted in a no-decision. (For a review of all of last term's decisions – including those involving the religion clauses – see *Update*, Fall 1985). This term, *Heckler v. Roy*, No. 84-780 (see *Preview*, Jan 31, 1986, pages 211 – 214) is an astoundingly unique case.

The issue in *Roy:* does the Free Exercise Clause require the government to respect a sincerely held religious belief that the administrative use of a Social Security number is an intolerable evil. The respondent in *Roy* is a Native American who was denied public benefits (AFDC payments and Food Stamps) for his infant daughter, Little Bird of the Snow, when he refused to provide state welfare agencies with her Social Security number. It was his belief – not directly questioned by the government – that the administrative use of that number would rob Little Bird of the spiritual protection endowed by her name. Weighed against these unique beliefs are the administrative demands of the state and federal welfare bureaucracies. It's a fascinating choice for the Supreme Court; for the results, check the next issue of *Update.* □



"Who was it said 'Laws were made to be broken'?"

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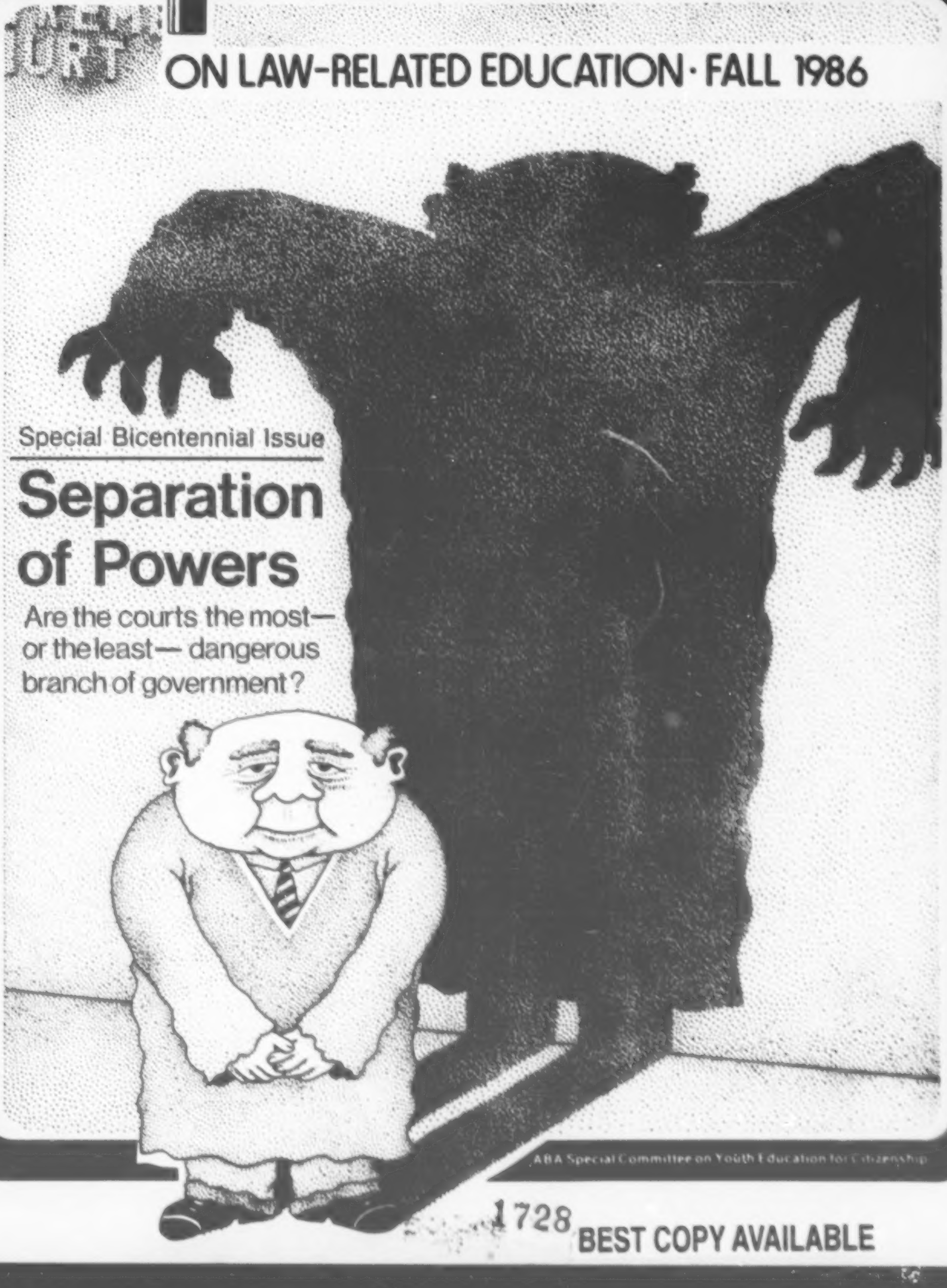

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contents

Volume 10, No. 3, Fall, 1986

2 **The Constitution's Prescription for Freedom**

STRATEGIES
- 6 The Tides of Power
- 9 Claim Your Powers
- 10 Case Study: A Separation of Powers Lesson
- 13 Teaching About Separation of Powers

18 **Foundations of Judicial Review**

STRATEGIES
- 22 Limits on Judicial Review, Interpreting the Constitution, Current Controversy

24 **The Least Dangerous Branch?**

STRATEGIES
- 28 Supreme Court Crossword
- 29 Selecting Supreme Court Justices: Beyond Advice and Consent

32 **The Supreme Court in Transition: From Warren to Burger to Rehnquist**

36 **Swan Song for the Burger Court**

STRATEGY
- 40 Voir Dire Simulation

43 **New Materials for the New School Year**

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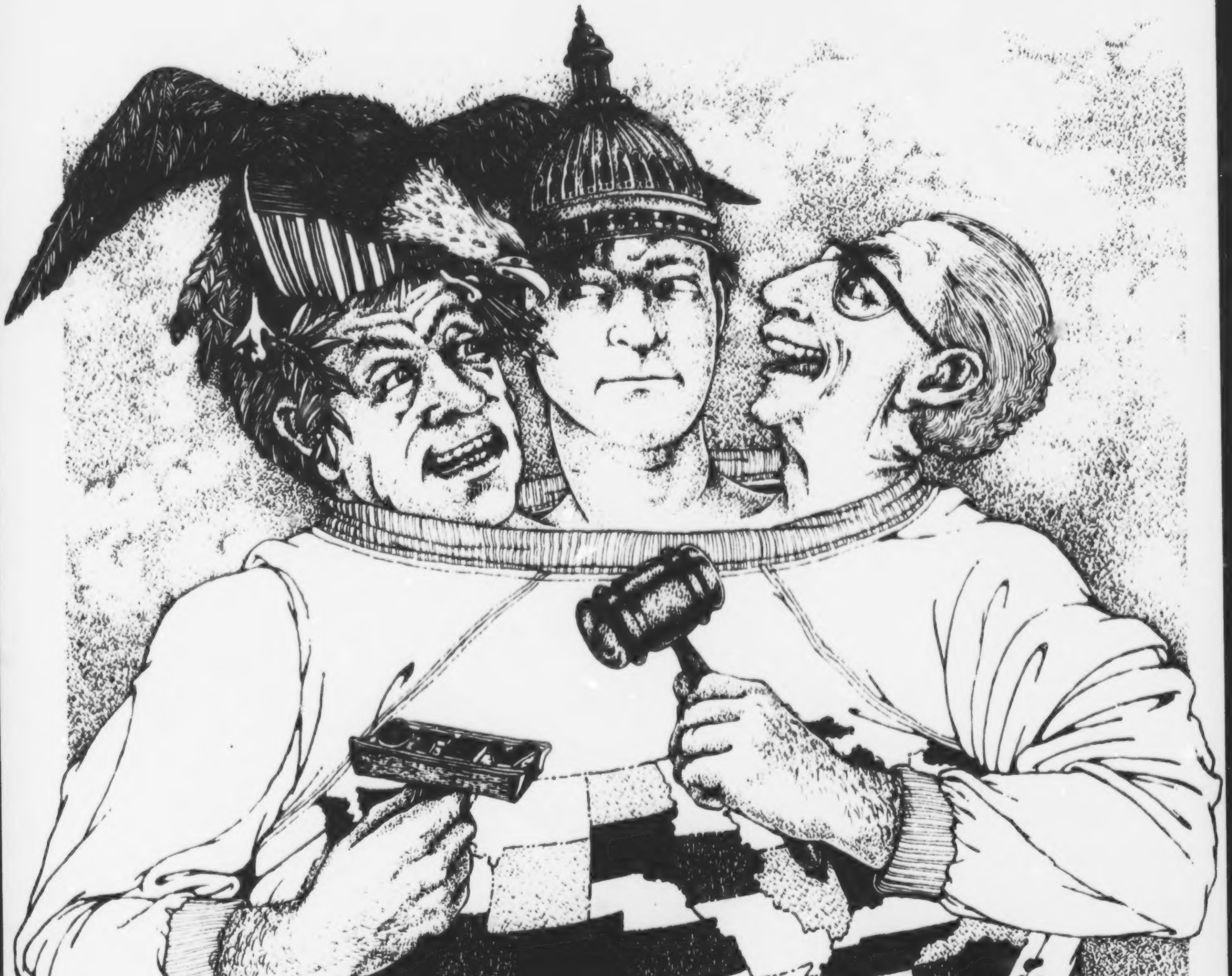
SEPARATION OF POWERS



Lucinda Peach

The Constitution's Prescription for Freedom

After the War of Independence with England, the citizens of the newly founded American nation were concerned about how to establish a system of government that would allow the people to remain sovereign and free to govern themselves, rather than being subject to the tyranny of the state. By dividing the powers of government among different branches, each having its own functions and defenses to prevent control by the others, and by leaving power to the states, it was thought that the people would remain able to "secure the Blessings of Liberty to ourselves and our posterity." The Constitution thus created the framework for dividing power among three separate and distinct branches of government: legislative, judicial and executive.

Throughout our constitutional history, there have been many situations where one branch has been accused of violating the principle of separation. Nevertheless, the "separation of powers" was designed so well that it has served to maintain our democracy for almost 200 years. This article will examine how the framers came to choose our particular system of government, how that system was designed to function, and how the separation of powers has served to maintain our democracy despite attempts to violate it.

Background

According to James Madison, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Jefferson and Adams agreed. However, the idea that governmental power would be less subject to abuse if it were distributed among different branches arose long before the framers decided to include it in the Constitution. The philosopher who is generally considered to have formulated the concept of separation of powers was the 18th century Frenchman Baron de Montesquieu, although aspects of the principle are thought to have originated with Locke and even Aristotle.

Montesquieu recommended a system of checks and balances, in addition to the separation of powers, to restrain government from exercising too much authority. He suggested that the executive branch should have a veto over legislative acts, that there should be two branches of the legislature which would act to check one another, and that the legislature should check the executive by controlling appropriations and making the executive's ministers accountable for the faithful execution of the laws. His book *The Spirit of the Law* was widely read at the time the Constitution was written and had an obvious influence on the framers.

Practical considerations also influenced the framers' ideas for how to form a workable plan for governing themselves. They had recently witnessed first-hand the abuse of power exercised by the English monarch and had been forced to declare war in order to liberate themselves from control by the British crown. They had little more confidence in the British Parliament, especially since Parliament's laws were not subject to constitutional review by the courts. However, the English plan of government did give the framers a familiarity with the ideas of a limited monarchy whose exercise of power was subject to due process of law.

In addition, many of the colonial states' constitutions provided for both a separation of powers as well as a three branch system of government, comprised of executive, legislative and judicial offices.

These constitutions proved better in theory than in practice, however. Since the executives had no real authority, the legislatures were effectively in control. Separation was untested and undefined. These experiences led Madison to conclude that the branches of government had to be independent as well as separate from one another. The judiciary could not serve only at the pleasure of the legislature because this would lead judges to base decisions on political considerations (pleasing the legislature in order to be reelected) rather than on constitutional and legal ones. Similarly, if the executive branch was dependent upon the legislature for reelection, it would not be able to exercise any real independent authority.

The framers encountered some practical problems in implementing the system of separation of powers in their plan for a new government. They did not have a strong existing government to work with. Instead, there existed a number of separate state governments which had been loosely but ineffectively affiliated under the Articles of Confederation. The Articles had not provided for a separation of powers and the Congress it created was without power to make laws. Since no monarchy existed in America, there was no readily available king to head the executive branch. And since no formal class system existed, there was no easy division for the legislature as there was in Britain, with an upper House of Lords and lower House of Commons. Furthermore, the framers did not want to replicate the British system of government, but wanted to vest sovereignty in the people, while retaining some authority in the states. After much argument and debate, they were able to overcome these difficulties.

Separation and Structure

The framework of the first three articles of the Constitution itself reflects the separation of powers principle. Article I creates the Congress, vesting all legislative powers in a Senate and House of Representatives. Section 8 of this article sets forth specific powers of Congress, including that "[t]o make all laws which shall be necessary and proper for carrying into execu-

1732

tion the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Article II creates the office of the president, vesting it with the executive power. Section 2 makes the president the commander in chief of the army and navy of the United States, gives the executive the power to pardon, make treaties, appoint judges of the Supreme Court and veto legislation (subject to limitations discussed later). Section 3 orders the president to "take care that the laws be faithfully executed."

The Supreme Court is established in Article III, which vests it and "such inferior courts as the Congress may, from time to time, ordain and establish" with the judicial power. The Supreme Court's jurisdiction is established in Section 2 as including the authority to hear all cases arising under the Constitution, the laws of the United States and treaties and controversies to which the United States is a party, between two or more states, between a state and citizens of another state, between citizens of different states, and between a state, or its citizens, and foreign states.

Thus, each branch of government was established to carry out a different and specific function. Congress would make the laws, the president would carry them out and the Supreme Court (and lower courts) would ensure that the laws were made and enforced properly.

Congress was designed to be the most powerful branch because it was most directly accountable to the people, being elected democratically. The Supreme Court was viewed as the "least dangerous" branch because its powers were thought to be the weakest. The powers of the presidency, however, were an unknown, since Americans had no prior experience with this form of executive authority.

Under the Articles of Confederation, Congress appointed various ad hoc committees to carry out the various administrative tasks of government, but did not give them power or independence. Early state constitutions similarly made the executive subject to the legislature. Because this led to legislative encroachments on the other two branches, the framers rejected proposals to have Congress elect the president. They also protected the president's salary from legislative control and created the executive's powers by an express constitutional grant rather than making it subject to legislative determination. The president, for example, has the sole power to grant pardons, a power which Congress cannot interfere with, just as the other two branches cannot interfere with Congress' impeachment power.

Lucinda J. Peach is an attorney-educator who is Assistant Staff Director for the American Bar Association's Commission on Public Understanding About the Law.

As history has unfolded, however, expectations about how much power the different branches of government would exercise have not been met. During different times, the balance of power appears to have shifted, first from Congress to the Supreme Court, and, during recent decades, to the president. Some of these shifts have been controlled by the system of checks and balances, which the framers developed to ensure that the framework of government contained enough relationships between the branches to prevent one from acting too independently of the others.

Checks and Balances

The new Constitution was criticized for not sufficiently distinguishing between the functions of each branch, in violation of the separation principle. Madison responded to such criticisms by contending that, although there was in fact no strict separation, the system was adequate to prevent too much power from accumulating in one branch.

The method that was used to prevent a power grab by one branch was the system of checks and balances that was written into the Constitution. This system establishes certain specific limitations on the independent exercise of authority by each branch. It creates some overlap of functions, and so runs contrary to the strict separation of powers, but the overall effect is to limit the branches.

Limitations on Congress

Although Congress wields a great deal of power under its constitutional mandate to make the law, its authority is limited. One significant limitation is internal—the result of having two houses of Congress which serve as a check on one another. This division of legislative power is partially the result of the framers' concern about giving too much power to this popularly elected branch of government— "the excess of democracy," as Elbridge Gerry called it. A similar kind of limitation is contained in Article I, Section 6 of the Constitution, which prohibits members of Congress from holding any other federal governmental office during the time for which they've been elected.

Another limitation placed on the legislature is the president's power to veto legislation. This power is not absolute, since Congress can override the veto by a two-thirds majority vote in both houses. In addition, if the president fails to return legislation within 10 days (excluding Sundays), it usually becomes law automatically, but if Congress adjourns before the 10 days have elapsed, the president's failure to act kills the bill, creating a "pocket veto." The hurdles involved in passing legislation over a veto have served to deter Congress somewhat from enacting controversial laws.

In addition to the veto power, the president also exercises considerable authority over Congress by recommending legislation. Because Congress is too large and unorganized to originate most legislative programs, the president has taken over this responsibility. In recent years, almost all important legislative proposals have originated in the executive branch.

The judicial branch also exercises some control over Congress. Although the Supreme Court does not give advisory opinions, its decisions as to the constitutionality of legislation may prescribe the outer limits within which Congress may act. For example, Congress often delegates power to the executive or to independent governmental agencies to carry out certain functions. If the Supreme Court determines that Congress has gone too far and delegated powers which the Constitution has allocated to the legislative branch, then it may declare such delegation of authority unconstitutional.

Limitations on the President

In recent years, the presidency has often seemed to overshadow the other two branches, but remember that the Constitution limits the executive in many ways. The president has the power to nominate persons for office, but ambassadors, judges, and other appointees won't serve unless they are confirmed by the Senate. The president can make treaties, but they won't go into effect unless they are ratified by a two-thirds vote of the Senate.

"Executive privilege," an implied separation of power, gives the president immunity from the judicial process, in all but extraordinary cases. This limits the ability of courts to interfere with the executive branch. However, federal courts act somewhat as a constraint on the activities of the executive when they rule on the constitutionality of executive activities. *United States v. Nixon,* 418 U.S. 683 (1979), arising out of Watergate, discussed below, is an example of this type of judicial check on the powers of the president.

The sole penalty for misbehavior by the president is removal from office—impeachment. Article I, Section 3 of the Constitution establishes the procedure for impeachment. The House of Representatives initiates the process by passing a resolution charging the president with "Treason, Bribery or other high Crimes and Misdemeanors." The House then appoints managers to prosecute the president in a trial before the Senate sitting as a court, at which the Chief Justice presides. A two-thirds majority vote of the Senate is required for impeachment. The framers intentionally made the procedure a difficult one to ensure the executive's freedom from congressional interference under normal circumstances.

Limitations on the Judiciary

Article III of the Constitution gives Congress some control over the federal courts by authorizing it to establish lower federal courts and decide the limits of their jurisdiction as well as to regulate the appellate jurisdiction of the Supreme Court. Under Article 2, Section 4, Congress may also remove federal judges from office if they violate the "good behavior" requirement of Article III, Section 1. The president, similarly, has some indirect control over the courts through exercising the power to appoint federal court judges. President Roosevelt's "court-packing" plan and President Reagan's appointment of politically conservative judges provide examples of attempts to use this power.

In an attempt to restrain the Supreme Court from striking down New Deal laws, President Roosevelt wanted Congress to pass legislation allowing him to appoint one new justice for every member of the Supreme Court over age 70, up to a limit of six new justices. By diluting the membership of the Court with members who shared his political views, the president hoped to be able to control its decision-making. Congress rejected the court-packing proposal on the ground that it would violate the system of checks and balances. But by this time, several of the older justices had resigned, and Roosevelt was able to appoint all but two members of the Court by the end of his term in office. Although the court-packing plan itself failed, in the long run the president was able to remake the Court.

In addition to limitations imposed on the Court by the other branches, the Supreme Court has also fashioned some limitations on its own decision-making powers which are not expressly provided for in the Constitution. An example of this is the "political question" doctrine, by which the Court decides that it is not the appropriate body to resolve the issue involved in the case before it. Sometimes the rationale used by the Court is that the matter has been committed by the Constitution to the politically accountable branches of government—Congress and the executive—and must therefore be resolved by them. The Court has declared many military questions, such as the necessity for calling out the militia, and foreign policy questions, such as the constitutionality of the war in Vietnam, to be political questions which it cannot rule on.

The system of checks and balances has not always been sufficient to prevent alleged violations of the separation of powers, however. Several times throughout our constitutional history, situations have arisen in which one branch of government has been accused of invading the territory of another or giving its own power to another branch in violation of the Constitution.

Violations of the Separation Principle

There are several different types of alleged violations of the constitutional separation of powers. Two in particular have recurred throughout history and remain important issues today. One involves the war powers; the other the legislative veto.

A problem concerning the war powers arises because the Constitution divides the power to wage war between the president and Congress. The framers gave Congress the power to declare war because it wanted the power vested in the body most broadly representative of the people. Congress was also given the power to tax and finance expenditures for defense, determine the rules of warfare, raise and support the army and navy and to make all laws necessary and proper for exercising the war power. But since the framers wanted to be sure that military forces could respond quickly to repel sudden attacks, the president has the authority to mobilize the armed forces.

As commander-in-chief of the armed forces, the president also has the power to see that the laws are faithfully executed and peace is preserved. This power arguably authorizes the president to use military force where required to protect the national interest, unless Congress prohibits it.

One issue which the framers neglected to resolve in the Constitution is whether the executive's power to declare war enables the president to commit troops to foreign soil in the absence of an express declaration of war, without congressional approval. Three theories have been used to justify this type of action.

In the *Prize Cases*, 67 U.S. 635 (1863), evolving out of the Civil War, the Supreme Court upheld President Lincoln's blockade of the southern states without a congressional declaration of war. The theory underlying these cases was that the war power was broad enough to authorize the president's use of troops to quell domestic insurrections. President Theodore Roosevelt used a theory of neutrality to send troops to Panama in 1903. He argued that the U.S. forces were not there to take sides, but merely to preserve the American investment in the Panama Canal, even though they were actually being used to fight the Columbian army. President Truman similarly ordered troops sent to South Korea to repel North Korean troops without authorization from Congress. In a third situation, President Kennedy used a collective agreement between the Organization of American States and the United States as justification for a quarantine during the Cuban missile crisis.

Public tolerance for such unauthorized uses of force by the president terminated with the escalation of the Vietnam War. Although a number of lawsuits were filed against the war on the grounds that Congress had not given its authorization, the Court refused to hear them, mostly on the basis of the political question doctrine.

In 1973, Congress passed the War Powers Resolution over the president's veto to "insure that the collective judgment of both the Congress and the President will apply to the introduction of U.S. armed forces into hostilities." The resolution establishes a 60-day limit on presidential commitment of U.S. troops abroad without specific congressional authorization and requires the president to consult with Congress whenever possible before introducing armed forces into hostilities. President Nixon condemned the resolution as an unconstitutional restriction on the commander-in-chief's authority to meet emergencies. Others have agreed. Yet the constitutionality of the War Powers Resolution has not yet been decided by the Supreme Court, and the conflict over the proper division of the war power between Congress and the president continues.

Congress and the president have long had conflicts about the proper spheres of their respective powers. President Washington refused to turn over papers to Congress concerning the Treaty of Commerce negotiated with Britian in 1795, despite

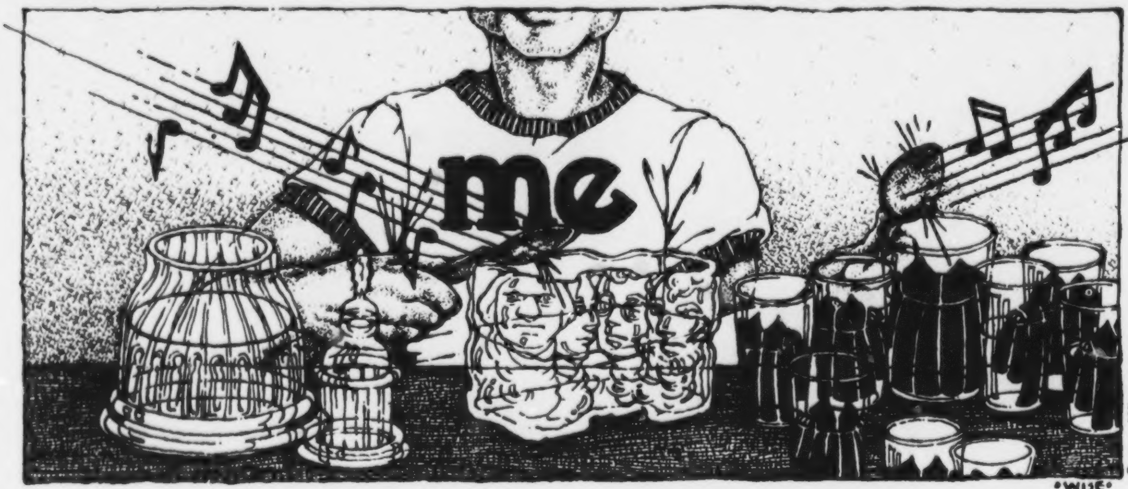
(continued on page 48)

1734

Separation of Powers

The Tides of Power/Secondary

Joseph Daly



Susan Wise

This activity began as a presentation for freshman legislators of the Minnesota House. The idea was that these men and women, many of whom are not trained in the law, might be in need of some extra help in understanding our constitutional form of government. I wondered whether the approach I decided to take—complete with simple action demonstrations—would work with these adults, but it turned out that they were very receptive. With a few variations, the approach would work well with high school youngsters too.

Objective

To show the sources of power under our federal and state systems of government. Specifically, 1) to provide a visual demonstration of how power is divided under our system of government, 2) to look at the U.S. and state constitutions, and 3) to highlight the role of the citizen in making democracy work.

Method

Begin by discussing power. What is it? Where does it come from? Answers will (and should) vary considerably, but probably they'll acknowledge that "power" is bound up with notions of control, authority, and ability to act. It's closely allied to "right," since, as one court put it, "the distinction between *power* and *right* in law is very shadowy and insubstantial. He who has a legal power to do anything has the legal right" to take action or not take action. (*State v. Koch*, 85 P. 272, 274).

Originally, most societies thought that political power came from God. Theories of divine right (power) held that God was the repository of all power, and that the king was His agent and the vessel for God's power on earth. The king, in turn, might share some of that power with noblemen who were subordinate to the crown.

You can get this idea of power across visually. Fill a large bowl or bucket with water. This represents God's power. Now pour some of it into a smaller vessel (representing the king), and then pour some of it from the smaller vessel to glasses, representing the lords, barons, knights and others to whom the king could grant power.

Ask students what kind of social and governmental organization this kind of thinking about power will produce. (Answers will probably stress a hierarchical society, in which each person has a precisely marked status depending upon how close or distant he is from the source of power. Slavery is a logical extention of this kind of thinking.)

PEOPLE POWER

Now ask students to think about power in a different way. What would happen if you turned the old system upside down? Instead of power coming from God to the king and then to the nobles, with no power to the people, what would happen if power came directly from God to the people, and they gave up some of it to form a government?

"We the people" are the first words in the Constitution. Similar sentiments in the Declaration of Independence also expressed the idea of people power:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights [the word "powers" could be substituted here]. . . that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. . .

How can we visually represent rights [powers] of which the people are "endowed by their Creator?" Pour water from a large vessel directly into a large variety of different shaped glasses, representing the people. Each glass has the same amount of water because each person is "created equally," no matter how different each is in talents or station of life. This is a truly revolutionary notion. Imagine, each person pursuing his *own* happiness.

An even more revolutionary notion is that each person has the ability to grant power to the government. To show this, pour some water from each glass into a medium-sized bowl, to show the people giving a grant of power to each state. (Make sure, however, that the glasses remain more than half full.) Why? People gave some power to the state in which they resided for police protection. They had to protect their safety and happiness through some form of government. But what happens when this—or any other—form of government becomes destructive of these ends, becomes destructive of life, liberty, and the pursuit of happiness? It is then the right—the power—of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles and organizing its powers in such form, as *to them* shall seem most likely to bring about their safety and happiness.

Our forefathers had the dream that people power could work, but they had had all too much experience with the reality of abusive power. They knew very well that government traditionally was centralized, highly structured, and dispensed power from the top down. In their first attempts to establish a government, they took great pains to limit the power they gave even to a government of their own making.

THE ARTICLES

Pour some of the water from the glasses into a number of different size bowls representing different states and different powers given to the states. This illustrates the concept of sovereign states given limited power by the people.

Soon the states and the people realized they needed some limited form of centralization to deal with problems. Why? The Declaration of Independence in 1776 and the war with England were carried out by a loose confederation of the states. This confederation was more like the United Nations than a national government. According to one of the Articles of Confederation, "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation expressly delegated."

Under the Articles, a very limited power was given by the states to a loose confederation which was the closest we came to a centralized government of the United States. For example:

1. The federal government was to raise an army to fight England.
2. The federal government was to settle disputes between the states.
3. The federal government was to assure that people could travel from one state to another.
4. The federal government was to attempt to centrally regulate the movement of commerce from one state to another.

Pour some water from each state bowl into a *very small* bowl (represents the federal government under the Articles of Confederation).

The primary tenet of the Articles of Confederation was that the *states* were agreeing that the central government was dependent and essentially impotent. Each *state* surrendered only a certain few of its powers to the new federal government.

Problems with the Articles of Confederation:

- Congress couldn't regulate and control land areas and free trade (e.g., Virginia claimed land from sea to sea, including part of Minnesota)
- The U.S. was unable to deal with a Canadian breach of a fur trade treaty
- The U.S. was unable to conclude commercial agreements with other nations
- Nobody would honor federal paper money
- Diplomats of the U.S. were not recognized by other governments

So on May 25, 1787, a Constitutional Convention was called for by the weak Congress set up under the Articles of Confederation. Why? To deal with the problem of having such a weak federal government. However, opinion was divided about what the convention was to do. According to Alexander Hamilton, one of those pressing for sweeping changes, it was "to devise further provisions as shall appear to the delegates necessary to render the Constitution of the Federal government adequate to the exigencies of the Union."

But the sole purpose, according to Congress, was to revise the Articles of Confederation. As we all know, the convention went much farther than that.

A NEW START

The opening paragraph of the new Constitution began "We the People of the United States." Ask students to look at the U.S. Constitution and read the first sentence. Ask: Who gave the power to this new form of government?

We've already seen that the Articles of Confederation took a very small amount of power from *the states* and set up a weak central government. The framers realized that the central government had to be more powerful. Get a bigger bowl, which represents the new federal government under the new Constitution. It necessarily must be bigger than the essentially impotent federal government under the Articles of Confederation.

Then ask: Where does the power come from for this new federal government? Does it come from the states? From the people? Or from both? Pour a little water from each state bowl into the bigger bowl. Pour some water from each glass into the bigger bowl. Ask where does the power of the federal government come from. From the people, Justice Marshall said in 1819, looking at the federal power under the Constitution. In *McCulloch v. Maryland,* 4 L Ed 579, Marshall wrote, "The people not the states gave life and power to the new government."

Then ask whether each state has the same amount of power as every other state, or if some states have more power? In relation to each other? In relation to the federal government? Compare the amount of power each state has (e.g., number of people, amount of resources, size of state).

The bowls of water can illustrate the questions you are asking. For example, when asking if each state has the same amount of power, hold up a big bowl with water and a little bowl with water. If the big bowl represents Texas, the little bowl represents Minnesota, and water represents power—is power a function of population, or wealth, or natural resources? Do some states have more of these than others? That's one kind of power. Then ask if each state is equal in power in relation to the federal government. That's another kind of power.

Then pass out a U.S. Constitution and look at specific powers given in it to the federal government and the states. Look at a general outline of the Constitution (i.e., the articles and amendments in very general form).

- Go to Article 1, Section 8, to show how the commerce clause and the general welfare clause have a lot to do with states
- Go to Article IV and show how the Constitution protects states against domestic violence

1736

- Then gradually go through the Constitution, making sure to show how Article I created the Congress; Article II, the Presidency, and Article III, the Judiciary.

If you wish, you can go to your state constitution for a quick run-through. Ours in Minnesota is very much like the federal Constitution in both the sources of governmental power and separation of power:

- Preamble: "We the People" do ordain and establish the constitution
- Article I – the very first article in the Minnesota Constitution – specifies that all political power is inherent in the people
- Article III (distribution of powers of government) establishes three branches. "No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others."

No doubt your own state constitution could be the basis of a similar exercise.

DIVIDING AND CONQUERING

The American system of government was revolutionary at the time. In many ways, it still is. Separation of powers and checks and balances have been adopted by very few governments around the world. To many foreign observers – and some domestic ones – our quaint 18th-century mechanisms to forestall tyranny are about as useful in the modern world as spinning wheels.

"It is the kind of system that must give efficiency experts fits," says Professor Rex Lee. "The only way to construct a system that would be more inefficient, even in theory, would be to create more branches of government, with a further splintering of powers among them." (Actually, in theory we do have one more branch of government. As conceived by the founders, there are three branches of the federal government, but general legislative power is retained by the states. Thus one branch of the federal government makes the laws, a second branch enforces them, and a third interprets them, while a fourth branch of state governments make their own laws which must be given "full faith and credit.")

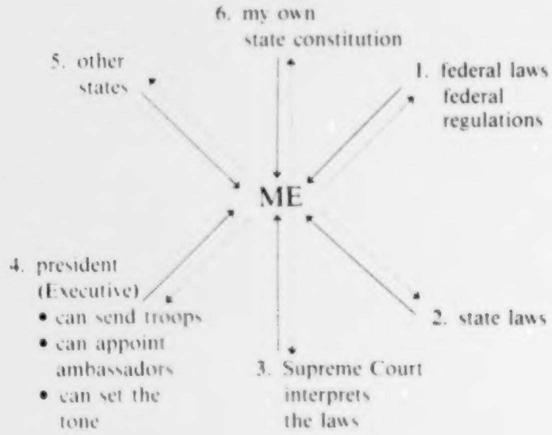
Certainly our system is inefficient, but as Rex Lee points out, "any system of government – in any country, in any century – involves a necessary choice between... efficiency, on the one hand, and checks against arbitrary exercise of governmental power on the other. It is impossible to have both." Our system is costly and time-consuming, but it has preserved individual liberties and a republican form of government for nearly 200 years.

THE ME IN ALL THIS

When I do this exercise for freshman legislators, I finish by focusing on what the federal and state constitutions say about the divisions of power and the role of legislators. For students, I finish up by asking them what all this has to do with them. How does this affect them, their lives and their power?

As the diagram shows, each of us is affected by at least six levels of government. We are all "the me in the middle." The diagram makes it look as if we are somehow caught by the system, with all of these forces impinging on us. But don't forget that the arrows go both ways. *We* are the source of power, and we impact on government.

"Me" in the middle – IMPACTS


6. my own state constitution
5. other states
1. federal laws federal regulations
ME
4. president (Executive)
• can send troops
• can appoint ambassadors
• can set the tone
2. state laws
3. Supreme Court interprets the laws

History shows that we think "governments...derive their just power from the consent of the governed." And our Constitution is about liberty and justice for all of us – for *me*.

- separation of power exists so that no one person or group can act as a despot over me
- checks and balances exist to stop any one group from becoming despotic
- the Bill of Rights exists to protect individual freedoms
- the many entry points for citizens – voting, influencing legislators, influencing regulators, involving the courts – carry forward in the modern world the Madisonian notion of a limited majority rule sensitive to minority rights

As the demonstration shows, we retain a good deal of our power. The glasses of water which represent us and our power remain more than half full, and none of the larger vessels – state and federal – to which we've given power dominates the individual.

So the Constitution is ultimately about me, my power, and the individuals like me who voluntarily join together to create a government. As Chief Justice Burger has written, the Constitution that implemented the Declaration of Independence is a

> written document by which the people voluntarily delegated powers to a central government, organized with an ingenious system of three divided and separate departments. This mechanism provided checks and balances on governmental power which, in turn, released the creative powers of a whole people. It encouraged diversity and enterprise so they could shape their future in ways that seemed best to them.

It may not be perfect, but as Benjamin Franklin said at the end of that long summer, nearly 200 years ago, "I agree to this Constitution, with all its faults, if they are such....I doubt too whether any other Convention we can obtain may be able to make a better Constitution." For better or worse, in both crisis and calm, it has preserved our freedoms for 200 years. And it all began with a revolutionary idea about power, and the ability of men to govern themselves.

Joseph L. Daly is a professor of law at Hamline University School of Law in St. Paul, MN.

Separation of Powers

Claim Your Powers/Secondary

Law in a Changing Society

Senate No.
H N
Bill 431
Article I.
Article II
Article III.
WISE

Susan Wise

This motivating game has students interpret Articles I, II, and III of the U.S. Constitution to understand the allocation of powers among the three branches of government. The lesson helps students understand the interaction between the three branches according to the principle of checks and balances and separation of powers.

Procedure

As a preliminary to the main activity, divide the students into three groups, each representing one of the three branches of government. (If the class is larger, two groups may represent each branch.) Give the following instructions: The legislative branch should examine paragraphs 4, 5, and 6 of Section 3 and Sections 7 and 8 of Article I, discussing the powers of Congress to be certain that everyone understands each grant of power. The executive branch should examine Sections 2, 3, and 4 of Article II and discuss the powers of the executive. The judiciary should examine Article III to determine the duties and powers of its branch. Each branch may find a statement of power belonging to another branch contained in its article. If so, this information should be shared with the other branch of government.

Provide each group with a large sheet of butcher paper, marking pens, and a copy of the United States Constitution (preferably an annotated version). Instruct each group to list (in the students' own words) the powers granted by the Constitution to its branch of government. Post these around the room and discuss the lists to share information and to check on the accuracy of each list. If it is more convenient, ditto masters could be used and copies run off for each student.

For the "Claim Your Powers" activity, divide the class again into the same three groups. Provide each group with two signs: "Claim" and "Do Not Claim." Each branch will also need the list of its powers developed in the earlier activity.

Establish the purpose of the activity by explaining that the exercise is intended to review and reinforce the student's knowledge of the first three articles of the Constitution. Tell the class that in this activity they will be acting as a branch of government and that it is their responsibility to maintain the powers granted to them in Articles I, II, or III of the Constitution.

Tell the class that you will read a series of situations, each involving a power of one or more branches of the government. In some instances, a branch will have the sole power; in others, the power may be shared. After each situation is read, each group will have one minute to discuss the situation and decide if the power described belongs to its branch and to find the part of the Constitution justifying that decision. At the end of the minute, the leader will say the word "vote" and each group must hold up a card, either "Claim" or "Do Not Claim." Every group must vote on each situation. Each group will then explain its reasons for its decision, and the teacher and students representing the other two branches will rule on the accuracy of the choice.

Explain that scoring will be as follows:

a. Two points will be given for correctly claiming and justifying the claim of a power.
b. One point will be given for correctly voting not to claim a power.
c. A zero will be given to a group incorrectly claiming or not claiming a power.

Assure the students that the activity will not be graded; rather, it will help both the teacher and students to measure students' understanding of the concept of separation of powers as outlined in the Constitution.

Conclude the activity with a cooperative evaluation of the students' knowledge and understanding of the concept and a decision to review or proceed to another concept.

Situations

(These may be read aloud or written on index cards and distributed to each group):

a. A bill is to be considered requiring automobile manufacturers to install seat belts in all new cars.
b. A case is being appealed from the Texas Supreme Court.
c. The United States needs an ambassador to Argentina.
d. There is a vacancy on the Supreme Court and a new justice must be appointed.
e. The United States has decided to recognize the new Republic of Xanadu.
f. The state of Arizona is suing California over water rights.
g. The army wants more money for tanks.
h. A law recently passed by the state of Louisiana has been challenged as being unconstitutional.
i. Ralph Z. has been charged with a federal crime of transporting stolen automobiles from Texas to Oklahoma.
j. Impeachment proceedings have been brought against the president.
k. A bill is being vetoed.
l. A State of the Union message is being prepared.

1738

m. An ambassador from a foreign country has been arrested.
n. A law is declared null and void.
o. War is declared on Transylvania.
p. A federal income tax rebate is being considered.
q. A treaty with a foreign country to import oil is being negotiated.
r. A case has arisen over a collision between a U.S. naval vessel and a privately-owned freighter.
s. There is a dispute over land between two Indian tribes who claim the land was given to each of them under separate treaties.

Bonus Points

i. Give the executive branch three bonus points if it claims this power and gives as its reason the power to enforce laws. (The FBI would probably arrest Ralph Z.)
j. Give the judicial branch three bonus points if it claims this power and gives as its reason that the Chief Justice presides during the trial.

Note:: There are other possible bonus-point situations. If students suggest other reasonable claims to a power, award points accordingly. Since this might throw off the equal sums for each branch (30 possible for each as currently written and scored), the groups could be told that the winner will be the group which comes closest to its total possible points.

This article is taken from the teacher's guide to The Constitution – Creation, Growth, and Change *which was created by Law in a Changing Society and published by the Law Focused Education Project of the State Bar of Texas*

SCORING SHEET

	Branch					
	Judicial		**Executive**		**Legislative**	
	C	**NC**	**C**	**NC**	**C**	**NC**
a		1	2		2	
b	2			1		1
c		1	2		2	
d		1	2		2	
e		1	2			1
f	2			1		1
g		1	2		2	
h	2			1		1
i	2			1		1
j		1		1	2	
k		1	2			1
l		1	2			1
m	2			1		1
n	2			1		1
o		1		1	2	
p		1		1	2	
q		1	2		2	
r	2			1		1
s	2			1		1

Separation of Powers

Case Study: A Separation of Powers Lesson/Secondary

Steve Jenkins

Can one house of Congress veto the action of another branch of government? The Supreme Court recently considered this issue in a case involving the deportation of a young man who was literally without a country.

In 1952, Congress passed the Immigration and Nationality Act. Two provisions of this act became the focus of a conflict concerning the doctrine of "separation of powers."

One provision (Section 244(a)(1) authorizes the attorney general, as a member of the executive branch, to halt an alien's deportation if the attorney general believes the alien or his or her family would suffer extreme hardship as a result of the deportation. The provision also permits the attorney general to change the alien's status to that of a permanent resident if the alien meets all of the proper qualifications. However, another provision (Section 244(c)(2) states that either house of Congress can reverse the attorney general's decision. So even if the attorney general granted an alien permission to remain in the United States, this provision, in effect, allows Congress to order the alien deported.

This act affects hundreds of aliens, like Jagdish Rai Chadha, every year. Chadha was born in Kenya. His parents were from India. He had come to the United States in 1966 with a student visa and a British passport. His visa expired on June 30, 1972. In October of 1973 Chadha was given notice by the Immigration and Naturalization Service (INS) to show cause why he should not be deported since his visa had expired. Chadha appeared before an immigration judge and conceded that he was deportable for overstaying his visa. He asked the judge to extend him an opportunity to file an application for suspension of the deportation order. Chadha then applied for permanent resident status under a special provision in the Immigration and Nationality Act. [(see section 244(a)(1).] Chadha again appeared before the immigration judge and explained his problem: Kenya had refused to take him back on the ground that he was a British, not a Kenyan, citizen; and the United Kingdom told him that he would not be allowed to immigrate for at least a year. Therefore, he became a man without a country. Chadha provided evidence that he met the requirements for permanent resident status under Section 244(a)(1), and he asked to remain in the United States.

The immigration judge, acting on behalf of the attorney general, and in accordance with Section 244(a)(1) of the Immigration and Nationality Act, granted Chadha's request and suspended his deportation. Chadha remained in the United States hoping to become a permanent resident. But in December of 1975, the House of Representative's Subcommittee on Immigration, Citizenship, and International Law of the Judiciary Committee, introduced a resolution striking Chadha and five other aliens from a list of 340 resident aliens to whom the INS had decided to accord permanent resident status. The House subcommittee resolution expressed the belief that these six persons would not suffer extreme hardship as a result of being deported. The resolution was sent on to the entire House of Representatives and passed without debate or recorded vote. The House acted under authority granted in Section 244(c)(2) of the Immigration Act. This action vetoed the decision of the immigration judge. The judge was forced to order Chadha deported, but Chadha appealed his deportation through the proper channels, including the federal court of appeals. His case was eventually heard by the United States Supreme Court.

Chadha claimed that the one-house veto was unconstitutional. The attorney general and Immigration and Naturalization Service agreed with Chadha that Section 244(c)(2) was unconstitutional. They claimed that the Constitution allows one-house action only under four circumstances:

- The House of Representatives alone is given the power to begin impeachments (Article I, Section 2, Clause 6).
- The Senate alone is given the power to conduct impeachment trials (Article I, Section 3, Clause 5).
- The Senate alone is given final absolute power to approve or disapprove presidential appointments (Article II, Section 2, Clause 2).
- The Senate alone is given absolute power to ratify treaties negotiated by the president (Article II, Section 2, Clause 2).

The only other single-house action is taken when each house develops internal rules affecting only the Congress itself.

In addition to the above claim, Chadha and the INS charged that the one-house veto is a legislative act, and therefore must follow the lawmaking guidelines as prescribed by the Constitution:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives (Article I, Section 1.)
>
> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. . . . (Article I, Section 7, Clause 2.)
>
> Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. (Article I, Section 7, Clause 3.)

The one-house action that would lead to Chadha's deportation did not receive Senate approval, and was not presented to the president. This constitutional requirement was included by the framers to prohibit any one branch (in this case, the legislature) from having too much power.

Attorneys for Congress defended the one-house veto. Congress claimed it has the expressed power to "establish a uniform rule of naturalization," (see U.S. Constitution, Article I, Section 8, Clause 4) and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . ." (see Article I, Section 8, Clause 18). The Immigration and Nationality Act was an exercise of this constitutional power. This act was passed and approved by the president without any challenge to any section.

The Laws in Question

Section 244(a) (1) of the Act states:

> (a) the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and (1) is deportable under any law of the United States; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Section 244(c) (2) grants either house of Congress the power to veto the suspension of deportation action granted to the Attorney General, stating:

> (2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

Furthermore, since 1932, when the first legislative veto was passed, Congress has inserted close to three hundred veto-type procedures in some two hundred laws. The provisions in these laws have not been challenged.

In addition, the legislative veto has permitted Congress to act more effectively while retaining the power to check the actions of the executive branch and independent agencies. For example, without Section 244(c)(2), Congress would have to pass a bill for each person it believed should be deported. This could add hundreds of bills to each legislative session, keeping Congress from addressing other serious problems.

If the Court finds the legislative veto unconstitutional, then some two hundred laws may have to be rewritten or abandoned, including laws affecting national defense. This reexamination will require enormous time and effort by Congress.

Now You Be the Judge

Teachers may wish to examine this issue through the case study method. Have students look at *Chada* and determine:

1. Facts—What are the important facts? What is the major conflict or conflicts, and who are the parties in this case?
2. Issues—What are the legal issues in this case? What constitutional issues are raised?
3. Arguments—If you were representing Chadha and/or

the INS, what are some arguments you would make for your side? If you were representing Congress, what are some arguments you would make for Congress' side?

4. Decision – If you were the judge in this case, what would you decide? Explain your decision.
5. Alternatives – What might be some other ways to resolve this type of conflict in the future?

Or teachers may wish to have students examine the facts of the *Chadha* case and then give the students excerpts from the unmarked majority and dissenting opinions in the case. After giving the unmarked opinions, the teacher should ask the students:

- Summarize the different opinions in this case.
- Which opinion, if any, do you agree with, and why?
- Which opinion do you believe was the majority opinion in this case? Briefly explain your answer.

Teachers should identify the majority and dissenting opinions, and ask the following:

- What is the likely impact of this case? How might the Supreme Court's decision affect Chadha? How might it affect other aliens? Congress?

Since the Chadha decision will have an impact on the use of the legislative veto by Congress, the teacher may wish to have students write to their U.S. Representatives and Senators in Congress and ask them to comment on the effect of this case on Congress, on the legislative veto, and on the principle of "separation of powers."

Or teachers might approach the same point by asking students to look at the actual decision. If students researched the case they would discover an extensive listing of legislation that will be effected by the majority opinion in this case (See "Appendix to Opinion of White: Statutes with Provisions Authorizing Congressional Review," 77 L Ed 377).

The teacher may also wish to have students conduct a simulated legislative hearing to rewrite the Immigration and Nationality Act to resolve the type of problems raised by the *Chadha* case. The students may use the facts in this case to help develop strategies and questions for the legislative hearing. The student legislators should plan on calling witnesses (e.g., a student could be assigned the role of Chadha; another could play the chairman or chairwoman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law; another could represent the attorney general).

The Actual Decision

On June 23, 1983, the U.S. Supreme Court, in a majority opinion written by Chief Justice Warren Burger, declared the legislative veto provision unconstitutional in *Immigration and Naturalization Service v. Jagdish Rai Chadha et al.*, 103 S. Ct. 2764. Chief Justice Burger concluded that the legislative veto violated the "separation of powers" doctrine. The chief justice wrote:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.
>
> Examination of the action taken here by one House pursuant to Section 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Article I, Section 8, Clause 4, to "establish a uniform rule of naturalization," the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the attorney general, executive branch officials, and Chadha, all outside the Legislative Branch. . . . The one-House veto operated in these cases to overrule the attorney general and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has acted and its action has altered Chadha's status. . . . The bicameral requirement, the presentment clauses, the president's veto, and Congress' power to override a veto were intended to erect enduring checks on each branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each branch must not be eroded.

Writing in dissent, Justice White claimed that the majority decision would have a major impact on some two hundred laws affecting all aspects of public policy. Justice White wrote:

> Today the Court . . . sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the court would have been well advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.
>
> Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policy-making by those not elected to fill that role.
>
> The history of the legislative veto also makes clear that it has not been a sword with which Congress struck out to aggrandize itself at the expense of the other branches – the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the Nation's lawmaker.

Some Supreme Court observers have claimed that Warren Burger's opinion in the *Chadha* case was his high point as chief justice. Commenting on the chief justice's tenure on the Supreme Court, *The Washington Post National Weekly Edition*, July 7, 1986, declared:

> Warren Burger's finest moment as chief justice probably came in 1983, when he wrote an opinion striking down the legislative veto. The opinion was a monument to the constitutional doctrine of separation of powers. It was well-reasoned, well-researched and carefully written and will stand as a major statement about the way our government was designed to function.

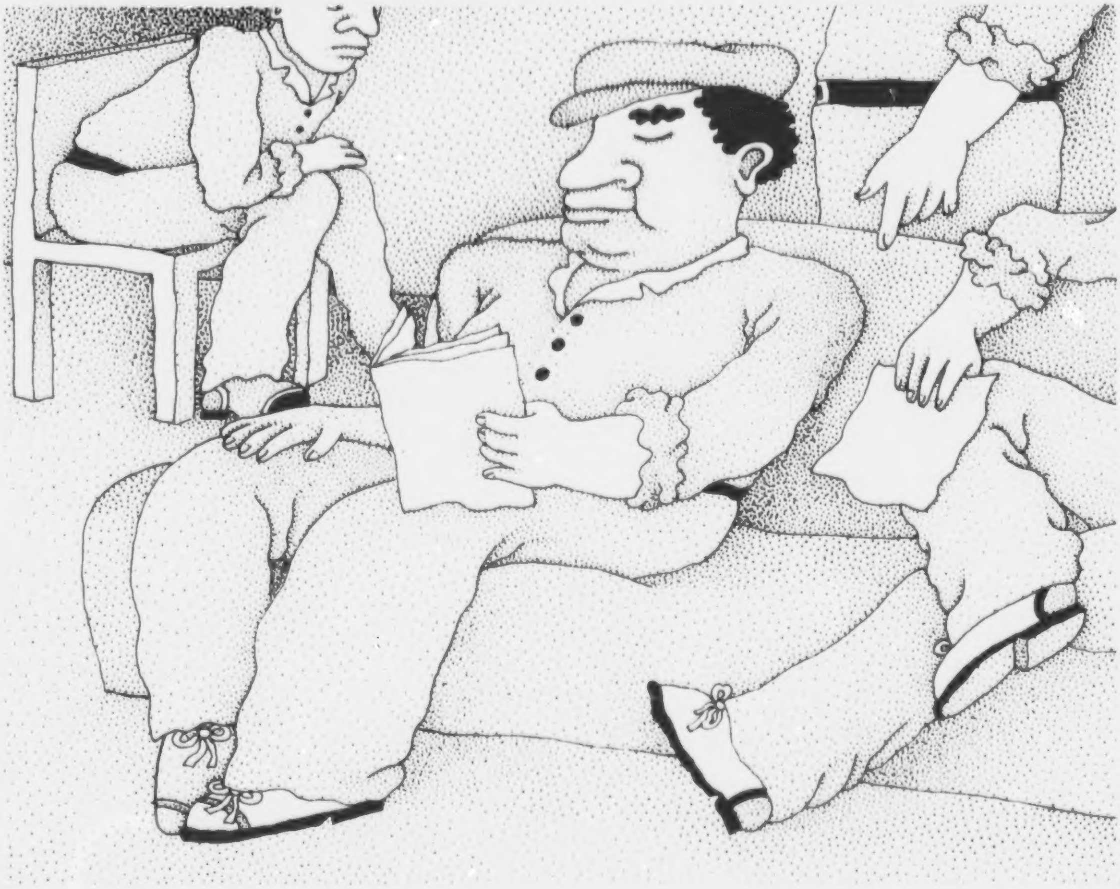
This landmark lesson in "separation of powers" would never have been written, if it had not been for the action of one alien seeking to make the United States his home. And as result of this decision, Jagdish Rai Chadha was permitted to remain in the United States and his case resulted in a major new chapter in the continuing story of separation of powers.

Steve Jenkins is law-related education director of the Bar Association of Metropolitan St. Louis. He was assisted by Nancy Eschmann of the bar association in preparing these activities for publication.

Separation of Powers

Teaching About Separation of Powers/Secondary

David E. Harris and Alan L. Lockwood



Dean Matthews

The Flint sit-down strike of 1937 against General Motors caused a conflict between a governor and the courts, and so is a useful way to teach about separation of powers. The strike also raises issues of conflict resolution, protection of property, fairness, and the appropriate role of government. Each of these relates to other articles in this *Update*.

A Lesson for One Class Period

1. Students are assigned to read the episode (see below) and discuss the facts of the case.
2. Students then discuss the ethical issues.
3. The teacher/resource person leads a group discussion of one item from the "Expressing Your Reasoning" activity.
4. The teacher/resource person guides the students in summarizing the main ideas raised during the discussion.

A Bitter Strike

The time was early evening of a bitterly cold winter day, December 30, 1936. The place was General Motors' key plant in Flint, Michigan. The event was an attempt by the autoworkers employed in the factory to shut it down. When the starting whistle blew to begin the evening shift, there was no roar of machinery. There was only silence. Then a third-floor window swung open. A worker leaned out and shouted, "She's ours!"

Thus began the great General Motors sit-down strike. For six weeks the attention of Americans was riveted on Flint. The sit-down strike was a lead story in newspapers, newsreels, and radio newscasts. One historian has called this strike the most significant conflict between U.S. labor and management in the twentieth century. What prompted the small and weak United Automobile Workers union (UAW) to challenge the giant and powerful General Motors Corporation (GM)?

Automobile manufacturing was the number one industry in the United States, and GM was the number one automaker. GM's 1936 sales of 1,500,000 Chevrolets, Pontiacs, Oldsmobiles, Buicks, LaSalles, and Cadillacs made it the largest manufacturer in the world. It was also the most profitable—$284 million in pretax profits in 1936.

These profits were widely distributed to GM's stockholders (those who own shares of the company's stock). They were pleased with the performance of the company they owned. They opposed any changes that might threaten the production of so many golden eggs.

Unions were considered a disruptive new influence at GM. Plant managers were allowed to meet with employee representatives to discuss wages, hours, and working conditions at local plants. The company refused, however, to recognize a labor union formally or to enter into a written contract with one. To prevent the union from gaining worker support, GM hired private detectives to spy on union workers in its factories.

Although autoworkers received high hourly wages and other benefits, their work schedule was irregular. Automobile production was seasonal. During periods of low production fewer workers were needed. The fear of being laid off during these periods hung over the head of every worker. The plant foreman usually decided who would be kept and who would lose their jobs. He often showed favoritism. Length of service did not protect a worker against layoff. The company could fire anyone it wished.

In 1936, 15 percent of GM's hourly workers had been laid off for part of the year. For those who were laid off, high hourly wages did not translate to high annual income. A study by the federal government in 1936 estimated that a family of four needed an annual income of $1,435. Average earnings for those laid off that year were below $1,150.

Workers not only felt insecure about keeping their jobs. They were also dissatisfied about the nature of their work. The major complaint was that the work schedule was exhausting: nine hours a day, five days a week. The wife of a Chevrolet plant worker put it this way: "My husband, he's a torch solderer.... You should see him come home at night, him and the rest of the men in the buses. So tired like they was dead, and irritable.... And then at night in bed, he shakes, his whole body, he shakes."

One cause of fatigue was the speed-up (increasing the pace set on the assembly line). As the workers stood in their places, tools in hand, the line monotonously moved one car after another past them. A foreman holding a stopwatch would sometimes yell at the workers to hurry. A Buick worker complained, "We didn't have time to go to the toilet.... You have to run to the toilet and run back." The faster the line moved, the higher the output. GM workers believed that the company was always trying to increase profits by getting more production with fewer workers. A Fisher Body plant worker protested bitterly: "You might call yourself a man if you was on the street, but as soon as you went through the door and punched your card, you was nothing more or less than a robot.... It takes your guts out, that line."

During the Great Depression, some workers began to turn to unionism as the best hope for improving their lot. Through unions they hoped to increase wages and benefits, improve job security, and slow down the pace of their work.

The autoworkers' union was not well established during the early thirties. By 1935 only 5.4 percent of the wage earners employed in the auto industry had joined the UAW.

Union leaders recognized that if the automobile workers were to be organized, the UAW would have to penetrate GM's Flint stronghold. If the union could prove its strength in Flint, autoworkers everywhere would be more willing to join the UAW. By the summer of 1936 the UAW had only 150 members in Flint. That drab industrial city was the home of GM's Fisher Body Number One, the largest automobile body plant in the world. Chevrolet, Buick, and AC Spark Plug factories were also located there. More than one-half of the city's labor force was made up of GM autoworkers. Eighty percent of Flint's families were dependent upon the GM payroll.

In November 1936, the UAW leadership announced its goals for the autoworkers. These goals included elimination of speed-up, seniority based length of service alone (last hired, first fired, when layoffs were necessary), an eight-hour day and forty-hour week, time-and-a-half pay for overtime, and improved safety measures. One goal, however, stood high above the others: recognition by GM of the UAW as the only labor union with which they would bargain. As 1936 drew to a close, GM leaders remained as opposed as ever to unions.

The hopes of UAW leaders were raised by the landslide re-election of Franklin Roosevelt in 1936. The president was considered a friend of organized labor. "You voted New Deal at the polls and defeated the Auto Barons—now get a New Deal in the shop," a UAW official told the autoworkers.

Recent changes in federal law further increased the optimism of labor leaders. In 1935, Congress passed, and the president signed into law, the National Labor Relations Act (NLRA), sometimes referred to as the Wagner Act after its chief sponsor, Senator Robert Wagner of New York. The Wagner Act required employers to bargain with their workers. It also prohibited employers from using "unfair labor practices," including firing union members and interfering with union organizing efforts. The new law also set up the National Labor Relations Board. Among other things, it held elections among the workers of a company to find out if they wished to be represented by a particular union.

Renewed efforts in the last months of 1936 to organize the autoworkers of Flint were unsuccessful. By late December only 10 percent of the city's GM workers had joined the UAW. Union leaders were convinced that if an

TEACHER'S KEY
to puzzle on p. 28

1 J	U	2 S	T	I	3 C	E		4 A	5 P	P	6 E	L	L	7 A	T	8 E
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24 N	A	T	I	O	N			R		W			N			D
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26 Q	U	E	S	T	I	O	N	S			27 R	U	L	I	N	G

1743

election under the NLRA were held, the UAW would lose it. It seemed that a dramatic display of union strength would be required to get the majority of workers to embrace the UAW. The majority of the workers were not necessarily opposed to the UAW. They were waiting to see how the union would fare in a struggle with the giants of the industry.

Even if the UAW could have won an election under the NLRA, GM would not have accepted the results. The company expected the Supreme Court to declare the Wagner Act unconstitutional and had decided not to obey it in the meantime.

The stage was set for a strike. But what kind of strike? Normally, when workers went on strike, they walked off their jobs. Carrying signs, they usually marched in picket lines around the outside of the building where they worked. In the past, this kind of strike had often been smashed by police breaking through the line of pickets.

UAW leaders decided upon a special kind of strike in Flint—a sit-down. Instead of walking off their jobs, strikers would remain at their machines overnight and refuse to operate them. An attempt by police to break the strike might lead the strikers to damage expensive company machinery. Also, in a sit-down strike, it would be very difficult for strikebreakers to replace the strikers at their jobs.

A union leader at Flint's Fisher One was asked if his workers were ready for a sit-down strike. "Ready? They're like a pregnant woman in her tenth month!" On December 30, 1936, it happened. Workers at Fisher Body One and nearby Fisher Two sat down inside the plants. David was trying out a new weapon against Goliath. The fate of the UAW rested upon the outcome of the contest.

A strike in one key automobile plant could paralyze other factories that depended on its product. During the first few weeks of the sit-down strike in Flint, parts shortages caused closings of 50 other plants. Production of Chevrolets and Buicks was grinding to a halt, and idled GM workers soon reached 136,000. Nonstrikers complained about being deprived of work by the striking minority.

Although the strike had spread to other places, the spotlight remained on Flint, the principal seat of GM's power. A proud GM worker wrote to his wife: "We have the key plant of the General Motors and the eyes of the world are looking at us. We shure done a thing that GM said never could be done."

Sit-down strikers conducted themselves with military discipline inside the struck plants. Strike committees drafted and enforced strict rules of conduct. Dining halls were established in the plant cafeterias. Sleeping quarters were improvised from car seats. For recreation there were lectures and games of ping-pong and volleyball. Some strikers went roller skating between the long lines of idle machinery. A feeling of solidarity grew among the strikers inside the plants. Morale was high.

GM insisted that the sit-downers were illegally trespassing on company property. The company refused to bargain with the strikers until the plants were evacuated. General Motors' president, Alfred Sloan, said the UAW was seeking a labor dictatorship. His company would not accept any union as the sole bargaining agent for its employees.

Tension mounted in Flint. On January 11, 1937, it exploded into violence. General Motors cut off heat to the Fisher Two plant. The temperature outside was 16 degrees. At dinner time, company guards refused to let the dinner meal be delivered to the strikers. In response, UAW leaders decided to bring in union members from other cities to take over the main gate of the plant. At 8:30 p.m. a squad of men, armed with billy clubs, approached the company guards blocking the gate. The guards fled. Their commander telephoned Flint police headquarters for help. Riot-equipped police officers were dispatched to the scene.

The police stormed the plant entrance. Tear gas crashed through the closed windows. The strikers fought back with bottles, bolts, steel car-door hinges, and torrents of water from the plant's fire hoses. The police were turned away. Buy the end of the battle, 13 strikers suffered gunshot wounds. Eleven policemen were also injured. Most of them had gashed heads. Heat and food were restored after the violent incident.

The outbreak of violence brought Michigan's new governor, Frank Murphy, to Flint. Throughout his career, Murphy had demonstrated a genuine sympathy for the afflicted and the unfortunate. Born and raised in Michigan, Murphy had graduated from the University of Michigan with a law degree. In a paper for a course he took at the university, Murphy had written: "If I can only feel, when my day is done, that I have accomplished something toward uplifting the poor, uneducated, unfortunate, ten hour a day, laborer from the political chaos he now exists in, I will be satisfied that I have been worthwhile."

Frank Murphy's secret ambition was to become president of the United States. During the early 1930s, he had been mayor of Detroit and then governor-general of the Philippine Islands. When he won the 1936 race for governor of Michigan, one newspaper noted that Murphy would be a presidential possibility in 1940. The thought had already occurred to the newly elected governor.

Unlike many public officials of his time, Murphy sympathized with workers. He believed that workers had the right to join unions and to strike. He favored arbitration (settlement of conflicts by an impartial third party) rather than force as a way to settle labor disputes. He was determined to avoid violence during strikes. The government, he believed, must not take sides during a stike. According to Murphy, police ought to keep peace without favoring either strikers or their employers.

Murphy received strong support for his election from labor unions. While campaigning he declared, "I am heart and soul in the labor movement." Upon his election, he received a congratulatory message from the president of the American Federation of Labor. Murphy responded, "My administration in Lansing will mark a new day for labor in Michigan."

The new governor arrived in Flint the day after violence had broken out. Murphy ordered National Guard troops and state police into the city. "Peace and order will prevail," the governor vowed.

By the end of the day, 1,289 guardsman, most of them in their late teens and early twenties, had arrived. Their number would double by the end of the month. The troops blockaded the area near the struck plants. They made no attempt to eject the strikers or deny them access to food.

In the past, strikers throughout the United States had reason to fear the arrival of troops. They had been used to break strikes, often violently. In Flint, however, strikers cheered the arrival of soldiers because they trusted the man who sent them. "Under no circumstances," Murphy declared, "would the troops take sides."

Critics of the governor charged that it was his obligation to take sides. The governor, they claimed, ought to employ the power of the state to restore GM property to its rightful owners. Some said Murphy's neutrality was really a prostrike policy.

Murphy wanted to break the stalemate by negotiation between the UAW and GM. His first efforts to bring about a negotiated settlement broke down. A major obstacle was the stance of GM's President Sloan. He refused to bargain with "a group that holds our plants for ransom without regard to law or justice."

The strikers were unlawfully occupying GM property. Governor Murphy was urged to enforce the law and eject the strikers by force. An attempt by troops to drive out the sit-downers would produce certain bloodshed. On February 2, the pressure mounted on Murphy to evict the strikers forcibly. A Flint judge issued an injunction (court order) requiring evacuation of the Fisher Body plants within 24 hours.

After the judge's order was read to the strikers at Fisher Two, they sent the following telegram to the governor:

> We have decided to stay in the plant. We have no illusions about the sacrifices which this decision will entail. We fully expect that if a violent effort is made to oust us many of us will be killed and we take this means of making it known to our wives, our children, and to the people of the state of Michigan and of the country that if this result follows from the attempt to eject us you are the one who must be held responsible for our deaths.

The responsibility to act was thrust upon the governor by the injunction. Would he order an assault on the occupied plants? 'I'm not going down in history as Bloody Murphy," the governor declared. "It would be inconsistent with everything I have ever stood for in my entire life." Murphy refused to use bullets and bayonets to drive the strikers from the plants.

Instead, the governor brought GM and UAW leaders to Detroit for negotiations. Murphy personally served as mediator. Like a jackrabbit, he jumped back and forth between the two parties carrying proposals and counterproposals. After a final grueling 16-hour session, the deadlock was broken. The 40-day sit-down strike came to an end. GM had lost production of 280,000 cars, valued at $175 million.

As part of the settlement, the UAW agreed to evacuate the plants. In exchange, GM recognized the UAW and agreed to bargain exclusively with it. The union had won a major victory. The settlement opened the floodgates of union membership. UAW membership swelled rapidly. In the wake of the sit-down strike, the UAW was recognized by Chrysler, Ford, and the smaller automobile manufacturers.

Governor Murphy, more than anyone else, affected the outcome of the strike. He had insisted that welfare payments be made to the strikers' families. He had dispatched troops to Flint, not to break the strike, but to prevent violence. He had delayed enforcement of a court order that could have broken the strike. He had personally kept the strike talks going day and night until a settlement was reached.

When the dispute finally ended, reactions were mixed. Labor leaders applauded Murphy for his handling of the strike. "A great achievement of a great American," was the praise offered by President Roosevelt. Many others were sharply critical of the governor for failure to enforce the law and protect GM property. Critics emphasized that the sit-downers had broken the law by committing criminal trespass. A member of Congress accused Murphy of having "sowed the seeds of armed rebellion and anarchy."

Soon after the settlement of the GM sit-down strike, a rash of sit-down strikes spread across the country, especially in Michigan. Workers of every stripe—garbage collectors, waitresses, hospital workers, dime store clerks—sat down on their jobs. There were 477 sit-down strikes during 1937. A group of civic leaders in Boston wired the Senate in March 1937:

> It is rapidly growing beyond control...if minority groups can seize premises illegally, hold them indefinitely, refuse admittance to owners and managers, resist by violence and threatened bloodshed all attempts to dislodge them, and intimidate properly constituted authority to the point of impotence, then freedom and liberty are at an end, government becomes a mockery, suspended by anarchy, mob rule, and ruthless dictatorship.

In 1939, the U.S. Supreme Court outlawed the sit-down strike as a violation of property rights. The citizens of Michigan rendered a verdict of their own a year earlier. Frank Murphy was defeated for re-election as governor. The sit-downs had been a major cause for his defeat. According to one newspaper, the voters carried "pictures of 1937 in the back of their heads when they went to the polls." Frank Murphy's hopes of becoming president had been dealt a shattering blow. He was never to hold elective office again. President Roosevelt, however, appointed Murphy attorney general of the United States and later justice of the U.S. Supreme Court.

Activities

HISTORICAL UNDERSTANDING

Answer briefly:

1. During the 1930s what was the leading industry in the United States and which corporation was the largest manufacturer in that industry? (Automobile manufacturing was the largest industry and General Motors was the largest manufacturer.)
2. In a labor dispute, what is arbitration? (Arbitration is the settling of disputes by an impartial third party whose decision disputants agree in advance to accept.)
3. What were two goals of the UAW in the 1930s? (The UAW sought to gain recognition as the only labor union for autoworkers and to improve the hours, wages, and working conditions for autoworkers.)
4. What were the major provisions of the National Labor Relations Act of 1935? (The NLRA required employers to bargain with their workers; prohibited unfair labor practices, such as firing union members and interfering with union organizing efforts; and allowed workers to vote for the specific union that they wanted to represent them.)

REVIEWING THE FACTS OF THE CASE

Answer briefly:

1. In what ways did Governor Murphy influence the outcome of the GM sit-down strike? (The governor worked hard for a negotiated settlement between GM and the UAW; he refused to use troops to break the strike, and he allowed welfare payments to strikers.)

ANALYZING ETHICAL ISSUES

Examining the value of property. Property is a value concerning what people should be allowed to own and how they should be allowed to use it. Identify two incidents in the story that involve the value of property. (Among the incidents involving the value of property are: The strikers occupying the plant owned by General Motors, the state paying welfare benefits to strikers, the workers threatening to destroy factory machinery if attempts were made to remove them by force, and the UAW demanding a greater share of GM profits.)

EXPRESSING YOUR REASONING

1. Should Governor Murphy have forcibly ejected the sit-down strikers from the plants they occupied in Flint? Why or why not? (See considerations suggested in next question.)
2. In deciding whether to use force to evict the sit-down strikers, which of the facts below do you think should have been most important to the governor? Which should have been the least important to him? Explain your choices. (Most students will be able to identify some reasons as more persuasive than others. They often have difficulty, however, articulating criteria that lie behind their selection of one reason over another. Establishing such criteria requires a sophisticated intellectual effort in ethical philosophy. It is unreasonable to expect students to pursue the ethical adequacy of reasons in great depth. They can, however, be introduced to the general problem of seeking criteria for justification.

   a. Removal of the strikers would have caused bloodshed.
   b. Most General Motors executives had opposed Murphy's election, and the UAW had supported his candidacy.
   c. A governor's oath of office includes a duty to enforce the laws of the state.
   d. Murphy wanted to become president of the United States.
   e. GM had refused to bargain collectively with the UAW.
   f. The premises occupied by the strikers belonged to GM.
   g. Murphy owned GM stock valued at $105,000.
   h. A poll showed that 65 percent of Michigan citizens thought the government should use force to remove sit-down strikers.

   After students have identified some reasons as better than others, they should be asked to explain why they made their selections. After eliciting their explanations, you may wish to list the following ways in which reasons may be characterized:

   - A reason that emphasizes revenge against an offending party
   - A reason that stresses the self-interest of one party in the dispute
   - A reason that stresses the need to show compassion for one or more of the parties involved
   - A reason that emphasizes following custom or tradition
   - A reason that shows respect for legitimate authority
   - A reason that shows concern for the welfare of society as a whole
   - A reason that attempts to take into account the rights of all parties concerned

   Students may be asked if any of the above characterizations fit the reasons they selected. You may then discuss whether some of these types of reasons should be preferred over others. (For example: Is a reason that shows respect for the rule of law better than one that focuses on revenge?)
3. Uncertainty of employment was one of the concerns of GM workers. Because auto production was seasonal and unpredictable, workers were in danger of being laid off their jobs. To protect themselves, the workers wanted GM to accept a seniority system. Under such a system workers would be laid off based on their length of service alone; last hired, first fired. Would it be fair for GM to follow a seniority system in determining the order of layoff? Write a paragraph expressing your position. Before writing consider whether marital status, number of dependents, or quality of work should be taken into account in deciding which employees should be kept on the job at a time of cutbacks. (Under the proposed seniority system, management might have to let some of the best workers go; by keeping workers with less time of service, management could pay less in wages, and thereby keep prices lower; if minorities had been last hired, they would be first fired; it is harder for older workers to find new jobs; older workers tend to have more family financial responsibilities. You may want to ask students what criterion ought to be used for layoffs if not seniority.)
4. During the sit-down strike in Flint, Governor Murphy ordered that public relief be paid by the state government to nonstrikers and strikers alike. Do you think he was right to grant welfare payments to the families of striking workers? State a reason for your position. (Reasons supporting welfare payments to the strikers include: The strikers' families were in need; strikers should not be the victims of management's refusal to bargain. Reasons opposing welfare payments include: Tax money should not be used to support either side during a strike; the strikers chose to strike and must accept the consequences.)
5. *Seeking Additional Information.* In making decisions about such questions as those above, we often feel we need more information before we are satisfied with our judgements. Choose one of the above questions about which you would want more information than is presented in the story. What additional information would you like? Why would that information help you make a more satisfactory decision?

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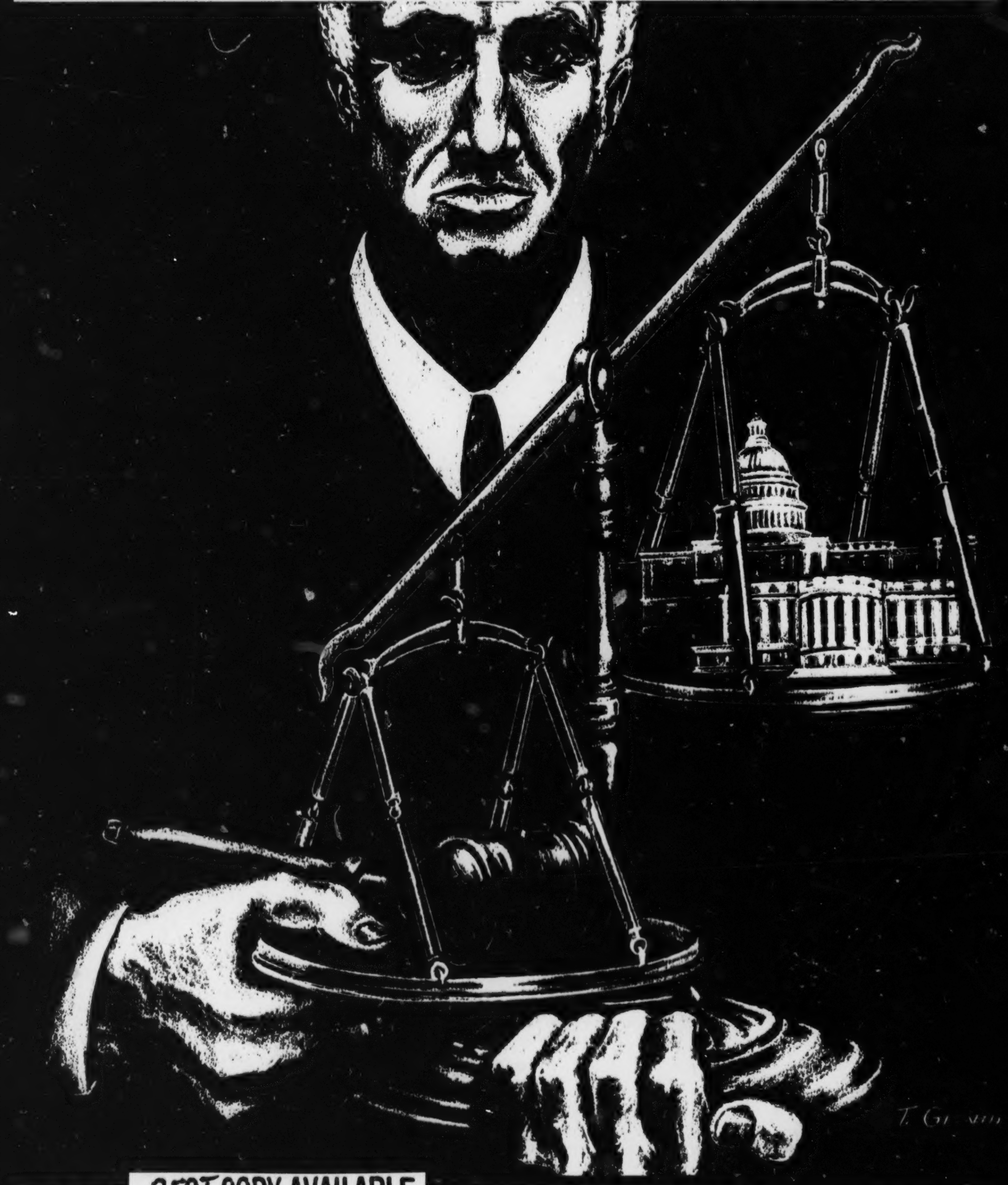

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Thomas Gianni

COURTS AND THE CONSTITUTION

Peter deLacy

Foundations of Judicial Review

In recent months, Americans have had the opportunity to consider the role of the Supreme Court in the United States by watching events unfold on the nightly news. In May, the Supreme Court exercised its ultimate power in striking down a section of the Gramm-Rudman Act, a piece of legislation enacted by the legislature and signed by the executive. More recently, Americans have been privy to the confirmation hearings of Justice William Rehnquist and Antonin Scalia to the Supreme Court. Both events present the question of the proper role of the Supreme Court in governing this nation.

We all know from high school civics class that the role of the Court within the three branches of government – executive, legislative, and judicial – is to interpret the law. Paramount in this role is the Court's power of judicial review. The basics of judicial review are simple. First, judicial review is the right of the judiciary to say what the law is. As Chief Justice Charles Evans Hughes stated early in this century, "the Constitution is what the Court says it is."

Second, judicial review operates by giving the courts the power to act as a check on the executive and legislative branches by ruling their actions invalid on the grounds that they violate the U.S. Constitution. This has become the key power of the judiciary. Alexis de Tocqueville wrote of judicial review, "(t)he power. . .of pronouncing a statute to be unconstitutional forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies."

Judicial review is easy to understand, but it's harder to explain how it became a distinctive feature of American government. Nowhere does the U.S. Constitution mention that the Court will have the power of judicial review. Article III, which establishes the judicial branch of government, is silent on any notion of judicial review. Nor do the other two branches of government – the executive and legislative – have a power that equals the dimensions of judicial review. The executive can veto a piece of legislation, but Congress can override the veto. Congress can override a presidential veto but cannot simply declare an executive act void.

The Why of It

Chief Justice John Marshall is generally credited with establishing judicial review in the case *Marbury v. Madison.* The facts of *Marbury* are too well known to be recited here. (For a description of *Marbury,* see *Update,* Winter, 1984.) What is important for our discussion is that in *Marbury* Marshall secured for the Court the power of judicial review.

In declaring part of an act of Congress invalid (a part, incidently, which would have given the Court greater power), Marshall answered two essential questions related to judicial review. The first question was "why have this power of review?" To this Marshall argued the supremacy of the Constitution: "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void."

The second question was "who has the power to conduct this review?" It was in answering this question that Marshall embarked on less secure ground. Marshall argued that it was the "duty of the judicial department to say what the law is" and this consequently provided the judiciary with the power of review.

Almost immediately, Marshall's critics challenged the Court's decision, and the legitimacy of judicial review has continually troubled constitutional historians. Few historians today would join Richard Dobbs Spaight, one of the Constitution's framers, who in 1787 denounced judicial review as a "usurpation" of power. At the same time, historians have been troubled by the lack of clear historical evidence on exactly what the framers had in mind with respect to judicial review. The framers did not explicitly provide for judicial review in the Constitution, and the records of the Constitutional Convention are surprisingly silent on the issue. Leonard Levy, in his book, *Judicial Review and the Supreme Court,* explained it this way: "The charge of usurpation most certainly cannot be proved; it is without merit. The difficulty is that the legitimacy of judicial review in terms of original intent cannot be proved either; it may forever remain obscure, a seductive issue to those who would lift the veil."

Moving beyond the question of original intent, historians have examined other roots of judicial review. Clearly, Marshall did not *invent* the concept of judicial review – his assertions were not made in a vacuum, but were written against the background of ideas and practices which created the new nation. Marshall's answer to the "why" component of judicial review was not an isolated example or a unique statement but reflected attempts of early Americans to establish a limited government and put into reality the notion of separate governmental powers.

Looking at these foundations of judicial review, historians have again differed on their interpretation. Commentators agree that there are no specific precedents, but rather trends and events which allowed for the emergence of judicial review in the early decades of our national history. What exactly these trends mean and to what degree they serve to legitimize judicial review is open to debate. While we cannot definitively answer the historical debate, we can inquire into the foundations of judicial review. Such an inquiry into Marshall's "why" and "who" questions allows us to reconsider the emergence of judicial review and to rethink their contemporary ramifications.

Dr. Bonham Files Suit

A discussion of the roots of judicial review begins unspectacularly with an otherwise obscure physician in seventeenth century London named Thomas Bonham. Much to his misfortune, Bonham found himself penalized by the London College of Physicians for practicing medicine without a license. Not surprisingly, the College of Physicians was responsible for issuing the license. In 1610 Dr. Bonham challenged the legality of an act of Parliament that gave the London College of Physicians the power to be both judge and prosecutor in cases brought before the college. In an often quoted passage from the court's report, Chief Justice Edward Coke made the following declaration:

> It appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.

There has been much debate on exactly what Coke meant by this passage. Some commentators have argued that Coke was claiming that the common law courts had the power to review acts of Parliament and declare them void. Others have argued that Coke was merely performing statutory construction so as to avoid inequitable results. They assert that Coke was not claiming that the judiciary had the power of review; some argue that the passage is merely his personal opinion, and not part of the official holding in the case. Most commentators agree that Coke did not mean to introduce judicial review in the manner that we are familiar with today. For example, seventeenth-century England did not contain the type of separation of governmental powers that is a hallmark of our notion of judicial review.

What the passage does demonstrate and what is important in looking towards the future American development of judicial review is the presence of the seventeenth-century English political theory of a "fundamental" or "higher" law. Unlike the written Constitution which was to appear in America a century and a half later, the English fundamental law was not written but rather was based on principles, traditions and natural rights. Under this theory, fundamental law was legally supreme over all parts of the government. No governmental institution was sovereign. The logical extension to this, arguably present in *Bonham*, was that fundamental law could overturn contrary parliamentary legislation.

Coke's statement in *Bonham*, then, at least suggests that it is within the power of the courts to compare fundamental law with parliamentary acts. However, in only two other English cases – one in 1615 and the other in 1702 – is reference made to Coke's assertion in *Bonham*. In neither case was an act of Parliament held invalid. While at first glance this may seem surprising, political events in the second half of the seventeenth and first half of the eighteenth century were taking place to prevent the further development of these "enlightened" principles. Emerging from the Glorious Revolution in England was a new concept of parliamentary supremacy. Rather than emerging as a limit on governmental power, the English constitution increasingly became a political tool of an all-powerful Parliament, which could alter the document at will through legislation.

The Colonial Experience

In the American colonies, these English political theories were being played out with a new and exciting twist. While British notions of parliamentary supremacy were applied in theory, the reality of the colonial experience found its true heritage in the earlier theories of fundamental law, a constitution superior even to Parliament. In fact, the colonists paid attention to power in an effort to *limit* parliamentary sovereignty over the colonies.

From the beginning, the colonists saw themselves as having the same rights as their fellow countrymen in England, and the colonial charters claimed for the colonists the rights "of Englishmen." However, they knew that their political life was inevitably different from that of the Englishmen who remained at home. The English, who voted for members of Parliament, saw Parliament as their protector. The Americans, who could not vote in parliamentary elections, wanted protection *from* Parliament. As Bernard Bailyn has observed, if "in England the concept of sovereignty was not only logical but realistic, it was far from that in the colonies. From the beginning of settlement, circumstances in America had run directly counter to the exercise of unlimited and undivided sovereignty." The day-to-day workings of the colonies limited the actual control Parliament exercised over their internal affairs and at the same time undermined the theory of parliamentary sovereignty in the colonies.

Another paradox was present in the colonies. While the British allowed the concept of constitutional development and review to remain in disuse at home, the colonies were providing concrete examples of their operation. The colonial charters placed a restriction that the laws of the colonists were inferior to those of Parliament. Thus, these charters were theoretically establishing a notion of inferior and superior laws, which is essential to judicial review. Moreover, the Privy Council (and later the Board of Trade) was empowered to review colonial legislation and disallow any acts which were contrary to British policy, and to act as an appellate body to colonial judicial decisions. While not technically "judicial" review, this power was effectively the same thing. It provided the colonists with a very real example of a third party reviewing the acts of the legislature.

The emergence of the American republic in the 1760's and 1770's transformed the colonists' notions of political representation, constitutionalism and sovereignty. Though in theory the colonists were indirectly represented in Parliament, they felt closer to, and more a part of, the colonial assemblies that they helped elect. Secondly, Americans were refining and elevating the notion of constitutional government – the belief that a constitution could mark and therefore limit the boundaries of governmental power. Finally, with the advent of the Stamp and Sugar Acts, the colonists began refining notions of sovereignty. They argued that *they* should have sovereignty over the internal affairs of the colonies, though they acknowledged the sovereignty of the crown in external affairs. Ultimately they argued for the division of governmental sovereignty among different levels of institutions – our modern separation of powers.

Mr. Otis Rejects

In this process of probing traditional concepts, the colonists made recurring reference to the notion of judicial review. In this light, the concept of judicial review became a tool to do battle with parliamentary sovereignty over the colonies. So it was that in 1761 James Otis, taking hold of Coke's language of a century and a half earlier, argued before the Massachusetts Superior Court in the writs of assistance case. The crown had granted colonial justices the power to issue writs of assistance – which gave royal customs officials sweeping powers to search for smuggled contraband. In arguing against these writs, Otis boldly stated:

> As to Acts of Parliament, an act against the Constitution is void: an Act against natural equity is void: and if an Act of Parliament should be made, in the very terms of this petition it would be void. The Executive Courts must pass such Acts into disuse.

Present during this speech was John Adams, who later was to write, "then and there the child Independence was born."

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The practical impact of Otis' plea was minimal – the Massachusetts court ruled the writs of assistance were legal. However, Otis' fundamental idea of a constitution limiting legislative authority – and its corollary that a court could determine this – was soon to be given credence.

With the passage of the Stamp Act in 1765, the argument for judicial nullification of a parliamentary act was again taken up, with more impressive results. The practical question facing the colonial courts after the Stamp Act was whether these courts should remain open for business without the stamped papers required by the act. Otis and lawyers in many of the colonies argued that they should remain open on the grounds that the underlying act which caused them to close was void. Otis again explained, "that there are limits, beyond which if Parliaments go, their Acts bind not."

This time the reaction to the argument was more positive. The Massachusetts House adopted Otis' position, as did the town meeting in New Haven. A year later, in 1766, a court in Virginia unanimously declared that the "law of Parliament imposing stamp duties in America was unconstitutional."

A Limited Embrace

American colonists supported the notion of judicial review to combat the supremacy of the British Parliament. It would be overstating the point to say, however, that they "embraced" the notion. The colonists had developed the answer to the "why" question, which was that some type of review was essential to limit power. As America gained its independence, the "who" question remained largely unanswered.

The emergence of the American Republic in 1776 shifted attention away from the issue of judicial review. State constitutions were drafted in which the judiciary and notions of judicial review were for the most part ignored. Because they focused on limiting the executive branch (which was seen as the immediate legacy of parliamentary supremacy), the writers of the state constitutions made little reference to the judiciary beyond establishing it as an independent branch.

In the years following independence and leading up to the adoption of the federal constitution in 1788, judicial review remained in a state of flux. The record in state courts during this period indicates a growing awareness of judicial review as lawyers presented the argument in the courts. But not enough examples exist to claim that the practice was common or widespread. In a handful of cases, state courts confronted the issue of judicial review. The results in these few cases are mixed, and it's hard to say whether these decisions established a precedent of judicial review. The decisions reflect the courts' uneasiness in using this novel concept.

And these decisions also show the general tensions involved in newly emerging concepts of the judiciary in the governmental structure of the nation. In England, the courts had in effect been part of the executive branch. There was little, if any, history of judicial independence. In the United States, it was clear that the courts were to play a new and possibly much larger role, but neither the courts themselves nor the other branches of government were sure of what that role was to be. In this period of political jockeying, the concept of judicial review was naturally approached gingerly by all concerned.

Illustrative of the cases in state courts during this period is *Trevett v. Weeden*. In 1786, John Trevett, a Rhode Island butcher, refused to accept paper money for merchandise sold at his store. He insisted on payment in gold or silver. Trevett was indicted under a Rhode Island statute that required him to accept paper money issued by the state. Further, the statute denied Trevett a right to a jury trial as well as any right to appeal. Trevett argued that by denying him these "fundamental" rights, the state legislature had overstepped its bounds. Therefore, the statute was unconstitutional.

In handing down its decision, the court gingerly approached a position of judicial review. In practical terms the court did review the action of the legislature and set Trevett free. However, the court avoided using the term judicial review or declaring the statute "unconstitutional." Instead, the judges ruled that the issue was "not cognizable" before the court.

The Rhode Island legislature, seeing beyond the court's semantics, was furious. To them, the notion that the court could rebut an action taken by the peoples' elected representatives was an outrage. They im-

(continued on page 49)

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Separation of Powers

Teaching About Judicial Review/Secondary

Peter deLacy

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WISE

Susan Wise

The following three strategies are designed to introduce to students the concept of judicial review, its limitations and process. The strategies are not designed as exhaustive curriculum but can serve as a springboard to more in-depth instruction on specific topics within judicial review.

Limits on Judicial Review

The Supreme Court's power of judicial review stands as a hallmark of American government. While an important power, judicial review does not give the Court free reign to interpret the Constitution, whenever or wherever it pleases. Article III of the U.S. Constitution designates the general parameters of the Court's jurisdiction. Article III provides the Court with original jurisdiction over certain cases (such as those to which a state is a party and cases involving ambassadors). The Constitution also provides the Supreme Court with appellate jurisdiction "under such Regulations as the Congress shall make." Essentially Congress has created two appeal routes. One route is through appeals from lower federal courts. The second route is through appeals from the highest state courts, provided there is a substantial "federal question" involved.

In addition to these stated limits on the Court's jurisdiction, through practice the Court itself has imposed limits on its review power. For example, the Court will not provide advisory opinions. The following strategy highlights limits on judicial review established by the Constitution and through the Court's own practices:

PROCEDURE

Have students read Article III, Sections 1 and 2, of the Constitution. Under which of the following examples would the Supreme Court have the constitutional authority to hear the case?

1. By law the Sabine River divides Louisiana and Texas. The river alters its course, and Texas sues Louisiana over the proper boundary between the states.

   (Answer/discussion: Yes. This example demonstrates the *original jurisdiction* of the Supreme Court as provided in Article III.)
2. The state of Oregon provides its citizens with the right to vote in statewide referendums and initiatives. If passed, the initiatives become law. This is challenged by citizens of Oregon as a violation of Article IV, Section 4, of the U.S. Constitution, which states "The U.S. shall guarantee to every State in this Union a Republican form of Government." The people challenging the law claim that a republican form of government requires that laws only be made by elected representatives.

   (Answer/discussion: No, this hypothetical demonstrates an area where the Court has imposed its own limitation on review. The example is based on *Pacific States Telephone and Telegraph Company vs. Oregon*, 223 U.S. 118 (1912), in which the Court declined to rule on the dispute because it involved a "political question." The doctrine of "political question" allows the Court to decline deciding a case in order to avoid encroaching on the decision-making authority of a separate branch of the government.)
3. A prisoner in Florida applies for review *in forma pauperis*. That means the prisoner is poor and the Supreme Court would have to appoint a lawyer to present the case. The prisoner files a writ of habeus corpus, alleging he had been denied certain rights because a lawyer was not provided for him at his trial.

   (Answer/discussion: Yes. This example, based on the case of *Gideon v. Wainwright*, 372 US 335 (1963), highlights two important considerations in the Supreme Court hearing cases. First, the case reflects the increasing number of *in forma pauperis* filings. Roughly one half of all cases brought to the Court are in this form. Second, the Court has great discretion in deciding what cases to hear based on writs. In this case Gideon sought a writ of habeus corpus—in other words, a court order to determine whether he had been lawfully imprisoned. Most of the Court's calendar consists of cases in which it has agreed to issue a writ of certiorari. Different from a writ of habeus corpus, a writ of certiorari is an order from the Supreme Court to a lower court to send a complete record of the case to the Supreme Court for review. Granting a writ of certiorari is entirely discretionary on the part of the Court.)
4. President Reagan asks the Supreme Court whether a proposed treaty with the Soviet Union is constitutional.

   (Answer/discussion: No. Article III states that "the judicial power shall extend to all Cases." The Court has interpreted this to mean that an actual controversy must exist in a bona fide lawsuit. In 1793, President George Washington requested an opinion on a proposed treaty. The Court declined to give the advisory opinion, saying that it was beyond the Court's power.)

Interpreting the Constitution

An essential element of judicial review is the Court's ability to interpret the Constitution. The following exercise introduces students to the difficulties in drafting and interpreting the Constitution.

1. Have students read the following:
   The Sixth Amendment to the U.S. Constitution, adopted in 1791, guarantees in part, "In all criminal prosecutions, the accused shall enjoy. . . .an impartial jury of the state and district wherein the crime shall have been committed. . . . [and shall have] the assistance of counsel for his defense."
2. Have the class identify the purpose of the amendment and list the specific guarantees it contains.
3. Ask students individually or in small groups to brainstorm as many ambiguities they can find in the wording and future implementation of this amendment. A possible list includes: does the amendment apply to state governments and/or the federal government, is there a right to a state-appointed free lawyer, what does "enjoy" mean, what is an "impartial jury," at what point are you guaranteed a lawyer, does this amendment only apply to men?
4. Ask students to act as legislative aides and redraft the Sixth Amendment to cure the "defects" they found and create an "air-tight" clause. Exchange the redrafts and compare them with the original amendment. Do problems still exist?

Current Controversy

The most recent controversy regarding judicial review centers around public comments made by Attorney General Edwin Meese and Justice William Brennan. Their celebrated debate over "original intent" embodies the two broad approaches that dominate judicial interpretation. In July, 1985, Attorney General Meese urged the Supreme Court to return to a "jurisprudence of original intention" when interpreting the Constitution. Under this approach, the Constitution should be interpreted literally whenever possible. The Court should be bound by the intent of the framers, either as explicitly stated or clearly implied in the words of the Constitution. Justice Brennan presented a different view, emphasizing the necessity of subjective choices and the idea of a "living Constitution." This approach is commonly referred to as "judicial activism." According to Justice Brennan, "We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time."

The following strategy provides students with the opportunity to explore the contours and implications of the two diverging approaches. While the competing views of interpretation arise in various contexts (abortion, criminal law, federalism), perhaps the most striking difference appears in discussing capital punishment.

PROCEDURE

Have students read the following excerpts. The first is from a speech by Justice Brennan. The second selection is from Chief Justice Burger's dissent in *Furman v. Georgia,* 408 U.S. 410 (1972).

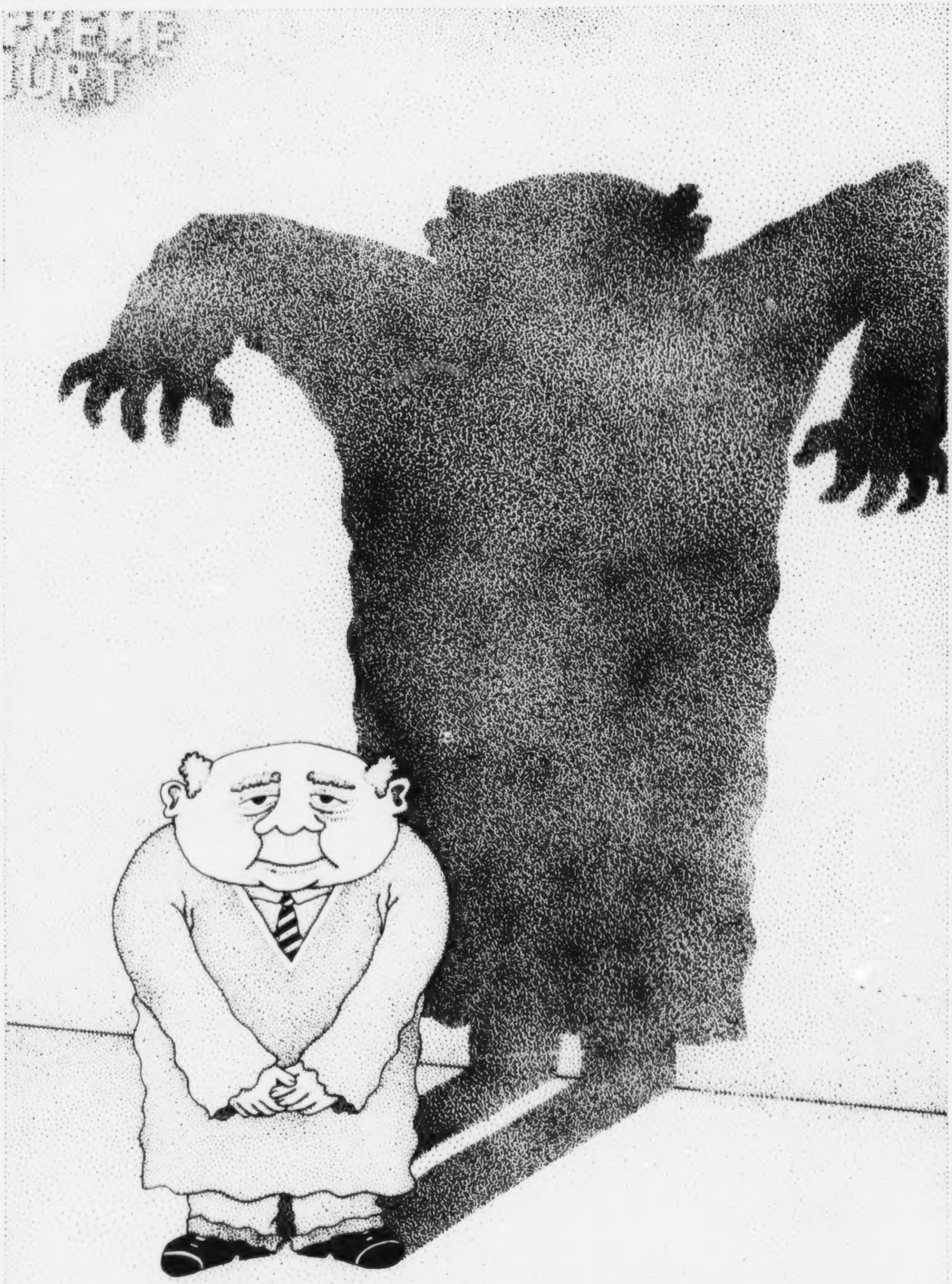
> Quotation I
>
> As I interpret the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. As I have said in my opinions, I view the Eighth Amendment's prohibition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments our civilized society may impose on those persons who transgress its laws. Foremost among the moral principles recognized in our cases and inherent in the prohibition is the primary principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. Death for whatever crime and under all circumstances is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the State from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, indeed, "cruel and unusual." It is thus inconsistent with the fundamental premise of the Clause that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity.

> Quotation II
>
> Not only do the records of the debates indicate that the Founding Fathers were limited in their concern to the prevention of torture, but it is also clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment. The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed "unless on a presentment or indictment of a Grand Jury." The Double Jeopardy Clause of the Fifth Amendment is a prohibition against being "twice put in jeopardy of life" for the same offense. Similarly, the Due Process Clause commands "due process of law" before an accused can be "deprived of life, liberty, or property." Thus the explict language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1791. Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not "cruel" in the constitutional sense at that time.
>
> In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment.

Write on the board the words of the Eighth Amendment. Discuss the approach each of the selections uses in interpreting the amendment. Have students identify the selections as either "judicial activism" or "jurisprudence of original intent." Note: at the time of the framing of the Constitution, capital punishment was common.

Discuss the advantages and limitations of each of the approaches (e.g., subjective versus objective standards of review, possible subjectivity of determining original intent, issues of courts versus elected official making policy decisions, the role of judicial activism in protecting individual rights not protected in the original intent of the Constitution, the problem of new technology not considered by the framers).

Use this framework to analyze other situations where the two approaches diverge (e.g., prayer in school, exclusionary rule).



Dean Matthews

COURTS AND THE CONSTITUTION

Joseph L. Daly

The Least Dangerous Branch?

Or is it the most dangerous one?
Ever since the debates over ratification,
opinion has been sharply divided over the
role of the courts in our republic.

The United States was founded on what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have freedoms that must be exempt from majority control.

This system relies on both separation of powers and checks and balances among our branches. It is an intricate system, in which the courts are crucial. What role did the framers of the Constitution assign the federal judiciary under this Madisonian system?

Origin of the National Courts

It's not at all clear that the framers assigned the federal judiciary a major role in resolving the dilemma between majorities and minorities. The Constitution says remarkably little about the judiciary (Article III), while it is quite expansive in its discussion of the legislative (Article I) and executive (Article II) branches. According to constitutional scholar Phillip B. Kurland, "A reading of the Constitution as originally drafted and as it has existed for almost two hundred years quickly reveals that the judicial branch was probably the least well-defined of the three great divisions of national government in terms of its organization and its powers."

The framers left the provisions of Article III vague. For example, the jurisdiction of the Supreme Court was compulsory in only a few cases. Nowhere in the Constitution were national courts other than the Supreme Court established.

Article III, Section 1, speaks to the judicial power of the United States, which is to "be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Article III, Section 2, defines the power of the Supreme Court. The Court is to decide cases "arising under this Constitution, the laws of the United States, and treaties." It is to decide "controversies to which the United States shall be a party," and to decide "controversies between two or more states; between a state and citizens of another state – between citizens of different states."

The only federal court whose existence is constitutionally protected is the Supreme Court. Professor Rex Lee, former Solicitor General of the United States, says "the only reason that federal courts other than the Supreme Court exist at all is that Congress created them, and Congress could increase or decrease the number of federal courts or abolish them altogether if it chose to do so. Likewise, Congress can alter the number of Supreme Court justices any time it sees fit. Indeed, there have been as few as five and as many as ten, and the number has been fixed at nine only since 1869."

The Judiciary Act of 1789

The first Congress under the new Constitution met in 1789 and did a remarkably good job of establishing our national judicial system from scratch. It drafted the Judiciary Act of 1789, providing for national courts in addition to the Supreme Court which the Constitution itself created. "This national court system, together with judicial review by the Supreme Court of state court action on matters of federal concern, lay at the center of the conception of a national judicial function," says Professor Kurland. More than that, it helped make us one nation. Federal courts were established in every state; the Supreme Court was authorized to review the actions of state courts to determine if other courts were complying with the federal Constitution. By these means, we became our nation, not a collection of squabling principalities.

Our Constitution, in conjunction with the Judicial Act of 1789, sets us apart. According to Professor Kurland, "No other modern confederation of states has established national courts for trial and intermediate appellate review, not even in nations covering so wide a territorial expanse, as do Australia and Canada." The origins of the national judiciary are to be found in the words of the Constitution and the Judiciary Act of 1789.

Once the United State Supreme Court in 1803 decided in *Marbury v. Madison* that it not only had the authority to interpret the Constitution but also to apply the Constitution to acts of other separate but equal branches of government, the making of the national judiciary system was completed.

Least Dangerous Branch?

Why did our forefathers at the Constitutional Convention have so little to say about the judiciary? Alexander Hamilton's opinion was that the judiciary would be the least dangerous branch of government. His reasons were stated in *The Federalist*, No. 78:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the *least dangerous* [emphasis added] to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen ought to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgments.
>
> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

Hamilton went on to discuss the function of the Supreme Court in the same number of *The Federalist:*

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act depreciating from the legislative body.

Today many scholars continue to believe that the judiciary is the least dangerous branch of government. The late Alexander Bickel of Yale University Law School wrote a book entitled *The Least Dangerous Branch* to prove the point. He argued that the Constitution itself provides controls over the judiciary. For example, while a federal judge's salary may not be diminished during his continuance in office, any increases are dependent upon congressional action.

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According to the Constitution, Congress controls the very existence of every federal court except the Supreme Court. And Congress controls the federal judiciary's jurisdiction other than the original jurisdiction of the Supreme Court, which is spelled out in the Constitution and which accounts for relatively little of the Court's work. The bulk of the Court's jurisdiction, like the jurisdiction of the other federal courts, is controlled by acts of Congress.

Jurisdiction is a legal term which refers to the power of the courts to act in determining a matter. If a court lacks jurisdiction over a certain category of cases, it cannot consider any cases which fall in that category. For example, federal courts today lack jurisdiction over cases which involve an amount in controversy under $10,000. So, if a car accident occurs between citizens of two states, but the amount in controversy is less than $10,000, the federal courts cannot hear the case. Obviously, Congress could raise the $10,000 jurisdiction to $20,000, $50,000 or $100,000 if it chose to do so.

Some constitutional scholars believe the U.S. Supreme Court is the least dangerous branch because of the constitutional limitation of "case or controversy" found in Article III. Article III limits the court to hear only actual cases. This means that the authority of the Court to decide any issue is limited to those instances in which the question is necessary to the resolution of an actual lawsuit that comes before the Court. The Judiciary Act of 1789 adopted this limitation also for federal district and appellate courts, so no federal court may give advisory opinions.

Professor Rex Lee tells us, "The Constitutional Convention seriously considered a proposal for a Council of Revision, which would have been composed of judges and other government officials and which would have given advance review to enactments of Congress, principally for the purpose of determining their constitutionality. That proposal was rejected." The case and controversy requirement is another way to eliminate advisory opinions.

As a consequence, no federal court can make official declarations concerning the constitutionality of statutes apart from the judicial holdings that are required to resolve actual lawsuits. The case must involve Smith *versus* Jones rather than simply a conflict between Smith *and* Jones. The "case and controversy" requirement in Article III and the Judiciary Act of 1789 requires an adversary system to authorize the judiciary to act.

Or Most Dangerous?

On the other hand some have argued that the judiciary, particularly the Supreme Court, is the most dangerous branch in government. In the *Marbury* decision, the U.S. Supreme Court "bootstrapped" itself to say *it* had the right to interpret the Constitution and to say what the Constitution means, and *it* had the right to declare an act of another branch of government unconstitutional. This gave "license" [to the Court] to roam at will through the territory of legislative policymaking," reports Professor Rex Lee.

The well known dictum that "he who interprets and applies the law is the true lawmaker and not he who promulgates it" furthers the "most dangerous" argument.

In addition, anything a government does can clearly have some adverse impact on an individual. That individual can argue his liberty or property interests were affected and thus the case can and often does end up in the Court. In 1835, Alexis de Tocqueville, the French historian and philosopher who was so fascinated by the United States, pointed out in *Democracy in America* that "scarcely any political question arises in the United States which is not resolved sooner or later into a judicial question." He recognized that the Supreme Court justices' "power is immense." If virtually anything that government does can have some adverse effect on the interests of an individual, then judges' authority to invalidate the work of the legislature may give the courts carte blanche authority to rewrite laws behind the facade of constitutional adjudication. This, it is argued, make the Supreme Court and the federal judiciary very dangerous.

Checks and Balances on the Judiciary

So who is right? Is it the most—or the least—dangerous branch? There is no widely agreed concensus on the point, but limitations written into the Constitution and the self-limits of the Court circumscribe what the Court can do. These limitations inevitably reduce the potential dangers posed by the unelected branch of government.

The framers of the Constitution had an historical and justified fear of the judiciary. According to Professor Kurland, "In Anglo-American history, the judiciary had always been the handmaiden of the Crown. It enforced the wishes of the King, serving him as a political tool, whether enhancing the royal treasury, or punishing the King's political enemies, or imposing the King's peace on the barons and their vassals." As an example, the Star Chamber, a political court, was completely devoid of judicial temper and was used by the Crown to punish its enemies. Probably because of this, the framers decided to give limited original jurisdiction to the Supreme Court and to keep Article III very short. They also decided to let Congress control the funds of the Supreme Court and all of the other lower courts. These are powerful external checks on the power of the Court.

De Tocqueville recognized an internal check. He said while the power of the Supreme Court justices is immense: "...it is power springing from opinion. They are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it... [they] must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to stay out of the current when a tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws."

As a consequence of the "use and controversy" requirement, the judiciary is limited by the actual cases and controversies brought to it by the disputants. Though it is true that many issues can be embodied by lawsuits, and so be brought before the courts, the courts themselves simply cannot initiate action. They have to wait for a case to be presented. Whether this or that issue will be presented for decision, and when and where and how it will be presented, lies outside the control of the courts. The decision whether to file a lawsuit is made by the person who brings it and not by the judge who hears it. If a case is settled, the question is "moot" and consequently the Court lacks authority to decide the issue, even if it wishes to do so.

The Court also puts checks on itself, probably in recognition that judicial authority can often enter into policy matters when it declares laws unconstitutional. Because of the open-endedness of its authority, the Court not only looks to the external constitutional limits but also has created its own limits. For example, the Court has held that the case or controversy requirements include four elements: (1) standing, (2) ripeness, (3) absence of mootness, and (4) absence of a political question. Any case that comes before the Court which fails to satisfy *any* of these four requirements is not a case or controversy within the meaning of Article III, and the Court therefore lacks jurisdiction to decide it.

Standing is the best known of the case and controversy requirements. The person who is called the plaintiff must satisfy the standing requirement by showing that the practice or program he's attacking has a particular effect on his interest.

While standing deals with the issue of who may bring a lawsuit, ripeness deals with the issue of when the suit may be brought. Ripeness goes to the prevention of premature litigation. So, for example, if a law is being considered by Congress but has not been put into effect, potentially affected parties may not sue because the case is not yet ripe. In fact, even if the law has gone into effect but parties have not been charged with violating that law, the case is not ripe for adjudication.

Mootness represents the other side of ripeness. Its function is to prevent federal courts from deciding cases that once represented genuine cases and controversies but have since lost their adversarial quality because of subsequent events. Perhaps the conflict has been resolved, or one of the parties has died.

Standing, ripeness and absence of mootness all have a common feature in that they are concerned with whether the case is sufficiently adversarial. The political question issue is different. The function of the political question doctrine is to identify those few constitutional issues that regardless of how adversarial they may be they simply should not be decided by the courts. For example, during the Vietnam era, courts continuously refused to hear cases involving the constitutionality, legality and morality of the war. The courts held that the political question was better left for Congress to decide.

There are other external checks on judicial power which are neither contained in the Constitution nor in the case law developed by the courts. For example, the president of the United States has the authority to nominate members for the Supreme Court. The president most often looks for members who fit his own view of how the Constitution should be read and applied to conflicts. Should it be read and interpreted based on the plain meaning of the words, or should it be read to fulfill the needs of modern society at the time the conflict is presented to the Court?

The president will naturally tend to appoint a person whose judicial philosophy is consistent with the public interest as he perceives it. Consequently, over a period of time the courts will take on the philosophy of the presidents who have appointed them. These presidents, having been elected, reflect the philosophy of the electorate. Over the long-run, the courts will respond to the interpretive method preferred by the electorate.

Conclusion

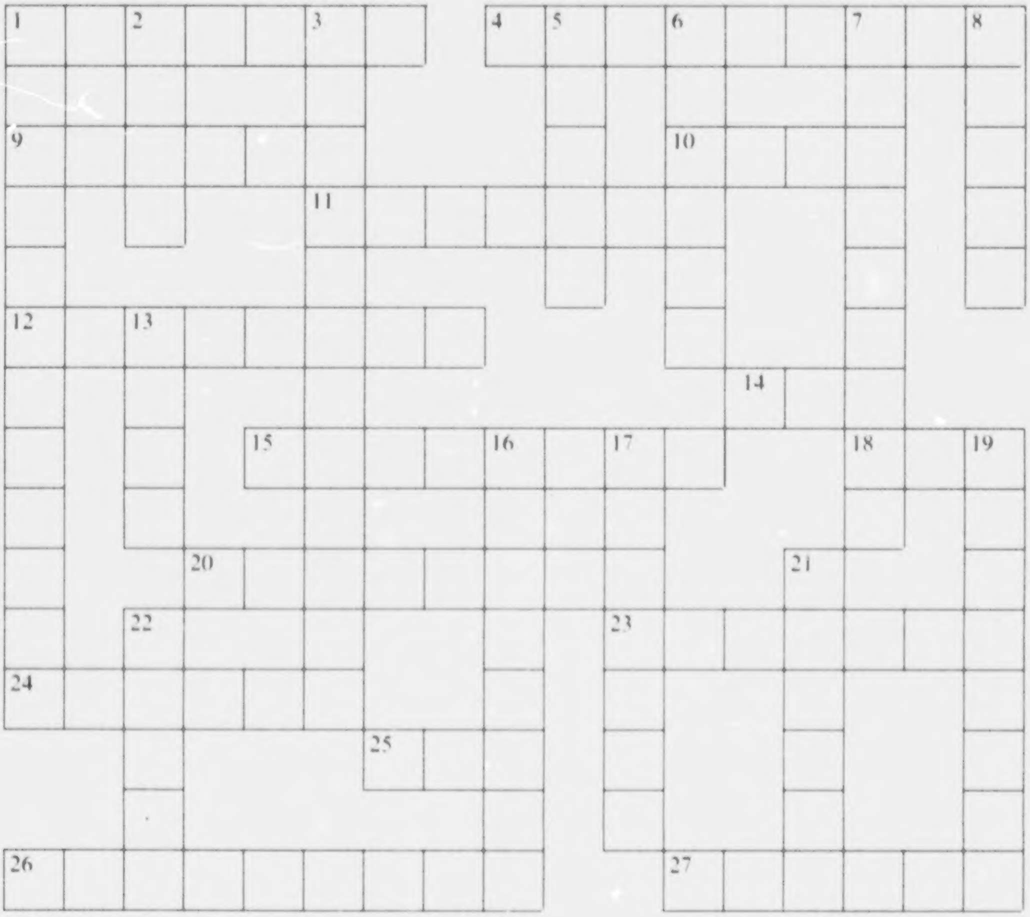
Robert H. Jackson, the late associate justice of the United States Supreme Court, in a speech delivered in France in April of 1946, realistically described the advantages and disadvantages of the Constitution and courts of the United States.

> Opinion, of course, will differ as to the advantages and disadvantages of this constitutional and judicial system. The United States on the whole has been a prosperous country, with varied resources, making a favorable background for any experiment in government. Its inhabitants have not faced the strains that beset some less favored nations. Even so, our history has not been free of sanguinary internal conflicts.
>
> It would not be realistic to contend that judicial power has always been used wisely. The Court has been sharply attacked by Presidents Jefferson, Jackson, Lincoln, and both Roosevelts. Yet no substantial sentiment exists for any curtailment of the Court's powers. Even President Roosevelt in the bitterest conflict with judicial power in our history suggested only change in the Court's composition, and none in its constitutional prerogatives.
>
> The real strength of the position of the Court is probably in its indispensability to government under a written Constitution. It is difficult to see how the provisions of a one hundred fifty-year-old written document [200 years old on September 17, 1987] can have much vitality if there is not some permanent institution to translate them into current commands and to see to their contemporary application. Courts will differ from time to time in the emphasis they will place on one or another of the Constitution's provisions, in part no doubt responsive to the atmosphere of the changes in public opinion. Interpretations will change from one generation to another, precedents will sometimes be overruled, innovations will be made that will not always be predictable. This always has been the history of the Supreme Court.
>
> The legal profession in all countries knows that there are only two real choices of government open to the people. It may be governed by law or it may be governed by the will of one or a group of men. Law, as the expression of the ultimate will and wisdom of the people, has so far proven the safest guardian of liberty yet devised. I think our constitutional and judicial system has made a valuable and enduring contribution to the science of government under law. We commend it to your notice, not because we think it perfect, but because it is an earnest effort to fulfill those aspirations for freedom and the general welfare which are common heritage of your people and of mine. □

Courts and the Constitution

Supreme Court Crossword/Secondary

Law in a Changing Society



Crossword Clues

ACROSS

1. The special title used by members of the Supreme Court—also a part of the motto over the entrance to the Supreme Court building.
4. Most of the Supreme Court's jurisdiction is _______ _________ meaning that the Court reviews the judgments of lower courts.
9. Unlike members of the other two branches, when the Supreme Court makes a decision, the Court is expected to explain the ___________ for the decision in writing.
10. One source a justice might use in deciding a case for today would be to examine _______ decisions in similar cases.
11. The highest court in the United States is the _____________ Court. The Constitution is the _____________ law of the land.
12. The lowest federal courts are called _________ courts.
14. The "_____ process of law" clause appears twice in the Constitution and requires the government to act fairly toward people.
15. The ______________ power of the United States was vested in one Supreme Court and in such lower courts as the Congress would establish.
18. Marbury wanted the Supreme Court to issue a writ of mandamus to Madison. Marbury hoped the Court would say _____ to his request.

20. In courts exercising ____________ jurisdiction you are more likely to find witnesses testifying and juries.

23. A Supreme Court ____________ may be labeled majority, concurring or dissenting.

24. John Marshall's early decisions were important in helping to unify the __________.

25. Lawyers usually charge it; the state will pay it for a poor defendant.

26. The Supreme Court will not decide issues they believe ought to be decided by another branch of government. The Court calls these political ______________.

27. The __________ of the Supreme Court can be found in the majority opinion. It is addressed specifically to the people and problems of that one case but may have application to many similar problems.

DOWN

1. The authority of a court to exercise its judicial power over a particular subject, person or geographical area is what is meant by a court's ____________________.

2. The _______ of the Supreme Court is stamped on its official papers. It has one star to symbolize the Constitution's creation of "one Supreme Court."

3. The Supreme Court can declare acts of the states, president or Congress null and void if those actions are contrary to the ____________________.

5. The Constitution separates the ________ to govern among three branches of government.

6. Someone who is very skillful or who has much training and knowledge in a field. A judge is expected to be a legal __________.

7. Only ____________ may appear to argue cases before the Supreme Court.

8. ________ Justice Under Law is the motto of the Supreme Court and is engraved on the Court's building.

13. Litigation is the process of carrying on a law ______.

16. According to the Constitution, ______________ can control the appellate jurisdiction of all federal courts including the Supreme Court.

17. Each side is ____________ to speak for 30 minutes during oral arguments before the Supreme Court. No one but the justices themselves is ____________ to attend the Friday conferences of the Supreme Court.

19. One must have ______________ to sue or the Supreme Court will not hear the case. This means, in part, that one must have a direct, personal interest in the case before one can sue.

21. The Supreme Court meets for ___________ terms which traditionally last from October to June.

22. ________ decisis is a Latin phrase which is often translated, "Let the decision stand." It refers to the rule of precedent observed by courts.

(Answers to puzzle on page 14.)

Courts and the Constitution

Selecting Supreme Court Justices: Beyond Advice and Consent/Secondary

Steve Jenkins

How are U.S. Supreme Court justices selected? Do you have a voice in the selection? Should citizens be able to vote for Supreme Court justices?

This strategy gives background on these questions and provides an activity that gives students a chance to weigh alternatives.

The decisions of the nine justices of the U.S. Supreme Court affect our everyday lives – from rulings on search and seizures in public schools (e.g., *New Jersey v. T.L.O.*, 105 S. Ct. 733, 1985) to opinions on the limits to students' free speech protections (e.g., *Tinker v. Des Moines School District*, 393 U.S. 503, 1969; and *Bethel School District v. Fraser*, 54 U.S.L.W. 5054, 1986), as well as decisions prohibiting public schools setting aside moments for silent prayer (e.g., *Wallace v. Jaffree*, 105 S. Ct. 2479, 1985). Decisions like these affect hundreds of thousands of school children; other decisions affect *all* Americans. It is no wonder that people sometimes ask, "How did they [Supreme Court justices] get so much power?"

The question of judicial power is older than the Constitution. Delegates to the 1787 Constitutional Convention were deeply divided over this issue. Some delegates favored having the chief executive – the president – make all federal judicial appointments. Other delegates argued for Congress to have the judicial appointment power. John Rutledge, delegate from South Carolina, said that if the president had sole appointment power, then "the people will think we are leaning too much towards Monarchy." The convention even passed a resolution allowing the Senate to have sole authority to make judicial appointments. This resolution was abandoned when delegates realized that Senators might be accused of having a conflict of interest since the Constitution also gives the Senate "the sole power to try all impeachments [brought against executive and judicial officers]." The present wording was worked out in a last-minute compromise – presidents would make appointments with the "advice and consent" of the Senate.

The compromise demonstrates the careful construction of "checks and balances," as well as the "separation of powers," in the U.S. Constitution. Article I, Section 8, Clause 9, grants Congress the expressed power "to constitute tribunals inferior to the Supreme Court." In other words, Congress has the power to establish and/or abolish the system of federal courts, except for the Supreme Court established by Article III, Section 1. That section specifies that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish." Congress has even passed laws to increase and decrease the number of justices on the Supreme Court. While Congress may determine the size of the Supreme Court, the president is granted the power to appoint the judges of the Supreme Court. Article II, Section 2, Clause 2, states, "and [the president] shall nominate, and by and with the advice and consent of the Senate, shall appoint...judges of the Supreme Court..."

Senators have taken the responsibility of "advice and consent" very seriously, particularly with regard to Supreme Court appointees. The senators have rejected close to one out of every five nominations made by presidents. Why such close scrutiny? Presidents realize that Supreme Court appointments are for life, and, therefore, each president who has an opportunity to fill a vacancy knows that his or her nominee may shape judicial decisions and influence public policy long after the president leaves office. Senators also recognize the potential impact of each appointment, and thus attempt to exercise their constitutional duty. In recent years, every person nominated by the president to serve on the Supreme Court has appeared before the Senate Judiciary Committee for questioning. Other persons or organizations, such as the American Bar Association, may also testify "for" or "against" the nominee. After hearing all testimony, the Judiciary Committee will make a recommendation to the full Senate. If a majority of the Senate approves of the nomination, then the president's appointment is confirmed. If the Senate rejects the nomination, then the president must start all over.

Evaluating a Candidate

So how does the Senate determine if a nominee is qualified to serve for life on the Supreme Court? The Constitution does not specify any qualification to serve as a federal judge. One unwritten rule is that all nominees have a bachelor of laws degree. Since there are no constitutional requirements, presidents may nominate anyone to the Court. Most presidents often seek to nominate persons who support their philosophy and policies. Before sending the nomination to the Senate for confirmation, most presidents will consult key senators and other political leaders to determine their support for the nominee.

Some suggest that presidents should take into consideration a variety of factors in selecting a Supreme Court nominee, such as judicial experience, political affiliation, geographic area or regional background, as well as racial, ethnic and religious background. A composite profile of the more than one hundred justices who have served on the Supreme Court produce the following characteristics:

- Natural born citizen (only six justices were not born in the United States);
- White (Thurgood Marshall, appointed in 1967, has been the only non-white justice);
- Male (Sandra Day O'Connor, appointed in 1981, has been the only woman justice);
- Protestant (there have been seven Roman Catholic and five Jewish justices);
- Upper-middle to high income family background;
- Fifty to fifty-five years of age at the time of appointment;
- Metropolitan areas;
- Politically active;
- Law degree (often from a prestigious institution);
- Some public service.

What factors should a president and the Senate consider before nominating and confirming a justice? In 1959, William Rehnquist, then a former Supreme Court law clerk and today the new Chief Justice of the Supreme Court, wrote in the *Harvard Law Record* that the Senate had a duty "of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him...."

Rehnquist argued that the way to change the Court was to change the justices. "If greater judicial self-restraint is desired, or if a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' [is desired], then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is by requiring nominees to state their views on these questions."

The current chairman of the Senate Judiciary Committee, Strom Thurmond, said in the confirmation hearings of Abe Fortas (nominated to serve as Chief Justice in 1968), "It is my contention that the Supreme Court has assumed such a powerful role as a policymaker...that the Senate must...be concerned with the views of the prospective justices or chief justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues.... The Senate, as representatives of the people, is entitled to consider these views, much as the voters do with regard to candidates for the presidency, or indeed for a seat in the U.S. Senate."

A recent national survey revealed that a majority of the public would like a greater voice in selecting Supreme Court justices—more than sixty per cent responded that they believe justices should be elected by the people. What do you think? Imagine that you are president. What qualifications would you be looking for in selecting a nominee to the Supreme Court? What if you were a member of the Senate Judiciary Committee? What kinds of questions would you want to ask a nominee to the Supreme Court?

Classroom Strategy: "Amendments May Have Dramatic Effect on Supreme Court"

What might happen if people demanded a greater voice in selecting Supreme Court justices? Since the adoption of the Constitution in 1787, several amendments and resolutions have been proposed that would affect the method of selection, the tenure or length of terms, and even the qualifications of Supreme Court justices.

Article V of the U.S. Constitution describes the process for amending the Constitution. One way of amending the Constitution is if two-thirds of both houses of Congress propose an amendment and send the proposed amendment on to the state governments. If three-fourths of the states ratify the amendment, it then becomes part of the Constitution. Imagine that the following amendments have been officially introduced and assigned a number (e.g., Senate Bill, SB 1986) in Congress. Each amendment would change the current constitutional guidelines for appointing Supreme Court justices. Imagine that you are a member of the Senate Judiciary Committee and your committee has been given the responsibility to review the amendments and make recommendations to the entire Senate. Your committee is going to be divided into small groups, subcommittees. Each subcommittee will be assigned one of the following amendments to examine, possibly revise and recommend. Here is your subcommittee's assignment. Each small group should:

- Read the proposed amendment carefully. Find out the meaning of any words or phrases that you do not understand.
- List and discuss at least two reasons to vote *for* recommending passage of this amendment and at least two reasons to vote *against* passage.
- Debate the amendment in your small group and then take the following votes to recommend action to the entire Senate:
  "Pass" the proposed amendment in its present form;
  "Do Not Pass" the amendment as it is written;
  "Change" the amendment and vote to pass the new amendment.
- If a majority of your subcommittee votes "Pass," then the proposed amendment should be recommended to the entire Judiciary Committee (i.e., your class). If a majority of your subcommittee votes "Do Not Pass," then your group should recommend defeat of the amendment to your class. If a majority of your group votes to "Change" the proposed amendment, then rewrite the amendment as desired, and read the revised amendment to your class with recommendation for passage.

  Remember, each subcommittee will be expected to report to the entire class and each member of a subcommittee should be able to give at least one reason in support of his or her vote.

PROPOSED AMENDMENTS

SB 8701 – Justices of the Supreme Court shall be elected by direct vote of the people in general November elections held simultaneously in presidential election years. Justices will be elected to eight year terms with no limitations on the number of terms for which they may be re-elected. The first elections will be scheduled for 1992. Current justices will be eligible to be candidates in the June, 1992, primary elections. The candidates in the November elections will have been selected as the candidate of their respective political parties, determined by voters in a national June primary election. Candidates for the Supreme Court may campaign just as candidates do for the presidency and Congress.

SB 8702 – Justices of the Supreme Court will be nominated and appointed by a majority vote of both houses of Congress. The Congress will establish minimum qualifications for Supreme Court justices. Each justice will be appointed for life unless he or she is found guilty of an impeachable offense, resigns, or for some other reason vacates his or her seat on the Court.

SB 8703 – Justices of the Supreme Court will be appointed by the president based on recommendations made by a Special Judicial Committee. The Special Judicial Committee will consist of the following members: the Speaker of the House of Representatives; the president pro tem of the Senate; the president of the American Bar Association; and two citizens (one male and one female) selected at random. The Special Committee will consider (e.g., study background and interview) all persons applying for Supreme Court vacancies. After considering all applicants, the committee will recommend five names to the president for appointment. The president may appoint any one of the five, or the president may reject all five. Then the committee must select five more nominees to send to the president until one of the nominees is finally selected. Each justice will be appointed for six year terms and at the end of each six year term the voters will have an apportunity to vote for retention of the justice. Each justice seeking to be retained for another six year term will have his or her name placed on the general November election ballot as follows:

- Should Justice ____________________ be retained on the Supreme Court for a six-year term? (Please vote "Yes" or "No")
  ________ Yes
  ________ No

SB 8704 – Justices of the Supreme Court shall be elected by direct vote of the people in nonpartisan elections. Whenever a Supreme Court vacancy exists, a special election will be scheduled and held six months from the date of the vacancy. Any citizen of the United States, who is an eligible voter, may file and have his or her name placed on the ballot for justice of the Supreme Court. Each justice will be elected to eight year terms and each justice will be limited to serving only one term.

SB 8705 – The president will nominate, and with the approval of a majority of both houses of Congress, shall appoint justices of the Supreme Court. Each justice will be appointed for life unless he or she is found guilty of an impeachable offense, resigns, or for some other reason vacates his or her seat on the Court.

SB 8706 – Justices of the Supreme Court will be selected by the remaining justices of the Supreme Court. Whenever a Supreme Court vacancy occurs, the remaining justices will nominate and with majority approval appoint a new justice to the Court. Each justice will be appointed for life unless he or she is found guilty of an impeachable offense, resigns, or for some other reason vacates his or her seat on the Court.

Enrichment exercise: The teacher may wish to invite a law-related resource specialist (e.g., an attorney, legislator, or constitutional scholar) to listen to and comment on the subcommittee reports to the entire class. Here are some questions you may wish to ask the resource specialist:

- How are judges elected in your state?
- What qualifications are necessary to be a judge in your state?

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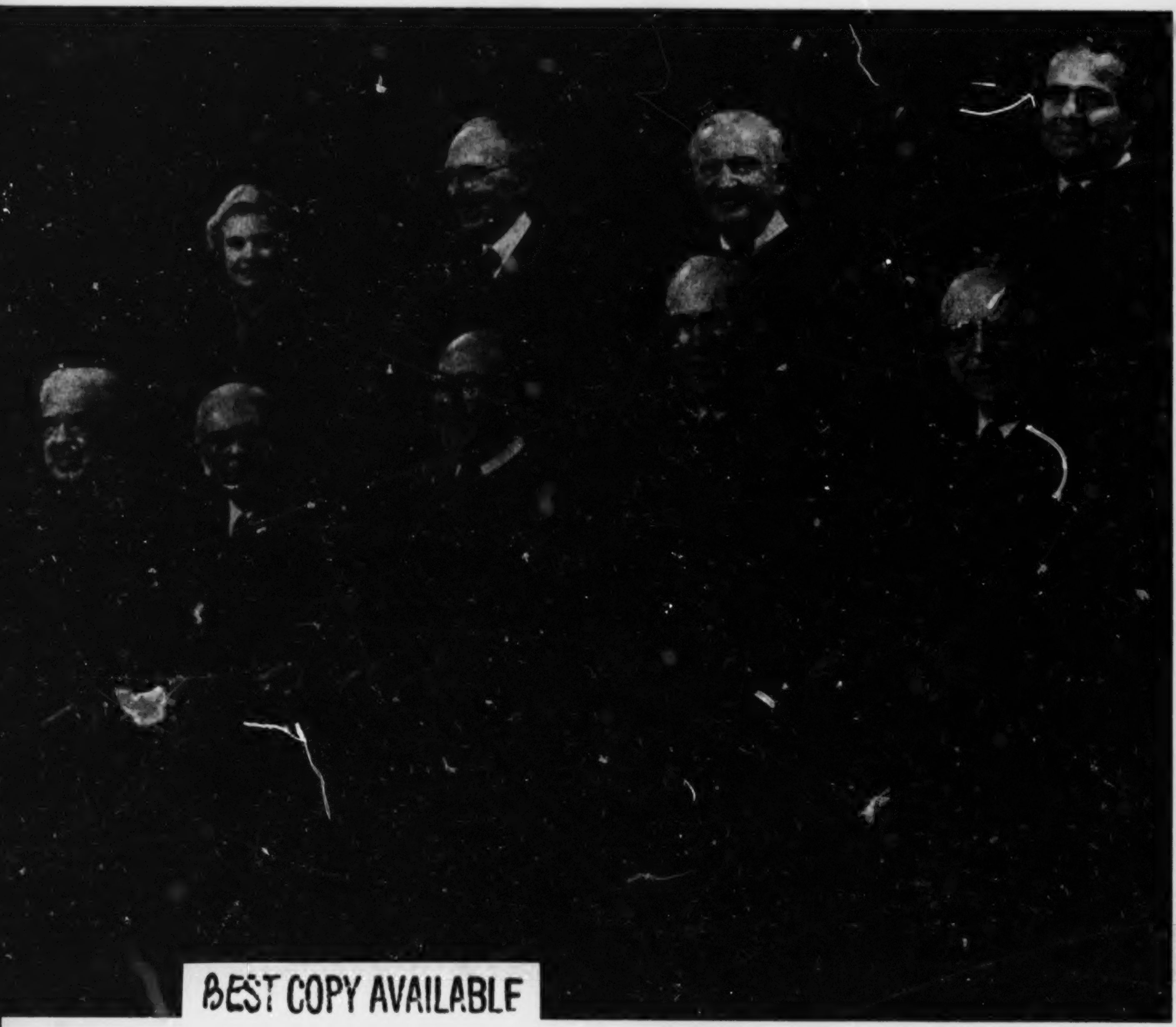
COURTS AND THE CONSTITUTION

The Supreme Court in Transition: From Warren to Burger To Rehnquist



AP/World Wide Photo

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Changes in the composition of the Supreme Court perhaps inevitably invite speculation about whether and how the Court will change, and what direction it will take in the future. The move of William Rehnquist from associate justice to chief justice and the addition of Antonin Scalia certainly alters the chemistry of the Court. These changes may also have a profound impact on the Court's place in American government during rest of this century.

There is no doubt that the Court will change. Differences are already apparent during oral arguments. Rehnquist is sharper, more thoughtful, more commanding and wittier than his predecessor in the center chair. And from the far right of the bench, Scalia almost bubbles over with energy and questions for counsel. No less revealing is that in the week before the start of the 1986-1987 term on the first Monday in October, Rehnquist managed to get the justices to dispose of over 1,000 cases (granting 22 and denying or otherwise disposing of the rest). He did so in only two days, whereas it usually took Burger more than twice as long to get through about the same number.

It nevertheless seems fair to say that we will not see an abrupt break with past rulings, in the near term at least. There is likely to be more of the same – more continuity than change in developing constitutional law. On the major controversial issues, the Court is likely to remain as in the past five years divided 6-3 or 5-4. Whether the Court makes a sharp turn to the right, as those in the Reagan administration anticipate, depends not only on the leadership skills of our sixteenth chief justice and our 103rd justice, but on when one or two more seats become vacant, and which seats they are.

The Supreme Court, of course, in a sense is always in transition. Within the marble temple, the justices are a close-knit group whose personal relations evolve and change. The docket each year brings new cases, affording fresh perspectives on old problems and opportunities for further reflection and negotiations. And the law clerks come and go, even if the justices remain the same.

From a broader political perspective, the Court swings back and forth with the country – much like a clock on a pendulum. For most of our history, the Court has been in step with major political movements, except during transitional periods or critical elections. The swing of electoral politics – through the power of presidential appointment – controls the composition of the bench and may temper the speed, if not shift the direction, of the Court. Public opinion also touches the justices' lives and may serve to curb them when they threaten to go too far or too fast in their rulings. But changes in the direction of the Court are ultimately moderated by its functioning as a collegial body, in which all nine justices share power and compete for influence.

The Court thus generally shifts direction gradually – on a piecemeal basis, incorporating and accommodating the views of new appointees. There are times, to be sure, when the Court makes rather sharp breaks with the past and charts a new course in constitutional law. This occurred in 1937 during the battle over FDR's "Court-packing plan," and then again during the latter years of the Warren Court. The future of the Renquist Court, I will argue, holds the potential for as great a change, and perhaps for greater change than at any other time in the recent past. This is clear from the history of the Warren and Burger Courts and how the Rehnquist Court could differ.

The House the Warren Court Built

The Warren Court (1953-1969) revolutionized constitutional law and American society. First, the unanimous and watershed school desegregation ruling, *Brown v. Board of Education,* in 1954 at the end of Warren's first year on the bench. Then, in 1962 *Baker v. Carr* announced the "reapportionment revolution" guaranteeing equal voting rights. And throughout the 1960s, the Court handed down a series of rulings on criminal procedure that extended the rights of the accused and sought to ensure equal access to justice for the poor. *Mapp v. Ohio* (1961), extending the exclusionary rule to the states, and *Miranda v. Arizona* (1966), sharply limiting police interrogations of criminal suspects, continue to symbolize the Warren Court's revolution in criminal justice.

These rulings became identified with an "egalitarian jurisprudence" that indelibly marks an era in the Court's history and elevated Warren above the ranks of most justices to the status of one of our "great chief justices." The record of Warren and his Court remains, of course, riddled with irony and controversy. But, Warren did ultimately take command of his Court. Whether they agreed with him or not, as Justice Potter Stewart put it, "We all loved him."

A big bear of a man with great personal charm, a real politician, he had the interest and capacity to lead the Court. Though by no means a legal scholar, he grew intellectually with the chief justiceship and won the Court over to his concern with basic principles of equality and fairness.

Still, like other chief justices, Warren could not lead until the others were willing to follow. Change comes slowly to the Court and we tend to forget that a chief justice is only first among equals. Even the force of a powerful intellect or personality may not overcome this basic fact of life in the marble temple.

The unanimity of ***Brown v. Board of Education*** tends to overshadow the fact that the "Warren Court" did not emerge for almost another decade. During that time in case after case involving criminal procedure, for example, Warren frequently found himself in dissent, along with liberal Justices Hugo Black, William O. Douglas and, after 1956 his close friend and advisor, Justice William J. Brennan, Jr. Justices Felix Frankfurter and John Harlan, apostles of judicial self-restraint, tended to hold sway over, if at times only to moderate, the brethren.

Not until the appointment of Justice Arthur Goldberg in 1962, and later of Abe Fortas and Thurgood Marshall, was there a critical mass to support Warren's liberal-egalitarian philosophy that placed individual rights above states' rights and boldly challenged the political process. The Warren Court then rather quickly forged new law with a rather broad brush, seeking "bright lines" when limiting the coercive powers of government, ensuring principles of equality, and opening up the electoral process.

The directions in which the Warren

Court pushed the country remain controversial. Republican President Dwight Eisenhower later regretted his appointment of Warren as "the biggest damn-fooled mistake" he ever made. From public opposition and campaigns to "Impeach Earl Warren," Vice President Richard Nixon eventually forged a successful 1968 presidential campaign based on the theme of returning "law and order" to the country. He promised to appoint "strict constructionists" and advocates of judicial self-restraint who would resurrect a Frankfurterian view of the role of the Court.

Interior Redecorating and Minor Remodeling: The Burger Court Years

With his four appointments, Nixon achieved remarkable success in remolding the Court, if not in his own image, then in the ghost of Justice Frankfurter. Burger came to the Court with the agenda of reversing the "liberal-egalitarian jurisprudence" of the Warren Court. The era of the Warren Court came to an end. Left behind though were numerous landmark rulings that had profoundly changed our constitutional landscape and a legacy that the Burger Court would not significantly erode or overshadow.

As chief justice, Burger proved a considerable disappointment for conservatives. For one thing, though a devoted Republican, he came from the liberal wing of the party, in the mold of fellow-Minnesotan Harold Stassen. Quite simply, he proved too moderate for California Republicans like Nixon and Reagan.

Even more troubling was that Burger could not lead the Court intellectually. More of a lawyer than Warren, he was by no means a legal scholar and lacked a well-developed judicial philosophy. As one of his colleagues on the Court observed, Burger does not have a "legal mind" or a "taste for the law" outside of the area of criminal procedure. Rather than a coherent judicial philosophy, Burger tended to take personal and ideological positions on various issues.

Moreover, he lacked the charisma of Warren and the demeanor and sharpness of mind of Chief Justice Charles Evan Hughes. With personal charm and a sense of humor, but also a temper, Burger did about all he could to promote collegial relations within the Court. Yet, his lack of precision in directing conference discussions (during which the justices discuss cases to be decided), occasionally led to confusion and frequently failed to flush-out differences among the justices that needed to be hammered-out. While this enhanced Burger's power in assigning opinions, and permitted him to later switch his votes, it troubled the brethren. Ironically, in spite of his interest in court management and basically managerial approach, Burger's personality and style was such that he had a hard time delegating responsibility and compromising with others. In the end, he was more interested (and his great accomplishments lie) in improving the administration of federal and state courts. Burger presided over the Court's functions, but did not lead the Court.

For the most part, centrists on the Court held sway. Eisenhower-appointee Potter Stewart, Kennedy-appointee Byron White, and Nixon-appointee Lewis F. Powell, Jr., in one way or another had all been touched by Frankfurter's philosophy of judicial self-restraint. And they provided the swing votes and moderating influence on the Burger Court.

More independent and less "team-players" are Justices Harry Blackmun and John Paul Stevens. Blackmun came to the Court as "the most conservative judge from the most conservative court of appeals in the country," at the urging of his high-school buddy, Chief Justice Burger. He remains perhaps the hardest-working, most self-consciously brooding justice, and perhaps Nixon's biggest disappointment. In his first years he voted almost 90 percent of the time with Burger but, after writing the abortion opinion in *Roe v. Wade* (1973), he has come to vote over 70 percent of the time with the liberal wing of the Court: Justices Brennan and Marshall. Likewise, Stevens, an appointee of President Gerald Ford in 1975, has demonstrated strong independent judgment. He considers himself a judicial conservative but without the political agenda of Nixon and Reagan appointees.

So it fell to Rehnquist to stake out the Court's conservative philosophy. He came to the Court in 1971 from the Department of Justice in the Nixon administration, though he had established his own conservative credentials years earlier. On the Court, he more than stood his ground. Rehnquist articulated a consistent and well-developed judicial philosophy that turned out to be more compatible with the Reagan administration than that of Reagan's first appointee, Justice O'Connor

"My client would like to plead guilty if that would make you feel any better."

Drawing by Joseph Mirachi
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(who was also considered for the post of chief justice, but had angered conservatives with her opinions on school prayer, libel, and affirmative action).

During Burger's tenure, the Court thus pretty much went its own way, pulled in different directions on different issues by either its most liberal or most conservative justices. There was no "constitutional counter-revolution" during the Burger Court, as some had predicted. Instead of a transformation, there were only modest "adjustments," as Burger noted when announcing his resignation. From the perspective of the Reagan administration, the Court headed by Burger accomplished little; it eschewed "bright lines" but lacked clear direction and appeared to drift from case to case.

In the final analysis, the Burger Court was one of transition, moderation, and self-restraint: a troubled and fragmented Court in the image of Felix Frankfurter. The legacy of the Burger Court (from 1969 to 1986) is likely to amount to little more than that of "a transitional Court"—a Court divided between what the Warren Court accomplished and what the Rehnquist Court achieves and leaves behind. While the Court headed by Chief Justice Burger broke some new ground (as in tackling the problems of affirmative action and reverse discrimination), by and large it confined itself to minor remodeling—with a few new additions (as with the ruling on abortion)—in the house built by the Warren Court.

From Minor to Major Remodeling? —The Rehnquist Court

By contrast, the Court that potentially could take shape under Chief Justice Rehnquist would be self-confident, aggressive, and decidedly more conservative. This is already evident in the atmosphere of the courtroom. In the long run, much depends on Rehnquist's willingness to compromise in order to bring others along without reinforcing past divisions among the brethren, or sacrificing his own well-developed judicial philosophy; and, again, on when the Court's composition changes again.

Where a Rehnquist Court ultimately goes is necessarily a matter of speculation. That is no reason, however tempting, to conclude that there will not be changes or that they won't matter. Rehnquist has already proven to be quite a different chief justice and the Court will be different with Scalia. Both are more conservative and ideologically committed than Burger. Recent trends in the rightward direction will certainly continue.

How the Court May Change Under Chief Justice Rehnquist

Unlike Burger, Rehnquist has the intellectual and tempermental wherewithal to be a leader. He is a shrewdly articulate advocate of his views, who also has the sense of humor of a practical joker—and this is readily apparent during oral arguments, despite the quite different impression he gave during his confirmation hearings.

Even liberals on the Court think he will make a "splendid" chief justice. This is largely because Burger was not equiped to lead. His presentation of cases at conference was poor and votes often all-too-tentative, with virtually everything turning on how opinions were written. As chief justice, he used the power—when in the majority at conference—to assign opinions to control over ninety percent of all Court opinions, even though he would subsequently change his views and even votes. Other justices were understandably angered and expect Rehnquist to be more candid and firm when discussing and voting on cases.

Even if conferences improve under Rehnquist, he must still mass a majority. In a good number of areas he can count on Justices Byron White, Sandra Day O'Connor and Scalia. White may align himself even more often with Rehnquist than he did Burger, while O'Connor may well continue down a path toward greater independence and moderation. To pick up one more vote, Rehnquist may moderate some views and exercise the power of assigning opinions in strategic ways. This will test Rehnquist's willingness and ability to compromise—traits rarely shown in the past. When staking out his often extreme positions as an associate justice, he wrote more solo dissents (54) on a broader range of issues than any of his colleagues.

Depending on the issues, Justices Stevens or Blackmun might swing over, but they have been increasingly inclined to align with the liberal wing: Justices Brennan and Thurgood Marshall. That leaves Lewis F. Powell, Jr. at the fulcrum of power in the near term. As a centrist, his vote will prove even more crucial than in the past. Last term, for example, the justices divided five-to-four in 46 cases. (In 35 cases there was a sharp 5-4 split and in another 11 cases four justices wrote separately to reject the majority's rationale.) Powell was most often in the majority (35 times), with the conservative wing winning about three times as often as the liberals. But Powell is an independent and pragmatic jurist who believes in precedent and self-restraint. He remains pivotal in upholding the Court's abortion decision and to rulings in a number of other areas as well.

In What Ways May the Court Change?

The most important immediate change may bear on which cases are granted review. The cornerstone of the Court's operation is the power to decide what to decide. Over 5,000 cases annually arrive, yet only about 170 are given full consideration—oral argument and decision by written opinion.

The power to deny cases enables more than managing a heavy caseload. It is the power to set the Court's substantive agenda as well. Ideological differences inevitably come to play. Indeed, setting the agenda is the first battleground in the war over the direction of the Court.

The importance of ideological changes in the Court's composition is clear. The Warren Court took a large number of cases involving the rights of the accused in order to extend the guarantees of the Bill of Rights to individuals in state as well as federal courts. By contrast, the Burger Court increasingly selected cases so as to cut back, if not reverse, the direction in which the Warren Court pushed constitutional law.

That and other trends are certain to continue with the Rehnquist Court. In recent years the Burger Court took cases involving the rights of the accused at the behest of the government, rather than at the request of individuals challenging governmental action. Whereas the Warren Court was sympathetic to cases brought by indigents, the Burger Court became more and more hostile to their claims. In 1969-1972, 30 such cases were granted on average each term. After Nixon's last two appointments, the average dropped to 16 during 1972-1980. Since Reagan's naming of O'Connor in 1981, the number further dropped to 13 cases per term.

When ruling on claims of individual rights, the Burger Court was generally inhospitable. The Warren Court sided with the individual against the government 66 percent of the time, while the Burger Court only 44 percent. The percentage could well drop further with the Rehnquist, whose record of voting for the government is unsurpassed.

As chief justice, Rehnquist has a greater role in structuring the Court's agenda. And he will have more interest and success in doing so than Burger. In addition, the way in which cases are granted could work to his advantage as well.

Prior to each weekly conference, the

(continued on page 46)

Swan Song for the Burger Court

The Burger Court bowed out with a blitz of controversial decisions this past term. Following are highlights of last term's criminal procedure rulings. Decisions from the civil side – including pronouncements on the "right of privacy," church and state, and affirmative action – will be summarized in next issue's "Court Briefs."

These criminal cases are a good example of how the Court operates, and thus how judicial review and separation of powers work in our system.

In each of these cases, the Court was confronted with a law or practice which might conflict with the Constitution. As the branch of government charged with being the final arbiter of the Constitution, it was the Court's role to uphold the law or practice if it was constitutional, or strike it down if it weren't. In doing so, it performed the ongoing constitutional interpretation which is its most celebrated task. As many commentators have noted, the Court serves as a kind of permanent constitutional convention, analyzing and reanalyzing our basic charter of government.

These cases also raise another issue central to the American system. The laws or practices under challenge were all state or local. Under our Constitution, most law enforcement is left to the states (and, through them, to local government). But the U.S. Constitution arches over all of our governments and all of our laws, and so even cases which seem local in scope can wind up before the high court if they raise issues which touch on the Constitution.

When Criminal Procedures Are Not Criminal

One of the most controversial criminal procedure decisions of recent terms turned out to be a noncriminal procedure decision. In *Allen v. Illinois,* 54 USLW 4966, the Supreme Court held that proceedings under Illinois' Sexually Dangerous Persons Act were not "criminal" proceedings, and that persons tried under the act were not entitled to the Fifth Amendment privilege against self-incrimination.

Under Illinois law, persons charged with certain sex crimes may be subject to petitions to have them declared "sexually dangerous persons." If the state can establish that the person suffers from a mental disorder and has a propensity to commit sexual assaults, then that person may be adjudged "sexually dangerous" and indefinitely committed to a maximum-security institution for psychiatric care. In *Allen,* the defendant was charged with deviate sexual assault, and was eventually judged to be a "sexually dangerous person," partly on the basis of testimony offered by court-appointed psychiatrists who interviewed him. Allen claimed that the psychiatrists had elicited information from him in violation of his Fifth Amendment privilege against self-incrimination, and that their testimony was therefore inadmissible. A series of appeals took the case to the Illinois Supreme Court, which held that the Fifth Amendment privileges were not available in Sexually Dangerous Persons proceedings because those proceedings were "civil" in nature, and not "criminal."

The United States Supreme Court, through Justice Rehnquist, agreed. After reviewing the Illinois scheme – and with considerable deference to the state court determinations – Rehniquist concluded that the purpose of the act was to treat mentally ill offenders, not punish them.

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As such, he reasoned, the constitutional protections afforded criminal defendents were not needed.

Justices Brennan, Blackmun, and Marshall joined a vigorous dissent by Justice Stevens. Stevens observed that the Sexually Dangerous Persons proceedings were in fact virtually identical to Illinois prosecutions for sex-related crimes, that the substantive standards employed under the act were defined with reference to Illinois criminal standards, and that the ultimate consequences for the subject of the petition—indefinite confinement and the stigma of being labeled sexually dangerous—were almost always more severe than if the person had been convicted of the crime he was originally charged with. In addition, Stevens noted, Illinois' contention that the act facilitated treatment rather than punishment does not resolve the inquiry. Even allowing for the truth of the assertion, there is nothing inherent in a goal of "treatment" that renders constitutional protections unnecessary. If that were the case, then any criminal system that allegedly seeks to "rehabilitate" rather than "punish" its convicts would be beyond the purview of the Bill of Rights.

Jury Selection: Racial Bias I

The Sixth Amendment gives defendants the right to an impartial jury drawn from a cross-section of the community. That's all well and good, but how do you guarantee it in practice? And how do you prevent racial bias from distorting the process?

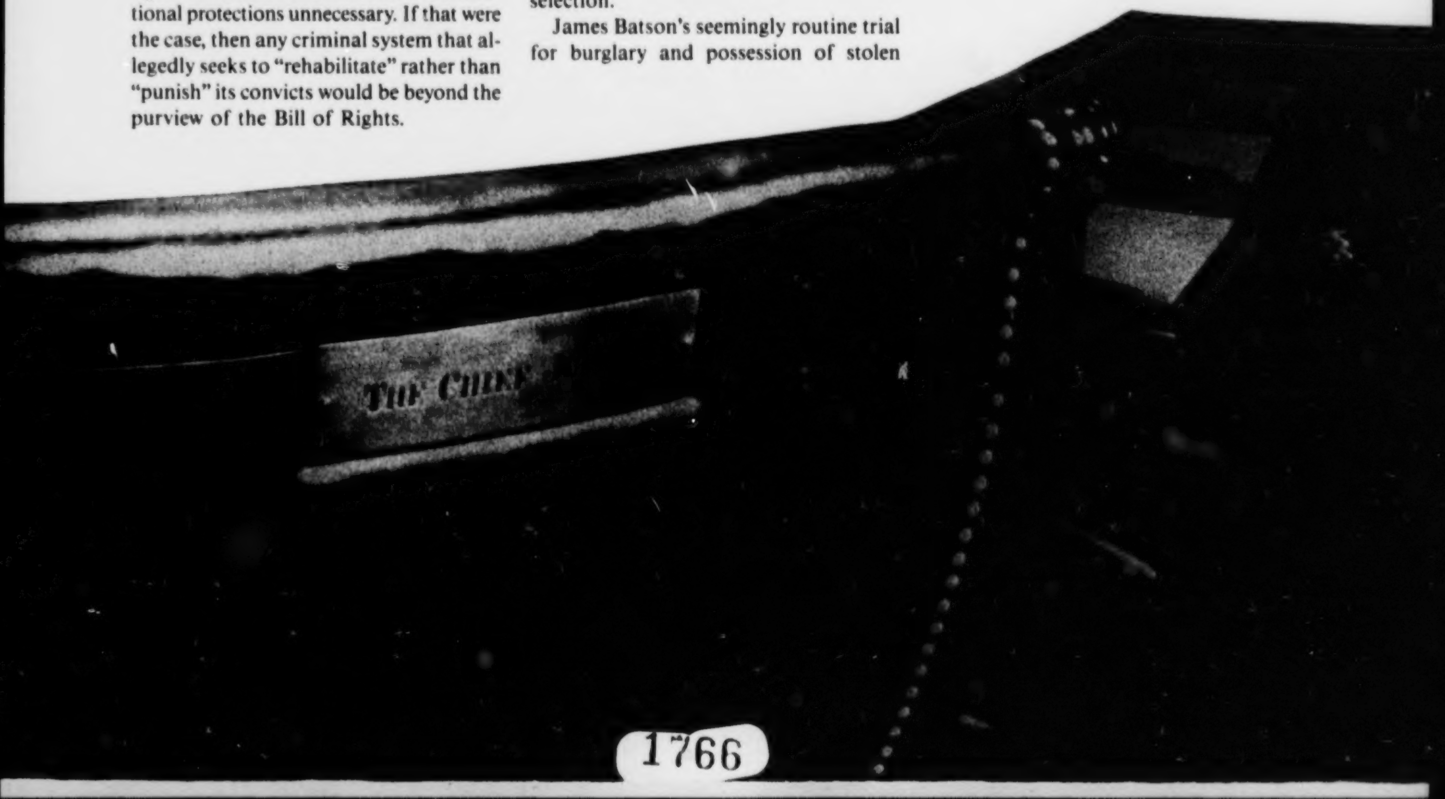
In most states, for example, the prosecution and defense have a certain number of peremptory challenges. That means they can eliminate a certain number of jurors without giving a reason. That rule permits lawyers to play hunches and get rid of prospective jurors who they think might favor the other side. It might also permit prosecutors to eliminate an entire portion of the community—such as black jurors in a case involving a black defendant.

In *Batson v. Kentucky*, the Court found a timely opportunity to reexamine its precedent on racial discrimination in jury selection.

James Batson's seemingly routine trial for burglary and possession of stolen goods found its way to the Supreme Court when the prosecutor used peremptory challenges to keep prospective black jurors from trying a black defendant. The prosecutor eliminated all four blacks in the jury pool and tried Batson before an all-white jury which utimately convicted him.

Batson argued before the Supreme Court that the state violated his Fourteenth Amendment equal protection right to an impartial jury and his Sixth Amendment right to be tried by a jury composed of a cross-section of the community. The state responded that the sole issue in question was whether the Equal Protection Clause of the Fourteenth Amendment was violated by the prosecutor's peremptory removal of all black venirement from the jury in the trial of a black defendant.

The Court agreed with the state and deferred ruling on the Sixth Amendment claim, but it found that the practice ran



John Neubauer

afoul of the equal protection guarantee.

The precedent under reexamination in this case is *Swain v. Alabama,* 380 U.S. 202 (1965), where the Court held that the state violates the Equal Protection Clause when it deliberately and purposefully excludes blacks from serving as jurors on account of race. However, the Court in *Swain* placed the burden of proof on the defendant. And what a burden! The Court required that the evidence against the state must show a pattern "case after case, whatever the circumstances, whatever the crime, whoever the defendant or victim may be." Under this rule, it was insufficient for a defendant to show discriminatory actions in his case alone. He or she had to prove that it was a practice across the board in prosecutions. It was in this context that the Court decided *Batson.*

The Court's decision in *Batson* aimed principally at strengthening the Equal Protection Clause. The crux of the ruling, wrote Justice Powell for the majority, was "that a defendant may [now] establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." To do so the defendant must establish himself to be member of a cognizable racial group; he may rely on the indisputable fact that peremptory challenges allow discrimination; and he must show that facts and relevant circumstances "raise the necessary inference that the prosecutor used that practice to exclude venirement from the jury on account of their race." The state would then face the burden of showing that the peremptory challenges were exercised for nondiscriminatory reasons. Ultimately, the trial court would then determine if purposeful discrimination is established.

The Supreme Court's decision was hailed by many as an effective rebuttal of the assumption that jurors determine guilt on account of the defendant's race. It was further lauded for promoting public confidence in the fairness of the judicial system. Going one step further, Justice Marshall in his concurring opinion argued for the elimination of peremptory challenges on the ground that in practice it is always used to discriminate.

The dissenting justices, Powell and Rehnquist, maintained on the other hand that the challenge is necessary in selecting fair juries and decried the judicial interference in its exercise.

Jury Selection: Racial Bias II

The Court expressed its intolerance of biased jurors in another case involving racial bias in jury selections. In *Turner v. Murray,* the Court decided that in the selection of jurors for an interracial capital crime case the judge erred in refusing to question potential jurors on racial prejudice.

In 1978, Willie C. Turner robbed a Franklin, Virginia, jewelry store, armed with a sawed-off shotgun. After the owner activated a silent alarm alerting police to the scene, Turner shot him once and then twice more, expressing his anger at the victim's "snitching." The crime was widely reported by the local press, so the trial was moved to a different county where no publicity occurred.

The defense sought to ask potential jurors during the voir dire [jury selection] examination whether the fact that the defendant was black and the victim white prejudiced them against the defendant. The judge refused to ask this question, reasoning that he already made a general inquiry as to each prospective juror's ability to be impartial, to which the response had been affirmative. The jury of eight whites and four blacks found Turner guilty and sentenced him to death. Turner appealed his death sentence, arguing that his right to an impartial jury was violated by the judge's failure to question the jury on racial bias.

The U.S. Supreme Court reversed Turner's death sentence, citing as a controlling factor that the crime charged was a capital offense in addition to being interracial. In previous interracial criminal cases, the Court decided that the mere interracial nature of a crime does not necessitate a questioning of racial bias. [*Ristano v. Rose,* 424 U.S. 588, (1976) *Ham v. South Carolina,* 409 U.S. 589 (1973)]. However, in light of the jury's wide discretionary power to impose capital punishment in Virginia, the finality of a death sentence and the difficulty of mimimizing racial prejudice, the Court found the trial judge made an error in failing to question the jury. The decision reversed the death sentence, but Turner's conviction was nevertheless left intact.

Concurring in reversing the sentence, but dissenting with respect to the conviction, Justice Brennan argued that it was impossible to differentiate between the potential effects of racial bias on a jury's decision to convict the defendant and its decision to impose the death sentence. He argued that the conviction should be reversed as well. Dissenting in the Court's opinion were Justices Powell and Rehnquist, who argued that the majority relied on an unfounded assumption that the jurors were racially prejudiced.

Search & Seizure: No Privacy

In *California v. Ciraolo,* the Court looked at the increasing impact of technological progress on police search and seizure methods.

Dante Ciraolo's backyard crop of marijuana plants was identified by Santa Clara police flying at low altitude over his property. (Their earlier ground level surveillance was obstructed by two fences, eight and ten feet high, which surrounded the backyard.) A search warrant was issued based upon these aerial observations. Ciraolo was arrested for growing the plants, a felony in California, and the plants were seized as evidence in his trial. Ciraolo said the evidence should be suppressed because police violated his Fourth Amendment right to privacy, and the trial court agreed. The state appealed.

The U.S. Supreme Court sided with the state. The issue, as the majority framed it, was whether Ciraolo had a constituionally protected reasonable expectation that his crop would not be aerially observed by police. In applying the Fourth Amendment analysis which it articulated in *Katz v. U.S.,* 389 U.S. 347 (1967), the Court considered, first, whether the defendant showed that he expected his privacy to be protected, and secondly, whether that expectation was reasonable to society. The Court acknowledged that the defendant's eight-foot and ten-foot fences showed that he expected privacy, but these fences limited that expectation to ground level observations. The Court reasoned that had the defendant expected privacy from aerial observations, he would have built a roof over his yard. In the Court's final analysis, therefore, Ciraolo did not manifest an expectation of privacy from aerial surveillance.

Assessing society's willingness to recognize the defendant's expectation of privacy, the Court affirmed the Fourth Amendment protection of the sanctity of the home and its curtilage. Citing *Oliver v. U.S.,* 466 U.S. 170 (1984) [quoting *Boyd v. U.S.,* 116 U.S. 616, 630 (1886)], the Court

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defined curtilage as "the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." Thus, Ciraolo's backyard is afforded maximum protection from unreasonable government intrusion, just as his house is. Nevertheless, the Court concluded that an expectation that the curtilage in this case is protected from aerial observation is unreasonable. The Court maintained that the Fourth Amendment does not demand that law enforcement officials who are legally present at the scene of the crime shield their eyes from observing illegal activities wherever they occur. Hence, the Santa Clara police did not violate the defendant's right to privacy within the curtilage of his home because the officers were flying in public navigable airspace. Furthermore, the plants were readily visible to and were in fact seen by the naked eye. Through this reasoning, the Court concluded that no unreasonable search or intrusion occurred in violation of the Fourth Amendment.

Justice Powell, writing for the dissenters and a sizable number of lay supporters, criticized the majority's misplaced emphasis on the legality of the police vantage point. He argued that the *Katz* test rested upon whether the search violated a reasonable expectation of privacy, not the physical position of police observers. He repeated Justice Harlan's concurring opinion in *Katz* that as electronic and other undetectable means of surveillance become increasingly sophisticated and available to police, the relevant issue in alleged Fourth Amendment violations becomes whether the challenged search violated a constitutionally protected reasonable expectation of privacy. In conducting such inquiry, he cited *Payton v. New York,* 445 U.S. at 589, noting that the sanctity of the home must be fully recognized and "any subjective expectation of privacy virtually will always be legitimate."

Jury Selection: On Witherspoon Excludables

In the 1968 case of *Witherspoon v. Illinois,* 391 U.S. 510 (1968), the Supreme Court held that under the Sixth Amendment to the U.S. Constitution, which guarantees an impartial jury, prosecutors could not automatically exclude jurors who held some reservations about the death penalty. Only persons who are unalterably opposed to capital punishment could be excluded – such jurors are now known as "Witherspoon excludables."

Witherspoon left open at least one significant question. In most states, capital cases are divided into two stages: a trial to determine guilt and a sentencing phase. Could the "Witherspoon excludables" be excluded from a jury prior to the sentencing phase? *Lockhart v. McCree,* 45 USLW 4449, gave the answer: Witherspoon excludables can be excluded from a jury during the trial, even if sentencing takes place at a later, separate stage.

In 1978, an Arkansas gift shop was robbed and the owner fatally shot. Police arrested Ardia McCree based on eyewitness identification of the getaway car. McCree's alibi failed to convince the jury, and he was found guilty of felony murder and sentenced to life imprisonment without parole. The state's request for the death penalty was rejected by the jury. McCree then filed a federal habeas corpus petition claiming, among other things, that excluding those opposed to the death penalty violated his Sixth Amendment right to be tried by an impartial jury selected from a representative cross-section of the community.

The issue before the Court was whether the Constitution permits excluding prospective jurors from the trial if their opposition to the death penalty is so strong that it would impair performance of their duties as jurors at the sentencing phase of the trial. The state, of course, argued that such exclusions are constitutionally permissible. McCree, on the other hand, argued that in removing the Witherspoon excludables from the guilt-finding jury, the state in effect stacked the deck against him. He submitted as evidence a series of social science studies which concluded that the result of forming juries willing to impose the death sentence – so-called "death-qualified" juries – produced juries that were more prone to convict defendants than other juries.

The Court – through Justice Rehnquist – agreed with the state. Rehnquist dismissed McCree's studies as inconclusive. Even assuming that they were accurate, Rehnquist continued, death-qualified juries violate neither the impartiality nor fair cross-section requirements of the Constitution.

Rehnquist rejected the argument for applying the "fair cross-section" requirement. Rehnquist first recounted the goals of the requirement: guarding against the exercise of arbitrary power and ensuring that common sense judgment of the community will act as a hedge against the over-zealous prosecutor; preserving public confidence in the fairness of the criminal justice system; and implementing the belief that sharing in the administration of justice is a phase of civic responsibility. These goals, the justice then asserted, were neither advanced nor deterred by excluding the Witherspoon excludables. Rehnquist differentiated between racial or sexual discrimination in jury selection and death qualification. Race and sex can't be changed, but the attitudes of a Witherspoon excludable are not immutable. A potential juror may simply affirm that, in spite of his beliefs, he is able to apply the law on the basis of the facts and evidence presented before him. If the prospective juror is unable to apply the sentencing law, once guilt is established, the state has a legitimate interest in removing him from service in capital cases.

With respect to the impartiality requirement, Rehnquist cited the definition of impartiality recently announced in *Wainwright v. Witt,* 469 U.S. (1985), that an impartial jury consists of "jurors who will conscientiously apply the law and find the facts." Under this definition, Rehnquist saw no need to balance views, background and other characteristics in order to create an impartial jury.

A stinging dissent from Justice Marshall, joined by Justices Stevens and Brennan, blasted the majority for ignoring the clear import of the social science data. The studies indicated that "death-qualification" excluded a large segment of jurors – at least 11 to 17% – who could be impartial during the guilt phase of a trial, and tended to disproportionately exclude women and blacks. More importantly, death-qualified jurors were systematically predisposed to favor the prosecution in a number of ways: they were more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more distrustful of defense attorneys, and less concerned about the danger of erroneous convictions. Their pro-prosecution bias was reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. Finally, the very process of death qualification – which focuses attention on the death penalty before the trial has even begun – predisposes the jurors who remain through the trial to believe that the defendant is guilty. The dissenters were bewildered by the majority's willingness to ignore this "overwhelming evidence." "With a glib nonchalance," they noted, "ill-suited to the gravity of the issue and the power of [McCree's] claims, the Court upholds a practice that allows the state a special advantage in those prosecutions where the charges are the most serious and the possible punishment the most severe." □

Voir Dire Simulation/Middle School

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Voir dire is one of the most important aspects of any trial. Many attorneys feel that jury selection is the single most significant procedure in the entire trial process.

The purpose of voir dire questioning is to obtain a fair and impartial jury. The selection process in which prospective jurors are questioned and challenged for bias can turn out to be a battle of wits and maneuvering more dramatic than the trial itself.

The ultimate objective of voir dire is to ferret out the prejudice and bias that lurks in some areas of the thinking of every juror. "Jury selection" is a misnomer. With a few peremptory challenges allotted, we do not "select" juries. We merely spend our few challenges to eliminate the jurors most likely to be prejudiced.

Also, jury selection is a matter of personal judgment and the use of the wits of the trial lawyer, whose judgment and instincts in the voir dire will be colored of necessity by her or his own experiences and knowledge of human nature, and personal prejudices and biases.

Background Information

"Why should anyone think that 12 persons brought in from the street, selected in various ways for their lack of general ability, should have any special capacity to decide controversies between persons," asked former United States Solicitor General Erwin Griswold. Yet, more often than not, most observers agree that when jurors are left to apply their experiences and common sense to the evidence presented to them, they render as impartial a brand of justice as is humanly possible.

Sometimes in the United States, many potential jurors are called to the jury box before twelve are chosen. In England the judge calls the first twelve potential jurors and simply asks one question: "Can you give a fair hearing to both the crown and the defense?" If they can, they are impaneled as part of the jury.

In this country, the questioning process, called voir dire from the French term which means "to tell the truth," is far more elaborate and involves judges and attorneys. The purpose of the voir dire is to determine disqualifications and ensure an impartial jury which represents a cross section of the community. It is not to afford anyone an in-depth analysis so he or she can choose a jury that fits some particular mold or pattern that the person desires.

Prospective jurors may be challenged for cause if they exhibit a bias for or against one of the parties. For example, jurors may be disqualified if they are related to one of the parties or the attorneys, or if they stand to benefit directly or indirectly by a decision for one side or the other, or if they have formed an opinion in the case.

A certain number of challenges without cause, which are called peremptory challenges, are also allowed each side. In North Carolina, for example, the state and the defendant each have fourteen peremptory challenges in capital offenses and eight in noncapital offenses. In civil cases each side is allowed eight peremptory challenges.

Jury selection in some very complicated cases can take almost as long as the trial itself. In one California murder trial of three defendants, it took five months to question more than 250 potential jurors. The actual trial took seven months.

In North Carolina the first twelve persons called are examined by the prosecutor, or the plaintiff's attorney in a civil case, for both cause and peremptory challenges. If challenges are exercised, the person challenged is replaced in the jury box by another potential juror. When the prosecutor or plaintiff's attorney is satisfied, the same process is repeated by the defendant's attorney. If juror replacements are made at this point, the other side gets to pass or reject the replacement(s). This process continues until each side is satisfied or they have run out of challenges.

North Carolina law states that challenges for cause must focus on competence, prejudice, or fairness. The scope of examination of jurors is subject to the sound discretion of the court.

Some companies now specialize in assisting trial attorneys in applying psychological techniques to determine the type of juror an individual will be. In fact, sometimes "shadow" juries are chosen that reflect similar characteristics to the actual jury. This jury observes the trial and provides feedback to the lawyers trying the case. Critics of these practices feel that it represents an unconstitutional manipulation of the justice system and is a costly process that favors the rich over the poor.

There are numerous social and psychological factors that enter into the selection of a jury. Studies have shown that women are thought to be more sympathetic to the defense, men to the prosecution. The wealthy are thought to be more sympathetic to the prosecution, the poor to the defense. Ethnicity and race are thought to be important, also.

Simulation Objectives

1. Develop skills in deductive reasoning.
2. Develop rationale on psychological factors which might affect the outcome.
3. Organize thoughts in logical sequential order.
4. Analyze and evaluate information.
5. Compare and contrast actual experience with perceived purpose.

Simulation Directions

Student lawyers in playing the voir dire simulation will role play real lawyers. One or more will be assigned to the prosecution and defense. The student lawyers should make a list of all the favorable features sought in the ideal juror on one side of a sheet of paper and all the unfavorable features on the other side. Prioritize these features. An adequate inventory should include ten to fifteen features on each side. After the catalog is complete, study it carefully. This exercise will help the student to think clearly about what kind of a jury is desired.

There are thirty potential jurors from which to choose a six-or twelve-person jury. You may impanel a jury of six or twelve, depending on the number of students involved.

Give students a number and a character role to play. Call the first six or twelve names and have the students sit in a mock jury box area.

They will be questioned first by the prosecutor and then by defense counsel. There are thirty possible questions that may be asked. Some might be asked by attorneys on either side, but some are designed to ferret out prejudices of particular interest to the prosecution or defense counsel.

Each side has four peremptory challenges and unlimited challenges for cause. You may either accept, reject for peremptory challenge, or challenge for cause. The judge, who may be a real judge, a lawyer, or another community resource person, will rule on cause challenges.

After a jury has been impaneled, ask students to analyze the process based on the objective of securing an impartial jury of one's peers. Ask students if they feel that such factors as career, sex, political beliefs, socio-economic status, nationality, and race influenced who was selected for the case.

Ask real attorneys to debrief the exercise by comparing the selections they would have made with those the student attorneys actually made.

Case Description

Jennifer, age 20, was returning to State Techical College after spending the weekend with friends at the beach. She was not concentrating on her driving, and swerved off the right side of the road near the corner of Dale and Elm streets in Raleigh. She ran over Mr. Driscoll's lawn, damaging shrubs and knocking down his fence.

An officer happened to drive by. After observing the situation he had reason to believe Jennifer had been drinking. There were two empty beer cans in the car. Jennifer's subsequent breathalyzer reading was .08. The damage to Mr. Driscoll's property is estimated at $850.

The officer charged her with Driving While Impaired (DWI) under the Safe Roads Act of 1983. If convicted, Jennifer could be fined up to $2,000 and be imprisoned from twenty-four hours to two years.

Jennifer is single, white and lives with two friends in an apartment. She has a part-time job as a waitress at Tony's Diner. She has never been in a car accident before, but is known to be a party girl.

She is majoring in drafting and received a partial scholarship from her hometown Chamber of Commerce.

Prospective Jurors

Emily is 34, white, single with a law degree. She is an attorney with the civil liberties union. Her hobby is racing sports cars on weekends.

Gordon is 20, black, single and is a biology major at State Technical College. He has a part-time job as a gas station attendant. He's an excellent tennis player.

John is 28, oriental, married with two small children. He is a research assistant working on a new breathalyzer which will be more accurate.

Deborah is 42, white, married, has two teenagers. She's a housewife and a heavy social drinker. Her husband is an insurance executive.

Helen is 43, white, single with a journalism degree. She is managing editor of the *Local Ledger,* which carried feature articles on the new Safe Roads Act.

Robert is 48, black, divorced and has two teenage daughters who live with their mother. He owns a chain of successful liquor stores and is expanding his business.

Thomas is 27, white, single with a high school degree. He plays lead guitar in a local band. He was recently involved in a drug raid by local authorities.

Lisa is 18, white, single and hopes to attend college after she graduates from high school this year. She drives a school bus and wants to major in business.

Grace is 62, white, married with a high school degree. She is a housewife and has four married children and ten grandchildren. Her husband is a retired plumber.

Cynthia is 41, white, divorced after a bitter court battle. She has a graduate degree in history and teaches history at the university. Her former husband is a truck dealer.

Perry is 48, black, married. He owns his own tobacco farm. His two teenage daughters help with planting and plowing on weekends and after school.

Alice is 43, black, separated. She has no children. She has a masters degree in business, is a local company executive and active in the Chamber of Commerce.

Louise is 52, black, married. She is active in her church. Her two sons are married. Her husband is a plant supervisor and active in the trade union.

James is 19, black, single and has a part-time job at an auto body shop to help pay for his junior college education. He's an outstanding soccer player and believes in keeping physically fit.

MARK is 65, white, married. He's president of the county country club, enjoys visiting his four grandchildren and retires next year as bank vice-president.

DAVID is 51, white, married. His son was arrested on DWI charges and convicted last month. He's sales manager for a home owners' insurance company.

SANDRA is 21, white, single and is attending the criminal justice academy officer training program. She's also studying psychology and wants to counsel youth.

CHRISTINE is 25, white, separated. She lives with two other girls and works as a waitress at the Blue Bunny Cafe. She didn't finish high school.

JOSEPH is 56, white, a widower with a degree in administration. He is a high school principal. His two married daughters live near by.

WAYNE is 49, black, married with three teenage daughters. He is administrator of the county hospital and is a respected member of the community.

NORMAN is 34, white, married with a high school degree. He's a country singer who spends a lot of time on the road. He has one child.

CLAUDIA is 56, black, married with a high school degree. She's a housewife with three married children. Her husband is a landscape gardener.

ELMER is 54, black, married with a 11th grade education. He is a construction worker and a strong union supporter. He has two grown children.

BETTY is 46, white, married with two teenagers. She has a college degree and teaches high school social studies. Her husband is a computer programmer.

MICHAEL is 73, white, a widower with a high school degree. He's a retired electrician. His wife was killed in an auto accident involving teenage drinking.

JOY is 60, white, married and has three married children and seven grandchildren. She's a volunteer at the hospital twice a week. Her husband is a car salesman.

LUCILLE is 48, black, married. She teaches at the day care center, and is active in community youth programs. Her husband is a Baptist minister.

CHARLOTTE is 40, white, divorced. She has a medical degree and practices psychiatry at the county hospital clinic. She has no children and is devoted to her work.

VIVIAN is 48, black, married and has two children in college. She is secretary at the arts council. Her husband is an engineer with a contracting company.

CLYDE is 73, retired. His wife is in a nursing home. He was in a car accident years ago but it didn't go to court. His son is a successful trial attorney.

Questions

1. Are you opposed to the new Safe Roads Act?
2. Do you have an opinion concerning the alleged facts in the case?
3. Do you believe "impairment" is a judgment call by the arresting officer?
4. Do you believe alcohol affects different people in different ways?
5. Do you have a driver's license?
6. Have you ever been involved in an accident with a drunk driver?
7. Do you have relatives or close friends who have been involved in an accident with a drunk driver?
8. Do you belong to a religious or fraternal organization that condemns the sale or use of alcoholic beverages?
9. Do you have relatives or friends who have been found guilty of DWI?
10. Are you related to anyone involved with this case?
11. Do you believe the burden of proof is the same for the prosecution in this case as in the case of rape or murder?
12. Have media accounts of this case caused you to form an opinion about the defendant?
13. Have you ever served on a jury before in a criminal case?
14. Do you believe our system of justice is fair?
15. Would your previous jury experience prevent you from being an impartial juror in this case?
16. Is there any reason you can't sit as an impartial juror in this case?
17. Do you understand that the prosecution must show "beyond a reasonable doubt" that the defendant is guilty as charged?
18. Do you occasionally drink some sort of alcoholic beverage?
19. Have you ever driven a car while consuming an alcoholic beverage?
20. Have you ever had an unpleasant experience with someone who was drinking alcoholic beverages?
21. Do you believe a person can safely drive a car after drinking two beers?
22. Have you ever been convicted of a traffic violation?
23. Do you ever inadvertently look away from the road while driving?
24. Will it be hard to recognize that opening and closing arguments by attorneys are not evidence in the case?
25. Will it be hard for you to disregard evidence the judge rules as inadmissible after you've heard it in open court?
26. Do you have any connection with or interest in an insurance company?
27. Do you believe that the defendant is innocent until proven guilty in this court?
28. Do you feel you would believe a police officer more than the defendant in this case?
29. Do you believe that youth, in general, drink too much and shouldn't be driving cars?
30. Do you believe that the officer is positive the defendant was drunk or he wouldn't have arrested her?

Additional Activities

After students have selected a jury, they can write a mock trial to go with the fact sheet provided in the voir dire simulation. Students can expand on the descriptions of the jurors selected as they pick students to play those roles. They can try their case incorporating some jury-related issues, such as contrasting the results of a twelve-person jury with a six-person jury. They can compare the results of a unanimous verdict with a less than unanimous verdict in the same case.

Invite trial lawyers to visit your class and discuss these issues. They can serve as judges in your mock trials.

Julie Van Camp is President of the Board of Trustees for the Center for Research and Development in Law-Related Education in Winston-Salem, North Carolina. This activity was adapted from the packet "Teaching about Our Jury System," produced by the North Carolina Administrative Office of the Courts in cooperation with Phi Alpha Delta Law Fraternity.

CURRICULUM UPDATE

Diane Farwick and Faye E. Terrell-Perkins

New Materials for the New School Year

Elementary LRE

- *Guide to Resources for Citizenship/Law Education in Elementary Grades* (1984). Paperback 159 pp.; currently being reprinted, phone 203/739-6971 for pricing information. Grades K-6 with teacher resource. (Connecticut Law-Related Education Program, State Department of Education, Box 2219, Hartford, CT 06145).

This booklet includes ideas, materials and teaching strategies that have been gathered from many LRE sources and elementary teachers in the Connecticut schools.

This helpful book contains a listing of resource persons and an annotated bibliography of state and national materials. Short-term infusion lessons and curriculum unit (4-8 weeks) descriptions, as well as comprehensive models are listed for teachers. –DF

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A commission of representatives of the Kansas Supreme Court, Kansas Bar Association, Kansas State Department of Education and Kansas State Board of Education developed a variety of lessons conceived on the premise that nearly every phase of basic curriculum provides a context for law-related education. These very complete booklets can be used to present or reinforce particular concepts and/or skills in the existing curriculum. Each lesson lists objectives, materials required and activities that are used to infuse LRE into existing courses of study in language arts, reading, social studies, mathematics, science, art, music and physical education.

Lessons emphasize rules and laws, and rights and responsibilities in the school and community that can promote good citizenship. Students become aware of ways they are affected by law on any single day and what their roles are in a law-regulated society. They have the opportunity to participate in making up rules and experiencing situations of responsibility.

Separate packets of student handouts used in the lessons are available for copying. –DF

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Safeguard is a Boulder County law-related education project that provides a myriad of lessons for students in third through sixth grade. Concepts, processes, skills and values of the American legal system are an integral part of each guide.

The guides give helpful introductory materials and topical lessons. Charts based on LRE concepts indicate topics, related activities and resources. Individual lessons list topics, major objective, materials needed and procedures to follow.

The curricula incorporates lessons taken from or adapted for use from many of the best tried and true LRE programs. The third/fourth grade booklets focus on rules, authority, rights, responsibilities and privacy. The fifth grade adds a decision-making component. The sixth grade program expands on these topics and covers additional areas. –DF

- *The Liberty Key: The Story of New Hampshire's Constitution* (1986), Lorenca Consuelo Rosal. Hardback, 476 pp; Student text $12.95; Teacher's guide with student text $18.95. Grades 4-8/student text plus teacher's guide. (Equity Publishing Company, RR 1, Box 3, Oxford, NH 03777).

New Hampshire, the second state to adopt a state constitution, has prepared a text which integrates lessons on its constitution with that of the U.S. Constitution. A very helpful teacher's guide gives the purpose and rationale of the program as well as a variety of teaching strategies and techniques.

The textual materials are for use in elementary schools. Fifteen core lessons (which may be extended) offer interesting readings and auxiliary activities. An appendix contains a copy of the New Hampshire Constitution and a summary of the United States Constitution.

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Juries

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This book is a real find for teachers who want to recommend an interesting book for student reading, yet one that delves into substantive law. This easy to read and easy to understand book is one that students at a number of reading levels will find fascinating.

Ms. Gustafson not only summarizes ten of the most controversial criminal cases and verdicts in history, she poses excellent queries on the peculiarities of each case. For example, is it possible that Lizzie Borden was found not guilty simply because she was a woman?

Who can resist taking a front seat at the trials of Sam Sheppard, John Wayne Gacy or John Hinckley, Jr.? The reader becomes a member of the jury in each case, analyzing the facts, attorneys' arguments and the social climate of the times. The author demystifies legal terminology, court procedures and role of evidence by presenting them in simple language and by using thoughtful, illustrative examples. –DF

- *Juries on Trial—Faces of American Justice* (1984), Paula Di Peina. Hardback,

CURRICULUM UPDATE

Diane Farwick and Faye E. Terrell-Perkins

New Materials for the New School Year

Elementary LRE

- *Guide to Resources for Citizenship/Law Education in Elementary Grades* (1984). Paperback 159 pp.; currently being reprinted, phone 203/739-6971 for pricing information. Grades K-6 with teacher resource. (Connecticut Law-Related Education Program, State Department of Education, Box 2219, Hartford, CT 06145).

This booklet includes ideas, materials and teaching strategies that have been gathered from many LRE sources and elementary teachers in the Connecticut schools.

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- *Juries on Trial – Faces of American Justice* (1984), Paula Di Peina. Hardback, and responsibilities in this high interest-low reading level book. The question/answer format and helpful index make it possible for youth to explore topics of interest and concern.

Relationships with parents, school authorities and the police are considered, as well as practical legal information about the juvenile court system, school rights and responsibilities and youth consumerism.

The author cautions the reader that many state and local laws may affect the answers provided in the book. It is always important to use additional resources.
–DF

- *Criminal Justice in America* (1983), 212 pp.; $7.95. Text for use with high school or junior college students. (Constitutional Rights Foundation, 601 South Kingsley Drive, Los Angeles, CA 90005).

Criminal Justice in America is a high-interest text that offers an in-depth analysis of criminal law and criminal procedure as integral parts of criminal justice. The text contains six chapters, which are sequentially arranged to aid students in understanding the logical order of events. They are: (1) Crime, (2) Police, (3) The Criminal Case, (4) Corrections, (5) Juvenile Justice, and (6) Solutions. Numerous case studies and police reports are used throughout the text. Photographs add to the realism, and make this seem to be more than just another law-related education textbook.

Varied student activities are employed including mock trials, role plays, interviews, and surveys. Chapter one, for example, features a simulated Senate hearing on victim assistance. Outside resource people and field experiences are a built-in component of the program. An answer section at the end of the book provides students with immediate feedback.

Criminal Justice in America would serve as an excellent supplement for high school law-related courses.
F E T-P

- *Street Law: A Course in Practical Law* (1986), Lee Arbetman, Edward McMahon and Edward O'Brien. Hardback or Paperback, 444 pp. For pricing information call: 1-800-532-9378. Text for high school students. (West Publishing Company, C.O.P. Department, P. O. Box 64526, St. Paul, MN 55164-1002).

Street Law: A Course in Practical Law, Third Edition, incorporates the best features of earlier editions along with some changes. This edition also reflects changes that have taken place in laws on the national level. However, the reader is reminded to be aware that laws do vary from state to state. *Street Law*, while an excellent source of information, is not designed to replace the kind of professional assistance provided by an attorney, but rather to aid in making students more law-literate.

Street Law's approach is to offer the student practical information and problem-solving opportunities on a wide range of legal issues. The text contains a potpourri of useful information divided into six chapters: (1) Introduction to Law and the Legal System, (2) Criminal and Juvenile Justice, (3) Consumer Law, (4) Family Law, (5) Housing Law, and (6) Individual Rights and Liberties. The book's authors point out that involvement of resource people and outside community experiences (such as court tours) is necessary to achieve optimal use of the text.

Supplemental resource information is provided at the end of the text. Appendix A, containing the complete text of the Constitution, is a feature new to this edition. Appendix B offers a useful reference guide of "Organizations to Know," including program descriptions, phone numbers, and addresses, while Appendix C is a handy glossary of legal terms. *Street Law* is a curriculum that encourages diverse teaching strategies, including case studies, role plays, mock trials, opinion polls, and small group activities. Vocabulary development is emphasized throughout the text, as unfamiliar words appear in boldface print.

Street Law offers a wealth of information and practical advice to help students untangle some of the legal problems they encounter daily.
–F E T-P

Supplementing LRE

- *Witch Trials—Crisis in Fear* (1977), Mary Simpson Furlong and Louise Weinberg Jacobsen. Simulation kit/teacher manual, $29.95. Teacher/high school student resource supplement. (Greenhaven Press, Inc. 577 Shoreview Park Road, St. Paul, MN 55126).

If you haven't tried it before, you'll be pleasantly surprised by this very interesting simulation of the Salem witch trials of 1692. It can be used in a variety of high school social studies classes and can be adapted for use by average and above-average eighth graders.

Objectives are to help students:

- Analyze how an ominous threat to a community can result in mass fear, irrational behavior and hysteria.
- Evaluate the effectiveness of legal remedies available in the 1600s.
- Analyze the concepts of law and justice and be able to make distinctions.
- Understand that "witch hunting" does not take one form nor is it unique to one period in history.

The teacher's manual includes very helpful historial background information, clear instructions, trial procedures of colonial America, the nature of evidence admitted to court, a sufficient supply of role play materials and a bibliography.
–DF

- *Law-in-Social Studies Series* (1984-86). A set of five books with teacher's edition for use with junior high and high school students. Starter set/$15.00; class set $135.00 (30 student editions with instructor's manual); additional student editions are $4.50 each. (Constitutional Rights Foundation, 601 South Kingsley Drive, Los Angeles, CA 90005).

The Law-in-Social Studies (LISS) series consists of infusion materials designed to address a broad range of law-related education knowledge, while supplementing established classroom courses of study. Each of the program's five texts correlate information about the law with traditional social studies curriculum.

The first booklet in the series, *Of Codes and Crowns: The Development of Law*, has been designated for integration with World History classes. Students learn about the origin and need for laws via the study of pre-history, ancient Near East, Greece, medieval England and renaissance Italy. Other titles in the series and areas of integration include: II. *To Promote The General Welfare: The Purpose of Law* (U.S. History), III. *A World of Difference: Comparative Legal Systems* (World Geography/International Studies), IV. *American Album: Legal Roles and Processes* (U.S. History), and V. *The Crime Question: Rights and Responsibilities of Citizens* (American Government/Civics). The illustrated student text emphasizes vocabulary development and sharpens critical thinking skills. The accompanying teacher's edition suggests varied classroom strategies (i.e., discussions, simulations, brainstorming, role playing and other activities designed to stimulate active student participation).

The Law-in-Social Studies series offers a good law-related education program that (1) helps to defeat the constraints of time so often faced by many educators, (2) can easily be integrated into the existing educational program, and (3) is flexible enough so that educators can tailor it to fit their own needs. LISS should serve as a good vehicle to provide the kinds of skills and attitudes needed to foster an educated citizenry.
–F E T-P

1771

- *Reasoning with Democratic Values: Ethical Problems in United States History* (1985) Alan L. Lockwood and David E. Harris. Vol. I: $8.95, Vol. II: $11.95, Teacher's Manual: $11.95. Supplemental material for high school. (Teacher's College Press, Columbia University, P. O. Box 1540, Hagerstown, MD 21741).

These supplemental materials are designed for use in secondary U.S. history classes. The curriculum's overall aim is to foster a sense of social responsibility by analyzing conflicts over democratic values in their historial context.

Volume I (1607-1876) contains 21 episodes, each of which brings you into contact with an ethical problem from history. It begins with the Colonial era and ends with Reconstruction. Volume II covers 28 episodes, beginning with the era of Expansion and Reform (from 1877) and ending with the contemporary era. Both volumes are arranged in chronological order. Following each episode is a four-section sequence of activities designed to help students develop into more complex and systematic thinkers. The first section, "Historical Understanding," guides students to place the event in proper historial perspective. "Reviewing the Facts," section two, sharpens the ability to observe and recall important details. Sections three, "Analyzing Ethical Issues," and four, "Expressing Your Reasoning," require students to employ higher level critical thinking skills.

Reasoning with Democratic Values has well defined goals enumerated in the teacher's edition. The democratic values emphasized throughout the text are defined here also. They are: authority, equality, liberty, life, loyalty, promise keeping, property, and truth. The topic and value chart provided gives a quick overview of the key values reinforced by each episode. This curriculum would certainly enrich the study of U.S. history, as well as guide students to become responsible decision makers. —F E T-P

Diane Farwick, a teacher at Lincoln Park High School in Chicago, has taught law-related education classes for the past fourteen years. Formerly director of a Title IV-C Project—Law and the Administration of Justice—she is a member of the Teacher Advisory Board of the Constitutional Rights Foundation/Chicago Project (CRF) and recently received the CRF's annual Citizenship Award.

Faye E. Terrell-Perkins, an elementary educator currently teaching at Hope Community Academy in Chicago, is also an education specialist with Information Plus, a private consultant firm. She co-wrote the Career Education Community Resource Data Bank Curriculum Guide, *and recently received a grant from the Chicago public school system to develop and implement an LRE program.*

Supreme Court

(continued from page 35)

chief justice circulates two lists of cases that establish the basis for conference discussions. On the first—the Discuss List—are those few deemed worthy of conference time. Attached is a second much longer list—the Dead List—containing those considered too unworthy, and which are simply denied. Any justice may request a case be put on the conference agenda. But the justices no longer individually review every case. They all delegate initial screening of cases to law clerks, who write memos recommending action on each case. Brennan, Marshall and Stevens have each of their clerks screen cases. The others—including, notably, all the conservatives justices—share memos prepared by a pool of their 23 clerks. With the benefit of those memos and the first crack at putting a limited number of cases on the Discuss List, Rehnquist could not be better positioned to get consideration of the cases he wants reviewed.

What happens at conference determines which cases are granted. As chief justice, Rehnquist has the opportunity to lead discussions. But no less crucial is how the justices vote to grant cases review. Cases are granted on the vote of only four justices, even though in all other respects majority rules. This so-called informal "rule of four" was adopted over 60 years ago, in order to cutback on the workload while allowing review of cases that some justices feel especially strongly about.

The rule of four takes on greater significance with ideological realignments within the Court. In the early years of the Burger Court, for example, less than 20 percent of the cases granted were on the basis of only four votes, but in recent years as many as 30 percent were selected that way. When there were only four votes for taking a case, they often came from those who pool their clerks and share the same ideological orientation. Rehnquist, along with Scalia, O'Connor and White, are now in a position to dictate the Court's agenda.

The advantages of the chief justiceship and the rule of four give greater weight to Rehnquist's personal skills in getting the Court to adopt his agenda. In the short run he may not always have the final say on the outcome of those cases granted review. But controlling the Court's agenda is the first step in altering the direction of the Court and redefining its role in American society.

Some recent trends will be prepetuated. In addition to being unsympathetic to claims of the poor and more favorably disposed to the government, the Rehnquist Court will likely take more cases involving federalism and separation of powers. In the area of criminal justice, prominent issues will revolve around fair trial procedures, double jeopardy, and others bearing on the factual guilt of the accused—such as whether a "harmless error" occurred in prosecution and conviction. The Fourth and Fifth Amendments will increasingly be viewed in a dim light. When cases raising these claims are taken, especially those involving the "exclusionary rule" and *Miranda,* the aim will be to carve out exceptions or to cutback on Warren Court rulings expanding those guarantees. Other civil rights cases will tend to fall in the areas of commercial speech, freedom of speech and the electorial process, governmental liability, abortion and reverse discrimination.

What Justice Scalia Adds to the Chemistry of the Court

For the Court to shift direction in the short run at least, it may well fall to Scalia to move Justices Lewis Powell and Byron White—the centrists—and forge a majority with Rehnquist and O'Connor. And, given the way the Court works, Scalia's personal style and skills will prove as important as his judicial philosophy.

Next to Rehnquist and fellow-appellate court Judge Robert Bork, no other legal scholar has been as close to Reagan "inner circle" or had as much influence in shaping the judicial and political agenda of the administration. With his energy and comparative youth (at age 50), Scalia will be able to continue this agenda long after Reagan has left office.

Ideology and judicial philosophy, however, is not all that the administration is banking on. By naming the first Italian-Catholic, the religious right wing may be appeased and an appeal made to ethnic voters, in the same way that O'Connor was a gesture to women. But, even more importantly, Scalia enjoys a reputation as a "team-player" and consensus-builder. And, his personal skills are what the Reagan administration is really betting on.

"Nino," as he is known to his family and friends, is highly sociable, hardworking and profoundly conservative. He brings a good deal of color to the Court with his quick wit, a street-wise sense about him, and the kind of engaging and incisive mind that one finds among New York intellectuals.

More than charm and conviviality, however, will be needed to win others over. Whether Scalia proves successful depends on his willingness to compromise and accommodate others. Rehnquist has often preferred to stand alone. Scalia is more open-minded to the extent that he enjoys kibbitzing and debating. But, once he has decided, he also tends to give no quarter and to stubbornly hold fast—earning him yet another nickname, "Ninopath," on the Court of Appeals for the District of Columbia Circuit. Whether Scalia is willing to temper his language—and often condescending, and even sarcastic, tone—as well as bend on some of his hard line views remains to be seen.

These personal skills and Scalia's own judicial and political philosophy should not be underestimated. It is tempting to say, for instance, that Burger is simply being replaced by Scalia—one conservative vote for another—and so not much will change. In the 35 cases that the justices divided 5 to 4 last term, if Scalia instead of Burger has been on the Court, the outcome of only one case might have changed. That was *Goldman v. Weinberger* (1986) in which Burger sided with Rehnquist in holding that an Orthodox Jewish captain in the Air Force could be forbidden from wearing a yarmulke while on duty; whereas, on the appellate court Scalia indicated that he leaned the other way. In this and perhaps some other areas, Scalia may well disappoint the administration.

But, over the years Scalia has developed a home-spun and trenchant philosophy of aggressive judicial conservativism that distinguishes him from Burger and endears him to the Reagan administration: a severely limited view of freedom of expression; antagonism toward affirmative action and the "liberal jurisprudence" that undergirds past judicial activism; a corresponding deference to broad presidential power and control; and a respect for tradition, a rigid separation of powers, and limited governmental intervention into the economy based on free-market capitalism.

His views on the First Amendment, for example, are so extreme that conservative columnist William Safire calls him "the worst enemy of free speech in America today." He not only favors making it easier to win libel awards, but cutting back protection for picketing, demonstrations and other forms of "symbolic speech." Constitutional law in the last 50 years simply got it all wrong, according to Scalia. Nor is the Freedom of Information Act spared his ascerbic pen. Too much data is released to the public and, in his view, the Act "is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored."

Even Rehnquist appears more moderate on some issues of civil rights. "Without question," he observed last term in *Meritor Savings Bank v. Vinson* (1986), "when a supervisor sexually harrasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." By contrast, in that same case in the lower court, Scalia sided with Judge Robert Bork in rejecting the claim and stressing "the awkwardness of classifying sexual advances as 'discrimination.' "

Although Scalia will prove a powerful ally of Rehnquist and O'Connor, he is not as taken by the latter's brand of judicial self-restraint based on "strict constructionism" and pays less deference to states' rights. He is certainly more aggressive and ideologically committed than Burger.

Much will thus depend on whether Scalia changes and how he adapts to his new challenges and responsibilities on the highest court in the land. If he helps forge a majority with the centrists during conferences, the new chief justice will be a position to assign opinions for the Court. Otherwise, the balance could tip at conference, giving senior Associate Justice Brennan the power to assign opinions. Even if Rehnquist has the opportunity to assign opinions, Justice Powell, White or O'Connor—all respected, more experienced and more moderate conservatives that Scalia—could still take the lead in opinion writing. Certainly, when writing opinions, Rehnquist and Scalia will have to moderate some expressions of their views in order to hang on to a majority.

To capture and hold the centrists on the Court, Rehnquist and Scalia also match wit and wisdom with that of the old consensus-builder, Justice Brennan. Scalia's personal style and approach is more closely matched to that of Brennan than any of the others, and this is what makes him so formidable in the long-run. Though one is a conservative Italian Catholic and the other a liberal Irish Catholic, both are sons of immigrants, students of the art of politics who work well and wear well with others, and know how to shape opinions and forge coalitions. Still, Scalia's ideological fervor and energy may well initially limit his ability to compromise, whereas Brennan has proven over the years that he knows how to both sway and yield so as consolidate power and maintain his principles. The challenge for Scalia will be to master Brennan's style and approach without sacrificing his own agenda.

Conclusion

Whether and how far the Rehnquist Court carries forth the "Reagan revolution" in dismantling the house built by the Warren Court, and in charting a truely new course in constitutional law, ultimately turns on the competition for influence among the justices and whether President Reagan has the opportunity to pack the Court with still more "true believers."

The Court is likely, in the near term at least, to continue down the paths trod by the Burger Court—no sharp change in direction, though perhaps a slightly more conservative tone in its rulings. In the long run, however, the Rehnquist Court could set its agenda so as to radically redefine its institutional role, and this is precisely what the Reagan administration hopes and why it was so meticulous in moving Rehnquist to the center chair and elevating Scalia.

How might the Rehnquist Court redefine its institutional role in the long-run as envisioned by those in the Reagan administration? In the last 50 years, the Court has stood as guardian of individual rights. The Warren Court, in particular, forged an egalitarian revolution that opened up the democratic process, strengthened the rights of the accused, and sought to safeguard the rights of minorities. By contrast, the Rehnquist Court would no longer look to the vindication of civil liberties and civil rights, but instead to the arbitration of political disputes between the president and Congress and between federal and state governments. The Court's agenda would expand governmental power over claims of individual rights, enlarge presidential power at the expense of Congress, and at the same time elevate states' rights above that of federal legislation.

Whether and how much and how fast the Supreme Court changes remains to be seen. But the Court will certainly change under Chief Justice Rehnquist and the direction of that change will not be toward more self-restraint. The trend toward judicial activism will continue, but may well push—as the Reagan administration anticipates—in a counter-revolutionary and reactionary direction—toward reclaiming constitutional values that were overshadowed by the revolutions forged by the Warren Court and perserved during the Burger Court years. ☐

Constitution

(continued from page 5)

Congress' demand to see them. President Jackson opposed the renewed charter for the Second Bank of the United States, which Congress wanted to pass. President Lincoln had vehement struggles with Congress over the proper reintegration of the southern states into the union at the end of the Civil War. And Congress refused to ratify the Treaty of Versailles negotiated by President Wilson at the end of World War I. The war powers issue is simply another example of the ongoing power struggle between these two branches.

Legislative Veto

Another major separation of powers problem has emerged from Congress' practice of passing legislation which delegates certain powers to the executive branch. Congress has enacted over 200 statutes containing legislative veto provisions. For many years, it has had a practice of delegating much of its powers in the areas of finance and departmental organization to the president. For example, the president prepares reorganization plans and presents them to Congress. These go into effect automatically unless vetoed by either branch of Congress within a specified time period. Sometimes, these delegations have been viewed as invalid because they give away powers which the Constitution has committed to Congress to exercise.

Delegation occurs in different ways. Sometimes, Congress delegates powers but retains the authority to retract by a concurrent resolution of Congress not requiring presidential approval. Other times, Congress may retain the authority to review and approve, by one or both houses of Congress, proposed administrative actions of the executive branch.

In *I.N.S. v. Chadha,* 103 S.Ct. 2764 (1983), the Supreme Court invalidated a legislative veto provision contained in immigration regulations. The regulation at issue provided that the attorney general (part of the executive branch) could decide to suspend an order of deportation issued by an immigration judge. Congress, however, retained the right to veto the attorney general's decision by a two-thirds vote of either the House or the Senate within a certain time after the decision. In the particular case at issue, the attorney general had decided to suspend an order of deportation which had been issued to Chadha, a Kenyan student with a British passport who had remained in the United States after his visa had expired. Kenya refused to take him back and British officials told him it would be at least a year before he would be entitled to immigrate to England. These circumstances persuaded the attorney general that Chadha should be permitted to stay. At the last minute, and without debate, the House of Representatives decided to pass a resolution which rescinded the order suspending deportation, in effect ordering Chadha deported.

The Supreme Court upheld Chadha's claim that the legislative veto was unconstitutional. It found that the House's veto was "legislative action" within the meaning of Article I, Section 7 of the Constitution because it "had the purpose and effect of altering the legal rights, duties and relations of persons. . .outside the legislative branch." As such, Congress was required to approve its decision in both houses and then present it to Congress. Since it had not done so, the veto was invalid.

Many questions have arisen since the *Chadha* decision about the status of the legislative veto contained in hundreds of other statutes. Are they all invalid, or was Congress' veto in *Chadha,* which the Court determined was "legislative action," different from those it has enacted elsewhere? What is the continued viability, if any, of this device Congress has used to cut down on its work load while retaining some control over executive actions? Hopefully, future decisions will clarify more precisely the separation of powers concerns which led the Court to invalidate the legislative veto contained in *Chadha.*

Other Separation Problems

While the war powers and legislative veto situations illustrate recent separation of powers problems, many other types of separation issues have arisen since the Constitution was written. One involves the allegation that the courts have unduly interfered with the Congress by invalidating certain types of legislation on constitutional grounds. This was the cause of Franklin Roosevelt's court-packing plan. The Supreme Court struck down New Deal economic legislation by narrowly interpreting the commerce and tax clauses of the Constitution. And by broadly interpreting the due process clause of the Fourteenth Amendment, the Court similarly prohibited state regulation of the economy. The Court's decisions were criticized as an improper interference with the political branches.

Another alleged violation of the separation principle involves efforts by the president to fill the federal courts with judges who have the same political views as his own. The criticism that this violates separation of powers by interfering with the autonomy and independence of the judiciary has been made not only with respect to Roosevelt's court-packing plan but also recently in opposition to President Reagan's nomination of politically conservative federal judges.

Similarly, efforts by Congress to control the judiciary by removing its jurisdiction to hear certain types of cases have been viewed as an unconstitutional interference with the proper separation of powers. Although there is little precedent on this issue, in *United States v. Klein,* 80 U.S. 128, 147-48 (1871) the Supreme Court invalidated congressional legislation attempting to limit the Court's jurisdiction, since it was found to abridge the president's Article II power to grant reprieves and pardons for federal offenses.

Another separation issue involves the claim of executive privilege. This issue arose in the Watergate prosecutions when President Nixon refused to turn over tapes to congressional investigation committees on the grounds that separation of powers means that each branch has the absolute right to defend itself against incursions by the other branches. In *U.S. v. Nixon,* 418 U.S. 683 (1974), the Supreme Court held that neither the separation of powers nor the need for confidentiality sustained an exclusive executive privilege of immunity from the judicial process.

Not all instances of perceived violations of the separation principle involve actions of one branch which interfere with the authority of another. Sometimes the issue involves one branch's failure to act itself, allowing another branch to exercise powers not validly its own or which the Constitution has committed to the inactive branch. One example of this is the legislative veto. Another is the Supreme Court's use of the political question doctrine to avoid making difficult decisions involving the other branches.

Conclusion

The system of separation of powers embodied in the Constitution is not a perfect instrument, as the foregoing discussion demonstrates. It has not always indicated the limits of each branch's authority, either within its own sphere or in relation to those of the other two branches. Nor has it always been able to clearly resolve conflicts which have arisen between the three branches. Nevertheless, the framework of independence and checks and balances established almost 200 years ago has served to maintain our individual freedoms from tyranny by the government. ☐

Judicial Review

(continued from page 21)

mediately moved to impeach the judges. Failing this, they chose not to reappoint four of the justices the following year.

Trevett shows that courts created controversy whenever they invalidated state legislative acts. The courts might intellectually accept judicial review, but they risked the hostility of the state legislature if they actually struck down a state law.

In 1788, James Monroe would observe that judicial review was an issue "calculated to create heats and animosities." But if the issue of judicial review created such turmoil a year earlier when the framers met in Philadelphia to draft the Constitution, it is not readily apparent in the constitution or the records of the convention.

Constitutional Convention

Somehow, the framers omitted in 1787 to explicitly grant the courts the power of judicial review. In summarizing the evidence of the convention, John Agresto in *The Supreme Court and Constitutional Democracy* observes:

> The doctrine of judicial review was mentioned, repeated, and widely accepted in the Constitutional Convention; its propriety was assumed by many of the most influential leaders; it naturally and easily completed the circle of checks and balances, for it gave the judicial branch a check on the other departments of power; and, finally, no serious discussion of the role of the judicial review, no examination of its limits, and no investigation of the relationship of judicial power to the legitimate activity of the other branches ever took place in the convention.

Some historians claim that the framers' silence on judicial review indicates their acceptance of the concept. How could the framers, the argument proceeds, have remained silent unless they *assumed* the courts would exercise the power. Other commentators counter that if the framers intended the courts to have such an important power, they most certainly would have included it in the document. Edward Corwin, in 1937, surveyed the debate and concluded "(the) people who say the framers intended [judicial review] are talking nonsense, and the people who say they did not intend it are talking nonsense."

The records of the convention are not entirely silent on the idea of judicial review. The most relevant comments occurred in debates involving the Council of Revision, a proposal which would have linked the courts and the executive in reviewing legislative actions. The proposal was rejected, and in those discussions are statements which support the idea of judicial review. Luther Martin explained, "as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative." At a separate point in the convention, James Madison noted that "[a] law violating a treaty ratified by pre-existing law, might be respected by the judges as law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the judges as null and void." It appears from the convention that the Council of Revision was not passed at least in part because some of the delegates assumed that the courts would already exercise judicial review.

It remains puzzling, however, that the framers were not more explicit in the document. Perhaps the framers underestimated the future importance of judicial review.

Federalist #78

Following the Constitutional Convention, the ratification struggle began in state conventions. Included in the debates in these conventions are statements by members such as Marshall in Virginia, Wilson in Pennsylvania, and Ellsworth in Connecticut, endorsing the idea of judicial review.

Clearer support for judicial review can be found in the Federalist Papers, which were written as an argument in favor of the Constitution. In Federalist #78, Alexander Hamilton provides a classic argument for the doctrine of judicial review. Starting with the existence of a written constitution, Hamilton explains the "why" component of judicial review:

> By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing . . . (t)here is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.

Hamilton then proceeds to explain the "who" component – that it should be the courts who interpret the Constitution. Hamilton argues "(t)he interpretation of the law is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."

Finally, Hamilton responds to critics who claim that the power of judicial review would make the courts superior to the other branches of government. "(N)or does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."

Early Republic

Following the ratification of the Constitution, the doctrine of judicial review quietly operated both in state and federal courts. The establishment in the Constitution of checks and balances between equal branches of the government, the emergence of party politics, and the adoption of the Bill of Rights served to enhance the judiciary's power and to provide a general acceptance of judicial review. Between the adoption of the Constitution and *Marbury v. Madison* (1803), state courts asserted the power of judicial review in most of the states in which the issue arose. Looking a little further along, by 1820 courts in every state except Connecticut had expressly endorsed judicial review.

At the federal level, it was in federal circuit courts, not the Supreme Court, that the power of judicial review was asserted in these first decades. The Judiciary Act of 1789 had specifically given federal courts power to review state legislation. In four cases, federal circuit courts declared state laws unconstitutional during this period. While the Supreme Court would not declare a federal statute unconstitutional until *Marbury*, the Court demonstrated the power of judicial review seven years earlier in *Hylton v. United States*, 3 Dallas 171 (1796). In *Hylton*, the Supreme Court upheld a congressional tax on carriages. However, in doing so it effectively exercised its review power.

In *Marbury*, the preceding foundations of a generation culminated in the Supreme Court expressly adopting the principles of judicial review. The historical debate on the foundations and legitimacy of judicial review remains today. Regardless of the outcome of the scholarly debate, what also remains is its legacy: the actual practice and power of judicial review. Ultimately, the story of judicial review in many ways is the story of the American experience in developing a constitutional government. The legacy of that story remains unwritten. □

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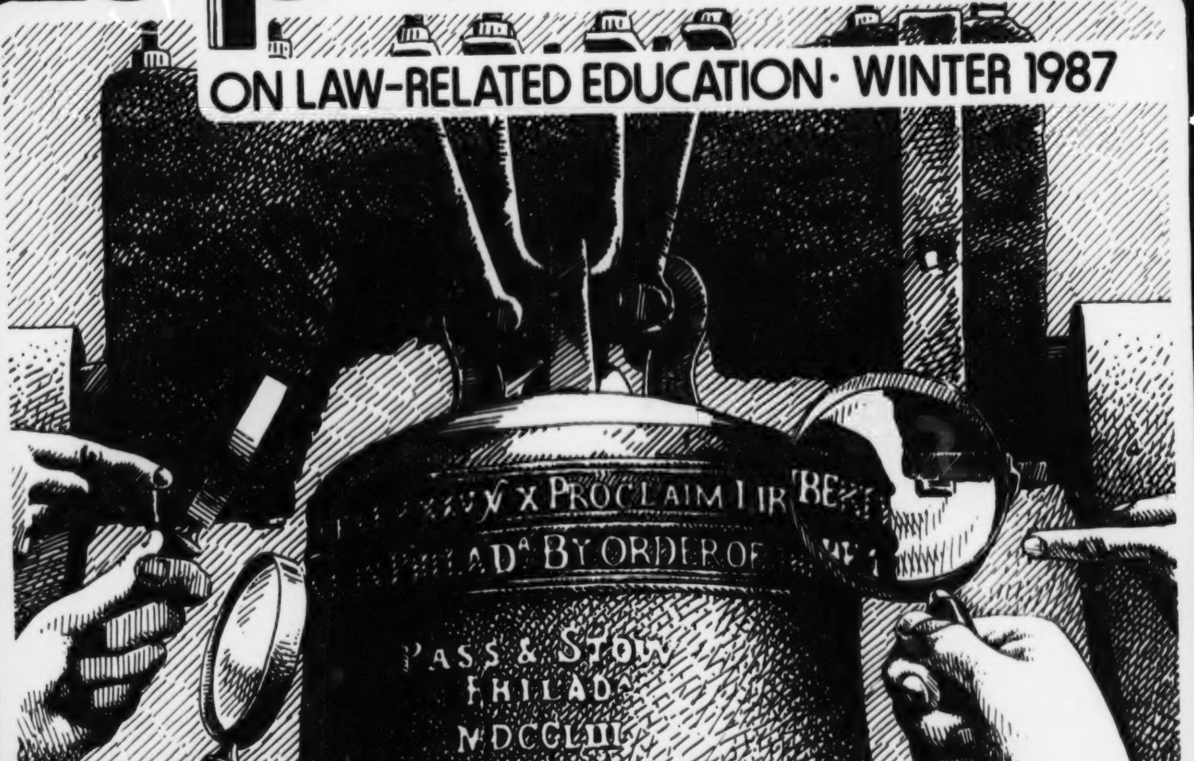
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contents

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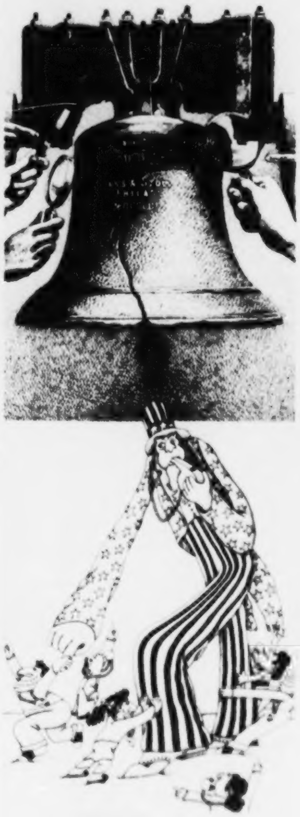

2 **The Five Great Ideas of Our Constitution**

ELEMENTARY SCHOOL

K-6 STRATEGIES

6 The Concept of Power
9 The Concept of Liberty
11 Why the Constitution Works
12 The Bill of Rights
15 Legislators, Police Officers, and Judges
16 The Presidency

MIDDLE SCHOOL

18 **Liberty: Beyond the Bill of Rights**

6-9 STRATEGIES

23 Freedom of Speech and Expression
25 Introducing the First Amendment
26 Authority

SECONDARY SCHOOL

28 **Power and Constitutionalism in America**

SECONDARY SCHOOL STRATEGIES

32 It's My Life
33 The Religious Guarantees
35 Balancing Power and Liberty in the School
38 The Exercise of Power: Developing Reasonable School Policies
42 Separation of Powers
43 **The Supreme Court Speaks**

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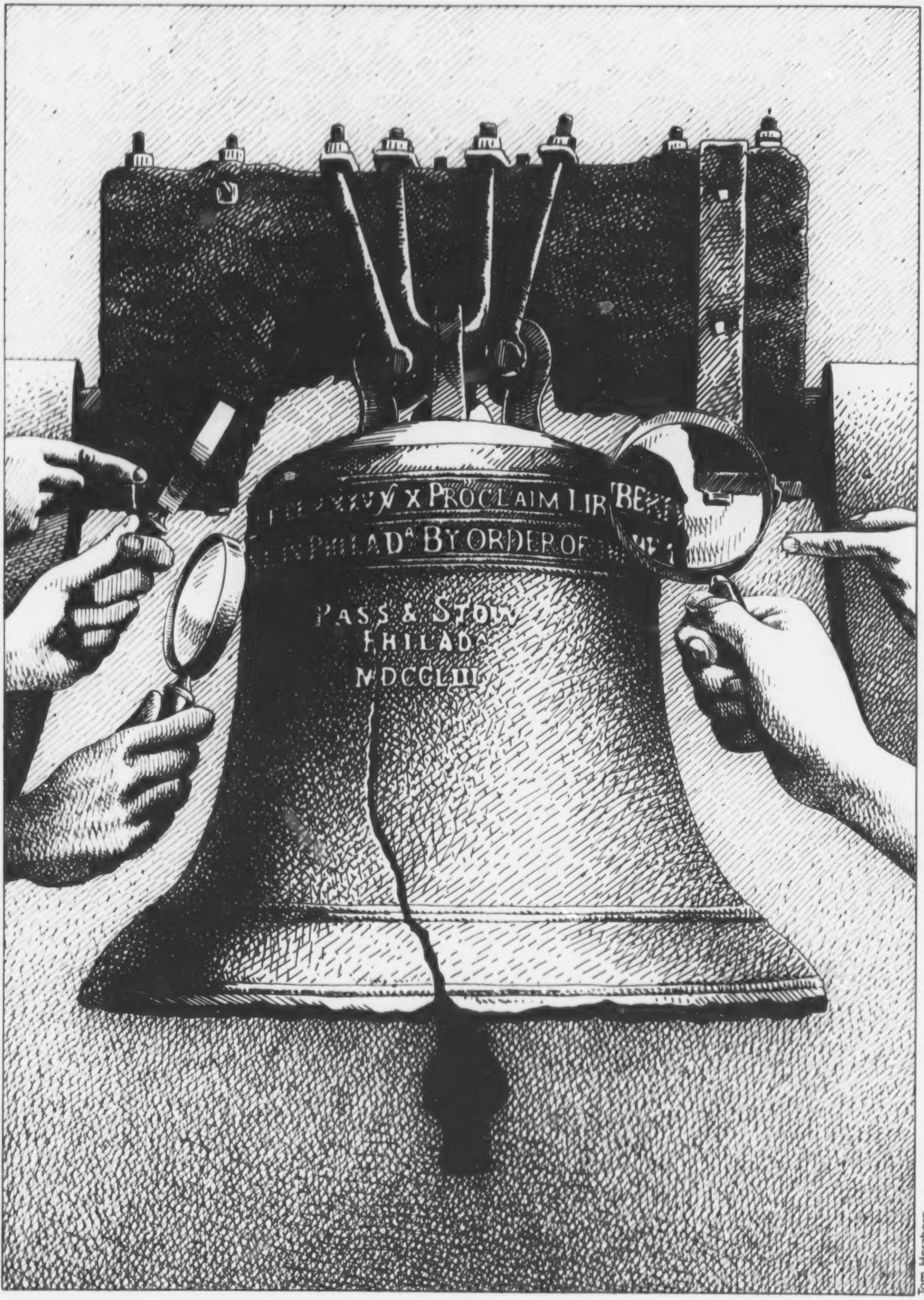
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Tom Herzberg

BICENTENNIAL THEMES

Isidore Starr

The Five Great Ideas of Our Constitution

During the past three decades, the American people have experienced a series of crises which has seared the conscience, troubled the mind, and shocked the emotions. The Vietnam conflict posed the issue of just and unjust wars, while at the same time casting doubt on the legitimacy of executive and legislative conduct under the Constitution. Charges and countercharges have clouded the traditional concept of loyalty to country. Watergate exposed lawlessness on the highest levels of government, while little Watergates marred the landscape of local and state politics. Tests to determine possible drug use or truthfulness have been implemented in many areas of society over the cries that such tests are invasions of individual privacy. At times, it has seemed that the law enforcers have forgotten that they are not above the law.

Brown v. Board of Education wrested the idea of equality out of the books and thrust the American dilemma onto the local, state, and national scenes. The persistence of poverty has divided the nation on the policy of public assistance, while posing the Biblical cry: "Am I my brother's keeper?" Violence, terrorism, and crime have led to such widespread fears that the social contract, which has cemented America into a constitutional democracy, may now be disintegrating. There has developed, understandably, a crisis of confidence in American institutions.

The problems confronting American society seem like tidal waves about to engulf the nation. Present discontents, however, are not unique. They have ancient roots; the issues of the past mesh with the issues of the present. To focus on one to the exclusion of the other is either to drown in the murky waters of antiquarianism or to wallow in the shallow streams of presentism.

To avoid this predicament and, at the same time, to restore confidence in American institutions, five major ideas in the constellation of democratic thought could be selected for inquiry. Liberty, justice, equality, and property are, to use Paul Freund's phrase, "moral standards wrapped in legal commands." Each of these four ideas operates within the context of the idea of power.

These are words found in the Declaration of Independence, the United States Constitution and the constitutions of the states, the United States Bill of Rights and the state bills of rights, and other important documents. In addition, words such as "liberty" and "justice" are mouthed, more often than understood and appreciated, when the Pledge of Allegiance is proclaimed. The time has come for us to move out of ritual and into a realistic assessment of the meaning of these ideas as they affect our lives.

Responsible citizenship entails, in large part, grappling with these ideas, publicly and privately, in the search for answers to persistent dilemnas: liberty versus license, justice versus injustice, equality versus inequality, property rights versus human rights, and the uses of power versus the abuses of power.

The quest for the citizen of virtue, prudence, and wisdom – the righteous individual – and the good society finds its way into the world of law with its concern for the inalienable rights of life, liberty, and the pursuit of happiness, for due process of law, equal justice under law, and peaceful resolution of value conflicts.

The late Edmund Cahn, one of our most distinguished legal philosophers of the century, in commenting on this relationship between law and the humanities, observed:

> In every mature society, there is considerable overlap between legal questions and moral questions. A man who violates the law against murder likewise violates a moral precept against killing; fraud and theft are condemned not only by courts but also by consciences; in short, law and morals frequently do their work with the very same item of human behavior. In a democratic society like ours where the law reflects many of the people's basic values, this overlap becomes all the more extensive and important. Under the official appearance of deciding the legal issues presented to them, American judges are often required to assess moral interests and resolve problems of right and wrong. It is realistic to look at the law not merely as a technical institution performing various political and economic functions but also as a rich repository of moral knowledge which is continually reworked, revised, and refined.

With the 200th anniversary of the Constitution looming on the horizon, now is a good time for educators to ponder where we are and where we've come as a nation operating under the same Constitution. How has the Constitution been changed over the years? What are the rights and responsibilities of teachers and students? How can we effectively teach about the Constitution in our schools?

This article will focus on the ideas of power and liberty, while the second article in this series, to be published in Spring of 1987, will focus on the ideas of justice, equality, and property.

The Idea of Power

In discussing the Greek myths relating to the birth of power, Adolf Berle intimated that there is a love-hate relationship between power on the one hand, and liberty, justice, equality, and property on the other. At times, power nurtures and sustains them; at others, it opposes and restricts them. The idea of power takes its most conspicuous forms in the police power of the state and in the power of the people. The former is used by government to protect the lives, health, morals, welfare, and safety of the people; the latter evidences itself in elections, protests, passive resistance, and revolution.

The drafters of the Constitution were keenly aware of the nature and scope of power. In drafting the Constitution, they were determined to separate power among the three branches of government and to divide power between the states and the newly created national government. By creating a system of checks and balances, they hoped to limit the power of each branch of government without immobilizing the system. By dividing power, they planned to keep the national government within its place. Both separation of power and individual power have been subject to change over the years. With the revolution wrought by the New Deal, the states often became petitioners and supplicants, while government by executive hegemony weakened the separation of power. Is the "new federalism" proclaimed by President Reagan creating a new balance of power? Is it an attempt to roll back the role of the federal government to the vision of the Framers? Do the demands of the 20th century make a strong central government inevitable?

The power of judicial review tends to be troublesome periodically. More than a century ago, de Tocqueville declared, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." This acute observation has been reflected in the unique role of the Supreme Court in American history. Its landmark rulings are, more often than not, moral-ethical pronouncements on value conflicts, rather than traditional legal decisions. As such, it is inevitable that its critics condemn judicial review as government by judiciary, while its defenders proclaim it as the conscience of the nation. With the appointment by President Reagan of Justice William Rehnquist as Chief Justice many questions have been asked as to whether the Court will continue its activist course in rectifying social injustices, become more of a passive player in the system, or attempt to restrict the general sweep of the Warren Court rulings. If the days of the activist Court are over, how will this affect the country? What will be the impact of a more deferential Court on civil liberties? On police practices? On state's rights? The fate of the Court as an institution of closure will be dependent, in part, on the quality of the debate with reference to its role as clarifier of the ideas of liberty, justice, equality, property, and power.

Ultimate power rests in the hands of the people. That the presidential elections of 1800, 1828, and 1932 have been referred to as revolutions attests to the power of the ballot. Voting, however, is more than marching hypnotically to the polls to the tune of an ideological drummer. It involves the ability to distinguish demagogue from democrat, capricious promises from realistic platforms, and short-run perspectives from long-term probabilities. Responsible decision-making in the leader-follow relationship is obviously a major mission of education for responsible citizenship.

The most ominous form of people power is the resort to the streets. The American Revolution, a war against the British oppression, and the Civil Rights Revolution of the 1950s and 1960s, a fight against racism, represent case studies of refusal to obey the law with intent to change the law. The refusal of many communities to obey the Supreme Court prayer ruling can also be seen in this light. It is preferable to examine such events fully and frankly to discover causes and consequences rather than to hide behind the bland treatments of textbooks.

The power issues confronting the American citizenry demand decisions relating to the form and substance of government. Are we still a federal republic, or have we taken, wittingly or not, the road to a unitary government? Is the road back to the federal system still viable and relevant for the solution of problems which transcend state lines? Since poverty and welfare, energy, ecology, employment and education now have nationwide dimensions, would it be desirable to experiment with a regional rearrangement of states as an alternative to the federal system?

The crisis resulting from the Great Depression of the 1930s elevated the presidency to a position of awesome power. Leadership in war and in domestic emergencies strengthened the hand of the Chief Executive and diminished the power base of the Congress. Present day revelations relating to governmental disinformation, presidential wars and irresponsible budgetary antics by public officials bring to mind Justice Brandeis' memorable warning:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law unto itself it invites anarchy.

Government abuse of power can no longer be overlooked in the history books and in the social studies classrooms. To face this issue fairly is to encourage confidence in a system which is periodically self-correcting.

The Idea of Liberty

The idea of liberty wends its way through American history and literature. It is proclaimed on the Liberty Bell, it is designated an inalienable right in the Declaration of Independence, it is pronounced a blessing in the Preamble to the Constitution, it is protected in the Fifth and Fourteenth Amendments against arbitrary acts by government, and it is recited daily as part of the Pledge of Allegiance. But nowhere is it defined.

Abraham Lincoln put it very well when he said, in an address in Baltimore, April 18, 1864:

> The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty, but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name, liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names – liberty and tyranny.

To avoid for the moment detours into definitions, I would like to suggest that for

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Isidore Starr is a lawyer-educator who is widely recognized as the father of law-related education. Previous versions of this article appeared in Daring to Dream: Law and the Humanities for Elementary Schools *(Chicago: American Bar Association, 1980) and* Education for Responsible Citizenship: The Report of the National Task Force on Citizenship Education, *cosponsored by The Danforth Foundation and the Institute for Development of Educational Activities, Inc., the educational affiliate of the Charles F. Kettering Foundation. It was published by McGraw-Hill Book Company in 1977.*

1 ; 1905

teaching purposes the First Amendment in the Bill of Rights is an excellent operating definition of liberty. It encompasses six significant principles: separation of church and state, religious freedom, freedom of speech, freedom of the press, the right to assemble peaceably, and the right to petition the government for redress of grievances. Each of these six dimensions offers opportunities to dig into the past and to discover how these principles came to be incorporated in this unique document.

Why is the First Amendment first? Was it intent, accident, or style? Perhaps it heads the constellation known as the Bill of Rights because it is basic to all the other rights. Those who drafted the first ten amendments knew firsthand the importance of freedom of thought, belief, inquiry, expression, petition, and assembly as a means of guaranteeing the other rights against the capricious or malicious whims of rulers. The First Amendment remains the best operating definition of liberty, and, as such, it contributes to the delineation of the dignity and integrity of the individual. It is understandably the first of what Madison referred to as the "Great Rights."

Why do the first ten words of the First Amendment prohibit an establishment of religion? Why did the drafters begin with this commandment rather than with one relating to speech or press?

Separation of church and state has been sought in America by both religious and political leaders. Roger Williams advocated "the wall of separation between the garden of the church and the wilderness of the world," and Thomas Jefferson supported "a wall of separation between church and state." One sought the wall to protect the church, the other the state. The result was the construction of a constitutional barrier to an establishment of religion and the beginning of a series of controversies which would carry over into the future. The use of public funds for busing parochial school students, released time, required sectarian prayers and Bible reading, religious practices in public schools, various forms of parochial aid, tax exemptions for church properties, and the teaching of the theory of evolution continue to find their way into the public forum and judicial tribunals.

In wrestling with these issues, the Supreme Court has formulated a number of guidelines: child benefit, neutrality, complete separation, nonpreference, and accommodation. The Court's rulings have been attacked as atheistic, communistic, and secularistic. In a disturbing number of instances, school authorities have deliberately disobeyed the Court's decisions on the Bible and school prayer. One can only speculate on the relationship between the educator as a lawbreaker and the educator as a model of responsible citizenship.

(continued on page 48)

How the Powerless Learn About Power

This article looks at power in the context of the U.S. Constitution. Power can also be approached in many other ways. Here are some ideas that would work with younger children.

Children are confronted with the idea of power in the concrete form of brute force and in the abstract form of legitimate authority. Like adults, children live in an atmosphere or nexus of power relationships. We could say that children are over-powered—physically, morally and legally—by adults, in general, and by parents, teachers, preachers, and police, in particular. Commands and mandates come from the family unit, the teacher's instructions, the police officer's badge, and the pulpit. Sanctions take the form of censure, censorship, a ruler, a paddle, or ultimately a confrontation with the juvenile justice system.

Children live in a world of symbols and signs. The flag, the police officer's badge, the Capitol, the White House, the police station, and the courthouse signify aspects of the law. The signs are omnipresent: Stop, Yield, Keep Off the Grass, Do Not Touch, No Trespassing, Private Property, and No Loitering, among many others. Each carries a legal message buttressed by a threat of punishment.

How does one explain to children the difference between the exercise of legitimate authority by parent, teacher, government official, and police officer, and the unlawful power of the bully, the gangster, and the mob? Why is some authority legitimate and other authority illegitimate?

William Golding's *Lord of the Flies* is on the surface an adventure story of English choirboys plane-wrecked on a tropical island. The thin veneer of civilization is quickly cut away to disclose the classic conflict of good and evil, brute force and reasonable authority, the nature of law and the meaning of justice.

Creative teachers have translated this story into an exercise entitled "The Island Game," in which, in imagination, students are placed for a period of time on an island without adult supervision. A leisurely paced exercise under the guidance of a nonintrusive instructor can lead to illuminating developments. Some classes will probably arrive at Aristotle's typology of governmental power: rule by one, rule by a few, and rule by the many. Given time, the activities may even confirm Aristotle's prediction of cyclical patterns. They may also reflect Max Weber's categories of authority: charismatic, traditional, and legal. Actually, it is too much to ask the elementary school child to mirror the sophistication of distinguished thinkers. It would not be unusual, however, to find these students reflecting some of the traditional questions relating to power and authority within this context.

Robinson Crusoe and other well-known (as well as teacher-created) stories and exercises can serve as lead-ins to the quest for an understanding of the origins of power and power relationships. Dilemma situations such as "Classroom without Rules" or "The Lawless Town" (a town without law-enforcement agencies) have been used successfully to pose the classic questions: Is might right? Why are rules and laws necessary? What is the source of power which legitimates laws and rules?

History and literature are depositories of case studies of legal authority, charismatic leadership, and unlawful domination. Hammurabi and his Code of Laws, Moses and his Ten Commandments, medieval kings and popes, the chiefs of Indian tribes, the leaders of primitive societies, and modern and contemporary dictators and democratic leaders offer opportunities for intellectual adventures in exploring the idea of power.

Lurking behind this inquiry is the imnipresent issue of the nature of human nature. Do we really need rules and laws to regulate our conduct? Or are we so inherently evil that our conduct must be regulated by informal rules and formal legislation? This historic and philosophical debate between Rousseau et al. and Hobbes et al. can be translated for classroom study. It holds great promise for the law and numanities approach to understanding the role of law in American society and in the world community. A discussion of this humanities-centered issue of the law may even touch the hearts and minds of young students in ways in which traditional materials regularly fail to do.

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Power

The Concept of Power/Grades k-6

Carol Roach

Susan Wise

Almost any legal concept can be taught to young children if one has a certain amount of imagination and a basic understanding of how they think and relate to others in their daily lives. However, in considering the most pervading concepts – those of power, justice, liberty, property, diversity, responsibility and privacy – *power* might at first seem the most difficult to present. Perhaps that is because, to a young child, it seems most in contradiction with the other concepts. To a youngster, justice – or fairness – is most important. How can justice be accomplished if one person is more powerful than another? Power implies control over others; therefore how can the "others" enjoy freedom, diversity, or the right to privacy? (These same questions are often asked by adults.)

And yet, of all the concepts named above, power is the one first and most often experienced by children. Power comes to them in the form of authority, and the younger they are, the more often they encounter authority. What is important in presenting this concept to youngsters is not just to see to it that they understand what power means, but to help them understand its place along with the other concepts; with power comes responsibility, and a need for justice, respect for property, privacy, diversity – and the liberty of others.

The following strategies were developed for teachers and can be taught over several days, but a lawyer can adapt them to a shorter time frame (i.e., one class period) by focusing on fewer facets of the suggested material.

These strategies can be used with students in any elementary school grade level (k-6) by simply adjusting the degree of thoroughness expected at each level. For example, with kindergarten or first grade students, ask only the simplest of the recommended questions; with fifth or sixth grade students, ask more complicated hypothetical questions to encourage higher level thinking. In some instances, specific recommendations are given for adjusting to the appropriate grade level.

Strategies

One of the simplest strategies for presenting this concept to children is to talk about "Who's in Charge," and just what that "privilege" entails. The number of class periods needed will vary, depending on the ages and maturity of the students.

1. Start by asking the students to name the various *places* where they might be on a typical school and/or

1737

weekend day. List these places on the chalkboard or a piece of chart paper. All ages of students, but the youngest in particular, will find this interesting in itself. One child will find comfort in knowing that she is not the only one who goes to a babysitter after school. Another will feel proud to announce that he goes to McDonald's for breakfast with dad most mornings. Still others will be anxious to report to mom and dad that "everyone else" in my class goes to the movie on weekends. The concept of *diversity* can be incidentally presented in this lesson. We almost always start out and end up at our homes, yet what we do and where we go in between varies according to our circumstances. We all have and do things alike, yet we are special because of the things we have and do differently. (For very young children – kindergarten or first grade – this introduction would be enough for one day. Older children could be guided through the next step.)

2. Once the list has been completed, discussed, and compared, ask students to name *rules* that apply to each of the places on the list. What are some of the rules in your home? (Diversity once again.) What are the rules at school? Are there rules at McDonald's? The babysitter's? The movie theater, the grocery store, church? Then ask, "Who's in charge in this particular place? Who sees to it that the rules are followed?" For some of the places named, the answers will vary. For example, at home – it may depend on the particular child and the time of day. Perhaps for a while it is a babysitter or an older sibling; eventually and ultimately it is the parent(s). In a store, it may first be the clerk, followed by a manager and/or the store owner. But even the youngest children will have ready answers; they have been taught to recognize those in authority at an early age. (This same strategy can be taken even farther with middle and upper elementary students. Who's in charge of our community, our state, our nation?)
3. Continue the lesson by asking students what they like or dislike about "people in charge." The concept of justice will surface immediately, because while children do want guidance and rules – authority – in their lives, they also want fairness. They want courtesy – a respect for themselves and others as individuals, for their freedoms, their privacy, and their properties. Guide the discussion to include the responsibilities of the person in charge, and the difficulties that person may face in trying to provide those courtesies and at the same time enforce the rules. What makes those tasks easy; what makes them a challenge? What are *our* responsibilities in each situation? Follow the discussion with role-playing situations (a to f are recommended for primary grade students; g to j are more suitable for intermediate grade students). Sample situations follow; give instructions to each participant privately:
   a) One child plays the teacher. Three children play students who get out lots of supplies (or toys) and forget to put them away.
   b) One child plays the role of department store clerk. Two children need help finding the sizes on some articles of clothing for sale.
   c) One child plays the manager of a movie theater. Have four or six children sit in rows of two chairs each. Put the tallest children in the front seats (or have them sit on books to appear taller) and perhaps even put a big hat on one. Seat the shortest child behind the one with the big hat. Or, have some of the children be noisy, while others are trying to "listen to the movie."
   d) Have one child play a police officer. Have several children be moving vehicles, and several others be children trying to cross the street. This has lots of possibilities: one child could try to cross in the wrong place; one vehicle could go too fast or neglect to stop; all participants could demonstrate proper procedures, etc.
   e) One child plays the role of a parent. Two others play siblings who want to play with the same toy.
   f) Two children play the roles of preschoolers who are playing ball in the front yard. Another child plays the role of babysitter. The preschoolers repeatedly throw the ball into the street.
   g) One child plays the teacher leading the class down a hallway. Others play students in the line; one child leaves the line and runs ahead and outside.
   h) One child plays a librarian. Another plays a child returning a damaged book. (Follow-up: how would this be different if the child were two years old, or ten years old?)
   i) One child plays a lifeguard at a swimming pool. Several others play swimmers, and one repeatedly tries to "dunk" another. After the lifeguard tells the child to stop, the child should continue anyway.
   j) One child plays a clerk in a grocery store. Three children play "customers;" while two distract the clerk, the third puts something into a pocket and tries to leave without paying.

   After each role-playing situation, discuss the *responsibilities* of the person in charge, and of the other people represented in the situation. Were the people in charge courteous? What about the others – did they respond in a courteous manner?
4. With older children, you can also discuss how the people in charge get their authority, or power. Is it due to circumstance? (parent/child) Are these people appointed or elected? What happens if they do not fulfill their responsibilities, or they misuse their positions of authority (power)?
5. Make a "Who's in Charge?" chart or bulletin board for classroom helpers. Be sure that numerous duties include interaction of students. For example:
   a) a helper who distributes paper and other supplies to the rest of the class
   b) someone to call the children to line up and/or to supervise the line in the hallways
   c) someone to distribute the playground equipment
   d) someone who (at a cue from the teacher) tells the class when it's time to put away particular subject material and what to get out next.
6. The concept of power can also be discussed with children in terms of "bullies." Almost every child has either actually experienced or imagined/feared the experience of being bullied by an older and/or bigger child. Children can be encouraged to express their feelings and to again discuss rights and

1738

responsibilities. Does being bigger give one the right to bully someone smaller? What responsibilities come with size and age? Does larger necessarily mean more powerful? (There is an excellent film for young children about a boy who fears a bully and is guided to speak up rather than keep quiet in fear. It also teaches children how to say "no" and "tell" when faced with sexual abuse. ["What Tadoo" produced by the J. Gary Mitchell Film Company.])

The Use of Children's Literature

There are also lots of children's stories that can be used to help illustrate the concept of power or authority. Some suggestions for primary grade students follow; examples of questions to use with the story are included with the first suggestion.

The 500 Hats of Bartholomew Cubbins by Dr. Suess. The Vanguard Press, 1938. Synopsis: Bartholomew tries to remove his hat to show respect for the king, but every time he takes it off, another hat appears. He is seized and taken to the castle where everyone in a position of authority tries to make him obey. He is sentenced to be executed, but even the executioner fails because Bartholomew can't remove his hat. The 500th hat is finally the last one, and it so appeals to the king, that Bartholomew is favored instead of persecuted.

1. What responsibility did Bartholomew have to his family? (To take the cranberries to market and bring home money.)
2. Who was in charge of the Kingdom of Didd? (King Derwin)
3. What responsibilities did Bartholomew have to the king? Why? (To remove his hat; to show respect)
4. At the castle, who were some of the other people in charge and what areas were they in charge of? (Sir Alaric, the king's records; Sir Snipps, making hats; the Wise Men, knowledge; the Grand Duke of Wilfred, whatever he wanted to be in charge of; Yeoman the Bowman, archery; Magicians, magic; the Executioner, executions. The king was in charge of everyone in all areas.)
5. Which of those people handled things fairly; who did not? Why do you think that? (Opinions)

Follow-up: cut wide strips of construction paper and staple them to make headbands as hats. Have students make up specific situations that would occur throughout the day when they should remove their "hats." What will happen if they forget? Who will be in charge? Do the activity numerous times, changing the rules and/or the roles played.

Miss Nelson Is Missing by Harry Allard and James Marshall. Houghton Mifflin Co., 1977. Synopsis: Miss Nelson is the nicest teacher in school, but her students won't cooperate. One day a substitute teacher comes instead of Miss Nelson. She looks like a witch and is very mean. The children want Miss Nelson back, but she is missing. When she finally reappears, the children are so glad to have her back, they are wonderful students.

We Never Get to Do Anything by Martha Alexander. The Dial Press, 1970. Synopsis: Adam wants to go swimming; his mother says no. He tries all kinds of tricks to get away and go swimming, but his mother always catches him and "gets her way." At the end, it rains and he builds a pool in his sandbox.

The Youngest Captain by Jay Williams. Parents' Magazine Press, 1972. Synopsis: The Appel family has a boat and Mr. and Mrs. Appel take turns being the captain or the crew. Young Pim must always be a passenger. When he asks when *he* can be the captain, his father always says, "someday." Pim finds a shallow pond, which in his imagination becomes a lake. A table is turned into a boat; a friend becomes his passenger—and off they go. In Pim's wonderful imagination, they sail around the world, and he handles every emergency they encounter. When he tells his father all about it, his father decides that "someday" has arrived and Pim gets to steer the real boat.

Noisy Nancy Norris by Lou Ann Gaeddert. Doubleday & Co., 1965. Synopsis: Nancy is noisy all of the time. She lives in an apartment house and her noises often disturb her neighbors. When faced with the possibility of having to move because of her noise, she learns the right times and places to be noisy, and the pleasure of being a good neighbor.

Martha Ann and the Mother Store by Nathaniel Charnley and Betty Jo Charnley. Harcourt Brace Jovanovich, Inc., 1973. Synopsis: When Martha Ann's mother makes her put away her toys, clean her shoes, and go to bed early at night, Martha Ann decides she wants a new mother. So she and her mother go to the Mother Store for a replacement; she leaves her mother there and takes four others home (one at a time). However, there is something wrong with each of them and Martha Ann decides she wants her own mother back. When they return home, they discuss the rules. Some compromises are made, but most rules are not changed because they were made for a good reason.

When I Have a Daughter or *When I Have a Son* by Charlotte Zolotow. Harper and Row, 1965 and 1967. Synopses: In these two stories, a girl and a boy list all the things they will someday allow their daughter/son to do, and the things they will not restrict them from doing. Obviously the lists reflect the rules the girl and boy must follow, but wish they could change. After reading either story, students could discuss the merits/faults of the rules and/or make their own lists of what they would expect of their children someday.

Move Over, Twerp by Martha Alexander. Dial Press Books, 1981. Synopsis: When a little boy rides the school bus for the first time, he encounters a bully who won't let him sit where he chooses. After several days of worry and frustration, he solves his problem in a creative way.

Note: Other examples of children's stories that can be used in the presentation of law-related lessons are found in each edition of *Life/Liberty/Law*, the Kansas series of teacher guides for law-related education. Contact the author for further information about these guides.

Carol Roach is the director of the law-related education project sponsored by the Kansas Joint Commission on Public Understanding of the Law. Her office is in the Jones Institute for Educational Excellence, Emporia State University, Emporia, Kansas.

Liberty

The Concept of Liberty/Grades k-6

Carol Roach

In teaching young children the concept of *liberty* it is important to go beyond a definition, and teach how this concept relates to others. It is a simple task to teach children what the word means, and to point out liberties that all of them enjoy. But what they need to understand is that we have the right to liberty, or freedom, only so long as our freedoms do not interfere with the freedoms of others. When and how does this happen? When does one person's freedom end, and another's begin? When there is a conflict, what criteria do we use to determine whose rights – or liberties – should be protected, and whose should be restricted? The strategies that follow are designed for teachers but could be easily adapted by a lawyer doing a classroom presentation.

These strategies can be used with students in any elementary school grade level (k-6) by simply adjusting the degree of thoroughness expected at each level. For example, with kindergarten or first grade students, ask only the simplest of the recommended question; with fifth or sixth grade students, ask more complicated hypothetical questions to encourage higher level thinking. In some instances, specific recommendations are given for adjusting to the appropriate grade level.

Strategies

1. Start by discussing the meaning of the word *liberty.* (Older students can look up the word in the dictionary.) Point out that it is synonomous with *freedom*, and also that it means freedoms enjoyed by the citizens of a particular place. Have available an assortment of coins and ask students to find the word liberty on each (or ask students to check coins at home). Make a class collage of symbols having to do with liberty, i.e. the Statue of Liberty, the Liberty Bell, coins, the American eagle (freedom to soar, symbol of our liberty), and the American flag (a symbol of our independence and the liberties we have fought to protect). Include the words to the Pledge of Allegiance. The collage could be made up of the words and pictures that are drawn by students and those that are cut out of magazines. Optional: older students could also do reports on each of the symbols represented.

   Kindergarten and first grade students may know little about the various symbols. The teacher or law professional could choose one symbol each day to present to the class before doing the collage. Or, if an upper grade class is preparing reports, those students could be invited to the class to share their information with the younger students.
2. (These activities are probably too advanced for kindergarten or first grade students, but could be used for second through sixth grades.) Ask students to name liberties or freedoms that we all enjoy. Lead the discussion so that they realize these liberties range from such everyday activities as choosing what to wear or watch on t.v., to the rights of all citizens to worship as they please, to move about freely in our country, etc.

   Tell the children that with freedom comes responsibility, and that as children, many of their choices are made for them by parents, teachers, or others in authority. Ask the children to write a sentence or two, naming something they *wish* they had the freedom to do while at school. (Children too young to write this well could give suggestions orally to be compiled on a class list.)

   Law professionals: Ask two or three students to name something they wish they could do but are not allowed to do (in general – not limited to the classroom). Write their responses on the chalkboard or on a sheet of chart paper to refer to later.

Next, introduce the words *protect* and *restrict.* (Simplified definitions: to protect – to guard, to defend; to keep from harm or from being taken away. To restrict – to limit, to keep to a certain amount.) Tell the students that rules and laws both protect, and restrict, our freedoms. Use as an example the rule, "We must be quiet in the library." Susan is looking at some picture books. She feels really happy. She feels like whistling or singing, but she can't because of the rule. The rule restricts her right to whistle or sing. Meanwhile, John is using the library's encyclopedia to do a report for school. The encyclopedia is hard to understand; he needs to concentrate. The rule protects his right to have a quiet place to read and study. Ask the students if they think this is fair. Why should John's right be protected and Susan's restricted? Be sure the discussion includes the following points:

1. What are the main purposes of a library?
   - (a) To loan books
   - (b) To provide a quiet place for study or concentration
2. Susan is not being denied the right to *ever* whistle or sing. There are other places appropriate for that activity.

Present, or have students role-play, the following rules. For each rule ask: (a) Whom or what rights does the rule restrict? (b) Whom or what rights does the rule protect? (c) Is this fair; why?

1. No running in the halls.
   - (a) Restricts a person's right to run.
   - (b) Protects other people in the building who might be run into or knocked down, or who are trying to work and should not be distracted.
   - (c) The safety of all people is more important than the right of one person to run. The school's purpose is for learning; distractions infringe upon the rights of all who need to learn. There are other places where a person *can* exercise the right to run.
2. Go to bed at a particular time.
   - (a) Restricts the child who wants to stay up later.
   - (b) Protects the same child, who might otherwise be too tired to get up in the morning or to do good school work, or who might even become ill from lack of rest.

1790)

  (c) Staying up later provides pleasure for the child. However, the rule for bedtime protects the child's health and welfare, which are more important.

3. Pets must be kept in one's house, yard, or on a leash.
   (a) Restricts the pet, and the pet's owner who wants the right to let the pet roam.
   (b) Protects people's yards and trash deposits from messes. Protects passers-by from being bitten. Protects the pet from being run over or lost.
   (c) More people are protected than restricted, and the pet itself is protected. People who care about their pets will exercise them, so there is no real justification for letting them run loose.
4. Let the students name another rule and answer the questions accordingly. With upper grade students, analyze laws or ordinances in addition to rules. (No burning of trash—who is restricted, who is protected? Speed limits, paying of taxes, registering before you can vote, etc.)
5. Students might want to choose a particular rule to illustrate. On one half (or side) of the paper they could show restriction; on the other they could show protection.

Younger students will need more guidance in discussion, including hints or suggestions. Older students should be encouraged to think things through more independently. Using examples of liberties named earlier in this lesson, discuss responsibilities that accompany freedoms or liberties. For example, if a student has the liberty of choosing what to wear, what responsibilities are included? (To dress appropriately for the weather and for the occasion; to take care of clothing; not to borrow the clothing of others without permission.) Now refer to the liberties students listed before; those that they *wish* they had at school, but are not now enjoying. Have them analyze the reasons that they have not been allowed the privileges: are there associated *responsibilities* that they have not considered? If they were given the rights they've wished for, would they be infringing on the right(s) of someone else? Depending on the grade level, ask students to justify their requests (orally or in writing). Allow the other students to help judge the validity of each child's request. Does it infringe on the rights, or freedoms, of others? Has the student listed the responsibilities that he/she would have to accept to be granted the privilege? (This will eliminate the irresponsible or impossible requests such as to skip classes.) If the answers are positive, make contracts with each student, granting the privilege requested in return for accepting the accompanying responsibilities. (Note: by the time students have worked through these steps, you will find that granting their requests, for the most part, will not be that difficult or disruptive, and the values gained, in terms of student understanding and self-esteem, will far outweigh slight inconveniences.) The law professional who is just visiting the class cannot, of course, go ahead and grant the privileges. However, he/she can conduct the discussion, pointing out the responsibilities and consideration of the rights of others that accompany privileges or freedoms.

The third grade edition of *Life/Liberty/Law* (the Kansas curriculum guides) includes a play titled, "The Mayor's Mistake." Although it appears in the third grade edition, it could be enjoyed by any elementary grade level. The reading level is appropriate for average or above third grade readers. Older students might enjoy performing the play for younger students. Teachers can use the play for reading, language arts, and/or social studies classes. Law professionals can suggest use of the play and make it available to interested teachers. They can conduct the discussion outlined in the "teacher instructions"—a discussion about the concepts of power, liberty, privacy, etc. that the play demonstrates. They might also volunteer to come to the "performance" or to occasionally visit class to help with the production.

In this play, the mayor of Freedomtown, U.S.A. decides that there are too many laws, and that the people of the community should really have freedom and not be restricted by so many laws. Therefore, the mayor issues a proclamation that there shall be no laws other than those prohibiting violence. As the play continues, a child is denied the right to attend school, police officers quit their jobs because no one will pay taxes, drivers are careless, a supermarket advertises falsely and sells spoiled products, a bully takes a child's bicycle, no one knows the correct time, television stations all try to use the same channel, clothing no longer has size or care labels, and strangers walk into the homes of others. At the end of the play, the citizens demand that the laws be reinstated, recognizing that *freedom* includes more than being able to do as one pleases.

Conclusion

The strategies outlined in this article were taken from the *Life/Liberty/Law* series, and represent only a few ways that the concepts of liberty might be taught to young children. Spontaneous lessons can be prompted by ordinary activities (or conflicts) that take place in the classroom or on the playground. Current events can be discussed in terms of the concept of liberty. Why are these people demonstrating/rioting/fighting? Is it about someone's freedom? Theirs—someone else's? etc. The important thing to remember is to use terminology that children can understand and to try to provide examples that they can relate to, terms and examples that are a part of their everyday experiences. Once children do grasp a basic concept, they love applying it to new situations. Don't be surprised if, after using these kinds of activities, Mary Jane stops complaining that Jason is picking on her and complains instead that he thinks he's in charge, but he's not, and he's violating her freedoms!

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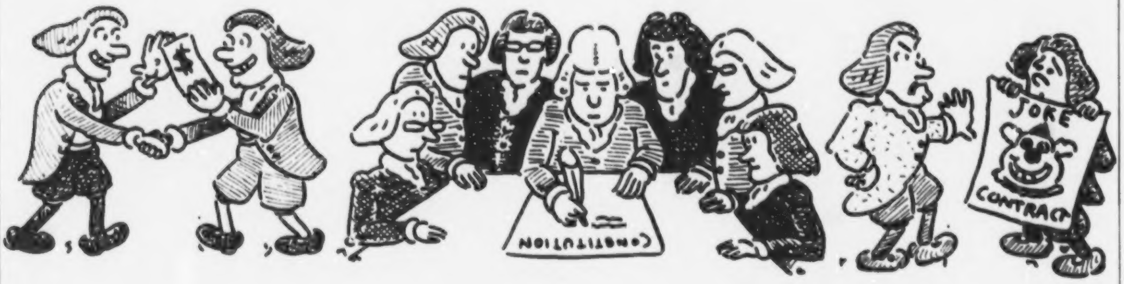
1791

The Constitution as a Contract

Why the Constitution Works/Grade 5

Phyllis J. Clarke



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Objectives

To teach the source of the Constitution's power, develop an interpretation, and report on the general purposes. It will also give a resource person or teacher an opportunity to discuss contracts and introduce the basic outlines of contract law.

Procedure:

1. Have the class brainstorm a definition for the word *contract.* List each definition.
2. What is a contract? (Basically, a contract is a promise made by two or more people in which each agrees to do or not to do something.) Write on the board the definition, "an agreement between parties." Ask the class if they can accept this as a definition. List the seven elements of a contract:
   - A person must make an offer and another person must accept it.
   - All parties must understand each other and the agreement.
   - Something of value must pass between the parties to show they mean business.
   - Everyone must understand what he or she is doing.
   - The agreement must not be against the law.
   - The agreement must be serious and not a joke. The parties must really mean to make an agreement.
   - Important contracts must be in writing. They should be read and studied carefully before signing.
3. Explain that the government enters into a contract with its people.
4. The Constitution is a written contract (set of guidelines and rules) agreed upon by the people of this country and the government.
5. Review the seven elements of a contract. Discuss each of these elements as they might apply to the Constitution. Example: A person must make an offer and another person must accept it. How does this apply as you look at the historic procedures involved in the acceptance of the Constitution?
6. Have the class look at a few of the rights or responsibilities of the government and of individuals. Use the "Constitution and the Law" handout.
7. The Constitution works because we have all ***agreed*** that we will *abide* by these rules. The source of its power is the acceptance and compliance of the people of the United States.

Constitution and the Law Handout

Group #1

Look at the Constitution and the Bill of Rights. Find five things the Constitution gives the government permission to do.

1. ______________________________
2. ______________________________
3. ______________________________
4. ______________________________
5. ______________________________

If the government didn't have these rights, how might your life be different?

Group #2

Look at the Constitution and the Bill of Rights. Find five areas that the Constitution sets limits on the government.

1. ______________________________
2. ______________________________
3. ______________________________
4. ______________________________
5. ______________________________

If the government wasn't limited, how might your life be different?

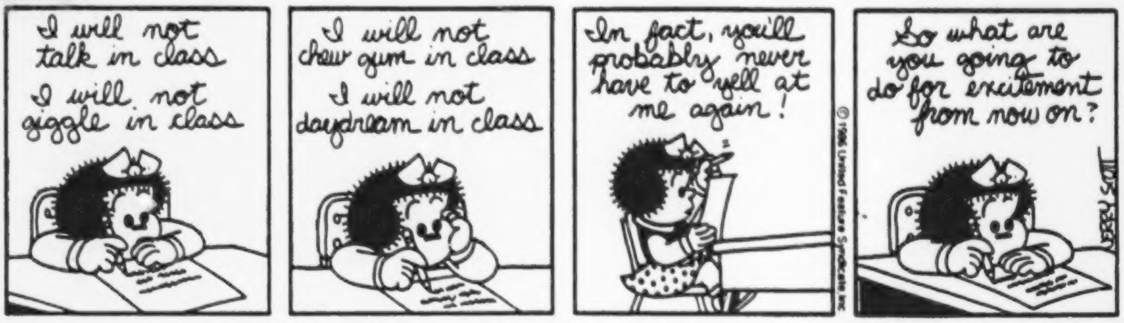
Phyllis J. Clarke is social studies teacher for special assignments in the Boulder (Colorado) Valley Schools. This article is adapted from other sources.

Liberty

The Bill of Rights/Grades 4-6

Connie Yeaton and Karen Braechel

NANCY


I will not talk in class
I will not giggle in class
I will not chew gum in class
I will not daydream in class
In fact, you'll probably never have to yell at me again!
© 1986 United Feature Syndicate, Inc.
So what are you going to do for excitement from now on?
JERRY SCOTT

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Objectives

Students will be able to identify the Bill of Rights as that portion of the Constitution which protects individual freedoms by illustrating at least three of the freedoms.

Background

The Constitution establishes a system of government with delineated duties and obligations. When signatures were added to the final document, the framers of the Constitution knew the instrument was not yet perfect. One area causing difficulty was the lack of a statement of individual rights. Several state constitutions already had these rights listed.

In order for the convention to move smoothly to closure, an agreement was reached to consider a bill of rights after the Constitution was ratified. Accordingly, the first ten amendments were added on December 15, 1791. In a mere 462 words, they defined the rights of people in the United States.

This lesson is designed to introduce the Bill of Rights to young people. They will learn that their rights are protected by our laws, but they also must act responsibly. Several situations involving personal rights will be studied.

Procedure

1. Distribute copies of "Freedom of Speech, Jr."
2. Explain that on the sheet there are six situations. They will have several questions to answer about each example and should think carefully before making any decisions. They can write the answers on the handout.
3. After students have completed the activity independently, have them assemble in groups of four to discuss their opinions. Instruct them to arrive at a group consensus for each item. Then have groups report to the whole class.
4. Conclude the discussion with these questions: Can you come up with a general rule stating when people should be allowed freedom of speech? When should it not be allowed? Should adults have more freedom of speech than children? What if these people in the examples had been adults? Would it make any difference? Why or why not? What would happen if people were not allowed any freedom of speech?
5. Read the newspaper article "Students Can Be Suspended for Vulgar, Offensive Language," the case that recently came before the Supreme Court concerning freedom of speech. Students might find this interesting since it concerns a speech given by a high school boy in support of his friend's candidacy for vice-presidency of the student body. As you read the newspaper article, have the students listen for the Supreme Court's answers to the questions discussed on the activity sheet.
6. Consider the questions: Does this behavior interfere with another individual's rights? Is the action acceptable? If no, should this behavior be regulated by a rule? If a rule is needed, should it be made by individuals or by the government?

   (Answers: Yes, society expects appropriate speech and behavior in public places. No, vulgar and offensive terms should not be used. Yes, a rule should be made for the general welfare of the students and society. The rule should be made by the local school board.)
7. Go through another situation by reading the following: The children of Bershire Elementary School were studying the pioneers. They were asked to write an essay for the school newspaper that included a conversation between two pioneer children. The paper was to be as true to life as possible, but no other directions were given.

   When Jonathan handed in his paper, the teacher was appalled. Jonathan's essay described a heated argument over a game two pioneer children were playing. The conversation included some swear words—language considered inappropriate for a school situation. The teacher not only verbally scolded him, but also insisted that he redo the assignment for publication. Jonathan had worked hard on the essay. He felt that the conversation was realistic and the language used was appropriate for that particular situation. Thus, he refused to do as the teacher asked.
8. Discuss these questions with the class: Was Jonathan justified in including swear words in his essay? Should

1
1793

he be allowed to do this? Was his teacher correct in asking Jonathan to rewrite his essay? If the teacher permits Jonathan to include swear words in this essay, should he and other children be permitted to do the same in other essays? Should the swear words be printed in the school paper? Who should decide this issue: Jonathan? The teacher? The principal? Jonathan's parents? A judge? Explain.

9. Explain that in the discussions about freedom of speech and freedom of the press, you have been talking about the right of people to do or not to do something.

   The writers of the Constitution were concerned with the rights of individual people living in the United States. Several states already had a list of those rights in their state constitutions. Some suggested that such a list be part of the United States Constitution, but others did not feel it was necessary.

   A compromise was once again reached. Remember that a compromise is putting together an idea by using parts of two different ideas. Each side gives up part of its idea to reach an agreement. Those wanting a bill of rights agreed to sign the Constitution if it would be added later. Those who felt it was unnecessary agreed to the addition of a bill of rights, if that would make the others sign the Constitution. The first ten amendments, or additions, to the Constitution list rights of citizens of the United States. We call these ten amendments "The Bill of Rights."

10. Explain that so far the discussion has been on two different rights listed in the Bill of Rights—freedom of speech and freedom of the press. Congress may not make laws limiting these freedoms. However, this does not give individuals the right to say or print false things. Nor does it allow people to endanger others by speech or writing.

    One example of abusing freedom of speech is yelling "FIRE!" in a crowded theater. Such irresponsibility could cause people to panic and result in death.

11. List some of the other rights found in the Bill of Rights.
    - One is freedom of religion, which means we can each worship as we want, at the church we choose. It also means that we have the right not to worship.
    - People are protected from unreasonable searches and seizures. Police are not allowed to enter and search a person's home without a warrant signed by the court. This order states what is expected to be found. This same rule applies to the person's possessions.
    - We are guaranteed the right to a fair trial if we have to go to court. Cruel and unusual punishment may not be used. For instance, hanging a person by the thumbs would not be a correct punishment for speeding.

    With each of the rights listed, there are responsibilities. It is up to each person living in the United States to consider other people. We must not interfere with their rights, if we want to maintain our own freedom.

12. Pass out constuction paper. Instruct students to label this, "Our Freedom: Our Bill of Rights." Fold paper in thirds. Illustrate three individual rights guaranteed by our Constitution. Use a summary of the Constitution for reference.

Handout: Students Can Be Suspended for Vulgar, Offensive Language

WASHINGTON—The Supreme Court today significantly broadened the disciplinary powers of public school administrators, ruling that students may be suspended for using "vulgar and offensive" language.

By a 7-2 vote, the Court upheld the three-day suspension in 1983 of a Spanaway, Washington, high school senior for giving an assembly speech filled with crude sexual allusions.

"Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," Chief Justice Warren E. Burger wrote for the court.

Matthew Fraser's one-minute speech in support of a friend's candidacy for student body vice president of Bethel High School contained no dirty words, but it caused a brief uproar among his fellow students.

His friend won the election by a wide margin.

Officials at the school in suburban Tacoma suspended Fraser for violating the school's disruptive conduct rule in "materially and substantially' interfering in the educational process.

Now a student at the University of California at Berkeley, Fraser sued school district officials with help from the American Civil Liberties Union.

A federal judge ruled that Bethel High officials had violated Fraser's free-speech rights by disciplining him, and the 9th U.S. Circuit Court of Appeals upheld that ruling by a 2-1 vote.

School officials were ordered to pay Fraser $278 in damages and $12,750 in legal costs. Today, the Supreme Court said the lower courts were wrong.

The Reagan administration had urged the court to rule against Fraser. Justice Department lawyers argued that student speech may be restrained "if officials have a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values."

They said such regulations should not be used to suppress "student expression of a particular political viewpoint."

Burger wrote: "The determination of what manner of speech in the classroom or in (a) school assembly is inappropriate properly rests with the school board."

He was joined by Justices Byron R. White, Lewis F. Powell, William H. Rehnquist and Sandra Day O'Connor.

Justices William J. Brennan and Harry A. Blackmun voted against Fraser but did join Burger's opinion.

Justices Thurgood Marshall and John Paul Stevens dissented.

Freedom of Speech, Jr. Handout

Directions: Read the situations below. Answer each question.

Example: Tommy swears at the principal.
Does this behavior interfere with another individual's rights?
Yes, the principal's rights are violated.
Is the action acceptable?
No, this language is unacceptable.
If no, should this behavior be regulated by a rule?
Yes, a rule could be written.
If a rule is needed, should it be made by individuals or by the government?
Individuals should write the rule.

1. Jimmy, a real joker, stands up during math time in Mrs. Snorgweather's class and yells, "I smell smoke!" (He really didn't.)
   Does this behavior interfere with another individual's rights?

   Is the action acceptable?

   If no, should this behavior be regulated by a rule?

   If a rule is needed, should it be made by individuals or by the government?

2. Mary thinks there is not enough peanut butter in the sandwiches at the lunchroom, so she makes a protest sign and puts it up in the cafeteria. It reads: "We want more peanut butter!"
   Does this behavior interfere with another individual's rights?

   Is the action acceptable?

   If no, should this behavior be regulated by a rule?

   If a rule is needed, should it be made by individuals or by the government?

3. Susie walks up to her grandmother, takes a sniff, and announces, "Grandma, you smell funny."
   Does this behavior interfere with another individual's rights?

   Is the action acceptable?

   If no, should this behavior be regulated by a rule?

   If a rule is needed, should it be made by individuals or by the government?

4. Alan and his friends are playing jump rope and singing loudly outside of the library window.
   Does this behavior interfere with another individual's rights?

   Is the action acceptable?

   If no, should this behavior be regulated by a rule?

   If a rule is needed, should it be made by individuals or by the government?

5. Mr. Swartz' class wants to play softball instead of kickball at recess time. They ask Mr. Swartz if they can have a class meeting to decide.
   Does this behavior interfere with another individual's rights?

   Is the action acceptable?

   If no, should this behavior be regulated by a rule?

   If a rule is needed, should it be made by individuals or by the government?

6. Annie's teacher tells her to be quiet. Annie takes a big piece of tape and puts it over her mouth in mock protest.
   Does this behavior interfere with another individual's rights?

   Is the action acceptable?

   If no, should this behavior be regulated by a rule?

   If a rule is needed, should it be made by individuals or by the government?

Extension Activities

1. Ask each student to prepare a "Bill of Rights for Students." Post these on the bulletin board.
2. Review a newspaper article dealing with a right.
3. Present the following situation for discussion: "There are too many vulgar words in today's books. Possible solution—burn all books with offensive language."

This article is taken from A Salute to Our Constitution and the Bill of Rights: 200 Years of American Freedom, *which was created by Connie Yeaton, law-related education coordinator for the Indiana State Bar Association, and Karen Braeckel, newspaper in education consultant for* The Indianapolis Star *and* The Indianapolis News.

Power

Legislators, Police Officers and Judges/4th and 5th grades — Utah Elementary LRE Program

Objectives

This activity would be appropriate for a lawyer, judge or government official. It will take one to two hours and help students place public officials into three categories:

a. Rule-makers – The Legislative Branch
b. Rule-enforcers – The Executive Branch
c. Rule-appliers – The Judicial Branch

Procedure for Lesson on Legal System

1. Distribute the handout – "He Does It All!" Read it as a role play with a student narrator and two other students reading the "officer" and "you" parts.
2. What did the officer do? (He *made* a new law, he *enforced* his new law, he *applied* his law.) Could this happen in the United States? (Not legally.)
3. The resource person can discuss how the legal system works in this country. How is power is divided within the system? What is the role of the police officer? What happens *after* the officer makes an arrest? What is his role in a trial? What is the role of the lawyers on either side? The role of the judge? the jury? Who makes the law that the police officer enforces? Examples from actual cases or a walk-through of a typical case would be helpful.

Procedure for Separation of Powers Lesson

Begin with steps one and two from above. Then:

1. Explain about the separated powers of government:
   - *Legislative*
     Who works there: Senators in the Senate; Representatives in the House of Representatives. Explain that the Senate and House make up *Congress*. What they do: make, change and repeal laws.
   - *Executive*
     Who works there: president, vice president, cabinet members and people who work in departments and agencies. What they do: carry out laws. The federal agencies and departments make federal regulations and see that laws are enforced.
   - *Judicial*
     Who works there: Supreme Court justices and federal judges. What they do: interpret and define what laws mean in specific cases. Determine if any laws go against the Constitution.
2. Using pictures of national leaders and the chalkboard, try to place the public officials into the legislative, executive, and judicial categories.
3. Give each student: copy of a summary of the Constitution, pencil or crayons, and paper.

Handout: He Does It All!

(A Make-Believe Tale of the Future)

It's a beautiful April afternoon. You've just arrived home from school. Even before you get through the front door, your mother meets you with an armload of books. "Take these books back to the library, would you please? We've got to get them back today, or they'll be overdue." She then adds the magic words, "You may take the car, if you wish." Hey, that's all right! You just got your driver's license. Off you go.

When you come back to the car after dropping the books in the book drop, a police officer is standing by your car. Good grief, what coud be wrong? He hands you a ticket! (With your new driver's license, you had been really careful. You were in a parallel parking place, just the right distance from the curb, and you had checked carefully for "No Parking" signs.)

"What did I do wrong, officer?" you ask. Then this dialogue takes place:

OFFICER: "You can't park here."
YOU: "But there isn't a 'No Parking' sign."
OFFICER: "I just made it no parking."
YOU: "But you can't do that!"
OFFICER: "I can now. You're under arrest."
YOU: "Arrest? How can I be under arrest when I didn't break a law?"
OFFICER: "You did break a law; my law. You are under arrest."
YOU: "What happens now?"
OFFICER: "I try you."
YOU: "Try me! You're not a judge!"
OFFICER: "I am now. You're guilty. I fine you $25.00 and costs."
YOU: "Twenty-five dollars and costs! How much are the costs?"
OFFICER: "Another $25.00."
YOU: "But, I'm not guilty!"
OFFICER: "Pay me."

This make-believe officer did it all! What did he do?

1. ____________________________________
____
2. ____________________________________
____
3. ____________________________________
____

Would this happen in the United States?
Explain:

4. On the chalkboard, draw the trunk of a tree and write, "U.S. Constitution" on or by it. Also write, "Three Branches of Government" at the top of the chalkboard. (Have students do the same.)
5. Have students read Article I or read it with them and have them decide how they would title the article. Draw a branch on your tree and label it, "Legislative or Congress" and put a I (one) on this branch. Discuss with students the main points in the Article I.
6. Follow the same procedure for the next two Articles, labeling the branches: II, Executive or President, and III, Judicial or Judges.
7. Review with students the title of each article, comparing them to the three branches they drew on their paper.
8. Summarize by stressing the names of the three branches, their functions, the concept of separation of powers and why this concept is essential to our form of government.

Going Further

A follow-up activity will provide more meaning to the first two articles of the Constitution.

1. Have students look at Articles I and II (one at a time) in their summary and tell you what the requirements are to run for each office. Write these on the chalkboard:

House of Representatives
Serve for 2 years
At least 25 years old
Citizen of U.S. for 7 years
Senate
Serve for 6 years
At least 30 years old
Citizen of U.S. for 9 years
President
Serve for 4 years
At least 35 years old
Born in U.S.

2. Have students decide which office they would run for and then describe themselves so they fit the requirements as established in the Constitution. As they finish, "candidates" could read their descriptions to the rest of the class. The class could then decide if the requirements meet those set up in the Constitution.

Taken from the Utah Law-Related Education Elementary Lesson Plan Book, *with additional activities by Mary Lou Crane, a sixth grade teacher at Oquirrh Hills Elementary School in Kearns, Utah.*

Power

The Presidency/Grades 4-6

Connie Yeaton and Karen Braechel

This separation of powers lesson is designed primarily for fourth graders. It will help these students understand the role and responsibility of the president.

Objectives

Students will be able to:

1. State that the presidency is in the executive branch.
2. Deduce that the presidency has limited powers.
3. Identify the current president by locating pictures in the newspaper.

Background

The Constitutional Convention was a series of compromises, with the decision on the executive branch being one of the most important.

The Articles of Confederation lacked executive power. This led to many problems. A president served as chairman during meetings of Congress, but had no power to enforce decisions.

Some states favored one person in the executive branch with very limited powers. They did not want to return to being ruled by a king. Other states preferred one person as executive with strong power in order to be an effective leader rather than a figurehead. A third group felt that no single person could be trusted to serve in the executive branch. It was even suggested that three men representing various sections of the country could best serve the people without becoming too powerful.

Procedure

1. Distribute copies of "Miller School Student Council" handout. If appropriate for your students' ability and grade level, read the material with your class. Otherwise, have class read silently.
2. Say: "As we read the story about the Miller School Student Council, try to pick out situations which may be problems. Keep in mind the idea of fairness."
3. Discuss the questions at the bottom of the "Miller School Student Council" handout.

   Question: What problems were mentioned?

   Answer: Sally insisted everyone would go to the museum. Sally insisted everyone sell candy instead of T-shirts. No one would complain because Sally was on the committee. Sally set the price of the candy too high. Parents and students complained about the price. No field trip could be taken unless money was raised.

   Question: Who was causing the problems?

   Answer: Sally.

   Question: Why did Sally cause problems for the student council?

   Answer: She had too much power.

   Question: What could be done to change the situation?

   Answer: Limit her power in the committee. Make her a non-voting member.
4. Ask: "Have you ever met someone like Sally?"

   "What is wrong with someone having all the power to make decisions for a group?"

   "What would be a way to keep a person from having too much power?"

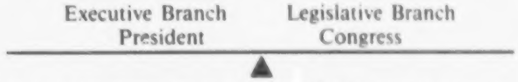
1707

5. Explain that the writers of the Constitution knew that a national leader was needed if the new country was to survive. Without a leader, states were each "doing their own thing" by making money, following the laws each chose, and deciding whether or not to supply troops for the army. A leader was needed, but the people were unhappy with the idea of being ruled by a king, as in England. Some felt *one* man should be in control with very little power. George Washington and several important men felt the new ruler had to have strong power in order to control the states. It was even suggested there should be *three* people instead of one as president.

   After much discussion, a compromise was reached. What is a compromise? (A compromise is using part of each idea to come up with a completely new idea.)

   It was decided to have one president with enough power to enforce the laws, but with the power limited by Congress. What is Congress? (Congress is a group of men and women selected by the voters to make laws for the United States.)

   To make sure that Congress did not become too powerful, the writers of the Constitution gave the president the power to veto, or say "no," to a law. In this way, the responsibilities of leading the country were shared between the president and Congress. We could picture the power as a teeter-totter.
6. Draw on chalkboard.



7. If one side becomes too powerful and causes an imbalance, the other side must take away some of the power to make things balanced again.
8. The president and members of Congress make decisions daily that have an effect upon the way we live in the United States.
   What is the name of the president?
   Who was the first president?
   Who are some other presidents in our history?
   Do you know the name of any congressmen?
   Do we have any congresswomen from our state?
9. Distribute copies of the newspaper.
   Ask students to look through the newspaper and find pictures, articles, or cartoons showing the president and members of Congress. If you want to find a cartoon showing the president or other people from the federal government, where would you look? (Editorial page.) Underline the names of congressmen or the president.
10. Give students time to complete the activity.
11. Allow students to share their pictures and cartoons. Make a bulletin board using these.

Extension Activities

As a class or individuals, write a letter to the president about a particular concern.

Write a report on a specific president. Choose one born in the same state as you were, one with the same last initial as yours, or one born in a place you'd like to visit.

Make a chart of the presidents used on various coins and currency.

Miller School Student Council Handout

Directions: Read the story below. Then answer the questions that follow on a separate piece of paper.

Sally French was the most popular girl at Miller School. She loved to be in control. Each school year, teachers were asked to select a student from the class to be a member of the student council. The council discussed problems, special projects, and ways to raise money for field trips.

During the first meeting of the year, officers of the student council were elected. Sally was voted president. Council members served on the complaint, the special projects, and the funding committees. As president, Sally was expected to be a member of each committee. Everything seemed to be working smoothly until October.

Sally's favorite trip was to the "Haunted House" at the Children's Museum. When the special projects committee met to decide between visiting the zoo or the Children's Museum, Sally insisted that no one would enjoy the zoo and she would not attend if the committee voted for it. Since everyone wanted to be Sally's friend, the committee voted for the Children's Museum.

When the funding committee met to decide on ways to raise the money for the trip, Sally suggested that the school sell her favorite candy. Eric wanted to sell T-shirts. Sally told the girls that she would not play with them at recess if they voted for Eric's idea. The committee voted to sell candy.

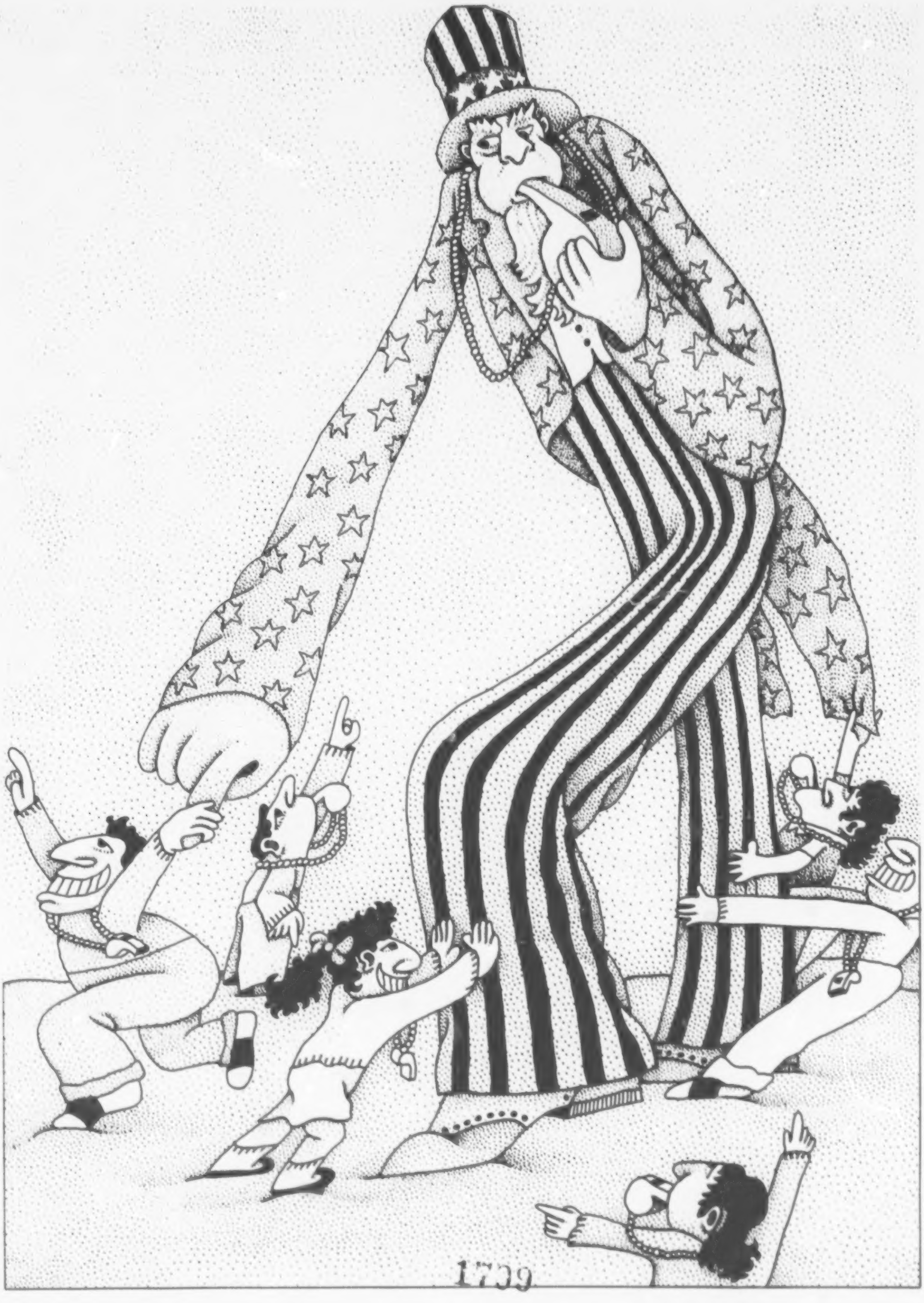
When the complaint committee met, no one wanted to mention Sally's habit of forcing her ideas upon the group since Sally was sitting on the committee. No one wanted to be her enemy.

The candy-bar company suggested the school charge $1.00 for each bar, but Sally insisted that they sell for $3.00 so the school could have more money. Parents complained about the high price and the students were upset because they could not sell the expensive candy. The fall field trip for Miller School would be canceled unless something happened soon!

Questions:

1. **What problems were mentioned in the story?**
2. **Who was causing the problems?**
3. **Why did Sally cause problems for the student council?**
4. **What could be done to change the situation?**

This article is taken from A Salute to Our Constitution and the Bill of Rights: 200 Years of American Freedom *which was created by Connie Yeaton, law-related education coordinator for the Indiana State Bar Association, and Karen Braeckel, newspaper in education consultant for* The Indianapolis Star *and* The Indianapolis News.



Dean Matthews

Charles White

Beyond the Bill of Rights

Liberty needs more than the courts—it needs the whole apparatus of government to protect it

America is many things to many people, but above all it is freedom. Our ancestors came here for many reasons, but the main reason was to be free – free to practice their own religion or free to speak or write as they please or free to simply be left alone.

We celebrate our freedom in our national icons and myths and rituals. We are "the land of the free" in our national anthem. We are the leading nation in the "free world." One of our great national symbols is the liberty bell, and we sing "let freedom ring."

Freedom is a powerful symbol – for those who have it, and for those who don't. The craving for freedom has led men and women all over the world to risk their lives to escape bondage. Our celebration of our common freedom is in many ways the mortar that holds us together.

But what, exactly, is freedom? How do we preserve and extend it? How can government foster it? How can constitutions further it?

At first glance, liberty and power (authority) are antagonists. The most powerful governments, we assume, are dictatorships which give their citizens no freedoms. Conversely, when citizens are free, then governments have less power, at least to the extent that they have to respect individual rights by following rules and procedures designed to protect those rights.

But is it that simple? Powerful governments can be a threat to liberty, but so can powerless governments. In fact, the ultimate nongovernment – anarchy – might well be as great a threat to individual liberties as the most ruthless dictatorship.

And it doesn't necessarily follow that governments become weak by giving citizens freedom. Even our enemies generally concede that the United States is a free nation, yet we are widely acknowledged as one of the most powerful nations on earth.

The relationship between liberty and power is obviously a good deal more complex than it first seems. Somehow our Constitution has enabled us to have it both ways, to have an effective national government without sacrificing vital liberties. How we have achieved this is the subject of this article.

Liberty Debated

Liberty is a compelling concept in spite of – or perhaps because of – the difficulty of precisely defining it. Disagreements over definitions of liberty – and the government structures that will preserve it – aren't new. They go back to our earliest days as a nation. The men who wrote the Constitution – who came to be known as the Federalists – were deeply concerned with liberty. So were their adversaries, the Anti-Federalists, who objected to the proposed constitution because they feared that it would take away the liberties we had just won with our independence.

Historian Michael Kammen notes in his introduction to *The Origins of the American Constitution: A Documentary History* that the Framers often spoke about liberty, but "they meant civil liberty, rather than natural liberty. The latter implied unrestrained freedom – absolute liberty for the individual to do as he or she pleased. The former, by contrast, meant freedom of action so long as it was not detrimental to others and was beneficial to the common weal. [Justice Holmes put the same point more succinctly: "One man's freedom ends at the point of another man's nose."] When they spoke of *political* liberty, they meant the freedom to be a participant, to vote and hold public office, responsible commitments that ought to be widely shared if republican institutions were to function successfully."

Both the Federalists and the Anti-Federalists agreed that preserving civil and political liberty was an important end of government, and that natural liberty represented a kind of mythic perfection, the liberty of a lost Eden which could not be brought back to this earth even by the best government. The difference is that the Anti-Federalists more often embraced the rhetoric of original, untrammeled freedom of natural man. They were often zealots for liberty, making it the central goal of government. In the words of Patrick

Henry, "liberty [is] the greatest of all earthly blessings—give us that precious jewel, and you may take everything else."

To Henry and the others who opposed the new constitution, we should not "inquire how [our] trade may be increased, nor how [we] are to become a great and powerful people, but how [our] liberties can be secured; for liberty ought to be the direct end of. . .Government."

Power vs. Liberty

Both sides of the debate over the Constitution had been shaped by the Revolutionary War. Many had fought in it; others had risked everything to support it. All remembered it vividly and tried to draw lessons from it. As a revolutionary generation, they were determined to keep their freedoms. But where was the greatest threat to liberty?

Many Americans naturally looked to the past to answer that question. They had fought a king and a powerful, entrenched aristocracy. They feared power and a strong central government. To the Anti-Federalists in particular, the greatest safety lay in keeping the enemy weak. If the central government was the threat, then the solution was to keep it as little able to do harm as possible. A Virginian, Richard Henry Lee, spoke for most of them in calling the proposed new constitution an "elective despotism," and observing that it was astonishing that "the same people who have just emerged from a long and cruel war in defense of liberty" should now seriously consider forming a government that would risk all that they had gained.

In short, they saw an inverse relationship between "power" and "liberty." The less the power, the more the liberty. The less the liberty, the more the power.

In essence, Patrick Henry and the other Anti-Federalists argued that the best government was the one that governed least. Their fundamental belief was that men were good and their virtue would preserve liberty, as long as government was not given the power to make mischief. Of course, some government was necessary, but they preferred it be state and local government. Their thinking was that government close to the people would be less of a threat than distant government. The town and the state would preserve freedom more zealously than the national government.

Thomas Hobbes, the English philosopher, had declared that "freedom is political power divided into small fragments." The Baron de Montesquieu had argued that history proved that the only states that maintained freedom were the very smallest ones, no larger than a single city. Many other thinkers of the time agreed.

In our first attempt at our own government, we put this advice into action by limiting the central government and reserving as much as possible to the states and localities. The Articles of Confederation were less like a government, more like an agreement between individual countries. It took more than half the Revolutionary War (from 1777 to 1781) to even get the document ratified, since *every* state had to assent.

The Articles provided for common action under certain circumstances, but under the Articles the power to tax was weak, and Congress lacked control over interstate and foreign commerce. Like a treaty between governments, there was no effective central authority to *impose* working together. Like members of the United Nations, or NATO, or the Common Market, the states retained their independence, and there was no real power to compel state compliance with acts of Congress.

Government under the Articles was slow and cumbersome, but that was the idea. Far better to face delay and disagreements than to lose freedom to an overzealous national government.

The Pastoral Vision

Real liberty wasn't to be found in nationhood, in a powerful United States. In fact, the more powerful the national government, the more mischief it could make. To the Anti-Federalists, a large republic was a lost republic. Smaller was better.

Real freedom was to be found in the farms and villages and towns, where people knew each other, where they were close to the land and close to the traditions they cherished. During the Revolution and in the years following, each state experimented with ways of making democracy as direct as possible. In the words of Ralph Ketcham, a contemporary scholar who has written extensively about the debates over the Constitution, the idea was to "give voice to the undistorted and uncorrupted will of the people. Small districts, annual elections, rotation in office, [and] versions of referendum and recall" were all tried as ways of keeping government small and manageable. (Introduction to *The Anti-Federalist Papers and the Constitutional Convention Debate.*)

Ketcham succinctly summarizes the Anti-Federalists' vision. The broad grant of authority in the Constitution was deeply disturbing to them. The broad power to lay and collect taxes, the president's role as commander-in-chief, Congress' authority to pass any laws "necessary and proper" to carry out its enumerated powers, and the "supreme law" and treaty-making powers, all seemed unbounded and potentially tyrannical. So a persistent thrust in their thought was to withdraw some of the explicit powers given to the national government and to restrain the remaining powers.

The Anti-Federalists countered with a positive republican vision of what America could become. They thought their vision far closer to the purpose of the Revolution than the political and commercial ambitions of the Federalists. They looked to the classical idealization of the small, pastoral republic where virtuous, self-reliant citizens managed their own affairs and shunned the power and glory of empire. Could they break the self-fulfilling cycle where selfish people needed to be controlled by checks and balances, which in turn required and encouraged more self-seeking by the people?

The Anti-Federalists wanted to retain as much as possible the vitality of local government, where rulers and ruled could see, know, and understand each other. The idea of self-government was tied inextricably to something like a town meeting directness. Corruption and tyranny would always be a threat, even among elected representatives, if they lived in a distant capital milieu, where power, intrigue, and wealth exerted their baneful influence. Remote and distantly powerful governments conjured up visions of Versailles, filled with courtiers and courtesans and superfluous office holders. Far better to keep government small and close to the people, to draw upon the basic decency of human nature evident among the families, churches, and schools of ordinary people. Under these circumstances, government could work for the people, and officials would be the servants of the people, rather than their oppressors.

Power *and* Liberty

Many citizens of the new republic felt that there was another, greater threat to liberty. They looked at the weak, divided national government under the Articles of Confederation and saw that it was powerless to protect liberty. As John Jay put it, "government without liberty is a curse; but liberty without government is no blessing either." Power was a threat, but powerlessness a greater one.

In part, this position is based on doubts about the virtue of "natural" man. Many Americans had indulged in extravagant

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Charles White is editor of Update.

hopes for newly liberated men in the heady days after the rebellion, but by 1787, Michael Kammen observes, a less optimistic view of human nature prevailed. Partially disillusioned, "the Framers still hoped that virtue might be possible, but they preferred to be realistic in relying upon institutional checks rather than individual virtue as the soundest basis for maintaining liberty."

In 1776, for example, John Adams believed that Americans could and should erect their new governments on a foundation of civic virtue. By 1787, his views had become more cynical. He looked to an effective separation of powers, a viable system of checks and balances, and legislative control of human "passions" as sounder bases for the new national government.

To the men who wrote the Constitution, "free government" was a challenge because the two ideas – liberty and power – pulled in opposite directions. Edmund Burke, the great English political writer of the time, put the dilemma succinctly.

> To make a government requires no great prudence; settle the seat of power, teach obedience, and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a free government, that is to temper together the opposite elements of liberty and restraint in one conscious work, requires much thought; deep reflection; a sagacious, powerful, and combining mind.

Fortunately, the Framers – and particularly James Madison, the father of the Constitution – had the wisdom, and the learning, and the experience to combine these opposites, to use each to further the other. As Madison put it in Federalist No. 51, "You must first enable the government to control the governed; and in the next place, oblige it to control itself."

In other words, you don't preserve liberty by making government powerless. You preserve it by giving government the power to preserve it, and by seeing that government does not abuse that power. And how do you do that? In part, by dividing the power, by seeing to it that no unit of government becomes so strong that it could overwhelm the other units and trample individual freedom.

The Machine of Government

"Balance of power" and "checks and balances" were not new ideas. As Ralph Ketcham observes in *The Anti-Federalist Papers and the Constitutional Convention Debates*, theorists in Europe had made use of the different orders of traditional society – king, lords, commons, or first, second, and third estates – to achieve equilibrium in government. But in the United States, without a hereditary monarch or nobility, how could checks and balances work? What real balance could there be when republican theory held that all legitimate power came from the same source, the people?

According to Ketcham, Madison's solution was:

> to build into the mechanism of government itself enough variations on election, powers, term of office, and complication of function to create separate interests and perspectives. Thus, for example, even though an upper and lower house might eventually derive from the people, different districts, different terms of office, and different modes of election and different definitions of authority would create balances of power.

The 18th century was fascinated with the metaphor of the intricate machine. Writers of the time spoke frequently of "mechanisms," and used the analogy of the watch to explain the workings of society. In that sense, the U.S. Constitution is the ultimate machine. It is an elaborate, carefully balanced set of weights and counterweights, of wheels and cogs and balances, designed to be a self-perpetuating, self-regulating system.

Building on Imperfections: The Nature of Man

If men were angels, Madison said, they would not need governments. But they were not angels. Imperfect, they needed the restraint and guidance of government. It was Madison's genius to turn the very imperfections of human nature into part of the mechanism of the new government.

Madison argued that if men were self-interested and ambitious, one of the balances of government would be turning that defect into an advantage. Part of the design of government would be to see to it that the government presented opportunities for ambitious men to chafe against one another, and thus to pit one set of ambitions against another so that each man, each unit of government, kept a watchful eye over the others and liberty was thus preserved.

Another way to look at the Constitution, and particularly at Madison's own contribution, is to focus on the dilemma of majority rule. Under any democratic theory, the majority is to rule, but on what terms and under what restrictions? How do we preserve the right of the majority to govern while preserving the rights of those not in the majority?

The question is central to the search for liberty. The Federalists argued that strength provided security for liberty, pointing out that confederations and small, vulnerable republics were too often provincial, quarrelsome, and the prey of larger, more united nations. James Wilson, one of the Framers, noted that strong government could as much serve the people when controlled by them as it could injure them when it was hostile to them.

That argument was effective in addressing the liberties of the country as a whole, but how did the Framers "guard one part of the society against the injustice of the other part," as Madison put it in Federalist 51. His answer focuses on essential characteristics of American government.

First of all, government was to be divided between the states and the nation. (See the article by Eugene Hickok in this *Update* for more on that mechanism to preserve freedom.) Secondly, power within the federal government (and very likely within each state, too), was to be separated between the branches. "Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be contolled by itself."

A third protection lay in the size of the nation and the diversity of its people:

> Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. [The remedy lies in] comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impractical. . . . [In a large, diverse republic like ours] the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. . . . Justice is the end of government. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. . . . [In a society as extended as the United States] . . . a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . .

Madison thus neatly reverses the arguments of the Anti-Federalists. The very size of the United States will preserve liberty, not destroy it. Liberty doesn't have to mean localism. Liberty can be protected on a large scale, as well as a small one.

The Bill of Rights Emerges

Madison's arguments were more political than legal. Though he is rightly revered as the father of the Constitution, our central legal document, Madison was not a lawyer. Deeply read in political philosophy, both ancient and modern, he played a leading role in crafting a *government* that would protect liberty and minority rights. As we have seen, Madison argued that the mechanisms of government, the ambitions of men, and the vast extent of the United States would prevent government from becoming tyrannical and would preserve liberty and the rights of minorities.

The Anti-Federalists were not convinced that these mechanisms would work. As the ratification debate wore on, they insisted on a *legal* mechanism for preserving individual liberties. They demanded that the document itself contain limitations on government that would explicitly guarantee the freedoms of religion, press, speech, and petition, as well as the rights to a speedy public trial and other rights for those accused of crimes.

The Bill of Rights emerged as a result of these debates, and stands as the greatest single contribution of the Anti-Federalists. (Ironically, their opposition to the Constitution changed the document enough to include them among the Framers.)

The Bill of Rights added another layer to the elaborate plan envisioned by Madison. Along with judicial review, which emerged in the early days of the republic, it provided additional mechanisms to preserve liberty.

Liberty and the Political Process—A Case Study

All too often today, we tend to assume that we owe all our liberties to the Bill of Rights. Newspapers and magazines—including this one—are filled with analyses of the cases that continue to define the Bill of Rights and balance the authority of the government and the liberties of the governed.

Yet only a tiny fraction of all legal cases deal with constitutional rights, and only a tiny fraction of this fraction eventually reach the Supreme Court. And enforcing rights through the courts is a slow and expensive process. If Americans had to rely *solely* on the courts to protect their rights, liberty would be deeply imperiled. Too much national energy would go into wrangles over rights, courts would be overwhelmed, and judges would become a kind of secular priesthood, a mysterious fraternity outside the normal process of elective politics, protecting us from our elected representatives, protecting us from ourselves.

Actually, Madison and the other Framers correctly saw that liberty and power were not inevitable antagonists, and that political rights depended on far more than any court interpreting any parchment barrier. Protecting and preserving the Constitution was not a job for the courts alone, or for any one branch of government alone, but a job for the political process in the broadest sense.

Consider, for example, the first major civil liberties crisis under the Constitution, the passage of the Alien and Sedition Acts in 1798, during the presidency of John Adams. The acts were passed in a time of international crisis when the French revolution was at its apogee and rumors of an immanent French invasion of the United States were widely believed. Like most wartime legislation dealing with speech and writing, the Sedition Act dealt harshly with criticism of government policies and personages. It made it a crime, punishable by a large fine or two years in prison, for any person to

> write, print, utter or publish, or . . . knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States.

If passed today, it would unquestionably be found an unconstitutional violation of the First Amendment, but the law was passed before *Marbury v. Madison*, so it was by no means clear that courts had the power to invalidate laws contrary to the Constitution.

In this instance, the Bill of Rights didn't prevent an encroachment of liberty—but the political process did. The process worked through at least three of the mechanisms envisioned by Madison: federalism, the legislative process and the electoral process.

Federalism was involved because several states led the opposition to the act. The Kentucky and Virginia Resolutions are among the most notable examples of state resistance in the history of the nation. If the depree and manner of opposition went beyond what Madison foresaw as the role of the states, the tension between the states and the nation exemplified in this resistance was part of the mechanism of divided powers.

The legislative process was involved because the debates in Congress were long and detailed. They spawned books and pamplets that helped shape our notions of free speech, and opposition in Congress may have resulted in a provision that the law would only be operative for three years unless extended.

As for the electoral process, when the three years expired, Adams and his party had been voted out of power, at least in part because of their position on the Sedition Law. A new Congress and a new president were more than happy to let the law lapse.

The Sedition Act is just one example of a conflict over liberty resolved without the courts. Every time a school board debates a new policy for the school newspaper, liberty is being defined through the political process. And the procedure is repeated thousands of times each year. Only the exceptional instances wind up in the courts.

Power and Liberty Today

Part of the genius of the Framers was their ability to create a Constitution that was broad enough to encompass the opposition and vague enough to leave room for succeeding generations of Americans to apply its principles to "the various crises of life."

The Federalists outflanked their opposition by anticipating many of their concerns and embodying many of their values in the new document. After all, the national government does not supercede the states but takes a limited number of powers and reserves all the remaining ones to the states. And as we've seen, the Framers were careful to build in protections for liberty through various mechanisms of government. In that sense, the Bill of Rights completed the work that the convention of 1787 had begun.

Debates over power and liberty continue, as indeed the Framers expected them to. The concerns of the Anti-Federalists continue to be expressed. For example, the appeal of small units of government, of liberty protected by small, circumscribed government, has been a powerful one in American history. We still cherish the straightforward, simple democracy of the New England town meeting. Our agrarian tradition—the veneration of simple goodness of rural life, the notion that virtue is to be found out in the open, and not in the crowded cities—is a thread that runs through our history. And we still venerate the myth of the frontier, where hardy individualists fought and won a land without help or interference from the federal government. Ronald Reagan has evoked the pioneering vision often as a model of self-reliance, and he has been eloquent throughout his career on the evils of "big government" and the remoteness of those in Washington.

(continued on page 49)

Liberty

Freedom of Speech and Expression/Grades 7-12 **Dale Greenawald**

Using three landmark Supreme Court cases, students will work with a community legal expert to explore the benefits of and limits to freedom of speech. The teaching time of this one is approximately 45 minutes. It's a natural for a community legal expert (e.g., judge, lawyer or law professor).

Objectives

To identify benefits of freedom of speech; to identify limits of freedom of speech; to support constitutional guarantees regarding freedom of speech; to develop critical thinking and analytical skills.

Procedure

Divide the class into groups of four students and assign each student primary responsibility for answering one of the four questions for the case assigned to their group. Give each group one case and ask students to analyze it and respond to their question. After each student responds to his/her question, the group should discuss that question to develop the best possible response. Students should be certain to have evidence to support their argument.

After each group has discussed its four questions, conduct a general class discussion of the three cases by considering the four questions associated with each case. List and define any legal terminology you may use. Emphasize that freedom of speech isn't license to say whatever you want whenever you want to say it, but rather that there are times when freedom of speech conflicts with other rights.

Case 1

Libel is publishing a false statement about someone which damages his/her reputation. Public officials are accorded less protection from libel. They must prove that the statements were not only false and damaging, but that they were also made with either malice or reckless disregard for the truth. In March of 1960, *The New York Times* ran a full-page advertisement calling for support of blacks protesting civil rights issues in the South. It described specific abuses and activities in Montgomery, Alabama. For example, it said blacks faced an "unprecedented wave of terror," and went on to describe police harassment of Dr. Martin Luther King. No specific names were mentioned. The ad cost $4,800 and was placed by a gentleman who was known to the *Times* as a responsible person. However, the ad contained numerous inaccuracies. For example, police had been called to a college campus, but had never surrounded it and the campus dining hall had never been locked.

L. B. Sullivan, commissioner of police in Montgomery, said that some of the incidents described happened before his tenure in office. In addition, he contended that people who knew him associated him with the ad. Some had indicated that his activities threatened their friendship and that if it were their choice he would not be rehired as police commissioner. Sullivan sued the *Times* for libel.

STUDENT QUESTIONS

1. What would be the difference between you taking space in the local paper to say derogatory things about your next door neighbor and criticizing the mayor of the city for neglecting his duties.
2. Is it necessary to prove that every statement in a signed editorial or ad be true before the paper prints it? What would be the effect of such a policy on freedom of the press?
3. When he assumed the office of commissioner, did Sullivan relinquish to some degree any of his rights?
4. What are the advantages of a totally free press? The disadvantages?

Case 2

Feiner v. New York (1951), 340 U.S. 315 (1951), is the case of the unpopular speaker.

Feiner began making a speech at 6:30 p.m. on a city street corner. He wanted to publicize a political meeting to take place that evening. A crowd of about 80 people had gathered, along with two police officers.

In the speech, Feiner referred to the president as a "bum," and called the mayor "a champagne-sipping bum." Then he said that "minorities don't have equal rights; they should rise up in arms and fight for them."

As Feiner continued, there was some pushing and shoving in the crowd. One listener told the police officers that if they did not get Feiner "off the box," he would do it. Others supported Feiner's position. The police officers told Feiner to stop, but Feiner continued anyway. Feiner was arrested for disorderly conduct.

STUDENT QUESTIONS

1. Was Feiner's speech likely to produce an immediate danger of disorder?
2. Who were the police officers protecting? Feiner himself? Feiner's expression? The general public?
3. Who should have been arrested – Feiner or the listener who made the threat?
4. If Feiner had talked only to a supportive audience should he have been arrested for criticizing the President?

Case 3

Burning the American Flag.

On June 6, 1966, Street was listening to his radio, when a news report told of the shooting of James Meredith, a Southern civil rights leader, by a sniper. Angered, he took out a folded American flag, which he had displayed on national holidays, and walked to an intersection. There, in the presence of about thirty people, he burned the flag. A police officer observed him and heard him say: "We don't need no damn flag." When the officer asked him whether he had burned the flag, he replied:

"Yes, that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag."

Street was tried under a New York law which makes it a misdemeanor "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]."

He was found guilty and given a suspended sentence. He appealed on the ground that his free speech rights under the First and Fourteenth Amendments had been violated.

STUDENT QUESTIONS

1. Was the burning of the flag a form of expression?
2. Or was burning the flag an action which the state had a right to regulate? What is the distinction between expression and action?
3. Would the First Amendment protect burning a draft card as a protest against the Vietnam War?
4. What values are protected by the law against defiling the flag? What values are asserted by the act of burning the flag as a political protest? Which set of values should prevail? Why?

Case 1: Court Decision

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court held that a public official could recover damages for a defamatory falsehood *only* if the libelous material was deliberately false—made with malice—or if the statement was made with indifference to the possibility of its falsehood. They did not feel that this was the case in the instance of *New York Times v. Sullivan.*

Futhermore, the Court emphasized the need for citizens in our society to have the privilege of criticizing the government and public officials, pointing to the "profound national commitment that debate on public issues should be uninhibited, robust and wide open, and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

The Court concluded its statement by saying:

> As to the *Times*, we similarly conclude that the facts do not support a finding of actual malice. . .We think the evidence against the *Times* supports at most, a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. . .
>
> We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" [Sullivan]. [Sullivan] relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. . .

Case 1 decision from: Institute for Political and Legal Education, *Individual Rights.*

Case 2: Court Decision

Law enforcement authorities may require a speaker to stop making a speech on a public street when the authorities determine that the speech is a clear danger to preserving order.

REASONING OF THE COURT

The Court believed that Feiner's speech passed the limits of persuasion and instead was an incitement to riot. Because there was a clear and immediate danger of riot and disorder, the Court held that the officers must be allowed to order that Feiner stop making his speech. According to the Court, it was the duty of the officers to maintain order on the streets. Looking to the particular facts of this case, the Court said that because Feiner encouraged hostility among the audience, interfered with traffic on the public streets, and ignored the officer's order to stop talking, his conviction for disorderly conduct did not violate his constitutional right of free expression.

Justice Black strongly disagreed in a dissenting opinion. The justice shifted his focus to the unpopular speaker. According to Justice Black, Feiner had been arrested for expressing unpopular views. He asserted the police officers had a duty to protect Feiner during his speech rather than to arrest him, since Feiner was exercising his constitutional right of free expression. In his view, it was the duty of law enforcement authorities to protect a person exercising his constitutional rights from those who threatened to interfere.

Case 2 decision from: *A Resource Guide on Contemporary Legal Issues. . .For Use in Secondary Education*, Phi Alpha Delta Law Fraternity, International. Available from publisher. Used with permission.

Case 3: Court Decision

In *Street v. New York*, 394 U.S. 576 (1969), the Court was badly split—a 5 to 4 decision. Writing for the majority, Justice Harlan overruled Street's conviction on the ground that he was "punished merely for speaking defiant or contemptuous words about the flag." The Fourteenth Amendment prohibits states from punishing those who advocate peaceful change in our institutions. The words used by Street were not "fighting words," nor did they shock anyone in the crowd. What Street did was to publicly express his opinion about the flag. Justice Harlan concluded on this note:

> We add that disrespect for our flag is to be deplored, no less in these vexed times than in calmer periods of our history. . . Nevertheless we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects. . .

It is on this very note that the dissenters parted company with the majority. Chief Justice Warren and Justices Black, Fortas, and White saw the issue as one involving action—the burning of the flag. Each felt that a state has the right to prohibit and punish those who desecrate the flag. Justice Fortas reasoned as follows:

> One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare, being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest.

Case 3 decision from: Isidore Starr's *The Idea of Liberty* (St. Paul, Minn: West Publishing Company, 1978. Available from publisher. Used with permission.)

Dale Greenawald is an educator in Boulder, Colorado.

Liberty

Introducing the First Amendment/Upper Elementary/Middle

Donna Sorenson

The New York
ПРАВДА

Susan Wise

This activity will take two class periods, though it can be compressed to one if it's used by an outside resource expert. (It would be a natural for a lawyer or judge interested in the First Amendment, as well as for a representative of the media.) It has two objectives:

1. Students will inductively discover the First Amendment in action through newspaper reading.
2. Students will get an overview of the Bill of Rights.

Procedure

Using a classroom set of newspapers. . . .

1. Hand out the national and local sections of the daily paper.
2. Ask students to use a colored pen or marker and cross out any articles in these two sections of the paper that contain criticism of government, government leaders or government policies and/or any that contain proposed changes of official people or positions.
3. Discuss articles and any questions or "borderline" articles that students marked.
4. Discuss with students:
    - How interesting and/or informative would the newspaper be if all of the marked articles were missing?
    - Have you ever known of anyone personally damaged – emotionally, professionally or financially – by something printed in the newspaper? Did this change your opinion of "freedom of the press?"
    - Is freedom of the press absolute? You may wish to discuss questions of libel, free press/fair trial, publication of national secrets.
    - Is the press – and the television/radio news – less "free" in some communities in the United States than others?
5. If time permits, the video tape, "A Question of Balance: Fair Trial/Free Press," produced by the American Bar Association's Communication Department and the Association of American Newspaper Publishers, discusses an issue that seemingly conflicts with a completely free press. A copy of this video tape can be ordered from Visual Associates, Inc., 665 Fifth Avenue, New York, New York 10022.
6. Use a cartoon or another news article to illustrate that there are other significant constitutional amendments beyond the familiar First Amendment.
7. Distribute to students a copy of the Bill of Rights.
8. Review with them and/or have them find in the dictionary any unfamiliar words, i.e., "abridging," "redress," "grievances."
9. Allow students to choose one of the first ten amendments and find articles in the newspaper that relate to "their" amendment. Allow them to go to other issues of the newspaper or news magazines to find relevant articles, if necessary.
10. Finally, the teacher may assign students to make a bulletin board displaying the news articles found labeled with the appropriate amendment.

Donna Sorenson is a Salt Lake District teacher. This activity was revised by Carol Lear and is part of the curriculum published by the Utah Law-Related and Citizenship Education Project.

1806

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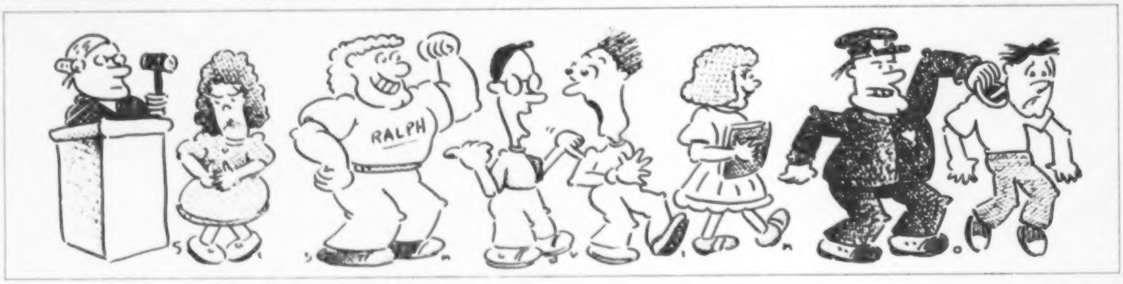
Power



Slug Signorino

This lesson is designed to help students recognize the philosophical principle embodied in the Constitution that the consent of the governed is the ultimate source of authority in our political system. Students will understand that the people delegate authority to the government to carry out certain functions. This delegation of authority gives people in government the duty and right, with certain limitations, to direct and control the actions of others through law. Students will further understand that this principle does not imply that consent is required for each action of the government, but rather that the underlying notion of consent helped shape the basic structure of our government.

The first part of the lesson explores briefly the meaning of the consent "authority." Then, through reading and discussion of the Mayflower Compact, an adaptation from John Locke, the Declaration of Independence, and the Preamble to the Constitution, students will understand that governmental authority derives from the consent of the people.

Procedure

Write the words "power" and "authority" on the board. Explain to students that in this lesson they will be exploring the source of our government's authority. Explain that power and authority both occur when someone controls or directs the actions of others. The difference between them is that authority is the exercise of power that is granted by the right of custom, law, or principle of morality. For example, when the driver of a car comes to a stop at a red traffic light, that is an example of authority because the law directs the driver to stop at a red light.

Next, ask students to read the introduction, "What Is Authority?" and to do the exercise which follows. Conduct a class discussion on their responses.

Ask students to read the "Mayflower Compact" and conduct a class discussion on the questions which follow. Students should recognize that the new government created under the compact directed the lives of those in the colony and the source of its authority was the consent of those who contracted to obey because they thought it was in the best interests of the group.

Next, have students read "An Adaptation from *Two Treatises of Government*" by John Locke. As they read they should look for problems which Locke says would arise if there were no govenmental authority. Conduct a discussion in which students identify these problems.

Divide the class into groups of three or four students. Assign each group the selection "The Source of Authority of the United States Govenment." Have each group respond to the questions and debrief by conducting a class discussion.

Student Handout 1: What Is Authority?

This lesson is about authority and our government. You probably know quite a bit about authority from your experiences. You see it in action every day.

When you talk about rules, you are talking about authority. When you wonder whether someone has the right to tell you what to do, you are thinking about authority. Authority has to do with rules and with people who sometimes have the right to tell others what to do.

When does someone have the right to tell you what to do? Do your parents have the right to tell you when you have to be home? Does the government have a right to say you can't drive a car until you are sixteen? Where does the government get this authority?

Questions of authority are often difficult. First, we should try to figure out exactly what authority is and how it should be used. The following examples should help you learn to consider authority more carefully.

AUTHORITY OR POWER WITHOUT AUTHORITY?

Directions: As you read the statements below, decide which are examples of authority and which are examples of power without authority.

1. Judge Alvarez places Maggie on probation.
2. Ralph Wingo tells Marty Krinsky to stay away from his girl or Ralph will "take care of him."
3. Max Oliver tells his daughter, Linda, that she will have to stay home all weekend because she stayed out too late on Tuesday.
4. A ninth-grade student tells a group of seventh-grade students not to sit on the school lawn. He says it is reserved for those who are about to graduate, but he knows that isn't true.
5. The U.S. Congress passes a law to control pollution.
6. A woman who runs an illegal gambling house tells a customer to pay his debt or it might mean trouble.
7. A man in a movie theater tells the two girls sitting next to him to get out because they are making too much noise.
8. The vice-principal takes a knife away from a student and then turns him over to the police.

1807

WHAT DO YOU THINK?

1. What is power?
2. What is authority?
3. For each example of authority, how did that person get authority?
4. How does authority differ from power?

Student Handout 2: The Mayflower Compact

Now let's consider the question, "where does government get its authority?" Read the following selection about a document with which you are already familiar, the Mayflower Compact.

The passengers on the Mayflower landed at a place that was outside the jurisdiction of the Virginia Company, which had paid for the trip. Because they were at a place where the authority of the Old World did not apply, the Pilgrims decided they should govern themselves. They drew up an agreement which was signed by the forty-one men aboard the ship. By the terms of this agreement, the Pilgrims agreed to govern themselves.

In the Mayflower Compact, the Pilgrims decided that "there should be an agreement that we should combine together in one body, and submit to such government and governors as we should by common consent agree to make and choose." They agreed that it was best "to combine together into a civil body politic" which would create laws, constitutions, acts, and offices that were thought by all to be for the general good of the colony. The Pilgrims agreed to follow and obey this authority, which they had created by their mutual consent.

WHAT DO YOU THINK?

1. In what way can the Mayflower Compact be considered an example of authority?
2. What was the source of the authority of the Mayflower Compact?
3. What appears to be the belief underlying the Mayflower Compact about the source of a government's authority?

Student Handout 3: An Adaptation of John Locke

Other people, too, have thought about the question of authority. They have thought about the question, "Why do we have government and from where does it get its authority?" Below is an excerpt from John Locke, an English philosopher during the 1600s. In this essay, John Locke talks about life in the state of nature, an imaginary condition in which people live together without government. As you read this essay, think about the problems which Locke says might be likely to happen if there were no governmental authority.

People are free in the state of nature. But why do they give up this freedom and subject themselves to the authority of government? The answer to this question is obvious: In the state of nature the enjoyment of freedom is very uncertain. People are always open to attacks from others. Life is dangerous and full of fear. That is why people seek out other people who have an interest in joining together. They do so in an effort to protect their lives, their liberty, and their property.

In the state of nature there are many things missing. First, there is no established system of law which all people have agreed upon and which all people know. And since there is no law, there is no standard of right and wrong which can be used to settle disagreements between people. Second, there is no judge with the authority to settle arguments. And third, there is no person or group of people who have the authority to enforce the law.

So then, this is why people join together under the protection of the authority of government. This is why every person agrees that punishment shall be administered according to the system of rules which the community has agreed upon. This is the source of governmental authority.

WHAT DO YOU THINK?

1. According to Locke, what problem would happen if there were no governmental authority?
2. According to Locke, what should be the source of governmental authority?

Student Handout 4: The Source of Authority of the United States Government

Now, let's think about why we have government and where our government gets its authority. As you read the following excerpts from the Declaration of Independence and the Constitution, try to find answers to the questions that follow.

THE DECLARATION OF INDEPENDENCE

In Congress, July 4, 1776: The Unanimous Declaration of the Thirteen United States of America

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any form of Government becomes destructive of these ends it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness.

PREAMBLE TO THE CONSTITUTION OF THE UNITED STATES

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

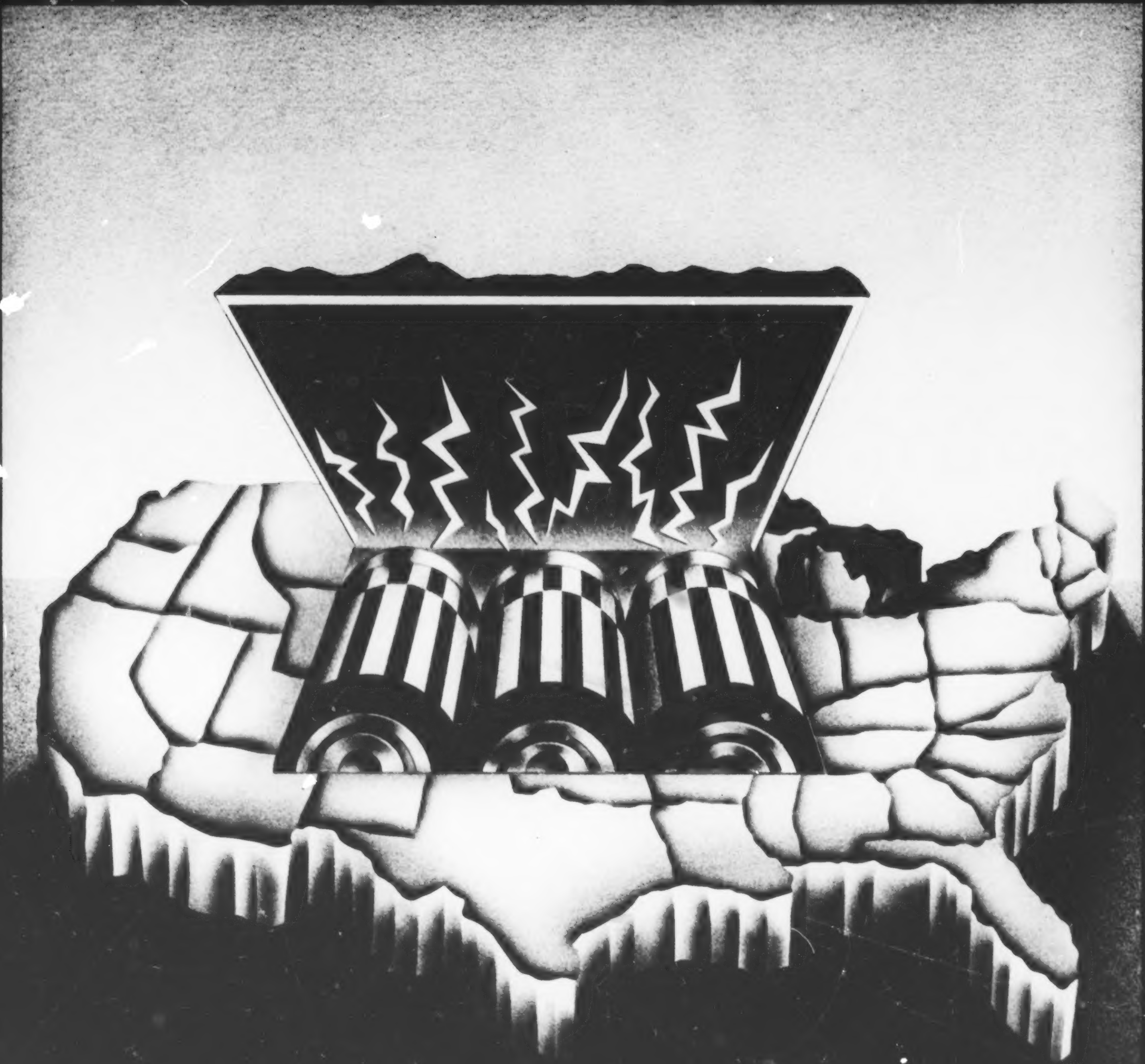
WHAT DO YOU THINK?

1. According to the Declaration of Independence, why do we have government and where does our government get its authority?
2. According to the Preamble to the Constitution, why do we have government and where does our government get its authority?

Some Final Questions

1. How might the Mayflower Compact and the thinking of John Locke have influenced our ideas about government?
2. What does it mean to say that the consent of the governed is the source of authority for our government?
3. List some examples of how government authority affects your daily activities.

This lesson on the Constitution of the United States is adapted from materials developed by the Center for Civic Education/Law in a Free Society.



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Eugene W. Hickok, Jr.

Power and Constitutionalism in America

Every student is taught very early in his or her education that government and politics is all about power. This pronouncement is usually followed by a discussion of the difference between power and authority and how government and politics is all about both. But what too many students are not taught is that the Constitution of the United States was written in response to the problem of power in government and politics and that anyone seriously interested in understanding modern American government and politics should begin by seeking to understand the Constitution.

I

The challenge that confronted the gentlemen who gathered in Philadelphia during the summer of 1787 is, in many ways, the challenge that continues to confront government in this country: "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." (*Federalist No. 1*, by Alexander Hamilton. All references to *The Federalist Papers* are to the edition edited by Clinton Rossiter for Mentor Books, New York, 1961.) The goal they sought was the reaction of good government. They agreed that the Articles of Confederation were deficient. They wanted more from government than the Articles, as they currently existed, could provide. The confederation was too weak. It did not provide for a national government, in any real sense, and the governments of the various states were of uneven quality, with corruption and economic disaster frequently undermining public authority. The system under the Articles lacked power sufficient enough to provide for good government. Change seemed necessary.

Recognizing this, however, the delegates to the Convention did not favor completely discarding the Articles either. Rather, most saw their responsibility to be limited to recommending revisions in the Articles. The idea was to improve the existing system rather than replace it.

Early into the proceedings, however, George Mason of Virginia offered the observation that "the present confederation [was] not only deficient in providing for coercion and punishment against delinquent states" but that "a government was necessary as could directly operate on individuals, and would punish those only whose guilt required it." (As reported in James Madison, *Notes of Debates in the Federal Convention of 1787*, Athens, Ohio: Ohio University Press, 1966, page 35.) Mason's argument followed quickly on the heels of Edmund Randolph's motion to establish a national government consisting of "a supreme Legislative, Executive, and Judiciary." (*Ibid.*, page 34.) Randolph's motion carried and it changed the terms of the debate for the remainder of the summer.

During that important summer the delegates met behind closed doors and crafted a new Constitution estalishing a new government. And while they debated many issues – some that nearly led to the dissolution of the Convention – at the very root of their deliberations was a concern for power. The challenge, as they understood it, was how to structure a government so that it would be both powerful enough to governeffectively yet not so powerful as to

Tony Griff

to pose a threat to the liberties the people had won during the Revolution. They envisioned the creation, in other words, of a competent but limited government. The majority of the delegates left Philadelphia in September 1787 feeling that they had indeed succeeded in establishing the sort of system that, as James Madison would later write, was structured so that it could "control the governed" while also being "controlled itself." (*Federalist No. 51.*)

The system established by the Constitution combines a rather sophisticated understanding of human nature with a deceptively commonsensical approach to governing in order to provide for the two concerns outlined by Madison. It offers a rational approach to governing that embraces a sort of rough and ready balance of authority and responsibility among the three "departments" of government by ensuring that each "department" possesses the "constitutional means and personal motives" to resist encroachments upon its legitimate authority. (*Ibid.*) Through the institutional device of separation of powers and checks and balances the government remains competent yet controlled. No single institution can encroach upon the other two and no single institution can become, in and of itself, a source of tyranny against the citizens.

It is through the institutional contrivance of separation of powers and checks and balances that the power of the national government is harnessed. But it would be an inadequate and erroneous reading of the Constitution and the intentions of those who wrote and ratified it to assume that separation of powers and checks and balances was the only, or even the primary vehicle, through which they had hoped to limit the reach of the new national government. In addition to this, they placed great emphasis upon the creation of an extended republic with active and sovereign states as safeguards against the gradual consolidation of power by the national government and the threat of public opinion itself becoming a source of tyranny.

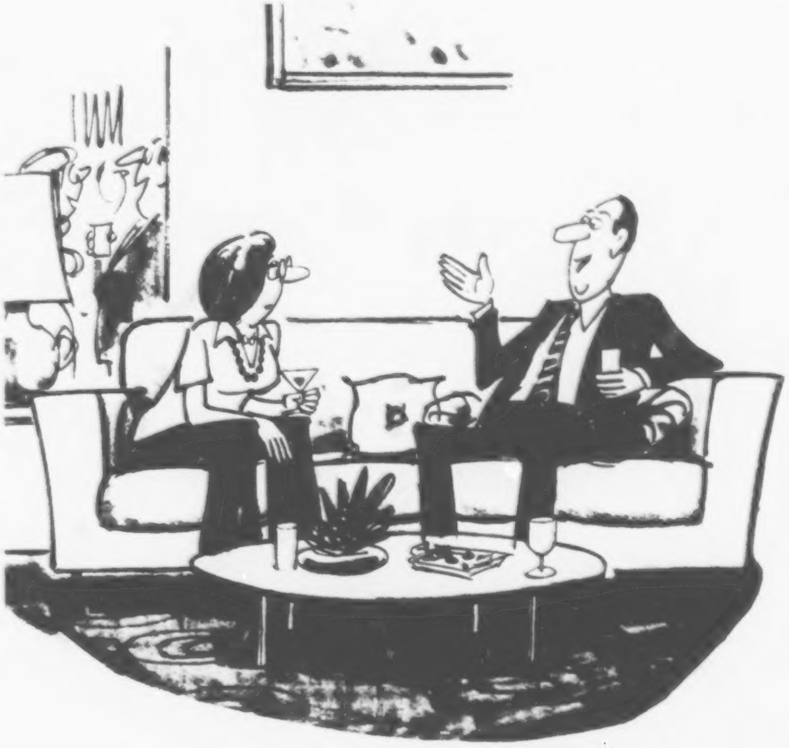
II

Perhaps the single most important work in American political thought is *Federalist No. 10.* Written by James Madison, it provides a logical and lucid explanation of the foundation of the constitutional design envisioned by the Framers. At its very root the essay concerns the management of power.

According to Madison, the great problem confronting popular government since the beginning of time has been the problem of popular opinion. In democracies, the opinion of the people counts. The problem with this is that sometimes the people can have bad opinions. In this essay, which first appeared in the New York press in 1787, Madison ties the problem of popular opinion to the existence of "factions": "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." (*Federalist No. 10.*) Factions pose a problem because they undermine order in a society, introducing "instability, injustice, and confusion." (*Ibid.*)

When people get together they find out that they have certain things in common, that they share certain attitudes, opinions, interests, and prejudices. Sometimes these attitudes, opinions, interests, and prejudices run counter to the long term interests of the society. Should this be the case and the citizens act upon their opinions, they behave in a fashion that runs counter to the good of society. The problem then is this: What can be done to ensure that men enjoy the freedom to have and express their opinions yet simultaneously protect the greater society from the possibility of periodic disruptions of the public order and challenges to the public interest?

Stated another way, in *Federalist No. 10* Madison is addressing the problem of the power of public opinion in a democracy. His essay reflects the observation that there are problems associated with democratic government – as he put it, problems flowing from the "excesses of democracy" – that cannot be dismissed casually if one expects that democracy to last for



"So what if the First Amendment does go? We still have twenty-five more."

Drawing by Dana Fradon; © 1979 *The New Yorker Magazine, Inc.*

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long and to provide for good government. The response to the problem, according to Madison, is a "large, extended commercial republic." A large republic offers the opportunity of dealing effectively with the problem of faction because it expands the size of the society, thereby ensuring that a greater number and variety of interest and opinions exist within the society and making it less likely that a single interest that is adverse to the public interest will become so popular as to pose a threat to the public good.

The genius of the design is that it embraces "a republican remedy for the diseases most incident to republic government." (*Ibid.*) You don't limit the right of the people to hold opinions. You don't limit the right of the people to associate with one another and to express their opinions. You don't try to limit the sorts of opinions people might have. Rather, according to Madison, you deal with this very difficult problem by creating a condition in which the effects of the problem are blunted.

There is another virtue to a large republic, according to Madison. The very size makes it difficult for opinions adverse to the interest of the society to become popular because it is difficult for individuals to find out that others share similar opinions. Unlike a pure democracy where citizens gather frequently to share opinions, in a large republic citizens sometimes are separated by great distances and decisions for the whole society are made by a body of representatives who "refine and enlarge" public opinion. Representation is critical to the effective functioning of the system. It ensures that the opinions of the people provide the foundation of governmental decision-making and that those decisions reflect the long term public interest rather than momentary inclinations that might from time to time hold sway in the society.

For Madison, then, the solution to the problem lies in the proper structuring of the system. It is structured so that public opinion remains at the very root of public decision-making. But it is public opinion that has been distilled and refined, having withstood the test of time after being held up to scrutiny by a number of people in a number of different settings. According to Madison, in such a system, only opinions that are in the long term interest of society can survive long enough to surface in the end as public policy.

There are obvious problems with Madison's design applied to the modern setting. The size of a republic doesn't really have much impact upon the ability of individuals to communicate anymore. And the influence of a mere handful of individuals upon the overall welfare of society is demonstrated almost daily. But the fact remains that for the most part Madison's design has held up well. Seldom do pernicious opinions become so pervasive in society as to gain control of the decision making apparatus of government. Moreover, the system remains responsive to public opinion.

III

The idea of a large republic was novel at the time of the framing of the Constitution. Until then most argued that popular governments, by definition, had to be small in order for the citizens to participate effectively and to monitor the activities of those they elect to public office. Madison effectively turned this argument on its head. But his argument for a large republic was contingent upon the states remaining important to the governing of society. Active states could provide the crucial link between the citizen and his government that was at the root of republican theory and could ensure that popular government could flourish even in a large republic.

Federalism – the ordering of authority among levels of government – emerged from the Constitutional Convention as the product of compromise. The distinction between a confederation and a unitary system of government was well known by the delegates in Philadelphia. As Gouveneur Morris explained it, the difference between a confederation and a unitary system was tied to the degree to which the government possessed adequate governing authority: "the former being a mere compact resting on the good faith of the parties; the latter having a complete and compulsive operation." (See *Documents Illustrative of the Formation of the Union of the American States*, 121 [C.C. Tansill, ed., 1927].) But the Constitution they crafted represented something of a hybrid or compromise between a confederal and a unitary system. The new national government was vested with sovereign authority in certain areas, defined by the Constitution itself. The states were to retain sovereignty in all other areas. The importance of the states to the successful functioning of the new system was outlined by Madison in *The Federalists.*

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.
>
> (*Federalist No. 45.*)

According to Madison, under the new Constitution the states would remain important because most of the activities of government would take place in the states.

For the Framers, federalism was considered important to the design of the new Constitution for several reasons. By ensuring that the activities in public life most directly affecting the people take place in the states and localities, popular participation in government is encouraged. This was considered essential to the political health of the fledgling republic. A democratic government would not long survive in the absence of an interested and informed public. By keeping government close to the people, federalism helps to ensure the political vitality of democracy. In addition, the Framers believed that active state and local government would improve the citizens' understanding of government, thereby contributing to a sense of public spirit or civic-mindedness that was considered essential to the health of popular government, especially in a large republic. Active states could provide the crucial link between the citizen and his government, helping citizens to understand the need to subordinate self-interest to the public interest by promoting a sense of community and civic virtue among the populace.

Federalism could provide the remedy for what many felt was the primary defect of the scheme of government outlined by the Constitution. The creation of a large republic posed something of a threat to popular government because it deposited too much authority in a government that was too distant from the citizens. But the system established by the Constitution limited the authority of the national government to "a few enumerated powers only," most contained in Article I, Section 8. Moreover, the states retained authority in all other areas. Political power was dispersed among governments, not consolidated, and the bulk of the political power was close, where the people could remain watchful of developments in public affairs.

Federalism provided something of a check on the power of the national government in another way as well. The Framers felt that the states would remain wary of the tendency of the national government to encroach upon their authority and would, therefore, attempt to check the exercise of power by the national govern-

(continued on page 49)

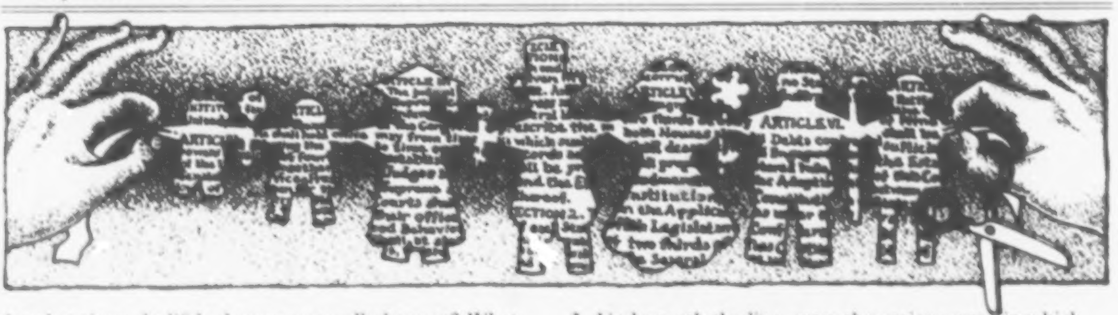
1932

1812

Power

It's My Life/Secondary

Jennifer D. Bloom


Susan Wise

At what times do life's changes naturally happen? What are these changes? Where does government intervene? Is this intervention fair? What are the governmental reasons for intervention? Are these good reasons? Where does government receive the authority to do this? What would happen if government didn't intervene?

The Constitution spells out possible governmental action that has been deemed necessary for the preservation of basic American values: justice, fairness, equality, freedom, etc. However, most students believe that only lawyers and judges concern themselves with the Constitution. This activity is an attempt to relate the Constitution and state and federal action to the lives of all students in the classroom.

It's My Life is an activity that has been used by lawyers in many Minnesota classrooms. Although the focus of the activity presented here is government power, the activity is also a very good way to introduce the wide variety of laws that exist, to teach about the legal implications of becoming an adult, to discuss the need for additional laws and the changes in existing laws, etc.

Objectives

1. Introduce governmental regulation of individual activities.
2. Consider the authority for governmental action: state and federal constitutions.
3. Consider the rationale for governmental action.
4. Compare individual rights with the public good.
5. Compare natural occurrence of life's events with the times of governmental action. (For example, the inability to continue working with mandatory retirement.)

This activity will take one class period (more if students are to analyze Constitution, Bill of Rights, etc.) It should be done as a general discussion with the entire class.

Procedure

1. Draw a long line on the blackboard. At one end write birth, at the other write death.
2. Instruct the students to brainstorm various events in their lives. Enter these events in chronological order at the top of the line. (Examples are learn to walk and talk, go to school, retire.)
3. Underneath the line, enter the various ways in which law has intervened in the life events. (For example, the law says children cannot get married before age 16.) Compare intervention with non-intervention. (For example, age at which a girl can become a mother.) Consider the reasons for intervention: public policy, possibility of successful intervention, etc.
4. Discuss the impact of technology on life events (birth, death, child bearing) and the frequent failure of law to keep pace with technology. (For example, invitro fertilization, life sustaining measures.)
5. Consider life without governmental intervention. Questions to ask:
   a. Does law unnecessarily interfere with the right to live one's life as one chooses?
   b. Does law protect some people's rights (minority rights to equal employment)?
   c. When does the public need and welfare override individual rights?
6. Discuss the "right to pursue happiness" as stated in the Declaration of Independence. Look over the life line, identify the times when the government interferes with one's pursuit of happiness. What does happiness mean? What did the signers of the Declaration of Independence mean by the word? Has the meaning changed over 200 years?
7. Look at the Constitution. Find sections that give government authority for its actions. Discuss the historical development of the public's need and governmental response. (For example, students realize that when they begin working they find they are paying income taxes. Discuss with them the development of taxes.)
8. Considering technological developments and legal trends, brainstorm the picture of a life line in the year 2187.
   a. What new laws might be necessary?
   b. Will governmental intervention be more or less?
   c. What individual rights might be in jeopardy?
   d. What individual rights might receive more protection?
9. Discuss possible citizen action that can help ensure a "happy" life line in the future.

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Liberty

The Religious Guarantees/Secondary

National Archives

The First Amendment contains two guarantees that relate to religion. The first of these prohibits government from establishing religion. But what exactly does that mean? A narrow construction of the establishment clause of the First Amendment would restrict its meaning to prohibiting establishment of a state church. However, in the first major establishment case brought before the Supreme Court, *Everson v. Board of Education*, 330 U.S. 1 (1947), the justices interpreted the clause in a broad manner. Justice Hugo Black's opinion in the case enunciates this construction with clarity:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect, 'a wall of separation between church and State.'

Federal courts have considered a wide variety of issues related to the establishment clause. These include:

- state aid to religion
- church intervention in state affairs
- state intervention in church affairs
- religion in public schools
- state aid to denominational schools.

Generally church and state are kept separate, but there are exceptions, such as legislative and military chaplains, chapel attendance at military academies, and "In God We Trust" on U.S. currency. The state also intervenes in some church affairs; for example, presidential proclamations of Thanksgiving, fasting, and prayer, and ambassadorial representation to the Holy See.

The issue of religion in public schools is of particular interest to educators, pupils, and parents. Topics that have emerged include Bible-reading and prayer in schools, teaching of evolution v. creationism, released time, and observation of holy days by schools. The immediacy of the issue is reflected by the proposed constitutional amendment regarding prayer in schools. Tuition tax credits for parents of students in private sectarian schools is also an issue of great current interest.

Procedures

The time of this lesson is one class period. Its objectives are:

- To identify and examine issues related to the establishment clause of the First Amendment.
- To consider the arguments and take a position on an issue.
- To trace the history of the interpretation of the establishment clause.

Divide the class into groups of five to six students. The question of state-mandated, sponsored, or ritualized group prayer came before the Supreme Court in the New York Regents school prayer case (*Engel v. Vitale*, 370 U.S. 421, 1962). The case dealt with a brief, nondenominational prayer authorized by the state. Below is a summation of the major arguments pro and con, extracted from the judicial record of the case. Give each group a copy of the arguments. (You may wish to have students research this and other cases before considering the arguments. See recommended readings.)

PRO PRAYER IN PUBLIC SCHOOLS

- Recognition of Almighty God in public prayer is an integral part of our national heritage.
- The Constitution of the U.S. is incapable of being so interpreted as to require that the wall of separation of church and state become an iron curtain.
- Judicial, legislative, administrative, and textual writers have agreed that what the framers of the First Amendment had in mind did not project the idea of a wall of separation between church and state into a "government hostility to religion" which would be "at war with our national tradition."
- A few seconds of voluntary prayer in schools acknowledging dependence on Almighty God is consistent with our heritage of securing the blessings of freedom, which are recognized in both the federal and state constitutions as having emanated from Almighty God.

CON PRAYER IN PUBLIC SCHOOLS

- Use of public schools and the time and efforts of teachers and staff of the schools violates the establishment clause.
- Saying prayers as teaching of religion and religious practices is contrary to the belief of many Americans and is offensive to them.
- Saying prayers results in exercise of coercion by school officials.
- Saying prayers as a sectarian or denominational practice favors one or more religions or religious practices over others and religion over nonbelief.
- Saying prayers results in divisiveness.
- Saying prayers is contrary to the prohibition against establishment, and the right to free exercise and the exercise of religion without discrimination or preference.
- Saying prayers exceeds the statutory authority of the schools and is in violation of their statutory duties.

Ask students to discuss each argument thoroughly and then take a position, pro or con. Encourage the group to reach a consensus rather than take a vote. A recorder from each group should report to the class on the group's position and the reasons for taking that position.

A similar exercise would be appropriate for such issues as compulsory flag salute, reference to God in the Pledge of Allegiance, or many other issues.

Free Exercise of Religion

The second guarantee relates to freedom of worship. Although the British colonies of North America were populated by many immigrants seeking a haven from religious persecution, on the eve of the American Revolution state-established religions appeared quite secure. However, a logical extension of the social contract theory that dominated eighteenth-century American political thought is that religious freedom is a natural right.

In 1776, the Virginia Convention adopted a new state constitution and a bill of rights, which included an article written by George Mason and amended by James Madison guaranteeing the free exercise of religion. In the years following the Revolution, under the Articles of Confederation, many states adopted constitutions or acts of toleration that moved to separate church from state and guarantee some measure of religious toleration among Christians. Of the thirteenth original states, only Virginia and Rhode Island moved beyond toleration of dissenting churches to guarantee religious freedom. When the Northwest Ordinance of 1787 was adopted, however, a bill of rights was included that proclaimed religious freedom in the territories.

At the Constitutional Convention, no statement was made concerning religious freedom. The only time the subject of religion specifically arises in the Constitution is in Article VI. In setting qualifications for federal office, the representatives determined that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

James Madison drafted a bill of rights for consideration by the first U.S. Congress. His original amendment pertaining to religion read: "The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of conscience in any manner or on any pretext be infringed."

Procedures

The lesson on free exercise of religion can be done in one class period.

1. Ask students to review the Northwest Ordinance; the Constitution, Article VI, clause 3; and the First and Fourteenth Amendments to the Constitution. Share with students additional background information found in the introduction to this lesson.
2. Duplicate and distribute copies of the Senate debate to the students. (The notes on the debate on the First Amendment [then called article three], are from *Journal of Proceedings of the U.S. Senate, First Session, First Congress*, which was printed in 1820 by Gales and Seaton in Washington and was based on the original minutes of the clerk of the Senate.) Direct students' attention to the section beginning "On motion to amend article third . . ." Tell students that the Senate was debating a House resolution that was very similar to the wording of the First Amendment as we know it: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed. . . ." Several alternatives were proposed. Ask students to write the First Amendment as it would have been worded if any of the three alternative wordings had been adopted. Discuss what the reasons may have been for rejection of the alternative wordings and the pros and cons of the various wordings. Ask for a show of hands for the wording that the students favor. Share with them Madison's original wording and have them discuss its relative merits.
3. Ask students to define religious toleration and religious freedom and to distinguish between them.

Journal of the Senate

WEDNESDAY, SEPTEMBER 2, 1789

The resolve of the House of Representatives of the 24th of August, one thousand seven hundred and eighty nine, "that certain articles be proposed to the legislatures of the several states, as amendments to the Constitution of the United States;" was taken into consideration. . . .

THURSDAY, SEPTEMBER 3, 1789

On motion to amend article third, and to strike out these words: "religion, or prohibiting the free exercise thereof," and insert "one religious sect or society in preference to others:"

It passed in the negative [i.e., failed].

On motion that article the third be stricken out:

It passed in the negative.

On motion to adopt the following, in lieu of the third article: "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society:"

It passed in the negative.

On motion to amend the article, to read thus: "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed:"

It passed in the negative.

On motion to adopt the third article as it came from the House of Representatives:

It passed in the negative.

On motion to adopt the third article proposed in the resolve of the House of Representatives, amended by striking out these words, "nor shall the rights of conscience be infringed."

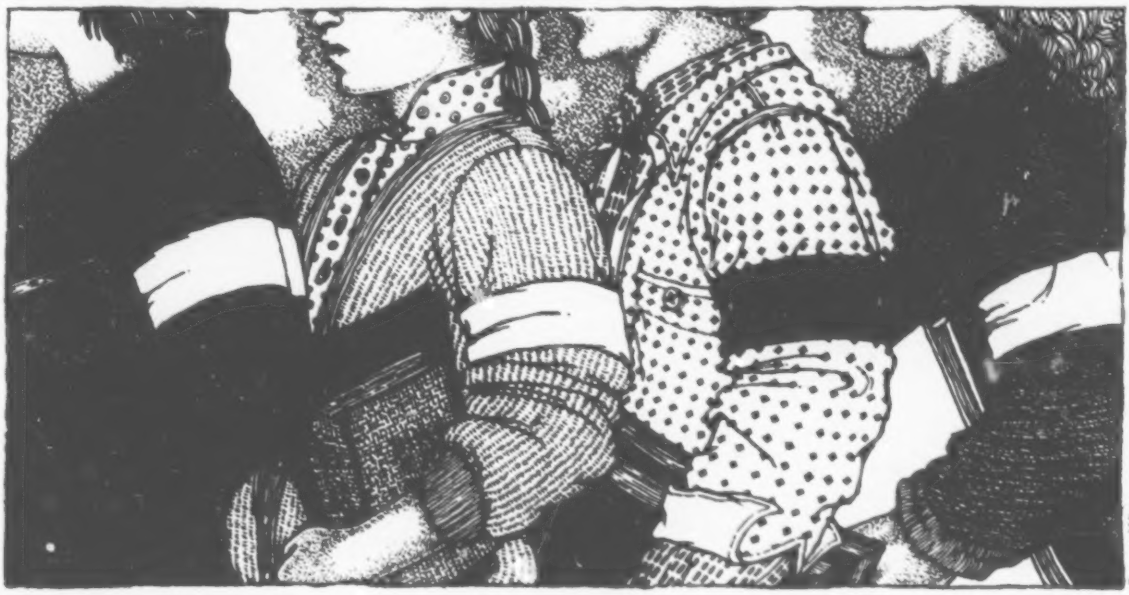
It passed in the affirmative. . .

These activities are adapted from The Constitution: Evolution of a Government, *a supplemental reading unit based on original source material and prepared by the National Archives. This and other National Archives units are available from SIRS, Inc. in Boca Baton, Florida.*

Power and Liberty

Balancing Power and Liberty in the School/Secondary

Kenneth A. Sprang



Susan Wise

The schools provide plenty of examples of the need to balance individual rights and the authority of a governing body. Here are three case studies that a lawyer or teacher can use to help students explore this complex and important issue.

The concept of liberty is "something more than exemption from physical restraint" (*Palko v. Connecticut*, 302 U.S. 319, 1937). It includes freedom of thought and lifestyle as well. Certain freedoms are guaranteed to Americans through the Bill of Rights of the Constitution. These include the well-known freedoms of the First Amendment – freedom of speech, religion, and the press – and the protection against unreasonable searches and seizures provided by the Fourth Amendment. The Supreme Court, which stands as the ultimate interpreter of the Constitution, and therefore as the guardian of our rights, has concluded that certain freedoms are so much a part of a civilized society and a system of "ordered liberty," that they deserve special protection, even though they are not specifically mentioned in the Constitution. One of the most important of these "fundamental rights" is the right to privacy.

Our basic rights are protected, among other ways, through the concept of "due process." Due process takes two forms – procedural due process and substantive due process. Procedural due process guarantees citizens notice and the opportunity to be heard. It requires that proceedings such as trials and hearings, and even student suspensions, be conducted in such a way as to assure fairness.

Substantive due process is the means by which fundamental freedoms found in the Constitution (which originally applied only to the federal government) are extended through the Fourteenth Amendment to the states. The right of substantive due process prohibits the government from taking any action which offends a fundamental right unless the government can show a compelling reason for doing so. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court held that an Oregon law requiring all children to attend public schools was unconstitutional, despite the state's desire to standardize education, because the statute interfered with the liberty of parents to direct the upbringing and education of their children by sending their children to private or parochial schools. Likewise, the Court rejected the arguments of the state of Nebraska in *Meyer v. Nebraska*, 262 U.S. 390 (1923), that its statute prohibiting the teaching of foreign languages was necessary to "promote civic development," and assure that the English language "be and become the mother tongue of all children reared in this state." The Court observed that the desire of the state to foster a "homogeneous people with American ideals" was easy to appreciate, but the statute was still unconstitutional because it interfered with fundamental rights of modern language teachers and parents.

The great challenge of our society and our system of government is to balance the preservation of rights so important to the concept of "ordered liberty" with the power that our government must exercise in order to preserve our way of life.

The following cases illustrate the difficulty of this balancing act.

Case 1

John Bodin, his sister Mary Beth, and Chris Eckhardt are students at Byron High School. Their parents are active in a group opposed to U.S. support of the Nicaraguan *contras*, which determined to wear black armbands during the holiday season and to fast on December 16 to publicize their position. On December 14, the administration of the school district adopted a policy that any student wearing an armband to school would be suspended until the student agreed to remove the armband. On December 16, John and Mary Beth wore armbands, while Chris wore his the next day. All three students were suspended. They did not return until after New Year's Day, when their protest period had expired. The students sued, alleging that their right of free speech had been violated. The school district argued that its action was based upon fear of a disturbance from the wearing of the armbands.

1. Should students have all the constitutional rights of any other citizen? What modifications, if any, would you suggest in their rights?
2. Would it make any difference if students at Byron High School were allowed to wear other items of political or social significance without punishment, e.g., "Right to Life" or political campaign buttons?
3. What rights must the Court balance in this case?
4. If you were the administration, how would you have handled the matter if you sincerely feared a disturbance at school as a result of the wearing of the armbands?
5. How would you decide this case if you were the judge? What remedy would you give?

Case 2

In April, Matt Fraser delivered a speech nominating a fellow student for president of Student Council. There were approximately 600 students in the audience, many of them 14 years old. Students were required to either attend the assembly or go to study hall.

During the entire speech, Matt referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. Prior to the speech, two teachers had informed Matt that the speech was inappropriate, and he should probably not deliver it.

Student response was mixed. Some were embarrassed, some hooted and yelled, while others used gestures to simulate the sexual activity alluded to in Matt's speech.

The Bethel High School Student Code, which was drafted by the Board of Education, provides that:

> Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

The morning after the assembly, Matt was called into the principal's office and notified that he had violated the code; he admitted his conduct. He was then suspended for three days and his name was removed from the list of candidates for graduation speaker. He appealed the suspension through the school's grievance procedure, but the school hearing officer upheld the suspension. Matt sued the school district, alleging violation of his First Amendment right of free speech. He also claimed that his right to procedural due process was violated because he was not informed in advance of the consequences of his actions.

1. Are constitutional rights unlimited? Do we have a right to say whatever we want, whenever and wherever we want? What kinds of limits, if any, would you set for the exercise of such rights?
2. Did students in the audience who were embarrassed have the right to not be exposed to the offensive speech? How should their rights, if any, be protected?
3. Is the Bethel policy reasonable and fair? Are there any changes you would make in the policy?
4. Was Matt's hearing and punishment fair, i.e., is there any merit to his procedural due process claim? Should the precise consequence of every infraction of the Student Code be stated in the code? Is that possible or reasonable?

Case 3

While doing "restroom and hall duty," Mrs. Jackson, a teacher at Piscatway High School, discovered Theresa Louise Olson and her friend Nancy Harper smoking in the restroom in violation of a school rule. Mrs. Jackson took the two girls immediately to the Assistant Principal, Mr. Choplick. Nancy admitted that she had violated the rule, but Theresa denied smoking in the restroom. In fact she insisted that she did not smoke at all.

Mr. Choplick then asked for Theresa's purse. He opened it and found a pack of cigarettes, which he took out. As he reached for the cigarettes, he noticed a package of cigarette rolling papers like those used with marijuana. Mr. Choplick then decided to look through the purse more thoroughly, and found some marijuana, empty plastic bags, a substantial sum of money, a list of students who owed Theresa money, and two letters that suggested Theresa was dealing in marijuana. On the basis of the evidence, Theresa was suspended from school for drug dealing and the evidence was turned over to the police.

At her hearing on delinquency charges, Theresa's attorney argued that the evidence was taken from her purse in violation of her Fourth Amendment right to be free from unreasonable searches and seizures.

1. Does the Fourth Amendment apply to searches by school officials like principals? to parents? Is the role of school officials, such as principals, more like that of parents or government authorities in dealing with students?
2. Should students in school be protected by the Fourth Amendment? Would you answer differently if evidence obtained from a search in school which did not comply with the Fourth Amendment prohibition against unreasonable search and seizure could only be used for discipline in school and not in juvenile delinquency proceedings?
3. Should school officials be required to get a search warrant before examining Theresa's purse? Would it make any difference if Mr. Choplick saw the butt of a gun rather than rolling paper? Why?
4. What rules would you develop for searches in school, e.g., searches of purses, lockers, personal searches?

The Court Speaks

ANSWERS TO CASE 1

This case is based upon *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in which the Supreme Court upheld the students' rights to wear armbands, noting that students and teachers do not "shed their constitutional rights . . . at the schoolhouse gate."

1. Yes, *Tinker* resolves the question of whether students have constitutional rights in school. However, other

cases have upheld some restrictions on those rights, e.g., children may be prohibited from purchasing pornography, in consideration of their youth.

2. The Court found the fact that the Des Moines school allowed the wearing of other political items, including an Iron Cross (Nazi symbol) "relevant," apparently in part because the fact weakened the school's argument that it feared disruption from the wearing of arm bands.
3. Obviously the balance here is between the students' fundamental right of free speech, and the necessary power and obligation of the school to provide a suitable, orderly environment for education.
4. Many answers are possible. One is that the school officials could have cautioned students against disruption. They could, of course, have disciplined any student who engaged in conduct beyond speech, e.g., fighting.
5. The Court decided for the Tinkers. This question could, however, generate lively discussion. It is a good opportunity to illustrate the importance of the principle of free speech by reference to the protests of the 1960's and current protests against the arms race, Central America policy, etc. Expression of public opinion is critical, of course, to the preservation of our "ordered liberty."

ANSWERS TO CASE 2

This case is based upon *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986). (See the Court Briefs section of this magazine for more on this case.) The Court found that the objectives of public education include the "inculcation of fundamental values necessary to the maintenance of a democratic political system." These fundamental values must take into account the sensibilities of others, including fellow students. The freedom to advocate unpopular or controversial views is to be balanced against the society's interest in teaching students the boundaries of socially acceptable behavior. The Court also noted that the same latitude of free speech allowed for adults need not be permitted in public school. Thus, the Court concluded that the First Amendment does not prevent school officials from "determining that to permit a vulgar and lewd speech. . .would undermine the school's basic educational mission," and that the Constitution does not compel "teachers, parents and elected school officials to surrender control of the American public school system to public school students."

1. No. The history of interpretation of First Amendment rights clearly shows that certain regulation is acceptable. As one famous jurist noted, the right of free speech does not give one the right to yell "fire" in a crowded room. State and local governments can impose reasonable restrictions on the time and place of parades or rallies, for example. The teacher or resource person may wish to discuss with students how one draws the delicate line between reasonable restriction and deprivation of the fundamental rights.
2. This is another balancing task. The issue supports the legitimacy of the school rule. Students should be aware that constitutional law often involves preserving the rights of the minority, as well as balancing individual liberties against the power of the state.
3. There is no right or wrong answer here. The Court found no constitutional violation in the policy.
4. The Court found no due process violation, in part because the punishment was not severe. Matt actually only served two days of his three day suspension. For further information on the applicability of due process to student suspensions see *Goss v. Lopez*, 419 U.S. 565 (1975), which establishes guidelines for due process in suspending students.

ANSWERS TO CASE 3

This case is based on *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Supreme Court case most applicable in the discussion of drug testing in the following unit. In addition, it is a helpful teaching tool, as the *T.L.O.* Court continually articulated the need to balance the rights of students with the needs (and the exercise of power to meet those needs) of the school.

1. Prior to *T.L.O.* some courts had found that schools stood *in loco parentis* (in the place of parents) and did not act as agents of the state. Since the Constitution only controls governmental action, such courts reasoned that it did not apply to the action of local school officials. The *T.L.O.* Court rejected that analysis, however, holding that school officials do act as representatives of the state.

   The Constitution does not generally affect private action. Consequently, parents' searches of children's belongings are not constitutionally prohibited.
2. The Court concluded in *T.L.O.* that the Fourth Amendment does apply to searches by school officials.
3. In *T.L.O.* the Court did not require a search warrant. The Fourth Amendment protects against "unreasonable" searches and seizures. However, the Court observed that the reasonableness of a search depends "on the context within which a search takes place." Determining the standard as to what is reasonable in the school context involves balancing the student's legitimate expectation of privacy with the need of the school to maintain discipline so that learning can take place.

   The Court held that "school officials need not obtain a warrant before searching a student who is under their authority," observing that a search warrant is unsuited to the school environment, since it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Inasmuch as the Court concluded that Mr. Choplick's search without a warrant was constitutional, based on his observation of the rolling paper, a search triggered by seeing the butt of a gun would clearly be constitutional. Consider spending time in discussion with students, however, as to what level of suspicion of illegal activity is necessary to justify a search, i.e., at what point does the interest of the school outweigh the student's right to privacy?
4. The Court concluded in *T.L.O.* that the school setting requires "some modification of the level of suspicion of illicit activity needed to justify a search." Observing again the need to balance the duty of the school to maintain order with the privacy interests of the students, the Court rejected the strong "probable cause" standard usually imposed on law enforcement officials. Rather, it applied a two-part test: 1) whether the initial search was justified at its inception, and

2) whether the actual search conducted was "reasonably related in scope to the circumstances which justified the interference [with the student's privacy right] in the first place." Usually the search is justified at its inception when there are reasonable grounds to suspect the search will turn up evidence that a student has violated or is violating either the law or the rules of the school. The scope of the search will generally be permissible when the steps taken are reasonably related to the objectives of the search and not excessively intrusive in light of the "age and sex of the student and the nature of the infraction."

In *T.L.O.*, the Court concluded there were two searches. The first was the search for cigarettes, which was reasonable at its inception based on the smoking incident. The second was the search for marijuana-related materials, which was triggered by discovery of the rolling paper. Both met the Court's two-part test.

The Court specifically reserved any decision on the issue of other kinds of searches, e.g., locker searches. Generally such searches have been upheld if students are on notice of the possibility of searches or if the school has taken some other clear action to take away any reasonable expectation of privacy. The criterion is the same in evaluating all searches: Does the student have a reasonable expectation of privacy? If the search invades the student's privacy, it is reasonable only if the need for the search outweighs the student's right to privacy. *T.L.O.* has now provided at least some definition as to what is "reasonable" and under what circumstances the needs of the school will prevail.

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Power and Liberty

The Exercise of Power: Developing Reasonable School Policies/Secondary

Kenneth A. Sprang

Susan Wise

The exercise of the power of the state (and resulting encroachment on individual liberty) is probably felt by students most keenly in the school. Schools develop and implement numerous policies, from requiring certain courses to graduate to prohibiting students from smoking. One of the most controversial issues facing society today is that of mandatory drug and alcohol testing. This issue has triggered lawsuits and heated debate from coast to coast among those, on the one hand, who are concerned with the invasion of the state into the privacy of their bodily functions, and those, on the other hand, who believe such testing is necessary to eradicate the epidemic of drug and alcohol abuse facing our society.

These activities can be conducted by a teacher or a lawyer or other law professional. The discussion of the proposed drug-testing policy might be accomplished in one class period. Having students develop a policy and do the concluding activities will take longer

What Is the Problem and How Do We Cope?

Lead the class in a discussion of the problem of drug and alcohol abuse. Perhaps students can do research into the scope of the problem, e.g., the financial cost, the number of persons affected. The issue is arguably not so much one of morality as health and safety. Addiction is an illness and it is threatening the well-being of the society.

1. What kind of problems are created by alcohol and drug abuse?
2. If such abuse costs taxpayers and consumers money through accidents, days missed from work, and similar

1819

consequences, do the schools or society in general have a right to try to stop the abuse?

3. Do abusers have a "fundamental right" to use alcohol or drugs since it is "their body," if their use affects the well-being of society?
4. Abuse of drugs or alcohol is an illness that can be treated. Some persons appear to be genetically predisposed to addiction. Unfortunately, the addict or alcoholic rarely realizes that he or she has a problem until it is too late. In light of those facts, is it legitimate for the government, e.g., the school, to seek to identify persons with substance abuse problems?
5. How might you go about identifying such usage? required physicals for all students every year? every quarter? spies in the student body? random testing of students?
6. Consider mandatory urinalyses. Should these tests be given to all students or just randomly? Should some "reasonable cause" be present before requiring the test? What about random testing using a lottery, e.g., when a student's number comes up the student must submit to testing? What about testing of certain groups who are visible, such as athletes? Is such testing fair?

A SAMPLE POLICY

In the inset is a sample policy requiring random drug testing for athletes. Students should read the policy carefully, then discuss the following questions.

Discussion Questions

1. Is it reasonable to apply the test only to participants in the athletic program?
2. What rights of students are affected by the policy? What rights or obligations of the school are involved?
3. Does the school have the right to regulate student activity away from school? What if such activity affects student behavior at school?
4. Note that the policy prohibits a student from having in the student's urine "any detectable trace of any illegal drug or alcohol" regardless of effect. Does it make any difference that the offense is having drugs or alcohol in the blood, rather than actually using the substances?
5. Is there any information you would like to have about the tests to be used in doing the urinalyses?
6. Look at the required rehabilitation program. Is there anything there that concerns you with regard to "due process" or "ordered liberty?"
7. Is the means of choosing the persons to be tested fair?
8. What problems do you see in having school personnel witness the urine collection? Why would the school include such a provision? What rights are at issue?
9. Assuming for discussion purposes that the policy is fair, is sufficient due process provided when someone tests positive?
10. What issues are raised by the option for the student to secure a second test at his own expense? What if the student has no money for the test? Who should pay for such a test?
11. Since the policy is therapeutic in that positive results cannot be used as evidence in support of suspension or other discipline, shouldn't it be permitted?

ANSWERS AND GUIDELINES FOR DISCUSSION

1. Perhaps not. The equal protection clause of the Fourteenth Amendment requires the government generally to treat all citizens equally. This "discrimination" against athletes might violate that constitutional provision.
2. Students' right to privacy is affected. The courts have found that students have no fundamental right to participate in extracurricular activities.
3. The school has a limited right to govern behavior outside of school if the out-of-school activities have some effect on the school or are related in some way. There is some question here, however, regarding whether the policy reaches too far. On the other hand, the policy prohibits having drugs or alcohol in the blood while in school; it does not expressly prohibit usage.
4. The offense here is in the nature of a "status offense" in which one is penalized for his status or condition. Some statutes allowing prosecution of "vagrants" and other persons based on status alone have been found to be unconstitutional. There is some question regarding the appropriateness of prohibiting the presence of the substance in the blood even if it has no physiological effect.
5. The students should look carefully at the technology of the test. As of this writing, the test used in the policy poses a serious risk of showing a positive reading when, in fact, the student has not used drugs or alcohol. The gas chromotography test, which is more accurate, may cost $300 or more per test. If the test is not accurate, there may be a due process violation. The skill of those administering the test should also be questioned, as well as guarantees that samples are actually those of the person being tested.
6. Failure to participate results in permanent suspension from the program – that may go too far to survive constitutional muster. In addition, rehabilitation therapy is required of all students, even though the drug or alcohol usage does not merit full-scale therapy.
7. The lottery seems as fair as any random system. However, testing based upon reasonable cause is probably necessary to be constitutional.
8. Here lies the most glaring privacy issue. Certainly there is an invasion of privacy in the test itself. The problem is exacerbated when a teacher watches the student collect the sample. On the other hand, how else does the school ensure that "clean" students are not switching samples with drug and alcohol users?
9. The policy seems to provide reasonable due process given the hearing and appeal rights.
10. The second test helps to preserve due process. However, if a student cannot afford the test and thereby is precluded from proving his innocence, the policy arguably fails to be fair and due process becomes a function of one's economic standing. Perhaps the school should pay if a student cannot or will not.
11. From a humanitarian perspective this proposal makes sense. However, a humanitarian motive cannot justify encroachment on the fundamental right to privacy unless the motive is compelling. Discuss with the class whether the need to help students who are

substance abusers is "compelling" enough to justify the invasion of their privacy.

Developing a Policy

It is easy, of course, to sit back and criticize school policies. It is, however, much more difficult to develop them. How does one go about it?

1. Divide students into small groups of 4-5. First have them interview school administrators and/or school board members to find out how the district develops policies. What kind of information do they seek? What considerations must they weigh?
2. Have each group write a drug testing policy that is fair and strikes a balance between the rights and power of the school and the rights of students. The policy should, of course, be constitutional. (The model policy is almost certainly constitutionally defective.)
3. Have each group present the policy it has developed to the class. Let the class select the best policy based upon criteria of fairness, effectiveness, and constitutionality.

Concluding Activities

1. Have students work in small groups to analyze current school policies for fairness, effectiveness, and constitutionality. Alternatively, students may want to develop written policies where none exist. Examples include:
   - School policy on drug and alcohol usage

Board Policy '86-'87-149
Passed January 20, 1987

WHEREAS the Board of Education of Earlham School District, Ohio, recognizes the existence of a severe and growing problem of substance abuse among school age persons in all areas of the country including this district, and,

WHEREAS the board has been alarmed in recent months by local and national news reports of young athletes who have died or become seriously disabled as a result of drug or alcohol use during or following participation in sports, and,

WHEREAS the board is mindful of the possibility of liability which may be incurred by it in the event that a student is allowed to participate in school-sponsored athletic events and suffers injury during the course of such participation due to his/her use of drugs or alcohol, and,

WHEREAS student athletes serve as role models for their peers in the schools and are often imitated in their behavior and attitudes, and,

WHEREAS participation in extracurricular athletics is a privilege not a right of students, we therefore enact the following policy:

1. Effective immediately, all participants in all extracurricular sports programs of this district at the high school level shall be subject to drug and alcohol testing procedures as specified herein;
2. Voluntary participation by a student in any such program shall henceforward be deemed to constitute consent of the student to these testing procedures;
3. Failure of a student to comply with any testing procedure authorized by this policy shall be cause for immediate and permanent ineligibility for participation in any school-sponsored extracurricular athletic activities.
4. These policies shall apply at all times during which a student is participating in any aspect of any extracurricular sport including but not limited to competitions, practice sessions, informal drills, instructional sessions, trips or meetings whether during schooltime or off-school hours or during vacations.
5. It shall be impermissible under this policy for any participant in any extracurricular athletic event to have in his/her urine any detectable trace of any illegal drug or alcohol regardless of the physiological effect which such trace may cause.
6. For these purposes, "illegal drugs" shall include any non-prescribed controlled substance as defined in Chapter 3719 of the Ohio Revised Code.
7. The superintendent of schools in cooperation with other school personnel will immediately develop a program of off-premises, off-school hours, substance-abuse training suitable for groups of students referred to counseling under this policy. The counseling will be provided at no cost to the student. The superintendent shall determine the time, place and content of a program under which each referred student receives not less than twelve (12) hours of training. A student referred to counseling will remain eligible to participate in sports except that any such student who fails, without an excused absence, to attend or fails to participate in good faith in any scheduled counseling session shall be immediately and permanently barred from further participation in any school-sponsored extracurricular athletic activities for the remainder of his/her high school career. Absences will be excused only in the case of verified illness of the student or serious family emergency.
8. Once each week during any week in which school-sponsored extracurricular athletic events or practices are in progress, a committee composed of the school's athletic director, vice principal and a third faculty member designated by the principal by random draw will select for alcohol/drug testing the names of five percent (5%) of the total number of students then participating in extracurricular athletics.
9. As soon as possible upon determination of the names of the students to be tested, the students selected shall be notified and required to comply with testing procedures.
10. Athletic coaches or other authorized school personnel shall witness the collection of urine

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- School policy on censorship of newspapers, plays presented to the public, and similar material
- Policy governing students' access to automobiles during the school day
- Policy governing students' freedom to leave the campus during the day
- Policy governing usage of the school by outside organizations

2. Invite the school board's attorney to review the student-drafted policies and discuss them.
3. Have students write about the problem of substance abuse and their reaction to the concept of mandatory drug testing.
4. Have a panel discussion, perhaps including the principal, a school board member, and perhaps a student who has been disciplined under the policy. If the policy is directed toward athletes, perhaps the athletic director might be invited to participate on the panel.
5. Look at the Bill of Rights of the Constitution. Does it provide sufficient protection for all citizens, or perhaps too much. Our society has changed since the Constitution was drafted. What changes, if any, would you make in the Bill of Rights?

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specimens from subject students to assure that valid samples are obtained.

11. Testing for drugs/alcohol as specified above shall be done by appropriate personnel of the student health office by the use of the EMIT d.a.u. (R) urinalysis test pursuant to the manufacturer's testing instructions.
12. If any such urine test shall indicate the presence of substances in violation of this policy, the athletic director shall immediately give the subject student and his/her parent(s) or guardian(s) notice of required substance abuse counseling as a condition of participation in any school sports activity pending further testing and/or administrative review as provided below. Said notice shall contain a statement of the student's rights under this policy.
13. Neither the result of any test administered under this policy nor a requirement of counseling under it shall be made public by school personnel except as it may be necessary to further investigate the matter under consideration. No indication of any action under this policy shall be placed in the student's permanent school record.
14. Any student whose test under this policy is positive for the presence of drugs or alcohol may apply to the athletic director of the school for permission to secure a confirmatory laboratory test at the student's expense. The confirmatory test must be requested by the student within forty-eight (48) hours of the receipt of the notice specified in Section 12 of this policy and must be performed upon a verified urine sample provided to the laboratory within seventy-two (72) hours of the receipt of said notice in order to insure that the drugs or alcohol detected in the first test have not cleared the system prior to the second test. The laboratory and the method of testing to be used must be approved in advance by the athletic director. If a timely and properly administered laboratory test is negative for the presence of the drug or alcohol detected by the original test, the first test result shall be considered null and void, and the student shall not be required to participate in counseling under this policy.
15. If requested to do so within (7) days after a Notice of Required Substance Abuse Counseling under paragraph 12 above is delivered, the principal shall, within fourteen (14) days of the date of the notice, conduct an informal hearing for the purpose of determining whether the student shall be required to participate in substance abuse counseling as a condition for participation in all extracurricular athletic events. At such hearing the student shall bear the burden of establishing by clear and convincing evidence that requirement is not warranted. The student and/or a parent or guardian may present affidavits (including his/her own) or other evidence as may be pertinent. The school shall be represented in such proceedings by a faculty member who may also introduce affidavits or evidence pertinent to the determination. Neither side shall be represented by counsel, and strict rules of evidence shall not be applied. Within five (5) days after the hearing the principal shall announce his/her decision whether or not to affirm the requirement of counseling. His/her decision shall be final.
16. Failure to timely request a hearing as provided in paragraph 15 shall be deemed a waiver of such hearing and shall result in the automatic imposition of a requirement of counseling as a condition for participation in extracurricular athletic activities.
17. The results of any test administered under this policy shall not be cause for or used as evidence in support of any academic suspension or expulsion from the curricular program of the school and shall not subject the student to any disciplinary procedure.
18. Nothing in this policy shall prevent the investigation, suspension or expulsion under the policies of this district or laws of the state of Ohio of any student reasonably suspected of drug or alcohol use where such suspicion arises independent of any test conducted under this policy.
19. Notice of this policy and its immediate effect shall be posted prominently in all schools in the district forthwith.

This policy was developed by the Ohio Mock Trial Program for use in its 1986-87 Mock Trial Competition.

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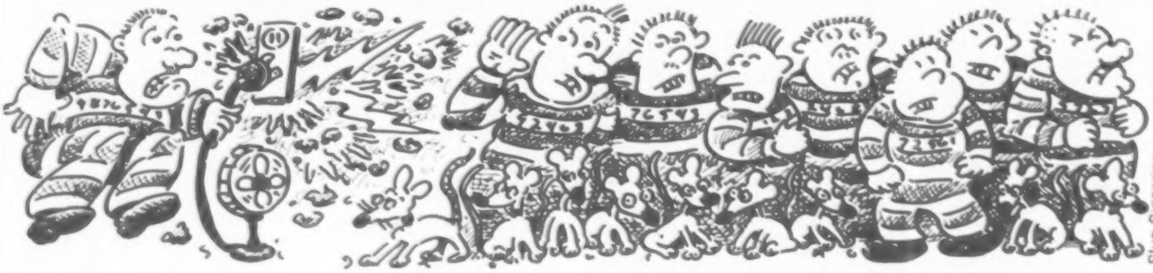
Power

Separation of Powers/Secondary

Margaret Fisher



Slug Signorino

Objectives

This lesson examines the judicial powers in relation to the concept of separation of powers under the United States Constitution. It would be particularly appropriate for a judge or a government official, but it could be offered by any resource person.

Procedure

Pass out "You Be the Judge" to the students and have them work in groups of five. Each group or "circuit" should appoint a chief judge to write down its ruling and order and report back to the class.

Poll each circuit, asking each what it would do. For those circuits ruling in favor of inmates, write each remedy ordered on the borad.

They may include:

1. Repair the building.
2. Replace the furnace and electrical system.
3. Install air conditioners.
4. Have regular exterminations for vermin.
5. Install fire equipment and comply with fire marshal regulations.
6. Reduce the number of inmates, perhaps by putting a "cap" or limit on the number of inmates allowed in jail.
7. Hire and train more personnel with pay raises for all staff.
8. Order the city council to appropriate the necessary money.
9. Close the jail/release the inmates.

If students do not list all these remedies, add the missing ones to the board as typical orders a judge might make in the case.

All but number 8 are executive actions. Number 8 is a legislative action. Arguably, 7 and 9 can be viewed as legislative actions too.

While courts are hesitant to order the legislature to appropriate the necessary money directly, courts are not hesitant to issue orders that require the expenditure of funds.

Discussion

Ask students if they agree or disagree with the broad orders that a court may issue in this case to remedy the unconstitutional conditions.

The United States Supreme Court in two recent cases has instructed the federal courts to defer more to the expertise of the executive branch in running facilities and not to substitute its own view of how to run the day-to-day operations of an institution. But if the facilities violate the Constitution, how can the Constitution be enforced? What alternatives might there be to a court order?

"You Be the Judge" Handout

The city of Highlands operates a jail that was constructed many years ago. After 62 years of continuous use, the jail facilities are in disrepair, the furnance does not adequately heat the building, the electrical system poses a potential fire hazard, and the temperatures in the summer months are unbearable. Because of severe overcrowding, inmates sleep on the floor on filthy mattresses. All manner of rats, mice and some unrecognizable rodents and insects also inhabit the jail. Assaults, rapes and suicides are common, resulting in great part from the lack of staff. Staff turnover is high due to low pay and poor working conditions. The fire marshal has condemned the building, the housing department has issued thousands of citations against the jail, and the health department has ordered the facility closed.

Of course, nothing has been done because all of these departments, like the local jail itself, are part of the city of Highlands. The mayor has stated that the sitation is deplorable, but there is nothing he can do because the city council refuses to set aside funds to make the necessary repairs.

Four inmates bring suit to require the city to bring the jail up to constitutional standards [No "cruel and unusual" punishment] or, in the alternative, close the jail.

Directions: You are the judges in this case. What will you decide? If you rule in the inmates' favor, what specific orders will you make?

Prepared for Seattle's Metrocenter YMCA by Margaret Fisher, based on criteria developed by the Today's Constitution and You Curriculum Committee.

1823

COURT BRIEFS

The Supreme Court Speaks

Decisions range from separation of powers to Miranda rights, election law, and pregnancy in the workforce

Albert J. Cunningham
and Carol Coplan

Photo credits: Mimi Forsyth

Recent decisions by the U.S. Supreme Court show the very diverse range of cases the Court deals with. Topics ranged from a separation of powers issue affecting the whole national government to primary elections in some states and the free speech rights of one student.

Congress Hasn't Power to Execute the Law

After years of struggling for a way to control burgeoning national spending and a debt growing ever more huge, Congress passed the Gramm-Rudman law to restrain annual expenditures. Alas, the law did not survive the test of constitutionality—at least in regard to its automatic deficit reduction provision.

In an important case in the 1986 term, *Bowsker v. Synar*, 55 U.S.L.W. 5064 (1986), the Supreme Court decided 7-2 to rely upon a separation of powers reasoning to disallow the automatic deficit reduction provision.

The Gramm-Rudman Act granted to the comptroller general the authority to make estimates of needed budget cuts in specific federal programs, based upon information received from the Congressional Budget Office and the Office of Management and Budget. Once the comptroller general had reviewed the reports, predicted the size of the deficit, and decided upon cuts, he would send his funding cut recommendations directly to the president. The law then required the president to order that the cuts be made, and that spending on the various programs cease as soon as the limits were realized.

Chief Justice Burger wrote the majority opinion, which clearly noted that the comptroller general can be removed from office by Congress. In effect, Congress is granting the authority to execute the laws to one of its own. Under the Constitution, Congress' only method of removing an executive officer is by impeachment, but Congress can simply fire one of its own employees. In this case, Congress has attempted to empower one of its own with executive authority, and the Court would have none of it.

In addition, a comptroller general who would have the authority to tell the president of the United States where to cut programs and by how much, would be making national policy. Only both houses of Congress, at the direction and advice of the president or on their own, ought to be in the business of setting national policy. It is unconstitutional for Congress to delegate its policymaking powers to an officer it appoints.

The entire Gramm-Rudman act did not fall, because the drafters inserted an alternative method of reducing spending, whereby Congress votes on cuts that have been recommended not by the comptroller, but by the Office of Management and Budget and the Congressional Budget Office. Congress takes the recommendations, passes a joint resolution mandating the cuts, and the reductions are made. This method passes constitutional muster because Congress is setting the policy.

Meanwhile, the deficits grow. Stay posted. —AJC

Students—Don't Tinker with School Administrators

Matt Fraser was a high school student who gave a nominating speech for a fellow student running for student office. He gave his speech in front of a large student auditorium audience. He characterized his chosen candidate as being "... firm—he's firm in his pants, he's firm in his shirt...", etc.

The school administrators did not care that Fraser's little speech was political. They did care that it was loaded with sex.

Fraser gained a three-day suspension from the high school administration. Also, he was not allowed to speak at his graduation, even though he had been on the list of speakers.

This student sued and won damages both in federal district court and in the court of appeals, but in *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986), the Supreme Court voted 7-2 to reverse.

Fraser relied upon the theory that his school had violated his First Amendment right to a student's freedom of speech, as established initially in the famous 1969 case, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Not so, said the Supreme Court. In *Tinker* students wore black armbands to protest the Vietnam War, and the essence of the message was a statement of political belief. Here, the student's speech was full of sex, which did not advance his political belief in his candidate. On the contrary, he violated the sensibilities of his fellow students, and his comments were "plainly offensive."

In other settings, such sexual language might very well be protected by the First Amendment. However, school officials have a societal duty to protect children against sexually vulgar and offensive speech. This they did, and the suspension was permissible. The majority noted that the school's actions against Fraser were independent of the politics of the election, but focused on the sexual language.

The two dissenting justices were concerned that Fraser did not have adequate notice that he would be suspended if he gave his speech (Justice Stevens), and that there was no showing that the speech was in fact disruptive (Justice Marshall).

In drawing the logical distinction between purely political speech as protected and sexually vulgar speech as unprotected, the Court again provides a guideline for school administrators nationwide. Along with the recent *T.L.O.* search and seizure case, the Court is telling school officials that they do have the responsibility and the power to control the school environment to make it a reasonably safe and conducive environment for learning. —AJC

The Right of a Homosexual to Be Let Alone Is Not Guaranteed

In a very controversial 5-4 decision, the Supreme Court has ruled clearly that homosexuals who engage in private consensual sodomy have no constitutional protections under the Fifth and Fourteenth amendments' due process clauses (*Bowers v. Hardwick*, 54 U.S.L.W. 4919, 1986). In this case, a homosexual man was charged with violating a Georgia anti-sodomy law. He was charged with violating it in his own bedroom, and the act was consensual.

The Supreme Court, in deciding this case, reversed the Eleventh Circuit, which had held a rather predictable view that such conduct "of a private and intimate association" could not be regulated by a state and was protected by the Ninth Amendment and the Fourteenth Amendment due process clause.

For the highest court to deny such privacy to a homosexual engaged in such activities in his or her own bedroom was a great surprise to many. After all, isn't this the Court which has championed individual privacy in matters such as abortion, marriage, raising children, and begetting them?

The majority gave several reasons for the decision. The Chief Justice noted that there have been laws against homosexual activity throughout Western history which ought not be disregarded. The majority refused to find that homosexuals have a fundamental right to engage in such activity because many state laws prohibiting such conduct would be undone, laws which have been on the books over a long period.

Justice White cited the history of such laws. Sodomy was illegal at common law and in each of the original colonies. It still is in twenty-four states and the District of Columbia. He also answered the argument that any private sexual conduct between those who consent is beyond the reach of state law. He acknowledged that courts have held that some private sexual conduct is beyond the reach of the states, but said that courts have generally not limited states which made sodomy by homosexuals a crime. Though gay rights activists assert that there is a constitutional right to engage in sodomy, no such right exists.

The fact that the conduct occurred in the person's own home is not the determining factor, said the Court. Other crimes, such as use of drugs at home, are not protected. Neither are adultery and incest.

The majority agreed that a notion of time-tested morality provided a rational basis for the statute to be held constitutional.

Justice Powell, although voting with the majority, considered an aspect of the law which might render it unconstitutional. The penalty for violators of up to 20 years in prison, he said, could be a violation of

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the Eighth Amendment prohibition against cruel and unusual punishment. (No one had raised this point previously in the case.)

The dissenting justices made several arguments against the law. Justice Blackmun argued that this man has the right to be left alone—to have his privacy. This case means that Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives. He noted that the Georgia anti-sodomy statute also applies to heterosexual conduct. (A heterosexual couple had been parties in this case at the beginning. However, lack of legal standing and failure to state a claim upon which relief could be based resulted in the district court's dismissal of their claim.)

The dissenters argued that the state of Georgia had no legitimate reason to enforce this statute against homosexuals but not against heterosexuals, except to demonstrate prejudice. Justice Stevens stated that previous cases had ensured the privacy of heterosexual couples, so that this Georgia statute could not be enforced against everyone, but only against homosexuals.

We have surely not heard the end of this rather disturbing case. —AJC

The Supreme Court Takes a Look at Primary Elections

The fall of 1986 produced two important cases which will have an effect on the manner in which primary elections are regulated by many states. In *Ralph Munro, Sec. of State of Washington v. Socialist Workers Party, et al.*, 55 U.S.L.W. 4052 (1986), the Court upheld in a 7-2 decision a Washington state law which requires that a candidate must receive a minimum of 1% of the votes cast for that particular office in the primary election in order to be placed on the general election ballot.

The state of Washington holds an open primary in which the voter may cast a ballot for any candidate of his or her choice, irrespective of party affiliation. The particular aggrieved person, Dean Peoples, was one of 32 candidates for U.S. Senator. He received nine one-hundredths of the vote, and so was not placed on the general election ballot.

The Socialist Workers Party appealed, claiming that the right to First and Fourteenth Amendment freedom of association was violated and that the state law ought to be invalidated. The district court did not agree, but the Ninth Circuit Court of Appeals did.

The Supreme Court reversed the Ninth Circuit and upheld the law for several reasons. In a 1974 case, the Court had ruled that freedom of political association was not absolute. If an election were fairly run, political association rights could be reasonably qualified (see *Storer v. Brown*, 415 U.S. 724, 1974). In previous cases, the Court ruled that a state could require a candidate to demonstrate a minimum amount of support before being placed on the ballot (*Jenness v. Fortson*, 403 U.S. 431, 1971, and *Anderson v. Cellebreeze*, 460 U.S. 780, 1981). States do not have to show that there has been a history of overcrowding or ballot confusion in order to require this minimum of support.

The Court held that the state of Washington had the right to simplify its general election ballot by raising the requirements for access to it. But no such limits are placed upon entry to the primary ballot. Any candidate may campaign among all voters in the open primaries. The Court found no constitutional violation in this system of providing access to the general election ballot.

In a decision which may have a wider effect, the Court agreed that a political party did have the ability to allow both its members and any non-affiliated voters to cast ballots in its primary elections in a state which conducted closed primary elections. In *Julia H. Tashjian, Secretary of State of Connecticut v. Republican Party of Connecticut*, 55 U.S.L.W. 4057 (1986), the Supreme Court agreed with both the district court and court of appeals, stating that Connecticut's law that only party members may vote in primaries violates the Republican Party's First and Fourteenth Amendment right to associate politically with individuals of its own choosing.

It is interesting to note that there are more non-affiliated independent voters in Connecticut than registered Republicans, and more registered Democrats than independents. The Republicans were seeking a way to involve these independents in their primary and then go on to win more general elections. Thus, in 1983 the party adopted a rule opening independents to vote in its primary.

The district court held that a state's judgment cannot be substituted for that of a political party on the question of who is sufficiently allied with its interests to be included in its candidate selection process. The Supreme Court agreed, restating the right of a political party to be free to identify those with whom it will associate and citing *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107 (1981).

In answer to the state's argument that opening the primaries to independents would be more expensive, the Court held that any additional costs would not justify the violation of the right of freedom of political association.

It is obvious that Connecticut, and other states as well, will be unable to require closed primary elections wherein only a party's members may vote for their candidates. And what of the Democratic Party of Connecticut? It must also now change its rules to permit non-affiliated voters to cast ballots in its primary, or take the risk that several hundred thousand independent voters in Connecticut may be attracted by the Republican Party.

These cases both measure the First Amendment right of freedom of political association against the duty of a state to conduct fair and efficient elections. The *Tashjian* case has the greater significance since it will lead to changes in states which mandate closed primaries. —AJC

Court Seeks Middle Ground for Pregnancy and the Law

Pregnancy and the female employee has been a controversial subject in our society, particularly in recent years as women have constituted an increasingly greater portion of the work force. Pregnancy constantly serves as a biological barrier for women trying to achieve complete equality in the work force. Just how far the state should go in an effort to eradicate this barrier is a question the Supreme Court has very recently had to decide in two back-to-back cases.

The cases concerned returning to work after a maternity leave and rights to unemployment compensation for those who cannot return to work. In each case there was a possible conflict between a federal and a state statute. The Court had to decide the proper interpretation.

In *California Federal Savings & Loan Association et al. v. Guerra*, 55 U.S.L.W. 4077 (1987), the Court approved, 6 to 3, a California Fair Employment Housing Act provision which allows pregnancy disability leave for female employees. Several days later, in *Wimberly v. Labor and Industrial Relations Commission of Missouri*, 55 U.S.L.W. 4146 (1987), the Court held unanimously that the Federal Unemployment Tax Act did not mandate preferential treatment to pregnant workers seeking to receive unemployment benefits.

The situation in the *Guerra* case arose in 1982 when California Federal Savings & Loan refused to immediately rehire a female employee who took a three-month maternity leave. She finally began work again seven months after she originally requested to return. The California Department of Fair Employment and Housing, directed by Mark Guerra, sued the bank

1826

in federal district court, claiming the bank had violated the state's pregnancy disability law.

The issue in the *Guerra* case is whether or not the California statute is inconsistent with the provisions in the Pregnant Disability Act (PDA) of Title VII. Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of sex with regard to employment. The PDA is a 1978 amendment to Title VII which prohibits employers from discriminating against an employee because she is pregnant.

The conflict arises because the California statute allots a special disability leave for pregnant employees. Thus if the PDA is interpreted to preclude preferential treatment of anyone, the California statute conflicts with Title VII and must be voided. The alternative interpretation of the PDA is that preferential treatment of female employees is necessary in order to create a situation of total equality in the workplace.

The lower courts took opposing views of the statute. In 1983, a federal district court in California held that the state statute conflicted with Title VII because the statute enforced a classification on the basis of pregnancy. In effect, it created a category on the basis of sex. In 1985, the Ninth Circuit Court of Appeals reversed this decision, reasoning that Congress intended the PDA to be a base standard beneath which states could not drop, but above which states may rise by creating any new disability programs consistent with PDA provisions.

The United States Supreme Court agreed, holding that the California statute was not inconsistent with the purposes of Title VII. The Supreme Court decided that the goal of Title VII is the same goal as the statute in California. Therefore the two are able to coexist equally. The majority explained that the underlying purpose of Title VII is to create equal employment opportunities for men and women by breaking down the barriers that traditionally placed men as the favored employee.

They further pointed to the intent of the bill, as expressed by its sponsor, Senator Williams, who stated that the act was designed to permit women to fully participate in both the workplace and family life as they please. They quote Justice Brennen, who held in a previous case that "a realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies" (*General Electric Co. v. Gilbert*, 429 U.S. 125 at 159).

The dissent contends that preferential treatment to pregnant employees is against Title VII because employers are then forced to commit unfair employment practices. They emphasize that the purpose of Title VII is to provide equal treatment of employees for all employment-related purposes. Because the California statute only provides special disabilities for pregnant employees, it conflicts with the purposes of the PDA. "Congress intended employers to be free to provide any level of disability benefits they wished or none at all—as long as pregnancy was not a factor in allocating such benefits." (*Guerra* at 4086.)

The dissenters also argue that an additional problem the *Guerra* holding creates is an overwhelming financial burden on California employers to comply with the statute. The financial burden includes both trying to support all of its female employees while they take pregnancy leave, and the pressures to now create new disability programs that will supplement the present ones for pregnancy only. The dissent highlights some legislative debating on the issue in which the overwhelming consensus of opinion was against forcing employers to create any new disability programs.

The *Wimberly* case is an interesting contrast to *Guerra*. *Wimberly* concerns the allotment of state funds for unemployment compensation. Traditionally, unemployment compensation is denied to any employee who leaves for voluntary reasons. Some states have extended unemployment compensation to female employees who leave because of pregnancy. Missouri has chosen not to include pregnancy as a valid claim for compensation.

The Federal Unemployment Tax Act, section 3304 (a)(12) in particular, provides federal supplements for a state's unemployment compensation benefits if the state does not deny compensation "solely on the basis of pregnancy or termination of pregnancy." (*Wimberly* at 4146.) A state is allowed to formulate its own qualifications for recipients. The Missouri statute refused compensation to any potential recipient who has left his or her job for reasons other than caused by the employer or the work itself.

The petitioner, Linda Wimberly, left her job because she was pregnant. She left upon the condition of possible non-rehiring. When she was not rehired she applied for unemployment compensation but was denied because pregnancy is not a direct consequence of her employer or her work. She claimed the Federal Unemployment Tax Act should be read to include not only prohibition against discrimination of pregnant employees but preferential treatment of pregnant employees, so that upon becoming eligible to work again she should immediately receive compensation.

In *Wimberly* the Court unanimously held that a Missouri statute is consistent with a federal statute because it does not discriminate against pregnant employees.

The way the statute is written simply precludes compensation to those who left work voluntarily, including female employees who have left their job because of pregnancy. The Court held no preferential treatment is mandated by the Unemployment Tax Act.

The Court denied any reference to preferential treatment in the legislative history or in recent application of the statute. In every commentary the Department of Labor has written on the statute's implementation, the department has stated that the statute "does not speak to treating pregnant claimants more favorably. It only requires they not be disqualified solely on the basis of pregnancy or its termination." (*Wimberly* at 4149)

According to the Court, the state's rules are neutral. The fact that the petitioner was pregnant is completely incidental. She stands in the same position as all those who leave their job for reasons other than caused directly by work or the employer. Thus the state statute is perfectly consistent with the federal one.

In viewing these decisions simultaneously, the Court's ambivalence becomes apparent. Obviously some of the conflict stems from the societal ambivalence on the issue of gender equality in the workplace. Another source is the Court's desire not to interfere with state and local authority. In this respect the Court seems to have decided to let the states have considerable discretion in their policies towards pregnancy and the law. —CC

Court Allows More Narrowing of Miranda Rights

Miranda v. Arizona, 384 U.S. 436 (1966), established the familiar Fifth Amendment right-to-remain-silent warning that must be chanted to anyone undergoing a custodial interrogation. The basic protection it gives to suspects is the choice between speech and silence throughout the whole interrogation process. Any waiver of the Miranda rights must be voluntary, knowing and intelligent.

In two recent Supreme Court cases the Court has continued its trend of narrowing these rights. As a result of these decisions, a suspect may validly waive his or her Miranda rights without being told the subject of the interrogation, and when a suspect requests an attorney during only the writing stage of the interrogation he or she has constitutionally waived the right to counsel during any oral portion of the interrogation.

Subject of Questioning

In *Colorado vs. Spring*, 55 U.S.L.W. 4162 (1987), the Court held that the Constitution does not require that suspects be aware of all the consequences when they give up their Miranda rights. In *Spring*, the defendant and a friend killed a third person, Walker, during a hunting trip. Spring was arrested on an unrelated charge after a set-up by the Bureau of Alcohol Tobacco and Firearms (ATF) on March 30, 1979. He waived his Miranda warnings and was asked about the murder as well as the ATF violation. He denied knowing about the murder. On May 26, 1979, Spring was questioned in jail and again waived his Miranda rights. This time he confessed to the murder.

When the case came to trial, the defendant claimed that the failure of the police to tell him on March 30 that he would be questioned on the murder violated his Miranda rights. He claimed the second confession was invalid because it was a direct product of the first invalid waiver.

The Supreme Court held 7-2 that the waiver was valid. The Court reasoned that Spring knew on May 26th exactly what they were going to ask him. They also concluded that the March 30th waiver was valid in spite of his ignorance of the subject matter of the interrogation. The Court found that Spring sufficiently understood what he was giving up and that the silence of the police about the subject matter was not trickery which would amount to an involuntary or coerced waiver. The Court held that knowing about the subject matter of an interrogation is irrelevant in determining whether a valid waiver is made.

The dissent characterized the knowledge of the subject matter of an interrogation as critically important. The dissenters felt that a defendant's choice will depend on knowing the questions to follow. They were concerned about police using the element of surprise to make the suspect feel the psychological pressure to speak, which constitutes a coerced waiver and is invalid. At the very least they would call the issue "relevant."

Counsel for Only a Part of Questioning

Connecticut v. Barrett, 55 U.S.L.W. 4151 (1987), concerns a suspect's right to request counsel during the interrogation. Here the defendant, Barrett, agreed to talk to the police but wanted an attorney present before he signed anything written. The Supreme Court of Connecticut said his statements should be given broad interpretation. They held the defendant meant he wanted counsel present throughout the entire proceedings. The Supreme Court of the United States rejected this argument 7-2, holding that the defendant made a voluntary and knowing waiver of the oral portion of the proceedings.

The Court stated that the defendant's right to stop the proceedings to wait for an attorney is not constitutionally mandated. Such priviledges were invented by courts to stop police coercion. Therefore the priviledge is merely a discretionary one, determined on a case by case analysis. Here, since the defendant had given a specific request that he only wanted an attorney during the writing stage of the questioning, that was all he was entitled to.

The Court refused to give the defendant's words a traditional broad interpretation. They stated that a defendant's words should only be given a broad interpretation if they are ambiguous. Here the defendant clearly spoke his request, and the police complied with it.

The dissent would not stray from the established principle that a defendant's request for counsel must be interpreted broadly. They point to what they see as a very similar situation in the case of *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards* the defendant wanted an attorney present before he made a deal, and he did not want the interrogation taped. The Court found a subsequent waiver of counsel invalid. The dissent felt the majority inadequately distinguished *Edwards* from *Barrett*. Both cases dealt with a situation in which a suspect asked for an attorney for only one portion of the proceedings. Yet in one, it was held that the suspect had not waived his Miranda rights, and in the other, that the suspect had waived his rights.

The Miranda rights were originally established during the height of the Warren Court era in 1966. Very recently, Attorney General Edwin Meese, III, orchestrated an attack on the *Miranda* ruling. Citing a 115-page report from the Department of Justice's Office of Legal Policy, observers believe Meese is seeking a case with facts that might convince the Court to overturn *Miranda*. Some law enforcement officials back him because they feel the ruling has hindered criminal investigations by encouraging suspects to remain silent rather than reveal critical information or confess.

Yale Kamisar, a University of Michigan constitutional law professor and expert on the Miranda ruling, is convinced the Court will not overturn the decision.

The Court is generally reluctant to directly reverse a previous ruling. And no member of the Court has suggested that the fundamental tenets of *Miranda* be reconsidered.

Whether or not the Court will ever be asked to overturn the ruling is still uncertain. One thing is highly likely though. Under the present Rehnquist Court, there will probably be no expansion of the *Miranda* rights. —CC

Other Decisions

The Court decided several other criminal procedure cases—all dealing with searches—as this issue was going to press.

In *Arizona v. Hicks*, the Court clarified the "plain view" exception to the general requirement that searches without a warrant are unconstitutional. The case involved police officers searching an apartment without a warrant and turning stereo equipment slightly so that they could see the serial numbers. By a 6-3 vote, the Court declared the search unconstitutional, since police had no probable cause to believe the equipment was stolen and by moving it for closer inspection went beyond what they could see in plain view.

In *U.S. v. Dunn*, the Court decided, by a 7-2 margin, that police were within their rights when, without a warrant, they visually examined a barn through an open door. A previous case had held that "open fields" are not included in the Fourth Amendment's protection of "houses, papers, and effects." In *Dunn*, the Court determined that a barn near a farm house was not being used for "intimate activites of the home" and was not within the fence that enclosed the house, so it did not have the Fourth Amendment protection the house would have.

In *Illinois v. Krull*, the Court carved out another good faith exception that permits introduction of illegally seized evidence. Police conducted a search of a junkyard under an Illinois law authorizing warrantless searches of automobile junkyards. The statute was later declared unconstitutional. Should the results of the search be allowed into evidence? In a 5-4 decision, the Court said yes. The Court reasoned that the exclusionary rule is designed to deter illegal searches by police, but the Illinois police had no reason to believe the search was illegal, so excluding the evidence does not serve to deter unconstitutional police practices.

Five Ideas

(continued from page 5)

On the other side, the religious freedom clause has been invoked to ensure parochial school education, to safeguard the educational objectives of selected religious sects, to permit schoolchildren to refuse to engage in patriotic ceremonies contrary to their religious beliefs, and to excuse conscientious objectors from military service where strongly held beliefs were comparable to traditional religious faith.

These are types of questions which responsible citizens will have to face for years to come. A pluralistic society with its contemporary condemnation of the melting pot is dedicated especially to respecting differences in customs, beliefs, and traditions. To what extent can education remove or moderate the prejudices and biases, which often emerge as barriers to the fulfillment of the ideal and practice of respect for the beliefs of others?

Freedom of speech and of the press, like the religion clauses, are basic liberties that help to define the dignity and integrity of the individual. The citizen who fears to express his views on public issues, whether within the school or in the public forum, is a diminished man or woman. Living in fear of governmental officials – national, state, or local – or apprehensive of what the community will think, means that quiet desperation or silent surrender becomes a way of life. There may be many who have little or nothing to say; but that may be due, in part, to an education which discouraged public discourse on moral-ethical questions and encouraged self-censorship and self-preservation. When this happens, the freedom of expression clauses become mere "parchment barriers."

Do we have the right to say anything, anywhere, and anytime? Is the First Amendment absolute in its protection of freedom of expression? It is certainly worthwhile to explore with students in a general way the various interpretations of the First Amendment: the absolute position, the preferred position, the clear-and-present-danger rule, and the balancing principle.

The real test of the First Amendment's free speech provision is in the concrete case. Why is free speech prohibited or limited in the library and in the classroom? Why is certain language regarded as improper? When does speech become slander? When does speech become conduct? The story of Socrates, the use of "fighting words," and the case of Irving Feiner, an unpopular speaker confronted by a hostile audience, force our students to face significant value conflicts demanding resolution. The latter case has important implications for classroom decorum (*Feiner v. New York*, 340 U.S. 315 [1951]). Does an individual or a group have the right to interrupt and to disrupt the right of a speaker to address an audience in the street or in an auditorium? Does the American Nazi party have the constitutional right to march in Skokie, Illinois, a Chicago suburb heavily populated with Jews, many of whom survived the Holocaust?

The Tinker case, popularly known as the "Black Armband" case, brought a freedom of speech issue from school surroundings into the Supreme Court. Widely criticized and just as widely unread, the decision held that freedom of speech is a preferred right in school as elsewhere; and that the imposition of restraints will be justified only upon reasonable prediction by school officials that the expression will substantially interfere with or materially disrupt discipline in the school. The schoolhouse gate does not bar the Bill of Rights from the school, declared the Court, but students do not have a blank check to interfere with the conduct of an educational system.

Students have gone to court to seek legal clarification of such freedom of expression issues as dress, hairstyle, "underground" newspapers, and "provocative" language. Resort to the courts rather than to the streets indicates a commendable trend toward responsible citizenship. On the other hand, it can be argued that school issues should be settled within the confines of the school. If that is to be done with any degree of success, both students and educators must have some understanding of the historic, philosophical, and constitutional dimensions of freedom of expression in the world at large.

Is there a constitutional right to listen without interruption to what a speaker is saying on a street corner, in a hired hall, in a school classroom, or in a school auditorium? Does a student body, invited to hear a speaker, have the right to interrupt if they find the views expressed an appeal to intolerance and hate? Does a speaker have any obligation to the audience in particular and to the community in general? Is there a constitutional mandate to grant tolerance to those who preach intolerance? What are the ethical and moral issues involved in these tormenting queries?

Freedom of the press is freedom written large both on newspaper stands and on the television screen. Although reviled by the Federalist press, Thomas Jefferson championed freedom of the press in these words: "The basis of our governments being the opinion of the people, the very first object should be to keep that right and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." The power of the press has been used, at times, however, to whip up public opinion against an accused and to cater to the prejudices of the community in the interest of circulation. The right to a fair trial and the right to a free press are in collision; which has priority?

How far should the press be able to proceed in criticizing public officials or prominent figures? Does the press have the right to disclose policy decisions which may embarrass the government? Should the press have the right, daily and nightly, to invade the privacy of homes, as well as people's thoughts and feelings? What is the relationship between the press, public morality, the law, and the issue of obscenity?

Issues concerning freedom of the press have become a part of the life of the school. School newspapers have commented on school policy and administrative rulings in rhetoric which is, to say the least, unflattering to the educators. In turn, school officials have censored the newspapers. In their turn students have produced so-called underground papers, and the response has been more restraints. *In extremes*, the courts have been invited to rule on whether school officials have the legal authority to censor student newspapers. If they do, is prior or post restraint the best way to conduct education for responsible citizenship?

Other components of the constellation of liberty are the important right to petition and the right to assemble peaceably. In the Declaration of Independence, one of the grievances of the Founding Fathers against the British was "our repeated petitions have been answered only by repeated injury."

There were times in our history when such petitions were regarded as seditious and criminal. In some countries today, citizens would not think of petitioning for redress of grievances because to do so would invite the heavy hand of government intervention.

Our ancestors fought for the right to petition, but some of us may now be afraid to use it. For example, on July 4, 1951, a newspaper in Madison, Wisconsin, had reporters on the street try to get people to sign a petition stating that they believed in the Declaration of Independence. Only one person out of 112 interviewed at random agreed to sign. Later, the *New York Post* repeated this experiment – gaining only 19 out of 161 possible signatures.

Why? People said they feared they would lose their jobs, be called communists, or otherwise encounter future harassment as a result of signing such a document.

In the 1970s this experiment was repeated in Miami by the *Associated Press*. A typed copy of the Declaration of Independence was shown to people and they were asked to sign. Only one out of 50 people agreed to sign. Comments ranged from calling it "commie junk" to saying it was "the work of a raver."

This right has been clouded by rumors and beliefs that government agencies compile records on people who sign petitions. Has this historic right to petition been diminished as a way of protesting the grievances of minorities?

In addition, the freedoms of association and assembly have frequently been challenged. Should employees have to answer the question of whether they have ever "lent aid, support, advice, or counsel or influence to the Communist Party?" Can a city council require all public school teachers to submit a list of all the associations to which they belong or contribute to each year? Can a law enforcement official record the license numbers of cars that belong to people attending a meeting of a generally unpopular political group?

All of these would seem to be abridgments of our right to association. Yet, though the Supreme Court declared some loyalty oaths to be unconstitutional, an oath stating that "I will oppose any attempt to overthrow the government by force, violence or unconstitutional means" was found to be constitutional.

Likewise, though the Supreme Court ruled that the need for teachers to declare which associations they belonged to be unconstitutional, the Court has held that a legislative committee acting under proper authorization can investigate an individual's associational relationships, "if a compelling state interest" justifies it.

In looking at these liberties today, we ask if they are what the framers intended them to be? Or have they been limited in times of crises and changed to take into account the many changes in our society?

Conclusion

This year our Constitution will be 200 years old – it is now the oldest living written constitution of a nation-state. The idea of liberty is much older. "Proclaim liberty throughout the land and unto all the inhabitants, thereof" – is the message found in Leviticus and inscribed on our Liberty Bell. The odyssey of this idea from Biblical times to our own era has been marked by the tragedies of persecutions and prosecutions and by the triumphs of the human spirit through landmark documents and judicial victories. The future of the idea of liberty, like all great ideas in history, will be determined by the courage of those who understand what it means to live in a country where liberty is a hostage to despotism. □

Liberty

(continued from page 22)

We still argue whether the central government has grown too big. We still debate the role of the states in our government. We still worry about how to protect liberty in the face of challenges from new technology and the demands of world leadership.

The balance is always shifting between the states and the federal government and among the branches of government. After many years in which power seemed to be flowing inexorably toward the federal government, the states have begun to take a more active role.

For example, state constitutions, state bills of right, and state courts have taken the lead in defining and protecting some individual rights. (See Robert Peck's "When the Constitution Isn't Enough," *Update*, Spring, 1986) In the heyday of Warren Court activism, when the U.S. Supreme Court struck down dozens of state laws in the name of the Bill of Rights, it would have been inconceivable for the state courts to be a significant counterweight in the process, but their new role demonstrates that in American government the players stay the same but the roles change.

What is constant is the diversity of the system, with its many parts sometimes working together, sometimes apart. Power is not fixed under our system. Nor is liberty. In a very real sense, each generation redefines and reconstitutes American government.

Through all the changes, though, fundamental liberties have been preserved and, over the years, extended. It's not a clean, simple form of government, and certainly not a streamlined one, but it has one virtue that counts for more than all its faults. It works. □

Power

(continued from page 31)

ment. Federalism, then, represented the application of separation of powers and checks and balances among governments under the Constitution. By distributing power among governments, as well as among branches within the national government, power could be checked.

IV

The Constitution written in 1787 reflects the concern of its framers for the judicious management of political power. The government is structured, according to the document, to ensure that power is never concentrated in a single branch of government but dispersed among three branches, each competing for authority and influence. The power of government is dispersed, as well, among competing governments, each exercising sovereign authority in certain areas of public policy while sharing authority in certain other areas. And the threat of factions, one of the more subtle problems accompanying popular government and a grim reminder of the power of public opinion, is blunted by relying upon republican theory.

Much of this nation's constitutional history is a history of the ongoing debates and controversy surrounding these critical aspects of our fundamental charter. Certainly federalism and separation of powers, perhaps along with controversies relating to the Fourteenth Amendment, are themes that dominate the history of constitutional jurisprudence. It is not an overstatement to argue that both separation of powers and federalism have undergone considerable change since the birth of the Republic. The Framers never envisioned the bureaucracy that exists today, nor the numerous semi-independent agencies that dot the political landscape. And they would be surprised, no doubt, by the contemporary status of federalism in this country. The states, once the hub of political activity and the very source of our political tradition, no longer occupy the position the Framers understood to be so critical to the original design.

The changes in our constitutional system that have occurred represent, at their very root, varying responses to a perceived need to fashion solutions to the problems endemic to popular government. The ongoing relevance of the Constitution and the support the document enjoys in the society testify to the magnificence of the achievement by those who wrote it in 1787. The goal of the Framers was to provide for good government. For them good government meant, among other things, the prudent management of political power so that the government always serves the public interest. This remains the ultimate criterion by which the contemporary society shall judge the quality of its government. □

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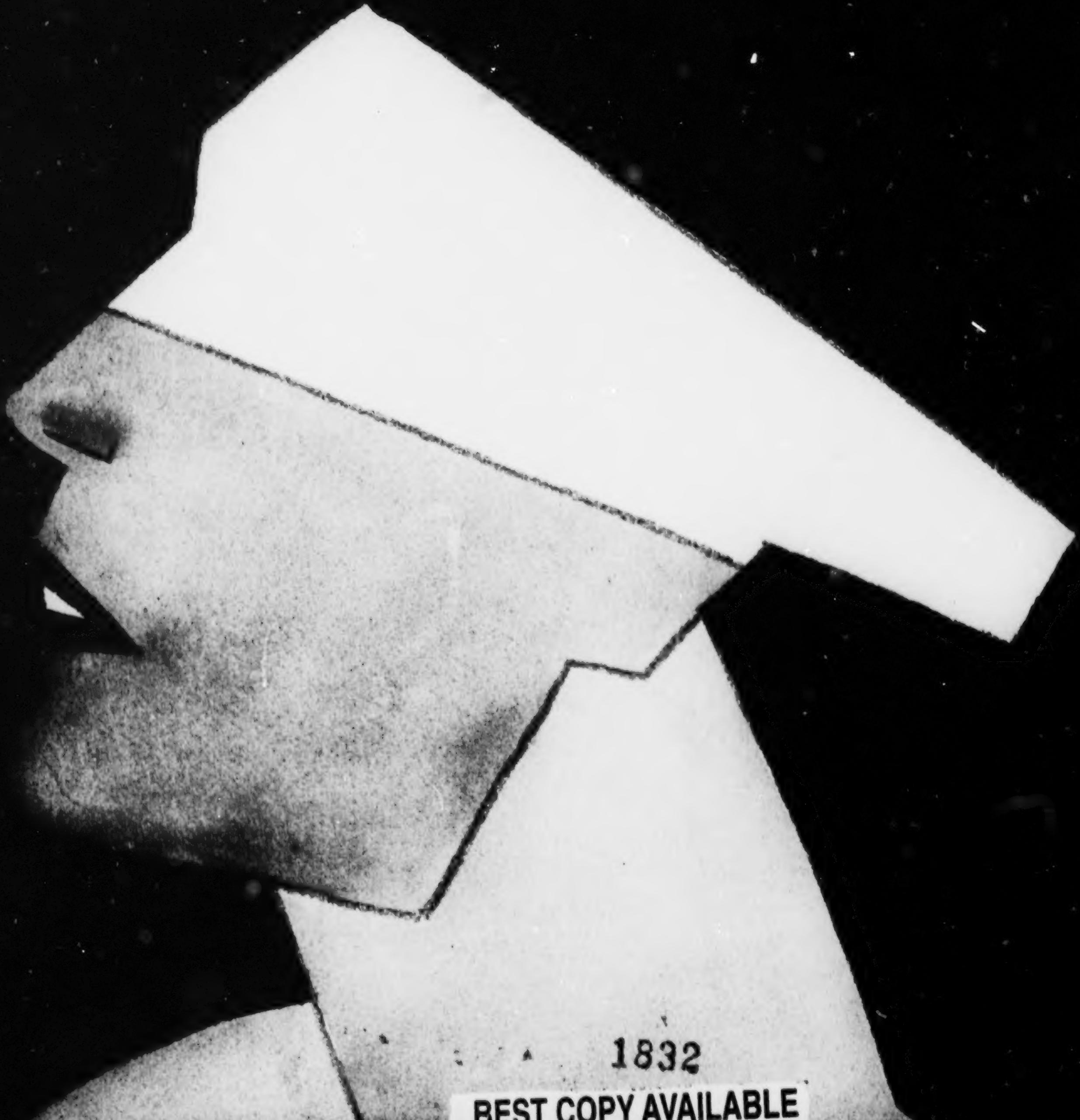

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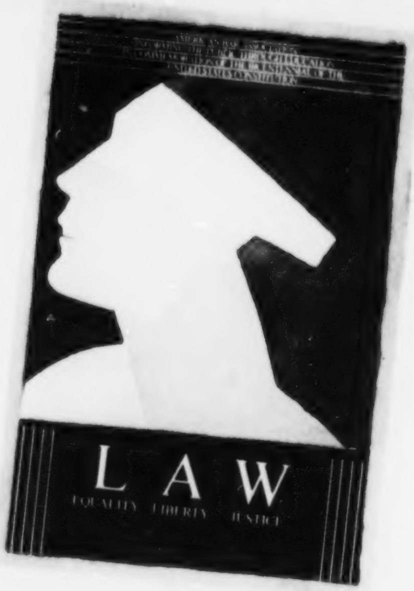

New from the ABA—a beautiful, full-color poster to commemorate the Constitution's bicentennial. The poster's main feature is the stylized head of justice which appears on the cover of this ***Update***. The poster, which was created by internationally acclaimed graphics designer Milton Glaser, adds a main text reading "LAW—Equality, Liberty, Justice," with the words "Informing the Public Through Education, in Commemoration of the Bicentennial of the United States Constitution" in smaller type.

The 24" x 36" poster is available unframed for $20; a limited number of numbered copies signed by Mr. Glaser and printed on heavier paper are available unframed for $100.

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* Other issues may be substituted if some of these are out of print.

Update
The First Amendment at Mid-Decade
Update
Update
The Revolution in Search and Seizure
Update
SOAP BOX
Play Fair!

contents

Volume 11, No. 2, Spring, 1987

2 Justice, Equality and Property
8 The Idea of Justice

ELEMENTARY SCHOOL

K-6 STRATEGIES

11 Justice: Making Wrongs Right
12 Property: Scope and Limits of Ownership of Property
14 Equality and Property: Yours, Mine and Ours

20 The Dilemmas of Equality

MIDDLE SCHOOL

7-12 STRATEGIES

26 Juvenile Justice
28 Searching for Equality
30 Weights and Measures

36 The Idea of Property in the Constitution

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

44 What is Justice?
46 Courthouses as Learning Laboratories
51 Affirmative Action
54 The Eighth Amendment and the Death Penalty

58 Court Briefs

Cover design by Milton Glaser, adapted from a poster created for the bicentennial.

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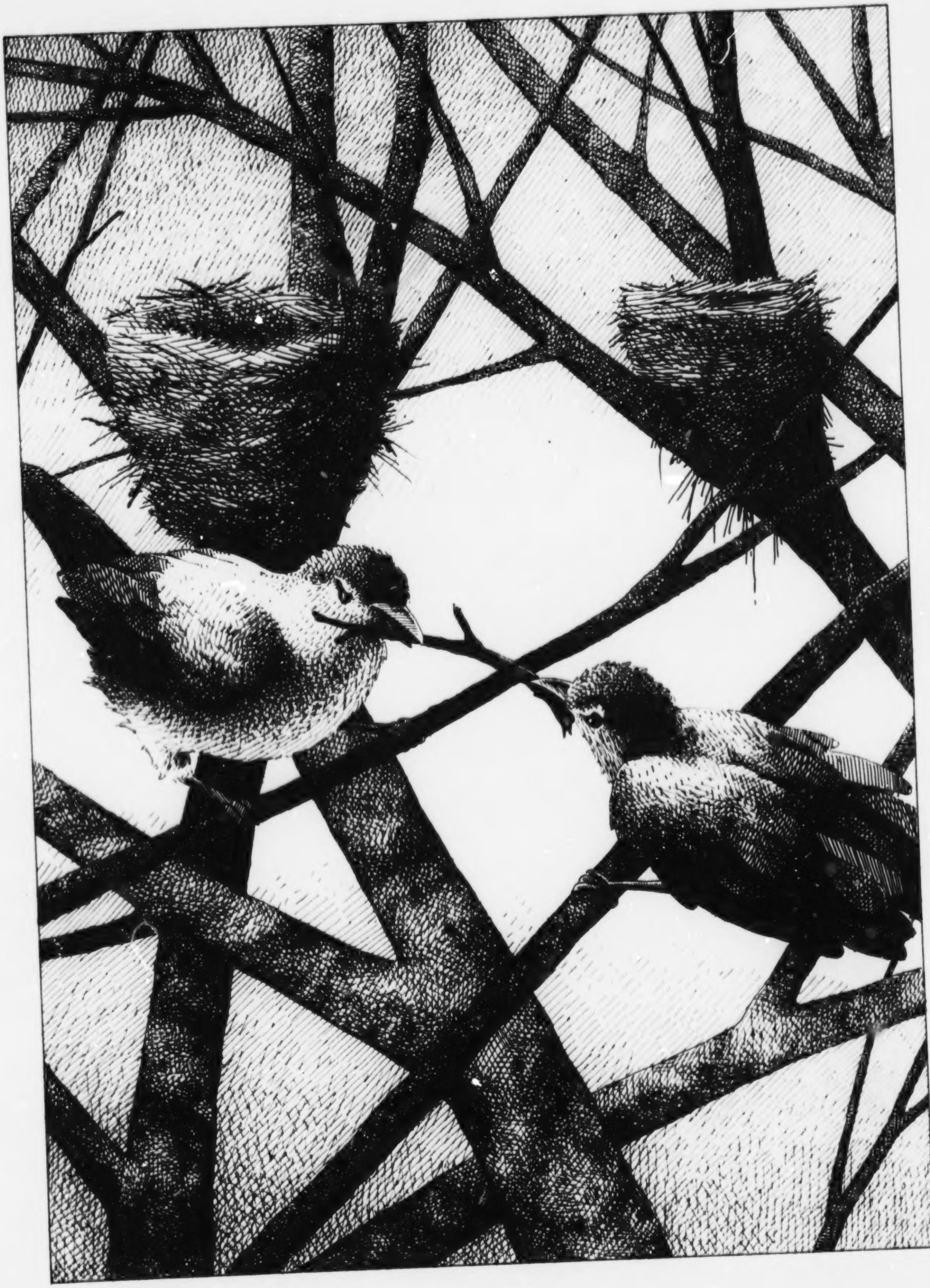

Tom Herzberg

BICENTENNIAL THEMES

Isidore Starr

Great Constitutional Ideas: Justice, Equality, and Property

The trick is to make them understandable to youngsters—and simple illustrations can help

In the first article of this series, (*Update*, Winter, 1987), I took a look at how the idea of power and the idea of liberty have structured the Constitution and posed conflicts of value throughout American history. Here we continue with a look at justice, property, and equality, three other great constitutional ideas students must confront if they are to understand our system of government under law. Where possible, I have discussed these ideas in the context of how schools operate: the problems/opportunities posed by school practices and the lessons we as educators teach – or don't teach – about constitutional society.

The Idea of Justice: Due Process of Law

Like liberty, justice is mentioned in our great documents. The Declaration of Independence speaks of justice and injustice; the Preamble to the Constitution aims to establish justice; and the Pledge of Allegiance promises justice for all. Finally, like liberty, the operational definition of justice must be sought in the Constitution and in the Bill of Rights. The Constitution prohibits bills of attainder, *ex post facto* laws, and the suspension of the writ of habeas corpus except in unusual circumstances. It also mandates jury trials in criminal cases and defines the crime of treason, specifying the testimony required for conviction and imposing certain limits on the punishment to be imposed.

It is, however, in the Bill of Rights that the nature and scope of the idea of justice are set forth in detail. The Fourth, Fifth, Sixth, and Eighth Amendments speak directly to the ideas of criminal justice by reference to the principles of due process of law.

The due process model, laboriously constructed through the ages, poses dilemmas for the citizenry. Does it require an adversary system – complicated, deliberate, expensive, and frequently marked by overacting? If the adversary system is the best guarantee of justice, how can society respond to the charge that in this country there is a law for the rich, a law for the poor, and a law for the middle class? Has the jury system outlived its usefulness? When does a criminal proceeding become a political trial? Is the continental system of justice – in which the adversarial nature of the proceedings is diminished and the investigating magistrate emerges as the chief fact-finder – preferable to ours?

While the debate goes on, the due process model is being gradually supplanted in criminal justice by plea bargaining, which in some cities disposes of 80 to 90 percent of the cases brought to court. The gap between the professed principles of due process and the actual practices of criminal justice raises questions concerning the integrity of a political system which sanctions bypaths to justice. Once again, decision making will have to weigh the merits of the controversy. To be ignorant of the issues or to abdicate the responsibility of choice is to approve the transformation that is taking place.

While plea bargaining is displacing trials for adults, in juvenile justice the trend is in the other direction. The juvenile courts came into existence when reformers argued, for a variety of reasons, that youthful accused should be tried and treated differently. The good intentions went astray, as the *Gault* case so vividly demonstrated. (See pp. 26-27 for a classroom strategy based on *Gault*.) To protect the juvenile, the Supreme Court has mandated substantial due process principles in juvenile court hearings with the proviso that

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Isidore Starr is a lawyer-educator who is widely recognized as the father of law-related education. Previous versions of this article appeared in Daring to Dream: Law and the Humanities for Elementary Schools *(Chicago: American Bar Association, 1980) and* Education for Responsible Citizenship: The Report of the National Task Force on Citizenship Education, *cosponsored by the Danforth Foundation and the Institute for Development of Educational Activities, Inc., the educational affiliate of the Charles F. Kettering Foundation. It was published by McGraw-Hill Book Company in 1977.*

each state has the option to offer the accused the right to a jury trial. The informal proceedings of the recent past are now subject to formal hearings measured by traditional due process.

Two 5-4 rulings by the Supreme Court have carried the due process mandate into school buildings and school systems. In dealing with controversies involving ten-day suspensions and three-month expulsions, a majority of five of the justices has imposed on school authorities minimal due process: oral or written notice of charges and a hearing in which each side has a right to present evidence before any disciplinary action is taken. The expulsion decision warned school board members and officials that they could be held personally liable if they violate the constitutional rights of students. A subsequent opinion by the Supreme Court upheld corporal punishment, once again by a 5-4 vote.

Due process of law applies to civil litigation, as well as to criminal and juvenile justice. Since most lawsuits in our courts deal with civil matters, due process requirements should not be overlooked. The United States Constitution in the Seventh Amendment, as well as provisions in state constitutions, address the right to trial by jury in civil controversies.

In recent years, the quest for justice has moved out of the courthouse and into community arbitration, conciliation, and mediation centers. These alternative forms of dispute resolution have been referred to as "justice without law" and call for inquiry in the context of the dimensions of justice in our society.

The Idea of Equality

The Constitution, in its unamended state, made no reference to equality. Using the euphemism "other persons," "such person," and "person" for slaves, the Founders sought to circumvent the uncomfortable implications of "the peculiar institution." If slaves were referred to indirectly, women were not mentioned at all.

With the Fourteenth Amendment and the guarantee of equal protection of the laws, the issue of equality took on a constitutional dimension, but it was not until 1954 that the Supreme Court declared *de jure* segregation unconstitutional. Congress followed with civil rights laws, and the issues were joined in education, employment, housing, and public accommodations.

The playing fields of the schools, as well as the streets of communities, became the battle grounds of the desegregation-integration rulings of the courts, which continue to assume the leadership in the quest for equal educational opportunity. When the orders of a court run headlong into the cherished mores of a community, "the sparks fly upward." To counter the idea of equality, an appeal has been made to another basic principle. The confrontation has taken the form of liberty versus equality: the right to choose the neighborhood school as the institution for learning against the right to an equal education through the use of buses, if necessary.

Explosive issues are involved in the equality controversy. Can the citizens of a community engage in selective law obedience with immunity? Can educators do so? If educators can do so, can students follow their example? If a state closes some of its public schools to avoid compliance with a court ruling on desegregation, is it in violation of the equal protection clause? Can parochial or private schools be used to circumvent judicial rulings on racial balance?

A recent study indicates that socioeconomic status is a far more important factor than schooling in personal success and that the idea of equality can become a reality only through reorganization of the eco-

Justice and the Humanities

Justice is a powerful idea that runs through our art, literature, and customs. As such, it offers many opportunities for creative teaching. Edmund Cahn has noted that justice is "a word of magic evocation," which troubles our thoughts, arouses our emotions, and stimulates our glands. The Holocaust, torture of the innocent, execution of an innocent man or woman, or the incarceration of political prisoners in insane asylums generally evokes either silent anguish or cries of "Unfair!" and "Unjust!" It is our sense of injustice, says Cahn, which forces us to try to define the idea of justice, and it is this sense of justice and injustice which coalesces us into programmatic crusades for reform.

Past and Present

Children are confronted with the idea of justice in the concrete form of fairness in treatment and in the abstract form of due process of law in the school and community. Our contemporary views of justice can have little meaning to the young unless they are introduced to those customs of the past which were designed to separate the innocent from the guilty. The medieval ordeals by fire, water, and battle, as well as the ingenious instruments of torture which have bloodied the soil of history down to the present day, offer opportunities for comparing what was, with what is, and with what ought to be.

There are episodes in ancient, medieval, and modern history which are useful in examining with students the relationship between power, justice, and law. For example, what can we learn about the values of Babylonian society and the nature of justice from a study of some of the provisions of Hammurabi's Code of Laws? What does a reading of the Ten Commandments tell us about the values of ancient Hebrew society? In early colonial Massachusetts, "a stubborn and rebellious son of sufficient understanding, sixteen years of age" who was disobedient to his parents could be put to death. This, too, tells us a great deal about moral values and legal enactments and the sense of justice in some societies. Each episode or example calls for inquiry about explanations, as well as supported critical judgment.

The comparative study of punishment carries with it value systems relating to human dignity. Socrates drinking hemlock, a witch burned at the stake or hanged, branding and mutilation, pillory, stocks, the dunking stool, prisons, and capital punishment by electricity, shooting, or drugs—these examples are both gruesome and instructive.

Symbol and Drama

Turning to contemporary society, the Pledge of Allegiance and the Preamble to the Constitution mention justice, but the term is not defined with any degree of precision. It is reasonable to infer that the Fourth, Fifth, Sixth, and Eighth Amendments of the Bill of Rights convert abstract justice to procedural justice. The judicial process or procedure that is due any person accused of a crime is converted to a series of principles designated as due process of law. To avoid laundry-listing these great rights, I offer a schema for presenting due process of law. If we conceive the courtroom as a theater, then we can involve students in the quest for the script, the props, the title of the drama, the starring roles, the subordinate players, the audience, and the press. If the dramatis personae do not assume the roles mandated by legal tradition, the morality play can easily become

nomic system. This discomforting conclusion, referring to the schools as "marginal institutions," cannot be swept away.

What Gunnar Myrdal called the American Dilemma has spilled over into business, labor organizations, and the schools and colleges – with charges of discrimination against women, blacks, and other minorities in appointments, assignments, and promotions. The *Bakke* case, dealing with so-called reverse discrimination in admission to a professional school, found the Supreme Court in a Solomonic mood trying to resolve the dilemma of adjusting the inequities of the past with the present demand for equal treatment for all. (See article by Michael Middleton in this issue of *Update* for more on affirmative action.) While educators are dealing with the practical consequences of affirmative action, they must design units or courses which confront students with these dimensions of civic responsibility. (See pp. 51-53 for one such strategy.)

Equality and the Constitution

Our Declaration of Independence proclaimed for all the world to hear that "all men are created equal," and most of our history since that time has focused on the meaning of equality. The Declaration reflected the temper of the times. Slaves and women were excluded from consideration. One was regarded as a chattel; the other, an appendage. Untaxed Indians were not regarded as part of the population for representation.

The March of the Equalitarian Amendments

The Civil War did not free the slaves. The legal status of property had to be changed by constitutional amendments to overrule the Dred Scott case. The Thirteenth Amendment freed the slaves, the Fourteenth Amendment made the freed slave a citizen, while the Fifteenth Amendment prohibited denying the right to vote on account of "race, color, or previous condition of servitude."

In his memorable "I Have a Dream" speech, Martin Luther King, Jr., declared that when the architects of the Constitution and the Declaration wrote their magnificent words, "they were signing a promissory note to which every American was to fall heir." That note was defaulted on for so many years. The lawlessness which characterized evasions of the three Civil War amendments is found in most history books, and the moral dilemmas raised by these practices – the supreme law of the land versus the folkways of a community – can be translated into resources suitable for the maturity levels of children.

The march of the equalitarian amendments takes us to the Nineteenth, dealing with woman suffrage. As in the case of the black man and woman, there were many participants in the march toward equality. Abigail Adams kept reminding John that, "whilst you are proclaiming peace and good will to men, emancipating all nations, you insist upon retaining an absolute power over wives." She goes on to warn that "notwithstanding all your wise laws and maxims, we have it in our power, not only to free ourselves, but to subdue our masters, and without violence, throw both your natural and legal authority at our feet."

The Seneca Falls Declaration and Resolution on Woman's Rights rewrote the Declaration of Independence, nearly 140 years ago, to read: "That all men and women are created equal." These words were finally heard in the Congress in the second decade of the twentieth century.

Gradually and inevitably, the Twenty-third, Twenty-fourth, and Twenty-sixth Amendments rectified inequalities in the election of public officials. One enfran-

an immorality farce. The corrupt or prejudiced judge, the bribed juror, the perjured witness, or the incompetent counsel or prosecutor tilts the scales toward injustice.

The symbol of justice, the goddess with the scales and the sword or book, has had an interesting history. Originally without blindfold, she was free to observe the human comedy and to sift the guilty from the innocent. Corrupt justice in the Middle Ages led some jesters to blindfold her – to show to all the world that the goddess was blind to justice. In later centuries the blindfold was interpreted to mean that justice was impartial because the goddess was not interested in the color, religion, or wealth of the accused. With the racial revolu[illegible] the blindfold has been removed so that the poor and the disadvantaged in our society can stand before the goddess and demand her intervention through the balancing of the scales.

Since the adversary system is our way of seeking the truth in the forum of justice, it is desirable that the scales be equalized. Landmark rulings of the Supreme Court in this area can be translated as evidence of sensitivity to the need for counsel for the poor, protection against unreasonable searches and seizures, and insistence that police refrain from coercing confessions. Such famous English maxims as "A man's house is his castle" and "A person is innocent until proven guilty beyond a reasonable doubt" can serve as entry points to study of the nature of criminal justice in this country.

Classroom Ideas

The mock trial offers teachers and students the opportunity to apply previously acquired knowledge about due process of law to an historic or contemporary issue. The witchcraft trials and the famous cases of Roger Williams, Anne Hutchinson, or Peter Zenger offer scripts for student involvement in the judicial process. The meshing of skills and knowledge often results in appreciation of the strengths and weaknesses of our system.

Our system of due process of law can be evaluated on various levels by comparison with other methods designed to settle disputes. The blood feud, the duel, "the law of the jungle," retaliation, and the Eskimo song duel have been used to achieve justice in some societies. Each has its rationale, and each has played a role in the clarification of procedural justice.

The evolution of the idea of juvenile justice from harsh codes to the juvenile courts today is an important part of the story of justice. Certainly, the young ought to be introduced to the due process of juvenile hearings and the alternative ways of disposing of such cases. Combining this subject with that of the mushrooming wave of juvenile crime offers ways of exploring the causes of c[illegible] and procedures for confronting this serious contemporary development both in the schools and in society at large.

For students, as well as for adults, the police represent power, authority, and justice. Meetings with police, role playing of problems confronting police, and trips to police stations and police academies can give students a realistic picture of the nature of the police officers' responsibilities. Such experiences may result in empathy, instead of vilification or apotheosis, and may bring each of the parties closer to an understanding of the other in the quest to clarify the meaning of justice on the streets, as well as in the courts.

—IS

chised District of Columbia voters in the election of the president and the vice president, another abolished the poll tax in federal elections, and the third extended the right to vote to 18-year-olds. Since the Constitution is the supreme law of the land, the march of the equalitarian crusade should be part of the education of our young people. Its subject matter raises serious questions about the morality of discrimination and the persistent gap between our principles and our practices.

Classroom Ideas

Children are sensitive to unequal or unfair treatment in their homes, in their classrooms, and in their schools. They know when they are treated as inferior to some or superior to others. With this realization as a starting point, the juxtaposition of past and present can be useful in clarifying the nature of the idea of equality and the events and the personalities that have contributed to a change in attitude toward the victims of prejudice, discrimination, and hate.

In the past, the status of indentured servants, Indians, slaves, women, and children represented legal relationships which permitted victimization. In recent years the crusade against inequality in education, housing, employment, and accommodations seems to have lost some of its momentum. Progress is painfully slow, and that is discouraging for many. But there is no escape from this American dilemma.

Affirmative action, with its programs for assisting minorities in joining the mainstream of American life, has aroused the backlash of protest. How to resolve this clash of interests will try the patience of a saint and the wisdom of a Solomon. This especially difficult dilemma of goals or quotas does not excuse an escape from history. Teachers owe it to their students to initiate discourse in this area so that issues can be clarified and the options analyzed.

The clash between the constitutional mandate for equality and the conscientious plea to right the wrongs of the past can be translated into role-playing situations in which the issues get under the skin of the students. Among the possible episodes are Rosa Park refusing to move to the back of the bus; a black couple trying to buy a house in an all-white neighborhood; a Chicano applying for a job in an all-white firm; a school setting up an honors class and reserving several places for black, Indian, and Chicano students; or white students being bused into an all-black elementary school. The situations are many, and the only prerequisites are the teacher's creativity and courage to try something important.

The frame of reference for dealing with the idea of equality was suggested by the late Senator Everett M. Dirksen, when he paraphrased John Donne, in urging his colleagues to pass the Civil Rights Act of 1964: "Every denial of freedom, every denial of equal opportunity for a livelihood, for an education, for the right to participate in representative government diminishes me. There, is the moral basis for our cause."

The Idea of Property

In the Declaration of Independence, Jefferson seemed to equate the natural right to the pursuit of happiness with John Locke's natural right to property. In the Constitution, the framers also showed a healthy respect for property by prohibiting the impairment of contracts and granting to authors and inventors "the exclusive right to their respective writings and discoveries." The amendments in the Bill of Rights providing for the right to bear arms, restrictions on quartering soldiers in

Teaching About Property

Like the air, property surrounds us on all sides. We [illegible] in it, build on it, walk and ride on it, produce and consume it, and save it. The three fundamental necessities of life—food, clothing, and shelter—are property. We protect it, worship it, steal it, and give it away. Nations claim it as air, space, and water shorelines, and wage wars over it. Political ideologies and economic systems grapple with its use and distribution.

Children and Property

Accumulation of wealth is a part of the American dream. Children reflect this drive in a variety of ways. Anyone who has seen school children fight over seats, books, pencils, paper, and other articles is familiar with the cry, "It's mine!"

Children, like adults, move in a world of property relationships. They have their private possessions which they have bought or had purchased for them. They learn at an early age the difference between mine and thine. Some get allowances, others earn money, and some even save. Daily they are informed by television advertisers that they are disadvantaged if they do not possess more of a never-ending line of products of dubious merit and uncertain value.

Even before children enter school, the mine and thine relationship is expanded to include the more abstract distinction between private and public property. Traffic regulations for driving, biking, speeding, and playing in the streets are law-related examples of restriction on property rights. (See pp. 12-13 for a strategy on property that uses bicycle regulations as a springboard.) That which belongs to the school and to the community belongs to all of us, and, therefore, the uses of private property may be restricted as to time and place.

Property as a Democratic Value

Our daily property transactions take place against a backdrop of history and political theory. Our Declaration of Independence speaks of life, liberty, and the pursuit of happiness, while our Bill of Rights protects life, liberty, and property. Is the pursuit of happiness to be equated with the acquisition of property? John Locke, who exerted a significant influence on colonial leaders, concluded: "The great and chief end, therefore, of men's uniting into commonwealth and putting themselves under government is the preservation of their property" (*Second Treatise on Civil Government*, Chap. 8, Sec. 95). Locke also defined property as including life, liberty, and estates. For him, as for many others, property is an all-embracing idea which is basic to the dignity and integrity of the individual as well as to the viability of a democratic republic. One of the assumptions on which this position is based is that property makes available options and alternatives and ways of effecting change.

Classroom Ideas

With these observations as background, let us focus on the practical question of teaching the idea of property in schools. A starting point might be the world of the child as it relates to real and personal property. Land, money, and things represent webs of legal and social relationships. Legal rights and legal obligations flow from possession or ownership or both. Such signs as Private Property, No Trespassing, Do Not Enter, and Public Property invite analysis of property rights. The home, the school, the public park, the family car, the public bus, the street, and the private yard can all be used as case studies of private and public.

Children engage in bartering and trading, giving and lending, and such transachouses, and prohibiting unreasonable searches and seizures speak to property rights. In addition, the idea of property was further sanctified by the Fifth and Fourteenth Amendments, which prohibited governmental deprivation of property rights without due process of law and just compensation for taking private property for public use.

Property relationships dominate American society in a variety of ways and are of great concern to students in the schools, who must differentiate public from private property as well as the use and abuse of property. If students were asked, for example, to sign formal contracts relating to the use of school textbooks or lockers, the rights-responsibilities equation might be clarified and transferable to other transactions.

Consumer law, landlord-tenant disputes, and welfare problems are especially close to students in the inner cities; for them, ignorance of the law can mean disaster. Consumers, confronted by false advertising, shady business practices, complicated installment buying contracts, exorbitant prices, and shoddy merchandise, have a range of available remedies. In landlord-tenant cases, a knowledge of the nature of a lease and the mutual obligations involved can contribute to a reasonable resolution or to legal recourse, instead of the violence and destruction of property. The welfare debate, punctuated by charges of laziness and cheating, takes on meaning only when the nature of poverty, in the midst of plenty, is studied seriously. In this sense government assistance to big business, which has been labeled welfare for the rich, calls for comparative analysis.

Some states mandate a course of study on the essentials and benefits of the free enterprise system. Based on the accomplishments of American capitalism, such a course would probably cover such topics as private property, individual initiative, competition, the profit motive, and the policy of laissez-faire. The intent seems to be to develop an understanding of the system with special emphasis on its superiority to other economic systems.

Education for responsible citizenship, of necessity, does have to raise questions about the content of such courses. Scholars, businessmen, workers, and farmers have found the free enterprise system far from perfect. The antitrust philosophy, buttressed by major legislation, was designed to preserve the substance of competition within the economy. Despite efforts of many administrations, industries have fallen under the domination of monopolies or oligopolies and, finally, multinational corporations whose property base makes them richer than many of the states and nations in which they have branches. The small private entrepreneur is overshadowed by economic giants.

The same development from the small to the big has marked labor and agriculture. The small-craft union has been merged into the powerful industrywide labor organization, and the small farmer is being swallowed by agribusinesses.

To confront what was once called "the curse of bigness" and to uphold the tenets of the free enterprise system, policy decisions have to be made. Is the antitrust philosophy obsolete? Should giant corporate units be dismantled into moderate and manageable enterprises? Should the activities of labor organizations be restricted? Have technology and automation transformed the nature of property and property ownership so that new forms have to be created? Is governmental intervention on behalf of private enterprise needed to-

(continued on page 64)

tions can be used as entry points to examining the idea of property. Taking property without the permission or against the will of the owner opens the door for a discussion of laws relating to burglary, robbery, and theft, as well as plagiarism.

As a consumer, the child is the beneficiary, as well as the victim, of advertisers. The study of advertising and the analysis of its messages are essential to an appreciation of the use and abuse of property. The sooner children learn to differentiate misleading from instructive media messages, the better it will be for the individual and the community.

As consumers, children are always entering contractual relationships, either through the intervention of adults or on their own initiative. Purchases are contracts; the loan of school books or equipment is a contract; library books are borrowed; and money may be loaned or borrowed. It is not difficult to illustrate the rights-responsibilities-remedies nexus of contractual relationships by designing an actual contract. Such a document covering the loan of school books or equipment or school lockers could detail in simple language the precise conditions relating to the care of school property, as well as the penalties for failure to live up to the terms. From this elementary step the students can be moved to an edited version of the installment agreement and the landlord-tenant lease. When students are able to confront these awesome documents in edited language, they will better understand the never-ending legal relationships which will mark their lives.

There is an aspect to property law which puzzles students. As a rule, merchants will not contract with minors because the law protects children against the enforcement of most contracts. Faculty advisors are necessary as the cosigners of contracts made by students on behalf of their organizations. The reasons for this precedent deserve classroom discussion, since at first glance this seems to be a case of discriminatory treatment.

Property in Other Disciplines

The study of American history, as well as other cultures, offers insights into the changing nature of property relationships. Slaves, serfs, indentured servants, and women as human property were accepted by intelligent people in the past as a natural component of the human condition. The study of economics raises issues of the distribution of wealth, the prevalence of poverty, and the role of the government in relation to each. The nature of the private enterprise system, as well as that of contrasting systems, can be presented in a variety of ways to young children.

The confrontation between the supporters of the quality of environmental life and the defenders of the right to use property for economic expansion or economic progress has produced such appealing slogans as "Pollution and Progress," "Save the Environment," "Protect the Wilderness," and "Protect Our Jobs." The complex nature of the controversy, however, compels the search for a hierarchy of values in contemporary society.

In the classic confrontation between property rights and human rights, we move from rules, tools, and institutions of the law to the law as humanity. In seeking legal solutions to these troubling questions, we might heed the advice of Justice Oliver Wendell Holmes: "To know what you want and why you think that such a measure will help it is the first but by no means the last step toward intelligent legal reform. The other and more difficult one is to realize what you must give up to get it, and to consider whether you are ready to pay the price."

1840
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Julius Chambers

The Idea of Justice

Sometimes it's simply a matter of what's fair

What is justice? What is due process? And how do our institutions respond to these philosophical ideas of the Constitution?

My interest is in ensuring that the bicentennial reflects a message for all Americans, particularly for blacks and for other minorities and the poor, so my emphasis will be on justice and equal rights.

We have frequently heard the Constitution described as a document designed to limit the powers of government, or to prevent tyranny by the majority and more recently to protect the rights and interests of individuals and minority groups. Those principles at work are vividly depicted in the efforts of black Americans to make the Constitution an effective instrument to ensure and protect minority opportunities. The limitations on government necessitated a search within the Constitution and the history of the Constitution for provisions that would remove the vestiges of slavery and for remedies that would make those freedoms real and effective. The remedies that evolved invariably led the Court to balance individual and group rights, both of which are protected by specific provisions of the Constitution.

The message I hope to convey to you today is that the document framed by our constitutional founders in 1787, and subsequently followed by amendments with the Civil War to make blacks and other disadvantaged Americans a part of the Constitution, is a living document. It evolves with principles and remedies to reflect what is right and what is fair. That evolution, however, comes not through inertia but through toil and dedication under principles themselves protected by the Constitution – freedom of speech, freedom of press, freedom of assembly, freedom to use the courts and the legislatures to redress grievances, and where all else fails, freedom to amend the Constitution itself. I will discuss three efforts that black Americans have pursued to evolve constitutional principles and protections.

The first is the right to equal educational opportunities. It has resulted in some major changes and obstensibly today ensures that all Americans have a right to an equal education, at least where such education is provided by individual states or by the federal government. The second effort is to abolish capital punishment. It has also had some successes, but problems in that area remain today. The third effort is to evolve constitutional principles prohibiting discrimination against the poor. It is just under way. Its success or failure will have to be measured in the years to come

Fairness in Education

Historically, blacks as a group were a disenfranchised and disfavored species in public education. Blacks were initially denied any right to an education. And with *Plessy v. Ferguson*, 163 U.S. 537 (1896), sanctioning racially separate but equal railroad cars, blacks continued to suffer educational disadvantages. Educational programs for blacks generally remained separate and unequal.

In an effort to challenge these practices and with the hope of broader applications, black Americans set out during the 1930's to evolve constitutional protections prohibiting discrimination on the basis of race in educational programs. The task was formidable. Some specific provision of the Constitution had to be identified. The Fourteenth Amendment applied to the states, but the Court had interpreted that amendment in *Plessy v. Ferguson* to permit racially separate facilities, so long as those facilities were equal. Due process (substantively and procedurally) and the privileges and immunities clauses of the Fourteenth Amendment (with the right to an integrated education defined as a privilege and immunity of citizenship) were other possibilities. So was the Ninth Amendment, largely then and even today undeveloped. The argument here was that a nonsegregated education was one of the rights reserved "to the people."

Public opinion also had to be considered, because public opinion in the 1930's supported racial segregation. If we were evolving constitutional principles to reflect public perceptions of what is fair, public perceptions regarding segregated facilities had to be changed. In fact there were even differences among blacks whether the goal should be integration or racially separate but equal educational facilities. W. E. B. DuBois argued forcefully in the 1930's that we should not seek integrated schools because blacks in supposedly integrated schools would still be subjected to racially discriminatory practices. And one hears that voice even today.

But the decision was made to challenge racially separate facilities and to base the fight on the interpretation of the equal protection clause of the Fourteenth Amendment. The equal protection clause, with its history, simply offered a better prospect for relief. Cases were therefore carefully selected with the least public controversy which would enable the parties to demonstrate the egregious inequities in separate and supposedly equal educational facilities.

Missouri ex rel. Gaines v. Canada, 365 U.S. 337 (1938), was one of the first cases. I ask you to consider the selection of a law school as a first test case, and the problem that was used to demonstrate the inequities of separate and supposedly equal facilities. Missouri had a public law school within the state and would not admit blacks to that institution. It did provide, however, that it would pay the expenses for blacks to attend the law school in an adjacent state. Is it a violation of the equal protection clause under *Plessy v. Ferguson*, for a state to exclude a black from a public institution while at the same time paying for that black to attend another school in another state? The Supreme Court held that it was a violation of equal protection for a state to sanction that kind of practice because the state had to provide an equal facility within the confines of the state. What was happening here was that the Court was beginning to chip away at the position taken in *Plessy v. Ferguson* and supported in many other areas, allowing a state to discriminate against people because of their race or color.

The second case that came up through this effort was *Sipuel v. the University of Oklahoma*, 332 U.S. 631 (1948). Again, Oklahoma had one public law school within the state and was paying for black students to attend law schools in adjacent states. Using the *Gaines* decision, the plaintiffs argued and the courts accepted the argument that Oklahoma, like Missouri, was denying blacks equal protection of the law. And the Supreme Court directed relief. But while the case was pending, Oklahoma decided that it would build a law school for blacks within the state of Oklahoma.

The question of a separate black facility within Oklahoma or a separate black facility within the state of Texas came to the Court again in 1950 in *Sweatt v. Painter*, 339 U.S. 629, and *McLaurin v. Oklahoma State Board of Regents for Higher Education*, 339 U.S. 637. And the question here, as distinguished from the earlier cases, was whether the separate facility for blacks within those states deprived blacks of equal educational opportunities. And the courts said yes, because the separate facilities provided within Oklahoma and within Texas still did not provide an equal educational opportunity for minority students in graduate and law school.

And the final case was whether a state, in admitting a black to a traditionally white institution, could segregate that black within that institution. The black student admitted in *McLaurin* was told to sit in a cubicle away from every one else in the library, and to sit behind a door in the classroom and not within the regular classroom, because that student was being segregated by the state within a supposedly all-white institution. The Court said that too deprived that black student of equal protection of the law.

Having chipped away as each argument advanced by the state supporting separate but equal educational facilities, the plaintiffs presented in *Brown v. Board of Education*, 347 U.S. 483 (1954), the stark issue. Does it violate an equal protection clause of the Constitution for a state to segregate students within the public facilities solely because of race or color? And in 1954 the Supreme Court said yes. And for a number of reasons the Court proceeded to articulate why separate but equal facilities would violate the equal protection clause. But note also that the Court at the same time held that that same discrimination practiced by the federal government would violate due process of law.

But *Brown* announced a constitutional principle, a substantive right, and then the problem came of how to develop a remedy. And one began in 1955 with Brown II. I submit that the Court ignored its responsibility to develop or direct relief, and shifted the responsibility back to the states for 20 and 30 more years of litigation. The Court said that the boards had to develop some means of achieving what the Court had announced the boards had to do. And the Court had the boards consider a lot of factors that went into the operation of the schools. And boards had to achieve this objective with all deliberate speed. And for 30 years the parties litigated what the Court meant by *Brown v. Board of Education*.

In 1968 the Court held that the time for all deliberate speed had run out. And it was time for the boards to proceed immediately, now, to implement the teachings of *Brown*. But in 1969 the Court said that "immediately" and "now" didn't quite mean immediately and now, it meant as soon as possible. And so it gave a board six more months. In 1968, the Court said that pupil assignment acts were not effective tools for desegregating the schools. And in 1971 the Court said that a district court could probably order busing and transportation of students in order to achieve desegregation.

We have proceeded from 1954 through 1970 and 1971, with orders directing boards to as soon as possible desegregate the public schools and to use all appropriate means for achieving that objective. Look at what has been accomplished. A Constitution in 1930 said it is appropriate and constitutional for a state to segregate its children solely because of race in their assignment to public schools. In 1971 and 1972 the Court was saying it is unconstitutional to permit that kind of practice and boards have a responsibility for eliminating those practices and the vestiges of those practices.

Is this the Constitution that was adopted in 1787 or that was amended following the Civil War? Or is this a Constitution that the Court was looking at in the 1950's and the 1960's to reflect what was then perceived to be fair and then perceived to be equitable?

But the Constitution doesn't stop in 1954 or 1970, it continues to live, and remedies and rights change. We move to 1986, with a court deciding in *Ridick v. the Norfolk School Board*, 784 F.2d 521 (Fourth Circuit, 1986), that 11 years of desegregation is enough and that the board should be permitted to return to neighborhood schools, racially segregated as before *Brown*. But another court in Oklahoma City decided that a similar change was unconstitutional. In *Dowell v. Board of Education of Okalahoma City*, 795 F.2d 1516 (Tenth Circuit, 1986), the appellate court ordered the board in Oklahoma City to return to the plan it had implemented over the past few years.

Those cases went to the Supreme Court this term. We all expected the Court to grant review to resolve the issue of whether you can resegregate public schools under the circumstances presented. The Court decided not to review those cases, and let stand a rule in the Fourth Circuit affecting five southern states that where a board demonstrates that a racially unitary system has been achieved the board can return to racially neutral assignment plans. And it let stand a ruling affecting the Tenth Cir-

(continued on page 63)

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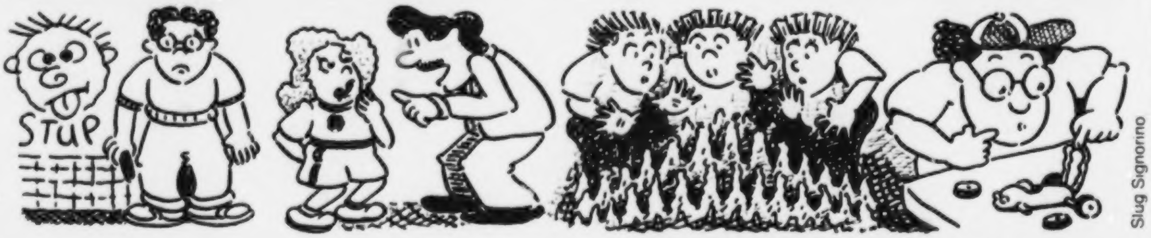
Justice

Making Wrongs Right/Grades K-6 **Dale Greenawald**



Slug Signorino

This activity is designed to help primary students to analyze situations where a wrong has occurred and offer recommendations for corrective justice.

Objectives

To apply the concept of corrective justice and develop critical thinking and problem solving skills. To emphasize that courts are to help those who were wronged, not just punish people.

Procedures

The teaching time is approximately 30 minutes for grades K-3 and approximately 45 minutes for grades 4-6. This lesson is a natural for a community resource person from the justice community (e.g., a lawyer or judge).

Explain that after a case is decided and a person is found guilty a court has several functions. It wants to protect society so that the person can't hurt anyone else. It also wants to help the guilty person improve himself/herself. It also wants to punish the guilty person so that he/she won't break the law again. Finally, the court wants to help the person who was hurt.

Read each case. Ask students to explain what happened. Ask what might be done by those involved to correct the situation. Why do they think that their solution is a good one? The resource person will critique responses.

K-3 READINGS

1. Mike wrote on the bathroom walls. When he admitted that he had been the person responsible, the principal asked him how he might make things right.

   Ask the class for suggestions about what would be fair. What might Mike do and why should he do that? Why is this a good suggestion and how will it help? Critique answers in a positive manner—"what about?" "did you think of. . .?"
2. Sarah was shopping with a friend and she took and ate some candy without paying for it. When she tried to leave the store the manager asked why she hadn't paid for the candy she ate. Sarah did not have any money to pay for the candy. She doesn't have any money anywhere. What can Sarah do to make this wrong right?
   A. Have the class brainstorm solutions and how they might make things better. What would be fair?
   B. What can the manager do if he wishes to stop this kind of behavior?
3. Three children are playing with matches at the picnic grounds, Blue Bell Shelter. A strong wind comes up and a spark sets the grass on fire. The shelter and many acres of land are burned, and several animals kept in a small zoo nearby are killed or injured. Before trying to make this wrong right, think about:
   - Some animals are gone forever.
   - The children are too small to rebuild the shelter.
   - The community cannot use the picnic grounds.
   - It cost a lot of money to put out the fire.
   - It costs a lot of money to rebuild the shelter.

   A. How can this wrong be made right? What would be fair?
   B. What can the children do even though they cannot make things the way they were?

FOR USE WITH GRADES 4-6

Several students at Westmeadow Elementary School see a television ad for the Whiz-Bang Mighty Automobile toys. It looks like a really neat set of toys. In the ad it looks like the toys are several feet long and have motors. The set costs $45.00. Each of the children work very hard cutting grass, doing chores and helping neighbors for several months to earn money. They stop going to movies and buying candy so that they can save all of their money for the Whiz-Bang Mighty Automobile toys. When the toys arrive, they are about six inches long, made of plastic, and powered by a rubber band. All of the toys are broken within a few days of use. They simply fell apart. It is clear that the advertisement was misleading.

CLASS DISCUSSION

1. What is fair?
2. What are the legal rights of the children?
3. How can this wrong be righted?
4. If you were a judge and this case came to your court, how would you right the wrong?

The resource person should explain the rights of the children in this case and what would probably happen if they complained to the county consumer affairs office. Also, if the students took their case to small claims court what might happen?

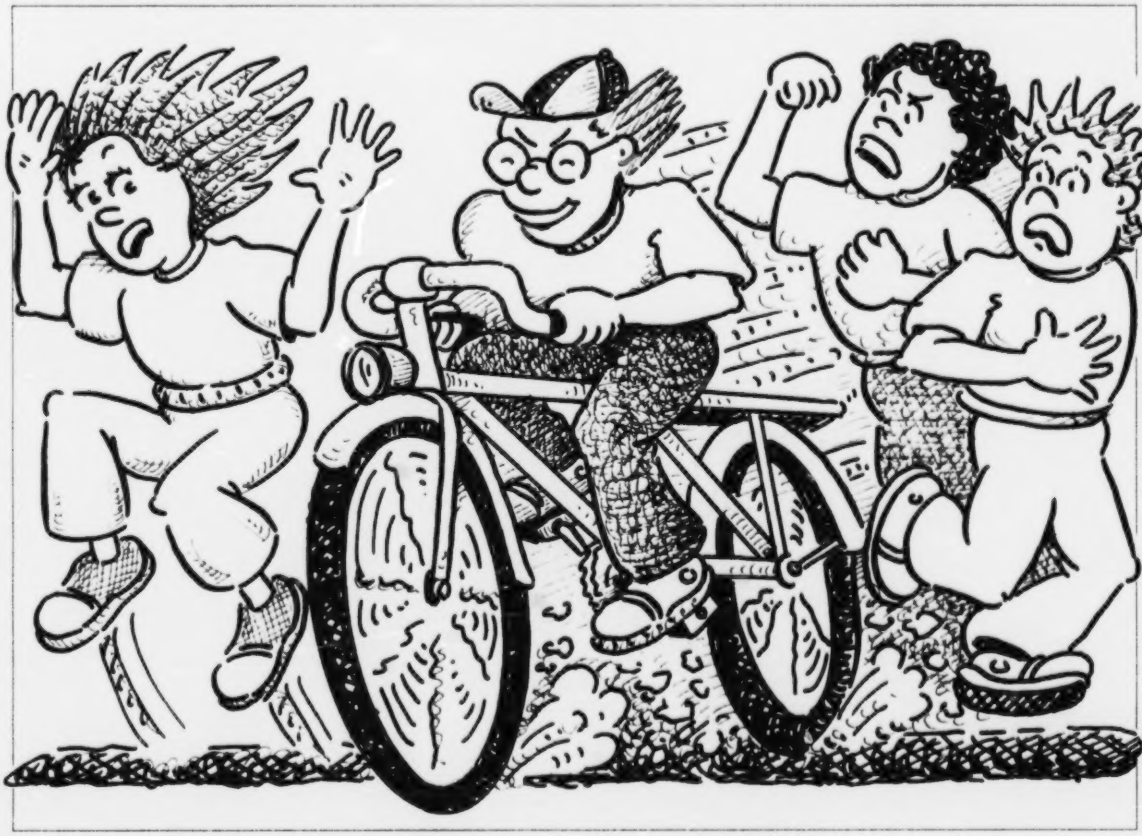
The lawyer or judge should tell about different programs and ways the courts can right wrongs. For example:

1. work release programs
2. community service sentences
3. paying back the cost of the damages (restitution)
4. repairing what can be fixed

Dale Greenawald is an educator in Boulder, Colorado.

Property

The Scope and Limits of Ownership of Property/Grade Levels 3, 4, 5 **Law in a Free Society**



Slug Signorino

The purpose of government as stated in the Declaration of Independence is the protection of the individual's right to life, liberty, and property. The Constitution of the United States protects property by limiting government. But what should happen when one individual's reckless use of private property endangers the life, liberty, or property interests of others in the community?

In this lesson young children focus upon the question of what should be the scope and limits of ownership. Students begin by reading a story about a boy who owns a brand new bike and then discuss whether owning something gives the person the right to use that property any way he or she wishes. They discuss some of the rights they think should accompany ownership of a bicycle, and what responsibilities, if any, the owner of a bicycle should have. Students then gather information on rules and laws within their own community which help determine the scope and limits of ownership. Students work in small groups to develop policies regarding the scope and limits of the use of property. The class then meets as a whole to discuss the policies developed by each group.

Procedures

Begin the lesson by reading the following hypothetical story to students. After they have listened to the story, discuss its content in terms of the questions that follow.

GEORGE'S NEW BIKE

George had a brand new bike. Did he feel great! This was HIS bike. He could do anything he wanted with it. Now he wouldn't have to borrow his sister's bike anymore. He wouldn't have to listen to her saying, "Take care of my bike!" "Don't go over curbs or you'll ruin the tires!" "Get off, you've ridden long enough!"

George pedaled down the street. He practiced going up and down curbs for a while. Then he tried a few wheelies. Next he worked on his hand signals – signal for right turn . . . signal for left turn. Things were getting dull. Just then he saw a group of children crossing at the corner. "Hah, I think I'll give 'em a scare," he thought. Straight toward the children he rode – faster and faster. "Better get out of the way," he yelled, "cause I'm coming through!" The children ran in all directions.

"George, you can't just ride at people and scare them half to death!" yelled one of the boys who had just reached the curb.

"It's my bike so I can ride it anywhere I want. You should've stayed out of my way!" George answered.

George rode on – past the corner and into the intersection. A woman driving a car slammed on her brakes and came to a screeching halt.

"Young man," she called, "that's a very good way to get hurt. Don't you know any better than to ride right into an intersection?"

George was a little frightened. After all, he had almost gotten hit by a car. Even so, he gathered up his courage and said, "You can't tell me what to do. It's my bike and I can ride it any way and anywhere I want to."

The woman shook her head and drove off. George looked around. It was getting dark. Time to start for home. George decided to ride on the sidewalk since he didn't have a light on his bike. Just then he saw his next-door neighbors, Jerry and Lisa. "Hey, want a ride?" George called.

"Sure," they both answered.

Lisa climbed on the handlebars and Jerry sat behind George. Off they went, laughing and singing. As they rounded the last corner on the way home, they saw an old woman with a shopping cart in their path.

"Look out!" shouted Lisa and Jerry. But it was too late.

The bicycle missed the woman but it hit the shopping cart. Cartons of milk and cans of vegetables flew every which way. The three children hopped off the bike to pick up the cart and reload the groceries.

"Don't you children know any better than to ride three on a bicycle in the dark on the sidewalk?"

George muttered to himself, "Who do you think you are to tell me what to do with my own bike? If I want to ride three people, I will. And if I want to ride it on the sidewalk, that's my business. You don't own the sidewalk."

"What did you say, young man?" asked the old woman sharply.

"Nothin'," George said quietly.

"You go on home now, do you hear, or I'm going to speak to your parents," the old woman said.

The three children walked the rest of the way to their homes. George said goodbye to Lisa and Jerry and leaned his bike on the lawn up against his house.

"Better put that new bike in the garage, Georgie," teased his sister who was standing on the porch. "It's going to get wet and all rusted if you leave it outside."

"So *what*!" shouted George. "It's my bike. I'll put it wherever I please. If it gets wet and rusty that's *my* business."

DISCUSSION QUESTIONS

1. What are some of the ways George used his bicycle in the story?
2. Which of these do you think are ways George should be allowed to use his bicycle? Can you explain why.
3. Do you think there are any ways in which George should not be allowed to use his bicycle? Can you explain why?
4. What are some rights you think the owner of a bicycle should have?
5. Are there responsibilities you think the owner of a bicycle should have? If so, what are they?

GATHERING INFORMATION

At this point, students might be asked to suggest ways of gathering information on rules and laws within their own community which help determine the scope and limits of ownership in regard to the use of bicycles. For example, students might want to invite to the classroom:

1. A police officer or other city official to discuss community laws dealing with the ownership and use of bicycles.
2. A school administrator or member of the school safety patrol to discuss school rules and regulations covering the use of bicycles owned by students.
3. Representatives of different families to discuss rules they have made to cover the use of bicycles by family members.

After students have gathered data related to the rights and responsibilities of ownership and use of bicycles, they might discuss what they have learned in terms of the following questions:

1. If George lived in your community, what laws would affect the ways he might use his bicycle? Why do you think your community has these laws? Do you think these laws should be followed? Why? Are there any laws you would add? Change? Remove? Why?
2. If George went to your school, what rules would he have to follow if he wanted to use his bicycle? Why do you think your school has these rules? Do you think these rules should be followed? Why? Are there any rules you would add? Change? Remove? Why?
3. If George were your brother, what rules would he have to follow if he wanted to use his bicycle? Why do you think your family has these rules? Do you think these rules should be followed? Why? Are there any rules you would add? Change? Remove? Why?

DECIDING WHAT TO DO

Next, the class should make a list of its policies for determining the scope and limits of bicycle use. In so doing, students should take into account the additions, deletions and changes made in response to the three questions above as well as any further suggestions they may have. When the policies have been completed, students might attempt to apply them to George's case. For example, students might role-play a situation in which a parent, teacher, or police officer explains bicycle-use policies to George. Students might then discuss the following questions:

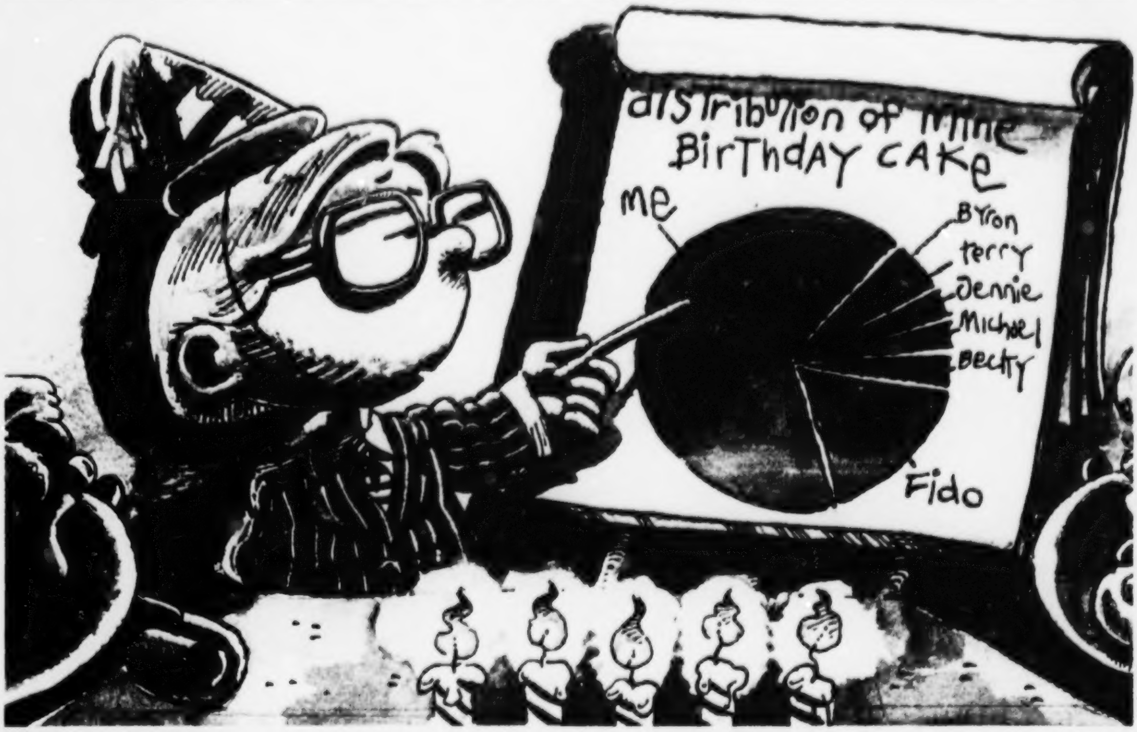
1. Should these policies be applied to the use of bicycles by all owners?
2. Should age be a factor in determining which policies should apply?
3. Are there other factors which might be taken into account?

As a final activity, divide the class into small groups of five to eight students each to develop policies regarding the scope and limits of the use of property other than bicycles. For example, all students who own pets might form one group, students who own books another, students who own a particular toy another group. Each group will then discuss the rights and responsibilities of ownership of the particular example of property and the scope and limits of use which should attend such ownership. After each group has finished, the class might meet as a whole to discuss the policies developed by each group. For more advanced and upper elementary children, it is suggested you use portions of the Constitution (Article 1, Section 9; and Amendments 3, 4, and 5) to investigate how the individual's right to property can be regulated and protected.

This lesson on the Constitution is adapted from materials developed by the Center for Civic Education/Law in a Free Society.

Equality and Property

Equality and Property: Yours, Mine and Ours/Elementary and Middle **Arlene F. Gallagher**



John Hayes

All of our lives we are confronted with questions about distribution, from how to divide a piece of cake to how much of the budget should be allocated to education. "Distribution is what social conflict is about," writes Michael Walzer in *Spheres of Justice* (Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books, Inc., 1983).

Children learn early from parents, siblings, and friends that some things are mine and some things are yours. Those things that fall into the "ours" category are less clear. Shared ownership and the notion that everyone should have equal access to some things are problematic. Along with ownership and use comes responsibility, but diffused responsibility often has the effect of making no one feel responsible.

EQUAL ACCESS AND RESPONSIBILITY

There are several difficulties with shared ownership that, once understood, can encourage greater acceptance of shared responsibility. The nature of that which is shared can be simple or complex. If two people jointly own a bicycle, or a car, they can set up a schedule of equal use. They can determine maintenance needs and share responsibility for caring for the bicycle. But what about things such as parks or lakes, that everyone thinks they have equal access to use? We all want to use these things but examples of a polluted environment are testimony to the fact that we don't always act responsibly.

Those things to which people believe they should have equal access are what Garrett Hardin calls "the commons" in his essay, "The Tragedy of the Commons." (Garrett Hardin and John Baden, editors, *Managing the Commons*, San Francisco: W. H. Freeman and Company, 1977. See Chapter Three, "Tragedy in the Commons," which first appeared in *Science*, 162:1234–1248, 1968.) Hardin uses a philosophical meaning of tragedy stated by A. N. Whitehead: "The essence of dramatic tragedy is not unhappiness. It resides in the solemnity of the remorseless working of things." (A. N. Whitehead, *Science and the Modern World*, New York: Mentor, 1948, p. 17.) Hardin's scenario is useful to illuminate how shared ownership and equality of access, unless controlled, can lead to the remorseless working of things.

THE TRAGEDY IN THE COMMONS

Imagine a pasture that is open to use by sheepherders. Each sheepherder wants to have as many sheep in the common pasture as possible. This is not a problem as long as the pasture's carrying capacity is not exceeded. It may work for years because various forces keep the number of sheepherders and sheep below the carrying capacity. Eventually with each person acting rationally, and in his or her own best interests, the carrying capacity will be exceeded, destroying the commons. This is the inherent logic of the commons.

CONSCIENCE, GUILT AND THE COMMONS

What can be done to avoid the tragedy of the commons? Many of the things we try are not effective. Hardin warns us that appeals to conscience and exhortations telling people not to exploit the commons puts people in a double bind. If they do as they are asked and others continue to exploit the commons, they feel at the least cheated, if not victimized. If they don't act responsibly they feel guilty.

TEACHING WITHOUT PREACHING

We try to get children to act responsibly all the time by *telling* them to be responsible. A classroom teacher who tries to get a student to pick up papers dropped on the floor will most likely get the response: "But I didn't drop it." Anyone who has raised a family of more than one child knows the ghost named "Not-me" because that is the answer to: Who left the lights on? Who spilled the milk? Who left this room in a mess?

How can teachers help develop a sense of responsibility toward the commons without preaching? It has been almost twenty-five years since Rachel Carlson wrote *Silent Spring*, then a highly controversial indictment about the use of pesticides. Her friends warned her not to expect brisk sales on this book but they were wrong. People want information. An explanation of how the tragedy of the commons works and how people, through mutual consent can prevent the "remorseless working of things," can guide children to assume responsibility for goods and resources without giving up their right to equal access.

DEFINING A COMMONS

The following simplification of the commons, while taking license with Hardin's theory, makes it useful to elementary teachers. The first criterion for something to be a commons is that individuals should be attracted to use it. This attraction should be natural and the use of the commons should be rational. Using the commons is not bad; it serves a person's self interest to do so, as in the case of the sheepherders' use of the pasture. But this rational behavior leads to overutilization which inevitably exceeds the commons' carrying capacity. This is the second attribute of a commons: it has a carrying capacity which, if exceeded, leads to the tragedy. For children a teacher may find an example other than sheep and pastures more helpful.

SIMULATING A COMMONS

In the *Sandbox Activity* more and more children are added to the sandbox until its carrying capacity is exceeded. The *Shrinking Classroom Simulation* uses the classroom itself as a "commons" and simulates its reduction. It enables students to see how the classroom would be affected if it were reduced in size or if more students were added.

More and More Immigrants deals with population control and will help students to envision another kind of commons.

THE IMPORTANCE OF CONTEXT

All of these activities help children to develop a broader point of view on use of a commons, but the commons does not exist in a vacuum. A sandbox in a neighborhood where there are very few children is not going to be overutilized. No rules or regulations are needed about its use. On the other hand, a sandbox in an inner city playground presents problems. In order to make decisions about whether to regulate a commons we need to know the context.

Dividing the Bagels is an activity that introduces human context to the process of fair distribution. Students are asked to distribute a limited resource to a group of people in a way they deem to be fair. Then, after receiving additional information about the needs and wants of the individuals, they are asked to reconsider their decision.

The *Vacant Lot Activity* dramatically demonstrates how a context affects decisions about a commons. In this activity students have to decide how to use a vacant lot. Initially they only know that this lot is available. They do not know the context. After brainstorming ways the lot could be used they receive more information about where the lot is located. The fact that it is surrounded by certain buildings makes the students revise their decisions about how this "commons" should be used.

The Sandbox

(ELEMENTARY)

This activity introduces the idea of the tragedy of the commons. It is primarily "teacher directed" and intended to be used to establish concepts that can be applied to further development of the ideas of shared ownership and equality of access.

MATERIALS

You can do this activity by drawing on the chalkboard or by preparing cut out figures of children ahead of time to tape up or use on a flannel board.

PROCEDURE

Ask the class if they have ever seen a sandbox. What is its purpose? It is a place for young children to play. This is the first attribute of a commons; humans are attracted to use it. Draw a sandbox on the chalkboard and tell them that this sandbox was designed for six children who live in the neighborhood. Ask the class if they think the children should be able to play in the sandbox. This establishes the idea that the children in the neighborhood have equal access to this "commons." Draw the six children in the sandbox, or tape cut outs of six children to the board. Be sure they fit comfortably. Discuss the kind of play that might be going on and whether the six children each have an equal right to play in the sandbox. Then bring out, or draw, six more children, explaining that they also live in the neighborhood and have an equal right to use the sandbox. Discuss what will happen if these children are added.

Ask what will happen if more and more children are added. The sandbox will no longer serve its purpose and will probably be ruined. It has exceeded its carrying capacity, another attribute of a commons. Ask the class what could be done so that the purpose of the sandbox will still be met. Have them suggest ways to control use the of the sandbox.

- Who should decide who can use the sandbox?
- What are "fair" ways to distribute use of the sandbox equally to all of the children in the neighborhood?

FOLLOW UP DISCUSSION

Discuss other "commons" in children's lives. Using a broad definition of the concept, children can discuss equality of access to jointly owned objects (i.e., toys in the classroom, television at home, recreation areas).

Adding Context with Children's Literature

One of the easiest and most enriching ways to add context to examine "commons" problems is through literature. There are hundreds of books that can be used to develop an understanding of how the environment is acted on and how resources are distributed by human beings; all stories happen in a setting with characters whose behavior often affects the environment. Some books demonstrate that the tragedy of the commons can occur when we put something into the commons, and others illustrate what happens if we take something out. The bibliography is not meant to be all inclusive but should serve as a stimulus for the reader to think of other titles that are equally appropriate.

BOOKS FOR THE YOUNGER READER

It Could Always Be Worse is a folktale retold by Margot Zemach. It demonstrates how our perspective on the same environment can change dramatically. *The Play With Thirty-Two, more or less, Parts Activity* physically puts children in a position where they can experience this change in perspective.

Rotten Island by William Steig is true to its title: full-page illustrations show what can happen if every creature on land and sea were free to be as rotten as possible. *The Wump World* by Bill Peet further develops the theme of how behavior can destroy environment. In *The Lorax* by Dr. Seuss, something is taken out of the environment. All of the beautiful truffula trees are cut down to make thneeds, until someone manages to "speak for the trees." In *The Wartville Wizard* by Don Madden, the wizard is sick and tired of the way people throw their trash around. He uses his magical powers to make thrown-away trash stick to the perpetrators.

Some books focus almost exclusively on the setting and how it is used or divided. *Playgrounds* by Gail Gibbons is an early concept book that shows various types of equipment found at a playground. It is a useful book for discussion about use of a playground and responsibility for care and maintenance.

BOOKS FOR THE OLDER READER

In the Grip of Winter by Colin Dann and *The Song of Pentecost* by W. J. Corbett are stories with animal with animal characters but are in the style of the classic *Wind in the Willows*. They can be read independently by middle grade readers and could be used as read-alouds for younger children. Colin's story is about a band of animals and their journey to the White Deer Nature Reserve where they are hunted by poachers who enter the reserve while the game warden is away. It would be good for discussions about who should have equal access to a reserve, why lands are set aside and why regulation needs enforcement. Dann's story is that of a harvest mouse named Pentecost and the journey of this tribe across a polluted wasteland to a new home. Environmental and property issues such as, "who owns the pond?", are integrated throughout the story.

Walls: Defenses Throughout History by James Giblin gives insight to the territoriality of human beings. People have built walls since the Ice Age, sometimes to surround entire countries. This book introduces the reader to some of the world's most impressive fortifications and reveals why none of them was ever entirely successful.

Jean Craighead George has written many books about animal and human behavior and its effect on the environment. Her most recent, *Water Sky*, is a young adult novel about a boy who joins an Eskimo whaling crew and learns how cultures can have opposing viewpoints about a natural resource. Lincoln learns about "silence that talks"; he experiences the hurt of racism, and realizes the interconnectedness of all living things. The centuries-old system of equal distribution of a whale to all the villagers points out how property is viewed differently in other cultures.

CHILDREN'S LITERATURE BIBLIOGRAPHY

1. *The Lorax* by Dr. Seuss. Random House, 1971.
2. *In the Grip of Winter* by Colin Dann. Arrow Books Limited, London, 1981.
3. *It Could Always Be Worse* by Margot Zemach. Scholastic Book Services, 1976.
4. *Playgrounds* by Gail Gibbons. Holiday House, 1985.
5. *Rotten Island* by William Steig. Godine, 1984 (revised edition).
6. *The Song of Pentecost* by W. J. Corbett. Puffin Books, 1984.
7. *Walls: Defenses Throughout History* by James Cross Giblin. Little Brown, 1984.
8. *The Wartville Wizard* by Don Madden. Macmillan, 1986.
9. *Water Sky* by Jean Craighead George. Harper and Row, 1987.
10. *The Wump World* by Bill Peet. Houghton Mifflin, 1970.

The Shrinking Classroom

(ELEMENTARY)

An earlier version of this activity appeared in *Living Together Under the Law: An Elementary Education Law Guide* by Arlene F. Gallagher. (New York: New York State Department of Education and the New York State Bar Association, 1982.)

This activity simulates a reduction in a "commons"... your classroom. It is effective with any age, although younger students need more specific instructions and the setting can be changed from a classroom to some other "commons" for adults.

The purposes of this activity are: to have students experience what happens when a resource is overused and decide ways to maintain equal access to that resource.

PROCEDURE

You can either use the following specific situation or tell your students that they are to participate in an experiment in space reduction.

Tell your students that the following announcement has just come from the superintendent's office. If it will help, tell the class that it is very special to be selected for this experiment.

Read the letter to them.

"This office has just been informed that the enrollment in this school district is going to quadruple next year. We are trying to decide how to accommodate all the children who will be coming to our schools. One alternative that we are considering is to divide all of the classrooms into four rooms but we are not sure whether or not this will work. Your teacher has agreed to try an experiment with this class to see whether or not this idea is worthwhile. The experiment will mean that you will confine yourselves to a quarter of the space you are presently using and conduct all usual classroom activity in that space. The teacher will also be limited to that space. Your teacher will tell you when to end the experiment. We are very interested in hearing about any problems this creates. Thank you for helping us to try out this new idea."

Signed: Superintendent of Schools

Ask the class if they are willing to participate in the experiment. The simulation will probably be more successful if you have their mutual consent.

Arrange the classroom so that only one fourth of the space is used. You can either do this before the students arrive, marking off a section with masking tape on the floor, or you can have them assist you. Rearranging the furniture ahead of time introduces an element of dramatic surprise when the students arrive but they may resent being manipulated, a frequent side effect of simulation gaming.

Proceed with the normal business of the day, asking students to help think of ways they will have to modify normal activities in the limited space. Continue the experiment at your own discretion. It doesn't take very long for students to realize how much space influences behavior. They will probably think it is fun for a while but they, and you, should run into some difficulties in this confined space. When problems arise discuss them and ask for suggestions about how to handle them.

FOLLOW UP DISCUSSION

Terminate the experiment when you feel it has run its course, or if the situation gets out of hand. Return your classroom to its normal arrangement before you have the follow up discussion. Do not keep the students in the crowded space where it will be difficult for them to focus their attention on the discussion.

- What problems were caused by the limited space?
- How did the needs of the group change?
- What did we do to try to adjust to the limited space?

More and More Immigrants

(ELEMENTARY/MIDDLE)

This game is only one small part of a very extensive unit titled, "Immigration Law, Customs and History." (Source: Safeguard Law-Related Education Program, P. O. Box 471, Boulder, Colorado 80306.) If the immigrant theme is used, additional materials on customs, laws and history of immigration should be used to avoid giving students the impression that decisions about immigrants are arbitrary. The game can be played without using the immigrant theme; simply refer to the game board as another kind of commons.

MATERIALS

Any board game that can be played by two or more players.

PROCEDURE

Remind children that immigrants settled mostly in cities. Because of this, city populations were shaped by the kinds of immigrants that came to this country.

Select two children to play the board game. Keep increasing the number of new players until the entire class is involved or the game isn't playable.

Direct the following questions to the original players:

- Did you enjoy the game when you started? Why?
- How did you feel about the game after six people joined? Why?
- What problems did you have after everyone joined the game?

Ask the whole class: how does the activity we just did relate to the way some Americans feel about immigrants coming to this country?

Dividing the Bagels

(ELEMENTARY)

The purpose of this activity is to have students practice making decisions about fair distribution of goods and to determine how the context can make a difference in what is considered fair. For a much more indepth treatment of distributive justice that engages children in discussing distributive justice and develops the concepts of need, capacity and desert, see materials from: Law in a Free Society, 5115 Douglas Fir Drive, Suite 1, Calabasas, CA 91302. The units on "Justice" and "Responsibility" are most applicable for this topic.

MATERIALS

Bagels, donuts, tootsie rolls or some other edible item. Be sure to have enough for the whole class at the end of the activity. Photocopy enough sets of role cards so that each group of six students will have a set.

PROCEDURE

Divide the class into groups of six. Place four bagels in the middle of each group and tell them they are to decide among themselves on a fair way to divide the bagels. Tell them not to eat the bagels because there are two rounds to this activity. They can use any method they want to distribute the bagels as long as everyone in the group agrees that it is fair. Explain that when there is a limited resource people often consider the following questions in making a fair decision:

- Does anyone need the bagels?
- Who can accept the bagels?
- Does anyone deserve the bagels?

Give them five minutes to make the decision, then have each group report its method of distribution to the class. Discuss the fairness of the various approaches. For the second round tell the class that they each represent a fictitious character. Distribute sets of the following role cards to each group, have each student select a role at random and ask them to tell the rest of the group about their character.

ROLE CARDS

You are on a diet to lose weight. You don't like this food and its not on your prescribed diet.

You are a single parent with five children. They are all very hungry.

You own a factory that makes this food and can have as much as you want, any time you want.

You have not eaten for 24 hours and do not know when you will get some food.

You are not as hungry as the other people in your group.

You are not starving but on a scale of one to ten you would rate your hunger at ten.

Give each group five minutes to decide whether they want to redistribute the bagels based on this new information. Have the groups report on their new decisions and the reasons for any changes.

Eat the bagels. Be sure you have enough for everyone.

The Vacant Lot

(ELEMENTARY)
Source: *Educating for Citizenship* (1982) Authors: Constitutional Rights Foundation, Law-Related Education Program for the Schools of Maryland, and National Street Law Institute. Publisher: Aspen Systems Corporation, 1600 Research Boulevard, Rockville, Maryland, 20850.

This activity gradually introduces the idea that a context is of crucial importance in determining how to utilize a commons.

PURPOSE

To demonstrate that information helps us to make better choices.

PROCEDURE

Tell students that a city official wants to know what to do with some vacant land. Draw a large square on the chalkboard or use a cut out shape of a vacant lot. Have the class brainstorm possible uses of the land (i.e., park, stores, housing, parking, etc.). Encourage them to come up with as many ideas as possible without making judgments about whether or not the ideas are good or bad. You will need a long list so they can modify it as they get more information about the context surrounding the vacant lot.

List their answers on the board. Next draw or use a cut out of the apartment buildings to the east of the lot and place them on the board. Ask the class whether the fact that there are apartment houses next to the lot affect their list of best uses for the land. If so, discuss the reasons and make necessary changes on the board. Add the Pet Store, Food Market and Taco Town south of the lot and use the same procedure. Add the apartment buildings to the west of the lot and use the same procedure. Finally, add the Library and Police Station to the north and discuss any changes they want to make in the list of possibilities.

Divide the class into groups. All but one of the groups will be assigned, or may choose, one of the suggestions for the vacant land (from the list generated in their discussion). The other group will act as a city council by listening to the arguments presented by each interest group and then making a final decision about what to do with the land based on these arguments.

Give each group a few minutes to decide what reasons to give in support of its suggestions to the council. Each group member should be prepared to give one supporting reason, upon request of the city council. A spokesperson should be appointed for each group to make an initial statement about what the group wants done with the land. City council members can then ask other group members for their reasons.

While interest groups decide what to say to the city council, meet with the council members. Stress that it is important that they pay attention to what each group has to say. By asking questions and listening carefully, they will be able to determine the good and bad aspects of each suggestion. In this way, they will be able to make an informed and fair final decision when the time comes. Appoint one member of the council to record each group's suggestion and supporting reasons—or act as a recorder yourself.

Have each group present its case to the council. Afterward, read from the recorder's list each group's suggestion and supporting reasons to the city council and the interest groups. To avoid any unfairness, ask groups if what was read back to them was accurate. Then, fishbowl style, let the class listen to the city council as it discusses and makes a final decision.

FOLLOW UP

Use the following questions to debrief the simulation.

- What made some of the suggestions better than others?
- Why is it good to have a group like a city council make a decision for the many community groups with different suggestions?
- What kinds of information did the council have to consider when making their decision?
- If the council had made a decision on what to do with the land without knowing anything about the land and the area surrounding it, what problems could have occurred?

It Could Always Be Worse: A Play with Thirty-Two, more or less, Parts

This activity has students experience a change in perspective about a resource: living space. It makes the point that it is not always the amount of a resource that is available but sometimes our own viewpoint.

MATERIALS

A copy of *It Could Always Be Worse* by Margot Zemach. (Scholastic Book Services, 1976. Available in paperback for $1.95.) This is an old Yiddish folktale retold by Zemach. It is a story about a man who lives in a little one-room hut with his mother, his wife, and his six children. The crowded conditions cause so much noise and argument that the old man cannot stand it any longer. Finally, at his wit's end, he goes to the Rabbi for advice. The Rabbi asks the old man if he has any animals. The old man says he has chickens, a rooster and a goose. The Rabbi tells the old man to go home, bring the animals into the hut and come back in a week. The old man thinks this is strange advice but, believing the Rabbi to be a wise man, he does as he is told. Life in the hut becomes worse than ever because the honking, crowing and clucking only adds to the quarreling and crying. In a week the old man returns to the Rabbi complaining that things are worse than ever. This time the Rabbi asks the old man if he has a goat. When the old man says yes, the Rabbi tells him to bring the goat into the hut. The old man follows the Rabbi's advice and things are worse than ever. The next week the Rabbi tells the old man to bring in the cow. When it seems the old man has surely reached the end of his rope, the Rabbi tells him to take out the chickens and return a week later. The old man finds that things are a bit better and reports this to the Rabbi. Each week the Rabbi advises the old man to take out another animal until the hut is back to the way it was when the old man first visited the Rabbi. The moral of the story? It could always be worse.

PROCEDURE

Assign parts for a play of this story. You can have as many parts as you want so that every student can participate. The play can be done with 32 parts; 16 speaking parts and 16 non-speaking parts.

Parts

The Old Man
His Wife. . . makes arguing and scolding noises.
His Mother. . . makes complaining noises.
Six Children. . . crying and fighting noises.
Three (or more) Chickens. . . clucking noises.
Rooster. . . crowing.
Goose. . . honking.
Goat. . . continually butts into people and animals in the hut.
Cow. . . mooing noises.
16 (or less) children to form the walls of the hut; four for each side.

Tell the walls to form the hut by linking arms. One student should be the doorway and should open and close. The rest of the walls should not move. The children will be tempted to expand the hut when it gets crowded so be sure to tell them that they are walls and should not move.

Read the story and have the speaking parts act it out.

FOLLOW UP DISCUSSION

Discuss how the Old Man's perspective on the space he and his family had to live in changed in the story. Relate the story to students' lives by asking them if lack of space creates problems in getting along with others. Discuss how cultures view space differently.

Additional Resources: Simulation Games with "Commons" Themes

BALDICER
Developer: Georgeann Wilcoxson
Grade Level: 6-14
Number of Players: 20
Playing Time: one and one half hours
Where to Order: John Knox Press, Box [illegible]
Richmond, VA 23209

In this game students become "food coordinators" for hypothetical countries [illegible] see to it that all of the people are fed.

THE PLANET MANAGEMENT GAME
Developer: Victor Showalter, Educational Research Council of America
Grade Level: 7-14
Number of players: 2-10 (5 optimum)
Playing Time: 3-4 class periods
Where to Order: Houghton Mifflin Company, 110 Tremont Street, Boston, MA 02107

Students play the roles of managers of [illegible] Clarion, an earth-like place with problems [illegible] overpopulation, pollution, food shortages, [illegible] insufficient incomes.

THE ROAD GAME
Developer: An adaptation of this game by Barbara Ellis Long
Grade Level: 4-Adult
Number of Players: at least 12 and up to 32
Playing Time: one and one half hours
Where to Order: Number 75 in the Intercom Series, Intercom, 218 East 18th Street, New York, [illegible] 10003

A fairly simple simulation about cooperation and competition in which four groups [illegible] another. Group leaders [illegible]

STARPOWER
Developer: R. Gary Shirts
Grade Level: 7-adult
Number of Players: 18-35
Playing Time: one to three hours
Where to Order: Simile II, P. O. Box 1023, La Jolla, CA 92037

This game simulates a three-class society based on wealth. Players trade chips until there are three levels of wealth. Debriefing this game is very important since players are manipulated into abusing their power.

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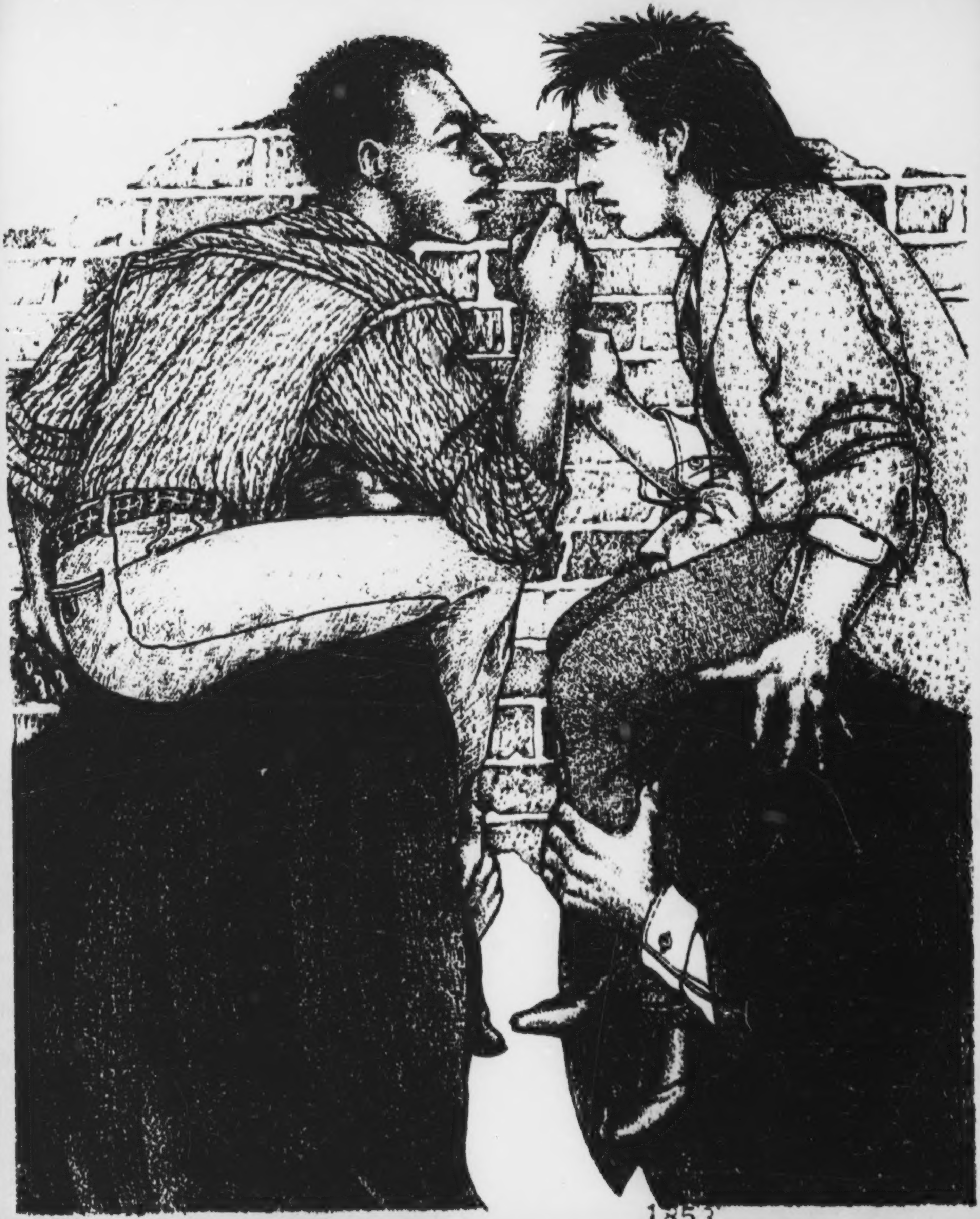

Michael Middleton

The Dilemmas of Equality

The courts are the battleground for deciding how best to remedy a legacy of discrimination

Can affirmative action be squared with the Constitution? Is affirmative action constitutional? Does it have a place in the Constitution's philosophical ideal of equality?

This issue has been the subject of much debate over the past several years, and that debate is important and useful. Affirmative action, of course, is the one current question that truly tests the meaning of equality under the Constitution. In what circumstances may race be a factor in governmental decision making? When may a preference for a particular group comport with the notion of equality? The significance of this controversy is evident in the fact that despite several opportunities, the Supreme Court has still not rendered a decision that finally resolves it.

It's undisputable that the equal protection clause of the Fourteenth Amendment had as its central purpose the elimination of racial discrimination emanating from official sources. It was enacted to negate the effect of state laws treating the newly freed slaves as less than full citizens. Then came the case called *Plessy v. Ferguson*, 163 U.S. 537 (1896). Although recognizing the central purpose of the Fourteenth Amendment, *Plessy* found that the amendment permitted distinctions based on color if the distinction was made through the exercise of reasonable legislative judgment and for the promotion of the public good. In this case, a Louisiana statute requiring equal but separate railroad passenger coaches for black and white passengers was held to not violate the Fourteenth Amendment because this racial classification was reasonable in light of the customs and traditions of the time and because it was designed to preserve public peace and good order. Further, that racial classification did not deprive any group of any facilities. The burden of the classification was viewed as minimal and the purpose of that classification viewed as compelling.

Justice Harlan vigorously dissented, proclaiming that our "Constitution is color blind and neither knows nor tolerates classes among citizens." It is to be regretted, he said, "that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that a state can regulate civil rights solely on the basis of race."

The *Plessy* logic that racial segregation was constitutionally permissible lasted until 1954, when in *Brown v. Board of Education*, the U.S. Supreme Court found that even if the tangible aspects of the educational services provided to blacks and whites were equal, the fact that they were separated on the basis of race rendered them unequal. In light of the history of blacks in this country, separation on the basis of race alone denoted to the Court the inferior treatment of the black race and thus denied blacks equal protection of the law. The mere fact of the racial regulation here amounted to a violation of equal protection. Any language in *Plessy* that suggested otherwise was soundly rejected.

But the *Brown* Court did not adopt Harlan's dissent as the basis for its reversal of the *Plessy* decision. It was not that the racial classification *itself* was impermissible. It was that in the context of public education segregation was inherently unequal. The significance of *Brown* then, for the purpose of the affirmative action debate, is not in the analysis that established the violation but in the remedy for the violation that was developed in subsequent school desegregation cases.

From Nondiscrimination to Race Consciousness

In *Brown*, the Court remanded the series of school desegregation cases before it to the lower courts for such orders as were necessary to admit black students to public schools on a racially non-discriminatory basis. The Supreme Court's order then required only that school systems bring to an end the practice of using race as the determining factor in school assignments and implement with all deliberate speed assignment practices that did not rely on race.

It was not until the late 60's, after years of resistance to that desegregation order, that the Supreme Court held that a federal court could require the assignment of students on a racial basis in order to remedy deliberate, unconstitutional school segregation and eliminate its vestiges.

Here then we have a dilemma. If the use of a racial classification by a governmental entity violates the equal protection

Susan Wise

clause in the situation where its use infringes upon the constitutional rights of blacks, doesn't the use of a racial classification by that same entity also violate the equal protection clause when it infringes upon the constitutional rights of whites? The easy answer is, of course, that it does. Despite the fact that the Fourteenth Amendment was designed to ensure that the newly freed slaves were treated equally under the law, its language and logic apply to all citizens. Whites denied or provided inferior opportunities on the basis of race could claim protection under the Fourteenth Amendment.

Still, the Court held that remedial use of race was constitutionally permissible in order to remedy a constitutional violation. The Court, in reaching that result, engaged in a balancing process, balancing the governmental interest promoted by the racial classification against the harm done by that classification. In the words of Chief Justice Burger in *Swann v. Charlotte Mecklenburg Board of Education* in 1971, 402 U.S. 1, "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct by balancing the individual and collective interest the condition that offends the Constitution."

Racial classifications, then, though inherently suspect, serve the important governmental purpose—indeed in *Swann* a constitutionally required purpose—of eliminating unconstitutional segregation in public schools. The harm done by those classifications was the denial of local autonomy to school districts to operate their schools as they saw fit and the inconvenience to citizens who were accustomed to the status quo of segregated neighborhood schools. But in the balance, those interests lost out.

It is important to note, however, that this balancing of interest is the same balancing act that in 1896 prompted the Supreme Court in *Plessy* to find that racial segregation in public transportation did not violate the equal protection clause. The result is very different; the process is the same. It's apparent inconsistency is a natural consequence of our traditional approach to constitutional interpretation.

The Need to Interpret

Because the document is necessarily rather vague, somebody must decide what it means. Who can say with any precision what the framers meant by equal protection of the law, not to mention what they meant by unreasonable search and seizure in the Fourth Amendment or due process of law in the Fifth Amendment. Since 1803 when Chief Justice John Marshall, to the chagrin of Thomas Jefferson, in *Marberry v. Madison* assumed for the Court the position of final expositor of what the words in the Constitution mean, the Supreme Court has done that job. It has done so with a recognition that the framers designed the document as a living document, the overarching principals of which were to be applied to changing times to reflect the will of the people confined only by those fundamental rights and privileges necessary to freedom and dignity.

Others view the document as a fixed and written charter, its words meaning what they say and saying what they mean. Any ambiguity in those words should be resolved on the basis of our current understanding of what the framers intended them to mean, not what we view as an appropriate application of the words to contemporary circumstances.

The debate over the proper role of the Court in giving meaning to the Constitution has been placed in the forefront through recent attacks by the Department of Justice on the judiciary. The fact that the Supreme Court can determine what the words of the Constitution mean and interpret those words to mean different things in similar situations at different times raises a concern that the courts are taking liberties with the intent of the framers. Assistant Attorney General Brad Reynolds, in a recent speech at the University of Missouri Law School, argued that the Court was wrong in *Plessy* because, using the words of Justice Harlan, "the Constitution is color blind." The argument is that the Constitution is still color blind and that racial classifications are as impermissible now as they should have been in the *Plessy* days.

On its face and in a vacuum, this is a compelling argument. That argument, however, ignores the fact that the classification that should have been outlawed in *Plessy* operated to perpetuate vestiges of slavery that had recently been outlawed by the Thirteenth Amendment. The racial classification that today is being attacked, affirmative action, is designed to promote the Fourteenth Amendment goal of equality by eliminating the vestiges of unconstitutional discrimination.

This difference is significant, but the similarity between *Plessy* and today's affirmative action cases is also significant. The *Plessy* Court was reflecting what it viewed as the national will in circumstances that existed in 1896. Today's Court is reflecting what it views as the national will in circumstances that exist in the 1980s. I suggest that this is the genius of the Constitution, that it can be interpreted to apply to contemporary problems. The Supreme Court, in interpreting the equality that the Fourteenth Amendment, even with its ambiguities, apparently guarantees, has determined that consideration of race is permissible when used to remedy a race based constitutional violation.

Some might disagree, but it is not too difficult to accept the use of race as a remedy for a proven constitutional violation where the remedy is necessary to correct that violation for those who have been harmed. The difficulty arises when the beneficiary of the racial classification is not clearly found to have been a victim of discrimination and therefore personally entitled to relief. In these situations, the tension between the interest of those utilizing racial classifications and those adversely affected by those classifications is heightened, and the constitutional balance becomes significantly more difficult. This is the problem that has most recently been analyzed by the Supreme Court in the affirmative action area. I'd like, therefore, to go through some of the major Supreme Court decisions in the affirmative action area to let you see how the Court deals with that tension under the Fourteenth Amendment.

Seeking a Standard

In *Board of Regents of California v. Bakke*, 438 U.S. 265 (1978), the Court first articulated its standard. There the University of California Medical School had a special admissions program which set aside 16 slots for minority applicants. Allan Bakke applied for admission to the school and was rejected. He showed that he had applied for admission, and had it not been for the set aside of those 16 slots, he would have been admitted based on his objective qualifications. He therefore claimed that the set aside violated his rights under the Fourteenth Amendment.

The Supreme Court rejected the University of California's special admissions pro-

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gram, finding that an absolute preference for members of a minority group based solely on race was impermissible. The Court, obviously concerned about and divided over both the effect of the racial classifications on whites and the constitutional legitimacy of using such considerations to overcome a history of exclusion, rendered two separate majority opinions. In one, by Powell, Burger, Rehnquist, Stewart and Stevens, the Court held that race may not be the sole criterion for a preference, unless there is a judicial, legislative or administrative finding of past discrimination by the institution using the racial classification, tying the use of race considerations directly to the actual proven existence of a previous racial exclusion. The Court then found that the state's interest in helping victims of what it called societal discrimination, discrimination not tied to the institution, does not justify a classification which imposes disadvantages on persons who bear no responsibility for the harm the beneficiaries of the program were thought to have suffered.

In the second majority opinion, with Powell, Brennan, Marshall, Blackman and White concurring (Powell was on both sides), the Court held that even absent a finding of prior discrimination, race may be given some consideration in the admissions process in light of the school's interest in creating a diverse student body. This state interest need not be tied to any prior discrimination practiced by the state. This majority noted that there are a number of factors that go into a university's decision as to whom to admit, ranging from income level of the applicant's parents to the region of the country he or she comes from, to the alumni status of the applicant's relatives. The state's interest in creating a multi-racial educational setting is but another legitimate factor to be weighed in the balance, and it is a factor which could justify some consideration of race.

Both opinions seem to agree that race may not be the *exclusive* factor unless there is a finding of prior discrimination on the part of the institution and that the *exclusive* use of race is not a legitimate remedy for mere societal discrimination. The second majority, however, suggests that while race may not be appropriate as the exclusive factor in the absence of a finding, even without a finding race may be a factor among many in order to cure societal discrimination.

Affirmative Action on the Job

In 1979, the Court rendered a decision in the case called *United Steel Workers of America v. Weber*, 443 U.S. 153. This was a case in which the constitutional question was not raised because there was no state action involved. It was a purely private affirmative action plan. But the Court set some standards for weighing the interests affected by affirmative action programs that would subsequently affect its constitutional analysis.

In *Weber*, Kaiser Aluminum and the steel workers' union entered into a collective bargaining agreement which established a new on-the-job training program for craft jobs at a Kaiser Aluminum plant in Louisiana. Recognizing the small number of blacks in such jobs and recognizing their history of exclusion, the parties agreed that they would admit to the program one black for every one white based on seniority, until the black percentage in craft jobs equaled the black percentage in the labor force.

Brian Weber sued under Title VII of the Civil Rights Act. He claimed that he applied for the training program but was passed over in favor of a less senior black. He was therefore excluded from the training program solely on the basis of his race.

The district court found in favor of Brian Weber. It found that the plan violated Title VII, which provides generally that no employer or labor organization shall discriminate against any individual in employment opportunities based on race. Here race was the only factor that excluded Weber. Therefore, there seemed to be a clear violation. The Supreme Court, however, found that the exclusion of Weber was not unlawfully discriminatory. The Court said that in light of the purpose and background of Title VII to open opportunities for blacks, it could not be construed to bar all private voluntary race conscious efforts to abolish traditional patterns of segregation. "It would be ironic," the Court said, "if a law triggered by a nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary private race conscious efforts to abolish traditional patterns of racial segregation."

So the Court found that voluntary private affirmative action is permissible under Title VII to effectuate that compelling congressional purpose. The Court went on, however, to focus on the harm that could be done to innocent bystanders in the name of affirmative action. Recognizing that harm, it developed some guidelines for measuring the legitimacy of such programs. It found the harm done to Weber here permissible because it was the result of the operation of an affirmative action plan that was narrowly tailored to meet the congressional objective in enacting Title VII. Critical to the determination that the plan was acceptable were the facts that it was designed to overcome a conspicuous racial imbalance in a traditionally segregated job category and that it did not unnecessarily trammel upon the rights of whites. The plan did not exclude whites from the program and it did not require the discharge of any whites.

Here we see the Court, although not in the constitutional context, expressing strong concern for those whose opportunities are adversely affected by the affirmative action. Because Congress in enacting Title VII expressed its purpose, a finding of a violation was not required to justify the preference, but the amount of harm done to innocent bystanders was set out as a critical factor in determining whether the affirmative action went so far in denying the rights of whites as to render the preference illegally discriminatory under Title VII. The Court, in interpreting a statute that strictly prohibits denying individuals employment opportunities on the basis of race, looked to the purpose of the statute and the harm done by the consideration of race and by balancing those factors determined this race discrimination not to be illegal.

Affirmative Action in Contracts

In 1980, one year later, in *Fullilove v. Klutznick*, 448 U.S. 448, the Court had to deal with legislation that required a 10% set aside for minority business enterprises in local public works projects funded by the federal government. Because this racial consideration was required by the federal government, the equal protection guarantees of the Constitution were implicated.

The Court, referring to the constitutional standard established in *Bakke* for the use of racial classifications, found that there was a compelling governmental interest here in remedying the effects of past discrimination. The Court found that Congress in enacting the set aside program had expressed its intent to redress the effects of discrimination against minority contractors and thus made a finding of past discrimination in the letting of federally supported public works contracts generally.

But what of the specific finding of prior discrimination by the agency using the classification that *Bakke* required? And what of the requirement that the racial classification be narrowly tailored as suggested in *Bakke* and as required by *Weber*?

The Court appeared to be relaxing its standard somewhat by allowing a general administrative finding of historical discrimination in the letting of public works contracts to justify a racial classification in the program. And the Court, while recognizing the need for the narrow tailoring of the remedy, noted that the effect of the remedy on innocent bystanders here — the denial of contracts to non-minority businesses on the basis of race — was only an incidental consequence of the program and not a part of its purpose.

This relaxed position provided little comfort to Justices Stewart and Rehnquist, who dissented strongly. Referring back to Harlan's dissent in *Plessy v. Ferguson*, they suggested that the Constitution is indeed color blind and that any legislation that accords a preference to citizens on the basis of race is unconstitutional.

So with *Fullilove* you saw the positions of the justices hardening somewhat on one side or the other.

A Recent Case

It was not until 1986 that the Supreme Court was once again called upon to address the permissible scope and limits of affirmative action under the Fourteenth Amendment. In ***Wygant v. Jackson Board of Education***, 106 S. Ct. 1842 (1986), the Court revisited the equal protection analysis that it formulated in *Bakke*. In 1972, the Jackson, Michigan, board of education and the teachers' union, because of racial tension in the school system, added to their collective bargaining agreement a layoff provision that protected black teachers from layoff to the extent necessary to maintain the percentage of black teachers employed at the time of the layoff. Otherwise straight seniority was to be used.

The board in the '76-'77 and '81-'82 school years conducted layoffs in compliance with the layoff provision of the contract. As a result, white teachers with greater seniority were laid off while minority teachers with lesser seniority were retained. One of the laid-off white teachers, Wendy Wygant, and other displaced nonminority teachers filed suit in federal court challenging the layoffs as violative of the equal protection clause.

The trial court dismissed their claims. Relying on the logic of the second majority in *Bakke*, the trial court found that under the equal protection clause racial preferences need not be grounded on a finding of prior discrimination but are permissible as an attempt to remedy societal discrimination by providing role models to minority school children. The court of appeals affirmed the district court judgment and the Supreme Court granted certiorari.

The question for the Court was the same as that raised in *Bakke*: What can constitutionally justify distinctions based on race under the equal protection clause of the Fourteenth Amendment? The majority opinion of Powell, Burger, Rehnquist and O'Connor, with White concurring, cited *Bakke's* first majority. The Court noted that racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. This examination, they said, had two prongs: one, the racial classification must be justified by a compelling governmental interest; secondly, the means chosen to effectuate that purpose must be narrowly tailored to the achievement of that goal.

As to the first prong, the Court found that societal discrimination alone has never been held to justify a racial classification. Rather, the Court insisted upon "some showing" of prior discrimination by the governmental unit involved before allowing even a limited use of a racial classification to remedy the discrimination. The Court reasserted that remedying past discrimination by the employer in question is a compelling governmental interest, but that societal discrimination is too amorphous a basis for imposing a racially classified remedy.

Then the Court made a very interesting pronouncement. "A public employer, before it embarks on an affirmative action program, must have convincing evidence that remedial action is warranted." Well, what about the finding of particular discrimination required by *Bakke*? The Court went on to hold that the governmental unit must have "sufficient evidence to justify the conclusion that there has been prior discrimination." The Court did not decide how much evidence is sufficient to justify that conclusion of prior discrimination because of its finding on the second prong of the test. But it is clear that there is no need now for a judicial, administrative or legislative finding. That, I suggest, is consistent with the second majority in *Bakke*.

But as to the second prong, whether the means chosen to effectuate that compelling governmental purpose is narrowly tailored to the achievement of the goal, the Court found that in this case it was not. The court of appeals had found that because the method chosen to achieve the goal, the layoff plan, was reasonable, it was permissible. The Supreme Court stated that it had never adopted such a standard. Citing *Fullilove* and others, the Court noted that the means adopted to accomplish the goal must be specifically and narrowly framed to accomplish the legitimate government purpose. The Court recognized that in order to remedy the effects of prior discrimination it may be necessary to take race into account and that in so doing innocent persons may be called upon to bear some of the burden of the remedy. But the Court pointed out its serious concern over the burden imposed on innocent parties by a preferential layoff scheme. It noted that hiring goals are significantly less burdensome on innocent whites because their effect is diffused among many in society. Here the layoff scheme had a direct effect on Wendy Wygant in that it required her to lose her job. Layoff schemes imposed the entire burden of achieving racial equality on particular individuals. This burden the Court found too intrusive. So even if the governmental purpose had been determined to be so compelling as to justify the racial classification, the method chosen to accomplish that goal was constitutionally impermissible. With this decision, the burden imposed on innocent bystanders becomes critical to the determination of whether the racial classification is tailored sufficiently narrowly. The Court, therefore, here disapproved the layoff plan.

The Court, however, did not disapprove of affirmative action. In fact, it seemed to broaden the governmental interest that could justify consideration of race by removing the requirement of an official finding of discrimination, while narrowing the kinds of affirmative action permissible by increasing the importance of impact considerations in the balance.

Looking to the Future

So there is still no clear picture of 1) what kinds of affirmative actions are permissible — hiring, layoff, promotion, training — or 2) the varying circumstances that might justify such action. It does seem clear, however, that the Court is embracing the position that to be legitimate an affirmative action plan need not be preceded by formal findings of past discrimination on the part of the agency implementing the plan. It is also clear that the impact of the plan on innocent others will have a significant impact on the decision about whether the plan is narrowly tailored.

The Court had before it this term two additional affirmative action cases. The decisions in these cases will further define the limits and scope of permissible affirmative action, with a focus on the extent to which the effect on innocent others should control the analysis. Both cases raise the issue of the legitimacy of affirmative action programs in the context of preferential treatment for blacks and women in promotions.

On February 25, 1987, the Supreme Court decided *United States v. Paradise*, 107 U.S. 1053 (1987). In this case, after a 1972 finding by the district court that the Alabama Department of Public Safety had systematically excluded blacks from employment in violation of the Fourteenth Amendment, that department was ordered to refrain from engaging in discrimination in its employment practices, including promotions. In 1979, in response to the fact that no blacks had been promoted, the district court approved a consent decree in which the department agreed to develop a promotion procedure that would have no adverse effect on blacks. By 1981, since that procedure had not been developed and since no blacks had been promoted, a second consent decree was approved by the court which provided that no promotions were to occur until the parties agreed upon a procedure or until the court ruled on a method to be used. In 1983, the court found that the promotional exam administered for promotion to corporal had an adverse impact on blacks, ruled that its results could not be used for determining promotion eligibility, and ordered that pending the development of a non-discriminatory selection procedure the department, subject to the availability of qualified applicants, was to promote one black for every one white until blacks constituted 25% of the upper ranks. The department then promoted eight blacks and eight whites and submitted a new promotion procedure to the court. The court approved the new procedure and suspended the one-for-one promotion requirement. The United States appealed the imposition of the one-for-one promotion requirement as violative of the Fourteenth Amendment, the court of appeals affirmed the requirement, and the Supreme Court granted certiorari.

In a majority opinion by Justice Brennan, joined by Justices Marshall, Blackmun and Powell with a separate concurrence in the judgment by Justice Stevens, the Supreme Court affirmed the one-for-one promotion requirement. The Court found that the race-conscious relief was justified by compelling governmental interests in eradicating the "pervasive, systematic, and obstinate" discrimination by the department, securing compliance with federal court judgments, and in eradicating the effects of the department's delay in implementing non-discriminatory procedures.

The one-for-one requirement was found to be narrowly tailored since it was necessary to achieve those compelling governmental interests; it was flexible in that it applied only when there was a need to make promotions and could be waived when there were no qualified blacks available for promotion; it was temporary in that its term was contingent upon the department's implementation of a non-discriminatory promotion procedure; it was properly related to the percentage of blacks in the relevant labor market; and it did not impose an unacceptable burden on innocent white promotion applicants since it did not bar, but only postponed, advancement by some whites, and did not require their layoff or dischage or require the promotion of unqualified blacks over qualified whites.

The dissent filed by Justice O'Connor, which was joined by Chief Justice Rehnquist and Justice Scalia and agreed to in substantial part by Justice White, reasserted the consensus reached in *Wygant* that race-conscious remedies are permissible under the equal protection clause of the Fourteenth Amendment, but challenged the majority's conclusion that the one-for-one requirement was sufficiently narrowly tailored to survive strict scrutiny. Noting that racial classifications are simply too pernicious to permit any but the most exact connection between the justification and the classification, the dissent proceeded to analyze the governmental interest served by the classification. The dissent concluded that the requirement was not narrowly tailored to the governmental interest in eliminating the effects of prior discrimination because it imposed a rigid quota rather than flexible goals. It was not designed to eradicate the effects of the delay in developing new procedures because it was to end not when those effects were eliminated, but when the new procedure was developed. The only governmental purpose which, in the view of the dissent, the one-for-one promotion requirement was arguably legitimately designed to accomplish was that of coercing compliance with the district court's earlier orders that the department develop a non-discriminatory procedure. For this purpose, the race-conscious remedy was inappropriate since the district court had not considered the effectiveness of alternatives to the requirement that would have had a lesser effect on the non-minority troopers and would have successfully achieved the legitimate purposes sought to be served by the district court order.

For purposes of the question of whether race-conscrious affirmative action is consistent with the constitutional ideal of equality, however, it is significant that the dissent here, as did he majority in *Wygant*, recognized that racial preferences are permissible under the Fourteenth Amendment. The dispute among the justices is not over the permissibility of racial preferences, but over the nature of the scrutiny under which such preferences will be put in determining their constitutional legitimacy. The minority of the Court, emphasizing the impact of such preferences on innocent others, would allow their use only where "manifestly necessary." The majority in this case, emphasizing the compelling governmental interests advanced by such preferences, struck the balance in their favor.

The second affirmative action case this term is still pending. In *Johnson v. Transportation Agency of Santa Clara*, the question is a preference for women in promotion in a California state agency.

It will be interesting to see how the justices align themselves in *Johnson* and other similar situations. We have seen that the burden imposed by hiring preferences is diffused among the general populace and the burden imposed by layoff protection is direct. How does one evaluate the burden of promotion preferences? Somewhere in between, I suspect. With the apparent consensus developed in *Wygant* and *Paradise*, however, I expect that while its limits are still somewhat unclear, it is highly unlikely that reasonable and legitimate considerations of race or gender in governmental decision making will be viewed by the Court as inconsistent with the notion of equality contained in the Fourteenth Amendment.

[Editor's Note: As this issue was going to press, the Court decided the *Johnson* case. In a 6-3 decision, the Court upheld the voluntary affirmative action plan adopted in 1979 by Santa Clara County. According to an article in the *Chicago Tribune*, the decision marked the first time the Court has upheld a voluntary affirmative action plan based on gender and on statistics demonstrating that women were underrepresented in certain job categories. Writing for the majority, Justice Brennan held that employers should be free to initiate voluntary plans to create a more balanced work force without being sued or forced to admit past discrimination. Brennan noted that the plan did not impose rigid quotas, ignore job qualifications, or exclude other employees from consideration for hiring or promotions. In a dissent joined by the Chief Justice, Justice Scalia wrote, "a statute designed to establish a color-blind and gender-blind workplace has. . . been converted into a

(continued on page 64)

Justice

Juvenile Justice/Grades 7-12

Dale Greenawald

Using the *Gault* case as a springboard for discussion, students will identify rights accorded juveniles, the juvenile justice process, and rights accorded adults which are not extended to juveniles.

Objectives

To identify differences between the juvenile and adult justice systems; to identify rights extended and withheld from juveniles; to recognize that the justice system despite its limitations and weaknesses has moved towards guaranteeing due process and justice for more people.

Procedure

The teaching time of this one is 45 minutes. Each student should have a copy of *In re Gault* (see below). Discussion can be led by a juvenile justice expert such as a lawyer, juvenile court judge or juvenile officer.

Have students read *In re Gault*. As they read have students note incidents which they consider to be a violation of constitutional rights or examples of "unfairness." After reading the case, have students form groups of four students. Each student group should be responsible for answering one of the four questions listed below. After each student has shared his/her answer, the entire group should discuss the question and reach a group answer. After each group has discussed all four questions, conduct a general class discussion of questions. The resource person should provide examples and explanatory information concerning each question.

1. What similarities and differences do you find between the process Gerald experienced and that which an adult would experience?
2. What constitutional rights normally given to adults were violated? Where do unfair events happen to Gerald?
3. Why do you think juveniles have traditionally had fewer rights than adults?
4. Do you think that juveniles should have the same treatment and rights as adults? Why or why not?

If time remains, the teacher or resource person should provide a brief overview of the difference between delinquency and status offenses (in most states this refers to a juvenile committing an act which would be considered a crime if committed by an adult). Discuss PINS, CHINS, or MINS depending upon the term used in your state.

Sorry, Wrong Number

On the evening of June 8, 1964, Mr. and Mrs. Gault of Maricopa County, Arizona, returned from work and couldn't find their son, Gerry. He wasn't at home where he was supposed to be. He wasn't at school. He wasn't with any of his friends. After a frantic search, they finally managed to locate their son at the Children's Detention Home. Gerry had been arrested that afternoon for allegedly making an obscene phone call to a neighbor.

The Gaults rushed to the home to collect their son, but he was not released. Instead, the family was told there'd be a hearing about Gerry's case the next day. On June 9th, an Arizona probation officer filed a petition with the court which stated that Gerry was a delinquent minor, but which contained no details about his alleged crime. Gerry and his parents were not told he could consult an attorney or refuse to answer questions. The offended neighbor wasn't even present at the hearing. After it was over, Gerry was sent back to the detention home.

When Gerry was released a few days later, his mother received a notice from the probation officer announcing another hearing on June 15th. Again, the neighbor was absent. Again, no records were kept. When it was over, the juvenile court judge committed Gerald Gault as a juvenile delinquent to the Arizona State Industrial School "for the period of his minority." In other words, Gerry received a six-year sentence. The maximum adult punishment for his alleged crime was a $50 fine and two months in jail.

The Gaults immediately filed a petition of *habeas corpus* on Gerry's behalf, arguing that their son had been denied his rights under due process of law. The Arizona state courts, however, denied these claims. Because the adult and juvenile systems had different aims, explained the Arizona Supreme Court, they required different definitions of due process. If the state applied strict adult regulations to juvenile cases, it could not provide the individualized justice which was the heart of the juvenile system. Though Gerry's treatment was not in accordance with adult due process requirements, the boy had not been treated differently from other juveniles. Arizona agencies had acted in accordance with their normal procedures. Therefore, the decision to confine the boy was upheld.

Unconvinced, the Gaults appealed to the U.S. Supreme Court. In 1967, the high court responded, shaking American juvenile justice to its foundations. A majority of five justices reversed the Arizona Supreme Court ruling and granted the Gaults' *habeas corpus* petition. (From *Justice in America*, Constitutional Rights Foundation, used with permission)

Background for Teacher or Resource Person

DECISION OF THE UNITED STATES SUPREME COURT

In a juvenile delinquency proceeding which may result in the child's commitment to an institution, due process of law requires that the child be guaranteed the following rights that are guaranteed an adult in a criminal proceeding: the right to be notified of charges against him, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses against him.

REASONING OF THE COURT

Justice Fortas wrote the majority opinion, beginning with a discussion of the wide gap between the theory and realities of the juvenile justice system. He noted that while the theory of the juvenile justice system placed great emphasis on the child's best interest and the informality of procedures, the reality of the system often tended toward arbitrary procedures that lacked the constitutional safeguards guaranteed an adult criminal defendant. The justice stated that the state's authority to intercede on behalf of the delinquent child's best interest should not be unlimited. Declaring that due process of law was the very foundation of individual freedom from unfairness and arbitrariness, Justice Fortas held that certain constitutional rights must be extended to juveniles because a finding of delinquency could result in the confinement of the juvenile, just as a criminal conviction could result in the confinement of an adult. The right to be notified of charges was required so that the juvenile could prepare his case against the charges. The right to counsel would assure the juvenile a trained legal advocate during the delinquency proceedings. The privilege against self-incrimination was essential to insure the integrity of delinquency proceedings against unfair compulsion in seeking confessions. The right to confront and cross-examine witnesses was required based on the principle of fairness in allowing an individual to confront and question his accusers.

Justice Stewart rejected the majority's analogy between juvenile delinquency proceedings and criminal trials. Discounting the similarity between a delinquency proceeding and criminal case, Justice Stewart stated that the purpose of the juvenile proceeding was to aid juveniles in correcting their delinquency. This, he argued, was very different from a criminal trial where the purpose was determining whether the accused is guilty of a crime.

ANALYSIS

Prior to *Gault*, U.S. courts had upheld the idea that young people had a right "not to liberty, but to custody." In other words, a child's right to protection outweighed his or her right to independence. In the *Gault* decision, the Supreme Court stated that, on the contrary, just like adults, juveniles had a vested interest in not getting locked up. It made no difference whether the jail was called a reform school, a detention home, or a prison. Any juvenile proceeding which could lead to confinement must follow minimum standards of fairness and due process. The majority opinion explicitly stated what some of these standards were.

A defendant must be informed of the charges against him or her; notice of the charges is an essential element of a fair trial. Until he found himself in a hearing room, neither Gerry nor his parents knew why he'd been accused. The official petition, which the Gaults were not shown prior to the hearing, said only that Gerry was "in need of the protection of the Honorable Court." The Supreme Court was not satisfied with this general charge. Detained juveniles and their parents must be told specifically what conduct was under question and why a hearing was being held. Moreover, this information had to be provided well in advance of the hearing so the accused could prepare a response.

All young people subject to confinement had a right to the services and advice of an attorney and must be informed of their rights. The state must provide attorneys for those too poor to afford legal fees. In theory, the hearing and probation officers were supposed to be looking out for the young person's best interest, but since confinement was so much like punishment, the Court decided that young people needed personal advocates. Attorneys would also help young people better understand what was happening to them in the juvenile justice process.

Under oath during the *habeas corpus* proceedings, Gerry's hearing officer testified that, during the June 9th and June 15th hearings, the boy had confessed to making the offensive phone call. Also under oath, Gerry's mother, who was present at both hearings, denied this claim. She asserted that her son only confessed to dialing the phone, but that another boy had done all the talking. The Supreme Court announced that this conflicting testimony was irrelevant because neither Gerry nor his family had been informed of the boy's right to remain silent. Juveniles, too, were protected from self-incrimination by the Constitution.

Officers must inform a young person of his or her right to remain silent before questioning. In addition, if a young person refuses to answer questions, that refusal cannot be used as an indication of guilt.

The neighbor who accused Gerry Gault never appeared at a hearing to confirm her accusation or explain why she blamed Gerry for the phone call. The Supreme Court decided that was invalid. Confronting and questioning witnesses was an important part of determining the validity of evidence. If a witness' testimony was to be used in determining the facts of a case, that witness must appear in court. Just like adults, *juveniles had the right to cross-examine their accusers.*

Though it marked the first big step in asserting juveniles' rights, the *Gault* decision was also significant because of the rights it did not guarantee. The Court refused to apply its due process requirements to cases where the detained juvenile was released on probation, sent to a foster home or in other ways "set free." Nor did it insist that juveniles receive all the constitutional protections available to adults.

The Court, for example, did not consider whether hearsay evidence was admissible in cases like Gerry's, where the juvenile was detained for a specific offense and the hearing officer had to determine whether or not the young person had actually committed that offense. It did not rule on cases where the juvenile was picked up on more general grounds, like being beyond parental control or keeping bad company. To decide whether such complaints were valid, a juvenile judge might have to rely on hearsay evidence, and *Gault* didn't necessarily prohibit this practice. *Gault* also left questions unanswered about other constitutional issues, such as the exclusionary rule and the rights to speedy, public and jury trials.

(Portions of this analysis of the Court's reasoning were adapted from *A Resource Guide on Contemporary Legal Isues. . . for Use in Secondary Education,* Phi Alpha Delta Law Fraternity International. Used with permission. Available from publisher.)

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Searching for Equality/Grades 7-12

James Giese and Barbara Miller

The evolution of equality is an important theme in U.S. history. This lesson provides an historical context for looking at current legal questions pertaining to equal rights. It is intended for the secondary grades, but if adapted by shortening the research, it would also be appropriate for middle school youngsters.

At the time the U.S. Constitution and the Bill of Rights were developed, equal rights was a limited concept that pertained primarily to white Christian males over the age of 21 who owned property. The story of the expansion of rights is contained in textbooks for U.S. history courses, but it is usually presented in segments rather than thematically. This lesson asks students to extract the story of the gains and setbacks of the civil rights movement from their textbooks and other resources and consider the search for equality as an historical theme that involves questions of morality and justice as well as law.

The historical perspective developed through this activity will illustrate the definition of equality (all humans have an equal right to status as citizens) in the following significant ways: (1) the definition of equality has been enlarged to address economic as well as political issues. Education, employment, health and housing have become the subject of "equal opportunity" in the 20th century; (2) numerous groups excluded from constitutional protections have, through hard work over long periods of time, gained rights and privileges that others have taken for granted.

Following a discussion of equal rights in the U.S. and a textbook search to gather information about the movement toward equal rights and opportunities, the students are asked to serve as an "editorial board" and select the 10 turning points that they feel were most critical in expanding constitutional protections and defining equality in American law and society.

Procedures

1. INTRODUCING THE LESSON: PRODUCING A MAGAZINE ABOUT EQUALITY

Tell students that they are to assume the roles of editors for a special edition of a national news magazine. They will develop and design a publication entitled *The Promise of Equality* featuring 10 significant events or turning points in the movement toward equal rights in U.S. history. Their task will be to present these events in a way that shows the range of issues, people, goals, and strategies that have broadened the meaning of equal rights. Explain that constitutional principles have been the source of rights for disadvantaged Americans throughout our history. By utilizing and respecting the document, disenfranchised Americans have made significant strides toward equality.

2. DESIGNING THE PUBLICATION

Provide the students with an overview of the project. The class must decide on both the format and the content of the project. They may want each page of the magazine to be poster size so that it can be displayed in the school or they may wish to produce a reference book for the library or produce booklets that can be reproduced for each student.

Discuss what will be included in each feature story. Encourage students to include a title or headline, at least two or three paragraphs describing the event and illustrations. Special editions of news magazines (e.g., *Life's* 1976 "The 100 Event that Shaped America") provide a concrete model for the project.

3. PREPARING FOR RESEARCH

Ask students to list some of the groups who were excluded from the protections of the Constitution at various points in our history. Depending on what has been studied in class, the students should be able to list specific religious groups, racial minorities, women, criminals, poor people and immigrants.

4. IDENTIFYING THE ISSUES OF INEQUALITY

Ask students if they can describe some of the specific issues of inequality that each of these groups experienced. You may wish to provide some examples to get the class started. For example, you may wish to point out that although blacks were freed by the Emancipation Proclamation and granted rights and privileges through the Thirteenth, Fourteenth and Fifteenth Amendments, they did not immediately enjoy the same protections as whites.

5. WHAT IS A TURNING POINT: DEVELOPING CRITERIA

Discuss the meaning of the term "turning point" as a significant change. Explain that these significant changes involved the use of multiple strategies both before and after a particular important event. Illustrate how constitutional amendments (Twenty-sixth Amendment), legislation (Civil Rights Act of 1964), and court decisions (*Gideon v. Wainwright*, 1963) have been primary strategies for effecting a broader definition of equality. Ask students to think of other strategies that have been used (i.e., boycotts, marches, civil disobedience).

Ask students what criteria they will use in selecting turning points to be featured? Two that can be provided as a start include:

1. Does this event result in more rights for more people?
2. Does this event result in a broader definition of equality?

6. RESEARCHING THE TURNING POINTS

Distribute the handout "Historical Turning Points for Equality." (If you wish, you may shorten the list before giving it to the students.) Tell students that this list of turning points has been suggested by readers of the magazine. The list is representative but not inclusive. They can add other events if they wish.

Ask students to use their textbooks and other resources to research the events that have been nominated. Student groups can be assigned a particular disenfranchised group, a strategy for achieving equality, or a particular time period.

Show students how they can use a chart to research the topic.

Time: 1955

Barriers/Problems: separate facilities not equal/sit in back

Goal: equal access to facilities
Strategies: boycotts/law suits
Outcome: Supreme Court ruling

7. ANALYSIS OF THE DATA

Once the research has been completed and organized, the class should analyze the data and discuss which events seem to be significant turning points.

Teacher questions to focus the discussion can include:

1. Do all the items nominated meet the criteria for enlarging the definition of equality? If not, which ones should be eliminated?
2. Which events seem to have made the most significant differences in the lives of Americans? How would our society be different if the events had not taken place?
3. Which strategies seem to be the most effective for groups seeking equal rights?
4. What types of barriers and setbacks did various groups experience? In which time period was most of the progress made? for political rights? for economic rights?
5. Are Americans satisfied with what has been accomplished? Does the progress that has been made indicate that we are firmly committed to equal rights? To live up to the ideals of our Constitution, do we need to continue enlarging the definition of equality?

8. FINAL SELECTION

The final selection of significant events can be made through a consensus process or through voting and debate. Students may wish to invite community resource people to comment on the final list or provide additional information that will help them with the decision-making process. Guest speakers could include spokespersons for such groups as the NAACP, NOW, AIM, and the ACLU.

9. PRODUCTION OF *THE PROMISE OF EQUALITY*

The actual production can be completed as home work or as an in-class assignment. Students can divide responsibilities for such tasks as doing illustrations, writing the text, editing, and composition.

10. CONNECTING WITH THE PRESENT

Ask students: Do we need to be concerned about providing more equality for the present and the future? Who are the groups that are now requesting constitutional protections and what are their concerns? How are current issues of inequality similar to or different from those they have studied during this lesson? Provide students with a list of questions that the Supreme Court has been asked to consider about equal rights. Are the questions being raised by the same groups of people who asked for equality in the past or are there new groups who are seeking changes in laws?

1. Has capital punishment been imposed in a manner that is fair and appropriate?
2. Can states discriminate on the basis of economic status? Is education a fundamental right?
3. Do racial quotas limit the constitutional rights of individuals?

Students can search newspapers to find articles about current issues of equality.

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Historical Turning Points for Equality

1. Declaration of Independence (1776)
2. Northwest Ordinance (1787)
3. Bill of Rights (1791)
4. Vermont Statehood (1791)
5. Alien and Sedition Acts (1798)
6. Impressment controversies (1790s-1800s)
7. Land Act (1800)
8. American Colonization Society (1817)
9. Missouri Compromise (1820)
10. "Democratizing" Politics in the 1820s
11. *Worcester v. Georgia* (1832)
12. Abolitionist Crusade (1840s)
13. Seneca Falls Convention (1848)
14. Common school movement (1830-1850)
15. Manifest Destiny
16. Fugitive Slave Act (1850)
17. *Uncle Tom's Cabin* (1852)
18. Kansas-Nebraska Act (1854)
19. *Dred Scott v. Sanford* (1857)
20. Emancipation Proclamation (1863)
21. Homestead Act (1862)
22. Thirteenth Amendment (1865)
23. Fourteenth Amendment (1868)
24. Fifteenth Amendment (1870)
25. *Slaughter House cases* (1873)
26. *Minor v. Happersett* (1875)
27. "Trail of Broken Treaties"
28. Chinese Exclusion Act (1882)
29. Civil Rights cases (1883)
30. Dawes Severalty Act (1887)
31. Sherman Anti-trust Act (1890)
32. *Plessy v. Ferguson* (1896)
33. *Muller v. Oregon* (1908)
34. Sixteenth Amendment (1913)
35. Seventeenth Amendment (1913)
36. Nineteenth Amendment (1920)
37. *Ozawa v. United States* (1922)
38. National Origins Quota Act (1924)
39. Social Security Act (1935)
40. Frances Perkins becomes Secretary of Labor
41. Fair Employment Practices Committee (1941)
42. G. I. Bill of Rights (1944)
43. Desegregation of U.S. Armed Forces (1948)
44. *Brown v. Topeka Board of Education* (1954)
45. Montgomery Bus Boycott (1955)
46. Civil Rights Act (1957)
47. 1960 Presidential Election
48. Freedom Rides (1960-61)
49. *Gideon v. Wainwright* (1963)
50. Equal Pay Act (1963)
51. *Baker v. Carr, Reynolds v. Sims* (1964)
52. Civil Rights Act (1964)
53. Twenty-fourth Amendment (1964)
54. Voting Rights Act (1965)
55. *Miranda v. Arizona* (1966)
56. *In re Gault* (1967)
57. Equal Rights Amendment (1972-1982)
58. *Tinker v. Des Moines* (1969)
59. Twenty-sixth Amendment (1971)
60. *Bakke case* (1978)

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Property

Weights and Measures/Grades 7-12

Ann Blum

EUREKA! This is it!
GREAT! What is it?
Bachtell

Tom Bachtell

Article 1, section 8 of the U.S. Constitution says: "The Congress shall have Power. . .To coin Money, regulate the Value thereof, and of foreign Coin, and fix the standard of Weights and Measures." The number of specified congressional powers is very limited. Why was fixing the standard of weights and measures important enough to be included?

In investigating this question, students will discover how the use of weights and measures permeates our daily lives as well as our worlds of industry, commerce, and science. They will also find that the constitutional power to fix a standard of weights and measures relates to two principles fundamental to our form of government – the rights of individuals to property ownership and fair treatment under the laws. They will learn that recognition of the need for fair enforcement of standards of weights and measures is not new, but can be traced from laws of ancient civilizations down through the Magna Carta to our Constitution.

The activities that follow should enable students to:

1. Explain the importance of a standard of weights and measures to people at the time of the Constitution and now.
2. Discuss the relationship of this congressional power to the fundamental constitutional principles of property and fairness.
3. Describe and compare the two systems of weights and measures in use in the United States today.
4. Review major congressional legislation on weights and measures over the past 200 years.
5. Demonstrate awareness of weight and measure laws and inspection and enforcement procedures in their state.
6. Evaluate the need for mandatory legislation on weights and measures today.

What Isn't Weighted or Measured or Counted?

In his report on weights and measures in 1821, John Quincy Adams wrote:

> Weights and measures may be ranked among the necessaries of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family. They are necessary to every occupation of human industry; to the distribution and security of every species of property; to every transaction of trade and commerce: to the labors of the husbandman; to the ingenuity of the artificer; to the studies of the philosopher; to the researches of the antiquarian, to the navigation of the mariner, and the marches of the soldier; to all the exchanges of peace, and all the operations of war.

To help students discover the importance of weights and measures in their own lives, divide the class into small groups. Each group is to "brainstorm" a list of items, in an assigned category, which are in some way affected by weights and measures. Categories might be:

a. You/your health (medical tests and procedures, pharmaceuticals, etc.)
b. What you eat (its growing, processing, cooking, etc.)
c. What you wear (clothing, accessories, etc.)
d. Where you live (structures, building lots, furnishings, utilities, etc.)
e. How you travel (on foot; in cars, boats, planes, etc.)
f. How you play (sports, games, hobbies, reading, etc.)

Groups should report their lists to the class as a whole, with additions allowed. From the lists, students should be able to generalize about the importance of weights and measures in everyday life. Ask also for examples of their use and importance in industry, agriculture, the sciences, etc.

1863

Weights and Measures: Properties of Property

Briefly discuss the meaning in of the term property. Use examples to illustrate the types of property – real and personal. Discuss how measures are important in delineating real property. Ask for examples of the ways in which they are necessary to creating personal properties (e.g., clothes, foodstuffs, etc.). Explain that fundamental to the Constitution – if not formally expressed – is the right of the individual to own property. Before giving (or letting students discover) some constitutional references to property ownership (e.g., copyrights, eminent domain, contracts, etc., as well as weights and measures), point out that implicit to the right to own property is the right to buy and sell it, or, in other words, the right to engage in trade and commerce.

How weights and measures are interwoven with commerce can be illustrated by having the class pretend that they have been asked to shop for items such as those listed below. Ask if the cost of any of these items will be affected by weight, measure, or number. What weights, measures, or numbers are involved?

file
shoes
dry cereal
cola drink
notebook paper
diamond ring
television
a cow
house paint
gasoline for car
candy bar
apples
firewood
aspirin
chair

Students should recognize that for most items there is a direct correlation between one or more measurements (size, weights, numbers) and the cost.

Standards of Fairness

Why was it important for Congress to establish a standard of weights and measures?

First, ask the class to define "standard." You might present some definitions. For example, standard can be defined as a representation of a unit of measure established by authority, custom, or general consent with which other measures are compared or to which they must conform. In its definition, the National Bureau of Standards first defines a "unit" as a value, quantity, or magnitude in terms of which other values, quantities, or magnitudes are expressed. A standard is then defined as "a physical embodiment of that unit." In other words, a foot is defined in terms of meters or inches or feet. The "physical embodiment," say, for a state government, would be a meticulously calibrated metal bar. For math class problems, a ruler would serve as a replica of that standard.

The class definition should incorporate the concepts that a standard of measure or weights is one (a) whose size, weight, or quantity is fixed and agreed upon and (b) that can serve as a guarantee of exact sameness. The following simulations will help students to discover why standards are important. Materials needed will be:

- a roll of ribbon or yarn
- a yardstick
- a package of dried beans
- small plastic bags
- a measuring cup
- a small scale

Roleplay 1: Select three students to be ribbon salespersons and three to be ribbon purchasers. Each purchaser is to buy a yard of ribbon from a salesperson. The salesperson has no device to measure the ribbon, but must estimate.

After the ribbons are cut, compare them. Are they the same length? Measure each on the yardstick. Is each of the ribbons a yard long? Were any of the buyers or sellers short-changed?

Roleplay 2: Select three students to be cooks and three to be sellers of dried beans. Each student needs to buy a cup of beans for a recipe. Without any kind of measure, have each seller put a "cup" of beans into a plastic bag.

After each transaction has been made, compare the results. Are the amounts of beans similar? Pour each bag of beans into a measuring cup. Compare the results. Were any buyers short-changed? Any sellers?

Roleplay 3: Select three students to be bean purchasers and three to be sellers. Each purchaser wants a half pound of dried beans. Without any kind of measure, each seller must put half a pound of beans into a plastic bag.

Compare the quantities. Are they similar? Now weigh each quantity of beans on the scale. Were any of the guesses accurate? What differences were there?

Results of this exercise should dramatize the need for standards. Without standards, either buyer or seller is likely to be short-changed – treated unfairly. Ask about the fairness of these transactions. Could there be fair trade without standards of weights and measures? In discussing fairness, point out that this is also an underlying principle of our Constitution. Ask students – or cite – some other constitutional protections of fairness. Major examples would be the right to a fair trial and to equal protection under the law.

Weights and Measures: 1787-1987

To understand what Congress has done to "fix standards of weights and measures," it will be beneficial to look briefly at some of the measurement units in use in the late eighteenth century (and today as well). The measures are of length or size, weight, or capacity (i.e., cubic measures) which are those most used in trade. Measures of time and temperature as well as numerous measures developed by science and technology of energy, magnetism, light, radioactivity, sound, etc., are not – for space reasons – included here.

Explain that the use of weights and measures goes far back into history. Linear measurements – for building homes or measuring land – generally were based on body parts and were used probably as early as 10,000 BC. The oldest known weights for scales are those found in Egypt, dated about 3800 BC. Scales were probably first used for weighing gold. It is not known exactly when measures of capacity were first used; it is suggested that the first measure may have been a handful of grain. (The term bushel comes from the Celtic word for handful.)

LEARNING ABOUT MEASURES

Activity Sheet 1 gives information about a variety of weights and measures currently in use. Their names – plus a few extra – are listed at the top of the sheet. Students should try to name each unit of measure in the blank that precedes its discussion. When students have

Activity Sheet 1

1. foot
2. ton
3. pound
4. teaspoonful
5. grain
6. meter
7. acre
8. carat
9. mile
10. barrel
11. cubit
12. kilogram
13. gallon
14. hand
15. yard
16. liter

____ a. This measure of length is associated with the soldiers of the Roman Empire. It originally equaled 1,000 paces. A pace was two steps (of left and right foot) and equal to five feet. Soldiers paced off distances as they marched.

This measure's current length—5,280 feet—was set by an English law of 1593. The law is interesting in being similar to one to preserve open space today. It forbade building within three miles from the gates of London. This was to preserve the land for training soldiers and the recreation of Londoners.

____ b. In early England, the standard size of this measure of capacity depended on what it held. The American measure is the size used in England to hold wine. Its size—231 cubic inches—was set in 1707.

____ c. In Britain, this weight was once defined in terms of coins. A law, with the colorful name of Assize of Bread and Ale (1266), set its standard as follows: An English sterling penny should weigh 32 grains of wheat taken from the middle of the ear; an ounce should weigh 20 pennies (pennyweights); this weight should weigh 12 ounces.

In 1787 and now, two of these weights are used. One of these, the Troy "__________," has 12 ounces, weighs 5,760 grains, and is used to measure precious metals, etc. The other, the avoirdupois "__________," has 16 ounces (7,000 grains) and is used to weigh heavier items.

____ d. This basic measure of length was adopted by the French government in 1799. It was intended to be 1/10,000,000th of the earth's quadrant between the North Pole and the Equator. Due to the limits of measuring devices of the time, the measurement is not exact. Since 1983, its standard is the length of a path traveled by light in a vacuum at a time interval of 1/299,792,458th of a second. [illegible] unit is divided or multiplied by tens.

____ e. This measure of length can be traced to [illegible] ancient Greek, Roman and Egyptian civilizations. Based on a part of the human body, its [illegible] has varied from about 13.1 to 10.5 inches. [illegible] 1305, the English king Edward I, trying [illegible] standards, defined this unit as 12 inches. [illegible] declared the inch to be three grains of dry [illegible] round barley.

____ f. A unit of weight for precious stones. Its [illegible] comes from the carob seed, said to have [illegible] used as a measure for weighing gold in ancient Egypt. Now, this unit officially equals 200 milligrams or 3,086 grains.

____ g. A measure of land defined in 1305 as forty rods (5½ yards) in length and 4 rods in width. An earlier definition was the amount of [illegible] ground a pair of oxen could plough in one day. Currently, this unit is one containing 43,560 square feet.

____ h. A measure of capacity. If this were in the form of a cube, the height and width of each side would be one-tenth of a meter.

____ i. It is said that the English king in 1105 set this measure of length as the distance from the tip of his nose to the tip of his outstretched fingers. It has also been said that this unit equaled two cubits or twice the distance from the elbow to the tip of the middle finger. In 1305, the [illegible] English king Edward I set it at three feet.

____ j. A measurement used for the height of horses. It equals about 4 inches.

____ k. A measure of capacity or weight that can be used for liquids or dry products. Its standard volume varies in terms of its contents. For example, for fermented liquors the standard [illegible] 31 gallons; for crude oil it is 42 gallons.

____ l. A unit of capacity used in cooking and [illegible] to 1.6 fluid ounce.

____ m. A large unit of weight or capacity. Its name probably comes from that of a large container for wine used in early times. A number of these units are used, including a long one (2,240 pounds), a short one (2,000 pounds), and a metric one (2,204.6 pounds).

finished, review the exercise so they can check and correct their answers. Some information about units named but not described on the sheet follows:

cubit—Not currently used in the United States, but interesting as an important measure of length in the ancient Middle Eastern civilizations. A cubit was the distance from the tip of the middle finger to the elbow. The Egyptian hieroglyph for the cubit was a forearm. References to the cubit can be found in the Bible. God told Noah to build an ark the length of 300 cubits, a breadth of 50 cubits, and a height of 30 cubits.

kilogram—The weight of a liter of water.

grain—It is the smallest unit of mass in the American/English system. Seeds and grains were among the earliest weight measures used. They were used to weigh small masses like gold. The National Bureau of Standards sets the weight of a grain at 64.79891 milligrams.

Correct answers to the activity are: 1-e; 2-m; 3-c; 4-l; 5-not on page; 6-d; 7-g; 8-f; 9-a; 10-k; 11-not on page; 12-not on page; 13-b; 14-j; 15-i; 16-h.

For further understanding of weights and measures, have class use the activity sheet to search for answers to the following questions:

1. What units of measure are part of the metric system? (meter, liter, and kilogram) Explain that we use two systems of measures. The one students are most familiar with, which includes feet, pounds, etc., came to us from the British and its units are referred to as "customary measures." The other is the metric system, which was introduced by the French and is now used by almost every nation.
2. For their earliest measures, people frequently used parts of the body. Which of the measures given were based on parts of the body? (hand, yard, foot, cubit)
3. Common items were used as standards of measurement in early times. For which of the measurements given were seeds a standard? (inch, foot, pound, grain, carat)
4. Historically, the earliest measures were for length. Which units of measure are of length? (foot, cubit, meter, mile, hand, yard)
5. Which measures are for weight? (ton, pound, grain, carat, kilogram)
6. Which measures are for capacity? (teaspoonful, barrel, gallon, liter; note these can also be expressed in weights)
7. Which units of measurement were used at the time the Constitution was written? (All but the metric measures)
8. Measurement systems have been built on numerical systems. For example, there is the binary system (dividing units into halves, quarters, etc.) used by ancient Hindus; the decimal system (based on 10s) as we use with our currency; the duodecimal system (based on 12) used by the Romans; and a system based on 60 used by ancient Sumarians and Babylonians and today in measuring circles. Of the units given, which is customarily divided by 2 into units? (gallon); by 12: (Troy pound and foot); by 10? (meter, liter, and kilogram)
9. What is the relationship between the pound and foot? Between the kilogram and meter? (There is none between a pound and foot; the kilogram is weight of a cubic decimeter (one-tenth of a meter) of water. A major criticism of our customary weights and measures is their lack of relationships to each other.)
10. In what ways does our system of weights and measures seem organized or confusing? Give examples. Speculate on reasons (e.g., diverse origins of measures).

Note that the system is far more complicated than it appears here since there are more everyday measures than cited and also many more scientific measures. In addition, many trades or industries have their own measurement unit (such as points and picas for type; denier for yarn; board foot for lumber). Consider how this profusion affects fairness in exchange of property.

How Has Congress Used Its Power?

To discover how and why Congress has carried out its power to establish standards of weights and measures, distribute "Activity Sheet 2, What's Been Done About Weights and Measures: 1787-1987." (See page 35.) After students read it, use the following questions, one though eight, for a factual information search. The search can be written or oral, and done individually, in competing groups, or with the class as a whole.

The last three questions (nine through eleven), which are speculative, can be included in the search or used separately.

SEARCH QUESTIONS

1. What specific power did the Constitution give to Congress regarding weights and measures?
2. How many years after the signing of the Constitution did Congress pass a law making a system of weights and measures legal? What system was this?
3. What two American presidents presented reports to Congress on weights and measures? What did each recommend?
4. What concerns led the Congress to give powers to the Treasury Department to provide some standards and tests of weights and measures?
5. Since 1893, what has been the standard of length and weight against which all other units are measured?
6. In what year was the National Bureau of Standards established? What are its responsibilities?
7. What do standards of weights and measures have to do with the Fair Labeling and Packaging Act?
8. What is the current U.S. policy on weights and measures?
9. In the Constitution, the power to establish a currency is associated with that to fix standards and measures. Why do you think this is true?
10. The system of currency was established very quickly. Speculate on why there was delay on the part of Congress in the 1790s to establish a system of weights and measures.

    (Note that the confusing profusion of customary weights and measures existed then as now. Further, standards varied among the states. Advantages of a decimal system were clear, but such a system was new and not yet in place even in France.)
11. Why is there reluctance today to make either the customary or metric system *the* one legal system? Why is it so difficult for people to give up traditional systems?

Enforcing Standards of Weights and Measures

Scales are the symbol of justice—of fairness. Discuss why this would be so. Ask what qualities does this symbolic use attribute to scales. Integrity? Accuracy? Impartiality?

Ensuring that measures be fair, impartial, and accurate has been concern since they were first used. For example, in the Bible (Deuteronomy 25:13-14), it says "Thou shalt not have in thine bag diverse weights; a perfect and just measure shalt thou have." In other words, under ancient Hebraic law, no false measures were to be carried to be sneaked onto the scales.

A look at English history over the past thousand years shows the continued efforts of the rulers to standardize measures and prevent falsification of weights. Some major laws are referred to in the "Name the Measures" activity. What were punishments in early days? In the reign of Henry III (1265), bakers caught using false weights and measures had to put in time standing in the pillory. Brewers, guilty of the same offense, had to stand in the tumrell (a farmer's cart that can be tilted to dump a load) or dung cart. In the eighteenth century, penalties were fines and imprisonment. How are laws regarding weights and measures enforced today?

ENFORCEMENT

In general, both federal and state laws pertaining to weights and measures are enforced by state and local officials. Besides providing "standards" for the states, the National Bureau of Standards conducts training for inspectors and offers calibration services. It also has made available model state laws drafted by the National Conferences on Weight and Measures.

To learn about enforcement, students will need to do some research. Have the class or selected teams of students gather information about state law(s) on weights and measures and the agency(s) that enforce them. Information can be requested from the agency(s). Your state's statute(s) should also be examined. Researchers should seek answers to the following questions:

1. What agency (or agencies) is responsible for testing weights and measures in your state? (It is most commonly the department of agriculture.)
2. What kinds of weights and measures are tested (and by whom)? (Consider commercial scales, supermarket scales, fuel pumps, produce and livestock scales, postal scales, pharmaceutical scales, clinical thermometers, airplane scales, etc.)
3. How often are weights and measures in commercial use tested?
4. What happens if a scale or measure is inaccurate?
5. What is the penalty for use of incorrect weights or measures?
6. What is the penalty for failure to dispose of faulty weights and measures?
7. How are inspectors trained and certified?
8. What provision is made for sampling weights of prewrapped packages?
9. What provision is made to deal with deceptive packages?

An inspector or agency representative could also be interviewed or invited to class to discuss these questions. He or she could explain inspection procedures, enforcement actions, and the extent of inaccuracies in measuring devices.

VOLUNTARY COMPLIANCE

Developments in food processing (canning, freezing, etc.) and tremendous increases in prepacking foods have created some weights and measures challenges unforeseen in 1787.

The Fair Labeling and Packaging Act of 1966 was a response to some of these problems – the "undue proliferation" of sizes and shapes of packaging and the consequent confusion to the consumer in determining the value of goods.

Enforcement of the Fair Labeling and Packaging Act was based on voluntary regulation. The National Bureau of Standards was empowered to identify harmful proliferations and work with manufacturers, packers, and distributors to correct the problem by developing voluntary standards. It also was to work with state and local governments to develop laws and regulations to promote and achieve uniformity.

Students may understand this "voluntary" regulation better if they know that, since the late 19th century, industries and trades – nationally and internationally – have voluntarily formed associations to establish product standards. One familiar association is the Underwriters Laboratory, which is concerned with safety standards. Students maybe familiar with the UL certification on electrical appliances.

Why have industries accepted and encouraged these standards? Because it is in their self-interest. Standards, which promote simplification, uniformity, and interfacing, are profitable. Have students consider the advantages, for example, of standard-sized school notebooks, beds, and tools.

How well does the Fair Labeling and Packaging Act work? Students can check this out by assuming the roles of inspectors in the following role play. Students, individually or in teams, should each be assigned one line of items to check at the grocery store. Assignments might be jars of instant coffee, cans of pineapples, boxes of laundry detergent, boxes of brownie mix, etc.

For their assignment, they should report on the following questions:

1. Is each container marked as the law requires with the identity of the product, name and address of manufacturer, packer, or distributor, and with net weight?
2. How many sizes of containers are used for the product?
3. Do all containers of a certain size contain about the same weight or quantity of the product?
4. Are the sizes or shapes of any containers deceptive? Might a consumer think any contains more than it does? Explain.
5. In your opinion, are there too many sizes of containers for this product? Are there too few? Explain.

Discuss reports. Do results indicate that the Fair Labeling and Packaging Act is being carried out? Why or why not?

Should Congress Take Action Now?

While Congress has utilized some of its powers exceedingly (or so some might say), it has never statutorily mandated a standard of weights and measures. Has this infringed on rights to fairness in property exchange? Should Congress, by statute, establish such a standard of weights and measures now?

To answer the latter question have the class weigh such options as:

a. That the customary system of weights and measures (pounds, feet, and such) be made the sole standard of weights and measures.
b. That the metric system be made the sole standard.
c. That no congressional action be taken and things be allowed to stand as they are.

Activity Sheet 2

What's Been Done About Weights and Measures (1787-1987)

1787 The U.S. Constitution empowers Congress to "fix the standard of weights and measures."

1790 Washington, in his first address to Congress, stated that "uniformity in the currency, weights, and measures of the United States is an object of great importance, and will, I am persuaded, be attended to."

Thomas Jefferson, then Secretary of State, prepared a report on weights and measures for the House of Representatives. It proposed adopting one of two plans:

1. to "define and render uniform and stable the existing system," (that is, the system commonly used today).
2. "to reduce every branch to the decimal ratio, already established for coin." This plan was similar to the metric system, then being considered in France. Jefferson's argument was that "this would bring the calculations of the principal affairs of life within the arithmetic of every man who can multiply and divide plain numbers."

1790-99 Although a Senate committee recommended Jefferson's second plan, Congress did not act on it. This was despite repeated requests to fix a standard from presidents Washington and Adams.

1799 The French government formally adopted the metric system. In the United States, varying standards of measurements used at different ports were an increasing problem. Congress ordered the surveyor of each U.S. port to "twice a year at least' test the weights and measures in use against standards to be provided for that purpose.

1821 John Quincy Adams submitted a lengthy report to Congress on weights and measures. He recommended:

a. for the present, fixing standards for the system in use.
b. for the future, consulting with foreign nations to ultimately establish a system of universal and permanent uniformity.

No congressional action was taken.

1832 Problems because of varying standards of measurements continued in ports. Congress asked the Treasury Department to adopt a system of standard units and measures, including the [illegible] yard. Four years later Congress had sets of standard weights and measures for this system distributed to the custom houses.

1866 Congress passed a law making use of the metric system of weights and measures legal in the United States.

1893 An order of T.C. Mendenhall, Superintendent of the Office of Weights and Measures, set the international meter and kilogram as the fundamental standards of length and mass (weight) in the United States. This was for customary as well as metric measures. Since then, the length of the yard has been officially determined in relation to the meter. Similarly, the weight of the pound is determined in relation to the metric kilogram.

1901 Congress established the National Bureau of Standards in the Department of Commerce. It was established at the request of science and industry. The bureau was to provide standards of measurements for the nation's use. It was also to conduct research on standards and measurements and to calibrate standards and measurement devices.

1966 Congress passed the Fair Labeling and Packaging Act. This was because containers of many shapes and sizes made it difficult for consumers to figure out the quantities inside. The Act sought to reduce the number of sizes of containers for each product. It also required that on each package, it should state the identity of the commodity; the name and place of business of manufacturer, packer, or distributor; and the net quantity of contents in weight, measure, or number.

1974 "Education Amendments" were adopted by Congress to encourage schools to prepare students to use the metric system.

1975 Congress passed the "Metric Conversion Act." This Act stated that it is U.S. policy to plan and coordinate increasing use of the metric system. It established a U.S. Metric Board to coordinate a voluntary changeover to the metric system.

After listing options, list reasons for each. Class should consider:

a. Resistance of people to change;
b. Entrenchment of customary system in terms of distribution of land, buildings, roads, etc.;
c. Costs of training, changing equipment, etc.;
d. Importance of metric system in trade, science, etc.;
e. Use of metric system by almost all other nations, including Britain and Canada;
f. Increasing use of metric system in our society;
g. Ease of using an interrelated, decimal system;
h. Advantages of voluntary v. mandatory implementation.

Finally have class vote on the options. Discuss the results. Discuss their reasons for their stands.

Remind students that the options posed for today are very similar to those that confonted Congress in the 1790s. How might they have voted then? Would they have voted differently now? Why? Are such options likely to confront the Congress of the 2090s?

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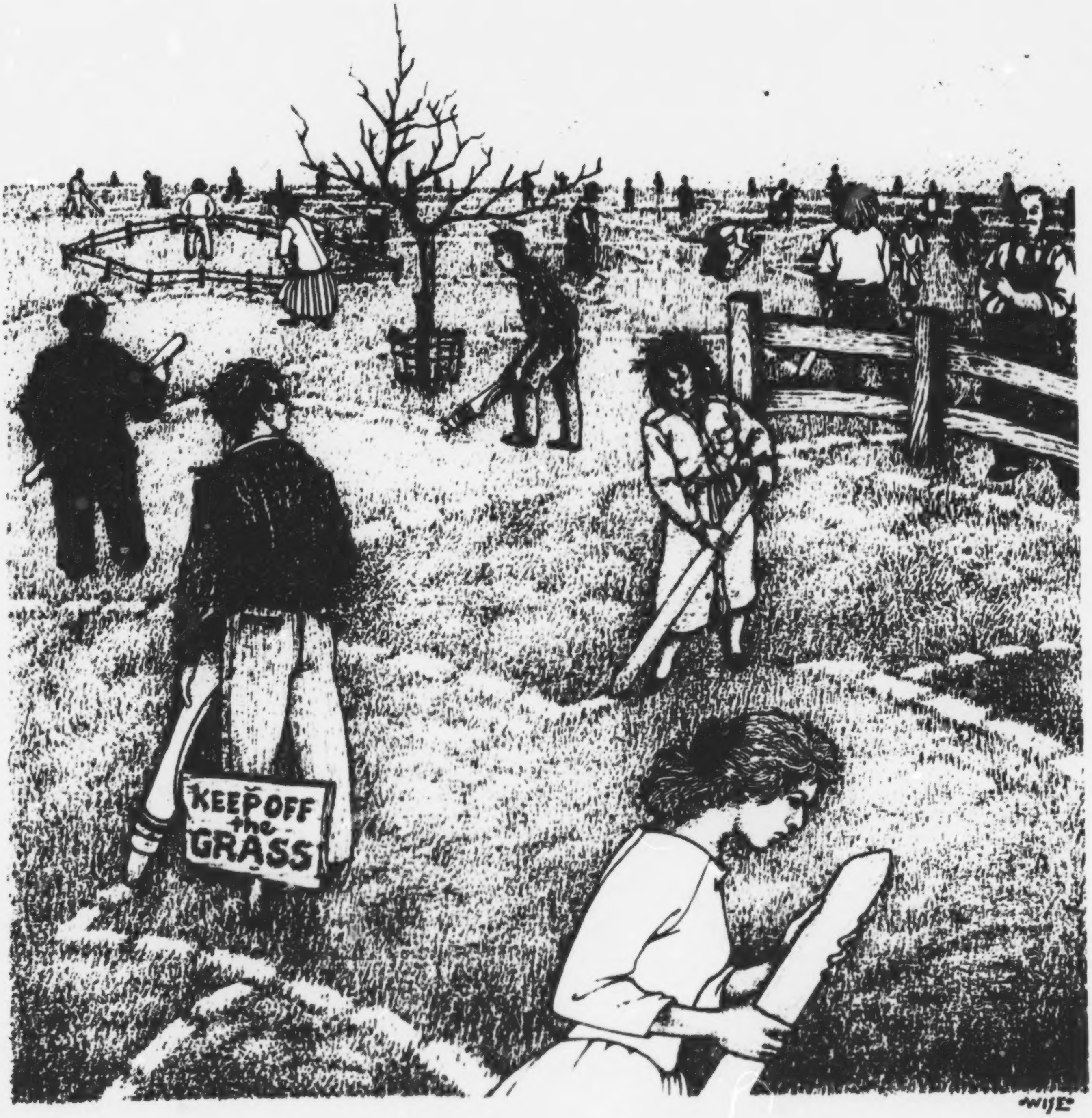
KEEP OFF the GRASS
WISE

Susan Wise

BICENTENNIAL THEMES

Isidore Starr

The Idea of Property

> All the Property that is necessary to a Man for the Conservation of the Individual and the Propagation of the Species, is his natural Right, which none can justly deprive him of: But all Property superfluous to such purposes is the Property of the Publick, who, by their Laws, have created it, and who may therefore by other Laws dispose of it, whenever the Welfare of the Publick shall demand such Disposition. He that does not like civil Society on these Terms, let him retire and live among Savages. He can have no right to the benefits of Society, who will not pay his club towards the support of it.
>
> Benjamin Franklin

> It is observable, that though many have disregarded life, and contemned liberty, yet there are few men who do not agree that property is a valuable acquisition, which ought to be held sacred. Many have fought, and bled, and died for this, who have been insensible to all other obligations. Those who ridicule the ideas of right and justice, faith and truth among men, will put a high value upon money. Property is admitted to have an existence, even in the savage state of nature. . . .And if property is necessary for the support of savage life, it is by no means less so in civil society.
>
> Samuel Adams

Throughout history, the arithmetic of property has contributed to the calculus of pleasure and pain. Philosphers have pondered, clerics have sermonized, and politicians have legislated their solutions to the equations of master and slave, serf and feudal lord, sovereign and subject, merchant and landowner, employer and employee, debtor and creditor, and rich and poor. The idea of property has become the touchstone of political power, economic wealth, and social class.

During this bicentennial year, it is appropriate for us to ask ourselves: What role did the idea of property play in the drafting of the Constitution? How does the Constitution refer to the nature of property? How has the Supreme Court of the United States interpreted the nature of property in its landmark rulings during the nineteenth and twentieth centuries?

As the drafters of the Constitution sat in the state house in Philadelphia during the months of May to September, 1787, grappling with the issues of their day, the dangers to propertied interests must have been uppermost in their minds. The specter of Shays' Rebellion, which began the year before they met and was suppressed in February, 1787, brought fears of anarchy. That rebellion, in a sense, was a civil war between two types of property owners: farmers who wanted to keep their land and mortagees who wanted their interest payments or foreclosure. The sparks of this confrontation flew upward to the courts, which became the symbol of eviction. The demand for stay laws to prevent foreclosures and tender laws which elevated printed money into legal tender added to the concern of those who saw propertied values diluted by popular demands. Merchants were confronted with tariff wars; manufacturers suffered from the flood of British imports; and storekeepers and their customers traded in a variety and multiplicity of coins and paper money—some of it "clipped" and some of it counterfeit.

Were the drafters motivated by their patriotism or by their pocketbooks? Writing in 1913, Charles A. Beard in his *Economic Interpretation of the Constitution* debunked the patriotism principle and attempted to prove that many of the participants in the writing of the Constitution were interested primarily in the safeguarding of property rights. This economic determinism approach has generated a battle of the books in which Robert L. Schuyler, Robert E. Brown, and Forrest McDonald attacked Beard's research and his conclusions. The British historian Esmond Wright, acting as mediator, concludes:

> The Founding Fathers, they remind us, were patriots after all, with principles as well as pocketbooks. If they represented property, they spoke for many constituents, for there were many property owners. They sought to create a strong government not only, and perhaps not mainly, to curb democracy but also to create a new nation and to preserve the gains of the Revolution. For they had pride in both achievements. The fashion today is to revere the Constitution . . . and to see it as conserving a society that had already gone far toward becoming a property-owning democracy. . . .But the appeals they were making were to interests much wider than Beard seems to have realized: to the public creditor, certainly, but also to the soldier, paid in bounty land that he could not obtain without a strong government, or in paper scrip that was almost worthless; to citizens as well as speculators in the West, who alike wanted protection from Indians and from foreign intrigues; to merchants trading abroad as well as manufacturers and workers seeking economic protection and security. . . .There were many who by 1787 had a stake in America's stability and its future. . .

Stability was the key word! Stability in government depended on responsible citizenship; responsible citizenship depended on property ownership; property ownership depended on government protection; and government protection of property created a stable government. Property qualifications for voting and for office-holding in the colonies and in the states were manifestations of this political philosophy.

The nature of property and its importance in governance had been a major concern of political thinkers both in England

and in the colonies. The voice of John Locke, in particular, was familiar to the delegates to the Constitutional Convention and his thoughts had been internalized by some of them as the political wisdom of the age.

For some philosophers, the key idea in political philosophy has been liberty, while for others it has been justice. For Locke, it was property. Hear now what he had to say in his *Second Treatise on Civil Government*:

> The great and chief end, therefore, of men's uniting into commonwealths and putting themselves under government is the preservation of property.

For Locke, however, the idea of property went beyond the traditional meanings of real property (land, the things attached to the land), personal property (money, bonds, contracts, goods, franchises, etc.) and, of course, slaves. Property, as viewed by Locke, included "life, liberties, and estates." He goes on to say that "every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his."

Property qualifications for voting and holding office were an acceptable practice at the time in the states. This was especially evident in the Northwest Ordinance of July 13, 1787, which was passed by the Congress of the Confederation while the delegates were debating the Constitution. Regarded as the third most important document in our history (after the Declaration of Independence and the Constitution), this democratically-centered legislation, nevertheless, imposed property qualifications on those who settled the territory. A freehold of 50 acres in the district was required for voting, and a freehold of 200 acres was the requirement for office holders.

It was inevitable that the subject of property qualifications for voting and for holding public office would be on the agenda of the convention. The debate began on August 7th, the day after the first draft of the Constitution had been submitted to the delegates. The two provisions which became the focus of their attention dealt with voting qualifications for the House of Representatives and property qualifications for public office.

The draft provided that qualifications for voters for the House of Representatives should be the same in each state as for the most numerous branch of their own legislatures. Gouverneur Morris stood firm for limiting suffrage to freeholders in no uncertain terms.

> Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them . . . Children do not vote. Why? Because they want prudence, because they have no will of their own. The ignorant and the dependent can be as little trusted with the public interest.

Madison concurred in these sentiments:

> In several states a freehold was now the qualification viewing the subject in its merits alone, the freeholders of the country would be the safest depositories of Republican Liberty. In future times a great majority of the people will not only be without land, but any other sort of property. These will either combine under the influence of their common condition: in which case, the rights of property and the public liberty, will not be secure in their hands: or which is more probable, they will become the tools of opulence and ambition, in which case there will be equal danger on another side.

That brought forth a spirited response from Mason, "the landed aristocrat who was the most democratic member of the Convention." He condemned this practice inherited from England. Every man, he said, who can show attachment to and permanent common interest with society ought to share in its rights and privileges, which include suffrage. He went on to say:

> Does no other kind of property but land evidence a common interest in the proprietor? Does nothing besides property mark a permanent attachment? Ought the merchant, the monied man, the parent of a number of children whose fortunes are to be pursued in his own Country to be viewed as suspicious characters, and unworthy to be trusted with the common rights of their fellow Citizens?

Rutledge concurred with Mason, saying that "the idea of restraining the right of suffrage to freeholders was a very unadvised one." He went on to warn that it would create divisions among the people and "make enemies of all those who should be excluded."

The *coup de grace* to the idea of property requirements for suffrage was delivered by Benjamin Franklin. Even in the cold reporting of Madison's notes, the eloquence of the old man and his wisdom comes through to us.

> Doctor Franklin: It is of great consequence that we should not underestimate the virtue and public spirit of our common people; of which they displayed a great deal during the war, and which contributed principally to the favorable issue of it. He related the honorable refusal of the American seamen who were carried in great numbers into the British prisons during the war, to redeem themselves from misery or to seek their fortunes, by entering on board the Ships of the Enemies to their Country; contrasting their patriotism with a contemporary instance in which the British seamen made prisoners by the Americans, readily entered on the ships of the latter on being promised a share of the prizes that might be made out of their own Country. This proceeded he said from the different manner in which the common people were treated in America and Great Britain. He did not think that the elected had any right in any case to narrow the privileges of the electors. He quoted as arbitrary the British Statute setting forth the danger of tumultuous meetings, and under that pretext narrowing the right of suffrage to persons having freeholds of a certain value; observing that this Statute was soon followed by another under the succeeding Parliament subjecting the people who had no votes to peculiar labors and hardships. He was persuaded also that such a restriction as was proposed would give great uneasiness in the populous States. The sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disfranchised, and there are a great many persons of the description. . . .

Three days later the delegates turned their attention to property qualifications for holding public office. Pinckney began by saying that he was opposed "to the establishment of an undue aristocratic influence in the Constitution." However, he thought it esential that the legislators, the judges, and the executive "should be possessed of competent property to make them independent and respectable." And what did he consider "competent property"? His recommendation of the "quantum of property" was not less than $100,000 for the president and $50,000 for judges and legislators. However, he would leave the sum blank at this time but eventually he would require them to swear that they were possessed of "a clear unincumbered Estate to the amount of ________."

Ellsworth did not think this matter belonged in the Constitution but preferred that it be left to the discretion of the national legislature. Once again, the elder statesman, Franklin, stepped in to put the matter at rest. As reported in Madison's notes:

> Dr. Franklin expressed his dislike of everything that tended to debase the spirit of the common people. If honesty was often the companion of wealth, and if poverty was exposed to peculiar temptation, it was not less true that the possession of property increased the desire of more property. Some of the greatest rogues he was acquainted with, were the richest rogues. We should remember the character which the Scripture requires in Rulers, that they should be men hating covetness. This Constitution will be much read and attended to in Europe, and if it should betray a great partiality to the rich, [it] will not only hurt us in the esteem of the most liberal and enlightened men there, but discourage the common people from removing into this country. . .

It is a tribute to the wisdom of the drafters of the Constitution that property qualifications for voting and public office were debated and excluded from the document. The "what if" approach to thinking about the past, if applied to this issue, could inspire some provocative observations about the course our nation might have taken if property qualifications had been included. Perhaps the Constitution would not even have been ratified.

Purists might contend that the provision in Article I, section 2 which states that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" implicitly recognized the power of the states to impose property qualifications for voting and office holding. The response to this argument is that the delegates rejected the arguments that these qualifications should be sanctioned explicitly in the new Constitution.

A Brisk Walk Through the Constitution

The overture of the Preamble is barely over before the idea of property makes its appearance. Article I, section 2 refers to slaves without mentinoning the word. As a matter of fact, throughout the Constitution where slaves are referred to, a variety of euphemisms are used. The Three-Fifths Compromise speaks of "all other Persons" (Article I, section 2); the section on the migration or importation of slaves refers to "such persons" (Article I, section 9); and the extradition article labels a fugitive slave as a "person held to Service or Labour" (Article IV, section 2).

The key empowerment article – Article I, section 8 – relates to property in a variety of ways: taxing and borrowing, coining money and counterfeiting, piracy and letters of marque and reprisal, interstate and foreign commerce, uniform bankruptcy laws, and patents and copyrights. It is an interesting oddity that the word "right" appears only once in the body of the Constitution and that is in connection with "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Dicoveries." Shades of John Locke's principle that every man has a property interest in himself, as well as in his goods! Of course, one must not overlook the pregnant Elastic Clause, which can extend the property provisions which precede it.

The seemingly innocuous provision that no state shall pass any "Law impairing the Obligation of Contracts" (Article I, section 10) was intended to put an end to the popular stay laws of the time, but in time this provision, as we shall see, became a mighty shield for the protection of property rights. In addition, by prohibiting the states from coining money or imposing "imposts or duties on imports and exports," the Constitution protected property owners from currency confusion and multiple taxation.

Isidore Starr is a lawyer-educator who is widely regarded as the father of law-related education.

The precise definition of the crime of treason limits forfeiture of property as a punishment (Article III, section 3). As for the creditors of the Continental Congress and the government under the Articles of Confederation, Article VI recognizes the validity of "All Debts contracted and Engagements entered into before the Adoption of the Constitution."

The Bill of Rights is the great repository of property rights: the right to bear arms, the prohibition against quartering of soldiers, the sanctity of one's home against unreasonable searches and seizures, the right to property and eminent domain, the right to jury trials in certain civil matters, and the protection against excessive bail or fines.

The extended Bill of Rights encompassing Amendments XIII, XIV, and XV freed the slaves from the stigma of the Dred Scott case and created the right to property against state interference without due process of law. The progressive income tax and the prohibition amendments impinged on certain rights to property. While the latter was repealed, the former continues to evoke opposition, evasion and litigation.

Property, Happiness, and Factions

Locke's trilogy of natural rights – life, liberty, and property – was transformed by Jefferson into his distinctive triad – life, liberty, and the pursuit of happiness. Why? In his intriguing volume on *The Pursuit of Happiness*, Howard Mumford Jones examines the intimate relationship between property and happiness in the minds of Locke, Adam Smith, Blackstone, and Jefferson. His kaleidoscopic array of philosophers, theologians, historians, and jurists creates a tangled web of explanations. From their commentaries, one can reasonably conclude that human beings are political animals with voracious economic appetites and troubled consciences in search of happiness – an ambiguous and elusive phenomenon.

The American conception of happiness does have a geographic base. In the words of Jones:

> I suggest that one of the chief links between private happiness and the theory that the pursuit of happiness is a social aim grows out of an emotional response to the picture of North America as a land without monopolists, "engrossers," medieval restrictions, autocratic government, or theological misrule.

The American frontier, that vast stretch of land unencumbered by titles of ownership, was a natural stage for the interplay of freely available land, private enterprise, and laissez-faire. As David Darcy points out, that "silent army" of fur traders, trappers, merchants, promotors, adventurers, mountain men, town builders, farmers and railroad men had a field day on the American continent playing out what became known as the American dream of happiness based on material success – that is, the right to use property to acquire material wealth and social status.

At this point there intrudes the figure of James Madison and his portentous message in his oft-quoted *Federalist Paper Number 10*, an essay which in the eyes of some writers has attained the status of Scripture. There are costs, warns Madison, in the quest for happiness. Factions – that is, groupings based on economic interest or social passions – arise in all societies. The latent causes of factions are sown in human nature. We are all born with a diversity of faculties and it is this condition which gives rise to the rights of property. And now comes his famous sentence: "The most common and durable source of factions has been the various and unequal distribution of property." He continues:

> Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulations of these various and interfering interests forms the principal task of modern legislation . . .

And, he might have added, the prinicpal task of modern jurisprudence, too.

The view of the American economic system as a field on which individuals and corporations stage their activities in search of profit, prosperity, success, and hopefully happiness, took hold on the imagination and became institutionalized as the American Creed. It was not surprising that judges reared on Blackstone and the common law began to take judicial notice of what James Willard Hurst has described as the tremendous release of individual creative energy which characterized most of the nineteenth century. Understandably, a jurisprudence of economic growth evolved which, in turn, evoked a jurisprudence of public interest.

The Marshall and Taney Courts

For most of its history, property issues have loomed large on the docket of the Supreme Court. Before the Civil War, both the Marshall and Taney Courts wrestled with property problems with different results. Each of the Courts produced important rulings which are illuminating, especially at this time.

The cases of *Fletcher v. Peck* (1810) and *Dartmouth College v. Woodward* (1819) are, according to Professor Wallace Mendelson, "the foundation of what has been called the first doctrine of American constitutional law: the doctrine of vested interest." The first case dealt with the infamous Yazoo land scandal. Since land speculation was one of the roads to riches, it comes as no surprise that some legislatures could be tempted to legislate on behalf of those who bribed them. Such was the case of a Georgia legislature, most of whose members had been corrupted by a syndicate. The legislators practically gave away some 35,000,000 acres (the bulk of what is now Alabama and Mississippi) for approximately 1½ cents an acre, and the syndicate, of course, sold it to innocent buyers at a great profit. When the fraud was discovered, the people of Georgia kicked the rascals out and elected a new legislature, which annulled the original transaction. Subsequently, an innocent buyer sued on the ground that the seller's title was tainted. The seller responded that he and others were *bona fide* purchasers of the land without knowledge of the fraud. Query: Did the second Georgia legislature have the power to destroy the titles of innocent buyers of land? On the advice of Hamilton, the buyers instituted a lawsuit to have their title vindicated and to have the rescinding law of the second legislature declared unconstitutional.

This case gave Chief Justice Marshall a great opportunity to persuade (perhaps persuasion was not necessary) his colleagues that the principles of nationalism and property rights were intertwined and necessary for the future of the nation. With this double-barrel attack, he declared the Georgia rescinding act unconstitutional, thus asserting the supremacy of the national judiciary. He then went on to give the reason: the state legislature had violated Article I, section 10, which prohibited states from "impairing the Obligation of Contracts." Since this was the first case in which the Supreme Court declared a state law unconstitutional, Marshall defended his decision in this way:

> . . .Georgia cannot be viewed as a single, unconnected, sovereign power on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is part of a large empire; she is a member of the American union; and that union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The Constitution of the United States declares that no state shall pass any . . . law impairing the obligation of contracts.

The opinion of the Court concludes with this revealing thought:

> It is, then, the unanimous opinion of the court that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, *either by general principles which are common to our free institutions*, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. [Italics supplied.]

Justice Johnson delivered a separate opinion in which he declared:

> I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle on the reason and nature of things: a principle which will impose laws *even on the deity*. [Italics supplied, enough said!]

Shades of Blackstone's proclamation that "so great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the common good of the whole community." Thirty-two years later, Macaulay, speaking in the House of Commons against popular suffrage, apotheosized private property as "the great institution for the sake of which chiefly all other institutions exist, the great institution to which we owe all knowledge, all commerce, all industry, all civilization . . ."

This theme of the importance of private property as a pillar of civilized society is reaffirmed in the *Dartmouth College* case. In 1769, a royal charter established Dartmouth College to educate and Christianize the Indians. It was a private institution managed by a board of trustees. Because of subsequent political and religious differences among the trustees, the New Hampshire legislature stepped in and placed the college under state control. The number of trustees was increased from 12 to 21; the governor was given the power to appoint nine new trustees; and the legislature created a board of overseers to make sure that the trustees did not go astray politically.

Daniel Webster represented the original trustees in their lawsuit to rescind the act of the legislature. His famous plea, it has been said, combined "the freedom of property and freedom of the mind."

> The case before the Court is not of ordinary importance, nor of every day occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence, the inviolability of their charters. It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. If the franchise may be at any time taken away, or impaired, the property also may be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate. . . .

Chief Justice Marshall, with Justice Duvall dissenting without opinion, delivered the opinion of the Court, ruling that the New Hampshire legislature violated the Constitution of the United States by impairing the obligation of contracts. In his words:

> It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.
>
> The points for consideration are,
>
> 1. Is this contract protected by the Constitution of the United States?
> 2. Is it impaired by the [legislative] acts under which the defendant holds?

The Court answered both questions "yes" and placed corporate charters under the general umbrella of contracts. As a contract, corporate charters were now protected by the constitutional shield against state impairment of the obligation of contracts. The original trustees of Dartmouth College and their lawyer, Daniel Webster, had won a great victory. How great was it in the test of time?

Although *Fletcher v. Peck* and *Dartmouth College v. Woodward* were two major bulwarks in support of property rights, the states did not prove to be idle bystanders. Some states reacted immediately by inserting in their constitutions and statutes the power to amend or even to repeal charters. Those, however, that did not, for whatever reason, strengthened corporate privilege and opened to them the royal road to laissez-faire economic enterprise.

It was Max Lerner who once remarked that judicial decisions are not brought by

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judicial storks. They, he reminded us, are the products of the ideologies of the judges and the political, economic, and social currents of the time. Whether or not the Supreme Court follows the election returns, those who are interested in Supreme Court history know that, like the stock market, "corrections" take place periodically.

With the advent of the Taney Court, a change in the attitude toward property did take place. A representative of Jacksonian Democracy (1837), Roger B. Taney used the showcase of *Charles River Bridge v. Warren Bridge* to change the direction of the Court. In 1785 Massachusetts had granted a charter to the Charles River Bridge Company to build a toll bridge between Boston and Charlestown. It was a long-term contract, and the company collected tolls long after it had recovered its original investment. Because of increased traffic over the Charles River, Massachusetts authorized a second company to build the Warren Bridge, which competed with the original company. This charter provided that passage over the Bridge was to be free after the company had recovered its original investment. Invoking the *Dartmouth College* case and the Obligation of Contracts Clause of the United State Constitution, the Charles River Bridge Company sued and lost. Chief Justice Taney, with Justice Story dissenting, placed judicial restrictions on the doctrine of vested rights. He declared:

> The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and for the purposes of travel, shall not be construed to have been surrendered or dimished by the State unless it shall appear by plain words that it was intended to be done. . . .*While the rights of property are sacredly guarded, we must not forget, that the community also has rights, and that the happiness and well being of every citizen depends on their faithful preservation.* [Italics supplied].

We have here a classic confrontation on the judicial landscape: Chief Justice Taney taking aim at Chief Justice Marshall. Taney is firing with both barrels (States Rights and the Police Power) while Marshall is returning the fire through his surrogate, Justice Story, who dissented from the *Charles River* case with his artillery (Nationalism and the Contract Clause). The prize is property rights — their sanctity and inviolability against state regulation and control through the police power to protect the lives, health, morals, welfare, and safety of the people. This duel was to be repeated after the Civil War and during the years of the twentieth century.

The most important property ruling prior to the Civil War was obviously the case of *Dred Scott v. Sandford* (1857). Congresses and the presidents, having failed to solve the tormenting problem of "the peculiar institution," the Taney Court decided to act as the institution of closure. The Court's decision and its opinions turned out to be its greatest "self-inflicted wound." Charles Evans Hughes described it as "a public calamity," and its tragic ripple effect marred the reputation of the Court and led to a bloody war.

Affected with a Public Interest

One of the far-reaching results of the economic revolution after the Civil War was the emergence of big business in railroads, oil, steel, and manufacturing. This development had significant implications for the rights of property: What were the rights of the consumers and of the small and medium-sized businesses when confronted with the economic power of giant corporations? An added consideration at this time was the intervention of the newly ratified Fourteenth Amendment with its protection of property against state deprivation without due process of law.

Cut-throat competition, monopolistic control of industries, and agreements in restraint of trade led to high prices, low quality, and economic disaster for the economically powerless. A case in point is the so-called Granger laws enacted by a number of Middle-Western states in the 1870's to protect farmers against the unreasonable rates and unfair practices of grain elevators and the railroads. This legislation set up state commissions with power to establish and to enforce maximum rates for these services. The railroads and grain elevators responded that such laws deprived them of their property without due process of law, in violation of the Fourteenth Amendment.

In the famous case of *Munn v. Illinois* (1877), the Supreme Court decided that the Granger laws were constitutional because the states could properly regulate the rates and services of those industries which were "affected with a public interest." Chief Justice Waite, following in the footsteps of his predecessor, Chief Justice Taney, declared:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. . . .We know that this [public power to regulate]. . . .may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

This brought forth the dissenting voice of Justice Field, whose views on property rights were to prevail in the years to follow. Echoing the thoughts of Chief Justice Marshall, he warned:

> The principle upon which the opinion of the majority proceeds, is, in my judgment, subversive of the rights of private property. . . .If this [the majority position] be sound law, if there be no protection either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of the majority of its legislature. . . .
>
> Of what avail is the constitutional provision that no state shall deprive any person of his property except by due process of law, if the state can, by fixing the compensation which he can receive for its use, take from him all that is valuable in the property.

The case of *Munn v. Illinois* established a class of businesses categorized as public utilities subject to public regulation. However, undaunted opponents of state regulation of private busineses persisted in their attacks. Even the spectre of communism was invoked against the Granger laws and, eventually, Supreme Court rulings concluded that state regulation of railroad rates was unconstitutional under the Commerce Clause of the Constitution. The second judicial blow against the Granger laws was the invocation of substantive due process of law under the Fourteenth Amendment. The Court assumed the power to determine whether rate regulations by state commissions were reasonable. By determining that certain rates were an unreasonable interference with the right to make a profit — a property right — the Court sanctified the views of Justice Field for a time.

While justices on the Supreme Court were wrestling with state regulation of industries and business, Congress was responding to the challenges of the giant corporations of the day by enacting the Interstate Commerce Act (1887) and the Sherman Antitrust Act (1890). The former initiated the regulation of the railroad industry, while the latter reinforced the economic philosophy that the public welfare is best served by retention of the competitive spirit as a major regulating element of business activity. Each of these landmark laws required additional federal legislation in later years to clarify regulatory public policy vis-a-vis corporate bigness. The numerous court decisions responding to challenges to these laws reflect, not surprisingly, the schism among the justices in their attitude toward private property and public regulation.

Laissez-Faire and Government Regulation

The early years of the twentieth century marked the return of a judicial shootout reminiscent of the one between Taney and Story, Marshall's surrogate. The prize was the same, but the weapons were differently named: substantive due process of law versus social legislation. Two cases will illustrate the duel.

In *Lochner v. New York* (1905), the justices had to grapple with the constitutionality of a New York State law limiting employment in bakeries to 10 hours a day and 60 hours a week. In a 5-to-4 decision, the Supreme Court declared the law unconstitutional because it violated the provision of the Fourteenth Amendment which declares that no state "shall deprive any person of . . . liberty, or property without due process of law." The majority reasoned that:

> The *statute necessarily interfers with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.* Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, *somewhat vaguely termed police powers*, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. [Italics supplied.]

Professor Charles Fairman, in commenting on this case, remarked that the justices had converted the word "liberty" into the liberty of contract, "property" into business conduct, and due process of law into anything which a majority of the Supreme Court regarded as reasonable. Whereas in the past, due process of law had been asociated with procedural remedies, the Court had now introduced a new version – the judicial option of examining the substance of a state law to determine whether it is arbitrary, capricious, or unreasonable in its impact on the economic system.

In his famous dissenting opinion, Justice Oliver Wendell Holmes accused the majority of mistaking their own personal faith in laissez-faire for a provision of the Constitution. He charged:

> This case is decided upon an economic theory which a large part of the country does not entertain. . . .It is settled by various decisions of this Court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . .A Constitution is not intended to embody a particular theory, whether of paternalism...or of laissez-faire. It is made for people of fundamentally differing views, and the accident of finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question of whether statues embodying them conflict with the Constitution of the United States. . . .General propositions do not decide concrete cases. . . .

The point of view expressed by the majority in the *Lochner* case – that property rights take priority over social legislation relating to wages, hours, and working conditions in factories – was reaffirmed in later cases relating to minimum wage laws for women and child-labor legislation. But the Holmes dissent buttressed by the Brandeis brief adducing statistical and sociological data supporting social legislation began to make inroads into the laissez-faire and substantive due process of law school of judicial thought.

It was in the case of *Muller v. Oregon* (1908) that the Holmes-Brandeis partership made its impact. The case involved the constitutionality of an Oregon law prohibiting employment of women in factories for more than ten hours a day. In a unanimous decision, the Court ruled:

> Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. *We take judicial cognizance of all matters of general knowledge.*
>
> It is undoubtedly true, as more than once declared by this Court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract. [Italics supplied.]

The New Deal and Property Rights

The Great Depression of the 1930's, that economic earthquake which bankrupted many businesses and industries and undermined the property base of many individuals and families, called for heroic measures. Farmers, workers, miners, bankers, savers, railroad workers, and businessmen looked to their governments – city, state, and national – to save them from the despair of poverty and insolvency. The New Deal, both on the state and national levels, was the response to the challenge. On the national level, the very enumeration of certain laws brings to mind the scope of the rescue measures: the National Industrial Recovery Act, the Agricultural Adjustment Act, the Railroad Pension Act, the Farm Mortgage Moratorium Act, the Guffey Coal Act, the Home Owners' Loan Act, the Municipal Bankruptcy Act, the National Labor Relations Act, and the Social Security Act.

The government intervention in the economic lives of individuals and in the decision-making processes of corporate enterprise was challenged, as expected, on a number of traditional grounds. To the argument that the New Deal legislation was an invasion of our traditional laissez-faire policy was added such historic principles as disregard of federalism (states rights) and unconstitutional delegation of power.

Since four of the justices on the Supreme Court at that time were supporters of the laissez-faire school, the New Deal encountered a bloc of opposition, and the Court nullified many laws which went to the heart of the New Deal policy. However, President Roosevelt's overwhelming popular endorsement in the election of 1936 and his plan to reform/pack the Court led to that famous switch in time that saved nine.

With Chief Justice Hughes and Justice Roberts the swing duo between the "four horsemen" of the status quo (Justices Butler Sutherland, McReynolds, and Van Devanter) and the three sympathetic to change (Brandeis, Cardozo, and Stone), the Court took the road to the future as blueprinted by the president and the Congress. Between March and May of 1937, a series of 5-to-4 rulings upheld the National Labor Relations Act, the Social Security Act, and the Washington State minimum wage law. It is in the latter case of *West Coast Hotel v. Parrish* (1937) that the majority of the justices, speaking through their Chief Justice Hughes, put to rest, at lease temporarily, the freedom of contract as property argument. The plaintiff had argued that the Washington mimimum wage law was a deprivation of freedom of contract. The Court's opinion responded:

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . .But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. . . .What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers. . . .The exploitation of a class of workers who are in an unequal position with respect to bargaining power and thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met.

Laissez-faire seemed to have been laid to rest. Or had it?

Conclusion

As we have seen, John Locke's conception of property as encompassing "lives, liberties, and estates" as well as "property which men have in their persons as well as goods" was internalized by many influential American figures both influential and unabashed." Gouverneur Morris, a framer of the Constitution, said that "men don't unite for life or liberty. . . they unite for the protection of property." John Adams went further by writing: "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is no force of law and public justice to protect it, anarchy and tyranny commence." John Jay went even further by insisting that "those who own the country should govern it." Years later, Daniel Webster voiced his tribute:

> Life and personal liberty are, no doubt, to be protected by law; but property is also to be protected by law, and it is in the fund out of which the means for protecting life and liberty are usually furnished. We have no experience that teaches us, that any other rights are safe, where property is not safe.

It was in the Gilded Age after the Civil War that the idea of property was invested with a theology and science. The theology of property became the Gospel of Wealth and the science of property became Social Darwinism with its rugged individualism and the survival of the fittest, economically speaking, of course. "God sprinkles holy water on economic success," remarked a cynic, and the judiciary during this period concurred with its blessings of substantive due process of law.

Although the Gilded Age is now interred in books, a new variation has emerged as the Age of Corpocracy. Richard G. Darman, Deputy Secretary of the Treasury, has attacked the "obese conglomerates" of today. Concerned that the contemporary orgy of mergers is leading this country to what he has termed the road to corpocracy, he warns of megadeals by managers who seem more interested in their golf scores than in the research and development of their "bloated, risk-averse, inefficient, and unimaginative" corporate structures. Corporate raiding motivated by profit for the sake of profit rather than for motives of diversification or legitimate expansion is dangerous to the economic health of the nation.

The uses of property – money, material wealth, land, and securities – harnessed to individual and corporate greed have always evoked spirited reactions. The Social Gospel of the Gilded Age was the response to the Gospel of Wealth. The contemporary religious response to the abuses and excesses of propertied interests appears in a Pastoral letter on *Economic Justice for All: Catholic Social Teaching and the United States Economy*, in which the Catholic bishops declare:

> Private property does not constitute for anyone an absolute or unconditional right. No one is justified in keeping for his exclusive use what he does not need, when others lack necessities. Pope John Paul II has referred to limits placed on the ownership by the duty to serve the common good as a "social mortgage" on private property.

This emphasis on the centrality of social responsibility, responsible individualism, and the ethics of business practices are not unique to the religious community. Soul searching on the part of business leaders and schools of business, as well as on the part of students of the economy, indicate a growing awareness of the need to re-examine the property-happiness nexus. Also, as we have seen in some of the judicial opinions of the twentieth centruy, some of the justices have not been blind to the idea of social justice.

At the same time, a new form of property has taken its place on the stage of history. Referred to in the literature as entitle-

(continued on page 64)

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For references [illegible] eralist and Anti-F[illegible] Clinton Rossiter [illegible] *Papers* [illegible] brary, 1961) and [illegible] *Anti-Federalist* [illegible] *tutional* [illegible] York,: New Am[illegible]

Wallace Mendelson [illegible] *Democracy and* [illegible] (New York: Appleton[illegible] Inc., 1960) is a valu[illegible] mation on various [illegible] and I have drawn [illegible]

The following bo[illegible] insights into [illegible] question: John B[illegible] *ties and A*[illegible] ington, D.C.: Cong[illegible] Press, 1984), [illegible] *trepreneurs of the* [illegible] Knopf, 1985), J[illegible] *The Law and the* [illegible] *dom in the Nine*[illegible] son: University [illegible] 1956), and Esmond [illegible] *Freedom: 1783–*[illegible] (New York: Hill [illegible]

Justice

What Is Justice/Grade Levels 10, 11, 12 **Law in a Free Society**

This lesson is intended to stimulate students' interest in the concept of justice and to focus their attention on how the Constitution of the United States protects and promotes justice.

Students first read and discuss four brief examples that raise issues of distributive, corrective, and procedural justice and how these issues relate to the Constitution of the United States. Next, students read a selection which defines these three categories of issues of justice, and then they apply these categories to six situations and determine which types of justice are raised in each.

Once the basic concept of justice is defined, the class is divided into five groups to apply the concept to excerpts from the Constitution to help them understand how the Constitution was designed to protect and promote the idea of justice.

Student Handout 1: How Does the United States Constitution Promote Justice?

What is justice?

- The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.
  Anatole France, *La Lys Rouge*, 1894
- At the end of the week, Jane received her paycheck for $72.00. She was upset and angry when she learned that Paul had received $114.00 for doing the same type and amount of work.
- During the riot, Ali had been arrested and dragged off the street by the secret police. He was questioned for about 10 minutes, then declared, "Guilty of rebellion against the government. Sentenced to death by firing squad at once!"
- Jean Valjean, the principal character in the novel *Les Miserables* by Victor Hugo, was sentenced to prison for stealing a loaf of bread to feed his sister and her children who were starving.

As you read each of the above situations, you may have had a common reaction: "That's not fair!" Each of the situations illustrates issues of justice that have been raised since the dawn of civilization. Our feelings about justice and our desire to achieve it have shaped our history.

Some of the most obvious examples of our nation's dedication to the ideals of justice can be found in our Constitution. Consider, for example, how the following excerpts from the Constitution are related to the types of situations described above.

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
> Amendment XIV, Section 1 (1868)
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
> Amendment VIII (1791)

But what is justice? How can you decide whether or not something is just? The term "justice" as used in this lesson has roughly the same meaning as "fairness."

WHAT DO YOU THINK?

1. What is fair or unfair about each of the situations above?
2. What relationship, if any, is there between those situations and the two excerpts from the Constitution of the United States?

Student Handout 2: Justice Divided into Three Categories

Scholars dealing with the subject of justice have divided questions about justice into three categories. These categories are: (1) *distributive justice*, (2) *corrective justice*, and (3) *procedural justice*. Definitions of the three categories are given below.

Distributive Justice is concerned with the *fairness of the distribution* of something among several people or groups. That which is distributed can be a benefit, such as pay for work or the right to vote, or it can be a burden, such as taxes, household chores, or homework.

Corrective Justice is concerned with the *fairness of a response* to a wrong or injury to a person or group. Common responses include making a person who has wronged or injured another give back something that was stolen, pay for damages, or suffer some form of punishment.

Procedural Justice is concerned with the *fairness of the way information is gathered* and/or *the way a decision is made*. Information might be gained from a person suspected of a crime, for example, by torture or by careful, unbiased investigation. A decision might be made after allowing all people interested in an issue to be heard, or it might be made without such a procedure. Procedural justice deals with the *fairness* of the way information is gathered or decisions are made, not with *what* information is gathered or *what* decision is made.

WHAT DO YOU THINK?

1. What are the three categories of justice and their definitions?
2. Why are they divided in this way?

IDENTIFY EXAMPLES OF THE THREE TYPES OF ISSUES OF JUSTICE

Directions: As you read each of the following examples, try to identify whether it raises an issue of distributive, corrective, or procedural justice.

1. To qualify for a driver's license you must have an adequate knowledge of traffic laws, adequate driving skills, and be a certain age.
2. In the 1880s, thousands of Irish immigrants came to the United States. Often they were denied employment opportunities because of their Irish ancestry.
3. In a recent court case, a man sued a driver whose car ran into his car for $5,000 in damages to his automobile, $4,300 in medical bills, and $1,000 for inconveniences caused by the accident.
4. During the early part of our nation's history, people convicted of certain crimes were placed in stocks in the public square for a specified period of time.

5. If you are accused of a crime, you have the right to be provided a lawyer to assist you at public expense if you cannot afford one.
6. Two boys were accused of vandalizing a school. They were brought to the principal's office and asked if they were guilty. They said they had been at the home of friends at the time of the incident. The principal called their friends and the parents of the boys to verify their stories.

WHAT DO YOU THINK?

1. Which examples raise issues of:
   a. Distributive justice?
   b. Corrective justice?
   c. Procedural justice?
2. What do you think is fair or unfair about each of the above situations? Why?
3. What situations have you experienced or observed that raised issues of justice similar to those contained in the above examples?

Student Handout 3: How the United States Constitution Promotes Justice

Directions: Each of the following excerpts from the Declaration of Independence and the Constitution of the United States is designed to protect and promote one or more of the kinds of justice you have been studying. Each group will examine the excerpts they have been assigned and:

- Decide whether the excerpts are designed to deal with issues of distributive, corrective, or procedural justice. (Some may deal with more than one type of justice.)
- Develop answers to the questions that follow the list of excerpts and be prepared to report your group's answers to the class.

GROUP 1

The Declaration of Independence: (1776) "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."

Amendment I: (1791) "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press..."

Amendment VIII: (1791) ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

GROUP 2

Amendment XIV, Section 1: (1868) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 9, Clause 3: (1787) "No bill of attainder or *ex post facto* law shall be passed."

Amendment VII: (1791) "The right to trial by jury shall be preserved..."

GROUP 3

Amendment XXVI, Section 1: (1971) "The rights of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Article 1, Section 9, Clause 2: (1787) "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Amendment V: (1791) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself...nor shall private property be taken for public use, without just compensation."

GROUP 4

Amendment VI: (1791) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIII: (1865) "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Amendment XXIV: (1964) "The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

GROUP 5

Article III, Section 2, Clause 3: (1787) "The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

Amendment IV: (1791) "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized."

Amendment XV: (1870) "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by and State on account of race, color, or previous condition of servitude."

Amendment XIX: (1920) "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by and State on account of sex."

WHAT DO YOU THINK?

1. Which of the foregoing excerpts deal with:
   a. Distributive justice?
   b. Corrective justice?
   c. Procedural justice?
2. What excerpts deal with more than one type of issue of justice?
3. What values or interests does each excerpt appear to be designed to protect or promote?
4. What similarities and differences are there among the values and interests protected or promoted by the excerpts?
5. What benefits and what costs accrue to society from each right protected or promoted by the United States Constitution?
6. Explain how the United States Constitution promotes justice.

This lesson on the Constitution of the United States is adapted from materials developed by the Center for Civic Education/Law in a Free Society.

Justice

Courthouses as Learning Laboratories/Secondary

Robert Clayman and Lynn Sygiel

Picture, if you will, a student's first day in court; not as a delinquent or as a child in the middle of a custody battle, but as an observer of the judicial system. The defendant stands before the court. Arrested the night before and held on bail, she awaits the movement of the wheels of justice. Slow and methodical, protecting one's liberty, the legal system attempts to discover the truth. Within minutes, decades of Supreme Court cases, civil rights laws, and due process under law are put into motion during the arraignment stage.

After careful classroom preparation, teachers can give their students an unforgettable experience with a court visit to see the judiciary in action. Court visits can be educational and call upon students to use critical thinking, listening and observation skills. Proper preparation, however, prior to the visit is critical if the visit is to be more than a "field trip." In this article, we offer two methods that we have found effective in the classroom and in teacher training workshops: (1) using the newspaper as a primer for court visits that emphasizes skill development, and (2) using observation worksheets before and during the court visit. (See inset on p. 47 for steps that will assure a productive visit to the courts.)

Using the Newspaper to Prepare Students

Bail. Arraignment. Pretrial conference. Plea bargaining. Defendant. Plaintiff. Recognizance. This is all common vocabulary used in curriculum material which literally lands on your doorstep on a daily basis. The curriculum material? The newspaper.

Because of its format, the newspaper has had many uses. Think, however, of its value and validity as an educational tool in classroom discussions about the law. It has features which can be used to introduce, reinforce, and apply skills and concepts taught in the law-related classroom. Every day, through its stories, the newspaper is filled with examples of the law's effect on the community, individual rights, values of society, situations protected by the Bill of Rights, and court proceedings. And every day those laws relate to the lives of children in the classroom.

Furthermore, the newspaper can do something no other textbook can – provide your class with updated information on a daily basis and relevant examples from real-life experiences. Because newspapers deal with a wide array of human dilemmas, they make excellent tools for the development of critical thinking skills.

Like life, newspapers pose conflicts without clearly defined black-and-white, right-or-wrong answers. They provide endless opportunities for divergent thinking and for open responses. Perhaps most importantly, they offer real and current quandaries proving the practical value of problem-solving skills.

Newspapers bring reality into the classroom, make laws meaningful, and establish community involvement in budding citizens. Consider the following activities designed to whet your appetite and open your eyes to the law-related education possibilities.

Activities

1. Select six newspaper articles dealing with the law. Typical headlines might be "Unpaid Traffic Fines May Soon Cost You Your License," "Indians Win Fight to Play Bingo," "Hiring Statute Challenged in Court," "Anti-Nuclear Protesters in Court." Have students generate as many law-related questions as posible. Find the answers to the questions through individual research on one of the articles.
2. The news section of a daily newspaper is ideal for introducing students to the terminology of criminal and civil law. Have students locate and underline all of the law-related terms and begin a class list for your unit of study. Refer to this list as the terms are introduced and discussed in context.
3. The newspaper can provide a variety of examples that will help to stimulate a discussion of fair and reasonable means of conflict resolution. Have students look for ways people resolve conflict. Thousands of conflicts take place daily. How many appear in the newspaper? What type are most likely to be reported? Which are least likely?
4. Check with your state's highest court (usually the supreme court) or state or local bar association for materials that explain the state's judicial structure. Use

your newspaper's police log and court reports to determine at which level each case will be heard and why.

5. Have students find articles in the newspaper that deal with due process of law. Decide which constitutional amendments are involved. Does the type of crime make any difference in the type of treatment received in court?

6. The initial court proceeding is the arraignment, where the formal charges are read to the defendant and he or she is advised of his/her rights by the judge. If the defendant wants time to speak with a lawyer, the judge will allow the time. If he or she wants a lawyer, but cannot afford one, a determination will be made to see if he or she is considered indigent. If so, and the crime carries a potential jail penalty, the defendant will be assigned a lawyer at no charge. In some states, defendants will be assigned to either a "bar advocate" or a "public defender," depending upon the seriousness of the crime.

   Use these articles on arraignments to have students locate the vocabulary used and discuss the steps in the court proceeding.

7. The next step in the court proceeding is the scheduling of a pretrial conference. Generally, this is about a month from the date of arraignment. This allows time for the defendant to engage a private attorney and also gives all attorneys time to get copies of police reports so they can prepare their cases. When drugs are involved, the pretrial conference date may be scheduled further from the arraignment date because of a possible backlog at the police laboratory where substance analyses are made.

   Have students assume the roles of the prosecuting and defense attorneys involved in the case and role play the courtroom scene. Discuss with the class the ideas presented.

8. The pretrial conference is the opportunity for the assistant district attorney and the defense attorney to discuss the case to see if it can be resolved without a trial. A judge may also postpone disposition for three or four weeks to give the court's probation department time to prepare a presentencing investigation report to help the judge determine the appropriate conclusion to the case.

Tips on Court Visits

Keep these court visit pointers in mind as you are planning an educational experience at the court.

1. Remember that courts are public facilities and open for you to use. Many judges and other court personnel will welcome you and your students. Please keep in mind that the courts are not schools. Courts throughout the country welcome students daily, but in a few courts, 30 students streaming in may create some uneasiness. Court personnel may speak another professional language and may not be familiar with educational issues, school schedules, and planning needs.

Therefore, make sure to discuss in advance the time of the visit, group size, age and knowledge level of students, as well as what you and the court expect to have happen. Make sure your visit is planned for a day when the court's business will be appropriate for your students. For example, if you are studying criminal law, you want to know whether the court will have any criminal matters scheduled for that day. A letter summarizing the discussion may help the court plan for your class's visit.

2. If it is necessary, get the clearance for buses and substitute teacher coverage before you call the court. You may not want to ask the court to schedule the visit if school administrators will not give you the time or transportation money. Some teachers bring all their classes or combine classes. From experience, we have learned that 30 students is a good number for most courts, but make sure the courtroom can accommodate that number, keeping in mind the number of people who fill the courtroom for court business. If you must bring two or more classes, make sure that each group is supervised by an experienced teacher and that there are enough courtrooms and proceedings to make the trip worthwhile.

3. Giving the court plenty of notice will make planning the visit easier for you and the court. At least three weeks before your planned visit, call the court and ask for the judge's chambers. If this is your first contact with the court, speak with the presiding justice or someone he/she may suggest. Explain your role in the school and the students' interest in visiting the court and meeting the judge. At this point, a visit with the judge can personalize your relationship with the court. When you appear with your students, you won't be a stranger to court personnel and [illegible]. The previsit will also give you a chance to learn the layout of the courthouse, from door, [illegible] place, where kids should sit in the courtroom, bathrooms, etc. Courthouses can be intimidating places if you are unfamiliar with the people and setting. Spending a couple hours before the [illegible] to prepare yourself can make a world of difference when you are with 30 students.

4. Try to think of all the details. What will you do if there is nothing for the students to observe? Who should you call if the bus breaks down and you are going to be late? If you arrive late and there aren't enough seats, is there standing room and is it allowed? Who should you contact when you get to the courthouse? Where will the students sit so they can hear the judge, the witnesses and lawyers? Do you need to ask the judge to hold some space in the gallery? What should be done about lunch?

5. Finally, plan and communicate with your courthouse contact person. Confirm the visit two days before the planned date. If a snag occurs, call the court as soon as you know that rescheduling is necessary. After your visit, send thank you notes from you and the students to the people who made the visit possible. This will make everyone feel appreciated and set a positive tone for your next educational experience with the court.

1880

BEST COPY AVAILABLE

Discuss the consequences of action for:
a. the person or persons committing the offense.
b. the victim's family.
c. the neighborhood.

Find court reports that have similar consequences of action. Ask students to discuss their findings.

9. Court procedures vary from state to state. The procedure outlined below applies to Massachusetts, but a similar procedure may well apply to your state. In cases that are beyond the jurisdiction of the district court, a probable cause hearing may be scheduled. If a judge finds probable cause, the defendant is bound over to the grand jury for indictment and arraignment in superior court. Once a defendant is arraigned in superior court, the district court charges are dismissed. More often, however, a defendant is indicted directly by a grand jury, making a probable cause hearing unnecessary.

Have half the class go through the newspaper and find articles pertaining to those charged with crimes. Have the other half find articles pertaining to accused persons who are on trial. Make a vocabulary list of terms involved with: (a) misdemeanors or felonies, and (b) trial court and appellate court proceedings.

10. Disposition of a case in district court can take many forms. There may be a guilty finding or a not guilty finding. A charge may be continued without a finding, usually for a specific period of time (3 months, 6 months, or 1 year). If the defendant stays out of trouble in this period, the charge is dismissed. A charge may also be filed with a guilty finding or filed without a finding. A charge can be dismissed for such reasons as the age of the complaint; a lack of prosecution due to the unavailability of a police officer or a witness or the refusal of a witness to testify; or a decision by the district attorney to "no pros" – decline to prosecute.

Have students list the punishments given for the crime. Discuss the different sentences and reasons for these differences.

11. Have students find examples of how the media reports crime stories responsibly so as to avoid libel

Understanding the Courtroom

Take a few minutes and write down all of the questions you have about the courtroom and how it works.

HALLWAYS

What is happening in the hallways outside the courtroom? (listen carefully)

COURTROOM

Make a sketch of the courtroom showing the placement of the judge, jury, defendant, lawyers, and all other persons who appear to be playing an active role in the process.

What kind of case it is? ________

Describe the people participating in the trial in terms of their sex, age, and race (the judge, the prosecutor, the defending lawyer, the court officers, the defendant) ________

____

Describe the offense ________

What is the penalty for the offense? ________

____

JUDGE

What is the name of the judge? ________

Who do you think the judge cares about: him/herself, the defendant, or the safety of the community?

____

____

DEFENDANT

Describe the defendant's age, sex, race and general appearance:

____

____

How much is the defendant involved in the case?

____

How much do you think the defendant understands about what is going on in the courtroom? ________

____

Did the defendant spend time in jail prior to [illegible] because she/he was dangerous or because [illegible] could not afford bail?

____

PROSECUTOR

Does the prosecutor seem to be prepared? ________

____

Do you feel that he or she has proven the [illegible] a reasonable doubt? ________

____

How does the prosecutor appeal to the [illegible] What tactics does the prosecutor use [illegible] them? ________

____

What purpose does the prosecutor [illegible] he or she makes his/her recommendation [illegible]

- **Protection of society** ________
- **Retribution (punishment)** ________
- **Rehabilitation** ________
- **Protection of the convicted person** ________
- **Crime prevention (as a deterrent to [illegible] defendant in the future)** ________

DEFENSE COUNSEL

[illegible] observations inside and outside [illegible] how much time does it seem that the [illegible] spent with his or her client? ________

____

Does it appear that the lawyer may [illegible] bargained the case? If so, what indications [illegible] have that this was done?

____

____

Does the defense counsel appear to be [illegible]

____

____

suits. Ask a local reporter to share with the class ways in which the local media guards against libel. Here is an example of the guidelines one paper's reporters are asked to remember: "In writing the summary of a day's business in court, the most important aspects are accuracy and clarity. Probably in no other part of the paper are the opportunities for libel as rife as they are in court reports. Use as much identifying information about a defendant as is available."

Have students write a news story based on a fact sheet that includes potentially libelous statements—"thief," "robber."

12. Stories about individual rights law can be found in every edition of the newspaper. Reporters cover federal, city, and county courts, as well as police departments. In covering a "beat," reporters generate information useful in teaching about due process (an important component of a lesson on the First Amendment).

    Discuss freedom of the press. Identify stories that raise the following points for debate:

    - One of the most important roles of the news media is to be a watchdog of government.
    - Freedom of speech and freedom of the press are necessary in a democracy.
    - Newspapers should be required to print letters to the editor dealing with controversial topics.
    - A person's right to a free trial is a legitimate reason for restricting the flow of information to the press during a trial.
    - Because students are not yet adults, student journalists should not have the same rights as professional journalists.

13. The local newspaper decides to report court proceedings of a case involving a former high school track coach and three 15-and 16-year-olds charged with operating a burglary ring. What will you, as a newspaper reporter, be able to report? Why? Have students list the differences between juvenile and adult criminal cases.
14. Assess the way your local newspaper covers a trial in your area. Have students follow the coverage. Analyze

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Does the defense counsel call witnesses and present evidence which puts "holes" in the prosecutor's case?

What is the recommendation of the defense counsel for sentencing?

Do you think the defense counsel is looking out for the best interest of his/her client?

If you were the defense counsel and you thought your client was guilty, could you defend him/her? Why or why not?

What would your obligations be as a member of the bar and the legal profession if you thought your client was guilty?

SENTENCING

Was the defendant found:

____ guilty

____ not guilty

____ set free

What was the sentence?

____ probation

____ term in jail or prison

____ suspended sentence

____ sentencing set for a later date

If a person is convicted, is sentencing done at that time or is a later date set for sentencing?

If sentencing takes place at that time, what factors does the judge take into consideration?

What do you think will happen to the defendant if he or she is either set free or put in prison?

If sentencing did not happen while you were there, how would you discover the verdict and the sentence?

OBSERVERS

Why do you think the people in the courtroom who are not directly involved in the trial are there?

What do you notice about their reactions?

YOUR REACTIONS

How do you feel being in a courtroom?

If you were the defendant, how would you feel?

If you were a relative of the defendant, how would you feel?

GENERAL OBSERVATIONS

Be aware of body language of every person in the courtroom (especially eye contact). How does the court deal with non-English speaking people?

How do people in the legal world dress?

1882

the fairness of the coverage. Can your students predict the outcome?

15. Select an article from the newspaper which describes a real-life conflict (for example, does the law permit city bus drivers to strike?). Divide the class into groups of three. Read or hand out copies of the article to each group. Explain to them that each group will take part in a court simulation, based on the problem described in the article. Students in each group should decide which members will take on the roles of judge, plaintiff, and defendant. Their roles should be described as follows:

    JUDGE: Must see that both sides have a fair chance to present their case. The judge should not interrupt or dominate the proceedings.

    PLAINTIFF OR PROSECUTION: This person has accused the defendant of doing or not doing something which he or she thinks is unfair. He or she is the one who has asked the court to hear the case and wants the court to decide who was at fault or guilty and determine compensation or punishment. The plaintiff speaks to the judge first.

    DEFENDANT: This person has been accused by the plaintiff. He or she has been ordered to appear in court. He or she listens to the accusation and then either tries to prove it untrue or give reasons to justify his or her actions.

    After the roles have been described to the students, groups role-play the situation. Have students then join together as a whole class. Ask each group to explain the decision they reached concerning the problem. Discuss differences of opinion. The following are suggested "debriefing" questions:

    a. What were the major issues in the case?
    b. Was the judge's decision fair? Why or why not?
    c. Which is the most difficult role to play?
    d. How well did the participants play their roles?

    What emotions did the students feel during the role-playing?

Keep Your Eyes Peeled and Ears Tuned In

There is a lot to see and hear in a courthouse. The worksheets in the box should be reviewed before the visit. They are written so that students will not only report what they observe and hear, but also analyze the justice system. The worksheets can be used before and during observations of criminal or civil proceedings. As you will notice, there are many questions. Teachers may want to divide the class into groups, giving each student within a group a set of questions. At the very least, students should be aware of the issues raised by the questions.

Why Arraignments

If you have limited time, observing arraignments can be an exciting learning experience for students. The rapid succession of cases and the flurry of activity in the courtroom keeps students' attention, clarifies classroom learning experiences, and allows students to see the Bill of Rights applied to real cases. Observing arraignments also provides students with an opportunity to understand the whole process, from the judiciary's initial involvement through the trial and sentencing. Moreover, newspaper coverage of the criminal courts lends itself to learning about legal language and criminal procedure before the students visit.

Most teachers and students are only afforded the luxury of one structured and educational day in court. This means that students only catch a segment of a trial and may have some trouble putting the pieces together. Arraignments are completed very quickly, and this gives the student some closure to one stage in the process. For teachers who have a few hours to visit the court, or elementary or middle school students with short attention spans, arraignments will rivet students to the task and prepare them for the longer trial, if one is scheduled.

Constitutional Protections During the Arraignment Stage

- Due Process of Law (Fifth and Fourteenth Amendments)
- Arraigned Where the Crime Occurred (Sixth Amendment)
- Notice of the Charges (Sixth Amendment)
- Right to Counsel (Sixth Amendment)
- Protection from Unreasonable Bail (Eighth Amendment)
- Protection from Cruel and Unusual Punishment (Eighth Amendment—if defendent is held prior to trial)
- Public Proceedings (Sixth Amendment)
- Freedom of the Press (First Amendment)

Refreshing Approaches for Court Visits

Shadow Jury: Ask the judge if students can sit as a shadow jury during the trial. They would be instructed along with a real jury if one is present, and would render a verdict. The judge may need to get permission from the lawyers, so discuss the idea well in advance of your visit.

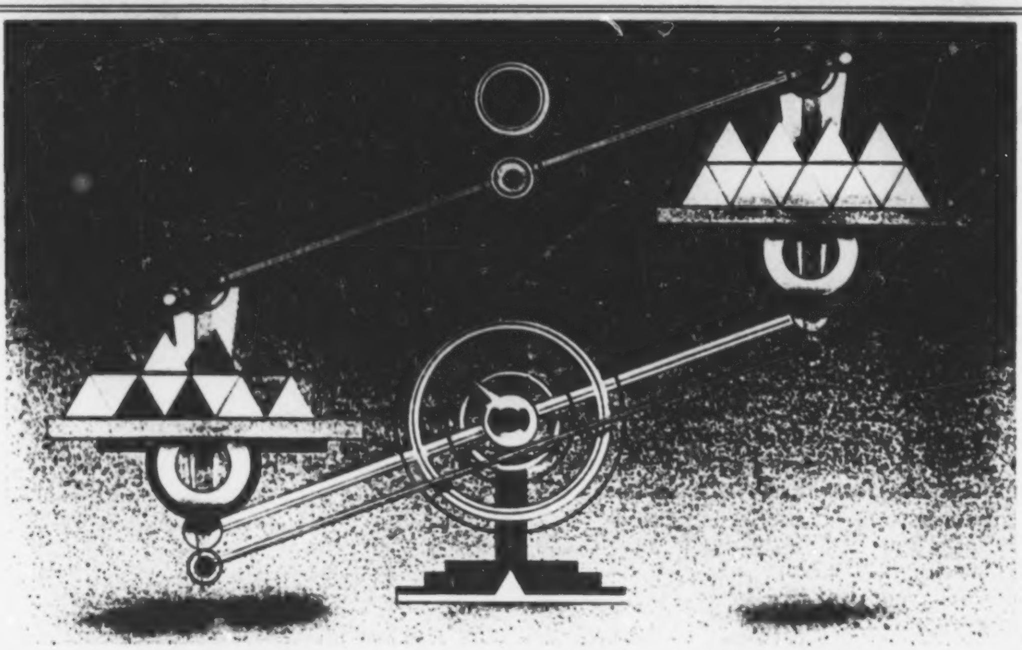
Shadow Judges: Students sit with judges for an entire day or for one trial, robes and all. This is more difficult to achieve and it is appropriate for older, more mature students.

Lunch with the Judge: Students can brown-bag their lunches, while the teacher packs a "picnic" lunch for the judge. You can get an hour of the judge's time and great candid discussions. A day the students will never forget.

Robert Clayman is the coordinator of law-related education for the Supreme Judicial Court of Massachusetts and the Massachusetts District Court Department. Lynn Sygiel is the educational services manager for The Salem Evening News, *Salem, Massachusetts. Mr. Clayman and Ms. Sygiel are the creators of "Constitution Corner," a national newspaper column developed to commemorate the bicentennial of the United States Constitution and the Bill of Rights.*

Equality

Affirmative Action/Secondary **James Giese and Barbara Miller**



Tony Griff

Throughout our history, Americans have regarded the concept of equality as one of their fundamental values as expressed through the Constitution. Equality, however, has meant many things to many different people. Beginning in the 1960s, the federal government began to urge "affirmative action," action by both public and private sectors to help correct the problems of the past, particularly those associated with discrimination against racial minorities in educational and employment opportunities.

Since that time, affirmative action has been the focus of much of the discussion of the concept of equality in American society. The issue has been much discussed in election campaigns, debated in legislative bodies, and considered in several Supreme Court cases. Each of the three branches of government has been involved in the changing definition of equal opportunity in education and in the work place.

After much effort over the years, racial minorities (and women and the handicapped) were achieving some gains with regard to equal treatment in many areas of American life. But new problems arose as a result of this drive for racial equality. When special affirmative actions are taken to alleviate past discrimination and to improve equal opportunity of minorities, do white citizens then face "reverse discrimination?" To what extent are white citizens' rights violated when they are excluded from an educational program (as in the Bakke case), prevented from being hired for a job, or are not being promoted within the place of work? What formulas are proper for pursuing both goals at the same time? These and other important questions have been the focus of discussions on equality in the last decade.

OBJECTIVE

This lesson will help students understand the role that each branch of the federal government can take in clarifying how Americans will approach redressing past discrimination
while protecting the rights of individuals whose opportunities may be limited by affirmative action programs.

PROCEDURES

1. What Types of Inequities Exist in Employment?

   Provide statistics to show that differences exist among various American social groups in terms of the types of jobs they typically hold and in terms of the incomes they receive for those jobs. Do students recognize any patterns in these differences? Do these differences show inequality? How do students feel about these social facts? Do students think the government should encourage affirmative action programs to eliminate inequality in employment?
2. Discussing a Hypothetical Case

   Tell students that they will have an opportunity to look at how each branch of the federal government can

Data Card

EXECUTIVE GROUP

When President Reagan was elected, he promised supporters that he would see that the law and the logic of the Fourteenth Amendment would apply to all citizens rather than special interest groups. He wants to fulfill his campaign promises to eliminate those aspects of affirmative action that he feels are harmful to individual citizens who may be unfairly punished for societal problems for which they are not responsible.

Prepare a brief as a "friend of the court" offering your opinion on what should be done in this case.

respond to concerns about equal opportunity in employment (and promotion). Give the class the following hypothetical situation to consider. (This case closely follows the recent *Paradise* case. See pp. 24-25 and 58-59.)

THE *TROOPER* CASE

In the early 1970s, the National Association for the Advancement of Colored People (NAACP) brought suit against the Department of Public Safety of a southern state. The suit charged that the department had used discriminatory employment practices – it had deliberately maintained an all-white force of state troopers for 37 years. The court ordered (among other things) that one-half of all state trooper openings (new hires) be filled with black persons. This policy was to be effective until blacks became one-quarter of the trooper force, roughly equal to the general employment distribution of blacks in the state.

By 1975, the court found that the department had consistently delayed implementing the required policy. In 1977, it was charged with discriminating against blacks with regard to promotions from trooper to corporal (the next highest rank). In 1979 and again in 1981, the department agreed to implement a promotion program that would not discriminate against black troopers. But by 1983 the department had failed to establish such a promotion plan for even the lowest ranks. The newly created promotion exam produced a list of 79 whites and no blacks for promotion to corporal (the department wanted to fill 16 to 20 positions).

In addition, only white troopers were promoted to ranks above that of corporal throughout the whole period. The department required that troopers serve a specified period of time at a rank before they were eligible for the next highest rank. Furthermore, the department promoted only within its own ranks – that is, it made no new hires in higher ranks from outside the department.

Since the department was unable to establish an equitable promotion plan, the court established a temporary plan for it. The court ordered that half of all promotions to corporal and above be awarded to black troopers. The one-for-one quota was seen as temporary – until 25 percent of those in each rank were black or until a valid promotional plan could be established by the department.

Four white troopers who had scored well on the promotional exam for higher rank opposed the court order and brought suit. They argued that quotas were unconstitutional and therefore their rights had been violated.

QUESTIONS FOR DISCUSSION

1. Was there an apparent problem of past discrimination in the state trooper force?
2. Would the court-ordered program correct problems of past discrimination?
3. Would the program limit opportunity for some employees?
4. Should citizens be concerned about the composition of the state trooper force?

SETTING UP THE ROLEPLAY

Divide the class into two groups. Assign each group to look at the issue of affirmative action from the viewpoint of (1) the legislative branch (your congressional district) or (2) the judicial branch – the U.S. Supreme Court. (The simulation provides for the

Data Card

LEGISLATIVE GROUP

In your congressional district, there is a large public agency that has a policy similar to that in the case of *Troopers*. Your want to know how your constituents feel about the issue of redressing past grievances through affirmative action.

If changes are needed to provide equality for all Americans, you feel that it is best done through the law-making branch of the government. Changes should reflect what the people want. Your job is to represent your constituents. Take a poll to find out if the people you represent want you to introduce a bill to give incentives to companies to undertake voluntary affirmative action programs, or if you should oppose such legislation.

Design a survey on affirmative action/reverse discrimination to administer to adults in your community. The questions below are provided to get you started. Administer the survey to a sample of adults and tally the findings to present to the class. Be sure you interview a broad cross-section of the population and get a wide diversity of views. [Note to teacher: if students are not able to secure opinions on both sides of the questions, be sure to see that arguments on both sides are adequately brought out.]

SAMPLE QUESTIONS

1. **Do you feel that racial minority groups in this country have equal job opportunities?**
   Yes No No opinion
2. **Do you feel that women in this country have equal job opportunities?**
   Yes No No opinion
3. **What is your opinion of Equal Opportunities Laws? Do they go:**
   Much too far A little too far Not quite far enough
4. **The current administration wants to eliminate all affirmative action programs that involve quotas as a means for solving problems of past discrimination. Do you favor or oppose this effort?**
   Favor Oppose
5. **A recent study shows that discrimination in equal pay is a serious problem for women and minorities. What, if anything, do you think should be done to correct this problem?**

Contact the local offices of your congressperson or senators. Find out how they have voted on affirmative action/reverse discrimination legislation. Ask about mail that they have received on this issue. They may also be able to provide the results of recent surveys and/or demographic information that students can use to compare with the survey they conduct in the community.

Based on information collected, report to the class on how you will vote on the issue of affirmative action if it comes up for a vote. If your constituents have strong feelings about the issue, you may wish to describe legislation you will introduce on the issue.

involvement of the executive branch if you prefer to add that dimension to the simulation.)

Ask the class: does the branch of government to which you have been assigned have any responsibility for affirmative action policies? Should the government take an active role in resolving questions of equality?

Explain that they are to consider the hypothetical situation from the viewpoint of their respective roles. Provide each group data cards with information about their roles or perspectives in looking at affirmative action. Review with the class what each group will be doing as follows:

a. The group representing the judicial branch will consider the precedents established in the case of Allen Bakke, a landmark case on affirmative action/reverse discrimination. Following a review of the Supreme Court rulings, the group will apply the law to the hypothetical situation of *Troopers*. (A number of other cases might also serve as a basis of discussion for this group. See especially pp. 23-25 of this *Update*, which discuss cases on affirmative action in the workplace.)
b. The group representing the legislative branch will conduct a public opinion poll to find out about community attitudes toward problems of affirmative action/reverse discrimination. They will also contact the office of the their congressional representative to gather additional data. This group must decide what type of legislation their constituents would want to have passed on this issue.
c. (Optional) The group representing the executive branch will consider the Reagan administration policies on affirmative action/reverse discrimination. The group will also prepare an amicus curiae (friend of the court) brief to express the opinion of the administration on this issue.

SMALL GROUP WORK/REPORTS

Small groups will need time to complete research and discuss and compile their findings.

Each group should report to the class as follows:

The *legislative group* should report the results of their survey and describe any legislation that they plan to introduce.

The *judicial group*, (the Supreme Court) will deliberate in front of the class or offer the reasoning of the court through minority and majority opinions.

(Optional) Representatives of the *executive group* should distribute copies of their brief or give oral arguments about affirmative action before the Supreme Court.

DEBRIEFING

How do the executive and legislative branches of government view the problem differently? Describe the approaches of each one. What are the strengths and weakness of each branch of government in dealing with the problem? What happens when the court interprets the Constitution in a way that goes against public opinion? What should the president and Congress do when the public wants them to do something that goes against a court decision? Is the issue of affirmative action/reverse discrimination best resolved through court cases or through legislation?

EXTENSION

What do you think would be a fair way to help victims of past discrimination without hurting individuals who are also deserving of "equal opportunity?"

Try writing a fair affirmative action plan for the Department of Public Safety described in the case study.

James Giese is the executive director of the Social Science Education Consortium, Inc. in Boulder, Colorado, and Barbara Miller is the co-director of the Colorado Civic/Legal Education Project in Boulder.

Data Card

SUPREME COURT GROUP

In this simulation, you will be asked to determine whether or not racial quotas should be used to correct problems of racial discrimination. The white male who has brought the case presents arguments saying that the policy of one-black-for-one-white promotion should be set aside. Lawyers for black troopers will argue that the policy is fair and necessary to correct years of discrimination by the state highway patrol.

Your job is to interpret the Constitution. You are not to be swayed by public opinion. Rather you are to look at the Constitution and the law that has been developed through other cases. You have the final word on what the Constitution means.

Use the following rulings from the landmark case of *Board of Regents of California v. Bakke* as a basis for you ruling. (Allen Bakke asked the Supreme Court to set aside a policy that allowed minority students with lower grades to be admitted to medical school instead of him.) In this case the Court answered two questions: Is an affirmative action program that sets aside a limited number of slots for minority students lawful? Are considerations of race in admissions always lawful?

The Court decided that it is unlawful to have a strict quota system.

1. **Race may not be the sole criterion for a preference unless there is a finding of past discrimination by the institution using the racial classification.**
2. **Helping victims of societal discrimination does not justify a classification which imposes disadvantages on persons who bear no responsibility for the harm the beneficiaries were to have suffered.**

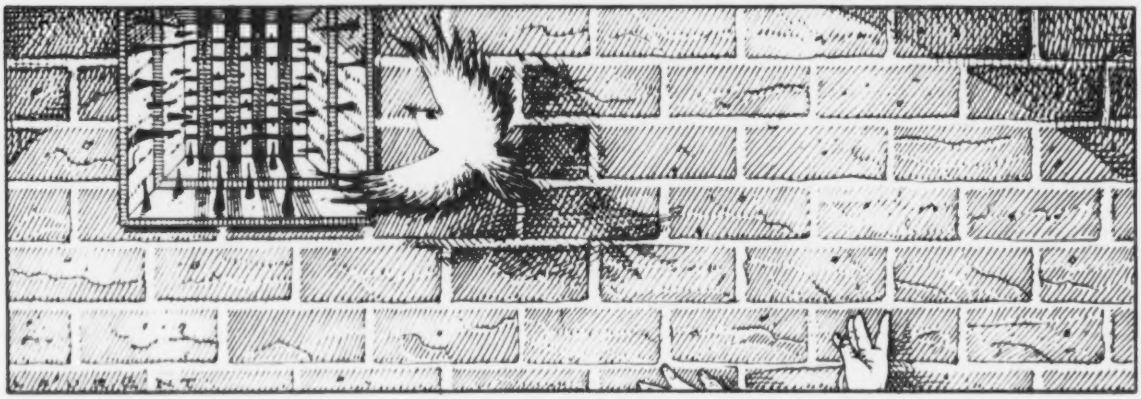
The Court also ruled that it is acceptable to consider race in affirmative action programs.

1. **Race may be given some consideration in the admissions process in light of the school's interest in creating a diverse student body.**
2. **A number of factors may be considered in deciding who shall be admitted to a college, including income level of parents, special talents including athletic ability, geographical distribution of the student body, and alumni status.**
3. **The Court recognized the value of a multi-racial educational setting.**

Justice

Eighth Amendment & Death Penalty/Secondary

Joseph M. Shortall and Denise W. Merrill


Richard Laurent

Here is an activity created by the Connecticut Bar Association for lawyers but easily adaptable for teachers.

Objectives

1. To introduce to students the meaning of the Eighth Amendment's prohibition against cruel and unusual punishment, specifically using the death penalty for juveniles as an example.
2. To have students begin to understand the complexities of decisions regarding the death penalty and its application.
3. To have the students understand their duty as citizens as they apply the concepts of the Constitution.
4. To give students the opportunity to discuss constitutional issues.

Special Note

Because of the sensitive nature of this topic, lawyers and teachers should avoid making judgments about the morality of capital punishment. Students will approach the issue of the death penalty from a variety of backgrounds, and it is important that you do not advocate a particular point of view or attempt to draw conclusions about what is morally right or wrong. Base class discussion on the facts presented in each hypothetical case and focus in general on the difference between an adult and a juvenile for the purposes of determining what is "cruel and unusual punishment," and, in particular, on the mitigating factors in each situation.

Suggested Approaches

These classroom activities could be performed during a 45-minute period.

1. Introduce yourself. Briefly discuss the goals of the class (e.g., "I am not here to sell you on a point of view." Maybe a brief background of general death penalty information – number of juveniles on death row, number of states that permit it, what the law is in your state). This should all take no longer than 10 minutes.
2. Poll the class at this point. Do they agree with the use of the death penalty for juveniles? This gives you a feel for the audience, and commits them to an abstract idea with which to compare their opinions at the end of the class or during later hypothetical examples.
3. Depending on the size of the class, you can then try the following activity with one of the hypothetical examples given:

   Divide the class into two or more groups and explain to them that they are to act as judge and/or jury in this case.

   Put the example on the board, listing each fact in the case. Have the two groups confer independently and come to a decision on a sentence. When the groups report back, you can ask them the questions on which factors determined their decision (e.g., what about the fact that the defendant is only 13 years old? How about his mental capacity? See hypothetical examples and suggested questions.)

   The pitfall of this approach is timing, since the deliberation alone could easily take the entire class period. Try to stick to a ten minute deliberation for the entire activity, so that you can still guide the class discussion back to "cruel and unusual" and the Constitution.
4. After the discussion of the case, you may want to take another poll of the class, or ask if the case had changed their views at all.

Hypothetical Example I

A female named Lisa helped her brother and some friends plan a robbery of a pawn shop in order to get some money for the friends to get back to their home in another state. Some of these friends had been in trouble before, and they all knew that this was a serious crime, including Lisa, but they needed the money and couldn't think of any other way to get it. They didn't think anyone would get hurt, but they thought they had better bring a gun, which Lisa found in her uncle's basement.

Lisa did not actually go into the pawnshop when her friends robbed the shop. In fact, she claimed that she went to a restaurant across the street to wait while the others robbed the store. Unfortunately, the pawnbroker tried to grab the gun from Lisa's friend during the robbery, and he was killed. They all feld from the scene, but were caught by the police as they drove away.

The friend who actually pulled the trigger that killed the pawnbroker was found guilty of murder, but did not get the death penalty because he agreed to testify against his friends. Lisa was found guilty of murder, since the law in her state is that someone who purposely helps another commit a crime is just as guilty as the one who actually commits the act. Lisa was initially sentenced to death.

Note to resource person/teacher: This hypothetical is loosely based on the actual case of *Lockett v. Ohio*, 438 U.S. 586 (1978). In that case, the defendant's death penalty was upheld by the Ohio Supreme Court but was overturned by the U.S. Supreme Court on the grounds that she was not the perpetrator of the crime.

QUESTIONS

1. Do you think that all murders committed during a robbery should result in the death penalty? Why or why not?
2. Connecticut's law lets the judge take certain things into consideration to decide whether or not someone should get the death penalty or whether he or she should get life in prison. What kind of things do you think the judge or jury should consider?
3. Do you think that Lisa deserved to get the death penalty? What if you knew that Lisa was 30 years old? Would your answer be different if you knew she was 14 years old? Would your answer be different if she had actually gone in and pulled the trigger?
4. How do you think you would feel about Lisa if the man who had been killed were your father? Do you think it would be fair for the pawnbroker's son or daughter to be on the jury to decide what happens to her? Why or why not?

Teacher or resource person: now hand out or read the hypothetical summary of the "Presentencing Report on Lisa." Ask students to consider the information contained there and answer the questions which follow the report.

Hypothetical Example II

Eddie was a 16-year-old boy with serious emotional problems. His father died when he was an infant, and he had been raised by a very violent stepfather who frequently beat him. This stepfather was a policeman. Eddie also had a very low I.Q., being close to mentally retarded, and was diagnosed by school psychologists as being in need of psychiatric help, which his family could not afford.

One day, Eddie decided to run away from home, stealing his brother's car and his stepfather's shotgun. He drove very fast down the highway, lost control of the car, and was seen by a policeman, who signaled him to pull over to the side of the road. He pulled over, and when the officer got out of the car and began to approach his car, he pulled out the gun and shot the policeman.

Since he was clearly guilty, Eddie pled guilty without a trial. The only issue was the punishment, which could be life in prison or the death penalty.

Note to teacher/resource person: This case is loosely based on *Eddings v. Oklahoma*, 455 U.S. 104 (1982). In that case, the U.S. Supreme Court vacated the death sentence on the grounds that the sentence had been imposed without the individual consideration of mitigating factors which the Constitution requires. In particular, the Court noted that the trial court should have permitted consideration of Eddings' difficult family history and pattern of emotional disturbance.

QUESTIONS FOR DISCUSSION

1. If you were on the jury and deciding whether he should spend his life in prison or should be executed, would it matter to you whether Eddie was only 16 years old?
2. What if the law said that someone sentenced to life in prison could be paroled for good behavior in 7 years? in 25 years? How about if life in prison meant no possibility of ever getting out? Is spending your whole life in prison worse than death?

Presentencing Report

Lisa, the accused in this case, is described in the accompanying psychiatric reports as a 16-year-old with average intelligence, not suffering from a mental deficiency. One of the psychologists says that, if she were to be put in prison, her chances of rehabilitation (not committing any more crimes) are good if she were ever returned to society.

The report also shows that Lisa has committed no other major crime, although she has one offense of shoplifting on her juvenile record (before she was 16 years old). She was also shown to have come from a very bad home situation. Her mother and father were divorced when Lisa was only two years old, and her mother then suffered a nervous breakdown. Lisa was found in the street, and given to the state for a foster home. She went from home to home until she was 14, when she was briefly sent to a juvenile home at the time of the shoplifting incident. She now lives with an aunt and uncle who agreed to take her in.

Lisa feels sorry for what happened, although she still maintains that she was innocent of any real crime, since all she did was help in the planning of the robbery. She didn't think anyone would be killed, and doesn't feel she should be responsible.

QUESTIONS FOR STUDENTS

1. **Do you think that Lisa is truly sorry for what she did? Do you agree or disagree with her about the killing not being her fault?**
2. **Does her background affect your thinking about how she acted? Should the judge or jury know about this and take it into consideration when deciding whether she should get the death penalty?**
3. **Does it matter that Lisa has never committed any other serious crime? What if this were the second or third time she had been involved in a robbery? Should this make any difference in what happens to her as a result of the crime?**
4. **If you don't think Lisa should get the death penalty, what do you think should happen to her in light of all the facts?**

Some Facts About the Death Penalty and Juveniles

1. Of the 37 states providing for the death penalty, 10 prohibit its imposition on persons under age 18; 15 set lower minimum ages, from 10 to 17, and 12 set no minimum age.
2. Of approximately 1800 persons awaiting execution in the U.S., 33 (1.8%) were under 18 when they committed their crimes.
3. In a 344-year period (1642-1986), 281 persons were executed in the U.S. for crimes they committed under age 18, nine of whom (3%) were girls. The last girl was executed in 1912.
4. In the 20th century, the youngest persons executed were two boys, Fortune Ferguson in Florida (1927) and George Stinney in South Carolina (1944), who were executed at ages 16 and 14 respectively. Since 1900, 192 persons have been executed for crimes committed while under 18.
5. The most recent executions of juveniles were one in 1985 in Texas and two in 1986, one in South Carolina and one in Texas.
6. Several public opinion polls have indicated that, while a large majority of Americans favor the death penalty in general, imposition of the death penalty on persons under 18 is opposed by a majority of the people responding to those polls.
7. The youngest person executed in the U.S. was a 12-year-old Indian girl, hanged five days before Christmas in 1786 in Connecticut for the murder of a 6-year-old white girl.

3. Can you think of any other punishments that might be more appropriate for someone like Eddie than prison or death?
4. The Constitution forbids the government to punish anyone in any way that is "cruel and unusual." Do you think that death is a cruel or unusual punishment? Can you think of anything that might be more cruel than death?

Hypothetical Example III

Jimmy and his two friends, Mark and Kevin, had been drinking beer and smoking a little marijuana. They decided to go for ride in Kevin's car "to see if they could find some girls."

At the same time Bill picked up his girlfriend, Janet, at her folk's house to go to the movies. They couldn't agree on a movie so they drove to a place where all the kids parked, to talk over some problems they'd been having in their relationship. Both were 18 years old.

After they had been there a short while, a car drove up with three boys in it, Jimmy, Mark and Kevin. Bill and Janet knew Jimmy and Kevin from school but had never seen Mark before.

Kevin and Mark got out while Jimmy stayed in the car. There was some conversation but, suddenly, Mark opened Janet's door and pulled her out of the car. Kevin and he dragged her to the car and forced her in the back with Mark. Bill yelled at them and started to get out of his car. Jimmy shot and killed him with a shotgun Kevin kept in the car for hunting.

All three drove away with Janet. She was found the next morning, raped and brutally murdered.

Jimmy was 15 at the time of the incident. Though sentenced to death while a minor, because of many appeals in his case he is now 25. He has been convicted of murder, rape and kidnapping. He is mentally retarded and has a mental condition known as a "personality disorder," which is a recognized mental illness but not one considered as serious as schizophrenia, paranoia, etc.

Note to teacher/resource person: Hypothetical three borrows certain elements from two actual cases, though it is not based in full on a real case. The actual cases, *Trimble v. State*, 478 A.2d 1143 (1983), and *Roach v. Martin*, 757 F.2d 1463 (Fourth Circuit, 1985), deal with a wide variety of mitigating circumstances – drug use, drinking, mental retardation, illness, youth – that might be considered in death penalty cases.

QUESTIONS FOR DISCUSSION

1. Should Jimmy receive the death penalty or life imprisonment for these crimes? Why? ("Life imprisonment" in Jimmy's state means that he would go to prison for about 25 years.)
2. Suppose "life imprisonment' really means Jimmy will be in jail for the rest of his natural life? Any difference? Why or why not?
3. If you had trouble making up your mind about the appropriate penalty, what additional information do you think would be helpful to you?
4. Suppose Jimmy had been 21 at the time of the crimes; would your decision be any different? Why or why not? Suppose he was 35? Suppose he was 17 now instead of 25?
5. As the case indicates, Jimmy had two companions when the crimes were committed. Suppose one was an adult, who dominated the mentally-retarded Jimmy and pressured him to kill Bill and Janet; what penalty should Jimmy get? Is this different from your answer to question one? Why or why not?
6. Suppose, in addition to what you already know about Jimmy, you found out he now has "Huntington's disease," an inherited disorder of movement, personality and thought, which has caused his present mental condition to deteriorate. Any difference in your decision? Why or why not?
7. Suppose Jimmy had been a "good kid" before; for example, he'd never been arrested at all? Any difference? Why or why not?
8. Suppose, before she died, Janet begged Jimmy and his friends not to kill her, but Jimmy shot her anyway. Any difference? Why or why not?
9. Bill's and Janet's parents have been devastated by their deaths. In addition, Janet's little sister wakes up screaming every night and has been seeing a therapist since her sister's murder. Would these facts make any difference in your decision about Jimmy's punishment? Why or why not?
10. How do you think you would feel about his punishment if Bill had been your brother or Janet your best friend? Would you want to sit on the jury that decides his punishment? Do you think it would be okay for you to do so?

11. The Constitution forbids "cruel and unusual" punishments. Do you think the death penalty is "cruel and unusual" in general? How about in this case?

Helpful Hints

1. Ensure that students are aware that their rights derive from the U.S. Constitution; the state constitution; federal, state and local laws or federal/state regulations.
2. Watch the time! Don't get caught on a tangent or take too long on any one part of the presentation. This will leave the students frustrated at the end.
3. End the class on time. If you said you would send students or the teacher materials, don't forget to do so.
4. A letter to the class thanking them for the opportunity to discuss a very important subject is a nice touch.

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The Eighth Amendment, the Death Penalty and Juveniles: Questions and Answers

1. Is the death penalty a violation of the Eighth Amendment's prohibition of "cruel and unusual punishments?" How about as imposed on juveniles, i.e., persons under 18?

   The U.S. Supreme Court upheld the constitutionality of the death penalty in 1976. State statutes, however, must minimize the risk that the death penalty will be imposed on an accused person arbitrarily or capriciously, by including certain procedural protections.

   The Court has never expressly ruled on the question of whether the imposition of the death penalty on a juvenile is cruel and unusual punishment. Many state supreme courts have found no constitutional obstacle to punishing juveniles with the death penalty. The statutes of 27 of the 50 states permit the death penalty for juveniles. [Editor's Note: As this issue of *Update* went to press, the U.S. Supreme Court accepted a case that directly raises the issue of whether states may execute convicted murderers who were under 18 years old when they committed their crimes. In the pending case, *Thompson v. Oklahoma*, the defendant argued that execution of a person for a crime committed as a minor would violate the Eighth Amendment's ban on cruel and unusual punishment. The case will be argued in the 87-88 term, and decision is expected no later than July 1988.]
2. For what crimes may the death penalty be imposed?

   Decisions of the Supreme Court have held that only intentional murder is punishable by death, expressly finding in 1977 that the death penalty for rape would be cruel and unusual punishment.
3. What procedure is constitutionally required before the death penalty may be imposed?

   A "bifurcated" or two-step procedure is constitutionally required before a person may receive the death penalty. First is the "guilt phase," where his/her guilt or innocence of the alleged capital crime is decided by a jury or judge. Where the accused is found guilty, a second proceeding, the "penalty phase," is held, usually before the same judge or jury. There, both the state and the defendant present evidence relevant to the question of the appropriate penalty.
4. How does the jury or judge decide whether the death penalty is called for?

   The state statute authorizing the death penalty must require the jury or judge to make an individualized decision on the basis of the character of the individual and the circumstances of the crime. Mandatory death penalties for any crime are unconstitutional.

   Second, the statute must guide the jury's or judge's discretion in making that decision by spelling out what special circumstances, usually called "aggravating factors," will allow the death penalty to be imposed, if they are proven by the state. Some statutes also indicate to the jury how it is to weigh or balance these "aggravating factors" against evidence the accused may submit as calling for a life sentence, usually called "mitigating factors."

   This right of the accused to offer *any* evidence as to his background or character or the circumstances of the crime may not be restricted by the death penalty statute. The jury or judge must be free to consider any and all such evidence in making its decision.

   One of the most important "mitigating factors," the Supreme Court has held, is the youth of the accused at the time she/he committed the crime.
5. Who decides on the death penalty, the jury or a judge?

   Of the 37 states allowing the penalty of death, 30 give the life-or-death decision to a jury. That decision is binding on the judge. Three other states provide for a jury recommendation as to the sentence, but the judge may override it. Four states provide for a judge to make the decision.
6. Are there any other procedural safeguards required in death penalty statutes?

   Yes, the Supreme Court has required that all death sentences be automatically reviewed by the highest appellate court in the state, to guard against arbitrary and capricious executions.

COURT BRIEFS

Carol Coplan

Mid-Term Report

In the 1986 term so far, the Court has spoken on affirmative action, the handicapped, and the right to political expression

Under the supposedly more conservative Rehnquist Supreme Court, affirmative action, school busing, and possibly other remedies for racial discrimination were expected to face an uphill battle. However, the Supreme Court rarely falls neatly into liberal and conservative patterns, and several recent cases show the Court hospitable to remedies for both past and future discrimination. In two cases, the Court directly upheld remedies against discrimination against blacks, and in a third case the Court applied a new rule against jury bias to pending cases on appeal, which in effect helps minority defendants against discriminatory jury selection.

Voting Rights Upheld

In *City of Pleasant Grove v. the United States*, 55 U.S.L.W. 4133 (1987), the Court refused to allow an all-white district of Alabama to annex two quadrants of land that would dilute any future black vote in the district. The Supreme Court broadly defined the power of section five of the Voting Rights Act. Under a narrower interpretation, cities could mask their discriminatory voting schemes by arranging future dilution plans that have no present showing of minority discrimination. By holding broadly the Court allows section five to bar present voting changes that will eventually produce a discriminatory effect.

Section five of the Voting Rights Act of 1965 requires prior approval of any voting changes in a district. The city of Pleasant Grove requested the annexing of two partitions of land next to its district. One section of land contained the residences of an extended white family; in the other, the land was currently undeveloped but high-rent housing was planned. The city had previously refused to annex an all-black section of land. A federal district court in Alabama found that the city had based its annexing plan on the basis of race and refused to allow it. The Supreme Court, on appeal directly from the district court, affirmed by a 6-3 vote. The majority opinion by Justice White held that section five applies to discriminatory purposes and future effects of voting changes. The Court also placed the burden of showing no discriminatory effect on the city.

The Court found the city of Pleasant Grove was "diluting the black vote in advance." (See p. 4136 of the decision.) The city's purported economic rationale merely masked its true discriminatory purpose. Noting the city's "extraordinary success in resisting integration thus far," the decision concluded that the annexation could be seen as a "shield for further resistance."

The dissent by Justices Powell, O'Connor and Scalia would limit section five's reach to only those situations where the voting change produces an immediate retrogressive effect on minority voting.

The dissenters charged the majority with being too hypothetical and speculative in holding that in the future the minority vote will actually be diluted by this move. They saw a very insignificant effect by the twenty-person white extended family on the voting in one district. They further stated that there are many other constitutional protections to ensure that blacks are not prevented from moving into the proposed new housing project in the other segment. They accused the majority of inappropriately trying to solve the overall discrimination problems of Pleasant Grove by section five.

Affirmative Action Approved in Promotion of Troopers

The Supreme Court approves of racial numerical quotas only on rare occasions. The Court fears that they lower standards, constitute possible reverse discrimination, and are overly intrusive. Especially today, when job competition is at an all time high, resistance to minority quotas is increasing. However, in *United States v. Paradise*, 55 U.S.L.W. 4211 (1987), the Supreme Court, by a narrow 5-4 margin, affirmed an Alabama district court's one-black-for-one-white hiring and promoting scheme for Alabama state troopers. In light of past severity of the discrimination, the Court found these measures the only sure way of finally remedying the situation.

The case began in 1972 when the NAACP and Phillip Paradise, representing a class of black applicants, filed suit against the Alabama state troopers, claiming a violation of the Fourteenth Amendment equal protection clause. A federal district court found that the Alabama state troopers had deliberately maintained an all-white state trooper force for 37 years. The court ordered a fifty percent black hiring quota until blacks constituted twenty-five percent of the force. In 1974, the court found that the state continued to discriminate. For example, the state had purposefully delayed remedial measures by reducing the number of troopers statewide. There were still no blacks in any of the higher ranking positions.

In 1977, the court ordered the state to develop a non-discriminatory promotion scheme to eradicate the policy against blacks in the upper ranks. In 1979, the state promised to implement such a program by 1980. In 1981, the state again promised to implement a program. By 1983, however, there still was no promotional plan in existence. This meant the state had ignored two previous consent decrees in 1979 and 1981, in which they promised to install such a program. The district court in 1983 refused to listen to any more promises to end the ad hoc method of promotion. It entered an order imposing a one-black-for-one-white promotion scheme until the state came up with an acceptable plan.

Justice Brennan announced the decision of the U.S. Supreme Court and delivered an opinion in which Justices Marshall, Blackman, and Powell joined. (Justice Stevens filed a separate opinion concurring in the result.) Justice Brennan's analysis of this order concluded that it is constitutional under the strict scrutiny analysis. Under the strict scrutiny analysis, the order must meet a compelling state interest and it must be narrowly drawn to achieve these interests. The Court found that the order relates to a compelling state interest in ending the discrimination and repairing the situation created by the history of state discrimination. Remedying only at the entry level – which is all that the hiring quota achieves – would not fully accomplish this goal, especially in light of the uncooperative behavior of the state in complying with previous consent decrees.

The Court found the 1983 order sufficiently narrow and flexible. Since the state's policy of promotion on an ad hoc basis completely bypassed blacks, the only way to eliminate the effects of the department's past violations was to ensure that blacks reached the higher ranks at a quicker rate than the regular process would provide. The one-for-one plan was only a temporary measure. It could be removed at any time as soon the state came up with a proper plan of its own. Indeed, the district court had already lifted its order in two specific areas where the state had implemented an acceptable policy. Further, the scheme only applies if there is an equally qualified black employee for the position, and only when the department determines that a promotion is necessary.

The Supreme Court admitted that some majority troopers would be adversely affected. In situations where an equally qualified black and white were eligible for promotion, the black would receive the promotion and the white would suffer. The Court allowed this situation because it was only temporary and would be stopped as soon as the state finally complied with its promise to implement an acceptable plan of promotion of its own.

The Court also stated that even if the order was not strictly "narrow" here, much deference is given to a trial court in this type of equitable remedy. This is due to the trial court's superior position to analyze the scope of a violation. Here the Court determined that the district court did not abuse its discretion by implementing the order, so it is valid.

Justices O'Connor and Scalia and Chief Justice Rehnquist filed the principal dissent. (Justice White filed a separate dissent.) Speaking for the principal dissent, Justice O'Connor contended that the district court erred in not choosing some applicable alternative measures of relief which would have been less intrusive on the majority troopers. The dissenters suggested that a trustee could have been appointed to develop a permissible plan for promotions. They also suggested contempt of court proceedings which would impose strict monetary fines on the state for noncompliance. They felt the majority relaxed the strict scrutiny requirements in order to find that the order complied with the test.

(For another analysis of the case, see pp. 24-25 of this issue of *Update*.)

Jury Bias Rule Applied to Pending Cases

Until last year, it was relatively easy for prosecutors to select all-white juries for black defendants, in an effort to make a conviction more likely. Such juries may produce prejudicial results, especially in situations where a white is complaining against a black defendant. This year, the Supreme Court held 6-3 in *Griffith v. Kentucky* and *Brown v. U.S.*, 55 U.S.L.W. 4089 (1987), that the rule established last year in *Batson v. Kentucky*, 106 S.Ct. 1712 (1986) – making it easier for criminal defendants to show a discriminatory purpose behind an all-white jury – can be applied to all non-final cases on direct appeal.

The *Batson* rule allows a criminal defendant to show that the prosecution used its peremptory challenges to produce an all-white jury. Peremptory challenges allow the prosecutor and defense attorney to dismiss a certain number of potential jury members without cause. Under the rule established in *Batson*, once a defendant can show a pattern of discrimination by race in these dismissals, the burden shifts to the prosecution to find a neutral explanation of the challenges.

The decision in *Griffith* and *Brown*, written by Justice Blackmun, extends *Batson* to a number of cases on appeal in which minority defendants were convicted by all-white juries. The decision will secure new trials for the defendants in *Griffith* and *Brown*, and for others whose cases were being appealed when *Batson* was decided.

Both *Griffith* and *Brown* are non-final cases pending direct appeal and both concern apparently prejudicial juries. In *Griffith* the prosecutor used four peremptory challenges to dismiss potential black jury members. The remaining potential black juror was dismissed by draw, leaving an all-white jury in a case that had a black defendant and white plaintiff. Griffith received a ten-year sentence for armed robbery, which was raised to twenty years under a persistent offender statue. In *Brown* the prosecutor excused four black jurors for cause and two by peremptory challenges, leaving again an all-white jury for a black defendant and white plaintiff. The prosecutor here said to a clerk, "Don't get any blacks on this jury." (Page 4090 of decision.)

The lower courts in both cases applied the standard set by *Swain v. Alabama*, 380 U.S. 202 (1965). Under the *Swain* standard, it is much more difficult for a defendant to demonstrate discrimination to a court. *Swain* required a defendant show that a prosecutor has had a systematic and intentional course of discriminatory conduct in past cases. Both Brown and Griffith failed to establish this pattern under the *Swain* rule. The Supreme Court reversed both convictions and remanded the cases to the lower courts to analyze the cases under the *Batson* standard.

In the decision announced in the *Griffith* and *Brown* cases, the Court limited its holding to non-final cases pending direct appeal. A non-final case is any case that has not exhausted all the appellate review options, which, of course, varies depending upon the subject matter of each case. Direct appeal cases are those that are appealing the full decision of the court below. The Court specifically excluded collateral appeal cases, which are cases appealing a decision about a motion or some other portion of the whole case.

Looking at *Pleasant Grove*, *Paradise*, *Griffith*, and *Brown* together, it appears that these rulings are quite favorable for minority rights. The Court is still looking carefully at each case before it, and its decisions are not necessarily predictable. And

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this, after all, is exactly the type of analysis the framers intended.

Court Broadly Interprets "Handicapped," Giving Hope to AIDS Victims

School Board of Nassau County v. Arline, 55 U.S.L.W. 4245 (1987), is more widely known for a topic indirectly at issue than its direct issues. The Supreme Court in *Arline* held 7-2 that tuberculosis is considered a handicap under section 504 of the Rehabilitation Act. By this holding, however, the Court has probably done a great deal for those suffering from Acquired Immune Deficiency Syndrome, or AIDS. Construing section 504 broadly, the Court may have opened up the door for an AIDS victim facing a similar situation as Arline, the tubercular teacher who claimed protection under section 504.

The 1973 Rehabilitation Act was enacted to combat the stereotypical prejudices handicapped persons face in all aspects of society from education to employment. A 1974 amendment of the Act spoke even more specifically to the problem of discrimination against those persons perceived to be handicapped but not actually handicapped, or those who were previously handicapped but still face discrimination because of society's misconceptions. Section 504 in particular prohibits anyone who is "otherwise qualified" from being excluded from any federally funded program solely on the basis of his or her handicap. The Act defines a *handicapped individual* as anyone either (1) having a physical handicap which substantially impairs a major life activity, or (2) having a record of such impairment, or (3) regarded as having such an impairment.

Gene Arline has had tuberculosis since 1957. She was in a twenty year remission until 1978, when she had three relapses and tested positive for an active culture of TB again. She was permanently discharged from her job as an elementary school teacher by the Nassau School Board in 1978. She filed suit, claiming a violation of section 504 of the Rehabilitation Act. The federal district court denied her claim, but the appellate court held that TB is a handicap under section 504 and remanded the case back to the district court to determine whether or not she was "otherwise qualified." The Supreme Court affirmed, with Justice Brennan writing for the majority.

The Court interpreted the Act's purposes to include the exact situation Arline experienced. Citing the Congressional Record, Brennan said the Act was written to end "irrational fears or prejudice on the part of employers or fellow workers." He especially pointed to the broadening amendment in 1974, which shows Congress's acknowledgement that those who have perceived impairments are just as discriminated against as those who have actual handicaps. According to Brennan, the Act mandates rational treatment of handicapped individuals. The majority stated that this interpretation will advance the goal of trying to control infectious diseases. Under this holding, those with infectious diseases will more freely report the illness because they have less fear they will be ostracized.

The majority found that Arline's TB fits within the definition of "handicapped" in the Rehabilitation Act. The disease substantially affected her respiratory system, and she was hospitalized several times during 1978. Thus, the disease affects one or more of her "major life activities." Arline's twenty year history of the disease establishes she has a "past record of impairment," which is also a form of being handicapped under the Act.

The school board had attempted to distinguish between the effects of the disease on the individual and its effects on the health of third persons. The board argued that it was not discriminating against her, but rather protecting the health of the children. The Court did not agree. The majority held that it would be unfair to allow an employer to distinguish between the two effects and exclude one type of effect from the coverage of the Act, since that would permit employers to manipulate their discriminatory actions into private actions not covered by the Act. Both effects come from the same source, the TB, and therefore both should be protected by the Act.

Once it is determined that Arline is "handicapped," a determination must be made to see if she is "otherwise qualified" to continue working. According to an earlier case, *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." The majority said if an employer can reasonably accommodate for the contagious aspects of the disease within the realm of public safety, the employer should do so. The majority would defer to criteria developed by the American Medical Association, and medical expert testimony, to determine the severity of the risk. The majority specifically stated four criteria to be used in the analysis to determine whether a worker is "otherwise qualified." First, how the disease is transmitted; second, the duration of the infectiousness; third, the severity of harm to third persons; and fourth, the probability of transmission or harm to others. The Court remanded the case to district court to apply these criteria and determine whether the school system could have reasonably accommodated Arline and protected the children by less severe means than firing her.

The dissent by Chief Justice Rehnquist, joined by Justice Scalia, concluded that the Act's intent was narrower and the harm against third persons was sufficiently dangerous to warrant discharging Arline.

They contend that the Rehabilitation Act, which applies to institutions receiving federal funding, cannot be applied freely to any school, as the majority has just assumed. The dissenters would require a specific agreement by the institution accepting federal funds that it understands that it is now subject to the Rehabilitation Act. Absent such agreement, the Rehabilitation Act should not be applied.

The dissenters further contend that Arline was discharged because her disease posed a substantial risk of infecting students, especially in an elementary school context.

The situation Arline faced is quite common for AIDS victims. Society's fear of AIDS today has placed AIDS victims in a wholly separate category from those suffering from other infectious diseases, and segregates them from leading a normal life almost as soon as they announce they have the disease. The majority specifically excludes its holding from applying to AIDS. "This case does not present, and we therefore do not reach, the question whether a carrier of a contagious disease such as AIDS could be considered to have physical impairment or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act."

There is, however, by implication, applicability to the AIDS situation. According to the *Arline* holding, the Rehabilitation Act was created to protect against exactly the type of irrational behavior many employers and educational officials show towards AIDS victims. Furthermore, AIDS victims experience a variety of severe physical problems that may affect a major life activity. Deferring to the medical profession to determine if the individual may continue working without causing risk to others will also help in the AIDS situation. AIDS causes a great deal of fear because the public is unaware of exactly how it is transmitted. However, *Arline* requires the district court to defer its decision to what the medical experts advise. Since the latest medical information still shows that AIDS can only be transmitted sexually, through blood transfusions, or through sharing contaminated needles, many employees with AIDS could well be safe from job loss.

This application of the decision to AIDS victims is, of course, merely speculative, but many observers hope the decision will prove to be a positive step in combating discrimination against those who suffer from AIDS.

Court Leaves Religious Accommodation for Teachers Up to the School Board

Probably all school calendars include holidays for certain predominant religious celebrations, such as Christmas and Easter. The other, less predominant holidays are usually provided for by the school's compensation days schedule. Unfortunately for some teachers practicing minority religions, even the compensation days may not provide sufficient time off for their religious practices. Section 701(j) of Title VII of the 1964 Civil Rights Act mandates that employers accommodate an employee's religion unless accommodation will produce undue hardship.

But what is "undue hardship"? The Supreme Court recently ruled on just how extensive the accommodation should be. In *Ansonia Board of Education v. Philbrook*, 55 U.S.L.W. 4019 (1986), the Court held 7-2 that reasonable accommodation is all that is required. It refused to require employers to use several suggested methods of accommodation to help an employee.

The teacher, Ronald Philbrook, needed six days off each year in order to fully practice his religion as a member of the Worldwide Church of God. However, the school board's collective bargaining plan only allowed three days of compensation leave for religious purposes. Philbrook was required to take no pay for the other three days off needed or give up three holy days per year. Philbrook suggested two alternative plans that would enable him to take the full six days off with compensation. First, he suggested that the school board allow him to use three personal business days for religious worship. Second, he suggested they let him pay the cost of a substitute and receive full pay for religious days off. The school board refused either alternative, and Philbrook filed suit, claiming the school board had violated section 701(j) of Title VII.

The district court held that Philbrook had not pleaded a violation of Title VII sufficient to warrant a trial. The appellate court found a violation of 701(j). It said the school was obligated to implement Philbrook's suggestions unless the board could show a sufficient hardship. The Supreme Court reversed, refusing to require the school board to show why Philbrook's proposed plans would cause undue hardship.

The Court, speaking through the majority opinion written by Chief Justice Rehnquist, reasoned that both the employer and the employee must be flexible in making religious accommodations. To require every employer to incorporate the proposals of employees would encourage employees to over demand and only settle for the best from an employer. The majority found the loss of pay was really only the loss of compensation pay, which is not an employment opportunity governed by Title VII. If employers give compensation days for some specific reasons they are obligated to provide such days for religion also, but once they have done so they have complied with 701(j). The Court felt the lower courts had misinterpreted section 701(j) by requiring the school board to show undue hardship, and remanded the case back to a lower court to examine the reasonableness of the present program, which is all that 701(j) requires.

The Court also remanded to determine if the "personal business" days should be broadly or narrowly construed. Philbrook contends they should include religious days off. The school, on the other hand, says they do not. The tone of the whole opinion, however, already suggests that the school board's plan is indeed reasonable and therefore does not violate Title VII.

Justice Marshall in dissent suggested a different interpretation of section 701(j). He said the question should be "can the school board accommodate the employee's needs without hardship on the program?" He felt Philbrook's suggested plan is such a situation. He stated that the Equal Employment Opportunity Commission intended this broad interpretation of 701(j), extending it to include a continuing duty to accommodate for special religions. He further claimed the EEOC calls compensation pay an employment opportunity, contrary to what the majority thinks. Citing his own dissent in *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63 (1977), he said the question is ". . . did the employer prove *it exhausted all reasonable accommodations*, and that the *only remaining alternatives would have caused undue hardship* on [the employer's] business?"

The Court has a valid concern in assuring that employees do not abuse Title VII. Certainly, employees cannot expect employers to accommodate their every demand. However, in Philbrook's case one has to take a step back and wonder. If requesting to use one's personal business days for religious worship is unduly burdensome on a school board, what kind of plan, if any, can a teacher propose that a school board will have to accept?

NonProfit Corporations Given More Latitude in Political Spending

In today's predominantly corporate society, huge corporations often have budgets exceeding those of many states. With such a large cash flow a corporation can exert its influence over many facets of society.

Recently much concern has been given to the influence of corporate money on political elections. Elections decided by massive contributions threaten the democratic nature of the election process. This problem has been dealt with by legislation, to ensure that the democratic process remains free from undue corporate influence, as well as to protect corporate shareholders who trust their funds are being well spent. Section 441(b) of the Federal Election Campaign Act of 1971 prohibits corporations from using general funds for politically related expenditures. The Act requires a wholly separate fund to be established specifically for political purposes.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 55 U.S.L.W. 4067 (1986), the Court held section 441(b) unconstitutional if applied to a nonprofit corporation formed to disseminate political ideas. The activities of Massachusetts Citizens for Life (MCFL) would have constituted a violation, however, if section 441(b) was applicable. The Court excused MCFL because its nature differs from a business corporation's. It does not have large capital gains to spend on campaigns, nor does it have shareholders to protect, and its purpose is political. Therefore, the dangers section 441(b) was enacted to protect against are absent in this situation.

MCFL is a nonprofit organization established primarily to promote the right to life. Its activities include drafting and lobbying for bills, conducting media programs and public prayer, and speaking out against abortion and euthanasia. Voluntary contributions from individuals constitute the general funding of the corporation, and it does not accept contributions from labor unions or corporations. Funds are collected by means of informal fund raising, such as bake sales and rummage sales.

The violation to section 441(b) stems from a special election of the regular newsletter, which exhorted readers to vote "pro-life" and identified candidates as either supporting or opposing MCFL's views. (The publication did include a written disclaimer denying any endorsement of candidates.)

The district court held that MCFL had not violated section 441(b) and that section 441(b) was unconstitutional as applied to MCFL. It found that the special edition was not a political expenditure within the meaning of section 441(b), and that MCFL also could claim the media exception to section 441(b). This exception protects any comment in a regularly published media segment. The appellate court affirmed. The Supreme Court only affirmed the unconstitutionality of section 441(b).

Justice Brennan, writing for a unanimous Court with respect to the holding concerning the special edition, found that the edition violated section 441(b). The Court held that it was a "political expenditure" within the meaning of section 441(b), since the phrase is intended to include any spending that influences an election for a federal office. Reviewing the legislative history of the bill, the Court quoted its sponsor, Representative Hansen, who discussed the purposes of section 441(b) during debate on the bill: it is designed to "... prohibit use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a federal election." The contribution must constitute concrete advocacy and not mere discussion, which is what the "special edition" did, regardless of the printed disclaimer.

Supreme Court Resource Debuts

Just in time for the Bicentennial, the *ABA Journal* has published *The Supreme Court and its Justices,* a 272-page volume on great Supreme Court cases and justices. This issue, which is made up of articles which have appeared in the *ABA Journal* over the years, also looks at such topics as the internal operation of the Court, the Court as a center of controversy, the appointment of justices, and lawyering before the Court.

To order: send check for $24.95 (includes shipping and handling) to Order Fulfillment 299, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611, Tel: 312/988-5555, or use your Visa or MasterCard (include card number and expiration date). For billed orders, add $2.50 for shipping and handling.

The Court also unanimously rejected the claim that the media exception should apply to the special edition. It explained that the media exception can only be invoked when the commentary appears in a regular edition. Here the MCFL publication by its own title claimed to be "special." No volume number appeared to show its correlation to the other issues. In addition, the issue was distributed to a very large number of people who were not regular subscribers.

However, MCFL escaped penalty for these transgressions because the Court went on to hold, 5-4, that section 441(b) is unconstitutional as applied to MCFL. Justice Brennan also wrote for the majority in this part of the decision. The unconstitutionality of section 441(b) occurs because it is an undue burden on an area afforded the broadest free speech protection—political speech—without a compelling state interest. The burden on political speech results from the formalistic requirements on corporations when they make political endorsements. It is not only the new treasury fund that must be established, but a series of other requirements that come into play. Other restrictions include detailed reports of any donations over fifty dollars, and who has made them, plus monthly and yearly reports of all spending in detail. The ongoing burdens will especially deter nonprofit organizations like MCFL which receive their donations by informal means. The Court was afraid that these corporations will simply abandon political speech rather than comply with the provisions.

The purported compelling state interests, the Court held, are inappropriate for MCFL. First, there are no shareholders to complain about improper spending. If contributors are unhappy with how their donations are being spent they can simply choose not to donate in the future. Second, since the corporation is nonprofit and does not accept contributions from business corporations or labor unions, there is no threat that it will have the power behind it to excessively influence the free political marketplace. Third, the corporation's primary purpose is political. Therefore, anyone who contributes should expect the funds to be used for such purposes. The Court also noted that this type of independent political spending is less dangerous than when corporations make direct contributions to candidates' election campaigns. The majority points out that there are still restrictions that apply to nonprofit corporations to keep their political spending under control. For example, the Taft-Hartley Act provides criminal sanctions for corporate political contributors and expenditures.

Four Justices—Rehnquist, Blackmun, White, and Stevens—dissented from this part of the decision, arguing that Congress

(continued on p. 65)

Deciphering Case Citations

Throughout *Update,* citations such as 545 F.2d 30, 34 (1976) pop up after the names of cases. What do these hieroglyphics mean? And how can you make use of them?

These citations tell you where to find the full decision in the case. The first number (545 in this example), refers to the volume number of the series in which the case appears. The second part of the citation (F.2d) tells you which series is involved—in this instance, the Federal Reporter, Second Series. The next number (30) is the page number on which the case begins. If it is followed by a comma and a second number, that tells you the specific page in the decision which is being referred to. The final number is simply the eyear the case was decided.

Citations for decisions of other federal as well as state courts use the same format, the only difference being the reporter system in which the case appears.

Recent cases of the U.S. Supreme Court—such as the ones reported in this article—are found in U.S. Law Week (abbreviated to U.S.L.W. in citations). This is a newsletter that appears weekly and is generally put into a loose leaf binder in libraries. It is the best way to find the text of decisions from the current term.

Cases from previous terms of the U.S. Supreme Court can be found in the U.S. Reports (U.S. in citations) or the Supreme Court Reporter (S.Ct. in citations).

Of course, a law school library is often the best place to research a case, but most bar associations, county or city governments, and law firms have at least one of the series that reports on Supreme Court cases. Establishing contacts with law librarians, practicing attorneys, and others who have ready access to such resources can thus be especially valuable for you and your students.

Justice

(continued from p. 10)

cuit that the same practice violates the Constitution. The point here is that over the years we have watched a Constitution evolve to reflect perceptions of fairness and that evolution is going to continue as long as this Constitution remains in effect.

Fairness and Capital Punishment

In the 1960's, we at the NAACP Legal Defense Fund were involved in getting demonstrators out of jail and trying to implement *Brown*, among other things. We were also concerned about the number of black people who were being assigned to death row. If one looks at the statistics in the 1960's, one sees that over 50% of the people on death row were black. Most of those people were sentened to death because they had allegedly raped a white woman. In most instances where a black was charged with raping a white woman, that black was sentenced to death. And in instances where a white man was charged with raping a black woman, the white man was sentenced to a term of years, if sentenced to any confinement at all. And it was not just with the rape convictions, but with murder and other capital offenses, that capital punishment was imposed in a discriminatory manner.

There was an interest at the Fund, despite the heavy load of demonstrators and the implementation of *Brown*, to challenge at least the administration of capital punishment. And looking at a Constitution, we had to begin again as with *Brown* in trying to identify a provision of the Constitution that one can use to effect some kind of relief.

In 1963, we noted that Justice Goldberg was also wrestling with this problem. And in a number of cases that came to the Court imposing capital sentences, Justice Goldberg among others on the bench tried to figure out a way to test the imposition of capital punishment. In *Rudolph v. Alabama*, 375 U.S. 889 (1963), an opinion descending from a refusal of the Court to review a case, Justice Goldberg raised the issue of whether it constituted cruel and unusual punishment for a state to put a person to death when most of the countries of the world were no longer imposing such sentences.

The Legal Defense Fund began an effort to give some meaning and life to the question posed by Justice Goldberg. We began then our capital punishment project. What constitutional provision would prohibit the imposition of capital punishment? Capital punishment had been imposed historically, and so if one was looking at the teachings of the founding fathers one would say the founding fathers contemplated capital punishment. Would due process serve as a basis? Would equal protection serve as a basis? Would the Eighth Amendment's cruel and unusual punishment clause serve as a basis? Would the Ninth Amendment serve as a basis? And what of public opinion? Public opinion at that time supported capital punishment.

How does one proceed with cases to convince a Court to interpret the Constitution to prohibit the arbitrary and capricious imposition of capital punishment? A similar effort in the capital punishment area followed as in *Brown*, and we moved from *Maxwell v. Bishop*, 398 U.S. 262 (1970), a case we thought the Court would use to prohibit capital punishment completely; to *McGautha v. California*, 401 U.S. 183 (1971), where the Court said that it is appropriate for a state to use the same jury, same trial to convict a defendant and impose a capital punishment; to *Furman v. Georgia* in 1972, 408 U.S. 238, where the Court said that the method then used by practically every state in the country to impose capital punishment violated the Constitution. Starting in the 1960's with a Constitution that sanctioned the imposition of capital punishment, to 1972, when the Court said that the method used by basically every state to impose capital punishment violated the Constitution, we saw a changing, living, evolving Constitution.

But capital punishment didn't stop there, because four years later, in 1976, the Court decided *Gregg v. Georgia*, 425 U.S. 153, and said that where the state had set up a dual method for imposing capital punishment and had provided some standards supposedly to guide the jury's discretion, that procedure would pass constitutional muster. But then in 1977 the Court decided in *Coker v. Georgia*, 435 U.S. 584, that it would violate the cruel and unusual punishment provisions of the Eighth Amendment for a state to impose capital punishment for one convicted solely of committing rape. The Court later decided, in *Lockett v. Ohio*, 438 U.S. 586 (1978), that it would violate the Constitution to impose capital punishment on a accomplice to a crime where the accomplice was not the trigger person.

Still, the Court is wrestling with whether capital punishment itself is unconstitutional. And this term of Court, 1986-87, the Court is still grappling with the issue of whether in Georgia capital punishment has been imposed in a racially discriminatory manner.

One of the problems in the capital punishment area is that there still is a major division about whether capital punishment is appropriate, is fair, and – in the Court's view – has been imposed on an equal basis. This year, perhaps, we will learn more.

Fairness and the Poor

When I came to the Legal Defense Fund, I came among other reasons because I was disturbed about the status of law and the protection of the poor. I litigated enough cases to realize that many of the cases I litigated and much of the relief that I had obtained didn't reach a substantial number of blacks whom I was trying to represent. In one case that I litigated for 17 years, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), 400 blacks were involved as laborers in a wood yard. We went to the Supreme Court, we got a very favorable ruling from the Supreme Court, we got back pay, we got affirmative action, we got injunctive relief, but 300 of those black employees never moved. They simply couldn't qualify to operate the machines we wanted them to transfer to. Was the relief that we got appropriate to address their particular needs?

I also litigated enough school cases to know that some of the things that were happening in the schools were not addressing the plight of many of the poor and many blacks. Was the relief that we sought in our school desegregation cases appropriate to address the special problems that they brought to the system?

The Supreme Court decided a case called *San Antonio Independent School District v. Rodriquez* in 1973, 411 U.S. 1, and said two things that bothered us. First, that education was not a fundamental right. How Justice Powell and his majority got to that decision is interesting, but that is what he said. And the Court also said that it does not violate the Constitution for a state to discriminate on the basis of economic status. So in *San Antonio*, it was appropriate or not a violation of the Constitution for the state to give one school district more money than it gave another. A rich, white school district could lawfully receive more dollars per student than a poor Hispanic school district. Was that providing equal protection of the law? In the *San Antonio* case, it was because race was not a factor in the decision. The Court had earlier decided the case of *Dandridge v. Williams*, 397 U.S. 471 (1970), holding that it didn't violate the Constitution to discriminate on the basis of economic status.

Aren't poor people entitled to the same protection the blacks, Hispanics, women and other disadvantaged people are entitled to? Isn't it appropriate to use the Constitution to reach out and establish protection for the poor?

We have begun an effort to reverse *San Antonio v. Rodriquez* just as we reversed *Plessy v. Ferguson*. We have begun the laborious process of trying to identify a provision in the Constitution and trying to cultivate public opinion to again help the Court reflect what is fair, what is reasonable. In looking at some of the constitutional provisions, we have considered the Ninth Amendment; we have considered the privileges and immunities clause of the Fourteenth Amendment. We have considered the due process clause and the equal protection clause, and we will consider others. But I think that down the road the Court will also say that it is a violation of the Constitution to discriminate against people solely because of their economic status.

Fairness and Evolution

I have described, briefly, three examples of how the Constitution has worked over the years. The Constitution has reached out and evolved principles to bring blacks, other minorities, women, and other disadvantaged Americans within its protective cloak. It has balanced individual claims against the interest of groups and, in the process, it has maintained peace, tranquility and hope for over 200 years. Utilizing and respecting the Constitution in this manner, rather than asserting that the Constitution is a staid document that is to reflect what some people believe is what white men in 1787 thought, will continue the same peace, the same hope and the same prosperity for years to come. ☐

Equality

(continued from p. 25)

powerful engine of racism and sexism." Justice White filed a separate dissent.]

According to the Court, equality under the Constitution does not require the same treatment of each individual in all circumstances but allows for differences in treatment that are clearly focused on achieving a compelling governmental interest. The Court is allowing, in other words, short term, limited inequality of treatment to achieve long term equality.

What Is "Equal"?

A strict reading of the words of the Constitution may suggest to you that the Court indeed has taken liberties with the document. Equal protection means equal protection, not preferences for particular groups. Reading the equal protection clause to allow for special treatment may be seen as a dangerous expansion on the meaning of the document.

The debate over the authority of the Court to interpret the Constitution has been alive since Chief Justice Marshall in 1803 assumed that authority. And the debate will be alive when we celebrate the 400th birthday of that great document. The debate over the legitimacy of the ends to be achieved and the extent to which those ends should influence one's view of the meaning of the constitutional provisions has also been alive and will live so long as there are differences of opinion and differences in self interest.

In my view, the current criticism of the Court for its radical egalitarianism, in the words of Brad Reynolds, reflects more a disagreement with the result of the Court's analysis than with the fact of the Court's analysis. The position of the critics is that the Court, for purposes of accomplishing a particular social agenda, has gone too far in broadening the meaning of the constitutional guarantee of equality. Resolving the question whether that criticism is well founded depends, I submit, on your own personal perspective, and for that reason I will not be so presumptuous as to suggest an answer. For me the fact that our Constitution leaves room for the debate reflects the genius of the framers and is the only guarantee of that document's continued vitality. ☐

Property

(continued from p. 43)

ments, this recent development encompasses welfare checks, unemployment insurance, medical care, and social security. These expectations rooted in national and state legislation have added a unique dimension to the historic definition of property as possessions and promises.

In this year of the bicentennial, it is appropriate to celebrate as well as "cerebrate" the contributions of property to our greatness as a world power. This is the time for communities and schools to set aside opportunities to read our Constitution and to ask ourselves: What does our Constitution say about the right to property? Did the Founders internalize an economic system in the interstices of the Constitution? Has the Supreme Court respected the doctrine of original intent so far as the idea of property is concerned? Or, have the justices during our journey through history responded to the challenges of time by improvising jurisprudence sensitive to the spirit of the document?

Our Constitution has been called our "secular Bible," and in some senses it is. In the words of Chief Justice Taney, so long as our Constitution endures, the Supreme Court will be called on to decide "the angry and irritating controversies" of each era. As we move into an uncertain future, the issues of laissez-faire capitalism, government regulation, and the welfare state will press for clarification. It will require a Solomon-like stance to protect the right to property, the pursuit of happiness, and the general welfare in the years ahead. ☐

Great Ideas

(continued from p. 7)

day to assist American corporations in competition with foreign corporations assisted by their governments?

In recent years, propertied interests have found themselves involved in legislative and judicial jousts with environmental interests. This confrontation between the sanctity of property and the quality of life is complicated by such issues as jobs, costs, prices, and progress. Among the factors to be considered in resolving this major issue of today and of the future is former Justice Douglas's proposal that the forests and mountains ought to have their legal representation when confronted by counsel for corporations.

Friction between the idea of property and the ideas of liberty and equality will continue to trouble thinking citizens so long as they are free to inquire into controversies, to evaluate the solutions on a hierarchy of values, and to influence decision makers. The schools are the training grounds for these activities, and they must open their doors to the currents of controversy.

Conclusion

Probing the nature and scope of liberty, justice, equality, property, and power will not preclude inquiry in depth into the myriad of ideas which gives meaning to our lives: self-preservation, peace, democracy, responsibility, honesty, right, good, and beauty, among others. The five ideas were selected for special attention because they are of special relevance in the days ahead. This year the American people will be celebrating the bicentennial of the drafting and signing of the Constitution. In 1991, we Americans will be commemorating the bicentennial of the ratification of the Bill of Rights. Each document is a historic landmark, a constitutional classic, and a philosophical response to a great challenge. The Declaration of Independence explains the breaking of a social contract; the Constitution attempts to establish a government that is both effective and sufficiently circumscribed to avoid despotism; and the Bill of Rights sets forth moral-ethical principles protecting the precious but fragile rights of individuals against oppressive government. It is simply not possible to understand and appreciate these events without analyzing the ideas embedded in the texts.

The global scene today reflects crises rooted in the clash of ideas. The democratic ethos is being confronted daily by the threat of authoritarian and totalitarian models. The capitalist system is on the defensive in a world turning toward government-supported industry, as well as socialist and communist economies. The quest for world peace involves issues of liberty, justice, equality, property, and power.

Each of the five ideas can be studied in a variety of contexts, ranging from the simple to the complex. Liberty can be seen as simple restraints of physical movement or complex distinctions between "liberty to" and "liberty from." Justice can be viewed as a simple law and order and "hang-'em" solution or as a network of due process rights. Equality can start with the study of the causes and types of historic discrimination and then proceed to the legislative and judicial landmarks seeking to resolve the racial, religious and gender dilemmas of the past and the present. Property can be studied as "mine and thine" and proceed to an analysis of competing economic systems. Power can be seen as a policeman's club or as the role of law. The possibilities are endless. It is up to us as educators to explain these great ideas fully and fairly, to see that the bicentennials of the Constitution and of the Bill of Rights are the occasion for a renewed effort to understand and appreciate our system of government where governors and governed, presidents and citizens, live under the rule of law.

Court Briefs

(continued from p. 62)

is the proper body to distinquish nonprofit from profit corporations. They warned against what they saw as judicial legislating, or the judiciary making laws instead of applying them. They felt that if Congress saw no potential corruption from contributions by nonprofit corporations, it would have exempted them from section 441(b) when making the law.

The Court's deference to free speech is seen in many areas of the law. Maintaining an atmosphere for political debate has always been in the forefront of free speech concerns. This holding not only maintains an atmosphere for free speech, but it also paves the way for more nonprofit corporations to become involved in political advocacy in the future. Whether or not this constitutes a threat to elections will soon be seen.

Further Readings

Liberty

Berns, Walter, *The First Amendment and the Future of American Democracy*, Basic Books, New York, 1977

Chafee, Zacharias, Jr., *The Blessings of Liberty*, J. B. Lippincott Company, Philadelphia and New York, 1956

Chafee, Zacharias, Jr., *Free Speech in the United States*, Harvard University Press, Cambridge, MA, 1954

Emerson, Thomas I., *Toward a General Theory of the First Amendment*, Random House, New York, 1966

Haiman, Franklyn S., *Freedom of Speech* (rev. ed.), published by National Textbook Company in conjunction with the American Civil Liberties Union, Skokie, IL, 1983

Handlin, Oscar and Mary Handlin, *The Dimensions of Liberty*, Harvard University Press, Cambridge, MA, 1961

Hayek, Frederick A., *Law, Legislation, and Liberty*, Vol. 1, *Rules and Order*, University of Chicago Press, Chicago, 1973

Howe, Mark DeWolfe, *The Garden and the Wilderness*, University of Chicago Press, Chicago, 1965

Levy, Leonard W., *Emergence of a Free Press*, Oxford University Press, New York, 1985

Pfeffer, Leo, *Church, State and Freedom*, rev. ed., Beacon Press, Boston, 1967

Starr, Isidore, *The Idea of Liberty: First Amendment Freedoms*, West Publishing Company, St. Paul, MN, 1978

Justice

Auerbach, Jerold S., *Justice Without Law? Resolving Disputes Without Lawyers*, Oxford University Press, New York, 1983

Cahn, Edmund H., *The Sense of Injustice: An Anthropocentric View of the Law*, New York University Press, New York, 1949

Gora, Joel M., *Due Process of Law* (rev. ed.), published by National Textbook Company in conjunction with the American Civil Liberties Union, Skokie, IL, 1983

Hayek, Frederick A., *Law, Legislation, and Liberty*, Vol 2, *The Mirage of Social Justice*, University of Chicago Press, Chicago, 1976

Hunt, Morton, *The Mugging*, New American Library, Inc., New York, 1972

Packer, Herbert, *The Limits of the Criminal Sanction*, Stanford University Press, Stanford, CA, 1968

Starr, Isidore, *Justice: Due Process of Law*, West Publishing Company, St. Paul, MN, 1981

Equality

Jencks, Christopher, et al., *Inequality*, Basic Books, New York, 1972

Klugel, Richard, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, Vintage Books/Random House, New York, 1975

Konvitz, Milton R., and Theodore Leskes, *A Century of Civil Rights*, Columbia University Press, New York, 1961

McDonald, Laughlin, *Racial Equality* (rev. ed.), published by National Textbook Company in conjunction with the American Civil Liberties Union, Skokie, IL, 1983

Sachs, Albie and Joan Holt Wilson, *Sexism and the Law: Male Beliefs and Legal Bias*, The Free Press, New York, 1975

Property

Berle, Adolf, *Power without Property*, Harcourt, Brace & World, New York, 1959

Power

Berle, Adolf, *Power*, Harcourt, Brace & World, New York, 1969

Rossiter, Clinton (ed.), *The Federalist Papers*, Mentor Books/The New American Library, New York, 1961

Moral Education

Beck, C.M., et al. (eds.), *Moral Education*, University of Toronto Press, Toronto, 1971

Childs, John, *Education and Morals*, John Wiley & Sons, New York, 1967

Kay, A. William, *Moral Development*, Schocken Books Inc., New York, 1969

Political Philosophy

Rawls, John, *A Theory of Justice*, Harvard University Press, Cambridge, MA, 1971

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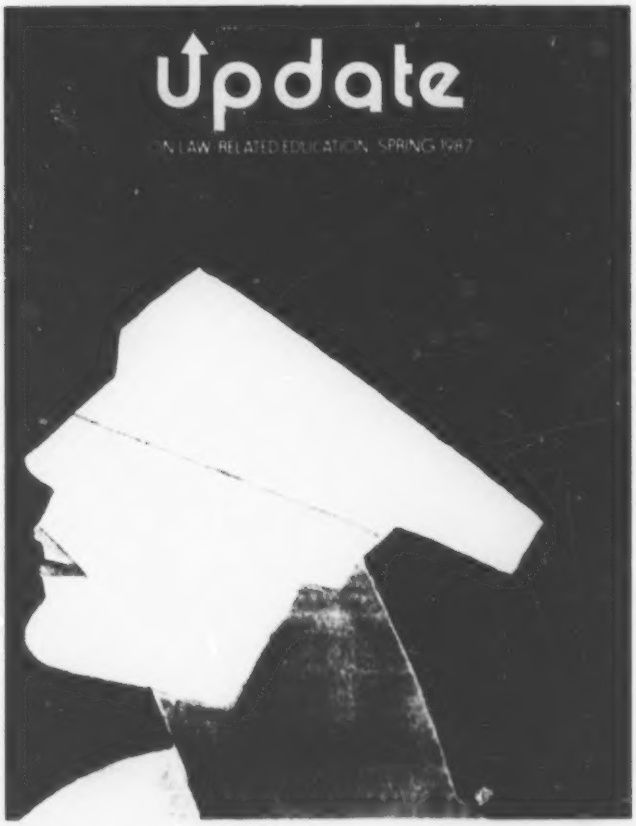
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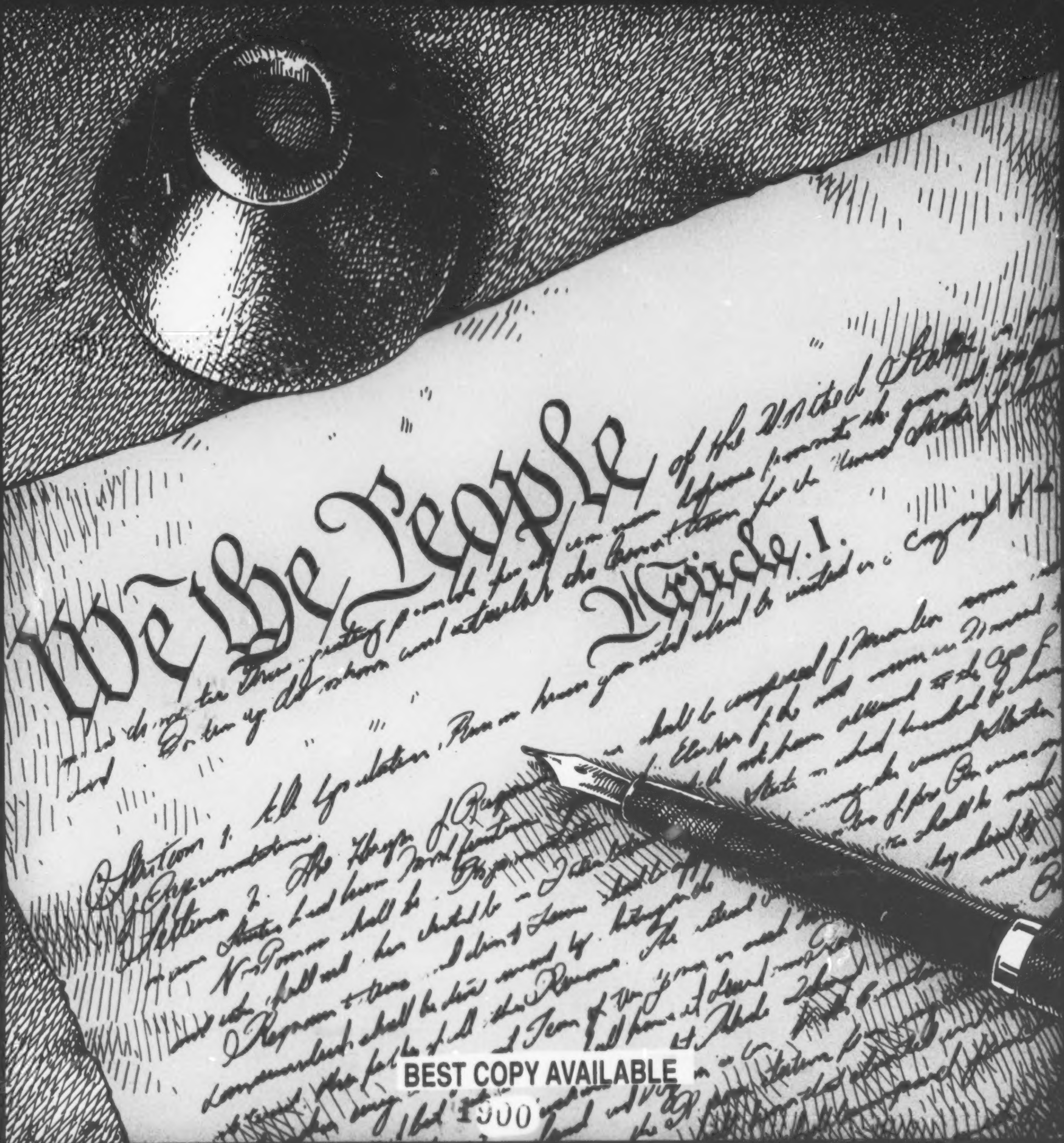
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Article. I

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contents

Volume 11, No. 3, Fall, 1987

CENTRALIZED GOVERNMENT

2 **The Evolving Constitution**

ELEMENTARY SCHOOL

K-6 STRATEGIES
4 The Civil Rights Amendments
6 The Supreme Court

8 **Written Constitution or None: Which Works Better?**

MIDDLE SCHOOL

4-8 STRATEGY
12 Classroom Constitutional Conventions

14 **Federalism Lives**

20 **Separation of Powers in Foreign and Domestic Contexts**

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES
25 Clash of Giants
28 Will the Court Hear This Case?
30 The Right to Vote
34 From Equal Vote to Equal Voice
35 What Does the Constitution Say About Federalism?
40 Federal/State Relations: 55 m.p.h. Speed Limit

45 **Court Briefs**

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1902 1

We the People
Article. I

Tom Herzberg

1903

The Evolving Constitution

The true miracle was not the birth of the Constitution, but its life through two turbulent centuries

1987 Marks the 200th anniversary of the United States Constitution. A Commission has been established to coordinate the celebration. The official meetings, essay contests, and festivities have begun.

The planned commemoration will span three years, and I am told 1987 is "dedicated to the memory of the Founders and the document they drafted in Philadelphia" (Commission on the Bicentennial of the United States Constitution, First Full Year's Report, 7, September 1986). We are to "recall the achievements of our Founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities" (Commission on the Bicentennial of the United States Constitution, First Report, p. 6, September 17, 1985).

Like many anniversary celebrations, the plan for 1987 takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the Framers and reflected in a written document now yellowed with age. This is unfortunate—not the patriotism itself, but the tendency for the celebration to oversimplify, and overlook the many other events that have been instrumental to our achievements as a nation. The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the "more perfect Union" it is said we now enjoy.

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of the America's citizens. "We the People" included, in the words of the Framers, "the whole Number of free Persons" (United States Constitution, Article 1, section 2, September 17, 1787). On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years (the Nineteenth Amendment, ratified in 1920).

These omissions were intentional. The record of the Framers' debates on the slave question is especially clear: The Southern States acceded to the demands of the New England States for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the "carrying trade" would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary source of wealth in the Southern States.

Despite this clear understanding of the role slavery would play in the new republic, use of the words "slaves" and "slavery" was carefully avoided in the original document. Political representation in the lower House of Congress was to be based on the population of "free Persons" in each State, plus three-fifths of all "other Persons" (United States Constitution, Article 1, section 2, September 17, 1787). Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" (Declaration of Independence, July 4, 1776).

(Continued on p. 48)

The Honorable Thurgood Marshall is a justice of the United States Supreme Court. This article is based upon a speech Justice Marshall gave before the Annual Seminar of the San Francisco Patent and Trademark Law Association, in Maui, Hawaii, May 6, 1987.

Equality

The Civil Rights Amendments/Grades 4-6 Cleveland Public Schools

Objectives

Students will be able to discuss the issues of the Thirteenth, Fourteenth, Fifteenth and Twenty-Fourth Amendments.

1. What are civil rights?
2. Why were these amendments added to the Constitution?
3. How do these amendments protect and preserve our freedom?
4. Did America invent human (civil) rights?

Directions To The Teacher

One dramatization per class period is recommended. Time to complete this activity should run 4-5 class periods. Before each dramatization of a scenario, place the paraphrased amendment on the chalkboard. Keep the amendment covered until the debriefing.

1. Divide the class into four groups.
2. Give each group a scenario. Allow the groups time to read the scenario and to select parts to be dramatized.
3. Allow time for groups to practice their scenarios.
4. Present one scenario each class period. After each dramatization present the debriefing questions included with this lesson.
5. Uncover and discuss the paraphrased amendment on the chalkboard. Include a discussion of unfamiliar vocabulary which may be associated with the amendment(s).
6. After all scenarios have been dramatized and debriefed, summarize by reviewing the terms and discussing the key questions.

Follow-up Activities

1. Have students complete the Constitutional Amendments activity page for reinforcement of vocabulary related to the amendments.
2. Divide the class into small groups and allow time to complete the following:
Think of how values are changing today and will be in the future. Draw up an amendment that is needed today or perhaps in the future. Allow each group to present an amendment and the reasons for it. Have the class vote on the amendment. Two-thirds majority is necessary to ratify an amendment.
3. Make up stories and have students find the amendment that applies to each story. See example below.

EXAMPLE

Frank and Joan, ages 18, went to register to vote in the next election. Will they be allowed to vote? Find the amendment and write the words that apply.

Lesson Resources

Scenario 1

Setting: Dining room in the home of Mr. Jones

MR. JONES: Samuel, bring me my dinner NOW!

SAMUEL: Yes sir, Mr. Jones.

MR. JONES: Did you hear that Betsy's Aaron was sent to Mr. Greenwald's house?

SAMUEL: No, sir, Mr. Jones. That's a shame. Aaron was Betsy's only boy.

MR. JONES: PAUSE...NO COMMENT...THEN CONTINUES.

MR. JONES: How long have you and your family worked for us, Samuel?

SAMUEL: A mighty long time, sir. Mighty long!

MR. JONES: Samuel, something happened today that shook me up. I saw you and your friends meeting behind the barn.

SAMUEL: Me, sir?

MR. JONES: Yes, you, Samuel. Do I have to remind you that you have been with us a long time, and that's the way I intend for it to be? It's about time you learned to do things right. I don't want to have to remind you again. You hear? Now, fetch me my tea!

SAMUEL: Yes, sir, Mr. Jones. (Samuel exits, murmuring and singing.) Steal away, steal away, steal away home to Jesus.

DEBRIEFING QUESTIONS

1. How does the song "Steal Away" reveal Samuel's mood?
2. Why did Samuel exit murmuring, "Steal away, steal away home?" (Note: The song "Steal Away" and other spirituals were songs used to signal a slave's intention to escape.)
3. Why do you think Samuel had no rights?
4. What rights were denied Samuel?

Scenario 2

HORSEMAN: You have robbed the bank. In New State we hang bank robbers. We know you are guilty and we are going to hang you. Let's go, men. Take him to Skull Hill.

VICTIM: Wait! This is an unlawful act. You have no right to do this. I should be able to have a trial.

HORSEMAN: Trial! Do you think we are going to waste time on a trial? You are guilty! In New State we decide what should happen to criminals.

VICTIM: Even though I am in New State, I am a citizen of Big Country. All citizens of Big Country have a right to a fair trial. This is against the law!

HORSEMAN: New State is NOT like the other states in Big Country. In New State the state is *all powerful*! Don't talk to us about your rights. You are from a different state and you have no rights in our state. You will be hanged!

DEBRIEFING QUESTIONS

1. What problems might develop if some states gave citizens a right to a trial and other states did not?
2. Why did the people of New State think they had a right to violate the laws of Big Country?
3. Could a person be convicted of a crime without a trial today? Why or why not?
4. What legal document do we have that guarantees the right to a fair trial?

Scenario 3

1st VOTER: May I have a ballot, please?

POLL WORKER: You cannot vote here.

1st VOTER: Why not?
POLL WORKER: You were in jail for 10 years. Jailbirds can't vote.
2nd VOTER: May I have my ballot?
POLL WORKER: No, you are a black man. Black men have no right to vote.
3rd VOTER: May I have a ballot, please?
POLL WORKER: No, you are an Oriental. You cannot vote either.
4th VOTER: May I have a ballot, please?
POLL WORKER: No, you are female. You do not qualify. Only free white males may vote.
5th VOTER: May I have a ballot, please?
POLL WORKER: You look mighty young to me. How old are you?
5th VOTER: I am eighteen, sir.
POLL WORKER: You are too young.

DEBRIEFING QUESTIONS

1. What factors created the need for common voting requirements?
2. What are the requirements you must meet before you are allowed to vote today? (Today, any man or woman who is an American citizen, eighteen (18) years and older, who has not been convicted of a serious crime and who is mentally able, may vote. Cities, states, and counties require that citizens live in an area a certain length of time and that they must register before they can vote.)
3. Should a blind person be able to vote?
4. Should citizens who cannot read be able to vote?
5. Should handicapped citizens be able to vote?

Scenario 4

1st VOTER: May I have my ballot so that I can vote?
POLL WORKER: It's a privilege to vote in this state. Did you pay your $500.00 Poll Tax? Where is your Poll Tax receipt?
1st VOTER: I don't have a receipt because I didn't have $500.00 to pay the Poll Tax.
POLL WORKER: I can't give you a ballot without your Poll Tax receipt.
1st VOTER: But I'm a citizen of Big Country and I should be allowed to vote:
POLL WORKER: You may be a citizen of Big Country, but in this state we still demand a Poll Tax before you can vote.
2nd VOTER: Here is my receipt. May I vote?
POLL WORKER: Yes, here is your ballot. Would the next voter step up? Show me your receipt, please?
3rd VOTER: I don't have a receipt. A black person in this town cannot earn that much money. I don't earn $500.00 in a year.
POLL WORKER: I must have that receipt in order for you to vote. Would the next voter step up. Show your receipt.

DEBRIEFING QUESTIONS

1. What do you think was the purpose of Poll Taxing?
2. Was Poll Taxing fair? Why or why not?
3. What effects did Poll Taxing have on voting?

Teacher Reference Sheet

Thirteenth Amendment (1865)—*Abolition of Slavery*
(Scenario 1)
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
Paraphrase: No person of the United States shall be placed into a slavery or bondage against his/her will unless they are being punished for a crime they were found to be guilty of doing in the United States or in a place which is under the authority of the United States.

Fourteenth Amendment (1868)—*Full Rights to All Citizens:*
(Scenario 2)
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
Paraphrase: All people born or who become citizens of

Follow-up Activity

Directions

1. Match the words in Column A with the definitions in Column B. Write the number of each word in the blank beside its definition.
2. Place the number of each word in the space of the Magic Square that matches the letter of its definition.
3. When you are finished, add the numbers down and across each row. If you are correct, the magic number (total across and down each row) will be the same. If they are not, try again.

COLUMN A

1. Liberty
2. Enforce
3. Poll Tax
4. Due Process
5. Immunity
6. Amendment
7. Naturalized
8. Deprive
9. Servitude

COLUMN B

8 A. Take away from
1 B. Being free
6 C. An addition to or change in law
3 D. A tax placed on voting rights
5 E. Freedom from duty or rule
7 F. Become a citizen
4 G. Fair treatment under the law
9 H. Slavery or bondage
2 I. To require obedience to a rule; or keep in force

MAGIC SQUARE

A 8	**B** 1	**C** 6
D 3	**E** 5	**F** 7
G 4	**H** 9	**I** 2

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the United States are citizens of the United States and also citizens of the state where they live. No state can make any laws that would take away a person's rights as a United States citizen. No state can take a person's life, liberty (freedom) or property without a hearing and without all of his/her rights guaranteed by the laws of the United States.

Fifteenth Amendment (1870)—*Suffrage Not Denied Because of Race, Color, or Servitude*

(Scenario 3)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Paraphrase: All citizens of the United States have the right to vote even if they were once slaves. And a citizen has the right to vote regardless of race or color.

Nineteenth Amendment (1920)—*Suffrage Granted to Women*

(Scenario 3):

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Paraphrase: All citizens of the United States have the right to vote whether they are men or women.

Twenty-Sixth Amendment (1971)—*Eighteen-Year-Olds Given the Right to Vote*

(Scenario 3)

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Twenty-Fourth Amendment (1964)—*Poll Tax Elimination*

(Scenario 4)

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States, or any State by reason of failure to pay any poll tax or other tax.

Paraphrase: No state can force United States citizens to pay a tax in order to vote. All citizens of the United States have the right to vote in *any* election without paying a poll tax.

Additional Reading Materials

Morris, Richard B., *First Book of the Constitution.* Franklin Watts, Inc., 1958. Riekes, Linda, and Mahe, Sally. *Lawmaking.* The Law in Action Series. West Publishing Company, 1980. Stiller, Richard. *Broken Promises: The Strange History of the Fourteenth Amendment.* Random House, Inc., 1972.

These activities were taken from the Elementary Law-Related Education Resource Guide *and are printed by permission from the Cleveland City School District. These activities were developed by a curriculum writing team of teachers and principals in the Cleveland Public Schools. They were edited by Beverly S. Clark.*

Constitutions at Work

The Supreme Court/Grade 6

Connie Yeaton and Karen Braeckel

After long angry debates, framers of the Constitution compromised on a new kind of Congress, with two houses. After more debate, they accepted the idea of an executive, a "president." Without any argument at all the delegates accepted the proposal for a Supreme Court. They agreed on the kinds of cases courts of the United States should try; when they disagreed over details for the lower courts, they left the matter up to Congress. (In fact, Article III establishing the judicial branch of the federal government mentions virtually no qualifications for the Supreme Court justices. Justices do not even have to be lawyers, though in fact all have been).

There was a need for a supreme court and as many federal courts as Congress deemed necessary to settle disputes between states, between citizens of different states, between a state and foreign countries, or between a state and the federal government. The system was set up to preserve judicial independence. Appointment by the president, with approval by the Senate, rather than election by the people, seemed to be the solution. Preserving the justices' independence was important, so the appointment was made for life (the guarantee that judges shall hold office during "good behavior" means that unless they are impeached and convicted, they can hold office for life). This protects judges from any threat of dismissal by the president who appointed them, or by any other president during their lifetime. The rule that a judge's salary may not be reduced protects the judges against pressure from Congress.

Originally there were six Supreme Court justices. There are now nine justices. One justice serves as Chief Justice of the United States.

The judicial branch of government interprets the laws of the country, including the Constitution. Critics of today's Court claim that the way the justices are interpreting the Constitution amounts to rewriting it.

In this lesson, students will act as judges for given situations. They will experience the difficulty of making a decision based on a law.

Objectives

Students will be able to:

1. Identify the Supreme Court as the highest court in the country.
2. Explain that the judicial branch shares power with the executive and legislative branches.

1907

No Vehicles in the Park

The town of Beautifica has established a lovely park in the city because the City Council wished to preserve some elements of nature—undisturbed by city noise, traffic, pollution and crowding. It is a place where citizens can go to find grass, trees, flowers and quiet. At all entrances to the park the following sign has been posted: "No Vehicles in the Park."

The law seems clear, but some disputes have arisen over the *interpretation* of the law. Pretend you are the local judge, and interpret the law in each of the following cases. As you make a decision, remember the *intent* of the law while following the *letter* or exact wording. Your decision should be fair to the City Council as well as to the individuals mentioned in each situation below.

1. Joan Smith lives on one side of the town and works on the other side. She can save ten minutes if she drives through the park.

2. There are many trash barrels in the park, so that people may deposit all litter there and keep the park clean. The sanitation department wants to go in to collect the trash.

3. An ambulance carrying a dying accident victim is racing to the hospital. The shortest route is through the park.

4. Some of the adults who visit the park want to ride their bicycles there.

5. Some of the children who visit the park want to ride their bicycles there.

6. A senior citizen likes to skateboard in the park.

7. A monument to the town's citizens who died in World War II is being constructed. A tank, donated by the government, is to be placed beside the monument.

3. Differentiate between the "intent" and "letter of the law" by making judgments on given situations.

Procedures

1. Distribute copies of "No Vehicles in the Park" and divide the class into four groups.

2. Before starting this activity, explain the key words in the story:

What does "interpretation" mean? (Giving the meaning of something)

What does "intent" mean? (Purpose)

What does "letter of the law" mean? "Letter" has a completely different meaning than normally used. When we use the term "letter of the law," it means the exact wording of the law.

3. The task is to look at each of the seven situations described and decide if the law has been broken. Students should be ready to discuss their reasoning in each case.

4. After the groups have had enough time to go through the list, have them report their decisions on each case. (By the time you have gone through all the cases, the class should be asking questions about the meaning of the law and how a vehicle is defined. If not, you can add your own cases, including roller skates, wagons, wheelchairs, and other such things.)

5. Possible questions for discussion can include:

Why would a community want a law about vehicles in the park? (People want to feel safe there.)

What is the purpose of a park, and how does the law protect that purpose? (The park is meant to preserve an element of nature and preserve a place for recreation. The law removes the danger of traffic so no one has to worry about it while playing.)

6. Students should be able to see that it is not always easy to make a judgment. Point out that it is important to look carefully at the purpose or intent of the law, as well as the letter or exact wording of the law. As a judge in each case, students need to be fair to both sides.

In the same manner as the City Council of Beautifica, the framers of the Constitution wanted to make sure that the meaning of the law was impartially determined in disputes before the federal courts. The highest court of the judicial branch of the government, which we call the Supreme Court, was intended to be the final authority.

Most cases they hear have been decided in lower courts. As the highest court in the federal system, the Supreme Court is the *court of last resort*. The Supreme Court decides which cases it will hear; each case requires an agreement to place the case on the Court's calendar by a minimum of four justices. The Supreme Court accepts less than 10 percent of the cases appealed to it; the remaining petitions are simply denied any hearing. A citizen or lawyer who proclaims, "I'll take this case to the U.S. Supreme Court" is either ignorant of how the Court operates, or is simply engaging in a rhetorical exercise. A petition for review will be granted only if the case raises unique and consequential issues involving interpretations of the Constitution or federal statutes and treaties.

7. Distribute copies of the newspaper.

8. Have the class scan the newspaper to see if they can find each of the following words: Supreme Court, Constitution, judicial branch, Justice Department, chief justice, justice. Using a pen, they can underline each word they locate. Select an interesting article that has some of these words marked. Read it carefully. Find the 5 W's and H: who, what, when, where, why and how.

9. Allow students time to share findings with the class.

10. Explain that the branches of government may be pictured as an equilateral triangle. (Draw diagram on the board.)

Executive Branch
The President
Justice Department

Legislative Branch
The Congress
House and Senate

Judicial Branch
The Supreme Court
of the United States

Each branch has certain powers and responsibilities. Each branch also has the authority to limit the power of the other branches. In other words, they keep an eye on each other.

This article is based on an article taken from A Salute to Our Constitution and the Bill of Rights: 200 Years of American Freedom, *which was created by Connie Yeaton, law-related education coordinator for the Indiana State Bar Association, and Karen Braeckel, newspaper in education consultant for* The Indianapolis Star *and* The Indianapolis News.

1908 1789

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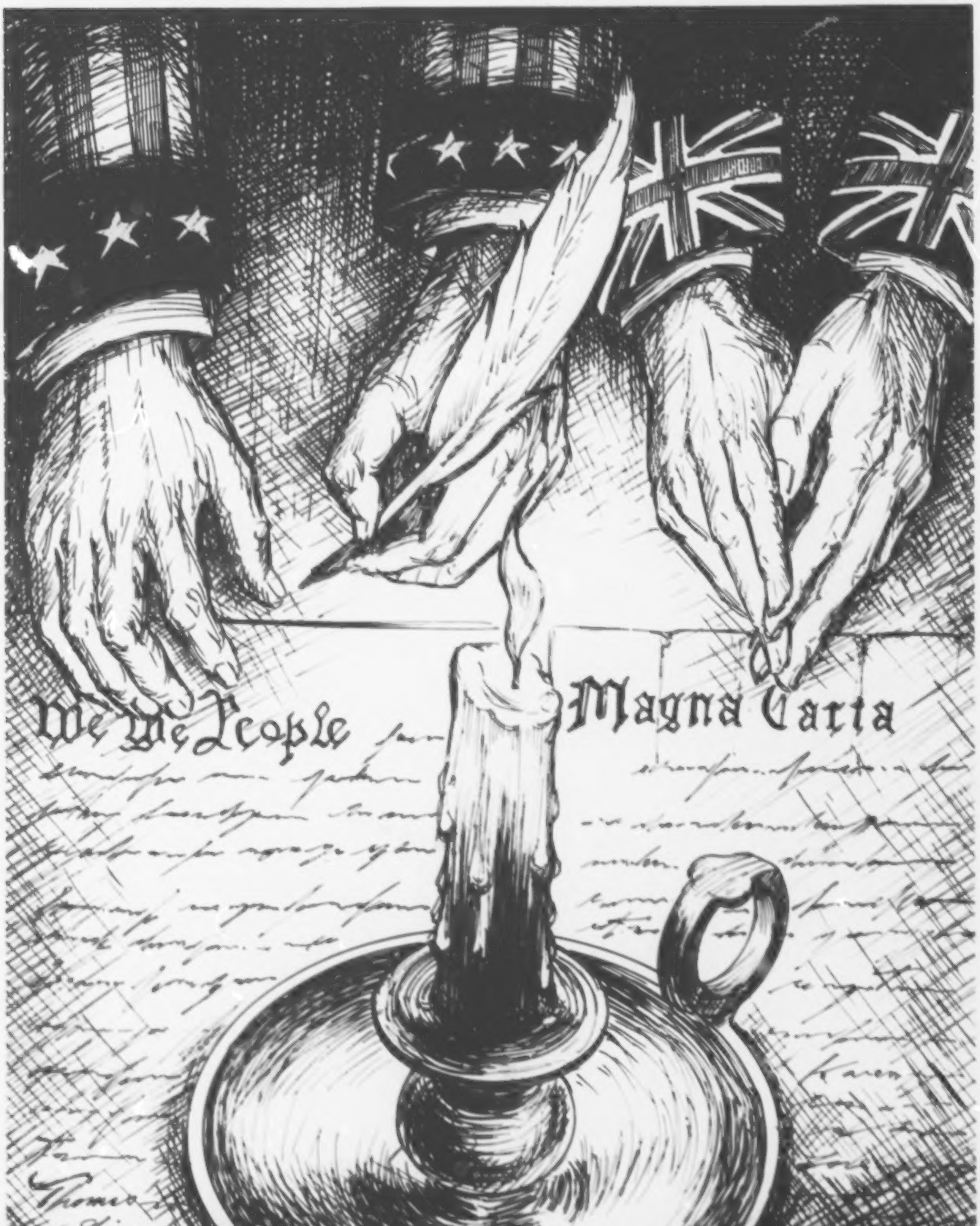
We the People
Magna Carta
Thomas Gianni

Thomas Gianni

Sir Zelman Cowen

Written Constitution or None: Which Works Better?

Great Britain and the United States protect individual rights in very different ways

Two hundred years ago, the founding fathers of the United States Constitution met to fashion a constitution for their newly independent nation. They laboured at their task throughout the summer, and by September they had done their work.

The Constitution was very soon augmented by amendment. Soon after the Philadelphia convention rose, the tasks of ratification were undertaken, and part of the price of ratification was the adoption of provisions constraining government's power over the individual citizen. Thus, the first major action of the first Congress, in September 1789, was to propose the first ten amendments to the Constitution, which were formally ratified in December 1791, when Virginia became the eleventh state to endorse them.

Great claims have been made for the instrument of 1787. It has been said to be as classic a piece of negotiation as imaginable. Its founders took great pride in their handiwork, and Thomas Jefferson spoke of the Constitution as unquestionably the wisest ever yet presented to men.

This year we count two centuries in the life of a great nation which over this period has experienced great economic, social and technological change.

Fundamental Law—or Not

It has been said that the most original intellectual contribution of the American Constitution to public law was the conceptualization of the Constitution as fundamental law.

In the United Kingdom there has been no such understanding of a constitution. Long ago, Alexis de Tocqueville made the often quoted statement that Britain has no constitution, and there are two senses in which this could be said to be so. First, there is no single document or enactment which sets out the main rules which prescribe and regulate the powers of government and the rights and duties of the citizen. There are many scattered provisions which, brought together, contain what one might look to find in a constitution, but there has been no disposition to shape them into one instrument.

More significant is the principle that there is no notion of fundamental law in the American sense. The central doctrine of British constitutional law is the common law doctrine of parliamentary sovereignty: whatever the parliament enacts is law. The great constitutional writer, Dicey, put it a century ago that "the dominant characteristic of (British) political institutions" is that *any* law could be amended or repealed in exactly the same way as any other Act of Parliament.

The American Constitution, by contrast, introduced a notion of fundamental law. Through this notion, laws must be tested for validity by reference to their conformity with the provisions of the Constitution, which itself could be amended *only* by the processes specified in that instrument.

Lord Scarman, a great contemporary English lawyer and judge, who has persistently argued the case for a United Kingdom Bill of Rights, says that "we have no written constitution; our one charter is to be found in a document of 1297 entitled Magna Carta . . . the key provision of which is often said only to be concerned to ensure that barons are tried by barons." If this were all that we ascribed to Magna Carta (issued and revised many times after 1215) it would not have been likely, for example, that the American Bar Association would have established a memorial at Runnymede to honour the Great Charter, to acknowledge it, and place it in American as well as in British history.

While in the books and in the rhetoric, Magna Carta is spoken of as fundamental law, it is not so in the usage which describes fundamental law as that which is alterable only by special process. According to Lord Scarman, it is not enough to depend on Magna Carta; if the legal system is to meet the standards of human rights assured by international treaty to which the United Kingdom was a party, it is necessary to provide for "entrenched and fundamental laws protected by a bill of rights—a constitutional law which it is the duty of the courts to protect even against the power of Parliament."

Bill of Rights—or Not

Whether in this form or at another level, issues relating to bills of rights have arisen in the United Kingdom and in other Commonwealth countries. On attaining independence in the early post-war years, India adopted a federal constitution with a fundamental, entrenched Bill of Rights. So, too, other former British colonies, on independence, have adopted fundamental charters of rights. The spread of such bills of rights owes much to American influence. They have at times been regrettably impermanent and ineffective, but overall their spread is, in the elegant words of a Commonwealth constitutional writer, yet another manifestation of that familiar process in which the deplorable becomes recognized as the inevitable, and is next applauded as desirable.

In older Commonwealth countries, in Canada, New Zealand and Australia, bill of rights issues have been actively debated. In Canada, after a substantial period of years with a statutory but not entrenched bill of rights, there is now a new, entrenched Charter of Rights, which is comprehensive in range, though more qualified in operation than the American Bill of Rights. That, I should say, is characteristic of modern bills of rights. Whereas the "broad majestic language" of the American First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech and of the press," the comparable Indian provision accepts laws which impose reasonable restrictions on the exercise of the right conferred in the interests of state security, morality, contempt of court, defamation and other specified concerns. So, too, the Canadian Charter guarantees the rights and freedoms set out, subject, however, to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Recently, in the United Kingdom, a *London Times* editorial discussed the issues in an impending debate on proposed human rights legislation in the British House of Commons. It did so in strong terms:

> There is no gainsaying the proposition that the real choice which the Bill presents is between two essentially different forms of constitution. One of them—the traditional one in Britain—rests fundamentally on the authority, indeed the omnipotence of Parliament; the other rests on the doctrine of the separation of powers and the authority of a supreme court appointed to act as guardian over a system of law based on highly abstract definitions of right. For this country to move along this last path would constitute at least the beginnings of a constitutional revolution.

The *Times* was plainly not in favour. It questioned whether the liberties of the subject in Britain are in so much danger as to call for such a radical step. The answer: no.

To characterize bill of rights proposals as the beginning of a constitutional revolution indicates the depth of feeling that such proposals generate. In the case of the proposed legislation which the *Times* was discussing, there was not a proposal for an entrenched bill of rights of the character which Lord Scarman advocated, but one which if enacted as statute law by the parliament, was, under the doctrine of parliamentary sovereignty, subject to modification or repeal by later legislation.

In favor of the bill of rights, there is the argument that a bill of rights would more effectively assure the most basic rights of citizens in a society in which the individual was at ever increasing disadvantage by reason of the massive system and apparatus of social management and control, and that parliament itself could no longer adequately protect citizens.

Another Way to Preserve Freedom

Against a bill of rights, it is strongly argued that "our constitutional history rather strongly shows that over the centuries, the British people have preferred that these matters should be decided by people whom they can elect and sack, rather than people immune from either process." In the House of Lords debate on such a bill, it was said by a distinguished lawyer member that "it is not our way, or in accordance with our traditions to create freedoms by these broad general propositions."

This lies at the heart of the opposition to bills of rights. An eminent Australian lawyer-politician asserts that "to live in a common law country is itself the very best guarantee of the rights of the individual," that such restraints on legislative and governmental action are undemocratic, because their adoption argues a want of confidence in the will of the people.

The voices which raise doubt, or which at least counsel caution, are not all to be heard outside the United States. One great modern American judge has warned that in the day-to-day working of our democracy, it is vital that the power of the non-democratic organ of government be exercised with rigorous self restraint. Because the powers exercised by the court (in this case the Supreme Court of the United States) are inherently oligarchic, Jefferson, all of his life, thought of the Court as an "irresponsible body" and "independent of the nation itself."

The Court is not saved from being oligarchic because it professes to act in the service of human ends. As history amply provides, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements. Such misconceptions are not subject to legitimate displacement by the will of the people, except at too slow a pace. Judges appointed for life, whose decisions run counter to prevailing opinion, cannot be voted out of office and supplanted by men of views more consonant with it. They are further removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure. A democracy, this judgment concludes, need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness in the people, there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself.

A little more than a decade ago, Archibald Cox, a distinguished practitioner and professor of constitutional law, gave a series of lectures to a British audience on the role of the *Supreme Court in American Government*. He did so at a time when there was vigorous advocacy for the adoption of an entrenched Bill of Rights for the United Kingdom. In brief compass, Cox explored the question: how far can and should a judicial body resolve by constitutional interpretation questions of public policy which are also fit for resolution by the political process? He spoke of a trend in American constitutional law to take more and more of the political process of government to the courts as justiciable questions. He illustrated this particularly by reference to the Warren Court as influenced by an extremely self-conscious sense of judicial responsibility for minorities, for the oppressed, for the open and egalitarian operation of the political system, and for a variety of rights

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Sir Zelman Cowen is Provost of Oriel College, Oxford; chairman, British Press Council; and a former Governor General of Australia. This article has been edited from a speech given May 7, 1987, in Philadelphia's Congress Hall. It comes from a bicentennial presentation sponsored by Friends of Libraries, U.S.A. and Mellon Bank.

not adequately represented in the political process. He questioned whether the Court had established sufficiently clear, principled standards. He judged that the courts (and not only the Warren Court) had been notably unsuccessful in formulating viable general principles explaining their roles and imparting a measure of consistency to their decisions. He referred to the "altogether novel and overwhelming tasks" assumed by the federal courts in the name of constitutional adjudication in prescribing affirmative remedies. This committed the courts to constant executive and administrative supervision of their orders and decrees. In summing up, he asked and he answered:

> Has the judicial branch over-expanded its role in American government and over-politicized the process of constitutional adjudication? Nearly all the rules of constitutional law written by the Warren Court relative to individual and political liberty, equality and criminal justice impress me as wiser and fairer than the rules they replace. I would support nearly all as important reforms if proposed in a legislative chamber or a constitutional convention. In appraising them as judicial rulings, however, I find it necessary to ask whether an excessive price was paid by enlarging the sphere and changing the nature of constitutional adjudication. The changes made in governmental institutions today may affect the results tomorrow by reducing the effectiveness of the institutions and the justice of their determinations . . .
>
> . . . Two institutional worries result from recent activism in constitutional adjudication. First there is concern that the Court may sacrifice the power of legitimacy that attaches to decisions within the traditional judicial sphere rendered on the basis of conventional legal criteria, and so may disable itself from performing the narrower, but none the less vital, constitutional role that all assign to it. Second, there is fear that excessive reliance upon courts, instead of self government through democratic processes, may deaden a people's sense of moral and political responsibility for their own future, especially in matters of liberty, and may stunt the growth of political capacity that results from the exercise of the ultimate power of decision.

As Archibald Cox points out, there are others in the United States who see the matter differently. They liken the Supreme Court to a purely political agency and believe that it should do whatever it can to carry out the policies it deems desirable. I have strong sympathy with Cox's concerns, which would be shared by many reared in a more traditional British view of the judicial function. There are serious concerns for human and individual rights which arise from the pressures, the reach and the character of modern government. Unless it can be shown that it is, on balance, necessary to enact a bill of rights to enable citizens to achieve rights not available through the presence of democracy, we should be slow to confer upon judges an unreviewable power to evolve a miscellany of actual rights and restraints whose real content we cannot sensibly predict. It is a view which rests upon an appropriate role for non-elected judges in the polity. It says, in the words of the distinguished English judge, Lord Devlin, that we (Britain and the United States) have lived with different experiences, that the Supreme Court of the United States, like the wines of France, is not for transplantation. The soil and climate in which it flourishes are not those of Britain; the hands that lead it, have now, like the Bordeaux vignerons, acquired unique skills.

Two Case Studies

In the light of Lord Devlin's words, one could also view some First Amendment issues. I have referred to the "broad and majestic" language of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech or of the press." Its reach has since been extended to the states via the Fourteenth Amendment. The necessary qualifications to these seemingly absolute words have long been debated. There are judges who would give the words their fullest amplitude. There are others, and they have composed a majority, who would read into them a requirement to make accommodations and to strike balances. They recognize, perhaps, as Mr. Justice Jackson once wrote, that unless doctrinaire logic is tempered with a little practical wisdom, the Bill of Rights would be converted into a suicide pact.

Whatever the qualifications, the American law starts with a grand assertion of freedom of speech and the press. English law starts more prosaically with the statement by Dicey, a hundred years ago, that there is no special law of free speech and free press. It is part of the ordinary law of the land. So, for example, in the context of the issue of fair trial and free press, it is put in one of the great English cases that "the extent to which the law should limit the freedom of the press is one upon which opinions differ widely . . . there is, of course, no right to absolute freedom of speech in the law of England: speech is free except insofar as the law restrains it, and therefore the crucial question is what measure of restraint is required in the interests of the due administration of justice." That certainly sounds very different from the American formulation. The issue is a *balance* between substantial conflicting claims.

I take two cases: one touching the law of libel, the other the issue of fair trial and free press. Archibald Cox, in his Oxford lectures, noted that a visitor to England gets the rough, though unconfirmed, impression that the danger of libel suits inhibits the British much more than the American press, and that this affects the democratic process. The Supreme Court of the United States (the Warren Court) affirmed in the historic case of *New York Times v. Sullivan* that the First and Fourteenth Amendments barred a state from awarding damages for defamatory falsehood at the suit of a public official, unless the falsehood was published maliciously, or with reckless disregard for whether it was true or false. The Court, in so holding, did so expressly against the background of a profound national commitment to the principle that debate on public issues "should be uninhibited, robust and wide open." It involved, as Cox says, the overruling of 175 years of settled legal practice with respect to the law of libel. In so doing, said Alexander Meiklejohn, it was an occasion for dancing in the streets. The doctrine was developed in later cases and, outside the context of public officials, was qualified.

It is certainly no part of English law. A committee considering the reform of the law of defamation in the mid 1970s expressly rejected its adoption in Britain: "we oppose it most strongly because we believe that here it would, in many cases, deny a just remedy to defamed persons." It was seen as a virtual abandonment of the protection of reputation to the claim of free speech and expression, and for this reason not acceptable.

The issues of fair trial and free press have been debated inside and outside the courts. The flavour of the English approach is given in the stately and magisterial expression of a senior English judge in 1972: the very structure of ordered life is at risk if the recognized courts of the land are so flouted that their authority wavers and is supplanted. It was the application of this principle in English case law which led a well known and remarkable British (now American) editor to complain and to wage a mighty battle on behalf of what he called the "half free" English press. He complained vehemently and effectively against the English law which restricted publication on grounds that it might prejudice a fair trial.

(*Continued on p. 49*)

Constitutions at Work

Classroom Constitutional Conventions/Upper Elementary, Middle

Carol Roach

Dean Matthews

With the exception of natural-born history buffs, upper elementary and middle level students usually find the study of the Constitutional Convention to be dry and (frankly) boring. Youngsters are most interested in studying, and seem to learn best, the kinds of things that relate to themselves or that they have personally experienced. Obviously our students can't have experienced *the* Constitutional Convention. However, a classroom simulation can spark a high degree of interest and help students develop a real understanding of the reasons for, and the outcomes of the convention.

The simulation strategy described below is appropriate for fourth through eighth grade students. Because it takes place throughout the entire school day (or class period), and for a number of days, it is specifically for classroom teachers rather than for resource persons. Teachers who field-tested the activity for the author reported tremendous successes, with students voluntarily and enthusiastically carrying the simulation into additional studies, i.e. the Constitution, governmental operations, taxation, and so forth.

Objectives

To establish classroom routines, to participate in decision-making activities and to improve understanding of the Constitutional Convention and the three branches of government.

MATERIALS NEEDED

Photocopies of "Constitution Guidelines" (see box), pencils, chart paper.

Activities

The following activities make up a simulation of the Constitutional Convention and the roles of the three branches of government. The activities should be spaced over a period of time. Continue with one section until students are comfortable and understand procedures before moving on to the next section. After each activity, the teacher should lead a discussion comparing the simulated activity to the actual.

1. Divide the class into groups of 4-5, according to seating proximity. Announce that each group is a "state." Allow group member to think of a name for their state. (Optional: they might also make up and draw a state bird, flower, flag, motto, etc.) Group members should also write down any rules they want for *their state area* only (i.e., let's pass the wastebasket among us twice a day; let's take turns collecting papers to turn in; let's keep our rows straight). Teachers can refer to states when asking students to line up, select materials, indicate lunch counts, and so forth.

Allow the "states" to function for several days. If teachers want students to move to a different location, each student will have to learn the rules of the new state (just as a person moving from one state in our country to another would have to be aware of different state laws).

2. After a few days, conflicts will probably arise due to the "state" operating under separate rules. Whether or not there are conflicts, point out the need for unity: what about areas of the classroom not included in a state? What about things we all do together? What if conflicts do arise?

1913 1

etc. You might want to even "stage" some of these conflicts to help students see the need for overall governance. Then point out that this is much like the situation of the original thirteen states, before we had a United States Constitution. Those states (with the exception of Rhode Island, which chose not to participate) sent representatives to a Constitutional Convention. At the convention, delegates *did not make up the laws* that would govern the people, but they did make up a plan for *how* the laws would be made and how the country would be governed.

Ask each "state" to choose one representative to attend a class constitutional convention. Let each group decide for itself how to choose the representative. The teacher serves as president of the convention and plans a meeting time that is convenient to class schedules and routines. During the meeting, guide the students to develop a class constitution using the "Constitution Guidelines" pages.

3. When the class constitution is completed, have convention representatives explain the constitution to the rest of the students. Then follow the guidelines of the constitution to select congresspersons, a president, and judges.

During the next few weeks:

A. Schedule a time for the congress to meet to set up classroom rules. All members of the congress should keep in mind that they represent the people of their various states and that the rules must be fair to all. The list of rules is then given to the president.

B. The president signs the list of rules (or vetoes some and sends them back to congress). The president presents the final approved list of rules to the class, and appoints someone from each state to help see that the rules are enforced.

C. The judges meet to check the constitutionality of all rules. If there is disagreement among students about any of the rules, the judges make final decisions.

At this point the simulation can end. However—especially if the constitution outlines terms of office—the teacher may want to continue the roles occasionally throughout the semester or school year. The three branches could continue to function whenever there is a need to plan special projects, class parties, bulletin board displays, or when conflicts occur between individuals or groups of students.

4. Read the book *Jump Ship to Freedom* (summarized below) to the class. Collier, James Lincoln and Christopher Collier. *Jump Ship to Freedom*. Delacorte Press, 1981. (William Allen White Award Master List 1983-84).

This book is historical fiction; in the last chapter the authors explain which parts/characters were real and which were strictly fictional. The story takes place in 1787, as the Constitutional Convention is meeting. Daniel, a young slave boy, is placed in a number of dilemmas. He wants to buy freedom for his mother and himself with soldier's notes that his father had earned in the Revolutionary War. But unless the Convention is successful, there will be no central government, no way to collect the taxes, and thus the notes will be worthless. On the other hand, if the Convention is successful, there will be a law about returning runaway slaves to their owners, and Daniel is a runaway slave. So he does—and does not—want the Convention to succeed. To further complicate matters, he makes a promise to a dying man that he will deliver a message to Philadelphia—the message about the slave compromise, that says runaways must be returned. If he doesn't deliver the message, the Convention might fail for lack of a compromise. But then the notes will be worthless. If he does deliver it, he will be returned to his master and probably sold in the West Indies before the notes can be paid.

During his adventures, Daniel learns a lot about self-confidence, self-respect, and his values.

Constitution Guidelines

To develop your constitution you will need:

1. To set up a congress. A congress makes up the rules or laws and plans for the whole group. Each state should be represented in the congress. How many people should each state send? How should each representative be chosen? How long should the representative serve on the congress before someone else is chosen?

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2. To make guidelines for congress to follow. Make a list of things congress must think about when making up the rules or plans for the class. (Can everyone understand them? Are they fair?)

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3. To set up a presidency. A president is needed to see that the rules are followed and the plans carried out. Can anyone in the class be chosen for president? How shall the president be chosen? How long should the president serve before someone else is chosen?

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4. To provide for judges. Judges are needed to be sure that all decisions made by congress and passed to the president agree with the guidelines of the constitution. They can also help settle disagreements. How many judges should there be? Should they be appointed by the president or elected? Are there any rules about who may or may not be a judge? How long should judges serve?

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Write your constitution on a sheet of chart paper. Explain it to your classmates.

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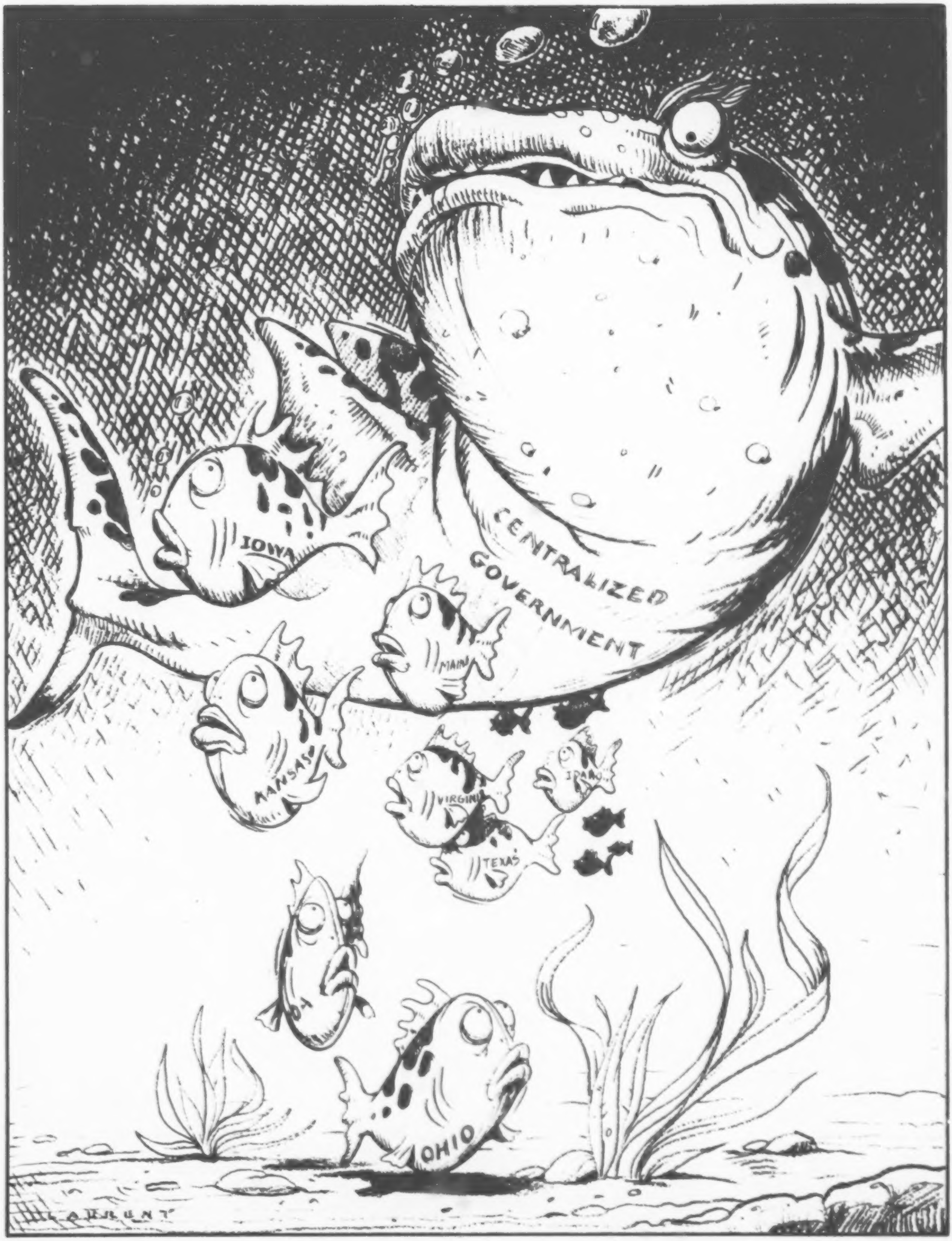
CENTRALIZED
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VIRGINI
IDAH
TEXAS
OHIO
LAURENT

Richard Laurent

The Constitution at 200

A. E. Dick Howard

Federalism Lives

The federal government will always be the biggest fish in the pond, but the states are showing surprising vitality

American federalism has never been easy to define, to understand, or to explain. It is as much the product of historical circumstances as of philosophical design. In the colonial era, the remoteness of British authority encouraged colonists to think in terms of de facto autonomy, whatever London's juridical authority. Thus, in the 1760s when the colonists were fashioning arguments against British policies (especially those looking to the colonies as a source of revenue), they had no difficulty distinguishing between policies that might legitimately be laid down by the central authority and those requiring assent at a more local level.

The story of how the delegates at the Philadelphia convention accommodated opposing views on state and national powers is a familiar one. There were those who, like James Madison and Edmund Randolph, conceived the overriding need to be the creation of sufficient power in the national government to deal with national problems. There were others who, like George Mason, feared excessive consolidation. There were, of course, the differences between small states and large, and varying economic interests, mercantile and agricultural.

The plan of government finally agreed upon was a compromise among varying views. Madison described the Constitution as something of a hybrid, "not completely consolidated, nor . . . entirely federal"; it was a government of "mixed nature, composed of many coequal sovereignties."

The nature of the federal union thus constituted remained the subject of sharp debate. In the famous Haynes-Webster debate, in 1830, South Carolina's Robert Y. Haynes saw the Constitution as a compact among states, while Massachusetts' Daniel Webster argued that the people as a whole, not the states, created the Constitution.

Civil War and Reconstruction settled by force what intellectual argumentation had not resolved—the indestructible nature of the Union. And the Reconstruction amendments, especially the Fourteenth, profoundly affected the balance between national and state powers. The Fourteenth Amendment's due process and equal protection clause planted the seed of federal judicial power which has become a garden—beautiful to some, a tangle to others—of federal judicial gloss in our own time. And the amendment's fifth section furnished the basis for extensive congressional legislation, such as the civil rights acts of the 1960s.

In antebellum America, federal power, notwithstanding Chief Justice John Marshall's generous view of that power, was sparingly used. Not only were criminal justice, commercial law, and domestic relations essentially determined by state law, but also promotion of economic undertakings was largely undertaken by the states. Indeed, the states competed with each other in the building of canals and other internal improvements and in the subsidy of private ventures, very much as nations might do.

Taking the long view, however, especially of the period beginning in the "gilded age" of American capitalism, one discerns powerful forces tending to centralize power, at the expense of the states. As economic enterprise flourished, spilling across the continent, pressures grew for national measures; seminal examples were the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890. In the 1930s, the social and economic disruptions of the great depression were beyond the abilities of the several states to repair, and the New Deal looked to national remedies.

Other forces have tended to enhance national powers. The needs of war and national defense tend, in all times and places, to concentrate power, and American history has been no exception, as the Civil War and the world wars remind us.

Notions of justice and equality have been powerful forces tending to the enhancement of national power. Egalitarianism has been a strong idea in American history (although not without its competitors). If people ought to be treated equally, a person of egalitarian instincts would reason, how better to assure that outcome than to have one government, the federal government, assure uniform treatment?

Such egalitarianism is especially evident in the decisions of the Warren Court. That tribunal made liberal use of the Fourteenth Amendment's equal protection clause in mandating legislative reapportionment ("trees don't vote, people do") and in acting against state laws discriminating on the basis of color. The Warren Court's quest for a more just society found its outlet in such decisions as those using the Fourteenth Amendment to impose the mandates of the Bill of

Rights upon the states. In all such decisions, the Court, of course, laid down national standards to supersede state norms or practices.

Sometimes the growth of national power has been in response to problems whose scope and scale defy state regulation. Ensuring the free flow of interstate commerce is a ready example, one obviously in the minds of these who drafted Article I, section 8, of the Constitution. Sometimes national power has been seized upon by particular interests who see federal laws or regulations as an apt vehicle for by-passing local preferences. The proliferation of conditions attached to federal grants-in-aid illustrate the popularity of this approach. Frequently the displacement of state or local authority in such cases has little to do with any reflective judgment about which level of government ought to be trusted to decide on a given policy; often the decision turns simply on political muscle.

States Resist Change

Thus forces beyond the states' direct control have operated to account for much of the growth in federal power in the nation's 200 years of history. But the states themselves have often contributed to the occasions for Congress, the federal courts, or some other instrumentality of federal power to step in and deal with problems previously left to the states to solve. Those who complain of federal aggrandizement must reckon first with the fact that the states' own record has often been a poor one.

In the years following World War II, for example, many of the states proved unwilling to face up to the demands changing times were placing upon them. Demographic changes were not reflected in the apportionment of legislative seats in state legislatures. When the Supreme Court decided *Baker v. Carr* in 1962, Tennessee's General Assembly had not reapportioned legislative districts since 1901, despite the state constitution's mandate that representation be allocated on the basis of population. Justice Clark, in a concurring opinion, said that he would not consider judicial intervention "into so delicate a field if there were any other relief available to the people of Tennessee." But no such relief was possible. Tennessee's legislature had "riveted the present seats in the Assembly to their respective constituencies, and by the vote of their incumbents a reapportionment of any kind is prevented."

Likewise, the states' record in the field of civil rights was often a sorry one. Blacks were systematically denied the vote, the vehicle being biased registration requirements having their roots in state constitutions and laws adopted with the undeniable purpose of purging the voting rolls of black voters (a perusal of the debates in some of the state constitutional conventions around the turn of the century makes sobering reading). State laws segregated blacks into separate, and usually inferior, public schools. Blacks rode the back of the bus, and state laws joined with local custom to enforce a segregated society. Small wonder that civil libertarians have argued that the states, far from being reliable protectors of civil rights and liberties, are instead a threat.

In academic circles, there has often been a tendency to dismiss federalism. Some scholars seem to consider it unfashionable, even naive, to take federalism seriously. A political scientist, William H. Riker, has commented, "Almost no ordinary citizens of the United States . . . concern themselves often or seriously about federalism." For him federalism is a legal fiction, a structure making little difference in the way a polity is governed. Much in the manner that a western missionary of the nineteenth century might have approached tribal customs, he added, "Since some lawyers appear to believe in it [federalism], we must, I suppose, concede that it exists." Legal realists—the late Karl Llewelyn comes to mind—have, of course, downgraded the importance of ideas and institutions such as federalism. Indeed, they have tended to look upon federalism—certainly upon arguments seeking to give legal and constitutional significance to federalism—as being, not simply unsophisticated, but downright harmful.

The Contemporary Scene

Recent years have seen a revival of interest in federalism. For a time it seemed that the simple-minded notion that "bigger is better" had as its corollary the equally simplistic attitude that somehow national solutions surely were better than local ones. Federal initiatives, many assumed, were bound to be fairer, more efficient, more responsive to social needs. Such notions have been undermined by widespread disillusionment with the federal government's record in many fields. Anyone who looks at the staggering federal deficit and considers the mountain of debt we are piling upon our posterity must surely pause before assuming that Washington knows better than Olympia or Raleigh or Augusta. The states may have been irregular guardians of the public trust, but federal officials are no strangers to the abuse of power and office, as the current hearings on Iran and the contras remind us.

Concerns about centralization of power have by no means been confined to those whose politics might be characterized as "conservative." It is easy to assume that arguments for federalism reflect conservative political values. One recalls how federalism—or "states' rights," as it was often called—was relied upon by critics of the New Deal, of civil rights legislation, of Supreme Court school desegregation decisions. But, especially since the 1960s, liberals and even radicals have worried about centralization. Thus there were calls for local community control for alternative outlets of local opinion.

Federalism has become a matter of serious political debate and concern. At the National Governor's Association meeting in 1980, Vermont's Republican governor, Richard Snelling, complained, "The role of the states has been eroded to the point that the authors of the Constitution would not recognize the intergovernmental relationships they crafted so carefully in 1789." Bruce Babbitt, Democrat of Arizona, agreed: "The federal system is in complete disarray. Congress has lost all sense of restraint. . . The Tenth Amendment, reserving powers to the states, is a hollow shell."

President Ronald Reagan, in his first State of the Union message, made federalism a central motif:

> Our Citizens feel they have lost control of even the most basic decisions made about the essential services of government, such as schools, welfare, roads, and even garbage collection. They are right.
>
> A maze of interlocking jurisdictions and levels of government confronts average citizens in trying to solve even the simplest of problems. They do not know where to turn for answers, who to hold accountable, who to praise, who to blame, who to vote for or against.

President Reagan's proposal, which he called the "New Federalism," was to have

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the federal government assume responsibility for Medicaid in return for the states' taking over AFDC and food stamps. The President also proposed to turn back 35 federal programs (in such areas as education, transportation, social services, and community development) to the states with a trust fund to finance them.

Reactions to the Reagan proposals from the state, localities, Congress, and the press were quite mixed. There was a fair degree of consensus in many quarters on the need to reform the federal system, but little agreement on specifics.

Unfortunately, appeals to federalism often obscure other objectives, ends for which the language of federalism is simply a convenient vehicle. It is possible to view the "New Federalism" proposals as being more concerned with reducing government and increasing efficiency than with such abstract notions as increasing political responsibility and civic health. Such a conclusion is bolstered by reading the Inaugural Address of January 21, 1985, in which there is but a single sentence mentioning federalism, but extensive attention to limiting government.

Whatever the political objectives of the President—or the governors who speak up at NGA conferences—such proposals as the "New Federalism" do help bring questions about the health of the federal system into public debate. Other groups have entered the dialogue. A commission chaired by Governor Charles S. Robb and Senator Daniel J. Evans issued a report, *To Form a More Perfect Union*, containing proposals for "sorting out" important government functions between the federal government and the states. The United States Advisory Commission on Governmental Relations has been especially active in assessing the viability of American federalism. Its concern is summed upon in a 1981 report in which ACIR concluded, "Contemporary intergovernmental relations . . . have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly, and, above all, more unaccountable."

Reforms and Innovations

One who argues that the states ought to be taken seriously should be prepared to answer the question: Are the states up to the job? Are they worthy of accepting responsibility?

In the 1960s one might have paused before giving a "yes" answer to this question. In the state legislatures, principles of democratic representation were submerged by glaring malapportionment, and fewer than half of the states required their legislatures to meet annually. When it did meet, the typical legislative body was poorly staffed and ill equipped to deal confidently with the art of legislation. State courts were seen to lack an air of professionalism, and their opinions too often failed to command the bar's respect. State criminal justice were faulted for failing to meet minimum levels of fairness and due process.

Today things are far different. The ACIR points to a "quiet revolution" of reform that took place in the states during the 1960s and 1970s.

> The structurally and procedurally stronger, more accountable, more assertive states of today, performing a major intergovernmental management and financing role, bear little resemblance to the generally poorer organized and equipped and unresponsive entities of a quarter century ago.

Thus ACIR concludes: "The transformation of the states, occurring in a relatively short period of time, has no parallel in American history."

Some of the reforms in state government were mandated by or resulted from federal law. The Supreme Court's reapportionment decisions, requiring that representation be based on population, produced state legislatures more fairly reflective of the people who voted in state elections. Civil rights laws, especially the Voting Rights of 1965, eliminated the most overtly racist practices.

Other reforms came from within. The 1960s and 1970s saw intense interest in revising or rewriting state constitutions. At the turn of the century, state constitutions commonly were detailed, complicated documents. Resembling more nearly codes of law than constitutions, they often hobbled responsive or responsible state government. The state constitutions of postwar America are usually shorter and simpler than their predecessors, emphasizing those fundamentals that belong in a constitution. Administrative and executive powers are focused on the governor, there are fewer restraints on the legislature, and the judicial articles point toward a more competent system of courts.

Still other reforms have taken shape in legislation or in executive actions. A few innovations and reforms in state government will be sampled here, some resulting from constitutional revision, others flowing from legislative or executive initiatives. They should serve to give something of the flavor of vitality that has brought the states a long way from the malaise and incompetence that often struck the observer a quarter of a century ago.

State governors are capable of greater leadership today, by and large, than was true at mid-century. They have broader powers of appointment, and there are fewer statewide elective officers to make executive management difficult, as was the case when the commissioner of agriculture or other such officers were elected independently of—and hence not answerable to—the governor. Governors serve longer terms: in 1960, fifteen states limited a governor to a two-year term, while today only four states retain this limitation. In 1960, 16 states forbade a governor to run for a second term; today, only four states forbid reelection.

The apparatus of state administration has seen thorough overhaul. In the past twenty years, over half of the states have had major executive branch reorganization. (Compare the failure of "Little Hoover" commissions in the states in the 1940s and 1950s.) The vast majority of states have a cabinet form of government, replacing chaotic systems featuring countless independent departments and boards. In Virginia, for example, until 1972, there was no cabinet; 95 agencies reported directly to the governor.

Political scientist Larry Sabato sums up how we may view today's governors. They are, he reports, "younger, better educated than ever, and more thoroughly trained for their specific responsibilities. Greater numbers have concentrated beforehand on developing legislative expertise, while fewer come directly to the executive from minor offices."

State legislatures are no longer the "sometimes governments" of yesteryear—meeting a few weeks every other year, badly malapportioned, lacking adequate staff, ill paid, and controlled by small cliques or powerful special interests. In 1940 only four states had their legislatures meet annually; by 1960, the figure had climbed to 13, and today it is 43 (36 states mandate annual sessions, and all but a half-dozen state legislatures find some way to meet annually). All states now have legislative research and bill drafting services and fiscal and policy review and analysis (although one should note that the quality varies considerably). The membership of today's state legislatures better reflect states' ethnic, racial, and gender patterns (for example, in at least nine states women comprise more than 20% of the legislature, a far higher proportion than is the case in Congress).

Allen Rosenthal, director of Rutgers University's Eagleton Institute of Politics, observed in 1981 that the state legislative process has become more "open, individualistic, professionalized, democratic" and concluded that today's state legislatures are the strongest in our history.

The emergence of modern, unified courts (mirroring the example set by Article III of the Federal Constitution) mark today's state judiciary. Stronger state courts are made possible by better training, an improved selection process, and better staffing, including professional judicial administrators. State judicial fitness commissions enable the states to deal with problems of judicial misconduct, poor health, or incapacity. Bodies such as the National Center for State Courts, at Williamsburg, have come into being to bring important professional and intellectual resources to bear on how the state courts go about their work.

Laboratories of Democracy

Justice Brandeis once referred to the states as "laboratories." He saw the states as experimenting with new ways of tackling social and economic problems. Failures need not be imitated, successes would inspire emulation. A few examples of state innovation and creativity will serve to show that Brandeis' hope for the states was not an idle one.

No functions are more central to government's ultimate performance than finance, revenue, budgets, and costs. In these respects some interesting ideas have come out of the states. Zero-based budgeting requires that each program, whether new or existing, must be justified in its entirety each time a new budget is formulated; this concept was first adopted in Georgia, in the early 1970s.

In 1975 New Jersey established a Commission on Capital Budgeting and Planning. Its twelve members (four citizens, four legislators, four from the executive branch) recommend short- and long-term capital investments to the governor and legislature. Its capital budget usually sees few changes. An example of its influence may be seen in the fact that, of nine bond issues it recommended, eight were approved by the voters.

The states have experimented widely with tax amnesties. Recent studies show that more Americans cheat on their taxes (one report estimates that the federal government loses more than $100 billion a year this way). Massachusetts decided to offer a three-month amnesty; 50,000 taxpayers came up with $84 million. Massachusetts officials have estimated that the amnesty program, coupled with stiffer enforcement and penalties, resulted in an overall gain of $233 million—a permanent part of the state's tax base. By late 1985, at least 17 states had announced tax amnesties (California and Illinois each netted $150 million).

States have looked for creative ways to cut costs. Michigan announced an early retirement program, under which 51% of those eligible during a one-time opportunity (a four-month period) took early retirement. This program was expected to save Michigan $60 million in salary and fringe benefits during a 16-month period. Ohio devised a self-insurance program, assessing premiums to each state agency based on the number of vehicles each has. During the program's first two years, Ohio saved over $2 million.

Public education, long a primary concern of state and local government, has attracted increasing attention in recent years. The issues are many: graduation requirements, teacher licensing and competency, salaries, and length of school day and school year among them. State initiatives in education have been both creative and controversial. In Texas, Ross Perot and Governor Mark White led a reform effort, featuring higher pay, competency testing, smaller classes, tutoring, and a no-pass, no play rule whose impact on high school football in that sports-minded state cannot have escaped the attention of any reader of American sports pages.

Economic development has been a high priority for most states. Major shifts in the American economy have left few states unaffected, whether it be the decline in heavy industry in the "rust belt," the loss of textile jobs to developing countries, or the uneasiness in electronics and other "high tech" sectors. State responses have often been creative, although their effectiveness is often difficult to evaluate and they can entail risks.

Massachusetts appears to be one of the country's economic success stories. Since 1975, Massachusetts has gone from economic despair—in the days when New England was being called "New Appalachia"—to prosperity driven by high-tech industries. Unemployment fell, in a decade, from 12.3% (the highest among the industrial states) to 4.3% (the lowest of all states). State revenue turned around, in a decade, from $600 million deficit to a $400 million surplus.

It is hard to say just what part state policies played in Massachusetts' recovery. The private sector, especially high tech industry, played a key and aggressive part. An enviable concentration of fine institutions of higher education has been a lodestar drawing talent to the state. But it appears that state policies played their part.

Geographical targeting has been helpful. The Massachusetts Industrial Finance Agency has issued more than $3 billion in industrial revenue bonds but has forbade their use outside city and town centers: Lowell, Worcester, New Bedford, and other cities have been the beneficiaries. "Heritage parks" are tied to historic themes, Lowell being the prototype. In general, after a period in which public and private sectors seemed to have been at odds in Massachusetts, press reports have spoken of successful efforts by Governor Dukakis to have better relations with the business community.

Competition among the states for economic development carried it hazards. In the area of banking deregulation, for example, actions by Delaware and South Dakota have put pressure on other states. In 1980 Delaware abolished usury limits, invited large banks into the state, and offered tax breaks. It is reckoned that, by such moves, Delaware gained at least 1500 jobs. When Maryland denied credit card operations the right to charge annual membership fees three of the four largest Maryland banks shifted their credit card operations to Delaware. Maryland lost 1,000 jobs, amidst an atmosphere of general complaint and recrimination.

State Constitutions Revisited

An especially striking phenomenon among the states is the way in which state courts are using state constitutions to shape a body of constitutional law quite independent of that emanating from the Supreme Court. A study of American constitutionalism is not complete without an understanding of state constitutions.

Well before the framers met at Philadelphia in 1787, the states had written their own constitutions. Frequently those documents reflected a concern for republican values, for civic virtue, for the duties of citizenship. Today state constitutions reach areas unmentioned in the Federal Constitution, such as education and the environment. Peridocially revised in many states, and amended even more frequently, state constitutions paint a fuller picture of a "way of life" than one could glean from a reading of the fed- document.

State court use of state constitutions touches many areas. Some of the areas overlap with Supreme Court jurisprudence (for example, criminal justice); in such areas the differences in state and federal constitutional law are essentially interstitial (the state courts, of course, may not devise standards laxer than those laid down by the Supreme Court). In other areas, state constitutional law touches frontiers not reached by the nation's high court.

An interesting example is economic regulation. Since the so-called "constitutional revolution" of 1937, the Supreme Court has taken the formal position that federal courts ought not to second-guess legislatures on matters of economic regulation. Yet the state courts, using state constitutions, are quite active in reviewing state economic measures. Thus a state court might invalidate a law found to constitute anticompetitive price fixing or to be intended to advance some special interest, rather than the public good, in hindering access to professions and vocations.

State court activity raises questions about legitimacy and competency not unlike those issues which are a familiar feature of academic and political debate about federal judicial "activism." No more than federal judges should state courts see themselves as knights errant, commissioned to do good and fight evil, whatever its form. But state constitutions exist independently of (although they may not conflict with) the United States Constitution. They often reflect historical and jurisprudential traditions of their own. And the decisions of state courts, grounded in the state constitutions, speak of a healthy pluralism in the making of constitutional law, enhancing the opportunity for local politics to make local value choices.

Federalism as a Constitutional Value

The case for taking federalism seriously does not, in the final analysis, turn upon listing the innovations or programs devised by the states. It is fair, of course, to ask how well the states are performing as political entities. But American federalism connotes values more fundamental to a free society than can be measured in the fashion one would assess the productivity of a factory or assembly line.

Federalism is linked with individual liberty and self-government. Tocqueville saw this connection. Municipal institutions, he said, "constitute the strength of free nations. . . . A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty."

Participating in government at the state and local level is an education in citizenship. To execute the laws of a distant government—even a government for whose legislators one has voted—is a remote exercise. It is deliberating together, making choices about government policy, that educates the citizen. Again, Tocqueville: he who participates in government at the local level "practices the art of government in the small sphere within his reach . . . ."

The very ambiguities of federalism may, paradoxically, be one of its appealing qualities. To one person the word "federalism" may imply great central powers; that was the understanding of those who were known as "federalists" in 1787. To another person "federalism" suggests greater respect for state and local institutions; that is more often today's connotation. Federalism aims at the same time to achieve national unity while also preserving diversity. Achieving both of these ends creates ambiguities and tensions. One byproduct of this dialectic is a continuing dialogue on first principles of government, a dialogue among ordinary citizens as much as among officials and experts.

Federalism is premised on the diversity of the American people. State lines are, to be sure, often arbitrary. Yet the states' existence reminds one that mores and attitudes do differ from one part of the country to another. So, too, do laws and institutions. The federal Constitution and federal laws place limits, of course, on the extent to which local customs may prevail. But to the extent that federalism permits diverse manners and mores to flourish, it encourages idiosyncracies, experimentation, and self-expression, not unlike the way in which the First Amendment operates to promote an open society.

Perhaps the ultimate value underwritten by federalism is the right of choice. No value is more basic to self-government. Federalism reinforces this value—and does so at levels of government, closer to the people, where choices are more likely to be effective and to have meaning.

Anyone who has studied American history would be foolish to deny the ills perpetuated by states and localities, especially upon unpopular racial, religious, or other minorities. But the remedy for such wrongs is judicial enforcement of such constitutional guarantees as the Fourteenth Amendment's equal protection clause and congressional enactments under such provisions as section 5 of the Fourteenth Amendment.

Guarding against abuses of citizens' rights by states and localities does not entail abandoning federalism as a constitutional value. Federalism—like the separation of powers and checks and balances—is one of the structural devices to protect American liberties.

A Supreme Court Case

One would expect the Supreme Court, in interpreting the Consitution, to take such an institutional protection seriously. The Court doubtless took federalism *too* seriously in the pre-1937 days of "dual federalism." In that era, the Court seemed all too prepared to use federalism, as it used the due process clause, to write the justices' economic and social philosophy into the Constitution.

One need not ask for a return to the "old Court"—certainly not to that Court's restrictive view of the capacity of nation and states respectively to regulate the private sector—to ask the Court to show some sensitivity to federalism as a constitutional value.

An egregious sample of insensitivity is the Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*. In that case, five justices concluded that if the states "as states" want protection within the constitutional system they must look to Congress, not to the courts.

Garcia neglects history and principle, and it betrays a myopic understanding of the political process. Whatever one may think of *Marbury v. Madison* (over which debate is by now surely academic), it is hard to escape the conclusion that, assuming the legitimacy of judicial review, limiting national power in order to assure the states' ability to function is as much a proper judicial function as any other issue. Moreover, *Garcia* clashes with the principle, fundamental in our constitutionalism, that no branch of government should be the unfettered judge of its own powers.

Garcia rests on erroneous assumptions about the ways in which the nation's political process actually works. Justice Blackmun, writing for the majority, sees the states as having ample protection in

(Continued on p. 49)

Tony Griff

Robert W. Bennett

Separation of Powers in Foreign and Domestic Contexts

Separation of powers—the division of our federal government into its three branches, the executive, the legislature, and the judiciary—is one of the two great structural principles of our federal constitutional system. The other, of course, is federalism, the division of sovereignty between federal and state governments. Separation of powers is often said to be the horizontal division and federalism the vertical.

Most of the recent separation of powers litigation, especially in the Supreme Court, has involved conflicts between Congress and the Executive in domestic matters, while a strong case can be made that those problems are trivial compared to problems of the division of functions with regard to foreign affairs. The controversy surrounding the Reagan administration's initiatives with regard to Iran and the Nicaraguan Contras, for instance, is in large measure one about separation of powers.

Litigation is not the only way—it is seldom the best way—to resolve any sort of problem, very much including problems of the division of governmental authority. In this case, however, what the Supreme Court has said about separation of powers in domestic contexts may unduly complicate resolution of the more serious problems in foreign affairs.

Efficiency v. Freedom

One way of conceptualizing many separation of powers problems is as the clash between efficient government and limited government, and it is best that that clash be made explicit early. Division of labor has long been recognized as a powerful engine of efficiency, and efficient operation of government was cited from the earliest days of our Republic as one virtue of separated powers. The dominant theme in justifying separation of powers, however, has been the enhancement of individual liberty through the dispersion of governmental power. As Madison put it in the 47th Federalist paper, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

The two goals will often exist in some tension with one another. For part of the idea of dispersing power is to ensure in some sense that government is weak. This will surely result in its doing some quite commendable things rather inefficiently, as a corollary of the design of making it weak in those things that threaten individual liberty. This tension becomes particularly telling when we turn to foreign affairs.

Before dealing with some of the recent cases, one further ambiguity about the separation of powers deserves attention. As the principle is carried out in our Constitution, the term "separation of powers" is something of a misnomer, because the constitutional design is clearly one of a substantial intermingling of powers. Powers are dispersed, but not really separated, at least into any very tidy compartments. Examples of this intermingling are undoubtedly familiar. The president—the executive—is constitutionally directed to recommend legislation to the Congress, which is the only body that can enact it. And any legislation requires executive assent, or at least withholding of the veto. The president is thus far from a passive vessel into which the legislature's laws are poured for later use in something called "execution" of the law.

Other examples of intermingling abound. Both Congress and the president are assigned functions with regard to the foreign relations of the country. The Congress is given the power to "provide for the common Defense . . . of the United States," to "regulate Commerce with foreign Nations," to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against" international law, to "declare war," to "raise and support armies" and "provide a Navy," and to "provide for calling forth the Militia to . . . repel Invasions." The president, on the other hand, is to be the "Commander in Chief of the Army and Navy . . . and of the Militia." He is given the authority to appoint our ambassadors to foreign countries and make treaties, both with the advice and consent of the Senate, and to receive the ambassadors of foreign countries.

How Separate?

This intermingling of functions combines with another feature of the three constitutional "powers" to create many of the most interesting separation of powers problems. That other feature is the conceptual difficulty of defining separate functions for the three branches. Articles I, II, and III of the Constitution deal respectively with "legislative powers," "the executive power," and "the judicial power," and it is easy enough to say the

"Looks as if the clean-air crowd turned out in force."

Drawing by Mischa Richter © 1987 by The New Yorker Magazine

legislature makes the rules, the executive enforces or executes them, and the judiciary decides disputes that arise under them. That is the conventional way in which the three powers are distinguished. While this scheme is surely helpful, distinctions among the three powers are a good deal harder to understand than the scheme lets on.

Resolving disputes under law requires the articulation of reasons, and those reasons should be ones the judge is prepared to apply in subsequent disputes. As a result, the judiciary in a very real sense makes "law" for the future in the process of adjudication—common law, as it is usually called after the English court system in which this judicial lawmaking initially flowered.

Similarly, the enforcement of law requires the interpretation of it, interpretation almost inevitably requires policy or value choices, and these often come in the form of rules, so that the executive function also involves promulgations that are often difficult to distinguish from the promulgated laws that legislatures make. In addition, execution of the law entails a multitude of decisions that closely resemble adjudication, the resolving of particular disputes. And, just to complete the circle, legislation is typically prompted by specific problems, and often by perceptions that the execution of law or adjudication under it has been carried out badly. Investigations will often be necessary in preparation for legislation, and those investigations may resemble adjudications in some respects.

The three powers are thus not hermetically sealed categories, either in theory or in constitutional design. Yet a law of separation of powers would seem to require some theoretical structure by which one can tell if a given exercise of power is beyond the power of the exercising branch. And that is what the Supreme Court has been groping for in a number of recent decisions. Two in particular give the flavor of the Court's recent activity in this area.

Congressional Vetoes Held Unconstitutional

In 1983, in *INS v. Chadha*, the Supreme Court faced the question of the constitutionality of the congressional veto. This is a device that the Congress had increasingly employed in recent years to control what it perceived to be executive encroachments on its prerogatives. Under these provisions, executive action under some laws could be overturned by congressional disapproval, and often by the disapproval of just one house of the Congress.

The problem in *Chadha* involved the Immigration and Nationality Act, under which the attorney general could conclude that a particular deportable alien should *not* be deported in cases of "extreme hardship." The attorney general said that Chadha should not be deported, and, as the act required, reported that conclusion to the Congress. Under the Act, any such determination by the attorney general could be overridden by a resolution of *either* the House or the Senate. The House passed such a resolution, and Chadha, now subject to deportation, challenged the one house veto provision, without which he would still have been under the protective ruling of the attorney general.

Chief Justice Burger wrote the majority opinion holding that the congressional veto provision of the Immigration and Nationality Act was unconstitutional. He relied upon the presentment clause and the bicameralism requirement of Article I of the Constitution. Article I, section 7, clause 2 says that "every bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States [for his action of approval or disapproval]." There is no doubt that the constitutionally required procedure for a typical piece of legislation is action by a majority of each house and concurrence of the president or an appropriate override of his veto. The question then becomes whether the veto of the non-deportation decision is such a

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piece of legislation, for, as the chief justice recognized, "not every action taken by either House is subject to the bicameralism and presentment requirements." Impeachment of an executive or judicial officer by the House, for instance, requires neither presentment nor bicameralism. The Court decided that the House's action with regard to Chadha was an exercise of the legislative power to which the bicameralism and presentment requirements attached, because it "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."

Justice White's dissent in *Chadha* placed heavy emphasis on the relationship of the congressional veto device to the congressional practice of delegating authority to the executive or to so-called "independent agencies," like the Securities and Exchange Commission, or the Interstate Commerce Commission, the Food and Drug Administration, or the Federal Reserve Board, which also alter "the legal rights, duties, and relations of persons outside the legislative branch." One reason for such delegation is that Congress now deals with so many more subjects, and passes so much more legislation than it did in 1787 that it would be impossible for its members to keep current on the array of subjects about which it legislates. The result has been delegation to the executive, and to a variety of agencies that are not directly answerable to the executive, the "independent" agencies. The Court has long held that such delegation is permissible as long as the delegatee is given sufficient guidance in the legislation that its discretion is not entirely at sea. If the veto of Chadha's permission to stay is an exercise of the legislative power that can be undertaken only in accordance with the presentment and bicameralism requirements, why, Justice White asked, can legislative authority be delegated to the executive or to independent agencies, which do not have to abide by those constitutional procedures.

Justice White saw the congressional veto as Congress's response to the "Hobson's" choice of abdicating its law-making function, or refraining from delegating altogether, thus "leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape."

Chadha has thus resurrected the issue long thought settled of whether delegation *itself* offends the constitutional separation of powers. In the hands of independent agencies in particular, the exercise of delegated powers by an agency not directly answerable to the Congress or to the president is hard to see as an exercise of either the constitutional legislative or executive power, or the judicial power, since each of those is vested elsewhere by one of the first three articles.

Automatic Spending Cuts Overturned

The second recent case worth dwelling upon here is *Bowsher v. Synar*, decided in 1986. The Balanced Budget and Emergency Deficit Control Act of 1985 provided that the comptroller general report to the president any conclusion he reached about projected deficits in the federal budget beyond permissible limits. The president was then charged with issuing a "sequestration" order for spending cuts in accordance with the comptroller general's report and a formula contained in the Act. After that order, the spending cuts were to take effect unless Congress took further action. Under the separate and much older statute governing the office of comptroller general, that officer could be removed by a Joint Resolution of Congress because of disability, inefficiency, neglect of duty, malfeasance, or a serious felony.

Chief Justice Burger again wrote the Court's opinion, again finding that this scheme was unconstitutional. He reasoned that the function of the comptroller general under the Act was to execute the law, and hence the provision for congressional removal of him impermissibly gave Congress control over an executive function. But any such conclusion obviously requires some basis for differentiating executive from legislative power.

The Court said that "in preparing the report, the comptroller general is to have 'due regard' for the estimates and reductions set forth in a joint report submitted to him by the Director of CBO (the Congressional Budget Office) and the Director of OMB (the Office of Management and Budget), the president's fiscal and budgetary advisor. However, the Act plainly contemplates that the comptroller general will exercise his independent judgment and evaluation with respect to those estimates. . . . Appellants suggest that the duties assigned to the comptroller general in the Act are essentially ministerial and mechanical so that their performance does not constitute 'execution of the law' in any meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."

Again Justice White wrote the principal dissent. The thrust of his opinion was that the congressional authority over the comptroller general was quite modest in fact, and that it posed no real threat to the separation of powers, or to the purposes that that principle was supposed to serve. He thus accused the majority of an unduly formalistic approach to separation of powers problems. The point, I suppose, is that the majority assumes some logically coherent constitutional division among the three powers, so that a decision of whether a given exercise of power is in one category or another is a matter of logical deduction.

I do not want to dwell unduly upon problems in *Chadha* or *Synar* or in reconciling the two. One can certainly agree with Justice White's assessment that the Court's attempt at a coherent scheme separating powers is unduly formalistic and yet sympathize with the Court's problem in trying to come up with dividing lines between the three functions. Those dividing lines are elusive, and yet without them there can't be any very satisfactory law of separation of powers. Without dividing lines the Court would be driven to case by case decision about whether a given action was executive or legislative, or perhaps would have to withdraw from such decisions altogether. The latter possibility, which as appealed to some commentators, I find particularly distressing. Recall the justification for judicial review in *Marbury v. Madison*, that the Constitution is law, and as courts of law the federal courts are bound to apply the constitution in cases before them. There is no apparent reason why that justification is not equally applicable to separation of powers provisions of the Constitution, and to ignore it in that context seems to me to run the danger of undermining the respect the Constitution has achieved as law.

Foreign Affairs

Recognizing the difficulty in fashioning dividing lines between governmental powers, I think the Court has stumbled badly in its recent separation of powers decisions, largely because of the problems it has caused in trying to fashion separation of powers accommodations in the foreign policy context.

There is a certain irony in the recent decisions. Most commentators view the growth of executive power as the major deviation from the original design of separated powers. The other principal contender is the growth of judicial power. The growth of legislative power is sometimes depicted as impinging on individual prerogatives, but the legislature is seldom thought to have acquired power at the expense of the executive. Yet in both *Chadha* and *Synar* the Court has struck down congressional attempts to assert a degree of control over executive ability to manipulate legislative actions. Purely in policy terms it is hard to see why the accommodations worked out in the legislation challenged in those two cases is offensive to the values that inspired separation of powers concerns. The net result of the Court's intervention has been to enhance the executive's bargaining chips in the legislative arena, perhaps serving the cause of efficient government, but certainly not making any discernible contribution to dispersed and hence limited government.

While the Court's attention has been focused on this domestic context, moreover, the real crisis in the modern American presidency is probably in foreign affairs, not domestic. It was foreign affairs that soured Jimmy Carter's presidency, and it is foreign affairs—mainly the Iran-Contra affair—that has shown how naked is the man now holding that high office, who before stumbling over foreign affairs, had one of the most incredible records of accomplishment and the most consistent record of popularity of any president within memory. It thus might be fit to judge the Supreme Court's recent decisions not in terms of the domestic context in which they arose, but in terms of their implications for the conduct of foreign affairs, where the most serious separation of powers problems might be thought to lie.

It seems to be generally assumed that the president has a special role with regard to foreign affairs. I do not want to challenge that conclusion, but I do think it is worth asking why the conclusion seems so clear. In a speech delivered to the Federalist Society on January 30 of this year, Vice President Bush said that the nation's founders "sought to focus the conduct of foreign policy on one man—the president—so we as a nation. . . . could act quickly, decisively and, when necessary, secretly to achieve his goals abroad. . . ." He acknowledged a congressional role, but characterized that role as "political," not "regulatory."

I will leave it to the historians to judge whether the vice president has his history right, but there is little in the language of the Constitution to support the assertion of executive primacy in foreign affairs. If you recall the various provisions I mentioned earlier, there is much more constitutional ink devoted to congressional foreign affairs powers than to presidential ones. If there is a justification for large executive power over foreign affairs, it is more likely a functional one, one heavily influenced by modern developments, the speed of modern communications and transportation, the destructiveness of modern weaponry, and the interrelatedness of modern national economies.

Much of any justification for executive prerogatives in foreign affairs must rest on the desirability of the country speaking with one voice, and on the frequent need for secrecy. In domestic affairs the typical unit of discourse is the individual, and domestic policy can be seen as the attempt to accommodate and reconcile the diverse interests of the nation's individuals. Conceived in this way, secrecy is at war with the proper functioning of our government, for individual interests can be taken into account only if they are first informed and then understood. Both require open communication, which is probably why freedom of speech and press have assumed such a central role in our constitutional scheme.

The unit of discourse in international affairs, however, is the state, usually without explicit recognition that that state is in any sense a collection of individuals. And the case for secrecy seems, on the surface at least, more compelling in international than in domestic affairs, for a variety of reasons. We must often deal with countries which insist on secrecy in order to deal at all, countries which may not be committed domestically to openness in the way we are. In addition many countries are hostile, so that secrecy will often be useful in dealing with them or with problems they pose. President Carter's decision about whether to launch a rescue mission for the hostages in our Teheran embassy is the obvious example that comes to mind.

If we work with the assumption that secrecy is important, then we at least have the start of a case for a larger measure of executive prerogative in foreign than domestic affairs. For legislatures are by definition non-hierarchical multi-member bodies, and in the case of the Congress quite large. They can act responsibly only with full information, and that poses a real danger of a breach of any requirement for secrecy.

How to reconcile secrecy in foreign affairs with openness in Congress is a great dilemma of modern America, and it can be conceived as a problem of separation of powers. The most commonly suggested resolutions of the dilemma are requirements of executive consultation with specialized committees of Congress or with committee chairmen. One can raise questions about whether such requirements for consultation give too much sway to the desire for secrecy on the one hand, or to democratic decisionmaking on the other, but there can be little doubt that they represent a compromise between the two extremes. The recent cases in the Supreme Court, however, raise serious questions of whether such requirements of consultation are constitutional. *Chadha* in particular suggests that legislative involvement in policymaking can only take the form of action that can be sent to the executive for his approval or disapproval. Both cases suggest that there is a dividing line between the respective functions of the legislative and executive branches that cannot tolerate the kind of mingling that any requirement of consultation involves. The point is not that consultation is impermissible. The president can presumably consult with anyone he likes, in the legislative branch, or elsewhere. But legislative involvement in secretive matters of state can likely be assured only if the consultation is mandatory, not optional, and that is exactly what *Chadha* and *Synar* cast into doubt.

It may be that the law here is not so important. Perhaps faced with a requirement of consultation or even of approval by some body of fewer than all the Congress, the president will comply even though a constitutional argument might be available that he need not. After all England purports to have constitutional government, without even a written constitution, let alone judicial review.

But law, very much including constitutional law, matters very much in the United States, and I fear that the law of separation of powers has disabled rather than facilitated our coming to grips with our most serious separation of powers problems. Much as I sympathize with the Court's problem in coming up with a workable regime of separation of powers law in the domestic context, I do not think it has pursued that enterprise with sufficient attention to where the most serious problems lie. □

1925

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Separation of Powers

A Clash of Giants/Secondary

This activity gives students extensive background on a major question about the powers of the branches of government. Through the case study method, students have the opportunity to weigh the issues and come to a decision.

The branches of the federal government are separate but far from isolated. Their functions overlap at many points, leading inevitably to friction about which branch is to perform which function. For the most part, the branches co-exist well, but every now and then there is a cataclysmic battle, in which the balance of power is in question.

One such battle took place during the Korean War, when President Harry Truman, acting under powers he said were implicitly given him under the Constitution, nationalized the steel mills to keep them running and keep the nation's fighting forces armed.

Opinion was sharply divided. Some said the president was acting within his powers during a national emergency. Others said that he was usurping the powers of Congress and violating sacred principles of separate powers.

Ultimately, the third branch of the government—the Supreme Court—was called in to settle the dispute under the Constitution.

Background

The Korean War was being fought to a bloody standstill late in 1951. Although the war was called a police action under the authority of the United Nations, the United States was the primary source of soldiers and equipment used to fight the North Koreans and their Chinese Communist allies.

A very important part of the war effort was the production of steel for weapons. In the latter part of 1951, a dispute arose between the major steel companies and their employees over terms and conditions that should be included in a new collective bargaining agreement. Lengthy conferences failed to resolve the dispute, and in mid-December the employees' union gave notice of its intention to strike when the existing labor contracts expired on December 31. The federal government intervened in hopes of bringing a settlement, but all efforts were unsuccessful. On April 4, 1952, the union gave notice of a nationwide strike called to begin at 12:01 a.m. on April 9. Steel was indispensable as a component of substantially all weapons and other war materials. That fact led the president to believe that the proposed work stoppage would immediately jeopardize the national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for this action, the president, a few hours before the strike, was to issue Executive Order 10340, which directed the secretary of commerce, Charles Sawyer, to take possession of most of the steel mills and keep them running. The secretary immediately issued his own orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions from the secretary. Sawyer would prescribe working conditions and wages, as well as collective bargaining procedures. The mills would be returned to their owners as soon as the labor disputes had been privately settled and continued steel production was assured.

On April 9, and again 12 days later, President Truman sent messages to Congress reporting his action. Congress itself took no official action, but general reaction to the president's order was intense.

Under protest, the steel companies obeyed Secretary Sawyer's orders. At the same time the companies, led by Youngstown Sheet and Tube Co., brought proceedings against him in federal court. The steel companies charged that the seizure was not authorized by an act of Congress or by any constitutional provisions. The district court was asked to declare the orders of the president and the secretary invalid, and to issue preliminary and permanent injunctions restraining their enforcement. Opposing the motion for preliminary injunction, the United States asserted that a strike disrupting steel production for even a brief period would endanger the well-being and safety of the nation, and that the president had "inherent power" to do what he had done—power "supported by the Constitution, by historical precedent, and by court decisions."

Because of the importance of the issues raised and the urgency that they be settled, the case went all the way to the Supreme Court, which heard the case on May 12, 1952.

Decision

The critical question before the Court was whether the seizure order was within the constitutional power of the president. In a 6 to 3 decision, the Court answered no. Mr. Justice Black wrote the majority opinion and explained his concept of the separation of powers. In part he said:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes (201(b) of the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."
>
> Moreover, the use of the seizure technique to solve labor disputes, in order to prevent work stoppages, was unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently, it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective

bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. . . .

It is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "the executive Power shall be vested in a President..."; that "he shall take care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States". . . .

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . .The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. Even if this be true, Congress had not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

The Founders of this Nation entrusted the lawmaking power to Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

The Dissent

The three justices who dissented emphasized the national defense emergency and the actions of past presidents. In part they said:

In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised.

Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict. . . .

...As an illustration of the magnitude of the overall program, Congress has appropriated $130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea. . . .

One is not here called upon even to consider the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant. Such considerations arise only when one ignores the central fact of this case—that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure. Even ignoring for the moment whatever confidential information the President may possess as "the Nation's organ for foreign affairs," the uncontroverted affidavits in this record amply support the finding that "a work stoppage would immediately jeopardize and imperil our national defense."

...The Union and the Steel companies may well engage in a lengthy struggle. Plaintiff's counsel tells us that "sooner or later" the mills will operate again. That may satisfy the steel companies and, perhaps, the Union. But our soldiers and our allies will hardly be cheered with the assurance that the ammunition upon which their lives depend will be forthcoming—"sooner or later," or, in other words, "too little and too late."

Accordingly, if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case. . . .

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval. . . .

Without declaration of war, President Lincoln took energetic action with the outbreak of the Civil War. He summoned troops and paid them out of the Treasury without appropriation therefore. He proclaimed a naval blockade of the Confederacy and seized ships violating that blockade. Congress, far from denying the validity of these acts, gave them express approval. The most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the Civil War, but wholly without statutory authority.

In an action furnishing a most apt precedent for this case, President Lincoln directed the seizure of rail and telegraph lines leading to Washington without statutory authority. Many months later, Congress recognized and confirmed the power of the President to seize railroads and telegraph lines and provided criminal penalties for interference with Government operation. This Act did not confer on the President any additional powers of seizure. Congress plainly rejected the view that the President's acts had been without legal sanction until ratified by the legislature. . . .

Strategy: The Case Method Approach

Why?

The case study allows students to grapple with real issues, to reach and support a decision, and to weigh the consequences of that decision. In approaching a problem through a case study, the student will gain practice in all levels of thinking from simple recall to evaluation.

How?

Provide students with the facts, only, of the case. Use questions and role playing, to identify the issue(s), develop arguments, and reach a decision. Or have students examine the facts of the case and them give them excerpts from the unmarked majority and dissenting opinion in the case. After giving the unmarked opinions, ask the students to summarize the different opinions in this case:

- Which opinion, if any, do they agree with, and why?
- Which opinion do they believe was the majority opinion?
- Which opinion was the minority? Explain.

Identify the majority and dissenting opinions, and ask the following: What is the likely impact of this case? How might the decision affect the balance of power in this case? How might it affect future presidents?

Next, provide students with the court decision. Use questions and discussion to compare and contrast their decision with that of the Court and to consider the implications of the Court's decision.

YOUNGSTOWN STEEL

Facts

What are the important facts: What is the major conflict, and who are the parties to the case? Why were the steel mills nationalized? What national emergency was facing the country? Who nationalized them, and why? What was the response of the owners of the mills? of the unions? What was the involvement of Congress?

Issues

What are the legal issues in this case? What constitutional issues are raised? Did the president have the right to nationalize the mills? If so, what law or provision of the Constitution gave him the right? Did this action alter the balance of power among the branches?

Arguments

What are the arguments favoring the steel company's position? What are the arguments favoring the government's position?

Decision

Should the Supreme Court review the case? Why? How would you decide this case?

This activity has been adapted from the teacher's guide to The Constitution—Creation, Growth, and Change, *which was created by Law in a Changing Society and published by the Law Focused Education Project of the State Bar of Texas.*

Courts and the Constitution

Will the Court Hear This Case?/Secondary

Law in a Changing Society

Here is an activity for one class period that will help students understand that the Supreme Court's jurisdiction is limited.

Procedure

Distribute copies of "Access to the Supreme Court." After the students have had time to read the handout, form small groups of four to six. Distribute copies of "Will the Court Hear This Case?" Tell the students to complete the activity through group discussion and by following the instructions at the top of the page. Conclude with a brief comparison of the various group responses. Although there are several "right" answers possible for each situation depending upon additional facts assumed, a guide to some expected answers follows. During the discussion of these situations it would be useful to remind the class that most of the limits on access to the Supreme Court are self-imposed or subject to interpretation by that body. The Court has the means to hear almost any case it truly wants to hear and decide.

Access to the Supreme Court

Have you ever heard someone declare, "Why, I'll take my case all the way to the Supreme Court!"? If you have, you, like the speaker, probably realized that the threat was more an expression of the person's commitment to the righteousness of his side than it was a statement of likely fact. Very few cases go all the way to the Supreme Court. There are a great many reasons for this. Some are imposed by the Constitution, some by the Court itself, still others by the emotional and economic realities of litigation (the process of carrying on a lawsuit, through which legal rights are sought to be determined and enforced). There are millions of criminal and civil cases begun in the state and federal courts each year. Of these the Court hears oral arguments in less than 180 cases. Each year the justices write formal opinions in 125 to 150 cases. How does the Court decide which cases to hear and decide?

Article III of the Constitution not only creates the Supreme Court but it also describes the kinds of cases that the Court can hear. The Supreme Court has very little original jurisdiction (the authority a court has to be the first to hear a case). That means very few cases are heard first by the Supreme Court. In fact, the Court has exercised its original jurisdiction only about 135 times in its whole history. The vast majority of the Court's work, then, is appellate (the authority to review the law as applied to a prior determination of the same case). So the first limit on access to the Supreme Court is that a case ordinarily must be tried by one or more state or lower federal courts before the Supreme Court will consider it. The United States Congress may also limit access to the Supreme Court by limiting the kinds of cases that the Court may hear on appeal. An important power of the Congress is to define the type of case which may be appealed to the Supreme Court.

Another limitation is found in Article III, section 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admirality and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.
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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Supreme Court, like other federal courts, will only hear "cases" and "controversies." These are technical terms that refer to real disputes in which the legal interests of two or more persons are in collision. Because of this rule, President George Washington was denied access to the Supreme Court when he asked the justices to give him advice on a foreign policy problem. Ever since then the Supreme Court has been unwilling to offer its advice or answer hypothetical, academic, or abstract questions in formal advisory decisions. Similarly, the Court will not decide a case that is moot. A moot case is one that involves a pretended controversy or one in which the Court's judgment would have no practical effect upon the existing controversy. A classic example of a moot question is, "Which came first—the chicken or the egg?"

Access is limited for many people because they lack "standing" to sue. This phrase refers to the long-established rule that one must have a direct, personal interest in a case before he can sue. One may not sue simply to protect the legal rights of the public at large. Rather, to have standing, one must show that he has suffered some direct injury or that the exercise of his personal rights are at issue. With rare exceptions the Court will not hear cases where a citizen claims standing to sue as a taxpayer unhappy with the way his taxes have been spent.

Timing is very important in determining whether the Supreme Court will hear a case. Before one may go to the federal courts for relief, all administrative hearings must have been concluded. The Supreme Court will only hear a case if it is "ripe" for a decision. That means that if the question can be decided by another body, that body must have had the opportunity to settle the issue. Another aspect of the ripeness limitation is that there should be access to lower federal courts unless the threat of harmful governmental action is immediate. The Supreme Court will not hear a case that involves a fear of adverse governmental action against someone in the future.

Another rule developed by the Supreme Court which limits the cases it will hear is the rule against deciding a "political question." The Court has described a political question as one whose settlement is the constitutional duty of one of the other branches of government, or which presents a problem in a field where one of the other branches has greater knowledge, or which presents an issue which is not one which the courts could handle. One difficulty with the political question limitation is that the Supreme Court has not been consistent in its designation of some issues as political. Also, there is often a thin line between the legal and political aspects of important issues heard by the Supreme Court.

Since 1925 the Supreme Court has had the authority to select the particular cases it will hear. An informal rule of the Court dates from that time. It is the "rule of four" and means that four justices must want to hear a case before it will be reviewed. Although there are some cases which automatically are sent to the Supreme Court by law, most cases are required to pass the rule of four.

When the justices are deciding whether to hear a case, other informal but long-observed rules operate. Cases which involve matters which are purely local in nature, affect only a few people, or fail to raise any serious question of federal or constitutional law are usually dismissed.

The final limits to access to the Supreme Court involve economic and emotional considerations. Even though the Supreme Court has lowered many of the economic barriers to litigation and there are private groups which sponsor and help pay for litigation, the cost of taking one's case all the way to the Supreme Court remains high. Additionally, there are intangible emotional considerations that often make a litigant end the pursuit of his case even when the outcome is not his liking and there are grounds for appeal. Persuing a case on appeal takes time and effort as well as money. Many litigants decide that whatever might be gained is not worth the effort of continuing the litigation. Other litigants find that they are sufficiently satisfied with the ruling of a lower court and so their appeal is dropped in favor of a verdict which establishes an acceptable compromise solution to the conflict. Still other litigants discover that there are no legitimate legal grounds on which they might appeal.

"I'll take this case all the way to the Supreme Court!" Yes, it is possible. However, if the case is decided by the highest court in the United States, it will be the exception. The Supreme Court hears only a very few cases when measured against all the cases begun each year, but the cases it does decide are the toughest and its decisions resolve, if but for a time, the most important legal questions before the nation.

Will the Court Hear This Case?

Read each item below. Discuss it and decide whether the Supreme Court would likely hear such a case. If the answer is no, decide which of the limits on access to Supreme Court review applies and write that rule or reason in the space provided.

I. A man says he was denied his Sixth Amendment right to have a lawyer when he was arrested and convicted of burglary. He was released from prison after the completion of his sentence last year.

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II. A disgruntled woman is tired of hearing about welfare cheaters. She wants the Court to hear her case, arguing that her tax money should not go to people whom she believes ought to be forced to take a job.

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III. An employee of the Internal Revenue Service was fired. Not believing that he could receive a fair hearing within the agency, he wants to appeal his firing directly to the Supreme Court.

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IV. A state has banned the killing of an animal found only in that state. A group of hunters object to the law. They want the Supreme Court to declare the law unconstitutional.

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V. Several members of Congress request the Supreme Court's opinion on the wisdom of a proposed treaty with a foreign country.

VI. A publisher wants to appeal the case he lost in all the courts in his state. He says the law under which he is being punished makes it a crime to criticize the state's governor. The publisher believes the law is an unconstitutional violation of his First and Fourteenth Amendment rights to free speech and press.

VII. A case involving the Fourth Amendment's guarantees against unreasonable search and seizure has captured the interest of two Supreme Court justices. The other seven, however, say that the issue raised in this current case was decided by the Court several years ago.

VIII. The Supreme Court has been requested to decide whether a newly-independent country ought to be recognized by the United States.

IX. A middle-class couple would like to continue their appeal but no interest groups or other organizations want to support their appeal. Three of the couple's children are in college and must be supported financially.

X. A woman believes she should not have been fined for double parking on a downtown street of a major city. She wants to take her case all the way to the Supreme Court.

XI. Congress has passed a law forbidding the Supreme Court to hear appeals concerning school integration. A group of parents has lost its suit challenging segregation in a local school district. They want the Supreme Court to decide the issue.

XII. A new law has been passed that will require banks to routinely send all records of their customers' checking accounts to the Internal Revenue Service. Even though he has no checking account and the law will not go into effect for three months, a young man sues in hopes that the Court will declare the law to be an unconstitutional violation of his rights to privacy and protection against self-incrimination.

XIII. Texas has sued Oklahoma over water rights. The states believe that the Supreme Court should decide the issue.

SUGGESTED ANSWERS

I. No. The case became moot when the man finished his sentence.

II. No. The woman lacks *standing* to sue.

III. No. The case is not *ripe*.

IV. No. No substantial federal or constitutional question is likely involved.

V. No. The Court will not give an advisory opinion.

VI. Yes. This presents an important constitutional question. A case may be appealed directly to the Supreme Court after the highest state court has heard it. Still there is no absolute guarantee that the Court will agree to hear the case.

VII. No. The rule of four would doom this case even though it involves an important constitutional question.

VIII. No. This is a *political question*. Only the president can recognize another nation by receiving its diplomatic representatives.

IX. No. The economic realities of further litigation would probably force the couple to accept the lower court's judgment.

X. No. For many reasons the Court would not likely hear this case. The reasons could include no substantial federal or constitutional issue, lack of ripeness, the rule of four, as well as whether the woman would really want to devote as much money and time and effort as would be required to continue the appeal.

XI. No. Congress has the constitutional right and power to limit the Supreme Court's appellate jurisdiction (See Article III, Section 2, Clause 1).

XII. No. The issue is not ripe.

XIII. Yes. If the Court wants to exercise its original jurisdiction, it could be the first and only court to hear this case. The Supreme Court's original jurisdiction is not, however, exclusive; and many cases which come under this category are heard by lower federal courts.

This article is taken from the teacher's guide to The Supreme Court—A Vital Institution in American History *which was created by Law in a Changing Society and published by the Law Focused Education Project of the State Bar of Texas.*

Equality

The Right to Vote: Giving New Meaning to "We the People"/Secondary

Steve Jenkins

> An accurate view . . . would prove that property is the main object of society. . . . Men don't unite for liberty or life. . . . They unite for protection of property. . . . Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them.
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> Gouverneur Morris

> You require that a man shall have sixty dollars' worth of property, or he shall not vote. Very well, take an illustration. Here is a man who today owns a jackass, and the jackass is worth sixty dollars. Today the man is a voter and he goes to the polls an deposits his vote. Tomorrow the jackass dies. The next day the man comes to vote without his jackass and he cannot vote at all. Now tell me, which was the voter, the man or the jackass?
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> Thomas Paine

One of the great ironies of history is the fact that a formidable few, many with elitist, exclusionary, anti-democratic views, like Gouverneur Morris, would develop our United States Constitution that is so often embraced as representing and protecting the rights of the masses, of "We the People." The views of the delegates to the Constitutional Convention more often reflected those of Morris than of Paine. Not only was Paine not invited, his name and influence are no where to be found in the records and commentaries on the Convention, except perhaps in the pro-populace sentiments of Paine's long-time friend, Benjamin Franklin. Franklin chastised the elitist views, reminding the delegates, "It is of great consequence that we should not depress the virtue and public spirit of our common people, of which they displayed a great deal during the war and which contributed principally to the favorable issue of it." With the exception of Franklin and a handful of other delegates, most of the framers viewed democracy as dangerous, and interpreted "We the People" very narrowly.

Roger Sherman, a lawyer and delegate from Connecticut, said, "The people . . . should have as little to do as may be about the Government. They lack information and are constantly liable to be misled." Delegate Elbridge Gerry of Massachusetts and of later "gerrymandering" fame warned, "The evils we experience flow from the excess of democracy." Such sentiments abound in the records of the Convention. Even the final draft of the Constitution excluded all but the "whole number of free persons" to be counted for purposes of apportioning representation. The Constitution specifically excluded "Indians" and counted slaves as "three-fifths of all other persons" (see Article I, section 2).

Ask a student or a person on the street, "Does the Constitution guarantee your right to vote?," and the response will likely be "absolutely." If you then ask, did the framers of the Constitution intend to grant this fundamental freedom to your ancestors, the answer becomes much more complex.

As we celebrate the bicentennial of the Constitution, it is important to examine the historic struggle to expand the franchise, to insure the right of "We the People" to make our vote and voice count. When the Constitution was signed, the only people permitted to vote in most states were free (not slave or indentured servants), white, male, property owners over twenty-one years of age. A careful reading of the Constitution and the deliberative debates of the Convention may lead one to conclude that the framers intended to limit this precious right (see the article by the Hon. Thurgood Marshall elsewhere in this issue).

The right to vote is seen as a cornerstone of democracy. Yet the U.S. Constitution contained no broad guarantee of the right to vote. In the absence of any expressed declaration of voting rights, the power to establish qualifications for voting has been basically reserved for the states. Constitutional references to voting qualifications and elections are limited (see Article I, sections 2, 3, 4 and 5; Article II, section 1). The dominant message of these passages is found in Article I, section 4—"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators. . . ." Clearly each state legislature has the power to establish its own qualifications for voting. This power meant some states had fewer requirements and more eligible voters than neighboring states with more restrictions.

In addition to being free whites males over twenty-one years of age, the following were the voter qualifications of states participating in the Constitutional Convention:

CONNECTICUT: Owners of 40 pounds of personal property or land bringing an annual income of 40 shillings.
DELAWARE: Owners of 50 acres of land with 12 acres cleared and improved or persons worth 40 pounds.
GEORGIA: Owners of property worth 10 pounds.
MARYLAND: Owners of 50 acres of land or persons worth 30 pounds.
MASSACHUSETTS: Owners of land worth 60 pounds or bringing in an annual income of 3 pounds.
NEW HAMPSHIRE: Property owners and taxpayers.
NEW JERSEY: Persons worth 50 pounds.
NEW YORK: Owners of land worth 20 pounds—an exception gave the vote to all freemen living in Albany and New York City before October 14, 1775.
NORTH CAROLINA: Owners of 50 acres of land to vote for the state senate; taxpayers for the lower house of the legislature.
PENNSYLVANIA: Free male taxpayers.
SOUTH CAROLINA: Owners of 50 acres or person paying the equivalent to taxes on 50 acres of land.
VIRGINIA: Owners of 25 acres of improved land or 50 acres of unimproved land and "certain artisans residing in Norfolk and Williamsburg."

While many of the framers may have intended to limit the right to vote or to reserve that decision to state governments, the Constitution provided the means for extending the right to vote to the disenfranchised classes. We the people can amend the Constitution, persuade Congress to pass voting rights laws, seek relief through the courts, or change state laws or constitutions. All of these means have been used to make "We the People" more universal. No other aspect of the Constitution has been changed as much as provisions protecting the right to vote. Seven of the twenty-six amendments address the issue:

Fourteenth Amendment (ratified, 1868)	Punished states that denied newly freed slaves the right to vote.
Fifteenth Amendment (ratified, 1970)	Extends the right to vote to black males.
Seventeenth Amendment (ratified, 1913)	Permits voters to directly elect U.S. Senators.
Nineteenth Amendment (ratified, 1920)	Extends the right to vote to women.
Twenty-Third Amendment (ratified, 1961)	Extends the right to vote to qualified persons living in the District of Columbia.
Twenty-Fourth Amendment (ratified, 1964)	Protects the right to vote of persons who cannot afford to pay a poll tax.
Twenty-Sixth Amendment (ratified, 1971)	Extends the right to vote to persons eighteen or older.

Classroom Strategy

Review the information above and answer the following questions:

1. Identify the groups of persons (e.g., Native American-Indians) denied the right to vote at the time of the adoption of the U.S. Constitution.
2. Why do you believe this group was denied the right to vote?
3. What changes in society may have led to the extension of the right to vote to each group?

Answers to Classroom Strategy

The answers below present a more comprehensive analysis than students are likely to offer. As an enrichment activity, the teacher may wish to assign students to do research on specific disenfranchised groups regarding the group's struggle and achievement of the right to vote, and to report the findings to the class.

To assist students in answering Question 2, the teacher may wish to ask them to answer the following: Why would some government leaders want to deny this group the right to vote?

In response to Question 3, some students may simply answer "times change." More appropriate answers should reflect some analysis of these changes. One means of assisting students in answering this question is to ask them to review their responses to Questions 2, and then describe some things that might be necessary in order to change the reasons why the vote was denied to each group.

1. a. Non-property Owners
   b. Black Americans
   c. Women
   d. Native Americans
   e. Youth (Persons under 21)

2. a. *Non-property Owners*

Many political leaders of the newly formed United States feared "mob rule," or rule by "democrats." As John Adams warned, "If you give more than a share in the sovereignty to the democrat, then you give them command of the legislature, and they will vote all property out of the hands of you aristocrats." Or as John Jay so sharply stated, "Those who own the government ought to run the government." Many leaders feared what James Madison described in Federalist Paper No. 10, that if those without property became majority rulers, then they would "abolish debts, they would call for an equal division of property, or for any other improper or wicked project." Other political leaders feared that wealthy, sophisticated people could buy the votes of propertyless, illiterate people. These leaders believed that voting should be limited to those who had the greater investment in the community, state, and nation; in their view, this meant men of property. Many state constitutions of the era reflected these sentiments.

b. *Black Americans*

Most Black Americans were denied the right to vote because they were not recognized as citizens in most jurisdictions. As a matter of historical record, most black Americans living in slavery were considered property. This was affirmed in the famous Supreme Court decision, *Dred Scott v. Sanford*, 60 U.S. 393. Many historians believed that this case catapulted the nation into the Civil War and passage of the post Civil War Amendments (13, 14 and 15) to reversing this decision. As a result, the status of black Americans changed briefly following the Civil War, during Reconstruction. But with the withdrawal of federal troops from the South in 1877, anti-Reconstruction political forces began to regain power. As these forces became legislative majorities in various states, they began to pass legislation to disenfranchise black voters. In some areas mobs threatened black voters to keep them away from the polls. A congressional committee reported in 1892 that in some southern states, white mobs made blacks swear to vote for the mobs' candidates "upon pain of being put back into slavery, and their wives made to work on the road." As more anti-Reconstruction representatives gained power in Congress, the support for and enforcement of the Reconstruction policies and Civil Rights Acts diminished. In 1894, Congress repealed 42 of the 49 sections of the Reconstruction Enforcement Acts. A series of U.S. Supreme Court decisions between 1876 and 1906 effectively stripped black Americans of equal opportunities, including the right to vote. See, for example, *United States v. Harris*, 106 U.S. 629 (1883); *The Civil Rights Cases*, 109 U.S. 3 (1883); *James v. Bowman*, 190 U.S. 127 (1903); and *Hodges v. United States*, 203 U.S. 1 (1906). This loss is clearly demonstrated in the following example: In Louisiana in 1896, there were 130,334 blacks registered to vote. In 1900, there were only 5,320. The actions of Congress, the Supreme Court, and the lack of executive support were a reflection of attitudes of many people at the time. A cursory examination of the publications of sociologists and psychologists of the time exemplify these prejudices with phrases such as, "Negroes are uncapable of governing themselves" and "They need watching and close supervision." Discussions of intellectual inferiority based on race were common.

c. *Women*

Like blacks, women were traditionally viewed as property, without a separate legal existence, and incapable of independent thinking. And, as with other examples of unequal treatment in respect to the vote, these attitudes found their way into all branches of government. In 1874, the U.S. Supreme Court held that the denial of voting rights to women was constitutional. Virginia Minor had challenged a Missouri law that permitted only males to vote. Minor claimed that the Missouri law denied her the "privileges or immunities of citizens" as guaranteed by the newly adopted Fourteenth Amendment. Following is an excerpt from the majority opinion in this case.

> There is no doubt that women may be citizens. They are persons, and by the Fourteenth Amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." . . .
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> If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters. . .
>
> For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage.
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> Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we affirm the judgment of the court below.

Minor v. Happersett, 88 U.S. (21 Wall) 162, 22 L.Ed. 627 (1874).

d. *Native Americans*

Many people believed Native American were "uncivilized" because they kept their tribal ways and did not assume a "civilized" way of life. People also felt that Native Americans should not have the right to vote in local or state elections because many of them live on federal reservations and were not subject to state or local jurisdiction. A Minnesota case exemplifies this reasoning. In *Opsahl v. Johnson*, 138 Minn. 42, 163 N.W. 988 (1917), the court ruled, "The tribal Indian contributes nothing to the state. His property is not subject to taxation, or to the process of its courts. He bears none of the burdens of civilization, and performs none of the duties of its citizens." This argument includes the assumption that until Native Americans adopt the "habits and customs of civilization," they should not reap the privileges of civilized people, which includes the right to vote. Some states and local communities feared what might happen if large numbers of Native Americans were permitted to vote; in some communities, the majority of the voting age population was Native American. Those in power wished to maintain control of government and did not want to contend with a potentially powerful voting bloc of Native Americans. This argument was expressed as recently as 1956 in *Allen v. Merrell*, 6 Utah 2d 32, 305 P. 2d 490: "It is thus plain to be seen that in a country where the Indian population would amount to a substantial proportion of the citizenry, or may even out number the other inhabitants, allowing them to vote might place substantial control of the county government . . . in Indian hands."

e. *Youth*

Persons under twenty-one were considered too young, too immature, and not responsible enough to vote. People believed that many young people were not well informed about politics, candidates, and the community, and therefore could not cast intelligent votes. Almost all of the government leaders were much older than twenty-one and probably were not very interested in lowering the voting age below twenty-one. Persons under twenty-one were not well organized as a political force and therefore were not very effective lobbyists for lowering the voting age.

3. a. *Non-property Owners*

Not all early political leaders desired to limit voting to men of property. Gradually states changed their property requirements, and in some instances eliminated them altogether. This was particularly true of new states being admitted into the Union, and was evidenced in the presidential elections of Andrew Jackson. But many of these changes only came about after bitter struggles, and in some cases almost open rebellion. The Dorr Rebellion in Rhode Island was of particular importance in that the Dorr forces, led by one of its adherents, Martin Luther, took their case to the U.S. Supreme Court. In *Luther v. Borden*, 48 U.S. 1, 7 Howard 1, 12 L.Ed. 581 (1849), the majority of the Court ruled that the Court could not guarantee a republican form of a state's government in accordance with Article IV, section 4, of the Constitution. The Court said this was a "purely political question" that must be left in the hands of the political branches (president or Congress) of the government to decide. Gradually the strict ownership of property qualification lost favor as new forms of wealth and social responsibility emerged. Thus, some jurisdictions changed the law to permit merchants and "mechanics" to vote along with freeholders. Although property qualifications for voting declined in the 1880s, it was not until a series of U.S. Supreme Court decisions in the late 1960s and 1970s that some additional property qualifications were removed (see *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and *Hill v. Stone*, 421 U.S. 289 (1975)). However, if an electoral district (e.g., a special water storage district) exists to advance a narrowly limited purpose and if the district's decisions have a greater impact on property owners, then the special district may restrict the vote to affected property owners (see *Salyer Land Co. v. Tulara Water District*, 410 U.S. 719 (1973)).

b. *Black Americans*

In addition to the post Civil War amendments, and particularly the Fourteenth and Fifteenth Amendments, the increased participation of black Americans in all phases of society began to change attitudes and influence public policy. For example, black Americans fought in two world wars. News of their service and, in some cases, distinguished heroism were reported. Many people thought it was unfair that these Americans did not have equal opportunities, including the right to vote. Black Americans began to become more politically organized, as exemplified by the founding of the National Association for the Advancement of Colored People in 1909. In the 1920s and 1930s, many black Americans moved out of southern states into northern states where they had the right to vote. Black Americans formed political coalitions to help elect government leaders who promised to work for laws supporting equal treatment. Mass communications (e.g., television and radio) also presented news that often reported stories of injustices and discrimination against black Americans. These reports repulsed many people. Many people pointed out the inconsistency of black and white Americans fighting against Nazi Germany's racist policies while racist policies were being practiced against black Americans. Sociologists and pychologists also influenced public attitudes, publishing studies demonstrating that the poor conditions and slow progress of black Americans was the result of unequal treatment, of being denied economic and educational opportunities, of a lack of food and medical assistance. As a result of increased public awareness, changing attitudes, and the increased political power of blacks, the decisions of government leaders began to reflect these changes. Congress passed a number of civil rights and voting rights acts. Some presidents lobbied for passage of this legislation, and they used their power to enforce the federal legislation. The U.S. Supreme Court handed down decisions striking down unconstitutional segregation. The changes continued. In 1984, Congress passed another voting rights act to further strengthen the voting rights of nonwhite minority citizens throughout the nation.

c. *Women*

As early as the Continental Congress in 1776, women began to militate for economic and political rights, including the right to vote (see, for example, *Women of the Republic: Intellect and Ideology in Revolutionary America* by Linda Kerber). Most political leaders did not eagerly endorse these ideas. With westward expansion, the frontier states used suffrage as an inducement for female settlers to move to their communities. The Wyoming territory granted women the right to vote in 1869, and Utah, Colorado, and Idaho soon followed. Wyoming, which extended full suffrage rights to women while a territory, insisted on retaining equal suffrage notwithstanding the possible opposition of Congress to its statehood. The Wyoming legislature announced, "We will remain out of the Union one hundred years rather than come in without suffrage." Some women organized and worked with other groups, such as the abolitionists, to pursue equal treatment for women and black Americans. Throughout the latter half of the nineteenth century, organizations like the American Women's Suffrage Association and the National Women's Suffrage Association worked vigorously for the right to vote. These two organizations became more powerful when they joined in 1890 to form the National American Women's Suffrage Association. After women's entry into all aspects of work during World War I, the suffragettes became more militant in their efforts to secure suffrage for women. Finally, in 1919 Congress adopted the Nineteenth Amendment, which was ratified by the requisite number of states within one year.

d. *Native Americans (Indians)*

The recognition of the voting rights of Native Americans closely parallels the movement supporting civil rights of other minorities. As people became more sensitive to and aware of the plight of the Native Americans, many felt that, as the first Americans, Native Americans should have the same rights as other Americans. And even though they were the first Americans, living here for thousands of years, it was not until Congress passed the Indian Citizenship Act of 1924 that Indians were made citizens and provided an opportunity to vote in most states. Arizona still prohibitied Indians from voting by interpreting their status as "persons under disability," but finally, in 1948, the Arizona Supreme Court struck down this practice, and Native Americans were granted the right to vote. (see *Harrison v. Laveen*, 67 Ariz. 337 (1948)).

e. *Youth*

At the time of the debate regarding ratification of the Twenty-Sixth Amendment, the nation was witnessing a boom in college attendance by those under twenty-one, and many of the students appeared well informed and took active roles in confronting issues and community problems. Also during the 1960s, eighteen-year-old males had to register for the draft, and many were drafted. Some were sent to combat in Vietnam. Some said it was not fair that a person could be drafted, sent into combat, and maybe even be killed, yet was denied the right to vote. Many of the young people became active in a number of causes (e.g., to end the draft, against United States intervention in Vietnam, for civil rights, etc.). As activists, many learned how to organize and lobby government leaders. They formed coalitions with other groups and older political leaders to assist them in lowering the voting age. There was also historical precedent for reducing the voting age. In 1943, Georgia lowered the voting age to eighteen. In 1955, Kentucky lowered the voting age to eighteen. And the two new states, Alaska and Hawaii, lowered their voting age in 1959 (to nineteen in Alaska and to twenty in Hawaii). Congress also lowered the minimum voting age in state, local, and federal elections from 21 to 18 in the Voting Rights Act Amendment of 1970, although this provision was overturned in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Concluding Activities

1. Review the class answers to questions 2 and 3 above, and then think about how history might be different 200 years ago. . .
   What if non-property owners had been granted the right to vote?
   What if Black Americans had been granted the right to vote?
   What if Native Americans (Indians) had been granted the right to vote?
   What if women had been granted the right to vote?
   What if eighteen-year-olds had been granted the right to vote?
2. Review the Twenty-Sixth Amendment. Do states have the power to lower the voting age below eighteen? At what age should persons be eligible to vote, and why? Ask students to research the voting behavior of young people? Why don't more of them vote?

Steve Jenkins is law-related education director of the Bar Association of Metropolitan St. Louis. He was assisted by Nancy Eschmann of the bar association in preparing these activities for publication.

Equality

Equal Vote to Equal Voice/Secondary

Steve Jenkins

In the last two hundred years, "we the people" have made the right to vote the "great equalizer." Once a person is in the voting booth, all votes are equal. The vote of the poorest citizen is equal to the vote of the richest. While we have achieved equality in the voting booth, we have not created an equal voice for everyone in the marketplace of ideas, politics and public policy debate.

In an age of advanced technology and mass media, it is becoming apparent that the general public, the average voter, is depending more and more on political TV ads as a major source of information during campaigns. In *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), Justice Brennan warned, "The electronic media are today 'the public's prime source of information,' and we have ourselves recognized that broadcast technology . . . supplants atomized, relatively informal communications with mass media as a prime source of national cohesion and news . . ."

Classroom Strategy

Those who have the wealth and power to use the mass media, to buy massive amounts of commercial television and radio time, may very well control access to the public, and therefore manipulate the information and message the public receives. Therefore, deciding who will be the next president of the United States may be determined by those who purchase the most advertising time and space—who splash their message and image everywhere. In an effort to regulate this political process, Congress passed a Federal Fair Election Campaign Act.

This Act regulates campaign contributions to and expenditures for presidential candidates. The Act also requires public disclosure of contributions to and expenditures by a candidate, his or her campaign committee or individual expenditures on behalf of a candidate. Under the Act, no person may contribute more than $5,000 to the candidate and no committee may contribute more than $10,000. The Act limits the amount a candidate may spend to $25,000,000. Also, the candidate will be required to keep a record of all contributions and expenditures, and to submit a list of names of individuals or committees who contribute $100 or more to the campaign. These names will be filed with the federal government and made available to the public.

Imagine that Bobby Billyon is a candidate for President of the United States. Billyon is very wealthy. Billyon believes that much of the Federal Fair Election Campaign Act is unconstitutional.

In a press conference on the steps of the federal courthouse, Billyon claims, "If I want to spend a billion dollars in my campaign, that's my right. The government should not limit the amount I can spend to get my message across. If Charmin can spend millions on TV commercials to sell toilet tissue, I should have the same free speech rights to purchase time for my important messages. The current Campaign Act restricts free speech and is therefore unconstitutional." Furthermore, Billyon claims the provision requiring public disclosure of the names of individuals or committees contributing more than $100 to the campaign is an invasion of privacy. Individuals or groups might not contribute to a candidate if they know the information about the contribution is going to appear in the newspaper or on TV or radio. Contributors might feel that this will cause all sorts of people and groups to contact them for contributions. Therefore, the public disclosure requirement will have a "chilling effect" on potential contributors—thus limiting the amount of funds a candidate may be able to raise. For these reasons, Billyon is filing a suit in federal court to declare the Act unconstitutional.

In defending the Federal Fair Election Campaign Act, attorneys for the federal government claim that the government has a compelling interest to promote fairness in presidential elections, to give all candidates a greater opportunity to be heard. Congress passed the Act to promote the "general welfare." The government has an interest in preventing the buying of elections by big money. The limits on spending and contributions are fair and equitable; and they help to equalize the ability of individuals and groups to influence the outcome of elections. The limits may not be perfect, but they are better than no limits at all. In regards to public disclosure, it is only fair that the people have an opportunity to know the source of campaign contributions. Without public disclosure, the appearance and potential of corruption increases. For example, if Bobby Billyon accepts millions of dollars from a nuclear power corporation and announces that as president, the United States will make nuclear power its number one source of energy, the people should have the right to know of this possible connection. The federal government's interest in keeping the election process public and fair outweighs the First Amendment and right of privacy arguments of Billyon.

You be the Judge

1. Facts–What are the important facts in this case? Who are the parties in the case? What is the court being asked to do?
2. Law and Issues–What laws and constitutional issues are involved in this case?
3. Arguments–What are the major arguments for each party in this case?
4. Judgment–If you were the judge in this case, what would you decide and why?
5. Alternatives–What are some other ways of resolving the problem raised in this case?

This hypothetical case is based on the challenge to the Federal Election Campaign Act Amendments of 1974. In the actual case, *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court upheld the disclosure requirements but struck down the spending limits. The Court said that the heart of free speech is expression of political ideas. Since money is often needed to publicize points of view in today's mass society, spending limits also limit free speech. Such limits are therefore unconstitutional. In regard to the public disclosure requirements, the Court found that substantial governmental interests outweighed the free speech interests affected by disclosure of contributions. The governmental interests recognized included: (1) providing the public with information about the sources of money received by a candidate; (2) deterring corruption by exposing large contributions; and (3) collecting the information necessary to detect violations of contribution limits.

As a follow-up, students may wish to brainstorm answers to the following questions or develop a debate on the issue of "government regulation of campaign advertising and free speech." Questions for consideration:

What, if anything, should be done to regulate the influence of advertising in political campaigns? Should anyone (i.e., individual or group) be able to purchase television time to promote or attack a particular candidate or issue? Should government have the power to regulate political commercials just like it regulates alcohol, tobacco, and gambling advertisements? Should a candidate be given free air time to respond to negative campaign commercials against him or her? Or should all political advertising be banned from radio and television—or would this violate free speech? What, if anything, should be done to give candidates an equal voice in our political process? What can be done to make sure voters have an opportunity to hear and see the candidates, to know the issues, to cast an intelligent and informed vote?

Steve Jenkins is law-related education director of the Bar Association of Metropolitan St. Louis. He was assisted by Nancy Eschmann of the bar association in preparing this activity for publication.

Federalism

What Does the Constitution Say About Federalism?/Grades 8-12 **Project '87**

The purpose of this lesson is to increase students' knowledge of a main constitutional principle—federalism. In addition, students should become more familiar with certain parts of the Constitution that pertain to federalism.

What Does the Constitution Say About Federalism?

Read each of the following statements. Decide whether or not each statement describes a situation in which the officials or institutions involved comply with the U.S. Constitution. If so, answer YES. If not, answer NO. Circle the correct answer under each statement.

Identify the number of the Article and Section or the Amendment of the Constitution that supports your answer. Write this information on the appropriate line below each item.

CLUE: Answers to these items can be found in Articles I, IV, and VI or in Amendment X.

1. Michigan, hard hit by a recession, has decided to issue coins made from old cars in order to stimulate the economy.

YES NO

____

2. Congress passes a law imposing new regulations upon airlines engaged in interstate commerce (doing business in several states and across state lines).

YES NO

____

3. Colorado's Scenic Drive Highway has become overcrowded. The state legislature passes a law forbidding out-of-state drivers from using the highway.

YES NO

____

4. The U.S. Supreme Court's upholding of Congress' power to regulate the strip mining of coal upset the governor of North Dakota very much. The governor has announced that he will not allow the enforcement of the law in his state.

YES NO

____

5. Displeased with the U.S. Postal Service, the state legislature of Nevada has passed a law creating the Nevada Postal Service.

YES NO

____

6. The state of Washington has placed a tax on goods imported and exported through its seaports.

YES NO

____

7. The neighboring state of Illinois has annexed Lake County, Indiana.

YES NO

____

8. The Governor of Montana requests that Kentucky return John Doe to Montana. Doe, convicted of murder in Montana, had fled to Kentucky where local authorities captured him.

YES NO

____

9. John Jones has been legally adopted in the state of Arkansas. After the Jones family moves to Georgia, the Georgia State Welfare Agency takes John from his adoptive parents. The Agency claims it does not recognize Arkansas adoption laws.

YES NO

____

10. The federal government passes a law to establish a single national system of public high schools.

YES NO

____

Answer Sheet for Quiz

1. NO, Article I, section 10, clause 1.
2. YES, Article I, section 8, clause 3.
3. NO Article I, section 8, clause 3; Article IV, section 2, clause 1 might also apply.
4. NO Article VI, section 2; also Commerce Clause—Article I, section 8, clause 3.
5. NO, Article I, section 8, clause 7.
6. NO, Article I, section 10, clause 2.
7. NO, Article IV, section 3, clause 1.
8. YES, Article IV, section 2, clause 3.
9. NO, Article IV, section 1.
10. NO Amendment X. (NOTE: The authority to operate public schools is a power not given to the national government nor prohibited to the states by the Constitution. Thus state and local governments have power under the Constitution to operate public schools.)

Lesson Plan and Notes for Teachers

PREVIEW OF MAIN POINTS

The lesson introduces students to three basic ideas about the principle of federalism. These are that federalism involves (1) two levels of government at work, (2) a constitutional division of powers, and (3) changing relationships between national and state powers. The lesson requires students to apply what they learn by working with examples of these key ideas.

CONNECTION TO TEXTBOOKS

Federalism is a complex idea. This lesson contains information along with practice exercises that reinforce textbook discussions of federalism. It further develops ideas about federalism found in textbooks. It can be used to introduce chapters or discussions about federalism or for practice and reinforcement after students have studied the topic.

OBJECTIVES

Students are expected to:

1. Know the basic definition and distinguishing characteristics of federalism.
2. Identify examples and non-examples of unitary and confederation government.
3. Explain the contributions to federalism of unitary and confederation approaches to government.
4. Identify examples according to the constitutional division of powers between the national government and state governments.
5. Understand that the constitutional division of national and state powers is not always clear and changes over time.

Suggestions for Teaching the Lesson

This is a concept-learning lesson. It is designed to present the concept of federalism to students through the use of definitions and examples. Students are asked to apply definitions to the organization and interpretation of information. Students complete a set of activities or "application exercises" at the end of each main section of the lesson and again at the end of the lesson.

OPENING THE LESSON

- Tell students the main point and purposes of the lesson, so that they know it focuses on a major principle of the U.S. Constitution—federalism.
- Discuss the statement by James Madison below, in the section on the principle of federalism. Ask them what this statement has to do with the principle of federalism.

DEVELOPING THE LESSON

- Have students work independently through each of the main sections of the lesson. Each section is about a major feature of federalism.
- Require students to complete the application exercise that follows each of the sections of the lesson.
- You could discuss student responses to each of the application exercises before having them move on to the next section of the lesson. Or you may wish to have them complete all the exercises before discussing them together.

CONCLUDING THE LESSON

- Have students complete the application exercise at the end of the lesson—"Reviewing and Applying Knowledge About Federalism."
- Conduct a class discussion of this application exercise. Keep in mind that alternative answers to some of the items may be acceptable. Students should be able to present a defensible reason for choosing their answer.

The Principle of Federalism

In 1787 the framers of the Constitution created an unusual governmental structure. They designed a federal system of government that provides for the sharing of powers by the states and the national government.

The founders created a federal system to overcome a tough political obstacle. They needed to convince fiercely independent states to join together to create a strong central government.

Writing to George Washington before the constitutional convention, James Madison considered the dilemma. He said establishing "one simple republic" that would do away with the states would be "unattainable." Instead, Madison wrote, "I have sought for a middle ground which may at once support a due supremacy of national authority, and not exclude [the states]." Federalism was the answer.

Federalism refers to the division of governmental powers between the national and state governments. Each may directly govern through its own officials and laws. Both state and national governments derive their legitimacy from our Constitution, which endows each with supreme power over certain areas of government. Both state and federal governments must agree to changes in the Constitution.

Federalism is a central principle of the American Constitution. In this lesson you will study the key ideas of federalism:

- two levels of government at work;
- a constitutional division of powers;
- an often unclear and changing line between national and state powers.

TWO INDEPENDENT LEVELS OF GOVERNMENT

The key idea of our federal system is two levels of government, national and state, with separate powers to act and govern independently. Thus, under federalism, the state of Oregon, as well as the national government in Washington, has formal authority over its residents. Oregon residents must obey both Oregon laws and national laws. They must pay Oregon taxes and federal taxes.

This novel system of government differed from the two forms already known to the founders in 1787—the confederation and the unitary government. Each of these located government powers in a different place.

Unitary Government. The term unitary government describes a system whereby all formal political power rests with a central authority. The central government directly governs the people. Today France and Japan have unitary governments.

Unitary government may have geographical subdivisions. These smaller units mostly serve as administrative extensions of the central government. The central government may create or abolish them at will. France has regional units called "departments," but the central government in Paris sets up and runs each department.

APPLY YOUR KNOWLEDGE

Which government described below is a unitary government? Why?

1. Great Britain, consisting of England, Scotland, Wales, and Northern Ireland, is controlled by a national government in London, the capital. Great Britain also has local governments, similar to those in American counties and cities. These can be changed at will by the government in London. Is this a unitary system? Explain.

2. Mexico has a national government located in Mexico City, the capital. A president and a congress direct the national government. Mexico also has thirty-one states with their own separate constitutions. Each state has independent powers to collect taxes in its territory. Is this a unitary government? Explain.

A Confederation. The other form of government known to the founders in 1787 was confederation. A confederation is an alliance of independent states. In a confederation the states create national government that has very limited powers. The states retain most of the power, granting the national government only limited independence. The national government does not directly govern the people. The national government can do only what the states permit.

The founders understood this approach very well. The Articles of Confederation, in operation from 1781 to 1788, established the confederation form of government. Under the Articles, for example, only the states had the power to tax people directly, leaving the national government dependent on state grants for revenue.

APPLY YOUR KNOWLEDGE

1. In a confederation government, the central government holds all power. TRUE FALSE

2. In 1861 eleven slave states seceded from the Union and created their own government and constitution. The preamble to their constitution declared: "We, the people of the Confederate states, each State acting in its sovereign and independent character...do ordain and establish this Constitution."

a. According to the preamble who "acted" to create the Confederate constitution?

b. What evidence in the preamble suggests that the constitution was creating a confederate form of government?

Characteristics of Federalism. The founders borrowed ideas from both the confederation and unitary forms of government in creating a federation or "federal republic," as they called it. It was truly a new idea. No one at the Philadelphia convention could predict how a federal system would operate. At that time, few delegates even used the word "federalism" to describe the plan they were designing. The founders realized, however, that they had to divide the powers of government between a national government and the states in a new way.

Since 1787 many nations have adopted federal systems of government. Canada, Australia, India, Brazil, Nigeria, Germany, and Mexico have federal forms of government. These systems have adopted varying arrangements outlining the relationships between the states, or lesser governments, and the central governments.

However, all true federal systems share four characteristics. These characteristics reflect ideas drawn from both the unitary and confederation forms of government.

First, all federal systems give both the national government and states some powers to govern the people directly.

Second, federal systems recognize that the states have certain rights and powers beyond the control of the national government.

Third, federal systems guarantee the legal equality and existence of each state. Each state has a right to equal treatment regardless of its size or population. But a state may not always have equal political power if differences in population affect proportional representation.

Fourth, federal systems rely on judicial bodies to interpret the meaning of their constitution and to settle disputes arising between the two levels of government (national and state) and between states.

APPLY YOUR KNOWLEDGE

Several features of our federal system are presented below. Which characteristic of federalism described above, the "first," "second," "third," or "fourth," does each example illustrate? Be prepared to explain your answers.

1. ____________ Montana, with a population of 786,690, has the same number of U.S Senators as California, with a population of 23,668,562.

2. ____________ In 1910, the Supreme Court ruled that the national government could not prevent the state of Oklahoma from moving its capital from one city to another.

3. ____________ Article III of the Constitution

TABLE 1

Examples of How the Constitution Divides Powers

POWERS GRANTED

TO NATIONAL GOVERNMENT	TO STATE GOVERNMENTS	TO BOTH LEVELS OF GOVERNMENT
To coin money To conduct foreign relations To regulate commerce with foreign nations & among states To provide an army and a navy To declare war To establish courts inferior to the Supreme Court To establish post offices To make laws necessary and proper to carry out the foregoing powers	To establish local governments To regulate commerce within a state To conduct elections To ratify amendments to the federal Constitution To take measures for public health, safety, & morals To exert powers the Constitution does not delegate to the national government or prohibit the states from using	To tax To borrow money To establish courts To make and enforce laws To charter banks and corporations To spend money for the general welfare To take private property for public purposes, with just compensation

POWERS DENIED

TO NATIONAL GOVERNMENT	TO STATE GOVERNMENT	TO BOTH LEVELS OF GOVERNMENT
To tax articles exported from one state to another To violate the Bill of Rights To change state boundaries	To tax imports or exports To coin money To enter into treaties To impair obligations of contracts To abridge the privileges or immunities of citizens	To grant titles of nobility To permit slavery To deny citizens the right to vote because of race, color, or previous servitude To deny citizens the right to vote because of sex

Table adapted from Robert L. Lineberry, Government in America *(Boston: Little, Brown and Co., 1981), p. 93.*

says that the judicial power of the Supreme Court "shall extend...to Controversies between two or more states."

4. ____________________ In 1981 Congress passed a law requiring every American male to register for the draft upon reaching the age of 18.

5. ____________________ Article IV of the Constitution prohibits Congress from creating a new state from territory belonging to an existing state without the consent of the contributing state.

Division of Powers by the Constitution

Both the national government and the states have powers under our federal system. Our Constitution divides these powers between the levels of government.

Article I, for instance, reserves the power to coin money and to make treaties with other nations for the national government. State governments have traditionally administered such areas as public health, fire and police protection, local elections, and marriages and divorces.

What prevents states from ignoring or contradicting the Constitution when they pass laws? Article VI of the Constitution says that the Constitution and "laws of the United States...shall be the Supreme Law of the Land." This statement, known as the supremacy clause, makes federalism work by preventing chaos.

The supremacy clause means that while the powers of the national government are limited, within its field the national government is supreme. Thus, the states can neither ignore national laws nor use their powers to oppose national policies or the Constitution itself. In fact, each state official must swear an oath to uphold the U.S. Constitution.

Table 1 gives examples of how the Constitution distributes powers between the national government and the states. The table shows that the Constitution grants some powers exclusively to the national government, some powers exclusively to the state governments, and some powers to both. Also notice that the Constitution withholds some powers from the national government, denies the state governments others, and prevents both from exercising still more power.

APPLY YOUR KNOWLEDGE

Use table 1 to answer these questions.

1. Which government, federal or state, is:
   a. granted power to establish post offices?

   ____

   b. denied power to enter into treaties?

   ____

   c. reserved power to take measures for public health and safety?

   ____

   d. denied power to grant title of nobility?

   ____

   e. granted power to borrow money?

   ____

   f. denied power to discriminate against citizens because of their race?

   ____

1939 -)

2. Which government, federal or state, has the power to provide for an army and a navy?

Find this power in the Constitution (Clue: look under Article I). What Section contains it?

Exactly what does the Constitution say?

Are there any limitations on this power (Clue: look under the Bill of Rights). What amendments are relevant?

Exactly what do these amendments say?

Does the Constitution prevent state or federal government from prohibiting the organization of a citizen's army?

What is a citizens' army called?

Which type of government does the Constitution entitle a state to organize?

Where does it appear in the Constitution?

3. The Constitution denies which type of government, federal or state, the power to impair obligations of contracts?

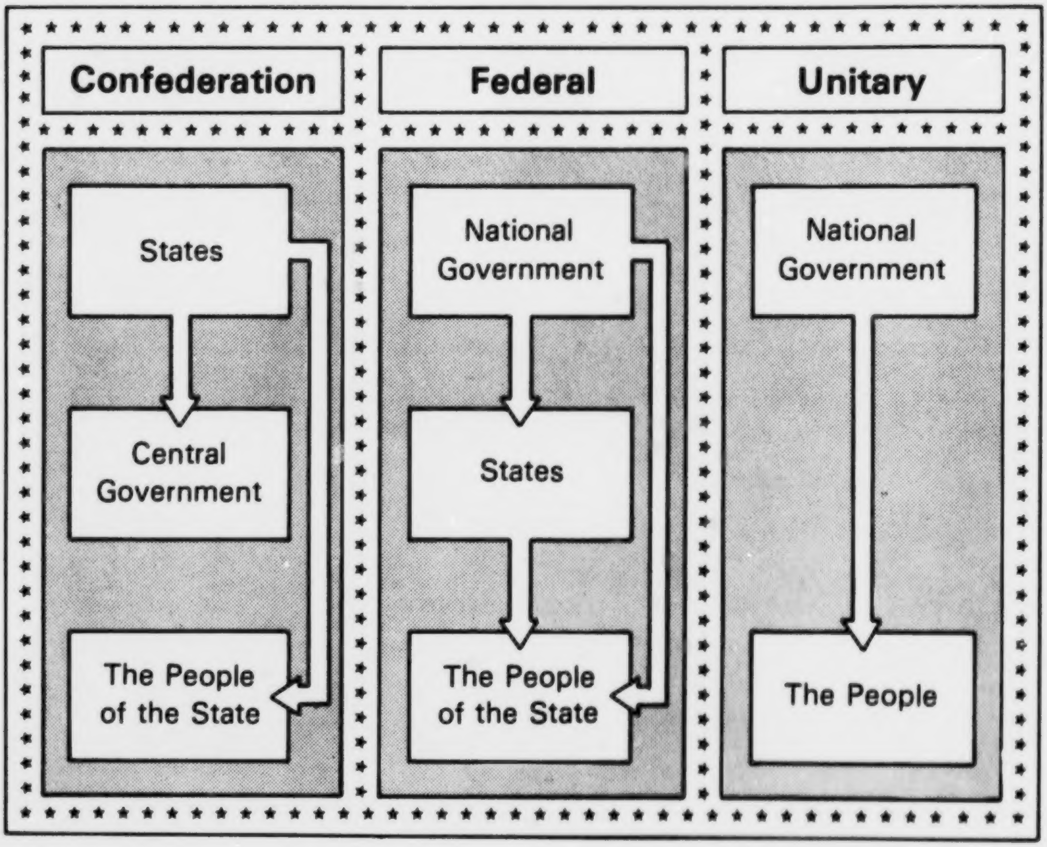
Find this restriction in the Constitution (Clue: look under Article I). What Section contains it?

Exactly what does the Constitution say about contracts?

4. Table 1 says state governments can exert powers the Constitution neither gives to the national government nor prohibits the states from using. Which amendment confirms this fact?

Diagram 1

Different Forms of Government


Confederation
Federal
Unitary
States
Central Government
The People of the State
National Government
States
The People of the State
National Government
The People

A CHANGING DIVISION OF POWERS

Table 1 is useful, but it should not mislead you. In some cases the division of powers is as clear as the table. For example, no one disputes that only the national government has the power to coin money. However, determining which government has jurisdiction in other cases is not always so easy.

Reviewing and Applying Knowledge About Federalism

You have learned that federalism involves two types of government (national and state) directly governing citizens. You also learned how a federal system differs from unitary and confederation governments.

1. List the four characteristics found in all true federal systems.

a.____________________________________

b.____________________________________

c.____________________________________

d.____________________________________

2. Study diagram 1. Use the information to answer these questions.

a. What does diagram 1 describe?________________

____

____

Which of the statements about diagram 1 are True or False? Be prepared to explain your answers.

b. A unitary government directly governs the people.

TRUE FALSE

c. In a federal system the national government has no power over the states.

TRUE FALSE

d. In a confederation the central government can directly govern the people.

TRUE FALSE

e. In a federal system only the states exercise power over the people.

TRUE FALSE

3. Table 1 shows the powers granted and denied the national and state governments. Given this division of powers indicate whether the hypothetical actions listed below are constitutional or not.

a. The United States declares war on a foreign nation.

YES NO

b. The State of Minnesota sets up separate schools for Native Americans in the state.

YES NO

c. Congress spends $5 billion for new army rifles and tanks.

YES NO

d. The State of Delaware levies an import tax on all foreign cars coming into the state.

YES NO

e. The California Board of Elections sets new hours and regulations for voting in the state.

YES NO

f. Congress passes a law moving the boundary between Idaho and Montana.

YES NO

4. Writing in *The Federalist*, James Madison said that both the state and the national governments "are in fact but different agents and trustees of the people, constituted with different powers."

a. What did Madison say about the source of state and national government powers?

____

____

____

b. Is the Madison quote an example of the idea of federalism?
Explain.

____

____

____

5. You have learned that the Constitution divides powers between the national government and the states in our federal system.

a. What is the "Supremacy Clause"?

____

____

____

b. Where is this clause found in the Constitution?

____

____

6. You have learned that the limits of national and state government jurisdictions are sometimes unclear and disputed. The case study below is an example of the kind of issue that frequently arises in a federal system. Read the case study and answer the questions following it.

THE CONCORDE DISPUTE

In 1976, France and Britain wanted to land their new supersonic transport plane, the Concorde, at American airports. Environmental groups in America opposed the idea, objecting to the planes as too noisy.

President Ford's Secretary of Transportation decided the Concorde could land at New York's Kennedy Airport. However, the national government did not own Kennedy Airport. State government officials in New York and New Jersey ran the airport. They refused to let the Concorde land at their airport.

The national government took the state officials to court. Federal courts eventually decided in favor of the national government. The courts ruled that the national government had the authority to let the planes land in New York.

a. What power did both national and state officials claim to have?____________________

____

b. Who settled the dispute over powers?____________

____

c. Which government won the dispute?____________

____

____

d. Is this case an example of federalism in practice?____
Explain.______________________________

____

____

____

____

The material for this article is reprinted by permission from Lessons on the Constitution, *by John J. Patrick and Richard C. Remy, a set of 60 lessons developed by Project '87. The book can be ordered from Social Science Education Consortium, Inc., 855 Broadway, Boulder, CO 80302 for $19.50.*

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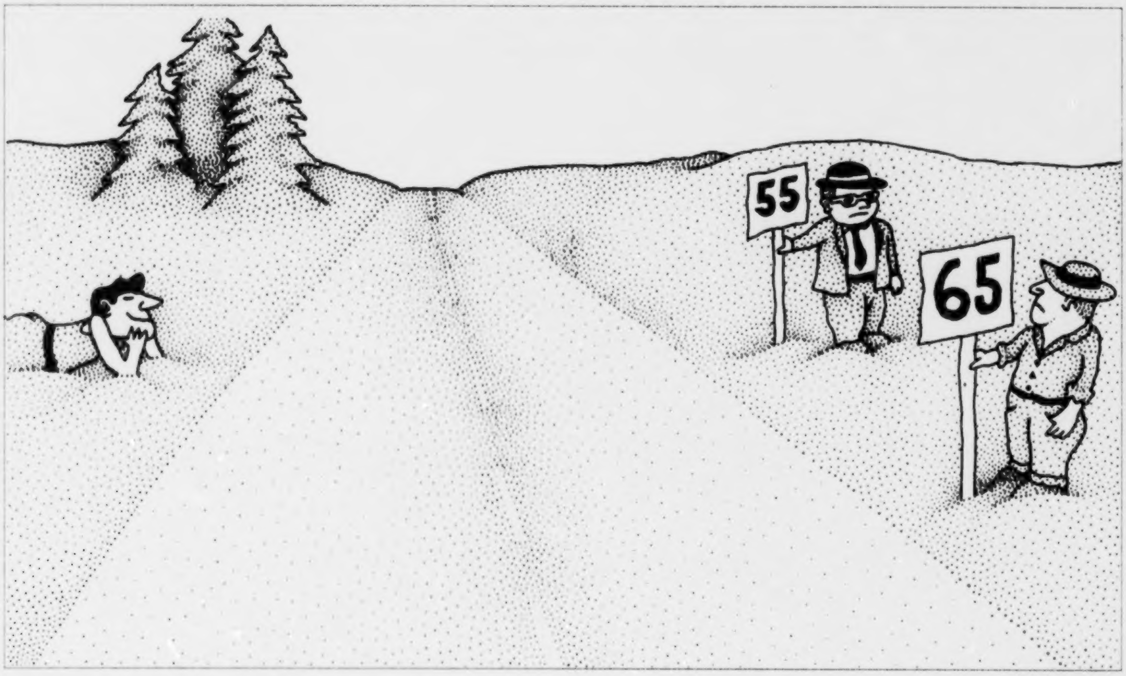
Federalism

Federal/State Relations: 55 m.p.h. Speed Limit/Secondary

Margaret Fisher



Dean Matthews

Objectives

At the end of this lesson students will be able to:

1. Identify other federal/state constitutional issues.
2. Explain how powers not delegated to the federal government are reserved to states.
3. Describe how powers of the state may be regulated by the federal government through conditioning of federal grants.
4. Apply federal/state concepts to the congressional attempt to impose a lower speed limit on all roads.

Procedures

This lesson will focus on the development of federal powers in relation to state powers.

Have students in groups identify each action in the "Federal or State Control" handout as subject to federal or state power. If federal, indicate what part of the Constitution assigns power to the federal government.

Write a grid on the board and have a reporter from each group announce whether it is a federal concern or a state concern.

The answer to the handout is that the state has the power in each of these areas. Refer to the Tenth Amendment that reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Students should be instructed that since there is no federal delegated authority to act in each of the five examples, the power is reserved to the states.

Inform students that in recent years the federal government has acted in each of these areas, with the exception of the state requirements for drivers' licenses.

1

Ask students how the federal government might constitutionally be able to act in these areas, even though the Constitution has not delegated that power to the federal government.

The spending clause of Article I, section 8, clause 1, allows Congress to collect taxes and spend money for the general welfare. This clause establishes the constitutional basis for a system of federal grants.

Federal grants are awards of money from the federal treasury to the states to permit them to accomplish some federal policy. So, for instance, federal grants to states are available to fund services for the states' mentally ill population.

Conditions are attached to these grants and are often the way that the federal policy goals are realized.

Here are some examples. To receive federal funds or tax credits:

1. for treatment of the developmentally disabled, a state must agree to provide certain services under certain conditions set by the federal government.
2. for a state's unemployment compensation program, a state must follow the federal guidelines.
3. for federal health grants, a state must establish a health planning and development agency, even if that requires the state to amend its own constitution.
4. for mass transit, a state must make its public transportation system accessible to developmentally disabled.

Class Discussion

In July 1984, Congress passed a law under which a state must approve a 21-year old drinking age by October 1, 1986, or lose 5% of its road construction allocation. The forfeit would go up to 10% in 1987. President Reagan, in signing the bill, said the 21-year drinking age would eliminate a "crazy quilt" of laws and reduce alcohol-related deaths. As of November 1985, 29 states required people to be 21 years old before drinking. Ask students: Should the Congress have passed such a law? Why or why not?

South Dakota filed a lawsuit against the U.S. Department of Transportation claiming that the federal government does not have the power to regulate drinking ages through federal grants. South Dakota believed that this is exclusively the power of the state.

Ask students if there should be any limits on what the federal government might require in its conditions.

States have challenged a number of grant conditions, claiming that they exceed the limits that the federal government can impose on states. In *Oklahoma v. Schweiker*, 655 F.2d 401 (D.C. Cir. 1981), the court said there may be some limit to the terms Congress can impose, but the court did not cite a single example.

Additionally the courts have ruled that because the state has the option of rejecting the money, they are not forced to comply.

In 1963, there were 160 federal grant programs spending 8.3 billion dollars.

In 1980, there were over 447 programs, spending 82.9 billion dollars.

Some legal commentators question whether or not the option of a state to reject the money really exists. Grants increasingly finance essential, traditionally local services, making the states and local government more dependent upon the federal government, and therefore they may no longer have the option of refusing the money without seriously harming their citizens.

Role Play

Ask students to act as members of the United States Congress. Some would like to make a speed limit of 50 miles per hour apply to all public highways—federal, state and local. How can they do this?

Under the commerce clause of the Constitution, Congress can directly establish a speed limit on interstate (federal) highways. They should draft a law that requires 50 mph as a means of safely assuring interstate commerce.

To accomplish a speed limit of 50 mph on non-federal highways, they could establish a condition for receiving federal highway moneys under the spending clause.

In fact, the national speed limit of 55 mph was established by the United States Congress in just that manner. 23 U.S.C. Section 154 states that the Secretary of Transportation shall not approve any project (for interstate highway construction) in any state that has a maximum speed limit on any public highway within its jurisdiction in excess of 55 mph. [This has since been amended to permit a limit of 65 mph on certain highways.]

Ask students what would happen if a state accepted the money, then refused to comply with a required condition. The federal government has the power to sue in court to order the state to comply. Sometimes the cost of complying with the condition is much higher than the amount of money received in the grant.

Ask students whether they think the balance of power between state and federal government is as the framers intended. Do they agree or disagree with this direction of increasing federal power? If they disagree, how would they change it? Have students draft an amendment to the Constitution to reflect any desired change.

Handout—Federal or State Control?

(1) Decide whether each action below is subject to federal or state control; and
(2) If federal, indicate what part of the Constitution delegates this power to the federal government.

Answers

________________ 1. Establishing requirements for state drivers' licenses.

________________ 2. Setting limits on state employees' political activities.

________________ 3. Establishing how much money will be paid to disabled persons in the state.

________________ 4. Requiring that a certain percentage of state government contracts be allocated to minority businesses.

________________ 5. Establishing the rights of state bus company employees to negotiate with the state government over working conditions.

Moot Court Simulation

Students are sure to have opinions about the drinking age, but how do you get them to focus on the question of whether the federal government should have a role in deciding the legal age of drinking? How do you help them see it as a legal and constitutional issue, as well as a question of public policy?

A moot court could be the answer. It provides a way for students to debate the issues as they might have been presented to the Supreme Court in the recent case on the constitutionality of the federal government's attempts to make 21 the legal drinking age nationwide.

Setting Up a Moot Court

Moot courts aren't mock trials, but rather are simulations of appellate arguments. They are like debates, in that participants have a set amount of time to argue the issues, advancing legal, constitutional, and public policy ideas in an attempt to convince appellate court justices that a lower court ruling should be upheld or overruled.

The rules for a moot court are simple. Break the class into three or more groups:

- a panel of appellate court justices, which can vary in size from five to a dozen or more, depending upon the number of students who need roles.
- attorney teams for each side. In this case, the main adversaries are the state of South Dakota and the federal government's secretary of transportation. Lawyer teams can be of varying sizes, from two to four or more. To provide as many roles as possible, you may wish to have each student attorney argue a separate point.
- attorney teams for each friend of the court, since in this Supreme Court case those not a party to the suit still took part by filing briefs as friends of the court (amici

curiae). In the actual Supreme Court case their arguments were written, but in the moot court, you can bend the rules a bit and permit the amici to make oral as well as written arguments to the court. In this case, amici supporting South Dakota included eight other states (filing a joint brief); the National Conference of State Legislatures, the United States Conference of Mayors, the National Governors Association and the National Association of Counties (filing a joint brief); the National Beer Wholesalers Association; the Mountain States Legal Foundation (a conservative legal foundation) and the state of New Mexico (filing a joint brief). Supporting the secretary of transportation were the following amici: a number of insurance companies (filing a joint brief); Mothers Against Drunk Driving; the National Council on Alcoholism; the National Safety Council.

Then give each attorney team and the judges background on the actual case of *State of South Dakota v. Elizabeth H. Dole, Secretary of Transportation*, which was argued before the U.S. Supreme Court on April 28 of this year. You can find such background in the "Issues" and "Facts" sections of the article on the case in *Preview of U.S. Supreme Court Cases*, pages 377-379 of Issue 14 of the 1986-87 term. (Available from Order Fulfillment, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611, $4. Please specify product code #738-0100 when ordering.) Or you can provide them with the abbreviated background below, which is adapted from *Preview*.

Ask student judges to familiarize themselves with the case, and, depending on the age and skills of the students, with other readings on federalism, so they will be prepared with questions and observations when the actual argument takes place.

Ask the attorney teams to familiarize themselves with the case and with other federalism cases or issues. Ask them to formulate arguments advancing their position. These arguments can be based on holdings in other cases, on the language of the Constitution, or on public policy considerations (for example, the practical consequences of a decision in favor of their side). You may wish to share with them some or all of the actual arguments made in the case (see "Arguments," below).

Give each party a limited time to argue its case (each side has 30 minutes in an actual Supreme Court oral argument, but you may adapt this as you see fit). They should prepare clear and cogent arguments in support of their position. They should be prepared for questions from the bench, since in actual oral arguments judges interrupt to ask for clarification or to pose hypothetical questions.

After the oral arguments are over, have the judges confer in public about how the case should be decided. After they have announced their decision, debrief by asking the judges and the rest of the class to comment on the decision-making process. Ask the attorneys to comment on the experience of oral argument, the strengths and weaknesses of their case, and their reaction to the decision.

Then share the decision with students. The actual decision can be found in *U.S. Law Week*, vol. 55, pages 4971-4975. It is available in most law libraries. Or you can use the abbreviated version given below. Ask participants to comment on the Supreme Court decision and the reasoning of the majority and minority.

Background on *South Dakota v. Dole*

In June, 1984, Congress passed and the president signed a new law which directed the Secretary of Transportation to withhold a portion of federal funds that otherwise would be granted to a state for highway construction if the state permits "the purchase or public possession of any alcoholic beverage" by a person less than 21 years of age.

The law provides for withholding five percent of the highway funds otherwise due the state in fiscal year 1987 and 10 percent in fiscal year 1988 if a state does not raise its minimum drinking age to 21. If it later raises its minimum age to 21, it can recoup funds withheld in prior years.

South Dakota permits persons under the age of 21 to purchase beer containing 3.2 percent alcohol. Fearing a reduction in its federal grant funds, the state sued the Secretary of Transportation, Elizabeth Dole, seeking to have the law declared unconstitutional.

The federal district court granted the Secretary's motion to dismiss. The Eighth Circuit Court of Appeals unanimously affirmed the decision. That court held that the law is a valid exercise of Congress' power under the Spending Clause (Article I, section 8, clause 1). The court of appeals held that the Spending Clause, when viewed in conjunction with the Necessary and Proper Clause of the Constitution, includes the authority to attach conditions to the receipt of federal funds, as long as Congress is seeking to advance the general welfare, and as long as the "conditions imposed by Congress [are] reasonably related to the national interests Congress seeks to advance."

The appeals court also held that the Tenth Amendment is not violated when Congress attaches conditions to grants of federal funds.

South Dakota appealed the decision, and the U.S. Supreme Court agreed to decide the case.

Arguments

Essentially, South Dakota and most of the amici argue that the law violates two provisions of the United States Constitution: the Twenty-First Amendment (which repealed prohibition) and the Tenth Amendment. South Dakota argues this case goes to the very essence of how the states are to relate to the federal government. It points out that under the constitutional scheme of federalism, the states are not merely departments or subdivisions of the federal government; rather, they are sovereign within all areas not granted to the national government. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This states' rights amendment was placed at the end of the Bill of Rights to clearly indicate that the federal government, albeit a more powerful government under the Constitution than it used to be under the Articles of Confederation, is not all-powerful. According to South Dakota, the only powers the federal government has are the powers delegated to it by the states. South Dakota argues that local control promotes participation in a democratic process and allows local people to fashion appropriate solutions to local problems.

South Dakota further contends that the Twenty-First Amendment actually expresses a "core power" over which the states have "virtually complete control," and thus the states can determine "whether to permit importation or sale of liquor and how to structure the liquor distribution system." The Twenty-First Amendment states: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." South Dakota points out that setting drinking ages is a core concern since it is part and parcel of structuring the liquor distribution system which the Twenty-First Amendment empowers only the states to do. South Dakota argues that Congress has recognized this and has traditionally respected the rights of the states in this area. Looking at the history of the Twenty-First Amendment, South Dakota contends that the Twenty-First Amendment was in fact designed to permit drinking rather than promote temperance.

In response to Secretary Dole's contention that the legislative purpose of section 158 is to reduce drunk driving, South Dakota argues that in fact its law permitting nineteen to twenty-one year-olds to drink 3.2 beer has a temperance interest. It contends that it was reasonable, as shown by scientific studies, for the South Dakota legislature to find that controlled drinking by nineteen and twenty-year olds promotes temperance to a greater degree than prohibition. Prohibition forces young adults to drink in cars, or in remote areas to which it is necessary to drive.

When a state regulation collides with a federal regulation, the courts have often used a test balancing the state's rights to regulate against the federal rights to regulate a specific area (*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 1984). The Eighth Circuit Court of Appeals held that no balancing of state and federal interest is necessary in this case because the state and federal legislation do not conflict. This conclusion was based on the premise that the state is not required to raise its drinking age, but may simply refuse and forego the percentage of federal funds involved. But South Dakota argues the balance should be struck in favor of the state since the interests—temperance and safety are cited by the state and the Congress—are the same and since the Twenty-First Amendment gives the core power to regulate liquor to the states.

Secretary Dole argues that the Tenth Amendment is not violated when Congress attaches conditions to grants of federal funds. The law in question, she contends, is not a coercive measure, but rather an incentive to the states. Each state has available to it the simple expedient of refusing to yield to "federal coercion."

Dole agrees with South Dakota's contention that the Twenty-First Amendment limits the authority conferred upon the federal government by other provisions of the Constitution. Clearly, the amendment puts some limits on the federal government's power over liquor. However, Secretary Dole argues that even if Congress' authority under the Spending Clause were thought to be limited by the Twenty-First Amendment, this law would pass constitutional muster. She contends that the Twenty-First Amendment's limits on congressional authority are implicated only when there is an actual conflict between federal and state law. Here, she argues, there is no actual conflict since the federal law is an incentive rather than a coercive measure. There is no conflict between the National Minimum Drinking Age and South Dakota's law permitting nineteen and twenty year-olds to drink 3.2 beer. Nineteen and twenty year-olds in South Dakota can continue to drink beer. South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so. It simply will not get a percentage of the monies which Congress has the constitutional authority to spend.

The Decision

The Supreme Court, by a vote of 7 to 2, upheld the federal law aimed at encouraging states to raise the legal drinking age to 21 years by withholding some highway grants from those that fail to do so.

The drinking-age decision essentially left the status quo intact by removing doubt about the validity of a 1984 federal law that had already prompted 25 states to raise their drinking ages.

Chief Justice William H. Rehnquist's majority opinion rejected arguments by South Dakota and several state and local government groups that the law violated constitutional principles of federalism and the broad powers of the states under the Twenty First Amendment to regulate sales of alcoholic beverages. He called the law a "relatively mild encouragement to the states to enact higher minimum drinking ages than they would otherwise choose."

Chief Justice Rehnquist said in his opinion that the Court did not have to decide whether the Twenty-First Amendment would bar Congress from legislating directly a national minimum drinking age. He said past decisions had already established that "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly."

He said in his opinion the 1984 law's purpose of reducing drunken driving was "directly related to one of the main purposes for which highway funds are expended: safe interstate travel."

He added that the 5% loss of funds is not so coercive as to pass the point at which pressure turns to compulsion.

Justices Sandra Day O'Connor and William J. Brennan, Jr. dissented separately. Justice O'Connor said the law was "an attempt to regulate the sale of liquor" that encroached on the powers of states under the Twenty-First Amendment, which repealed Prohibition and authorized states to regulate sales of alcoholic beverages.

Justice O'Connor said the vast majority of highway deaths involving drinking were caused by people over the age of 21. "Establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose," she said.

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1

Carol Coplan

Criminal Law Wrap-Up

Many top law enforcement officials, including Attorney General Edwin Meese, III, have complained about the disadvantages of judicial rules such as the Miranda rights, the exclusionary rule, and other Fourth Amendment protections. They say that these rules limit efficient crime control. Under the Warren Court, these judicial rules expanded, giving more protections for the criminally accused. Since then, the Supreme Court has generally narrowed these constitutional protections. In four recent Supreme Court cases, the Court has further whittled away at procedural protections for criminal defendants.

Miranda Rule: When Is a Confession Voluntary?

In *Colorado v. Connelly*, 55 U.S.L.W. 4043 (1986), the Court held 7-2 that even an involuntary confession may be used at trial as long as the state is not at fault in making the confession involuntary. This narrows the scope of the Miranda rights and broadens the use of confessions during a criminal trial.

The defendant in *Connelly* appeared to be completely sane to the officer he initially confessed to, but he later turned out to be a schizophrenic. The defendant approached the officer on the street and told him he wanted to confess to a murder. He received the Miranda warning and waived it. His behavior the following day revealed his long history of mental disorder, and psychiatrists later determined that he was compelled by hallucinatory voices to confess to the murder. The defendant claimed that the confession should be suppressed because it was involuntary, and that his second Miranda waiver given while he was in custody was also involuntary. The Supreme Court of Colorado suppressed the confession, but the Supreme Court of the United States reversed.

The Court saw no constitutional violation unless the state caused the violation. "No matter how outrageous the behavior it does not violate the Fourteenth Amendment, if it is private," said Chief Justice Rehnquist for the majority. The majority construed the purpose behind the Miranda warning to suppress involuntary confessions obtained by illegal police coercion. That purpose cannot be served in this instance. The Court stated that a detailed inquiry into defendants' states of mind every time they confessed would be adding a right to the Constitution and would be economically infeasible for an already overcrowded court docket. Since confessions are a crucial issue in determining guilt or innocence by a jury, the Court felt it was more important to let the jury hear the confession first and later decide how much weight to give it. Under this theory, relevant evidence is let in to court, and then subjected to the federal rules of evidence and the trial process of cross examination, leaving the jury to determine just how much weight to give the evidence (in this case, the confession).

The decision lowered the standard of proof a state must show in claiming that a valid Miranda warning has been given. The Court announced that a state must show by a preponderance of the evidence—and not by the higher standard of clear and convincing evidence—that the defendant received a proper Miranda warning. The lowered standard is again due to the purpose of *Miranda*, which is to deter police coercion. This issue is of less importance than the main issue of guilt or innocence, in which the state still has a "beyond a reasonable doubt" standard of proof.

The dissent by Justices Brennan and Marshall claimed that the use of involuntary confessions goes against fundamental fairness embodied in the Due Process Clause. They disagreed that police coercion is the essential element for an involuntary confession. They saw a major flaw in the precedent the majority relied on to support their proposition that personal characteristics are irrelevant in determining whether or not a confession *Townsend v. Sain*, 372 U.S. 293 (1963), for example, the Court held a confession involuntary by analyzing the totality of factors, such as the defendant's drug addiction, his young age, and lack of counsel. Yet the majority heavily relied on this case to back their conclusion that such factors should not be considered.

The dissent stressed the inherent prejudicial influence confessions have traditionally had for juries. The dissenters therefore would require more stringent analysis of their applicability, not less. They felt the lowered standard of proof permitted states for Miranda warnings is completely contrary to what the *Miranda* Court intended. They feared that under this holding too many involuntary confessions will reach the trial stage, which will in turn weigh heavily in jurors' mind regardless of what goes on during the cross examination.

Fourth Amendment: Another Good Faith Exception

Every person is guaranteed by the Fourth Amendment the right to be free from an unwarranted search in his or her home. Individuals have traditionally enjoyed extra protection from police intrusion in their homes under the theory that the home is "a man's castle." Many say the framers of the Constitution specifically intended to guard against government intrusion into the area of most sacred privacy, a man's home, when they wrote the Fourth Amendment. Under a recent ruling, *Maryland v. Garrison*, 55 U.S.L.W. 4190 (1987), the Supreme Court greatly diminished an individual's expectation of privacy in his or her own home.

In *Garrison* the Court held 6-3 that a search based on a warrant for a different apartment is constitutional. The warrant here was for McWebb's apartment, supposedly the only apartment on the third floor. Unknown to the police, however, there were two apartments on the third floor. When the police arrived they mistakenly searched Garrison's apartment and found controlled substances. Garrison claimed the search warrant did not apply to him, and therefore the search violated the Fourth Amendment. The Maryland trial court refused to suppress the evidence, but the Maryland Supreme Court found the warrant only applied to McWebb and therefore entry into Garrison's apartment was unconstitutional.

The U.S. Supreme Court found the warrant sufficient in all respects. Speaking for the majority, Justice Stevens stated that there is no question the warrant was valid and supported by probable cause. He further concluded that it was not overly broad because of the mistake concerning the number of apartments on the third floor. A warrant is declared invalid if it does not detail a very specific area that can be searched. This is to ensure that no "general searches" are conducted, which would be unconstitutional. The Court admitted that if the police had known about the two apartments the warrant would have been overly broad. But based on the facts the law enforcement people knew at the time the warrant was issued, there was only one apartment. The discovery of the mistake afterward does not invalidate the warrant.

The Court further concluded that the execution of the warrant was constitutional. Once the Court decided that the officers were truly ignorant of the mistake, an overbroad execution, by intruding on an unauthorized apartment, was a good faith mistake. When they realized the mistake they discontinued the search. The Court recognized the need "...to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants."

Justice Blackmun joined Justices Marshall and Brennan in dissent. They contended that the expectation of privacy in the home should not be sacrificed, especially in a situation where the warrant did not particularly describe the unit to be searched in a multi-unit building. They further denied that the police had no indication of the mistake. They pointed to what they felt were clear indications that the third floor had two apartments, not one. These factors included the existence of seven bells on the outside door of a three floor building, an indication that more than one apartment was on each floor; Garrison's appearance in the hallway in his sleeping clothes; and the preliminary search of both residences for anyone dangerous, which clearly revealed that there were two apartments which were mirror images of each other. They also questioned the police officers' actions when McWebb arrived. In their opinion, the police placed McWebb in custody, thus requiring the Miranda warnings. (The majority mentioned none of these extenuating factors and did not consider whether *Miranda* should have been used.)

Fourth Amendment Vehicle Searches Expanded

Another recent Supreme Court case also narrows the warrant requirement of the Fourth Amendment. *Colorado v. Bertine*, 55 U.S.L.W. 4105 (1987), upheld a warrantless search of an impounded van and a backpack inside the van. The searching of impounded vehicles is an established exception to the the warrant requirement, but as for personal containers, especially when sealed from the public eye and containing personal articles, the individual's expectation of privacy has traditionally prevailed.

Here the majority, in an opinion by Chief Justice Rehnquist, held that reasonable police regulations relating to the inventory procedures of impounded vehicles and carried out in good faith satisfy the Fourth Amendment. The majority also held that containers of personal effects no longer carry an expectation of privacy if inside impounded property.

The defendant in *Bertine* was originally stopped for driving under the influence of alcohol. The arresting officer decided to impound the vehicle and searched the contents of the van, including the defendant's backpack and closed containers inside the backpack. The officer found cocaine, drug paraphernalia, and excessive amounts of cash. He then added possession of and trafficking in narcotics to the D.U.I. charge. The defendant claimed that the Fourth Amendment protected him from such an intrusive search without a warrant and that the drug charges should be dropped because the drugs were unconstitutionally obtained. The Supreme Court held this search valid as part of the regularly accepted inventory search, including the search of the backpack.

Warrantless searches are allowed, the Court reasoned, when the police have control over the property. These searches are called inventory searches. They are conducted to prevent theft of the contents inside the vehicle while it remains in police custody, and to protect the law enforcement officials in charge of it from possible dangerous objects inside. The necessity for a quick and efficient search outweighs any privacy interest a defendant has in the vehicle or objects inside it. Furthermore, the Court held, as long as police discretion is curbed by having an established police procedure to follow and the officer's decision to impound the vehicle is not based on his desire to search it, the search complies with the Fourth Amendment.

The dissenters, Justices Marshall and Brennan, thought the majority holding ignored the truly discretionary nature of the search in this instance. They saw total police discretion at two stages of the search. First, the Colorado rules allow a police officer to choose between three alternatives whenever a defendant is stopped. The officer can park the car and lock it, impound and search the vehicle, or let the defendant make arrangements for a third party to take it. Here there was a public parking area across the street from where the defendant was originally stopped for the drunk driving charge. And since a D.U.I. charge is minor, the defendant would return to his car quickly, and thus the need for police impounding would be further diminished. The second area of discretion occurred during the search itself. By the officer's own testimony, inventory searches of impounded vehicles in Boulder, where the arrest occurred, are guided by each officer's choice of what is suspicious. The dissenters therefore concluded that the search was not based on a well established plan, and did not meet the Fourth Amendment requirements.

Right to Confront Witnesses Limited

The Sixth Amendment confrontation clause guarantees criminal defendants the right to cross examine the witnesses against them. The importance of cross examination in our trial process is undisputed. It reveals the inconsistencies and half truths in a witness's testimony. It further reveals possible biases or other personal prejudices a witness may have either for or against the defendant, which may distort his or her true perception of an event. It ensures that the jury can properly weigh all the witnesses' testimony and most accurately decide guilt or innocence.

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In *Pennsylvania v. Ritchie*, 55 U.S.L.W. 4180 (1987), the Court held, 7-2, that the confrontation clause protections only mandate the chance to cross examine a witness during trial. The Court refused to extend the right to include "effective" or "meaningful" cross examination by giving a defendant the right to examine certain confidential documents. This decision also narrowed the use of the compulsory process clause of the Sixth Amendment.

Ritchie specifically involves whether or not a criminal defendant has the right to investigate presumptively confidential evidence against him in order to be able to prepare an effective cross examination beforehand. Ritchie was accused of several sexual crimes, including rape and incest. At trial, the primary witness against him was his daughter. She had used a protective agency in Pennsylvania called the Children and Youth Services or CYS. Ritchie subpoenaed CYS to produce his daughter's file during a pretrial hearing. He said that the file might contain the names of favorable witnesses, as well as other evidence tending to establish his innocence. CYS refused, claiming all the material in a file is confidential. One exception to the confidentiality of a file occurs when a court has ordered the contents to be disclosed for the purposes of a fair trial. However, the court reviewed the file and refused to issue such an order in this case. Ritchie was convicted.

Ritchie appealed his conviction, claiming that his inability to know the contents of the CYS file prejudiced his case. Since he could not adequately prepare questions to cross examine the main witness against him, he was denied due process of law, given to him by the Fourteenth Amendment. The Pennsylvania appellate court and the Supreme Court of Pennsylvania vacated Richie's conviction and remanded the proceedings with directions for the trial court to review the records to determine whether they contained any statements by Jeanette regarding abuse. After this, defense counsel would be permitted to review all records to which he had previously been denied access. The Pennsylvania Supreme Court, however, held that the trial court should take "appropriate steps" to guard against improper dissemination of the confidential material, including, for example, "fashioning of appropriate protective orders, or conducting certain proceedings *in camera*." After review of the files, the parties would present arguments on whether the lack of disclosure was prejudicial, after which the trial court might or might not order a new trial, on the merits.

Before reaching a decision on the merits of the case, the U.S. Supreme Court first established that it had jurisdiction, although further proceedings remained in the lower courts. The general rule is that the Supreme Court must wait until all lower courts have made a final decision before it may review a case. However, by a 5-4 vote, the Court decided to issue a decision in this case even though further investigation of the file still remained in the Pennsylvania court system. An exception allows non-final cases to be heard by the Supreme Court if the federal issue will be lost if the Court waits for the final procedures. Here the Court found that the Sixth Amendment issue would be lost if the Court waited for the result of the lower court's proceeding on the CYS file. If the lower court decides that the CYS files do not contain relevant information, or that the nondisclosure was harmless, the state will have prevailed and the Sixth Amendment issue will be lost completely. If the court decides to give him a retrial, and he wins, the issue will also be gone. If he loses at the retrial the issue may be lost because he may not appeal again.

A four-justice dissent found that this case did not fit within the exception, and should not have been decided by the U.S. Supreme Court at this time. The dissent found viable alternatives for Ritchie to present the issues. First, if CYS continued to refuse to produce the documents, Ritchie could bring a suit for contempt of court, which will impose criminal-like penalties on CYS in order to compel the agency to produce the file. CYS might appeal that order, and by this means the U.S. Supreme Court might obtain proper jurisdiction. Second, if the file is produced and the court finds it would not make a difference in his case, then the issue need not be reviewed. Third, since interlocutory or immediate appeals are allowed in Pennsylvania for new trial orders, if the trial court decides that the CYS file is sufficiently important for a new trial, there is still a way to appeal this issue before the next trial.

With this procedural matter decided, the Court next determined the scope of the confrontation clause. The Court held, through Justice Powell's decision for the majority, that the confrontation clause's purpose is to provide "an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterrer*, 106 S.C. 292, 1985.) The threshold inquiry is whether or not the defendant had an opportunity to cross examine the witness at the trial itself. The trial court allowed Ritchie's attorney to cross examine his daughter at trial, so it complied with the Sixth Amendment requirements. To compel more would be to create a new constitutional right. "If we were to accept this broad interpretation the effect would be to transform the confrontation clause into a constitutionally-compelled rule of pretrial discovery."

The Court also gave a narrow construction of the compulsory process clause of the Sixth Amendment. That clause gives the accused "the right to have compulsory process for obtaining witnesses in his favor." This clause has rarely been used in modern litigation. The Court stated that it merely allows the government to compel (subpoena) a favorable witness to appear for a defendant at trial. The majority refused to hold that it compelled discovery of the identity of witnesses. This is better left to the Fourteenth Amendment due processes rights, which apparently the Court did not feel were compromised by CYS's refusal to permit the defendant to review the file.

The Court discussed the balancing of interests between the confidentiality of the file and the Sixth Amendment claim. The Court noted that the applicable statute did not give CYS absolute authority to keep the files confidential, but that the children's interests in keeping their files confidential are especially important in rape and incest cases where children generally are fearful and need the confidentiality to encourage them to pursue legal help. The Court concluded that the trial court was in the best position to determine if the value of information inside the CYS file is of such importance for Ritchie's defense to warrant destroying the confidentiality privilege in this case.

The two dissenters, Marshall and Brennan, interpreted the confrontation clause in a broader manner. They concluded that the Sixth Amendment is not complied with unless the defendant is provided with the opportunity to *meaningfully* cross examine a witness. Anything less defeats the true nature of this crucially important step in a trial, and subjects a defendant to jury decisions that are inaccurate.

Looking at these four cases together, it becomes clear that the Court continues to narrow protections given to criminal defendants by the Warren Court of the 1960's. The emphasis clearly is on facilitating crime control. ☐

Constitution

(Continued from p. 3)

It was not the first such compromise. Even these ringing phrases from the Declaration of Independence are filled with irony, for an early draft of what became that Declaration assailed the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions (See Becker, *The Declaration of Independence: A Study in the History of Political Ideas*, p. 147, 1942). The final draft adopted in 1776 did not contain this criticism. And so again at the Constitutional Convention eloquent objections to the institution of slavery went unheeded, and its opponents eventually consented to a document which laid a foundation for the tragic events that were to follow.

Pennsylvania's Gouverneur Morris provides an example. He opposed slavery and the counting of slaves in determining the basis for representation in Congress. At the Convention be objected that

> the inhabitant of Georgia [or] South Carolina who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice (Farrand, ed., *The Records of the Federal Convention of 1787*, vol. II, p. 222, New Haven, CT., 1911).

And yet Gouverneur Morris eventually accepted the three-fifths accommodation. In fact, he wrote the final draft of the Constitution, the very document the bicentennial will commemorate.

As a result of compromise, the right of the Southern States to continue importing slaves was extended, officially, at least until 1808. We know that it actually lasted a good deal longer, as the Framers possessed no monopoly on the ability to trade moral principles for self-interest. But they nevertheless set an unfortunate example. Slaves could be imported, if the commercial interests of the North were protected. To make the compromise even more palatable, customs duties would be imposed at up to ten dollars per slave as a means of raising public revenues (United State Constitution, Article 1, section 9, September 17, 1787).

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the Framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.

The original intent of the phrase, "We the People," was far too clear for any ameliorating construction. Writing for the Supreme Court in 1857, Chief Justice Taney penned the following passage in the *Dred Scott* case, (19 How. [60 U.S.] 393, 405, 407-408, 1857) on the issue whether, in the eyes of the Framers, slaves were "constituent members of the sovereignty," and were to be included among "We the People":

> We think they are not, and that they are not included, and were not intended to be included. . . . They had for more than a century before been regarded as beings of an inferior order, an altogether unfit to associate with the white race . . .; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . . [A]ccordingly, a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such . . . [N]o one seems to have doubted the correctness of the prevailing opinion of the time.

And so, nearly seven decades after the Constitutional Convention, the Supreme Court reaffirmed the prevailing opinion of the Framers regarding the rights of Negroes in America. It took a bloody civil war before the Thirteenth Amendment could be adopted to abolish slavery, though not the consequences slavery would have for future Americans.

While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the Fourteenth Amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment, and to have their votes counted, and counted equally. In the meantime, blacks joined America's military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country's magnificent wealth and waiting to share in its prosperity.

What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendent of an African slave. "We the People" no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them.

And so we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. Otherwise, the odds are that for many Americans the bicentennial celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives. If we seek, instead, a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history, the celebration of the "Miracle of Philadelphia" (Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787*, Boston, 1966) will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.

Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights. □

Constitution or Not

(*Continued from p. 11*)

If, however, it was unduly restrictive, it may be that the American law, in its interpretations of the reach of the First and Fourteenth Amendments, goes to the other extreme. The Warren Commission (not the Court), reviewing the events in the early aftermath of the assassination of President Kennedy, records that those events were "a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed, and the right of the individual to a fair and impartial trial."

Archibald Cox's judgment was that the American press had been freed from the fear of prosecution for contempt of court by reason of commentary or pending judicial business, however strident the effort to arouse public pressure to influence the course of justice. His evaluation of the whole performance was a mixed one.

> On one side this rule seems a sorry sacrifice of sobriety and decency in the administration of justice. Yet the Watergate affair illustrates the value of the (American) rule, at least in the trial of charges against high public officials . . . . The value of that exercise in self government . . . seems to me to have outweighed any risk of unfairness at the trial of these former leaders. . . . The case seems different when the crime nowise affects the conduct of public business, but it is difficult to perceive just how and where to draw a line.

If this says that one must bear with the bad if one is to enjoy the benefits, it is not altogether a clear and satisfactory outcome.

The late Alexander Bickel once wrote that the American Constitution via the First Amendment furnishes no certain answers, but only unruly accommodations. The fact is that in American, as in English law, the applications call for balances between countervailing claims and interests. This very brief discussion of areas of law affecting the press shows—is intended to show—that the balances may come out differently in the two systems of law. When Katharine Graham writes that "some paper may occasionally embark on a crusade in blatant disregard of some person's rights. These are not light offences. But, to put it bluntly, those are the risks—the risks which freedom always bears. The costs of limiting that freedom would be higher," she gives expression to widely held American values.

They are not necessarily English values. So when a judge bred in the English tradition (in this case a New Zealander) writes, after reviews of outcomes in these areas, that the English press is not *worse* off than its United States counterpart, though this does not mean that it is as free as it is in the United States, he gives expression to complex value differences in our two free societies. □

Federalism

(*Continued from p. 19*)

that process. His assumptions have two dimensions. One is institutional—that the states play a major role in structuring the national government. The other is political—that the nature of the process (especially in Congress) permits adequate focus on the states' interests as states. Neither branch of the argument reflects reality.

As to institutional influence, state legislatures at one time elected United States senators, the states drew the boundaries of congressional districts, and state law decided who could vote in federal elections. Amendments to the Constitution (direct election of senators), judicial decisions (reapportionment, poll tax, etc.), and federal statutes (such as the Voting Rights Act of 1965) have dramatically reduced state control of the federal political process.

Likewise, the "political" safeguards have declined. Political parties, especially at the state level, are no longer the force they once were; political action committees now pump vast amounts of money into political campaigns, so that special interest politics weakens federal lawmakers' sense of loyalty to constituents.

It would be an exercise in myth-making to suppose that on Capitol Hill a constitutional value such as federalism is likely to be weighed for its own merits. One of the reasons we have federal courts and judicial review is that it would be folly to leave the guarantees of the Constitution and the Bill of Rights solely to legislative discretion, state or federal (the Bill of Rights was, after all, originally drafted to cabin *federal* power; even the First Amendment begins with the phrase, "Congress shall make no law . . ."). In arguing that the Supreme Court ought not leave federalism to the unchecked discretion of Congress, any more than it would be indifferent to the impact of federal laws upon free speech or free exercise of religion, one need not impute any kind of bad motives or constitutional recklessness to Congress. It is simply to recognize that the limits of time, the pressures of lobbyists, the temptations of expediency, undue reliance on staff to draft and interpret bills, and other distractions have more to do with the final shape of legislation than any thinking about constitutional issues. Martin Shapiro has put the point well: "The nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified, or responsible judgments on the constitutionality of its own statutes."

The essential flaw in *Garcia*, however, does not turn on empirical judgments. *Garcia* betrays an unsettling disregard of a basic truth about American federalism: That institutional rights, under our Constitution, are a form of individual rights. Even our most prized guarantees—such as the First Amendment's speech and religion clauses and the Fourteenth Amendment's due process and equal protection clauses—do not secure absolute personal rights. They protect against governmental (that is, institutional) actions, not against infringements by private parties.

Securing individual rights under the Constitution, therefore, requires that Americans be assured of the stability of the institutional safeguards explicit or implicit in the Constitution. Neither institutional nor individual protections are to be abandoned simply because they may be thought by some to be inconvenient or outmoded. Federalism may be hard to define, but it is also difficult to give precise meaning to "freedom of speech" or "establishment of religion." That a value may elude easy application does not mean that the Court should neglect the job of enforcing its constitutional dimensions. Federalism is more than a political compromise adopted to get the Constitution underway; it is one of the predicates of the constitutional order.

Perhaps one of the legacies of the year in which Americans mark the Constitution's bicentennial will be a revival of concern for federalism, not simply as a convenient administrative arrangement, but as a fundamental constitutional value.

Of vigorous local democracy—local people having genuine power to make choices about issues that affect their lives—one can say what Thomas Jefferson said in describing his Bill for the More General Diffusion of Knowledge: that the object is to render the people "the safe, as they are the ultimate, guardians of their own liberty." □

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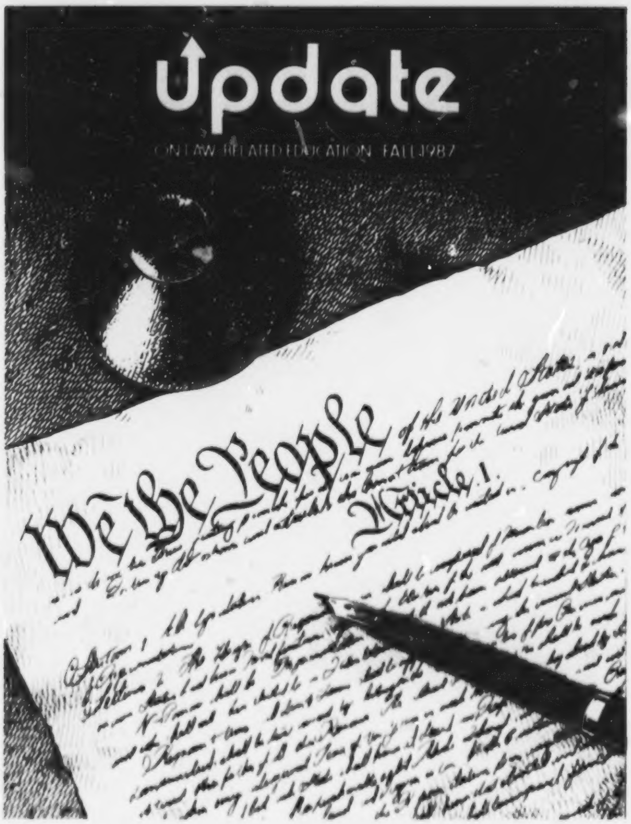
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ON LAW-RELATED EDUCATION FALL 1987
We the People
Article 1

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Update

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contents

Volume 12, No. 1, Winter, 1988

2 Lawyers and the Quest for Justice

ELEMENTARY SCHOOL

K-9 STRATEGIES

6 Contracts
6 Warranties
11 Privacy and Property
12 Battle for the Truth
14 Rules and Responsibilities
15 Dramatization of Salem Witch Trial
16 Lawmakers: Who's Who in the Law
18 Freedom of Expression

22 Why Do I Have to Go to School?

MIDDLE SCHOOL

MIDDLE SCHOOL STRATEGY

30 Students' Constitutional Rights

34 Legal Literacy for Laypeople

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

40 Making a Lawyer's Work Come Alive
42 Privacy and Property
44 Law "Tests"
47 Extending Understanding of Equal Protection
50 Your Rights on the Job

54 Court Briefs

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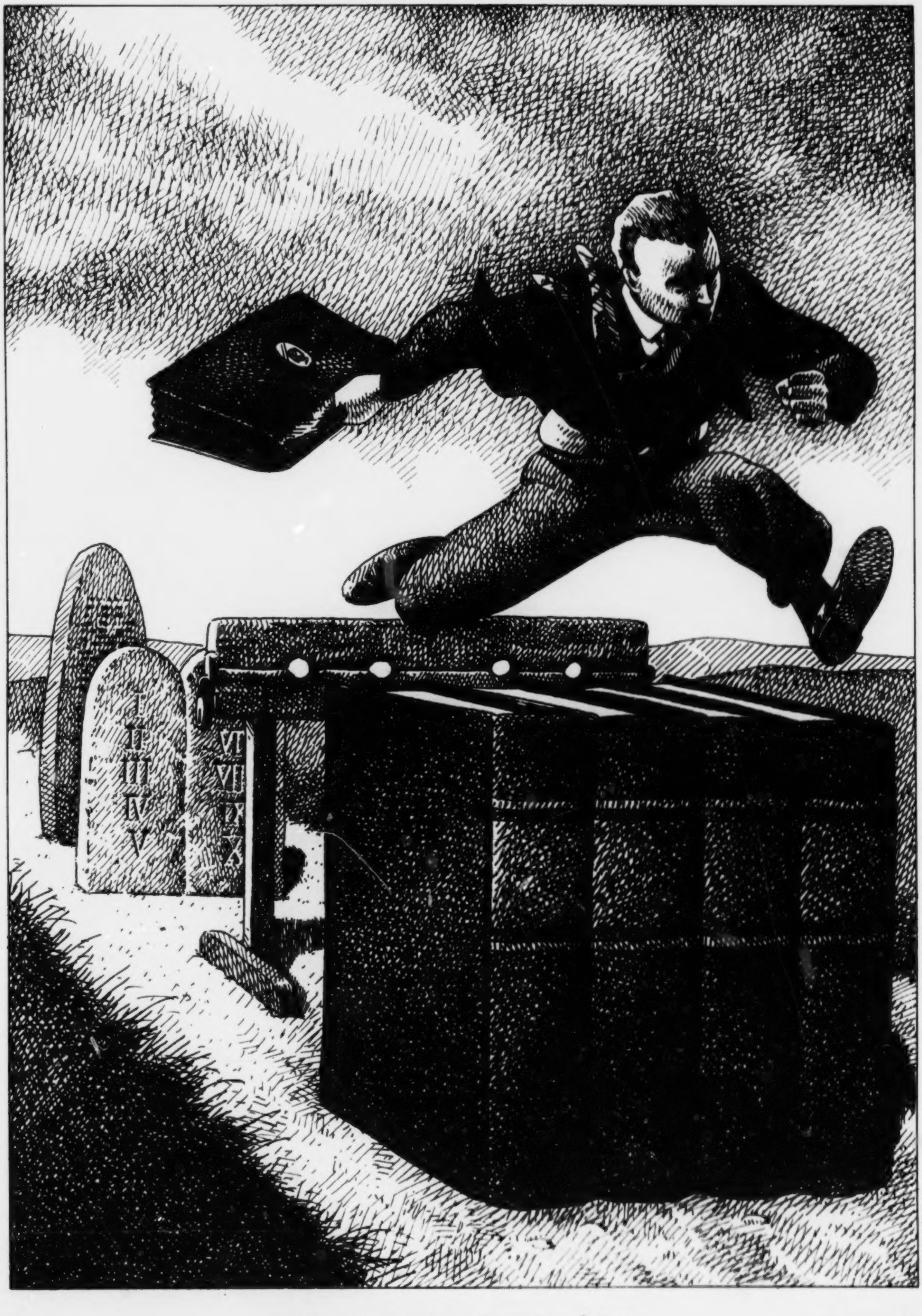
I
II
III
IV
V
VI
VII
IX
X

Tom Herzberg

Lawyers and the Quest for Justice

A look at the past, the present, and the future

[Editor's Note: The following article on law and lawyers in American life was prepared as a speech for the State Bar of Texas and could easily be adapted as a Law Day speech.]

Each of us lives in a network of legal relationships. The law is with us from the moment we are hatched to the time when we are matched and finally dispatched. One is hard-pressed to identify any activity or relationship which has no legal connection. The family, the local community, the city, the state, and the nation could not function without legal systems. The food we eat, the clothes we wear, the places in which we work, the work we do, as well as the sidewalks on which we stroll, the highways on which we drive, and the skies through which we fly are entangled in a legal skein. Why, even the names we bear and the addresses at which we live are matters of legal record.

From the simplest societies, such as the Eskimos in the Arctic and the tribal societies in the tropics, to the most complex nations, such as our own and the Soviet Union, the law seems to be everywhere, like the air we breathe. Why is that so and how did that come to be?

If the law could be compared to a tree, its roots would rest in the soil of human nature and human history and its branches would cover most, if not all, of our activities.

Hammurabi and Moses

It was almost 4000 years ago that Hammurabi, King of Babylonia, posted his famous code of 282 laws on diorite columns throughout his realm. He probably used these public bulletin boards to make sure that no one could claim ignorance of the law. To read this long list of laws today is to realize that human nature has not changed very much in some ways. The laws condemn assault, robbery, theft, usury, kidnapping, fraud, and trespass. In family matters, the code deals with marriage, divorce, adoption, inheritance, and incest. It even punishes medical malpractice and provides veterans' benefits in the form of a G. I. Bill of Rights.

It has been said that this code was all justice and no mercy. Its major form of punishment was the *Lex Talionis*—"The Law of the Claw." Put simply, it required "an eye for an eye, a tooth for a tooth, and a life for a life."

Several hundred years after Hammurabi's venture into lawmaking, Moses made his famous climb up Mount Sinai to hold the first summit meeting in history with "The Party of the First Part." He returned with perhaps the shortest code in history: ten simple commandments which could be easily memorized by using the fingers of both hands. This was probably the first example of basic education. In time, Moses discovered that additional laws were necessary to control relationships and transactions between members of his community and, like Hammurabi, the Mosaic Code developed into a long list of do's and don'ts. Although some writers argue that one code was derived from the other, there are those who maintain that the law is a mirror of society and the commonalities in both codes are the result of similar human experiences and a reflection of the morality of the times.

What is especially interesting is that both codes incorporated the *Lex Talionis*. Although for us Americans, such punishment is regarded as harsh, brutal, and unacceptable, it must be recognized that "an eye for an eye, and a life for a life" was a great modern reform over the old ways of revenge—the lives of an entire family for one life, a life for an eye, and a mouth full of teeth for one tooth. This is the way the law moves—small steps toward justice tempered with mercy.

Ordeals by Fire, Water, and Battle

Throughout history, rulers and governments have been confronted with the most difficult of all legal questions: How do we know who is telling the truth? Ancient and medieval societies resorted to trial by ordeal in the belief that God could be depended upon to reveal his judgment in various ways.

In ordeal by fire, an accused was required to walk over hot coals or to plunge the hand into boiling water. If, after several days, usually three, there was little or no injury, the verdict was "not guilty." If, on the other hand, there was an injury, it was obvious that the divine sign was "guilty."

In ordeal by water, the accused were thrown into deep water. If they sank, it was proof of innocence because the water would receive only the pure. Those who were rejected by the water were obviously guilty of the crime charged. It has been said with "tongue in cheek" that a guilty

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Isidore Starr is a lawyer-educator who is widely recognized as the father of law-related education.

party could choose suicide in order to preserve his or her good name.

In ordeal by combat or battle, the contestants took an oath that they were telling the truth and then a duel was fought. The victor was awarded the decision and was regarded as the innocent party. In some cases, a child, a woman, or an older person could be represented by a champion.

In a fourth method used to determine guilt or innocence, the accused or prisoner had to bring a number of friends or neighbors who would swear that he or she was telling the truth. The number of required oath swearers depended on the severity of the crime. These witnesses took the oath in the name of God that they were telling the truth. If they failed to follow the required ritual or were not convincing, the accused was judged "guilty."

We should ask ourselves why these ordeals persisted for so many years and in so many societies? A famous English scholar (Maitland) answered as follows: "The case is too hard for man so it is left to the judgment of God." Another explanation is that in highly religious societies the role of God is central to all human activity, and, in that sense, God is the ultimate judge. In addition, it was believed that ordeals served the important purpose of deterring crime and punishing severely those whom divine intervention had adjudged to be guilty.

As societies became more secular and as more men and women began to grapple with fairness in the laws of their country, there gradually began to emerge what has been called our "sense of injustice." Whether it lies in our heads, or our hearts, or in our glands, many of us are appalled by the methods of the past: ordeals and an eye for an eye. We feel that there are better and more humane methods for deciding guilt and innocence in criminal cases and right and wrong in civil cases. It is this sense of injustice that marked the transition from the past to the present.

A Look at the Present

If trial by ordeal characterized the legal systems of the past, trial by due process of law characterizes our legal system today. Ordeals may be used by totalitarian systems today, but we Americans find such methods abhorrent. The framers of our Constitution had their roots in English law and envisioned a society based on the rule of law. In pursuit of that vision, they created a framework of government and a Bill of Rights that has become a beacon for all people who seek freedom and love liberty.

Due process of law is an old English phrase which means that, when you become involved in the legal system as a plaintiff or as a defendant, or as an accused in a criminal proceeding, you are entitled under the law to certain safeguards or procedures. The Fifth and Fourteenth Amendments state clearly that no person may be deprived of life, liberty, or property without due process of law. This applies to the federal government, as well as to the states.

What does all of this mean specifically so far as each of us is concerned? It means that there can be no unreasonable searches and seizures because "a man's house is his castle." It means that no person can be compelled to be a witness against himself. In other words, confessions are not acceptable unless the accused has been read the Miranda rules at the time he or she is taken into custody. Confessions must be voluntary, not coerced. Due process of law means that you are entitled under the Constitution to a speedy and public trial before an impartial judge and jury; to be informed of the nature of the charges against you; to confront the witnesses against you; to subpoena your own witnesses; and to have the assistance of counsel for your defense.

What does all of this add up to? It means that you are innocent until the State proves that you are guilty beyond a reasonable doubt. As I have tried to show, we have all come a long way in history from those days when accused persons had to prove their innocence. Today we try to protect the accused with a battery of constitutional rights to make sure that we have not made the tragic mistake of convicting an innocent person.

The Adversary System

To achieve the ideal or goal of justice for all, our legal system is based on the adversary system. Lawyers for the opposing sides engage in a modern trial by battle before a judge, or a judge and jury, and in the presence of an audience—the public. Our trials are open to the public so that justice can be seen in operation and reported on by the press and the other media. Our open trials are in sharp contrast to the secret Star Chamber proceedings in the English courts of many years ago, as well as the closed trials in modern totalitarian states.

As you know, our system does not depend on divine intervention. Complex societies produce complicated laws, and we depend on lawyers to use their skills to bring out the facts favorable to their clients. It is up to the judge and jury to make the final determination. Losers in a case no longer appeal to Heaven: they appeal to a higher court.

So much attention in our press and television is paid to criminal trials that we fail to appreciate that most court trials deal with civil cases involving accidents, land claims, family problems, business deals, consumer issues, and landlord-tenant disputes. Here, too, the law requires due process of law in the form of rules of evidence, codes of conduct on the part of judges, lawyers, and witnesses, and rules for jury selection and deliberation. In a criminal case, the State has the burden of proving that the accused is guilty beyond a reasonable doubt; in a civil case, the plaintiff must prove that he or she is right by a fair preponderance of the evidence—not an easy task.

Those of you who remember Gilbert and Sullivans's *Mikado* may remember the Mikado's popular song:

> My object all sublime
> I shall achieve in time—
> To let the punishment fit the crime.

Our legal system rejects the *Lex Talionis*, although there are people who would like to revise it. Our Bill of Rights prohibits excessive bail, excessive fines, and cruel and unusual punishments. It is this last phrase that gives rise to protests against capital punishment.

The ever-developing refinement of our sense of justice has carried over into civil law. The principle of fairness is the foundation for judgments of money and property, as well as injunctions to prevent harm to persons or property.

The Legal Profession

Whenever a flagrant case of injustice is reported in the media, there immediately arises the cry that our legal system is a disaster. Whenever a lawyer is reported to have engaged in an unethical, immoral, or illegal act, there immediately arises the cry that the profession is a closed corporation and that the bar tolerates the incompetent and the corrupt. The thousands of cases in which justice triumphs each year, the thousands of lawyers who serve their clients faithfully and well, and the many disbarment hearings held throughout the years do not somehow seem to be newsworthy.

Criticism of lawyers has persisted throughout history. In one of Shakespeare's plays (*Henry VI*) there appears the oft-quoted line: "The first thing we do, let's kill all the lawyers." Many, many years later, when the Communists came to power in Russia, one of their leaders declared that the first class scheduled for liquidation should be the lawyers. To which Lenin replied: "And then we will issue our first decree and we will have a whole new class of lawyers."

Like other people in history, the Americans have had a love-hate relationship with lawyers and the bar from the very beginnings of our history. Believe it or not, in colonial times Virginia, Massachusetts Bay, and Connecticut prohibited pleadings for hire, while the Quakers opposed the adversary system because it conflicted with their ideal of the Common Peacemaker. Lawyers had apparently developed the reputation of obfuscating issues, using esoteric language, charging excessive fees, and being meddlesome intermediaries who gain while their clients lose.

On the other hand, the love relationship revolves around the lawyer as a popular, heroic figure. Students in elementary and secondary schools read about Andrew Hamilton, architect of Independence Hall and counsel for Peter Zenger in his 1735 quest for freedom of the press. In September, 1985, the American people, in general, and the press, in particular, celebrated the anniversay of this landmark victory for newpapers. Andrew Hamilton, an old man at the time, made so eloquent a spech before the jury that Zenger was acquitted for the crime of criticizing the governor of New York. At that time, it was a crime to criticize a British official, even if the criticism was true.

Students in our schools also learn about John Adams and his decision to represent the British soldiers in the alleged Boston Massacre. They and all of us should know that almost half of the signers of the Declaration of Independence and more than half of the framers of the Constitution were lawyers. Our history has been enriched by such historic personalities as Abe Lincoln, the great country lawyer, and Clarence Darrow, the defender of unpopular causes.

As in all other professions, the legal profession has had its triumphs and tragedies. In evaluating us, you have to ask yourselves how many lawyers you know—there are several hundred thousand of us—and what has the legal profession done to assist you, your associates, your city, your state, and our nation. The record may not be a perfect score, but the balance sheet of our contributions to American life has been a favorable one.

A Look at the Future

The one thing that can be said about most lawyers and their bar associations is that they are not sitting on their hands looking to the past. Our legal system is under constant scrutiny, and our state bar associations, as well as the American Bar Association, meet regularly to grapple with current criticisms of the legal system. Ours is a litigious society and that is not all bad. Instead of taking to the streets or to the fists to settle serious disputes, we take to the courts. In some states, the backlog of cases is so serious that it may be threatening the collapse of some court systems. Since justice delayed is justice denied in many cases, lawyers have tried to work with state legislators to develop ways and means of speeding up the judicial process. The use of computers and videotapes of testimony are being tried. In one state (Connecticut), lawyers have actually sued the state over the backlog that has been building up.

In addition to overcrowded courts, litigation has become so expensive that many people cannot afford to go to the courts to seek the justice which they feel is their due. To confront this challenge, a number of states are experimenting with mediation, in which trained private volunteers are used to bring the parties together in an informal setting to get them to define the issues and to try to agree on a solution. If this fails, they can resort to the courts. Lawyers are also beginning to make use of this approach.

In some states, arbitration panels are available to resolve a dispute. Under this procedure, the contestants submit the issues to a panel whose decision is binding on all parties to the dispute.

Small claims courts are available in most states and the parties appear without the benefit of representation of counsel. Indigent parties have recourse to legal services furnished by the federal government with assistance of the state. An indigent accused of a crime involving a jail sentence must be furnished assistance of counsel by the local community or the state.

Since the rich can afford the best counsel money can buy and the poor can often get the assistance of legal services, where does that leave the middle class? In recent years, there have been experiments in Judicare—programs in which organizations, such as unions, have retained counsel for themselves and their members. The members pay a small fee each week or month and they are then entitled to a limited number of hours of office consultation, as well as a limited number of hours in courtroom representation. As we move into the future, these programs will be improved and refined.

Lawyers and bar associations are very sensitive to public criticism of our criminal justice system. There is merit to the charge that our system is overly concerned with the rights of the accused and seemingly callous to the rights of the victim. We tried to show in our opening remarks how in the past the accused rarely had a chance to prove innocence. The accused were generally regarded as guilty and the ordeals were so designed that it required a miracle to prove innocence. That is why, when we designed our system, we made every effort to protect the innocent with the shield of due process of law. To begin to experiment radically with this important principle may turn the clock back to some of barbaric practices of the past.

However, to rectify the scales of justice and to give deserved recognition to the rights of the victims and their families, a number of states have passed victim compensation laws. Under this legislation, the victim becomes eligible for compensation for medical expenses, loss of earnings or support, pain and suffering, and funeral expenses. In death cases, dependents are generally eligible. As we move into the future, this type of legislation will probably become more common. In all cases, the victim can sue the guilty party. Unfortunately, however, in many cases there is little that the victim or the members of the family can collect.

As for the criticism that there is too much plea bargaining under our criminal justice system, the answer is that in many states it is financially and practically impossible to try every accused before a judge or a judge and jury. Although Alaska has outlawed plea bargaining, larger states with serious crime problems do not have the courtrooms, the prosecutors, the judges, and the finances to give each accused his or her day in court. That would be the ideal thing to do, but we have to ask ourselves how we could do it, if every accused is to be afforded a speedy trial.

There are other imperfections in our legal system, and we are free to criticize freely and even to condemn. But we are also free to work together to improve the system. Trying to achieve "Equal Justice Under Law" is a community responsibility, and the legal profession needs all

(continued on page 63)

Legal Literacy

Contracts/Grades 5-9 **Gayle Mertz**

What is a contract and why is it important?

Objective

Students will be able to define the word *contract* and give the elements of a good contract in their own words.

Procedure

Have students read the section entitled "Mikey's Big Deals" in the *Bummers* comic strip (pp. 8-10). Ask the following questions:

1. What did Mikey do wrong the first time he borrowed the bike?
2. What deal did Mikey finally make so he got a bike to ride?
3. What is another word for the "deals" Mike tried to make?

Then ask students for a definition of a contract. (An oral or written promise made by two or more people in which there is an exchange of goods and/or services. The parties can agree to do or not to do something.) To help students understand (or arrive at) the definition:

1. Take something from one of the students and give them a penny or nickel in exchange. Then ask, "Is this a contract?" (No, there isn't mutual agreement.)
2. Take something from one student and give it to another student. "Is this a contract?" (No, you have to have a right to what you exchange.)
3. Go up to a student and offer her $25.00 if she/he will poke the tires of someone's bike whom you don't like. "Is this a contract?" (No, it's illegal.)

Have the students separate into pairs and have each pair write a contract between themselves for either goods or service. (Give them 10-15 minutes.)

After the students have finished, critique the contract.

1. Ask how many students put the date on their contract.
2. Have them look at the "Contract Hints" (see box) and see if they put in the seven things that make a legal contract.
3. Why is it important to have all the details? (To avoid conflicts).

Have students give examples of people who have contracts. (i.e., teachers with school districts; school districts with dairies for milk.)

What is a Contract?

A contract is a promise made by two or more people in which each agrees to do or not to do something.

SEVEN THINGS THAT MAKE A LEGAL CONTRACT

1. **One person must make an offer and the other person must accept it.**
2. **All parties must understand each other and the agreement.**
3. **Something of value must pass between the parties to show they mean business.**
4. **Everyone must understand what they are doing.**
5. **The agreement must not be against the law.**
6. **The agreement must be serious and not a joke. The parties must really mean to make an agreement.**
7. **Important contracts should be in writing. They should be read and studied carefully by both parties before signing.**

Legal Literacy

Warranties/Grades 5-9 **Gayle Mertz**

What is a warranty and why is it important?

Objective

Students will be able to define the word warranty and to explain in their own words the information that every warranty should contain.

Procedures

Write the word *warranty* on the board. Ask the students the following questions:

1. What is a warranty? (They will probably say something like a guarantee, which is acceptable. For a more complete definition you may want to write: *warranty*—a statement, usually written, which promises certain things about the quality of the product or how long it will last. It may also promise what will be done if the product breaks or fails to do what it was bought to do.)
2. Why do we need warranties? (So that when a product breaks down, you will know if you can get it fixed or replaced and who is responsible for the costs of repair.)
3. What should be included in the warranty? Give each student or small groups of students one of the warranties from the warranty box on the facing page and then have them locate the following information:
   - exactly what is covered by the warranty
   - length of time the product is warranted
   - by whom the product is warranted
   - what parts, if any, are included under the warranty
   - step-by-step information on what the consumer should do to get repair or replacement of the product under warranty
   - is it a "limited" warranty
4. Discuss the students' responsibilities concerning warranties.

   a. They need to put them in safe places.
   b. They need to follow the conditions of the warranties.
5. Ask the students if they think that the following items could be returned:
   a. Tennis shoes worn twice in the rain with the sole coming apart from the shoe.
   b. A doll that broke one day after being received.
   c. A shirt which had only been worn once, but after being washed was two sizes too small.

   Inform the students that there is something called a *warranty of merchantibility* (write on board), which means that what you buy should be fit for the ordinary purposes intended when used in a reasonable manner. This is an *implied* warranty, and does not need to be written.
6. Have students role play the following situation: A consumer is shopping for a bicycle. He/she talks to the store clerks at two or three stores about bikes and their warranties. They should question the clerk about specific things in the warranty such as how long the warranty is for, exactly what it covers (materials, labor, etc.).

Gayle Mertz is director of the Boulder County Safeguard Law-Related Education Program, Boulder, Colorado.

LIMITED WARRANTY

[This warranty supersedes any warranty or guarantee which may be printed on any other literature packed with this product.]

The language of Sunbeam's warranty has been modified recently to conform to a new federal law. The substance of our warranty, however, remains unchanged and the benefits previously offered to purchasers of Sunbeam products have not been diminished in any way by this new language.

Your Sunbeam product is warranted for one year from date of purchase against defects in material and workmanship. During this period such defects will be repaired, or the product will be replaced, at Sunbeam's option, without charge. This warranty does not cover damage caused by misuse, negligence or use on current or voltage other than that stamped on the product. ALL IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF FITNESS AND MERCHANTABILITY, ARE LIMITED IN DURATION TO A PERIOD ENDING ONE YEAR FROM THE DATE OF PURCHASE. Bring the product (or send it, postage prepaid) to the nearest Sunbeam Appliance Service Company, or authorized independent service station. If you send, please write a letter explaining the nature of your difficulty to the station.

SUNBEAM APPLIANCE COMPANY
A Division of Sunbeam Corporation
5400 West Roosevelt Road
Chicago, Illinois 60650

One-Year Limited Warranty

Any Bell Helmet found by the factory to be defective in materials and/or workmanship within one year from the date of purchase will be repaired or replaced—at the option of the manufacturer—free of charge when received at the factory, freight prepaid.

Any modifications made by the user will render the warranty null and void.

This warranty is expressly in lieu of all other warranties, and any implied warranties of merchantability or fitness for a particular purpose created hereby, are limited in duration to the same duration as the expressed warranty herein. Bell shall not be liable for any incidental or consequential damages. Some states do not allow the exclusion or limitations of implied warranties, incidental or consequential damages, so the above limitations and exclusions may not apply to you.

This warranty gives you specific legal rights, and you also have other rights which vary from state to state.

Bell Helmets, Inc.
1530 Shoemaker Avenue
P.O. Box 1020
Norwalk, CA 90650

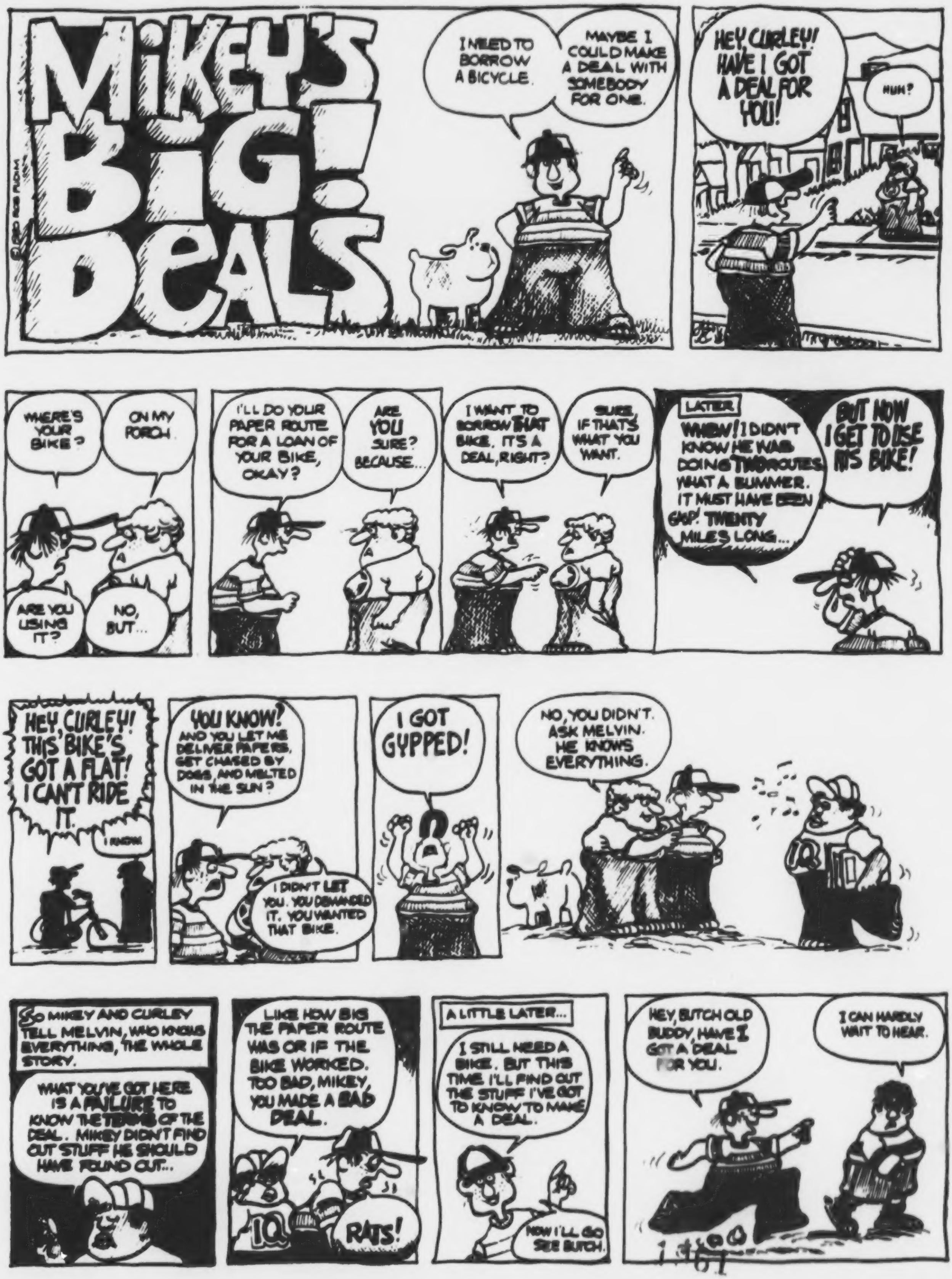
LIMITED WARRANTY ON AQUARIUM

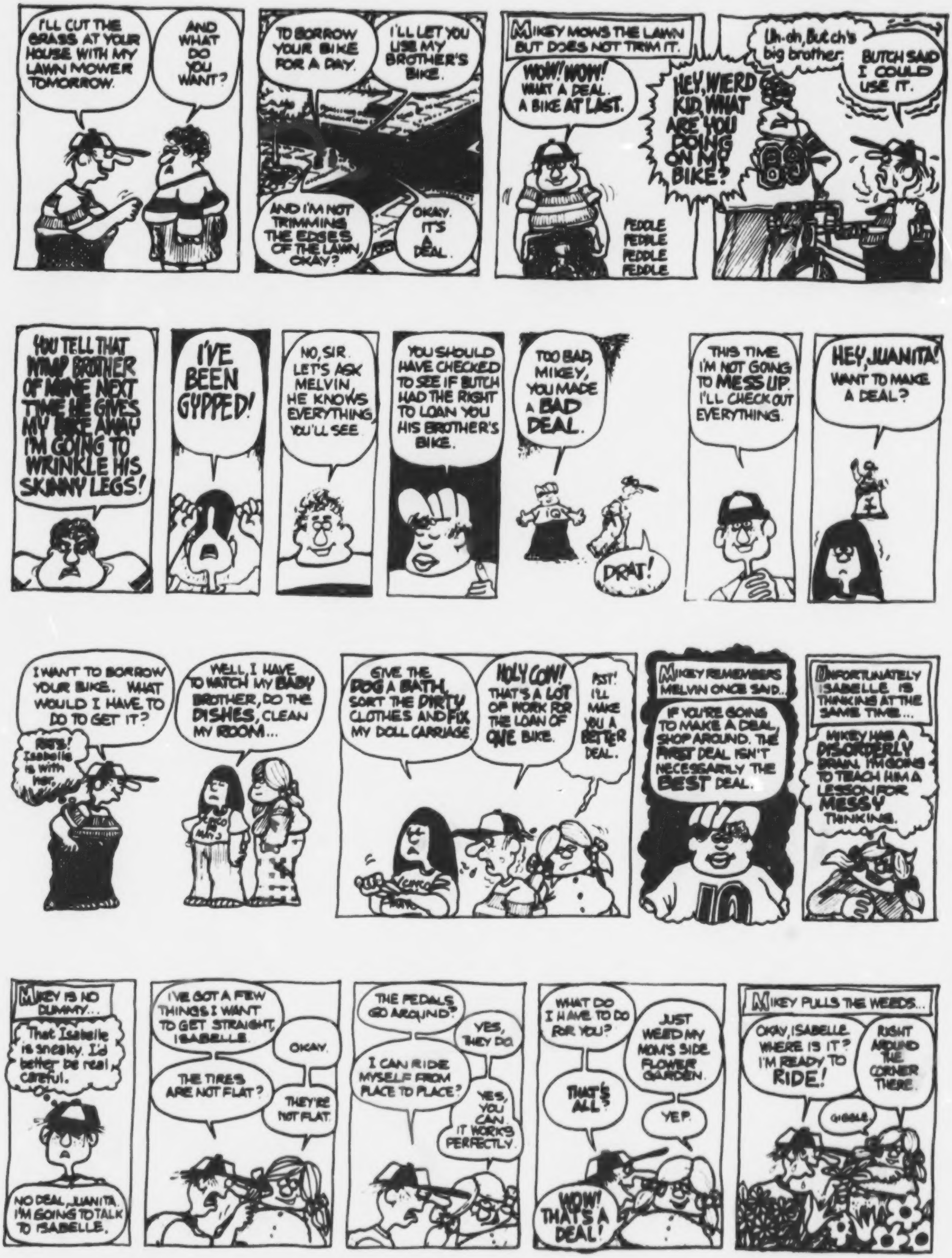
This aquarium is warranted not to leak. O'Dell does not warrant this aquarium against breakage. The warranty is limited to the value of this aquarium only and does not cover consequential loss or damage suffered by the customer including damage to living or material objects. Fill aquarium and check for leaks.

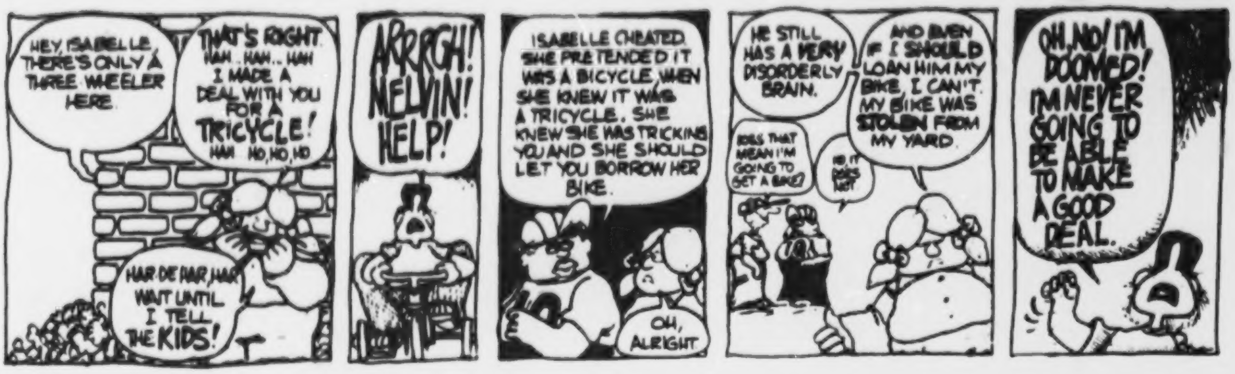
Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

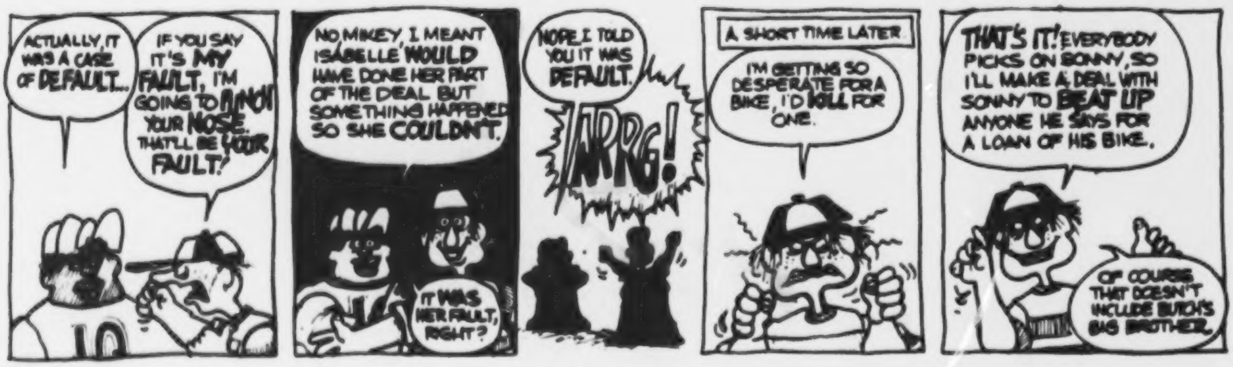
This warranty gives you specific legal rights, and you may also have other rights which vary from state to state. THIS WARRANTY APPLIES FOR NO MORE THAN 30 DAYS FROM DATE OF PURCHASE. WHEN MAKING A CLAIM, PROOF OF PURCHASE IS REQUIRED.

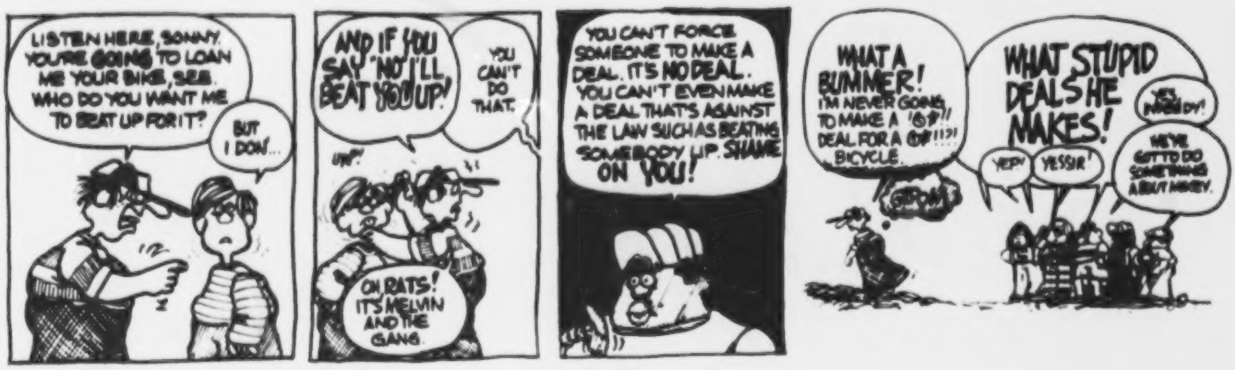
To obtain service under this warranty, simply contact your nearest O'Dell dealer or write O'Dell Mfg., P.O. Box 1169 Univeter Road, Canton, Georgia 30114.

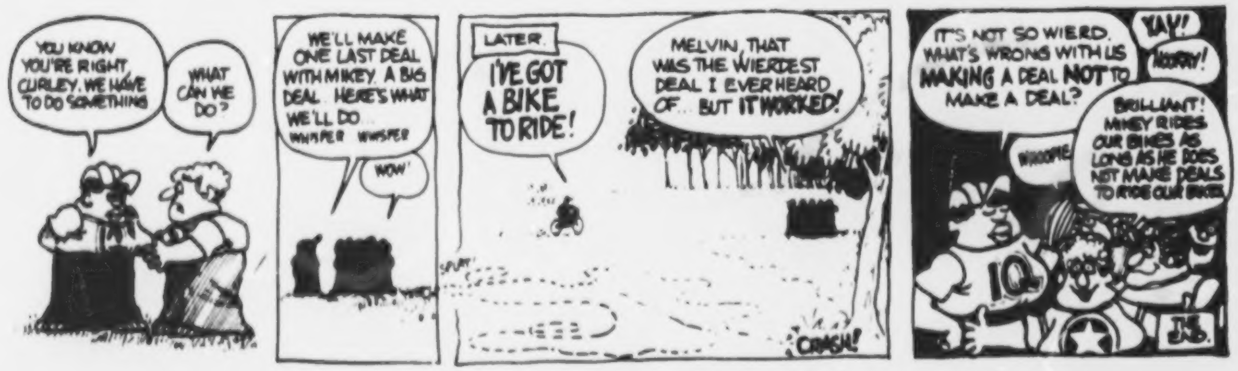
MiKEY'S BIG! DEALS
© 1980 ROB FUDIM
I NEED TO BORROW A BICYCLE.
MAYBE I COULD MAKE A DEAL WITH SOMEBODY FOR ONE.
HEY, CURLEY! HAVE I GOT A DEAL FOR YOU!
HUH?
WHERE'S YOUR BIKE?
ON MY PORCH.
ARE YOU USING IT?
NO, BUT...
I'LL DO YOUR PAPER ROUTE FOR A LOAN OF YOUR BIKE, OKAY?
ARE YOU SURE? BECAUSE...
I WANT TO BORROW THAT BIKE. IT'S A DEAL, RIGHT?
SURE, IF THAT'S WHAT YOU WANT.
LATER
WHEW! I DIDN'T KNOW HE WAS DOING TWO ROUTES. WHAT A BUMMER. IT MUST HAVE BEEN GASP! TWENTY MILES LONG...
BUT NOW I GET TO USE HIS BIKE!
HEY, CURLEY! THIS BIKE'S GOT A FLAT! I CAN'T RIDE IT.
I KNOW.
YOU KNOW? AND YOU LET ME DELIVER PAPERS, GET CHASED BY DOGS, AND MELTED IN THE SUN?
I DIDN'T LET YOU. YOU DEMANDED IT. YOU WANTED THAT BIKE.
I GOT GYPPED!
NO, YOU DIDN'T. ASK MELVIN. HE KNOWS EVERYTHING.
IQ
SO MIKEY AND CURLEY TELL MELVIN, WHO KNOWS EVERYTHING, THE WHOLE STORY.
WHAT YOU'VE GOT HERE IS A FAILURE TO KNOW THE TERMS OF THE DEAL. MIKEY DIDN'T FIND OUT STUFF HE SHOULD HAVE FOUND OUT...
LIKE HOW BIG THE PAPER ROUTE WAS OR IF THE BIKE WORKED. TOO BAD, MIKEY, YOU MADE A BAD DEAL.
RATS!
A LITTLE LATER...
I STILL NEED A BIKE. BUT THIS TIME I'LL FIND OUT THE STUFF I'VE GOT TO KNOW TO MAKE A DEAL.
NOW I'LL GO SEE BUTCH.
HEY, BUTCH OLD BUDDY, HAVE I GOT A DEAL FOR YOU.
I CAN HARDLY WAIT TO HEAR.


I'LL CUT THE GRASS AT YOUR HOUSE WITH MY LAWN MOWER TOMORROW.
AND WHAT DO YOU WANT?
TO BORROW YOUR BIKE FOR A DAY.
I'LL LET YOU USE MY BROTHER'S BIKE.
AND I'M NOT TRIMMING THE EDGES OF THE LAWN, OKAY?
OKAY. IT'S A DEAL.
MIKEY MOWS THE LAWN BUT DOES NOT TRIM IT.
WOW! WOW! WHAT A DEAL. A BIKE AT LAST.
PEDDLE PEDDLE PEDDLE PEDDLE
Uh-oh, Butch's big brother.
HEY, WIERD KID, WHAT ARE YOU DOING ON MY BIKE?
BUTCH SAID I COULD USE IT.
YOU TELL THAT WIMP BROTHER OF MINE NEXT TIME HE GIVES MY BIKE AWAY I'M GOING TO WRINKLE HIS SKINNY LEGS!
I'VE BEEN GYPPED!
NO, SIR. LET'S ASK MELVIN. HE KNOWS EVERYTHING, YOU'LL SEE.
YOU SHOULD HAVE CHECKED TO SEE IF BUTCH HAD THE RIGHT TO LOAN YOU HIS BROTHER'S BIKE.
TOO BAD, MIKEY, YOU MADE A BAD DEAL.
IQ
DRAT!
THIS TIME I'M NOT GOING TO MESS UP. I'LL CHECK OUT EVERYTHING.
HEY, JUANITA! WANT TO MAKE A DEAL?
I WANT TO BORROW YOUR BIKE. WHAT WOULD I HAVE TO DO TO GET IT?
RATS! Isabelle is with her.
WELL, I HAVE TO WATCH MY BABY BROTHER, DO THE DISHES, CLEAN MY ROOM...
GIVE THE DOG A BATH, SORT THE DIRTY CLOTHES AND FIX MY DOLL CARRIAGE.
HOLY COW! THAT'S A LOT OF WORK FOR THE LOAN OF ONE BIKE.
PSST! I'LL MAKE YOU A BETTER DEAL.
MIKEY REMEMBERS MELVIN ONCE SAID...
IF YOU'RE GOING TO MAKE A DEAL, SHOP AROUND. THE FIRST DEAL ISN'T NECESSARILY THE BEST DEAL.
10
UNFORTUNATELY ISABELLE IS THINKING AT THE SAME TIME...
MIKEY HAS A DISORDERLY BRAIN. I'M GOING TO TEACH HIM A LESSON FOR MESSY THINKING.
MIKEY IS NO DUMMY...
That Isabelle is sneaky. I'd better be real careful.
NO DEAL, JUANITA. I'M GOING TO TALK TO ISABELLE.
I'VE GOT A FEW THINGS I WANT TO GET STRAIGHT, ISABELLE.
OKAY.
THE TIRES ARE NOT FLAT?
THEY'RE NOT FLAT.
THE PEDALS GO AROUND?
YES, THEY DO.
I CAN RIDE MYSELF FROM PLACE TO PLACE?
YES, YOU CAN. IT WORKS PERFECTLY.
WHAT DO I HAVE TO DO FOR YOU?
JUST WEED MY MOM'S SIDE FLOWER GARDEN.
THAT'S ALL?
YEP.
WOW! THAT'S A DEAL!
MIKEY PULLS THE WEEDS...
OKAY, ISABELLE. WHERE IS IT? I'M READY TO RIDE!
RIGHT AROUND THE CORNER THERE.
GIGGLE.


HEY, ISABELLE, THERE'S ONLY A THREE WHEELER HERE.
THAT'S RIGHT. HAH.. HAH.. HAH I MADE A DEAL WITH YOU FOR A TRICYCLE! HAH HO, HO, HO
HAR DE HAR HAR WAIT UNTIL I TELL THE KIDS!
ARRRGH! MELVIN! HELP!
ISABELLE CHEATED. SHE PRETENDED IT WAS A BICYCLE WHEN SHE KNEW IT WAS A TRICYCLE. SHE KNEW SHE WAS TRICKING YOU AND SHE SHOULD LET YOU BORROW HER BIKE.
OH, ALRIGHT.
HE STILL HAS A VERY DISORDERLY BRAIN.
AND EVEN IF I SHOULD LOAN HIM MY BIKE, I CAN'T. MY BIKE WAS STOLEN FROM MY YARD.
DOES THAT MEAN I'M GOING TO GET A BIKE?
NO IT DOES NOT
OH, NO! I'M DOOMED! I'M NEVER GOING TO BE ABLE TO MAKE A GOOD DEAL.


ACTUALLY, IT WAS A CASE OF DEFAULT...
IF YOU SAY IT'S MY FAULT, I'M GOING TO PINCH YOUR NOSE. THAT'LL BE YOUR FAULT!
NO MIKEY, I MEANT ISABELLE WOULD HAVE DONE HER PART OF THE DEAL BUT SOMETHING HAPPENED SO SHE COULDN'T.
IT WAS HER FAULT, RIGHT?
NOPE. I TOLD YOU IT WAS DEFAULT.
ARRG!
A SHORT TIME LATER
I'M GETTING SO DESPERATE FOR A BIKE, I'D KILL FOR ONE.
THAT'S IT! EVERYBODY PICKS ON SONNY, SO I'LL MAKE A DEAL WITH SONNY TO BEAT UP ANYONE HE SAYS FOR A LOAN OF HIS BIKE.
OF COURSE THAT DOESN'T INCLUDE BUTCH'S BIG BROTHER.


LISTEN HERE, SONNY. YOU'RE GOING TO LOAN ME YOUR BIKE, SEE. WHO DO YOU WANT ME TO BEAT UP FOR IT?
BUT I DON'...
AND IF YOU SAY 'NO' I'LL BEAT YOU UP!
YOU CAN'T DO THAT.
OH RATS! IT'S MELVIN AND THE GANG.
YOU CAN'T FORCE SOMEONE TO MAKE A DEAL. IT'S NO DEAL. YOU CAN'T EVEN MAKE A DEAL THAT'S AGAINST THE LAW SUCH AS BEATING SOMEBODY UP. SHAME ON YOU!
WHAT A BUMMER! I'M NEVER GOING TO MAKE A '©$'!! DEAL FOR A ©#!!?! BICYCLE.
WHAT STUPID DEALS HE MAKES!
YEP!
YESSIR!
YES, INDEEDY!
WE'VE GOTTO DO SOMETHING ABOUT MIKEY.


YOU KNOW YOU'RE RIGHT, CURLEY. WE HAVE TO DO SOMETHING
WHAT CAN WE DO?
WE'LL MAKE ONE LAST DEAL WITH MIKEY. A BIG DEAL. HERE'S WHAT WE'LL DO... WHISPER WHISPER
WOW!
LATER.
I'VE GOT A BIKE TO RIDE!
MELVIN, THAT WAS THE WIERDEST DEAL I EVER HEARD OF... BUT IT WORKED!
CRASH!
IT'S NOT SO WIERD. WHAT'S WRONG WITH US MAKING A DEAL NOT TO MAKE A DEAL?
YAY!
HOORAY!
WHOOPIE!
BRILLIANT! MIKEY RIDES OUR BIKES AS LONG AS HE DOES NOT MAKE DEALS TO RIDE OUR BIKES.
IQ
J.S.

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Legal Literacy

Privacy and Property, Search and Seizure/Grades 4-6

Dale Greenawald and Phyllis Clarke

Working with a legal expert, students will explain why privacy and the protection of private property is important, recognize that the right of society to protect itself sometimes conflicts with an individual's need for privacy, and recognize appropriate search and seizure procedures.

Objective

This lesson will take approximately 45 minutes. It is designed to help students recognize that individuals are guaranteed privacy in most situations in our society, to recognize that individual privacy and society's need for security may be in conflict, to recognize lawful search and seizure procedures, to support constitutionally guaranteed rights regarding search and seizure, and to apply analytical skills.

Procedures

Ask students to imagine what their life would be like if there was no privacy, e.g., the government could search their house any time, any conversations they had might be listened to by someone they didn't know, anyone could look at their school records. List all of the responses and discuss why it is important that people have privacy.

Explain that in most cases our privacy is guaranteed. For example, the Fourth Amendment of the Constitution indicates that we can usually assume that we have privacy in our homes, that our possessions and papers won't be searched, and that our conversations will be private.

However, sometimes a conflict arises between our right to privacy and society's need to protect itself from dangerous and illegal activities. Sometimes, to protect society, police and agents of the government need to obtain information, and their efforts may sometimes interfere in areas normally thought to be private and protected from outsiders. Most of the time, before the police or agents of the government can try to find the information they want, they must get a judge to issue a warrant. To get a warrant the police or agents of the government must show that they have a good reason to believe that they will be able to find the information that they want. They can not investigate a place just because they want to see what is there.

The procedure places a judge in the position of being a referee between the state, represented by the police, and the individual. This process attempts to balance the power between the individual and the state.

Sometimes, however, there are exceptions and police or government agents do not need to obtain a warrant. You might want to post these on the board. These exceptions include:

1. motor vehicles
2. stop and frisk
3. consent
4. hot pursuit
5. emergency circumstances
6. airline and border security searches
7. plain view
8. search by private party, rather than government

Explain the meaning of each of the above and give an example. Then divide the class into groups and have each group decide if their case is a legal search or seizure. Critique answers in a positive manner.

Search and Seizure

CASE 1

Joe stole a video game cassette and hid it in his room. Officer Valdez came to the house while Joe was away and indicated that a store employee who knew Joe saw him take the game. Officer Valdez asked if he could search Joe's room. The parents agreed and the officer found the game.

CASE 2

Sally and Ann used to be friends, but now they don't get along. Sally has stolen a few toys from classmates. One day Ann decides to get even with Sally and she takes the stolen toys from Sally's garage and takes them to a police station. She wants the police to get Sally for stealing the toys.

CASE 3

Willie is out very late at night and tries to hide when a police car drives past. The police stop and ask Willie what he is doing. He tries to run and the police catch him and find a gun in his pocket.

CASE 4

Marianne sees a bicycle she really likes. It is parked in the bike rack at the playground. She decides to go for a little ride on it and then return it. But before she gets back, she stops to see her friend, Suzie. She leaves the bike parked on the sidewalk. Officer Jones drives past in her patrol car and sees the bike. It was just reported missing. She thinks that this is the missing bike. It matches the description of the missing bicycle, which had very unusual colors. She takes the bicycle and Marianne down to the police station.

CASE 5

Nancy and her friends are walking home. They see an old lady, and Nancy's friends dare her to steal the lady's grocery bag. Nancy runs past and grabs it. An officer sees what happens and follows Nancy. The officer chases Nancy home and follows her right into her house.

CASE 6

Mrs. Wilson reports that someone has stolen her mail. The police knock on John's door, and when he opens it, they walk in and search his house looking for Mrs. Wilson's mail. They find it in his dresser.

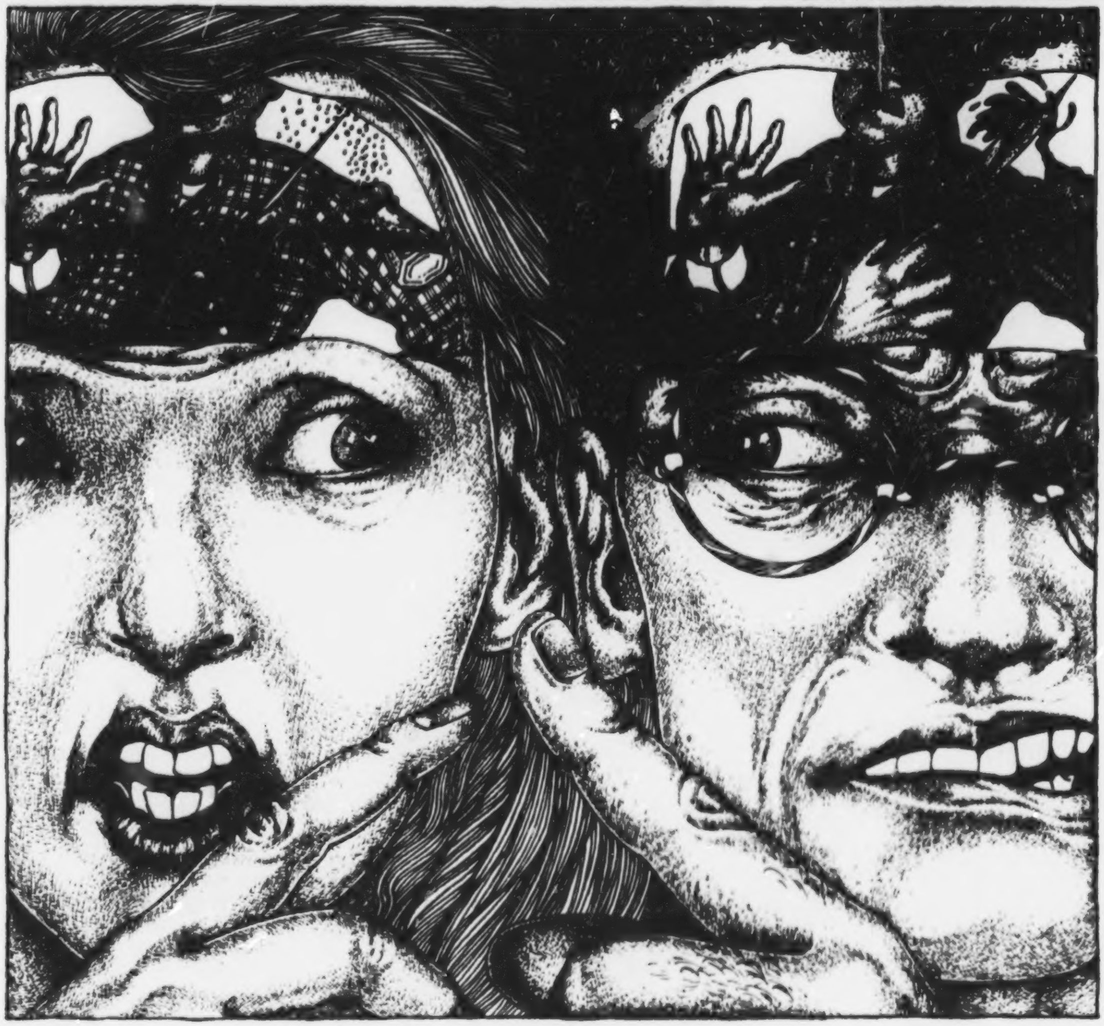
CASE 7

Joanne is detained by the police for taking a candy bar from the Elm Street Drug Store. The police take Joanne home and search her house. They find an Apple computer reported stolen from the school library.

Dale Greenawald is director of education services at the Boulder County Bar Association. Phyllis Clarke is an elementary social studies specialist with the Boulder Schools. This activity was created for community resource experts going into the schools on Law Day.

Legal Literacy

Battle for the Truth/Grades 4-12 **State Bar of Texas**



Susan Wise

This lesson examines the role of the attorney in court.

When to Teach This Unit

This strategy can be used as a social studies unit on the Bill of Rights, the judicial system, and/or courtroom procedures. The only materials needed are a class set of the cartoon and "It's Your Witness."

Instructions for the Attorney

PREPARATION

Read article beginning on page 3, which traces the history of our system of justice and the role of the attorney. (This article could also serve as the basis of a speech to students, though the activity-oriented strategy outlined here would be preferable if time and space permit.)

Before visiting the class, ask the teacher what students know about our system of justice. Are they familiar with the following terms:

- attorney/counsel
- plaintiff
- defendant
- adversary system

PRESENTATION

1. Ask students to define conflict and give examples. Encourage examples which are both civil and criminal. Write these on the chalkboard (theft, assault, child abuse, damage to property, divorce, car accident).
2. Ask students to imagine that they lived thousands of years ago when there were no formal governments. If, for example, you had a warm deerskin jacket, what would happen if someone stole it while you were sleeping by the campfire? Discuss with students the "might is right" concept. Discuss with students the evolution of justice via medieval practices, trial by ordeal, and the Star Chamber.
3. Explain that today in order to ensure justice for all, we have a legal system which guarantees due process for all. Our present system uses the adversary system to determine truth and fairness. Pass out the cartoon above depicting the adversary system. Describe the role of the attorney.

4. Discuss the right to counsel and the responsibilities of counsel to his/her clients.
5. Use the activity below ("It's Your Witness") to show how the questioning skill of lawyers is important in establishing the facts of the case.
6. Discuss why witnesses often disagree and the role of the attorney in this process of establishing the truth.

QUESTIONS FOR DISCUSSION ON ROLEPLAY

1. An eyewitness account is not always absolutely accurate. If I were to ask each of you to write an account of what happened in this classroom between the last period and the beginning of my presentation, there would be many versions. How would I get to the truth?
2. How does the adversary system promote truth-finding?
3. Is the adversary system always the best way to resolve all legal conflicts? Are there times when the "win-lose" approach is not appropriate?
4. Read the following quote by Clarence Darrow: "A lawyer who represents himself has a fool for a client." Ask students what the disadvantages might be in representing yourself? Advantages?
5. Explain briefly to students that a lawyer will be appointed for them if they cannot afford one in criminal cases. Also explain when one is not needed. small claims court.

QUESTIONS FOR DISCUSSION ON CARTOON

1. How does the cartoon illustrate some aspects of the adversary system?
2. What methods can the attorneys use for discovering the facts?

Excerpted from Law in the Lone Star State, *available from the State Bar of Texas.*

It's Your Witness

The purpose of this activity is to help students understand the role of the lawyer in a trial and the way that he or she uses questions to prove a case. One of the most difficult elements of a trial for students to understand is the questioning of witnesses.

1. Select one witness, two prosecutors, and two defense lawyers.
2. Give each a copy of this activity.
3. Allow the attorneys 10 or 15 minutes to write their questions. (The number of questions may be increased.)
4. Write the four elements of the crime on the board. Tell the rest of the class they are the jury. Tell them that the evidence elicited by the prosecutor must prove "beyond a reasonable doubt" that Mr. A killed Mr. B and that they will have to deliberate and vote after the evidence is given.
5. Proceed with the questioning.
6. Have the jury deliberate and reach a majority decision.
7. Discuss the purpose and use of questions by the lawyers in a trial.
8. Discuss the term "adversary" and tell students that our legal system is called an "adversary system."
9. Evaluate the adversary system as a means of insuring justice.

STATEMENT OF CASE

Mr. B, a construction worker, was killed in a diner during his lunch hour. Mr. A is accused of the killing. Mrs. C was a witness. Mr. A was arrested, indicted by the grand jury, and charged. The indictment is as follows:

On March 17th, Mr. A did unlawfully, willingly, and with "malice aforethought" kill Mr. B by stabbing him with a knife.

The District Attorney, in order to convict Mr. A of murder with malice, must prove the state's case beyond a reasonable doubt, including

1. that there was a killing;
2. that Mr. A did the killing;
3. that Mr. A killed Mr. B with a knife; and
4. that Mr. A did the killing with "malice aforethought" (This means that he did so without any legal reason and with an evil intent.).

The Medical Examiner has already testified that she performed an autopsy on Mr. B, who died of a stab wound which could have been caused by a knife.

Witness C can testify to the following facts:

1. She heard loud voices that caused her to look up at Mr. A and Mr. B
2. She heard Mr. B say, "I know you have that knife, Joe," in a loud voice.
3. She saw Mr. A back away and hold up his hands saying, "No, I don't have any knife."
4. Next thing she saw was Mr. B staggering and falling back toward him. She saw blood running out of his stomach from a big gash.
5. After Mr. B fell at his feet, Mrs. C looked up and saw a flash of light in Mr. A's hand.
6. She started toward Mr. A, then turned and ran off. She didn't know what Mr. A did after that.
7. She did not see a knife around anywhere.

INSTRUCTIONS TO PARTICIPANTS

Prosecutors:

You may ask Mrs. C ten questions to try to prove the four elements of the crime. You may not "lead" the witness. This means you may not ask questions which suggest an answer; for example, "You did see a knife, didn't you?"

Defense Attorneys:

Your job is to see that your client gets a fair trial. The state must prove its case "beyond a reasonable doubt." You should try to create a reasonable doubt in the minds of the jurors. You have ten questions to raise this doubt.

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Legal Literacy

Rules and Responsibilities/Grades 1-4

Meredith Henderson

Tom Bachtell

The goal of these lessons is to enable students to understand responsibility by considering a situation from children's literature. Emphasis is placed on the connections between people and their responsibilities to each other and themselves. Students are also asked to appreciate the perspectives of various characters in the stories. Questions, discussions, and activities are planned to develop thinking skills. Discussions and a mock trial provide important roles for attorney guests. These lessons fit easily into the social studies or language arts curriculum, or serve as an enrichment program. Each lesson will take at least an hour and perhaps much more if the activities generate considerable discussion.

Procedures

A literature selection is read to or by students. Discussion, questions, and an activity designed to examine the theme follow. There is a debriefing after the activity.

Was It the Pied Piper's Fault?

Read the poem "The Pied Piper of Hamelin" by Robert Browning to the class. Ask the students to write who they think is responsible for the children's disappearance and why they think as they do.

Discuss the events in the poem. Be sure the following questions are considered:

- Who is responsible for the agreement with the Pied Piper?
- Who is responsible for the children's disappearance?
- Who is hurt?
- Who is responsible for righting the wrong?

ACTIVITY: MOCK TRIAL

Attorneys can work with students preparing for the mock trial. A third attorney might serve as judge. The teacher or resource person(s) should assign students parts of the Pied Piper, mayor, little lame boy, townspeople, a jury, lawyers for each side and a judge. Divide them into groups. The lawyers will help prepare questions. (This may be done with general group discussion if there is only one adult leader and the group has had limited experience in questioning.) Students on the prosecution side should list reasons Pied Piper is responsible for the children's kidnapping. They should plan questions to ask and decide to whom they will be asked in order to show that responsibility. The defense should list reasons why the Pied Piper is not responsible. Perhaps they will wish to list reasons the mayor might be considered responsible and plan questions which would show that. What information will the jury need?

Conduct the trial, assisting students with their roles. Because of the age group, strict adherence to courtroom procedures is not expected. The prosecuting attorney opens the case with a statement, followed by the defense attorney. Lawyers call witnesses, question them, and cross-examine them. Since questioning is the key to this activity, there may need to be occasional recesses to consider the next questions.

After questioning is completed, the jury discusses evidence presented. It will be useful if the class can observe the jury discussion.

Throughout this activity the leader's role is to help students stay on the subject and remember their purpose. After the jury makes its decision, it is announced to the students.

DEBRIEFING

- Could other questions have helped?
- Was the problem solved by the court?
- Were some problems solved?
- Are there further responsibilities that need to be considered?
- Do you agree with your first decision?

FOLLOW-UP

Students may be given their first questionnaire and told to write on the back if they would change any of their answers.

Are We Responsible for Everyone?

Read chapters one and two of *Fantastic Mr. Fox* by Roald Dahl to the students. Discuss the three farmers and Mr. Fox. Are they mean? Why or why not? What is the job of each? During and after reading, discuss perspectives of various characters.

SUGGESTED QUESTIONS

- Why does Mr. Fox take food from the farmers?
- Do animals have responsibility? If so, how is it different from people's responsibility?
- If Mr. Fox were a person, what else might he do?
- What responsibility do the farmers have? How do they think of Mr. Fox?

ROLE PLAY

Ask students to role play Mr. Fox and the farmers. Have each explain his responsibility.

Meredith Henderson is an elementary school teacher in Franklin, Tennessee. These lessons were originally published by CRADLE (see p. 33).

Legal Literacy

Dramatization of Salem Witch Trial/Upper Elementary

Elizabeth Chorak

A simple play and follow-up activities can provide elementary students with an opportunity to compare fair and unfair trials. This lesson will work best using a local lawyer as a resource person. It leads logically into a discussion of why we have certain fair trial (or due process) protections under the Constitution and the Bill of Rights.

Preparation

1. Provide the lawyer with a copy of the lesson prior to his or her visit.
2. Obtain sufficient copies of the play to make one available for each student.
3. Review background information on the period and the prevailing customs prior to the lesson.

Class Activity

1. Select students for each part and have them stand in front of the class.
2. Allow the students a few minutes to read their parts and plan their presentation.
3. Read the story introduction to the class.
4. Introduce students to the class as their characters (i.e. as Mr. Goodwin, Rachel, Judge Smith).

Play

Story Introduction: A long time ago, before we had television, cars, or even electricity, some people believed in witches. A witch was any person who had special evil powers. In the town of Salem, Massachusetts, there was a law against witches. If someone said another person was a witch, that person was brought to court and tried. If found guilty, he or she was usually hanged or burned. Here is a story about one of those trials.

Narrator: There was a family by the name of Goodwin. The family included Mr. and Mrs. Goodwin and their two children: Rachel and Michael. They had a servant named Sarah.

Mr. Goodwin: "Sarah, two loaves of bread disappeared from the kitchen yesterday."

Mrs. Goodwin: "We think you stole it, Sarah."

Sarah: "I did not steal it. You don't trust me. I curse you and your children. You will suffer for saying this."

Narrator: A few months later, the Goodwins noticed their children were acting strangely and couldn't speak.

(Rachel and Michael walk around in circles, wave their arms like birds and make strange noises.)

Mr. Goodwin: "Sarah, you did this. You are a witch. You cursed our family."

Mrs. Goodwin: "Let's ask our friend Judge Smith to put her on trial." (The Goodwins grab Sarah and take her to Judge Smith.)

Mr. Goodwin: "Sarah is our servant and she cursed our children and now they can't speak and are acting strangely."

Judge Smith: "Is she a witch?"

Mrs. Goodwin: "Yes."

Judge Smith: "Then she must be punished. I know you are good people and wouldn't lie, and I don't believe this woman Sarah, so I believe you. She is guilty and I sentence her to die."

Follow-up

The teacher and lawyer direct the following questions to the students for group discussion:

1. Do you think Sarah had a fair trial? If not, why? (Make a list on the chalkboard of the students' responses).
2. What do you think should have happened in this trial to make it fair? (Refer to unfair things on the board).

The teacher and lawyer lead a short discussion on the guarantees under the U.S. Constitution for a fair trial. (Refer to class discussion on fair and unfair trials.)

1. Amendment V: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury;... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...;
2. Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed;... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
3. Amendment VII: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
4. Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
5. Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conclusion

Do you think Sarah was guilty? Why or why not? Tell the class that they are going to be divided into three groups (of no more than five students) to discuss the question of guilt or innocence as follows:

1. Group one will be the "judge" group and will have to decide if Sarah is guilty or not based on the

presentations from the other groups.

2. Group two will make a list of the reasons why they think Sarah is guilty. They will select one person as recorder to write the list and one to present their reasons to the judge.
3. Group three will make a list of the reasons why they think Sarah is not guilty. They will also have a spokesperson and a recorder.
4. Repeat groups two and three for larger classes, if necessary. All groups will present their reasons for guilt or innocence to the judge.
5. While the other groups are working, the judge group should think of questions to ask the groups regarding Sarah and the Goodwins.
6. The judge group will listen to all presentations and ask each group questions. They will discuss the case openly, so the class may observe their reasoning, and vote on whether Sarah is guilty or innocent.

After explaining the instructions, designate the groups. Insure that a recorder and a spokesperson are appointed and begin the activity.

Following the decision of the judge group, ask if the class agrees or not? Discuss why or why not. Was the judge group decision fair? Were the group members impartial? Did they listen to what everyone had to say?

The lawyer could discuss procedures in the court system in reference to the activity. Would lawyers develop the same arguments? How would they present them to the judge? How would the judge respond?

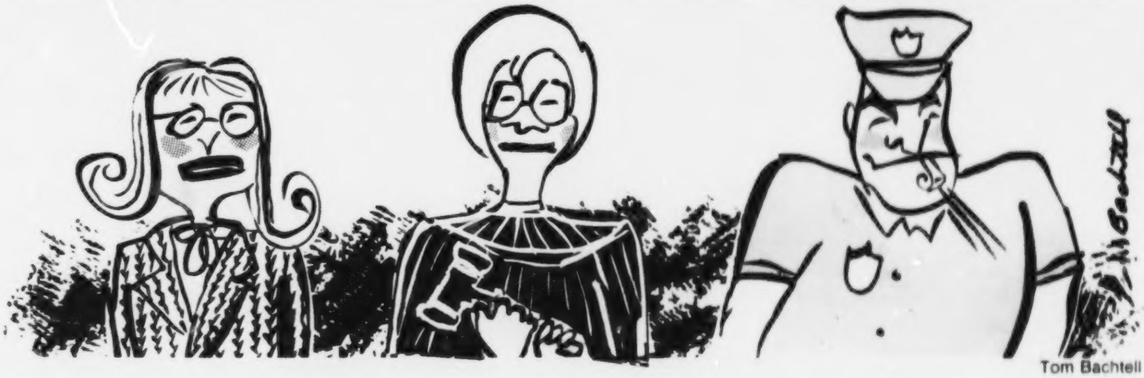
Additional lessons could follow on the Constitution, Bill of Rights, or the judicial system.

Elizabeth Chorak is a program director for the National Institute for Citizen Education in the Law. This activity is adapted from Educating for Citizenship, Level 4, *Aspen Systems, 1982.*

Legal Literacy

Lawmakers: Who's Who in the Law/Grades 4-6

Patricia Jarvis



Tom Bachtell

The purpose of this activity is to expose students to individuals involved in law-related professions.

Goals

- To provide the students with the opportunity to meet law-related professionals.
- To provide the students with an understanding of the need for such professionals.
- To enable the students to identify the specific purpose and function of these professionals.
- To familiarize the students with the importance of knowing about these people.
- To help the students realize that people who have authority in certain situations also have responsibilities.
- To familiarize the students with parts of our legal system.
- To show the students how these people may affect their lives.
- To help the students identify various ways their lives are affected by laws.

Procedure

The main activity of this project is to have students conduct formal interviews with the different law professionals. If possible, these should be video-taped. The interviews are conducted by a small group of students and take place in the classroom. The other students make up the audience. Enough guests should be invited in order to provide all of the children with an opportunity to do some interviewing. The interviews should be approximately ten to fifteen minutes in length. The remaining time is spent in open classroom discussion. An interview could be scheduled once a month, or more often to take advantage of special events such as Law Week.

Prior to the actual classroom visit, letters are sent out to the different guest speakers inviting them to participate in this project. When they have accepted and a schedule is set up, each speaker will receive a copy of the students' questions.

The purpose of the taping is to accumulate a number of interviews which can then be edited into a single program for classroom use. The tape could then become a main part of a law unit in the school district and the law-related project in your state.

List of Law-Related Professionals

- an attorney
- a police officer

- a sheriff
- a state police officer
- a probation officer
- a member of the city council
- a judge
- a court clerk
- a person who has participated on a jury
- a juvenile officer

Sample Questions

What is the official title of your job?

Could you please tell us how got your position as a ___?

Do you use any special equipment in your type of work? If so, please explain some of them to us.

As a/an ______________________, what type of schooling or training did you have to receive?

Does your profession require you to wear a uniform of some kind?

How do you feel about your job?

Would you choose this profession again if you had the chance?

How does a person go about getting into a profession like yours?

Did you have to take any type of special test to get your job?

Was there anything special that made you decide to go into your profession?

How does your family feel about your career?

Does your career ever put you in any kind of danger? If so, could you please give us an example?

What has been the most interesting case that you have worked on?

If someone wanted to go into the same profession that you are in, what advice would you give this young person?

Special Questions for Police Officers

Did you ever have to shoot at anyone?

Have you ever arrested a child about our age? If so, why?

Has there ever been a case where you were really afraid?

Have you ever been a part of a high speed chase? If so, what does it feel like?

What are some of the different types of weapons you have used?

Did you ever have to do something you really did not want to do in your profession?

What is the difference between a motorcycle police officer and one who rides in a patrol car?

How does the police car work and what are some of the things in your car which you use?

How do you go about catching a criminal?

After you have caught the criminal what do you do with him or her?

Have you ever worked on a case that had a happy ending?

Have you ever worked on a missing child case?

Special Interview Questions for Judges

Are there any laws which a judge can enforce on his or her own?

As a judge can you decide what takes place in your courtroom?

Are there any laws which govern what goes on in your courtroom? If so, who made or makes these laws?

Are there cases when no jury is needed and the judge makes all of the decisions?

Besides presiding over a courtroom, what other jobs or responsibilities does a judge have?

Can a person lose his or her position as a judge? What would be be some reasons for this?

Who can appoint judges to the bench?

Is there anyone who can overrule the decisions which you make in your courtroom?

Can a judge tell a lawyer that he is taking too much time in questioning a witness?

In family court, when can a child have his or her own lawyer and who pays for the lawyer's services?

Are there any particular problems in being a woman judge?

Can a judge exclude a person from serving on a jury?

As a judge is there anyone who can tell you what to do? Do you have a boss?

Could you please explain the terms "sustained" and "over-ruled"?

What is meant by contempt of court and does it carry a punishment?

Special Questions for Mayor of the City

How does a mayor work with the members of a city council?

Can a mayor veto a law which the members of the city council have passed? Please explain.

Can the mayor of a city ask the members of the city council to pass a law which he or she feels is necessary? How would a mayor do this?

A mayor makes sure that the laws the city council makes are carried out. What are some of the ways in which you can do this?

Are there laws which tell a mayor of a city what he can do and what he cannot do? Could you give us some examples please?

How does a mayor work with the state government?

How does a mayor work with the federal government?

Is there ever a time when either the state government or the federal government can tell a mayor of a city what to do?

Are there any time when the mayor can have complete control over the governing of a city? What type of emergencies would allow him to do this?

What are some of the legal powers held by a mayor if any?

As a mayor, what do you feel are your most important duties to the citizens of the city?

How can a mayor protect the citizens of his or her city?

As mayor, could you give us an idea of your typical day?

What are some suggestions you would give to citizens who wish to become more involved in the city's government?

Patricia Jarvis is an elementary school teacher in Woonsocket, Rhode Island. This activity was originally published by the Center for Research and Development in Law-Related Education (see p. 33).

Legal Literacy

Freedom of Expression/Grades 4-12 **State Bar of Texas**

This activity uses hypothetical situations to explore the proper boundaries of free expression. Students will understand the role of the Supreme Court in interpreting the limits of freedom of expression.

When to Teach This Lesson

This strategy can be used as part of a social studies unit on the Constitution and Bill of Rights, or in units on citizenship or rights and responsibilities.

Materials Needed

Class set of First Amendment quiz (below); chalkboard or overhead.

Instructions for the Attorney

PREPARATION

Read "Summary of Law for Teachers and Lawyers" (below) for an overview of Supreme Court cases involving free expression. Review First Amendment quiz, "Defining Proper Boundaries for Free Expression" (p. 21), to guide discussion with students.

Before visiting the class, ask the teacher if the students have studied the First Amendment to the U.S. Constitution or any of the case studies. Are they familiar with any of the following terms or processes:

precedent	Bill of Rights
appellate	amendment
justices	"clear and present" danger
Supreme Court	prior restraint

PRESENTATION

1. Ask students to tell you what they think of when they hear the phrase "freedom of expression." List their ideas on the chalkboard or overhead transparency.
2. Ask students where we get this freedom or right. Read the First Amendment to them: "Congress shall pass no law...abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."
3. Compare the types of expression listed in the First Amendment to the students' list of ideas from Step 1.
4. Ask: Is freedom of expression absolute? Can you say anything you want, anywhere you want, anytime you want? Ask students what the following quotes mean:

   "...free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" (Holmes, 1919, *Schenck v. United States*)

   "...your right to swing your fist stops at where my nose begins..."
5. Pass out First Amendment quiz, "Defining Proper Boundaries for Free Expression." Discuss each hypothetical situation with students. Identify the circumstances in which freedom of speech is limited. Note: For elementary students, you may want to reduce the number of hypotheticals. For more advanced students, you may want to discuss the facts, issues, arguments, and decisions in the actual Supreme Court cases.
6. Conclude with a discussion of why freedom of expression is considered the cornerstone of a free society. What other individual rights and principles of our government are dependent on it?

Note to the teacher. Follow-up for this presentation may include examining case studies involving free expression. Contemporary case studies, as well as historic ones, such as John Peter Zenger, may be used.

Additional Resources

Starr, Isidore, *The Idea of Liberty*, West Publishing Co.; *Liberty: Freedom of Expression* and *Free Press—Fair Trial*, Law in a Changing Society, available from State Bar of Texas.

Summary of the Law for Lawyers and Teachers

The First Amendment states that "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These guarantees have been recognized as protected liberty interests under the concept of due process of law in the Fourteenth Amendment. Since the Fourteenth Amendment is applicable to the states, the incorporation of First Amendment rights into the concept of due process of law make these rights applicable to the states.

It has been said that the right of free expression is the cornerstone of a free society. This right assures that a continual means of communication will exist between citizens and their government. It also protects the right of citizens to enlighten themselves and remain informed of ideas and events around them.

But the right of free expression is not absolute. It is subject to restriction by the government in order to protect the public interest in peace and order. A speaker does not always have the right to say what he wishes, where he wishes, and when he wishes. Justice Holmes' famous statement reflects this notion when he said in *Schenck v. United States*, 249 U.S. 47 (1919), "...free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Thus, it has been recognized that the state's interest in preserving peace and order is superior to an absolute right of expression. It is this balance between the state's interest and the right of expression that is the central focus of this discussion.

Speech Advocating Unlawful Conduct: The Consequence Test

One of the central problems regarding free speech is the advocacy of unlawful conduct that may have particularly harmful consequences. Over the years, the Supreme Court has formulated tests to scrutinize regulation of speech advocating unlawful conduct. These tests look at the likely consequences of such speech and the context in which it was made. Many times, speech advocating unlawful conduct was critical of the government during periods of national stress. Other times, it was subversive speech advocating radical change in the government or abolishing the government.

1. THE "CLEAR AND PRESENT DANGER" TEST

During the First World War, federal laws prohibited causing or attempting to cause insubordination in the military service or advocating resistance to the United States government. These laws were designed to forbid conduct harmful to the war effort.

In *Schenck v. United States*, the defendant was convicted of violating these federal laws after circulating leaflets advocating resistance to the draft. In Justice Holmes' opinion, the defendant was properly prosecuted for violating the federal laws because the leaflets had a tendency to induce draft resistance and were circulated with that intent. Justice Holmes said, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the serious evils that Congress has a right to prevent." This was the first statement of the "clear and present danger" test. Thus, in determining whether speech advocating unlawful conduct could be prohibited, the context of the speech was to be viewed and a determination made of the tendency of the words to produce a "clear and present danger" of a substantive evil.

2. THE IMMINENCY REQUIREMENT

Justice Brandeis added an important element to the "clear and present danger" test in *Whitney v. California*, 274 U.S. 357 (1927). He stated that three elements must be present under the test: (1) the evil must be serious, e.g., the violent overthrow of the government; (2) the evil is likely to occur, e.g., a great potential for rebellion; and (3) the evil must be *imminent*, e.g., an immediate danger of rebellion. The imminency requirement was Justice Brandeis' important addition. He believed that speech advocating a remote danger could not be prohibited, since such a danger would be speculative.

3. REJECTION OF THE IMMINENCY REQUIREMENT

However, in *Dennis v. United States*, 341 U.S. 494 (1951), the Court discarded the imminency requirement. The Smith Act, enacted during the Second World War, prohibited advocacy of the violent overthrow of the government and knowingly being a member of an organization advocating violent revolution. Several leaders of the Communist Party were prosecuted under the Act, but during their trial there was little evidence that any of them advocated violent acts or specifically planned for a violent revolution. Chief Justice Vinson wrote the Court's opinion stating, "the gravity of the 'evil' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger." Therefore, rather than look at the imminency of the evil, the Court looked at the seriousness of evil. If the evil was sufficiently serious, e.g., overthrowing the government, then speech advocating such a serious evil could be prohibited.

4. RETURN OR THE IMMINENCY REQUIREMENT

However, the Court in later years was uncomfortable with the absence of the imminency requirement. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court held that speech advocating the need for violent conduct or the abstract teaching thereof could not be prohibited "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Court construed *Dennis*, and other prior cases as requiring "imminent lawless action." Thus after *Brandenburg*, speech involving the advocacy of unlawful conduct in abstract terms, e.g., speaking to the need for revolution, could not be prohibited. If the speech is made with an intent to produce imminent unlawful action (e.g., "Let's burn down City Hall") and it is likely to produce such action (e.g., the mob is carrying torches outside City Hall), then the speech itself could be prohibited.

Although the Court has not agreed on a precise formulation of the "clear and present danger" test, it will utilize this approach when focusing on speech advocating unlawful conduct. The Court will also engage in balancing the public interest against the individual's right of free expression, but the major consequence test is the "clear and present danger" test.

Symbolic Expression

Under the First Amendment, speech is not only verbal or written communication but may take a variety of forms, including symbols and gestures. For example, the wearing of armbands as means of protest is a form of symbolic expression. In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), a case discussed below, the Supreme Court held that symbolic expression "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."

Another example of symbolic expression was in *Cohen v. California*, 403 U.S. 15 (1971). While in a local courthouse, Cohen wore a jacket which bore the words, "F...the Draft" on the back. He was arrested and convicted of disturbing the peace. The Supreme Court employed a balancing approach between the governmental interest in preserving peace and Cohen's symbolic expression. The Court held that a general fear of a breach of the peace was not sufficient to convict Cohen, since there was no showing that Cohen's conduct was designed to instigate a violent confrontation. Looking to the consequences of Cohen's conduct, the Court found that he could not be punished on the vague basis that his conduct was generally offensive.

In *United States v. O'Brien*, 391 U.S. 367 (1968), however, the Court held that the burning of a draft card on the steps of a local courthouse to protest against the draft was not symbolic conduct entitled to First Amendment protection. O'Brien had been convicted of violating a federal law forbidding willful mutilation or destruction of draft cards. The Court found that the statute had nothing to do with speech, but rather related to the government's legitimate purpose of requiring draft registrants to carry their draft cards and not destroy them.

Student Expression

The beginning point of a discussion of free expression in the schools is the important case of *Tinker v. Des Moines School District*. In this case, the Supreme Court said, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Thus the right of free expression applies in the school setting.

In *Tinker*, public school students active in the anti-war movement decided to wear armbands to school to protest against the Vietnam War. When the principals of the Des Moines schools heard of the plan, they adopted a policy prohibiting the wearing of armbands during school hours. Nevertheless, the students wore their armbands to school and were suspended until they would return to school without their armbands. In a constitutional challenge to the no-armband rule, the Court held that the prohibition was aimed at the expression conveyed by the armbands and thus constituted a restriction on the expression of student views. The Court said there was no evidence that wearing the armbands disrupted school activities. However, the opinion implied that two limitations on students' First Amendment rights may be allowed: (1) school authorities may restrict expression if they can "forecast substantial disruption of or material interference with school activities"; and (2) it was implied that a general prohibition on the wearing of all controversial symbols may be appropriate in explosive situations. It was also implied that the decision had no application to student dress and grooming codes.

In *Guzick v. Drebus*, 431 F.2d 594 (1970), a federal appellate court upheld a long-standing school rule prohibiting the wearing of all symbols. The court found that the wearing of controversial symbols had caused substantial disruption in the past and would have aggravated an already tense situation.

Time, Place, and Manner Restrictions on Expression

Implicit in the guarantee of free expression are allowances for reasonable time, place, and manner regulations by the government. A student cannot demand the right to make a speech on "legalizing marijuana use" during English class. A citizen cannot demand a right to have a "morality rally" on Main Street during rush hour. The right of free expression must be balanced against the public interest in peace and the maintenance of order. A neutrality principle is also recognized regarding time, place, and manner regulations, holding that the government must remain neutral toward the content of the speech and apply regulations evenhandedly.

In *Adderly v. Florida*, 385 U.S. 39 (1966), the defendants were convicted of trespass after they refused to comply with a sheriff's order to leave an area outside the local jail where they were conducting a demonstration. The Supreme Court upheld the conviction, stating that the government was allowed to control the use of its property for lawful nondiscriminatory purposes. The Court noted that the defendants were not using a public forum but trespassed into an area not open to the public.

In *Greer v. Spock*, 424 U.S. 828 (1976), the Court ruled that political candidates, here a well-known minor-party advocate against the Vietnam War, were subject to evenly applied military regulations denying political candidates access to military bases since these areas were not considered public forums.

The distinction between regulating the content of expression and regulating the time, place, and manner of expression is sometimes difficult. There is always the danger that government authorities may use time, place, and manner regulations as an excuse to regulate the content of expression. This issue arose in *Feiner v. New York*, 340 U.S. 315 (1951). In speaking to a crowd of black and white people, Feiner urged black people to rise up in arms and fight for equal rights. A member of the crowd told police that if Feiner was not silenced, then he would silence him. After Feiner refused to discontinue his speech, the police arrested him and he was convicted of disorderly conduct. The Supreme Court upheld Feiner's conviction, finding that the police were attempting to prevent disorder. In a dissenting opinion, Justice Black argued that the Court was allowing police censorship of unpopular speakers.

The Court adopted a different approach in *Edwards v. South Carolina*, 372 U.S. 229 (1963). In this case, several black students picketed the state capitol protesting racial discrimination. A large, hostile crowd had gathered and made threatening remarks in demanding that the demonstration end. Nevertheless, the picketers continued their demonstration until the police intervened and arrested them for breach of the peace. The Court reversed the convictions of the demonstrators, distinguishing this case from *Feiner* by reasoning that since the demonstrators were lawfully exercising their First Amendment rights, they were entitled to carry out their demonstration without interference.

The Qualitative Approach: Obscenity and Defamation

Looking to the quality and character of certain forms of expression, the Supreme Court has determined that certain classes of utterances are of such slight social value that their punishment raises no constitutional issue. Such forms of expression are "fighting words," i.e., those which by their very utterance inflict injury or tend to incite an immediate breach of the peace, "the lewd and obscene," e.g., pornography, and "the libelous," e.g., "Bill is a cheating and thieving scoundrel." This qualitative approach considering the social value of expression has led to distinctions between "protected" speech, i.e., speech receiving full First Amendment protection, and "unprotected" speech, i.e., speech receiving no protection.

1. OBSCENITY

Regulation of obscenity is premised on the protection of minors and preventing offensive matter from being displayed to those who do not wish to view it.

The Supreme Court has had difficulty in defining obscenity. However, the Court's definition of obscenity contains the following elements: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. See *Miller v. California*, 413 U.S. 15 (1973). Potential problems occur in the application of this obscenity concept due to the nebulous meanings of "contemporary community standards," "appeals to the prurient interests," "patently offensive," and "serious literary, artistic, political or scientific value." Because of the vague character of such terms, problems arise concerning the chilling effect such characterizations can have on protected speech. Standards also may be elusive because they may vary from community to community.

2. DEFAMATION

Defamation is generally defined as a statement which injures the reputation of other people or holds them up to public ridicule; it is called libel when the statement is written and slander when spoken. The Supreme Court has included defamation within the categories of expression beyond constitutional protection. Nonetheless, since a distinction must be made between protected expression and what is allegedly libelous expression in defamation suits, constitutional issues arise in such suits.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court ruled that libel suits against public officials would succeed only in cases where the libelous matter was intentionally false (actual malice) or the defendant was recklessly indifferent to its probable falsity. In later cases, the Court applied this standard to "public figures." The Court said that "public figures" are those who seek publicity or voluntarily place themselves in a position where publicity is expected.

The Court, in *Herbert v. Lando*, 441 U.S. 153 (1979), held that the plaintiff, a public figure who was subjected to criticism in a television news program, could inquire into the program editor's state of mind in order to prove "actual malice" in a defamation case. The Court held that there must be a balancing between this inquiry and protection against any chilling effect on the publication of truthful information.

Conclusion

Whether we look at the consequences or the quality of certain forms of expression, the courts provide vigorous protection for the right of free expression. Even though this right is not absolute, it is fundamental to the preservation of a democratic society. The courts remain ready to safeguard this important right even when the message is unpopular, critical of the status quo, or lacking in social merit.

Strategy excerpted from Liberty—Freedom of Expression, *Law in a Changing Society, State Bar of Texas. Background reading excerpted from* A Resource Guide on Contemporary Legal Issues...for Use in Secondary Education, *Phi Alpha Delta Law Fraternity.*

Defining Proper Boundaries for Free Expression

The First Amendment says, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Does the First Amendment protect someone who: YES NO

1. **makes a political speech in support of a candidate for mayor?** _____/_____
2. **publically criticizes the president?** _____/_____
3. **makes a pro-Nazi speech outside a Jewish Community Center?** _____/_____
4. **uses a sound truck to broadcast his message in a residential area?** _____/_____
5. **pickets a grocery store in support of a demand that the store hire more black personnel?** _____/_____
6. **wears a green armband to school to show his support for the Irish Republican Army?** _____/_____
7. **telephones the school with a phony bomb threat?** _____/_____
8. **after hearing that American soldiers would be sent once again to fight in Southeast Asia, burns his draft card?** _____/_____
9. **writes a book praising the communists?** _____/_____
10. **attends a meeting of the KKK?** _____/_____
11. **assembles a group to protest some city policy and in doing so blocks sidewalks?** _____/_____
12. **wants to buy an ad in the school newspaper to criticize the school board?** _____/_____
13. **speaks to others so they can plan a series of political kidnappings?** _____/_____

YES NO

14. **throws a rock—tied to it is the message "Free all political prisoners!"—through a window at the county jail?** _____/_____
15. **urges an angry crowd to march on city hall and "Teach those in power a lesson"?** _____/_____
16. **falsely shouts "Fire!" in the gym while it's filled with people watching a basketball game?** _____/_____
17. **writes a book which is advertised as the "dirtiest book ever written"?** _____/_____
18. **makes false claims in an advertisement for a product offered for sale?** _____/_____
19. **threatens verbally to kill you?** _____/_____
20. **urges the violent overthrow of the government at some future, unspecified time?** _____/_____
21. **carves obscene messages in desk tops at school?** _____/_____
22. **refuses to follow the school dress code?** _____/_____
23. **collects signatures on a petition opposing planned zoning change?** _____/_____
24. **holds a parade without a permit?** _____/_____
25. **hands out leaflets urging passage of the Equal Rights Amendment to members of the state legislature?** _____/_____
26. **embarrasses the governor by telling a large audience about a mistake the governor made?** _____/_____
27. **calls for resistance to the military draft during a declared war?** _____/_____
28. **damages your reputation by publishing lies about your private life?** _____/_____
29. **joins the Communist party of America?** _____/_____
30. **has a friendly conversation with a neighbor?** _____/_____

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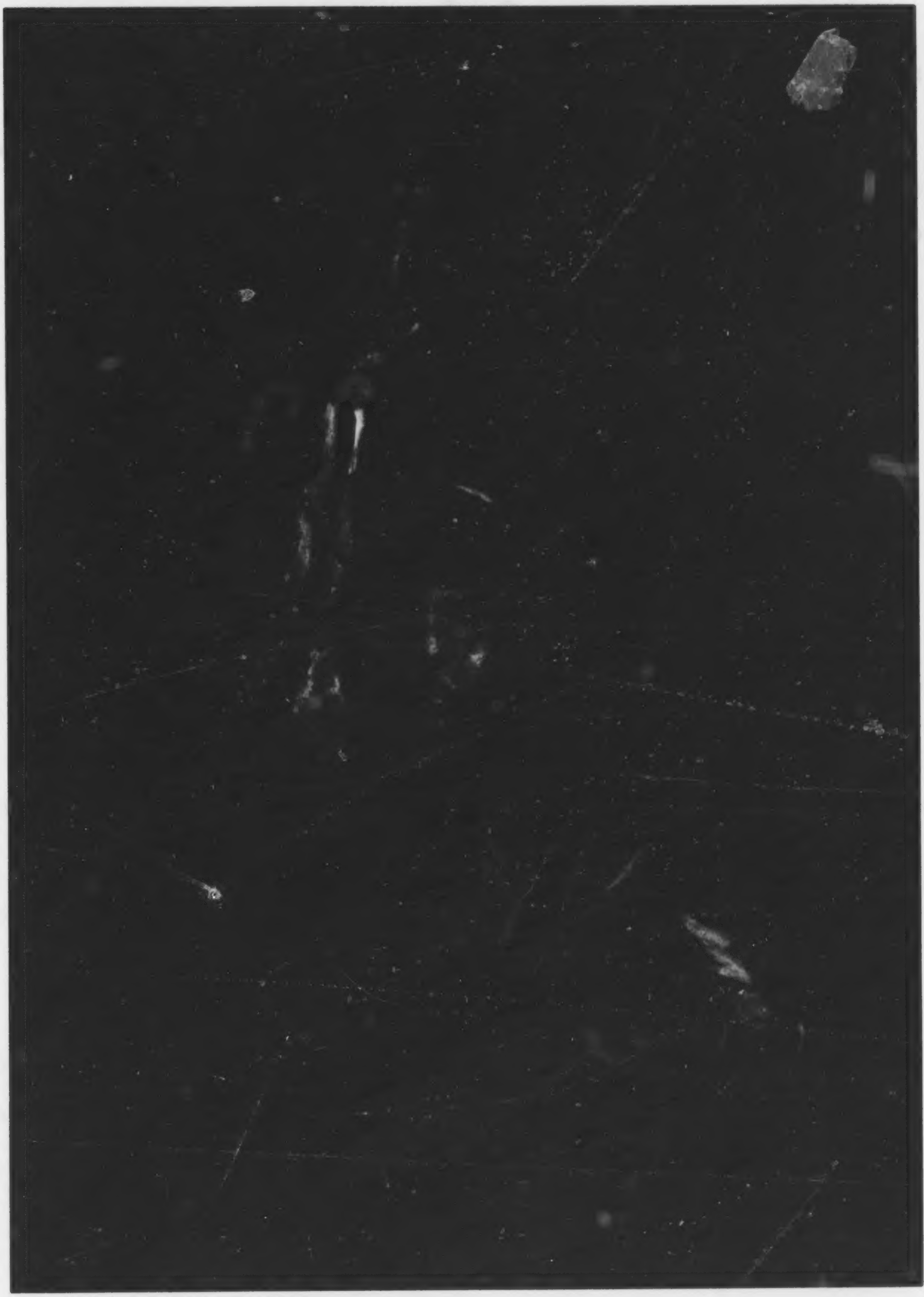

Lucinda J. Peach

Why Do I Have to Go to School?

Legal literacy in the classroom

What should young people know about the law? The definitions of literacy that have been formulated in recent years have emphasized a *functional* approach, one that focuses on the knowledge and skills necessary to function successfully within a particular area, such as reading or using computers. A functional approach to "legal" literacy requires students to know enough about the law to have an awareness and appreciation of how it affects their daily lives. This article will focus on helping students become literate about law in the public school setting, since that is a place where most American young people spend a significant amount of their time.

The following scenario describes a day in the life of Theresa, a junior high school student. The legal aspects of the situations Theresa encounters will be obvious in some instances, less so in others. After setting forth the scenario, we'll explore what Theresa should know in order to be legally literate about school law.

A Day in the Life

At 6:30 a.m., when her alarm clock rings, Theresa shuts it off and promptly falls back to sleep. About fifteen minutes later, her mother yells "Are you getting up yet?" Groggily, Theresa responds "Can't go to school today; have to sleep...." Her mother warns her that the truant officer will be after her if Theresa misses many more days of school this term and that she had better get a move on. Although she is too tired to think much about it, Theresa wonders if her mother is right or whether she is just trying to scare her into going to school more regularly.

Theresa begrudgingly showers, dresses, and stops in the kitchen for a quick glass of orange juice before heading out of the apartment and down the stairs to the bus stop at the end of the block. She glances across the street at Fairmont Junior High School and wonders why she has to take a bus to Greenway Junior High School on the other side of the city when there is a perfectly fine school right in her neighborhood. She knows that it has something to do with school desegregation, which got a lot of news coverage a few years ago, but she doesn't know what it means except that she and many of her friends must now attend schools outside of their neighborhoods.

As she is walking across the school yard into the building, Theresa's friends JR and CD approach her. JR asks her if she wants to buy some marijuana from them. She declines. CD then asks her if she wants to get drunk with them before class and she again says no, making the excuse that she has to pass a test later today and better not be messed up when she takes it.

Once inside the building, Theresa goes to her locker to get the books for English, her first class of the day. She notices a policeman walking around the hallway with the vice principal. The policeman is leading a German Shepard alongside the rows of lockers that line the corridor. She overhears another student saying that they are searching for marijuana and other contraband. Theresa wonders whether the search is justified or not and thinks about warning her friends JR and CD, but before she has time to look for them, the bell rings, meaning that she must hurry to homeroom.

On her way to English class, Theresa witnesses a group of five or six kids fighting in the hallway. All she can see is a lot of kicking and yelling going on and someone yelling something about a knife. As she watches, Theresa's homeroom teacher, Mr. X, runs over to the group and tries to break up the fight. He grabs one of the kids, who calls himself "Sid," wears punk clothes and dyes his hair blue. Although it isn't obvious, at least to Theresa, that Sid is responsible for the brawling, Mr. X pushes him to the side of the corridor and bangs his head several times against a locker. She then hears Mr. X tell Sid that he'd better start dressing like a real human being or else he'd make sure Sid was suspended. Theresa finds it hard to believe that someone could be thrown out of school just because of the way he dressed.

Meanwhile, the brawling continues. A couple of students wearing T-shirts that say "mediation" on them also try to stop the fight. One of them addresses the group in a calm voice, saying "There's another way to resolve this fight without using your fists. If you'll stop fighting now and agree to come to the mediation center this afternoon, we can try to help you avoid the penalties which may damage your record if the principal has to resolve this." Theresa has never seen these kids with T-shirts before and wonders whether the mediation center really provides an alternative to the principal's office. Eventually, the fighting abates and those involved are sent to the principal's office,

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Laws Governing Education

Theresa wonders why she has to go to school. The basis for this obligation, and for most education law, comes from state rather than the federal government. Although the federal Constitution is the supreme law of the land, it does not expressly refer to education. Because of the Tenth Amendment to the U.S. Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," primary responsibility for providing education rests with the fifty states.

The federal government has some role to play in the public schools, however. As governmental entities, public schools cannot violate the individual rights granted by the federal Constitution, at least in some instances, as the discussion in the article shows. The United States Supreme Court interprets the constitutionality of school practices and defines what a school may not do in its day to day operations. Pursuant to its power to make laws to carry out the purposes of the Constitution, Congress has enacted education laws that offer federal money to the states on the condition that they comply with certain requirements for how the money is to be used. Other laws prohibit discrimination because of race, color, national origin, sex or handicaps.

The constitutions of all 50 states provide for a system of free public education as well as for compulsory education for children between certain ages. Most laws affecting public schools are enacted by state legislatures, although state and local boards of education, school administrators and classroom teachers can adopt and enforce reasonable rules and regulations. Courts, both state and federal, have the responsibility for interpreting these laws. In addition, since teachers and administrators are viewed as acting *in loco parentis* (in the role of parents), teaching in local schools is expected to reflect the wishes of parents and the standards of the community, although this doctrine has lost some of its appeal as time has passed and students have been accorded greater autonomy.

—*LP*

led by Mr. X. Theresa wonders what will happen to them.

During English class, the teacher, Mrs. P., tells the students that she wants them to read a book that involves the role of human sexuality in defining a person's sense of self. They are to choose the book, and the assignment is broad enough to encompass either non-fiction or fiction. Mrs. P. warns that they may have to look in the public library since a committee of the school board has recently completed an investigation of the contents of the school library and ordered several books concerning this topic removed from the shelves. Theresa wonders how the school board can do this, especially when its decisions conflict with a teacher's assignments.

In her next class, Mr. H., the history teacher, has been having the students read additional materials to the textbook since they are covering the role of religion in shaping life during the colonial period in American history and the textbook contains almost no references to religion. Theresa is aware that the parents of a couple of her classmates are upset that religion is being discussed in school and have forbidden their children from reading these independent materials. Her own parents think it is a good idea. These conflicting views confuse Theresa, and she wonders who is right and whether religion should be taught in school.

During her last class of the morning, Theresa struggles, as usual, with the math problems on the weekly standardized exam. Although she is generally a bright student who masters the subject matter in her courses with little difficulty, Theresa has lagged behind the rest of the math class for some time now. Although she has requested that the mathematics teacher, Mrs. M., give her extra help, she has only threatened to put Theresa in the "special class"—"with the other minorities"—if her grades do not improve. Theresa is hurt by the teacher's statement, but does not know whether she has any way of disputing Mrs. M's remarks.

During the free period following lunch, Theresa goes to the student newspaper office, where she is both an assistant editor and a reporter. Based on her concerns about students needing more education about sex, especially those who have been prohibited by their parents from attending the parts of science classes that cover these matters, she and a couple of other students have proposed that the paper run a series of articles covering such topics as unwed mothers, birth control, community planned parenthood and pregnancy resources, date rape, AIDS, etc. When they first spoke to the paper's teacher advisor, Mr. W., about the series, he was enthusiastic, but he has now informed them that the principal has denied permission for the series because of concern about parental objections. He has threatened to shut down the paper and suspend anyone involved if any articles on these topics appear in the paper. Theresa is obviously concerned about the possibility of getting thrown out of school but believes that the proposed articles should be printed if there is any way to do so. She wonders how she can find out what her options are.

After school, Theresa returns to the lunchroom, where she has been invited by a group of students who attend her church to join them for a prayer and Bible study meeting. The group has distributed posters around the school inviting anyone interested to attend. Soon after the meeting starts, the principal walks into the lunchroom, apologizes for having to interrupt, and informs the group that he is sorry to have to ask them to find a place outside of school grounds to hold their meeting. Even though the school initially granted permission to the group to meet on school property, he has been informed by the school's attorney that allowing the meetings at school violates the Constitution. Theresa has heard of the right of freedom of assembly and wonders how the group's meeting can possibly be unconstitutional.

Disappointed, Theresa leaves the school building and wanders out to the playing field to watch her friends Jim and Tim at football practice. She is surprised to see that both of then are sitting on the sidelines, rather than practicing out on the field with the rest of the team. Jim tells her that he has been suspended until he shaves off his beard, because it violates a team rule. Theresa tells him he should try to find out whether the school can get away with it. Tim then explains that he's not playing because he has refused to submit to a mandatory urine test that has been instituted to screen members of all school sports teams in the district. He tells her confidentially that he's afraid he might not pass the test because he smoked some pot at a party over the weekend and he understands that the chemicals can remain in the bloodstream for weeks afterwards. Theresa tries to comfort him by suggesting that the mandatory drug test might be illegal. She then tells them that since they all seem to be having conflicts with the school, perhaps they should hire a lawyer and find out whether they have any grounds to sue the school for violating their rights.

Before Theresa and her friends rush off to hire an attorney, they should develop "legal literacy" about how the law affects their rights and responsibilities in school. The following material explores the legal background and significance of the events that Theresa encountered during her day at school. This information can be used as the basis of informal discussions with students or as the framework for a mini-unit in legal literacy that could be incorporated into a course in social studies or American government or civics.

Mandatory Attendance and Truancy Laws

Theresa's mother was correct when she informed her daughter that she had to go to school. All 50 states have laws requiring that students between certain ages attend school. These laws have uniformly been sustained against various claims that they violate individual liberties guaranteed by the Constitution. Attendance obligations are primarily directed to the parent or guardian, which means that Theresa's mother could be subject to criminal sanctions if Theresa was absent from school more than a specified number of days during the school year. Compulsory attendance laws are generally enforced by criminal sanctions which don't directly involve the student, but they can also result in truancy, dependency or neglect proceedings which do involve the student.

Although students between certain ages must attend school, they don't have to attend *public* school. In the case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court held that the state of Oregon could not require all children between the ages of eight and sixteen to attend public schools, although it could regulate all schools, set up qualifications for teachers and require that certain studies essential to citizenship be taught to all. The Court's decision was based on the finding that parents have a fundamental right to direct the upbringing of their children. Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause of the First Amendment prevented a state from requiring Amish children to attend school beyond the eighth grade because the parents' right to direct the religious upbringing of their children was deemed to be more important than the state's interest in controlling their education beyond this point. In general, though, school-aged children not attending public school must obtain equivalent instruction elsewhere.

Equal Protection of the Laws

Theresa encounters racial discrimination in a couple of forms during the day. It appears as the answer to her question about why she has to attend school across town when there is a perfectly adequate school right in her neighborhood. It also appears in Mrs. M's threat about putting her in a special class for math.

Public school authorities have discretion to assign students to particular schools and school hours, but they may only do so within statutory and constitutional limits. One such limitation is contained in the Fourteenth Amendment, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause prohibits public schools from discriminating or adversely treating students without a proper governmental interest. Race is almost never considered a proper basis for discrimination and gender rarely is.

Busing. The busing of school children from their home neighborhoods to schools located elsewhere in order to remedy violations of the Fourteenth Amendment and achieve racial integration began as a result of the Supreme Court's historic decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Court held that states which segregated students into different schools on the basis of race were in violation of the Equal Protection Clause.

Prior to *Brown*, many states, especially in the South, maintained racially segregated schools. This practice was viewed as acceptable in view of an old Supreme Court case ruling that a state could constitutionally require racial segregation on a "separate but equal" basis. This case, *Plessy v. Ferguson*, 163 U.S. 537 (1896), was reversed by the Court in its *Brown* decision. Since *Brown* was decided in 1954, many states have had to desegregate their school systems, often under the orders of federal courts. School authorities have the primary responsibility for desegregating schools, but if they are unable or unwilling to eliminate the effects of racial discrimination, courts are left with the task.

Busing students from one school to another has been one method courts have ordered to achieve greater racial balance. One such order was upheld by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Since *Swann*, limits on busing as a remedy have been imposed, both by the Supreme Court and by Congress. For example, in 1974, Congress passed the Equal Education Opportunity Act, which directs federal courts to order transportation of students only as a last resort.

Besides busing, courts have also ordered a wide range of other measures designed to eliminate segregated schools, including voluntary student assignments; magnet schools and optional majority-to-minority transfers; altering attendance zones and grade structures; clustering or grouping of schools; faculty and staff desegregation; the construction of new schools; and even such internal measures as remedial reading, non-discriminatory testing, and counseling and career guidance programs.

Class Placement. Theresa is concerned by Mrs. M's threat that if her math grade doesn't improve, she will be placed in a special class "with the other minorities." Several lawsuits have been brought by parents and others alleging that the practice of grouping students according to aptitudes derived from standardized tests is discriminatory. These cases have been evaluated on an individualized basis and not according to any general principles. In one of these cases, *Georgia State Conference of NAACP v. State of Georgia*, 775 F.2d 1403 (11th Cir. 1985), the court concluded that Georgia's use of achievement testing to place students in ability groups was not discriminatory. It reached this conclusion even though the state had a history of segregation and there were more black children in the lower achievement groups than would be expected from a random distribution, since it found that the school districts had met their burden of showing the "educational necessity" for the ability grouping practices used.

Crime in School

Theresa encounters criminal law in several forms at different times during her day—when she is offered drugs and alcohol in the school yard, when she observes the dog-sniff search of lockers, and when she observes the brawl in the hallway.

Schools can establish reasonable rules prohibiting the use, possession, sale or distribution of tobacco, alcohol or drugs at school, although courts are divided on the issue of whether this applies to conduct taking place outside of school as well.

The United States Constitution applies to the dog-sniffing search Theresa observed in the corridor. The Fourth Amendment states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The federal district court in *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part and remanded in part*, 631 F.2d 91 (7th Circ. 1980), considered a dog-sniff search similar to the one Theresa observed taking place. In *Doe*, the principal of a high school hired a private company that trained dogs to conduct a search of a school. The search went through the classrooms and the dogs sniffed each student, resulting in over fifty students being asked to empty their pockets, eleven being subjected to an extensive body search, and one to a strip search. The court concluded that since only school personnel and no police were involved, the sniffs were not a "search" within the meaning of the Fourth Amendment.

This theory that a search conducted by school officials does not merit the same level of Fourth Amendment protection as searches by police personnel was expanded by the Supreme Court in *New Jersey v. T.L.O.*, 105 U.S. 733 (1985). The Supreme Court held that the Fourth Amendment was applicable to searches of students in schools, but in a more limited manner than in other settings. T.L.O. was a junior high school student suspected by a teacher of smoking cigarettes in the girl's room and sent to the principal's office. When she denied that she had been smoking, the assistant vice principal opened her purse and found not only cigarettes, but also rolling papers, a small quantity of marijuana, and notes indicating that she had been selling marijuana to fellow students. T.L.O. objected to her suspension from school on the grounds that the search violated her Fourth Amendment rights.

When the case reached the Supreme Court, it found that students do have a constitutionally protected expectation of privacy. However, the Court eliminated the requirement that a warrant must be obtained prior to a search inside of school, deciding that it was an undue interference "with the maintenance of the swift and informal disciplinary procedures needed in the schools." In addition, it modified the level of suspicion required to authorize a search from "probable cause" to the lesser standard of "reasonable suspicion." The Court determined that this standard provided an appropriate balance between the interests of society in maintaining order and discipline in the schools and the interests of students in protecting their privacy. Thus, a search in school is justified if reasonable grounds exist to believe that the search will uncover evidence of a violation of criminal law or a school rule or regulation.

Applied to T.L.O.'s case, the Court found that there was reasonable suspicion for the search of T.L.O.'s purse to look for cigarettes, and once evidence of marijuana was uncovered, this justified the further search of the purse. The effect of the *T.L.O.* case is to lower a student's expectation of privacy below that which the Fourth Amendment guarantees to others. However, it is unclear how far the Court's decision extends, especially since it declined to decide whether the reasonable suspicion standard would also apply to school searches of other areas where students keep personal belongings, such as lockers and desks.

The school search cases that have been decided in lower courts since the Supreme Court's *T.L.O.* decision indicate a trend towards giving students fewer and fewer Fourth Amendment rights. For instance, in *Cason v. Cook*, 810 F.2d 188 (8th Cir.), a search of a high school student implicated in stealing items from gym lockers was held not to violate the Fourth Amendment even though a police liaison officer questioned the student in a locked bathroom and found someone else's missing change purse in her possession. The circuit court used the rationale that applying the higher, probable cause standard for assessing whether a crime had been committed would not serve the interest of preserving swift and informal disciplinary procedures in the school setting. And in *State v. Brooks*, 43 Wash. App. 569, 718 P. 2d 837 (1986), the court upheld, on the grounds stated in *T.L.O.*, a student locker search that was conducted on the basis of a tip that the student was selling marijuana out of a box in his locker.

In contrast to locker searches, courts have generally subjected personal searches of students to greater constitutional scrutiny. For example, a Michigan court in *Cales v. Howell Public Schools*, 635 F. Supp. 454 (E.D. Mich. 1986), found that a search of a student's pockets and a visual inspection of her bra for drugs violated the Fourth Amendment. Although the court found that the basis for the search—the student's behavior in hiding behind a car in the school parking lot during class-time, and giving a false name to the security guard who discovered her—was reasonable grounds for suspicion that she had violated some school rule, it was insufficient to suspect that she was violating rules concerning use or possession of drugs.

Dress Codes

Theresa's curiosity about whether Mr. X could have Sid suspended for the way he was dressed depends in part on what is provided by the particular dress code regulations at Greenway Junior High School, if any. Personal appearance and clothing is clearly within the protection of the First Amendment if it is intended as political or religious expression. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 505 (1969), the Supreme Court held that suspending students for wearing black armbands to school in protest of the Vietnam War violated the First Amendment protection of free speech. While courts have disagreed about whether public schools can regulate the hairstyles of male students, none to date has viewed hairstyle as symbolic speech which would be protected under the *Tinker* decision.

In general, though, schools can adopt rules governing personal appearance and clothing as long as they are effectively related to the educational process and not based on mere preference. In a recent case, *Harper v. Edgewood Board of Education*, 655 F. Supp. 1353 (S.D. Ohio 1987), the federal district court upheld the decision to prohibit two high school students from

The Legal Rights of Students in Context

Students in public schools are protected by the U.S. Constitution, although the scope of that protection, as we will see, may be more limited than that accorded to others. The first Supreme Court case to establish that students do have constitutional rights in public schools was *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The Court held that students who were members of the Jehovah's Witnesses could not be compelled to salute the flag against their religious beliefs, since the requirement violated their First Amendment rights to free exercise of religion. This fundamental principal was reaffirmed in a more recent case, *Spence v. Bailey*, 465 F. 2d 797 (6th Cir. 1972), which declared that a high school could not compel a student, who was a religiously motivated conscientious objector, to participate in a mandatory ROTC program.

However, not all the individual rights contained in the Constitution are granted to students in public schools. Students' rights are often viewed as subsidiary to the rights of the government and of parents, which sometimes come into direct conflict with one another. For example, while parents have a constitutionally protected interest against unreasonable interference in the upbringing and education of children under their control (*Pierce v. Society of Sisters*, 268 U.S. 510 [1925]), their rights are subordinate to the power of the state to set minimum educational standards. (See *Scoma v. Chicago Board of Education*, 391 F. Supp. 452 [1974].)

attending their junior-senior prom because they came dressed as members of the opposite sex. It decided that the school's dress code regulations were related to the valid educational objective of teaching socially appropriate community values and maintaining school discipline.

Discipline and Punishment

Theresa is concerned about the extent of the school's authority to impose discipline and punishments on students. Several events during the day provoked her concern, including the morning brawl in the hallway and Mr. X's physical punishment of Sid; her friends' potential liability for getting caught smoking marijuana or drinking alcohol at school; the school newspaper being closed for refusal to comply with the principal's order against publishing the series on human reproduction; and her friends Jim and Tim being suspended from the school's football team.

The Constitution does not require schools to publish advance regulations for every conceivable offense or penalty. Students whose conduct is obviously wrongful cannot complain because they received no formal notice of the obvious, but advance notice in published regulations has been required where penalties are severe or school rules impinge upon speech-related activity. The school's right to punish students is not unlimited, however. In *Slayton v. Pomona Unified School District*, 161 Cal. App. 3d 538, 207 Cal. Rptr. 705 (1984), the California Court of Appeals held that parents have a right to require that a school district obtain their prior written approval according to the education code before administering punishment.

Suspensions. Although there is no constitutional right to a free public school education, once a state extends free public education to all residents between certain ages, it creates an entitlement to education which cannot be removed without the use of fundamentally fair procedures. In *Goss v. Lopez*, 419 U.S. 565, 579 (1975), the Court upheld the suspension of students during a period of student unrest. It concluded that the Constitution requires that "some kind of notice . . . [and] some kind of hearing" be given to students before they are suspended, but that the hearing that is required can be quite informal. Even a meeting between the student and the personnel applying the disciplinary measures is adequate, as long as the student is informed of the charges and given an opportunity to tell her side of the story.

Even this minimum level of constitutional protection has not always been enforced by the courts. For example, in *White v. Salisbury School District*, 588 F. Supp. 608 (E.D. Pa. 1984), the district court upheld the school's decision to suspend students who police observed smoking marijuana on school grounds one day before a hearing was held, stating that prior notice and a hearing before suspension was not required when students present an ongoing threat of disrupting the academic process. Giving the student an informed opportunity to present her side of the story is all that is required.

Students can validly be suspended even for conduct which has taken place off school property. In *Pollnow v. Glennon*, 594 F. Supp. 220 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 496 (2d Cir. 1985), the court held that a high school was justified in suspending a student who had seriously beaten a friend's mother the week before, finding that he was a danger to the health, safety and welfare of other students. And in *Clements v. Board of Education*, 133 Ill. App. 3d 531, 88 Ill. Dec. 601, 478 N.E.2d 1209 (1985), the court upheld a school's prohibition against allowing a student to play on the school's softball team because of her presence at a party where alcoholic beverages were given to minors.

The Fifth Amendment's prohibition against self-incrimination, which protects individuals accused of crimes from having to testify against themselves, is largely inapplicable in the context of school suspensions, since they are civil rather than criminal proceedings. Although students cannot be suspended, expelled or removed from activities for "taking the Fifth," decision makers at disciplinary hearings may be justified in drawing adverse inferences concerning the student's guilt based on his or her refusal to testify, as long as there is additional evidence to support the finding.

Corporal Punishment. In *Ingraham v. Wright*, 430 U.S. 651 (1977), students challenged the constitutionality of a Florida statute which authorized corporal punishment without a prior hearing. The Supreme Court found that although students have an interest in not being deprived of their liberty without due process of law, remedies provided by Florida were sufficient to protect this interest, so that no additional procedures were required. The Court reached this conclusion even though Florida provided remedies only for excessive punishments, not for those which never should have been made to begin with. The Court also held that corporal punishment in schools does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Although the Supreme Court in *Ingraham* found that corporal punishment did not violate the federal Constitution, it may violate state laws or local administrative regulations. Teachers have been dismissed for failing to comply with school board policies regulating corporal punishment and for improper use of physical force with students. *See Harris v. Commonwealth*, 29 Pa. 625, 372 A.2d 953 (1977); *Welch v. Board of Education*, 45 Ill. App. 3d 35, 3 Ill. Dec. 679, 358 N.E.2d 1364 (1977). For example, in *Landi v. West Chester Area School District*, 23 Pa. 586, 353 A.2d 895 (1976), a teacher was dismissed for "cruelty" as a result of throwing a student against the blackboard and then pulling him upright by his hair.

Alternatives to Punishment. In recent years, mediation has begun to be used as a method of solving a wide variety of conflicts in schools. Often, mediation or conciliation can provide an alternative to suspension or can prevent student-student and student-teacher disagreements from escalating. Mediation programs differ widely from school to school—some involve professionals training students and/or teachers, while others have used students and teachers to teach mediation techniques to students. Some programs require that students who are subject to certain disciplinary action submit to mediation, while other programs are completely voluntary. Schools that have implemented mediation programs have been able to verify benefits such as reduction in suspension rates.

Censorship

The issue of the school's authority to censor the content of what students are exposed to arose in a couple of different contexts during Theresa's day. This issue was involved in the school board's removal of books from the library, limits on the subject matter of textbooks and supplemental materials, and the student newspaper staff's right to print what they choose.

In general, the degree to which censorship can take place is governed by the First Amendment, which says that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." In *Tinker*, the Supreme Court found that the school policy was an invalid attempt to quash speech and held that "state operated schools may not be enclaves of totalitarianism" and that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." And the "right to receive ideas" has been declared by the Supreme Court to be a necessary predicate to the recipient's meaningful exercise of his own rights of speech. (*Board of Education v. Pico*, 457 U.S. 853 [1982].) Nonetheless, even the Court in *Tinker* recognized limits to students' free expression. It declared that students' right to free speech must be considered "in light of the special characteristics of the school environment" and concluded that the boundary of this right was that which could "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . [or] intru[sion] in the school affairs or the lives of others."

School Library Books. In *Board of Education v. Pico*, a local school board ordered several books removed from the junior and senior high libraries and school curriculum on the grounds that they were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy." In reversing the school board's decision as unconstitutional, the Supreme Court suggested that students' access to ideas can only be restricted where there is evidence of material disruption to the school; where the books are "perversely vulgar" or educationally unsuitable; where unbiased, established procedures have been used in evaluations; or where the books are part of the curriculum rather than the library. In a similar case, *Right to Read Defense Committee v. School Committee of Chelsea*, 454 F. Supp. 703 (D. MA. 1978), the court prohibited the removal of an anthology of adolescent writing from the school library on the ground that the school committee's decision had been based on personal values rather than on educational standards.

Textbooks. Most states permit local school districts to select their own books from state-approved lists. Challenges to school board text selection have largely failed, even when the text allegedly engendered hostility to a group or a set of religious beliefs. See, for example, *Williams v. Board of Education*, 388 F. Supp. 93 (S.D.W. Va.), *aff'd*, 530 F.2d 972 (4th Cir. 1975), which involved materials offensive to parents' beliefs. The school district's authority over textbook selection is so broad that in *Fisher v. Fairbanks North Star Borough School District*, 704 P.2d 213 (AK 1985), the court held that a teacher did not have the right to include supplemental materials on homosexual rights, even though the school district's rules on submission of such materials for prior review were not generally enforced. It found that the teacher's right to select materials must give way to the school board's authority to control the curriculum in order to communicate community values.

The parents of Theresa's classmates who objected to the content of their children's textbooks and other instructional materials probably could insist that their children be exempted from having to read them. But it is unlikely they would be successful in attempting to compel the school to use alternative texts. Courts have upheld the general power of state legislatures to control even such sensitive subjects of the curriculum as sex-related topics. For example, in *Mercer v. Michigan State Board of Education*, 379 F. Supp. 580 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974), the court upheld a statute prohibiting the teaching of birth control in school and permitting parents to withdraw their children from classes on sex education, hygiene or the symptoms of disease, stating that the state has the power to permit parents to make the final decision as to exactly which courses children should take. Similarly, in *Citizens for Parental Rights v. San Mateo Board of Education*, 51 Cal. App. 3d 1, 124 Cal. Rptr 68 (1975), a California court upheld a program of family life and sex education implemented by the county school board against a challenge by parents on religious grounds, since students could be excused from any part of the program that conflicted with the parents' religious beliefs.

Student Publications. Theresa might be very surprised to learn that the Greenway student newspaper is subject to regulation by the school administration. In general, although public schools are under no obligation to provide students with a forum for free expression, once they do create such a forum, like a student newspaper, the First Amendment limits the extent to which school officials may discriminate against the content of that expression. Schools have some flexibility in limiting the content of student publications, however, since students may be afforded a lesser degree of free speech rights outside of the classroom that they

1981

are inside (see *Tinker*, 393 U.S. at 514; *Shanley v. Northeast Independent School District*, 462 F.2d 960, 969 [5th Cir. 1972]), as well as less freedom of speech than what teachers are entitled to (see *Nicholson v. Board of Education*, 682 F.2d 858, 863 [9th Cir. 1982]). School officials can prevent distribution of literature that may cause emotional harm to other students or may otherwise substantially interfere with the rights of other students or materially disrupt the order of the school. The articles that Theresa wants to write would be evaluated by these standards.

Most courts have found that students can also be required to submit student-written publications for approval prior to distribution if the school's guidelines spell out what is forbidden "so that a reasonably intelligent student will know what he may and what he may not write." (*Nitzberg v. Parks*, 525 F.2d 378, 382 [4th Cir. 1975].) One court went so far as to state that "the special characteristics of the high school environment, particularly one involving students in a journalism class that produces a school newspaper, call for supervision and review by a school faculty and administrators." (*Nicholson*, 682 F.2d at 979.) However, in *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972), the court interpreted *Tinker* as forbidding the use of prior restraints in the school setting, allowing only post-publication punishments for students who publish material that later proves to be substantially disruptive. Similarly, in *Burch v. Barker*, 651 F. Supp. 1149 (W.D. Wash. 1987), a pre-publication procedure for reviewing student publications was struck down, in part for placing a blanket prohibition on underground student papers and for vague and overboard standards prohibiting expression that "encourages actions which endanger health and safety of students."

[*Editor's Note: As this issue of* Update *was going to press, the Supreme Court decided* Hazelwood School District v. Kuhlmeier, *a case raising many of the issues covered in this section. As indicated in the article on the case in this issue's Court Briefs, the decision supports the right of educators to review school newspapers before publication and to exercise the power of prior restraint if, in their opinion, the publication is unsuitable for the age and maturity of its readers, as well as for other reasons connected with the schools' mission to educate and transmit social values.*]

In a recent case, *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), the Supreme Court upheld the suspension of a high school student for making a nominating speech in support of a candidate for student elective office which contained graphic and explicit allusions to sex, despite the student's claim that the suspension violated his free speech rights. The Court stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must . . . also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

The Court in *Bethel* also said that the local community, in the form of the school board, could decide what types of language might be inappropriate in school settings and lead to minor penalties.

Religion

Theresa encounters the tension between religion and public schools at several different points during the day. Religion is the basis of some of the parental objections to the subject matter of Mrs. P's class assignment, as well as to the supplemental reading materials that Mr. H has assigned to Theresa's class. And it is clearly present with respect to the prayer group meeting after school.

The First Amendment provides that "Congress shall make no laws establishing a religion nor prohibiting the free exercise thereof . . . ." Although this amendment specifically only prevents Congress from making such laws, the Supreme Court established that this amendment also applies to the states. It has been interpreted to prevent governmental agencies from giving any official support to religion, whether that be by aiding one religion, all religions, or preferring one religion over another. (*Everson v. Board of Education*, 330 U.S. 1715 [1947].)

The First Amendment limits the extent to which public schools can be involved with religion. The Court has determined that it prohibits private religious instruction from being given in public school classrooms, (*McCollum v. Board of Education*, 333 U.S. 203 [1948]), as well as Bible readings, (*Abington v. Schempp*, 374 U.S. 203 [1963]), posting of the Ten Commandments, (*Stone v. Graham*, 449 U.S. 39 [1980]), and prayer, (*Karcher v. May*, 56 U.S.L.W. 4022 [Dec. 1, 1987]; *Wallace v. Jaffree*, 105 S. Ct. 2479 [1985]; *Engel v. Vitale*, 370 U.S. 421 [1962]).

The First Amendment also puts limits on the extent to which governmental officials, including legislators and school board members, can influence the religious content of education in public schools. The Supreme Court recently held in *Edwards v. Aquillard*, 107 U.S.L.W. 2573 (1987), that Louisiana's Creationism Act, which forbids the teaching of evolution unless accompanied by "creation science," violated the Establishment Clause since the purpose of the legislation was to narrow the science curriculum "to reflect endorsement of a religious view that is antagonistic to the theory of evolution." This case was in accord with an earlier Supreme Court decision, *Epperson v. Arkansas*, 393 U.S. 97 (1968), where the Court stated that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

However, the Court has allowed public school children to be given "release time" from public school to attend classes of religious instruction. (*Zorach v. Clauson*, 343 U.S. 306 [1952]). And there is no constitutional prohibition against classes which teach "about" religion. The Supreme Court in *Abington School District v. Schempp*, 374 U.S. 203 (1963), declared that schools could lawfully offer "study of the Bible or of religion, when presented objectively as part of a secular program of education." Courts have also found that Bible study courses are permissible as long as the instruction is objective, historical and non-devotional. (*Wiley v. Franklin*, 497 F. Supp. 390 [E.D. Tenn. 1980], *Crockett v. Sorenson*, 568 F. Supp. 1422 [D. W. Va. 1983]).

Several courts have recently had to grapple with the issue of the extent to which parents can control the content of their child's education in the public school based on the Free Exercise Clause. For example, in *Mozert v. Hawkins County School Board*, 827 F.2d 1058 (6th Cir. 1987), the federal appeals court ruled that a local school board requirement that all students in grades one through eight use a prescribed set of reading texts did not violate the constitutional rights of objecting parents and students, although it found that "[p]roof that an objecting student was *required* to participate beyond reading and discussing assigned materials, might well implicate the Free Exercise Clause because the element of compulsion would then be present."

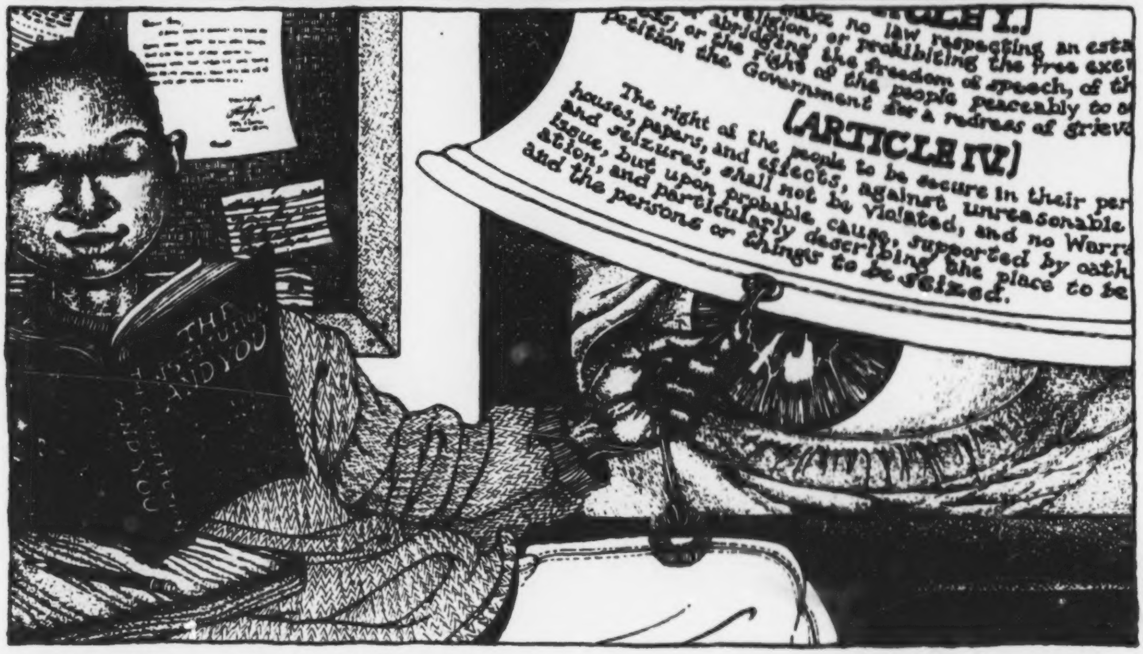
(continued on page 65)

1982

Legal Literacy

Students' Constitutional Rights/Upper Elementary, Middle School

Kathy Aldridge and Jeanne Wray


[ARTICLE I.]
make no law respecting an esta
religion, or prohibiting the free exe
abridging the freedom of speech, of th
or the right of the people peaceably to a
petition the Government for a redress of grieva
[ARTICLE IV.]
The right of the people to be secure in their per
houses, papers, and effects, against unreasonable
and seizures, shall not be violated, and no Warra
issue, but upon probable cause, supported by oath
ation, and particularly describing the place to be
and the persons or things to be seized.
THE
AND YOU

Susan Wise

The focus of this lesson is students' rights as related to the Bill of Rights. The lesson will probably take two or two and a half hours (or three 45-minute class periods) to do in its entirety. It centers around a role-play simulating the search of students suspected of possessing illegal drugs. Class discussion focuses on reactions to this enactment. Students then examine the situation from several points of view and analyze the implications of drug searches under our Constitution. To enhance critical thinking skills, students argue landmark cases involving students' rights. There are roles for resource people at all stages of the lesson.

Since the 1960's the Supreme Court has applied constitutional rights to the public school setting more frequently. However, applying the protections in the Bill of Rights to schools raises many unanswered questions. The rights to privacy, to free press, and to fair treatment at school become more pertinent when teachers and resource people involve students in the case study approach to landmark Supreme Court cases.

Goals

As a result of this lesson, students will:

- discuss and analyze the First and Fourth Amendments as they relate to the rights of students.
- develop understanding of the importance of the First and Fourth Amendments.
- develop critical thinking skills.

Procedures

1. This lesson might be more effective after students have some familiarity with the Bill of Rights, specifically the provisions of the First and Fourth Amendments. In preparation for this lesson, to the attorney can provide the children with a general understanding of these amendments. Later, he or she could work with the children in developing arguments for their court cases. Attorneys and teachers will find good discussions of the First and Fourth Amendments in the school setting on p. 26 and pp. 28-29 of this *Update*.

2. After students have been briefed on the amendments, select a girl to be a "plant" to protest simulated search of students in the classroom. A "plant" is a student with whom the teacher or resource person has an arrangement to say something or react in a certain manner at the appropriate time in the lesson.

3. Possibly at the beginning of the next class period, the principal, who has been briefed prior to the simulation, will enter the classroom and inform the teacher or resource person that certain students were reportedly seen in the restroom preceding the discovery of a plastic bag containing a white, powdery substance.

4. Inform the class that a search is necessary. Rationalize the search in terms of school policy and discipline. The "plant" should then protest the violation of students' rights, citing the protection against searches and seizures in the Fourth Amendment.

5. Solicit other students' opinion concerning the search and encourage critical thinking by asking students to defend their position on the issue.

6. After a thorough discussion, reveal that the activity was a simulation and assure students that no one has actually been accused or set up.

7. Ask for feelings and reactions concerning the accusation, possible search, and confrontation with school authorities. (Possible questions in box.)

8. Using the Fourth Amendment, discuss "reasonable cause" and "probable cause." Lead the students to

understand that "probable cause" means that the circumstances leading to the search make it probable that the person being searched might have committed a crime, though "probable cause" does not require absolute certainty. However, when a search is conducted by a school official, all he/she needs is "reasonable cause," which is a less stringent standard. A search at school may be conducted as a result of suspicion or rumor, a lesser degree of certainty than "probable cause." The guest lawyer or law enforcement officer can reinforce this concept and answer questions that will arise.

9. After distributing copies of *New Jersey v. T.L.O.* (see below) use the case study approach to review and analyze the case. In case studies, students are asked to deal with the facts and the issues in the case, to reach and support a decision and to weigh the consequences of that decision. Therefore, students will gain practice in all levels of thinking. First, ask students for an oral recitation of the facts in the case. Then ask students to identify issues or key questions that the facts raise. Divide the class into two sides and allow both sides to argue their issues in front of the class. The "judge" (a student or an adult) will render a decision based on the arguments presented. Finally, announce the actual decision. Use questions to guide the students to consider the implication of the court's decision. (Depending on the discussion, steps 3-9 could take one or two class periods.)

10. At the beginning of the final period, divide the class into three groups. Each group will analyze a landmark case (see below) pertaining to the rights of students. Case studies should include:

- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
- *Fairfax Co. School Board v. Gambino*, 564 F. 2d 157 (1977).
- *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986).

11. In each group appoint some students to be judges, some to be representatives for the plaintiff and some to be representatives for the defendant. After members of each group have received the case summaries, allow approximately five or ten minutes for representatives to prepare arguments for their sides. One or more attorneys would go from group to group, helping students with their arguments. Each group should then briefly argue their issue in front of the class. The "judge," who might be a guest attorney, will render a decision based on the arguments presented. Then the actual higher court decision will be announced.

12. At the conclusion of the lesson, inform students that the Supreme Court generally deals with at least one student case each term. Stress that students are citizens and that the Court has held that they are therefore protected by the Constitution. However, as with adults, the protection of individual rights is rarely absolute, and the Court will carefully weigh the values in conflict in deciding each case. Encourage student awareness concerning forthcoming decisions.

Other Activities

(1) Students can create a poster depicting student rights or illustrate a rights case studied by the class. (2) Students can create a multi-framed cartoon strip telling the story of *New Jersey v. T.L.O.*

Tips for the Teacher

Teachers are encouraged to visit with a local attorney concerning local cases and/or particular federal or state rulings that deal with the rights of students.

Students at this level also enjoy and learn from conducting a mock trial, either re-enacting an actual case or creating a case of their own. As part of the simulated search, the teacher should make certain that the class had indeed just returned from the restroom (or cafeteria, or playground) so as to coincide with the supposed "accusation" as presented by the principal.

Search and Seizure Case

New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

On March 7, 1980, a teacher in New Jersey found two girls smoking in a restroom. Since this was against school rules, the teacher took the two students to the principal's office. The assistant vice principal questioned the two girls separately. One student admitted she had been smoking. However, T.L.O. denied she had been smoking in the restroom and claimed she did not smoke at all.

The assistant vice principal asked to see T.L.O.'s purse. When he opened the purse he found a pack of cigarettes and also noticed a package of rolling papers. From his experience, he knew that rolling papers were often associated with using marijuana, so he searched the purse more thoroughly. He found a small amount of marijuana, a pipe, several empty plastic bags, a lot of money, a card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing.

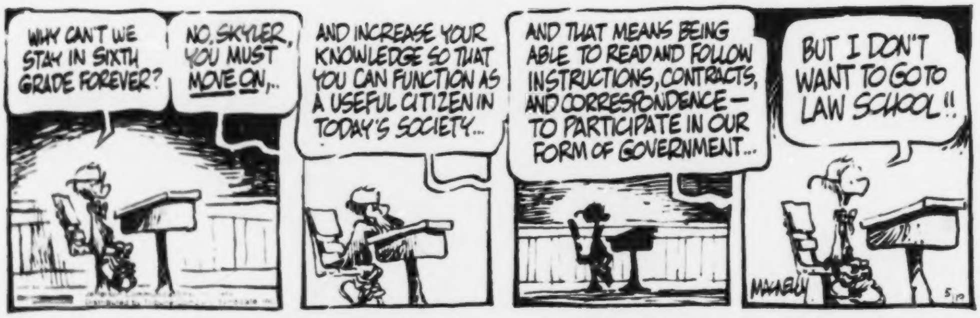
Thereafter, the state brought delinquency charges against T.L.O. in juvenile court. T.L.O. said the evidence that was found in her purse shouldn't be used against her, claiming that the search by the assistant principal violated her rights under the Fourth Amendment. The trial court

Handout: Follow-up Questions on Simulated Search

1. Does a teacher have the right to search a student? Why or why not?
2. How would you react if you were searched?
3. Are you willing to give up your right of privacy?
4. How many of you agree with the girl who objected to the search? Why or why not?
5. Are you United States citizens?
6. Are your rights protected by the Constitution?

Reaction to Simulation

1. How did you feel when the principal came in? Why?
2. How does it feel to be accused?
3. What were your feelings toward the teacher?
4. How did you feel when the girl protested? Why?
5. Would any of you have protested on your own?
6. Should your teacher protect you from a search?
7. Should a teacher search lockers if there has been a bomb threat?
8. Are airport searches legal?


WHY CAN'T WE STAY IN SIXTH GRADE FOREVER?
NO, SKYLER, YOU MUST MOVE ON,..
AND INCREASE YOUR KNOWLEDGE SO THAT YOU CAN FUNCTION AS A USEFUL CITIZEN IN TODAY'S SOCIETY...
AND THAT MEANS BEING ABLE TO READ AND FOLLOW INSTRUCTIONS, CONTRACTS, AND CORRESPONDENCE — TO PARTICIPATE IN OUR FORM OF GOVERNMENT...
BUT I DON'T WANT TO GO TO LAW SCHOOL!!
MACNELLY

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allowed the evidence to be introduced. On appeal the New Jersey Superior Court agreed with the trial court, ruling that there had been no Fourth Amendment violation. The New Jersey Supreme Court said that the trial court was wrong, and ordered the suppression of the evidence found in T.L.O.'s purse, holding that the search violated her Fourth Amendment rights.

The State of New Jersey appealed to the United States Supreme Court.

Issue: Did the assistant vice principal's search of T.L.O.'s purse violate her Fourth Amendment right to be protected from unreasonable searches and seizures?

DECISION

No. The assistant vice principal's search was reasonable under the Fourth Amendment.

According to the Court, school children have a legitimate expectation of privacy in those legitimate items they bring onto school grounds. However, it is necessary to strike a balance between the schoolchild's legitimate expectation of privacy and the school's equally legitimate need to maintain an environment in which learning can take place. Ordinarily a search must be based on "probable cause" to believe a violation of the law has occurred. Schools, however, require a lower standard to accommodate the "privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools." Thus, "the legality of a search of a student should depend simply on the reasonableness, under all circumstances, of the search."

The Court concluded that a search of a student by a school official is constitutionally permissible when:

1. there are "reasonable grounds for suspecting that the search will turn up evidence that the student violated or is violating either the law or the rules of the school."
2. the search methods and measures adopted by the official "are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Freedom of Expression Case

Tinker v. Des Moines Independent Community District, 393 U.S. 503 (1969).

In December 1965, a group of adults and students decided to publicize their opposition to the Vietnam conflict by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Several of the students had engaged in similar activities in the past and they decided to participate in this program.

The principals of the Des Moines schools heard about it, and on December 14, they adopted a policy that prohibited wearing an armband to school. Students who refused to remove armbands would be suspended until they complied.

On December 16, Mary Beth Tinker, a thirteen-year-old junior high school student, and Christopher Eckhardt, a sixteen-year-old high school student, wore armbands to their schools. John Tinker, a sixteen-year-old high school student, wore an armband the next day. All three knew about the regulation. They were suspended and were told not to come back until they removed their armbands. They stayed away from school until after New Year's Day, when the planned period for wearing the armbands had expired.

The three students filed a complaint, through their parents, in the United States District Court, asking for an injunction ordering the school officials not to punish them. In addition, they sought nominal damages—a small or token sum of money, generally $1.00, to show that a legal injury had been suffered.

The District Court dismissed the complaint, and the case reached the United State Supreme Court on appeal.

Issue: Did the school system's action violate the students' constitutionally protected right of freedom of speech?

DECISION

Yes. The United State Supreme Court held that the Tinkers' actions, in this situation, were protected by the First Amendment.

Reasoning: The Supreme Court concluded that:

> First Amendment rights, applied in light of special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate....
>
> The school officials banned and sought to punish [the Tinkers] for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the[ir] part. There is no evidence whatsoever of [their] interference with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other student. ...
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. ...

School Newspaper Case

Fairfax County School Board v. Gambino, 564 F. 2d 157 (1977).

Cindy Gambino, a student at Hayfield High School, served on the staff of the school's student newspaper, *The Farm News*. In her role as a reporter, Ms. Gambino wrote an article on birth control, based partly on a canvass of Hayfield students' attitudes toward birth control. The article was submitted for publication.

As a result of a prior agreement regarding potentially controversial material, the article was submitted to the principal for review. The principal saw that portions of the article contained information on contraceptives, viewed apart from the information obtained from the canvass. The principal ruled that portions of the article violated school board notice 6130, which prohibited the schools from offering sex education until a decision was reached on a proposed program, and therefore it was not to be published as written. The principal gave the students the option of publishing the article with the objectionable passages cut out, but they chose to print all or none of the article.

The principal's decision was upheld by the Advisory Board on Student Expression, the division superintendent, and the school board. Students then filed a lawsuit to stop the county school board from prohibiting publication of the article in the school newspaper. The United States District Court found that the students were entitled to the injunction, and the school board appealed the decision to the United States Court of Appeals for the Fourth Circuit.

Issue: Did the Hayfield Administration/Fairfax County School Board violate the First Amendment rights of Ms. Gambino by not publishing the article in the school paper?

DECISION

Yes. The United States Court of Appeals for the Fourth Circuit ruled that the article was protected by the First Amendment.

Reasoning: The court of appeals found that the secondary school newspaper was a conduit for student expression in a wide variety of topics and thus fell within the parameters of the First Amendment.

The court rejected the arguments that: (1) the students were a "captive" audience merely because of their compulsory attendance at the school; (2) the newspaper was an official publication and thus part of the curriculum; or (3) the material was suppressible because it was objectionable to the sensibility of the school board of its constituents. [*Editor's Note, but see the recent case of* Hazelwood School District v. Kuhlmeier, *reported in this issue's Court Briefs, which holds that the student newspaper in question was part of the curriculum and so properly subject to the approval of school officials.*]

Student Free Speech Case

Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986).

Matthew Fraser was a student at Bethel High School. In April he gave a speech to around 600 high school students, nominating another student as a school officer. The students could either attend the assembly or go to study hall.

There was a rule against obscene or profane language at Bethel High School. Matthew Fraser had shown his speech to two of his teachers before he gave it. They warned him that it was inappropriate, that he probably should not give it, and that he would probably get in trouble if he did. He gave the speech, anyway, just as he had written it. It contained suggestive language that would be offensive to many people.

During the speech, some students in the audience yelled and hooted, while others seemed embarrassed. When the speech was over, Fraser was called into the assistant principal's office, told that he had broken the rule prohibiting obscene language, and suspended for three days. He felt that his right to free speech, as protected by the First Amendment, was being violated; therefore, he sued the school board for making that rule.

Issue: Did the school district's policy against obscene and profane language, and the suspension of Fraser, violate Fraser's First Amendment right to free speech?

DECISION

No. The Supreme Court decided that the school district acted within its authority in punishing Fraser for his indecent speech.

Reasoning: The Court distinguished this case from the *Tinker* armband case. In *Tinker*, students wore black armbands to protest the Vietnam War, and the essence of the message was a statement of political belief. In this case, however, the student's speech was full of sex, which did not advance his political belief in his candidate. On the contrary, he violated the sensibilities of his fellow students, and his comments were "plainly offensive."

In other settings, such sexual language might very well be protected by the First Amendment. However, according to the Supreme Court, the purpose of schools is to prepare students for citizenship. "It is important for the children to learn about the democratic political system, but it is also necessary to take into account consideration of the sensibilities of fellow students." Adults must consider others' feelings and sensibilities in making public speeches, and so must students. In our society the distinction between appropriate and inappropriate social behavior applies to students, too.

Kathy Aldridge and Jeanne Wray are elementary school teachers in Abilene, Texas. This lesson was originally published by CRADLE (see below).

CRADLE Provides Help

The lessons on pages 14, 16, and 30 were originally published by the Center for Research and Development in Law-Related Education (CRADLE). The lessons were written and field-tested by teachers who have participated in CRADLE programs. For further information, contact: Julie Van Camp, Center for Research and Development in Law-Related Education (CRADLE), P. O. Box 7206, Reynolda Station, Winston-Salem, North Carolina 27109, 919/761-5434.

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LEGAL LITERACY

Susan Fillichio

Legal Literacy for Laypeople

What you—and your students—should know about common legal situations

[Editor's note: This article provides a quick look at some of the law that is apt to be important to the average person. It could easily be adapted into a speech.]

We hear and read about law all the time. But do we realize how close we come to the law ourselves, every day?

You don't have to be a lawyer to understand many legal issues that touch your daily life. This article will demonstrate how our lives, our work and our families are affected by the law. Knowing about our rights and responsibilities under the law gives us tools we need to get the most out of life in an increasingly law-oriented society.

Civil Law and Criminal Law

One of the functions of the law is to provide a system of regulating disputes, so that all people enjoy rights within the framework of an ordered society. Legislators draft laws reflecting this purpose, while courts provide a forum for resolving disputes.

Civil cases primarily involve the resolution of *private* conflicts between people or institutions. Criminal cases, on the other hand, involve the enforcement of *public* or *official* codes of behavior that society has established to protect its citizens.

In criminal cases, the state brings charges against the person who allegedly committed the crime. In civil cases, the people involved in the dispute bring the suit. Although criminal cases may be more colorful, civil cases are much more common.

Most disputes do not involve the trial process and are settled through an agreement by the parties. Instead of Perry Mason tactics in the courtroom, most lawyers work to settle disputes peacefully, by settlements that take place outside of court.

State Courts and Federal Courts

One of the most confusing aspects of our courts is that we have two separate court systems—state courts and federal courts. Most cases are tried in state courts, which are established in each state under the authority of the state government. These courts are governed by state law, which gives them the authority to hear almost every type of case. Most legal affairs dealing with divorce and wills and all other matters except those assigned to the federal courts are handled by state courts.

Federal courts, also referred to as United States courts, are fewer in number. Only about 10% of all cases are tried in these courts. A case may be filed in federal court only if there is a specific statute or constitutional provision granting the federal courts jurisdiction to hear the case. Although there are circumstances when state and federal jurisdiction overlap, cases generally cannot be tried in both systems.

Where Law Comes From

The laws applied in both civil and criminal cases are derived from four sources: the U.S. Constitution and state constitutions, federal statutes, state statutes, and case law. Though landmark constitutional cases make news, most cases don't involve constitutions at all but are derived from statutes or earlier case law.

Civil Law

There are two major areas of civil law, "tort" and "contract" law. Let's look at torts first. When a person is injured, and the injury results from the intentional or negligent actions of another, the injured person may be able to recover money from the injuror. The injured person has the right to bring an action in tort. If a court finds that the injuror has breached a duty of care to the injured person, the injured person will usually be awarded money to compensate him or her for the injury.

A typical example of liability in tort occurs when a person is injured in an automoblie accident. The injured person may have the right to file a claim against the driver of the automobile.

The concept of strict liability also is an important part of tort law. American courts have found that product manufacturers—drug companies, for example—are responsible to the American public for *any* harm that results from use of the product. Courts have stated that the manufacturing companies are in a better position to make sure that their products are safe than is the average user of these products.

If you think you may have the right to bring an action in tort against another person or company, consult with an attorney who specializes in handling such cases.

Contracts are agreements between people or businesses. Generally, contracts are formed when people agree to exchange money for goods or services. Contracts represent the terms that the parties agree to follow in conducting a business transaction or series of transactions.

If you are thinking about purchasing something, you may want to put your request in writing so that a court, if ever a problem arose, would have proof of the terms of the agreement. Courts have a

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1988

difficult time enforcing sales agreements for over $500 unless the agreement is in writing.

A party who violates the terms of a contract may be responsible to the person or business suffering harm as a result of the breach of contract. Usually, the remedy is to put the injured party in a position as close to the one he or she would have been in if the contract terms had never been violated.

Sometimes, circumstances occur which make it impossible to follow contract terms. For example, if a wheat farmer agrees to sell 20 bushels of wheat to a company which produces bread, and the farmer's crop is ruined by rain, a court may intervene and decide that the farmer should not be responsible to the bread company for the wheat or the amount of money it would take to purchase 20 bushels of wheat from another farmer. The court may decide that both parties should bear the loss.

When entering into a contract that involves large sums of money, consult an attorney who can advise you on how best to protect your rights.

Law in the Workplace

Another important area of civil law deals with jobs. Because work is central to our lives, the law regulates many aspects of work and the workplace.

Although the Constitution does not guarantee citizens a right to a job, there are certain things you can expect once you are employed. One of these is a safe working environment.

In 1970, Congress passed the Occupational Safety and Health Act to create safe working conditions throughout the U.S. Under the Act, Congress established the Occupational Safety and Health Administration (OSHA), a federal agency which administers the Act. OSHA is allowed to inspect employment premises to make certain that they are free from hazards that will likely cause death or serious physical harm. An employer may be fined up to $1,000 for each violation of the Act. Most employers, however, voluntarily agree to correct the violations.

For those workers who are unemployed through no fault of their own, there is unemployment insurance. Unemployment insurance provides workers and their families with weekly income to help them through unemployment resulting from layoffs, plant closures, or natural disasters. To find out whether or not you qualify for unemployment insurance, contact the state employment security agency. Most states require workers to be employed by someone else. Self-employed persons are generally not covered, nor are temporary laborers, minors working for their parents and student interns. And usually you are not covered if you voluntarily quit your job.

An additional protection for employees are the workers compensation laws which compensate workers or their dependents when, despite the precautions employers take against accidents and injury, workers are injured or killed. You are guaranteed benefits resulting from injuries on the job no matter what the circumstances of the injury. However, under the workers compensation laws, you don't have the right to sue your employee for injuries that result from the employer's negligence. Moreover, workers compensation benefits are normally rather low. You or your family may get a fixed weekly benefit to compensate for the injuries you may have suffered. The size of the benefits depends on your regular salary. An employee may be able to recover hospitalization, medical care and rehabilitation costs which result from an injury. The employer alone bears the costs of these benefits. In other words, they can't be taken out of your regular pay.

If you should happen to be injured on the job, notify your employer as soon as possible. Then, file a claim with the state agency administering the workers' compensation plan. Each state has a time limit for filing claims, so file promptly to make sure you preserve all of your rights.

Law and Marriage

Family law is another important area of civil law. The law regarding marriage and family relations is changing rapidly. Marriage today is a status, with rights and obligations established in part by the state. Yet marriage has elements of a contract, allowing husband and wife, to some degree, to establish just what their relationship will consist of. Although state law provides the best source of information regarding marriage and divorce, there are general principles that apply in most cases.

First, some basic principles about marriage. States still allow a person to have only one spouse. A person may not marry another person of the same sex, and marriages between homosexuals have not been upheld by courts. All parties who plan to marry must get a license from the appropriate state official.

In most states, a woman who marries and wants to use her husband's name need only begin using it. No formalities are required. Similarly, if a married woman choses to keep her own name, she simply continues using it.

Prenuptial agreements have become more popular in recent years, in part because of the climbing divorce rate. Prenuptial agreements are contracts between two people before marriage. They may lessen the emotional strain upon divorce by forcing both parties to decide some financial matters before marriage. They can be used, for instance, to prevent money or property from passing to a spouse or his or her family upon death or divorce. In the past, these contracts were not enforced by the courts since it was the state's job to regulate the marital status. Courts in at least fourteen states will now uphold these agreements as long as they are fair and reasonable when made.

Regardless of the value society places on marriage, divorce today is common practice. The law generally doesn't interfere in ongoing marriages; it will, however, play a strong role in divorce.

Separation is often the first step toward a complete dissolution of marriage. Separated couples retain many of the rights and obligations of married couples. Neither spouse can marry, for instance, and they may still be permitted to inherit from each other. When couples separate by mutual consent, they should draft a separation agreement—a contract—which details financial and living arrangements, as well as the rights and duties each spouse owes to children.

A court may grant a civil annulment, although a couple generally must show substantial reasons why the annulment should be granted. An annulment is a declaration by a court that the couple never was legally married or that one spouse was not bound by the marriage. Annulments are generally granted on grounds of fraud—that is, when one party deliberately withholds important information from the other before the wedding. Generally, when such a status is granted, people are restored to their premarital financial positions.

When divorce is inevitable, each spouse should choose a different lawyer to represent him or her in the formal proceedings. In almost all states, courts will grant a "no fault" divorce, where neither party must show that the other committed a marital wrong. In most states, it is very difficult to contest a divorce. A party, therefore, is often granted a divorce even if his or her spouse is unwilling.

Most states have replaced the outdated

concept of alimony, a husband's support of his wife, with "maintenance." Either the husband or the wife may be forced to pay maintenance, depending on who requires the financial support and who can provide it. Maintenance lasts for usually only about two years, just enough time for the receiving person to get back on his or her feet and make a living. Maintenance usually terminates when the recipient remarries, or dies, or, in some cases, lives with a member of the opposite sex out of wedlock.

The division of property after divorce differs from state to state. Most states follow a process of "equitable distribution." In these jurisdictions, the court retains the power to distribute marital property—the money or property acquired during the marriage—regardless of who holds the title. Community property states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington—either divide all money and property in half, or the part that is considered to be "marital property."

Law and the Constitution

So far, we've talked about practical, everyday law. We've talked about torts, the kind of civil cases which arise from auto accidents or someone slipping on an icy sidewalk. We've talked about the contracts we make, the law that affects us at work, and the law that affects us in our families.

But there's another dimension of law—constitutional law. This area of law deals with the great values that we cherish as citizens of a democracy. It deals with liberty, with justice, with equality.

Most of us will never be part of a lawsuit that has constitutional dimensions, yet the Constitution—and the cases which have interpreted it—affects us every day as much as our relations with our landlord or our boss.

Unfortunately, Americans have a weak idea of what the Constitution does—and does not—guarantee. A 1987 Hearst Report entitled "The American Public's Knowledge of the U.S. Constitution" revealed that 59% of Americans do not know that the Bill of Rights is the first ten amendments to the original Constitution. The Bill of Rights provides, however, some of the most fundamental rights U.S. citizens enjoy. Those ten amendments guarantee that the individual is treated fairly by federal, state and local governments. The Bill of Rights assures the individual that these governments treat us in ways which are reasonable and proper, and that any governmental action which infringes upon individual rights can be challenged in the courts.

Laws enacted by either the federal or state governments must meet constitutional standards. The U.S. Supreme Court's job is to determine what those constitutional standards are.

The Bill of Rights outlines various rights the individual possesses, including the right to worship, to speak and write freely, and to receive fair treatment when accused of a crime.

Still, each of these rights is not absolute. Much depends on the circumstances. Let's look at freedom of expression, guaranteed by the First Amendment. Although an individual has the right to express his ideas, they cannot be dangerous, illegal or offensive when made. For example, although an individual may speak out against government, he cannot threaten its very existence. In a number of cases, the U.S. Supreme Court has sustained convictions on the ground that freedom of speech and freedom of the press do not protect serious attempts to overthrow the government.

The First Amendment also guarantees American citizens the right to assemble and associate freely. People have the right to meet in public places and to openly discuss public concerns. People cannot be prosecuted for the mere participation in

Becoming an Adult

When does a person become an "adult"? In most states, you become an adult at age 18. Each state may determine its own "age of majority."

What does it mean to become an "adult"? When you become an "adult" you then have certain new rights, i.e., to vote, make contracts in your own name, become completely independent. You also have certain new responsibilities and are held personally accountable for your actions.

When I reach age 18 am I automatically given all the rights of an "adult"? In many states, the answer is "yes," with the frequent exception of the laws relating to alcoholic beverages. Each state may set differing age limits for many situations, including the following:

- voting in state and local elections;
- jury service;
- marrying without parental consent;
- making a will;
- working for pay;
- obtaining a driver's license;
- the right to examine your credit record.

May the age of majority be different for men than women? No. That would be unconstitutional sex discrimination.

Do people under 18 have any rights? Yes. Good sources for information on the rights of minors are as follows:

- Alan Susman. *The Rights of Young People*, N.Y., Avon, 1977; N.Y., Bantam, 1985.
- Alan Levine. *The Rights of Students*, N.Y., Avon, 1977.
- American Bar Association. *Standards Relating to the Rights of Minors*, Ballinger, Cambridge, Mass., 1980.

What are some of the rights I have after the age of majority that I did not have before?

- to vote;
- to make a will;
- to sue in your own name;
- to make a contract (rent an apartment, buy a car, take out a loan) in your own name;
- to obtain medical treatment without parental consent;
- to marry without parental consent;
- to be completely independent from parental control.

What are some of the responsibilities I have after the age of majority that I did not have before?

- Any criminal charges filed against you after a certain age, which varies by state, will be tried in adult criminal court rather than juvenile court.
- Your parents are no longer required to support you, and they are not liable for any accidents you cause.
- You may be sued by others on contracts you make.
- You are eligible for jury duty.
- All males are required to register for military service.

Adapted from Now You Are 18, *published by the Texas Lawyers Auxiliary.*

Apartments: Now That You're 18

Must a lease be written to be enforceable? No, unless the lease is for longer than one year.

What are the advantages of having a written lease?

- You will have a better idea of all of your rights and obligations.
- You will have protection against dishonesty.
- You will have protection against poor memories.

What are the disadvantages of a written lease?

- Printed form leases usually favor the landlord.
- The lease could change some of the rules that would otherwise favor the tenant.

What is a security deposit, how much money is it usually, and what is it used for? It is an amount of money (often equal to one month's rent, but it can be any amount) which the landlord holds as security against property damages, unclean conditions, and unpaid rent.

The landlord may retain all or part of the security deposit to pay for damages or charges for which you are legally liable under the lease or as a result of breaking the lease. He may not, however, retain any portion of the security deposit to cover normal wear and tear. The tenant should give the landlord a written statement of the tenant's forwarding address upon moving out. If the tenant does this, and is not delinquent in rent, in most states the landlord must give the tenant the security deposit and/or an itemized list of deductions within 30 days.

In a monthly lease can I end the lease by just leaving at the end of a month? No. You must give one month's notice, unless a different period of notice is specified in a document signed by both parties.

If I sign a lease with three friends and they move out, do I have to pay the full rent or only my 1/4 share? It depends on what the lease says. You will probably have to pay the full rent. You would then have a claim against your friends and could sue them.

If I break a lease, what amount can I be sued for? You can be sued for all unpaid rent, for any physical damage including unusual cleaning expenses, for advertising expenses and other costs of rerenting the apartment, and for the landlord's attorney's fees and court costs, if the written lease provides for that.

Should I have renter's insurance? Yes. The landlord's insurance will cover only the building, not your possessions. Renter's insurance is relatively inexpensive.

What are my obligations as a tenant? Under the law, a tenant must refrain from damaging the rental premises and keep the premises in a fit and habitable condition.

How does a landlord terminate a tenancy for non-payment of rent? If you do not pay the rent when due, a landlord may give you a notice to either pay or leave within a short period of time (three days in many states). The notice allows you to pay the rent due and continue to live on the premises.

What can I do if a landlord refuses to make repairs to the premises? The landlord's general duty is to make a diligent effort to repair or remedy a condition if (1) the tenant specifies the condition in a notice to the person to whom rent is normally paid; (2) the tenant is not delinquent in the payment of rent; (3) the condition materially affects the physical health or safety of an ordinary tenant; and (4) the condition is not caused by the tenant or a member of the tenant's family or a guest of the tenant. If the cost of repair is minor in relation to the rent, it may be your responsibility to fix the problem. When conditions are so bad as to make the premises "uninhabitable," you should consult an attorney about possible remedies.

Under what circumstances can a landlord enter my premises? A landlord may enter your premises at reasonable times to inspect, make repairs or show the premises to prospective tenants. In unusual situations, the landlord may enter to preserve or protect the premises.

Adapted from Now You Are 18, *published by the Texas Lawyers Auxiliary.*

peaceful assembly and lawful discussion. However, if in doing so they threaten public peace, then they may be prosecuted.

Turning to the Second Amendment, although citizens are given the right to bear arms, the state has the authority to limit this freedom for the protection of the community. State laws control the ownership, procurement and possession of certain firearms, while they require licenses for pistols and revolvers.

The American legal system may be distinguished from the legal systems of other nations by our criminal laws. The Fourth, Fifth, Sixth, and Eighth amendments guarantee fair treatment for those accused of crime.

The Fourth Amendment to the Constitution protects citizens from unreasonable searches and seizures. What is "unreasonable"? There is no easy answer. Courts and legislatures have shaped several general rules. For example, a police officer can arrest (seize) a person suspected of having committed a crime, yet the law requires the arresting officer to have either a warrant, or to show that there is a "probable cause" that the person committed a crime. To illustrate the concept of probable cause, also known as "reasonable belief," a police officer who receives a radio report of a man robbing a bank would have probable cause to arrest a man who is running away from the bank and waving a gun. Although there is no set standard for determining probable cause, it must be based on facts.

Probably the most important use of the Fourth Amendment is to protect individuals against unreasonable searches. To conduct a search, a police officer must obtain a warrant based on a sworn statement that describes the facts and circumstances that show a search is justified. If the officer obtains a warrant, the search must be executed within a limited time period, such as ten days. A further limitation on the warrant is that it does not necessarily authorize a search of everything in the particular place. For example, if the police are issued a warrant to search for large stolen objects, like televisions, they can not reasonably inspect desk drawers, envelopes or other small places where a television couldn't be hidden.

There are, however, exceptions to the requirement that the police have a warrant for a search. The police can search a lawfully arrested person without a warrant since the arrested person may pos-

(continued on page 64)

ABA Booklets Highlight Practical Law

Want to build up your own legal literacy—and your students' too? The American Bar Association publishes lively, low-cost handbooks that bring you up to date on vital areas of everyday law.

Law in the Workplace

Can an employer administer a lie detector test to job applicants? Can a waitress be paid less than the minimum wage? Can an employer listen in on phone calls workers make at work? Do public employees have a right to collectively bargain? What does "sexual harassment" really mean?

These and many other employment questions are answered in "Law in the Workplace," a recent addition to the ABA's "You and the Law" series of law-related booklets for consumers.

This 80-page booklet provides a balanced survey of the law of the workplace, and can help both employers and employees understand their rights and responsibilities.

Law and the Courts

The American Bar Association's most recent booklet is the revised and expanded "Law and the Courts: A Handbook About United States Law and Court Procedures." The 80-page booklet attempts to unravel some of the mysteries surrounding American legal and courtroom procedures.

"Law and the Courts" provides an introduction to the legal system, briefly discusses the roles of key actors in the system, and outlines and explains the steps involved in most civil and criminal cases. It also discusses some of the special courts in the American system, provides a chart on courts in the federal system and in a representative state, explores various methods of alternative dispute resolution and includes a glossary of frequently used legal terms.

The American Lawyer: When and How to Use One

When do you need a lawyer? When can you help yourself? How can you keep legal costs down while guaranteeing high-quality legal services?

This 36-page booklet answers these and other questions. Included are

- the role of lawyers in the American legal system
- what to look for in a lawyer
- what questions to ask in choosing a lawyer
- what to do if you're not happy with your lawyer
- alternative ways of resolving disputes, including mediation and small claims court

This publication also includes a complete list of the addresses and phone numbers of state bar associations.

Law and Marriage: Your Legal Guide

This booklet gives an overview of how law affects living together, whether you're married or not. It provides information on getting together, including issues in traditional marriage (name changes, prenuptial agreements, duties within a marriage) and in nontraditional arrangements (common-law marriage, children of couples who live together, palimony, and discrimination against unmarried couples).

Other chapters deal with money matters, including credit, taxes, bankruptcy, and estate planning; sex and children; domestic violence; and separation, annulment, and divorce, including alimony, child custody, and child support.

Included in this 57-page publication is a section listing books and organizations which can provide further help on the subject.

Your Guide to Consumer Credit and Bankruptcy

What is credit? How much does it cost? How do I apply for credit? These are some of the questions answered in this booklet. It deals with various types of credit, your right to check your credit records, how to avoid being discriminated against in credit, and how to deal with debt collectors. Credit for women is highlighted, and special chapters deal with calculating your credit limit, and bankruptcy and other alternatives for those who've exceeded their limit.

Your Rights Over Age 50

This booklet deals with rights and protections not just of senior citizens, but of everyone over the age of 50. It explains

- your right to a job (mandatory retirement, working conditions, fighting back, avoiding age discrimination)
- your right to try (higher education, job training)
- your right to credit (equal credit opportunity, credit and the older woman)
- your right to financial security (social security, pensions, insurance, health care, and retirement).

A final section of this 41-page booklet advises you on where to turn for further help.

Landlords and Tenants: Your Guide to the Law

Is an oral lease legally binding? Can you negotiate over a preprinted lease? How do tenants sublet? Do tenants have rights when a building goes condo?

This 48-page booklet answers these and other questions. It deals with laws concerning leases, moving in and out, payment and non-payment of rent, discrimination in renting, and eviction.

How to Order

Copies of any of the booklets in this series are available for $2.00 each, plus $1.00 for postage and handling on orders under $5, $2.50 for postage and handling on orders of $5 or more. Order from ABA Order Fulfillment 235, 750 N. Lake Shore Drive, Chicago, Ill., 60611. Volume discounts are available.

"Law in the Workplace," "Law and the Courts," and "The American Lawyer" are also available to organizations that wish to order the booklets with their names imprinted on the cover. To inquire about this option, please contact Charles White or Jane Koprowski, ABA Public Education Division, 750 N. Lake Shore Drive, Chicago, Ill., 60611, or call 312/988-5725.

BEST COPY AVAILABLE

Legal Literacy

Making a Lawyer's Work Come Alive/Secondary

Peter deLacy

Tom Herzberg

A natural use of lawyers in the classroom is to help students better understand the work of a lawyer. For example, contrary to popular belief, most lawyers rarely go to court. The practice of law usually involves giving advice, drafting legal opinions, negotiating settlements, or otherwise providing out-of-court legal assistance.

In addition, the presence of lawyer provides a "human" dimension to a profession often viewed negatively by students. Public opinion of lawyers has varied over the years, but the legal profession has never ranked very high. The evidence suggests that this is due to the public's perception that the legal profession's ethics just are not very sound. They are too often viewed as unscrupulous "ambulance chasers" and "hired guns"—quick to promote useless litigation and extract exorbitant fees, to prey on society at large for the benefit of a narrow band of interests.

While some of this scorn may well be deserved, a good deal of it stems from a fundamental lack of public understanding of the lawyer's unique role as an advocate, a role often demanding behavior that seems to be totally at odds with general notions of morality, even though it is legally and professionally "ethical."

Many classes teach about the law and have lawyers serve as resource persons. However, few of these classes explore the role of the lawyer in the legal system and society. The following strategy is designed to help young people better understand the work of lawyers and to think critically about the role of lawyers. A good source for additional teaching materials on this topic is *Street Law*, 3d. ed., by Arbetman, et al. (West Publishing Co., 1986). This strategy is designed to be taught during either one or two 45-minute class periods. The strategy can be used by a classroom teacher alone, or, preferably, in conjunction with a visit by a lawyer (for example as part of Law Day, a Mentor Program or a Lawyer-Teacher Partnership Program).

Strategy I: Opinion Poll About Lawyers

As an introductory activity, to find out students' opinions and knowledge about lawyers, have them complete the following opinion poll. The poll raises a number of issues related to lawyers and the legal system.

For each of the statements below circle the response that reflects how you feel about lawyers. "SA" means strongly agree; "A" means agree; "U" means undecided; "D" means disagree; "SD" means strongly disagree.

a. Lawyers follow high ethical standards. SA A U D SD

b. Lawyer's fees are reasonable. SA A U D SD

c. A lawyer should not represent someone he or she knows is guilty. SA A U D SD

d. Lawyers should be able to advertise their services. SA A U D SD

e. Lawyers work hard to protect their clients' interests. SA A U D SD

f. There are too many lawyers in the United States. SA A U D SD

g. Too many disputes end up in court because of lawyers. SA A U D SD

h. Plea bargaining (when a defendant agrees to plead guilty to a lesser charge) should only be used in less serious cases. SA A U D SD

i. A lawyer should always withdraw from a case if he/she learns that the client is going to lie on the stand. SA A U D SD

j. A lawyer should be required to provide free legal services to the poor. SA A U D SD

Debrief the opinion poll by compiling the class' responses to the poll. Point out similarities and differences in responses. Discuss a few of the questions, including those questions which generated the greatest difference of opinion, to determine the basis for opinions students hold. A lawyer could provide further information related to these questions and, where appropriate, explain applicable legal standards.

Strategy II: The Duty of Confidentiality

This activity focuses on the special relationship between lawyer and client in the context of the adversary process. We are all familiar with the image of the adversarial process—two lawyers doing battle in the courtroom on behalf of their clients. The notion is that justice will be served if the lawyers can concentrate on zealously representing their side while allowing the factfinder (either judge or jury) to glean the truth from testimony and physical evidence. Central to the adversary process is a lawyer's duty to his/her client. Within the rubric of this duty, lawyers are required to represent their client's interest zealously, avoid conflicts of interest, and most importantly maintain in the strictest confidence what their clients tell them.

Confidentiality is the cornerstone of the attorney-client relationship, because the adversarial process works only if the client can confide completely in a lawyer. Without such confidence, a lawyer might not be able to present fully the client's case because the client would not entrust the lawyer with critical information. As the Supreme Court has stated, "the purpose is to encourage full and frank communication between attorneys and their clients and thereby promote the broader public interest."

While the notion of confidentiality between a lawyer and client is paramount, it has it limits. For example courts have required lawyers to reveal a client's plan to commit future criminal acts or to turn over to the court a gun which was used to commit a crime. In these cases the court has balanced the lawyer's duty to his/her client against the duty of the lawyer as an officer of the court.

The following case raises, in an extreme situation, the conflicts that arise as a result of a lawyer's duty of confidentiality. While most lawyers and virtually all courts agree with the legality and ethical propriety of the lawyers' actions in the following case, many people still question the implications of how the lawyers acted in terms of everyday moral standards. In exploring this case with students, bear in mind that there is a certain ambivalence inherent in the practice of law. In many instances the work of a lawyer within the context of the legal system defies common notions of morality. For example, lawyers must sometimes argue points with which they personally disagree, defend unpopular people and controversial causes, and convince juries to free a person a lawyer knows is morally guilty.

THE CASE OF THE MISSING BODIES

In July of 1973, in upstate New York, two girls disappeared. Later that month in the same area, Robert Garrow was arrested and accused of fatally stabbing Philip Domblewski, an 18-year-old student. Two lawyers, Frank Armani and Francis Belge, were appointed by the court to represent Garrow. During their investigation, Garrow told the lawyers that he had killed the two missing girls. Garrow's directions led his lawyers to the location of the bodies. The two lawyers went to the sites and photographed the bodies but did not inform the police.

Learning that a man had been arrested for a murder in the same mountains as his daughter's disappearance, the father of one of the dead girls visited the lawyers. The lawyers refused to even see the girl's father. Armani and Belge continued to refuse to reveal their client's confession to either the girls' parents or to the police.

It was only a year later in the course of the Domblewski trial that Garrow suddenly admitted publicly to the girls' murders, with the further revelation that his lawyers had long known and had tried to use the information as part of a plea bargain arrangement with the prosecution.

(Criminal charges were brought against Belge and disciplinary action was brought against both lawyers by the New York Bar Association. In the end, both Belge and Armani were cleared of any wrongdoing, based on the lawyer's duty to maintain a client's confidentiality.)

PROCEDURES

1. We all face ethical decisions in our own lives. To introduce the notion of legal ethics have students examine ethical decisions they face in their daily lives. Brainstorm with students the ethical dilemmas they have experienced in their own lives—e.g., turning in a friend or cheating. Make a list on the board. Debrief by asking students to state the conflicting values involved in each of the dilemmas.
2. Review what happened in this case. The lawyers in this episode, Mr. Armani and Mr. Belge, did not notify the police or the girls' parents about the location of the missing bodies. Why did Armani and Belge make this decision? What would have happened if they had notified the police? How would you feel about the lawyers' conduct if you were one of the girls' parents or relatives? Do you agree with the lawyers' decision not to notify the police and parents? Why or why not?
3. Divide the class into small groups (3-5 students). Have groups answer the following questions:
   a. What are two arguments supporting the lawyers' conduct in this case?
   b. What are two arguments criticizing the lawyers' conduct in this case?
   c. Should a lawyer's duty primarily be to the client or to society?
   d. Which is more important: a lawyer's duty as an officer of the court or a lawyer's promise to a client?
4. Debrief this activity by reviewing the important role that confidentiality plays in maintaining trust in the lawyer-client relationship. Explain that to encourage clients to speak freely to their lawyers, the law grants an attorney-client privilege. This means that whatever you tell your attorney about your case is secret and confidential. Without your permission, this information cannot be disclosed to anyone.
5. What are the advantages and disadvantages of the adversary process? How could the adversary process be improved?
6. Optional Student Reading: The *New York Times* reported the case of the missing bodies on February 8, 1975, p. 54, col. 5. Ask students to write a letter to the editor regarding Mr. Armani's and Mr. Belge's behavior in this case.

Peter deLacy is Program Director for the District of Columbia Center for Citizen Education in the Law. This lesson is adapted from the teachers guide accompanying the television production "Ethics on Trial," produced by and available through WETA, Educational Activities, Box 2626, Washington, D.C. 20013.

Legal Literacy

Privacy and Property/Secondary

Margaret Fisher

Search and seizure provides a way of teaching about privacy and property, as well as justice. An attorney could provide back-up to the high school teacher in handling difficult questions on search and seizure. Additionally, criminal defense lawyers could present facts from real cases involving search and seizure and have students apply the principles they have learned. This could involve a role play of a suppression hearing where the lawyer would work with both sides to identify their arguments in the case. After the concert search case (see below) is completed as a case study, the class could be divided into pro and con and a debate staged. An attorney could monitor the debate.

The Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment was designed to protect against certain British practices, specifically used by British officials, of general warrants to enforce the acts of trade and to search for seditious publications.

The common law of England did prohibit search warrants that did not describe in detail the places to be searched and the things or persons to be seized. There were two exceptions, however, authorized by Parliament, that prompted first Virginia in its state Declaration of Rights and then the federal government to adopt a specific right against unreasonable searches and seizures. The general search warrant, called a writ of assistance, gave royal officers the authority to search any house or ship, to break down doors, open trunks and boxes and seize goods. The other exception was the warrant for the search and seizure of libelous publications. This permitted royal officials to search all houses and shops where they suspected upon some probable reason that unlicensed publications were kept.

Brainstorm

Ask: "What interest of the individual is involved in the Fourth Amendment?" Answer: Privacy and property.

Ask "What interest of the government is involved in the Fourth Amendment?" Answer: Law enforcement.

Exceptions to the Fourth

The Fourth Amendment does not apply to searches by private citizens. It won't prevent a parent searching the room of a child or a husband going through the possessions of a wife. It also does not apply to areas that are beyond a reasonable expectation of privacy.

In other searches, the general rule is that searches without a warrant issued by a judicial officer are presumed unreasonable, unless the search falls within one of the stated exceptions to the rule.

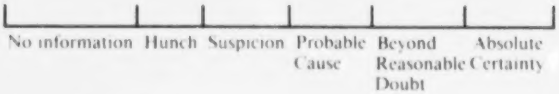
Does anyone know what any of these exceptions are? List on board and explain each.

1. *Search Incident to a Lawful Arrest.* This allows police to search a lawfully arrested person and the area immediately around the person for hidden weapons or for evidence that might be destroyed. The rule has been expanded by a U.S. Supreme Court ruling that allows police with probable cause to search every part of a lawfully stopped vehicle and its contents, including containers and packages.
2. *Stop and Frisk.* Police officers who reasonably think a person is behaving suspiciously and is likely to be armed may stop and frisk the person for weapons. They may also search the passenger compartment of an automobile where a weapon may be hidden provided they have specific facts and inferences that suggest the person is dangerous and may gain immediate control of a weapon.
3. *Consent.* The police may search anyone who agrees to the search, provided the consent is voluntarily given.
4. *Jail and Prison Searches.* Correctional personnel are allowed to search inmates and cells to provide security in the facility.
5. *Plain View.* If officers are in a place they have a right to be in, they may seize illegal objects or evidence of crime which are in plain view.
6. *Vehicle Searches.* Police may search a car or vehicle when they have probable cause to believe contraband is hidden in the vehicle.
7. *Emergency Situations.* In certain emergencies, the police may conduct a search without being required to get a warrant (for example, if police are rendering needed medical aid to a person and search a handbag for medicine).
8. *Hot Pursuit.* Police in hot pursuit of a suspect are not required to get a search warrant before entering a building they have seen the suspect enter.
9. *Airport and Court Searches.* In view of the danger of airplane hijacking and courtroom bombings, courts have held it reasonable for airlines and courts to conduct searches by using a metal detector and visual inspection of handheld items. The government may detain a person's luggage for a reasonable time in order for a dog to sniff the luggage, provided police have a reasonable suspicion that the luggage contains contraband.
10. *Border and Open Seas Searches.* Customs agents are authorized to search without warrants or probable cause.

What Is Probable Cause?

Write the term "probable cause" on the board. Probable cause is a very important concept of searches. No search warrant will be issued unless the judicial officer finds that probable cause exists. Several of the exceptions to the search warrant requirement require that probable cause exist. So what is probable cause? Probable cause is a standard of the amount of knowledge that would justify a person of prudence and caution in believing that an unlawful act is occurring.

Draw this chart on the board:



Case Study

Hand out the case study and have students read it and decide which opinion they agree with and why. Have students apply the principles they have learned. Tell students that this case was one in which the court was asked to create another exception to the search warrant requirement. Also tell them it is not important whether or not they know already how this case came out. What is important is their understanding of the principles and their own opinion.

Poll students as to which court opinion they agree with. Break students into groups of five based on their agreement with each opinion.

Spend five minutes summarizing their arguments. Debrief by having each group list its arguments and having the other side respond.

Note: If no students agree with one of the opinions, assign students to argue the view they oppose—as lawyers and law students are often required to do.

In *Jacobsen v. Seattle*, 98 Wn.2d 668 (1983), the Supreme Court of Washington ruled the rock concert search unconstitutional. It declined to create a new exception to the search warrant and probable cause requirement, so the search is illegal. Opinion 2 is the court's opinion. The court could have decided it differently. (In its opinion, the court noted that the city had not argued consent, so it did not rule on the consent issue.)

The writers of the Bill of Rights never went to a rock concert. However, the broad prohibition on unreasonable searches adopted in 1791 is actively being used today to curb police practices.

If time permits, have students write an opinion of their own for the rock concert case.

Margaret Fisher is an attorney-educator who prepared this activity for the Metrocenter YMCA's Today's Constitution and You *curriculum, based on criteria developed by the Today's Constitution and You curriculum committee. This activity is reprinted with permission from the book* Teaching Today's Constitution: A Contemporary Approach *published in conjunction with the National Institute for Citizen Education in the Law.*

Case Study: Search and Seizure at Rock Concerts

There have been frequent violations of the law at various rock concerts held at the Seattle Center Coliseum, including throwing of hard and dangerous objects by persons attending the concerts. Four persons attending the concerts were searched by the police as they entered to attend a concert of the Grateful Dead in July 1979. The police officers physically searched them, confiscated heart medicine in an unmarked pill box, removed an unopened pack of cigarettes from one of their purses, opened the pack and inspected individual cigarettes.

These persons sued the city, claiming that the searches without warrants and without probable cause violated the Fourth Amendment.

Directions: Read each of these two opinions and decide which one you agree with and why. Use principles discussed earlier.

Opinion #1

These searches are proper police action. The Fourth Amendment concerns itself with unreasonable searches. These searches are not unreasonable. People attending rock concerts expect to be able to view the performances without being injured by flying firecrackers or hurtling beer bottles. Also, the presence of alcohol and drugs at the concerts results in serious security and health problems. The police confiscate and destroy the items seized and only refer for prosecution those whom police believe intend to sell a controlled substance. No one is forced to go to the concerts, and the city does not have to allow them on its property. It can condition admission on consent to the search.

Given the limited nature of the intrusion and the efficiency with which police confiscate the items, these searches are reasonable. They are like the constitutionally permitted searches conducted at airports and courthouses.

Opinion #2

The police have shown that a serious problem of illegal substances and flying objects plagues rock concerts. However, the Constitution makes it clear that searches must be reasonable. Searches without warrants are unreasonable unless the search can be justified by one of the narrow exceptions to the warrant requirement. None of these exceptions applies here.

The police ask us to create a new exception, similar to the exception for courtroom and airport searches. This we refuse to do.

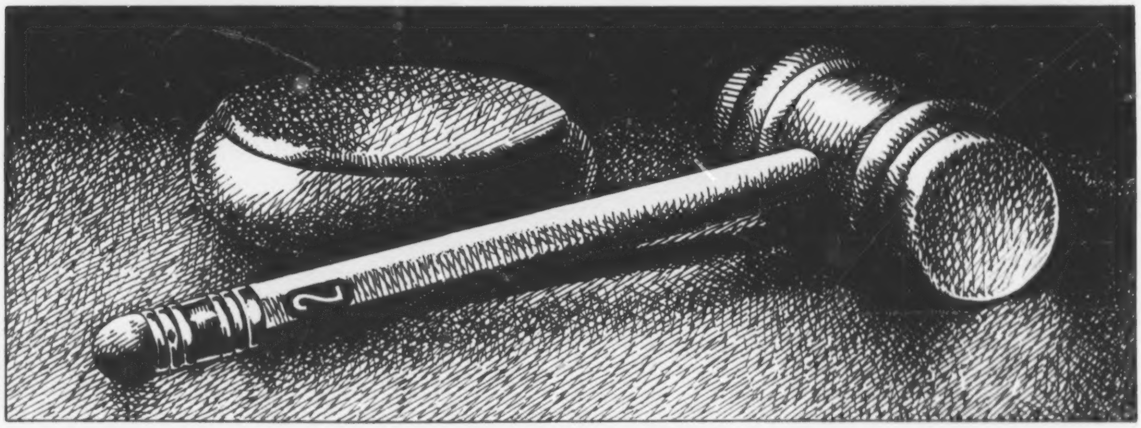
Airport and courtroom searches are justified because of the wave of bombings and other acts of violence that inflicted death or serious injury to a large number of persons. These airport searches only involve metal detectors, and the courtroom searches only involve a brief stop and visual examination of carried items. There is no touching of the person being searched.

Here, at the concerts, the police conduct pat-down searches to prevent much more minor injuries, and we therefore hold them to be unconstitutional.

BEST COPY AVAILABLE

Legal Literacy

Law "Tests"/Secondary **Carolyn Pereira**



Tom Herzberg

Think back to the earliest memory you have of learning about our legal system and how it really works. If you're like most of the people who have done this exercise, including myself, your experience was negative and school hadn't provided the knowledge, skills, or attitudes you needed to work through the problem.

Legal literacy—being able to survive in our law-based society—means much more than knowing the "facts." The fallacy of misplaced utility—what is useful in our age—commonly means school systems, particularly secondary schools, "upgrade their standards" by increasing content and testing. Historically we have never done much better than we are now doing in classrooms. Read, memorize, regurgatate. Our system has withstood the test of time—200 years—so why worry? But recalling facts does well only if you are planning to spend your life in winning games of Trivial Pursuit.

How should young people learn to exercise their rights and responsibilities as citizens? It might be argued that they learn about the rights and responsibilities of citizenship daily. The nature and structure of our system may help them to learn about citizenship on a regular basis without ever stepping into a classroom. All of their encounters with the legal system may not be negative; many of the experiences are positive.

We need to find methods of building on these life experiences. One way is for educators to establish partnerships with the community. Resource persons can help educators help young people toward effective legal literacy. Not only will this increase the numbers of people working on the problem but it is also tremendously effective in teaching the people who are delivering the programs about the value and effectiveness of volunteerism in our democratic society.

State Law Test

Once a year, during Law Week, Illinois high school students and attorneys discuss questions about the law. The questions are constructed to promote discussion and debate, and alternate between questions which directly affect the students and questions which should be of general concern to all citizens. A discussion guide for teachers and attorneys provides information on the current status of the law and probing questions to help students consider each issue from more than one point of view. Teachers are asked to review the "test" with their students—asking the students for their opinions, reasoning, and questions—to prepare for the attorney's visit. The conversations which transpire enable students enrolled in a variety of social studies classes to appreciate the importance of becoming more legally literate. With modifications, the questions which follow could be used as a basis for tests in any state.

1. Lois and Elmer want to get married. They have been told they need to register for a marriage license, but they are both religious and feel that they only need to be married in their church for the marriage to be legal. Should government have a place in this spiritual, personal matter?
2. Should an elected official have the power to place his or her supporters in government jobs?
3. John, a student at a private school near your high school, needs transportation to and from school. Should he be allowed to ride the public school bus free like public school students?
4. Should school officials be allowed to search students' lockers, just as parents have the right to search their children's rooms?
5. As long as the U.S. Constitution has a Bill of Rights, does a state constitution need one?
6. Should state judges be appointed by the governor based on recommendations by a committee of lawyers and approved by the state legislature or should they be elected by the people?
7. A friend of yours has heard that there is a bill being debated that would cut off all extracurricular activities in your high school. She asks you how to find out more about the bill. The best thing to tell her would be:

____ To write or call her legislator asking for information about the bill or for a copy of it.
____ To immediately write a letter to the editor of the local paper complaining about poor representation.
____ To have as many students as possible stage a

protest against the bill by trying to camp overnight at the school.

____ To write a petition stating a case against the proposed bill and to have all registered voters in the school, as well as community members, sign it.

____ To find out about the bill in the published journal of the legislature's activities.

8. Alicia is thought of as a discipline problem in your school. She just heard a rumor that she is going to be suspended. Mark an X beside the statements you feel accurately describe Alicia's rights and the school's responsibilities.

____ The school must have notified all students of which rules, if broken, would result in punishment.

____ Alicia has the right to be told which rule she broke and what the punishment will be.

____ Alicia has the right to tell her side of the story to those accusing her.

9. Our system of government is based on the concept of federalism. Within a federalistic system like ours, different governmental bodies have responsibility for certain problems. Federal, state and local governments share powers and responsibilities with each other, but they each have powers and responsibilities which are their own. In the following examples, mark which governing body you think would be involved. Remember you can choose federal, state, local, two of those, or even all three.

   a. Deciding how land will be used
   b. Setting up curfews
   c. Defining punishment for crimes
   d. Deciding the age to drink alcohol
   e. Deciding who can vote
   f. Setting up schools
   g. Taxing
   h. Making rules about birth control clinics in schools
   i. Setting speed limits
   j. Keeping the peace

10. The student council at your high school is made up of sophomores and seniors only. Whether there are more sophomores or more seniors is very important because the student council must approve activities. Freshmen and sophomores can vote for the sophomore candidates, and juniors and seniors vote for the senior candidates. Each home room has one representative. The problem is that the home rooms are not equally divided. Most home rooms have 30 students, but some have only 15. The smaller home rooms are all upperclassmen. That means that 15 juniors and seniors have as much representation in the student council as 30 sophomores and freshment do. The freshmen and sophomores think this is unfair. They think the majority should rule. The principal has decided that the students should be reorganized into different groups to vote for their representatives. Here are some suggestions. Which do you think would be the fairest?

____ The principal goes through the school and randomly divides the students into groups of equal size, without regard to class.

____ The entire school votes on all of the candidates for student council.

____ The present student council divides the school into groups they feel will be fairly representative of both sophomores and seniors.

____ A nine-member committee of 4 seniors and 4 sophomores is formed to divide the school. The principal chooses the ninth member.

The above questions are taken from Illinois' 3rd Annual Law Test. The test was written by CRF's Lawyers' Advisory Committee and distributed to all high schools in the state by the Illinois Board of Education.

State Law Test Discussion Guide

[This guide discusses how some questions might be answered according to Illinois law. It would need some revision to apply to the laws of other states. Remember, however, that answers to the test are less important than questions. The idea of the test is not so much to provide "right" answers, but to stimulate discussion of legal issues.]

1. In order to be legally married, a couple must register for a marriage license and participate in a marriage ceremony which can be either secular or religious. There is no common law marriage in Illinois. (It might be helpful to discuss what a common law marriage is.)

   Discussion Questions:

   A. If only a church could make a marriage, what about the non-religious? Does the law exist only to formalize marriages for non-religious couples? What makes laws regarding marriage reasonable for everyone?

   B. What are some possible reasons why government requires a marriage license? (taxes? identification? census? morality? disease control?) Are these reasons valid?

2. At this time, government appointments are an accepted part of our political system. Most governors appoint hundreds if not thousands of government employees. Often, some appointments must be approved by the state senate.

   Discussion Questions:

   A. Does the appointment process bring in qualified people or just people who contributed money or time to the governor's (mayor's sheriff's) election campaign?

   B. What would government be like if the governor could appoint no one? He or she might have no effective mechanism to enact gubernatorial decisions.

   C. Alice has helped Brant out in the past, and he feels he owes her a favor. When a job opens up at the Burger King where Brant works, Brant tells Eileen, his manager, that Alice would be a good worker. Eileen tells Brant to have Alice come in for an interview. Alice gets the job. Is this wrong? Is this similar to government appointments?

3. In the case of *Board of Ed., Sch. Dist. No. 142 v. Bakalis*, 54 Ill. 2d 448, 299 N.E. 2d 737 (1973), the Illinois Supreme Court upheld a statute requiring public school districts to provide, with some exceptions, transportation along regular bus routes to private school students.

   A. Should state grants for textbooks be provided for students who attend private schools?

B. Should low-income parents who send their children to private school receive a state grant as partial payment for expenses incurred in providing schooling? In *People ex rel. Klinger v. Howlett*, 56 Ill. 2d 1, 305 N.E. 2d 129 (1973), the Illinois Supreme Court held both A and B unconstitutional? Do you think they should be?

4. According to the School Code of Illinois, while a student is in school, or at a school activity, school officials may act "in loco parentis" (in place of the parent) for the discipline and safety of the student. In addition, some court cases have ruled that the school locker belongs to the school, not the students, and may be searched by school officials. (See p. 26 for other cases on school searches.)

Discussion Questions:

A. Under what conditions, if any, do students feel a locker search is warranted? If officials suspect there are drugs in it? A weapon? Pornography? What about if a student leaves a tuna fish sandwich in his or her locker and is then out of school for a couple of weeks. The sandwich rots and smells up the entire hall. Should officials have the right to open the locker and remove the food?

B. What about using a trained dog to detect drugs in lockers? (Courts have generally held that the use of dogs to detect drugs in objects such as lockers, ventilators, or desks is permissible.)

5. Most state constitutions do have a bill of rights. Discuss with your class what the significant differences are between the U.S. Constitution's Bill of Rights and that of your state.

Discussion Questions:

A. The U.S. Constitution is the supreme law of the land. In what ways can the state constitution qualify or supplement it? (For i[illegible] Illinois Constitution cannot deny the [illegible] to bear arms, but it can qualify that right, as it does in Amendment 22.)

B. State constitutions are often more specific than the U.S. Constitution. For instance, the Illinois Constitution extends the right to privacy to the right to be free from electronic eavesdropping. What are the advantages and disadvantages to a more specific law? (The U.S. Constitution is more open to interpretation, which can be confusing, but the Illinois Constitution has been rewritten four times.)

6. In two-thirds of the states and the District of Columbia, some or all judges are selected under the merit selection system. Merit selection is a way of choosing judges that uses a permanent, non-partisan commission, often composed of non-lawyers as well as lawyers, to recruit, investigate and evaluate candidates for judgeships. Most judges in Illinois are currently elected. An exception to this rule is associate circuit court judges, who are chosen by circuit court judges.

Discussion Question:

Debate the pros and cons of election versus merit selection.

7. Obviously, there is no "right" answer to this question. Discuss with the class what the most effective course of action might be. For instance, a logical first step could be simply getting accurate information about the bill.

Discussion Questions:

A. How do citizens participate most effectively in government? Do young people face special problems in the democratic system?

B. Are protests, such as camping at school, an effective way to influence legislation? Would a letter-writing campaign be more effective?

8. All three answers are correct. For a more complete discussion of rules regarding suspension, see "Discipline and Due Process in the Schools" (*Update*, Fall, 1977) and "School Discipline: Round Two" and "The Worst Kind of Discipline" (*Update*, Fall, 1982).

Discussion Questions:

A. Compare these rights to the rights guaranteed to those accused of committing a crime.

B. Does a school have different needs from society at large that justify it having a different disciplinary system? (Recall "in loco parentis.")

9. a. local zoning ordinances, state parks, federal land.
   b. local ordinances.
   c. local, state, federal.
   d. state. (Mention that there is a movement to establish a national drinking age. How do students regard it?)
   e. local, state, national. (Consider the voting amendments: at one time local and state governments were much more powerful in determining who could vote. Poll taxes were used to screen voters. How do state and local governments have a voice in who can vote now? Consider residency requirements and voter registration.)
   f. local, state, federal.
   g. local, state, federal.
   h. local, state, federal.
   i. local, state, federal. (The federal 55 mph speed limit was instituted to save gasoline. Could the states have refused to comply? (See "Federal/State Relations: 55 mph Speed Limit," *Update*, Fall, 1987))
   j. local, state, federal.

Discussion Questions:

A. Many powers are shared among the governments. Is this the most effective way of providing for the general welfare at each level? Do local laws help local people? Do federal laws provide for the health of the nation?

B. What would be the advantages and disadvantages of having uniform laws across the country?

10. The situations described here are relatively analogous to the alternative ways of reapportioning, which have been, or are being, used in many states.

Discussion Questions:

A. Is there any "fair" way to divide people up to vote, or does one party always get the short end of the stick, or feel they did?

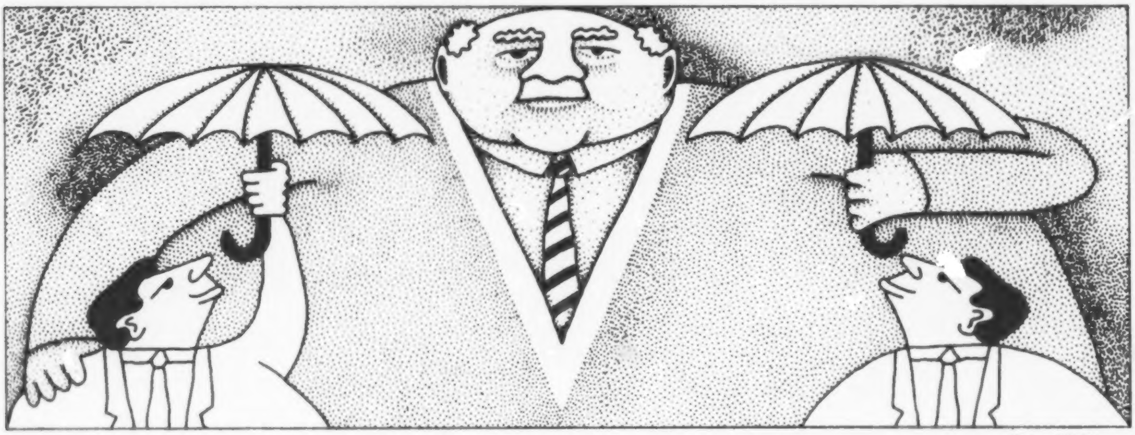
B. Is the best way to divide up a school for voting also the best way to divide up a state? What would the different needs of each group be?

Carolyn Pereira is executive director of the Chicago office of the Constitutional Rights Foundation.

Legal Literacy

Extending Understanding of Equal Protection/Secondary

Elisabeth T. Dreyfuss



Dean Matthews

"Few would quarrel with the basic precept of the Fourteenth Amendment—if they knew and understood what that precept is. The task of eliminating racial inequality and state-fostered segregation in education is, however, too important to be left in blind trust to officials overly responsive to popular pressures nourished by ignorance and prejudice. The patient and untiring teaching of the basic principles of freedom to the 'majority,' therefore, is an essential task to establish a close nexus between democratic politics and the preservation of civil rights."

These words introduce the *Equal Protection and Desegregation Handbook*, published by the Cleveland Street Law Program in 1979. Frank Battisti, Chief Justice of the United States District Court of the Northern District of Ohio, wrote them at a time when our community desperately needed the attitudes, knowledge, and skills essential to healing racial divisions.

The link between civil and human rights and the concept of equal protection has been a recurring theme in the relationship of citizens to government. All the strategies which follow can be done by lawyers in the classroom, and strategies 2-4 are especially appropriate for lawyers.

Strategy 1 involves students in seeing equal protection as a link to the past and the future.

Strategy 1: Equal Protection, a Recurring Theme

Troubled times, particularly those characterized by civil unrest, have led to historic statements of equal protection.

Using the statements listed below, students working in four small groups should research the historic circumstances which produced each one of the statements. In reporting back to the class each small group should be able to:

- briefly characterize the conflict between citizen and government which marked the era which produced their statement
- accurately paraphrase and summarize the statement itself
- describe the historic impact of the statement

Reviewing selected items in the news, students identify those areas where denial of equal protection is a source of conflict. Cloture on this strategy involves students identifying and recommending steps for securing equal treatment and equal protection in world trouble spots such as South Africa, Afganistan, or Israel.

1. Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Declaration of Independence: We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ...
3. An earlier statement can be found in Magna Carta. In the fortieth clause King John promised, "To no one will we sell, to no one will we deny right or justice."
4. A contemporary version, fashioned forty years ago, takes this form in Article 7 of the universal Declaration of Human Rights: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against incitement to such discrimination."

Strategy 2: The Application of the Equal Protection Clause

For many years, restrictive convenants were common in the world of American real estate. These arrangements specified that the property could only be sold to certain kinds of people—whites, gentiles, etc. Were these arrangements legal, or did they violate the equal protection guarantees of the Fourteenth Amendment? In the following case, the U.S. Supreme Court held that while the arrangements themselves were lawful, they could not be enforced without violating the Fourteenth Amendment.

SHELLEY V. KRAEMER

Reprint this abridged and edited version of the Supreme Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), for students to read:

"In June 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

> This property shall not be used or occupied by any person or persons except those of the Caucasian race.
>
> It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction.

"The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded, and similar agreements were executed for eighty percent of the lots in the block in which the property is situated.

"By deed dated November 30, 1944, a Negro family, the Shelleys, bought and occupied the property. On January 30, 1945, owners of other property on the block brought suit against them in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing the Shelleys to move from the property within ninety days. They were also restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan upheld the lower court's decision, deciding that the Shelleys had not been denied rights protected by the Fourteenth Amendment.

"Before the U.S. Supreme Court, the Shelleys placed primary reliance on their contentions, first raised in the state courts, that when courts enforce restrictive agreements like these, they violate rights guaranteed to them by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.

"We hold that in enforcing the restrictive agreements in these cases, the states have denied the Shelleys the equal protection of the laws and that, therefore, the action of the state courts cannot stand.

"Freedom from discrimination by the states in the enjoyment of property rights was among the basic objectives sought by the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these home owners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.

"In the earlier case of *Strauder v. West Virginia*, the Court held that the Fourteenth Amendment declares 'that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.' Only recently this Court declared that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guarantee of the equal protection of the laws. (*Oyama v. California*, 332 U.S. 633 [1948]). Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power."

STRAUDER V. WEST VIRGINIA

In this case, the U.S. Supreme Court struck down a West Virginia law that excluded blacks from jury service.

Reprint the edited and abridged version of *Strauder v. West Virginia*, 100 U.S. 303 (1880), for students to read:

"The Fourteenth Amendment is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoys. To quote the language used by us in the *Slaughter-House Cases*, 'The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the Fourteenth Amendment] such laws were forbidden. It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.' What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

"That the West Virginia statute respecting juries—the statute that controls the selection of grand and petit juries—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws.

"The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the composition of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the freed slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By that amendment, the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection—that is, that there might be discrimination against them—was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the perceived existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection."

PROCEDURES

1. Students should identify the facts in each case.
2. Students should identify the issues as they are presented in the case.
3. Discussion should focus on the idea that civil rights are nationally protected and include conflicting issues of states' rights and federalism.
4. Students should weigh the cases in light of Abraham Lincoln's speech below, in which Lincoln says that most governments have been based on the denial of equal rights of men while ours began by affirming those rights.

"The ant, who has toiled and dragged a crumb to his nest, will furiously defend the fruit of his labor, against whatever robber assails him. So plain, that the most dumb and stupid slave that ever toiled for a master, does constantly know that he is wronged. So plain that no one, high or low, ever does mistake it, except in a plainly selfish way; for although volume upon volume is written to prove slavery a very good thing, we never hear of the man who wishes to take the good of it, by being a slave himself.

"Most governments have been based, practically, on the denial of equal rights of men; ours began by affirming those rights. They said, some men are too ignorant, and vicious, to share in government. Possibly so, said we; and, by your system, you would always keep them ignorant and vicious. We proposed to give all a chance; and we expected the weak to grow stronger, the ignorant, wiser; and all better, and happier together. . .

"If A. can prove, however conclusively, that he may, of right, enslave B.—why may not B. snatch the same argument, and prove equally, that he may enslave A.?

"You say A. is white, and B. is black. It is color, then; the lighter, having the right to enslave the darker? Take care, by this rule, you are to be slave to the first man you meet, with fairer skin than your own.

"You do not mean color exactly?—You mean the whites are intellectually the superiors of the blacks, and, therefore have the right to enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own.

"But, say you, it is a question of interest; and, if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you."

RESOURCES

Film (16 mm.) *Eye of the Storm*, Xerox Films (1970); Columbus, Ohio.

The curriculum materials below are relevant to equal protection and available from: Cleveland-Marshall College of Law, Cleveland State University, Street Law Program, 1801 Euclid Avenue, Cleveland, Ohio 44115.

- ***Equal Protection and Desegregation Handbook*, by Marjorie Kornhauser**
- ***Human Rights, High School Curriculum*, by Elisabeth T. Dreyfuss**
- ***Polling Places, the Voting Rights Acts*, by Elisabeth T. Dreyfuss**

Strategy 3: Panel of Experts

Equal protection is living law, particularly lively in American schools. School administrators and teachers are state officials whose decisions and activities provide the essential "state action" required for application of the equal protection clause of the Fourteenth Amendment.

A panel made up of a school administrator, an athletic director, and a school board attorney should be invited to address questions developed by students. Students should design their questions to bring out issues of resource allocation in the district, particularly the delivery of services to populations identifiable by race, gender, national origin, religion or handicap.

Among the educational issues to be considered are these: inclusion of identifiable groups in higher level math, science and language courses; number of group members taking the SAT and ACT; number receiving benefits of athletic programs such as coached hours, use of facilities, availability of equipment, uniforms, travel; number being suspended, expelled or dropping out of school.

Schools can also be examined as employers. Is the make-up of the teaching staff and administration roughly the same as the community? Are minorities and women represented in top administrative positions?

The panel, particularly the school board's attorney, can introduce students to Title IX of the Education Amendments of 1972. This discussion can enable students to write their representatives in Congress and ask for current bills on equal treatment of women and minorities in school programs.

Strategy 4: Students Design a Remedy

Public controversy on the issue of equal protection has often centered on the court-ordered remedies, such as transporting students to achieve racial balance. This strategy asks students to design a remedy.

When Cleveland teachers and students faced the issue in the late 1970's, Marjorie Kornhauser, then staff assistant to Cleveland-Marshall's Street Law Program, responded by developing the following strategy, which involves students in a problem-solving activity growing out of a non-school equal protection issue. The stategy, Gloria Glitter's Will, is taken from the *Equal Protection and Desegregation Handbook* by Marjorie Kornhauser.

Gloria Glitter, the famous silent film star, filled her life with glamour: men, money, mink coats, etc. Despite this wealth and excitement, she still dreamt nightly of her dreary childhood in the small town of New Hebetude. Dreading her nightmares, she turned to an even more frenzied life.

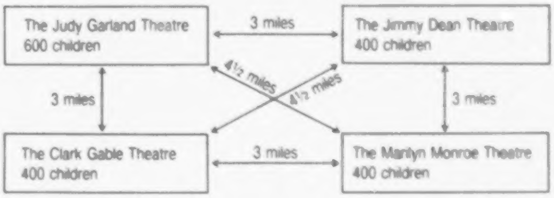
At 10:20 p.m., July 9, 1938, she was found dead in the garden of her 36-room mansion. Searching her house for clues to her death, the police found a cardboard box underneath her bed stuffed with papers, old newspaper clippings and crumpled Hershey bar wrappers. Carefully sifting through the box's contents, the police found this paper written upon in gold ink in Gloria's own flowery handwriting:

Last Will and Testament

I, Gloria Glitter, being of sound mind and body, do bequeath all my money and belongings to the town of New Hebetude on the condition that New Hebetude use this money to build neighborhood movie theaters and to provide free Saturday afternoon double features (plus popcorn) for all children ages 6 through 16 that they will not suffer the boredom I suffered as a child.

Gloria Glitter
December 2, 1934

Over the years, New Hebetude built four movie theatres, scattered throughout the city approximately every three miles. Each theatre was built to hold 500 children. By 1976, however, the population of New Hebetude had shifted so that some neighborhoods had more children than others. Consequently, one theatre was overcrowded, with children sitting in the aisles and on each other's laps, while the other theatres had empty seats. The situation looked like this:



Question: Do you think the overcrowdedness of the Judy Garland Theatre is a serious enough problem to bother fixing? If so, can you think of any way(s) of solving the problem?

Suppose there were no problems of overcrowdedness; rather, change the facts so that 450 children were attending each theatre (each still having a capacity of 500). Now what do you think of each of the following situations? Is there a problem in any of the situations serious enough to warrant fixing?

1. All the theatres except the Judy Garland have new projectors and wide screens. The Judy Garland has fifteen-year-old, out-dated equipment.
2. All the theatres except the Clark Gable are air-conditioned.
3. All the theatres except the Jimmy Dean are decorated in blue. The Jimmy Dean is decorated in green.
4. All the theatres except the Marilyn Monroe get first-run movies. The Marilyn Monroe gets movies that are two years old and have already been shown at the other theatres.

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Legal Literacy

Your Rights on the Job/Secondary

Dale Greenawald and Tom Roberts

By examining a series of hypothetical cases, students will work with a community legal expert, e.g., judge, lawyer, store owner who employs youth, to identify the rights and responsibilities of youth in the workplace. The teaching time is approximately 45 minutes. Materials include hypothetical cases. This activity is a natural for a community resource person with expertise in employment or juvenile law. (If the resource person uses legal terms, please list them on the board and define them the first time they are used.)

Procedures

Divide the class into groups of three to five students. Give each group one or two cases and be certain that each student has at least one question to answer. Allow the students to read and think about the case and their question. Once each student has an answer to his/her question, discuss it with the group and try to reach a group consensus about the question. After all students in the small groups have had an opportunity to discuss each question, conduct a large group discussion of each case and the accompanying questions. The resource person should critique the answers and explain the laws pertinent to each case.

Case 1

Joe, age 14, thought that he had the deal of a lifetime. Mr. Stanley had an old car that he hadn't driven for years. It needed some work, but it would make a neat car when Joe got his license. Mr. Stanley agreed to give Joe the car and to help him fix it in exchange for taking care of Mr. Stanley's yard for an entire year. They drew up a list of tasks Joe would do. He agreed to cut the grass once a week between April 1 and November 1, rake leaves once a week for two months, shovel snow within 24 hours of a storm and do other tasks as requested.

Joe cut the grass, trimmed the hedges, shoveled snow. A couple of times he let the grass get a bit long and he missed a couple of times when he should have shoveled snow but he couldn't because of basketball practice. At the end of the year, Joe went to Mr. Stanley and asked for the title to the car. Mr. Stanley said, "Joe, I'm sorry, but you didn't do all of the things that you agreed to. I don't have to give you the car."

QUESTIONS

a. Does Joe deserve to get the car?
b. If Joe wants the car, what can he do?
c. What could Joe have done to possibly avoid this situation?

Case 2

Sally, 17, was excited about getting her first job, working at Greasy Castle Hamburgers. Soon after she started working, Sally noticed that it was very easy to burn yourself on the grease from the fries because someone had taken away the grease guard. Sally mentioned this danger to Mr. Sleeze, the owner, and he told her that if she didn't want to work there, she could quit. Two weeks later Sally mentioned the problem to Mr. Sleeze again and he fired her. He told her that her work was sloppy and that she used too much lettuce on the burgers. He had told her this once before, just after she started working, but she started using less and assumed that she was doing O.K. Sally believes that she was fired because of her complaints about the missing guard.

QUESTIONS

a. Can Sally get her job back?
b. What might Sally do now?
c. Should Sally just ignore the missing guard since no one has been hurt? Why, why not?

Case 3

Ann, 16, was using her new income to buy items that she had wanted for a long time. Her new job at the Greasy Wrench Garage promised to not only pay bills now, but also to help her learn to be a mechanic, a job she's wanted to learn for a long time. After she had been working at the garage for several months, the manager began to ask her to stay late to help clean up. One night he made a pass at her. He promised her a raise if she would go home with him. She refused. The next day the manager told her that he placed a reprimand in her file because she didn't work well with the other people in the shop. Over the next couple of months, she got a series of reprimands and poor evaluations from the manager, although she had gotten very good evaluations until the night of the pass. Finally, the manager fired her because he said that her work wasn't improving and she had a "bad attitude."

QUESTIONS

a. Does Ann's firing seem to be a result of sexual harassment? What is your evidence?
b. What can Ann do?

Dean Matthews

Case 4

Wanda was delighted to have been selected to work at Dumpy's Donut Shop even though she was only 15. She originally agreed to work two hours a night, since she was worried about having time to do her school work. After several months the owner asked her to work a couple more hours every other night. Wanda agreed, since it was early in the semester and she didn't have too much homework. However, as the classes in school began to cover new material, Wanda felt that she needed to put more time into homework. She told Ms. Simmons that she wanted to only work two hours a night. Ms. Simmons told Wanda that she really needed someone who could work the four hours a night that Wanda was now working. If she didn't want to do that she would have to let her go. Wanda doesn't want to be fired, but she doesn't want to do poorly in school either. When she goes home after two hours the next night, Ms. Simmons tells her not to return.

QUESTIONS

a. Should Ms. Simmons have the right to fire Wanda because she won't work more hours?
b. What can Wanda do to get her job back?
c. What might have been done to avoid this situation?
d. Should students be able to work as many hours a week as they want? Why, why not?

c. Do you think Wanda can collect unemployment compensation? Why, why not?

Case 5

Willie, 17, was a hot man on the grill at PT and JR's. He would prepare more food faster than anyone else in the kitchen. Everyone knew that he was the man who could really pump out the dinners when it had to be done. Unfortunately, Willie also liked to show off because he had his eye on one of the waitresses. One night when things were really happening fast in the kitchen, Willie was watching the waitress as he went to do another batch of fries. As he dumped the basket into the deepfry pit, he bumped a large box which he had put on the counter beside the boiling grease, and a big blob of hot oil landed on his hand. His hand was burned so badly that he couldn't work for a month. When he came back to work, he found that his hours were cut by more than half and someone else was doing his old job. Now, all that the manager wanted him to do was bus tables, and that didn't have any glamour and it certainly wasn't going to pay the bills for his car.

QUESTIONS

a. Has Willie been treated fairly?
b. Should he be able to have his old job back?
c. What can Willie do to get his job back?

Case 6

At first, Harvey, 14, was glad to have a job working for the community recreation program. He enjoyed being out in the sun, getting exercise cutting grass, painting, fixing broken pipes, and doing a lot of other tasks necessary to keep the Wazoo City parks open in the summer. By July, however, he felt that he was putting in long, long days under less than grand working conditions. He had all the sunburn he could want for $2.25 an hour. After doing a lot of thinking about what was happening, Harvey decided to try to form a union. He met with the other recreation employees and told them that he knew that a lot of them were not very happy with their jobs. The only way to change that was to form a union so that they could bargain as a group to get things changed. Two days after conducting this meeting, Harvey was called into the office of his boss and fired. The boss said that the town didn't need any more problems and that trouble-makers weren't welcome on the city payroll.

QUESTIONS

a. Why do you think Harvey was fired? Was this fair?
b. What can Harvey do now?
c. Should public employees be able to form unions? Why, why not?
d. Can Harvey collect unemployment? Why, why not?

Discussion Guide on the Hypos

Case No. 1

Law Applicable

Contract law of state where contract is made.

Cause of Action

Contract; not gift because of agreed upon exchange of consideration.

Issues

1. Can an adult contract with a minor?
2. Does Joe's failure to perform *precisely* his agreement mean he loses the car?

Resolution of Issues

1. Generally a contract with a minor is *voidable* at the option of the minor. Mr. Stanley can be held to the agreement if Joe sues him.
2. If Joe has made an agreement which requires performance of specific duties on specific conditions in order to obtain the car, he may not be able to get the car. However, he can sue through his "next friend," *i.e.*, parent or guardian, to recover the *value* of the services he rendered to Mr. Stanley. Such a cause of action is called *quantum meruit* or unjust enrichment.
3. If Mr. Stanley can be said to have "accepted" Joe's defective performance, *i.e.*, by failing to object at the time, Joe may be entitled to have the car transferred to him.

Sample Authority

See, Restatement of Contracts, Second edition, Sections 344, 371, 373, 374, 376.

Case No. 2

Law Applicable

Federal Occupational Safety and Health Act and any state/local law regulating health and safety in the workplace.

Cause of Action

Statutory violation for failing to have grease guard and for retaliatory discharge.

Issues

1. Are protections such as a grease guard required by law?
2. What protection does Sally have from retaliation by her employer?

Resolution of Issues

1. Must look to specific regulations of OSHA or state/local health agency to see if grease guard is required. There appears to be no specific OSHA standard covering restaurant kitchens. However, if a "hazard" is present about which the employer has knowledge, there is a general duty under OSHA to remove it. A state/local health or safety law may prohibit such conditions, generally or specifically.
2. The Act and most state laws prohibit an employer from retaliating against an employee who has asserted his or her rights by complaining to the employer about safety violations, or by filing an administrative complaint.

   In order to seek reinstatement Sally will have to file a complaint with the Occupational Safety and Health Administration or the state agency responsible for enforcing job safety rules.

   Sally may *rationally* decide to overlook the absence of the grease guard because complaining about it might cost her the job. Enforcing her rights could be an expensive and troublesome affair.

Sample Authorities

See, Restatement of Contracts, Second edition, Sections 344, 371, 373, 374, 376.

Case No. 3

Law Applicable

Title VII and state anti-discrimination laws and possible state criminal statutes.

Cause of Action

Statutory violations.

Issues

1. Is Ann being discriminated against because of her sex?
2. Did the "pass" involved other tortious or criminal acts?

Resolution of Issues

1. Title VII and most state laws prohibiting sex discrimination would be violated by the manager's actions in this case, which clearly constitute harassment.

   In order to enforce her rights, Ann initially must file a complaint with the Equal Employment Opportunity Commission or a state human rights agency. If no administrative action is taken by either entity, Ann would then be entitled to sue her employer.
2. Depending upon the character of "the pass," *i.e.*, did it involve touching or feeling, a crime may have been committed, or a tort such as assault or battery may have occurred.

Sample Authorities

See, pp. 34-35, and 41-45, *Law in the Workplace*; Volume 42, *U.S. Code*, Section 2000e; *Vinson v. Meritor Savings Bank*, 106 S. Ct. 2399 (1986).

Case No. 4

Law Applicable

Fair Labor Standards Act (FLSA); state law governing child labor and wages and hours of work; unemployment compensation law.

Cause of Action

Statutory violations.

Issues

1. Can Wanda work at age 15?
2. How many hours must Wanda work?
3. Can Wanda be terminated legally?
4. Can Wanda qualify for unemployment compensation?

Resolution of Issues

1. The FLSA and most state laws governing child labor require that children under age 16 obtain a work permit from the state department of labor and work only in certain occupations.
2. Such laws generally restrict the number of hours that a person 15 years of age can work, and the time during which the hours may be worked. If Wanda is being required to work too many hours, or at too late an hour, she may be protected. However, if Ms. Simmons has a need for an employee to work four hours each night she would generally be free to hire someone to do so, and terminate Wanda.
3. Wanda probably will not qualify to collect unemployment compensation.

Sample Authorities

Volume 29, *U.S. Code*, Section 212; Chapter 450, part 1, Florida Statutes (1985).

Case No. 5

Law Applicable

State workers compensation statute.

Cause of Action

Statutory violation.

Issues

1. Would Willie qualify for workers compensation?
2. Was Willie wrongfully demoted after his injury?

Resolution of Issues

1. Willie's injury would be of the type normally covered by workers compensation laws. However, if Willie's employer can show that the injury is a result of Willie's misbehavior, he might be disqualified.
2. Workers compensation laws generally prohibit an employer from *retaliating* against an employee who has been injured. However, the employer might be justified in demoting Willie for "cutting up" in the kitchen, a dangerous activity.

Sample Authorities

See, pp. 65-66, *Law in the Workplace*; Chapter 440 and Section 440. 205, Florida Statutes (1985).

Case No. 6

Law Applicable

State public employee collective bargaining statute. Minimum wage law.

Cause of Action

Statutory violations.

Issues

1. Is Harvey being paid less than minimum wage?
2. Is Harvey involved in "protected concerted activity" in trying to form a union?

Resolution of Issues

1. The federal Fair Labor Standards Act requires that workers be paid at least $3.35 an hour. The law of the state where Harvey lives may have a similar law requiring a higher wage.
2. Many states have laws protecting the rights of government employees to engage in "protected concerted activity," *i.e.*, collective activity for the benefit of workers. This includes the right to form and join unions. If such a law exists in Harvey's state it would be illegal for his employer to fire him for trying to start a union.

Sample Authorities

Volume 29, *U.S. Code*, Section 201 *et req.*; Chapter 447, Florida Statutes (1985).

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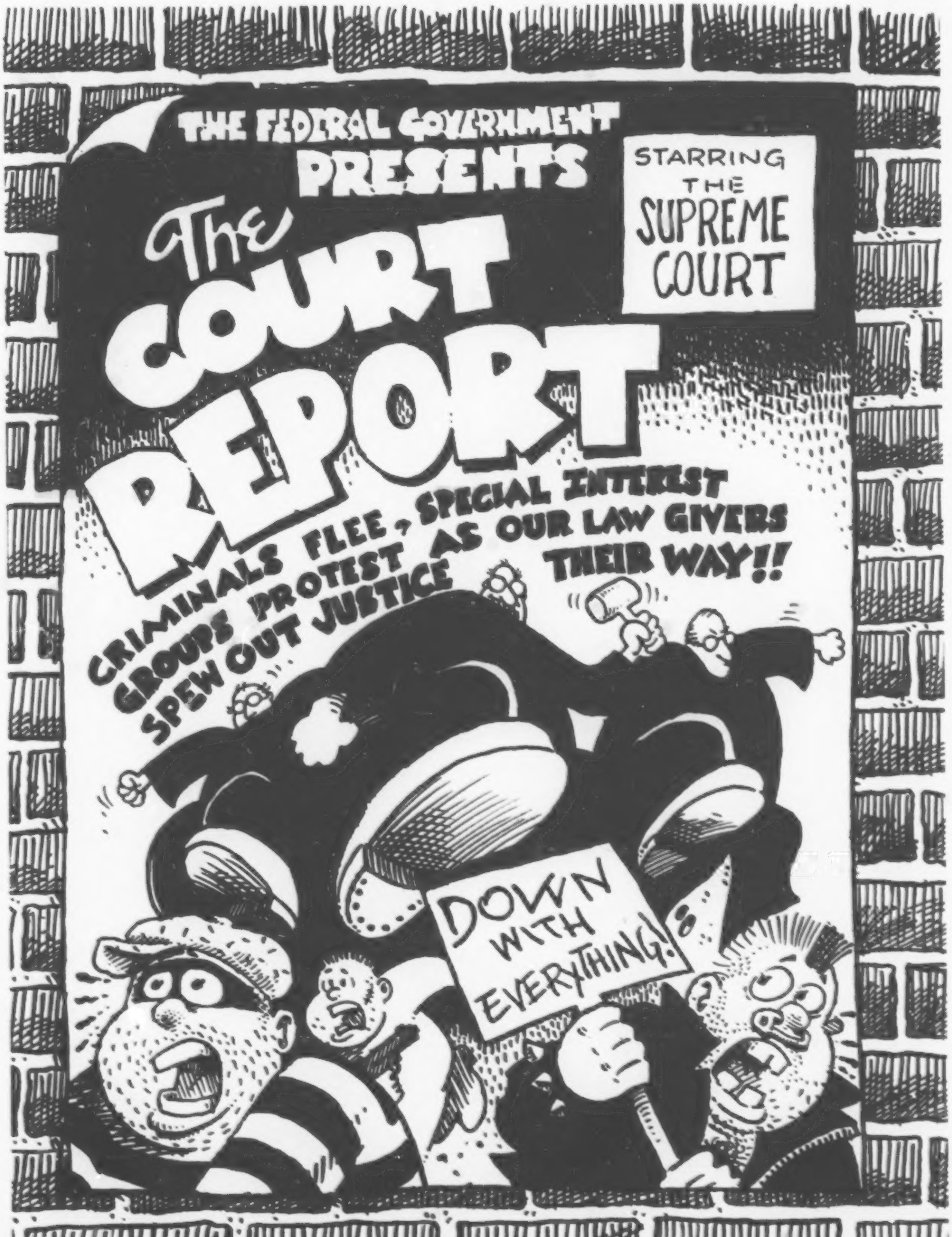
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STARRING THE SUPREME COURT
CRIMINALS FLEE, SPECIAL INTEREST GROUPS PROTEST AS OUR LAW GIVERS SPEW OUT JUSTICE THEIR WAY!!
DOWN WITH EVERYTHING!
John Hayes

Susan Fillichio

Court Report

The Supreme Court speaks on the student press, criminal law, civil rights, and a host of other issues

The defeat of Supreme Court nominee Robert Bork and the hasty withdrawal of second nominee Douglas Ginsburg has left the High Court one member short this term. As our "On the Docket" section notes (see p. 56), the Court has been unable to decide two cases already this year because of an even split among the justices. Nonetheless, the Court continues to work. Its major decision of the term to date came just as this *Update* was going to press. As chance would have it, it is a school case sure to be of interest to educators everywhere.

Court Limits Student Press

In *Hazelwood School District v. Kuhlmeier*, decided January 13, 1988, the U.S. Supreme Court, by a 5-3 margin, gave public school officials a broad right to censor school newspapers and other school-sponsored activities the officials deem inappropriate for their audience.

According to a *Chicago Tribune* story reporting on the case, Justice White, writing for the majority, said that students participating in curriculum-based activities do not have the same First Amendment rights of free press and free speech as adults have.

"A school need not tolerate speech that is inconsistent with its basic education mission, even though the government could not censor similar speech outside the school," White wrote, speaking for himself, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Stevens.

He said educators may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

The case began in 1983 at Hazelwood East High School in a suburb of St. Louis, Missouri, when the principal refused to approve publication of two articles on the ground that they were highly personal and inappropriate. He rejected one story on the pregnancy experience of three students because, although pseudonyms were used, the students were identifiable. The second story, on divorce, was seen as an invasion of privacy because one of the students interviewed was named and information was printed on the events leading to her parents' divorce.

The editors of the student newspaper, which is sponsored by the school, are students of the Journalism II class. Their teacher is faculty advisor to the paper, which is designed to give a clinical setting in which to apply the skills taught in Journalism I. Each issue of the newspaper is routinely submitted before publication to the principal for approval.

In many ways, the case hinged on whether the newspaper was considered a news organ or a curriculum project. If the former, it would have some claim to the protections of the First Amendment against government interference. If the latter, it would be subject to greater control by school authorities.

Justice White's opinion clearly places the newspaper within the school's mission to educate. He said a school has the right to "dissociate itself . . . not only from speech that would substantially interfere with its work or impinge upon the rights of other students but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."

White held that school officials have the right to censor student speech that advocates "conduct otherwise inconsistent with the shared values of a civilized social order . . . Otherwise, the schools would be unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

In dissent, Justice Brennan spoke for himself and Justices Marshall and Blackmun. In a strongly worded opinion, he said the decision risked converting "our public schools into enclaves of totalitarianism."

". . . Instead of teaching children to respect the diversity of ideas that is fundamental to the American system and that our Constitution is a living reality, not parchment preserved under glass, the court today teaches youth to discount important principles of our government as mere platitudes. . . . The young men and women of Hazelwood East expected a civics lesson, but not the one the court teaches them today."

Iowa Must Extradite Fugitive

In a recent case that pitted two governors against one another, the Supreme Court held that when proper extradition papers are presented, a state *must* surrender a fugitive to another state, commonwealth, or territory. In *Puerto Rico v. Branstad*, 55 U.S.L.W. 4975 (1987), the Court ordered Iowa's Governor Terry Branstad to extradite a fugitive charged with murder and attempted murder to the Commonwealth of Puerto Rico.

In 1981, Ronald Calder, an air traffic controller working for the Federal Aviation Administration, had a heated argument in the parking lot of a grocery store in Puerto Rico. Calder exchanged harsh

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words with Antonio de Jesus Gonzalez and his pregnant wife, Army Villalba. Witnesses said that Calder then struck the couple with his car and repeatedly drove over Villalba's body. Neither she nor the baby she carried survived the incident.

Calder was arraigned before a district court in Puerto Rico and charged with first degree murder and attempted murder. His bail was set at $50,000, yet Calder failed to appear at a scheduled preliminary hearing. Bail was then set at $300,000 and Puerto Rico declared Calder a fugitive of justice.

Calder fled Puerto Rico and returned to his family's home in Iowa. When Puerto Rican officials tracked him down, they served a formal extradition request upon the governor of Iowa. During a hearing on the matter, Calder's counsel commented that "a white American man...could not receive a fair trial in the Commonwealth of Puerto Rico." Iowa denied the extradition request following the hearing. Puerto Rico later renewed its request with Iowa's present governor, Terry Branstad. Branstad would not comply.

In February of 1984, the Commonwealth of Puerto Rico filed suit in a federal district court in Iowa. Puerto Rico demanded two things: first, it asked the court to declare that Iowa's refusal to extradite Calder violated the Extradition Clause of the Constitution and the Extradition Act of 1793. The Act, an interpretation of the constitutional provision, requires a state, district or territory to surrender a fugitive of justice to the authorities of any state or territory when that state or territory produces the appropriate extradition papers. Puerto Rico also asked the court to issue a writ of mandamus directing Governor Branstad to honor the extradition request.

The district court dismissed Puerto Rico's request based on the holding in a 125 year old case, *Kentucky v. Dennison*, 24 How. 66 (1861). The court of appeals affirmed under the same analysis. The Supreme Court's holding in *Dennison* was twofold: (1) the Extradition Clause imposes a mandatory duty upon the states to deliver up fugitives upon a state's proper request; but (2) the Court held that federal courts have no authority under the Constitution to compel a state official to perform the ministerial duty of delivery. In other words, although the Constitution demands extradition by state officials under certain circumstances, the demand had no impact since no one, including the federal government, could force state officials to comply with it.

Governors have often come into conflict about extradition. In the *Dennison* case, a grand jury in Kentucky had charged Willis Lago, "a free man of color," with the crime of assisting the escape of a slave. Lago lived in Ohio, and the governor of Ohio's argument was that he need not extradite Lago since Lago's actions were not criminal in Ohio. Refused extradition in this case comports with modern ideas of justice and fairness.

Other conflicts have had unexpected ramifications. For instance, in 1937, the governor of Massachusetts refused to honor an extradition request by the governor of Georgia. In retaliation, the Georgia governor paroled a prisoner on the sole condition that he go directly to Massachusetts on release.

Upon review of Puerto Rico's request in the present case, the Supreme Court overruled both lower courts by overturning the second holding in *Dennison*. The Court affirmed that the Extradition Clause and the Extradition Act imposes

On the Docket

The Supreme Court opened its term on October 5, 1987, with only eight members. Because of the defeat of High Court nominee Robert Bork and Douglas Ginsburg's subsequent withdrawal, it is likely that the Court will be shorthanded for at least the first half of the term. With only eight justices, the Court may deadlock much more frequently, in effect not deciding a number of the controversial cases before it this year.

When the Court reaches a deadlock over a case, such as a 4-4 decision, the case is treated as if it had never been reviewed by the Court. The lower court's decision remains intact and binding on the immediate parties. However, the decision does not set a national precedent. This is similar to what happens when the Court refuses to hear an appeal, leaving the lower court's ruling intact. This does not suggest that the Court believes the lower court's ruling to be correct. It merely indicates that the case will not be reviewed and will stand as is.

Already this term, the Court has been unable to reach a decision twice. In December, by a 4-4 vote the Court deadlocked in a controversial abortion case, *Hartigan v. Zbaraz*, Docket No. 85-673. The effect of the tie vote is to let stand a lower court decision that an Illinois law violate the Constitution by requiring a girl under 18 years old to wait 24 hours after notifying her parents before obtaining an abortion.

Two physicians brought this class action in federal district court on behalf of minors seeking and physicians performing abortions to challenge the statute's constitutionality. Both a federal district court and a federal appeals court declared the statute unconstitutional and permanently enjoined its enforcement.

In October, the Court deadlocked 3-3 in a case involving appeal of a decision limiting the government's power to bar aliens from visiting the U.S. simply because they are affiliated with communist organizations. The case revolved around the Reagan Administration's denial of visas to Nicaragua's Interior Minister, two female Cuban experts on women and the family who are purportedly members of Cuba's Communist Party, and a former Italian general. The court of appeals held that under present immigration law, the State Department must have a reason independent of affiliation with a communist organization in order to deny a visa, or certify to Congress that the alien's visit would threaten national security.

As a result of the deadlock, the appellate court decision in *Reagan v. Abourezk*, Docket No. 86-656, will stand, and the case will go back to the district court level for additional hearings.

Free Speech and Press

Among the cases the Court has agreed to review are many dealing with the First Amendment, particularly free speech and press.

In *Commonwealth of Virginia v. American Booksellers Association*, No. 86-1034, the Court will decide whether or not it was proper for a federal dis-

trict court to strike down a 1985 Virginia statute that restricted the display of certain sexually explicit books and magazines in order to protect juveniles. The district court held that the Virginia statute was unconstitutional on its face and enjoined the state from enforcing it. The Court of Appeals for the Fourth Circuit affirmed the decision. The sale of the magazines to adults is protected by the First Amendment; the issue here is whether or not the *display* of such items is constitutionally protected.

The Court will also determine whether or not Jerry Falwell is entitled to a $200,000 judgment from Hustler magazine. In *Hustler v. Falwell*, No. 86-1278, the Court will determine whether or not the magazine intentionally caused Falwell emotional distress when it printed a parody that depicted him as an incestuous drunk. The lower court found the parody mean but not libelous. The case may be significant for all cartoonists, writers and comedians who criticize or mock public figures, even though their statements involve no false issues of fact.

In a newspaper case, *United States v. Providence Journal*, No. 87-65, a federal district judge ordered a Rhode Island newspaper not to publish parts of conversations intercepted in illegal federal wiretaps of a reputed organized crime figure, Raymond Patriarca. The newspaper ignored the order and printed the information. An appellate court later found the order unconstitutional. The Court will apply its prior rulings, including the 1971 Pentagon Papers case, which protect the press from court orders barring publication of articles allegedly harmful to national security, privacy rights or other legally protected interests.

In an additional First Amendment case, the Court will hear an appeal from its own order which stated that a prestigious San Francisco club had no constitutional right to discriminate against women in employment. In *Bohemian Club v. Fair Employment Commission*, No. 86-1915, the Court's order stated that the club raised no "substantial Federal question" when it challenged the constitutionality of a state law barring it from discrimination practices.

Death Penalty and Juveniles

The Court will also determine whether or not states may execute convicted murderers who were under 18 years old when they committed their crimes. The Court will address the issue in *Thompson v. Oklahoma*, No. 86-6169, which involves an appeal by William Wayne Thompson, who was sentenced to death at age 15 for a brutal murder committed in 1983. Of the 2,000 people on death row across the country, at least 32 of them were condemned for murders they committed as minors. This case could affect all their sentences.

Criminal Procedure

The Fifth Amendment to the U.S. Constitution guarantees all defendants in criminal cases the right against self-incrimination. This right has been construed by the Court to mean that a defendant need not testify at trial if he or she chooses not to. The Court in *Griffin v. California*, 380 U.S. 609 (1965), stated that the right to remain silent during trial would be meaningless if the jury were allowed to connect the defendant's silence with guilt. Therefore, neither the prosecutor nor the judge may comment adversely on the accused's choice to refrain from testimony.

In *U.S. v. Robinson*, No. 86-937, the Court will be asked to determine whether or not defense counsel could ever create circumstances under which the prosecution would be permitted to comment on the defendant's silence.

In this case, defense counsel commented in summation that the government had denied Robinson an opportunity to comment on government-prepared investigative reports. In response, the prosecution summed up by stating that the defendant had numerous opportunities to explain his actions, yet had chosen not to do so. The prosecutor also told the jury that the defendant could have taken the stand if he had wanted to. Robinson was then convicted at the trial level for mail fraud.

The court of appeals reversed the conviction on the grounds that the prosecution's remarks violated *Griffin*. The prosecution does not seek to overrule *Griffin*, and therefore the general rule that a defendant's silence at trial is inadmissible evidence. However, the prosecution would like the right, any time a defendant suggests that the government prevented him or her from testifying, to point out that the defendant could have taken the witness stand but chose not to.

—*S.F.*

a mandatory duty on state officials to deliver up fugitives upon a state's proper request. However, this time the Court held that federal officials do indeed have the authority to compel a state official to hand over a fugitive.

The Court substantiated the authority of federal officials on several grounds. The power of the federal government has changed drastically since the *Dennison* era. At that time, several states had seceded from the Union, and civil war was imminent. Never has the government's power been so low. Since that time, however, the Court has repeatedly recognized that the federal government may forbid unconstitutional action by state officials in opinions such as *Ex Parte Young*, 209 U.S. 123 (1908) and *Brown v. Board of Education*, 349 U.S. 294 (1955). There is no reason to distinguish delivering up a fugitive of justice from the other sorts of constitutional duty enforceable in federal courts.

The Court held further that the Extradition Act applies to Puerto Rico, despite its Commonwealth status. The Act requires the rendition of fugitives upon proper demand of a "State" or "Territory." Governor Branstad must now deliver Calder to Puerto Rican officials to stand trial for murder and attempted murder.

Court Pries Open Rotary's Doors

In upholding a California law, the Court ruled that state laws can permit women to become members of the popular Rotary Clubs. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, 95 L. Ed. 2d 474 (1987), the Court upheld the application of a state law, designed to combat all forms of discrimination, to the Rotary Clubs' membership policies. The Court stated that Rotary Clubs are not so private as to warrant First Amendment protection of the right of association, which would render them free from governmental interference.

Rotary International is a non-profit corporation made up of local Rotary Clubs. The clubs' active memberships consist only of men. Women may, however, attend meetings, give speeches, receive awards and join associations sponsored by Rotary International. Rotary International's purposes are to provide humanitarian service, encourage high ethical standards in all vocations, and build good will and peace in the world.

In 1977, the Rotary Club of Duarte, California, admitted three women to active membership. Rotary International revoked the charter of the Duarte Club and terminated its membership in Rotary International. The Duarte Club unsuccessfully appealed the decision to the International Convention.

The Duarte Club and two of its women members filed suit in a California court. The club's position was that Rotary International's actions violated California's Unruh Civil Rights Act. The Unruh Act, passed in 1982, states that "all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

The trial court found that neither Rotary International nor the Duarte Club is a "business establishment" within the meaning of the Unruh Act. The business benefits that any member may derive from the club are merely incidental to the primary purposes of the association: to promote fellowship and service activities. Furthermore, Rotary Clubs do not provide their members with goods, services, or facilities.

The California Court of Appeals reversed the holding for several reasons. First, the court found that Rotary International and its local clubs are business establishments which do provide goods, services and facilities to its members. Furthermore, admitting women to its membership would not violate the objectives of Rotary International, nor was the policy of excluding women protected by the First Amendment to the Federal Constitution, which guarantees each individual the right to associate freely without governmental intrusion.

Justice Powell delivered the opinion for the seven justices who participated in the decision. He began by citing an earlier case, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), which provided the Court with a framework under which to analyze the Duarte Club's dilemma. The Court has recognized that the Constitution protects against unjustified governmental interference in certain intimate or private relations an individual may enter into. The Court has also upheld an individual's right to associate for the purpose of engaging in protected speech or religious activity. To determine whether or not a particular association is entitled to First Amendment protection, the Court considers factors such as size, purpose, selectivity, and whether or not others are excluded from critical aspects of the relationship. The *Roberts* court determined that the association among the Jaycees was not sufficiently private or intimate to preclude governmental interference. A Minnesota statute requiring the Jaycees to admit women as full voting members was therefore constitutional.

Similarly, the Court in the present case found that the relationship among the Rotary Club members is not of the sort that is protected by the First Amendment. Because Rotary Clubs are large and one of the goals of the organization is to include members of all business sectors of the community, the relationship among its members cannot be characterized as private and personal. Furthermore, the clubs encourage their members to invite business associates and competitors to meetings, which are often covered in local newspapers. The Court concluded that applying the Unruh Act to local Rotary Clubs does not interfere with the members' freedom of private association since the meetings are essentially open to the public.

The Court rejected Rotary International's argument that admitting women would hamper the members' ability to carry out the Clubs' purposes. "Indeed, by opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross-section of community leaders with a broadened capacity for service." Even if application of the Unruh Act would infringe upon the members' rights, such an infringement is justified since it serves California's compelling interest of eliminating discrimination against women.

By upholding the validity of California's Unruh Act, the Supreme Court shows its commitment to eradicating a pervasive form of discrimination, discrimination against women.

Court Protects Free Speech

The First Amendment to the U.S. Constitution guarantees each citizen the right to voice his or her opinions free from governmental intrusion. However, the Supreme Court has held that the First Amendment does not protect some forms of speech. For example, it does not protect incitement to crime or violence. In a case that raised this issue, the Court in *Rankin v. McPherson*, 55 U.S.L.W. 5019 (1987), upheld a government employee's right to state, in reference to an attempt on President Reagan's life, "If they go for him again, I hope they get him."

Ardith McPherson, a black woman, worked for Constable Walter Rankin of Harris County, Texas. She was 19 years old when she was appointed "deputy constable" in January of 1981. McPherson was hired as a clerk. Her duties consisted of typing data into a computer. She was not involved in law enforcement nor did she wear a uniform.

On March 30, 1981, McPherson and some co-workers listened to a radio broadcast which related an attempt to assassinate President Reagan. McPherson presented uncontroverted testimony that she and her boyfriend, a co-worker, were talking after the broadcast when she made the comment which eventually resulted in her losing her job. Another deputy constable overheard her statement. McPherson admitted making the statement, yet stated that she meant nothing by it. Constable Rankin, however, fired her.

McPherson brought suit in a federal district court in 1981 alleging that Rankin had violated Section 1983, a civil rights statute, by depriving her, under color of state law, of her constitutional right to free speech. The district court granted Rankin's motion for summary judgment on the grounds that McPherson's comment was not protected by the First Amendment. After several intervening proceedings, the court of appeals reversed by employing a balancing test. Because McPherson's comment addressed a matter of public concern, the court must weigh society's interest in McPherson's freedom of speech against her employer's interest in maintaining a disciplined workplace. The court concluded that McPherson's rights outweighed her employer's and sent the case back to the district court for the determination of an appropriate remedy.

Constable Rankin appealed to the Supreme Court. A narrow majority affirmed the court of appeals' decision. Justice Marshall's majority opinion cited several reasons for holding that McPherson's statement was indeed protected by the First Amendment and that Rankin acted unconstitutionally in firing her.

First, the Court concluded that the statement was a matter of public concern since it was made in response to a broadcast that discussed policies of the President's administration. A statement that threatened the President's life would be considered criminal and punishable under at least two federal statutes, yet McPherson's statement, no matter how controversial, did not amount to a threat on the President's life.

The Court examined the statement in its context and concluded that the state did not meet its burden of showing that it had fired McPherson on legitimate grounds. There was no evidence that she disrupted the working environment of the constable's office, nor that she had spoken in front of anyone other than her boyfriend, a fellow employee. Further, the remark did not show that McPherson was unfit to perform her job. Considering the clerical nature of her duties, the Court determined that she was not in a position to inhibit the successful functioning of the constable's office.

The dissenters, led by Justice Scalia, were of the opinion that "no law enforcement agency is required by the First Amendment to permit one of its employees to 'ride with the cops and cheer for the robbers.'" Essentially, Scalia argued that the majority broadened the definition of public concern while isolating those public employees who perform clerical functions from discipline for subversive statements. The dissenters would also redefine the balancing test used to determine the validity of McPherson's First Amendment rights. Contrary to the majority, which would consider *society's* interest in allowing such a statement, they would weigh Rankin's interest in preventing the expression of such statements in his agency with McPherson's *individual* interest in making the statement. Unlike the majority, the dissenters concluded that such statements undermine public confidence in governmental agencies and therefore that McPherson was properly fired.

Use of 'Olympics' No Game

In a case important to the gay rights movement, the Supreme Court recently interpreted the Amateur Sports Act of 1978 to grant the United States Olympic Committee (USOC) exclusive use of the word "Olympic" and various Olympic symbols. San Francisco Arts & Athletics, Inc. (SFAA), a non-profit gay organization, can therefore not use the word to promote its athletic activities.

When the USOC first learned that SFAA was promoting an athletic event known as the "Gay Olympic Games" to be held in 1982, it asked SFAA to refrain from using the word "Olympic," since the 1978 law grants the USOC exclusive use of the word. When SFAA continued to publicize the word, the USOC got an injunction against it in federal district court.

The court of appeals affirmed the district court. The court held that the law entitled the USOC to exclusive use of the word "Olympic" without requiring the USOC to prove that any unofficial use was misleading. The statute states that a person who uses, without official permission, the word "Olympic" or anything which would imply a connection with the USOC is subject to a lawsuit.

The court of appeals also dismissed SFAA's contention that the USOC enforced its rights in a discriminatory manner, pointing out that since USOC is a private group, it is not part of the government.

In a 5-4 decision, the Supreme Court agreed. The law grants the USOC exclusive use of the word "Olympic" whether or not any unauthorized use is misleading. The Court conceded that the USOC's privileges are greater than those conferred under a standard trademark. It stated, however, that Congress rightfully granted USOC a limited property right in the word "Olympic" since USOC has, through the years, worked to promote the integrity of the Olympic games and their associated words and symbols. The First Amendment does not preclude Congress from granting a limited property right in a word.

The Court rejected the argument that precluding the SFAA from using the word "Olympic" denies SFAA the opportunity to convey its political message. SFAA can easily substitute words like "athletic games" for "Olympics."

Noting that Congress has a legitimate public interest in encouraging participation in the amateur games, the Court stated that the greater-than-trademark protection given to the USOC is not overly broad in violation of the First Amendment. SFAA claimed it was using the word for expressive as opposed to commerical purposes. The First Amendment grants expressive speech the highest form of protection. However, even use for expressive as opposed to commercial purposes does not grant SFAA the right to utilize any value that the USOC's effort has given to the word "Olympic."

In response to the SFAA's claim that enforcing the law is discriminatory in violation of the Fifth Amendment, the Court responded that the Fifth Amendment guarantees that the *government* will provide equal protection to all groups. The USOC, however, is not a government actor to which the Fifth Amendment applies. Even though Congress granted the USOC a corporate charter and helped it obtain funding, USOC is not a government actor. Therefore, the USOC's decision to enforce the exclusive right to use the word "Olympic" is not a governmental decision.

Justice Brennan, joined by Justice Marshall, argued that the USOC and the United States are intimately connected entities. He stated that when groups are "endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its limitations." Since the USOC represents the United States in international Olympic events, it takes on the role of a governmental entity. Further, by precluding use of the word "Olympic" in non-commercial settings, the law infringes on SFAA's First Amendment rights of freedom of expression. Brennan concluded that the USOC's interests would be served equally as effectively if Congress were to grant the USOC a standard commercial trademark.

Court Narrows Rights of Accused

The Sixth Amendment to the Constitution guarantees a criminally accused person the right to an impartial jury selected from a cross-section of the community. The Fifth Amendment states that an accused in a criminal trial cannot be compelled to be a witness against himself or herself. In *Buchanan v. Kentucky*, 55 U.S.L.W. 5026 (1987), the Court recently narrowed both rights in a single case. In Kentucky, which administers capital punishment, prospective jurors can be "death qualified." "Death qualifying" occurs when prospective jurors are excluded from the jury because they cannot set aside their strong opposition to the death penalty. The Court held that David Buchanan, a criminally accused, was not deprived of his Sixth Amendment right to an impartial jury because the jury was "death qualified."

A Fifth Amendment question was also decided against Buchanan. The issue was whether Buchanan's statements to a psychologist could be used against him at trial. The Court said they could. The Court ruled that, when Buchanan's counsel presented psychological evidence in order to establish a mental-status defense, the state properly introduced additional psychological evaluations, based on interviews with Buchanan, in rebuttal. The Court reasoned that admitting such evidence did not violate the Fifth Amendment's protection against self-incrimination since the reports read at trial contained no statements by Buchanan implicating himself in the crime.

The case began years ago. On January 6, 1981, Barbel Poore was working as she usually did at a gas station in Louisville, Kentucky. When she did not return home on time, her mother called the police. The police found her dead body in her automobile shortly after midnight on January 7, 1981. They arrested Kevin Stanford, Troy Johnson (a juvenile), and David Buchanan in connection with the crimes.

After attempting to rob the gas station, Stanford and Buchanan had raped and sodomized Poore, while Johnson waited outside the station in a car. Stanford later shot Poore in the face while Buchanan stood by and watched.

In juvenile court, Johnson pleaded guilty to accomplice liability in exchange for becoming a witness for the state. Stanford and Buchanan were indicted for capital murder and other offenses, and tried together. Buchanan filed pretrial motions requesting that the jury not be "death qualified," and that there be two juries, one for guilt and other for sentencing, and that the first jury not be "death qualified." He argued that "death qualification" of the jury before the guilt phase violated his Sixth Amendment right to an impartial jury drawn from a cross section of the community, since such a jury—made up only of people who said they could apply the death penalty—might be prone to convict the defendants. The trial court denied the motion.

Later, the court dismissed the capital portion of the indictment against Buchanan since he had not killed Poore and had no intent to do so. Buchanan renewed his motion to prevent "death qualification" of the jury since he was no longer subject to capital punishment. Again, the court denied the motion.

At trial, Buchanan's counsel called as his sole witness a social worker who had conducted extensive evaluations on Buchanan. The defense lawyer attempted to establish a defense of extreme emotional disturbance. When the prosecution attempted to present an additional series of evaluations of Buchanan's mental status compiled by Doctor R.J. Lange, defense counsel objected on the basis that no attorney had been present during the evaluations. Furthermore, Buchanan was unaware that the evaluations could be used against him in court. The court, however, overruled the objection and allowed a limited reading of the evaluations. The jury found Buchanan guilty on all charges and imposed a life sentence for the murder charge.

The Supreme Court of Kentucky affirmed Buchanan's conviction and sentence. The court stated that his Sixth Amendment right had not been violated. The court stated that a "death qualified" juror is not necessarily a conviction-prone juror, but is a person that will objectively follow the law despite his or her own ideas and beliefs.

The Kentucky Supreme Court also stated, with reference to Dr. Lange's reports, that once defense counsel opened the door to the question of Buchanan's mental state, the prosecution was permitted to introduce rebuttal evidence. Further, admitting Lange's reports into evidence did not violate Buchanan's Fifth Amendment privilege against self-incrimination because the reports contained no statements by Buchanan admitting guilt.

The Supreme Court affirmed the Kentucky courts on both points. Justice Blackmun wrote the majority opinion, in which five other Court members joined. Justice Blackmun first addressed Buchanan's Sixth Amendment claim. He relied on an earlier case, *Lockhart v. McCree*, 106 U.S. 1758 (1986), to show that exclusion of certain members of the jury was in keeping with Sixth Amendment goals. The Court stated that the state had a legitimate interest in forming a jury that could neutrally apply the law and facts to the case at both the guilt and sentencing phases of the trial. Additionally, the Court pointed out that not all those who oppose the death penalty can be excluded for cause. Those who are able to set aside their personal beliefs in favor of just administration of law can qualify as jurors.

The Court said that the trial court properly admitted the prosecution's evidence on Buchanan's mental state. Because Buchanan's counsel sought to establish as a defense Buchanan's mental status, the prosecution had no way to counter this defense other than with other psychological evaluations. When Dr. Lange testified, he merely set forth his descripton of Bucanan's mental state. He did not read any statements Buchanan had made in reference to the charges pending against him. Introducing the report, for rebuttal purposes only, did not violate Buchanan's Fifth Amendment rights.

Buchanan brought forth one last claim before the Court. He alleged that the trial court had denied him his Sixth Amendment right to competent counsel by allowing Dr. Lange's reports into evidence when neither he nor his counsel were aware that the reports would be used at trial. The Court responded that defense counsel knew from prior case precedent that if he intended to present psychological evidence to support his defense, he could expect the prosecution to use similar evidence in rebuttal. Further, evidence showed that Buchanan's counsel was aware of the psychological evaluation and in fact discussed it with Buchanan.

Court Limits Land Use Regulations

The Fifth Amendment to the U.S. Constitution provides that "private property shall not be taken for public use, without just compensation." The Court has applied what has become known as the "Takings Clause" to the states through the Fourteenth Amendment. In California, where land is expensive and beachfront property at a premium, questions have surfaced regarding exactly how vulnerable private property is to government use. Conflicts often center around the rights of private citizens clashing with the needs of society. In two recent cases, the Supreme Court strengthened the right to private property. In *Nollan v. California Coastal Commission*, 55 U.S.L.W. 5145 (1987), the Court found that requiring landowners to permit the public access to their private beach before building a larger house on their property was an improper exercise of land regulation. Additionally, where the government's actions result in a taking, the Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 55 U.S.L.W. 4781 (1987), held that the government must provide compensation for the period during which the taking was effective.

James and Marilyn Nollan leased a beachfront bungalow in California. The cottage fell into disrepair after years of use. The Nollans had the option to purchase the land conditioned on their promise to tear down the bungalow and rebuild it.

The Nollans decided to purchase the land and wanted to build a larger house on it. They applied to the California Coastal Commission for a required building permit. The Commission granted the permit subject to the condition that the Nollans open their private beach to the public. This would provide access between two public beaches situated on each side of the private property.

The Ventura County Superior Court remanded the case to the Commission for a hearing. The Commission subsequently affirmed the imposition of the condition. As a basis for its decision, the Commission stated that building a larger house on the property would obstruct the public's view of the ocean as well as prevent the public "psychologically...from realizing a stretch of coastline exists nearby that they have every right to visit."

Procedurally, the Nollans' case grew increasingly complex. After the Commission affirmed its original position, the Nollans filed suit for a writ of administrative mandamus with the Ventura County Superior Court. They argued that the imposition of the access condition violated the Takings Clause of the Fifth Amendment. The court found in favor of the Nollans, stating that the Commission could not impose such a condition since the proposed development would not have an adverse impact on public access to the ocean.

The Commission appealed the Superior Court's decision to the California Court of Appeals. During this time, the Nollans bought the property, tore down the old bungalow and began to build a new house. The court of appeals reversed the lower court's decision and found that the access requirement was constitutionally acceptable. The court applied the reasoning used in its earlier case, *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148 (1985). In *Grupe*, the court held that if a project contributes to the need for public access, the imposition of an access condition on a development permit is sufficiently related to the burdens created by the project to be constitutional. In the court's view, the Nollans' proposed larger house contributed to the need for public access by blocking a view of the ocean. Further, in the Nollans' case, the imposition of the condition did not deprive the Nollans of the use of their property, although it may have lessened its value.

Appearing before the U.S. Supreme Court, the Nollans reiterated their position that imposing an access condition on their building permit violated the Takings Clause. A narrow majority agreed. Justice Scalia pointed out in the opinion that, although the government can effect a permanent taking of private property, a regulation amounting to a taking must substantially advance legitimate state interests and may not deny a landowner the economical use of his or her land.

The Commission argued that it had a legitimate interest in protecting the public's ability to see the beach, assisting the public in overcoming the psychological barrier to using the beach created by a developed shorefront and preventing congestion on the public beaches. The Court, however, could not see how "a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." Further, the Court rejected the argument that the proposed easement would reduce either any psychological barrier to using the beach or beach congestion. Although the Commission argued that such an easement was part of a comprehensive plan to provide continuous public access along coastal beachfronts, the Court saw the argument as a mere expression of the Commission's belief that the public interest would be served by a continuous strip of publicly accessible beach.

Among the four dissenters, Justice Brennan wrote a particularly noteworthy opinion. He argued that the California Constitution declares public interest to outweigh private interest when dealing with free access to water. The state's constitution prohibits any individual from blocking the right of way to any navigable water; the access condition would eliminate such blockage. The majority responded that, first, the government seeks a right of way *along* the waterway, not *to* it. Second, to obtain easements that transgress private property, the state must proceed through its power of eminent domain.

The Nollans are now living in their new house. If it chooses to establish public access across the Nollans' private beach, California must proceed through its power of eminent domain and compensate the Nollans for any use it derives from the property.

In another California case, *First English Lutheran*, the Court held that the government must provide compensation for a land use regulation that results in even a temporary deprivation of a landowner's property. Requiring the government to provide compensation under such circumstances comports with the Just Compensation Clause of the Constitution, otherwise referred to as the Takings Clause.

In 1978, a storm created a severe flooding in the Mill Creek Canyon area of Los Angeles County, California. Among other properties, the flood completely destroyed a church retreat center known as "Lutherglen." Los Angeles County, in response to the damage, enacted an ordinance that prohibited the construction or reconstruction of any building within a designated flood zone.

The church filed suit against the County in a state court. It sought damages for the loss of use of Lutherglen, alleging that the ordinance violated the Just Compensation Clause of the Fifth Amendment. The clause states that the government can take private property for public use, yet must compensate the landowner for the taking. The trial court, relying on an earlier California Supreme Court case, *Agins v. Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), struck from the complaint the allegation that the ordinance denied the church all use of Lutherglen. The court interpreted the *Agins* case to hold that the Just Compensation Clause does not require compensation for those deprivations of land use which are ultimately declared unconstitutional. In other words, even though an ordinance temporarily deprives a landowner of the use of his or her land and is eventually declared unconstitutional, the landowner cannot recover monetary relief for the temporary loss of use. The trial court stated that the church should instead seek declaratory or mandamus relief from the court ordering the County to remove the ordinance.

The court of appeals affirmed the lower court's decision. The California Supreme Court denied review of the decision.

Contrary to the lower courts, the Supreme Court held that the Just Compensation Clause *does* require the government to compensate for even a temporary deprivation of land use. The Court stated that, although a "taking" occurs when a governmental authority exercises its power of eminent domain, excess land-use regulation may also effect a taking. After all, the purpose of the Clause is to ensure that an individual does not bear costs that are rightfully borne by the public as a whole. The Court found that the ordinance in the present case did effect a taking, even though temporary.

The Court stated further that, although the government retains the power to amend or withdraw a regulation once a court determines that it is unconstitutional, the government must still pay for the use of the property between the time the regulation becomes effective and the point at which the government changes the regulation.

Justice Stevens filed a dissenting opinion joined in part by Justices O'Connor and Blackmun. Stevens pointed to several adverse consequences which he felt would result from the Court's opinion. He foresaw that local officials and land-use planners will avoid taking action that may result in a suit for damages. Therefore, "much important legislation will never be enacted, even perhaps in the health and safety area." Stevens viewed the Court's decision as inspiring an explosion of litigation.

Meanwhile, however, the County of Los Angeles will be required to pay for the "use" of Lutherglen from January 1979, the effective date of the ordinance, to June of 1987, the date of the Supreme Court's decision.

Church's Choice Protected

Resolving a dispute between the Mormon church and one of its employees, the Supreme Court recently held that the church was justified in firing an employee for the sole reason that he did not qualify for a certificate of membership to the church. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos et al.*, 55 U.S.L.W. 5005 (1987), the Court held that religious organizations are exempt from the 1964 Civil Rights Act, which prohibits employment discrimination.

Justice White related the unanimous Court's analysis of the problem. For 16 years, Mr. Mayson worked as a building engineer at the Deseret Gymnasium in Salt Lake City, Utah. The gymnasium is a nonprofit facility, open to the public, and run by religious entities associated with the Church of Jesus Christ of Latter-Day Saints, otherwise known as the Mormon Church. The Church terminated Mayson's employment because he did not qualify for a certificate that rendered him eligible to become a formal member of the church.

Mayson and others purporting to represent a class of plaintiffs brought suit against the church in a federal district court alleging discrimination based on religion in violation of the Civil Rights Act. Further, the plaintiffs challenged the constitutionality of a section 702 of the same Act, which exempts religious organizations from liability for choosing members of their own faith to perform work-related activities associated with the organization.

The district court applied a three-part test to determine whether or not the gymnasium was part of the Church's religious activities. The court concluded that Mayson's case involved non-religious activities. It reasoned that there was no connection between the purpose the gymnasium serves and the religious beliefs of the Mormon Church. Additionally, Mayson's job did not relate to Church beliefs or rituals.

Addressing the constitutional challenge to the exemption for religious organizations, the district court applied a different three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The court concluded that the exemption properly assures that government does not interfere with a religion's decision-making processes, thereby meeting *Lemon's* first requirement that the law serve a "secular legislative purpose." However, the exemption fails the second part of the *Lemon* test because its effect is to advance religion by authorizing religious organizations to engage in conduct that propitiates religious beliefs and practices. Without addressing *Lemon's* third part, the court declared the exemption unconstitutional. It ordered the that Mayson be reinstated to his position at the gymnasium with backpay.

The U.S. Supreme Court disagreed. The Court concluded that the exemption comports with the Constitution for several reasons. Employing the *Lemon* test, the Court held that the exemption serves the legislative purpose of minimizing governmental interference in the decision-making process of an organization. The statute also satisfies *Lemon's* second requirement: the law must not have the primary effect of advancing religion. A law would be unconstitutional under this part of the test not simply because it allows a church to advance its beliefs but because the government itself is advancing religion through its own activities. Prior Court opinions do not indicate that giving special consideration to religions is per se invalid. In addressing the third prong of *Lemon*, the Court noted that, contrary to the plaintiff's contention that the exemption "entangles" church and state, the statute effectively separates the two by reducing governmental intrusion in religious activities.

The Court remanded the case to the district court for proceedings to vacate the judgment in favor of Mayson.

Caucasians Protected by Civil Rights Legislation

Over a century has passed since Congress first passed legislation designed to combat racial discrimination. Among those laws passed were the Civil Rights Act of 1866 and the Voting Rights Act of 1870. In two recent cases, the Supreme Court has interpreted those Acts to protect against racial discrimination aimed at members of even the Caucasian race. In *Saint Francis College, et al. v. Majid Ghaidan*, 55 U.S.L.W. 4626 (1987), and *Shaare Tefila Congregation, et al. v. John William Cobb, et al.*, 55 U.S.L.W. 4629 (1987), the Court held that a member of the Caucasian race may be protected by federal civil rights statutes by showing he or she experienced intentional discrimination based on ancestry or ethnic characteristics.

In *Saint Francis College*, Majid Ghaidan, an assistant professor born in Iraq, applied for tenure in January of 1978. After denying his request, St. Francis College offered Ghaidan a one year, nonrenewable contract. The college further denied him administrative review of the tenure decision. In 1980, Ghaidan filed suit against the college alleging that he was denied tenure and a renewable contract solely because of his Arabian ancestry. He claimed that the college violated Section 1981 of the Civil Rights Act, codified in May of 1870. Section 1981 states that all persons in the U.S. "have the same right...to make and enforce contracts...and to the full and equal benefit of all laws...enjoyed by white citizens." Although the statute does not explicitly mention "race," the Supreme Court has interpreted it to forbid all racial discrimination in the making of contracts. The statute, however, does not cover discrimination based on religion or national origin.

Ghaidan met with opposition at the district court level. The district court dismissed his complaint, concluding that he alleged only discrimination based on national origin and religion. Even if Ghaidan could show racial discrimination, he was not protected by Section 1981 since his Arabian ancestry placed him within the Caucasian race.

The court of appeals rejected the district court's argument and reversed the dismissal. Siding with Ghaidan, the court of appeals held that an Arab, even though considered to be among the Caucasian race, can bring an action under Section 1981 if he alleges intentional discrimination based on his ancestry.

Unanimously affirming the court of appeals' decision, the Supreme Court focused on Congress' intent when it passed Section 1981. Section 1981 is historically rooted in both the Civil Rights Act of 1866 and the Voting Rights Act of 1870. The debates surrounding the passage of these statutes show that Congress intended to protect immigrants, including the Chinese, Scandinavians, Latins, Jews, Anglo-Saxons, blacks and Mongolians. These statutes did not specifically exclude those ethnic groups considered to be of the Caucasian race nor was there evidence of congressional intent to do so.

Since Congress intended to protect all citizens subjected to intentional discrimination specifically because of their ancestry or ethnic characteristics, Ghaidan could present a claim under Section 1981. The Court remanded the case to the district court. Ghaidan will now have the chance to prove that St. Francis College denied him tenure and later issued him a non-renewable contract simply because he is an Arab.

An additional federal statute provides all U.S. citizens with rights similar to those granted in Section 1981. Section 1982, passed in April of 1866, guarantees all citizens "the same right...as is enjoyed by white citizens...to inherit, purchase, lease, sell, hold and convey real and personal property." The Court in *Shaare Tefila Congregation, et al. v. John William Cobb, et al.*, 55 U.S.L.W. 4629 (1987), overruled both the district court and the Fourth Circuit Court of Appeals by holding that Jews may bring a claim under Section 1982.

Delivering the opinion for a unanimous court, Justice White related the facts of the case. In November of 1982, members of the Shaare Tefila Congregation in Silver Spring, Maryland, found the outside walls of their synagogue smeared with anti-Semitic slogans, phrases and symbols in red and black paint.

The Congregation's members filed suit against the defendants. Their position was that they were deprived of their rights to hold property in violation of Section 1982 because defendants were motivated by racial prejudice. The district court and the court of appeals affirmed that, because discrimination against Jews is not racial discrimination, the Congregation had no claim.

For the historical reasons cited in *St. Francis College*, the Court concluded that Jews were among those citizens Congress intended to protect when it passed Section 1982. The Court remanded the case to the district court for the determination of whether or not the Congregation could show that defendants' actions were prompted by racial discrimination.

In recognizing that even ethnic groups within the Caucasian race may be protected under 42 U.S.C. Sections 1981 and 1982, the Court has provided a forum for those citizens subjected to discrimination based on race yet considered among the "white" population. ☐

Quest for Justice

(continued from page 5)

the help it can get from each of us to achieve that goal.

Conclusion

In 1987, we Americans celebrated the Bicentennial of the drafting of the Constitution of the United States—the oldest living written constitution of a nation-state in the world. In 1991, we, as a nation, will be commemorating the 200th anniversary of the Bill of Rights—that great treasury of our precious liberties.

Our Constitution and our Bill of Rights have survived almost 200 years despite foreign wars, a devastating Civil War, periodic Cold Wars, economic crises and the Great Depression, inequality and injustice toward minorities, and corruption and unethical conduct from City Halls to the State Houses and even to the White House. How is it that, as a people, we have faced these challenges and have overcome these crises with our Constitution relatively unchanged?

There is, of course, no one answer. Among the explanations are the following:

- Our Constitution divides powers between the Federal Government and the States.
- Our Constitution separates powers among the legislative, executive, and judicial branches of government.
- Our Constitution creates a unique type of Presidency.
- Our Constitution includes a unique Bill of Rights.
- Our Constitution makes it intentionally difficult to add amendments by emphasizing deliberation over speed.
- Our Constitution creates a Supreme Court, and historical developments have transformed it into the ultimate arbiter.

All of these institutional arrangements have been of crucial importance in ensuring our survival. There is, however, one other feature of our lives that has to be considered. Through our educational system and through our historic triumphs and tragedies, the American people have learned the significance of the rule of law. The maxim that "Ours is a government of laws and not of men" has been a constant reminder that no one is above the law, not even the President of the United States.

Paul Valery, the distinguished French diplomat and philosopher, once remarked that "the trouble with the world today is that the future is not what it used to be." In moving into the uncertainty of the years ahead, we must keep uppermost in our minds that our legal system under our Constitution has protected our dignity and integrity as private individuals; it has clarified our rights and responsibilities in the world of work; and it has made it possible in the world of civic affairs for us to get the kind of government we deserve.

When any individual or group comes to us bearing the gift of utopia, let us beware. The word utopia means "nowhere." ☐

Legal Literacy

(continued from page 38)

sess evidence of a crime that might be easily destroyed. An officer may "stop and frisk" an individual who appears suspicious and who may be armed. This exception was designed to add to the safety of the police and other innocent persons who may be harmed by anyone carrying a concealed weapon. If a person consents to an official search, the police need not produce a warrant. There are several other exceptions to the warrant requirement.

The Fifth Amendment guarantees that anyone suspected of a crime has a privilege against self-incrimination. This

Contracts: Now That You're 18

What is a contract? A contract is any agreement between two or more people from which each receives some benefit.

Can I make a contract before turning 18? Yes, but as a minor you could have terminated most contracts. Once you reach the age of 18 you can affirm a contract made as a minor either expressly or by failure to disaffirm it. Adults cannot usually enforce contracts against minors. That is why your parents, or some adult, probably had to co-sign any contract you made as a minor. You may be liable for the fair market value of necessary items purchased as a minor. In many states, if you're married and under the age of 18 you are considered as an adult.

What are some likely contracts I may soon be part of? Some of these contracts are:

- employment contracts;
- loan for education or to buy a car or to make another large purchase;
- installment purchase of some product;
- apartment rental;
- insurance;
- marriage;
- medical care.

Do all contracts have to be in writing? No. Many contracts (employment, some apartment leases, a promise to pay for medical care) are rarely in writing. However, some contracts must be in writing:

- Any purchase of an item costing more than $500.00; or
- Any contract to buy or sell land.

What are some of the advantages of written contracts?

- Protection against dishonesty—against lies by the other person as to what you had agreed.
- Protection against poor memories—after a time people will usually have different recollections of their agreement even if there is no dishonesty.

What are some of the disadvantages of written contracts? Consumers are often forced to sign preprinted standard contracts which are written to favor the seller. For example, these often attempt to limit warranties and say that the consumer must pay the business's legal fees if there is a lawsuit to enforce the contract. Some words contained in written contracts have technical legal meanings which are unknown to most people.

What are some general rules to follow when I am asked to sign a contract?

- Do not sign anything until you are sure you understand the agreement.
- Read the entire contract before signing it.
- Ask questions about anything in the contract you do not understand.
- Cross out parts of the contract that conflict with your agreement. If you do this, initial the cancellations and have the other party do so as well.
- Write in parts of your agreement that are not in the contract and have the other party initial the additions.
- Do not sign a contract if it contains any blank spaces; either fill them in or cross them out if they do not apply.
- Be concerned if someone asks you to sign a contract without reading it.
- Do not be intimidated by sales people.
- Do not be taken in by friendly sales people.
- Do not think that a printed form contract must be O.K.
- Never sign anything unless you understand why you are being asked to sign and what you are agreeing to do.
- Be sure that you get a complete, accurate, signed copy of the contract.

What can happen if I do not perform a contract—if I miss payments or other obligations? You can be sued. You, as a "defendant," can be required to appear against the other person's (plaintiff's) claim against you. The judge or jury decides what the facts are and who wins. If you do not defend, you will lose by default. If you lose, a "judgement" will exist against you. Garnishment proceedings may be filed against you, which means some of your pay will be taken until all the money the other side won has been paid. The judgement lasts until it is paid. Interest is added to the amount of the judgement.

What can I do if I owe more money than I can pay? Some options include working out agreements to pay your debts back over a period of time, taking out a new loan to pay back existing debts, and bankruptcy.

What are some of the consequences of bankruptcy? Bankruptcy is a formal court proceeding. It is quite complicated. The result is that most of your assets (money, property, possessions) are put into a fund to pay as much as possible of your debts. Most debts are then cancelled. Debts that are not cancelled include:

- debts obtained by fraud;
- taxes;
- debts that were not reported to the bankruptcy court;
- debts for intentional or malicious injury to people or property;
- education loans.

Your homestead is usually exempt from bankruptcy proceedings, as well as certain other items.

Bankruptcy can have a bad effect on your credit rating, making it harder for you to obtain a loan in the future.

Adapted from Now You Are 18, *published by the Texas Lawyers Auxiliary.*

guarantees that a suspect has a right to remain silent and cannot be forced to testify at trial against himself or herself. This is known colloquially as "taking the Fifth." It's important to remember that under our legal system, any accused person has every legal right to remain silent.

The Sixth Amendment guarantees a criminally accused person several other rights, including the right to an attorney. The Supreme Court case of *Miranda v. Arizona* made famous the Miranda warning, which requires law enforcement officials to advise an arrested person of his or her rights to remain silent and to consult an attorney.

The Eighth Amendment protects each individual from cruel and unusual punishment. In 1976 the Supreme Court upheld the right of states to impose the death penalty, saying capital punishment is not necessarily "cruel and unusual" punishment. Although thirty-five states now have laws that authorize the death penalty, the state cannot impose the death penalty without considering aggravating and mitigating factors that may raise or lower the seriousness of the offense.

The Fourteenth Amendment, though not part of the Bill of Rights, is important because it provides a way of extending the Bill of Rights to the states. The Bill of Rights originally applied only to the federal government; thanks to the Fourteenth Amendment, it applies now to state and local governments as well. The Fourteenth Amendment says that all person born or naturalized in the United States are citizens and are entitled to the privileges and immunities of citizenship. They cannot be deprived of their life, liberty or property without due process of law.

The Fourteenth Amendment remedied the great defect of the Constitution and the Bill of Rights—the failure to protect equality. By guaranteeing "the equal protection of the laws" to all citizens, the amendment is the cornerstone of racial justice in this country.

No state may promote discrimination as to the use of any public facility because of race, color or religion. Further, anyone who opens his or her facilities to the general public does not have the right to discriminate based on race, color or religion.

Everyone's Law

Although most of us cannot be experts on all areas of the law, it helps to be aware of the basic legal ideas that we may someday encounter in our lives. Constitutions and laws are drafted by ordinary people, many whom of are not lawyers. People pass the laws, and the public participates in their administration through the jury system. Because law is a reflection of the values we as members of society embrace, we as citizens can understand it, live by it—and work to improve it. ☐

Law in the Schools

(continued from page 29)

But in *McClean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark 1982), *aff'd*, 723 F. 2d 45 (8th Cir. 1983), the court rejected the parent's argument that Creation Science was science and therefore had to be taught in the classroom. And parental challenges to sex education courses as violating their rights of parenthood and the free exercise of religion have consistently been rejected. See, for example, *Cornwell v. State Board of Education*, 314 F. Supp. 340 (D. Md. 1969), *affirmed*, 428 F.2d 471 (4th Cir.); *Citizens for Parental Rights v. San Mateo County Board of Education*, 51 Cal. App. 3d 12, 124 Cal. Rptr 68 (1977); *Medeiros v. Kiyosaki*, 52 Hawaii 436, 478 P.2d 314 (1970).

Extra-Curricular Activities

Theresa finds both herself and her friends being confronted by school rules which prevent them from participating in extracurricular activities at school as they wish. First, Theresa's Bible study meeting is cancelled, and though she is told that it is because the Constitution prohibits such meetings, she doesn't understand why. Courts have generally held that the Establishment Clause prohibits Bible study clubs from meeting on public school grounds.

The court in *Brandon v. Board of Education of Guilderland*, 635 F.2d 971 (2d Cir. 1980), upon encountering facts similar to those involved with Theresa's Bible study group, upheld a school district's refusal to grant permission to a group called "Students for Voluntary Prayer" to conduct communal prayer meetings in a classroom immediately before the school day commenced. It determined that the presence of Bible clubs in the schools would "create an improper appearance of official support" for religion. And *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), rejected the school district's policy allowing voluntary student groups to meet outside of school hours for "any educational, moral, religious or ethical purposes."

The Supreme Court came close to deciding this issue with respect to high school students in *Bender v. Williamsport*, 106 S. Ct. 1326 (1986), which involved a challenge to a public high school policy which permitted student-initiated prayer meetings during pre-school activity periods, but it dismissed the case on other grounds, leaving its resolution for another day. Although the Supreme Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), held that a state university that makes its facilities available for activities of registered student groups cannot close them to groups who want to use them for religious activities, it based its decision on the *free speech* rights of students and expressly distinguished the case from situations involving younger public school students, where the facilities are not generally open forums and the students are more impressionable.

Despite Theresa's thought that the school might be out of bounds in not allowing Jim and Tim to play football due to one's facial hair and the other's refusal to take a drug test, the law is that school authorities generally do have the right to regulate such activities. The court in *Humphries v. Lincoln Parish School Board*, 467 So. 2d 870 (La. App. 1985), found that school authorities can regulate students' hairstyles if the regulations are intended to accomplish a constitutionally permissible purpose (which it found the goals of athletic and academic improvements in the case at hand to be). Recently, courts have upheld school rules requiring that students maintain a 2.0 grade point average (*State ex rel Bartness v. Board of Trustees of School District No. 1*, 726 P.2d 801 [Mont. 1986]), and a 70 average for the preceding nine weeks (*Spring Branch Independent School District v. Stamos*, 695 S.W.2d 556 [Tex. 1985]) before participating in extra-curricular activities.

Conclusion

As the preceding discussion shows, the law is involved in almost every facet of a public school student's life, both at school and, to a certain extent, outside of it as well. By understanding how the law affects their rights and responsibilities in the school setting, students can gain an appreciation of how and why the law affects their everyday lives. They can become, in effect, "legally literate." ☐

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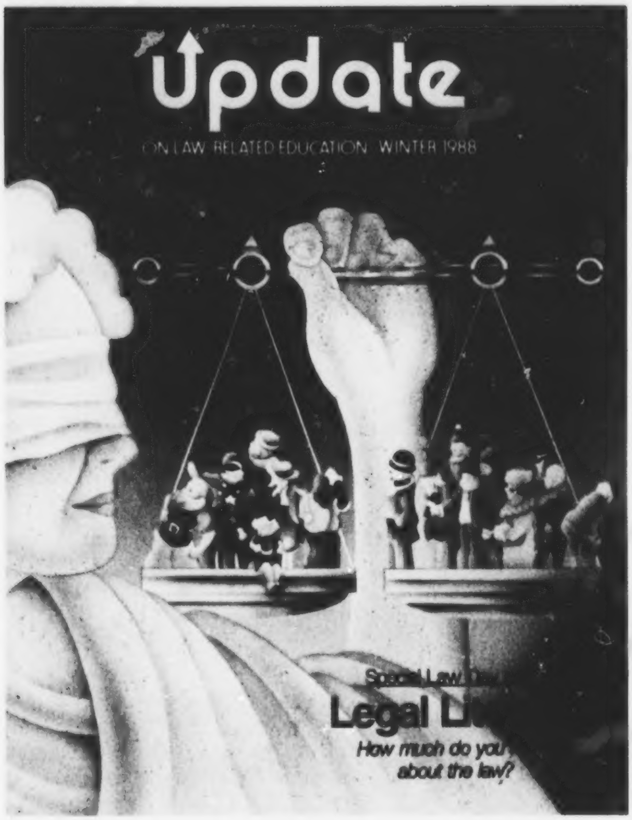
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contents

Volume 12, No. 2, Spring, 1988

2 Youth at Risk: the Challenge—and the Response

4 What Teachers, Parents and Kids Should Know About Drinking and Drugs

8 What Do We Know About Delinquency?

ELEMENTARY SCHOOL

K-9 STRATEGIES

10 An Ounce of Prevention

12 Children as Victims

MIDDLE SCHOOL

MIDDLE SCHOOL STRATEGIES

15 Role-Plays and Partnerships

17 Youth and the Law

20 Confronting Child Abuse

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

27 Teens and Crime Prevention

31 Mock Disposition Hearing

33 A Peach of a Constitution

34 Choosing America's Judges

40 Lessons of the Iran-contra Affair

45 Index

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YOUTH AT RISK

Irving Slott

The Challenge—and The Response

What causes delinquent behavior? While we don't have all the answers, we do know some determining influences that promote or inhibit delinquency in youth, that motivate youngsters to choose a life-style that will carry into adult years. Family is one of them. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) and others are trying to help through parenting training, family counseling, and programs of permanency planning—Permanent Families for Abused and Neglected Children, which we operate through the National Council of Juvenile and Family Court Judges. And there is the CASA program: the Court Appointed Special Advocates program of the National CASA Association.

Peers are also very important. We try to influence the peer environment through support of programs such as Boys Clubs and Explorer Scouts. As with families, however, our influence is severely limited.

The school, an institution of society, is where we can be most effective and where we must be effective if we are to succeed in guiding these future citizens in a healthy life. Moreover, law-related education (LRE) appears to OJJDP to be using a strategy that is practical and highly cost beneficial. At a relatively small cost to the federal government, the OJJDP-LRE program exerts leverage that results in an enormous output in the states. To OJJDP, law-related education (LRE) is not simply a citizen development education program. It is a delinquency prevention program.

Unfortunately, today delinquent behavior can be quite serious and can express itself in and around schools. Gallup polls year after year show that parents rank discipline as the number one problem in the public schools. However, the type of discipline problem has changed drastically over the past several decades. In 1940, in all probability, the top discipline problems that teachers faced were talking out of turn, chewing gum, making noise, running in the halls, getting out of turn in the line, wearing improper clothing, and littering. I know there was more. I am old enough to remember. These were isolated in the so-called "blackboard jungles." But now the problems have spread to almost all schools. In 1982, the top discipline problems were—according to parents responding to polls—assault (on teachers as well as on other students), burglary, drug and alcohol abuse, gang warfare, rape, robbery, extortion, and vandalism—pretty horrible stuff.

Drug and alcohol abuse are major problems. They are among the highest priority of problems to OJJDP. Interestingly, teenagers have been experimenting somewhat less with drugs in recent years but, more and more, they identify drug abuse as a major problem. According to a 1985 Gallup poll that was released in 1986, four teens in ten say that drug abuse is the leading problem facing people their age.

Last week I was in south Texas—Brownsville, McAllen, and Corpus Christi. I was meeting with juvenile justice officials of every branch and with school administrators, counselors, and teachers. They all considered drug and alcohol abuse to be inextricably tied to dropping out. They quoted school dropout rates at about 50 percent. They see alcohol and inhalants, principally, as the major drug problems. An inhalant may not even be an illegal substance, but it can addle the brain just as surely as PCP.

School violence is another major issue. An estimated 525,000 attacks, shakedowns, and robberies occur in an average *month* in public secondary schools. Almost eight percent of urban junior and senior high school students miss at least one day of school each month because they are afraid to attend.

OJJDP is supporting efforts to combat school violence and drug abuse through the National School Safety Center, but LRE is doing a great deal and can do more in this cause.

Furthermore, all is not lost even after a youth is arrested and charged with an offense, not even after repeated offenses have resulted in an assignment to a training school. In New York, and elsewhere,

Susan Wise

judges assign delinquents to LRE programs instead of training schools. This form of diversion is most promising for delinquents whose acts and records are not serious enough for secure residential programs. In Iowa, and recently in other states, LRE has been brought to the training schools.

Let me say a word about training schools. As you may know, juvenile justice has traditionally used different terminology from adult criminal justice. You can be a cynic about it, and say that only the terms are different—delinquency means crime, detention means jail, adjudication means trial, disposition means sentences, training school means prison. Unfortunately, in too many states and communities, the cynic is correct. There are too many kids in detention who recognize that they are really in jail—locked up and waiting. Training school is a prison for many of them. It is not a penitentiary as the old Quaker dreamers saw it. It is a prison, boring and restricted. But I am not a cynic. I do not believe we should give up. There are training schools that are training schools, effectively training many youth for a life of healthy choices. LRE belongs in each of them. OJJDP is promoting the expansion of this program into corrections. It is still somewhat of an experiment, but it has great promise.

Of course, LRE is not only for youth at risk. I fully appreciate the concept of law-related education as a broad program, infused at every K-12 level, relevant to age and understanding. It is not a program of preachments by the teacher and invited outside resources. That would be ineffective and defeat our purposes. However, it should also be recognized that many issues may be important to adults, but irrelevant to grade school students.

LRE is a serious responsibility and a proven, effective tool. It has an ethical dilemma also—it can manipulate or it can educate. It can waste this power and opportunity with unimportant temporal issues, extraneous and irrelevant. Or it can pursue those objectives that are meaningful to the students. Among these, delinquency prevention is of great importance. That is why the Office of Juvenile Justice and Delinquency Prevention and the Congress support LRE. □

Irving Slott is on the staff of the Office of Juvenile Justice and Delinquency Prevention. He also served in one of its predecessor agencies, the Law Enforcement Assistance Administration.

Tony Griff

Thomas A. Nazario

What Teachers, Parents and Kids Should Know About Drinking and Drugs

The problem in general has been called "substance abuse," and although those who abuse alcohol and drugs often get their start during the teen years, the problem neither originates within nor is limited to teens. Substance abuse costs us all dearly. It costs our families, schools, employers and the country as a whole. In terms of the law, however, what should teens know and how do we recognize abuse when it is occurring?

Alcohol

Here, one should know that the likelihood that a youngster will not take a drink of beer, wine, or hard liquor before he or she reaches the teens, is fairly slim. This is not necessarily terrible. Problems occur, however, when liquor and drinking slowly become incorporated into a youngster's everyday life.

A recent national survey of high school seniors pointed out that over 65 percent had used alcohol over the previous 30-day period, while 5 percent admitted to drinking daily. The reasons why youngsters start drinking are very similar to the reasons why they start smoking. Kids often say that "it tastes good," "makes you feel good," and "helps you loosen up." Also, they say it's great at parties or when celebrating, and there is always cause for that.

Believe it or not, there are some three million youngsters in the United States who have a serious drinking problem, and of all our teens who start drinking, one in ten of them become alcoholics later in life, if they are not already.

The minimum age for drinking in most states is 21. What this means is that, at least in the majority of states, the sale of alcoholic beverages to persons under that age is prohibited. The law also covers situations where one might just give a youngster a drink rather than sell it. This prohibition is common in states where the age of majority for all other purposes is 18. The definition of an alcoholic beverage usually includes any beverage containing more than a small percentage of alcohol (usually any amount over one-half of 1 percent), hence most, if not all, beer, wine and liquor. A few states, while requiring that one be 21 to purchase "hard liquor," will allow younger people (usually 18 or 19 years of age) to purchase beer and/or wine. Additionally, a number of states do allow persons who are under 21 years of age to purchase alcoholic beverages, though their number is dwindling. The reason for this is that as of 1984 a federal law mandated that all states receiving federal highway funds raise their minimum drinking age to 21. States which didn't comply stood to lose up to 10 percent of their federal highway funding. This legislation was specifically designed to address the problems of teenage drunk driving and the fact that youngsters sometimes travel across state lines (when the state they are visiting has a lower drinking age) just for the opportunity to be served liquor.

Minors are also often prohibited from being in an establishment where liquor is being sold (unless, as in some states, they are accompanied by a parent or guardian); from possessing or drinking alcohol in a public place, on state highways, or in and around schools; and from presenting false identification in order to purchase alcohol or enter an establishment where alcohol is being served. The only major exception to these laws is that many states allow for the private consumption of alcohol by minors if it occurs at the child's home with the permission of, or in the presence of, the child's parents or guardian.

Punishments for violation of these laws vary from state to state. Most states, for example, will not arrest or prosecute minors who are picked up for drinking in public if it is their first offense. Other states, however, will fine youngsters from $100 to $1,000 for the same conduct. Presenting false identification is a misdemeanor in most, if not all, states. This subjects youngsters to stiffer penalties. Driving under the influence of alcohol is a serious crime, which in a growing number of states requires that the violator receive a large fine, a mandatory jail sentence, and the suspension and/or revocation of a driver's license. This is particularly true if he or she had been convicted of the same offense in the past.

Adults too may be criminally liable. For example, statutes which prohibit the sale of alcoholic beverages to minors provide for criminal as well as civil penalties against bar or liquor store owners who sell to minors. Also, parents and others who knowingly serve or encourage minors to drink, either at their home or at a party, may be found guilty of contributing to the delinquency of a minor. Finally, it is possible for adults to be held responsible for the acts of a minor whom

2026

For Help and Information About Alcohol

Students Against Drunk Drivers

This organization was established in 1981, largely to do something about the fact that each year almost 5,000 teenagers die on our highways in alcohol-related accidents.

They provide brochures and materials aimed at increasing public awareness, and they urge students to take action against drunk driving. They will also provide you with the address of the chapter nearest you and information on how to start a chapter. You can reach them at P.O. Box 800, Marlboro, MA 07152, (617) 481-3568.

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(212) 302-7240

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(212) 206-6770

American Council on Alcoholism
8501 LaSalle Road, Suite 301
Towson, MD 21204
(301) 296-5555

National Clearinghouse for Alcohol Information
P.O. Box 2345
Rockville, MD 20852
(301) 468-2600

For children who do not have a problem with drinking or alcohol but live with another member of the family who does, consider calling or writing: *National Association for Children of Alcoholics.* They provide support and serve as a resource for individuals of all ages who are children of alcoholics. They also work to protect the rights of those children to live in a safe and healthy environment. You can reach them at 31706 Coast Highway, Suite 201, South Laguna, CA 92677, (714) 499-3889.

they allow, or in fact, encourage to drink. An example would occur when a minor attends a party at his/her home, is given an exorbitant amount of alcohol to drink, is allowed to drive, and while doing so, injures or kills him or herself or someone else on the road.

Sadly, in spite of all these laws, youngsters in the United States will continue to drink and abuse alcohol. The truth is, it would be hard for kids not to drink. Alcohol is all around us. It is associated with fun, with popularity, with sex, with winning and success. None of which makes too much sense. Nevertheless until we are willing to make some substantial changes in the symbols associated with drinking, kids will continue to buy into the package.

Drugs

Here again, as with tobacco and alcohol, it has become increasingly less likely that a youngster will make it through his or her adolescence without coming into contact with some type of illicit drug. This is particularly true with respect to marijuana. In fact, a recent national study placed the percentage of high school seniors who use marijuana regularly at over 25 percent. The same survey also indicated that more than 60 percent of all young people try one or more illicit drugs before they graduate from high school. In short, no school is immune, no neighborhood is too remote and no child is too innocent.

Unfortunately, the law with regard to the use of drugs has had seemingly little effect on our youngsters' behavior. Today, other than alcohol, the most popular types of illicit drugs used by youngsters are marijuana, various types of stimulants, cocaine and various types of sedatives, hallucinogens and tranquilizers. Again, although some youngsters may be more vulnerable than others, any youngster in any family, in any school, or in any neighborhood can become involved with drugs.

With regard to the law, you should know that both federal and state laws come into play when regulating the manufacture and sale of drugs, and last year there were approximately 811,000 drug-related arrests in this country. The Uniform Controlled Substances Act of 1970 classifies drugs by placing each of them on one of five schedules (or categories) and prescribes controls and penalties for each schedule. Penalties are highest for drugs considered most dangerous. Formerly, a person convicted of making or selling one of these drugs (such as heroin) may have received up to fifteen years in prison and a $25,000 fine (or thirty years and a $50,000 fine for a second conviction). Under the new 1986 Federal Anti-Drug Abuse Bill, however, the minimum sentence after conviction is ten years in prison, and there are fines of up to $4 million for individuals involved in the manufacture, sale and/or transportation of illicit drugs. (There is additional prison time and up to $8 million in fines for second convictions.) Up to $10 million in fines are provided for organizations involved in similar activities (with additional prison time and up to $20 million in fines for second convictions).

Youngsters, however, are generally not involved in these kinds of activities. Instead, youngsters are usually charged with "possession of a controlled substance." The punishment for possession varies from state to state. Also, the punishment varies depending on the type and amount of the drug involved. In California, for example, the law was recently changed so that it now defines possession of one ounce or less of marijuana as an offense punishable by a fine of up to $100. It is treated much the same way as a traffic ticket. Possession of amounts over one ounce, however, are punishable by up to six months in a county jail and/or a fine of up to $500. A few other states have similar laws. California does provide, however, for punishment of up to 10 days in jail and/or up to a $500 fine for possession of any quantity of marijuana on school grounds. Additional sanctions when the drug is found on school grounds are common in many states.

Possession of most other drugs or possession with intent to sell are more serious crimes than simple possession of marijuana. In some states, a jury may presume that quantities of a drug greater than a certain amount would not be in the defendant's possession unless he or she intended to sell them. Also, almost all states make sales of illegal drugs to children more serious than sales to adults. Moreover, some states have tried to outlaw drug paraphernalia (the equipment or accessories associated with drug use), such as hypodermic needles and hashish pipes.

Many states, however, do allow youngsters who have been arrested for drugs to avoid prosecution and possible imprisonment by entering a diversion program. As such, the child would receive treatment aimed at curtailing his or her addictive behavior, rather than imprisonment. This is particularly true with first-time offenders, who are not themselves involved in the sale or distribution of drugs.

Another problem associated with the use of drugs is the fact that parents or those closest to our youth (teachers, friends and relatives) are often the last to know. This is true even when the youngster has begun to exhibit many of the classic signs that often signal trouble.

Adults need to look for marked changes in the child's general behavior and attitude, and remember that although some behavior changes may reflect mood changes typical during adolescence, they should be particularly concerned when they see a combination of unusual conduct or behavioral changes, such as:

- A noticeable lack of interest in formerly rewarding activities and close friends.
- Frequent vague or withdrawn moods.
- Secret telephone calls and meetings, or being peculiarly secretive about personal possessions.
- A greater tendency to become frustrated and frequent temper tantrums.
- Changes in sleeping and eating habits.
- A rapid decline in school grades or an unusual number of recurring absences.
- Frequent borrowing of money or the outright lack of money.
- Stealing or the disappearance of valuable items around the house.
- Changes in personal dress, from neat and reasonably clean to unkempt and dirty.
- Forming new friendships and hangouts and developing a strong alliance with those friends.

If you find a child is using drugs, be firm, but also understanding and supportive. Make it clear that the child will not be allowed to use drugs. However, keep in mind that the child needs your help. Talk about your concern, but don't lecture your child as though you were an expert.

For serious drug problems, there are counselors and organizations in nearly every community that can help. If the telephone directory is not helpful, call your state or county department of public health or the National Clearinghouse for Drug Abuse Information. They provide, among other things, free brochures which describe how parents/peer pressure can be used to counter adolescent drug use. Their address is P. O. Box 416, Kensington, MD 20995, (301) 443-6500.

If the problem is related to the use of cocaine, call the Cocaine Hotline, 1-(800) 262-2463 or 1-(800) 662-HELP.

Adapted from Thomas A. Nazario's book, In Defense of Children. *Copyright © 1988, Thomas A. Nazario. Reprinted with permission of Charles Scribner's Sons, an imprint of Macmillan Publishing Company. Mr. Nazario teaches law at the University of San Francisco School of Law.*

Some of the More Popular Drugs Abused by Young People

Marijuana

Slang Names: Pot, grass, weed, tea and mary jane.

In General: After alcohol, the most commomly used drug. Ten to twenty million Americans are current users, and more than 30 percent of 12- to 17-year-olds use marijuana on a regular basis.

How Abused: Marijuana is a substance that comes from the leaves and flowering tops of the Indian hemp plant. The flowers and leaves are dried, chopped, then smoked as a cigarette (called "reefers," "joints" and "sticks") or in pipes. It can also be taken orally.

Effects: Marijuana affects mood, thinking, behavior and judgment. It physically enters the bloodstream and acts on the brain and the nervous system. The following ill effects may occur: reduced coordination and reflexes, some distortion of time and distances, difficulty in thinking clearly, drowsiness, depression and possible impairment of judgment.

Inhalants

In General: Inhalants, often called deliriants, include any chemical which gives off fumes or vapors which, when inhaled, produce symptoms similar to intoxication.

How Abused: Sniffing airplane glue, gasoline, lighter fluid, paint thinner, varnish, shellac, nail polish remover, and aerosol-package products. Sometimes inhaled from a moistened cloth, or by placing chemicals in a plastic bag or container to concentrate the fumes.

Effects: Deliriants may give a feeling of mild intoxication followed by excitement and exhilaration. Physically, they can cause a loss of coordination, distorted perception and hallucinations. Extreme use can lead to convulsions and death. Also, these toxic vapors can cause physical damage to lungs, brain and liver.

Hallucinogens

Slang Names: "LSD," "acid," "cubes," "Mesc," "STP," and "DMI."

In General: Hallucinogens are natural and man-made drugs which affect the mind, causing distortions in physical senses and mental reactions.

How Abused: Taken internally by capsules, tablets or sugar or food. Can also be injected.

Effect: Hallucinogens affect certain chemicals in the brain and change the electrical activity of the brain. They may increase sociability, exhilaration, and "kicks." Physically, they increase blood pressure, cause chills, nausea, and irregular breathing. Users can experience hallucinations, panic and strong suicidal urges. There is also evidence that use of LSD can cause permanent genetic damage.

Cocaine

Slang Names: coke, snow, flake and gold dust.

In General: Cocaine is a white powder made from the leaves of the coca bush. It acts as a stimulant and local anesthetic.

How Abused: Cocaine can be sniffed, swallowed or even injected into veins.

Effects: Acts as a stimulant on the central nervous system. This drug is used for pleasure, thrills and sociability. It may hide feelings of hunger, thirst and fatigue. Extreme use may cause hallucinations, convulsions, ulcerations in the nasal cavity, severe depression and death.

YOUTH AT RISK

Thomas A. Nazario

What Do We Know About Delinquency?

How can we help children stay out of trouble with the law?

These are very likely the two most asked questions by parents and teachers alike. Unfortunately, there simply is no single answer that experts can agree on. Nevertheless, since long before 1974, when Congress established the Office of Juvenile Justice and Delinquency Prevention, many studies have been done to try to get some kind of answer to the question of why some kids go wrong. As a result we have learned some things.

First, stereotypes about who commits crimes don't work and are often very destructive. A juvenile delinquent is simply not limited by his or her economic status, race or sex. For example, although the crime rate remains highest in our inner cities, during the last ten years crime has grown fastest in suburbs and rural areas. Moreover, although boys still commit six times as many crimes as girls, girls are responsible for a greater and greater portion of overall delinquent behavior in this country. Therefore, it is probably safe to say that, although certain characteristics of high risk children do seem to exist, children everywhere are at some risk.

Second, there is simply no single reason to explain why some children will turn to crime while others will not. At best many factors may come into play and, in some cases, a child's behavior could simply not have been predicted by anyone. Factors which experts say seem to contribute to delinquency include:

Poverty: Here the problem is not necessarily the lack of money in and of itself, but "relative" poverty. When people who have little are surrounded by people who have much, they are more likely to take from those who have. This is particularly true when they feel they have been unjustly deprived of society's goods and services. Children from poorer neighborhoods will sometimes steal from children or adults in wealthier neighborhoods and later try to justify their conduct by asserting that they have been victimized.

Unemployment: Although somewhat related to poverty, here experts claim that youth frustrated about the lack of jobs, skills, or job opportunities (and/or something to do) become angry and consequently get into trouble.

Friends or the lack thereof: Peer group pressure, particularly in adolescence, is phenomenal. When a youngster's friends are inclined to break the law, they often take otherwise good kids with them. This is particularly true in gangs, where the support network rewards those who disrespect the rules of the larger society. In addition to the "wrong" kinds of friends, the lack of friends also contributes to delinquency. All children and young people, just like adults, need someone to talk to. The lack of that kind of support is always dangerous.

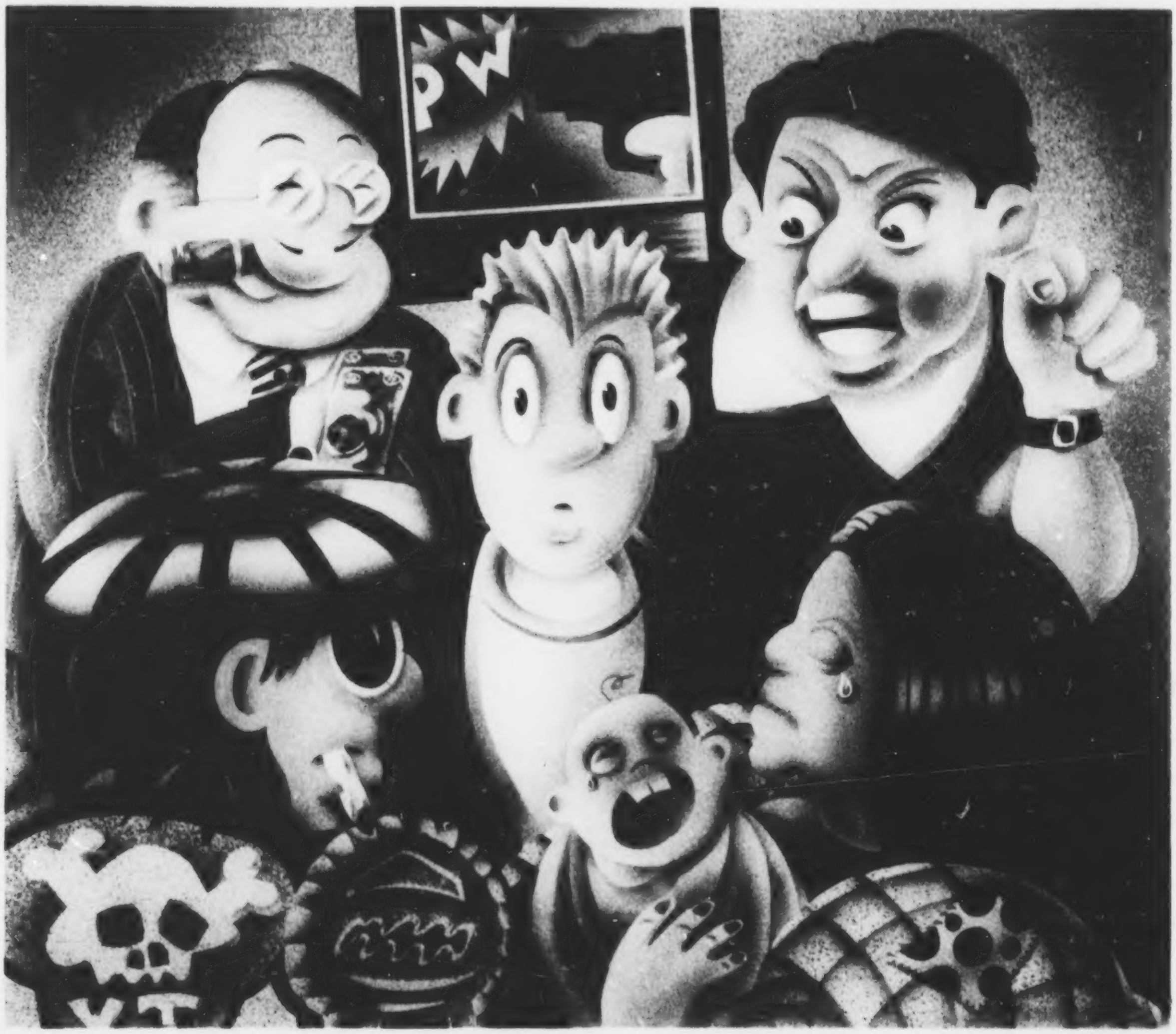
"Negative" role models: Closely associated to peer pressure and linked to delinquency in children. Many studies show that delinquency is associated with the troubled backgrounds of parents, siblings or friends. This has a negative impact on the child and, more often than not, the child simply follows in his or her parent's, sibling's or friend's footsteps.

Child abuse: Recent studies have shown that a disproportionate number of those convicted of violent crimes have themselves been abused as children. (Ninety percent of those spending time in state prison were abused as children.) Often this tendency toward violence begins during adolescence or younger. This is also true with children who may not necessarily have been physically abused, but instead neglected or simply unloved. Conversely, strong and emotionally supportive families have the opposite effect upon children.

Self-esteem: Children who lack self-esteem or suffer from a sense of powerlessness sometimes feel more important after committing a crime. These feelings of powerlessness might stem from conditions like poverty or unemployment or perhaps failure at school, lack of friends or overly domineering parents.

Self-image: Delinquency can be brought about by endless cycles of personal and environmental conditions. Nevertheless, studies have shown that once a child is labeled a "brat," "delinquent," or "troublemaker," the label itself becomes a factor contributing to the child's bad image of him or herself. The label becomes a "self-fulfilling prophecy" and the child simply surrenders to the expectation of others by acting out what he or she perceives is expected. This is particularly true when those who have labeled the child are significant persons in that child's life.

Certainly the above list is not meant to be all-inclusive. Many would argue that other factors should be made note of, such as permissive courts, lack of quality education, lack of after-school activity and clubs, the abuse of alcohol and drugs by children and/or by their parents, breakdowns in families, inadequate police protection and an ineffective correction system. Finally, a recent $750,000, three-year study in California identified eleven causes of violence, including racism, war,



Tony Griff

diet, television and the use of capital punishment. The commission noted, among other findings, that:

- Alcohol is involved in nearly two-thirds of all violent incidents.
- There is a "strong association" between having been abused as a child and growing up to become a violent adult.
- The theory that violent TV shows "drain off" the violent energy of the viewers, thus preventing violence, is not supported by findings.
- Chemical additives in food and vitamin deficiencies may set off violent behavior.
- Economic deprivation and frustrated ambitions are related to violence.
- Though there is no direct cause-and-effect relationship between any of the negative factors identified and violence itself, children subjected to several of them (for example, abused children who eat junk food and spend much of their time watching violent TV programs) are much more likely to resort to violent behavior than others.

Among the California commission's more controversial recommendations were the consideration of laws that would prohibit parents from spanking their children and new legislation tightening restrictions on the ownership of guns.

Finally, although clearly not necessarily a precursor of delinquency and/or problems with the law, behavior which might lead to more serious problems later and should be discouraged in young children includes bullying of others, cheating on school exams, using profanity, cruelty toward friends or animals, destruction of property, drinking, gambling and truancy.

Despite the best efforts of parents and teachers, sometimes children get in trouble with the law anyway. Therefore, these adults should be concerned with how to best deal with the juvenile justice system. If you would like more information about delinquency and/or delinquency prevention, call or write the **Office of Juvenile Justice and Delinquency Prevention.** They provide a clearinghouse and information center for collecting, publishing and distributing information on juvenile delinquency at the national level. They also provide grants to states in order to foster better programs that serve youth throughout the country. Their address is: 633 Indiana Avenue, N.W., Room 1142, Washington, D.C. 20531, (202) 724-7751.

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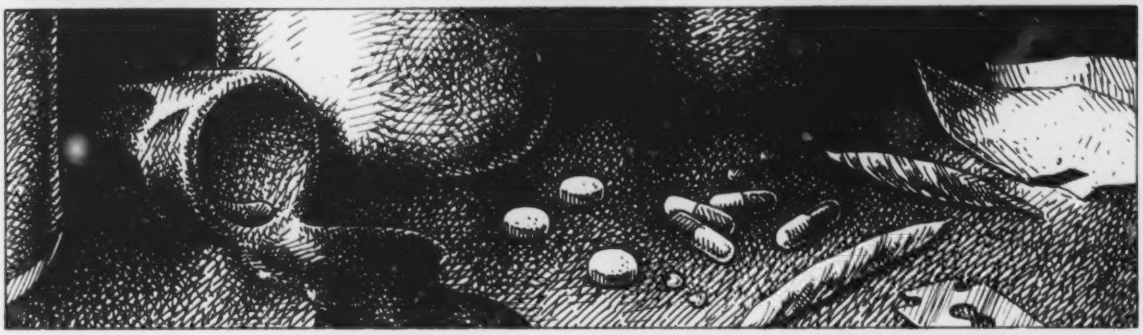
Youth at Risk

An Ounce of Prevention/Elementary, Middle

Suzanne Bolton



Tom Herzberg

The headline read "Local Man, 22, Found Dead in Dumpster."

> Robert Rocco [not his real name] 22, a local man, was found dead Saturday morning in an apartment building dumpster. A neighborhood resident spotted a pair of running shoes sticking out of the dumpster and found the body when he went to investigate. He immediately notified the police. Authorities said that Mr. Rocco had been beaten, stabbed and shot and had died from multiple injuries. There are no suspects in the death. Drug trafficking is believed to be involved.

How did one of "my" students meet his demise in such tragic circumstances? This isn't the inner city, but a comfortable middle class community. I'd known Bobby since he was in the second grade. A nice kid, a good kid. I knew his family. I watched him grow up. I remember the last time that I saw Bobby. I even have a picture of us on that sunny June day. It had been the last day of school and he stopped by his old elementary school to say "Hi." He was seventeen, a beautiful young man with his whole life ahead of him. I remember thinking that he was on his way.

I ask myself what could we have done as his teachers during those formative years to guide him through the minefields and jungles of adolescent experimentation and temptation? I'll never know, but I believe that we do need to make the effort for the millions of other "Bobbys" that are traversing that scary territory right now or will be in the very near future.

A Challenge for Educators

We all know that the elementary school curriculum is overburdened with computer literacy, mandatory sex education and greater emphasis on the basics. However, part of the education process must deal with the development of coping skills needed to handle real life situations. While we're teaching facts and figures, our students are busy worrying about peer pressure to experiment, to be "cool" and to be accepted as part of the group. We must consider the affective domain (attitudes) as well as the cognitive (knowledge).

Substance dependence, whether it be drugs or alcohol, is so pervasive in our society that it affects the lives of our children in very significant ways. School personnel need the training and the tools to confront the issue head on.

The facts are there. A recent *U.S. News and World Report* article on alcoholism stated that two out of every three adults drink. Two out of every three high school seniors have drunk alcohol within the past month. Five percent drink daily. Forty percent of sixth graders have tasted wine coolers. By the age of 18, a child will have seen 100,000 beer commercials ("Coming to Grips with Alcoholism" *U.S. News and World Report*, Nov. 30, 1987).

It is estimated that there are millions of children in the country living in alcoholic homes. In any classroom of 25 students, four to six are children of alcoholics (NIAAA, "Alcohol and Health," Fourth Special Report to the U.S. Congress, U.S. Department of Health and Human Services, DDHS Publication No. (ADM) 81-1080. Washington, D.C.: U.S. Government Printing Office, 1981; Woodside, Migs, "Children of Alcoholic Parents: Inherited and Psycho-Social Influences," *Journal of Psychiatric Treatment and Evaluation*, Vol. 5, pp. 531-537, 1983). Add to these facts legal and illegal drug abuse. There are also many people who are cross-addicted (addicted to both alcohol and drugs).

Very often the toughest issues that young people must deal with are directly related to substance dependence and abuse by either the parents, the child or both. Think about it.

- Domestic violence/abuse (emotional, physical, sexual)
- Runaways
- Juvenile delinquency
- Traffic offenses/fatalities
- School suspension/expulsion
- Teen pregnancy
- Suicide

Scrape off the surface of these problems and more often than not there is a causal relationship with substance dependence and abuse.

Therefore, elementary schools should be charged with a three-pronged program that provides education and recognizes the need for intervention and support.

The decision as to experimenting with alcohol and drugs must be made as early as age 10 or 11. Programs must be in place prior to that time, preferably in kindergarten.

An effective program should offer the following components:

1. Age appropriate drug and alcohol information
2. The disease and genetic concepts of substance dependence
3. The impact on family dynamics and interaction

4. Practice in decision-making skills
5. Channeling feelings
6. Coping skills
7. Identifying resources and where to go for help
8. Dealing with denial

her inservice is mandatory to give the teachers the information and confidence to feel comfortable in this area. Parent education and involvement is also crucial.

We also need to remember that no amount of education, no matter how effective, will stop some children from becoming substance abusers for many different reasons. Elementary teachers must be able to recognize the signs of substance abuse. Parents will often deny that there is a problem and that there is a need for professional intervention with a professional therapist. A child's teacher may be in the best position to identify a problem.

School sponsored support groups are beneficial for children from alcoholic homes or who have problems with alcohol or drugs themselves. They need to know that they are not alone with their problems, that there is somewhere that they can go for help and that there is an outlet for their feelings.

Support group attendance has been used with positive results on a voluntary basis as an alternative to suspension for possession or use of drugs.

Classroom Strategies

Experiences can be structured so that students learn by doing. A non-threatening, non-judgmental atmosphere encourages open and honest communication. Social and emotional growth can be developed by providing opportunities to examine feelings, motives and values.

1. *Role Playing*

Role playing actually gives students a chance to deal with real life simulated situations. Puppets are also effective since students are able to mask their identities and take on the role of a puppet character. They need the confidence that practice can give them to just say "no" to peer pressure to try a joint or drink a beer.

Different enactments of the same problem situation can result in alternative solutions. Participation, observation and discussion can promote problem-solving abilities.

a. Three friends are playing in a basement. Two decide to sample dad's whiskey that they found in a cabinet. The third says "no". How does each one react? What other activities could the third friend suggest instead of experimenting?

b. The school is sponsoring a rollerskating party. A group is passing a joint around in the restroom. Two other students come into the restroom and are pressured by the rest to take a "toke". What can be done in this situation?

c. "Mr. Trouble" is getting high or drunk. Have someone take on the role of Mr. Trouble. What kind of situations could you get into hanging around with Mr. Trouble? Examples: suspension from school, blackouts, regrettable sexual situations, drunk driving violations, accidents, fights, etc.

2. *Critical Thinking Skills*

Students must become familiar with the emotional, physical and legal consequences from drugs and alcohol. They need to be able to weigh the pros and cons of various situations in order to make independent decisions.

a. Analysis.

Analysis is breaking learned material down into component parts to understand its organizational structure and the relationships within.

Alcohol and drug use and abuse is often a means to escape from problems. What are some other ways to deal with problems? Do problems go away after the effect of drugs or alcohol wear off or are they still there?

b. Synthesis.

Synthesis is being able to put parts together to form a new product based upon a learned predetermined criteria.

Some people drink or use drugs to mask their true feelings. They change from:

Shy to outgoing
Sad to happy
Lonely to content with being alone
Afraid to courageous
Angry to mellow
Uptight to uninhibited

What are some ways to confront feelings and change them without using drugs or alcohol?

c. Evaluation.

Evaluation is making a personal value judgment of material based on clearly defined criteria.

Drug and alcohol use is often presented as an exciting, glamorous way of life. There are pros and cons. Have students list why they think the lure of drugs and alcohol is so attractive to some people. List the possible consequences. Discuss the findings in the large group. Examples on each side include:

peer pressure
addiction
beer commercials
traffic accidents

3. *Problem Solving/Coping Skills*

Students need to be able to work through strategies to cope with various problems that they may encounter. Groups can brainstorm together to come up with many different approaches and solutions for a given situation.

a. A friend is experimenting with cocaine. What progressive steps could you take to get help for him/her?

b. A parent has radical mood swings and often changes his or her mind after making a decision that affects you. Where can you go for help?

4. *Just say "no"*

A few bad apples (drug pushers) can affect the entire student body. There is safety in numbers. Have students plan a campaign against drug and alcohol abuse. What about getting students involved in SADD (Students Against Drunk Driving) and the designated driver policy?

5. *Law-Related Education*

There are many ways to infuse LRE into a drug and alcohol awareness program. The following topics can be used for discussion or research assignments.

a. Mandatory drug testing can be argued for in some situations (i.e., sports, airplane pilots, etc.). Is it constitutional?

b. What are the consequences of refusing the breathalyzer test?

c. What are the penalties for the possession of illegal drugs? For the sale of illegal drugs?

d. Why is there a legal drinking age? What are the penalties for a "minor in possession"?

e. What was Prohibition? What happened to Prohibition and why?

Many schools do have programs in place such as "BABES" and Children Are People. The National Association of Children of Alcoholics has recently mailed educational packets with information and awareness posters to 47,000 elementary schools nationwide.

Even before a formal program is introduced in your school you can instill in your children just what acceptable behavior should be, that they are not to blame for an alcoholic situation in the home and that there is help available for them.

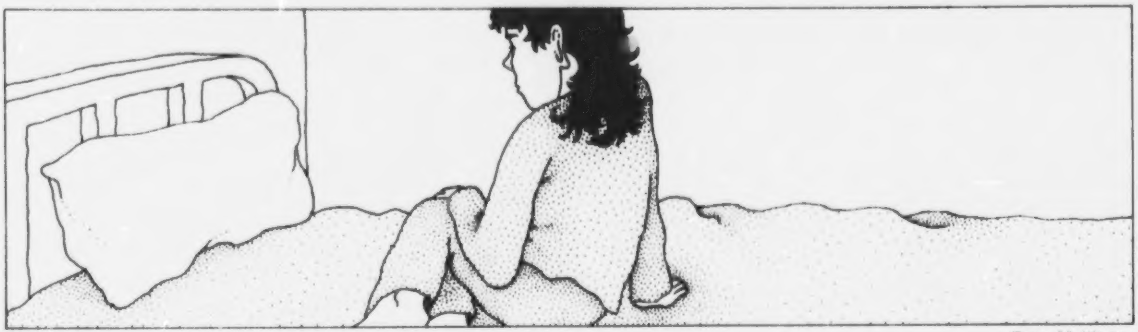
In conclusion, covering "all the bases" is an overwhelming responsibility for the schools. The message will not come across with a one-shot program, the message must be consistent and repetitive. I remember Bobby and I am confident that if we try, we will be able to make a difference.

Suzanne Bolton taught elementary school grades one through six and special education for sixteen years in the Walled Lake School District in Walled Lake, Michigan. She is also an attorney. She is currently practicing law and is an active teacher-trainer for the Michigan Law-Related Education Project.

Youth at Risk

Children as Victims/Elementary Activities

Arlene F. Gallagher



Dean Matthews

A victim is someone who has suffered either by intentional or accidental action. A child tends to see suffering and action in terms of extremes: good and bad, or right and wrong. Viewing victimization on a continuum from severe to minor, with many shades of grey in between, is more realistic and more useful. A broader perspective on suffering and the action that causes it enables the child to assess incidents through classification, comparison and contrast.

Children can be victimized by adults or by each other. Regardless of the source or the severity of the action, there are common results. The child feels alone, disconnected, and powerless. The books and activities described here are intended to empower children by helping them to view incidents on a continuum and by encouraging them to act and react appropriately.

The Power of Names Activity

Your name is on the first and last legal documents of your life: birth certificates and death certificates. There are laws to protect the illegal use of your name by you and by anyone else. Forgery is a crime. The law also protects, defines, and awards priviliges to you, with labels such as minor, senior citizen, landlord and tenant.

"You are what you eat" proclaims a sign in a health food store. You are also what you are named, called or labeled. The law protects individuals and groups of individuals from the damages that result from naming and labeling, but names can be used to achieve positive results as well as negative ones.

STICKS AND STONES

"Sticks and stones can break my bones but names can never hurt me" is still chanted on playgrounds today, and it is as untrue now as it ever was. Names do hurt. Labeling can be used to create a self-fulfilling prophecy, to disenfranchise, or to dehumanize. This first activity focuses students' attention on how names influence people, while the second one suggests a way to use this knowledge to improve self-concepts.

Here is a list of names we might be called:

honey sweetheart handsome ugly fatso skinny dumbo
smart clever honest mean cruel strong nasty nerd
awesome purple tall short four-eyes foreigner
highbrow tenderfoot lazybones leatherneck
hippie rubbernecker redneck skinflint

Have the class be creative and suggest both positive and negative labels. Have the class as a whole or have students independently sort the list into two categories: names they would like to be called and names they would not like to be called.

Discuss the possible origins of the labels. A good dictionary will help with some of the names. More detailed information for the last eight items on this list can be found in Susan Kelz Sperling, *Tenderfeet and*

Ladyfingers: A Visceral Approach to Words and Their Origins. New York: The Viking Press, 1981.

EXTENDING THE ACTIVITY

Find situations in history where names and labels have played a significant role. For example, during slavery, slaves' last names were ignored, and children of slaves were often given the last name of their owner. Read Mildred Taylor's *The Friendship* out loud and discuss how using a person's first name was a measure of status.

Discuss the arrival of immigrants in our country. Often people whose names were difficult for immigration officers to pronounce or spell had them changed without their permission. This was sometimes justified as an attempt to "Americanize" new arrivals.

"Also Known As" Activity

It is entirely legal to use more than one name unless you are attempting to defraud in some way. If more than one name is used, the letters A.K.A. (for "also known as") follow the first name.

satisfying and exciting challenge. They can interview parents and relatives about the meaning of their names and find out how their particular name was chosen.

In this activity students have a chance to create new names for themselves and each other.

PROCEDURE

Explain to the class that many Native American names were symbolic. They may have told of some behavior, event or accomplishment by the person, or the names might have been related to nature, the climate or the seasons.

First, brainstorm and list words on the chalkboard that come to mind when you think about seasons, animals, and behavior. The class may be divided into small groups for this activity, or it can be done as a whole class activity. Each person in the group or in the class creates a name for every other person. The only rules are that the name must be a positive one and that it must somehow relate to the individual.

The teacher should participate fully in this activity, receiving and giving names. Names are written on slips of paper and may be handed to the person or placed in anonymous envelopes tacked to a bulletin board. The activity can be done in one class period or it can last as long as a week. Every day students will look forward to seeing what new names appear in their envelopes. At the end of the activity each student chooses the name by which he or she wishes to be called.

Mountains from Molehills Activity

We sometimes make victims of ourselves by the way we perceive others' actions. We make "mountains out of molehills," claiming someone has caused us great harm when the incident was really a minor one. Everyone experiences times when he or she feels cheated or victimized by others, but clearly some experiences are worse than others. This activity will help you classify items according to whether or not they are examples of being a victim or being mistreated but not necessarily victimized.

PROCEDURE

Reproduce the following examples on cards and distribute them to the class. Place two labels on the chalkboard: MOUNTAIN and MOLEHILL. Have each student read the incident out loud and then discuss with the class whether it is a mountain, an act that victimizes someone, or a molehill, a minor accident or small act of mistreatment.

A Poke in the Eye with a Sharp Stick
Pulling Someone's Chair out When They Are About to Sit Down
Borrowing Someone's Pen or Pencil
Taking Someone's Lunch
Taking the Dessert from Someone's Lunch
Putting Your Foot in the Aisle So That Someone Will Trip
Holding Your Thumb on the Water Fountain and Squirting the Next Person Who Tries to Get a Drink
Copying Someone's Answers on a Test

Add others that have happened in your class or ones that the students suggest.

Use the following questions to focus the discussion:

1. What are the potential consequences of the act? What damage could result? How serious an injury could result from this act? Is the damage something that can not be repaired?
2. Do the consequences of the act determine its severity?
3. What was the intent of the act? Does the motive make a difference? Was the act an accidental one?

Tattling or Responsible Reporting Activity

Too often children do not report when they are being tormented, victimized or abused because they fear reprisals or have been admonished about tattling. This activity encourages discussion of when it is appropriate to inform an adult about something and when it is not.

PROCEDURE

Write the following categories on the chalkboard: TATTLING and RESPONSIBLE REPORTING. Discuss the meaning of these terms. With younger children it might be helpful to use the book *The Berenstain Bears Learn About Strangers*, which gives concrete examples. For older children use the novel *Chernowitz*, in which a boy is being tormented by a bully but doesn't want to tell his parents or teachers.

Go back through the list of actions from Mountains and Molehills, and identify those incidents which should be reported to an adult, discussing who would be the most logical person to tell—parent, teacher, police officer or other persons.

Children's Literature: Children as Victims

Stories are excellent vehicles for opening discussion about victims and abuse. Too often the abused child feels guilty and somehow responsible, which prevents communication and increases a sense of alienation. Stories about children with similar experiences, even if they do not give the child the courage to talk about his or her experience, do reduce the feelings of isolation. The use of books to help children confront and solve their personal problems has become an accepted and useful teaching method.

This list is only a sampling of what is available for primary and intermediate grade students. Many of the books can be read independently or they can be read aloud in conjunction with the activities.

The following levels are suggested but should not be viewed as restrictive, since many books are appropriate for all ages:

P = primary grades: 1, 2, and 3
I = intermediate grades: 4, 5, and 6
YA = young adult grades: 7, 8, and 9

TEASING

Caple, Kathy. *The Biggest Nose*. Boston: Houghton Mifflin, 1985. P An elephant child named Eleanor is teased by classmates who claim she has the biggest nose in the whole school. They keep threatening to measure it until Eleanor figures out a way to give them a poignant lesson why we shouldn't criticise others.

Berenstain, Stan and Jan. *The Berenstain Bears Learn About Strangers*. New York: Random House, 1985. P The popular Berenstain Bears deal with two very important issues for the younger child: knowing when to be cautious with strangers and knowing the difference between tattling and responsible informing. Warned by her parents to be wary of strangers, at first Sister Bear sees everyone and everything as scary, even the frogs and butterflies, until she learns how to decide whether a person is a stranger. Sister Bear is accused of tattling by Brother Bear until their mother explains that tattling is "telling just to be mean" but that reporting something to an adult is not always tattling.

Irma, Joyce. *Never Talk to Strangers: A Book About Personal Safety*. New York: Western Publishing Company, 1967. P This light-hearted rhyming book reinforces the rule about strangers in a way that doesn't frighten yet helps children to identify potential danger.

LEARNING TO SAY NO

Cosgrove, Stephen. *Squeakers*. Los Angeles, CA: Price Stern Sloan, Inc. 1987. P Squeakers, a young squirrel, is victimized by an elder mole who takes fur from her silver tail. Squeakers is afraid to refuse this adult until her parents teach her that all she has to do is say "no."

Wachter, Oralee. *No More Secrets for Me*. Boston: Little, Brown and Company, 1983. I First published in 1983, this book has had many reprintings because it has served a real need for parents and teachers. Four different stories illustrate that there are times when a child should say no to an adult. Each story involves an adult that is known to the child, not a stranger. This familiar relationship makes is much harder for the child to say "no."

THE CHILD AND SEXUAL ABUSE

Howard, Ellen. *Gillyflower*. New York: Atheneum, 1986. I and YA The "bad thing" that affects Gillian's life at home is incest. Typical of sexual abuse victims, Gilly feels ashamed and guilty until she learns from a friend that some secrets are not for keeping.

Irmin, Hadley. *Abby, My Love*. New York: McElderry/Atheneum, 1985. YA Written in journal style, this first-person account of sexual abuse is told by a fourteen-year-old girl.

PHYSICAL ABUSE

Byars, Betsy. *Cracker Jackson*. New York: Viking, 1985. I and YA Cracker wants to save his "second mother," his babysitter, and her children from an abusing husband. The story brings out the vicious cycle of abuse and how victims can permit themselves to be abused.

Roberts, Willo Davis. *Don't Hurt Laurie*. New York: Atheneum, 1977. I Reprinted often since published, this is the story of a young girl physically abused by her mother. Laurie is afraid to tell because she doesn't think people will believe that her endless injuries were not accidents but the result of attacks by her mother.

Peet, Bill. *Big Bad Bruce*. Boston: Houghton Mifflin, 1977. P Bruce, a great big bully of a bear, torments the partridges and rabbits who are smaller than him until a crafty witch magically shrinks his size. Little Bruce then becomes the victim. Bruce seems to change until on the final page he starts tormenting bugs and insects that are still smaller than him. The story raises questions about the validity of forcing the bully into the victim's shoes. The role switch story is excellent for reading aloud and generates good discussion on how to handle a bully.

Arrick, Fran. *Chernowitz*. New York: Bradbury, 1981. I and YA Bobby Cherno is tormented by an anti-Semitic bully in his class. Bobby has to wrestle with the problems of telling his parents, protecting himself, and his own desire for revenge. The theme of revenge as an unsatisfying and ineffective response to a bully is similar to the one in *Big Bad Bruce*.

Sleator, William. *Among the Dolls*. New York: E.P. Dutton, 1975. I A young girl who abuses the dolls in her dollhouse is "drawn into" the dolls' lives and is treated with the same cruelty she formerly imposed on the dolls. She learns that the "rough and violent things she had made them do had become their personalities." The author is a master at evoking a sense of horror and entrapment, and in this story the main character learns a better way to be from her experience.

NEGLECT AS ABUSE

Byars, Betsy. *The Pinballs*. New York: Harper, 1977. I Four children who are victims of different kinds of abuse meet at a foster home. Strangely, but realistically, they would all rather be back in their own homes no matter how bad it was. Bounced around they feel like "pinballs" until they learn to become a family.

Voigt, Cynthia. *Homecoming*. New York: Random House, 1981. YA A mother abandons four children in a shopping center. They survive by ducking authorities, sleeping in cemeteries and doing anything they have to to stay together as a family. The story of the Tillerman family continues in *Dicey's Song*, winner of the 1983 Newbery Medal.

Arlene F. Gallagher is an Adjunct Faculty Member at the Boston University School of Education. An author of law-related books, articles and filmstrips, she frequently works with school districts and law projects conducting in-service workshops. She is also the editor for the "Children's Literature and Social Studies" department of Social Studies and the Young Learner, *a new NCSS quarterly journal.*

Youth at Risk

Role-Plays and Partnerships/Middle and Secondary

Carolyn Pereira

Troy Thomas

Drop-out rates, unemployment, and drug use are part of the picture of youth at risk. So is the recent influx of people from countries with customs, cultures, and governments whose values conflict with the rule of law in this country. In large urban areas these "students at risk" are often in the majority. They are a challenge to educators, and have increased the difficulty of conveying positive values about our society and imparting the skills and knowledge that youngsters will need to become productive members of that society.

Obviously this is not just a problem for the social studies educator or the law-related educator. However, how can they become a part of the solution?

Citizenship has always been best learned through experience. The following examples are drawn from programs and materials developed by the Constitutional Rights Foundation. The first represents what can be done as a regular part of the ongoing curriculum. The second represents what can be done as a club.

Cross-Age Teaching—Youth and the Police

It isn't often you find high school students associating with eighth graders. They're doing it in Chicago, though, in a program that also includes lawyers and police officers. It began in 1985 with students from Lincoln Park High School enrolled in a law course combining efforts with Chicago police officers. They teach eighth grade students from racially and economically diverse neighborhoods about their rights and responsibilities under the law.

As a part of the eighth graders' study of the Constitution, high school students help the eighth graders role-play situations involving police and young people at school. Chicago police officers discuss the scenes with the students, describing how they would handle similar situations. Law students from DePaul University and lawyers recruited by the Chicago Bar Association Young Lawyers' Section discuss the legal aspects. With minor modifications, the model could be used anywhere.

Constitutional issues raised include freedom of assembly, freedom from unreasonable search and seizure, and trial by jury. There is a training component for the high school students, which takes about three hours; for the participating police officers and lawyers and law students, it takes one hour; and for the eighth grade teachers, it takes three hours.

Call the Police Activity

Students often think that legal restrictions are placed on them but not on those who enforce the law. This lesson gives them an opportunity to consider how rules, laws and court decisions also affect the police. A number of rights included in the Bill of Rights can be discussed in the debriefing of the activities.

OBJECTIVES

- To gain a better understanding of what it is like to be a police officer in modern American society.
- To show how the Constitution relates to the role and responsibility of the police officer.

PROCEDURE

1. The teacher should contact the local police organization and arrange for two officers to visit the class, if possible. A lawyer or law student should also be invited to take part. A planning session or sharing of the materials should take place to review the lesson.
2. Say to the students, "We are going to role-play some typical situations. Most of them do not involve a violent crime. All of them will involve typical encounters with young people in and around school. Some students will take the role of police officers, some will act out the situations and others may act as observers."
3. Debriefing should then take place using the following questions:
   - What are the facts of the situation? What happened?
   - Was the situation realistic? Has anyone ever known anyone to be involved in a similar situation? How did the role-players feel? How do you think people really involved in this situation would feel/act?
   - Did the police officers exhibit the characteristics most important to being a police officer? How did the role-players feel? What would have helped them be better police officers? What kind of training or support could help?
   - Have the police officers talk about similar situations

and how he/she handled them. What laws was he/she enforcing? What restrictions are placed on him/her in the work done?

- Have the lawyer or law student comment on the law involved.

4. Repeat procedure for each scene. Each scene should take about 15 minutes including the question and answer discussion period.

ROLE PLAY

Scene One finds a group of students standing in front of the local hot dog stand during school hours. The owner of the hot dog stand has called the police because he feels the noise the students are making is causing him to lose customers. As the eighth grade students re-enact this common scene they raise concrete questions about the rights and responsibilities of the students, the store owner, and the police. Rights are in question when they infringe upon others' rights. Are there any circumstances under which the First Amendment might apply in this situation? What if the students were protesting what they felt to be unfair hiring practices or unfair prices?

Scene Two has a group of students playing ball on the playground during recess. A fight ensues. One student appears to have a broken wrist. The school has a history of gang violence. What might the Constitution say about this incident? Currently the Constitution does not guarantee all the same rights to a juvenile as it does to an adult charged with a crime. Are there any conditions under which the student(s) accused of breaking the student's wrist should/could have a trial by jury?

Scene Three involves a parent who calls the school to tell the principal a rumor that there are two eighth grade students selling drugs to other students. The parent gives a description of the students but does not know their names. The principal in conjunction with the police questions two students who fit the description. Does/should the Fourth Amendment apply if the principal and/or police search the students and/or their lockers?

Specific Constitutional Issues for Each Scene of the Situation Role-Play

SCENE 1

Freedom of Assembly; Freedom of Speech (First Amendment): Rights are in question when they infringe upon others' rights.

SCENE 2

If there was intent, the student may find him/herself in juvenile court. Currently, the Constitution does not guarantee all the same rights to a juvenile as it does to an adult charged with a crime. A juvenile charged in a delinquency petition does not have the right to a trial by jury or right to bail (Sixth and Fourth Amendments). Discuss the arguments for and against these exceptions. *Note*: There is a movement to change these. The Cook County Juvenile Court in Illinois actually has some courtrooms with space for a jury in anticipation of a change in law.

SCENE 3

Freedom from Unreasonable Search or Seizure (Fourth Amendment) will come under discussion here. Police must have a warrant to search or seize except in incidences involving:

S – Stop'n'frisk
E – Emergencies
A – Arrests, abandoned property, airline or border searches
R – Right-in-plain-view
C – Cars, consent
H – Hot pursuit

A principal or authorized school person may search a locker for "reasonable cause" without a warrant because the courts have ruled that:

1) the locker is school property, not the student's; and
2) a principal or authorized school person is considered "in loco parentis" (acting in place of the parent/guardian for the good of the child).

Youth Community Service

On November 7, 1987, Joey Krakoff, a student from Hamilton High School in Los Angeles, had 800 community members and high school students wiping out graffiti throughout Los Angeles. Armed with 1000 gallons of paint donated by Standard Brands Paint Company, teams erased eyesores from over 50 sites. Joey is a member of a Youth Community Service Club sponsored by the Constitutional Rights Foundation and the Los Angeles public schools.

Youth Community Service (YCS) began in 1984 with funding provided by the Ford Foundation. The program is designed to help youth develop leadership skills and apply them in community service projects. Students from 22 high schools attend a weekend leadership training retreat and then meet on a weekly basis in their own schools to continue leadership development by planning and implementing their service activities. Each school has a trained teacher sponsor and two community volunteers. The community volunteers serve as role models and as links to business, government, the professions, and the community in general.

What Joey accomplished seemed impossible when he first suggested it to CRF staff and his school sponsors. But he had had two years of experience in the program and had learned more about how our system works and what it takes to make it work than most adults. Not only did Joey organize and mobilize students, he got the full support of the City Council. The law was not enough to get this job done. Government action was needed to secure the proper permits and assist in gaining public support and help for the project. Joey knows that being legally literate means not only knowing how to work within our system of laws but also knowing that law and government cannot solve all of society's problems. (See box on p. 22 for more information on this project.)

Carolyn Pereira is Executive Director of the Chicago Office of the Constitutional Rights Foundation.

Youth at Risk

Youth and the Law/Grades 5-9 — State Bar of Texas

Dean Matthews

Introduce the topic of "juvenile delinquency" with a continuum to explore students' feelings on the attitudes of lawmakers and society in general toward delinquent children. The continuum opens up a range of responses on a given issue. It allows all students to express an opinion and publicly defend that position.

Read the following statement to the class:

> The FBI Uniform Crime Report and the juvenile court statistics show that youth are responsible for much of the national crime problem. The picture looks even worse if you look at serious property crimes like car theft and burglary. The 11 to 17-year-old age group, representing 17.2% of the population, is responsible for 36-38% of the arrests for these crimes.

Present the following hypothetical: The state legislature is considering a new code (set of laws) dealing with delinquent children. Considering the statistics on juvenile crime, what concern would be reflected in the new laws?

1. Society is suffering from the crimes that juveniles are committing. The greatest concern in passing this new law is to protect society at all costs.
2. The welfare, protection, and development of the child must be the greatest concern of this new law and not the protection of society.

Ask students to place themselves on the continuum at the point that most nearly reflects their feelings.

Protect Society X________________________X Protect Child

Using the Continuum

Here is how to conduct a continuum. Draw a long line on the blackboard. At either end of the line create complete extremes of the issue. Have the students place their initials on the line to represent their stand. Do not allow anyone to take a middle position. After placing their initials on the line, ask students to give their reasons for holding that position. After the discussion, provide an opportunity for students to change their position as a result of new information.

The activity can be varied by using masking tape to make a line on the floor. Students can actually stand on the line at the position they choose. They should then discuss their reasons for selecting that position with students standing near them. Next allow each student or a representative of each basic position to justify the stand. Again students should be permitted to change their positions as a result on the discussion.

Each student can make an individual continuum by taking a sheet of paper, drawing a line on the paper, and placing an X at the appropriate point. Next ask the students to circulate and discuss their position with students whose positions are similar to and different from their own.

Ranking the Alternatives

Then do a ranking exercise. Ranking gives students practice in choosing among possible alternatives and in openly supporting and defending or explaining their choices. It stimulates more critical consideration of an issue that might otherwise occur.

Divide students into groups of five based on where they stand on the continuum. Instruct each group to rank what they think the purposes of adult and juvenile courts should be. Write purposes on chalkboard:

	Juvenile	Adult
1. to help the person change his/her ways		
2. to protect society from lawbreakers		
3. to punish the guilty		
4. to make sure the accused is treated fairly when he/she comes before the court		

After the class has participated in an activity where several ideas have emerged, ask the students to rank these choices according to their own preferences. The ranking can be conducted in a large group by calling on different class members, or it may be done in smaller groups. After the ranking, a class discussion may follow with students stating the reasons for their choices.

DISCUSSION QUESTIONS

1. Did you rank the purposes for the juvenile court and adult court about the same? Or differently? Discuss why.
2. What is the main purpose of juvenile court? How is this illustrated in juvenile procedure?
3. Why is greater emphasis placed on rehabilitation for juveniles than for adults?

Case Study/Moot Court

Case study allows students to grapple with real issues, to reach and support a decision, and to weigh the consequences of that decision. In approaching a problem through a case study, the student will gain practice in all levels of thinking from simple recall to evaluation.

Provide students with the facts only of the case. Use questions and role playing to identify the issue(s), develop arguments, and reach a decision. Next, provide students with the court decision. Use questions and discussion to compare and contrast their decision with that of the court and to consider the implications of the court's decision.

IN RE GAULT

Facts: The *Gault* case started in 1964, when Gerald Gault and a young companion were brought before the Arizona juvenile court. The two of them, it seemed, had been making dirty phone calls "of the irritating, offensive, adolescent sex variety." One of the calls was made to a Mrs. Cook, who reported the boys to Deputy Probation Officer Flagg.

Things moved fast after that. Young Gault was taken into custody that day by the sheriff and brought to the local detention home. When his mother arrived there, she was told to report to court the very next day. The next day Officer Flagg filed a short petition with the court, which was not served on Gault or his mother. In fact, neither saw it until two months later. Even if they had seen it, it wouldn't have helped them understand the charges against Gerry, since it did not deal with the facts of the case and merely said that he was a delinquent "in need of the protection of this Honorable Court."

When the Gaults appeared in court the day after he was arrested, there was no lawyer for young Gault. It is unclear exactly what the substance of the calls was, since no transcripts were made of the hearing. Of course, as in all juvenile courts, the victim was not there.

At later hearings in the federal courts, the judge and other witnesses were unclear about the testimony that day in juvenile court. Young Gault, in response to questioning by the judge, may have confessed that while he dialed the number his companion actually made the call. At any rate, the hearing adjourned with Judge McGhee saying he would "think about it." Seven days later (during three of which Gerald was in the detention home), the judge was ready to pass sentence.

Had Gerald been an adult, he could have been sentenced to a fine of $5 to $50 or imprisoned for up to two months. But because he was a child, only 15 at the time, he was committed to the state industrial school until 21, unless sooner discharged by law.

The precise reason for Gault's sentence was unclear. He was on probation at the time for purse snatching, and Judge McGhee claimed authority from the statute which defined delinquency in part as "habitually involved in immoral matters." However, the judge later admitted he had only vague recollections of Gerald's prior behavior.

Issue: Whether a juvenile should have the same constitutional protections as adults.

Decision: The Supreme Court ruled in favor of Gault on four points:

1. Notice. He was not given any advance notice of court hearing and there was no opportunity to prepare a defense. The notice must state what offense the person is charged with. The Court did not feel proper notice had been given.
2. Right to Counsel. The Court ruled that the Fourteenth Amendment's Due Process Clause requires that in a hearing where a juvenile may be sent to an institution and may lose his/her freedom, the child and his/her parents must be told of the child's right to have a lawyer represent him/her. If they cannot afford a lawyer, they have the right to have one appointed free of charge.
3. Self-Incrimination. The Court said if hardened criminals had a right to remain silent when accused of a crime then certainly children should have this right, too. The Court felt that this constitutional right was to be accorded to children as well as adults.
4. Cross-Examination. The Court ruled that the right of

an adult to face and cross-examine (question) witnesses was also guaranteed to juveniles by the Constitution. Gerald Gault's right to face his accuser was denied him because Mrs. Cook, the person who accused him, never appeared at the hearing.

It's important to note that *Gault* left many questions unanswered. The justices did not rule on two issues before them: whether juvenile courts had to keep transcripts of delinquency proceedings and whether juveniles had the right to appeal. And there were many other questions not even raised by *Gault*, such as whether juveniles had a right to trial by jury or were covered by the Bill of Rights' protection against double jeopardy.

The decision was not unanimous. Justice Harlan concurred in part and dissented in part. He agreed that Gerald had been denied due process, but argued that the Court had gone too far. By stipulating the privileges that must be accorded to youths, he felt the decision prevented legislatures from coming up with creative solutions to juvenile problems.

Justice Stewart dissented entirely. He pointed out that juvenile hearings are "simply not adversary proceedings" and should not be converted into "criminal prosecutions," with all the attendant due process trappings. Reminding the Court that the juvenile system was originally set up as a reform that would remove youngsters from the harshness of the adult system, he called the *Gault* decision "a long step backwards into the nineteenth century."

Ask the class to comment on the statement made by Justice Fortas in the *Gault* case: "Under our Constitution, the condition of being a boy does not justify a kangaroo court."

IN RE WINSHIP

Facts: In *re Winship* (397 U.S. 358) raised one of the issues not reached in *Gault*, i.e., standard of proof. Prior to that case, state statutes permitted many juvenile court judges to find guilt in delinquency cases using a preponderance of the evidence standard. In adult courts, the burden has traditionally been proof beyond a reasonable doubt.

Generally speaking, the standard of a preponderance of the evidence is met when the judge finds that the existence of guilt is more probable than its nonexistence. The "beyond a reasonable doubt" standard is met when a judge has an abiding belief to a moral certainty that a person is guilty.

The trial judge in Winship's case candidly admitted that while he could not find the young man guilty of larceny beyond a reasonable doubt, he could find him guilty by a preponderance of the evidence. Finding him so, the judge committed the 12-year-old to the state training school for an initial period of 18 months, subject to extensions until his eighteenth birthday.

Issue: Whether a juvenile must be proved delinquent "beyond a reasonable doubt."

Decision: The Supreme Court ruled in favor of Samuel Winship. The Fourteenth Amendment's Due Process Clause required proof "beyond a reasonable doubt" in adult criminal cases. The Court said that the same test should be applied to juvenile cases. According to the Court, the heavy burden of proof would not hurt any of the other protections given to juveniles in court proceedings. The new standard wouldn't disturb the confidentiality of juvenile proceedings, nor affect the informality, flexibility, or speed of the hearing, nor limit a wide-ranging review of the child's social history and the creation of individualized treatment for him/her. What it would do is assure that juveniles in jeopardy of losing their liberty would have one of the "essentials of due process" available to adults.

Chief Justice Burger and Justice Stewart joined in a short dissent. They called the decision a regression to an earlier system that would frustrate the "legislative judgment of the States" and further straitjacket an "already overly restricted system." They pointed out that the juvenile court needed more support, more staff, and better facilities—and, most of all, "breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court."

MCKEIVER V. PENNSYLVANIA

Use a moot court simulation to explore the arguments in this case. Divide the class into three groups. Assign one group of nine to act as the Supreme Court. Assign the other two groups to act as petitioner (McKeiver) and respondent (Pennsylvania) in the *McKeiver v. Pennsylvania* case. Each group should meet for 10 minutes to brainstorm arguments in support of their side. Remind them to use precedents established in the already studied *re Gault* and *re Winship* cases. They should develop and refine their arguments and select a spokesperson/attorney.

Attorneys will have 5–10 minutes to argue their side: McKeiver will start first and be given the opportunity for a three-minute rebuttal after Pennsylvania's presentation. Justices may interrupt the spokesperson/attorney at any time to ask questions. Justices should be allowed to deliberate in front of the groups. The Chief Justice will call for a vote after deliberation.

Debrief, comparing the moot court's decision and attorney's arguments with the real case. Highlight the better developed arguments. Compare moot court procedure with actual Supreme Court procedure.

Facts: When McKeiver was 16, he was charged with stealing 25 cents from another boy. He requested a jury trial, but since the Pennsylvania statute did not require jury trials in juvenile proceedings, he was tried before a judge and found guilty.

Issue: Whether a juvenile is entitled to a jury trial in a juvenile proceeding.

Decision: The Supreme Court ruled against McKeiver. The Court said that the Fourteenth Amendment did guarantee a jury trial in an adult proceeding but that a juvenile trial was not exactly the same as an adult criminal trial. The Court said that due process in a juvenile case meant that the court hearing must be basically fair. They said that a hearing before a judge rather than a jury did not mean that the hearing was not fair. Many adult cases are heard before a judge. The Court also was afraid that requiring a jury trial might result in a public hearing and destroy the privacy of juvenile hearings.

Excerpted from Law in the Lone Star State, *available from the State Bar of Texas.*

Tom Herzberg

2041

YOUTH AT RISK

Howard A. Davidson

Confronting Child Abuse

In the '60s and '70s, great strides were made to protect children. An overloaded child protective system and funding cutbacks in the '80s are challenges to that progress

In 1962 the "battered child syndrome" was first publicly identified. This term, coined by Dr. C. Henry Kempe and his associates at the University of Colorado School of Medicine, characterizes a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent. At about this same time, the first state mandatory child abuse reporting laws appeared, and in an extraordinary legislative reaction, within five years every state had enacted similar statutes. Concern over this issue since that time has resulted in a federal child abuse act, a federal child-victim focused law reform statute, a federal criminal law on child pornography and other forms of sexual exploitation, as well as comprehensive amendments to federal and state child welfare laws. These developments have produced sweeping changes in the legal process affecting "endangered" children.

Analyzing the Statistics

In 1965 the Children's Bureau of the U.S. Department of Health, Education, and Welfare (now Health and Human Services) initiated a series of nationwide studies on child abuse, conducted within the Child Welfare Research Program of Brandeis University. Although limited to physical abuse, reports compiled in 1967 totaled about 9,500. Almost twenty years later, annual reports compiled by the American Humane Association (AHA) of neglect and abuse combined totaled over 2 million!

This dramatic increase is explained partially by the fact that in 1967 state mandatory child abuse reporting laws were still new and limited in scope. Few professionals listed in the laws as "mandated reporters" understood their responsibilities or how to exercise them. But during the following twenty years, state, county, and local child protective service agencies developed a sophisticated ability to collect and process reports. Central registries of abuse and neglect reports and case data were promoted and widely established. In addition, the federal Child Abuse Prevention and Treatment Act (42 U.S.C. §5101, et seq.) and a growing media awareness contributed to mass consciousness raising.

During this time, the education community has had to learn how to detect child abuse and neglect and what steps to take in these situations. Although reports from education personnel have increased over the years, in 1985 they still accounted for less than 15% of the cases reported to child protective service agencies. The largest proportion of reports—over 46% in 1985—came from family relatives, friends, neighbors, and other nonprofessionals.

Over the past 25 years, juvenile and family courts and child protective statutory systems have been expanded, if not transformed. As of 1983 (the last year such projected court data was available) there were slightly less than 200,000 new abuse and neglect "child protection" cases filed annually. This was the largest number of such judicial actions ever brought in one year, and these figures have increased each year since 1970 according to the National Center for Juvenile Justice. Not only are the courts receiving increased numbers of cases, they are also now holding many more hearings on individual cases as a result of new case review laws and court rules.

In evaluating 1984 data, the AHA found that only a small proportion of reports actually result in court action. Of all substantiated cases of abuse and neglect, only 16% were brought into court. Surprisingly, only 3.3% of substantiated reports of major physical injury to children led to child protective court action, versus 54.6% of substantiated neglect cases involving alleged "deprivation of necessities." Sexual maltreatment of children—not widely discussed before the late 1970s—is much more likely to lead to court proceedings, especially criminal prosecution of the offender, than a reported case of physical abuse.

Earlier data discloses that cases resulting in court involvement are more likely to lead to the child's removal from the home. By contrast, mental health, homemaker, and day care service are provided less often in cases that go to court. The importance of providing these services as an alternative to unnecessary removal of children from their home is an important principle of the landmark federal child welfare law of this decade, the Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272). Data has also shown that families involved in child protective cases are disproportionately burdened with such problems as alcohol or drug dependency, poor health of the caretaker and child, inadequate housing, social isolation, spouse abuse, and a general inability to cope with with responsibilities of parenting.

In March 1987 the U.S. House of Representatives Select Committee on Children, Youth, and Families issued a report entitled *Abused Children in America: Victims of Official Neglect.* Based on a nationwide survey, it found that Child Protective Services (CPS) agencies are in fact now dealing with more serious and complex cases, often involving more dysfunctional families. According to the report, although child abuse reports rose 54.9% between 1981 and 1985, total financial resources (federal, state, and local) to serve these children rose by less than 2% during this same period. During these years the states lost more than $170 million alone in federal Social Services Block Grant (Title XX) money, the largest single source of funds for services to abused and neglected children. Child Abuse Prevention and Treatment Act funds were also cut during this period.

Many of the states suffering the greatest shortfall of funds related to child abuse were those which underwent the steepest increase in reported cases. It is therefore no surprise that CPS agencies have begun to seriously address how they can move quickly and effectively to screen cases in order to ferret out reports that are later deemed "unsubstantiated" or "unfounded," the percentage of which varies from state to state from approximately 25% to 60%, with the average according

Youth at Risk: Projects Respond

CRF Youth Community Service Program

The Constitutional Rights Foundation Youth Community Service Program (CRF/YCS) started three years ago as an offshoot of a leadership development project in Los Angeles. It provides a way for high school students to become involved with the community and its people. For 25 years, CRF programs have linked the educational process with the community. YCS, a natural extension of these efforts, helps high school students establish meaningful relationships within their communities, develop leadership skills and recognize that each young person can make a difference.

Funded by the Ford Foundation, the program has two premises: (1) that the students who are actively involved in the community learn more about their community, and are more likely to avoid delinquent behavior, and (2) that young people will only feel part of the community if they are involved.

CRF's initial evaluation shows that the program does indeed help prevent delinquency. One of the things that happens in community service is the building of self-esteem. Jackie Tabigne, a second-year YCS member from Grant High School, explained, "YCS helped me realize that we, the youth of today, can make a difference. We can feed the hungry, clean our streets, strengthen the awareness of the community, give our love to those who need it, share our ideas with others who will listen and, most of all, let everyone know we care."

What do YCS projects actually accomplish? Efforts vary from painting numbers on previously unidentified classroom doors to regular visitations at convalescent homes. Students have organized blood drives, adopted a shelter for battered women and children, promoted student awareness of the problems of drunk driving, helped in programs to feed homeless people, embarked on campus beautification projects and much more.

With the support of principals and teacher sponsors at each school, as well as CRF staff, 500 YCS participants are developing leadership skills and taking initiative to identify needs, plan activities and complete community service projects involving additional youth. Volunteer community mentors are helping students establish meaningful relationships with their communities.

CRF staff members develop comprehensive materials and coordinate all aspects of the program. Each year CRF conducts a two-day teacher training session, a two-day leadership training retreat for the students, and special day-long conferences for additional skill development and networking opportunities with community representatives. A year-end celebration brings together students, teachers and community members to assess and recognize the efforts of the youths.

CRF tells us, "In LRE the focus is upon democratic principles, and the rights and responsibilities of citizens. There is no better way to teach these skills and concepts than through participation and service. De Tocqueville called this concern for cooperative endeavors a 'habit of the heart.' Community service is really a way to teach the habit of the heart. Students have such a great sense of self worth in getting involved, in knowing that the library is open in the evening because of their volunteerism. In addition, they are learning real life volunteerism and not just hearing about it. It teaches them dignity, responsibility and, of course, communication skills."

The UCLA Center for Evaluation has just completed an evaluation of this program and determined that academic achievement greatly improved. For the teachers involved, this finding was a real morale booster.

Kids at Risk in the Hispanic Community

The National Council of La Raza has, over the last several years, been engaged in an effort to develop and demonstrate five innovative, community-based approaches to improve the educational status of Hispanics. Three of the five models are designed to address school-age groups and special populations, which both national research and local community experience indicate are among the most educationally at risk. The remaining two projects address the needs of parents and teachers, whose informed assistance is essential to improve educational outcomes for Hispanic children and youth.

The five projects being demonstrated are:

The *Academia del Pueblo*, which addresses the problems of early academic failure and grade retention faced by many Hispanic children in elementary school by establishing after-school and summer academics to provide reinforcement, and supplemental educational assistance to help children meet and exceed grade retention and grade promotion requirements in elementary school.

Project Success is a program de-to the Select Committee report being 44.8%.

To encourage improvements in the CPS system, the ABA, in association with the American Enterprise Institute and the American Public Welfare Association, in March 1988 published a document entitled *Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decision Making*. In a similar vein, the National Association of Public Child Welfare Administrators in January 1988 published a set of *Guidelines for a Model System of Protective Services for Abused and Neglected Children and Their Families*. Both documents reflect a concern that CPS agencies have become overburdened with inappropriate responsibilities, that the forms of child maltreatment must be more clearly defined, and that the CPS system should be reserved for cases where children have been seriously harmed or are in imminent danger of such harm.

Legislative and Judicial Reform

Although all states have amended their child abuse laws within the past 25 years, many statutes still fail to define with precision those instances where the state may forcibly intrude into the family, remove children, and sever the parent-child relationship. This, as well as the broadening of mandatory reporting laws and the growth of citizen concern about the problem, has caused the number of cases in protective caseloads to skyrocket, which in turn has limited the agencies' ability to provide prompt investigations, thorough services, and comprehensive casework supervision. In some states, lawsuits have been filed to address the agencies' failure to protect children or to respect the rights of the family in the investigation and intervention process.

Where possible, state intervention laws and formal agency regulations should be reformed to provide more clarity as to the legal definition of child abuse and neglect. Existing laws and regulations should be reviewed to see how they could protect children without resorting to overbroad and imprecise language. Less subjectivity is needed, and clearer guidance is required, for both the general public and the professional community as to what constitutes child abuse and neglect. Wherever possible, catchall phrases like "without proper care" or "injurious to the child's welfare" should be replaced with specific kinds of mistreatment and criteria for determining whether a case belongs under a given category.

Lawmakers and legal advocates also should help assure that all necessary services, despite their cost, will be readily available to abused and neglected children and their parents after a case is reported. This is particularly true where such services can avoid the needless separation of children from their families. The costs of long-term foster care certainly exceed the costs of parent aide, homemaker, day care, or other home-based services. Being in an indefinite foster care status also can exert a great psychological penalty on children whose needs for stability in placement and caretaking are acute. Every child, therefore, who either has been, or may be, removed from home because of abuse, neglect, or incapacity of his or her parents, should be the focus of careful and timely long-range planning by the intervening child welfare agency, as well as by the court.

It is also important to thoroughly review the state laws that govern the process of reporting and agency intervention, as well as the judicial procedures used in child abuse and neglect cases, both in juvenile court and the criminal justice system. Some of the most critical legal areas include:

- assuring that child protection court cases are speedily docketed and resolved, that these cases are not unduly delayed because of related criminal proceedings, and that creative use be made of pre-trial mediation approaches and mandatory case conferencing to help reduce the level of contentiousness in these matters;
- establishing formal court rules which govern the handling of child protection cases, from initial notice to necessary parties and appointment of counsel through dismissal, termination of parental rights, or other final outcomes (the ABA Child Advocacy Center has published a set of sample court rules, with full commentary, that can substantially help judicial administrators in this area);
- providing for the protection of young child witnesses so that they are not unnecessarily traumatized in the course of judicial system involvement (the ABA has endorsed a set of *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*). This is also an area in which the federal government has enacted legislation to assist the states, known as the Children's Justice Act (Public Law 99-401);
- requiring the reporting by professionals of suspected abuse or neglect where they have information from *any* source, not just through examination of the child, that suggests maltreatment; making sure that legal privileges and confidentiality rules do not inhibit either reporting or sharing of all relevant information with protective agencies; and mandating that these agencies provide feedback to the original reporters on the outcome of their investigations;

signed to serve Hispanic youth in junior high and middle schools to increase their high school completion and college entrance rates by providing them with academic enrichment, career and academic counseling, and other special opportunities.

***Project Second Chance* is a drop-out recovery program which serves those Hispanic youth who have already left school, and provides them with both education and counseling so that they can either gain a high school diploma or prepare for the GED.**

***Parents as Partners* is a program that recognizes that Hispanic parents are their children's most important teachers, but often lack the necessary skills to help their children progress successfully through school. It provides training and assistance to parents so that they can become active in their children's education. The Parents as Partners program is also incorporated in all the models to improve and increase parent involvement.**

The *Teachers' Support Network* brings community resources together to provide training and assistance to Hispanic teachers, and other teachers working with Hispanic children, so that those teachers may benefit from the latest educational research and curriculum and receive greater community support for their efforts.

Each of these projects is designed to be implemented by a Hispanic community-based organization, in cooperation with parents, schools, members of the business and corporate communities, and other appropriate local organizations. La Raza assists demonstration sites in securing resources to demonstrate the selected model projects. These models are currently being tested and evaluated in 13 different states and 22 cities.

- utilizing a multidisciplinary, interagency approach in the investigation of cases and in making intervention decisions. The coordination of judicial actions which may simultaneously be taking place in the criminal, juvenile, and domestic relations court systems is also absolutely critical; and
- evaluating whether the penalty structure for child abuse-related homicide, severe physical abuse, and sexual maltreatment sufficiently reflects the gravity of these offenses, whether judges have clear authority to order long-term closely monitored treatment for offenders as part of their sentencing, and whether certain endangered children (e.g., those in households with drug-abusing or extremely violent parents) are adequately covered under existing child protection laws.

Need for Legal Expertise

Another problem in the child protective system is that judges and lawyers have not been as effective as they could be in getting overburdened child welfare agencies to carry out their responsibilities and to be more sensitive to the needs of children and families. Social workers who handle child protective cases also require a better understanding of the law and easier access to legal consultation. The ABA has been a leader in efforts to educate and assist child welfare workers. But there rarely have been adequate resource allocations made within child protective and child welfare agency budgets to assure that

Youth at Risk: Projects Respond

Helping Teens at Risk from Crime

Teens, Crime and the Community is the result of a partnership between the National Crime Prevention Council and the National Institute for Citizen Education in the Law (NICEL), working with the Office of Juvenile Justice and Delinquency Prevention. It responds to the fact that teens are victimized at two times the rate of the rest of the population. The Teens, Crime and Community program builds on the positive strength of teens to reduce crime by teaching crime prevention strategies, and then involving students in community projects. So it has two major components: an education component that makes students as smart as possible about individual crime prevention, then an action component that empowers teens to design crime prevention projects for use in their own communities.

The program begins with the development of a local site team, a local partnership between a law-related education person, a crime prevention specialist, and a teenager. We have tried to involve teens in every aspect at the local level and at the national level. Site teams steer the local project, and they come up with the plan for teacher training and community resource training at the local level, and eventually work in mentoring the student projects within the cities.

Law-related education is a natural vehicle for this national initiative because of its emphasis on rights and responsibilities, and active participation and problem-solving skills. The book, *The Curriculum*, gives students an opportunity to learn everything from the nature and impact of crime to crime prevention strategies, and includes individual safe student and safe school strategies.

The program gives students an educational background and then asks them to apply that information in a larger world, in a sense of community, however that is defined. Students designing these projects define community sometimes to mean their own school, and sometimes to mean the city/community area around the school, and sometimes to mean the larger community.

In addition to involving students in improving their own safety, the curriculum asks this larger question, "How can I make my community safer?" The action component asks students to carry out a project in which they take the leadership role. These projects involve a larger group of students, normally, than the students who have just taken the curriculum. So the program has really reached a larger number of students through the youth projects than through the curriculum component.

These students have dealt with a lot of different issues. Some of the student projects that have grown out of this program in St. Louis and in Knoxville have resulted in the development of school-based mediation programs. There have also been student videos done on topics within the curriculum, such as substance abuse, child abuse, and vandalism. Students have done cross-age teaching projects where students in the 9th and 10th grade have taught younger students in the elementary schools about what they have learned.

The program is in its third year. It has been in ten cities during the first two years, in approximately 150 high schools. It has had contact with about 15,000 teenagers in the course of the first two years. In this third year, it has added nine new cities. Some of those cities are funded through the Office of Juvenile Justice and Delinquency Prevention grant. But a number of the cities have come into the project by doing private fund raising—because they liked the curriculum and liked the idea of student involvement in local projects.

The National Urban League Response

Since its inception in 1910, the National Urban League movement has built a long, proud and successful record as a community-based organization providing direct services to the black community.

Initial programming centered on the areas of employment, job training, housing, health and social services. Seventy-eight years later, these remain as centerpieces of the League's efforts. However, growing alarm over issues particularly related to black young people has resulted in the addition of other program elements in the areas of education, teenage pregnancy, single female heads of households, crime, and voter education and participation.

A number of disturbing facts clearly define the issues:

- Public schools continue to graduate students deficient in basic reading, writing and mathematics skills;
- Dropout rates from high school are two to three times greater for black

legal consultation and training needs are met.

Today, many public social service agencies lack their own "in-house" legal staff and therefore depend on the district attorney's, county counsel's, or state attorney general's office to provide legal representation of their case workers. But these lawyers can sometimes be inaccessible when workers need to discuss the possibility of intervention, prepare for court, or present their case to a judge. To help agencies measure the scope and quality of their own legal representation in court cases, the ABA has developed a special evaluation manual for assessment of these services. However, we also must not ignore the need for legal counsel to people in the education, mental health, and medical professions. Very few public school systems or large municipal hospitals have full-time attorneys on their staff specifically to provide consultation to personnel on child abuse-related legal issues.

Preparing a lawyer for work in the child protection field should start in law school. Students increasingly are beginning their legal education with prior work experience in the human services field. Although courses on juvenile delinquency have been common since the 1960s, and broad family law courses are available at almost all schools, few law schools offer special courses or clinical opportunities specifically related to state intervention into the family. The ABA has recently developed a model curriculum that can be used to teach a specialized law school

students than for white students;

- Dropouts annually cost the nation $240 billion in lost revenues and increased costs for welfare and correctional system services;
- A U.S. Labor Department report, "Workforce 2000," indicates that unless education achievement is drastically upgraded, by the year 2000 only half of the new black workers entering the labor force will be employed.

In response to what has generally come to be perceived as a national crisis in the public education of the nation's children, the National Urban League launched its education initiative in September 1986. The initiative is a five-year plan of action whose goal is to mobilize the network of 112 Urban League affiliates and their communities in a cooperative effort to upgrade the quality of education and education performance for students in general, and for black, poor and minority students in particular, in grades pre-kindergarten through high school. To achieve this goal the Urban League is working in four program areas:

Community Mobilization: To develop school/community collaborations, to identify problems, and to develop and implement plans for solving them.

System Change: To work on changing school policies, procedures and practices that unfairly impact on black students.

Academic Assistance: To provide direct educational services in the areas of tutoring, cultural awareness and black history programs.

Support Services: To assist young parents develop parenting skills and ways to help their children with school work, and to provide opportunities for informal student counseling and mentoring by community leaders.

A major emphasis in each of the four program areas is on working toward educational equity and excellence. As defined, equity holds that in addition to access, the educational system must provide a learning environment in which black, minority and poor students are able to acquire skills and demonstrate results commensurate with those of white students. Equity can also be measured by outcomes such as reduction in drop-out and push-out rates, improved attendance, reduction in the disproportionate representation of minority males in disciplinary actions, and improved retention rates of minorities in four-year higher education programs. Excellence refers not only to the quantity and quality of resources and teaching committed to the educational enterprise, but to the high levels of performance expected and demanded of students by teachers and parents, and by students meeting these expectations.

Under the auspices of the education initiative, a number of Urban League affiliates have developed significant programs targeted to at-risk youth.

Flint, Michigan: Conflict Resolution School Initiative

Conflict mediation techniques are used in resolving conflicts between high school students instead of standard disciplinary measures, thus reducing the incidence of school suspensions. Student, staff and community volunteers are trained as conflict conciliators. To date, 45 students and 36 adults have been trained. In January 1988, 65 middle school students began training.

Pittsburgh, Pennsylvania: Peer Tutoring

A tutoring program pairs high-achieving 9th grade tutors with 4th-6th grades who are more than six months below national norms on standardized tests of basic skills. Tutoring in computer skills is also offered for 90 minutes three afternoons a week.

Seattle, Washington: Disproportionality Task Force

The Task Force consists of 20 school district representatives and 19 community representatives including members of local justice agencies. Disproportionality refers to the overrepresentation of the number of students of a particular ethnic group in any given area of education such as disciplinary action or low academic achievement. The goals of the task force are to develop and implement a comprehensive community-wide action plan to improve the academic achievement of minority students, and eliminate disproportionality in the Seattle public school system by 1990.

If we accept the notion that youth represent the future strength and well-being of our community and nation, then we must all accept some of the responsibility for seeing that they are educationally prepared. The National Urban League has recognized and accepted the challenge.

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course in child protection intervention and litigation. This could also be adapted for use by graduate students of social work and even for use at the undergraduate course level. Universities with graduate schools of both law and social work should explore not only the possibility of joint degree programs, but also the opportunities for cross-fertilization and sharing of ideas and backgrounds.

In addition, clinical education programs that can give law students a chance to actually handle child abuse and neglect, foster care review, or other child welfare cases must be expanded, for which models already exist at several schools. Government and foundation support should be more readily available for law school legal assistance clinics that demonstrate effective use of students in representation of children, parents, or child protective agencies. Continuing legal education programs also need to be prodded to devote attention to the child welfare area, with a special emphasis on helping lawyers to better understand child development principles.

Judicial Improvements

Insufficient educational opportunities have been available for the training of judges on the practical aspects of child and family dynamics and on handling child abuse and neglect cases. Where training programs have taken place, they have been quite successful, but practical ways of freeing judges from their crowded trial calendars need to be found so that more judges can avail themselves of these opportunities. Because state legislatures or county commissioners rarely allocate adequate funds for judicial education, chief administrative judges have been inhibited from developing such specialized programs. They may therefore need financial assistance from the federal government or the private sector to undertake this training.

Another important child protective reform is the consolidation of all state intervention cases and intrafamily conflict cases within one specialized court system. While cases involving children and families usually are heard in courts of general jurisdiction, they also are handled in juvenile courts, probate courts, and other judicial forums. This lack of consistency in the way child abuse, child custody, and termination of parental rights cases are handled from court to court causes much confusion. In addition, the court that handles a child abuse matter may be different from the court with jurisdiction over a termination proceeding, custody dispute, or adoption case.

Unfortunately, juvenile court assignments, or the hearing of juvenile cases as part of a full range of criminal and civil actions, often are considered less important within the framework of the judiciary, and these positions sometimes go to judges with the least seniority and experience. Rotating judges in and out of juvenile and family court positions is common. The result is that once the judges become familiar with child welfare issues, they must move on to other areas. Although rotation of judges often is favored over an indefinite tenure on a specialized court, most experts oppose the three-to-six month rotation that is so common today. In addition, some judges are assigned to juvenile or family court without having demonstrated a special interest in the social and legal problems of children, youth, and families.

The ABA House of Delegates, in approving the *Court Organization and Administration* volume of its Juvenile Justice Standards, has supported the creation of a special "family court division" of the highest court of general trial jurisdiction of each state. In doing so, it has joined with recommendations of the National Advisory Commission on Criminal Justice Standards and Goals and the U.S. Department of Health and Human Services to broaden the scope and increase the strength of the juvenile court by giving it jurisdiction over a wider array of family-related legal problems.

Representation of Children

Before 1967, when the Supreme Court issued its historic *In re Gault* decision, 387 U.S. 1 (1967), lawyers for children were rarely seen in juvenile courts. But that case, which held that court-appointed counsel for children in delinquency proceedings is essential as a matter of constitutional law, failed to state whether legal representation would also be required for children in abuse and neglect cases. As a result, many children who are the subjects of child maltreatment or related termination of parental rights proceedings still do not have a court-appointed *lawyer* as a matter of right; it is generally within the discretion of the trial judge to appoint such counsel.

Almost all states now provide for abused and neglected children to have some form of independent representation, often through the advocacy of a lay volunteer guardian *ad litem* or court-appointed special advocate (referred to as "C.A.S.A."). However, these appointed advocates for children are often confused about their proper role, and they are frequently lacking in essential training on child development and family conflict issues. Whether or not the child's court-appointed advocate is a lawyer, he or she needs to clearly understand the parameters of his or her responsibilities. But only a few state laws or court rules, as well as the ABA Juvenile Justice Standards, provide any guidance. We need to create a new field of specialization for those concerned with representation of children in order to provide a focus for the resolution of these concerns. We also need an acceptable code of ethics or professional conduct for those who undertake the task of advocating for children in court. Don Bross, founder and executive director of the National Association of Counsel for Children, suggests the creation of a legal specialization called "pediatric law," in which lawyers would be well versed in all child-related areas of the law. That membership organization has become a leading force in the improvement of legal skills relating to child protection, and it works closely with the ABA's Child Advocacy Center.

Room for Reform

The ABA has been instrumental in helping identify areas where the system of state child protective intervention can be improved. The Association also has been at the forefront of legal efforts to assure the enhanced protection of children from serious abuse and neglect. But the legal profession must become more involved as a whole in the work of state task forces, community-based interdisciplinary councils, and other state and local activities related to child abuse and neglect. Many states now have special bar association committees on children and the law which formally examine state intervention issues, explore law reform options, and develop legislative proposals. All state and local bar groups should establish such committees. We also need a concerted approach by the bar towards improving legal representation for each of the parties in child maltreatment cases. Finally, the bar should monitor compliance with federal and state child welfare laws to help assure their full implementation. The complete protection of children through the legal

(continued on page 39)

Youth at Risk

Teens and Crime Prevention/Secondary **Judith A. Zimmer**

Tom Herzberg

Once every 19 seconds a teen in the United States is the victim of a crime. Teens are victimized by violent crimes at twice the rate of the general adult population and 10 times the rate of the elderly. Few people realize that teens are the most highly victimized age group in our society. As a society, we typically focus our attention on teenagers when they cross some pathological line—violent crime, substance abuse, pregnancy, suicide. Then we try to diagnose the problem and fix it.

The Teens, Crime and the Community program, from which this lesson is taken, builds on the positive strengths of teens to reduce crime and build a safer community. The program was designed by the National Institute for Citizen Education and the Law and the National Crime Prevention Council. The program has two components: education and action. These activities are part of the text, *Teens, Crime and the Community*, which provides the educational component for the program. The action component involves students in assessing the crime prevention needs in their community and designing a project to address some of those needs.

Objectives

As a result of these activities students will be able to:
- identify who are commonly the victims of crime.
- discuss community services which are available to victims.
- discuss the causes of crime.
- explain some roles teens can play in community crime prevention.

Activity 1: Use Your Experiences

This activity is designed as a discussion starter. Students are asked to comment on a problem based on their own experience. Teachers or resource persons can use this discussion as a way of assessing how much information students have about the topic. Students should be encouraged to brainstorm and to piggyback on the ideas of others. The following questions will set the stage for the rest of the activities:
- What is meant by the word "crime"?
- What crimes are most common in your community? In your school?
- What could you do to help solve the crime problem in your school?
- Do you know anyone who has been the victim of a crime?
- How did the crime affect the victim?
- What community resources were available for the victims?

Student Reading Material

WHAT CAUSES CRIME?

Experts give many reasons why people commit crime. But no theory is fully accepted by crime control experts. Professionals who have studied the problem of crime and criminal behavior have suggested different theories as to why people commit crimes. The following sections describe some—but not all—of these theories.

POVERTY AND UNEMPLOYMENT

Many people believe crime is somehow connected to poverty. Some studies show that crime is highest among the poor and unemployed. The theory is that criminal behavior has less to do with the individual than it does with a person's circumstances. A presidential commission that studied crime in 1967 put it this way: "Fighting poverty, inadequate housing, and employment is fighting crime."

However, there is evidence that crime cannot be totally explained by poverty. If poverty were the sole cause of crime, how would one explain why crime in America went up at a time when the number of people living in poverty was declining?

INADEQUATE POLICE PROTECTION AND PERMISSIVE COURTS

Some people believe that crime has gone up because the courts are soft on criminals. Critics call this "revolving door justice." They say legal loopholes and lenient judges let dangerous criminals loose to prey on society. Critics police and lock up more criminals for longer sentences."

Adequate police protection does have something to do with crime control. However, studies show that simply hiring more police officers does not necessarily reduce crime, though it may reduce fear of crime. Many experts say that simply putting people behind bars for longer terms will not reduce crime. They point out that the United States already locks up more people for longer terms than almost any other Western nation.

Locking up criminals or hiring more police officers is expensive. Studies show a cost of $20,000 to $40,000 to lock up one person for one year. Similarly, it can cost $30,000 to $50,000 per year to add a police officer to the force.

2048

Reporting Crime

Law enforcement agencies learn about crime through investigation, discovery by police on the street, and crime reports by citizens. Crimes that are not reported cannot be solved. Many crimes are not reported to law enforcement agencies. The U.S. Department of Justice estimates that only half of all crimes are reported.

How to Report a Crime

If you are ever a victim of or a witness to a crime, you should do the following:

- Stay calm. It is very important to report crimes to the police, but sometimes it can be a difficult, trying experience for the victim or witness.
- Call the police immediately!
- Always report a crime. If you don't report it, the police can't help. Someone else may become a victim.
- Tell the police who you are, where you are, and what happened.
- If anyone is hurt, ask for an ambulance.
- When the police arrive, tell them exactly what you saw. If possible, write down what you remember before the police arrive.
- Try to describe the scene of the crime. How many suspects were there? Did they say anything? How did they get away? If the crime was a robbery, what was taken?
- Tell the police what the suspect looked like: age, sex, race, height, weight, clothing, facial features. Was the suspect driving a car? If so, try to remember the make, model, color, license number, and direction of travel.
- You may be asked to make a complaint or to testify in court. Remember, if you don't help the police, the criminal might hurt someone else.
- The police may ask you to attend a lineup or look through photo albums to try to identify the person you saw commit the crime. Do your best.

PEER AND FAMILY INFLUENCE

Some people believe that criminal behavior is learned. They say it is learned by associating on a daily basis with other people who are involved in criminal activity. Through such contacts, a person learns a set of values and behaviors that encourage or condone crime.

Others say family influences are the cause of crime. That is, some parents aren't strict enough and don't teach their children to respect the law and the rights of others. Another argument is that crime is caused by emotional and family problems. Since the family is society's most important social group, the family helps shape a person's behavior in later life. In other words, family problems or an unhappy childhood can lead to criminal behavior, according to this theory.

While no one doubts the important role of family and peers, it is important to remember that children of the same parents, raised in the same surroundings, often follow opposite courses with respect to the law.

RISING SIZE OF YOUTH POPULATION

The age group with the highest crime rate is made up of youths aged 15 to 24. In 1950, there were 24 million people in this age group. Today, there are over 40 million. Young people do commit more crimes per person than any other age group. There are more young people today, so there is more crime.

But crime has gone up even faster than the youth population. Thus, even this simple explanation has flaws. Some experts say we can't look at just the number of young people, we must also look for reasons why they may be committing crime.

OTHER THEORIES

Many other reasons have been suggested to explain crime and its severity. These include abuse of alcohol and drugs, easy access to handguns, the influence of television, the spread of pornography, and a decline in moral values.

As you can see, experts cannot agree on the major causes of crime. It is likely that crime has many causes. Thinking about crime requires us to carefully consider all the suggested causes. Only when we know what causes crime can we determine the best ways to deal with it.

CLASS DISCUSSION QUESTIONS

1. Which causes of crime do you think make the most sense? The least sense?
2. Rank each of the suggested causes of crime from the most important. Discuss your choices.

Activity 2: Victims of Crime

Students should individually complete the True or False questionnaire prior to class discussion.

TRUE OR FALSE

Mark True or False in the space provided, and if the answer is false, explain why.

1. Most Americans will never be victimized by crime. If false, why?____________________
2. The age group 65 and older is most often the victim of crime. If false, why?____________________
3. Women are more likely to be victimized than men. If false, why?____________________
4. The rich are more likely to be victims of crime than the poor. If false, why?____________________
5. Members of minority groups are more likely to be victimized by crime. If false, why?____________________
6. Once people become victims, there is not much that can be done to help them. If false, why?____________________

TEACHER/RESOURCE PERSON BACKGROUND ON TRUE-FALSE QUESTIONS

Who are victims of crime in America? Do they make up a very small part or a very large part of our population? Who is the typical victim? Are victims generally young or old? Poor or rich? Male or female? Here are the answers and additional information for class discussion on victims. Discussion should help students begin to understand the nature of crime victimization in the United States. Local victim assistance organizations or the police department could provide additional information.

1. Most Americans will never be victimized by crime. True or False?
   Studies show that sooner or later almost everyone will be touched by crime. In 1985, one in four households was touched by a crime of violence or theft. Each year over 35 million Americans are victimized at home, at school, or on the streets.
2. The age group 65 and older is most often hit by crime. True or False?
   Believe it or not, older people are victims of crime less often than teens are. For all major types of crimes, people aged 12 to 19 are the most frequent victims; those 65 and over, the least. Yet the fear of crime is the reverse. Senior citizens, though less frequent victims, are much more afraid of crime than those in other age groups.
3. Women are more likely to be victimized than men. True or False?
   Males are twice as likely as females to be victims of crime. Male teenagers are much more likely to be victims than are female teens. Nearly half the violent crimes against teens are committed by people they know.
4. The rich are more likely to be victims of crime than the poor. True or False?
   Once again the answer is False. The poor, along with the unemployed and the separated or divorced, are more likely to be crime victims. Even among businesses it is the small businessperson, the retailer, who is the hardest hit by crime. Small businesses are hurt by crime more than big businesses. Burglary, robbery, shoplifting, and internal theft add to costs and eat away profits.
5. Members of minority groups are more likely to be victimized by crime. True or False?
   This statement is True. Studies show that blacks, Hispanics, and other minorities are more likely to be victimized than whites. Whatever their ethnicity, people are more likely to be victimized by persons of the same ethnic group.
6. Once people become victims, not much can be done to help them. True or False?
   This is False. Many communities have established victim assistance programs. These programs include rape crisis centers and other counseling programs, drug hotlines, and assistance for victims who go to court.

CLASS DISCUSSION QUESTIONS

1. Which of the preceding answers surprised you the most? Why?
2. What feeling do victims of crime have? Are the feelings different depending on the type of crime? If so, how?
3. Why do you think the elderly are fearful of crime? Is this fear justified?
4. Why do you think the poor and minorities are most likely to be victims of crime?

Activity 3: Teens and Crime

TEENAGERS: THE MOST FREQUENT TARGETS OF CRIME

- Once every 19 seconds a teen in the United States is a victim of crime.
- From 1982 to 1984, youths aged 12 to 19 experienced an average of 1.8 million violent crimes and 3.7 million crimes of theft annually.
- Teens are victimized by violent crimes (rape, robbery, and assault) at twice the rate of the general adult population and 10 times the rate of the elderly.
- Teens are victims of crimes of theft more frequently than any other age group.
- In 1984, one in three victims of rape was a teenager as were four in five assault victims. But teens represent only about a tenth of the population.
- The leading killer of teens is drunk driving. Between 4,000 and 5,000 young people are killed each year in alcohol-related crashes. Sometimes the teen is the drinking driver. But sometimes the teen is a sober pedestrian, passenger, or driver of the other car.
- About half the time, teens know the person who assaulted them.
- Teens who are victims of crime but survive may bear the scars of the incident for years to come.
- If you are a teen, what are your chances of becoming a crime victim? Out of a gym filled with 2,000 teens, approximately 360 were probably victims of crimes in the past year. Fill that same gym with 2,000 parents (aged 36 to 64), and you'll probably find about 145 victims. Replace them with 2,000 grandparents—people over 65—and expect 60 victims. (Remember, though, that those over 65 are most afraid of crime and, when victimized, may be even more severely affected by the incident.)

HOW CAN TEENS PREVENT CRIMES?

Teens can prevent crime with the same strategies used by the general adult population. Self-protective actions include: not carrying lots of cash or flashing it around, walking in well-lighted areas with friends rather than alone, and ensuring that your home's doors and windows are appropriately secured.

But remember that crime, and especially crime against teens, is often committed by people known to the victim. Thus, you need to develop good decision-making skills to deal with specific situations. One strategy for refining your decision-making skills is to "think it through," either by yourself or with friends, asking "What would I do if . . . ?" questions.

For example, if you have to get from one place to another at night, try to figure out the safest way to travel. Can someone drive you or walk with you? Thinking and planning ahead may help to prevent crime.

Another strategy is to cut your risk by cutting the risk for everyone in your community. Chipping in to help the entire neighborhood become safer for everyone is not just

2050

good sense; it can be fun and a great opportunity to get involved in community projects.

You can lend a hand to crime watch activities, work with the elderly or younger children, or work with peers and with adults. Peer counseling, assistance to teen victims, substance abuse prevention, and other programs rely on the special talents teenagers bring to program efforts. General cleanups, security surveys, identification marking programs, and public education campaigns can always use a hand and some of your enthusiasm.

ALONE AFTER SCHOOL?

Many teens are by themselves after school until parents return home from work. Some are babysitting younger brothers or sisters. Here are some quick tips to keep you safe—and to keep your parents from worrying.

- Talk with your parents about what you can and should do before they get home. Wash the breakfast dishes? Have a friend over? Walk and feed the dog? Do your homework?
- Know how to work all the door and window locks. Keep all doors locked when you're inside. Do not open the door until you are sure you know and can trust the person outside.
- Near the phones, keep a list of numbers for your parents at work, a neighbor, the police and fire departments, and the local poison control center.
- Check in with a parent at work as soon as you get home. Let your mom or dad know if you're going to be late or going home with a friend.
- Don't let any stranger into the house or apartment unless you check with your parents first. If someone comes to the door and asks to make a phone call, you can offer to make the call without letting the person in.
- Know the quickest ways to get out in case of fire. If you smell smoke or hear the smoke alarm go off, get out immediately and call the fire department from a neighbor's home or a public phone.
- If you come home and things in your house or apartment don't look quite right—a window is broken, a screen is ripped, or the door is open—don't go in. Go to a neighbor's home or a public phone and call the police.

CLASS DISCUSSION

1. One afternoon you're home alone talking to a friend on the phone when the doorbell rings. A strange man at the door says his car has broken down and asks to use the phone. You offer to make the call for him, but he becomes insistent, demanding to be let in. What should you do?
2. Imagine that you are home babysitting for your two-year-old sister, Katie. While you are watching TV, she gets into the medicine cabinet and opens a bottle of aspirin. By the time you discover what she has done, the aspirin tablets are scattered everywhere. You can't tell if she has taken any. What should you do? Who should you call? What should you say?
3. Make a list of these phone numbers for your wallet:
    - Your parents at work
    - A neighbor
    - The police
    - The fire department
    - The local poison control center

Activity 4: Take a Look at Your School

No one—kids, teachers, principals—wants any crime problems in school. But sometimes they happen. Even a little vandalism or a few petty thefts threaten a school's well-being. They diminish the sense of pride and feeling of security that are essential to any good workplace.

Look around your school and decide what crime problems exist. The following questions may help you:

- Are local "artists" displaying their "talents" on bathroom walls, doors, and hallways?
- Are the school grounds attractive or do you see litter, overgrown shrubbery and mud?
- Do fights break out often?
- Is having something stolen from a locker an everyday occurrence?
- Are drugs or alcohol being used by students in or near school?
- Are some students afraid of others?
- Do some students avoid coming to school because of fear?
- Does it take a while before a broken window, broken light, broken anything gets fixed?
- Is there an "us against you" feeling between students and teachers?

IT'S UP TO YOU TO DO SOMETHING

All over the country, teenagers are working with parents, teachers, community people, and school administrators to build school pride, reduce fear and crime, strengthen community ties, and create a secure and peaceful place where students can learn. The following programs represent just a few examples of what you can do:

- Anti-vandalism projects where students take the lead in deciding the best ways to stop vandalism.
- Student forums on drug and alcohol abuse, drunk driving, runaways, suicide, and sexual abuse that discuss the extent of the problem and possible solutions.
- Youth crime watches to encourage students to report crime and keep others from being victims.
- Mediation programs that use a neutral party to help resolve disputes between students, between teachers and students, and between the school and the community.
- Projects that give students a say in the school's physical environment and pride in its appearance.
- Law-related education classes to help students understand the legal system, as well as their own rights and responsibilities.
- Community service projects that give students class credit, awards, or other formal recognition for working in a community agency, such as a mental health center, the recreation department, a senior center, libraries, hospitals, and nursing homes.

CLASS DISCUSSION

1. One night you see two unfamiliar teenagers throwing rocks through the windows of your high school. Would you report them to the police? Why or why not? Would your answer be different if you knew the students?
2. Suppose you saw two teenagers vandalizing your neighbor's car. Would you report them to the police? Why or why not?
3. Suppose you saw two teenagers vandalizing your own

2051

car. Would you report them to the police? Why or why not?

4. Were your answers to questions 1 through 3 consistent? Did you feel differently when the teens were vandalizing your car than when they were vandalizing your school? Why?
5. One afternoon, about 2:30 p.m., you see a blue van pull up in front of a neighbor's house. Two strange men get out of the van and walk to the rear of the house. You are suspicious because you know your neighbors are on vacation. What would you do? Does your answer change if you do not like the neighbors?
6. If you call the police about the incident in question 5, what would you say? Role-play a phone call between yourself and the police, discussing the crime in question 5.
7. Have you ever witnessed a crime? What happened? What did you do? Brainstorm and discuss a list of reasons why a crime might go unreported.

Additional Student Activities

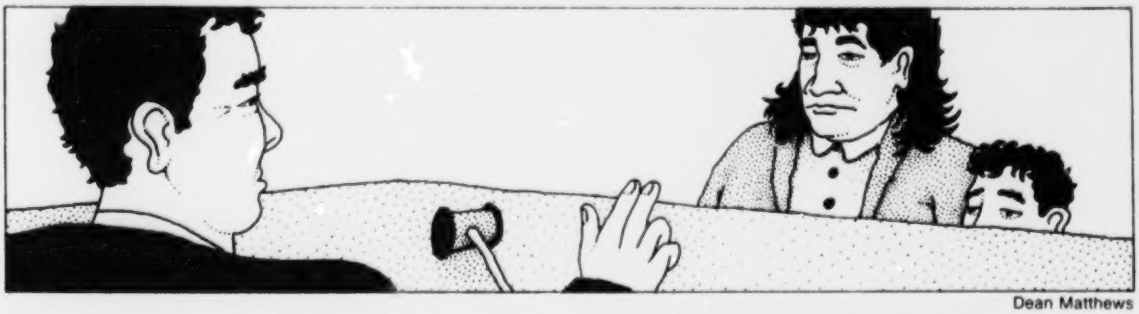
1. Your class can conduct a survey about what students consider to be the most serious problems in your school. Once you have a list of problems, decide what projects could be started to help solve them.
2. Assume that you are a scriptwriter at a local radio station. You have been asked to draft a public service announcement directed at teenagers about preventing teen victimization or helping teens who have been victims of crime. Write an announcement that will be effective in getting your message across to teens.

Judith A. Zimmer is a program director for the National Institute for Citizen Education in the Law.

Youth at Risk

Mock Disposition Hearing/Secondary

Elenor Taylor



Dean Matthews

One young person out of nine will appear in juvenile court before his or her 18th birthday. In spite of this statistic, few Americans have direct experience with the problems of these kids in crisis. Since the young people who come before courts may be permanently affected by the experience, it is important for everyone in our society to better understand the difficult problems that young people often face in this society.

Most of us think of the courts as places where people who have broken the law are taken for trials. This is only part of the story. There are many young people who come under the jurisdiction of the court not for breaking the law but because they are wayward or neglected. Wayward children are those who are constantly in trouble because they refuse to obey their parents, school officials or other authorities. Many other children are neglected by their parents and do not have those things we all consider basic, such as food, clothing and necessary care. Some also suffer physically from beatings or other mistreatment at the hands of their parents.

Since our courts are run by human beings, they face problems typical of all public institutions: a lack of time, money, patience and alternatives to deal with the problems as ideally as we would like them to. Unfortunately, because of these daily pressures, the courts sometimes tend to develop standard ways of dealing with these problems. We should better understand the problems of young people in crisis and of the institutions designed to deal with them.

The materials which follow offer students the opportunity to participate in a disposition hearing decision. At a disposition hearing, the judge reviews the report and the recommendation submitted by governmental agencies (the Department of Public Social Services in dependency proceedings, and the Probation Department in truancy, runaway, and delinquency matters). On the basis of that report as well as any testimony that may be offered by any of the parties to the action, the judge determines whether the minor should be made a ward of the court and placed in the home of his or her parents under agency supervision, the home of relatives or friends, a foster home, or (in delinquency cases) in County Camp or the Youth Authority.

Eleven months following the disposition hearing in neglect cases, another proceeding is conducted to review the progress of the case and determine whether the court's jurisdiction should continue and, if the child is to remain a ward of the court, whether the child should reside with his or her parents or in a foster facility. (Based on California procedures.)

[Students should be aware that the adult and juvenile justice processes in our legal system are somewhat different. For example, while juveniles are now entitled to many of the legal rights that adults have (jury trial is a large exception), they are protected from public scrutiny, from bail procedures, and from detention in jail (in cases of delinquency).]

The following materials are not intended to teach court procedure, but to give participants an opportunity to talk about the problems of the courts and kids in trouble.

Activity Instructions

1. Summarize the above introductory information about juvenile courts for your students.
2. Divide students into small groups and distribute copies of the Probation Report on Ronald Jordan (see box).
3. In small groups, students should discuss the report and the disposition alternatives. Each small group should determine which disposition alternative is the best.
4. Each small group should report the disposition of the case.
5. Discuss how the problem was decided—encourage students to express how they felt about the case. (If a resource expert is in attendance, he or she should comment and answer questions relating to the case.)
6. After this discussion, read the actual decision of the case: The judge decided that for Ronald's safety, he should be placed in a foster home. In a case such as this, Ronald would be viewed as a victim and the case handled under the Welfare and Institutions Code; parents would be considered defendants.
7. De-brief using the following questions:

a. What are your feelings about people in trouble, i.e., how would you feel about someone you know who is in trouble with the police? Parents? School officials? An employer?

b. Ask any lawyers who may be present to comment on the following statement: "Our best lawyers ignore juvenile cases, partly because juvenile courts are puzzling wonderlands, partly because there is no money in defending children in trouble. Only the best law schools are concerned with this subject."

c. Consider the case of a frightened girl of nine who has been raped by her own father. Where might she turn for real help? What attitudes do you believe should guide her helpers? What values does your statement reflect?

d. Compare the following statements: "Some young people get in trouble because they are born losers." "The problem lies not with the kids, but with the system." Which statement seems to you to be the most accurate? What values does each statement reflect? If you were a judge, how might each set of values affect your actions and/or decisions?

e. What does the term "Children in Crisis" mean? What values does your answer imply or reflect?

The above is based on materials from Kids in Crisis, *a publication developed by the Constitutional Rights Foundation (CRF), a non-profit educational foundation focusing on delinquency prevention and improving law-related and citizenship education for all young people. For more information, contact Elenor Taylor, Director of Business and Legal Issues Programs, CRF, 601 South Kingsley Drive, Los Angeles, CA 90005, (213) 487-5590.*

Probation Report on Ronald Jordan

Ronald is 13 years old. He lives with his mother and stepfather. He is extremely close to his mother. His friends and teachers say he is an extremely withdrawn boy. He has never been in trouble and rarely talks about his home or family with anyone.

One of his friends noticed strange bruises on Ronald's upper arms and neck and asked him what had happened. After making his friend promise not to tell anyone, Ronald described how he had been beaten by his stepfather with a tree branch in the garage. He said that he was too frightened to tell anyone. He also said that his mother never helped him because she was also afraid of the stepfather when he became angry.

Ronald's friend went to the school principal and told him of the beatings. Ronald was called into the office and asked to repeat the story. He denied everything. The principal threatened to call Ronald's parents and then the boy became hysterical and admitted the truth of his friend's story.

PRIOR RECORD

None

PRESENT CASE

The police were called; Ronald was placed in Juvenile Hall for his own protection and a court hearing was scheduled. There was not enough evidence to arrest the stepfather. However, there was enough evidence at the original hearing to convince the judge that Ronald had been seriously mistreated. Throughout the hearing Ronald wept and showed great emotional upset. When questioned by the judge, Ronald indicated that he wanted to go home with his mother.

At the dispositional hearing, the judge had to decide what to do with Ronald.

JUVENILE DISPOSITION ALTERNATIVES

1. **Informal supervision by probation officer in the minor's home with the agreement of parents after minor's admission of guilt. During the period of supervision the minor may seek out and participate in recommended rehabilitation programs. No petition is filed and no record is kept.**
2. **Home on Probation. There are two possibilities: (1) minor is made a ward of the court and is under the supervision of a probation officer for an unspecified length of time; or (2) minor is not a ward of the court but is on probation under the supervision of a probation officer for a period not to exceed six months.**
3. **Suitable Placement. Custody is taken from the parents and the minor is placed with relatives, in a foster home, a group home, or institution. All privately owned placements must be authorized by the County Probation Department.**

Louis Fischer

A Peach of a Constitution

As our nation celebrates the bicentennial of the Constitution, I recall with fondness my first years as an immigrant in Lorain, Ohio. Not too long after I arrived there in 1940, the United States entered World War II, and all noncitizens were required to register. We were branded either "friendly aliens" or "enemy aliens," depending on the country of our birth.

Since I was born in Czechoslovakia, I was designated a "friendly alien," even though my language and culture were Hungarian, as I was born in a Hungarian village just inside the Czech border. However, there were many Hungarians in south Lorain branded "enemy aliens." An elderly friend of my family—I shall call her Mrs. Magyar—had been a resident of Lorain for approximately 40 years and was among those so branded. Her three sons, all native citizens, had enlisted in the U.S. armed services, but she and her husband, who worked at a steel mill, had never bothered to become citizens. This was not unusual among immigrants who often dreamed of returning to their homeland after they made their "fortune" in America.

As rumors of imminent deportations of "enemy aliens" spread in south Lorain and other industrial cities of the Midwest, thousands of aliens rushed to file their "first papers"—their declaration of intent to become U.S. citizens—and Mr. and Mrs. Magyar were among them. This first step had to be followed by learning about the structure of our government and the foundational ideas embodied in the Constitution. A federal judge would then quiz all applicants; the successful ones would become citizens, thus shedding the terrible label of "enemy alien."

Since Mrs. Magyar spoke practically no English, preparing for this examination seemed an insurmountable task. At the age of 17 I was learning English rapidly, from attending the public schools of Lorain, from friends while playing tennis in Oakwood Park, from working as an usher at the Palace Theater, and from sitting for hours at a time in Saturday afternoon movies that only cost 10 cents for double features with cartoons and newsreels. Since I was learning about the Constitution and the rest of our government in my history and civics courses, I offered to help Mrs. Magyar in her preparations for the citizenship examination. When she readily accepted my offer, we worked on the ideas in Hungarian and in English. She understood the materials quite well and could explain them in Hungarian, but her English was extremely limited. After much work, we arrived at a point where her explanations in English were marginally understandable, which was when she was discussing ideas in a comfortable setting among friends. With strangers or when under stress, Mrs. Magyar mixed Hungarian and English into a seamless web intelligible only to close friends.

Susan Wise

Time rushed by, and the date was set for Mrs. Magyar to appear, along with many other aliens, before the federal district court judge in Cleveland. My aunt, Mrs. Lovy, was Mrs. Magyar's sponsor and would testify to her fitness of character.

With great decorum and efficiency, the judge went down the list, asking two or three questions of the tense and nervous candidates, trying to put them at ease and ruling on their petitions. Then Mrs. Magyar was called by the clerk of the court, and with my aunt's assistance, Mrs. Magyar took her turn—obviously very nervous—before the somber, imposing judge, who sat on a podium and was flanked by the U.S. and the Ohio state flags. After routine identification questions, the judge asked, "Mrs. Magyar, what do you know about the First Amendment to the Constitution?" I was pleased to hear this question because we had worked long and hard on the details of the First Amendment and its provision for free speech, religion, and assembly.

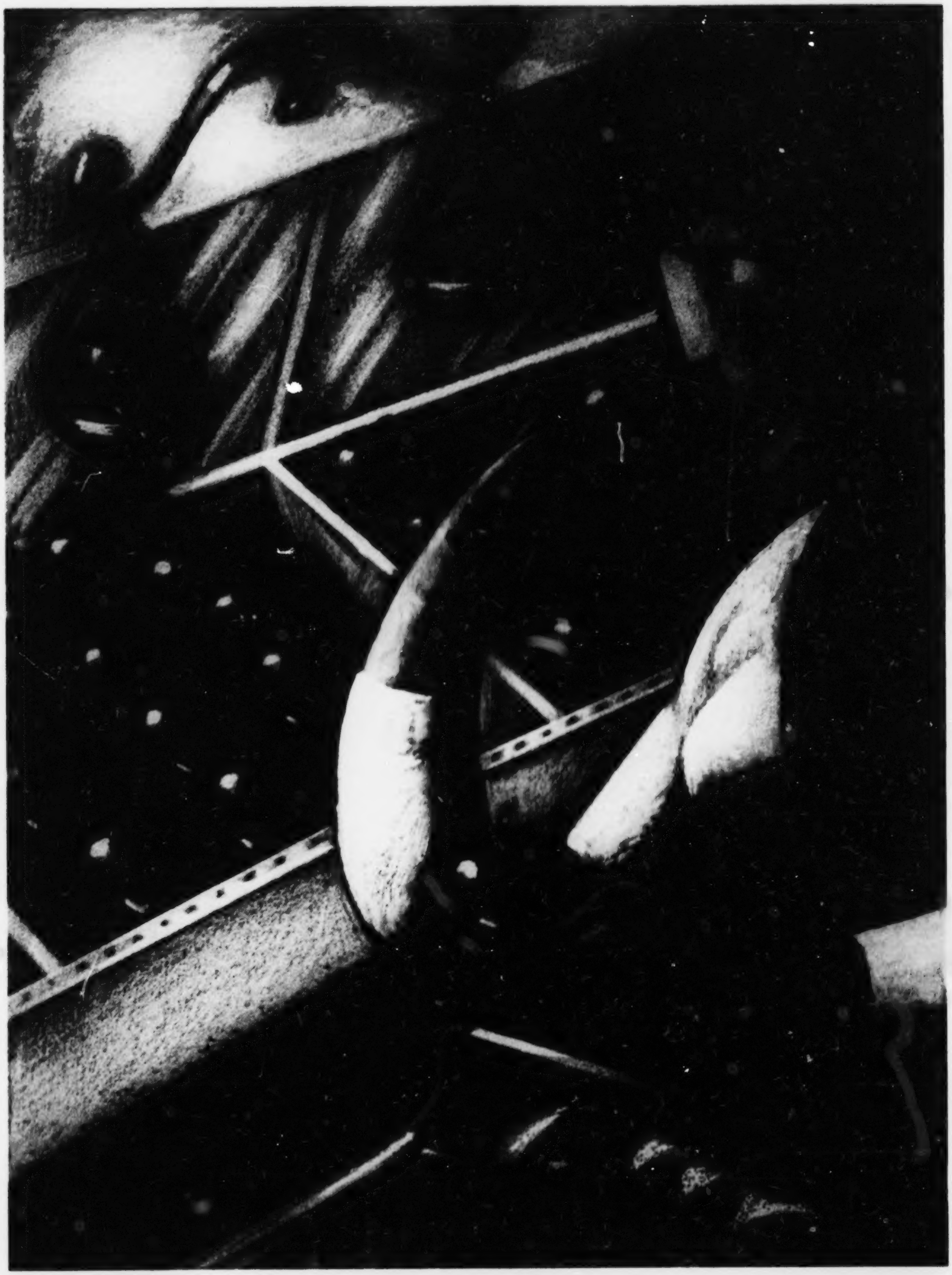
Mrs. Magyar, however, obviously overcome by tension and the drama of the situation, burst forth: "The First Amendment, she gives us free peaches." After a split second of silence, there was loud laughter in the courtroom. The judge only smiled, but Mrs. Magyar burst into tears. My aunt approached the bench and spoke quietly with the judge for some time. The judge then turned once again to Mrs. Magyar and asked, "Have you ever been arrested?" Crying, she said, "No, no, I never rest. I work all time." Once again there were outbursts of laughter in the courtroom and the judge used his gavel and a stern look to silence the spectators. Then he turned to Mrs. Magyar again and asked, "Mrs. Magyar, do you like America?"

Through a flood of tears, she replied, "I love, I love."

"You are then a citizen," said the judge, and my aunt put her arms around Mrs. Magyar and led her back to her seat.

As I teach the relevance of the Constitution in the daily lives of students, teachers, and the rest of us, I often think of Mrs. Magyar. I am convinced that while it gives no free peaches, it is certainly a peachy Constitution. ☐

Louis Fischer is a professor of education at the University of Massachusetts, Amherst, and a lawyer. This article first appeared in American Way, *the American Airlines magazine, September 1, 1987.*



John Figler

2055

THE CONSTITUTION TODAY

Candice Goldstein

Choosing America's Judges

After 200 years, new questions are being raised

Judicial selection in the United States is very much in the news these days. The defeat of Judge Bork, the withdrawal of Judge Ginsburg, and the well-publicized process that led to the confirmation of Judge Kennedy has focused attention on how Supreme Court justices are selected. In recent years, vociferous opposition to incumbent judges and scandals in the courts have brought into question the selection systems used by the various states.

This article will look at the pros and cons of the various methods of selection. A strategies section provides ways of making the issues real and meaningful to students.

Importance of Judicial Independence

Selecting judges is inevitably linked—to some extent, at least—with the political process. For example, a majority of the federal judiciary has been appointed by President Reagan. In the most recent election in California, three state supreme court judges, including Chief Justice Rose Bird, lost their jobs in the most costly judicial election in the nation's history. And in Cook County, Illinois, popularly elected judges spend thousands of dollars for their campaigns even when running unopposed.

Each method of selecting and retaining judges—appointment, merit selection, and popular election—is being scrutinized by scholars, lawyers, and journalists to determine which produces "quality" judges: professionally competent, moral and fair-minded. But a larger question is which process of selecting and retaining judges best ensures the continuing independence of the judicial branch of government. Archibald Cox, former Watergate special prosecutor and a professor of law, defines judicial independence in this way—

1. That lawsuits shall be decided by judges free from any outside pressure, personal, economic, or political, including any fear of reprisal
2. That there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.

Background

The British recognized judicial independence as a protection against oppressive government long before they established colonies in America. The Magna Carta declared that no freeman should be punished "except by the lawful judgment of the land." Three centuries later, King James of Scotland came down to govern England with a strong belief that a king rules by divine right. When the existing common law courts interfered with the prerogative courts he created to effectuate his will, he wished to reprimand them and summoned the common law judges to appear before him. Sir Edward Coke, who led the judges, admonished King James that although monarchs should not be under any man, even monarchs themselves are ruled by God and the law.

Under later Stuart monarchs, the assignment of judges and their tenure was at the royal whim. Finally, in a great victory for British liberty, the Act of Settlement of 1701 provided that judges should not be removed except upon a proceeding of the Houses of Parliament.

In the American colonies, King George III made tenure of colonial judges dependent on the will of the monarch. The Declaration of Independence listed the king's act of making judges "dependent upon his will alone for the payment of their salary" high on the list of grievances justifying the colonies' revolt.

In the Federalist Papers, Alexander Hamilton explained the necessity for judicial independence: An independent judiciary is an "excellent barrier to the encroachments [of liberties] and oppressions [of rights]" that may come in a republic. He argued that a constitution could not limit the government's powers or protect individuals' rights if judges did not have the power to strike down laws that conflicted with the constitution.

James Madison summarized it well when he said in proposing the Bill of Rights: "Independent tribunals of Justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive."

Over the years, courts have proved wiser than legislatures in interpreting constitutional guarantees protecting essential liberty, speaking for the individuals and minorities shut out of, or inadequately represented in, politics. The Supreme Court's decision in *Brown v. Board of Education* ordering desegregation in public schools is an example. Similarly, judicial review provides better protection for enduring values which politicians may neglect and the public frequently ignore in the fray of political conflict, providing what Justice Stone called "the sober second thought of the community."

Selecting Judges

Because the Founders realized how important an independent judiciary is, the U.S. Constitution in Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish." It guarantees federal judges life tenure during good behavior, and a checks and balances method of appointment to office.

The Constitution states that the president shall nominate people for the federal courts, but it also provides that the Senate must give its "advice and consent" to any appointment. The Constitutional Convention records establish that the current provision was a compromise between those who wanted judicial appointments solely in the hands of the Senate—the prevailing position until the end of the convention—and those who thought the president should have a greater role. Special scrutiny by the Senate was thought to be appropriate because, in contrast to the president's nominations to positions within the president's own executive branch, appointments to the judiciary are to a branch of government that is supposed to be independent of the president and for a duration exceeding the president's term of office. In a political system where checks and balances are so important, it would be wrong for the president to unilaterally control such appointments.

Article III did not mandate how each state would select its judges. For many years, however, state methods closely resembled the federal system's. In fact, until 1832, judges in all states were appointed either by the governor or the legislature. Life tenure was the rule in many states. Jacksonian democracy changed that. It introduced the notion that the people should be heard and heeded in judicial selection. The first popular election for judges occurred in Mississippi in 1832, and at their high point, popular elections were used by over 70% of the states. However, people became dissatisfied with judicial elections, and in 1937 the American Bar Association endorsed a plan for the "merit selection" of state judges. Merit selection involves appointment of judges by the chief executive (or supreme court, in one state) from nominees selected by a judicial nominating commission (composed of lawyers and nonlawyers). Today, 35 states and the District of Columbia have this system for some or all of their courts.

Merit selection is sometimes linked to "merit retention," where incumbent judges must prove themselves acceptable to the electorate by winning more yes than no votes on the simple ballot question of whether they should remain in office. Merit retention may also be used in combination with direct popular elections (as in Pennsylvania and Illinois) or gubernatorial appointment (for California's appellate judges, for example).

Some merit selection jurisdictions employ a judicial review commission. Candidates for judicial retention (incumbent judges) found to be qualified by the judicial review commission are retained in office without any action by the appointing authority or the electorate. Candidates not so retained are removed unless they choose to stand for retention. This allows the voters to decide whether to renew a judge's term.

Each selection method has advantages—and disadvantages. The turbulent times we're living through provide many examples of each.

Appointive System—Life Tenure

As discussed earlier, federal judges are nominated by the president, but the Senate must give its "advice and consent" before any appointment. The Constitution guarantees these judges life tenure during good behavior: they need never stand for any retention review by the president, the public or a review commission.

The federal bench thus has the necessary security and independence to make important judgments affecting the constitutional rights of every American. They are, as Archibald Cox has said, "as free as an individual can become from political or economic self-interest, from most forms of ambition, and from the obligations of loyalty to political parties or other organizations."

But observers point out that the system can be abused. Senator Paul Simon, a member of the Senate Judiciary Committee (the committee responsible for investigating and interviewing federal judicial nominees), has criticized the lack of Senate input for federal judge nominees, particularly for the circuit courts of appeals. He noted that the federal court system is not as broadly representative as it should be, and that under the Reagan Administration, the representation of women and minorities has worsened. He further stated that President Reagan is "systematically making ideological nominations." The senator warned that further Senate passivity could allow the law to become a "pendulum swinging back and forth, simply following ideological changes at The White House." He urged "comprehensive Senate consideration of nominees' views when the president is considering them."

Senator Simon spoke before the recent controversies over President Reagan's Supreme Court nominations. In the hearings on Judge Bork, the Senate Judiciary Committee did inquire into the nominee's judicial philosophy, a development that some observers thought compromised both the selection process and the independence of the judiciary. Even more alarming, to some observers, was the concerted campaign mounted by People for the American Way and a number of other groups to defeat Judge Bork. These groups raised considerable funds and purchased TV time to oppose the nomination, leading President Reagan and others to complain that the confirmation process was being converted into something like a plebiscite on Judge Bork's fitness, a development that blurred the line between elective politics and the judiciary, and distorted Judge Bork's views.

In response, others pointed out that the nomination of Judge Bork was political and ideological in the first place, asserting that the nominee's vigorously stated ideas had made him a conservative hero and called him to the president's attention. They added that the confirmation hearings and Senate debates were generally conducted at a high level that illuminated contrasting views of the Constitution in a way that was particularly appropriate for the bicentennial year.

It remains to be seen whether the process of selecting federal judges will be permanently altered by the Bork affair. It is clear, though, that the nonideological character of the process, which has been the norm through American history, could be lost as the process becomes more overtly political.

Popular Elections

Of course, judicial selection in the states is often closely tied to elective politics. The election method of judicial selection permits the people to have a direct role. Like any other candidate for public office, judicial candidates obtain the endorsement of party slatemakers. Once endorsed, they depend on the public for contributions to support their campaigns. Often, the candidate runs unopposed. Once elected, the judge standing for retention repeats many steps of the

Strategies

1. Ask students to research how judges are selected in their state. Invite judges, lawyers and public officials into class to discuss the pros and cons.
2. Ask students to debate the issue of merit selection versus election of judges.
3. Ask students to role-play a committee on the judiciary of a constitutional convention that will rewrite your state's constitution. As members of the committee, they have the responsibility for determining how their state will choose judges in the future. They can call real witnesses to appear before them—political leaders, actual judges, lawyers, bar association officials, and others—or other students can role-play witnesses before the committee. Make sure a wide range of views is presented to the committee, including, among others, the views of those concerned with crime, those concerned with opening up the judiciary to minorities and women, those concerned with an independent judiciary, and those who want the judiciary to be answerable to the public. After the witnesses have presented their testimony, ask students role-playing the committee members to conduct further research, then debate the issues and issue a written report recommending a method of selection that meets the needs they deem most compelling. If the committee cannot agree, have dissenters file a minority report, pointing out the weaknesses in the majority plan and suggesting an alternative.
4. Ask students to prepare a campaign for judge in an elective system within the guidelines of the ABA Code of Judicial Conduct. How should a judicial candidate or incumbent go about raising funds, making public appearances and disseminating his or her views? What may the candidate say on such topics as:
    - abortion
    - capital punishment
    - decriminalizing marijuana
    - decisions of the appellate courts
    - earlier decisions of the candidate
    - gun control
    - pending cases
    - plea bargaining
    - sentencing
5. Hold a mock press conference panel discussion. Have one student be the judicial candidate and have other students role play reporters seeking answers to their questions on the courts. Have other students role-play members of a panel discussing the courts: one can represent a group concerned with the victims of crime; others can represent groups supporting the death penalty, opposing the death penalty, favoring abortion, opposing abortion, etc. Have them ask questions, too, of the candidate. According to the Code of Judicial Conduct, what can the candidate say?

process, including campaign fund raising and endorsements by political parties.

In places where numerous candidates for election are competing, lawyer organizations have taken on the responsibility of rating judges as qualified or unqualified. The evaluations are based on confidential interviews with attorneys who practice before the judge. The results are released to the local press in advance of election day. Unfortunately, some bar associations issue only summary statements that a particular judge is or is not qualified. The public then has no way of evaluating the bar's reasons for its recommendations.

Jurisdictions where judges are elected attempt to shield the judicial candidate from direct involvement in the fund raising process. Statutes and ethical guidelines provide for a committee to receive contributions from donors. It would be unseemly for a candidate to accept money from attorneys and others who may someday appear before the candidate in his or her courtroom if elected.

This shield may not, however, be completely effective. As former Illinois Supreme Court Justice Seymour Simon has said:

> Although under our Supreme Court rules and those of the ABA, a committee ostensibly shields a candidate from the identity of his campaign contributors, a candidate is not prohibited from attending his own fund raising parties where he can observe who shows up and who doesn't. For that matter, I wonder how many judicial candidates turn down checks handed to them by acquaintances who meet them on the street. And, all campaign contributions, including names of contributors of more than $150, must be reported by the fund raising committee, so that anyone who is curious, including the candidate or his friends or family, can examine these reports.

Opponents of the election method suggest that requiring political candidates to campaign for election means the successful candidate may carry to the bench a load of political debt to party leaders who provided political, organizational or financial assistance. As the American Bar Association has noted, "There is no harm in turning a politician into a judge...the curse of the elective system is that it turns every elective judge into a politician."

Those opposed to the election of judges also criticize elections because the person selected may have political qualifications at the expense of legal qualifications.

Finally, some observers have noted that popular elections of judges rarely offer true accountability to the public. Candidates for office usually campaign by announcing what they will attempt to accomplish in office. Judges, however, are forbidden by the Code of Judicial Conduct from describing their views about matters that might come before them. Unlike all other politicians, judges are not permitted to run on a platform. Voter interest is usually low. There is a drastic drop in participation by voters once they reach the judicial portion of the ballot. As the Special Commission on the Administration of Justice, a blue-ribbon panel established in the wake of the Greylord scandal in Chicago, reports:

> The few upsets in high visibility races have been confined largely to Supreme Court contests. Upsets in circuit court races offer little evidence of an informed electorate. It is generally agreed that, as a group, the five defeated slated candidates in the 1984 Cook County [Illinois] Democratic primary election were more qualified than the challengers who were elected. The election apparently turned on factors irrelevant to judicial qualifications, such as which candidates had Irish names.

Merit Selection

The merit selection process has been praised for selecting well-qualified candidates. Under this system, a nominating commission recommends a list of judicial candidates from which the governor must appoint the judges.

Although statistics show that women and minorities are actually *more* likely to reach the bench in a merit selection system than an elective one, some minorities are opposed to a merit selection or appointive system. Minorities and women are underrepresented in large law firms, which generally are powerful in merit selection systems where the organized bar has a say in selecting members of nominating and review commissions.

Some states which have a merit selection system also use the mechanism of retention election, an increasingly popular procedure. If a judge, running unopposed, fails to get approval by more than 50 percent of the votes cast, he or she must step down, and a replacement will be named by the governor. Judicial retention elections were introduced about 50 years ago, but the idea didn't catch on until the 1960s. Some criticize the practice because it fails to stimulate enough voter turnout to produce a valid expression of public opinion; others say that because the judges run unopposed, voters have little or no knowledge on which to make an informed decision. But supporters of retention elections point out that states have commissions to remove judges who have engaged in misconduct; beyond that, retention elections allow qualified judges to serve long (6-12 year) terms subject to a limited degree of public accountability.

More problematic than the retention of judges who are incompetent, disabled from performing judicial duties or otherwise unfit for the bench, is the judge who makes unpopular, though legally tenable, decisions with sufficient frequency to arouse the anger of voters. At what point should the independence of the judiciary be subordinated to the will of a public which often knows little about the constitutional obligations of the of-

Canon Seven of the Code of Judicial Conduct

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.

A. Political Conduct in General

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

Commentary: A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a nonjudicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Commentary: Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.

[Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

fice in particular or the dynamics of the legal system in general? Making the votes serve as referenda on the judge's rulings carries the threat of politicizing the course of decision. The danger is that if votes turn on the judge's previous decisions, then gradually the whole course of decisions will turn upon calculations concerning the effect of a particular ruling upon campaign contributions and blocs of votes. This could destroy the dream of impartial justice according to law.

1986—A Historic Year

Judges were defeated in many states in the November 1986 elections. Ohio Chief Justice Frank Celebreeze—who had incurred the wrath of lawyers for his pro-labor decisions and abrasive manner—was defeated by a margin of 54-46 percent. The chief justice allegedly had received a contribution from a PAC connected with a mob-run union. Californians voted against retaining Chief Justice Rose Bird and two associate justices. Conservative opponents based their campaign on a contention that Bird blocked imposition of the death penalty in California because of her moral opposition to it. The campaign, costing between $11 and $14 million, was the most costly in the nation's history.

In North Carolina, a newly appointed chief justice lost to an incumbent associate, and two other justices lost their seats—an event unequaled since 1894. An Oklahoma court of appeals judge won retention by a relatively close margin as a result of a campaign against him by death penalty advocates, and in Cook County, Illinois, three trial judges were defeated. One of the losing judges had acquitted a defendant accused of beating up a policewoman. He was the subject of a police campaign including a "Passarella out" banner flown by airplane over a Chicago Bears football game.

Conclusion

What distinguishes the United States from most other nations is the existence of an independent branch of government to enforce the rule of law. Judges should be chosen carefully, and, once in office, should not be subject to demagogic attack for implementing higher court decisions or controversial statutes.

Judges who are subject to the election or retention process seem most vulnerable to zealous opposition campaigns based on particular decisions or even the general course of decisions they rendered. Judicial elections in 1986 illustrate how emotional issues produced furious—and well-financed—opposition to judges. Roy Schotland, a Georgetown University law professor, calls the judicial events of 1986 a "classic crisis"—frightening for those concerned about judicial independence but full of opportunity. He suggests that judges not change their judging in response—but rather their behavior as public officials: to become less aloof and to make more public appearances. Further, incumbents could preemptively raise funds (this is illegal in some states), conduct joint campaigning, and prepare manuals on campaigning. He concludes by noting that most Americans understand too little about how courts operate and their place in government. As an example, he points to the attacks on trial judges for merely applying the law and on appellate judges for merely upholding sentences. He suggests that judges themselves make a greater effort to educate citizens about our courts. In doing so, they may retain their offices longer, at a lower cost both emotionally and financially. ☐

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Child Abuse

(continued from page 26)

system can only be achieved if we aggressively pursue our responsibilities to children, parents, and child protective agencies alike.

Reference Material on Child Abuse and Neglect

The American Bar Association has produced a wide array of educational publications about legal issues related to abuse and neglect of children. A complete catalog describing these and other works is available from the National Legal Resource Center for Child Advocacy and Protection, 1800 M Street, N.W., Suite 200, Washington, D.C. 20036. The Center's publications about child abuse include:

Child Abuse and Neglect Litigation: A Manual for Judges—Focuses on the practical aspects of courts' work in these cases.

Child Sexual Abuse and the Law—A detailed state survey and analysis of laws and legal issues related to intrafamily child sexual abuse.

Innovations in the Prosecution of Child Sexual Abuse Cases—A survey and description of special prosecutorial approaches and their relationship to treatment programs.

Protecting Child Victim/Witnesses: Sample Laws and Materials—Contains a recent survey of special state laws dealing with child testimony and includes ABA guidelines on fair treatment of child witnesses.

Child Abuse: A Police Guide—A practical skills booklet for frontline law enforcement officers on investigation and intervention issues.

Sexual Abuse Allegations in Custody and Visitation Cases: A Resource Book for Judges and Court Personnel—A collection of new papers and excerpts from other published work dealing with this topic, including the issue of false allegations and expert evaluation.

Efforts to Sensitize Professionals

Sensitizing and training lawyers, judges, and members of other disciplines to help them professionally handle child abuse and neglect cases has since 1978 been a major goal of the ABA's National Legal Resource Center for Child Advocacy and Protection, located in Washington, D.C. The Resource Center, a project of the ABA Young Lawyers Division, has held seven national training institutes, makes presentations at ABA meetings, provides consulting and technical assistance services, and participates in educational programs of other organizations as a means to reach large groups of professionals. The Resource Center has aided programs sponsored by social service agencies that have tried to reach lawyers and judges. While these programs have been too few in number, they have been uniformly successful. In addition, special publications on the legal aspects of abuse and exploitation of children have been developed. Information about the Center is available by writing to the ABA Child Advocacy Center, 1800 M Street, N.W., Suite 200, Washington, D.C. 20036 (202/331-2250). ☐

This article is adapted and updated from an article originally published in the the summer 1982 issue of the ABA Family Advocate. *Mr. Davidson has directed the Association's National Legal Resource Center for Child Advocacy and Protection since its creation in 1978.*

Troy Thomas

THE CONSTITUTION TODAY

Philip Bobbitt

Lessons of the Iran-*contra* Affair

Are they being taught?

The issues I am going to talk about today vary from the very straightforward to the somewhat complicated. One thing ties them together—my dismay at how little the fundamental constitutional issues of the Iran-*contra* affair seem to have been brought to the surface, either by the hearings, or by the commentary in the press, or even by the schools that led us to this affair in the first place.

I want to talk about three issues which represent the failure of civics education in this country. The three questions are: 1) what is wrong with pursuing secret private funding for what are called special operations—that is, covert action operations; 2) what is wrong with pursuing a secret policy, such as our overtures to Iran; and 3) doesn't the doctrine of plausible denial to some extent require that the president be shielded from being implicated in covert operations?

On each of these issues Admiral Poindexter and Lt. Colonel North were admirably forthcoming. I am inclined to think this is because they sincerely saw nothing wrong. And they didn't think that any fair-minded, non-politically motivated person would either.

Private Funding

Imagine you are the governor of a state in a time of budget deficits or declining revenues. You decide that you have to trim the budget. Perhaps you might cut back on less central activities first. Perhaps the museum might not be fully funded or the ballet. But you don't want that activity to stop all together. So you might organize with your friends and supporters some kind of private support for that activity. Maybe you could cut back the government funding to half of what it was and pick up the other half from a charity ball, or some kind of foundation contribution. If that works you can continue the project, and you save the taxpayers' money to boot.

What is the problem with this? What is wrong with it when, instead of doing it to save a museum, you are trying to save the *contras*, or to save the lives of Americans who are held hostage overseas? The answer lies with Article I of the Constitution.

Article I is the trunk and torso of the Constitution. We could do without the Bill of Rights. I would hate to see that happen, but it could be done. There is nothing prohibited in the Bill of Rights that isn't really prohibited by the system of limited government that the unamended text puts in place. This is why Madison initially opposed the Bill of Rights, though he ultimately ended up drafting it.

We could do without Article III. We would still have courts. We might not have federal courts, but we would have state courts. They would be enforcing the Constitution. They would have judicial review.

We could even do without Article II. We might not have a sole magistrate, a single president, but we would have something like the governors of the various states that created the Constitution.

What we couldn't do without is Article I. You can see, as you flip through the Constitution, where the most pages are. And that is evident to any foreign visitor who reads the Constitution for the first time. Article I sets up the relationship between the states and the federal government, and between the people and the government at large. Within Article I, the appropriations power is the beating heart of that trunk and torso.

That is why if, like Justice Holmes, you were to die and leave your estate to the United States, the country could not accept that money without first having a statute allowing it to do so. Because if you could bypass the appropriations power you would thereby bypass the electoral legitimacy that comes up every two years, when the people who are spending your money have to come back and account for it. And if you did that, then you would have bypassed Article I altogether. No gift—not even a foreign country's gift of a trinket to the president—can be accepted. And no money can be spent for any item, no matter how trivial, without a statute. That is because the relationship that Article I sets up is the most fundamental constitutional relationship we have.

We are sometimes told that the framers set up a system of a separation of powers, relying, among others, on Montesquieu. This is a deeply misleading portrait. Montesquieu really did write about separation of powers, and that is not the system we have. We have a linked system of powers where none of the branches can

Q & A: Iran-*contra*

These questions were directed to Professor Bobbitt by a panel after his speech at the LRE Leadership Seminar in Fort Worth in November of 1987. Panel members included Harvey Prokop, San Diego City Schools; Nancy Brown, Mississippi State Dept. of Education; and Howard Kaplan, ABA/YEFC.

Q. In a recent article in *Foreign Policy*, Kenneth Sharp, in talking about the Iran-*contra* affair, said that the affair pointed to a deeper problem for constitutional democracy. One source of this problem was not merely bad people or bad laws, but the chronic tension between America's democratic domestic political system and its non-democratic national security system. You say that our system does not permit secret policies, and you distinguish between secret policies and secret operations. Is there a tension between a domestic system, which is largely constitutional and operates in a constitutional framework, and a national security system whose relationship to that constitutional system is much more problematic?

A. Well, it shouldn't be problematic. Nobody has any authority in this government—whether he is a sergeant in Vietnam or a diplomat in Beirut—unless that authority comes from law. We aren't supporting banditry abroad just because we've left the territorial waters. There may be a tension between the demands of an international security system and law. There is also a tension between maintaining your tax affairs and law. Zoning and law creates a terrible tension between how you use private property. Law is fabricated just so it can maintain and mediate these tensions.

The American government has done a rather good job over a long period of time in creating laws, customs, conventions, and legal cooperation by which this tension is resolved. For example, in the field of intelligence, most persons in the CIA would say that having their activities ratified protects them rather than exposes them. There is a complicated and interlocking system of executive orders and statutes that are workable and practical. If we don't have law, then we don't deserve our security.

Q. It is not unusual for presidents throughout our history to operate secret policies even though the direction of those policies was rather well known, as in the case of Roosevelt's assistance to Britain before our entrance to World War II. Do we not in the Iran part of the Iran-*contra* affair have a situation where the government is pursuing a secret policy which has not had public discussion, public support, or even governmental advocacy in any public forum? Isn't it almost as much of an about-face as Ribbentrop and Molotov signing the 1939 pact between the Nazis and the Soviet Union?

A. Yes. That is an excellent distinction to draw. The president's policy in Central America was no secret. That he was arranging for the *contras* to be funded was not a secret. Ransoming hostages was.

Let me give you an example of how this plays out in law. I read the sentencing transcript of some arms merchants who were convicted in the southern district of New York and given very stiff sentences. The transcript quotes the presiding judge, who says, in effect, "How can you sell arms to Iran at a time when we have an embargo on this? You are the lowest scum of the earth. Capital punishment is too good for you. The Secretary of State has declared Iran to be a terrorist nation. We are organizing an embargo all across Europe, and you are going behind our backs."

They really put these guys away. That happens when a secret policy is being maintained at complete cross purposes with the overt policy. I don't think anybody dreamed that we were ransoming hostages, and not just ransoming them with Iran, but ransoming them wherever we could find a kidnapper who was willing to deal.

Q. You seem to not recommend any wholesale changes in the national security system. For instance, no Senate approval or confirmation of the national security advisor. Is that a fair assessment? Is there a need for specific changes in the institutional mechanisms of our security system?

A. I think you are going to get some changes, and that is a shame. We don't need them. But when trust breaks down among the actors, they try to restrict their counterparts more closely by regulation or by statute. So I am afraid we probably will get some changes in the War Powers Act. We are probably going to get some changes in the Intelligence Oversight Act, which I am really sorry to see. I don't think you will get a confirmed national security adviser. Everybody realizes that is a dumb idea. The president will use whomever he wants as his national security adviser. President Wilson used Colonel House, but he never held an appointment. If the Congress required that Henry Kissinger be confirmed, he would have just

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act to make a lawful event without the cooperation of the other.

This is a system that is not cynical, but it certainly takes a skeptical view of human nature. It doesn't say that we are perfectible, that we are going to get any better than we were in the last part of the 18th century. And so it thinks that the way to get our attention as citizens is to make our representatives come back to us frequently for fresh legitimacy when they have spent our money. It doesn't assume that we are patriots. It doesn't think that we are virtuous citizens. It assumes that Americans are now what they have always been—basically a non-political people, interested in their families, their homes, their businesses, their churches, their local communities.

Now a system like that is completely evaded when money for government operations is spent from a private source. It would be handy to be able to short circuit the process. I know. I served in an administration that could scarcely get anything through Congress. And nothing would have been better than to have found contributors who would have helped us over some of those rough patches. When you care so passionately about something that resigned his job. The president would appoint some nonentity like me as national security adviser to go testify every week. And Kissinger would retain the role. Because the role is wholly a matter of the president's confidence and access to the president's thinking. If you can say, "I speak for the president," because you're Bobby Kennedy and you are his brother or because you are his closest political adviser, that is really what counts.

Q. There is an old saying in international relations that only two things are unforgivable—to fail and to get caught failing. Would you care to comment on the international impact of this entire affair?

A. The principal impact in some countries has not been that we did it, but that we did it so badly. But I think there are other countries—non-European countries—that were shocked that we would deal with Iran, whom they feel poses a security threat to them. It made our word disintegrate.

For diplomacy there is a third rule. And that is, you better be trusted by the people on whom you rely. Because they are dealing with the security of their own states. You won't be able to fool them twice.

Something like this is extremely costly to those relationships. It then requires you the next time to really go over the top to prove to them that you are not lying to them this time, and that you are not misleading them. And that leads you to make security commitments that probably are not always in your interest, or certainly put you at greater risk than you ought to be.

Q. Could you elaborate on "plausible deniability"? How can we as teachers deal with students disillusioned with government?

A. I think you have to put plausible deniability in the context of international affairs, and the relationships among states that are relatively new. The state system is relatively new. It replaced the personal relationships that princes and kings had. So what you have to show is that when plausible deniability protects the person rather than the state, you are regressing.

The states continue to carry on intrigue and secret diplomacy because states' interests conflict. But *within* the state, you are supposed to have a relationship of trust that makes your representative somehow more believable than somebody else's representative.

I always thought when I was a kid growing up that this was our biggest card. You've listened to Castro or Kruschev say something absurd about the Americans—"The Americans are poisoning people in Africa by the millions. They have a secret nuclear facility underneath the Arctic. They are going to blow up the polar ice caps"—that sort of nonsense. It was amusing nonsense because it was so absurd. When you sacrifice that and you make these weird things actually possible, you really have lost an awful lot. It is hard to get back to that.

I would think your students would be very skeptical. If you said, "Look, the president says we don't assassinate people," they would say, "Oh, don't be so naive."

Q. I want to ask you a question about the War Powers Act. In the face of this controversy, is it constitutional? If it is, how is it enforced?

A. First, two parallels. One is about marriage contracts, such as "If you'll do the dishes, I'll take out the garbage. If you will take care of the dog, I'll take care of the cat." These contracts seem to me really vulgar and a terrible debasement of the relationship.

I think the same thing happens in the War Powers Act. You shouldn't need a law to formalize the relationship, to require the president to inform the leadership of Congress before he introduces troops into an arena where hostilities are imminent. You shouldn't have to be told to do that by law. Now we know the law can't be enforced. Holmes said, "Hard cases make bad law." That is also true in politics. Difficult political trauma puts battles on the books. There is a section of the War Powers Act that is unconstitutional, the legislative veto section. The rest of it is certainly constitutionally problematic because it in some ways attempts to insinuate the Congress into the commander's role of where troops can go. The president is the commander in chief. He can order troops to go to Antarctica if he chooses. I do not think that Congress can say that he must pull them back. But Congress can clearly say that he can't fund them. And they can force him to withdraw by that mechanism.

Q. Can he do that in the absence of a declaration of war?

A. I imagine. It doesn't say he is commander in chief only for wartime purposes. The text says he is commander in chief, period. I don't think that a declaration of war is to be equated with the introduction of troops and hostilities.

I may be wrong about this, but I doubt we will get a case on it. I don't think the courts will decide it.

you know it is in not just the best interest, but the interest of the very survival of the country's security, it is very tempting to go around the frustrating, time-consuming, irritating process that we have. But at the same time, it is fundamentally wrong. There is nothing more constitutionally basic than that. When I add that the funds that were spent were solicited from foreign governments, I tell you something that I think would have really shocked the framers.

On Secrecy

What is wrong with secret policies? Obviously, we need secret operations sometimes to carry out national policies. But our policies themselves can't be secret. This goes back to a fundamental constitutional compact, which makes us so unusual as a constitutional system.

Unlike other systems, ours doesn't identify the state with the sovereign. Here the people are sovereign, and the state is just an instrument of the people. As a lawyer, I analogize this to the trustees of a trust agreement. The trustees are not identical with the settlor who sets up the trust. The government can carry out, like the trustees can carry out, only those specific duties that are delegated to it by the settlor.

This often baffles foreign students when they are studying our system. I taught a course on the Bill of Rights this summer in Salzburg, Austria. I spent about 10 days there with European officials. They were a highly intelligent and extremely professional group. They had the most difficulty accepting the separation between the state on the one hand, and the sovereign the other. Now this separation causes us endless problems in international law, as, for example, when a president signs a treaty that it is not ratified.

Nevertheless, this is the system that we have. The acts of state are not legitimate simply because they are acts of state. There are legitimated through what often—this time of year—seems like an endless series of debates, elections, and speeches. This goes on in all sorts of elections, even some not for national office. Nothing is more fundamental than this scene, which is reenacted every two years.

That is how the link is made back to the people. Someone stands up and says, "I am for the president's policy to fight inflation. I think he has kept inflation down. That is why you ought to vote for me." And someone else stands up and says, "That is all rubbish. The president is ruining this country. The economy is in shambles. That is why you ought to vote for me. I will never support his policies." It is the link back to the people when policies are expressed that the Constitution assumes.

If the policy under scrutiny is just a fake, if it is just a sham to cover the real policy that only a very few know, then the whole process is subverted. It really doesn't matter whether the people support Mr. Jones, who supports that president's policy, or Mr. Smith, who is against it, because the whole thing was just a charade. The real policy has never surfaced.

It may be a shame that our system does not permit secret policies. I teach a course in nuclear strategy, so I am not insensitive to the benefits of secret policies. Our system inhibits bold diplomacy; it surrenders initiative.

But that is the system that we have. And it is a system that has served us rather well.

The policy here was not simply an approach to Iran. It was a policy to ransom hostages. It didn't begin with Iran. It didn't begin with arms. It didn't end even in November 1986 with the exposure of the arms trade. And the reason it was secret was not to keep it from our adversaries—because we know that the secret services of a number of countries knew about this. The reason it was kept secret was to protect the administration politically. It was an effort to allow it to get the hostages released while pretending that expert diplomacy and smooth dealing had done the trick.

Plausible Denial

From a constitutional point of view, plausible denial is a very old subject. It also involves the identification of a sovereign with the state.

When Phillip of Spain was courting Elizabeth I of England, there were letters between the two of them in which he inquires about, and she denies all knowledge of, Sir Frances Drake and the activity of English buccaneers and privateers. He says, "Who are they, and why are they doing this to my shipping? Why don't you stop them?" She says, "I haven't got any idea who they are, but if I catch them we will certainly treat them badly." The fact is that she knew who they were. The fact also is that he knew that she knew. A further fact is that because of her diplomats in Madrid she knew that he knew that she knew. But the relationships between states had to go on. The possible union of Spain and England was a crucial triangulation of the relationships between England and France, and France and Spain. The buccaneering issue, important as it was to both countries, was not the only issue nor even one of the top two or three.

Plausible denial allows states to continue their formal relationships, and to cooperate in areas where they have mutual interest, while nevertheless allowing them to do some very nasty things privately to each other.

While covert action typically violates international law, and almost always violates the law of the state where it is carried out, most covert actions are not really nasty. They involve supporting a local newspaper, providing a transmitter or radio equipment, or helping unions. They are not violent. They are not paramilitary. They are not things that most of us would disapprove of or would think are highly improper.

The system of plausible denial comes about because the countries where these take place would think that they were highly improper, and it would discredit the elements that we are trying to help in those counties if our covert actions became public.

Plausible denial, as you see, happens between states. It allows the United States to say, "We are not doing this." And it allows the people whom we are assisting to say, "We are not getting this sort of aid." As a matter of fact, the Continental Congress received covert aid from the French and the Spanish, both of whom denied it. And when Thomas Paine leaked the news of the French aid, he was fired by the Continental Congress. They passed a resolution saying, in effect, "We are not getting any aid from France. The whole story is false."

There is nothing new about plausible denial among states. What is new is plausible denial *within* the government, where one branch will deny its activities either to other branches or even to elements within its own branch.

The intelligence oversight of 1980, on which I worked, and part of which I drafted, never contemplated that the president would simply be shielded altogether and his authority usurped by his subordinates. Or that he, by not signing the proper documents, or signing them and having them destroyed, would evade the knowledge that he, in fact, had.

A Civics Lesson

The lessons of Iran-*contra* have hardly begun to be explored. They are fundamentally constitutional lessons. But, more than that, they represent a failure on the part of our system to educate patriotic, sincere, highly intelligent, energetic persons in the most fundamental arrangements that we have.

Admiral Poindexter, Colonel North, and Bud McFarlane are highly patriotic, genuine human beings, people any of us would be pleased to serve with. But they didn't believe there was anything wrong about overlooking the arrangements our Constitution sets up. It was that willingness to evade the Constitution that we worked on in the hearings. I hope our findings will be taught down the line when this affair becomes part of the schools' curriculum. ☐

Philip Bobbitt has been Professor of Law at the University of Texas at Austin since 1976. Recently he served as Legal Counsel to the U.S. Senate Select Committee on Secret Military Assistance to the Iranian and Nicaraguan Resistances. He served in the White House in 1980-81 as the Associate Counsel to the President. This article is an adaptation of a speech he gave to the LRE Leadership Seminar in Fort Worth in November 1987.

INDEX

Update somehow made it to the ripe old age of 11 without an index, an omission which we belatedly remedy below. This index covers volumes 1-11 in their entirety, as well as issue number 1 of volume 12.

We began publishing in Spring of 1977. Now, 11 years and 33 issues later, we look back on thousands of pages and hundreds of articles. The law is always evolving, and issues change, but most of what we've published remains fresh and pertinent. Most of our past issues are still in print, and we provide information about how to order them (or order photocopies from out-of-print issues) in the box which accompanies the article.

Alcohol
What's All the Controversy Over Drinking Ages?, Patricia McGuire
Vol. 4, No. 2, Spring 1980
Can the Courts Cope with Alcoholism?
Joseph L. Daly and Rosemary Kassekert
Vol. 8, No. 1, Winter 1984
Drink, Drank, Drunk
James P. Manak
Vol. 10, No. 2, Spring 1986
Federal/State Relations: 55 mph Speed Limit, Margaret Fisher
Vol. 11, No. 3, Fall 1987

Automobiles/Driving
Wheels
Walter M. Perkins and Lisa Broido
Vol. 3, No. 3, Fall 1979
Drink, Drank, Drunk
James P. Manak
Vol. 10, No. 2, Spring 1986
Federal/State Relations: 55 mph Speed Limit, Margaret Fisher
Vol. 11, No. 3, Fall 1987

Constitution
To Establish—and Limit—a Government
Paul Murphy
Vol. 6, No. 2, Spring 1982
Attacks on the Courts
Isidore Starr
Vol. 8, No. 1, Winter 1984
When Small Disputes Make Big Differences, James Lengel and Gerald Danzer
Vol. 8, No. 1, Winter 1984
Who Shall Declare War?
Melinda Smith, Ken Rodriguez, Mary Louise Williams
Vol. 8, No. 1, Winter 1984
Does the Constitution Protect the Despised?, Richard Roe, Lee Arbetman, Rick Morey
Vol. 8, No. 1, Winter 1984
Building Blocks of Freedom
Lucinda Peach
Vol. 10, No. 1, Winter 1986
When the Constitution Isn't Enough
Robert S. Peck
Vol. 10, No. 1, Winter 1986
Eternal Issues and Eternal Questions
Robert Hayman
Vol. 10, No. 1, Winter 1986
Comparing State and Federal Constitutions, Lucinda Peach
Vol. 10, No. 2, Spring 1986
Constitutions and the Spirit of Liberty
Paul Murphy
Vol. 10, No. 2, Spring 1986
The Tides of Power
Joseph Daly
Vol. 10, No. 3, Fall 1986
Claim Your Powers
Law in a Changing Society
Vol. 10, No. 3, Fall 1986
Case Study: A Separation of Powers Lesson, Steve Jenkins
Vol. 10, No. 3, Fall 1986
Teaching About Separation of Powers
David Harris and Alan Lockwood
Vol. 10, No. 3, Fall 1986
Limits on Judicial Review, Interpreting the Constitution, Current Controversy, Peter deLacy
Vol. 10, No. 3, Fall 1986
The Constitution's Prescription for Freedom, Lucinda Peach
Vol. 10, No. 3, Fall 1986
The Five Great Ideas of Our Constitution
Isidore Starr
Vol. 11, No. 1, Winter 1987
Power and Constitutionalism in America
Eugene W. Hickok, Jr.
Vol. 11, No. 1, Winter 1987
Justice, Equality and Property
Isidore Starr
Vol. 11, No. 2, Spring 1987
The Idea of Property in the Constitution
Isidore Starr
Vol. 11, No. 2, Spring 1987
The Dilemmas of Equality
Michael Middleton
Vol. 11, No. 2, Spring 1987
The Idea of Justice
Julius Chambers
Vol. 11, No. 2, Spring 1987
The Evolving Constitution
Thurgood Marshall
Vol. 11, No. 3, Fall 1987
The Civil Rights Amendments
Cleveland Public Schools
Vol. 11, No. 3, Fall 1987
Written Constitution or None: Which Works Better?, Sir Zelman Cowen
Vol. 11, No. 3, Fall 1987
Federalism Lives
A.E. Dick Howard
Vol. 11, No. 3, Fall 1987
Separation of Powers in Foreign and Domestic Contexts, Robert W. Bennett
Vol. 11, No. 3, Fall 1987
A Clash of Giants
Law in a Changing Society
Vol. 11, No. 3, Fall 1987
The Right to Vote: Giving New Meaning to 'We the People', Steve Jenkins
Vol. 11, No. 3, Fall 1987
Equal Vote to Equal Voice
Steve Jenkins
Vol. 11, No. 3, Fall 1987
What Does the Constitution Say About Federalism?, Project '87
Vol. 11, No. 3, Fall 1987
Federal/State Relations: 55 mph Speed Limit, Margaret Fisher
Vol. 11, No. 3, Fall 1987

Consumer Law
Wheels
Walter M. Perkins and Lisa Broido
Vol. 3, No. 3, Fall 1979
Ranting and Renting
Joseph L. Daly and Jennifer D. Bloom
Vol. 6, No. 1, Winter 1982
Warranties
Gayle Mertz
Vol. 12, No. 1, Winter 1988

Contracts
Teaching About Contracts
Michael Froman and Kathy Erlinder
Vol. 2, No. 3, Fall 1978
Teaching About Breaching
Thomas J. Stanfa and Ilene Goldstein
Vol. 3, No. 1, Winter 1979
A Legal Battle Brews—Disputed Teacher Contract, Charles White
Vol. 3, No. 2, Spring 1979
A Legal Battle Ends
Charles White
Vol. 3, No. 3, Fall 1979
Teaching About Contracts
Lloyd E. Shefsky
Vol. 10, No. 1, Winter 1986
Contracts
Gayle Mertz
Vol. 12, No. 1, Winter 1988

Copyrights, Intellectual Property
Piracy Pays—and Pays Well
Charles White
Vol. 7, No. 1, Winter 1983
Invisible Property—Can You Own What You Can't Touch?, Alita Letwin
Vol. 7, No. 1, Winter 1983
The Scene of the Crime—(Taping Off the Air), Robert Peck
Vol. 7, No. 1, Winter 1983
Parody: Not Always a Laughing Matter
Lisa Broido Kenoe
Vol. 7, No. 1, Winter 1983
Life Beyond Copyright
Miriam Krasno
Vol. 7, No. 1, Winter 1983
Preservation Laws—Can the Law Save Beauty?, Sharon Irish
Vol. 7, No. 1, Winter 1983
Nude Encounters of the Legal Kind—(Libeling Real People in Fiction), Christopher Torem
Vol. 7, No. 1, Winter 1983

Court Briefs (Analyses of recent Supreme Court decisions)
From License Plate Mottos to Nixon's Papers and Tapes, Norman Gross
Vol. 1, No. 2, Fall 1977
From Forced Retirement to Tainted Identification, Norman Gross
Vol. 2, No. 1, Winter 1978
From Plea Bargaining to Student Discipline, Norman Gross
Vol. 2, No. 2, Spring 1978

From Bakke to Filthy Words
Norman Gross
Vol. 2, No. 3, Fall 1978
From Double Jeopardy to Bakke Revisited
Norman Gross
Vol. 3, No. 1, Winter 1979
From Striking Teachers to Diplomats Striking Out, Norman Gross
Vol. 3, No. 2, Spring 1979
New Decisions to Reckon With
Walter M. Perkins
Vol. 3, No. 3, Fall 1979
The Court Tackles Some Tough Ones
Walter M. Perkins
Vol. 4, No. 1, Winter 1980
The Supreme Court Speaks
Walter M. Perkins
Vol. 4, No. 2, Spring 1980,
Vol. 5, No. 1, Winter 1981
Statutory Rape, Minors and Abortion
Norman Gross
Vol. 5, No. 2, Spring 1981
Females in Fatigues, Comparable Worth, Hostage Deal, Norman Gross
Vol. 5, No. 3, Fall 1981
Keeping Krishnas in a Booth, Pollution Wars Between Cities, Search and Seizure, Larry Stanton
Vol. 6, No. 1, Winter 1982
The ERA Extension, Religious Meetings in School, Marijuana Possession,
Joseph Daly
Vol. 6, No. 2, Spring 1982
Immunizing Presidents, Educating Aliens, Busing Kids,
Joseph Daly and Deborah Strigenz
Vol. 6, No. 3, Fall 1982
Supreme Court Considers Abortion, Racial Discrimination, Police Choke Holds, Anonymous Tips, and Respect for the Flag, Joseph L. Daly and Monte Walz
Vol. 7, No. 1, Winter 1983
An Alien Starts a Fight, Male Employee Claims Sex Discrimination, God Gets Expelled from School, Joseph Daly and Monte Walz
Vol. 7, No. 2, Spring 1983
Searches, Sex Discrimination, Sentences
Joseph Daly and Monte Walz
Vol. 7, No. 3, Fall 1983
Can the Courts Cope with Alcoholism?
Joseph Daly and Rosemary Kassekert
Vol. 8, No. 1, Winter 1984
Bizarre Murder Case Resparks Controversy Over Death Sentence,
Rosemary Kassekert and Joseph Daly
Vol. 8, No. 2, Spring 1984
Whatever Happened to the Fourth Amendment?—Last Term the Supreme Court Handed Down Decisions Which Drastically Change the Legal Meaning,
Robert Hayman
Vol. 8, No. 3, Fall 1984
The High Court Goes to School
Robert Hayman and George Kassouf
Vol. 9, No. 1, Winter 1985
Religion and Crime Head the High Court's Decision List, Robert Hayman and Jeanett Gringo
Vol. 9, No. 3, Fall 1985
Eternal Issues and Eternal Questions
Robert Hayman
Vol. 10, No. 2, Spring 1986
Swan Song for the Burger Court
Robert Hayman and Cornelius O. Ramarui
Vol. 10, No. 3, Fall 1986
The Supreme Court Speaks (Separation of Powers, Miranda Rights, Election Law, Pregnancy in the Workplace), Carol Coplan and Albert J. Cunningham
Vol. 11, No. 1, Winter 1987
Mid-Term Report (Affirmative Action, the Handicapped, Right to Political Expression), Carol Coplan
Vol. 11, No. 2, Spring 1987
Criminal Law Wrap Up
Carol Coplan
Vol. 11, No. 3, Fall 1987
Court Report (Student Press, Land Use, Criminal Law), Susan Fillichio
Vol. 12, No. 1, Winter 1988

Courts
Too Much Law?
Edward McMahon and Sharon Irish
Vol. 6, No. 1, Winter 1982
People Power in the Courts
Julie Van Camp
Vol. 6, No. 1, Winter 1982
By Reason of Insanity
Gary Rivlin
Vol. 6, No. 1, Winter 1982
Tailoring the Sentence to Fit the Criminal
Lori Andrews and Stephen Kanner
Vol. 6, No. 1, Winter 1982
How I'd Run the Courts . . . If I Were Dictator, George Williams
Vol. 6, No. 1, Winter 1982
Attacks on the Courts
Isidore Starr
Vol. 8, No. 1, Winter 1984
Do Cameras in the Courtroom Hurt the Cause of Justice?, Audrey Benson
Vol. 8, No. 2, Spring 1984
When Is a Sentence Fair?
Jay Casper
Vol. 8, No. 2, Spring 1984
People Who Make Courts Work
Dale Greenawald
Vol. 10, No. 1, Winter 1986
Foundations of Judicial Review
Peter deLacy
Vol. 10, No. 3, Fall 1986
The Least Dangerous Branch
Joseph Daly
Vol. 10, No. 3, Fall 1986
Courthouses as Learning Laboratories
Robert Clayman and Lynn Sygiel
Vol. 11, No. 2, Spring 1987
The Supreme Court
Connie Yeaton and Karen Braeckel
Vol. 11, No. 3, Fall 1987
Will the Court Hear This Case?
Law in a Changing Society
Vol. 11, No. 3, Fall 1987

Curriculum Update
Focus on Audio-Visual Materials
Joanna Banthin and Susan E. Davison
Vol. 1, No. 1, Spring 1977
Focus on Juvenile Law
Joanna Banthin
Vol. 1, No. 2, Fall 1977
Focus on Law and Citizenship
Charlotte C. Anderson
Vol. 2, No. 1, Winter 1978
A Potpourri of Materials
Charlotte C. Anderson, Kathy Kosnoff Erlinder and Barbara Ann Pearson
Vol. 2, No. 2, Spring 1978
Materials to Kick Off the New School Year
Charlotte C. Anderson and Kathy Kosnoff Erlinder
Vol. 2, No. 3, Fall 1978
Materials Aplenty for 1979
Charlotte C. Anderson and Lisa Broido
Vol. 3, No. 1, Winter 1979
A Juvenile Justice Cornucopia
Charlotte C. Anderson and Lisa Broido
Vol. 3, No. 2, Spring 1979
New Materials on the Market
Lisa Broido
Vol. 3, No. 3, Fall 1979
Help Is on the Way
Mabel C. McKinney-Browning
Vol. 4, No. 2, Spring 1980
Justice and Due Process
Mabel C. McKinney-Browning
Vol. 5, No. 1, Winter 1981
Materials on Law and the Family
Mabel C. McKinney-Browning
Vol. 5, No. 2, Spring 1981
Materials on Women and the Law
Patricia Huckle
Vol. 5, No. 3, Fall 1981
New Materials for You
Mabel C. McKinney-Browning
Vol. 6, No. 1, Winter 1982
A Grab Bag of Goodies
Mabel C. McKinney-Browning
Vol. 6, No. 3, Fall 1982
New Materials for the New Year
Mabel C. McKinney-Browning
Vol. 7, No. 1, Winter 1983
The Rites of Autumn: Women's Rights, Gay Rights, Prisoners Rights. . .
Richard A. Davis, Diane Farwick and Faye Terrell-Perkins
Vol. 7, No. 3, Fall 1983
Materials to Help You Plan Ahead
Diane Farwick and Faye Terrell-Perkins
Vol. 8, No. 2, Spring 1984
Picking the Right Ones
Diane Farwick and Faye Terrell-Perkins
Vol. 9, No. 2, Spring 1985
New Material for the New School Year
Diane Farwick and Faye Terrell-Perkins
Vol. 10, No. 3, Fall 1986

Due Process
Discipline and Due Process in the Schools
David Schimmel and Louis Fischer
Vol. 1, No. 2, Fall 1977
Why I Went to Small Claims Court
Charles White
Vol. 1, No. 2, Fall 1977
Unsnarling Legal Tangles
Frank J. Kopecky and Rebecca S. Wilkin
Vol. 4, No. 3, Fall 1980
There Is an Alternative to the Adversary System, Charles White
Vol. 4, No. 3, Fall 1980
The Court and the Cops
James J. Fyfe
Vol. 5, No. 1, Winter 1981
When a Trial Becomes a Political Circus
Charles White
Vol. 5, No. 1, Winter 1981
Does Conscience Matter More Than Law?
Sharon Irish
Vol. 5, No. 1, Winter 1981
Widening the Scope of Due Process
Victor Rosenblum
Vol. 5, No. 1, Winter 1981

Due Process: What is It?
Patricia McGuire
Vol. 5, No. 1, Winter 1981
Justice and Due Process—Resources
Mabel C. McKinney-Browning
Vol. 5, No. 1, Winter 1981
When Law Becomes a Political Football
Charles White
Vol. 5, No. 2, Spring 1980
"Hell, We Couldn't Agree on Lunch" (Chicago Seven Trial), Charles White
Vol. 5, No. 3, Fall 1980
Except When Due Process Is Done in. . . (Political Trials), Charles White
Vol. 6, No. 1, Winter 1982
Wheeling and Dealing Justice
Gary Rivlin
Vol. 6, No. 1, Winter 1982
If I Were Dictator
George H. Williams
Vol. 6, No. 1, Winter 1982
When Tortured Children Strike Back
Barry Siegel
Vol. 7, No. 3
Justice Without Judges
Albie Davis
Vol. 8, No. 3, Fall 1984
Seeking Facts to Solve Mysteries
Dale Greenawald
Vol. 10, No. 1, Winter 1986
Mini Mock Trials
Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Elementary Mock Trial
Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Mediation and the Adversary Process
Melinda Smith
Vol. 10, No. 1, Winter 1986
Teaching About Habeas Corpus
Richard Roe
Vol. 10, No. 1, Winter 1986
You Decide: A Jury Simulation
Joseph O'Brien
Vol. 10, No. 1, Winter 1986
Right to Counsel
Alan Lockwood and David Harris
Vol. 10, No. 1, Winter 1986
What Is Procedural Justice?
Richard Roe
Vol. 10, No. 1, Winter 1986
Criminal Law Mock Trial
Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Making Government Fair
George Galland
Vol. 10, No. 2, Spring 1986
Equality: The Forgotten Word
Joyce A. Hughes
Vol. 10, No. 2, Spring 1986
Voir Dire Simulation
Julie Van Camp
Vol. 10, No. 3, Fall 1986
The Idea of Justice
Julius Chambers
Vol. 11, No. 2, Spring 1987
Great Constitutional Ideas: Justice, Equality and Property, Isidore Starr
Vol. 11, No. 2, Spring 1987
Making Wrongs Right
Dale Greenawald
Vol. 11, No. 2, Spring 1987
What Is Justice?
Law in a Free Society
Vol. 11, No. 2, Spring 1987
Lawyers and the Quest for Justice
Isidore Starr
Vol. 12, No. 1, Winter 1988
Battle for the Truth
State Bar of Texas
Vol. 12, No. 1, Winter 1988
Legal Literacy for Lay People
Susan Fillichio
Vol. 12, No. 1, Winter 1988
Dramatization of Salem Witch Trials
Elizabeth Chorak
Vol. 12, No. 1, Winter 1988

Employment/Jobs
Jobs
Elisabeth Dreyfuss and Richard D. Ellmers
Vol. 4, No. 1, Winter 1980

Equality/Racial Justice
The Court Grapples With Equal Protection, Norman Gross, Cynthia A. Kelly, and Charles J. White
Vol. 1, No. 1, Spring 1977
A Plea for Equality
Cynthia A. Kelly
Vol. 1, No. 1, Spring 1977
25 Years of Controversy (School Desegregation), Ivan Gluckman
Vol. 3, No. 3, Fall 1979
You Must Desegregate!
Walter M. Perkins
Vol. 3, No. 3, Fall 1979
A Minority Agenda
Walter M. Perkins
Vol. 4, No. 1, Winter 1980

Update: The Complete Roster

Here are the titles and present status of each of our thirty-three issues. If you find a hole in your collection, or want to track down some issues that came out before you began your subscription, the information below will tell you what's in print and how you can order past issues (as well as photocopied articles from out-of-print issues).

Vol. 1, No. 1 (Spring, 1977)—The Court Grapples with Equal Protection*
Vol. 1, No. 2 (Fall, 1977)—Discipline and Due Process in the Schools

Vol. 2, No. 1 (Winter, 1978)—Freedom of Press on Trial*
Vol. 2, No. 2 (Spring, 1978)—Focus on Search and Seizure*
Vol. 2, No. 3 (Fall, 1978)—Sports and the Law

Vol. 3, No. 1 (Winter, 1979)—Religion and the Law*
Vol. 3, No. 2 (Spring, 1979)—Juvenile Justice*
Vol. 3, No. 3 (Fall, 1979)—Law Goes to School*

Vol. 4, No. 1 (Winter, 1980)—Law in the '80s
Vol. 4, No. 2 (Spring, 1980)—Speech: The First Freedom*
Vol. 4, No. 3 (Fall, 1980)—Law Around the World

Vol. 5, No. 1 (Winter, 1981)—What Is Justice?*
Vol. 5, No. 2 (Spring, 1981)—Law and the Family
Vol. 5, No. 3 (Fall, 1981)—Women and the Law

Vol. 6, No. 1 (Winter, 1982)—Courts at the Crossroads
Vol. 6, No. 2 (Spring, 1982)—Privacy vs. Power
Vol. 6, No. 3 (Fall, 1982)—Prisons—All Locked Up and Nowhere to Go

Vol. 7, No. 1 (Winter, 1983)—Law and Creativity
Vol. 7, No. 2 (Spring, 1983)—Sports and the Law II
Vol. 7, No. 3 (Fall, 1983)—Juvenile Justice: Getting Beyond the Stereotypes

Vol. 8, No. 1 (Winter, 1984)—The Constitution in War and Peace
Vol. 8, No. 2 (Spring, 1984)—The Law Takes New Directions
Vol. 8, No. 3 (Fall, 1984)—Is the World Ready for International Law?

Vol. 9, No. 1 (Winter, 1985)—The Revolution in Search and Seizure
Vol. 9, No. 2 (Spring, 1985)—The First Amendment at Mid-Decade
Vol. 9, No. 3 (Fall, 1985)—Free Press in America

Vol. 10, No. 1 (Winter, 1986)—Foundations of Freedom
Vol. 10, No. 2 (Spring, 1986)—Play Fair!
Vol. 10, No. 3 (Fall, 1986)—Separation of Powers

Vol. 11, No. 1 (Winter, 1987)—We the People
Vol. 11, No. 2 (Spring, 1987)—Bicentennial Themes
Vol. 11, No. 3 (Fall, 1987)—The Constitution at 200

Vol. 12, No. 1 (Winter, 1988)—Legal Literacy

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Beyond Racial Discrimination
Robert O'Neil
Vol. 4, No. 2, Spring 1980
Minority Agenda for the '80s: Part II
Walter M. Perkins
Vol. 4, No. 3, Fall 1980
The Dislike of the Unlike
Carlos Cortes and Van Perkins
Vol. 4, No. 3, Fall 1980
South Africa: The Last Plantation
N. Brian Winchester
Vol. 4, No. 3, Fall 1980
Does the Constitution Protect the Despised?, Richard L. Roe, Lee Arbetman and Rick Morey
Vol. 8, No. 1, Winter 1984
Equality—the Forgotten Word
Joyce A. Hughes
Vol. 10, No. 2, Spring 1986
Discrimination and the Law
Dale Greenawald
Vol. 10, No. 2, Spring 1986
Searching for Equality
James Giese and Barbara Miller
Vol. 11, No. 2, Spring 1987
Affirmative Action
James Giese and Barbara Miller
Vol. 11, No. 2, Spring 1987
The Idea of Justice
Julius Chambers
Vol. 11, No. 2, Spring 1987
The Dilemmas of Equality
Michael Middleton
Vol. 11, No. 2, Spring 1987
Great Constitutional Ideas: Justice, Equality and Property, Isidore Starr
Vol. 11, No. 2, Spring 1987
The Evolving Constitution
Thurgood Marshall
Vol. 11, No. 3, Fall 1987
The Civil Rights Amendments
Cleveland Public Schools
Vol. 11, No. 3, Fall 1987
Equal Protection Strategy
Elisabeth Dreyfuss
Vol. 12, No. 1, Winter 1988

Family Law
Cases on the Parent-Child Relationship
Will Bernard
Vol. 1, No. 2, Fall 1977
Parents, Children, Government: Sharing the Constitution Is Not Easy, Diane Gereghty
Vol. 5, No. 2, Spring 1981
Who Gets the Kids When Mom and Dad Call it Quits?, Teri Engler & Julie Gorman
Vol. 5, No. 2, Spring 1981
How to Teach Your Students about Marriage and Divorce, Ed O'Brien
Vol. 5, No. 2, Spring 1981
The Debate Over Sex Education
Louise Kaegi
Vol. 5, No. 2, Spring 1981
Should the Family Protection Act Be Passed? Charles Rice–Yes, Peter Bonavich–No
Vol. 5, No. 2, Spring 1981
Marriage in India: Law & Custom
Joan Erdman
Vol. 5, No. 2, Spring 1981
Materials on Law and the Family
Mabel C. McKinney-Browning
Vol. 5, No. 2, Spring 1981
Do Kids Have Rights at Home?
Teri Engler and Susan Sussman
Vol. 5, No. 2, Spring 1981

Federalism
When the Constitution Isn't Enough
Robert S. Peck
Vol. 10, No. 2, Spring 1986
Comparing State and Federal Constitutions, Lucinda J. Peach
Vol. 10, No. 2, Spring 1986
The Tides of Power
Joseph Daly
Vol. 10, No. 3, Fall 1986
Beyond the Bill of Rights
Charles White
Vol. 11, No. 1, Winter 1987
What Does the Constitution Say About Federalism?, Project 87
Vol. 11, No. 3, Fall 1987
Federal/State Relations: 55 mph Speed Limit, Margaret Fisher
Vol. 11, No. 3, Fall 1987
Federalism Lives
A. E. Dick Howard
Vol. 11, No. 3, Fall 1987

Fifth Amendment (see "Due Process")

First Amendment (see "Freedom of Religion," "Freedom of Speech," "Freedom of Press")

Fourth Amendment (see "Search and Seizure")

Freedom of Press
Freedom of Press on Trial
Alfred Goodwin and Lynn Taylor
Vol. 2, No. 1, Winter 1978
The Struggle for a Free Press
Cynthia A. Kelly
Vol. 2, No. 1, Winter 1978
Free Press vs. Fair Trial in Japan
John Walsh
Vol. 2, No. 1, Winter 1978
The Emerging Student Press
Christopher Fager
Vol. 2, No. 1, Winter 1978
New Decisions to Reckon With
Walter M. Perkins
Vol. 3, No. 3, Fall 1979
May Both Sides Win
Joel F. Henning
Vol. 4, No. 1, Winter 1980
The All-Seeing Eye of the Media
Gary W. Kubek
Vol. 6, No. 2, Spring 1982
Privacy vs. the Media
David T. Naylor and Bruce D. Smith
Vol. 6, No. 2, Spring 1982
New Life in Times of Strife?
Melinda Smith, Ken Rodriquez and Mary Louise Williams
Vol. 8, No. 1, Winter 1984
Has the Pen of the Press Been Turned into a Weapon?, Mary Manemann
Vol. 9, No. 2, Spring 1985
Down With Tyranny (John Peter Zenger's Trial), Isidore Starr
Vol. 9, No. 3, Fall 1985
Three First Amendment Cases
Richard Roe, Peter deLacy and Naomi Cahn
Vol. 9, No. 3, Fall 1985
The Universal Urge to Censor
Judith Krug
Vol. 9, No. 3, Fall 1985
The Curious Case of the Student Press
J. Marc Abrams
Vol. 9, No. 3, Fall 1985
Putting a Lid on Dissent
Eugene Roberts
Vol. 9, No. 3, Fall 1985
Should the Press Ever Be Limited?
Dale Greenawald
Vol. 9, No. 3, Fall 1985
Introducing the First Amendment
Dale Greenawald
Vol. 11, No. 1, Winter 1987
The Bill of Rights
Connie Yeaton and Karen Braeckel
Vol. 11, No. 1, Winter 1987

Freedom of Religion/Separation Between Church & State
Teetering on the Wall of Separation
Isidore Starr
Vol. 3, No. 1, Winter 1979
Should Churches Be Taxed?
Yes–Steven Delibert; No–Dean Kelley
Vol. 3, No. 1, Winter 1979
Religion and the Law in the Middle East
John Walsh
Vol. 3, No. 1, Winter 1979
Christian Yellow Pages Under Fire
Lisa Broido
Vol. 3, No. 1, Winter 1979
The Crusade Against Polygamy
Charles White
Vol. 3, No. 1, Winter 1979
Sectual Discrimination?
Lisa Broido
Vol. 3, No. 1, Winter 1979
My Pilgrimage to the Wall of Separation....
Isidore Starr
Vol. 9, No. 2, Spring 1985
Going Beyond Darwin
Marshall Croddy
Vol. 9, No. 2, Spring 1985
Religion and Crime Head the High Court's Decision List, Robert Hayman and Jeanett Gringo
Vol. 9, No. 3, Fall 1985
The Religious Guarantees
National Archives
Vol. 11, No. 1, Winter 1987

Freedom of Speech
The Case for the Case Study Approach
Isidore Starr
Vol. 1, No. 2, Fall 1977
Carving Exceptions out of the First Amendment, Franklyn S. Haiman
Vol. 4, No. 2, Spring 1980
Teaching About Free Speech for Students
Frank Pawlak
Vol. 4, No. 2, Spring 1980
Who Says Teachers Have Rights?
Louis Fischer
Vol. 4, No. 2, Spring 1980
How Are Communists Treated in France, Germany and the U.S.?, John Walsh
Vol. 4, No. 2, Spring 1980
If Courts Recognized Student Rights
David Schimmel
Vol. 4, No. 2, Spring 1980
Freedom Fighters of the 30s
William Preston
Vol. 4, No. 2, Spring 1980

Free Speech and the Military
Edward Sherman
Vol. 5, No. 1, Winter 1981
Locked Books, Locked Minds
Judith Krug
Vol. 5, No. 1, Winter 1981
Teachers Do Have Rights
Leigh Stelzer and Joanna Banthin
Vol. 6, No. 2, Spring 1982
New Life in Times of Strife? (Free Speech in Wartime), Melinda Smith, Ken Rodriguez and Mary Louise Williams
Vol. 8, No. 1, Winter 1984
What Is the Status of Free Speech in America?, Franklyn Haiman
Vol. 9, No. 2, Spring 1985
Freedom of Speech
Dale Greenawald
Vol. 10, No. 1, Winter 1986
Our Freedom to Assemble and Associate
Ann Blum
Vol. 10, No. 1, Winter 1986
Come to the First Amendment Fair
Ann Blum
Vol. 10, No. 2, Spring 1986
The Bill of Rights
Connie Yeaton and Karen Braeckel
Vol. 11, No. 1, Winter 1987
Balancing Power and Liberty in the School, Kenneth A. Sprang
Vol. 11, No. 1, Winter 1987

Habeas Corpus
Teaching About Habeas Corpus
Richard Roe
Vol. 10, No. 1, Winter 1986

Hypnotism in Law
Is Hypnotism a Weapon Against Crime?
Robert Yates
Vol. 8, No. 2, Spring 1984

Insanity Defense
By Reason of Insanity
Gary Rivlin
Vol 6, No. 1, Winter 1982

Justice (see "Due Process")

Juvenile Justice
Juvenile Justice from Hammurabi to John Rector, Wallace Mlyniec
Vol. 3, No. 2, Spring 1979
Juvenile Justice in Action
Todd Clark
Vol. 3, No. 2, Spring 1979
Are Our Juvenile Courts Working?
Edward Kennedy and William White
Vol. 3, No. 2, Spring 1979
Portrait of a Maverick
Walter M. Perkins
Vol. 3, No. 2, Spring 1979
A Double Standard for Girls?
Lisa Broido
Vol. 3, No. 2, Spring 1979
Does Sweden Have a Better Idea?
John E. Walsh
Vol. 3, No. 2, Spring 1979
Justice Is for Kids Too
Stuart Goldblatt
Vol. 3, No. 3, Fall 1979
New Directions for Youngsters in Trouble
Debra Dresbach
Vol. 4, No. 2, Spring 1980
Child Abuse: The Crime No One Wants to Talk About, Beverly Cole
Vol. 6, No. 2, Spring 1982
Once an Adult, Always an Adult
Robert Clayman
Vol. 7, No. 3, Fall 1983
When Tortured Children Strike Back
Barry Siegel
Vol. 7, No. 3, Fall 1983
The Ins and Outs of Juvenile Crime
Albie Davis and Peter deLacy
Vol. 7, No. 3, Fall 1983
Aging Youngsters Before Their Time
Teri Engler
Vol. 7, No. 3, Fall 1983
New Ideas for Disturbed Youngsters
Deborah Strigenz and Doug Marek
Vol. 7, No. 3, Fall 1983
Junior Is Heading for Jail
Donna Wulkan
Vol. 8, No. 1, Winter 1984
The High Court Goes to School
Robert Hayman and George Kassouf
Vol. 9, No. 1, Winter 1985
Juvenile Justice
Dale Greenawald
Vol. 11, No. 2, Spring 1987
The Eighth Amendment and the Death Penalty, Joseph Shortall and Denise Merrill
Vol. 11, No. 2, Spring 1987

Labor Law
Solidarity for What?
Frank C. Kopecky
Vol. 7, No. 2, Spring 1983
Solidarity Forever
Sargent Karch
Vol. 7, No. 2, Spring 1983
Keeping Owners and Players from Maiming Each Other, Betty Southard Murphy
Vol. 7, No. 2, Spring 1983

Law Around the World
Free Press v. Fair Trial in Japan
John E. Walsh
Vol. 2, No. 1, Winter 1978
Privacy vs. Crime Detection in England and the United States, John E. Walsh
Vol. 2, No. 2, Spring 1978
Religion and the Law in the Middle East
John E. Walsh
Vol. 3, No. 1, Winter 1979
Does Sweden Have a Better Idea?
John E. Walsh
Vol. 3, No. 2, Spring 1979
What? Students Have No Rights in Canada?, John E. Walsh
Vol. 3, No. 3, Fall 1979
How Are Communists Treated in France, Germany and the U.S.?, John E. Walsh
Vol. 4, No. 2, Spring 1980
The Dislike of the Unlike
Carlos Cortes and Van Perkins
Vol. 4, No. 3, Fall 1980
Folklaw
Lynne Schwab and Lynda Falkenstein
Vol. 4, No. 3, Fall 1980
South Africa: The Last Plantation
N. Brian Winchester
Vol. 4, No. 3, Fall 1980
Unsnarling Legal Tangles
Frank Kopecky and Rebecca Wilkin
Vol. 4, No. 3, Fall 1980
Teaching Global Law
Margaret Stimmann Branson
Vol. 4, No. 3, Fall 1980
There Is an Alternative to the Adversary System, Charles White
Vol. 4, No. 3, Fall 1980
Russia's Schizophrenic Courts
Sharon Irish
Vol. 4, No. 3, Fall 1980
Marriage in India: Law and Custom
Joan L. Erdman
Vol. 5, No. 2, Spring 1981
The Tug-of-War Between Law and Custom, Linda S. Wojtan
Vol. 5, No. 3, Fall 1981
Can One Court Reach Around the World?
Joe Daly
Vol. 8, No. 3, Fall 1984
Refugees: The Problem Without a Solution, Kathleen Daly
Vol. 8, No. 3, Fall 1984
Making Human Rights Come Alive—Strategies, Dorothy Skeel
Vol. 8, No. 3, Fall 1984
Lawyers in the Street: The Chinese Have Big Plans for Bringing Law—and Education About the Law—to the People
David Schimmel
Vol. 8, No. 3, Fall 1984

Law in the Future
Space-age Crime Stoppers
Frank Kopecky
Vol. 4, No. 1, Winter 1980
Teaching About the Future Is No Joke
Ronald Gerlach
Vol. 4, No. 1, Winter 1980
Civil Liberties and the Atom
John Palincsar
Vol. 4, No. 1, Winter 1980
How I'd Revolutionize the Schools . . . If I Were Dictator, Robert Rubel and John Rubel
Vol. 5, No. 2, Spring 1981
If I Were Dictator
George H. Williams
Vol. 6, No. 1, Winter 1982
Trial by Cassette?
Gerald R. Miller
Vol. 9, No. 1, Winter 1985

Legal Language
Legal Language—Help or Hype?
Mandamus
Vol. 3, No. 2, Spring 1979
When Judges Throw Gibberish at Jurors
Anthony Partridge
Vol. 8, No. 2, Spring 1984

Mediation
Justice Without Judges
Albie Davis
Vol. 8, No. 3, Fall 1984
Tales of Schoolyard Mediation
Albie Davis and Kit Porter
Vol. 9, No. 1, Winter 1985
Resolving Disputes: The Choice Is Ours
Albie Davis and Richard Salem
Vol. 9, No. 2, Spring 1985
Mediation and the Adversary Process
Melinda Smith
Vol. 10, No. 1, Winter 1986
The Case of the Professional Tap Dancer
Arlene Gallagher
Vol. 10, No. 1, Winter 1986

Military Law
Free Speech and the Military
Edward Sherman
Vol. 5, No. 1, Winter 1981

Miranda Rights
Would Your Students Talk?
Mary Furlong and Shavaun Wall
Vol. 6, No. 3, Fall 1982

Mock Trials
From Classroom to Courtroom: The Mock Trial, Lee Arbetman and Ed O'Brien
Vol. 2, No. 1, Winter 1978
Mini Mock Trials
Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Elementary Mock Trial
Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Criminal Law Mock Trial
Jennifer Bloom
Vol. 10, No. 1, Winter 1986

Morality and the Law
Morality on Trial
Frank Kopecky
Vol. 4, No. 1, Winter 1980
Does Conscience Matter More Than Law?
Sharon Irish
Vol. 5, No. 1, Winter 1981
Making Government Fair
George Galland
Vol. 10, No. 2, Spring 1986
Justice: Making Wrongs Right
Dale Greenawald
Vol. 11, No. 2, Spring 1987
What Is Justice?
Law in a Free Society
Vol. 11, No. 2, Spring 1987

Plea Bargaining
Wheeling and Dealing Justice
Gary Rivlin
Vol. 6, No. 1, Winter 1982

Power (Authority)
To Establish—and Limit—a Government
Paul Murphy
Vol. 6, No. 2, Spring 1982
Making Government Play by the Rules
Richard L. Roe
Vol. 10, No. 1, Winter 1986
Building Blocks of Freedom
Lucinda J. Peach
Vol. 10, No. 1, Winter 1986
Constitutions and the Spirit of Liberty
Paul Murphy
Vol. 10, No. 2, Spring 1986
Making Government Fair
George Galland
Vol. 10, No. 2, Spring 1986
The Five Great Ideas of Our Constitution
Isidore Starr
Vol. 11, No. 1, Winter 1987
Power and Constitutionalism in America
Eugene W. Hickok, Jr.
Vol. 11, No. 1, Winter 1987

Prisons
Tailoring the Sentence to Fit the Criminal
Lori B. Andrews and Stephen Kanner
Vol. 6, No. 1, Winter 1982
More than Slaves, Less than Free Men
Janisse Lifton
Vol. 6, No. 3, Fall 1982
The Crime of Punishment
Gary Rivlin
Vol. 6, No. 3, Fall 1982
There Are Alternatives
Jerome Miller and Herbert Hoelter
Vol. 6, No. 3, Fall 1982
A Prison by Any Other Name
Robert Hunter
Vol. 6, No. 3, Fall 1982
What Prison Does to Women
Miriam Krasno
Vol. 6, No. 3, Fall 1982
Junior Is Heading for Jail
Donna Wulkan
Vol. 8, No. 1, Winter 1984
When Is a Sentence Fair?
Jay Casper
Vol. 8, No. 2, Spring 1984

Privacy (see also "Search and Seizure")
Does Sweden Have a Better Idea?
John E. Walsh
Vol. 3, No. 2, Spring 1979
Privacy in School: Something to Sniff At?
Patricia McGuire
Vol. 4, No. 3, Fall 1980
An American Right Unmentioned in the Constitution, William Preston
Vol. 6, No. 2, Spring 1982
Do You Sleep in the Nude?
Gary Rivlin
Vol. 6, No. 2, Spring 1982
Open Doors, Open Minds: The Privacy Issue, Alita Letwin
Vol. 6, No. 2, Spring 1982
The All-Seeing Eye of the Media
Gary Kubek
Vol. 6, No. 2, Spring 1982
Privacy vs. the Media
David Naylor and Bruce Smith
Vol. 6, No. 2, Spring 1982
F.O.I.A.—No Gov't, Liberal or Conservative Would Like This Law, David Harris
Vol. 6, No. 2, Spring 1982
A Conspiracy Against the Inner Life
Louise Kaegi
Vol. 6, No. 3, Fall 1982
Privacy and Prosecution: Can We Have It Both Ways? Edward T. McMahon and Lee Arbetman
Vol. 8, No. 1, Winter 1984

Property
No Patent on Wisdom (Patents)
James A. Sprowl and James J. Myrick
Vol. 7, No. 1, Winter 1983
Piracy Pays—and Pays Well (Copyright Violations), Charles White
Vol. 7, No. 1, Winter 1983
Invisible Property (Intellectual Property)
Alita Z. Letwin
Vol. 7, No. 1, Winter 1983
The Scene of the Crime (Taping TV Programs off the Air), Robert S. Peck
Vol. 7, No. 1, Winter 1983
Parody: Not Always a Laughing Matter
Lisa Broido Kenoe
Vol. 7, No. 1, Winter 1983
Life Beyond Copyright
Miriam R. Krasno
Vol. 7, No. 1, Winter 1983
Can the Law Save Beauty? (Landmark Preservation Laws), Sharon Irish
Vol. 7, No. 1, Winter 1983
Justice, Equality and Property
Isidore Starr
Vol. 11, No. 2, Spring 1987
The Idea of Property in the Constitution
Isidore Starr
Vol. 11, No. 2, Spring 1987
Property: Scope and Limits of Ownership of Property, Law in a Free Society
Vol. 11, No. 2, Spring 1987
Weights and Measures
Ann Blum
Vol. 11, No. 2, Spring 1987
Equality and Property: Yours, Mine and Ours, Arlene Gallagher
Vol. 11, No. 2, Spring 1987

Renting
Ranting and Renting
Joseph Daly and Jennifer D. Bloom
Vol. 6, No. 1, Winter 1982

School Law (see also "Student Rights and Responsibilities" and "Teacher Rights and Responsibilities")
A Plea for Equality
Cynthia A. Kelly
Vol. 1, No. 1, Spring 1977
From Cheerleader to Competitor
Mariann Pogge
Vol. 2, No. 3, Fall 1978
25 Years of Controversy
Ivan Gluckman
Vol. 3, No. 3, Fall 1979
"You Must Desegregate!"
Walter M. Perkins
Vol. 3, No. 3, Fall 1979
Is Law Polluting the Schools?
Edward J. Meade, Jr.
Vol. 3, No. 3, Fall 1979
Educational Malpractice Worrying You?
Cynthia Kelly and Bernice McCarthy
Vol. 4, No. 1, Winter 1980
Privacy in School: Something to Sniff At?
Patricia McGuire
Vol. 4, No. 3, Fall 1980
Locked Books, Locked Minds
Judith F. King
Vol. 5, No. 1, Winter 1981
Child Abuse: The Crime No One Wants to Talk About, Beverly Cole
Vol. 6, No. 2, Spring 1982
A Conspiracy Against the Inner Life
Louise Kaegi
Vol. 6, No. 3, Fall 1982
The Sexist Underground in Sports
Marianne Pogge-Strubing
Vol. 7, No. 2, Spring 1983
Going Beyond Darwin
Marshall Croddy
Vol. 9, No. 2, Spring 1985
The Exercise of Power: Developing Reasonable School Policies, Kenneth A. Sprang
Vol. 11, No. 1, Winter 1987
Why Do I Have to Go to School?
Lucinda J. Peach
Vol. 12, No. 1, Winter 1988

Search and Seizure (see also "Privacy")
In Search of Fourth Amendment Standards, Charles White
Vol. 2, No. 2, Spring 1978
Teaching About Search and Seizure
Cynthia Kelly
Vol. 2, No. 2, Spring 1978
Privacy vs. Crime Detection in England and the United States, John Walsh
Vol. 2, No. 2, Spring 1978
Righting an Old Writ
Charles White
Vol. 2, No. 2, Spring 1978
Search and Privacy in the Schools
Norman Gross
Vol. 2, No. 2, Spring 1978

Cases on Privacy and Property
Will Bernard
Vol. 2, No. 2, Spring 1978
New Decisions to Reckon With
Walter Perkins
Vol. 3, No. 3, Fall 1979
Privacy in School: Something to Sniff At?
Patricia McGuire
Vol. 4, No. 3, Fall 1980
An American Right Unmentioned in the Constitution, William Preston
Vol. 6, No. 2, Spring 1982
Privacy and Prosecution: Can We Have It Both Ways?, Edward T. McMahon and Lee Arbetman
Vol. 8, No. 1, Winter 1984
Whatever Happened to the Fourth Amendment?, Robert Hayman
Vol. 8, No. 3, Fall 1984
The Revolution in Search and Seizure
Joseph Daly
Vol. 9, No. 1, Winter 1985
Should Students Have Rights?
Marilyn Cover
Vol. 9, No. 1, Winter 1985
Teaching About Search and Seizure
Leslie A. Williamson
Vol. 10, No. 1, Winter 1986
Making Government Play by the Rules
Richard Roe
Vol. 10, No. 1, Winter 1986
The Need for the Fourth Amendment
Steve Jenkins
Vol. 10, No. 2, Spring 1986
Giving Meaning to the Phrase 'Probable Cause', Steve Jenkins
Vol. 10, No. 2, Spring 1986
Examining an Affidavit for a Search Warrant, Steve Jenkins
Vol. 10, No. 2, Spring 1986
Examining a Search Warrant
Steve Jenkins
Vol. 10, No. 2, Spring 1986
Searches Without a Warrant
Steve Jenkins
Vol. 10, No. 2, Spring 1986
Search and Seizure
Dale Greenawald
Vol. 12, No. 1, Winter 1988

Separation of Powers
The Constitution's Prescription for Freedom, Lucinda Peach
Vol. 10, No. 3, Fall 1986
Foundations of Judicial Review
Peter deLacy
Vol. 10, No. 3, Fall 1986
The Tides of Power
Joseph Daly
Vol. 10, No. 3, Fall 1986
Claim Your Powers
Law in a Changing Society
Vol. 10, No. 3, Fall 1986
Case Study: A Separation of Powers Lesson, Steve Jenkins
Vol. 10, No. 3, Fall 1986
Teaching About Separation of Powers
David E. Harris and Alan L. Lockwood
Vol. 10, No. 3, Fall 1986
Teaching About Judicial Review
Peter deLacy
Vol. 10, No. 3, Fall 1986
Separation of Powers
Margaret Fisher
Vol. 11, No. 1, Spring 1987
Separation of Powers in Foreign and Domestic Contexts, Robert W. Bennett
Vol. 11, No. 3, Fall 1987
A Clash of Giants
Law in a Changing Society
Vol. 11, No. 3, Fall 1987

Sixth Amendment (see "Due Process")

Small Claims Court
Why I Went to Small Claims Court
Charles White
Vol. 1, No. 2, Fall 1977

Sports and the Law
Ballplayers Score Big in the Legal Game
Frank Kopecky
Vol. 2, No. 3, Fall 1978
From Cheerleader to Competitor
Mariann Pogge
Vol. 2, No. 3, Fall 1978
The NCAA Goes to Court
Dennis Gilbert
Vol. 2, No. 3, Fall 1978
The More Things Change. . . .
Stephen Conn and Paul Beach
Vol. 2, No. 3, Fall 1978
Cases on Sports and Torts
Will Bernard
Vol. 2, No. 3, Fall 1978
Kill 'Em!
Teri Engler
Vol. 7, No. 2, Spring 1983
Is Student Athlete a Contradiction in Terms?, C. Thomas Ross
Vol. 7, No. 2, Spring 1983
Sports News You Can Use
Nancy Mathews
Vol. 7, No. 2, Spring 1983
The Sexist Underground in Sports
Marianne Pogge-Sturbing
Vol. 7, No. 2, Spring 1983
Getting in the Pit with Players and Owners, Frank Kopecky
Vol. 7, No. 2, Spring 1983
Solidarity Forever
Sargent Karch
Vol. 7, No. 2, Spring 1983
Keeping Owners and Players from Maiming Each Other, Betty Southard Murphy
Vol. 7, No. 2, Spring 1983
Can the League Cope with a Renegade Owner?, Robert Peck
Vol. 7, No. 2, Spring 1983
Blessed by a Bandage of Cold Cash
Harry Shooshan
Vol. 7, No. 2, Spring 1983
Playing with Pain—Football Injuries
Mabel McKinney-Browning
Vol. 7, No. 3, Fall 1983
Is the Law Ruining Sports?
Herb Appenzeller
Vol. 7, No. 3, Fall 1983
Using Sports to Teach Torts
Teri Engler
Vol. 8, No. 1, Winter 1984

Strategies (General)
The Case for the Case Study Approach
Isidore Starr
Vol. 1, No. 2, Fall 1977
From Classroom to Courtroom: The Mock Trial, Lee Arbetman and Ed O'Brien
Vol. 2, No. 1, Winter 1978
Teaching About Search and Seizure
Cynthia A. Kelly
Vol. 2, No. 2, Spring 1978
Teaching About Contracts
Michael Froman and Kathy Kosnoff Erlinder
Vol. 2, No. 3, Fall 1978
Teaching About Breaching
Thomas J. Stanfa and Ilene Goldstein
Vol. 3, No. 1, Winter 1979
Juvenile Justice in Action
The CRF Staff
Vol. 3, No. 2, Spring 1979
Teaching About Student Rights and Responsibilities, David Naylor
Vol. 3, No. 3, Fall 1979
Teaching About the Future Is No Joke
Ronald A. Gerlach
Vol. 4, No. 1, Winter 1980
New Directions for Youngsters in Trouble
Debra Dresbach
Vol. 4, No. 2, Spring 1980
Teaching Global Law
Margaret Stimmann Branson
Vol. 4, No. 3, Fall 1980
I Do (Strategies on Family Law)
Ed O'Brien
Vol. 5, No. 2, Spring 1981
Open Doors, Open Minds: The Privacy Issue, Alita Z. Letwin
Vol. 6, No. 2, Spring 1982
Privacy vs. the Media
David T. Naylor and Bruce D. Smith
Vol. 6, No. 2, Spring 1982
People Power in the Courts
Julie Van Camp
Vol. 6, No. 1, Winter 1982
Classroom Strategies for Handling Women's Issues, Carolyn Pereira
Vol. 5, No. 3, Fall 1981
Would Your Students Talk? (Miranda Rights), Mary Furlong and Shavaun M. Wall
Vol. 6, No. 3, Fall 1982
Sports News You Can Use
Nancy N. Mathews
Vol. 7, No. 2, Spring 1983
The Ins and Outs of Juvenile Crime
Albie Davis and Peter deLacy
Vol. 7, No. 3, Fall 1983
How to Present the Latest in the Law
Hope Lochridge and Tom Powers
Vol. 8, No. 2, Spring 1984
Making Human Rights Come Alive
Dorothy J. Skeel
Vol. 8, No. 3, Fall 1984
Resolving Disputes: The Choice Is Ours
Albie Davis and Richard A. Salem
Vol. 9, No. 2, Spring 1985

Strategies (Elementary)
Lawyers in Elementary Classrooms
Arlene Gallagher
Vol. 10, No. 1, Winter 1986
Problems in Green Valley (Early Elementary), Arlene Gallagher
Vol. 10, No. 1, Winter 1986
The Case of the Professional Tap Dancer (Early Elementary), Arlene Gallagher
Vol. 10, No. 1, Winter 1986
Teaching About Contracts (K–4)
Lloyd E. Shefsky
Vol. 10, No. 1, Winter 1986
People Who Make Courts Work (K–3)
Dale Greenawald
Vol. 10, No. 1, Winter 1986
Seeking Facts to Solve Mysteries (K–3)
Dale Greenawald
Vol. 10, No. 1, Winter 1986

Seeking Facts to Solve Mysteries (4–6)
Dale Greenawald
Vol. 10, No. 1, Winter 1986
Mini Mock Trials (5–12)
Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Elementary Mock Trial (5–6)
Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Freedom of Speech (4–6)
Dale Greenawald
Vol. 10, No. 1, Winter 1986
The Concept of Power (K–6)
Carol Roach
Vol. 11, No. 1, Winter 1987
The Concept of Liberty (K–6)
Carol Roach
Vol. 11, No. 1, Winter 1987
Why the Constitution Works (Gr. 5)
Phyllis J. Clarke
Vol. 11, No. 1, Winter 1987
The Bill of Rights (4–6)
Connie Yeaton and Karen Braeckel
Vol. 11, No. 1, Winter 1987
Making Wrongs Right (K–8)
Dale Greenawald
Vol. 11, No. 2, Spring 1987
The Scope and Limits of Ownership of Property (3–5), Law in a Free Society
Vol. 11, No. 2, Spring 1987
Equality and Property: Yours, Mine and Ours (Elementary and Middle), Arlene F. Gallagher
Vol. 11, No. 2, Spring 1987
The Civil Rights Amendments (4–6)
Cleveland Public Schools
Vol. 11, No. 2, Spring 1987
The Supreme Court (Gr. 6)
Connie Yeaton and Karen Braeckel
Vol. 11, No. 2, Spring 1987
Warranties (5–9)
Gayle Mertz
Vol. 12, No. 1, Winter 1988
Contracts (5–9)
Gayle Mertz
Vol. 12, No. 1, Winter 1988
Search and Seizure (4–6)
Dale Greenawald
Vol. 12, No. 1, Winter 1988
Battle for the Truth (4–12)
State Bar of Texas
Vol. 12, No. 1, Winter 1988
Rights and Responsibilities (1–4)
Meredith Henderson
Vol. 12, No. 1, Winter 1988
Dramatization of Salem Witch Trials (Upper Elem.), Elizabeth Chorak
Vol. 12, No. 1, Winter 1988
Lawmakers: Who's Who in the Law (4–6)
Patricia Jarvis
Vol. 12, No. 1, Winter 1988
Freedom of Expression (4–12)
State Bar of Texas
Vol. 12, No. 1, Winter 1988

Strategies (Middle)
Teaching About Habeas Corpus (7–9)
Richard Roe
Vol. 10, No. 1, Winter 1986
Mediation and the Adversary Process (5–8) (9–12), Melinda Smith
Vol. 10, No. 1, Winter 1986
What Is Procedural Justice? (Middle-Secondary), Law in a Free Society
Vol. 10, No. 1, Winter 1986
Criminal Law Mock Trial (Middle-Secondary), Jennifer Bloom
Vol. 10, No. 1, Winter 1986
Voir Dire Simulation (Middle School)
Julie Van Camp
Vol. 10, No. 1, Winter 1986
Freedom of Speech and Expression (7–12)
Dale Greenawald
Vol. 11, No. 1, Winter 1987
Introducing the First Amendment (Upper Elem., Middle), Donna Sorenson
Vol. 11, No. 1, Winter 1987
Authority (7–9)
Law in a Free Society
Vol. 11, No. 1, Winter 1987
Juvenile Justice (7–12)
Dale Greenawald
Vol. 11, No. 2, Spring 1987
Searching for Equality (7–12)
James Giese and Barbara Miller
Vol. 11, No. 2, Spring 1987
Weights and Measures (7–12)
Ann Blum
Vol. 11, No. 2, Spring 1987
Classroom Constitutional Conventions (Upper Elem., Middle), Carol Roach
Vol. 11, No. 3, Fall 1987
Battle for the Truth (4–12)
State Bar of Texas
Vol. 12, No. 1, Winter 1988
Freedom of Expression (4–12)
State Bar of Texas
Vol. 12, No. 1, Winter 1988
Students' Constitutional Rights (Upper Elem., Middle),
Kathy Aldridge and Jeanne Wray
Vol. 12, No. 1, Winter 1988

Strategies (Secondary)
You Decide: A Jury Simulation (Secondary) Joseph O'Brien
Vol. 10, No. 1, Winter 1986
Historical Foundations of Individual Liberties (9–12), Steve Jenkins
Vol. 10, No. 1, Winter 1986
Teaching About Search and Seizure (9–12)
Denise Merrill, Margaret Richards and Joseph Shortall
Vol. 10, No. 1, Winter 1986
Our Freedom to Assemble and Associate (9–12), Ann Blum
Vol. 10, No. 1, Winter 1986
Right to Counsel (9–12)
Alan L. Lockwood and David E. Harris
Vol. 10, No. 1, Winter 1986
Come to the First Amendment Fair (Secondary), Ann Blum
Vol. 10, No. 2, Spring 1986
The Need for the Fourth Amendment (9–12), Steve Jenkins
Vol. 10, No. 2, Spring 1986
Giving Meaning to the Phrase "Probable Cause" (9–12), Steve Jenkins
Vol. 10, No. 2, Spring 1986
Examining an Affidavit for a Search Warrant (9–12), Steve Jenkins
Vol. 10, No. 2, Spring 1986
Examining a Search Warrant (9–12)
Steve Jenkins
Vol. 10, No. 2, Spring 1986
Sex Discrimination (7–12)
Dale Greenawald
Vol. 10, No. 2, Spring 1986
Discrimination and the Law (9–12)
Dale Greenawald
Vol. 10, No. 2, Spring 1986
Comparing State and Federal Constitutions (Secondary), Lucinda J. Peach
Vol. 10, No. 2, Spring 1986
Searches Without Warrants (9–12)
Steve Jenkins
Vol. 10, No. 2, Spring 1986
The Tides of Power (Secondary)
Joseph Daly
Vol. 10, No. 3, Fall 1986
Claim Your Power (Secondary)
Law in a Changing Society
Vol. 10, No. 3, Fall 1986
Case Study: A Separation of Powers Lesson (Secondary), Steve Jenkins
Vol. 10, No. 3, Fall 1986
Teaching About Separation of Powers (Secondary), David E. Harris and Alan L. Lockwood
Vol. 10, No. 3, Fall 1986
Teaching About Judicial Review (Secondary), Peter deLacy
Vol. 10, No. 3, Fall 1986
Supreme Court Crossword (Secondary)
Law in a Changing Society
Vol. 10, No. 3, Fall 1986
Selecting Supreme Court Justices: Beyond Advice and Consent (Secondary),
Steve Jenkins
Vol. 10, No. 3, Fall 1986
It's My Life (Secondary)
Jennifer D. Bloom
Vol. 11, No. 1, Winter 1987
The Religious Guarantees (Secondary)
National Archives
Vol. 11, No. 1, Winter 1987
Balancing Power and Liberty in the School (Secondary), Kenneth A. Sprang
Vol. 11, No. 1, Winter 1987
The Exercise of Power: Developing Reasonable School Policies (Secondary),
Kenneth A. Sprang
Vol. 11, No. 1, Winter 1987
Separation of Powers (Secondary)
Margaret Fisher
Vol. 11, No. 1, Winter 1987
What Is Justice? (10–12)
Law in a Free Society
Vol. 11, No. 2, Spring 1987
Courthouses as Learning Laboratories (Secondary), Robert Clayman and Lynn Sygiel
Vol. 11, No. 2, Spring 1987
Affirmative Action (Secondary)
James Giese and Barbara Miller
Vol. 11, No. 2, Spring 1987
Eighth Amendment & Death Penalty (Secondary), Joseph M. Shortall and Denise W. Merrill
Vol. 11, No. 2, Spring 1987
A Clash of Giants (Secondary)
Law in a Changing Society
Vol. 11, No. 3, Fall 1987
Will the Court Hear This Case? (Secondary), Law in a Changing Society
Vol. 11, No. 3, Fall 1987
The Right to Vote: Giving New Meaning to "We the People" (Secondary), Steve Jenkins
Vol. 11, No. 3, Fall 1987
Equal Vote to Equal Voice (Secondary)
Steve Jenkins
Vol. 11, No. 3, Fall 1987
What Does the Constitution Say About Federalism? (8–12), Project '87
Vol. 11, No. 3, Fall 1987

Federal/State Regulations: 55 mph Speed Limit (Secondary), Margaret Fisher
Vol. 11, No. 3, Fall 1987
Battle for the Truth (4–12)
State Bar of Texas
Vol. 12, No. 1, Winter 1988
Freedom of Expression (4–12)
State Bar of Texas
Vol. 12, No. 1, Winter 1988
Making a Lawyer's Work Come Alive (Secondary), Peter deLacy
Vol. 12, No. 1, Winter 1988
Privacy and Property (Secondary)
Margaret Fisher
Vol. 12, No. 1, Winter 1988
Law "Tests" (Secondary)
Carolyn Pereira
Vol. 12, No. 1, Winter 1988
Youth Rights on the Job (Secondary)
Dale Greenawald
Vol. 12, No. 1, Winter 1988
Equal Protection Strategy (Secondary)
Elisabeth Dreyfuss
Vol. 12, No. 1, Winter 1988

Student Rights and Responsibilities

Discipline and Due Process in the Schools
David Schimmel & Louis Fischer
Vol 1, No. 2, Fall 1977
The Case for the Case Study Approach (Tinker Case, Student Freedom of Speech), Isidore Starr
Vol. 1, No. 2, Fall 1977
Spare the Rod and . . . (19th Century School Discipline), Cynthia Kelly
Vol. 1, No. 2, Fall 1977
The Emerging Student Press
Christopher Fager
Vol. 2, No. 1, Winter 1978
Search and Privacy in the Schools
Norman Gross
Vol. 2, No. 2, Spring 1978
Teaching About Student Rights and Responsibilities, David Naylor
Vol. 3, No. 3, Fall 1979
Is Law Polluting the Schools?
Edward Meade
Vol. 3, No. 3, Fall 1979
What? Students Have No Rights in Canada?, John E. Walsh
Vol. 3, No. 3, Fall 1979
Teaching About Free Speech for Students
Frank Pawlak
Vol. 4, No. 2, Spring 1980
If Courts Recognized Student Rights
David Schimmel
Vol. 4, No. 2, Spring 1980
The Worst Kind of Discipline
Gail Paulus Sorenson
Vol. 6, No. 3, Fall 1982
School Discipline, Round Two
David Schimmel and Jeffrey Eiseman
Vol. 6, No. 3, Fall 1982
Should Students Have Rights?
Marilyn Cover
Vol. 9, No. 1, Winter 1985
The High Court Goes to School
Robert Hayman & George Kassouf
Vol. 9, No. 1, Winter 1985
Tales of Schoolyard Mediation
Albie Davis & Kit Porter
Vol. 9, No. 1, Winter 1985
The Curious Case of the Student Press
J. Marc Abrams
Vol. 9, No. 3, Fall 1985

Balancing Power and Liberty in the School, Kenneth A. Sprang
Vol. 11, No. 1, Winter 1987
Why Do I Have to Go to School?
Lucinda J. Peach
Vol. 12, No. 1, Winter 1988
Students' Constitutional Rights
Kathy Aldridge and Jeanne Wray
Vol. 12, No. 1, Winter 1988

Supreme Court Cases (See also "Court Briefs")

Ballplayers Score Big in the Legal Game
Frank Kopecky
Vol. 2, No. 3, Fall 1978
The Court and the Cops
James Fyfe
Vol. 5, No. 1, Winter 1981
When a Trial Becomes a Political Circus
Charles White
Vol. 5, No. 1, Winter 1981
Sharing the Constitution Is Not Easy
Diane Geraghty
Vol. 5, No. 2, Spring 1981
When a Law Becomes a Political Football (Political Trials), Charles White
Vol. 5, No. 2, Spring 1981
An American Right Unmentioned in the Constitution, William Preston
Vol. 6, No. 2, Spring 1982
No Patent on Wisdom
James Sprowl and James Myrick
Vol. 7, No. 1, Winter 1983
Attacks on the Courts
Isidore Starr
Vol. 8, No. 1, Winter 1984
When Small Disputes Make Big Differences, James G. Lengel and Gerald A. Danzer
Vol. 8, No. 1, Winter 1984
Who Shall Declare War?
Melinda Smith, Ken Rodriguez and Mary Louise Williams
Vol. 8, No. 1, Winter 1984
New Life in Time of Strife?
Melinda Smith, Ken Rodriquez and Mary Louise Williams
Vol. 8, No. 1, Winter 1984
Privacy and Prosecution: Can We Have It Both Ways?, Edward T. McMahon and Lee Arbetman
Vol. 8, No. 1, Winter 1984
Does the Constitution Protect the Despised?, Richard L. Roe, Lee Arbetman and Rick Morey
Vol. 8, No. 1, Winter 1984
Separation of Powers in Foreign and Domestic Contexts, Robert W. Bennett
Vol. 11, No. 3, Fall 1987

Supreme Court Justices

Can the President Pack the Court?
Robert Peck
Vol. 8, No. 2, Spring 1984
Supreme Court Crossword
Law in a Changing Society
Vol. 10, No. 1, Winter 1986
Selecting Supreme Court Justices: Beyond Advice and Consent, Steve Jenkins
Vol. 10, No. 1, Winter 1986
The Supreme Court in Transition: From Warren to Burger to Rehnquist
David O'Brien
Vol. 10, No. 3, Fall 1986

Teacher Rights and Responsibilities

A Legal Battle Brews
Charles White
Vol. 3, No. 2, Spring 1979
A Legal Battle Ends (Concluding Chapter of Dispute Over Teacher's Contract), Charles White
Vol. 3, No. 3, Fall 1979
Life in a Fishbowl
Lisa Broido
Vol. 3, No. 3, Fall 1979
Educational Malpractice Worrying You?
Cynthia Kelly and Bernice McCarthy
Vol. 4, No. 1, Winter 1980
Who Says Teachers Have Rights?
Louis Fischer
Vol. 4, No. 2, Spring 1980
Teachers Do Have Rights
Leigh Stelzer and Joanna Banthin
Vol. 6, No. 2, Spring 1982

Women and the Law

Is the ERA Constitutionally Necessary?
Yes: Ruth Bader Ginsburg; No: Philip Kurland
Vol. 2, No. 2, Spring 1978
From Cheerleader to Competitor
Mariann Pogge
Vol. 2, No. 3, Fall 1978
A Double Standard for Girls?
Lisa Broido
Vol. 3, No. 2, Spring 1979
Out of Aprons and into the Job Market
Susan Spiegel
Vol. 5, No. 3, Fall 1981
Is Abortion a Women's Issue?
(pro-choice) Sally Hudson-Nichols, (pro-life) Paige Comstock Cunningham
Vol. 5, No. 3, Fall 1981
Classroom Strategies for Handling Women's Issues, Carolyn Pereira
Vol. 5, No. 3, Fall 1981
Women and the Law—The Tug-of-War Between Law and Custom
Linda Wojtan
Vol. 5, No. 3, Fall 1981
The Limits of the Law
Ellen Wilson
Vol. 5, No. 3, Fall 1981
The Last Bastion of Macho
Gary Rivlin
Vol. 5, No. 3, Fall 1981
Don't Call Me Madam!
Mabel McKinney-Browning
Vol. 5, No. 3, Fall 1981
Some Kinds of Discrimination Die Hard
Gary Rivlin
Vol. 5, No. 3, Fall 1981
Materials on Women and the Law
Patricia Huckle
Vol. 5, No. 3, Fall 1981
What Prison Does to Women
Miriam Krasno
Vol. 6, No. 3, Fall 1982
Assault on Rape
Teri Engler
Vol. 6, No. 3, Fall 1982
The Sexist Underground in Sports
Marianne Pogge-Strubing
Vol. 7, No. 2, Spring 1983
Sex Discrimination
Dale Greenawald
Vol. 10, No. 2, Spring 1986
Discrimination and the Law
Dale Greenawald
Vol. 10, No. 2, Spring 1986

2071

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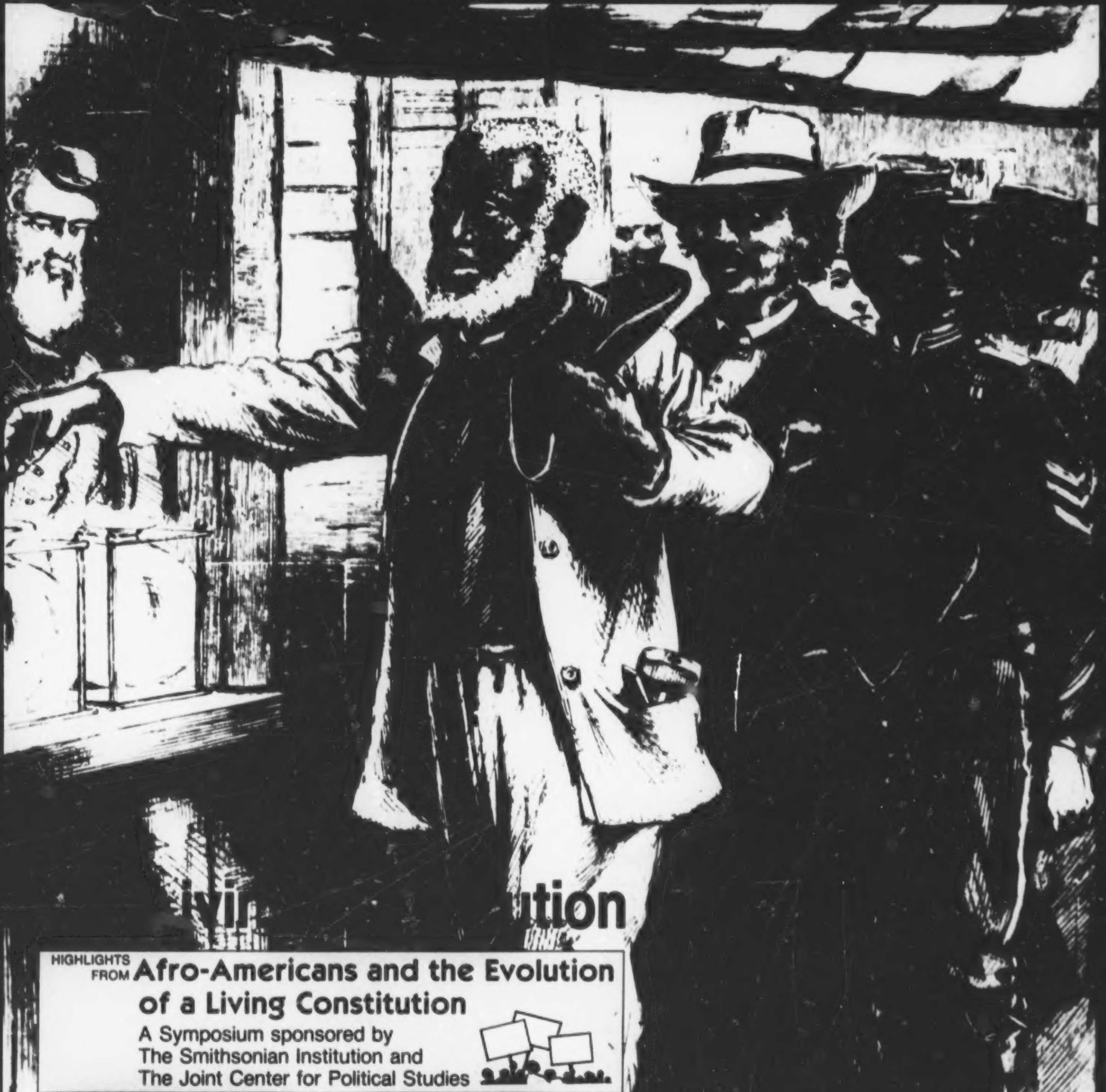

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HIGHLIGHTS FROM **Afro-Americans and the Evolution of a Living Constitution**

A Symposium sponsored by
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2077

contents

Volume 12, No. 3, Fall, 1988

2 Introduction
3 Slavery, the Constitution, and the Founding Fathers
8 Race and the Constitution in the Nineteenth Century
14 Protest, Politics and Litigation
22 The Legacy of Racial Discrimination: Who Pays the Cost?
27 Indians in United States Civil Rights History
34 The Impact of the Civil Rights Movement on the Women's Movement

ELEMENTARY SCHOOL

K-7 STRATEGIES

38 Children's Books and Minorities: Focus on the Black Experience
40 Terra Firma

MIDDLE SCHOOL

MIDDLE SCHOOL STRATEGIES

42 Equality: Changing the Rules of the Game
45 The Expansion of Voting Rights

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

47 Civil Rights in the 19th and 20th Centuriesn
55 Tyranny of the Majority
56 Equality Under Law
59 Voting Rights: Key to Equal Rights
61 Hispanics! Immigration! Reform?
68 Unincorporation
69 Indians and the Law

72 Why Young People Don't Vote

MIDDLE SCHOOL

MIDDLE SCHOOL STRATEGY

77 Three Voting Activities

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGY

81 Increasing Participation in Democracy

83 Court Briefs

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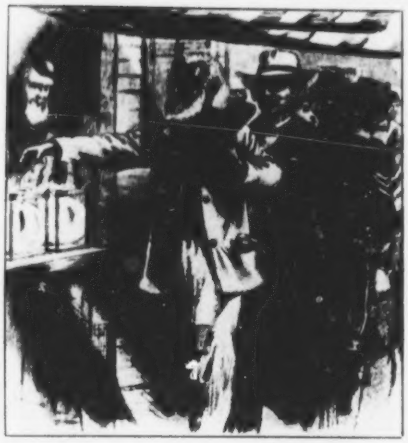
Update on Law-Related Education helps classroom teachers and law-related education program developers educate students about the law and legal issues. Points of view or opinions in this document are those of the authors and do not necessarily represent the official positions or policies of the American Bar Association.

Since 1980, at least one *Update* each year has focused on the Constitution. Building on that rich tradition, this double-issue of *Update* will focus on the continuing evolution of the Constitution, highlighting its vitality, its flexibility, and its humanity.

On March 15-16, 1988, The Smithsonian Institution and The Joint Center for Political Studies presented a symposium entitled Afro-Americans and the Evolution of a Living Constitution. Nearly a year prior to the symposium, Supreme Court Justice Thurgood Marshall observed that "the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making..."(*Update*, Fall, 1987). Reflecting on this assertion in his opening remarks to the symposium, Robert McC. Adams, Secretary of The Smithsonian Institution, noted that "the Constitution is truly a living document...It reaches out to the fullest horizons of human possibility; it recognizes that life involves struggle...and that, in the words of Frederick Douglass 'if there is no struggle, there is no progress.' " In his remarks to the symposium, Eddie Williams, President of The Joint Center for Political Studies, underscored the uniqueness of the symposium's focus, noting that it would "[call] attention to the role of Afro-Americans in constitutional history, not only in terms of that document's shortcomings, but also [illuminate] how Afro-Americans had contributed to its vitality." Thus, the symposium offered an extraordinary opportunity to examine the progress of the Constitution from an historical perspective and a cultural dynamic that, at once, enriches our understanding of the document and reflects the diversity of our shared experience in living under it. Symposium papers will be available in an upcoming book edited by John Hope Franklin and co-sponsored by The Smithsonian Institution and The Joint Center for Political Studies.



Update is especially fortunate to bring abridgements of six of the outstanding papers presented at the symposium to our readers. We thank The Smithsonian Institution and The Joint Center for Political Studies not only for the permission to abridge these papers but for their support and encouragement of this special issue of *Update*. Our featured classroom strategies complement the papers, reflecting their content, and offering suggestions for instructional opportunities.

This issue of *Update* also highlights voter participation among young people. How do we raise their consciousness to exercise the voting privilege at 18 with the same excitement and enthusiasm they exercise the right to drive at 16? How do we develop their critical skills of analysis, evaluation, and decision making? An article by Curtis Gans and several classroom strategies address these questions. A pamphlet insert describing voter education materials available from a broad range of organizations and Court Briefs round out this bigger-than-ever issue of *Update*.

—Mabel C. McKinney-Browning
Staff Director, Youth Education
for Citizenship

FROM **Afro-Americans and the Evolution of a Living Constitution**
A Symposium sponsored by
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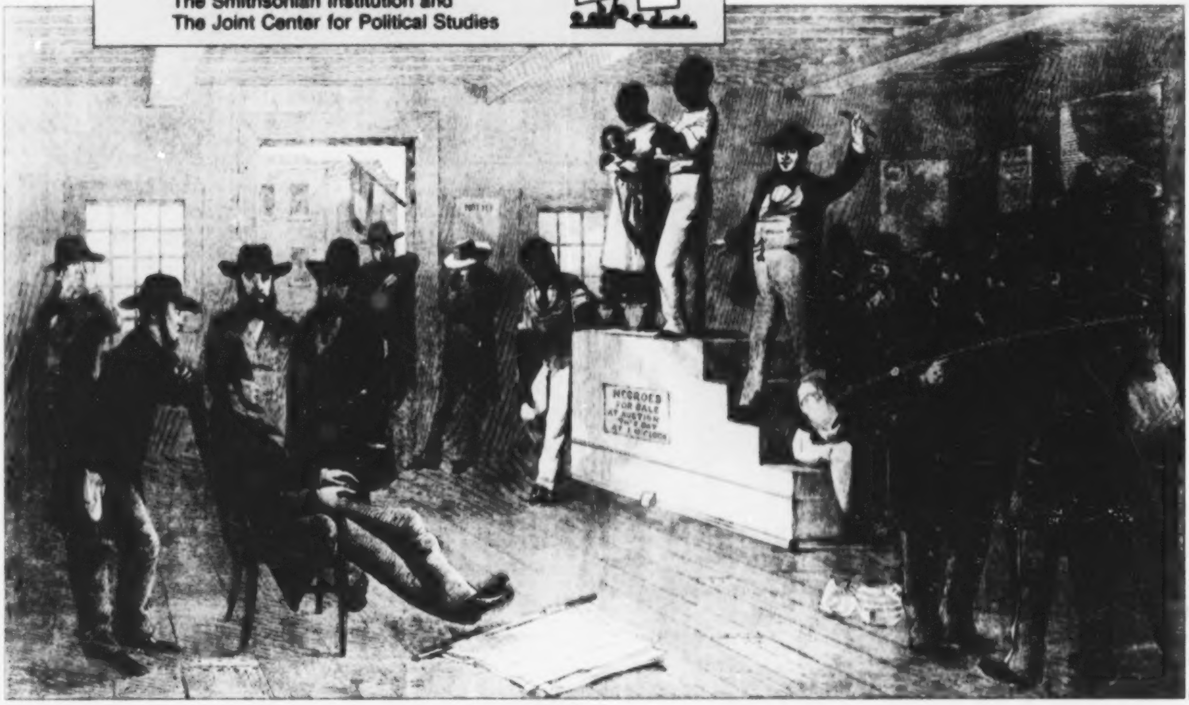
Mary Frances Berry



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Slavery, the Constitution, and the Founding Fathers

The Afro-American Vision

[*Editor's Note:* In this article, the author examines the impact of slavery and racism on the creation of the Constitution, the Constitution at the time of its centennial, and the Constitution now. The article is an abridgement of a paper delivered at "Afro-Americans and the Evolution of a Living Constitution," a Symposium sponsored by The Smithsonian Institution and The Joint Center for Political Studies.]

We speak of slavery today in terms of the proslavery compromises worked out by the framers at the Convention in 1787. Slavery was expressly sanctioned in three different places in Article I. Section 3, the three-fifths clause, states that three-fifths of the slaves—euphemistically referred to as "other persons"—would be counted for purposes of representation in Congress. Another provision required that any direct tax levied in the states could be imposed according to population, but only three-fifths of the slaves could be counted in determining each state's tax levy. Counting slaves helped the South, but taxing slaves partly nullified this benefit. In Article I, section 8, paragraph four, any capitation (head tax) or other direct tax had to be consistent with the provision of the three-fifths clause. This meant that the slaveholders could pay less tax. In Article I, section 9, paragraph one, the slave trade was not to end before 1808.

The fugitive slave clause in Article IV, section 2, and the Article V provision prohibiting any amendment of the slave importation provision before 1808 were also important to slaveholders. These provisions can be called direct actions ratifying slavery.

There are other constitutional provisions helpful to the institution of slavery. Article I prohibits taxes on exports, which slaveholders desired because of their reliance on agricultural exports produced by slaves. The Electoral College provision, on its face, gave whites in slave states a disproportionate influence in the election of the president. The Electoral College, based on congressional representation, increased slave states' congressional representation by the three-fifths ratio by counting nonvoting slaves.

The framers included in the Constitution other provisions useful to the slave states. For example, three-fourths of the states were required to ratify a constitutional amendment. Slave states could refuse to ratify any constitutional amendment that curtailed or adversely affected the institution of slavery. There is Article III's granting of diversity jurisdiction to "citizens" of different states: the Supreme Court interpreted this as a prohibition on slaves' right to sue in federal court. If the language had said "inhabitants" of different states, assuming that slaves would be inhabitants and not property, there might have been a stronger basis for jurisdiction.

In recent years we have added to the list of acknowledged proslavery features of the 1787 Constitution. After Madison's notes became available in 1836, abolitionists, led by Wendell Phillips, took a radical anti-slavery tack. (See, for example, Phillips's "The Constitution a Pro-Slavery Compact", in *Selections from the Madison Papers* [1845].) Phillips characterized the Constitution as an essentially proslavery document and called attention to other proslavery constitutional provisions. He analyzed the military clauses in Article IV, section 4, which called on the federal government to protect the states from domestic violence, including slave rebellions; and Article I, section 8, which required the Congress to call forth the militia to suppress insurrections, including slave rebellions. My history on the federal government's role in suppressing black rebellions—*Black Resistance/White Law: A History of Constitutional Racism in America*—dealt with this most important proslavery compromise.

How Afro-Americans Saw the Constitution

As a result of the slavery provisions, there has been consistency over the last two hundred years in the predominant Afro-American vision of the Constitution, in general, and as it directly affects Afro-American status and aspirations. We know a great deal about the thoughts of free Negros in the period before the Civil War as expressed in newspapers, letters, pamphlets, lectures, and speeches. Of course, Afro-Americans in the years immediately after the Convention did not have available Madison's notes and other materials that we have today, but they were contemporaries of the Constitution's framers. In the absence of records of the debates at the Convention, they could, when it suited their purposes, use the very vagueness of some of its wording to support arguments that the Constitution stood for freedom and rights. As petitioners, they noted the potential for antislavery action in the First Amendment and the Interstate Commerce, General Welfare, and Guarantee of a Republican Form of Government claus-

Slavery and the New Nation

Berlin, Ira and Ronald Hoffman (eds.). *Slavery and Freedom in the Age of the American Revolution.* (Charlottesville, Virginia: University Press of Virginia, 1983).

Davis, David Brion. *The Problem of Slavery in the Age of Revolution, 1770-1823.* (Ithaca, N.Y.: Cornell University Press, 1975).

Finkelman, Paul. *An Imperfect Union: Slavery, Federalism, and Comity.* (Chapel Hill, N.C.: University of North Carolina Press, 1981).

Higgenbotham, A. Leon, Jr. *In the Matter of Color: Race and the American Legal Process: Colonial Period.* (New York: Oxford University Press, 1978).

Lynd, Staughton. *Slavery, Class Conflict and the Constitution.* (Indianapolis: Bobbs-Merrill, 1967).

Quarles, Benjamin. *The Negro in the American Revolution.* (New York: The Norton Library, W. W. Norton, 1973).

———. *The Negro in the Making of America.* (Rev. ed., New York: Collier Books, 1987).

Black History: A Reading List

Aptheker, Herbert. *A Documentary History of the Negro People in the United States.* (Three vols., New York: Citadel Press, 1966). A useful and important work. Court petitions and other original documents allow readers to experience history directly through the words of those who made it.

Bennett, Lerone, Jr. *Before the Mayflower.* (Chicago: Johnson, 1982). A popular account of black American history, written in 1962.

Berry, Mary Frances and John W. Blassingame. *Long Memory: The Black Experience in America.* (New York: Oxford University Press, 1982). Traces black history from Africa to black nationalism, with, among others, chapters on family and church, sex and racism, education, military service, and blacks and the criminal justice system.

Franklin, John Hope. *From Slavery to Freedom.* (New York: Alfred A. Knopf, 1988). The definitive book in the field.

———. *An Illustrated History of Black Americans.* (New York: Time-Life Books, 1970). A popular history.

Genovese, Eugene D. *Roll, Jordan, Roll: The World the Slaves Made.* (New York: Pantheon Books, 1974). Focuses on the creation of an Afro-American culture during slavery.

Handlin, Oscar. *Race and Nationality in American Life.* (Boston: Little, Brown, 1957). An early book by one of the major scholars of the immigrant experience in America.

Harding, Vincent. *There Is a River: The Black Struggle for Freedom in America.* (New York: Harcourt, Brace, Jovanovich, 1981). The first volume of a projected three-volume work on black history, which traces black history from Africa through the slavery experience.

Katz, William L. *Eyewitness: The Negro in American History.* (New York: Pitman Publishing Corp., 1974). Extensive text intended for secondary students.

Logan, Rayford W. *The Negro in the United States: Vol. 1, A History to 1945: From Slavery to Second-Class Citizenship* (Reprint ed., New York: Van Nostrand, 1970).

Logan, Rayford W. and Michael R. Winston. *The Negro in the United States: Vol. 2, The Ordeal of Democracy.* (New York: Van Nostrand, 1971).

Quarles, Benjamin and Leslie H. Fishel, Jr. *The Black American: A Documentary History.* (Glenview, Illinois: Scott, Foresman, 1976). Extensive history, with bibliography.

Williams, Juan. *Eyes on the Prize: America's Civil Rights Years, 1954-1965.* (New York: Viking, 1986). A book designed to accompany the major PBS TV series of the same name.

es. They could and did assert that Congress could therefore manumit contraband slaves, prohibit the coastal and interstate slave trade, ban slavery from the territories and other property of the United States, enlist slaves in the armed forces and even take private property for public use by purchasing and emancipating slaves. Most Afro-Americans chose at one time or another to avoid emigration or attacks on the Constitution, preferring to advance the antislavery cause by swaddling themselves in arguments emphasizing its potential. These Afro-Americans asserted that the Constitution could be interpreted in such a way as to make possible the abolition—or at least the containment—of slavery.

Afro-Americans and their white allies were very fond of the First Amendment because under it they hoped petitioning the Congress and assembling to protest would be protected. They were decidedly unimpressed with the Tenth Amendment and federalism because it meant, as it still too often means to us today, states' rights allowing discrimination and subordination in the states without interference by the national government. They found that their protests were not protected automatically from state suppression because the First Amendment did not apply to state action in those days.

Frederick Douglass perhaps best summed up the consensus among antebellum Afro-Americans on the Constitution when he pointed out in 1849 that the Constitution's words could be taken to be antislavery. But the meaning of the Constitution given to it by the men who framed it and by those with the power to interpret it made the Constitution a proslavery document. He explained:

> Had the Constitution dropped down from the blue overhanging sky, upon a land uncursed by slavery, and without an interpreter, although some difficulty might have occurred in applying its manifold provisions, yet so cunningly is it framed, that no one would have imagined that it recognized or sanctioned slavery. But having a terrestrial, and not a celestial origin, we find no difficulty in ascertaining its meaning in all the parts which we allege to relate to slavery. . . . [The Constitution] was made in view of the existence of slavery, and in a manner well calculated to aid and strengthen that heaven-daring crime.

The Centennial

When, as a result of the bloodshed and violence of Civil War and Reconstruction, we changed the Constitution, the central place still held by the legacy of slavery remained prominent in the Afro-American vision of the new reality. For purposes of this bicentennial discussion, it is interesting to focus on the vision at the Centennial, one hundred years after the Constitution's writing in 1787. Among the about seven million Afro-Americans, most of whom lived in the South in 1887, the badges of slavery persisted. Frederick Douglass summed up their experiences and reliance on the Constitution in a time of deep trouble when the promises of freedom often seemed abandoned forever:

> I now undertake to say that neither the original Constitution nor the Constitution as amended since the War is the law of the land . . . as a result of lynching, disfranchisement, and economic exploitation without federal help or protection. So far as the colored people of the country are concerned, the Constitution is but a stupendous sham . . . keeping the promise to the eye and breaking it to the heart. . . . They have promised us law and abandoned us to anarchy.

There was more to celebrate in 1887 than there had been in 1787, when there was practically nothing, but an enormous amount still not to celebrate. Slavery was depicted in the centennial exposition floats in Philadelphia, for which even for payment organizers could not find blacks to play the role of plantation slaves. Incongruously, among the banners in the black part of the exposition were those proclaiming enfranchisement and full political rights. By 1887, the trend toward almost total disfranchisement in the South, where most blacks lived, was already well advanced.

Slavery was visible in the Afro-American vision of what the Constitution meant as it was interpreted by the Supreme Court of the United States. Its influence permeated the *Slaughterhouse Cases*, 16 Wall. 36 (1873), which acknowledged that the amended Constitution negated slavery but diluted the effectiveness of the Fourteenth Amendment. The *Civil Rights Cases*, 109 U.S. 3 (1883), further weakened the ability of the Fourteenth Amendment to remove badges and incidents of slavery. And *Plessy v. Ferguson*, 163 U.S. 637 (1896), reduced the badges of slavery to a figment of the black imagination. Slavery was fundamental in white Southerners' rationales for the political disfranchisement of the Negro, whom they characterized as still not far enough removed from the slave condition to be a positive participant in politics. Slavery was there in the decisions handed down during Military Reconstruction, which prohibited whites from re-enslaving black children as "apprentices," and protecting blacks from disproportionately harsh

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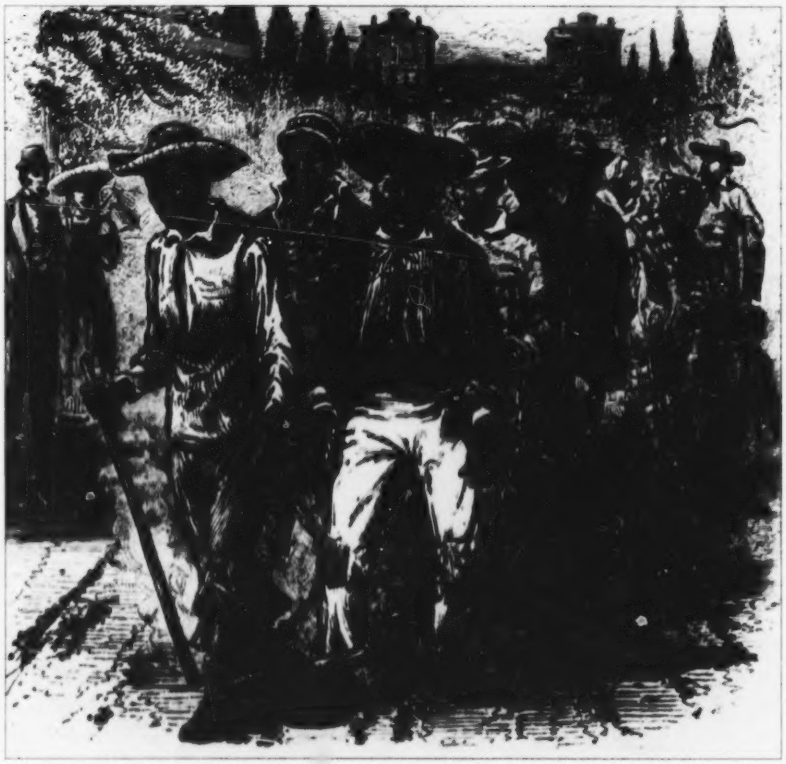

This nineteenth century engraving shows a slave coffle passing the Capitol.

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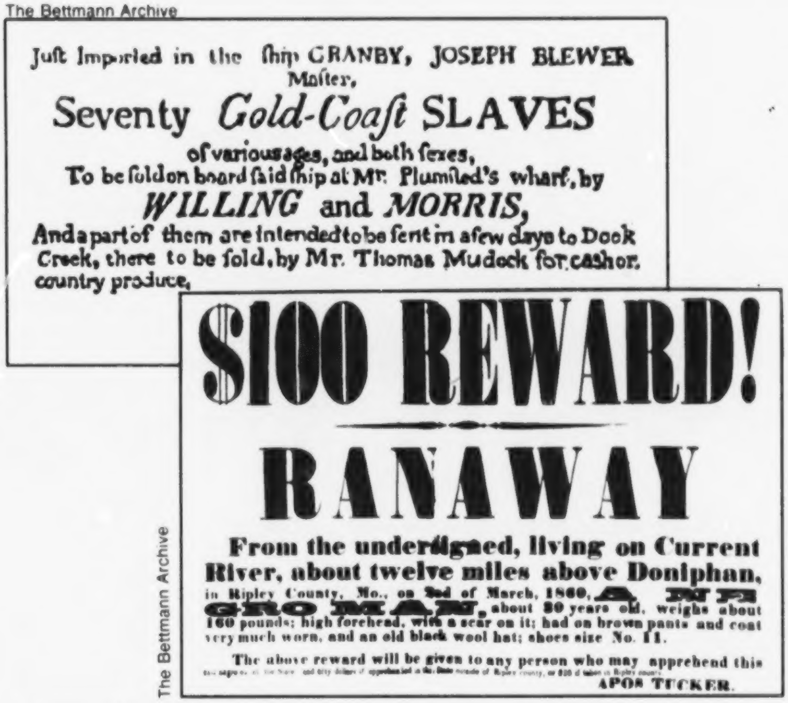

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To be ſold on board ſaid ſhip at Mr. Plumſted's wharf, by
WILLING and *MORRIS,*
And a part of them are intended to be ſent in a few days to Dook Creek, there to be ſold, by Mr. Thomas Mudock for cash or country produce,

$100 REWARD!

RANAWAY

From the undersigned, living on Current River, about twelve miles above Doniphan, in Ripley County, Mo., on 2nd of March, 1860, A NEGRO MAN, about 30 years old, weighs about 160 pounds; high forehead, with a scar on it; had on brown pants and coat very much worn, and an old black wool hat; shoes size No. 11.

The above reward will be given to any person who may apprehend this

APOS TUCKER.

The Bettmann Archive

A slavery advertisement from the eighteenth century and a flyer for a runaway slave from the nineteenth century.

punishment in the criminal justice system. Slavery was there, too, in the decisions handed down by the Southern state courts, where the majority of the black population lived in those late nineteenth-century days. Slavery as a context, as a definition for all that occurred to blacks, was prevalent even in the highest state courts. All through the late nineteenth century, when racial fairness appeared impossible, the presence of slavery and its legal and social implications were considerations. The North Carolina Court, just in time to set the right tone for the Centennial celebrations, struck down the practice of earmarking taxes paid by Negroes only for the Negro schools and by whites only for the white schools, explaining that because of slavery, "the vast bulk of property yielding the fruits of taxation belongs to the white people of the state and very little is held by the emancipated race." But the court hurried on to say that it was not questioning the constitutionality of separate schools, or laws forbidding the intermarriage of the races, which were made more necessary by the abolition of slavery.

All during the Centennial period, the high courts—the most visible representatives of a justice system in the South—kept handing down decisions acknowledging the persistence of slavery ideals. The Alabama high court in refusing to convict, as demanded by "her mistress," a colored girl, 17 or 18 years of age, for burning down the house in which she lived and worked, noted that her confession could be attributed to the fact that "her mistress" routinely disciplined her by whipping. The court did not find whipping, which was a routine punishment administered to slaves, unusual in 1887, but thought since there was no other evidence of the girl's guilt, the fact that she was locked up and whipped might have meant that her "confession" was false.

Cases declaring the illegitimacy of intimate relations between whites and blacks were common, indicating there were many such relationships and an eagerness to end them.

Evidence of the persistence of race and the badges of slavery occurred in every type of legal matter. But at least blacks could bring lawsuits and appear as parties and sometimes win, contrary to pre-Civil War restrictions.

The Constitution Today

The Afro-American vision of the founding fathers, of the meaning of slavery, and of the Constitution in 1787 and 1887, was shaped by political, economic and legal conditions. That vision displayed consistency and hope as well as suspicion of a kind which still persists. The founding fathers left us a framework of government that has served many purposes. But in protecting slavery and assuming racial inequality, they left us as outsiders from the beginning. In doing so, they also left a rationale for those who were not Afro-Americans to assume our basic worthlessness, powerlessness, and inhumanity as a part of the nation's legacy. After a great deal of violence by the time of the centennial, their work had been modified and improved upon but the pall of slavery's influence remained.

During this bicentennial, the influence of our slave past has receded but not disappeared. The identification of blackness with inferiority and subordination arises in discussions about intelligence and qualifications as often unstated premises. Today, discussions over Afro-Americans and legal rights under the Constitution often turn on how far away we are from slavery. There are those conversations which begin "my granddaddy did not have any slaves and anyway slavery was a long time ago and why do we still need to remedy vestiges and discuss redress." There are also those discussions about the continued economic disparities which plague many in the black community. These are often suffused with talk of how we should count ourselves as immigrants who only came to the United States in 1865 or 1910 or 1920, depending on the discussants, or how the reality of legally enforced slavery means we should not expect to ever close the gap and become equal except for a few extraordinary individuals who ought to be thankful instead of complaining.

Our vision of the Constitution as it was written in 1787 can be characterized as an affirmation of exploitation and exclusion. Our vision of it in 1887 was inclusion in language but exclusion in reality. Today our vision of the Constitution is a continuing struggle for inclusion. Our lives begin and end taking into account that vision of us crafted by the founding fathers in the Constitution. The role we have today they might not have envisioned, but certainly our Afro-American ancestors did.

Because there was slavery, there were free Negroes who bore the burden of the identification of blackness with subordination. Because there was slavery there were the Thirteenth, Fourteenth and Fifteenth Amendments, and because some of the slaves were women there was the partial effect of the Nineteenth Amend-

(continued on page 71)

Glossary of Civil Rights Terms

affirmative action The requirement that an organization take steps to make up for past discrimination in hiring, promotion, or admittance, for example by accepting more minorities and women; see also **reverse discrimination**.

Bill of Rights The first ten amendments to the U.S. Constitution. The term also applies to state consititutions which enumerate rights. These rights cannot be violated by government.

discrimination The unequal treatment of a person or persons on a basis other than individual merit. Discrimination can be illegal when based on a person's race, religion, sex, or age.

gerrymandering The drawing of legislative voting district boundaries to gain a voting advantage for political parties or other factions. Gerrymandering was used to limit the impact of black voters during the civil rights era. Maneuvering voting boundaries to limit electoral influence of blacks was declared unconstitutional by the Supreme Court in *Gomillion v. Lightfoot* in 1960.

integration The assimilation or incorporation of all races as equals in society. The goal or end result of desegregation.

involuntary servitude/slavery The practice of owning individuals to extract work or other services from them. A slave is the property of his or her owner and has no individual rights.

Jim Crow The legally sanctioned system of segregation which included blacks-only schools, bathrooms and trains.

living Constitution The belief that the interpretation of constitutional law should change with the changing times. This school of thought does not look primarily to the original intent of the writers of the Constitution to apply the law.

lynching Unlawful, group-instigated killings, usually carried out by way of hanging. From the 1880s to the 1960s, more than 3000 blacks were lynched in the United States. The Ku Klux Klan, a white supremacist organization, lynched blacks that they accused of committing crimes.

NAACP The National Association for the Advancement of Colored People is a civil rights organization founded in 1909. Its mission is to end all barriers to racial justice and to guarantee full equality of opportunity and achievement in the United States. The organization disseminates its message through *Crisis* magazine, which was originally edited by W.E.B. DuBois. The NAACP works towards its mission through litigation, legislation and education. It represented the black cause in landmark civil rights cases such as *Brown v. Board of Education*. The NAACP is active in housing, education, labor, voter education/registration and prison issues.

"one person, one vote" The phrase is found in the Supreme Court's *Baker v. Carr* (369 U.S. 186) decision of 1962. The case involved a dispute over the apportionment of legislative districts in Tennessee. The state had not redrawn the legislative districts since 1901. Because the twentieth century brought with it a huge migration to metropolitan areas, urban voters felt their votes counted less than the votes of citizens living in rural areas. The appellants argued that the 1901 statute "constitutes arbitrary and capricious state action." The Court ruled that "a citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution."

original intent (or strict construction) The importance of deciding constitutional issues by determining what the founding fathers had in mind while writing the Constitution. The term is also used to describe a school of legal thought that considers law as unchanging with the passage of time.

poll tax Fees charged to voters for the privilege of voting. States used poll taxes to exclude poor blacks from voting after the Civil War. Poll taxes were later deemed unconstitutional by the Supreme Court.

reverse discrimination Unequal treatment of a person or persons resulting from favorable treatment of other persons who had been previously discriminated against. Reverse discrimination is often claimed by white males who are treated unfavorably when blacks or women are treated favorably to make up for the effects of past discrimination.

rights Powers and privileges extended to individuals by law. The Bill of Rights secures certain rights for Americans that government cannot take away. These individual rights include the rights to be free from unreasonable search and seizure, to have a lawyer when charged with a crime, to be free from cruel and unusual punishments. The civil rights struggle changed what were once privileges into rights. With the ratification of the Fifteenth Amendment, for instance, voting became an individual right.

slave codes The body of law designating slaves as property.

voting rights The Fifteenth Amendment, ratified in 1870, was designed to grant blacks the right to vote. However, states used tactics such as poll taxes, literary tests, residence and registration requirements and grandfather clauses to prevent blacks from practicing their voting rights. A series of Supreme Court cases eventually chipped away at state efforts to deny voting rights. In federal elections poll taxes were outlawed in 1964 with the passage of the Twenty-fourth Amendment. Congress passed the Voting Rights Act of 1965 to preclude racial discrimination in voting.

white primary The white primary was a technique used by whites to block blacks from voting in primaries. States using white primaries claimed they were legal because political parties were private entities and thus were excluded from the Fifteenth Amendment's prohibition against state discrimination. In *Smith v. Allwright* (1944) the Supreme Court declared white primaries unconstitutional.

—*Claire Conway*

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FROM **Afro-Americans and the Evolution of a Living Constitution**
A Symposium sponsored by
The Smithsonian Institution and
The Joint Center for Political Studies

John Hope Franklin

Race and the Constitution in the Nineteenth Century

[*Editor's Note:* This article, in contrast to that of Mary Frances Berry, looks at the impact of race *per se*—rather than slavery—on politics and the social order in the nineteenth century. It is abridged from a paper delivered at "Afro-Americans and the Evolution of a Living Constitution," a symposium sponsored by The Smithsonian Institution and The Joint Center for Political Studies.]

Those who wrote the Constitution brought with them to Philadelphia not only a century and a half of experience with slavery but a similar period of discrimination against blacks who were *not* slaves. If the Framers of the Constitution gave no attention to blacks who were free, it was not because they believed that there should be no distinction among free peoples, but because of their preoccupation with slavery at a time when continued discrimination against free blacks was assumed. That was the situation when the First Congress under the new Constitution met in 1789. One of the questions to be settled was who was worthy of citizenship of this new nation that aspired to become the model for all future democracies. The question was answered without much debate. Only white aliens, the law of 1790 specified, could become naturalized citizens of the United States. The message was clear: any free black person imprudent enough to migrate to the United States could not expect ever to become a citizen.

In that Congress which did so much in setting precedents and patterns for the future and which defined who could become a citizen of the United States, there were no less than twenty members who had been members of the Constitutional Convention two years earlier. Not one of them raised any objection to barring free blacks from becoming naturalized citizens. Framers such as Elbridge Gerry of Massachusetts, Roger Sherman of Connecticut, Hugh Williamson of North Carolina, and James Madison of Virginia, the "father" of the Constitution, all acquiesced in this first act of racial discrimination by the first Congress of the United States.

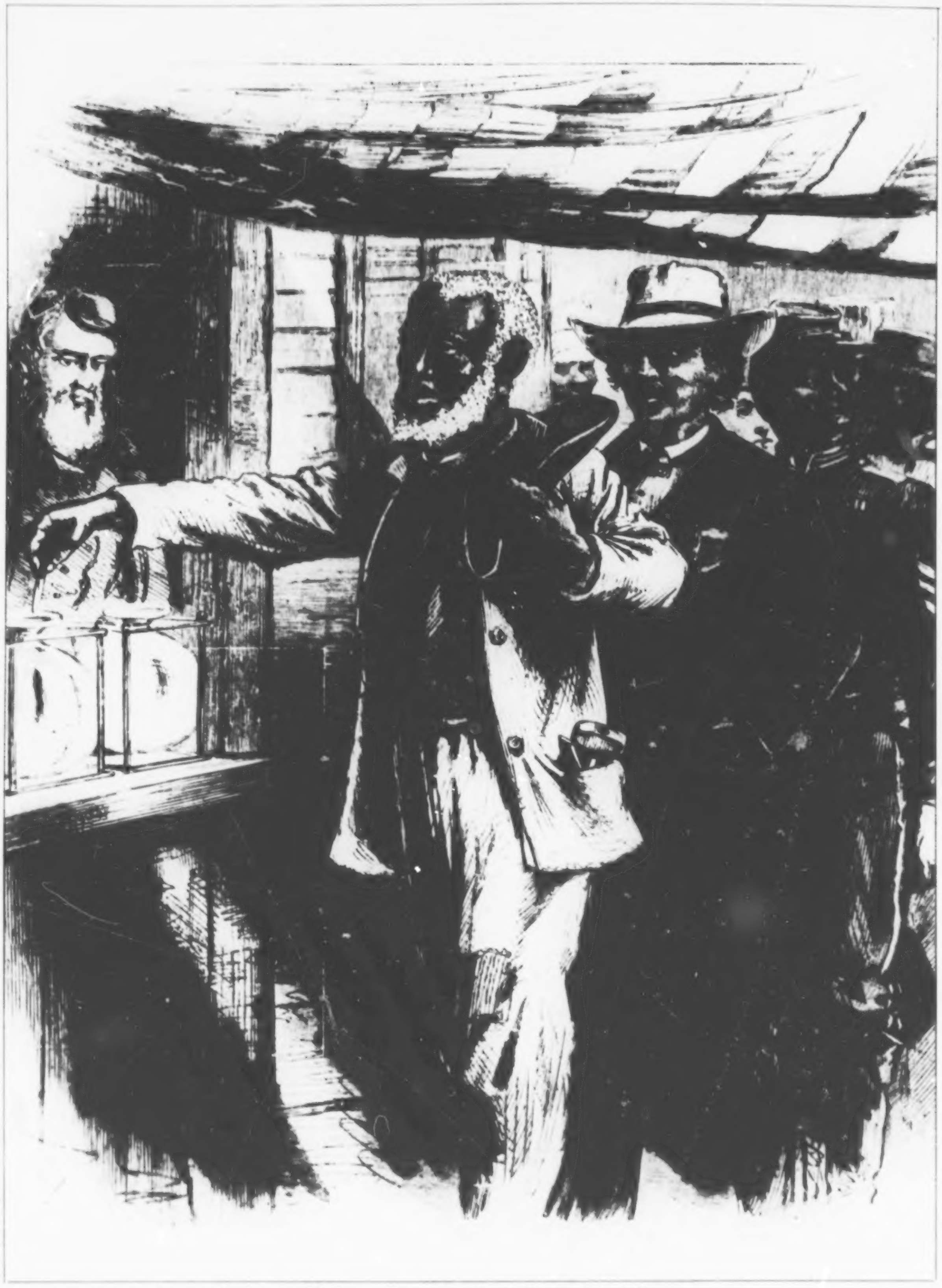
If the First Congress, with such fresh memories of the framing of the Constitution could, with impunity, violate the dignity of persons on the basis of race, it should not be surprising that succeeding congresses enthusiastically followed suit. If such were possible, the Second Congress even went beyond its predecessor in indicating the disesteem in which free blacks were held. In an act establishing a "uniform militia throughout the United States" the Second Congress limited membership to "free able-bodied white male citizens." In a word, the act told the 5,000 blacks who saw service in the War for Independence that their services were no longer needed.

No Voting Rights, No Due Process

In 1801, when the new capital of the United States was established in Washington, the Seventh Congress, in its act incorporating the new city, declared that "the city council be elected annually . . . by the free white inhabitants of full age, who have resided twelve months in the city and paid taxes therein." The law was enacted when Framers such as Gouverneur Morris, who had spoken out against slavery in 1787, was in the United States Senate and Thomas Jefferson was President of the United States. And, in the words of the revered Negro spiritual, "They never said a mumblin' word, not a word!"

We all take pride in the fact that even as the Constitution was being written, the Congress under the Articles of Confederation enacted its most important piece of legislation, the Ordinance of 1787 or, as it is popularly known, the Northwest Ordinance. It established the process by which territories were to be organized and admitted to the Union as states. A territory could be formally organized when it had a population of 5,000 free male inhabitants, and it could become a state when it had 60,000 free inhabitants. It also forbade slavery in the territory. The Ordinance did not specify that the 5,000 male inhabitants should be white for purposes of organizing the territory or that all of the 60,000 inhabitants should be white in order to qualify for statehood.

Since slavery was forbidden in the territory, it is reasonable to assume that free black persons living in the territory would be counted in determining the area's qualification as a territory and as a state. Yet, when the Tenth Congress enacted legislation in 1808 enabling Indiana to qualify as a territory, that Congress saw fit to limit the suffrage in the territory to free white males. Since the Constitution had given *states* the authority to determine the qualifications for voters, one would have thought that the Tenth Congress would have given Indiana the opportunity to work through the early stages of this problem and to define the qualifications for voters. Instead, it told the Indiana Territory that whatever else it did, it could not permit free blacks to vote. What a remarkable way to launch a territory on the road to statehood.



Courtesy of the Smithsonian Institution

"The First Vote," a drawing by A. R. Waud, appeared in Harper's Weekly, *Nov. 16, 1867.*

2086

The Black Experience in the Nineteenth Century

Cattarall, Helen. *Judicial Cases Concerning American Slavery and the Negro*, 5 vols. (Reprint ed., New York: Negro University Press, 1968).

Cover, Richard M. *Justice Accused: Anti-Slavery and the Judicial Process*. (New Haven, Conn.: Yale University Press, 1975).

Fehrenbacher, Don E. *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective*. (New York: Oxford University Press, 1981.)

Franklin, John Hope. *The Militant South, 1800-1861*. (Cambridge, Mass.: Belknap Press, 1970).

Goodell, William. *The American Slave Code in Theory and Practice*. (1853; Reprint ed., New York: New American Library, 1969).

Klein, Herbert S. *Slavery in the Americas: A Contemporary Study of Virginia and Cuba*. (Chicago: University of Chicago Press, 1967).

Litwack, Leon. *Been in the Storm So Long: The Aftermath of Slavery*. (New York: Alfred A. Knopf, 1979).

__________. *North of Slavery: The Negro in the Free States, 1790-1860*. (Chicago: University of Chicago Press, 1961).

Quarles, Benjamin. *Allies for Freedom: Blacks and John Brown*. (New York: Oxford University Press, 1974).

Stampp, Kenneth M. *The Peculiar Institution*. (New York: Random House, 1956).

Weinstein, A., and F. Gatell (eds.). *American Negro Slavery, A Modern Reader*. (New York: Oxford University Press, 1968).

Woodward, C. Vann. *The Strange Career of Jim Crow*. (Third rev. ed., New York: Oxford University Press, 1974).

__________. *Origins of the New South, 1877-1913*. (Baton Rouge: Louisiana State University Press, 1951).

The Constitution and the Fugitive Slave Law of 1793 gave ample protection to slaveowners in their effort to recover their runaways. But blacks, even in the free states, who were accused of being fugitive slaves—and who may well have been free—had no protection from false or erroneous accusations. All that the owner or his agent had to do was to bring the alleged fugitive before any federal or state court and, upon proof of identity, that person would be turned over to the alleged owner or his or her agent. There was no provision for a trial, no provision for the alleged fugitive to defend himself or herself. Indeed, there was no provision for the alleged fugitive to give testimony in his or her own behalf. An alleged fugitive had no standing before the court anyway. And as we consider the ways in which this law could promote a miscarriage of justice, it is well to remember that there were a quarter of a million free Negroes in the Northern states by 1850 and about as many in the Southern states exposed to a possible miscarriage of justice.

Negro Americans, delivered from slavery in a variety of ways and desperately anxious to enjoy at least a modicum of that freedom, joined with antislavery groups in seeking the civil and legal rights that others enjoyed. It is interesting to observe, however, that in their national conventions that met annually after 1831, and in numerous addresses to public officials and to their own people, black leaders seldom invoked the Constitution as the source of their anticipated support and protection. From time to time, they asked Congress to repeal all laws that made distinctions on the basis of race or color, to no avail, of course. When the Pennsylvania Constitution of 1837 disfranchised blacks, some forty thousand of them protested this move. They took their stand, they said, on the basis of the electrifying words in the Declaration of Independence which proclaimed that to protect the inalienable rights of all people "governments are instituted among men, deriving their just powers from the consent of the governed." Not once did they refer to the Constitution of the United States, for their examination of it revealed nothing to relieve them in that solemn hour of their disfranchisement.

As the rights of white Americans were being extended, the rights of black Americans were being diminished. One could see this virtually everywhere. In 1834 and 1835 blacks were disfranchised by Tennessee and North Carolina respectively. As we have seen, the Pennsylvania Constitution of 1837 disfranchised Negroes, with New Jersey and Connecticut following Pennsylvania's lead. From the admission of Maine in 1819 until the end of the Civil War every new state wrote a constitution that barred blacks from voting. Yet this is precisely the period when the franchise was being extended to large numbers of whites who, up to then, had been voteless.

When Congress enacted a more stringent fugitive slave law in 1850 that had no provision for a jury trial or for the alleged fugitive to testify in his own behalf, blacks who were free were convinced that they had no reasonable protection under the Constitution and laws of the United States. They condemned the law of 1850 as a natural evil flowing from the Constitution of 1787. Small wonder that the reaction of many free Negroes to the Fugitive Slave Law of 1850 was to flee *en masse* to Canada, convinced, as Henry McNeal Turner would say a generation later, that there was "no manhood future for Negroes in the United States."

If Congress could disfranchise free Negroes in the territories, as we have seen in the case of Indiana, it should come as no surprise that some branch of the federal government—in this case the Supreme Court—would protect the institution of slavery in the territories. That is precisely what the Court did in the celebrated Dred Scott case. Chief Justice Roger B. Taney not only insisted that slavery was protected by the Constitution in the territories as well as the states, but that blacks, whether slave or free, did not have and had never had any legal standing in the courts of the United States. One is compelled to agree, after this cursory view of the status of blacks in the late eighteenth and early nineteenth centuries, that the Chief Justice was giving an accurate reading of the nation's history when he referred to the degraded status of blacks in the late eighteenth century. In the most widely quoted passage in the decision, he said:

> It is difficult at this day [1857] to realize the state of public opinion in relation to that un-

> fortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted. . . . They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . .

The Chief Justice may well have been a better historian than a lawyer, though his judgment about slaveholders as being a part of the civilized and enlightened portions of the world could bear some modification. There is no evidence, however, to contradict his reading of the status of free blacks at the time of the Declaration of Independence and the framing of the Constitution. One looks in vain at that entire miserable period from the writing of the Constitution to the outbreak of the Civil War to find any indication that the Framers, the fledgling government of the United States, or the great leaders of the nation in the first half of the nineteenth century pursued a policy looking toward any semblance of citizenship or equality for free black Americans. The terrible truth is that by the beginning of the Civil War the status of free black persons had deteriorated to the point that they were pariahs of the land, unwanted, virtually helpless, and with no substantial bases for relief or redress of grievances under the Constitution.

Unkept Promises

When the emancipation of the slaves finally came in 1865 with the end of the Civil War and the ratification of the Thirteenth Amendment, there were precedents in abundance which could be used to set forth a public policy for the freedmen. They were not the precedents established by more than two centuries of slavery, but precedents established by more than two centuries of discrimination and degradation of free black Americans. What a way to initiate free Negro soldiers in the Civil War, by placing them in a segregated army and giving them less pay for the same rank and service than that given to white soldiers. Small wonder that in 1865 black people—all of them legally free by this time—looked not to the slave experience but to the experience of free blacks to get some notion of what the future held for them.

It was this experience that influenced the conduct of white Americans toward black Americans even after the ratification of the Reconstruction Amendments. In *Roberts v. City of Boston*, decided in 1850, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court declared that little Sarah Roberts, a black child, did not have the right to attend the school that she wished to attend, although it was closer to her home than the one she was required to attend. The Boston School Committee had plenary authority, the Chief Justice said, to determine which primary school a child should attend as long as it was "as well fitted" as other primary schools. Surely over the following century the influence of the decision in the *Roberts* case, with its incipient doctrine of separate but equal, would exert greater influence over the condition and destiny of black Americans than the Fourteenth Amendment.

It would be reasonable to assume that once the Reconstruction Amendments, especially the Fourteenth Amendment, were ratified, race would no longer be a special problem under the amended Constitution. The Thirteenth Amendment had been ratified in 1865, thus eliminating all those cryptic, convoluted references to slavery in the original Constitution. It no longer mattered—or did it—that in some states the ratification of the Thirteenth Amendment was hotly debated and it was alleged that a bit of bribery here and there was necessary to get it accepted in certain Northern states. At first glance the Fourteenth Amendment seemed so straightforward, so unequivocal. Surely, black Americans would enjoy equal citizenship and equal protection of the laws. And if black Americans were not guaranteed the franchise by the citizenship provision of the Fourteenth Amendment, then it would seem that the Fifteenth Amendment had "wrapped the whole thing up," as President Lincoln said in referring to the Thirteenth Amendment when Congress sent it to him for his signature.

It was not nearly so simple as that. The bill that was to give real meaning to the Fourteenth Amendment, the Civil Rights Act of 1875, was in the making for five years, and when it was finally passed it was never effectively enforced. The at-

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Lynching—and protests against lynching—continued well into the 20th century.

The Bettmann Archive

Core Figures in Black History

Sojourner Truth

Mooreland-Spingarn Research Center, Howard University
Courtesy of The Smithsonian Institution

Banneker, Benjamin (1731-1806) A self-educated black scientist and mathematician who corresponded with Thomas Jefferson in protest against slavery. He published an almanac from 1792 to 1802 and was one of the surveyors of the District of Columbia in 1791.

Bethune, Mary McCleod (1875-1955) A graduate of the Moody Bible Institute of Chicago, Bethune went on to teach in southern mission schools from 1895 to 1903. She founded the Dayton Normal and Industrial Institute for Negro Girls. The school eventually took her name and became the Bethune-Cookman College. She also established the National Council of Negro Women in 1935. Bethune, the 17th child born to former slaves, later served as special adviser on minority affairs to Franklin D. Roosevelt.

Douglass, Frederick (1817-1895) Known as the foremost speaker of the Abolitionist movement, Douglass began his crusade as an agent of the Massachusetts Anti-Slavery Society. He published his *Narrative* in 1845. Douglass was the founder of newspapers entitled *The North Star* and *Douglass' Monthly*. The former slave was one of the most prominent blacks of the Civil War period. From the onset of the war, Douglass wrote dozens of articles and made many speeches asserting that victory was impossible without emancipation.

Garvey, Marcus (1887-1940) A black nationalist, Garvey founded the Universal Negro Improvement Association in 1914. The association encouraged racial purity, thus discouraging integration. Garvey advocated the establishment of a strong African heritage and created a "back to Africa" movement. He gained influence and voice in the early 1920s through his newspaper *Negro World*. Garvey was eventually convicted of mail fraud as a result of his involvement in a black steamship company. He was then deported to Jamaica.

Gray, Fred David (1930-) Gray is known as an attorney, evangelist, and civil rights activist. He is noted as Dr. Martin Luther King, Jr.'s first civil rights attorney. Gray represented Rosa Parks after her arrest for refusing to give up her bus seat to a white passenger. Gray is currently a senior member in the law firm of Gray, Langford, Sapp & McGowan, with offices in Montgomery and Tuskegee. He is also a cooperating attorney with the NAACP Legal Defense Fund.

Houston, Charles Hamilton (1895-1950) Houston was a black civil rights lawyer who received his degree from Harvard Law School in 1922. He was appointed vice-dean of Washington D.C.'s Howard Law School in 1929. During his years there, he was credited for revitalizing the school and for producing new black lawyers with fervor and expertise in civil rights law. In 1935 he became the Chief Legal Counsel of the NAACP. In this capacity, Houston lured dozens of worthy black lawyers to the ranks of the NAACP from across the nation to fight for black rights.

King, Martin Luther Jr. (1929-1968) King was a Baptist minister who advocated passive resistance against segregation. A master orator, King rallied blacks to conduct a year-long boycott of the segregated bus system of Montgomery, Ala. King created the Southern Christian Leadership Conference as a center for the planning of nonviolent protests and marches. Most notable of his marches was the 1963 March on Washington. He was awarded a Nobel Peace Prize in 1964. King spoke out against economic discrimination in subsequent years. He was planning a multiracial Poor People's March for antipovery legislation when he was assassinated in 1968 in Memphis, Tenn.

Marshall, Thurgood (1908-) Marshall was appointed by Lyndon B. Johnson in 1967 as the first black Supreme Court justice. He graduated at the top of his class from Howard University Law School in 1933. By 1938 he became head of the legal staff of the NAACP, where he advocated black rights for 23 years. Of the 32 cases he argued before the Supreme Court, his most notable ended in a 1954 decision outlawing segregation in schools. He was named U.S. Solicitor General under Johnson before his appointment to the Court. Marshall sided with the liberal wing of the Warren Court. He has been said to bear the human impact of the law in mind when deciding cases.

Parks, Rosa (1913-) Parks became a leading figure in the twentieth-century civil rights movement in 1955, when she refused to give up her seat to a white passenger on a bus in Montgomery, Alabama. Her arrest triggered a bus boycott that was led by 27-year-old Martin Luther King, Jr. The Supreme Court ultimately decided that segregated city buses—like segregated public swimming pools, court houses, and other municipal facilities—were unconstitutional. Today, Parks is known as the Mother of the Modern Civil Rights Movement.

Randolph, A. Philip (1889-1979) The founder (in 1925) and long-time president of the all-black Brotherhood of Sleeping Car Porters' union. Randolph was a proponent of desegregation in the military and in organized labor. He was appointed vice president of the American Federation of Labor and Congress of Industrial Organizations in 1955. He directed the 1963 March on Washington for Jobs and Freedom.

Truth, Sojourner (1797-1883) Born Isabella Baumfree, she took on the name Sojourner Truth when she began her mission of traveling the country to spread the truth about slavery. She was known as a preacher, abolitionist and lecturer. She had a huge following that thought her to have mystical powers. She raised money to buy gifts for soldiers in the Civil War and distributed them among the troops herself. She published her *Narrative* in 1875. The piece logged her war experiences and a meeting with Abraham Lincoln.

Tubman, Harriet (*c.* 1821–1913) Tubman was considered by both black and white abolitionists as the "Moses" of her race. She fought against slavery in her early years and for social justice after the Civil War. Born a slave, Tubman was aided to her freedom in 1849 by conductors of the Underground Railroad. She was said to have made 19 trips back to the South, rescuing some 300 blacks—including her parents—from slavery. Tubman worked in the Union Army during the Civil War as a cook, nurse, scout, and spy. After the war she devoted her energies to establishing schools in North Carolina for freed slaves. In her later years, Tubman became active in the temperance and women's rights movements. After her death from pneumonia in 1913, Tubman was given a full military service funeral.

Wells-Barnett, Ida B. (1862-1931) A civil rights advocate of the 1890s who spread her message through her newspaper, the *Memphis Free Speech.*

—Claire Conway

torney general did not even provide the U.S. marshals with copies of the bill so that they would be informed about it in order to enforce it. Benjamin Butler, the floor manager of the bill in the House of Representatives, made it clear to a Cincinnati audience that the bill would not permit blacks to enter saloons that served white people. After all, he said, there must be some place where whites could get away from the ubiquitous black race!

It was a painful experience for black Americans to learn in 1883 that the Supreme Court declared the Civil Rights Act unconstitutional, with the assertion that the Fourteenth Amendment had not authorized Congress to enact laws extending civil rights to Negroes. It had merely restrained the state, not private persons, from denying equal protection to Negroes. This caused T. Thomas Fortune, the black journalist, to bewail, "We have just been baptized in ice water." It had already become painfully clear that the Fifteenth Amendment did not provide all the guarantees of enfranchisement that blacks had hoped for; for the Supreme Court said as early as 1876 that the Fifteenth Amendment did not confer the right of suffrage on anyone but merely prohibited the states or the national government from excluding persons from voting on racial grounds.

Meanwhile, it appeared that the Fourteenth Amendment was proving to be of greater benefit to the burgeoning corporate world than to the hapless, powerless blacks. Even before the end of Reconstruction, the Supreme Court had broadened its role of judicial review by passing on the constitutionality of state legislation that sought to regulate businesses ranging from slaughterhouses to grain elevators to railroads. In so doing the Court greatly enhanced the role of the Constitution in the economic life of the country at a time when the Constitution's role in protecting human rights seemed to be diminishing. By the time that the case of *Plessy v. Ferguson* reached the Supreme Court in 1896, the Court appeared to be in no mood to be distracted from what seemed to have become its major preoccupation, economic growth. Plessy, who thought that the Fourteenth Amendment protected his right to sit anywhere on a Louisiana train, soon discovered that even his fair skin was no protection if his race was known. When he was forced to sit in a rail car set aside for Negroes, he sued and the case eventually reached the Supreme Court. Echoing the assertions made by Chief Justice Shaw a half century earlier, the United States Supreme Court, through Justice Brown, saw no constitutional objection to a Louisiana law requiring separate railway coaches for whites and blacks, as long as the accommodations were equal.

It was not a great distance for the Court to travel three years later in concluding, in *Cumming v. Georgia*, that a white high school need not be closed because the county did not have sufficient funds to maintain a high school for blacks also. The logic of *Plessy* and *Cumming* led directly to every conceivable form of discrimination and segregation, most of it unequal, such as the one in 1945 when forty-five blacks, including me, were crammed into a half-coach designed to accommodate twenty passengers, next to the baggage car, on a trip from Greensboro to Durham, while a full coach was occupied by six German prisoners of war, who took much delight in our discomfort.

Racism Reigns

The nineteenth century closed as it began, and as, indeed, the eighteenth century had closed as it began, as far as race was concerned. The factor of race haunted the relations of whites and blacks in the eighteenth century and dictated not only the relations of master and slave but the relations of whites and blacks who were free. This same factor of race in the nineteenth century dominated the thoughts and actions of proslavery advocates as well as abolitionists, and was a major issue in determining the interpretation of the Constitution and in setting public policy virtually to the end of the twentieth century. Throughout the nineteenth century white Americans could not bring themselves to subscribe to the view that free black Americans were entitled to the same privileges and rights of citizenship that whites enjoyed. The view that free blacks had no rights prevailed at the time of the framing of the Constitution and was in place when all blacks became free in 1865. This was the basis for the policy and practices that persisted throughout the nineteenth century and for most of the twentieth century.

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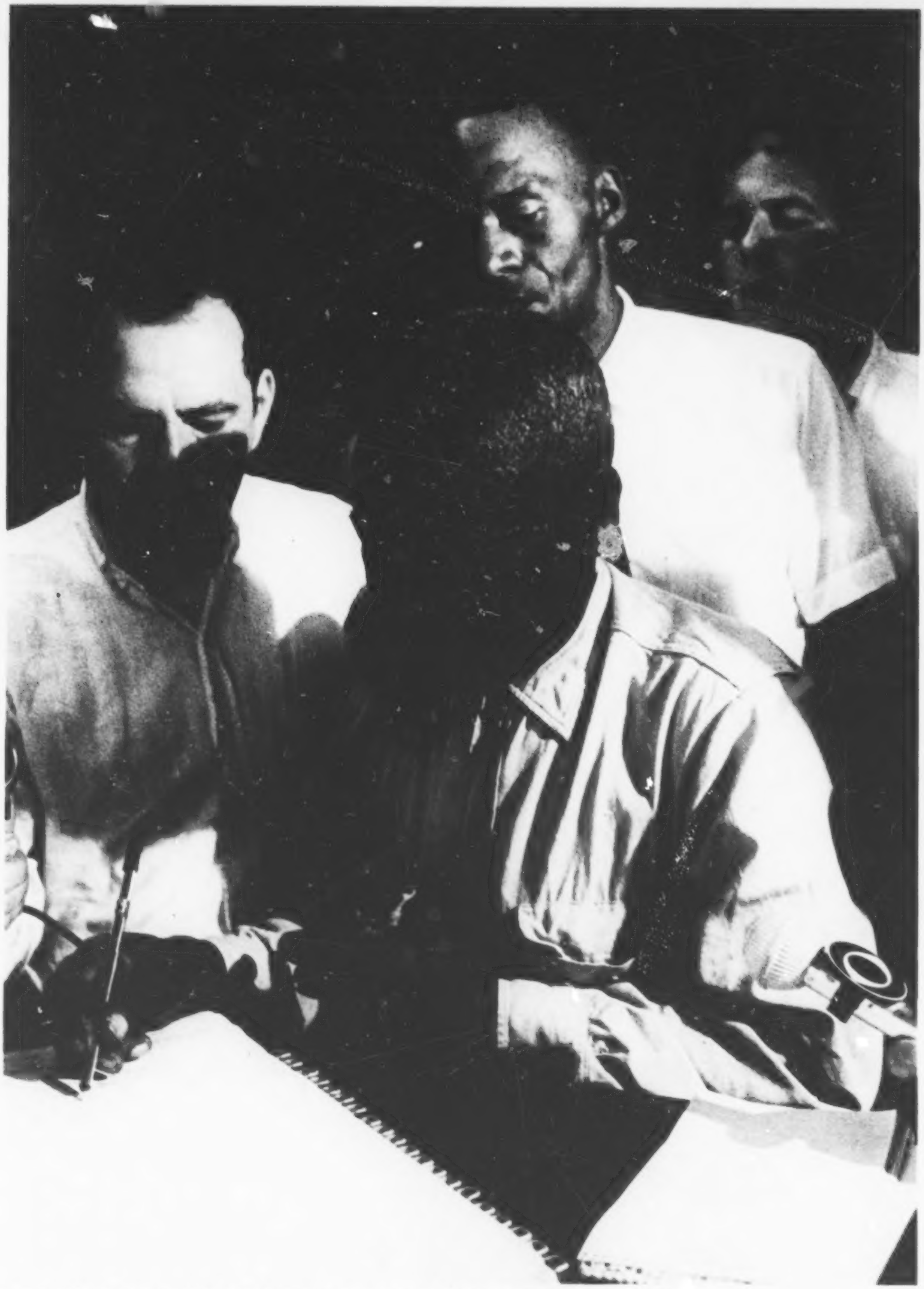

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68-year-old man registers to vote in Batesville, Mississippi, in 1966, as part of a "Mississippi Freedom March."

FROM **Afro-Americans and the Evolution of a Living Constitution**
A Symposium sponsored by
The Smithsonian Institution and
The Joint Center for Political Studies

Frank R. Parker

Protest, Politics and Litigation

Political and Social Change in Mississippi from 1965 to the Present

[*Editor's Note:* Historically, Mississippi has had the highest percentage of black population—and the highest barriers to equality. Mississippi has been the scene of the most stubborn resistance to the constitutional rights of black people, leading the country in black disenfranchisement, lynchings, and the most oppressive Jim Crow political, social and economic system.

For black people in Mississippi in 1965, there was no "living constitution;" in fact, it was a dead constitution, with virtually no protections against racial discrimination in any area of public life.

Although most Southern states had begun to dismantle their Jim Crow systems during the period 1954 to 1965, as late as 1965 Mississippi remained a rigidly segregated state. After five years of civil rights protest, only 6.7 percent of the eligible adult black population was registered to vote, there were no black elected officials outside the all-black town of Mound Bayou, not a single school district had dismantled its racially segregated schools, and most black people worked as field hands or household servants. Civil rights protests were ruthlessly suppressed by police harassment, economic reprisals, and Ku Klux Klan terrorism.

Now, less than a quarter of a century later, there have been huge gains in black voting, schooling, and employment. While true equality has still not been achieved, the progress has been astonishing.

The article which follows is an abridgement of a paper given at "Afro-Americans and the Evolution of a Living Constitution," a symposium of The Smithsonian Institution and The Joint Center for Political Studies. It looks at how these changes came about, with particular attention to the role of constitutional litigation.]

Voting

During the early 1960s, case-by-case litigation proved inadequate to remedy the massive exclusion of blacks from the political process. From 1961 to 1965 half of the Justice Department's voting discrimination and harassment lawsuits filed in the South were filed in Mississippi, but these cases failed to make more than a slight dent in the political exclusion of black citizens. More was needed. In 1965 Congress passed the Voting Rights Act to enforce the constitutional guarantees of the Fourteenth and Fifteenth Amendments.

The Voting Rights Act primarily did three things. First, it struck down the literacy tests, the other discriminatory voter registration tests, and the poll tax that had been used since 1890 to deny black people in the South the right to vote. Second, it authorized the Justice Department to send federal registrars and poll watchers into Southern states to register voters and to ensure that elections were conducted fairly. Third, and most important for the post-1965 era, in Section 5 it required all covered states and localities to submit any changes in their voting laws to the Justice Department or to the Federal District Court in Washington for approval before they could be implemented.

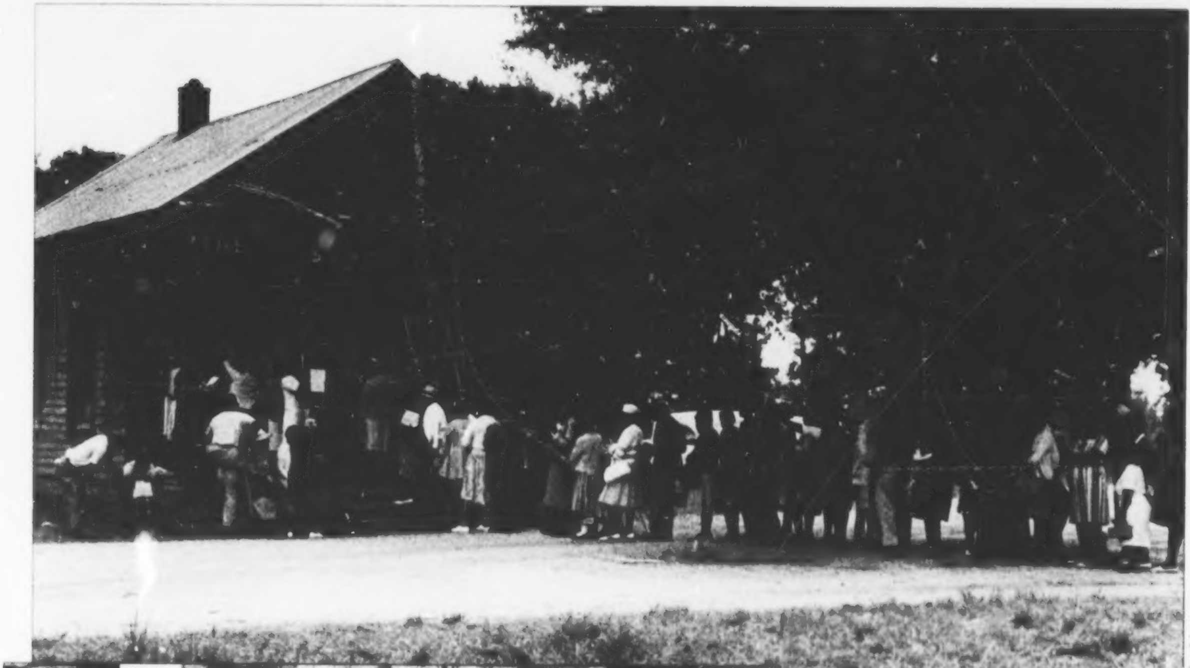
As a result of the passage of the Voting Rights Act, within two years black voter registration rates in every Southern state jumped to over 50 percent of the black voting age population. Mississippi's black voter registration rate ballooned from 6.7 percent in 1965—the lowest in the South—to 59.9 percent in 1967—the highest of any state covered by the Voting Rights Act. In this brief two-year period, black voters in Mississippi went from 5 percent of the statewide electorate to 28 percent.

Mississippi Resists

Contrary to popular expectations, however, the Voting Rights Act did not eliminate all the barriers to equal black political participation. In fact, the dramatic increases in black voter registration produced by the Voting Rights Act triggered a massive resistance reaction by the state's white supremacist establishment that ushered in a whole new second generation of discriminatory devices aimed at nullifying the newly-gained black vote.

Once again, Mississippi led the way. Deprived of the legal authority to deny blacks the right to register and vote, the Mississippi legislature (1) gerrymandered congressional district lines to eliminate the black majority Delta congressional district and to slice it up among three of the five districts; (2) increased the number of at-large districts for electing members of the state legislature; (3) authorized counties to switch from district to at-large, countywide elections for members of the county boards of supervisors and county school boards; (4) greatly increased the qualifying requirements for independent candidates for office, most of whom were black; and (5) abolished elections for county school superintendents in a number of majority black counties.

These measures eliminated or minimized the number of black majority election districts. In 1967, in the first statewide elections after the Voting Rights



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In here lived families of Negro tennant farmers
Share croppers & day laborers who have been
driven from their homes or evicted by White landlords
because they dared to use their American right to
register and vote

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Act became law, only 22 out of 127 black candidates who ran or attempted to run for office were elected in an election in which over 2,000 state, county, and district offices were to be filled.

Without victory over these vote dilution devices, all prior successes—over the white primary, the literacy tests, and the poll tax—would be negated. Black voters would be able to register and vote but would be unable to elect candidates of their choice.

Initially, the Supreme Court was unprepared to cope with these new challenges to the right to vote, and in 1967 rejected a constitutional challenge to the racial gerrymandering of Mississippi's five congressional districts (*Connor v. Johnson*, 386 U.S. 483).

Similarly, the federal courts were resistant to black voters' claims that at-large legislative elections diluted black voting strength. Black voters were denied all but token representation in the Mississippi legislature until—after 14 years of litigation—17 black state legislators were elected from single-member districts in 1979.

A Meaningful Right

Two Supreme Court decisions have been critical to overcoming this second generation of disfranchising devices. In 1969 in *Allen v. State Board of Elections*, 393 U.S. 594, which involved three Mississippi cases, the Supreme Court ruled that voting law changes that diluted the effectiveness of black votes were subject to the federal preclearance requirement of Section 5 of the Voting Rights Act, even if they did not directly interfere with the right to register or cast a ballot. The Court ruled: "This type of change could . . . nullify [black voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting."

For the first time, the Supreme Court recognized that the right of black citizens to vote can be affected as much by vote dilution as by vote denial, and this recognition makes the Supreme Court's decision in *Allen v. State Board of Elections* the *Brown v. Board of Education* of voting rights.

As a result of *Allen*, states and localities covered by Section 5 of the Voting Rights Act must submit any and all voting law changes, no matter how minor, either to the Justice Department or the Federal District Court in Washington for preclearance. Since 1969, the Justice Department has lodged Section 5 objections to approximately 2,000 voting law changes in the South.

The second landmark Supreme Court

decision in the voting rights area was *White v. Regester*, 412 U.S. 755, in which the Supreme Court in 1973 struck down as unconstitutional at-large legislative districts in Texas. The Court held that the Fourteenth Amendment prohibits methods of election that deny minority voters an equal opportunity "to participate in the political processes and to elect legislators of their choice." The Supreme Court's decision in *White v. Regester* was critical because there are structural devices that dilute minority voting strength that are not subject to Federal preclearance under Section 5 of the Voting Rights Act, either because they were adopted before the Voting Rights Act became law or because they are utilized in states not covered by Section 5. For example, Jackson, Mississippi, adopted at-large city council elections in 1911. After 1965, citywide voting prevented black voters in Jackson from electing candidates of their choice to the city council, but Jackson's at-large voting system was not subject to Section 5 preclearance because it was adopted before 1965.

In 1982, Congress amended Section 2 of the Voting Rights Act to make the *White v. Regester* standard a statutory prohibition of the Voting Rights Act. Section 2 now prohibits any voting law or practice that results in discrimination, regardless of its intent.

Section 2 has been phenomenally successful. The Justice Department estimates that since 1982 more than 1,300 jurisdictions have changed their methods of electing officials in response to litigation or the threat of litigation under Section 2.

A New Electorate

What impact have these developments had on Mississippi? The voting rights litigation of the 1970s and 1980s has removed many of the barriers to black political participation and has spurred black political mobilization. As a result, Mississippi now has over 600 black elected officials—more than any state in the nation—including a black member of Congress, a black state supreme court justice, 22 black state legislators, 71 black county supervisors, and 205 black city council members. As Mary King, a former civil rights worker in Mississippi and author of the recently-published memoir, *Freedom Song: A Personal Story of the 1960s Civil Rights Movement*, noted in a 1987 *New York Times* interview:

> People often ask me if I believe any progress has really been made in civil rights. . . . I tell them that it may have taken 23 years, but a black lawyer, Mike Espy, was elected last fall to Congress from a majority black district in the Mississippi Delta. Back in 1964 those black counties didn't have a single black registered voter.

Education

Racial segregation in education was extremely damaging to both black and white schoolchildren in Mississippi. Black schoolchildren frequently attended inadequate school facilities in which they were educated by poorly-trained teachers. In 1950, Mississippi employed over 700 black teachers who had not completed high school, although every white teacher was at least a high school graduate. In the 1963-64 school year, there were over 1,900 white teachers with graduate degrees, but fewer than 500 black teachers had graduate degrees. The per pupil expenditures for heavily-black counties show shocking disparities between white and black children.

In 1960 half of the black population had completed only six years of school or less, and over 32,000 black adults had no formal education at all. By comparison, over half of all white adults had completed 11 years of education or more.

Of all the southern states, Mississippi was the last to begin compliance with the *Brown* decision, and this was under the force of Fourteenth Amendment litiga-

Lawyers and the Civil Rights Movement

Auerbach, Jerold. *Unequal Justice: Lawyers and Social Change in Modern America*. (New York: Oxford University Press, 1976).

The Black Law Journal. Volume 7, Number 1, 1980.

Bell, Edward F. "The Black Lawyer, an American Hero." *Howard Law Journal*. Volume 17, Number 2, 1972, p. 319.

Bland, Randall Walton. *Private Pressure on Public Law; The Legal Career of Justice Thurgood Marshall*. (Port Washington, N.Y.: Kennikat Press, 1973).

Crockett, George W., Jr. "The Role of the Black Judge." *Journal of Public Law*. Volume 20, Number 2, 1971, p. 391.

__________. "A Black Judge Speaks." *Judicature*. Volume 53 [April-May 1970], p. 360.

__________. "Commentary: Black Judges and the Black Judicial Experience." *Wayne Law Review*. Volume 19, November 1972, p. 61.

Fenderson, Lewis H. *Thurgood Marshall: Fighter for Justice*. (New York: McGraw-Hill, 1969).

Horowitz, Harold W., and Kenneth L. Karst (eds.). *Law, Lawyers and Social Change*. (New York: Bobbs-Merrill, 1969).

Jackson, Maynard H. "The Black American and the Legal Profession: A Study in Commitment." *Journal of Public Law*. Volume 20, Number 2, 1971, p. 377.

Jordan, Barbara and Shelby Hearon. *Barbara Jordan: A Self-Portrait*. (Garden City, N.Y.: Doubleday, 1979).

Leonard, Walter J. *Black Lawyers: Training and Results, Then and Now*. (Boston: Senna & Shih, 1977).

Lynn, Conrad J. *There Is a Fountain: The Autobiography of a Civil Rights Lawyer*. (Westport, Conn.: Lawrence Hill, 1979).

McGee, Henry W., Jr. "Black Lawyers and the Struggle for Racial Justice in the American Social Order." *Buffalo Law Review*. Volume 20, Winter, 1971, p. 423.

McNeal, Genna Rae. *Groundwork: Charles H. Houston and the Struggle for Civil Rights*. (Philadelphia: University of Pennsylvania Press, 1983).

Ware Gilbert, ed. *From the Black Bar*. (New York: G. Putnam, 1976).

__________. "Black Lawyers: Strangers in a Strange Land." *Civil Rights Digest*. Volume 9 [Summer, 1977], p. 371.

__________. "A Word to and About Black Lawyers." *Crisis*. Volume 85 [August-September, 1978], p. 247.

Washington, Michele. "Black Judges in White America." *Black Law Journal*. Volume 1, Number 3, 1971, p. 241.

__________. "Constance Baker Motley: Black Woman, Black Judge." *Black Law Journal*. Volume 1, Number 2, 1971, p. 172.

tion. The first school desegregation lawsuits were not filed until 1963, against only three school districts. By the 1964-65 school year, only 57 of Mississippi's 280,000 black schoolchildren attended formerly all-white schools.

Freedom of Choice

As in other southern states, the school desegregation process in Mississippi developed in two stages, "the freedom of choice" stage and the school integration stage. The first wave of lawsuits led to court orders to desegregate, and Mississippi school districts initially adopted freedom of choice school desegregation plans under which students theoretically were given the opportunity to choose which school to attend. In practice, this meant that black students could obtain an integrated education only by transferring to the white schools.

Little school desegregation actually was accomplished under this system. School officials erected numerous administrative barriers to black students transferring to white schools, and black families choosing to send their children to the white schools suffered from Ku Klux Klan terrorism and violence, harassment of black children in school by white students and teachers, and economic reprisals, including eviction from their homes and loss of credit and jobs.

In 1968 in *Green v. School Board of New Kent County*, 391 U.S. 430, a Virginia case, the Supreme Court held freedom of choice plans to be constitutionally inadequate where they failed to achieve full school desegregation. The Court of Appeals for the Fifth Circuit then ordered new plans implemented in 33 Mississippi districts by September, 1969, for the 1969-70 school year. The Fifth Circuit found that under freedom of choice not a single white child attended a Negro school in any of the districts, and the percentage of Negro children attending white schools ranged from zero to 16 percent.

In 1969, the Supreme Court held in *Alexander v. Holmes County Board of Education*, 396 U.S. 19, the Mississippi case, that "continued operation of segregated schools under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. [T]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." The *Alexander* decision marks an important turning point in the school desegregation effort.

Within ten months, 146 of Mississippi's 148 school districts were forced to abandon ineffective freedom of choice plans and to adopt new desegregation plans that revised attendance boundaries and employed zoning, pairing, busing, and other remedies to achieve fully integrated school systems.

The school desegregation litigation of the 1960s and early 1970s dismantled the *de jure* dual, racially segregated school systems in Mississippi and generally eliminated the one-race schools and the one-race faculties. This litigation, however, did not completely eliminate racial segregation in the schools. By 1980, only 23.6 percent of the black students were in predominantly white schools, and 36.7 percent of the black students were in schools that were 90-100 percent minority. By 1987, the percentage of black students attending 90-100 percent black schools increased to 38.7 percent. White flight to segregated academies, ability grouping, tracking, and other systems separate white and black students.

Along with school desegregation, the period 1960 to 1980 was a period of increased federal and state funding for education, reforms in education and teaching methods, and increased qualifications for teachers. Mississippi also became more urbanized and industrialized. The changes have produced substantial improvements in educational attainment among black people in Mississippi. The 1980 Census statistics show that the median educational attainment for blacks was 9.4 years of school, compared with six years in 1960. By 1980, 33 percent of all black adults were high school graduates, compared with only 7.6 percent in 1960, and 60 percent of all young black adults 18 to 24 years of age had completed high school.

School desegregation was even more vigorously resisted in Mississippi than in neighboring Arkansas. This photo shows a confrontation in Little Rock in 1957.

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Employment

Title VII of the Civil Rights Act of 1964, which outlawed racial discrimination in employment by private companies, marks the beginning of the desegregation of the Mississippi work force. Enforcement efforts by the Equal Employment Opportunity Commission, which opened an office in Jackson in the early 1970s, and Title VII lawsuits have gone far to open up employment opportunities for black people across the state.

But the Civil Rights Act did not prohibit racial discrimination in employment by state and local governmental agencies until 1972. Prior to 1972, employment discrimination cases against governmental agencies had to be filed under the Fourteenth Amendment and the 1871 Civil Rights Act (42 U.S.C. Section 1983). Constitutional litigation in Mississippi contributed to the development of national legal standards for job discrimination cases.

Highway Patrol Case

In 1970, an employment discrimination lawsuit was filed against the Highway Patrol on behalf of two black men who had been denied application forms for patrol officer positions. This case, *Morrow v. Crisler*, and another case, *Wade v. Mississippi Cooperative Extension Service*, were the first two state government employment discrimination cases filed in Mississippi in recent times.

Since 1938, when the Highway Patrol was formed, the Patrol had never employed a black person as a sworn officer, and the only blacks it had ever hired were janitors and cooks at its training academy. After a trial, the district court entered a court order prohibiting racial discrimination in hiring and terms and conditions of employment. The court refused, however, to order any hiring quotas or any other form of affirmative hiring relief.

In the next two years, the Patrol hired 91 whites as patrol officers, but only five blacks (plus a sixth black recruit in training school). One of the reasons for this low black hiring rate was that after the district court's injunction was entered, the Patrol for the first time adopted a hiring examination, the Army General Classification Test (AGCT), a test that had been developed by the Army during World War II for making job assignments, not for screening out applicants. In the two years in which it was administered by the Patrol, the white pass rate was 66.6 percent, but the black pass rate was 12.9 percent.

On plaintiffs' appeal from the district court's 1971 injunction, the Fifth Circuit sitting *en banc* ruled that the Patrol's hiring and testing statistics since 1971 showed that the district court's order was insufficient to eliminate the effects of past racial discrimination. The Fifth Circuit ordered additional recruitment measures, reexamination of the Patrol's hiring criteria, and "some affirmative hiring relief," which could take the form of "*temporary* one-to-one or one-to-two [white-black] hiring, the creation of hiring pools, or a freeze on white hiring, or any other form of affirmative hiring relief until the Patrol is effectively integrated."

The Fifth Circuit's opinion in *Morrow v. Crisler*, 491 F.2d 1053, had a significant impact on employment discrimination litigation in the South. The *Morrow* case was one of the first cases—and certainly the first against a governmental agency—in which the Fifth Circuit had ordered quotas or other affirmative hiring relief to eliminate the effects of past discrimination.

Subsequent developments have proven the effectiveness of race-conscious remedies in employment discrimination cases. The first recruit training class held after the district court's new order was three-fourths black, and since then training classes have been one-third to one-half black or more. As of 1988, the Patrol had a black troop commander (captain), a black personnel officer (captain), and two blacks serving as assistant inspectors in charge of two of the Patrol's nine districts, and 20 percent of the Patrol's 305 troopers were black.

Affirmative Action

The second constitutional employment discrimination case filed, *Wade v. Mississippi Cooperative Extension Service*, 372 F. Supp. 126, had a similar history. The district court found unlawful racial discrimination but refused to order any affirmative hiring relief. Four years later, presented with evidence that its "don't discriminate" decree had proven to be ineffective, the district court in 1978 ordered, subject to the availability of qualified applicants, one black hired for each white hired and one black promoted for each white promoted until the extension service was 20 percent black at all levels.

Although court decrees requiring quota hiring and other forms of affirmative relief have come under criticism, they have consistently been affirmed by the Supreme Court when necessary to overcome the effects of past discrimination. The history of constitutional employment discrimination litigation in Mississippi shows that this relief is necessary to overcome the numerous barriers employers can erect to prevent the hiring or promotion of qualified black employees even after the employers have been ordered to stop discriminating.

Litigation Works

David Garrow once remarked:

> Perhaps the greatest breakthrough that the movement of the '60s represented was in its progression from the superbly-conducted, elite-oriented tradition of seeking civil rights progress through the federal courts to mass political action that featured both protest demonstrations and grassroots electoral activism.

Contrary to Garrow's comment, the history of change in Mississippi indicates that once the mass protest movement of the '60s succeeded in passing the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the civil rights movement was required once again to revert to the federal courts to effectuate the civil rights of black Americans. Protest demonstrations and grassroots electoral activism simply were insufficient to overcome racial gerrymandering and at-large elections, rigidly segregated public schools, and an all-white Highway Patrol.

What were the critical elements that produced this litigation and led to those changes? First, it required a black community leadership alert to the discrimination to which black citizens were being subjected and persevering enough to carry through years of litigation and appeals.

Second, it required lawyers with the skills and legal talent to devise new legal strategies and to overcome scores of adverse decisions at the district court level to win on appeal either to the Fifth Circuit or the U.S. Supreme Court. That many of the landmark decisions came in Mississippi cases is no accident. Largely as a result of the Mississippi Freedom Summer of 1964 and the high level of civil rights work in the state, three national civil rights legal organizations—the NAACP Legal Defense Fund, the Lawyers' Constitutional Defense Committee, and the Lawyers' Committee for Civil Rights Under Law—established full-time, staffed offices in Jackson in 1964 and 1965.

Third, it required federal judges who were sensitive and responsive to the legal claims of black citizens. There is nothing in the express language of the Fourteenth or Fifteenth Amendments that says that black voters have a right to elect candi-

Glossary of Legal Terms

This glossary defines a number of terms in common legal use, particularly those which refer to the appellate process. Many books on the law for nonlawyers contain glossaries. Check your library or bookstore. See especially, Lyle Denniston's *The Reporter and the Law* (New York: Hastings House, 1980), *Barron's Dictionary of Legal Terms* (New York: Barron's Educational Series, 1983) and *Black's Law Dictionary* (West Publishing Company).

adversary system The trial methods used in the U.S. and some other countries, based on the belief that truth can best be determined by giving opposing parties full opportunity to present and establish their evidence, and to test by cross-examination the evidence presented by their adversaries, under established rules of procedure before an impartial judge and/or jury.

affirm To uphold the decision of a lower court.

amicus curiae A friend of the court; one not a party to a case who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it.

appeal A request by the losing party in a lawsuit that the judgment be reviewed by a higher court.

appellant The party who initiates an appeal. Sometimes called a **petitioner**.

appellate court A court having jurisdiction to hear appeals and review a trial court's decision.

appellee The party against whom an appeal is taken; sometimes called a **respondent**.

bar The whole body of lawyers. The "case at bar" is the case currently being considered.

brief A written argument prepared by counsel to file in court that sets forth both facts and law in support of a case.

burden of proof In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a lawsuit. The responsibility of proving a point—the burden of proof—is not the same as the **standard of proof**. "Burden of proof" deals with which side must establish a point or points; "standard of proof" indicates the degree to which the point must be proven. For example, in a civil case the burden of proof rests with the plaintiff, who must establish his or her case by such standards of proof as "a preponderance of evidence" or "clear and convincing evidence."

case law law based on previous decisions of appellate courts, particularly the Supreme Court.

certiorari "To make sure." A request for certiorari is an appeal which the higher court is not required to grant. If it does, then it agrees to hear the case, and a writ of certiorari is issued commanding officials of inferior courts to convey the record of the case to the higher court.

common law The term generally refers to the "judge-made law" (case law or decision law). The common law originated in England in the rulings of judges based on tradition and custom. These rulings became the law common to the land. Common law is distinguished from statutes (laws enacted by legislatures).

decision The judgment reached or given by a court of law.

decree An order of the court. A final decree is one which fully and finally disposes of the litigation; an **interlocutory** decree is a preliminary order that often disposes of only part of a lawsuit.

defendant In a civil case, the person being sued. In a criminal case, the person charged with a crime.

dissent The disagreement of one or more judges with the decision of the majority.

due process of law Law in its regular administration through the courts of justice; the guarantee of due process requires that every person be protected by a fair trial; i.e., the right to an impartial judge and jury, the right to present evidence on one's own behalf, the right to confront one's accuser, the right to be represented by counsel, etc.

enjoin To issue an injunction, i.e., to issue a court order prohibiting an act.

equal protection of the law The guarantee in the Fourteenth Amendment to the U.S. Constitution that all persons be treated equally by the law. Court decisions have established that this guarantee requires that courts be open to all persons on the same conditions, with like rules of evidence and modes of procedure; that persons be subject to no restrictions in the acquisition of property, the enjoyment of personal liberty, and the pursuit of happiness, which do not generally affect others; that persons are liable to no other or greater burdens than such are laid upon others; and that no different or greater punishment is enforced against them for a violation of the laws.

federalism or federal system As applied to the United States, a division of powers between the federal or U.S. government and the governments of

dates of their choice to the Mississippi legislature in single-member legislative districts, that black schoolchildren have a right to be bused to integrated schools in the middle of the school year, or that black men and women have a right to be state highway patrol officers. Each of these cases required the application of the general principles of the post-Civil War amendments to the specific facts of the case. In each case, success depended upon federal judges responding to the fundamental injustice of racial discrimination.

Fourth, the success of much of this litigation depended upon the formulation of new legal remedies, such as 65 percent black super-majority election districts, cross-town busing, and racial hiring and promotion quotas. While these remedies remain somewhat controversial today, it is important to remember that they were not derived from some abstract notion of social engineering, but emerged from the experience of scores of cases in which lesser solutions failed to eradicate the effects of past discrimination.

Conclusion

Despite the changes that have taken place, elements of the past persist in Mississipthe fifty states. The states have powers of their own, such as power to create a public school system. The federal government has powers such as the control over coinage and the regulation of foreign trade. Both have concurrent powers in such areas as taxation and public health and welfare.

finding Formal conclusion by a judge or regulatory agency on issues of fact; also, a conclusion by a jury regarding a fact.

injunction A court order prohibiting a threatened or continuing act.

judicial review The power of the Supreme Court to declare an act of Congress unconstitutional. *Marbury v. Madison* is the classic case of judicial review.

legislative history Background of action by a legislature, including testimony before committees, written reports and debates on the legislation.

litigation The process of resolving a dispute over legal rights in court.

moot A moot case or a moot point is one not subject to a judicial determination because it involves an abstract question or a pretended controversy which has not yet actually arisen or has already passed. Mootness usually refers to a court's refusal to consider a case because the issue involved has been resolved prior to the court's decision, leaving nothing which would be affected by the court's decision.

motion An application for a rule or order, made to a court or judge.

opinion A written statement of a judge setting forth the reasons for a decision and explaining his or her interpretation of the law applicable to the case. A **majority** opinion represents the views of more than half of the judges who participated in the case. A **plurality** opinion represents the views of the greatest number of judges, but less than half of those who heard the case. For example, suppose nine judges hear a case and decide it by a five-to-four vote. If all five agree in their reasons for the decision and join in an opinion stating those reasons, it would be a majority opinion. However, if three of the five agree on the reasoning and the other two agree with the decision but not with the reasoning, the opinion of the three would be a plurality opinion. A **dissenting** opinion is one which disagrees with the decision of the majority. A **concurring** opinion agrees with the decision of the majority, but differs from the reasoning of the majority opinion.

overrule To overturn; as, for example, when a court of appeals decides that a previous decision in a different case, by that court or by a lower court, was incorrect. After a case has been overruled it can no longer be referred to as a precedent.

plaintiff The complaining party to litigation; one who initiates the court action.

precedent A prior judicial decision that serves as an example or rule to authorize or justify another.

ratification The process of approving an amendment to the U.S. Constitution, which is spelled out in Article 5 of that document. (Article 7 spells out the procedure for ratifying the Constitution itself.)

relief Deliverance from oppression, wrong, or injustice; a general designation of the assistance, redress, or benefit which a plaintiff seeks at the hands of a court.

remand To send back to a lower court. A higher court can remand a case to a lower court with instructions to carry out certain orders.

remedy Legal or judicial means by which a right or privilege is enforced or the violation of a right or privilege is prevented, redressed or compensated.

reverse To overturn the ruling of a lower court.

standard of proof The level of evidence necessary to prevail in a legal case. It varies depending on the nature of the case: the standard is "beyond a reasonable doubt" in criminal cases, "preponderance of the evidence" or "clear and convincing evidence" in most civil cases.

statutory law Law enacted by the legislative branch of government, as distinguished from **case law** or **common law**.

stay To stop or hold off. To stay a judgment is to prevent it from being enforced.

supreme court The highest court of most states; the highest court of the United States. The U.S. Supreme Court is made up of a chief justice and eight associate justices appointed by the president. Supreme Court decisions must be followed by lower courts in similar cases. However, the Supreme Court itself need not abide by its earlier decisions if it becomes convinced that circumstances demand a new approach. After a major decision, legislatures often revise laws to bring them into accord with the Constitution as interpreted by the decision.

supremacy clause Article 6, cl. 2 of the Constitution, which declares the federal Constitution and laws to be binding over the state constitutions and laws.

pi. Voting in Mississippi elections remains racially polarized; many of the segregated academies begun in the 1960s to avoid public school desegregation are flourishing today. In the 1987 election, in which Mississippi's current progressive governor, Ray Mabus, was elected, the voters by statewide referendum finally repealed Mississippi's constitutional prohibition against interracial marriage; however, 48 percent of the voters voted in favor of retaining the ban. The changes that have been achieved provide a firm basis for future progress; whether these changes will continue, or whether the society will regress, depends on future developments. ☐

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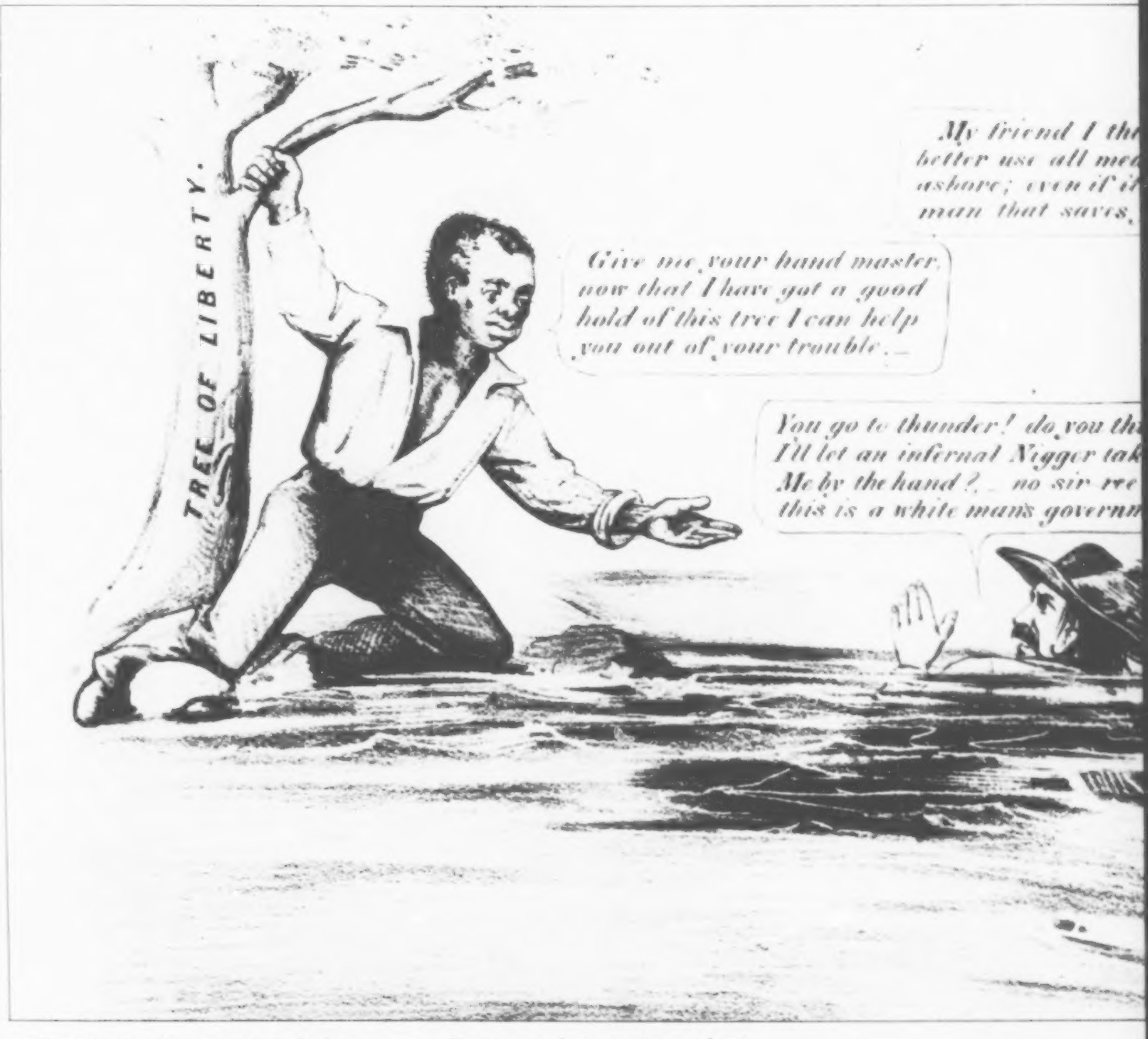
FROM **Afro-Americans and the Evolution of a Living Constitution**
A Symposium sponsored by
The Smithsonian Institution and
The Joint Center for Political Studies

The Legacy of Racial Discrimination: Who Pays the Cost?


TREE OF LIBERTY.
My friend I th
better use all mea
ashore; even if i
man that saves,
Give me your hand master, now that I have got a good hold of this tree I can help you out of your trouble.—
You go to thunder! do you th
I'll let an infernal Nigger tak
Me by the hand?,— no sir ree
this is a white man's governm

This Currier and Ives print from the Reconstruction Era suggests the intransigence of racism.

you had
to get
a black

The Bettmann Archive

[*Editor's Note:* In this article, the author suggests that racial discrimination hurts whites as well as blacks. The article, which is abridged from a paper delivered at "Afro-Americans and the Evolution of a Living Constitution," a symposium sponsored by The Smithsonian Institution and The Joint Center for Political Studies, begins by noting that political phenomena associated with the belief that whites are superior to blacks have served critically important stabilizing functions in our society.]

First, whites of widely varying socioeconomic status employ white supremacy as a catalyst to negotiate policy differences, often through compromises that sacrifice the rights of blacks.

Second, even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered more willing to accept their lesser share, by an unspoken but no less certain property right in their "whiteness." This right is recognized and upheld by courts and the society like all property rights under a government created and sustained primarily for that purpose.

Racism in the New Nation

Let us look first at the compromise-catalyst role of racism in American policymaking. When the Constitution's framers gathered in Philadelphia, it is clear that their compromises on slavery were the key that enabled Southerners and Northerners to work out their economic and political differences.

The slavery compromises set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. But those compromises are far more than an embarrassing blot on our national history. Rather, they are the original and still definitive examples of the ongoing struggle between individual rights reform and the maintenance of the socioeconomic status quo.

My recent book, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987), contains several allegorical stories intended to explore various aspects of American racism using the tools of fiction. In one of these stories, or chronicles, the book's heroine, Geneva Crenshaw, a black civil rights lawyer, gifted with extraordinary powers, is transported to the Constitutional Convention. Her mission is to use her knowledge of the next two centuries to convince the framers that they should not incorporate recognition and protection of slavery in the document they are writing.

She tries to embarrass the framers by pointing out the contradiction in their commitment to freedom and liberty and their embrace of slavery. They would not buy it:

"There is no contradiction in our compromise," replied one delegate. "Life and liberty are generally said to be of more value, than property, . . . [but] an accurate view of the matter would nevertheless prove that property is the main object of Society."

"A contradiction," another added, "would occur were we to follow the course you urge. We are not unaware of the moral issues raised by slavery, but we have no response to the southern delegates who admonish us that 'property in slaves should not be exposed to danger under a government instituted for the protection of property.' Government was instituted principally for the protection of property and was itself . . . supported by property. . . . After all, Negroes are their wealth, their only resource."

A third delegate said, "The economic benefits of slavery do not accrue only to the South. Plantation states provide a market for Northern factories, and the New England shipping industry and merchants participate in the slave trade. Northern states, moreover, utilize slaves in the fields, as domestics, and even as soldiers to defend against Indian raids."

"Slavery has provided the wealth that made independence possible," another delegate told her. "The profits from slavery funded the Revolution. Desperately needing assistance from other countries, we purchased this aid from France with tobacco produced mainly by slave labor."

"The contradiction of which you speak is real," a fifth said. "We have sacrificed the freedom of your people in the belief that this involuntary forfeiture is necessary to secure the property interests of whites in a society espousing, as its basic principle, the liberty of all. Perhaps we, with the responsibility of forming a radically new government in perilous times,

Key Civil Rights Cases

Dred Scott v. Sandford (60 U.S. 393, 1857) The Court held that blacks are not included in the Constitution's definition of "citizen." Scott, a black slave, was denied the rights and privileges guaranteed U.S. citizens even though he had lived with his master in free states where slavery was illegal.

Slaughterhouse Cases (83 U.S. 36, 1873) In this case, a group of New Orleans butchers attacked a Louisiana law that gave one company a slaughterhouse monopoly. The butchers argued that the monopoly violated their rights under the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment. The Slaughterhouse cases were the first to test how broadly the Court would interpret the Fourteenth Amendment. The Court's decision against the butchers represented a very narrow interpretation of the amendment. To the Justices, the amendment did little more than protect the rights of newly emancipated blacks from racial discrimination by the states. Thus, the Fourteenth Amendment's protection of individual liberty against state restrictions was rendered minimal by the Slaughterhouse decision.

Civil Rights Cases (109 U.S. 324, 1883) The Court decided that the Fourteenth Amendment does not require a private citizen to refrain from discriminatory practices. According to the Court, discrimination between two individuals is a private dispute. Discrimination, the decision stated, is unconstitutional only if the state is involved.

Plessy v. Ferguson (163 U.S. 537, 1896) The Court's ruling allowed for racial segregation if various facilities met the same standards for each race. Thus the case established the constitutionality of segregation and the doctrine of "separate but equal."

Missouri ex rel. Gaines v. Canada (305 U.S. 337, 1938) The case involved a black man who was denied admittance to the law school of the University of Missouri on the basis of his color. Missouri offered to pay Gaines' tuition at an out-of-state law school that accepted blacks. The Court determined that Gaines was denied equal privileges under the Constitution despite the state's offer. The Court ruled that it was unconstitutional for Missouri to provide the privilege of attending law school to whites and not to blacks. The decision is one of a series of higher education cases won by black plaintiffs. It indicated the deterioration of the doctrine of segregation and was a precursor of *Brown v. Board of Education.*

Brown v. Board of Education (347 U.S. 483, 1954) The decision determined that segregation and the doctrine of "separate but equal" were inherently unconstitutional. The Court wrote that segregation of white and black children in the public school system "generates a feeling of inferiority as to their status in the community."

Gomillion v. Lightfoot (364 U.S. 339, 1960) Charles Gomillion, the social science department chairman of Alabama's Tuskegee Institute, sued mayor Phil Lightfoot for rearranging the city borders to ensure a white voting majority in the town. Tuskegee was populated by five times as many blacks as whites. In its decision, the Court wrote that "state power" could not be used as "an instrument for circumventing a federally protected right." Thus gerrymandering on the basis of race was declared illegal.

Dixon v. Alabama State Board of Education (294 F. 2d 150, 5th Circuit, 1961) In March 1960, a group of black students was expelled from Alabama State College for participating in racial demonstrations. They were not given notice that they were going to be expelled or an opportunity to present their position at a hearing. The Alabama Board of Education argued that the students had waived their right to notice and a hearing because they were attending the university on a voluntary basis. The board reasoned that "just as students may decide to withdraw from the university at any time, the university may decide to expel any student whose behavior is disruptive." The U.S. Court of Appeals ruled that the state cannot condition the granting of admittance to one of its universities upon the renunciation of the constitutional right to due process. The court decided that due process in this case required notice and an opportunity for a hearing before expulsion.

Harper v. Virginia State Board of Elections (383 U.S. 663, 1966) The case was brought by Virginia residents seeking to have the state's poll tax deemed unconstitutional. The Court concluded that any state that makes a fee a precondition to voting is acting in violation of the Equal Protection clause of the Fourteenth Amendment.

South Carolina v Katzenbach (383 U.S. 301, 1966) In this case, South Carolina argued that sections of the Voting Rights Act of 1965 were unconstitutional. The act was created by Congress to eliminate racial discrimination in voting. The Court ruled that Congress, in writing the act, was working within the constitutional boundaries of the Fifteenth Amendment. The

see more clearly than is possible for you in hindsight that the unavoidable cost of our labors will be the need to accept and live with what you call a contradiction."

Rights Sacrificed

My point—that the slavery compromises set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests—is almost self-evident. Consider only a few examples:

—The long fight for universal male suffrage was successful in several states when opponents and advocates alike reached compromises based on their generally held view that blacks should not vote. Historian Leon Litwack reports that "utilizing various political, social, economic, and pseudoanthropological arguments, white suffragists moved to deny the vote to the Negro. From the admission of Maine in 1819 until the end of the Civil War, every new state restricted the suffrage to whites in its constitution."

—By 1857, the nation's economic development had stretched the initial slavamendment allowed the national legislature to develop remedies for racial discrimination.

Allen v. State Board of Elections (393 U.S. 544, 1969) The case was brought by black, functionally illiterate voters who were unable to fill out a write-in ballot for a Virginia election. The four had attempted to vote by sticking labels with the name of their chosen candidates in the space provided on the write-in ballot. Virginia election officials ruled that their use of labels violated state election laws. The Court ruled that the Virginia law constituted "a voting qualification or prerequisite to voting" and thus violated the Voting Rights Act of 1965. The ruling determined that states must abide by the Voting Rights Act provisions that proscribed "tests or devices" in voting practices.

Milliken v. Bradley (418 U.S. 717, 1974) The Court held that the Fourteenth Amendment did not require busing of school children over district lines to achieve desegregation.

Regents of the Univ. of California v. Bakke (438 U.S. 265, 1978) The decision invalidated the university's admissions program, which set aside 16 spaces for minority applicants. However, the Court held that "the state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." This decision is the first and most important involving affirmative action. The Court did not take a definitive stand on the issue. In effect, the decision rules out formal quotas but leaves room for using race and gender as factors in selection processes.

—*Claire Conway*

ery compromises to the breaking point. The differences between planters and business interests that had been papered over 70 years earlier by greater mutual dangers could not be settled by a further sacrifice of black rights in the case of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

Chief Justice Taney's conclusion in *Dred Scott* that blacks had no rights whites were bound to respect—a view rather clearly reflecting the prevailing belief in his time as among the founding fathers—represented a renewed effort to compromise political difference between whites by sacrificing the rights of blacks. The effort failed, less because Taney was willing to place all blacks—free as well as slave—outside the ambit of constitutional protection, than because he rashly committed the Supreme Court to one side of the fiercely contested issues of economic and political power that were propelling the nation toward the Civil War.

—When the Civil War ended, the North pushed through constitutional amendments, nominally to grant citizenship rights to former slaves, but actually to protect its victory. But within a decade, when another political crisis threatened a new civil war, black rights were again sacrificed in the Hayes-Tilden Compromise of 1877. Constitutional jurisprudence fell in line with Taney's conclusion regarding the rights of blacks *vis-a-vis* whites even as his opinion was condemned. The country moved ahead, but blacks were cast into a status that only looked positive when compared with slavery itself.

Right to "Whiteness"

My second and connected point is that even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered more willing to accept their lesser share.

According to historians including Edmund Morgan and David Brion Davis, working-class whites did not oppose slavery when it took root in the mid-1660s. They identified on the basis of race with wealthy planters, even though they were and would remain economically subordinate to those able to afford slaves.

The creation of a black subclass enabled poor whites to identify with and support the policies of the upper class. Large landowners, with the safe economic advantage provided by their slaves, were willing to grant poor whites a larger role in the political process. Thus, paradoxically, slavery for blacks led to greater freedom for poor whites.

In the post-Reconstruction era, the constitutional amendments initially promoted to provide rights for the newly emancipated blacks were transformed into the major legal bulwarks for corporate growth. The legal philosophy of that era espoused liberty of action untrammelled by state authority, but the only logic of the ideology—and its goal—was the exploitation of the working class, whites as well as blacks.

Two Cases

As to whites, consider *Lochner v. New York*, 198 U.S. 45 (1905), where the Court refused to find that the state's police powers extended to protecting bakery employees against employers who required them to work in physically unhealthy conditions for more than 10 hours per day and 60 hours per week. Such maximum hour legislation, the Court held, would interfere with the bakers' inherent freedom to make their own contracts with the employers on the best terms they could negotiate.

For blacks, of course, we can compare *Lochner* with the decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the Court upheld the state's police power to segregate blacks in public facilities even though such segregation must, of necessity, interfere with the liberties of facilities' owners to use their property as they saw fit.

Both opinions are quite similar in the Court's use of Fourteenth Amendment fictions: the assumed economic "liberty" of bakers in *Lochner* and the assumed political "equality" for blacks in *Plessy*. Those assumptions, of course, required the most blatant form of hypocrisy. Both decisions, though, protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*).

The effort to form workers' unions to combat the ever more powerful corporate structure was undermined because of the active antipathy against blacks practiced by all but a few unions. Excluded from jobs and the unions because of their color, blacks were hired as scab labor during strikes, a fact that simply increased the hostility of white workers that should have been directed toward their corporate oppressors.

The Populist Movement in the latter part of the nineteenth century attempted to build a working class party in the South strong enough to overcome the economic exploitation by the ruling classes. But when neither Populists nor the conservative Democrats were able to control the black vote, they agreed to exclude blacks entirely through state constitutional amendments, thereby leaving whites to fight out elections themselves.

With blacks no longer a force at the

Law and the Black Experience

Abraham, Henry J. ***Freedom and the Court: Civil Rights and Liberties in the United States.*** **(New York: Oxford University Press, 1977).**

Bardolph, Richard, ed. ***The Civil Rights Record: Black Americans and the Law, 1849-1970.*** **(New York: Crowell, 1970).**

Barker, Lucius Jefferson. ***Civil Liberties and the Constitution: Cases and Commentaries.*** **(Englewood Cliffs, New Jersey: Prentice-Hall, 1986).**

Bell, Derrick A. ***Race, Racism, and American Law.*** **(Second edition, Boston: Little, Brown & Co., 1980).**

__________, ed. ***Civil Rights—Leading Cases.*** **(Boston: Little-Brown, 1980).**

__________, ed. ***Shades of Brown: New Perspectives on School Desegregation.*** **(New York: Teachers College Press, 1980).**

__________. ***And We Are Not Saved: The Elusive Quest for Racial Justice.*** **(New York: Basic Books, 1987).**

Berry, Mary Frances. ***Black Resistance/White Law: A History of Constitutional Racism in America.*** **(New York: Prentice-Hall, 1974).**

Blaustein, Albert, and Clarence C. Ferguson, Jr. ***Desegregation and the Law.*** **(Rev. ed., New York: Vintage Books, 1962).**

Greenberg, Jack. ***Judicial Process and Social Change.*** **(St. Paul, Minn.: West Publishing Co., 1977).**

Hamilton, Charles V. ***The Bench and the Ballot: Southern Federal Judges and the Right to Vote.*** **(New York: Oxford University Press, 1973).**

Kluger, Richard. ***Simple Justice: The History of*** **Brown v. Board of Education** ***and Black America's Struggle for Equality.*** **(New York: Alfred A. Knopf, 1976).**

Konvitz, Milton R. ***A Century of Civil Rights.*** **(New York: Columbia University Press, 1961).**

Miller, Loren. ***The Petitioners: The Story of the United States Supreme Court and the Negro.*** **(New York: Random House, 1966).**

ballot box, conservatives dropped even the semblance of opposition to "Jim Crow" provisions pushed by lower-class whites as their guarantee that the nation recognized their priority citizenship claim, based on their whiteness.

New Passwords

Southern whites rebelled against the Supreme Court's 1954 decision declaring school segregation unconstitutional precisely because they felt that the long-standing priority of their superior status to blacks had been unjustly repealed. This year, we celebrate the 34th anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954), which marked the Court's rejection of the "separate but equal" doctrine of *Plessy*.

In the late 20th century, new passwords have been used for gaining judicial recognition of the still viable property right in being white. In *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), the password became "higher entrance scores."

In *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), the password is "seniority." And in *Milliken v. Bradley*, 418 U.S. 717 (1974), it is "neighborhood schools." There is as well the use of impossible-to-hurdle intent barriers to deny blacks remedies for racial injustices. This happens where the relief sought would either undermine white expectations and advantages gained during eras of overt discrimination (see *Washington v. Davis*, 426 U.S. 229 [1976]), or where such relief would expose the deeply imbedded racism in a major institution, such as the criminal justice system (see *McCleskey v. Kemp*, 107 S. Ct. 1756 [1987].

And the continuing resistance to affirmative action plans, set-asides, and other meaningful relief for discrimination-caused harm, is based in substantial part on the perception that black gains threaten the main component of status for many whites: the sense that as whites, they are entitled to priority and preference over blacks. The law has mostly encouraged and upheld what Mr. Plessy argued in *Plessy v. Ferguson* was a property right in whiteness, and those at the top of the society have benefited because the masses of whites are too occupied in keeping blacks down to note the large gap between their shaky status and that of whites on top.

Caught in the vortex of this national conspiracy that is perhaps more effective because it apparently functions without master plans or even conscious thought, the wonder is not that so many blacks manifest self-destructive or non-functional behavior patterns, but that there are so many who continue to strive and sometimes succeed, despite all.

Counter-Indications

There are today—even in the midst of outbreaks of anti-black hostility on our campuses and elsewhere—some indications that an increasing number of working class whites are learning what blacks have long known: that the rhetoric of freedom so freely voiced in this country is no substitute for the economic justice that has been so long denied.

True it may be that the structure of capitalism, supported as was the framers' intention by the Constitution, will never give sufficiently to provide real economic justice for all. But in the beginning, that Constitution deemed those who were black as the fit subject of property. The miracle of that document—too little noted during its Bicentennial—is that those same blacks and their allies have in their quest for racial justice brought to the Constitution much of its current protection of individual rights.

The challenge is to move the document's protection into the sacrosanct area of economic rights, this time to ensure that opportunity in this sphere is available to all. Progress in this critical area will require continued civil rights efforts, but may depend to a large extent on whites coming to recognize that their property right in being white has been purchased for too much and has netted them only the opportunity, as C. Vann Woodward put it, to hoard sufficient racism in their bosoms to feel superior to blacks while working at a black's wages.

Those pulls, despite the counter-indicators provided by history, logic and simple common sense, remain strong. But the efforts to achieve racial justice have already performed a miracle of transforming the Constitution—a document primarily intended to protect property rights—into a vehicle that provides a measure of protection for those whose rights are not bolstered by wealth, power, and property. □

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FROM **Afro-Americans and the Evolution of a Living Constitution**
A Symposium sponsored by
The Smithsonian Institution and
The Joint Center for Political Studies

W. Richard West, Jr. and Kevin Gover

Courtesy of the Newberry Library

Indians and whites at the signing of the Treaty of Ft. Laramie in 1868. This amity was short-lived; the treaty was abrogated a few years later (see p. 40 of this Update*), leading to many years of litigation.*

Indians in United States Civil Rights History

[*Editor's Note.* Messrs. West and Gover discuss the unique legal status of Indians in tracing their struggle for civil rights. This is an abridgment of an article which Mr. West used as the basis of his presentation at "Afro-Americans and the Evolution of a Living Constitution," a symposium sponsored by The Smithsonian Institution and The Joint Center for Political Studies.]

Like other ethnic minorities, American Indians have been subjected to discrimination by both governmental and private entities throughout the history of the United States. Unlike other minorities, however, Indian people's views of their rights under law extend beyond those expected by their fellow citizens, to include a wide range of preferences, immunities and prerogatives that arise not from their status as a racial minority but, rather, from their status as citizens of tribal governments.

The "civil rights" of Indian people are best understood, therefore, by separating them into two broad categories. The first category deals with those matters that we ordinarily think of as "civil rights": the right to be free from discrimination on the basis of race, the right to vote, the right to due process of law, freedom of speech and religion, etc. And in the case of Indian people, we are concerned not only with the constitutional limitations on the power of state and federal governments, but also with limitations on the power of tribal governments. The second broad category includes the rights and disabilities of Indians as members of tribal bodies politic. The United States has established legal preferences, immunities and disabilities that run directly to indi-

An eighteenth century view of "negotiations" with the Indians.

The Bettmann Archive

vidual Indians as well as rights and immunities that flow through the tribal government. In both cases, though, it is tribal citizenship that creates the right or immunity.

Indians, The Constitution and Treaties

The relationship between the United States and the Indians has been described by the Supreme Court as "anomalous and complex." Many of these anomalies and complexities will be seen in this article. The Constitution as originally adopted mentioned Indians twice. Under Article I, "Indians not taxed" were excluded from state populations for purposes of apportioning taxes and representatives in Congress among the states. Also under Article I, Congress is accorded the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The implications of these provisions are twofold: (1) that Indians generally were not citizens of the United States or the states in which they resided, and (2) that Indian tribes were distinct political societies, relations with which were to be managed by the federal government. The manner in which the early leaders of the United States exercised their powers under the Constitution demonstrates these points. Congress's earliest enactments included several laws governing relationships with Indian tribes. Among the most significant were the Trade and Intercourse Acts, which required, among other things, that traders in Indian country be licensed by the federal government and that all sales, cessions or other dispositions of Indian land be approved by Congress. Also important were the numerous treaties with eastern Indian tribes that were submitted to the Senate for ratification.

The supremacy of United States–Indian treaties over state laws was established by the Supreme Court in *Worcester v. Georgia*, 31 U.S. 515. A white missionary, Samuel Worcester, defied Georgia's ban on non-Indians entering the Cherokee Nation and was arrested, tried and convicted. He appealed to the Supreme Court, arguing that the Georgia law was void because only federal law governed relations with the Cherokee Nation. John Marshall, the Chief Justice of the Supreme Court, discussed at length the status of Indians:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable by making treaties. . . . The Cherokee Nation, then, is a distinct political community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . . The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

This early formulation of the federal-Indian relationship would affect the civil rights of Indians in several profound ways. The most obvious is that Indian people, as citizens of "distinct political communities," were not citizens of the United States and, therefore, enjoyed none of the statutory and constitutional rights reserved to citizens. Their status as citizens of other nations also had the effect of exempting them from state laws that applied to all other residents of the states, at least so long as the Indians remained in their territories.

The tribes, however, were not "nations" in other respects. Their power to conduct relations with European powers, under Marshall's formulation, was surrendered when they came within the boundaries of the United States. So, too, was their control of the disposition of their lands. The title of Indian tribes to the lands they used and occupied was not the inviolable fee title of European and American governments. Instead, first the Europeans and then the American governments laid claim to the legal title of lands occupied by the Indians under the "discovery" doctrine. This doctrine held that the Indians held only a legal right of possession and that the "discovering" nation had the exclusive right to terminate the Indian right of possession either by agreement or conquest. The doctrine was developed by the Europeans to resolve their conflicting claims to territory in the New World, and was ratified as an element of American jurisprudence by the Supreme Court in *Johnson v. McIntosh*, 21 U.S. 543 (1823). The Court discussed the origins and contours of the doctrine, and seemed troubled by the plain implication that Indians were somehow inferior to other people in their legal rights. The Court could not reverse history, however, noting that:

> Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. . . . However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

This early recognition of a distinction between the natural rights—and therefore, the legal rights—of those who were Indian and those who were white is troubling in the abstract, and lays the intellectual groundwork for later violations of Indian rights. The title of every landowner in the country would have been clouded had the Court failed to acknowledge the discovery doctrine. Later courts, however, also would yield uncritically to the proposition that the basic human rights of Indian people were somehow less than those of white people, even when the practicalities of the situation did not so demand.

Marshall's description of the relationship between the United States and Indian nations was correct in theory but not in practice. Georgia refused to honor the Supreme Court's decree. Less than ten years after the *Worcester* decision, the so-called Five Civilized Tribes of the Southern United States were forced from their ancestral homes through treaties procured by fraud and duress.

Manifest Destiny—Warfare and Conquest

The notion of manifest destiny dominated federal Indian policy for the rest of the nineteenth century. Warfare between the tribes and frontier settlers rendered civil rights inoperative during the middle years of the century. The legal rights of the tribes were disregarded when they proved inconvenient and the legal rights of individual Indians were subsumed by the hostility of frontier settlers. The federal government made token attempts to protect Indian treaty rights but, as a practical matter, both the Indians and the white frontier populations were beyond its control. Whites and Indians on the frontier developed brutal and savage attitudes towards each other and engaged in vicious racial warfare. Incessant warfare and disease eliminated the military capacity of the tribes. Shortly after the Civil War, most of the tribes were confined to reservations and made almost entirely dependent upon the federal government.

In such a setting, of course, the rights theoretically accorded by law become virtually irrelevant. Despite dramatic developments in the field of civil rights generally, therefore, the rights of Indian people were not a subject of favorable attention between 1833 and 1883. The post-Civil War amendments to the Constitution were revolutionary in their impact on civil rights, but had little impact on the condition of Indian people at the time.

Indians generally remained beyond the reach of state law throughout the period and, for this reason, "Indians not taxed" were excluded from the Fourteenth Amendment's formula for the allocation of representatives to Congress. The Fourteenth Amendment, in order to overturn the infamous *Dred Scott* decision, contained the following provision on citizenship: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Although this provision clearly granted citizenship to newly-freed black slaves, it was held not to be a general grant of citizenship to Indians in *Elk v. Wilkins*, 112 U.S. 94 (1884). In the *Elk* case, an Indian resident of Omaha, having severed his relationship with his tribe, nonetheless was denied suffrage by state officials. The Supreme Court held that he was not a citizen under the Fourteenth Amendment:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, although in a geographic sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign state born within the domain of that government . . . .

Thus, because most Indians remained tribal citizens primarily, and because tribal citizenship was regarded as inconsistent with American citizenship, Indians were not entitled to the rights of citizens.

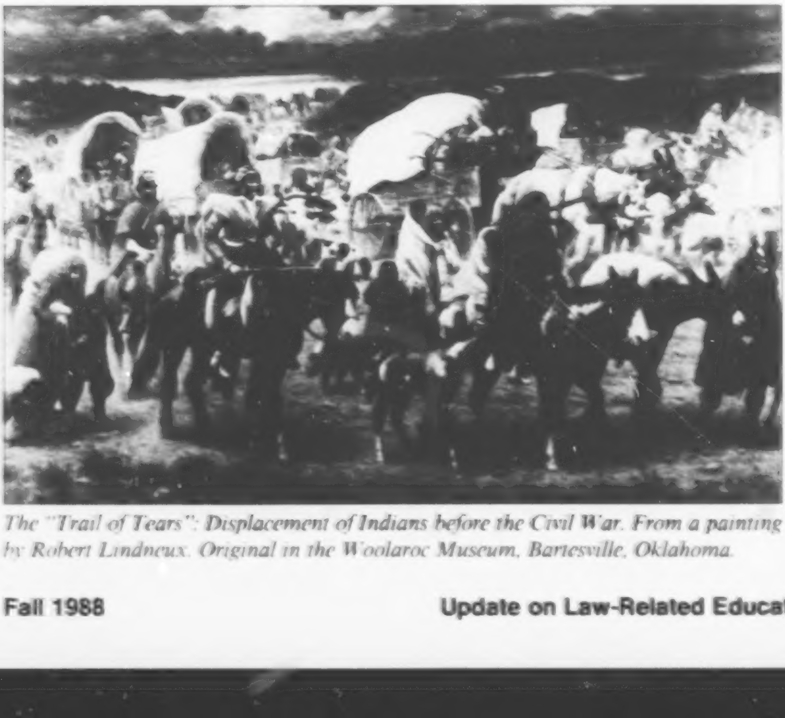
Significantly, many of the rights afforded by the post-Civil War amendments were granted to "persons" as opposed to "citizens." The states, therefore, were required to afford equal protection and due process to Indians as "persons" even though not required to provide the elective franchise and the equal privileges and immunities the Constitution now granted to "citizens."

In these waning years of tribal independence, the civil rights of Indian people were not a topic of much discussion. Although Indians were theoretically guaranteed the rights of other "persons," frontier hostility between whites and Indians and the inability of the federal government to manage affairs on the frontier rendered these guarantees virtually meaningless.

Two significant developments, however, occurred in this era. The first was the granting of citizenship to Indians. Although few Indians would choose to become citizens, congressional power to grant such status to Indians and the Indians' innate capacity to be productive citizens were recognized and would form the basis for guaranteeing the civil rights of Indians in future years. Similarly, the post-Civil War amendments, though initially of little practical value to Indians, would be used in future years to defend Indians from racist assaults on their civil rights.

Assimilation—The Allotment Policy

By 1883, the United States faced a critical decision in its conduct of relations with the Indian nations. The military



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The "Trail of Tears": Displacement of Indians before the Civil War. From a painting by Robert Lindneux. Original in the Woolaroc Museum, Bartesville, Oklahoma.

Books on Indian Law

The following books provide useful information on many aspects of Indian law. They range from scholarly works to more popular treatments of the subject.

American Indian Law Review. (Norman, Oklahoma: University of Oklahoma College of Law, 1973–present).

American Indian Policy Review Commission. *Final Report.* (Washington, 1977).

Berger, Thomas R. *Village Journey: The Report of the Alaska Native Review Commission.* (New York: Hill and Wang, 1985).

Brodeur, Paul. *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England.* (Boston: Northeastern University Press, 1985).

Canby, William C. *American Indian Law in a Nutshell.* (St. Paul: West Publishing Company, 1981).

Cohen, Felix. *Handbook of Federal Indian Law.* (Charlottesville, Virginia: Michie Bobbs-Merrill, 1982).

Deloria, Vine Jr. *American Indian Policy in the Twentieth Century.* (Norman, Oklahoma: University of Oklahoma Press, 1985).

__________ and Clifford M. Lytle. *American Indians, American Justice.* (Austin, Texas: University of Texas Press, 1983).

__________. *Behind the Trail of Broken Treaties: An Indian Declaration of Independence.* (Austin, Texas: University of Texas Press, 1985).

DuMars, Charles T., et al. *Pueblo Indian Water Rights: Struggle for a Precious Resource.* (Tucson, Arizona: University of Arizona Press, 1984).

Getches, David H., et al. *Federal Indian Law.* (St. Paul: West Publishing Company, 1979; supplement, 1983).

Indian Law Reporter. (Washington: American Indian Lawyer Training Program, 1974–present).

Kappler, Charles T. *Indian Affairs: Laws and Treaties.* (7 volumes, Washington, D.C.: Government Printing Office, 1941, 1967).

Kickingbird, Kirke and Lynn Shelby Kickingbird. *Indians and the U.S. Constitution: A Forgotten Legacy.* (Washington: Institute for Development of Indian Law, Inc., 1987).

Matthiessen, Peter. *In the Spirit of Crazy Horse.* (New York: Viking, 1983).

Price, Monroe E. and Robert N. Clinton. *Law and the American Indian: Readings, Notes, and Cases.* (2nd ed., Charlottesville, Virginia: Michie Co., 1983).

U.S. Commission on Civil Rights. *Indian Tribes: A Continuing Quest for Survival.* (Washington, D.C., 1981).

conquest of the tribes was complete, the surviving tribes were confined to reservations comprising only small fractions of their former domains, and many Indians lived on government-furnished rations. In 1871, Congress had passed a law providing that future relations with the tribes would not be conducted by treaty, but, rather, by ordinary legislation approved by both houses.

The practical ability of the tribes to resist federal intrusion on their affairs having been destroyed, the exercise of federal power over Indians took an ugly turn. The federal-tribal relationship would be transformed from a solemn agreement between nations to that of a despotic guardian and a helpless ward.

The assault took the form of the allotment policy, by which tribal lands were parceled out to adult members and "surplus" lands were opened to non-Indian settlement. The underlying philosophy of the allotment policy was that the tribal lifestyle bred sloth and dependence upon the generosity of others, while American free enterprise bred initiative and independence. Only through the pride of individual ownership of land might Indians be introduced to the benefits of American society and, ultimately, become full-fledged, church-going, tax-paying American citizens.

The tribes resisted allotment but the United States was not about to be deterred by their protests. The government staged "negotiations" with the tribes, but the agreements that resulted were tainted by duress, coercion, forgery and fraud. The courts engaged in a charade. Although American constitutional law accorded almost sacred importance to vested property rights, Indian property rights, established by treaty, received no protection. In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), Kiowa chief Lone Wolf challenged the validity of the "agreement" by which Kiowa, Comanche and Kiowa Apache lands were allotted and sold to whites. Despite clear evidence of fraud and the breach of the 1867 treaty with the tribes, the Court would grant no relief:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. . . . In view of the legislative power possessed by Congress over treaties with the Indians, and Indian tribal property, we may not specially consider [the allegations of fraud], since all these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts.

Theoretically, then, congressional power could be exercised only for the good of the Indians. But the Court would not second-guess Congress as to what was or was not good for the Indians. Thus, congressional power was unlimited under the *Lone Wolf* doctrine.

This era was the darkest hour of Indian civil rights history. Despite constitutional guarantees, Indians' rights of free speech, free exercise of religion and property were disregarded. More significantly still, the right of Indian tribes to maintain a distinct political and cultural existence was violated intentionally and systematically. The damage to Indian well-being has yet to be repaired.

Reform—Tribal Reorganization

A new era, an era of reform, began in 1924 when Indians were made citizens of the United States. Many Indians already had become citizens in the early 1900s through "competency commissions" established to determine whether particular Indians had adjusted to the majority culture sufficiently to be released from government guardianship. One might expect the Indians to have been anxious to be declared "competent." In fact, however, the declaration of competency was resisted by many, perhaps most, Indians. Competency meant the end of federal protection of Indian-owned allotments. Many thousands of Indians saw their land removed from trust or restricted status, rendering the land alienable and taxable. Such lands soon were lost—taken by fraud or state tax sales.

Unlike the grant of citizenship through competency commissions, the 1924 Indian citizenship act, fortunately, did not terminate the federal duty of protecting Indians and their property. Indians thus were the beneficiaries of a unique status. They enjoyed not only the rights and privileges of American citizenship, but also the rights and privileges of membership in distinct tribal political communities. The operative assumption of federal policy makers in 1924 was that the tribes eventually would disappear and Indians would be citizens only of federal and state governments. When that assumption proved false and the tribes refused to disappear, what resulted was the special dual citizenship enjoyed by Indians today.

The policy that emerged from the social activism of the 1930s was based on the proposition that there was a place for Indian tribes in modern America. Under the leadership of Commissioner of Indian Affairs John Collier, a policy of restoring tribal governments to their rightful place was adopted. The Indian Reorganization Act of 1934 allowed tribes to enact constitutions for their tribal governments and renounced the allotment policy. Tribal governmental structures were recognized as the appropriate means for effecting federal policies towards Indians. The right of Indian people to maintain distinct political communities was recognized by Congress for the first time in over half a century. The assumption that tribes would disappear no longer was the basis for federal Indian policy.

Assimilation—The Termination Policy

With the end of the Depression and the beginning of World War II, America turned to other priorities. The federal Indian budget was slashed and Collier's policy came under sharp attack from congressional critics whose constituents were unhappy with the renewal of tribal authority.

The new policy was called "termination." It involved the dismantling of tribal government, the distribution of tribal assets to tribal members and the end of federal services to individual Indians. Sponsors of the legislation spoke euphemistically of "emancipating" the Indians from federal domination. Why emancipation from federal control should require the destruction of tribal government is a question left unanswered. The assimilationist policy took other forms as well. A program of voluntary relocation of Indians from reservations to urban areas was begun. Indian families were provided with funds for moving expenses to cities, placed in poor housing, provided with menial jobs and then abandoned.

Ironically, even as this assault on the Indian right of self-government was under way, the rights of Indians as American citizens were being established firmly in the courts. Despite the 1924 grant of citizenship to Indians, many states continued to discriminate against Indians for purposes of voting, jury duty and providing testimony in court. This discrimination fell to the commands of the Fourteenth and Fifteenth Amendments. Even as the NAACP carefully litigated test cases leading to the abandonment of the "separate but equal" doctrine, activist lawyers were chipping away at state laws that discriminated against Indians on the basis of their race.

Indians and the Civil Rights Movement

As the civil rights movement gained strength in the 1960s, Indian-interest organizations became active participants. Indian demands were the same as those of other minorities in terms of the rights of citizenship. In another respect, however, they were fundamentally different. Indians asserted not only their constitutional rights as members of the American body politic, but also their right to maintain distinct political and cultural communities. In short, Indians were asserting a right to be different.

They met with success on both fronts. This success is reflected in both the legislation and the judicial decisions of the sixties and early seventies. Indians routinely were made beneficiaries of civil rights legislation such as the Voting Rights Act, the Fair Housing Act and the Equal Employment Opportunity Act. The Voting Rights Act, for example, not only prohibits discrimination against Indians, but also creates special protections for them as persons whose primary language is not English.

Reflecting the fact that Indian rights go beyond those afforded to other citizens, however, special provisions were included in civil rights legislation. The Equal Employment Opportunity Act, for instance, excludes from its prohibition on discrimination programs granting employment preferences to Indians by employers on or near Indian reservations. On its face, this seems ripe for an attack on the grounds of "reverse discrimination." In *Morton v. Mancari*, 417 U.S. 535 (1974), however, the Supreme Court upheld a statute granting preference to Indians for employment in the Bureau of Indian Affairs and the Indian Health Service. The Court reasoned that the preference was not one based on race but, rather, one based on the unique political relationship between Indian nations and the United States. As a preference based on political status rather than race, it only needed to be "tied rationally" to the fulfillment of federal obligations to the Indians to be upheld as constitutional. It was not subject to the "strict scrutiny" applied to racial classifications under the Fifth Amendment.

The status of tribes as distinct political communities was recognized as well in much of the social legislation spawned by the civil rights movement. "New Frontier" and "Great Society" programs such as the Office of Economic Opportunity's Headstart and Community Action programs, the Elementary and Secondary Education Act, and the Comprehensive Older Americans Act all expressly included Indian tribes as governments eligible for participation. The influence of these heady days of the civil rights movement on Indian tribes and people can hardly be overstated. Aside from placing the weight of the law on the tribes' side and providing economic resources to Indian communities, perhaps the most important aspect was a renewal of Indian confidence and pride.

An interesting aspect of the combined civil rights movement and the rejuvenation of tribal self-government was the passage of the Indian Civil Rights Act of 1968. Because of their unique political status and the absence of any express limitations on their powers in the Constitution, Indian tribes were not subject to the restrictions on governmental action to which federal and state governments were subject. As tribal governments began to exercise their long dormant powers, concern was raised that Indians were unprotected from arbitrary and harmful actions of tribal officials. Congress decided to look into the state of Indian civil rights.

Tribal leaders were not thrilled at the prospect of having their actions reviewed by federal tribunals. Many opposed the legislation on the grounds that it represented an attempt to impose non-Indian values on tribal societies. Others believed that the Act would result in costly lawsuits against the tribes by antagonistic non-Indians and dissident tribal members with no genuine complaint. Such fears were well-founded, but Congress deemed unacceptable the existence of governmental bodies lacking legal restraints on the exercise of official power.

The result was the Indian Civil Rights Act. The Act, in essence, requires tribal governments to afford to persons under their jurisdiction the civil rights guaranteed by the Constitution. Tribal concerns, however, were accommodated in several respects. The freedom of religion provision included the right of free exercise of religion but not the prohibition on the establishment of a state religion. A number of tribal governments are theocratic, and Congress protected these governments in the Act. Another difference between the Act and the Bill of Rights involves the right to counsel in criminal proceedings. By 1968, the Supreme Court required states and the federal government to pay for attorneys for indigent criminal defendants. Tribal budgets could not bear such an expense. Congress, therefore, provided that criminal defendants in tribal courts were entitled to counsel, but only at their own expense. Another difference between the Act and the Constitution was a limitation on the punishments tribal courts could impose on persons convicted of crimes. The Act limits criminal sentences in tribal courts to six months of imprisonment and $500 fines. The reasoning behind this limitation was that, under the Major Crimes Act of 1883, the federal government was responsible for prosecuting most felonies involving Indian offenders. The problem with this reasoning is that federal investigators and prosecutors often are less than diligent in responding to reservation crime. If federal officials fail to act, tribal officials are left to address serious crimes with minimal sentences.

Even as the general civil rights struggle was winding down, Indians were gearing up for an initiative that would take them beyond even the dramatic gains of the sixties. Their rights as American citizens were firmly established, in law if not always in fact. The time now had come to assert their rights as tribal citizens, rights born of the tribes' status as domestic nations and confirmed by hundreds of treaties. Treaty rights and the right of tribal self-government would become the new focus of Indian efforts.

Perhaps the primary battleground in the field of treaty rights was a remote site on the Nisqually River in Washington known as Frank's Landing. In the 1850s, the Treaty of Point Elliott was signed by Indian nations in Washington Territory and approved by Congress. Among the treaty's provisions was a guarantee that Indians would retain the right of "taking fish at usual and accustomed grounds in common with all citizens of the territory." The Indians exercised this right for 100 years before non-Indians began to challenge their fishing activities. Despite a 1963 federal court decision sustaining the Indians' rights, state courts enjoined Indian net fishing. A series of protests followed in which Indian fishermen were arrested and jailed by state officials. Allegations of police brutality fell on deaf ears. Despite continuing success in federal court, the treaty fishermen were harrassed, threatened and, in one case at least, shot by local non-Indian residents.

The Indians persisted until a dramatic court decision held that they were entitled to nearly fifty percent of the annual harvest. The non-Indian citizenry was enraged, but the decision survived review after review until, in 1979, the Supreme Court itself affirmed the decision in all key respects. In so holding, the Court remarked that the lower court's decision had been the subject of the most concerted disregard of federal court rulings by state officials since the desegregation rulings of the fifties and sixties. Against all odds, the Indians prevailed in protecting rights recognized over a century earlier, and established that treaty rights do not fade with time. The allocation of resources made in the treaties were ruled binding on the descendants of the treating parties, notwithstanding the different circumstances that now exist in Indian country and surrounding communities.

Rights over a century old were being redeemed in the eastern United States as well. Attorneys for several eastern tribes, including tribes that long had been neglected by federal authorities, discovered a startling fact. Many treaties and other documents taking land from the eastern tribes never were ratified by Congress as was required by the Trade and Intercourse Acts of the eighteenth and nineteenth centuries. Under the plain language of the acts, such transactions were void and of no effect. These cases presented a critical test of America's commitment to the rule of law. Although some claims were nearly 200 years old, ancient rules of law established for the benefit of Indian tribes, if followed, would result in court victories for the tribes. Despite intense political pressure from the affected states and their residents, the lower federal courts ruled favorably on the Indian claims in case after case. Although many of the claims were settled by the parties and the settlements approved by Congress, others remained in court until, in 1984, the Supreme Court agreed to hear a case involving title to 100,000 acres in New York state. Finally, in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Supreme Court upheld the Indian claims. Wrongs committed almost two centuries ago, thus, still could be addressed by the courts and lost rights restored.

Tribal rights of self-government also were redeemed in the Indians' legal offensive. State power over reservation Indians was curtailed in the areas of taxation, civil court jurisdiction and Indian child welfare proceedings. Tribal authority over non-Indians in Indian country, though denied in criminal proceedings, was affirmed in other areas. Despite significant defeats in court, the legal offensive generally was quite effective, and the governmental authority of Indian tribes, which had been dormant for so long, was asserted broadly and effectively.

Tribal rights of self-government were redeemed in the legislative arena as well. The Indian Self-Determination Act of 1975 gave tribes the ability to administer federal assistance programs and wrest control of such programs from the government officials that had dominated reservation affairs for a century. The Indian Child Welfare Act of 1978 placed the welfare of Indian children squarely within tribal forums and limited state power in this critical area, state power that too often had resulted in Indian children being removed and isolated from their tribal communities. The American Indian Religious Freedom Act of 1979 recognized the validity of traditional Indian religious practices and pledged to honor and accommodate such practices.

All of these developments in the seventies and eighties resulted from the civil rights movement of the sixties. Indians built on the progress made in the sixties in registering these important legal victories in the seventies. In a very real sense, therefore, it was the civil rights movement that made these victories possible.

Still, the rights claimed by the Indians were different from those claimed by other minorities. The civil rights movement was responsible for the vindication of the rights of Indians as individuals. The vindication of tribal rights, however, could be accomplished only by the Indians themselves. Thus, while the tribal rights movement of the 1970s grew out of the general struggle for civil rights of the previous decade, the tribal rights movement was distinctively Indian because the rights claimed were distinctively Indian rights—

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Wounded Knee, revisited: Indian activists occupy town in the 1970s.

rights held by no other people in the country.

No discussion of the Indian rights movement is complete without some mention of the militant wing of the movement. Although the American Indian Movement (AIM) probably never had the influence in the Indian community that the American media believed it had, it did reflect accurately the frustration and anger that all Indians felt to at least some degree. The seizure of Alcatraz Island in 1969, the takeover of BIA headquarters in 1972 and the siege at Wounded Knee, South Dakota, in 1973 all served to focus public attention on the injustice of Indian life. Like all militant movements, AIM was born of the belief among young poor people that the system that dominated them was incapable of reform from within.

All in all, the militant Indian movement probably was helpful, if for no other reason than that it demonstrated the commitment of Indian people to the redemption of their rights and the extremes that were possible if legitimate Indian demands were not honored.

The gains made in the sixties and seventies have given rise to an ominous tide of support for organizations dedicated to dismantling tribal treaty and governmental rights. This backlash has its roots in the philosophy of those who preach the idea of "reverse discrimination." This philosophy seems to hold that the current generation of white Americans is not responsible for past violations of minority rights and should not be made to suffer in efforts to redress past injustices. Whatever merit this idea may have in other contexts, it is intellectually bankrupt in its application to Indian treaty rights.

As was true years ago in the Northwest, hunting and fishing rights in the Great Lakes region is the hottest treaty issue today. Almost as if to demonstrate that the frontier mentality is alive and well, Indian hunting and fishing rights seem to inspire the most strident, vocal and occasionally, violent opposition to the enforcement of treaty rights. Bumper stickers bearing the legend "Save a Deer, Shoot an Indian" are appearing in the Great Lakes region in response to a federal court decree affirming the Indians' right to hunt and fish free from state regulation. Apparently unmindful of the experience of state officials in the Northwest, officials of the Great Lakes states are engaged in a series of legal maneuvers designed to avoid the command of the federal court.

Anti-Indian activists in the Northwest, interestingly, have become more sophisticated in their methods. A recent state referendum in Washington urged the abrogation of Indian treaty rights. Senators and representatives from Northwest states introduced treaty abrogation legislation in response to the referendum. Although we have every reason to believe that the legislation will fail, the effort demonstrates the unwillingness of its supporters to abide by the laws their ancestors made. And there lies the hollowness of their claim.

Indian treaty rights were not created by any act of generosity. They represent, instead, the *quid pro quo* for cessions of vast amounts of tribal land. The settlers who entered these lands did so on the basis of those treaties. The Indians have made no demand that those lands be returned or that the rights of non-Indians under the treaties be abrogated. Why they should be expected to give up their rights under the treaties is most difficult to understand.

One can say quite accurately that Indians are better off today than at any time in the past century. Even so, much remains to be done. In its 1979 report on America's compliance with the human rights accords, the United States said that Native Americans, on the average, have the lowest per capita income, the highest unemployment rate, the lowest level of educational attainment, the shortest lives, the worst health and housing conditions and the highest suicide rate in the United States. The poverty among Indian families is nearly three times greater than the rate for non-Indian families, and Native people collectively rank at the bottom of every social and economic statistical indicator. This is the legacy of past failures to honor the rights of Indian people, both as human beings and as members of distinct tribal political communities. As Felix Cohen wrote, America's treatment of Indians, even more than its treatment of other minorities, reflects the rise and fall of its democratic faith. The central issue remains the same. Whether future generations will honor the special rights of Indians acknowledged by past generations remains an open question. □

Messrs. West and Gover are attorneys with the firm of Fried, Frank, Harris, Shriver & Jacobson. A version of this article is available in Indians in American History: An Introduction, *edited by Frederick E. Hoxie, published by Harlan Davidson in Arlington Heights, IL, 1988. Reprinted with permission of the Newberry Library.*

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The changing face of the women's movement: Suffragette protests and a contemporary march.

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FROM **Afro-Americans and the Evolution of a Living Constitution**
A Symposium sponsored by
The Smithsonian Institution and
The Joint Center for Political Studies

Karen O'Connor

The Impact of the Civil Rights Movement on the Women's Movement

[*Editor's Note:* Ms. O'Connor's article points out that civil rights movements have been an important influence on women's movements since the time of the abolitionists. This article is a revised version of a paper she gave at "Afro-Americans and the Evolution of a Living Constitution," a symposium sponsored by The Smithsonian Institution and The Joint Center for Political Studies.]

The struggle for black rights and women's rights has long been intertwined in American society. In the 1830s, the Grimke sisters from South Carolina were among the first to speak out for women's rights. The efforts of the Grimke sisters and others quickly led to the formation of numerous local and national female antislavery societies. These groups brought women together for the first time and gave them the opporunity to develop leadership and political skills. One of their most favored activities was petition campaigns designed to secure legislation to end slavery. Women's efforts to end slavery also earned for them the right to speak out on political issues as social codes were "bent" to allow them a voice in public life. Thus, in addition to providing a means for women to come together and learn to speak out, the antislavery movement also was important in providing the event that led several women to organize not on behalf of blacks, but for women.

In 1840, while attending a meeting of the International Anti-Slavery Society in London, England, Lucretia Mott and Elizabeth Cady Stanton resolved to call a meeting to discuss the status of women when they were refused seats on the main floor of the meeting room on account of their sex. After all, they reasoned, if they were fighting for the rights of blacks, shouldn't they, too, have rights?

Eight years later, in 1848, they sent out a call in the *Seneca County Courier* for a "convention to discuss the social, civil, and religious condition and rights of women" to be held in the small town of Seneca Falls, New York, on July 19-20. Prior to the meeting, Stanton and her friends drafted "A Declaration of Rights and Sentiments," to be presented to those attending the meeting, borrowing the phrase from noted abolutionist William Lloyd Garrison and the covenant of the American Anti-Slavery Society. In the Declaration, they demanded property rights, education, employment, equality under the law and the franchise.

While women put aside their efforts to gain expanded rights for themselves during the Civil War, once it was over they fully expected that women would be given expanded rights along with former slaves. Stanton believed that women should have been rewarded for their war efforts by suffrage. When they were not, she publicly opposed passage of the Fourteenth Amendment because, among other things, it introduced the word "male" into the U.S. Constitution for the first time. The proposed Fourteenth Amendment equated citizenship with voting rights and made both rights dependent upon sex. Without the word male, the Fourteenth Amendment could be construed to enfranchise women. With its inclusion, Stanton and her followers recognized that another constitutional amendment would be required to enfranchise women.

While most abolitionists—including Frederick Douglass, who had been at the Seneca Falls convention—insisted that, "Now is the Negro's hour," Stanton adopted an antiblack, profemale argument that appalled many of her supporters. According to her, it was more important and wiser to enfranchise educated white women than to give the vote to uneducated slaves or ignorant immigrant males.

Thus, the catalyst for the creation of the National Woman Suffrage Association was provided. Its founders, chief among them Stanton and Susan B. Anthony, believed that women should no longer take a back seat to blacks and that to do so would minimize their chances to secure expanded rights for themselves.

The Modern Era

Women did not get the right to vote until 1920 and have yet to win all of their goals through the legislatures or through the courts. Many of women's efforts to improve their status since the 1960s, like the 1800s, however, have been closely modeled on, or have occurred as a result of events or experiences gained though participation in, or a close watching of, the black civil rights movement. Had not the black civil rights movement occurred in the United States in the 1960s, it is unlikely that women in America in the 1980s would enjoy many of the rights they do today.

Most chroniclers of the women's rights movement note its birth from two very different strains. However, both the older,

For the suffragettes, the vote was a way out of bondage.

or more traditional strain, represented by the National Organization for Women, and the younger, liberationist strain, had roots in the civil rights movement. The ideas that sparked the formation of the younger, more radical strain came directly from women who worked in and were influenced by the Student Nonviolent Coordinating Committee (SNCC), itself the radical wing of the civil rights movement.

During the summer and fall of 1964, SNCC staffers Mary King and Casey Hayden gave considerable thought to the status of women both within SNCC and American society. Like Lucretia Mott and Elizabeth Cady Stanton before them, they slowly came to recognize that they too were but second class citizens in a paternalistic system. Thus, they attempted to compile some of the more outrageous instances of sexism they observed internal to SNCC and have their concerns addressed at an uncoming SNCC conference. Fearing the reaction of their coworkers, however, they shared their ideas in the form of an anonymous position paper. The following year, Hayden and King co-authored "Sex and Caste: A kind of memo . . . to a number of other women in the peace and freedom movements." This position paper began by noting the many parallels that could be drawn between the treatment of blacks and women in society. It went beyond those parallels, however, and attempted to highlight some conditions unique to women and urged discussion of the status of women as a sub-caste in society and the many problems inherent in mobilizing women.

While these female SNCC workers were the first to call out for collective action, or at least discussion of women's status within all spheres of society, it was women active in the Northern student protest movement who actually got the younger strain of the women's movement off the ground. Enthused by the Hayden/King memo and put off by the reaction of men in the movement to it and to their subsequent calls for groups such as Students for a Democratic Society (SDS) to consider the status of women, they founded small women's liberation groups throughout the nation.

While most of the founders of these groups were active SDS members, many had experience with SNCC or other southern-based civil rights groups. In fact, at one time or another most had traveled south for Freedom Summer or some other form of civil rights protest or mobilization activity. Thus, there can be no denying the strong catalytic effect of the civil rights movement on the consciousness of women. In addition, work within the movement provided many of the liberationists with a communications network (witness the profound impact of the Hayden/King memo), organizational skills, and even the leaders so critical to any fledgling movement.

The younger strain of the movement, which relied so heavily on SNCC workers for its inspiration, was also guided by SNCC's belief in the need for radical societal change. Thus, its concerns in the main were quite different from those of the older, more traditional strain of the movement. While the younger strain cried out that "personal is political" and called for dramatic societal reform, the older strain, as best personified by NOW, followed a much more traditional course of action.

Litigation and Lobbying

The National Organization for Women was founded in 1966, when it became clear that the bylaws of the Third National Conference on the Status of Women prohibited attendees from demanding that the EEOC treat sex discrimination complaints seriously. In 1964, at the urgings of civil rights groups and the Johnson administration, the U.S. Congress had passed the sweeping Civil Rights Act of 1964, which barred discrimination in employment, education and accommodations based on race, creed, color, national origin or sex. The prohibition against sex discrimination had been added at the last minute, some have said, to minimize the Act's chances at passage. Nevertheless, the entire Act, with the sex discrimination provision, was enacted into law. Under its terms, the EEOC was created to investigate violations of the Act

Suggested Readings

Du Bois, Ellen Carol. *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869.* (Ithaca, N.Y.: Cornell University Press, 1978) This is a major work on the history of feminism. Du Bois makes an important contribution to our understanding of Republican Party politics during the Reconstruction era and how they affected feminist goals.

Evans, Sara. *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left.* (N.Y.: Vintage Books, 1979) This is a valuable insider's account based on personal interviews, extensive research and actual participation in these movements. Evans provides an insightful account of how the political postures of women active in these movements were catalyzed to join forces to forge the 1960s women's movement.

Ferree, Myra Marx and Beth B. Hess. *Controversy and Coalition: The New Feminist Movement.* (Boston: G.K. Hall & Co., 1985) Ferree and Hess examine the coming of age of the modern women's movement and the influences of conservative forces on its successes.

Freeman, Jo. *The Politics of Women's Liberation.* (N.Y.: David McKay, 1975) A brilliant, award-winning account of the formation and growth of the numerous groups that became the core of the women's movement. Based on Freeman's Ph.D. dissertation, this book continues to be an important source on the founding of the National Organization of Women and the creation of the political agenda of the modern women's movement.

Giddings, Paula. *When and Where I Enter: The Impact of Black Women on Race and Sex in America.* (N.Y.: Bantam Books, 1984) Giddings draws on speeches, diaries and original research to describe how black women in America have attempted to overcome the double-edged sword of racism and sexism since slaves were first brought to America in chains. This is an exceptionally important contribution for its moving account of black women's conflicts with white feminists at various points in time.

Griffith, Elisabeth. *In Her Own Right: The Life of Elizabeth Cady Stanton.* (N.Y.: Oxford University Press, 1984) A definitive biography of Stanton that thoroughly describes her life and times. Griffith's work is especially useful concerning Stanton's break with abolitionists over the woman suffrage issue.

Hooks, Bell. *Ain't I A Woman: Black Women and Feminism.* (Boston: South End Press, 1981) Hooks describes how the perceptions of white and middle class women were taken as representing all women. She provides an interesting description of the contribution of black women to the struggle for women's rights.

King, Mary. *Freedom Song: A Personal Story of the 1960s Civil Rights Movement.* (N.Y.: William Morrow & Co., 1987) This is a personal account of a young, white female's experiences as a white and a woman in the Student Nonviolent Coordinating Committee. Mary King eloquently describes the civil rights movement in the South that she experienced as a recent college graduate, the personalities of the major actors, and how women in the movement came to view their status in that movement.

McGlen, Nancy E. and Karen O'Connor. *Women's Rights: The Struggle for Equality in the 19th and 20th Centuries.* (N.Y.: Praeger Publishers, 1983) This book is a comprehensive survey and analysis of the history and progress of the women's equality movement from its beginnings in the abolition and temperance movements to the demise of the Equal Rights Amendment. The authors detail accomplishments made by women in several historical periods in the areas of politics, economics and the family.

O'Connor, Karen. *Women's Organizations' Use of the Courts.* (Lexington, Mass.: Lexington Books, 1980) This is a comprehensive examination of the role that women's groups played in bringing major cases affecting women's rights to the U.S. Supreme Court from 1869 to 1979. O'Connor draws parallels between the litigation activities of women's groups and those of blacks, comparing and contrasting their results.

Stanton, Elizabeth Cady, Susan B. Anthony and Matilda Joslyn Gage, eds. *History of Woman Suffrage.* (Published in 6 volumes, reproduced by Arno Press in 1972) These volumes are probably the single best compendium of the beginnings of the women's rights movement. They are especially valuable for providing the perspective of its major leaders. Each volume contains minutes of meetings, reproductions of newspaper articles, etc. *—Karen O'Connor*

and to seek enforcement of its provisions. When EEOC officials failed to investigate the thousands of sex discrimination complaints it received, noting that race discrimination was a far more serious matter, many women believed that they had no choice but to form their own organization.

From the beginning, NOW founders attempted to model the organization after the National Association for the Advancement of Colored People. The name similarity is no accident. NOW leaders viewed the NAACP as a highly successful, traditional association geared toward public change. Unlike the younger strain, NOW members did not seek to alter the structure of the family or society. Instead, like the NAACP, NOW sought to improve the status of its constituent group in society through resort to more traditional avenues. Not surprisingly then, chief among its tools for political change were legislative lobbying and litigation.

Plans were quickly made by NOW to establish a legal defense fund patterned after the NAACP LDF. Internal disputes, however, delayed the actual creation of a separate entity. In fact, in 1972, Board

(continued on page 71)

The Evolving Constitution

Children's Books and Minorities: Focus on the Black Experience/Elementary

Arlene F. Gallagher

One of Webster's definitions of a minority is "a part of a population differing from others in some characteristics and often subject to differential treatment." We accept that differential treatment is sometimes the only way to achieve justice but whenever such treatment is prescribed we must keep in mind the statement made by Paul Tillich in his book *Love, Power and Justice*: "We have discovered the absolutely valid formal principle of justice in every personal encounter, namely the acknowledgment of the other person as a person." Whenever we begin to treat people as property, we have injustice.

The black experience in America is saturated with examples of human beings being treated as property: as something to be bought and sold. There are many children's books that help us to see the injustice of not treating persons as persons. The following reviews only skim the surface of a rich genre in children's literature. Although reading levels are identified according to the following key, it is important to remember that a good book is good for any age and young readers can listen to books read out loud that are far above their independent reading level.

P = Primary (kindergarden through third grade)
I = Intermediate (grades four through six)
A = Advanced (grades seven through adult)

Books About Prejudice

Racial Prejudice. By Elaine Pascoe. Illustrated with photographs and prints. Watts, 1986. A

This nonfiction book presents the complex problems of prejudice in the United States, including stereotypes about blacks, Indians, Asians and Hispanics. In addition to sensitizing the reader to the harm prejudice does to minority groups, this book also stresses how those who are prejudiced suffer a loss as well. This is good background reading for teachers as well as for older students.

Loudmouth George and the New Neighbors. By Nancy Carlson. First published by Carolrhoda Books, Inc., 1983. Puffin Books, 1987. P

Although this book is not explicitly about prejudice against blacks it does illustrate how prejudice works and would be useful to generate a discussion about likeness and differences. When a family of pigs moves next door, George the rabbit wants nothing to do with them. Harriet the dog tries to convince him to meet the new neighbors but George refuses arguing, "But pigs are dirty . . . they eat garbage. They're not like us at all." At first George is disgusted when all of his friends go to play with the "smelly old pigs" but soon he finds himself all alone. He gives in and finds out they aren't so bad after all. When some cats move in George reacts with prejudice again but this time his stereotype is short-lived.

The parent or teacher who wants to encourage children to see that all people are alike and different could have children focus on positive aspects of likenesses and differences. Brainstorm how people are similar and how they are different. Categorize physical, personality and interest differences to show that likenesses and differences are valuable to a society.

Books with a Historical Perspective

Tancy. By Belinda Hurmence. New York: Clarion Books, 1984. I & A

Tancy, a favored house slave, is set free with Emancipation at the end of the Civil War. She is free to leave the plantation and search for her mother. The author brings the Reconstruction Period to life and guides the reader to understand the feelings of former slaves as they adjust to an entirely different way of life.

Let the Circle Be Unbroken. By Mildred Taylor. New York: Dial, 1981. I & A

Events in Mississippi during the Depression test the stamina and dignity of a black family. They family's survival is a tribute to their sense of values and family devotion. This story deals directly with the injustice of a racist society through mockery. It is the sequel to the 1977 Newbery Award Winner, *Roll of Thunder Hear My Cry*.

When Daylight Comes. By Ellen Howard. New York: Atheneum, 1985. I & A

A white girl is held prisoner by rebels following a slave uprising on an eighteenth-century settlement in the Virgin Islands. As Helena begins to understand her captors and see things from their perspective she understands how it feels to be a slave and how it feels to be "owned."

A Girl Called Boy. By Belinda Hurmence. New York: Clarion Books, 1982. I & A

Blanche, a pampered black girl, doesn't want to be reminded of any link with her slave ancestors and dislikes family tradition. When she travels back in time to slavery in 1850 she learns about the reality of slavery. The story is based on oral histories and plantation records of actual slaves.

In the Circle of Time. By Margaret J. Anderson. New York: Alfred A. Knopf, 1979. I & A

This is a time slip fantasy in which two young people are transported in time to where there are caught in the struggle of a gentle people threatened by invaders in search of slave labor. The futuristic setting gives the reader a new perspective on our country's history of slavery.

Anthony Burns: The Defeat and Triumph of a Fugitive Slave. By Virginia Hamilton. New York: Alfred A. Knopf, 1988. A

Anthony Burns was born a slave but he escaped to Boston in 1854. He was arrested and held without bail because his former owner demanded it under the Fugitive Slave Act of 1850, a highly controversial federal law that allowed owners to reclaim escaped slaves by presenting proof of ownership. This case rocked Boston during a time when antislavery feeling was at a fever pitch in the North. The hearings triggered violent riots, causing the federal administration to call in thousands of troops. The mistreatment of humans is vivid and powerful. The sale and rental of people as property is abhorrent. The author presents the story of Anthony Burns with factual authenticity all the more appalling because she does so in an objective and candid style.

The Friendship. By Mildred Taylor. Pictures by Max Ginsburg. New York: Dial. 1987. All ages.

Set in Mississippi in 1933 this is a story of intense racial conflict. Cassie Logan and her four brothers go to the Wallace store despite their parents' warnings never to go there. They witness Mr. Tom Bee, an old black man, calling the white storekeeper by his first name. The cruelty of the storekeeper is shocking and unforgettable.

The Gold Cadillac. By Mildred Taylor. Pictures by Michael Hays. New York: Dial. 1987. P & I

This is a story about civil rights set in the 1950s. The father of a black family living in Toledo, Ohio, brings home a new gold Cadillac. He is excited about driving his family to visit relatives in Mississippi and does so in spite of friends and neighbors warning him that a black man takes a risk by driving a Cadillac in the South. Instead of admiring glances, the family is met with restaurants, motels and drinking fountains . . . all with signs stating, "COLORED NOT ALLOWED." White policemen are suspicious of a black family driving such a beautiful car, and the father is arrested. This is a poignant story of a closely knit family's first encounter with ignorance and prejudice. This book is only forty-three pages long, eleven of them filled with dramatic sepia paintings that evoke the 1950s. It is a book to be read aloud.

Nettie's Trip South. By Ann Turner. Pictures by Ronald Himler. New York: Macmillan, 1987. All ages.

Young Nettie travels from Albany, New York, to Richmond, Virginia, in pre-Civil War South. In letters to her friend Addie she tells about a slave auction where a woman is sold "like a sack of flour" and wonders what her life would be if she had been a slave. This is a moving account of one girl's reaction to slavery. It is based on the diary of the author's great-grandmother. This book is very sensitively done, with an amazing economy of words, making this difficult subject available to the younger reader.

Which Way Freedom. By Joyce Hansen. New York: Walker, 1986. I & A

Some two hundred thousand blacks fought in the Civil War but historically their contributions have been neglected. This is the story of a fictional runaway slave who fights with a black regiment at the Battle of Fort Pillow, Tennessee, in 1864.

Circle of Fire. By William H. Hooks. New York: Atheneum, 1982. I & A

In North Carolina in 1936, an eleven-year-old white boy and his two best friends, who are black, stumble onto a Ku Klux Klan plot to attack a band of gypsies. The boy has to grapple with his sense of loyalty to his father, whom he suspects is involved.

Not Separate, Not Equal. By Brenda Wilkinson. New York: Harper and Row, 1987. I & A

Malene Freeman is among the first six students from Pineridge, Georgia's "black elite" to integrate the white high school in 1965. By birth she is the daughter of poor sharecroppers who died in a fire but her adoptive well-to-do parents insist that she be one of the students to desegregate Pineridge High. The students are threatened and harassed until finally a malicious act sparks an explosive episode. The author captures the struggle and the pain of a recent era in our history.

The Black Experience and Other Cultures

In the Year of the Boar and Jackie Robinson. By Betty Bao Lord. New York: Harper, 1984. I

Shirley Temple Wong moves to Brooklyn from China. She speaks very little English. At school she stands with her class and "pledges a lesson to the frog of the United States of America and to the wee puppet for witches, hands. One Asian, in the vestibule, with little tea and just rice for all." She has no friends until a miracle happens—baseball. Her teacher tells her about Jackie Robinson, grandson of a slave and the first Negro to play baseball in the major leagues. Using sports as a metaphor, Shirley's teacher gives the class a civics lesson on what it means to be a citizen of the United States.

The Return. By Sonia Levitin. New York: Atheneum, 1987. A

Set in Ethiopia during a six month period between 1984 and 1985, this is the story of Desta, a young Ethiopian Jewish girl. Although they are black and African, the Jews are outcasts, blamed for the famine and drought that afflict the country. Based on Operation Moses, the secret airlifting of thousands of Ethiopian Jews to Israel, this is a compelling book about a modern day Exodus and the courage of a young girl.

Black Indians: A Hidden Heritage. By William Loren Katz. New York: Atheneum, 1986. A

Our history has omitted the relationship between the Native Americans and Africans, making this book a valuable resource. Beginning with the year 1527, the author explores the history of two groups that had a common experience. The theory that Native Americans provided Africans with an escape from slavery is investigated.

Journey to Jo'burg: A South African Story. By Beverley Naidoo, illustrated by Eric Velasquez. New York: Lippincott, 1985. I & A

When their baby sister becomes dangerously ill, thirteen-year-old Naledi and her younger brother make a journey of over three hundred kilometers from their village to Johannesburg, where their mother works as a maid for a white family. Their mother is prohibited by law to have her family living with her. The children are berated for trying to board a bus designated "For Whites Only," and they watch people arrested for not having their "passes" in order.

Two Dogs and Freedom: Black Children of South Africa Speak Out. This book is from the Open School in Soweto (Rosset & Company, Inc, 1987, First American Edition).

This collection of essays by children presents their perspective on the political strife in South Africa and its effect on their daily lives. Not surprisingly, it was banned as subversive in South Africa by the South African authorities.

Arlene F. Gallagher is Adjunct Professor at Boston University, editor of "Children's Literature and the Social Studies" for Social Studies for the Young Learner, *and chairperson for the Book Review Subcommittee of the National Council for the Social Studies—Children's Book Council Joint Committee.*

The Evolving Constitution

Terra Firma/Grades 5-7 Educating for Citizenship

Purpose

During the settlement of the United States many conflicts arose between the American Indians and the United States government regarding land and land ownership. This lesson is designed to explore the differences in perspective between settlers and American Indians surrounding the issue of land. Futhermore, students are introduced to the case study method in order to examine a recent Supreme Court decision involving a 100-year conflict over a land treaty. The opportunity to discuss the American Indian nations' unique status with the U.S. government is incorporated into this lesson.

Resources

- Newspaper "Point/Counter-Point" (handout A; see inset)
- Case study worksheet (handout B; see inset)
- *United States v. Sioux Nation of Indians* (handout C, below)
- Decision in *U.S. v. Sioux Nation* (handout D, below)
- "Indians in United States Civil Rights History" (teacher resource, page 27 of this *Update*)
- Case study definitions (teacher resource, which can be projected on overhead for students; see inset)

Vocabulary

Act of Congress, treaty, property rights, real property, plaintiff, defendant.

Procedures

1. Have students read the newspaper "Point/Counter-Point" (handout A).
2. Discuss the following:
   (a) What did the Indians believe about land ownership?
   (b) What did the settlers believe about land ownership?
   (c) How did each group believe the conflict could be solved?
3. Using the "Indians in United States Civil Rights History" article as a teacher resource, explain to students the "citizenship" status of the American Indian and the unique legal status the Indian Nations held with the U.S. government.
4. Explain to the students that land conflicts still exist in the present time and that they will be analyzing a recent Supreme Court case about Indian lands.
5. Explain elements of the case study approach using "Case Study Approach: Teacher Resource."
6. Distribute case study work sheet (handout B) and *U.S. v. Sioux Nation of Indians* (handout C).
7. Have the students read the case study and identify the case name, plaintiff, defendant, the facts and the issues of the case.
8. Discuss the case by encouraging students to present oral arguments for each side.
9. Assign each student to write a decision and give reasoning.
10. Debrief the activity by having students share

Handout A: The General Advertiser

POINT

Every part of this earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every humming insect is holy. . . . Our dead never forget this beautiful earth, for it is the mother of the earth and it is part of us. So when the Great Chief in Washington sends word that he wishes to buy our land, he asks much of us.

This shining water that moves in the streams and rivers is the blood of our ancestors. The rivers are our brothers. . . . If we sell our land, you must give the rivers the kindness you would give any brother.

The air is precious to the red man, for all things share the same breath. If we sell you our land, you must remember that the air shares its spirit with all life. . . .

We know that the white man does not understand our ways. The earth is not his brother, but his enemy, and when he has conquered it, he moves on. His appetite will devour the earth and leave only a desert.

We will consider your offer and if we decide to accept, I will make one condition: the white man must treat the beasts as his brothers. I have seen a thousand rotting buffaloes on the prairie, left by white men who shot them from a passing train. I do not understand how the smoking iron horse can be more important than the buffalo. Whatever happens to the beasts soon happens to man. The earth does not belong to man; man belongs to earth.

COUNTERPOINT

General Rufus Putnam, leader of the Ohio Company, has written to Reverend Nanasseh Cutler about the urgency of making a treaty with the Ohio Indians. Putnam says the new settlement at Marietta is not safe from attack. A few Mingos, Shawnee and Cherokee live on the bank of the Scioto River. Putnam calls them "lawless bandits" and a "set of thievish, murdering rascals." He does report that they are visited at the settlement by the Delaware and Wyandot tribes every day. They appear to be friendly. He believes that their friendship depends upon a treaty. They believe Governor St. Clair will treat them fairly. Reports of Indian attacks on small parties of settlers have reached Marietta. Putnam is planning to build a stockade around the settlement for protection.

Handout B. Case Study Worksheet

Case Name:
Plaintiff:
Defendant:
Facts:

Issues:

Your Decision:

Your Reasoning:

Court's Decision and Reasoning:

Case Study Approach: Teacher Resource

FACTS

A description of the circumstances that occurred to raise the legal question.

ISSUES

The legal problem which results from the factual situation. This is posed as a question which may be answered "yes or "no."

DECISION

The court's response to the presented question.

REASONING

The factors the court takes into consideration in reaching its decision.

DISSENT

The opinions of justices on the court who do not agree with the holding.

LAW

The court's response to the question presented, restated to express a principle or rule of law.

decisions. Discuss reasoning for decisions.

11. Poll the class to get a consensus of the majority opinions.
12. Share the actual Supreme Court decision and reasoning as well as the dissenting opinion (handout D). Discuss and summarize.

Handout C: U.S. v. Sioux Nation of Indians

Under the Fort Laramie Treaty of 1868, the United States "solemnly agreed that no unauthorized persons shall ever be permitted to pass over, settle upon, or reside in (Sioux) territory, including the Black Hills."

No treaty for giving up any part of the reservation would be valid against the Sioux unless agreed to and signed by at least three-fourths of the adult male Sioux population. The treaty also preserved the right of the Sioux to hunt in their territory.

To assist the Sioux in becoming civilized farmers, the government promised to provide them with the necessary services and materials and with rations for four years.

The treaty brought peace to the Dakotas that was disturbed by news that the Black Hills contained vast amounts of gold and silver.

Since the Black Hills were reserved to the Sioux, the United States Army soon found itself having to use force against settlers and prospectors from trespassing on Indian land.

Finally General Philip H. Sheridan wrote that he would welcome settlers if Congress should decide to open up the country by doing away with the treaty rights of the Indians. The president decided that the Army should not take any more action against miners in the Black Hills. This brought many more settlers into Indian territory.

And so it was that in 1876, another "agreement" was presented to the Sioux chiefs and their leading men. In exchange for 900,000 acres of grazing land and continued rations for as long as needed, the "agreement" said that the Sioux would give up their rights to the Black Hills. The "agreement" was signed by only 10% of the adult male Sioux population.

For many years, most of the members of the Sioux believed that the United States had unlawfully taken the Black Hills under the terms of the Fort Laramie Treaty, saying that the Act of 1877 which made the "agreement" into law was illegal.

More than 100 years passed before the case was finally accepted to be heard before the Supreme Court of the United States. The case was argued on March 24, 1980, and the Court's decision was handed down on June 30, 1980.

Handout D: Case Study

ISSUES

Should the Sioux Nation be entitled to compensation for the taking of their land and the gold and silver taken out of the Black Hills by the Act of 1877?

DECISION

Yes. The United States Supreme Court held (8-1) that the Sioux were entitled to an award of interest on the fair market value of the Black Hills in 1877, which was a principal sum of $17.1 million.

REASONING

Congressional good faith in the taking of the land under the act of 1877 to manage and control tribal lands for the Indians' welfare cannot be presumed. The taking of the tribal land which was guaranteed by the Fort Laramie

Treaty does require the government to pay the Indians for that land.

DISSENTING OPINION

Justice William Rhenquist disagreed with the majority opinion. He argued that previous court cases on the matter, including one in which the Supreme Court refused to hear this case, took away the Sioux rights to have the same claim heard again.

He also stated that: "There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. . . . They lived only for the day, recognized no rights of property, robbed and killed if they thought they could get away with it. . . . That there was tragedy, deception, barbarity, and virtually every other known vice in the 300-year history of the expansion of the original 13 colonies into a nation which now embraces more than three million square miles and 50 states cannot be denied; but in a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: 'Judge not, that ye be not judged.' "

This activity has been adapted from the Citizenship Law-Related Education Program for the Schools of Maryland's Educating for Citizenship *fifth grade curriculum. Original materials were developed by Jane Anders and Pat Bartlett, who are both elementary educators.*

The Evolving Constitution

Equality: Changing the Rules of the Game/Grades 7–12

Carolyn Jefferson

This unit for one or two class periods is designed to allow students to explore the changing definitions of equality and the impact that this has on the people affected by the change. The students will examine historical and current legislation, as well as constitutional interpretation of laws that impact on how society defines equality.

The unit consists of three basic components: a large group simulation/role play activity; a class discussion about the experience; and a written assignment where students will discuss the meaning and importance of equality.

This activity should be attempted only after students have completed a study of constitutional issues of equal protection.

Goals

- To compare data in primary and secondary sources
- To analyze the impact of legislation and Supreme Court decisions on society
- To empower students to think critically about equality and effectively communicate their views about it

Materials

Tagboard, cardboard arrows, reference sheet, profile cards, newspaper articles, thumb tacks, notebook paper, pen, index cards, tokens.

Procedure

Prior to beginning the lesson, make sure that students have a knowledge of the information contained on the reference sheet.

Instruct students to remove everything from their desks except notebook paper and pen. Randomly distribute profile cards (one to each student) and allow students time to review the characteristics contained on the card. Each card will give a student a race, age, gender, religion, or handicap; e.g., "21-year-old black male," "75-year-old Catholic female." Place the wheel (which has been constructed by the teacher in advance using the tagboard, arrows, and thumbtacks) in a position so that it is visible to the entire class. (Note: If this is to be used as a small group activity, several small wheels should be constructed and laminated.)

Explain the game rules to the class:

- Each student will assume the role of the person identified on the profile card.
- In this game, a student will be eliminated from play if his/her characteristics are selected by the spin of the wheel (for the general category) and selection of the sub-category by card.

Read or post the following rules:

1. The teacher will spin the arrow on the wheel for each round of play. The wheel consists of five categories: race, age, religion, gender, handicap.
2. Within each category, there are sub-categories such as male/female, black/white, Hispanic, Asian, etc. When the arrow of the wheel stops on one of the major categories, the teacher will then select a card from the appropriate sub-category pile which should be located adjacent to the wheel. The teacher reads the card: "female," or "age 60s," or "Hispanic." Those students whose profile card contains any of the characteristics selected will *not* be allowed to participate in the game until the next spin of the wheel.
3. Students who are eliminated from any round of play should write their reactions/feelings on the notebook paper which they have on their desks.

Sub-Category Cards

Gender: Male, Female.
Age: 14, 15, 16, 17, 18, 20s, 30s, 40s, 50s, 60s, 70s, 80s.
Race: African-American (Black), Hispanic, Polish, Italian, Asian.
Religion: Jewish, Catholic, Baptist, Protestant, Fundamentalist.
Handicap: Blind, Mentally Retarded, Deaf, Paraplegic.

Student profile cards may also consist of any of these categories.

Game Questions

Cut the questions out and attach them to an index card. (Note: Cartoons or news articles may be substituted for these questions. See "Tips for the Teacher.")

1. What protection was granted under the 14th Amendment?
2. What was the importance of the Title IX of the Education Act Amendments of 1972?
3. What was the importance of the *Brown v. Board of Education* decision?
4. What was the importance of the Rehabilitation Act of 1973?
5. What was the importance of the *Plessy v. Ferguson* decision?
6. What was the importance of the Equal Credit Opportunity Act of 1974?
7. What protection was granted under the 13th Amendment?
8. What protection was granted under the 15th Amendment?
9. What protection was granted under the 19th Amendment?
10. What protection was granted under the 23rd Amendment?
11. What protection was granted under the 26th Amendment?
12. What was the importance of the Equal Pay Act of 1963?
13. What was the importance of the Civil Rights Act of 1964?
14. What was the importance of the Age Discrimination in Employment Act of 1967?
15. What was the importance of the *Board of Regents of California v. Bakke* case?
16. What was the importance of the Civil Rights Restoration Act of 1988?
17. What was the importance of the *Grove City v. Bell* decision of 1984?
18. Use this card for a current situation from the news.
19. Use this card for a current situation from the news.
20. Use this card for a current situation from the news.

Reference Sheet

CONSTITUTIONAL AMENDMENTS

Amendment 13 (1865)—Prohibits slavery within the United States or any place subject to their jurisdiction.

Amendment 14 (1868)—Citizenship is given to black Americans. The states are forbidden to deny equal privileges and protection by law to any citizen. The basic protections of the Bill of Rights apply to state governments as well as the federal government.

Amendment 15 (1870)—Citizens cannot be denied the right to vote because of their race or color, or former condition of servitude.

Amendment 19 (1920)—Extends the right to vote to women.

Amendment 23 (1961)—Extends the right to vote to qualified persons living in the District of Columbia.

Amendment 24 (1964)—Protects the right to vote of persons who cannot afford to pay poll tax.

Amendment 26 (1971)—Extends the right to vote to persons eighteen or older.

SUPREME COURT DECISIONS

Plessy v. Ferguson (1896), *Brown v. Board of Education* (1954), and *Regents of the University of California v. Bakke* (1978): See box on page 24. *Grove City v. Bell* (1984)—The Court ruled that anti-discrimination laws could be enforced only on a program-by-program basis and that an entire institution could not be penalized for a single isolated infraction.

CIVIL RIGHTS LEGISLATION

Equal Pay Act of 1963—Requires equal pay for equal work, regardless of sex. Requires that equal work be determined by equal skill, effort and responsibility under similar working conditions at the same place of employment.

Civil Rights Act of 1964 (amended in 1972)—Prohibits discrimination based on race, color, religion or national origin in public accommodations. It does not apply to private clubs not open to the public.

Age Discrimination in Employment Act of 1967 (amended in 1978 and 1988)—Prohibits age discrimination in employment by employers of 20 or more persons, employment agencies, and labor organizations with twenty-five or more members. It protects persons over the age of 40.

Title IX of the Education Act Amendments of 1972—Prohibit discrimination against students and others on the basis of sex in educational institutions receiving federal funding. Prohibits sex discrimination in student and faculty recruitment, admissions, financial aid, facilities, and employment.

Rehabilitation Act of 1973—Prohibits activities and programs receiving federal funds from excluding otherwise qualified handicapped persons from participation or benefits.

Equal Credit Opportunity Act of 1974—Requires all financial institutions to make credit equally available to credit-worthy customers regardless of sex and marital status. Prohibits creditors from asking the sex of the credit applicant.

Civil Rights Restoration Act of 1988 (amends Civil Rights Act of 1964)—Requires that an entire institution be penalized with a fund cut-off if any of its entities engage in discrimination based on race, age, religion, gender or handicap. It overturns *Grove City v. Bell.*

BEST COPY AVAILABLE

After students understand the order of events, begin the game.

- Spin the wheel.
- Select a sub-category card and read it to the class.
- Select a question card from the pile of twenty questions (attached to index cards by the teacher prior to the beginning of the game).
- Students who are allowed to play—i.e., those who have not been eliminated by selection of their profile characteristics—should attempt to answer the question selected. The person with the correct answer will receive one token.
- Spin the wheel again to begin the second round of play. Use the same procedure listed above.

Proceed with subsequent rounds until each of the five major categories on the wheel has been used at least once, or until all twenty questions have been answered. End the game, count the tokens, declare a winner!

Needed for the Game

PROFILE CARDS

Teachers may elect to expand the categories based on their particular student population. A sample card would be: "15-year-old Hispanic male." Additional characteristics may be included. Note: For the sake of durability, all profile and sub-category cards should be affixed to an index card. This is particularly useful if you plan to use the game for several classes.

INDEX CARDS

The twenty questions should be cut out and attached to index cards and numbered from 1–20. Additional cards may be added at the discretion of the teacher.

SUB-CATEGORY CARDS

These cards contain information not included on the wheel for each major category such as specific ages, handicaps, etc.

TOKENS

Bingo chips are useful and inexpensive.

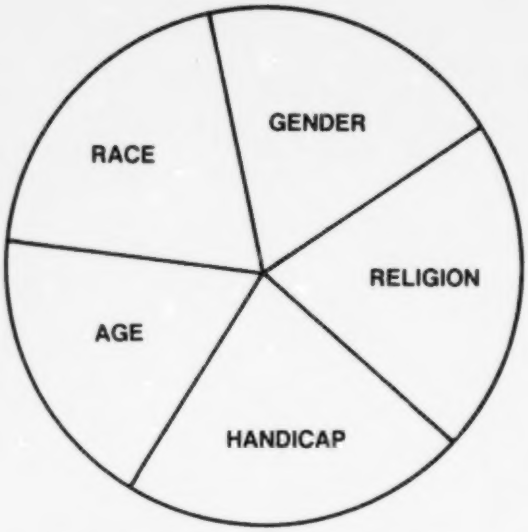
WHEEL

The wheel should have the five major categories listed. An arrow should be attached in the center using a thumb tack which will allow it to move freely (see diagram).

Debriefing

Conduct a class discussion to determine how students felt about the experience. Use the following questions to guide the discussion:

1. Why is the game entitled Changing the Rules?
2. Why were the profile cards arbitrarily distributed? (People don't always have control over characteristics, circumstances or events that shape who they are.)
3. Was it fair for some students to have more opportunities to participate than others? (Some students may have suffered from double jeopardy, i.e. black/female, old/handicapped, etc.)
4. Must all situations always be equal for all people? How can this be possible?
5. Was the process used to eliminate students from play reasonable? How, if at all, does it reflect what happens in real life?
6. What did you learn from this experience? What were some of the reactions recorded by those students who were eliminated during the game?
7. What is equality and how can we ensure it? (At this point the teacher should share his/her observations of the students' reactions during the game.)



Evaluation

Students will write an essay on the significance of equal protection to the "American" way of life. The essay should include historical references from the reference sheet, as well as the feelings they experienced while participating in the simulation. It should be written from the perspective of the person represented on the profile card. The conclusion should be their own personal opinion about equal protection and its implications. The essay should be entitled: "What Would America Be Like Without Equality?" Select several essays to be read aloud and discussed.

Tips for the Teacher

This activity may be modified to accommodate several small groups instead of one large group.

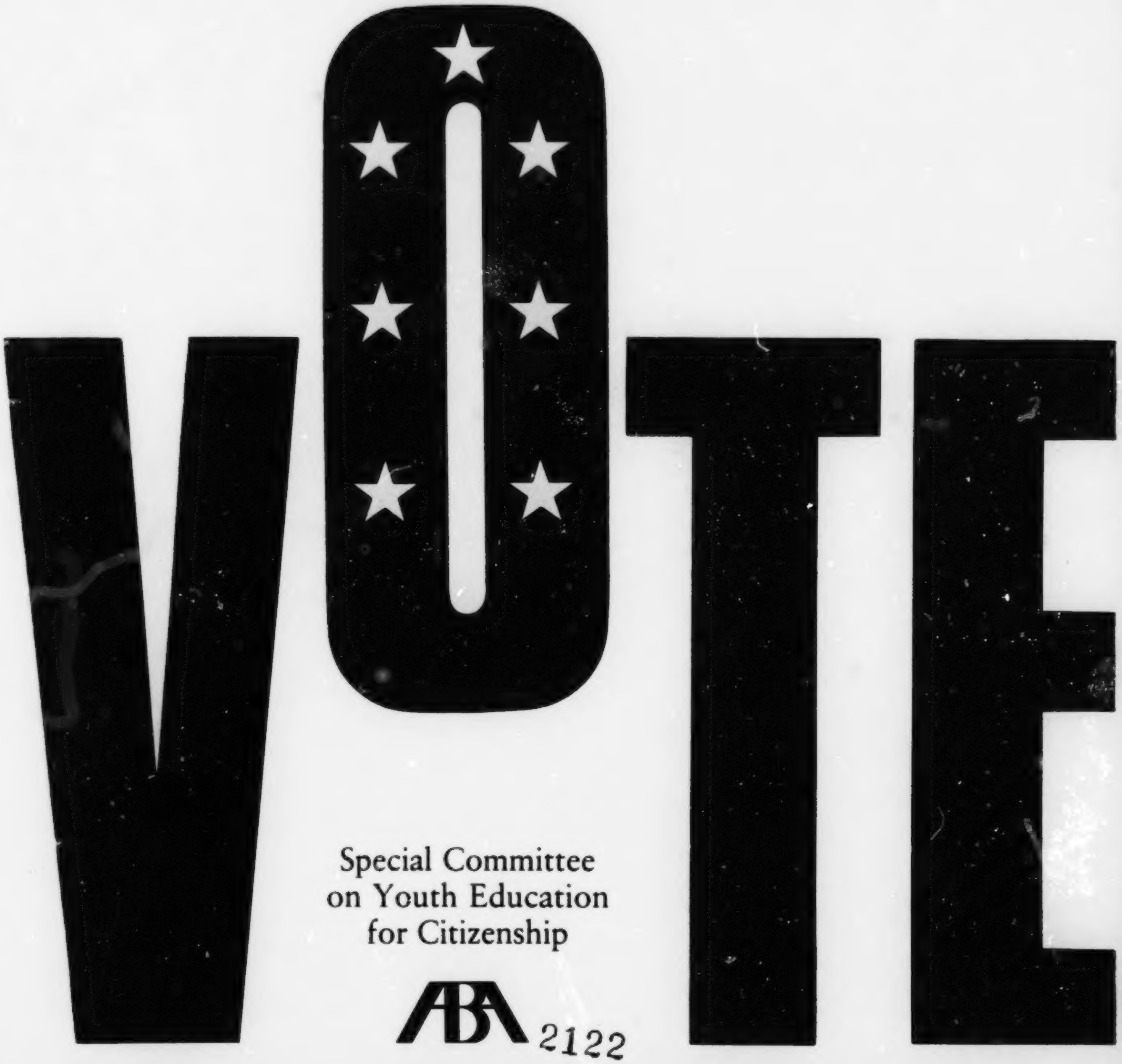
Develop a bulletin board using the five categories listed on the wheel as headings. Have students collect newspaper articles dealing with equal protection and place them in each category.

Cartoons or pictures reflecting violations of the equality premise may be substituted for the twenty questions in the simulation. Show the pictures and have students determine which amendment is at issue.

Carolyn Jefferson teaches at Carl F. Schuler School in Cleveland. This lesson is adapted from an activity which will appear (possibly in revised form) in Righting Your Future: LRE Lesson Plans for Today and Tomorrow, *a book written by the SPICE III teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law.*

Classroom Materials on Voting and Elections

EDUCATE OUR FUTURE VOTERS



Special Committee
on Youth Education
for Citizenship

ABA 2122

For some years now, the number of young voters who have exercised their franchise has diminished. In 1986, for example, only 18.6% of 18- to 20-year-olds voted. This dangerous trend poses a serious threat to our American democracy. The 1988 election, however, provides an excellent opportunity for us to improve these statistics by encouraging our nation's youth to participate in the electoral process.

The Special Committee on Youth Education for Citizenship (YEFC) has developed this pamphlet through the American Bar Association's *Voter '88* program to assist in this important effort. YEFC is dedicated to fostering active and responsible citizenship among elementary and high school students through law-related education. We believe that you will find this pamphlet to be a useful source of materials for teaching about the American citizen's right and responsibility to vote.

Special thanks for the creation of this pamphlet go to Maria Morocco, an intern in the ABA's Public Education Division and a recent graduate of Northwestern University.

As we approach the 1988 election, we look forward to working with you in the drive to build an involved and informed electorate among our nation's youth.

Robert MacCrate, President
American Bar Association, 1987-88

Teaching Kits

Title: **Feel the Power: The How and Why of Voting for Your Students**
Grade Level: Secondary
Contents: Materials are designed to encourage high school students to register and vote. Included in the package are: student information booklets on voting; an activity guide for teachers with reproducible worksheets; wall chart showing voting regulations in 50 states; wall map showing 1986 state-by-state voter participation; "Feel the Power" poster.
Cost: Free
Order From: Vote America Foundation, 1100 Fifteenth Street, N.W., Suite 1120, Washington DC 20005, (202) 659-4595.

Title: **Election '88: The Race for the Presidency**
Grade Level: Secondary
Contents: Materials cover the entire election process from the primaries to the November election. The following are included in the package: teacher's manual outlining a step-by-step election-year curriculum; 24 reproducible student handouts; a "Transfer of Power" poster which gives election information on the nation's 40 presidents.
Cost: Free
Order From: Election '88: The Race for the Presidency c/o TelEd, Inc., 7449 Melrose Avenue, Los Angeles, CA 90046, (213) 655-9482.

Curricula

Title: **Elections: Secondary Teaching Activities in the Participation Series**
Grade Level: 7-12
Contents: Instructions for 30 election-related activities. Included are exercises in which students conduct opinion polls, examine debate methods, track candidates, and question media coverage of current issues.
Cost: $10.95, plus $3.00 for shipping and handling
Order From: Educators for Social Responsibility, 23 Garden Street, Cambridge, MA 02138, (617) 492-1764.

Title: **Teaching Presidential Elections: A Guide for Educators**
Grade Level: Secondary
Contents: Six experimental activities for teaching about the elections.
Order From: Special insert in the September 1988 issue of *Social Education*. Insert was published in conjunction with the Close Up Foundation. *Social Education*, 3501 Newark St., N.W., Washington, DC 20016.

Activity Books

Titles: **The "Election Books 1988" Series** (comprised of three books)
Grade Level: Grades 2-3, *How We Elect a President*, #22852, 24 pages.
Grades 4-6, *Electing the President*, #26452, 32 pages.
Grades 7-9, *Path to the White House*, #21452, 32 pages.
Contents: History of U.S. political parties and elections; the caucuses and primaries; who can vote; campaign planning; responsibilities of the president; qualifications for office; the electoral college. Activities include: comprehension quizzes; vocabulary quizzes; mock elections; polltaking; fun facts about U.S. presidents; tracking elections.
Cost: $1.95 each
Order From: Customer Service, Weekly Reader Skills Books, 4343 Equity Drive, Columbus, OH 43216, 1-800-848-1882.

PAMPHLETS

Title: **How to Judge a Candidate(#818)**
Grade Level: Secondary
Contents: Seven steps on how to evaluate a political candidate. Also included are sections entitled "See through distortion techniques" and "Evaluate candidates' use of television," as well as a "Candidate Report Card" for the student to complete.
Cost: 75¢ per pamphlet. (Quantity discounts available).
Order From: League of Women Voters, 1730 M Street, N.W., Washington DC, 20036, (202) 429-1965.

Title: **How to Watch a Debate (#819)**
Grade Level: Secondary
Contents: Subheadings include "Candidate Debates: A Behind the Scenes Look;" "Impact of Debates;" and "Rate the Debate." Suggested activities also included.
Cost: 75¢ per pamphlet. (Quantity discounts available).
Order From: League of Women Voters (see address above).

COMPUTER SOFTWARE

Title: **President-elect**
Systems: Apple, Commodore 64 (Color monitor required)
Grade Level: 8 and up
Activity: Simulates presidential elections from Labor Day to election night with decisions about budgeting, campaign stops, foreign visits, and debates.
Cost: $39.95
Order From: Strategic Simulations, 833 Stierlin Rd., A200, Mountain View, CA 94043.

Title: **Presidents/The Medalists**
Systems: Apple
Grade Level: 3-9
Activity: Facts about U.S. presidents with follow-up drill.
Cost: $39.95
Order From: Hartley Courseware, P.O. Box 431, Dimondale, MI 48821.

Title: **Run for President**
Systems: Apple
Grade Level: 4-6
Activity: Includes a mock presidential election and geography review in which students answer questions about states to gain electoral votes.
Cost: $39.95
Order From: World Book, Inc., Electronic Products Division, Station 13, Merchandise Mart Plaza, Chicago, IL 60654.

BOARD GAMES AND SIMULATIONS

Title: **Delegate: A Simulation of a National Political Party Convention**
Grade Level: 7 and up
Activity: Students are divided into five groups, from radical to reactionary, which work to build the platform and to select the nominee by bargaining and compromising with the various candidates.
Cost: $16
Order From: Interact, P.O. Box 997, Lakeside, CA 92040.

Title: **Electors: A Simulation of the Electoral College Process**
Grade Level: 7 and up
Activity: Students play roles of the two major-party candidates and the chairs of each state's electors. Features playing roles of the 1824 election, which resulted in a deadlock resolved in the House of Representatives.
Cost: $20
Order From: Interact (see address above).

Title: **Hail to the Chief**
Grade Level: 4 and up
Activity: A board game in which 2-4 players race across the country in a bid for the presidency. Two levels of play; 1988, 1992 election updates are included.
Cost: $25
Order From: James' Games, Dept. C, P.O. Box 15309, Seattle, WA 98115.

Title: **Presidential Hats**
Grade Level: 8 and up
Activity: A five-day simulation activity in which twelve presidential roles are examined; the whole class can participate.
Order From: Instructions for this activity can be found in the journal *Social Education*, #48, 1984, pp. 100-102. *Social Education*, 3501 Newark St., N.W., Washington, DC 20016.

Title: **Votes: A Simulation of Organizing and Running a Political Campaign**
Grade Level: 7-12
Activity: Candidates, staff, and voters all play a role in this simulation. Committee members determine issue positions, disperse funds, and make decisions.
Cost: $16
Order From: Interact (see address above).

VIDEOS

Title: **First Tuesday**
Grade Level: 8 and up
Description: A futuristic story in which a group of students set out to reinstate voting, which had been eliminated in the U.S. due to apathy.
Length: 20 minutes
Cost: $20
Order From: Registrar of Voters, P.O. Box 85093, San Diego, CA 92138-5093.

VOTER REGISTRATION MATERIALS

Title: **Register '88: Make It a Class Act**
Grade Level: Voting-age students
Contents: A kit with materials for conducting an in-school voter registration drive. Contents include: step-by-step guidebook; public relations materials; chart of voting regulations; voting record map of USA.
Cost: Free
Order From: The National Association of Secondary School Principals, 1904 Association Drive, Reston, VA 22091-1598, (703) 860-0020.

Title: **Getting Out the Vote: A Guide for Running Registration and Voting Drives** (#424)
Grade Level: Voting-age students
Contents: A 21-page booklet explaining how to run a voter registration drive.
Cost: $1.25 per booklet
Order From: League of Women Voters, 1730 M Street, N.W., Washington, DC 20036, (202) 429-1965.

Title: **Take Part in America: An Action Guide for High Schools**
Grade Level: Voting-age students
Contents: Pamphlet outlines a plan for motivating eligible students to register and vote. Included is a reproducible worksheet for outlining and rating the candidates. The guide folds out into a voter awareness poster.
Cost: Free
Order From: Contact your local NBC affiliate.

ADDITIONAL CLASSROOM RESOURCES

Title: **USA Today Classline Series**
Grade Level: Secondary
Materials: USA Today published "Decision '88" for Classline subscribers. The supplement contains articles on party conventions, election polls, campaign financing, as well as a board game called "Win the Nomination" and a map showing a breakdown of state party delegates.
Cost: Free for Classline subscribers
Order From: USA Today/Classline, P.O. Box 500, Washington, DC 20044.

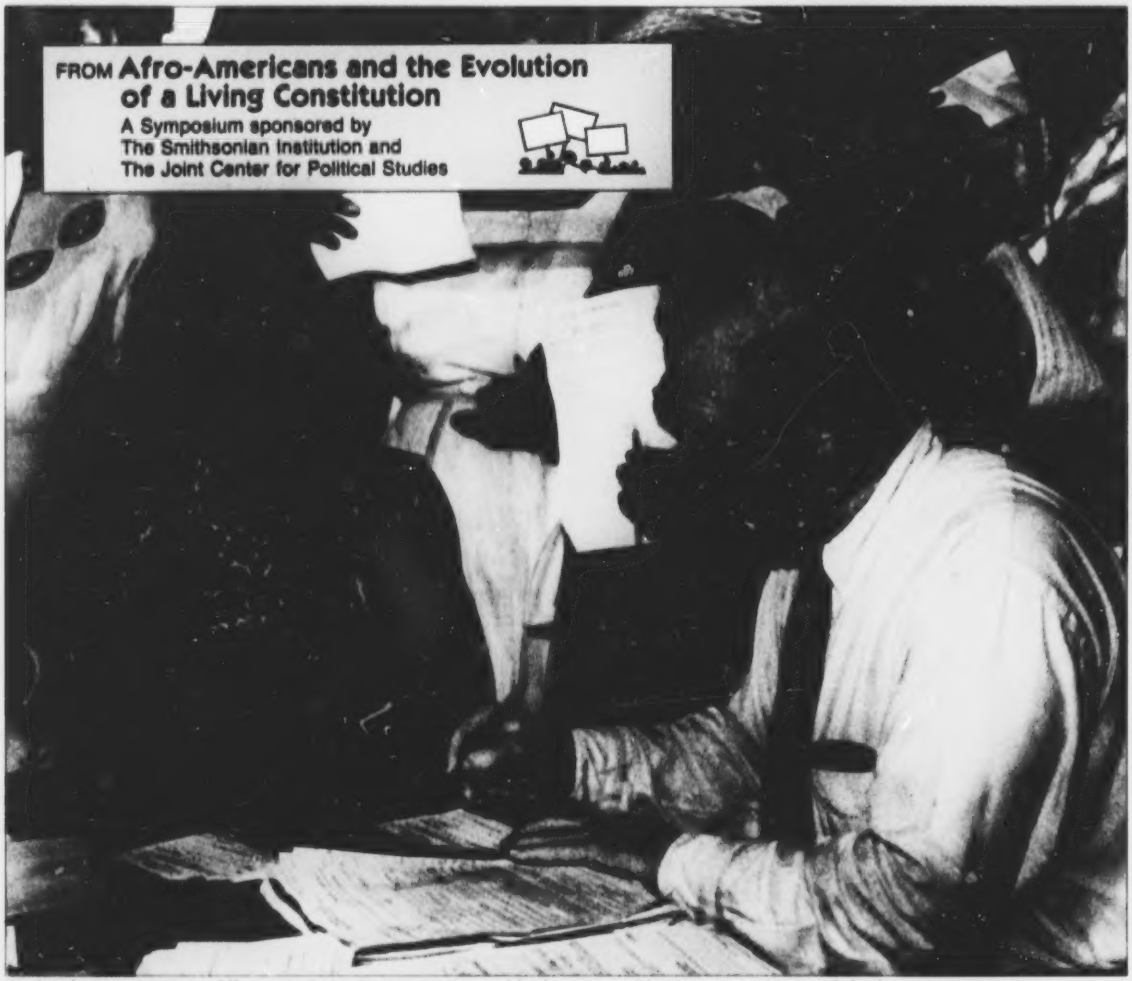
Title: **Newsweek Classroom Program**
Grade Level: Secondary
Materials: "The 1988 Presidential Election Guide" contains articles on all aspects of the presidential election, as well as reader activities.
Cost: Free with the purchase of the Newsweek Social Studies Program.
Order From: Newsweek Classroom Program, 444 Madison Ave., New York, NY 10022-6999.

Many of the resources cited in this guide are inexpensive or free. For additional materials on voter education and law-related education, contact:

Special Committee on Youth Education
for Citizenship
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5725

The Evolving Constitution

The Expansion of Voting Rights/Grades 7–12 **Richard Roe and Peter deLacy**



FROM **Afro-Americans and the Evolution of a Living Constitution**
A Symposium sponsored by
The Smithsonian Institution and
The Joint Center for Political Studies

The Bettmann Archive

Federal voter registrar fills out a form for a prospective black voter in Mississippi in 1966, while dozens more wait to register. Note that the woman registering has money in her hand to pay the poll tax.

The United States in 1987 began celebrating the bicentennial of its Constitution. By examining the expansion of the right to vote, the following activity highlights the notion of the United States Constitution as a living document. Eight of the sixteen amendments adopted since the ratification of the Bill of Rights have involved voting rights. Numerous Supreme Court decisions as well as federal legislation (most notably the Voting Rights Act) have attempted to break down barriers to voting.

This lesson is designed as an introductory activity to provide students with an overview of the historical development of voting rights. In addition, the activity provides students with the opportunity to begin exploring what the right to vote means in America. It is anticipated that teachers will adapt this activity according to their curriculum and will follow this activity with additional lessons on the issues presented.

Objectives

At the end of this lesson, students will be able to:

1. identify specific examples of 'voting qualifications' used by states in America's history to deny the right of minorities to vote;
2. analyze specific historical examples in terms of their restriction on the right to vote;
3. appreciate the expansion of the right to vote through constitutional amendments, Supreme Court decisions, and the Voting Rights Act.

Method

1. Introduce the topic of voting rights, stressing its historical development.
2. Distribute copies of the Activity Sheet (see inset) and allow students to read the law and legislative history.
3. Divide the class into small groups (three to five students) and ask each group to decide whether or not

the action in each example is a denial of the right to vote. Tell each group that it will be expected to give reasons for each of its answers. Groups may wish to appoint one spokesperson for the entire exercise or may wish to have a different spokesperson provide the answer and an accompanying rationale for each case study. Allow 10 minutes for groups to reach their decisions.

4. Record each group's responses on the board and note groups' rationales where appropriate.
5. Debrief the activity by reviewing the actual outcome of each case study as well as its basis (e.g., constitutional amendment, Voting Rights Act, Supreme Court decision). It is anticipated that the outcome of examples one, two and four will not generate a great deal of controversy. Reference should be made to the fact that the basis for each of these cases is relatively recent. Examples three and five should generate class discussion. The teacher may also wish to guide this discussion to a more general question of what the right to vote means. Depending on the course content, additional debriefing can focus on issues of federalism, closer historical analysis, or current controversies relating to voting.
6. Follow-up activities to this lesson include having students read excerpts from the Voting Rights Act and/or selected Supreme Court decisions (recommended: *South Carolina v. Katzenbach*, 383 U.S. 301, 1966). In addition, students could research current local or national voting rights issues.

This activity was developed for "Afro-Americans and the Evolution of a Living Constitution," a symposium sponsored by The Smithsonian Institution and The Joint Center for Political Studies. Richard Roe and Peter deLacy are both attorneys/educators who are on the staff of the National Institute for Citizen Education in the Law, 25 E. Street, N.W., Suite 400, Washington, D.C. 20001, (202) 662-9620.

Activity Sheet: The Right to Vote

Assume the United States Congress passed the following law: "The right to vote shall not be denied." The report accompanying the legislation explains that Congress wanted to encourage the greatest amount of voter turnout and to eliminate discrimination on the basis of race and gender, since blacks and women had been denied the right to vote in the past. Moreover, the right to vote is a fundamental principle in our democratic form of government.

Directions: For each of the following examples, decide whether the law has been violated or not. Briefly explain your answer.

1. A state requires a person to be at least 21 years old to vote. Sandy Kent is 20 years old and is told she cannot vote.
2. A city charges a $5.00 poll tax on all persons of voting age. Those who do not pay the tax cannot vote. The tax money is used to improve the school system in the city. Steve Eller does not pay the $5.00 and is not allowed to vote.
3. A state passes a law that denies convicted felons the right to vote until five years after completion of their full sentences. Anita Jackson, serving a ten-year sentence for committing a felony, is told she cannot vote.
4. A state requires everyone who registers to vote to pass a literacy test. More difficult tests are given to blacks than to whites. 55% of the blacks fail the tests while only 10% of the whites fail. David Anderson, a black man who failed the test, is not allowed to vote.
5. A state requires a person to be a resident for at least a year before he or she can vote. Dana Brown has been a resident for six months and is not allowed to vote.

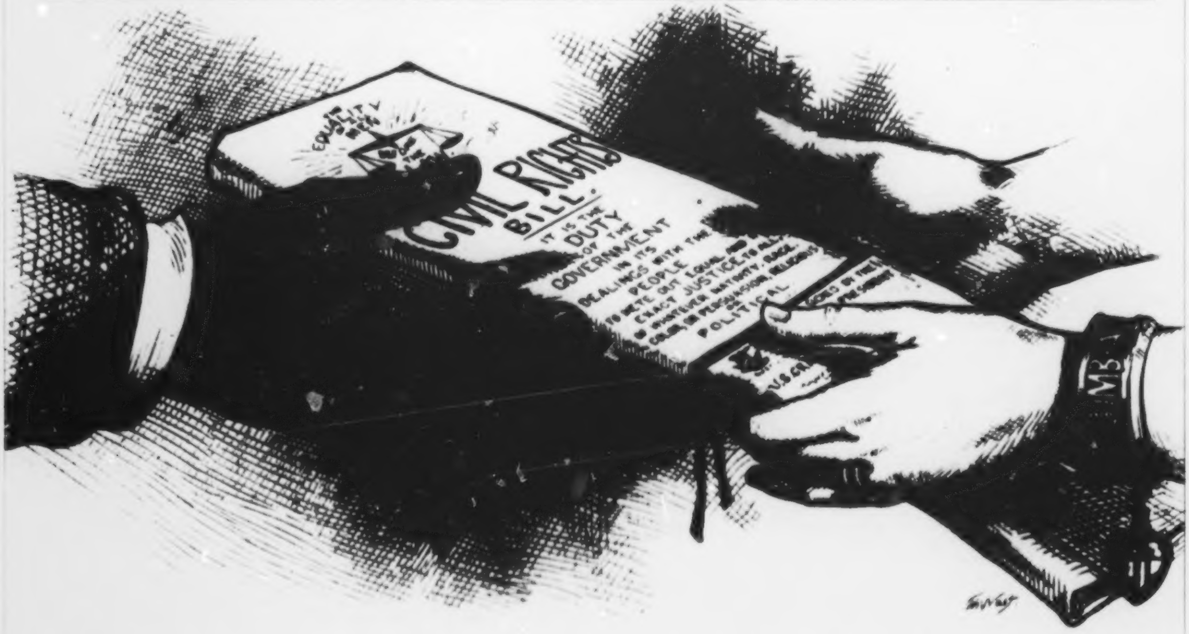
Voting Rights Exercise: Answer Key

1. The Twenty-Sixth Amendment to the United States Constitution, adopted in 1971, guarantees the right to vote to citizens who are eighteen years and older.
2. The U.S. Supreme Court in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), struck down a similar poll tax as a violation of the equal protection clause of the Fourteenth Amendment. The Court said, "Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." The Twenty-Fourth Amendment abolished poll taxes in all federal elections.
3. This case is based on *Richardson v. Ramirez*, 418 U.S. 24 (1974), in which the Supreme Court held that the equal protection clause of the Fourteenth Amendment does not prohibit a state from disenfranchising convicted felons who had completed their sentence and paroles. The Court relied heavily on Section Two of the Fourteenth Amendment, which allows for the abridgement of the franchise for "participation in rebellion or other crime."
4. The Voting Rights Act of 1965 (as amended in 1970, 1975 and 1982) bans literacy tests as a requirement of voting. The Supreme Court in *South Carolina v. Katzenbach* upheld the constitutionality of this provision of the Voting Rights Act.
5. The Supreme Court in *Dunn v. Blumstein*, 405 U.S. 330 (1972), struck down a Tennessee law similar to this example. The Court said that residency requirements were not valid "unless the State can demonstrate that such laws are 'necessary to promote a compelling government interest.' "

The Evolving Constitution

Civil Rights in the 19th and 20th Centuries/Secondary

Mary Louise Williams


EQUALITY BEFORE THE LAW
CIVIL RIGHTS
BILL.
IT IS THE DUTY OF THE GOVERNMENT IN ITS DEALINGS WITH THE PEOPLE TO METE OUT EQUAL AND EXACT JUSTICE TO ALL OF WHATEVER NATIVITY, RACE, COLOR, OR PERSUASION, RELIGIOUS OR POLITICAL
U.S. GRANT
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Nast

This drawing, from an 1875 issue of Harper's Weekly, *shows the hopes raised by passage of the Civil Rights Act. The law was struck down by the U.S. Supreme Court in 1883.*

Courtesy of The Smithsonian Institution

This lesson examines the legal concern, during two periods in American history, over private acts of discrimination on the basis of race. The lesson involves learners in analysis and comparison of the constitutional arguments of two Supreme Court cases—the *Civil Rights Cases* of 1883 and *Heart of Atlanta Motel, Inc. v. United States* (1964)—which challenged congressional acts outlawing private discrimination against individuals based on race. The focus of the lesson encourages students to formulate arguments from different perspectives by studying the legal issues in their historical setting. Students are encouraged to distinguish between the "letter of the law" and the "sense and reason of the law" and to determine the social and political consequences when "sense and reason" are removed from the judicial process. For purposes of evaluation, each student is asked to write two papers: 1) a position paper developed in preparation for oral arguments for moot court activities, and 2) a "judicial decision" based on findings of the moot courts.

Audience

American history classes, senior law classes, advanced placement history classes.

Goals

As a result of this lesson, students will

- understand how the Fifth, Thirteenth, and Fourteenth Amendments and the Commerce Clause framed the legal issues in the civil rights cases in 1883 and 1964
- apply the knowledge of historical and political perspective in analyzing laws and cases
- compare application of the concepts, "the letter of the law" and "the sense and reason of the law," to Supreme Court cases during two historical periods
- evaluate the impact of Supreme Court rulings on the social and political lives of citizens
- develop an understanding of the personal and social effects of private acts of discrimination based on race, color, and ethnic background

Procedures

1. Duplicate all handouts (below) for each student.
2. Read aloud to the students the first four paragraphs of Handout 1 as an introduction to the activity. Briefly discuss this actual experience of the Youngs and how they must have felt. Should this kind of discrimination be legal in our society? What about the rights of the motel owner?
3. Then pass out a copy of Handout 1 to each student. Read together its section entitled, "Relevant Constitutional Provisions." Ask the students whether any of these provisions provide legal protection for the Youngs against private acts of discrimination such as they experienced. What about the Fourteenth Amendment? If blacks are citizens as the Fourteenth Amendment says, what about their privileges and immunities? Due process rights? Equal protection rights? What is the key word in the Fourteenth Amendment? Does it say that individuals may not discriminate? No, it says ". . . no state shall make or enforce any law nor deprive any person. . ." What about Amendment Five? Remember that Amendment Five is a prohibition against the national government. Who was doing the discriminating? Continue reading the

rest of Handout 1, beginning with the fifth paragraph. What is meant by "the letter of the law" and "the sense and reason of the law"? (The "letter" is exactly what is written. The sense and reason is the spirit of the law or the unstated logic, rationale, or principle behind the law.)

4. To initiate interest in the lesson, list the three topics below on the board. Ask students to work in pairs to create a list of rights which would illustrate each topic. Use these examples as a guide:

- Economic rights: make contracts, own property, sue and be sued;
- Political and legal rights: give evidence, hold public office, vote;
- Social rights: marry, have access to public accommodations.

Record student responses on the board and discuss the reasons for their choices. Next, explain that civil liberties have historically meant the Bill of Rights. Today, civil rights and civil liberties are used interchangeably, and they embrace economic, political, and social rights. In the 1860s it was a different matter. Civil rights meant basically one's economic rights, which were legally protected. Political rights were considered to be in the nature of privileges that were enjoyed but not necessarily legally protected. Social rights were a matter of personal taste and prejudice. No one considered it the business of

Handout 1. Introduction to Private Acts of Discrimination: A Personal Story

(1) The motel sign blinked "Vacancy." Jim, Elaine, and son, Chip, turned in and stopped the car's engine. Jim stretched himself out of the car to his height of over six feet. Handsomely dressed in a lightweight wool sport jacket, he asked Chip to hand him his wallet out of the pocket of his raincoat carelessly tossed in the back seat. His voice was rich and resonant with a speech pattern and word choice joltingly correct.

(2) The family had just returned from a year in Copenhagen where Jim was doing research at the Niels Bohr Institute, one of the most prestigious physics facilities in the world. He was driving west to resume his position as a theoretical physicist at Los Alamos National Laboratory in New Mexico, the birthplace of the atomic bomb. Elaine would return to teaching mathematics in the public schools. This was their first night back in the United States after a wonderfully free year of Danish hospitality and European travel.

(3) Jim walked up to the motel desk and asked for rooms, a double and a single. The man behind the desk stared at him for several seconds and said, "I'm sorry, we're full up for the night." "But, may I point out, your vacancy sign is on." Angrily the man replied, "I told you that we're full. Now, get out!" Jim thought to himself as he returned to the car, "Welcome back to the United States, nigger!!"

(4) Jim Young was the first black in the history of Massachusetts Institute of Technology to receive a Ph.D. in theoretical physics. Brilliant and highly respected by his colleagues, his professional credentials were the envy of many. Elaine held an M.S. in mathematics and was considered to be an outstanding teacher in Los Alamos. But they were black. That fact was all that was necessary to provide reason for private acts of racial discrimination against them and their son in the 1950s and early 60s.

(5) Today, the individual discrimination as experienced by the Youngs is no longer legal. But, then, it wasn't supposed to be legal in 1875! The Fourteenth Amendment, ratified in 1868, had been the constitutional basis for congressional legislation that came later, such as the Civil Rights Act of 1875. This act was attempting to make illegal private acts of discrimination against blacks in hotels and inns, restaurants, public conveyances (river boats, trains, etc.) and amusement facilities. Congress in the 1870s had been determined to secure these social rights.

(6) But could the Civil Rights Acts of 1875 make such a violation of social rights illegal in 1875 based on the wording of the Thirteenth and Fourteenth Amendments of the Constitution? Was it illegal in the early 1960s when the Youngs were subjected to it? Was it really necessary to once again enact a law against private acts of discrimination in 1964? In answering these questions, this activity explores the legal history of private acts of discrimination against individuals on the basis of race (a violation of social rights) from 1875 to 1964.

(7) The underlying theme of this lesson comes from the words of Supreme Court Associate Justice John Marshall Harlan written over a hundred years ago. "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and the reason of the law is the soul." What do you think this quotation means? As you study the material in this lesson you will learn how the branches of government, as well as the states, interpreted the letter of the law during the 1870s and '80s. It will help you understand how this narrow interpretation created a distortion of reason and sense of the Thirteenth and Fourteenth Amendments. The "body" remained but the "soul" was removed. Lastly, you will examine the reason for the new civil rights law in 1964, a new avenue for interpreting constitutionality. You will see that with a new reason and sense the law became whole again; the soul was restored.

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment XIII (1865)

Section 1. Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within government to concern itself with discrimination against individuals because of their color or gender. This was regarded as a social preference. The Thirteenth Amendment marked the beginning of modern civil rights law and policy.

5. Divide the students into four groups. Groups One and Two will work on the *Civil Rights Cases* of 1883 and will receive copies of Handout 2. This information is to be used in preparing oral arguments and position papers. Group One will be attorneys for the United States government (the petitioner or appellant) asking for a reversal of a lower court decision. Group Two will be attorneys for the respondents or appellees, individuals who had discriminated against black patrons and against whom the appeal was made.

Groups Three and Four will be responsible for *Heart of Atlanta Motel, Inc. v. U.S.* (1964). Group Three will be the attorneys for the owners of the motel, who are the appellants who challenge the constitutionality of Title II of the Civil Rights Act of 1964. Group Four will be attorneys for the appellees, the United States government. Give Handout 4 to these groups only.

Handouts 2 and 4 provide specific information which should not, at this point, be shared with the two groups preparing the other case, since these groups will be the "Supreme Court" for the other groups' oral argument. In other words, Groups 3 and 4 will act as a Supreme Court for Groups 1 and 2 on the first day(s) of presentation and Groups 1 and 2 will be a Supreme Court for Groups 3 and 4. If class enrollment makes the Supreme Court too large, use the extra students as journalists and have them write newspaper accounts.

6. Place the students in their groups and have them begin work on their cases. The students must judge whether their law is constitutional according to the Fifth, Thirteenth, and Fourteenth Amendments and the Commerce Clause in Article I. They are to consider the constitutionality of the statutes based on the issues discussed in Handout 1. Tell the students they may also determine constitutionality by considering "the letter of the law" or "the sense and reason of the law." Explain that the law is tested when someone challenges the constitutionality of the law itself or actions taken. In preparing arguments the attorneys must look at case law, previous decisions handed down by the Supreme Court which act as precedents. Explain to the students by writing on the board or transparency that the position papers will include the following: (1) a statement as to whether you believe the law to be constitutional; (2) support for your position based on reasons cited from the Fifth, Thirteenth, and Fourteenth Amendments and the Commerce Clause in Article I; (3) support based on the historical setting which might have influenced your decision had you lived in that time period. The preparation of position papers will help clarify what their arguments should be.

7. After the preparation phase, tell students that presentations to the Supreme Court are divided as follow:

a. Appellant's introduction (explanation of the case in its historical context)
b. Appellant's arguments (two or more students give separate arguments)
c. Appellee's introduction
d. Appellee's arguments
e. Appellant's rebuttal

8. Oral arguments of the *Civil Rights Cases* before the Supreme Court. Groups 3 and 4, acting as a Supreme Court, will listen to the arguments presented by Groups 1 and 2 and make a decision based on a majority vote. (It is suggested that the Supreme Court be given a copy of Handout 2 to be read as homework the night before. It is necessary to understand the historical setting.) Stress that the Supreme Court must think in terms of the 1880s, not the 1980s. Also stress to the Supreme Court that the federal government has grown very powerful during the Civil War. This was reversing the 19th century trend of increased state authority as the number of states

the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV (1868) (relevant section only)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Commerce Clause

Article 1, Section 8, Para. 3. Congress shall have power: To regulate commerce with foreign nations and among the several states, and with the Indian tribes.

Amendment V

No person . . . shall be deprived of life, liberty, or property, without due process of law; . . . nor shall private property be taken for public use, without just compensation.

DETERMINING CONSTITUTIONALITY

Here are some issues to use in determining the constitutionality of the Civil Rights Acts of 1875 and 1964.

1. Does the wording of these constitutional provisions provide protection for an individual against private acts of discrimination based on race? Look particularly at the Fourteenth Amendment.
2. If not, should a law be written which more specifically addresses the problem of private acts of discrimination?
3. Would the law be constitutional based on the wording of the 13th and 14th Amendments?
4. Do private acts of discrimination constitute involuntary servitude?

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increased, the nation expanded westward, and the federal government grew more remote and further away. It was to the functions and services of state governments that most people turned. The Supreme Court was well aware of this and wanted to restore the state-federal balance of power. It had been regularly limiting federal authority in its decisions.

9. Each member of the Supreme Court will then provide his/her decision as a written statement with the reasoning and constitutional justification included. Each student will write either a concurring opinion or dissenting opinion. You will then compare their decision with the actual decision. Give Handout 3 to each student and go over it carefully for discussion and analysis of the actual Supreme Court reasoning and constitutional justification.

10. Oral arguments for *Heart of Atlanta Motel, Inc. v. U.S.* before the Supreme Court. The Supreme Court, Groups 1 and 2, will listen to the arguments presented by Groups 3 and 4. (It is suggested that Handout 4 be given to the Supreme Court before the oral arguments.) The Supreme Court has to determine whether the power to regulate actions defined as interstate commerce is within Congress's power or not. Commerce has been defined by previous Courts as buying and selling, the interchange of commodities, any kind of exchange, communication, or commercial intercourse which can include persons. Interstate commerce can include activities intrastate which might affect interstate commerce or Congress's exercise of it.

The Court must decide if that power can include regulating local incidents and activities occurring within states that might affect interstate commerce.

Have student think carefully about the following questions: Does forcing someone to rent a room to another on the basis of race cause a loss of property as defined in the Fifth Amendment? What is the effect on the human dignity of blacks? How do the Thirteenth and Fourteenth Amendments consider the moral question of segregation?

11. The Supreme Court will then provide its decisions as a written statement following procedure described in step 9. Give Handout 5 to each student and compare decisions, etc.

12. Debrief the lesson as a means of measuring achievement of the objectives of the lesson. Following are suggestions for debriefing questions.

a. Did the four groups consider the letter and/or the sense and reason of the law in addressing the Civil Rights Act of 1875? Why or why not?
b. Did the actual decision consider the "sense and reason" of the Fourteenth Amendment? Why or why not?
c. Why was the Commerce Clause used for the constitutional authority in the Civil Rights Act of 1964? Doesn't that seem a strange route to go in the Constitution to get at individual discrimination? Was it effective?
d. Did the decision in *Heart of Atlanta Motel* attempt to get at the sense and reason?
e. What effect, if any, did the historical setting have on the two decisions? Aren't the justices of the Supreme Court supposed to be operating independent of the societal demands around them?
f. What has been the most important lesson you have learned from this unit?

Evaluation

Evaluations can be based on:

1. the assigned position papers developed in preparation for oral arguments for moot court activities.
2. oral arguments.
3. a written "judicial" decision based on findings of the moot court.

Tips from the Teacher

Any part may be used separately. One could use the section on the Civil Rights Act of 1875 alone or just use the Civil Rights Act of 1964. The arguments have been provided as a guide. Better students could develop their own.

Handout 2. The Historical Setting—1870s and 1880s

Radical Reconstruction, which began in 1866, is bringing changes in the political, economic and social structure of the South. The Ku Klux Klan has been organized since 1867 to use intimidation against blacks to discourage their participation in the public affairs of the states. But since the Republicans have been in power for seven consecutive Congresses up to 1876, genuine concern for the new black citizens has caused ratification of constitutional amendments and enactment of several laws designed to protect black rights and to curb white extremists.

Since it has been generally accepted that the states are the main source of civil rights and personal liberty, the Fourteenth Amendment has been ratified to grant both national and state citizenship rights to blacks. By so doing it is hoped the national government can better protect the rights of blacks citizens, since historically it has been and is expected to be the states that are the problem.

To further arm the blacks with a means of protecting their own rights, the Fifteenth Amendment has been ratified forbidding the denial of the right to vote on a basis of race. Black voters, as a result, vote Republican, contributing to that party's continued control. The promise of economic security and political equality are now in legal existence.

But one final concern remains: private acts of discrimination against individuals on the basis of race. Shouldn't there be federal protection for social rights? To ensure this protection, the Civil Rights Act of 1875 has been passed.

In the presidential election in 1876, a crisis has formed over the electoral votes of four states. The Republicans claim they have retained the presidency with these votes, while the Democrats swear they have carried the four disputed states, thus winning the presidency with their candidate, Samuel J. Tilden.

A compromise has been worked out with the Southern Democrats. The Democrats have allowed Rutherford B. Hayes, the Republican, to have the presidency. In return, the Republicans have made several unwritten agreements. There will be an immmediate end to military reconstruction; home rule will be restored. The North will stay out of the "Negro problem" in the South; the whites will write the rules governing their relations with the blacks, meaning limited political and social equality.

So, in 1877 federal troops have been withdrawn from the South, leaving the rights of the blacks protected by the constitutional amendments and civil rights laws. Would the letter of the law be enough with the return of the white rule?

THE CIVIL RIGHTS ACT OF 1875

It had the following provisions: (Only relevant parts included)

Sec. 1. Be It Enacted, That all person within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of public amusement. . . . . .

Sec. 2. That any person who shall violate the foregoing section . . . shall pay five hundred dollars to the person aggrieved thereby . . . and [be] imprisoned not less than thirty days nor more than one year. . . .

CIVIL RIGHTS CASES (1883)

In four instances, acts of discrimination were made in the late 1870s and early 80s in inns, theaters, and public transportation in violation of the Civil Rights Act. Five separate cases went to the Supreme Court but only the cases relevant to this lesson will be examined. The United States was the petitioner or appellant, and the respondents or appellees were a Mr. Stanley and Mr. Nichols, who were in violation by "denying to persons of color the accommodations and privileges of an inn or hotel."

These cases are asking whether or not the above actions are violations of the Thirteenth and Fourteenth Amendments. The Thirteenth forbids all kinds of involuntary servitude and acts of discrimination as a badge or incident of slavery. The Fourteenth grants rights, privileges, and immunities to blacks. Congress has the power to protect these rights.

CASE LAW (THE LAW AS DEFINED BY PREVIOUSLY DECIDED CASES)

Slaughterhouse Cases (1873)

This decision was the first interpretation of the meaning of the Fourteenth Amendment. It stressed that the Thirteenth, Fourteenth, and Fifteenth amendments had one underlying purpose—giving citizenship rights to the former black slaves. State citizenship rights were separate from those of the federal government (dual citizenship). The states protect the rights of the citizens of the states; thus, the federal government could only protect the federal citizenship rights (left undefined). Thus, the former slave states were assigned the protection of the new state citizenship rights of the former slaves.

United States v. Cruikshank (1876)

In this case the Court invalidated the convictions of racist white hoodlums who used violence to break up a political meeting of Louisiana blacks. The conviction had been obtained under the Federal Enforcement Act of 1870. The Court stressed that, "The Fourteenth Amendment . . . adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the

Handout 3. Supreme Court Decision: Civil Rights Cases (1883)

In an 8 to 1 decision, the Supreme Court struck down as unconstitutional the most important parts of the Civil Rights Act of 1875. The Court could find nothing in the Thirteenth and Fourteenth Amendments to give authority to the act.

"Rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws. . . . The wrongful act of an individual . . . is simply a private wrong, or a crime of that individual; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." In other words, if one were discriminated against, one would have to go to the state for any correction of the wrong. The states had been the problem in the first place, which is why the Fourteenth Amendment was enacted.

The Court denied that a refusal of an innkeeper to rent a room on the basis of race was "involuntary servitude," thus rejecting that the Thirteenth Amendment had been violated. "It would be running the slavery argument in the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain or as to the people he will take into his cab. . . . Mere discrimination on account of race or color was not regarded as badges of slavery."

Only Justice John Marshall Harlan dissented. He denied the lack of authority in the Thirteenth and Fourteenth Amendments. "Exemption from the race discrimination in respect of the civil rights which are fundamental in citizenship in a republican government is . . . a new right, created by the nation, with express power in Congress, by legislation, the enforce the constitutional provision from which it is derived." He went on to stress that the states still have the same authority to define and regulate civil rights. But now its exercise is the subject of enforcement through the national government to make sure that exemption of citizens from discrimination is protected.

In strong words, Harlan argued that the Thirteenth Amendment did apply. What Congress had sought with the Thirteenth Amendment was to accomplish "what had been done in every State . . . for the white race—to secure and protect rights belonging to them as freemen and as citizens; nothing more . . . to make the rank of mere citizens."

He then referred to the Commerce Clause, leaving open a suggestion that would be taken up by a more determined people in a more determined time. "Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the States. . . . . I suggest, that it may become a pertinent inquiry whether Congress may in . . . its power to regulate commerce among the States enforce . . . equality of rights, without regard to race, color or previous condition of servitude. . . ."

fundamental rights which belong to every citizen as a member of society."

Hall v. DeCuir (1877)

In this case, the Court struck down a state law forbidding public carriers to racially discriminate, because the Court found such a law to be a burden on interstate Commerce. "There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it. . . . But we think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress . . . ." Does discrimination in inns and restaurants inhibit interstate commerce in any way?

ARGUMENTS FOR THE APPELLANT

(Group One, attorneys for the U.S. Government) Use the following arguments to help in the preparation of your case.

The denial of accommodations of an inn inflicts a badge of servitude (humiliation) as well as denial of personal liberty which is a form of slavery in violation of the Thirteenth Amendment. Personal liberty consists in the power of changing one's situation or taking oneself or person to whatever place one may wish, without restraint. How can one move freely if one cannot use overnight accommodations and restaurants wherever available?

The Fourteenth Amendment was the first instance in which Congress had the power to enforce an express prohibition upon the states. The Fourteenth granted blacks both state and federal citizenship. Therefore, exemption from race discrimination with respect to civil rights, fundamental to citizenship, was within the power of Congress to regulate. States possess the same authority which they have always had: the power to define and regulate the civil rights of their own people. Except, now, its exercise is subject to regulation by Congress through powers granted in the Fourteenth and the Civil Rights Act.

All one has to do is look at the historical framework for the ratification of the Fourteenth Amendment as well as the Civil Rights Act of 1875 to understand the sense and reason for them. They were intended to give power to the national government to intervene in situations where black rights were being violated, particularly in cases of private acts of discrimination where blacks only have the law to protect them. Without the federal government there to support the law, blacks are helpless before the white majorities.

ARGUMENTS FOR THE APPELLEE

(Group Two, attorneys for the individuals who discriminated, Mr. Stanley and Mr. Nichols.) Use the following arguments to help in the preparation of your case.

You will argue for "states rights." The Civil War has strengthened the power of the national government, but the states are determined to regain their power. Civil rights step into the domain of local and state government by laying down rules for the conduct of individuals in society toward each other. As the closest government to the people, the states, not the national government, have the right to define civil rights for the people. They have historically set voter qualifications and rights for their state citizens. Congress has no authority to intervene in this area. The national government can exert power over the states but has no right to impose its will on the citizens of that state.

The Thirteenth and Fourteenth Amendments do not give the federal government the power to establish regulations about discrimination in hotels and inns. The Thirteenth Amendment refers to actual slavery. How can denying a black a room in an inn or a seat in a restaurant place a "badge of servitude" on him? If he chooses to interpret it that way, that is his choice, not that of the innkeeper.

The state government is the closest government to the people. The Fourteenth Amendment prohibits states from discriminating against individuals; it does not and cannot protect against discrimination by individuals. If one citizen chooses not to hold social intercourse with another, he is not and cannot be in violation of the Thirteenth or the Fourteenth Amendments. It is a matter of individual taste and choice, not governmental regulation. Private acts of discrimination which a person may see fit to make as to the guests he will entertain in his inn or as to the people he will admit into his restaurant, etc., can only be remedied by the state government, not the federal.

To force an innkeeper or owner of a restaurant to serve Negroes would cause him to lose much business from the white clientele. Therefore, loss of business would be loss of property without just compensation, as well as a loss of his "liberty" of choice, a violation of the Fifth Amendment.

Handout 4: Historical Setting, 1960s

As a result of Supreme Court decisions, such as the *Civil Rights Cases* of 1883 which gave support to Jim Crow laws, segregated society became fact in America. *Plessy v. Ferguson* of 1896 cemented the practice with its "separate but equal" decision. Therefore, there were separate schools, drinking fountains, waiting rooms, sections on trains and buses, graveyards, mortuaries, churches, even armies fighting in World War II. For all practical purposes, blacks' economic, political, legal, and social rights were nonexistent. White America had forgotten blacks were even here. And when whites did remember, it was to participate in lynchings, and acts of intimidation, humiliation, and degradation.

During the 1930s President Franklin Roosevelt and Eleanor Roosevelt took steps to force white America to remember its black citizens, the segment of the society hardest hit by the Depression. Blacks were appointed to senior government posts and relief was fairly apportioned to the 50 percent of black workers who were unemployed.

President Harry Truman made the first assault on civil rights issues with his Justice Department. It entered civil rights cases, filed by the NAACP (National Association for the Advancement of Colored People), as a "friend of the court." Truman forbade segregation in the military and ordered an end to racial discrimination in federal employment and government contracting.

Handout 5. Decision—Heart of Atlanta Motel Case

The Supreme Court upheld Title II of the Civil Rights Act of 1964 as constitutional, "a valid exercise of Congress' power under the Commerce Clause as applied to a place of public accommodation serving interstate travelers." The Court denied all arguments of the appellants.

It pointed out that the decision handed down in the *Civil Rights Cases* of 1883 was not applicable because the "Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power." It determined that the test of the exercise of the power of Congress under the Commerce Clause is simply "whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest." The Court then proceeded to prove that denying people accommodations in motels because of race met that test, because of "approximately 20,000,000 Negroes in our country," many are able to, and do, travel among the states in automobiles.

Through concurring opinions, the Thirteenth and Fourteenth Amendments were again focused upon as constitutional authority against discrimination. Justice Douglas stated, ". . . . our decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person . . . to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate. . . ." In addition, it was pointed out that the Thirteenth Amendment was to be regarded as "additional authority" for the legislation. Civil rights legislatipn dealing with individual discrimination had come full circle.

But Congress also considered this a "moral problem" as well. In a concurring opinion Justice Goldberg pointed out that the purpose of the act was to solve the problem of "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues."

The historic ending of school segregation came with *Brown v. Board of Education of Topeka* in 1954. The blacks ended segregation on buses in Montgomery, Alabama, with a boycott. Student sit-ins at lunch counters attacked segregation in public eating places. The University of Mississippi, historic bastion of white supremacy, was forced to admit James Meredith, its first black student. Martin Luther King, Jr., black civil rights leader, led a peaceful march of a quarter of a million people to Washington, D.C., and spoke eloquently for the cause of the black citizens. The date was August, 1963. White America had become profoundly aware of black America.

But no major legislation in regard to civil rights had been enacted for over 82 years. In June 1963, President John F. Kennedy called on Congress to provide legislation to address all forms of individual discrimination. Its stated purpose was "to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations, . . . to enforce the provisions of the Fourteenth and Fifteenth amendments, to regulate commerce among the several states . . . ."

JFK was assassinated the following November. President Johnson, returning from Dallas shortly after taking the oath of office, made the decision on Air Force One to go "all the way" on civil rights. Five days after the assassination, Johnson told a joint session of Congress that passage of the Civil Rights Act would be the greatest tribute they could make to honor President Kennedy's memory.

THE CIVIL RIGHTS ACT OF 1964

The Civil Rights Act was signed into law by President Johnson on July 2. Since Title II is the part of the act constitutionally challenged, that is the only part quoted. (Only the relevant portions have been included.)

Sec. 201.

(a) Any persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if it operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, . . . which provides lodging to transient guests, other than an establishment . . . which contains not more than five rooms for rent . . . and which is actually occupied by the proprietor . . . as his residence;

(2) any restaurant, cafeteria . . .

(3) any motion picture house . . .

(4) . . . any "commerce" means travel, trade, traffic, commerce, transportation, or

> communication among the several States, or between the District of Columbia and any State . . .

HEART OF ATLANTA MOTEL, INC. V. UNITED STATES (1964)

The appellant, the owner of a large motel in Atlanta, Georgia, sued to have Title II of the law struck down as unconstitutional. The owner restricts his clientele to white persons, three-fourths of whom are interstate travelers. He has 216 rooms available to transient guests and is conveniently located near two interstate highways and two state highways. There is national advertising to solicit business through national magazines and 50 billboards and highway signs within the state. Approximately 75 percent of the registered guests are from out of state, which includes convention trade.

The appellant maintains that Title II of the Act exceeds Congress' power to regulate commerce and thus violates the Commerce Clause under Art. I, Sec. 8, cl. 3.; that the Act violates the Fifth Amendment by depriving the owner of the right to choose his customers and operate his business as he pleases, thus taking liberty and property without due process of law and taking property without just compensation; and that being forced to rent available rooms to Negroes against his will subjects the appellant to involuntary servitude in violation of the Thirteenth Amendment.

CASE LAW (THE LAW, AS DEFINED BY PREVIOUSLY DECIDED CASES)

No cases of importance since the *Civil Rights Cases* (1883).

ARGUMENTS FOR THE APPELLANTS

(Group Three, attorneys for the owners of the Heart of Atlanta Motel). Use the following arguments to help in the preparation of your case.

The transfer to the national government of the power to determine civil rights is a violation of federalism and of the balance of power between state and federal governments. This is just another attempt by the national government to take over powers granted to the states. Civil rights have historically been the responsibility of the states. The Court has repeatedly said that the Fourteenth Amendment allows only the states to regulate the behavior of their citizens. Besides, there is no need for such national legislation because 32 states have statutes concerning civil rights. When all the states decide such legislation is needed, state law will cover the country, and there will be no need for federal law on the subject.

The Commerce Clause never gave the national government the right to regulate local incidents and local activities. The choice of to whom one wishes to rent rooms or to serve food is a matter of personal taste and is not the business of the federal government.

The national government cannot force the issue; otherwise, a citizen is being deprived of his Fifth Amendment rights of "liberty" of choosing patrons. To take that away is forbidden without due process of law. When citizens are forced to rent to or serve blacks, their white clientele stop patronizing them and they start losing money. This causes a loss of "property" or economic well being and constitutes the taking of property without just compensation.

ARGUMENTS FOR THE APPELLEES

(Group Four, attorneys for the U.S. Government). Use the following arguments to help in preparation of your case.

Congress held hearings in both Houses as to the burdens of discrimination and its effect upon interstate commerce. Since the unconstitutionality of the Civil Rights Act of 1875 resulted from arguments that was based in the Thirteenth and Fourteenth Amendments, you will avoid using these amendments as the basis for your arguments. Instead, the law specifically deals with inns and restaurants that cater to interstate commerce; thus, use the Commerce Clause as your main constitutional argument. Don't forget that people travelling from one state to another would qualify as interstate commerce. Congress, in the exercise of its power to regulate commerce among the several states, has the power to regulate traffic of persons who travel from state to state, and thus become a part of interstate commerce.

U.S. citizens have become increasingly mobile. Millions of people of all races are traveling every year. Blacks have been subject to humiliating discrimination, causing them to have to travel selectively in areas where they know they can find motels and restaurants that will serve them. Blacks have special guidebooks because of this problem. Doesn't this hurt commerce and interstate travel, since they cannot go where they want to and stay where they want to? The same thing is true for restaurants. If the food served comes from within the state, then it would not be interstate. But if a significant portion comes from without, then it is interstate commerce.

Innkeepers may be defined as a sort of public servant, as agents or instrumentalities of the state. When a person devotes his property to a public use, he, in effect, is granting the public an interest in that use since it can affect the community at large. They have licenses granted them to operate their businesses, giving them special privileges. Therefore, they are charged with certain duties and responsibilities to the public. The public nature of the employment forbids discrimination against any person on account of race or color. The innkeeper must submit to control by the public for the common good. He has the choice of withdrawing his property from public use, thus removing his property from public interest and public control. But so long as he maintains the use, he must submit to the control. No property is being taken, only regulated consistent with the power granted to Congress in the Fourteenth Amendment. Thus, no Fifth Amendment rights are violated.

Mary Louise Williams is an education consultant with the Los Alamos Public Schools in New Mexico, the New Mexico Law-Related Education Project, and Project Crossroads. This strategy is adapted from Constitutional Sampler, *published in 1988 by The Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law. The book consists of nearly 50 strategies by teachers from a variety of states.*

The Evolving Constitution

Tyranny of the Majority/Secondary

Jack Hanna

Very often, LRE teachers can take advantage of a history lesson by infusing LRE content into their regularly scheduled historical content. This lesson is an attempt to create a mechanism for infusion.

In a democracy there are inherent dangers from majority rule. These dangers are particularly sensitive for minority groups. One of America's most original political theorists, John C. Calhoun, in his *Disquisition on Government*, laid forth his warnings against what he termed the "tyranny of the majority." He was, of course, referring to the tyranny populous states could perpetrate on smaller states, but his theories form perfect justifications for the civil rights movements led by Martin Luther King and Susan B. Anthony.

Objectives

1. Students will identify three American leaders who have advocated "minority" rights.
2. Students will identify three quotes from John C. Calhoun.
3. Students will discuss minority rights in a democratic system.
4. Students will discuss civil rights movements.

Procedure

STEP ONE

Divide your class into four or five groups and distribute the handout containing quotes and biographies. Have each group discuss the quotes and decide which quotes can he attributed to whom. Have each group compare and contrast the three individuals.

STEP TWO

Have each group report out their conclusions concerning the author of the quotes.

STEP THREE

Inform the groups that John C. Calhoun wrote all three statements.

STEP FOUR

Ask each group to discuss the following questions and then report out its conclusions.

QUESTIONS

1. How would each individual listed view the tyranny of the majority?
2. Give examples of how the majority has been tyrannical during American history. Examples:
   a. Slavery;
   b. Denying women the vote;
   c. Tariffs passed by northern states;
   d. Jim Crow laws;
   e. Japanese internment during WWII;
   f. Discrimination against Irish-Americans, Jewish-Americans and others.
3. What groups today are in danger of tyranny from the majority?
4. What protects minorities from the tyranny of the majority?

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Who Said That?

1. "... a people self-governed, is but the government of a part over a part—the major over the minor portion."
2. [Under majority rule] "it matters not how powers may be exercised; whether directly by [the people] themselves or through representatives ... the minority, for the time, will be as much the governed or subject portion as in a monarchy."
3. "Those who exercise power and those subject to its exercise—the rulers and the ruled—stand in antagonistic relations to each other .... Our nature ... which leads rulers to oppress the ruled ... leads the ruled to resist when possessed of the means of making peaceable and effective resistance."

WAS IT:

Susan B. Anthony, b. 1820, in Adams, Massachusetts. Worked for temperance movement, anti-slavery movement, and women's suffrage movement. With Elizabeth Cady Stanton, she organized the National Woman Suffrage Association in 1869. She also helped organize the International Council of Women in London and later served as president of the merged National and American Woman Suffrage Associations until 1900.

or

John C. Calhoun, b. 1782, in Abbeville District, South Carolina. Graduate of Yale, 1804; Congressman from 1811 to 1817; Secretary of War under President James Monroe; Vice-President of the U.S. from 1824-1832; Secretary of State under President John Tyler; and U.S. Senator from South Carolina. Pro-slavery, Calhoun authored theory of nullification.

or

Martin Luther King, Jr., b. 1929, in Atlanta, Ga. Baptist minister. Doctorate in theology, Boston University. Non-violent civil rights leader. Led 1956 boycott of bus lines in Montgomery, Alabama, which ended when the U.S. Supreme Court ruled that segregation on the buses was illegal. President of the Southern Christian Leadership Peace Conference in 1957. Nobel Prize, 1964. Assassinated in Memphis, Tennessee, in 1968.

2136

The Evolving Constitution

Equality Under Law/Secondary

Isidore Starr

This topic focuses on the themes of political, social, and economic equality. Some of the decisions and opinions have become landmarks in our history. At the same time, some of the rulings have been criticized vigorously.

Objective

To study the landmark rulings dealing with equality in education, voting, and other areas of American life.

Racial and Political Equality

As the United States entered the twentieth century, the genesis of organizations like the National Association for the Advancement of Colored People (NAACP) foreshadowed better things to come for American blacks. The migration of many blacks to the North, coupled with their service in the armed forces during the two world wars, exposed many whites to blacks for the first time and helped to counteract the racism of ignorance.

The Supreme Court began to depart from the precedent it established in *Plessy v. Ferguson* (allowing for "separate but equal" public facilities) when Jim Crow laws affected interstate commerce. It wasn't until 1954, however, that the Court began to question the true import of *Plessy*—whether separate could ever truly be equal—in *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), and *Brown II*, 349 U.S. 294 (1955).

The *Brown* decisions were issued by a Supreme Court headed by Chief Justice Earl Warren. The Chief Justice himself wrote both opinions, each for a unanimous Court.

Brown found that segregation in the public schools was harmful to black children; segregation connoted inferiority and deprived them of some benefits a racially integrated school system would provide. Since "separate but equal" facilities were inherently unequal, plaintiffs were "deprived of the equal protection of the law guaranteed by the Fourteenth Amendment."

In *Brown II*, decided the next term, the Court said that school desegregation must proceed "as soon as practicable," but "with all deliberate speed."

Although *Brown* set high goals, the national temperament evolved slowly. Some resisted any change in the status quo. Others, like Rosa Parks—who refused to go to the back of a Montgomery, Alabama, bus in 1955—helped spawn the civil rights movement. "The Movement," as it came to be known, catalyzed public opinion against racial discrimination and created its own heroes, perhaps chief among them Martin Luther King, Jr.

The *Brown* decision and rulings that followed it helped establish desegregation as a fact of life, as the Warren Court used the Equal Protection Clause of the Fourteenth Amendment and other constitutional provisions to strike down other discriminatory practices.

In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court used the Commerce Clause to justify laws restricting racial discrimination in public accommodations. According to the majority opinion by Justice Clark, upholding the Civil Rights Act of 1964, discrimination against blacks in the motel impeded interstate commerce:

> It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

What Is Discrimination?

Moving beyond the landmark decisions of the Warren Court, which often dealt with laws that explicitly classified on the basis of race, the Burger Court had to determine whether discrimination existed in laws that do not classify racially. In order to evaluate these laws, the Court formulated a number of standards. These standards were influenced by the debate between those who felt the judiciary has to assume an active role in equality issues and those who prefer to allow legislative bodies to lead the way. In addition, the Court has had to wrestle with how far laws can go to ameliorate past prejudice.

Since all laws inevitably affect some people more than others, the Court adopted a number of tests for unconstitutional discrimination. The "reasonableness" standard declares that if classification is "rationally related to the object of the legislation" it is constitutional. Under this reasoning, the complaining party has the difficult task of proving that the legislation is not reasonable.

A second standard requires that any classifications must be "substantially" related to the legislative goal. This standard effectively shifts the burden of proof to the lawmaking body, which cannot merely plead that its classification is rational, but must also argue that it is a necessary element in achieving an important legislative objective. In the case of *Craig v. Boren*, 429 U.S. 190 (1976), the Court used this standard to strike down an Oklahoma law that allowed females between the ages of 18 to 20 to buy beer when males the same age could not, on the grounds that the law violated the Equal Protection Clause of the Fourteenth Amendment.

The most stringent test to determine whether classifications discriminate says laws are "inherently suspect" if they are based upon characteristics determined "solely by the accident of birth." Here the Court requires more than a "substantial" relationship between the law and its purpose—a showing that the state had a "compelling interest" in drafting the law as it did. (This standard was advanced in the majority opinion in *Korematsu v. United States*, 323 U.S. 214 (1944), which found that orders excluding the Japanese from the West Coast during World War II did indeed meet the test.)

The Court applies one or another of these tests depending on the groups affected by the laws. The traditional "rationally related" test is applied when the law does not deal with categories established by birth (i.e., race or national origin) or groups with a history of unequal treatment. The Court will use this standard to determine if a state can require nonresidents to pay higher tuition at state universities than residents of the state, or if juveniles and adults can be treated differently even if each committed similar crimes.

2137

Oklahoma Legislative Strategy

You are a member of the Oklahoma legislature. Recently you have become concerned about the number of traffic accidents which have involved young adults who have been drinking. The police department supplies you with the following statistics:

PERSONS ARRESTED BY AGE AND SEX FOR THE MONTHS SEPTEMBER, OCTOBER, NOVEMBER, AND DECEMBER, 1973 IN THE STATE OF OKLAHOMA FOR ALCOHOL-RELATED OFFENSES

		18 yrs.	19 yrs.	20 yrs.	Total Persons Arrested 18–65 and over
DRIVING UNDER THE INFLUENCE	Male	152	107	168	5,400
	Female	14	2	8	499
DRUNKENNESS	Male	340	321	305	14,713
	Female	39	33	30	1,278

OKLAHOMA CITY POLICE DEPARTMENT ARREST STATISTICS FOR THE YEAR 1973

		AGE			
CLASSIFICATION OF OFFENSES	SEX	18 yrs.	19 yrs.	20 yrs.	TOTAL For All Ages
DRIVING UNDER THE INFLUENCE	Male	47	54	72	3,206
	Female	10	1	5	279
DRUNKENNESS	Male	102	104	96	9,413
	Female	18	22	19	823

NUMBER OF PERSONS KILLED AND INJURED IN VEHICLE TRAFFIC COLLISIONS IN 1972

		TOTAL				DRIVER			
AGE		KILLED		INJURED		KILLED		INJURED	
GROUP		Male	Fem.	Male	Fem.	Male	Fem.	Male	Fem.
17-21	Municipal	34	8	1640	1277	16	4	932	637
	Other	82	26	1171	639	49	10	681	261
	Statewide	116	34	2811	1916	65	14	1613	898

What law would you propose to deal with this problem?

However, the much more stringent "compelling interest" standard applies to "inherently suspect" laws which impact upon groups established by birth (race, national origin, or alien status), or groups who have been victims of "a history of purposeful unequal treatment," or who have been "relegated to a position of political powerlessness." The Court has stated that such "suspect" laws must be subjected to "the most rigid scrutiny" if they are to be upheld.

The "substantially related" test falls between the "rationally related" and "compelling interest" tests. It applies to laws which impact upon gender-based classifications. The Court has held that these laws must be held to higher standards than most laws, but not the very high standard applying to "suspect" laws affecting racial and national origin groups. Some have questioned why the Court has fashioned this in-between test for laws dealing with gender. After all, isn't gender "an accident of birth" as much as race or national origin? To date, however, the Court has declined to apply the "compelling interest" test to laws impacting on gender.

Although some laws do not classify on the basis of race, sex, or religion, the Court has ruled that they can still be discriminatory. But a discriminatory *intent* must exist to establish a violation of the Equal Protection Clause, whether or not the *effect* of the law is to discriminate. Justice Lewis Powell, writing for the majority in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), used this distinction to declare that Arlington Heights could refuse to rezone an area to make way for low and moderate income racially-integrated housing. Such an action would not be discriminatory—although it did affect members of minority groups more than it did whites—since it followed an established zoning plan. Its *intent* was not to discriminate. However, Powell offered guidelines to help determine if similar laws intentionally discriminated: did a "clear pattern" of discrimination result from the law; what was the historical background of the law's passage; were there any departures from normal legislative procedure when it was passed?

In recent years, issues of racial equality have included "affirmative action" to provide relief for past discrimination and charges of "reverse discrimination."

Not Race Alone

The Court has of course tackled equal protection cases involving issues other than race. It stepped into the "political thicket" of vote apportionment with *Baker v. Carr*, 369 U.S. 186 (1962). This decision prompted spirited debate over the extent of the Court's jurisdiction and how far its application of the Fourteenth Amendment could reach.

The facts in *Baker* were as follows. Although the Tennessee constitution required equitable apportionment every ten years, legislative districts had not been redrawn since 1901. With the twentieth century's migration to metropolitan areas, urban voters complained that their votes counted for far less than those of their rural counterparts. They appealed to the state legislature and state courts and then took their case to the federal courts, which ruled they lacked the jurisdiction to intervene in such a political issue. Justice Brennan's majority opinion in *Baker v. Carr* explained why the Supreme Court became involved:

> . . . [the appellants'] constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. . . . A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. . . .

Justice Clark wrote a concurring opinion:

> . . . the form of government must be representative. That is the keystone upon which our government was founded. . . . It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long time. National respect for the courts is more enhanced through the forthright enforcement of those rights. . . .

Dissenters Felix Frankfurter and John Marshall Harlan felt that *Baker* allowed too much judicial intervention in political matters and opted for restraint. According to Frankfurter:

> The Court's authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment . . . from political entanglements. . . .

Questions/Strategies

1. *Brown v. Topeka Board of Education* and *Baker v. Carr* both overruled precedents. Explain. (*Brown* overruled *Plessy v. Ferguson*, *Baker v. Carr* overturned *Colgrove v. Green*, 328 U.S. 549 (1946). Justice Frankfurter had written for the majority in *Colgrove*, declaring that voting apportionment was a "political thicket" the judiciary should avoid.)
2. Supreme Court decisions are not self-executing. They must be backed up by laws and statutes, by executive actions, and by force if necessary. The Supreme Court, although the final arbiter of the Constitution, has to rely on the executive branch to enforce its decisions and upon the legislative branch to add statutory substance to them. Give examples which illustrate this point. (The integration of Little Rock's Central High School in 1957, when President Dwight Eisenhower called in the National Guard to uphold *Brown*, and passage of the 1964 Civil Rights Act provide two good examples.)
3. How did Martin Luther King influence our views on racial equality, and on resistance movements in general? For an in-depth look at various leaders' roles in the crusade for civil rights, teachers may wish to assign biographical essays. In addition to the Reverend King, students could profile figures like Malcolm X, Rosa Parks, John Kennedy, and Roy Wilkins.
4. The quest for women's rights has been going on for a long time. In 1971, the Supreme Court began to decide a number of issues bearing on this subject. Beginnning with *Reed v. Reed* in 1971, 404 U.S. 71, trace the Court's rulings which have clarified and extended the rights of women (see box on page 37 for books on women and equal protection).
5. If the Fourteenth Amendment guarantees "equal protection of the law" to all Americans, why did many people consider the Equal Rights Amendment necessary? What arguments have been advanced for and against the amendment? (Law professors Philip Kurland and Ruth Bader Ginsburg debated the issue in the Spring, 1978, *Update* [Vol. 2, No. 2].)
6. Using the guidelines established by the Court in reviewing equal protection issues, indicate which of the following laws or actions violate the Equal Protection Clause of the Fourteenth Amendment (by placing a "V" next to the item), which are protected (by placing a "P" next to the item), and which are uncertain (by placing a "U" next to the item).

- State law requiring a citizen to pay a poll tax before being allowed to vote.
- Private club which refuses to serve a white member's black guest in the dining room or bar.
- State law allowing a property tax exemption for widows but not for widowers.

- State law denying payments for any fifth or succeeding child in a family on welfare.
- State law requiring that 10 percent of government construction contracts be given to minority firms.

Next, divide the class into five groups. Have each group list the reasons why the law or action is or isn't a violation of the Equal Protection Clause, and ask them to reach a consensus on the issue. Have a representative of each group report back to the class on the group's decision and reasoning.

Lesson Highlight

In both this and the previous topics, there were numerous instances where the Court overruled the decision of some legislative body. To provide students with a sense of the various considerations which go into legislative decision making, hand out the Oklahoma legislative strategy which appears on page 57. This strategy asks students to consider the teen-age drinking problem facing the Oklahoma legislature when it passed the law ultimately struck down by the Court in *Craig v. Boren*.

After the students have prepared a law to deal with the situation, appoint five students to a "court" and have them review the law for any possible equal protection violations and report back to the class with their findings. Finally, use this strategy as an opportunity to discuss the relationship between legislative and judicial bodies, what function each serves and why, and whether—as some contend—the judiciary has assumed the role of a "super legislature" in recent years. In this regard, it might be useful to refer to some of Justice Frankfurter's quotes in the apportionment and flag salute cases—*Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)—as arguments for judicial self-restraint.

Isidore Starr is a lawyer-educator widely regarded as the father of law-related education. This strategy is adapted from the book Instructor's Guide to Equal Justice Under Law *(Chicago: American Bar Association, 1985).*

The Evolving Constitution

Voting Rights: Key to Equal Rights?/Secondary

Mary Louise Williams

END SEGREGATED RULES IN PUBLIC SCHOOLS
AN FE LAW NOW
FREEDOM
WE DEMAND
VOTING RIGHTS NOW!
JOBS FOR ALL NOW!
R ALL
T PAY
W!

Courtesy of The Smithsonian Institution

Rally speakers at the March on Washington, August, 1963.

Mooreland-Spingarn Research Center, Howard University

This lesson examines the Fifteenth and Nineteenth Amendments by raising the question of the importance of voting rights in relation to others we have come to call "equal rights." Students are asked to determine this by (1) reading the following information and (2) analyzing the differences among economic, legal, political and social rights. An optional position paper culminates the activity.

For the Student

Read the Fifteenth and Nineteenth Amendments. Notice the wording in each. How do they differ? Is voting the same thing as *equal rights*? This is a familiar term because of the Equal Rights Amendment that recently failed ratification. Why has an equal rights amendment for women and men been considered necessary when the Fifteenth and Nineteenth Amendments gave blacks and women the right to vote? To answer this question, we must take a look at what *rights* have been and have come to mean.

Professor Herman Belz in his book, *Emancipation and Equal Rights* (New York: Norton, 1978), states that *civil rights* is a term that historically referred to *legal rules*. These "legal rules" protect individuals in their daily economic and social lives from hindrance or harm from the government or other individuals. Professors Harold Hyman and William Wiecek, also constitutional historians, state that civil rights were regarded as a legal status defined in the nineteenth century as primarily economic. (See *Equal Justice Under Law* (New York: Harper & Row, 1982).) These rights included the right to own and rent property and have that property protected by police; to contract in areas of labor, commerce or marriage; to inherit and to bequeath; "to be licensed in trade or profession where one's state or community required a license." Civil rights also included the rights to sue and be sued, to be a witness in courts of law, and to travel freely. After ratification of the Fifteenth Amendment, voting was no longer considered a *privilege* selectively given by the political community, but a *political right* which became a part of the changing definition of civil rights.

Social rights—education, moving freely in a society, marrying whom and living where one wishes—were usually considered a matter of personal taste and prejudice. Many Americans did not believe the government should concern itself with discrimination based on color, sex, etc. This was outside the scope of the meaning of civil rights. That had to wait until the 1960s, when the Civil Rights Movement began addressing racial and sexual discrimination, thus expanding the meaning of civil rights. If one were to draw the concept of the changing meaning of civil rights, it would look something like this:

NINETEENTH CENTURY CIVIL RIGHTS		MID 20TH CENTURY CIVIL RIGHTS
Pre-1860s	Post-1860s	
Primarily	Economic	Political
Economic	Some Legal	Social
	Political	More Legal

Thus, the present concept of civil rights results from an evolving process. From basically economic rights in the nineteenth century, the concept of civil rights has grown to include increasing legal and political rights, with social rights included in the 1960s. For a citizen to enjoy all of the civil rights equally before the law is the concept of equal rights.

WOMEN SEEK EQUAL RIGHTS

When the Fifteenth Amendment was ratified in 1868 its Republican authors and abolitionist supporters failed to add the word "sex" to the amendment, which would have given the vote to women (white and black), as well as the black males for whom the amendment was intended. This failure to support women suffrage (the right to vote) resulted in the organization called the Equal Rights Association. This organization was determined to achieve for women not only the vote but all rights which would recognize them as equal before the law. Sojourner Truth, the Negro abolitionist and worker within the Equal Rights Association, expressed her concern: "There is a great stir about colored men getting their rights but not a word about the colored women theirs. You see, the colored men will be masters over the women, and it will be just as bad as it was before. . . ."

Black men began to vote in large numbers with the ratification of the Fifteenth Amendment. But when the carpetbag governments collapsed in the South, political power was recaptured by many of the former slave owners. Since the states still set voter qualifications, they could introduce any number of means of curbing the black man's right to vote. "Grandfather clauses," poll taxes, literacy tests, and the like were used to gradually destroy black suffrage. Blacks in the South were not able to vote in large numbers until after 1965 and 1970, when the Voting Rights Acts were passed suspending all literacy tests.

Women were given their constitutional right to vote in 1920, but they were not content. An Equal Rights Amendment was introduced in 1923 and has been introduced in every Congress since. The various amendments never reached the states for ratification until 1972. That amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." But ratification fell short by three states, and the amendment died in 1982. Obviously, many people feel the amendment is unnecessary, because many state and federal laws are attempting to provide for equality. However, the fact that equal rights amendments have been introduced over and over (after failure of ratification, yet another was introduced in 1982) shows that many people feel that it is necessary.

Student Instructions for Activity

You will be trying to answer the question, "Have voting rights been the key to equal rights?" Get into groups of three or four.

1. Brainstorm and list your economic rights, legal rights, political and social rights. (Don't worry if some overlap.)
2. Try to determine civil rights that supporters of equal rights amendments feel are not adequately protected before the law. Refer to your text books, your own experiences and those of your older relatives and friends, and your own historical understanding. Place a question mark by those civil rights you feel have not been provided equally for blacks and women.
3. Try to determine within your groups if the right to vote has led or will ultimately lead to equal application of the law and equal rights before the law. Recall that the affected groups may not have voted in full force before being granted the right to vote (if they had, there would have been no need to formally assure the right). If that is the case, then the groups secured their right to vote through something else than their power at the polls. What methods did the groups use to win their right to vote? Could these same methods be used after they had won the right to vote, as forms of persuasion to be used on other issues as a complement to the power of their ballots? More specifically, would these minority voters continue to need the support of "majority" voters? If so, how could they win that support?
4. Then decide how you would respond to the question, "Have Voting Rights Been the Key to Equal Rights?"

To the Teacher

A good culminating evaluation of students' understanding would be to assign a position paper asking them to take a position and support it.

Mary Louise Williams is an education consultant with the Los Alamos Public Schools in New Mexico, the New Mexico Law-Related Education Project, and Project Crossroads.

The Evolving Constitution

Hispanics! Immigration! Reform?/Secondary

Mary Louise Williams and Esther V. Cordova May

This lesson, appropriate for 9th through 12th grades, is a simulation/role-play of the House Judiciary Committee hearings on the Immigration Reform and Control Act. The bill was first introduced in Congress in 1982 and finally passed in 1986. This lesson explores the major portions of the act by having witnesses testify for and against certain aspects of the bill. Through role-playing witnesses, students will present testimony which provides demographic data on Hispanics as well as contributions of Hispanics in America.

Objectives

1. To understand the role of committee hearings in congressional consideration of legislation.
2. To examine the provisions of the Immigration Reform and Control Act of 1986.
3. To determine the effect of this act on the Hispanic populations in different regions as well as the society as a whole.
4. To analyze the historical role of Hispanics in the socio-economic development of the United States.

Procedures

1. Distribute, read, and go over with the class the Background Information for the Student, House Committee Roles and Witness Roles. Explain that the students will enact a House Judiciary Committee hearing. Such hearings invite testimony from witnesses, many of whom are experts in their fields. The purpose is to enable the committee to recommend whether the Immigration Reform and Control bill should be amended, rejected, or passed by the entire House of Representatives. Committee decisions are very influential and usually determine the fate of the bills before the entire House.

2. Either have students volunteer or assign committee and witness roles. Other students can be newspaper reporters or observers.

3. During preparation time, have committee members prepare questions for the witnesses while the witnesses prepare their testimony. Warn the witnesses that they will have to respond extemporaneously to committee questions so that they must carefully prepare their role by thinking through the information provided.

4. Prior to class, set up the room for the hearing with the witness chair facing the committee and the committee facing the audience. After completion of the hearing, give the committee time to determine its recommendation—favorable, unfavorable or recommended with amendments. The chairperson will then announce the committee's decision. (Observers may be asked to give their decisions.)

5. Postscript: Point out to the students that the bill did pass, but just barely! In the summer of 1986 the committee voted out a version. The bill was sent to the full House, which refused to bring the bill to the floor for debate because of the controversial provision on guest workers. It finally passed and was signed into law on November 6, 1986.

Amnesty applications began on May 5, 1987, and ended May 4, 1988. By the latter date, 2.1 million undocumented aliens had filed applications. If able to prove residency since January 1, 1982, they could apply for temporary residency. Starting December 5, 1988, these (LAWs)—legalized "temporary residents"—will have until June 1990 to apply for permanent residence. They must be tested for a basic knowledge of English and how the U.S. government works. Permanent residency—"green card" status—can lead to citizenship after five years. The cost of the application was $185 per adult, $50 per child or $420 per family of three or more. Of all the LAW applications filed throughout the country, 71.6% were Mexicans.

Starting on June 1, 1987, undocumented aliens working at least 90 days in seasonal agriculture (SAWs) between certain periods also became eligible and began applying for temporary residence. The cost of the application was the same as for the regular amnesty application. However, residence requirements were much more lenient for agricultural workers. Based on the historical need for Mexican labor to support U.S. agricultural interests, it is not surprising. The law provides that the Departments of Labor and Agriculture can, if faced with a worker shortage, admit "replenishment" workers (RAWs) in 1990. They would be granted temporary resident status with the potential for permanent residency and ultimately citizenship. (*Population Today*, April 1987, May 1987, June 1988).

6. Debriefing is the most important way to determine how much the students understand. Following are suggestions for debriefing questions.

a) Which provisions of the Immigration and Control Act do you think are the most controversial? Why? What are some of the perceptions as to the need for this act? Perceptions as to why it is not needed?
b) What has determined the differences among the various Hispanic groups? What do they have in common?
c) What have been the effects on U.S. society of legal Hispanic immigration? Illegal?
d) What are some of the most important Hispanic contributions to this nation?
e) Having evaluated information regarding the act, do you support the Immigration Reform and Control Act of 1986? Why or why not?
f) What impact will this act have on the Hispanic community? On the society as a whole?
g) Will it solve the problems perceived by its supporters? Will it create the problems perceived by its critics?
h) Should there be a change regarding the numbers of legal immigrants admitted into the U.S.? This act did not change the present ceiling of 270,000 plus family members of U.S. citizens.

Background Information for the Student

This simulation/role-play of a hearing before the House Judiciary Committee provides an opportunity to learn about the recently passed Immigration Reform and Control Act and how it effects Hispanics. This 1986 law addresses, in part, growing concern over the increasing numbers of immigrants, many of whom are Hispanics, who are legally and illegally immigrating into the United States.

Some of you will be role-playing witnesses. These witnesses will testify before the House Judiciary Committee presenting the witnesses' perceptions, both positive and negative, of the impact of these immigrations on the U.S. Hispanic population and the U.S. society as a whole. This simulation also serves as a reminder of the long history and diversity of the Hispanic peoples in North America. As students role-play witnesses, Hispanic contributions to the building of the U.S. society will be presented.

Hispanic history in the Americas predates the British or Anglo settlement of North America. It is important for the understanding of this simulation to review the history of Hispanics in the U.S.

It will be remembered that Spain began her explorations of the Americas with Columbus' first voyage in 1492, resulting in the discovery of San Salvador and Hispaniola (now the Dominican Republic and Haiti), as well as Cuba. Returning in 1493, he discovered Puerto Rico and Jamaica. At this time, colonization began in the West Indies. Further exploration and colonization in Florida, Mexico, Central and South America, and the southern half of North America, were under way by the end of the sixteenth century, and permanent imprinting of the Spanish culture was taking place. There was intermarriage with the Indians. Missions and villages were built, land was tilled, and cultures were blended. But Spain's greatness peaked and declined.

In the first two decades of the 1800s, Spain's internal weaknesses resulted in a loss of control of her external empire. The region east of the Mississippi, which included Florida, had been sold in 1819 to the United States. Discontent with Spain's treatment led to revolt throughout the New World. By the 1820s, Mexico had won its independence and claimed Texas and the southern half of the continent, which included what is now New Mexico, Arizona, California, parts of Colorado, Utah, and Nevada. Spanish colonies in Central and South America had become independent. Only Puerto Rico and Cuba remained as Spanish colonies in the western hemisphere.

TEXAS

In 1836, with help from the United States, Texas declared its independence and became a republic. The U.S. declared war on Mexico in 1846. In 1848, as a result of the war, the northern half of Mexico became part of the United States through the Treaty of Guadelupe Hidalgo. It is estimated that there were some 60,000 Mexicans in New Mexico; 7,500 in California; 5,000 in Texas; 1,000 or less in Arizona; and small settlements in what is now Colorado. (Moore and Cuellar, p. 12). The Mexican citizens who elected to stay rather than emigrate to Mexico were promised through the treaty to receive "all the rights of citizens of the United States." Witness testimony will determine if this promise was kept. Article X, recognizing all Spanish land grants in the Southwest as valid, was deleted by the U.S. Senate before ratification on March 19, 1848. (Weber, pp. 162-163). This set the stage for land-grant title disputes that persist to this day in New Mexico.

The Immigration Reform and Control Act

Main Provisions of the Immigration Reform and Control Act (Reprinted from *Population Today*, Bureau of Demographic Information, Inc., October 1986).

1. **Employer Sanctions: Civil penalty fines for knowingly hiring illegal aliens start at $500 per alien for a first offense. Employers can also receive criminal penalties (maximum prison sentence of six months) for a "pattern or practice" of violation.**
2. **Amnesty: Aliens able to prove they have lived in the U.S. since before January 1, 1982, can apply for temporary resident status for a year; then permanent resident status for five years; then United States citizenship.**
3. **Agriculture: Illegal alien farmworkers may similarly gain legal status if they worked in the U.S. at least 90 days in the year prior to May 1, 1986. (This provision addresses the concerns of Western growers about sufficient labor supply.)**
4. **Aid: The federal government is to spend $1 billion per year for four years to reimburse state agencies for benefits given aliens if the need becomes apparent.**
5. **Identification: No national ID card is called for at this time. Employers are required to ask job applicants for documents proving either citizenship or resident alien status. (The bill does give the president power to implement some system to identify legal employees if the need becomes apparent.)**

Unchanged from the Immigration Act of 1965 and subsequent amendments:

1. **Ceiling of 270,000 immigrants, with a maximum of 20,000 per country.**
2. **Preference Requirements: Certain professional or job skills or family relationships make one person more desirable for immigration than another. For example: Second Preference status is given to spouses and unmarried adult children of permanent resident aliens. Fourth Preference status is given to married children of U.S. citizens.**
3. **Spouses, unmarried minor children, and parents of U.S. citizens are exempt from numerical quotas or preference requirements.**

Unchanged from the 1980 Refugee Act:

Individuals are allowed to enter if they are unable or unwilling to return to their own country because of a well-founded fear of persecution or harm. This persecution or harm stems from their race, religion, politics, or nationality.

In Texas between 1840 and 1859, all Mexican-owned land grants, with the exception of one, passed into Anglo ownership. With little or no land and unclear titles to that which was claimed, Mexican cattlemen were left to work as hired hands on Anglo ranches. As Texas turned more and more to cotton, Mexicans supplied much needed labor where slaves were either too expensive or unavailable. As a source of cheap labor among a growing Anglo majority that came to regard them as inferior, Mexican-Americans in Texas were relegated to a position of political, educational and social inequality. (Moore and Cuellar, p. 14).

NEW MEXICO

Because there was a Hispanic majority, New Mexico was a different story. "During the early decades after the conquest there is little evidence that the Mexican population was looked down upon or discriminated against on the basis of their ethnic differences per se." (Gonzales, p. 80). Nancie Gonzales goes on to point out that intermarriage between Anglo men and Mexican women cut across all classes and was very common. However, these intermarriages often resulted in the loss of Hispanic control of land holdings. In business and politics, Mexicans and Anglos worked together. The territorial legislature was dominated by prominent Hispanic families. This cooperation was made evident in the original constitution, which specifically provided for protection of the rights of the Hispanics. But this peaceful accommodation began to change prior to the turn of the century.

For years the Spanish-speaking natives were confronted with a legal system foreign both in origin and language. Thousands of acres of Hispanic lands, many of which were land grants from the King of Spain, were transferred both legally and illegally to Anglos. The new railroads brought in day-labor opportunities for the Hispanics, but mineral exploitation and marketing opportunities for the Anglos. Nontheless, Hispanics in New Mexico have continued to be a vital part of the economic, social and political life of the state.

ARIZONA

Arizona, with a small Hispanic population, was dominated from the early territorial days by Anglo money and influence. Mining was the major economic force in the state, which meant that several company towns grew up, including Bisbee and Morenci. The labor market was small so Mexicans from south of the border and Mexican-Americans from the border towns were brought in. "From the beginning there was rigid separation by occupation, which meant segregation of the Mexicans from the Anglos, with such additional forms of segregation as 'Mexican' shopping hours in the company store." (Moore and Cuellar, pp. 16-17).

CALIFORNIA

Early in the nineteenth century, American contact with California increased and Californios welcomed the Anglo-Americans as friends. Anglo trappers, sailors and traders often married California women and were given large sections of this beautiful, resource-rich land. (Acuna, p. 95). For Anglo expansionists, however, California had become increasingly more valuable as trade with Asia flourished. As early as 1835, President Andrew Jackson authorized diplomatic agents to Mexico to buy San Francisco Bay and the northern part of Alta California. Failure to negotiate the purchase, however, did not thwart intense interest.

By 1842, when gold was first discovered in southern California, ". . . the U.S. minister to Mexico praised California's potential, proposing that efforts to acquire California be renewed." (Acuna, p. 95). The expansionists of the U.S. were then ready to provoke any situation which would provide an excuse for conquest. The excuse came in what is know as the Bear Flag Rebellion. This provocation was created and supported by agents of the U.S. government with the purpose of acquiring the long desired Pacific coast with all of its resources, especially gold.

Miners by the thousands moved in with a spirit of lawlessness and prejudice. " 'A greaser is a greaser' even if he owned 35,000 acres of land and was pure Castilian. . . . Mexicans were taxed, lynched, robbed, and expelled." (Moore and Cuellar, p. 18). Natives of the land for many generations were "by 1900 hopelessly inundated by the tide of Anglo immigration, reduced to landless laborers, and made politically and economically impotent." (Moore and Cuellar, p. 20.) This is still the situation today, but the increasing number of Hispanic immigrants could change the political balance of power.

PUERTO RICO

After the Spanish-American War of 1898, the United States acquired Puerto Rico through the Treaty of Paris. Puerto Rico, lying east of Cuba and the Dominican Republic, was lost by Spain some 390 years after the Spanish had established its first settlement at San Juan Bay. Through the Jones Act of 1917, Puerto Ricans were granted American citizenship but were given little say in their own political policies. In 1947 Congress granted them the right to elect their own governor. Commonwealth status was approved by a plebiscite in 1951, which gave Puerto Ricans control over their internal affairs and Washington control over their external affairs.

Instructions to the Witnesses

The time is the Spring of 1986. The place is the Rayburn Building, Washington, D.C. You are testifying for your particular interest group. Your group has a vital interest in getting the Immigration Reform and Control Act passed, rejected, or amended. Study the bill and its provisions, the information presented in your witness role, and the background information. Determine your position on each provision of the bill using this information.

Prepare your testimony (a speech of persuasion) to be three to five minutes in support of your position on the bill. Begin your testimony by thanking the committee for allowing you to testify. Avoid reading the testimony; this will enable you to maintain eye contact with the committee members. Be as persuasive and sincere as possible.

The committee can interrupt your testimony at any time to ask you questions. Be ready to give answers which are consistent with your role.

Instructions to the House Judiciary Committee

There should be a chairman who conducts the hearing and six members of the committee. The time is Spring 1986. The place is the Rayburn Building, Washington, D.C. As the House Judiciary Committee, you will hear testimony of witnesses on the Immigration Reform and Control Act who will be for and against certain provisions of the bill. After they present their testimony, you should ask them questions about their positions and reasons for those positions. Don't be afraid to ask difficult, penetrating questions. That is how you will determine the validity of their positions which will help you in determining whether or not the bill is in the best interest of the nation.

CHAIRPERSON

The chairperson calls the meeting to order and asks for the witnesses to present testimony in the order listed. Allow between three and five minutes for testimony and questions. After each witness concludes his/her formal testimony, ask your fellow committee members if they have any questions to ask the witness. You as chairperson may also ask questions. After all the witnesses have spoken, recess the hearing and find a quiet place where you and the committee can decide the merits of the bill. When you reach a decision, announce the decision either to recommend the bill for full House consideration, reject the bill, or propose amendments to the bill.

COMMITTEE MEMBERS

Take notes as each witness testifies. Keep lists of reasons for and against the bill as you hear testimony. Prepare questions to ask each witness pertaining to his/her testimony and perceptions of the bill. Don't hesitate to ask probing questions. Your job is to try to get as much information as possible about the underlying reasons for the different positions.

After you have heard from all of the witnesses, the committee will discuss and then vote on whether to recommend the bill to the entire House for its consideration, reject the bill, or propose amendments. The House, as a rule, tends to follow the committee's recommendation. Therefore, your decisions will strongly influence, if not determine, the bill's passage or rejection. So give serious thought to the consequences of your committee's decision.

In practice Congress still has absolute power over Puerto Rico.

Improvements in sanitation, education, and economic opportunities at first raised the standard of living. But gradually the small farmer lost his land as plantations, many owned by absentee owners, became larger in size and fewer in number, growing two crops—tobacco and sugar. With Puerto Rico's markets dependent on the American market, its economy collapsed in the Crash of 1929. The Great Depression of the 1930s resulted in 60% unemployment in Puerto Rico. The New Deal and the war-time activity of World War II helped to solve some—but by no means all—problems. (Faulkner, pp. 560-562).

After the war there was a population flight of these U.S. citizens to the east coast of the U.S., at the end of which there were more Puerto Ricans in New York City than in the Puerto Rican capital of San Juan. (Morison, p. 719). Some 800,000 Puerto Ricans, one third of the island's population, left their island and took up residence, with mixed economic success, in cities in the East and as far west as Chicago. Puerto Ricans make up less than 25% of all Hispanics living in the U.S. (Rivera, p. 141).

CUBA

By the Treaty of Paris of 1898, Cuba received its independence from Spain. It went under the control of the United States through the Platt Amendment of 1901, attached to Cuba's new constitution. These provisions gave the U.S. the right to intervene in any way to preserve the political and financial independence of Cuba. This control was supposed to come to an end in 1934. But because Cuba was situated close to the Panama Canal and only 90 miles from Florida, the United States wanted to continue to control Cuba.

United States businessmen had already gained economic control. By 1924, 66% of Cuban imports were from the U.S., with 83% of its exports going to the U.S. By 1928, 75% of Cuban sugar production was in U.S. control (that number declined to 40% by 1956 because of unstable markets). Eighty-five percent of the foreign investment in Cuba came from the U.S., which meant American control over Cuba's efforts to determine its own industrial development. (Sherwin, p. 60).

With such heavy American investments and interests in the Cuban economy, it followed that "friendly governments" were a necessity. From 1934 to the overthrow of the Cuban government in 1959, the U.S. controlled Cuban politics. During President Fulgencio Batista's last seven years in office, Cuba's economy was booming. Those who supported him were granted concessions, owned land and businesses, and held political offices. "Never were Cubans richer . . . . In fact, under Batista, Cuba had everything—except liberty." (Herring, p. 405). For Batistia's critics, many of whom suffered economically, there was growing repression, terrorism and violent reprisals. Fidel Castro's revolution in 1959 was economic as well as political. Emphasizing economic reform, Castro began to nationalize farms, businesses and education. As a result, half a million Cubans fled, seeking political refugee status in Miami, Florida. (Sherwin, p. 65). By the 1980 census there were 800,000 persons of Cuban origin in the U.S., concentrated in four states—Florida (470,000), New Jersey, New York and California.

Then in 1980 came the 125,000 "Mariel refugees," Cubans who had elected to leave through the Cuban port of Mariel. Castro included 2,000 convicted criminals among the refugees. (Segal, p. 120). The 1959 refugees, who were, on the whole, well-educated and had skills and money, have transformed Miami into the "capital of the Caribbean." The 1980 refugees, as a group, came with few skills and education. Here, then, were yet different groups of Hispanics coming to join the already established Hispanic communities in the U.S.

HISPANICS IN THE U.S.

So what have we determined? Hispanics in New Mexico, Arizona, California, Texas, and other parts of the Southwest have origins dating back to the Spanish conquistadores and subsequent migrations from Mexico and Latin-America. Many have migrated to Chicago and other areas where railroads and farm work have provided incomes and homes. In Florida, the Hispanics are of Cuban origin, with others coming from the Dominican Republic. In New York and New Jersey there is a heavy concentration of Puerto Ricans. Each regional group has unique cultural differences based on which part of the Spanish empire it came from, the geographical influences of the region it settled in, and the cultural influences of indigenous Indian populations.

Witness Statements

MEMBER, SELECT COMMISSION ON U.S. IMMIGRATION AND REFUGEE POLICY

Our commission, created by Congress in 1978 and appointed by President Carter, was chaired by Rev. Theodore M. Hesburgh, president of Notre Dame. We issued our recommendations in March 1981. In March 1982 the Simpson-Mazzoli bill was introduced incorporating much of what we had recommended. It died, along with a second version, before becoming law. In 1985 a third version, somewhat different from the commission's recommendations, was reintroduced in both houses. As you know, the bill has already passed the Senate. So here we are before the House committee with a version which has some major differences from the commission recommendations. I would like to review those recommendations.

We had urged Congress to raise the worldwide ceiling on legal immigration from the 1980 number set at 270,000 per year to 450,000 per year for five years. This two-thirds increase would have thinned out the backlog of accumulated applications. We strongly recommended worker identification and employer sanctions to protect the employer and the employee. The first measure would help employers determine if applicants have a legal right to be working in the U.S. The second would help ensure that employers do not violate federal employee safety laws when dealing with illegal immigrant employees.

The point is illegal immigration has done harm to this society, not because of the bilingualism or ethnic tensions which some people fear, nor because of concern for national security. "Most serious is the fact that illegality breeds illegality. The presence of a substantial number of undocumented illegal aliens in the U.S. has resulted not only in a disregard for immigration law but in the breaking of minimum wage and occupational safety laws and statutes against smuggling as well." (Segal, p. 128). This smuggling of illegal workers has resulted in inhuman treatment and tragic deaths. I urge that this bill be passed with amendments dealing with some means of worker identification and a raised annual worldwide ceiling.

OFFICIAL, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

This bill as written must be passed this year. The INS, the Immigration and Naturalization Service, registered 570,009 new legal immigrants in 1985. The number 570,009 for one year is greater than what all other nations combined accept annually. Remember that the 1980 ceiling was set at 270,000. The additional 300,009 reflect the policy of "reunification of families" and political refugees. Of this number, Asians accounted for 46 percent and Latin Americans, mainly Mexicans, about 37 percent.

The real problem is illegal immigrants. An illegal immigrant is defined as "a noncitizen physically present in the U.S. who entered the country illegally and has not regularized his or her situation, or who has violated his or her terms of entry." Illegal immigrants are estimated to be arriving at some 100,000 to 300,000 a year, possibly up to half a million. Census Bureau researcher Jeffrey Passel estimates that there were between 2.5 and 3.5 million illegal immigrants in the U.S. as of 1980, although only 2.1 million were counted in the 1980 census. But Los Angeles County and INS officials maintain that L.A. alone has two million undocumented residents. Mayor Edward Koch believes that there are at least one million such residents in New York City.

Ninety-five percent of INS apprehensions are people attempting to cross the U.S.-Mexican border. We estimate Mexicans make up 50 to 60 percent of the illegal immigrants. We also make arrests on the U.S.-Canadian border and ports of entry from Puerto Rico, where illegal aliens attempt to come in with Puerto Ricans, who are U.S. citizens. In the early part of 1986, illegals apprehended were from 93 countries. This means that the number of non-Hispanics entering through Mexico is increasing. My point is we have lost control of our borders. But more importantly, we have to ask what effect is this number of illegal immigrants having on our society? (Bouvier and Gardner, pp. 36-37).

DEMOGRAPHER, BUREAU OF DEMOGRAPHIC REFERENCE, INC.

Demographers study human populations and their statistical changes or trends. We then interpret and publish the facts and implications of these trends. We attempt to draw no conclusions which reflect political or social bias. Rather, we use statistics to determine what population changes can mean to a society. Societies must have population data in order to plan for the future. Governments need the data to set policy. I am testifying as to certain facts for the committee to think about in terms of the bill. The fertility rate needed to keep population stable (meaning no growth) is 2.1 births per woman. Current fertility rates for American women are 1.8 births per woman, which is below replacement. This means that if such a fertility rate remains and there is no immigration, by the year 2000 the total work force would be in decline. The United States would have a labor shortage. But even with the same low fertility rate of 1.8 births per woman and immigration of 1 million a year, the work force would continue growing. So it could be concluded that immigration is necessary to ensure a work force for the future. However, one must be careful in drawing such conclusions. The way machines are

2146

displacing workers, perhaps we will not have an increasing demand for labor in the future. Already, machines are replacing migrant workers in agriculture. The kind of jobs available may change drastically. (Bouvier and Gardner, p. 32).

REPRESENTATIVE OF STATE GOVERNMENTS

As a representative of the interests of state governments I speak in favor of the provision dealing with aid to reimburse state agencies for benefits given to aliens. It appears that immigrants are concentrating in five states—California, Texas, New York, Florida, and Illinois—placing a heavy financial burden on the resources of these states.

California and Texas receive about 40 percent of the immigrants. Population projections for California indicate a growth from 24 million in 1980 to 43 million in 2030, with 38 percent of the population being Hispanic, 38 percent non-Hispanic whites, and nearly 16 percent Asian, with the black population slipping to less than 7 percent. Texas is projected to grow from 16 million in 1985 to 30 million in 2035. Non-Hispanic whites will make up 43 percent of the population, Hispanics 39 percent, blacks 11 percent, and Asians 6 percent. (Bouvier and Gardner, p. 27). Some people are concerned about these changes in the ethnic composition of these states.

Another concern has to do with the cost of illegal aliens to our states. In an INS study made in 1983 it was estimated that one million illegal aliens cost $2.25 billion a year to federal, state and local governments in police services, education, welfare benefits, loss of jobs to citizens, etc. Some $995 million was estimated to have been paid in taxes by these one million illegal aliens. That is a net annual loss of $1.26 billion coming out of the taxpayers' pockets. Those specific taxpayers are state taxpayers to a large degree. Los Angeles County's Department of Health reported the 76 percent of the babies born in county public hospitals in the fiscal year ending June 1986 were to illegal alien mothers. This cost to the county came to some $14.8 million in medical and obstetrical costs alone. (Bouvier and Gardner, p. 31).

Another concern has to do with the educational level of immigrants, in particular those from Latin America and Mexico. In 1980, of the total U.S. population 25 years and older, 67 percent had at least completed high school. High school graduates accounted for 82 percent of immigrants from Africa, 73 percent from Asia, 41 percent from Latin America and only 21 percent from Mexico. It raises questions about the kinds of work available for them and the resulting ethnic/class structure. (Bouvier and Gardner, p. 23).

Therefore, the governments of these five states plead with you to keep the aid provision in the bill!

REPRESENTATIVE, UNITED FARM WORKERS

My name is Roberto Santiago Pena. I represent the United Farm Workers. I joined Cesar Chavez in the 1960s in the struggle to unionize the farm workers in California. I am here today in support of the bill. We strongly support amnesty, employer sanctions and worker identification. Until there is some control over the numbers of immigrants joining the labor force making up farm workers, we have little hope of raising wages or controlling the conditions under which we live and work.

Mexicans were brought into the U.S. during World War II and the Korean War period under the Braceros program, which was terminated in 1964. I came to the U.S. in 1944 at the time of the first program. We supplied the U.S. with 10 million man-days of farm labor, harvesting crops estimated at $432 million, which supplied food not only for the military but the civilians. (Meier and Rivera, p. 207). The Mexican and U.S. government regulated working conditions and hours. Texas wasn't in the program. They preferred an "open-border policy," which meant they didn't require regulation or standards! There have been many documented cases of collusion with the Immigration and Naturalization Service and state employment agencies in Texas. (Meier and Rivera, pp. 223-224).

If guest workers have to be brought in for a period of time, let it be done under mutual agreement with the governments of Mexico and the U.S., with wages and working and living standards carefully regulated. Then it doesn't compete with the gains we farm labor union workers have struggled so hard for.

But, I am also raising the question, would it not serve both countries better—the U.S. and Mexico—to help the Mexican economy in such a way that Mexican citizens would not need to immigrate either legally or illegally in such large numbers into the U.S.? I am suggesting that the immigration bill is not the real issue. The issue is finding jobs in their own nation, which the U.S. could help create through economic cooperation with their government.

WITNESS FROM EL PASO, TEXAS

My name is Antonio Salazar. I am the owner of the five Portales Markets in El Paso. I have approximately two hundred full-time employees with a wide range of skills. Due to the fact that the majority of my clients are Spanish speaking, so are the majority of my employees. However, in the twenty-eight years that I have been in business, I have never hired any worker in any capacity who was not a legal resident or a citizen of the United States.

I am here today to urge passage of the Immigration Reform and Control Act. And I strongly support the employer sanctions. As an employer I favor this provision so as to guarantee small businesses such as my own the opportunities to compete under the law. I believe that if the same rules of competition apply to all of us, and if those rules are enforced, we can all profit at a level that will allow large and small businesses a measure of success. Furthermore, I recommend passage of this bill with employer sanctions as a matter of personal concern. As a Hispanic merchant I want to ensure that my community understands that whatever profits and benefits I enjoy have been earned legally, and not derived from exploiting other Hispanics.

WITNESS FROM NEW MEXICO, EX-GOVERNOR JERRY GALLEGOS

I testify today as an ordinary citizen and not as an ex-governor of New Mexico. I support the concept of a bill controlling illegal immigration but I am very much opposed to employer sanctions. Employer sanctions will become yet another excuse for Anglos to discriminate against Hispanics. Even though a Hispanic may be a

Sources Used in the Preparation of This Lesson

Acuna, Rodolfo. *Occupied America, A History of Chicanos.* Second Edition. New York: Harper & Row, 1981.

Bouvier, Leon F. and Robert W. Gardner. "Immigration to the U.S.: The Unfinished Story." *Population Bulletin*, Vol. 41, No. 4. Washington, D.C.: Population Reference Bureau, Inc., November 1986.

Elwood, Ann. Milton Finkelstein, Consultant. *Our American Minorities.* New York: Globe Book Company, Inc., 1978.

Faulkner, Harold Underwood. *American Economic History.* Eighth Edition, New York: Harper & Row, 1960.

Garcia, Chris F. and Rudolph O. de la Garza. *The Chicano Political Experience: Three Perspectives.* North Scituate, Mass.: Dukbury Press, 1977.

Gonzalez, Nancie L. *The Spanish-Americans of New Mexico.* Albuquerque: University of New Mexico Press, 1967.

Herring, Hubert. *A History of Latin America.* Third Edition, New York: Alfred A. Knopf, 1968.

* Levine, Barry B. "Miami: The Capital of Latin America." *The Wilson Quarterly.* Washington, D. C., Winter 1985.

* McWilliams, Carey. *North From Mexico, The Spanish Speaking People of the U.S.*. New York: Greenwood Press, 1968.

Meier, Matt S. & Feliciano Rivera. *The Chicanos, A History of Mexican Americans.* New York: Hill and Wang, 1972.

* Moore, Joan W. and Alfredo Cuellar. *Mexican-Americans.* Ethnic Groups in American Life Series, Milton M. Gordon, Ed. New Jersey: Prentice-Hall, Inc., 1970.

Morison, Samuel Eliot and Henry Steele Commager. (William Leuchtenburg, Ed.) *The Growth of The American Republic.* Sixth Edition, New York: Oxford University Press, 1969.

Nava, Julian. *Viva La Raza*! New York: D. Van Nostrand Co., 1973.

Pitt, Leonard. *The Decline of the Californios.* Berkeley: University of California Press, 1971.

* *Population Today.* Washington, D.C.: Bureau of Demographic Information, Inc., October 1986, April 1987, May 1987, June 1988.

* Rivera, Pedro A. "The Migrants (Puerto Rico)." *The Wilson Quarterly.* Washington, D.C.: Spring 1980.

* Santiago, Jaime. "One Step Forward (Puerto Rico)." *The Wilson Quarterly.* Washington, D.C.: Spring 1980.

* Segal, Aaron. "The Half-Open Door." *The Wilson Quarterly.* Washington, D.C.: New Year's 1983.

* Sherwin, Martin J. and Peter Winn. "The U.S. and Cuba." *The Wilson Quarterly.* Washington, D.C.: Winter 1978.

* Weber, David J., Ed. *Foreigners in Their Native Land, Historical Roots of the Mexican Americans.* Albuquerque: University of New Mexico Press, 1973.

(Starred sources are recommended to students for further reading.)

citizen well able to prove himself on the job, it will enable the Anglo employer to legally say, "I can't use you. You may be an illegal immigrant." The alternative to this is, of course, the forcing of all Hispanics to have identification cards. That too is an intolerable system of differentiating among citizens. We have enjoyed economic gains in the job market because of the 1964 Civil Rights Act and the resulting affirmative action programs. Employer sanctions will undo all that has been gained. I urge you to drop employer sanctions.

WITNESS FROM CALIFORNIA, MONICA SILVA, PH.D.

My name is Dr. Monica Silva. I am Associate Professor of History at the University of California, Lone Pine Campus. I am here today to advocate passage of the bill with an amendment which would raise the worldwide ceiling of legal immigrants to 450,000 persons per year, for a period of five years. I then propose that after five years the ceiling be dropped back to 270,000 persons per year, as set in the 1980 amendment to the Immigration Act of 1965.

My observation during the evolution of this bill has led me to conclude that there are those who support this piece of legislation only if the 270,000 ceiling is maintained. And the reasons for this seem to be that they are seeing this bill as a "stop-gap measure" for slowing, if not stopping, what is seen as "the browning of America." The fact is that a worldwide situation exists which demands our having to make changes in our perceptions of immigration in general and of those immigrants who ultimately live next door to each of us, whether here legally or illegally. Realistically, Anglo-America's prejudices against immigrants can no longer be accommodated. For it is the prejudices that are out of phase and out of place, not the immigrants.

Historically, Anglo-America's xenophobia can be traced back to the "Black Legend" of the 15th and 16th Centuries, a legend which Latin-American historian Hubert Herring says, "perpetuates the conviction that Spaniards were and are wicked, cruel, wanton, bigoted, and foolish." Furthermore, in retrospect, one can see that "Spain had to be wrong so that France, Holland, and England, and later the United States, could be right." (Herring, p. 64). For Anglo-Americans, this rightness has served as the justification for their resentment of foreigners and immigrants. The "Black Legend" has also served many Americans well in their opposition to all foreigners, as well as Native Americans [Indians] and Mexican Americans. Attitudes which have their origins in our "Black Legend" have also led to such laws as those which restricted foreigners from working in the California gold mines and prohibited additional foreigners from particular parts of the world from immigrating to this country, simply because of skin color. I urge that this bill be passed with amendments that address the real problem of immigration rather than those based on fears of people different from ourselves.

WITNESS FROM ARIZONA, JUAN BASILIO RAMOS

I am Juan Basilio Ramos. I am a third generation resident of Tucson, Arizona. I am a Mexican-American. My great grandfather, Juan Luis Ramos, his wife Manuelita, and their children came to Tucson in 1882 from Sombrerete, Zacatecas, Mexico. In the summer of 1882, Juan Luis Ramos and his friends and relatives were promised jobs and housing in the U.S. by one of many Southern Pacific Railroad representatives sent to the interior of Mexico to recruit cheap laborers. Mexican laborers were to replace the Chinese workers who had been eliminated from the work force by the Chinese Exclusion Act of 1882. Those workers who agreed to work for Southern Pacific were given one way legal passage to the U.S. for themselves and their families.

When Juan Luis, Manuelita, and their many compatriots arrived in Tucson they were indeed given jobs and the promised housing—railroad boxcars on side tracks, conveniently mobile. With such mobility the company could easily move the workers and their families anywhere in the system where the company needed or wanted them to be. The jobs given were "Mexican jobs," meaning the dirtiest and hardest jobs in the system. In twelve hours a day, six days a week, in the Arizona sun, they earned just enough money to keep the family fed. Therefore, as soon as my grandfather, Manuel Ramos, and his two younger brothers were old enough to carry a pick and shovel, they too went to work for Southern Pacific.

In 1902, the young Manuel Ramos, his wife Teresa, and their infant son, Tomas, moved out of the Southern Pacific boxcar community. Tomas Ramos learned English, attended school regularly, and by the time that he was eighteen years old had graduated from high school. Slowly, but persistently, the rest of the Ramos family fled their boxcar addresses, moving into town determined to begin educating their children.

Unlike his father and grandfather, Tomas Ramos did not have to work for the railroad. Instead, Tomas Ramos, my father, concentrated his and my mother's energies into a small hardward business, which has provided them the means to give me, my brother, and my sister college educations. Despite discrimination, hardship and exploitation, the Ramos family has proven our system works to the benefit of the nation and of the individuals concerned. Therefore, I appeal for the passage of this bill with amnesty provisions so as to give illegal immigrants the dignity and freedom to seek their opportunities within the laws of this country. I firmly believe one of the advantages the Ramos family enjoyed in the struggle to succeed was the knowledge that we had been in this country legally, and as such were afforded all the rights and privileges of citizens living under the law. The result has been law-abiding citizens with a deep and sincere respect for the law and for this country.

Mary Louise Williams is an education consultant with the Los Alamos (New Mexico) Public Schools, the New Mexico Law-Related Education Project, and Project Crossroads. Esther V. Cordova May is instructor and district coordinator, Cuba (New Mexico) Independent Schools; district coordinator for the New Mexico Law-Related Education Project; and former instructor, Chicano Studies Department Contra Costa College, San Pablo, California.

The Evolving Constitution

Unincorporation/Secondary

Jack Hanna

The First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ."

How can this amendment be construed to apply to state and local government action, since it clearly limits its coverage to Congress? It can't by itself. However, the Supreme Court since the 1920s has gradually applied the Bill of Rights to the states via the Fourteenth Amendment, through a process called incorporation.

There is a strong school of thought in judicial circles that believes the incorporation doctrine is bad law. The focus of this activity is to assume that the incorporation doctrine is dismantled and that the United States Constitution's Bill of Rights does not apply to the states.

Objectives

1. Students will understand the doctrine of incorporation.
2. Students will analyze the impact of dismantling incorporation on their state and other states.
3. Students will examine their state's Bill of Rights.
4. Students will discuss the impact of dismantling incorporation on various minority groups.

Procedure

1. Ask students why the Bill of Rights applies to states.
2. Distribute a copy of the Fourteenth Amendment, Section 1, or copy it on the blackboard, or read it.
3. Define incorporation—the process of gradually applying the Bill of Rights to the states through judicial interpretation of the meaning of Section 1 of the Fourteenth Amendment.
4. Ask students to name as many rights to which they are entitled under the Constitution as they can. List these on the blackboard.
5. Divide your class into 4-6 groups and distribute the attached handout to your students.
6. Obtain a copy of the Bill of Rights from your state constitution. List for students those rights protected by the state constitution and those not. List rights existing

under the state constitution that don't exist under the U.S. Constitution.

7. Discuss with students the process for amending your state constitution. Compare this process to the process for amending the federal Constitution. Is it more or less difficult? If it is less difficult, discuss with students the relative security of rights protected by state constitutions.
8. Make sure your students discuss the impact of dismantling the incorporation doctrine on the following areas of law: Prayer and religion in schools; freedom of speech, freedom of press; right to bear arms; freedom of religion; right to vote; right to a lawyer; right to a jury trial; child labor; cruel and unusual punishment; right to privacy; corporal punishment; abortion. Make sure your students discuss the possible impact of dismantling incorporation on the following groups in your state and other states: Minors, women, American Indians, blacks, Asian-Americans, Jews, Catholics, Protestants, Hispanics, white ethnic groups, poor whites, gays and lesbians, non-citizens (aliens), males.

Jack Hanna is a lawyer/educator who directs law-related education programs for the South Carolina Bar.

Handout

Imagine for the moment that all federal judges appointed during the last ten years were of the opinion that the incorporation doctrine is erroneous, and that after waiting for the right case they overturn the entire line of cases applying the Bill of Rights to the states. Thus, the Bill of Rights once again only applies to action taken by the federal government, notwithstanding the Fourteenth Amendment.

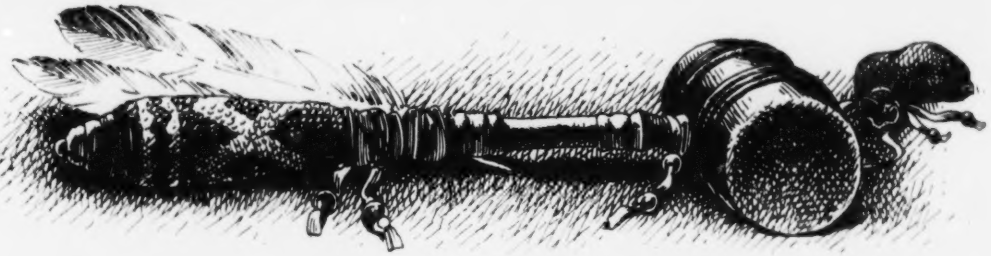
Now you must decide the following:

1. **What rights might be given up by you and the citizens of your state?**
2. **What are the benefits of dismantling the incorporation doctrine?**
3. **What groups might be affected by dismantling incorporation?**
4. **What national issues would be affected, changed, or become different according to which state a person is in?**
5. **What effect on people traveling from one state to another would this decision have?**

The Evolving Constitution

Indians and the Law/Secondary

Ronald F. Cold



Tom Herzberg

The conflict between Indian tribal law and state and federal law continues to erupt from time to time. Often, such disputes have focused on interpretation of Indian hunting rights as granted by treaty.

In 1987, several such situations attracted national attention. In October, near the town of Kamiah, Idaho, a Nez Perce Indian shot and killed a rare bighorn ram. Although the Indian was presumably within his legal rights, the act infuriated local residents who had come to look upon the ram as a community pet. The rare animal was shot on private land within the Nez Perce reservation.

In Wisconsin, special hunting privileges enjoyed by the Chippewa tribe are being assailed by conservationists, wildlife officers and legislators. While the regular deer season in Wisconsin is nine days, with a limit of one to two deer per hunter, the Chippewas' season extends to four months. Although the Chippewas set a limit on their total deer harvest (in agreement with the state), there are no individual limits, with the result that some Indians shoot over 20 deer per season. Some groups have advocated the abrogation of treaty rights such as these, which they feel are too expansive and unreasonable.

In Florida, a Seminole tribal chief became embroiled in a prolonged legal battle after he allegedly shot and killed a rare Florida Panther. In addition to being the state animal, the Florida Panther is one of the most endangered species on earth. It is estimated that fewer than 30 of the animals remain alive in the wild. The panther is protected by state and federal law.

The Seminole chief, Jim Billie, admitted that he killed a "cat" on the Seminole's Big Cypress Reservation in December of 1983. Billie was charged by the state of Florida and the U.S. government with the violation of endangered species laws.

Billie and his attorneys maintained that the federal and state laws did not apply to the Seminole Reservation. They argued that treaty rights provided unrestricted hunting privileges on the reservations. Moreover, Billie said that his First Amendment rights to practice his religion had been violated. Various parts of the panther have religious and medicinal value in the Seminole culture.

After four years of legal wrangling (which included a dismissal, a reinstatement and a mistrial) a state court aquitted Billie following a four-day jury trial. Subsequently, federal charges were dropped.

Although the case was ultimately decided on evidence (it could not be determined whether the slain cat was a true Florida Panther), the other issues involved in the case form the basis for several useful strategies in dealing with the rights and status of native Americans as they conflict with the laws and values of American society at large.

Strategies

DISCUSSION

1. Should state and federal laws (such as endangered species laws) apply to Indians on reservations? What would be the basis for exemption from such laws?
2. Which value is more important: the preservation or protection of an endangered species, or the Indian's right to practice his religion?
3. Some treaties grant Indians hunting privileges which extend far beyond the boundaries of reservations (such as those that recognize ancestral homelands and hunting grounds). Should such treaty rights be honored?
4. In discussing the tribal rights movement, West and Gover suggest that such rights (are) "distinctively Indian rights—rights held by no other people in the country." Likewise, one of Jim Billie's lawyers, Bruce Rogow, has said that "It's clear Indians do have different privileges." Should Indians have special rights or privileges that extend beyond the rights of American citizenship? Why?

ANALYSIS

Apply the case study method to the situation involving Jim Billie and the panther. One way to use this technique is adapted from procedures listed in the *Street Law* teacher's manual. (*Street Law: A Course in Practical Law*, 3rd ed., Teacher's Manual [St. Paul: West Publishing Co., 1986], pp. 6-8.)

1. Select the Case Materials (Based on the description above, provide students with a summary of the Jim Billie case without revealing the outcome.)

2. Review of Facts ("Model" answers provided in italics.)

What happenend in this case?

- *Jim Billie shot a "cat"*
- *Jim Billie was arrested and charged with killing a panther in violation of endangered species laws (state and federal)*
- *Jim Billie was acquitted in state court*
- *Federal charges were dropped*

Who are the parties?

- *Principals: Jim Billie; State of Florida, U.S. Justice Department. (Also involved, but not mentioned in the summary above, were the U.S. Fish and Wildlife Service and the Florida Game and Fresh Water Fish Commission.)*

What facts are important?

- *Was the cat Jim Billie shot a true Florida Panther?*
- *Where was the cat killed? (on the Seminole's Big Cypress Reservation)*

Is any significant information missing?

- *Again, was the cat really a Florida Panther?*

Why did the people involved act the way they did?

- *Jim Billie: following his tribal customs and religious beliefs*
- *U.S. Department of Justice and State of Florida: enforcing federal and state laws*

3. Frame the Issue

Legal: Killing of a panther is illegal, but does law apply to Indians on federal reservations?

Public Policy: Should Indians on federal reservations be allowed to hunt endangered species? Why?

Ethics: Which value is more important, the preservation of an endangered species or the Indians' right to conduct religious practices and customs?

Practical: What options are open either side? Can Seminoles attain religious fulfilment without killing panthers? Could the government make any concessions or allowances? (In this case, there was an attempt to settle out of court)

4. Discuss the Arguments

- What are the arguments in favor of and against each point of view? Which arguments are most persuasive? Least persuasive? Why?
- What might be the consequences of each course of action? To the parties? To society?
- Are there any alternatives?

5. Reach a Decision

After the students have reached their own conclusions, the teacher can tell them the actual result of the case.

ROLE-PLAYING/MOCK TRIALS

For the Florida and Idaho cases above, students could write and conduct mock trials or role-plays.

FOR RESEARCH: EXTENSION ACTIVITIES

1. What is the current citizenship status of American Indians? (American Indians were made full citizens by an act of Congress [Snyder Act] in 1924)
2. Are Indians mentioned in the Constitution of the United States? (Yes. Article I, Sections 2 and 8)
3. Are there any American Indian tribes in your state that are offically recognized by the federal government? If so, name them. (Answers will vary)
4. Are there any American Indian reservations in your state? (Answers will vary; there are 260 reservations in the U.S.)
5. What agency of the federal government is responsible for administering educational, health and social programs for the country's Indian population? (Bureau of Indian Affairs)

USING COMMUNITY RESOURCE PERSONS

If feasible, invite a representative of an American Indian tribe to visit the class and discuss problems of Native Americans. Similar invitations might be extended to representatives of various governmental agencies (federal, state or local) that have responsibility for Indian affairs.

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Slavery

(continued from page 6)

ment, not made fully effective for black and language-minority women until the Voting Rights Act of 1965. Because there was slavery there was Jim Crow and segregation and a race-imbued justice system. Because there was slavery there were civil rights movements; there was litigation for rights and jail for those who fought for those rights. There were lost jobs and death in the name of improving our lives and the constitutional imperatives under which we live. Because there was slavery there is debate over remedies and correctives such as affirmative action, school busing, self-help and black community organizations designed to overcome the lingering effects of slavery. Because there was slavery the most important features of the Constitution are the amending clause in Article V and the power of interpretation by the Supreme Court under Article III. Because there was slavery, the appointment power for Supreme Court Justices under Article II, providing for a sharing of power between President and the Senate, has to be kept constantly on our minds. We have to remember that, interpreting the same Constitution, one group of judges said forced segregation was wrong in 1954 but another said it was perfectly legal in 1896. We must worry about who is appointed to the courts and what they will say in the future. Because there was slavery we read and hear everyday that the United States is not ready for a black man, not just Jesse Jackson, to become president. Because there was slavery we have race and slavery on our minds, and we are likely to keep it on our minds until it is obviously on no one else's minds in ways that constrict our freedom and opportunities. Therefore, when we think about everything important to our well-being, including the Constitution and the founding fathers, our vision, our Afro-American vision, remains preoccupied and on guard. But perhaps it is not simply because there was slavery, but because the vision of others was shaped by slavery, that most of us still experience unpleasant reminders that we are the descendants of those who were enslaved.

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Women's Movement

(continued from page 37)

member Kenneth Davidson called specifically for the creation of an "NAACP type" litigating arm for the women's movement.

It was not NOW, however, that was to become the representative of women's rights in court. Agreeing with Davidson's assessment, the American Civil Liberties Union created the Women's Rights Project to fill the void that NOW's concentration on legislative lobbying had left in the women's rights arsenal.

The litigation successes of the NAACP LDF have been well documented. Without the political clout necessary to win legislative victories, the NAACP immediately turned to the courts. The NAACP LDF long was "the" representative of black interests in court. Through a strategically designed assault on *Plessy v. Ferguson*'s separate but equal doctrine, the LDF was able to convince the Court that racially segregated public schools violated the Fourteenth Amendment. This the LDF did by bringing a series of test cases, first challenging discrimination in law schools and graduate schools to prime the Court to adopt its legal theories concerning racial discrimination.

While women had the advantage of congressional passage of the Equal Pay and Civil Rights Acts, it took them several years to design a test case strategy to bring about expanded rights. In fact, so closely were the litigation activities of the ACLU Women's Rights Project modeled after the general game plan used by the LDF in the school desegregation cases, that it was the Fourteenth Amendment to the U.S. Constitution and not these statutes around which litigation was planned.

The Fourteenth Amendment was enacted as part of the Civil War amendments. It prohibits the states from denying to their citizens "equal protection of the laws." Because the amendment clearly was enacted to enhance the legal status of blacks, the Supreme Court now views discrimination based on race with strict scrutiny. Thus, to withstand a constitutional challenge to a practice affecting blacks or alleged to discriminate against blacks, a state must prove to the Court that the statute or practice in question has a compelling rationale. Using this stringent standard of review, few practices that discriminate based on race have been able to withstand constitutional muster.

Prior to 1971, the Court had never invalidated a sexually discriminatory practice under the Fourteenth Amendment. By 1973, the ACLU WRP, however, was able to convince four of the nine Justices of the U.S. Supreme Court that sex, like race-based classifications, should be afforded the elevated standard of review. Although the ACLU WRP clearly is the premier litigator in the field of women's rights, unlike the NAACP LDF, it has been unable to control the flow of cases to the Court, given the plethora of women's and public interest groups that were established to litigate in the 1970s. Thus, its adoption of a test case strategy modeled after the NAACP was severely damaged when a "bad" case was accepted for review by the Court. In *Kahn v. Shevin*, a challenge to a Florida statute that was attacked as violative of the Fourteenth Amendment because it provided an automatic tax exemption for widows but not widowers, the Court upheld the law relying on state assumptions about the relative earning power of men and women, regardless of their actual financial situation.

The large number of groups bringing women's rights cases has continued to plague women's rights activists who have tried to pursue the kinds of litigation, as well as legislative strategies, successfully implemented by the NAACP. Since the mid 1970s, numerous women's groups have been created to lobby or to litigate or to do both. This often has made coordination difficult.

To date, although the Court generally has been supportive of women's rights (through the 1986 term, the Supreme Court decided in favor of women's rights in 63% of the 54 cases heard since 1971 involving sex discrimination), it has yet to use the elevated standard of review employed in race cases when dealing with issues of gender discrimination. Nevertheless, without the pioneering work of the NAACP LDF, it is unlikely that any of the women's rights litigators would have been nearly as successful. Not only did the NAACP provide the model, it blazed the way. ☐

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Curtis Gans

Why Young People Don't Vote

Can we survive an epidemic of kids who don't care?

Young people vote less than any other group in the United States. When we enfranchised young people between the ages of 18 and 21, we enfranchised the first group *not* to increase its rate of participation in the years that followed enfranchisement. When we enfranchised blacks, they consistently increased their rate of participation, so that they are within five percentage points of whites. When we enfranchised women, as we did in 1920, they consistently increased their rate of participation, until they now vote at a higher rate than men. But in the years since we enfranchised youth, their level of participation hasn't gone up. Their rate of participation is level, if not downward.

We don't know why young people don't vote, but we do know a good deal about why adults vote—or don't vote. So I am going to discuss the general problem of nonvoting and relate youth to it.

I would like to start by looking at the 1986 election. Three weeks before that election, I was in Chicago. Two weeks before it, I was in New York. When I got out of my various meetings, I looked in the streets. There were no placards, no bumper-stickers, no buttons, no people hawking literature, no signs that one of our two most important elections was about to take place.

The three major news magazines—*Time*, *Newsweek*, and *U.S. News and World Report*—for the two weeks prior to the election and the week of election had nothing on their covers to suggest that an election was about to take place.

Two television networks were, at the time I was doing those travels, announcing that they weren't going to give full coverage to the election on election night but were instead putting on more lucrative commercial programming.

Even national public radio was putting election news on its final cycle.

Neither political party offered one issue, theme, or purpose for voting Republican or Democratic. The only evidence that there was a campaign going on was the nastiness of 30-second commercials on television, except for the last week, in which the president, speaking to groups of largely ineligible high school and grammar school students, urged people to win again "for the Gipper," and to reject the Carter administration, six years long gone.

Is it any wonder that only 37.1 percent of the eligible electorate voted; that we had the lowest turnout since 1942; that we had the third lowest turnout since 1798; that outside of the South, we had the lowest turnout ever? Is it any wonder that only 16.6 percent of those between the ages 18 and 24 voted? Is it any wonder that in elections since 1960 we have gone down 20 percent in our participation in presidential years, and over 20 percent in congressional years? Is it any wonder that the United States has the lowest rate of voter turnout of any democracy in the world in its presidential elections, with the occasional exception of Switzerland and India, and the lowest turnout of any nation in the world in its congressional elections?

I used to say the United States had the lowest turnout of any country in the world except Botswana, but four years ago Botswana pulled ahead of us. In the last two decades, fully 20 million people have dropped out of the political process. The rate of youth participation shows that they are not being replaced.

Use It or Lose It

These dropouts from the system pose a series of important threats to American democracy. Voting is the lowest common denominator in American politics. People who don't vote tend not to participate in anything else. As voter turnout decreases, you are leaving our politics to those intensely interested. You're leaving politics to the big interests of business and labor; you're leaving it to the narrow interests of pro- and anti-abortion, pro- and anti-gun control. Our political system is being split apart by the centrifugal forces of special interests.

Similarly, you are also creating a situation in which the course of public policy is being altered. Certain groups have a much more important stake in the process, and much more impact on it.

My favorite example is a conservative one. Public employees account for one-sixth of the electorate. If half of the rest of the electorate votes—as they do in presidential elections—and the public employees turn out in greater numbers (as they often do), their potential share of the electorate is one-third. If a third of the rest of the electorate votes—as they do in congressional elections—that one-sixth share could come close to one-half. Then try to abolish agencies or consolidate agencies, dissolve power, change civil service, privatize some services. It is not possible.

Second, our country survives on voluntarism. To the extent that people cease to participate, the very voluntarism upon which our society depends erodes.

Third, if we have a 16.6 percent rate of youth participation, what is our future in terms of leadership, societal cohesion and involvement? If young people have a 17 percent allegiance, as they did in the last election, to the Republican Party, and a 19 percent allegiance to the Democratic Party, where is the cohesion to develop public debate and bring public order? A high degree of inattention is an invitation to demagoguery and abuse. If people do not participate in the political system, then there is the danger of people participating outside of the political system to bring change.

For example, in 1976 the pollster Peter Hart found an underlying "Mussolini" factor in American politics. Nonvoters responded 87 percent favorably to the statement, "What this country needs most, more than laws, is a few courageous, tireless, devoted leaders in whom the people can put their faith."

So, for all sorts of sound reasons, the decline in participation threatens American democracy. We are in grave danger of becoming not government of, for, and by the people, but government of, for, and by the few.

Only Indicators Are Up

This decline has occurred during a period in which every indicator but one should suggest an increased turnout. In 1963, President Kennedy established a commission on voter participation. They recommended a whole series of things—abolishing the poll tax and the literacy test, enfranchising minorities and the young, shortening the time between the close of registration and elections, liberalizing state and local residency requirements, providing bilingual ballots and bilingual information, reaching out in various ways to voters, and registering by mail. Of this whole series of recommendations, all but one—an election-day holiday—has been enacted in whole or in part (twenty states have registration by mail), and voter turnout has gone down.

In *Who Votes*, Stephen Rosenstorm and Raymond Wolfenger argue that educated people have a higher turnout. Yet twice as many people are going to college and graduating from college as in 1960, and voter turnout has been going down. They argue that mobility is a deterrent to turnout, yet we are a less mobile society than we were in 1960 and 1970, and voter turnout has gone down. They argue that people who are older tend to vote more. The baby boomers are now settling down and having children and yet turnout still goes down. In only one area do the statistics of voting correlate with the statistics of theory. Married people are supposed to vote more. We are a less married society than we were a decade or two decades ago, so this factor may contribute to the nonvoting trend.

Given that all these structural and demographic indicators are wrong, it is possible to argue that most of the problem of nonvoting is that we've lost the will to vote. Increasingly, people feel less and less that their vote will make a difference.

Major Problems and Opportunities

There are a number of opportunities for us to reverse this downward slide. Several involve education.

The first is values. My parents came from a generation largely shaped by the Depression. Many people in this generation were either immigrants or people who suffered through the Depression. They had as a principal value creating a society in which their children would have better lives.

And the next generation translated that vision, in a comparatively affluent society, to making society better. We committed ourselves, in one way or another, to a degree of public service for the betterment of the society for future generations. I have a terrible sense that the generation that is growing up now is a generation looking at personal betterment, not the betterment of the future.

In that sense, Secretary of Education William Bennett is right—somewhere in the educational process we have to inculcate values larger than the self. That applies to home and to school.

The second problem/opportunity is advocacy. Let me approach it through autobiography. I got into what I am now doing, in part, because of a speech I made at the Woodrow Wilson School at Princeton in 1974. At the end of the question-and-answer session, somebody said, "What should we do; what should we do?" My answer to that was—the first time I ever said it, and it came somewhere from the viscera—"Read."

My sense was that the center of America, in terms of its ideas, leadership, and direction, had been destroyed by the events of the '60s, and hadn't been replaced. Before we charge out into activity, before we advocate, we had better think about the "what" of American politics.

I think we are still in that same situation. For thirty years, from the New Deal to the early '60s, we had a national consensus that narrowed the public debate. That consensus was built around two events, the Great Depression and World War II. The first part of that consensus was Keynesian economics and economic pump-priming for growth. The second was the New Deal, which was essentially a series of attacks on specific problems—create an agency, attack a problem. The third was global containment, first of Hitler, and then of Communism.

Both parties accepted this consensus, differing only in how the goals were to be achieved. Republicans wanted to go slow in adding new social programs. Democrats wanted them to proliferate. Republicans wanted our containment to be more militaristic. Democrats wanted it to be more ideological and economic.

Then, in the sixties, three things happened. First, we had stagflation. The paradigm of Keynes came apart.

Second, we found that social programs often conflicted with each other. As we built highways, we strangled cities. As we pushed for industrial growth, we polluted the air and created acid rain. Could you deal with everything as an isolated series of problems, or did you have to look at the undetermined effects of dealing with the problem in isolation?

Third, the big object lessons of the war in Vietnam were the limits of American power to contain or control the world globally, and the need to redefine a set of vital interests that were more narrow and more manageable.

I think we have solved none of these problems. The problem we face now is that there is no consensus of values that speaks to both the needs and feelings of the American people.

We could turn voting participation around if we simply had a candidate who advocated what people perceived as their needs, and then was able to deliver, once elected.

The third part of the problem/opportunity has to do with both governments and political parties. Political parties were extraordinarily important in separating the wheat from the chaff on issues, training leadership, organizing campaigns, and exerting some discipline in the way candidates performed once elected. They could deliver. That delivery mechanism has broken down for lots of different reasons.

First was the progressive movement around the turn of the century, which took the nominating process out of the hands

Q & A on Voting and Youth Participation

This exchange on youth voting took place after Mr. Gans' speech at the LRE Leadership Seminar in Fort Worth last November.

Q. If TV doesn't give us positive models of voting and political participation, how do we motivate young people to participate?

A. The first step is to overcome apathy with a sense of efficacy. Try to find things in schools and in the community that young people can be involved in. Don't tell them what they ought to be involved in, but let them figure out what they want to be involved in. That will produce results.

I don't know whether anyone can change television, but I do know that with some effort I can change a curriculum. I can put out a newspaper. I can have a stop sign put up where I want it. I can change my community's budget priorities if I organize well enough. So I would start by doing. If you give people a sense that they can do something, then they may want to do it in a larger framework.

Q. You mentioned that 16.6 percent of young people between the ages 18 and 24 vote. Is that of those eligible or those registered?

A. Eligible. That is the only constant figure you can use. Registration fluctuates from election to election, but those eligible is a constant figure.

Q. What level of participation should we aim for? Do we want everyone to vote? Are some people so uninformed that we would be better off if they did not vote?

A. I don't know what the optimal level of participation is. I do know that smaller and smaller levels threaten democracy. I don't buy the argument that only the truly educated ought to vote. People who are concerned about the size of the welfare check ought to be as able to vote as people concerned about the size of the dividend check. The answer is to educate, rather than to see a drop-off of voting.

Q. Would frequent elections help or hurt turnout?

A. I lived in the District of Columbia for a few years, where I was frequently called to elections in which there was nothing else up but the school board or the advisory neighborhood council. Elections like that depress turnout. The advisory neighborhood council doesn't have a legislative responsibility in the world. If you have a special election for it, you are holding an election for the sake of holding an election, and that is crazy. If you call people out to the meaningless too often, they are not going to come out for the meaningful.

Q. Would turnout be better if campaigns were shortened?

A. The campaign for president is not too long, and the efforts to compress it have been deleterious. Most people really don't focus on the presidential race except between September and November of the election year. The race for the nomination is a gestation period for those who are interested—the people who vote in primaries and caucuses and go to the convention. These people need time to evaluate and reevaluate candidates to determine who their party's nominees are.

I am particularly leery of grouping a lot of primaries on one day. The long-term effect of Super-Tuesdays is to give much more power to the people who have money, and to the media manipulators who continue to run campaigns on television. We need a long series of sequential small tests, not a short series of grouping tests. We need to be able to see Jimmy Carter's feet of clay before he gets nominated.

Q. Can the schools do anything to help voter turnout?

A. Yes, we can develop viable student government in the schools; let students debate the issues that they care about; let them have newspapers that even print dirty words occasionally (and let them deal with how the community reacts); let them deal with the real tensions of politics; let them find partnerships in the community to get something done. If students are going to vote, they are going to vote because they want to vote. They have to get the motivation from within.

Q. Is there any evidence that illiteracy contributes to low turnout?

A. The one gauge that we have is through the U.S. Census Bureau. Their election studies show clearly that the people with the least education have the lowest level of turnout.

Q. Do elections within the school help?

A. I can only speculate. You want elections in the schools, but I would argue that you should give some substance to the offices that you elect people for. It shouldn't simply be a beauty contest to see who is the most popular. In electing a leader, the class ought to be deciding on a series of programs.

Then it would be helpful to involve students in community activities that show that they can make a difference in the community. If you want to change zoning, street signs, street lights, police protection, availability of condoms—I don't care what the issue is—you have to win support in the political community. You need to learn about coalition building, persuasion, and all the techniques that ultimately are political techniques.

Q. When I register people to vote, I hear from a lot of people that they don't want to register because they are afraid that they will be called for jury duty. Is there any evidence to indicate that this is one reason people don't register?

A. There is some evidence. I don't think it is a huge factor, but it would help if the two processes were separated.

2155

of the leaders and put it into the hands of the people. Second was the New Deal, which took the hiring power away from local organizations and gave it to the federal government. Third was the advent of television, and campaigning by television, which essentially made the party irrelevant. You now hire a media advisor to run a campaign.

So the parties are infinitely weaker. They are also misaligned. What we have right now on the Republican side is essentially right-wing populism and big business greed. On the Democratic side is a cacophony of interests that adds up to mush. People don't think they face a real choice. In fact they have choices—there was no wider choice than Reagan and Mondale—but it is not a real choice, in terms of the world that a large percentage of people see.

The fourth problem/opportunity is the existence of issues that don't seem to be solved. Commuter traffic is worse than ever. If you are a family farmer, you feel equally threatened by whatever administration is in power. If you are a flyer, the products of deregulation seem to be delays and cancelled flights, and for those flying to or from smaller towns infinitely increased costs.

In many instances, the political process seems to be frustrating majority rule. Between 60 and 70 percent of the American people opposed what we were doing in Nicaragua in the last six or seven years,

Changing the Law to Increase Turnout

We have just completed a study for the Ford Foundation on how voting laws and changes in voting laws affect voter turnout. The principal finding is that between six and seven million Americans are still blocked by voting laws and voting procedure.

We found that if election-day registration were adopted in every state, voter turnout would increase by six or seven million. If voting were a one-step act, if you didn't have to both register in advance and vote, you wouldn't have to face unnecessary administrative barriers.

You cannot vote in this country without registering previously, unless you live in one of the very few jurisdictions which have adopted election-day registration. We are the only democracy in the world that makes voting a two-step act and puts the burden of qualification on the citizen. We need to move towards and explore ways of achieving a fraud-free system, in which the burden of keeping elections clean is on the state and not on the individual. We could and should adopt election-day registration, a voter identification card, or, best of all, a system such as that which exists in Canada, in which the state conducts a bipartisan canvass of eligible voters, ensures that fraud at the ballot box is minimized, and requires of the citizen no more than that he or she appear to vote.

In the absence of such sweeping changes, it would be useful to explore ways to bring the United States closer to this ideal by further shortening the time between the close of registration and elections, eliminating differences between local registration practices and registration practices in federal elections, and adopting means of making it easier to register and vote, such as liberalized and uniform deputy registration laws and driver's license registration, to name but two. These changes would increase turnout less than same-day registration, but they would help.

It should also be possible to reduce the length of our ballots. There are no good reasons why stepping-stone offices such as secretaries of state and attorneys general, which are implementing rather than policy-making offices, should be elected. Similarly, we could reduce the number of other elected offices and the number of ballot propositions. With ballots a mile long and information about them scarce as hen's teeth, it is no wonder that the public says in opinion polls that it is confused and that there are discouragingly long lines at the polling places.

To eliminate some of those lines we might have more polling places and slightly longer hours (although not a 24 hour voting day or an election day holiday, since there is no evidence these changes would enhance turnout).

It would also be desirable to eliminate the last vestiges of discrimination and obstacles to voting that exist in law and practice. There is no reason why voters should be purged for failure to vote in a particular election. Our studies have shown that states with permanent registration tend to have both higher registration and higher turnout than states which purge on the basis of nonparticipation.

Systems of dual registration, in which a voter must register at one place in federal elections and at another for local elections, should be eliminated, as they were in 1984 in Mississippi. There is no reason why registration places should be opened for two unadvertised hours every two years, as they currently are in Upper Marlboro, Maryland. And deputy registrars should be deputized easily and uniformly. In the immediate past election, it was next to impossible for anyone who wanted to register not to get registered in Fairfax County, Virginia, so seriously did local registrars take their outreach responsibilities, but 100 miles to the south and west, operating under the same laws, it was impossible for new registrants to get registered because no one was allowed to be deputized. Liberal uniformity should be the order of the day.

These reforms would make some difference, but remember that over 70 million people did not vote in 1984. Over 104 million did not vote in 1986. So six or seven million—the estimated increase in turnout of election-day registration—is, at best, one-tenth of the problem.

The barriers are not the main part of the problem. People will vote, as they did in Chicago in the last three mayoral elections, as they did in San Francisco in its last mayoral election, as they did in Louisiana and North Carolina in the senatorial elections of 1986. They vote *when there is good reason to vote*. High turnouts accompany good reasons to vote.

—Curtis Gans

and yet the government would not act to stop it, whether there was a Democratic or Republican Congress. There's an example also on the conservative side. At least 70 percent of the American people want at least a moment of silence in the schools, but they haven't been able to get it.

Broad Trends

In the '60s and '70s, events had important impacts on participation. The first was the birth control pill, which I consider the most salutary for participation, because it essentially liberated women to have greater control over their bodies and to take a much more active role both in the economic and political life of our society.

The second was the advent of television as a central factor in our lives. There is probably no more deleterious aspect of our society. Television translates people from participant and stockholder in our society to spectator and consumer. An average day has eight hours of work, two hours of commuting, one hour of dinner, and the rest of television watching. There is no time for participation.

We get news on TV in one-minute or half-minute blips. Without a sense of context, it is very hard to make historical judgments. We expect our politics to deliver us solutions as quickly as Preparation-H helps hemorrhoids. We focus on the visually exciting, so that Abbie Hoffman, who led a band of 250 people, became a national figure, where in an era of print journalism he might have made page 96 when he was arrested.

You have people shot into the firmament, like Jimmy Carter, and, before we have had a chance to evaluate the down side, swept to a nomination. Through television, political campaigns come down to a battle of 30-second commercials.

What to Do

As I suggested earlier, education can help us do something to end the downward spiral. We ought to deal nationally with parents on the TV viewing habits of their children, but for the majority of young people in this country, TV will continue to act as a baby-sitter. And their perceptions and experiences are going to be shaped by television.

Somehow we have got to find the tools to make teaching about our political process as visually exciting as *Miami Vice*. Seventy percent of the young people in America are probably not going to do the type of disciplined reading necessary to learn about issues from the printed page. So we better find other ways, through the media, to make participation work.

Teachers can deal with values. Teachers can deal in schools with advocacy. One other thing that a teacher can do is try to develop ways for young people to learn how to work in concert in a political context.

I don't think you can get young people to deal with the broad, intractable range of problems we face, but one of the things you can do if you are working with young people, since the central issue in voting is the feeling of efficacy, is to find ways that they can define things that they care about, and that they can work to change on a much more local level. In that experience and satisfaction, they might find some efficacy; they might find some reasons for participation.

A Long Haul

At root, my feeling has always been that voting is a religious act. Participation occurs despite the fact that we know most elections are not decided by our one vote. People want somehow to contribute to or withdraw their support from candidates and leaders. The critical problem is that the religion is gone, and the will is gone. Everything that I have said should indicate that this is not a problem that will be answered in a year. I predict that unless there is a severe recession, voter turnout will go down in 1988. If you want to get into the area of participation, and particularly youth participation, you better be in it for the long haul. Because the problem is not small, nor should we think small. □

Curtis Gans is presently the Director of the Committee for the Study of the American Electorate. Mr. Gans' career has straddled both politics and journalism. He has managed a number of political campaigns, including the presidential campaign of Eugene McCarthy in 1968. He is a former member of the Democratic National Policy Council and has served as a consultant to the Woodrow Wilson Center for International Scholars.

Kids Voting Day in Arizona

On Election Day, students in grades 3-12 from Mesa, Tempe, Chandler, and Gilbert, Arizona, will go to the polls with their parents to vote for the new president of the U.S. The simulated election is the culmination of a pilot program called Kids Voting, which has two goals—increasing adult voter turnout and creating a commitment to voting in young people.

Prior to the election, 18,000 students will receive classroom instruction on the election process. A committee of representatives from the six participating school districts have devised a special curriculum for Kids Voting.

The program is modeled after a similar one in Costa Rica in which school children have accompanied their parents to the polls for the past forty years. Voter turnout in that country is nearly 90 percent. Arizona currently ranks 46th out of the 50 states in voter participation.

In order for children to be allowed at the polling places, the Arizona Legislature had to change an election statute which prohibited anyone from coming within 50 feet of the polls, except poll watchers, election workers and registered voters.

Kids Voting has been privately financed, and costs are expected to run about $20,000. The computers at the participating schools will be used to tabulate the children's votes, and the results will be announced at a press conference.

Since many of the schools serve as polling places, the logistics of the simulated election will be simplified. However, only high school students can vote without their parents. The organizers of Kids Voting hope for a significant improvement in voter turnout in the 55 precincts involved in the program. They also hope that, in future elections, Kids Voting will become a national event.

—*Maria Morocco*

Maria Morocco is an intern in the Public Education Division of the American Bar Association. She recently graduated from Northwestern University with a degree in English.

Voting

Three Voting Activities/Middle School

Susan Marcus and Janet Kakishita

Good Morning, American Voters (*Lesson One*)

This lesson prepares students for the election experience by examining current events, interviewing voters and listening to speakers who have participated in the process themselves.

It is important for middle school students to practice citizenship skills. The goal is to have greater and more informed participation for these students when they are adults.

OBJECTIVES

1. The students will gather background information on the election through research of current events, media, shared discussion and reference to appropriate periodicals.
2. The students will listen to and form an opinion on four election issues.
3. The students will become familiar with the sample ballot in preparation for participation in the mock election

TIME TO COMPLETE

Basic lesson is designed for one class period but extensions may require up to five class periods.

MATERIALS

Vocabuary flash cards, group packet [teacher generated collection of information from *Vote*, sample ballot, voter registration cards, and current events on election issues and candidates; each group will need a copy of the packet], and teacher-made ballots.

PROCEDURE

1. Warm-up: each student gives a ten-second news flash with any election information he or she knows. Teacher models with excitement and enthusiasm: "we interrupt this broadcast to announce that . . . . has jumped ahead in the polls in the presidential race!!!! Stay tuned for details."
2. Using the warm-up information as a bridge, teacher displays flash cards with vocabulary which relates to the election process (primary/caucus, party convention, nomination, campaign, general election, electoral vote, inauguration.) Students identify those terms they know and seek definitions or explanations for unfamiliar words. Students place them in chronological order.
3. Jigsaw Activity. Small group information sharing about elections.
   a. Teacher describes purpose of this group activity. "Today we are going to learn how an election works by reading short articles, sharing information, and forming opinions in our groups."
   b. Divide students in home groups of four. Hand out packets. Assign each student in the home group to a different article.
   c. Home group students separate into same article groups. Same article groups break into groups of four. In article groups, students are to identify the main issues. (Suggested topics for articles: Issue of 18-year-old voting, voter apathy, explanation of voting process.) Article group members are to report back to their home group with an oral summary of the article, an indication of the election issue/issues in their article, and their opinion of the issue/issues.
   d. *The Informed Voter Speaks Activity.* After all four articles are presented to the home group, each student writes a short paragraph or one sentence on how he/she feels about each issue. (Example of sentence starters—"After listening to ____, I ____.") Students may wish to share responses with home groups or the class.
4. Sample Ballot Walk Through Activity.
   a. Divide class into two groups.
   b. Distribute teacher-made sample ballots to students.
   c. Go over ballot directions and categories with students. Do not allow students to mark on ballots.
   d. Students return ballots so that they can vote during the next class period.

DEBRIEFING

Teacher asks students: "What will we be doing in class tomorrow? What will you need to know?"

EVALUATION

Warm-up provides pre-knowledge of election process. Small group summaries and paragraph reaction papers demonstrate mastery of basic facts and their use in forming opinions.

OPTIONAL ACTIVITIES

Have students interview a parent or any other registered voter with the following questions:

- Did you vote in the last election?
- How do you decide which way you will vote on the candidates? On the issues?
- What advice would you give to a first-time voter?

They should be prepared to return to the class and graph or chart their answers.

They should select an election topic in which they have an interest, read the printed handouts provided by the teacher, and demonstrate what they learned by constructing a poster, banner or mobile. Or they can draw a political cartoon strip showing their reaction to one of the issues presented.

Simulating an Election (*Second Lesson*)

This lesson is a simulation of an election. It begins with some time for the prospective voters to learn about the candidates and the issues. Students need to complete lesson one before beginning this activity.

Students learn by doing, and they will be able to use this experience in a real-life voting situation. This active participation is an important part of developing citizenship skills.

OBJECTIVES

The student will practice decision-making skills by:

1. Analyzing and participating in the registration process.

2. Examining candidates and issues.
3. Participating in a mock election.

TIME TO COMPLETE

Basic lesson is designed for one class period.

MATERIALS

Transparencies of voter registration forms, 5 x 7 note cards, League of Women Voters' *Vote* magazine, teacher revised and shortened sample ballots, voting results worksheet.

PROCEDURE

1. Warm-up: "What is voter registration?" (Teacher displays overhead transparency of voter registration form.) Topic is "should voters be required to register before they vote?"

Divide class into two large groups. One group is to think of reasons why registration helps the democratic process. The other group is to think of reasons why registration hurts the democratic process. Teacher provides context by asking "what-if?" questions. What if there were no registration for voters? How would that make a difference?

2. Using 5 x 7 cards, students create their own registration forms. They are to include information that they think is important to the registration process. Students trade and fill out registration forms. Teacher questions to debrief activity: "What questions were easy to fill out? Which were difficult or unfair? Why?" Collect cards.

3. Timed-debates on candidates and/or issues. Assign four students to each campaign or issue group (the groups can deal with current local, state, or national issues/candidates on the ballot). Student one will make the first pro argument. Student two will make the first con argument. Student three will make the pro-rebuttal statement. Student four will make the con-rebuttal statement. Each side has a time limit of thirty seconds to make both statements. Statements are not to be longer than one sentence. Time should be allowed for teacher instructions and modeling of activity.

Students break into groups of four and prepare arguments. Use campaign information [League of Women Voters' *Vote* magazine for issues and voters' pamphlet for candidates] as a resource to prepare for presentation.

Use timekeeper as groups present.

Debrief this activity by asking students how they felt. What frustrated them in getting information? Can they name other ways voters can find information about issues and candidates? What should voters do if they do not have information about voting topics? This leads into the actual voting activity.

4. Student voting on teacher-prepared ballots. All registered voters (we did this at the beginning of this class period) will receive shortened student ballots. Follow voting procedure for your state.

As students finish voting, ask them to make a list of words that describe their reaction to the voting process, ask them to create a slogan that would encourage reluctant citizens to vote or ask them to comment on what was the most difficult part of making the voting decision.

DEBRIEFING

Students share responses to the above activity.

EVALUATION

Warm-up allows students to explain the rationale for registering to vote. Mini-debate: students synthesize facts in order to support opinions on issues and candidates. Voting: students participate in an election.

OUT OF CLASS ASSIGNMENT

Voting results worksheet for students to follow election returns.

OPTIONAL ACTIVITIES

List factors which influenced voting such as positions taken by the candidates, amount of advertising, word of mouth, etc. Then ask students to respond to the list by indicating which factor was most influential for them. This could lead to an in-depth discussion of how people make voting decisions.

Survey others in the community on a candidate or issue

Voting Results Worksheet

Directions: choose one or more candidates or issues to record information on this worksheet.

	CANDIDATE/ISSUE	VOTING RESULTS	SOURCE: NEWSPAPER, TELEVISION, RADIO, WORD OF MOUTH	TIME RESULTS REPORTED	EXTRA-CREDIT: COMMENTS OR OBSERVATIONS
1.					
2.					
3.					
4.					

of special interest to the students. Students will use this to predict outcome and compare with actual election results.

Students who have prior knowledge of absence should apply for an absentee ballot by writing down their reasons for not being available.

The Last American Emperor (*Third Lesson*)

This lesson is a debriefing of the election process. Students will compare the voting results of their class with the actual results from the general electorate.

Students learn by participating in simulations of real-life experiences. By internalizing and personalizing the voting experience, students develop a greater concern and interest in the outcome of the election. Activities are designed to practice the skills of analyzing outcomes and projecting election issues into the future.

OBJECTIVES

- The students will tally the ballots and debrief the results of their class voting.
- The students will share information on the results of the election.
- The students will compare the results of the actual election with those of their class.
- The students will speculate about local or national consequences of the election and about future changes in election procedures.

TIME TO COMPLETE

Basic lesson is designed for one class period.

MATERIALS

Class ballots, media articles, transparency of ballot for overhead projector, voting results worksheet, placards listing ballot issue or candidate race, and future probe sheet.

PROCEDURE

1. Warm-up: Hand-raising activity where students predict the outcome of one ballot item from yesterday's election simulation.
2. Using the warm-up activity as a bridge, students determine actual result of their class election.
a. Distribute one ballot to each student in the class.
b. Teacher selects a student to tally the votes on the overhead ballot.

Election Activity Ideas for 1988 Presidential Election

1. Write a political advertisement for a candidate/issue. Include the main reasons for voter support.
2. Collect five election current events and write a summary of each which stresses its main themes.
3. Write an election vocabulary list with at least 10 terms. Include the definitions and illustrations.
4. Create a campaign slogan. Illustrate the slogan with a bumper sticker, a balloon, a button, a banner, a T-shirt or video.
5. Survey three adults on a campaign issue and record the results.
6. Keep an election log for the five school days before the election.
7. Pick one issue and write the two major arguments pro and con.
8. Predict the winners in the election with a headline and include the reasons for your prediction.
9. Develop a political cartoon on an election issue.
10. Create a plan to encourage 18-year-olds to vote.
11. Interview an office-holder or candidate. Record the costs and benefits to the person.
12. Write and/or record a political song, poem, jingle, chant or rap.
13. Clip out a political poll and explain its significance.
14. Design a new "party animal" [wolf, donkey, elephant]. Explain the significance of your animal.
15. Using a paper doll, design an outfit for a candidate. Explain your choices.
16. Write a letter to a student in the U.S.S.R. explaining our election system.
17. Write a short children's book for first graders about our election.
18. Send a news flash back to your native Mars about our election.
19. Design a voting machine of the future.
20. Write a letter to an elected official about an opinion you have. Mail a copy.
21. Plan an election party: menu, decorations, invitations.
22. Write a job description for an election security person [secret service] or an hour by hour daily report.
23. Create the perfect candidate by combining qualities of others, e.g., ____________________'s height, ____________________'s eyes, ________'s voice, ________________________'s intelligence, ________________'s sense of humor.
24. Collect 10 different pieces of campaign literature. Choose the most effective and tell why.
25. Write the one-minute script you would use to convince someone to run for public office.
26. List five kinds of people who should *not* be allowed to vote and explain your reason for each.
27. Write a travel packing list for a candidate on a campaign swing and explain your choices.
28. Role-play a newspaper or TV reporter trying to get an interesting campaign story.
29. Cut out and re-write part of a campaign speech from a newspaper or magazine. Use language that is easy to understand.
30. Outline the plot for a soap opera, detective story, sit-com or mystery based on the election.
31. Based on biographical facts about Bush and Dukakis, describe what they were probably like when they were in middle school.
32. Choose one or more categories and compare Bush and Dukakis. Be creative! Favorite sports, favorite music, hero or heroine, favorite menu, favorite vacation, favorite clothes, favorite color, favorite car, favorite movie, book or TV show.

Political Analysis Sheet

ISSUE/CANDIDATE	WON	LOST	UNDECIDED	RESULTS	CONSEQUENCE

POLITICAL ANALYSIS REPORT

Choose one issue/candidate that interests you. Examine the above information. Explain why that issue or candidate interests you. Consider the following questions in your analysis: Do you agree or disagree with the results? Why? What is your opinion as to why that issue/candidate has won, lost, or is undecided? What other consequences may result from this voter decision?

c. Teacher selects a student or students to call out ballot items and report orally the number of votes for each item.
d. As ballot items are called out, students raise their hands to indicate voting on their ballot.
3. Debrief class voting. Did anything surprise you? If so, what and why do you think it turned out that way? [the number of voters, the margin on candidates or issues, the media blitz, how the class differed from their individual voting] If nothing surprised you, what were the clues that told you what was going to happen? [voter apathy, previous polls]
4. Students will share the results of the election by discussing the voting results worksheets and comparing them to the outcome of the class vote through the result line activity.

RESULT LINE ACTIVITY

A. Designate three sections of the room to indicate *won, lost,* and *undecided.*
B. Have prepared a number of placards or sheets of paper with the topic of a ballot measure or a political race written in large letters on them.
C. Distribute one placard each to groups of four students.
D. Direct each group to "huddle" and together come up with answers to the following questions: (Each group member is responsible for reporting one of these.)
  1. What was the result of your ballot measure or political race in your class? (Won, Lost, Undecided)
  2. What was the result in your state?
  3. Why do you think the results came out as they did?
  4. What is one consequence of this voter decision that might occur in your community?
E. Distribute "political analysis sheet." Explain to class that they will be keeping track of the information reported to the class and that they will be analyzing one issue that interests them from the information reported to them.
F. Model the activity using one of the groups and placard topics. Have each group indicate its topic result by moving physically to the designated section of the room and displaying its placard to the class. Model the cooperation of each group member by students reporting the results of their "huddle." Have students record information on their political analysis sheet.
G. Continue result line activity allowing each of the groups to report and physically take their place on the result line. After each presentation, students update their political analysis sheet.
H. Students share with whole class their analysis of one issue that interests them.

DEBRIEFING

Based on information gathered through the comparison of class and state voting results, students will predict some future events using the future probe sheet.

DIRECTIONS FOR USE OF FUTURE PROBE SHEETS

A. Check for student understanding of directions on handout by completing the first question in class.
B. Students fill in handout. When completed, students may add other conditions in which they have an interest.
C. Teacher uses probe questions to encourage futuristic thinking. Examples: Which conditions are most probable? Why? Which are most desirable? Why? What could be done to achieve the desirable conditions? What are the possible consequences of each condition?

EVALUATION

1. Tallying the class votes and discussing the results involves students personally in the voting experience.
2. Result line activity allows students to synthesize and analyze information to make future predictions about elections.

TIPS FOR THE TEACHER

Accept unusual ideas and uncertainties with positive responses to encourage students to try out their thoughts in a risk-free environment. These issues may have no "right" answers.

OPTIONAL ACTIVITIES

Continue the future probe activity by asking students to develop additional conditions that affect the election process. This could be an extra-credit/homework activity to be discussed at home.

Invite a defeated candidate/measure supporter to discuss the high and low points of the campaign and suggestions for improving the process. Create a story/cartoon/skit about the election.

Future Probe Worksheet

For the following possibilities indicate if they will happen, could happen, should happen. (You can choose all those outcomes if appropriate.) Write your best reasons for each prediction.

1. Presidential candidates will be selected by a committee of political party members.
2. All state primaries will take place on the same day.
3. Voters will be required to register six months before the election.
4. People will vote in their homes or places of work with a computer-like device.
5. The winners of our state primary will become the candidates of their party.
6. Vice presidential candidates must be of the opposite sex, geographical area and background from the presidential candidate.

Susan Marcus and Janet Kakishita teach at West Sylvan Middle School in Portland, Oregon. Valuable assistance and encouragment were provided by Susan Booth-Larson of the School of Education of Portland State University. This activity is adapted from an activity which will appear in Righting Your Future: LRE Lesson Plans for Today and Tomorrow, *a book written by the SPICE III teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law.*

Voting

Increasing Participation in Democracy/Grades 9-12

Joellen Fritsche

The challenge for today's teacher is to break down the attitude among young people that voting—and participation in the political process in general—is meaningless.

The activities presented here are designed to help students realize the value of participating in our political system. Although the initial emphasis is on voting, students also will learn about other ways in which they can effect change. The first activity sets the stage for students to think about and discuss voting and political participation. The second activity is designed to help students see the dangers of allowing a few people to participate in the political process. The third activity is designed to engage students in a school or community project in which they learn first-hand the intricacies of the political process. Teachers should note that these three activities can take place over several class periods or be consolidated into one class period.

A primary goal of this study unit is to strengthen the skills students need to become effective citizens. The unit emphasizes discussion and listening skills, distinguishing fact from opinion, creating logical arguments based on facts, identifying current political problems, analyzing alternative solutions, and implementing problem-solving strategies.

Objectives

After completing the activities, students will be able to:

1. Explain the dangers of nonparticipation in the political process.
2. Summarize arguments for and against voting in major elections.
3. Describe the different ways young people can get involved in the American political system.
4. Analyze a problem, organize a plan to bring about change, and implement the plan.

Activity 1: Uncle Sam Wants You—To Vote!

Before you conduct this activity, you need to prepare ballots for a class poll. On each ballot, write the question:

Should all American citizens be required by law to vote in all major elections?

Yes________

No________

Mark half of the ballots on the back with an X and mix them in with the rest of the ballots.

Give ballots to students as they enter the class. Then have students vote and place their ballots in a box. Tabulate the results and record them on the board. How did the class vote on this question? Now, tabulate the marked ballots only. Are the results any different? Lead the class in a discussion on voting, using the results of this poll as a springboard. Some questions you might want to consider include:

- Could Congress pass such a law? Would it be enforceable?
- Would this law infringe on the rights of the individual?
- What kind of punishment would be appropriate if someone broke this law?
- Is there any problem in letting 50 percent of the class decide the issue for the entire class? If not on this issue, then on others?

Encourage students to explain why they voted "yes" or "no" to this question. Compare the results of the poll with the low level of voter participation in the United States today. (You might want to cite some of Curtis Gans's figures.) Ask students why they think voter participation is so low in the United States. List these reasons on the board and label them "Reasons for Not Voting." Save this list for Activity Two.

Activity 2: Government by the Few

Before conducting this activity, you will need to prepare a numbering system for your class. Mark enough slips of paper for 84 percent of your students with the numbers 3, 4, 5, or 6. Mark slips for the remaining 16 percent with the number 2. Fold the slips of paper so students cannot see their number.

As students enter the class, give each one a slip of paper. Instruct them that they are not to open the paper until you tell them. After all the students have entered the classroom, have them open their slips of paper. Have those students with the number 2 go to the front of the room. Tell the class that this group now has complete control over the rest of the group. Tell the group that they must establish new rules for the conduct of the class but that they can make up any rules they wish. Move to the back of the room. It may take some prodding on your

2162

part, but try to get them to establish at least three or four new rules. After five or ten minutes, have the group return to their seats.

Explain to the students that the percentages you used to determine who would control the class and who would not reflect the percentage of eighteen to twenty-four-year-olds who did and did not vote in the 1986 congressional elections (16 percent voted, 84 percent did not). Explain to the students that when they do not vote they are giving the reins of power to someone else—someone they may not agree with. Discuss the implications of this. Should a small percentage of the class be given the right to control the entire group? Were the rules the ruling group made fair? Did the group think of themselves or the class when making the rules?

Lead the discussion into an examination of the dangers of nonparticipation in government. Again, you might want to use some of the examples Gans cites in his article, but encourage students to come up with their own as well. List these on the board and label them "Dangers of Not Voting."

Now compare this list with the "Reasons for Not Voting" list made in the previous activity, and discuss both lists with your students.

Some questions to consider:

- Which list poses the greatest threat to democracy?
- Is voting for the "lesser of two evils" better than not voting at all? Why or why not?
- Is there any reason not to vote?
- What are some ways people can get involved in the political process, other than voting?

Use the discussion to focus on what motivates people to get involved in the political process. List some of these reasons on the board and ask students to keep them in mind for the next activity.

Activity 3: Participating in the Political Process

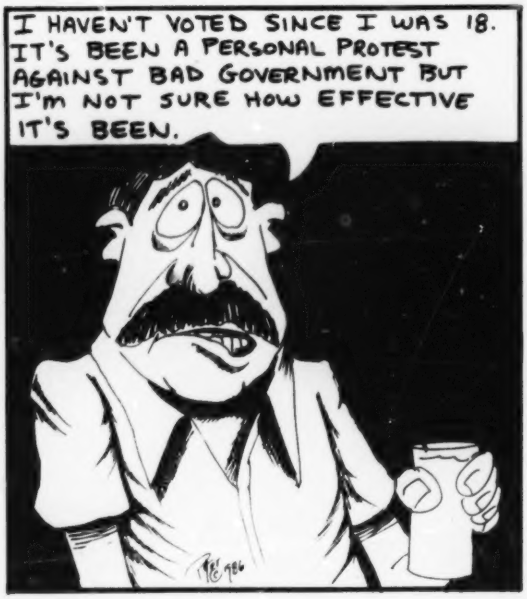
When students enter the class, hand each one a copy of the cartoon on this page. Divide the class into groups of four to six students. In their groups, students are to discuss and answer the following questions:

1. Do you think the person in this cartoon is participating in the political process?
2. What is the irony in this cartoon?

After students have had some time to discuss the cartoon, have each group report their answers to the rest of the class. Record them on the board. Discuss the responses with the class. Is not-voting a way of participating in the political process? Does not-voting send a message to decisionmakers? If so, what kind of message?

Explain to students that voting is only one way to effect change in the political process. Ask students how else the character in the cartoon might protest against bad government? List these reasons on the board and label them "Ways to Effect Change." Some suggestions for this list might include: conducting a petition drive, instituting a letter writing campaign, participating in a protest march, or running for class office.

Now ask students to think about an issue, problem, or situation either in their school or in their community that they would like to change. List them on the board. Ask students which problems they feel they could most likely solve. Bring the class to a consensus on one issue. Once you have decided on an issue, look at the list, "Ways to Effect Change," and ask students which method they think is the best for solving their issue. For example, students might want to:


I HAVEN'T VOTED SINCE I WAS 18. IT'S BEEN A PERSONAL PROTEST AGAINST BAD GOVERNMENT BUT I'M NOT SURE HOW EFFECTIVE IT'S BEEN.

- Change the way the school's student activities fees are paid. To reach this goal, students might research and document the current payment plan and present school administrators with sound arguments for the change.
- Make a street crossing in their community safer. To reach this goal, students might organize a petition drive and then present petitions to the local governing body.
- Persuade their representatives in Congress to vote a particular way on a piece of legislation. To reach this goal, students might initiate a letter-writing campaign at the school, community, or state level.

Be prepared to advise your students if they need help conducting background research, building a case, or identifying next steps.

Once their project is complete, instruct students to prepare a report on what they learned about participation in the political process. This report should be an oral presentation to the entire class. In their reports, students should consider the following questions:

1. Did you achieve your desired goals? Why or why not?
2. What was the most difficult aspect of the project? What was the easiest?
3. What kind of "political techniques" did you use? Which techniques were the most successful? Why? Which techniques were the least successful? Why?
4. What was the most important thing you learned from this project?

After the reports have been presented, ask the class what they learned about the value of participation in our political process.

Joellen Fritsche is on the publications staff of the Close Up Foundation in Washington, D.C.

2163

Steven J. Uhlfelder, Linda Bruin, and Christopher J. Burke

Court Report

The Supreme Court speaks on "outrageous" parodies, whether garbage has constitutional protection, and the constitutionality of special prosecutors.

First Amendment Foils Falwell

The First Amendment guarantees the freedoms of speech and the press. Few disagree that the ability to speak freely is essential for a functioning democracy. The Supreme Court consequently has been reluctant to restrain what Justice Holmes once called the "free trade in ideas." However, the Court occasionally abandons its laissez faire approach to the ideas marketplace, protecting consumers by excluding from the First Amendment's scope particularly valueless or harmful expressions, such as obscenity, falsehoods, and fighting words. Because the line between useful and useless speech cannot be drawn with precision, denying First Amendment protection to expressions which arguably have merit risks stifling expressions which clearly do, an unintended result often called a "chilling effect." Thus, rather than chill "robust political debate," the Court in *Hustler v. Falwell*, 56 U.S.L.W. 4180 (1988), conferred First Amendment protection on a "gross and repugnant" parody purposefully designed to hurt its public figure subject, because the publishers of the offensive portrayal did not act with "actual malice."

The controversy began when *Hustler* magazine lampooned the Reverend Jerry Falwell in November 1983. That month's issue of the nationally circulated adult magazine contained an "ad parody" resembling an actual advertisement for Campari Liqueur. The parody, following the format of real Campari ads, featured the name and picture of the Reverend Falwell, accompanied by a fictional interview with the Reverend in which he described his "first time." Genuine Campari ads, capitalizing on the various connotations of the phrase "first time," depicted celebrities talking about their initial experiences with the liqueur. The *Hustler* parody showed Falwell declaring that his "first time" took place in an outhouse "during a drunken, incestuous rendezvous with his mother." At the bottom of the page, in small print, appeared a disclaimer: "ad parody—not to be taken seriously." The magazine's table of contents listed the ad parody by a similar designation.

Reverend Falwell sued *Hustler* magazine, employing three theories: (1) invasion of privacy; (2) libel; and (3) intentional infliction of emotional distress. At trial in a federal district court, the judge ruled in *Hustler's* favor on the invasion of privacy claim, and the jury found in favor of *Hustler* on the libel claim. The jury, however, sided with Reverend Falwell on the claim of intentional infliction of emotional distress, awarding him $200,000 in compensatory and punitive damages. The U.S. appeals court upheld the verdict, after which the Supreme Court agreed to hear the case.

The jury's verdict established that the ad parody had been intended to, and in fact had, caused Jerry Falwell severe emotional distress; it also established that the satire offended "generally accepted standards of decency or morality." (One often-repeated test for revealing the required level of repugnance is whether an average person, upon being told of the offensive conduct, would exclaim, "Outrageous!") About these issues no dispute remained. Whether the parody deserved the status of constitutionally protected speech turned on the Court's decision whether to apply, in a claim for intentional infliction of emotional distress, the "actual malice" standard developed for libel and slander, or as the two are frequently called for convenience, defamation.

"Actual malice" actually has nothing to do with malice as that term is commonly used. A term of art first defined by the court in the famous case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "actual malice" refers to the publication of a false statement of fact with knowledge that such statement was false, or with reckless disregard as to whether it was true. Thus, hatred or ill will are not aspects of actual malice, and speech motivated by these seemingly malicious feelings very well may be protected. The First Amendment precludes a public figure such as Jerry Falwell from recovering for damage to his reputation caused by defamatory statements, unless he can prove that such statements were made with actual malice.

Reverend Falwell argued that actual

malice was not relevant to a claim for intentional infliction of emotional distress. He urged the Court to accept the position that *Hustler's* intent to cause injury, a like level of culpability as actual malice, stripped the ad parody of constitutional protection. In Falwell's view, which the appeals court had adopted, defamation issues regarding the truth or falsity of the statement, and the distinction between fact and opinion, were irrelevant questions not raised by his claim. Thus, the actual malice rule formulated to address issues particular to defamation should have no place in an action distinct from libel and slander.

The Court disagreed, nearly unanimously (Justice White concurred in the judgment). The majority, speaking through Justice Rehnquist, reviewed general First Amendment principles, focusing specifically on the importance of political cartoons in this country's public discourse. To make its point, the Court cited cartoonist Thomas Nast's excoriation of Boss Tweed, and it named a few past presidents, like FDR, whose features frequently were cruelly caricatured. The Court conceded, however, that the *Hustler* parody was "at best a distant cousin of the political cartoons described above, and a rather poor relation at that." But the Court could not devise a principled standard for distinguishing valuable political satire from the *Hustler* piece, and it was "quite sure that the pejorative description outrageous, [did] not supply one."

Deciding that free speech requires adequate breathing room, the Court concluded that a public person cannot recover for intentional infliction of emotional distress by reason of an offensive publication without an additional showing that the injurious statement was made with actual malice. Because the jury had determined that the *Hustler* ad parody reasonably could not have been understood to include facts about Jerry Falwell, the actual malice standard had not been met, and the court reversed the judgment in Falwell's favor.

When the Court announced its decision in this case, the media generally and cartoonists and satirists in particular, breathed a collective sigh of relief. Applying the actual malice rule as the Court did here virtually forecloses the possibility of successful suits by public persons claiming intentional infliction of emotional distress. Paradoxically, the more outrageous a portrayal is, the more likely it will be unbelievable; and, after *Hustler v. Falwell*, expressions which are not reasonably believable, cannot be understood to contain actual facts, are absolutely protected by the First Amendment. The downside of this decision is the license to inflict emotional distress upon public persons that has been granted to the press. That, apparently, is a cost of freedom.

—*Steven J. Uhlfelder*

Garbage at the Curb: No Fourth Amendment Protection

The Fourth Amendment, which expressly binds the federal government and also applies to the states through the Due Process Clause of the Fourteenth Amendment, forbids unreasonable searches and seizures. Consequently, subject to some limited exceptions, law enforcement officials must obtain a warrant to search an item or area which an individual reasonably believes to be private and protected against unsupervised scrutiny. In *California v. Greenwood*, 56 U.S.L.W. 4409 (1988), the United States Supreme Court ruled that because society does not recognize as objectively reasonable an expectation of privacy in garbage placed at the curb for collection, trash so situated may be constitutionally searched and seized without a warrant.

Early in February 1988 a federal narcotics agent informed Laguna Beach Police Investigator Jenny Stracner that a truck full of elicit drugs was travelling to Billy Greenwood's house. The two unsuccessfully searched for the truck. Later that month one of Greenwood's neighbors called Stracner to report suspicious activity at the Greenwood residence.

Stracner conducted a surveillance of Greenwood's house. Her observations confirmed the neighbor's description of Greenwood's numerous late night visitors. Still lacking the probable cause needed for a warrant, Stracner asked the trash collector to give her Greenwood's garbage; the collector complied. Stracner searched the refuse and found the residue of drug use. She immediately prepared an affidavit in support of a warrant to search Greenwood's home, reciting the information gleaned from the surveillance and the garbage.

On April 6, police searched Greenwood's home, seizing a considerable quantity of cocaine in the process. Greenwood and two other occupants were arrested on felony drug charges; the three quickly posted bail and were released.

Greenwood and his friends went back to business. The police continued to receive phone calls concerning the midnight parade of customers patronizing Greenwood's place. Another investigator, Robert Rahauser, had Greenwood's garbage grabbed. In the trash Rahauser found the tell-tale signs of drug trafficking. He secured another warrant to search Greenwood's house, executing it three days later on May 12, 1988. Again police discovered drugs and other evidence of the drug trade in the house. Greenwood was arrested.

Before Greenwood could be tried, the California trial court dismissed the charges against him, agreeing with Greenwood that the warrantless trash searches violated the Fourth Amendment and the California Constitution. The judge's decision required that the information obtained from Greenwood's garbage be excised from the search warrant affidavits. Editing the affidavits stripped them of probable cause, destroying their validity. As a result, the state was unable to use the evidence—including the seized drugs—against Greenwood in court, and the prosecution's case collapsed.

On appeal, a California appellate court affirmed the lower court's judgment, relying on an earlier decision by the California Supreme Court. That case, *People v. Krivda*, 486 P.2d 1262 (Cal. 1971), had held that warrantless trash searches violated both the Fourth Amendment and the California Constitution. But a 1982 amendment to the California Constitution weakened *Krivda* somewhat, providing that the state would no longer suppress evidence obtained in violation of California law. The exclusionary rule, a judicially created remedy designed to deter police misconduct, continued to bar evidence gathered in contravention of the Fourth Amendment. Thus, although the warrantless trash search clearly violated California law, the evidence obtained from Greenwood's garbage would not be kept out of court for that reason. The evidence could be barred only if the search violated the Federal Constitution as well. Because the U.S. Supreme Court had not considered the question in the years following *Krivda*, the California appeals court was bound by the state Supreme Court's decision that warrantless garbage searches violated the Fourth Amendment.

The California Supreme Court declined to review the appellate court's decision, and the U.S. Supreme Court agreed to hear the case. The Court reversed, overruling *Krivda* to the extent it rested on Fourth Amendment grounds.

2165

Justice White authored the majority opinion, which methodically rejected each of Greenwood's three arguments for affirmance. The first of these dealt directly with the two-part test which must be met before a Fourth Amendment violation can be found. The test first focuses on the accused, the party alleging an infringement of his constitutional rights. The accused *himself* must have demonstrated an expectation of privacy in the area searched or the items seized. If the accused did not demonstrate such an expectation, even though others similarly situated ordinarily would do so, a search is legal. However, a personal expectation of privacy does not by itself merit Fourth Amendment protection. Thus, the second part of the test requires that the individual's expectation of privacy be one that society accepts as reasonable. An expectation of privacy which would strike an ordinary person as inappropriate will not catch the Constitution's attention.

Greenwood contended that he had, and exhibited, an expectation of privacy in his garbage. Greenwood argued that he had displayed an expectation of privacy by sealing his trash in opaque plastic bags and by placing the bags on the street to be picked up, mingled with the trash of others, and deposited at the dump. The Court agreed that Greenwood himself may have expected that the contents of his garbage were private, but the majority felt that society would not accept that expectation as reasonable. The Court based this conclusion upon the "common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."

The Court brushed aside Greenwood's second and third arguments. Greenwood's second argument urged the Court to enforce the California state law forbidding warrantless garbage searches by invoking the Fourth Amendment and its attendant exclusionary remedy. The Court flatly refused to permit the Fourth Amendment to bow to state law. Greenwood's last argument looked away from the Fourth Amendment and turned to the Fourteenth Amendment's Due Process Clause. Greenwood asserted that California's constitutional amendment abrogating the exclusionary rule for state law violations offended due process by depriving him of "the only effective deterrent" to violations of this right. The majority saw "no merit" in this position. Police misconduct which violates the Fourth Amendment generally must be penalized by the federal exclusionary rule; the Constitution demands that states offer no less protection than that, but it requires no more.

Writing a dissent joined by Justice Marshall, Justice Brennan lashed out at the majority, suggesting that "members of our society will be shocked to learn that the Court . . . deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public." In Justice Brennan's eyes, the Laguna Beach police "clawed" through Greenwood's garbage, "undoubtedly dredging up intimate details of Greenwood's private life and habits."

The dissenting argument began with a lengthy discussion of a settled principle not in issue—that the Fourth Amendment does not discriminate between containers. After presenting an exhaustive list of containers which have supported reasonable expectations of privacy, including suitcases, tote bags, boxes, briefcases, and paper bags, the dissent concluded that had Greenwood been carrying personal effects in a trash bag such as the one he placed on his curb, the contents of that bag would have been protected against warrantless police intrusion.

Justice Brennan argued that Greenwood "deserved no less protection just because [he] used the bags to discard rather than to transport his personal effects." This statement the dissent supported with a series of similes. To Justice Brennan, a search of trash is "like a search of the bedroom," or "like rifling through desk drawers or intercepting phone calls." The dissenters rejected the majority's position that no reasonable expectation of privacy could attach to garbage, since society understands that garbage is easily tampered with. The possibility that an unwelcome meddler might inspect the garbage, wrote Justice Brennan, does not negate the expectation of privacy in its contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone.

These analogies attempted to blur the distinction between the home and the garbage pail, the wanted contents of a package and discarded waste. The dissent also compared placing garbage bags on a curb for collection by the garbage collector, and placing letters in a mailbox for collection by a postal worker. The latter does not defeat a reasonable expectation in the letters' contents, claimed the dissent, and so neither should the former result in a relinquishment of a privacy expectation in the garbage.

The Court's decision in *Greenwood* is a victory for law enforcement officials. However, society is less protected against governmental intrusion. The question now is whether the benefit to society resulting from the enhanced ability to capture criminals will justify the cost to it in the form of increased exposure to unsupervised police inspection of discarded personal items. *—Steven J. Uhlfelder*

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Busing Fee Challenged by Poor Family

The Supreme Court upheld a state law that allows some school districts to charge a fee for bus transportation, while others are prohibited from doing so, in *Kadrmas v. Dickinson Public Schools*, 56 USLW 4777 (1988). The Court ruled, 5 to 4, against a family who claimed the law violates the equal protection clause of the Fourteenth Amendment by allowing certain school districts to charge a busing fee while students in other districts receive free transportation.

A North Dakota law allows the school board of any district which has not been reorganized to charge a fee for students riding school buses. On the other hand, school districts that have been reorganized are not permitted to charge a fee. Students living in reorganized school districts ride free. Only eight of North Dakota's 310 school districts have not been reorganized.

Sarita Kadrmas lives with her family on a farm near New Hradec, North Dakota, in the Dickinson School District and attends Roosevelt Elementary School in Dickinson, about 16 miles from her home. Because the Dickinson district has not been reorganized, it charges a fee of $97 per year for students to ride the bus.

Until 1985, the Kadrmases, whose family income at the time was near the poverty level, had agreed each year to pay the fee for transporting Sarita to school. Having fallen behind on their bills, however, the family refused to sign a contract for the 1985-86 school year. Accordingly, the school bus no longer stopped for Sarita, and the family challenged the law. Sarita and her mother argued that Dickinson's user fee for bus service unconstitutionally deprives those who cannot afford to pay it of minimum access to education.

A majority of the Supreme Court—Justice O'Connor, Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy—did not agree. The North Dakota law does not discriminate against a suspect class and does not interfere with any fundamental right, wrote Justice O'Connor. Sarita's family did not prove the statute is arbitrary and irrational. Sarita was denied access to the school bus only because her parents would not agree to pay the same fee charged to all other families whose children used the service. Moreover, the majority continued, "a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible." Since the Constitution does not require that such service be provided, a school district that chooses to provide transportation is not obligated to offer it for free.

Four justices dissented. In a strongly worded dissent, Justice Marshall (joined by Justice Brennan) wrote that the Court's ruling denies equal opportunity and discourages hope for poor people. In Marshall's view, education often is the only route by which poor children can become full participants in our society. Imposing a transportation fee on students in Sarita's position is no different, in practical effect, from imposing a fee directly for education. Children living far from school can receive an education only if they have access to education.

Justices Stevens and Blackmun also dissented on grounds that there was no rational basis for a law allowing nonreorganized districts to place an obstacle in the paths of poor children seeking an education in some parts of North Dakota when that obstacle has been removed in other parts of the state. *—Linda Bruin*

Food Stamps May Be Denied to Strikers

In *Lyng v. UAW*, 99 L Ed 2d 380 (1988), the Supreme Court upheld a provision in the Food Stamp Act which prevents the household of a striking worker from receiving food stamps.

A 1981 amendment to the Food Stamp Act states that no household can become eligible to receive food stamps during the time that any member of the household is on strike and that the allotment of food stamps a household is already receiving prior to a strike cannot be increased because of a reduction in the striker's income.

The amendment was challenged by the United Auto Workers and United Mine Workers after members of both unions and their families were disallowed food stamps when they went on strike. The unions contended the amendment infringed on their First Amendment associational rights and their rights of free expression. They also believed the law violated the equal protection component of the Fifth Amendment's due process clause.

The Supreme Court, in a 5 to 3 decision, disagreed. The Court recognized that denying food stamp benefits to strikers and members of their households makes it harder for them to maintain themselves during a strike and that both the strikers and their unions would be much better off if food stamps were available. However, the Court pointed out that exercising the right to strike inevitably involves the risk of economic hardship and that the government is not required to minimize that result by providing food stamps to strikers and their families.

There was no First Amendment violation, said the majority, because the amendment to the Food Stamp Act does not infringe the strikers' right to associate with their families or the associational rights of the workers and their unions. The law does not prohibit individuals from dining together or associating together to conduct a strike. Furthermore, the statute does not abridge the workers' right to express themselves about union matters.

In addition, the majority continued, there was no violation of the equal protection component of the Fifth Amendment because the Food Stamp Act amendment is rationally related to the legitimate government objective of avoiding undue favoritism to one side or the other in labor disputes and because the amendment also serves the legitimate purpose of protecting the government's fiscal integrity by cutting expenditures.

Three dissenting justices concluded that the striker amendment to the Food Stamp Act should have been struck down. The desire to save government funds, said the dissenters, is not sufficient justification to pass a law singling out strikers, rather than some other group, to suffer the burden of cost-cutting legislation. The purpose of the equal protection component of the Fifth Amendment is to protect citizens against government arbitrariness by guaranteeing that similarly situated individuals will be treated in a similar manner. If the rationale of saving money is a sufficient reason for enacting laws that have a discriminatory impact, the minority observed, then that rationale could be used to justify the exclusion of any unpopular group from a public benefit program. *—Linda Bruin*

Injured Citizen May Sue the Federal Government

It may be somewhat easier for citizens who are injured by the negligent acts of government employees to sue the federal government as a result of the Supreme Court's decision in *Berkovitz v. United States*, 56 USLW 4549 (1988).

The legal theory of sovereign immunity dates back to the divine right of kings. (According to a common [though dubious] explanation, if "the King can do no wrong," it would be a contradiction of his sovereignty to allow lawsuits against him.) Chief Justice John Marshall cited the concept of sovereign immunity in *Cohen v. Virginia*, 19 US 264 (1821). Sovereign immunity prevents individuals from filing suit against the government without its consent. In 1946, the United States waived its immunity from liability in certain situations by enacting the Federal Tort Claims Act. However, immunity continues to protect the federal government from lawsuits in many instances. For example, a person who is injured as a result of combatant activities of the military forces during a war cannot make a claim against the government. Another exception to the Federal Tort Claims Act specifically exempts from liability any actions of federal agencies or employees done in the performance of a "discretionary" function or duty. This sweeping exception from liability was the focus of the *Berkovitz* case.

In 1979, Kevan Berkovitz, then a two-month old infant, was given a dose of oral polio vaccine. Within one month, Kevan contracted a severe case of polio, which left him almost completely paralyzed and unable to breathe without the assistance of a respirator. It was determined that Kevan had contracted polio from the vaccine.

Kevan's parents filed suits against the manufacturer of the vaccine and the United States government. (The lawsuit against the manufacturer was settled.) The parents contended the United States was responsible for Kevan's injuries because the National Institutes of Health had wrongfully licensed the manufacturer to produce the vaccine and because the Food and Drug Administration had wrongfully approved the release of the vaccine for use by the public. Although the oral polio vaccine is routinely given to nearly all children in the United States and has been credited with virtually eradicating polio, Kevan's parents alleged a dangerously virulent dose had infected their son.

Government attorneys responded that the sovereign immunity theory embodied in the Federal Tort Claims Act precluded liability for any and all acts arising out of the regulatory programs of federal agencies. The discretionary function exception, they argued, meant that the lawsuit should be dismissed and the Berkovitz's claim cut off.

The Supreme Court ruled Kevan and his parents should have the opportunity to proceed with their case. Justice Marshall, writing on behalf of a unanimous Court, explained the reasons for permitting the lawsuit against the government. Under the Federal Tort Claims Act's discretionary function exception, Marshall said, the government is immune from liability and cannot be sued if the action challenged in the case involves the permissible exercise of policy judgment by government employees. However, the government may be liable and can be sued for injuries attributable to the negligence of government employees who violate specific mandatory directives in federal statutes and regulations. In other words, if the employee's conduct is not appropriately the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

As a result of the Supreme Court's decision, the Berkovitz case can now go to trial. In order to prevail, the family will have to prove their allegations that the National Institutes of Health violated regulations requiring it to receive certain test data from the manufacturer and apply certain safety standards before issuing a license to the vaccine manufacturer and that the Food and Drug Administration violated regulations by knowingly approving the release of a specific lot of the vaccine that did not comply with safety standards. —*Linda Bruin*

Postal Monopoly Upheld

The Supreme Court's decision in *Regents of the University of California v. Public Employment Relations Board*, 99 L Ed 2d 664 (1988), upholds the federal government's postal monopoly and invalidates a widespread practice of public sector unions.

The University of California operates an internal mail system to facilitate the delivery of mail to its more than 100,000 employees located at various sites on the university's campuses. In 1979, a local union attempted to use the university's internal mail system to send unstamped letters from the union to university employees whom the union was attempting to organize. The university refused to carry the unstamped letters in its internal mail system.

The union claimed university officials had committed unfair labor practices in violation of California's Higher Education Employer-Employee Relations Act by prohibiting the union from distributing its organizational literature to potential union members. The California Public Employment Relations Board ruled that the university's denial of access constituted a violation of the state law requiring employers to grant unions access to institutional bulletin boards, mailboxes, and other means of communication.

The university responded that regardless of the state's interpretation of its collective bargaining law, the university could not deliver the union's mail without postage because of a series of federal laws called the Private Express Statutes.

Congress enacted the Private Express Statutes pursuant to Section 8 of Article I of the United States Constitution, which authorizes the establishment of post offices and post roads. The postal monopoly was first created in 1782 by the Continental Congress when this country was governed by the Articles of Confederation. Congress embraced the concept of a federal postal monopoly in 1792 as a means of providing "prompt, reliable, and efficient services" to postal patrons in all areas of the country.

The federal Private Express Statutes establish the postal monopoly and generally prohibit the private carriage of letters over United States' postal routes without payment of postage to the Postal Service. However, the general prohibition allows for limited exceptions, two of which were at issue in this case, one called the "letters-of-the-carrier" exception, and the other referred to as the "private hands" exception.

The Supreme Court analyzed the two exceptions to resolve the potential conflict between the California labor law and the federal postal laws.

The "letters-of-the-carrier" exception allows a business or institution, that is, the "carrier," to operate an internal mail system to deliver letters related to the carrier's current business. To fall within this exception, the letters must relate to the current business of the business or institution.

A majority of the Supreme Court found this exception was not applicable to the case at hand. Letters relating to the union's efforts to organize the university's employees into a bargaining unit may be of interest to the university, wrote Justice O'Connor on behalf of Chief Justice Rehnquist and Justices Brennan, Blackmun, and Scalia. However, the subject of such communications can only be described as the union's current business, not the university's. The alleged business in this case, said the majority, is not close enough to the university's affairs to be the natural subject of letters concerning the university's current business.

The "private hands" exception allows the conveyance of letters by individuals who carry letters for a friend without receiving any form of benefit from the sender, that is, without compensation. When this exception was added to the postal laws in 1908, it was intended solely to permit a person to do a favor for someone.

The Supreme Court majority held the private-hands exception is applicable only when there is no compensation of any kind flowing from the sender to the carrier. In this instance, wrote Justice O'Connor, the university's carriage of the union's letters would not be without compensation, because compensation includes indirect as well as direct payment. By delivering the union's letters, the university would be providing a service for its employees that they would otherwise have to pay for themselves through their union dues. Since neither exception was applicable, the majority concluded the university could not deliver the union's letters without postage.

Justices Stevens and Marshall dissented on grounds that when the postal laws were written, Congress could not have envisioned the development of today's internal mail systems in large universities. The dissenters doubted that Congress intended to interfere with not-for-profit civic organizations such as schools and universities in providing for the delivery of internal mail without reward or other profit or advantage.

Justice White concurred in the judgment. Justice Kennedy took no part in the consideration of the case.

—*Linda Bruin*

Safeguards for Handicapped Students Strengthened

The power of school officials to expel handicapped students was strictly limited by the Supreme Court's recent interpretation of the Education of the Handicapped Act (EHA) in *Honig v. Doe*, 98 L Ed 2d 686 (1988). The Court's 6-2 decision guarantees certain procedural protections to special education students even though their conduct may be violent and disruptive.

Enacted by Congress in 1975, the purpose of EHA is to provide appropriate educational programs for children with handicaps. Under the EHA, a committee, including both parents and school personnel, develops an Individualized Educational Program (IEP) describing the types of classes and related services necessary for each special education student.

The controversy in this case resulted from the so-called "stay-put" provision of the EHA. Once the committee agrees on an appropriate educational placement for the student, a change cannot be made unless the committee agrees to a change in the IEP. There is only one exception in the statute. A change in the student's placement may be made pending the committee's completion of a new IEP, if the student's parents agree to the change.

In 1980, school officials in San Francisco attempted to expel two special education students for violent and disruptive conduct related to their disabilities. John Doe, who at the time was 17 years old and had serious emotional problems, had a violent outburst during which he choked another student with sufficient force to leave abrasions on the victim's neck. Afterwards, while being escorted to the principal's office, John kicked out a school window. John was suspended for five days, and the principal recommended that John be expelled indefinitely.

In a separate incident, Jack Smith, an emotionally disturbed student enrolled in another special education program, was suspended for stealing, extorting money from classmates, and making lewd comments to female students. Again, the principal recommended expulsion.

The main question in this litigation was whether the stay-put provision of the EHA precludes a local school district from unilaterally changing the educational placement of a student whose handicap-related behavior poses a danger to others. School officials argued there should be an exception to the stay-put requirement when students engage in misconduct that threatens the safety of other students and school employees. The students contended Congress specifically had written the law to allow for only one exception, those instances where the parents give their consent.

The Supreme Court agreed with the students. Justice Brennan wrote for the majority. The language of the stay-put provision is unequivocal, he said. Unless both the school officials and the parents agree, the student must remain in his or her current educational placement. There is no emergency exception for dangerous students.

In reaching this conclusion, the Court emphasized that its interpretation of the EHA does not leave educators hamstrung when dealing with handicapped students who are disruptive. While the student's placement may not be changed during a complaint proceeding pending a decision of the IEP committee, school districts may use normal procedures for dealing with dangerous students.

For example, disciplinary procedures such as the use of study carrels, timeouts, detention, and the restriction of privileges are available. More drastically, where a student poses an immediate safety threat, he or she may be temporarily suspended for up to ten school days. Finally, in those situations where the parents of a truly dangerous child adamantly refuse to permit any change in placement, school officials may invoke the assistance of the courts. While school officials cannot remove the child from the classroom over the parents' objection pending completion of the IEP review, the stay-put provision does not limit the judicial power of the courts to grant injunctive relief under appropriate circumstances.

Justice Scalia filed a dissenting opinion, in which Justice O'Connor joined.

—*Linda Bruin*

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Court Upholds Special Prosecutor Law

Because the separation of power into three distinct branches is a concept on which our system of government is founded, intrusions of one branch into another's territory are likely to be hotly contested.

Opponents of the special prosecutor law argue that it smudges the line between the executive and judicial branches and takes away the executive's traditional authority to execute the laws.

The framers of the American Constitution placed the power of criminal prosecution in the executive branch, which appoints federal judges and prosecutors and directs the Department of Justice. For two centuries, this arrangement worked adequately. In his second term, however, Richard Nixon removed a prosecutor who was responsible for ferreting out the malfeasance of executive branch officials, in the infamous "Saturday Night Massacre."

In 1978, Congress passed the Ethics in Government Act, which created a formal system for the naming of a special prosecutor. Under the system, Congress must notify the attorney general that it thinks a special prosecutor is needed, then the attorney general must decide whether to seek the appointment of a prosecutor. Appointments are made by a special court in the District of Columbia.

The controversy has been that special prosecutors are appointed by the judicial instead of the executive branch. But the Supreme Court decided this year, in *Morrison v. Olson*, that the special prosecutor provision is constitutional.

In *Morrison v. Olson*, —U.S.—, 56 USLW 4835 (6/29/88), a committee of Congress, believing that three officials of the Environmental Protection Administration may have lied to them and conspired to obstruct justice, sent a report to the Justice Department, thus invoking the Act. The attorney general asked the special court to appoint a prosecutor. Alexia Morrison was named and given the mission of investigating one of those officials, Theodore Olson. Morrison obtained subpoenae which commanded the other two officials to appear before a grand jury, but the White House resisted. A district court ruled against the administration's move to quash the subpoenae, but the court of appeals came down on the side of the administration, which led the prosecutor to appeal to the Supreme Court. The issue was whether Congress had the power to enact a law which allows a court to appoint a prosecutor, outside of the executive branch's traditional authority to execute the laws.

The topical interest in the appeal comes from the fact that former Reagan administration officials have already been convicted at the hands of special prosecutors, and the cases of Oliver North and National Security Advisor John Poindexter awaited this decision because a ruling invalidating the special prosecution law might have jeopardized their prosecutions.

Placed in a historical perspective, the question of separation of powers that this case poses is always a ripe vine for constitutional scholars. Political court-watchers undoubtedly will read into the opinion all manner of thoughts on the Reagan Administration's disappointment that the lead opinion was written by William Rehnquist, elevated to the post of Chief Justice by Mr. Reagan. Rehnquist was joined by all but Justice Kennedy, who took no part, and Justice Scalia, who excoriated his brethren in his strong dissent.

The Court affirmed the power of Congress to vest the appointment of "inferior" officers in either the executive or judicial branches, and found that Ms. Morrison's appointment fell into that category. Article II, section 2 of the Constitution describes this power of Congress. The Court decided that because special prosecutors are 1) removable for cause by the attorney general, 2) limited in their tenure to the completion of their given mission, 3) curtailed by specific grants of jurisdiction handed down by the special division court and 4) limited to prosecution as opposed to policy or lawmaking, they are "inferior" officers.

The appellees contended that such an interbranch appointment was not what Article II, section 2 intended. They wanted the Court to interpret the Article to mean that Congress could give the power to appoint an officer to the judiciary for judicial purposes, or to the executive for executive purposes, but could not give an appointment to the judiciary for executive purposes.

The Court looked at the remaining records of the Constitutional Convention and the Federalist Papers and decided that the power to appoint inferior officers was a compromise that encompasses the appointment of special prosecutors. The Court also found that it was not "incongruous" to allow a court to appoint an executive officer, because the problem Congress sought to remedy was executive misconduct.

The EPA officials had appealed the law on the basis that it gave the special division court the power to perform a nonjudicial role. They claimed that federal courts have only Article III power to decide "cases and controversies." But the Court said that because Congress' power to assign the appointment of special prosecutors to a court is constitutional, the court must articulate the parameters of the prosecutor's job as an incident of making that appointment. The appointing court's participation in the prosecutorial mission is limited: the court has only "passive duties" with regard to the prosecutor, such as receiving reports, disclosing them to Congress and awarding fees. The special division does not hear cases brought by special prosecutors, nor does it have removal power over them. A prosecutor must be removed "for good cause" by the attorney general, and disputes over removals must be heard by a regular district court. Thus, the "cases or controversies" power is not enlarged by this Act.

Does this Act constrict the executive branch in its power to see that the laws are "faithfully executed," and thus violate the separation of powers? While removal of the prosecutor by the attorney general must be for "good cause," the justice department policies and rules still must be observed by counsel. Considering that special prosecutors exist to investigate executive branch malfeasance, the Court found that it does not overly burden the presidency to have to show "good cause" for firing a prosecutor. The Court also found that the legislative history spoke of "good cause" in connection with prosecutorial misconduct, and that this was certainly a low-enough threshold for the executive branch to be able to remove an offending counsel with its constitutional power intact.

Lastly, the Court addressed the question of whether, as a whole, the Act interfered with functions of the executive power. It found no motive on the part of Congress to usurp authority. The law limits congressional power to the making of the request to the attorney general for an investigation. The attorney general then decides whether to seek, from the special division court, the appointment of a prosecutor. The Court also found that the law does not drain power from the president to the judiciary because the judiciary must await the attorney general's request and is only allotted ministerial duties.

Undeniably, said the majority, the president loses power in this scheme: the power to appoint, to control the investigation, to remove at will. But the removal power is still there and, noted the Court, the attorney general is not required to ask for the appointment of a special prosecutor. The Court ruled that in light of the fact that the Act seeks to eliminate government misconduct, the encroachment of one branch upon the other is permissible because it is narrowly tailored to the ends sought.

In his dissent, Justice Scalia wrote that the attorney general is faced with a law written in such a way as to make it politically impossible for him to not ask the court for special counsel. If, for example, the attorney general resists Congress' request that he have the court appoint a special prosecutor, he must determine that there are "no reasonable grounds" to believe that further investigation is warranted.

Scalia also wrote that the prosecutorial power is inherently executive in nature, and that once the Act limits the presidency's control over that role, it violates the separation of powers by infringing upon an executive function. He derided the majority's analysis of whether the incursion into executive functions is too much to pass constitutional muster; Scalia's view of the separation of powers is that any encroachment is a violation. The solution to executive malfeasance is ultimately political, whether at the voting booth or by impeachment, and not by the steady erosion of the authority of one branch by another.

Scalia felt that Special Prosecutor Morrison was not an "inferior" officer by any stretch. Scalia said that the failure of the act to articulate limits on the authority of the judiciary and Congress is an invitation to those branches to make further inroads on presidential authority.

The fact that a number of Reagan appointees to the Court abandoned their patron in the *Morrison* decision is perhaps a sign that the separation of powers principle is still quite healthy.

The complexity and demands of government's role in modern society have made it easier for the powers of the executive branch to grow. Perhaps the Supreme Court's decision in *Morrison* is representative of the organic tension in American constitutional law that allows for the self-adjustment of tri-partite power—something the framers would have applauded.

—Christopher J. Burke

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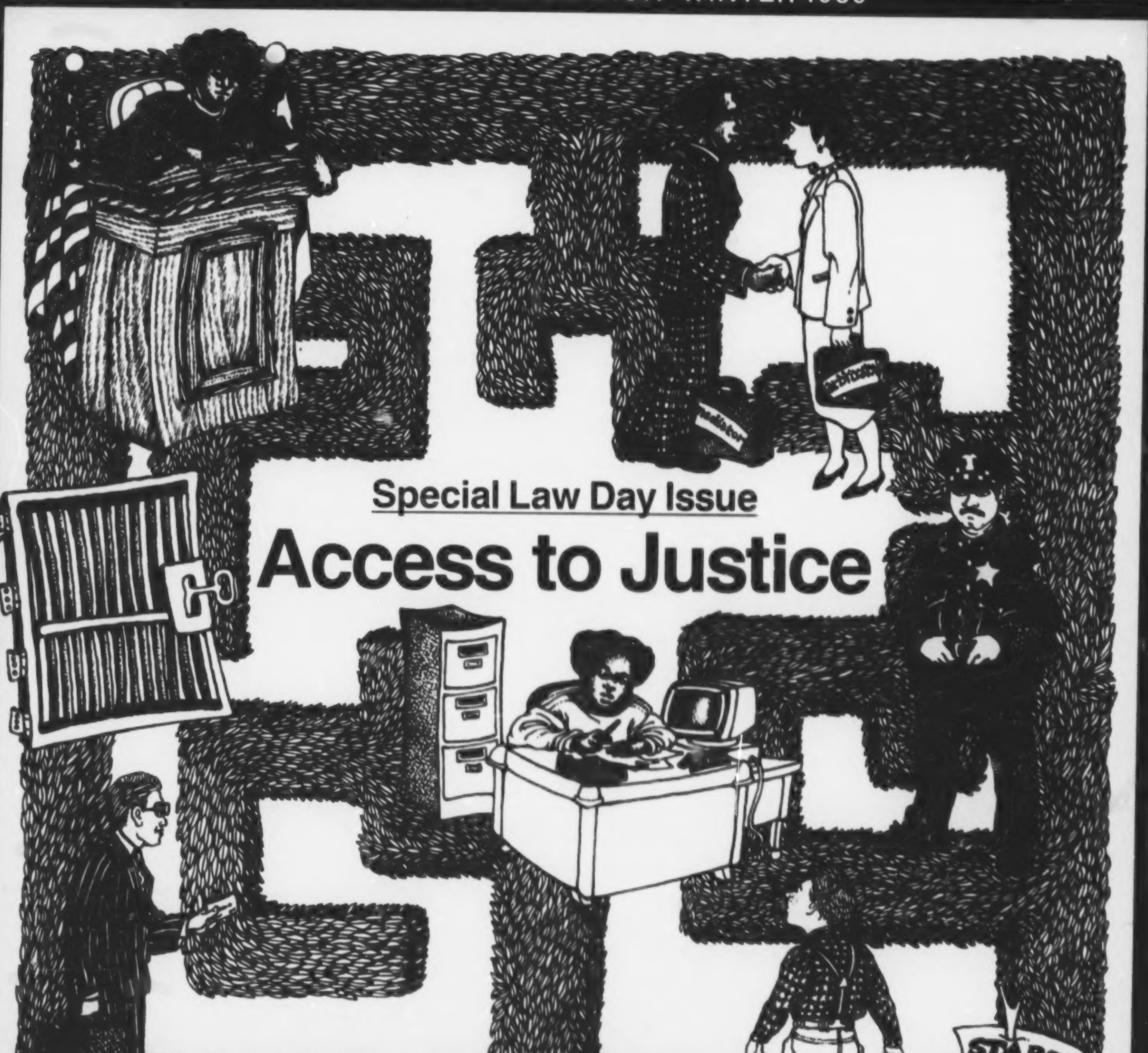

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contents

Volume 13, No. 1, Winter 1989

2 Alternative Dispute Resolution to the Rescue

ELEMENTARY SCHOOL

K-6 STRATEGIES

5 Pro Se Court Simulation
9 A Mindwalk Classroom Strategy
11 ALIEN and the Law
12 The Case of *Brown v. Dellinger*
15 Shoplifting Mock Trial

18 Youth and Justice

MIDDLE SCHOOL

MIDDLE SCHOOL STRATEGIES

24 Evolution of a Juvenile Justice System
25 Mock Election on Juvenile Justice Issues
28 There Ought to Be a Law
29 Mock Transfer Hearing
30 Using Resource Persons Creatively
31 Children in Need of Assistance
32 Consumer Small Claims Court Simulation

34 Death Row Lawyers

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

40 Mediation and the Courts
44 Arbitration
46 A Lawyer's Pro Bono Work
47 Plea Bargaining: A Mini Simulation
48 Problem Solving Through Mediation

53 Court Briefs

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Maria Kassberg

Alternative Dispute Resolution to the Rescue

How mediation, arbitration, and other techniques are making justice affordable

Two neighbors are fighting again, this time over a sprinkler in one's yard that is getting the other's car wet. The verbal abuse turns physical, as one neighbor punches the other. The traditional way to solve this dispute would be through the courts, but this type of conflict is increasingly being settled through mediation, arbitration, or med/arb, a combination of the two.

These alternative forms of dispute resolution (ADR) have traditionally been used to settle labor disputes. In the 1960s, mediation came to be viewed as a way to humanize justice and relieve the backlogged courts. It was then that dispute resolution centers began to appear, usually set up by social agencies, bar associations or government. In the last 10 years, 300 dispute resolution centers were established, bringing the nationwide total up to 400.

People are usually referred to dispute resolution centers by the courts, the police or the government agencies to which they originally took their complaint.

The Alternatives

In mediation, the disputing parties meet with a trained mediator, and each gives its side of the story. Sometimes they are also given a chance to speak to the mediator alone. At the end of the session, which usually lasts a little over an hour, the disputing parties come up with a solution together. The solution is spelled out in a contract which both parties sign and agree to abide by.

In some centers, if the parties can't find a solution that's mutually agreeable, the case goes to arbitration, which most often means the mediator asks each side to sum up its case and then makes a decision and draws up a contract. At centers that don't offer arbitration, the next step for those unable to come to an agreement is the courts.

Mediated settlements are not enforceable by law. In many states, however arbitrated settlements are enforceable. If a defendant is required by an arbitrated decision to pay the plaintiff money and does not, the plaintiff can have the defendant's wages garnished or a lien placed on his property.

In arbitration, the parties do not come up with their own solution. An arbitrator listens to both sides of the story and then decides what the settlement should be.

Arbitration is most often used for labor disputes, commercial disputes and consumer complaints. It is an appropriate dispute resolution avenue to take when there is a question of fact and the law concerning the problem is already well established, said Larry Ray, executive director of the ABA's Special Committee on Dispute Resolution. If the law is not well established, going to court is probably the best course of action.

When disputing parties agree to arbitrate, they must also decide whether the arbitrator's decision will be binding or non-binding. If they decide it will be binding, they will not be able to appeal the decision to the courts because their signed agreement to abide by the arbitrator's decision is in most cases considered a legal contract. (A judge may hear an appeal if the plaintiff can show that the arbitrator was prejudiced against him or if the decision violates the law).

Why ADR?

There are several reasons people turn to alternative dispute resolution, according to Ray. One reason is to save time. The legal system is overcrowded, which results in long delays between the filing of a complaint and the hearing. Another reason is accessibility. Courts are often hard to get to, and their 9 to 5 routine means people have to take time off from work. A third reason is that certain disputes, like those between neighbors, family members and other people who have to maintain a relationship, can be better resolved by mediation or arbitration. These methods of dispute resolution don't create the win/lose atmosphere that pervades the adversarial system of our courts.

Cost is another reason people turn to ADR. Going through the court system would involve hiring a lawyer and paying court costs, while ADR is usually offered for little or no charge. Dispute resolution centers are funded in a variety of ways, usually by a combination of public money and donations from businesses and bar associations.

Another advantage that ADR offers is flexibility. Judicial proceedings are formal and take place at times specified by the court. In mediation, meetings can be scheduled after work and participants can take the time they need to work disagreements out.

ADR in Action

At the Better Business Bureau Dispute Settlement Center in Buffalo, New York, mediation is used to settle family and school disputes. Mediation is very useful in family disagreements over visitation schedules because mediators can take the time to work with the parents on a detailed solution. The final contract can go into a lot of detail about who's going to pick up the kids when, what they should have with them, and what they're going to do. "The courts just don't have the time to do that," said Judith Peter, vice president of the Buffalo center.

There are now 33 jurisdictions in the United States that require mediation in custody and visitation disputes (there weren't any 10 years ago). After an agreement is worked out, the contract is brought to the judge, who then issues a court order to make it enforceable.

Mediation also provides a good forum for hammering out property settlement agreements in divorce cases. At a City University of New York conference on mediation, Adriane Berg, a New York attorney who has extensive practice in matrimonial law and divorce mediation, said mediation has found its place in the divorce process out of necessity. She listed three problems that the court system is not coping with – the volume of cases, the emotional problems that couples going through a divorce face (these are often made worse by the courtroom's adversarial setting), and non-compliance with the terms of the settlement.

These three problems are present throughout our court system, and mediation helps to alleviate them all. Mediation cuts down on the delay between the time a complaint is filed and a hearing held – the average turn-around for disputes at the Buffalo center is 30 days. Mediation creates a cooperative atmosphere that makes people who have continuing relationships more comfortable than the adversarial atmosphere that develops in court. Courts cannot diffuse anger the way mediation can, Berg said.

For example, she said, when a property damage case is being mediated, "merely forcing people to read their insurance policies, which is terribly boring, is a diffusion of anger. All of a sudden, they are sitting together and they get a little closer, their heads are together, they do not understand what is says either. It is a great leveler. Soon, everybody is working together against the common enemy – the insurance company."

This feeling of cooperation and being a part of the decision, rather than having it handed down by a judge, makes people more likely to abide by their agreements. In a survey done by the Community Service Society on the enforceability of agreements in the area of consumer affairs, only 50 percent of all judge-made awards were complied with voluntarily. Eighty percent of the mediated agreements were carried out to everyone's satisfaction.

Berg estimates that people abide by their agreements 85 percent of the time. Of the 15 percent that partially comply or do not comply at all, about half the plaintiffs drop the issue and half take the defendant to small claims court.

Med/Arb

At some dispute resolution centers, a combination of mediation and arbitration is used. At the center in Buffalo, med/arb is used for community conflicts between neighbors, boyfriends and girlfriends, and landlords and tenants. Community conflicts, like the neighbors with the sprinkler dispute that ended with one of them punching the other, are conflicts that would probably end up in the court as a misdemeanor. These conflicts often involve people fighting over the location of driveways and fences or children's behavior, and are usually harassment or simple assault cases.

In mediation/arbitration, both types of dispute resolution are used. The third party acts as a mediator until the parties have reached an agreement. He or she then acts as an arbitrator and issues a contract that makes the agreement formal. Since it is officially an arbitrated agreement, in many states it will be enforceable by law.

If the parties cannot reach an agreement, the third party acts as an arbitrator and asks each participant to summarize his or her position, considers the facts and then makes a decision. "Med/arb puts pressure on people to settle because if they don't, they know a decision will be imposed on them," Peter said. At the Buffalo center, parties settle their own dispute 90 percent of the time.

According to a study by Buffalo-based psychologists Gary Welton, William Rick Fry and Dean Pruitt, med/arb in which one person functions as both the mediator and the arbitrator is the most successful dispute resolution procedure. They found that participants were less hostile and more anxious to reach a settlement than when other procedures were used. They were also more respectful of the mediators.

Who They Are

Dispute mediators come from a variety of backgrounds. At Neighborhood Justice of Chicago, about half are lawyers and half are businesses people, educators and retirees. Mediators at the Buffalo center have an average of 16 years of education and are also teachers, lawyers and business people. About half are women and half men.

There is a growing number of professional mediators who are paid by the hour and work mostly on business and commercial disputes as well as divorce and custody settlements. Most mediators are volunteers, and there is not a lack of them. "Whenever a center asks for mediators, hundreds volunteer," Ray said. He estimates that there are over 20,000 trained mediation volunteers in the country.

The training mediators receive varies from center to center. They have an average of 40 hours of training and often must also complete an internship before they are certified by the center they will be working for. At the Buffalo center, mediators receive 30 hours of training and do an internship. "Mediators need a lot of interpersonal skills, and that takes longer to teach," Peter said, referring to the fact that arbitrators only receive 12 hours of training. "Arbitrators are taught how to think out and then write a decision, which doesn't take as long," she said.

Arbitrators generally receive very little training. "There is the assumption on the part of many that if you're a business person or a lawyer you can instantly be an arbitrator," Ray said, adding that he would question that assumption. There is a struggle going on now in the field over whether there should be a national certification program and what the requirements would be. "Basically, the question is what makes a good mediator? And we don't seem to have a lot of information on that right now," Ray said.

(continued on page 64)

Maria Kassberg recently received a Masters in Journalism from the Medill School of Journalism of Northwestern University. She worked with the American Bar Association's Public Education Division in the summer of 1988 as a student intern.

Access to Justice

Pro Se Court Simulation/Elementary

Arlene F. Gallagher

Signorino

The mock trial is perhaps the best known and most popular strategy in law-related education. There have been many debates about whether this is a positive experience for young people, through which they can learn adversary procedure, or whether it emphasizes competition and suggests a win-lose quality to our system of justice. Presented carefully in the context of a law-related education program, the mock trial can be an excellent learning experience and can enable the visiting lawyer to engage students actively, avoiding the lecture format so typical of guests who come to school. There is no question that the strategy is highly motivating, especially if it is presented in a way that involves every student.

Pro se court, or small claims court as it is called in some communities, is an appropriate court to model for elementary students because complex courtroom procedure and rules of evidence are kept at a minimum. This simplified version of a mock trial also appeals to the elementary classroom teacher, who avoids a strategy requiring considerable time and research. The teacher could easily do this without a lawyer and might want to try a few cases before inviting a lawyer to visit.

The strategy inevitably raises interesting and specific questions about the court that a lawyer or judge would be able to answer. Often when a visitor comes to a class, students ask standard questions about the visitor's work, but when those students have had an opportunity to be in a courtroom role they have more pertinent questions.

In this simulation the mock trial strategy has been broken down into its major components and then rebuilt by adding other components step-by-step. It has been designed so that all students play a major role whether as judge, plaintiff or defendant. The cases are short, and there are enough of them so that every student will have an opportunity to be a judge.

Optional Introduction

You may wish to demonstrate a pro se court first by choosing three students to do a case in front of the class. Arbitrarily assign one to be judge, one to be the plaintiff and one to be the defendant. Ask the judge to leave the room. Give the written facts to each student to read or read the facts to the entire class. Ask the two students to discuss the conflict and see if they can resolve it. This settling out of court step is not seen on television but is an important one and happens frequently in a real small claims court. If this step is excluded, students may get the impression that the court is the best place to resolve differences. There are enough lawsuits in our society without encouraging more, and judges certainly do not want people to bring all of their disputes to court.

If students do settle out of court, have them explain the conflict to their judge and ask the judge what he or she would have decided. If the students are disappointed that they are not going to be able to play the roles, they can pretend that they haven't settled out of court and do the role play. After the judge decides, they can compare their settlement with the judge's decision.

Pro Se Court with the Whole Class

Divide the class into groups of three. Have them rearrange their seats so that you have groups of three spread out in the room.

Have students in each group choose a role: judge, plaintiff, defendant. Tell them that everyone will have an opportunity to be the judge before you finish. They will rotate roles for three rounds.

Using the role descriptions, read or paraphrase the brief statements about each role. If the class has been watching *People's Court*, they probably already know about the parts. You might also want to use some information from a recent book by Harry Levin on *The People's Court* (New York: Quill [A Division of William Morrow & Co.], 1985). This is a book describing many of the cases adjudicated by Judge Joseph A. Wapner. The lively writing style makes this easy for a lay person to read, and the information about how to prepare for court is very useful. The book also contains a national survey of small claims courts in the United States.

Ask the judges to step outside the room. You might want another adult to go with them.

Choose a case from those included in this article, or present one that you know, or use one of the cases in the article on page 30. You may read the information aloud or have it photocopied ahead of time and distribute the facts for students to read silently. Give only the facts, not the issue, at this time.

Settling Out of Court

Ask the plaintiff and defendant to try to resolve their differences. Encourage them to come up with a compromise that is acceptable to both parties. Explain that those who resolve their disputes will explain their decisions to the judges, or they can pretend that they haven't resolved the dispute and find out what the judge would have decided.

Invite the judges back into the room, telling the class to rise and saying, "All rise. Pro se court is now in session." Students may be self-conscious about standing up for their classmates and may laugh or act embarrassed. Explain that a courtroom is a very formal place and encourage a serious tone. You might want to explain the role of bailiff, the person responsible for maintaining courtroom decorum.

Have those plaintiffs and defendants who have not been able to "settle out of court" present their cases to the judges. This will mean a number of small groups talking at the same time, so expect a little noise. For the groups who were able to resolve their conflict, have them explain what the case was to the judge and ask the judge what he or she would have decided before explaining their resolution.

After the parties have presented their arguments, have the judges render a decision. Ask the judges to give the reasons for their decisions. It is likely but also realistic that different courts will have different decisions. What is important here is that the judge should try to make a decision that is based on information presented and that is fair to both parties. The judge should explain the reasons for the decision. After the judges have informed the parties of the decision, bring the class back together as a group. Discuss the decisions and the issue in the case.

Rotate roles – new judges, new plaintiffs, new defendants – and repeat the whole process with a new case. Do this until everyone has had a chance to be a judge.

Debriefing the Simulation

This is an important part of the simulation, for without it the students think they have just been playing a game. Explain that you will now talk about the process they experienced.

Use the following questions to discuss the procedure (not the content) of the cases.

- Which was the most difficult role to play?
- How well did the participants play their roles? Were they realistic?
- How did people feel when they had resolved their differences without a judge, as opposed to submitting the dispute to a court?

Role Descriptions

JUDGE

The judge must see that both sides have a fair chance to present their cases. The judge should not interrupt or dominate the proceedings. The judge may ask questions to get more information and should listen carefully. Listening is one of the most important skills for a judge to have.

PLAINTIFF

This person has accused the defendant of doing or not doing something which he or she thinks is unfair. The plaintiff is the person who has brought the case to court to ask the judge to make a decision that will require the defendant to pay a certain amount of money. The plaintiff tells his or her side of the story first, because this is the person making a complaint. In pro se court, if there is no complaint there is no case.

DEFENDANT

This person has been accused by the plaintiff. The defendant has been called to court to answer to the complaint. The defendant should listen carefully to everything the plaintiff tells the judge to be sure that it is true and that the facts are not distorted. The defendant should not interrupt the plaintiff but should wait to tell the other side of the case.

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Roots, Roots and More Roots

Edwardo Rodriguez owns a home next to Eileyanna Turpin. There is a fence dividing their property line. Large spreading trees line the fence on the Turpin property, and a concrete driveway runs along the Rodriguez side. The trees have been there for over fifty years, long before either of these two home owners bought their houses. The Turpin trees have been spreading their branches over the fence, and despite Rodriguez's requests to have them trimmed only minor pruning has been done. During an especially violent storm a number of branches fell, scratching and damaging Rodriguez's new red Mustang. Rodriguez brought his car to a body shop and had the damage repaired, after which he presented Eileyanna Turpin with a bill of $350 and showed her Polaroid photographs of the damaged car before it was repaired.

- **Who is the plaintiff? Edwardo Rodriguez. He wants the court to rule that Eileyanna Turpin has to pay him $350.**
- **Who is the defendant? Eileyanna Turpin.**
- **What is the issue? Is the tree owner responsible for the storm damage done by the branches of her tree that extended over her neighbor's property?**

NOTE TO THE LAWYER AND/OR TEACHER

This case can raise the question: Was the damage caused by an act of God? An act of God is defined as an inevitable event occurring by reason of the operations of nature unmixed with human agency or human negligence. The judge may rule that the storm was such an act, and therefore the plaintiff is not responsible, or the judge may rule that the plaintiff was asked to trim the branches and was negligent in not doing so. The case can lead to discussions about what an act of God means. The students can brainstorm other examples, such as, floods, hurricanes, hail storms, snow storms, and volcanic eruptions.

Sample Cases

THE NEWSPAPER ROUTE

Hans and Fritz live on the same block. Fritz has had a daily paper route of one hundred papers for a year. Sometimes Hans goes with Fritz and helps deliver papers, for which he receives a dollar or two depending on whether he does the whole route. One day Fritz becomes ill and asks Hans to do the route, explaining that he will pay ten dollars for the job. Hans agrees and delivers all of the papers but doesn't put them inside the mailboxes or hallways. It rains shortly after Hans finishes the route, and fifty of the papers get wet. Fritz refuses to pay the ten dollars.

- Who is the plaintiff? Hans is bringing the complaint against Fritz. He wants the ten dollars.
- Who is the defendant? Fritz.
- What is the issue? Did Hans live up to his agreement? Does Fritz owe Hans ten dollars?

THE COMIC BOOK COLLECTOR

Ho Min has been living in the United States for two years. When he first came to this country he spoke very little English but now he is almost fluent. He believes that one of the reasons he learned English so quickly is from reading comic books. He has a large collection of different comics and is saving them because he is sure they will be very valuable in years to come. He paid one dollar apiece for the books he owns.

Emilio has only been in this country for a year, and he is having difficulty with English. Ho Min tells him about his comic book collection and agrees to loan ten of them to Emilio. Ho Min explains that these comic books are part of a collection and tells Emilio to be careful of them. When Emilio returns the comic books, five of them have torn pages. They are still readable but they are not in the condition they were in when Ho Min loaned them. Ho Min says he wants two dollars for each of the comic books with torn pages, arguing that these books would double their value in a few years if they were in mint condition. Emilio refuses, claiming that the comic books are just as good as they were when he received them.

- Who is the plaintiff? Ho Min.
- Who is the defendant? Emilio.
- What is the issue? Is Ho Min entitled to damages of ten dollars for the comic books because they were not returned in the same condition they were in when he loaned them?

Expanding the Simulation

The two previous cases, plus the ones in the article on page 30, should have given every student an opportunity to be in each of three roles: judge, plaintiff, and defendant. At this point you can continue the simulation with the boxed cases on pages 7 and 8, using the same procedure, or you can add the role of attorney, one for each side. You may also want to add a role of observer because more people will be involved in the role play and it helps to have someone who is not invested in the issue to observe the process. If you use an observer, this person should report at the end of each case instead of the judge. Encourage the observer to take notes so that he or she can report accurately on what happened. This role is similar to the role of a court reporter.

If you expand the simulation, divide your class into groups of six. Have them decide who will play each of the following roles: judge, plaintiff, defendant, plaintiff's attorney, defendant's attorney, and observer. You will need to allow time for the attorneys to meet with their clients.

When to Go to Court

After your class has done a number of cases, they will be more adept at presenting their sides and at making decisions that are fair. You can continue with more cases developed by students or you might want to arrange a field trip to observe a small claims court. At some point you need to discuss the question of when it is appropriate to take a problem to court. The following case is presented in two versions to encourage discussion about this issue. The two versions of "The Brick Wall Case" should bring out the concept of "de minimus non curat lex" (the law does not cure small things).

Divide the class into two groups of small claims courts. Give Version I of the following case to one group and Version II to the other. The cases are identical except for the placement of the brick wall. It should lead to a discussion about how a judge draws a line in coming to a decision.

The Brick Wall: Version I

This case involves two home owners. Their houses are each in the middle of quarter acre lots. Hazel Swartz and Johanna Fischer have lived next door to each other for ten years. Hazel decided to have a brick wall four feet high built to surround her property and did so, believing that she had the wall built exactly on the edge of her property. A year passed. The wall really bothered Johanna. She thought it was unattractive and didn't like the shade it caused on her lawn. Johanna hired a surveyor, who determined that the brick wall intruded on Johanna's property by three quarters of an inch. She then brought two bills to Hazel and asked her to pay them. One is for the $120 Johanna paid the surveyor, and one for $820 she paid in property taxes during the year the wall was there.

The Brick Wall: Version II

This case involves two home owners whose houses are each in the middle of quarter acre lots. Hazel Swartz and Johanna Fischer have lived next door to each other for ten years. Hazel decided to have a brick wall four feet high built to surround her property and did so, believing that she had the wall built exactly on the edge of her property. A year passed. The wall really bothered Johanna. She thought it was unattractive and didn't like the shade it caused on her lawn. Johanna hired a surveyor, who determined that the brick wall intruded on Johanna's property by three feet. She then brought two bills to Hazel and asked her to pay them. One is for the $120 Johanna paid the surveyor, and one is for $820 she paid in property taxes during the year the wall was there.

- Who is the plaintiff? Johanna Fischer.
- Who is the defendant? Hazel Swartz.
- What is the issue? Whether or not Hazel Swartz should pay $940 to Johanna Fisher for building a brick wall that intruded on Johanna's property.

Summary

It is important to have a general discussion after you have done the small claims cases. In fact, the discussion is really more important than the role plays. It helps to have students reflect on the experience by having them do some thinking independently. It helps to focus their attention if they write some responses to questions. Doing this independently encourages students to come up with their own opinions and not simply agree with whoever speaks first. Often we aren't sure what we think about something until we either write or talk about it.

The Flea Bath

Malene E. Brumme is the owner of an adult female cat named Eliza. Lorenzo Caruso is the owner of a pet shop that also gives care to animals.

Malene Brumme brought her cat, Eliza, to Caruso's Pet Shop for an "ordinary bath." Lorenzo gave Eliza a flea bath, and the cat died shortly after. Malene Brumme believes that the cat died because of toxins in the flea-killing formula, but Lorenzo explained to her that it is common practice to use a flea-killing formula on fleas, and he noticed that Eliza did have fleas when Malene brought her into the shop. Malene agreed that her cat had fleas, but said that she didn't ask for a flea bath and expected her cat to get just an ordinary bath. Lorenzo said he had been using the formula for several months and never had another pet die from it. Lorenzo has been in business for twenty years and has never been charged with anything like this before. Malene believes that Lorenzo was negligent, or careless, in his treatment of Eliza, and she brings the case to court asking for $50, which is what she paid for Eliza as a kitten.

- **Who is the plaintiff? Malene E. Brumme.**
- **Who is the defendant? Lorenzo Caruso.**
- **What is the issue? Whether Lorenzo Caruso was negligent in treating the cat Eliza by giving her a flea bath.**

SUGGESTED QUESTIONS

- Which role was most difficult to play and why? Judge? Plaintiff? Defendant?
- What do you think are the most important qualities for a person judging in small claims court?
- Would other qualities be important in courts where the damages are higher or in criminal court?
- Now that you have been in the "judge's shoes," do you think judges should be elected or appointed?

Arlene F. Gallagher is Adjunct Professor at Boston University and editor of the "Children's Literature and Social Studies" department for Social Studies and the Young Learner. *This activity is adapted from "Pro Se Court: A Simulation Game" by Arlene F. Gallagher and Elliott Hartstein, which originally appeared in* Law in American Society, *May, 1973. This simulation has been used widely by teachers and law-related educators. It has been revised and reprinted a number of times, most recently in Arlene F. Gallagher's* Living Together Under the Law: An Elementary Education Law Guide, *1988 Edition, published by the New York State Bar Association and New York State Department of Education.*

Law in Toyland

A Mindwalk Classroom Strategy/K-4

Jan Robey Alonzo and Steve Jenkins

Susan Wise

Here's a sure-fire attention getter for teachers and attorneys working with elementary grades. This activity is a variation on the effective mindwalk strategy (i.e., Brainstorm—"What have you done today that involves the law?" The list of laws is almost endless.). Experience has demonstrated that "Toyland" is a sure-fire success.

Goal

As a result of participating in this activity, students will increase their understanding of the impact of law in our everyday lives.

Materials Needed

A pillow case or tote or shopping bag full of toys (e.g., stuffed animals, baby and teen dolls, cars and/or trucks, planes, a variety of guns, a baseball glove or other sports item, and whatever else you can borrow from a young friend).

Procedures

This is an ideal activity for an attorney. The teacher can team with the attorney during the brainstorming and debriefing.

The teacher should introduce the attorney. It would be most helpful if the teacher provides name tags for the students. The attorney may give a brief overview about his or her job. Get the students involved immediately by asking them, "Do you know what a lawyer does?" The attorney should call students by name as they give responses.

Next, the attorney should ask the students, "How many of you like toys?" (All hands will go up.) Tell them they are going to help you talk about laws using your bag of toys. Please note that the students are likely to identify laws not listed below and/or laws that only apply in some jurisdictions—these responses can lead to further discussion about lawmaking by different government bodies. As the students respond, the teacher can write the responses on the chalkboard.

Reach into your bag and select a toy that is likely to provoke some immediate, enthusiastic responses. Here are some examples.

CAR

"Imagine that this is a real car, and you are a passenger in the car. What would be some laws you would need to follow?"

- Seat belt laws ("Buckle up for safety")
- Safety inspections ("How do you know if the car is safe to drive?")

"If you were riding in the car, what laws might apply to the driver of the car?"

- Driver's license requirement

"What would be some laws the driver would have to obey?"

- Speed limit laws
- Traffic signals
- Stop signs

"What do you need to make the car operate? Gas. Are there any laws about gas?"

- Regulations requiring unleaded gas
- Gasoline taxes

If you are speaking in a state requiring infant car safety seats, you might ask:

"Where would you place a young baby riding in the car?"

- Car seat

MOTORCYCLE (with helmeted rider—if you can find one)

You might ask, "Do motorcycles have to follow laws like those applying to cars? What are some examples?"

Students will probably identify some of the laws already listed—just gesture to the chalkboard and affirm each response.

"What about helmets for people on motorcycles?"

- Helmet laws—Answers will vary depending on jurisdictions. You may wish to talk about the differences in state laws and the importance of state lawmakers. Of course, this applies to other vehicular laws—even minimum-age requirements to qualify for driver's licenses. Students always like to discuss at what age you can drive. In addition, some states are considering requiring that young people under age 18 provide proof of attending school if they wish to qualify for a license when they are 16 or 17.

BICYCLES

As a follow-up, you might discuss laws and ordinances young people need to know as bike riders.

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BABY DOLL

"If this were a real baby, what legal document would the baby have soon after it is born—each of you has one?"

- Birth Certificate—giving a baby a name is then legally recorded.
- Laws involving baby care may also be discussed (e.g., doctors who are licensed to practice medicine).

"Who is legally responsible for taking care of the baby?"

- Parents or legal guardians

"What are some things parents must provide for their children?"

- Basic necessities (food, shelter, clothing, and health care—some might say education, and then you can discuss compulsory attendance laws)

"What might happen to parents who fail to provide these basic necessities?" or "What might happen to parents who mistreat their children?"

- Child abuse and neglect laws

TEENAGE DOLL (You can use Barbie or Ken dolls to represent teenagers)

"What are some laws affecting teenagers?"

- School laws
- Curfew laws
- Status offenses (e.g., those who run away)

You may wish to do a variation on this, "What if Barbie were eighteen, can she get married, purchase a car, live on her own, etc.?"

- Marriage laws
- Contract laws

STUFFED ANIMALS (e.g., a dog)

"If this were my real pet dog, what laws or rules would I need to follow in taking care of my dog?"

- Licensing—dog tags, shots
- Leash laws
- Pooper Scooper ordinances
- Animal care statutes (e.g., anticruelty laws)
- Statutes governing the use of animals for lab experiments (i.e., antivivisection laws)

If you have a wild stuffed animal, then you can discuss laws governing hunting of wild animals, protection of endangered species, etc.

PISTOL

"If this were a real gun, could anyone legally carry it at any time?"

- Handgun registration laws or local ordinances
- Laws concerning carrying a concealed weapon

"What might happen to someone caught by the police using the pistol in a robbery?"

- Armed robbery statutes
- Armed criminal action laws
- Felonies and criminal prosecution, including the possibility of a long prison sentence (mandatory sentencing statutes)

RIFLE

"If this were a real rifle, what would be some legal uses for the rifle—what can I use it for?"

- Hunting laws (including licenses)
- Target practice in an appropriate or safe area
- Safety laws—laws regarding carrying weapons unloaded

HIGH TECH WEAPONS

"If this were a real laser gun or bazooka, could anyone use it?"

- Constitutional establishment of armed forces (Article I, Section 8) and state militias-National Guard (Amendent 2)
- Federal laws regulating the sale of certain types of weapons

PLANES

"What if this were a real plane? Are there any laws governing planes? Can they fly anywhere?"

- Air safety laws
- Regulations requiring baggage to be searched and persons to submit to metal detector searches, as well as other antiterrorist laws
- Federal Aviation Agency
- Civil Aeronautics Board
- Air traffic controllers
- Noise level regulations (anti-sound-barrier statutes, airplane noise around airports)

If the plane is a military aircraft, then you may highlight the laws that are similar to those governing high tech weapons.

BASEBALL GLOVE OR OTHER GAME GEAR

"What are some rules I might need to know to use this in a game?"

- Rules. Rules are similar to laws. Discuss the importance of having rules.

OTHER TOYS

Ask students to think of other toys that can teach us about laws. For example, a doll house might spark discussion about building laws, buying a home, laws governing utilities and household sanitation and safety.

Follow-Up Activity

Have students do this lesson at home. Show parents toys and repeat the process at home. See how many laws their parents can identify. Students may then report back to the class and compare parental responses.

VARIATION

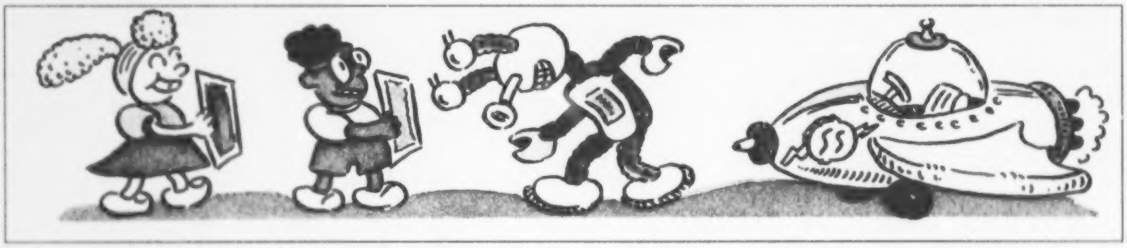
Create a bulletin board with pictures of toys and describe laws related to the picture.

Jan Robey Alonzo is an associate in the St. Louis office of Thompson & Mitchell and serves on the Law-Related Education Committee of the Bar Association of Metropolitan St. Louis. Steve Jenkins is Law-Related Education Director of the Bar Association of Metropolitan St. Louis. They were assisted by Nancy Henry of the bar association in preparing these activities for publication.

Access to Justice

ALIEN and the Law/Grades 1-4

Katherine Zuzula



Signorino

Here are two activities that help introduce such topics as: "What is a law?" "Do we need law?" and "How are community rules made and enforced?" These activities may be conducted by a community resource person, or a teacher and a community resource person working together.

The premise for the activity is that a creature from another planet has landed in the classroom. This creature does not understand what laws are and why they are necessary. It is the task of the students, through language arts activities, to acquaint the creature with the importance of laws.

The creature is named ALIEN, which stands for:

A pply
L earn
I nvestigate laws! laws! laws!
E valuate
N eed

Activity 1: What Is a Law? Do We Need Law?

PURPOSE

- To define what a law is
- To discuss why laws are necessary
- To discuss what a society without laws would be like
- To classify pictures

MATERIALS NEEDED

Chart paper, markers, drawing paper, crayons, tape

PROCEDURE

1. ALIEN has never heard the word law before. He wants us to explain to him what a law is.
2. Raise your hand and tell me what you think a law is.
3. Teacher or resource person writes students' responses on a piece of chart paper titled: A law is . . .
4. Now ALIEN wants to know why laws are so important in our society, i.e., home, school, community.
5. On the second sheet of paper the teacher or resource person writes the students' responses to: Laws are important because . . .
6. ALIEN wants us to describe what we think earth would be like without laws.
7. On the third sheet of chart paper the teacher or resource person writes the students' responses to: What if there were no laws?
8. The students are given a piece of drawing paper and instructed to draw a picture depicting a situation where a law is being obeyed or disobeyed.
9. The pictures are then given to ALIEN.
10. The teacher or resource person states: ALIEN is not familiar enough yet with the concept of whether or not a law is being obeyed or disobeyed just from looking at your pictures. He needs your help. Please raise your hand and describe your picture to ALIEN and the class. If your picture describes a law being obeyed, put it on the board under the smiley face. If a law is being disobeyed, put it under the sad face.
11. The pictures are displayed in the learning center.

Activity 2: Community Rules

PURPOSE

- To have a guest speaker such as a judge, attorney, or state representative discuss city laws and their importance
- To utilize a community resource person
- To provide media coverage (a newspaper article and a picture) about the guest speaker and the importance of law-related education in elementary classrooms

PROCEDURE

1. ALIEN wonders who is responsible for making laws and representing the people in your community. For that reason, we have a very special guest speaker who will speak to you and ALIEN about laws, how they are made and the consequences for people who disobey laws.
2. ALIEN is introduced to the guest speaker.
3. A question and answer period follows the guest speaker.
4. The class writes an article about the guest speaker to be submitted to the city newspaper and the school newspaper.

Katherine Zuzula is currently principal at Reese Elementary School in Reese, Michigan. This lesson is adapted from a ten-activity unit which appears in Teaching Our Tomorrows: Special Programs in Citizenship Education, *written by SPICE I classroom teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law and the New York State Bar Association.*

Access to Justice

The Case of *Brown v. Dellinger*/Grades 3 and 4 **Law in a Free Society**

Lesson Overview

This lesson involves elementary students in resolving a problem of fairness. The case is about Dan and George Brown, whose actions have caused substantial damage to a neighbor's home. Children are asked to think about the meaning of justice and the methods available to decide issues of fairness. The activities of the lesson encourage children to work cooperatively to prepare role-playing activities and to use critical thinking skills to decide how to resolve a problem. The activities also demonstrate how citizens can have access to justice through mediation, arbitration, or the courts. This lesson encourages teachers to invite judges and attorneys into the classroom to help children understand the issues and local laws regarding parental responsibility for acts committed by their children.

Goals

- Students should be able to define justice.
- Students should understand alternative methods of dispute resolution.
- Students should understand how citizens can obtain access to justice-related rights and privileges.

Teaching Procedures

PREPARATION

1. Duplicate sufficient copies of Handout 1, The Case of *Brown v. Dellinger*.
2. Duplicate sufficient copies of Handout 2, Worksheet.
3. Invite a judge, lawyer, or mediator to participate in the class activity. Provide them with a copy of the case and the worksheet.
   a. Ask the resource person to be prepared to discuss with the class what alternatives would be available to solve the problem. He or she should explain mediation or arbitration procedures and how these procedures could be used to resolve the conflict.
   b. Ask the resource person to work with the students to help them prepare their parts in the role-play portion of the lesson.
   c. Have the resource person witness the student activity. Then, ask him or her to explain the law in this case as it would apply in your community. Also discuss how mediation, arbitration, and courts help give citizens access to the justice system.
   d. Ask a lawyer to write the story into a script for a mock trial. Ask the lawyer to assist the students in preparing the case. You might ask a judge to preside over the mock trial.

PROCEDURE

1. Introduce the lesson by asking the children to identify situations in which they have used the phrase "that's not fair." What about the situation did they think was unfair? How do they know if something is fair or not? What might they do to correct an unfair situation? Explain that fairness and justice mean about the same thing. Tell them that in this lesson they will be looking at ways to solve problems of fairness.
2. Distribute Handout 1, The Case of *Brown v. Dellinger*. Have students read the selection individually, then answer the questions under the heading "What Do You Think?" Now reread the case aloud with them. Guide them in identifying and analyzing the wrongs and injuries in the selection. Remind them that the definition of wrongs and injuries includes violations of law, custom, tradition, or morality. Guide them to understand that there is a variety of methods to manage conflict.

Handout 1: The Case of *Brown v. Dellinger*

Dan and George were brothers. George was seven and Dan was eight. Mr. Dellinger was their neighbor. The boys often played in his house, yard, and garage.

They watched Mr. Dellinger burn leaves in the empty lot next door. The boys asked if they could help. Mr. Dellinger told them to stay away from the fire.

One day Mr. Dellinger was out of town. The two boys went to play in his garage. It was easy to get in. The garage door was a canvas sheet. They found many interesting items to examine and play with.

After a while, they felt cold. They looked around for something to keep them warm. In a corner, there was a charcoal grill. They moved the grill near the door. Then, Dan went home to get matches and George went to gather leaves. They lit the leaves and stood with their backs to the fire. The fire felt good.

Suddenly the fire roared. The canvas sheet caught fire. The boys tried to put it out, but couldn't. The fire quickly spread. Over $28,000 in damages was done before the fire was put out.

Both boys had been told by their parents not to play with matches or fire.

WHAT DO YOU THINK?

1. What was the wrong, if any?

2. Who was the victim?

3. Who caused the wrong?

Handout 2: Worksheet

Our group represents ____________________

1. How serious was the wrong?
    a. Which people or what things were affected?
    b. How bad was the damage or injury?
2. Who caused the damage?
    a. Did this person(s) cause the damage on purpose? How?
    b. Was this person careless or reckless? How?
    c. Did this person know what might happen? How?

       Should this person have known?

       Why?
3. Which people might be held responsible for the damage?
    a. Did any person who might be responsible for the damage have a choice to act in a different way?

       Who?

       How could they have acted differently?
    b. Did any person who might be responsible for the damage have an excuse for his or her actions?

       Who?

       What was the excuse?
4. Was the victim in any way partly responsible for causing the wrong to happen?
5. What would be a fair response to the problem in this story? (Remember your role!)
6. Does this response correct the wrongs, damage, or any injuries?

   How?
7. Will this response prevent further wrongs, damage, and injuries?

   How?

3. Ask the community resource person to discuss with the class methods that might be used to resolve this problem of fairness. These methods are: (1) allow the principal parties to settle the problem by themselves; (2) use a mediator to help the principal parties seek a mutually agreeable solution; (3) allow an arbitrator to solve the problem; or (4) take the issue to trial. Your community resource person should also explain how each procedure works.
4. Tell the children they will be simulating a mediation session or an arbitration committee to resolve the problem between the Browns and Mr. Dellinger. (See options one and two below.)

Option One—Mediation

1. Divide the class into four groups to prepare for a meeting among the parties in the case. The first group will represent Mr. and Mrs. Brown. The second group will represent George and Dan Brown. The third group will represent Mr. Dellinger. The fourth group will be the mediators who will help the Browns and Mr. Dellinger resolve the problem.
2. Groups one, two, and three will: (1) select students to role play their parts; (2) decide what a fair response would be for their role; and (3) help prepare the role play. The fourth group will: (1) select a chairperson, and (2) discuss what questions they might ask of the principal parties. Distribute Handout 2, Worksheet, and Handout 3, Things to Think About. These materials should help the students prepare their roles. The community resource person can be useful in working with group four.
3. Provide each group adequate time to prepare their positions.
4. Have the representatives of each group meet. The meeting will be started by the mediators. The parties should discuss the facts of the case and agree on

Handout 3: Things to Think About (for Mediators and Arbitrators)

1. What are the possible responses? Consider the following possible responses before you develop your own
   a. INFORMING a person what actions caused the wrong
   b. OVERLOOKING the wrong
   c. FORGIVING the person
   d. PUNISHING the person
   e. RESTORING the item or PAYING for damages
   f. TEACHING the person not to repeat the action that caused the wrong
2. Does your solution meet these values?
   a. CORRECT the wrong
   b. STOP the person from causing more wrongs
   c. PREVENT other persons from causing the same wrong
   d. TREAT EQUALLY other persons causing similar wrongs
   e. RESPECT the dignity of all persons involved
   f. RESOLVE REALISTICALLY and PRACTICALLY the problem
   g. MATCH FAIRLY the solution to the degree of seriousness of the wrong

what actually happened. Then, the mediators will ask the parties to state what would be a fair response to the problem.

5. Next, the parties return to their respective groups, and discuss the various proposals. Each group should decide: (1) if the proposals are reasonable; (2) if they can accept all or any part of a proposal; and (3) if they should change their own proposal. The mediators should: (1) decide what additional questions they might ask of the parties; and (2) consider what they think might be a fair solution.
6. The mediators reconvene the meeting. They call for new or revised positions. Mediators may now ask questions of the other three groups. The questions should help the parties clarify their position and lead to a mutually agreeable solution which is perceived as fair by all parties. If no solution can be arrived at in this session, the chairperson declares an impasse.

Option Two—Arbitration

1. Divide the class into three groups. The first group will role play the arbitration committee. They need to: (1) select three students to be attorneys on the committee; (2) elect a chairperson to conduct the arbitration hearing; (3) prepare a list of questions they might ask the Browns and the Dellingers; and (4) discuss what responses might be fair.

   The second and third groups will role play the Browns and Mr. Dellinger. These groups will: (1) select two students to be attorneys for the Browns and two students to represent Mr. Dellinger, and (2) help the attorneys prepare a position to present before the arbitration committee. Distribute Handout 2, Worksheet, and Handout 3, Things to Think About, to help the students prepare. The community resource person will also be useful in helping the students prepare.
2. Allow time for the students to prepare their positions.
3. The chairperson of the arbitration committee will call the hearing to order. Each party will have five minutes to present their positions. Attorneys for Mr. Dellinger present first. During the presentations, members of the committee may ask questions and try to get both parties to agree on certain issues.
4. At the conclusion of the two presentations, members of the arbitration committee will confer and decide a solution to the problem. Then, they will announce their solution and explain their reasoning.
5. Ask the community resource person to lead a discussion of the events in the mediation or arbitration role play. The resource person should explain how the process works in your community. He or she should talk about the strengths and weaknesses, explaining how these mechanisms allow citizens to have access to the justice system. Discuss what took place during the role play and whether the decision reached was a fair solution to the problem.

Background Information

The story used in this lesson is taken from an actual court case. The lower court ruled in favor of Mr. Dellinger. The case was appealed. The appellate court held that as a result of the children's prior authorized entries onto Mr. Dellinger's property, the boys may have had "implied licence" to enter the garage. However, as soon as they began burning the leaves in the grill, the boys exceeded any license they may have had. At that point in time, they became trespassers on Mr. Dellinger's property. The court defined the "gist of a trespass [as] the doing of an unlawful act in an unlawful manner, to the injury of the person or property of another."

Motive was not important. To prove trespass all that was required was to show that the young defendants intended to light the fire in the grill. They exhibited the capacity for that intent by lighting the fire.

After stating the general rules that trespassers must be held liable for the consequences that directly flow from their unauthorized acts and that minors are civilly liable for their own torts, the appellate court affirmed the lower court's judgment of $28,000 against the two boys.

This lesson is an adaptation of material from the Law in a Free Society curriculum for the concept of justice. The Law in a Free Society materials promote: understanding of the fundamental principles and values of a democratic society; skills necessary to participate as effective, responsible citizens; and willingness to use democratic principles when participating in making decisions and managing conflict. For more information, contact the Center for Civic Education, 5146 Douglas Fir Road, Calabasas, CA 91302, (818) 340-9320.

Access to Justice

Shoplifting Mock Trial/Upper Elementary/Middle

Michael R. Morris

The mock trial and pre-trial activities are designed to apply some of the concepts learned in the study of the United States Constitution. Specifically, the Fifth, Sixth, Seventh and Eighth Amendments are used to show students some of the due process rights and responsibilities. Using a series of field trips and guest speakers which culminate in a mock trial, students may experience the workings of the Constitution. Students will also have an opportunity to question those individuals who work with the Constitution on a daily basis–police officers, lawyers and members of the judiciary. If students can experience a situation or concept, they will be more likely to learn from it and retain more of the content than they would by simply reading or hearing of it.

The subject of the mock trial is shoplifting. Students role play the various participants that would be found in an actual trial. Given the number of juveniles that are appearing in court and the problems of shoplifting, the mock trial and its topic are very timely.

Time to Complete

Approximately seven class periods (but the mock trial and debriefing can be accomplished in a day).

Goals

As a result of this lesson, students will:

- understand the Fifth, Sixth, Seventh and Eighth Amendments to the Constitution and how they apply in an actual situation
- increase their communication skills
- develop their critical-thinking skills
- apply legal principles to factual situations

Materials

Copies of the Constitution and the Bill of Rights.
Handout 1–Shoplifting mock trial procedures (p. 16)
Handout 2–Sample of panel discussion evaluation questions (p. 17)
Handout 3–Mock trial evaluation questions (p. 17)

Procedures

Instruct students on the historical background of the Constitution and the Bill of Rights. Include viewing any appropriate filmstrips, movies or other material that might assist students in understanding how the Constitution works.

Involve the students in any combination of the following: Presentation from a lawyer to discuss the Constitution and how it relates to the attorney's work with the law, a police department field trip to learn how the police officer's work is affected by the Constitution, a field trip to a court to learn how a judge's work is affected by the Constitution.

Discuss with the class the problem of shoplifting. Have students formulate questions they will be willing to ask of actual shop owners. Invite a group of business people to participate in a panel discussion answering student questions on the legal issues involving shoplifting.

The preparations for the actual trial itself can be accomplished in one day. One to two hours will be needed to prepare the students to role-play attorneys and witnesses. Attorneys need time to write questions for both defense and prosecution witnesses. The attorneys will also need to prepare opening statements and closing arguments. Judges and jurors can be taken aside during this time and have court proceedings and responsibilities outlined for them. It is good to spend time on separating fact from opinion.

Assign the roles: attorneys, judge, witnesses, jury. Choose two to four attorneys for each side. You may wish to have a lawyer advise the students as they prepare their roles.

Conduct the mock trial, followed by jury deliberations and verdict.

Criminal Mock Trial (State of Alaska v. Tori)

FACTS

On Friday, March 13, 1987, Tori Fredrickson was at the Rock Rack. She was looking at some audio tapes. After receiving help from the clerk she continued to stand in the area of the tapes. The clerk noticed her placing something in her pocket. When Tori came to the counter she paid for one tape, "Slipperty When Wet" by Bon Jovi. Maeve Taylor, the clerk, was certain that Tori had another tape in her inside pocket of her jacket. Maeve called the store owner, Mike Gassman, and together they checked Tori's inside pockets. She did have an additional tape in her pocket, "51-50" by Van Halen. It was still in the original wrapper and had the store price tag on it. The police were called and a citizen's arrest complaint was filed with the Sitka police.

The State has charged Tori with concealment of merchandise with intent to take the merchandise out of the store.

1. Did Tori Fredrickson take the tape?
2. Did she intend to steal the tape?

WITNESSES

Prosecution witnesses	Defense witnesses
Maeve Taylor, store clerk	Holly Reed, friend of Tori's
Mike Gassman, store owner	Tori Fredrickson, defendant
Calie Spriggs, part-time store clerk	Melissa Calhoun, neighbor of Tori's

PROSECUTION WITNESS STATEMENTS

Statement of Maeve Taylor

I am a full-time clerk for the Rock Rack. I have worked there for six years. Tori was in the store after school on March 13. I noticed her because she kept looking around, and seemed nervous. I observed her looking at the audio tapes. I asked her if she needed help and she

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Handout 1: Shoplifting Mock Trial

PARTICIPANTS

Judge
Prosecution attorneys
Defense attorneys
Witnesses for prosecution
Witnesses for defendant
Bailiff
Jury
Representatives of the media (sketch artist, reporter)
Court reporter

OPENING OF TRIAL

Bailiff: "Please rise. The Court of ________ is now in session, the Honorable ____________ presiding."
(Everyone remains standing until the judge is seated.)
Judge: "Mr. (Ms.) Bailiff, what is today's case?"
Bailiff: "Your Honor, today's case is State v. Fredrickson."
Judge: "Is the prosecution ready? Is the defense ready?"
Attorneys: "Yes, your honor." (Always say "your honor" when speaking to the judge.)

TRIAL PROCEDURE

Opening Statement—prosecuting attorney introduces himself or herself and states what the prosecution hopes to prove. Begin with "Your honor, members of the jury," then state what the facts on your side will show and ask for a guilty verdict.

Defendant's attorney then says, "Your honor, members of the jury," introduces himself or herself and explains the evidence on his or her side that will deny what the prosecution is attempting to prove. Ask for a not-guilty verdict.

The Oath—all witnesses are sworn in before they begin answering questions. This is to remind them that they must tell the truth. The bailiff asks the witness to raise his or her right hand and then says "Do you swear to tell the truth, the whole truth, and nothing but the truth?"

Direct Examination—prosecution asks its first witness to take the stand. Prosecutor asks the witness clear and simple questions that allow the witness to tell his or her side of the story in his or her own words. For example, the attorney may ask "What happened on the night of March 15, 1985?" He or she may then ask "What happened next?" or "What do you remember?" Witnesses may make up answers to questions that are not included in the witness statement or the witness may say "I don't know."

Cross Examination—defense attorney questions witnesses for the prosecution to try to prove that the witness is lying or can't remember. For example, the lawyer may ask, "Isn't it true that you really couldn't see because it was almost dark outside?"

After all the prosecution witnesses have been questioned and cross-examined, the defense calls its witnesses and questions them under direct examination. Then the prosecutor cross-examines.

Closing Argument—prosecuting attorney summarizes the testimony presented during the questioning in a way that will convince the jury to believe the prosecution's side of the case. Prosecution asks the jury to find the defendant guilty.

Defendant's attorney summarizes the testimony in a way that makes the defendant look not guilty. Defense then asks the jury to find the defendant not guilty.

Jury Deliberations—after hearing the judge's instructions, the jury meets to decide the verdict, and then gives their verdict to the judge.

said yes. I helped her locate the two tapes she was looking for. I noticed that she continued to hang around the tape section. I turned around and looked in the mirror behind the counter and saw Tori place something in her jacket pocket. When she came up to the counter to pay for the tapes she only purchased one. I suspected that she had another in the inside pocket of her jacket. I called the store owner, Michael Gassman, and we both checked Tori's pockets. The tape "51-50" was in her inside pocket, still wrapped and with the store's price tag on it.

Statement of Michael Gassman

I am the owner of the Rock Rack. I was called to the front of my store a little after 3:30 by my clerk Maeve Taylor. Maeve said she suspected that Tori had a tape hidden in the inside pocket of her jacket. We checked and she had a Van Halen tape, "51-50." It was still wrapped in its original packing and had the store's price tag on it. At this point I decided to call the police and have Tori charged.

Statement of Calie Spriggs

I am a friend of Tori's and a part-time clerk at the Rock Rack. On the morning of March 13, 1987, Tori asked me if we had two tapes at the store. One was "Slipperty When Wet" and the other "51-50." I said yes we did. This conversation was held by our lockers before school started. Tori said she needed the tapes for a party on Saturday.

DEFENSE WITNESS STATEMENTS

Statement of Holly Reed

I am a friend of Tori Fredrickson's. I had promised to meet her at the Rock Rack after school. I was late getting there because I had to see one of my teachers after school. When I arrived at the store Tori was already there looking over the tapes. She had one of them in her hand. She was carrying her school books in the other. She said she had decided to buy only the Bon Jovi tape. She reached in her pocket to check and see if her wallet was there and check how much money she had. When we went up to the counter Tori paid for the one tape. The clerk called the store owner. They wanted to see her inside pocket. It had a tape in it. I thought she had put it back and had only the one tape.

Statement of Melissa Calhoun

I am a neighbor of Tori's. I have known her since she was a small child. I have had her over to our home on many occasions. We have never had any trouble with her. She is always doing things for us and making gifts for us on Mothers' Day and birthdays and Christmas. I just can't believe that she would do such a thing.

Statement of Tori Fredrickson

I went to the Rock Rack to buy two tapes for a party I was attending on Saturday, March 14. I was supposed to meet Holly at the store. She wasn't there when I arrived. I went over to the audio tape section and began looking at them. Holly had still not arrived and I began to look around for her. I didn't want to miss her. The clerk came over and asked if I needed some help. I said yes, and she showed me where the Bon Jovi and Van Halen tapes were. I thanked her. I decided to buy just the Bon Jovi tape. I checked to see if I had my wallet, which I keep in the inside pocket of my coat. About that time Holly showed up and we talked about the tapes. I went to pay for the one, and when I had done so the clerk said I had another one in my pocket. She called the store owner and they made me empty my pockets. There was another tape there. I had thought I put it back. I must have put it in there by mistake when I checked for my wallet. The store owner then called the police and had me arrested and charged with theft.

INSTRUCTIONS

The prosecution must set out such a convincing case against the defendant that the jury believes "beyond a reasonable doubt" that the defendant is guilty.

THE LAW

Alaska Statute sec. 11.46.220

A person is guilty of concealment of merchandise if a person conceals the merchandise while still in the store with the intent to take the merchandise out of the store.

CONCEPTS

1. Circumstantial evidence vs. direct proof;
2. Credibility of witnesses;
3. Beyond a reasonable doubt standard of proof.

Evaluation

This will take place at several points. Before each field trip or visit from a community resource person, students should write questions to be asked. Videotape the trial to use in debriefing and discussion of the trial.

Tips from the Teacher

While the jury is deliberating you may want to begin some debriefing of the attorneys and witnesses.

Before we arrived at a point where the trial was a meaningful experience for the children, we had to give them as much background as we possibly could.

If you visit a courtroom or have a member of the judiciary as a guest, be sure to provide an agenda. One pitfall here is questions from the class dealing with sensationalism. One way around this is your previous preparation with the class, and written student questions.

Handout 2

Questions to be answered by students after the panel discussion.

1. What reasons do people have for shoplifting?
2. Does this reason make any difference as far as the law is concerned?
3. What may a store owner do if he or she believes someone is shoplifting?
4. What people seem to be shoplifters?
5. Why do you think shoplifting is a crime?
6. Who pays for the protection stores need?
7. Who pays for the merchandise that gets stolen?

Handout 3

Questions to be answered by students after completion of the mock trial.

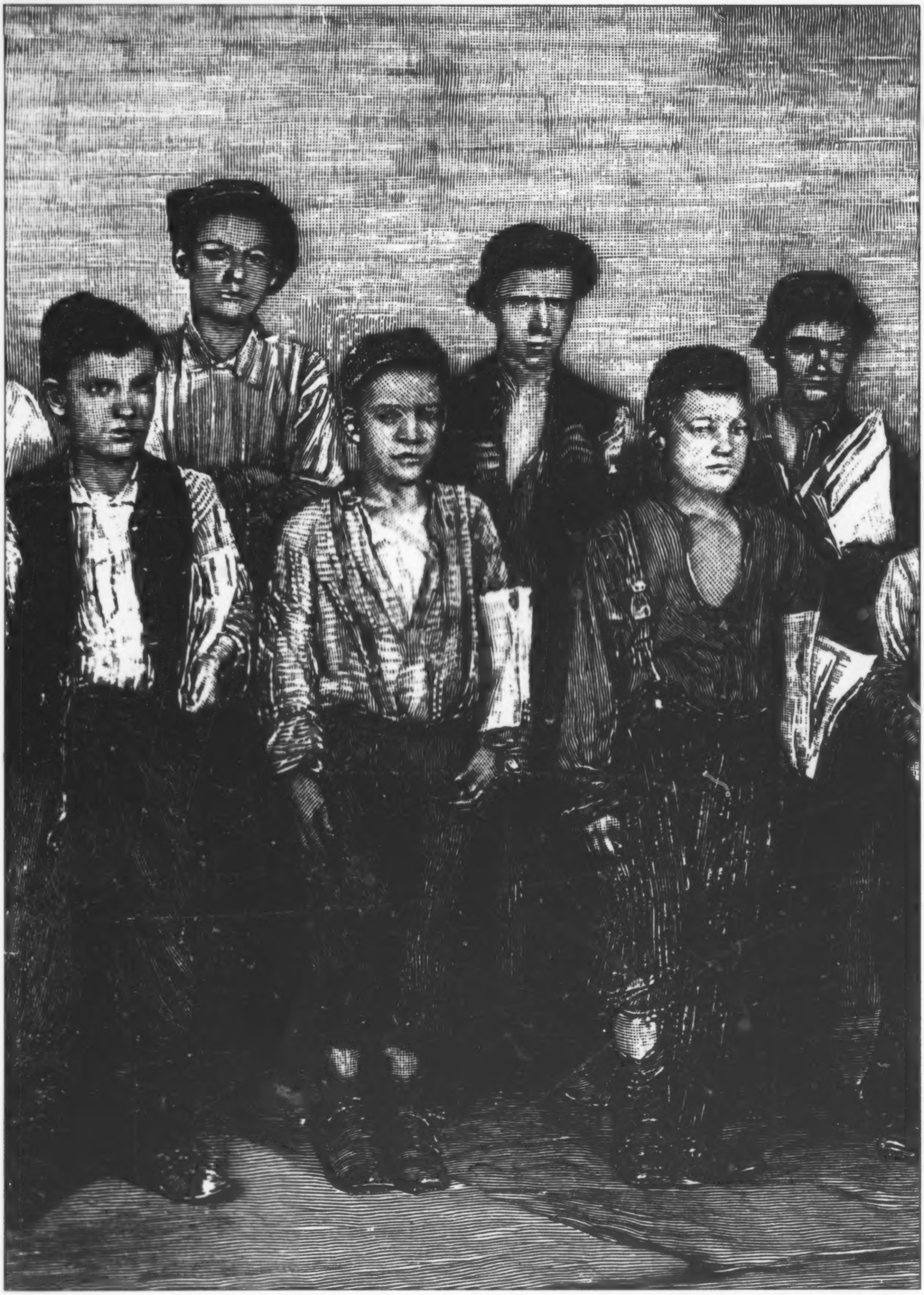
1. How was due process given to the defendant?
2. In what way(s) was the defendant able to confront the witnesses against her?
3. Did the defendant receive a good and adequate defense? Why or why not?
4. Did the sentence comply with the Eighth Amendment? Should the judge's sentence have been more severe? Less severe?
5. Did you agree with the jury's decision? Why? Why not? What things did you take into consideration in coming to your decision?
6. Did the witnesses stick to the facts of the case?

Bibliography

Fritz, Jean. *SHH! We're Writing the Constitution.* New York: G.P. Putnam's Son, 1987.

National Institute for Citizen Education in the Law. *Street Law Mock Trial Manual.* Culver City, CA: Social Studies School Service, 1985.

Michael R. Morris teaches at Etolin Street School in Sitka, Alaska. This lesson is adapted from a unit which appears in Constitutional Sampler: In Order to Form a More Perfect Lesson Plan, *written by SPICE II classroom teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law.*



Historical Pictures Service, Chicago

Gayle Mertz

Youth and Justice

For 350 years, Americans have grappled with juvenile correction and juvenile protection

"With liberty and justice for all." These six words conclude the pledge that is recited daily by millions of students in American schools. The recitation of this Pledge of Allegiance became the focus of a political controversy during the 1988 presidential election. The controversy did not address the meaning of the words, but debated the patriotism of a candidate who supported, or did not support, the institutionalization of the pledge in public schools.

"With liberty and justice for all." Poets, historians, students, songwriters, jurists, comedians, and politicians have written volumes on these six words. What is liberty? What is justice? Who are we talking about when we use the word "all"? Are kids included? Do students enjoy the blessings of liberty? How about access to justice?

Historically this nation has teetered between protecting or punishing its youth; serving the interests of the child or the interests of the community. Due process, for youth, is a twentieth century phenomenon. Yet we have longstanding traditions of state intervention into the family for the purposes of both child correction and child protection. We also have a longstanding tradition of debating the distinctions between protection, correction, and punishment.

The Beginnings

Colonial America witnessed a break from the accepted English common-law practice that considered the child as chattel. Rejecting the English legal tradition of unwritten law, two Puritan ministers wrote the *Body of Liberties* in 1641. Puritans put great stock in the written word of the Bible and wanted an explicit written law that would prescribe parental behavior and guide leaders in a fair and predictable application of the law. This law was codified in 1648 as the *Laws of the Massachusetts Colony* and was soon adopted throughout New England.

These *Liberties* more resembled a bill of rights than a code of law. They gave legally enforceable rights to children and expressly imposed obligations on parents. Although English parents were presumed to have a duty to maintain, educate, and protect their children, it was a duty void of legal persuasion.

These new laws instructed "all Parents and Masters to breed and bring up their children and apprentices in some honest lawful calling, labour or employment, that may be profitable for themselves, or the Country." It was incumbent upon parents to teach their children the Capital Laws, which were defined as the "Capitall offences lyable to death." They included: "(1) Treason or rebellion against the person of the King, State or Commonwealth, either of England or these Colonies; (2) Willful murder; (3) Solemn Compaction or conversing with the divell by way of witchcraft conjuracon or the like; (4) Willful or purposed burning of ships houses; (5) Sodomy, rapes, buggery; and (6) adultery." Under this law, parents were entrusted with giving their children "due correction" for wrongs committed under the age of discretion.

Also under this law, youth were given the right of special protection at trial because of their status as children. The new *Liberties* read in part: "Children, Idiots, Distracted persons, and all that are strangers, or new commers to our plantation, shall have such allowances and dispensations in any Cause whether Criminal or other as religion and reason require."

These new laws were significant because they were the first to acknowledge youth as inexperienced and immature individuals and to provide some protective rights for them based on this newly recognized status. (They also criminalized what would later become known as status offenses.) Children were no longer considered 'little adults' or the property of their family or community. These new allowances and dispensations were the precursors of juvenile courts that were to appear in the twentieth century.

Although opening the doors to procedural 'justice,' laws of this era were harsh and demanded strict adherence to family and community standards of harmony and commitment to the common good. A disobedient youth was a threat to the very survival of the colony. The Massachusetts Stubborn Child Law of 1646 epitomizes laws of this era. Under this law, parents who claimed that their child was "stubborn and rebellious" and "disobedient of their voice" could seek a state reprimand. This statute limited parental authority by requiring a court process, unlike English common law. In Massachusetts, the penalty for this offense could include capital punishment of a child. (No children were actually executed under these laws.)

Under these new laws, courts became sovereign parents to colonial youth, establishing the doctrine of *parens patriae*. The *Body of Liberties* of 1641 established that youth were part of the citizenry to be pro-

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Lost, strayed, and abandoned children waiting to be claimed at Police Headquarters in New York in the late nineteenth century.

tected as a class and as individuals. *Parens patriae* was given to youth in lieu of the equal rights enjoyed by adults.

The Reforms of the 1800s

The beginning of the nineteenth century marked a new era for juveniles in the justice system. As industrialization and immigration rose, American society became concentrated in urban areas. Poverty, truancy, and lack of supervision were commonplace in rapidly growing cities. Most Americans agreed that poor families did not have the capacity to raise their children properly, and they feared that crime in general and juvenile crime in particular was on the rise.

The term 'juvenile delinquent' unfolded as a euphemism for the crimes and conditions of poor children. In 1849, the police chief of New York City warned of the "constantly increasing numbers of vagrant, idle and vicious children of both sexes . . . who are growing up in ignorance and profligacy, only destined to a life of misery, shame and crime. . . ." Charles Loring Brace, founder of the New York Children's Aid Society, threatened in 1854 that the day might come when "the outcast, vicious, reckless multitude of New York boys, swarming now in every foul alley and low street, come to know their power and use it."

Social reformers of the day became alarmed that children were first being exposed to the vices of urban living. Vagrant and delinquent youth were locked up with adult criminals and misfits who schooled them for future crimes. Although many children were acquitted because of the reluctance of juries to condemn them to death or incarcerate them with depraved adults, they soon wound up back on the streets. Many of these children were orphans and had no home to return to after release from jail. In colonial times they would have been packed off to a relative or 'sold' at a town auction. But with the arrival of cheap Irish labor in the 1840s, bonded servitude, already on the wane, ended completely. Americans preferred to hire an adult immigrant rather than take on the responsibility of bringing up an orphan. Relatives hardly had the space or money for their own children and were unable, or unwilling, to take in the orphan of a deceased family member. Children, in this situation, did not have access to a safe home or regular means, let alone justice.

Enter now the 'child savers.' Well-meaning wealthy women, religious groups, and philanthropic organizations emerged, promoting a policy of rescue and rehabilitation over one of punishment for 'delinquent' children. Houses of refuge, and later reform and industrial schools for destitute, abandoned, wayward and vagrant youth were in vogue. Whatever the merits of such institutions, they clearly did not bestow 'rights' upon children. This is demonstrated by the first reported case that espoused the state's *parens patriae* right to protect children.

In *Ex parte Crouse* (1838), the father of a girl who had been placed in a house of refuge brought a habeas corpus action for her release. The mother had placed her in this facility without a hearing, by claiming that she was incorrigible. The Pennsylvania court denied the writ, asserting that the refuge house was a school for reformation and not a prison for punishment. Therefore, procedural due process was denied.

In order to save children from lives of crime, the refuge founders attempted to teach them middle-class values. Neatness, manners, frugality, and punctuality were all stressed, but the virtue of hard work was most important. By teaching juveniles how to work, the houses of refuge hoped to exorcise the demons of lower-class sin and depravity. The staff of the refuge house contributed to a greater commitment to education and to less exploitive work in these new institutions. Child labor and compulsory education laws were two major protective legislative advances resulting from this era.

Juvenile Courts Begin

In 1899, the first statewide juvenile court was created in Illinois, followed shortly by the Denver, Colorado, juvenile court. Within thirty years all but two states had a separate court system that fully embraced the state's *parens patriae* duties. From its inception, the juvenile court addressed all issues pertaining to youth – abuse, neglect, dependency, and delinquency statutes were expansive and detailed, as evidenced by this turn-of-the-century Colorado law:

> The words 'delinquent child' shall include any child sixteen (16) years of age or under such age who violates any law of this state or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly patronizes or visits or enters a house of ill-repute; or who knowingly patronizes or visits any policy shop or place where any gaming device is, or shall be, operated; or who patronizes or visits any saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits any public pool room or bucket shop; or who wanders about the streets in the night time . . . or who wanders about any railroad yards or tracks . . . or who habitually uses vile, obscene, vulgar, profane or indecent language, or is guilty of immoral conduct in any public place or about any school house. . . .

Juvenile courts were informal – often resembling a talk between father and child. There was no transcript, no rules of procedure, no juries, often no witnesses for the child or specific charges against the child. Information about the case, and the identity of the "delinquent child" was not protected. Consider the case of Pearl, an eleven-year-old living in Colorado in 1910. Pearl's mother testified that she was of limited circumstances and was obliged to spend her time largely away from home to earn her living, and that she was unable to manage Pearl. After calling several witnesses for the state, Judge Carlson ruled that Pearl "did unlawfully violate the ordinances of the City of Longmont, is incorrigible, and knowingly associates with vicious and immoral persons and is growing up in idleness, and did then and there habitually use vile, obscene, vulgar and profane or indecent language." The court ordered that custody of Pearl be transferred from her mother to the House of Good Shepherd in Denver for a period of two years. The court order read in part:

> . . .under and by virtue of the statute . . .the care and custody and discipline of the child shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable any delinquent child shall be treated as misdirected and misguided and needing aid, encouragement, help and assistance; . . .by virtue of the right and imperative duty of the State in its character of *parens patriae* to protect and provide for its comfort, care, morals and well being, as well as looking to the perpetuity and maintenance of our government and civic institutions. . . .

Another early Colorado case was reported in the *News of Denver* on February 2, 1899:

> JOHN IS NO GOOD. John Tuffield, 15 years old, is a vagrant. Recently, he told the police a long story about how his father mistreated him. The father has since proven that the son is worthless. Yesterday the magistrate said, "John, you're no good," and fined him $180. The fine was suspended and the district attorney will take steps to have the boy sent to Golden [the state reformatory].

The delinquent child had two statuses: that of a child and that of an offender. The court was put in the position of both protecting the child and protecting the community from offenders. Children needed to be nurtured; offenders were to be punished. The emphasis of the 1899 court was on the delinquent's status as child. The court attempted to balance justice and security and to communicate the greater importance of the child status over the offender status through its rehabilitative ideal. The early court enjoyed considerable public support, but this support began to erode as juveniles became involved in more serious crime.

Big Changes in the 60s

Over the next fifty years, juvenile courts came under attack from many directions. Many of the attackers alleged that the rights of children were being neglected, and that well meaning goals of protecting the child were not a substitute for due process. Critics charged that the courts were unconstitutional. Children, they pointed out, were being prosecuted for crimes and were entitled to protection against unfair loss of liberty as guaranteed by the Constitution.

Others were concerned that children in need of supervision (status offenders) were not adequately represented. In many states, school officials had unbridled authority over students who did not attend school.

In 1966 Justice Fortas wrote for the Court in *Kent v. United States*, "There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." In this case, sixteen-year-old Morris Kent had been charged in 1961 with robbery and rape in Washington, D.C. The judge of the juvenile court decided, without a hearing and without consulting Kent's attorney, to waive jurisdiction on the case and send the case to adult court. Kent was convicted and sentenced to a term of thirty to ninety years in prison. The Supreme Court ruled for the first time that constitutional principles might be applicable to juvenile court procedures. The Court also intimated that, given an appropriate case, it would consider the constitutionality of other juvenile court procedures.

Gerald Gault provided the case that would turn the juvenile justice system upside down. A neighbor of Gault's called the police and reported that fifteen-year-old Gault had made an obscene telephone call to her. Gerald Gault was adjudged a delinquent based on these allegations. The complainant [*i.e.*, the neighbor] did not appear at Gault's hearing, and he was not informed of his, or his parents', right to counsel, the privilege against self-incrimination, or the specific charges against him. Gault was found guilty and committed to the state industrial school until he was 'cured,' or until his twenty-first birthday, whichever came first. An adult found guilty of the same offense would have received, at most, two months in jail or a fifty-dollar fine.

In affirming due process rights for juveniles, the Court wrote: "The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principles has not always produced fair, efficient, and effective procedures. Departures from estab-

Historical Pictures Service, Chicago

Street kids in Charleston, South Carolina, at the turn of the century.

lished principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." The Court made it clear that juveniles had the right to counsel, to confront their accuser, and to cross-examine witnesses.

The doors to the justice system were further opened to juveniles in 1970 when the Supreme Court ruled in *In re Winship*.

Samuel Winship was twelve years old when he was accused of stealing $112 from a woman's purse. At the time, the New York State Family Court Act defined a juvenile delinquent as "a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." Although adults could only be found guilty if the charge was proved beyond a reasonable doubt, children at this time could be found delinquent if the preponderance of evidence made it seem likely that they had broken a law. Using the 'preponderance' standard, Winship was found to be delinquent and sent to a state training school for eighteen months, subject to annual extensions until his eighteenth birthday, a possible term of up to six years. According to *parens patriae* arguments, a troubled child should not be denied the help of the juvenile court simply because some doubt existed as to his/her guilt. In extending the 'reasonable doubt' standard to delinquency proceedings, Justice Brennan wrote in his majority opinion:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . .

Due process rights were extended to the school-house in 1975. A class action was brought by a number of Columbus, Ohio, public school students. The Supreme Court was asked to address the constitutionality of a ten-day suspension from school without the opportunity for a hearing. At the time that this case was filed, such a suspension was permitted under authority of Ohio statute. The Court ruled in part: A 10-day suspension from school is not de minimis and may not be imposed in complete disregard of the Due Process Clause. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

The Court continued to expand constitutionally protected rights to youth both in and out of juvenile court. The 1960s saw the extension of First Amendment rights affirmed for young people. In 1969 Justice Fortas, in a First Amendment case, declared that children 'are persons' under our Constitution. Children's access to the justice system has been greatly expanded. There is still debate as to whether children have true access to 'justice.'

Looking Ahead

Many juvenile justice issues of both policy and law await decision and direction in the future. The distinctions that we have established between juveniles and adults are being debated and redefined. Several fundamental issues being debated today include: if and when young people should be punished the same as adults for similar offenses; whether confidentiality laws should protect the privacy of youth; and whether juveniles should be afforded full due process of law.

Should a young person be punished the same as an adult upon conviction of a similar criminal act? Today many Americans, including youth themselves, would answer a simple 'yes' to this question. Yet the question is not a simple one. First, let us simply recognize that punishing youth is a departure from the philosophy that has ruled juvenile courts since their inception. Treatment, supervision, oversight, reform, rehabilitation, and care were the building blocks of the juvenile court system. Yet, there appears to be a consensus that these blocks do not have the strength to support an increasingly complex and overburdened system. Is this the fault of society? Of the youth themselves? Or of the system?

Irrespective of who, or what, is at fault, public outcry has influenced every state in this nation to adopt procedures by which a juvenile charged with delinquent behavior may be transferred to an adult court for prosecution. Many states have been known to alter their juvenile code immediately following a particularly violent crime committed by a juvenile, and the Supreme Court is now being asked to consider the constitutionality of the death penalty for youthful violent offenders (see pp. 60-62). While the F.B.I. tells us that juvenile crime, including violent crime, has actually decreased in the past decade or two, public exposure to acts of delinquency is at an all-time high. It sells papers and keeps us watching the evening television news.

Those who support transferring juveniles to adult courts claim that these teens are so vicious, hardened, and unamenable to rehabilitative treatment that the juvenile court is unable either to help the child or to protect society. Society cannot afford the luxury of a protective 'justice' system.

Ironically, a juvenile waived to adult court may ultimately fare better than had he/she remained in juvenile court. Once in adult court, the teen will enjoy all of the constitutional protections afforded adults, including the right to a jury trial and to post bail (for juveniles, these rights are not protected by the U.S. Constitution, but are sometimes afforded youth by state statute).

Juries are generally more sympathetic to younger criminals and are often reluctant to convict them knowing that they risk being sent to a brutal prison environment. An offender who would have been adjudicated in the juvenile court may soon be back "on the street." Finally, although transfer does allow for longer and harsher punishment for some felonies, it also provides a specific sentence for conviction of a specific crime.

Ajudication, on the other hand, is a broader finding and can carry with it an indefinite commitment to a secure state institution, or a sentence that is open to periodic review and to extension if deemed necessary by the court.

Remember Gerald Gault. He received a six-year sentence in juvenile court for an offense that would have carried a maximum two-month sentence in an adult court. Simply transferring teens to adult court does not necessarily mean that they are being punished the same as adults.

Those who oppose trying teens as adults argue that no matter how serious the crime committed, a 'child' is immature and inexperienced and deserves the right to another chance and to treatment. They cite the failure of the juvenile justice system in providing early intervention and appropriate, adequate treatment before a child commits a violent crime. (Most juveniles who commit a violent or serious crime, do so only after extensive involvement with the juvenile justice system for less serious delinquent acts.) Also, research has established that the majority of youthful offenders in institutions today have been abused or neglected, or suffer from learning disabilities. They argue that continued efforts by the juvenile court are not only humane, but cost effective in the long run. If we can 'fix kids' while they are still young we will not be supporting them in expensive prisons or suffering further criminal acts at their hands.

Privacy for Juveniles

If juveniles are committing 'adult crimes,' should we continue to protect their privacy in the juvenile justice system?

Most states have laws that limit access to juvenile court records and proceedings. Current law in Colorado, for example, reads:

> Court records in juvenile delinquency proceedings . . . [excluding] a traffic ordinance shall be open to inspection to the following persons without court order . . . the juvenile named . . . the juvenile's parent, guardian, or legal custodian . . . any attorney of record . . . the juvenile's guardian ad litem . . . the juvenile probation department . . . any agency to which legal custody of the juvenile has been transferred . . . . with the consent of the court, records of court proceedings in delinquency cases may be inspected by any other person having a legitimate interest in the proceedings and by persons conducting pertinent research studies. . . .

It is important to remember that juvenile court proceedings and transcripts include not only evidence relating to the commission of a crime (as in adult court) but a wide variety of 'personal' information, and opinion about 'personal' information. It is common for court proceedings to include testimony about family problems: incest, abuse, neglect, divorce, finances, drug and alcohol problems and treatment. In order to best serve the child, the court frequently orders educational and psychological testing, which is then reported to the court and becomes part of the juvenile's record.

The original juvenile courts operated on the premise that public awareness of a child's contact with the juvenile system would be detrimental to the child's rehabilitation and future. Families would be less likely to cooperate in a proceeding that was open to the public. Public records may bar the child from access to employment, education, or the military in the future. Some professionals worried that if names of juveniles were made public it would shame or humiliate the child; others feared that such publication of names would not be considered a symbol of shame but a badge of courage. No evidence exists that publishing the names of juvenile offenders either acts as a deterrent or enables teens to improve their ability to function better as a law-abiding member of society.

UPI / Bettmann Newsphotos

The perception that street gangs foster violence has stirred calls for tougher sanctions against juveniles.

Some agencies that work with youth, including the police, schools, social service agencies, and mental health associations, are currently lobbying to ease regulations that protect the confidentiality of juvenile records. In supporting this, the National School Safety Center states:

> Since we live in an information society, it is time to create an information network linking all the agencies serving children: schools, law enforcement, social services, medical and mental health professions, and the juvenile court system. When all agencies share data as they provide services to children, they avoid duplication, can do joint planning and service delivery, and overall can make better-informed decisions for the child and family.

Purporting that "the individual student's right to privacy must be weighed against the mandate of schools to protect all students and staff from harm," the National School Safety Center supports revision of the 1974 Family Educational Rights and Privacy Act.

The issue of confidentiality is a complex one, affecting not only the accused but individuals and institutions related to the accused. The court often finds itself overseeing the performance of a parent, social worker, or school employee as part of its inquiry into the history and treatment of the juvenile offender. Yet these proceedings do not have the protection of open public hearings, coverage by the press, or review by public interest groups. The question remains: is it more just to protect juveniles from the curiosity, prejudice, and intrusion of the public, or to allow them, and individuals concerned about them, full access to open trials and open files?

Due Process

The issue of due process cannot be separated from the other issues discussed above. During the past twenty-five years, the Supreme Court has broken new legal ground in extending due process rights to juveniles, not only in juvenile court but at school and in the workplace. The questions still remain, however: should juveniles have access to full due process rights as afforded adults, and if so, what happens to *parens patriae*?

Founded out of a concern for wayward, unsupervised children, the modern juvenile court has been informal, unstructured, and hopefully therapeutic. The language of the criminal court is absent in juvenile proceedings. Juveniles are not arrested, they are taken into custody. They are not charged with a crime, a petition is filed alleging delinquency. They are not found guilty, but adjudicated. In fact, they are not in a criminal court. Juvenile proceedings are civil.

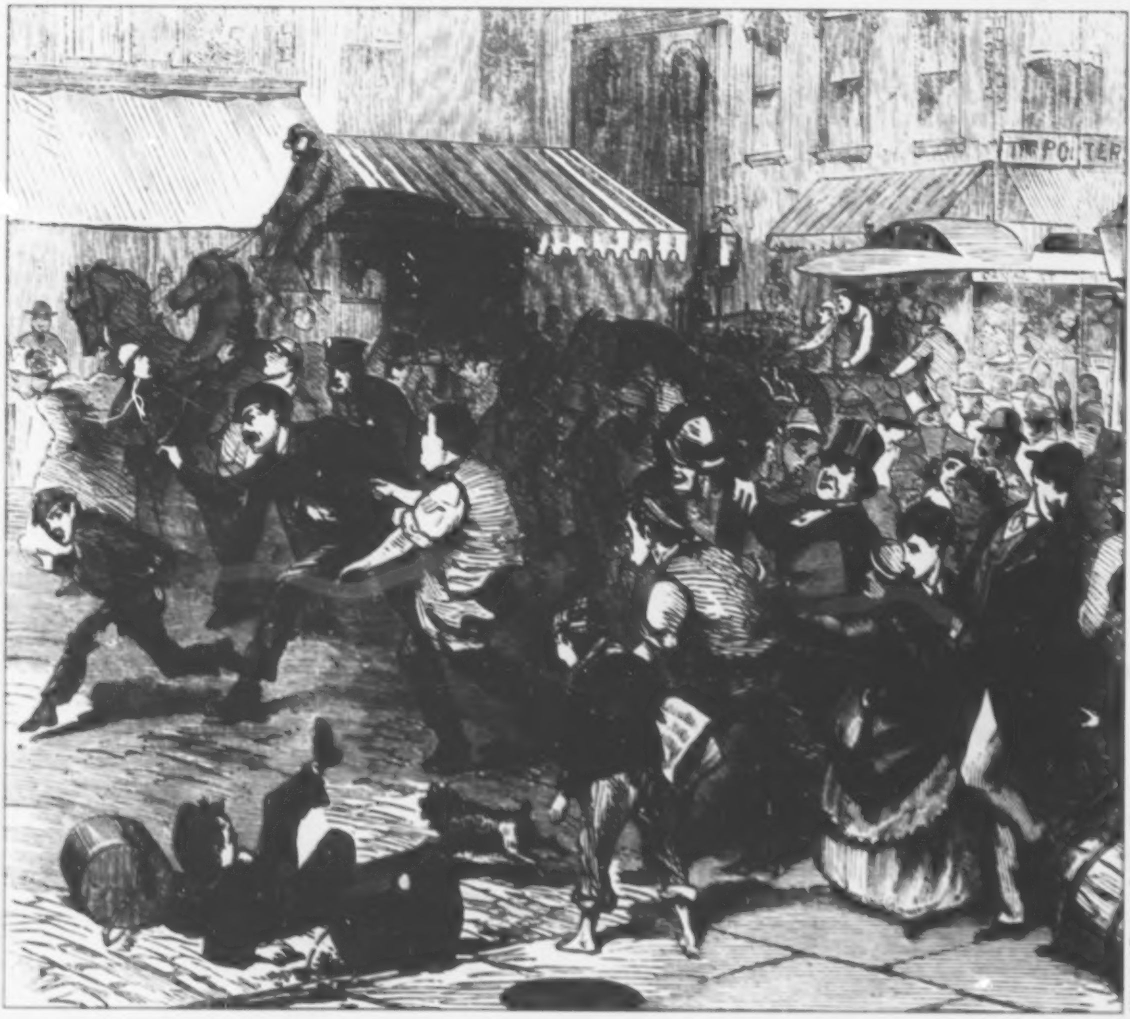
It is confusing, in the 1980s, to try to understand a legal system that uses a definition of delinquency that is largely derived from the criminal code and a procedure that depends heavily on civil tradition. While designing the new juvenile court, turn-of-the-century reformers were relatively unencumbered by con-

(continued on page 64)

Access to Justice

Evolution of a Juvenile Justice System/Middle and Secondary

Gayle Mertz



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The history of the juvenile justice system can be broken into six stages: (1) English common law. Children were defined as chattel. They were the property of their parents, especially their father. If caught violating the law, they were treated as adults. (2) Colonial period. Characterized by strict social control and laws, but a new realization that children are inexperienced and immature, and need some special protections. (3) 'Child savers,' or 'reformers,' established houses of refuge that emphasized reform, or rehabilitation, rather than punishment. Many of the children committed to these institutions were 'status offenders' as opposed to 'criminals' (early to late 1800s). (4) Turn-of-the-century statewide juvenile courts embracing the *parens patriae* duties. Emphasis on child care and welfare. (5) Children's rights. Beginning in 1966 with *Kent v. United States*, the U.S. Supreme Court began extending First, Fourth, Fifth, and Fourteenth Amendment rights to youth. (6) Deinstitutionalization. In 1972, Massachusetts was the first state to begin closing juvenile institutions in favor of smaller, community-based facilities. Most states now have residential treatment centers for youth. (Read article beginning on page 19 for more detail.)

Procedure

1. Describe the above six stages to students. Add some local history, if possible.
2. Divide students into small groups (3-5) and distribute case histories 1, 2, 3 and 4. (Variation: Create your own case history that addresses a local case or situation.)
3. Ask students to read each of the case histories and then discuss how society would have handled each of the situations during each of these stages of history. (Variation: Divide students into six groups and have

each group apply one of the stages of history to each of the case studies.)

4. Debrief. Write the numbers one through six on the blackboard several times. Have each group report their decisions and write key words or phrases next to each number representing a stage in history. Compare different findings from different groups, if necessary. Ask students what factors they considered in reaching their disposition, and how it related to what they know of the historical era.
5. Have teacher, or visiting attorney, lead discussion using the following questions: Which era is/was most just, and why? How can we combine the best of each system to create a better system? What would happen today, in our community, if one of these cases came before the juvenile court? Should one of the systems used in the past be put back into practice today?

Four Juveniles in Trouble

CASE HISTORY #1

Joseph, a fifteen-year-old, is the youngest of five children. Both of his parents work very hard all day and have little time to give him personal attention. Joseph has not been obeying family rules and has become a burden to the family. He is told to leave the family home. Disgruntled and depressed, Joseph leaves and soon steals a vehicle from a neighbor. Joseph is soon apprehended by the authorities. This is his first encounter with the law.

CASE HISTORY #2

Sally does not like the school and has never been a good student. At fourteen she stopped attending classes. At sixteen she and another girl were caught burglarizing a home. Although she has only been caught breaking the law three other times, it is believed that she has burglarized as many as twenty other homes. Sally's parents say that they cannot control the child.

CASE HISTORY #3

Alex has a long history of being a "troublemaker." Since he was very young, he has always been known to quarrel and to fight with the other children. His violence has created problems at home, at school, and in local shops. In a recent incident, Alex became angry at another boy who teased him about his clothing. Alex physically attacked the other boy, and beat him so severely that he will be permanently disabled. Witnesses agree that Alex started the fight.

CASE HISTORY #4

Maria had just moved to a new town and did not have any friends. In her eagerness to meet new people, she agreed to spend an afternoon with Sally, and was persuaded to climb in the window of a house that her new friend Sally said belonged to Sally's aunt. The house did not belong to Sally's aunt, and the girls were caught and taken into custody. Maria had never been in trouble with the law before, and was a good student.

Access to Justice

Mock Election on Juvenile Justice Issues/Grades 6-9

Gayle Mertz

Most states have a process whereby citizens can go to the polls and vote directly on whether to change a state law, or initiate a new law. The procedure for placing a referendum on the ballot varies. In some states, items are placed on the ballot by the state legislature. Other states allow citizens to circulate petitions to place a citizens initiative directly on the ballot. In this activity students will learn about their First Amendment right to petition their government, the specific laws of their state regulating these special elections, and the pros and cons of three issues facing the juvenile justice system today.

Procedure

1. Produce a set of mock ballots (resembling ballots in your community) that list these three issues:
   No. 1 A measure authorizing the state to give the same punishment to juvenile offenders as is given to adult offenders.
   No. 2 A measure authorizing the state to keep all records about juveniles confidential.
   No. 3 A measure authorizing the state to grant full due process of law rights to juveniles.
2. Read the article beginning on p. 19.
3. Locate information about referendum procedures in your state.
4. Have the teacher, or a visiting attorney, discuss each of the issues with the class. Use the attached 'ballot issue' information.
5. Read the Fred Foolish story to the class (see p. 27).
6. (A) Ask the students the following:
   - What will happen to Fred now?
   - Does Fred, as a juvenile (a person under 18 years of age), have any rights?
   - What are those rights?

   List student answers on the board. Be sure the list of rights include:
   - Advisement of legal and constitutional rights
   - Right to counsel
   - Right to a speedy trial
   - Notice of the charges against him/her
   - Right to confront and cross-examine witness against him/her
   - Privilege against self-incrimination
   - Protection against double jeopardy
   - Guilt must be established beyond a reasonable doubt

(B) Inform students that this list includes what is known as due process of law (a series of steps that the government must go through before any person can be deprived of life, liberty or property).

Inform students that this guarantee of due process is found in the 5th and 14th Amendments to the Constitution of the United States.

Explain to students that a juvenile's right to a jury trial is qualified. For some offenses, a juvenile does not have this right to have an impartial jury hear the case.

(C) Direct students' attention to Ballot Issue No. 3. Explain that *full* due process of law would include this right to a jury trial.

Ask students for reasons why this protection granted to adults might not be extended to juveniles. (The Supreme Court of the United States has given two reasons: (1) The fact that a juvenile court proceeding is not considered a criminal proceeding and (2) the undue delay and expense incurred in jury trials.)

(D) Ask for and answer any questions before proceeding on in the discussion of ballot issues.

7. (A) Direct students' attention to Ballot Issue No. 2. Explain confidentiality (something that is kept away from the public's eye). Ask the students the following:
   - Should the reporter for the local newspaper print Fred's name in a story about the incident? Why? Why not? (Inform students that while a reporter is not forbidden by law to print the name, most reporters choose to keep the name confidential.)
   - Should Fred's classmates come to court to watch the proceedings in Fred's case? Why? Why not? (Inform students that juvenile court proceedings are in some jurisdictions open to the press and public. However, the judge has the final say as to the audience in his or her courtroom.)
   - Should Fred's record be open for any of the following people to see?
     a) the principal of Fred's school
     b) Fred's school counselor
     c) Fred's neighbors
     (Inform students that as the law now stands concerning juvenile records, only those people directly concerned with the particular case have access to a juvenile court record. All other persons must obtain the consent of the court and then only if they can show a good reason.)

   (B) Explain to students that if they think juvenile court records should be kept confidential, they would vote for Ballot Issue No. 2.

8. (A) Direct students' attention to Ballot Issue No. 1—Punishment. Ask the following:
   - What's to be done with Fred?
   - Do we want to teach him a lesson?
   - Punish him? How?

   Explain that if Fred were 18 (considered an adult in the eyes of the law) his punishment for this offense might include a fine and/or a jail sentence. Is this what we want to do with Fred? Why? Why not?

   List student responses on the board. Give students a few of the options that a juvenile is entitled to under Colorado law. (Teacher should refer to the background information (below) on Ballot Issue No. 1 to aid in the explanation of the following alternatives)
   - deferral of adjudication
   - probation
   - out-of-home placement

   (B) Inform students that under the law juvenile offenders are treated differently from adult offenders. A judge, then, is free to choose from many alternatives which consider the best interest of the juvenile.

9. Conclude the discussion of the ballot issues by reviewing each one. Answer any questions.
10. Distribute ballots, allow students sufficient time to vote, collect and count the ballots.

Ballot Issue No. 1: 'Juvenile Offenders'

The theory behind establishing a separate process for young people in trouble with the law is based on two ideas:

1) that a child should not be labeled a criminal or put in prison, and 2) that he or she should be rehabilitated instead of punished.

In juvenile court, a person is taken into custody, rather than arrested; commits an offense rather than a crime; is found delinquent rather than guilty; and receives a disposition rather than a sentence. Being found delinquent is not regarded as a criminal conviction, and confining a child to a training school is not regarded as a sentence of imprisonment.

After making a finding of delinquency, the court hears evidence on the question of the proper disposition that best serves the interests of the juvenile and the public. Here are a few of the dispositions the court may consider:

DEFERRAL OF ADJUDICATION

- The case is continued (postponed) for 1 year.
- The juvenile is placed under the supervision of the probation department.
- The court may impose any conditions of supervision it deems necessary (such as counseling or going to school).
- If all the conditions are complied with, the case is then dismissed.

PROBATION

Each juvenile placed on probation shall be given a written statement of the terms and conditions of his probation and shall have such terms and conditions fully explained to him.

- That the juvenile will not violate any federal, state, or municipal laws.
- That the juvenile will not consume or possess any alcohol or any controlled substance.
- That the juvenile will not use or possess a firearm; or a dangerous or illegal weapon.
- That the juvenile must attend school or an educational program or work.
- That the juvenile will report to a probation officer.

- That the juvenile will make restitution as ordered by the court.
- That the juvenile will pay the victim a compensation fee.

OUT-OF-HOME PLACEMENTS

- The juvenile is placed in legal custody of a relative.
- The juvenile is placed in the legal custody of county department of social services or a child placement agency for placement in a family care home or child care facility or in a child care center.

If the court finds that placement out of the home is necessary and is in the best interest of the juvenile and the community, the court shall place the juvenile in the facility or setting which most appropriately meets the needs of the juvenile, the family and the community.

DETENTION

A juvenile may be placed in a locked facility exclusively for juveniles found to be delinquent.

A FINE

The court may impose a fine of not more than $300.

Ballot Issue No. 2: 'Juvenile Confidentiality'

All states have laws that limit access to juvenile records. Each state law is different, but they usually say that the records are not open to the public in order to protect the child. Information is made available to individuals that have a legitimate interest in the case, such as:

- the juvenile
- the juvenile's parents
- the juvenile's legal guardian or custodian
- the attorney representing the juvenile
- the prosecutor
- the juvenile's guardian ad litem (guardian for the purposes of a lawsuit)
- the juvenile's probation officer

In most states, if someone not included in the above list feels that he or she has a legitimate reason to see juvenile records, that person must first request permission from the court.

Ballot Issue No. 3: 'Juvenile Due Process'

The Fifth and Fourteenth Amendments to the Constitution of the United States state that no person shall be deprived of life, liberty or property, without due process of law. Due process of law means that the law must "play fair." The law must follow rules and procedures which have been established in our legal system for the protection of individual rights.

In juvenile courts, some, but not all, of the basic rights of procedural due process apply to children who have been brought before the juvenile court. Until 1967, only general elements of due process and fair treatment were observed in juvenile proceedings. Then a case called *In Re Gault* was heard by the Supreme Court of the United States. For the next 20 years, the Court heard and decided more cases, gradually extending most of the protections of procedural due process to juveniles.

The rights due juveniles in any court proceeding include:

- Advisement of legal and constitutional rights
- Right to counsel
- Right to a speedy trial
- Notice of the charges against him/her
- Right to confront and cross-examine witnesses against him/her
- Privilege against self-incrimination
- Protection against double jeopardy
- Beyond a reasonable doubt standard for guilt

A juvenile does not have an automatic right to a jury trial. Some states grant jury trials to juveniles, but the right is qualified.

Fred Foolish—A Juvenile in Trouble

Fred Foolish was a young man of 12 years of age. He was very lonely. His Dad lived in California and his Mom worked all day. His little sister spent her day at Little Lucille's Baby Care Center.

Every day after school, he went home and watched television by himself. One day on the way home from school, he felt very sad and alone. He was angry that he had had to move to a new place and that making new friends was taking a long time. On this particular day, as he approached his house, he saw that Mrs. Smith, his neighbor, was having her large apartment building painted. Paint cans were everywhere, even on the sidewalk. He had to make his way through them very carefully.

Fred let himself into his house, got food from the refrigerator, and settled down to watch his usual TV programs. His Mom arrived home from work and got busy with his little sister and fixing supper. Fred ate his meal and watched his usual evening TV programs and went to bed. "What a booooooring day!" "Just like all my dumb, boring days!" "I hate this place!" He tossed and turned in bed, but he couldn't get to sleep. When the house was quiet, he got up and went outside. There, just where she had left them, were all of Mrs. Smith's green paint cans. He kicked one of them and the lid popped off and the new green paint splashed down the walk and trailed off into thin streams, like bright green ribbons. He kicked another can and then another, until all the paint cans were lying on their sides, and the sidewalk was a foaming river of green goop.

Just then, a porch light went on and Mrs. Smith appeared at her door. She screamed aloud at the sight before her. Fred was frozen in his tracks. Mrs. Smith disappeared into her house, and Fred came unglued from his spot and beat a path for home. Once inside his room, he dove into his bed and pulled up the covers. Not long after, there was a knock on his door. His Mom summoned him to the living room, where Mrs. Smith was talking excitedly with a police officer. The adults demanded some answers!

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Access to Justice

There Ought to Be a Law/Middle and Secondary

Gayle Mertz

Historical Pictures Service, Chicago

Three central questions facing the juvenile justice system today are: Should juveniles be punished the same as adults for committing a similar offense? Should juvenile arrest and court records be kept confidential? Should full due process rights be granted to juveniles? The general public believes that these matters are decided by the courts. However, policy is set by state legislation and state constitutions. Although states must comply with certain federal regulations and constitutional protections, there is considerable discretion allowed in regulating each of these matters. This activity will allow students to:

1. Discuss opposing views on a matter that may personally affect them.
2. Assess community values related to the above issue.
3. Practice drafting legislation.

Procedure

1. Read article beginning on page 19.
2. Select one of the three issues mentioned above.
3. Locate a copy of your state's current laws regulating the issue selected.
4. Several days before doing this activity in class, ask each student to discuss the issue with any three people who are not members of the class. It could be another student, a teacher, parent, relative, neighbor, etc. The purpose of this part of the activity is to find out about people's opinions, not to research facts about policy or procedure.
5. In class the teacher, or visiting attorney, should begin by leading a discussion about the types of responses that were given to them when they questioned people about the issue.
6. Discuss key issues that may not have been covered in the preceding dialogue.
7. Without answering specific questions about your state laws, tell the students that you are going to draft model legislation for your state – legislation that will justly serve both the interest of the child and the interest of society. This legislation will both address the problems of the past and provide a creative approach in planning for the future. It will be legislation that can serve as a model for the entire nation. Explain that this legislation is to provide broad philosophical guidelines. Procedure will later be set in place by administrators.
8. Divide students into groups of four or five students.
9. Give each group ten minutes to brainstorm what the three most important issues are relating to this matter.
10. Ask each group to write a concise draft of a bill that addresses their three most important issues. Remind them that, politically, this bill must meet with the approval of the general citizenry.
11. With the entire class listening, have each group report on their proposed legislation. Write key words

and phrases on the blackboard. Compare/contrast words and phrases from each of the groups. How do the words and phrases compare with those put on the board while talking about community concerns?

12. If possible, merge ideas from different groups into one bill that is acceptable to the entire class. If necessary, negotiate a resolution to differences. If consensus cannot be reached, have students with similar ideas meet in two groups and draft two separate pieces of legislation. If this process is lengthy it might spill into another class period, or could be completed outside of class.
13. On another day, invite a speaker or speakers (ideally a juvenile judge, prosecutor, or defense attorney) to come to class to describe the current law in your state that regulates the issue that you selected. Compare the real law with your model legislation. Ask the speaker to comment on your model legislation.

Optional Activity

Using the four case studies in the strategy beginning on page 24, discuss how your model legislation would apply to the youth in the cases.

Access to Justice

Mock Transfer Hearing/Middle and Secondary

Gayle Mertz

A major debate in America today addresses the issue of transferring juveniles to adult courts for prosecution (see article beginning on page 19.) All state juvenile codes include provisions for such a transfer. Three things are considered before a child can be transferred: (1) The age of the child; (2) the type of offense the child is accused of (some states allow transfers only when a felony is alleged); and (3) the accused's prior history of delinquent behavior, or adjudication. Each state has different criteria and different procedures.

Traditionally, the decision to transfer a juvenile to an adult court has been in the hands of the juvenile judge. However, many states in recent years have taken the discretion away from these judges and created statutory provisions for automatic transfer when the child is accused of committing certain crimes (usually crimes of violence, or repeat property offenses). Some states have now placed the decision in the hands of the prosecutors. In many cases there is considerable public support for transferring more juveniles to adult courts, and many legislatures, judges, and prosecutors are complying with public demands.

Procedure

1. Invite a lawyer to help you with this lesson. Ask him/her to bring a copy of your state statute that sets conditions and procedures for transferring a juvenile to an adult court (have enough copies to distribute to the students).
2. Review the above issue with students (see the article).
3. Conduct a quick attitude poll by having students raise their hands and answer "yes" or "no," indicating whether or not they support the following statements:
    - Children should never be tried in adult court.
    - If rehabilitation does not work the first time, a juvenile accused of a second offense should be transferred to adult court.
    - A juvenile accused of committing a felony should always be transferred to adult court.
    - Only juveniles accused of committing a violent crime should be transferred to adult court.

    Record the total number of "yes" and "no" responses to each statement.
4. Divide the students into teams of three or four students per team (you will need an even number of teams). Assign a prosecution and a defense team to each of the case studies on page 25 that you select.
5. Explain the difference between the role and the responsibilities of a prosecutor and a defense attorney.
6. Have each team select a spokesperson and prepare arguments for, or against, transferring the juvenile to adult court. Set a time limit for each presentation and instruct students to honor the limit.
7. Using an attorney, judge, or teacher as the judge, conduct a hearing in front of the entire class to determine if the child will be transferred. Allow only arguments by the student attorneys, but be prepared to explain to students what type of testimony would be allowed in a similar hearing in your state.
8. Have the judge rule on the matter and explain reasons for the ruling.
9. Pass out copies of your state statute. Discuss whether students used criteria in their arguments similar to those which appear in the law.
10. Ask students to respond to the same statements that you asked them earlier (#3). Compare and discuss the two sets of responses.

Variation

If you would like to do this in less time, or feel that your students may not want to speak in front of the entire class, omit the mock hearing and place students in groups of five or six students per group. Have each group debate the pros and cons of a transfer in one or all of the case studies, and then report their decision (or lack of decision) to the entire class. Compare and contrast each group's decision and reasoning. Try to arrive at a consensus for the entire class.

Access to Justice

Using Resource Persons Creatively/Middle School

Mercedes J. Newsome

Here is a module written for use with ninth grade students but adaptable to any grade, since it allows resource people to interact with students and tailor their presentation to the maturity of the students.

The resource person can be a judge, lawyer, mediator, arbitrator, or anyone else familiar with our civil justice system.

Procedure

Through examining a series of case studies, the resource person will discuss conflict resolution and the role of the justice system. The case studies will make the conflicts real to the students, and will provide the resource person with a springboard to discuss many topics, including the role of the courts (especially small claims) and of alternative dispute resolution, negotiation as a way of resolving disputes, and the civil justice system generally.

Divide the class into four small groups. If your classroom is large and you find that you have students that are quiet and might not participate, you might want to divide into five or six groups and use one or two of the cases twice. Two groups will have the same case, but the students will not know it until they present the cases. Or you might have them do one of the cases in the article beginning on page 5.

Ask the students in each group to evaluate the case they have been given and answer the questions that are posed. The resource person will discuss their answers and provide insight into how disputes are actually resolved in our society.

Cases

Duplicate and give each group only one case. Each member of the group should have a copy.

CASE I—CHIVES v. ONION

Mary Chives was taking her morning walk. As she passed her neighbor's house, his dog chased her down the street. Mary Chives fell and broke her $200 pair of eye glasses. She called to tell her neighbor, Mr. Onion, what his dog had done. Mr. Onion said that he would only pay damages if his dog had bitten her and that she had no business running from the dog. He also stated that he did not have proof that she was wearing glasses when the dog chased her.

1. Does Mary have a case?
2. Who is the plaintiff and who is the defendant?
3. How would you decide the case if you were the judge?

CASE II—PAPRIKA v. PARSLEY

Sue Paprika is the neighborhood's professional babysitter. Mrs. Parsley asked Sue to sit with her two children on Friday night, February 14, 1985, from 9:00 p.m. until 2:00 a.m. Sue agreed to babysit for $1 an hour until 12:00 a.m.; after 12:00 a.m. the fee would be increased to $2 per hour. Mrs. Parsley stated that she would have her children in bed when Sue arrived. Sue went to check on the children because the baby began to cry around 10:00 p.m. When she turned on the light in the room, there were six children instead of two. Sue demanded payment of $42 for babysitting the six children when Mrs. Parsley returned. Mrs. Parsley refused to pay the $42.

1. Does Sue have a case?
2. Who is the plaintiff and who is the defendant?
3. How would you decide the case if you were the judge?

CASE III—NUTMEG v. CINNAMON

John Nutmeg took his $65 pants to Nancy Cinnamon to have them altered. He told her to give him a two inch cuff and to take in two inches around the waist. Nancy did not measure John When John returned home and tried on his pants, he discovered that his pants were too short and the waist was too small. He called Nancy, but she did not answer her telephone. John sent Nancy a letter telling her the condition of his new pants. After ten days he had not received an answer.

1. Does John have a case?
2. Who is the plaintiff and who is the defendant?
3. How would you decide the case if you were the judge?

CASE IV—POPPYSEED v. REDPEPPER

Henry loaned five model racing cars in good condition to his friend, Fred, for a week. Henry paid $4.50 for each racing car. Fred returned the cars after a week. The wheels were off three of the cars and Henry found they could not be repaired. Henry demanded full payment for the three damaged cars. Fred said that he would pay $1 for each damaged car because the cars were not new when they were loaned to him.

1. What is the issue?
2. Who is the plaintiff and who is the defendant?
3. How would you decide the case if you were the judge?

Mercedes J. Newsome teaches ninth grade at the New Hanover County School System's Laney High School in Wilmington, North Carolina. This activity is adapted from a longer activity first published in Teaching Our Tomorrows: Special Programs in Citizenship Education, *written by SPICE I classroom teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law and the New York State Bar Association.*

Access to Justice

Children in Need of Assistance/Grades 7-12

Teri Wilson

Troy Thomas

After studying and acquiring some knowledge of the juvenile court system, its jurisdiction, and how it works, students will observe a peer as he/she progresses through a role play simulation of a proceeding for a child in need of assistance (CHINA). If the school has the equipment and students have the expertise, the role plays can be videotaped. In most situations, it is not possible to transport an entire class of students to the various proceeding sites. The videotaping of the procedure allows the proceedings to be viewed by all the students in the classroom at a later date.

This activity is intended to be the culminating activity of a unit on the juvenile court. It should include the code provisions and procedural requirements. The activity allows students to meet with many professionals involved in juvenile proceedings.

Time to Complete Procedure

Before undertaking this activity, make sure your students have a basic understanding of juvenile law and that they understand that juvenile courts are designed to protect the child's interests.

The process of organizing (and filming) each step may take several days. Make prior arrangements with all professionals involved. This is especially important if you are videotaping, so the desired filming locations and/or settings are available and staged appropriately. Plan on each of the eight steps taking approximately thirty minutes to role play or tape.

Procedure

Assign one student to be the child in need of assistance, and the other(s) to videotape as he/she progresses through the following steps: (Juvenile court procedures vary in every state. Contact your local juvenile court for steps in juvenile proceedings. In most states, juvenile courts are not open to the public. You will need to receive special reprint permission to videotape a process in the courtroom.)

RESOURCES NEEDED

You and your students will need to contact a variety of law-related professionals. Explain your activity and purpose. (I have found many individuals willing to participate in order to accomplish the goals of this activity.)

You will need:

- Prosecuting attorney
- Probation officer
- Juvenile court judge
- Attorney (guardian ad litem) for child
- Shelter care worker

Ask each law-related professional to role play the specific phase of the proceeding. Each one should explain his or her role and its purpose while you are role playing or filming.

EIGHT STEPS

1. Child being referred to Social Services meets with juvenile probation officer.
   Scripting – Department of Social Services representative should give a description of the situation to the juvenile probation officer as he/she acts out the role.
2. Juvenile probation officer warrants that the case needs juvenile court action.
   Scripting – Juvenile probation officer explains in detail the reasoning why the case needs juvenile court action as he/she acts out the role.
3. County attorney reviews the complaint and determines there is sufficient legal basis to file a petition. (Petition should explain why the juvenile court is looking into the family.)
   Scripting – County attorney explains why he/she has the legal basis to file a CHINA petition. This should be done as he/she is acting out the role.
4. If required, child is admitted to shelter care. An attorney is assigned to the child (guardian ad litem).
   Scripting – An attorney, acting as "guardian ad litem," should explain his/her role in the proceedings as he/she is acting out the role.
5. If the case is an emergency, a shelter care hearing

Sample Flow Chart

Step 1
Child referred
to Social Services.

Step 2
Juvenile probation
officer sends case to
juvenile court.

Step 3
County attorney
assesses situation and
files a CHINA petition.

Step 4
If required, child is
admitted to shelter care.

Step 5
If situation is an
emergency, shelter care
hearing is held.

Step 6
Adjudicatory hearing
takes place.

Step 7
Dispositional hearing
takes place.

Step 8
Possible resources
for the situation and how
their implementation
will be monitored are
established.

should take place. Court determines the child should remain in shelter care.
Scripting—All parties involved in the shelter care hearing should make sure to explain their roles as they act out the hearing.

6. Adjudicatory hearing. Judge hears facts of the case and determines that the evidence supports the allegations.
Scripting—Judge explains proceedings as he/she acts out the role.
7. Dispositional hearing. Judge discusses alternatives and resources to rehabilitate the child and/or family.
Scripting—Judge asks representatives from the various resource agencies to explain the possible alternatives as they act out their roles.
8. Explanation of how the provisions will be monitored to make sure the child's needs are being met.
Scripting—The judge could also incorporate the monitoring provisions into the previous step. He/she should make it clear that the possible alternatives are always in the best interest of the child.

Classroom Activity

Encourage the class to discuss the proceedings and the impact each step has in the total process. Emphasize that the "best interest of the child" is always of primary importance to juvenile proceedings.

Instruct each student to make a flow chart depicting the sequence of steps involved in child-in-need-of-assistance proceedings (see box for sample flow chart). When students have completed their charts, play the videotape for everyone to see.

Follow-up

To complete this activity ask your students to invite the professionals involved in the role playing or videotaping to your classroom. The professionals could take this opportunity to answer questions and give additional information about the process, their career preparation, and their involvement in the community.

Teri Wilson is a guidance counselor at Ames Middle School in Ames, Iowa. This lesson was adapted from an activity appearing in Teaching Our Tomorrows: Special Programs in Citizenship Education, *written by SPICE I classroom teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law and the New York State Bar Association.*

Access to Justice

Consumer Law Small Claims Court Simulation/Grades 7-12

Richard Marcroft and Elenor Taylor

Step One: What to Tell Students

Have you ever purchased an item and found it to be defective? Although there are many quality products in the marketplace, occasionally you may buy a product that is not satisfactory. If this occurs, there are inexpensive ways to protect your rights as a purchaser.

Of course, the best way to protect yourself is to be an informed consumer. Before deciding to buy anything:

- make sure you know what you *want* (or *need*) and what you are likely to *get*;
- shop around before you buy;
- check guarantees/warranties carefully before you buy;
- before you buy, ask about the policy on returning or exchanging goods;
- don't agree to pay more than you can afford;
- find out about refund policies if you change your mind or are unable to complete payments (if purchased on credit or lay-away plans); and
- if you're unfamiliar with the product, ask someone you trust who has used this product, or call a consumer agency, such as the Better Business Bureau (see your local phone book for phone numbers of consumer protection agencies) to find out if there are any complaints about the product.

By following these tips you can avoid a lot of problems. Still, even the most careful buyers will sometimes run into trouble, such as a defective product. In such a case, you need to make a complaint to the vendor (seller). You should speak to the returns department representative. Be firm, clear and polite. Explain the problem and say what you want the store to do to correct it. You should also have with you any papers relating to the complaint–sales receipts, guarantees, etc. If the problem isn't solved, ask to speak to the supervisor/manager. If that doesn't work, then write a letter to the owner of the business, or sales representative of the company that makes the item, or even the president of the company. Very often, these methods are enough to solve the problem because most businesses want to please their customers and will do what they can to make sure that you're satisfied.

If there's still a problem, you can file a complaint with a local agency or organization which deals with consumer problems (the Better Business Bureau or the Chamber of Commerce) or with a consumer action program of a local paper, TV or raddo station. This often brings very quick results. There are also state agencies, as well as federal agencies, and consumer advocate organizations you can contact. As a last resort, you can take legal action.

Case Study: *Johnson v. Wheels*

Pat Johnson, 18, while shopping for a bicycle, passed the "Fast Wheels Bicycle Shop" and noticed a sign that stated "WAVA-500 10-SPEED BICYCLE–$149.00 VALUE–TODAY ONLY $99.00." Pat, believing that this was a great deal, entered the store and was greeted by Jean, the salesperson.

Pat looked the bike over and found it to have everything needed. After reading the Wava manufacturer's 90-day warranty attached to the handlebars on the bike, Pat agreed to purchase it.

Pat paid for the bike with a personal check, and Jean gave Pat a sales receipt for the purchase price plus tax. Pat took the bike home and assembled it.

Three weeks later, when Pat and a friend, Billy, were riding their bikes to school, the chain on the Wava-500 fell off. After several failed attempts to put the chain on the sprockets (the teeth on the wheel rim) and continue riding, Pat had to walk to school. After school, Pat and Billy tried to fix the bicycle, without success.

Remembering the manufacturer's warranty, Pat decided to return the bike to the shop. At the "Fast Wheels Bicycle Shop," Jean, the salesperson, told Pat that the bicycle couldn't be returned. Pat asked to speak with the owner, Tracy Wheels, who explained to Pat that the bicycle could not be returned after being ridden for several weeks.

The next day, Pat filed a suit in small claims court.

QUESTIONS FOR DISCUSSION

- Who is the plaintiff in this suit?
- Who is the defendant?
- Should Pat bring any witnesses to small claims court? If so, who? Why?
- Should Tracy Wheels bring any witnesses to small claims court? If so, who? Why?
- What papers, if any, should the parties bring to court?
- If you were Pat, what would you plan to say in court?
- If you were Tracy Wheels, what would you plan to say in court?
- If Pat does not win the suit in small claims court, what other action, if any, could Pat take?

If you cannot settle a consumer complaint any other way and decide to take legal action, hiring a lawyer and filing a lawsuit can be very expensive. However, many states have an inexpensive way for a consumer to take legal action. This is a special court usually known as small claims court (which can award money up to several thousand dollars in some states, and up to several hundred dollars in all states). Small claims court has many advantages. The procedures are simple and conducted without difficult legal terms. In some states, you may be represented by a lawyer if you wish. In other states, lawyers are not permitted. Filing a suit is inexpensive. Court costs usually run about ten to twenty dollars.

Usually you can file a suit in a small claims court if you are older than 18. In some states, you must be 21 or older to file. If you are younger than the legal age, an adult must go with you when you file a suit. If you are considering filing a complaint, check with your local small claims court for local regulations.

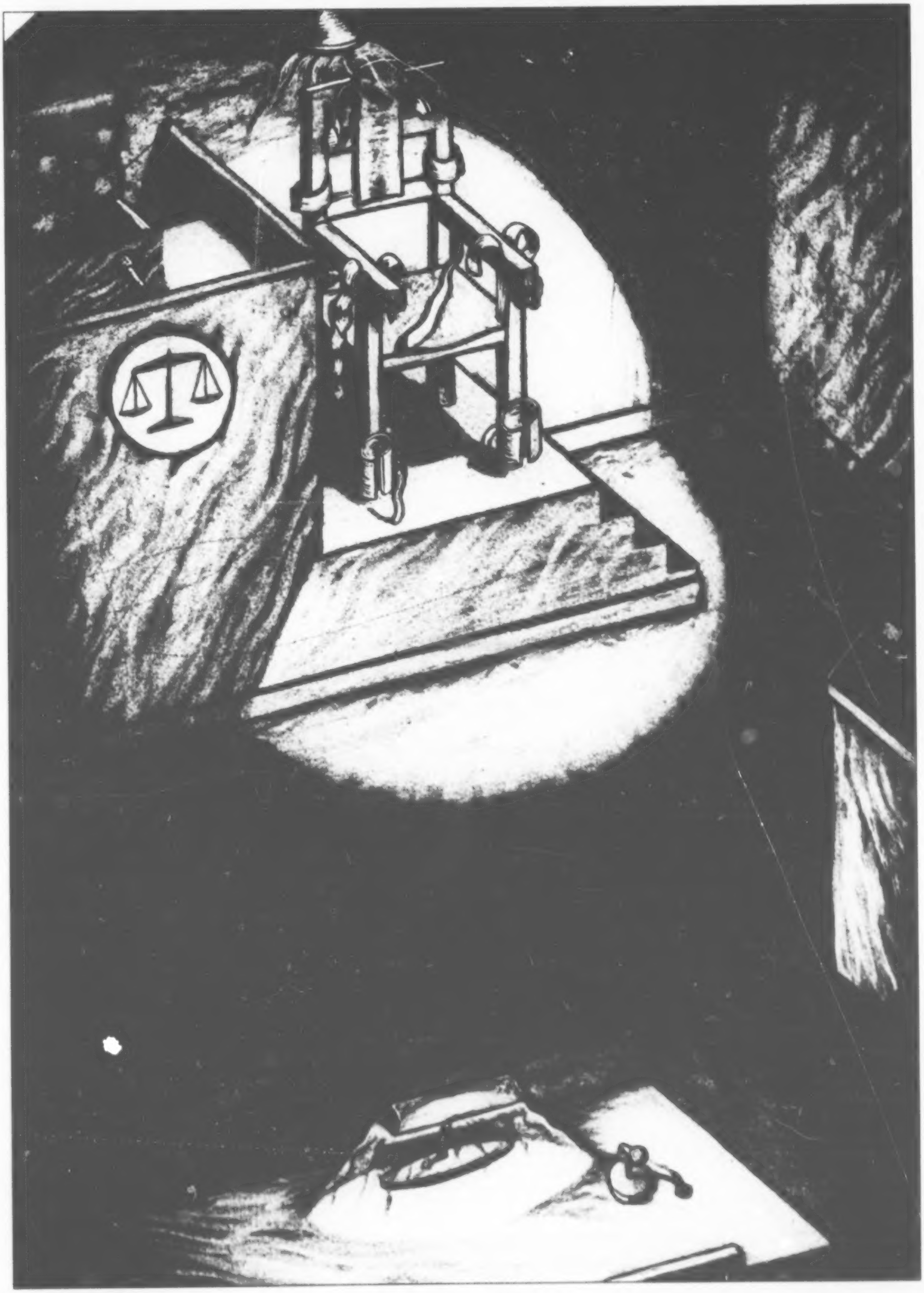
Activity: Small Claims Court Simulation

Assign various members of the class to play the roles of the plaintiff (the person filing the suit), defendant (the person against whom the suit has been filed), and witnesses in the case described in the box on this page. Plaintiffs, defendants, and witnesses should read the facts of the case and decide what they will say in court.

Invite a local attorney or judge to visit your class and play the role of presiding judge in your small claims court simulation. If this cannot be arranged, choose a student to be a judge. (Also choose a student to play the court clerk to announce the case, assist the judge, etc.) At the end of the trial, the judge should announce his/her decision and the reason(s) for that decision.

Note: If possible, the hearing should follow the same procedure used in a real small claims court. You can be guided by the visiting judge or attorney or by your own visit to a court. (Call your local county courthouse to find out if there is a small claims court in your area. If there is, arrange to visit the court in session. During your visit, note the kinds of cases heard and the roles of the parties. Also note the kinds of evidence presented and the decisions of the judge.) Typically, in court, after the case is announced, the plaintiff is asked to present his/her side first. After the plaintiff's presentation is completed, the defendant may present his/her side. Then the judge renders a decision.

Eleanor Taylor and Richard Marcroft are on the staff of the Constitutional Rights Foundation in Los Angeles. Portions of this article are adapted from materials in Living Law: Civil Justice, *from the Constitutional Rights Foundation and Scholastic, 1978.*



Troy Thomas

Claire Conway

Death Row Lawyers

Preserving the rights of those condemned to die is one of the toughest challenges to equal justice for all

In 1931 nine black men and boys were arrested in Alabama for the alleged rape of two white girls. The young and illiterate defendants were split into three groups and tried for the crime. Too poor to afford lawyers, they were awarded counsel by the court minutes before their trials began. Scottsboro, Alabama, where the trials were held, was in such a fury of hostility over the case that the militia was brought in to guard the defendants. In this Southern setting, blacks were systematically excluded from the juries during the selection process, and all three trials were carried out in a single day.

The Scottsboro Boys, as they came to be known, were convicted and sentenced to death. Their motions for new trials were denied, and their sentences were later affirmed by the Alabama State Supreme Court. In 1932, in a case involving the seven tried as adults, the U.S. Supreme Court spared their lives.

In *Powell v. Alabama*, the Court reversed the death sentences of the Scottsboro Boys because there had not been an adequate appointment of counsel to represent them. The decision extended the right to counsel to indigents in capital cases who were "incapable adequately of making [their] own defense because of ignorance, feeble mindedness, illiteracy or the like."

Since the 1932 decision, progress has been made by the Court to expand the right to counsel. Subsequent Court decisions have extended the right to counsel to include all indigent capital defendants without qualification. The Court has gone so far as to rule that the right to a lawyer is only valuable if that lawyer is able to competently and effectively represent the defendant. As a result of these decisions, the right to counsel is synonomous with the right to effective counsel.

Despite the progress made in the 57 years since *Powell*, the right to effective counsel for the poor in capital cases has fallen fatally short of its promise. Evidence of the failure to provide effective representation to indigents can be found in looking at the demographics of death row. The ABA's Postconviction Death Penalty Representation Project (PDPRP) reported that 99.5 percent of the people housed on death row are poor, meaning "utterly indigent and without resources." While blacks make up 12 percent of the U.S. population, 48 percent of the inmates on death row are black. According to James Neuhard, president of the ABA's Standing Committee for Legal Aid and Indigent Defendants, 300, or 14 percent, of the death row inmates have no lawyers.

Limits on the Right to Counsel

The fact that death row is comprised predominantly of the poor and minorities exposes two major flaws in our criminal justice system. According to Esther Lardent, chief consultant to PDPRP, the first flaw is the system's failure to ensure counsel throughout the appeals process. While there can be up to 10 levels of appeals available to those convicted of capital crimes in some states, the right to counsel is ensured only as far as the first, direct appeal.

All defendants are guaranteed counsel during the trial and sentencing stages of capital cases. The condemned also have a right to be represented by a lawyer up to and through direct appeal. Depending on the state, direct appeals are heard by the state appellate court or the state supreme court. Beyond this point the assistance of counsel is a privilege and not a constitutional right.

After the direct appeal, death row inmates are entitled to seek certiorari or review in the U.S. Supreme Court. From there, inmates enter another stage of appeals, referred to as postconviction appeals. According to an article by Michael Mello, published in the *American University Law Review*, state postconviction appeals provide the condemned with a tool they can use to raise claims which were not or could not have been raised on the direct appeal. Depending on local procedure and the nature of the claims raised, state postconviction proceedings may be initiated in state trial courts and if denied, be appealed to state appellate courts. The process can also begin in state appellate courts.

After the state postconviction process is exhausted, inmates can file a petition for writ of habeas corpus in federal district court. A writ of habeas corpus is a legal document that asks the court to require the state to legally justify the inmates' convictions against claims that they were denied their constitutional rights. If denied in federal district court, prisoners can appeal to the federal Circuit Court of Appeals. In most cases, a final postconviction appeal to the U.S. Supreme Court can then be made.

According to Mello, an execution date can be set at any point after direct appeal. Once a date is set, the inmate must obtain a stay of execution to remain alive so that he or she may take advantage of postconviction appeals.

The limits of the system are clear. According to the Spangenberg Group, a private criminal justice consulting firm, indigent inmates are not provided with counsel past direct appeal in one third of the 37 death penalty states. In these states, inmates must rely on the good will of members of the private bar to volunteer their services. What good is an elaborate system of appeals for the indigent if they are too poor to hire a lawyer? How can a death row inmate pursue a habeas corpus petition without a lawyer?

Postconviction appeals are critical. Between one-half and one-third of the cases that are appealed at this stage are sent back to lower courts for resentencing or retrial. Robert Raven, president of the ABA, has said that between 1976 and 1983, the federal courts of appeals decided 41 capital habeas appeals and ruled in favor of the condemned 30 times, or 73 percent of the time. "What that means is that legitimate issues were raised by lawyers with the skill and ability to raise them," Raven said in a speech in Houston last year. Mello's statistics are just as disconcerting. He reported that "of the 56 capital habeas appeals decided by the U.S. Court of Appeals for the llth Circuit between 1981 and 1987, half of the inmates were granted relief."

Reversals, which occur most frequently in Texas, Mississippi, Georgia and Florida, cast doubt on the skill and ability of the lawyers who handled the cases in trial court proceedings. Successful appeals show that some trial court lawyers have failed to introduce exonerating statements by witnesses as evidence. Other appeals show that trial lawyers did not challenge or even acknowledge inaccuracies in reports from state expert witnesses. In some reversal cases, lawyers did not introduce mitigating evidence that would have made their clients ineligible for the death penalty. Had other lawyers not volunteered to take on the postconviction appeals in these cases, the defendants may have been executed.

Ineffective Assistance of Counsel

The high reversal rate is evidence of the criminal justice system's second major flaw: The right to effective representation of counsel has proven to be illusory in practice. In many court systems around the country, capital defendants are being represented by untrained, poorly paid and overworked attorneys. Right to counsel means nothing if the lawyer does not have the time or experience to be effective. "Most often in cases that are reversed or remanded, you have lawyers who are grossly undercompensated or lawyers who don't have the expertise to handle death penalty cases," Lardent said.

States can provide counsel to indigents either through the public defender system or the private bar. States that have chosen to use members of the private bar to represent indigents often implement an ad hoc assigned counsel program. The program predates the public defender system and is the oldest method for providing defense services to indigents. Assigned counsel programs are used in many jurisdictions where reversal rates are high. In assigned counsel systems, judges appoint lawyers to represent indigent defendants at the trial and appellate level. According to a study done by the ABA's Bar Information Program, lawyers are either selected from a list of available attorneys or are assigned simply because they are in the courtroom at the time. In assigned counsel programs, attorneys are paid either at the discretion of the judge or in accordance with statutory guidelines.

Undercompensation

In some Southern states, court-appointed lawyers are compensated at rates starting as low as $500 for their representation throughout the trial stage of capital cases. Arkansas, Louisiana, Mississippi and South Dakota are among the states that have set a $1000 maximum on compensating attorneys for the trial phase of capital cases.

Aside from attorney time, death penalty cases require extensive resources at both the trial and appeals phases. Expert witnesses, paralegals, fingerprint experts, social workers and laboratory tests are just some of the necessities in many capital cases, according to Mary Broderick, a director of the National Legal Aid and Defender Association. A court-appointed attorney with no budget for these services could not take advantage of these resources, yet they may be essential to winning the case.

Prosecutors do have access to these resources, however. Public defenders and court-appointed lawyers representing capital defendants are often pitted against prosecutors who are armed with expert witnesses and investigators that the defense cannot afford. For many defense attorneys, the fight appears to be fixed the moment they are assigned the case.

In Maryland and New Jersey, the death penalty statutes read that compensation to lawyers in appeals should be nominal, according to Beth Walsh of the Spangenberg Group. Arizona, Arkansas, Colorado, Illinois, Kentucky, Montana, New Mexico, North Carolina, Oregon, Utah and Washington state have no specific level of compensation. The amount paid to attorneys for appeals is left to the discretion of the court.

Only Alabama, Delaware, Georgia, New Hampshire and Ohio have set compensation schedules in appeals. In Georgia there is no mandatory right to counsel after direct appeal. However, if under certain circumstances an indigent inmate is provided with free counsel, the attorney can be compensated a maximum of $150 for the entire appeals process, according to analyst Bob Spangenberg.

On average, the postconviction process consumes 1800 hours of attorney time. Given the negligible compensation and time demands of death cases, Lardent said, "You basically have people who are working for less than the minimum wage." States and counties on average spend more money on prosecution than defense. According to the Bureau of Justice Statistics, in 1985 state and county governments were willing to spend $3 billion on criminal prosecution but only $1 billion on criminal defense. (It should be noted that the state must support a prosecutor in every criminal case, but a public defender or a court-appointed attorney may not be used in every case, since some defendants can afford their own lawyer.) Money buys the necessities of criminal defense just as it buys the necessities of criminal prosecution. "In any situation, when you have a system where one side is able to out spend the other side by three or four times, you have a system that is inherently unfair," Broderick said.

Inexperience and High Caseloads

Lawyers may not only be crippled by lack of funds but by insufficient time and experience to competently represent capital clients. Whether a defendant in a murder case gets a lawyer who has death penalty experience during the trial phase or direct appeal, depends on where he or she is. If a defendant stands accused of a capital crime in some parts of the South, he or she may be assigned an attorney who has never tried, nor been trained to try, a capital case. The same can be said for lawyers assigned to appeals in capital cases in states that mandate representation. Defendants may also be assigned to a well-qualified attorney who is debilitated by an unmanageable caseload.

Indigents' access to justice in public defender's offices also appears to be dictated by location. "There is such gross disparity between the representation you find in the public defenders office of Los Angeles and what you would find in a rural county of Missouri that it is nightmarish," Neuhard said. In major cities like Los Angeles and Chicago, the public defenders who are assigned capital cases are the most seasoned and well-qualified. "In rural communities, you've got whoever happens to be there," Neuhard said.

In major industrial states, attorneys in public defender's offices specialize in death penalty cases and devote 100 percent of their time to a reasonably-sized caseload. "In states like Missouri, you have public defenders with a full felony caseload and they will have two or three capital cases on top of that," Neuhard said.

The Financial Barriers

Death penalty states are already struggling financially to fund the inadequate defense systems that are in place. "The death penalty is a black hole in terms of destroying the ability of systems to cope with the spiraling costs of the provision of services," Neuhard said. The Bar Information Project, which Neuhard chairs, devotes most its time to helping courts deal with the financial quagmire created by the death penalty. "Any state that has the death penalty generally ends up pouring immense amounts of resources into just coping with it," he said.

The person sitting on death row, facing interminable appeals (if he or she can afford it) represents the final stages of the spending process. The financial drain for state and county governments starts the moment a homicide takes place. When a homicide is reported in any jurisdiction, police treat it as a potential death penalty case. Maximum resources are committed immediately. "Police start bringing crime labs in, they start spending more time and pay more attention to detail," Neuhard said. "From step No. 1, there are more police officers, more prosecutors and more public defenders involved."

For every 20,000 homicides reported, Neuhard says only 200 defendants will receive a death sentence. He likens the process to an hour glass. Maximum resources are initially spend on thousands of homicides that are eventually whittled down to far fewer actual death cases. Once the defendants are sentenced to death, the costs escalate again, in terms of attorneys, resources and time.

WHY
do we kill
people who kill
people to show
that killing
is wrong?

UPI / Bettmann Newsphotos

UPI / Bettmann Newsphotos

Two condemned murderers play cards at Mecklenburg Correctional Center in Virginia; despite protests, the rate of executions is growing steadily in this country.

Trial and Appeal Costs

According to a review done by the *Miami Herald*, studies agree that death penalty cases cost more than life imprisonment cases at every level from pretrial investigation to appeals. According to one Maryland study, capital cases cost at least $36,000 more to try than nonexecution murder trials. A similar study in Kansas estimated additional costs at trial to be $116,700. Death trials cost more because

Evolution of a Right—
Assistance of Counsel Becomes a Reality

The Sixth Amendment provides that, "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." Originally, the provision was interpreted merely to assure that those who were able to afford a lawyer could not be barred from hiring one. For those unable to pay for an attorney, the right was meaningless. Moreover, the right involved only representation at a trial, not at proceedings before or after the trial.

Over the last six decades, the Court has expanded the guarantee so that it may be enjoyed by the indigent. Court decisions since the 1930s have also broadened the right to ensure effective assistance of counsel and to cover many pre- and post-trial proceedings.

The first case to redefine the scope and importance of the right to counsel was *Powell v. Alabama* (287 U.S. 45) in 1932. In *Powell*, the Court reversed the convictions of seven young black men who were sentenced to death in Alabama for the alleged rape of two white women. The Court set aside the convictions because there had not been adequate appointment of counsel to represent the seven illiterate defendants.

The decision, however, does not rest on the Sixth Amendment (which applies to the federal government) but on the Fourteenth Amendment, which directly applies to the states. In the decision, Justice Sutherland wrote that the due process clause of the Fourteenth Amendment requires the observance of certain fundamental procedural rights in a hearing. According to Justice Sutherland, "the right to aid of counsel is of this fundamental character." The decision marked the first time the Court recognized that the right to a trial is of little worth if it does not include the right to be represented by a lawyer. "Even the intelligent and educated layman has small and sometimes no skill in the science of law. He lacks both the skill and knowledge to prepare his defense, even though [he may] have a perfect one," the Court acknowledged. According to the decision, a defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

However, the ruling was narrowly limited to the specific situation in *Powell*. The ruling extended the right to counsel to indigents in capital cases under certain circumstances. The Court held that, "In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." Moreover, the counsel must be available to him prior to trial, since these proceedings are also governed by the due process clause.

The Right Expands

Just six years after *Powell*, the Court's decision in *Johnson v. Zerbst* (304 U.S. 458) directly expanded the Sixth Amendment right to counsel. This case involved criminal proceedings in the federal courts, so the Sixth Amendment applied, rather than the Fourteenth. In *Johnson*, the Court established a rule requiring the federal government to appoint counsel, at its own expense, to indigent defendants in federal courts. *Johnson* also established that, if a defendant refuses counsel, he must make the waiver intelligently, on the record, before trial proceedings begin.

But what about defendants in the state courts? The vast majority of criminal cases take place there, and *Powell* applied only to a very few cases. In 1942, the Court applied the counsel requirement to a limited number of cases but declined to extend the right to counsel to all state felony proceedings. In *Betts v. Brady* (316 U.S. 455), the Court refused to apply the *Johnson* ruling to the states via the Fourteenth Amendment's due process clause.

Betts involved a poor Maryland farm hand who had been convicted of robbery and sought a new trial on a *habeas corpus* writ, on the grounds that his state trial without a defense attorney violated the Constitution.

According to the Supreme Court, though, the ordinary man could take care of himself in a courtroom without a lawyer's help. The Court held that the Constitution required a state to provide a lawyer only if "special circumstances" made it especially hard for him to defend himself. For example he might be sick, or very young, or the case might be especially complicated. According to *Betts*, "appointment of counsel is not a fundamental right essential to a fair trial," at least in most trials.

Part of the 60s Revolution in Criminal Law

After *Betts*, the guarantee to counsel did not make headway the the courts until 1961. In that year, with *Hamilton v. Alabama* (368 U.S. 52), the

they take longer. Attorneys are given greater liberty to question potential jurors in the selection process. Defense attorneys also submit twice as many pretrial motions than are filed in nondeath cases, a California study showed.

The time and money drain does not stop there. According to research done by the Spangenberg Group, the average defense cost for each mandatory state supreme court review is $34,740. The group estimates the cost of government-salaried defense lawyers appealing past mandatory review is on average $137,410. The *Miami Herald* reported that appeal costs after state review in Florida range from $274,820 to $1 million.

Similar research has been done by the

Court widened the scope of the right to counsel by abolishing the "special circumstances" rules of *Powell* that dictated when counsel was or was not mandatory in capital cases in the state courts. Here the Court broadened the right to counsel by holding that capital defendants do not have to show a particular need or prejudice resulting from an absence of counsel. Thus, *Hamilton* required that the assistance of counsel be provided in all capital cases.

The special circumstances rules for noncapital cases were abandoned in *Gideon v. Wainwright* (372 U.S. 335) in 1963. With this landmark decision, *Betts* was unanimously overruled. The Court held "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Justice Black, who regarded the decision as an "abrupt break" with precedent, wrote that the right to counsel was fundamental and that the Fourteenth Amendment mandated that the right be constitutionally required in all felony cases heard in state courts.

Gideon applied to trials for felonies (serious crimes punishable by imprisonment, usually in a penitentiary). The Court later extended the right to counsel to include misdemeanor cases (less serious crimes, often punishable by relatively short jail sentences). In *Argersinger v. Hamlin* (407 U.S. 25), in 1972, the Court held that *Gideon* applied even to misdeamenor cases if the person charged might be imprisoned. However, in *Scott v. Illinois* (440 U.S. 367) in 1979, the Court determined that the right to counsel was not guaranteed to defendants in misdemeanor cases where only fines are imposed. However, *Gideon* and *Argersinger* established that criminal defendants facing possible imprisonment must be allowed legal counsel unless they intelligently waive the right to counsel.

In re Gault (387 U.S. 1), a 1967 Supreme Court decision, established the right to counsel for juveniles.

The scope of the right to counsel has also reached beyond trial to pre- and post-trial proceedings. In *Miranda v. Arizona* (384 U.S. 436), the Court looked to the Fifth Amendment clause guarding against self-incrimination (applied to the states through the Fourteenth Amendment) to ensure that a person under police custody has the right to counsel before and during questioning. In *United State v. Wade* (388 U.S. 218, 1967), the Court held that after arrest the accused may not be subjected to eyewitness identification in a lineup unless counsel is present or unless the right to counsel has been waived by the defendant.

The right to counsel after conviction, during probation revocation proceedings, was secured by the Court in *Mempa v. Rhay* (389 U.S. 128) in 1967. The right to counsel was also guaranteed to defendants at the first level of appellate review in *Douglas v. California* (372 U.S. 353, 1963) and in *Evitts v. Lucey* (469 U.S. 387, 1985).

Effective Counsel Mandated

Regardless of the Court's decisions broadening of the right to counsel, the guarantee is worthless if an attorney fails to deliver effective representation to his or her client. The Court recognized this in *Powell* and later in *Jones v. Barnes*, 463 U.S. 745 (1983). However, prior to the 70s, when an attorney's performance was challenged, most appellate courts would not act unless a trial proceeding were rendered a "farce and mockery."

This rock-bottom standard of effectiveness was raised in 1984 with *U.S. v. Cronic* (466 U.S. 648), a case dealing with ineffective representation of an appellate lawyer. In *Cronic*, the Court said the effective assistance requirement is essential to the constitutional right to counsel. The Court determined that the right to counsel is violated when the deficiency of an appellate lawyer causes "the process [to] lose . . . its character as a confrontation between adversaries."

The same year the Court developed a dual standard to determine whether the performance of an appellate counsel was so defective that the defendant's rights to counsel was denied. In *Strickland v. Washington*, 466 U.S. 668, the Court said that to establish constitutionally ineffective representation, the defendant must (1) prove incompetency on the part of counsel which (2) prejudiced his chances of a successful appeal. The standard for proving incompetency in *Strickland* is "whether in light of all the circumstances, the identified acts or omissions [of counsel] were outside the range of professionally competent assistance." To prove prejudice, a defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome."

More to Do

While the right to counsel has swelled to include the poor and children, to include felony and some misdemeanor cases, and to include various stages of the criminal justice process, there is much room for growth. Many have argued that due process demands that the right to counsel be extended to civil proceedings and to death row inmates past direct appeal. Some also contend that the right in practice is far more narrow than the opinions of the Court that have sought to broaden it. To these critics, much needs to be done to narrow the gap between theory and practice.

—Claire Conway

Sacramento Bee, a daily newspaper in Northern California. California ranks third nationwide in terms of the amount it spends on criminal defense. California's supreme court of nine justices has close to 250 death penalty cases for review this year, according to Neuhard. Transcripts in capital cases are often 20 to 30 times longer than any other first-degree murder trial. With grand jury proceedings and coroner inquests that can be 3,000 to 4,000 pages each, transcripts in capital cases can be up to 20,000 pages long. "You've got a state supreme court trying to swallow that caseload like a boa constrictor trying to swallow a hippopotamus," Neuhard said.

(continued on page 65)

Mediation and the Courts/Secondary

John F. Khanlian, Ericka B. Gray & Sandi Dittrich

BAR LEADER/Neighborhood Justice Center of Chicago, Inc.

The use of nontraditional methods to resolve disputes has been increasing dramatically in the past decade. There are community, corporate, and court-annexed programs throughout the United States and in many other countries. Within the court system, these programs are often referred to as alternative – or complementary – dispute resolution programs.

The use of these programs within the court system has become more prevalent as court backlog has increased. The consumers of court services have been seeking quicker and more appropriate resolution of their cases than they would have if a judge imposed a decision. Quality of justice is one of the key issues addressed by the use of such programs, which seeks quick resolution of the case and reduction in the cost of litigation as well.

Programs are being implemented in every area of the court system, including the municipal, civil, family, and criminal courts. Among the many programs currently operating are mandatory arbitration for automobile cases, mediation and arbitration for minor juvenile cases, child custody and visitation mediation, mediation of neighborhood disputes and minor criminal complaints, mediation and arbitration of consumer-merchant complaints, programs set up to deal with bad check cases, and mediation of complex environmental cases.

Mediation is a process which allows disputing parties to resolve a conflict themselves with the help of a neutral third party known as the mediator. Disputing parties come together to work through their problems and reach agreements. The mediator structures and facilitates the meeting, encouraging angry people to speak with each other. The mediator guides people towards solutions acceptable to all sides. Mediation is different from arbitration and adjudication because the third party (the mediator) is neutral, does not take sides and has no decision-making power.

People who have used mediation to resolve their dis-

2213

pute have reported feeling very satisfied with the results. Usually, all parties to a dispute leave the mediation session feeling that they have "won" what they wanted on the issues important to them, whereas in cases decided by a judge, one party will often leave feeling like the winner while the other feels the loser. With all parties feeling good about the mediation outcome, there is less likelihood of residual bad feelings or a grudge which could lead to later conflicts. Also, when people make their own agreements they are more likely to comply with the terms of those agreements than with those imposed by a judge.

A mediation session may include various stages. Examples are:

Opening Statement	Mediator makes introductions, sets ground rules and explains confidentiality.
Uninterrupted Time	Getting each person's story.
Clarifying Information	A chance for the parties to respond to each other and for the mediator to ask questions.
Finding Solutions	Exploring alternatives and looking for solutions that work best for the parties.
Agreement Writing	Drawing up all points of agreement which the parties can then sign.

Within the past six years an exciting new development in dispute resolution programming has occurred. This is the creation of mediation programs in the school system. They are now in operation in many elementary and secondary schools throughout the country. Students are trained as conflict managers and mediators who assist their peers in resolving a variety of problems, including name calling, harassment, gossip, and property disputes happening both on and off school grounds. The success of peer mediation has been phenomenal, and students involved in these programs are learning new skills which may help them resolve later problems without turning to adjudication by the courts.

Classroom Activity

OBJECTIVES

1. To introduce the concept of mediation as another mechanism in the legal system to resolve disputes.
2. To have students explore, through roleplays, the difference – in participant control and satisfaction with the outcome – between the mediation process and going before a judge.

TIME REQUIRED

A minimum of two class periods (50 minutes each) will be required for this experiential activity. Day one includes background information, role distribution, and first roleplay. Day two follows with second roleplay, debriefing, and discussion with the whole class.

MATERIALS

Duplicated role cards (see pp. 42-43).

Procedure

After presentation and discussion of traditional court procedures and of mediated dispute resolution, tell students that they will be presenting two roleplays, one showing the case in court and the other showing the case in mediation. Photocopy the role descriptions, cut them out and distribute them to the students who will be playing the particular roles for the two simulations. The roles should be assigned and students given time to acquaint themselves with the characters in the case, create any specifics they may need, and plan strategies with the others in their group. Other assignments can be given, such as background research or interviewing, if a comprehensive look at these issues is desired. Assign roles or ask for volunteers for each role. If there are extra students, they can serve as official "observers" and be called on for their reactions and critiques when debriefing after the roleplays.

We recommend presenting the court roleplay first, with the mediation roleplay second. After both have been presented, contrast and compare outcomes and reactions of the players and observers.

ALTERNATIVES

To have all students involved in a role, the exercise can be set up so that two or more court hearings and two or more mediations may be conducted simultaneously. Be sure there is plenty of room, so that groups are not distracted by neighbors.

As an alternative, you may want to consider using the school library or even arrange for use of an off-campus setting, such as a courtroom, city council chambers, or mediation center, to add to the experience. A 'field trip' could be arranged, scheduling enough time (3 or 4 class periods) to set up, present and debrief both roleplays. Attorneys, judges, or mediators may be available to speak about their role in dispute resolution and the process they use.

ROOM ARRANGEMENTS

The class should be arranged in a way that physically sets the players apart from the class observers and creates an environment for the action to take place. The juvenile court hearing requires a formal arrangement with the judge taking a place of authority facing the defendants and the victim. The defendants should be at one table facing the judge, while the victim and the police officer should sit at a separate table.

For the mediation roleplay, participants should be seated around a table, or in a circle if no good-sized table is available.

OUTSIDE RESOURCES

This activity provides an excellent opportunity to invite one or more outside resources – lawyers, judges and mediators – into the classroom. Your local bar association can be helpful in providing contacts. The request should be made two or three weeks in advance, if possible, specifying the subject area which will be addressed and the role they are to play. A copy of the activity should be sent along with the letter of invitation. The resource person can assist in presenting background information, serve as an advisor to students as they prepare for their roles, or actually play the part of judge or mediator. The resource person can also provide commentary and feedback during the group discussion on procedural issues, realism of the roles presented, or nature of the disposition or settlement in each case. A local practitioner can also provide information on alternative dispute resolution within your area's court system.

Basic Scenario

Sandy and Chris were out in the neighborhood on Halloween night having fun and pulling some typical Halloween pranks. They were fooling around near a neighbor's house when a window of the house was broken.

A police officer patrolling the neighborhood spotted Sandy and Chris outside the house immediately after the window was broken, and charges were filed against them. Their case was referred to juvenile court.

PARTICIPANTS IN JUVENILE COURT HEARING

The case was scheduled for a hearing before a judge.

Chris & Sandy	The defendants–teenagers accused of damaging Del's property.
Del	The victim–a neighbor whose window and figurines were broken.
Officer Haines	The officer on the scene.
Judge Willis	A juvenile court judge.

Role Cards for Juvenile Court Hearing*

OFFICER HAINES

You are to testify only to the facts as you saw them. In this case, you were patrolling the area on Halloween night when you heard the sound of breaking glass and observed two juveniles, later identified as Chris and Sandy, standing several feet away from a broken window of an older resident's home. You saw no one else in the vicinity. You did not actually see anyone break the window. You then took a report from the victim, Del, and found crystal figurines had been broken as well. Damage was estimated at $500.

JUDGE WILLIS

You are to convene the hearing by indicating that Chris and Sandy have pleaded not guilty. You will first ask Del to explain what happened on Halloween night. Then you will ask Officer Haines, then Chris and Sandy. You may only allow information about what happened that night, and you must interrupt anyone who tries to talk about anything other than the facts of the case. Do not allow anyone to get off the subject and talk about things that happened long ago, or about their feelings towards other people involved in the case. You may ask questions to clarify what has been said or to get more information. Such questions may be: What happened next? What did you see then? How close were you to the house? etc.

You are also to give Chris and Sandy the chance to ask questions of Del and the police officer but these questions must be directly related to what happened on the night in question. Your role is very important, and you must stay in charge at all times. At the end of the hearing, it will be your responsibility to decide whether Sandy and Chris are guilty (*i.e.*, delinquent) or not guilty, and to recommend an appropriate disposition (sentence).

* Role cards for Chris, Sandy and Del are the same as in mediation roleplay below.

Mediation Roleplay

A complaint against Chris and Sandy was filed with the court. It was suggested by the juvenile court intake officer that they try to mediate the case All parties agreed to participate.

PARTICIPANTS*

Chris	Teenager
Sandy	Teenager
Terry	Chris's Parent
Pat	Sandy's Parent
Del	Senior Citizen Victim
Robin	Mediator

* Students should not use their own names in any roleplays. Gender-neutral names are provided for your use.

Role Cards for Mediation

CHRIS (Teenager)

It was Halloween and you and your friend Sandy were just goofing around like everyone else. You don't know how the window got broken, but of course Del makes more of it than it is. How could she/he possibly know if it was you; Del's eyesight is so bad. Del seems to hate you and is always complaining about you and yelling out his/her door at you when you're not even doing anything.

SANDY (Teenager)

It was Halloween and you and your friend Chris were just goofing around like everyone else. You don't know how the window got broken, but the old neighbor is making more of it than it is. He/she is always complaining about you and yelling out the door at you when you aren't even doing anything. It's like he/she has some grudge against you for something. Del should just mind his/her own business and stop harassing you.

TERRY (Chris's Parent)

You know that Chris and Sandy were out on Halloween but don't believe they would intentionally break Del's window. Del has complained to you about Chris before for being near her/his bushes, etc. You have told Chris to keep at a distance. He/she is a good kid and doesn't cause trouble.

PAT (Sandy's Parent)

You know Sandy and Chris were out in the neighborhood on Halloween. You aren't clear how the window got broken, but you are prepared to pay for a third of the cost to replace it.

DEL (Senior Citizen Victim)

These kids are trouble-making rowdies who are always using bad language. The neighborhood just isn't like it used to be. Kids never used to be so disrespectful to you. Now these two have broken your bay window AND some of your cherished figurines that were on the table. You heard the window break and immediately looked out the door and saw Sandy and Chris outside laughing. They should pay for everything and not be allowed to come near your property.

ROBIN

You are a mediator with the local court-annexed mediation program. You help structure the session by asking Del to speak first and tell what happened. Nobody is allowed to interrupt. Next, Chris and Sandy (& their parents) are asked to present their points of view. Help them determine what they can each agree to do to resolve the dispute. Remember: mediators do not make suggestions, give advice, or make any judgments about right or wrong.

Debriefing and Discussion

The most valuable part of any experiential activity often comes from the whole group discussion and debriefing of participants following the exercise. Debriefing is important to get students (psychologically) out of the roles they have been playing. Begin by asking questions that make the roleplayers reflect on how they felt while in their role.

Other Resources

- **National Association for Mediation in Education (NAME), 425 Amity Street, Amherst, MA 01002 (413-545-2462). A national clearinghouse of information and articles on the subject. Offers a directory of programs in schools. Sponsors a national conference.**
- **ABA Standing Committee on Alternative Dispute Resolution, 1800 M Street NW, Washington, DC 20036 (202-331-2258). Provides a directory of mediation programs throughout the country. Holds special conferences on subjects relating to alternative dispute resolution.**
- ***Training Middle School Conflict Manager*. A publication of the School Initiatives Program, Community Board Center for Policy and Training (149 Ninth St., San Francisco, CA 94103). 1986.**
- ***Conflict Resolution*. A curriculum by Vivian Einstein Gordon. West Publishing Co., St. Paul, MN 55164. 1988.**
- ***Street Law: A Course in Practical Law*. A text by McMahon, E., Arbetman, L., & O'Brien, E., of the National Institute for Citizen Education in the Law. West Publishing Co., St. Paul, MN 55164. 1986.**

Debriefing questions include:

- How did you feel in this role?
- Did your attitude or ideas change during the roleplay?
- What did the judge/mediator do that you liked/didn't like and how did it affect you?
- When did you feel most powerful in the case? Least powerful?
- How much control did you feel you had in the outcome of your case?
- What was frustrating to you?
- Did you like the outcome?
- How comfortable was the judge with his or her options? Authority?
- How did the mediator perceive his or her role?
- What was the hardest?
- What was the easiest?

As you move into whole group discussion, include the comments of any student observers.

- How much of the others' point of view was heard in the court hearing? In the mediation?
- What were the biggest differences between the two methods?
- What were the similarities?
- Were there more solutions to this case than you had thought?
- Did the parties leave the hearing/the mediation feeling different from when they began?
- Which method would you have preferred if you were in this conflict?

If several groups have simultaneously roleplayed mediations and hearings, judges and mediators in each group can be surveyed to find out what the ultimate disposition or settlement was. By comparing and contrasting the cases, students will see that there is obviously no one "right answer" and that the outcomes are determined by a variety of factors, including the advocacy skills of the participants, presentation of evidence, and philosophy and approach of the judge or mediator.

John F. Khanlian works as an instructional specialist in a regional curriculum office for the New Jersey Department of Education and is on the steering committee of the Comprehensive Justice Center.

Ericka B. Gray is the director of the Comprehensive Justice Center in Burlington County, New Jersey, a court-based unit devoted to researching and developing new programs in dispute resolution.

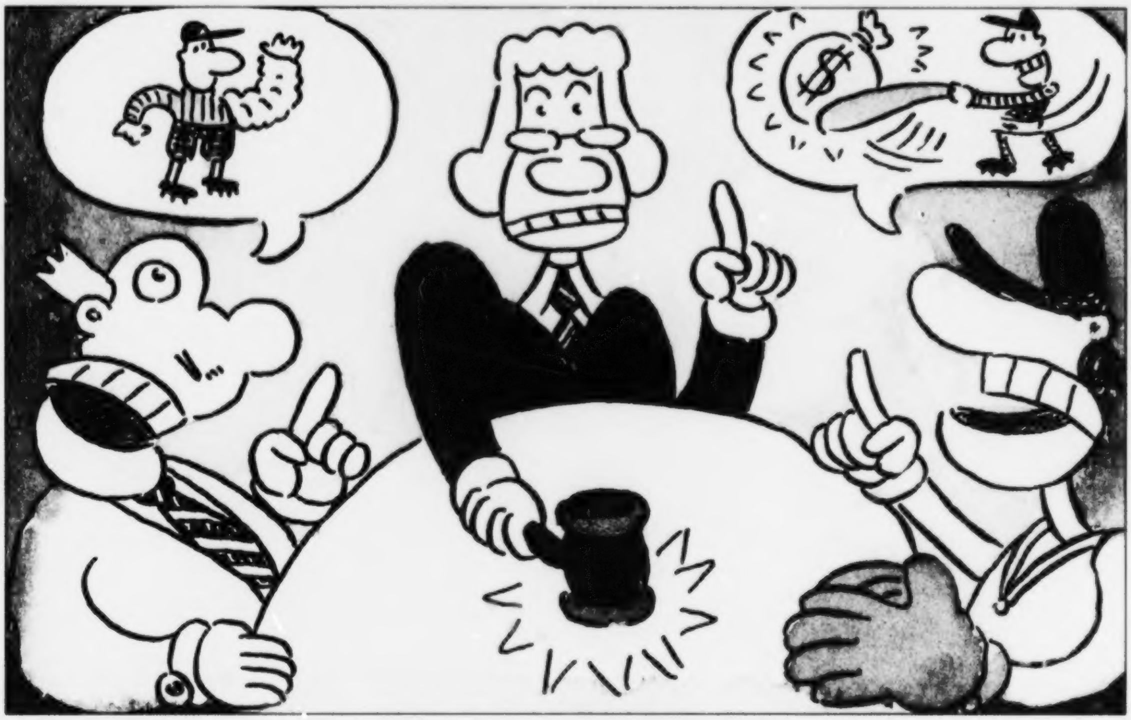
Sandi Dittrich is coordinator and trainer at Friends Mediation Service in Philadelphia, where she is responsible for developing school mediation programs.

For more information, contact: Comprehensive Justice Center, County Courts Facility—3rd Floor, 49 Rancocas Road, Mt. Holly, NJ 08060 (609-265-5160) or Friends Mediation Service, 1515 Cherry Street, Philadelphia, PA 19102 (215-241-7234).

Access to Justice

Arbitration/Secondary

John Nelson



Signorino

Arbitration is a form of dispute resolution which involves placing a conflict before a neutral person or panel. Unlike mediation, which allows the parties to the dispute to "back out" if they are not happy with the solutions suggested by the mediators, arbitration results in a binding resolution of the dispute. Often, arbitration as a means of resolving disputes is consented to in advance. Many employment contracts, for example, say that future disagreements between employer and employees must be settled by a process of binding arbitration.

Because arbitration is usually quicker and less formal than court litigation, it has become a favored way of resolving conflicts in situations where frequent disputes can be anticipated by the parties to contracts. Landlords and tenants, employers and employees, and sports team owners and players, for example, often agree in advance to settle problems through binding arbitration.

Which of the following disputes are apt to be resolved best through binding arbitration? Divide the class into small groups, and have each group analyze the examples given, in order to determine whether binding arbitration might have advantages over mediation or court litigation in each case. Then ask the groups to report their conclusions to the class as a whole. Groups of students could then pick a few of the examples to serve as the basis for a mock arbitration hearing or mediation session. Students will then see how each form of dispute resolution has certain advantages.

To Arbitrate or Not

EXAMPLE 1

The U.S. Olympic Committee is faced with many decisions about who should be placed on Olympic teams and who should compete in certain events. A competitor in the rowing events feels that he has been left off the Olympic team because during the double-scull trial heats he was paired with a less experienced oarsman, and the trial events were poorly judged. In particular, he believes that he actually won a single-scull race which was very close and which was awarded by the judges to his opponent.

EXAMPLE 2

A landlord wants to evict a tenant for not paying the rent called for in a written lease. The tenant claims that she offered to pay the rent, but the landlord refused to accept her check.

EXAMPLE 3

A victim of an automobile accident disagrees with her insurance company about how much she should be given to settle her claim. The insurance company believes that she wants to be paid for medical treatment of injuries not related to her accident. The victim is demanding $10,000, but the insurance company does not want to pay more than $6000.

EXAMPLE 4

A husband and wife being divorced disagree about how to split up personal property. They each have a list of things they think they should be allowed to keep as part of the divorce settlement, and there are several things they both want.

EXAMPLE 5

A professional baseball player wants to be paid $250,000 more in the coming season than his team owner is willing to pay. The player claims that attendance at home games goes up by several thousand people each time he pitches. The owner says that the player's last medical exam revealed that he may be developing tendinitis in his shoulder, and will probably not be able to start as many games this year as last.

EXAMPLE 6

Neighbors disagree about where a fence dividing their property should be built. The disagreement has become so strong that the neighbors have refused to speak to one another for two months.

EXAMPLE 7

In the above example, the neighbors agree about the property line, but they disagree about what kind of fence should be built.

EXAMPLE 8

A member of the girls' basketball team at a high school feels that her constitutional rights have been violated by the school sports program. She thinks that the athletic budget of the school discriminates against girls' teams by allocating less money for uniforms, travel to away games and coaching salaries than is set aside for boys' teams.

Background Notes

EXAMPLE 1

The Olympic Committee uses binding arbitration to resolve disputes such as the hypothetical one suggested by this example. Arbitration provides speedy resolution of these disputes, and is agreed to by athletes and coaches when they enter into competition for positions on Olympic teams.

EXAMPLE 2

This is the kind of case traditionally resolved through court litigation. Increasingly, however, disputes like this one are being resolved by arbitration or mediation. The disagreement about whether the rent has been offered signals a more difficult problem between the landlord and tenant which could be exposed and aired with the help of a mediator. The chances are good that this dispute involves more than payment of rent.

If the disagreement were more clearly over a simple fact (has the rent been paid or not?), it might easily be resolved by an arbitrator, who could request rent receipts and other forms of documentation to prove the disputed fact. Dispute resolution experts are apt to recommend mediation prior to arbitration in this situation, since it is always better to end a personal disagreement voluntarily if possible.

EXAMPLE 3

Again, this kind of dispute has traditionally been litigated in court. Insurance companies have seen the costs of litigation skyrocket in recent years, however, and many insurance contracts now require binding arbitration of disputes such as this one. In this case, the cost of going to court would quickly exceed the cost of the accident victim's claim. Binding arbitration would be much more effective than court litigation.

EXAMPLE 4

Many divorce lawyers and family court judges say that no imposed resolution in a divorce case is as good as one which is consented to by the parties. For this reason, mediation is increasingly used to settle disagreements about property, custody and child visitation. The major advantage to mediation is that it may result in a voluntary resolution to the dispute.

EXAMPLE 5

Professional athletes often engage in arbitration when they have contractual disagreements with their team owners. Here, a neutral arbitrator will evaluate the claims of both the player and the owner, and he or she will impose a resolution to the dispute. Sports contracts usually contain a "Compulsory Arbitration Clause," automatically leading to arbitration in this situation.

EXAMPLE 6

If the neighbors disagree so strongly that they are not on speaking terms, a mediator will find it very difficult to help them arrive at an agreement. An arbitrator could determine the property line after hearing evidence from a surveyor, and could settle the dispute in a less expensive way than could be accomplished by court hearings.

EXAMPLE 7

Unlike the previous example, this dispute can not be resolved through expert testimony. The neighbors need the help of a mediator to reach an agreement that they both can live with.

EXAMPLE 8

This is an example of a case which will probably have to be settled through court litigation. The presence of a constitutional claim means that someone with the legal expertise of a judge will be best suited to make a legal ruling. Many arbitration or mediation agreements provide that disputes involving highly technical legal questions, if not settled through mediation, will be referred to the courts.

John Nelson is a lawyer/educator who directs the state LRE program in Vermont and is a social studies consultant with the state department of education.

Access to Justice

A Lawyer's Pro Bono Work/Secondary

Jack Hanna

Lawyers have a professional responsibility to complete a certain amount of Pro Bono work. The phrase "Pro Bono" comes from "Pro Bono Publico," which is Latin for "for the public good." This work for the public good is usually work for which the attorney receives little or no compensation. More often than not, Pro Bono work is defined as providing free legal representation for those who cannot afford to pay for it.

Objectives

1. Students will understand that lawyers have a professional responsibility to do public service work called "Pro Bono Publico" or for the public good.
2. Students will analyze various definitions of Pro Bono work.
3. Students will survey local lawyers about their Pro Bono work.
4. Students will identify what they consider to be appropriate Pro Bono work.

Procedure

1. Define "Pro Bono Publico" and a lawyer's overall public service responsibility.
2. Distribute the Pro Bono Public Policy Fact Sheet. Have students read the sheet.
3. Divide your class into six groups.
4. Inform each group that its assignment is to design a public policy that will close the gap between the legal needs of the poor and the services available to meet those needs. Remind them that around 80% of the legal problems of the poor are currently dealt with without lawyer representation.
5. (Optional) Distribute the Lawyer Pro Bono Survey to your class. Inform each group that it should complete the survey with approximately 10 lawyers and use the results to help formulate its public policy. If you use the survey, the results for the entire class should be tabulated before the class makes its final vote.
6. Have each group present its public policy to the class and defend it.
7. Have the class as a whole vote on the best public policy to close the gap between the legal needs of the poor and society's ability to meet them.
8. Invite a Legal Services lawyer, a Pro Bono volunteer lawyer and a lawyer who does not participate in a Pro Bono program to your class to discuss each group's recommendations.

Lawyer Pro Bono Survey

1. How do you define Pro Bono?
2. How much Pro Bono work do you do in a year?
3. What Pro Bono work are you doing right now?
4. Do you plan to do more next year?
5. Have you changed your definition of Pro Bono?
6. Do you participate in an organized Pro Bono program?
7. Should providing a certain amount of legal representation to the poor free of charge be mandatory for all lawyers? If not, why not?

Jack Hanna is a lawyer/educator who directs law-related education and Pro Bono programs for the South Carolina Bar.

Pro Bono Public Policy Fact Sheet

There are 713,456 practicing attorneys in the United States.

There are over 30,000,000 people in the United States whose income is below the poverty guidelines. Indigent people generally have more legal problems than others, including improper housing, consumer problems, public benefits, unemployment, and consumer fraud. Because so many of our nation's poor are women and children, family law problems are particularly acute for them.

There are state, federal and private programs to deliver legal services to our nation's poor. All of these programs combined meet only approximately 20% of the legal needs of the poor.

Lawyers have a responsibility to do a certain amount of work for the public good for which they receive no compensation.

A few jurisdictions *require* that attorneys provide a certain amount of representation to the poor free of charge to meet their Pro Bono obligation. Critics argue that specialized lawyers like patent attorneys don't understand the poor or the areas of law in which they need representation and that they should not be forced to enter areas of law in which they are not competent or comfortable. Others say that because of the magnitute of the problem, they should learn.

A few jurisdictions define appropriate Pro Bono work as not only representing the poor free of charge but also include within their Pro Bono definitions activities such as serving on the board of directors of a nonprofit corporation, serving on a committee of a bar association, donating money to programs that help the poor with their legal problems and working to improve the administration of justice.

Your job is to develop a public policy to meet the legal needs of 80% of our nation's poor who currently go without legal representation.

Access to Justice

Plea Bargaining: A Mini Simulation/Grades 11 and 12

Lowell Ueland

This activity is designed for high school juniors and seniors, but it should work with younger students as well.

Simulations conducted within a class period or two can help students learn about the legal system in an interesting and enjoyable way. However, too often the simulation is lengthy, and it takes an enormous amount of the teacher's time to prepare the students.

The following simulation is an attempt to present the concept of plea bargaining and the advantages and disadvantages of its use in a short period of time with minimal preparation for the teacher. It's a natural for a community resource person such as a defense attorney, public defender, prosecuting attorney or judge.

Purpose

Too often we look at the law as only dealing with procedural rights and the courtroom drama of the jury trial. This activity will give the student the opportunity to experience another avenue used extensively in the criminal justice process. The students' involvement in plea bargaining will make them aware of a legal process by which many criminal cases are handled short of a trial. In addition it will give each student the opportunity to look at another method of conflict resolution and to make value judgements regarding our legal system. It should also allow the student a further analysis of the purposes and goals of our legal system from another perspective.

Background

After a crime has been committed and an arrest made, the prosecutor faces a most difficult task of deciding what crime the accused should be charged with and evaluating the chances of getting a conviction on those charges. Many factors go into making the decision, including the specifics of the crime, the elements that must be proved, the evidence, the political climate, and public pressures.

After making the decision, the prosecutor must then build the case. The defense attorney, on the other hand, is looking at the same factors and building a defense.

Objectives

The student participant will

- list and explain with understanding the legal concepts presented in this activity.
- be aware of the problems and controversy centered around plea bargaining.
- be able to determine the values that influence each participant in making his or her decision.
- be able to describe and evaluate the effectiveness of the various strategies in dealing with the problem.
- be able to formulate a hypothesis about the conflict between the plea bargaining process and the individual's constitutional rights.

Time

This activity can be completed in two to three class periods. Orientation, instructions and other preliminary activities will take 20 to 30 minutes (and provide a good opportunity for the resource person to share his/her perspective). Enactment will take 40 to 50 minutes. Evaluation will take 20 to 30 minutes and will provide another excellent opportunity for the resource person to contribute.

Procedures

Begin the class by having the resource person or the teacher discuss plea bargaining as an alternative to a jury trial. Explain what plea bargaining is and how it differs from an accused's right to a jury trial. Discuss the circumstances under which plea bargaining might take place. You might want to have the students explain what they think the advantages and disadvantages of plea bargaining might be and how it might affect the rights of the accused. End the discussion with the statement that they are now going to participate in a plea bargaining simulation.

Prior to playing the plea bargaining game, the facts of the case (developed by the teacher or resource person) and a copy of the applicable law(s) should be distributed to the class. The teacher should check the class for understanding of the facts and the applicable laws for the particular state they are in.

When developing the facts of the case remember that each side will have strengths and weaknesses. Also, one side will often not know all of the strengths and weaknesses of the other side. A local prosecuting or defense attorney will be most helpful in developing facts that accurately reflect a plea bargaining situation.

Divide the class into several groups of six to eight students. Each group will consist of the prosecution team, the defense team, the judge, and the accused. Each of these teams will role play a plea bargain of a case assigned to them. There should be at least three to four groups going at the same time, depending upon the size of the class.

Each group should select who should play each of the roles: prosecution, defense, judge, and the accused. Roles should be selected based on ability and interest. A plea bargaining scenario will usually include the following participants:

- judge
- the prosecution team (2-3)
- the defense team (2-3)
- the accused

Each team will be permitted to meet to prepare for the enactment. The prosecution and the defense will be assigned to represent their respective side and build a case. They prepare their sides by looking at the facts of the case and the charge.

During the preparation, the instructor should make sure

that each participant understands:
- his/her role in the game
- the kinds of activities he/she may not engage in
- the sequence of events
- any other related facts or information

Enactment

The actual enactment of plea bargaining should follow the sequence of events outlined as follows:
- The charge(s) is/are read by the judge and the accused pleads not guilty. The judge then will set the date of the trial. This should take about five minutes.
- The defense attorney(s) meets with the accused to go over the facts of the case and the negotiated plea. This should take approximately 5-10 minutes.
- The two teams will begin negotiating a plea based upon the strengths or weaknesses of their case. This will be 15 to 20 minutes of class time.
- A second hearing takes place, at which time the original charges are read. The prosecution will ask for a reduction in the charge or whatever has been negotiated, and the defense will respond. The judge will ask that each justify the reduction in the charges. The judge will then sentence the accused accordingly. This will take approximately 10 to 15 minutes.

Evaluation

After all the groups have completed their cases, a spokesperson from each group will summarize their case and give their reasons for doing what they did before the entire class. A discussion should take place using, among others, questions such as the following:
- Does the class agree with the group's decision and why?
- Was justice served or did the accused get away with the crime?
- What are some of the consideration that are involved in the plea bargaining process?
- How effective was the strategy that was used to plea bargain your particular case?
- Describe any conflict between the plea bargaining process and the rights of the accused.

This debriefing will provide the resource person plenty of opportunities to describe plea bargaining as it actually takes place, and to discuss how professionals weigh these considerations.

Follow-up

View the videotape *The Law* (available from Social Studies School Services, Culver City, California). This is an excellent dramatization of plea bargaining and the issues of the criminal justice system.

Lowell Ueland teaches at Glencoe Sr. High School in Glencoe, Minnesota. This lesson is adapted from an activity first published in Teaching Our Tomorrows: Special Programs in Citizenship Education, *written by SPICE I classroom teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law and the New York State Bar Association.*

Access to Justice

Problem Solving Through Mediation/Grades 9-12

JoEllen Ambrose

This lesson is designed to familiarize students with other ways of resolving disputes besides the traditional method of "taking it to court" or adjudication. There are three components to the lesson: (1) an explanation of mediation as an alternative dispute resolution process and how it differs from adjudication, (2) a role play activity where students act out the parties in a mediation situation, and (3) a discussion of the strengths and weaknesses of mediation and adjudication and when each process might best be used. This lesson is best used after students have some familiarity with the elements of a trial.

Rationale

Alternative dispute resolution has been developing rapidly over the last ten years, mostly in response to congested court calendars and the expense of litigation. In some cases, mediation and arbitration are required by state statute (Example: Farm Lender Mediation Act, Minn. Stat. 583.20-582.32). In other cases, alternatives to court are outlined as part of private contracts or employment agreements. Whatever the circumstance, students living in the 21st century will probably encounter mediation or arbitration in resolving family, work or community conflicts.

This lesson is appropriate for any mainstreamed civics, futures, or law course. It is a natural for any community resource person with experience in mediation or arbitration. It is also suitable for lawyers and judges more familiar with adjudication.

Time to Complete

Approximately two one-hour class sessions. It can be adapted easily to one hour to fit a resource person's presentation. The background on alternative dispute resolution could be presented by the teacher, with the resource person focusing on the role play and debriefing.

Goals

- Students will become familiar with the process of mediation as an alternative to going to court.

- Students will identify key characteristics of mediation and compare and contrast these characteristics with adjudication.
- Students will adapt a problem-solving strategy while role playing disputants and mediator in a mediation situation.
- Students will describe the strengths and weaknesses of mediation and traditional adjudication and identify types of conflicts that may better be resolved by these processes.

Materials

1. Student handout #1, with conflict resolution diagram and chart outlining major features of mediation and adjudication (litigation in court).
2. Student handout #2, summarizing mediation and the steps of a mediation session.
3. Handout #3, with confidential information for students roleplaying disputants and mediators.

Procedure

INTRODUCTION

Alternative dispute resolution or ADR is used to describe how people can resolve conflicts besides going to court. Two of the most common methods are called mediation and arbitration.

Mediation is a voluntary process whereby two parties with differing viewpoints (disputants) create their own resolution under the guidance of an impartial and neutral mediator. The decision is binding only if the parties agree to make it so. Mediation is the process focused on in this lesson.

Arbitration is a more formal process, where the neutral third party listens to the evidence and arguments as presented by both parties and then issues a binding decision. Arbitration may be mentioned for background purposes.

Both of these methods are called "alternatives" because they are different from the court trial process called

Student Handout #1 Alternative Dispute Resolution

Negotiation
(2 people)

Mediation
(2 people, with third party to help reach agreement)

Arbitration
(2 people, with third party who resolves dispute, often binding)

Adjudication
(Third party—judge or jury—hears facts and determines guilt or innocence or civil liability)

Comparison of Dispute Resolution Processes

	MEDIATION	ADJUDICATION
Parties' Involvement	By agreement or contract	Voluntary as to plaintiff; involuntary as to defendant
Type of Process	Usually informal and unstructured	Rigid formal procedures and rules of evidence apply
Type of Process	Emphasis on relationship and attitudes of parties	Decision making is controlled by precedent (past case law) and consistency in applying the law
	Problem solving approach	Adversarial approach
	Private proceedings	Public process, matter of record unless sealed by court
Role of Third Party	Mediator is facilitator	Third party (judge or jury) is fact-finder and decision-maker
	Mediator suggests alternatives to parties	Parties (lawyers) present evidence and an argument
End Result	Mutually acceptable agreement sought	Win/lose result unless settled through negotiation
	Agreement written in a contract	Reasons given for decision in court order or published case
Effect of Decision	Recommendations of mediator are not binding	Court's decision binding but appealable

Student Handout #2: What Is Mediation?

Mediation is a way to solve problems between people. The people who are in conflict are called *disputants*. They have agreed to ask a third person or *mediator* to help them solve their problem. Most mediation is voluntary. In other words, the parties agree to mediate, to the rules that will be followed during the mediation, and to the solution that is reached as a result of the mediation.

The mediator's role is to allow each party an opportunity to tell its side of the story, identify the facts and issues that are in conflict, and suggest alternatives that would help solve the problem. As a facilitator, the mediator tries to bring out underlying concerns and help the parties arrive at a solution both sides can agree to. Sometimes a mediator may discuss the problem alone with a disputant in order to find out where the parties can agree. Then the mediator brings the parties together to find common ground. Other times a mediator may ask the parties to reverse roles so they can better understand the other person's position.

It may take one meeting or several before a solution is reached that is acceptable to both parties. A mediator cannot force a decision on the parties. If the parties wish, they may write up their agreement in a contract that will be enforceable by law.

Steps of Mediation

STEP 1. INTRODUCTION

The mediator sets the parties at ease and explains the ground rules. The mediator's role is not to make a decision but to help the parties reach a mutual agreement. The mediator explains that he or she will not take sides.

STEP 2. TELLING THE STORY

Each party tells what happened. The person bringing the complaint tells his or her side of the story first. No interruptions are allowed. Then the other party explains his or her version of the facts.

STEP 3. IDENTIFYING FACTS AND ISSUES

The mediator attempts to identify agreed-upon facts and issues. This is done by listening to each side, summarizing each party's views, and asking if these are the facts and issues as each party understands them.

STEP 4. IDENTIFYING ALTERNATIVE SOLUTIONS

Everyone thinks of possible solutions to the problem. The mediator makes a list and asks each party to explain his or her feelings about each possible solution. The advantages and disadvantages to each solution are discussed by the parties.

STEP 5. MODIFYING AND DISCUSSING SOLUTIONS

Based on the expressed feelings of the parties, the mediator revises possible solutions and attempts to identify a solution that both parties can agree to. The mediator may ask to talk with each party individually in order to find out where middle ground can be met. Another technique a mediator may use is called role reversal, where the mediator asks disputants to repeat what they hear the other party saying.

STEP 6. AGREEING ON A SOLUTION

The mediator helps the parties reach an agreement that both can live with. The agreement should be written down. The parties should also discuss what will happen if either of them breaks the agreement.
(Source: *Street Law*, p. 25)

adjudication. Adjudication is the most formal process because the parties are represented by lawyers who argue their cases before a judge or jury as the neutral third party. Formal rules determine what evidence is allowed as well as court procedures. The decision by a court of law is binding over the parties unless or until a higher court alters the decision as a result of an appeal. The parties can't appeal automatically; one of them must convince the appeals court that there was a possible error requiring review by the higher court.

An underlying difference between adjudication and mediation is the overall objective of the parties. The goal of adjudication is to win—each party wants to achieve the outcome most favorable to its side. Usually there is a clear winner or loser. In mediation, a problem-solving process is used. The objective of the process is to maximize the joint gain (or minimize the joint loss) of the parties—to split the largest possible pie between the parties.

DISCUSSION ACTIVITY ON ALTERNATIVE METHODS

Student handout #1, containing a dispute resolution diagram and characteristics of dispute resolution processes, should be given to each student.

Start with the dispute resolution diagram. Ask the students if they have ever disagreed with a sibling over which television program to watch. What process is being used to help decide which program to watch? (Negotiation)

If the two of you cannot agree, you might ask an older brother or sister to listen to the problem. This person may be good at suggesting different compromises that might help solve the problem. However, he or she may not force a solution. That person wants the two of you to learn to work things out. (Mediation)

But the problem only gets worse, and now you and your sibling must present your case to a parent. Your parent sits back and listens to both sides carefully. Then he or she makes a decision that you are better off not contesting because it is "the law." (Arbitration)

If the conflict has not been resolved by any of these first three methods, you may take your "case" to a stranger (judge or jury), who listens to arguments presented on your behalf by lawyers and will enter a decision for

Handout #3: Roleplaying Information

MR./MRS. WILSON'S CONFIDENTIAL INSTRUCTIONS

You have filed a complaint against Dennis/Denice the Menace with the City Attorney. The lawyer in the City Attorney's office referred you to the local neighborhood justice center, which scheduled a mediation hearing. You are not sure what mediation is about, but you are angry with Dennis and you think that he/she should be punished for this act of vandalism.

Dennis broke the windshield on your car by throwing a brick through it. You did not see Dennis throw the brick, but just before the windshield was broken you and Dennis had exchanged angry words. You had gone into the house and a short time later came out to find the windshield broken.

You want Dennis to pay for the damage. You have one estimate for $700 from a local Oldsmobile dealer. You have insurance that could cover the damage, but you would have to pay a $200 deductible. You want Dennis to pay the full amount because you fear your insurance rates would go up if you submit a claim.

You have lived next door to Dennis ever since he was born, 18 years ago. You have watched him grow up, and until lately you have always shared a special relationship with Dennis. But ever since he graduated from high school he has not had time to visit with you, and you miss the special times you had together. Shortly before the brick incident, you had asked Dennis why he hadn't mowed your lawn that week, as you hired him to. You don't understand kids these days and think Dennis has turned into a selfish member of the "me" generation.

DENNIS/DENICE'S CONFIDENTIAL INFORMATION

Mr./Mrs. Wilson has filed a complaint against you with the City Attorney and the local neighborhood justice center. Mr. Wilson claims that you broke the windshield in his car by throwing a brick through it. The Neighborhood Justice Center has scheduled a mediation hearing. You don't know exactly what this means, but you are worried because you have just turned 18 and don't want this to become a criminal matter in adult court. You did break the window in a fit of anger. However, you are pretty sure that no one saw you. The incident happened last Saturday in the early evening, just as it was getting dark.

You are 18 years old and have known Mr. Wilson all your life. When you were a kid you used to spend a lot of time visiting the Wilson's, and Mr. Wilson often took you to sporting events as a special treat. Since junior high, you have been hired by the Wilsons to mow their lawn every week during the summer. But since graduating from high school you have been busy working two jobs (to save money for college) and sometimes forget to mow Mr. Wilson's lawn. You have never explained to Mr. Wilson why his lawn hasn't been done.

Last Saturday, you had just turned in the driveway when Mr. Wilson ran out of his house to talk to you. In a screaming voice he yelled how irresponsible and untrustworthy you were. You were embarassed and responded by yelling back. Mr. Wilson slammed the door as he went inside. You went in your house, but just thinking about the incident made you angry. Later, in a fit of rage, you picked up the brick and threw it, not intending to hit the windshield. You are embarassed about acting childishly, and you would rather Mr. Wilson didn't know that you broke the windshield, but you do value Mr. Wilson's friendship.

You are unwilling to pay for the windshield because you assume Mr. Wilson has insurance that will replace the windshield free.

MEDIATOR'S INFORMATION

You are a volunteer mediator at the neighborhood justice center. The City Attorney diverts to your program minor complaints of vandalism, theft, etc. She has referred this matter to you for an out-of-court resolution. Mr. Wilson has complained that Dennis threw a brick through the windshield of Mr. Wilson's car. The City Attorney, rather than treating this as a criminal matter, prefers that the parties solve their own problem through mediation.

You should explain that the parties should make a good faith effort to solve their problem here and now, since any criminal case will involve much more time and effort on the part of both parties.

Try to get at the parties' underlying concerns and urge them to come up with their own solutions.

Bibliography

Bloom, Jennifer. *Conflict Resolution Wheel.* Minnesota Center for Community Legal Education, Hamline Law School, St. Paul, Minnesota.

Gordon, Vivian Einstein. *Conflict Resolution.* St. Paul: West Publishing Company, 1988.

McMahon, Edward T. *Street Law 3rd Edition.* St. Paul: West Publishing Company, 1986.

or against you. (Adjudication)

Today we will focus on only one of these methods – mediation. First, let's read through the explanation of mediation on student handout #2.

Now let's compare and contrast key characteristics of mediation with the process of court trials or adjudication. See chart on student handout #1. You may want to leave the characteristics of adjudication blank so students can recall how a trial would differ from mediation.

ROLEPLAY ACTIVITY

In order to understand more about mediation, the class will divide up into groups of three and roleplay a mediation session.

Explain the steps in a typical mediation session (student handout #2).

Students should choose one of the three parties to roleplay in a mediation situation. These roles are Mr./Mrs. Wilson, Dennis/Denice the Menace, or the mediator at the Neighborhood Justice Center.

Hand out to each student the appropriate confidential instructions. Allow five minutes for students to become familiar with the facts and then allow groups of three to mediate the dispute. Fifteen to twenty minutes should be sufficient time.

DISCUSSION

Ask each group to share with the class the terms of the agreement reached through mediation. Note the wide range of solutions and creative ways of solving the problem. How would a trial have resolved this case? Did participants feel the process was an effective one? Why or why not?

Debriefing

Now that students have experienced a mediation, see if they can identify its strengths and weaknesses. This list can be compared and contrasted with a similar list for adjudication.

Put on board:

Mediation		*Adjudication*	
Strengths	Weaknesses	Strengths	Weaknesses

What do students see as the strengths of mediation? List them. Listen for: Quicker process; cheaper; more efficient; more creative solutions; less of a traumatic impact on parties; better chance of maintaining a workable relationship after the conflict is resolved.

What do students see as the weaknesses of mediation? List them. Listen for: Difficult where more than two parties are involved in the dispute; less effective with complex issues; a party that has less power may be taken advantage of by a stronger party; parties that need to vindicate their position may not be satisfied; since a resolution is only binding if the parties agree to make it so, there may not be a true resolution of the dispute.

What do students think are the strengths of adjudication? List them. Listen for: Justice will be done where each party has its day in court; consistency of application of the law; orderly process for complex issues; balancing of power between two parties; vindication of a party's position; binding decision.

What do students think are the weaknesses of adjudication? List them. Listen for: Formal rules limiting evidence and remedies; narrow focus on conflict through the framing of issues; time and costs of litigation; emotional trauma to parties of testifying in court and being in an adversarial stance.

DISCUSSION

Read through hypotheticals representing different types of conflict. Have students explain whether mediation or adjudication would be a better way to resolve the problem. Students should give reasons to support their choice. Brainstorm solutions that might be created if this problem were approached in a mediation session.

HYPOTHETICALS

1. John Jones is shot in the arm by a person trying to burglarize his home.
2. Mr. and Mrs. Smith are getting a divorce. Mr. Smith wants custody of the children. Mrs. Smith strongly disagrees.
3. A car mechanic friend of Jane's went ahead and did $500 worth of work when Jane only authorized $200 of work to be done.
4. A car manufacturer produces a car that has the gas tank in the back where it explodes too easily upon impact. There are hundreds of injuries all over the country reported from this defect in the design of the car.
5. Mrs. Green is a very shy person and gets embarassed easily. Her husband wants a divorce and wants her to get nothing – no maintenance or property. They have no children.
6. Northland Development Company is having a contract dispute with the general contractor who is building a shopping center. Northland could lose millions if the problem isn't solved quickly.

JoEllen Ambrose teaches ninth grade at Anoka-Hennepin District No. 11, Coon Rapids Junior High School, Coon Rapids, Minnesota. This activity is adapted from an activity which will appear in Righting Your Future: LRE Lesson Plans for Today and Tommorow, *a book written by the SPICE III teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law.*

2225

COURT BRIEFS

Supreme Court Potpourri

The Court speaks on the powers of the NCAA, picketing private homes, involuntary servitude, alcoholism, and many other issues

Justices Uphold NCAA Right to Demand Suspension of Coach

In a decision that brought to an end nearly a decade of litigation, the Supreme Court decided that the National Collegiate Athletic Association (NCAA) was not a state institution and that it could demand a suspension of a college athletic coach when NCAA rule infractions were discovered. The Court's ruling did not allow the NCAA to actually suspend the individual.

In *N.C.A.A. v. Tarkanian*, 56 USLW 4050 (1988), the justices ruled that, because the NCAA is not a state institution and is, in fact, a private organization, it is not bound to the same constitutional requirements of due process that governmental agencies must observe.

This finding reversed a lower court decision in favor of University of Nevada-Las Vegas basketball coach Jerry Tarkanian, wherein the coach had successfully requested an injunction against the university when UNLV had been ordered by the NCAA to suspend him in 1977 following a three-year inquiry into possible recruiting violations.

Mr. Tarkanian took over a lackluster basketball program at UNLV in 1973 and within a few years had taken the team to the championship level of the NCAA basketball program. In 1976, after the three-year inquiry, the NCAA's Committee on Infractions found 38 violations, including 10 by Tarkanian, and the NCAA imposed a number of sanctions upon UNLV and requested it to show cause why additional penalties should not be imposed if it failed to suspend the coach. Facing demotion and a drastic cut in pay, Tarkanian filed suit in Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of a federal civil rights act (42 U.S.C. Section 1983).

Tarkanian obtained an injunction and an award of attorney's fees against both the UNLV and the NCAA. The lower court found that the NCAA's conduct had constituted state action, and the Supreme Court of Nevada affirmed that decision. Specifically, the Nevada Supreme Court held that, in effect, the university had delegated its authority over personnel decisions to the NCAA in demanding the suspension of Tarkanian. Therefore, the court reasoned, the two entities had acted jointly to deprive Tarkanian of his job and property interests, making the NCAA a state actor.

On appeal, the Supreme Court refuted this argument by pointing out that the NCAA is a body that is made up of 920 schools, all of whom help in policy formulation and all of whom agree to abide by the Association's rules. It follows that the NCAA is not a Nevada institution but a collective membership independent of any particular state. Added to this is the fact that UNLV had alternatives at its disposal in terms of its own course of action. If the university was sure that the orders of the NCAA's Committee on Infractions were too harsh or too arbitrary, it could have worked through the Association's legislative process to amend those rules. Also, UNLV delegated no power to the NCAA to take specific action against Tarkanian or any other university employee. The NCAA is only a private actor acting on behalf of its members when it investigates even a public university. And the Association had no state governmental powers to help it do its investigation at any time. Its greatest authority was the threat of sanctions against UNLV, with the ultimate sanction being expulsion from membership. But never was the contention made that the NCAA had the power of direct discipline over Tarkanian.

Certainly there is a seemingly persuasive argument to be made, and Tarkanian made it, that the power of expulsion offers no practical alternative except compliance with its demands. This argument, persuasive as it may seem, doesn't have a legal connection to the argument that the NCAA is a state actor or making its recommendations and threats under color of state law. This is simply another example of how the law frustrates the most logical and perhaps "morally right" positions in a case. Nobody would argue that, without the NCAA's recognition, a university might as well play an intramural schedule and forget the publicity and money that goes along with a successful sports program. Still, that power alone does not make it a state actor.

This case was decided by a narrow 5-4 vote. Justice Stevens, who wrote the majority opinion, noted that the NCAA and UNLV were not really acting as partners, and there is nothing presented that makes a strong case for partnership. To the contrary, it was obvious that "UNLV used its best efforts to retain its winning coach." It did not appeal the injunction against Tarkanian's suspension which the coach won in the early rounds of this case. Quite clearly, the university was attempting to find a delicate balance between mollifying the NCAA and keeping Tarkanian. Justice Stevens acknowledged that the university might have followed orders in fear of losing its membership, but added, "UNLV's options being unpalatable does not mean that they were non-existant."

The dissent of Justices White, Marshall, Brennan, and O'Connor argued that there are cases that have held that private parties could be found to be state actors if they were "jointly engaged with state officals in the challenged action" and if they are "willful particpants in joint actions with the State or its agents." (See *Dennis v. Sparks*, 449 U.S. 24 (1980).)

The dissenting justices contend that, on the facts of this case, the NCAA acted jointly with the UNLV in suspending Tarkanian. They argue that a university agrees, by joining the NCAA, that it will enforce the Association's findings in these types of cases, and there is no body to which one can appeal the findings of these investigations. UNLV did suspend Tarkanian, and it did so because it embraced the NCAA rules governing conduct of its athletic program, as it agreed it would.

As a result of the Supreme Court's decision, the NCAA can renew its efforts to suspend and discipline the coach. (Many believe that it will not pursue this vigorously, on the supposition that the drawn-out legal battle is punishment enough.) The decision also means that the NCAA can move more aggressively in the area of requiring drug testing for collegiate athletes without the fear of similar due process lawsuits.

Mr. Tarkanian issued a statement saying he was "disappointed" by the decision. He also said that he was not the only loser, that "society has lost because of the individual rights taken away. This decision is more far-reaching than just a basketball coach or intercollegiate athletics."

–Jim Fine

Court Limits Picketing of Private Residences

In *Frisby v. Schultz*, 56 USLW 4785 (1988), the Court was asked to determine whether an ordinance banning picketing near private residences violated the Constitution under either the First Amendment guarantee of free speech or the Fourteenth Amendment guarantee of equal protection under the law. The majority decided that the ordinance in question was constitutional after they heard the arguments about how it would be enforced.

The town of Brookfield, Wisconsin, a suburb of Milwaukee with a population of 4,300, is a residential area with a nine-person police force. Dr. Benjamin Victoria and his family live in a home in the residential section of Brookfield, zoned exclusively for residental homes. Dr. Victoria performs abortions as part of his medical practice. Between April 20, 1985, and May 20, 1985, the Milwaukee Coalition for Life, an anti-abortion group, sponsored picket lines in front of Victoria's home. The pickets lasted from one to two hours and usually consisted of ten to forty people. They carried signs and shouted slogans such as "Dr. Victoria, you're a killer." The picketers talked to passersby and told one that "a man up the road killed babies." The picketers allegedly trespassed on the house and property, damaging some shrubbery.

In response, the town board of Brookfield enacted an ordinance prohibiting all picketing in residential areas. The ordinance simply states: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the town of Brookfield." The problems in this case seem to stem from the simplicity, and hence the vagueness, of this ordinance. Several of the picketers, including Sandra Schultz, filed this suit against the town and town officials to have the ordinance stuck down as unconstitutional under the First and Fourteenth Amendments and to enjoin enforcement of the law.

The district court concluded that the law probably was unconstitutional and granted the injunction, stating that it would become permanent if the town did not appeal and if neither party requested a trial within sixty days. The town made a timely request and appealed the preliminary injunction to the Court of Appeals of the Seventh Circuit. The three-judge panel affirmed the lower court's ruling and sent the case back to the district court for further proceedings. Brookfield then appealed to the Supreme Court.

Students might ask, "Why is the defendant allowed to take this matter to the Supreme Court? After all, the case hasn't even been tried on the merits at this point!" According to federal law, when a federal appeals court declares a statute unconstitutional, the party relying on the statute may appeal directly to the Supreme Court. Thus, the Supreme Court was able to grant certiorari and hear this case.

On first blush there appears to be a conflict here between the fundamental rights of the picketers to exercise their freedom of assembly and free speech and Dr. Victoria's right to be secure in his property. The majority opinion, written by Justice O'Connor, acknowledged the precedent of "uninhibited, robust, and wide-open debate" on public issues (*New York Times v. Sullivan*, 376 U.S. 254 (1964)), and Justice O'Connor also pointed out that "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood."

However, it is also a well established principle that the government of a city can place reasonable restrictions on the time, place, and manner of expression. Such restrictions must leave open ample opportunity for exercising free speech rights, and there must be a legitimate government interest served by the restriction. The question then becomes whether this ordinance met these restriction requirements and if the picketing actually fell under the category of speech that could be so regulated.

The majority opinion was directed to the question of the picketers' rights and their ability to express their message versus the rights of "captive" listeners. In previous cases the Court has been careful to acknowledge that unwilling listeners may be protected in their own homes. In the present case the Court points out that "there simply is no right to force a speech in to the home of an unwilling listener."

So what becomes of the right of free speech? The Court ruled that this picketing was targeted at a single household in an offensive manner and that the picketers were not really attempting to take their message to the general public. It further stated that the picketers subjected the doctor and his family to the presence of a large group of hostile people who added tensions, psychological pressures and property abuse to the situation. The Court agreed that it would be proper for the town to strike a statutory balance between the right to convey a message and the individual's right to the quality of his environment.

The problem with this decision, said the dissenters, is that the Court took the simply worded statute and allowed the oral arguments of the town of Brookfield to persuade the majority justices that Brookfield intended to enforce the ordinance only in these extreme cases of intrusion on the rights of others. The statute is still vague on its face, but this didn't prevent the majority from interpreting the ordinance anyway. As Justice Brennan pointed out in his dissent, the fact that speech takes place in a residential neighborhood does not automatically violate a residential privacy interest. And Justice Stevens, in a separate dissent, states, "that the picketers have a right to communicate their strong opposition to abortion . . . but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family."

In other words, it seems that the dissenting judges are in agreement with the spirit of the ordinance, at least as it was explained by the town of Brookfield, which was to protect the people who were the targets of the protest, but they see the majority opinion's interpretation of the overly vague statute as not solving the problem. The dissenters seem to see the best solution as being a simple matter of having the town redraft the ordinance to specify the restrictions on time, place, and manner of expression about which they are concerned. As the ordinance stands, picketers and others desirous of this type of expression must act at their own risk and hope that the enforcement of the ordinance by Brookfield will coincide with the interpretation expressed by the majority.

In a final note, the majority justices in this matter are those usually aligned with the pro-life position on abortion rights cases. In this instance they are actually interpreting the ordinance quite liberally to protect the property rights of the doctor performing the abortions. The justices often put aside personal beliefs in the face of constitutional challenges and questions of fundamental freedoms. This is, of course, as it should be.

–Jim Fine

Does a Statute Prohibiting Displays of Popular Literature Infringe on Adult Rights?

Most people would agree that the way they choose books and magazines is by the time-honored practice of browsing. A Virginia state statute makes it a crime to publicly display any books or magazines which could lawfully be sold to adults but not to children. The question asked in the case of *Virginia v. American Booksellers Association, Inc.*, 56 USLW 4620 (1988), is to what extent can a state inhibit the constitutional rights of an adult in order to protect its children?

It has long been established by law in Virginia that it is a criminal offense to sell or loan to a juvenile any sexually explicit material. With the help of the obscenity standards set forth in *Miller v. California*, the Virginia legislature defines sexually explicit material as that which appeals to prurient interests of juveniles, is patently offensive to juveniles and lacks serious literary, artistic, political, or scientific value for these young people. This criminal statute is not challenged.

It is also clear that this category – "sexually explicit" – includes many books and magazines which adults may purchase without punishment. However, in July, 1985, Virginia amended its criminal statute to include as punishable the "knowing display" of such material "in a manner whereby juveniles may examine or peruse it."

This lawsuit was brought two weeks after the effective date of this statute, and before there had been any attempt made to enforce it. The American Booksellers Association, Inc., a trade association of approximately 4,000 booksellers, brought this on behalf of themselves as well as their customers. The laws do allow a party to bring a suit on behalf of unknown others when it is clear that those "others" have rights which will be infringed by legislation even before actual injury. The booksellers are seeking the courts to declare the statute unconstitutional on the basis that it violates First Amendment freedoms.

In this case, the booksellers felt that the "chilling" effect of the statute was going to cause self-censorship and economic hardship, because they would have to take significant and costly steps to comply with the statute and avoid criminal prosecution. Coupled with this problem is the uncertainty that exists in the minds of most merchants as to what standards will be used to judge whether they are, in fact, complying with the law. They complain that the statute is written in such a way as to be overly broad and vague. It is of interest to note that an amicus brief was filed on behalf of the booksellers. Such noteable writers as Jean M. Auel, Judy Blume, Jackie Collins, John Irving, Erica Jong, James Michener, Sidney Sheldon, John Updike, and Irving Wallace expressed their support in joining this petition. When the fundamental freedoms of speech and the press come into question, writers often rally to the side of free expression.

The district court found that the 1985 amendment was unconstitutional on its face and enjoined the state of Virginia from enforcing it. They said that many customers are unable or hesitant to ask for specific titles and this statute would only serve to inhibit the sales of most booksellers. The district court also found that the booksellers had only four options under the statute: 1) sell only children's books; 2) exclude all children from the store; 3) place all adult material in an "adults-only" section; or 4) place all adult material under the counter. The district court found all these options unacceptable.

Virginia argues that a bookseller could comply with the law by merely labeling adult books or sealing them to avoid access by minors. This, the booksellers reply, would severely cut the access of adults, which would, in turn, lead to drastic declines in sales. It would also be a costly procedure.

What the Supreme Court chose to do was not decide the question of constitutionality at this time, partially because the Court has always been ambivalent about pre-enforcement challenges of state statutes. Rather, it certified two questions for the lower courts to decide. By deciding these two questions, the lower courts could hopefully lend direction to the state and the legislature regarding what they might want to do about the present form of the law.

By certifying a question to a lower court, the Supreme Court is delivering a certain message. That message is a direction to the court to clear up certain problems in a case which, in the opinion of the Supreme Court, is more properly decided at the state level because of implications for state law and local enforcement.

The first question that the Supreme Court asked was, "Does this statute cover borderline obscene works?" In other words, what are the specific types of works that fall into the category of "sexually expicit" under the Virginia definition of that term? If the legislature interprets this term broadly, the booksellers contend that it could mean as much as 25% of their inventories will fall under this label. Also implicit in this question is the problem of how the legislature will expect the authorities to deal with the differing levels of maturity in minors.

The second question the Court sent back is "What is the meaning of 'knowingly display'?" Will the bookseller have complied with the statute if the bookseller has a stated policy of nonpermission for minors to browse, and if he or she prohibits browsing when such behavior is observed? Or will the merchants be in violation if they take this somewhat laissez-faire position?

When these certified questions are answered, it is probable that the case will be remanded to the district court for further action. At that time the lower court will have ample opportunity to address the continutional questions that this case asks. Depending on what the verdict is on the state level, this matter could end up back at Supreme Court again.

Of interest here is the often elusive definition of what is obscenity in any given community and how this reflects the culture from which the definition is molded. The case also raises the always volatile subject of First Amendment rights in conflict with state interest in protecting a special class of its citizens, in this case juveniles.

—Jim Fine

Jim Fine is a lawyer/educator on the staff of the American Bar Association's Special Committee on Youth Education for Citizenship. Before coming to the ABA, he had a litigation practice in Chicago and taught for nine years in suburban Chicago high schools.

Attorney Ads Protected

In *Shapero v. Kentucky Bar Association*, 100 L Ed 2d 475 (1988), the Supreme Court considered the First Amendment implications of direct mail solicitations by lawyers, determining that the free flow of information about legal rights outweighed concern over legal ethics.

Richard Shapero, an attorney in Louisville, Kentucky, wanted to send a letter to people threatened with mortgage foreclosure suits. The proposed letter encouraged homeowners to call Shapero's law office for free information about how the law might help them prevent foreclosure and give them more time to make their mortgage payments. Shapero intended to mail a personalized letter to individuals in his community confronted with foreclosure problems.

Acting under a rule governing Kentucky attorneys, Shapero sent his proposed letter to the Attorneys Advertising Commission for approval. The Commission found the letter was a solicitation, rather than an advertisement, and therefore prohibited by a Kentucky ban against attorney solicitation. The Ethics Committee of the Kentucky Bar Association agreed. Finally, the Supreme Court of Kentucky affirmed the Ethics Committee's decision, denying Shapero's request for permission to mail his proposed letter. Shapero protested that his letter was a form of speech protected by the First Amendment.

Prior to 1977, both attorney advertising and solicitation were prohibited in every state. In that year, however, the Supreme Court ruled that the First Amendment allowed attorneys to advertise in the print media. Eight years later, the Court upheld the right of an attorney to print a newspaper ad informing readers of his willingness to represent women who had been injured by using the Dalkon Shield IUD. This newspaper ad constituted commercial speech protected by the First Amendment, said the Court, because it was not false or deceptive and did nothing more than inform the readers of their legal rights. The Supreme Court rejected the argument that state regulation was justified by the fact that the ad might stir up litigation and lead some women to file lawsuits when they otherwise would not have done so. In the Court's view, a state may not interfere with the right of access to the courts by denying citizens accurate information about their legal rights.

The *Shapero* case carried the argument one step further. In the Court's 1985 decision, the advertisement was directed toward women who had suffered an injury by using a particular product. The women learned of their potential legal claim by reading the newspaper advertisement. In contrast, Shapero was not proposing a general media ad, but rather a personally addressed letter to each homeowner threatened with foreclosure.

Six members of the Supreme Court agreed that the First Amendment prohibits a state from establishing rules that prohibit all direct-mail solicitation by lawyers, unless the solicitation is false or misleading. A majority of the Court, Justices Brennan, White, Marshall, Blackmun, Stevens, and Kennedy, essentially ruled that under the First and Fourteenth Amendments, states may not categorically prohibit lawyers from soliciting legal business for financial gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

However, in applying this holding to Shapero's proposed letter, only four of the justices believed the letter was constitutionally protected. Justices White and Stevens expressed the view that the question of whether Shapero's letter was worthy of First Amendment protection should be decided by the Kentucky Supreme Court.

In dissent, Justice O'Connor, joined by Justice Scalia and Chief Justice Rehnquist, would have upheld the right to enact a blanket prohibition against targeted, direct-mail solicitations by lawyers. The states should have considerable latitude to ban lawyer advertising that undermines the government's substantial interest in promoting high ethical standards for the legal profession, wrote Justice O'Connor.

—Linda Bruin

Involuntary Servitude Does Not Include Psychological Coercion

The definition of involuntary servitude, for purposes of criminal prosecution, is limited to physical and legal coercion, according to a recent ruling of the U.S. Supreme Court. The decision was made last summer in an unusual case concerning the Thirteenth Amendment.

In *United States v. Kozminski*, 101 L Ed 2d 788 (1988), three family members who operated a Michigan dairy farm were prosecuted for holding two workers in involuntary servitude. Both farm workers were mentally retarded adults who could neither read nor write. Ike and Margarethe Kozminski and their son John offered to provide the men with room, board, and cigarettes if they would work on the Kozminskis' farm.

The two farm hands, Robert Fulmer and Louis Molitoris, worked seven days a week, often from 3:00 a.m. until 8:30 p.m. Their chores included cleaning manure from the barn twice a day and doing odd jobs. At first Fulmer was paid $15 per week, plus room, board, and clothing, but later the Kozminskis stopped giving him regular pay for his work. The laborers were given $10 each on holidays and for the county fair.

Fulmer and Molitoris were housed in a dilapidated trailer with broken windows, a broken refrigerator, no running water, no lights, and no heat. The clothing they received was tattered and inadequate for the cold Michigan winters. The men received little medical care, but the Kozminskis did give them groceries.

In 1983, while the Kozminskis were away, a newly hired farmhand called county officials. Following a visit by the sheriff and a social worker, Fulmer and Molitoris asked to be taken away. Charges were then filed against the Kozminskis for holding Fulmer and Molitoris in involuntary servitude.

At the trial, it was shown that the Kozminskis subjected Fulmer and Molitoris to physical and verbal abuse. They threatened to send the two men to institutions if they didn't obey instructions. The men were not physically imprisoned or continuously guarded, but the Kozminskis told them never to leave the farm and ordered them not to talk to others. If either man tried to run away, the Kozminskis would bring him back.

To decide the case, the courts looked not only at the Thirteenth Amendment, but also a 1948 law prohibiting the knowing and willful holding of another person to involuntary servitude. Because the statute does not include a definition of "involuntary servitude," the Supreme Court could not decide the Kozminskis' fate without first interpreting that phrase. While the general spirit of those words is easily comprehended, said the Court, the exact range of conditions they prohibit is harder to define. In the end, the Supreme Court concluded that, for purposes of criminal prosecution, the term "involuntary servitude" means a condition of servitude in which the victim is forced to work for another by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. This definition, said the Court, includes those cases where a person holds a victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.

However, the Supreme Court rejected the prosecution's argument for a broad construction of "involuntary servitude" to prohibit the compulsion of services by any means that, from the victim's point of view, either would leave the victim with no tolerable alternative but to serve another person or deprive the victim of the power of choice. If such a construction were applied, the Court explained, the type of coercion prohibited would depend entirely on the victim's state of mind, providing almost no objective standard for measuring the prohibited conduct. Without such objective indicators, ordinary people who are required to obey the law would not have fair notice of what conduct is prohibited. Accordingly, the Court declined to include the use of purely psychological coercion within the definition of "involuntary servitude."

Because the trial court had used a broader definition of involuntary servitude, including both physical and other coercion, when the Kozminskis were convicted of violating the 1948 federal statute, the Supreme Court remanded the case back to the lower court for a determination consistent with the Supreme Court's stricter interpretation of the law.

—Linda Bruin

Shield Laws Must Comply with Sixth Amendment

The Sixth Amendment guarantees a criminal defendant the right to face-to-face confrontation with witnesses testifying against him or her at trial, even when the witnesses are children, according to the Supreme Court's decision in *Coy v. Iowa*, 108 S Ct 2798 (1988).

In 1985 Iowa passed a statute designed to protect children who are sexual abuse victims from intimidation and further injury and trauma when testifying in a criminal trial. The Iowa statute allows the child's testimony to be given behind a screen that blocks the defendant from the sight of the child witness. The general purpose of the statute is to provide fair and compassionate treatment for child victims.

That same summer two thirteen year-old girls were camping out in the backyard when an assailant wearing a stocking over his head entered their tent and forced them to commit sexual acts. John Avery Coy was arrested and charged with sexually assaulting the girls.

At the beginning of Coy's trial, the prosecutors sought permission to use the procedure authorized by the new statute. Although Coy objected strenuously, the trial court approved the procedure to shield the two girls when they testified. A large screen was placed between Coy and the witness stand when each of the girls testified. Coy could dimly perceive the witnesses, but they could not see him. The jury convicted Coy of two counts of lascivious acts with a child.

On appeal, Coy argued that the use of the one-way screen violated the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. The use of the screen, said Cox, was inherently prejudicial because the jury might view it as implying guilt. Moreover, he contended, under the confrontation clause he was entitled to face-to-face meeting with the witnesses who testified against him. Attorneys for the state of Iowa responded that the confrontation right was outweighed by the need to protect young victims of sexual abuse from further harm.

Six justices of the Supreme Court agreed that the placement of the screen between defendant Coy and the child victims during their testimony violated the defendant's right to face-to-face confrontation guaranteed by the Sixth Amendment. Confrontation is essential to fairness, wrote Justice Scalia for the majority. Confrontation also helps to ensure the integrity of the factfinding process by making it more difficult for witnesses to lie.

The majority found it unnecessary to address the due process claim. Since Coy's constitutional right to face-to-face confrontation was violated, the judgment of the Iowa Supreme Court upholding Coy's conviction was reversed.

Justices O'Connor and White agreed with the majority that the procedure used in Coy's trial was unconstitutional, but wrote a separate concurring opinion suggesting there might be alternative procedures, such as closed circuit television, for appropriately protecting child witnesses. The concurring opinion indicated a willingness to permit something other than face-to-face confrontation in cases where the trial court could make a specific finding that the procedure was necessary to protect child witnesses from trauma or psychological harm.

Justice Blackmun and Chief Justice Rehnquist took the position that Coy's constitutional rights had not been violated and that his conviction should have been affirmed. While the confrontation clause reflects a preference for the witness to be able to see the defendant, opined the dissenters, there are times when that preference in outweighed by the need to protect children from serious consequences such as psychological injury or the ability to give effective testimony.

Justice Kennedy did not take part in this case.

—Linda Bruin

Antitrust Law Applies to Physicians' Peer Review Committees

The U.S. Supreme Court last May ruled that doctors serving on peer review committees are subject to the Sherman Antitrust Act. The decision in *Patrick v. Burget*, 100 L Ed 2d 83 (1988), represents an important victory for a physician who believed a hospital review committee acted in order to reduce competition, rather than to improve patient care, and may have far-reaching implications for doctors who serve on these committees.

Dr. Timothy Patrick is a physician in Astoria, Oregon, a town which has only one hospital. In 1973, Dr. Patrick was invited to become a partner in a clinic to which most of the hospital's staff mem-

Flag Burners' Rights: A Preview of an Important Case to Be Decided This Year

Does a statute that forbids the burning of an American flag violate the First Amendment to the Constitution? The state of Texas says it does. It prosecuted Gregory Lee Johnson for violating a Texas statute forbidding flag desecration. Johnson was convicted by a jury and sentenced to one year in jail and a $2,000 fine. A state court of appeals upheld Johnson's conviction, but the Texas Court of Criminal Appeals later reversed the conviction in a 5-4 vote. The District Attorney in Dallas, who previously had been one of the judges to vote to uphold Johnson's conviction, petitioned for a writ of certiorari from the Supreme Court.

Facts

In August 1984, the Republican National Convention was held in Dallas, Texas. On August 22, a group gathered in downtown Dallas to protest against policies of the Republican Party. Gregory Johnson was a leader of that group. The group marched around downtown, occasionally staging "die-ins" in which the people in the group would collapse on the ground in a symbolic display of the effects of a nuclear war. The group also engaged in fairly significant vandalism. They spray-painted buildings and broke into a bank and overturned potted plants and tore up papers. Though there were at least two undercover police officers in the group, there was no police effort to stop the group.

When the group reached the plaza in front of Dallas City Hall, an American flag was obtained, probably from a flagpole in the plaza. A group of about 40 or 50, who had chanted anti-American slogans, formed a circle, and Johnson soaked the flag in lighter fluid and set it on fire. The two police officers and an employee of the United States Army who witnessed the burning all testified that they were offended by the flag burning.

No violence took place as a result of the flag burning, and 45 minutes after the act took place, uniformed police arrived and arrested Johnson for destroying the flag.

Background

The First Amendment to the Constitution forbids any law that limits the freedom of speech. Speech, as we all know, involves words. Yet there are no words at all involved in this case. So why is this a First Amendment case? The simple reason, which we will see is not so simple, is that the courts have long interpreted the First Amendment to protect not just verbal expression, but any form of expression of ideas. This can be symbolic speech.

We often use conduct to express ideas. We shake our heads to say, "no." We put our hands over our hearts when the Star Spangled Banner is played. We bow our heads when a prayer is recited. All of these acts involve no words but communicate strong ideas, such as patriotism or religious faith, in a clear way. Because these acts communicate beliefs, they are protected by the First Amendment. People cannot be forced to bow their heads when a prayer is recited or denied their right to bow their heads by the government.

On the other hand, some conduct, while it communicates an idea, also involves a harm which society has a right to protect itself against. For instance, the government cannot stop a person from hating another person. But what if that hatred is expressed by a physical attack on the person? Such an attack clearly expresses the views of the attacker but it also presents the danger of injury to the person attacked. So the government can prosecute assaults even though an assault may be a physical expression of an idea—hatred—that one has a constitutionally protected right to hold.

Sometimes the problem of the First Amendment protections in a case where both speech and conduct are involved can be even more complicated. The government obviously has a strong interest in protecting people against violent assaults. So when someone "expresses" his or her beliefs by hitting someone else, the case is very easy.

But what if the government's interest was not so great? What if someone believed, as a part of his or her religion, that all living things were sacred and, therefore, one should never cut one's grass? In living up to this belief and expressing this religious view, a homeowner's lawn grows wild. Could a city ordinance requiring that grass be no higher than six inches be enforced against that person, or would his or her First Amendment rights outweigh the government's interest in neat lawns?

In such a situation courts balance the two interests. If the government cannot show a compelling interest, the individual's First Amendment rights generally are found to outweigh the government's interest. It is just such a balancing that is involved in this case.

Previous Rulings

Two landmark Supreme Court rulings are on point. Both involve the antiwar protest movement of the late 1960s and early 1970s. It was a time when the justices were forced to define what forms of expression through protest are protected by the First Amendment.

The justices are sure to take a close look at these two cases in deciding whether Johnson's actions were protected or not.

One case involves David O'Brien, who in 1966 burned his draft card on the steps of the South Boston Courthouse in protest against the war in Vietnam. He was convicted of violating a federal law that prohibits individuals from forging, altering or

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bers belonged. Patrick declined the invitation and set up an independent practice in direct competition with the clinic. From that point on, members of the Astoria Clinic refused to have professional dealings with Dr. Patrick. The clinic doctors criticized the care being given to patients by Dr. Patrick and his associate and accused them of stealing patients away from the clinic.

In the fall of 1979, the clinic doctors filed a complaint against Patrick and his associate with the state Board of Medical Examiners. The chair of the investigating committee was also a partner in the destroying their draft cards.

O'Brien claimed that the law is too broad and infringed on his free speech rights. In burning the certificate in public, O'Brien said he was making a statement in hope of convincing others to share his antiwar beliefs.

The court of appeals agreed. It felt that the statute singled out those engaged in protests for special treatment.

In 1968, that decision was overturned by the Supreme Court, and O'Brien's conviction was reinstated.

The justices said that various forms of conduct cannot become speech whenever an individual wishes to claim he or she is expressing an idea.

Further, the Court said, if O'Brien's actions are a form of speech, the government's substantial interest in supporting the armed forces, in this instance, outweighs his First Amendment free speech right.

The second case, decided in 1974, involved a college student who hung out of his apartment window a U.S. flag with a peace symbol taped to it. He had been convicted under a Washington state statute that prohibits the placing of words, figures or designs of any kind on publicly displayed state or American flags.

The student said the flag was meant to be a protest against the invasion of Cambodia and the killings at Kent State University. The peace symbol, he said, could easily be removed without damaging the flag.

A state trial court convicted the student and fined him $75. The state's supreme court upheld the ruling. But the U.S. Supreme Court disagreed.

The justices noted that the student's conduct involved a flag he purchased and displayed from his own property. Historically flags have been viewed as a form of symbolism and a powerful method of communicating ideas, the Court said.

In this instance, the justices concluded that the state's interest in maintaining the flag could not outweigh the student's right to express his views.

While times have changed since the turbulent anti-Vietnam era, these two cases—one apparently decided in support of protesters and the other in opposition—are sure to play a role in the Court's decision.

Texas' Argument

Texas makes a number of arguments in behalf of its view that Johnson's conviction should be upheld. First, it argues that Johnson is not being prosecuted for a protected expression of his ideas. They would have prosecuted him no matter what idea he was trying to express through his conduct. Johnson was prosecuted for the act of burning a flag, not for the idea behind the burning.

Second, Texas argues that the lower court was wrong in saying that Johnson's act could only be prosecuted if it involved a clear and present danger to the public. This is a special exception to the First Amendment. The classic example of it is the person who yells out "Fire!" in a crowded theater when there is no fire. The likelihood of danger and injury is so great that the speech can be punished. The Texas court found that Johnson's conduct did not involve a clear and present danger of violence. Texas says that that question is not even involved in this case because Texas' interest is not in preventing violence but in protecting the flag as a symbol of national unity. So, they say, the clear and present danger issue is irrelevant to this case.

Third, Texas argues that, if the clear and present danger test *does* apply, then the conduct here meets the test because it is very likely to cause violence.

Finally, Texas argues that even if Johnson had a First Amendment right to burn a flag as an expression of his beliefs, Texas has a greater interest in preserving the American flag as a symbol of national unity.

Johnson's Argument

Johnson argues that Texas is wrong on each point. He says that his conduct was symbolic speech and is protected by the First Amendment. He points to cases involving the burning of draft cards and the wearing of arm bands as examples of cases in which conduct similar to his was found to be protected.

He argues that, since his conduct was protected by the First Amendment, the state must show a clear and present danger to the public in order to prosecute him for that conduct. He says that his conduct presented no such danger or no more than other protected conduct. He points out that the only danger involved here was that someone who disagreed with his expression of beliefs would attack him. That, he says, is common to many protected acts. It would be wrong, he argues, to allow the fact that some people may wrongly attack a person expressing strong views to be a reason for censoring the expression. The attacker should be punished, he argues, not the person expressing his or her beliefs.

Finally, Johnson argues that the statute is "overbroad." This argument involves a special rule in First Amendment cases. If a statute prohibits some conduct that is protected by the First Amendment and some that is not, the Supreme Court has held that the entire statute, good and bad, must be thrown out in order to protect the First Amendment. This statute forbids, among other things, mistreating a flag in "any way that the actor knows will seriously offend one or more persons." Johnson argues that this gives the viewers of conduct a right to decide, based on their taste, whether that conduct is criminal or not. This portion, he argues, violates the First Amendment, so the whole statute must be found to be unconstitutional anyway.

Adapted from an article by Denis J. Hauptly and David A. Sellers in Supreme Court Spotlight: A Monthly Report for High Schools. *For further information about* Supreme Court Spotlight, *contact them at Post Office Box 27531, Washington, D.C. 20038.*

Astoria Clinic. The Board of Medical Examiners, acting on the recommendation of the committee, voted to issue a letter of reprimand against Dr. Patrick, but the letter was retracted when he filed suit and sought judicial review of the nation.

Two years later, the medical staff at the hospital initiated peer review proceedings at the hospital to determine whether Patrick's privileges as a physician should be terminated. Before the peer review committee rendered its decision, Dr. Patrick resigned from the hospital and filed a lawsuit against the Astoria Clinic and its doctors for allegedly violating the

Sherman Act. The Sherman Antitrust Act is the basic federal law prohibiting contracts, combinations, and conspiracies in restraint of trade. However, certain activities are considered exempt from the Sherman Act when it is determined that the public interest is better served through the regulation of competition. In this instance, the doctors being sued by Patrick contended their activities were exempt under a provision called the "state action" doctrine because peer review in state hospitals is mandatory under Oregon law.

At the trial, the jury found the doctors who were partners in the clinic had acted against Dr. Patrick with the intention of injuring or destroying competition. Having found for Dr. Patrick on the antitrust claim, the jury awarded him $650,000 in damages, an amount which was trebled by the court.

On appeal, the Ninth Circuit Court of Appeals accepted the jury's finding that the clinic doctors had conspired to deprive Dr. Patrick of his privilege to practice medicine at the hospital in Astoria, but also concluded the doctors were not liable because of the "state action" exemption to the Sherman Act. The Supreme Court, in a unanimous decision by eight justices, disagreed. The Court held that the "state action" doctrine does not protect physicians in Oregon from federal antitrust liability for their activities on hospital peer-review committees. The decision of the review committee, explained Justice Marshall on behalf of his colleagues, is the action of a private group, not the state. No state actor in Oregon actively supervises hospital peer-review decisions, and the "state action" doctrine protects only that conduct which a state clearly authorizes and actively supervises. Even though the peer review committee doctors had argued that any threat of antitrust liability would prevent physicians from participating in such proceedings, the Supreme Court indicated the law as presently written does not accommodate such an argument. If a challenge is to be made against the wisdom of applying antitrust laws to the sphere of medical care, Justice Marshall observed, that argument must be directed to the legislative branch of government, not the judiciary. *–Linda Bruin*

Alcoholism Constitutes Willful Misconduct

A split decision of the Supreme Court last April has left intact a Veterans Administration regulation which denies time extensions for using educational benefits to veterans handicapped by alcoholism. The case is *Traynor v. Turnage*, 99 L Ed 2d 618 (1988).

Veterans who have been honorably discharged from military service are entitled to educational benefits under the G.I. Bill. As a general rule, the benefits must be used within 10 years following discharge. However, the 10-year period may be extended when veterans are prevented from using their benefits because of a disability that is not the result of their own willful misconduct.

Eugene Traynor and James McKelvey were honorably discharged ex-servicemen. Neither had exhausted his educational benefits during the 10-year limit, and both sought extensions on grounds that they had been disabled by alcoholism during much of the period following their return to civilian life. The Veterans Administration denied the extensions on grounds that alcoholism constituted willful misconduct.

At the time the Veterans Administration made its determination, both men were recovered alcoholics. Traynor began drinking when he was eight or nine years old and drank with increasing frequency throughout his teenage years. By the time he served in Vietnam, Traynor was suffering from alcohol-related seizures. Following his discharge, Traynor was hospitalized repeatedly. In 1974, however, Traynor conquered his drinking problem and a little later began attending college. When the 10-year limit expired in 1979, Traynor applied for an extension to continue his college studies.

McKelvey also began drinking as a child and, like Traynor, McKelvey's problems continued to plague him during his army service and for almost nine of the ten years following his discharge. McKelvey took his last drink in 1975, when only a year and a half of the 10-year eligibility period remained.

After first deciding the question of whether the Veterans Administration regulation was subject to judicial review, the Supreme Court turned to the main issue in this case: does the Veterans Administration regulation which treats alcoholism as willful misconduct violate Section 504 of the Rehabilitation Act of 1973?

Section 504 prohibits discrimination against handicapped individuals solely because of their handicaps. Under guidelines issued by the Department of Health and Human Services, an alcoholic is covered by Section 504.

The justices were divided on the main question. Justices White, Stevens, and O'Connor, together with Chief Justice Rehnquist, concluded the regulation was valid and upheld the position of the Veterans Administration. The willful misconduct provision does not undermine the central purpose of Section 504, they said. The regulation does not treat handicapped persons less favorably than nonhandicapped persons; rather, disabled veterans are treated more favorably than able-bodied veterans. Disabled veterans may obtain extensions for using their educational benefits as long as they do not become disabled through their own willful misconduct. In contrast, able-bodied veterans are absolutely precluded from obtaining such extensions regardless of the reasons for having delayed their schooling.

Furthermore, the majority found no inconsistency between Section 504 and the Veterans Administration's presumption that alcoholism, other than that motivated by mental illness, is necessarily willful.

Justices Blackmun, Brennan, and Marshall took strong exception to the majority holding. According to the dissenters, Section 504 should be interpreted to prevent the generic treatment of any group of handicapped individuals based on simplistic stereotypes about attributes associated with their disabling conditions. Section 504, they argued, requires an individualized assessment of such person's qualifications for benefits. The three justices in the minority believed that the Veterans Administration had failed to justify its conclusive presumption that Traynor and McKelvey's alcoholism was incurred willfully.

Justices Scalia and Kennedy took no part in this case.

–Linda Bruin

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Death Penalty for Juveniles Is Limited

By a 5-3 vote in the case of *Thompson v. Oklahoma*, the Supreme Court decided that, under current statutes that applied in the case, persons who are under 16 at the time they committed an offense may not be executed as a punishment for that offense. (Justice Kennedy did not participate in the case.)

Two constitutional provisions govern

2233

the law concerning capital punishment. The Eighth Amendment bars the imposition of "cruel and unusual" punishments. The Fourteenth Amendment requires states to give persons subject to the death penalty "due process of law." In 1972 in the landmark case of ***Furman v. Georgia***, the Supreme Court held that due process required that juries not be allowed complete discretion in deciding which persons should be executed. Instead, the Court said that the death penalty could only be imposed if juries found that specific aggravating factors existed and that no sufficient mitigating factors existed. Aggravating factors are likely to cause imposition of a more severe penalty or sentence, while mitigating factors are likely to result in a less harsh penalty or sentence. Some justices, notably Justices Brennan and Marshall, have long argued that the death penalty always violates the Eighth Amendment. However, a majority of the Court has never supported that position.

Since 1972 the Court has decided a number of issues involving capital punishment. It has limited the types of offenses for which it can be imposed and ruled that insane persons cannot be executed. In late June, 1988, the Court decided *Thompson v. Oklahoma*, its first decision on the execution of juveniles. The *Thompson* decision does not put the matter to rest, though, and further litigation can be expected.

William Thompson was 15 years old in 1983 when he and three older persons attacked and brutally murdered his former brother-in-law. He was charged with first-degree murder, tried and convicted. An Oklahoma statute allowed juveniles to be tried as adults under certain circumstances (most, if not all, states have such statutes). A separate statute provided that adults convicted of murder could be sentenced to death, if the jury made certain findings. Among these findings was one that the murder was especially cruel. The jury in Thompson's case made such a finding and imposed the death penalty on Thompson (in many states juries are allowed to set the sentence in serious cases; in others the jury may make a recommendation to the judge; in still others the jury plays no role in setting the sentence).

Thompson appealed both his conviction, claiming that the jury was prejudiced by being shown some gruesome photographs of the victim, and his sentence, claiming that the death penalty ought not to be imposed on someone who was so young at the time of the offense. The state courts in Oklahoma upheld both the conviction and the sentence. The Supreme Court of the United States agreed to hear his appeal on both issues. By a 5-3 vote the Court overturned the sentence and sent the case back to state courts for resentencing.

There were three opinions in the *Thompson* decision. Four justices (Stevens, Brennan, Marshall and Blackmun) agreed with Thompson's argument that the execution of juveniles constituted cruel and unusual punishment. Three justices (Scalia, Rehnquist and White) argued that it was not cruel and unusual punishment, and that if the state had a right to try a juvenile as an adult it had a right to punish him as an adult. Justice O'Connor agreed that Thompson should not be executed but she did not agree with the logic of the other four justices. Because she did not agree with their reasoning, their opinion is a plurality, rather than majority, opinion. This means that their position has not been adopted by the Court, and so does not constitute a precedent.

The four justices who believed that the execution of juveniles constituted cruel and unusual punishment relied heavily on statistics and the practices of other states and countries. First they found that in almost every state, the rights of 15-year-olds are severely restricted. They cannot generally drive, marry, drink, or vote, for example. As to capital punishment itself, they noted that 14 states do not permit it, 19 permit it without mentioning any age, and the remainder permit it but set 16 as the minimum age. They also noted that capital punishment of juveniles is not permitted in most, if not all western nations, including the Soviet Union.

From these data the justices concluded that there was a consensus in society against executing juveniles. That consensus, plus the view in the law that juveniles are less responsible for their actions than adults, led the justices to conclude that the juvenile death penalty violated the Eight Amendment.

Justice O'Connor noted that Oklahoma had passed one statute permitting juveniles to be tried and punished as adults. But in a separate action, many years earlier, the Oklahoma legislature had passed the death penalty provision under which Thompson was sentenced, which contained no mention of age limitations. She concluded from this that it was unclear whether or not the Oklahoma legislature had understood that it was effectively authorizing the execution of juveniles. Given that this was unclear and given that the punishment involved was death, she felt that the penalty should not be permitted. A clear implication of her opinion is that if a state was to specifically authorize the execution of juveniles, Justice O'Connor would vote to support it. If Justice Kennedy, who joined the Court too late to participate in this case, were to support juvenile executions, then there would be a 5-4 majority supporting the death penalty in such a case.

The three justices in dissent disputed the idea that society had rejected juvenile executions. Their view was that while many states had rejected juvenile executions specifically, 19 states with death penalty statutes had not done so. They accused the majority of legislating rather than judging.

EXCERPTS FROM THE PLURALITY OPINION

"The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishment, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'

"Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

"In short, we are not persuaded that the imposition of the death penalty (for juveniles) . . . can be expected to make any meaningful contribution to the goals that capital punishment is intended to achieve. It is, therefore, 'nothing more than the purposeless and needless imposition of pain and suffering.'"

EXCERPTS FROM JUSTICE O'CONNOR'S CONCURRING OPINION

"The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case.

"In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution."

The Case Study Method: An Educator's Perspective

My first encounter with the case study method was more than fifty years ago. It was my first week in law school and I was called upon to brief an old English case in contract law. Dutifully, I recited the cause of action, the facts, the issue, the arguments, the decision and the opinion. Since the Grand Inquisitor made no comment, I sat down thinking that I had done well for a beginner. No such luck!

Imperiously, His Eminence intoned: "Starr, you did not tell us how you feel about the ruling? Do you agree or disagree?" Well, this was my first week in law school, and who was I to disagree with these learned and venerable British judges. So I took the easy way out and announced that I agreed with the decision.

The silence was shattered with a command dripping with sarcasm. "Starr, do you mind enlightening us with your reasons as to why you agree?" I did mind, but that was irrelevant. Every reason I gave was refuted; every argument I advanced was demolished; and every principle I presented was viewed with derision. All this, of course, was the forerunner of the *Paper Chase*.

By the time I reached my third year at the school, the professor and I were on speaking terms and we had several enjoyable conversations. When I asked him why he found it necessary to present the case study method in so threatening a manner, he replied that it was the only way to train lawyers. Several years ago, I mentioned this episode to the dean of a law school and he assured me, to my dismay, that many of his colleagues were still practicing cruel and unusual punishment.

From its very inception, law-related education recognized that the law school approach was fraught with peril. Bludgeoning students into critical thinking could easily lead to hostility to the topic under discussion, as well as to rejection of the subject of the law. Presenting cases in a nonthreatening manner became the *modus operandi*.

Romance

In discussing the rhythms of education, Alfred North Whitehead, the distinguished mathematician and philosopher, suggests that the elementary schools should focus on the romance of learning, the secondary schools on precision, and the universities on generalization. For those of us seeking to breathe new life into an old format, the Whitehead frame of reference offers an interesting perspective.

The case study method should begin with the nature of the cause of action: a criminal case involving guilt or innocence, a juvenile case involving delinquency, or a civil case involving damages or injunctions. Associated with this, of course, is the standard of proof and the weight of evidence: beyond a reasonable doubt or a fair preponderance of the evidence or clear and convincing proof.

The romance comes in with the presentation of the facts. It is not unusual, unfortunately, for the facts to be dished out in a handout or to be presented orally in a matter-of-fact manner. That is not good enough. We have to put some romance into the exercise.

The facts should tell a story, an unfinished story, which grips the reader or the hearer. It should get under the skin of the student; it should touch the emotions; and it should stimulate the mind. In short, the unfinished tale should cry out for solution.

In trying to understand the facts, the student should possess the skill of differentiating facts from opinion, relevant facts from those which are irrelevant to the case, and expressed facts from implied facts. Here precision intrudes on romance.

Precision

Once there is agreement on the facts, the issue or issues must be clarified. This is not an easy task because the failure to identify clearly the question or questions to be answered leads to a detour and a loss of direction. Identifying the correct issue is an exercise requiring sophisticated skills. It can be taught and it can be done, but it requires patience and persistence.

Now come the arguments by the adversaries, using the armory of logical reasoning and experiential thinking. One uses deductive reasoning, another inductive reasoning. Identifying and evaluating these weapons of argumentation encourage precision in thought and critical analysis of evidenced adduced. If this aspect of the

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EXCERPTS FROM JUSTICE SCALIA'S DISSENT

"The question posed here . . . is whether there is a national consensus that no criminal so much as one day under 16, after consideration of his circumstances, including the overcoming of the presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime. Because there seems to me no plausible basis for answering the question in the affirmative, I respectfully dissent.

"If 15-year-olds must be explicitly named in capital statutes, why not those of extremely low intelligence, or those over 75, or any number of other appealing groups as to which the existence of a national consensus regarding capital punishment may be in doubt."

LOOKING AHEAD

These opinions do not end the question of juvenile executions. In fact, the Court already has accepted for argument this year three separate cases dealing with the death penalty.

Two of the cases question the age at which the death penalty may be imposed: one involves a 16-year-old and the other, an 18-year-old. The third case raises the issue of whether the death penalty can be imposed against a mentally retarded person who may not appreciate the wrongfulness of his or her crime.

Adapted from an article by Denis J. Hauptly and David A. Sellers in Supreme Court Spotlight: A Monthly Report for High Schools. *For further information about* Supreme Court Spotlight, *contact* case study method can be approached in a non-threatening way, we may yet be able to achieve the educational goals of reflective thought, critical thinking, and sensitivity to moral and ethical values.

Generalization

All this is prologue to the main event. The beauty of the case study method is that it moves us from the microcosmic confrontation of individuals in conflict with each other or in disputes with the state to the macrocosmic principles which reflect the ideals of a civil society. We move from the search of a student's locker to the principle of privacy. We wend our way from the wearing of a student's armband in school to the principle of freedom of expression. We proceed from the required Pledge of Allegiance to the principle of freedom of conscience. We proceed from aid to parochial schools to the principle of separation of church and state.

Having identified the cause of action, the facts, the issue or issues, and the arguments of the adversaries, the student is then prepared to state the decision in the case and to justify it by formulating a principle of law, an axiom of justice, or a maxim of conduct which could serve as a precedent for future rulings. With the generalization accompanied by its rationale, we enter the domain of philosophy where moral and ethical values vie with self-interest and pragmatic experiences. The tug of war between the pangs of conscience and the pressures of peers is an appropriate training ground for responsible decision-making at a time when young men and women are facing an uncertain future.

The test of the viability of the generalization or precedent is its applicability to variations on a similar theme. In a previous article on this subject ("The Case for the Case Study Method," Fall, 1977), we demonstrated how the Tinker (armband) case ruling could be applied to a number of similar cases.

Conclusion

There is some talk these days of the Office of Citizen, Madison's Inner Republic mirroring his Outer Republic, and Edmond Cahn's moral constitution within us with its sense of injustice. The case study method of instruction is one of the most effective ways of contributing substance to each of those ideas. Perhaps Cahn put it best when he stated:

> . . . it is only in the concrete case that rational speculation can draw to it the flesh and blood of imaginative projection, and an abstract personal subject can be converted into a vibrant personality. The concrete case alone offers a stage suitable for projected drama, where it prompts the emotions, the glands, and the viscera to join with the faculty of reason in the experiences of a moral evaluation. In a concrete case, the sense of wrong is informed with some general personal commitments: in other words, there is real water in the cup and its presence there has put real lives at stake. . . human wisdom is on the mettle only where there is a practical risk, which imports responsibility and the felt burden of a personal involvement.

—Isidore Starr

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Court Clarifies Methods for Proving Employment Discrimination

Clara Watson, a black bank teller, sued her boss after being passed over for promotion four times in favor of white applicants. In *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777 (June, 1988), the Supreme Court allowed the use of something called the "disparate impact analysis" to be applied in examining the promotion criteria used by Ms. Watson's employer. This ruling significantly alters the method of proving employment discrimination.

Two earlier cases show the vital importance of the methods used to prove employment discrimination. The first, *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), was a case that focused on the *impact* of employment criteria. In *Griggs*, an employer required a high school diploma and a passing mark on an aptitude test as conditions for employment. In *Griggs*, the Supreme Court held that even employment practices which are neutral on their face could be found to be discriminatory if (1) they did not bear a reasonable relationship to the job, and (2) if they screened out a number of people from a protected class. This is the disparate impact analysis. (Protected classes are those groups who have, in the Court's opinion, been frequently discriminated against and, as a result, receive special protection under the law).

Watson argued that this criteria should be applied in her case. The district court relied instead upon a second similar case, *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), whereby individual subjective testing and treatment of a prospective employee are analyzed for subtle proof of discriminatory *intent*. The facts show that Watson's rejection for promotion was the result of subjective inquiry, such as interviews and evaluations, rather than standardized tests which showed she was qualified for promotion. The bank justified its use of subjective methods by its need to identify skills, or the lack of skills, not discoverable by objective evaluation.

For example, if an applicant could pass the aptitude and math tests, that person might qualify for a position. However, if that position also called for interpersonal skills which were only able to be evaluated through interviews and other subjective methods, that applicant might not have the necessary skills and, therefore, would not be hired. Watson argued that this *McDonnell Douglas* criterion could permit discrimination contrary to the purpose of Title VII of the 1964 Civil Rights Act. An employer could give objective exams, find that a candidate was qualified, and then disqualify that same person by applying one arbitrary, subjective standard.

Ft. Worth Bank argued that subjective criteria are not susceptible to validation, which is a requirement under the *Griggs*-type of analysis, wherein the only legitimate defense to an employer's testing methods is the "business necessity" of a chosen method of selection. This analysis, the bank argued, denies the need for the type of criteria that go beyond objective test results, but which discover skills necessary to certain businesses, like the ability of a prospective employee to be a public presence.

Because the bank's arguments prevailed, it won at the lower court level. At the Supreme Court, however, Justice O'Connor, leading a plurality, reversed the lower courts. The distinction between a defense based upon legitimate, nondiscriminatory reasons, which Watson failed to overcome at trial, and the business necessity of selected, subjective criteria, is not one which is necessary to the enforcement of Title VII. Bias, said O'Connor, is possible in selections based upon subjective standards for promotion, and bias is what Title VII was meant to prohibit, whether it surfaces as an intended practice, or an unconscious result. Therefore, subjective criteria have to become the objects of statistical scrutiny to further the basic intentions underlying civil rights law. The "effects" test of *Griggs* was a recognition that practices which appear neutral may produce an invidious result unless such practices can be "validated" as necessary to achieve bona fide business goals. Subjective methods of selection *are* susceptible of validation, albeit not readily. O'Connor noted examples, such as academic tenure, which have acquired a presumption of validity as a subjective structure, and writing samples for nonliterary jobs, where writing is an adjunctive skill to the primary duties. Common sense provides the justification for "plainly relevant criteria."

The concurring opinion by Justice Blackmun adopted the holding, but not the explanation. In advancing a mixture of both *Griggs* and *McDonnell*, he said, O'Connor has also attempted to render *Griggs*-type statistical analysis more palatable to the employers by altering a settled formula on the burden of proof. Indeed, O'Connor wrote that Watson and other plaintiffs would have to proffer, in the face of valid subjective criteria, other criteria, of equal worth as job-performance predictors, but of less discriminatory effect. Further, said O'Connor, the employee would also have to show that the employer's suspect criteria helped cause the statistical—i.e., discriminatory—results complained of. And, as always, statistical proof would be vulnerable based on what methods the employer used to choose or reject the employee. Under the guise of permitting either result-oriented or proof-of-intent tests, the Court, said Blackmun, has rearranged the burden of proof in the employer's favor. Specifically, the seesaw pattern of proof, defense, and counterproof, from party to party, now emerges as the plaintiff's continuing burden.

The decision in *Watson v. Ft. Worth Bank* does open new opportunities for minority employees to assail the subjective practices of employers on statistical grounds. This may, indeed, provoke a reconsideration of workplace rosters, as well as the traditional methods of promotional selection. Does this represent, coming from a Reagan appointee, the insularity of the Supreme Court from changes in public opinion? It may be just as telling that the volume of Reagan appointments to all federal courts has often produced victories like those of the bank at the trial level. What remains clear is that the rule of law is ever reasserted by an independent judiciary.

Footnote: Blackmun offered an example of the mercurial quality of subjective personnel practices—one of the white employees chosen over Watson for promotion at the bank resigned under pressure after his first review found him only "close to being competent." Query, what criteria are predictive of employee merit?

—Christopher J. Burke and Jim Fine

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Alternative Dispute Resolution

(continued from page 4)

While the definition of a good mediator is still hazy, the need for ADR is clear. "Every once in a while you catch a glimpse of the need," Ray said. A little over a year ago, Ann Landers mentioned mediation in her column and included the ABA Dispute Resolution Committee's telephone number. "We received 10,000 requests for information in 15 months," Ray said. "For two solid months our lines were busy and we were receiving huge stacks of mail." Everyone wanted to know about the center nearest them.

Education is the key to unlock the success of dispute resolution centers. The more people know about ADR, the more likely they will be to head for a dispute resolution center instead of a court, Ray said. That will help courts reduce their case backlogs and give people a chance to work together to resolve their disputes. "When you mention mediation, a lot of people think about reconciliation, medication or meditation," Ray said. "So there is a need for education." □

Youth and Justice

(continued from page 23)

cerns of due process of law as we understand it today. It was only after the Second World War, mostly in the 1960s, that the courts began defining rules of evidence, the right to counsel, provisions for bail, protection against self-incrimination, and the right to appeal under the Fourteenth Amendment, and even later that these rights were extended to juveniles.

Kent, Gault, and *Winship* (see above) expanded federal due process rights to youth and spurred juvenile code revision throughout the country. Still excluded, however, is a federal right to a trial by jury. The United States Supreme Court, in *McKeiver v. Pennsylvania* (1971), ruled that the federal constitutional right to trial by jury does not extend to juveniles on trial for delinquent behavior. The Court feared that the burden imposed upon juvenile courts by having to conduct jury trials might interfere with the juvenile court's rehabilitative goals. The Court did not prohibit the states from utilizing a jury trial system in juvenile court if they so desire. "That, however, is the state's privilege and not its obligation," wrote the Court.

Some child advocates contend that 'due process' problems continue to exist in the preadjudication and postdispositional stages of the juvenile court process. Many of these problems stem from the use of social history reports. According to the founding principles of the juvenile court, the judge should have access to all information regarding the accused juvenile's past and present in order to serve the 'best interest of the child.' This usually includes social history reports compiled by juvenile officers, social workers, or probation officers. These reports include information on prior contact with the court or law enforcement, school and employment records, financial status of the family, and an assessment of the child's home environment.

Opponents argue that the presence of these reports prior to the dispositional stage is irrelevant and prejudicial and would never be allowed with an adult defendant. They say that the contents of a social history report are irrelevant in determining whether the accused child has engaged in the delinquent conduct asserted in a complaint or petition, and that a child's prior delinquent acts, family history, and home environment may be relevant at the dispositional stage, but not before. Further, a social history report is not a finding of fact but is often based on hearsay statements made by neighbors, relatives, teachers, and friends or enemies of the child. The argument continues that this manner of seeking and using 'prejudicial' information is in conflict with efforts to afford juveniles access to full due process. Concerns about social history reports and informal sharing of information overlap with the confidentiality issues mentioned above.

In fact, most juveniles (and adults) enter a plea of guilty or affirm an allegation of delinquency without ever exercising their full rights to due process – trial, facing accusers, calling witnesses, remaining silent, etc. For a guilty plea to be valid in adult criminal cases, it must be shown that a voluntary and intelligent waiver of these rights has been made. In light of most juveniles' lessened ability to fully understand their legal rights and the consequences of waiving them, many states have provided additional safeguards in order to insure that the guilty plea is entered knowingly and intelligently. Some have provided that counsel must be present to advise and assist a juvenile before any plea can validly be entered. Many states add similar safeguards requiring that a parent, guardian, or attorney must be present before a juvenile may be questioned by law enforcement. Granting full due process to juveniles may eliminate these safeguards. It may also limit the court's authority to order state-financed treatment for a juvenile offender, thus placing more juveniles in institutions that punish rather than protect.

The issue is a complex one that forces us to reassess both our philosophy about juvenile justice and the system itself. Does *parens patriae* sufficiently protect children to outweigh the value of complete due process? If the answer is no, or maybe, or sometimes, then how do we determine when and under what circumstances we extend these constitutionally protected rights?

Access to Justice?

Attempting to define justice is an impossible task and a valuable process. The above brief discussion of the juvenile system and some issues currently facing the system does not begin to address the question of whether young people feel that they have access to justice in America today. The quest for justice reaches far beyond the juvenile court and must be viewed in the context of the cultures, or subcultures, that define the role of the court and other social institutions. The opportunities for young people to influence, or impact, these systems are limitless in a participatory government. Perhaps the most salient point made in this brief history is that "access to justice" is an evolutionary process and not an exercise in definition. It is to be hoped that discussion and debate about these issues will not simply become a Law Day exercise, but an ongoing dialogue among students, educators, law professionals, and parents.

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Death Row Lawyers

(continued from page 39)

The time spent dealing with the countless pages of transcripts in appeals cases can't be underestimated. Regardless of whether justices are for or against the death penalty, they spend more time on a death case than on any other. "A liberal justice might agonize over the cases, but a conservative justice still treats them as deadly serious," Neuhard said.

Prison Costs

The costs for maintaining a death row in a maximum security prison are debilitating. While many people believe that execution is cheaper than life imprisonment, this is not the case. Death row inmates must be isolated from the rest of the population and are guarded more heavily and more regularly. This translates into more cells and a higher ratio of guards to prisoners. The *Miami Herald* reported that feeding and housing a death row prisoner until execution costs, on average, $108,000. Once a death warrant is signed, Florida prison guards keep round-the-clock surveillance on an inmate for the remaining 30 days before execution. Overtime costs are $13,800 in Florida for prison guards each time a death warrant is signed. Based on the most conservative statistics available, Florida taxpayers have spent more than $57 million for the death penalty since 1973, according to the *Miami Herald*.

Dividing $57 million by the 18 executions in Florida since 1973, the cost per execution works out to be $3.2 million. As a point of comparison, the cost of housing an inmate in a maximum security prison for 40 years in Florida is $515,964.

New York also compared the costs of life imprisonment and execution. According to Spangenberg, their statistics showed that execution was three times more expensive than life imprisonment.

Remedies?

Some positive steps have already been taken. To ensure that inexperienced attorneys are not assigned to death penalty cases, Illinois, Tennessee, California, Kentucky and Ohio have extensive training programs for public defenders and members of the private bar. The Ohio Supreme Court recently set standards that lawyers must meet to qualify as potential defenders in capital cases. The bar associations in Nebraska and Arizona are considering adopting standards as well.

The federal government is also starting to take action. The U.S. government has recently set aside money for resource centers to give training, advice and other technical assistance to lawyers involved in appeals. The ABA's Bar Information Project and PDPRP also work to provide training and technical assistance to local bar associations. The PDPRP has recruited hundreds of lawyers who are willing to volunteer their time to capital appeals cases. They have also developed an instruction manual for capital defense training.

It is not enough to say that progress has been made in some areas, however. While there is a multi-level system of appeals available for death row inmates in all states, only those who can afford it can take advantage of it in some states. Are the rights of a poor capital defendant in the deep South less than those of a poor convict in Los Angeles? The existing criminal justice systems make this so. Does this create a dual system of justice – one for the financially solvent and one for the poor? One for residents of some states, another for someone in a different state?

Whether states are willing and able to spend the money on the training and compensation needed to provide effective representation from trial to final appeal for the indigent remains to be seen. The 2,100 inmates on death row cannot wait while states decide. Unlike the Scottsboro boys, some may not leave death row with their lives.

Claire Conway recently received an M.A. in journalism from the Medill School of Journalism of Northwestern University. She was an intern with the ABA in the summer of 1988.

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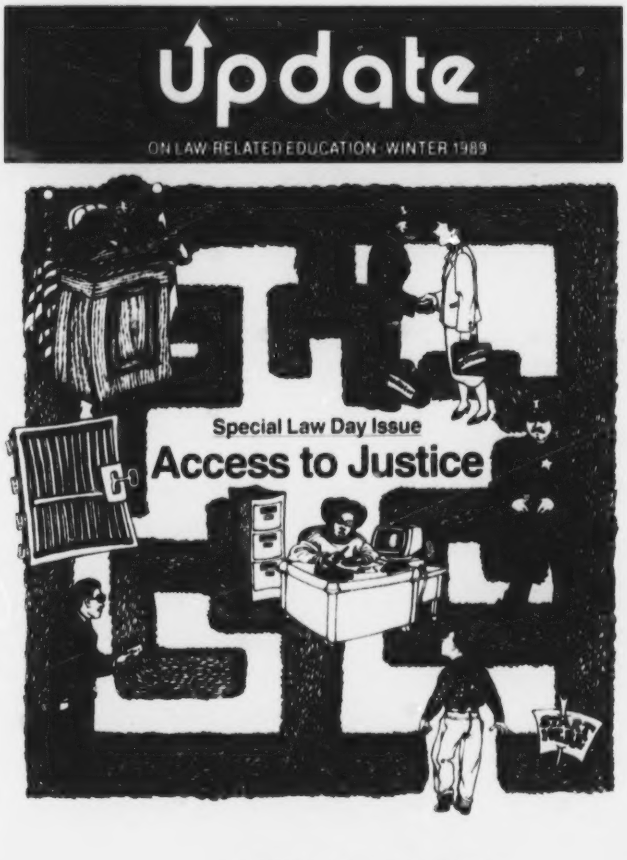

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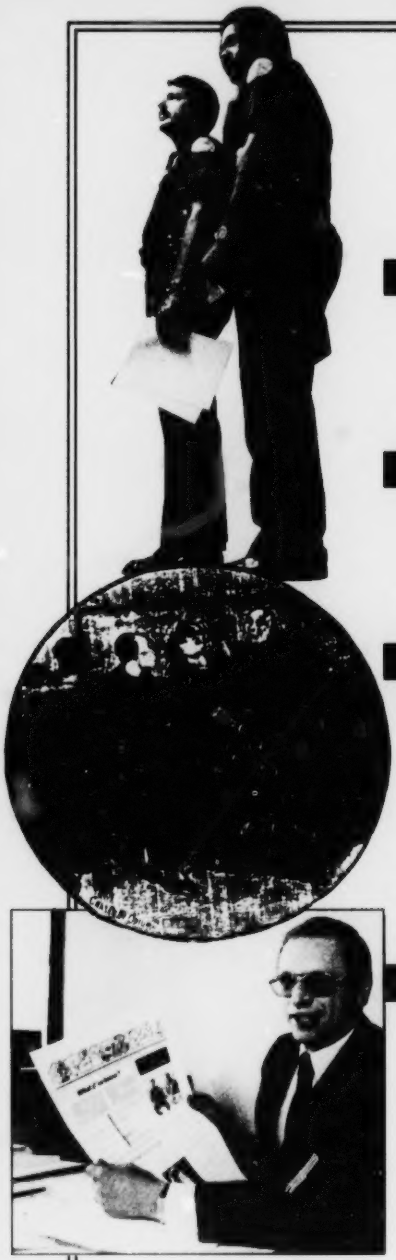
contents

Volume 13, No. 2, Spring 1989



2 **The History of American Drug Control**

ELEMENTARY SCHOOL

STRATEGIES FOR GRADES 4-6

7 Understanding Drugs
9 What Does the Law Really Say?

14 **Is Drug Testing Constitutional?**

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

17 "Honest Mistakes" and the Excusionary Rule
20 Drug Testing: Is It Constitutional?

24 **Should Drugs Be Legalized?**

OJJDP STRATEGIES

MIDDLE AND SECONDARY SCHOOL STRATEGIES

29 Planning to Solve a School Drug Problem
32 Assessing Public Opinion: Views You Can Use
33 Conduct and Actions
36 Case Study: Parents, Drugs, and Neglect

38 **Education and Delinquency**

41 **Court Briefs**

48 **Hazelwood One Year Later**

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGY

51 Individual Rights: Freedom of the Press

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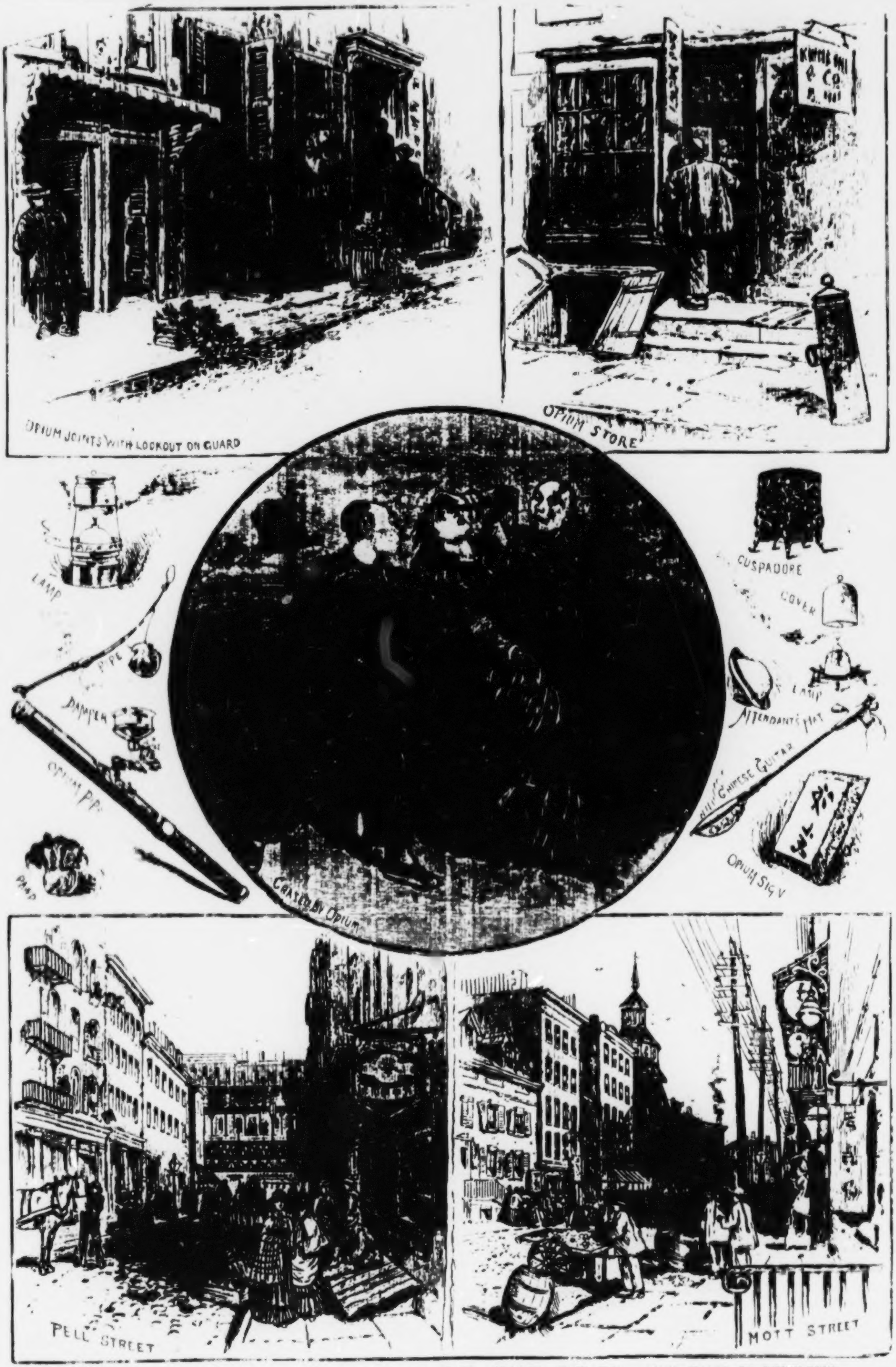
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NEW YORK CITY—THE OPIUM DENS IN PELL AND MOTT STREETS—HOW THE OPIUM HABIT IS DEVELOPED

FROM SKETCHES BY FRANK YEAGER.—SEE PAGE 306.

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D. F. Musto

The History of American Drug Control

Americans have something to learn from our earlier and extensive consumption of opiates, including heroin, and also massive consumption of cocaine, both of which occurred before World War I. This era is forgotten. We commonly act as if the heroin "epidemic" of the 1960s or the current cocaine "epidemic" is a new phenomenon in the United States. Some of us assume that the widespread use of a drug implies that legalization or "decriminalization" is the only reasonable response.

The history of legislative control in the United States suggests that other courses may be effective and that these alternatives to legalization appear to have reduced enormous opiate and cocaine consumption in the United States earlier in this century. In spite of a heavy addiction rate in the United States in 1920, the United States did reduce its number of addicts to a relatively small number. These early efforts at narcotic limitation will help us approach contemporary policy issues with an appreciation of the policy options that reduce or encourage ingestion of these substances. Clearly the social and legal factors affecting drug use are complex, and there is no single influence that determines a particular level of drug use and abuse.

Legislative control over dangerous drugs may be dated from attempts in the nineteenth century to prevent acute poisoning by certain substances that might be purchased in ignorance of their lethal potential or might be too easily available to would-be suicides. Opium was being sold in a crude form containing about 10 percent morphine, as well as in concoctions derived from crude opium: paregoric, laudanum, and a solution in acetic acid known as "black drop." Morphine had been isolated from opium in 1805. From the 1830s onward, in factories in Germany, Great Britain, and the United States, morphine was produced in great quantities. Thus when in 1868, Great Britain came to enact pharmacy laws to control dangerous substances, "opium and all preparations of opium or of poppies" was listed as a commodity that could not be sold without being labeled "poison."

English Antidrug Laws

The British Pharmacy Act of 1868 is an important symbol of legislative control in a Western country. Establishment by the British of some limitation on the availability of dangerous drugs—drugs that would eventually become more serious a problem for society as addictive agents than as tools for suicide—was a policy also followed by other European nations. It had an apparently discouraging effect on the per capita consumption of opium, opiates, and cocaine in the late nineteenth century and contributed to the low level of British consumption (at least compared to the American) right up to the 1960s.

Britain's Pharmacy Act of 1868 was regulated in large part by the organized association of pharmacists, the Pharmaceutical Society (established 1841). In order to retail, dispense, or compound "poisons," or to assume the title of chemist, druggist, or pharmacist, the individual had to be registered by the Pharmaceutical Society. As well as being the testing and registering body, the Society was also given the initial responsibility for adding new drugs to the poison list. Thus the law, which ultimately would be enforced in British courts, was monitored by local members of the Pharmaceutical Society as a tool in competition with unregistered druggists, grocers, and anyone else who might attempt to purvey these drugs to the public.

Although the drugs could be obtained with no specific restraint on the amount or frequency of sale, the bottles had to be labeled "poison." A stricter category of substances also required that the purchaser be an acquanintance of the pharmacist or someone the pharmacist knew. "Patent medicines" were excepted from these controls, and this led to a campaign against them later in the century, but the pure forms of the drugs, e.g., morphine suitable for injection, were restricted in availability from the time of the Pharmacy Act onward.

Free Enterprise Reigns

The experience of the United States stands in contrast to Britain's. In the United States, throughout the nineteenth century, both medicine and pharmacy remained essentially unorganized, although there were some physicians and pharmacists attempting to organize their professions. There was no national group for the health professions to which government could turn for regulation, even if the American constitutional system had permitted such an arrangement.

Licensing of pharmacists and physicians, which was the central government's responsibility in European nations, was, in the United States, a power reserved to each individual state. In the era of Andrew Jackson, any form of licensing that appeared to give a monopoly to the educated was attacked as a contradiction of American democratic ideals. State after state repealed the medical licensing laws adopted in earlier days. American medical schools were similarly unregulated, and many flourished – some no better than diploma mills. The states did not begin reestablishement of medical licensing until the 1880s, and even then the movement was spotty, with a wide range of standards. Pharmacists, also seeking to raise standards and limit competition, likewise fought at the state level for licensing, since the U.S. Constitution placed in the hands of states the regulation of the health professions. In general, the nineteenth and early twentieth century interpretation of the Constitution favored a strict division between state and federal powers.

The status of legislative control of dangerous drugs during the nineteenth century may be summed up as follows: The United States had no practical control over the health professions, no representative national health organizations to aid the government in drafting regulations, and no controls on the labeling, composition, or advertising of compounds that might contain opiates or cocaine. The United States not only proclaimed a free marketplace, it practiced this philosophy with regard to narcotics in a manner unrestrained at every level of preparation and consumption. In fact, states made little attempt to control addictive drugs until quite late in the last century, and those efforts did not prove very effective.

During the first part of the nineteenth century, the amount of opiates used in the United States may have been comparable to that used in Britain, where some areas, notably the fen counties, had a fairly large per capita consumption. However, at least during the nineteenth century, our annual per capita consumption rose steadily from about 12 grains in 1840 (an average single dose being one grain) until the mid-1890s, when it reached 52 grains annually per capita. Then statistics show that average individual consumption gradually subsided up to 1914, by which time the per capita rate had fallen back to the level of about 1880. The highest rate of addiction in the United States occurred in the 1890s at the maximum rate of 4.59 per 1,000. Today that rate would result in 1.1 million addicts, about twice the current official estimate.

19th Century Drug Use

Opium was available in many forms derived from crude opium long before the nineteenth century. In ninetenth century America, the two developments that spurred both consumption and concern about opium were (1) the isolation of morphine and its injection into the body with hypodermic syringes and (2) the introduction of smoking opium, which had been brought to the United States mainly by a feared minority, Chinese laborers imported to help build western railroads. Morphine caused much more addiction than the more dilute forms employed previously, which focused attention on the drug, on medical practitioners, and on modern technology in the form of the hypodermic syringe.

Consumption of opium in the United States rose steadily before and after the Civil War. Before the war, such prominent and progressive physicians as Oliver Wendell Holmes had complained about "opium drunkards," but in the second half of the century, many more physicians, as well as the general public, widely deplored opium and morphine addiction.

Americans received opium and morphine not only from their physicians for pain; they could receive what they wanted, for whatever reason they chose, over the counter or from mail order catalogues. The American free enterprise system, coupled with the federal system of government, meant that a bottle heavily laced with morphine could be sold across state lines as an "addiction cure" and affirmed on the label to contain no morphine whatsoever, quite within the law.

States could pass laws restricting such advertising, but they were not inclined to do so. Patent medicine companies were the leading advertisers in American newspapers. They developed an ingenious protection from prying investigations or public pressure to reveal secret formulas, or from any state requirement to make only valid claims for effectiveness: The proprietary manufacturers included in their lucrative contracts with newspapers a proviso that the advertising agreement would be void if the state in which the newspaper was published enacted any laws affecting the sale or manufacture of the nostrums.

The Struggle to Label Contents

In the nation's capital, the manufacturers also fought off requirements that their nostrums be labeled as to contents. Bills to enact such a law under the interstate commerce clause of the Constitution were defeated repeatedly, but in the 1890s a new reforming spirit was evident in the nation. These reforms were extensive, ranging from control over the use of forest land, to government inspection of meat. Attention to the danger of narcotics accompanied the peak of per capita consumption in the United States.

It is clear that what were regarded as the most negative aspects of drug use led to the passage of the new legislation. The simplest reform, correct labeling, was part of the Pure Food and Drug Act of 1906. Any over-the-counter medicine – commonly these would be "patent medicines" – had to be labeled correctly as to inclusion of any of the following drugs: morphine, cocaine, cannabis, or chloral hydrate. A long-desired reform, it simply informed the purchaser whether any of these drugs were present; it did not prevent purchase or restrict the amount of the drug.

Nevertheless, reports at the time indicate that usage of these substances dropped from a third to a half as a response to public concern. Although the newspapers remained quiet, widely read magazines such as *Collier's* and *Ladies Home Journal* railed against patent medicines, especially against morphine and cocaine.

Tracing the movement to restriction, as opposed to labeling accuracy, requires a step back to the mid-nineteenth century. The problem initially was approached by limiting renewal of prescriptions for opiates. These legal controls were mostly in the form of additions to state health statutes. These controls would not, of course, affect interstate commerce in narcotics or the familiar patent medicines, which still could be bought over the counter.

As the public and leaders of the health professions became more aware of the growing number of those addicted to opiates, chiefly morphine, state laws were amended to be more stringent, and the police occasionally staged crackdowns. But the professions were pretty much unorganized and struggling to achieve mandatory licensing; a threat to take away a license could not hold much fear until a license was required to begin with. Legislators also felt, or at least claimed, a helplessness when neighboring states did not enact strict laws – a circumstance more familiar to us with variations in the legal drinking age between states – with the result that enforcement was weak. This circumstance, combined with a poorly trained medical profession, a lack of professional organization and an absence of laws controlling either patent medicine or interstate commerce in drugs, left local controls more symbolic than effective.

Part of the Progressive Movement

The nineteenth century's last decade brought the rise of what would come to be called the Progressive Movement, a set of reforms usually taking the form of federal laws affecting the entire nation with the ostensible purpose of improving the nation's morals or resisting the selfish actions of the rich and powerful. Alongside it grew a temperance, soon a prohibition, movement that would eventuate in the Eighteenth Amendment mandating prohibition of alcohol distribution for nonmedical purposes in the United States.

In many ways, of course, the antialcohol movement was part of the Progressive Era; its startling success and later dramatic repeal have given the alcohol issue a somewhat separate development in our minds, but the interrelation between the battles against alcohol and against narcotics is an important one. The antialcohol crusade helped establish the attitude that there could be no compromise with the forces of evil, that "moderation" was a false concept when applied to alcohol: Prohibition was the only logical or moral policy when dealing with this great national problem.

The significance for the control of narcotics is that another dangerous substance, over which there was even more dispute as to the means of control, progressed inexorably toward a policy of "no maintenance" and no compromise.

Drug Control in the Philippines

The means by which the narcotics issue arose at at federal level was accidental. Certainly it would have come to the attention of Congress and the president eventually as a corollary to the alcohol prohibition movement or as a way of controlling addiction, which was becoming a target of journalist reformers and physicians. As it happened, however, it was acquisition of the Philippines through the Spanish-American War that occasioned action by the federal government.

Again, in order to understand how the Philippines forced the central government to take action on opium, it is necessary to appreciate the divisions between federal and state powers that were so marked until the last half-century. The Philippines, unlike a state, came directly and wholly under the control of the federal government. At last, Congress could not avoid making decisions on such matters as the local availability of opium.

Opium had been provided to Chinese on the Philippine Islands through a Spanish government monopoly. After the islands had passed to American control, Civil Governor William Howard Taft considered whether the monopoly should be reinstituted. It was at this point, in 1903, that the moral question of compromising with "evil" affected the future of opium's legal availability in that land. Missionaries in Manila and in the United States besought President Theodore Roosevelt to prevent this moral wrong. He ordered Taft to stop the bill, and that was the end of it. The mood of moral leaders in the United States was sufficient during the first few years of this century to prevent any such "maintenance" program, even if it was restricted, as promised, to the Chinese in the Philippines. This immediate reaction to allowing opium to be used for purely "recreational" purposes, coming even before the Food and Drug Act, gave a signal as to how the federal government would respond to later questions regarding the legal supply of opium to individuals, not for medical reasons but for enjoyment or to satisfy their addiction.

In response to the veto from Washington, Governor Taft appointed an Opium Investigation Committee. The Philippine Opium Investigation Committee recommended that (1) male opium smokers over 21 should be registered in order to receive opium from a reinstituted government monopoly and (2) after a three-year period, the amount provided the smokers be reduced gradually until the smokers had been completely weaned from the drug. But Congress reacted more sternly. Congress decreed immediate opium prohibition, except for medicinal purposes, for all native Filipinos; non-Filipinos – mostly Chinese – were allowed a three-year period of use.

The Philippine situation forced the federal government to take a stand on opium use for nonmedicinal purposes, and the decision was to prohibit. To Congress, once the question was posed, compromise with narcotics was not a politically practical alternative. The Philippines also gave the United States leadership of the international control of narcotics, a role it still holds. It was apparent to the Opium Investigating Committee that the solution to the Philippine opium problem lay in the control of international trafficking in opium, as well as in the curtailment of opium production in the original producing states, such as India, China, Burma, Persia, and Turkey, to name some of the most prominent sites for the cultivation of the opium poppy. Through a series of international conferences in the years before World War I, the United States sought to curtail the drug trade. The State Department took the lead in formulating an antidrug policy for this country.

Domestic Legislation

Americans understood that strong and enforced domestic legislation in other nations would result in diminishing the flow of drugs into the United States, but would other nations understand why the United States had no national antinarcotic legislation whatsoever?

The simplest law that could be framed and stand a chance of passage was one that excluded from the United States opium not intended for legitimate medical uses or, in other words, opium prepared for smoking. This law was enacted on February 9, 1909. Additional legislation was seen as imperative both to curtail the American narcotics problem and to present an American example to other nations where the implementation of narcotics control programs was essential to the solution of the American domestic problem.

In late 1909, a domestic law was proposed based on the federal government's power of taxation. The alternative federal power was that over interstate commerce, but State Department specialists believed that taxation would result in a detailed accounting of narcotics from their introduction into the United States to their distribution to manufacturers, wholesalers, and retailers, including pharmacists and physicians. Heavy fines would be levied on anyone not keeping records accurately or selling and transferring these products without proper reporting and payment of taxes.

The federal/state dichotomy was to be solved in this manner: The information obtained by this proposed law would be made available to state boards of pharmacy and medicine, which would then take appropriate action to ensure that "the proper relations should exist between the physician, the dispensing druggist, [and] those who have some real need of the drugs."

The State Department did not envision a federal role in policing the relationships between, say, an addict and his or her supplying pharmacist or physician. The sanctity of the state's police powers would be maintained; the federal government would supply only information. Reformers believed that the information, however, could lead a responsible state agency to take only one action, that is, to curb the supply of narcotics to those who did not have a medical need for it—and "mere" addicts did not fall into that category.

Passing an Antinarcotic Bill (1910-1914)

Republican Congressman David Foster of Vermont introduced the State Department's bill in April 1910. In addition to opium and cocaine, as in the eventual Harrison Act, the bill was aimed at cannabis (marijuana) and chloral hydrate, the same substances the Food and Drug Act of 1906 required to be revealed on labels. (Technically, only the opiates are narcotics, that is, sleep-inducing, and these drugs all have different effects. Nevertheless, most dangerous drugs, including cannabis, were grouped under the rubric "narcotics" from at least the 1920s until the 1960s.)

The bill did not allow small amounts of the drugs in mild remedies such as cough syrup to be exempt from the stringent report requirements and their severe penalties. Druggists feared the multitude of stamps and labels at each stage; the fines, which would range from $500 to $5,000; and the one- to five-year jail sentences. The word "knowingly" did not qualify the prohibited actions, making it likely that simple errors without any intention to deceive would result in horrendous punishments. Although support for the bill could be found, the individuals in the drug trade would not endorse the detailed and hazardous provisions of the Foster Bill. It never came to a vote in the 61st Congress, which ended in March 1911.

The next Congress was marked by a significant change: For the first time in almost two decades, the Democrats gained control of the House of Representatives. The South now had achieved new importance, in that committee chairmanships changed hands. In the 62nd Congress the Foster Bill became the Harrison Bill, named after Francis Burton Harrison, a New York City Democrat who served on the Foreign Relations Committee. State Department antidrug specialists continued the difficult task of trying to obtain the most stringent bill consistent with winning essential political support from the medical and pharmaceutical interests and now from the Democratic Party. In order to mitigate the severity of the original Foster Bill, the drug trade established the National Drug Trade Conference (NDTC), which would represent the major trade associations and try to reach a compromise position on the complex antinarcotic bill. The NDTC, which first met in Washington, D.C., in January 1913, provided the most powerful influence on the writing of what would become known as the Harrison Act.

The attitude of the newly influential southern Democrats toward any potential invasion of states' rights now had to be taken more seriously. These politicians feared an interference with the South's local laws, which enforced racial segregation and Negro disenfranchisement. They remembered the era of "reconstruction," when the North ruled the South following 1865, and wanted to maintain the authority the white citizenry had won with the withdrawal of troops and "carpetbaggers." Furthermore, the example of using the federal tax power primarily to achieve a moral end—for the taxes were not intended to bring in a significant revenue but rather to force disclosure and compliance with the rules of narcotics distribution—could be a precedent for other concerns brewing in the United States, such as protecting Negro voting rights in the South.

State Department specialists, therefore, faced a new set of attitudes in the Democratic-controlled House. They reacted by stressing the impact of narcotics, especially cocaine, on Negroes. They attributed attacks on whites to crazed Negro cocaine fiends. They also argued that many poor Negroes would not have the energy or knowledge to send away for the cocaine, so northern businessmen who did not care about the South's concerns must be shipping—via interstate commerce—cocaine to Negroes.

One further concern about the precedent the antinarcotic law would provide related to the flourishing prohibition movement. As prohibition was achieved in state after state, the loophole for at least the upper and middle classes was that alcohol could be ordered across state lines and shipped into a dry state, for interstate commerce was regulated by the federal government, which so far was not teetotal. The Webb-Kenyon Act of 1913, however, was passed to close this loophole. It survived President Taft's veto, and, much to the surprise of many, was declared constitutional by the Supreme Court. This occurrence removed one of the stumbling blocks to the Harrison Bill, for now a national antinarcotic law could not serve as a precedent for curtailing interstate commerce in a dangerous substance.

In the course of all this maneuvering, no one rallied to the defense of any of the drugs named for control, except that occasionally cannabis was described as not habit-forming or not as serious as opium or cocaine. Perhaps because the cannabis problem was not seen to be serious or because the drug did not seem so dangerous, it was dropped from the proposed law. Chloral hydrate, a sleeping medicine, was also dropped.

The attitude toward opium and cocaine, however, was almost totally condemnatory. The only question was how to control their distribution most efficiently, since they had medicinal value but were also considered dangerously addicting. This was in sharp contrast with alcohol; its use divided the nation, and huge legitimate industries depended upon its continued consumption.

The government and the trades eventually reached agreement on the proposed law by moderating the record-keeping provision, reducing penalties, and allowing the sale of patent medicines with small amounts of narcotics in them. Representative Harrison introduced the bill in June 1913, and it was passed quickly by the House. In August of 1914, the Senate passed the bill. Finally, on December 17, 1914, President Wilson signed it into law, to become effective March 1, 1915. At

(continued on page 47)

Drug Education

Understanding Drugs/Grades 4-6 **Wichita Police-School Liaison Program**

Objectives

The students will:

1. Demonstrate an understanding of what a drug is by stating a definition in their own words.
2. Identify the three basic categories of drugs as listed by effect and by use.
3. State what drugs are used by people.
4. Understand how the drugs affect an individual.

Teacher Preparation

1. Make copies of "Are You a Drug Quiz Whiz?" (below) for each student.
2. Read "Overview of Basic Drug-Related Concepts" (below) to students.

Classroom Activities

1. Provide to each student a copy of "Are You a Drug Quiz Whiz?" Give the students time to complete the quiz. Tell them the quiz is *for their information only*.
2. Solicit ideas from students concerning their definition of a drug. Record and compile the list. Conclude with the components in the definition included in the overview.
3. Review and discuss the basic categories of drugs as listed in the overview. The students need not memorize this information; however, it will be useful when discussing the involvement of law enforcement.
4. Discuss what drugs are being used and what effects they have on people. Be sure to include pharmaceutical drugs, foodstuffs, alcohol, and tobacco (see overview).
5. While discussing what drugs are used, include discussion of the issues involving law enforcement.
   a. Are there specific alcohol and drug laws?
   b. Are they necessary? Why? Why not?
   c. What roles do such laws play in our society?
   If specific questions arise, write them down to be addressed in later lessons (see p. 9 for a possible follow-up lesson).
6. Check the answers for the quiz in using the answer key (see inset). Discuss questions of greatest concern or most often missed.
7. Invite a police officer or drug prevention specialist to speak to your students. Provide an opportunity for students to ask questions of the officer and the prevention specialist. Use a question box (or other container) to allow students to ask specific questions anonymously.

Are You a Drug Quiz Whiz?

T F 1. More people use marijuana in the United States than any other drug other than medicine.

T F 2. Marijuana ("pot") is not a narcotic.

T F 3. More drug abusers are between the ages of 26 and 35 than any other age group.

T F 4. Most drug users had their first experience with drugs through their friends.

T F 5. A person will have a harder time knowing what might happen if he takes PCP ("angel dust") than any other drug.

T F 6. Abusers of substances that are inhaled are usually adults.

T F 7. More people have their health ruined by cigarettes than by almost any other drug.

T F 8. When heroin was first made, people though it was not a habit-forming drug.

T F 9. The only thing that will sober up a drunk person is time.

T F 10. Alcohol should never be mixed with sedatives or other drugs that slow you down.

T F 11. If a person wants help with a drug problem, he is free to get it under the protection of federal law.

T F 12. Stopping drug abuse before it starts is called prevention.

T F 13. Marijuana stays in the body only a few hours after it is smoked.

T F 14. The use of drugs by a pregnant woman is not usually dangerous if she is careful not to take any strong drugs.

T F 15. Marijuana is more harmful today than in past years because younger kids are using it, it is stronger, and it is known to affect a person's mind and body.

Overview of Basic Drug-Related Concepts

1. Definition of Drug
   A. Drug – any substance that is injected, ingested or inhaled that can make changes in the way a person thinks, feels, behaves or perceives things.
2. Basic Categories of Drugs by *Effect* (with Definitions)
   A. Stimulants – drugs that stimulate or speed up all or part of the body's metabolism (Examples: caffeine, cocaine, amphetamines/"speed," etc.)
   B. Depressants – drugs that depress or slow down all or part of the body's metabolism (Examples: narcotics, barbiturates/"downers," alcohol, marijuana, etc.)
   C. Hallucinogens – drugs that cause the brain to create illusions (seeing things that are not there) or delusions (believing things that are not true) (Examples: LSD/"acid," peyote/mescaline, PCP/"angel dust," THC/marijuana, etc.)
3. Basic Categories of Drugs by *Use* (with Examples)
   A. "Street Drugs"/Illegal Drugs – substances taken specifically for the purpose of altering moods, feelings, or consciousness without the benefit of a doctor's care (Examples: "speed," Quaaludes, marijuana, LSD, PCP, heroin, cocaine and many more.)
   B. Pharmaceuticals/Medicines – Over the counter (OTC) or prescription drugs, taken for medical purposes, often under a doctor's care (Examples: aspirin, Tylenol, amphetamines, valium, penicillin, codeine, Pepto Bismol, NoDoz, Formula 44 cough medicine, and many more.)
   C. Foodstuffs – substances found in food that fit the drug definition (Examples: caffeine, sugar, salt, vitamins, etc.)

Are You a Drug Quiz Whiz? (answer sheet)

1. FALSE It is estimated that about 10 million people in the United States are dependent on alcohol.
2. TRUE Marijuana, an illegal drug, was classified as a narcotic in the past but now it is not. The way the drug works on a person's mental and physical system differs from the effects of narcotics.
3. FALSE The findings from the 1982 National Survey on Drug Abuse showed that among the three major age groups surveyed, illicit drug abuse was most prevalent among young adults ages 18-25.
4. TRUE The pressure from friends to experiment with drugs can influence many people to try drugs, especially young people.
5. TRUE Phenylcyclohesylpiperidine (PCP) can produce unpredictable, erratic and violent behavior in users. These actions can be directed at themselves or at others and, in some cases, have led to serious injuries and death.
6. FALSE Inhalant abuse is rising among children between the ages of 12 to 17. These substances are readily available in household products, often found in aerosol sprays. Inexpensive and available aerosol products can cause irregular heartbeats, breathing problems and sudden death. This can happen the first time or any time one uses these substances.
7. TRUE There are over 50 million cigarette smokers in the United States. It is estimated that 300,000 deaths each year are related to tobacco use. Some of the long-term effects of smoking are emphysema, chronic bronchitis, heart disease, and cancer of the lungs, mouth, larnynx and esophagus.
8. TRUE In 1898, when heroin was placed on the market, it was not believed to be habit-forming. However, a few years later, researchers found heroin more addictive than morphine or any other narcotic drug.
9. TRUE There are no shortcuts to sober up a drunk person. Once alcohol is in the bloodstream, it takes time for the body to rid itself of the alcohol. This process, called metabolism, takes about 2 hours for each drink taken.
10. TRUE Most people do not realize that alcohol is a sedative drug. Combining sedatives with alcohol increase their effects. Judgment is impaired and lapses in memory can occur. More Americans die from overdoses of barbiturates (another sedative) than from heroin addiction.
11. TRUE Under federal law, persons can seek help for drug problems. Federal law in most instances requires doctors, psychologists and drug treatment centers to keep confidential any information received from drug patients if the drug treatment program is federally funded.
12. TRUE The purpose of prevention is to provide young people healthy and attractive alternatives to drug abuse. This involves the whole community and includes helping young people to develop meaningful relationships with parents, teachers and peers.
13. FALSE The major active ingredient in marijuana is tetrahydrocannabinol (THC). Scientists have discovered that THC accumulates in the fatty tissues of the cells and is eliminated slowly. It takes approximtely four weeks for the body to rid itself of THC.
14. FALSE Pregnant women should be extremely careful about taking any drug, even aspirin, without consulting a physician. Research has shown that heavy smoking and drinking can harm the fetus. Babies born of narcotic-dependent and barbiturate-dependent mothers are often born drug dependent and must receive special care.
15. TRUE The more potent marijuana increases the physical and mental effects and the possibility of health problems to the user. Research shows that marijuana can interfere with learning by impairing thinking, reading comprehension and verbal and arithmetic skills. Studies of teenage marijuana use show that many young people in the 12 to 17 age group started smoking marijuana in junior high school. The earlier a person starts to smoke marijuana and the heavier the use, the more likely it is that the person will use even stronger psychoactive drugs five years later.

The Wichita Police-School Liaison Program is a cooperative effort of the Wichita Public Schools and the Wichita Police Department. The drug education unit is one of 23 curricula, intended for students at a wide range of grade levels. For more on the program, contact Debbie McGee, Police-School Liaison Program, 217 North Water, Wichita, KS; telephone: (316) 268-4207.

Drug Education

What Does the Law Really Say?/Grade 6

Legal Education for Youth Program

Objective

Students will be able to apply the decision-making process to a given fact situation and to identify the consequences of violating the law as it relates to minors and the possession of controlled substances.

Lesson Focus

The lesson will focus on the law and the authority of its application to protect the general health, welfare and safety of people. Therefore, during this lesson, students will be provided with facts and information surrounding each of the major laws related to substance abuse. By the end of this lesson, students should be able to identify the specific law that applies in any situation involving an illegal substance, and the legal consequences of violating that law as it relates to an adult as well as a minor. It is hoped that students, through exposure to these laws, will make better decisions if and when they are confronted with any drug-related situation.

Materials

Student readings and quizzes (in insets to this article).

Vocabulary

You may wish to discuss the following key vocabulary words before beginning this lesson: intoxicated, solicit, induce, juvenile hall, diversion program.

Introduction

Begin the lesson by informing students that during today's lesson the types of drug laws and the consequences of violating them will be discussed. Next direct students to the legal/illegal quiz in the inset. Have them complete the exercise. When they have finished, discuss students' choices.

Legal Substances

Read the following facts about legal substances to the class.

ALCOHOL

1. Anyone who sells or gives alcohol to a minor is violating the law. In California, a person must be 21 years of age to legally purchase alcohol.
2. If under 21 years of age, there are some restrictions to working in places where only liquor is sold.
3. Consumption of alcohol at home is technically illegal for a minor, even with parental approval. However, due to various religious and cultural practices, the law respects the individual's right to privacy. However, if a minor's intake of alcohol is excessive, parents may be found by the courts to be "contributing to the delinquency of a minor." Parents should also be aware that they are legally responsible for the actions or damage caused by a minor while under the influence of alcohol.
4. If a false identification (I.D.) is used to purchase alcohol, a fine of $200 and a charge of illegal possession may be imposed by the courts. It should be noted that if the alcohol was purchased at a bar, it is the bartender's duty to ask for proof of age by requesting an I.D. Bartenders who illegally sell liquor to minors and fail to check their I.D.'s are subject to severe penalties, which may include a fine and/or loss of license.

CIGARETTES

1. It is not unlawful for minors to smoke cigarettes unless the law is modified by a local community or school ordinance. (Students should be reminded to balance what the law says regarding potential damage that could be done to their bodies as a result of smoking. The Surgeon General's report will be able to supply additional facts and figures related to this problem.)
2. Students should note that it is unlawful for adults to sell or give minors cigarettes. Machines that dispense cigarettes usually have posted signs on or near them to warn a person regarding purchasing cigarettes for minors.

After reading the facts, direct students to "Cigarettes, Alcohol, and the Law" in the inset and have them complete the exercise. Discuss their answers as necessary.

Development (Class Discussion)

Provide students with input as to what the law says regarding the use of a "controlled" substance. Note that substances are usually placed under control if they are considered to be dangerous and detrimental to the health of individuals and society.

Ask students what would make a substance dangerous and/or detrimental to their health. Ask them for some examples of such a substance.

Individuals using "controlled" substances not only endanger their own safety or health, but that of others as well. For instance, people under the influence of an illegal drug may not have control of their actions and may harm someone else, whether intentionally or not. They also create

Legal or Illegal

Check ( ) each of the statements listed below which you think are illegal for minors (persons under 18) to do according to the law.

( ) buying a can of beer for a friend.
( ) buying a can of beer for yourself.
( ) buying a can of beer for your parents.
( ) parents giving you a sip of an alcoholic beverage in a restaurant.
( ) parents giving you a sip of an alcoholic beverage at home during dinner.
( ) a friend giving you a can of beer.
( ) buying cigarettes for a friend.
( ) buying cigarettes for yourself.
( ) when you're ill, taking a prescription medicine given by the doctor for someone else.
( ) smoking cigarettes.
( ) taking pills (controlled substances) given to you by a friend.
( ) taking pills (controlled substances) given to you by a stranger.

Cigarettes, Alcohol and the Law

Laws regarding cigarettes and alcohol are specific. Cross out the incorrect word(s) in order to have a statement that shows what the law really says:

1. **A minor (is/is not) a person under 18 years of age.**
2. **The law says it (is/is not) unlawful for anyone in business to sell or give a minor any tobacco.**
3. **It (is/is not) against the law to give or sell alcohol to a minor.**
4. **Parents, technically, (can/cannot) give their children small amounts of alcohol in the home. If they do, and the intake of alcohol for a minor becomes excessive, parents could be found (guilty/not guilty) of "contributing to the delinquency of a minor." However, because of respect of individual privacy and due to cultural and religious practices, law enforcement (does/does not) concern itself with this, in most situations.**
5. **Parents (may be/are not) responsible for the harm done by their intoxicated children if the parent provides him or her with alcohol.**

problems for law enforcement officers who arrest them. When stopping someone under the influence of an illegal drug, the officer's safety may be endangered. It is not always apparent to the observer when someone is under the influence.

Inform students that usually substances are placed in large categories according to the effects they have on a person. Make sure students realize that since no two people react the same to substances, the categories represent a general overall effect only.

Have students read the inset regarding illegal substances and the law. Then have students complete the exercise. Discuss student responses and have the class try to categorize the items in the inset. Possible categories would include:

1. legal/illegal,
2. medical/nonmedical,
3. addicitive/nonaddictive.

Decision-Making Process

Review the decision-making process (below) with students, using one or more of the following issues or situations: (a.) cigarettes/alcohol are harmful but legal; (b.) a family member takes twice the prescribed dosage of a presciption; (c.) "Everyone in my club has tried marijuana. I'm the only one who hasn't."

1. Identify the conflict. Problems or conflicts may occur in situations where two or more people see things differently. They are likely to arrive at different solutions regarding the problem.
2. Get the facts. In order to determine what really has taken place, you have to find the facts in the situation. Knowing who, what, where, and how something happened can help you to better understand what has taken place. By finding out what the facts really are, you can avoid jumping to a false conclusion. In addition, you should find out if there are any rules or laws that may apply, since they determine the choices available to you.
3. Identifying the feelings. Identifying your feelings and those of others can be very helpful. Since feelings are emotional responses, they can play an important part in influencing how you perceive reasons and facts about any given situation. For example, if you were hit by a ball from behind, you probably would turn quickly, and your feelings would be very different if you saw a friend or someone you didn't like very well standing there.
4. Examine the choices (alternatives). In making a decision, it is important to be aware of the full range of choices. Each conflict usually has more than one possible solution. Consider what these solutions might be.
5. Predict the consequences (outcomes) of the choices. Just as it helps to identify possible solutions, it is useful to try to figure out what would probably happen if each choice became the solution. Each consequence can be judged by asking the following question: "What are the positive and negative effects on both a short term and long term basis?"
6. Make the decision. After going through all the above steps, you can make the final decision. No matter what you decide to do, the final responsibility for that decision lies with you. Different people might still reach different decisions, though based on the same information. When addressing similar problems in the future, students will be better prepared for decision-making, for negotiation, and for compromise as needed.

Volunteer Option

If there is an attorney volunteer available, please introduce the volunteer at this point and allow him or her to present the remainder of the lesson. If there is no volunteer option, the teacher should continue the instruction.

The Play

After reviewing the above decision-making process with the class, tell students they will be doing a play (see inset) dealing with substance abuse. Inform them they are going to see a situation that involves "peer pressure." Have students give examples of positive and negative peer pressure.

Illegal Substances and the Law

The California Health and Safety Code lists all drugs deemed unhealthful. It is unlawful to sell, buy or possess a "controlled substance" unless it is with a physician's written prescription or by a licensed person.

The penalties for selling a "controlled substance" without proper authority can be extremely severe. In addition, it is a violation of the law to solicit, induce, or encourage any person to violate the law regarding controlled substances.

Knowledge of the law regarding controlled substances can help people make more intelligent decisions when confronted with a drug-related situation.

Place a check in front of each of the following items which you consider to be a controlled or an illegal substance:

( ) alcohol
( ) food
( ) amphetamines
( ) barbiturates
( ) hallucinogens
( ) prescription drugs
( ) nonprescription drugs
( ) marijuana
( ) certain chemicals in glue
( ) cigarettes
( ) wine
( ) beer

2251

Point out to students that it is unlawful to pressure or scare another person into using or furnishing drugs. Ask them for some of the reasons this might be true.

Distribute the copies of the play. Inform students that in the play they will find examples of peer pressure. They will be asked to analyze the situation in the play and to discuss some of the legal consequences of breaking the law when someone "talks you into it." Perform the play.

Applying the Decision-Making Process

After the play has been presented, hold a class discussion on the content and have students use "The Decision" outline (inset) finding the problem, facts, feelings, choices, outcomes of those choices and appropriate decision.

Inform students that sometimes decisions can be very difficult, especially when peer pressure is involved. Ask students to name some examples of peer pressure they observed in the play and/or have experienced in their personal lives.

Tell students that sometimes we get into situations that require a great deal of courage and skillful decision-making, even though the problem may not be our making.

Have students pretend they are in a similar situation as the persons in the play. Further, have them pretend that the unthinkable happens and the police are called in to investigate the problem. What choices do the officers have? Direct students to "Juveniles, Controlled Substances and the Law" (inset) and have them do the exercise.

When students have finished the exercise, inform them that all of the items listed are options open to the police. Briefly explain the options to students.

1. One of the options open to the officer is to talk to the minor and release him or her. Sometimes there is not enough evidence as to what actually happened or the problem is not serious enough to warrant detaining the minor. However, most police departments keep stop records as a way of keeping track of a minor's activities and providing a link to any other law-related problems the minor might have had in the past or will have in the future. The length of time these records are kept varies from department to department.
2. Another option is to take the minor to the police station, call his or her parents and have them come to the station for a talk. They may discuss the problem with the parents and, if satisfied that an understanding has been reached with the minor and the parents, release the minor from police custody.
3. A third option of the police is to place the minor in a drug-related diversion program. Diversion programs are community-based programs that provide counseling and information. Diversion programs are useful because they can help minors solve particular problems without becoming involved with the juvenile justice system.
4. The police may also release the minor to the parents and refer the minor to the probation department because of the seriousness of the problem. The probation department analyzes many factors in deciding if or how long a minor would be on probation.
5. In addition, depending on the seriousness of the offense, and if the minor is considered dangerous to himself or herself or others and/or might run away from the area, the minor may be placed in Juvenile Hall, a place where minors are kept until they go to court.
6. Finally, for the minor's protection and safety, the police may take a minor to the hospital for emergency aid, depending on the mental and physical condition of the minor.

Remind students that decisions made by the police offi-

The Decision

1. The Problem or Conflict:
2. The Facts:
3. The Feelings:
4. The Choices:
5. The Outcomes (of the Choices):
6. Make the Decision:

Juveniles, Controlled Substances, and the Law

A minor who violates the law regarding prohibited substances may become involved with the police. When minors are arrested they become involved with what is known as the juvenile justice system. This system is different from the adult justice system in several ways. The basic concern of the juvenile justice system is for the best interests of the minor.

Suppose an officer has reasonable suspicion that someone has violated the law, and decides to place him/her under arrest. After advising the minor of his/her constitutional rights, the officer has several options. Place a check in the spaces provided in front of each of the options the police can legally choose:

( ) talk to the minor and release him/her.
( ) take the minor to the police station, call his/her parents and release him/her.
( ) enter into an agreement with the parents and minor for the minor to attend a "diversion program" to receive counseling and information.
( ) release the minor to his/her parents and refer the matter to the probation department for further legal action.
( ) take the minor to Juvenile Hall if the offense is serious or if the minor is considered dangerous or if the minor might leave the area.
( ) take the minor to a hospital for emergency aid.

Play Dialogue

Characters: Guide, Allison, Jeff, Lisa, Matt, Chuck, New Kid, 5 extra kids, police officer.
Playing Time: 10 minutes.
Costumes: Kids wear everyday school clothes. Guide can be dressed as a mime. Police outfit, badge, etc.
Properties: Music, soft drink cans, cigarettes.
Setting: None required.
Theme: The basic issue of the play is possession. Would the new kid be charged with possession?

We open. We hear footsteps, then the sound of a musical beat which counterpoints the footsteps. After a few seconds of this, we hear a snap! and the guide appears. He is dressed in a dark, solid color and has a slight bit of make-up on – enough to suggest the appearance of a mime, but not full mime make-up. The guide relates either directly to us as the audience or to the individuals in the play. While he may talk to other people in the play, no one is aware of him. He functions as a kind of commentator. His speech is in a rhythm – the sense of beat is always there.

(The guide bows, with a flourish.)

Guide: Permit me to introduce myself.

(The guide looks at us.)

Guide: I am your Guide to the mystical, magical, confusing, and tragical, amusing, illogical world of decisions!

(Guide moves to stage left.)

SCENE 1

At a park, we see Allison, Lisa, Matt, Chuck, and Jeff. They are basically junior high age, a mixture of male/female and ethnic types. They are just sitting around looking rather listless. We see the guide in the foreground.

Guide: Here we have a group of folks, not to different from most. Life's not bad, and not real great. In fact, it's sort of – let me relate.
Allison: Boring . . .
Chuck: Nothing to do.
Jeff: Yeah, what a drag.
Lisa: *(Sigh)* Yeah.
Guide: But our friends here have a trick for getting away from blah days – very sleek, they've each developed a special style of using substances that make them smile.

(Allison is getting out cigarettes. [Students can use something else if cigarettes are not available])

Guide: *(Pointing to Allison)* Allison here, she smokes lots, sometimes these, sometimes something else, they all please.

(We see Matt drinking. [Students can use soft drink can.])

Guide: *(Pointing to Matt)* Matt here imbibes liquid excitement added to soft drinks for nourishment, beer and tequila and sometimes gin. Oh what a mellow mood he's in.

(Lisa and Jeff are pretending to sniff something out of their hands.)

Guide: *(Pointing to Lisa and Jeff.)* These two here, decided to experiment. If you can sniff it somehow, well that's an event.

(Guide moves arm to focus attention on the whole group of characters.)

Guide: They spend a lot of their time in the fog. But so what? They've decided that life's a drag. So don't nag.

(A new kid approaches the group.)

Guide: *(Walking with him)* Here's someone new to the crew. Let's see how he'll do.
New Kid: Hi!
Group: Hi *(Said without enthusiasm).*
New Kid: What are you guys doin?
Matt: Nothin.
Chuck: *(Sighs)* Yeah, nothin.
Allison: You're new here, aren't you?
New Kid: Yeah, my folks and I just moved from the country.
Allison: I remember, you're in my class. That's all I remember from that class. *(The other kids laugh)*
Jeff: *(Getting out cigarettes)* Here, sit down, want a cigarette?
New Kid: No, thanks, I don't smoke.
Jeff: *(Shrugs)* Whatever . . .
Lisa: *(Shrugs)* For something to do . . . don't you try anything?
New Kid: No . . .
Chuck: Weird. We'll have to get you involved.

(We see guide's reaction, a "here it comes" look.)

Allison: Hey you guys, party time Saturday night. *(Everyone perks up)* My mom and dad are going out

cers are based upon the following considerations.

1. Seriousness of the Offense. Usually seriousness is judged by the court to mean the chance one has of injuring another individual and/or group of people. The greater the possibility of physical harm, the more serious the violation.
2. The Minor's Condition. The officers will assess the condition of the minor, which may include physical and mental condition or the possible harm or damage the minor might do to himself or others.
3. The Minor's Attitude. The way a person responds or reacts to a given situation is different for each individual.

of town and my big brother is having a wild party. He said I could bring friends, as long as we stay upstairs out of his way. And, hey, he's going to have some good stuff there. *(Everyone responds with "ok," "alright," "yeah", etc.) (To new kid)* You're invited if you want to come.

New Kid: Thanks.

(The others leave, and the new kid is alone on stage with the guide.)

Guide: *(Walking with the new kid)* Sounding good, sounding bad, what do you think? The decision's in your hands.

Jeff: *(Coming back)* Hey, you seem ok, but if you want to be part of this group, you've got to participate. It's not so bad after a while. Get it?

New Kid: Yeah . . .

SCENE II—AT THE PARTY

Party scene, music playing, five extra characters plus main characters.

Guide: Here we are, it's party time!

(The new kid walks in.)

New Kid: Hi.

Group: Hi.

Allison: Have a drink, here, help yourself.

New Kid: *(Hesitant)* Well, how about a cola.

Jeff: Sure, but cola alone is nothin. Here let me improve it. *(Pours in some liquor)*

New Kid: *(Unsure)* I don't know . . .

Jeff: Come on, you'll love it . . . participate, remember?

Guide: Well, what do you say?

New Kid: *(Remembering what Jeff had said, "If you want to be part of this group, you've got to participate.")* Well, maybe just a little.

(We see the new kid looking doubtful, but taking the glass. Suddenly, we hear sirens. Everyone panics. There is a loud knock at the door. Police bust the party.)

Police: Who's the owner of this house?! *(To new kid)* What's your name young man?

(We see new kid looking scared, holding the glass.)

New Kid: My parents are going to kill me.

Guide: Decisions! What happens now?

The way in which a person responds or reacts can be either positive or negative. For example, if we are courteous and fair, most people will respond in a positive manner. However, if we act in an obnoxious and hostile manner, the response will probably be anger or some other negative response.

4. Check the Minor's Record (if any). Knowing if the minor has previously been involved with the law may help the officer to know more about him or her so that a fair decision can be reached.
5. Parents' Attitude. If parents are concerned about the problem and willing to help solve it, officers will have an easier time deciding what to do about a particular situation.
6. The Home Environment. Why is this important? Inform students that if there is little or no supervision, the officer may feel that the minor should be temporarily placed in a different environment, where he or she could be watched or helped.
7. Local Programs. They are usually known as "diversion programs," which are established by the community to assist minors with problems. This is a very important option because it allows the minor to work out a problem without direct involvement with the juvenile justice system.

Drug Controls

Inform students that many drugs are restricted or controlled. Alcohol use by minors is restricted or controlled. Use and possession of many drugs are restricted even to adults. For example, many drugs may be prescribed only by physicians.

Ask students to list substances which are restricted or controlled for all individuals. In addition, they should list their reasons for restricting and controlling substances. You may wish to have students do this as a small group activity.

Inform students that use or possession of prohibited substances often leads to confrontation with the police. Check students' lists to be sure they are correct. Discuss the reasons why.

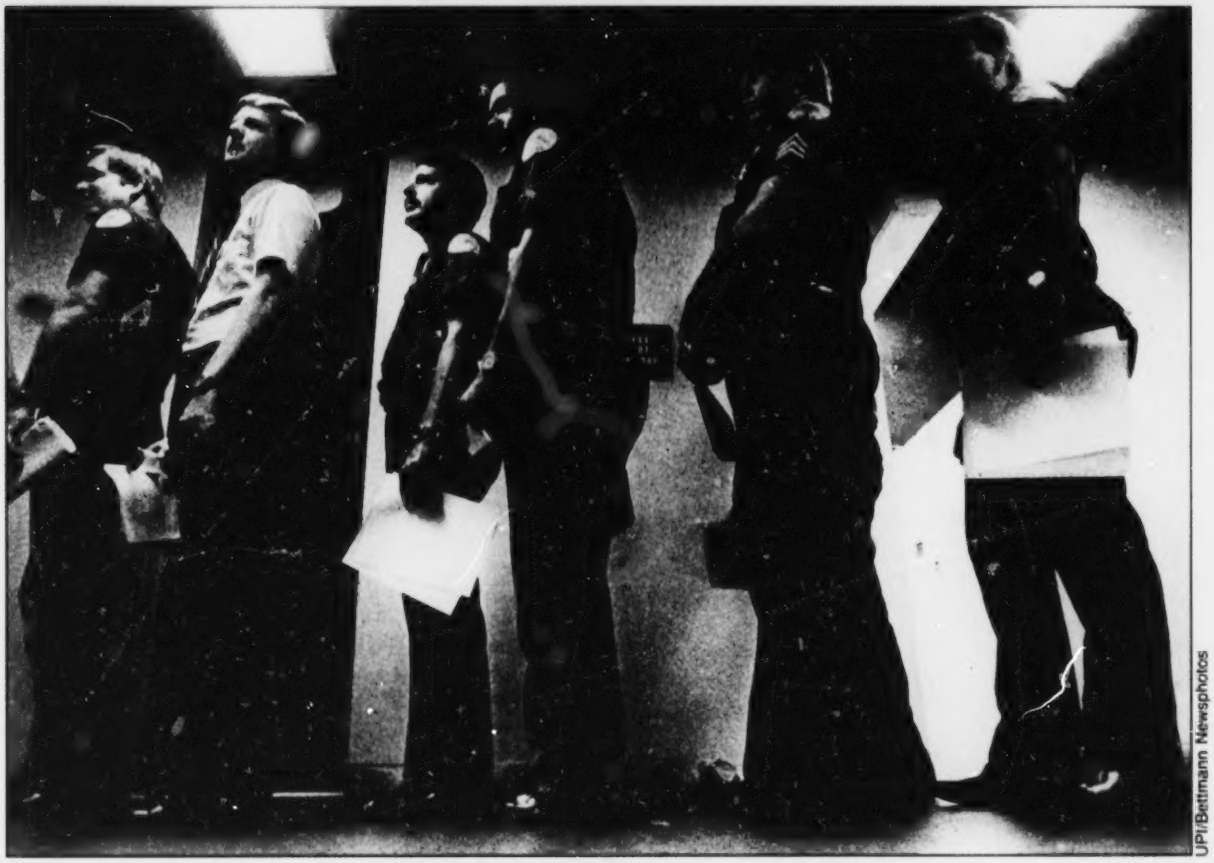
Ask students to decide what substances or drugs are to be restricted and/or controlled. Make sure students realize the following points about controlled substances:

1. Substances considered unhealthy or harmful are listed in the State Health Code.
2. The Health Code refers to these as "controlled substances." Some of these may be legally prescribed, but sale by someone not licensed to legally prescribe such substances can subject such persons to fines, imprisonment, or both.
3. In general, the penalties for selling controlled substances are more severe than for the use or possession of the same substances. Ask students why they think this is so.
4. It is illegal to intimidate a person to use or sell an illegal substance, either by using pressure or force.
5. Some laws referring to dangerous drugs are published in the Business and Professions Code. For example, glue is placed on the aforementioned list because it is considered a *poison*, and can cause serious physical damage or death.

The Legal Education for Youth Program is a cooperative effort of the Orange County Bar Foundation, Inc., and the Orange County Department of Education. This lesson is adapted from one of a six-lesson unit on drugs available for sixth grade. Lessons on a variety of topics are available at each grade level. For further information, contact the bar foundation at 1850 E. 17th Street, #219, Santa Ana, CA; telephone: (714) 542-2282.

DRUGS AND THE LAW

James Phillips



UPI/Bettmann Newsphotos

Is Drug Testing Constitutional?

A friend of the Court explains his role in a drug testing case

Many of us, especially lawyers, consider ourselves "friends" of the courts. However, the *amicus curiae*, as a "friend of the court," is a term of art within the legal world with a specific meaning largely unknown to the public. Yet the *amicus* serves an important role in our legal system.

The role of the *amicus curiae* will be examined in the context of a brief filed by the author as General Counsel to The National Fraternal Order of Police, in *National Treasury Employees Union, et al., v. William Von Raab, Commissioner of the United States Customs Service* (hereinafter "*Von Raab*"). *Von Raab* is one of two drug testing cases currently under consideration by the United States Supreme Court, both of which were argued before the Court on November 2, 1988.

Drug Testing on the Job

Before discussing the role of the *amicus curiae*, let's look at the drug testing cases before the Court. Both cases deal with drug testing, but the factual background and reasoning behind the testing programs are very different, thus raising different issues. Likewise, the differences between those interested in the outcome of each case reflect the differences in the cases.

In addition to the *Von Raab* case, the Court is considering a drug testing case called *James H. Burnley v. Railway Labor Executives Organization* (hereinafter "*Burnley*"). *Burnley* is a drug "impairment" case, while *Von Raab* is a drug "use" case. The distrinction between drug impairment and drug use provides the critical distinction between the legal justification for and objection to the drug testing programs involved in these two cases.

In *Burnley*, a pervasive drug testing program imposed by the Federal Railroad Administration (by delegation from the Secretary of Transportation, James Burnley) is challenged by the railway employees association. The testing applies to a wide range of railway workers and requires mandatory blood and/or urine tests upon the occurrence of certain events. For example, if an accident occurs involving fatalities, certain types of injuries, property damages, or environmental impact, employees *are required* to submit to testing *unless* the employer has specific information that an employee was *not* involved in the event. (Is this a presumption of guilt?) Urine samples are to be donated under visual observation (to avoid cheating), and .01% blood-alcohol or the presence of any drugs is deemed "impairment" and may result in employee discipline.

The testing program is designed to eliminate drugs and alcohol from the industry and deter on-the-job use of intoxicants.

Von Raab, on the other hand, involves a drug testing program (urinalysis) imposed on *all* persons seeking to be hired, promoted or transferred into certain jobs within the Customs Service. No suspicion is required nor must any event occur (other than the job application or request for transfer or promotion) in order to subject an employee to drug testing.

While the *Burnley* testing program seeks to determine whether employees involved in accidents were under the influence of drugs or alcohol, the *Von Raab* testing program is designed to disclose whether certain employees "use drugs." In fact, the *Von Raab* testing program cannot determine present impairment—only whether the employee has ingested drugs within a certain (disputed) period prior to the test.

The Customs program is designed to preserve a drug-free Service. No evidence exists that there is a drug problem within the Service, but it is believed that the testing program will provide a powerful deterrent to any future problem.

Candidates are given five days notice of the test. Failure to appear and give the required sample disqualifies the candidate for the position, although no adverse inference is supposed to be drawn from the employee's refusal to take the test. If, on the other hand, the candidate tests positive for the presence of drugs, he/she may be fired. Interestingly, during the five months in which the Customs Service was allowed to test (until an injunction was granted), over 3500 tests were given and only *five* tests came back positive—less than .001%.

In both *Burnley* and *Von Raab*, the employee association or union sought an injunction halting the administratively ordered testing plan. In *Von Raab*, a U.S. District Court in New Orleans found the testing program to be an unconstitutional "search" and granted an injunction against any further implementation of the program. The Customs Service appealed to the Fifth Circuit Court of Appeals, which vacated the lower court's decision and found the program constitutional, based upon the government's strong interest in a drug-free Service and the limited nature of the intrusion.

In *Burnley*, the situation was reversed. The U.S. District Court in Northern California upheld the testing program, and the employees appealed to the Ninth Circuit Court of Appeals, which reversed the district court, concluding that drug testing in the absence of individualized suspicion violates the Fourth Amendment rights of employees.

Both cases were appealed to the Supreme Court (and were consolidated for argument), and both cases deal with drug testing. However, issues raised by each are very different, thus explaining why third parties, uninvolved in the specific cases, chose to become involved as *amicus curiae*.

Why Friends Get Involved

Amicus curiae means in Latin a "friend of the court." A person or group with strong interest in or views on a case may petition the court to file a brief arguing in favor of the position it supports. Most courts have procedural rules governing the process by which an *amicus curiae* is permitted to file briefs. Unless all parties agree in advance, the *amicus* must petition the Court for permission to file its brief, tendering a copy of the proposed brief with the petition. Courts rarely allow the *amicus* to participate in oral arguments, so the role of the *amicus* is confined to submitting a written brief in support of its position. The *amicus curiae* most often appears in cases involving matters of public interest. Thus many cases before the United States Supreme Court involve *amici curiae* (plural of *amicus curiae*).

The National Fraternal Order of Police ["NFOP"] is the largest police organization in the United States, with over 190,000 members in 43 states. The NFOP's membership consists of active and retired full-time law enforcement officers at the local, county, state and federal level. The NFOP is vitally interested in the *Von Raab* case because law enforcement officers are frequent targets of drug testing programs, and *Von Raab* may substantially affect police departments throughout the United States. Accordingly, the NFOP sought and received permission to file a brief as *amicus curiae* in *Von Raab*. The NFOP did not, however, file such a brief in *Burnley*, and the reason why it didn't helps explain the difference, at least to the NFOP, between the two cases.

In *Burnley*, testing occurs after certain events (principally accidents). To the NFOP, while these events may not always be sufficient basis to justify testing, the *Burnley* testing program is at least triggered by some event that could be the result of drug usage. NFOP members understand the need to investigate the causes of accidents. Thus the NFOP finds the *Burnley* testing scheme far less objectionable than the *Von Raab* program, which involves testing not premised upon *any* suspicion of drug use whatsoever. The *Von Raab* program is status-based, mandating testing simply due to the job held (or to be held) by the employee. Further, the *Von Raab* program seeks to determine whether subjects "take drugs," as opposed to whether they are under the influence of drugs, thus essentially regulating off-duty conduct.

The role of the *amicus* differs from case to case, according to the nature of the interests involved. In some cases, a group may be concerned that the party with whom they are aligned may not adequately brief the issues. In other cases, an *amicus curiae* may support the position of a party to the case but for different reasons. In *Von Raab*, the NFOP chose to appear as *amicus curiae* because the issues to be resolved by the Court will likely affect the NFOP's members in greater numbers than the employee union that is the actual party to the case.

Accordingly, the NFOP's brief, although similar to that of the NTEU (the employees' union), raises the same issues in a different context, seeking to help the Court understand the implications of a decision permitting broad based, mandatory, no-cause required testing.

What We Argued

The first issue to be resolved in both *Burnley* and *Von Raab* is whether a drug test is a "search" for constitutional purposes and therefore subject to the Fourth

Amendment. The NFOP believes (and almost all lower courts that have confronted the issue have agreed) that the compulsory taking of urine samples constitutes a Fourth Amendment search.

If the taking of a urine sample is a Fourth Amendment search, then, absent one of the recognized exceptions to the warrant requirement, the government/employer is required to obtain a search warrant prior to taking a sample. The NFOP believes that none of the exceptions to the warrant requirement applies to drug testing. For example, one commonly used exception is "exigent circumstances," *i.e.*, that there was no time to get a search warrant without the chance of losing evidence. In *Von Raab*, however, where the test is not intended to determine present impairment, there is no exigent circumstance. Likewise, other exceptions to the search warrant requirement (such as the automobile exception, incident to arrest exception, etc.) do not apply. The only exception(s) that could be argued to apply are those relating to "consent" (that by applying for the job or the transfer or promotion to the particular position, the applicant has implicitly "consented" to the search), or administrative searches of heavily regulated industries (where, in the administrative context, certain searches *of places* [not persons] have been allowed due to the heavily regulated nature of the business).

The NFOP argues that neither of these exceptions apply in the *Von Raab* context. "Consent" must be voluntary, and making such consent a condition of continued employment is hardly voluntary. The exception to the search warrant requirement based upon administrative searches in heavily regulated industries has rarely been applied to searches of persons (as opposed to places like bars, junkyards, etc.). While both the *Von Raab* testing program and administrative searches generally are designed to deter conduct, there is something terribly wrong with searching a person without any probable cause (or even suspicion) simply as a means to deter conduct. Moreover, few could argue that it's appropriate to conduct searches of *everyone* in the hope of finding *someone* who is guilty.

Notwithstanding, the vast majority of lower court drug testing decisions have not required a search warrant. Instead, they have conducted a balancing test to determine the reasonableness of the program. In most cases, the courts have found the testing programs to be reasonable *if* based upon reasonable, individualized suspicion. The government in *Von Raab*, however, seeks to go one step further—testing without any suspicion whatsoever.

Ultimately, the NFOP's position boils down to the simple proposition that police officers "[d]o not lose Fourth Amendment rights merely because they work for the government instead of a private employer" (*O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 1498 [1987]) and "are not relegated to a watered-down version of constitutional rights" (*Garrity v. New Jersey*, 383 U.S. 493, 500 [1967]). In virtually all other contexts, searches must be conducted pursuant to either a warrant, an exception to the warrant requirement or, at the very least, reasonable suspicion. The Supreme Court required a "reasonable apprehension of danger" in *Terry v. Ohio*, 392 U.S. 1 (1968), for a police officer to even "pat down" or "frisk" a suspect to ensure the officer's protection. At least to police officers, a compelled (and observed) urine sample seems far more intrusive than a pat down. Accordingly, no less reasonable suspicion should be required for the drug test than is already required for the pat down.

Of course, the legal arguments of all parties in *Von Raab* are substantially more complex than can be set forth here. *Amicus* briefs were filed by numerous groups on both sides of the question.

Looking Ahead

What is likely to happen? How will the Court resolve both of these drug testing cases? What issues will be left after these cases are decided?

It is generally believed that the Court will uphold drug testing in the *Burnley* case—in part based upon the heavily regulated industry exception and in part based upon an argument that the government's interest in safe and efficient railroads outweighs the diminished expectations of privacy of the employees.

Von Raab will be more troublesome for the Court, but, it is believed, the Court will probably uphold the Customs Service drug testing program based upon the argument that by applying for the particular job, transfer or promotion, the employee "consents" to the drug test.

If the Court does hinge its decision in *Von Raab* upon consent, it will yet be faced with one last fact pattern (and a number of such cases are looming in the lower courts). How will the Court justify mandatory, across-the-board drug testing of *all* employees (without regard to any specific job)? Will it find that by applying to become a public employee, for example, an individual "consents" to any future intrusion the government may later deem to be necessary? Should the government decide that searching employees' homes (without any reasonable basis) is necessary some day, will it be argued that by agreeing to become a government employee, one "consented" to such searches?

It can only be hoped that the Court listens to its "friends." [*Editor's Note.* See page 41 for an article on the decisions in the cases. The Court did not listen to its friends, and its decision in *Von Raab* is not premised upon employee consent, but in most respects Mr. Phillips' predictions are right on target.]

Questions for Students

1. What constitutes a search?
2. Is a "search" different when speaking "constitutionally"?
3. What governmental interests are sufficient to override an employee's privacy interests?
4. Is the governmental interest in having employees not cause train wrecks, death and injuries stronger than its interest in simply having employees who are drug-free?
5. Does a public employee have an expectation of privacy in his bodily fluids?
6. Should the fact that drug tests can reveal other facts about the subject (*e.g.*, pregnancy, treatment for diseases, etc.) have an effect on your analysis of question no. 5?
7. If probable cause or reasonable suspicion is required to search a governmental employee's desk (*O'Connor v. Ortega*) or a high school student's purse (*New Jersey v. T.L.O.*), should a similar standard be required for drug tests upon governmental employees?
8. Is there anything wrong with conducting searches (with or without probable cause or reasonable suspicion) in order to *deter* crime, as opposed to *discover* crime?
9. If drug testing for applications to certain jobs is permissable, what jobs should require drug testing?
10. Should the standard for determining which jobs require drug testing be safety? Importance? Security?

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Drug Education

"Honest Mistakes" and the Exclusionary Rule/Secondary

David Morris and John Sullivan

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TRAILER

UPI/Bettmann Newsphotos

The theme of this lesson, search and seizure and the exclusionary rule, has always piqued student interest. How many classes, in courses relating to constitutional law, start with "What if . . ." questions? The following activity is designed to appeal to that inherent interest and to help students develop higher-order thinking skills.

Time to Complete

This unit plan took 15 class periods, but the individual lessons can be integrated into daily instructional plans.

Goals

As a result of this lesson, students will:

- apply inquiry and problem-solving/decision-making skills to other areas of constitutional study such as the Sixth, Seventh, and Eighth Amendments;
- gain substantive knowledge of rights and privileges in the area of search and seizure;
- engage in interactive learning by means of the lecture/discussion method.

Materials

- Case, *Maryland v. Garrison*, 107 S.Ct. 1013 (1987) (Handout 1, below)
- Fourth Amendment/Exclusionary Rule: *Mapp* through *Garrison* (Handout 2, inset)
- Analytical Model for Search and Seizure Problems (Handout 3, inset; see handout on page 22 for a somewhat different approach to the same problem)
- Decision in *Maryland v. Garrison* (Handout 4, inset)

Procedures

1. Distribute Handout 1, the case of *Maryland v. Garrison*, 107 S.Ct. 1013 (1987).
2. Define and delineate the student task. It is important to emphasize that the development of a well-reasoned argument based on inference and analogy, as well as facts and evidence, is the desired outcome, rather than a right answer.
3. Assign students to Supreme Court groups and give them

Handout 2: Fourth Amendment/Exclusionary Rule, *Mapp* through *Garrison*

EXCLUSIONARY RULE

Mapp v. Ohio, 367 U.S. 643 (1961):

By the Due Process Clause of the Fourteenth Amendment, all evidence obtained by searches and seizures in violation of the Constitution is inadmissable in a state court. Such evidence had been inadmissable in federal courts since 1914. The Court thus overruled *Wolf v. Colorado*, 338 U.S. 5 (1949).

USE OF INFORMERS

Aguilar v. Texas, 378 U.S. 109 (1964):

Provided a two-part credibility test of hearsay evidence from an informant: (1) Police must show why they believe informant ("veracity"), and police must state (2) the circumstances as to how the informant acquired personal knowledge of the crime.

REASONABLE EXPECTATION OF PRIVACY

Katz v. U.S., 389 U.S. 347 (1967):

Defines a search as follows: The "Fourth Amendment protects people not places. . . . What he [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

STOP AND FRISK

Terry v. Ohio, 392 U.S. 1 (1968):

Police may stop and frisk a citizen, and the activity will be reasonable under the Fourth Amendment even when the police act on reasonable suspicion rather than probable cause (limited to "pat-down" for weapons).

SCOPE OF SEARCH

Chimel v. California, 395 U.S. 752 (1969):

An officer may conduct a warrantless search of arrestee's person and the area within his immediate control (area from within which he may get a weapon or destroy evidence).

PLAIN VIEW DOCTRINE

Coolidge v. New Hampshire, 403 U.S. 443 (1971):

It is reasonable under the Fourth Amendment for the police to seize criminal goods inadvertently discovered in plain view when the police are where they have a right to be.

VOLUNTARY CONSENT

Schneckloth v. Bustamonte, 412 U.S. 218 (1973):

The government must show that consent to conduct a warrantless search was given voluntarily, and was not the result of duress or coercion, express or implied. Voluntariness is based on the totality of circumstances.

SEARCH INCIDENT TO A LAWFUL ARREST

U.S. v. Robinson, 414 U.S. 218 (1973):

A full-blown search conducted incident to a lawful arrest is acceptable even when the officer has no reason to believe that the suspect is concealing a weapon or evidence.

THIRD-PARTY CONSENT

U.S. v. Matlock, 415 U.S. 164 (1974):

Spouses and roommates are generally held to have the power to consent to the search of premises jointly possessed (shared space).

PUBLIC ARREST WITHOUT WARRANT

U.S. v. Watson, 423 U.S. 441 (1976):

An arrest in a public place without a warrant is reasonable under the Fourth Amendment.

WARRANTLESS SEARCHES OF AUTOMOBILES

U.S. v. Ross, 456 U.S. 798 (1982):

If probable cause exists to believe that an automobile contains criminal evidence, a warrantless search by the police is permissible, including search of closed containers in the vehicle.

HEARSAY INFORMATION FROM INFORMANT

Illinois v. Gates, 462 U.S. 213 (1983):

The judge or magistrate may make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband will be found in a particular place. [totality of circumstances]

"GOOD FAITH" EXCEPTION

U.S. v. Leon, 775 F.2d 302 (1984)

If the police rely in good faith on a warrant, issued by a magistrate, they cannot be deterred by threat of suppression. The standard for good faith is entirely objective, "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization."

WARRANTLESS SEARCH OF MOBILE HOMES

California v. Carney, 105 S. Ct. 2066 (1985):

A warrantless search of a mobile home based on probable cause is reasonable under the Fourth Amendment. [inherent mobility/lesser expectation of privacy]

HONEST MISTAKES

Maryland v. Garrison, 107 S.Ct. 1013 (1987)
See Handout 4.

the task of formulating the "Court's Opinion," with a majority as well as a dissenting opinion.

4. Debrief by including as much discussion of the process of decision-making as of the actual decision.
5. Distribute decision.

Evaluation

As a result of repeated experiences with the inquiry method, teachers may observe an increased ability among students to apply and test theories and explanations to problems, and to discuss strengths and weaknesses of various problem-solving strategies as the strategies apply to a wide range of topic areas. Students should demonstrate a greater awareness of their own problem-solving strategies and a development of their metacognitive skills (i.e., planning, monitoring, evaluating).

Tips from the Teacher

The teacher should model attitudes/dispositions which create a classroom environment that encourages risk-taking and a critical and creative thinking "spirit."

Handout 1: *Maryland v. Harold Garrison*, 107 S. Ct. 1013 (1987)

The defendant, Harold Garrison, was convicted in the Circuit Court, Baltimore City, of possession with intent to distribute heroin, and he appealed. The Maryland Court of Special Appeals affirmed his conviction, and Garrison appealed to a higher Maryland court. The Maryland Court of Appeals reversed and sent the case back for a new trial. The U.S. Supreme Court then accepted the case.

SYLLABUS

Baltimore police officers obtained and executed a warrant to search the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment." When the police applied for the warrant and when they conducted the search pursuant to the warrant, they believed that there

Handout 3: Analytical Model for Search and Seizure Problems

THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

BASIC MODEL

- I. Is the government activity a "search"?
  - A. If NO, the amendment does not apply to limit government [evidence admitted].
  - B. If YES, then was the government activity reasonable [see II below]?
  - C. "Search" defined by *Katz* (see Handout 2).
- II. Assuming a "search" [I above], was the government activity reasonable?
  - A. Reasonable searches based on warrant plus probable cause [evidence admitted].
  - B. Reasonable searches based on an exception to warrant and/or probable cause requirement [evidence admitted].
    1. Public arrest
    2. Exigent circumstances
    3. Incident to arrest
    4. Auto search
    5. Stop and frisk
    6. Plain view
    7. Consent search
  - C. If government activity is a "search" but unreasonable, then evidence is excluded.

Bibliography

Canon, Bradley, "The Exclusionary Rule: Have Critics Proven It Doesn't Deter the Police?" *Judicature* 62:398 (1979).

Cronin, Joseph D., "Good Faith Exception to the Exclusionary Rule." 13 *Massachusetts Lawyers Weekly* 147, 148.

Kamisar, Yale, "How We Got the Exclusionary Rule and Why We Need It." *Criminal Justice Ethics* 1:4 (Summer 1982).

"The Exclusionary Rule." *American Bar Association Journal* (February, 1983).

Handout 4: *Maryland v. Garrison*, 107 S.Ct. 1013 (1987)

In a 6-3 decision, the Court held for the state of Maryland. Justice John Paul Stevens spoke for the majority.

(1) The fact that the search warrant was broader than appropriate because it was based on the mistaken belief that there was only one apartment on the third floor of the building did not retroactively invalidate the warrant, and (2) whether the warrant was interpreted as authorizing search of the entire third floor or only the apartment of McWebb, the search of Garrison's apartment by mistake was valid because objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the other third floor premises. Stevens said the "officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment."

Justice Harry A. Blackmum, dissenting, wrote that ". . . officers' error . . . was not reasonable under the circumstances." The "words of the warrant were plain and distinctive," clearly saying that detectives were to search only McWebb's apartment, not Garrison's.

Justice Blackmum, who was joined in dissent by Justices Brennan and Marshall, argued that the majority, by allowing "honest mistakes" to obviate Fourth Amendment problems, was ignoring the "special protection" that the High Court has reserved for searches of homes.

was only one apartment on the premises described in the warrant. In fact, the third floor was divded into two apartments, one occupied by McWebb and one by Garrison.

Having conducted an investigation, including a verification of information obtained from a reliable informant, exterior examination of the three-story building at 2036 Park Avenue, and an inquiry of the utility company, the officer who obtained the warrant concluded that there was only one apartment on the third floor and that it was occuppied by McWebb. When six Baltimore police officers executed the warrant, they fortuitously encountered McWebb in front of the building and used his key to gain admittance to the first floor hallway and to the locked door at the top of the stairs to the third floor. As they entered the vestibule on the third floor, they encountered Garrison, who was standing in the hallway area. The police could see into the interior of both McWebb's apartment to the left and Garrison's to the right, for the doors to both were open. The police searched Garrison's apartment in the belief that it was McWebb's apartment. Only after Garrison's apartment had been entered, and heroin, cash and drug paraphernalia had been found, did any of the officers realize that the third floor contained two apartments. As soon as they became aware of that fact, the search was discontinued. No further search of Garrison's apartment was made. However, even a limited search discovered contraband and provided the basis for Garrison's conviction for violating Maryland's Controlled Substances Act.

In granting certiorari, the Supreme Court said that the case presented two separate constitutional issues, one concerning the validity of the warrant and the other concerning the reasonableness of the manner in which it was executed.

Task: Formulate an opinion in *Maryland v. Garrison*. Discuss the constitutional issues separately.

ISSUE 1: VALIDITY OF SEARCH WARRANT

Consider Article 26 of the Maryland Declaration of Rights: "That all warrants, without oath of affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or person in special, are illegal and ought not be granted."

Consider the warrant clause of the Fourth Amendment, which categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized."

In *Steel v. U.S.*, 267 U.S. 498 (1925), the U.S. Supreme Court held that the particularity-of-description requirement is satisfied where "the description is such that the officer with a search warrant can with reasonable effort ascertain the identity of the place intended."

Question: Does a factual mistake (that there was only one apartment on the third floor of the building at 2036 Park Avenue) invalidate a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding of the building floor plan?

ISSUE II: REASONABLENESS OF MANNER IN WHICH WARRANT WAS EXECUTED

Consider *Brinegar v. U.S.*, 338 U.S. 160 (1949), in which the U.S. Supreme Court held that "Because many situations which confront offices in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on fact leading sensibly to their conclusions of probability."

In *Silverman v. U.S.*, 365 U.S. 505 (1961), the U.S. Supreme Court held that "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion."

Question: Did the execution of the warrant violate Garrison's constitutional right to be secure in his home?

David Morris teaches at R.J. Reynolds High School in Winston-Salem, North Carolina. John Sullivan teaches at Bedford High School in Bedford, Massachusetts. This activity is adapted from Constitution Sampler: In Order to Form a More Perfect Lesson Plan, *written by the SPICE II teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law.*

Drug Education

Drug Testing: Is It Constitutional?/Secondary

Connie Hankins

This lesson relates the current concern over drug use to Fourth Amendment search and seizure issues. There is a lot in the news these days about whether it is constitutional to test individuals to find out whether they're using drugs. (See page 14 and page 49 for articles about two current drug testing cases.) This lesson allows students to examine the drug testing issue and to make decisions about whether it is constitutional. Students will role play situations where drug testing might protect other people's safety, as well as a school situation. Should air traffic controllers be tested? Is it constitutional to test them for the safety of the passengers? Should workers at nuclear power plants be tested? Should teachers, principals, and students be tested?

Students are put in these situations to develop their own opinions. Because of the widespread use of drugs and drug testing, students might face one of these situations in the future.

This activity would be appropriate for law education or government classes in grades nine through twelve.

Time to Complete

Six or seven class periods (50 to 60 minutes). The activity can easily be broken into two separate lessons. The teacher can simply use the search and seizure materials as an entire lesson (using Handouts 1 and 2), or the teacher can distribute the handouts on search and seizure as an introduction to the activity on drug testing. If used separately, the lessons will take two or three class sessions apiece.

Goals

As a result of this lesson, students will:

- explain the rationale behind the Fourth Amendment;
- list common situations in which a search warrant is not required;
- analyze factual situations in order to determine whether a search is lawful;
- analyze situations in which drug testing might or might not be appropriate.

Materials

- Pretest/Posttest (Handout 1, inset)
- Search and Seizure Questions Under the Fourth Amendment (Handout 2, below; see page 19 for a somewhat different approach to the same type of analysis)
- Questionnaire on Drug Testing (Handout 3, inset)
- Scenarios (Handout 4, inset)
- *Schmerber v. California* (Handout 5, inset)

Procedures

1. Day One: Introduce the Fourth Amendment by reading it to the class. Then give students a pretest (Handout 1) to determine what situations they feel are covered by the amendment. Allow five to ten minutes to complete the handout. Then collect the handout and tally the students' responses
2. Give each student a copy of Handout 2. Students should read this out loud in class and discuss it. The teacher may conclude the lesson at this point by having students answer the following questions: What are the exceptions to the search warrant/probable cause clause? What are the requirements for a search warrant? What is the meaning of probable cause?
3. Day 2: Begin class by reviewing the previous day's activities. The teacher can ask similar questions to the ones asked the day before. Then give the students the same test (Handout 1) they took earlier. Allow the same five or ten minutes for them to complete this posttest and tell you why they believe the searches are or are not reasonable. Each student should then be given a copy of *Schmerber* (Handout 5). (Teachers can use other Fourth Amendment cases if desired.) There should be enough time left in the class period for the teacher to note the key points in the case. Students can then finish reading the case for homework.
4. Day Three: Students can begin by answering the following questions about the Schmerber case. In what court did the trial take place? What was Schmerber charged with? Was he convicted? Do you think there was a fair search and seizure in the case? After discussing the case for three-fourths of the class period, hand out the questionnaire (Handout 3) and have students complete it.
5. Days Four and Five: Divide the class into three groups. Each group will be given one scenario (Handout 4). Allow students five to ten minutes to read and discuss the scenario. Then allow group members to decide what roles they will assume. Suggested roles are given below; the teacher can add more if needed. It is important to make sure that each student is given a part in the role play. Allow one or two class periods for students to plan their role plays. Each group should be encouraged to be creative. If possible, the teacher could call in a resource person familiar with drug testing to watch the role plays and react to them.

Suggested roles for Scenario I: (See Handout 4) 1) pilot, 2) passenger, 3) union representative, 4) air traffic controller, 5) television reporter. Scenario II: 1) power

Handout 1: Pretest/Posttest

For each of the following situations indicate whether, in your opinion, the police officer conducted a reasonable search and seizure. Explain why or why not.

1. **Jim Smith was home one evening when two police officers knocked on the door. When Mr. Smith answered the door, they identified themselves and asked if they could speak to him. Smith let the officers in and asked what they wanted. They said that they had received information that stolen jewelry and furs were hidden in the apartment. They asked Smith for permission to search the apartment, and he gave them permission. They conducted a search and found some furs and jewelry. Smith said they belonged to his wife. The police arrested Smith.**
2. **Burt Johnson was stopped for having a broken tail light and arrested for driving after his license had been revoked. Before taking Johnson to the station, the police searched him and found a package containing cocaine inside the pocket of his jacket. Johnson was also charged with possession of drugs.**
3. **Jessica Falcon was returning to this country after spending two weeks in Europe on a skiing trip. Her luggage was searched by customs officials upon arrival and nothing was found. The customs official also examined her ski poles. They came apart and packages of heroin were found inside. She was arrested for possession of drugs.**
4. **The police were chasing a man who had just robbed a bank. The man had a gun. He ran into a building. The police chased the man to the third floor, where they saw him enter an apartment and close the door. The police forced their way into the apartment and arrested him. Then they searched the chair he had been hiding behind and found a gun, which they seized.**
5. **While on patrol, a police officer passed a parked car. The officer looked into the car through the closed window and saw a shotgun on the back seat. The owner of the car returned and was asked if he had a license for the gun. When he said he did not he was arrested.**
6. **Armando Schmerber was at the hospital being treated for injuries that had occured as a result of an automobile accident. Schmerber was the driver. Police arrested him and directed a physician to withdraw a blood sample from him against his wishes. As a result of the blood test, Schmerber was arrested for driving under the influence of an intoxicating liquor.**

Handout 3: Questionnaire on Drug Testing

1. Do you think there are jobs in government that should require drug testing?
   Yes _____ No _____
2. Would you consent to a drug test in order to keep your job?
   Yes _____ No _____
3. Do you think employers should or should not require drug testing as a condition of employment?
   Yes _____ No _____
4. Do you care if your teacher uses drugs?
   Yes _____ No _____
5. Do you care if your teacher uses drugs while on the job?
   Yes _____ No _____
6. Would it bother you if one of your lawmakers used drugs daily?
   Yes _____ No _____
7. Do you think a person could or should be fired because he or she refused to take a drug test?
   Yes _____ No _____
8. Do you think drug testing is fair?
   Yes _____ No _____
9. If you were a manager, would there ever be a time when you would want to test your employees for drugs?
   Yes _____ No _____
10. Do you think police officers should be tested for drug use?
    Yes _____ No _____
11. Do you think people should be allowed to use drugs whenever or wherever they choose?
    Yes _____ No _____

Handout 4

SCENARIO I

A large, international airport is rumored to have a problem with drug use among its air traffic controllers. This is a highly stressful job, and many observers are most sympathetic to the pressures controllers are under. At the same time, everyone is concerned about passenger safety. There is a debate about the constitutionality of the government, as an employer, testing individuals for drugs. Is drug testing accurate? Can it detect present impairment because of drugs? Past impairment? Should the government be allowed to test these controllers in order to ensure the safety of the many people who are flying in and out of the airport, or should the privacy of the controllers (and, by extention, the privacy rights acknowledged and protected by our society) be the controlling value?

SCENARIO II

A nuclear power plant is being constructed near a medium-sized city. This type of plant could prove to be extremely dangerous if precautions are not taken. The builders must be very careful in selecting the people who will construct the power plant. Several times in the past, hazards have developed because of poor work done by this particular construction company. After checking into the causes of this inferior work, it was determined that much of it was caused by workers who were using drugs. Is drug testing an appropriate way of addressing this problem? How accurate is drug testing? Can it detect present impairment because of drugs? Past impairment? Is drug testing constitutional if it is done by a private corporation? Does a utility—which is heavily regulated—qualify as a private employer, or is it in effect an extention of the government and thus covered by constitutional guarantees? If the utility *is* a private employer, is the threat of nuclear disaster enough that the government should be allowed to test construction workers for drugs?

SCENARIO III

A high school has been dealing with increased use of drugs and alcohol among the students and faculty. The local newspaper has covered drug use at the school thoroughly. Some think it has blown the situation out of proportion. Parents are calling the school and the school board demanding that immediate action be taken to find out which faculty members are using illegal drugs. Parents are requesting that a mandatory drug test be given to all faculty members, including the principal. Is such a test, conducted by a government employer, constitutional? If you were a teacher, would you want to be subjected to the test just to hush the parents? Can the school dismiss a teacher who refuses to take the test? As a student, would you be willing to be tested? Do you think other students should be tested? If only some students are tested, what criteria should be used to select them?

plant coordinator, 2) construction worker, 3) personnel director, 4) local homeowner, 5) local business person, 6) newspaper reporter. Scenario III: 1) principal, 2) newspaper reporter, 3) teacher, 4) parent, 5) student, 6) school board member.

6. Day Six: Students act out their scenarios. Each role play should take between ten and fifteen minutes. After completing all three, the teacher (and resource person, if applicable) can debrief the class. Students should be able to see how others might feel about drug testing and be able to come to a decision as to whether they would or would not allow drug testing in each case.
7. Day Seven: Begin the day by administering the questionnaire (Handout 3) again. Then compare the first results to the second results. Finally, have students write about why their views did or did not change. This should serve as a summative evaluation.

Handout 2: Search and Seizure Questions Under the Fourth Amendment

The Fourth Amendment reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

Handout 5: Armando Schmerber v. State of California (summary)

In 1966, a young man named Armando Schmerber was arrested at the hospital where he was being treated for injuries he sustained in an accident while driving his car. Despite Schmerber's protests, a police officer ordered that a blood sample be taken from Schmerber by a doctor. The report of the chemical analysis of the test, indicating intoxication, was admitted into evidence at the trial. He was convicted in a Los Angeles (California) Municipal Court of driving an automobile while under the influence of intoxicating liquor. Schmerber argued that the state violated his right to due process of law under the Fourteenth Amendment, his privilege against self-incrimination under the Fifth Amendment, and his right not to be subjected to unreasonable searches and seizures under the Fourth Amendment. Schmerber took his case to an appellate court, but the Appellate Department of the California Superior Court affirmed the conviction. The U.S. Supreme Court also affirmed the conviction and held that according to the facts, Schmerber's constitutional rights had not been violated by the compulsory blood test and the admission of the evidence at the trial.

particularly describing the place to be searched, and the person or things to be seized.

Here is an outline to help students think about whether a particular search violates the amendment.

1. First, you must determine if the government activity is a search.
   a. If yes, see #2 (below)
   b. If no, the amendment does not apply.
2. If the activity is a search, you must then determine if the government activity was reasonable.
3. What is a reasonable search?
   a. To be a "reasonable" search it must be based on a search warrant issued when there is probable cause.
   b. Requirements for a search warrant:
      - Each search warrant can allow the search of only one person, place or vehicle.
      - The warrant must identify the exact area to be searched.
      - The warrant must state what type of property is being searched for.
      - The warrant must be issued by a neutral and properly authorized judge.
      - The person who issues the warrant must believe there is probable cause.
   c. Probable cause requirements:
      - Probable cause to search requires evidence that leads a reasonable person to believe that by looking in a specific place he or she will find specific criminal goods.
      - Probable cause to arrest requires evidence that leads a reasonable person to believe that a crime has been committed and the person to be arrested is the one who committed the crime.
4. Exceptions to the search warrant and/or probable cause requirements (i.e., instances in which the police may search or seize without a warrant or probable cause):
   a. *Search incident to a lawful arrest:* The police can search a person and his immediate surrounding area for hidden weapons or evidence that could be destroyed (you do not need probable cause).
   b. *Items discovered in plain view* can be seized by an officer if the officer was in a place where he or she had a right to be.
   c. *Automobile search* is reasonable if the police officer has probable cause to believe there is contraband in the automobile.
   d. *Stop and frisk:* The police officer must reasonably think a person is behaving suspiciously and may be armed.
   e. *Voluntary consent:* If the person to be searched agrees, the police can conduct a search without a search warrant or probable cause.
   f. *Hot pursuit*: If police are in hot pursuit of a suspect, they do not have to get a search warrant to enter a building they have seen the suspect enter. They can also seize evidence they find while in hot pursuit of a felon.
   g. *Emergency situations*: Sometimes police do not have time to get a warrant because of an emergency like a bomb scare, a person's life in danger, or some other urgent situation.
   h. *Border and airport searches:* Customs agents may search without probable cause or a warrant. Also, a metal detector search is legal in an airport, to detect bombs or weapons.

Evaluation

The informal evaluation is ongoing. The teacher must make sure the students understand by asking questions throughout the lesson to check comprehension. The final evaluation is a summation of what they learned in the lesson. The teacher may also add an objective test based on the search and seizure guidelines.

Tips for the Teacher

This activity could be used with grades six through eight by taking out the case study. All other material can be understood by younger students.

If the teacher wants to spend more time on this activity, there are a variety of other cases dealing with search and seizure available. Ask a local lawyer or judge who is familiar with the issue to suggest some major cases, or use the following list: *U.S. v. Choate, U.S. v. Knotts, Smith v. Maryland, Katz v. U.S., U.S. v. Karo, Illinois v. Gates, U.S. v. Watson, Chimel v. California, Coolidge v. New Hampshire,* and *California v. Carney* (for case cites and a brief description of most of these cases, as well as some other search and seizure cases, see page 18.)

Connie Hankins teaches at Miami Central Senior High School in Miami, Florida. This activity is adapted from Constitution Sampler: In Order to Form a More Perfect Lesson Plan, *written by the SPICE II teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law.*

Should Drugs

YES!

William Chambliss

I am for legalization of drugs unequivocally, unabashedly, and determinedly. I am as opposed to drug addiction as anyone. I have done research in many different countries, as well as in the United States. I have seen the devastation that drugs can do. I have seen people murdered. I have seen people's friends taken away to jail for possession for narcotics.

The one thing that becomes clear to me, is that what we are doing is not working, will not work, and cannot work. For all of the good intentions, for all of the good rhetoric, the facts belie the possibility that it can work. We are, in fact, engaged in a process that is not only devastating to human lives, it is devastating to whole countries.

Why We Can't Stop Drugs

The drug industry in the United States is a $130 billion a year industry in three drugs alone: cocaine, heroin, and marijuana. That is just the United States; that doesn't count Europe, Asia or the rest of the world. That industry is larger than the gross national product of all but about 12 nations in the world. It has a gross volume of business that is larger than the gross volume of business of any multinational corporation.

You can get a packet of cocaine in Columbia for $4,000. You can sell it immediately in Miami, after a $400 plane ride, for $20,000. If it is heroin, you can sell it for $50,000. If you take it to the street, you can get upwards of $500,000 for it. Four-fifths of the people in the world don't see that much money in a lifetime. And you are going to tell me that a law enforcement system can ever be sufficient to stop that drug from coming in? You're not. You cannot. It cannot be done.

Or rather, it cannot be done by means that we can sanction. It was done in China, after the revolution of 1949, by killing thousands of people. That is not what we want to do.

We have already filled our prisons with people accused of drug usage, possession, or dealing. Forty percent of the prisoners in the federal prison system are in for drugs. Twenty to thirty percent of those in the state and local jails are in for drugs. Seventy five per cent of those jailed for drugs are in for possession. If you go out tomorrow in every city in the United States and arrest every drug pusher, every 12-year-old kid running crack and cocaine, put them in prison tomorrow, the day after tomorrow I guarantee you that all you have done is create new jobs for the people who are not working now. If you think that you can convince 13-year-old kids that it is better to work at McDonald's for $3.50 an hour than it is to sell drugs for $300 a day, you are mistaken. They will sell them; they will risk their lives.

The law enforcement system has completely failed. We are interdicting more drugs than ever before, and more drugs are coming in. We have been interdicting approximately 10% of the drugs coming into the United States for the last 20 years. That is what we are still interdicting. Our budget for fighting drugs has gone from 3 billion to 8 billion dollars a year since 1980. We have had no impact. Indeed, the price of cocaine has gone down on the streets. It has gone down in spite of the drugs that are caught.

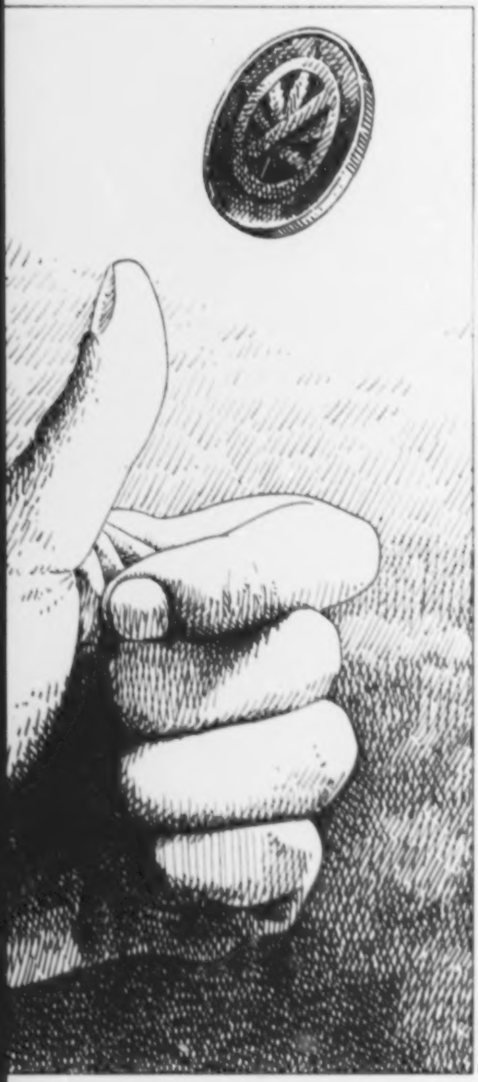
The chief of police of San Jose, California, summed it up when he said, "80 percent of the effort of the police force in San Jose is spent on drug interdiction, and we are not having a slight impact on drugs in San Jose." Now, I am not saying that it can't be done in some small towns. The mayor of Annapolis is convinced that they have done it in Annapolis. But it cannot be done on a nationwide scale. The profits are too great; where the profits are that great the corruption is inevitable.

What we are doing with our present system is financing the most massive, vicious, organized crime networks the world has ever known. Networks extend into countries all over the world. We are corrupting the governments of Panama,

(continued on page 27)

2265 2

Be Legalized?



Tom Herzberg

NO!

Thomas Scorza

Professor Chambliss aids us very much by being so forthright in his presentation, and by making very plain the argument on behalf of legalization or decriminalization. However, I think his argument has two main tricks to it, one of which is overall and theoretical, and the other of which is more practical.

Don't Give Up

The overall theoretical argument, which I think is mistaken, is that since we cannot be perfect, then let's give up. That is essentially what the argument boils down to. No one – no prosecutor, or DEA agent, or FBI agent – believes that law enforcement efforts and prosecutions are going to eliminate drugs from the United States. There is not going to be a drug-free America ever. There is not going to be a murder-free America; there is not going to be a divorce-free America; there is not going to be an America free of abuse of women. But we never accept the argument in the other fields that because we cannot totally eliminate those things, we should stop contesting them.

Essentially, I think what Professor Chambliss wants us to believe is that because we cannot, in fact, eliminate drugs, and that is apparent, we should despair. That leads to an understatement by him of the effect that law enforcement *does* have on drugs and on drug dealing. I can name you some people who would find it very surprising that drug enforcement efforts have had no impact. I have sent many people to prison for the rest of their lives because of laws and punishments are that tough now. Many other people caught up in drug investigations, and sent to jail for less than life, find that prison is the beginning of a new life for them.

My main point is that it is deceptive to go from an argument which admits that there is not going to be complete success, to an argument that says let's throw in the towel. By the way, some people in the antidrug movement help the professor in that regard because their presentations and their ideas often strike me as being quite utopian. They assert an unobtainable standard, and they lay themselves open for an argument that their goals are unrealistic, so let's give up.

Hidden Costs

The second part of my response is practical, more nitty-gritty. People who engage in cost benefit analysis have all the cards. The guy who lists the costs and the benefits always wins the argument, because it is very easy to show the benefits and then say, "well, there are too many costs and the costs outweigh the benefits." It is very easy to see, for instance, that if we decriminalize narcotics we would save $8 billion that is now being spent on law enforcement. You would drive organized crime people out of narcotics trafficking; that is easy to see. You would probably lower the number of crimes that are committed by drug addicts in order to get money to buy their drugs.

The harder things to see are the costs on the other side, and those the professor is not quite accurate about. It is inconceivable to me that making narcotics legal will not increase consumption. The experience of alcohol prohibition in the United States is quite contrary to what the professor will have you believe. Prohibition *reduced* per capita consumption of alcohol by two-thirds to three-quarters, and consumption went up again after Prohibition.

If there is increased consumption, it is inconceivable that there won't be increased addiction. If you drive automobiles more, there are going to be more accidents, because that is the way human beings are. If you increase the amount of one thing, the basic activity, you are going to increase the amounts down the line of the portions of it. Increased consumption will lead to increased addiction. It is inconceivable that there won't be increased deaths; increased accidents; increased loss of productivity; increased lost study hours; and increased opportunities, by the way, for organized crime

(continued on page 56)

Questions and Answers on Drugs

[Editor's Note: The following responses to audience questions took place after Mr. Scorza and Professor Chambliss debated at the LRE Leadership Seminar.]

Q. Can we win the "war" on drugs?

A. [Scorza] I think sustained law enforcement efforts against narcotics traffickers, as well as sustained efforts to reduce demand by education and counseling, will have an effect. My backup argument is that even if we get no better than we are right now, I think it will prevent us from getting a lot worse.

I know people who drink, I know people who smoke, and I know people who use narcotics. The one thing that seems to me critical is narcotics. If I were a doctor and didn't have enough time to operate on everybody who needed it, I would distinguish between the nose job and the life-threatening illness. It is a world of limited resources. There is not time to do everything; there are not resources to do everything. That is why we're putting our resources into stopping drugs. We have had a good impact on narcotics trafficking. I think we can have more of an impact by putting more resources on the job. We could also continue to do more on the demand side.

Q. The drugs that we consider evil are determined a lot more by our cultural perceptions, our overall historical perspective, than by any kind of rational, real physiological distinction between one drug and the other. In Saudi Arabia, for example, they believe alcohol is a very dangerous drug, far more so than some of the drugs we outlaw, and they have a very strict prohibition against alcohol. So before we rush to eschew legalization, let's think about it a little more carefully, especially about what is culturally determined.

A. [Scorza] What you say is obviously true. The policy that you should follow in Sparta is not the same policy you follow in Athens. The reason is that Spartans are different from Athenians. The reason we wouldn't have the same policy in the United States as in Saudi Arabia is that we are different from them in many ways.

It never surprises me that you have these great stories of success from Scandinavia or some other place. I'll bet you if you did the same study on the Scandinavian population of Chicago, or some place in Minnesota, you would have the same result. But do you know what? They are not representative of the community as a whole.

We have to talk about *this* society as a whole and where we stand. We have been able for generations to have a socially acceptable level of usage with alcohol. There is not that place for narcotics usage. That is the world that your daughter or your son – and my daughters – face. I have a 17-year-old daughter. I am prepared to try to tell her how she can become a responsible user of alcohol at dinner or at a party. I like having the law on my side when I say, "but narcotics is something else," or "come down to court one day," which my children have done. By the way, that is a very effective type of legal education.

[Chambliss] I am very disappointed that the conversation continues to link marijuana, hashish, cocaine and heroin as though it was one substance with one effect. They are entirely different. Marijuana is not a narcotic, it doesn't have the same effect as the others. Heroin is very different from cocaine. This is one of the problems with law enforcement's definition of reality. It refuses to acknowledge differences that are crucial. One of these days, I venture to say that your daughter is going to smoke a joint and is going to discover that she has been lied to. Then when someone says, "have a little coke," she may think she has been lied to about that. Then they say crack, then they say heroin, and she has been lied to – and how does she know the difference. It is one of the real prices we pay for the present system.

[Scorza] One of the things we do in our drug education program at the United States Attorneys Office is to make exactly that point. We give lectures and literature that distinguish these drugs one from another. So I agree with Professor Chambliss on that point. We have to be careful to give the true scoop, especially to high school students, because they are going to find out the true scoop anyhow, and you don't want to squander your credibility.

Q. Are young black males the biggest users of drugs?

A. [Chambliss] Probably the proportion of young black males who use cocaine is somewhat higher than the proportion of young white males. Certainly the proportion of young black males who use heroin is much higher than whites. That's not true with marijuana. It is widely used everywhere, probably more by whites than by blacks.

The answer lies in the culture. The young black males you are talking about are not the ones who are in college, or who have an ability to get somewhere in their lives. They are the ones for whom life is a dead-end already. They have little place to go, and drugs offer relief from that. I did research in Thailand on drugs. In Thailand it's the same kind of phenomenon. The people living in the hills are devastated by disease and misery, and opium provides relief from that disease and misery, even though they know that the consequences of it are very severe.

I would imagine that young, black, *middle class* males have a *lower* incidence of drug use than young white, middle class males. The class phenomenon becomes extremely important because it has to do with life opportunities. You must realize that these drugs are a relief, a great relief. In fact, when heroin was first developed, it was developed by the Bayer Pharmaceutical Company. It was developed as a legal drug. They used to have advertisements in the *National Geographic* and the *Saturday Evening Post*. On one side the advertisement would say, "For headaches, neuritis and neuralgia, take Bayer Aspirin." On the other side it would say, "For anything else take Bayer Heroin." And they were right.

Q. How much would legalized drugs cost?

A. [Scorza] If you legalize narcotics, the cost obviously would go down. If these guys are making the efforts that they have to now to get the money to buy narcotics, it is hard for me to believe that they are going to be dissuaded from using them when they get cheaper. Don't forget that we are dealing with people who are already acclimated to usage, if not addicted to usage.

[Chambliss] You could highly tax drugs, and they would not necessarily get cheaper. So it depends on how one legalized them. As far as heroin is concerned, it would be available to addicts through medical doctors at a very low cost, as long as they registered as addicts. But it would not be available at this low cost to people who did not register as addicts. People who did not register as addicts, however, could get access to it, but it would be at a high cost, and the cost would be determined by the price that would keep illegal narcotics trafficking down, but also keep consumption down as much as possible.

Q. Assuming legalization happens, should there be age limits for drugs and alcohol?

A. [Chambliss] Absolutely – age limits and distribution limits. I would not legalize it as we have legalized alcohol. We legalized alcohol by allowing it to be advertised, by allowing it to be shown as a commodity that is very beneficial to life. On the contrary, drugs would be legalized with notifications much more stringent than appear on packets of tobacco. They would say, "These are very dangerous substances, they should only be taken under very careful consideration, and a doctor's guidance." I think there is evidence that this would have the effect of reducing consumption.

Q. What about the psychological differences, if any, in dependency on various drugs? Don't drugs cause psychological as well as physiological problems?

A. [Chambliss] One of the implications of your question is that drugs in a society always have a bad effect. I couldn't agree with you more. We are looking at a problem that there is no good solution for.

There is not much research on the impact of different drugs as far as addiction is concerned. What little there is suggests that of the drugs we are discussing, alcohol is by far the most addictive. One way to get at that is to ask people who have taken these drugs, "Once you took these drugs, how difficult was it for you to stop?" I don't place a lot of credibility in these studies, but they are all we have to go by. Alcohol is the highest, 40%; cocaine is about 18%; tobacco, 14%; heroin, 5%; marijuana less than 1%. Users experience these levels of difficulty giving the drug up after taking it for a sustained period of time.

Evidence of a more ethnographic nature about heroin suggests that it is far more difficult to give up than that. My guess is that the samples used in the studies asking about heroin didn't really get to the hard core heroin users, and that is why that statistic came out low. I am confident enough to think that we probably won't find as great an addiction to these drugs, with the exception of heroin, if they were legalized, as we have to alcohol. That doesn't mean we won't have addicts.

Finally, we need to create clinics that will help these people. Right now, the waiting period for cocaine addicts or heroin addicts – people going in for help – in almost every city is six to eighteen months. Now think about it. These are people who, first of all, have to say I am a criminal, who get on record, who now are identifiable as drug addicts, as people who will have drugs and who can be busted at any time. Then they have to wait six to eighteen months to get treatment. A massive campaign to cut that time down needs to be implemented whether or not we legalize drugs.

[Scorza] An article on the subject of legalization quotes studies that show that of alcohol drinkers, 10-15% become alcoholics; about the same percentage of marijuana users become addicted; of cocaine users, 70% become addicts. I don't know if this article is right or Professor Chambliss's study is right. But can you imagine making policy in an area where the experts have that kind of difference?

Yes!

(continued from page 24)

Columbia, Bolivia, Thailand, Turkey, and many other countries whose economy depends upon the drugs that they export.

Why Legalization

There is no simple solution to the problem. There is no magic wand that can be waved. There is no way that you can morally preach to people about drugs and expect to change this pattern instantly. Moral preaching will go a long way. Education will go a long way, but it is only one of many things that have to be done.

The cost of legalizing drugs will be less than the costs we are paying. Whenever this discussion is broached, it must be broached in terms of what is the cost now, and what will the cost be if we legalize drugs. It must also be approached by a definition of legalization. Do you mean that you are going to put packets of cocaine in the drugstore for kids to go in and buy when they can reach the counter, like we do with cigarettes in cigarette machines? Of course not. Do you mean that heroin should be available to anyone that wants to use it? Of course not. But there are models that have been used, even in this country, models prior to 1914 which were effective in containing the spread of drug addiction.

In 1938 the market in drugs in the United States was estimated by Congress at one billion dollars. Today it is $130 billion dollars. It will be $250 billion dollars in another 30 years, no matter what we do, as long as we try to stop drugs through law enforcement.

If we were to legalize drugs, it would be necessary to follow the models of other countries whose programs have been not entirely successful, but more successful than our own. Great Britain, which the law enforcement agents like to tell you is a failure, is an immense success compared to our system. The number of addicts in Great Britain for many years, until at least the late 60s, stayed almost minuscule. It went from about 1,200 at the end of World War II to 2,500 by 1968. Changes in national health policy in Europe generally, as well as the immigration of heroin addicts who were looking for a drug program that they could get into, has increased that number, perhaps to 15,000 today, minuscule compared to the 500,000 to 2 million heroin addicts we have in the United States. Their problem with organized crime and drugs is not insignificant but, compared to ours, it's very minor. Their problem with corruption of the police is not insignificant, but compared to ours it pales.

Every city in the United States is fraught with police corruption. Not every policeman is corrupt, for sure, maybe only a minority in most places, but every city has corrupt police officers, corrupted by the massive profits from drugs. That won't disappear, but it will certainly decline. If you take the profits out of organized crime, $130 billion dollar a year net income, you are going to do a lot to reduce the power – the political power, the law enforcement power – of organized crime in the United States.

Racially Motivated?

Let me address another point. Jesse Jackson has spoken against legalization; Congressman Charles Rangal has spoken against legalization; other leading blacks in the country have as well. Is legalization really a racist point of view? Are we saying that blacks are using drugs, and that if we allow drugs to be legalized, we are really writing the death warrants of those particular people?

But the leading proponent of legalization is also black. He is the mayor of Baltimore, Mayor Schmoke, who has taken an incredibly courageous stand on this issue. He was a prosecutor before he became mayor. He has had much the same experience as most people who have dealt with drugs.

The black community is not unified. It is divided on the issue. So I don't think that in any way this is an issue that splits the black and the white communities against each other.

It is true, absolutely true, that drugs are rampant in the ghettos. This is the case today when it is illegal, when it is criminal – you can get them anywhere. Where I live, which is about 80% black and Hispanic, I can go out of my door any time and get cocaine and heroin and marijuana, just like that. So can you. It is everywhere. That is after 75 years of it being criminalized.

What we want is a program, a plan, that is gentler and kinder, to use the words of our president. And a gentler and kinder program cannot be found by knocking people on the head, by creating SWAT teams, by having people attacking cars when they go into neighborhoods where drugs are being sold. It cannot be found by having people in these communities at war with each other, where communities are taken over by drug dealers because the police are ineffective to stop it.

We Must Educate

Legalizing drugs and educating people about their impact will be effective. That is exactly what needs to be done. This is not a despairing idea. In fact, it is an idea that has some hope for improving the present circumstance.

If we say drugs are legal we are not saying it is OK for everyone to take them. We know from the recent experience with alcohol and tobacco that educating people about detrimental effects has had a decided impact on their usage. Smoking is prohibited on airplanes; smoking in restaurants is segregated. These things have changed in the last 10 years due to education. They have not changed because we had law enforcement people bursting into restaurants, finding someone smoking, and dragging him off to jail. It wouldn't have worked if we had. If we were to prohibit tobacco tomorrow, organized crime would move in and there would be tremendous profits in tobacco sales.

The Prohibition Analogy

I want to say one thing about Prohibition. We are still in an era of Prohibition. We have never gotten out of it. Drugs and alcohol were prohibited in the 1920s, then alcohol was said to be legal.

There is a difference between alcohol and narcotics. Alcohol is a lot more harmful than marijuana. People on heroin can in fact function very well, as they do. They do in England, where they have legal access to the drugs. The occupational group with the highest incidence of heroin addiction in the United States is the medical profession. I guarantee that large numbers of people have been operated on and well cared for by heroin addicts who are medical doctors. They have a supply of heroin that can sustain their habit. They don't have to go out and steal. They don't have to look over their shoulder for policemen who are coming after them. It is the illegal nature of the narcotics that creates the horrendous effect on people's lives. It is not the narcotic itself.

A Foreign Parallel

In the Scandinavian countries, when they legalized alcohol after Prohibition, they also instituted a campaign to educate the people about the dangers of alcohol. They raised the price of alcohol by taxing it heavily. The incidence of alcoholism, and of drinking, and of cirrhosis of the liver and other diseases associated with alcohol, went down.

They also instituted a campaign to severely punish people who used alcohol and then drove automobiles. They were so successful that opinion polls in Scandinavian countries today show that people think the second most serious crime is driving under the influence of alcohol.

These are the kinds of programs that should go hand in glove with legalization – programs that educate, but also programs that make it expensive, that make it a sacrifice.

Legalization Scenario

Just a word about what our country would look like if we did legalize drugs. Marijuana has been decriminalized in 12 states. In those states the evidence is that the use of marijuana has declined. The use of marijuana has declined generally in the United States as well. If heroin were medicalized, the illegal use of heroin would also, in all likelihood, decline. It would not be eliminated, but it would decline.

We would also help fight AIDS. The use of dirty needles spreads AIDS. In New York City, fifty percent of the people who have contracted AIDS in the last two years have contracted it from needles. AIDS spreads to the heterosexual community rapidly through the use of dirty needles by heroin addicts. That epidemic in itself should be sufficient to have a drastic change in policy, because it can't be stopped by having law enforcement people arresting addicts.

People are dying from overdoses of heroin, cocaine, and crack because they are unaware of what proportion they are getting in the drug that they are taking. This is not new, it has been happening since 1914. The same thing is true with marijuana. Marijuana has been the cause of very few deaths, and it is the cause of very little addiction. However, what deaths there have been from marijuana have been deaths caused by marijuana that was spread with paraquat, or other chemicals, in an attempt to keep it from growing as a plant. None of these deaths would occur if drugs were legalized.

Miseducation

In every respect, what we are doing is insanity; it is a disaster and it will continue to be that way. We have to educate people about the differences between drugs. Everyone knows that beer, and wine, and whiskey have different effects, that they

(continued on page 56)

Classroom Materials on Substance Abuse

EDUCATION FOR PREVENTION

2270

SPECIAL COMMITTEE ON YOUTH EDUCATION FOR CITIZENSHIP

2

o problem in our society is more pressing than drugs. And in o segment of society is the drug menace more deeply felt than mong young people.

Because of the gravity of the drug problem, the Office of Juve-ile Justice and Delinquency Prevention (OJJDP) has funded a ajor national effort, in which law-related education projects ave created curricula and resources to help schools fight drugs. everal of these curricula are highlighted here, and the brief escription of materials you are now reading is itself supported y OJJDP funds.

Law-related education is well suited to deal with the drug enace because it does not stress abstract concepts but the orld as it is. The LRE curricula—and all the curricula we clude here—stress the realities of peer pressure and other fac-rs which drive youngsters to drugs, while showing the conse-uences of drug use and providing means of resisting drugs and e pressures to use them.

Many other materials and programs exist to combat drugs. or further information about them, or about law-related edu-ation and the OJJDP drug education program, contact the BA's Special Committee on Youth Education for Citizenship, 750 N. Lake Shore Drive, Chicago, IL 60611; telephone: 12-988-5735.

Corinne Levitz, Project Coordinator
Special Committee on Youth
Education for Citizenship

GUIDES TO CURRICULA

Title:	**Drug Prevention Curricula: A Guide to Selection and Implementation**
Grade Level:	K-12
Contents:	This publication represents the current thinking of experts in the substance abuse prevention field about drug prevention education. It shows what to look for when adopting or adapting ready-made curricula, and suggests important lessons that ought to be part of any prevention-education sequence, including those developed by schools and school systems for their own use. Concerned educators, parents, and citizens can use this guide to select or design, and implement, curricula that are educationally sound. Chapter topics include: what the overall goals of a good K-12 curriculum should be; instructional approaches for different grade levels; ways to reach high-risk populations and children in special education classes; and guidelines for the curriculum selection process, plus information on staff training and the need for administrative leadership. [Developed by the U.S. Department of Education, Office of Educational Research and Improvement.]
Cost:	Bulk quantities of up to 25 copies are available free as long as supplies last.
Order From:	National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20852; telephone: 301-468-2600.

Title:	**Curricula and Programs for Drug and Alcohol Education**
Grade Level:	K-12
Contents:	This directory of curricula and programs for alcohol and drug abuse prevention contains nearly 200 resources, many of which are in use in the western U.S. The list of resources includes information on the publisher, grade level, cost, and a brief description. It is classified into three sections: (1) instructional materials to be used in the classroom; (2) programs which have a broader focus outside the classroom; and (3) resources which are useful supplements to curricula and programs. The first part of the directory is a brief guide to evaluating drug and alcohol curricula. A revised edition will be available in May, 1989.
Cost:	One free copy to residents of Alaska, California, Hawaii, Idaho, Washington, Nevada, Montana, Oregon, Wyoming, and the Pacific islands. The cost to other states is not yet determined. This directory may be duplicated for distribution.
Order From:	Western Center for Drug-Free Schools and Communities, Northwest Regional Educational Laboratory, 101 S.W. Main Street, Suite 500, Portland, OR 97204; telephone: 1-800-547-6339, extension 480; in Oregon, telephone: 503-275-9480.

Title:	**A Guide to School-Based Drug and Alcohol Abuse Prevention Curricula**
Grade Level:	Elementary; middle; high school; also comprehensive K-12 programs.
Contents:	This user-friendly guide for consumers of school curricula is unique in that it not only reviews and rates the content of approximately 31 curricula, but also reviews and rates research written about their effectiveness. The curricular materials are rated on a number of different criteria, including the quality of their skill-building (e.g., skills in decision-making, problem-solving, coping with stress in both drug and general life situations); their factualness; their currentness; and their cultural sensitivity. The research on the effectiveness of the curricula also is rated on a number of different criteria including indication of change in student knowledge, attitudes, and behavior. This guide gives basic information on the curricula, including a description and review of the content, and the cost. The entries in this guide were compiled from a national search for field-tested curricula.
Cost:	$19.50, plus approximately $1.50 for shipping and handling. (This guide will be ready for distribution by June, 1989).
Order From:	Linda Salser, Distribution Center Coordinator, Health Promotion Resource Center, Stanford Center for Research in Disease Prevention, 1000 Welch Road, Palo Alto, CA 94304-1885; telephone: 415-723-1000.

Title: **Schools and Drugs: A Guide to Drug and Alcohol Abuse Prevention Curricula and Programs**
Grade Level: K-12
Contents: This publication reviews 25 prevention programs and curricula, and highlights several multi-element projects and resources. Its purpose is to help educators and other interested individuals select and implement effective drug and alcohol abuse prevention curricula and programs. The listings were reviewed and evaluated by an outside consultant. The publication is divided into sections on curricula, programs, multi-element projects, and resources. Also included is an assessment tool which teachers and school districts can use for assessing and selecting curricula.
Cost: Free
Order From: Crime Prevention Center, California Attorney General's Office, P.O. Box 944255, Sacramento, CA 94244-2550; telephone: 916-324-7863.

CURRICULA

Title: **Drug and Alcohol Awareness Day K-12 Workshop Manual**
Grade Level: K-12
Contents: This 160-page manual is a practical guidebook for a one-day school program that provides a step-by-step approach to youth awareness about drugs and alcohol.
Cost: $31.
Order From: Alcohol Council of Nebraska (ACN), 412 Lincoln Center Building, 215 Centennial Mall South, Lincoln, NB 68508; telephone: 402-474-0930.

Title: **Here's Looking at You, 2000**
Grade Level: K-12
Contents: Drug education program which goes beyond simply teaching kids to "say no" to drugs to teaching them *how* to do so. The core of the program is its "refusal skills" technique, the goals of which are to allow kids to have fun, to keep their real friends and to stay out of trouble. In addition to teacher guides, the comprehensive K-12 curriculum includes workshops, videotapes, games, books, puppets and software. The curriculum seeks to involve parents and incorporates cooperative team learning.
Cost: The entire K-12 curriculum sells for $7,250. Prices for individual grades range from $525 to $1,395.
Order From: Comprehensive Health Education Foundation, 22323 Pacific Highway South, Seattle, WA 98198; telephone: 206-824-2907.

Title: **Project Charlie**
Grade Level: K-6
Contents: Project Charlie (Chemical Abuse Resolution Lies in Education) is a K-6 curriculum which focuses on promoting the social and emotional growth of children. The goals are (1) to build self-esteem in chidren and provide them with better skills for living; (2) to teach children how to say no to drugs, how to build healthy relationships, and how to make good decisions; (3) to assist teachers and school administrators in promoting an atmosphere of mutual respect and acceptance; and (4) to provide learning opportunities for parents focusing on building self-esteem at home. The curriculum includes lesson plans, worksheets, games, and directions for making teaching aids. Teachers interested in implementing the program attend special training workshops.
Cost: The training program is held three times a year in Minneapolis, Minnesota, at a cost of $525 per person. This cost includes 5-day training session, the curriculum materials, and some meals. Trainees are taught how to train other teachers in using this curriculum. On-site training in one's own community, for a maximum of 45 teachers, is also available ranging from a total cost of $2000 to $3500 (plus expenses for two trainers) depending upon whether the training is 1, 1½, or 2 days in length. This curriculum is *not* for sale separately from the training.
Order From: Project Charlie, 5701 Normandale Road, Edina, MN 55424; telephone: 612-925-9706.

Title: **Preventing Drug Abuse: An Activity Pack**
Grade Level: 5-8
Contents: Designed to encourage students to exchange feelings and information about drug abuse, this learning packet centers around a cassette which contains 12 dramatizations illustrating some of the crises which often result from drug abuse. After listening to the dramatic episodes (which are keyed to specific substances), students are prompted to discuss their reactions by questions provided on a reproducible worksheet. Among the topics covered are the symptoms of drug abuse, dangers of chronic addiction, steps to prevention, and ways of seeking and finding help.
Cost: Cassette, 40 spirit masters, and guide: $34.00 [Catalog #: JWW 715].
Order From: Produced by J. Weston Walch. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **Legal Education for Youth Program: Substance Abuse and the Law**
Grade Level: 6
Contents: The sixth grade lesson of this K-12 curriculum specifically addresses the topic of "Substance Abuse and the Law." Portions of the materials refer to California law; however, they can be adapted to other states. The accompanying teacher's manual includes exercises and hypotheticals, as well as a decision-making model. In

addition to the teacher's manual, there is a student lawbook and a volunteer handbook which contains one lesson that a trained volunteer can teach as part of a classroom program.

Cost: $85.00 plus $5.00 shipping for 35 student lawbooks (workbooks), one teacher's manual, one volunteer handbook, and one play involving peer pressure and substance abuse (includes 12 scripts).

Order From: Legal Education for Youth Program, Orange County Bar Foundation, 1850 E. 17th Street, Suite 217, Santa Ana, CA 92701; telephone: 714-542-3943.

Title: **Drugs in the Schools**

Grade Level: Middle School

Contents: Eight lessons, with teacher's guide, on confronting drugs within a middle school. The lessons are part of the drug education initiative of the Office of Juvenile Justice and Delinquency Prevention.

Cost: To be determined [available summer, 1989].

Order From: Louis Rosen, Center for Civic Education, 5146 Douglas Fir Road, Calabasas, CA 91302; telephone: 818-340-9320.

Title: **Can I Handle Drugs? A Self-Assessment Guide for Youth**

Grade Level: 7-12

Contents: Addressed directly to adolescents, this guide helps young people assess how using chemicals can harm (or is already harming) them in specific, significant areas of their life. Fourteen brief sections focus on such topics as feelings, behavior, school, work, friends, family, self-concept, growing up, recreation, spirituality, and wellness. A good catalyst for discussion, this 28-page workbook can be used with individuals or groups.

Cost: 1-4 copies: $4.95 each; 5 copies and over: $4.45 each [Catalog #: JN 102].

Order From: Produced by Johnson Institute. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **Self-Discovery: Developing Skills**

Grade Level: 7-12

Contents: Strategies designed to help teenagers meet their personal needs and gain self-acceptance without resorting to unhealthy or potentially destructive habits. Containing many photographs, illustrations, charts, activities, questionnaires, and real-life accounts, this 159-page book provides a series of self-directed experiences to enable students to appreciate themselves, set goals, manage stress, build relationships, make decisions, and help themselves to change and grow.

Cost: Student edition [Catalog #: LL 102]: $12.95; teacher's guide [Catalog #: LL 103]: $17.95 (free teacher's guide with order of 20 or more student editions).

Order From: Produced by Management Sciences for Health. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **Alcohol and Other Drugs: Self-Discovery**

Grade Level: 7-12

Contents: Basic facts about alcohol, tobacco, marijuana, and other drugs, and strategies to avoid abusing them. Students learn to distinguish between responsible and irresponsible drinking, to resist peer pressure and advertising, and to feel good without drugs. Designed to be used alone or as an accompanying module for *Self-Discovery*, this engaging 59-page workbook helps students form their own rules and values while considering the effects their choices have on others.

Cost: Student edition [Catalog #: LL 104]: $8.95; teacher's guide [Catalog #: LL 105]: $9.95 (free teacher's guide with order of 20 or more student editions).

Order From: Produced by Management Sciences for Health. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **Coping with Substance Abuse**

Grade Level: 7 and up

Contents: How do alcoholics and drug addicts behave? What is it like to have a parent, brother, or sister who abuses drugs or alcohol? What does chemical abuse do to a friendship between two people when one of them begins to abuse drugs? This 145-page book answers these and other questions, relating case histories which offer insight into how chemical abuse affects friendships and families. Throughout, the book defines co-dependency, shows how adjusting to a drug-dependent person perpetuates the problem, and indicates how to recognize and help a substance abuser.

Cost: Hardback [Catalog #: RRP 194]: $12.95.

Order From: Produced by Rosen. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **Innerchoice: An Expanded Version of Innerchange with a Drug/Alcohol Abuse and Smoking Prevention Program**

Grade Level: Junior and senior high school versions

Contents: Built around small-group discussions and supporting activities, the lessons in these comprehensive kits guide students in the assessment of their goals, beliefs, values, feelings, and thoughts. Covering over 40 topic areas, this amplified version of the *Innerchange* program includes a new segment comprised of three instructional units focusing directly on substance abuse prevention. The kits also include a reproducible book of "experience sheets" (textual materials for students) which are to be done individually, and an 11" x 17" chart listing information about various drugs. Activities and topics are interdisciplinary and can be related to major subjects in the curriculum. The reading level is appropriate for less-skilled students. It is packaged in a display box with a 112-page leader's manual and an additional 47-page instructor's guide keyed specifically to a substance abuse prevention segment. The numerous instructional units cover such topics as communication, values, risk-taking, decision-making, problem-solving, conflict management, the realities of drugs, responsibility, and justice.

Cost: Complete junior high level kit [Catalog #: HDT 100]: $245.00; complete senior high level kit [Catalog #: HDT 101]: $245.00.

Order From: Produced by Palomares. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **The Drug Problem, the Constitution, and Public Policy**

Grade Level: Middle and secondary

Contents: Five lessons of varying difficulty, with the simplest usable at either the middle or secondary level, and the most difficult at the secondary level. The lessons include both student materials and a teacher's guide. These lessons are part of the drug education initiative of the Office of Juvenile Justice and Delinquency Prevention.

Cost: To be determined [Available Fall, 1989].

Order From: Carolyn Pereira, Constitutional Rights Foundation, 407 S. Dearborn, Suite 1700, Chicago, IL 60605; telephone: 312-663-9057.

Title: **A Resource Guide to Assist Law Students for Participation in a High School Law-Related Education Drug-Alcohol Education Program.**

Grade Level: High school

Contents: Six lessons are featured in this 198-page book, which is part of the drug education effort of the Office of Juvenile Justice and Delinquency Prevention. Though the lessons are intended to be taught by law students coming into the classroom to assist teachers, they are very easily adaptable to being taught by teachers alone. Lessons include both student materials and law student/teacher resources.

Cost: $10, with discounts available for bulk orders.

Order From: Brian Swerine, Phi Alpha Delta Public Service Center, 7315 Wisconsin Avenue, Suite 325E, Bethesda, MD 20814; telephone: 301-961-8985.

TEACHER EDUCATION AND TRAINING RESOURCES

Title: **What Works: Schools Without Drugs**

Grade Level: Adults (parents, teachers, principals, and community leaders) and students

Contents: This handbook provides a practical synthesis of the most reliable and significant findings available on drug use by school-age youth. It tells how extensive drug use is and how dangerous it is. It lists resources and organizations that parents, students, and educators can turn to for help. It tells how drug use starts, how it progresses, and how it can be identified. Most important, it tells how drug use can be stopped. It recommends strategies—and describes particular communities—that have succeeded in beating drugs. This book is designed for those who want to prevent drug abuse. Its premise is that parents and teachers need to educate themselves about the dangers of drugs so that they can then, more effectively, teach their children. It espouses that children must be taught that drug use is morally wrong and harmful to society.

Cost: Free.

Order From: U.S. Department of Education. Call toll-free number: 1-800-624-0100; in the Washington, DC metropolitan area, call 202-732-3627. Or send your name and address to Schools Without Drugs, Pueblo, CO 81009.

Title: **Drugs, Kids, and Schools: Practical Strategies for Educators and Other Concerned Adults**

Grade Level: Adults (parents and teachers)

Contents: This 210-page resource book analyzes the causes of drug abuse among junior and senior high school students and offers specific approaches on how to deal with it. Discussions of the social roots of drug abuse, interviews with students who candidly discuss why they use drugs, and information on the substances themselves provide thorough background information for teachers and parents. The main focus, however, is on approaches to understanding and communicating with students and presenting activities for values clarification, decision-making, assertiveness training, peer-counseling, and improving self-concept. Includes extensive references to further reading, films, and materials for students.

Cost: 1-4 copies: $10.95 each; 5 copies and over: $9.85 each [Catalog #: GDY 108].

Order From: Produced by Good Year/Scott, Foresman. May be ordered through Health Education Services (see sidebar on last page for address).

VIDEOTAPES

Title: **The Drug Avengers**

Grade Level: 1-6

Description: The year is 2050 and the planet Earth has a terrible drug problem. Earth's leaders organize a group of students to go back to the 20th century to teach children about the dangers of drug abuse. Each episode has its own message and can be used as a self-contained unit. These shows urge caution about ingesting unfamiliar substances: encourage students to trust their instincts when they think something is wrong; show that drugs make things worse, not better; explain that offering or accepting an offer of drugs is not the right way to become someone's friend; and demonstrate that there are ways to refuse drugs without losing friends. An extensive teacher's guide is available as well as a guide for parents. [Close-captioned for the hearing impaired; 1/2" VHS.]

Length: Ten five-minute animated adventures – four for grades 1-3, five for grades 4-6 and a pilot episode introducing the characters.

Cost: *To Purchase:* $34.95 plus $2.00 shipping for video package (includes video cassette, teacher's guide, and one poster).

Order From: *To Purchase:* Drug Avengers, 1970 Chain Bridge Road, McLean, VA 22109-0670; telephone: 1-800-358-5858.
To Borrow: Modern Talking Pictures (see sidebar on last page for address). Borrowing may involve some shipping cost. Videotape may be copied by borrower. [Catalog #: 24167V.]

Title: **Fast Forward Future**

Grade Level: 4-6

Description: This is an interactive drug abuse prevention video program for elementary schools, featuring the actor Richard Kiley. This adventure/fantasy involves three elementary students who discover the Fast Forward Future machine which allows them to peer into the future and see what will happen if they use drugs and what will happen if they remain drug-free. The three scenarios illustrate the children learning refusal skills, decision-making skills, and how to deal with family members who have alcohol or drug addiction problems. This videotape deals with sensitive drug-related issues, such as the special needs and stresses facing children of alcoholics and other high-risk youth. A teacher's guide includes topics, learning objectives, and classroom activities based on the videotape. [1/2" VHS.]

Length: Three 15-minute episodes.

Cost: *To Purchase:* $95.00 plus $5.00 shipping and handling (includes teacher's guide).

Order From: *To Purchase:* Weston Woods Institute, Weston, CT 06883; telephone: 1-800-243-5020 (outside of CT); 203-226-3355 (collect in CT).
To Borrow: Modern Talking Pictures (see sidebar on last page for address). [Catalog #: 24161V.]

Title: **Straight Up**

Grade Level: 4-6

Description: Actors Lou Gossett, Jr., and Chad Allen appear in this pre-teen drug awareness story about a boy named Ben who faces peer pressure to use alcohol and drugs. Ben experiences a number of adventures during his struggle to resist drugs. Through his journeys, he gains knowledge, self-esteem, and the ability to see through illusion. [1/2" VHS.]

Length: Six 15-minute adventures.

Cost: *To Purchase:* $19.95 plus $2.50 for shipping and handling, and $3.50 for the 48-page teacher's guide. (Total cost: $25.95).

Order From: *To Purchase:* KCET Video, Room C32, 4401 Sunset Boulevard, Los Angeles, CA 90027; telephone: 1-800-228-5238.
To Borrow: Modern Talking Pictures (see sidebar on last page for address). [Catalog #: 24158V].

Title: **Dare to Live (Atrevete a Vivir)**

Grade Level: 5-8

Description: This video against drug abuse portrays a realistic view of a kid's fight against peer pressure. It promotes a message to children that they are capable of making their own choices. It is in English with Spanish subtitles, and uses rap music throughout the video. [1/2" VHS.]

Length: 26 minutes

Cost: *To Purchase:* $100.00 (includes shipping and handling). (No teacher's guide available).
To Preview: $30.00 (applies toward purchase price). May be kept for 10 days.

Order From: Bi Lingual Cine-Television, 2601 Mission Street, #703, San Francisco, CA 94110; telephone: 415-647-8010.

Title: **Lookin' Good**

Grade Level: 7-9

Description: The purpose of this videotape is to discourage student drug and alcohol use, while encouraging peer support among students for being drug-free. In keeping with this goal, teachers may wish to use cooperative learning techniques to study the videos. Activities offered in the teacher's guide include brainstorming, small and large group discussions, and writing assignments. Active student participation is emphasized throughout the suggested activities. This series is based on actual incidents involving drug and alcohol use. The two programs spotlight refusal skills and show how a handful of concerned students – with the help of their school and community – build a peer support group to resist peer pressure to use drugs. Although the two dramas underscore the importance of prevention, they also recognize that some students have already been exposed to drugs and may need help. [1/2" VHS.]

Length: Two 29-minute dramas.

Cost: *To Purchase:* $200.00 (includes shipping costs, and 2 free teacher guides).
To Rent/Preview: $50.00 (applies toward purchase price). May be kept for 2-3 weeks.

Order From: *To Purchase:* Phil Lucas Productions, P.O. Box 1218, Issaquah, WA 98027; telephone: 206-392-9482.
To Borrow: Modern Talking Pictures (see sidebar on last page for address). [Catalog #: 24129V].

Title: **Straight at Ya**

Grade Level: 7-9

Description: Kirk Cameron, teen favorite from ABC's "Growing Pains," is featured in this video set in a junior high classroom. Cameron replaces the class monitor, who has been assigned to show a drug prevention film to a class when a teacher is unexpectedly absent. Discarding the out-of-date film, Cameron engages students in discussions

that cover such topics as peer pressure, mustering the resolve to say no, and choosing a positive and healthy life style. Classroom scenes are supplemented by animation and flashbacks that give the students an opportunity to learn how they can more effectively deal with real-life situations. [1/2" VHS.]
Length: 44-minute, three-part comedy.
Cost: Videotape is not yet available. It will be sold for approximately $15.00, plus 75¢ for the teacher's guide. Teacher's guide also is available separately.
Order From: *To Purchase:* Scott Newman Center, 6255 Sunset Boulevard, Suite 1906, Los Angeles, CA 90028; telephone: 213-469-2029.
To Borrow: Modern Talking Pictures (see sidebar on last page for address). [Catalog #: 24128V].

Title: **Private Victories**
Grade Level: 10-12
Description: These programs emphasize that young people can achieve private victories by caring enough about themselves to reject drugs. Students learn that deciding against drugs can influence friends to do the same. The stories focus on a group of high school students who experience first-hand the devastating effects that drug use can have on academic performance, health, and family relationships. [1/2" VHS.]
Length: Four 29-minute dramas.
Cost: *To Purchase:* $29.00 plus $5.00 for shipping and handling (includes three teacher guides).
Order From: *To Purchase:* Producers International Corp., 3921 N. Meridian Street, Indianapolis, IN 46208; telephone: 317-924-5163.
To Borrow: Modern Talking Picture (see sidebar on last page for address). [Catalog #: 24130V].

Title: **The Addictive Personality: Who Uses Drugs and Why?**
Grade Level: 7-12
Description: This filmstrip introduces the problem of physical and psychological dependency in a two-part program which discusses how any normal activity such as eating, sleeping, or drinking can develop into an addictive habit. Also examined are the effects of addiction on emotional growth, the influence of family and friends on addiction, and techniques for combatting destructive dependency. A teacher's guide contains objectives, discussion questions, and suggested activities.
Length: Approximately 30 minutes.
Cost: $119.00 for 2 color filmstrips, 2 cassettes, and guide; $139.00 for filmstrips on VHS video, and guide. [Catalog #: HRM 707V]
Order From: Produced by Human Relations Media. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **The Danger Zone: Substance Abuse**
Grade Level: 7-12
Description: A series of short, nonpreachy monologs dramatizing the dangerous consequences of drug abuse. In three segments, teenagers describe why they started using drugs, the price they paid, and their eventual road to recovery. As they matter-of-factly tell their stories, on-screen labels identify the behaviors being described: loss of control, alienation, mixed messages, increased dependency denial, loss of family trust, and many more. Contemporary in tone, the program could be very helpful as a nonthreatening starting point for class discussion.
Length: Approximately 20 minutes.
Cost: VHS videocassette: $89.00. [Catalog #: MER 100V]
Order From: May be ordered through Health Education Services (see sidebar on last page for address).

Title: **How Can I Tell if I'm Hooked?**
Grade Level: 7-12
Description: Introducing a working definition of addiction, this program shows how to identify the difference between use and abuse of drugs and alcohol. Common danger signals—such as loss of control regarding use, continued use despite negative consequences, and denial of a problem—are shown to apply as well to overeating, cigarette smoking, workaholism, or risk taking. The program also discusses the factors most likely to initiate a drug dependency and asks a series of questions serving as a decisive test of addiction.
Length: 26 minutes.
Cost: $125.00 for 2 color filmstrips, 2 cassettes, and guide [Catalog #: SUN 330C]; $139.00 for filmstrips on VHS video, and guide [Catalog #: SUN 330V].
Order From: Produced by Sunburst. May be ordered through Health Education Services (see sidebar on last page for address).

Title: **Turning Off: Drugs and Peer Pressure**
Grade Level: 7-12
Description: Using real-life dramatizations to illustrate its points, this two-part program specifies how peer pressure causes drug abuse, and suggests simple techniques teenagers can use to cope with this complex problem. Part 1, "Everybody's Doing It," explores the varieties of peer pressure, whether tacit or out in the open, and pressure originating within oneself from a misconception of what it takes to "belong." Part 2, "Standing Up for Yourself," consists of a minicourse in assertiveness training with role-playing suggestions so that the class may practice the techniques being discussed. A teacher's guide contains discussion questions and activities, scripts, and a bibliography.
Length: Approximately 30 minutes.
Cost: $125.00 for 2 color filmstrips, 2 cassettes, and guide [Catalog #: SUN 164]; $139.00 for filmstrips on VHS video, and guide [Catalog #: SUN 164V].

Order From: Produced by Pleasantville Media. May be ordered through Health Education Services (see sidebar on this page for address).

Title: **Teen Substance Abusers: A Unit of Study**
Grade Level: 7-12
Description: Four rehabilitated adolescents and their family members relate their experiences with substance abuse in this four-part program. Interviews reveal how they began using alcohol or drugs, why they continued using and abusing them, and how they ultimately chose to quit to regain control of their lives. The accompanying teacher's guide provides lesson plans, student activities, and scripts on alcohol abuse, marijuana abuse, multiple drug abuse, and cocaine abuse. "Pointers for Parents/Tips for Teens," a parent reference booklet, is included with the program.
Length: Approximately one hour.
Cost: $145.00 for 4 color filmstrips, 4 cassettes, duplicating masters, and guide [Catalog #: FH 212].
Order From: Produced by United Learning. May be ordered through Health Education Services (see sidebar on this page for address).

Title: **It Only Takes Once**
Grade Level: 10-12
Description: This videotape, produced by the Knoxville, Tennessee, Barristers, promotes a "Don't Get High and Drive" message to teenagers. It features young people telling their stories about the consequences they have suffered from driving under the influence of drugs or alcohol. With its popular-music backdrop, this engaging videotape can be effectively combined with a multidisciplinary team of volunteer speakers (lawyers, law enforcement personnel, and probation officers) who can discuss the law-related consequences of driving under the influence of alcohol or controlled substances.
Length: Approximately 20 minutes.
Cost: Approximately $20.
Order From: Knoxville Bar Association, P.O. Box 2027, Knoxville, TN 37901; telephone: 615-522-7501.

Computer Software

Title: **Drug Series**
Systems: Apple
Grade Level: 4 and up
Activity: These computer programs combine to offer a comprehensive drug awareness unit. The first program offers a series of tutorials introducing basic information on drugs, drug abuse, and peer pressure. The second program provides role-playing scenarios which give students experience handling drug-related peer pressure. Both programs focus on the importance of saying "no" to drugs. Illustrated with graphics.
Cost: $104.50 for complete set: 2 Apple diskettes and guides [Catalog #: MF 138A]. Separate programs are available for $55.00 each – "Drugs: Their Effect on You" [Catalog # MF 139A]; and "Drugs: Who's in Control" [Catalog # MF 140A].
Order From: Produced by Marshware. May be ordered through Health Education Services (see sidebar on this page for address).

Title: **Substance Abuse Education**
Systems: Apple II; IBM-PC Compatible
Grade Level: 7-12
Activity: This series is designed to augment strategies for primary prevention of substance abuse. It contains up-to-date information on drugs, their effects, reasons for abstaining, and alternatives to substance abuse. These computer drug abuse prevention programs include facts, tests and games that can be played with two people or one person against the computer.
Cost: $39.95 for each of seven disks. [Catalog #s SAE-1: Alcohol: Drinking and Not Drinking; SAE-2: Marijuana: Keep Off the Grass; SAE-3: Introduction to Psychoactive Drugs; SAE-4: Six Classes of Psychoactive Drugs; SAE-5: Support Group Data Base; SAE-6: Tobacco; and SAE-7: Cocaine.]
Order From: Substance Abuse Education, 670 S. 4th Street, P.O. Box 13738, Edwardsville, KS 66113; telephone: 913-441-1868.

Additional Classroom Resources and Information

Title: **Drug Video Program**
Grade Level: Elementary, junior high, and high school
Description: Videos on drug prevention, with teacher guides and some parent and community guides available.
Cost: School districts receive a copy of all of the videotapes direct from the individual producers without charge. Tapes also are available on loan from state educational agencies, ED Regional Centers for Drug-Free Schools and Communities, and the National Clearinghouse for Alcohol and Drug Information.
Order From: Office of Public Affairs, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202; telephone: 202-732-4637, Contacts: Louie E. Mathis, Director; Jim Bradshaw, Assistant to the Director.

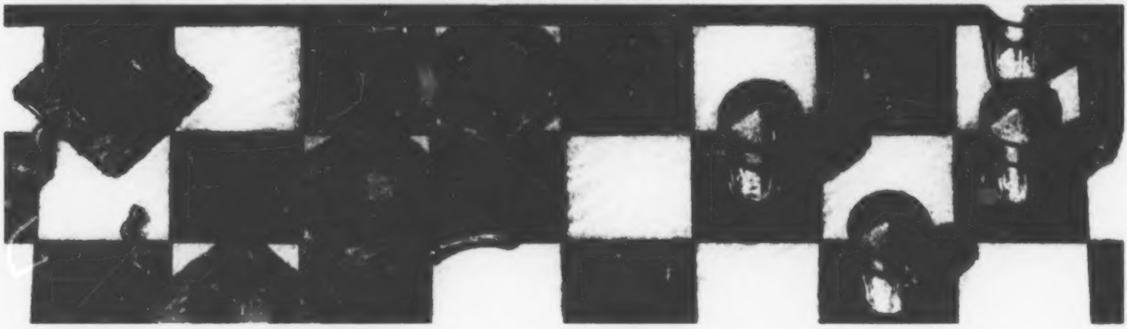
Ordering Information

Those interested in ordering materials through Health Education Services (a division of Social Studies School Service) can contact them at 10200 Jefferson Boulevard, P.O. Box 802, Culver City, CA 90232-0802; telephone: 800-421-4246; or in California, call collect at 213-839-2436. Those interested in borrowing videotapes through Modern Talking Pictures can contact them at 5000 Park Street North, St. Petersburg, FL 33709; telephone: 813-541-5763. Borrowing may involve some shipping cost.

Drug Education

Planning to Solve a School Drug Problem/Middle School

Center for Civic Education



Troy Thomas

A Plan to Solve the Drug Problem

This lesson, which will easily take two class periods, attempts to help the students realize that drug problems in schools are everyone's problem. Students, teachers, administrators, and parents must all work together to solve the problem. It also attempts to help the students clearly identify the responsibilities of the school in dealing with areas such as health and welfare, enforcing the law, protecting individual rights, and protecting the welfare of the community. Students are asked to evaluate various courses of action in light of the responsibilities of the school.

Lesson Objectives

At the conclusion of this lesson:

1. Students should be able to identify and explain some of the school's responsibilities in developing a plan to deal with drugs in the schools.
2. Students should be able to evaluate some of the proposed actions the school might take in light of the responsibilities of the school.
3. Students should be able to explain how fulfilling one set of responsibilities might conflict with fulfilling other responsibilities.
4. Students should be able to evaluate rules about illegal drugs in their own school.

Student Reading: What Responsibilities Should Be Considered in Creating a Plan to Solve the Drug Problem?

The drug problem is serious in our nation. There are drugs at many middle schools. At Jackson Middle School, the principal, Ms. Sage, knew she had to do something to deal with the drug problem at her school.

On Wednesday, Dr. Johnson, the school superintendent, and Ms. Sage met to discuss the problem. Dr. Johnson told Ms. Sage that several members of the community had talked with him about the problem. Members of the school board had asked about what was going to be done. Dr. Johnson asked Ms. Sage to help develop a plan to solve the problem at her school.

Ms. Sage thought about the problem and how to solve it. As she thought, she decided that solutions to drug problems would have to be the joint responsibility of administrators, teachers, other staff members, and students. The school as a whole has responsibilities concerning illegal drugs. Ms. Sage made the following list of some of the responsibilities of the school in regard to illegal drugs.

THE SCHOOL'S RESPONSIBILITIES

1. Health and welfare. The school has the responsibility to protect the health and welfare of the students. This means
   - protecting students. The school is responsible for protecting students who do not use drugs from the influence of those who do.
   - helping students. The school is responsible for helping those students who have a serious drug problem.
   - preventing drug use. The school is responsible for educating all students about the dangers of drugs in order to help prevent them from using drugs.
2. Enforcing the law. The school is responsible for enforcing the laws and school rules against drug use. This means
   - discovering students who are breaking the law. The school is responsible for finding out who is using drugs at school and informing the police about them.
   - confiscating illegal drugs. The school is responsible for finding and taking away any illegal drugs that students might bring to school.
3. Protecting individual rights. The school is responsible for protecting important rights such as those included in our Constitution and Bill of Rights. This means protecting students' rights to
   - privacy. The school is responsible for protecting students' right not to be searched or have their property searched without a good reason.
   - "fair treatment." The school is responsible for making sure that:
     - anyone suspected or accused of using illegal drugs is given a fair hearing. For example, students should have the right to present their side of the story.
     - anyone found guilty of having or using drugs is treated fairly. For example, he or she should not be given cruel or unusual punishments.
4. Protecting the welfare of the community. The school is also responsible for protecting the welfare of the community. This means

- protecting public safety. The school is responsible for enforcing the laws which relate to illegal drugs to make sure the school is not a source of problems for the community. This includes
  - making sure there are no illegal drugs bought, sold, or used in school;
  - making sure students attend school and fulfill their responsibilities to learn and obey school rules.

Other materials for students are in the insets which accompany this article.

Teaching Procedures

1. Introduce this lesson by discussing with the class who they think is responsible for solving the drug problem at Jackson Middle School.
2. Have the class read what happened at Jackson Middle School.
3. Have the students read the information about what the school's responsibilities were relating to drugs.
4. After students read the four responsibility sections, discuss each area separately.
5. Under "Health and welfare," ask students just what kinds of specific things the school could do to protect students from other students who are suspected but not proven drug offenders.
6. Under "Health and welfare," ask students how the school could help students with a serious drug problem without removing them from the campus.
7. Under "Health and welfare," ask students what kinds of educational material might be helpful to make students aware of the dangers of drugs.
8. Under "Enforcing the law," discuss with students the advantages and disadvantages of using student informants or police officers posing as high school students, in order to assist in discovering students who are breaking the law.
9. Under "Protecting individual rights," ask students if they think it is acceptable to violate basic rights in wartime. Are we in a "war on drugs"? If we are, what consequence would this have upon student rights?
10. Under "Protecting the welfare of the community," ask students what kinds of crimes might occur in the community as a result of illegal drug use.
11. Ask students if they have any additions or changes to the list of school responsibilities.
12. Have students read the "Evaluating solutions to the drug problem" section.
13. Divide the class into five groups. Have each group take one pair (A & B) of "suggested actions" problems in the lesson and apply the "Evaluation Form" to them.

Optional Activities

The question of protecting the welfare of the community while respecting the rights of the individual is a very current and important topic. Students should be introduced to the dilemma which often results from conflicts between these two fundamental rights of Americans.

Some of the basic rights that citizens of the United States have against search and seizure, as well as their right to due process under the law, are found in the amendments of the Constitution of the United States. You may want to discuss the ramifications of the amendments to developing a plan for the drug problem at Jackson Middle School. Relevent sections of the Constitution are listed below.

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

Evaluating Solutions to the Drug Problem

Ms. Sage gave her list of school responsibilities to a group of students and asked for suggestions. The students were supposed to examine Ms. Sage's list and suggest additions or changes. They were also to suggest things that the school might do to fulfill each responsibility on the list. They soon discovered that suggesting ways to fulfill the responsibilities was not an easy task.

The students at Jackson Middle School made several suggestions about how the school might fulfill its responsibilities concerning the drug problem.

Pretend you have been asked to evaluate the ideas suggested by the group of students. Your class should be divided into five groups. Each group should evaluate two of the suggestions made by the students about actions the school might take. Each group should use the evaluation form provided (see inset) to complete this exercise. Be prepared to report your group's findings to the class.

SUGGESTED ACTIONS

Group 1 **A. Students suspected of being involved in illegal drug use or sale will come to the office and empty their pockets or purses on a table.**
B. Students who are known drug users will receive counseling from a professional counselor.

Group 2 **A. Whenever a student is suspected of having or selling drugs, the principal will call the police and have them come and search the student and all of his or her possessions.**
B. A peer counseling program will be started at the school where students with personal problems can talk their problems over with another student.

Group 3 **A. Once or twice each month the principal will conduct a surprise search of all student lockers and bookbags.**
B. A student drug enforcement committee will be formed where students will tell administrators or teachers the areas of the campus or the community where drug purchase offers are made.

Group 4 **A. Students suspected of drug use will be tested by a medical doctor.**
B. The police will stop and detain any strangers seen loitering near the school.

Group 5 **A. Any student found having illegal drugs will be suspended from school for three days.**
B. A special drug education assembly will be held where a special high interest program will demonstrate the dangers of drug abuse.

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

AMENDMENT XIV

". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Reviewing and Using the Lesson

1. Have each group review for the class what it found were the advantages and disadvantages of each of the suggested actions to help solve the drug problem at Jackson Middle School.
2. Have students discuss how fulfilling one of the school's responsibilities might conflict with fulfilling another. Ask the students how they think such problems could be solved.
3. Make a list of all the "suggested actions" which the class thought were positive and might help with a school drug problem.
4. Have students use the "Evaluation Form" to evaluate the rules in their school. (Optional)

This strategy is adapted from Drugs and the Schools, *a series of eight middle school lessons, with teacher's guide. The lessons are currently being field-tested and will be available in the summer of 1989. For more information, contact Center for Civic Education, 5146 Douglas Fir Road, Calabasas, CA 91302; telephone: (818) 340-9320.*

Evaluation Form

Each group should use the following form to evaluate the proposed actions.

Proposed Action

A. ________

B. ________

1. Health and welfare
   - *Protecting students.* Would taking this action protect students who did not use drugs from the influence of those who did?
     A. Yes _____ No _____ Comment ________
     B. Yes _____ No _____ Comment ________
   - *Helping students.* Would taking this action help those students who did use drugs to stop doing so?
     A. Yes _____ No _____ Comment ________
     B. Yes _____ No _____ Comment ________
   - *Preventing drug use.* Would taking this action help educate students about the dangers of drugs to help prevent them from using drugs?
     A. Yes _____ No _____ Comment ________
     B. Yes _____ No _____ Comment ________
2. Enforcing the law
   - *Discovering students breaking the law.* Would taking this action help the principal find out who was on drugs so she could inform the police?
     A. Yes _____ No _____ Comment ________
     B. Yes _____ No _____ Comment ________
   - *Confiscating illegal drugs.* Would taking this action help the principal find and take away illegal drugs that students might bring to school?
     A. Yes _____ No _____ Comment ________
     B. Yes _____ No _____ Comment ________
3. Protecting individual rights.
   - *Privacy.* Would taking this action protect students' right not to be searched or to have their property searched without a good reason?
     A. Yes _____ No _____ Comment ________
     B. Yes _____ No _____ Comment ________
   - *Fair treatment.* Would taking this action help make sure anyone suspected or accused of using illegal drugs would be given a fair hearing?
     A. Yes _____ No _____ Comment ________
     B. Yes _____ No _____ Comment ________
4. *Protecting the welfare and safety of the community.* Would taking this action help protect the welfare and safety of the community?
   A. Yes _____ No _____ Comment ________
   B. Yes _____ No _____ Comment ________

Would you support the idea, reject it, or change it in one way or another? Explain your decision.

A. ________

B. ________

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Drug Education

Assessing Public Opinion: Views You Can Use/Middle and Secondary Constitutional Rights Foundation

This lesson provides students with an opportunity to assess how their community feels about issues related to the drug problem by conducting a local poll. Students can learn about public opinion surveys and analyze questions and the rationale for different types of questions.

Time Needed

Two half-class periods.

Procedures

1. Instruct the students to read "Public Policy and Public Opinion" and the survey on the drug problem.
2. Ask the students to differentiate the two types of questions included on the survey. Questions 1 and 8 are open-ended; questions 2 through 7 use a Likert scale. Ask students to speculate about why the two types of questions were included.
    - What is the strength of questions 1 and 8? They provide an opportunity for respondents to cite their own views, something not always possible if they are given the responses to choose from.
    - What is the weakness of questions 1 and 8? They are difficult to tally.
    - What is the strength of questions 2 through 7, using a Likert scale consisting of a set of answers (strongly agree, etc.) that respondents select? They are easy to tally. What is their weakness? They can be too closed, not allowing the respondent to really communicate his/her own views.
3. Explain the impossibility of completing a full assessment of all the members in the community and ask the students to decide what their collective sample should be. Mention the general rule of polling: Every person in the "universe" they're seeking to assess should have an equal chance of being polled. For example, if their "universe" is the school, grades 9-12, the poll should not just be given in senior homerooms.
4. Review the following with the students: The students will have to read the questionnaire to the respondent orally and write the appropriate response on the sheet as the person answers. When approaching a stranger, ask that students introduce themselves as being from ______ School and then explain that they are giving a survey for a class. (Students should not say they are taking a survey on

Handout 1: Public Policy and Public Opinion

In a democracy it is vitally important for lawmakers to understand how the public views important issues. There are many ways to assess public opinion. One way is to conduct a public opinion survey or poll. These surveys gather information about large groups within society by asking a carefully selected number of people their views. The people selected for such surveys are sometimes chosen at random, a method of selection that assumes that the results will speak for the population as a whole. Other surveys select people because they represent certain kinds of interest groups that seek to influence legislation on specific issues.

The results of public opinion research helps keep lawmakers aware of how the public is thinking and what kinds of policies or laws would be popular and acceptable.

Handout 2: Assessing Public Opinion

Conduct your own public opinion survey of three other people to get some idea of how people feel about the drug problem and about the kinds of measures they feel are appropriate for dealing with the problem.

FINDING VIEWS YOU CAN USE: A POLL ON DRUGS

A. Give this survey to three people in the categories that your class has selected. Read each statement aloud. Please be aware that statements 1 and 8 require the respondent to provide his/her own answer and statements 2 through 7 ask the respondent if he/she STRONGLY AGREES (SA); AGREES (A): HAS NO OPINION (?); DISAGREES (D); STRONGLY DISAGREES (SD) with the statement. Circle the appropriate symbol below the statement. Choose respondents who are not in this class and who have not already been surveyed by another class member.

B. Combine your results with those of other members of your team. Share your team results with the rest of the class.

1. What is the most serious problem the United States faces?
   (list the responses of those you poll)
2. Penalties for dealing illegal drugs should be harsher.
   SA A ? D SD
3. Juveniles involved in drug dealing should receive the same penalties as adults.
   SA A ? D SD
4. We do not have enough treatment programs for drug abusers.
   SA A ? D SD
5. All schools should offer prevention programs on drug abuse.
   SA A ? D SD
6. Drug dealers who are convicted should receive the death penalty.
   SA A ? D SD
7. The police should be able to tap phones or look into personal belongings such as garbage without a warrant if they suspect illegal drug activities.
   SA A ? D SD
8. What is the single most effective activity that the government could implement to solve the drug problem?

drug abuse.) They should ask the individual whether he/she would mind spending a few minutes to help them complete their project. If he/she is reluctant to do so, the students should not persist – the responses of a reluctant individual are usually not usable. They should also be sure to tell the interviewee that his/her name is not necessary to the completion of the survey; results of the survey will be reported anonymously. It is a good idea for them to use clipboards to hold the surveys. They should, of course, always end their survey interviews with a courteous "thank you." Role play a sample interview and review the tips for good interviewing.

5. Instruct the students to give the poll to people in the sample group. For example, if the class has decided to sample the community at large by age, have each student give the poll to one person in the various age categories that the class determined. The students should average the responses of those they polled for questions 2-7 before they come back to class the next day.
6. Tally the poll results for the entire class. A fast method for this is to reassemble the class in their assigned groups, have each group tally and then average the group tallies for the class as a whole. Summarize the open-ended questions in the same fashion.
7. Discuss the poll results:
   - Are there any significant differences in how people responded to the questions by category? What could account for these differences?
   - If the sample was highly accurate, what message could a local/state legislator learn from the results?

This lesson is adapted from one of five middle and secondary school lessons on drugs and the law currently being field-tested by the Constitutional Rights Foundation. The lessons will be made available in the fall of 1989. For further information, contact the Constitutional Rights Foundation, 407 S. Dearborn, Suite 1700, Chicago, IL 60605; telephone: (312) 663-9057.

Drug Education

Conduct and Actions/Secondary

Phi Alpha Delta Law Fraternity

Lesson Overview

This lesson provides students with information on specific drug-related conduct and actions that are prohibited by laws. It gives students the opportunity to rule on a drug possession case and report their decisions to the class, with their reasoning.

Lesson Materials

1. Student Handout 1 (inset): provides the actual language from Missouri drug laws regarding unlawful activities (to be used as an example; you will probably want to research your own state's laws).
2. Teacher Reference 1 (below): provides background information on unlawful activities related to drug paraphernalia and two additional student problems. This background information will be used to introduce and discuss the student problems.
3. Teacher Reference 2 (below): introduces a student problem involving a series of five "possession" cases. It provides information you will need to introduce the student problems and to answer each of the case-related questions in Student Handout 2.
4. Student Handout 2 (inset): presents students with information on five possession cases.

Lesson Sequence

1. Begin the lesson by asking students to make a decision on their current knowledge about laws related to search and seizure and arrest in drug possession cases. Have students select one of the following options: very knowledge, knowledgeable, somewhat knowledgeable, not very knowledgeable, no knowledge at all. Ask students to indicate these responses as part of the student evaluation.
2. Pass out a copy of Student Handout 1. Lead a class discussion using the problem on the student handout. Encourage participation from as many students as possible. After the discussion, present the background information using the teacher reference materials. Provide other current or local information as appropriate.
3. Ask students to count off from one to five. Reorganize the class into five small groups. Inform the students that they will read and discuss one of the five cases (assign each group their corresponding case number), acting as appeals court judges. Pass out Student Handout 2, which includes the problem for each of the five cases. Indicate that the groups will share their information and discussion with the rest of the class. Provide time for small group discussion. Each group should report the facts, and their decision and reasoning for their assigned case. Lead a class discussion of the five cases, calling on the small groups for answers to the discussion questions in the Student Handout. After the discussion of each case, provide factual legal information as well as case outcome. Share other current cases and related legal information as time permits.
4. Ask students to reconsider the decision they made about their personal level of knowledge about drug possession laws now that they have discussed specific cases. Ask if students were accurate in the estimation of their personal level of knowledge. Ask students to indicate any changes in their level of knowledge as a part of the student evaluation.
5. Close the lesson with appropriate observations and comments.

Teacher Reference 1: Background Information

In addition to the subsection making unlawful the possession, sale, etc., of any controlled or counterfeit substance (see Student Handout 1), there are a number of subsections referring to the illegal use or possession, or delivery, or advertisement, of drug paraphernalia.

The term "drug paraphernalia" has been defined as: "all *equipment, products and materials of any kind which are* used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, sorting, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance or an imitation controlled substance in violation of this chapter." (Your state's definition may vary).

The language is both complex and specific, in an attempt to cover every contingency. The first terms refer to the cultivation or manufacture of illegal drugs; the last terms, from "sorting, containing," etc. on, to the use or possession of illegal drugs. The latter terms are the ones which will interest high school students the most.

The language of the subsection includes the following guide for the court in interpreting the term "drug paraphernalia." In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

a) Statements by an owner, or by anyone in control of the object, concerning its use;
b) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance or imitation controlled substance;
c) The proximity of the object, in time and space, to a direct violation of this chapter;
d) The proximity of the object to controlled substances or imitation controlled substances;
e) The existence of any residue of controlled substances or imitation controlled substances on the object;
f) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of this chapter; the innocence of any owner, or of anyone in control of the object, as to a direct violation of this chapter shall not prevent a finding that the object is intended for use or designed for use as drug paraphernalia;
g) Instructions, oral or written, provided with the object concerning its use;
h) Descriptive materials accompanying the object which explain or depict its use;
i) National or local advertising concerning its use; and
j) The manner in which the object is displayed for sale.

Optional Student Problems

Problem: Brainstorm with the students and make a list on the chalkboard of at least ten different, commonly-known items of drug paraphernalia.

Then have them give examples of any two of the criteria listed above for court interpretation. (Example: a hypodermic needle, with heroin residue, which was found on a table near the defendant, who was arrested for possession of a controlled substance.)

Problem: Write on the board several of the longer, more complicated examples of how to prove an item is drug paraphernalia, and then have the students attempt to explain the statutory meaning, word for word. Then have them rewrite each criterion in their own language – using simple, clear words.

Student Handout 1: Actions Prohibited by a State's Laws (Missouri)

What actions are prohibited by the Missouri drug laws?

Section 195.020: "It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, distribute, or compound any controlled or counterfeit substance, except as authorized in sections 195.010 to 195.030."

What do those terms mean, and who decides their meaning?

First, you can look in Section 195.010 of the Missouri Narcotic Drug Act, entitled Definitions. There, the state legislators have spelled out the meaning of many of the most important terms used in the act.

For example the term "sale" is defined in Section 195.010 as including "barter, exchange, or gift, or offer therefore . . ."

Second, you can read the cases decided by the Missouri courts, many of which are listed at the end of each section in the act.

***Problem*: Why do you think the Missouri Legislature defined "sale" so broadly as to include any transference of ownership of a controlled drug, regardless of whether or not money changed hands?**

On the other hand, the terms "possess" and "have under his control" are not included among the definitions in Sect. 195.010. Instead, over the years they have been given meaning through a series of court cases. A sampling of these cases is included in Student Handout 2: You Be the Judge, which includes the problem that you will be answering.

In this way they will learn to read a statute, and have an opportunity to write a statute in their own words. Some states have even enacted "plain English" laws in order to better explain state statutes. Students may wish to research their state law to see if their drug laws are written in plain English.

Teacher Reference 2: Introduction to Problem

Students role play appeals court judges.

Keep in mind the role discretion plays in any court decision, at the trial or appeals level. In drug decisions in particular there are many gray areas.

Students should be urged to think for themselves and not to look for "the right answer." However, whatever decision they make concerning possession, they should have reasons to back it up. The livelier the discussion, the better.

At the end of the discussion of each case, tell the students whether or not the court of appeals upheld the lower court conviction, and why or why not.

Answers to Student Handouts

1. *State v. McCurry*, 587 S.W. 2d 337 (Mo. App. 1979). "Possession?" Yes.
   - Drugs were in "plain view;"
   - Drugs were found in the defendant's bedroom, in a house he owned jointly;

- The defendant's home was a known site for drug sales, as undercover police were aware of it and had come and bought drugs from the defendant before.

2. *State v. Jackson*, 576 S.W. 2d 756 (Mo. App. 1979). "Possession?" Yes.
   - The defendant was standing two feet from a kitchen table, upon which – "in plain view" – were drugs and drug paraphernalia;
   - The apartment was occupied, jointly, by him and by his girlfriend.
3. *State v. Corley*, 682 S.W. 2d 380 (Mo. App. 1982). "Possession?" Yes.
   - The proximity of the drugs to the defendant;
   - The evidence of prior drug transactions;
   - No one else was in the bedroom with the defendant when the drugs were found.

Student Handout 2: You Be the Judge!

Problem: You are a judge sitting on the state court of appeals. A series of cases involving "possession" of a controlled substance is before you.

In each of the following cases, the defendant was found guilty in the lower court and is appealing that conviction.

Read the facts in each case and then decide whether or not there was sufficient evidence from which "reasonable" persons could have found the defendant guilty.

In order for "possession" of drugs to have been proven, there need not be actual possession. Constructive possession is enough. This means, for example, drugs a few feet away from the defendant in "plain view" may be sufficient to prove that the drugs belonged to the defendant. In any case, the evidence must show that the defendant was aware of the presence and nature of the substances in question.

1. *State v. McCurry*
   - Two undercover police go to the defendant's home to buy heroin;
   - The defendant comes to the door of the house he jointly owns, and recognizing the officers as prior buyers, says he'll be right back with the drugs;
   - The defendant goes into the bathroom and escapes through the window;
   - In a later search of the house police find, on a dresser top in the defendant's bedroom, a quantity of heroin.

   Was the defendant in "possession" of the drugs?
   Yes _____ No _____ Why?
2. *State v. Jackson*
   - Police officers go to an apartment occupied, jointly, by the defendant and his girlfriend;
   - His girlfriend lets police into the apartment;
   - Police enter the kitchen and find the defendant, dressed in his bathrobe, standing about two feet from a table on which there is drug parphernalia, and eighteen capsules of heroin;
   - The defendant claims to have had no knowledge of the items and says he was awakened from sleep by the police knocking at the door;
   - A further search of the apartment finds sixty additional capsules of heroin in a bathroom closet.

   Was the defendant in "possession" of the drugs?
   Yes _____ No _____ Why?
3. *State v. Corley*
   - Police go to the defendant's home, with a search warrant based upon information provided by a "reliable confidential informant;"
   - They find the defendant alone in a bedroom upstairs, seated on the bed with a revolver to his immediate right;
   - Beside the bed is a chair containing a plate with a quantity of heroin and two measuring spoons;
   - On top of the dresser in the room are syringes, a small bag of marijuana, a pipe with marijuana in the bowl, and a roach clip;
   - The police had had prior drug transcations at this address, while the defendant was there.

   Was the defendant in "possession" of the drugs?
   Yes _____ No _____ Why?
4. *State v. Barber*
   - At 4:40 a.m. police officers enter a residence owned by Donald Ray Ward with an arrest warrant for Elizabeth Ward, who is wanted by the police in another jurisdiction;
   - In one bedroom they find Donald Ward, Carol Ward, and her child;
   - In another bedroom they find the defendant, D. Barber; his wife; and Gregory Dorsey;
   - In this second bedroom they discover over 1,000 pills and capsules, stacked in individual piles on the floor by color, size, and type. Other rooms also had drugs, but not in this quantity;
   - No drugs are found on the defendant's person.

   Was the defendant in "possession" of the drugs?
   Yes _____ No _____ Why?
5. *State v. West*
   - The defendant and several friends are having a party at a mobile home;
   - The home is rented by someone other than the defendant;
   - The defendant has been staying in the mobile home for a few days prior to the party;
   - The sheriff obtains a search warrant for the mobile home, including the defendant's possessions;
   - The next morning the sheriff asks if the defendant would consent to the search of her automobile, located near the mobile home;
   - She agrees to the search and is released;
   - Two hours later, after she has returned to the mobile home, the police search her car and find a small box in the trunk of the car. The box contains several pills of the controlled substance, phencyclidine, "PCP".

   Was the defendant in "possession" of the drugs?
   Yes _____ No _____ Why?

4. *State v. Barber*, 635 S.W. 2d 342 (Mo. 1982). "Possession?" No.
    - There was no evidence of whether the defendant resided at that address, or how long he had been there;
    - There was no actual possession of the drugs, and no evidence presented that the defendant exercised any control over them;
    - There were seven other adults in the house at the time;
    - There was no evidence that the defendant had regular use, whether exclusive, or joint, of that bedroom, or of any other part of the residence.
5. *State v. West*, 559 S.W. 2d 282 (Mo. App. 1977). "Possession?" No.
    - There was no evidence that the defendant had touched the box, or even entered the trunk;
    - The defendant did not have exclusive control of the car (her brother and boyfriend used it too);
    - The car keys had been left at the mobile home while the defendant was in custody overnight;
    - Perhaps the most compelling fact indicating lack of knowledge of drugs was the defendant's conduct. She had given permission for the police to search her car, and two hours had elapsed since her release, time enough for her to get the drugs out of the trunk if she knew that they were there;
    - The only evidence that implicates the defendant was her ownership of the car, and that, by itself, is not enough.

This lesson is adapted from one of six lessons on drugs and alcohol currently being field-tested by Phi Alpha Delta Public Service Center. These lessons are intended for use by law student volunteers who will work with teachers and students in law-related education classes, but they can be adapted for use by teachers. For information on the 198-page book of drug/alcohol strategies, contact Brian Swerine, Phi Alpha Delta Service Center, 7315 Wisconsin Avenue, Suite #325E, Bethesda, MD 20814; telephone: (301) 961-8985.

Drug Education

Case Study: Parents, Drugs, and Neglect/Secondary

Edward L. O'Brien and Richard L. Roe

Objectives

As a result of this lesson students will be able to:

- analyze a situation involving parental drug involvement in order to determine whether or not it constitutes "neglect";
- describe how drug use by parents may affect children; and
- discuss options judges have when faced with the problem of drug use by parents.

Important Words and Concepts

child abuse
neglect
negligent petition
negligent treatment
parental rights

Part I—Overview of Neglect and Child Abuse

The teacher should refer to *Street Law, A Course in Practical Law*, pp. 222-223, and pp. 160-162 in the *Street Law Teacher's Manual* for an overview of the topic. (An excerpt on neglect from the teacher's manual is included with this article in the inset.) It may be advisable to do this section with the class or at least generally discuss the concepts of child abuse and neglect before moving on to the case study below. Discuss how the state brings a neglect petition and may or may not ask that parental rights be taken away. If they are taken away the child will be removed and placed in a foster home or put up for adoption.

Part II—Case Study: Parents, Drugs, and Neglect

Have the students read (or one student read aloud) the student handout, which includes two paragraphs of facts and a paragraph on neglect law. Ask students to pay particular attention to the words in the law, as this is what the state must prove to establish "neglect" under the law.

Go through the questions listed with the class. Possible student answers to the questions following the case study are:

a. For Neglect: That the child is living in a place where drugs and drug addicts are present means that she is not receiving "care or control necessary for her physical, mental or emotional health" and also that such drug presence constitutes a "neglect case." Even if her mother's husband brought the drugs and drug addicts to the home, it is neglect on her mother's part to let him come there. Also, Cheryl, the mother, is an addict herself, and this may indicate neglect. Against Neglect: Cheryl is a good mother and six-year-old Kimberly loves her and wants to be with her. Cheryl is employed, and Kimberly is doing well in school. There is no evidence that Kimberly's physical, mental, or emotional health is being damaged by the mother or that the mother is being negligent or maltreating the daughter.

b. This is a difficult decision and is based on an actual case in Washington, D.C. One judge did not find neglect because he felt it was not the court's business to say that growing up in a drug environment definitely constituted neglect under the law without more specific evidence of danger. Another judge disagreed and ordered the child removed from the home. A key issue may be whether or not Cheryl continues drug treatment as well as whether she will keep drugs out of the home in the future. In the actual case, the mother continued drug abuse and died of an overdose.

c. The choices include a finding of neglect and termination of parental rights and placing the child in a foster home or for adoption. There also could be a finding of neglect and only a temporary removal from the mother until she appeared to be drug-free and her home became a drug-free environment. The mother could be ordered to submit to drug treatment. Students should be asked what kind of order they believe is best. The judges in the actual case finally temporarily removed the child both from the mother, and later after the mother died, from the father, who had been arrested for selling heroin. However, the court did not terminate parental rights and continued to allow the father to visit the child on weekends.

d. Some students will probably see any use of drugs as constituting neglect. However, some will limit neglect to situations in which the parent is an addict. Others will argue that the effects on the child must be examined. Many will see a difference between parents who expose their children to drug use or subject them to living in a drug environment, as in the case study. The child's awareness of the drug use by the parent will be important, due to the impact of the parent as a role model.

Other factors which should be considered before neglect is found to exist include whether the child is in good health, is properly fed and clothed, is going to school and doing well, etc. The parent's willingness to submit to drug treatment and to work to eliminate the drug environment should also be considered.

Resources

The use of a community resource person during this lesson would enhance the student's experience.

Possible resource persons and topics for this lesson include:

- Child protective services worker to present information on how decisions are made to file neglect petitions in your community.
- Police officer to present the role of law enforcement in the process.
- Judge to present the critical question s/he faces when determining neglect and the options available for dealing with the problem.

Edward L. O'Brien is Co-Director and Richard L. Roe is Deputy Director of the National Institute for Citizen Education in the Law (NICEL). This lesson is part of a five-lesson package currently being field-tested by NICEL. The final lessons will be revised during the summer of 1989 and will be incorporated into NICEL's ongoing curriculum publications.

Student Handout #1—Case Study: Parents, Drug Use, and Neglect

Cheryl Abbey is the mother of six-year-old Kimberly Abbey and is married to Darrell Abbey; the father lives separately from the mother and child. The police have recently executed a warrant to search for drugs in their apartment and found it to be a "shooting gallery" for heroin. Numerous syringes and needles were found, and Cheryl and others present were arrested. Six-year-old Kimberly was present during the raid.

There is no definite evidence that Cheryl is using drugs at present, although she has a past history of drug use and is currently in a drug rehabilitation program. She claims her husband lets friends who sometimes use drugs visit the apartment. Cheryl has a full-time job as a secretary, and Kimberly is doing well in school. She is very attached to her mother and does not want to be taken from the home.

The "neglect" law in their state says: "a neglected child means a child (1) who is without parental care or control, subsistance, education as required by law or other care or control necessary for his or her physical, mental or emotional health" or (2) a child who has received negligent treatment or maltreatment from his or her parent, guardian or other custodian.

a. Assuming the state brings a neglect petition against Cheryl, what are the arguments for and against finding Kimberly to be a neglected child?

b. If you were the judge would you find "neglect" in this case? Why?

c. If Kimberly were found to be neglected, would you terminate parental rights and remove her from the home? What other orders might be issued?

d. Do you think any parent who uses drugs is committing neglect? Does it make a difference if the child is aware of the drug use? What other factors should be considered before neglect is found to exist?

The Legal Dimensions of Neglect

A representive state law on neglect includes the following definition: a child may be declared neglected if the child's parents fail to provide necessary support or education required by law, or fail to provide the supervision and care necessary for the child's well being.

What are some examples of neglect? Leaving a three-year-old alone at home for an extended period would probably be considered neglect. Telling a 14-year-old that she could do anything she wanted, including staying out all night, might constitute neglect, since this could be considered a failure to provide adequate care. However, as a practical matter, this situation would rarely come before a court unless the daughter was involved in some sort of trouble.

Neglect cases can result in termination of parental rights. Because these are not criminal cases, the Supreme Court has held that there is generally not a right to counsel for parents who can't afford one. In another case, the Court held that the higher standard of proof of "clear and convincing evidence" must be proven in neglect cases. At the time, the "preponderance of the evidence" standard usually used in civil cases was being used in a number of states for neglect cases.

Teachers should be extremely sensitive in teaching about child neglect, since some students may themselves have been victims of neglect.

Attorneys, social workers, medical personnel, pyschologists, and others working in the child abuse and neglect area might be good guest speakers at this point.

Adapted by permission from Street Law: A Course in Practical Law *and the* Street Law Teacher's Manual.

Frederica Massiah-Jackson

Education and Delinquency

A judge's four-point plan for at-risk kids

I sit in adult criminal court. In Pennsylvania, an adult is 18 years old or older. So, although the words "adult criminal court" sound pretty serious, and they are, many of the people that I see, in fact, are between 18 and 21. From my perspective, that is pretty young.

The Philadelphia court system is the largest, and certainly the busiest, in our state. My average disposition rate during the last five years has been approximately five hundred felony trials each year. I hear rapes, robberies, assaults, child and domestic abuse, drug cases, burglaries, and other thefts. I have heard it all.

I sit as a trial judge, either as a jury judge or a nonjury judge. I hear many, many nonjury cases. That means I am the one who makes the findings of fact; I am the one who delivers the verdict; I am the one who imposes the sentence. Most of the defendants are between 18 and 25. (By the time people are 30, or 40, or 50, either they are never going to be involved in the criminal justice system, or they have been incarcerated for years and years.) Almost all of these 18- to 25-year-old young people have dropped out of high school with few skills. They have no jobs, no motivation, and a lot of time on their hands. Many, if not most, are addicted to drugs or alcohol. And by the time they get to my courtroom, it is too late.

Why LRE

We need law-related education as early into the educational curriculum as possible. High school is simply too late for the high-risk adolescent. By 9th or 10th grade, those adolescents who need the special interaction that LRE provides are skipping classes, are hanging out in the streets, and are getting ready to drop out. Many of you reading this article can shape the curriculum in your local communities. I urge you to focus your attention toward the elementary and middle schools. Don't forget the youngest of the young people.

The Honorable Juanita Kitsdell, the first black woman justice of Pennsylvania's Supreme Court, said recently, "education is necessary for the survival of this nation." There are 23 million functionally illiterate people in America today. That number includes 60 to 80 percent of the prison population, one half of the chronically unemployed, one third of the welfare recipients. Statistics from the U.S. Bureau of Prisons show that very few people with even a high school education are convicted of violent crimes. The lower the educational level, the higher the crime rate.

As we attempt to reach out to at-risk youth, there are four goals which I would like to call to your attention. First, let us bring to these young people an appreciation of an ordered society. Second, let us bring to them an understanding of the mainstream American value systems. Three, let us bring to them an awareness of legal concepts. Four, let us provide a recognition of the legal processes which flow in the everyday lives of everyone who lives in this country.

An Ordered Society

I believe that the most important of these objectives, one which overlaps and encompasses the others, is that our young people understand and appreciate what we mean by an ordered society. Law-related education provides students with an understanding of how the legal processes and society are connected to them. Law-related education can demonstrate in a personal way to students that our civilized society, our government of laws, exists to benefit each and every one of them.

We want them to understand that each student is a participant in the whole of our society. What each person does, or does not do, will affect society as a whole. Our civilization exists for the peace, security and well being of each of the individual members. As John Donne said, "no man is an island entire unto himself." That means, if any individual creates disharmony, aggression, and discord, then all of us suffer. That is what citizenship is all about. This concept must be instilled in each classroom, in the heads of the young students. That is what our job is all about.

What does an ordered society mean? We need to go back to a historical understanding. Political philosophers since the time of Aristotle have given us their theories and interpretations. In many cases the underlying theme is that the existence of a state, a society, or a political body can be morally justified only if it can create an environment where men and woman realize their own ends. That is where individual destinies can be shaped.

It was the writings of Hobbes, Locke, Rousseau, and Montesquieu, in the late 17th and 18th centuries, which influenced the writers of our Articles of Confederation and the Declaration of Independence, as well as the writers of the Constitution and the Bill of Rights. Those political scientists developed the so-called contract theory of government. It is the concept that the United States is founded on. It is a concept that democratic societies today accept. It is a concept which our young people should understand.

Our society exists, and our political structure exists, due to the implicit and the explicit consent of every individual member of our state. John Locke wrote that all men are born free, equal, and independent, with a right to enjoy all privileges of life and liberty with all other men. This is what he called the state of nature – that is, a moral order – which preceded political structure and preceded political organizations.

When we became a political society, that meant that every one of us gave up our individual and natural power to the protections of the umbrella of the law. The community is united, there is a civil society, one people, one body politic. That is our contract with each other and with ourselves. We are no longer in a state of nature. We are part of a commonwealth of men and women. We have set up laws, legislatures, judges, and leaders, and this is a political society by contract and consent. We have obligated ourselves to each other person in the society.

When we see antisocial behavior by adolescents, we are witnessing their lack of belief in conventional social order and rules. Their disruptive behavior in school and at home is based on a misconceived notion – that is, they act out, they use force and intimidation for material gains, they have explosive urges for immediate gratification. They believe that what they do does not matter to anyone except themselves. They cannot perceive that their self-destruction with alcohol, cocaine, inhalants and pills will make any difference to anyone else on this planet.

Well, they are wrong. We have to show that to them. Our role as educators and legal professionals must be to provide a sense of history to those young people. We must explain to them that their conduct creates a ripple effect, a mushroom effect. It is destroying the very threads of the fabric of our societal order. They are tearing apart that social contract that our society and our government is built on. They confuse liberty with license. They confuse independence with chaos, insecurity, and lawlessness.

Educational administrators, classroom teachers, and all LRE colleagues and resource people, are, in reality, trying to incorporate that historical perspective to save ourselves and to save the future of our nation. It is not just trite to say that today's young people are the future of our country. It is true. But the young people must understand that it is true. They must understand that our lifestyle, our democratic society, is a system that is built on trust and consent with each other. With an appreciation of that historical sense of what it means to participate in an ordered society, our primary objective as LRE professionals will advance. And the class discussions regarding citizenship and legal concepts and procedures will be on their way.

Appreciating Values

Of our four objectives in reaching out to those at-risk youths, the second is the most difficult. However, it is certainly just as important as demonstrating the historical perspective. The second goal is to bring to the youths an understanding of the mainstream American value system – discipline, hard work, ambition, self-sacrifice, patience, honesty, integrity, and responsibility. Those are words that have become almost foreign, certainly in the urban school systems and in many populations of at-risk youths. America is still a melting pot of cultural, racial, and religious groups. We know that different cultures put differing priorities on lifestyle and on life ambitions. But I am a firm believer that the traditional old-fashion work ethic is still the mainstream value system that leads to a pathway of success. But I have also found, in my court, that I can't impose my values on the defendants that come in front of me. Sometimes all they understand is go to jail, do not pass go. Sometimes that is the only thing that will get through to them. But it is too late. So your job is to get them to understand it *before* they get to my courtroom.

The family is of crucial importance in this area of values. We know, however, that people who are more likely to be involved in delinquent behavior are also those with one-parent families, female-headed households with too many children, not enough money, and too much stress. But the family is still important.

Sometimes what happens is that educators have to take up where the families leave off. Law-related education must include a component on ethics and moral choices. There has to be some class discussion about caring and feeling about others. Law-related educators must address long-range life planning, and let the young people think about their perspective on long-range life planning. What does self-discipline mean? What does patience mean from the perspective of a 13- or 14-year-old? LRE should include the exploration of goal setting, whether it is how to buy a car, and thinking about all that buying a car means from a perspective of a 16- or 17-year-old, or whether it means how to graduate from high school, which might simply mean how to pass one class at a time.

I had a defendant who robbed a senior citizen of his social security check. The young man didn't have a drug problem. His parents were in the courtroom. He was a high school graduate. He pled guilty, and he admitted the incident. So I asked him why he got involved. It was very unusual. He had all of the good things going for him. I couldn't understand his motivation. He told me that he needed the money for clothes. He didn't want to buy a tuxedo, but sneakers cost $75, a jogging suit is about $150, a special jacket that he and his buddies liked to wear that identified their neighborhood comes to about $200 with the special insignia on it. So I suggested, how about working at a fast-food place, like McDonald's, or Burger King, or something. He told me very seriously that those places were just not suitable to him. So I said, "why not?" He explained that it would have taken him about three or four weeks to get the money that he needed. He got it from that old man in just a few minutes.

Well, I was amazed and everyone in the courtroom was just taken aback. He was very sincere, not cocky, very matter of fact. But what he didn't have was any remorse, because he had no concept of right or wrong. He simply knew that he needed sneakers and a jogging suit. There's the old guy cashing his social security check. There was some easy and quick money.

Fortunately, his parents were able to reimburse the man for the money that was stolen. But usually, of course, that is not the case. I sent him to jail for a year. When he comes out, he will be on my parole for a year. I told him that perhaps when he comes out he'll find McDonald's more suitable to him. I'll wait and see, that was only about three or four months ago. Frankly, he is not going to get any classes in ethics and morals while he is in jail. So I don't have any expectations that he is going to learn anything from his jail experience. He might simply learn that it is not a very nice place to be, and, if he can stay out of trouble for a year, then he won't have to see me anymore and he'll go ahead and do it again.

We need law-related education to put some moral values – the traditional values and work ethic, integrity and honesty – in the heads of our young people.

Legal Concepts and Processes

Finally, I believe that the objectives of teaching legal concepts and procedures is best served by using resource people, by having mock trial competitions, having special people come to your classrooms. And don't forget tours of courtrooms and police stations, and inviting police officers and criminal justice people to the classroom. When I visit classrooms as a resource person, I share with the young people my court experiences. I tell them about the sentences which I can impose for crimes that they are familiar with, such as purse snatching, drug possession, car thefts, and shoplifting.

A purse snatch is not just grabbing a wallet and running. It is a robbery. If the victim happens to trip or fall, even accidently, the robbery is graded as a felony of the first degree, with a maximum sentence of ten to twenty years. Then I tell them that shoplifting is not just a game, but a crime that can be graded as a felony of the third degree, three and one half to seven years. You should hear the gasps. People are just incredulous, "10 to 20 years for grabbing somebody's purse, wow, I better tell my older brother." That seems to have an impact on them.

What about auto theft? I remind them that when their friend drives up in a new car, and he doesn't have a job, and there is a screwdriver in the ignition, if they get into that car, the police will charge all of the passengers with auto theft – third degree felony. Even if the charges are eventually dismissed for everyone but the driver, their parents have to get lawyers, they may spend some time in jail. It is going to take about a year in Philadelphia, due to our backlog, before the whole matter is cleared up. Meanwhile, their life, whether it is school, or a job, has been disrupted because of the anxiety of that arrest.

I remind them to take the time to communicate, to talk with their families. Most of my cases involve confrontations between family members: young people against parents, boyfriends versus present or former girlfriends, girlfriends against present or former boyfriends. The results are burglaries, robberies, knife-slashings, gun confrontations, rapes, assaults. What can they do? I remind those young adults, and older adults too, when the parents are available, that we cannot live by emotions and by outbursts. They must take the time to talk, to communicate, to think before they shoot or stab.

We are finding more and more younger people involved in more serious cases as victims and as defendants. Within the criminal justice system in Philadelphia, although 18 is considered adult, more and more we have 16- and 17-year-olds certified as adults. Some of them have histories of arrests and convictions at the ages of 13, and 14, and 15 that rival those of adults.

How many of you go to shopping malls and see groups of girls lounging by the water fountains? They have teased hair, make up, and tight pants, and they are 12, or 13, or 14 years old. Who is corrupting whom? Young people are acting as carriers for major drug dealers, going for quick money. They are also getting stiff sentences. In Philadelphia, we are finding that more young women – the girlfriends and the sisters – are getting involved. The expectation is that the judges will give lighter sentences for women. But we also have mandatory sentencing for certain drug cases in Pennsylvania now. That's something they are aware of, but the women are still more actively involved in drugs.

We have young men who get involved in criminal behavior because their friends dared them to do something. Sometimes, young people do something as a joke. They can't imagine that anyone would take a crime seriously because, after all, it was just a joke. I urge you to impress on the students not only the concept of legal versus illegal, but the principles of right versus wrong.

I'll give you one last example. On Halloween, my daughter, who is 10 years old, came to me when I was cooking dinner. She said, "Mommy, why don't we get some spray paint and spray some cars for mischief night." I turned around. I tried to keep a straight face because I wanted to have an open conversation without being a parent. I said, "Why did you say that?" She could tell by my face, so she said, "Oh, you're telling me it's illegal, right?" I said, "Yes, it's illegal."

What I realized is that in my household my kids and my family are very aware of what is legal and what is not legal, but she did not understand that it was morally wrong. Even if it wasn't illegal, you don't spraypaint somebody's car. So we had a lengthy discussion, somewhat heated, about that whole issue. But it really struck home for me that while legal versus illegal is important, right versus wrong is even more important. She didn't understand about the car, and I am thinking, "Oh my gosh, what happens when she gets older and has more serious thoughts?" So we are going to be talking about this as time goes on. At least she asked me first before she did it. At least she has a parent at home. One of these days she'll just go do it first and ask questions later.

A Challenge

Let's challenge ourselves to face the tough questions of how we can reach through persistent poverty, broken homes, street culture, teen pregnancies, low self-esteem, alcohol and drugs. Let's find out how we can get into the heads of those high-risk students. How can we make the educational process relevant to them? How can we bring to them the historical perspective of how they fit into the scheme of things? I can't stress enough how important I feel the historical perspective of an ordered society is.

Your classroom strategies must include an effort to foster stronger, achievement-oriented self-images and positive self-esteem. When students meet law professionals, make an effort not to foster stereotypical images. Need I remind you, not all judges are silver-haired old men who look like Judge Wapner, and not all defendants are black.

Law-related education, in many senses, means taking over where the parents stopped. And if the parents didn't start, then law-related educators are acting as the parents.

Law-related education is the personalization of our Constitution and of our Bill of Rights. More than that, it represents our faith in young people.

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COURT BRIEFS

C. White, D. Hauptly, D. Sellers, and A. Ellis

Court Upholds Drug Tests

In two cases decided on March 21, 1989, a divided Supreme Court upheld the constitutionality of some drug tests in the workplace. The decisions are limited to federal employees covered by a Customs Service drug testing program and privately employed railway workers who were ordered to take blood or urine tests by the government to detect traces of drugs. (See article on p. 14 for the views of a lawyer involved in one of the cases.)

These rulings do not provide carte blanche for all workforce drug testing programs, not do they sanction random testing in the workplace. However, they are expected to encourage further testing programs for both government and non-government employees.

According to Attorney General Richard Thornburgh, the rulings are the first time the Supreme Court has approved mandatory drug testing without a search warrant and without specific reason to believe that the person being tested had taken drugs. He said that the rulings should encourage private employers to establish their own "responsible drug testing programs."

The majority opinion in each case was written by the Court's newest justice, Anthony Kennedy. In both, he asserted that the government's interest in ensuring passenger safety and controlling drug traffic was compelling and outweighed the employees' privacy interest.

Kennedy agreed that taking urine from employees and subjecting it to testing to determine what the person ingested was a search under the Fourth Amendment. The amendment protects Americans from "unreasonable searches." The issue in these cases was whether such searches were "reasonable" under the amendment. (See p. 20 for a classroom strategy based on the constitutional dimensions of drug testing.)

The testing program at issue in *Burnley v. Railroad Labor Executives Organization* involved railway workers who were involved in major accidents or whose actions may have contributed to an accident. They were required to give blood and urine samples for analysis of drug or alcohol use.

Justice Kennedy wrote for a seven-justice majority in *Burnley*. He pointed out that railway workers have a diminished expectation of privacy "by reason of their participation in an industry that is regulated pervasively to ensure safety."

Though the government did not have particular reason to suspect the tested workers of drug use, Kennedy said that the tests were reasonable considering the government's "surpassing safety interests." Kennedy supported the testing because "employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disasterous consequences." He added that the tests might have a deterrent effect, and would greatly assist investigators seeking to determine the cause of a railway accident.

In *Burnley*, the drug testing program was triggered by a significant event (an accident). In contrast, the drug testing of customs agents was triggered by no such event, but rather was a condition of their employment if they applied for transfers or promotions to Border Patrol jobs.

In the customs case, *National Treasury Employees Union v. von Raab*, a much more evenly divided Court (5-4) upheld the constitutionality of testing those customs agents who sought promotion or transfer.

"The Customs Service is our nation's first line of defense against one of the greatest problems affecting the health and welfare of our population," Kennedy said. "The public interest demands effective measures to bar drug users from positions directly involving the inderdiction of drugs."

Kennedy also pointed out that some of the customs agents to be tested carry guns, and testing is reasonable considering that "successful performance of their duties depends uniquely on their judgment and dexterity."

He said it was immaterial that the testing conducted so far had detected drugs in only five of 3600 customs agency employees.

Justices Marshall and Brennan dissented in both cases. Marshall wrote, with Brennan's concurrance, "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not. . . .The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens."

Because of the differences in the testing programs involved in the two cases – accidents triggered the testing in *Burnley*, but the Customs Service testing was more routine – two justices who had supported the majority in *Burnley*, Antonin Scalia and John Paul Stevens, joined Brennan and Marshall in dissenting in *von Raab*.

Justice Scalia, joined by Justice Stevens, wrote that the Court's opinion in *von Raab* was "supported by nothing but speculation." In contrast to a documented record of abuse among railroad workers, he said, there was no indication of a "real problem" to be solved by drug testing. He added: "Symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."

"In my view," Scalia wrote, "the Customs Service rules are a kind of immolation of privacy and human dignity. It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler."

– Charles White

High in the Sky

By a vote of five to four in the case of *Florida v. Riley*, the Court ruled that police do not need a warrant to conduct low altitude helicopter searches of private property.

BACKGROUND

A Florida county sheriff's office received an anonymous tip that marijuana was being grown in a greenhouse in Michael Riley's back yard. When they investigated, police found that trees and Riley's mobile home obstructed their view of the greenhouse.

The police then went up in a helicopter, and from a height of 400 feet were able to observe marijuana plants through a hole in the roof of the greenhouse. An arrest warrant was obtained and Riley was arrested.

The trial court and court of appeals said that the police conducted an illegal search by failing to first obtain a search warrant. Consequently, the information they learned by flying over Riley's greenhouse could not be used in court against him.

Florida law enforcement officials asked the Supreme Court to decide whether the search violated the Constitution. The justices heard the case October 3, 1988, and issued their decision January 23, 1989.

ANALYSIS

The Fourth Amendment of the Constitution protects citizens against unreasonable searches and seizures.

The question in many criminal cases becomes, what is a reasonable search? The answer has been evolving over the years.

In the Riley case, the justices said there were a number of factors that contributed to the search being a legal one.

The search was conducted by the naked eye, the helicopter was flying at an altitude deemed legal by the Federal Aviation Administration, and the top of the greenhouse was open. Just because the area being searched involved a person's home does not mean that an individual can have a reasonable expectation of privacy, a majority of the Court said.

EXCERPTS FROM THE MAJORITY DECISION (Written by Justice White)

"The home and its curtilage are not necessarily protected from inspection that involves no physical invasion. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections.

"The police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft . . ."

EXCERPTS FROM THE DISSENTING OPINION (Written by Justice Brennan)

"The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. . . . I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described forty years ago in George Orwell's dread vision of life in the 1980s." (see *1984* by G. Orwell).

– Denis Hauptly and
David Sellers

Guidelines Upheld

By an 8-1 vote the Supreme Court, on January 18, decided that the United States Sentencing Commission and its guidelines for sentencing, which set the sentences in major federal criminal cases, are constitutional. The decision not only has a practical impact on sentences, but also has important long-range implications for the doctrine of separation of powers between the branches of government.

BACKGROUND

In 1984, Congress enacted legislation establishing the United States Sentencing Commission. The Commission's task was to develop a set of guidelines that would establish the sentences for offenders in federal criminal cases. As part of the same act, Congress abolished the parole system, under which a judge set the maximum term a person would serve and the Parole Commission determined how much of that time the person would actually spend in prison.

The changes were intended to reach several results. First, Congress hoped to achieve "truth in sentencing." That is, when a person received a sentence of five years, that was the amount of time he or she would serve. There would be no early release on parole.

Second, Congress hoped to end disparity in sentencing. Studies had shown that a bank robber in a federal court in Texas might receive a term as much as ten times longer than a bank robber in Brooklyn. Congress charged the Commission with developing a set of sentencing guidelines that would even out these sentences, so that people who had committed the same crime under the same circumstances and had the same type of criminal background would receive the same sentence.

Federal judges had opposed the legislation setting up the Commission. They had been concerned that the Commission would be taking away the power to sentence that had traditionally been theirs.

To ease judicial concern, Congress stated that the Commission would be in the judicial branch of government and required that at least three of the seven commissioners be judges.

Despite the fact that the Commission was to be in the judicial branch, its members were appointed by and could be removed by the president.

This structure raised some basic constitutional questions, largely concerning separation of powers, the constitutional principle that assigns distinct and separate duties to the executive, legislative and judicial branches of government.

Was it permissible under the Constitution for a commission in the judicial branch to "legislate" the lengths of sentences in criminal cases? Could judges sit with laypersons on such a commission? If the commission was in the judicial branch, could the president (the executive branch) have the power to remove its members?

When the guidelines went into effect on November 1, 1987, their constitutionality was challenged in hundreds of cases all over America. More than 150 federal judges found them to be unconstitutional; a slightly smaller number found them to be constitutional. The split in decisions caused chaos in the federal courts, and the Supreme Court took the very unusual step of agreeing to hear a case even before a court of appeals had looked at the question. The case it agreed to review was *Mistretta* v. *United States*.

That case involved John M. Mistretta, who was indicted in late 1987 on three counts of selling cocaine. He later pled guilty to these charges in the U.S. District Court for the Western District of Missouri.

When it came time for him to be sentenced, Mistretta argued that the guidelines to which he was to be subjected were unconstitutional. The district court disagreed, and sentenced Mistretta under the guidelines to 18 months in prison and fined him $1,000.

Although he appealed to the Eighth Circuit Court of Appeals, Mistretta also asked the Supreme Court to hear his case because of the "imperative public importance" of the issue.

ANALYSIS

There were two opinions in the *Mistretta* case. Justice Blackmun wrote for the eight-justice majority; Justice Scalia was the lone dissenter.

Blackmun first dealt with the "delegation of powers" question. The argument here was that, in giving the Commission the power to set sentences for offenders, Congress improperly gave up its own powers and handed them over to the Commission.

Blackmun found, though, that Congress may create bodies to give it assistance – to flesh out its general policies – and he concluded that was precisely what the Sentencing Commission did. Congress has given the Commission instructions as to the maximum sentence available, what factors should be considered, and what the range of sentences for particular crimes should be. Under those circumstances, Blackmun concluded that no improper delegation had taken place.

Blackmun next took up the separation of powers arguments. He first stated that the doctrine of separation of powers did not bar contact or intermingling among the three branches of government. Instead, it meant that one branch could not perform the functions of another branch.

The majority opinion found that the function of sentencing did not belong to any one branch of government. It had traditionally been shared by the legislature (in setting maximum sentences), the judical branch (in imposing a sentence on an individual offender), and the executive branch (in setting parole dates). Since no one branch had sentencing as its sole function, putting the Commission in the judicial branch did not violate separation of powers principles.

Blackmun also found no problem in having judges sit on the Commission. He concluded that this role did not interfere with their judical role and that judges had sat on various commissions since the start of the republic.

Finally a majority of the justices found no problem with the fact that the president could remove the members of the Commission. The removal power was limited to cases where a Commissioner committed some serious offense or other misconduct.

A judge removed from a seat on the Commission would remain a judge. Thus, Justice Blackmun concluded, the presidential removal power would not interfere with the independence of the judiciary.

Justice Scalia's dissent was vigorous. He argued that Congress had delegated to the Commission the very heart of the sentencing power – the power to determine how much time a person would actually serve. He felt that such a delegation was unlawful.

He also argued quite strongly that the majority was wrong and unwise in approving a mingling of the branches as it had in this case. The majority, he argued, approved the creation and operation of an independent body in the judicial branch. This independent body was not a court but it was not a legislative or executive entity either.

Scalia expressed grave concern that such a new type of organization could be used by Congress as a dumping grounds for many difficult and politically divisive issues, such as abortion or fetal tissue research. Such bodies could have great authority but not be accountable to anyone. That, Justice Scalia argued, was the great danger in the majority opinion.

EXCERPTS FROM THE MAJORITY OPINION

"The separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft explained our approach to such cooperative ventures: 'In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of government coordination. . . . So long as Congress shall lay down by legislative act an intelligible principle to which the person or body is directed to conform, such legislative action is not a forbidden delegation.' . . . We harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.

"We have recognized that the Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct. Justice Robert H. Jackson summarized this pragmatic, flexible view: 'While the Consititution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon the branches separateness but interdependence, autonomy but reciprocity.'

"As a general principle, executive or administrative duties of a nonjudicial nature may not be imposed on judges. We have recognized significant exceptions to this general rule. We specifically have held that Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch. Because of their close relation to the central mission of the Judicial Branch, such extra-judicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch. In light of this precedent and practice we can discern no separation of powers impediment to the placement of the Sentencing Commission within the Judicial Branch.

"We (also) conclude that the principle of separation of powers does not absolutely prohibit judges from serving on the Sentencing Commission. The Constitution does not forbid judges from wearing two hats; it merely forbids them from wearing both hats at the same time.

"The President's removal power over Commission members poses a negligible threat to judicial independence. The act does not, and could not under the Constitution, authorize the President to remove, or in any way diminish the status of Article III judges, as judges."

SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE 0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle *Possession of Marijuana*	I	**12***	**12***	**12***	**13**	**15**	**17**	19 *18-20*
Theft Related Crimes ($250-$2500) *Aggravated Forgery ($250-$2500)*	II	**12***	**12***	**13**	**15**	**17**	**19**	21 *20-22*
Theft Crimes ($250-$2500)	III	**12***	**13**	**15**	**17**	19 *18-20*	22 *21-23*	25 *24-26*
Nonresidential Burglary *Theft Crimes (over $2500)*	IV	**12***	**15**	**18**	**21**	25 *24-26*	32 *30-34*	41 *37-45*
Residential Burglary *Simple Robbery*	V	**18**	**23**	**27**	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Criminal Sexual Conduct, 2nd Degree (a) & (b) *Intrafamilial Sexual Abuse, 2nd Degree subd. 1(1)*	VI	**21**	**26**	**30**	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated Robbery	VII	24 *23-25*	32 *30-34*	41 *38-44*	49 *45-53*	65 *60-70*	81 *75-87*	97 *90-104*
Criminal Sexual Conduct 1st Degree *Assault, 1st Degree*	VIII	43 *41-45*	54 *50-58*	65 *60-70*	76 *71-81*	95 *89-101*	113 *106-120*	132 *124-140*
Murder, 3rd Degree *Murder, 2nd Degree (felony murder)*	IX	105 *102-108*	119 *116-122*	127 *124-130*	149 *143-155*	176 *168-184*	205 *195-215*	230 *218-242*
Murder, 2nd Degree (with intent)	X	120 *116-124*	140 *133-147*	162 *153-171*	203 *192-214*	243 *231-255*	284 *270-298*	324 *309-339*

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

☐ At the discretion of the judge, up to a year in jail and/or other nonjail sanctions can be imposed as conditions of probation.

☐ Presumptive commitment to state imprisionment.

*one year and one day
(Rev. Eff. 8/1/81; 11/1/83; 8/1/84)

What Are Guidelines?

The *Mistretta* case is concerned with the constitutionality of sentencing guidelines. But what exactly are sentencing guidelines and how do they work?

From the late 1800s through the early 1970s, there was a consensus about sentencing in the United States based on what was called the "medical model." Under this theory, criminals were people who had an "illness" that could, in many cases, be "cured" through "treatment." A convicted person was sentenced by a judge to a long period in prison and then some group (usually called a parole commission) would review the person's progress and decide when he or she were cured and should be released.

This theory had several defects. First, the "cure" was not always easy to determine. Second, prisoners would learn how to play the system. They would sign up for all the right programs and give all the right answers and be released. Third, parole commissions could arbitrarily withhold release for reasons that might be political or racial or otherwise inappropriate. Fourth, judges would give longer terms to delay a person's parole eligibility (usually not allowed until one-third of the term imposed has expired).

In the early 1970s a new view began to take hold: prison was not there to rehabilitate but to punish. Under this approach, the facts needed to determine the length of punishment were solely the facts about the defendant's crime and his past criminal history.

Because such facts are known at the time of sentencing, the initial sentence given could and should be the actual sentence served – and no early release on parole would be permitted.

Nevertheless, people remained concerned that different judges were giving wildly different sentences for the same conduct. This was unjust, and prisoners would use this injustice as an excuse for their own misconduct, many argued.

Sentencing guidelines are an effort to determine an appropriate level of punishment for offenders while at the same time applying those punishments uniformly. The first successful effort to develop sentencing guidelines took place in Minnesota in the late 1970s. The Minnesota system has served as a model for all other jurisdictions that have tried to develop sentencing guidelines.

Minnesota's system divides all types of crimes into 10 categories. It also applies points to past criminal activity and divides these points into seven groups. The ten offense groups go down the left side of a chart and the seven criminal history categories go across the top. The judge figures out which offense row the offender is in and moves across that row until he or she finds the column that has the proper criminal history record. In that box is a sentence (for example 24-30 months). The judge selects a sentence in that range, and the prisoner must serve that whole sentence. If the judge feels that the range is too low or too high, he or she may impose a greater or lesser sentence. But, if he or she does so, the sentence may be reviewed by an appellate court.

The chart on page 44 shows the Minnesota sentencing grid. The dark area in the upper left indicates cases in which the judge can give probation or up to one year in jail.

EXCERPTS FROM THE DISSENTING OPINION

"I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.

"The decisions made by the Sentencing Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments.

"The scope of Congressional delegation is largely uncontrollable by the courts so we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation. The major one is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of judicial or executive power.

"In the present case, however, a pure delegation of legislative power is precisely what we have before us. The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law. The Commission's lawmaking is completely divorced from the exercise of judicial powers (as well). The power to make law at issue here, in other words, is not ancillary (to some other power rightly belonging to the Judicial Branch) but quite naked.

"I think the Court errs not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling but about the creation of a new branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a branch would be desirable; perhaps the agency before us will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structures we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous."

–Denis Hauptly and David Sellers

Do Private Clubs Have a Right to Exclude? Maybe, and Maybe Not

If a city or state decides to eliminate discrimination wherever it is found, how far can it go? Does a private citizen have a right to be left alone in the face of such social regulations? The answer to these questions, as provided by the Supreme Court in *New York State Club Assoc., Inc. v. City of New York*, 108 S. Ct. 2225 (1988) was a resounding, "it depends."

This case gave the Court the opportunity to clarify two previous rulings on the delicate balance between state efforts to eliminate discrimination against citizens and the individual citizen's protected freedom to associate and exclude. Previous decisions by the Supreme Court had avoided many of the difficult issues because of the size of the organizations involved (United States Jaycees and Rotary International). The crucial issue to be decided here was whether small, private clubs of exclusive membership require a different analysis.

BACKGROUND

The New York State Club Association is a nonprofit organization of 125 private clubs in the State of New York. Many of the clubs intentionally discriminate on the basis of religion, national origin, ethnic heritage and gender. Most of the clubs have more than 400 members and provide regular meal service.

New York Local Law 63 was an attempt by the city to clarify the private club exemption in its public accommodation and antidiscrimination laws. It stated that a club was *not* to be considered distinctly private if it

- had more than 400 members,
- provided regular meal service, and
- regularly received payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

The impetus for enactment of Local Law 63 was the finding made by the New York City Council that discriminatory practices of large private clubs had a prejudicial impact, particularly on the business opportunities of women. The law was enacted to affect private clubs where business activity was most likely to take place and where it would be unlikely that the predominant purpose of the club was intimate association without a substantial business component.

LEGAL ARGUMENTS

Soon after the law was enacted, New York City instituted proceedings against four large all-male clubs. The New York State Club Association then brought an action to stop enforcement of Local Law 63, arguing that the law violated its members' constitutional rights to freedom of association, privacy and speech, as well as the right to equal protection under the law. The trial court entered a judgement in favor of the law, and the intermediate state appellate court and the Court of Appeals of New York affirmed that decision.

The United States Constitution does not expressly create the right of association as we know it today, but protection for associational activity has long been recognized as implicit within the rights retained by the people and guaranteed in the Bill of Rights. The general framework of the doctrine protects one's "expressive" right to associate when the conduct around which the activity is centered is protected by the First Amendment. However, many activities are vulnerable to state regulation. An unqualified right to associate does not apply to purely social activities, and commercial speech and related activity is given less protection from state social legislation than political, religious and family activities. From this background, private club case law emerges as a combination of activities containing elements of both social and political decision-making, and both commercial interests and intimate, highly personal relationships.

The Supreme Court was called upon to decide the constitutional limits of a city's ability to broaden the scope of its antidiscrimination laws through the so-called public accommodation concept. Two recent Supreme Court cases, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S. Ct. 1940 (1987), provided the framework for analysis in this case. In both cases, the Court found that neither club was private for the purposes of the First Amendment because membership extended to a large segment of the public, with little exclusivity, and also because the public purposes behind the club's service activities would not be significantly affected by complying with the law.

The New York State Club Association contended that Local Law 63 violated its members' right to privacy, expression, and association by creating an irrebuttable presumption that every organization which falls within the three-prong test of the law is not private and not entitled to constitutional protection. It argued that Local Law 63 did not adequately consider the selectivity or expressive activity of a club and did not allow for a careful assessment of the objective characteristics of a club, thus stopping many clubs from proving that they were indeed private and exempt from state regulation.

The city contended that the requirements of Local Law 63 were based on three objective characteristics, which if met, would negate any claim that a club was private. The city contended that its criteria were consistent with the Supreme Court decisions in regard to the United States Jaycees and Rotary International. It argued that a club with more than 400 members was too large and unselective to be truly private, and that a club that regularly receives funds from nonmembers for business purposes demonstrated its public nature.

THE DECISION

Did the Supreme Court answer the question as to whether or not a private club has the right to exclude? Not really. The Court simply stated that Local Law 63 in and of itself is not an unconstitutional violation of the First Amendment. The Court pointed out that the law's antidiscrimination provisions may in fact be constitutionally applied to at least some of the large covered clubs. The Court further held that the law could not be said to infringe upon *every* club members' right of expressive association, since in the absence of specific evidence on the characteristics of a covered club, it must be assumed that many of the large clubs would be able to effectively advance their desired viewpoints without confining their membership to persons having the same sex, religion or race. The Court further held that it was not shown that the law was overbroad and applied to "distinctively private" clubs, since there was no evidence that any club, let alone a substantial number of clubs, was impaired in its ability to associate or to advocate public or private viewpoints. In short, the Court simply stated that the law was constitutional on its face and that it must be left to *individual clubs* to contest the law's constitutionality as it might be applied against them. If there were any overbreadth in the law, it could be cured on a case-by-case analysis of specific facts.

Justice O'Connor's concurring opinion emphasized the limited nature of the Court's decision. She noted that nothing in the Court's opinion in any way undermined the importance of any associational interest at stake. The Court, she said, was simply reaffirming the power of the states to pursue the important goal of ensuring nondiscriminatory access to *commercial* opportunities in our society. She emphasized that this and previous decisions recognize an association's First Amendment right to control its membership, acknowledging that the strength of that right varies with the nature of the organization.

—Al Ellis

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"High in the Sky" and "Guidelines Upheld" were adapted from articles by Denis J. Hauptly and David A. Sellers in Supreme Court Spotlight: A Monthly Report for High Schools. *For further information about* Supreme Court Spotlight, *contact them at Post Office Box 27531, Washington, DC 20038.*

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History

(continued from page 6)

last the United States had redeemed its pledge to other nations that it would enact a stringent law, as it had urged every other nation to do.

The significance of the Harrison Act to State Department strategists, though, was more than just the satisfaction of redeeming pledges made to questioning representatives of other nations. For them, the Harrison Act was the implementation of the Hague Convention of 1912, which called upon signatories to enact domestic legislation controlling narcotics supplies and distribution. Understood as the fulfillment of treaty obligations, the Harrison Act would have the authority to usurp the states' police powers, for the Constitution in Article Six gives treaties concluded by the United States supremacy over the laws of states. This would resolve the problem of states' rights interfering with the ability of a national law to require a uniform compliance with strict narcotics control.

Enforcement in the First Years

Unfortunately, the Supreme Court at first did not give a very strict interpretation to the Harrison Act. In the first *Jin Fuey Moy* case (1916), the Court declared by a six-to-two majority that the Harrison Act could not be understood as having been required by the Hague Convention and that physicians could prescribe as they saw fit, even to simple addicts. This decision was a stunning blow to federal enforcement, which, from the first day of the act's implementation, was directed at pharmacists and physicians who sold prescriptions or treated addicts without any intent to cure them.

World War I, arriving at almost the same time as the Harrison Act, profoundly affected American attitudes, creating an intense desire to purify the nation as it girded itself to fight for democracy against the barbarism of the Kaiser. The fall of Russia and the spread of Bolshevism intensified fears of contagion and the desire to be sure that the United States remained pure and strong. Prohibition also took giant strides during World War I.

Similarly, a battle was being fought to overturn the *Jin Fuey Moy* decision, which had weakened the government's intention for the Harrison Act. A Treasury Department committee reported that the number of addicts in the nation was over a million. These exaggerated figures, as well as fear of returning veterans having become addicted on the battlefield and the specter of alcohol prohibition, which might drive alcoholics to morphine and cocaine, led to a new attempt to put teeth into the Harrison Act. This time the government was successful.

In March 1919, two months after the ratification of the Eighteenth Amendment (which would go into effect a year later), the Supreme Court ingeniously decided, five to four, that a "prescription" for narcotics intended to supply a "mere" addict with maintenance doses was a misnomer, for such a script could not be considered a true prescription given in the proper conduct of medical practice. Since it was not a prescription, the issuing physician had conveyed narcotics without the required tax; he had therefore violated the Harrison Act and could be arrested.

At last, the intent of the reformers had been achieved: Simple maintenance was outlawed, and the federal government could take action nationwide to arrest and convict health professionals who practiced it. Narcotics now had a no-maintenance policy, which a few months later would also be the policy for alcohol. Enforcement of both prohibitions would be the responsibility of a unit in the Bureau of Internal Revenue, reflecting the similarity of the two conceptions.

Enforcement During the 1920s

Perhaps the most important addition to the Harrison Act's control of opiates and cocaine came in 1924, when the United States banned the importation of opium to be used for the manufacture of heroin. The observance of federal-state boundaries is evident in this law, for it does not ban the manufacture of heroin altogether, but only the importation of crude opium for that purpose. Just that much seemed to be within the power of the federal government.

Heroin had been made available commercially by the Bayer Company of Germany in 1898 as a superior cough suppressant. Heroin essentially had been unrestricted in the United States prior to the Harrison Act, and by 1912 in New York City it had replaced morphine as the drug of recreational choice among the youthful males. The addictive nature of heroin had been recognized rather quickly, for the AMA issued a warning in 1902. Heroin was popular because it could be inhaled by sniffing, like cocaine, as well as injected by needle. When injected into the bloodstream, heroin crossed the blood-brain barrier more quickly than morphine and therefore gave a more intense, but briefer, "high." During the years of intense concern over social control, which began with the First World War, heroin became linked with male gang violence and the commission of crimes. Some believed that heroin stimulated the user to commit crimes or at least provided the courage to pull off a bank robbery or mugging. In the early 1920s, most of the crime in New York City was blamed on drug use, chiefly of the opiates, including heroin.

The preference for heroin over morphine by recreational users, and the belief that other opiates could fulfill heroin's role as a painkiller and cough suppressant, led to a move to ban heroin for medical purposes. Heroin's image as a foreign product popular with feared domestic groups helped support an isolationist stance, illustrated by the American refusal to join or even recognize the League of Nations.

The United States stopped all domestic heroin production in the 1920s, but failed to achieve its goals at the Geneva Opium Conferences of 1924 and 1925. In fact, in disgust at the refusal of other nations to agree to curb production of poppies and coca bushes, the ultimate source of heroin and cocaine, the United States walked out of the conference. The United States, which had founded the world antinarcotic movement before World War I, now saw it taken over by the League of Nations (as the Versailles treaty had mandated) and controlled by the very nations the United States sought to shame or force into a narcotics policy that the United States viewed as responsible. By the outbreak of World War II, however, the United States was again achieving significant participation in international antidrug activities.

The Effect of Drug Control

The use of cocaine, which had been in "soft" drinks like Coca-Cola until 1903 and was available easily to sniff as a treatment for sinusitis or hay fever, fell precipitously after reaching a peak somewhere around 1905. By the 1930s, cocaine use had receded, and by the 1950s it was practically absent.

Several reasons for its reduced use can be suggested. The drug had been introduced as a wonder substance – Freud had called it the first medicine that worked as an antidepressant. The Parke-Davis Company manufactured it after 1885 in many forms for drinking, smok-

(continued on page 54)

2296

Hazelwood One Year Later

How have student newspapers been affected by a controversial Supreme Court decision?

What d'ya know?

UPI/Bettmann Newsphotos

Hazelwood East High School Principal Dr. Robert E. Reynolds holds a copy of the school newspaper after the U.S. Supreme Court held that he acted within his constitutional authority in censoring the publication.

Maria Morocco

January 13 marked the one-year anniversary of the Supreme Court's decision in the case of *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562. The case received large amounts of publicity because, in its 5-3 ruling, the Court denied broad First Amendment protection to a high school newspaper.

Now that a year has passed, we can ask what the effect of the decision has been and what effect it may have in future years.

It's important to understand that the Court was not directly determining school policy, but rather delineating the extent to which schools are limited by the First Amendment. By declining to enunciate a broad First Amendment protection for student journalists, at least when the school newspaper is sponsored by the school, the Court gave wide latitude to states and individual districts to shape their own policies, which may provide more protection than that granted by the Court.

The Decision

The facts of the case are as follows: In May, 1983, Principal Robert Reynolds of Hazelwood East High School near St. Louis decided to delete two pages from the school paper, the *Spectrum*. Reynolds objected to two articles on those pages, which comprised a special section on the problems of teenagers. One article described the experiences of three students who had become pregnant; the other dealt with the impact of parents' divorce on teenagers. Reynolds felt that the identities of the girls in the first article were not adequately concealed and that the subject matter was inappropriate for the school's younger students. He objected to the article on divorce because it failed to give a parent's viewpoint.

In its decision, the Court stated that "a school need not tolerate student speech that is inconsistent with its educational mission." Hazelwood's Journalism II class publishes the *Spectrum*, so the Court reasoned that the newspaper is not entitled to broad First Amendment protection because, as a curricular activity, it does not constitute a forum for public expression.

The decision states that educators can exercise greater control over school-sponsored activities "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." Only when the censorship has "no valid educational purpose" will the Court act to protect students' rights.

The Court's three dissenters, led by Justice William Brennan, argue that the *Hazelwood* decision approves of "brutal censorship." In the minority opinion, Brennan states: "The young men and women of Hazelwood East High School expected a civics lesson, but not the one the court teaches them today."

The Impact

Legal experts are divided in their opinions of *Hazelwood*. Some, like Brennan, feel that *Hazelwood* is utterly repressive. Others feel the decision is merely pragmatic and realistic.

"Regrettable" is how First Amendment expert and Northwestern University professor Jamie Kalvin describes the *Hazelwood* decision.

"There is a general consensus that the First Amendment rights of students don't coincide with those of adults in society," he says. "But it does not follow that students have no rights. The challenge for the courts and the schools is to define these rights. The *Hazelwood* decision doesn't do that – it doesn't honor the complexity of the situation or the dignity of students, who should be seen as apprentice citizens."

Kalvin argues that *Hazelwood* does not prepare students for the responsibilities of citizenship because it approves of censorship – a practice condemned and prohibited in the larger society. However, other legal scholars argue just the opposite – that *Hazelwood* prepares students for adult realities and responsibilities. According to Professor Clark Mollenhoff, a journalism professor at Washington and Lee University, *Hazelwood* is consistent with the view that "a free press is for the man who owns one."

"We should not realistically expect that school newspapers should be permitted a greater freedom from management – the school administrators – than the *The New York Times*, *The Washington Post*, or the *Chicago Tribune*," he says.

While Mollenhoff contends *Hazelwood* will not cause significant changes, Kalvin worries that the decision, which he says is "unnecessarily broad," will chill the debate about the First Amendment rights of high school students.

"It is my strong hope that *Hazelwood* does not mark the end of the controversies," says Kalvin. "They are healthy for the schools and serve to educate people in our First Amendment tradition."

Applying *Hazelwood* in the Courts

It is difficult to predict what the effects of *Hazelwood* will be until after the lower courts have applied the decision. Ivan Gluckman, the attorney for the National Association of Secondary School Principals, predicts that in applying *Hazelwood*, "the courts will return to an earlier state of the law and defer more to school district authority."

Kalvin partially agrees with that statement. "The federal judiciary, as a result of a huge influx of Reagan appointments, is now more deferential to claims of authority in all settings," he says.

But Kalvin finds it encouraging that *Hazelwood* did not overturn *Tinker v. Des Moines Independent Community School District*, a 1969 decision in which the Supreme Court ruled that a school administration acted unconstitutionally when it suspended students for wearing black armbands to protest the Vietnam War. In *Tinker*, the Court stated that school officials can only limit student expression when they can demonstrate that the expression in question would cause a material and substantial disruption of school activities or an invasion of the rights of others.

"*Hazelwood* is fundamentally inconsistent with *Tinker*," says Kalvin. "Yet *Tinker* is still available, for often two antithetical legal precedents or standards exist at the same time. The courts might try to come up with a third formulation as a less extreme way of handling the situation."

Hazelwood in the Schools

When *Hazelwood* was decided, teachers, students, and lawyers were immediately concerned over what the tangible effects of the decision in the schools might be – how, for example, would it affect the day-to-day workings of school newspapers?

"One of the negative things we have seen as a result of *Hazelwood* is students censoring themselves," says Mark Goodman, the director of the Student Press Law Center in Washington, D.C. A student in Wilmington, Delaware, worries that if high school journalists are edited more heavily as a result of *Hazelwood*, they will not stand up to the challenge of censorship. "When students are censored they are submissive," he says.

However, Gluckman contends that *Hazelwood* will result in "a more responsible student press."

"Prior to *Hazelwood*," he says, "an anomalous situation existed in which student writers felt themselves freer in what they could print than did the members of the professional press, who operate under legal constraints, professional codes of conduct and under guidelines established by editors and publishers. Students had carte blanche, and this was not a good method of teaching responsible journalism."

The *Hazelwood* case prompted some school administrators and students to act to protect the First Amendment rights of students. The Dade County school system in Florida, which has had a policy promoting students' freedom of expression since 1980, filed a Supreme Court amicus brief favoring the students in the *Hazelwood* case. When *Hazelwood* was decided, deputy superintendent for education Paul Bell sent a memo to all the system's principals saying that the existing policy would remain intact.

"We knew nothing was going to change," says Joel Rose, who last year was a senior at North Miami Beach High School and the student advisor to the school board of Dade County. In response to the ruling in *Hazelwood*, Rose wrote an editorial which appeared in the *Miami Herald* condemning the decision.

Rose also requested that school board's attorney draft a legislative proposal which would protect freedom of expression for students statewide. The school board of Dade County has included the proposed statute in its 1989 state lobbying package.

At the State Level

Groups in numerous states have urged their legislatures to pass laws that would guarantee freedom of expression for high school students, thereby nullifying the power given to state and school officials by *Hazelwood*. State senator Rich Varn of Iowa is the sponsor of such a bill, which he says is a "direct response" to *Hazelwood*. "I read the headline in the *Des Moines Register* and immediately started writing," he says. Varn adds that his bill is an effort to clarify what students' rights are.

"Rather than doing this by case law – which is a long process – we are trying to define these rights through legislation," he says. "It is certainly within the state's rights to grant more freedom to its citizens that the Supreme Court might allow." California has had a statute since 1976 which prohibits censorship of student expression unless that expression is libelous, obscene or materially disruptive. This provision worked almost immediately to counteract *Hazelwood*.

On the day that *Hazelwood* was decided, a story about a student who claims to have tested positive for the AIDS virus was shelved for a day by the principal of Homestead High School in Cupertino, California. Principal Jim Warren claimed that he held the story in order to check on whether *Hazelwood* could make him personally responsible for the content of the school paper.

Lawyers advised him about section 48907 of California's education code, which guarentees that student newspapers be free of prior restraint. This statute mandated that the story run.

Most of the bills that are being considered by various state legislatures have been modeled after the California statute. The Student Press Law Center has drawn up model legislation to encourage the passage of state laws to counteract *Hazelwood*.

Teachers and Principals React

While the state legislatures work to affirm or reject the *Hazelwood* decision, on the local level school administrators will be doing the same. High school journalism advisors seem to agree that the tangible effects of the decision will depend on the dispositions and outlooks of individual school administrators, who can choose to either implement or ignore the ruling.

The staff at the Student Press Law Center hopes that the decision will be largely rejected by school administrators. "No school is required to censor as a result of the *Hazelwood* decision," says Goodman in the SPLC's 1988 spring report. "Schools that want high quality student publications and a vital educational environment will eventually realize that censorship prevents them from ever reaching those goals."

Nancy Hastings, journalism advisor at Munster High School in Indiana, views *Hazelwood* as "an option for someone who has an axe to grind." She says that she has not had problems with censorship because of her good relationship with her principal and the experience she has gained as a result of 16 years of teaching. "But a new journalism advisor could have a completely different situation on her hands," she says.

Cindy Blair, a journalism advisor at Chesterton High School in Indiana, agrees that the effects of *Hazelwood* in the schools will depend on the relationships between teachers and administrators. She describes her principal as "very supportive," but adds "I have nightmares about what would have happened under a previous administrator."

A principal's decision whether or not to censor may depend upon the policies for student expression established by local school boards. Rodney Lowe, the journalism advisor at Evanston Township High School in Illinois, says that he operates with complete autonomy because the school board has an open policy for student publications.

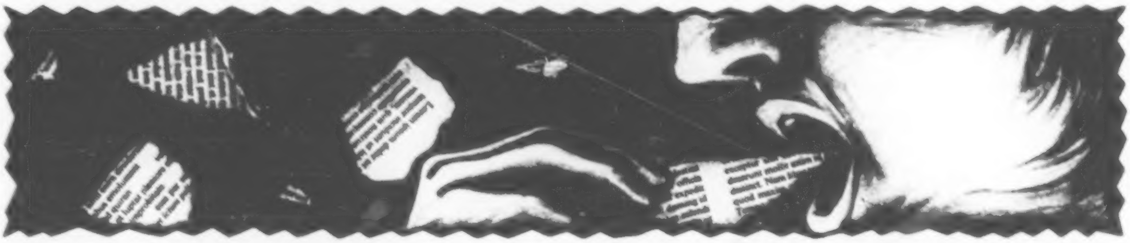
Because the effects of *Hazelwood* will largely occur at the local level, it may be difficult to determine a "net result" of the decision. Moreover, it will take years for school disstricts, state legislatures, and lower courts to work through the implications of *Hazelwood*. Yet what happens at each high school is important because, as Kalvin points out, "Our schools are somehow central to our notion of what we are committed to as a society." *Hazelwood* may very well prove to be a societal barometer which indicates what we, as a nation, value more deeply – individual freedom or administrative authority.

Maria Morocco is Fund for Justice and Education Promotions Assistant for the American Bar Association's Resource Development Office. She is a recent graduate of Northwestern University.

Student Press

Individual Rights: Freedom of the Press/Secondary

Dorothie C. Shah



Troy Thomas

Since 1950 the Supreme Court of the United States has considered several cases in which civil rights of public school students are an issue. Not only has the Court ruled that segregated education deprives children of fundamental rights, but the Court has also determined that students as well as adults are entitled to protections of the Bill of Rights. At the same time, however, the Court has acknowledged that school officials do have responsibility and power to control the school environment to make it reasonably safe and to establish a setting conducive for learning. Consequently, there are restrictions within a public school which do not exist on the street.

A recent Court action significantly affecting public school students is the January 1988 decision in *Hazelwood School District v. Kuhlmeier.* This case deals with freedom of expression protected by the First Amendment.

Objectives

1. To examine First Amendment freedom of expression protections.
2. To discover how Supreme Court rulings define the extent and limits of constitutional rights and, thus, to recognize that these rights are not absolute.
3. To explore how constitutional rights affect teenagers.
4. To consider the role of the press in a free society.

Procedure

Allow at least three class periods for this lesson.

1. Distribute the summary of the *Hazelwood* case below and go over instructions: Carefully read the information provided. Note the evidence supporting Hazelwood School District and then list the evidence supporting Kuhlmeier, et al. Note factors which were significant in two pertinent precedent setting cases: *Tinker v. Des Moines School District* and *Bethel School District v. Fraser.*
2. Direct students to bring notes to class for an activity.
3. Divide class into four or six groups of five to six students each. Half the groups should represent the petitioner, Hazelwood School District. The other half should represent the respondent, Kuhlmeier, et al.
4. Each group should select a recorder and a reporter. All group members should participate in preparing presentations for their spokesperson.
5. Arguments/evidence should be presented by the reporters from each group representing the petitioner. Three minutes should be allowed for comments and clarification by group members.
6. Arguments/evidence should be presented by the reporters from each group representing the respondent. Comments and clarification from group members should be permitted for no more than three minutes.
7. All class members should listen carefully during presentations of arguments in order to be prepared to write an opinion, which they may begin in class, but should complete for homework. Each student should select one of the following statements to begin his or her paper. *This Court finds that the petitioner, the Hazelwood School District, acted appropriately censoring articles* or *This Court finds that the First Amendment rights of Hazelwood East students were violated by deletion of two pages of the May 13, 1983, issue of the school newspaper.*
8. Students should submit opinions identified by I. D. number rather than name at the beginning of the following class period. The teacher should quickly check to make sure no names appear on the papers.
9. The teacher should distribute sheets containing four copies of the evaluation form (see inset).
10. Each student should read and evaluate at least four opinions written by his or her classmates.
11. Students should submit evaluations and return all opinion papers.
12. The teacher should distribute summaries of the Supreme Court's decision and the dissent written by Justice Brennan. Students should read these before the following class.
13. During a final class session there should be an open discus-

Evaluation Form

Rate the opinion according to each of the following criteria using a scale of 5 to 1 (5 is excellent, 4 very good, 3 is good, 2 is okay, 1 is poor).

I.D. number of author ____________________

Organization

- **Evidence (consider specific facts regarding precedents, responsibilities of public schools, publication of *Spectrum*, and readers)**
- **Conclusion**
- **Mechanics**
- **Overall**

sion in which major issues arising from this case should be addressed, including:

- instruction in analytical thinking
- education regarding responsibility
- citizenship education
- specific responsibilities of publications
- responsibilities of publishers.

Summary of Hazelwood School District v. Kuhlmeier

In May 1983, three members of the staff of *Spectrum*, the student newspaper published by the Journalism II class at Hazelwood East High School in St. Louis, Missouri, decided to investigate students' experiences with sexual activity and pregnancy and the impact of divorce on teenagers. They submitted articles on these topics for publication in the final edition of the newspaper for the 1982-83 academic year. As was customary, the journalism teacher submitted page proofs to the high school principal, Robert Eugene Reynolds, for his review prior to publication. Mr. Reynolds found two of the articles objectionable. He was concerned that although false names had been used to conceal the identity of the girls who had been interviewed regarding their pregnancies, details in one story might make them recognizable. Moreover, he felt that the articles' references to sexual activity and birth control were inappropriate for younger students at the school. Although the name of a student who had been interviewed regarding the divorce of her parents was deleted in the final copy of the article in which she complained that her father "wasn't spending enough time with my mom, my sister, and I" and "was always out of town on business or out late playing cards with the guys," Mr. Reynolds felt that the parents should consent to publication or have an opportunity to respond to the daughter's allegations. Since there was inadequate time to revise the articles between May 10, when the principal received the page proofs, and the press run for the May 13 issue, Mr. Reynolds decided that the two pages on which the "objectionable" articles appeared should be eliminated. Thus a four page issue rather than the planned six page paper was published on May 13.

Members of the *Spectrum* staff subsequently filed a lawsuit in the United States District Court seeking a declaration that their First Amendment rights had been violated. Cathy Kuhlmeier, one of the students, said that she and her colleagues were "trying to make a change with the school paper and not just write about the school proms, football games, and piddly stuff." The students maintained that since the First Amendment states that "Congress shall make no . . . law abridging freedom of speech, or of the press," public school authorities had no right to arbitrarily censor articles on controversial subjects. In fact, Journalism II students were assured that publication of *Spectrum* "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution . . . ." The students' statement of policy, tacitly approved by school authorities, announced their expectation that "only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." School Board policy vowed that "school-sponsored student publications will not restrict free expression or diverse viewpoints within the rules of respectable journalism."

The students were familiar with the decision made by the Supreme Court in the *Tinker v. Des Moines* case. In that 1969 decision the Supreme Court held that while the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." The Supreme Court declared that official censorship of student expression is unconstitutional unless the speech or expression of opinion "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ."

The situation in the *Tinker* case involved a protest regarding United States involvement in Vietnam. During the holiday season from December 16, 1965 to January 1, 1966, teenagers as well as adults who had previously participated in programs protesting government policy chose to express their disapproval of the military build-up in Southeast Asia by wearing black armbands. On December 14, the Des Moines Board of Education adopted a policy specifically prohibiting wearing armbands to school. Students who disobeyed the school regulation were to be suspended until they complied. Three students wore armbands to school and were suspended. They did not return to school until after January 1 when the protest period had ended. Subsequently, the students and their parents filed a complaint in the U.S. District Court contending that their First Amendment rights had been violated by the school's action in suspending them. The Supreme Court agreed.

The Hazelwood principal maintained that the censorship of student expression which resulted in deleting articles from *Spectrum* was dramatically different from the action of the Des Moines Board of Education in imposing restrictions on the Tinker children, who were individuals expressing opinions about a controversial issue. Since *Spectrum* was written and edited by the Journalism II class at Hazelwood East as part of the school curriculum, Mr. Reynolds maintained that ideas published in the paper bore a stamp of approval from the school. The Board of Education allocated funds from its annual budget for printing *Spectrum*. Although supplemental revenue from sales of the paper totaling $1,166.84 were used to publish *Spectrum*, the major costs of printing, totaling $4,668.50 in 1982-83, were borne by the Board of Education, which also furnished supplies, textbooks, and the salary of the journalism teacher. The paper was distributed not only to students but also to school personnel and members of the community. Mr. Reynolds argued that reasonable pedagogical concerns may restrict expression of opinions in school-subsidized publications which bear the schools imprimatur [approval].

Another relevant case pertaining to First Amendment rights of high school students was decided by the Supreme Court in 1986. In *Bethel v. Fraser*, the Court upheld the right of the Bethel School District to discipline a student for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly. The Court reasoned that a school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the fundamental values of public school education."

The case of *Hazelwood School District v. Kuhlmeier*, which was decided by the Supreme Court in January 1988, prompts consideration of many issues regarding freedom of expression and First Amendment rights of public school students in the United States. Consideration of some of these issues should enliven study of the Constitution and citizenship education.

Summary of the Majority Decision

The decision was written by Associate Justice Byron R. White, joined by Chief Justice William H. Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor, and Antonin Scalia:

In the *Tinker* case it was determined that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Supreme Court has nonetheless recognized that the First Amendment rights of students "are not automatically coextensive with the rights of adults in other settings." A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school. In the *Bethel* case the Court recognized that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." Kuhlmeier's claims in the *Hazelwood* case must be considered in light of these two decisions.

First of all is the question of whether *Spectrum* may be characterized as a forum for public expression. Since public schools do not possess all of the attributes of streets, parks, and other places of public assembly, only if school authorities have opened those facilities "for indiscriminate use by the public" may schools be deemed to be public forums. Since Hazelwood East had not been made available for indiscriminate use by the public, neither the school nor the student newspaper may be regarded as public forums.

The second question is whether the First Amendment requires a school to tolerate particular student speech, which was the issue in *Tinker*. Although educators may not silence a student's personal expression that happens to occur on school premises, school authorities are not required to promote particular student speech. This is the relevant issue in the *Hazelwood* case. Educators are entitled to exercise control over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. Authority is reasonable in order to assure that participants learn whatever lessons an activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. A school must be able to set high standards for student speech that is disseminated under its auspices.

Thus educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Since the students who had written and edited the controversial articles on pregnancy and divorce had not sufficiently mastered journalistic considerations of treatment of controversial issues and personal attacks, and "the legal, moral, and ethical restrictions imposed upon journalists within a school community," the principal's decision to delete two pages of *Spectrum* was reasonable. Accordingly, no violation of First Amendment rights occurred.

Summary from Dissent

The dissent was written by Justice William J. Brennan, Jr., joined by Justices Thurgood Marshall and Harry A. Blackmun:

The Hazelwood East principal violated the First Amendment's prohibitions against censorship of student expression. Public education serves vital national interests in preparing the nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic republic.

If incompatibility with the school's pedagogical message were constitutionally sufficient to justify the suppression of student speech, school officials could censor student expression and convert schools into "enclaves of totalitararianism" that "strangle the free mind at its source." The First Amendment permits no such blanket censorship authority. Public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

In *Tinker* the Court held that official censorship of student expression is unconstitutional unless the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ." There is no precedent for the Court's erection of a distinction between a student's personal expression that occurs on school premises and school-sponsored expressive activities that might bear the imprimatur of the school. This distinction, established by the Court in the *Hazelwood* case, is simply an excuse to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit.

Tinker teaches that the state educator's mandate to inculcate moral and political values is not a general warrant to act as "thought police." Otherwise educators could transform students into "closed circuit recipients of only that which the State chooses to communicate. . . ." The mere fact of school sponsorship does not license such thought control in the high school whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity.

Instead of "teaching children to respect the diversity of ideas that is fundamental to the American system," and "that our Constitution is a living reality," the Court's decision in the *Hazelwood* case "teaches youth to discount important principles of our government as mere platitudes."

Dorothie C. Shah is a teacher at Evanston Township High School in Evanston, Illinois. References include Stuart Taylor, Jr., "Court, 5-3, Widens Power of Schools to Act as Censors," The New York Times, *January 14, 1988, pp. 1 and 15; "Excerpts from Opinions in Ruling on Censoring High School Newspaper,"* The New York Times, *January 14, 1988, p. 14; and Supreme Court of the United States,* Hazelwood School District v. Kuhlmeier et al., *No. 86-836, argued October 13, 1987, decided January 13, 1988, Cited 108 S. Ct. 562.*

History

(continued from page 47)

ing, inhaling, or rubbing on the skin. Within about a decade, warnings surfaced. Consumption peaked about twenty years after its initial distribution, and around the same time the accounts of its effect on the lives of its users and its popularly believed – although questionable – special link with southern blacks created in the public's mind an image so fearful that cocaine's effects became the extreme against which other drugs would be compared. Cocaine's association with violence, paranoia, and collapsed careers made laws against it by 1910 a popular matter. The first strict antinarcotic law in New York State was passed in 1913 and was directed to cocaine. The combination of strict laws and intense public support of control measures brought on a reduction in consumption, which, at the peak of its popularity, must have seemed most unlikely if not impossible.

The effect of the Harrison Act, its court interpretations, and supplementary legislation also appear to have reduced greatly the number of opiate addicts. The medical and pharmacy professions were denied an easy way of providing drugs. Although it is clear that only a fraction of either profession was liberal in their provision, this nevertheless had been enough to maintain a large number of users. The number of those addicted fell from about a quarter-million around 1900 to much less than half that number by World War II. The war effectively reduced supplies of narcotics to the United States, and in 1945 the United States probably had its lowest number of opiate addicts since the mid-nineteenth century.

Narcotic Clinics, 1913-1925

In order to close the story of the decline in addiction after 1900, it is necessary to consider the narcotic clinics that, like the Philippine opium dispensaries, were intended to deal with addicts who no longer could receive opiate or cocaine supplies from local physicians. The first in the United States was opened in 1912 by Charles Terry, the public health officer of Jacksonville, Florida, where he provided both opiates and cocaine to men and women, blacks and whites.

Other clinics followed, particularly after the Treasury Department, in enforcement of the Harrison Act, prosecuted or threatened with prosecution health professionals who supplied addicts indefinitely. A series of clinics in New England were established at the suggestion of officials of the Internal Revenue Bureau. In New York State, the crackdown on druggists and physicians emanated from state law, and clinics were established in upper New York State through state planning and authorization. Registration of addicts was permitted so that physicians would restrict maintenance to those already addicted.

In New York City, the Health Department did not wish to provide opiates, morphine, and heroin on an indefinite basis but did open a clinic at the city Health Department headquarters. This clinic provided heroin, but only as an inducement to registration and eventual detoxification and rehabilitation. About 7,500 addicts registered, received their drug of choice in dosages gradually decreased until uncomfortably small, usually three to eight grains of morphine daily, and were offered curative treatment. Most declined to be cured. Those who did receive treatment, at North Brother Island, seemed both unappreciative and very likely – the estimate was 95 percent – to return to narcotics available on the street or from a physician or druggist.

The Treasury Department, armed with fresh Supreme Court decisions of March 1919, started to close down the clinics, along with prosecuting the dispensing physicians and druggists. One argument was that the availability of easy maintenance inhibited cures. Another was that giving legal permission for maintenance clinics undercut the Treasury Department's position when it brought action against a professional for reckless provision of drugs. From a legal point of view the "reckless" provider was obeying the tax laws, as was the clinic, unless the federal government wanted to get into the question of medical competence, which was a state, not a federal, concern.

Gradually the clinics were closed, the last one in 1925 in Knoxville, Tennessee. Some had been operated poorly, others quite responsibly with community support. Yet, because of the intricacies of the tax powers under which the federal law operated, all were closed, even if unfair harassment was necessary to discourage the operation.

Before their demise, the clinics treated a number of addicts. The 13,000 addicted registrants in New York State in 1920 add up to the largest number of legally supplied addicts recorded in any Western country this century, a number not approached yet by Britain under the so-called "British System." Although the "American System" preceded and surpassed in size any scheme attempted then or subsequently in Britain, it was in fact the large number of addicts in America that made maintenance so unwieldy and unpopular.

The demise of the clinics left drug peddlers and individual members of the health professions as the major targets of the federal government. Generally, the physicians did not wish to treat addicts, nor did they have any sympathy with addicts. Those physicians who, for whatever reason, did continue to treat addicts with maintenance doses were threatened and arrested, unless the maintenance was permitted, but only on a case-by-case evaluation. From reports prepared by agents investigating narcotic clinics, it appears that an acceptable life-style was a requirement for permission to be maintained.

Along with the rejection of maintenance, physicians unfortunately had no effective medical cure available for addiction. Several had been promoted in many forms in the nineteenth and early twentieth century, but each had been found to have no scientific merit. The problem developed into a decision of whether to stop opiates abruptly and thereby cause the patient to go directly into full withdrawal – the so-called "cold turkey" approach – or gradually to reduce the opiate over a few days or a few weeks. Detoxification – the "cold turkey" approach – was the preferred route for legal reasons. Two ancient warnings about detoxification, that the patient would die in withdrawal, or that a supply cutoff would precipitate a rash of suicides, did not materialize.

Marijuana Tax Act of 1937

With the battle against opiate addiction apparently at a more stable, less alarming level in the 1930s and the use of cocaine having declined dramatically, a new dangerous drug appeared on the American horizon: marijuana smoking arrived in the United States with Mexican farm workers who had crossed the border, mostly to labor in agricultural fields in the Southwest and in sugar beet fields as far north as Montana and Michigan. During the prosperous 1920s, about half a million farm workers came to the United States, but as the Depression's widespread unemployment laid an increasingly heavy burden on the country's citizens, the Mexicans became an unwelcome group, encouraged in all ways to return to Mexico. Entwined with the troubles they were said to cause local citizens was the Mexicans' custom of growing marijuana for their own use. Hence, marijuana was linked to violence, dissolute living, and Mexican aliens.

The greatest fear of marijuana in the United States lay in the West and Southwest. The government was importuned to take action, but the recent experience with alcohol prohibition (which had ended in 1933) made the Federal Bureau of Narcotics (FBN) hesitant to get involved in a drug that grew domestically and prolifically. Cocaine and heroin were both foreign imports and therefore, at least theoretically, could be regulated more easily, but marijuana appeared to be almost impossible to curb, let alone eradicate. The FBN tried to address this drug by including it in a recommended uniform state narcotic law that would leave to localities the question of prosecution and allocation of enforcement resources. Then a curious law intended to reduce the number of machine guns provided the government with a mechanism to attack marijuana nationally and at the federal level.

The Firearms Act of 1934 decreed that a machine gun could not be transferred in any way without the payment of a transfer tax (from which law enforcement personnel were exempted). As odd as this mechanism may sound, the law was upheld by the Supreme Court in 1937 as a legitimate use of the power of taxation for a moral objective. Within weeks of this decision, the Treasury Department, which housed the FBN, appeared before Congress asking for a transfer tax for marijuana. Without a stamp permit and the proper tax stamps, marijuana could not be sold, bartered, or given away. Congress quickly approved the bill, and President Franklin Roosevelt signed it into law later in 1937.

Unfortunately for the enforcement of this law, the FBN did not receive any more money or agents. Therefore, the FBN relied on obnoxious descriptions of marijuana to do the job. The substance was described to the public as a danger at least equal to cocaine or morphine, and the penalties for its illegal use or possession were severe. Because use of marijuana does not seem to have been great in the 1930s, the law's extraordinary severity did not concern the general public until the 1960s, when thousands of users were arrested as marijuana's popularity burgeoned. Furthermore, the contrast between the effects of marijuana observed in the 1960s and the longstanding claims of the FBN regarding marijuana led to a problem concerning the credibility of official statements, which still affects popular perceptions.

World War II to the 1960s

The Second World War ended with relatively few opiate addicts and very little use of cocaine or marijuana in the United States. The only closely controlled drug rising in use was alcohol, consumption of which had increased in per capita rates since the repeal of Prohibition. During all this period, sleeping pills and other barbiturates were prescribed widely but did not appear to be a major problem. The same holds true for the amphetamines, which had been made available in the 1930s and continued to be manufactured and prescribed without restriction.

Treatment of hard-core addicts did take place at the two federal narcotics hospitals in Lexington, Kentucky, and Fort Worth, Texas. Each was, in fact, a prison in which addicts were treated and forced to detoxify, but the patients/prisoners frequently resumed their drug habits when they returned to their previous environments.

Around 1950 a younger age group began to be admitted for heroin addiction, an abuse that reached a very high level in 1970 and remains high today. This threat elicited two responses. First, the federal government enacted more severe laws that levied mandatory sentences for conviction of dealing in narcotics. The laws enacted in 1951 and 1956 are the peak of legal penalties against narcotics, including marijuana, in the United States.

The second response reflected the domestic and international tensions of the time. The heroin menace – and it should be reemphasized that cocaine and marijuana were not seen as major problems in the 1950s – was ascribed to the infiltration of the drug trade by Chinese Communists who had taken over the China mainland in 1949.

Heroin addicts in the 1950s mainly were young males concentrated in black and Hispanic urban ghettos. Reform-minded lawyers, academics, and physicians found the harsh penalties and the loathing attitude toward addicts to be inhumane. Rather than depriving addicts of heroin, heroin should be provided them. Rather than jailing addicts, they should be hospitalized, if necessary, or just left alone. This alternative view competed with the more hard-line style of law enforcement.

However, after forty or more years, treating addicts medically, which had been popular before World War I and had then been found inadequate to the task of reducing addiction, became part of public policy in the 1960s. Methadone, a synthetic opiate developed in Germany in World War II, was used to provide maintenance. This marked a major break in American narcotic control policies; maintenance again was legal, although not with heroin or morphine.

1960s to the Present

In the 1960s, an enthusiasm for drug consumption of all kinds, polydrug abuse, replaced the habitual use of one or two drugs, which had been more common in the past. Marijuana became very popular with young people, and then gradually its popularity expanded in both directions, to even younger and to older ages. Psychedelic drugs, such as LSD, appeared on the scene, along with injectable methedrine or "speed." Drugs came to symbolize opposition to the government and older mores. The turmoil and dissension caused by the Vietnam War added to the sense of alienation many young people already felt from the older generation, which frowned on drug use other than alcohol and tobacco. In addition to cultural alienation and the rapid increase in multidrug use, the drug problem in the 1960s was intensified by the extraordinarily large number of young people in the ages most likely to experiment with drugs; the post-World War II "baby boom" generation had reached the teenage years.

By 1970, marijuana was used commonly, and research was showing that it did not have the awful effects ascribed to it from the 1930s onward. Various groups and individuals initiated movements to legalize the substance, perhaps along the lines of tobacco. The drug situation was perceived by the public and the federal government to be so bad and yet so difficult to control that this seemed a good time to reevaluate the nation's entire policy. A National Commission on Marijuana and Drug Abuse was established

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Dr. David F. Musto of the Yale University Medical School and Yale's Department of History is the author of American Disease: Origins of Narcotic Control *(New Haven: Yale University Press, 1973). This article is abridged from "The History of Legislative Control over Opium, Cocaine, and their Derivatives," which appeared in the book* Dealing with Drugs: Consequences of Government Control, *edited by Ronald Hamowy and published by Lexington Books in 1987. It is reprinted with permission from the Pacific Research Institute for Public Policy.*

by President Richard Nixon in 1971.

In general, the members of the commission reflected traditional views on the subject of drug control, and therefore it was with even greater impact that the commission recommended in its first report, "Marijuana: A Signal of Misunderstanding," that the substance be "decriminalized." By decriminalization was not meant legalization but a step short of that position: Marijuana possession for individual use no longer would be a crime, but its sale and distribution would be against the law. The purpose of control at this stage would be to relieve law enforcement agencies of the nuisance of arresting individual users and thereby allow more resources to be concentrated on investigating large-scale crime and more dangerous drugs.

The second and final report, published in 1973, dealt with drugs more broadly. It attempted to draw attention to the actual, measurable damage done by drugs, reflected in hospital admissions and drug-related deaths, as opposed to the myths that had evolved around many of them. Heroin, for example, was misperceived as causing more deaths annually than barbiturates. This approach intended to make more rational the discussion over drug policy, but it also laid the groundwork for the inclusion of cigarettes and alcohol in the antidrug crusade. It de-emphasized, however, the effects a drug such as cocaine has on judgment and efficiency, the less quantifiable but still real aspects of drug use.

The enforcement of laws against individual possession or use of marijuana has fallen in the United States to a very low level. Moreover, dealers in relatively small amounts are reportedly not prosecuted either, because the largest dealers and smugglers, who are involved with tons, not ounces or pounds of marijuana, require all the time of officials. There has been a *de facto* decriminalization throughout large parts of the country, even if laws against individual use remain on the books. Yet, the frequency of marijuana use by high school seniors has been dropping since 1978, and this reduction, coupled with a more conservative national mood, has slowed further moves toward formal federal decriminalization or more liberality in the drug laws.

The rise in cocaine's availability and popularity, for the second time this century, has further complicated the control of drugs in the United States. The fact that first millions should use marijuana, then millions more take cocaine raises questions about the ability of local and national governments to control narcotics. The corruption that follows the drug traffic and the restraints on resources that may be allocated to drug control combine to leave a sense of frustration with enforcement policy.

What will be the result of these trends? It all remains uncertain. We appear to be in an era of widespread drug use that would seem to make reasonable the revocation of antidrug statutes. We should recall, however, that a similar condition prevailed around 1900, shortly before an onslaught against drug use led to a substantial reduction in the use of the opiates, heroin, cocaine, and alcohol. That such a national response could occur must make us pause before offering predictions for the future. ☐

Yes!

(continued from page 27)

should be dealt with differently, that you should treat them differently when you use them. But millions and millions of people don't know the differences between marijuana, cocaine, crack, opium and heroin. Yet those differences are more profoundly important than the differences between beer, wine and alcohol. People don't know that because we continue to treat drugs as though they are a single phenomenon.

We continue to miseducate people about the dangers of these things, and to spread lies and myths about how if you start smoking marijuana you will move to cocaine and heroin, and how these drugs affect your ability to do anything. All of these myths get perpetuated, in large part, by law enforcement agencies with the best of intentions but with an abundance of ignorance about what drugs really are and what they do. They have good intentions, but an unwillingness to honestly portray what the different drugs are and what they do, because it isn't in their interest to do it. Former Assistant U.S. Attorney General William Bradford Reynolds said in a report to the Justice Department, "Overall we should send the message that there are two ways to approach drugs: the soft, easy way that emphasizes drug treatment and rehabilitation versus the hard, tough approach that emphasizes strong law enforcement measures and drug testing." Naturally, he favored the latter, as do most law enforcement people.

Maybe they naturally favor the tough approach, but if they understood the reality of the situation, they would at least begin to consider alternatives, rather than a knee-jerk response that anything except putting people in prison, and increasing already harsh penalties, is a mistake—because that is the mistake.

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No!

(continued from page 25)

figures to make money off of drugs.

If you think that an organized crime person involved in narcotics trafficking now is going to give his efforts over the Boy Scouts when drugs are legal, you are dreaming. There will be other opportunities, other crimes for him to spend his time on. He is not somebody who would be in church, except that he is involved in narcotics because it happens to be illegal and makes him money. He is somebody who will take advantage of whatever illegal opportunities there are at a given time.

The Moral Imperative

In any event, I actually believe that the whole business about cost benefit analysis is irrelevant. I don't care if the professor is correct about his assessment of the relative costs and benefits of criminalization and decriminalization.

In other words, I don't care if he could actually show that the cost to society of making drugs illegal is just too high, and that the benefits to society of making them legal are great. Let's assume that he is right for the sake of the argument. It strikes me even so that the argument entirely misses the point. Let me give an example. Let's say there's a hypothesis that we could solve the economic problems in the United States by indenturing the lowest 15 or 20 percent of the population to the top 20 percent. Under this hypothesis we could rearrange things so that the people on the bottom came to work for the people on the top, as household servants, as aides at businesses, and so on, and the only real price for that would be that we simply repeal the Thirteenth Amendment, which eliminates slavery. If I could show you hypothetically that the economic benefits of doing that are great and that we can improve social and economic conditions in the United States markedly, you would say to me, but Mr. Scorza, you are missing the point. The point is that slavery is wrong.

This is the point about narcotics too. There is a difference between narcotics and alcohol. You know that difference when you work in law enforcement, as a DEA agent, as an FBI agent, as a Chicago police officer, as a prosecutor. And you know that difference if you work counseling these people. Narcotics has a devastating effect upon the human being. I don't know why that is the case. I speculate about that a lot on a given day. Why have people been so utterly corrupted? I have informants that I would like to have 3,000 miles away from me when I have to deal with them. I have drug agents who sometimes have worked so closely undercover that they themselves seem to get tainted as human beings by the narcotics business. There is something about it that is devastating to the human being in a way that alcohol is not, perhaps because alcohol has such a long history of social use, especially in the West.

The point about drug trafficking and drug usage is this: when we have a law against narcotics usage and narcotics trafficking, we are essentially making a moral statement, not in the narrow or religious sense of the television preachers, but in the broad political sense. We are saying what we want our citizens, especially our young people, to be like, and what we want them not to be like.

We don't want them to give their lives over to this poison that people traffic in for profit. We would substantially change the character of our country if we had narcotics as acceptable legal activity. We would change the character of our country in many subtle ways because we would be saying something different about ourselves than we are saying now.

My position, and I know it is the position of the United States Attorney for whom I work, is that we don't really care what the cost is going to be, don't really care how much work remains to be done, don't really care that we can't actually be totally successful. The point is that narcotics usage is wrong in the social, political and moral sense because it gives the wrong message about what people ought to be like and what type of citizens we want.

There is no way of really convincing somebody of that by any kind of statistical analysis or sociological model. It has a lot to do with the raw experience of life, what drug trafficking is like, and what drugs do to people and do to their lives. So, even if you can concede the cost benefit analysis under the professor's position, do you want to make a statement – especially to the young – that drug usage is one of those things you chose, like going to the movies, or deciding to go to college, or falling in love? The reason that you are squeamish about that idea, I trust, is that you realize intuitively or by your own experience and your own studies, that all of these things that we have – our laws, our customs, our principles – make a society one thing rather than another. The danger in legalization is that we would change ourselves to be something worse and less than we are.

Churchill once said at a very gloomy time of his life, "there is probably going to be a better day, but we don't know when we are going to get there." But it is clear that we must keep on doing what we do now – never flinch, never waiver, never despair – keep punishing people on the supply side, and doing the best we can on the demand side.

Racially Motivated?

Racial issues inevitably overlap with drug issues in our society. These racial issues are very sensitive. I think people like Jesse Jackson are wrong to say that the proponents of legalization are doing it for racist motives. That doesn't give these people their due. They mean well. I do think, however, that what he sees is absolutely true. The effects of narcotics trafficking and usage, and in the long run of legalization, are going to be borne more by the lower economic classes, more by the black and the brown than the white. The use of narcotics in the black neighborhood where I live in the city of Chicago, near the University of Chicago, is devastating. The use of narcotics, especially on young male blacks, is devastating. The mayor of Chicago has said that the biggest problem he has is drug usage by black boys and young black men. He is right.

The Law as Educator

It is obviously true that attitudes are changing about both alcohol consumption and cigarette smoking, because the level of those things in society has a lot to do with general social attitudes. If society is celebrating those things, people do them more. That is the way human beings are. If society is down on those things, people do them less.

Notice what would happen if tomorrow you legalize narcotics. A big part of the social negative on narcotics would go away. Overnight what would happen is that one of the things that is dissuading some people from engaging in narcotics usage would disappear. You have to be extraordinarily optimistic to think that you are going to replace the negative impact of illegality on usage. You are not going to be able to replace that by an education program or by social programs.

I look at this by seeing all the children out there on a continuum. A whole bunch of them, maybe half or more, are never ever going to use narcotics. Some are going to use narcotics no matter what we do. We are really fighting for the big chunk in the middle. The people in the middle are affected by whether something is legal or illegal; whether famous people do it or not; whether it is the cool thing to do or not. You push the scale when you make it legal, as opposed to illegal. When you make something legal, you give it a kind of blessing that has an effect down the line.

In closing, I want to make one point. I know it is true that the law enforcement people – that means the U.S. attorneys, the state's attorneys, the police departments, the DEA, and the FBI – are putting a lot of their spare time, and they don't have much, into the demand reduction effort, regularly going out to schools and civic groups with antidrug presentations.

I think law enforcement people are more sophisticated than the professor believes. We know that you are not going to be able to eliminate narcotics by putting people in jail. We spend our time, therefore, not only in law enforcement but also in demand reduction. None of us has the illusion that we are going to have a drug-free America. What we want is to have a better America than we would have if we followed Professor Chambliss's advice.

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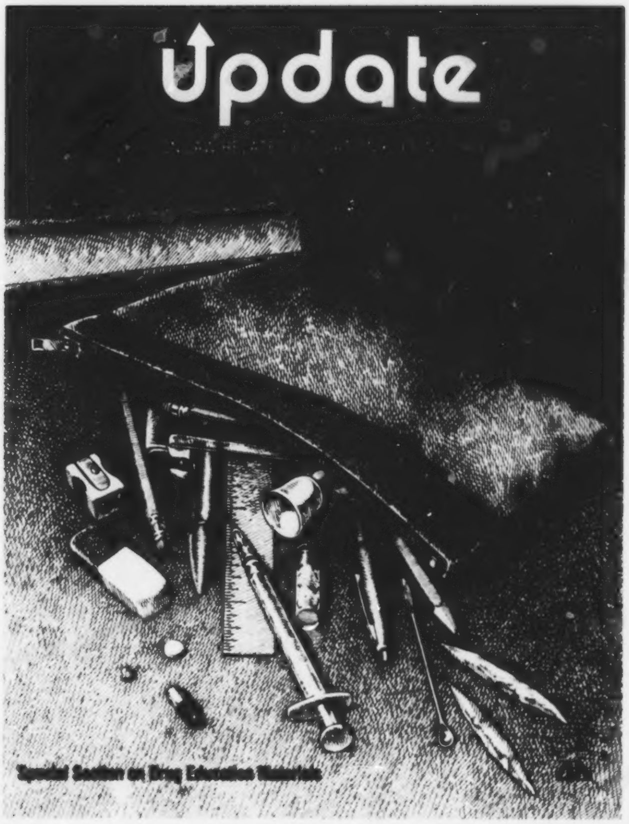
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Special Issue on the Supreme Court

The Rehnquist Court Comes of Age

2308

contents

Volume 13, No. 3, Fall 1989

2 The Rehnquist Court Comes of Age

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

6 So You Want to Become a Supreme Court Justice?
8 What Makes a Good Supreme Court Justice?
11 The Viability of *Roe v. Wade*

ELEMENTARY SCHOOL

STRATEGIES FOR UPPER ELEMENTARY GRADES

16 Does the Constitution Protect Your Right to Fair Play?
18 What Is the Judicial Branch?

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

20 Good Law or Bad Law?
21 *California v. Greenwood* Moot Court Simulation
25 Court Briefs

MIDDLE SCHOOL

STRATEGY FOR GRADES 7-8

35 Christmas Creche Crisis
39 Courting the Court

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGY

42 The Supreme Court and Public Pressure
45 Covering the Court

Cover Art by John Figler

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2309

SUPREME COURT

David M. O'Brien

The Rehnquist Court Comes of Age

The past term was the fulfillment of a judicial revolution

The Rehnquist Court has come of age and may well prove to be President Ronald Reagan's most lasting legacy. With the elevation of William H. Rehnquist from associate to chief justice in 1986 and appointments of Justices Sandra O'Connor in 1981, Antonin Scalia in 1986 and, finally, Anthony Kennedy in 1987, Reagan achieved what no other president since Franklin D. Roosevelt has: He managed to turn the Court around and point it in new directions.

The emergence of a solid conservative majority is unmistakeable. In the 169 cases decided by full written opinion in 1988–1989, Chief Justice Rehnquist dissented only ten times. Moreover, Justice Byron White sided with him in all but two cases. Kennedy broke with Rehnquist only seven times; Scalia eight times; and O'Connor in thirteen cases.

Another measure of the Court's rightward move is dissenting opinions from the denial of review of certiorari petitions. It takes the votes of at least four justices to agree to hear a case. Sometimes when these votes are not forthcoming on a petition for certiorari, one or more of the justices who wished to hear the case will dissent from the Court's denial. The most ideologically-opposed justices tend to write opinions dissenting from denials. In 1980–1981, for instance, Rehnquist wrote 32 percent of the dissents from denials, whereas Brennan wrote 22 percent. By contrast, as the Court became more conservative due to Reagan's appointees, in 1987–1988 Brennan wrote 44 percent of all dissents from denial of certiorari, while less than one percent came from Rehnquist.

In addition, the Court now splits five-to-four less often. And 22 of the 35 cases decided by a bare majority went Rehnquist's way in 1988–1989. The most senior and liberal justice, William J. Brennan, Jr., was in the majority only seven times.

The Politics of Institutional Change

As an institution, the Court usually shifts course gradually. Moderate changes in legal currents come with the addition of new justices. But the first full term (1988–1989) of the Reagan/Rehnquist Court brought about the kind of sea-change that rarely occurs. And the forces within the Rehnquist Court are likely to gather momentum in future terms. There may be some sweeping changes, but more likely just a powerful undertow for precedents in a number of areas of constitutional law.

The Court has changed course abruptly twice in the last half century. The year after President Roosevelt's landslide reelection victory, 1937, was one of the two major turning points for the modern Court. That was when a bare majority of the Court abandoned its defense of laissez-faire capitalism and ceased attacking progressive-New Deal legislation. The 1937 "switch-in-time-that-saved-nine" contributed to the Senate's defeat of FDR's plan to enlarge the size of the Court in order to secure a majority sympathetic to the New Deal. Although his "Court-packing" plan failed, FDR eventually succeeded in naming eight justices and elevating Justice Harlan Stone to the center chair on the Court. The Roosevelt Court gradually became more solicitous of civil liberties and set the stage for the revolutions later forged in constitutional politics by the Warren Court.

Despite the landmark school desegregation ruling in *Brown v. Board of Education* in 1954, 1962 was the year of the other major sea-change for the modern Court. In that year, a solid majority came together on the Warren Court to push constitutional law in new directions – towards greater freedom of speech and press, more protection for the rights of the accused, and expanded guarantees of due process and equal protection. However, between 1954 to 1962 – nearly a decade following *Brown* – Chief Justice Warren and Justices Hugo Black, William Douglas, and William J. Brennan were forced to dissent together in a large number of areas.

Chief Justice Earl Warren could not muster a majority for forging the "due process revolution" and the "reapportionment revolution" until after the 1962 appointment of Justice Arthur Goldberg. Then the Warren Court moved quickly, painting with a broad brush and leaving a sweeping and indelible imprint on constitutional law.

The Warren Court "era," however, lasted a remarkably brief period in the history of American politics. It ended just seven years later in 1969. Yet, as great as the revolutions forged in constitutional law during that period was the impact of Warren Court on American politics. For the last 20 years Republican presidents have railed against the Court and made it an issue in every presidential election.

Fearing that Richard Nixon would win the 1968, Chief Justice Warren offered to retire upon the Senate's confirmation of his successor. But Republicans and Southern conservative Democrats in the Senate forced the withdrawal of President Lyndon Johnson's nominee for chief justice, Abe Fortas. Nixon won the 1968 presidential election in a campaign based in part on attacking the "liberal jurisprudence" of the Warren Court. And in 1969 he named Warren E. Burger to succeed Chief Justice Warren.

The Reagan "Revolution"

Nixon's appointment of Burger and later Justices Harry Blackmun, Lewis F. Powell and William Rehnquist, nevertheless failed to turn the Court around. The Burger Court could stem but not reverse the tides in constitutional law set in motion by the Warren Court. This was because the Burger Court was often fragmented, frequently divided five-to-four or six-to-three, and pulled in different directions by either its most liberal or most conservative members. There were only modest "adjustments," as Burger put it when announcing his retirement, in the jurisprudential house built by the Warren Court.

But the Burger Court also made a few new additions. It upheld abortion, affirmative action, and busing, and gave even greater scope to the Fourteenth Amendment's Equal Protection Clause. Those rulings in turn embittered New Right "movement conservatives" in the 1970s and 1980s. And they set the stage for the Reagan era and packing the Court anew.

Reagan campaigned in 1980 and 1984 on a promise to appoint as judges only those opposed to abortion and the "judicial activism" of the Warren and Burger Courts. No other president has had as great an impact on the federal judiciary since FDR. Before leaving the Oval Office, Reagan named close to half of all lower court judges (368 out of 743). Numbers are only part of the story, though. Reagan put into place the most rigorous process for judicial selection ever. Justices and judges were viewed as symbols and instruments of presidential power and a way to ensure Reagan's legacy.

Through judicial appointments, claimed Attorney General Edwin Meese III, the administration aimed "to institutionalize the Reagan revolution so it can't be set aside no matter what happens in future presidential elections."

While hugely successful in appointing lower court judges, Reagan failed to win a majority of the Court over to his positions on abortion, affirmative action, and other hotly contested issues until Justice Powell stepped down in June 1987. Powell held the pivotal vote on a number of crucial issues. In Powell's last two terms (1985–1987), the justices split five-to-four in 81 cases. In over 75 percent of those cases, Powell cast the deciding vote. Notably, Powell held the crucial fifth vote in cases rejecting the Reagan administration's positions on abortion, affirmative action, and some other social policy issues.

With Powell's departure, Reagan got a chance to turn the Court around. Reagan's first nominee for his seat, Judge Robert Bork, was defeated after an bitter confirmation battle by the widest Senate vote ever on a nominee (58-to-42). Reagan's second nominee, Judge Douglas H. Ginsburg, was forced to withdraw once revelations about his personal affairs turned New Right senators against him. Reagan's third nominee, Judge Anthony M. Kennedy, won easy confirmation. While he was not the kind of justice that officials in Reagan's Justice Department had hoped would "lock in the Reagan Revolution," there was no doubt that he and other Reagan justices would bring a new conservatism to the bench.

The Mood and Direction of the Rehnquist Court

By all accounts, Rehnquist is a splendid chief justice. He has the intellectual and temperamental wherewithal to be a leader. No less important is the simple fact that there are now four justices who are more inclined than not to agree with him. Rehnquist has not moderated his views, which as an associate justice earned him the reputation of being the "Lone Ranger" for standing alone in 54 solo dissenting opinions. In his fifteen years as an associate justice, Rehnquist staked out his own conservative philosophy, for which Reagan elevated him to chief justice. Rehnquist has not turned his back on his record. Rather, with the addition of other Reagan justices, the Court has moved in Rehnquist's direction.

While Rehnquist is much less interested in the administrative side of the chief justiceship and the matters of judicial reform which preoccupied his predecessor, he wins praise for his crisp business-like conduct of the justices' private conferences. His wit and humor enliven oral arguments. That has made for more relaxed collegial relations among the justices off the bench as well. And it has contributed to moving White closer to the chief justice than when Burger held the center chair.

As anticipated, O'Connor bolstered the conservative camp. In her first eight years on the bench, she has sided with Rehnquist about 87 percent of the time, while joining Brennan barely more than half the time. Unlike Reagan's other justices, though, O'Connor was chosen more for symbolic than ideological reasons: In 1980 Reagan had promised, if elected, to name the first woman to the high court. As a result, O'Connor is more likely than any other justice in Rehnquist's bloc to break ranks.

For the time being, O'Connor will determine the Court's course on abortion, church-state relations, and some issues arising over the imposition of capital punishment. Much to Scalia's ire, she would not go along with overturning *Roe v. Wade* (1973) in *Webster v. Center for Reproductive Health Services*, 57 U.S.L.W. 5023 (1989). She also held the crucial vote in the 1989 ruling on the public display of creches and menorahs, which was handed down in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 57 U.S.L.W. 5045. O'Connor joined Justice Blackmun's tortured opinion in that case, while all the other justices partially concurred with and dissented from it. O'Connor, nonetheless, is not a "centrist" or "swing" voter across the broad range of issues in the same way that Justices Potter Stewart and Powell were in the 1970s and 1980s. Besides being decidedly more conservative than those two justices, she is a more ardent defender of states' powers than Chief Justice Rehnquist.

Scalia's style is more closely matched to that of Justice Felix Frankfurter than any other justice who has come along in recent years. He claims that it is the "academic" in him that drives him to pepper attorneys with questions during oral arguments and to try to lecture the other justices during conferences. But some members of the bench and bar find his behavior irritatingly overbearing. Scalia is firmly aligned with Rehnquist and O'Connor, voting with them, respectively, over 85 and 74 percent of the time. However, he pays less deference than they do to "states' rights" claims and disappointed some conservatives by adhering to precedents. He has also shown a civil libertarian streak when it comes to First and Fourth Amendment jurisprudence. In particular, he joined the majority in the "flag-burning" case, *Texas v. Johnson*, 57 U.S.L.W. 4770 (1989), and the dissenters in the drug-testing case, *National Treasury Employees v. Von Raab*, 57 U.S.L.W. 4338 (1989). Scalia also stands alone when defending the Reagan administration's views of presidential power and a rigid separation of powers in cases such as those dealing with the constitutionality of special prosecutors, *Morrison v. Olson*, 108 S. Ct. 2597 (1988), and the

United States sentencing commission, *Mistretta v. United States*, 57 U.S.L.W. 4102 (1989).

Despite being portrayed at the time of his nomination as a low-profile nonconfrontational jurist in the mold of Justice Powell, Kennedy quickly emerged as a solid conservative. His style is more of a tempered technician than an eloquent and inspired jurisprude like Bork. Yet, with the exception of his vote in the flag-burning case, he ended up just about where Bork would have. Consequently, the Court turned a sharp corner in the areas where Powell had held the line – affirmative action, capital punishment, and privacy, for example – as well as moving much closer to deeply cutting back (if not ultimately reversing) *Roe*.

Whereas the Court in the mid-1980s often appeared unsure of itself and deeply fragmented, the Court under Chief Justice Rehnquist appears more self-confident. That may be because its more liberal members are in their eighties, while Rehnquist is 65 and Reagan's other justices are in their early fifties. But that is not all. Rehnquist's camp can dictate the Court's agenda, since it only takes four justices to grant cases review. Thus, when handing down *Webster*, Rehnquist announced that the Court would hear three more abortion cases in its 1989–1990 term.

Rehnquist's majority also signaled that it does not want to waste time with "frivolous" appeals from indigents. Over the bitter dissent of Justices Brennan, Marshall and Stevens, the majority issued an extraordinary order barring a prison inmate, who since 1971 had filed over 73 petitions, from filing any more *in forma pauperis* petitions. That order, *In re MacDonald* (1988), symbolically represented the other recent rulings cutting back on the assistance of counsel and other protective benefits accorded the poor.

If there were any doubt that the Court would not abruptly change course, it ended with the one-two punch dealt affirmative-action programs. After *City of Richmond v. J. R. Croson Company*, 57 U.S.L.W. 4132 (1989), state and local affirmative action programs are virtually impossible to defend, unless states and localities show concrete evidence of their past discrimination. Other rulings by the Rehnquist Court made it easier for white males to challenge court-approved affirmative action plans, even years after they have been put into place. Businesses will also find it easier to avoid liability for past discrimination in refusing to promote women. And women and men seeking compensatory damages for job discrimination by states and localities under the 1866 Civil Rights Act will now find that door closed as well.

Ironically, though, those in Rehnquist's camp saved their sharpest barbs for each other. In *Webster*, for example, Scalia sharply criticized Rehnquist for being "stingy" in stopping short of expressly gutting *Roe*. And revealing his infuriation with O'Connor's refusal to go along with overturning *Roe*, Scalia complained that "the mansion of constitutionalized abortion law" will have to be "disassembled doorjamb by doorjamb." Although generally dismissing out of hand (and, thereby, refusing to take seriously) the views of those in the minority, in 1988–1989 Rehnquist's camp evidenced a curious failure to fully appreciate that they are in command and need not carry their squabbles into print.

Style and Modes of Analysis

There were few surprises in the Rehnquist Court's first full term. The major surprise came with the five-to-four ruling upholding an appellate court which overturned the conviction of a protester who burned an American flag when protesting the Reagan administration's foreign policies at a rally outside the 1984 Republican national convention. Reagan's last two appointees, Scalia and Kennedy, joined the three most liberal justices (Brennan, Blackmun and Thurgood Marshall) in upholding the First Amendment. It was one of a handful of cases in which they broke stride with Chief Justice Rehnquist and Justices O'Connor and White. A troubled Kennedy was moved to explain how "painful" the decision was for him. But flag desecration touches the heart of American politics. It tears the Court and the country between reason and passion. Twenty years ago, when upholding free speech in another flag-burning case, the Court also split five-to-four. That time Chief Justice Warren and Justices Hugo Black, Fortas and White dissented.

Rehnquist's majority displays an eagerness to overturn prior rulings with which it disagrees. At the same time, it appears to shrewdly and prudently calculate the importance of not appearing to break too radically with the past. Rehnquist's camp is thus often content to simply continue chipping away at landmark rulings.

This has been the practice when dealing with issues related to controversial rulings like *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d. 694 (1966), which held that police must inform suspects of their rights to remain silent, to have the presence of an attorney during police questioning, and to have one appointed for them if they are too poor to hire their own. Over the years, so many exceptions have been made that *Miranda* survives only as a hollow symbol of the Warren Court. Last term, the Rehnquist Court held that police do not have to honor *Miranda* when making routine traffic stops that result in the driver's arrest. Nor, held a bare majority in *Duckworth v. Eagan*, 57 U.S.L.W. 4942 (1989), must police use the exact language of *Miranda* when informing suspects of their rights.

Making exceptions to landmark rulings is not the only way Rehnquist's bloc is working its will. Four rulings in the 1988–1989 term expressly overturned prior decisions, and two others did that the year before. But the strategy of Rehnquist's bloc is often to reinterpret precedents in such a way as to reverse them without explicitly saying so. For instance, in a major ruling making it more difficult for women and minorities to prove on-the-job bias, a bare majority of the Court held in *Wards Cove Packing Co., Inc. v. Atonio*, 57 U.S.L.W. 4583 (1989), that they may no longer use statistics to prove discrimination and that *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in Justice White's words, "should have been understood to mean" that!

More typically, the Rehnquist Court either refuses to extend or decides to carve out exceptions to prior rulings. In this respect, the Rehnquist Court is maintaining the practice that emerged when approving "good faith" and "inevitable discovery" exceptions to the Fourth Amendment's exclusionary rule, which bars the use at trial of evidence illegally obtained by police. In a series of cases, the Court held that evidence which the police illegally seized in good faith – in the mistaken belief that they were acting legally – may be admitted and used against the defendant. So too, the Rehnquist Court is inclined to uphold convictions based on the "harmless error" doctrine, which holds that not all procedural errors and failures to respect the rights of the accused merit the reversal of convictions and require the retrial of defendants.

On other matters of criminal procedure, the Rehnquist Court demonstrates a continuing aversion to "bright-line" rules which infringe on law-enforcement interests. The Rehnquist Court, for instance, is prone to look at the "totality of

(continued on page 49)

Supreme Court

So You Want to Become a Supreme Court Justice?/Secondary — Edward Nicholanco

Dean Matthews

Introduction

As Hamilton wrote in *The Federalist Papers* (No. 78), "The Judicial Branch from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." But Hamilton also wrote in *The Federalist Papers* (No. 22) that "Laws are a dead letter without courts to expound and define their true meaning and operation."

"Separation of powers" is an essential part of our political system under the Constitution of the United States. Students must be aware of this premise and understand how this system works and how it has been used throughout the history of the country. This simulation lesson will contribute to their further understanding of the system.

Rationale

This lesson enables students to simulate the constitutional procedures on appointment of Supreme Court justices and the Senate Judiciary Committee hearings into the fitness of nominees.

The purpose of the simulation is to show how the "separation of powers" established by the Constitution affects all three branches of the government. This lesson should be taught when examining the political institutions of our system of government.

Audience

This lesson is appropriate for grades nine through twelve. It could be taught in classes on law, civics, government, or problems of democracy.

Time to Complete

Two to three weeks, but the actual simulation would last two to three days.

Goals

As a result of this lesson students will:

- Examine the functions of the Judiciary Committee other than hearings for Supreme Court nominees.
- Examine committee powers.
- Be familiar with the names of the members of the Senate Judiciary Committee.
- Attempt to examine the backgrounds of the committee members.
- Research information on past nominations both accepted and rejected.
- List the names of present members of the Supreme Court, and their experiences and background before becoming justices.
- Examine the history of Supreme Court selections.
- Explore the constitutional areas that reflect the "separation of powers" concept, including congressional committees and full Senate votes.
- Read various articles on the most recent controversial nominees to the Supreme Court.
- Explore the significance of media involvement in the hearings.
- Learn about the dialogue between the committee and the nominee.
- Explore the intricacies and difficulties of the selection process.
- Examine and discuss what Hamilton meant in his statements about the judicial branch in *The Federalist Papers* (Nos. 78 and 22).
- Analyze the power and influence of the press, especially in the use of editorial cartooning.
- Develop an awareness of the values judged to be important in the selection of a nominee.
- Appreciate the significance of the judge's life term.
- Explore the backgrounds of the people who become Supreme Court justices.

Materials

1. Copy of the U.S. Constitution.
2. Student handouts relating to significant historical hearings from the past.
3. Student signup sheets.
4. Separate rooms for student groups to meet and organize.
5. Video equipment for taping.
6. Terms and vocabulary list.

Procedure

1. See the simulation in the box.
2. Debriefing questions:
   a. What are the functions of the Senate Judiciary Committee?
   b. Relate the "separation of powers" concept to federal court nominations.
   c. What is the constitutional process used to become a Supreme Court justice or federal judge?
   d. Is there any better method of going through the selection process (suggestions)?
   e. What significant issues should be considered in the selection of a federal judge? What should senators look for in a nominee's background?

Evaluation

1. Objective quizzes can be used throughout to evaluate content areas.
2. Essay tests can also be used to evaluate student progress.
3. Reports related to basic concepts of the lesson can be written.

Tips for the Teacher

- Depending on class level, some areas of the simulation may be deleted. For example, there might be some difficulty in the media segment.
- This simulation will not become dated because federal judicial appointments will always be a part of our future.

Bibliography

"A New Majority Moves to the Right," *U.S. News & World Report*, July 13, 1987.

Baum, Lawrence, *The Supreme Court*, Congressional Quarterly Press, pp. 46-58.

"The Bork Battle," *Newsweek*, Sept. 14, 1987.

"Defining the Real Robert Bork," *Time*, Aug. 24, 1987.

"Far More Judicious," *Time*, November 23, 1987.

Guide to the Supreme Court, Congressional Quarterly, 1979.

"Spoiling for a Second Round," *Newsweek*, Nov. 9, 1987.

Edward Nicholanco teaches at Vineland High School in Vineland, New Jersey. This lesson is adapted from a lesson which will appear in Righting Your Future – LRE Lesson Plans for Today and Tomorrow, *to be published by the Center for Research and Development in Law-Related Education (CRADLE).*

Simulation Procedure

An associate justice of the Supreme Court of the United States retired at the age of 80 so that he can finally "enjoy" the rest of his life. The political and philosophical make-up of the Court at the time of the announcement was split, with four justices tending to vote liberal, four justices tending to vote conservative, and the recently retired justice tending to be a true "swing" vote. It is the constitutional duty of the president of the United States to appoint a new justice, but the majority approval of the Senate is needed to confirm the appointment. Before this vote can take place, there must be a formal hearing by the Senate Judiciary Committee.

Simulation Roles

Students will all participate in a simulation of a Senate Judiciary Committee confirmation hearing of a Supreme Court associate justice nominee. Class members will play the role of the Senate Judiciary Committee, the president, media, and court nominees.

A. President
- **Will be selected by the class.**
- **If more than one class member wants the position, an election will take place.**
- **The president (student) will announce the appointment of a nominee.**
- **The appointment will reflect his or her general political philosophy.**

B. Media (optional)
- **The presidential announcement of the nominee will be televised.**
- **The actual class Senate can be filmed.**
- **A mock newspaper will report on the hearings.**
- **The reports will be published as needed.**

C. Justice Nominee
- **Potential nominees will submit their names to the president.**
- **Credentials and backgrounds will be based on those of court nominees.**
- **Should nominees be asked to present a written statement regarding their positions on the following suggested issues and cases?**
  1. **School prayer**
  2. **Abortion**
  3. **First Amendment rights**
  4. **Power of the press**
- **Nominee will answer questions as prepared by the judiciary committee**

D. Judiciary Committee
- **Will select a chairperson and a minority party chairperson.**
- **Will establish a seniority system in the committee and will establish rules and regulations to guide the hearing.**
- **Will prepare questions for the judicial nominee.**
- **Each student may role play an actual member of the Senate Judiciary Committee.**
- **At the conclusion of the hearing the committee will vote on the nominee.**

2315

Supreme Court

What Makes a Good Supreme Court Justice?/Secondary **Debra Hallock Phillips**

Introduction

Federal judges are appointed rather than elected in an attempt to isolate both the process and the future justices from the pressures of public opinion and the political system. In actuality, those pressures cannot be eliminated; they are simply manifested in more subtle forms. Judges are a product of their environment and cannot be shielded from the media, which report peoples' opinion on judicial issues in great detail.

Here's how the selection process for federal judges works. A list of suggested nominees is generated by the attorney general, who can rely upon recommendations from senators in the appointee's area, from prominent attorneys, law school deans, and other leaders, or from the president and his advisors.

What qualifications are considered when an individual is recommended as a nominee? In most instances, presidents recommend nominees of their own political persuasion – hoping that their own goals and philosophy will be reflected in judicial decisions long after they have left office. Judges, however, have been known to surprise their appointors with unexpected decisions.

If judges' political philosophy upon appointment cannot determine future decisions, what other qualities should be

Handout 1: What Makes a Good Justice of the U.S. Supreme Court?

Directions: Read the characteristics listed below and categorize them on the chart under the most appropriate heading. Following the activity, develop a definition of a "good" justice. Write it in the space provided.

CHARACTERISTICS

1. female
2. old and wise
3. Republican
4. pro peace
5. fair
6. radical
7. determined
8. youthful
9. pro environment
10. collegial
11. good campaigner
12. aggressive
13. self-reliant
14. honest
15. good looking
16. clear thinker
17. concise writer
18. Southern
19. male
20. single parent
21. good health
22. conservative
23. humane
24. traditional
25. well-educated
26. Democrat
27. liberal
28. controversial
29. Midwestern
30. family-oriented
31. supports welfare
32. handicapped
33. trustworthy
34. risk-taker
35. helpful
36. religious
37. loyal
38. Western
39. Eastern
40. good fundraiser
41. trial attorney
42. U.S. citizen
43. independent thinker
44. strict constructionist
45. eloquent speaker
46. supports abortion
47. supports foreign aid
48. opposes school prayer
49. member of minority group
50. opposes higher taxes
51. civil rights activist
52. holder of public office
53. business background
54. community-minded
55. distinguished lawyer
56. follows party line
57. middle-of-the-road
58. tough on crime
59. DWI conviction
60. eminent legal scholar
61. brilliant mind
62. judicial experience
63. child of immigrant

ESSENTIAL FORMAL REQUIREMENTS	DESIRABLE INFORMAL CHARACTERISTICS	UNDESIRABLE QUALITIES	UNNECESSARY QUALITIES

Develop a definition of a "good" justice or judge.

2316

examined when choosing nominees? This exercise attempts to expand student horizons in this area.

Description

The Constitution sets forth some basic qualifications for president and for members of Congress. However, qualifications to serve on the Supreme Court are not addressed. How does someone qualify for a seat on the U.S. Supreme Court? What are the important characteristics of a Supreme Court nominee? Why have some nominees failed to receive confirmation? What causes controversy in the selection process? This activity may be adapted for use in several contexts:

1. As an introduction to the judicial branch of government;
2. As a basis to examine and compare characteristics of different kinds of judges at the federal, state and local levels (for example, a juvenile judge versus a bankruptcy judge); and
3. As a vehicle to analyze the historical development of the Supreme Court.

Objectives

1. To promote awareness about the judicial branch.
2. To develop knowledge about the appointment and confirmation process to the U.S. Supreme Court.
3. To distinguish between formal and informal qualifications for office.
4. To gain information on the actual justices of the Supreme Court.
5. To strengthen critical-thinking skills and apply ethical conflicts to the decision-making process.
6. To utilize research skills in information gathering.

Procedures

1. (Optional) Ask the class which types of students they would like to see appointed to a school supreme court if a so-called court of last resort was created to interpret school policy and student rules. Discuss student-justice qualities, such as age, race, sex, dress, involvement in activities, grade point average, etc. Write the list on the board and ask students to prioritize the characteristics and discuss the reasons for their importance. Determine whether the characteristics are: a) essential, formal requirements; b) unnecessary. Finally, ask students to develop a job description for a good student justice.
2. Distribute Handout 1. Review the list of characteristics with students, and ask them to complete the chart.
3. Hand out Handout 2. Ask students to complete.
4. Have students consider the informal characteristics for Supreme Court justices suggested in Part II of Handout 2. List the informal criteria on the board and have students discuss and agree upon what characteristics *most often* describe *actual justices* of the Supreme Court. Write them on the board and have students record these in their notebooks. Develop a definition of a good justice.
5. Then ask students to select a justice of your state supreme court and see how closely s/he fits the formal and informal rules for the U.S. Supreme Court. Reference materials will be needed on your state's supreme court justices. (This might be homework or used as an extra credit project.)

Handout 2: Background Investigation on a Supreme Court Justice

Directions: Complete the following survey on a past or current justice of the Supreme Court. Select one justice, find his/her biography in *Who's Who in America*, *Who's Who in American Law*, or other reference materials. Try to find information on as many characteristics as possible.

NAME OF JUSTICE: ____________________

PART I. ESSENTIAL FORMAL REQUIREMENT:

Citizenship: ____________________

PART II. DESIRABLE INFORMAL CHARACTERISTICS

Age: ____________________
Sex Status: ____________________
Race: ____________________
Religious Affiliation: ____________________
Education: ____________________
Socio-Economic Status: ____________________
Occupational Background: ____________________
Political Experience: ____________________
Community Involvement: ____________________
Political Affiliation: ____________________
Geographic Location: ____________________
Reputation: ____________________
Position(s) on Controversial Issues: ____________________
____

Why do you think there are not more formal requirements for the position of Supreme Court justice?

____
____

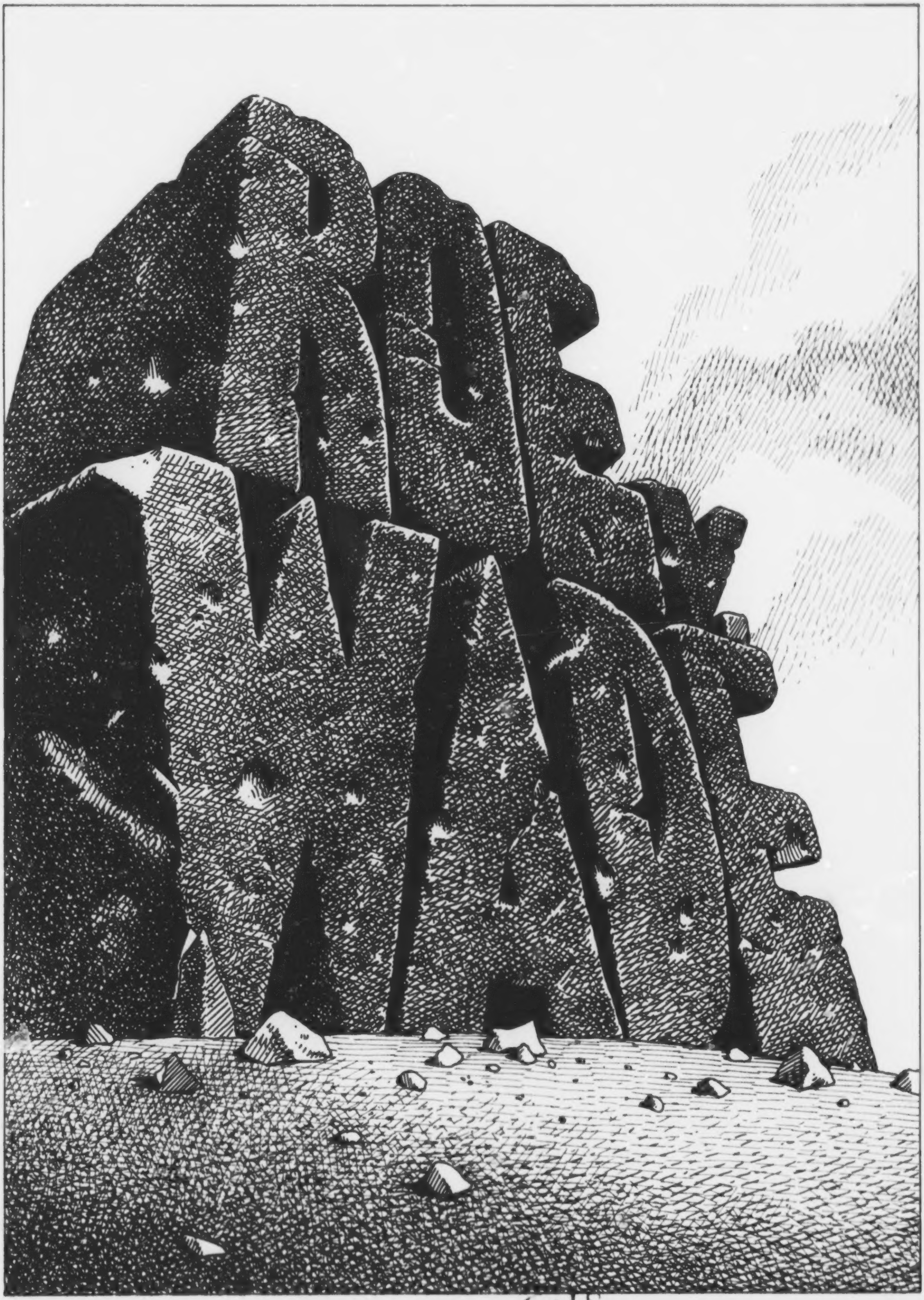
Why do you think the justice you selected received an appointment and confirmation to the U.S. Supreme Court?

____
____
____

6. Discuss with students what kind of appeal these characteristics have to voters and why? Should voters care about some of these criteria?
7. Bonus Question—Ask students how long U.S. Supreme Court justices are appointed to office.

NOTE: Teachers will want to contact the school or public librarian to request biographical information on U.S. Supreme Court justices and justices in their own states. Selected newspaper and magazine articles could add to the reference collection for this activity.

Debra Hallock Phillips is Director of the Ohio Center for Law-Related Education. She writes, "This is a favorite old LRE activity with a new twist. It is adapted from a lesson originally developed by LRE consultant Kenneth Rodriquez. A special thanks to Sue Hunt McNaghten, my colleague at the Ohio Center for Law-Related Education, and Art Marziale, administrative assistant from the Supreme Court of Ohio, for their collaboration."



Tom Herzberg

2018 2

Nicole Belson

The Viability of *Roe v. Wade*

The Court's latest abortion ruling leaves a landmark standing

In 1973, the Supreme Court held in *Roe v. Wade* that the right of privacy founded in the Fourteenth Amendment to the Constitution included the qualified right of a woman to choose with her physician whether or not to terminate her pregnancy.

In *Roe*, the Court held that states have two interests that outweigh a pregnant woman's right to choose to abort a fetus, but only at specific points in the pregnancy. The state has an interest in the health of the mother, which becomes compelling at the end of the first trimester. At that point, the state may regulate abortion to the extent that the regulation reasonably relates to the protection of maternal health.

The state also has interest in potential human life. That interest, the Court ruled, becomes compelling at the point of fetal viability – the end of the second trimester – and at that point the state may even prohibit abortions.

Many abortion cases have come before the Court since *Roe v. Wade*, and in each one, the Court has reaffirmed the notion of a qualified constitutional right of access to abortion services. In *Webster v. Reproductive Health Services*, 57 U.S.L.W. 5023 (1989), however, the Supreme Court questioned the continuing vitality of the trimester framework established in *Roe v. Wade*. The decision dealt with the constitutionality of several provisions of a Missouri statute regulating abortion.

The Issues in the Lower Courts

This case involved, on one side, five health care professionals employed by the state of Missouri who offered abortion counseling or services and two nonprofit corporations which offered abortion services. Initially, as plaintiffs, they brought an action on their own behalf, and on behalf of all Missouri health care professionals and facilities offering abortion counseling and services. This suit was also on behalf of pregnant women seeking abortion counseling or services within the state of Missouri.

The defendants in lower court actions were William L. Webster, Attorney General of the state of Missouri, and the state of Missouri itself, which waived, for this action, the Eleventh Amendment immunity from suit in federal court which states usually enjoy.

In the district court, plaintiffs challenged the constitutionality of seven provisions of the 1986 Missouri statute regulating abortion. The challenged provisions included:

1. a preamble declaring that life begins at conception and that unborn children have protectable interests in life, health and well-being;
2. a requirement that the attending physician first inform the patient seeking an abortion of whether or not she is pregnant, of the risks associated with the abortion technique, and of alternatives to abortion and then obtain the patient's written consent to the abortion (the "informed consent requirement");
3. a requirement that every abortion performed at or after sixteen weeks gestational age of the fetus be performed in a hospital (the "hospitalization requirement");
4. a requirement that the physician determine whether the fetus is viable if there is reason to believe the fetus is twenty or more weeks gestational age and a requirement that the physician perform the medical tests necessary to determine gestational age, weight and lung maturity of the fetus;
5. a prohibition against the use of public funds to perform or assist in a nontherapeutic abortion or to encourage or counsel a woman to have a nontherapeutic abortion;
6. a requirement that no public employee perform or assist in a nontherapeutic abortion or encourage or counsel a woman to have a nontherapeutic abortion;
7. a prohibition against the use of any public facility to perform or assist in a nontherapeutic abortion or to encourage or counsel a woman to have a nontherapeutic abortion.

The prohibitions against the use of various public resources to *perform or assist* in a nontherapeutic abortion are distinct from the prohibitions against the use of such resources to *encourage or counsel* women on abortion.

Lower Court Decisions

The district court found all the challenged provisions unconstitutional except the requirement that the physician determine if the fetus is viable when there is reason to believe the fetus is twenty or more weeks gestational age. The court considered that this requirement could be severed from the unconstitutional requirement that the physician perform the tests necessary to find gestational age, weight and lung maturity.

The defendants appealed all of the trial court's rulings against them except the court's invalidation of the informed consent requirement. The Court of Appeals for the Eighth Circuit found all the provisions challenged at the appellate level unconstitutional except the prohibition against the use of public funds to perform or assist an abortion. The defendants appealed all the Eighth Circuit's rulings against them except the court's invalidation of the hospitalization requirement and the prohibition against the use of public facilities and employees for abortion counseling.

Thus, of the seven issues originally before the courts, only four provisions of the law were before the Supreme Court:

1. the preamble, defining conception as the beginning of human life and declaring unborn children to have protectable interests in life, health and well-being;
2. the prohibition against the use of public facilities or employees to perform or assist in abortions;
3. the prohibition against the use of pub-

lic funds for abortion counseling;

4. the requirement that physicians perform tests to determine gestational age, weight and lung maturity before performing an abortion.

Issue 1: The Preamble

Chief Justice Rehnquist, delivering the opinion of the Court, first considered the preamble to the Missouri statute. In addition to defining conception as the beginning of life and declaring that unborn children have protectable interests in life, health and well-being, the preamble mandates that Missouri law must be construed to protect unborn children equally with other persons except when to do so would violate the U.S. Constitution, the decisions of the Supreme Court, the Missouri Constitution, or Missouri statutory law.

The Chief Justice's opinion held that the preamble did not violate the prohibition expressed in *Roe v. Wade*, 410 U.S. 113 (1973), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), that a "State may not adopt one theory of when life begins to justify its regulation of abortions." The *Webster* Court construed that prohibition to mean that a state could not justify a particular abortion regulation that was otherwise unconstitutional by claiming that the regulation embodied the state's view of when life begins. The Court determined that the preamble itself did not regulate abortion and had not yet been applied to interpret abortion regulations. Rather, the Court said, it expressed a "sort of" value judgment in favor of childbirth rather than abortion, which the state is constitutionally entitled to do under *Maher v. Roe*, 432 U.S. 464 (1977).

But that did not mean that the Court found the preamble to be constitutional. Rather, it deferred decision on the issue. Since Missouri had not yet applied the preamble to interpret state abortion law, and since the extent to which the preamble could be used to interpret Missouri abortion law is a matter only Missouri courts can definitively decide, the Court ruled that it lacked the power to decide the constitutionality of the provision.

Justice O'Connor concurred in Rehnquist's judgment on the preamble. She said that there was no indication in the record or the lower court opinions that the preamble would affect a woman's decision to have an abortion.

She also addressed Justice Stevens' argument in his dissent (see below) that the preamble might interfere with a woman's constitutional rights under *Griswold v. Connecticut*, 381 U.S. 479 (1965), to use contraceptives. Another section of the statute defines conception as occurring upon fertilization of the ovum, rather than six days after fertilization upon implantation of the fertilized ovum in the uterine wall, as standard medical texts have defined it. And certain contraceptive devices must be used after fertilization.

If fertilization defines conception, use of such postfertilization devices may be considered an abortive technique rather than a contraceptive technique. O'Connor noted that the use of postfertilization devices may be constitutional but that, as with abortion, neither the record nor the opinions below indicated that the preamble would affect a woman's decision to use contraception. Since any unconstitutional application of the preamble to restrict the availability of abortion or contraceptives was merely hypothetical in her view, she said the injunction which the plaintiffs had sought was inappropriate.

Justices Blackmun, Brennan and Marshall dissented, finding that the preamble is not "abortion-neutral," but a theory of life with which all Missouri laws, including the state's abortion regulations, must comport. The three justices rejected as insufficient the preamble's self-limitation, that fetal interests could not be protected in violation of the U.S. Constitution or Supreme Court decisions. They also agreed with Stevens that the definition of fertilization as the beginning of fetal life endangers the constitutional freedom to use contraceptives.

Stevens found the statute's definition of conception as fertilization unconstitutional both under the Due Process Clause of the Fourteenth Amendment and *Griswold*, and under the Establishment Clause of the First Amendment, because it endorses the religious view of some Christian faiths without serving an identifiable secular purpose.

Issue 2: Prohibiting Abortions by Public Employees

After considering the preamble, the Court examined the provisions prohibiting the use of public employees and public facilities to perform nontherapeutic abortions. The Court reversed the court of appeals and found these provisions constitutional.

The majority's chief concern about these provisions was whether they departed from the rules set out in *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980).

In *Maher*, the Court upheld a Connecticut regulation that only allowed state Medicaid benefits for first trimester abortions which were medically necessary. The Court ruled that the regulation merely had the effect of encouraging childbirth rather than abortion and imposed no new restriction on access to abortions.

In *Poelker*, the Court upheld a St. Louis, Missouri, policy of refusing to perform nontherapeutic abortions in public hospitals. The Court asserted the right of a state or city to express its preference for normal childbirth.

In *Harris*, the Court upheld the "Hyde Amendment," a congressional provision denying public funding for certain abortions. The Court found that the amendment merely encouraged childbirth rather than unnecessary abortion.

The *Webster* Court found that upholding the Missouri provisions was completely consistent with *Maher*, *Poelker* and *Harris*: Missouri's decision to prohibit use of public employees and facilities to perform nontherapeutic abortions expresses the state's preference to encourage childbirth. It leaves indigent pregnant women with the same choices as if the state had opted not to operate public hospitals at all.

Public employees and facilities, like public funds, are public resources. If the state is not obligated to pay for abortions, it is similarly not obligated to provide the actual abortion services.

The Court also rejected the argument that since the patients would have to pay for the state abortion services, the state's costs would be recouped. The Court found no constitutional right to state-offered abortion services whether or not the state could profit by offering such services. The Court suggested, however, that its opinion about the statute might differ if either all of the state's hospitals and physicians were publicly funded, or if the state prohibited doctors who performed abortions in private facilities from the use of public facilities for any purpose.

Justice O'Connor joined in Rehnquist's judgment but wrote separately on these provisions as well. O'Connor agreed that rejecting the plaintiffs' challenge to the provisions is consistent with *Maher*, *Poelker* and *Harris*. She did concede that there are some conceivable unconstitutional applications of the provisions at issue.

The Missouri statute defined "public facility" very broadly, as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof." Plaintiffs argued, and O'Connor considered the possibility, that the state could try to enforce the prohibition against private hospitals using public utilities, sewage lines, equipment or land.

O'Connor felt that the Court did not have to decide the constitutionality of these applications, however, because the plaintiffs raised a facial challenge to the statute. (That is, they said that this part of the law was unconstitutional on its face.) The facial challenge, O'Connor explained, required them to show that no set of circumstances exists under which the prohibition could be valid. Since under *Maher, Poelker* and *Harris*, some applications of the prohibition are constitutional–e.g., applications to publicly-owned hospitals–a facial, or complete, challenge must fail. Therefore, the Court could uphold the prohibition.

Justices Blackmun, Brennan and Marshall dissented from the finding that the prohibition was valid, and Justice Stevens joined in their dissent. Blackmun argued, adopting the view of plaintiffs, that Missouri had assured the nonavailability of abortions performed by private as well as public physicians and facilities because of its sweeping definition of "public facility." This effective ban on private abortion services, Blackmun said, exceeds the state's right under *Maher, Poelker* and *Harris*, to express a preference for childbirth and to refuse to engage in the business of abortion because it is an affirmative measure to curb the availability of private as well as public abortions. The ban restricts, if not eliminates, a pregnant woman's choices.

Blackmun expressly disagreed with O'Connor's approach of ignoring the conceded "constitutional difficulties" merely because some constitutional applications of the ban rendered the plaintiffs' facial challenge impossible. Finally, Blackmun suggested that while *Maher, Poelker* and *Harris* were consistent with the case, they were not, themselves, well-decided cases; he noted that there were strong dissents in those cases.

Issue 3: No Public Funds for Encouraging Abortion

The third provision before the Court was the ban on the use of public funds to encourage or counsel a woman to have an abortion. The Court accepted Missouri's claim that the prohibition is a direction to Missouri's "fiscal officers" not to allocate money for abortion counseling, rather than a direction to public health care providers not to provide such counseling. (A ban on what public health care providers could say might violate the First Amendment.) Plaintiffs had agreed that they were not injured under that interpretation of the prohibition and contended that the controversy over the ban had, therefore, become moot. They withdrew their claims of unconstitutionality, and the Court directed that the lower court judgment be vacated and the part of the complaint concerning that provision be dismissed.

Justice O'Connor agreed with the Court that under the interpretation which the state urged, the controversy over the prohibition no longer existed. She observed, however, that the state's interpretation for purposes of this litigation did not preclude the Supreme Court of Missouri from construing the statute differently. The Missouri Supreme Court's interpretation would then be the authoritative one. If that court construed the statute to prohibit public employees from giving medical advice to pregnant women, future relitigation of the issues between the parties would be possible. Justices Blackmun, Brennan and Marshall agreed with her view.

Issue 4: Gestational Age and Viability Provision

Finally, the Court considered the provision of the Missouri statute which concerned a physician's determination of gestational age, weight and lung maturity. As with the preamble, the parties disagreed on the meaning of the provision.

This provision was the only one the Court understood to implicate *Roe v. Wade*, and a majority could not agree on the effect the provision had on *Roe*. The opinions filed on this provision speak only in part to the provision itself; they speak at greater length about *Roe*.

The first sentence of the section requires the physician to determine if the fetus is viable before performing an abortion on a woman whom the physician has reason to believe is carrying an unborn child of twenty or more weeks gestational age. The physician is also required to make that determination "by using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions."

The second sentence of that statute was the one subject to disagreement. The sentence reads, in full:

> In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

The plaintiffs argued that this sentence mandated the physician to perform tests to find gestational age, weight and lung maturity. They argued that requiring such tests interferes with the physician's right to determine viability in the manner she or he chooses. They claimed that prior to thirty weeks of pregnancy, of the three required findings, only a finding of gestational age is relevant to determing viability. They claimed, further, that the tests necessary to find fetal weight would add unnecessary expense to the cost of the abortion. They argued that amniocentesis is the only known test to determine fetal lung maturity and that it increases the cost of the abortion by hundreds of dollars, creates health risks for both the woman and fetus and provides no information that can be helpful in determining whether the fetus is viable until at least the twenty-eighth to thirtieth week of pregnancy.

The state argued that the language in the first sentence of the provision–requiring the physician to determine viability by using that degree of care commonly used by prudent physicians in similar circumstances–applied to the second sentence as well. Thus, the state argued, the physician is not required to perform tests which would violate the prescribed standard of care; the physician is not required to take tests which would not reveal useful information or which would impose unnecessary risks upon the woman or fetus.

THE COURT'S DECISION

A plurality of the Court, including only Justices Rehnquist, White and Kennedy, followed the "well-established principle" that statutes should be interpreted to avoid constitutional difficulties and determined that the second sentence had to be read in light of the standard of care prescribed in the first sentence. The second sentence, the justices said, required only those tests that would enable the physician to make "subsidiary findings as to viability" and could not require unnecessary or hazardous tests.

The justices suggested that under prior decisions of the Court, the second sentence might be constitutionally suspect.

The justices considered *Colautti v. Franklin*, 439 U.S. 379 (1979), where the Court struck down a Pennsylvania statutory provision which regulated the standard of care to be used by a physician performing an abortion on a fetus which the physician determined was viable or might be viable. The *Colautti* Court held that a physician is responsible for determining whether the fetus is viable and that neither the legislature nor the courts could declare that one factor used to establish viability was the determinant of when the state has a compelling interest in the life or health of the fetus.

The *Webster* plurality indicated that the Missouri requirement that a physician determine gestational age, weight and lung maturity constitutes a state regulation of the physician's determinaton of whether a fetus is viable. Thus, the Missouri requirement seems to violate the *Colautti* rule. Further, insofar as the requirement increases the cost of the abortion, it may violate *Akron*, where the Court struck a requirement that second trimester abortions be performed in hospitals. There, the Court reasoned that the additional cost of hospitalization creates an obstacle to a woman's access to abortion.

Rehnquist, White and Kennedy, faced with the apparent unconstitutionality of the specific testing requirement under *Colautti* and *Akron*, concluded that the Missouri requirement was constitutional, but that *Colautti* and *Akron* were the unfortunate results of the "rigid trimester analysis" introduced in *Roe v. Wade*. The justices identified two faults of the *Roe* trimester framework. First, it is inconsistent with "the notion of a Constitution cast in general terms, as ours is." Neither the term "viability" nor the term "trimester" appears in the Constitution, and application of the framework has produced "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." Second, the framework dictates that the state's interest in protecting potential human life only comes into existence at the point of viability, and the justices "do not see why" that is so. The justices contended that the state's interest in protecting potential human life justifies the tests even though (1) the tests will frequently be unnecessary because they will show nonviability at twenty weeks and (2) under *Roe*, the state may only regulate abortions in the second trimester to protect its interest in maternal, rather than fetal, welfare.

The plurality was ambiguous on the ultimate significance of their finding that the testing requirement is constitutional for *Roe* and its progeny. Rehnquist began his discussion of the failings of the trimester framework by commenting that, "We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' . . . We think the *Roe* trimester framework falls into that category." He ended his discussion with the somewhat inconsistent observation that, "This case . . . affords us no occasion to revisit the holding of *Roe* . . . and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases."

AN IMPORTANT CONCURRANCE

Justice O'Connor concurred in the plurality's judgment concerning the testing requirement but not in their opinion. She agreed with the plurality that the physician's duty to test for gestational age, weight and lung maturity is only a duty to test where prudent to do so. She did not agree, however, that the testing requirement conflicts with the Court's prior decisions and that the Court needed to reexamine *Roe v. Wade*. She appealed to the "venerable principle" that the Court will not decide a constitutional question not precisely before it. The constitutional validity of *Roe*, she said, was not in issue in this case. She commented that when it is in issue, "there will be time enough to reexamine *Roe* and to do so carefully." She noted later in her discussion, however, that she continues to consider the *Roe* trimester framework "problematic."

O'Connor indicated that no prior decision precludes the state from promoting its interest in potential human life when the viability of the fetus is merely possible as well as when it is certain. In fact, O'Connor thought the Court had already indicated this in the case of *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). There, she said, the Court's failure to assert a difference between a state's interest in potential life after viability and during a period of possible viability was evidence that the Court agreed that the state can constitutionally regulate abortions when viability is only possible. Missouri's viability testing requirement, she said, is a means of promoting the state's interest in potential life when the viability of the fetus is possible. Therefore, it is constitutional.

O'Connor also found Missouri's requirement consistent with the holdings in *Colautti* and *Akron*. *Colautti*, she explained, prohibited the state from making one factor in the determination of viability the determinant of when the state's compelling interest in the life or health of the fetus is triggered. But the Missouri statute only requires the prudent performance of tests that would be useful to making "subsidiary findings as to viability." Under the Missouri statute, she observed, the state's interest is still only triggered by viability. As for the *Akron* Court, she explained, it simply applied, though incorrectly, the standard for evaluating state abortion regulations—that a regulation is only unconstitutional if it "unduly burdens the right to seek an abortion." The cost of the tests required under the Missouri act, she found, is marginal and does not impose an undue burden on a woman's abortion decision. Thus, the Missouri statute does not conflict with *Colautti*, *Akron* or any of the Court's prior abortion decisions and, therefore, did not require a reexamination of *Roe*, O'Connor said.

ANOTHER CONCURRANCE

Justice Scalia wrote separately on the testing requirement, concurring in the judgment, but "dissenting from the manner" in which it was reached. Scalia, like Rehnquist, White and Kennedy, but unlike O'Connor, understood the viability testing requirement to raise the issue of the "soundness" of the *Roe* trimester framework. He reduced his comments on the actual testing requirement to a footnote, where he indicated that the statute does, in fact, encroach upon the independent judgment of the physician and does increase the cost of abortion, in violation of the rules set out in *Roe* and its progeny. He rejected O'Connor's argument that the increased cost does not impose an undue burden on a woman's access to abortion, since the fact that the testing requirement is less expensive than the hospitalization requirement at issue in *Akron* does not eliminate the possibility that the less expensive testing is still expensive enough to constitute an undue burden. Thus, Scalia argued, O'Connor's mechanism for avoiding the issue of *Roe's* soundness "merely adds to the irrationality of what we do today." Justice Scalia also considered "irrational" O'Connor's notion of a state's interest in potential life when viability is merely possible. He explained that since "viability" means a possibility of survival, the notion of "possible viability" is redundant; it must mean, he said, the "possibility of a possibility of survivability outside the womb."

The thrust of Scalia's opinion is that the Court had a duty to reconsider *Roe*, which it failed to meet. He noted the Court's habit of deciding cases on unnecesarily broad grounds and criticized the Court for suddenly revoking that policy to hold on as narrow grounds as possible in order to avoid addressing *Roe*. One hazard of avoiding the question of *Roe's* continuing vitality, he observed, is that the Court, must "retain control, through *Roe*," of a political issue. To do so, he complained, perpetuates the public's misguided perception of the Court's role as arbiter of political disputes. Political disputes properly belong to the legislature, he said.

THE DISSENT

While Scalia rebuked the plurality for reaching its conclusions on grounds too narrow, Blackmun, writing for Brennan and Marshall, rebuked the plurality for reaching its conclusions on grounds too broad. Blackmun accused the plurality of "contriving" the conflict between the viability testing requirement and the *Roe* trimester framework just to enable them to disapprove *Roe*.

He observed, first, that the plurality had misread the viability testing requirement. In his view, the statutory provision mandated a physician to make findings of gestational age, weight and lung maturity regardless of the necessity or safety of the tests. According to Blackmun, the provision, if construed properly, bears no rational relation to any state interest in protecting fetal life. The plurality could therefore have struck the provision without any reference to the *Roe* framework. Furthermore, according to Blackmun, the plurality could have upheld the statute without any reference to the *Roe* framework, as well. *Roe* and its progeny do not preclude a state from adopting measures to assure that no viable fetus is aborted because of a mistaken estimate of gestational age.

Blackmun also agreed with Justice O'Connor that, as construed by the plurality, the statute does not violate *Colautti* by interfering with the physician's right to exercise independent judgment in determining viability. For the physician still makes the determination alone; she or he must merely make a finding of viability by using tests to determine particular fetal qualities when such tests are feasible and appropriate.

Further, Blackmun noted, the testing requirement does not violate the *Akron* rule against the imposition of an unnecessary burden on women's access to abortion services either. In his view, the viability determination is necessary to carry out the state's compelling interest in the potential human life of viable fetuses.

After criticizing the plurality for avoiding the underlying issue of the case – whether the Constitution includes a right to privacy and whether that right extends to family matters, including abortion – Blackmun examined each of three reasons the plurality offered for disapproving the *Roe* trimester framework. First, he addressed the justices' contention that the trimester framework and the notion of viability do not appear in the Constitution and are, therefore, inconsistent with the notion of a Constitution cast in general terms. He argued that there are many tests or standards which, like the trimester framework, do not appear, in explicit terms, in the Constitution. He explained that these tests are not, themselves, constitutional rights, but methods of balancing constitutional rights against governmental interests. The trimester test is intended to accommodate the different interests of pregnant women and the state.

Second, Blackmun addressed the justices' contention that the trimester framework has created an unduly intricate set of legal rules more closely resembling a code of regulations than a constitutional doctrine. Blackmun observed that the intricacy of the legal rules has resulted from the Court's careful factual analysis of each case before it and that such attention to factual distinctions epitomizes constitutional adjudication.

Third, Blackmun addressed the justices' position that the trimester framework fails because the state's interest in potential life is compelling, not just after viability, but throughout the entire pregnancy. Blackmun adopted Stevens' analysis of the previability state interest. Stevens observed that if there is a difference between a fetus and a human being, as all concede, there must be a difference between a newly fertilized egg and a nine-month-gestated fetus. Because pregnancy is a constantly changing condition, the differences between the fetus at one stage and at a later stage must justify different treatment of the fetus at different stages, different degrees of state regulation. Blackmun concluded that the *Roe* framework continues to offer "an easily applicable standard for regulating abortion" while assuring pregnant women enough time to exercise their constitutional right to consult with physicians on the decision of whether to have an abortion.

Finally, Blackmun attacked what he perceived to be a new standard of review offered by the plurality. That standard, he explained, required the Court to examine the statute and ask whether it "permissibly furthers the State's interest in protecting potential human life." According to Blackmun, the standard is "meaningless." For whether a statute "permissibly furthers a state interest" is the very question before the Court, not the standard of review to be applied in answering the question. Blackmun concluded that the "standard" was actually a "rational-basis" standard, *i.e.*, an inquiry into whether the statute had any rational basis. As such, it is the Court's "most lenient level of scrutiny." According to Blackmun, the standard is so lenient that under it every abortion regulation, including outlawing abortions, would be "permissible."

Blackmun scoffed at the plurality's comment that it left *Roe* "undisturbed." While Blackmun found that the Court did not actually change the abortion law, in that it did not overrule *Roe* and its progeny, he found also that the plurality of the Court encouraged state legislatures to continue to enact increasingly restrictive abortion regulations so that the Court would, at a reasonable pace, be able to destroy *Roe*. Blackmun observed that the result of such a change in the law would be that hundreds of thousands of women would obtain illegal abortions or attempt to perform abortions upon themselves, gravely endangering their health and safety.

Blackmun concluded by noting that never in the Court's history has it overturned a constitutional decision securing a fundamental personal freedom to millions of people. Overruling *Roe* would break that precedent. He explained that any departure from the tradition of courts' adhering to precedents – the rule of *stare decisis* – "demands special justification," concluding that the plurality failed to offer that justification.

In addition to joining Blackmun's dissent, Justice Stevens also wrote separately on the viability testing requirement. Like Blackmun, he considered the conflict between the requirement and *Roe* a conflict which the plurality contrived; he saw no inconsistency between *Roe* and a decision to uphold the requirement. Like Blackmun, he thought the provision in issue required the physician to test for gestational age, weight and lung maturity, regardless of the medical soundness of the tests in the particular case. He based his construc-

(continued on page 48)

Supreme Court

Does the Constitution Protect Your Right to Fair Play?/Upper Elementary **Center for Civic Education**

Lesson Overview

One of the great fears of the founders and framers was the tendency of powerful governments to act unfairly and unreasonably. The due process clause in the Fifth Amendment was intended by the framers to prevent such abuse of power on the part of the federal government.

The due process clause in the Fourteenth Amendment protects against state or local government abuse of power. This clause has been interpreted by the courts to extend most of the rights in the Bill of Rights, that originally applied only to the federal government, to protect people against unfair actions by state and local governments.

Students first read about what due process means. Then they are involved in a problem-solving activity that raises questions about who should have the right to a lawyer in a criminal case. The lesson ends with a discussion of the importance of the right to due process in criminal proceedings, as well as a discussion of other situations in which the right to due process applies.

Lesson Objectives

At the conclusion of the lesson:

1. Students should be able to state in general terms what due process means.
2. Students should be able to explain the importance of the due process clauses in the Bill of Rights (Fifth Amendment) and in the Fourteenth Amendment.
3. Students should be able to identify situations in which due process rights are important, particularly the right to a lawyer in criminal proceedings.

Teaching Procedures

Ask students to read the paragraphs below. Go over with them the location of the two due process clauses and the meaning of the phrase.

In this lesson we will look at important words in the Constitution that are about fairness. These words are in the due process clauses of the Constitution. We will see how these clauses help protect our lives, liberty, and property from unfair and unreasonable acts by our government.

WHAT IS DUE PROCESS OF LAW?

The right to due process is the right to be treated fairly by your government. You will find the words due process in two places in our Constitution. They are in both the Fifth Amendment and the Fourteenth Amendment.

- Fifth Amendment. It says that no person shall be deprived of life, liberty, or property without due process of law. This amendment protects your right to be treated fairly by the *federal* government.
- Fourteenth Amendment. This amendment says that state governments cannot deprive you of your life, liberty, or property without due process of law. It protects your right to be treated fairly by your state and local governments.

Most people don't know that before the Fourteenth Amendment was passed, the Bill of Rights only protected you from unfair treatment by the federal government. The Fourteenth Amendment has been used to protect you from unfair treatment by state and local governments.

Due process means that members of your government must use fair methods or procedures when doing their jobs. They must use fair procedures when they gather information. They must use fair procedures when they make decisions. They must use fair procedures when they enforce the law.

For example, the Bill of Rights says that if you are

2324

Gideon v. Wainwright

Clarence Gideon was accused of breaking into a poolroom in Florida. Police said he had stolen a pint of wine and some coins from a cigarette machine. Gideon was a poor, uneducated man who was 50 years old. He did not know much about the law. However, he believed he could not get a fair trial without a lawyer to help him.

When Gideon appeared in court, he asked the judge to appoint a lawyer for him. He was too poor to hire one himself. The judge told him that he did not have the right to have a lawyer appointed for him unless he was charged with murder.

Gideon was tried before a jury, and he tried to defend himself. He made an opening speech to the jury and cross-examined the witnesses against him. He then called witnesses to testify for him and made a final speech to the jury. The jury decided he was guilty. Gideon was sent to the state prison to serve for five years.

From prison he wrote a petition to the Supreme Court. It was handwritten in pencil. He argued that all citizens have a right to a lawyer in cases where they might be sent to prison.

1. Should Gideon have been given a lawyer to help him? Why or why not?
2. Should the right to have a lawyer mean the government has to provide one to anyone who cannot afford to hire one? Why or why not?
3. Should lawyers be appointed to help people accused of breaking any laws, even traffic laws? Why or why not?
4. When should a person have the right to a lawyer? Upon arrest? Before being questioned? Before the trial? After the trial, if the person thinks the trial was unfair and wants another trial?
5. Should defendants have the right to have the services of other experts to help them prepare for their trials? Fingerprint experts? People to find witnesses? Psychiatrists?

accused of a crime, you have the right to have a lawyer help defend you. Suppose the government did not allow you to have a lawyer. The government would have violated your right to due process that is guaranteed by the Constitution.

What does the right to have a lawyer in a criminal case mean? Does it mean the government must pay for a lawyer to help you if you cannot afford to pay for one yourself? The Supreme Court has changed its ideas about this right over a period of years. In 1963, in a famous case, the Supreme Court thought again about what the constitutional right to a lawyer means.

Problem Solving: Determining Who Has the Right to a Lawyer

Form groups of 3-5 students and assign them the task of reading the problem-solving activity in the box and answering the questions that follow. You might have students write their answers on chart paper and share their opinions with the rest of the class.

NOTE: In the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court overruled its decision in a case decided 20 years earlier, and held that a state must provide counsel for an indigent accused of a serious crime. This case is an example of how ideas as to what constitutes due process, or fundamental fairness, can change over time.

Reading and Discussion: Understanding the Importance of Due Process

Ask pairs of students to read the sections below entitled, "Why Is Due Process Important in Criminal Trials?" and

Handout I: What Rights Do People Have When They Are Suspected or Accused of Crimes?

Read the protections in the Bill of Rights that are summarized below. Then answer the questions that follow.

FOURTH AMENDMENT

- People, their homes, and their possessions cannot be searched or taken by the government without a good reason.
- In most cases, the police must get a warrant (permission from a judge) before they can conduct a search.

FIFTH AMENDMENT

- People who are accused of crimes do not have to give evidence against themselves.
- People cannot be tried again for a crime for which they have been found innocent.
- People's lives, liberty, or property cannot be taken from them without due process of law.

SIXTH AMENDMENT

- A person accused of a crime has the right to a speedy, public trial by a jury (other citizens).
- People must be told what crimes they are accused of.
- People have a right to question the persons who are accusing them.
- An accused person has the right to have a lawyer.

EIGHTH AMENDMENT

- People arrested for crimes are entitled to be free on reasonable bail (money deposited with the court) while awaiting trial.
- If a person must pay a fine, it must be a fair amount.
- People found guilty of crimes shall not be punished in cruel and unusual ways.

Suppose the police think you have committed a crime and come to arrest you. Which of the rights you have just read about do you think would be most important to you? Why?

"Other Examples of Due Process Rights." They should discuss and answer the questions that follow each section. Also ask them to write down examples of rights to due process that would be important to school children.

WHY IS DUE PROCESS IMPORTANT IN CRIMINAL TRIALS?

To get some idea of the importance of fair procedures in enforcing the law, read the following situations. Then answer the questions that follow them. Suppose you lived in a country in which the following things could happen.

- If the police suspected you of a crime, they could force you by any means to give them information that might show you were guilty.
- If you were taken to court, the judge could use any means to get information from you to decide whether you were guilty.
- The leaders of the country could make decisions about your life, liberty, or property in secret, without allowing you or anyone else to participate.

1. Would you believe that you would be treated fairly if you were accused of a crime? Why or why not?
2. Even if you haven't broken the law or been arrested, would you want other people suspected of crimes treated in these ways? Why or why not?
3. Would you want decisions that affected your life, liberty, or property made in secret? Why or why not?

OTHER EXAMPLES OF DUE PROCESS RIGHTS

Due process means the right to be treated fairly by all agencies of your government. Your right to due process is not limited to making sure you are treated fairly by law enforcement agencies and the courts. The government must treat you fairly whenever it creates laws about your right to travel, raise a family, or use your property. It must also be fair if you apply for a government job or receive government benefits. The right to due process means the right to be treated fairly in all your dealings with your government.

Concluding Activity: Reviewing and Using the Lesson

Have the students answer the questions below.

1. Why is the guarantee of due process so important? Give examples to support your position.
2. Look at the Bill of Rights. Find parts of it that are designed to make sure you are treated fairly by your government. Be prepared to explain what you have found to your class.
3. Explain these terms: due process, procedures, cross-examine, testify.

Optional Activities

For reinforcement, extended learning and enrichment:

1. Point out that the public gets much of its information about due process from television programs. Have students watch some currently popular television series about police work, taking notes on procedures followed. Ask the students what they would have done in the situations portrayed. What actions by the police officers were fair or unfair? Then invite a police officer to visit the class and analyze the accuracy of the information conveyed on television.
2. Arrange to have the class visit and observe procedures at a local court hearing. If possible, have the judge discuss procedures with students.
3. A handout has been included to extend students' knowledge of specific rights included in the Bill of Rights which are applicable to state actions under the due process clause of the Fourteenth Amendment. Distribute Handout I and allow time for students to complete the worksheet.

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Supreme Court

What Is the Judicial Branch?/Upper Elementary

Center for Civic Education

Lesson Overview

This lesson examines the judicial branch and the power of judicial review. Students learn that the courts protect the rights of the people against any unconstitutional actions by the president or Congress. The power of judicial review is an important check by the judiciary on the other two branches of government. Students will read about an actual case, *Torcaso v. Watkins*, to see how the Supreme Court used its power of judicial review to strike down an unconstitutional state law.

Lesson Objectives

At the conclusion of this lesson:

1. Students should be able to describe the functions of the judicial branch.
2. Students should be able to explain how members of the judiciary are selected.
3. Students should be able to define judicial review and explain its importance.

Teaching Procedures

Here is an introductory activity to increase understanding of the role of the judicial branch.

Read aloud to the class the following excerpt from the Constitution: "Congress shall have Power . . . [to] provide for the . . . general welfare of the United States." Ask students if the meaning of this phrase is clear. Why might people argue about what it means? Who should decide what the words in the Constitution mean?

Explain that one of the functions of the judicial branch is to settle disputes about what the Constitution and the federal

Freedom Not to Believe

***Torcaso v. Watkins*, 367 U.S. 488 (1961)**

The state of Maryland had a law saying that everyone who wanted a job in the state government had to swear that he or she believed in God. A man named Torcaso applied for a job as a government official. He was denied the job because he would not say that he believed in God.

Mr. Torcaso said that the Maryland law was unconstitutional because it limited his freedom of religion. He said that freedom of religion meant the freedom to believe in God or not to believe in God, as a person wishes.

The Supreme Court agreed with Mr. Torcaso. The Court said the Maryland law was unconstitutional and could not be enforced. The Court ruled that people cannot be required to say that they believe in God or do not believe in God.

The Supreme Court was using its power of judicial review over the action of a state government.

laws mean. Have students read the section below and discuss it with them.

What Does the Judicial Branch Do?

The framers created the judicial branch to handle disagreements over the law. Article III of our Constitution describes the responsibilities and powers of this branch. In this lesson, you will learn how the judicial branch works.

Suppose you thought the government had taken away one of your rights guaranteed by the Constitution. What could you do? You could ask the judicial branch to protect your rights. You could ask a court to listen to your case. If the court agreed with you, it would order the government to stop what it was doing and protect your rights.

The courts interpret the law. They also settle disagreements between individuals and the government. Different levels of courts handle different kinds of cases. Federal courts handle cases about the Constitution and the laws made by Congress. They also deal with problems between one or more states.

How Is It Organized?

To help students understand the structure of the judicial branch, have them read the following paragraphs.

The Supreme Court is the highest court in the judicial branch. The judicial branch also includes lower courts. The judges on the Supreme Court are called justices. The head of the Supreme Court is the chief justice.

The framers believed that if judges were elected by the people, they might favor some people over others. For this reason, judges are not elected. They are appointed to office. Judges on all federal courts are appointed by the president. However, the Senate must approve all the president's appointments. Judges serve in the judicial branch until they retire or die. They can also be impeached, tried, and removed from their positions, just like the president.

Ask the students whether they agree that judges should be appointed rather than elected. You might wish to discuss whether judges, who are appointed, should have the power to overrule the will of the majority as expressed by elected representatives.

Understanding Judicial Review

Have students read the following paragraphs.

Judicial review is one of the most important powers of the judicial branch. Judicial review is the power of the courts to say that the Constitution does not allow the government to do something. For example, the Supreme Court can say that a law passed by Congress is not constitutional. The Supreme Court can also say that the president is not allowed to do certain things.

Suppose Congress passed a law that said you must belong to a certain religion. The Constitution says Congress cannot do this. You can go to court and say that Congress has no right to tell you to belong to a certain religion. The court will review your case. The court has the power to say that the law made by Congress is unconstitutional. If the court does this, the law cannot be enforced.

When you read the story in the box, you will see how the Supreme Court used its power of judicial review. In this case, the Court decided a state law was unconstitutional.

Conclusion

Discuss the meaning of judicial review and remind students of its importance in protecting our constitutional rights. Judicial review allows people, especially minorities, to seek protection of rights that government agencies have attempted to limit. The case of *Torcaso v. Watkins* provides students with an opportunity to see how the Supreme Court used its power of judicial review to protect religious freedom.

Conclude the lesson with a discussion of these questions:

1. What court is the highest court in the judicial branch?
2. Why are Supreme Court justices appointed and not elected? Do you agree with this system? Why or why not?
3. Do you think the Supreme Court should have the power to declare a law made by majority vote in Congress to be unconstitutional? Why or why not?
4. Find an article in the newspaper that explains something the Supreme Court is doing. Be prepared to explain the article to your class.
5. Explain these terms: interpret, Supreme Court, justices, chief justice, judicial review.

Students could be given an opportunity to work on a bulletin board display. Students could also add the new terms in this lesson to their vocabulary-building activity.

Optional Activities

For reinforcement, extended learning, and enrichment:

1. Have individual students research the lives and careers of famous justices on the U.S. Supreme Court.
2. Interested students could write a proposal for a student court at your school. They would need to decide what types of cases they would hear, the extent of punishment they would recommend to the principal, the procedures in the student court, and the selection of the student judges.

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Supreme Court

Good Law or Bad Law?/Secondary

William R. Marcy

Lesson Overview

This is a two- to three-day lesson engaging students in an analysis of individual rights issues decided by the Supreme Court. The students are provided with a simple outline and "test" to evaluate a law or government action. The outline and "test" provide students with objective criteria to guide their reasoned opinions.

Lesson Objectives

At the conclusion of this lesson students should be able to:

1. identify and summarize a contemporary individual rights issue brought before the Supreme Court of the United States;
2. create pertinent questions relating to the Constitution and individual rights;
3. analyze and synthesize a contemporary individual rights case using "Briefing a Case" and "Test of a Good Law";
4. evaluate a contemporary individual rights issue using guided reasoning strategies.

Procedures

1. Provide students with a summary of a contemporary individual rights issue argued before the U.S. Supreme Court (i.e., flag burning, abortion, search and seizure, due process). Case summaries are available in *Update*, as well as in many law-related education publications. Be sure not to include the decision or reasoning of the Court.
2. Pass out "Briefing a Case," read the introduction, and have students identify the key facts of the case chosen for this activity. Brainstorm pertinent questions this case raises about the intent of the Constitution and individual rights. Identify the key judicial question, the one the Supreme Court answered. Identify the law that was violated or the government action that initiated the case.
3. Pass out "Test of a Good Law" and have each student complete the rating chart individually. The answers to the questions at the end of the chart can be accomplished in pairs and then shared through class discussion.
4. Complete "Briefing a Case." Each student should identify his/her decision, explaining the reasoning. A vote can be taken and a majority determined. Compare students' reasoning with that of the Supreme Court. (Legitimacy should be awarded to any reasoned student opinion.)
5. Debrief: Perhaps a discussion on the enforcement powers of the Court and alternatives available to dissenters could be conducted. Also, the various "tests" employed by the Court (clear and present danger, balancing, incitement, least restrictive means, etc.) could be discussed and evaluated, along with the "Test of a Good Law." A quest activity could include a student essay on "What makes a good law good?"

Handout 1: Briefing a Case

According to American tradition, a good law upholds human dignity and promotes individual liberty. It also protects and defends the general welfare of society. A law should not serve the special interest of a few people. It should not cause undue harm to the well-being of society or to the individual citizen.

It is often difficult to determine if a law is good or harmful. It is sometimes hard to maintain a proper balance of individual liberty and social justice. The use of a reasonable and rational method to analyze the law becomes critical when our judicial system is founded upon the belief in "equal justice under the law."

The Supreme Court uses the Constitution and legal precedents as the primary guides for its opinions. The Court, although rarely, may look to historical traditions and sometimes social values when deciding an issue of individual rights. In an effort to maintain "equal justice" the Court attempts to apply certain "tests" to gauge appropriate actions and laws. Perhaps we can apply a "test" to help us determine if a law is good or bad.

What Makes a Law Good or Bad?

Choose a case recently decided by the United States Supreme Court involving a state or federal law. "Brief" the case according to the outline below and apply the "Test of a Good Law."

1. Briefing a Case
   - A. What are the important facts of the case?
     1. Take care to distinguish fact from opinion.
     2. It may also be important to distinguish between undisputed facts and implied facts.
   - B. What law or governmental action initiated the dispute?
   - C. What is the legal question the Supreme Court was asked to answer?
     1. What constitutional provision(s) apply to this case?
     2. List other pertinent legal questions you would like answered.
     3. List the questions you would like answers to which would aid the decision-making process.

[Before you complete D & E, complete the "Test of a Good Law" worksheet]

   - D. What arguments and reasoning can be applied to this case?
     1. Arguments and reasoning for answering the judicial question yes;
     2. Arguments and reasoning for answering the judicial question no.
   - E. Decision
     1. What is your ruling and your reasoning for this conclusion?
     2. What was the ruling of the Supreme Court? What legal precedent was created?

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2328

Handout 2: A Test of a Good Law

Write the disputed governmental action or law identified in your brief:

Yes No

1. Does the law or governmental action serve a useful purpose?
   - a. It supports the general welfare or helps the society prosper; [ ][ ]
   - b. It corrects something that is harmful or makes something better; [ ][ ]
   - c. It does not create more problems than it solves; [ ][ ]
   - d. there is a proven need for the law. [ ][ ]
2. Is the law or governmental action fair?
   - a. It does not discriminate unjustly against any group or person; [ ][ ]
   - b. It is easily understood and possible to follow; [ ][ ]
   - c. It can be applied equally to everyone; [ ][ ]
   - d. It balances the general welfare and individual liberty; [ ][ ]
   - e. It is not contrary to the accepted standards, values, or goals of society; [ ][ ] [ ][ ]
   - f. It applies to the leaders as well as to the public; [ ][ ]
   - g. It does not impose cruel or unjust punishments. [ ][ ]
3. Is the law or governmental action practical and reasonable?
   - a. It is flexible enough to apply to new or unique situations; [ ][ ]
   - b. It is worth the cost and effort of enforcement; [ ][ ]
   - c. It is possible to change if found to be unfair, impractical, or unreasonable; [ ][ ]
   - d. It is relatively easy to enforce; [ ][ ]
   - e. It holds someone accountable for enforcement; [ ][ ]
   - f. The law and punishment are known to the members of society. [ ][ ]

TOTAL ___ ___

A. What test statement(s) did you answer no? Be prepared to explain your reasoning.

B. If you answered yes to all seventeen statements, is the law likely to be good? How many "no" statements would it take to make this law bad? Explain your reasoning.

C. Is this law good or bad? Return to "Briefing a Case" and complete "D 1" or "D 2."

Supreme Court

California v. Greenwood Moot Court Simulation/Secondary

Diana Hess

Moot court simulations provide students with the opportunity to learn by role-playing the major players in the judicial process. Although students will necessarily learn about the facts of a specific case, moot court simulations also help students understand the decision-making process followed by an appellate court, in this lesson the Supreme Court.

Teacher Guide

In this mock Supreme Court hearing, students are asked to consider the facts of *California v. Greenwood*, 486 U.S. 35, a case heard by the United States Supreme Court in 1988. Students will portray Supreme Court justices and attorneys to gain an understanding of how appellate courts operate.

Objectives

As a result of this lesson, students will:

1. Be able to explain the process used by the United States Supreme Court to make decisions.
2. Describe the facts, issues, arguments and decision in *California v. Greenwood*.
3. Form and express an opinion on the decision made by the Supreme Court in *California v. Greenwood*.

Time Needed

Two or three class periods.

Resources

1. Enough copies of student materials for the entire class.
2. An attorney, either for day one to help students prepare for the moot court, or for day two or three to react to the moot court. The attorney should receive a copy of the lesson in advance. A police officer could be included after the activity to discuss the effect of the Greenwood case and more recent cases allowing exceptions to the exclusionary rule in criminal investigations.

Procedures

1. Assign student reading material for homework the night before the discussion.
2. List the objectives for the two to three days on the board.
3. Check students' understanding of the Greenwood case. Who is Greenwood? What was he charged with? What was the evidence against Greenwood and what was controversial about it? On what grounds was the case appealed? When the Supreme Court heard this case, what question were the justices considering? (Answer: Was Greenwood's constitutional right to be free from unreasonable searches and seizures violated by the warrantless searches of his trash on several occasions?)
4. Before the simulation, poll the class to discover how they would rule on the case and record the results on the board.
5. Tell the students that they will be preparing for a moot court simulation of this case. Assign heterogeneous groups of four to six students to act as attorneys for the petitioner (the state of California), four to six students to act as attorneys for the respondent (Greenwood), and the rest of the class to serve in groups of four to six justices. Review the roles as outlined in the student instructions. Give them the rest of the period to prepare their presenta-

tions for the next day. The attorney groups should select a member to present their arguments in the simulation. Nine of the student justices should be selected to preside during the simulation; make sure they are evenly selected from all of the justices. If an attorney is visiting the class, he or she may give comments and suggestions to the whole class or circulate among the groups.

6. On day two, either you, one of the student justices, or an attorney may moderate as chief justice. Also select a timekeeper. When everyone is ready, the person in charge should call the court to order and proceed as directed in the student instructions. The petitioner's team (the state of California) should present first. The timekeeper should interrupt if time limits are exceeded.

   After the presentations, the court recesses to confer. All students will observe this conference, though only the justices participate. The observers should have the following questions as they listen. When the justices come to a decision, discuss these questions with the class. If possible, involve an attorney in this discussion.
   - What were the strongest arguments presented by the attorneys for the state of California? Can you think of any information or argument which would have improved their case?
   - What were the strongest arguments presented by the attorneys for Greenwood? Can you think of any information or argument which would have improved their case?
   - What were the key questions asked by the justices? Are there any other questions the justices should have asked? During their conference, what arguments did they consider? Did they ignore any important arguments?
   - Did the decision tend to favor the exclusionary rule or not? Do you agree with the decision?

7. Students should be encouraged to step back and consider the fairness of the Supreme Court decision-making process.
   - The claim that it is a fair procedure is supported by the fact that both sides have equal opportunity to present their arguments. Other interested parties can also contribute (through friend-of-the-court briefs). The winning opinion is formed by a majority of relatively well-informed judges.
   - The claim that it is an unfair procedure would be based on the fact that laws and court decisions are, in effect, being produced by only a handful of people.

8. Share the actual Supreme Court's decision with the class and compare both the judgment and the reasoning behind it. The Supreme Court decided in favor of California (the petitioner) and held that the Fourth Amendment's protection against unwarranted search and seizure does not extend to the garbage Greenwood placed in opaque bags outside his house for collection.

   Majority Opinion – Justices White, Rehnquist, Blackmun, Stevens, O'Connor and Scalia:
   "[A]n expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable. [R]espondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. . . . Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage in an area . . . for the express purpose of having strangers take it . . . respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded. . . . [T]he police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."

   Dissenting Opinion – Justices Marshall and Brennan: "In holding that the warrantless search of Greenwood's trash was consistent with the Fourth Amendment, the Court . . . depicts a society in which local authorities may command their citizens to dispose of the personal effects in the manner least protective of the sanctity of the home and privacies of life. . . . [S]ociety [should be prepared] to recognize as reasonable an individual's expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably with the trash of others."

California v. Greenwood Moot Court Simulation

As the problems of drug use have increased dramatically, law enforcement efforts have also increased, especially where drug dealing is suspected. The following case, which raised important questions about search and seizure protections, came before the United States Supreme Court on January 11, 1988.

THE CASE OF BILLY GREENWOOD

Billy Greenwood lived in Laguna Beach, California. Early in 1984, the police there were trying to verify information they had received that Greenwood was selling drugs. About the same time, a criminal informant told a federal drug enforcement agent that a large shipment of narcotics was on its way to Greenwood's house in a truck.

One of Greenwood's neighbors had previously complained to police of being awakened by vehicles continually passing through the neighborhood late at night and stopping briefly at Greenwood's home. The police watched Greenwood's house and verified the neighbor's statement. The police also saw a truck leave the house and followed it to another residence that they had earlier investigated as a drug-dealing location.

On April 6, 1984, police investigator Jenny Stracner, who had been working on the case for several months, asked the trash collector in Greenwood's neighborhood to pick up the plastic garbage bags that Greenwood placed on the curb in front of his house and to give them to her without mixing their contents with the neighbor's garbage. When Stracner searched Greenwood's trash, she found items related to the use of narcotics. She used this information to obtain a search warrant to search Greenwood's home.

The search of Greenwood's home revealed quantities of cocaine and hashish. Greenwood was arrested on felony narcotics charges, but was released after posting bail. Neighbors continued to complain of Greenwood's many late night visitors. On May 4, 1984, another investigator, Robert Rahaeuser, again asked the trash collector to obtain Greenwood's trash and found further evidence of narcotics use. Rahaeuser secured another search warrant for Greenwood's home based on the information from the second trash search. During the second search, police found additional evidence of narcotics trafficking and arrested Greenwood again.

Greenwood claimed that the searches of his trash were unconstitutional and that the evidence obtained from those searches and the searches of his house should be excluded from his trial. He said that police would not have had probable cause to search his house if they had not first obtained evidence illegally by searching his trash. Greenwood also said that the trash collector acted as an agent of the police when he singled out Greenwood's trash from the other trash.

The state of California said that Greenwood's trash was collected at the street where it had been left for the trash collector and that the trash was left in plain sight. Therefore, Greenwood had no reason to expect that his trash would remain private. The state of California claimed that its case against Greenwood was valid.

The trial court dismissed the charges against Greenwood, and the court of appeals and the California Supreme Court agreed with that decision. The state of California then appealed the case to the United States Supreme Court, asking the Court to decide whether Greenwood's rights had been violated by the search of his trash.

The Greenwood case raises an important question about the exclusionary rule and about the privacy of a citizen's trash: At what point may police search your trash without a warrant? With a warrant?

- After it is wrapped and tied in opaque garbage bags?
- After it has been placed at the street for collection?
- After it has been picked up by a trash collector?

A CASE IN POINT: YOU DECIDE

After reviewing the Greenwood case, the members of the class will serve as Supreme Court justices and attorneys for the parties. The Court's procedures are simplified to the following steps:

1. Attorney teams (4-6 people) for the petitioner (the party making an appeal) and for the respondent (4-6 people) will prepare arguments to support their positions and present these to a court of nine justices. Each side has four minutes for its presentation.
2. During the attorney presentations, any justice can interrupt to ask questions. After both presentations, the chief justice moderates a five-minute conference in which justices discuss the issues and arguments. The justices then vote.

ATTORNEY INSTRUCTIONS

As attorneys, you are responsible for presenting the best argument for:

- Why the evidence from the trash should be allowed (if you represent the petitioner, the state of California);
- Why the evidence from the trash should be excluded (if you represent the respondent, Greenwood).

Working with your team, write down the following information:

- A clear, brief statement of your position;
- At least two facts from the case which support your position;
- An explanation of how each fact supports your position;
- One previous court decision which supports your position;
- One reason why your position is fair to your client;
- One reason why a Court decision in your favor will benefit society.

Make an outline of this information so that all of it can be included in your four-minute presentation. Select a team member as speaker and one or two members to answer the justices' questions. They should prepare by carefully reviewing the case description.

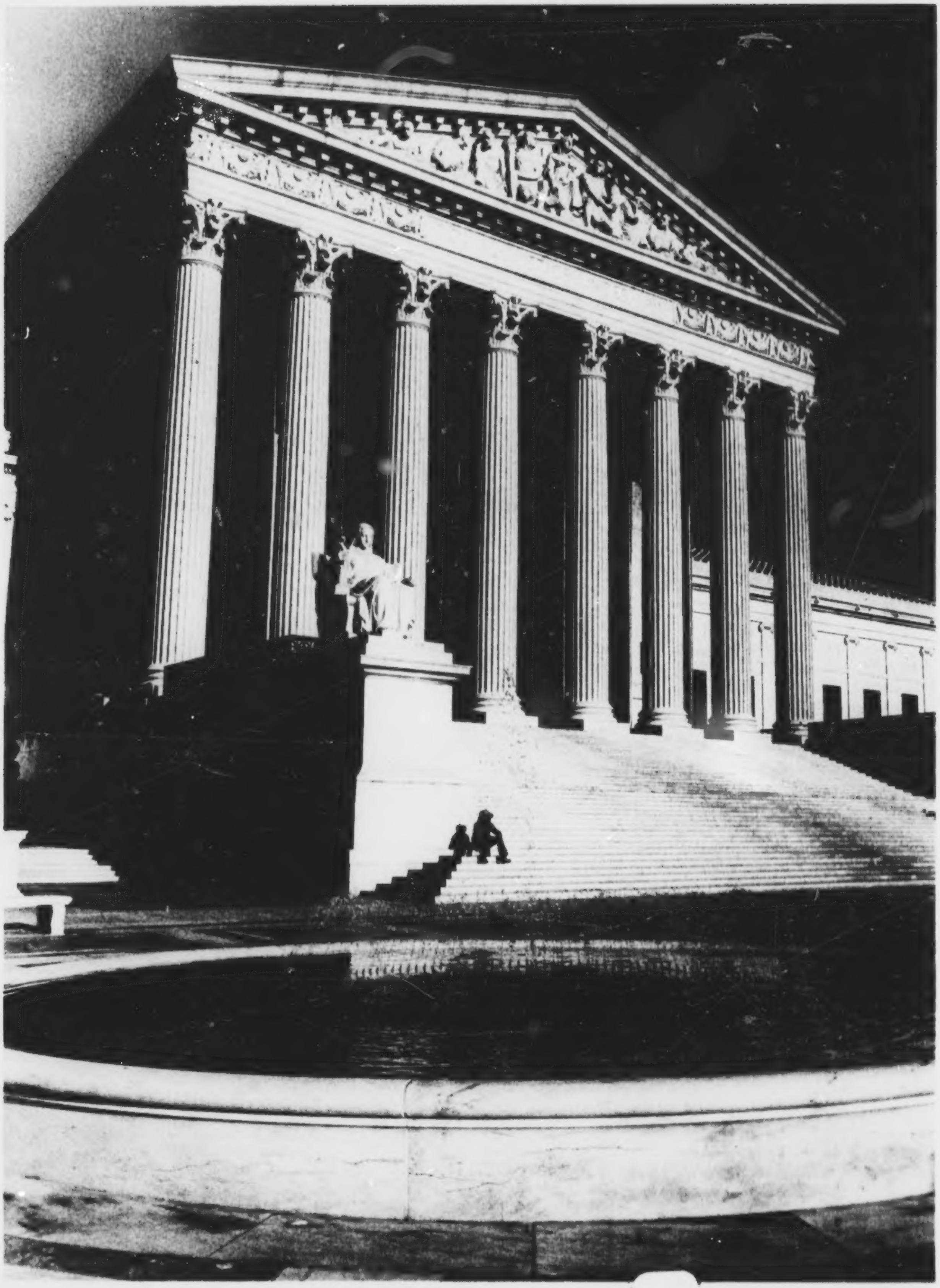
JUSTICE INSTRUCTIONS

When preparing to hear arguments, Supreme Court justices review case documents with their clerks and indentify questions to ask the attorneys. What don't you understand about *California v. Greenwood?* What facts do you want clarified? Which of their clients' actions would you like the attorneys to justify or explain?

THE JUDGMENT

1. How well did the state's attorneys present their case? Did they leave out any important information? Were their arguments sound and reasonable?
2. How well did the respondent present his case? Was any important information left out? Were Greenwood's arguments valid?
3. Did the justices ask the attorneys the right questions? During their conference, what arguments did they consider? Did they ignore any important arguments?
4. Does the justices' decision support or reject the exclusionary rule? Do you agree with their decision? Would the people you surveyed support this decision?
5. U.S. Supreme Court decisions are made by a process similar to this except:
    - Attorneys for the petitioner and respondent give the Court detailed written arguments, called briefs, before the case is heard. Because Supreme Court decisions set precedents which affect the entire nation, other interested parties can air their views about a case in friend-of-the-court briefs.
    - During oral arguments, each side is allowed one-half hour, which includes questioning by the Court. This time limit is strictly enforced.
    - When the Court reaches a decision, the chief justice assigns one of the justices to write an explanation of that decision called the majority opinion. Justices who support the decision but differ with the majority's reasoning may write a concurring opinion. At least one of the justices who disagree with the decision may write a dissenting opinion. Do you think this process is fair? Why or why not?
6. Your teacher will explain the Supreme Court's decision in *California v. Greenwood.* Compare both the judgment and the reasoning behind it with your own.

This lesson was adapted by Diana Hess from one of five secondary school lessons on drugs and the law written by the Constitutional Rights Foundation. The lessons, "Drugs, the Constitution and Public Policy," *are available from the Constitutional Rights Foundation, 407 S. Dearborn, Suite 1700, Chicago IL 60605; telephone (312) 663-9057.*



COURT BRIEFS

Court Reviews First Amendment Guarantees

During its 1988-89 term, the Supreme Court decided nine important First Amendment cases, one dealing with the freedom of expression guarantee in the political sphere, three dealing with the freedom of speech guarantee in the area of obscenity, three dealing with the amendment's religion clauses, and two with the free press guarantee.

Flag Burning a Form of Protected Speech

In a term marked by more controversy than any in recent years, one case stands out – the flag-burning case. In *Texas v. Johnson*, 57 U.S.L.W. 4770, the Court, in a 5-4 decision, struck down a Texas law prohibiting political protestors from burning the American flag. This decision could affect the constitutionality of flag desecration laws of 48 states.

In 1984, when the Republican National Convention was held in Dallas, Texas, Gregory Johnson organized and led the Republican War Chest Tour, a group which gathered in downtown Dallas to protest against various party policies. The group marched through the downtown area, staged "die-ins" in which people in the group would collapse to the ground in a symbolic display of the effects of nuclear war, engaged in vandalism by spray-painting buildings and breaking into a bank where they overturned potted plants and tore up papers, and finally marched to the plaza in front of Dallas City Hall, where they took the American flag from the pole outside a nearby office building. Protestors chanted "America, the red, white, and blue, we spit on you" while Johnson soaked the flag in kerosene and set it on fire. Two police officers and an employee of the Army witnessed the burning and testified that they were offended by the action. No violence took place. Nearly 45 minutes after the event, police arrived and arrested Johnson.

LOWER COURT ACTION

Johnson was convicted of violating the Texas Penal Code, sentenced to one year in jail, and fined $2,000. He appealed to Texas's Fifth District Court of Appeals, which upheld his conviction. The Texas Court of Criminal Appeals, however, reversed the judgement by a 5-4 vote, and ordered that the charges brought against Johnson be dropped since the statute on which they were based was overbroad and unconstitutional.

Texas, in appealing to the U.S. Supreme Court, said that its law was in the interest of public safety, since it was likely that flag burning would lead to violence. For Johnson, freedom of expression was the main focus of the case.

THE SUPREME COURT DECISION

The case caused the Court to form what the *New York Times* called "a rare coalition," where the majority was composed of conservative justices Anthony Kennedy and Antonin Scalia and liberal justices Thurgood Marshall, Harry Blackmun, and William Brennan. Justice Brennan wrote the majority opinion. Justice John Paul Stevens – often aligned with Marshall, Brennan, and Blackmun – not only crossed his usual ideological lines in voting with the minority, but read from his own dissenting opinion in the courtroom, a rare occurance for any dissenting judge.

The decision stirred up strong feelings among the justices. Justice Brennan's majority opinion said, "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the ideas offensive or disagreeable. The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that the cherished emblem represents."

To this, Chief Justice William Rehnquist responded by characterizing parts of Justice Brennan's majority opinion as "a regrettably patronizing civics lecture." He pointed out that one of the purposes of a democratic government surely must be to legislate against conduct that is regarded as offensive to the majority of people, whether it be "murder, embezzlement, pollution, or flag burning."

Justice Stevens attempted to differentiate between disagreeable ideas and disagreeable conduct. The former would always, in his opinion, have protection. But flag burning is tantamount to property destruction, like spray-painting the Lincoln Memorial to convey a message of discontent. There should be a "legitimate interest in preserving the quality of an important national asset."

THE AFTERMATH

Subsequent public opinion polls indicated that many people were offended by the flag burning itself but realized the value of protecting speech and expression. Perhaps these feelings were best summed up by Justice Kennedy's statement, "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."

The opinion did leave open the possibility that a state could prosecute flag desecration if the act was simple vandalism without expressive content, or if the flag burning was done in such a manner as to create an immediate threat of violence, such as going to a VFW lodge and burning the flag knowing the probably violent reaction of the likely witnesses at such a site. As Justice Brennan's opinion stated, "We do not suggest that the First Amendment forbids a state to prevent imminent lawless action."

What makes this case unusual, besides the way in which the justices voted, is the firestorm of reaction from both sides of the ideological spectrum. Many representatives and senators, and even President Bush himself, have called for a constitutional amendment to correct what they feel is a Supreme Court mistake.

At a time when major issues like civil rights and abortion seem to have so many levels and textures, flag burning seems clear-cut, and the political pressure to ban this activity was initially very intense. However, flag burning is rare and usually done by a fringe element in society. No one claims these isolated incidents pose a threat to the republic.

Most amendments are attempts to deal with matters vital to the nation – voting rights, civil rights, or protection of civil liberties. If a flag desecration amendment is approved, it will be the first time that individual rights under one amendment – the First Amendment freedom of expression – will be curtailed by the rights defined in another. *–Jim Fine*

57 U.S.L.W. 4770!?

Are you unsure about the meaning of 57 U.S.L.W. 4770? You are not alone. Legal citations baffle most Americans. However, they're easy to master, and they'll help you find cases cited in *Update* and other publications.

First, let's look at Supreme Court citations. Let's say you want to look up the flag-burning case decided last term. You'll find it cited in Court Briefs as *Texas v. Johnson*, 57 U.S.L.W. 4770. Now what?

The most recent Supreme Court decisions appear in a weekly periodical called *United States Law Week*. In citations it's shortened to "U.S.L.W." or "L.W." A citation to this publication looks like this:

***Texas v. Johnson*, 57 U.S.L.W. 4770, June 21, 1989**

Broken down, the citation gives the following information: (1) the name of the case, with the party appealing to the Supreme Court listed first, and the party against whom the appeal is being brought listed second:

Texas v. Johnson

(2) the volume and page it can be found in *United States Law Week*:

57 (volume) U.S.L.W. 4770 (page)

(3) the date the case was decided:

June 21, 1989

Supreme Court cases which are not so recent appear in several publications: *United States Reports* (abbreviated "U.S." in citations); *Supreme Court Report* ("S.Ct."); and *Supreme Court Report, Lawyers' Edition*, a volume which includes commentary on each decision ("L. Ed. 2nd"). Citations to a Supreme Court case may list two or even all three of these cites, as a convenience to the reader.

Citations to an important earlier case on symbolic expression under the First Amendment, this one on burning a draft card, look like this: *U.S. v. O'Brien*, 391 U.S. 367 (1968), 88 S.Ct. 1673 (1968), and 20 L. Ed. 2nd 672 (1968).

Each of these gives the following information:

(1) the name of the case, with the party appealing to the Supreme Court listed first, and the party against whom the appeal is being brought listed second:

U.S. v. O'Brien

(2) the volume and page on which it can be found in each reporter system. In *United States Reports*, for example, it is found in

391 (volume) U.S. 367 (page)

(3) the year the case was decided:

1968

Citations for decisions of lower federal courts, as well as state courts, are similarly structured. The volume always comes first, followed by the abbreviation of the reporter system, the page number, and the year.

Of course, a law school library is often the best place to research a case, but most bar associations, county or city governments, and law firms have at least the Supreme Court reporters.

Establishing contacts with law librarians, practicing attorneys, and others who have ready access to such resources can be especially valuable to you and your students.

Obscenity and Indecency: Three Cases

The Supreme Court decided three cases in the past term in the always controversial areas of obscenity and indecency. Cases like these are so often troublesome because the definitions of the key concepts are often vague and open to interpretation. This term's cases were no less difficult, causing the Court to grapple with questions of free speech, prior restraints, and statutory definitions of nudity.

Dial-a-Porn Statutes Meet the First Amendment

The issue in *Sable Communications of California v. FCC and Thornburgh*, 57 U.S.L.W. 4920, is easily stated. Does a federal statute banning "dial-a-porn" services abridge the First Amendment's freedom of speech guarantee?

"Dial-a-porn" is big business. Companies provide a sexually explicit message, usually on tape, which callers can hear by dialing a phone number. Callers are billed for the service, generally having the charge added to their regular bill.

The statute makes it a crime to use the telephone to make an "obscene" or "indecent" phone communication for commercial purposes. It applies only to interstate calls.

Sable Communications sued to have the law declared unconstitutional under the First Amendment. The U.S. District Court found the statute constitutional as it applied to "obscene" communications, but unconstitutional as it applied to "indecent" communications. Both sides appealed.

The government argued that these services should be banned in order to prevent children from calling the numbers and listening to these lurid messages. The government admitted that the law curtailed adult usage, but said that was an unfortunate by-product outweighed by the protection of youth and the fact that these messages were obscene under the definition of obscenity advanced in the case of *Miller v. California*, 413 U.S. 15 (1973). That definition is based ultimately on "community standards."

For Sable Communications, the argument was one of First Amendment freedom of expression. They argued that this statute would make them conform with the morals and values of the least tolerant community able to receive their messages, and that alone made the statute overly broad and overly restrictive. They argued, for example, that a message acceptable in the tolerant atmosphere of Los Angeles might subject it to criminal liability elsewhere. They also argued that "indecent" is too vague, is not defined in law, and has not been defined in previous cases.

THE DECISION

The Supreme Court upheld, by a 6 to 3 vote, the part of the law that banned "obscene" communications, but struck down the part banning "indecent" but not obscene messages. The Court acknowledged that the goal of preventing children from being exposed to indecent telephone messages was valid, but it could not justify a complete ban that also prevented adults from access to material that does have the protection of the First Amendment.

Some observers feel this is a tempest in a teapot. While this has been a lucrative business for the past few years, these services are virtually unknown in some parts of the country, flourishing mainly in urban centers in New York and California.

Moreover, alternatives have been offered to keep "dial-a-porn" away from children without denying it to adults. Credit card payments, scrambled messages (like cable television movie channels), and access codes mailed to people privately are all possible ways to circumvent the problem.

Finally, this should not be viewed as a victory for the dial-a-porn industry. It did free "indecent" communications from prosecution for the time being. But the case will probably have some chilling effect on "dial-a-porn" services because the Court again refused to issue a working definition of "indecent." This makes the use of certain messages risky. Some operators of these businesses agree that they most certainly will tone down some of the more graphic messages. *—Jim Fine*

First Amendment Meets RICO

One of the toughest laws ever enacted is the Racketeer Influenced and Corrupt Organizations Act—RICO for short. RICO has been a very successful weapon against the mob. It not only has given federal prosecutors a powerful tool, but it has spawned a host of similar state laws.

What happens, though, when the draconian provisions of RICO cross swords with the First Amendment? That occurred in a recent Supreme Court case, in which the state of Indiana attempted to use its own RICO act to seize and confiscate the assets of an adult bookstore before trial. The act also imposed extra-heavy penalties on the store's owners after they were convicted.

In *Ft. Wayne Books, Inc. v. Indiana*, 57 U.S.L.W. 4180, the Court had to decide whether the First Amendment's protections against prior restraints applied to pretrial seizure and posttrial forfeiture provisions of the Indiana RICO law. "Prior restraint" means that laws restrict expression through censorship rather than by imposing punishment after finding an abuse of the law and the rights of free speech.

IN THE LOWER COURTS

The facts state that the bookstore was locked and the assets of the corporation were seized under court order prior to any trial or hearing on the obscenity or racketeering charges. Fort Wayne Books filed a motion to vacate the seizure on the grounds of First Amendment free speech violations. They filed another motion objecting to the seizure of the property as a Fourteenth Amendment procedural due process violation. The trial court denied the motions. The bookstore was closed for nearly a year without any resolution of the RICO charges.

At the trial court, probable cause was found to support RICO charges. However, the Indiana Court of Appeals ruled that the pretrial sanctions of seizure and padlocking were unconstitutional. The court also found the procedural application of the RICO statutes was impermissable as a prior restraint on the distribution of the books in question before a trial as to whether the content was actually "obscene."

THE ISSUES

This case and the notion of prior restraint create a complex legal dilemma. There is one issue of substantive law and one issue of procedural law. The substantive issue is whether a state may attach or seize, and then liquidate, bookstores and their inventory for a violation of obscenity laws *prior* to trial.

The procedural issue asks whether Indiana may even *apply* the RICO law to adult bookstores prior to a court hearing on obscenity and prior to any showing that the books in question, and the operation of the bookstore, are tied to racketeering. "Racketeering" is defined as commission of two related offenses from a list of specified offenses within the course of five years. If RICO is not the proper statute, then the state has no right to seize a store's inventory because the appropriate law might demand a quite different penalty.

For example, under Indiana state law, obscenity convictions carry a maximum penalty of one year in prison, a $5,000 fine, and no pretrial seizure of property. Under the RICO law, the same obscenity conviction can have a five-year prison term and up to $10,000 in fines. Further, if the state can convince the court that a company has been guilty of "racketeering" and that RICO provisions apply, the state may seize property up to 180 days prior to the filing of formal charges against that company. There is no obligation on the part of the state to give formal notice to the allegedly guilty party, in this case the bookstore.

THE DECISION

In addressing the substantive part of the appeal, the Supreme Court, in a unanimous decision, found that the First Amendment's guarantees of free speech bar law enforcement officials from seizing the inventory before any of the publications have been found at trial to be obscene. The decision, written by Justice Byron White, referred to decades of Supreme Court precedents holding that the First Amendment bars the use of "prior restraints" against the publication or display of materials that have not been judged obscene. The Court has held in previous cases, beginning with *Near v. Minnesota*, 283 U.S. 697 (1931), that "any system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity."

Focusing on the implications of racketeering laws and the First Amendment, Justice White said, "The state cannot escape the safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'" He went on to say that the First Amendment establishes a presumption that expressive materials are protected and "that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding."

The owners of the bookstores had asked

the Court to rule that the use of RICO statutes in these cases violated their Fourteenth Amendment due process rights. They claimed the law was too vague and permitted excessively severe sentences. To this the Court replied, in a 6-3 decision, that racketeering statutes are allowable in such cases to determine penalties. In other words, although RICO provisions cannot destroy prior restraint protections, they allow the state to impose more severe penalties *after* trial and a finding of obscenity violations.

While acknowledging that these harsh sentences may have a chilling effect on some owners who will practice self-censorship, the justices said they felt "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws." *–Jim Fine*

Child Porn: The Court Decides Not to Decide

A Massachusetts case heard last term promised to be another major decision on First Amendment freedoms and obscenity standards. Instead, *Massachusetts v. Oakes*, 57 U.S.L.W. 4787, became notable for the method and grounds on which it was resolved rather than for carving any new standards by which to define obscenity.

In 1982, Massachusetts enacted a law which made it a crime to photograph a minor who is posed or exhibited in a state of nudity. The only allowable defense was that the picture or pictures in question were taken for legitimate scientific, medical, educational, or cultural purposes. Nudity, as defined in the statute, explicitly included nude female breasts.

IN THE LOWER COURTS

In 1984, defendant Douglas Oakes took color photographs of his partially nude and physically mature 14-year-old stepdaughter. The stepdaughter was a student at a modeling school. She attended modeling classes and entered various beauty contests. Oakes took hundreds of pictures for her modeling portfolio in which the stepdaughter wore various outfits, including body suits or lingerie. He was arrested and convicted of violating the law.

The Massachusetts Supreme Court reversed the conviction. It held that restricting Oakes's photos of the stepdaughter violated Oakes's First Amendment freedom of expression. It struck down the statute in question as being overbroad. It concluded that the law criminalized conduct that virtually every person would regard as lawful, such as taking of family pictures of nude infants. Subsequently, the law was amended to add a "lascivious intent" requirement to the "nudity" portion of the law.

THE DECISION

In a somewhat confusing ruling, a plurality of justices – O'Connor, Rehnquist, White, and Kennedy – decided to ignore the question on which this case was appealed – that is, was the statute overbroad? Because the state of Massachusetts repealed the original statute, the plurality called this question of overbreadth moot and allowed the case to turn, instead, on the revised version of the law. Justice O'Connor noted that the question of overbreadth could never chill protected expression in the future under this statute because of the change. She wrote, "Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. An overbroad statute is not void *ab initio*, but rather voidable, subject to invalidation . . ."

By returning the case to the Massachusetts courts, the Court is giving a lower court another chance to convict Oakes, this time under the amended statute that the legislature has redrafted more precisely. The rationale was that the practice of striking down overbroad statutes was never meant to protect conduct that is obviously obscene under normal definitions of community standards.

SCALIA CONCURS

Justice Scalia took issue with this line of reasoning by writing in his concurring opinion that the overbreadth defense should still be available even when the statute is amended. "It seems to me strange judicial theory that a conviction initially invalid can be resuscitated by postconviction alteration of the statute under which it was obtained." Although Scalia understood that this defense allows a "guilty" party to go unpunished, he believed this type of reasoning would eliminate any incentive for legislatures to stay within constitutional bounds in the first place. It would allow lawmakers as many chances as time allows to draft a narrow and proper statute, right up to the last appeal by a defendant.

One might ask why, if Justice Scalia disagreed with the plurality reasoning, the case was remanded. The reason was that Justice Scalia and Justice Blackmun agreed with the plurality that the case should indeed be reviewed again by the Massachusetts courts. Their concurring opinion differed from the plurality opinion in that they felt the statute was not impermissibly overbroad in the first place. Citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *New York v. Ferber*, 458 U.S. 747 (1982), Justice Scalia noted that a statute's unconstitutional application must be substantial and must be judged in relation to the entire legislative intent. Since a lower court validated the purpose of the statute – the banning of obscene photographs of young children – even if it invalidated its scope, he felt that Oakes's activity could be judged by the legislative intent. Family baby pictures certainly were not meant to be censored, yet the lower court used this example to hold that the statute was overbroad. Remanding the case would allow the lower court to apply a "legislative intent" test rather than an "overbreadth" test.

It may seem somewhat unfair that the defendant must be retried for what seems to be the same set of issues. But the question here remains whether the photographs were obscene. If the lower court decides they are protected expression and lack the new standard of "lascivious intent," Oakes will be acquitted on retrial.

Neither Justice Scalia, nor any of the other justices, were judging the photographs themselves. All of which leaves the standards by which we define "obscene" or "lascivious" behavior as muddled as before. *–Jim Fine*

Court Reviews Holidays, Taxes, and Sunday Work in Light of the First Amendment

Three cases interpreted the First Amendment's provisions protecting freedom of religion. One was based on the free exercise clause, and two involved the establishment of religion clause.

Personal Religious Beliefs Can Be "Good Cause" for Inability to Work

In *Frazee v. Illinois Department of Employment Security*, 57 U.S.L.W. 4397, 103 L. Ed. 2d 914 (1989), the key issue was whether unemployment benefits could be withheld from a person who refused to work on Sunday because of his religious beliefs.

Illinois law prohibits an unemployed person from collecting unemployment benefits if he or she refuses to accept suitable work that is available. However, an exception is made if the person can show "good cause" for refusing to accept the work.

After William Frazee was laid off from his regular job, he found temporary work through Kelly Services. When an assignment requiring work from Wednesday through Sunday became available, Frazee rejected the offer, stating that as a Christian, he was unable to work on Sundays. Frazee then sought unemployment benefits, claiming there was good cause for his refusal to work on Sundays.

The Department of Employment Security and the Illinois courts denied Frazee's claim and declared him ineligible to receive unemployment benefits. They reasoned that the good cause exception should apply only if the person refusing Sunday work for religious reasons belonged to an established religious sect. Because Frazee did not belong to an organized church and his refusal to work on Sundays was based only on his personal religious beliefs, unemployment benefits could be denied.

THE DECISION

The U.S. Supreme Court reversed the Illinois decision. In a unanimous opinion, the Court emphasized its prior rulings that the free exercise clause of the First Amendment protects only beliefs which are rooted in religion. It is not enough that a person base his or her action on a purely personal preference, rather than a religious belief, when seeking the protection of the First Amendment. But a person need not be a member of an organized religious denomination to claim the protections of the free exercise clause. Here, Frazee's refusal to accept Sunday employment was based on a sincerely held religious belief. He was entitled to claim the protection of the free exercise clause, even though he was not a member of a particular Christian sect, because his views clearly constituted a religious conviction. *—Linda Bruin*

Court Upholds Holiday Display

The Supreme Court's latest decision regarding religious holiday displays on public property, *County of Allegheny v. American Civil Liberties Union*, 57 U.S.L.W. 5045, 106 L. Ed. 2d 472 (1989), attracted much publicity but added little to previously established law on this controversial issue.

The case involved two recurring religious displays set up during the winter holidays on public property in downtown Pittsburgh. One, a religious creche depicting a Christmas nativity scene with a message proclaiming "Gloria in Excelsis Deo," was placed on the steps of the county courthouse. The creche was donated by a religious group and bore a sign to that effect. The second display was placed outside the City-County Building and consisted of a large decorated Christmas tree, a smaller menorah, and a message from the mayor declaring the city's salute to liberty. The menorah was owned by a religious group. The Supreme Court, in a split decision, ruled the creche display unconstitutional, but upheld the second display.

THE DECISION

The Court, on a 5 to 4 vote, struck down the county's display of the nativity scene on grounds that it violated the First Amendment establishment clause. The majority of justices held that the county, through this display, was lending its support to the communication of a religious organization's religious message. By associating itself with the creche and its accompanying signs, the county was not merely acknowledging Christmas as a cultural phenomenon, but was endorsing a patently Christian message.

By a 6 to 3 vote, the Supreme Court concluded that county had not violated the First Amendment's prohibition against state sponsorship of religion by permitting the holiday display at the City-County Building. The lead opinion, written by Justice Blackmun, reasoned that the combination of the Christmas tree, menorah, and message saluting liberty did not constitute a governmental endorsement of a particular religion. The Christmas tree, wrote Blackmun, is widely accepted as a secular symbol of the Christmas season. Justice O'Connor further explained that the combined display recognized cultural diversity and conveyed a message of pluralism and freedom of belief. Although the menorah—a symbol with religious meaning—was included, there was no constitutional violation given this particular physical setting. *—Linda Bruin*

Tax Laws Can't Penalize Nonreligious Magazines

The second establishment of religion case, *Texas Monthly, Inc. v. Bullock*, 57 U.S.L.W. 4168, 103 L. Ed. 2d 1 (1989), involved a challenge to a Texas sales tax law. Until 1984, Texas exempted all magazine subscriptions from the state's sales tax. In that year the law was amended to narrow the exemption so that it applied only to periodicals published by a religious faith and consisting wholly of writings promulgating the teaching of the religious faith.

The publisher of *Texas Monthly*, a nonreligious, general interest magazine, paid the tax under protest and applied for a refund. The publisher argued that the sales tax exemption for religious magazines violated two provisions of the First Amendment. First, the exemption favored religion in violation of the establishment clause and, second, it discriminated among publications based on the content of speech.

THE DECISION

Although a majority of the Supreme Court found the sales tax exemption for religious magazines unconstitutional, the justices were divided in their opinions. Justices Brennan, Marshall, and Stevens expressed the view that the exemption violated the First Amendment establishment clause. Using a test developed by the Court in 1971 for deciding such issues, the three justices found: (a) the statute creating the exemption lacked a secular purpose that would have justified the conferral of a governmental subsidy for only religious publications; (b) the exemption had the effect of advancing religion because it resulted in an endorsement of the religious beliefs printed in the magazines; and (c) the administration of the sales tax exemption led to an impermissible government entanglement with religion. These justices also went on to find that the First Amendment's free exercise of religion clause did not compel the state of Texas to provide a sales tax exemption for religious publications.

Justices Blackmun and O'Connor also relied on the establishment clause in finding the exemption unconstitutional, but saw no need to resolve the free exercise question. A sales tax exemption limited only to religious publications violates the establishment clause, they said, because such an exemption involves preferential, governmental support for the communication of religious messages.

The sixth vote against the exemption was Justice White. However, he thought the dispute should have been resolved by applying the free press protections of the First Amendment, rather than its freedom of religion provisions. The prohibition against government action abridging freedom of the press was dispositive, wrote White. Texas could not impose a tax on the publishers of certain magazines while exempting other publishers solely on the basis of the religious content of their publications. A state cannot discriminate on the basis of the content of publications.

Chief Justice Rehnquist and Justices Scalia and Kennedy filed a dissenting opinion and thought the law should have been upheld. *–Linda Bruin*

Court Finds "Actual Malice" in Libel Case

Juries in libel cases tend to find against the media. Appellate courts tend to do just the opposite, often reversing large damage awards in the name of First Amendment "breathing space." But in *Harte-Hanks Communications Inc. v. Connaughton*, 57 U.S.L.W. 4846 (1989), the Supreme Court agreed with the jury and both courts below that the *Journal News* in Hamilton, Ohio, acted with "actual malice" when it published a story about a candidate running for judge. The Court unanimously affirmed the jury award of $5,000 compensatory damages and $195,000 punitive damages.

The Court had little trouble concluding that the newspaper's actions constituted "actual malice"–that is, "reckless disregard" for the story's truth or falsity. The story, published one week before the November 1983 election, reported that Daniel Connaughton offered a woman and her sister jobs and a trip to Florida in appreciation for their help in investigating corruption in courts. The *Journal News* published the story based on allegations made by a single source who interpreted remarks made to her by Connaughton at an all-night meeting attended by six others. The source characterized the remarks made by Connaughton as "dirty tricks" in the candidate's election campaign.

All those who attended the meeting, except the sister, were contacted by the newspaper. Each denied that any such offer was made. The sister, who might have corroborated the "dirty tricks" version of the meeting, was not sought out. Audio tapes recorded by Connaughton of part of the meeting left no indication that an offer was made. Reporters for the *Journal News* declined to listen to the tapes despite being granted access to them, claiming that they had been told that the compromising statements were not recorded. In its defense, though, the newspaper did include in its story the conflicting interpretations of what transpired at the meeting.

Evidence was also presented at trial that the *Journal News* was engaged in a bitter circulation rivalry with the *Cincinnati Enquirer* and the *Enquirer* was perceived to favor Connaughton over his judicial opponent. Shortly before the story appeared, the *Journal News* ran an editorial critical of Connaughton that hinted that further information concerning the integrity of the candidate might surface in the final days of the campaign. Immediately after the story ran, the paper endorsed his opponent. Connaughton lost by a margin of 60 percent to 40 percent.

In reviewing libel cases, the Court is not to defer to the factual determinations reached by the jury. The Court is to conduct an independent review of the facts to determine if they constitute reckless disregard for the truth. In other words, even if a jury concludes that the facts just mentioned amount to reckless disregard, an appellate court or the Supreme Court may reach a contrary conclusion. The rationale for such independent review is that juries in the heat of trial may not be sufficiently protective of First Amendment considerations. The Court was asked to consider not only whether the newspaper acted with reckless disregard for the truth, but whether the appeals court below conducted an appropriate independent review of the evidence.

In writing for the Court, Justice Stevens underscored those aspects of the newspaper's conduct that he believed exhibited the most indefensible disregard for the story's veracity. He listened to the tapes that the newspaper ignored and he quoted extensively from them. He found it "utterly bewildering" that the newspaper would commit substantial resources on such a pre-election story yet not interview the sister, who was the only person likely to confirm the version the newspaper headlined. And he regarded the editorial critical of Connaughton as evidence that the newspaper was committed to running a "dirty tricks" story regardless of what the newspaper discovered that might undermine that version of the story.

Stevens compared the case to one the Court decided 22 years ago, in which the *Saturday Evening Post* published an account of an unreliable source's false description of a purported agreement by the athletic director at the University of Georgia to fix a college football game. There too, the editors chose not to interview a witness who had access to the same facts as the sole source and decided not to view game films that might have revealed what actually happened in the game. And there too, the Court affirmed a large jury award which included punitive damages. The only difference, as pointed out by Justice Blackmun in his concurrence, is that in the 1967 case, the *Saturday Evening Post* presented its version as truth rather than as contested allegations. The *Journal News* at least published both versions, leaving readers to draw their own conclusions.

–Jack C. Doppelt

No Liability for Identifying a Rape Victim This Time

The *Florida Star* made a mistake when it published the name of a rape victim in its police blotter section. Normally, the weekly newspaper in Jacksonville maintains the anonymity of sex offense victims. The Duval County Sheriff's Department made a mistake too when it posted an unexpurgated version of the incident report in the press room. Department procedure calls for the names of sex offense victims to be obliterated.

Mistakes happen, but a jury found that the newspaper should pay $75,000 in compensatory damages and $25,000 in punitive damages for its mistake. In *Florida Star v. B.J.F.*, 57 U.S.L.W. 4816 (1989), the Supreme Court found another mistake, holding that liability could not constitutionally be imposed upon the newspaper for publishing truthful information which it had lawfully obtained. The 6-3 decision was not a ringing victory for the press or a fatal blow to a victim's privacy. The Court made it quite clear that newspapers are not necessarily free to publish the identities of crime victims, particularly rape victims, with impunity. Repeatedly, Justice Marshall cautioned that his opinion was limited to the specific facts in the case and the Florida law in question.

A Florida statute prohibited the mass media from identifying the victim of any sexual offense. Violations constituted a misdemeanor. A one-paragraph summary of the crime appeared among 54 police blotter stories in the *Florida Star* on October 29, 1983. The summary identified the victim, pinpointed the location of the crime, described the assault and the possessions taken, and reported that the investigation was suspended due to lack of evidence. The victim testified at trial that acquaintances and co-workers learned of the attack from the newspaper, that her mother had received threatening phone calls and that she felt compelled to change her phone number and residence and seek police protection.

Despite holding for the newspaper, Justice Marshall rejected two key arguments the paper presented to the Court. He declined to recognize the proposition that truthful publications may never be punished consistent with the First Amendment. Marshall also distinguished this case from a 1975 case in which the Court struck down a jury award against an Atlanta television station for airing the name of a rape-murder victim which the station had obtained from court records. Marshall treated the police report in this case as different from court records, which are part of an adversarial proceeding that is subject to public scrutiny.

The majority divined three reasons for favoring press freedom over a victim's privacy in this case. First, in stressing that the victim's name was provided, though mistakenly, by the government itself, the Court held that government has a more narrowly tailored means to safeguard anonymity than to allow for punishment of newspapers that publish the name. It can prevent the dissemination of the name in the first place.

Second, the majority was troubled that the Florida statute permitted liability and criminal punishment without fault. The statute did not require that the newspaper act negligently or that there be a finding that publication of a rape victim's name is something the ordinary person would find highly offensive. And third, the Court found the statute underinclusive, in that it singled out the mass media. The Court noted that the victim's name could just as easily have been spread through "backyard gossip," though the statute would not punish such dissemination.

Justice White's dissent pointed out that the government tried to prevent disclosure, even through mistake, by posting signs in the press room that stated that the names of rape victims were not matters of public record and were not to be published. In a scalding appeal to the conscience of the press, Justice White wrote, "As I see it, it is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim's name, address, and/or phone number."

The dissent was not bothered by the statute's absolute liability, noting that in this case, the jury found that the newspaper acted with reckless indifference towards the rape victim. Justice White also noted that the Florida legislature determined by passing the law that disclosure of a rape victim's name is categorically a revelation that reasonable people find offensive.

Both the majority and the dissent anticipate recurring confrontations between victims' rights and press freedoms. Though both sides argue for a case-by-case involvement in the fray, certain hints are being dropped. The most revealing hint the dissent left until the end, where Justice White stated emphatically: "There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime—and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed."

The dissent is not content to limit its observation to rape victims. What three justices on the Court seem to be saying to the press is that it ought to reconsider the very premise of one of its routine reporting techniques. Just because a rape is news, or a burglary is news, that need not give license to reporters to treat as newsworthy the identity of victims thrust involuntarily into the spotlight. If reporters are willing under normal circumstances to protect the anonymity of rape victims or juveniles, why not accord the same "standard of decency" to others victimized by crime? *—Jack C. Doppelt*

Jurisdiction of Indian Courts Strengthened

The traditional and legally recognized sovereignty of Indian tribes over the domestic affairs of their members was reinforced by a Supreme Court decision interpreting the Indian Child Welfare Act. As a general rule, disputes between Indians living on reservations are decided by tribal courts rather than the courts of the states in which the reservations are located.

In 1985, an unmarried woman gave birth to twins, a boy and a girl, in Harrison County, Mississippi. Both the mother and father were full-blooded Choctaw Indians who lived on the Choctaw Reservation in Neshoba County, some 200 miles away. The mother had deliberately left the reservation at the time of the babies' births so that they would not be born on the reservation. After waiting the ten days required by Mississippi law, the natural parents signed the necessary legal forms consenting to the children's adoption by Mr. and Mrs. Holyfield, a non-Indian couple who lived in Harrison County. Two months after the adoption was finalized by a state court in Harrison County, the Mississippi Band of Choctaw Indians filed a lawsuit to have the adoption decree set aside.

IN THE LOWER COURTS

The tribe argued that the state court had no authority to approve the twins' adoption because the federal Indian Child Welfare Act gives tribal courts the exclusive right to decide cases involving the adoption of Indian children who reside on, or are domiciled within, a reservation. The biological and adoptive parents countered that the federal law was not applicable in this instance since the infants had not been born on the reservation.

Congress enacted the 1978 Indian Child Welfare Act in response to rising concerns about the removal of Indian children from their homes. Studies conducted prior to the passage of this law showed that 25% to 35% of all Indian children had been separated from their families and placed in adoptive homes, foster care, and institutions. Two problems resulted from this pervasive practice of placing children in non-Indian homes. First, Indian children who were raised with a white cultural identity, living in a white home and attending predominantly white schools, experienced difficulty in relating to their racial identity when they reached adolescence and discovered society would not accept them as whites. Second, the removal of Indian children from their tribes significantly decreased the ability of the tribes to preserve Indian culture, traditions, and social values. When the tribes were drained of their children, the only real means of transmitting their tribal heritage was lost.

THE DECISION

The Supreme Court, in *Mississippi Band of Choctaw Indians v Holyfield*, 57 U.S.L.W. 4409, 104 L. Ed. 2d 29 (1989), interpreted the Indian Child Welfare Act to mean that the Indian tribal court had the power to decide the fate of the twins, not the state courts of Mississippi. The justices focused their analysis on the section of the Indian Child Welfare Act that gives tribal courts exclusive jurisdiction over the custody cases of Indian children who are domiciled on a reservation. In a 6 to 3 decision, the Court held that the common law principles applicable to the determination of a child's domicile meant that the twins were legally domiciled on the reservation because the domicile of an illegitimate child follows that of its mother. Since it was undisputed that the domicile of the mother was on the reservation, the twin babies were also domiciled on the reservation at the time of their birth, even though they themselves had never been there.

Thus, the Supreme Court concluded that the Choctaw Tribal Court should decide the question of the children's custody. The Court noted that over three years had passed since the twins had been placed in the Holyfield home and expressed concern about the trauma facing everyone involved in this custody dispute. Nevertheless, the only question the Court could decide was who should make the custody decision. It was the responsibility of the tribal court to use its experience, wisdom, and compassion to fashion an appropriate remedy. *—Linda Bruin*

Death Penalty for Minors and the Mentally Retarded Upheld

The Eighth Amendment's protection against cruel and unusual punishment was the subject of two important and difficult decisions made by the Supreme Court this year. At issue was the death penalty and its application to the mentally retarded and minors.

Retardation Alone Does Not Bar Death Penalty

Johnny Paul Penry was charged with murder in 1979. He was accused of killing Pamela Carpenter, who had been brutally raped, beaten, and stabbed in her Livingston, Texas, home. Before she died, Carpenter described her assailant. The victim's description led the police to Penry, a mentally retarded person suffering from brain damage, which was probably caused at birth but may have been caused by beatings in his early childhood. Penry was 22 years old at the time of the crime. However, as a result of his retardation, Penry had the mental age of a 6- or 7-year-old. Although Penry raised an insanity defense at trial, the jury found him guilty of murder and he was sentenced to death.

One of the issues raised by Penry in his appeal to the U.S. Supreme Court was the question of whether the Eighth Amendment prohibits the execution of a convicted murderer if he or she is mentally retarded.

THE DECISION

The Supreme Court's decision in *Penry v. Lynaugh*, 57 U.S.L.W. 4958, 106 L. Ed. 2d 256 (1989), was divided on the various issues presented in this appeal. On the Eighth Amendment question, the Court split 5 to 4. Justices O'Connor, White, Scalia, Kennedy, and Chief Justice Rehnquist held that the imposition of the death sentence against a mentally retarded person convicted of a capital offense is not categorically prohibited by the Eighth Amendment. The majority rejected Penry's argument that mentally retarded people do not possess the ability to distinguish between right and wrong and, thus, should not be subject to punishment for acts committed while mentally incapacitated.

The majority accepted the basic premise that a person cannot be held responsible for criminal acts if, as a result of mental disease or defect, the accused lacks the substantial capacity to understand the wrongfulness of his or her conduct. However, the abilities and experiences of mentally retarded people vary greatly. Therefore, it would be impossible to conclude that no mentally retarded person can ever act with the "level of culpability associated with the death penalty." While mental retardation may lessen the accused's culpability, wrote Justice O'Connor, the Eighth Amendment does not preclude the execution of any mentally retarded person convicted of a capital offense simply by virtue of mental retardation alone.

THE DISSENT

Justices Brennan and Marshall dissented, contending that the Eighth Amendment's prohibition against cruel and unusual punishment should be interpreted to prevent the execution of offenders who are mentally retarded and "lack the full degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty."

In their dissenting opinion, Justices Stevens and Blackmun also concluded that executions of mentally retarded persons are unconstitutional. Although mentally retarded people can be held responsible and punished for their criminal acts, the death penalty is not justified, explained Stevens, because of the mentally retarded person's disabilities in moral reasoning and control of impulsivity and his or her inability to understand the relationship between cause and effect. *—Linda Bruin*

Execution of Minors Not Cruel or Unusual

The Supreme Court's second decision of 1989 dealing with the Eighth Amendment actually was a consolidation of two cases in which juvenile offenders were sentenced to death after being convicted of murder. Kevin Stanford, 17 years old, was found guilty of robbing a gas station, raping and sodomizing the station attendant, and then shooting her to death so that she could not identify him. He was sentenced to death plus 45 years' imprisonment. Heath Wilkins, 16 years old, was convicted of first degree murder after robbing a convenience store, repeatedly stabbing the owner, and leaving her to die. The trial record showed that Wilkins had not only planned the robbery, but also the murder of whoever was working at the store because, in his words, "a dead person can't talk." Wilkins also was sentenced to death.

THE DECISION

In *Stanford v. Kentucky*, 57 U.S.L.W. 4973, 106 L. Ed. 2d 306 (1989), five justices of the Supreme Court agreed that the death sentence was permissible in these cases, even though the convicted murderers were minors at the time of the crimes. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O'Connor and Kennedy in the majority opinion, which held that the imposition of the death penalty for crimes committed at age 16 or 17 does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Justice Scalia observed that a majority of the 37 states whose laws permit capital punishment allow the penalty for crimes committed at age 16 or above. While it is true that statistics show that a far smaller number of offenders under 18 than over 18 have been sentenced to death in the United States, continued Scalia, this does not mean that the death penalty is unacceptable for offenders under 18. Scalia also rejected the argument that there should be a relationship between the legal age for voting, driving, or drinking alcohol and the age at which the death penalty would be appropriate. "It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong," he wrote.

THE DISSENT

Justice Brennan, Marshall, Blackmun, and Stevens dissented, stating that it is cruel and unusual punishment to execute any person for a crime committed while that person was under 18 years of age. Among other points, the dissenters noted that 27 states either do not authorize capital punishment or specifically limit it to persons who are at least 18 years old. In addition, they emphasized that the Eighth Amendment forbids punishment that is "wholly disproportionate to the blameworthiness of the offender." Because the law often assumes that juveniles as a class are insufficiently mature to be regarded as "fully responsible," explained Brennan, the same principles ought to apply to exempt juveniles from the ultimate penalty.

—Linda Bruin

Court Considers Drug Courier Profiles

Stopping Drug Suspects

By a vote of seven to two, the Court ruled that law enforcement officers may stop and briefly detain someone for investigative purposes simply because he or she appears to meet certain characteristics attributed to criminal behavior. The decision in the case of *U.S. v. Sokolow* (57 U.S.L.W. 4401) was handed down April 3, 1989.

BACKGROUND

In July 1984 Andrew Sokolow went to the United Airlines ticket counter at Honolulu International Airport, where he purchased two roundtrip tickets for a flight to Miami, leaving later that day. He paid for the tickets with $2,100 in cash taken from a large roll of $20 bills he pulled from his pocket. He also gave the ticket agent his home phone number. The tickets were purchased in the names of "Andrew Krag" and "Janet Norian."

According to court records, the ticket agent said that Sokolow appeared nervous. Sokolow, 25, was dressed in a black jumpsuit and wore gold jewelry. Neither he nor Janet Norian, who was accompanying him, checked any luggage.

After the two left for the flight, the ticket agent contacted the police. Upon further investigation it was determined that Sokolow was using a different name from that listed for the phone number he gave the agent and that no "Andrew Krag" was listed in Hawaii. Investigators also found that he was to return to Hawaii in only three days (even though the round trip to and from Miami takes 20 hours) and would make stopovers in Denver and Los Angeles.

Sokolow was observed by Drug Enforcement Administration agents in Los Angeles, where he also was said to appear very nervous. After the couple returned to Honolulu, they were stopped by an agent at the airport as they were about to get into a cab. They were advised of their constitutional rights and had their carry-on luggage examined by a narcotics detector dog, who gave an alert indicating the presence of drugs. Officers then secured a search warrant, opened the bags, and found over 1,000 grams of cocaine in one of them.

Sokolow was indicted and, after the district court denied his motion to supress the cocaine and other evidence, entered a conditional guilty plea to charges of possession of cocaine with intent to distribute. A federal appeals court overturned his plea, finding that the agents did not have a reasonable suspicion that he was involved in criminal activity to justify stopping him in Honolulu.

The appeals court used a two-part standard, saying that it was relevant to determine if Sokolow fit certain personal characteristics only if there also was evidence of ongoing criminal behavior. The presence of suspicious personal characteristics, by itself, was insufficient to justify a stop, the appeals panel said.

The U.S. government appealed to the Supreme Court, which heard arguments in the case on January 10, 1989.

ANALYSIS

In 1968, in *Terry v. Ohio*, 392 U.S.1, the Supreme Court held that police can stop and briefly detain a person if they have a "reasonable suspicion supported by articulable facts that criminal activity may be afoot." Under this standard, they must have more than a hunch – they must have some specific facts to justify their suspicion.

Having this degree of reasonable suspicion is much less difficult to meet than the "probable cause" required before a search and seizure can be conducted under the Fourth Amendment.

Those who meet the reasonable suspicion standard can only be briefly detained, while those who have met the probable cause standard can be searched and any evidence found can be seized. However, as the Sokolow case shows, a brief detention can sometimes uncover sufficient information to justify a search warrant and a full-scale search.

Unfortunately, neither the reasonable suspicion standard nor the probable cause standard conform to a neat set of legal rules, so that an agent could look at a checklist and say that if people met certain criteria they could be stopped for reasonable suspicion, but if they met a different set of criteria they could be searched based on probable cause. Instead, this is an evolving area of the law based on a string of cases in the area.

In *Sokolow*, Chief Justice Rehnquist spoke for the majority. He noted that each of the acts Sokolow performed, taken by themselves, might have been totally innocent. However, when taken together, they warranted further investigation.

There was nothing illegal about Sokolow paying for his plane tickets with $2,100 in cash, traveling to Miami—a city known for its drug activity—traveling a total of 20 hours to stay two days in Miami in July, appearing nervous, and not checking any luggage, Rehnquist said. But the totality of these events did raise suspicion.

In a 1983 case relied on by the majority—*Florida v. Royer*, 460 U.S. 491—the justices held that totally innocent behavior may nevertheless provide a basis for reasonable suspicion of criminal activity.

But Sokolow's lawyers claimed he was stopped because he fit a so-called "drug courier profile," a standard used by agents since 1974 to identify drug smugglers based on certain attire and behavioral patterns.

If police were suspicious of him because he fit this mold, Sokolow's lawyers claimed, then police could have continued to watch him but they could not legally stop him without more concrete suspicion of actual criminal activity.

The majority stated that the fact that agents may have relied on criteria listed in the drug courier profile was irrelevant, since the factors they noted in Sokolow's behavior had evidentiary value whether or not they were found in the courier profile. The Court said the appropriate standard required police to look at the totality of the circumstances in deciding whether or not a stop can lawfully be conducted.

The Court also disposed of Sokolow's last contention. His lawyers said that the police erred in detaining him at the airport. They said police were obliged to use the "least obtrusive means" of verifying their suspicions, and should have merely spoken with him rather than forcibly detaining him.

Not so, said the Court. Sokolow and his companion were about to get into a cab, and police were required to make a quick decision on how to proceed. To say after the fact that they made the wrong decision would hamper their ability to investigate and put courts in the position of second-guessing.

In upholding the stop of Sokolow, the Court gave law enforcement officials in Miami, Dallas, New York and other key points of entry a valuable tool for controlling the entry of illegal drugs into the country.

Justices Marshall and Brennan, the dissenters in the case, noted that the concept of reasonable suspicion was derived from the standard of probable cause. It is to be used only for brief detentions aimed at stopping on-going crimes or preventing crimes that are imminent.

The dissenters claimed there simply was no evidence that Sokolow was in the process of committing a crime or was about to engage in criminal activity. He was stopped, they said, primarily because he appeared nervous, which in this era of proliferating plane crashes and near-collisions could be a totally normal state of behavior.

EXCERPTS FROM THE MAJORITY DECISION

"Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."

"The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift on-the-spot decisions . . . and it would require courts to indulge in unrealistic second-guessing."

EXCERPTS FROM THE DISSENT

Justice Marshall: ". . . Nothing about the characteristics shown by airport traveler Sokolow reasonably suggests that criminal activity is afoot. The majority's hasty conclusion to the contrary serves only to indicate its willingness, when drug crimes or anti-drug policies are at issue, to give short shrift to constitutional rights."

—Denis Hauptly and David Sellers

Whose Job Is It to Protect Abused Children When Parents Won't?

Every state, the District of Columbia, and all territories of the United States have enacted child protection statutes. In each system, social workers will investigate abuse reports and intervene if abuse is found, even removing the child from the home if necessary. Despite these laws, many have questioned whether children, especially pre-schoolers and others too young to protect themselves, are adequately protected.

Many contend that the government must do more to prevent abuse. Some add that its failing to do so amounts to negligence, and thus the government should be liable for damages. In *DeShaney v. Winnebago County Department of Social Services*, 57 U.S.L.W. 4218, 103 L. Ed. 2d 249, a new twist was added—a suit against the government alleged a deprivation of constitutional rights. Melody DeShaney and her brutally abused son, Joshua, sued the county under a civil rights statute, 42 U.S.C. Section 1983, claiming a violation of young Joshua's Fourteenth Amendment civil rights. The suit claimed that public officials failed to protect the child from a catastrophic injury at the hands of his father, Randy DeShaney, thus depriving the child of his lawful rights. The Supreme Court was asked to decide whether this failure to act on the part of the public officials did, in fact, deprive him of his Fourteenth Amendment rights to life and liberty.

THE FACTS

After nearly two years of repeated abuses and at least five trips to the emergency room of the local hospital, Joshua DeShaney, already comatose, was taken to the emergency room at Mercy Medical Center in Oshkosh, Wisconsin, on March 8, 1984. At the hospital the child, then five years old, was determined to have suffered multiple abrasions, lacerations, edemas, skull fractures, and brain damage. Neurosurgery was undertaken but Joshua was diagnosed as being profoundly disabled, having lost half his brain tissue. He will require institutional care the rest of his life.

The state became involved in Joshua's life two years earlier, when, in January 1982, his father's second wife notified

(continued on page 48)

Supreme Court

Christmas Creche Crisis/Middle School

Leeann Jones

Dean Matthews

In this establishment of religion simulation, the town of Middleboro owns a traditional Christmas creche, or nativity scene. Each year, for the past 30 years, it has been displayed on a corner of the town hall grounds from Thanksgiving to January 5th. The creche, made of life-sized figures, was donated by the Middleboro Pioneers Society. It is illuminated at night by spotlights. Many residents come by, especially when walking or driving to the nearby stores and shopping center.

A citizens' group, United Americans for Separation of Church and State (UASCS), asked the town council not to erect the scene, but the council continued to do so. The UASCS disputes the constitutionality of the creche being placed on town land. The group decides to file suit in federal district court, asserting that the town has violated the First and Fourteenth Amendments.

The religion clauses of the First Amendment state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment applies that regulation to state and local governments.

Objectives

1. To develop an understanding of the religion clauses of the First Amendment.
2. To develop an understanding of governmental limitations on religious practices.
3. To develop an understanding of governmental regulations that may incidentally support religious beliefs.

Materials

1. One copy of the handout per student.
2. One map per group.
3. One copy of the referenced cases per group.

Procedure

1. Divide the class into groups of four or five.
2. Have each group read the creche scenario and discuss the constitutionality or unconstitutionality of the creche using the information in Section I.
3. Conduct class discussion using "Questions for Section I."
4. Have each member assume a different "community role" in Section II to select suggested sites for placement of a creche.
5. Conduct class discussion using "Questions for Section II."

Section I

As a panel of judges, decide the constitutionality of the creche scene. Guidelines were formulated in the *Lemon v. Kurtzman* case of 1971 (see "Cases for Reference"). Also refer to the other cases heard since then by the Supreme Court. Consider the following: what is in the scene, who owns it, where is it displayed, and is the city supporting a religion by erecting the scene? The group should apply the guidelines and the holdings in the other cases. The town map may be used.

Section II

If the panel of judges finds the creche scene unconstitutional, take new roles as townspeople who are to solve the dilemma of the Middleboro creche. Using the map on p. 37, a new site may be selected, or the group may make adjustments to the creche scene so that it could remain on the grounds of the town hall. All sections of the map – commerical, public, and private – should be considered.

2343

Cases for Reference

LEMON V. KURTZMAN, 91 S.Ct. 2105 (1971)
Rhode Island passed a law providing state financial assistance to supplement the salaries of teachers in nonpublic elementary schools who taught secular subjects. The money would go directly to the teachers, who would agree in writing not to teach a course in religion while receiving the monies and to use materials used in the public schools.

The Court said that the purpose of the law was to benefit the child and improve the quality of education, but it found that teachers could probably not totally separate their religious beliefs from their teaching. The state's efforts to keep track of these teachers and their subjects would create an "excessive entanglement" for the government and churches. For these reasons the law was found to be unconstitutional under the establishment clause of the First Amendment, as applied to the states through the Fourteenth Amendment.

The Court established a guideline, popularly called the *Lemon* criteria, to use in reviewing establishment clause cases. A governmental law or conduct will be held to be constitutional only if it meets all of the following three criteria:

1. The purpose of the law or conduct must be secular, not sectarian.
2. The principal or primary effect of the law or conduct must be neither to advance nor inhibit religion.
3. The act or conduct must not create an excessive governmental entanglement with religion.

LYNCH, MAYOR OF PAWTUCKET V. DONNELLY, 104 S.Ct. 1355 (1984)
For more than forty years, Pawtucket, R.I., had erected a Christmas display in a privately owned park in the midst of the downtown business section. The display included a Christmas tree, Santa Claus house, candy-striped poles, reindeer and sleigh, carolers, a "Season's Greetings" banner, hundreds of colored lights, a creche or nativity scene, and cut-out figures of a bear, clown, and elephant. All the items were owned by the city. Some local residents challenged the constitutionality of the creche on the grounds that it violated the establishment clause of the First Amendment, as applied to the states through the Fourteenth Amendment.

The present value of the display was $200, and it cost the city about $20 to erect and dismantle it. Until this lawsuit, there had been no complaints about the creche's inclusion.

In a 5 to 4 decision, the Court allowed the display, emphasizing that the nativity scene commemorated the origins of "a particular historic religious event" that is recognized by Congress as a national holiday. With all the other secular display items, the creche did not seem to advance a particular religion, and the town's involvement was minimal.

BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE V. McCREARY, 105 S.Ct. 1859 (1985)
A citizens committee in a New York village had been displaying their privately owned creche in a public park for 25 years. In 1982, local officials for the first

GROUPS REPRESENTED ON THE COMMITTEE
Here is a list of groups whose members are appointed to the committee. If you want more students to participate, extra people can double up on the roles.

1. Middleboro Pioneers Society (prefers placement in a park, but will consider other suitable yet prominent locations; may be interested in reassuming ownership of the creche);
2. Easttown Shopping Area Merchants' Association (opposed to placing the creche at the shopping area, fearing offending the public; may be interested in donating funds for enlarging the display);
3. Community Church of Middleboro (wishes to place the creche in a respectable location; will consider additional items, but doesn't want secular items placed right next to religious ones);
4. United Americans for Separation of Church and State (opposed to the creche being placed on any public land).

Questions for Section I

1. What was each group's decision?
2. How did the groups arrive at their decision? How were the *Lemon* criteria and other cases used?
3. Would the decision be different if Christmas were considered a public holiday rather than strictly a religious one?
4. Would the judges rule another way in the following related situations:
   a. The town erects the creche along with other secular holiday symbols in a private park near the downtown area.
   b. The town denies a request to place a privately owned creche in a public park, as had been done for the previous 14 years. The creche belongs to an interdenominational group. The town has no ordinances limiting any type of public displays in public parks.

Questions for Section II

1. What was the solution of each group? What other choices did the group have?
2. How did the group arrive at its decision?
3. What kinds of things motivated group members' actions? What part did different personalities play in the decision-making process? Were alliances formed?
4. Is there a holiday display in the students' town? How does it meet the Court's criteria and opinions?

Leeann Jones teaches seventh and eighth grades at Desert Horizon Elementary School in Phoenix, Arizona. She has been involved in the Arizona Center for Law-Related Education since 1980. She wishes to acknowledge the support of Isidore Starr, Ellie Shragia, and the Center's staff.

denied permission to place the creche on the park property and suggested the committee place the nativity scene on private property. The creche committee took the decision to the federal district court.

When the case went before the Supreme Court, one of the justices was ill. On a 4 to 4 vote the Court upheld the court of appeals decision. They said that since the park had been used as a traditional public forum for all types of purposes, the village was not involved in any sectarian activity. The permission to exhibit the display did not advance religion. The town's role was "indirect, remote, and incidental," especially since the committee had placed a disclaimer sign in 1976 stating that only the committee had erected and maintained the creche. Since there was no financial support, Scarsdale was not engaged in any entanglement with religion.

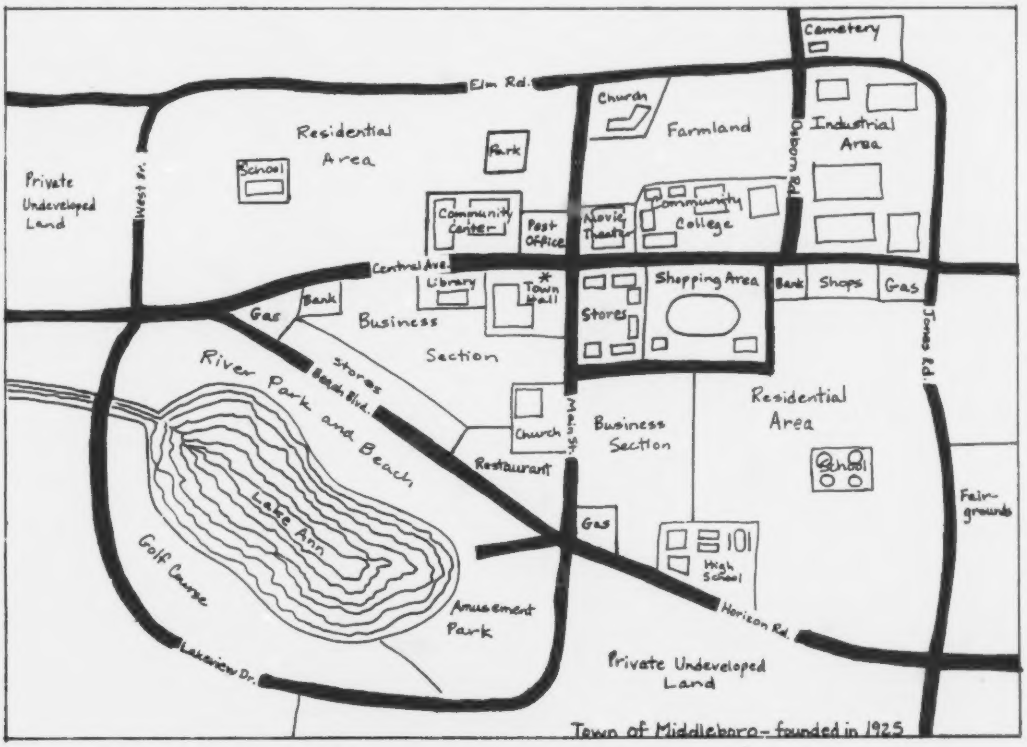
COUNTY OF ALLEGHENY, CHABAN, AND CITY OF PITTSBURGH V. AMERICAN CIVIL LIBERTIES UNION, 106 L. Ed. 2d 472 (1989)

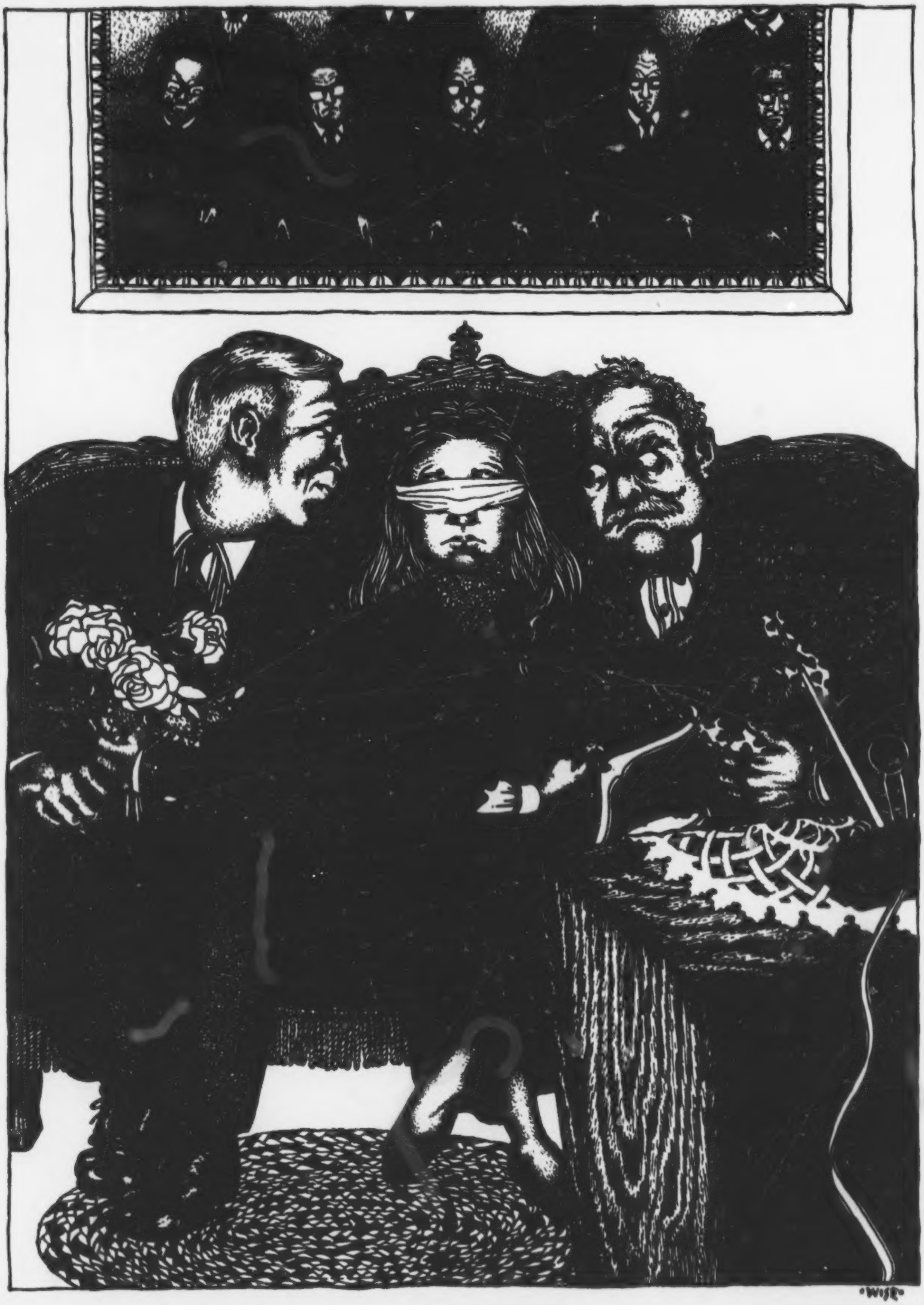
This case is really two cases in one, involving two different displays at separate public buildings during the winter holiday period. Since 1982, the Allegheny County Courthouse in downtown Pittsburgh has permitted a Roman Catholic group to display a creche scene at the grand staircase of the entranceway. The group donated the creche, and a sign to that effect is in place. The manger had at its crest an angel bearing a banner proclaiming "Gloria in Excelsis Deo," meaning "Glory to God in the Highest." The county transports the display, places poinsettias around the display, and invites school groups to sing Christmas carols around it during the season.

About a block away is the City-County Building. For a number of years city employees have erected a 45-foot Christmas tree near one of the entrances. The city has placed a sign at the exhibit, bearing the mayor's name, which explains that the tree's lights are to remind citizens of the importance of liberty and freedom. At least since 1982, the display has included an eighteen-foot menorah representing the Jewish holiday of Chanukah. A local Jewish group owns the menorah, but the city stores, erects, and removes it.

The Supreme Court split its decision, ruling the creche scene unconstitutional, but the second display acceptable. On a 5 to 4 vote, the Court said that the creche was violating the establishment clause of the First Amendment because of the religious message of the banner above the creche and the lack of any other object which might detract from its meaning. The county was endorsing a Christian message instead of just celebrating a cultural event.

In the second part of the case, the justices voted 6 to 3 that the holiday display at the City-County Building did not violate the First Amendment. The combination of the Christmas tree, menorah, and message did not show a governmental endorsement of a religion, namely Judaism. The Christmas tree is a secular symbol of Christmas. The menorah reminds people of different ways to celebrate the winter season. The sign's message proves the government is not sponsoring a particular religion but just recognizing citizens' cultural differences.


Elm Rd.
Cemetery
Church
Farmland
Osborn Rd.
Industrial Area
Residential Area
Park
School
Private Undeveloped Land
West St.
Community Center
Post Office
Movie Theater
Community College
Central Ave.
Library
* Town Hall
Stores
Shopping Area
Bank
Shops
Gas
Jones Rd.
Gas
Bank
Business Section
Stores
Beach Blvd.
River Park and Beach
Church
Main St.
Business Section
Residential Area
School
Restaurant
Fair-grounds
Lake Ann
Gas
High School
Golf Course
Amusement Park
Horizon Rd.
Lakeview Dr.
Private Undeveloped Land
Town of Middleboro - founded in 1925



Susan Wise

SUPREME COURT

Mary Neil Crosby

Courting the Court

Did ads, PR campaigns, and demonstrations affect the Court's abortion decision?

Supporters and opponents of abortion rallied, marched, advertised and picketed while the Supreme Court considered its ruling on a Missouri abortion case that had the potential to overturn *Roe v. Wade*.

Never before in American history had so many people expressed their own opinions while trying to influence the opinions the justices would write.

Many years ago, Justice Oliver Wendell Holmes wrote of the Court, "We are very quiet here, but it is the quiet at the center of the storm." The noise, and the storm, came a lot closer to the Court when it got caught in the abortion crossfire.

The Supreme Court heard the abortion case, *Webster v. Reproductive Health Services*, on April 26, 1989. The case required the Court to rule on the constitutionality of a Missouri law placing certain restrictions on abortions.

The Missouri law specified that abortions not necessary to save a woman's life may not be performed by public employees or in public facilities. The Missouri law also required that medical tests determining the fetus's viability outside the womb be run on fetuses believed to be at least 20 weeks old.

The Supreme Court could have used the Missouri case to overrule its controversial 1973 *Roe v. Wade* decision giving women the constitutional right to abortion.

Instead, the Court's decision was not as sweeping as pro-lifers had hoped and pro-choicers had feared. In its July 3 ruling in the *Webster* case, the Supreme Court ruled that the Missouri law was constitutional, but the Court stopped just short of overturning *Roe v. Wade*.

Building Public Support

In the months between the Court's agreeing to hear the case and the actual ruling, advocates on both sides of the issue campaigned to gain public support.

More than half a million pro-choicers participated in a march sponsored by the National Organization for Women on April 9 in Washington, D.C., just a few weeks before the Court was scheduled to hear the *Webster* arguments.

Molly Yard, president of NOW, told *New York Times* reporters, "This is the biggest march for women's rights in the history of the country."

Advocates and opponents of abortion rallied outside the Supreme Court building when the case was argued on April 26, and again when the decision was handed down on July 3.

In the months preceding the *Webster* argument, the American Civil Liberties Union bought full-page pro-choice ads in *USA Today*, *The Washington Post* and *The New York Times*.

National Right to Life bought a four-page insert that ran in *USA Today* the day before the Supreme Court heard *Webster*.

The national headquarters of Planned Parenthood has run "dozens and dozens" of newspaper ads since January, according to Doug Gould, vice president of communications for Planned Parenthood Federation of America.

What Was the Impact?

Most activists and legal experts agree that public opinion does not determine the Supreme Court's decision on a case, but that it does affect the Supreme Court. What no one can say for sure is just how and to what extent the Court is affected by public opinion.

Most experts and activists interviewed for this article said they don't think public opinion determined the outcome of *Webster*. But few think the Court was completely oblivious to the volume of public outcry on the case.

"I think the only thing that could have happened [with *Webster*] is that the Supreme Court knows lots of people feel strongly, but I don't think numbers of people on opposing sides one way or another affected the decision," said Christine Smith Torre, director of the Feminists for Life law project.

"It [public opinion] was effective in the political arena, not the judicial arena," said Bruce Fein, a legal scholar and attorney specializing in constitutional and communications law.

The strong campaigning by activists, Fein said, showed the justices that court intervention is unnecessary because both pro-lifers and pro-choicers are powerful enough to get a fair hearing in the legislative chambers.

"Political advertising is perfectly appropriate for people who have money and want to spend it, but I don't think it has any bearing on what judges do," said Victor Rosenblum, professor of law at Northwestern University.

Alan Dershowitz, law professor at Harvard University, said he thought the enormous pro-choice public opinion campaign was worse than ineffective.

"I think that was counterproductive because it showed they [pro-choicers] have power to influence public opinion," he said. "Therefore the Court sees no need to protect them and sees it as a legitimate reason for taking it to the legislatures.

"The choice people had enormous access to the media. I think it backfired," Dershowitz said.

Public opinion "is a sword that cuts both ways" in its effect on the Supreme Court, according to Dershowitz.

"To certain justices, like Scalia, it [public opinion] is an argument in favor of the political branches of government," Dershowitz said. "Scalia says, 'Pro-choicers are saying they have a majority. If they do, why don't they start winning legislative battles?'

"For other justices, it [public opinion] vindicates their view that choice should be constitutionally protected," Dershowitz said.

Uses of Public Opinion

There are three types of situations in which public opinion comes into play in Supreme Court decisions, said Marc Stern, co-director of the legal department for the American Jewish Congress.

In matters involving highly charged issues, like civil rights or abortion rights, public opinion sets outer limits on what the Court is able or willing to do, Stern said.

He pointed out that Justice Rehnquist, in his *Webster* opinion, said the Supreme Court's ruling does not mean America will return to the dark ages on the abortion issue.

"The fact that he uses that expression suggests he understands the public will not tolerate the Court going so far as to ban abortion," Stern said. The *Webster* case is one example of public opinion setting outer limits on what the Court is willing to do, Stern said.

In other cases, public opinion determines how the Court frames a decree, according to Stern.

For example, in the famous *Brown v. Board of Education* case, the Supreme Court handed down a decision that was unpopular with many because it forced schools to desegregate.

In *Brown*, public opinion in Southern states was strongly opposed to the Supreme Court decision. In anticipation of adverse public opinion, Chief Justice Earl Warren worked with the associate justices to develop a unanimous opinion. The fact that the Court spoke with a single, authoritative voice strengthened the ruling. Public opinion affected how the Court framed its decree in *Brown*.

There are also those cases in which public opinion plays a role in determining constitutionality, Stern said.

For instance, when the Court decides whether or not to allow a creche on a government building, it asks, "Is that understood as a government endorsement of religion?"

"There's no scientific way of determining that," Stern said, adding that the Court must look to public opinion to determine the answer.

"Amongst other things, the Court is asking how something is perceived by the public. 'How is it seen by the public if we take the creche down?'" Stern said. "'How is it seen by the public if we keep it up?' These are questions about public opinion. 'How does the public perceive it?' It's not the same as saying, 'How should we decide this case?'"

History tells us that under the separation of powers provided by the U.S. Constitution, our Founding Fathers designed the Supreme Court so justices could be independent of popular will.

Justices' Insulation from Public

"In establishing our three branches, we made one immediately responsible to the public [Congress], and the second more indirectly responsible to the public [the president, elected every four years]. We deliberately separated [justices] from public decisions over them by giving [them] life-time tenure," said Northwestern law professor Rosenblum.

"The judicial branch was constituted by the founders of our system of government to be above daily sways of public opinion, and to interpret the Constitution in light of the text and history of the Constitution," said David O'Steen, executive director of National Right to Life.

"I have to work on the assumption that justices render their opinion based on their honest evaluation of the Constitution, and that being the case, public opinion should not enter into it," he said.

Others think the isolation of justices from public opinion cannot be absolute in the practicality of day-to-day living.

"It's clear in the past that Court decisions. . .have acknowledged public debate. Civil rights did not come out in a vacuum," said Colleen O'Connor, national director of public education for the American Civil Liberties Union.

"We know justices read the papers," she said. With cases involving such issues as civil rights and abortion rights that affect lots of lives and "represent great social upheaval," the Supreme Court cannot be entirely insulated from public debate, she added.

Molly Yard, executive director of NOW, agreed.

"I do not believe the Court can sit there and be unaffected by what the polls show. I don't think anybody can live in an ivory tower. They [justices] have to be affected by what's written and what they hear."

"How would you insulate justices from public opinion when it's in the paper everyday, on the radio, on television—it's everywhere," said Christine Smith Torre, director of the Feminists for Life law project.

Expecting Supreme Court justices to be insulated from public opinion is "naive," Bruce Fein said.

"To say the Supreme Court can open its eyes, look out the window and see public opinion like anyone else is to do no more than ask that they take judicial notice of reality," he said.

Elaine Weiss, past president of the Illinois Women's Agenda, said, "Hard core [public opinion] campaigns should be directed towards elected officials, but it's improper for justices to be so out of step that they no longer reflect the vast majority viewpoint among Americans."

Dershowitz of Harvard University said justices should watch the election returns simply so they can look at public opinion and do the opposite.

"When an election goes one way, their [justices'] protective antennae should go up the other way, and they should be more sensitive to those without access to the electoral process," he said.

"I don't think they should be insulated. They should be exposed to public opinion so they can go the other way," he said.

"Their job is to be counter-majoritarian, to vindicate those constitutional rights which are not capable of being vindicated through the legislative process," he added.

Spokesmen from most activist groups said they didn't lobby the Supreme Court on *Webster* because they realized the Supreme Court was designed to be independent of public opinion.

But apparently thousands of individuals across the country don't understand that the Court was set up to be independent of popular will. During the days before the *Webster* arguments, the Supreme Court received between 15,000 and 18,000 letters a day from Americans expressing their views on abortion.

Doug Gould of Planned Parenthood said people probably write the Court "because they're desperate, they're scared, and they hope members of the Court will listen to their pleas."

Gould said he thinks efforts specifically aimed at lobbying the Supreme Court are wasted energy.

"It's sort of like boiling water when a woman is in labor," he said. "It doesn't do any good, but it makes you feel useful."

Christine Smith Torre of Feminists for Life agreed with Gould that trying to lobby the Supreme Court is a waste of time.

"I think the majority [of Court justices] in this case neither likes the perception that the public thinks they're influenced, nor the lobbying. I don't think they're very much impacted by it," she said.

"I think Scalia made it clear that he thought thousands of letters arriving as though he were a legislator was distasteful," she said.

In his opinion, Justice Scalia said, "We can now look forward to at least another term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will. Indeed, I expect we can look forward to even more of that than before, given our indecisive decision today."

Why Advertise?

Why did so many activist groups advertise when they believed lobbying the Supreme Court is useless?

"I think it [public opinion campaigning] is public relations for both sides to draw public attention to their groups' activities," said Laurie Anne Ramsey, director of education for Americans United For Life.

"The objective [of ads] is to try to mobilize and heighten involvement of people in their cause," Victor Rosenblum of Northwestern said. "Many [ads] are accompanied by boxes for contributions. Often they are fundraising devices."

"We ran a number of ads, but we did not run the ads targeted towards influencing the Supreme Court," said Nancy Broff, legislative political director of the National Abortion Rights Action League.

NARAL's ads were aimed at mobilizing the pro-choice community, she said.

The ACLU conducted a letter-writing campaign, said spokesperson O'Connor, targeted at Attorney General Dick Thornburgh after the Justice Department came out with a pro-life stand in *Webster*.

The Los Angeles Times ran an ACLU ad asking people to write letters to Thornburgh. Through the ad, the ACLU received more than 200,000 letters, which it mailed to the Justice Department, O'Connor said.

Amicus Briefs

Amicus curiae briefs *are* the one persuasive tool that legal experts and activists agree are acceptable in Supreme Court cases.

Amicus curiae briefs, or friend-of-the-court briefs, are the arguments offered to a court by parties not directly involved in the case at hand. There were 78 amicus curiae briefs filed in *Webster*.

"The whole concept behind amicus briefs is in part to have these groups represent what they feel would be the impact upon them of changes in the law," said Christine Smith Torre.

The *Webster* Court's Place in History

Just as experts and activists disagree on the issue of exactly how public opinion affects the Supreme Court, they also disagree on the question of where the *Webster* Court and its decision fits into history.

Some are reminded of Franklin D. Roosevelt's attempt to add justices to the Supreme Court when the ones already on the Court blocked him at every turn on his New Deal agenda.

"This is a very clear case of a popular president, Ronald Reagan, stacking a court with people who agreed with his litmus test," said Doug Gould, vice president of communications for Planned Parenthood Federation of America.

"That Court [during Roosevelt's presidency] was as out of step with the needs of people as this Court is today; in that way it's a highly similar situation," he said.

"I think it's fair to say Reagan sought to find justices who would interpret the Constitution according to its text," said David O'Steen, executive director of National Right to Life.

O'Steen compared the abortion issue in the courts to civil rights.

"There are plenty of precedents for the Court rendering a wrong decision in the area of civil rights and correcting itself, such as *Dred Scott*," he said. The civil rights of unborn children are at stake in the abortion issue, he added.

Law professor Victor Rosenblum of Northwestern University said a big difference between the civil rights controversy and the abortion controversy in the Court is that today, as opposed to the civil rights era, all citizens, including minorities, are fairly represented in the legislatures.

"Both pro-choice and pro-life are well-represented and have the opportunity to express themselves fully, both in their opinions and in their choices of members of representative bodies," he said.

"In the race relations dimension of civil rights, I thought intervention by the Court was justifiable and necessary because at the time, state legislatures were not only NOT representative of black people, but there was the most overt discrimination based on racial grounds that was continuing to flourish," he added.

Molly Yard, executive director of NOW, compared the abortion issue to the Civil War.

"I think this issue is the same kind of divisive issue," she said. "The minority wants to impose its view on the majority about what is moral. The rest of the country has stood up and said, 'We're not going to do that.'"

Marc Stern, co-director of the legal department for the American Jewish Congress, said he thinks drawing analogies between the abortion issue and other issues only muddles the point.

"We can address what is at stake without analogies," he said.

"We believe the most effective way to influence the Court is through amicus briefs," said Laurie Anne Ramsey of Americans United For Life. AUL coordinated 30 of the 47 pro-life amicus briefs filed in *Webster*.

Friend-of-the-court briefs in *Webster* raised abortion issues based on a wide variety of themes: history, religion, privacy, freedom of speech and the nature of the Constitution, to name a few.

The 47 amicus curiae briefs supporting Missouri in *Webster* included one filed by American Collegians for Life, Inc., stating the Ninth Amendment gives the state the right to declare when human life begins.

In one of the 31 pro-choice amicus briefs in support of Reproductive Health Services, the American Civil Liberties Union stated that Missouri's abortion-control law violates the free speech clause of the First Amendment. A pro-choice friend-of-the-court brief filed by 281 American historians said abortion was known and legal at the time the Constitution was adopted.

The question of how and whether or not public opinion affects the Supreme Court has no pat answers.

Mark Stern of the American Jewish Congress said, "It's a very hard question. Only nine people can answer it, and maybe they can't either." ☐

Mary Neil Crosby is a graduate student in magazine publishing at Northwestern University.

The Supreme Court and Public Pressure/Secondary

Scott Richardson

This lesson uses recent freedom of expression cases to explore the effect of public opinion and pressure on Supreme Court rulings. The perennial controversies that surround the definition and limits of speech rights are often engaging to students. Is flag burning a form of constitutionally protected protest? Who defines obscenity and how is it proscribed? Do hate groups have a right to express their repulsive, antipluralistic views? Who controls the content of public school libraries?

The exercise allows students to assume the role of judicial partisans, basing their lobbying efforts toward the Court on public opinion and community sentiment. They will be assigned a pressure group to simulate, discussing the facts of the case in small groups and formulating their position and arguments. A representative from each group will then report the group's conclusions to the entire class in a large-group discussion format. As a writing assignment for homework, each student should write an amicus curiae brief on behalf of his special interest group.

Time to Complete

Each case, when used only to examine amicus briefs and interest-group pressure on the Court, requires one 50-minute class period. The exercise can be expanded, covering three days per case, to illustrate the Court's oral argument procedure. Thus the total time required ranges from one period to twelve periods.

Objectives

Students will be able to:

- Define "amicus curiae" brief.
- Identify many interest groups that try to influence the Supreme Court.
- Predict and explain the positions and arguments of their assigned interest group.
- Describe and assess the arguments on both sides of various free speech disputes.
- Determine the proper role for public pressure in Supreme Court rulings.

Material

Information on most of the following cases can be found in the case background section, below.

- *Miller v. California*;
- *Texas v. Johnson*;
- *Board of Education, Island Trees v. Pico*;
- *Village of Skokie v. National Socialist Party of America*.

Procedures

1. Introduce the facts of each case, tracing its path from criminal court to the Supreme Court.
2. Explain the purpose of dividing the class, then separate the students into five interest groups. For *Texas v. Johnson*, for example, these can include the ACLU, the U.S. Department of Justice, the Vietnam Veterans of America, the Jehovah's Witnesses, and the American Society of Publishers and Editors.
3. Help the groups determine both their position and arguments, which should rely primarily on precedent and clauses of the Constitution.
4. Reconvene the whole class to discuss the divergent points of view presented by the interest groups. Consider these questions:
    - What are student findings based on?
    - Can rights conflict with each other? What should the Court base its decisions on when this occurs?
    - How do values, of an individual justice or a community, affect Court decisions? Are values consistent across or within communities?
    - Do sections of the Constitution ever conflict, and can precedents ever contradict the Constitution?
    - How much effect should public opinion and pressure have on Court rulings?

Optional Court Simulation

Following the amicus exercise, students could do these exercises:

1. *Day One.* Explain the oral argument format used in the Court.
2. Merge the five groups into three: one combining the groups on the petitioner's side, one combining the groups on the respondent's side, and one randomly selected group of nine justices.
3. The adversarial groups choose a "lawyer" who will argue for them during the oral argument. The Court group discusses relevant cases, precedents, and all of their classmates' amicus briefs in preparing questions for the lawyers. Allot twenty minutes for each attorney's presentation, and the first class period should end as the petitioner's time expires.
4. *Day Two.* Open this day with the respondent's presentation. Begin the second half of the period with the justices writing their votes and sending them to you. Delay announcing the decision until the end of the class. In the meantime, ask the justices to describe the factors affecting their decisions. Have them weigh the relative influence of precedents, oral argument, community values, their colleagues' amicus briefs, and the Constitution's text. To what extent did they consider interest group pressure? What is the proper balance between isolating the Court from public influence and having a referendum on every constitutional issue?

Case Backgrounds

MILLER V. CALIFORNIA (1973)

Here is a brief summary of this important case. The full description can be found at 413 U.S. 15.

After a jury trial in California state court, the defendant, who had mailed unsolicited advertising brochures containing pictures and drawings explicitly depicting sexual activities, was convicted of violating a California statute making it a misdemeanor to knowingly distribute obscene matter.

On appeal, the Superior Court of California, County of Orange, affirmed. The United States Supreme Court vacated and remanded. Rejecting the previous test of "utterly without redeeming social value," the Court said that

6650

"a work may be subject to legislation when that work, taken as a whole, appeals to the prurient interest in sex, portrays in a patently offensive way sexual conduct specifically defined in the applicable state law, and, taken as a whole, does not have serious literary, artistic, political, or scientific value." The Court declared that in determining whether a work is obscene, a jury may follow the standards that prevail in its own community and need not apply national standards.

Suggested pressure groups for this case: People for the American Way, the Eagle Forum, the U.S. Attorney General, the PTA, and the American Society of Publishers and Editors.

TEXAS V. JOHNSON (1989)

See pp. 25-26 of this *Update* for a discussion of the case and the cite for it.

VILLAGE OF SKOKIE V. NATIONAL SOCIALIST PARTY OF AMERICA (1977)

A small band of American Nazis wanted to demonstrate in Chicago's Marquette Park. The park authorities promptly erected severe restrictions against such demonstrations. Nazi leader Collin then solicited suburban authorities. Most of them ignored Collin, but Skokie, home of 600 concentration camp survivors, emphatically rejected the Nazi request for a marching permit. The main deterrent device used by both the Chicago parks and Skokie was a $350,000 insurance requirement against property damages. The requirement effectively banned the march because such insurance was not available on the market.

The U.S. Supreme Court ruled (432 U.S. 43) that the Illinois Supreme Court had to settle Collin's suit challenging the insurance provision. The Illinois court struck down the insurance regulation, and 25 Nazis marched in Marquette Park while thousands counter-demonstrated.

Suggested pressure groups for this case: American Jewish Congress, the National League of Cities, the ACLU, the U.S. Attorney General, and the World War II Veterans of America.

BOARD OF EDUCATION, ISLAND TREES V. PICO (1982)

The United States Supreme Court ruled in 1982, in *Board of Education, Island Trees v. Pico*, 457 U.S. 853, that it is not constitutionally permissible for school boards to remove books from school libraries "simply because they dislike the ideas contained in those books." The decision limits the otherwise broad authority of school boards in educational matters, and gives students and parents the right to bring suit for First Amendment violations when books are removed from school libraries. School boards involved in book removals may now have their motivations scrutinized at a trial.

The Island Trees school board reshelved the banned books, thereby avoiding a trial. However, they required a notice be sent to the parent of any student who borrowed one of the books. This restriction violated state law protecting the confidentiality of library records, and the school board finally dropped it.

The banned books were:

1. *Slaughterhouse Five*, by Kurt Vonnegut, Jr.
2. *The Fixer*, by Bernard Malamud
3. *The Naked Ape*, by Desmond Morris
4. *Down These Mean Streets*, by Piri Thomas
5. *Best Short Stories by Negro Writers*, edited by Langston Hughes
6. *Go Ask Alice*, Anonymous
7. *A Hero Ain't Nothin' But a Sandwich*, by Alice Childress
8. *Soul On Ice*, by Eldridge Cleaver
9. *A Reader for Writers*, edited by Jerome Archer
10. *Laughing Boy*, by Oliver LaFarge
11. *Black Boy*, by Richard Wright

Here is a summary of the events leading up to the United States Supreme Court decision in this case, handed down on June 25, 1982.

The Supreme Court accepted the school board's petition to hear the case after a court of appeals had ordered a full trial to determine the board's motivations for book removal.

Eleven books, including a Pulitzer Prize-winning novel by Bernard Malamud, and works by Langston Hughes and Kurt Vonnegut, were removed in 1976 because they appeared on a list of "objectionable books" obtained at a conference attended by several board members. The school board called the books "anti-American, anti-Christian, anti-Semetic (sic) and just plain filthy," and described specific objections in court affidavits. *A Hero Ain't Nothin' But a Sandwich*, by Alice Childress, was called anti-American (in part because a black teacher in the novel tells his students that George Washington owned slaves.) An anthology of writings which included Jefferson and Madison was banned because Jonathan Swift's satirical essay "A Modest Proposal" was considered "in bad taste."

The New York Civil Liberties Union represented the student plaintiffs. Thirty-four organizations participated as friends-of-the-court in the Supreme Court in support of the students' contention that the First Amendment prohibits the state from proscribing "wrong" books.

Suggested Further Readings

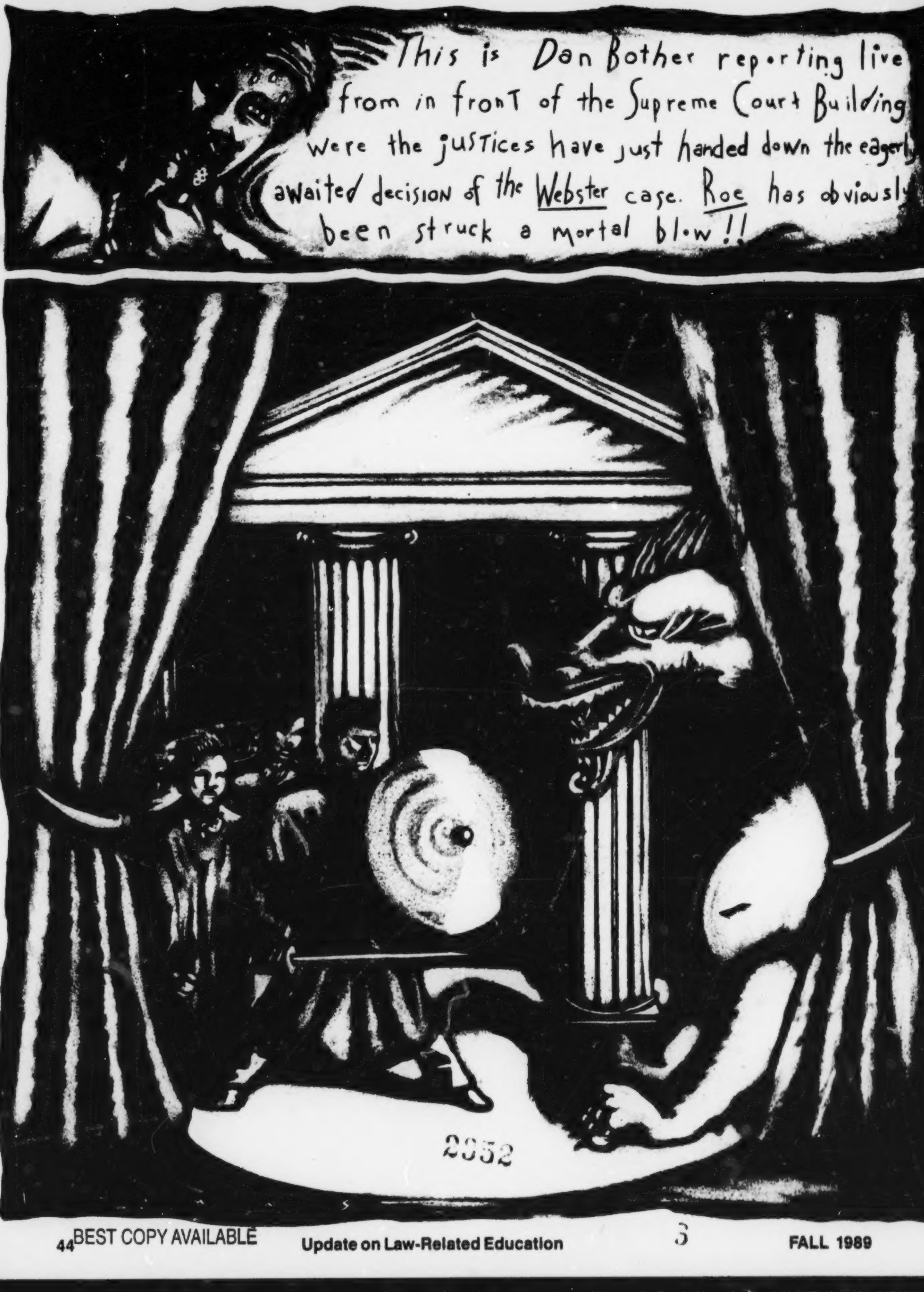
The court decisions cited are an excellent place to begin research on the cases. Here are some other suggestions:

On the First Amendment speech guarantee generally, see Franklyn S. Haiman, *Freedom of Speech* (National Textbook Company and American Civil Liberties Union, 1983), James G. Lengel and Gerald A. Danzer, *Law in American History* (Scott, Foresman, 1983), and Isidore Starr, *The Idea of Liberty* (West Publishing, 1978).

For *Texas v. Johnson* (the flag-burning case), see *New York Times*, June 22, 1989, for a full discussion with excerpts from the majority and minority opinions.

On the Supreme Court and the political and judicial processes, see Henry J. Abraham, *The Judicial Process* (Oxford University Press, 1986) and *The Judiciary: The Supreme Court in the Governmental Process* (Allyn and Bacon, 1987), Howard Ball, *Courts and Politics: The Federal Judicial System* (Prentice-Hall, 1987), Lawrence Baum, *The Supreme Court* (CQ Press, 1989), and Sheldon Goldman, *Constitutional Law: Cases and Essays* (Harper & Row, 1987).

Scott Richardson is on the staff of the Close Up Foundation in Alexandria, Virginia.


This is Dan Bother reporting live from in front of the Supreme Court Building were the justices have just handed down the eagerly awaited decision of the Webster case. Roe has obviously been struck a mortal blow!!

BEST COPY AVAILABLE

Renée Cordes

Covering the Court

The Webster case shows the pressures and pitfalls the media faces

In our highly-sophisticated electronic age, we often know who our next president will be hours before the last polls in the country have closed. It therefore seems hardly surprising that many of us heard the emotional responses from both sides of *Webster v. Reproductive Health Services* before we even knew what the Court had actually decided.

At 10 a.m. on July 3, 1989, the Supreme Court handed down its eagerly-awaited decision on the *Webster* abortion case from Missouri. Television correspondents had a few minutes before appearing live on camera to flip through the 77-page opinion and figure out what the Court had decided, who the dissenters were and why, and what its political implications were. Numerous legal experts, politicians and representatives from pro-choice and pro-life interest groups were all standing by to give their instantaneous interpretations of the decision.

Television reporters were forced to reduce a complicated issue into a single formula: *Lights. Camera. Action.* However, as many critics have pointed out, action does not always speak louder than words when it comes to covering Supreme Court decisions—especially decisions as complicated as *Webster*, where the language of the justices may be more important than the ruling itself.

"Sometimes you need a thousand pictures to capture what the Supreme Court has written in five sentences," said Ethan Katsch, who teaches legal studies at the University of Massachusetts at Amherst. Katsch says television tends to oversimplify Supreme Court decisions, sacrificing detailed, often very abstract, legal arguments for high drama and conflict. "Television often has difficulty with decisions that aren't neat and simple," he added.

"The nature of television is to distill everything down," said Thomas B. Rosenstiel, media writer for the *Los Angeles Times*. "Television moves the coverage of the Supreme Court out of the legal and into the political realm . . . Television and the Supreme Court are two institutions that get along uneasily at best. Television deals with feelings and emotions, and the Supreme Court deals in ideas and laws."

Immediate Emotional Reactions

Rosenstiel, who was on the steps of the Supreme Court building when the *Webster* decision was handed down, refers to the instant analysis of the decision by television reporters as a "paint-by-numbers coverage." Rosenstiel sharply criticized one reporter who quickly scanned the decision on the air before turning to Planned Parenthood's Faye Wattleton, who called the decision "an outrage."

Douglas Gould, vice president for communications of Planned Parenthood, said later, "We knew we lost [*Webster*] in about two seconds. It didn't take long to figure that out."

Whereas pro-choice supporters were condemning the decision as the beginning of the end of *Roe v. Wade* (the 1973 Supreme Court decision legalizing abortion), anti-abortion forces were hailing the decision as the "beginning of a new era," as stated by Dr. John Wilke of the National Right to Life Committee.

James Warren, media critic for the *Chicago Tribune*, likened the television coverage of *Webster* to a boxing match. "Television has a compulsion to place all issues in debate form," he said.

Instead of trying to figure out for themselves what the *Webster* decision was all about, critics say, many reporters got carried away in the emotionalism of both sides. "The media were reporting the 'Oh-my-Godness' of it all," said L. Anita Richardson, a Chicago attorney who has done extensive research on the *Webster* case. "The press did not temper its response."

However, that is precisely what helps interest groups gain visibility and mobilize political and financial support for their causes, Rosenstiel said. He added that reporters should not have taken the volatile responses of the interest groups at face value, for each of these groups has its own political agenda. Each group wants to be the "winner" in state legislatures, where the abortion battle is expected to continue.

"Both sides in the abortion case are in the business of over-reacting," said Stuart Taylor Jr., a senior writer for *American Lawyer* who spent three years covering the Supreme Court for the *New York Times*. "The pro-choice movement has an interest to say the sky has fallen even when it hasn't."

Even on July 4, some newspapers were giving perhaps too much coverage to the immediate reactions to the decision. "Court's ruling reopens bitter Michigan battle," read the headline for the *Detroit Free-Press*. On the front page of the *Chicago Sun-Times* were two giant photos of representatives from pro-choice and anti-abortion groups reacting to the decision.

"Both sides had been so anticipating the decision, that we knew whatever the Court said, the reaction was going to be immediate and impassioned," said Richard Carelli, who covered the case for the Associated Press.

A few television correspondents did rely on legal experts to get another perspective of the highly complex and controversial case. ABC's Tim O'Brien spoke with conservative legal scholar Bruce Fein, while Rita Braver of CBS went on the air with Paul Rothstein, a law professor at Georgetown University Law Center. "While Rothstein did the talking, I could be listening to him with one ear and flipping through the opinion at the same time," Braver said.

Exaggerated Impact

Several reporters and legal experts say that the *Webster* decision came as no surprise to them. Ironically, though, the newsworthiness of *Webster* appeared to lie not in what the Court had decided, but rather in what the case *may* mean for the future. The dramatic language of Justice Blackmun's strong dissent seemed to be the key ingredient for an attention-grabbing story on the evening news. In his opinion, Justice Blackmun writes: "Today, *Roe v. Wade*. . . and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure. Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality and Justice Scalia would overturn *Roe*. . . and would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term."

Suddenly, reporters around the country seemed to be trading in their press passes for crystal balls. O'Brien, who covered the case for both ABC television and radio, said he had enough time to skim the syllabus and dissenting opinions before reporting that *Roe* had not been overturned. However, like other correspondents, O'Brien also reported that *Webster* was an invitation to state legislatures to impose restrictions on abortion.

Jesse Choper, dean of the University of California Law School at Berkeley, said the media's coverage of *Webster* "may have been accurate as a prediction, but it was inaccurate as fact."

Many critics argue that the press exaggerated the impact of *Webster*. "The media made it sound as if *Roe* had been struck a mortal blow," said Yale Kamisar, a professor at the University of Michigan Law School at Ann Arbor. Too easily, Kamisar said, reporters blindly accept the language of one of the justices "as the word of God" before thinking it through themselves. In this case, reporters paid so much attention to Blackmun, that "O'Connor got lost in the shuffle," Kamisar said.

But as it turned out, O'Connor was the key vote in *Webster*. Although four justices appeared to be prepared to overturn *Roe*, O'Connor did not believe that *Webster* directly conflicted with *Roe*; hence, she saw no need to reconsider *Roe*. As a result, a woman in this country still has the right to have an abortion as part of her fundamental privacy right. "*Webster* is full of portent," Richardson said, "but it hasn't fundamentally changed the law. . . That message got lost."

However, Richardson added, O'Connor sees this fundamental right as a limited one. "O'Connor does not indicate where she will stand when a case comes before the Court that directly implicates *Roe*," Richardson said. But for now, "she [O'Connor] feels that *Roe* remains good law." Richardson said the electronic media initially dismissed O'Connor's opinion as merely a "technical" one without placing enough emphasis upon it.

The *Baltimore Sun's* Lyle Denniston, a 30-year veteran and so-called dean of the Supreme Court press corps, said it became apparent to him right away that the controlling opinion in the *Webster* decision was O'Connor's. In cases where the Court is as split as it was in *Webster*, Denniston said, it is important to look for a "common ground." Reporters often "pay too much attention to the rhetoric of the justices and not enough to the legal results of a decision," he added.

Deadline Pressure

But one must keep in mind that whereas Denniston had time to read the entire decision before writing several stories and sidebars as well as preparing excerpts of the decision for the next morning's paper, television and radio correspondents and reporters for the wire services had but a few minutes to look at the opinion. All of America was waiting to hear the outcome of the case.

"It was a situation that required on-the-spot reporting," said Suzanne Braun Levine, editor of the *Columbia Journalism Review*. "I would have switched channels until I found someone standing on the steps [of the Supreme Court building]." Levine said although she thought the instant television coverage of *Webster* was very good, the press was not immediately able to analyze in great detail the practical consequences of the decision.

"It's a common fact of life that the more important and newsworthy a decision, the less time a reporter has for getting it on the wire," AP's Carelli said. "As soon as we get an opinion, we are writing for afternoon papers facing an immediate deadline."

"The Supreme Court today cut back significantly women's constitutional right to abortion, giving states far greater power to restrict abortion," read the lead in a wire story written by Carelli on the day of the *Webster* decision. Carelli wrote his initial bulletin at 10:06 a.m. Carelli, also a lawyer, incorrectly reported that the Court ruled that Missouri and other states "may ban the use of tax money for 'encouraging or counseling' women to have an abortion not necessary to save life." In reality, the Court did not even rule on this part of the Missouri abortion law.

Carelli said although the deadline pressure in reporting Supreme Court decisions is intense, "you can't let the possibility of making a mistake paralyze your reporting. The challenge [of *Webster*] was to quickly report how far did the Court go and where did it go."

Because of the enormous public interest in *Webster*—and in all abortion cases, for that matter—television reporters and producers had been preparing to cover the case live for several months. CBS-TV had five correspondents, eight camera crews, five producers and an "untold number of technicians" all ready to interrupt the network every day the decision could have been announced, said Mark Knoller, assignment manager for the Washington, D.C., bureau. When *Webster* was announced, CBS interrupted "Family Feud" to cover the decision.

Although representatives from ABC and CBS say their primary goal in reporting *Webster* was accuracy and not speed, they also insist that they were the first to go on the air. All three networks were within a few seconds of each other. "That may not be a lot," Knoller said, "but it's enough to win a gold medal."

By July 4, when the deadline pressure was off, many of the larger papers published—along with excerpts of the opinions—more objective accounts of what *Webster* would mean in the long run. Janny Scott of the *Los Angeles Times* reported on July 4 that in upholding the Missouri law on testing for fetal viability, the Court's ruling would affect only one percent of all abortions in the United States. Stephen Wermiel and Michel McQueen of the *Wall Street Journal* reported on July 5 that the chief effect of the decision would be "to widen the disparity in access to abortion between rich and poor." Linda Greenhouse of the *New York Times* reported that "the Supreme Court's three new abortion cases offer a more direct road map for overturning *Roe v. Wade* than the route offered by [*Webster*]."

"You can't look at the Supreme Court in a vacuum," explained Greenhouse, who has covered the Court for 20 years. Greenhouse said she tries to keep track of outside political developments and relate what the high court does to the real world.

Improving Coverage

O'Brien said television coverage of *Webster* could have been improved if the networks had agreed to a 15-minute "lock-up" and let the wire services get the scoop. O'Brien said he would have liked to have had at least 15 minutes to read the decision before going on the air. He added that being first is not all that is important. "You want to be competitive, but competition should make you better," O'Brien said. "The idea is to serve the public as effectively as we can."

For the past 10 years, the AP has campaigned unsuccessfully for a different lock-up plan on days when Supreme Court cases are decided. Under their lock-up plan, wire reporters would get copies of a decision at 9 a.m. EST – an hour before the Court announces its decisions. However, reporters would not be able to file their stories until 10 a.m. That way, reporters would have an entire hour to study the opinion before sending in their stories. The main argument against a lock-up is that a justice can undermine the consensus of an opinion at the last minute, said James Rubin, who also covers the Supreme Court for the AP. Although the possibility that a justice would change his or her mind at the last minute seems highly unlikely, the Supreme Court is also opposed to the early release of decisions because it prides itself on being a leak-proof institution.

O'Brien said a lock-up would be especially useful for reporters on days when several decisions are handed down. When the Supreme Court rules on several cases in one day, reporters and editors must decide what cases are the most important and the most newsworthy. "It can be a real nightmare," O'Brien said, especially at the end of the term, when the most important decisions are usually released.

According to Professor Ethan Katsch, who has studied and written articles about television coverage of the Supreme Court, the Court releases 30 to 40 percent of its opinions in June, often several important ones on the same day, which forces the media to select the cases that are going to be covered.

On the day the *Webster* decision was handed down, the Supreme Court also decided several religion cases from Pittsburgh, namely *County of Allegheny, Chabad, and City of Pittsburgh v. American Civil Liberties Union, et al.* In those cases, consolidated for purpose of Supreme Court review, the Court ruled that religious displays on public property are permissible as long as they are part of a larger secular display and do not appear to be government endorsements of particular religious beliefs. Although legal scholars and journalists say the Pittsburgh decision was not very important because the Court merely reaffirmed an earlier decision, many argue that the Pittsburgh religion cases did not get as much play in the press as they deserved.

"Abortion squeezes out every other issue," Katsch said. On July 3, the Supreme Court press information office handed out approximately 650 copies of the *Webster* opinion, as opposed to only 200 of its opinion on religion.

Had the Pittsburgh decision been handed down on another day, critics argue, it would have gotten more publicity than it actually did. Similarly, Carelli said that if the flag-burning case, *Texas v. Johnson*, had come down on the same day as *Webster*, there probably would have been less political furor over the flag-burning issue. Carelli added that "there was other news in the world besides what the Supreme Court said on July 3."

The Media and the Court

The media's coverage of *Webster* illustrates the important role played by the press in shaping our understanding and perception of the Supreme Court. Because most of us do not have direct access to the Court, we rely on the media to find out what the Court has decided.

Many reporters, like Carelli, O'Brien and NBC's Carl Stern, are attorneys themselves. Others, like Greenhouse and Linda Ponce of the *Washington Times*, have received a Masters in Law degree through a special one-year program for journalists at Yale University.

But Denniston is strongly opposed to journalists who are attorneys. "Journalists should be trained as journalists and not as lawyers," Denniston said. "The best journalist is the one who is least respectful of tradition, authority and hierachy."

Although Supreme Court reporters who are also attorneys say that being a lawyer helps them in their reporting, they believe that the most important qualification for covering the Court is experience. "A law degree is not necessary but helpful" in covering the Court, O'Brien said. "When it comes to Supreme Court cases, reporters who cover the Court day in and day out ought to be experts."

The Future

Many reporters believe that allowing cameras in the Supreme Court would greatly increase the public's knowledge of the Court. "It's terrible that so few of the public can ever see what goes on in the Supreme Court," said Ted Gest, who covers legal affairs and the Supreme Court for *U.S. News & World Report*. TV could cover oral arguments in cases and the court sessions in which decisions are announced.

One criticism of allowing cameras in the Supreme Court is that television would distort legal arguments by presenting only the most dramatic excerpts of oral arguments, Katsch said. However, C-SPAN has offered to broadcast oral arguments in their entirety. In addition, Denniston said the Court is discriminating against the broadcast media by not allowing cameras in the Court. "They [the justices] forget the fact that all news coverage is selective."

Still, the print media seems to be better adapted to cover the Supreme Court, since all journalists are reporting from a written record. Although television may give us fast coverage of a decision, "nothing can beat looking at a text in the paper the next morning and fully understanding it," said *Chicago Tribune* media critic Warren.

But papers with correspondents in Washington have an advantage over smaller papers, which must either wait for reports from the wire services or from bigger papers. To receive a copy of an opinion on the day of the decision, one must go to the press information office in the Supreme Court building in Washington, D.C.

However, the Supreme Court is considering proposals for the electronic dissemination of its opinions (EDO) on the day they are issued. The American Bar Association is one of 50 organizations that have submitted proposals for a consortium of news organizations and not-for-profit organizations to organize the EDO under guidelines established by the Supreme Court.

One day, perhaps all Americans will be able to get copies of the Supreme Court opinions on their home computers or turn on the Supreme Court Channel on television. For now we must continue to see the Court through the eyes of the media. However, we must not be afraid to open our own eyes and question the media so that the system of justice the Supreme Court so cautiously seeks to preserve is not destroyed. □

Renée Cordes is a recent graduate of Northwestern University's Medill School of Journalism who interned with the American Bar Association this past summer. She will pursue graduate study at Medill in the 1989-90 school year.

Roe v. Wade

(continued from page 15)

tion of the statute on two principles: the policy of the Court to accept the interpretation of a state law on which the district court and court of appeals have agreed even if the Court's own examination might yield a different interpretation, and the rule that the Court cannot ignore the plain meaning of a statute in order to avoid a constitutional question. He found that since the preamble of the Missouri statute defined conception as the beginning of life, the purpose of the statute as a whole was to protect the potential life of the fetus. Thus, the viability testing requirement was probably intended to protect the potential life of nonviable fetuses by increasing the cost of abortion services. Finally, Justice Stevens agreed with Blackmun that the provision was unconstitutional insofar as it imposed undue "discomfort, risk, and expense" for which there was no rational basis.

Looking Ahead

The disagreement among the justices, manifested by the many separate opinions filed, concerned more than a dispute about the constitutionality of the statute before the Court. The justices disagreed on whether Chief Justice Rehnquist actually reexamined *Roe v. Wade*, on whether the validity of *Roe v. Wade* was, in fact, an issue the Court had to decide, and on whether the liberty established in the 1973 decision should remain.

The justices were disputing what the job they had to do was and how they had to do it. This dispute concerned not only constitutional rights of pregnant women but the role of the Court in constitutional adjudication. To many of the justices, deciding the Court's role is prerequisite to deciding whether the Constitution includes a right to choose to abort a fetus. ☐

Nicole Belson is a third-year student at the Columbia University School of Law. She is grateful to the law firm of Kronish, Lieb, Weiner & Hellman and to Alan Levine for their support for this project.

Court Briefs

(continued from page 34)

Oshkosh police that Randy DeShaney was abusing his son. Ann Kemmeter, a caseworker with the Department of Social Services (DSS), was assigned to discover whether there was sufficient evidence of abuse to make Joshua a ward of the court. No charges were filed as a result of the investigation, but Kemmeter conducted about a dozen counseling sessions over the next years with the DeShaney family.

During the visits Kemmeter sometimes saw Joshua, and sometimes she was told he was sick, away, or sleeping. She often noticed bumps and bruises on Joshua's head, face, and arms. She said later that she was afraid of losing contact altogether if she pushed too hard for details. The emergency room visits increased in frequency, until the climactic visit of March 8, 1984.

Melody DeShaney, Joshua's mother and co-plaintiff, argued that the officials' failure to intervene on her son's behalf violated Joshua's right under the Fourteenth Amendment not to be deprived of life or liberty without due process of law. She contended that the negligence of the state in failing to protect a child from physical abuse amounted to a deprivation of liberty. The Court was asked to decide if the circumstances in this type of case created a special relationship sufficient to support a constitutional claim.

Melody DeShaney acknowledged in her suit that most social services organizations must be insulated from liability because of limited workers, resources, and time, given the case loads with which most of these agencies must contend. Still, she asked the Court to impose liability on them—and on the governmental agency they work for—where the "refusal to act . . . is so profound that it violates the community's sense of outrage" and is "wrong or unfair." In various contexts, lower courts have struggled with whether the Constitution ever imposes a duty on government agencies to rescue citizens from peril.

THE DECISION

The Supreme Court, by a vote of 6 to 3, ruled that the failure of the DSS to protect the boy from his father's brutality did not violate his constitutional rights. As Chief Justice Rehnquist stated in the majority opinion, the purpose of the Fourteenth Amendment's due process clause "was to protect the people from the State, not to insure that the State protected them from each other."

Rehnquist acknowledged two important things. First, he noted that states were free to enact laws that imposed liability on welfare officials under similar circumstances. In other words, if a state feels that there is inadequate protection for children under existing statutes, perhaps criminal and civil penalties should be legislated to put social service workers on notice that they will have to intervene when youngsters are put in danger of severe injury or even loss of life.

Second, he stated that "the most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." However, he said there is no liability for inaction, even when reasonable people could see that a child was in dire need of protection. In further defending the *laissez-faire* role of the state, he noted that interfering too soon might have been met with charges of improperly intruding into the parent-child relationship.

The dissenting justices, William Brennan, Thurgood Marshall, and Harry Blackmun, argued that the failure of the state to act denied the child or his family other options. The DeShaneys thought they would be adequately protected by the DSS. They didn't think to look for other relief until it was too late.

UNRESOLVED ISSUES

This decision raises a number of questions. What role should social services agencies play? If their mission is to end child abuse, when, if ever, can they be held accountable for problems like those in the DeShaney matter?

The larger questions that this case raises are: Who does help the infants and the very young in abusive situations? At what age can a child be said to be truly able to protect him or herself to the point of leaving an abusive situation for a better environment? How can a child be sure he or she won't be returned to a home where the abuse will be swift and brutal, as in the case of Joshua DeShaney?

In a country where we face growing "at-risk" student populations and increasing amounts of child abuse, the DeShaney case demands better responses to these abhorrent situations. *—Jim Fine*

Jim Fine, an attorney and former high school social studies teacher, is a project coordinator for the ABA's Special Committee on Youth Education for Citizenship.

Linda Bruin is Legal Counsel to the Michigan Association of School Boards. She is a former member of the ABA Special Committee on Youth Education for Citizenship.

Jack C. Doppelt, an attorney, is associate professor at Northwestern University's

Medill School of Journalism.

"Court Considers Drug Courier Profiles" *was adapted from an article by Denis J. Hauptly and David A. Sellers in* Supreme Court Spotlight: A Monthly Report for High Schools. *For further information about* Supreme Court Spotlight, *contact them at Post Office Box 27531, Washington, DC 20038.*

Rehnquist Court

(continued from page 5)

the circumstances" when addressing claims of coerced confessions and the denial of an accused's rights under the Fifth and Sixth Amendments. Likewise, when presented with a constitutional choice, the Rehnquist Court tends to rest with the more amorphous Reasonableness Clause of the Fourth Amendment's prohibition of "unreasonable searches and seizures," rather than enforcing the stringent requirements of that amendment's Warrant and Probable Cause Clauses.

Not surprisingly, a solid majority stands firmly against challenges to the imposition of the death penalty. What is remarkable, though, is the Rehnquist bloc's mode of analysis and (rather disingenuous) attempt at counting the number of state laws permitting the execution of minors and the mentally ill in such a way as to "establish" a national consensus supporting their execution.

In *Michael H. v. Gerald D.*, 57 U.S.L.W. 4691 (1989), Justice Scalia also employed this kind of dubious empirical analysis. There, Rehnquist's bare majority upheld California's presumption that a legal husband is the "father" of his wife's children, reasoning that most states had similar laws, establishing a national consensus in favor of the presumption. In doing so, it rejected the claim of the natural father of a child of a woman married to another man that he ought to have the same opportunity as a legal father to make a case for winning child-visitation rights.

In *DeShaney v. Winnebago County Department of Social Services*, 57 U.S.L.W. 4218 (1988), a bare majority of the Rehnquist Court also signaled the end of substantive due process analysis with respect to claims that the government in some circumstances has an affirmative obligation to protect or extend benefits to individuals. In this case, Rehnquist's majority declined to hold social workers accountable for violating a five-year-old boy's constitutional rights. They had failed to protect him from repeated beatings by his father which left him brain damaged, even though on occasion they had taken the child into custody as a precaution against abuse by his father.

DeShaney indicates as well that the Rehnquist Court is capable of painting just as broadly as the Warren Court, but in a different direction and away from bright-line rulings that burden governmental authorities.

Political Sensitivity

In the 1988–1989 term, however, the Rehnquist Court also seemed to gauge the political wind when declining to bring down other landmark civil rights rulings. The two best examples of the Court's concern with the political fallout of its rulings are *Webster* and *Patterson v. McLean Credit Union.*, 57 U.S.L.W. 4705 (1989). To be sure, in *Webster* it was only O'Connor's resistance to "reconsidering" *Roe* that stopped the Rehnquist camp from moving further. But the political repercussions of reversing *Roe* must have weighed on the minds of others in Rehnquist's wing of the Court. The significance of expressly reaffirming or discarding *Roe* was certainly underscored for the Court by the unprecedented number of *amicus curaie* ("friend of the court") briefs—78 briefs in all, which were joined by hundreds of organizations on both sides of the abortion controversy.

Patterson was likewise remarkable in suggesting that the Rehnquist Court might occasionally bow to the political wind, even though preferring to sweep away a prior ruling that it deemed wrong. In keeping with the Rehnquist Court's policy orientation, *Patterson* refused to extend the 1866 Civil Rights Act to cover racial and sexual harrassment in the workplace. However, it did not overturn an earlier decision which gave an expansive reading to the law. This was so in spite of the justices taking the unusual step of asking attorneys to argue the merits of overturning *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586 (1976), which extended the 1866 law to employers discriminating in their hiring and firing practices. But when 185 senators and U.S. representatives, 47 state attorneys general and 112 civil rights groups joined in briefs opposing the overturning of that decision, the Rehnquist Court appeared to back down.

Instead of reversing, it merely refused further extension of the law and *Runyon*.

Finally, there is one area which the Rehnquist Court appears as yet unwilling to tinker with: the First Amendment. Besides the flag desecration ruling, the Court affirmed First Amendment protection for newspapers publishing the names of rape victims and overturned a major portion of Congress's "dial-a-porn" law. However, several of the justices' opinions indicate that the Rehnquist Court might well alter its methods of First Amendment analysis with respect to government regulation of commercial speech and protection for privacy interests against claims of freedom of the press. Also, in *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (1989), the Court indicated that it will no longer require governments to use the "least drastic means" available when imposing "time, place and manner" restrictions on the use of public forums such as city parks, streets and the like. In short, through a change in its methods of analysis the Rehnquist Court may well slightly devalue the First Amendment in deference to governmental regulation and protection for some interests in personal privacy and public decency.

The Rehnquist Court and Constitutional Politics

Changing times have brought the age of the Rehnquist Court. As reconstituted by Reagan, the Rehnquist Court could well prove to be one of the most lasting legacies of the Reagan era. Certainly, the mood, modes of analysis and directions of the Court have changed and will continue to change. In many ways, the Rehnquist Court now registers the prevailing national political consensus identified with the election and re-election of Reagan. The political process worked in imposing a measure of democratic accountability on the Court through Reagan's appointments. Whether the Rehnquist Court stays in tune with the times in the post-Reagan era remains to be seen. ☐

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David M. O'Brien is a government professor at the University of Virginia and author of several books, including Storm Center: The Supreme Court in American Politics *(Norton), which received the American Bar Association's 1987 Silver Gavel Award and which will be out in a second edition in January, 1990.*

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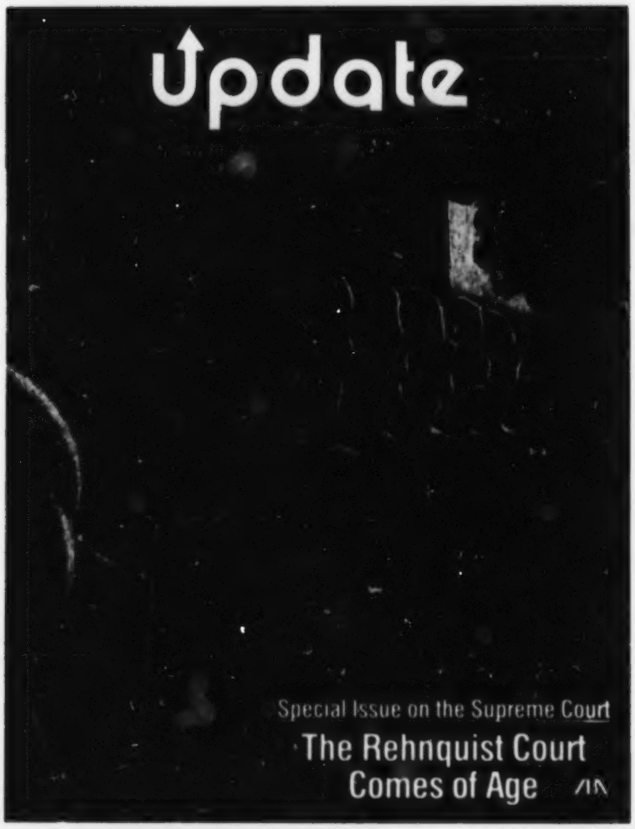
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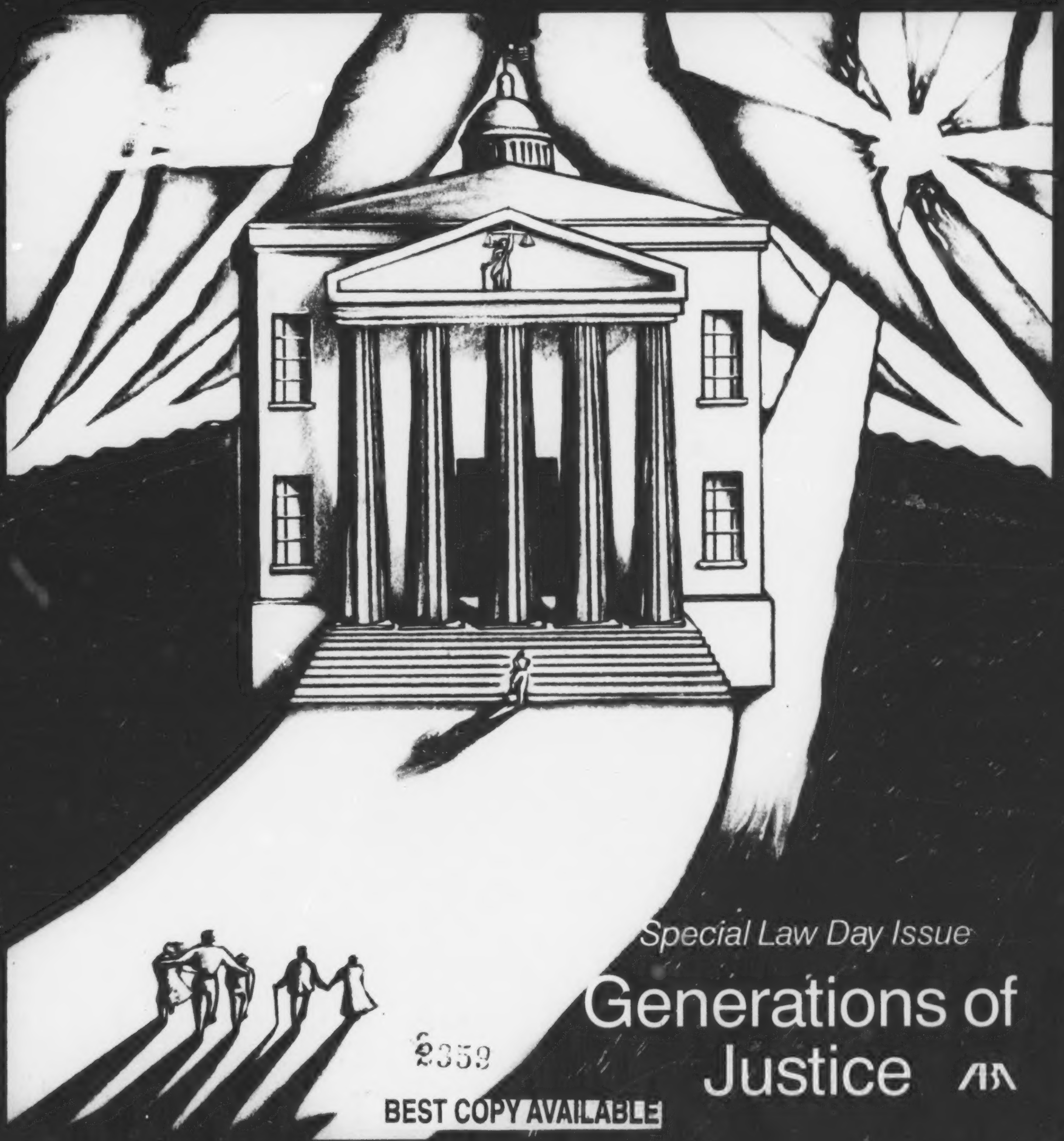

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contents

Volume 14, No. 1, Winter 1990

3 Why We Must Win the War Against Drugs

7 Can the Bill of Rights Survive the Crisis in Criminal Justice?

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

10 The Right of the People to be Secure

15 The Death Penalty

UPPER ELEMENTARY/MIDDLE SCHOOL

UPPER ELEMENTARY/MIDDLE SCHOOL STRATEGY

18 Humpty Dumpty's Assault

21 Court Briefs

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

27 Judicial Review—How Judges Decide

31 Are There Limits to Symbolic Speech?

40 To Protect or Not to Protect—That is the Question

43 The Flag Burning Case

ELEMENTARY SCHOOL

ELEMENTARY SCHOOL STRATEGY

45 A Famous Kansas Child

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Hon. Reggie B. Walton

Why We Must Win the War Against Drugs

Education is crucial in changing attitudes

The educational process, I am convinced, is ultimately the key to solving the drug crisis that now confronts us. I believe that, with knowledge, young people can and will make the right choice – to say no to drugs. Providing young people with that knowledge is one of the major objectives of the Office of National Drug Control Policy.

As I travel across the country, I am often asked why there is a need for the federal government to put together a national strategy against drug abuse. I answer that question by citing statistics that illustrate the need for us to come together to deal with this crisis, a crisis that is tearing away at the fabric of our nation.

Last year over 200,000 babies were born to women who were addicted to some type of drug. Many of those babies were also born addicted. Several weeks ago, I visited a hospital in New York that treats children who were born addicted to drugs. Many were born with AIDS and will have only a short life on this earth. Some of them were not afflicted with AIDS but are severely handicapped as a result of their mother's use of drugs during pregnancy. In Philadelphia, it is estimated that one out of five babies is born addicted to some type of drug. In the public hospitals of Washington, D.C., 40% to 60% of the children are born addicted to drugs.

This is the magnitude of the problem that confronts us, a problem that is taking a tragic toll on our most valuable asset – our children.

Drug abuse also affects the kind of homes that our children grow up in. Crack, for example, seemingly has a greater appeal to women. This is creating havoc in many communities, especially inner-city communities, where many men have not played the role that they should in families. They walk away from their families after the children are born, leaving women to function as the backbone of many families, backbones that are now being broken because of crack.

Drug use is literally killing many of our young people. In the District of Columbia, there were over 400 homicides last year; most of the victims were young black men. It's sad to see so many individuals who have the potential of doing something positive with their lives being struck down because of their involvement in drugs. But the problem is not confined to one city or one state. It is a problem plaguing the entire nation and it's something with which we must come to grips.

Imprisoned by Fear

One thing that concerns me as I tour the nation is that many people are being virtually held captive in their own homes because of drug-related violence. I was in Trenton, New Jersey, not long ago and before I arrived the police went in and sealed off about a 10 block area so I could walk down the street and talk to the residents in safety. As I walked through this neighborhood, I went up on the porches of several homes and I spoke to the residents. They told me "You know, Judge Walton, what's happening today is not a normal occurrence in our life. Even though we've worked hard to buy these homes and tried to raise our children properly, we can't sit on our porches like we are now because we are afraid of being hit by a stray bullet. Our children can't play on the sidewalk because we fear that they may be caught in a crossfire." These are real fears, fears that make people prisoners in their own homes.

I often hear the question "How did we get into this situation? How could this happen in the richest, most productive, most powerful country in the world?" There are a number of reasons. In the first place, a lot of misinformation about drugs was given to young people during the '60s and '70s. During the Nixon administration, a presidential report was issued which said that cocaine use was not bad because it was not addictive. Later, the Carter administration issued another report which came to the same conclusion and also found that using marijuana had no harmful effects.

In recent years, however, research indicates that using marijuana is in fact harmful and has a significant long-term impact on the brain. We also know that cocaine can kill; the tragic death of Len Bias, the all-American basketball star, is proof of that. The information provided by these presidential commissions regarding cocaine and marijuana was wrong, and it sent the wrong message to our young people.

I believe there has also been a significant breakdown in the family structure in this country which has led to an erosion of morals and values. The situation is very serious. There is no question about the fact that it's a crisis, and it's a crisis in all of America.

Unfortunately, many people have thought that the drug problem affected only minorities in the inner-city. The problem was left to fester. Now it's grown into an epidemic that affects the entire country. If you don't have a drug problem now in your neighborhood – and

I don't think there are many neighborhoods in America that can say that – you can be sure that if we don't address this problem and focus all our resources to deal with it, then tomorrow or the next day you will find that you have a drug problem in your neighborhood as well.

Legalization Is Not the Answer

We hear many people say that the problem is so difficult, so pervasive, that we have no hope of solving it. They say we should just throw up our hands, give up, and legalize drugs. That, I think, would be devastating. Yet, there are some very prominent people, people such as William F. Buckley, Jr., and former Secretary of State Schultz who say that we should consider legalizing drugs. I think that they are, unfortunately, very misinformed about the situation.

Those who favor legalization seek to draw an analogy between Prohibition and today's drug problem. They say that the only way we can attack the problem is to take the profit out of selling drugs and that the only way to do that is through legalization. Let's stop here for a minute and analyze that argument. During the Prohibition era, the use of alcohol by teenagers and pre-teenagers was not a problem – young people were not using alcohol to any great degree. I'm sure there were some, but not in significant numbers. Today, however, we are seeing situations in many communities where seven- and eight-year olds are showing up in emergency rooms suffering from drug overdoses.

Even the strongest advocates of legalization wouldn't legalize drugs for everyone, only those 21 or older. There would still be many young people who would have a desire to get and use drugs, and as long as they have that desire, they will find some way to get drugs. How? On the black market that would inevitably develop to satisfy this desire despite legalization.

Let's also consider how our society views the use of drugs and alcohol. The use of alcohol has always been socially acceptable. We mourn with it, and we celebrate with it. Alcohol can be an appropriate part of socializing with others. If, for example, you go out to dinner tonight with one of your friends and decide to have a glass of wine, that friend across the table will probably not subject you to public scorn and criticism because you decided to have that glass of wine.

But let's suppose for a minute that we legalize drugs. You go out to dinner with that same friend and you decide that because you like to use drugs, you're going to smoke some crack before dinner. So you take out your crack pipe and fire it up. Or, let's assume instead that your drug of preference is heroin and you decide to take out your needle and inject yourself. Do you think your friend sitting across the table is going to find this kind of conduct acceptable? Do you think that your employer is going to find this kind of conduct acceptable? No, I don't think that your friend or your employer are ever going to find this type of conduct acceptable.

I think it's naive to expect that if we legalize drugs, people are going to go down to their local drugstore and say to the entire world "Look at me, I am a drug abuser here to buy my drugs." I think that's very naive. I think that people in responsible positions will not want to be identified as drug abusers and that even with legalization they will continue to obtain drugs on the black market, a black market which would be lucrative and profitable.

Sending the Wrong Message

More importantly, legalization would send the wrong message to young people. A recent survey done by the University of Michigan found that drug use among high school seniors has been steadily declining. I think education and awareness is starting to have an impact on our young people. They're learning that drugs are destructive and they are turning away from them. Another survey done by the National Institute of Drug Abuse in 1989 indicated that the use of drugs among those living in households has decreased by 37%. I think this is because drug usage is no longer acceptable. Rock stars today aren't advocating drug use; the days of Jimi Hendrix are gone. Drug use is no longer socially acceptable and legalization would send young people the wrong message just when drug use is starting to decline.

Those who advocate legalization say that at the same time we legalize drugs, we should also tell young people that it's not right to use them. I don't think young people are going to buy that kind of reasoning. I think a lot more young people would end up using drugs if we legalized them. A few years ago in Milan, Italy, there was a great deal of concern about heroin use in that city. The politicians there decided that the way to deal with the problem was to decriminalize the possession and use of heroin. Now, after decriminalization, what was originally a relatively minor problem has evolved into a situation where Milan now has over 100,000 heroin addicts. As a result, many of those same politicians who favored decriminalization are now having second thoughts about the wisdom of their actions.

The final, and I think the strongest argument against legalization, is that legalization would have its greatest effect on minorities and the poor. Why do I say this? Let's use Washington, D.C. as an example. Go to communities like Bethesda and Chevy Chase. Go up near my alma mater, American University. Drive through the very affluent areas of the city. Notice the number of billboards in those areas that advertise alcohol or cigarettes. Notice the number of liquor stores you see in those neighborhoods. You won't find very many. If you want to buy liquor, you'll have to go to the commercial areas.

Now let's drive over to Northwest Washington, to the poorer areas. See how many billboards you see there advertising liquor. A lot of them. See how many billboards advertise cigarettes. A lot of them. Notice the number of liquor stores. Sometimes there are three or four on each block. Who, then, do you think drugs would be pushed on? The poor and minorities, and I can tell you that poor people in America don't need more burdens placed on their shoulders. This is why I do not believe that legalization is the answer. I think it would cause America to deteriorate and would ultimately destroy us as a nation.

I don't think that the proper response to a tough problem is to just throw up your hands and give up. When people ask me "Well, Judge Walton, what are we going to do? How can we deal with this problem? Isn't it out of hand? Can we really come to grips with it?" I say to them yes, we can.

I believe that the President's strategy is a good first step in seeking to solve the problem. The President does not claim that the strategy announced in September is the "silver bullet" that will solve all of the problems. We believe it's a good first step because it's the first time that we have sought to attack this problem on all fronts. We believe that it is very important to maintain strong law enforcement because we can't allow people to sell and use poison with total impunity. We will seek to beef up our law enforcement efforts so that we can go after more people and make them accountable for their illegal conduct.

We also realize that those who use drugs and become addicted to them are sick people who need help, and therefore it's important that we provide them with adequate treatment. To that extent, the President has recommended that $685 million be spent on drug treatment – a 53% increase. In fact, there will probably be somewhere around $1 billion available for treatment as a result of a compromise that came out of the Senate.

We believe that, ultimately, victory will be won in educating our young people. To that extent, the President has recommended that $392 million be made available for drug education programs – a increase of $37 million over last year. The actual total will probably be closer to $500 million dollars because of the Senate compromise.

An International Problem

We also realize that the drug problem is international in scope and we will be working with other nations to encourage them to play a larger role in anti-drug efforts. In response to the demand for drugs in this country, the drug cartels have flooded the market and, as a result, their profit margin here has basically peaked. They are looking for new, untapped markets. Because of that, we're now finding that South American cocaine is showing up as far away as Australia. I met recently with the Minister of Justice from Australia who came here to look at our problems so that Australia might find a way to deal with their problems before they find themselves in the same situation as the U.S. The Soviet Union and some of the Eastern Bloc countries, incidently, are also seeing South American cocaine flow across their borders.

As I travel throughout the country, I find a great deal of apathy about the drug problem. Many people seem ready to give up; many are throwing up their hands in disgust and saying that they don't believe that we can come to grips with this problem. I don't buy that. I think the figures I've cited that show declining drug use by high school seniors and by those who live in households are positive and indicate that we're getting the message across.

I try to stop at a school in each community I visit and in talking to young people, especially the very young, I'm seeing a different attitude about drugs. I see this as a very hopeful sign and an indication that our efforts are starting to take effect.

I think education is a very powerful tool that can change attitudes about drugs, but it's going to take time. To those who want to see this problem solved over night, to those who are talking about legalization, to those who want to raise the white flag of defeat, I say let's look back at our history as a nation.

What History Tells Us

This is a very resilient country and we are a very resilient people, a people who have overcome significant obstacles throughout our history. Let's go back just a few years to the time of the Vietnam War. Back then, some people said that the war would destroy us as a nation. But although some of the scars of that war are still with us, we have basically put that historical event behind us and we've continued to be a great nation.

DRUG ABUSE:
SOME FACTS AND FIGURES

- **Three out of five adolescents will try an illegal drug before graduating from high school**
- **Drug abuse costs our nation an estimated $100 billion each year**
- **57% of adolescents buy most of their drugs at school; most buy them from other students**
- **Over a half million Americans are addicted to heroin**
- **One out of four AIDS patients were intravenous drug abusers**
- **40% of all organized criminal activity is drug-related**

(Note: The Spring 1989 issue of *Update* is devoted to drug prevention; to order, see page 44.)

I think back to the conversations I had with my parents about World War II, and their fears during the course of that war that we might be conquered by a foreign power. Yet, we came together then as a nation and as a people. We decided that we would not allow ourselves to be conquered. We came together and we fought and defeated our enemies, and we continued to be a great nation.

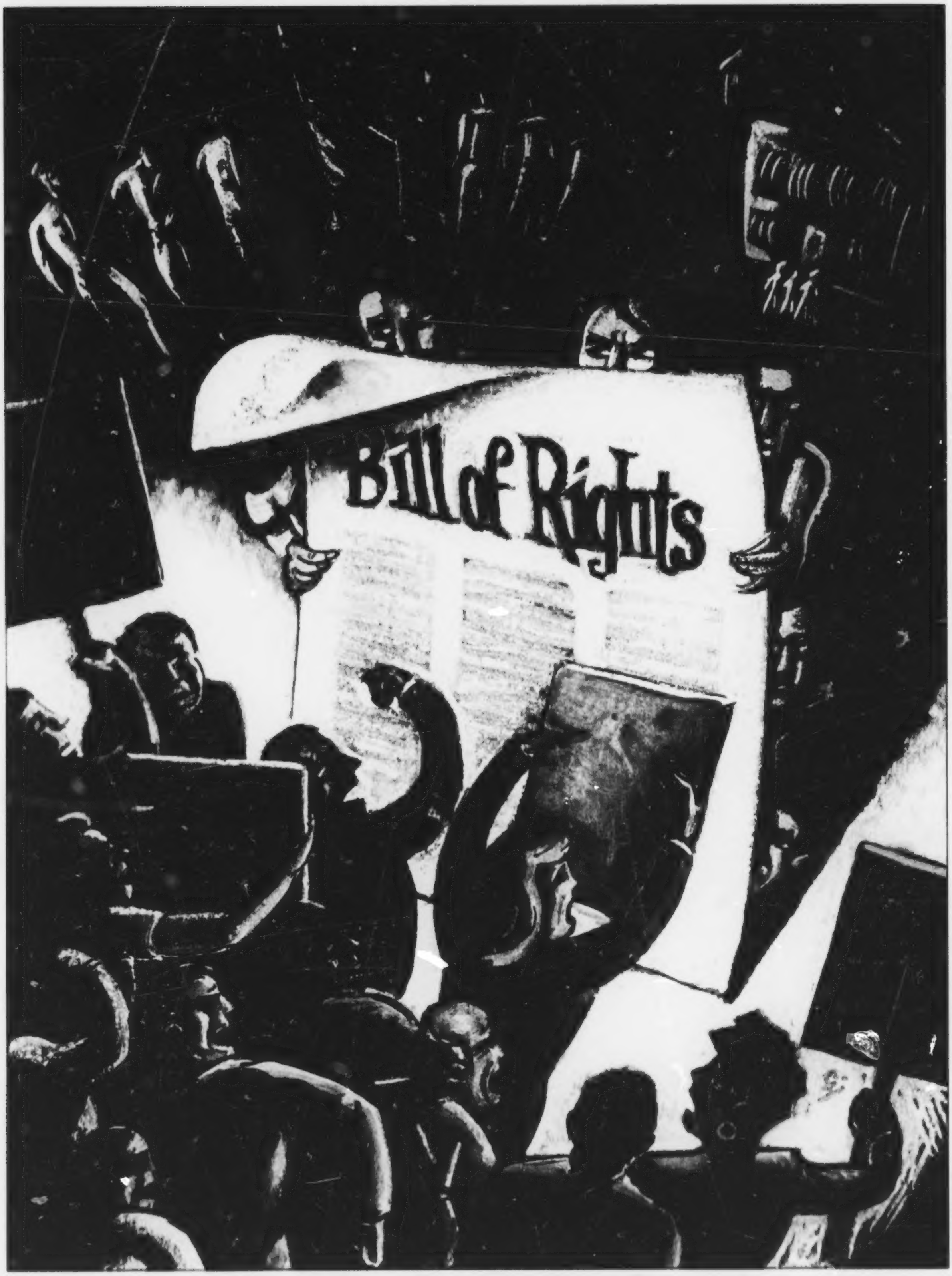
I remember the conversations I used to have with my grandfather about the Depression. He used to wonder sometimes whether he would be able to feed his children and care for them. But during those dark days of the Depression we came together as a nation, as a people, to develop innovative ways of solving our economic problems. We put that historical event behind us as well.

I think back to the greatest, the most difficult and most pervasive social issue that ever confronted America – slavery. I think back again to the conversations I had with my grandfather about his father, my great grandfather. A great American, born into slavery, a man who died in slavery, and a man who broke his back near the end of his life doing free work for his master. I think about the disgust and frustration he must have felt having given all he could to this country and being given virtually nothing in return. I'm sure that as that good man lay dying from a broken back, he must have said to himself that this country will never provide equal opportunity for the black man.

But we didn't give up. We didn't decide that slavery was something that we had to live with because powerful people wanted to see it flourish and thereby profit from the free labor of poor black people. We did not give up as a nation. We did not give up as a people. I also include the good white Americans who knew that slavery was wrong, who stood up with the black man and fought against it. We came together as a nation and as a people to say that slavery was wrong. We changed attitudes about it, and we put that historical event behind us.

I say to you as fellow Americans that if we are prepared to stand up and face the drug problem, if we are prepared to say that America is worth saving, and if we come together to fight this problem as we did when we fought slavery, we can put this behind us as well and continue to be the great nation and great people that we truly are. □

The Hon. Reggie B. Walton is Associate Director of the Office of National Drug Control Policy of the Executive Office of the President. This article is based on the author's remarks at the 1989 National LRE Leadership Seminar held in St. Louis, November 7, 1989.



Bill of Rights

John Figler

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Samuel Dash

Can the Bill of Rights Survive the Crisis in Criminal Justice?

Myths, realities and questions for the future

A major crisis exists in this country in what is perhaps the most important part of our government – the criminal justice system. This crisis is not about crime. It is the crisis of ignorance and misunderstanding as to what the criminal justice system is all about.

The Bill of Rights is threatened because of the public's ignorance and misunderstanding about the real problems that cripple the criminal justice system. I believe it is urgent that the public be educated about the system and that we must begin this education at the lowest levels of our educational system.

The ABA Special Committee on Criminal Justice in a Free Society was created about three years ago in conjunction with the Bicentennial of the Constitution because of concern that there was a public perception that the criminal justice system wasn't working because of constitutional protections enjoyed by criminals. Some of those protections involved the Bill of Rights including the exclusionary rule of evidence and the *Miranda* rules on confessions. As chair of the committee, I decided that since this issue was so important and controversial, we needed to put together a group of people who truly represented the criminal justice system. This diverse group included individuals such as the Attorney General of California, the police chief for the District of Columbia, the District Attorney of Miami, a federal court of appeals judge, and the Appellate Defender of Michigan.

We held public hearings in a number of cities throughout the country and surveyed 800 district attorneys, police chiefs and judges. We wanted them to tell us whether the Bill of Rights really is an impediment to the work they do every day. They told us that it wasn't. If the public mistakenly believed that the Bill of Rights was an obstacle to preventing crime, then the result would be a serious loss of confidence and respect for the basic foundation of our constitutional society.

The Rights of Englishmen

Looking back in history, you can argue that the Revolution may have been fought principally because the colonists were denied the rights that we now enjoy under the Fourth Amendment. When King George sent his men out with writs of assistance and general warrants, the colonists were deprived of the traditional protection enjoyed by Englishmen against unreasonable searches and seizures.

A great 18th century case illustrates this important tradition. In it, the judge speaks about an Englishman's little hut. It could be poor, it could be made of rotten wood, there could be holes in the roof allowing the wind and rain to come in. But the King's men, the judge said, the King's men couldn't come in, because our home is our castle. For Englishmen, this was a sacred concept, and it became a fundamental concept in American constitutional law. If this concept has eroded to the point that Americans think that we can do without it because it puts us at risk, then we are in indeed serious trouble.

To determine if there was any validity to this notion, we asked police chiefs, district attorneys, and judges who try criminal cases every day, "Is it true that you are seriously impeded by the exclusionary rule and by *Miranda*?"

Let me just restate very briefly what *Miranda* and the exclusionary rule are about. The exclusionary rule, incidently, goes back some time. The Fourth Amendment protects us against unreasonable searches and seizures and limits the use and issuance of warrants. In 1914 the federal courts had to address police violations of those rights in a case where federal police broke into people's homes and seized goods without warrants and without probable cause. The theory was put forward that police are naturally very competitive and enthusiastic about solving crime and can't be trusted to decide whether probable cause exists. There's a conflict of interest. We want the police to be aggressive, but we also want a system of checks and balances that requires them to prove the need for that search to an independent, objective, dispassionate magistrate, a judicial officer.

In the case that came before the Supreme Court, the federal police were not doing that. The Court held that the Fourth Amendment protects us against unreasonable searches and seizures, but there must be some sort of a sanction present, a sanction with some bite in it, otherwise, as the Court said, "These words would be merely words on paper." The exclusionary rule means simply that if the police come into your home illegally, they can't use in court what they take.

When the Constable Blunders

For many years, by the way, the states didn't go along with this concept, and even Judge Cardozo in New York said, "Why should the prisoner go free because the constable blundered?" That's an interesting statement. It was not until 1960 when Justice Tom Clark speaking for the Supreme Court finally extended the exclusionary rule to the states. Tom Clark was a law and order man, a very tough former Attorney General, and a very tough, conservative justice, but as he reviewed the history and the cases in the states where police were burglarizing homes, were breaking into homes, he was fed up. He answered Cardozo by saying "The prisoner may go free, but it's the law that sets him free." Justice Clark stressed that it's the Constitution that sets him free. He said that we should not allow the convenience of law enforcement to let us put aside one of our most basic rights. He concluded his opinion by saying that he did not believe that the exclusionary rule was going to harm good law enforcement. Rather, he said, good law enforcement can get along with it – law enforcement doesn't have to be lawless.

In *Miranda*, the issue before the Court regarded interrogation. Back in the 1960s, Chief Justice Warren looked at the police stations where confessions were obtained and found that many interrogations took place in police stations where the individual who was in custody had no friends, no lawyer, no family members present. They were all alone with a police officer who was attempting to get a confession. There is nothing wrong with police officers interrogating suspects or trying to obtain a confession if a person wants to confess and confesses voluntarily. What bothered Warren is that there was no way to know whether the person being interrogated knew that he had a constitutional right to be silent. Powerful and influential people knew about this right, because they had lawyers, but what about the poor man who is there alone and uneducated? In our society, the least of us are as entitled to the protection of the law as the best of us.

I can hate criminals as much as anyone, and I'd like to find a way to take constitutional rights away from criminals and keep them for myself. I can't find a way to do that because if they don't have those rights, then neither do I.

Don't believe people when they say that if we get rid of the Fourth Amendment, get rid of the Fifth Amendment, get rid of the Bill of Rights, we will still have a free society and we will still be protected. No, the lowest of us stands for all of us – that's what Chief Justice Warren said. What he said in *Miranda* was really quite simple. He said that before a police officer questions someone accused of a crime, the officer should tell that person, "You don't have to answer my questions, you have the right to be silent and you have the right to a lawyer." What's wrong with at least telling him what his constitutional rights are and then allowing him to talk if he wants to?

The court recognizes that a person could waive the right to a lawyer and, in fact, a study that my institute of criminal law and procedure did right after *Miranda* found that very few persons in custody, when given *Miranda* rights, asked for a lawyer. Part of the reason for this was a failure of communication because when many of these people heard the words, "You have a right to counsel," they didn't understand that "counsel" meant "lawyer." To those who understood, the only lawyers they knew were either the lawyers who prosecuted them or evicted them. It indicated a need to show people what lawyers really do and why its important to be represented by a lawyer. The situation is perhaps different now, but even today police say that more confessions are obtained after *Miranda* than before.

Crime and "Technicalities"

Miranda and the exclusionary rule are responsible for much of the ongoing controversy and misinformation about "technicalities." Unfortunately, the Bill of Rights is viewed by many as merely a list of technicalities.

The basic question asked by our study was this: Were these rights preventing the police and the prosecutors from protecting us against crime? Of the 800 we polled, police chief after police chief, prosecutor after prosecutor, replied "No, it's a myth. We are not impeded in any significant way." The district attorneys told us that they wanted *Miranda* because it resulted in confessions that were more likely to stand up in court.

The people we interviewed, as well as the members of our committee – prosecutors, defense lawyers, police chiefs – all on the front line of criminal justice – know that we can't solve the crime problem by eliminating Bill of Rights protections. The public is being misled by political leaders who are using the Constitution as a scapegoat to win a few points. They are leading many Americans to distrust and disrespect the Constitution, the foundation of our government.

Now that we know that the Bill of Rights is not hindering law enforcement, the next question becomes "What is?," because the criminal justice system isn't working. We all know that. It is not successful and is practically irrelevant to the crime problem. There is good reason for the public to be angry but, they've been angry for the wrong reasons.

The Tip of the Iceberg

One statistic in particular from the Justice Department will prove just how irrelevant the system is. In 1986, there were about 34 million serious crimes committed in this country. Of that total, 31 million never got into the criminal justice system at all. What, then, is the system working on? Not even those three million that result in felony arrests, because only half of those arrests will likely result in convictions, and of those convictions only about half will result in prison sentences. What the system is dealing with is just the smallest tip of a vast iceberg.

Although we report this as something new, we have known this for many years. There have been many national crime commissions, going back to 1930 with the Wickersham Crime Commission and the Katzenbach Crime Commission set up by President Johnson in 1967. Each of these commissions came to the same conclusion.

The criminal justice system is almost like the cancer ward in a hospital. It's a mop-up system. It was not invented to nor could it ever prevent crime or solve all crime. The public, unfortunately, believes that if the police worked honestly and competently they would protect them against crime. This is very frustrating for the police because every policeman out there realizes how little he can really do to protect the community against crime. It's not because he's not doing his job or is incompetent. It's impossible. It's impossible for the policeman on the street to solve the crime problem.

A Criminal Society?

Crime is a pervasive, endemic problem. America is a criminal society if you look at it from the point of view of what we do and how we act. Forget the street criminal and look at his models. In Watergate, we saw a President resign because of corruption and crime. Consider the Pentagon procurement scandal, the HUD

UPI/Bettmann Newsphotos

scandal, the insider trading scandals on Wall Street. Are we really a country based on morals and integrity? Theoretically, yes, but is that the way we live?

When President Bush spoke to high school students in the District of Columbia and told them to reject drugs, one of the students was quoted as saying, "I make a hundred bucks an hour selling drugs. What does the President want me to do, work at McDonald's for the minimum wage?" A police sergeant in New York stopped a young drug peddler and told him he was ruining his life. The peddler pulled a couple thousand dollars from his pocket, showed the officer his Rolex watch and his Jaguar and asked "How much do you make a week, sergeant?" What lessons are we teaching the young about corruption, morality and integrity?

Our report identified some of the problems facing the criminal justice system and two in particular are important. The first is the overwhelming, corrupting, distorting drug problem. Thousands of drug users and small-time peddlers are being forced into the system, crowding our courts and jails, and preventing us from dealing with other types of major crime. During our hearings, I asked witnesses if they could do a better job with more resources. They said that no amount of resources could enable the law enforcement system by itself to solve the drug problem. What the drug problem has done, they told us, is corrupt the system, overwhelm it, and create more crime, such as drug-related robberies and murders.

A Need for New Approaches

One of our recommendations is that both the American Bar Association and other institutions need to think about new approaches to the drug problem. I wish the President well in his war on drugs, but I think that unfortunately he may be going down the same road again. I hope that the people who are fighting that war on drugs would take seriously what the police chiefs, prosecutors and judges are saying – we're losing the war and additional resources are not going to help. We've got to approach it a different way and not place all the burden on law enforcement.

The second major problem is that the criminal justice system is starved in every way. We say crime is a major problem, yet we are unwilling to pay to do anything about it. While it is frustrating to admit that the system can't do much about crime, just look at how crowded our courts and our prisons are now dealing with only the smallest tip of that huge iceberg. God help us if we were more successful. This puts law enforcement in a difficult position. If they do a better job, it looks as if they're not protecting the public because crime rates go up and prisons become even more overcrowded. We just don't have enough judges and courts to deal with the problem that already exists without bringing more cases into the system.

In New York, for example, the system has completely broken down because of this overload. I've been told by some judges that if someone charged with a felony jumps bail and doesn't show up in court they all celebrate and applaud. It means one less case to try. They don't even send the police out to arrest that person. They hope he never comes back. The system won't see him again until he's arrested for another crime. This is the attitude that develops because of the overcrowding and the stuffing of the system.

Making the Sixth Amendment Work

The standard response when we talk about ways of dealing with this overloaded, nonworking, delayed criminal justice system is to put more police on the streets and give more money to the district attorneys and judges. But we forget that we have an adversary system which requires that we provide an adequate defense for defendants who cannot afford to hire counsel. We don't have to cry or worry about the Wall Street criminals or the Mafia – the system rarely deals with them anyway. It deals with the street criminal, the poor criminal, the people who are represented by public defenders.

What we found in talking with public defenders around the country is outrageous and deplorable – our Sixth Amendment doesn't really work. No less a conservative than former Chief Justice Burger recognized that without an adequate defense arm, the rest of the system doesn't work. It clogs up because, without an adequate defense, there is no one to present the cases in court. They can't be tried. Frequently the best advocates for better defense services are district attorneys, not because they like defense lawyers, but because they can't move their cases without them. I believe it's good to get the prosecutors on the other side of the fence advocating more public defenders because no one wants to listen to the defense lawyers. We won't listen to them because they represent the criminals, but we will listen to the prosecutors.

We also must apply resources uniformly throughout the system. Former Chief Justice Burger likened the criminal courtroom to a three-legged stool with the judge, the prosecutor and the defense lawyer as its legs. Weakness in any one of the legs, he said, would cause the system to topple like a stool. When he said this in the 1960s it was probably one of the first times in our history that the defense lawyer was put on the same level as the prosecutor and the judge. If we spend more money on prosecution and other areas of the system but neglect defense services, the system will only get more clogged up.

A study such as ours will not be remembered unless it becomes part of our continuing knowledge and education. We must continue educating people about the truth of the criminal justice system or the misunderstanding and ignorance will continue. The public is right to be angry about the failings of the system, but they are angry for the wrong reasons.

We must begin now and continue to speak honestly to the public, especially in our schools. Because of this misunderstanding, some of the basic freedoms gururanteed us by the Bill of Rights are at risk. If we cherish a continued, vital democracy, we can no longer tolerate ignorance of the fundamental legal foundation of our constitutional government in our grade schools, junior high schools, high schools, colleges, and among our adult citizens. We must emphasize these areas in our curriculum so that today's young people will become literate adults who can take their place as participating members of our democracy.

Samuel Dash is Professor of Law and Director of the Institute of Criminal Law and Procedure and the Appellate Litigation Clinic at Georgetown University Law Center in Washington, D.C. This article is based on the author's remarks at the 1989 National LRE Leadership Seminar held in St. Louis, November 6, 1989. Copies of the report, Criminal Justice in Crisis, *prepared by the Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section and referred to by Professor Dash in this article, are available free of charge from the ABA Order Fulfillment Department, 750 N. Lake Shore Drive, Chicago, IL 60611.*

Generations of Justice

The Right of the People to be Secure/Secondary

Law in a Changing Society Project

Part 1: The Right to Privacy

PURPOSE

To clarify the meanings of "secure" and "privacy."

PROCEDURE

Discuss the meaning of the words "secure" and "privacy." Ask the class:

1. If they have ever heard the phrase, "A man's home is his castle."
2. Where did the phrase originate?
3. What is its meaning?

Part 2: Writs of Assistance

PURPOSE

To trace the history of the American concept of privacy.

PROCEDURE

Mount each of the 12 arguments listed below on a piece of construction paper and set up learning stations around the classroom with one of the arguments on the case posted at each station.

Review the information in your U.S. history textbook on the writs of assistance to provide a background for the case.

Give each student a copy of the worksheet on page 11 and the background of the writs of assistance case. Read aloud the instructions which follow. Allow sufficient time for each pair of students to visit each learning station and complete their worksheets.

Probable answers are: for the plaintiff – 1, 2, 5, 11, and 12; for the defense – 3, 4, 6, 7, 8, 9, and 10

After each pair of students has reported its decision and reasoning, read the following decision to the group:

DECISION (1761)
The Massachusetts court decided that the writs of assistance were legal. Thus, the privacy of American colonists was not given the same protection as that allowed other Englishmen. The writs continued to be one of the many sore points between the colonies and England which eventually led to the outbreak of the Revolutionary War in 1775.

Conclude the activity with a brief discussion based on the following questions:

1. Why is each argument relevant to the side on which you chose to list it?

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2. Did you reach the same decision as the court?
3. Do you think your decision would have been different if you had lived in the same period of history in which the case actually occurred?

WRITS OF ASSISTANCE: LEARNING STATIONS CASE STUDY INSTRUCTIONS FOR STUDENTS

1. Select a partner and together read the background of the writs of assistance case.
2. With your partner go to a vacant station with your student worksheet and a pen or pencil.
3. When you reach the station, one partner should read the argument listed there and tell his/her understanding of that argument and what bearing it would have on the case.
4. The listening partner should paraphrase his or her partner's ideas and write the number of the station on your student worksheet under the side (plaintiff or defendant) that would make that argument.
5. Go to the next vacant station. Reverse the above steps (one partner reads, tells, and the other listens and paraphrases).
6. After all the stations have been visited, decide how you would judge the case. Write your decision and the reasons for it on your worksheet. (It is not necessarily the number of arguments for each side but how convincing the arguments are that should help you make your decision.)
7. Be prepared to report your decision and your reasoning to the class.

Writs of Assistance Background

In the 1700s, England passed trade laws that said colonists had to buy and sell certain goods only in England. If they traded with other countries, the colonists had to pay taxes to England.

Many colonists tried to get around these trade laws by smuggling – that is, they secretly brought goods into the colonies and did not pay taxes on them. Instead, they hid the goods in their houses and barns until they could be sold.

English officials tried to catch the smugglers. They searched homes, warehouses, and ships. To make these searches lawful, the courts issued orders called writs of assistance. These writs allowed or helped officials make their searches. The colonists grew angry over these writs. In Boston, a group of colonial businessmen hired a lawyer, James Otis, to attack the writs.

Learning Stations

STATION 1
Argument:
The key right of all Englishmen is the right of privacy in one's home.

STATION 2
Argument:
The American colonists are Englishmen and should have the same rights as other Englishmen.

Writs of Assistance Worksheet List of Arguments for Each Side

Plaintiff **James Otis** **(for colonial businessmen)**	**v.**	**Defendant** **English Government**

Decision:

Reason for your decision:

STATION 3
Argument:
It was wrong for the colonists to disobey laws passed by England.

STATION 4
Argument:
It was wrong for the colonists to smuggle goods and not pay taxes on them.

STATION 5
Argument:
In England, an official needed a special search warrant whose powers were very limited. It was issued by a judge to one official to search one specific place for a good reason. This kind of search was acceptable.

STATION 6
Argument:
The writs of assistance were necessary.

STATION 7
Argument:
Many colonists were breaking the trade laws.

STATION 8
Argument:
It would be impossible to catch smugglers if officials had to get a search warrant for every search.

STATION 9
Argument:
A government should have the right to collect evidence that a law has been broken.

STATION 10
Argument:
The colonists should have traded with England. England needed the colonists' products such as tobacco, rice, lumber, rum, and furs. The colonists should have sold these to England and not to other countries. In exchange, the colonists should have bought manufactured goods from England.

STATION 11
Argument:
The writs of assistance powers were too broad. They could be used by any official to break into a person's home any number of times, for any reason.

STATION 12
Argument:
"A man's home is his castle." In his home, a man should be free to do whatever he wants – as long as he does not break the law.

Part 3: Privacy and the U.S. Constitution

PURPOSE

To enable the student to realize that personal privacy is protected by the Fourth Amendment to the U.S. Constitution.

PROCEDURE

Instruct the students to read the Fourth and Fourteenth Amendments of the U.S. Constitution.

> AMENDMENT IV
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> AMENDMENT XIV
> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS

1. To what level of government does the Fourth Amendment apply?
2. What amendment could be used to apply the language of the Fourth Amendment to the individual states?

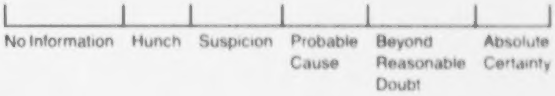
Ask the students to help you list on the blackboard the three things the Fourth Amendment demands before a search warrant may be issued:

1) probable cause supported by oath or affirmation;
2) particularly describing the place to be searched; and
3) particularly describing the persons or things to be seized.

Inform the students that in *United States v. Ventresca* (1965) the requirement of judicial intercession for measuring the sufficiency for a finding of probable cause was established, and so add a fourth requirement to the list:

4) a judge or magistrate must decide if the warrant should be issued.

Explain the concept of probable cause by placing the continuum shown below on the board. Explain to students that although police officers must have probable cause, the Supreme Court ruled in the case of *T.L.O. v. New Jersey* (1985) that reasonable cause was sufficient cause for student searches by school authorities.



Part 4: Searching Without a Warrant

PURPOSE

To acquaint students with some of the occasions when a search warrant is not necessary.

PROCEDURE

Contact your local police department or law enforcement agency and arrange for an officer to be present to watch the role-play activity and help with the discussion. Explain the topic to be covered and describe the activity. Using the officer as suggested will help keep the speaker and students focused on the topic.

Distribute copies of "Authority to Search Without a Warrant" (see page 14). List on the blackboard the eight examples of situations when a search warrant is not necessary.

Divide the class into eight groups and give each group a situation to role-play.

After each role-play discuss the type of search with the students using the questions which follow.

Ask the police officer to comment on the search by discussing why a warrant is not needed and to relate other relevant experiences.

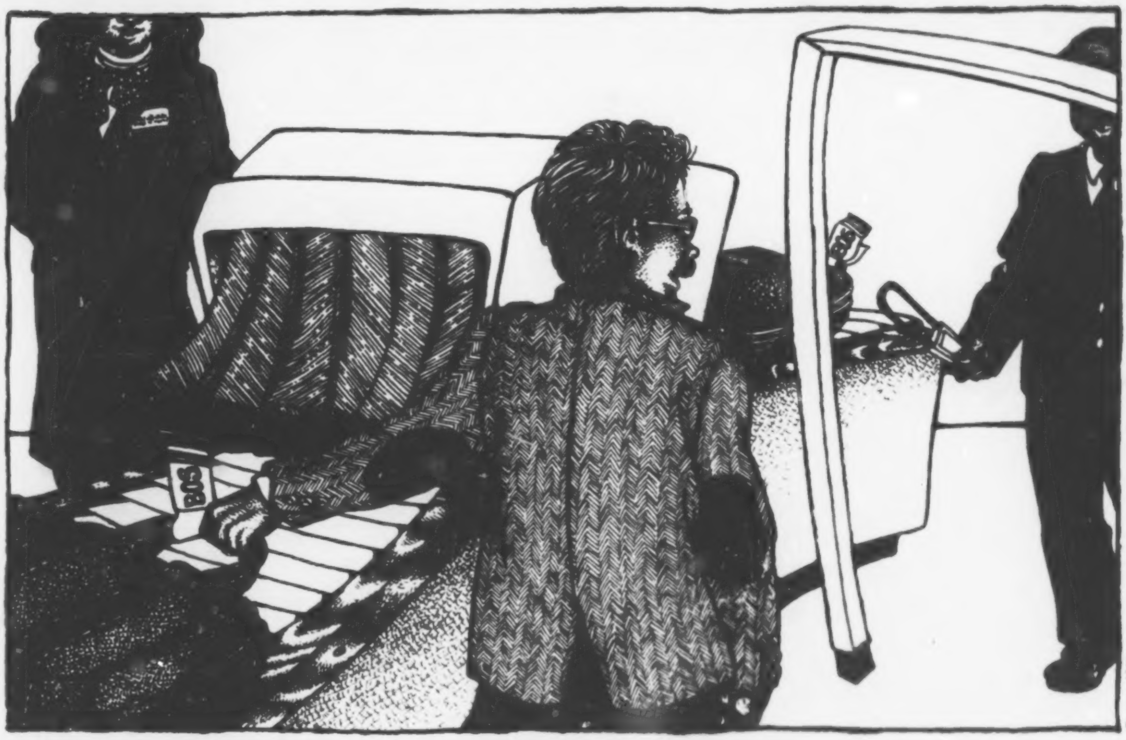
SITUATION 1

Set up a scene for searching passengers about to board a commercial airliner. Give the security personnel doing the searching badges to show their authority.

The searchers should be courteous to all the passengers, but they should also be insistent about searching luggage, packages, purses, or any other items the passengers may be carrying. Each passenger must also walk through an electronic scanner which can be simulated by having the passengers walk between two chairs.

Questions

1. According to the list, what kind of search was this? (lawful inspection)
2. What was the reason for the search? (to ensure the safety of all passengers)
3. Do you think this reason is more important than one passenger's privacy? Why?
4. What other lawful inspections can you name? (border inspection, health inspection of restaurants, and postal inspection)



Susan Wise

SITUATION 2

A police officer knocks on the door of a home and the owner of the house answers the door. The officer asks to search the room of the owner's 16-year-old son for narcotics. The officer says:

- you need not give consent if you do not wish to;
- the search will not be made if you do not consent; and
- if you do consent, anything we find may be used against your son in a criminal prosecution.

The father gives consent, the officer searches the son's bedroom and finds narcotics under the son's pillow.

Questions

1. What kind of search was this? (with consent)
2. Do you think the search would be legal if the father had been coerced (forced) to give this consent? (no)
3. Do you think the following persons could give consent? Landlord for a tenant? (the law says "no") Husband or wife for the other? (The law says "yes" if the usual amicable relation exists.) A child? (no) An employer for an employee's locker or desk? (no)

SITUATION 3

A person breaks into a drugstore through a window and sets off the burglar alarm. An officer, responding to the alarm, arrives just as the burglar is climbing into his car. The officer arrests the burglar and searches his car, finding watches, electric razors, and other items possibly stolen from the drugstore or other stores.

Questions

1. What kind of search was this? (incident to arrest)
2. Do you think this is a reasonable search? Why or why not?
3. Why couldn't the officer be required to obtain a warrant before searching the car?

SITUATION 4

Neighbors call police to report that they have not seen a 70-year-old man in or around his home for the last two days. The neighbors say they are worried because he lives alone and had a heart attack a few years earlier. The man did not mention to anyone that he was going on a trip.

When the police approach the house, they notice that newspapers for the last two days are still at the front door. After ringing the doorbell repeatedly and knocking at the front and back doors, they look in and knock on the windows. They try the doors and windows. Finding them locked, they break a window and enter the house.

Questions

1. What kind of search was this? (emergency)
2. Do you think there was enough "probable cause" for this search?
3. Do you think the officers explored all other alternatives before they broke in?

SITUATION 5

A police officer stops a car for a routine license check. He notices an open whisky bottle on the front seat beside the 16-year-old driver. He arrests the driver.

Questions

1. What kind of search was this? (plain view)
2. The law says: "If the officer is lawfully where s/he has a right to be, and whatever s/he observes is in the open, where it can be observed by anyone who cares to look, it is in plain view and is not a search." Do you agree? Why

Authority to Search Without a Warrant

Search warrants provide the authority for only a small percentage of the searches that are made every year in the United States. The great majority of police searches are perfectly legal, even under the Fourth Amendment, because there are many circumstances in which even common sense will teach us that the police are authorized to search or arrest without first obtaining a warrant.

Probably the best example of a common sense situation where a warrantless arrest or search would be allowed is a situation where there is simply no time to obtain a warrant. For example, if a police officer sees a burglary in progress, obviously he would not be required to go before a magistrate and make an oath, obtain a piece of paper, and return to the scene of the crime in order to arrest the suspect. Why? Because the police officer has probable cause in seeing the burglary in progress, and it is simply unreasonable to require him to obtain a warrant before making an arrest in those circumstances. Furthermore, the same would be true for a search of the suspect, or perhaps of the suspect's car, under similar circumstances. Again, there is simply no time to obtain a warrant and it is clear that the officer has probable cause.

The underlying rule, then, is that the officer must always have probable cause, but need not always obtain a warrant. The warrant requirement is desirable and it applies if there is time to obtain a warrant, but if there is no time to obtain a warrant, the warrant is not necessary so long as probable cause exists.

The following are examples of times when a search warrant is not necessary:

1. In time of an emergency (bomb threat, fire, screams);
2. Incident to a lawful arrest (persons in the immediate area may be searched for weapons and/or evidence);
3. During temporary detention (stop and frisk to protect an officer's safety);
4. With consent (self, spouse or parents);
5. Lawful inspection (border and airport);
6. When item is in plain view;
7. Hot pursuit;
8. When there is probable cause known to the officer that an automobile (or any mobile object) contains illegal items.

Although these situations generally do not call for search warrants, there might be other circumstances involved which might change the situation and make it necessary to obtain a warrant. In some cases, it is very difficult to determine if a search was legal or not, and it must be decided by a court.

or why not? (Note: This ruling was made in the 1963 case of *Ker v. California*.)

SITUATION 6

An officer sees three men on a street corner. They take turns walking down the street, looking in store windows, and then returning to the corner. After they have repeated this five or six times, the officer approaches them, identifies himself as a police officer, and asks for their names. They mumble answers. Fearing that they might have a gun, the officer pats them down and finds guns on two of the men. The officer arrests these two men.

Questions

1. What kind of search was this? (temporary detention)
2. Do you think the officer had "reasonable suspicion" to stop the men?
3. How did the men respond to the officer's questioning?
4. What is the reason for frisking? How does it feel to be frisked? (Ask the persons frisked in the role-play.) (Note: This incident is based on the case of *Terry v. Ohio*, 1968.)

SITUATION 7

A sheriff receives a phone call from a reliable informant that some stolen merchandise is now on a truck leaving for another state. The sheriff gives the truck's license plate number, description, and location to one of his deputies and tells him to go quickly and search the truck.

Questions

1. What kind of a search was this? (searching an automobile for illegal items)
2. Do you think the deputy had "probable cause" to search the truck?
3. In what way do motor vehicles make preventing and detecting crimes difficult? (The vehicle can be moved quickly.) (Note: This law was decided in 1925 in the case of *Carroll v. United States*.)

SITUATION 8

Lisa is an armed robbery suspect. After a high speed chase, police officers block her in an alley, search her and the immediate area, and find $120,000 in the trunk of her car.

Questions

1. What kind of search was this? (hot pursuit)
2. Did the officer have probable cause to stop and search the woman? Her immediate surroundings?
3. Was there time to get a warrant?

This lesson was adapted from Law in a Changing Society, a project of the State Bar of Texas.

Generations of Justice

The Death Penalty/Secondary

Mark Crockett

Insight

Introduction

The death penalty has been a controversial issue in American society for more than two decades. Various legal issues and questions have been raised by civil libertarians regarding the imposition of the death penalty, and the constitutionality of capital punishment has been addressed by federal courts. Although the Supreme Court has ruled on the constitutional issue, a number of important issues remain unresolved. This lesson is intended to focus on the controversy surrounding capital punishment and to stimulate critical thought on the part of students.

Rationale

Students usually listen, answer direct questions, take notes and remember facts for tests; they rarely consider the meaning of what they read, discuss their ideas and thoughts, or initiate areas for study. This may explain why students usually rank social studies as one of their least favorite subjects.

Through the use of reflective inquiry, teachers can use content material to help students develop their own ideas and philosophies, and ultimately, to solve their own problems. Through the study of controversial issues such as the death penalty, students can experience the conflict, the cooperation, and the consensus essential to resolving controversial issues in a democratic society.

Audience

This lesson is designed to be used at the secondary level (eleventh and twelfth grades) but could be adapted for use with younger students.

Time to Complete

Approximately one week (five to eight class periods), although the time frame will vary depending upon the activities/materials used by the individual teacher.

Goals

As a result of this lesson students will:

- become familiar with the Eighth Amendment's prohibition against cruel and unusual punishment as well as the equal protection clause of the Fourteenth Amendment;
- discuss and share their views on the death penalty and its relationship to these amendments;

Writing Assignment
Death Penalty: Pro or Con

You are to take a position in favor of the death penalty or against it. It doesn't matter which position you take. You will be evaluated on how well you present and support your argument, and your clarity in doing so.

Your paper should contain the following components; each is worth twenty points.

1. Introduce the question/issue you are writing about. What is your position? Why? Prepare the reader for what follows.
2. In the second part of the paper, consider the factors of racism and discrimination as they relate to the death penalty. Is the death penalty handed out fairly, or are certain groups more likely to receive it than others? Is the spirit of the equal protection clause of the Fourteenth Amendment damaged in any way?
3. In part three, consider the issues of capacity, responsibility, and maturity. Is the death penalty appropriate for the mentally handicapped and young people? Does capital punishment, for them, constitute a "cruel and unusual" punishment?
4. In the fourth part of your paper, address the questions of deterrence and retribution. Does the death penalty serve as a deterrent to those who might commit violent crimes? Why? What evidence can you present? Should society use the death penalty as a method of punishing wrongdoers? Of gaining revenge? If so, why? If not, why not?
5. Conclude by summarizing your position on the death penalty and the major points which support your position. Your argument(s) should be cohesive and persuasive.

You may include other factors or points not mentioned above. Be specific. Use evidence and statistics whenever possible.

- facilitate respectful dialogue among themselves and encourage cooperative learning;
- critically think through a study of relevant Supreme Court cases and news articles; and
- prepare a position paper on the death penalty.

Materials

- Videotape of the February 5, 1988 "20/20" segment, "Old Enough to Murder, Too Young to Die?" (available through ABC Distribution Co., 825 7th Ave., New York, NY 10019)
- The U.S. Constitution
- "An Eye for an Eye," *Time*, January 24, 1983
- "To Die or Not to Die," *Newsweek*, October 17, 1983
- Nat Hentoff, "The Wrong Man," from *The Washington Post*, April 25, 1987
- "Gridlock on Death Row," *Newsweek*, May 4, 1987
- "Clearing a Path to the Chair," *Time*, May 4, 1987
- "Too Young to Die?," from the *New York Times Magazine*, March 12, 1989
- "Bad News for Death Row," *Time*, July 10, 1989
- other related stories reported in the local press

Procedure: Part 1

1. Day One: Distribute copies of the Eighth and Fourteenth Amendments or have students read them from a text. Focus student attention on the Eighth Amendment's prohibition against cruel and unusual punishment and the equal protection clause of the Fourteenth Amendment.
2. Students should be encouraged to discuss what they think the language of these amendments means, especially concerning the death penalty.
3. End the period by summarizing, on the board or orally, student interpretations of the Eighth and Fourteenth Amendments as they relate to capital punishment.

Procedure: Part 2

1. Day Two: Briefly review the previous day's discussion and outcomes (either directly or through student participation). Move the discussion to the notion of capital punishment (a brief history of capital punishment may be useful at this point).
2. Discuss student views on the death penalty:
   Who is in favor of the death penalty? Why?
   Who is opposed to the death penalty? Why?
   Is your position solid and unwavering?
   Do you have any evidence or data to support your view?
   Do you know where, or how, to find relevant data?
3. The teacher may wish to poll students about their opinions on the death penalty and place the results on the board for discussion. An additional question might be, "Would you like to find out what others think about this topic?" Students can then survey others in the school, in the community, or in their families. Students should be encouraged to listen carefully to others' views about the death penalty and to see if they can determine inconsistencies in reasoning. End the period with a restatement of the positions and justifications provided by students.

Procedure: Part 3

1. Day Three: Collect, summarize and discuss the survey results. Allow ample time for student discussion. The teacher should take the lead in focusing discussion on issues related to the death penalty, including fairness,

deterrence, discrimination, retribution, racism, cruelty, insanity, and method of execution.

2. Day Four: To introduce the issue of fallibility, students should be given copies of Nat Hentoff's article "The Wrong Man" to read in class. After reading it, students should be questioned about the possibility of mistakes, the seeming intransigence of "the system," and the protections afforded by the Constitution. Distribute the instructions for the writing assignment (see page 16).

3. Day Five: The day's lesson focuses on three Supreme Court cases: ***Furman v. Georgia*, *Gregg v. Georgia***, and *McCleskey v. Georgia*. Students should be given copies of the Court rulings in each of the cases (available in periodicals, newspapers, or in Bartholomew's *Leading Cases on the Constitution)*. Students should consider the legal issues and questions considered by the Court and look for consistencies and/or inconsistencies within and between the rulings. Give students copies of two articles to read for the next day: "Too Young to Die?" and "Bad News for Death Row."

4. Day Six: Begin with the "20/20" videotape, if available. Review the facts of *Penry v. Lynaugh* and *Stanford v. Kentucky* (see the discussion of these cases in the Fall 1989 issue of *Update*). Ask students to discuss how they would define "cruel and unusual" punishment and in what circumstances might capital punishment be considered "cruel and unusual." Class discussion should focus on the questions: "Who should get the death penalty and for what?" End the class by posing two additional questions: "Who does get the death penalty in the U.S.? Why?" Give students copies of two articles to read for the next day: "Gridlock on Death Row," *Newsweek*, May 4, 1987 and "Clearing a Path to the Chair," *Time*, May 4, 1987.

5. Day Seven: Allow students an opportunity to share questions, comments, and concerns about the cases and the assigned articles. Divide the class into two groups: those who favor (or tend to favor) the death penalty and those who are opposed (or tend to be opposed) to the death penalty. Allow students to share and clarify views and question each other with the teacher serving as moderator. Remind students of the position paper that is due as part of their evaluation.

6. Day Eight: (Optional) Allow students to use the class period to work on their position papers (compare ideas, work with the teacher, etc.) or, alternatively, the period may be used for a formal debate between opposing sides (in this case, some time should have been allowed earlier for each side to research and organize their arguments). A local attorney may be enlisted to serve as judge for the debate. If students are working on papers, it is a good idea for the teacher to work on one as well. A teacher-prepared position paper, shared with students, will 1) aid in the process of exchanging and sharing ideas; 2) help create or strengthen student-teacher dialogue; 3) stimulate the critical thinking process as students work and think to determine possible inconsistencies and flaws in the teacher's line of reasoning; and 4) expose students to an example of writing/thinking a level above their own.

Evaluation

The lesson may be evaluated in several ways:

- through informal observation(s) of student participation in classroom discussion(s) and debate(s);
- through participation in gathering research for the optional classroom debate and/or participation in the debate; and
- through the preparation of a position paper on the death penalty which addresses the various issues and questions raised in class (including the student's view on the Eighth and Fourteenth Amendment issues that bear on capital punishment).

An example of the writing assignment to be given students follows, and would be the preferred method of formal evaluation.

Tips for the Teacher

Ideally, debriefings will occur periodically as the lesson progresses. The reviews and restatements of previous learnings serve as debriefings. In addition, the informal discussions and debates serve as debriefing vehicles. The position paper assignment not only allows the teacher to evaluate student thinking/learning/writing, but also serves as a mechanism by which students develop and organize their perceptions on a topic significant to the society in which they live. The process is one that can (and hopefully will) be transferred to the manner in which students analyze and interpret data as they seek to understand the nature of controversy in a democratic society.

Once all position papers have been collected (and if possible, after they have been evaluated) the teacher should moderate a classroom discussion so that students may reflect on their experiences. Some questions central to such a discussion/debriefing include:

- Did any of you change your views on the death penalty? Why?
- What did you learn that you didn't know before?
- How do you think this experience will prove beneficial to you later?
- What did you find hardest about studying this topic? Preparing your paper? Why?
- Can you apply any of what you've learned to your personal lives? If so, how?
- What insights did you gain about the Constitution? About the law? Courts? People?

ADDITIONAL REFERENCES:

"Sentences That Seldom Come to an End," *Insight on the News*, February 12, 1990

Instructor's Guide to Equal Justice Under Law, (contains additional background and questions on issues related to capital punishment; available from ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611)

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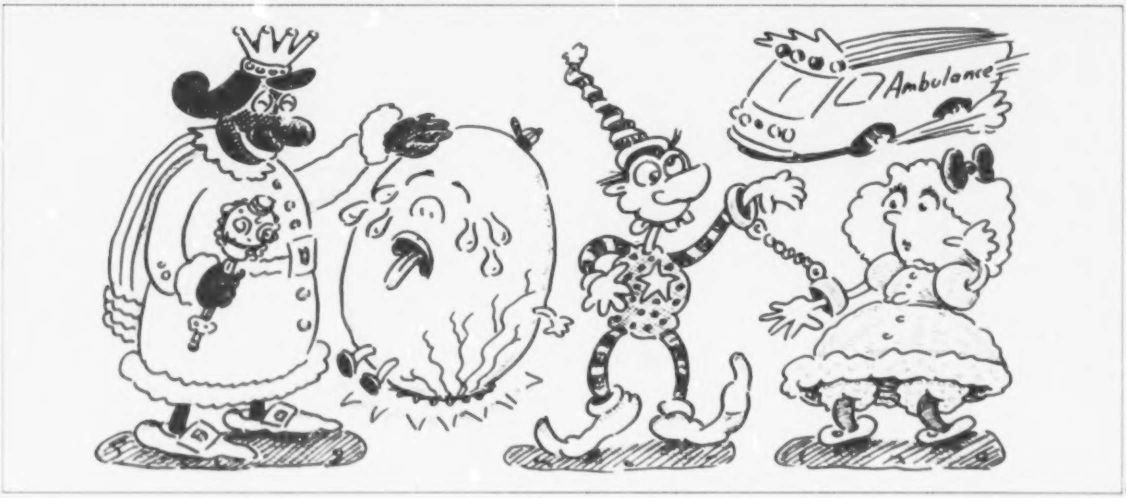
2

Generations of Justice

Humpty Dumpty's Assault/Upper Elementary/Middle

Sally Jensen-Ricciotti



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Purpose

The goals of this lesson are to:

1. Outline the criminal justice process, beginning with the commission of the crime, through investigation, arrest, and trial, and concluding with sentencing if a verdict of guilty is returned.
2. Review the rights of the accused as set forth in state and United States constitutions.
3. Provide possible role playing situations focusing on:
   a. the commission of the crime;
   b. the investigation;
   c. the arrest;
   d. the mock trial;
   e. the jury simulation; and
   f. the sentencing process.
4. Use of a police officer, lawyer, and judge as resource persons.
5. Review the laws on simple assault and the technical vocabulary involved with this particular crime.
6. Review the differences between the types of crime: violation, misdemeanor and felony.
7. Review the different levels of court trial appropriate in your state.

Materials Needed

1. Copies of your state constitution and the U.S. Constitution's Bill of Rights.
2. Materials on the structure of state and federal government.
3. Materials on organizing mock trials. State bar associations usually have materials which can help teachers and resource people in setting up a mock trial or simulation.
4. Copies of "Humpty Dumpty's Assault," to be used as a handout.

Procedures

A. Using the story "Humpty Dumpty's Assault," students can choose characters and write their own sworn statements. Begin with a general discussion to establish the date, time and place that the crime took place. This creates a common basis for the development of the students' statements. Students can then share their statements with each other.

B. Using a police officer, review the arrest procedure and vocabulary involved in the law on simple assault. Review the different classifications of crime. The following outline can be used as a guide for both the student and the resource person.

THE ARREST

What happens? What does an investigation include? What has to be done at the scene of the crime? When does the arrest occur? What happens during the arrest?

A. The Call
   1. At the scene of the crime
   2. The investigation
B. The Complaint and the Warrant
   1. Definitions of these terms
   2. When are they used?
   3. How do they differ?
C. The Arrest
   1. What is the law on simple assault?
   2. What procedures must be followed?
   3. When does the reading of rights occur?
   4. Who reads the rights?
   5. When does questioning occur?
   6. What happens during questioning?
D. Booking
   1. What is booking?
   2. What is bail?
   3. Who sets bail?
   4. When is bail set?

E. Arraignment
  1. What is an arraignment?
  2. What happens during an arraignment?
    a. Reading of the complaint
    b. Assignment of a lawyer
    c. Setting a trial date

THE TRIAL AND JURY SIMULATION

After these points have been covered, preparation for a mock trial can begin. State bar associations usually have excellent materials which can be obtained from the law-related education coordinator. They can also help put you in touch with a lawyer and/or a police officer in your community.

SENTENCING

A. The judge sets a date for sentencing.
B. Procedures at the sentencing.
  1. The state makes a recommendation, based on:
    a. the nature and seriousness of the crime;
    b. the prior history of defendant.
  2. The defense makes a recommendation, based on:
    a. circumstances surrounding the crime;
    b. the prior history of defendant.
  3. The defendant's statement
    Occasionally, a judge will ask the defendant to speak in order to gauge the attitude of the defendant.
  4. The victim's statement
    By statute, the victim has a right to be heard.
C. The judge announces the sentence.

The appeal process can be discussed, with discussion of the different levels of courts and the differences between them. The role played by the Bill of Rights during the process should also be discussed.

Tips from the Teacher

This lesson examines the process from commission of the crime to sentencing. The teacher may select which components of this lesson are simulated or role played.

The use of resource persons such as lawyers and police officers is important to the success of the lesson due to the technical information and insights they can offer. It is also important to include discussion of the various constitutional guarantees which apply during the individual stages of the process.

The Humpty Dumpty story used in this lesson was written by a fifth grader, Christy Bluhm, as part of a creative writing activity. Students can write their own stories for use in mock trials or judicial studies. The following procedure was used in developing this lesson:

1. Review the simple assault law (or any law you select) using a resource person.
2. Establish ground rules before the students write their own stories. Ground rules will give students a common starting point. In this lesson, for example, students were told that Humpty Dumpty was to be the victim of a simple assault and that there must be an eyewitness to the crime. Students were allowed to use any other characters they wanted to tell the story.

Humpty Dumpty's Assault

One beautiful, bright, sunny day, an egg named Humpty Dumpty was laying on top of a crooked brick wall, sunbathing to make his shell brown, the color he wanted. Nearby, little Bo Peep was sitting in a field, crying because she had lost her sheep.

And above, a cow was trying to jump over the moon twenty times.

Little Miss Muffet, a friend of Bo Peep's, was trying to comfort her and eat her curds and whey (which her mom, the Old Woman Who Lived in a Shoe, made her eat) at the same time.

Just as Humpty Dumpty dozed off, a spider came over to Miss Muffet and scared her so much that she ran wildly into the crooked wall, knocked it down, with Humpty on the bottom.

His shell was cracked! Miss Muffet ran away quietly, not wanting to get the blame, but Bo Peep and the cow saw what happened, and they called Old King Cole and Simple Simon.

Simple Simon arrived on the spot and arrested Miss Muffet, who was hiding, and read her her rights. Then Old King Cole came and said to Humpty, "Listen, son, I meant it when I said all of my men would try to put you back together again," and Humpty was driven off in an ambulance.

At the hospital, Tweedle Dum and Tweedle Dee were his doctors, but they just couldn't put him back together. (No wonder, as they were fighting all of the time.)

Humpty went through much pain and was in the hospital for several days. His bill at the end of his stay was $1,000.

During his stay, several people were questioned by the police. One was Miss Muffet, who said it wasn't her fault, as the spider chased her. The witnesses, Bo Peep and the cow, said Miss Muffet hit the wall and made it fall.

They also questioned The Fork and The Spoon, who were Miss Muffet's friends, and they said she wouldn't do such a thing.

Her mother, The Old Woman Who Lived in the Shoe, said the same thing. So did Old Mother Hubbard, who was a friend of Miss Muffet's mother. She said that the way the Old Woman raised her, such a thing would never happen, although she didn't exactly know Miss Muffet.

The Crooked Cat and Mouse said that the wall was crooked and not sturdy. (They should know; they built it!) And if Humpty just leaned the wrong way it could have fallen on its own.

Tweedle Dum and Tweedle Dee said Humpty couldn't have possibly done it himself, because if he purposely pushed the wall down, there would be blisters on his hands.

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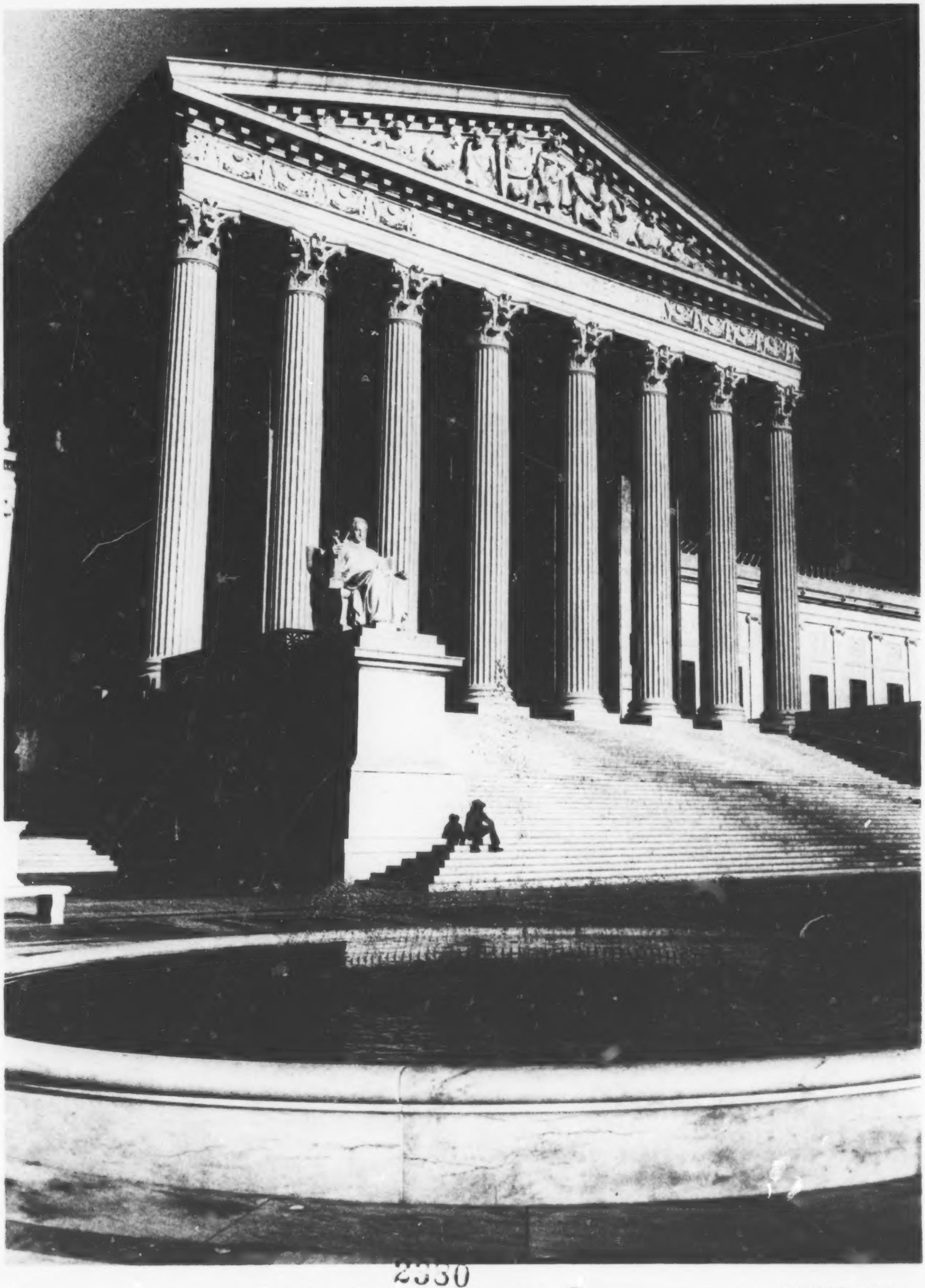

2030

COURT BRIEFS

Daniel Jay Baum

Civil Rights and the Burden of Proof

A look at three 1989 cases that narrow the definition of discrimination

Introduction

At first glance, it would seem that that which is required to prove discrimination ought not be difficult to state: Was John treated differently than Bill, for example, because of his race? Yet, how is discrimination to be proved where the facts necessary to show intent have not been openly voiced, or where there might not have been any intent, but the effect of actions taken resulted in discrimination? And, in what way, if any, is a political body to be questioned when it imposes a kind of affirmative action program, having found discrimination practiced generally by one sector of the economy?

These are among the questions asked and answered in part by the United States Supreme Court in three 1989 decisions—*Price Waterhouse v. Hopkins*, 57 U.S.L.W. 4469; *Wards Cove Packing Co., Inc. v. Antonio*, 57 U.S.L.W. 4583; and *City of Richmond v. J.A. Croson Company*, 57 U.S.L.W. 4132.

This article will focus on the criteria or tests set out by the Court in terms of the proof of discrimination. Keep in mind, however, that the term discrimination can take on different meanings depending on whether it is applied to a statute or the Constitution. This difference will become clear in the discussion of the *City of Richmond* case. Finally, at various points in the article, we have introduced the feature—"You Be the Judge." It is designed to be used as a teaching tool. In that regard, it is assumed that the textual material preceding the feature will have been discussed with the students. "You Be the Judge" is a way for students to sharpen their understanding of the rationale not only of the Court, but of individual Justices. Each "You Be the Judge" is followed by a brief statement describing what the Court or a particular Justice either decided or would decide.

Individual Discrimination

Price Waterhouse arose under Title VII of the Civil Rights Act of 1964 which created what amounts to a statutory tort. Under Title VII, it is unlawful to impose, as a condition of employment, discrimination because of a person's religion, race, color, sex or national origin. Violation can result in an order to make the injured person whole by way of money damages, including back pay. In *Price Waterhouse* a central issue concerned the burden of proof: Just how much did the plaintiff, Ann Hopkins, have to prove? At what point, if any, did that burden shift to the employer?

The case was not easy in part because it involved an employer judgment calling for no small measure of discretion: Ms. Hopkins was not appointed a partner in the firm for what a majority of the Court found to be mixed reasons.

By that, the majority of the Court meant Price Waterhouse considered illegitimate (sex-based) as well as legitimate reasons in weighing Ms. Hopkins' application for partnership. A majority of the Court found that at a given point, Ms. Hopkins—who as plaintiff had to prove her complaint—was able to shift the burden of proof to the employer. (Note that a majority of six members of the Court reached this conclusion, but Justices White and O'Connor wrote separate concurring opinions. Justice Kennedy wrote a dissenting opinion which was joined by the Chief Justice and Justice Scalia.)

Ms. Hopkins was a professional within a national accounting firm. She was a senior manager in the Washington, D.C. Office of Government Services of Price Waterhouse where she had worked for five years. Becoming a partner in the firm is significant; it means, among other things, having a role in the direction of the organization and a share in its profits. At the relevant time, Price Waterhouse had a total of 662 partners of whom seven were women. Ms. Hopkins did not initiate her own partnership application. Firm policy dictated that this was to be done by senior partners in her office, of whom there were 32. The recommendation then went to an Admissions Committee for review.

The choices of the Committee were either to approve the candidate, disapprove, or place the application on hold. If the candidate was approved, then the application was forwarded to the Policy Board which had the same range of choices. Approval by the Policy Board brought the candidate's name before the full partnership for approval. (Both the Admissions Committee and the Policy Board were staffed by partners.)

Thirteen partners from Ms. Hopkins' office submitted a statement in support of her candidacy. They noted, among other things, her outstanding performance in obtaining a $25 million government contract, a more significant achievement than other candidates from the Washington, D.C. office. Both the recommending partners and clients praised her strong character, her forthright approach, her intelligence and her integrity. However, eight partners on the Committee recommended that partnership be denied, and three others asked that the application be placed on hold. The remaining office partners expressed no opinion.

Several of the partners who voted against making Ms. Hopkins a partner used sexist comments in describing her and her work. However, at one and the same time, they criticized her interpersonal skills, that is, her capacity to work cooperatively with others. Such criticism came from others than the dissenting partners. Ms. Hopkins' candidacy eventually came before the Policy Board where it was placed on hold. The partner who communicated the Board's decision said to Ms. Hopkins, among other things, that to improve her chances for partnership Ms. Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Looking at these comments, as well as other statements which had the appearance of neutral criticism by partners who had little direct contact with Ms. Hopkins, a social psychologist concluded that there had been sexual stereotyping.

The trial court found that Price Waterhouse legitimately had emphasized interpersonal skills. Moreover, the trial court stated, the firm in good faith had determined that Ms. Hopkins was deficient in those skills. Still, there was a finding of unlawful discrimination: Price Waterhouse had listened to and weighed the partners' remarks which resulted from sexual stereotyping. Indeed, according to the trial court, those remarks played a substantial part in the Policy Board's final decision. In effect, there had been a demonstration of mixed motives in the determinations made by the Policy Board. The burden, said the trial court, was on Price Waterhouse to show by clear and convincing evidence that its decision to place Ms. Hopkins' candidacy on hold was based on non-sexist reasons. For our purposes, it is enough to say that, in principle, the court of appeals affirmed the decision of the trial court.

The plurality judgment of the Supreme Court, announced by Justice Brennan, reversed the trial court. It stated that the burden shifted to Price Waterhouse after Ms. Hopkins demonstrated that a substantial reason for the partnership decision was based on sexual stereotyping. The standard required of Price Waterhouse in meeting the case against it appeared to be less rigorous than the clear and convincing standard announced by the trial court. Justice Brennan said Price Waterhouse was to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken Ms. Hopkins' gender into account. To Justice Brennan, and Justices Marshall, Blackmun, and Stevens, who joined him, however, that proof in all likelihood had to take the form of objective evidence. Justice Brennan wrote:

"As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving 'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made' . . . An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing [the trial court] that Hopkins' interpersonal problems were a legitimate concern. *The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.*" [Id., at 4476.]

Justices White and O'Connor, in separate concurring opinions, agreed with the judgment of Justice Brennan. However, they disagreed with at least one important aspect of what Justice Brennan seemed to read into the standard of preponderance of the evidence, namely, objective proof. Justice White stated:

"In my view . . . , there is no special requirement that the employer carry its burden by objective evidence. In a mixed motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof."

Justice O'Connor, by the thrust of her opinion, would have agreed with Justice White but she felt a need to draw additional limits around her agreement with the judgment of Justice Brennan. The fact is, said Justice O'Connor, that the plaintiff does carry the burden of proof.

Ordinarily, that would mean that the defendant would not have to prove the absence of discrimination. Rather, the plaintiff would be put to the task of proving the reality of discrimination. Thus, once the plaintiff established a case of discrimination (prima facie), then the defendant would offer its explanation. The plaintiff would then have to demonstrate that this was not the real explanation, the real reason for the decision.

What Justice O'Connor did in this case was create a kind of exception based on the fact that Ms. Hopkins had taken her case about as far as it could go. And, in that regard, Ms. Hopkins had demonstrated that a substantial reason for the partnership decision was gender-based. Justice O'Connor said: "It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners file in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid. If . . . presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to proof, . . . one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate concerns."

The dissent written by Justice Kennedy and, as noted, joined in by the Chief Justice and Justice Scalia, saw no need for an exception. The burden, in their view, should remain where it always is in a civil matter: on the plaintiff. To accept Justice O'Connor's exception is to invite more confusion in already complex litigation. A trial court, Justice Kennedy said, would nearly always be asked to use the test set down by Justice O'Connor wherever there was even some evidence to support the plaintiff's argument of discrimination. And, according to the dissent, the test would place an improper burden on the defendant.

You Be the Judge

Let us assume that the matter involving Ms. Hopkins is returned to the trial court. Price Waterhouse, by way of further defense, takes evidence from each member of the Policy Board as to their views at the time the decision was made to place Ms. Hopkins' candidacy on hold. Let us further assume that two members of the Board can be demonstrated as having formed conclusions about Ms. Hopkins as a result of sexual stereotyping. However, the overwhelming majority of the Board formed their opinion concerning Ms. Hopkins as a result of a good faith, but subjective judgment that her interpersonal skills were significantly deficient.

Based on your reading of the opinions of the Justices, what do you think would be the likely result if the trial court found that Price Waterhouse had carried the requisite burden of proof?

Discussion

The likelihood is that a majority of the Court would affirm that decision with Justices Brennan, Marshall, Blackmun and Stevens dissenting. Recall that both Justices White and O'Connor indicated that objective evidence was not always necessary, and especially so where the judgment, by its nature, required a certain subjectivity. The difficulty for Justices White and O'Connor, however, might be the question as to whether the majority of the Policy Board might nonetheless have had their judgment "tainted" by the few. This raises a matter noted in the dissent: Does the judgment of the plurality require the defendant, in effect, to poll the voting members and affirmatively guarantee that they were free from bias?

Fair Practices but Discrimination in Effect "Disparate Impact"

In *Price Waterhouse*,the issue related to a claim of direct, individual discrimination resulting from sexual stereotyping (disparate treatment). There is another kind of discrimination: it concerns practices that on the surface appear to be fair but are discriminatory in their application. This is called disparate impact and it, too, is covered by Title VII of the Civil Rights Act of 1964. At the end of its 1988 term, the Court ruled unanimously that disparate impact cases could be made in matters involving subjective employment practices or criteria, such as hiring interviews, professionalism, leadership and responsibility. [*Watson v. Ft. Worth Bank and Trust*, 108 S. Ct. 274.] Proof of disparate impact will tend to be largely statistical because the assumption is that subjective intent neither exists nor can be proved. The questions are: What must be the nature of that statistical evidence? And, under what circumstances, if any, does the burden shift to the defendant? These questions were not fully answered in *Watson*.

The opportunity to answer them arose in *Wards Cove Packing Co. Inc. v. Antonio*, a case that had been in litigation for fifteen years. At issue were claims of disparate impact discrimination brought by former employees in a class action against the owners and operators of a number of Alaskan salmon canneries and fish camps, often located in remote locations requiring dormitory facilities. Those who brought the action were largely non-white – Alaska natives, Filipinos, or of Oriental descent. With few exceptions, these were the people hired as cannery workers, jobs that not only paid significantly less than non-cannery jobs, but also were substantially inferior in their living accommodations.

The work of the canneries was seasonal. Sometime before the summer salmon runs, those who held the non-cannery jobs came to prepare the camps and the processing plants. Their jobs varied in skill levels, from cooks to mechanics. Most were skilled or semi-skilled; some were unskilled. They continued working after the runs started. Indeed, they remained for a period of time after the runs ended; their task then was winterizing the facilities. As noted, their pay and their living facilities, which were separate, were far better than the cannery workers. The non-cannery jobs were not advertised; they were awarded by word of mouth; a form of nepotism developed. The result, however, was that the non-cannery jobs went almost exclusively to whites.

There was actual segregation between the cannery and non-cannery workers. Each had their own bunkhouse and mess rooms that were given names with racial labels, such as "Eskimo quarters," the "white mess house," and the "Filipino house." The same was done with some machinery, laundry bags, and employee badges. The dissent in *Wards*, written by Justice Stevens and concurred in by Justices Brennan, Marshall and Blackmun, stated: Some characteristics of the Alaska salmon industry described in this litigation – in particular, the segregation of housing and dining facilities and the stratification of jobs along racial and ethnic lines – bear an unsettling resemblance to aspects of a plantation economy. [Id., at 4589, note 4.]

Two rulings of the court of appeals were of primary concern to the Supreme Court: (1) The court of appeals determined that a prima facie case of disparate impact had been made. This proof was developed through a statistical showing of a high percentage of non-white workers in cannery jobs and a low percentage of such workers in non-cannery jobs. (2) The burden shifted to the companies to justify through business necessity the discriminatory impact that had been shown.

In a 5-4 decision, the Supreme Court reversed the court of appeals on both points. Justice White, who had concurred in the *Price Waterhouse* judgment, delivered the Court's opinion. (Note, too, that Justice O'Connor, who also concurred in *Price Waterhouse*, joined in the judgment of Justice White.) The majority demanded that the statistics have a focus directly related to the labor pool able to perform the challenged jobs. Justice White stated: "It is such a comparison – between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs – that generally forms the proper basis for the initial inquiry in a disparate impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics – such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs – are equally probative for this purpose . . . . The statistics offered bore neither upon the pool of qualified job applicants nor the qualified population in the labor force." [Id., at 4586.]

To accept the position of the court of appeals, said the majority opinion, would open the way for employers to establish racial quotas to avoid having any segment of its workforce racially "imbalanced," and thus subject to a Title VII disparate-impact complaint. Such a complaint, again according to the reasoning of the court of appeals, could only be defended by a show of business necessity. The cost and time of litigation, said Justice White, made this kind of broad approach inappropriate and not in harmony with the intent of Title VII which does not favor racial quotas.

Yet, even if the bottom-line statistics were provided, the majority opinion found two other defects in the plaintiffs' case and the judgment of the court of appeals: (1) As a general matter, the plaintiffs must show that it is the application of a specific employment practice which brought on the racial imbalance. It is true that the plaintiffs have pointed to both objective and subjective hiring practices. What they must prove is that each practice attacked has a significantly disparate impact on employment opportunities for whites and non-whites. In this regard, the majority opinion noted that "liberal" rules of discovery should make the task of the plaintiffs somewhat easier. (2) Finally, Justice White dealt with what the court of appeals referred to as a shifting burden of proof once a prima facie case had been established. Justice White emphasized that there is a real difference between a shift in the burden of proof and a requirement that the employer show its business reasons, that is, its business justification for its actions.

Justice White was unequivocal that the burden of proof at all times remains with the plaintiffs. Practically, what this means is that the burden of persuasion remains with the plaintiffs. The business justification offered by the employer need not be one of demonstrating that the challenged practice was essential or necessary to the business. It is sufficient that the employer adopted the practice in good faith to serve a proper business purpose.

Justice Stevens' dissent took issue with the majority on a number of points. First, he drew a line of distinction between a disparate-treatment case *(Price Waterhouse)* and a disparate-impact case *(Wards Cove)* on the matter of burden of proof. In *Price Waterhouse*, Ms. Hopkins was, in the final analysis, put to the proof of intent: Did her employer intend to discriminate on the basis of gender? On the other hand, intent plays no role in a disparate-impact case. The singular question goes to the effect of an employer's actions; the assumption is that there was no intent to discriminate.

In such a situation, said Justice Stevens, there was every reason to view the employer's show of justification after proof of a prima facie case as an affirmative defense. And that means that the burden of proof should have shifted.

Next, Justice Stevens criticized the majority for the "numerical exactitude" required in terms of the plaintiffs' statistics. The result of such exactitude was to make it either difficult or impossible for the plaintiffs to prove their case especially bearing in mind the nature of the industry, the locations of the plants and camps, and their seasonal work.

It may be, said Justice Stevens, that "virtually all the employees in the major categories of the at-issue jobs were white, whereas about two-thirds of the cannery workers were non-white, may not by itself. . .establish a prima facie case of discrimination." But, how is it possible to lose sight of the employment practices of the employers, and the de facto segregation that exists?

Justices Blackmun, Brennan and Marshall not only joined in the dissent of Justice Stevens, but through Justice Blackmun appended a sharply worded addition: They spoke of taking "major strides backwards in the battle against race discrimination." And, they further stated:

"Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination against non-whites is a problem in our society, or even remembers that it ever was." [Id., at 4593.]

You Be the Judge

For the moment, let us assume that all of the requirements necessary to establish a prima facie case, as set down by Justice White, have been met. Let us further assume that the employers have offered their business justification for the acts which resulted in discrimination. The plaintiffs now want to offer evidence that there are reasonable alternatives to the practices of the employers which will not result in discrimination. (1) The employers object to the receipt of such evidence; they feel that the burden is on the plaintiffs to prove that the justification offered is not the true reason for what was done. (2) However, should the trial court overrule their objection, they want the opportunity to demonstrate that so long as they make a good faith judgment that in their view the alternatives are not desirable from a business viewpoint, there is no more to be said. The plaintiffs object to this position. How would the majority of the Supreme Court rule on the points raised?

Discussion

The majority opinion spoke to the points raised: (1) It is possible, said Justice White, for the plaintiffs to prove that reasonable alternatives were available to the employers. If this were shown, then it would demonstrate that so-called business justification was only a "pretext" for the real reason for the actions challenged, namely, discrimination. (2) Any alternatives offered by the plaintiffs must be as effective as those used by the employers and justified. But, in this regard, said Justice White, courts should listen to employer arguments relating to costs and other burdens incident to using the alternatives imposed. Courts, he continued, are less competent than employers to restructure business practices, and therefore the judiciary "should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit." [Id., at 4588.]

Legislative Discrimination/Affirmative Action

In *City of Richmond v. J.A. Croson Co.*, the Court considered an affirmative action program launched by a city government to remedy what it saw as past racial discrimination in the construction industry. One set of statistics was most compelling in causing the City of Richmond to establish this affirmative action program: While blacks constituted about 50 percent of the city's population, less than 1 percent of the city's prime construction projects had been awarded to minority groups in the five-year period immediately preceding the establishment of the special program.

The terms of the program were adopted after a public hearing. A variety of contracting firms appeared and argued against the program. It was, however, noted that none of the firms had any minority members. It was also noted that only 4.7 percent of all construction firms in the United States were minority owned. And, of these minority firms, fully 41 percent were located in California.

At the time the Richmond program was adopted, the majority opinion of the Court noted, five of the nine Richmond council members were black. Implicit in this, again according to the majority opinion, was the danger that an affirmative action program to end discrimination could turn into a program of majority preference. This in itself, the Court seemed to imply, warranted the imposition of strict standards of review. Justice Marshall strongly dissented from this conclusion: (1) The numerical and political supremacy of any racial group is a factor in the level of scrutiny the Court should apply. But numbers alone do not justify strict scrutiny; they must be coupled with political action. There was no demonstration that this occurred. (2) Indeed, if anything, the Richmond city government showed cooperation between whites and blacks. Of the four white council members, one voted for the program and one abstained.

The program, which related to construction contracts for the city, for our purposes, had these characteristics:

– at least 30 percent of every prime contract was to be set aside for a Minority Business Enterprise (MBE);

– the set-aside applied unless the prime contractor was itself an MBE;

– an MBE was defined as an entity made up of U.S. citizens who are black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut;

– the MBE was not limited to either doing business or even residing in Richmond; and

– the set-aside could be waived by the city if it could be shown that it was difficult in the extreme to find a qualified MBE.

The program was enacted. An Ohio firm, the J.A. Croson Company, bid for and obtained a city construction contract. It tried hard to find an MBE but was unsuccessful. Croson lost the prime contract and challenged the constitutionality of the city program.

In a 6-3 decision, the Supreme Court held that the plan was unconstitutional: it violated the Equal Protection Clause of the Fourteenth Amendment which provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The judgment of the Court was handed down by Justice O'Connor. However, separate concurring opinions were written by Justices Stevens, Kennedy, and Scalia. A dissent was given by Justice Marshall, and it was joined by Justices Brennan and Blackmun.

Despite the 6-3 vote, the majority was divided on a number of points. Five members of the Court, including the Chief Justice and Justices O'Connor, White, Stevens and Kennedy, agreed on the following reasons for striking down the Richmond program:

1. Merely because a legislature (the Richmond city council) called the program "remedial" did not make it so. It is true that courts in general are to be hesitant in questioning legislative findings. However, where those findings touch upon equal protection issues, they are to be subjected to strict scrutiny.

2. The statistical disparity between the number of blacks in the community (50 percent) and those who received prime contracts from the city (less than 1 percent) is irrelevant where special qualifications are necessary to do the questioned work. Justice O'Connor wrote: "[T]he relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." This is far more precise data than that which the city relied upon.

3. The city relied in part on a federal program which allocated a percentage set-aside to minority groups. Justice O'Connor said that reliance was misplaced for two reasons: (a) The federal program was enacted to implement the Fourteenth Amendment. Section 5 of that Amendment gives Congress heightened powers not so clearly available to the states; the Congress is specifically permitted to enact laws which further the purposes of the Fourteenth Amendment. (b) In any event, the federal program had substantially more flexibility as to set-aside waivers and application than the Richmond plan.

4. The Richmond program does not apply only to blacks. It applies as well to Orientals, Indians, Eskimos, or Aleuts. Any program that invades the equal protection guarantee of the Fourteenth Amendment, said Justice O'Connor, must be narrowly tailored to meet the needs of past wrongs. There simply was no showing that any of the other listed groups had suffered discrimination within the Richmond community.

5. There was no evidence that the city could not use "race-neutral" means to overcome past wrongs. For example, Justice O'Connor asked why it would not have been possible to offer small business assistance (both in terms of capitalization and advice) which would have enabled all small businesses, including those operated by blacks, to become better able to compete for city contracts. Implicit in this comment seemed to be an obligation to exhaust other less burdensome means than a quota system to achieve the end of overcoming past wrongs.

Some of the points developed in the concurring opinions should be mentioned here because different facts might well cause a different alignment of the Justices. First, consider Justice Stevens. "It is one matter," he said, "for a legislature to remedy present wrongdoing. It is quite another to fashion laws that focus on the past. This is in the nature of ex post facto legislation. It is to be guarded against. Legislatures should look to the present and the future."

The courts, through their broad discretion as chancellors (in equity), are better equipped to handle past wrongdoing on a case-by-case basis. Second, Justice Kennedy had difficulty accepting what he acknowledged to be precedent in terms of the power of the federal government to enact laws which work toward guaranteeing equal protection within the meaning of section 5 of the Fourteenth Amendment.

That question was not actually before the Court in the Richmond case. And, in any event, subjecting any law to strict scrutiny would tend to soften his concerns. Third, Justice Scalia would brook no racial quotas except to undo present wrongdoing. He stated: "It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that

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will, if it endures within our society, be the source of more injustice still." [Id., at 4148.]

The dissent of Justice Marshall, noted above, argued that race-conscious classifications must indeed serve important government objectives to pass scrutiny under the Equal Protection Clause. But, those purposes, he said, surely were served by the Richmond program.

There was a factual basis for what was done which the Court should not have ignored. Not only did the city council hold public hearings which highlighted the statistical discrepancy between population and the awarding of city contracts, but it also referred to federal studies which clearly demonstrated, on a national basis, discriminatory effect within the construction industry. The same studies established, said Justice Marshall, the enormous difficulty minority groups had in entering the construction business. Why, he asked, shouldn't the city be permitted to call upon and rely on federal studies.

Further, the city program was not only directed to the past, but also to the future. It was intended to prevent city funds from "reinforcing the exclusionary effects of past discrimination." To do otherwise, he said, would cause government to place its imprimatur on private discrimination.

What the city did was no more than what the federal government required in legislation which was earlier approved by the Court. Indeed, the federal government had found that so-called "race-neutral" efforts were largely ineffective; de facto discrimination remained. Richmond had outlawed discrimination on the basis of race many years before the program in question was enacted. Yet, said Justice Marshall, this did not result in any measurable change in the number of minority construction firms receiving prime contracts (less than 1 percent). Why, he asked, should the city be required to follow again the path of the federal government before being permitted to enact set-aside laws?

Finally, he wrote that "there is simply no credible evidence that the Framers of the Fourteenth Amendment sought 'to transfer the security and protection of all the civil rights. . . from the States to the Federal government.'"

You Be the Judge

Assume the City of Richmond embarks on another program designed to ensure minority groups a "fair shake." The core of the program is the appointment of a race equality officer, a kind of ombudsman, who is given the responsibility of reviewing every city contract involving an amount in excess of $25,000. The review is intended to determine whether the contractors are indeed free of discrimination on the basis of race.

Toward that end, the contractors must demonstrate that they have been open to minority involvement. The failure of any contractor to satisfy the race equality officer in this regard will allow the officer to invalidate the contract.

To what extent, if any, would such a revised program be permitted under the majority view in *City of Richmond*?

Some Additional Issues

Do any of the following violate the Equal Protection Clause of the Fourteenth Amendment? Why or why not?

1. A court orders a city to desegregate its swimming pools. The city closes the pools rather than comply with the order.

2. A city leases space to a restaurant in a city-owned building. The restaurant's owner refuses to serve blacks and the city is sued for discrimination. The city argues that the restaurant's owner is acting in his capacity as a private citizen.

3. Japanese fishermen are denied commercial fishing licenses based on their nationality.

4. The parents of a deceased child are separated. Both petition the court to be appointed to administer the child's estate. The Idaho Probate Code says that, all other factors being equal, men are to be given preference over women in such cases.

5. The Federal Food Stamp Act prohibits participation by "any household that contains an individual who is unrelated to any other member of the household."

Discussion

The answer is not entirely clear. Justice O'Connor stated: "Since the city must already consider bids and waivers on case-by-case basis, it is difficult to see the need for a rigid numerical quota." In that regard, Justice O'Connor noted that individual contractors who had been the victims of discrimination might indeed be given preference. However, Justices Stevens, Kennedy and Scalia questioned any legislative preference on the basis of race for past wrongdoing.

Yet, here the program on its face is not designed to give a preference but rather to ensure the absence of discrimination. Perhaps the real question for the majority would be whether the power of the officer in fact induces contractors to establish their own subjective racial quota system to avoid charges of discrimination and to prove the absence of such discrimination.

Conclusion

It is probably unfair to characterize the Supreme Court's decisions as an intent to retreat from civil rights protection. Rather, the majority of the Court seems bent on effecting certain values which, in their effect, do restrict civil rights protection. These values include:

1. The Equal Protection Clause of the Fourteenth Amendment is to be read broadly. Any legislation which impinges upon it will be subject to strict scrutiny.
2. There is a concern for direct proof of civil rights violations. It is the task of the plaintiff, on charges of individual discrimination, to carry the burden of proof. That burden will not shift to the defendant except where the plaintiff has gone as far as the facts permit and where those facts make out substantial discrimination.
3. Where discrimination by way of impact (rather than intent) is alleged, statistical evidence may indeed go to establish the wrong claimed. However, that evidence must be focused sharply on the specific wrong and it must allow for the inference of discrimination.

These, then, are some of the values which surfaced from the 1989 Supreme Court civil rights decisions. Their practical result is to make the plaintiff's burden of proof in civil rights complaints more difficult and make judicial decision-making more complex.

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Generations of Justice

Judicial Review—How Judges Decide/Secondary

Our Living Legacy Project

Signorino

Judical review is one of the cornerstones of our Constitution, but it's an elusive concept, hard to teach, hard to understand. This article provides background that can be shared with students, then involves them in a role play in which they act as judges trying to apply the Constitution to a school case.

What Is Constitutional Judicial Power?

"Judicial power" is the power to hear and decide cases. A court's "jurisdiction" is the power a court has to hear and decide particular types of cases. Under the scheme set up by the Constitution, the federal judicial power is given to and held by the Supreme Court of the United States and "such inferior courts" as Congress may establish. Below the Supreme Court, Congress has established the regular lower federal courts – the district courts (the general trial courts of the federal system) and the court of appeals – and specialized courts, such as the Court of Claims, the Court of International Trade, and the Tax Court.

The judicial power of the federal courts includes all cases mentioned in the Constitution, specifically in Article III, section 2, clause 1:

a. Cases involving laws of the United States.
b. Cases involving treaties made by the United States.
c. Cases involving foreign representatives.
d. Cases of admiralty and maritime jurisdiction.
e. Controversies or disputes in which the United States is involved.
f. Disputes between two or more states.
g. Disputes between citizens of different states.
h. Disputes in which citizens of the same states claim lands granted by different states.

Note: Before the Constitution was changed by the Eleventh Amendment, the federal courts also had power to hear and decide cases involving disputes between a state and citizens of another state and between a state and foreign country. Under the Eleventh Amendment, that power now belongs to the state courts.

The Supreme Court possesses both "original" and "appellate" jurisdiction. Original jurisdiction means the power to hear and decide a case before any other court can consider it. The Supreme Court has original jurisdiction over cases that involve ambassadors, public ministers and consuls and cases in which a dispute between states is involved. Appellate jurisdiction is the power to hear and decide a case on appeal, after another court has tried the case first. The Supreme Court has appellate jurisdiction over all other cases mentioned in the Constitution. Congress may pass laws to change and regulate the Supreme Court's appellate jurisdiction.

Judicial Review

The doctrine of judicial review stems from the power of the courts to determine the proper interpretation of the Constitution, to say what the law is and to rule that laws are permitted or not permitted by "The People" in our Constitution. Laws which are inconsistent with and not permitted by the Constitution are void and have no effect. When a law is rendered void it is as if it had never become a law.

Assume that Congress passed a law removing original jurisdiction of cases affecting ambassadors from the Supreme Court. Additionally, the law grants original jurisdiction in these cases to the Senate. This law would stand directly contrary to the express words written by the Framers in Article III, section 2, clause 2. This law is inconsistent with the Constitution and should not be allowed to operate against the will of the people. Otherwise, Congress could amend the Constitution merely by passing laws, even though Article V of the Constitution contains the Constitution's only valid amendment process.

Congress is prevented from exercising any powers never granted or specifically denied to it through the Constitution's system of checks and balances. In this sense, the Supreme Court's judicial power and the dynamic doctrine of judicial review keep Congress' use of its powers in check and balance.

The early Supreme Court case of *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803), is celebrated for having established the basis for the constitutional doctrine of judicial review. In that case, the Court was thrust into a political struggle when William Marbury petitioned the Court for extraordinary relief. He was one of about 60 circuit court judges and justices of the peace appointed in the last days of John Adams' presidency. He wanted the justices to force the newly-appointed Secretary of State, James Madison, to deliver to him the formal document (commission) authorizing him to serve as a justice of the peace.

The most significant question answered by the Court was whether Marbury could call upon the Supreme Court in the first instance to grant the extraordinary relief requested, as a matter within the Court's original jurisdiction. But as Chief Justice Marshall said, writing for a unanimous Court, the Constitution strictly limits the Supreme Court's original jurisdiction to "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party" (Article III, section 2, clause 2). The next sentence of the Constitution reads: "in *all other* cases, the Supreme Court shall have appellate jurisdiction . . ." (Emphasis added).

Since it would have been inconsistent with the Constitution for the Supreme Court to exercise its original jurisdiction in Marbury's case, the Court concluded that the legislature's act which attempted to give the Court such authority was void and could not be allowed to operate. Chief Justice John Marshall explained the reasoning in support of the Supreme Court's power of judicial review:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

It is important to understand that the Constitution does not give the Supreme Court the express authority to review the decisions of Congress and declare them void. Chief Justice Marshall relied on the common sense logic of the matter before him. First, when asked to hear and decide the case, the Supreme Court was faced with two different types of authority, one the Constitution and the other an act of Congress. Second, it was (and remains) the Supreme Court's function, just like other courts, to declare what the law is. Third, the Supreme Court had to accept the authority of the superior or "higher" law. Fourth, since the people's Constitution is the higher authority, in fact the very source of the "ordinary" authority given to Congress to make a law, then a legislative act that conflicts with the Constitution is inoperative and of no effect.

The concept of judicial review was not a new doctrine introduced by the Supreme Court. In fact, in colonial times, courts decided whether certain laws were consistent or not with colonial charters. Also, there were instances after 1776 and before 1787 in which state courts utilized the doctrine of judicial review with respect to state statutes.

Today, when we think of the power of judicial review, we think of (1) the powers of federal courts to review acts of the United States Congress and state legislatures and (2) the powers of the Supreme Court of the United States to review decisions of the highest state courts.

Constitutional Decision-Making: Active or Passive?

Until former Attorney General Edwin Meese suggested otherwise, it was universally accepted that the decisions of the Supreme Court are the "supreme law of the land." Nearly 200 years of the nation's acceptance of its decisions amount to clear evidence of the confidence we place in the Court.

Meese believed that the Supreme Court had improperly involved itself in matters that used to be handled by Congress and the states within the authority of Congress and the states. Meese openly criticized the Court for its decisions on abortion, desegregation and affirmative action, and the rights of criminal suspects.

Meese, an advocate of judicial restraint, held that the proper bounds of judicial authority give considerable latitude to other government authorities, such as Congress or the states. Only when these bodies have *clearly* contravened the Constitution should the courts overturn their actions. Those who supported his view argued that there is very little to limit what the Court does. Therefore, the judges must restrain themselves from intruding into the functions of other branches of government, except in very clear cut cases.

Judicial activists, on the other hand, are sometimes regarded as the champions of the guarantees contained in the Constitution and Bill of Rights. Under the view of the judicial activists, judges must uphold our Constitution and serve the role of keeping the other branches in check.

It is clear that the power of judicial review is an awesome power, in part because so much of it depends on the discretion available to judges. The basic problem is that words have different meanings, either standing alone or in the context of other words and phrases. The written word can be interpreted differently by reasonable, well-meaning people. If there are different interpretations, the question is how – by what criteria – one interpretation can be selected as the right or best one. Chief Justice John Marshall set the pattern for developing a proper sense of constraint on judicial power by focusing on the Constitution, its overall purposes and the words used, as the paramount source of authority and guidance and as the standard to judge all other laws. Nevertheless, even though justices rely on the words of the Constitution in deciding cases, reference to the text is usually not enough to decide the hard cases that reach the Supreme Court.

Judges can limit themselves to a strict reading of the Constitution or interpret the Constitution in a broad sense to further what they see as the primary objectives of the Constitution. The historic debate over the proper role of the Supreme Court continues in present-day discussions about the correct method for deciding constitutional cases.

Judicial restraint versus judicial activism is one aspect of this discussion. Another concerns what a judge is actually doing in order to decide a particular case. Is it the judge's job to interpret the law or to make the law? Very few people would disagree with the notion that courts and individual judges interpret the law. But in many cases, the parties go to court desiring to know what the law is which controls the dispute between them. Although we are flooded with federal and state laws on an incredible range of subjects, it is not always clear what law applies. It is impossible for a specific law or rule to exist to cover each and every situation. Therefore, it is often necessary for courts, in pronouncing the law which applies to a particular dispute, to state "new" law or to formulate from existing laws and principles a rule by which the dispute can be decided. In that sense, it is clear that courts and judges also "make" law. Whether they overextend themselves in the process really depends on one's point of view about judicial restraint or activism.

Courts should find the objective law which applies to a dispute through principles unconnected to the personal values of the deciding judge, but that may be an impossible task. Either in relying on the Supreme Court's past precedents or in deciding how to select the various laws which may be considered in a dispute, someone's subjective values will always be brought into it.

You Be the Judge

The best way of helping students really understand the role of judges under our Constitution – as well as the debates over the proper way to interpret that document – is to ask students to role play a case in which they will have to apply the Constitution. This particular case involves a school disciplinary matter, and so is both close to students and distant from the Founders, but a wide variety of cases could be used. The key is that students understand that even in a small incident such as this, the Constitution governs how the state shall treat the individual.

This activity can be done as a moot court, in which teams of student attorneys argue the case before an appellate court or the Supreme Court, or you may wish to divide the class into a number of courts which will consider the case separately and then compare decisions.

Set forth below are the facts and issues in a case which will be heard and decided by participating students acting as a panel of judges (the panel can number three, five, seven or nine judges). Tell students "You will deliberate and decide the case. It is your job to act as you would expect a judge to act in the same circumstances. You will first confer with your brother and sister judges and then vote on your decision. Following your vote there will be a question and answer and discussion session. Specifically, you will be asked to explain *how* you decided the case, including what moved or led you to your decision; what factors were critical to your decision; and what steps (process) you followed to reach your decision."

The Facts

A student has brought a lawsuit against the principal and superintendent of his former high school for violations of his constitutional rights to due process under the Fifth and Fourteenth Amendments.

The student-plaintiff, Malcolm Whye, a black student in a predominantly white school, was 17 at the time of the incident leading to the dispute. In the then-recent election of cheerleaders, a black girl, Edna Honey, won a plurality of the votes, but was ultimately not selected for the squad. In class, Malcolm expressed displeasure at this result, and got into an argument over the affair with a white student named Eric Snow. His teacher then sent Malcolm to the principal's office.

Malcolm did not go to the principal's office at once, but came later after the teacher had gone to the office and given the principal his version of what happened. When the student arrived, the principal (with the teacher still present) addressed him with "What's this about your disrupting Mr. Guinn's class?", to which the student replied, "Why are you picking on me about this? Why not Eric, too?"

The principal then told Malcolm, "This does not concern Eric," to which Malcolm responded, "You're punishing me because I'm black and he's white. You honkies are all alike, I can't ever get a fair deal from any of you." At this, the principal told him that such language and such behavior as occurred in the classroom could not go unpunished, and ordered him to take three licks with a paddle. Malcolm refused, and the principal told him that he would have to leave the campus until he was willing to take his punishment. There were only two weeks remaining in the school year, and Malcolm did not return during this time.

Two days after the confrontation, the principal sent a letter to Malcolm's parents explaining his position. There were also telephone communications between the principal and the parents.

The state has a law compelling public school attendance of children through age 17. There is also a law leaving punishment and discipline policy up to the individual school districts. The school in question has an informal "custom" of corporal punishment for behavior which is disruptive or insubordinate.

When Malcolm returned to school the next year – at a new school in a different state – he was informed that he would not graduate with his class because his old school had denied him any credit for the last semester (as the principal had threatened in his letter to the parents).

The Issues

I. Were procedural due process requirements complied with in the imposition of the corporal punishment "sentence"?

The Fourteenth Amendment prohibits any deprivation by the state (or any entity sufficiently connected to or acting with the authority of the state) of "life, liberty or property" *without due process of law*. In order to determine whether that prohibition applies, courts use a two-stage analysis: First, whether the individual interests at stake are included within the Fourteenth Amendment's protection of "life, liberty and property"; second, if protected interests are at stake, the court must decide what procedures constitute "due process of law."

Generally, in *criminal proceedings*, due process includes (1) notice of the specific charges against an individual; (2) an opportunity to be heard in a fair hearing to answer and defend the charges; (3) the right to be represented by an attorney; and (4) the right to confront and cross-examine the individual's accusers.

In the main Supreme Court case on corporal punishment, *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401 (1977), the Supreme Court found that corporal punishment in public schools raises a constitutionally-protected "liberty" interest under the Fourteenth Amendment. But the Court ruled that students' ability to sue in Florida's courts on the basis of existing remedies recognized by the legal system was adequate to meet the requirements of procedural due process.

In *Ingraham*, the Supreme Court explained that the interest at stake was the "right to be free from and to obtain judicial relief for, unjustified intrusions on personal security." The Court recognized that it was "among the historic liberties protected" from governmental power. In the Court's view, however, "the available civil and criminal sanctions for abuse – considered in light of the openness of the school environment – afford significant protection against unjustified corporal punishment." The Court also determined that a hearing, even an informal one, would substantially burden the use of corporal punishment as an "immediately-administered disciplinary measure due to the time and use of school personnel required.

An earlier case, *Baker v. Owen*, 395 F.Supp. 294, 423 U.S. 907 (1975) (M.D.N.C.), upheld students' rights to due process before the imposition of corporal punishment, but only to a limited degree. Basically, except where student behavior "shocks the conscience," (1) the student must be "informed beforehand that specific misbehavior could occasion" corporal punishment (Does such a "custom" as here meet this test?); and (2) the punishment must be inflicted in the presence of a second official, "who must be informed beforehand and in student's presence of the reasons for the punishment." This is not to give the student a chance to give his side to the second official, which the court felt unnecessary, but to "allow the student to protest, *spontaneously*, an egregiously arbitrary or contrived application of punishment."

Are the requirements of *Baker v. Owen* met here? Malcolm could argue not, since such an exchange between teacher and principal did not take place in his presence. If the defendants (the principal and superintendent) answer that such was not necessary, since clearly everyone present knew the reason for the meeting, Malcolm can claim that their answer avoids the primary policy reasons for the requirement. The defendants can also argue that Malcolm, by his refusal to discuss the matter or by his abusive language, waived any further hearing right. The issue basically is whether the opportunity for a hearing, given that one is required to some extent at least, was "granted at a meaningful time and in a meaningful manner," under the circumstances.

There may also be an issue of whether corporal punishment is ever an appropriate "first line" punishment for a 17-year-old student, in light of a dictum in *Baker v. Owen* to the effect that corporal punishment may never be permissible for adults. The court also implied that it would be desirable in any event to attempt "modifying behavior by some other means" before resorting to corporal punishment, such as extra assignments, keeping the students after school, etc.

The defendants' answer might be that the problems of keeping order in the schools are, if anything, more serious with high school students than with sixth graders (the student in *Baker*), so the availability of a corporal punishment option is arguably just as necessary. Further, that, 17 or not, high school students are not "adults" in the sense the court meant, because they are still of school age under the authority of their parents and the school. Also, in *Ingraham v. Wright*, the Supreme Court *rejected* an attack on corporal punishment of school children based on the Eighth Amendment's prohibition against cruel and unusual punishment. Therefore, public schools are not *forbidden* from imposing corporal punishment because of the United State Constitution, so long as due process requirements are met.

II. Even if due process was satisfied for purposes of inflicting corporal punishment, is the actual punishment imposed – a conditional suspension and loss of a semester's credit – a permissible substitute without further procedural safeguards?

If the issue were purely corporal punishment, there is a good deal of potential flexibility in *Baker v. Owen* as to the extent of a hearing required, or even whether a hearing is required at all. But in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), the Court was a bit more stringent regarding the due process requirements preceding suspensions of students. Specifically, there would be stronger arguments than under *Baker* that the suspension here was imposed with inadequate notice and opportunity to be heard. Under *Goss v. Lopez*, the Supreme Court calls for "oral or written notice of the charges against [the student] and, if he denies them, an explanation of the evidence . . . and an opportunity to present his side of the story." The policies are somewhat different here, especially in that a suspension, much more than corporal punishment, results in a disruption or loss of education and also can damage a student's reputation.

On the defendants' side are arguments of *waiver* (the student was given an opportunity to speak, but declined, as above with corporal punishment) and *self-determination* (the student or his parents had full control over the extent of his punishment). As to the latter, there may be a question of whether this is a permissible burden to place on the student. It may also be that the self-determination argument leads too far from the central issue of whether due process was satisfied for purposes of what was effectively a suspension.

The argument could also be made here that an appropriate substitute punishment would be one of approximately equal severity, such as extra work or time after school, and that suspension as a "first line" substitute is impermissibly severe. This is basically the gist of the second issue as stated.

Since the student was out for the remainder of the year, and lost a semester's credit, if the plaintiff can overcome the self-determination argument he might even argue that the punishment was tantamount to an expulsion, for which even more stringent procedural safeguards attach under *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961) and *Goss v. Lopez*.

Questions

1. What decision would you make? Why?
2. How did you decide?

(a) Did you first get a "sense" or a "feel" for what is right and what is wrong and then try to find ways to justify the result you think is best?

(b) Or did you take legal principles explained in "The Issues" section and see how they applied to or fit with the facts of the case?

3. Should these issues be decided by the Supreme Court as matters of federal (as opposed to state) constitutional law? Why or why not? Should they be decided by the Court at all? Did any of the judges feel that disputes such as this do not have a constitutional dimension, but rather should be decided on the basis of state law? In other words, were any of the judges advocates of judicial restraint?

This activity is adapted from one of a series of eight activities on the Constitution, developed by Our Living Legacy, An Educational Celebration of the Bicentennial of the Constitution. The research and writing for that effort was the work of four organizations: The Division of Social Studies, School District of Philadelphia; World Affairs Council of Philadelphia; Young Lawyers Section of the Philadelphia Bar Association; and Temple – Law, Education and Participation (LEAP), Temple University School of Law.

Generations of Justice

Are There Limits to Symbolic Speech?/Secondary

Steve Jenkins

UPI/Bettmann Newsphotos

Among the fundamental freedoms proudly proclaimed is freedom of expression. Often we hear expressions such as "I've got a right to express my opinions," or "You can't interfere with my free speech rights," and any efforts to prohibit individual expression may be met with the strong protest, "That's unconstitutional."

Brainstorm as many responses as possible to the following questions:

- What is freedom of speech?
- What, if anything, does the U.S. Constitution say about freedom of speech?
- Are there any limits to freedom of speech?

The First Amendment of the U.S. Constitution states: "Congress shall make no law. . . abridging the freedom of speech, ..." Review your responses to the questions about freedom of speech and limits to freedom of speech. Did everyone agree in their responses, or were there disagreements? For example, do you think everyone would agree that students should be able to say anything they wish or wear anything they want if they claim that this is a part of their freedom of expression? Discuss responses to this question.

Who decides what speech is protected by the First Amendment? Since the First Amendment only refers to "Congress," do states have the power to restrict speech? Although the U.S. Constitution does not directly answer these questions, the Supreme Court of the United States, using the doctrine of judicial review [*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 1803], has staked a strong claim of judicial supremacy in interpreting the Constitution when justiciable conflicts come before the Court. For example, may a state make it a crime to publish pamphlets that advocate overthrowing organized government by violent and other unlawful means (e.g., a pamphlet exclaiming, "Grab a Gun and Overthrow the Bums in the State House, the White House and Congress"), or does an individual's First Amendment protection of freedom of speech, or of the press, protect him or her from being charged for this type of crime?

Benjamin Gitlow was arrested and convicted of violating this type of state law, the New York State Criminal anarchy statute. Gitlow appealed his conviction to the U.S. Supreme Court, claiming that the New York law violated his First Amendment protections of speech and press. The Supreme Court upheld the statute and conviction, but acknowledged that First Amendment protections should also protect individuals from state, as well as federal governments. In *Gitlow v. New York*, 268 U.S. 652 (1925), the Court expressed this extension, claiming, "For present purposes we may and do assume that freedom of speech and the press – which are protected by the First Amendment from abridgement by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."

While the Court recognized the importance of First Amendment protection against state action, the majority of the Court concluded that Gitlow did not have an absolute right to speak or publish. According to the majority, Gitlow's speech could be punished because it created a threat and danger to organized government. The Court's majority claimed,

> That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. . . . The State cannot reasonably be required to measure the danger from every utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that smoldering for a time may burst into a sweeping and destructive conflagration. . . . It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace of imminent and immediate danger of its own destruction, but it may, in the exercise of its judgment, suppress the threatened changes in its incipiency.

Cases like *Gitlow* become precedents for courts in deciding similar cases. Law libraries are full of extensive opinions on the meaning of the three little words, "freedom of expression." For example, is something you wear a form of expression (i.e., sweatshirt with a message)? If you believe it is expression, is the freedom to wear the expression protected by the First Amendment? What do you think? The U.S. Supreme Court has decided several cases involving symbolic expression. The following section examines some of these legal precedents.

Legal Precedents

Note: As an additional strategy, the teacher may wish to divide the students into small groups (3-5 students per group) and assign each group one of the following cases to analyze and decide. Have each group read the assigned case, explain the pertinent laws in plain English, answer the follow-up questions, read the Court's majority decision, and compare their group's decision with the Court's decision.

CASE 1

[Based on *Halter v. Nebraska*, 205 U.S. 34 (1907)]

In 1903, the Nebraska legislature passed a law to protect the flag of the United States. The law entitled "An Act to Prevent and Punish the Desecration of the Flag of the United States" stated:

> §2375g. Any person who, in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard,color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding $100, or by imprisonment for not more than thirty days, or both, in the discretion of the court.
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> §2375h. The words flag, color or ensign, as used in this act, shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color, or ensign, of the United States of America, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, color, standard, or ensign of the United States of America.
>
> §2375i. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission or appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, said flag, disconnected from any advertisement. 1 Cobbey's Ann. Stat. (Neb.) 1903, chap. 139.

Nicholas Halter and Harry Hayward were arrested and convicted of violating the Nebraska flag statute. The criminal charges accused Halter and Hayward "of having, in violation of the statute, unlawfully exposed to public view, sold, exposed for sale, and had in their possession for sale, a bottle of beer upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States." Halter and Hayward claimed that they were not guilty because the Nebraska statute should be null and void because it infringed on their personal liberty guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Now Answer the Following

1. Should states and/or the federal government have the power to enact laws like this Nebraska statute that prohibits using the flag for advertising purposes? Explain your answer.
2. If you were the judge or a juror considering this case, what would you decide and why?

The U.S. Supreme Court, with only one dissenting opinion, upheld the Nebraska law and the convictions. The Court stated:

> . . . more than half of the states of the Union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. The fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the Constitution of the United States. . . .
>
> In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or State, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness, and prosperity of the people.
>
> Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the Constitution of the United States, or that it relates to a subject exclusively committed to the national government. From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not, then, remarkable that the American people, acting through the legislative branch of the government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the nation. Indeed, it would have been extraordinary if the government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

Compare your decision with the Supreme Court's majority opinion.

CASE 2

[Based on *Stromberg v. California*, 282 U.S. 359 (1931)]

A California law made it a crime to use certain symbols to demonstrate opposition to organized government. The law made it a felony to "display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government."

Yetta Stromberg, a member of the Youth Communist League in California, led a group of League members in displaying and saluting the red Soviet (i.e., Russian) flag. She was arrested and convicted of violating the California law.

Now Answer the Following

1. In your opinion, is public display of another nation's flag that might represent an unfriendly nation a protected form of speech, or should the government be able to make it a crime to display the flags of unfriendly nations? What if a person displayed a flag of an enemy nation (i.e., the United States has declared war on or is engaged in actual military combat with this nation)?
2. If you had been the judge hearing Yetta Stromberg's case, what would you have decided, and why?

The U.S. Supreme Court struck down the California law, declaring that the law was too vague and therefore infringed on freedom of speech. The Court's majority stated:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system. A statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment . . . .

Compare your decision with the Supreme Court's decision.

CASE 3

[Based on *United States v. O'Brien*, 391 U.S. 367 (1968)]

In 1965, Congress amended the Universal Military Training and Service Act of 1948. This Act required all males eighteen or older to register with Selective Service (i.e., the draft). After registration, a person received a Selective Service number and a registration certificate, commonly called a draft card. The 1965 addition to this Act made it a crime for any person to "forge, alter, knowingly destroy, knowingly mutilate, or in any manner change any such certificate (i.e., draft card)."

On the morning of March 31, 1966, David Paul O'Brien burned his Selective Service registration certificate on the steps of the local courthouse. A large crowd, including several FBI agents, witnessed O'Brien's actions. Some members of the crowd started attacking O'Brien immediately after the draft card burning. An FBI agent safely escorted O'Brien away from the angry crowd.

O'Brien told the FBI agents that he had burned his draft card to express his opposition to the Vietnam War and against the draft. O'Brien was tried and convicted of violating the Universal Military Training and Service Act as amended by Congress in 1965.

Now Answer the Following

1. Should the federal government make it a crime to knowingly mutilate or destroy a Selective Service registration certificate (i.e., draft card)? Explain your answer.
2. If you had been the judge in this case, what would you have decided and why? Would your decision be any different if O'Brien had publicly burned a picture of the president of the United States? What if he had burned an army uniform? Explain your answers.

The U.S. Supreme Court upheld the conviction and the law. With only one dissenting opinion, the majority concluded:

> We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong . . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it . . . . [Pursuant to its power to classify and conscript manpower for military service], Congress may establish a system of registration for individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

Compare your decision with the Supreme Court's decision.

CASE 4

[Based on *Street v. New York*, 394 U.S. 576 (1969)]

The state of New York had a statute to prevent flag desecration. The New York law made it a crime to "mutilate, deface, defile or defy, trample upon, or cast contempt upon [the American flag] either by words or act."

Sidney Street, a New York resident, became angry when he heard the news that civil rights activist James Meredith had been shot by a sniper in Mississippi. Street seized his own American flag out of a drawer. He took the flag to a nearby street corner and burned it. A police officer, who arrived at the scene, claimed he heard Street say, "We don't need no damm flag . . . . If they let that happen to Meredith, we don't need an American flag." Street was arrested and convicted of violating the New York flag desecration law.

Now Answer the Following

1. Briefly explain, or give examples of, what you believe is meant by the phrase "cast contempt upon [the American flag] either by words or act." In your opinion, should it be a crime for someone to curse or shout negative comments at an American flag? Explain your answer.
2. If you had been the judge in Sidney Street's case, what would you have decided and why?

In a very close decision (5-4), a majority of the U.S. Supreme Court overturned Street's conviction and decided that the New York law violated the First Amendment protection of freedom of speech. The majority opinion of the Court stated that the New York law "was unconstitutionally applied in [Street's] case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag." It should be noted that the Court did not give an opinion on the flag-burning issue, since Street was convicted for verbally attacking the flag. Compare your decision with the Supreme Court's decision.

CASE 5

[Based on *Cohen v. California*, 403 U.S. 15 (1971)]

The state of California had a disturbing-the-peace statute that made it a crime to "maliciously and willfully disturb the peace or quiet of any neighborhood or person" by "offensive conduct."

Paul Cohen wore a jacket with a visible inscription, "Fuck the Draft," into a Los Angeles courthouse hallway. His jacket was clearly seen by women and children in the corridor. Cohen claimed that he wore his jacket to demonstrate his strong opposition to the Vietnam War and the draft. Cohen removed the jacket when he entered a courtroom, but when he left the courtroom and put the jacket back on, he was immediately arrested by a police officer. Cohen was charged with violating the California disturbing-the-peace statute. The prosecution claimed that Cohen's conduct "might cause others to rise up to commit a violent act against him or attempt to forcibly remove his jacket." The message on Cohen's jacket was likely to provoke others and, thus, would disturb the peace. Cohen was tried and convicted of violating the disturbing-the-peace statute.

Now Answer the Following

1. In your opinion, should governments have laws like the California disturbing-the-peace law? Explain your answer. Can written words (i.e., inscriptions) or drawings (i.e., illustrations) on the things people wear represent "offensive conduct"? Explain your answer.
2. If you were the judge in Cohen's case, what would you decide and why? Would your decision have been different if Cohen had worn his jacket, with the inscription, into a public school? Explain your answer.

A five-member majority of the U.S. Supreme Court overturned Cohen's conviction, deciding that Cohen's freedom of speech had been violated by his conviction. The majority concluded:

> [The] constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restrains from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. . . .
>
> It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

Compare your decision with the Supreme Court's decision.

CASE 6

[Based on *Smith v. Goguen*, 415 U.S. 566 (1974)]

The state of Massachusetts had a flag-misuse law that made it a crime for a person to publicly treat the flag of the United States contemptuously. Specifically, the law stated:

> Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or to use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both.

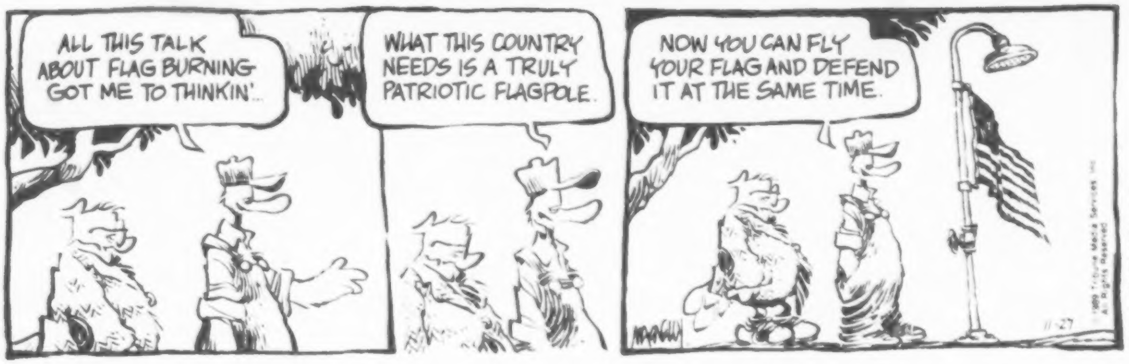
Valarie Goguen wore a small cloth version of the U.S. flag sewn near the left rear pocket of his blue jeans. The flag was approximately four by six inches. A police officer saw Goguen standing and talking with a group of persons on a public street. Neither Goguen or the group appeared to be involved in any demonstration or protest. There was no apparent peace disturbance or disruption of traffic. When the police officer asked Goguen about the flag sewn to his jeans, the other persons all laughed. After a brief conversation, the crowd dispersed. Later that day another police officer observed Goguen walking in the downtown business district. Goguen was still wearing the jeans with the sewn-on flag. One of the officers filed a complaint against Goguen, charging him with violating the contempt section of the Massachusetts flag-misuse statute. Goguen was tried and convicted of violating this law.

Now Answer the Following

1. Should governments have the power to pass laws making it a crime to treat the flag contemptuously? Explain your answer. In your opinion, is it contemptuous to sew a flag on to an article of clothing that a person wears in public? Explain your answer.
2. If you had been the judge in Goguen's case, what would you have decided and why?

A majority of the U.S. Supreme Court decided that the phrase "treats contemptuously" was too vague and therefore unconstitutional. The majority concluded:

> Flag contempt statutes have been characterized as void for lack of notice on the theory that "[w]hat is contemptuous to one man may be a work of art to another." Goguen's behavior can hardly be described as art. Immaturity or "silly conduct" probably comes closer to the mark. . . . Flag wearing in a day of relaxed clothing styles may be simply for adornment or a ploy to attract attention. It and many other current, careless uses of the flag nevertheless constitute unceremonial treatment that many people may view as contemptuous. Yet in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag. The statutory language under which Goguen was charged, however, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not. Due process requires that all "be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct.


ALL THIS TALK ABOUT FLAG BURNING GOT ME TO THINKIN'...
WHAT THIS COUNTRY NEEDS IS A TRULY PATRIOTIC FLAGPOLE.
NOW YOU CAN FLY YOUR FLAG AND DEFEND IT AT THE SAME TIME.
11-27

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618, 619, 83 L. Ed. 888 (1939), and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). Given today's tendencies to treat the flag unceremoniously, those notice standards are not satisfied here.

CASE 7

[Based on *Spence v. State of Washington*, 418 U.S. 405 (1974)]

The state of Washington had a statute making it a crime to desecrate the flag and an "improper use" statute that made it a crime to display the flag improperly. The "improper use" statute stated:

> No person shall, in any manner, for exhibition or display: (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of state . . . or (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

Harold Spence, a college student, hung his United States flag from the window of his apartment. The flag was hung upside down, and attached to the front and back of the flag was a peace symbol made of removable black tape. The flag with the peace symbol was approximately three feet by five feet, and it was plainly visible to passersby. The peace symbol covered about half of the surface of the flag.

Three police officers observed the flag and entered the apartment building where Spence lived. Spence met the officers at the front door of the apartment. According to the police, Spence said, "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." Spence permitted the officers to enter his apartment. The officers seized the flag and arrested Spence. Spence cooperated with the officers, and no disruption or disturbance occurred.

Spence was charged with violating Washington's "improper use" flag statute. During Spence's jury trial, he testified that he displayed the flag with the peace symbol to protest against the U.S. invasion of Cambodia and the killings of students by National Guardsmen at Kent State University in Ohio. He testified, "I felt that the flag stood for America, and I wanted people to know that I thought America stood for peace." Spence also testified that he used removable tape in assembling the peace symbol so that the flag would not be damaged.

The jury found Spence guilty of displaying the flag with a peace symbol attached, a violation of the "improper use" law.

Now Answer the Following

1. Should states pass laws like the Massachusetts improper use law making it a crime to display the flag in certain ways? Explain your answer.
2. If you had been the judge or jury in Harold Spence's case, what would you have decided, and why?

A majority of the U.S. Supreme Court reversed Spence's conviction. The majority opinion stated:

> A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any government. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag. Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication . . . .
>
> The Court for decades has recognized the communicative connotations of the use of flags. *E.g., Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931). In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . . ," and "a short cut from mind to mind." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632, 63 S. Ct. 1178, 1182, 87 L. Ed. 1628 (1943). On this record there can be little doubt that appellant [Spence] communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.
>
> Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 2D L. Ed. 731 (1969) . . . .
>
> For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *West Virginia State Board of Education v. Barnette*, 319 U.S. at 632-633, 63 S. Ct. at 1182. It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings . . . .

> Appellant was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it. He displayed it as flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated.

Review the above legal precedents. According to the precedents, did the U.S. Supreme Court ever issue a majority opinion on the issue of flag burning? Explain your answer.

Other Federal Court Flag Cases

Many flag-desecration cases have been decided by lower federal courts. In several of these cases, convictions were upheld because the U.S. Supreme Court refused to review each case. The following summarizes some of the convictions that resulted because the Supreme Court declined to hear the cases on appeal.

Radich v. New York, 401 U.S. 531 (1971) – The U.S. Supreme Court let stand the conviction of Stephen Radich, the owner of a Madison Avenue art gallery in New York City. Radich was found guilty of casting contempt on the U.S. flag in violation of New York law. Radich had displayed a gun caisson wrapped in an American flag, along with some other anti-war sculptures using the American flag in ways that might appear offensive to some, in his gallery window.

Cahn v. Long Island Vietnam Moratorium Committee, 418 U.S. 906 (1974) – The U.S. Supreme Court declined to review a federal court of appeals decision upholding the conviction of a New Yorker who had displayed on a car window a decal containing a peace symbol with the flag in the background. The New York flag-desecration law made it a crime to place any design on a U.S. "flag, standard, color, shield, or ensign."

Farrell v. Iowa, 418 U.S. 907 (1974) – The U.S. Supreme Court refused to review the conviction of Farrell, who had been found guilty of burning a U.S. flag in violation of Iowa's flag-desecration law.

Kime v. United States, 459 U.S. 949 (1982) – The U.S. Supreme Court refused to review the conviction of Teresa Kime and Donald Bonwell, who were found guilty of setting fire to a privately owned flag on a public sidewalk in front of the Federal Building in Greensboro, North Carolina. Kime and Bonwell were convicted of casting contempt on a U.S. flag in violation of federal law, 18 U.S.C. §700.

These precedents will assist you in analyzing the following case, and in preparing and conducting the following mock trial activity.

The Case of Gregory Lee Johnson

Read the case – based on *Texas v. Gregory Lee Johnson*, 57 U.S.L.W. 4770 (1989) – and answer the questions that follow. The decision may change the course of constitutional history.

THE FACTS

In August of 1984, a group of approximately 100 protesters took part in a series of demonstrations at the Republican National Convention in Dallas, Texas. Gregory Lee Johnson was among the 100 protesters.

The demonstrators marched through Dallas streets, chanting political slogans and stopping outside several corporations to stage "die-ins" intended to dramatize the consequences of nuclear war. At several locations, some of the demonstrators spray-painted the walls of buildings and overturned potted plants. There is no evidence that Johnson took part in the spray-painting or overturning the plants. Johnson did accept an American flag that was handed to him by a fellow protester, who had taken the flag from a flag pole outside one of the buildings where the protesters had demonstrated.

The protesters ended their march and demonstrations in front of Dallas City Hall. There Johnson unfurled the American flag that he had accepted, poured kerosene on the flag, and set it on fire. While the flag was burning, the protesters chanted, "American, the red, white, and blue, we spit on you."

After the flag burning, the demonstrators dispersed. A witness to the flag burning collected the flag's remains and buried them in his backyard.

No one was physically injured or threatened during the demonstrations, although several witnesses later testified that they had been seriously offended by the flag burning.

Out of all of the protesters, Gregory Lee Johnson was the only demonstrator charged with a crime. He was charged with descration of a venerated object (i.e., the American flag), in violation of the Texas Penal Code. The Texas law – Tex. Penal Code Ann. Section 42.09 (1989) – provides in full:

> (a) A person commits an offense if he intentionally or knowingly desecrates:
>
> (1) a public monument;
>
> (2) a place of worship or burial; or
>
> (3) a state or national flag.
>
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
>
> (c) An offense under this section is a Class A misdemeanor.

(Conviction could result in a sentence of one year in prison and a fine of $2,000).

Should Gregory Lee Johnson be found guilty of violating this law? The following arguments should help you reach a decision.

TEXAS' ARGUMENTS

In prosecuting Johnson, the state of Texas claimed that Johnson's action was a breach of peace, and that the state of Texas's antidesecration law tries to preserve the flag as a symbol of nationhood and national unity. The state argued that Johnson's flag burning clearly disturbed the peace of many of the eyewitnesses who were seriously offended by the action. Furthermore, for more than 200 years, the American flag has served as a symbol of the nation, a unique treasure that deserves government protection from desecration. Congress and almost all states have passed laws that prohibit misuse of the American flag, including flag burning. Johnson clearly misused the flag. In addition, the U.S. Supreme Court has even upheld the conviction of an individual for publicly burning his draft card *(United States v. O'Brien*, 391 U.S. 367 (1968)). Although the individual burned the draft card as an expression of opposition to the Vietnam War, the Court concluded that draft card burning was not a constitutionally protected activity. A majority of the Court claimed that this individual had many other means of peaceful protest. The Court has often recognized the limits of free speech (e.g., restricting speech that may incite violence or that causes a clear and present danger). Therefore, Johnson should be punished for violating the Texas antidesecration statute.

JOHNSON'S ARGUMENTS

Johnson argued that the First Amendment protects freedom of speech, even speech that may offend others, even the majority. The flag is a political symbol, and the burning of the flag is a form of symbolic speech, demonstrating opposition to the symbol and what the symbol may represent. Furthermore, no one was injured by the flag burning. There were no fights or riots. Besides, Johnson seems to have been singled out for prosecution, since only he, of all the demonstrators, was charged.

In addition, the U.S. Supreme Court has recognized the value of symbolic speech. The Court upheld the right of students to wear black arm bands in public schools to protest the Vietnam War, as long as the student expression did not substantially disrupt school (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)). The Court has also protected actions that may appear to offend national patriotism. For example, the Court has concluded that students cannot be compelled to say the pledge of allegiance, although the pledge is also a symbol of nationhood (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)). Johnson believes the Texas law against flag desecration violates the First Amendment protection of free speech and should be declared unconstitutional.

YOU BE THE JUDGE

1. Facts – What are the important facts in this case? What is the major problem(s)? Who are the sides, or parties, in this case?
2. Legal Issues – What laws (i.e., constitutional principles, statutes, rules) might apply to this case?
3. Arguments – What arguments would you make for each side (i.e., Johnson and the prosecution – the state of Texas) in this case?
4. Decision – If you were the judge in this case, what would you decide and why? Would you agree with Johnson, would you agree with the state, or would you offer a different opinion? Be sure to explain your decision.
5. Hypotheticals – Would your answer have been different if Johnson had burned or desecrated a copy of the U.S. Constitution? What about a state constitution? What if Johnson had held up the flag and cursed at it and repeated the poem and spat on the flag? What if Johnson had destroyed the flag as an act of vandalism without any purpose of protesting? What, if anything, should be done to persons who burn American flags on foreign soil? For example, if a protester burned a U.S. flag on the grounds of a foreign embassy in the United States, should he or she be charged with a crime? Explain your answer.
6. Alternative Solutions – Are there any other ways of resolving this conflict? For example, should there be a constitutional amendment to protect the flag and prohibit physical desecration of the flag; or should greater tolerance for strong political expression and protest be encouraged? Explain your answer.

Gregory Lee Johnson was tried and convicted of violating the Texas Penal Code Ann. §42.09(a)(3)(1989). He was sentenced to one year in prison and fined $2,000. Johnson appealed his conviction and the Texas Court of Criminal Appeals reversed Johnson's conviction. It held that the state of Texas violated the First Amendment by prosecuting and punishing Johnson for burning the flag in these circumstances.

The state appealed the decision to the U.S. Supreme Court. In a highly emotional 5-4 decision, a majority of the Supreme Court agreed with the court of appeal's decision to reverse Johnson's conviction. Writing for the majority, Justice Brennan concluded:

> The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by – as one witness here did – according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.
>
> Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore affirmed.

In a concurring opinion, Justice Kennedy stated:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases. . . .
>
> For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statement must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remain that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

In one of two strongly worded dissenting opinions, Chief Justice Rehnquist proclaimed:

> The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag. . . .
>
> As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived for [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order.

In an emotional dissent read from the bench, Justice Stevens stated:

> A country's flag is a symbol of more than "nationhood and national unity" . . . .
>
> So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling

> Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other people who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.
>
> The value of the flag as a symbol cannot be measured. . . .
>
> The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others – perhaps simply because they misperceive the intended message – will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. . . . The case has nothing to do with "disagreeable ideas." It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.
>
> The Court is therefore quite wrong in blandly asserting that respondent [Johnson] "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray paint – or perhaps convey with a motion picture projector – his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

Enrichment Experiences

Contact a member of your state legislature or a law librarian and seek information on the following:

1. Does your state have a statute about the use and/or misuse of the state or American flag? Briefly describe the law or laws on flags.
2. Have the flag laws changed since your state passed its first flag law(s)? If yes, describe the changes. Bonus: What actions, if any, influenced the passage of the flag laws? For example did they flag law follow a wave of patriotism, or was it a reaction to some protesting act?
3. Are there any current efforts to change laws to protect the state or American flag? For example, is the state legislature considering supporting an amendment to the U.S. Constitution to protect the flag? If yes, explain the wording of the amendment.

Extra Enhancement Activities

(Contact a state or local bar association or law-related education project for assistance with these activities.)

DEBATE

Have students research the wording of an amendment or statute regarding protecting the flag from desecration, express this in the form of a resolution ("Resolved, . . . "), then divide the students into groups "for" or "against" the resolution and conduct a debate.

Constitutional Amendment

President Bush is supporting an amendment to the U.S. Constitution to address the flag-burning issue. The proposed constitutional amendment states, "The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States."

In a Senate vote late in the 1989 session, the proposed amendment fell 15 votes short of the two-thirds required to pass a constitutional amendment, making it unlikely that Congress will in the near future approve an amendment to be presented for ratification to the states.

Federal Statutory Changes

In the months following the *Johnson* decision, more than fifty proposals were introduced to amend the Constitution or enact federal legislation making flag desecration a crime. The bills introduced in the U.S. Senate and House of Representatives would have amended the federal flag law, 18 U.S.C. 700, which makes it a crime to cast contempt upon the U.S flag.

The wording of the House bill stated "Whoever knowingly mutilates, defaces, burns, or tramples upon any flag of the United States shall be fined . . . or imprisoned for not more than one year, or both." Under the Senate bill, anyone who "knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States" would be subject to a $1,000 fine, one year in prison, or both, if found guilty.

Under the version finally passed by both houses and allowed to become law without President Bush's signature, anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" any American flag is subject to a $1,000 fine and a year in jail.

(Editor's note: In its first court test, a federal court judge in Seattle declared the act unconstitutional on February 21, 1990; as this issue goes to press, the U.S. Attorney's Office, the Department of Justice, and the Solictor General were conferring regarding a possible appeal to the Supreme Court (a provision in the act provides for direct appeal to the Court)).

MOCK TRIAL

Review the facts of the *Johnson* case, develop some witness statements for each side (e.g., Gregory Lee Johnson, a co-demonstrator, a witness offended by Johnson's actions, and a police officer), and conduct a mock trial.

Comparative Constitutional Studies

Research other constitutions to locate provisions concerning flags, and answer the following:

What does the constitution state, if anything, about the flags? Does the constitution address the issue of punishment for misusing the flag? Explain the wording. For example, flags are mentioned in the Constitution of the People's Republic of China and the Constitution of the Russian Socialist Federal Soviet Republic:

> Article 136
> The national flag of the People's Republic of China is a red flag with five stars.
>
> Article 137
> The national emblem of the People's Republic of China is Tain'anmen in the centre illuminated by five stars and encircled by ears of grain and a cogwheel.
>
> Article 89
> The arms of the Russian Socialist Federal Soviet Republic shall consist of a sickle and a hammer, gold upon a red field and in the rays of the sun, the handles crossed and turned downward, the whole surrounded by a wreath of ears of grain, with the inscriptions: (a)"Russian Socialist Federal Soviet Republic" and
> (b)"Proletarians of All Countries, Unite!"

Article 90
The commercial, naval, and military flag of the Russian Socialist Federal Soviet Republic shall consist of red (scarlet) materials, on the upper left corner of which, near the staff, are the letters in gold "RSFSR" or the inscription "Russian Socialist Federal Soviet Republic."

Review the proposed amendment to the U.S. Constitution. How does this compare with the constitutional flag references in the Soviet and Chinese constitutions?

Moot Court Appellate Activity

The following describes an effective strategy for further examining these issues:

After reviewing the *Johnson* case, the members of the class will serve as Supreme Court justices, law clerks, and attorneys for the petitioners and respondents. (The petitioner is the party making the appeal to the Supreme Court, and the respondent is the defendant, the party responding to the petitioner). The Supreme Court's procedures are simplified to the following steps.

A. Attorney teams (4-6 people) for the petitioner and for the respondent (4-6 people) prepare arguments to support their positions and present these to a court of nine justices. Each side is allowed four minutes for its presentation.

B. As the court (9 justices and 9 clerks) hears the arguments, justices, with the assistance of law clerks, can interrupt to ask questions. After all have spoken, the chief justice moderates a five-minute conference in which justices and law clerks try to change each others' minds. At the end of the conference, the justices take a final vote.

Students should plan to use the various cases (precedents) discussed above to help them prepare for this activity.

INSTRUCTIONS FOR ATTORNEYS REPRESENTING THE PETITIONERS

As attorneys for Texas, you are responsible for giving the best explanation for why the state's actions were *not* a violation of the First Amendment rights of Gregory Johnson. Consider arguments which would support the following claims:

- Johnson is not being prosecuted for a protected expression of ideas. He was prosecuted for burning the flag, not the idea behind it.
- The lower court was wrong in saying the act could only be prosecuted if there was a clear and present danger to the public. Texas's interest is not in preventing violence, but in protecting the flag as a symbol of national unity.
- If clear and present danger does apply, the statute meets the test, since flag burning is likely to cause violence.
- If Johnson had a First Amendment right to burn the flag as an expression of beliefs, Texas had a greater interest in preserving the flag as symbol of national unity, and in reducing the liklihood of violent conflict over flag burning.

INSTRUCTIONS FOR ATTORNEYS REPRESENTING THE RESPONDENTS

As attorneys for Johnson, you are responsible for giving the best explanation for why his First Amendment rights were violated by the state's actions.

Consider arguments which would support the following claims, that:

- His conduct was symbolic speech and is protected by the First Amendment.
- Since his conduct was protected, the state must show a clear and present danger to the public.
- The statute is "overbroad." The statute forbids, among other things, mistreating a flag "any way that the actor knows will seriously offend one or more persons."

Working with your team (i.e., petitioners and respondents), write down the following information:

- A clear, brief statement of your position.
- At least two facts from the case which support your position.
- An explanation of how each fact supports your position.
- At least one previous court decision which supports your position.
- One reason why your position is fair either to Texas or to Johnson.
- One reason why a Court decision in your favor will benefit the American public.

Make an outline, ordering this information so that all of it can be included in your four-minute presentation. Decide which team member will present the information. Finally, assign at least one team member to answer the justices' questions. He or she should prepare by carefully reviewing the case description.

JUSTICE/CLERK INSTRUCTIONS

When preparing to hear arguments, Supreme Court justices review documents with their law clerks about the case and identify the questions they want to ask the attorneys, for example: What are the important legal issues in this case? What questions would you want to ask attorneys for Johnson and the attorneys for the state of Texas? What facts do you want clarified? Which of their clients' actions would you like the attorneys to justify or explain?

Justices also prepare by reviewing previous court decisions. Which of the cases you read about under "Legal Precedents" could be applied to this case? Based on these precedents, what questions might you want to ask attorneys for Texas or for Johnson? Remember, when you make your decision about *Texas v. Johnson* you must consider these precedents, but you are not bound by them.

(The moot court activity is adapted from materials prepared by the Chicago project of the Constitutional Rights Foundation.)

ADDITIONAL READINGS

Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482–1508 (1975).

The Oral Argument, (from Texas v. Johnson*),* HARPER'S June 1989, at 38.

Steve Jenkins is director of the Resource Center for Law-Related Education of the Bar Association of Metropolitan St. Louis. He was assisted by Nancy Henry, the Center's administrative assistant. He wishes to make a special acknowledgment to Linda Start of the Michigan LRE Project for her encouragement and for sharing ideas and strategies.

Generations of Justice

Protect or Not to Protect—That is the Question!/Secondary

William R. Marcy

This one-to two-day lesson introduces students to the implications and applications of constitutional free speech. Students are confronted with a hypothetical situation where they must decide if the actions proposed by "Hatbury High School's Political Action Committee" would be protected under the First Amendment of the Constitution as interpreted by the U.S. Supreme Court. Each proposed action is based upon an actual legal precedent established by the Supreme Court. The teacher is provided with case references to aid in discussion.

Lesson Objectives

At the conclusion of this lesson, students should be able to:

1. identify instances when an individual's free speech is protected or not protected by the First Amendment;
2. analyze and evaluate parameters of free expression.

Procedures

1. Provide individual students with the hypothetical, "Political Action at Hatbury High School." Students should read the story and 23 options, select their reasoned response, and write their decision on the line provided.
2. Conduct a class vote and write the plurality response on a continuum written on the board (see example; writing the class mean response may be more accurate and desirable but a plurality vote saves time.) A discussion of the responses will indicate the scope of expression protected or not protected by the Supreme Court. Perhaps a discussion of the "tests" and speech restrictions employed by the Supreme Court – balancing/position, incitement/fighting words, symbolic speech/excessive conduct, obscenity, defamation – will be beneficial for understanding the reasoning behind the Court's position.

Handout 1: Political Action at Hatbury High School

Hatbury is a small New England city with one high school. Over the last year local taxpayers have been bitterly complaining about rising taxes. The former mayor lost the last election over the tax issue. The new mayor promised to drastically reduce government spending. As a result, Hatbury High was forced to make the following cuts: all junior varsity sports, nine faculty positions (including the football coach, student government advisor, senior class advisor, and all of the recently hired young teachers), all senior elective courses, drastic cuts in language, art, music, and vocational education classes, all field and building improvement projects, and cancellation of the band and choir tour to the Washington, D.C., celebration of the 200th anniversary of the Supreme Court.

Christine Taylor, president of student government, and several student government representatives formed a "political action committee." They asked to speak at a public city council meeting to request additional funds for the high school and to explain the distressing damage being done to their education. The mayor and a majority of the council denied their request because the students were not registered voters due to their age. They were also not city property owners. Chris and a majority of Hatbury High's students were very upset over the budget cuts but infuriated over being denied the opportunity to address the mayor and city council.

Below is a list of possible protests being considered by Chris and the Hatbury High School's Political Action Committee. Which of these activities would be protected by the Constitution of the United States? Indicate your reasoning by putting one of the following codes in the space provided:

[DP] definitely protected [P] protected [U] undecided
[NP] not protected [DNP] definitely not protected
Be prepared to defend your reasoning.

Possible Protests

Chris and the other students protest in the following ways:

___ 1. Speaking against the mayor and his budget on a street corner by the high school. The speech includes insults against the mayor and council. The crowd becomes angered and threatens the speaker. The police arrest the speaker for breach of the peace.

___ 2. Speaking in the park, passing out pamphlets, and signing up students for violent student revolution against the city council and the mayor.

___ 3. Giving a speech at the local park declaring: "We should revolt against the dictatorship of the mayor because he will not permit the expression our opinions at the public hearing."

___ 4. Distributing pamphlets at the shopping mall criticizing the mayor and the council's budget cuts and asking shoppers to sign a petition demanding more money for the school.

___ 5. Picketing in the mall parking lot against the mayor's policies and budget cuts.

___ 6. Parading around town using loudspeakers to address Hatbury's citizens.

___ 7. Conducting a school walk-out march from the high school to city hall.

___ 8. Marching to the city jail chanting, "the stupid mayor has imprisoned our school – smarten up and get rid of the fool!"

___ 9. Marching to the local courthouse chanting, "equal justice is for all – remove the mayor from city hall!"

___ 10. Responding to insults from the mayor. The mayor conducts a special meeting with the council in the high school auditorium, and he refers to protesting students as "criminals, druggies, and social misfits who should be spanked for their silly protects." Students, outside picketing peacefully and quietly, are angered by the mayor's insults and start to yell and throw rocks at the auditorium windows.

___ 11. Sitting-in silently and peacefully at the city library against the librarian's wishes.

___ 12. Planning more protests at school. Political Action Committee members meet during their lunch period to plan protests, but a new school rule prohibits PAC members from meeting because it is not an "officially recognized" school organization.

___ 13. Burning student identification cards that the board of education required to be carried by every student.

___ 17. Publishing an article in the school paper questioning the mayor's "good judgment and character" because his wife recently filed for divorce due to his infidelity (his son attends HHS).

___ 18. Purchasing an ad in the city newspaper attacking the mayor and his "fascist tactics."

___ 19. Broadcasting grievances and criticism of the mayor and council on the local public radio station during a local news editorial.

___ 20. Canvassing homes door to door, distributing pamphlets explaining the impact of budget cuts upon Hatbury High.

___ 21. Camping overnight in a "non-violent sleep-in" at the city park to protest the mayor and council's policies and budget cuts (this is against a city ordinance).

___ 22. Boycotting city merchants by not buying from their stores until the mayor and council increase the budget.

___ 23. Burning the U.S. flag flying outside of the mayor's office and chanting, "the mayor disgraces our flag and our freedom – impeach the bum and unseat'um."

(Adapted from "Freedom of Speech" activity by Norman Gross, ABA Committee on Youth Education for Citizenship)

Case References

1. *Feiner v. New York*, 340 U.S. 229 (1951) – Irving Feiner was a student speaking on a street corner of Syracuse, N.Y., urging blacks to fight for their rights. Insulting remarks were made toward the president and mayor. The public was forced to walk onto a busy street around the crowd of listeners. The crowd became hostile and threatened Feiner. The police arrested Feiner for breach of the peace. (Court declared 6-3 that public order and safety was of greater significance than Feiner's interest in free speech and therefore his speech was *not protected* under these circumstances.)

2. *Gitlow v. New York*, 268 U.S. 652 (1925) – Benjamin Gitlow was a member of the Socialist party. He gave speeches and passed out pamphlets advocating the revolutionary overthrow of the government by the "proletariat" using force and violence. Gitlow was arrested under the New York Criminal Anarchy Law. (Court ruled pamphlets were an abuse of free expression at the expense of the public welfare by "tending to corrupt public morals, incite to crime, or disturb the public peace" and therefore *not protected.*)

3. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) – Mr. Brandenburg was a leader of the Ohio Ku Klux Klan who declared that the government was trying to suppress the white race and that "it's possible that there might have to be some revengance [sic] taken." Brandenburg was arrested for violating Ohio's Criminal Syndicalism Act. (Court ruled a state can not forbid speech if it is not likely to incite or produce "imminent lawless action." Therefore, the speech is constitutionally *protected.*)

4. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) – Mike Robins and a group of his high school classmates went to their local shopping mall to peacefully protest a United Nations resolution they believed to be anti-semitic. They passed out pamphlets and asked shoppers to sign a protest petition. Mall security guards asked Robins and the others to leave and they did. (Court ruled that Robins's manner of speech was *protected* because it was orderly and the activity was conducted in common public areas of the mall.)

5. *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) – Workers of a food employee union conducted a protest in the parking lot of Logan Valley Plaza by peaceful picketing. The signs indicated their displeasure with a food store which would not hire union workers or pay union wages. When refusing to leave the mall's private property, the protesters were arrested for breach of the peace. (The Court declared that a "private" shopping mall is the same as a town business district and therefore the law can not prohibit picketing that advanced the communication of ideas. This speech was *protected.*)

6. *Kovacs v. Cooper*, 336 U.S. 77 (1949) – Mr. Kovacs was publicly protesting a labor dispute through the city streets of Trenton, New Jersey, by using a sound truck to broadcast his message. He was arrested for violating a local ordinance prohibiting the use of any sound equipment on public streets that emitted "loud and raucous noise." (The Court ruled that the city had a legitimate interest in reasonably regulating the time, place, and volume of sound, and that Kovacs's method of communication could be restricted as long as its *content* was not. He was free to communicate the same ideas in a different way. Therefore, his manner of speech was *not protected.*)

7. *Edwards v. South Carolina*, 372 U.S. 229 (1963) – Approximately 200 high school and college students conducted a peaceful march to the South Carolina State Capitol protesting racial discrimination. Government officials met with the protestors and stated that as long as their protest was peaceful, they could remain at the capitol. After a half hour of speeches, patriotic songs, and chants, police told demonstrators to leave. They did not leave and the police arrested the demonstrators for breach of the peace. (The Court ruled that a state may not "make criminal the peaceful expression of unpopular views" and declared that this form of protest was *protected*.)

8. *Adderly v. Florida*, 385 U.S. 39 (1966) – Black demonstrators in Florida protested the arrest of several students who tried to integrade a "white only" movie theater. The demonstrators were arrested for criminal trespass because they conducted their protest at the county jail. (The Court ruled that the place of the demonstrators' expression was *not protected* by the First Amendment because jails are "built for security purposes" and therefore are not a "reasonable" place to conduct a civil rights demonstration.)

9. *Cox v. Louisiana*, 379 U.S. 536 (1965) – Reverend Cox and 2,000 black students conducted a peaceful march from the Louisiana State Capitol to a courthouse in protest of 23 other students being arrested for trying to integrate white lunch counters. The marchers were told to leave the courthouse area after they sang songs, picketed, and heard Reverend Cox urge all marchers to eat at white lunch counters. When the demonstrators did not leave, police fired tear gas into the crowd and arrested Reverend Cox for breach of the peace in violation of ordinance that prohibited demonstrations "in or near" the courthouse. (The Court held that "near" was a vague and arbitrary term and the protestors could not know what "near" meant, so the method of expression was proper under these circumstances and therefore *protected* by the First Amendment.)

10. *Terminiello v. Chicago*, 337 U.S. 1 (1949) – Mr. Terminiello spoke at a private meeting of the Christian Veterans of America, where he verbally attacked Jews, blacks, and the president. As 1,000 demonstrators gathered outside of the hall listening over a public address systems, some began to throw rocks at the windows. The police were unable to contain the disturbance, so they arrested Terminiello for disorderly conduct. (The Court stated that the "function of free speech" is to invite dispute, and to be "often provocative and challenging." Unless there was a clear and present danger of a serious substantive evil, free speech cannot be restricted. Terminiello's speech was *protected*, but the demonstrator's actions were *not protected*.)

11. *Brown v. Louisiana*, 383 U.S. 131 (1966) – Five black men staged a peaceful and orderly demonstration in protest of racial segregation at a public library reserved for whites. The silent protestors refused to leave when asked and were arrested for breach of the peace. (The Court held that First Amendment freedoms "embraced appropriate types of action which certainly include the right to protest in a peaceable and orderly manner" where the "protestant has every right to be." The sit-in was *protected* by the First Amendment.).

12. *Healy v. James*, 408 U.S. 169 (1972) – Catherine Healy and other SDS (Students for a Democratic Society) members, who were Central Connecticut State College students, prepared to conduct a protest meeting in the student snack bar. In an effort to curb student unrest and disruption, the school dean prohibited SDS meetings on campus because they were a "disruptive influence" and not a "recognized college organization." The students left peacefully but sued. (The Court distinguished between speech and conduct by sending the case back to the state court to determine if the students intended "imminent lawless action" along with their speech. If not, SDS would be a "recognized college organization" allowed to conduct their business and protests. They were *protected* by the First Amendment.)

13. *United States v. O'Brien*, 391 U.S. 367 (1968) – The Vietnam War caused much discontent and protest, particularly among college students such as O'Brien, who burned his draft-card and was arrested. (The Court made a distinction between speech and conduct by declaring that draft-card burning is beyond the protective mantle of symbolic speech. The government had an overwhelming interest in national security, which included issuing draft cards to eligible males, so it could prohibit such action. The burning therefore was *not protected* by the First Amendment.)

14. *Bethel School District v. Fraser*, 106 S. Ct. 3159 1986) – During a high school assembly to elect student government officers, Fraser campaigned for votes by telling lewd jokes and performing gestures with sexual overtones. (The Court ruled that school officials had the right to discipline students whose speech in their judgment is offensively lewd and indecent. Fraser's manner and content of speech was *not protected* by the First Amendment.)

15. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) – John Tinker and other high school students decided to wear black armbands to school in symbolic silent protest of the war in Vietnam. The principal had advance warning of the protest and declared that any student wearing an armband would be suspended because he anticipated a disturbance. Tinker and others wore the bands and were suspended. (The Court ruled the protest was symbolic speech *protected* by the First Amendment. A "undifferentiated fear or apprehension of disturbance is not enough" to deny freedom of expression.)

16. *Elfbrandt v. Russell*, 384 U.S. 11 (1966) – Barbara Elfbrandt, a Quaker and Arizona teacher, refused to take a state-mandated employee loyalty oath to the state and federal constitutions. The law also included the forbidding of future membership in the Communist Party under penalty of perjury. (The Court *protected* Elfbrandt's rights by ruling "a law which applies to membership without 'specific intent' to further the aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here.")

17. *Hazelwood v. Kuhlmeier*, 108 S. Ct. 562 (1988) – Cathy Kuhlmeier, student editor of Hazelwood High's newspaper, produced articles that described sexual experiences of three unnamed students and dramatized a student's bitterness toward her father. The principal censored the publication to protect the identity of the students, to eliminate inappropriate sexual material, and to protect the rights of the father. (The Court ruled school officials have broad powers to regulate school newspapers in their effort to maintain a proper educational environment. Since the newspaper was part of the school curriculum, it could be regulated as part of the school's mission to educate future

journalists into the practices and ethics of the profession. Speech in this instance was *not protected*.)

18. *New York Times v. Sullivan*, 376 U.S. 254 (1964) – L. B. Sullivan, Montgomery, Alabama, commissioner of police, sued the *N. Y. Times* for libel because of a published ad claiming Montgomery police intimidated and brutalized civil rights demonstrators and Martin Luther King, Jr. The ad was placed by a group of civil rights leaders but did not specifically name Sullivan. (The Court unanimously ruled "debate on public issues should be uninhibited, robust, and wide-open, and sometimes [include] unpleasantly sharp attacks on government and public officials." The Court *protected* such criticism as free speech.)

19. *FCC v. League of Women Voters of California*, 104 S. Ct. 3106 (1984) – A California public radio station received support from government grants which forbade editorials in an effort to avoid management's bias in broadcasting. Suit was brought against the government, citing abridgement of free speech. (The Court ruled that this was unconstitutional censorship of "speech that is 'indispensable to the discovery and spread of political truth.' Public radio and TV editorials are therefore *protected* by the Constitution.)

20. *Martin v. Struthers*, 319 U.S. 141 (1943) – Martin, a Jehovah's Witness, was distributing pamphlets door-to-door in Struthers, Ohio, advertising a religious meeting. Such activity was viewed as an invasion of privacy by a local ordinance prohibiting all distributors of handbills or other ads from knocking on doors of residents. (The Court ruled that this form of dissemination of ideas "is essential to the poorly financed causes of little people." Door-to-door canvassing is therefore *protected*.)

21. *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984) – A group of protestors concerned with the Reagan administration's treatment of nation's poor camped and demonstrated in Lafayette Park across from the White House. They were arrested for camping on restricted government property. (The Court held the prohibition of camping on designated property was a "reasonable restriction of the time, place, and manner in which the First Amendment rights could be exercised" and was therefore *not protected*.)

22. *NAACP v. Claiborne*, 458 U.S. 886 (1982) – A group of civil rights demonstrators conducted a non-violent boycott of white merchants in Port Gipson, Mississippi, protesting racial segregation. The merchants sued the demonstrators, claiming damages of significant economic loss as a result of the boycott. (Court declared the boycott was speech and conduct *protected* by the First Amendment.)

23. *Texas v. Johnson*, 57 U.S.L.W. 4770 (1989) – Gregory Johnson burned the American flag as participant in a political demonstration against President Reagan's policies in Dallas during the 1984 Republican National Convention. He was arrested for violating the Texas statute prohibiting the desecration of the flag. (The Court ruled that burning the flag was "expressive conduct" *protected* by the First Amendment.)

William R. Marcy teaches at Danbury High School in Danbury, Connecticut. He has taught for 19 years and has won numerous state and federal awards.

Generations of Justice

The Flag-Burning Case/Secondary

Lee Arbetman and Ed O'Brien

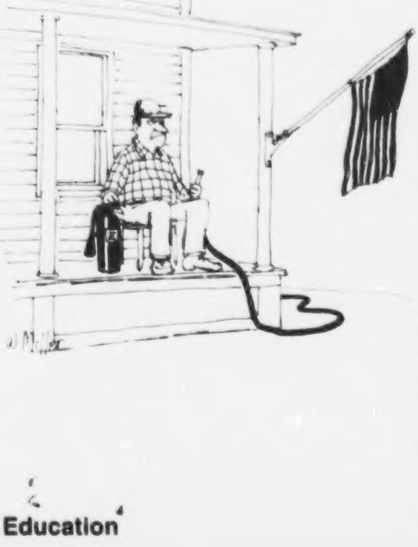
Here is an unmarked opinion strategy to use with the flag burning case. In deciding which opinion they agree with, and which should be the majority opinion, students will discuss and debate "expression," "symbolic speech," "protected speech" and a wide range of other First Amendment topics.

Background

While the Republican national convention was taking place in Dallas in 1984, Gregory Lee Johnson participated in a political demonstration. Demonstrators marched through Dallas streets, stopping at several locations to stage "die-ins" intended to dramatize their opposition to nuclear weapons. One demonstrator took an American flag from a flagpole and gave it to Johnson.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, protestors chanted, "America, the red, white and blue, we spit on you." There were no injuries or threats of injury during the demonstration.

Of the 100 demonstrators, only Johnson was arrested. He was charged under a Texas criminal statute that prohibited desecration of a venerated object (including monuments,



Drawing by W. Miller; © 1989 The New Yorker Magazine, Inc.

places of worship or burial, or a state or national flag) "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

At his trial, several witnesses testified that they had been seriously offended by the flag-burning. He was convicted, sentenced to one year in jail, and fined $2,000. The Supreme Court heard the case or appeal.

Procedure

Study the two opinions below and decide which should be the majority opinion in this case.

Opinion A

Johnson argues that his burning of the flag should be protected as symbolic speech under the First Amendment. The First Amendment literally protects speech itself. However, this Court has long recognized that First Amendment protection does not end with the spoken or written word. While we have rejected the idea that virtually all conduct can be labeled speech and protected by the First Amendment, we have recognized conduct as symbolic speech when the actor intended to convey a particular message and there was a great likelihood that those viewing the conduct would understand the message.

In this case, Johnson's conduct is similar to conduct protected as symbolic speech in our earlier cases. However, the First Amendment does not provide an absolute protection for speech. This Court will analyze the Texas law, along with the facts of the case, to determine whether the state's interest is sufficient to justify punishing Johnson's action.

In earlier cases we upheld the conviction of a protestor who burned his draft card. We reached that decision because the government had an important interest in requiring that everyone age 18 and older carry a draft card. In that case we did not punish the protestor's speech, but rather his illegal act (burning his draft card). However, we overturned convictions and held that freedom of speech was violated in cases of individuals arrested for displaying a flag with a peace symbol constructed of masking tape and for wearing a pair of pants with a small flag sewn into the seat.

In this case the state argues that it has two important interests: preventing a breach of the peace and preserving the flag as a symbol of nationhood and national unity. The first interest is not involved in this case because there was no breach of the peace or even a threat of such a breach.

The state's other argument – the preservation of the flag as a symbol of nationhood and national unity – misses the major point of this Court's earlier First Amendment decisions: the government may not prohibit expression simply because it disagrees with its message. Johnson's conviction must be reversed because his act deserves First Amendment protection as symbolic speech and the government has not provided sufficient justification for punishing his speech.

Opinion B

Both Congress and the states have enacted many laws regulating misuse and prohibiting mutilation of the American flag. With the exception of Alaska and Wyoming, all the states have specific statutes prohibiting the burning of the flag. The American flag has come to be the visible symbol of the nation. Regardless of their own political beliefs, millions of Americans have an almost mystical reverence for the flag. We do not believe that the federal law and the laws in 48 states that prohibit burning of the flag are in conflict with the First Amendment.

While earlier cases have protected speech and even some symbolic speech related to the flag, none of our decisions have ever protected flag burning.

The First Amendment is designed to protect the expression of ideas. Indeed, Johnson could have denounced the flag in public or even burned it in private without violating the Texas law. In fact, the entire demonstration permitted a wide range of expression. The Texas statute did not punish him for the ideas that he conveyed but rather for the symbolic act by which he conveyed his message.

Our decisions have never held that speech rights were absolute. This Court could, after all, create a new constitutional right to spray-paint graffiti on the Washington Monument to enlarge the marketplace of free expression, but at a cost we should not pay. Requiring that Mr. Johnson use some method to convey his message other than flag-burning places a very small burden on free expression. If the great ideas behind our country are worth fighting for – and history demonstrates that they are – then the flag that uniquely symbolizes the power of those ideas is worth protecting from burning. The conviction should be affirmed.

Adapted with permission from the forthcoming 4th edition of Street Law: A Course in Practical Law, *written by Lee Arbetman and Ed O'Brien, and published by West Publishing Company.*

For more information . . .

The following back issues of *Update* contain additional features and strategies on some of the topics discussed in this issue, including criminal justice, drug education, and the Constitution:

Spring 1988 (Youth at Risk)
Fall 1988 (The Living Constitution)
Spring 1989 (Drugs, Law, and Education)

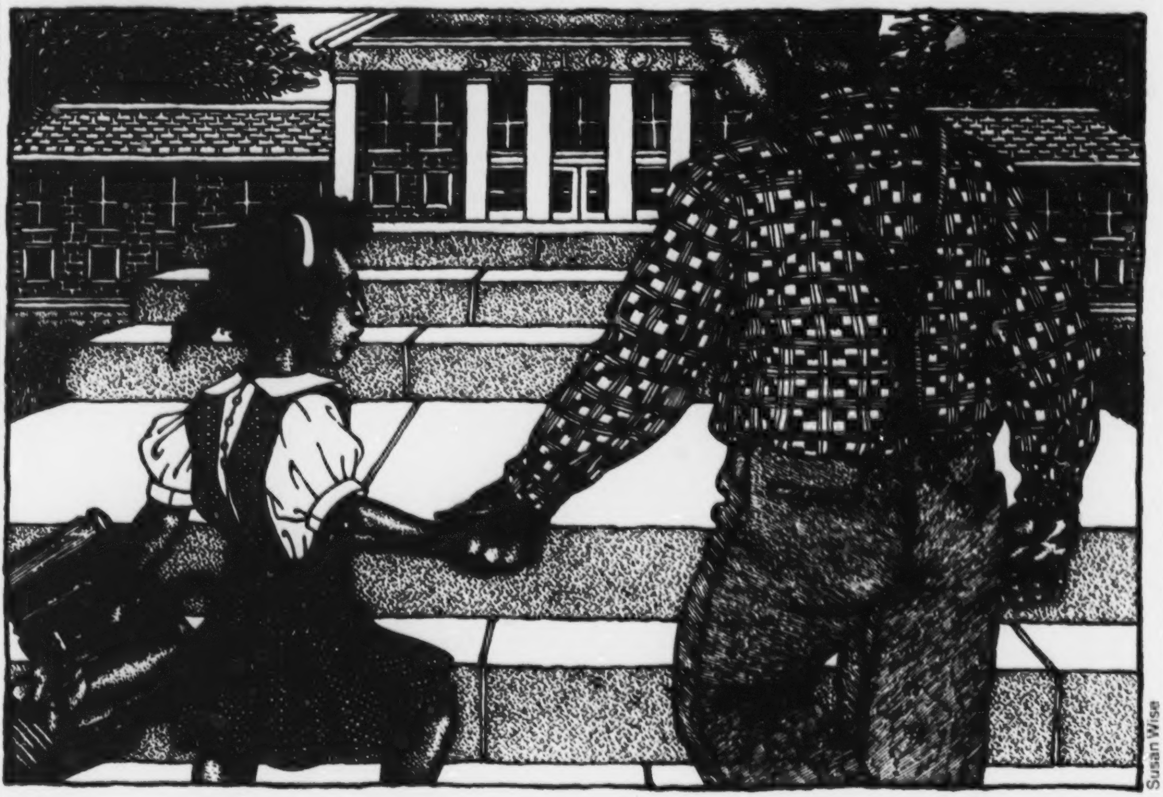
Individual copies of these issues may be purchased for $5 each ($4 if you order 2 to 9 back issues or $3 if you order 10 to 24), plus $2.95 per order for shipping and handling. Send your check, made payable to the American Bar Association, to Order Fulfillment 738, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611. Visa and MasterCard orders are also accepted. Please indicate type of card, account number, expiration date, and your daytime phone number. To order by phone or for additional information, call (312) 988-5555.

***Note: The Spring 1988 issue contains an index to the first 11 years of* Update.**

Generations of Justice

A Famous Kansas Child/Elementary

Carol Roach



Susan Wise

Objectives

As a result of this activity students will be able to:

1. learn about a famous United States Supreme Court case;
2. understand the definitions of segregation, integration, and equality; and
3. think critically.

This lesson can be used by the classroom teacher alone, or by a teacher and resource person working together. A story has been written on the elementary level about Linda Brown and the Supreme Court case of *Brown v. Board of Education*. The story is divided into four short "chapters," with questions or activities provided at the end of each.

If used by the teacher alone, all of the story may be covered in one day, or it may be broken by chapters into several days' lessons. The story can be read to the children by the teacher, or it can be duplicated and used in place of a reading assignment from the basal text. Any of the questions or activities can be used to stimulate discussion and critical thinking.

A resource person can use this lesson by reading the story to the children, interrupting the text with the discussion questions at the end of each chapter. The teacher can use the other suggestions as follow-up activities. If time does not allow covering the whole story in one day, the teacher could do the first chapter (or two chapters) and activities in advance, then the resource person can finish the story with the children and explain the Supreme Court process and its decision.

In either case, it should be pointed out to the children that the Supreme Court's decision affected not just the students in Topeka, Kansas, but in all of the United States. The students might also be interested in knowing that more than 30 years after this decision, a motion was filed in Linda's name, claiming that the Topeka schools were not complying with the Court's order to desegregate. A U.S. district judge in Kansas ruled that the school district had complied; however, the plaintiffs appealed to the 10th Circuit Court of Appeals, which announced its decision in December, 1989. The U.S. district judge's decision was overturned, and the Topeka Board of Education was ordered to take additional steps to better integrate the schools.

(Editor's note: The Board of Education's request for a rehearing of the court's decision was denied in February 1990; the Board will appeal the decision to the Supreme Court, which will decide in late spring whether to hear the case.)

A Famous Child

This is a true story about a little girl in Topeka, Kansas, who didn't really know that anything special was happening in her life. And yet her name became known by people all over the United States. Her name, and facts about her life, introduced one of the most important cases ever to be decided by the Supreme Court.

CHAPTER 1

Linda Carol Brown was seven-years-old. She lived with her father, Oliver, and her mother, Leola, and two younger sisters in a poor neighborhood in Topeka, Kansas. It was a very noisy neighborhood, because it was right next to a switching yard for trains. Linda and her sisters didn't mind the noise. They liked making up games about the trains, and they made friends with many of the trainmen who ran the switches. Some of these friends gave them candy. One man played a teasing game with them. Every time he saw the three girls, he would wave and yell, "Hi boys!" The girls would laugh and call back, "Hi Mary!" The man was so jolly, he reminded Linda of Santa Claus.

The girls also liked being near the railroad yard because when the big fair came to town, the show cars were brought up on the siding, and the children who lived nearby would be the first to see them and the first to know the fair was in town. There were bright silver flatcars, and troupers' quarters, and the red and yellow cars that held the animals.

When Linda was inside her home, life was much quieter. Her father worked at a different kind of railroad job, about a half mile away. He was a welder who repaired boxcars. He was very tired when he returned home at night and often took a little nap as soon as he arrived. When he woke, everyone would come quietly to the dinner table and remain solemn until grace was said. Then Mr. Brown would joke with his family during dinner and everyone would laugh and feel happy. Friday nights were special times, and Linda's favorite. The family would pop popcorn and then Mr. and Mrs. Brown would tell wonderful stories about when they were children.

Each night Mr. Brown would listen to the girls' bedtime prayers. On Sundays, the family went to Sunday school and church. Mr. Brown gave much of his Sunday time, and any other time he could, to work at the church as an assistant pastor. The church was an important part of life for everyone in the Brown family.

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1. In what ways was Linda's life the same as yours?
2. In what ways was it different?
3. Draw a picture to illustrate one part of this story.

CHAPTER 2

Linda went to Monroe School, which was a mile away from where she lived. Getting to school was not easy. She had to leave home by 7:40 each morning to walk to a bus stop that was six blocks away. She started off by walking between the train tracks that went through the switching yard. Even though this was dangerous, it was easier than trying to walk outside the tracks, because the street was crowded with warehouses and there were no sidewalks. The bus was supposed to arrive by 8:00. Sometimes it did. Sometimes it was late. When it was late, Linda would have to stand and wait – often in freezing cold weather, or rain, or snow. When the bus was on time, she could get right on, but then she would arrive at school a half hour before it opened, so she still would have to stand outside and wait. That was the only bus that could take her to school, so there was no way that Linda could make the trip without having to stand out in the weather at one place or the other.

When Linda was ready to start third grade, her father surprised her by saying he was going to walk her to her first day of school. Then he surprised her even more by taking a different route. They went the opposite direction from the trains for about three blocks, then turned onto a pleasant tree-lined street with small, neat houses. After walking three more blocks, they came to a school. It was lighter and prettier than Monroe School, with a little tower on one end that was topped by a fancy weather vane. On the other end was a big wall sculpture of a cheerful sun beaming down on children who were running, jumping rope, rolling a hoop, and flying a kite.

Linda wasn't sure why they had come to this school, and she could tell her father was uneasy as he took her hand and walked up the front steps. Once inside, they were directed to the principal's office. Linda was told to wait outside the door while her father went in to talk to the principal. He was only there a few minutes, then he came out and took her hand again. As they walked home, Linda could tell that her father was very upset. Even though Sumner School was so much closer to their home than Monroe School, the principal said Linda could not go to school there. Sumner School was for white children only. Linda Brown was black.

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1. How do you think Linda felt? Why?
2. How do you think Mr. Brown felt? Why?
3. What would you do if you were Linda?
4. Draw a map to represent Linda's house, the route to Monroe School, and the route to Sumner School.

CHAPTER 3

Linda went back to Monroe School. One night, not long after school had started for the year, her father took her to a meeting that was held at a church – a different church than the one they usually attended. There were lots of grown-ups at the meeting, and Linda didn't understand what they were talking about. But after a while, she was called to the front of the room and asked to stand up on the podium. As she stood there a voice asked loudly, "Why should this child be forced to travel so far to school each day?"

Linda didn't hear very much about the school situation after that. But the rest of the country did. There was an organization called the N-Double-A-C-P, which stood for: The National Association for the Advancement of Colored People. With the help of the NAACP, Oliver Brown sued the Topeka Board of Education. According to the law, it was okay for the black and white children to be sent to separate schools, as long as those schools were considered to be equal. The school authorities said the schools were equal. Although Sumner School was a little newer and prettier, Monroe School had a larger playground and fewer cracks in the walls. Both schools had good teachers (all white teachers at Sumner; all black teachers at Monroe). The teachers all had about the same size classes, and were paid the same amount of money. Although most of the black children lived farther away from their schools than the white children did, buses were provided for them. There were no buses for any of the white children. The school authorities said the people were used to things being this way, and not everyone wanted change. They said the children should continue to be segregated, or separated.

The people who testified in court on behalf of Linda (and others like her) said that these facts did not make the schools equal. The very fact that the children were separated made the schools unequal. The people said that the separation could make the children think they were different from one another, instead of teaching them that they could learn from each other. It meant that as adults, they would not work as well together or get along in our world because they had not been taught to be together as children. They said the children should not be separated and should go to the schools closest to them.

---

1. You be the judge. If you had to decide whether to keep the children in separate schools or let them attend the school closest to their homes, which would you decide? Why?
2. Role-play the situation. Ask two students to pretend to be parents who still want segregation (white students and black students separated). Ask two other students to pretend to be parents who want integration (both races attending the same schools). What would these parents say? How could each try to convince the others to change their minds?

CHAPTER 4

The court decided that the schools should continue to be segregated. Three judges had listened to the presentations. Although not all of them felt that this was the right thing to do, they felt they had no choice. Other cases that had been decided by the Supreme Court all supported the idea that separate-but-equal was okay, and this case seemed to fit the separate-but-equal guidelines.

The lawyers for the NAACP, Mr. Brown, and people in the other states with similar cases all decided to take this case to the Supreme Court. They said this case was different. The other cases were about transportation or students in college – not elementary school students. They said that the Fourteenth Amendment to the Constitution guaranteed everyone equal protection under the law, and that these elementary school students were not being protected equally. The case was called *Brown v. Board of Education*, ("v." stands for versus, which means against) and was argued before the Supreme Court in 1953. It was almost a year later – May 17, 1954 – when the justices made a decision.

It was one of the most important decisions made in the history of the United States, because it said that the previous cases – which may have been decided correctly in their time – were no longer correct in the 1950s. It said that separate was not equal, and that children of all races should be allowed to go to school together, in the schools in their neighborhoods.

Linda Brown never testified in court. But her father did, and so did many other people who had not even met her. Even though they were criticized by others, they worked hard for what they believed. *Brown v. Board of Education* is still one of the most famous cases in American history.

1. Below are the names of some of the other famous people who participated in this case. Choose one name and read about that person. Share what you learn with your classmates.
   Thurgood Marshall   John W. Davis   Earl Warren
2. Write a paragraph about something you have learned from another student in your class. Write a second paragraph about something you have helped another student learn.
3. Read a book and write a report about another famous American who has helped our country live up to the words, "All men are created equal."

Additional Follow-up Activity
Fact and Opinion

This is an optional follow-up activity that not only helps students learn to distinguish between fact and opinion, but can also stimulate further discussion about the *Brown* case. Ask students to define the words *fact* and *opinion*. Give the following examples for students to distinguish as fact or opinion.

1. We study more than one subject each day. (fact)
2. Math is a more difficult subject than English. (opinion)
3. Reading is the most important subject we study. (opinion)

When satisfied that students understand the difference between the two terms, have them distinguish fact from opinion in the statements below. The statements can be duplicated, or the teacher can read them aloud.

Write F in the blank if the statement is a *fact*. Write O in the blank if the statement is an *opinion*.

________ 1. Linda Brown lived near the railroad switchyard.

________ 2. Living near a switchyard is fun.

________ 3. The Browns were happier than most families.

________ 4. A different bus schedule could have made Linda's trip to school easier.

________ 5. Sumner School was closer to Linda's house than Monroe School.

________ 6. The principal at Sumner School was a very mean person.

________ 7. Sumner School was a better school than Monroe School.

________ 8. Children can learn more if they go to an integrated school.

________ 9. The Fourteenth Amendment to the Constitution guarantees equal protection to all citizens.

________ 10. *Brown v. Board of Education* was an important Supreme Court case because it ended segregation in our schools.

Carol Roach is Education-Information Specialist for the Kansas Supreme Court, Topeka, Kansas. Portions of this strategy's narrative were adapted from Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality *by Richard Kluger (Alfred A. Knopf, New York, NY).*

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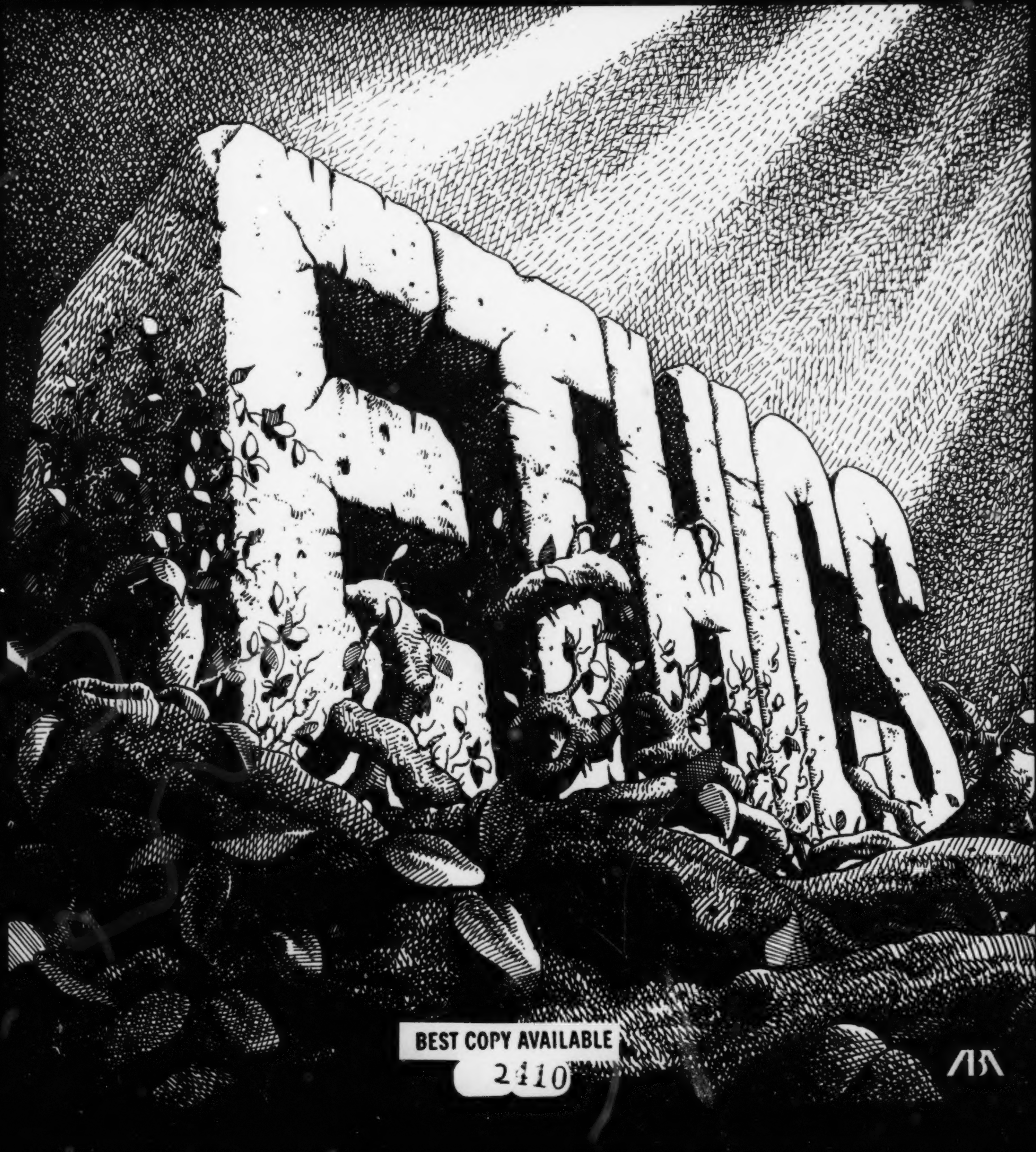

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contents

Volume 14, No. 2, Spring 1990

3 **Values in Decline**

UPPER ELEMENTARY/MIDDLE SCHOOL

UPPER ELEMENTARY/MIDDLE SCHOOL STRATEGY

4 Some Basic Definitions

7 **The "Debbie" Affair**

UPPER ELEMENTARY/MIDDLE SCHOOL

UPPER ELEMENTARY/MIDDLE SCHOOL STRATEGY

12 Codes of Ethics

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

13 A Lesson in Legal Ethics
19 Duties: Legal? Moral? Religious? or Social?

22 **Learning Ethics in School-Based Mediation Programs**

UPPER ELEMENTARY/MIDDLE SCHOOL

UPPER ELEMENTARY/MIDDLE SCHOOL STRATEGY

28 Making Decisions

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGY

30 Ethics in Government

33 **Educating for Citizenship: LRE and the Social Studies**

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

37 A Luxury We Can't Afford
42 Law, Morality, and the Relocation Camps

51 **Court Briefs**

Cover art by Tom Herzberg

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Tom Herzberg

C.J. Silas

Values in Decline

Making a choice between principles and privileges

Somewhere, somehow in our journey through the modern-day wilderness, we seem to have lost our way.

The landmarks that told us right from wrong aren't there anymore. They've been hammered away by the winds of self, howling: "Do what feels good . . . Do what's right for you . . ." And above all, as the popular song goes, "Don't worry . . . be happy."

Is it any wonder, then, that from Wall Street to Pennsylvania Avenue, from the boardroom to the classroom, and from the arena to the altar, our nation has become the stage of scandal?

Last year, Stephen Koepp of *Time* wrote this:

> In virtually every one of half a dozen scams, members of the public have been fleeced by names they thought they could trust . . . . The current dragnet for white-collar criminals culminates a roaring, greedy decade that created not only legitimate prosperity but also boundless motivation for stealing . . . . Fraud was never so tempting or remorseless."

The simple fact that the scandals of the 1980s have shocked our moral sensibilities is encouraging; it tells me we *still* have moral sensibilities.

Specifically, let's look at three false views of ethics before seeing what ethics really is. First, ethics is not merely what's enforceable. Those who rely only on the law as their standard of ethics forget that laws change. Laws also can be bent, dodged and misinterpreted.

Further, laws – because they are made by imperfect people – cannot possibly be perfect in all situations, or at all times. Paul Sand is an executive director of the National Conference of Christians and Jews. In a speech last year, he said: "Merely observing a rule or a law doesn't necessarily make one ethical. Remember, segregation laws were once legal, but most certainly obeying such laws did not make a person ethical."

Mr. Sand hits a nerve with that statement. Laws change, not to establish our values, but to reflect them. For example, gambling once was widely condemned. Today, in many states, it's promoted under the guise of "revenue enhancement" through pari-mutuel betting and state lotteries. Or, consider that the sale of alcoholic beverages once was banned nationwide. Today, at most, it's restricted in some areas.

Shifting Values

Maybe our society's shifting values are best illustrated in a cartoon that appeared in the *New Yorker*. In it, two clean-shaven, middle-age men are sharing a jail cell. They look stiff in their new prison clothes.

And one inmate says to the other, "All along, I thought our level of corruption fell well within community standards."

Ethics, then, first of all, is not merely what's enforceable.

Second, ethics is not always what's expedient. We live in a society that places a premium on personal freedom, but while that has made us the envy of the world, it also has made us, in some respects, a society of thieves.

For example, James Walls is a North Carolina man whose firm provides business with honesty tests for job applicants. He reports that three of every 10 prospective retail workers admit stealing from a previous employer. What's more, by one estimate, American workers will "steal" nearly $200 billion from their employers this year by arriving late, leaving early and misusing time on the job. The U.S. Chamber of Commerce argues that employee theft raises the cost of consumer goods by as much as 15 percent. And a nationwide poll three years ago found that 37 percent of all taxpayers cheat.

Why?

Mostly, the poll indicates, because the odds of getting away with it are so good. Michael Douglas won an Oscar for his role in the movie, "Wall Street." In that film, he plays a Wall Street insider by the name of Gordon Gekko. Rich, powerful and cocky, he personifies the bravado that, in real life, vaulted men like Ivan Boesky to the top.

Gekko takes a raw young stock broker named Bud Fox under his wing. He teaches Fox to make money the new-fashioned way: through inside information. As Gekko lavishes more favors on his young protege, he convinces Fox that what's good is greed . . . what matters is power . . . and what's expedient is ultimately what's right.

While the film is a bleak portrait of a Wall Street shark, it's also a touching study of a young man struggling for a proper sense of values.

The movie's turning point comes when the mentor crosses his student. Gekko uses information supplied by Fox to launch a takeover attempt against the airline where Fox's dad is employed.

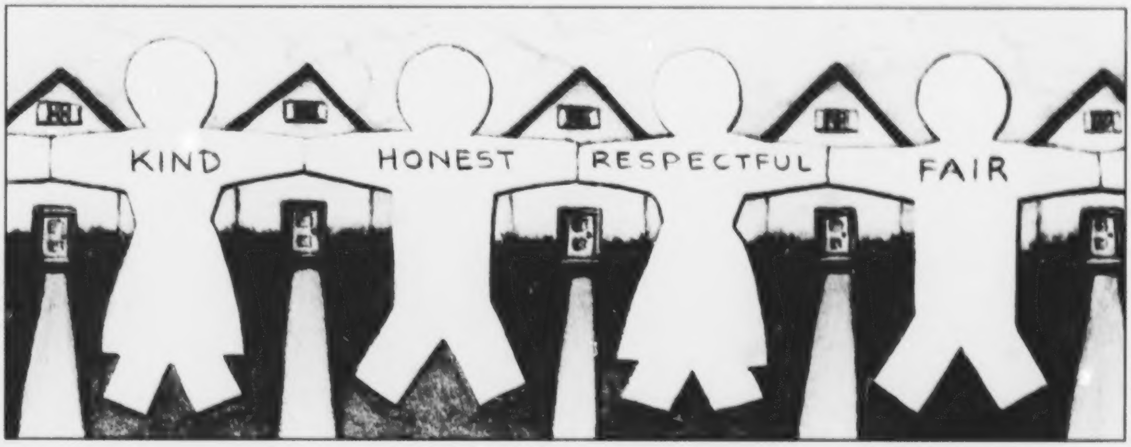
Stunned and angry when he's sucked into the moral vacuum he helped create, Fox confronts Gordon Gekko. Gekko pats Fox on the cheek and tells him it's nothing personal, just business. Wealth, he explains, can't be created or destroyed, but merely redistributed.

Fox takes one last look at Gekko's office – and seems, for the first time, to

(continued on page 27)

Ethics

Some Basic Definitions/Upper Elementary/Middle **Alberta Education Curriculum**



Holly Pribble

Goals

At the end of this lesson, students will be able to:

- list six qualities of a good person;
- specify behaviors that exemplify qualities of goodness;
- define the concept of standards and describe how standards apply to issues of right and wrong;
- identify examples of standards of right and wrong;
- arrive at a working definition of the term "ethics";
- demonstrate an awareness that society is characterized by uncertainty, change and ambiguity;
- identify the ethical implications in issues;
- define and give examples for the concept of ethical issue; and
- express personal convictions in productive group discussions of ethical issues.

Time to Complete

Allow at least four class periods to complete this lesson.

Day 1: Qualities of a Good Person

MATERIALS NEEDED

Chart paper; felt-tipped markers; scissors

PROCEDURE

Divide the class into five groups. Give each group a piece of chart paper, a marker, and a pair of scissors. Instruct two groups to draw (and cut out) legs and feet, two to create arms, and one group to make a head. Explain that the class is going to build a "Good Person." Have each group brainstorm qualities of a good person and write them on their drawing with a marker. After ten minutes, reassemble the class, tape the body parts to a torso that you have previously drawn, and review the lists.

Compare the qualities and develop, with the class, a master list of qualities that students agree on. Write the list on the torso of the figure.

Discussion Questions

- What does "being good" mean to you?
- Does it mean the same to everybody?
- What are some qualities of goodness (from the qualities written on the torso of the "Good Person") that you think everyone agrees on?
- How do right and wrong relate to goodness?
- How do we judge whether somebody is honest, fair, and so on?
- Where do we learn our standards of good and bad, right and wrong?

Have each student choose four qualities from the master list and interpret them in written statements or give examples of behavior:

"If a person were (e.g., respectful) he or she would (do) ______________________________."

Day 2: Standards

MATERIALS

Student handout (see page 5)

PROCEDURE

1. The three questions in Part A of the handout can serve as an introduction to and a basis for discussion of the concept of standards. There is always an acceptable range of variation when applying standards (zone of tolerance).
2. Discuss standards of right and wrong in relation to the two scenes presented in Part B of the handout.
   - Can behavior be "more or less" right or wrong?
   - What are some examples of behavior everyone agrees would be totally wrong?
   - What are some examples of behavior that seems wrong, but really is not?
   - What makes them different?
3. Have students record in their notebooks their individual views of how standards apply to the "rightness" or "wrongness" of the different situations previously discussed.
4. Lead the class to develop a common definition of ethics, using information gathered in the discussion of standards of right and wrong.

Handout: Standards

PART A

1. Draw a picture of a ruler, as realistically and accurately as possible. *Do not* use real rulers, other straightedges or measuring devices to make the drawing. Compare results. Could your drawing be used as a "real" ruler to measure something? Explain.
2. What do "good enough" and "close enough" mean? Give two examples for which great variation is allowed and two for which almost no variation is allowed.
3. Suppose that you have a very strict grandparent who visits only once a year. How might your behavior differ from how you normally behave?

PART B

Read the following short scenes.

Scene 1

"I don't agree with you – you're just being stupid," said Phillip. "Nobody cares – and anyway, we look old enough. We'll never get caught."

"But my mother doesn't want me to go to movies like that unless an adult goes along. She says they're too violent," answered his friend.

"So? Do you agree with everything your mother says?"

"No, but she *said* . . . ."

"Oh, forget it – if you're going to be that way, I'll just go with Allen," said Phillip, as he rode away.

Scene 2

Mrs. Larsen sat at the dining room table filling out her income tax return, surrounded by stacks of papers. "Are you going to include that money Mr. Murdoch paid you for making those costumes for the dance class?" asked Andrew.

"Of course not. He paid me cash, so the government will never know."

"But. . . isn't that cheating? Boy! And after the way you carried on this morning about cheating on assignments – you'd think it was murder!"

"It's not the same, and there's no need for you to worry about it," said his mother, adding up the figures on the last page.

Phillip in Scene 1 and Mrs. Larsen in Scene 2 say that they don't *feel* that what they are doing is wrong. Do you agree? With what would you compare their behavior to help you to decide whether they are right or wrong?

Optional Activity

Students could be assigned to talk to community members who work in trades where standards apply; to people in the recreation/athletics field where standards are part of skill training; to medical personnel who apply standards of training and care. In addition, they could list ways in which people they come in contact with each day, such as school bus drivers and cafeteria staff, are subject to standards of skill, training, and behavior.

Days 3 and 4: Ethical Issues

An ethical issue is a situation wherein standards of behavior must be applied to decide what is the right or wrong way to behave.

PROCEDURE FOR DAY 3

Brainstorm the concept of an ethical issue. Students should give examples to support their views and be able to generalize from the examples. They need to understand that ethical issues have no clear-cut or easy answers and often cannot be resolved to accommodate everyone. An issue is not necessarily something bad (as is a "problem"), but it is something that needs to be addressed.

After the brainstorming, students should discuss the following questions:

- What is an issue?
- Do we always know when there is an issue?
- In what contexts have you heard the word used? (environmental issues, social issues, political issues)
- If ethics is the study of standards of right and wrong, in what ways might an issue raise ethical concerns?
- Do ethical issues always have to do with behavior in relation to people? Would cruelty to animals, for example, be an ethical issue?

Conclude the discussion period by having students write a draft definition of what constitutes an ethical issue.

To prepare for Day 4, instruct each student to identify an issue which requires a decision about behavior and write a short scene about it (such as the two scenes presented in Part B of the student handout for Day 2). Ensure that issues for class, peer group, and community are well represented. Have students choose classmates to act out the scenes which they will perform on the next day.

PROCEDURE FOR DAY 4

The scenes written the previous day will be performed before the class; students should be instructed to keep three questions in mind as they view each scene: 1) How is the issue presented "ethical" in nature?; 2) What standard of behavior is involved?; and 3) What choice was made and why? After each scene is presented, its writer should be prepared to answer these questions as they are posed by the class.

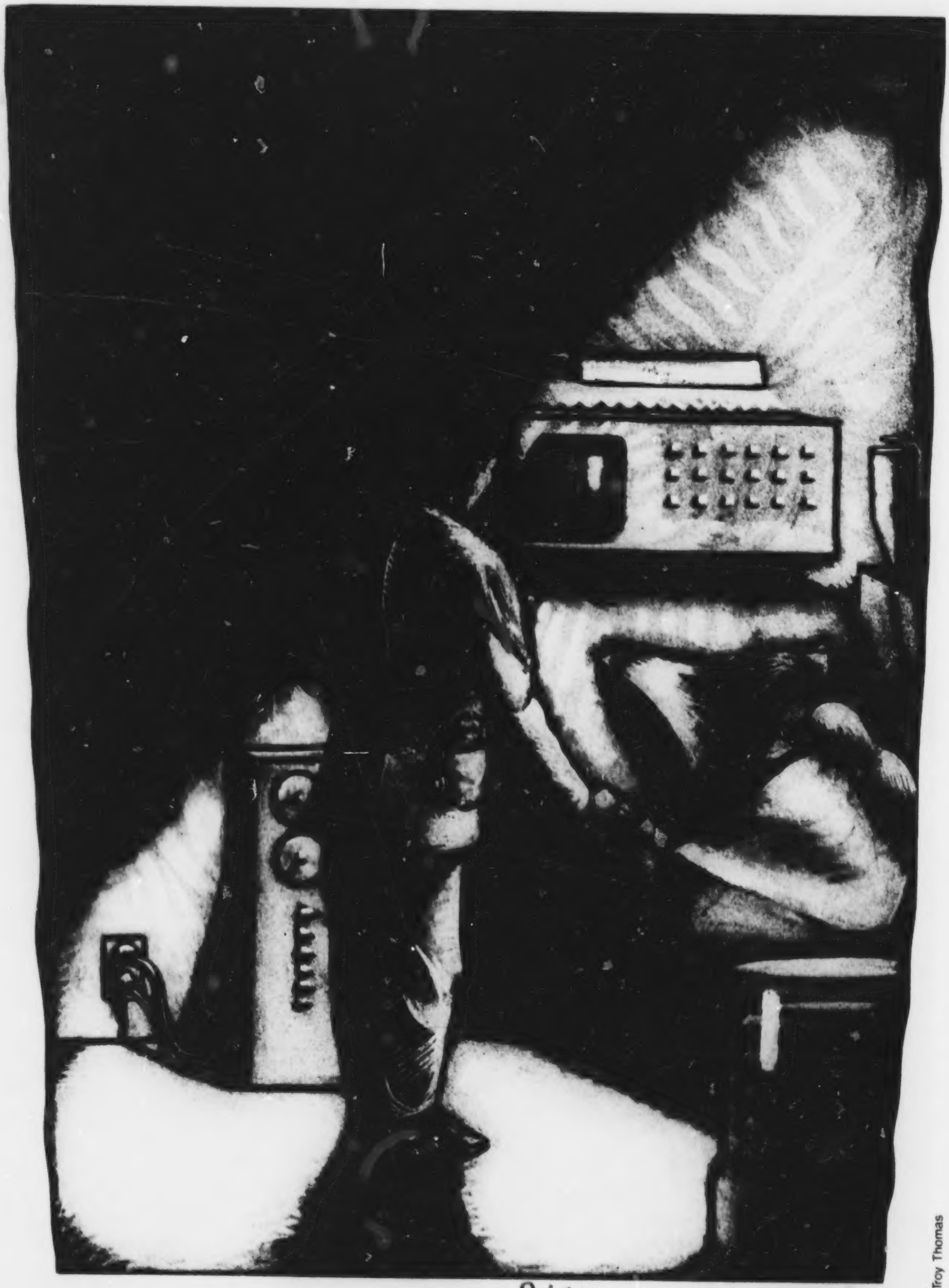
In addition, the class could also be presented with the following questions after each scene:

- What is the issue?
- Is there a choice to be made between right and wrong?
- Are there generally held acceptable standards of the community that would contribute to its solution?

Optional Activity

Newspaper articles can be used to help students create role-playing scenarios to present to the class.

This lesson was adapted from the Grade 8 Ethics Teacher Resource Manual *produced by the Alberta Education Curriculum Support Branch. Copyright © 1989, the Crown in Right of Alberta, as represented by the Minister of Education. Reproduced with permission.*



Troy Thomas

2417 2

Howard Wolinsky and Tom Brune

The "Debbie" Affair

How a doctor's letter touched off a controversy that raised many questions but provided few answers

It all started when someone sent an unsolicited essay to the *Journal of the American Medical Association* in 1987. It could have happened to any publication. Newspapers, magazines and scientific and medical journals get manuscripts they haven't commissioned all the time. The difference in this case was the subject matter of the essay.

The essay – 500 words or so – was a first-person account of how a groggy gynecology resident in an unnamed hospital was awakened at 3 a.m. to ease the pain of a suffering, sleepless 20-year old ovarian cancer patient. The resident ended her pain by giving her what he believed to be a fatal injection of morphine.

The essay, reprinted on page 9, was a description of a mercy killing, and, in effect, a confession to a murder. And it had been submitted to JAMA for publication on one condition – that the author's name be withheld.

Editors have many choices when they get a piece like this.

Dr. George Lundberg, a physician and the editor of JAMA for the past six years, chose a course that landed the AMA in court – and reaped angry denunciations from physicians, ethicists and many journalists and the editors of other medical journals.

Lundberg plunked the piece into the essay section of the January 8, 1988 edition of JAMA without listing the author's name, without verifying that the event actually took place, and without running a preface explaining *why* he was publishing the essay or that he was uncertain about the essay's veracity.

Lundberg later explained that he wanted to stir up a debate over a controversial subject. That he did. But he also stirred up a discussion about his own actions, raising questions of medical and journalistic ethics for which there are no ready answers.

And, through his actions and statements, he illustrated that editors of medical and scientific journals operate in a culture that is largely foreign to the world of journalists who gather news for a general audience.

The 105-year-old *Journal of the American Medical Association*, published in Chicago, claims to be the most widely circulated medical publication in the world, with 383,000 readers of the English language edition and 250,000 readers of its 10 foreign-language editions. Published by the most powerful doctors' organization in the country, JAMA also is one of two top medical publications in the United States. The popular press looks to JAMA and the *New England Journal of Medicine* each week for the latest medical news.

JAMA's January 8 edition was no exception. Graced with a portrait of a woman by the 19th-century painter Ingres on its cover, JAMA included two items many newspapers picked up: a study of a syndrome in which people's blood pressure shoots up at the sight of a doctor's white coat, and an article and editorial saying tighter controls and better counseling need to accompany Human Immunodeficiency Virus antibody testing, commonly known as AIDS testing. The issue also included, "It's Over, Debbie."

"Debbie" appeared in a section called "A Piece of My Mind," which Lundberg portrays as "an informal courtyard of creativity," a place where poems, anecdotes and unscientific matters are published.

Lundberg refuses to reveal many specifics of the editorial process, and he forbids interviews with his staff. But he does note that JAMA articles are put through a peer-review process. Lundberg, however, won't disclose the number, names or occupations of the reviewers who looked at the Debbie piece, or the contents of their reviews. Nor will he talk about the number of JAMA staffers who opposed publishing the piece.

He also declines to say whether he asked lawyers for the AMA to review the piece. However, Kirk Johnson, the AMA's general counsel, said Lundberg didn't discuss the essay with him prior to publication.

Lundberg also refuses to say whether he consulted with medical ethicists in advance of publication, though AMA attorney Johnson said the essay had been reviewed by an ethicist.

That Lundberg chose to publish "Debbie" precisely because it would be controversial was no surprise to anyone who knows him.

Lundberg, 55, is a pathologist who made a name for himself as a top expert on the toxic effects of street drugs and overdoses. He served as chairman of the pathology department at the University of California-Davis before taking his first full-time editorial job, as editor of JAMA, on January 1, 1982.

His editorial experience has been limited to the medical and scientific press. In the past 30 years, he has served as a reviewer for journals and has contributed more than 150 scholarly papers to books, journals and magazines. He was named to JAMA's editorial board 15 years ago and wrote a column about laboratory use. He also serves on the editorial boards of two other medical journals.

JAMA has 39 editorial categories, including a small staff-generated news section. But, like most scholarly journals, it relies greatly on unsolicited contributions; it publishes about one in 10 of the submissions. The studies, rather than JAMA itself, usually are the subject of controversy, if there is a controversy.

Lundberg has attempted to make JAMA a little less dry and predictable. Instead of always being a neutral ground for vigorous debate, JAMA under Lundberg has crusaded for various causes and sought to capture the attention of a public beyond its doctor-readers.

So it was in 1983, when Lundberg became a crusader against boxing, declaring the sport "an obscenity" and "barbaric" because of the physical damage suffered by boxers. He was supported by many doctors, and criticized by others, who felt that he should have been focusing on more important issues, such as the deadly effects of smoking. But the AMA followed Lundberg's lead, calling for a boxing ban in 1984.

Lundberg also goes for a bit of flash. In 1986, for example, he ran an article during Easter week that described an "autopsy" of Jesus by a Mayo Clinic expert that concluded that Jesus had died of shock. Atheists were livid that a scientific journal should take Jesus seriously; some Christians were offended.

Lundberg has said, from time to time, that "to be deliberately controversial is one of [JAMA's] critical objectives."

Lundberg agreed to an interview for this article only after we cleared it with AMA's public relations office; but he would not let us talk to Roxanne Young, the JAMA editor responsible for the section in which the Debbie essay ran.

He described the origin of the article as follows.

The essay came in the mail unsolicited sometime in 1987 to JAMA offices in Chicago. Because it was an essay, it was channeled to Young as editor of "A Piece of My Mind." Young, seeking advice, brought it to one of the twice-weekly manuscript meetings, which are usually attended by anywhere from eight to 15 editors of JAMA.

It was at that meeting that Lundberg saw the piece for the first time. The staff members at the meeting held a vigorous discussion about the essay. Some believed the piece was a hoax. In an informal straw poll of the staff, about half voted to reject it, and half to run it, Lundberg recalled.

Lundberg didn't know what to do. He said he had read the piece with "interest and surprise." He said he had believed the piece to be true, but he had "lingering doubt." He believed law enforcement officers would consider the action described by the doctor as a crime, but he chose not to call the police. Before doing anything else, he decided to send the manuscript through peer review.

Like other scientific and medical journals, JAMA relies on the peer review process to weed out bad articles. In peer review, experts read the submission and make recommendations as to whether the journal should run the piece. And, if so, in what form and when.

When the review on the Debbie essay came back in, Young brought it to a second manuscript meeting. The review was "highly positive," Lundberg said, though he refused to relate any specific comments.

"The group then discussed what to do," Lundberg said."It [involved] the basic ethical dilemma whether or not we should report this author to somebody, whether we should publish it as is or with minor revision, and what the impact of all that would be on the readers, the public, the author, the *Journal*, the editors and the subject matter, which of course was critical to the whole thing."

The staff was still split, so Lundberg sent the essay out for a second peer review, an action he described as not rare or particularly uncommon, but not something that happens to every piece, either.

"The results were not as enthusiastically in favor as the earlier results," Lundberg said of the second review cycle. "The results were still favorable when you considered both cycles together."

There was still uncertainty as to whether the piece was true, but Lundberg purposely made no attempt to verify it one way or another. He relied on the peer-review process and his own editorial judgment.

Without putting it to a vote, Lundberg decided to run the piece.

Lundberg said his decision was in part influenced by a petition drive in California aimed at putting a referendum on the November 1988 ballot that would deal with legalizing controlled euthanasia. That movement, the only one of its kind, signals a debate that could spread beyond that state, Lundberg said.

"I decided the greater public good would be served by publishing the piece rather than the other options," he said. "It was our opinion that the best use of this information was to publish it in the *Journal* for widespread information and discussion."

Though the AMA steadfastly opposes euthanasia, Lundberg dropped the essay into his journal like bait, waiting to land some letters.

The New York Post on January 27 was the first major newspaper to write about the essay. The *Post* reported that New York Mayor Ed Koch, alerted by a doctor friend, had sent a letter to U.S. Attorney General Ed Meese. Koch told Meese that the act described in the essay was "what I can only conclude is a murder. . . ."

"I urge you to look into this matter," he said, "and if appropriate, pursue criminal charges against this doctor."

Meese did nothing, and all was quiet until January 31, when the *Chicago Tribune* ran a page-one article by science writer Jon Van describing the essay and reporting views of doctors and medical ethicists. Van said he heard about the Debbie case from an angry doctor on January 22. "The doctor was really pissed off," he recalled. Van had contacted prominent medical ethicists to get reactions.

Two days after the *Tribune* piece, the office of then Cook County State's Attorney Richard M. Daley, son of the late mayor, informally asked Kirk Johnson, the AMA's attorney, for the author's name.

Daley actually had been made aware of "Debbie" on January 14 by Americans United for Life, a pro-life law firm based in Chicago. But it may have taken the high visibility of the *Tribune* piece to spark action by the prosecutor, whose jurisdiction includes the AMA's Chicago headquarters.

"It [the Debbie essay] would have made a splash and died, if it were not for Daley's office pursuing it," Van said.

At a February 5 news conference, Johnson said the AMA would not voluntarily give the name to prosecutors, but *would* turn the writer in if ordered to do so by a judge.

The *Chicago Sun-Times* followed this up with a string of stories questioning the veracity of the essay as well as JAMA's handling of the case. On February 14, the *Sun-Times* broke the story that the Cook County grand jury had issued a subpoena for essay documents. The AMA waffled a bit on just how far it would go to protect the author's identity. On February 22, the AMA filed a motion to quash the subpoena.

In its brief, the AMA argued that the

It's Over, Debbie

The call came in the middle of the night. As a gynecology resident rotating through a large, private hospital, I had come to detest phone calls, because invariably I would be up for several hours and would not feel good the next day. However, duty called, so I answered the phone. A nurse informed me that a patient was having difficulty getting rest, could I please see her. She was on 3 North. That was the gynecologic-oncology unit, not my usual duty station.

As I trudged along, bumping sleepily against walls and corners and not believing I was up again, I tried to imagine what I might find at the end of my walk. Maybe an elderly woman with an anxiety reaction, or perhaps something particularly horrible.

I grabbed the chart from the nurses station on my way to the patient's room and the nurse gave me some hurried details: a 20-year-old girl named Debbie was dying of ovarian cancer. She was having unrelenting vomiting apparently as the result of an alcohol drip administered for sedation. Hmmm, I thought. Very sad.

As I approached the room I could hear loud, labored breathing. I entered and saw an emaciated, dark-haired woman who appeared much older than 20. She was receiving nasal oxygen, had an IV, and was sitting in bed suffering from what was obviously severe air hunger. The chart noted her weight at 80 pounds. A second woman, also dark-haired but of middle age, stood at her right, holding her hand. Both looked up as I entered.

The room seemed filled with the patient's desperate effort to survive. Her eyes were hollow, and she had suprasternal and intercostal retractions with her rapid inspirations. She had not eaten or slept in two days. She had not responded to chemotherapy and was being given supportive care only. It was a gallows scene, a cruel mockery of her youth and unfulfilled potential. Her only words to me were, "Let's get this over with."

I retreated with my thoughts to the nurses station. The patient was tired and needed rest. I could not give her health, but I could give her rest. I asked the nurse to draw 20mg of morphine sulphate into a syringe. Enough, I thought, to do the job. I took the syringe into the room and told the two women I was going to give Debbie something that would let her rest and to say goodbye.

Debbie looked at the syringe, then laid her head on the pillow with her eyes open, watching what was left of the world. I injected the morphine intravenously and watched to see if my calculations on its effects would be correct.

Within seconds her breathing slowed to a normal rate, her eyes closed, and her features softened as she seemed restful at last. The older woman stroked the hair of the now-sleeping patient. I waited for the inevitable next effect of depressing the respiratory drive. With clocklike certainty, within four minutes the breathing rate slowed even more, then became irregular, then ceased. The dark-haired woman stood erect and seemed relieved.

It's over Debbie.

Name Withheld by Request

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prosecutor had failed to follow guidelines set down by the Illinois Reporters Privilege Act and that disclosure of the author's name would jeopardize confidential sources for all publications, which would be an inhibition of free and open discussion guaranteed by the First Amendment to the U.S. Constitution.

The Illinois shield law requires those seeking privileged information to apply in writing to the court to set aside the protection. The act also holds that the court can set aside the protection only after determining that the person seeking the information had exhausted all other available sources and that the information was essential to the protection of the public interest involved.

The AMA also argued that it was unclear as to whether the state's attorney had jurisdiction in the case. The actions described in the essay could have been done by any doctor at any hospital in any state or in any country, not necessarily in Cook County. Finally, the AMA argued that it did not know whether the actions described had actually happened.

The Headline Club, the local chapter of the Society of Professional Journalists, Sigma Delta Chi, as well as the Media Institute, the Reporters Committee for Freedom of the Press and the Radio-Television News Directors Association filed *amicus* briefs in support of the AMA position.

The state's attorney's office argued that a homicide had taken place, and that the First Amendment never was intended to protect the identity of a murderer. It argued that the AMA had a duty to turn over the name, just as a citizen who had knowledge of a person who had committed a crime would.

The court battle was short. After hearing arguments, Richard Fitzgerald, Chief Judge of the Cook County Criminal Court, dismissed the subpoena March 18.

"At the present time," Fitzgerald ruled, "there is no indication a crime was committed, and the question of whether a crime was committed in Cook County is merely speculative." The judge also said that the state's attorney had failed to exhaust all other avenues for getting information about the matter and had not proved that obtaining the name was essential to the public interest.

Lundberg hailed the ruling. Not only did it vindicate his decision to print the essay, he said, but it set a precedent by confirming that medical and scientific journals enjoy the same press freedoms and protections that have been normally afforded broadcast news and newspapers.

"I never had any doubt from the day we published the essay that we did the right thing," Lundberg said afterward.

The decision also saved Lundberg from the need to make the painful decision as to whether he would turn in the author if a court ordered him to do so. He said he was unsure as to whether he would have gone to jail to protect the author's anonymity. He admitted that JAMA had agreed "as a condition of acceptance we would not publish the name of the author."

But, Lundberg added, "We did not enter into a blood pledge to the author that we would go to jail if subpoenaed, because it didn't come up in the correspondence with the author. We recognized it

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as a remote possibility, but that was not discussed with the author."

The possibility of perhaps going to jail has passed, at least for now. The matter appears to be dead legally. But controversy continues to swirl over the medical and journalistic ethics of Lundberg's handling of the essay, not to mention the moral and ethical problems raised by the essay itself.

Newspaper editors generally have been critical of JAMA's handling of the Debbie essay, and their most common complaint has been that Lundberg's handling of the matter was "amateurish." The comments of newspaper editors illuminate the difference between medical and "lay" editors in approach, in their experience with tough calls, and in their assumptions about the role of the free press.

Read, for instance, the sharply critical *Chicago Tribune* editorial reprinted on page 11. James Squires, the editor of the *Tribune* and the author of the editorial, later explained that he did not believe the Debbie essay was "a source-protection situation." The AMA was protecting a person who had confessed to a murder, he said, not a source. "We as journalists have no right to conceal evidence of a crime," he added. "We are citizens just like everyone else."

Squires asked, "Where do you have a right to go out and interview a criminal and tell people what that criminal said?" He said that, historically, anonymity has been granted "where the crime is of a political nature."

He explained, "Do you protect someone in the radical underground who is being persecuted by the government? Probably. Do you protect him if he says he is going to kidnap the President and kill him? Probably not."

Raymond R. Coffey, managing editor of the *Chicago Sun-Times*, agreed with Squires that the Debbie case was not a source-protection situation. But he noted that there is a vagueness as to when you allow anonymity for someone who has possibly committed a crime. "I don't know where you draw the line," he said, "but you don't protect self-confessed murderers."

However, Kent Pollock, weekend editor of *The Sacramento Bee* in California, says it's wrong for editors to blow the whistle on confessed lawbreakers whose identities aren't known to the police.

The *Bee* in February 1988 ran a two-part interview with unidentified animal-rights advocates who claimed to be on the run from the FBI because of their involvement in illegal raids on laboratories where research was being performed on animals. The stories ran in connection with a heated issue as to whether Sacramento County should continue to sell unclaimed dogs and cats to medical researchers.

Pollock said that if journalists began turning in sources to the authorities, their sources would dry up. "We want the public to view us as journalists, not as policemen," he said.

Michael Gartner, editor of the *Daily Tribune* in Ames, Iowa, and the former editor of *The Des Moines Register* and *The Louisville Courier-Journal*, said he believes the *Chicago Tribune* "made a big leap" in dismissing the Debbie case as a confession of murder. As one who has never edited a medical journal, he said he isn't sure a crime was committed, though he knows the doctor faced "a medical dilemma."

"If I got a letter from a reader who said he'd killed somebody, I'd go to the police," Gartner said. "But I'm not sure the JAMA case is comparable."

It was that vagueness, that lack of certitude as to what had actually happened, that galled most newspaper editors, and the criticism was particularly intense on that point.

Pollock said he was particularly troubled that JAMA did nothing to verify the essay writer's story. He noted that the *Bee* reporter did everything she could to confirm that the animal rights advocates she interviewed were who they purported to be.

He said if he had received the Debbie essay, he would have assigned a reporter to interview the author and try to confirm the claims. The essay might have run as a sidebar to an analytical piece about mercy killing, he said. And the *Bee* would have described the terms of any agreement the paper had with the doctor whose identity was being protected.

Pollock was also disturbed by the notion of using anonymous authors.

"I'm real uncomfortable about protecting an author," he said. "Bylines—I sometimes call them blamelines—are important. Readers have a right to know who they're reading."

Richard P. Cunningham, a *Quill* columnist and an expert on journalistic ethics and accountability who teaches journalism at New York University, thinks JAMA blew the story.

"If they were going to do it, they ought to investigate it, tell more of the story, tell it in some context, and not just flop it out there. If it were a daily newspaper and this thing came in, we would have checked out the hospital, the patient, etcetera," Cunningham said. "We would have said, 'Hell no, I'm not going to let this guy manipulate my columns.' If a daily newspaper did what JAMA did, it would lose my complete trust."

Further, he said: "I get pretty mad at them. Here is a story about a doctor who wants to make a point, but they put themselves in the position of becoming a party to his point making. Our job is to tell a story, not to become sucked into frying this guy's fish."

Cunningham said he had "disdain" for Lundberg's contention that the JAMA editor wanted to spark a debate on euthanasia. "These guys haven't started a debate. The debate was already there. All they did was muddy the water with side issues because they practiced lousy journalism."

As many journalists have noted, if JAMA had taken steps to verify the essay, the question as to whether it might have been a hoax might never have arisen.

But the *Daily Tribune*'s Gartner said: "I think the First Amendment protects the careless as well as the careful, just as it protects the sleazy as well as the reputable. *Hustler* is no different than *The New Yorker*; JAMA is no different than the *Daily Tribune* of Ames."

Lundberg also has been criticized for his "maybe" attitude toward protecting the author's anonymity after he had made a pledge to that person.

Cunningham, for instance, speculated that Lundberg "walked into water up to his neck without knowing what he got into." He said anonymous sources are sometimes necessary, but editors and reporters ought to be careful in using them. And journalists should abide by any agreements they make with them, even if it means the reporter or editor has to go to jail.

The *Sacramento Bee*'s Pollock, who said JAMA should "go to the wall" for the author, said the way the *Journal* handled the anonymity issue "shows the difference between real journalists and those who publish special-interest publications."

JAMA did not even get much support from editors of other medical journals.

Dr. Bruce Squires, scientific editor of the *Canadian Medical Association Journal*, said if he had received a Debbie essay, he would have contacted the Mounties. In contrast, Dr. Stephen Lock, editor of the *British Medical Journal*, said he would publish an anonymous piece, but he emphasized that he would make an effort to verify it *before* putting his publication's reputation on the line.

AMA lawyers claimed a precedent for the Debbie essay in the publication in December 1987 in the *Hastings Center Report*, a leading medical ethics journal, of a case study of euthanasia that had been "edited to preserve confidentiality."

But the director of the Hastings Center, Daniel Callahan, argued that "the AMA shouldn't cite us." The case study described in his journal was based on a well-publicized, real-life case of a prominent Washington, D.C., surgeon who gave lethal poison to a patient, he said. The use of case histories to teach are important in ethics, business and many other fields, but Callahan maintained that what JAMA did "was not wise."

He explained, "For an important, influential and distinguished journal to get into a debate on euthanasia or any other hotly debated subject, it ought to present it in a much more full and solid manner than an anonymous essay."

Lundberg had been right not to play the role of "police informant" on alleged crimes that occurred in the past or whose veracity it had not confirmed, Callahan said. But he added, "If there [had been] an imminent threat to life, that would [have been] another matter." And he concluded that JAMA's handling of the case was "harmful." In the Hastings journal, the case history of euthanasia was followed by articles by three experts commenting on the case.

"The Debbie article was not reflective. There was no careful analysis that would give the piece a wider meaning and justification," Callahan said. "It's not clear what the point of the author was."

Lundberg, a confident man who speaks in precise sentences, defended his decision to edit and publish the Debbie essay the way he did. He said in an interview that he would not have changed anything he did in the editorial process.

"The *Journal* is no stranger to controversial subjects and confrontational medical politics," Lundberg said. "Publication of 'Debbie' fits perfectly in with our style and philosophy and our demonstrated practices."

He said it was important to make a distinction between a medical peer-review publication and a newspaper.

"Put yourself in our position and realize the editors of medical and scientific journals assume that authors are telling the truth about their experiments, about the patients they cared for, or about their own actions, and do not send independent investigators," Lundberg said.

The Death of "Debbie" & Press Rights

The American Medical Association has said it will invoke the First Amendment to the Constitution and the Illinois Reporters Privilege Act in an effort to protect the identity of the physician who wrote about the mercy killing of a cancer patient in the January 8 issue of its *Journal*.

Though the action may be a viable way to defend the doctor from inquiring subpoenas of the state's attorney, it is a great disservice to both the First Amendment and the Reporters Privilege law.

Neither the constitutional guarantee of free speech nor the state's reporters shield law was envisioned as a way to hide critical evidence from official investigation into the possible commission of a crime.

It is true that the press in America has fought long and hard to protect reporters and their source relationships from court subpoenas. And for good reasons. One is that the press cannot be turned into an investigative arm of any branch of government without losing its critical asset—independence. If reporters are perceived as agents of the government, they will no longer be trusted by those who fear government. Shield laws also prevent opposing sides in legal suits, criminal and civil, from using the press as an investigative tool in any case that gets publicity.

But it is not the intention or the habit of the press to uncover evidence of a crime and refuse to make it available to the proper authorities. To the contrary, many important criminal prosecutions begin with evidence published first in the press. Neither is it the traditional claim or practice of the press to try to protect the identity of a reporter who publicly confesses to behavior that may be considered criminal.

A noted ethics expert has said the AMA's decision to publish the essay, which detailed how the doctor-writer deliberately gave a lethal drug dose to a tormented, terminally ill patient, produced a dilemma for both journalists and physicians. Reporters and editors have a duty to pursue and publish the truth, he said, while doctors have a duty to protect the health of patients.

That is ridiculous. Medical ethics may have a dilemma here, but journalistic ethics do not. Ethical journalism does not condone shielding anonymous authors who confess in print to homicide, justifiable or not, with First Amendment protection from grand juries. Self-incrimination is protected by the Fifth Amendment, which is hard to invoke after the fact.

If this article was, as some believe, nothing but a fictional essay designed to focus attention on an ethical dilemma in the medical profession, it was a serious breach of journalistic ethics. Separating fact from fiction is hard enough in this business without somebody deliberately confusing the two.

—editorial appearing in the* Chicago Tribune*, February 22, 1988. © Copyrighted, Chicago Tribune Company, all rights reserved, used with permission.

"What kind of staff would I have to have, or would Bud Relman [editor of *The New England Journal of Medicine*] have to have, to send investigators to the log books of every researcher who sends a paper in," he continued. "It's preposterous. It just can't be done.

"And it means that we are all sitting ducks for fraud. A skillful liar can get published in medical journals."

But Lundberg believes he turned that ambiguity in the review system to his advantage, allowing him to publish a piece for the purpose of stirring a debate. He described the process a newspaper might have followed: send someone to the scene, check the records, interview witnesses, interview the author.

"Had I done that and discovered that the facts were exactly as stated, I would have had no choice but to not publish the piece and to report the author to local authorities," Lundberg said. The reason?

"I would have known it to be true. It no longer would have been hearsay," he said. As long as the piece was hearsay, he explained, he could not report the author because he could not say for sure that a crime had been committed.

His decision *not* to verify the essay, he admitted, was a big hedge.

(continued on page 56)

Ethics

Codes of Ethics/Upper Elementary/Middle

Alberta Education Curriculum

Goals

At the end of this lesson, students will be able to 1) define "code" and relate the concept to standards of behavior; and 2) draft a code of ethics for the class.

Time to Complete

Two class periods

Materials

Handout 1: Morse Code
Handout 2: Medical Ethics – A Case Study

Procedures

1. Write a message on the board in Morse Code. Hand out the key to the code (Handout 1). Ask the first student who can decode the message to write a brief message for his or her classmates to decode. After this 5-10 minute exercise, discuss the meaning of "code" (a systematic body of laws; a system of principles; a system of signals for communication; a system of symbols used to represent meanings). The important concept is that a code is systematic: an orderly presentation of assigned meaning or laws.
2. Relate "code" to the legal code, then to a code of ethics. A code often applies to a specific group of people: in a secret cipher, the key is known to very few; the legal code applies to all; a professional code of ethics applies to members of the profession.
3. Discuss professional standards of ethics and their function in regulating the behavior of members of a profession. Professionals have to agree to these codes in order to practice.
   - Who writes these codes?
   - How do these codes serve the members?
   - How do they serve the public/clients?

   The Canadian Medical Code of Ethics, for example, specifically refers to a doctor's responsibilities to the patient, the profession, and society.
4. Some provinces in Canada have specific regulations about physicians receiving money under a patient's will; other provinces do not, and cases are decided on the basis of interpretation of the general statement in the Canadian Medical Association's Code of Ethics, that a physician "will take neither physical, emotional nor financial advantage of his patient" (Article 3: Respect for Patient). The regulatory body must examine the physician's behavior and the situation to determine whether a physician has violated the code.
   - What is the advantage of having a regulation dealing specifically with a matter such as this?
   - What is the advantage of a general statement which must be interpreted according to the situation at hand?
   - Who decides whether an ethical issue is at stake, and who initiates an inquiry?
5. Distribute Handout 2, Medical Ethics – A Case Study. Students can work in groups of three or four, discussing

Handout 1: The Morse Code

Key to the International Morse Code.

a	.-	n	-.
b	-...	o	---
c	-.-.	p	.--.
d	-..	q	--.-
e	.	r	.-.
f	..-.	s	...
g	--.	t	-
h	....	u	..-
i	..	v	...-
j	.---	w	.--
k	-.-	x	-..-
l	.-..	y	-.--
m	--	z	--..

Handout 2: Medical Ethics—A Case Study

Mrs. Smith was 81 and living in an extended care facility. Although she was not strong enough to live alone and care for herself completely, she was mentally alert and competent. She had no close family living nearby and kept pretty much to herself. The only persons she saw regularly were the people who worked at the facility and her personal physician.

When she died following an extended illness, she willed a substantial sum of money to her doctor for his "friendship and care over the years." The family, which received the remainder of her estate, filed a complaint with the medical association.

In your group, each choose one of the following positions to defend:

- **Take the point of view of the elderly person and explain why you believe the doctor has a right to benefit from your estate.**
- **Put yourself in the place of the elderly person's family.**
- **Put yourself in the place of the doctor.**
- **Try to give the point of view of the profession. What are some of the reasons that may have contributed to the formation of a code of ethics for members of the medical profession?**

Have each student write a paragraph from the point of view of one of the roles. Form a panel representing a range of opinions and have students on the panel read their statements to the class. It is the responsibility of the rest of the class, as the audience, to listen carefully and respond to points they think are well made. They can also suggest other interpretations or justifications that might be possible.

the scenario and then prepare their statements for presentation to the class.

6. After presentations and discussion, elicit general discussion about the medical code of ethics. The following questions may be considered:
   - In what way is a ruling such as this designed to protect the interests of patients?
   - How might a doctor abuse the trust placed in him and take advantage of a patient?
   - How would this reflect on other doctors and the medical profession, and what might that do to the trust that is necessary between physicians and patients? Is this one of the reasons for a code of ethics?
7. Brainstorm suggestions for a code of ethics for the class. It may include standards of conduct in relation to other pupils, to teachers and school staff, to members of the public, and take into account not only interactive behavior but also individual integrity. As a class, draft a joint statement and post it on a bulletin board. Discuss the following questions with the class:
   - How do you agree on the standards of behavior expected?
   - How should the code be enforced?
   - What will you do if someone violates the code?
   - How should decisions about conflicts be decided?
   - How would a class ethics committee be set up?

Additional Activities

Students may wish to develop a code of ethics for the whole school. If they do, they should present it in draft form to administration, other classes, teachers, or students; confer and write revisions; develop a plan for dealing with infractions of the code; and possibly set up a school ethics committee for hearing cases. Other activities might include surveying other community members to see how many are employed in places where there is a written code of ethics; researching the codes of ethics for various professions (e.g.; teachers, lawyers, government employees); and arranging for guest speakers representing medical, legal, or other professions with a professional code of ethics.

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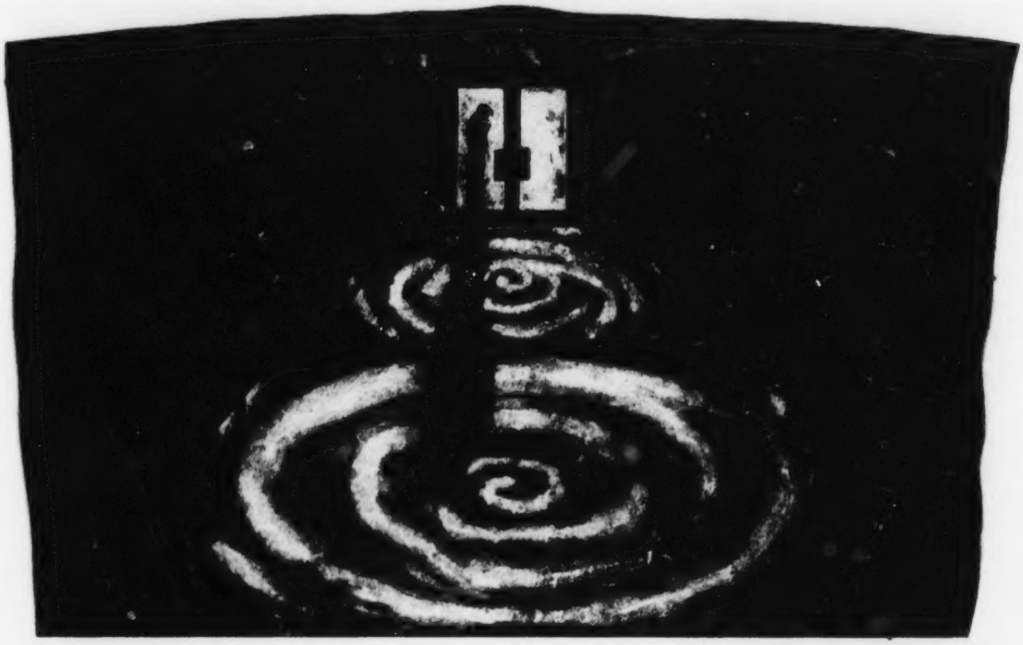
Ethics

A Lesson in Legal Ethics/Secondary

Margaret Reilley and Susan Neisuler



Troy Thomas

Purpose

This lesson is designed to help teachers and students explore some of the ethical issues that affect all of us, with particular emphasis on ethical considerations inherent in the practice of law. Students will learn about some of the ways lawyers think, some of the experiences they have in their daily work, and some of the ethical problems they must confront. It is hoped that this unit will set students to thinking: What ethical questions face lawyers? What ethical questions face students and teachers? What ethical questions confront citizens? And how might the ethical issues of each of these groups be more effectively resolved to serve the interests of all?

Procedure

The definition of ethics supplied by C.J. Silas (see the Introduction below and the article on page 3) can be used to introduce the topic. Soliciting student definitions of ethics before continuing may be both advisable and rewarding. The Introduction briefly summarizes some recent ethical lapses, and sets the stage for the discussion of the Pete Rose case in Part 1.

Bringing ethical issues closer to the student is the objective of Part 2. Students are asked to state what they would do if placed in a particular situation which poses an ethical dilemma. In addition, they are asked to state what the most ethical choice would be and why. Lastly, if their personal choice of action is different from their choice of the best ethical option, an interesting discussion of the balance between ethical considerations and self-serving actions should ensue. We have included only four situations. In discussing Situation 3, the teacher should ask students why there are requirements for passing and failing. Who or what is harmed when students cheat? Mention also that some of the ways students cheat are unethical, but not truly dishonest. Have students discuss the difference. Students could easily be asked to write about one or two situations involving themselves that the class could discuss. It is advised that the students not be identified in front of their classmates as to which situations they have written.

Having spent time identifying ethical issues in general, Part 3 examines legal ethical issues such as attorney-client privilege, a zealous defense for a client believed to be guilty, and the obligation to perform pro bono work. Before proceeding with this part of the lesson, have students brainstorm what they feel are ethical issues confronting lawyers. Then match their list with those mentioned in the lesson. For the appropriate ethical responses to the various case studies presented, consult the abridged ABA Model Code of Professional Responsibility guidelines included as Student Handout 2. In addition, state legislatures can require lawyers and people in mental health professions to reveal the confidences of a client/patient if there is reason to believe that someone is going to be hurt if the knowledge obtained by the lawyer/therapist is not revealed. Finally, the bar allows any lawyer to withdraw from a case if his conscience is bothered by the secrets of his client. However, what is contained in those secrets is still a secret, and, therefore, still an ethical problem. (And, of course, someone will continue to represent the client, so one attorney's conscience feels better, but the problem remains.)

Note: Problem 2 in Part 3 is based on the facts of the 1913 Leo Frank murder case. This case not only provides a forum for a discussion of legal ethical issues, but also could lead to a very relevant discussion of prejudice and discrimination. The girl's body was found in the cellar of Frank's factory; Frank, a Jew, was accused of attacking and killing her. The local newspaper urged his hanging – even before a trial. The paper's owner said, "Lynch law is a good sign; it shows that a sense of justice yet lives among the people."[1] Frank's lawyer was driven out of town and threatened with lynching. Frank did have a trial, was found guilty, though later evidence proved otherwise. The Georgia governor felt the trial was unfair and changed Frank's sentence from death to life imprisonment. The press, however, continued to demand Frank's execution. Finally, on August 16, 1915, a mob took Frank from his jail cell and lynched him. The *Marietta Journal* told its readers: "We regard the hanging of Leo M. Frank as an act of law-abiding citizens." Tragically, Leo Frank was innocent.

Problem 3 presents the highly publicized Syracuse, N.Y., case. In this case, the government was considering prosecuting the lawyers for breaking a public health law that said everyone was legally obligated to make sure that dead people were buried; one who knowingly left a dead body exposed was breaking the law. But, again, when you read the case, you will see that the attorney-client privilege presents lawyers and society with tough problems.

Introduction

According to one definition, "Ethics is the moral strength to do what we know is right, and not to do what we know is wrong." This sounds straightforward and seems a simple enough guideline to follow, but a quick glance at today's headlines will show us otherwise. Corporations, public officials, and individual citizens repeatedly demonstrate unethical behavior. A defense contractor is indicted for falsifying his test results; officials of a federal agency are shown to be involved in a multimillion dollar kickback scheme; the wealthy Leona Helmsley is convicted for tax evasion; and college students are caught buying term papers and passing them off as their own work.

Lapses in ethical judgment are not new, but what disturbs many observers is the apparent extent of present-day unethical behavior. Sociologists offer several explanations for this situation. First, our culture glorifies wealth, equates success with wealth, and frequently condones any behavior which helps to acquire great wealth. Second, the public seems to have lost much of its concern for the common good. The new standard is "me first." And third, there is a growing lack of consensus as to what is wrong. Behavior that used to be considered clearly unethical is now rationalized and justified; there appear to be no more moral absolutes. Fourth, appropriate role models of ethical behavior are harder to find. Newspapers, magazines, and particularly television, glamorize the corrupt, the bizarre, and the unscrupulous. The bad guys are often admired for beating the system while "nice guys finish last."

Part 1

Before examining some of the ethical issues lawyers must face, let's look first at situations which involve other individuals, and even situations which might involve you.

Baseball legend Pete Rose has been banned for life from the sport he dearly loves. He had allegedly broken a cardinal rule of baseball: he had gambled on baseball games, including games in which his team was involved. Although he continues to deny he ever bet on baseball, evidence acquired by the baseball commissioner's office indicates otherwise.

Questions:

1. Is Rose's gambling an ethical issue?
2. Why did the commissioner of baseball feel that it was harmful to baseball even if Rose only bet on his team to win?
3. Did Rose's gambling hurt anyone or anything other than himself?
4. Could it have hurt anyone or anything other than himself?
5. Did he deceive anyone?
6. Having been banned from baseball, is it proper that he could still be voted into the Baseball Hall of Fame?
7. How would you vote? Why?

There are no easy answers here, but remember to keep in mind that ethics involves doing what is right and what is honorable.

Part 2

Now let's bring the issue of ethics a little bit closer to home. In each of the following situations, consider first what you most likely would do yourself, and second, decide what would be the most ethical choice to make. Be ready to give reasons for your decisions.

Situation One: You are asked out on a date by someone you like. However, your best friend is madly in love with this person. Do you:

a) Go out on the date anyway, but not tell your friend
b) Decline the offer because of your friendship
c) Tell your friend first, but go out on the date anyway
d) Decline the offer, but make it clear why you are saying "no"
e) Other choice

Situation Two: You are selling your 11-year-old car. You know that it will soon need several expensive parts. A potential buyer test drives the car, notices nothing wrong, and makes an offer. Do you:

a) Say nothing
b) Say that some "minor" repairs might be necessary, but otherwise it "runs like new"
c) Say that the car will soon need some work and that it may be expensive
d) Other choice

Situation Three: You need to pass U.S. History and so far you have, but not with a very high average. There is a mid-term test tomorrow that you haven't studied for. You have a friend in an earlier class with the same teacher who will be taking the same test. Do you:

a) Ask your friend to somehow get an "extra" copy to help you study
b) Ask your friend specific questions about the test
c) Not compromise your friend and just take the test
d) Other choice

Situation Four: You are a lawyer representing a client you know is guilty. You are required to provide the best defense possible. As you prepare your case, you learn that an important witness against your client has a history of family problems. Using this knowledge could help your client, but could destroy the witness's marriage. Do you:

a) Use this knowledge to discredit the witness without regard for the consequences
b) Do the best job you can without mentioning the family problems
c) Resign from the case
d) Other choice

In the situations above, did your actions match the ethical choice? If they didn't, why did you feel you would not act ethically? Did your view of what was ethical match the opinions of those in the class? What might account for any differences of opinion?

Part 3

The practice of law may involve lawyers in situations where their personal beliefs clash with their professional obligations to clients or with the reality of legal practice.

Following are a few questions that highlight these problems:

1. How zealously should a lawyer defend a vicious criminal? The American legal system is based on the idea that every person who wants legal representation can have it. Moreover, the Supreme Court has said that once a lawyer begins to work on a case, he or she has a constitutional obligation to provide that client with the best representation possible. But what if that means working to keep a dangerous person out of jail?

2. What should a lawyer do when faced with a client who has a serious problem but absolutely no money to pay a fee? Poor clients are often involved in very time-consuming and urgent matters such as evictions, wrongful arrests, and so on. A lawyer working alone or in a small firm really cannot afford to work on such a case without being paid a fee. Should the lawyer refuse to take the case? Should the lawyer overcharge other clients to pay for this one? Should all the lawyers in the community band together with each taking on a percentage of these cases? What about all the people who remain unserved?

3. How much protection does a lawyer owe other lawyers (and judges) if he or she thinks they are doing a bad job? We are not surprised when lawyers sue doctors, but it is very rare to see lawyers suing other lawyers. This may be because it is more difficult for people to sue others with whom they work or see in court as "colleagues." But legal malpractice does occur. What should a lawyer do when he or she sees it? Should the lawyer tell the victim (if the victim does not know)? Should the lawyer offer to help the victim? Should the misbehaving lawyer be confronted? What if an honest mistake was made? What if the mistake was dishonest? How would you be able to tell the difference? What if there was dishonesty but no one was actually hurt? Should these factors even be considered? Would it be best just to report the misbehaving lawyer to the State Disciplinary Board?

Some of the best examples of these problems lie in the area referred to as "attorney-client privilege." This phrase means that information exchanged between attorney and client is privileged information, and that it is protected – it can and will remain a permanent secret. An attorney can never reveal such information without the permission of the client. The attorney has a professional obligation not to disclose such privileged information unless that information is needed to defend the client. Only the client has the right to reveal such information; it is called "waiving the privilege."

Once it is waived, the attorney is no longer obliged to be silent.

Why do lawyers have this ethical obligation to maintain their clients' secrets? The American Bar Association, the organization responsible for developing ethical guidelines for lawyers, argues that this guarantee of secrecy (of "privilege") is necessary because:

1. It creates a climate in which the client feels comfortable telling his/her lawyer everything the lawyer will need to know in order to prepare a good defense.
2. The American legal system is one in which people in trouble must have a lawyer, and such people would not go to a lawyer unless they could be sure ahead of time that what they said would be held in confidence.
3. People sometimes consider doing things that are either foolish or illegal. If these people went to a lawyer for advice the lawyer might be able to talk them out of their plans. But they probably would not go to a lawyer unless they felt the lawyer would keep their plans secret.

In order to understand why the ABA says, "The rules on confidentiality are among the most controversial in the field of legal ethics," let's consider the following situations.

Problem 1. A lawyer met with a very angry client whose former business partner cheated him and ran off with his wife. The lawyer was suing to regain the client's lost profits. During the meeting, the client repeatedly said that if the courts would not give him justice, he would "get it himself." The lawyer knows that the man owns a gun. On the day of the court decision, which went against him, the client left the courthouse angry and muttering threats.

a) What should the lawyer do?
b) Should he break confidentiality and warn someone about this man?
c) Whom should he warn?

Problem 2. In a small town, a young factory worker was raped and murdered. After a brief, highly publicized trial, a fellow worker has been convicted and sentenced to life imprisonment. The conviction was based solely on the basis of an eyewitness identification. Sometime later, a man goes to a lawyer's office seeking advice. In talking with this man, it becomes clear to the lawyer that this was the real murderer. After questioning by the lawyer, the man admits his guilt. Furthermore, he has caused the eyewitness to commit perjury. Meanwhile, the convicted man has received several death threats; he is a member of a religious minority that is very unpopular in the town. However, the murderer refuses to turn himself in.

Should any – or all – of the following factors cause the lawyer to break his promise of confidentiality?

a) The nature and length of the convicted man's sentence – a short or long term of years; life imprisonment; death
b) Which man, the convicted man or the murderer, has a family to support
c) Which man, the convicted man or the murderer, already has a criminal record, including crimes of violence
d) The danger faced by the convicted man from the death threats

Problem 3. Read the newspaper account of the Syracuse case (Student Handout 1, page 17) and answer the following questions:

a) Did the lawyers have a right to go to the mineshaft and not report what they found?
b) Should the lawyers reveal their knowledge if they learn that a group of cave explorers is planning a dangerous attempt to search for the bodies?
c) Should they reveal their knowledge if they are told that the parents of the victims are so upset that they might suffer a permanent mental breakdown?
d) Do you agree that the lawyer's highest obligation is to serve his clients and no one else? Why or why not?

In response to vexing problems such as these, the American Bar Association has developed a Code of Professional Responsibility (parts of which appear in Student Handout 2). The Code sets out a list of rules that tell lawyers how they should behave. It says that a lawyer may reveal the intention of a client to commit a future crime. That would be a solution for the attorney in Problem 1. In fact, in that case the Bar of Florida agreed that the attorney could speak to someone, and let the attorney decide whom to tell.

The Code is not exactly like a law, because a lawyer would not go to jail just for not following one of the Codes. He or she could, however, be disciplined by the bar organization. A mild form of discipline would be a letter of reprimand. A very strong form of discipline would be a decision to take away his or her license to practice law.

It is important to remember that a lawyer cannot break a law to help a client. In the Syracuse case, the government considered prosecuting the lawyers for breaking a public health law that said everyone was legally obligated to make

Suggested Additional Readings

Bowen, Ezra. "Looking to Its Roots." *Time*, May 25, 1987: 26-29.

"Burning Questions: Lying, Cheating, and Stealing in America." New York, ABC News, 1989 (videotape).

Carlson, Margaret. "Charlie Hustle's Final Play." *Time*, September 4, 1989: 64.

"Do Unto Others." "Ethics in America" series. Columbia University: PBS, February 13, 1988 (videotape).

"Ethics on Trial." Fred Graham reporting. Washington, D.C.: WETA Educational Activities, 1986 (videotape).

Fanning, Deirdre. "Beware the Boomerang." *Forbes*, February 6, 1989: 66-67.

Finkelstein, Milton, Sandifer, Hon. Jawn A. and Wright, Elfreda S. *Minorities: USA* (New York: Globe Book Company, Inc., 1976), pp. 255-256.

Gelman, David. "Of Mice and Men – and Morality." *Newsweek*, July 18, 1988: 65.

Kanner, Bernice. "What Price Ethics?" *New York*, July 14, 1986: 28-34.

Lieber, Jill and Neff, Craig. "Rose's Grim Vigil." *Sports Illustrated*, April 3, 1989: 52-57.

Morgan, Thomas D. and Rotunda, Ronald. *1984 Selected Standards on Professional Responsibility.* (Mineola, NY: The Foundation Press, Inc., 1984), pp. 26-27.

Sachs, Andrea. "Showdown in 'Sue City.'" *Time*, August 7, 1989: 42.

Shapiro, Walter. "What's Wrong." *Time*, May 25, 1987: 14-17.

sure that dead people were buried; one who knowingly left a dead body exposed was breaking the law. These lawyers did not go to jail for breaking this law, but, again, you can see that the attorney-client privilege presents lawyers and society with difficult problems.

A further complication is a requirement by state legislatures which requires lawyers and mental health professionals to reveal the confidences of a client/patient if there is reason to believe that someone may be harmed.

Finally, a lawyer is permitted to withdraw from a case if his or her conscience is troubled by the secrets of a client. However, those secrets are still protected and privileged, and, therefore, an ethical problem remains. (And, of course, another lawyer will take up the case, so while the first attorney's conscience feels better, the second will face the same problem.)

Optional Activity

One way to make this ethical lesson as up to date as possible is to assign students the task of bringing in newspaper and magazine articles which illustrate a violation of ethical behavior. Using categories, like government, business, and sports, can help students focus their search. Have students explain to others why they selected the article that they did.

Tips for the Teacher

Lawyers are valuable resources for any discussion on legal ethics. To help a lawyer feel more comfortable and confident in the classroom, supply him or her with a copy of this lesson and plan ahead which specific areas the lawyer might want to focus on.

Another possibility is to ask a lawyer to talk about how other legal systems operate (e.g., the inquisitorial system) in order to help students better determine the value and effectiveness of our adversarial system.

A representative of the local organization responsible for attorney discipline might also be invited to discuss ethical dilemmas facing lawyers and how they are addressed.

Student Handout 1

PAIR FACE DISBARMENT THREAT AFTER KEEPING TWO SLAYINGS SECRET

Ethical Dilemma: Should Lawyers Turn in Clients?

by Bryce Nelson

. . . The issue of client-attorney confidentiality received wide attention in recent days after it was disclosed that two Syracuse, N.Y., lawyers, Frank Armanti and Francis Belge, had known for six months the location of the bodies of two young women who had been killed but felt legally obligated to keep silent – because they got the information from their client.

Although many legal authorities say Armanti and Belge acted properly in keeping their client's information secret, the two court-appointed lawyers have found themselves battered by protests and investigations that could lead to disbarment or criminal prosecution.

"Very rarely are lawyers put to these kinds of tests," Armanti commented in an interview.

The case brings into sharp focus the ethical quandary of lawyers trying to protect the confidences of a client – a problem that faces doctors, psychiatrists, accountants, ministers, social workers and journalists also.

According to legal experts, the case promises to become one of the most studied examples of the confidentiality privilege.

"Any lawyer with any guts who knew what he was doing would have done the same thing," Armanti said, "but the law profession is composed of many different kinds of lawyers."

Confidentiality is a privilege more easily defended in the tranquility of a law school than in the outside world . . . .

William Hauck, father of one of the murdered girls, has filed a complaint against the lawyers with the Onondaga County Bar Association, which has referred it to the appellate division of the State Supreme Court, which has in turn, asked for an investigation by the State Bar Association.

The two lawyers may well be in a fight for their professional lives, and not all their fellow lawyers support the stand they have taken.

"It's outrageous," said a leading Minneapolis attorney. "They should both be put in jail. You have to report a crime if you know about it."

But the Syracuse lawyers have their supporters too.

"The only way this New York case is different," said George P. Lynch, a leading Chicago criminal lawyer, "is that the evidence is composed of human bodies. I recognize the unappealing position the lawyers were in, but the lawyer is duty-bound to remain silent about information from his client. If you reveal such information, you should be disbarred."

The client who put Armanti and Belge in this spot is Robert Garrow, a 38-year-old Syracuse mechanic who has admitted that he killed four persons in upstate New York last summer.

Garrow was arrested August 9 and indicted on charges of murdering 18-year-old Philip Domblewski. The court appointed Belge and Armanti as Garrow's attorneys. In his conversations with the lawyers, Garrow told of the other murders he had committed.

One was that of Alicia Hauck, 16, a Syracuse high school student, who had disappeared in July; the lawyers later found her body in a Syracuse cemetery. The other murders were those of Daniel Porter, a 22-year-old Harvard student, whose body had been found on July 20, and of Susan Petz, 21, of Skokie, Ill., a Boston University journalism student who had been Porter's camping companion in the Adirondack Mountains.

Following Garrow's directions, the two lawyers found and photographed the bodies of Miss Petz and Miss Hauck – but they said nothing to authorities.

Miss Hauck's family thought she might have run away from home. The Petz family – knowing their daughter's companion had been killed – feared the worst.

With the knowledge that the two Syracuse lawyers represented a client charged with a killing in the Adirondacks, Earl Petz, Susan's father, went to Syracuse to talk to Belge. The lawyer has since said he felt obliged not to tell Petz anything – and didn't – adding that his silence caused him "many, many sleepless nights."

The bodies of both girls were found accidentally last winter by students.

When Garrow testified at his trial about the other three killings he said he committed, the lawyers felt they had been

Student Handout 2

Disciplinary Rules

DR 4-101 Preservation of Confidences and Secrets of a Client

- **(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.**
- **(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:**
  - **(1) Reveal a confidence or secret of his/her client.**
  - **(2) Use a confidence or secret of his client to the disadvantage of the client.**
  - **(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.**
- **(C) A lawyer may reveal:**
  - **(1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them.**
  - **(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.**
  - **(3) The intention of his client to commit a crime and the information necessary to prevent the crime.**
  - **(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.**
- **(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.**

(Excerpted from the Model Code of Professional Responsibility, copyright © 1984 American Bar Association. Note: Further amplification of points (C) (2) through (4) may be found in ABA Opinions 155, 156, 314, 202, 19, and 250; also see ABA Canon 37.)

released from their obligation of secrecy and disclosed they had known the locations of the bodies.

Garrow was convicted of Domblewski's murder Thursday. He was sentenced Monday to the maximum penalty of 25 years to life.

Roberta Petz, mother of Susan, angrily asked for the prosecution of the two attorneys.

She said, as have several lawyers, that she could not understand why the attorneys could not have given the information to the police anonymously, so that the parents could have been spared their troubled and seemingly interminable wait for information on their daughters.

One answer, say legal scholars, is that even an anonymous disclosure, if given without the client's permission, would be a breach of lawyer-client confidentiality. In addition, evidence obtained from or near the bodies, such as fingernail scrapings or footprints, might incriminate the client.

Armanti and Belge understand from personal experience the anxieties caused by a death in a family. Belge suffered the death of a 12-year-old son. And Armanti's brother was lost during an Air Force reconnaissance mission over the North Sea. The body was never recovered.

"We feel for these parents," Armanti said. "I know what torment my mother went through in never having my brother's body returned. We know what hell these parents were going through.

"We both have daughters the same age as the girls who were killed . . . We just couldn't figure any other way to do it.

"You have your duty to your state, to your law and order, but my primary duty is to my client – so long as I don't jeopardize anybody's life or property. If the girl had been alive, then we would have had the duty to save her life, because life is primary. A body is a sacred thing but I couldn't give it life, and I figured somebody is going to find it."

After their client had told them about the killing last summer, it took a while for the two attorneys to find the abandoned mineshaft in which Susan Petz's body had been left.

The bodies of Miss Petz and of Miss Hauck, which were back in the woods of the Syracuse cemetary, were found months after they had been located by the lawyers but well before Garrow's disclosures in court.

One aspect of the case that has raised questions is the lawyers' attempt to plea bargain with the Hamilton County district attorney and police investigators of four other upstate New York counties.

In September, after the two lawyers had found Miss Petz's body, they offered to help the district attorney and the police solve the Petz and Hauck murders if their client, Garrow, were placed in a mental institution. The district attorney rejected the offer and went ahead with the prosecution of Garrow for the murder of Domblewski . . . .

Several leading prosecutors interviewed, however, said that the New York lawyers had acted properly both in their refusal to divulge information about the bodies and in their attempt to bargain with the prosecutor.

"I'm in complete agreement with these lawyers," said Samuel Skinner, head of the criminal division of the U.S. attorney's office in Chicago. "They operated in accordance with the highest traditions of the legal profession at a time when the profession is in great trouble." . . .

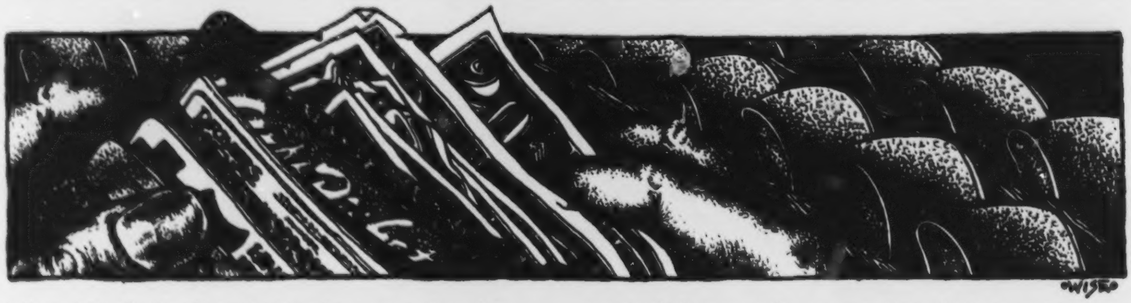
But the lawyer-client confidentiality relationship is not clear-cut, and judges and official investigating bodies sometimes have a different view from that of a defense lawyer . . . *(Reprinted with permission from the Los Angeles Times, July 2, 1974; Copyright* © 1974 The Los Angeles Times.)

Margaret Reilley teaches grades 10-12 at Norwood High School, Norwood, Massachusetts. Susan Neisuler is a lawyer in Boston. This lesson is adapted from a legal ethics unit developed for the Massachusetts Bar Association's Law-Related Education Subcommittee on Secondary Education and partially funded by the Norwood Public Schools. Used with permission.

Ethics

Duties: Legal? Moral? Religious? or Social?/Secondary

Ann Blum



Susan Wise

The activity derives from the introductory section of *An Introduction to Law in Georgia*, a text for middle and secondary students. (Written by the Young Lawyers Section, State Bar of Georgia, edited by Ann Blum and R. Ernest Taylor. Athens, GA: Carl Vinson Institute of Government, University of Georgia, 1985. Used with permission.)

Objectives

At the conclusion of this lesson, students should be able to:

1. Define and discuss what the law is.
2. Identify sources of "duties" affecting our behavior.
3. Define and give examples of legal, as well as social, religious, and moral, duties.
4. Compare social, religious, moral, and legal duties, and discuss their relationships.

Procedures

I. Introduction: *What is the law?* Introduce and discuss the definition of law that follows. Alternatively, students could first be asked for their definitions of law, which then could be related to the definition: "The law consists of all legal duties and obligations and rights that can be enforced by the government (or one of its parts) and the means and procedures for enforcing them."

II. Discussion: *Identifying and defining legal duties.* To explore the definition of law, begin by examining the term "legal duties and obligations." To do this, use the examples and discussion in "Legal Duties: Yes or No?" that appears on page 20. It can be reproduced for use as a student handout. After distributing the handout, have students answer as best they can the questions posed in the examples; use the "Discussion" section (below) to examine responses.

III. Discussion. Some duties are set up by the rules or laws made by the social groups in which we live. A family is one type of a social group. Families, as you know, set up certain duties and rights for their members. Example 1 shows an obligation to the family. If you fail to do it, your parents – not the government – will give out any punishments. It is a social, not a legal duty.

Example 2 is also a social duty. In this case, the social group is your club rather than your family. You will not have broken any legal duty if you do not pay the fine. But the club may enforce its rule by kicking you out.

Social groups can be very large. They may consist of the people in your circle of friends or in your community. They may include your nation or even the entire human race. Treating people with courtesy is a social duty (Example 3). However, as long as no injury results from rudeness, it generally does not violate any legal duty.

Example 4 involves another source of "laws" or "rules" and another kind of obligation – religious duties. Examples of religious duties would be prayer, observance of holy days, contributing to the support of religious institutions, etc.

One of the most basic freedoms our government protects is freedom of religion. Thus, our government cannot prohibit people from following their religious beliefs, unless following those beliefs would harm themselves or others.

In countries with state religions, religious and legal duties may be the same. But in our country, religion and government are separated. The government cannot enforce religious duties. Enforcing religious duties, in the United States, is a matter solely between individuals and the institutions of their personal religions. So, in Example 4, you don't have a legal obligation to attend church.

Example 5 involves a moral obligation to help others. What does "moral obligation" mean? Morality is concerned with determining what is right and what is wrong in human action and character. A moral lesson would be one that teaches goodness or correctness in character. How do you decide what is moral? Usually, it is suggested that you let your conscience be your guide. Should you do this because it is right? Or not do it because it is wrong?

Under our laws, moral obligations to do something – that is, to carry out some action – are generally not enforceable. In Example 5, you would not be arrested if you did not try to help the accident victim. However, your conscience might bother you. Or you might feel that you failed to carry out a religious duty. (Note, however, that if there were no one else around the victim, refusing to try to seek or give aid could be criminal negligence.)

On the other hand, the law does enforce a number of duties *not* to do something. Laws generally impose *duties* not to take or damage the property of others. Your taking of someone else's property (Example 6) could be punished by the law.

IV. Wrap-up. To conclude the discussion of these examples, consider the following questions.

1. *What was the criteria used to determine whether a duty was legal?* Identification of the enforcer of "law" is one way to ascertain the source of a duty or obligation.

Legal Duties: Yes or No?

1. At home, you are supposed to take out the kitchen garbage everyday. Usually, you do this, but for two days you've been too busy. Your parents are upset. Have you failed to perform a legal duty?
2. You belong to a cycling club. One of its rules says that you must pay a fine if you are late to its meetings or events. Do you have a legal duty to pay the fine?
3. You are driving down a busy road. The driver behind you honks loudly and continuously as soon as the light turns green. You get mad; you think his behavior is rude and dangerous. Is the driver violating his legal duties as a driver?
4. Your religion requiries you to go to church on Sunday. You want to go to a picnic at the lake instead. Do you have a legal obligation to go to church?
5. You see an accident in which someone has been hurt. A crowd has gathered. Are you legally obligated to stop and offer assistance?
6. You find a wallet on a movie theater seat. It contains the name of the owner. It also contains $50. But you found it, and you are really broke, so you decide to keep the money. Do you have any legal duty to return it?

Then, as in "Discussion," the key to determining whether an obligation is a legal duty is whether the duty can be enforced by the government. The government might be the courts, the police, or some governmental agency. Note, however, that this duty or obligation may not be enforced every time. Not everyone who commits a crime is arrested. The point is that the duty can be enforced.

2. *What does enforcement of a legal duty mean?* It means that if you do not meet a legal obligation, like attending school, the government can take some action against you. It means that if a person does not meet a legal duty to you (such as returning money borrowed), you can take legal action against him or her. You may not choose to – but you do have the power to do so.
3. *Can duties derive from more than one source?* This question should arise particularly in consideration of Example 5. Certainly, the duty to help others can be seen as "social" and "religious" as well as "moral." (What it is ultimately is another question.) This is a good time to stress that laws enacted by governments derive from societal, religious, and moral sources, which often overlap. Illustrate that even with the separation of church and state that prevails in our country, religious values are reflected in our laws. Look, for example, at whether any of the Ten Commandments prescribe legal duties in our society.

Activity: Are These Legal Duties?

Distribute the worksheet "Are These Legal Duties?" It can be filled out by individuals, teams, small groups, or the class working as a whole. (An effective alternative is to distribute worksheets with duties illustrated by pictures taken from newspapers, magazines or other sources, or ask students to bring in illustrations of legal duties.)

On the worksheet, Part 1 can be used alone, completed before Part 2, or both parts can be answered at the same time. In all instances, if used in introducing a law class or unit, students should feel comfortable guessing at the answers if they don't know them.

Before beginning, provide students with simple guidelines such as the following to make their decisions:

Legal – duty that can be enforced by a government.

Social – (1) duty that can be enforced by a small defined group such as a family, club, or team, or (2) duty that can be "enforced" by community in which you live. Enforcement can simply be nonacceptance, displeasure or disapproval.

Religious – duty set by religion. (Enforcement could take various forms. In some religions, it might be a penance, such as giving up a favorite activity for some time period.)

Moral – conscience can be used as a guide (and can be seen as enforcer). (If any students have doubts about theirs, they could try to "borrow" the conscience of someone they respect for the activity!)

Discuss responses; anticipate some disagreement.

Answers to Worksheet

Responses given below are based on Georgia law, so where state law applies, check the law in your state. Whether duties are social, moral, or religious is, in general, left for group discussion. Exceptions or "what-ifs" to generalized questions can lead discussion far astray: circumscription is suggested. Feel free to use other examples. The exercises can be shaped to stress specific issues.

1. No (Social; family duty)
2. Yes, if under a certain age. Requirements vary by state.
3. No.
4. No.
5. Yes. The requirement for exercising a reasonable standard of care in dealings with others is part of tort law.
6. No. (Social; club rule)
7. No. (Social; game rule)
8. Yes.
9. Yes.
10. No, in general. However, use of fur of certain endangered species is prohibited.
11. No. (Social)
12. No. (If performance requirements were in an employment contract, they would need to be less vague.)
13. No, as stated. But yes in a number of contexts, such as when under oath. Numerous lies as misrepresentations of truth – such as, defamation, fraud, and false advertising – violate legal duties.
14. No. (Social; business rule)
15. No.
16. Yes. (Is boxing an exception? Any others?)
17. No, not as stated. Too general.
18. Yes, generally. Depends if applicable law.
19. No.
20. No. Voting is a right.

General Questions

1. How would (did) you classify duties that pertain to personal well being, such as #15? Is there a moral duty to

Are These Legal Duties?	Part 1 Legal Duty?		Part 2 Is Duty –		
	Yes	No	Social?	Religious?	Moral?
1. Is having to help with the dishes usually a legal duty?					
2. Is there a legal duty to go to school?					
3. Is there a legal duty to graduate from school?					
4. Is there a legal duty to feed the poor and hungry?					
5. Is there a legal duty to be careful so as not to harm others?					
6. Does a cheerleader have a legal duty to be at every game (as the rulebook says)?					
7. Is there a legal duty not to foul your opponent (in basketball)?					
8. Is there a legal duty to have your dog vaccinated against rabies?					
9. Do you have a legal duty not to mistreat your pet cat?					
10. Is there a legal duty not to wear furs?					
11. Is there a legal duty to tip waiters and waitresses?					
12. Is there a legal duty to do your job as well as possible?					
13. Is there a legal duty to always tell the truth?					
14. Is there a legal duty to wear a shirt and tie in a restaurant?					
15. Is there a legal duty to have regular dental check-ups?					
16. Is there a legal duty not to "beat up" other persons?					
17. Is there a legal duty to care for the environment?					
18. Is there a legal duty not to disturb neighbors with loud parties?					
19. Is there a legal duty to be informed about candidates for election?					
20. Is there a legal duty to vote?					

care for self? Is a separate category needed?

2. If "duty" is not legal, should it be? Why? Might it be in other societal or religious groups? Consider any difficulties in enforcement.
3. Identify any duties that were purely "legal." Do these have any special generalizable characteristics?
4. In how many instances were duties considered religious, moral, and/or social as well as legal? Discuss why it was often difficult to assign a duty to one category or distinguish among them.
5. On the basis of responses, support an argument in favor or against the statement that laws are based on moral values (or social or religious values).
6. Can laws or legal duties go against "moral" (or religious or social) values? Give examples. (e.g., abortion opponents consider any right to abortion immoral; some people consider laws supporting tobacco farming immoral).
7. Legal duties only apply where the government has the power or jurisdiction to enforce them. For example, Georgia cannot enforce the legal duties that Alabama enacts. China cannot enforce American legal duties. What about social duties? religious duties? moral duties? Do these change if you go to another state or country? Explain.

Note: "Legal rights" and the "enforcement" part of the definition of law can be explored in subsequent lessons.

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Learning Ethics in School-Based Mediation Programs

The old hidden curriculum taught the standard brand of ethics, but a new "curriculum" teaches in a whole new way

The problem is no one wants to teach ethics.

At a recent community meeting on schools in Cleveland, a session called the Education Summit, a Chicago-based consultant slammed his papers down on the table, stood up, and shouted, "That's the problem with American education, no one wants to teach ethics."

Perhaps my experience is different, but I find no shortage of adults willing to teach morals to young people. I have seen student eyes glaze over as adults have talked about right and wrong, about peace and violence, about honesty and integrity, about consumerism and deferred gratification.

This article suggests that the enemy of ethics education is not that teachers do not try to develop a sense of right and wrong in students. Instead, the culprit identified here is the hidden curriculum schools teach through their disciplinary procedures.

In many schools, disciplinary procedures are unimaginative, noncreative, and stifling. Discipline policies fail to prepare students to live in a democratic society or in an unsupervised world. In many situations, procedures do not conform to the essential due process guarantees of fairness and equal protection.

The critical flaw in school discipline is its emphasis on punishment. It thwarts the development of student responsibility, leadership, independence, and interdependence. It works against the stated curriculum objectives of critical thinking and problem solving. Students find themselves caught between the liberal arts message of academic instruction and the hidden agenda of authoritarian discipline.

Students are told that natural consequences will flow from their acts. But justice is often delayed and fact finding is flawed. School discipline fails to be convincingly fair, impartial, or supportive of human dignity. At times, favoritism, prejudice and stereotyping make school disciplinary policies a charade.

At worst, school discipline labels students as liars and cheats. It convinces them that they are unreliable and irresponsible. These are labels that are difficult to outgrow. They deprive students of their good name and reputation without formal charges or an opportunity to be heard.

Thousands of students are excluded from instruction in American high schools each year on the basis of rules that are unclear, unpublished, or unfair. An important 1975 civil rights case, *Goss v. Lopez*, 419 U.S. 565 (1975), forbids arbitrary school suspension. Most students and many administrators have never heard of this case.

The consultant from out of town was right, though. The teaching of ethics is critical to American education.

A New-Generation High School

When several of us at Cleveland-Marshall College of Law worked with teachers in the Cleveland district to establish the Law and Public Service Magnet High School (LPS) in 1982, we included students in the governance process. The goal was to make students responsible for their own behavior, responsible for creating school rules, and responsible for resolving student-to-student disputes.

We were inspired by Jeffersonian ideas of government based on the consent of the governed. "If you don't like the rule, why don't you change it?" we wanted to hear one student say to another. As I watched the school develop, I saw students become advocates for the school rules they helped create.

Upper-division students were exasperated at the beginning of each school year with the unruly and disordered ninth graders until the younger students gave up their "junior high school attitudes" and internalized the basic operating procedures of the rule-governed school.

We found additional guidance in John Dewey's insight that students grow ethically through their relationships with each other. What Dewey called "conscious egoism and altruism" become possible as students identified their interests in participating in the educational program of the school and protecting the educational environment of the school for others. Through the law-related curriculum of the school, the interests of self and others were translated into issues of rights and justice.

Our most innovative idea in establishing the school was including a mediation program in its governance structure. The suggestion came from Judith A. Zimmer, now deputy director of the National Institute for Citizen Education in the Law. In 1982, her job with LPS was to coordinate the Cleveland State University resources with the academic and work experience program of the magnet school. In this role, she introduced mediation and worked with staff and students to create a mediation program to fit the school's needs.

The university and school district planners were linked by common ideas which have worked out well. We agreed that it was more important to see students develop than it was to see them adjust. We felt that as students developed they would increase their ability to deal with power and influence. We toyed with the idea that there was a relationship between power and influence and learning to read, but that is another story.

We knew that real learning would only come if students tested their classroom-learned theories in reality-based experiences in the community. What we did not know in 1982, that we know now, is how important a role school-based mediation would play in achieving the *educational* goals of the school. Particularly, we did not see at the time the importance of mediation to the moral and ethical development of our students.

With the cooperation of school administrators who were willing to experiment with alternative forms of school discipline, the responsibility for student conduct was shifted to the students. Corporal punishment decreased, and the number of school suspensions was reduced.

We saw the climate of the school become one where the student ethos rejected fights as a way of settling disputes; where students held each other accountable for their behavior; where students dealt openly and effectively with anger, fear, and aggression; and where students used their school-learned skills of conflict resolution to provide service in the community.

Community Building: School and Neighborhood

Space does not permit me to go into detail about how our school-based mediation programs actually operate. As noted later in the article, our program and several others are available to consult with schools seeking to begin school-based mediation programs. A number of related books are listed at the end of this article. In addition, several previous articles in *Update* discuss the actual workings of mediation programs, including those in the schools. See in particular "Tales of Schoolyard Mediation," by Albie Davis and Kit Porter, which appeared in the Winter 1985 issue. It lists a number of organizations that can be of help.

The school-based mediation program made students directly responsible for the governance process of the school. The school's administrators said that mediation saved about half of the time they had traditionally spent resolving student-to-student disputes. Students were fascinated by their leadership roles. They began to see the big picture of the school community and of the school in the larger community.

But the real learning took place as students observed conflict and brainstormed about ways to meet school management needs. The endless variety of disputes provided an opportunity for students to learn *about* conflict by learning *from* conflict. As students became experienced as mediators, they came to understand themselves better, and to understand the management dynamics of their school.

"There is a conflict there because everyone piles up at that door at that time of day," a student told me one day. "Some conflicts are caused by situations, you know," he explained without any deference to my law degree or my extensive reading in organizational behavior. "Kids are going to tear pages out of books until we have a copy machine in the library," another student assured me.

The very students who, in many high schools, would have been suspended for one thing or another were building a school that they loved to attend. When one student faced school suspension, he acknowledged his guilt but asked for a "bifurcated hearing" so that he could "show good reasons why it is important to my education that I not be sent home from school." The extension from mediation to negotiation is very natural.

Central to students' development was their acceptance of the idea that conflict is a natural and normal part of daily life. As they worked as school mediators to resolve conflicts, they became better and better. They became able to prevent trouble through early observation of body language, facial expression, and tones of voice. Through the efforts of school mediators, the school population generally picked up on the language and skills of mediation. One day, I heard one student say to another, "wait a minute, don't we have some options," as they were moving toward disagreement.

As they built a history of successfully mediated cases, the confidence of student mediators grew. They got better at early and accurate fact finding. They were able to help students feel comfortable recalling facts and verbalizing the feelings that brought them to the mediation table. They enabled students to deal with hurt, embarrassment, rejection, anger and fear in ways that let students move forward to generating options and fashioning agreements. Mediators used emotions, particularly empathy, to help students relate to each other. "Now put yourself in her shoes," the mediator would suggest.

New Learning

As students took the position of the other party and felt the consequences of their actions, a learning unlike other learning took place. "I hate to be picked up and moved around," the heavy-set male student said when he assumed the role of the small demure female student who had brought him to the mediation table. He had been manhandling her on a fairly regular basis. Up to that moment he had thought that she liked being picked up, pushed against the lockers, and held over the open stairwell. She was so fearful of his unwanted touching that she stayed home from school to avoid him.

Role reversal or putting themselves in the shoes of the other person can work instantly to help students move beyond the conflict and start to get on with a new definition of their relationship. Because the relationship really does change through the mediation process, student agreements work. Rarely are these signed agreements violated. Even when they are,

Photo courtesy Chuck Humel, Cleveland State University

Artemus Carter

students simply return to the mediation table to work out additional terms or details.

In sum, a school community develops where people know and value each other. The school is predictable from one day to the next. No gossip, no anger will be allowed to go without an accounting. Student mediators, in fact all the students in the school, increase their communication and questioning skills, increase their sense of control, and increase their self-esteem. No one is disaffected, everyone in the school community is essential and appreciated.

Using conflict as an opportunity to develop and define relationships in positive and civil ways was the key to building a sense of community at the Law and Public Service Magnet High School. So much positive energy was released by abandoning traditional discipline that students were able to show improvement on nationally normed tests, carry an additional social studies course for a total of five academic subjects in the ninth and tenth grades, and participate in a learning experience in the community each of their four years in high school.

They also put themselves out of the mediation business. Their schoolmates became convinced that fighting was "dumb." They became skilled at handling most disputes without the help of a third-party neutral. As their role at Law and Public Service took less and less time, student mediators took their skills into service in the community.

They worked with "little kids" in elementary schools to build conflict manager programs. They worked with social service agencies, recreation officials, and public housing security to share their experience in conflict management and mediation. Law and Public Service students and graduates have become part of the rebirth of their school neighborhood and the strengthening of schools in our community.

On the anniversary of the Hough riots, magnet students were asked by the city council representative from the school's neighborhood to write a special dedication. What they wrote was inscribed on a plaque that marked the opening of the first private housing to be built in the Hough neighborhood since the civil unrest in 1967.

Opportunity Theory: Learning Ethics from Conflict

School-based mediation is an educational gold mine. Mediation is rich in its own history, literature, heroes, and martyrs. Conflict-resolution techniques are an important part of our nation's relationships with other nations and with international organizations. Mediation is a mandated part of American civil rights legislation, and mediation programs exist in the U.S. Department of Justice. There are local jobs for mediators, as well as international posts.

Since the establishment of school-based mediation in the early 1980s, school projects are now recognized as a successful part of school reform. Through the creation of the National Association for Mediation in Education (NAME), a na-

2435

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tional forum for advancing mediation exists. Through the efforts of the national law-related education organizations such as the National Institute for Citizen Education in the Law (NICEL) and crime-reduction organizations like National Crime Prevention Council (NCPC), school texts include mediation materials. The addresses of these organizations are listed in the box on this page.

Because of our early involvement in establishing the LPS mediation program, our law school is a center of national training in mediation and conflict management. We have worked with school districts in several states to establish successful programs. We have had training relationships in a dozen states and made several national presentations to advance school-based mediation. In 1986, the Cleveland-Marshall Street Law Program received a gold medal award from the Council for the Advancement and Support of Education for its work with community organizations to establish the mediation program in the Law and Public Service Magnet School.

Through the efforts of Artemus Carter, Director of the Street Law Student Leadership Program at Cleveland-Marshall, we have been able to respond to student interest in establishing mediation programs and learning mediation skills. In addition to national training, we trained over a hundred local high school students at Cleveland-Marshall last year.

The Making of a Mediator

Artemus Carter established his reputation as a mediator at the age of fourteen when he was a student at the Law and Public Service school. He was a member of the Class of 1986, the first graduating class of the new school. When Judy Zimmer introduced mediation to the school, Artemus was one of the first to think that it was a terrific idea.

Artemus was a sixth grader in the Cleveland district when court-ordered desegregation began. He was bused across town to what had been a "white" elementary school on Cleveland's west side.

Artemus remembers being told by the bus driver to stay below the bus windows so that Clevelanders angry enough to attack school buses would think that the bus he was on was empty. He remembers white administrators too fearful of black students to discipline them. He remembers getting away with rule violations, avoiding fights, and becoming disaffected from school.

By the time he got to the ninth grade, he drifted off to join his brother at an army base and to look for an option to the Cleveland schools. It was only a whim that made him apply to the new magnet school, Law and Public Service, and some feeling that the participation of Cleveland State University in the school might make it worth his while.

A phone call from his mom reached him in New Jersey telling him that he had been accepted. It brought him back to public education in Cleveland. After an unbroken record of attendance, he graduated and came to work at Cleveland-Marshall's Street Law Program while attending Cleveland State University as a parttime student.

By the fall of his second year at Law and Public Service, Artemus was elected to the school's Magnet Mediation Board. He was in charge of handling logistics for the program. The school administrator would hand him a form describing a dispute between two students, and Artemus would find two student mediators and a school faculty or staff member to make up a three-person panel to hear the dispute.

Cases were also initiated by students. Students came to school mediators and asked them to help them with their problem. At times, members of the Magnet Mediation Program would urge students to bring their problems before the panel "before it gets you in trouble."

As the 1983 school year started, there was a problem at another school in the district. The local newspaper was beginning to investigate what it felt was a "racial incident" on a school bus. Although the district had not paid much attention to the LPS Mediation Program, district administrators found that traditional discipline options were not going to work and that the headlines were getting bigger.

In a kind of baptism by fire, Artemus Carter and Judy Zimmer brought students designated as representatives of both sides of the school bus dispute to the mediation table. In a two-day drama, students became increasingly frank about their fear and anger. Gradually, they moved from accusations toward common ground. By brainstorming options, they came up with several that were acceptable to both sides.

The next day, 40 students got back on the bus and a story about students resolving conflicts appeared in the local newspaper. The agreement the students wrote defined seating arrangements (students agreed to alternate sitting at the back of the bus) and basic civility (they agreed not to spit in each others' hair). It worked.

For More Information

The National Institute for Citizen Education in the Law, 711 G Street, SE, Washington, DC 20003, (202) 546-6644.

National Crime Prevention Council, 1700 K Street, NW, Washington, DC 20006, (202) 466-NCPC.

The National Association for Mediation in Education, c/o The Mediation Project, 425 Amity St., Amherst, MA 01002, (413) 545-2462.

The settlement of the school bus dispute brought the LPS mediation program recognition and legitimacy. It showed how effective mediation could be with the community's most difficult problems and the kinds of role students could play in solving those problems.

Mediation Increases Ethical Understanding

This article argues that traditional discipline works against the ethical development of children in school. We have found that the "do it because I say so" tone of authority figures makes students into adversaries of school rules rather than allies.

In this adversarial role, school officials are trapped into a narrow range of options in dealing with an increasingly diverse student population. Often school discipline is presented in "if/then" statements. "If you do this, then this will happen" or, the other side of it, "If you don't do this, then this will happen." There are a few more variations, but not many.

What is presented here as "opportunity theory" is the idea that students can be involved through special training in issues arising out of student-to-student disputes. Through their involvement, several school objectives will be achieved. Most important for our purposes is ethical development.

My argument is that through their involvement as mediators and conflict managers, children will be "forced" to make choices. As they make these choices, they will develop knowledge, attitudes, and skills that develop their creativity. They will generate options, make decisions, communicate, and solve problems.

Through this conduct, students will develop new habits and new ways of responding to situations. As students grow older and gain experience, they will

Photo courtesy Racine Unified School District

A mediation session at Mitchell Middle School, Racine, Wisconsin

attempt to act consistently and to make decisions consistently from one situation to another. That struggle is what this article calls ethical development. It is an individual struggle, but it is a struggle that an individual experiences within a group or community. Making schools communities, and the kind of community where this kind of struggle or development is respected, is what I mean by a "new-generation high school."

The new high school in the Hough neighborhood went beyond being a school to become a resource to its community. Graduates of Law and Public Service work with the mediation program here at Cleveland-Marshall, then go on to be resources to schools throughout the country.

But it all starts with a school admitting that the school is a community. Strangers don't mediate. It is the interest in an ongoing relationship that motivates people to resolve a dispute. Why should I resolve a dispute I have with a person in the line at Burger King unless I am going to see that person, or work with that person, or live in the same community with that person?

This development is a community process. Ethics deals with conduct, with ways we treat others. Schools with mediation programs are schools that recognize that they are communities. They are schools in which people know each other and have a sense of common purpose. There is a basic trust in these schools. There is room for a variety of conduct, a wide latitude for conduct, and an understanding that each individual will balance his or her freedom to act against the effects of those acts on others.

Mediators as Heroes

In my work with Cleveland's Law and Public Service Magnet High School, I find it to be a new-generation high school because it is a school where a different kind of child is a leader.

If the school had a hall of fame, there would be pictures of what Dr. Martin Luther King, Jr. called the "bridge builders"—students who listen, observe and bring people together. These students have learned to be nonjudgmental, to be neutral, and to respect the confidential nature of their work. These students expect to serve their community and to be served by it.

These heroes have substance. They think about what they observe and they respond to what they hear. They respect a predictable process that brings agreement out of conflict. They take responsibility for the quality of their school and their community. They have a kind of authority that is convincing to others.

As a teacher and lawyer, I have been revitalized by the kind of growth I have seen in children as school and community leaders. It would be hard for me now to feel comfortable in a school environment where students were anything less.

For Further Reading

Dewey, John, *A Critical Theory of Ethics*, Greenwood Press, New York, 1969.

Dewey, John, *Ethics*, Henry Holt and Company, New York, 1908.

Dewey, John, *Human Nature and Conduct*, The Modern Library, New York, 1930.

Dewey, John, *Theory of the Moral Life*, Holt, Rinehart and Winston, Inc., New York, 1960.

Fisher, Roger and Brown, Scott, *Getting Together, Building a Relationship That Gets to Yes*, Houghton Mifflin Company, Boston, 1988.

Follett, M.P., *Creative Experience*, Peter Smith, New York, 1951.

Follett, Mary Parker, *Dynamic Administration, The Collected Papers of Mary Parker Follett*, Sir Isaac Pitman and Sons, London, 1965.

Follett, M.P., *The New State, Group Organization the Solution of Popular Government*, Peter Smith, New York, 1965.

Tavris, Carol, *Anger, The Misunderstood Emotion*, Simon & Shuster, Inc., New York, 1982. ☐

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Values

(continued from page 3)

ask himself just whose wealth was redistributed to provide Gekko with such lavish surroundings. Fox leaves – disillusioned, but decidedly different.

The film's ending is bittersweet. Bud Fox is indicted, and faces a possible jail term, but not before rescuing his father's airline, and helping federal investigators trap Gekko in a sting operation. Bud Fox loses his wealth and his freedom, but he finds his way.

Ethics is not merely what's enforceable, ethics is not always what's expedient.

No Excuses Allowed

Third, ethics is not ever what's excusable. The ability to justify a wrong, or to rationalize a deed after it's been done, does not make it ethical. Yet we persist in making excuses our Maginot Line – our forward wall of defense that is easily outflanked and effortlessly overrun.

Washington sociologist Amitai Etzioni recently conducted a survey of young people. The young people questioned overwhelmingly said they believe their right to be tried by jury is critical to a free society; however, practically none of them said they would serve on a jury. In addition, while most youth said they want our nation to be defended, few wanted to serve in the armed forces.

Why Nothing is Wrong

A few years ago, *Newsweek* columnist Meg Greenfield wrote a column on the subject, "Why Nothing is Wrong Anymore." She argues that in our age of situational ethics, we've chosen – not to change our ways – but to come up with alternative names for wrong.

First of all, she points out that what is wrong is not really wrong anymore, but "stupid." That is, someone can be excused for doing something unethical because that person did a dumb thing.

Next, she says, what's wrong is not really wrong anymore, but "within legal bounds." If an action is legally permissible, then it must be morally acceptable, and possibly even good.

Third, what's wrong is not really wrong anymore, but "sick." Wrong deeds are done, not because they're intentionally wrong, but because the person who does them isn't well. What's more, society has to take its share of the blame for bruising that person's self-esteem and tearing down his or her moral barriers.

Fourth, what's wrong is not really wrong anymore, but "only to be expected." That is, an act can be justified because of mitigating circumstances. Using this rationale, leaving a restaurant without paying the bill is okay, as long as the food is rotten, or the waiter is fresh.

Absolutes are Obsolete

And fifth, says Meg Greenfield, what's wrong is not really wrong anymore – it's "complex." No issue can be painted in stark black and white anymore. The world has grown too complicated – and far too clever – for there ever again to be moral absolutes.

After listing these five names that we use to whitewash wrong, she concludes with these words: "As I listen to the moral arguments swirling about us, I become ever more persuaded that our real problem is this: The still small voice of conscience has become far too small – and utterly still."

I've shared with you three wrong views of ethics:

– Ethics is not merely what's enforceable.

– Ethics is not always what's expedient.

– And ethics is not ever what's excusable.

May I share my definition of ethics with you? It's simply this: Ethics is the moral strength to do what we know is right, and not to do what we know is wrong. Granted, there are times when you and I may act in humble ignorance. Further, we may disagree about the finer points of ethics – like the rightness or wrongness of doing business in South Africa. But that "still small voice" in all of us sings in harmony on the vast majority of moral issues.

Ronald W. Roskens, president of the University of Nebraska, puts it this way:

> Ethical conduct is not simply principled behavior guided by a prescribed code. . . . It is, rather, what we might in an earlier time have called "character". . . . At a minimum: A respect for self, and others. . . A willingness to sacrifice for the common good . . . A sense of civic responsibility . . . The relentless pursuit of truth . . . Basic honesty . . . And an intolerance for anything less than adherence to the highest standards.

And because what we do affects the lives of others, we may choose our own ethical course, but we cannot isolate the consequences of it. This, I think, is what Walter Lippmann meant when he described honorable conduct as "the hygiene of the spirit by which the good life becomes possible."

In his inaugural address 37 years ago, Dwight D. Eisenhower said, "A people that values its privileges above its principles loses both." As Americans looking ahead to the waning years of the 20th century, we must ask ourselves this: Is the needle of our moral compass fixed on principles or privileges? How we set our compass determines whether we will continue to wander in the wilderness, or find our way. ☐

C.J. Silas is Chairman and Chief Executive Officer of the Phillips Petroleum Company, Bartlesville, Oklahoma. This article is adapted from a speech delivered by Mr. Silas at the University of Alabama in March 1989; reprinted with permission. The speech appears in its entirety in the May 15, 1989 issue of Vital Speeches of the Day.

Ethics

Making Decisions/Upper Elementary/Middle **Alberta Education Curriculum**

Susan Wise

Introduction

There are no simple answers to value conflicts, but as shown in this lesson, it is possible to learn to analyze a situation in terms of its value components in order to make ethical decisions. Day 2 builds on student skills to illustrate how value conflicts can be dealt with in ways other than complete acceptance or complete rejection.

Goals

At the end of this lesson, students will be able to:

- analyze conflicts in terms of moral and ethical values and make decisions on the basis of what they perceive to be right;
- develop more complex and systematic reasoning about decisions involving ethical values;
- recognize problems or values conflicts;
- differentiate between attitudes ranging from acceptance to rejection; and
- identify and evaluate some of the different ways in which people deal with problems.

Time to Complete

Two class periods

Materials

Handouts 1 and 2

Procedure for Day 1

1. Review the sample decision-making model (Handout 1) and discuss the following questions:
   - How do we make decisions?
   - What do we need to know first?
   - What are the characteristics of a "problem"?
   - Is an ethical decision always a "problem" or are there situations that require more neutral resolutions?
   - When you gather information about an issue before making a decision, how do you assess the quality of that information?
   - Consequences can be both positive and negative. They usually affect everyone involved and have both short- and long-term significance. How can you be sure that you have considered all of the possibilities?
   - Why is it necessary to take care to consider all of the factors and the consequences before making a decision, rather than to guess and take your chances about the result?
   - Suppose that after you have made a decision and began

Handout 1: A Decision-Making Model

STEPS:

1. **Identify the problem.**
2. **Assess sources of information regarding the problem.**
3. **Consider all possible alternatives.**
4. **Make a decision based on the pros and cons of each alternative and its consequences for self and others and the situation.**
5. **Decide on a course of action that will support the decision.**
6. **Accept responsibility for the decision.**
7. **Put a plan of action into effect.**
8. **Evaluate the success of the plan and the decision.**
9. **The success or failure of the decision will determine the course of action: if successful, future behavior should support and be consistent with the decision; otherwise, it may be necessary to change the decision through one of the alternatives considered earlier.**

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Handout 2: Problems

If you found yourself in one of the following situations, would you have a problem?

- **Someone starts to gossip to you about a person you have always respected.**
- **You are staying at a friend's home and have a chance to watch a video your parents have said they do not want you to see.**
- **You are a sales clerk at a local record store. At the end of the day as you are adding up your cash and receipts you find that you have more cash than you can account for. The store manager has already left for the day; there is no one around to know if you simply take the extra money.**
- **There is a new student in class, a member of another racial group. No one wants to share a table in the science lab with the new student.**

1. **Identify the problem in each case.**
2. **What factors are involved?**
3. **What consequences would there be to:**
   a) doing nothing; or
   b) taking some sort of action (specify).
4. **How do the values of respect, responsibility, etc., influence the decisions made in each of these situations?**

a course of action, you receive new information that changes the situation. What do you do now?

2. Distribute Handout 2 and discuss each scenario with the students. They should know that a choice is possible and necessary but that the alternatives may have disadvantages. The influences that have helped form values continue to act on decisions about behavior. They may sometimes be in conflict, and people must choose what they think is the right thing to do in a particular situation.
3. Have students develop a scenario illustrating a dilemma in which they need to make a value decision but must deal with conflicting expectations as well as their own feelings. Students should analyze the conflict in terms of its components. They can make a decision only if they know all the facts.
4. Have students draw and write a comic strip story which depicts a dilemma. Students may wish to work in pairs to share the tasks of drawing and finishing the work. Have students indicate what values need to be considered; fairness, respect, respect, responsibility, and so on.
5. When they have finished, they can distribute the illustrated story to their classmates and discuss it. The stories can be collected into a book to produce a limited edition resource which could be used at a later time or for another class studying ethics.

Procedure for Day 2

1. Present students with the following scenario:
   Your friend wants to do something and you do not. You disapprove and think your friend is wrong to want to follow such a course of action. It goes against something in your value system and you believe that it is an inappropriate way for your friend to behave. (Think of a real situation to use as an example.)
   - Is the behavior wrong?
   - How can you express your disapproval without rejecting your friend?
   - How did you decide that the behavior was inappropriate (e.g., someone might be hurt)?

   There is a continuum of response between acceptance and rejection of the behavior. Have the students list their possible responses, depending on the strength of their disapproval of the behavior. It is important for students to realize that it is not necessary to reject the person.

TOTAL ACCEPTANCE	ACCEPTANCE	NEUTRAL	DISAPPROVAL	TOTAL REJECTION
1	2	3	4	5

   - Do you need to justify your friend's choice of activity?
   - Do you need to understand it? Why?
   - How would you use a decision-making model to decide how to respond?
   - What would be the consequences of each of your choices?
2. Have students work in pairs. One student should develop a possible conflict situation and present it to the other student, who will develop a suggested response, after analyzing the conflict in terms of the decision-making model. The pair should discuss the situation and the choice until they agree about both the process and the decision.

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2440

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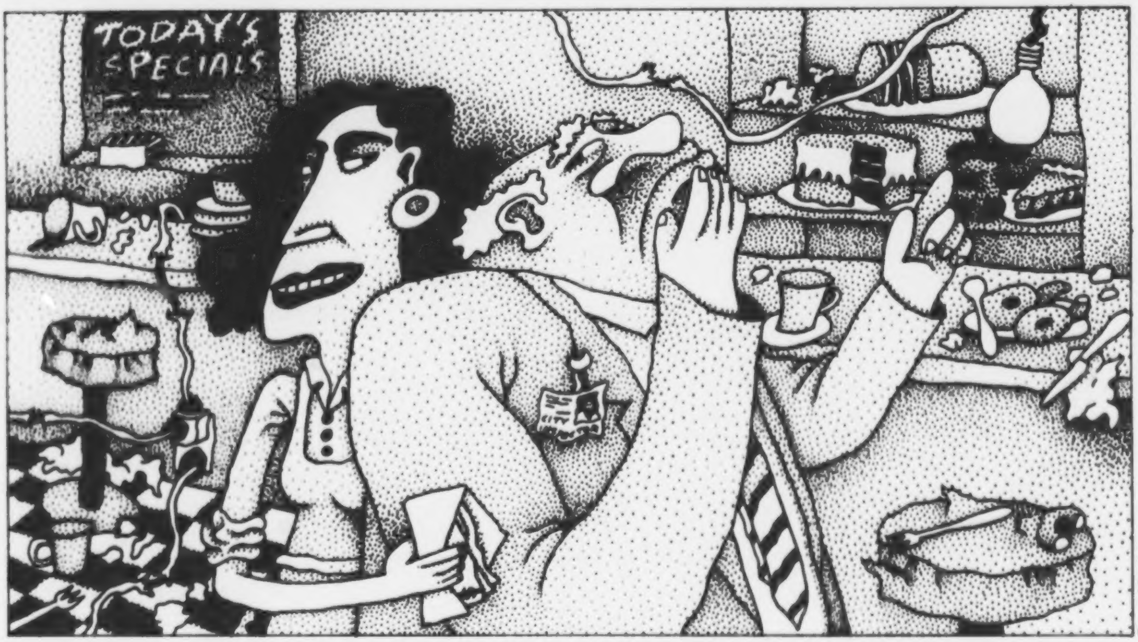
Ethics in Government/Secondary

Center for Civic Education



Dean Matthews

This lesson gives students the opportunity to explore the question of ethics in government from the perspective of corrective justice.

Procedure: Part 1

Ask students to read the handout on the ethics scandal in Bay City (page 32) and the witness statements in part 2. To help students identify the wrongs and injuries caused by some of the Bay City government officials, they should work with a study partner to complete the questionnaire appearing on page 31. Afterward, they will be working with the rest of their class to role play a government hearing.

Procedure: Part 2

Students should work with classmates to role play a meeting of the mayor's Ethics in Government Task Force. The Task Force has been assigned the responsibility of investigating the scandal and recommending what should be done about it.

The Task Force is bipartisan. However, some members are already looking forward to the next election cycle and know that there is some political hay to make. One in particular, Gerri Mander, is interested in challenging Mayor Bob N. Weave for his post.

Additional roles to play are the parts of the city clerk, Conn Puter, who will be recording the session; the three witnesses; and members of the news media, who will report on the scandal and interview the key players after the hearing. (Students may wish to use a video camera to broadcast "live" from City Hall.)

Finally, there is Heidi Indignant, a representative from the Keep Your Eye on the Rascals citizen group, the attorneys for the parties involved, and the young district attorney, Marshall Law, who is hoping to make a name for himself with this case.

Use the following witness statements as guides for playing the roles. Following the hearing, the Task Force should deliberate, using the questions on the chart to help them consider possible responses. The Task Force should then make its recommendations, indicating whether they are designed to (1) correct the wrongs or injuries, and (2) prevent future wrongs or injuries, or both.

If all members of the Task Force cannot agree, individuals may wish to issue their own statements to the waiting press.

WITNESS STATEMENTS

Tommy Rot, state-licensed contractor

The witness is 62 years old, married, and the father of four children ranging in age from 11 to 26 years old. He has been a licensed state contractor for nearly 35 years.

Mr. Rot acknowledges that he has personal assets in excess of $1 million, but will not give details as to how these were acquired. State records indicate that Mr. Rot was suspended from contracting activities in 1975 for a period of six months as a result of his supplying faulty building materials on a housing contract. He has no other prior criminal or professional violations.

In his testimony, Mr. Rot admits that he has engaged in the activities described in the newspaper article. However, he seems genuinely surprised at the uproar resulting from the *Gazette* series. He expresses the belief that his conduct was not in any way unusual.

"It's just Bay City," he says. "I've been a contractor here for over 30 years and that's the way things have always been done here and always will be."

Robin Banks, Department Head, Building Code Office
Mr. Banks is 47 years old and divorced. He has been employed by the city for 17 years, and has held his present position for the last eight years. His current salary is $35,000 per year. Mr. Banks has a good civil service record and received an excellent rating in his last personnel evaluation. He has no prior criminal record.

During his testimony, Mr. Banks states, "I knew nothing about the alleged acts of people in my office. Maybe I should have known, but I didn't."

When Mr. Banks is reminded that last year the mayor had asked him to look into complaints about bribe-taking by building code inspectors, he shrugs and says, "I asked a few of my people about it. They said no one was taking bribes. When you've been in city government as long as I have, you learn not to ask too many questions."

Smokie Waters, Inspector, Bay City Fire Department
Inspector Waters is 23 years old and the mother of two. She has been an inspector with the Fire Department for two years. Her personnel record with the department is very good. She has no prior criminal record, although she once received a two-week suspension from Bay City High School for cheating on an exam.

In her testimony, Inspector Waters admits that she has taken bribes.

"I know what I did was wrong. When I started with the department, I never took a bribe. But then I saw the other inspectors taking them and nobody seemed to care.

Look, I'm a single mother with two kids to support, and a Fire Department salary doesn't go very far. So I figured that if I took a few bribes, my kids would have decent clothes to wear and a roof over their heads in a safe neighborhood – a place where they could play outside without getting harassed by gangs or pressured into taking drugs. The way I see it, my responsibility to my children comes first."

After testifying, Inspector Waters, upon the advice of her legal counsel, delivers a letter to the Task Force. The letter states that she is willing to testify about bribe taking by other inspectors if the Task Force will recommend that she not be prosecuted.

What Do You Think?

1. What responses did the Task Force recommend?
2. Do you think the responses will correct the wrongs or injuries? Why or why not?
3. What special interests and values did you consider?
4. Can you make any generalizations about what our society's responses should be in instances of unethical practices by government officials?

INTELLECTUAL TOOLS FOR ISSUES OF CORRECTIVE JUSTICE

1. Identify the wrong or injury.
   a. What was the wrong, if any?
   What was the injury, if any?
   b. How serious was the wrong or injury?
      1) Extent: How many people or things were affected?
      2) Duration: Over how long a period of time did the wrong or injury take place?
      3) Impact: How serious is the harm or damage?
      4) Offensiveness: How offensive or objectionable was the wrong or injury in terms of your sense of morality, human dignity, and other values?
2. Identify the relevant characteristics of the person causing the wrong or injury.
   a. State of mind
      1) Intent: Did the person act intentionally or purposely to bring about the wrong or injury?
      2) Recklessness: Did the person deliberately ignore forseeable risks?
      3) Carelessness: Did the person act thoughtlessly? Did the person pay attention to possible risks?
      4) Knowledge of probable consequences: Did the person know, or should the person have known, the likely results of his or her actions?
      5) Control: Did the person have physical and mental control over his or her actions?
      6) Duty or obligation: Did the person have a duty to act or not act in a certain way so as to prevent the wrong or injury?
      7) Other considerations: Did the person have any important values, interests, responsibilities, or motives that might justify or excuse his or her actions?
   b. Past history: What in the person's past history is relevant in this case?
   c. Character and personality: What facts about the person's character and personality are relevant in this case?
   d. Reactions after causing the wrong or injury:
   What feelings did the person express after causing the wrong or injury?
   e. Role: What was the person's role in causing the wrong or injury?
3. Identify the relevant characteristics of the person or persons wronged or injured.
   a. Contribution: Did the person contribute to causing the wrong or injury in any way?
   b. Ability to recover: What is the person's ability to recover from the wrong or injury?
4. Identify common responses to wrongs and injuries.
   a. To inform: Should the person be informed that what he or she did was wrong or injurious?
   b. To overlook or ignore: Should the wrong or injury be overlooked or ignored? Why or why not?
   c. To forgive or pardon: Should the person be forgiven or pardoned? Why or why not?
   d. To punish: Should the person be punished? Why or why not? If so, in what way?
   e. To restore: Should the person be required to restore what was taken or damaged? Why or why not?
   f. To compensate: Should the person be required to compensate in some way for the wrong or injury? Why or why not? If so, in what way?
   g. To treat or educate: Should treatment or education be provided? Why or why not?
5. Consider related values and interests.
   a. Corrective justice: What responses would result in a correction of the wrong or injury?
   b. Deterrence and/or prevention: Which responses may prevent the person from causing further wrongs and injuries and/or deter others from similar acts?

c. Distributive justice: How have others who have caused similar wrongs or injuries been dealt with?
d. Human dignity: What beliefs about human dignity should be taken into account in deciding what would be a proper response?
e. Preservation of human life: What responses will be most likely to preserve the life of the wrongdoer and the lives of members of society?
f. Efficient use of resources: How costly are various responses in terms of available resources?
g. Freedom: How do various responses affect the freedom of the wrongdoer and other members of society?
h. Proportionality: What responses would be reasonable in relation to the seriousness of the wrong or injury?
i. Revenge or retribution: What responses might satisfy the desire for revenge or retribution?

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Handout

Bay City Gazette

EXTRA

ETHICS SCANDAL UNCOVERED

Political Time Bomb Rocks Mayor's Administration

BAY CITY – With an election only six months away, Mayor Bob N. Weave's administration has been blown sky high by a growing scandal of widespread corruption.

The *Gazette* has learned of dozens of incidents involving bribe taking and illegal payoffs to city inspectors. Agencies involved include the Fire Department, the Building Code Office and the Health Commission. Also implicated are a number of state-licensed building contractors.

In order to investigate the rumors of corruption, the *Gazette* provided funds and authorization to investigative reporter Penny Dreadful, to purchase a run-down snack shop on the city's East Side. She had some repairs made to the shop, but left many serious building and health code violations. Dreadful then contacted Tommy Rot, a state licensed building contractor, and asked him to visit the premises.

She asked Mr. Rot if he could arrange the necessary inspections to satisfy the city's building, health and safety codes. Rot told her that he would be glad to "run things through the city" for her if she first paid him a "consultant's fee."

After Dreadful gave Rot a sizable amount of cash, he gave her some of his business cards. He explained that whenever an inspector came to the store, Dreadful should put $100 in an envelope, along with Rot's business card, and give it to the inspector.

"If you do that, you won't be hassled," Rot assured her. "Trust me."

The first inspector to come to the shop was Smokie Waters, from the Fire Department. Following Rot's instructions, Dreadful gave Inspector Waters an envelope containing cash and Rot's card.

Ignoring a number of serious fire hazards, Inspector Waters completed a department form certifying that the snack shop was safe for occupancy.

Dreadful followed the same procedure whenever an inspector came to the snack shop. Each inspector supplied the required certification after being given the cash-filled envelope and Rot's card.

According to Dreadful, not one of the city employees conducted a thorough inspection of the premises. She then invited to the shop the head of each of the city departments involved.

After their investigation, the department heads identified a total of 38 serious code violations. The department heads voiced outrage and unanimously agreed that the snack shop constituted "a serious public health and safety hazard."

Bay City's up-and-coming young district attorney, Marshall Law, has assured city taxpayers that he will "get to the bottom of this outrageous perversion of the common weal if I have to work night and day to do it."

Mayor Weave was unavailable for comment, although his press secretary, Spin Kontrol, said that the mayor "has the situation well in hand and has already scheduled an emergency meeting of the Ethics in Government Task Force."

Meanwhile, City Counsellor Gerri Mander, a member of the Task Force and a potential mayoral candidate, was quick to comment on the situation.

At an early morning press conference, Mander stated, "I think it's abominable that the mayor has allowed such contemptible corruption to creep into every crevice of City Hall. The good citizens of Bay City should be outraged." Continued Mander, "These revelations are a time bomb, just ticking away, and I predict they'll soon blow up in the mayor's face. The time for shakedowns is long past. Now it's time for honest citizens to shake up the corrupt political machine in this city."

2443

David T. Naylor

Educating for Citizenship: LRE and the Social Studies

Discovering common methods, common goals and common rationales

Mention law-related education to a teacher, a principal, or a parent (and describe what it is if that person does not know). Then ask where law-related education would fit in the school curriculum. Invariably the response will be social studies. While much effort has been expended over the past two decades to demonstrate how LRE can be incorporated into other curriculum areas, especially language arts, the relationship between law-related education and social studies remains strong, durable, and widely recognized.

This article will examine this relationship, particularly in the context of some of the areas dealt with elsewhere in this issue, including values education, ethical reasoning, and participatory activities.

The following observations by R. Freeman Butts and Walter Parker serve as a good starting point for understanding why law-related education is so often linked with social studies and why social studies provides such a fertile environment for law-related education to grow and flourish. Both see education for citizenship as the primary mission of schools. Butts points out that "the original purpose of universal public education as viewed by the founders of the American Republic was to prepare all persons for their roles as citizens in the new representative democracy." Parker echoes this sentiment, emphasizing:

> Schools must remember that they are *not* primarily for helping children acquire jobs, get into college, or develop a better self-concept. As worthy as these goals may be, they are less important than the school's distinctly *civic* mission: to educate students to be capable of – and passionately committed to – meeting the challenges of the democratic way of life.

Social studies has an especially important role in helping the schools fulfill their "distinctly civic mission." Of the various areas of the school curriculum, social studies is the one area in which citizenship education is regarded as the primary goal and purpose. The following excerpt from the 1979 revised curriculum guidelines statement of the National Council for the Social Studies (NCSS) makes this clear.

> The basic goal of social studies education is to prepare young people to be humane, rational, participating citizens in a world that is becoming increasingly interdependent . . . . Social studies education provides the only structured school or community focus for the preparation of citizens.

Further support for this assertion comes from Donald Bragaw, a former NCSS president, and Michael Hartoonian, Wisconsin State Supervisor of Social Studies Education. They regard social studies as "the school-based subject with the best potential for helping students put their citizenship all together in preparation for a lifetime of holding 'the office of citizen.'"

A Special Responsibility

U.C.L.A. professor Charlotte Crabtree acknowledges that, by widespread agreement, social studies bears a special responsibility in citizenship education. She points out that, in assuming responsibility for this central goal,

> social studies at once assumes responsibility for a relatively broad and demanding range of learnings: (a) skills for rational analysis and decision making required for informed participation in the political, social, and economic life of the nation; (b) basic historical and social scientific knowledge needed to bring an informed perspective to that task; and (c) understanding of the nation's highest ideal, human dignity, and of those basic substantive and procedural values expressed in the Constitution and the Bill of Rights which give operational meaning to that ideal. Given the central mission of the social studies, these learnings are closely interrelated. The test of what knowledge is of most worth – hence "basic" to the field – rests largely on the contribution that knowledge makes to bringing broad perspective and informed analysis to the affairs with which citizens must cope . . . . Knowledge, participatory skills, rational analysis and decision making, and basic values are all interrelated in the criterion of responsible citizenship to which the social studies directs its central efforts. Together, these four domains define the basic learnings of the field.

Those familiar with law-related education will find many similarities among it and descriptions of the nature of social studies, such as Crabtree's cited above.

Most social studies programs include the four basic components Crabtree identifies (i.e., a knowledge component, a skills component, a values component, and a participation component). The definitions of these components differ among school programs, as does the focus and time allocations each component receives.

Yet, general acknowledgement of their importance is widespread.

These perspectives make clear why law-related education is so strongly connected with the social studies curriculum. Its priorities, goals, content, and methodology are closely related to those of social studies education. LRE enables young people to acquire a knowledge and understanding of law and the legal process, and the fundamental principles and values on which they are based. It seeks to equip young people with the essential skills, attitudes and values necessary to become informed, responsible participants in the civic affairs of their community, their state, and their nation. In short, effective law-related education is effective social studies education. They share a common goal: to enhance the ability of young people to function more knowledgeably, more skillfully, and more responsibly in their lifetime office of citizen.

To understand law-related education in this context is to recognize it as a fundamental, indispensable part of civic education in general and the social studies curriculum in particular. To understand law-related education in this context is, as Butts has advised, to enable LRE to avoid successfully the trap of narrowing its scope, thereby categorizing it as just "one more special-interest group seeking government support, along with such categories as metric education, consumer education, environmental education, drug abuse education, and the like."

More than 150 years ago, in *Democracy in America,* Alexis de Tocqueville described the significant impact law has in American society. "Scarcely any political question arises in the United States," he wrote, "which is not resolved, sooner or later, into a judicial question." His prescient observation remains as valid today as it was then.

An Inescapable Influence

Contemporary law-related education practitioners amplify and extend de Tocqueville's observation with the popular mind-walk activities that illustrate the pervasive impact, both facilitative and restrictive, that law has on our daily lives. As Isidore Starr aptly puts it, law affects us "from the moment we are hatched to the time when we are matched and finally dispatched." That's quite extensive but the scope of the law is even broader. Law affects us before we are born (e.g., regulation of drugs and medical care; abortion) and after we die (e.g., inheritance and wills; use of organs), from pre-womb to post-tomb. The law is simply too pervasive and too important to neglect – much less ignore – in school-based citizenship education programs.

Because of law's far-reaching influence and impact, it is an integral part of the human experience, past and present. The social studies curriculum therefore offers many opportunities for law-related education, especially in American history (typically dealt with at grades five, eight, and eleven) and American government courses. For the informed observer, these opportunities are extensive and readily identifiable. For the uninformed, these opportunities are, once pointed out, recognizable and readily acknowledged as part of sound social studies instruction. The challenge is to get teachers first to recognize and then to capitalize upon the law-related education opportunities that are already present in their curricula.

Teaching about the Constitution of the United States is an excellent example of the strong relationship between law-related education and the social studies curriculum. Long a staple in social studies programs, this area provides rich opportunities for incorporating LRE. In recent years, celebrations marking the bicentennial of the writing and ratification of this seminal document have sparked a renewed interest in teaching about it. Scores of special courses, institutes, and workshops have been held for elementary and secondary school teachers, and a variety of instructional materials have been developed for use in elementary and secondary schools.

LRE and American History

Lessons on the Constitution, a collection of lessons and source materials for students, teachers, and curriculum developers, is a publication sponsored by the American Historical Association and the American Political Science Association in preparation for the bicentennial. The book's promotional material emphasized the importance of constitutional literacy for good citizenship.

> From busing students to setting the limits of Presidential power, political leaders and citizens regularly confront constitutional issues that directly affect their lives and the destiny of the nation. Citizens who do not understand the Constitution cannot really know how their government affects them. Of course, knowledge of the Constitution alone is not sufficient to comprehend political reality in the United States. It is, however, a necessary condition for knowing how the government works. In particular, knowing the main ideas of the Constitution enables citizens to understand what the government may do for them, what it may not do to them, and what they may do to sustain civil liberties and the rule of law.

Intended as a supplement for teachers of courses in American history and American government, this publication contains a number of excellent law-related materials and instructional ideas for teaching about the Constitution. These materials do *not* require teachers to depart significantly from typical course objectives and content. Instead, they are designed "to help teachers deal more effectively with topics that are rooted in their curricula in American history and government."

American history is another essential element of the social studies curriculum. It contains a host of opportunities for law-related education, as illustrated by the following examples.

Historian Paul Gagnon is principal investigator for the Bradley Commission on History in Schools, a group that advocates giving significantly greater attention to history in elementary and secondary social studies curricula. In an article published in *The Atlantic Monthly,* Gagnon echoes the Bradley Commission's call for more history and better taught history in our nation's schools. His justification is improved citizenship education, contending that developing good judgment is the primary benefit of studying history and stressing that good judgment is what is needed "most in the profession of citizen." Gagnon urges teachers to focus on "broad, significant themes and questions, rather than short-lived memorization of fact without context."

For Gagnon, one of the few major themes should be the story of American democracy,

> the story of the slow, unsteady journey of liberty and justice, together with the economic, social, religious, and other forces that barred or smoothed the way, and with careful looks at advances and retreats made, and at the distance yet to be covered.

In similar fashion, the Bradley Commission's 1989 report identifies eight major topics as central to the history of the United States. Significantly, three of the eight have especially strong LRE elements:

> The evolution of American political democracy, its ideas, institutions, and practices from colonial days to the present; the Revolution, the Constitution, slavery, the Civil War, emancipation, and civil rights.
>
> The distinctively American tensions between liberty and equality, liberty and order, region and nation, individualism and the common welfare, and between cultural diversity and civic unity.
>
> The major successes and failures of the United States, in crisis at home and abroad. What has "worked" and what has not, and why.

The relationship of law and law-related

education to the teaching of American history is readily apparent in each of these themes. As they are explored and illustrated, teachers will see the many opportunities they afford for incorporating law-related education.

In *Law in American History*, James Lengel and Gerald Danzer illustrate more specifically how law-related education contributes to the teaching of American history. Intended to supplement an American history course, their text focuses on key law-related concepts, such as liberty, equality, authority, due process, and justice. Its chapters address such topics as "Colonial Origins of American Law," "Origins of the Court System," "The Law of the Frontier," "Law and Economic Change," and "Minorities and the Law." In addition, it pairs case studies – a historical case study (e.g., *Marbury v. Madison*, 1803) with a related contemporary case study (e.g., *United States v. Nixon*, 1974) – "to show how the law has changed over the years and how the same legal issues that concern us today have their roots in earlier days." Speaking about the relationship between the law and American history, Lengel and Danzer write:

> The law has played a special role in the history of the United States. . . . We can separate the legal events in life from other events and study them carefully. But in fact, we often find that we cannot separate the history of law from the history of people. Our system of law and our history reflect each other. Each mirrors the hopes of the American people and sheds light on their conflicts and controversies.

Gerald Fetner, writing in *Social Education*, reinforces this point: "[A]s the record of past human activity and endeavor, history is enriched through the study of law's influence on society . . . . In short, law shapes our history, but history shapes our law."

Rich Opportunities

Elementary social studies programs also contain a variety of opportunities for law-related education. Beginning with kindergarten and extending through grade six, there are many ways in which children can be exposed to law-related education in the social studies curriculum, primarily through such basic concepts as authority (e.g., rules, laws, leaders), justice (or fairness), rights, responsibilities, freedom, property, and privacy. As the teaching strategies found elsewhere in this issue demonstrate, children typically explore such topics as the nature of rules and law, why rules and laws are needed, how rules and laws are made and enforced, the importance of and differences between rights and responsibilities, consequences of following or not following rules and laws, and how groups and communities use rules and laws to help them deal with important problems. Similar examples could be given for the other identified concepts. The focus in the elementary grades is not on having children learn the structure of the legal system but rather on having them understand and appreciate the basic concepts, principles, and values that are the foundation of that structure.

"Democracy," social studies educators Shirley Engle and Anna Ochoa emphasize,

> is not only an enlightened way of governing and being governed; it is also a system based on ethical and moral principles that requires continual attention to what is right and just. Every social problem has an ethical and moral dimension, and learning to deal with this dimension is as important as learning to deal with facts.

Engle and Ochoa remind us of the important roles that values education and ethical reasoning play in citizenship education overall and social studies in particular. Sound ethical reasoning demands students (citizens) who possess a reasoned commitment to democratic values and principles and strong decision-making skills. "[T]here is no trick to virtuous behavior when things are going well," Gagnon points out. "The truly tough part of civic education is to prepare people for bad times."

James Shaver, another leader in the field of social studies, notes that the emphasis on citizenship education makes the focus on moral values and ethical reasoning particularly relevant in social studies. (The same could be said for law-related education.) Maintaining that values are the essential ingredient in defining a democratic society, Shaver observes that our basic democratic rights are rooted in moral values, citing as examples equal protection of the law, equal opportunity, freedom of speech, and freedom of religion. He contends that these basic rights "are principles or standards by which we judge the morality [i.e., the good or bad, right or wrong] of individual, collective, and governmental actions." While each of these rights, or values, is an important end in itself, Shaver continues, we cannot fully attain all of the basic values at any one time. Conflict is inevitable; as we move toward full attainment of one value, we unavoidably must compromise another. The result is a persistent tension between these often competing rights, or values, coupled with a continuing reliance on moral and ethical reasoning to determine an appropriate balance in specific, concrete situations.

When Values Collide

It is in the area of ethical reasoning that law-related education makes some of its strongest contributions to social studies and, ultimately, to citizenship education. Isidore Starr, the "father of law-related education," has long held ethical reasoning to be fundamental to LRE.

> Law studies, by their very nature, force students and teachers to grapple with and analyze the issues in

"What's happening to us, Bob? We used to be so issue-oriented."

Drawing by M. Twohy; © 1990 The New Yorker Magazine Inc.

Additional Reading

Bradley Commission on History in Schools. (1989). "Building a History Curriculum: Guidelines for Teaching History in Schools." In *Historical Literacy: The Case for History in American Education*, edited by P. Gagnon and the Bradley Commission on History in Schools. New York: Macmillan Publishing Company.

Bragaw, D.H., and Hartoonian, H.M. (1988). "Social Studies: The Study of People in Society." In *Content of the Curriculum*, 1988 ASCD Yearbook, edited by R.S. Brandt. Alexandria, VA: Association for Supervision and Curriculum Development.

Butts, R.F. (1980). *The Revival of Civic Learning: A Rationale for Citizenship Education in American Schools*. Bloomington, IN: Phi Delta Kappa Educational Foundation.

Crabtree, C. (1983). "A Common Curriculum in the Social Studies." In *Individual Differences and the Common Curriculum*. 82nd Yearbook of the National Society for the Study of Education, Part I, edited by G.D. Fenstermacher and J.I. Goodlad, Chicago: University of Chicago Press.

de Tocqueville, A. (1956). *Democracy in America*. edited by R.D. Heffner. New York: Mentor Books.

Engle, S.H., and Ochoa, A.S. (1988). *Education for Democratic Citizenship: Decision Making in Social Studies*. New York: Teachers College Press.

Fetner, G.L. (March 1977). "Law in History: History in Law." *Social Education* 41: 179-183.

Freund, P.A. (May 1973). "Law in the Schools: Goals and Methods." *Social Education* 37: 363-367.

Gagnon, P. (November 1988). "Why Study History?" *The Atlantic Monthly* 262: 43-66.

Lengel, J.G., and Danzer, G.A. (1983). *Law in American History*. Glenview, IL: Scott, Foresman.

Lockwood, A.L., and Harris, D.E. (1985). *Reasoning with Democratic Values: Ethical Problems in United States History*. New York: Teachers College Press.

National Council for the Social Studies. (1979). "Revision of the NCSS Social Studies Curriculum Guidelines." *Social Education* 43: 261-273.

Newmann, F.M. (October 1989). "Reflective Civic Participation." *Social Education* 53: 357-360, 366.

Parker, W. (November 1989). "How to Help Students Learn History and Geography." 47: 39-43.

Patrick, J.J., and Remy, R.C. (1985). *Lessons on the Constitution: Supplements to High School Courses in American History, Government and Civics*. Boulder, CO: Social Science Education Consortium, Inc.

Shaver, J.P., and Strong, W. (1982). *Facing Value Decisions: Rationale-Building for Teachers*. 2nd. ed. New York: Teachers College Press.

Starr, I. (Fall-Winter, 1975). "Law Studies in the Schools Today." *Southwestern Journal of Social Education* 6: 13-20.

Starr, I. (Winter 1988). "Lawyers and the Quest for Justice." *Update on Law-Related Education* 12: 3-5, 63.

> a value conflict. What is especially intriguing about the law is that it often forces us to choose between two desirable values: free press versus fair trial or the rights of a seller and the rights of a buyer, or the right to property and the right to fair or open housing. . . . These are not conflict [*sic*.] between good values and bad values: the problem here is which of the good values deserve priority in our hierarchy of values at a given time and place. What we are really stressing is moral and ethical reasoning.

Paul Freund, noted professor of law at Harvard, concurs with this view. In an influential article published seventeen years ago, he identified ethical reasoning as the first, and most important, of three primary goals of law-related education in schools. (The other two were understanding and appreciating the legal process and acquiring information about the law.)

Legal cases, an essential element of law-related education, provide excellent opportunities for students to engage in ethical reasoning. They serve as powerful vehicles for students to gain understanding of and insight into the nature of conflicts over basic values that our society has wrestled with over time. Each legal case necessarily involves real people, in a specific situation involving rights and values in conflict, at a specific time. Studying legal cases reveals how our society, through its legal system, has dealt with those conflicts and examines the reasoning used in attempting to resolve them. Landmark cases involve clashes between fundamental values. Their resolutions have a marked effect on how we define and apply those basic values. They help us understand the nature of a democratic society and what it means to live in one.

In *Reasoning with Democratic Values: Ethical Problems in United States History*, Alan Lockwood and David Harris demonstrate how ethical reasoning contributes to sound social studies education and how law-related education complements both. Their two-volume work consists of a collection of 49 episodes (most, if not all, of which are clearly law-related) involving conflict over democratic values in their historical context. The episodes begin with the colonial era and extend to contemporary times. Examples include Mary Dyer's fight for religious freedom in Puritan New England, John Adams' decision to defend the British soldiers accused in the Boston Massacre, Thomas Jefferson's struggle with slavery (see the opposite page), defiance of the fugitive slave law in Wisconsin, Susan B. Anthony's difficulties during the 1867 woman suffrage campaign in Kansas, Eugene V. Debs' decision to violate the Espionage Act during World War I, the decision to relocate Japanese-Americans during World War II, President Eisenhower and the U-2 incident, Lt. Calley and the My Lai massacre, John Dean and the Watergate scandal, and President Carter's decision to admit the Shah of Iran to the U.S. for medical treatment and the related hostage crisis. Intended to supplement a basic textbook, the Lockwood-Harris material illustrates how teachers can use historical episodes with strong law-related content to enrich and enhance student understanding of major events and figures included in their textbooks. Although designed for use in secondary schools, these materials may be successfully adapted for use in intermediate grades.

Building Participation

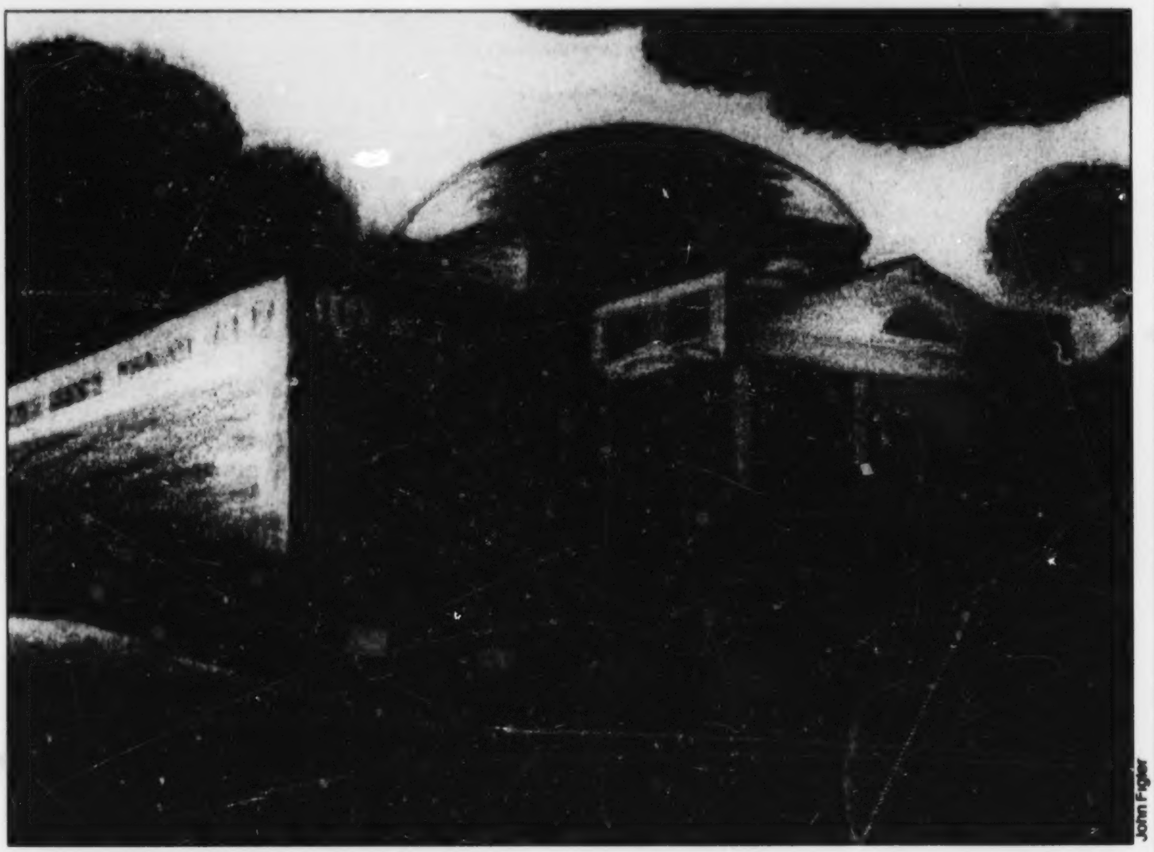
The real test of any citizenship education program is what its participants do in their lifetime office of citizen. "Our ultimate educational purpose," observes social studies educator Fred Newmann, "is . . . to develop student competence to influence

(continued on page 56)

Ethics

A Luxury We Can't Afford/Secondary

Alan Lockwood and David Harris



John Figler

Thomas Jefferson stands out as one of the most distinguished leaders in American history. The list of his achievements in government is impressive. He was a delegate to the Virginia colonial legislature, author of the Declaration of Independence, governor of the State of Virginia, member of the U.S. House of Representatives, U.S. minister to France, secretary of state, and both vice president and president of the United States. As one of the founding fathers of the United States republic his ideas formed a cornerstone of U.S. democracy. His brilliant intellect has been admired from the colonial era to the present time. A more recent president, John F. Kennedy, honored him in an address given in 1962. Speaking before a group of Nobel Prize winners being honored at a White House dinner and reception, Kennedy said: "I think this is the most extraordinary collection of talent, of human knowledge, that has ever been gathered together at the White House, with the possible exception of when Thomas Jefferson dined alone."

To many it seemed odd that Jefferson, a patron saint of democracy and foe of tyranny, arose from a society based on slavery. Jefferson was in close contact with slavery from cradle to grave. His first memory was of being carried on a pillow by a slave. A slave carpenter made the coffin in which he was buried.

Though he regarded slavery as a "blot" and a "stain" upon America, Jefferson became one of the largest slaveholders of his time. Throughout his career he was troubled by the existence of slavery in America. A statement he made in 1820 reveals the continuing dilemma posed for him by slavery. In reference to slavery he said: "We have the wolf by the ears; and we can neither hold, nor safely let him go. Justice is in one scale, and self-preservation in the other."

Historical Background

The story of Jefferson's struggle with slavery begins in Virginia. He was born there in 1743 and until his death was a member of its upper class. During the American Revolution when Jefferson said "my country" he meant Virginia. He was a Virginian before anything else, and he never ceased to be one. His roots went deep into Virginia soil. His ancestors had lived there for three generations before him. All of his formal education took place there. By age 40 he had spent less than a year outside the borders of Virginia.

In the year 1757, when Tom was 14, his father died. From his father Tom inherited an estate near Charlottesville including 30 slaves. This inheritance made Tom a member of the Virginia aristocracy.

Tom's father had wanted his son to be well schooled. His dying instruction was that the boy receive a thorough classical education. Tom later said that he was more grateful for this than all the privileges his father placed within his reach. From private tutors he learned Greek and Latin. Later he attended the College of William and Mary in Williamsburg, the colonial capital. He loved books as much as he hated laziness and applied himself eagerly to his studies. After college he became a law student in Williamsburg at the age of 19. In 1765 Thomas Jefferson officially became a lawyer. His father's wish had been satisfied. The boy was well schooled and refined of manners. Socially, in all respects, he was considered a gentleman.

Before he was to step on the public stage, Jefferson's education had made him a student of the Enlightenment. Beginning in Europe, the Enlightenment was a cluster of ideas closely tied to human freedom. Enlightenment thinkers believed that mankind was emerging from the shackles of darkness. In their view the time had come for people to be forward-looking and free of old superstitions and myths.

Enlightenment philosophers believed that the path of reason and science would lead to discovery of natural laws that governed the universe. Out of this natural law doctrine came the political idea of natural rights. One such right that absorbed Jefferson was liberty. To Jefferson liberty meant freedom from both tyranny and oppression.

Two years after he began the practice of law, Thomas Jefferson took the case, without fee, of Samuel Howell. Both Howell's mother and grandmother had been slaves who were freed. Howell sued for freedom from the master to whom he had been sold before his mother received her freedom.

Jefferson argued that Virginia law did not extend slavery to the offspring of slaves who had been set free. His arguments in court went beyond the laws of Virginia. He invoked the "law of nature." Under that law, he said, "We are all born free." The Virginia court ruled against him. Such Enlightenment ideas carried no weight with a practical-minded judge in a slaveowning society. Slaves were considered essential to the cheap production of the cotton and tobacco crops of Virginia plantations.

Following a brief period practicing law, Jefferson entered the political arena. In 1769 the freeholders (white landowners) of Albermarle County met in the Charlottesville courthouse to elect their representative to the Virginia House of Burgesses. They chose as their burgess 25-year-old Thomas Jefferson. While a burgess, Jefferson regarded himself a loyal subject of the Crown. He drank toasts to the king and royal governor. From the beginning, however, he defended colonial rights against the crown, strongly opposing the taxes England placed on the colony.

Just when colonial rights were becoming a major issue in 1772, Jefferson decided to settle down. He had married Martha Skelton and had for several years been building a house. For the time being he put public affairs aside and tended to personal matters.

He arranged for the leveling of the little mountain on the estate he inherited from his father. He translated "little mountain" into Italian. Monticello became the name of the plantation to which Jefferson devoted a lifetime of building. His house at Monticello is today a famous architectural monument. To Jefferson, always a domestic man, it was simply his home and the center of his life. His heart was on his mountain top. There he found privacy and the peace of family life.

Jefferson the Slaveholder

Upon the death of his father-in-law, two years after Jefferson married, his wealth doubled. Included in his wife's inheritance were 135 slaves. This brought the total of his slaves at Monticello to 185.

Compared to most slaveholders, Jefferson was a kind master. A French nobleman visiting Monticello reported that Jefferson's slaves were nourished, clothed, and treated as well as white servants could be. Jefferson rewarded hard work with extra rations of food and time off for slaves to work their own gardens. He once described Monticello as a place "where all is peace and harmony, where we love and are loved by every object we see."

Jefferson never personally applied the lash, and he directed that overseers whip slaves only in extreme cases. He always preferred to sell disobedient slaves rather than to flog them. When selling such slaves, unlike other masters, Jefferson tried to dispose of families as a unit. He tried not to separate parents and children, husbands and wives.

In addition to growing tobacco and cotton Jefferson had nails manufactured at Monticello. They were sold in Richmond for a handsome profit. The slave boys who worked in the naillery shared in this prosperity. They received a pound of meat a week, a dozen herrings, a quart of molasses, and a peck of meal. Those who turned out the most nails were rewarded with a suit of red or blue cloth. Not all slaves at Monticello were content, however. When the Revolutionary War broke out, about thirty of Jefferson's slaves escaped from Monticello and fought with the British army.

Slavery and the Declaration

Soon after Jefferson settled down at Monticello, the political pot in the colonies began to simmer. The growing conflict between colonies and Crown took a radical shift when Virginia suggested a meeting in Philadelphia of the various colonies to draft a joint protest. This meeting marks the birth of the Continental Congress. In 1775 Virginians sent Jefferson as one of their delegates to the congress in Philadelphia. From this date onward Jefferson's story becomes a key part of the history of the republic. Political events snatched him from his happiness as husband and father.

The Virginia delegates were instructed to propose to congress that the united colonies be declared free and independent states. Jefferson had come to support this proposal because of recent acts of Parliament. In his view, trade with all parts of the world was a natural right of the colonies. The acts of Parliament that restricted colonial trade were void, he wrote, because "the British Parliament has no right to exercise authority over us."

In response to the Virginia proposal, congress appointed a committee to prepare a declaration. The committee comprised John Adams of Massachusetts, Benjamin Franklin of Pennsylvania, and Thomas Jefferson of Virginia. Those meeting in Philadelphia considered the document about to be written an important one, but nobody then knew it would become immortal.

Jefferson was asked to draft the declaration. What he wrote was presented to the whole congress on June 28, 1776. Members of the congress debated the document before voting on it. According to the rules, the vote had to be unanimous for the resolution to be adopted. Several changes were made before the final vote was taken. The most heated conflict occurred in the debate over Jefferson's words about slavery. The delegates from South Carolina and Georgia objected to the passage in Jefferson's draft that condemned King George for the slave trade. His passage read:

> He [King George III] has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. This piratical warfare . . . is the warfare of the Christian King of Great Britain.

Scene 7 of the play by Peter Stone and Sherman Edwards entitled *1776* presents a dramatic account of the debate over this passage by members of the Continental Congress. The characters in this part of the play are:

Edward Rutledge: Delegate from South Carolina
John Hancock: President of the Continental Congress
Charles Thompson: Secretary of the Continental Congress
Thomas Jefferson: Delegate from Virginia
John Adams: Delegate from Massachusetts
Stephen Hopkins: Delegate from Rhode Island
Benjamin Franklin: Delegate from Pennsylvania

HANCOCK:
If there are no more changes, then, I can assume that the report of the Declaration Committee has been . . . .

RUTLEDGE *(deliberately)*:
Just a moment, Mr. President.

FRANKLIN (*to John*):
Look out.

RUTLEDGE:
I wonder if we could prevail upon Mr. Thompson to read again a small portion of Mr. Jefferson's Declaration – the one beginning "He has waged cruel war –"?

HANCOCK:
Mr. Thompson?

THOMPSON:
(reading back rapidly to himself): ". . . He has affected . . . He has combined . . . He has abdicated . . . He has plundered . . . He has constrained . . . He has excited . . . He has incited . . . He has waged cruel war! Ah. (He looks up.) Here it is. *(He clears his throat and reads.)* "He has waged cruel war against human nature itself, in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere. Determined to keep open a market where men should be bought and sold, he has prostituted . . . .

RUTLEDGE:
That will suffice, Mr. Thompson, I thank you. Mr. Jefferson, I can't quite make out what it is you're talkin' about.

JEFFERSON:
Slavery, Mr. Rutledge.

RUTLEDGE:
Ah, yes. You're referrin' to us as slaves of the King.

JEFFERSON:
No sir, I'm referring to our slaves. Black slaves.

RUTLEDGE:
Ah, black slaves. Why didn't you say so, sir? Were you tryin' to hide your meanin'?

JEFFERSON:
No, sir.

RUTLEDGE:
Just another literary license, then?

JEFFERSON:
If you like.

RUTLEDGE:
I don't like at all, Mr. Jefferson. To us in South Carolina, black slavery is our peculiar institution and a cherished way of life.

JEFFERSON:
Nevertheless, we must abolish it. Nothing is more certainly written in the Book of Fate than that this people shall be free.

RUTLEDGE:
I am not concerned with the Book of Fate right now, sir. I am more concerned with what's written in your little paper there.

JOHN[ADAMS]:
That "little paper there" deals with freedom for Americans!

RUTLEDGE:
Oh, really, Mr. Adams is now callin' our black slaves Americans. Are-they-now?

JOHN:
They are! They're people and they're here – if there is any other requirement, I've never heard of it.

RUTLEDGE:
They are here, yes, but they are not people, sir, they are property.

JEFFERSON:
No, sir! They are people who are being treated as property. I tell you the rights of human nature are deeply wounded by this infamous practice!

RUTLEDGE*(shouting)*:
Then see to you own wounds, Mr. Jefferson, for you are a – practitioner – are you not? *(A pause. Rutledge has found the mark.)*

JEFFERSON:
I have already resolved to release my slaves.

RUTLEDGE:
Then I'm sorry, for you have also resolved the ruination of your personal economy.

JOHN:
Economy. Always economy. There's more to this than a filthy purse string, Rutledge. It's an offense against man and God.

HOPKINS:
It's a stinking business, Mr. Rutledge – a stinking business.

RUTLEDGE:
Is it really, Mr. Hopkins? Then what's that I smell floatin' down from the North – could it be the aroma of hypocrisy? For who holds the other end of that filthy purse-string, Mr. Adams? *(To everyone)* Our northern brethren are feelin' a bit tender toward our slaves. They don't keep slaves, no-o, but they're willin', for the shillin' – *(rubbing his thumb and forefinger together)* – or haven't y'heard, Mr. Adams? Clink! Clink! . . .

BEST COPY AVAILABLE

Gentlemen! You mustn't think our northern friends merely see our slaves as figures on a ledger. Oh no, sir! They see them as figures on the block! Notice the faces at the auctions, gentlemen – white faces on the African wharves – New England faces, seafaring faces: "Put them in the ships, cram them in the ships, stuff them in the ships!" Hurry gentlemen, let the auction begin! . . .

Mr. Adams, I give you a toast! Hail, Boston! Hail, Charleston! Who stinketh the most?!?!? *(He turns and walks straight out of the chamber. Hewes of North Carolina follows, and Hall of Georgia is right behind them. Others leave the chamber. Only Franklin, Jefferson, Hancock, and Thompson remain.)*

FRANKLIN:
We've no other choice, John. This slavery clause has to go.

JOHN:
Franklin, what are y'saying?

FRANKLIN:
It's a luxury we can't afford.

JOHN:
A luxury? A half-million souls in chains, and Dr. Franklin calls it a luxury! Maybe you should have walked out with the South!

FRANKLIN:
You forget yourself, sir! I founded the first anti-slavery society on this continent.

JOHN:
Don't wave your credentials at me! Perhaps it's time you had them renewed!

FRANKLIN:
(angrily): The issue here is independence! Maybe you've lost sight of that fact, but I have not! How dare you jeopardize our cause when we've come so far? These men, no matter how much we disagree with them, are not ribbon clerks to be ordered about; they're proud, accomplished men, the cream of their colonies – and whether you like it or not, they and the people they represent will be part of the new country you'd hope to create! Either start learning how to live with them or pack up and go home – but in any case, stop acting like a Boston fishwife!

* * *

Adams was finally persuaded that the antislavery passage in the Declaration should be removed. Jefferson reluctantly agreed to delete the passage from his draft. With it remaining, there could be no unanimous vote for independence. The passage removed, the Declaration of Independence was unanimously adopted by the delegates' meeting in Philadelphia.

For Thomas Jefferson, the main issue in the debate over the Declaration had not been slavery. Though Jefferson opposed slavery, his main concern was independence from England and new principles of government for the colonies. Deleting the slavery passage from the Declaration, he thought, was a small price to pay for his broader goals. Once independence was achieved the slavery issue could be raised again. Jefferson would repeatedly have to decide what to do about slavery in light of his most memorable words from the Declaration: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."

Slavery in Virginia

Jefferson did not forget that he had offered a creed for himself and the new republic. The challenge for him would now be to make this creed a living reality. He went back home to Virginia to take a major hand in the drafting of a new constitution and new laws for his native state. His return to the national scene would await the building of the State of Virginia as a proving ground for the new social and political order.

A major issue for the new order was slavery. Jefferson was convinced that slavery was an intolerable wrong. Yet, he thought it would be better to send former slaves, once freed, out of the country where they could set up a colony of their own. After emancipation he believed blacks and whites would be unable to live in peace under the same government. Deep-seated prejudices ingrained in whites and the memory of injuries suffered by blacks would produce violent uprisings.

Upon his return to Virginia, Jefferson tried to translate his hatred of slavery into state law. In his 1776 draft of a new state constitution he introduced a clause prohibiting future importation of slaves. He later proposed freedom for the children of all Virginia slaves born after 1800. Freedom, he said, was "the birthright of all men regardless of their color or condition." His fellow Virginians did not share his views on freedom for slaves. They rejected both of his proposals.

Freeing Jefferson's Slaves

As a result of repeated rebuffs, it became clear to Jefferson that the time had not arrived for the government to abolish slavery. Nonetheless, he could still act personally to free his own slaves. A sense of guilt beset him.

Setting his own slaves free posed several obstacles for Jefferson. Since he was often burdened by debt, he hired out some of his slaves to raise money. Outright selling of his slaves would have been the quickest way to raise cash to pay his creditors, but to do so would have deprived him of the labor force upon which his income depended and would have had an adverse effect on his comfortable style of living. Without slaves, a Virginia plantation like Monticello could not function.

Another obstacle to freeing his own slaves was the law of Virginia. Under Virginia law, a master who took a slave to the county court to gain his or her release had to certify that the slave had a skill and a place to use it. It was unlawful to free a slave without first providing for his or her support. This would have been extremely difficult for Jefferson, because he owned so many slaves. Colonial Virginia was organized around the great plantations. There was no place, off the plantation, for large numbers of freed slaves to settle. Also, freed slaves were not welcome in other states, several of which excluded their entry by law.

Despite these obstacles, abolitionists (those favoring freedom for slaves) urged Jefferson to set an example by freeing his own slaves. They urged the patriarch of Monticello to put the full weight of his immense prestige on the side of the antislavery movement. Jefferson, they said, was in a position to set an example that would lead other Virginia planters to free their slaves.

The famed black mathematician Benjamin Banneker claimed that Jefferson was violating his own principles by holding blacks as slaves. In a letter to Jefferson, Banneker asked him to reconcile his "created equal" phrase from the Declaration with his practice of "detaining by fraud and violence so numerous a part of my brethren, under groaning captivity."

Jefferson came to take the position that emancipation was an idea whose time had not yet come. He thought it would be a mistake to try to hasten its coming. His aim was gradually to place slavery in the course of ultimate extinction. He was awaiting the "ripening" of public opinion. He believed a premature effort against slavery would result in an irreversible setback. He did not want to get so far in advance of public opinion that he lost his political followers. A successful reformer, he thought, ought not rush in where revolutionaries might fear to tread. Overeager zealots might set the cause back.

Thomas Jefferson died on July 4, 1826, without freeing most of his slaves. At the time of his death he had one of the largest holdings of slaves in Virginia. If Jefferson had freed his slaves, he would have jeopardized his political career. He would not have succeeded in doing the things in which he took the greatest pride. It is most unlikely that he would have become president of the United States. Not until 1860 was a man actively opposed to the spread of slavery elected to that high office.

Activities

TESTING HISTORICAL UNDERSTANDING

1. How did the Enlightenment influence Jefferson's view of slavery?
2. What did Jefferson mean when he said: "We have the wolf by the ears; and we can neither hold him, nor safely let him go"?
3. For what purpose did the First Continental Congress meet?
4. Why was the antislavery passage deleted from the draft of the Declaration of Independence?
5. In what ways did some New Englanders benefit from slavery?

REVIEWING THE FACTS OF THE CASE

1. State two ways that slaves at Monticello were treated differently from slaves on most other plantations.
2. For what reasons did Jefferson believe that freed blacks and whites could not live peacefully together in the United States?
3. Why were Jefferson's antislavery proposals rejected by Virginia lawmakers?
4. What economic effect would freeing his slaves have had on Jefferson?
5. What did Virginia law require of masters who wished to free their slaves?

ANALYZING ETHICAL ISSUES

Equality is a value concerning whether people should be treated in the same way. There are places in this story where the value of equality conflicts with other values:

Property: A value concerning what people should be allowed to own and how they should be allowed to use it.

Authority: A value concerning what rules or people should be obeyed and the consequences for disobedience.

Indicate two places in the story where the value of equality is in conflict with one of these values – property or authority. First identify the value that conflicts with equality. Then briefly identify the incident in the story where the conflict occurs, as illustrated in the following example:

VALUE CONFLICT	WHERE THE CONFLICT OCCURS
Equality (for slaves) versus liberty (for the colonies).	Benjamin Franklin had to decide whether or not to delete the antislavery passage from the Declaration.

EXPRESSING YOUR REASONING

1. Should Thomas Jefferson have freed his slaves? Why or why not?
2. Some have argued that it might be wrong to own slaves in the twentieth century, but that during the eighteenth century it was morally acceptable. Can an action be right at one time and wrong at another? Explain your thinking.
3. For each situation below specify a basis for comparison and explain whether you think the people involved were treated equally:

SITUATION	BASIS FOR COMPARISON
British subjects in England were represented by elected representatives in Parliament, but colonists were not.	If the basis for comparing two groups is opportunity to influence legislation, the colonists were being treated unequally because they had no direct voice in the legislature.

a. Virginia was allowed more representatives in Congress than Rhode Island. (citizens of Virginia/citizens of Rhode Island)
b. Jefferson gave special bonuses to those slaves who produced the most nails at the Monticello naillery. (slaves producing more nails/slaves producing fewer nails)
c. Thomas Jefferson's inheritance was greater than that of his sister. (Thomas/his sister)

Write a short position paper answering the question: Does equal treatment of people require that they receive identical treatment? Refer to the situations above, as well as other examples, in what you write.

Seeking Additional Information

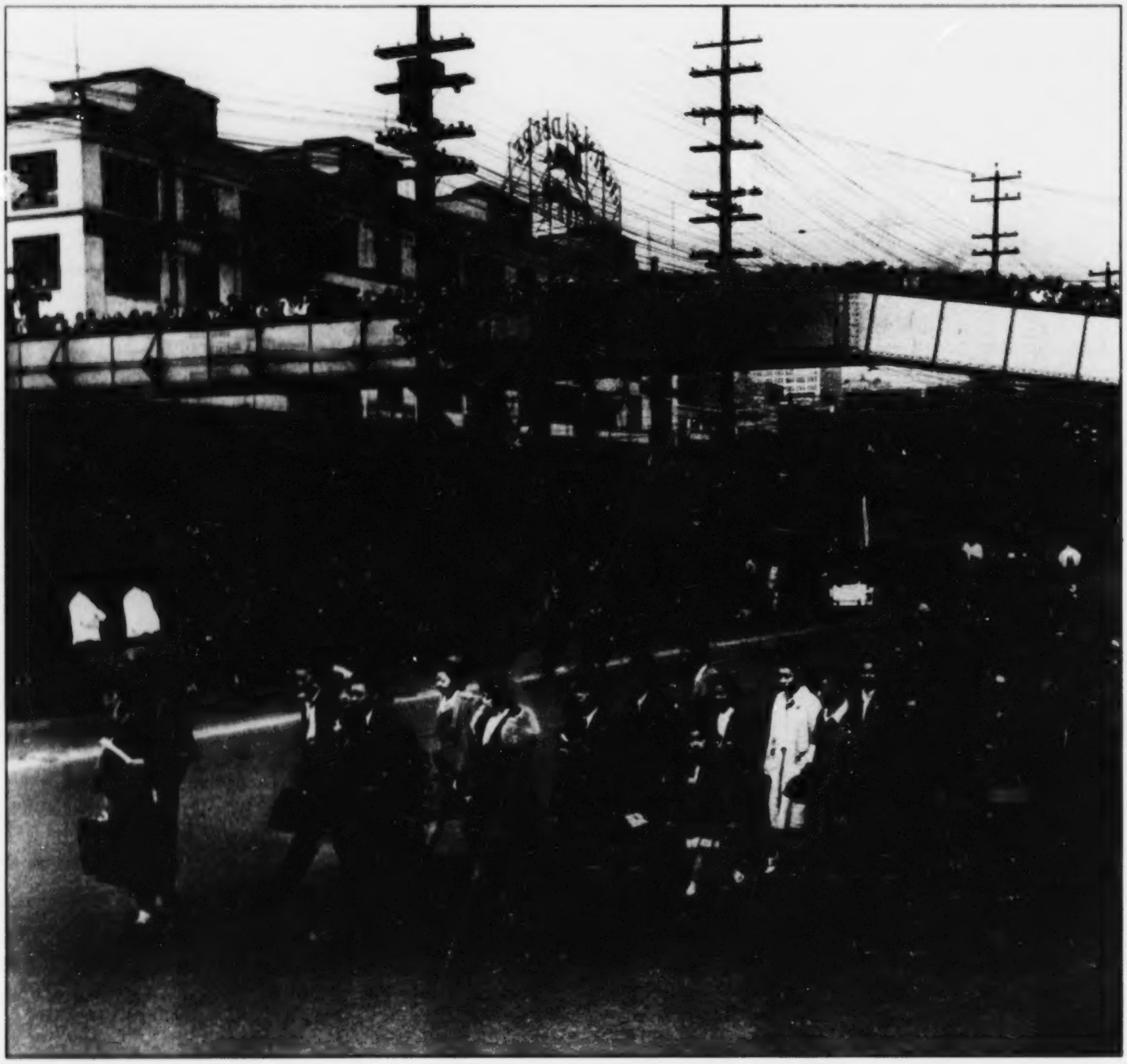
In making decisions about such questions as those above we often feel we need more information before we are satisfied with our judgments. Choose one of the above questions about which you would want more information than is presented in the story. What additional information would you like? Why would that information help you make a more satisfactory decision?

"A Luxury We Can't Afford: Thomas Jefferson and Slavery" is reprinted by permission of the publisher from pp. 54-66 of Lockwood, Alan and Harris, David, Reasoning with Democratic Values Vol. I: 1607-1876. *(New York: Teachers College Press, © 1985 by Teachers College, Columbia University. All rights reserved.)*

Ethics

Law, Morality, and the Relocation Camps/Secondary

Hal Stearns



UPI/Bettmann Newsphotos

Introduction

Democracy is a fragile political system. It is only as good as its beliefs and values and laws. The United States Constitution is the foundation for this system. How well has it worked and how well do we make it work?

This lesson examines the historical background of the U.S. government's relocation and internment of Japanese-Americans and Japanese aliens living in the U.S. during World War II. Students will read original source materials and a summation of the issues involved. They will have an opportunity to role play and discuss the various personalities involved both in the 1942 internment and in current efforts to secure reparations. The lesson will ask them to consider both the legal and moral dimensions of the relocation effort.

Time to Complete

One to three class periods

Goals

As a result of this lesson, students will be able to:

1. understand the "living" Constitution by using as an example the World War II internment of Japanese-Americans;
2. test the proposition: Is judicial decision-making

2453

influenced by wartime pressures?;
3. explore the concepts of liberty and power;
4. examine the interplay between popular sentiment (which in this case could perjoratively be called wartime hysteria), moral values such as fairness, and the law; and
5. discuss knowledgeably the status of current legislative and court actions to redress the wrongs done to the Japanese-Americans who were interned.

Materials

- Handout 1: Background (below)
- Handout 2: Instructions to All Persons of Japanese Ancestry (see page 44)
- Handout 3: Excerpts from Testimony to the Commission on Wartime Relocation and Internment of Civilians (see page 45)
- Handout 4: The Legal Dimension (below)
- Handout 5: The Reparations Question (below)
- Handout 6: Questions for Role Play and Discussion (see page 48)

Procedures

1. Distribute Handout 1. Through the lecture and discussion address the historical precedents of curtailment of individual liberties during wartime. Explore the dimensions of this episode in our history. Relocations of Native Americans during Andrew Jackson's presidency might be investigated as a relevant precedent. Examine the context of the internment during World War II. Why did we not put all descendants of our enemies in relocation centers during World War II?
2. Distribute Handout 2 and have students read the evacuation instructions. Ask students to imagine that they were receiving these instructions. How would they react? What individual liberties might be violated by these instructions? Teachers could have students look at the language of the Fifth and Fourteenth Amendments to examine what constitutional provisions may have been violated.
3. Teachers may use the excerpts from personal testimony to the Commission on Wartime Relocation and Internment in Handout 3 in a number of ways. Students can develop role plays based on the testimony. They can be divided into small groups to discuss the impact of the experience on people's lives.
4. Students should read Handout 4 "The Legal Dimension." Have them discuss the questions that follow.
5. Have students read Handout 5 on reparations. Have them discuss the questions that follow.
6. Conduct a class discussion using Handout 6 as a guide. Have students role play, argue or discuss the issues and points of view as they are presented.

Handout 1: Background

Wars always pose special problems for democracies. Almost always, wars place heavy pressures on constitutional guarantees such as freedom of speech and assembly, and on such democratic values as fairness, diversity, and tolerance.

Our Constitution was first tested not by a war, but by a war scare. In the late 1790s, American shipping was increasingly harrassed by warring European powers. Many Americans feared that we would be drawn into the Napoleonic wars. Congress responded by passing the Alien and Sedition Acts in 1798. The Alien Acts placed new obstacles to becoming a United States citizen and made it impossible for aliens from nations with whom the United States was at war to become citizens. The Act also allowed the government to deport aliens who were suspected of being disloyal or dangerous to the United States. A third section of the Act provided that all male aliens above the age of 14 from hostile countries were subject to "be apprehended, restrained, secured, and removed, as enemy aliens."

The Sedition Act made it a crime for anyone to publish any "false, scandalous and malicious writing . . . against the government of the United States . . . to stir up sedition within the United States, or to excite any unlawful combinations:...for opposing or resisting any law of the United States." Many people criticized the acts when they were in force. When the Alien and Sedition Acts expired a few years later, they were not renewed.

Other wars also resulted in a curtailing of individual freedoms. During the War of 1812, British subjects could not live within forty miles of the East Coast.

The Civil War placed particular strains on the legal/constitutional system. Newspapers were suppressed; the writ of habeas corpus was suspended by the president; and many citizens were arrested and imprisioned by military authorities. (After the war was over, the U.S. Supreme Court reversed by a unanimous decision the conviction of a civilian found guilty of treason by a military court. See *Ex Parte Milligan*, 71 U.S. 2 (1866).)

In World War I, there was strong anti-German feeling in America. German-sounding names were changed, the study of German disappeared from school curricula, and many customs and traditions identified with the enemy were discontinued.

At the start of World War II, President Franklin D. Roosevelt used his presidential wartime powers to issue orders concerning German, Italian and Japanese aliens. German and Italian aliens were allowed to continue to live in their communities as long as they expressed loyalty to the United States. There were, however, instances of arrest or expulsion when individuals were shown to be dangers to "public safety."

German and Italian aliens were forbidden to give information to our enemies or interfere with our defense. It was illegal for them to have cameras or guns, or to be members of certain organizations. Their ability to travel was restricted as well.

Officials took harsher and less individualized action against both Japanese-Americans and Japanese aliens than against aliens of other enemy nations. No mass exclusion or detention was ordered against German and Italian aliens or American citizens of German or Italian descent. Japanese in both categories, on the other hand, were rounded up and shipped off to relocation camps.

Approximately 125,000 people of Japanese descent lived in this country; 70,000 of them were U.S. citizens by birth.

The Japanese attack on Pearl Harbor immediately changed the status of the Japanese in America. Bitterness and hatred suddenly became part of their daily lives. They became "Japs" and were viewed as the enemy. Their loyalty

Handout 2:

Western Defense Command and Fourth Army
Wartime Civil Control Administration
Presidio of San Francisco, California

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY LIVING IN THE FOLLOWING AREA:

Pursuant to the provisions of Civilian Exclusion Order No. 27, this Headquarters, dated April 30, 1942, all persons of Japanese ancestry, both alien and non-alien, will be evacuated from the [designated] area by 12 o'clock noon, P.W.T., Thursday, May 7, 1942.

No Japanese person living in the [designated] area will be permitted to change residence after 12 o'clock noon, P.W.T., Thursday, April 30, 1942, without obtaining special permission from the representative of the Commanding General, Northern California Sector, at the Civic Control Station located at: 530 Eighteenth Street, Oakland, California.

Such permits will only be granted for the purpose of uniting members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.
2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles and livestock.
3. Provide temporary residence elsewhere for all Japanese in family groups.
4. Transport persons and a limited amount of clothing and equipment to their new residence.

THE FOLLOWING INSTRUCTIONS MUST BE OBSERVED:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 a.m. and 5:00 p.m. on Friday, May 1, 1942, or between 8:00 a.m. and 5:00 p.m. on Saturday, May 2, 1942.
2. Evacuees must carry with them on departure for the Assembly Center, the following property:
   a) Bedding and linens (no mattress) for each member of the family;
   b) Toilet articles for each member of the family;
   c) Extra clothing for each member of the family;
   d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;
   e) Essential personal effects for each member of the family. All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.
3. No pets of any kind will be permitted.
4. No personal items and no household goods will be shipped to the Assembly Center.
5. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.
6. Each family, and individual living alone will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 a.m. and 5:00 p.m., Friday May 1, 1942, or between the hours of 8:00 a.m. and 5:00 p.m., Saturday, May 2, 1942, to receive further instructions. J.L. DeWitt, Lieutenant General, U.S. Army Commanding, April 30, 1942. See Civilian Exclusion Order No. 27.

to America was questioned, and there were growing fears that all Japanese were spies. Overnight, life in America turned cruel and ugly: stores denied food and services; banks refused to do business with them. There were insults and ridicule; attacks and beatings.

On February 19, 1942, President Roosevelt signed Executive Order 9066, empowering the Secretary of War and designated military commanders to exclude any and all persons of Japanese descent – both citizens as well as aliens – from designated areas in order to secure national defense objectives against sabotage, espionage and "fifth column" activity.

Lieutenant General John L. DeWitt was commander of American military defenses on the West Coast. Citing "military necessity," he requested that all American citizens of Japanese descent and all Japanese resident aliens be excluded from the West Coast. The 112,000 Japanese-Americans in the area were evacuated and "relocated" away from the West Coast. Relocation centers, Justice Department internment camps and citizen isolation camps were established in eleven Western states.

The policy of exclusion, removal and detention was carried out without hearings into the loyalty of the persons who were interned. Congress supported the policy by enacting a statute which made it a federal crime to violate orders issued pursuant to Executive Order 9066.

Handout 3:

Excerpts from Testimony to the Commission on Wartime Relocation and Internment of Civilians

It is difficult to describe the feeling of despair and humiliation experienced by all of us as we watched the Caucasians coming to look over our possessions and offering such nominal amounts, knowing we had no recourse but to accept whatever they were offering because we did not know what the future held for us.

* * *

People who were like vultures swooped down on us, going through our belongings, offering us a fraction of their value. When we complained to them of the low price, they would respond by saying, "You can't take it with you, so take it or leave it."…. I was trying to sell a recently purchased $150 mangle. One of these people came by and offered me $10. When I complained he said he would do me a favor and give me $15. I went for my last look at our hard work…. Why did this thing happen to me now? I went to the storage shed to get the gasoline tank and pour the gasoline on my house, but my wife…said don't do it, maybe somebody can use this house; we are civilized people, not savages.

* * *

On May 16, 1942, my mother, two sisters, niece, nephew, and I left…by train. Father joined us later. Brother left earlier by bus. We took whatever we could carry. So much we left behind, but the most valuable thing I lost was my freedom.

* * *

On May 16, 1942, at 9:30 a.m., we departed for an unknown destination. To this day, I can remember vividly the plight of the elderly, some on stretchers, orphans herded onto the train by caretakers, and especially a young couple with four pre-school children. The mother had two frightened toddlers hanging on to her coat. In her arms, she carried two crying babies. The father had diapers and other baby paraphernalia strapped to his back. In his hands he struggled with duffle bag and suitcase. The shades were drawn on the train for our entire trip. Military police patrolled the aisles.

* * *

When we finally reached our destination, four of us men were ordered by the military personnel carrying guns to follow them. We were directed to unload the pile of evacuees' belongings from the boxcars to the semi-trailer truck to be transported to the concentration camp. During the interim, after filling one trailer-truck and waiting for the next to arrive, we were hot and sweaty and sitting, trying to conserve our energy, when one of the military guards, standing with his gun, suggested that one of us should get a drink of water at the nearby water faucet and try and make a run for it so he could get some target practice.

* * *

At the entrance…stood two lines of troops with rifles and fixed bayonets pointed at the evacuees as they walked between the soldiers to the prison compound. Overwhelmed with bitterness and blind with rage, I screamed every obscenity I knew at the armed guards, daring them to shoot me.

* * *

An oft-repeated ritual in relocation camp schools…was the salute to the flag followed by the singing of "my country, 'tis of thee, sweet land of liberty"—a ceremony Caucasian teachers found embarrassingly awkward if not cruelly poignant in the austere prison-camp setting.

* * *

At Parker, Arizona, we were transferred to buses. With baggage and carryalls hanging from my arm, I was contemplating what I could leave behind, since my husband was not allowed to come to my aid. A soldier said, "Let me help you, put your arm out." He proceeded to pile everything on my arm. And to my horror, he placed my two-month old baby on top of the stack. He then pushed me with the butt of the gun and told me to get off the train, knowing when I stepped off the train my baby would fall to the ground. I refused. But he kept prodding and ordering me to move. I will always be thankful [that] a lieutenant checking the cars came upon us. He took the baby down, gave her to me, and then ordered the soldier to carry all our belongings to the bus and see that I was seated and then report back to him.

* * *

They begin to file out of the bus, clutching tightly to children and bundles. Military Police escorts anxiously help, and guides direct them in English and Japanese. They are sent into the mess halls, where girls hand them ice water, salt tablets and wet towels. In the back are cots where those who faint can be stretched out, and the cots are usually occupied. At long tables sit interviewers suggesting enlistment in the War Relocation Work Corps.... Men and women, still sweating, holding on to children and bundles, try to think.... Interviewers ask some questions about former occupations, so that cooks and other types of workers much needed in the camp can be quickly secured. Finally, fingerprints are made, and the evacuees troop out across an open space and into another hall for housing allotment, registration and a cursory physical examination.... In the end, the evacuees are loaded onto trucks along with their hand baggage and driven to their new quarters.

* * *

Pinedale. The hastily built camp consisted of tar-paper roofed barracks with gaping cracks that let in insects [and] dirt from the ... dust storms.... No toilet facilities except smelly outhouses, and community bathrooms with overhead pipes with holes punched in to serve as showers. The furniture was camp cots with dirty straw mattresses.

* * *

Manzanar. Nothing but a 20 by 25 foot barrack with roof, sides of pine wood covered with thin tar-paper ... no attic, no insulation. But the July heat separated the pine floor and exposed cracks to a quarter of an inch. Through this a cold wind would blow in [at night], or, during the heat of the day, dusty sand would come in through the cracks. To heat, one pot bellied wood stove in the center of the barracks.

* * *

Puyallup (Camp Harmony). This was temporary housing, and the room in which I was confined was a makeshift barracks from a horse stable. Between the floorboards we saw weeds coming up. The room had only one bed and no other furniture. We were given a sack to fill up with hay from a stack outside the barracks to make our mattresses.

* * *

Portland. The assembly center was the Portland stockyard. It was filthy, smelly, and dirty. There were roughly two thousand people packed in one large building. No beds were provided, so they gave us gunny sacks to fill with straw – that was our bed.

* * *

Life begins each day with a siren blast at 7:00 a.m., with breakfast served cafeteria style. Work begins at 8:00 for the adults, school at 8:30 or 9:00 for the children.

* * *

Camp life was highly regimented. It was rushing to the wash basin to beat the other groups, rushing to the mess hall for breakfast, lunch, and dinner. When a human being is placed in captivity, survival is the key. We developed a very negative attitude toward authority. We spent countless hours plotting to defy or beat the system. Our minds started to function like any POW or convicted criminal.

* * *

I recall sitting in classrooms without books and listening to the instructor talking about technical matters that we could not study in depth. The lack of qualified evacuee teachers was awful. I remember having to read a chapter a week in chemistry and discovering at the end of a semester that we had finished one full year's course. There was a total loss of scheduling, with no experiments, no demonstrations or laboratory work.

* * *

In some ways, I suppose, my life was not too different from a lot of kids in America between the years 1942 and 1945. I spent a good part of my time playing with my brothers and friends, learned to shoot marbles, watched sandlot baseball and envied the older kids who wore Boy Scout uniforms. We shared with the rest of America the same movies and screen heroes and listened to the same heartrending songs of the Forties. We imported much of America into the camps because, after all, we were Americans. Through imitation of my brothers, who attended grade school within the camp, I learned the salute to the flag by the time I was five years old. I was learning, as best one could learn in Manzanar, what it meant to live in America. But I was also learning the sometimes bitter price one has to pay for it.

* * *

Many families with sons in the United States Army and married daughters living in Japan are said to feel terrific conflict. Many who consider themselves good Americans now feel they have been classed with the Japanese.... There is a great financial insecurity. Many families have lost heavily in the sale of property.... Savings are dipped into for the purchase of coupon books to be used at the center store, and with the depletion of savings come a mounting sense of insecurity and anxiety as to what will be done when the money is gone.... Doubtless the greatest insecurity is that about post-war conditions ... many wonder if they will ever be accepted in Caucasian communities.

Handout 4: The Legal Dimension

Before the war evacuation, the Western Defense Command ordered everyone of Japanese ancestry to stay indoors from 8 p.m. to 6 a.m. In May 1942, the Army ordered such persons to report for evacuation to "relocation centers" – detention camps.

Gordon K. Hirabayashi, a senior at the University of Washington, thought it was his duty as a citizen to disobey both these orders, to defend his constitutional rights. Convicted and sentenced to three months in prison, he appealed to the Supreme Court.

Chief Justice Stone spoke for all nine justices in June 1943: The curfew was within the war power of the President and Congress. Concurring, Justice Douglas wrote that the Court did not consider the wisdom of the order; Justice Murphy insisted that the government could take such measures only in "great emergency."

The case of Fred Korematsu is a model of the time. Korematsu was 22, a native born American citizen. He ignored the relocation order and went into hiding, but was eventually arrested and brought to trial. The American Civil Liberties Union defended Korematsu in court. Korematsu was convicted, received five years' probation, and was interned at Topaz, Utah. Eventually the U.S. Supreme Court heard the case. Korematsu's lawyers argued that it was unconstitutional to take people out of their homes and intern them solely on the basis of race. Likewise, they argued that there was no evidence that Korematsu was disloyal and that he had a constitutional right to be treated as an individual and not as a member of a particular racial group.

Government lawyers argued that the 112,000 evacuees were interned under a lawful military order issued for the protection of the West Coast, that some Japanese had been proven to be loyal to Japan, and it was necessary to remove all Japanese-Americans from a "war zone."

The Supreme Court announced its decision on December 18, 1944, more than two years after the evacuation order. In *Korematsu v. U.S.*, 323 U.S. 214, it upheld the lower court in a 6-3 vote. Justice Hugo L. Black wrote the majority opinion.

> The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 . . . which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to his loyalty to the United States . . . .
>
> All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.
>
> Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can . . . .
>
> Exclusion Order No. 34, which Korematsu knowingly and admittedly violated, was one of a number of military orders and proclamations . . . . We are unable to conclude that it was beyond the war power of Congress and the executive to exclude those of Japanese ancestry from the west coast war area at the time they did . . . . Exclusion from a threatened area . . . has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores . . . ordered exclusion in accordance with congressional authority . . . .
>
> Korematsu was not excluded from the military area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our west coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the west coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders – as inevitably it must – determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were unjustified.

Mr. Justice Frankfurter concurred.

> To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

Justice Frank Murphy's dissenting opinion emphasized due process and basic human and civil rights. He wrote: "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life . . . All residents of this nation . . . must be treated at all times as the heirs of the American experiment and are entitled to all the rights and freedoms guaranteed by the Constitution." He said excluding Americans of Japanese descent went over "the very brink of constitutional power," and fell into the ugly abyss of racism.

> The exclusion . . . of all persons with Japanese blood in their veins . . . must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.
>
> Moreover, there was no adequate proof that the FBI and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved – or at least for the 70,000 American citizens – especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

Mr. Justice Jackson also dissented.

> Korematsu was born on our soil . . . . No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived . . . . Had Korematsu been one of four – the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole – only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought different than they, but only in that he was born of different racial stock.

Justice Douglas's opinion warned that power to defend the community is not power to detain trustworthy citizens. Federal courts may issue writs of habeas corpus in such cases, he said. "Loyalty is a matter of the heart and mind," added Douglas, "not of race, creed, or color."

That same day, the Court unanimously ordered the Central Utah Relocation Center to release Miss Mitsuye Endo. The War Relocation Authority had conceded she was a loyal, law-abiding citizen, but it had not allowed her to leave the center freely.

Handout 5: The Reparations Question

In early 1943, the government proposed to end detention, but not exclusion, for those who volunteered to join the Army. In the spring of 1943, the highest civilian and military officials of the War Department concluded that military requirements no longer justified excluding American citizens of Japanese descent or resident aliens from the West Coast. However, it was not until May 1944, that a recommendation to end exclusion was put before President Roosevelt at a Cabinet meeting. Nevertheless, exclusion ended only after the presidential election in November 1944.

The excluded Japanese suffered enormous damages and losses, both material and intangible. The loss of farms, businesses, and homes, disruption of careers and professional lives and long-term loss of income, earnings and opportunity is incalculable. In 1983 dollars, the loss was estimated to be between $810 million and $2 billion.

In 1980, Congress established a bipartisan Commission on Wartime Relocation and Internment of Civilians. The commission reviewed postwar actions by federal, state and local governments to partially redress the wrongs that were done.

The Commission noted the following:

1. In 1948, Congress passed the Japanese-American Evacuation Claims Act. This gave persons of Japanese ancestry the right to claims from the government of real and personal property losses. Only $37 million was ever paid in claims, an amount far below fair compensation.
2. In 1972, the Social Security Act was amended so Japanese-Americans over 18 would be deemed to have earned and contributed to the Social Security system during their detention.
3. In 1978, the federal civil service retirement provisions were amended in the same way.

Handout 6: Questions for Role Play and Discussion

The year is 1942. Role play the following:

1. You are 15 years old and Japanese-American. Your family has just been notified of the movement to a camp. What questions do you ask your parents? What responses do they give to you and your brothers and sisters?
2. You are a member of President Roosevelt's inner circle. A decision is being made about the Japanese-American relocation. What arguments will you and others of the inner circle present to the President?
3. You are a member of the American Civil Liberties Union. How do you react to the internment order?
4. You are John Q. Public, Anytown, U.S.A. Politically, you see yourself as a middle-of-the-roader. You are chatting with several of your friends. Their points of view cross the political spectrum. What are all your reactions to the internment order? (Extend this question by having the friends be black, Native American, white, from the West Coast, from the Midwest, from the South).
5. You are Lieutenant General DeWitt. Why do you request the evacuation and relocation away from the West Coast?
6. You are a Japanese-American. You are chatting with Japanese-American friends. You are discussing all the viewpoints on the evacuation.
7. You are the editorial page editor of a daily newspaper. You try to give a balanced viewpoint on your opinion-editorial page. What are the arguments pro and con about the evacuation and internment that you will include in your editorial? (For an extension of this exercise, have students write editorials expressing various viewpoints on the issue.)
8. You are Fred Korematsu. How do you respond to the order?
9. You are teaching the U.S. Constitution to your high school or junior high school students. A student asks: "How does this order tie in with the U.S. Constitution? I want you to explain this to us in light of the current time and American history." What is your comment?

The year is 1987. Role play the following:

1. You are an attorney for the Japanese-Americans seeking redress for the evacuation and internment during World War II. What arguments will you present to the courts?
2. You are the U.S. attorney in this case. You have been instructed to take a stand against compensation. What are your arguments?
3. You are a member of the U.S. Congress. You are considering legislation to help the Japanese-Americans. What would you include/exclude in your bill in terms of the recommendations of the final report of the Commission on Wartime Relocation and Internment of Civilians?
4. You are members of the U.S. Congress considering the proposed bill. What are your arguments for and against the proposals? What would you recommend that is different from the proposals?
5. You are Fred Korematsu. You are being interviewed about your World War II court case and your life since the war. What will you say in your interview?
6. You are teaching a course in your government unit about the U.S. Constitution and its 200th anniversary. How would you introduce and teach this lesson?

The Commission made the following recommendations:

1. Congress should pass a joint resolution signed by the President, recognizing that a grave injustice had been done and offering the apologies of the nation for acts of exclusion, removal and detention.
2. The President should pardon those who were convicted of violating the statutes imposing a curfew on American citizens on the basis of their ethnicity and requiring the ethnic Japanese to report to assembly areas. The Department of Justice should review other convictions and make like redress.
3. Executive agencies should help with restitution of positions, status or entitlements lost in whole or in part because of acts or events between December 1941 and 1945 and give full consideration for the same.
4. Congress should demonstrate official recognition for the injustice done. A fund should be developed to sponsor research and public educational activities so that the events which were the subject of this inquiry will be remembered. Comparative studies of similar civil liberties abuses or of the effect upon particular groups of racial prejudice should also be undertaken.
5. Congress should establish a fund which provides for personal redress to those who were excluded. Appropriations of $1.5 billion should be made to the fund. A one-time compensatory payment of $20,000 to each of the approximately 60,000 surviving persons should be made. The remainder of the monies should be used for public educational purposes as well as for the general welfare of the Japanese-American community. The Commission concluded its recommendation by stating: "It is our belief that, though history cannot be unmade, it is well within our power to offer help, and to acknowledge error."

In August 1988, the Wartime Relocation of Civilians Act (102 Stat. 903) was enacted by Congress to implement the Commission's recommendations. All five of the Commission's recommendations were in fact implemented by this Act, except that the actual appropriations to the trust fund were $1.25 billion rather than the suggested $1.5 billion.

Questions/Strategies

1. Compare the Court's rulings in *Korematsu* and two other cases dealing with military orders applied to Japanese-Americans: *Hirabayashi v. United States* [320 U.S. 81 (1943)], which sustained a curfew order that applied to Japanese-Americans before they were relocated; and *Ex Parte Endo* [323 U.S. 283 (1944)], decided the same day as *Korematsu*, which struck down restrictions on Japanese-Americans who the government conceded were loyal. How did the Justices justify their decisions?
2. In these cases, which powers of the President were at issue? On what grounds did the Japanese-Americans appeal their cases?
3. The evacuation of Japanese-Americans to "relocation centers" raised legal and moral questions. The legal issues were decided by the Supreme Court in *Korematsu*, but the moral issue persists, most recently in the passage of legislation compensating those Japanese-Americans who endured that experience and who are still alive. Have students debate whether Japanese-Americans detained in relocation camps during World War II should receive compensation. Then distribute copies of the legislation which was recently enacted, and, if possible, comments from the debate which preceded its enactment. Compare the points raised in the class debate with those discussed in Congress.
4. What other legislation has been proposed or enacted to compensate ethnic and racial minorities for past injustices?

Evaluation

Teachers can evaluate this lesson by observing the questions students ask, the comments they make and the caliber of observations made during the discussion.

A short evaluation quiz may be used to gauge student understanding of the executive order, subsequent confinement, the *Korematsu* case, and later events.

Tips from the Teacher

Personal Justice Denied, the Report of the Commission on Wartime Relocation and Internment of Civilians, is the definitive study of the topic. This work gives a full account of the Japanese-American experience, as well as that of the Aleuts, German-Americans and Latin Americans.

This lesson may be integrated into a general U.S. history course, complement a government class discussion on the Fourth and Fifth Amendments, or be used as a separate, specific class lesson on the changing Constitution.

Bibliography

Bosworth, Allan R. *America's Concentration Camps*. (New York: W.W. Norton & Co., Inc., 1967)

Daniels, Roger. *The Politics of Prejudice*. (New York: Atheneum, 1980)

Gardiner, C. Harvey. *Pawns in a Triangle of Hate*. (University of Washington Press, 1981)

Hosokawa, William K. *Nisei: The Quiet Americans*. (New York: William Morrow and Co., Inc., 1969)

Hosokawa, William and Robert A. Wilson. *East to America*. (New York: William Morrow and Co., Inc., 1980)

Irons, Peter. *Justice at War: The Story of the Japanese-American Internment Cases*. (New York: Oxford University Press, 1983)

Library of Congress Catalog Card Number 82-600664 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. This book contains many examples, case studies, and original documentation as well as a wealth of source materials.

Hal Stearns teaches at Sentinel High School in Missoula, Montana. This activity is adapted from Constitutional Sampler: In Order to Form a More Perfect Lesson Plan, *written by the SPICE II teachers and published by the Center for Research and Development in Law-Related Education (CRADLE), in cooperation with Wake Forest University School of Law. Additional material has been adapted from* Instructor's Guide to Equal Justice Under Law, *a publication of the American Bar Association.*

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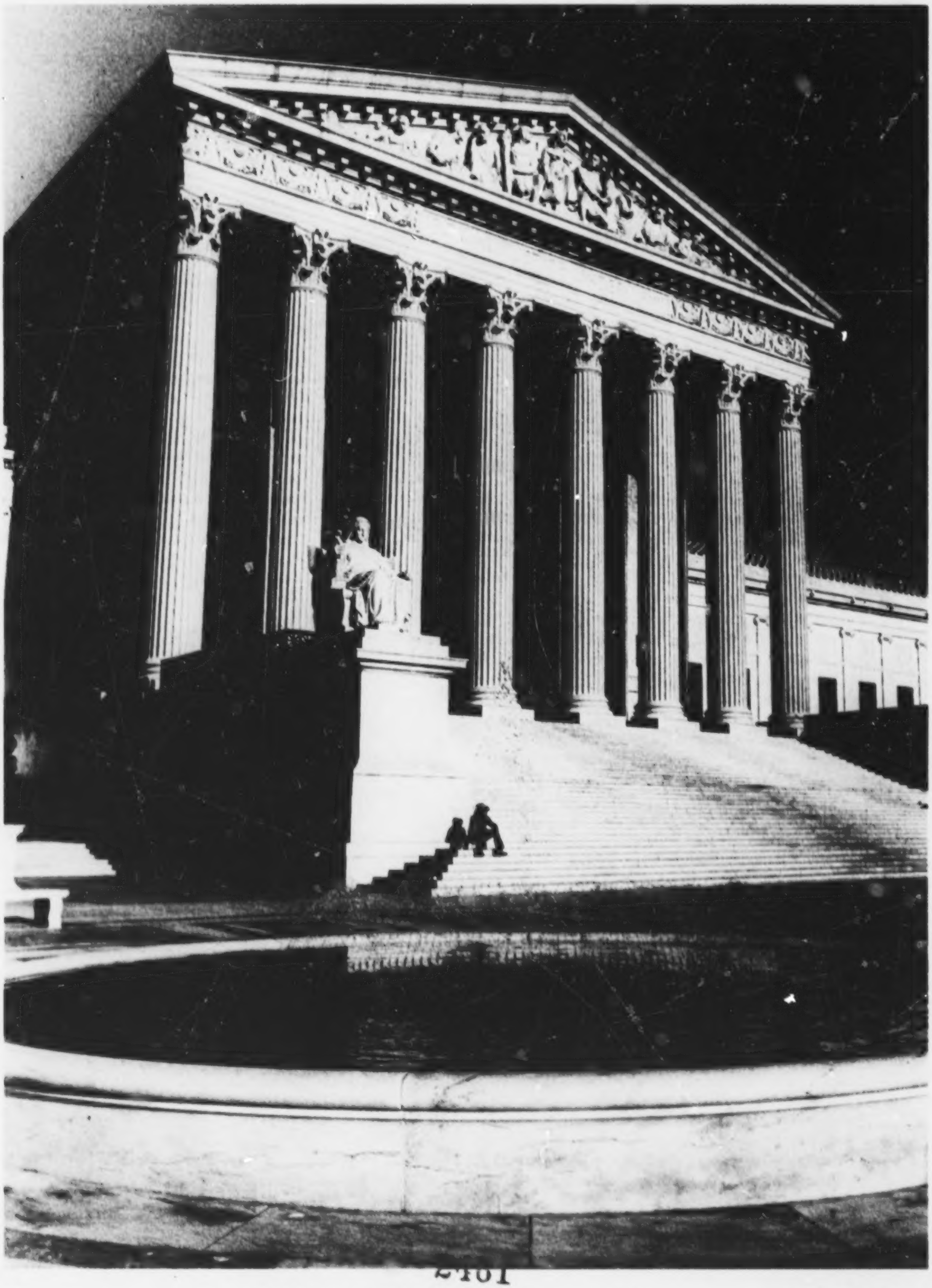

Linda L. Bruin

A Court Divided

Controversy surrounds recent 5-4 decisions as Justices struggle with difficult issues

In areas as varied as judicially-imposed sanctions, the exclusionary rule, and the right to a trial by an impartial jury, the Supreme Court has continued its marked trend to hand down controversial rulings. Several of the cases decided were along well-defined (and hotly contested) ideological lines.

Two such cases dealt with the question of how far a court can go in providing a remedy for past wrongdoing, one coming out of Yonkers, New York and the other from Kansas City, Missouri.

Jucidial Remedies

In 1985, a federal district court ruled that the City of Yonkers had committed racial discrimination by locating its public housing projects only in an area of the city where the population was largely nonwhite. To remedy the violation, the court ordered the city to designate some public housing sites in other parts of the city. Following further litigation and appeals, the parties reached a settlement in which the city agreed to take future corrective action. The district court accepted the agreement as a consent decree in the case.

Later, the city council – in direct defiance of the consent decree – refused to enact the legislation. The court then ordered the city council to enact an ordinance implementing the agreement. When a proposed resolution declaring the city's intent to comply was defeated by the council by a 4 to 3 vote, the court ruled that the council members who voted against the resolution were in contempt of court. The court also found the city itself was in contempt. The city was ordered to pay an escalating fine, starting at $100 the first day and doubling for each day of noncompliance thereafter. The individual council members were required to pay $500 per day and told they would be imprisoned if they were still in contempt after ten days.

By the time two council members switched their votes, enabling the city to enact an ordinance that met the terms of the consent agreement, the city had paid a fine of $820,000, and each of the four council members who originally had voted against the resolution paid $3,500. None of the council members went to jail.

On appeal, the Supreme Court agreed to review the contempt citations against the council members, but declined to consider the penalties against the city. The Supreme Court ruled in *Spallone v. United States*, 107 L.Ed. 2d 644 (1990), that the district court order imposing contempt sanctions against the individual council members for failing to enact an ordinance implementing the consent decree previously agreed to by the city was an abuse of the court's discretion. The Court's decision was split on a 5-4 vote.

The majority, Justices Rehnquist, White, O'Connor, Scalia and Kennedy, based its conclusion on the theory that when a court finds it imperative to impose contempt sanctions, the court must use the least possible power necessary to accomplish its purpose. Given the fact that the city had entered a consent agreement committing itself to the enactment of legislation implementing a remedy for its prior segregation, the lower court could impose contempt sanctions against the city. However, the contempt sanctions were not proper in the case of individual council members because they had never been found individually liable for any of the violations which led to the court's remedial order.

To reinforce the position of the Court's majority, Chief Justice Rehnquist distinguished between sanctions imposed against the city and those prescribed against local legislators as individuals. If sanctions were permitted against individual council members, wrote Rehnquist, they would vote "not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests." In such a case, the Chief Justice continued, council members would vote for or against a proposal "in order to avoid bankrupting themselves."

The four dissenters, Justices Brennan, Marshall, Blackmun and Stevens, thought the contempt sanctions against both the city and individual council members should have been upheld.

The second case decided by the Supreme Court this year that relates to judicial intrusion on legislative prerogatives was *Missouri v. Jenkins*, 58 USLW 4480 (1990). Following many years of litigation, a federal district court ruled that the State of Missouri and the School District of Kansas City had failed to eradicate the effects of segregated schools in Kansas City. The district court ordered a desegregation plan, which was upheld on appeal.

The district court then conducted hearings on how to implement the plan. The court ordered the state to pay most of the costs, but also concluded the school district should bear part of the expense. Because of limitations in state law, the judge determined the only feasible alternative available for paying the school district's share was to raise taxes. Accordingly, the judge ordered an increase in the school district's property tax rate and established an income tax surcharge on people working in Kansas City.

On appeal, the Eighth Circuit Court of Appeals upheld the order raising property taxes, but struck down the income tax order. However, the lower court's order on property taxes was modified so that the school board could submit to county authorities a proposed school tax levy adequate to fund its share of the desegregation costs, rather than allowing the district court itself to set the levy. In addition, the district court was authorized to enjoin county and state officials from applying any state limitations that would prevent the school board from raising the property tax revenues necessary to pay the costs of the court-ordered desegregation programs.

The Eighth Circuit based its decision on a 1964 Supreme Court decision, *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, where local officials had not only closed the public schools to avoid integration, but also contributed tax revenues to support private schools. In that case, the Supreme Court had indicated that where it was necessary to prevent further racial discrimination, the courts could require local officials to exercise their powers to levy taxes and "raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system."

The Supreme Court was unanimous in *Missouri v. Jenkins* in its conclusion that a federal court does not have the power to directly order a tax increase to fund a court-imposed school desegregation plan. However, in a controversial 5-4 ruling (the justices in the minority expressing their opinion as a concurring opinion rather than a dissent), the high court held a judge may order a local school district to raise taxes to pay for such a plan.

The Court's judgment on the first question was clear: the district court abused its discretion when it imposed a tax on the school district. The rationale was less clear. Justice White, writing on behalf of the majority, stated that by "assuming for itself the fundamental and delicate power of taxation," the lower court had circumvented local authority. The concurring opinion agreed that the district court had exceeded its power by attempting to impose a tax, but offered a separate rationale.

The primary difference between the majority and concurring opinions related to the second issue, that is, whether a court may order a local governmental body to levy taxes as a means of desegregating a public school system.

The majority, Justices White, Brennan, Marshall, Blackmun and Stevens, concluded that where a particular remedy is required to operate a unitary school system a court may direct the governing entity to levy taxes. Furthermore, if state limitations prevent the local government from collecting funds sufficient to finance the court-ordered remedy, the court may enjoin the operation of those state requirements. As a result, the majority said that in the future the district court could require the school board to levy a tax increase for residents of the school district. In the words of Justice White, "[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court."

The concurring opinion by Justices Kennedy, Rehnquist, O'Connor, and Scalia was sharply critical of the majority's rationale. Justice Kennedy contended it was difficult to see the difference between an order requiring the school board to levy the tax, which the majority upheld, and a direct order of the court to levy a tax, which the majority struck down. "Today's casual embrace of taxation imposed by the unelected, life-tenured federal judiciary disregards fundamental precepts for the democratic control of public institutions," Kennedy wrote.

Impeaching the Defendant

Two cases decided by the Supreme Court this year dealt with limitations applicable to the use of statements obtained by the police from a person accused of a crime. The first case was based on the Sixth Amendment, and the second involved the Fourth Amendment.

In *Michigan v. Harvey*, 108 L.Ed. 2d 293 (1990), Tyris Lemont Harvey was convicted of two counts of first degree criminal sexual conduct. When Harvey was first taken into custody, he made a statement to an investigating officer. Later, following his arraignment, Harvey was assigned a court-appointed attorney. Shortly before his trial was to start, Harvey told a police officer that he wanted to make a second statement, but wondered if he should consult his lawyer. The officer told Harvey there was no need to contact counsel because the lawyer would be given a copy of the statement. Harvey then described his version of what happened the night the rape allegedly took place. Harvey's account, as told to the officer in his second statement, differed from that of the victim and also differed from the testimony he later gave during the trial.

Both the victim and Harvey testified at the trial. The victim said that Harvey had chased her with a barbecue fork and garden shears and forced her to engage in sexual acts. Harvey agreed there had been a struggle over the barbecue fork, but insisted the victim had voluntarily removed her clothes and that the two had never engaged in sexual intercourse.

On cross-examination, the prosecutor used Harvey's second statement as a means of impeaching his testimony. The judge believed the victim's testimony and found Harvey guilty.

The issue before the Supreme Court was whether Harvey's second statement, given without the benefit of legal counsel, could be used for impeachment purposes. There was no question that the statement could not be used to present the case-in-chief against Harvey. The police officer's comment that the defendant didn't need to check with his attorney before volunteering information violated the Sixth Amendment right to counsel as interpreted by the Supreme Court in the 1966 *Miranda v. Arizona* decision. Harvey clearly was entitled to counsel when the statement was given. The issue before the Court was whether a statement made under these circumstances could be used by the prosecutor in an attempt to show inconsistencies in the defendant's testimony and, thus, attack his credibility.

In a 5-4 decision with Justices Rehnquist, White, O'Connor, Scalia and Kennedy in the majority, the Supreme Court ruled that a defendant's voluntary statement to the police, even if made in violation of his or her right to counsel, may be used to impeach the defendant's contradictory trial testimony. Chief Justice Rehnquist, writing for the majority, noted that although the accused might later regret the decision to talk to investigators, the Sixth Amendment does not "disable a criminal defendant from exercising his free will."

The four dissenting Justices – Stevens, Brennan, Marshall and Blackmun – contended that the right to counsel applies not only to the presentation of the case-in-chief against a defendant, but also to rebuttal evidence, trial strategy, and the impeachment of witnesses. "The accused's right to assistance of counsel is not limited to participation in the trial itself," wrote Justice Stevens. Moreover, the majority's position condoning the use of Harvey's statement for impeachment purposes amounted to a "shabby" practice denigrating the values of the Sixth Amendment.

In this instance, because there was room for doubt as to whether Harvey had made a truly voluntary statement or whether he had been deliberately misled about the need to consult with counsel, the case was remanded for further hearing.

Exclusionary Rule Revisited

The Supreme Court, again in a 5-4 decision, reached a different conclusion in the Fourth Amendment case, *James v. Illinois*, 107 L.Ed. 2d 676 (1990). Darryl James was convicted of murder and attempted murder and sentenced to 30 years in prison. The victims were among a group of eight young boys returning from a party. James was one of three boys who initiated the nighttime holdup. In the course of the encounter, someone in the smaller group fired a gun into the larger group, killing one boy and seriously injuring another. When the police arrived, several members of the larger group gave eyewitness accounts and descriptions of the perpetrators.

The next evening police took 15-year-old James into custody as a suspect. James was found at a beauty parlor, sitting under a hair dryer. When he emerged, his hair was black and curly. The detectives questioned James, who admitted that his hair previously had been reddish-brown, long, and combed straight back. James also told the police that he had gone to the beauty parlor in order to change his appearance. After James was indicted, his attorney moved to suppress these statements on grounds that they had been obtained in violation of the Fourth Amendment.

The trial court sustained the motion and James did not testify. Several of the boys in the victims' group identified James at the trial as the person who fired the gun, but agreed that the person responsible for the shooting had long, reddish, and slicked back hair, while the defendant had black hair worn in a natural style. When a friend of James testified that the defendant had had black hair on the day of the shooting, the prosecutor sought to introduce the statements made by James at the time of his arrest as a means of impeaching the witness' testimony. One of the detectives was allowed to tell the court what James had said about his hair.

A majority of the Court consisting of Justices Brennan, White, Marshall, Blackmun, and Stevens reversed James' conviction. According to the Court's previous interpretations of the Fourth Amendment, an exception to the exclusionary rule (generally prohibiting the use of evidence obtained in violation of the Fourth Amendment) allows the prosecutor to introduce illegally obtained evidence to impeach the defendant's own testimony. However, explained the majority, this exception does not allow the prosecutor to use illegally obtained evidence, in this case James' statement made while in police custody where the police had neither a warrant nor probable cause at the time of the defendant's arrest, to impeach the testimony of all defense witnesses. Expansion of the exceptions to the exclusionary rule to the situation at hand was not permitted because such an expansion would "chill" the opportunity of some defendants to present their defense through the testimony of others, especially in the case of reluctant witnesses, and would undermine the deterrent effect the exclusionary rule has on police misconduct.

In dissent, Justices Kennedy, Rehnquist, O'Connor and Scalia contended that the position taken by the majority may be viewed by future witnesses as a "license to perjure," knowing that their testimony will not be subject to rebuttal.

Aggravating Versus Mitigating

The death penalty was the focus of the Court's action in *Clemons v. Mississippi*, 58 USLW 4395 (1990). Chandler Clemons was one of three young men attending a party in Vicksburg, Mississippi. Clemons suggested that they rob a pizza delivery man. Clemons and his friends, Calvin and Hays, ordered the driver, Arthur Shorter, to get out of the car and leave his money. Shorter, aware of the shotgun carried by Clemons, complied. Clemons took the money and some pizza and was about to leave, when Hays asked if Shorter had seen Clemons' face. After Clemons responded affirmatively, Hays told Clemons to kill Shorter. Shorter begged for his life, but his plea was futile. The three friends returned to the party, ate some of the stolen pizza, and divided the loot – each getting three or four dollars.

The three defendants were tried individually. After Clemons was convicted of capital murder, a separate sentencing hearing was held. The jury sentenced Clemons to death under a Mississippi law permitting the death penalty in cases where certain aggravating factors outweigh any mitigating circumstances. The aggravating factors present in this instance were: (1) that the murder was committed during the course of a robbery for pecuniary gain; and (2) that the killing was "especially heinous, atrocious or cruel." Clemons appealed the sentence.

In 1988, when the Supreme Court of Mississippi heard the case, it was aware that the U.S. Supreme Court had just decided *Maynard v. Cartwright*, 486 U.S. 356, invalidating an Oklahoma statute allowing the death penalty in "especially heinous, atrocious or cruel" circumstances. The Oklahoma law had been declared unconstitutional on grounds that it was too vague to provide the jury sufficient guidance when deciding whether or not to impose the death penalty.

The Mississippi court of last resort concluded *Maynard* did not apply to Clemons' case because even without the "especially heinous, atrocious or cruel" factor as an element, the jury would have found the mitigating circumstances presented by Clemons insufficient to overcome the first aggravating factor cited in the Mississippi law. Accordingly, the state supreme court affirmed the death sentence.

A divided U.S. Supreme Court ruled that the Sixth Amendment does not prevent an appellate court from invalidating an aggravating circumstance found by the jury and, at the same time, affirming the death sentence because the court has concluded that a valid aggravating factor still remains to outweigh the mitigating factors put forth by the defendant. The five-member majority of the Supreme Court rejected Clemons' argument that the

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Eighth Amendment does not permit an appellate court to "reweigh" aggravating and mitigating factors after a jury has completed its task.

Because it was unclear whether the Mississippi Supreme Court actually had performed a reweighing task, the majority was not certain that the state court had given consideration to the mitigating evidence. Therefore, the case was remanded to clarify this issue.

Justices Blackmun, Brennan, Marshall and Stevens concurred and dissented. Justice Brennan took the position that the death penalty should never be permitted because of the Eighth Amendment's prohibition against cruel and unusual punishment. The remaining three rejected the theory that a state court can salvage the death sentence by reweighing the aggravating and mitigating circumstances. The reweighing action is inappropriate for an appellate court that makes its decision solely on the basis of a paper record, objected Justice Blackmun. "If a sentence of death is to be imposed," he wrote, "it should be pronounced by a decisionmaker who will look upon the face of the defendant as he renders judgment."

Sympathy at Issue

Another murder case, *Saffle v. Parks*, 58 USLW 4322 (1990), decided by the Supreme Court this year was somewhat unusual in that the justices could not agree on how to state the issue before the Court.

In 1978 Robyn Parks was convicted for murdering a gas station attendant. The victim was shot because Parks was afraid the attendant would tell police that Parks had used a stolen credit card to buy gasoline.

During the sentencing phase of the trial, Parks' lawyer asked the jury to give special consideration to the defendant's deprived background and troubled youth as mitigating factors against the death penalty. However, the judge instructed the jury to avoid any influence of sympathy in its consideration of an appropriate sentence. Parks received the death penalty.

Parks appealed, claiming the antisympathy instruction violated the Eighth Amendment. Parks argued that a jury confronted with the decision of whether to impose the death sentence should not be prevented from considering all relevant mitigating evidence.

The Supreme Court decision was split. The justices were divided not only in their judgment, but also in their definition of the precise issue before the Court.

The majority, Justices Kennedy, Rehnquist, White, O'Connor, and Scalia voted to uphold the sentence and framed the issue as one of simply continuing a line of cases holding it is not unconstitutional for a state to prohibit juries from basing their sentencing decisions on factors other than those presented at the trial of the case-in-chief. Thus, an instruction from the judge telling the jury not to swayed by mere sentiment or sympathy when determining the sentence does not violate the Eighth Amendment. The majority rejected Parks' contention that the prohibition against cruel and unusual punishment requires that jurors must be allowed to base the sentencing decision on the sympathy they may feel for the defendant.

In a stinging rebuttal, Justices Brennan, Marshall, Blackmun and Stevens accused the majority of inexcusably distorting the question being appealed. According to the dissent, the real question was whether the judge's antisympathy instruction was understood by the jurors as prohibiting them from giving consideration to the mitigating evidence. The dissenters maintained that the jury might have believed it could not consider Parks' mitigating evidence at all. If that were true, then the instruction would have violated the Eighth Amendment's mandate ensuring that the decision to impose the death sentence must be individualized.

"Impartial" or "Representative"

Two questions related to the right to trial by an impartial jury were at stake in *Holland v. Illinois*, 107 L.Ed. 2d 905 (1990). Four years ago, the Supreme Court ruled that a black criminal defendant's constitutional rights are violated when the prosecution uses its peremptory challenges to keep all blacks off the jury. That decision, *Batson v. Kentucky*, 476 U.S. 79 (1986), was based on equal protection grounds.

Daniel Holland was a white criminal defendant who objected to the exclusion of all Afro-American potential jurors from his jury. Holland was convicted of kidnaping, rape, deviate sexual assault, and armed robbery.

A venire (jury pool) of 30 potential jurors, two of whom were Afro-Americans, had been assembled for Holland's trial. During the process of selecting jurors from the pool, the prosecutor used his peremptory challenges, which are challenges for no stated reason, to eliminate the two Afro-American venire members. Peremptory challenges are not guaranteed by the Constitution, but are allowed in both state and federal courts. Following his conviction by an all-white jury, Daniels appealed on grounds that he had the right, under the Sixth Amendment, to be tried by a jury representative of a cross section of the community. The Supreme Court addressed two issues.

First, the majority – Justices Scalia, Rehnquist, White, O'Connor and Kennedy – held that a white criminal defendant has standing, or the right to file a lawsuit, claiming a violation of the Sixth Amendment's guarantee of an impartial jury because the prosecutor exercised the state's peremptory challenges to exclude all Afro-American potential jurors from the jury. Thus, Holland was entitled to bring his challenge protesting the exclusion of Afro-Americans from his jury.

Second, the Court ruled that there was no violation of the Sixth Amendment in Holland's case. Five of the justices concluded Holland's claim was without merit because nothing in the Sixth Amendment mandates a "representative" jury. What is demanded under prior judicial decisions interpreting the Sixth Amendment is that the jury must be "impartial." Thus, the jury must be drawn from a fair cross section of the community. But once an initial venire reflecting that cross section has been created, both the accused and the prosecution must be free to eliminate potential jurors who might unduly favor the other side.

Justice Kennedy wrote a concurring opinion agreeing with the five-member majority, but making special note of the fact that Holland raised his claim under the Sixth Amendment. If the claim had been presented as a Fourteenth Amendment equal protection challenge, Kennedy wrote, the outcome might have been different. "[T]he exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights," he emphasized.

The four dissenters, Justices Marshall, Brennan, Blackmun and Stevens, would have ruled that even under the Sixth Amendment a prosecutor's use of peremptory challenges for the sole purpose of excluding Afro-Americans from the jury is unconstitutional. ☐

Linda Bruin is Legal Counsel to the Michigan Association of School Boards. She is a former member of the ABA Special Committee on Youth Education for Citizenship.

Debbie

(continued from page 11)

"It allowed us a very simple ethical 'out' on the decision to publish, rather than the decision to report," Lundberg said.

He dismissed criticism that a publication dedicated to the truth should be ashamed for running a piece whose veracity was deliberately left undetermined. He said the fact that the essay appeared in a section known for occasionally running fiction should have been a tipoff, and added that JAMA runs a disclaimer for all JAMA articles. The disclaimer says that all articles represent solely the opinion of the authors.

"I would utterly reject the notion that we in a peer-review journal in our relation to authors should function the same as a regular newspaper functions. We clearly cannot do that, nor do I think we should," Lundberg said.

"But I recognize that it is different, and foreign, to traditional journalists, unless they look to their letters column. It may not be foreign there at all."

Further, said Lundberg, his point was to raise debate over the issue.

"When you have a piece like the Debbie piece," he said, "you use that as a key to open the door for discussion, to literally a cascade, where before it was quiet and impersonal for many people."

More than 150 letters have come in regarding the Debbie essay, Lundberg said, a large number for JAMA. About 80 percent of them have condemned the resident's action in putting Debbie out of her misery. In the April 8, 1988 issue of JAMA, Lundberg published 18 letters, two commentaries and an editorial on the topic of mercy killing.

It was precisely that discussion of a controversial issue of public importance that earned the author protection under the shield law and the publication its rights under the First Amendment.

But after the judge ruled in JAMA's favor, Cook County State's Attorney Daley released a statement filled with questions.

"Was a murder committed? If so, where? Are other lives in jeopardy from this same doctor?" he asked. "Officials of the *Journal* have stated they believe the Debbie essay is true. If that is the case, they are protecting the identity of a killer who may kill again – indeed who may well have already killed again."

While under fire, Lundberg repeatedly argued that doctors have more than one ethical obligation; the one he was fulfilling by publishing the essay was "the duty to teach and inform their colleagues."

Let's say he did that. Does he now have the obligation of fulfilling the other ethical obligation of protecting the lives of patients, or the duty to help a fellow doctor who may be in need of counseling or other professional help?

"The question is a good one, a troubling one," said Lundberg. "And there is no clear answer. We've done some things that I'm not free to tell you about. And I'm still thinking about others things to be done." ☐

Howard Wolinsky and Tom Brune are reporters specializing in medical news and issues for the Chicago Sun-Times. *This article is reprinted from the May 1988 issue of* The Quill. *Copyright © 1988 Howard Wolinsky and Tom Brune. Reprinted with permission.*

Social Studies

(continued from page 36)

public affairs in accordance with democratic and ethical principles. Special forms of community participation are necessary for building this competence. . . ." Active, participatory learning is another important component of social studies programs, one that is growing in scope and popularity. It is based on the following rationale: If you want to learn to teach, you need to do more than read books and take courses. If you want to learn to "citizen," you need to do more than read books and take courses.

Participatory activities are broad in scope. Some occur within school settings, including classroom instruction (e.g., role plays, simulations, visits by community resource persons), classroom and schoolwide governance, and volunteer and school service projects. Others occur beyond school walls, including field trips to significant community sites, community surveys and oral history projects, internships, and volunteer and community service projects.

Newmann recommends giving students opportunities to engage in a variety of participatory activities both inside and outside of school. He advocates structured experiences which place students "in settings and roles that require them to deliberate about the nature of public good and participate in the processes of influence and negotiation to achieve it. . . ." In this way, students come to understand that, while they have their own self-interests, they are also members of a larger community and are accountable to it.

Law-related education advocates have long promoted active learning experiences and featured them in their programs. Highly participatory methods and activities, such as mock trials, moot courts, role plays and simulations characterize LRE at both elementary and secondary levels. Other activities include bringing community members to the classroom and involving students in the community, with field trips, internships and community-action projects. LRE teachers and administrators at all grade levels emphasize democratic school governance, including classroom and school meetings and alternative dispute resolution approaches, an excellent example of which is described by Elisabeth Dreyfuss in her article on page 22.

An Integrated Whole

The components of sound social studies instruction – knowledge, skills, values, and participation – are also the components of sound law-related education. These components are not discrete parts of the curriculum; they constitute an integrated whole. As emphasized in the "Revision of the NCSS Social Studies Curriculum Guidelines," ignoring any one of the components weakens instruction overall. "The relationship among [these four components] is tight and dynamic. Each interacts with the others. Each nourishes the others."

All too often, there is a tendency to relegate law-related education to a separate elective course or special event (e.g., Law Day program; mock trial competition). When this occurs, LRE has little relationship to or impact on the regular curriculum. This is clearly a mistake. As described here, law-related education is an integral, indispensable part of citizenship education. It must be regarded as an integral, indispensable part of the required social studies curriculum as well.

Like the knowledge, skills, values, and participatory components of social studies, the relationship between law-related education and social studies can be similarly characterized. It is a tight and dynamic relationship. Each interacts with, nourishes, and strengthens the other. LRE and social studies are not discrete parts of a citizenship education program – they are an integrated whole. ☐

David T. Naylor is Professor, College of Education, University of Cincinnati and a member of YEFC's Advisory Commission.

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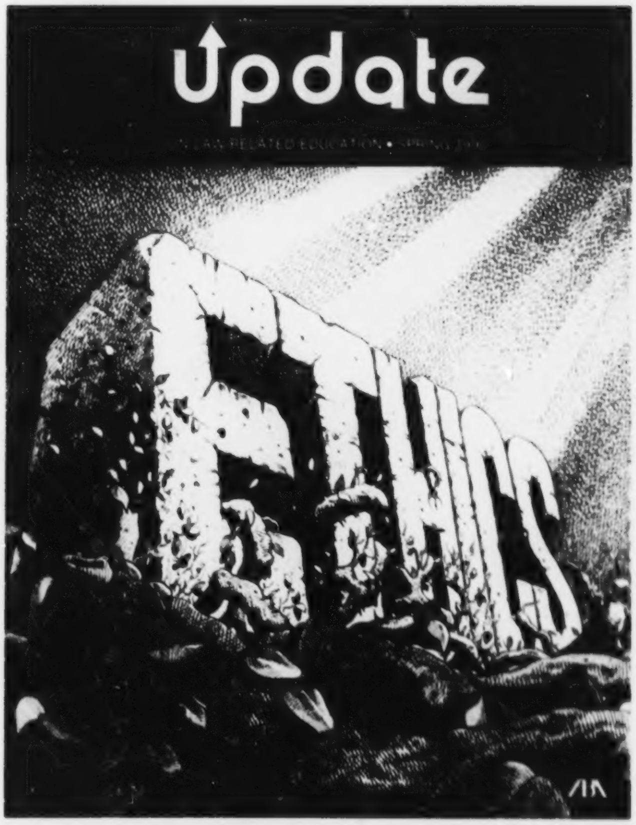
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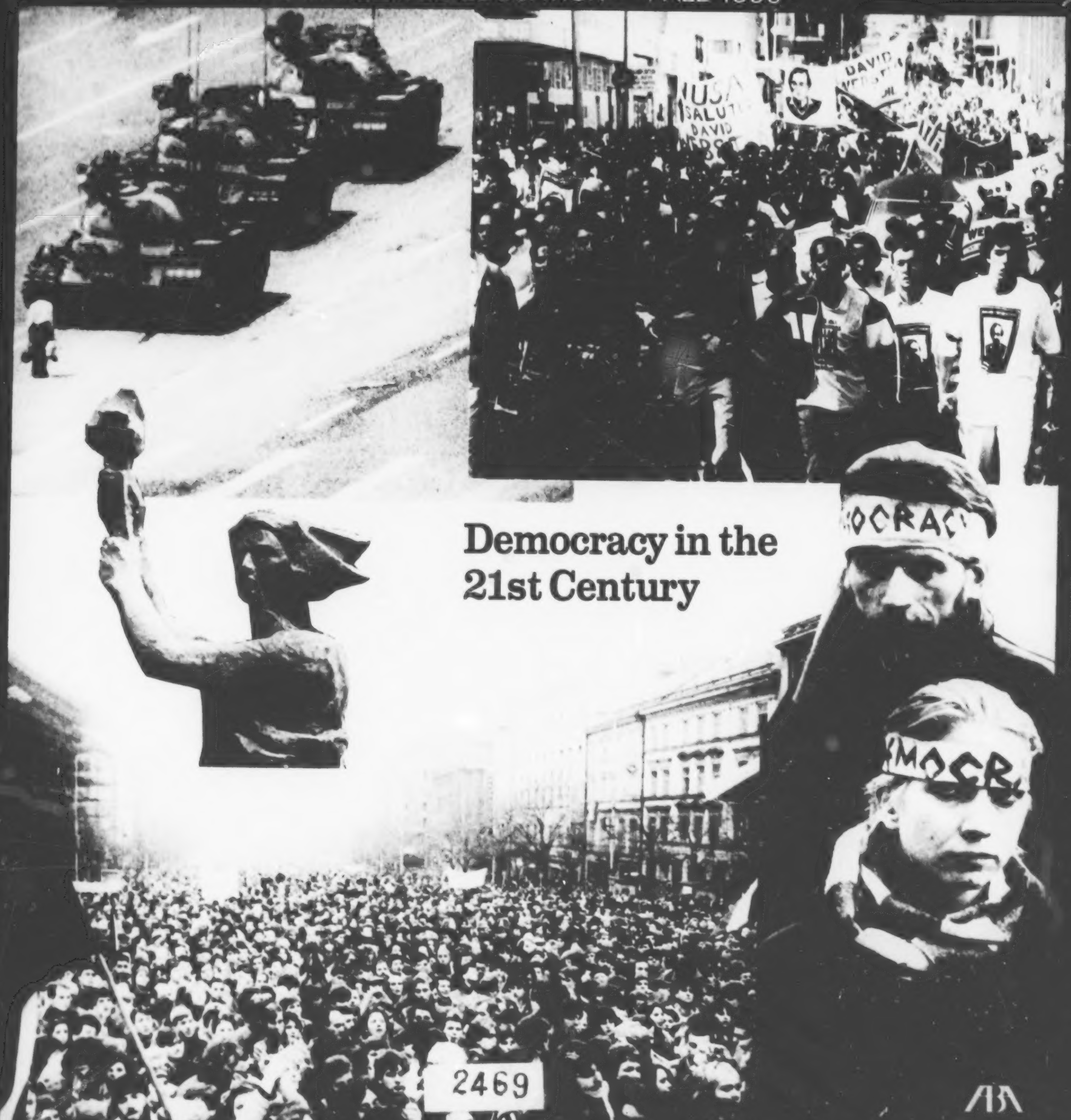
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contents

Volume 14, No. 3, Fall 1990

3 **Crumbling Walls, Enduring Obstacles**

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGY

9 Democracy and Rights

13 **Prospects for Democracy in the People's Republic of China**

UPPER ELEMENTARY/MIDDLE SCHOOL

UPPER ELEMENTARY/MIDDLE SCHOOL STRATEGY

16 What is a Democracy?

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGY

19 The U.S.S.R.: A Democratic Constitutional Government?

23 **Will Democracy Come to South Africa?**

29 **Constitution-Writing in Central Europe**

SECONDARY SCHOOL

SECONDARY SCHOOL STRATEGIES

33 Human Nature and Democracy
34 The Final Right

39 **Court Briefs**

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Daniel Jay Baum

Crumbling Walls, Enduring Obstacles

Cultural blocks to democracy in Eastern Europe

With growing rapidity over the past few years, power has come to many peoples in Eastern Europe, and they have reasserted their identity as a group. For some of these peoples, it had been almost 60 years, and for others it had been 45 years, since their identity through nationhood was recognized.

Two powerful forces have allowed peoples in Eastern Europe to assert control over their own lands after decades of imposed restraint.

1. The Soviet Union under the burden of economic stagnation, springing in part from inefficient bureaucratic control over the economy, moved to end its costly domination over Eastern Europe. This winding-down included the removal by stages of Soviet military forces.
2. The European Community, composed of twelve nations whose strongest economic partner has been West Germany, not only has been growing in strength, but it has been rapidly integrated into a common market that will be fully realized by 1992. When that occurs, the European Community will be the world's largest trading bloc both in economic power and in numbers of people.

To say that the means are at hand for peoples long subjugated to express themselves does not indicate what that expression will be. Will the voice of people call for democracy, or will it call for another form of authoritarianism? Will the majority acede to the rule of law for the protection of all, or will minorities find themselves endangered? The answers are far from certain.

For some of the Eastern European peoples, democratic traditions have never existed. For others, those traditions have gone unused for decades. Our focus will be on the cultural environment which influences whether and to what extent democracy will develop in any of the newly established nations.

These are the questions that will be explored:

- How can external factors influence culture and the shape of government? In this regard, can it be said that cultural patterns, once etched, must forever remain?
- What can be the cultural impact on a people who are subject to authoritarian rule over a long period of time?
- Is it possible for the freely expressed culture of a majority to oppress a minority?

War as a Factor Influencing Culture

Culture is an expression of a people's shared values, customs and beliefs. It does not simply happen as if by magic. Its development can be influenced by external factors. An example of an external factor is an *ongoing* threat of invasion. This could cause a people to coalesce and yield much of their individual freedom in the interest of the strength of the state. They may see this sacrifice as necessary to their survival. In such an environment, it is difficult for democracy to take root and grow. An efficient and effective military demands a clear and obedient chain of command. And, where the very life of the state seems at risk, that command can totally embrace the people.

Consider briefly the Thirty Years War in Europe. In 1517, Martin Luther nailed to the church door in Wittenberg his 95 theses against what he saw as the corruption of the Roman Church. This proved to be a catalyst for one of the world's most destructive wars. Luther refused to recant. He was given the protection of one of the many independent German fiefdoms, the Elector of Saxony. There he translated the Bible into German. His was a protest to make religion relevant and available to the people. And language, an important element of culture, was a vital means for achieving those ends.

Many German princes chose to follow the Protestant religion. Often this was more than a matter of faith. They were in the position of being able to seize and hold land of the Roman Church as the spoils of war. The major powers of Europe, not the least of which was France, became involved in the conflict. For about thirty years, the wars lasted, only to be followed by plague. It was estimated that eight million of Germany's 21 million residents died as a result of that war and the attendant plague. The Treaty of Westphalia, which formalized the end of that war, in effect granted sovereignty to about 300 kingdoms, duchies and bishoprics in which the German people lived.

What was the effect of this long conflict on the Germans? Gordon Craig, professor emeritus of history at Stanford

University and author of *The Germans*, said:

> The Germans from earliest times were a free and independent people and dreadful things happened to them, which inhibited those qualities and induced others. After the Thirty Years' War, habits of authoritarianism and dependence crept into the behavior of average Germans. You did what your local ruler told you to do. One result is what one German writer has called "the retarded nation." The nation never did have the opportunity to get a political education, as in the English Enlightenment or the American Enlightenment.

That collective behavior pattern calling for sacrifice of the individual to the will of the state was played upon centuries later when Prince Otto von Bismarck fashioned a united Germany through what he called "blood and iron" and "realpolitik," the politics of expediency. Put somewhat differently, Bismarck did that which he felt necessary to bring about one Germany, including the use of force and war against Austria and France. The leader of the newly unified nation was the King of Prussia, then crowned Kaiser (Caesar) on March 21, 1871.

Where representative democracy tended to make its way in France and England, Bismarck saw to it that command remained in the Kaiser (and, to the extent possible, in Bismarck himself). In essence, power was held by royalty, the military and significant industrialists.

The power coming from unity might have been used to encourage democratic institutions. It was not. Rather, Bismarck helped to found a deep and generous social welfare system ranging from workers' compensation to social security. Such measures, from Bismarck's point of view, blunted the democratic reformers and revolutionists. It kept power where Bismarck, the Kaiser's Prime Minister, wanted it. The British Prime Minister Gladstone said of Bismarck: "He made Germany great and Germans small."

The power gathered in a united Germany was used to reach out and compel recognition of the new nation as an equal among the great nations. German leaders rationalized this by saying that Germany was merely protecting itself from the risk of further invasion or protecting Germans living outside the fatherland.

Bismarck and several German militarists were fond of quoting Napoleon, who analogized military power to a sword: It can be used for anything but to sit upon. German power was used to acquire colonies from Africa to the Pacific. It was also used in Europe itself to extend the reach of Germany geopolitically. Alliances were formed with other nations, and wars more devasting than the Thirty Years' War were fought. These included two world wars within this century. Each world war resulted in the deaths of millions. At the end of the first war, France, for example, had lost more than half of its men between the ages of 18 and 35. The second world war cost the lives of 50 million. Of these, 27 million were citizens of the Soviet Union. In each war, Germany failed to achieve its geopolitical ends, but the wars laid waste to nations and peoples.

War is an external factor that can burn its experience into the collective consciousness of a people, affecting their behavior and beliefs. The peace imposed by the Allies following World War I attempted to deny Germany the ability to wage a massive war by controls over its territory and military, and a complex of alliances that promised swift response should any of the allied nations ever be attacked by Germany. Added to this were severe reparation payments. In a sense, World War II resulted from a German willingness to seek revenge and reclamation of the Bismarck goal of great power status.

Faced with German militarism, the Allies, including especially France and Britain, backed away from enforcement of earlier treaties. They sought compromise with the new German leader, Adolf Hitler, who had his own sense of realpolitik. He acted to enlarge the state, heighten the citizen's awareness of being German, and emphasize his/her responsibility to the nation, and more particularly Hitler as the personification of the state to whom the citizen pledged allegiance.

The war that Germany waged was one of terror directed as much at civilian populations as the armies it faced. The Allies reacted by declaring that the war could end only with Germany's unconditional surrender. And they brought to Germany and the German people some of the same horrors and suffering that their own citizens had endured, such as massive fire bombing of whole cities. At one point in that war, the Allies' view was that along with unconditional surrender should come the destruction of the German state itself. *There should be no more Germany*. Needless to say, that judgment changed.

From the end of hostilities between the Allies and Germany in 1945 to 1990, a total of 45 years, Germany effectively was divided between East and West. The Soviet Union occupied the East while the United States, Britain and France held sway in the West. Upon each sector was impressed the will of the occupying powers, which was very different: The West nurtured a democratic and capitalistic society integrated into the other nations of western Europe. The East established an authoritarian government with power in the hands of a few. It had both a heavy welfare underpinning and a powerful military and police establishment. It was integrated into the economy and social structure of Eastern Europe under the control of the Soviet Union.

Then, in 1990, came the sudden unification of the two Germanies. For our purposes, it is enough to say that the thrust for one nation came spontaneously from the East Germans, who found welcome from their West German compatriots. Diplomacy, negotiations, and political decisions (especially by West German and Soviet leaders), which many characterized as realpolitik, resulted in Soviet acceptance of a united Germany bound to the North Atlantic Treaty Organization (NATO) and the European Community.

More will be said in the next section about the cultural effects on a people suddenly shifted from an authoritarian welfare state to one where control of individual destiny tends to be in the person. It is enough to say here that external factors – namely, war and its aftermath – strongly influenced the cultural development not only of Germany but of all the nations that were touched by it. Craig R. Whitney, writing in *The New York Times* of June 24, 1990, stated:

> [T]he idea of German unification causes anxiety among its neighbors, even for people who did not live through the war. The reason, perhaps, is that for most Europeans *Germany* has been a point of reference that has shaped their own idea of who they are today. And suddenly, the Germany they have known for [45] years will become tomorrow, something very different. What, then, are its neighbors to make of themselves?
>
> The whole European Community was built around a central lesson from the last war: There would be no lasting peace or prosperity in Europe unless Germans had a stake in both. But even more than most of them realize, the other European states have defined themselves in the modern era by their relationship to Germany. When they worry about unification, they are worried about themselves.

Lord Shawcross, a British jurist, formerly Attorney-General of Britain from 1945 to 1951, and chief British prosecutor at the Nuremberg War Trials after World War II, said of German unification:

> The Germans are a single people, a single nation. The division was artificial, and as far as the Germans were concerned, imposed by *force majeure*. . . . It's difficult now to understand how politicians [during the war] thought it would be possible to liquidate a nation-state while leaving its peo-

AP/Wide World Photos

ple alive, but some did. I certainly did not think that I would live to see reunification, but I'm in favor of it. I think it is natural. But—and it's a big but—it will undeniably result in Germany's becoming the biggest economic and political power in Central Europe, probably bigger than Russia

Cultural Impact of Authoritarian Rule

In this section, questions are raised about what can happen when a culture steeped in authoritarianism suddenly is exposed to the openess of freedom. Two areas will be briefly explored: education and developing a free press. As each area is reviewed with students, ask what impediments, if any, may prevent responsible citizenship, without which a democracy is crippled.

Consider the importance of the areas: Education is designed to help children understand the society in which they live and make them feel comfortable raising questions that cause leaders to reflect on citizen views before acting. A free press is a means for informing the citizenry not just about what government has decreed, but also about what government may choose not to discuss.

EDUCATION

Overnight the education of children has been altered without explanation and generally without change of teachers. For more than four decades, children were instructed, almost as a form of catechism, on the meaning of communism, the evils of capitalism, the fraternal relationship between their people and the Soviet Union, and, perhaps above all, the need to accept the dictates of leadership. Now, using different books, the same teachers have been called upon to explain the virtues of democratic elections and the value of capitalism.

The teachers have made the move from Communism to the new freedom in silence. This may reflect fear of job loss. For example, in East Germany, most school principals were summarily discharged with the change in regime. Teacher assemblies were formed to elect new school heads. They reinstated more than half of the principals. Their reason seemed to be related more to keeping order in the system than the substance of education.

The role and importance of authority remains. The story is told of an East German teacher who refused to take her students into a medieval church during a field trip. She feared that some of her students might report her to their orthodox Communist parents. Not long after, the Communist regime fell. The same teacher now feared students who said she was a state agent under the former Communist government.

It was authority without control that the students threatened and the teacher acknowledged. The rule of law, the right to know whether a given set of facts constitutes an offense, and the right to privacy largely did not exist in Eastern Europe. Rather, there was the pervasive presence of state security, which gathered information kept in secret files and made judgments affecting the future of people based on that information. State security was an organization to be feared. In Bulgaria, one of the last East European nations to free itself, mobs stormed and burned the state security offices holding personal files. In Poland, great concern has been expressed over allowing bureaucrats who had access to personal security files to remain in positions of power. And, in East Germany, the offices of state security were ransacked by large crowds seeking their individual files.

The acceptance of authority may be reflected in the behavior of students. Consider the towns of Schonberg in East Germany, with a population of 5,000, and Reinfeld in West Germany, 15 miles away, with a population of 7,200. Reporters visited the high schools of the two towns following unification. They found the following differences:

- Teachers in the East German high school offered to leave the classrooms so students would talk more freely. Teachers in the West German high school did not think this necessary, a point confirmed by students; their presence would not inhibit the students.
- East German students tended to be "more patient," willing to wait in long lines, than their West German peers.
- From the tenth grade, East German students generally knew what occupations they would enter. The same is not true of West German students.
- East German students were uninformed about international sensitivity to unification and about the history of the Nazi years. This is the result of politicized education that obliterated responsibility for the national past by insisting that Hitler's acts were the work of fascists. And they had been outlawed from the people's state; they were only to be found in the capitalistic state. A quite different attitude was found in the West German town of Reinfeld. There students were aware of the Hitler past and international attitudes. One Reinfeld student said: "The world has a right to skepticism about a reunited Germany . . . The past can't be forgotten."

In East Germany, some corrective action has been taken. Teacher exchanges between East and West have taken place. Moreover, efforts have been made to help East German teachers feel secure that they will not lose their jobs or be otherwise disciplined without knowing the charges and being able to meet them in a fair hearing.

Education, however, involves the family as a whole. What happens in the home affects the classroom. Some psychotherapists have said parents themselves have much to work out. The statements that follow are from East German psychotherapists, but their substance was intended for a wider audience. Their words are directed toward all of Eastern Europe.

Dr. Hans-Joachim Maaz, chief of psychotherapy at the Protestant Hospital in Halle, East Germany, said: "For 40 years, everyone had to adapt to the system. We suffered, we complained, but we went along. Now every one of us has to change, and this has created what I call a fear of freedom. . . . The trouble is that we must first overcome our inner problems. Collective guilt can't be cleansed by reunification. An open border is not freedom – there is still a wall in every one of us."

Blame, he said, cannot be passed on to a few who would serve as scapegoats. "For 40 years," he continued, "we have experienced repression, brainwashing, manipulation, fear – every one of us was guilty either as a player or adapting to the circumstances. All of us are burdened with guilt."

Dr. Irene Blumenthal, a 76-year-old East German retired psychotherapist, said: "We of the older generation who were there before the wall went up, learned to adapt, to channel our frustrations into studies or careers not linked to ideology . . . Young people born within the limits and values of the [Berlin] wall learned to be cynical. They were pampered and oppressed, and this made them less tolerant and responsible, less prepared for the West."

Yet, consider the *wall*. Think about the thousands who risked (and many who lost) their lives escaping from East Germany. And, toward the end of the Communist regime in that country, think about the more than 300,000 persons who left their possessions behind to reach the West. Did they not understand the significance of their choice? After all, the culture of the West was beamed to their homes through both radio and television. Can it be said that they lacked a sense of the meaning of freedom? Dr. Blumenthal answered that the difference between East and West allowed those in the East to nurture disdain for their own world fed by a lack of self-esteem.

"This is what made it possible," she stated, "for them to start fleeing last fall (1989) and to rise up against the regime. They simply declared they want a different world, a world of freedom. Their rage and mourning made change possible. But inherent in this was a lost sense of responsibility, and now they face disillusionment with the West."

A FREE PRESS

(In this section, press is referred to in the context of printed media, and especially newspapers. Obviously, among the more

Question for Students: Can 45 Years Bring Real Cultural Change?

Central to the life of a democracy is respect for the rule of law. Among other things, the rule of law places controls on the power of the state. It subjects the state to objective standards of conduct in relations between the government and its citizens as well as between the government and other nation-states.

Realpolitik, doing what was expedient for the greater good of the state as determined by an unchecked leadership, is the antithesis of the rule of law. This is because realpolitik dictates that rules have meaning only insofar as they are useful at any given moment. Yet, realpolitik formed a part of German culture (with some exceptions) from the time of Bismarck to that of Hitler. In part, the reasons for this are to be found in external forces, such as war, which allowed an independent German spirit to be molded into one of obedience to authority.

A central query for the world is: To what extent have the 45 years following World War II allowed the German people to reevaluate and reshape their culture to give supremacy to the rule of law?

The unification of Germany has brought about the full restoration of sovereignty. Since the end of World War II, the Allies (the Soviet Union, the United States, Britain and France) were occupying powers. Sovereignty brings this to an end, and means that Germany has the right to decide for itself what obligations are to be assumed and how they will be carried out.

The united Germany, with 16 million new citizens from the East, will have a population of about 78 million, the largest of any European state. And it will have a $1.3 trillion economy, the most powerful of any European state. By agreement with the Soviet Union, leaders of West Germany bound the new German government to make significant reductions in its military establishment, also the most powerful in Europe, aside from that of the Soviet Union. The German armed forces in 1990 totalled 590,000 (490,000 in the West and 100,000 in the East.) They are to be cut to 370,000. It appears that few of the East German military will be incorporated into the German army. Those East German soldiers wanting to be part of the German army will have to be cleared by a committee of West Germans.

There are other points in the diplomatic accords leading to the reestablishment of Germany:

- Germany will renounce nuclear, biological and chemical weapons.
- Germany recognizes its existing boundaries and seeks no extension of them. This involves acceptance of the historically long-contested boundary with Poland.
- Germany agreed to a non-agression pact with the Soviet Union, under which it provides that Germany will never be the first to resort to arms against the Soviets.

NOTES AND QUESTIONS

1. German businesses have provided both Libya and Iraq with technology for nuclear and chemical weapons. The economic success of Germany depends upon exports. Ought there be a special obligation on Germany to also renounce development of the technology for nuclear, chemical and biological warfare?
2. West Germany had a preexisting agreement with France requiring it to come to the aid of the French in the event of attack. Doesn't that agreement conflict, at least in theory, with the German-Soviet non-agression pact? Is this an example of realpolitik? Is more expected of the German nation than other democratic nations, including the United States?

important media for the communication of information and opinion are radio, television, and video cassettes. Each medium raises special problems. For the purpose of example, I have chosen to deal with newspapers, which have a deeper and more cultural base than other media.)

A free press is not necessarily responsible. There is no guarantee that truthful information will be printed, or that democratic opinions will be espoused. Indeed, it is entirely possible that fact and opinion may be merged in a way that makes it difficult to separate one from the other. In Western Europe, by way of example, it is not unusual for newspapers essentially to be vehicles for the expression of opinion rather than information. Yet, for all its faults, a free press is not an appendage of a ruling government. It is an independent means for bringing both information and opinion to the citizenry. And, to that extent, there is afforded the citizenry further means to communicate with others, to form judgments and to act upon them. A free press inhibits the capacity of government to manipulate the people.

But what happens when there has been no free press for 40 or 60 years? What happens when all the ways of communicating with the citizenry have been exclusively in the hands of government, to be used to affirm government action and suppress dissent? It may be that an immunity of a sort develops; people may tend not to believe that anything printed by the government represents the whole truth. government-controlled media may lose their edge. But this does not quench the desire for real news, for different opinion.

Yet what happens when change in government does occur? Does the destruction of the ruling party apparatus and its control over the press necessarily mean the advent of a free press? Does passing control of the government's physical plant to the opposition merely substitute one press lord for another? After all, it is not possible to turn out a mass distribution newspaper through use of a hand-operated press.

Consider the following illustrations. In Hungary, another newly independent and democratic nation, one of the country's leading newspapers, *Magyar Nemzet*, with a circulation of 140,000, and controlled by the institutions of the state, was offered for sale in 1990. Two foreign bidders were in contention: France's press baron, Robert Hersant, owner of the conservative *Le Figaro*, and the Swedish independent liberal daily, *Dagens Nyheter*. The Hungarian government at the time, following elections, consisted of a center-right coalition. It favored sale of the paper to the French bidder. The editorial staff of *Magyar Nemzet* favored sale to the Swedish paper.

Hungarian Foreign Minister Geza Jeszenszky made public a letter he wrote to the *Magyar Nemzet* editors urging that the newspaper not be sold to the Swedish bidder because *it does not share the same views as the Hungarian government*. The Foreign Minister stated:

> It [the Swedish newspaper] has a "leftist liberal" ideology, and does not stand on the national-liberal base that is so popular in Hungary; . . . After this, it is of secondary importance to mention that this paper regularly publishes disparaging articles not only about the Hungarian Government and its supporters, but about the issue of Hungarians living in Romania, on which it shares the views of the Causescu-era [the previous Communist regime] propaganda. . . . You must know that the Government does not want to control the paper but simply to avoid putting it in the hands of those who are either hostile or simply indifferent to the fate of the Hungarian nation.

Another example is Václav Havel, an author and playwright, who had been imprisoned for his outspoken views on the need for freedom in his homeland, Czechoslovakia, then under a repressive Communist rule. In prison, letters were subject to strict censorship. (Letters, for example, could not contain any underlining. Words could not be crossed out. And the censor's view was the final judgment as to whether letters would be forwarded. Violation of rules could have resulted in severe discipline.)

Havel, almost by acclamation, became the first president of the newly freed Czechoslovakia. Only hours before his election as president, Havel stood before an international gathering of editors and media executives in his nation's capital, Prague. He did not speak of the need for press freedom. Rather, he spoke of the need for press responsibility, of the importance of keeping government secrets. He deplored a press that was always playing "detective," to use Havel's term.

The next day, the newly elected president's press secretary confirmed what Havel had stated. On the one hand, he said, press freedom must be safeguarded. However, he cautioned, press freedom "is also a sacred cow, largely of the press' own making, that it has nurtured for years to build a protective wall around itself." The need to control the press was rationalized in part be saying that freedom in the newly formed states was fragile. Only the Communists, they continued, could benefit from a broad definition of press freedom.

Question for Students

The writers' group was able to have its own lawyer, Andrei Makarov, assist in prosecuting the case. Some of the writers wanted an order from the judge which would have banned Smirnov-Ostashvili from speaking in court because of his behavior. When Makarov left the court after the verdict and sentence, he needed police to protect him from Pamyat violence. He found the tires of his car had been slashed.

Aside from the trial and the rather severe sentence imposed, what more could the state do to help insure acceptance of the rule of law? Is there a free speech issue in prosecuting the shouting in the House of Writers? Would there be a free speech issue in prosecuting the shouting in court? Why or why not?

There are as well technical problems, if such they may be called. Newspapers require printing presses and paper. Who is to supply them? In the West, on the whole, the material resources necessary to sustain a newspaper come from the sale of advertising. Newspaper sales are important insofar as they indicate the potential market that advertisers might reach. (*The New York Times*, for example, maintains a ratio of more than 4/1 between advertising and circulation revenues.) With the revenue from advertising and circulation, presses, paper, and computers are purchased. The capital investment necessary to sustain even a medium-sized newspaper can be enormous. In the first instance, who will lend the money necessary to start up a newspaper? The government? Government-controlled banks? Will press freedom be inhibited if it must turn to government for support? In nations without a tradition of an independent free press, these are some of the questions that must be asked.

Some Limitations Implicit in Majority Freedom

Democracy, so the myth goes, means protection of the individual. That, in turn, furthers the cause of peace, because government responsive to the people will act only in the peoples' self-interest. The myth ignores both the potential for tyranny of the majority and the irrationality that can be a part of majority self-interest. Indeed, as will be demonstrated, the embedded culture of peoples can promote the oppression of minorities and violent conflict.

LANGUAGE RIGHTS

Language in itself is the expression of culture. Lenin recognized this in seeking support for the October Soviet Revolution. Professor Peter Drucker wrote: "Lenin's promise to give all nationalities full cultural and educational autonomy obtained for him the support of the Lett Sharpshooters, one of the Czar's crack regiments. Without them, the October Revolution could not have succeeded." Lenin's nationalities' policy lasted until the time of Stalin.

No later than 1930, however, Stalin – himself a Georgian whose people have a strong sense of cultural identity – determined to act exactly as the Czar had earlier done: Russianize the Soviet republics. The only language of government, including the military, was Russian. *The only language of instruction in the school system was Russian.* Stalin, like the czars, felt this was necessary, because individual national languages encouraged knowledge of their individual culture, including folklore, poetry, literature and religion.

A single Russian language allowed for integration of republics within the Soviet Union. Those who wanted to succeed had to master not their native language, but Russian. Further, one language allowed for heightened mobility, especially by citizens of the Russian Republic, the largest and most populous within the Soviet Union. They could move into the Ukraine, the Baltic republics of Latvia, Lithuania and Estonia, or Moldavia and know that language would not be a barrier. Indeed, they, rather than the native population, would have an important advantage, because Russian was the required language for the conduct of government business and for instruction in the school system. And Russian as a required language permitted greater control over what would be disseminated throughout the Soviet Union.

Now, independence has come to many of the Soviet republics. Russians who have settled there constitute minority groups. The offical language of instruction and of government has become the indigenous language. Consider tiny Moldavia, which is between Romania and the Soviet Union. It has a population of four million. Its indigenous language is Romanian. Yet 35 percent of its population consists of Russians, Ukranians, and other non-Moldavian nationalities. They are being pressured to learn Romanian. This means use of the Latin alphabet and the elimination of the Cyrillic alphabet. The questions arise: What rights, if any, should the new minorities have to their own language in the new states? Is it one matter to allow and encourage the indigenous language for a reborn culture, and is it another matter to suppress a minority culture?

ANTI-SEMITISM

Eastern Europe reflects a population with a strongly Christian culture. It is also a culture that historically has reflected a virulent strain of anti-Semitism. This takes on an almost surrealistic quality: Hitler's legions murdered millions of European Jews, yet anti-Semitism continues. Poland stands as an extreme example. Before World War II, there were 3.5 million Jews living in Poland. The work of the German death camps was brought to an end in 1945. According to current data, there are between 10,000 and 12,000 Polish Jews living in that land.

A Polish delegate to the Prague international conference on the press, described above, told of a forum conducted in 1990 at the University of Warsaw. Adam Michnik – described as one of Solidarity's most talented young members, who had spent much of his adult life in jail because of his support for Solidarity – was debating Jan Lopusynski, an ultra-nationalist member of the newly elected democratic parliament.

An audience question was handed to Michnik, but it addressed him as Szechter. His mother was named Michnik. His father, Szechter, was connected with the Communist regime. In his youth, to separate himself from the Communist regime, he took his mother's name. And, for his entire political career, Michnik was the name that he used, and by which

(continued on page 45)

Suggested Readings

BOOKS

Peter F. Drucker, *The New Realities*, Harper & Row, Publishers, New York, 1989.

Vaclav Havel, *Disturbing the Peace*, Alfred Knopf, New York, 1990.

Andrei Sakharov, *Memoirs*, Alfred Knopf, New York, 1990.

MAGAZINE ARTICLES

Josef Joffee, "One-and-a-Half Cheers for German Unification," *Commentary*, June 1990.

John J. Mearsheimer, "Why We Will Soon Miss the Cold War," *The Atlantic Monthly*, August 1990, at p. 35.

Peter Schneider, "Is There a Europe," *Harper's*, Sept. 1988, at p. 55.

"Germany Is One," *Time*, Oct. 8, 1990, at p. 26.

"Germany Toward Unity," *Time*, June 25, 1990, at p. 12.

"Mr. Germany," *Time*, July 30, 1990, at p. 14.

NEWSPAPER ARTICLES

Richard Bernstein, "Several Germanys Since 1871, but Today's is 'Very Different,'" *The New York Times*, Oct. 3, 1990, at p. A-9.

Thomas L. Friedman, "Two Germanys Vow to Accept Border with the Poles," *The New York Times*, July 18, 1990, at p. 1.

Serge Schmemann, "East Germany's Ballot: Voting Away a Nation?" *The New York Times*, March 18, 1990, at p. 12.

John Tagliabue, "New Germany or Not, in the East It's Same Old Teachers, Same Old Books," *The New York Times*, Sept. 29, 1990, at p. 7.

John Tagliabue, "Secret Dossiers Arousing Germans," *The New York Times*, Sept. 8, 1990, at p. 3.

Craig R. Whitney, "From Germany's Neighbors, Respect Then Acceptance," *The New York Times*, Sept. 27, 1990, at p. 1.

Craig R. Whitney, "Germany Again Forces a Redefining of Europe," *The New York Times*, June 24, 1990, at p. E-1.

Craig R. Whitney, "Powers That Be: It's a New World, Much Like That of 50 Years Ago," *The New York Times*, Sept. 16, 1990, at p. E-1.

"Be Nice to the Germans," *The New York Times*, July 20, 1990, at p. A-13.

Democracy

Democracy and Rights/Secondary

Linda R. Monk

Reuters/Bettmann Newsphotos

The spread of democracy in Eastern Europe coincides with the bicentennial of the U.S. Constitution and its Bill of Rights. Newly democratic nations now face issues similar to those that confronted the framers of American government two hundred years ago. Many of the issues about democracy remain the same, whether in America two centuries ago, in the revolutions of Eastern Europe today, or in yet-unknown arenas of the twenty-first century.

One of the primary issues of democratic government is what role individual rights should play. At first glance, democracy and rights appear to conflict, because majority rule by itself, without any limits, can be used to deny individuals such basic rights as freedom of religion or due process of law. Thus, many Americans argue that democracy alone is not enough to ensure good government. Like Thomas Jefferson, they believe that the purpose of government is to protect individual rights, and that democracy is incomplete if it does not protect those rights.

The activities described here have been designed to help students understand both the conflicting and complementary relationships between democratic government and individual rights. The first activity demonstrates the conflict between majority rule and minority rights. The second activity explores the limitations placed on majority rule in a constitutional democracy, focusing on how the Bill of Rights functions in the United States. The third activity examines whether certain individual rights are necessary to good government.

Objectives

After completing the following activities, students will be able to:

1. define and discuss the concepts of democracy, majority rule, and constitutional democracy;
2. explain how the Bill of Rights places limitations on majority rule in the United States;
3. analyze conflicts between majority rule and minority rights;
4. determine whether some issues should not be decided by majority rule; and
5. evaluate which rights are necessary to ensure good government.

Activity 1: Majority Rule vs. Minority Rights

Brainstorm the word "democracy" with your students. Write their responses on the board and then have your students use these responses to create a class definition of democracy. Write the class definition on the board. Next, have one student look up "democracy" in the dictionary. Write that definition on the board. Compare the two definitions. What are the similarities? What are the differences? Make sure that the term "majority rule" comes up in this discussion and that students understand the role the majority plays in a democracy.

Next, conduct a roleplay in which all students are citizens of the new democratic government in Poland. Pick approximately 10 percent of the class to be Protestant, 10 percent to be Jewish, and 5 percent to be agnostic; the rest of the class is Roman Catholic. Tell the students that as part of the new democracy they are to vote on a proposed law that would require religious instruction in the public schools, based on the doctrines of the Roman Catholic Church. After the votes have been tallied by a show of hands for and against the law, lead a class discussion using the following questions as a guide:

- Did the law pass? Why or why not?
- Did most of the Catholics vote for the law? Why?
- Did any of the Catholics vote against the law? Why?
- How did the Protestant, Jewish, and agnostic students vote? Why?
- Should religious issues be decided by majority rule? Why or why not?
- Are there any types of issues that should not be decided by majority rule? Why not?
- Should the rights of a minority be protected against the majority? Why, and under what circumstances?

Conclude by writing the following quote from James Madison on the board: "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." Ask the students if they think it is possible for a democracy to be a totalitarian government – one that has absolute control over society – or, in effect, a "tyranny of the majority."

Activity 2: Constitutional Democracy

Explain to students that a constitutional democracy is one that, through the fundamental law of the government, sets limits on how the democracy can function. In the United States, for example, the Bill of Rights limits majority rule to protect individual rights.

Distribute Handout 1, "Civil Liberties and the Constitution," by Arthur Spitzer. After the students have finished reading the handout, ask them to write a paragraph based on the article explaining how and why the Bill of Rights limits democracy in America. Their paragraphs should also state whether or not they agree with Mr. Spitzer's point of view and why. Next, ask several students to read their paragraphs aloud to the class. Discuss the paragraphs with the rest of the class. Do the students agree with their classmates? Why or why not? Do students agree with Mr. Spitzer that unpopular minorities should be protected in a democracy? How would they feel if they were part of an unpopular minority?

Activity 3: Can There Be Good Government Without Rights?

Thomas Jefferson stated in the Declaration of Independence that all people are endowed with certain inalienable rights and that the very purpose of government is "to secure these rights." Since the Declaration, our form of democracy has been associated with rights – most Americans believe that you cannot have one without the other. However, a democratic form of government does not necessarily include individual rights. Certainly, all democracies do not agree on which rights are to be protected. Consequently, the new governments in Eastern Europe may not protect some of the individual rights many Americans see as vital to good government. Ask the students what rights they think are necessary for good government.

Divide the class into groups of three or four. Distribute Handout 2, "The Democracy Corps – What to Pack?" Each group is to report to the class on the rights it would take to the new governments being formed in Eastern Europe and why.

After the groups have given their reports, compare the results. Are there major differences between the groups, or is there a consensus? What other rights besides those in the Bill of Rights and the Universal Declaration of Human Rights did the groups include? Do the reports indicate any relationship between democracy and individual rights? In

Additional Resources

For more activities and information on democracy and rights, the following resources are available from the Close Up Foundation, 44 Canal Center Plaza, Alexandria, VA 22314; (800) 765-3131. "Democracy and Rights: One Citizen's Challenge" (1989). This videotape depicts the struggle in 1957 of Ernest Green, the first black student to graduate from Central High School in Little Rock, Arkansas. The accompanying teacher's guide provides activities on the nature of rights in a democratic society.

***Perspectives: Readings on Contemporary American Government* (1987). This book offers the viewpoints of government officials and prominent citizens on major issues in American government.**

***The Bill of Rights: A User's Guide* (forthcoming, 1991). This book traces the historical evolution of the Bill of Rights and outlines the major developments in constitutional law using an amendment-by-amendment approach.**

Handout 2: The Democracy Corps—What to Pack?

The president has appointed your group to go to Eastern Europe as part of the "Democracy Corps." Your job is to help the new leaders there decide how to set up their governments. Below is a list of rights from the U.S. Bill of Rights and the United Nations Universal Declaration of Human Rights. Since your knapsack is small, you can only pack ten rights. What rights from the list will you take with you? Why? Are there other rights not on the list that you will take? Why?

U.S. BILL OF RIGHTS

separation of church and state
free exercise of religion
freedom of speech
freedom of the press
right to assemble peacefully
right to petition the government
right to bear arms
freedom from unreasonable searches and seizures
due process of law
right to a fair trial
trial by jury
right to reasonable bail
protection from excessive fines
protection from cruel and unusual punishment

UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS

freedom from slavery
freedom from discrimination
right to travel within and between nations
right to own property
right to work
right to social security
right to rest and leisure
right to an adequate standard of living
right to education

the students' opinion, can there be good government without rights?

Handout 1: Civil Liberties and the Constitution

Most of the Constitution is a blueprint for the structure of the federal government – how officials are elected or appointed and what their duties are – but the Bill of Rights deals with the relationship of the government to its citizens.

In a sense, the Bill of Rights stands in conflict with the main body of the Constitution. The basic philosophy of our government is democracy – a government of the people, by the people, and for the people, in Lincoln's words. Decisions in a democracy are made by majority rule, either directly, as in the election of the president and members of Congress, or indirectly, as when laws are passed by the legislature. But the purpose of the Bill of Rights is to put some matters outside the majority's rule: to say that there are some decisions the majority cannot be allowed to make.

But why shouldn't the majority always rule? The answer comes from the Declaration of Independence – that there are "certain inalienable rights" to which each of us is entitled as an individual. The philosophy of the Constitution is that a person's religion is his or her private business, not the government's; that "a man's home is his castle"; and that the government should treat all its citizens fairly and without prejudice. The Bill of Rights protects those rights for each of us, individually, so that they cannot be taken away by a majority that may hate our particular race or religion or political activity.

People who are in the majority at any given moment often don't understand why they shouldn't be allowed to have their way. The simple answer is that by respecting the rights of others, they are protecting their own rights in the long run, because tomorrow, or next year, or ten years from now, they may be in the endangered minority.

History is replete with examples: when labor unions began organizing in the 1920s and 1930s, when civil rights workers began marching in the South, when people began demonstrating against the war in Vietnam, they were often called Communists or traitors, and local authorities often attempted to stop their activities. Yet ultimately their causes prevailed. New religions – from Christianity 2,000 years ago to the Christian Scientists and Mormons of the nineteenth century to the Scientologists, Hare Krishnas, and "Moonies" of today – have almost always been despised and persecuted by the existing majority. Yet many religions that were once new and radical are well-established and accepted by society today.

In the 1970s, when a Nazi organization wanted to hold a march in Skokie, Illinois, the city council tried to prevent them. Many people couldn't understand why a group that advocated the extermination of Jews should be allowed to demonstrate in a mostly Jewish town, but the courts upheld their right to conduct a peaceful march. Just imagine what might happen today if the courts had ruled the other way: the city council of a town where most voters disapproved of abortions might ban meetings or other activities by pro-choice groups on the ground that they also advocate mass murder. The lesson of history is that the only way to protect the rights of any of us is to protect the rights of all of us.

–Arthur Spitzer

(Reprinted by permission of the publisher from Perspectives: Readings on Contemporary American Government *(Arlington, VA.: Close Up Foundation, 1987), 13-15. Arthur Spitzer is Legal Director of the Washington, D.C., chapter of the American Civil Liberties Union.)*

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2431

AP/Wide World Photos

James V. Feinerman

Prospects for Democracy in the People's Republic of China

One year after Tiananmen Square, how bright is liberty's flame?

China is a country with a long history and a well-developed political culture. Unfortunately, for the Chinese people and the rest of the world, democratic values have never figured very highly in Chinese society.

For over 2,000 years, China was ruled by a succession of despotic emperors, some enlightened and fairly benign, others ignorant and cruel. The ruler's command was law, although a network of court retainers and local government officials were often able to soften the harsher aspects of autocratic rule. Published laws did exist, but they largely concerned criminal punishment and bureaucratic administration. Law only constrained the imperial will insofar as it was willing to be constrained.

Wise philosophers and advisers to China's rulers, from Confucius onward, counseled restraint and benevolence. They spoke of the advantages of ruling by force of moral example and of gaining the people's respect by having a reputation for righteousness. The ideal of just rule by right-thinking monarchs was established as the Chinese Confucian standard. Yet this only encouraged the Chinese populace to base their hopes for decent treatment by their rulers on the moral character of individual leaders. As a result, China became, and remained, a country where the rule of man, as opposed to the rule of law, held sway. Such a political culture has not contributed to the development of democratic values or governmental structures in China.

20th Century Turmoil

After almost a century of disunity and rebellion, combined with the pressures of Western and Japanese imperialism, the old Chinese imperial order finally fell in 1911. That revolution, out of which grew the Republic of China, demolished the old order but not the attitudes on which it was based. Indeed, just a few years later, one of the revolutionaries, Yuan Shih-kai, attempted to establish a new imperial dynasty with himself as the first emperor. Although he failed, an effective democratic government never developed on the Chinese mainland under the Republic.

Chiang Kai-shek and his Nationalist Party did achieve a degree of control over much of China by the late 1920s. His rule was harsh and autocratic, based on the one-party model later employed by Hitler, Mussolini and Franco. Japanese incursions into China, beginning with Manchuria in the early 1930s, ultimately sapped his government's strength, forcing it to retreat to the interior of China. Wartime dislocations also permitted the Communist insurgents in the northwest of China to become established and to vie with the Nationalists for control.

Although China was one of the victorious Allied Powers at the close of World War II, Chiang Kai-shek's troops did not stop fighting at the war's end. For another four years, they struggled against the People's Liberation Army controlled by the Communist leader, Mao Zedong. Gradually, inexorably, Mao's army pushed the Nationalists out of North China, then across the Yangtze River and finally off the Chinese mainland. Chiang and his Nationalist cohorts fled to the island of Taiwan where, protected by the United States Seventh Fleet, they implanted their Republic of China.

The victorious Mao Zedong declared the establishment, on October 1, 1949, of the People's Republic of China (PRC). The new government, led by the Communist Party, moved quickly to wipe out all remnants of the former Nationalist regime. "Class enemies," including landlords, wealthy merchants and officials of the Nationalist government, were persecuted and even sentenced to death. In very short order, and with a minimum of due process, quite a large number of people were swept from the pinnacle of power. Although there was later much discussion of the need in the new people's government for "democratic dictatorship," the Chinese have experienced far more dictatorship than democracy since 1949.

The PRC Dictatorship

Since the founding of the PRC, there have been brief periods of relative freedom. At those times, the government has stressed the unity of the Chinese people and the

2433

need for a "new democracy" which obliterates pre-revolutionary class distinctions. Yet every successive repression has reiterated the need for a "dictatorship of the proletariat" under which all who oppose the regime are branded as enemies against whom "class struggle" will be waged.

To be an enemy of the Chinese state is a terrible experience. Enemies are denied all the rights and protections which the people enjoy. They can lose their jobs, their property and their homes. Their family and friends may have to disown them to avoid persecution themselves. During the Anti-Rightist Movement of 1957 and the Cultural Revolution of 1966-1976, many of those who were denounced as enemies committed suicide rather than continue to endure the pain and humiliation to which their status subjected them.

In general, political democracy has also not fared very well in the PRC. The preeminent role of the Communist Party is guaranteed by the Chinese Constitution and by the fact that virtually every political leader is a member of the Party. Although there are a number of small so-called democratic (i.e., non-Communist) parties in China today, their membership is tiny and their influence extremely limited. In fact, they exist primarily to provide the illusion of democracy and choice in a one-party state.

Over the past decade, the practice of offering more than one candidate for every office during periodic elections for low-level local government positions has begun to make inroads across China. However, at the national level, candidates for office still run unopposed and are selected for their adherence to Party discipline.

Ironically, despite elaborate provisions for state government in the PRC Constitution and for Communist Party hierarchy in the Party's constitution, the most important ruler in the PRC – Deng Xiaoping – holds no official position in either the government or the Party. Nevertheless, everyone knows that he, and not the Premier or the Party General Secretary, really runs China. In the face of such undeniable political realities, it will be very difficult for effective democratic institutions to emerge in the PRC. Thus far, the environment has been unable to generate them or to prove receptive to their transplantation.

The Current Situation

In the year since the Beijing Massacre, the most significant development with respect to democracy and freedom in the PRC has been the amount of attention focused upon the subject, both within China and in the international community. Scrutiny of China's human rights practices emerged as a salient feature of other countries' relations with China. Even in the United Nations, China was the subject of an intensive investigation of its suppression of the 1989 demonstrations. Although the popular opposition, which had led to the imposition of martial law in Beijing and in Tibet, eased enough to permit the lifting of martial law by the spring of 1990, considerable popular resentment lurked behind the thin veneer of calm.

Reuters/Bettmann Newsphotos

The source of this new interest in democracy in China was the suppression of the 1989 pro-democracy movement on June 3-4, 1989, by troops of the People's Liberation Army. Despite the lack of accurate casualty figures more than a year after the Beijing Massacre, reliable sources estimate that hundreds were killed and thousands injured. In the crackdown that followed and lasted well into 1990, tens of thousands of pro-democracy movement participants, supporters and sympathizers were rounded up, held without charges and interrogated. Some were released after a brief period, but others remain in detention even after their friends and classmates were released. None of those detained have been proven guilty of any act of violence.

Ironically, as a result of these repressive acts, China now finds itself shunned not only by traditionally democratic countries but also by its former socialist allies in Eastern Europe which have peacefully made the transition to democratic rule which China's leaders brutally put down in Tiananmen Square.

Surprisingly, there has been some improvement since June of 1989 with respect to human rights in China, at least by comparison with last year's massacre and crackdown. No similar events have recurred since June 1989. Large-scale demonstrations have been effectively discouraged by the demonstration of the leadership's determination to suppress them. In the year since the massacre, occasional releases of pro-democracy movement activists detained during the military crackdown have lowered the number of political prisoners held in China. Some of the most prominent detainees claim to have been reasonably well-treated during their confinement. Yet the limited improvement in certain areas was overshadowed by renewed abuses of other basic rights, such as religious freedom. Moreover, the arbitrary actions of government forces and political leaders heightened concerns that the cautious movement towards rights-based democratic government would not soon resume in the PRC.

Civil Rights

In the aftermath of the Beijing Massacre, China's disregard for universally accepted human rights became increasingly evident. Credible reports of foreign observers have detailed a range of abuses, including extrajudicial killings, disappearances, torture, arbitrary arrest and interference with personal privacy. Civil rights guaranteed in China's 1982 constitution – freedom of speech and the press, freedom of assembly and association, freedom of religion and freedom of movement – all have been severely curtailed in the crackdown period. Political rights have been restricted, and discrimination against both women and China's national minorities has emerged again after some improvement. Class discrimination has also appeared to be a factor in disparate treatment of workers and students detained in connection with last June's demonstrations; in all reported cases, workers were more harshly punished. No students have been executed, but several workers did receive the death penalty.

The arbitrary arrest and detention of the thousands who participated in the 1989 protest movement demonstrated the inadequate protection of democratic rights in the PRC. In June and July of 1989, a nationwide hunt for protesters was undertaken, employing a "Most Wanted" list of the chief organizers of the demonstrations in Tiananmen Square. Although the authorities eventually admitted to taking 6,000 people into custody, unofficial sources estimated that in Beijing alone as many as 10,000 were arrested, with at least twice as many arrested in other parts of China. Many were released shortly after being detained, but others have languished in custody without being charged or tried, held incommunicado, for more than a year.

Torture and ill-treatment by jailers have been widely reported during the months following the arrests of the summer of 1989, including severe beatings, assaults with electric cattle prods, and handcuffing and suspension by the arms from the ceiling of cells. Many suspects initially interrogated who were not detained or arrested report being roughed up by police and security forces before being released. Such action was clearly intended to intimidate the Chinese masses.

The right of fair public trial was clearly abrogated in many hundreds, if not thousands, of cases following the crackdown. In some cases, those detained were given "administrative penalties" – which may include sentences as severe as three years' imprisonment at a labor reform institution – to circumvent the procedural requirements of China's criminal law. Due process provisions of China's 1982 Constitution and Criminal Procedure Law, requiring that a public trial be held within two months of a defendant being taken into custody, were seldom honored in the cases involving participants in the pro-democracy movement.

Some of the demonstrators have been found guilty of serious crimes in connection with the pro-democracy protests. These crimes include setting fire to trucks, tanks or railroad equipment, stealing military goods or assaulting soldiers. Almost all who were sentenced to death were executed with brutal speed following brief trials which afforded few procedural protections. Defense counsel, when available, made little effort to dispute the defendants' guilt, the mandatory appeal of the death sentence was decided – against the defendants – in one or two days, and details of the charges and the judgments convicting the defendants were never made public, even to their families.

In their eagerness to capture participants in the pro-democracy demonstrations, Chinese police investigators also trampled upon the constitutional rights of privacy, family, association and correspondence of many Chinese citizens. Warrants were almost never obtained before raids on the homes and businesses of suspected "counter-revolutionaries." Their mail was confiscated and read, their telephone conversations were monitored, and covert videotaping was carried out to document the "criminal" activity of those detained or wanted for questioning. Rights of peaceful assembly and protest, as well as of association, were dealt serious blows by the enactment of national and local laws in late 1989 and early 1990 severely restricting the ability of citizens to organize parades and demonstrations. These laws were obviously intended to prevent recurrence of the mass public activity seen in the spring of 1989.

Reuters/Bettmann Newsphotos

Clampdown on Religion and Freedom of Movement

For more than a decade, greater religious freedom allowed the re-opening of many churches, mosques and temples closed due to the anti-religious and anti-foreign fervor of the Cultural Revolution (when all expression of religious belief was prohibited). The past year witnessed extensive new restrictions on religious activities. Despite the constitutional protection of religious practice contained in Article 36 of the 1982 Constitution, the Chinese government has limited the exercise of that constitutional right to officially recognized, government-controlled religious institutions – supposedly to prevent foreign "domination" of Chinese believers. Religious proselytizing is tightly controlled, with missionary work by foreigners prohibited. Buddhists, who are the largest group of religious believers in China, have been given the greatest latitude to practice their faith, but Tibetan Buddhism, in which the Dalai Lama occupies the primary position of religious leadership, has been subject to intense scrutiny.

In 1989 and 1990, Catholic priests have been detained as part of a campaign to wipe out the underground Catholic church, which continues to resist state regulation. Many Roman Catholic priests, bishops and lay people who have remained loyal to the Vatican since China's establishment of an official Catholic Patriotic Association in the 1950s were arrested in various provinces of north China. They have joined other long-term prisoners, both Catholic and Protestant, who have been sentenced for such "counter-revolutionary" activities as distributing religious publications, conducting religious services outside the state-regulated churches, and remaining loyal to church authorities outside of China.

China's population registration system, which uses identification cards to restrict the movement of Chinese citizens within their own country, was reinforced in September of 1989. Public security officials intensified checks of residents' identification cards, which they are now required to carry. This move was designed to close the escape routes through which prominent dissidents managed to evade capture during the summer and fall of 1989. Although this dragnet did aid in the capture of several of the most wanted pro-democracy movement fugitives, the Chinese government was greatly embarrassed by the escape of student protest leaders such as Wu'er Kaixi and Chai Ling to the West.

In addition, rumors have persisted that, in reaction to student-initiated protests, China intends to limit severely the number of its citizens, including university students and recent graduates, who will be allowed to study overseas. In August 1989, half a million college graduates were sent to "grass roots" organizations – mostly in remote rural locations – for one or two years of reflection and indoctrination. Many Chinese students who had previously expected to be sent abroad for further education now believe such opportunities have been eliminated. The highly publicized decision to send the entire freshman class of Peking University to a military academy in Shijiazhuang added to these fears. For China's anxious leadership, ideological orthodoxy, not study abroad, is the new priority for Chinese students.

The historically low status accorded to women continues to be a fact of life in the

(continued on page 46)

Democracy

What is a Democracy?/Upper Elementary/Middle **Phyllis Maxey Fernlund**

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Reuters/Bettmann Newsphotos

There are many definitions of democracy and many countries which claim to have a democratic form of government. The diversity of our world can be very confusing. In this two-day lesson, students will expand their understanding of democracy, and learn of criteria that scholars use to identify democracies. On the second day they will work in small groups to apply these criteria to different fictional countries.

Goals

At the end of this lesson, students will be able to:

1. expand their definition of democracy by considering several new criteria;
2. identify democratic practices in fictional and real countries; and
3. work with others in making decisions.

Procedure for Day 1

Give students an example of unlimited power by making arbitrary and unpleasant changes in the day's schedule.

"I have decided that there will be no lunch period today."

"Homework tonight will be a ten-page paper on _____."

"No students in my classes can be in after-school sports."

After they have had an opportunity to protest, explain that you have just given them an example of autocratic government, in which one person or group has unlimited power.

Put the word DEMOCRACY on the chalkboard or overhead transparency. Ask students to think about what that word means to them. Invite students to brainstorm about the word "democracy." Record their ideas on the board. Do not comment on or question their suggestions at this point.

Ask the students if some of the things they have listed under DEMOCRACY go together in some way. Take suggestions for linking words together, and ask what each category has in common. (Example: freedom of speech, religion and press might be grouped and labelled "rights.")

Ask students to label the categories they have created. This reassessment will let you know what they think about democracy in particular and government in general.

Post their words, groups and labels on the bulletin board.

Using an overhead transparency or handouts, show them the list in Handout 1. Explain that these are characteristics of a certain kind of government, a democracy, that have been identified by scholars. These are the characteristics of constitutional government, as opposed to autocratic government. Discuss each and compare this with the students' list.

Procedure for Day 2

Divide the class into groups of five. Pass out Handout 2 and the chart on page 18. Assign the following roles:

2436

discussion leader – asks questions about examples and the chart;

reader – reads aloud each example;

recorder – takes notes and fills in the chart;

reporter – shares the group's decision chart with class; and

facilitator – keeps track of time for group work, asks for help from teacher if needed.

Introduce the chart and the group task.

After the groups have discussed the examples, choose a reporter from each group to share their decisions about the democratic characteristics of a country.

Debrief the small group activity.

In what ways does democracy in Alpha and Kappa differ?

In addition to democracy, what other forms of government can be found in the world?

Are there other characteristics of democracy that you want to add to our list? Possible additions might include:

- rights for all people;
- participation of all adults in voting;
- freedom to join private organizations not under government control; and
- government represents the desires of its citizens.

Follow-up: Bring in news stories which illustrate the actions and characteristics of actual governments in the news and look for attributes of democratic government. As individual projects or group work, find out more about each of these countries.

Handout 1: Democratic Government

A government is often called a democracy if the following characteristics are present:

1. **Government leaders gained power by legal, peaceful means. They can be removed from office by the people or their elected representatives.**
2. **Individuals have basic rights such as freedom of speech, freedom of the press, freedom of assembly, and freedom of religion.**
3. **Individuals and groups are protected from unfair government actions that may take away their lives, property, or freedom.**
4. **Regular elections with two or more political parties, secret ballots, and majority rule are part of the political process.**
5. **Individuals have the right to be represented when government passes laws or levies taxes. A legislature of elected representatives meets to make the laws.**
6. **The media – newspapers, magazines and television – freely report news from around the world, and present favorable and unfavorable views of government actions.**
7. **The country's courts make rulings for and against the government, and help protect citizens' rights. People are equal before the law.**
8. **A national constitution, written or unwritten, limits the power of government. It defines what the government may do and how it will be organized.**

Handout 2: Deciding about Democracy

Directions: Read each of these examples. Using the chart on page 18, decide which characteristics of democratic government are present or missing. Decide if you consider this country an example of a democracy.

COUNTRY A

The people of Alpha have a prime minister rather than a president as their national leader. The people vote for their representatives in the legislature, but they do not vote for prime minister. The prime minister is chosen by the elected representatives in the legislature. If they lose confidence in their leader, the majority in the legislature choose a new prime minister. Alpha has an unwritten constitution based on many important documents in their history and long-standing customs. Individuals and groups are free to criticize the government. They are free to worship as they please, move freely within the country, change jobs, and travel.

COUNTRY B

Beta has a written constitution that is 25 years old. It states that citizens have the right to freedom of speech and freedom of religion. Even though these rights are in their constitution, the people of Beta are not allowed to criticize their government. People who disagree with the government are arrested. They disappear from many years, sometimes forever. There are elections in Beta, but there is only one political party. The people of Beta are afraid of their government. They do not feel safe.

COUNTRY G

Gamma is a country with a president and legislature elected by the people. The president appoints the governors of Gamma's sixty states. Military leaders (who are not elected) have a great deal of power in Gamma. They decide which candidates can run in an election. They have shut down newspapers that criticize the government. In the old days, a military dictator ruled Gamma. Five years ago, the military gave power to a president and legislature. If the military leaders do not like the government's actions, they can try to take over the government again.

COUNTRY I

The country of Iota has some citizens who are very wealthy. They have the right to vote for president and their representatives. They hold important positions in business, government, and education. They can travel freely, choose their place of worship, their jobs, and schools for their children. Many of their children go to college in other countries. Most people in Iota are poor and have little education. They are not allowed to vote and must live in the area assigned to them by the government. There is no constitution that protects the rights of all of the people of Iota.

COUNTRY K

Kappa is a country where there are many elections. In every part of the nation, leaders, legislators, and judges are elected to office. If the people of Kappa do not like what their government is doing, they can wait for the next election and vote for a new political party or a new candidate. Sometimes the people of Kappa don't wait for the next election. They sign a petition to recall the government official and remove him or her from office. These procedures are written in their constitution. People often discuss and debate government actions. Sometimes citizens take a government

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CHARACTERISTICS	COUNTRY				
	A ALPHA	B BETA	G GAMMA	I IOTA	K KAPPA
Peaceful change of leaders					
Basic political freedoms					
Protection of life, liberty, property					
Regular elections, majority rule					
Elected representatives					
Free and open media					
Courts – Equality before the law, rule of law					
Constitution – limits government					
Is this country a democracy? Yes/No					
Why? Why not?					

(Y = Yes, N = No, ? = No information)

official to court and win their case. Politics is an important part of the daily lives of the people of Kappa.

Teacher Background

Many children associate democratic government with attributes such as majority rule and individual rights. Scholars have used a variety of criteria in their studies. G.B. Powell, in his book *Contemporary Democracies* (Cambridge, MA: Harvard University Press, 1982), includes five criteria:

- The government bases its legitimacy on representing the desires of its citizens.
- Leaders are chosen in free elections by at least two viable political parties.
- Most adults can participate in the political process.
- Citizens' votes are secret and are not coerced.
- Citizens, leaders and party officials enjoy basic freedoms of speech, press, assembly, religion, and organization.

In four different studies conducted between 1976 and 1984, 19 nations were consistently rated as democracies: Australia, Austria, Belgium, Canada, Denmark, Finland, France, West Germany, Ireland, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States. (This data is summarized in K. Janda, J.M. Berry, J. Goldman, *The Challenge of Democracy: Government in America* (Boston, MA: Houghton Mifflin, 1987). All of these nations are industrialized, democratic societies. Third World countries are not represented.

A more recent study by T.D. Anderson ("Civil and political liberties in the world: a geographical analysis" in J. Norwine and A. Gonzalez, *The Third World* (Boston, MA: Unwin Hyman, 1988) classifies the nations of the world on a six-point scale, with category I composed of countries where all elements of individual rights are specified by law and are extended to all inhabitants without restriction. Category II includes countries in which legal rights are *not* extended uniformly to some minorities or recent immigrants. Many of the largest Western nations fall into Category II because of their diverse populations and the role of discrimination against racial or ethnic minorities. In this study, based on 1988 data, the following Third World countries are included in Categories I and II: Barbados, Costa Rica, Antigua-Barbuda, Argentina, Bahamas, Belize, Botswana, Columbia, Cyprus, Dominica, the Dominican Republic, Grenada, Jamaica, Kiribati, Mauritius, Nauru, Papua-New Guinea, St. Kitts-Nevis, St. Lucia, St. Vincent, the Solomon Islands, Trinidad-Tobago, Tuvalu, Uruguay, and Venezuela.

Anderson argues that not all democratic nations have an educated population and an advanced economy: "striking exceptions are places like Botswana, Papua-New Guinea, and the Solomon Islands . . . . This evidence suggests that the premise that mass access to civil and political freedoms is a feature only of Europeanized, middle-latitude countries does not accord with reality."

Given the changes in Eastern Europe and elsewhere, these studies must be continually updated. Teachers may wish to use countries from these lists as the basis for student research projects.

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Democracy

The U.S.S.R.: A Democratic Constitutional Government?/Secondary

Michael H. Reggio

Abstract

This one- to two-lesson plan teaches students the concept of constitutional government and what is actually necessary for a government to be considered a constitutional government. It differentiates constitutional governments from autocratic or dictatorial governments. To do this, a study of the Soviet Constitution, the Declaration of Independence, and the United States Constitution is undertaken. Numerous methods are suggested that appeal to many learning styles, including small group work, group and class discussion.

Objectives

As a result of this lesson, students will:

1. be able to explain the concepts of constitution and constitutional government;
2. learn the essential characteristics of constitutional governments which differentiate them from autocratic or dictatorial governments;
3. understand the difference between a constitutional government and a government with a constitution; and
4. learn the unenforced democratic qualities of the Soviet Constitution.

Audience

This lesson can be used at the middle school, high school, and university level. It is relevant to U.S. History, World History, Government, Civics, and most social studies classes. Because of its evaluative nature and group techniques, it is also recommended for special learning environments such as learning disabilities classes.

Materials

Blackboard (or overhead projector, flip chart, etc.); Handout: "Excerpts From the Model Constitution."

Procedure

Ask the class how they would define "constitution." The following definitions may be used: (1) a plan for government; (2) a set of customs, rules, laws, traditions, and concepts that describe the way a government is organized and operated; or (3) a framework for government composed of cus-

Handout: Excerpts from the Model Constitution

Preamble excerpts: "It is a society in which the law of life is [the] concern of all for the good of each and concern of each for the good of all." "It is a society of true democracy, the political system of which insures effective management of all public affairs, ever more active participation of the . . . people in running the state, and the combining of citizens' real rights and freedoms with their obligations and responsibility to society."

Chapter 1, Article 2
"All power . . . belongs to the people."

Chapter 1, Article 5
"Major matters of state shall be submitted to nationwide discussion and put to a popular vote." (referendum)

Chapter 2, Article 13
"The personal property of citizens and the right to inherit it are protected by the state."

Chapter 3, Article 20
"The state pursues the aim of giving citizens more and more real opportunities to apply their creative energies, abilities, and talents, and to develop their personalities in every way."

Chapter 3, Article 23
"The state pursues a steady policy of raising peoples' pay levels and real incomes through increases in productivity."

Chapter 4, Article 28
". . . war propaganda is banned."

Chapter 6, Article 33
"Citizens . . . are equal before the law, without distinction of origin, social or property status, race or nationality, sex, education, language, attitude to religion, type and nature of occupation, domicile, or other status. The equal rights of citizens . . . are guaranteed in all fields of economic, political, social, and cultural life."

Chapter 6, Article 35
"Women and men have equal rights . . . . Exercise of these rights is ensured by according equal access with men to education and vocational and professional training, equal opportunities in employment, remuneration, and promotion . . . by legal protection, and material and moral support for mothers and children, including paid leaves and other benefits for expectant mothers . . . and gradual reduction of working time for mothers with small children."

Chapter 7, Article 39
"Citizens . . . enjoy in full the social, economic, political, and personal rights and freedoms proclaimed and guaranteed by the Constitution . . . and by . . . laws. The . . . system ensures enlargement of the rights and freedoms of citizens and continual improvement of their living standards as social, economic, and cultural development programs are fulfilled."

Chapter 7, Article 40
"Citizens . . . have the right to work (that is, to guaranteed employment and pay . . .), including the right to choose their trade or profession . . . ."

Chapter 7, Article 41
"Citizens . . . have the right to rest and leisure . . . ."

Chapter 7, Article 42
"Citizens . . . have the right to health protection . . . ."

Chapter 7, Article 43
"Citizens . . . have the right to maintenance in old age, in sickness, and in the event of complete or partial disability or loss of the breadwinner."

Chapter 7, Article 44
"Citizens . . . have the right to housing."

Chapter 7, Article 53
"The family enjoys the protection of the state. Marriage is based on the free consent of the woman and the man; the spouses are completely equal in their family relations."

Chapter 7, Article 54
"No one may be arrested except by a court decision or on the warrant of a procurator."

Chapter 7, Article 55
"No one may, without lawful grounds, enter a home against the will of those residing in it."

Chapter 7, Article 56
"The privacy of citizens, and of their correspondence, telephone conversations, and the telegraphic communications, is protected by law."

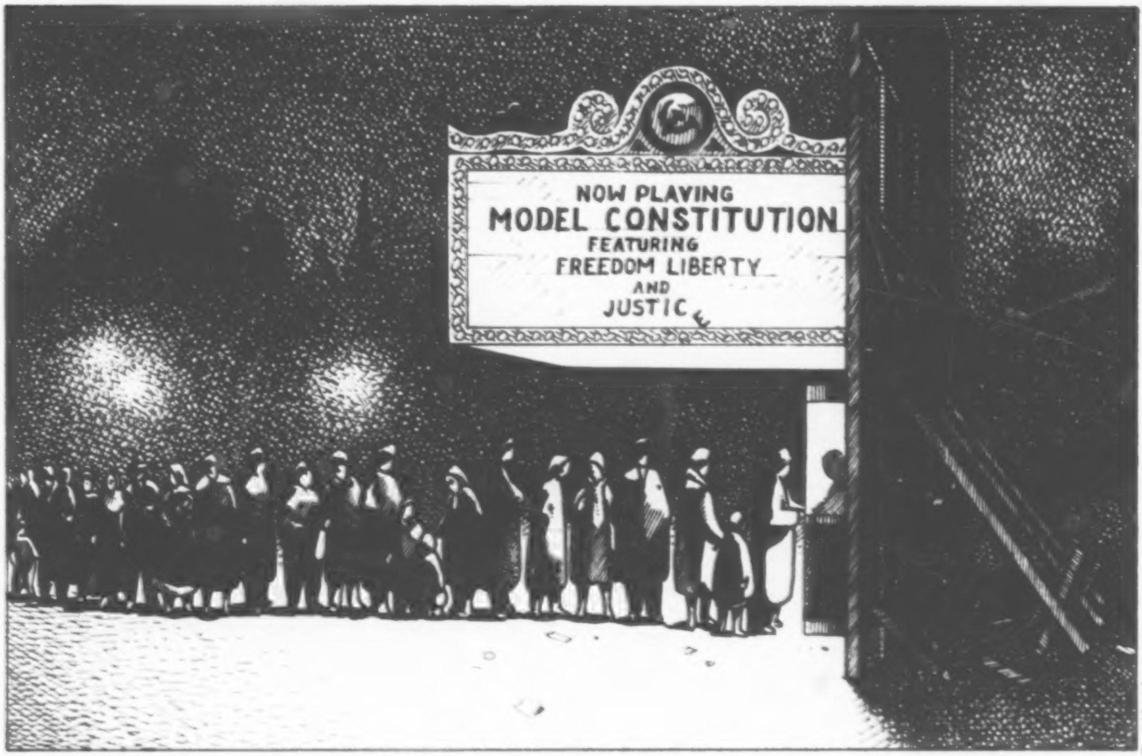
toms, rules, laws, traditions, and documents that describe the organization of government.

Explain that most constitutions are written, but some are only partially written or are totally unwritten. For example, Great Britain's constitution is partially written. Still, every nation has a constitution, no matter how good or how bad, even if it is not written. Some of worst governments have constitutions that list basic rights of citizens, even though they may violate them in practice.

When you study the constitution of a government it should be with several questions in mind:

- How is it organized?
- What are its purposes and how does government carry these out?
- How is government involved in economics (laissez faire, mixed economy, etc.)?
- Who are its citizens?
- What controls are there on governmental power?
- What responsibilities do citizens have?

The second section of the lesson plan looks at the Soviet Constitution and the concept of constitutional government. There are four methods that are suggested to carry out this



Tom Herzberg

section. Choose the one that most meets the learning style, needs and the group personality of your particular class. Two involve groups and one involves class discussion. The fourth may use any of the other three techniques.

Begin each by telling the class that the excerpts in the handout are taken from a constitution that was written a number of years ago and has been touted as the most progressive and forward looking constitution ever written. It was said that it protected human rights better than any constitution in history and was to be a model for countries that wanted to change their government to a truly constitutional form. It has been called the model constitution. Do not tell students at this time that this is the Soviet Constitution.

In the first group method, divide the class into small groups of three to four students and have them take the handout and go through each chapter and article. Instruct each group to decide whether it approves or disapproves of the excerpt and why. Then after each clause is discussed, have the group vote on whether the constitution as a whole is acceptable. Following the vote, discuss each clause with the class and allow group input. Then move to closure (see below).

The second group method also involves groups of three to four. Read each section of the "model constitution" to the class and have the groups discuss it. Then have students decide if they want to keep the clause as is, modify it, reject it, or write another. At end of discussion have the class vote on whether they like the constitution as a whole or not. Then go to closure.

The third method treats the class as a whole. Read each clause and invite comments. After discussion, take a vote to determine whether the class feels the clause is acceptable in an ideal constitution. Keep a running total of approvals and disapprovals on the board. After voting on the individual clauses, have students vote on whether they like the constitution as a whole or not. Then move on to closure.

Method four is the most comprehensive and is highly recommended. Use any of the three methods described above, but in addition, have students examine each clause of the "model constitution" and look for a similar clause in the United States Constitution. If a comparable clause is not found, discuss with the class whether it should be included. At the end of the discussion, ask the class to vote on whether they like the so-called model constitution or not. You may want to ask them to vote on which constitution they like best – the U.S. Constitution or the "model" constitution.

Closure

After students have voted on whether they like the "model" constitution or not (they usually will overwhelmingly vote for it), tell the students that this is the Constitution of the U.S.S.R. as adopted October 7, 1977. Ask students if having a constitution is the same as having a constitutional government. Discuss the issue. Present the class with this question: "If a constitution provides for the unlimited exercise of political power, by one, a few, or even many, is there a basis for a true constitutional government?" Also ask, "If a constitution says it is to be limited, but does not include ways to enforce those limitations, do you have a constitutional government?" Conclude by developing a good definition of a constitutional government. (It should take into account the answers to the above questions and build on what students learned in the lesson.)

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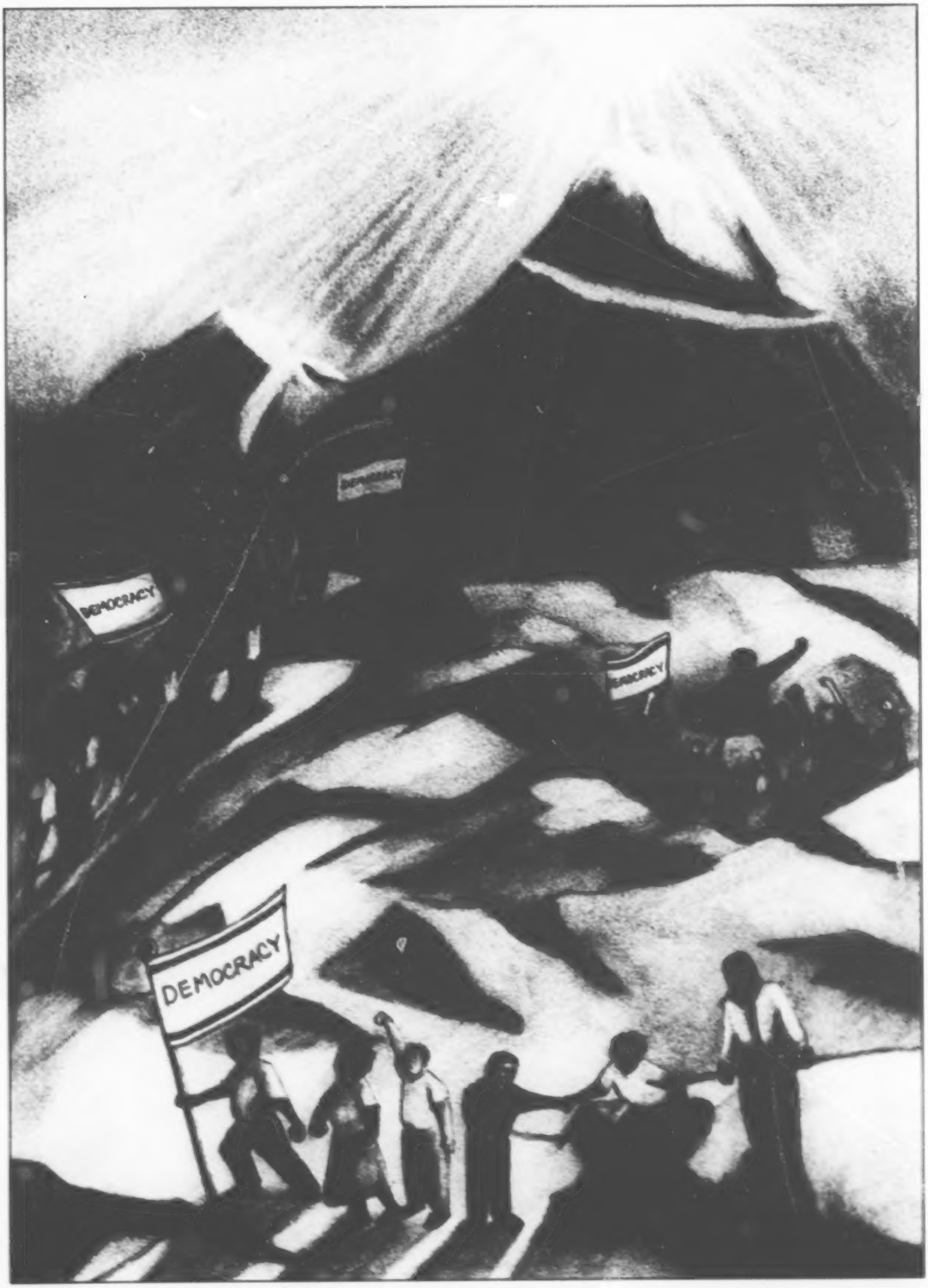
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Holly Pribble

N. Brian Winchester

Will Democracy Come to South Africa?

As apartheid crumbles, pressures grow to create a new political order

White South Africans have always had the pretension that they were part of the western democratic family of nations, but South Africa is not now nor has it ever been a democracy. Widespread and effective participation limited to a small minority of a community does not constitute democracy. On the contrary, for most of its history South Africa has been a racial tyranny where a small white minority has monopolized power and enjoyed certain democratic rights while at the same time viciously repressing any attempts by the black majority to exercise those same democratic rights.

Notwithstanding the exclusion of blacks from political participation and the institutionalization of racial discrimination, whites continued to maintain that theirs was a society based on law and demanded that all citizens obey those laws. Racism and inequality, which had existed for generations as a matter of custom and practice, were legalized, especially after 1948 when the National Party (NP) came to power.

At the heart of the NP legislative agenda was "apartheid," a doctrine of white supremacy which it promoted as a program of separate development. Once in power, the NP extended and legalized white economic exploitation, political domination and social privilege and reinforced these with a harsh and intrusive security system, separate and unequal education, job discrimination and residential segregation. Such fundamental rights as protection against search without a warrant and detention without a trial were severely circumscribed.

After generations of white intransigence to their demands for justice and equality, black opposition groups turned to non-violent civil disobedience in the 1950s. In repeatedly foreclosing the possibility of peaceful change, whites ensured that blacks would eventually resort to political violence, which they did, beginning in the 1960s. Thereafter, South Africa entered a prolonged period of enforced calm, punctuated by outbreaks of political violence, labor unrest, and school boycotts.

Constitutional Change: The Illusion of Power Sharing

By the 1980s the psychological, financial and human costs of maintaining some semblance of order were increasing to the point that a small but growing number of whites saw some form of power sharing as an essential way to break the cycle of repression, black violence and white counterviolence. In 1983, then Prime Minister P.W. Botha introduced a constitutional amendment that provided for three racially separate chambers in a proposed new parliamentary structure and replaced the position of prime minister with a state president. The new tricameral parliament gave the appearance of power sharing among whites, Asians, and people of mixed race, so-called Coloureds, but the fact that the Office of President and the powerful President's Council would be controlled by whites—and the white chamber would have more members than the other two combined—ensured that real power would remain in white hands. Furthermore, Africans, who constituted nearly three-quarters of the total population, continued to be excluded from the new political arrangement.

Reaction to the new constitution was the exact opposite of what the white government had intended: it precipitated a renewed crisis of unprecedented magnitude and duration. Violent confrontations between protesters and security forces spread, the death toll rose, and the government declared a state of emergency in July 1985. The state of emergency gave police and army wide powers of detention without trial and search and seizure without warrant, as well as full indemnity from all legal claims arising from their actions. All of this only served to incite greater violence.

Limited Reforms

The government's plan to restore law and order rested on a policy of modest reform in the midst of continued repression. Between 1984-86, prohibitions against interracial marriages and racially mixed political parties were repealed, and the rights to conduct business and acquire ownership rights to property in designated urban areas were extended to blacks. At the same time, over 2,000 blacks were killed and as many as 24,000 arrested and detained in confrontations with security forces.

The government's limited and self-serving reforms were rejected, not only by blacks, who were interested in having apartheid abolished, not reformed, but by conservative whites, who felt that the government had already gone too far, and by liberal whites, who argued that the reforms had not gone far enough. They were implicitly rejected as well by foreign governments which imposed sanctions against South Africa and by the many multinational corporations which disinvested. South Africa slipped deeper into crisis.

Throughout 1987-88, President P.W. Botha continued this "carrot and stick" approach, approving some limited changes while rejecting others. For example, he opened bars, restaurants, and hotels to persons of all races *(subject to the owners' right of admission)*, while insisting that such public institutions as schools and hospitals remain separate. While Botha refused to hold talks with the African National Congress (ANC), one of the principal nationalist movements, a group of white South African business leaders, academics, and politicians met with exiled leaders of the ANC in an historic meeting in July 1987 in Dakar, Senegal.

The significance of that meeting, organized by the Institute for a Democratic Alternative for South Africa (IDASA), was not in what was accomplished but rather in the fact that it took place at all. It was a clear signal that a combination of domestic and international pressures was finally forcing a growing number of whites to concede the need to dismantle apartheid and begin a dialogue on the nature of the transition to a post-apartheid society.

This should not be misinterpreted, however, as a sudden groundswell for a democratic alternative to South Africa's racial oligarchy. Many whites (perhaps a majority) continued to oppose a complete dismantling of apartheid, and the government's position was best summed up by Foreign Minister Roelof Botha, who remarked in 1989, "Why should we surrender when we have not been defeated?"

From Stalemate to Compromise

In 1989, advocates of reform, retrenchment, and revolutionary change confronted each other in domestic and international fora as well as in the streets. According to Frederik van Zyl Slabbert, former member of Parliament and founder of the Institute for a Democratic Alternative for South Africa, it was by then becoming clear that neither the regime or its opposition were certain of victory nor, conversely, were they on the verge of collapse. Rather, each was strong enough to frustrate the intentions of the other.

Whites recognized that the state's deteriorating economy, crisis of legitimacy, and increasing international isolation could not be reversed without far-reaching changes. For their part, the ANC leadership expressed doubts about the ultimate outcome of a protracted armed struggle. Mutual recognition of such a debilitating stalemate offered a strong incentive to compromise.

F.W. de Klerk succeeded P.W. Botha as head of the National Party in February 1989 and subsequently as President of South Africa in September. For the first time, whites in power acknowledged the need for a negotiated settlement with blacks. Within weeks of his election, President de Klerk permitted large multiracial crowds in Cape Town and Johannesburg to march against apartheid, met with Archbishop Desmond Tutu and other church leaders for what was described as a talk about future talks, and ordered the release of eight of South Africa's most prominent black political prisoners.

Given past government propaganda about change, it is not surprising that these moves were greeted with skepticism. Delegates to "The Conference for a Democratic Future" held in Johannesburg in December 1989 accused de Klerk of not being interested in genuine negotiations or in creating a democratic South Africa. They claimed that, "de Klerk is buying time to re-order the forces of minority domination and win over some of our people to his fraudulent schemes." Even if he remained circumspect about the extent and pace of future changes, de Klerk continued to move quickly to establish his credibility as a reformer by lifting the ban on anti-apartheid organizations such as the African National Congress and by releasing Nelson Mandela, arguably the world's most famous prisoner.

With the release of Mandela, events gained a momentum which outpaced even the most optimistic predictions, and internal resistance began to de-emphasize the armed struggle in favor of so-called proximity talks, and eventual negotiations. To a certain extent, preliminary negotiations, or at least pre-negotiation maneuvering, was already being conducted in the media. The principal players, especially de Klerk and Mandela, tested various positions on South African and world public opinion and on each other. On his release from prison, for example, Mandela reaffirmed his belief in nationalization as an economic strategy and sent tremors throughout the stock market. De Klerk, meanwhile, announced that there could be no compromise on group rights, which many interpreted as a euphemism for the maintenance of white privileges. However, not only were their respective positions on nationalization and group rights subsequently softened or redefined (Mandela later said that nationalization is a good idea only if it helps the economy), but the government rescinded the nationwide state of emergency everywhere but in the Province of Natal, and the ANC ultimately abandoned its commitment to the armed struggle.

Risks of Concessions

While such compromises are the very essence of negotiation in as deeply divided a society as South Africa, concessions pose great risks for those who make them. De Klerk, for his efforts, was labelled a traitor by extreme right-wing whites, and the pressure on the leadership of the ANC from conflicting black interests was as great as that experienced by de Klerk. Added to that pressure was the outright rejection of Mandela's strategy of a negotiated settlement by such groups as the Pan Africanist Congress (PAC) and the violent opposition from Inkatha, a Zulu ethnic association which is one of the ANC's main challengers for power. That violent rivalry is estimated to have claimed 800 lives in black townships during the months of August and September 1990 alone.

Ironically, few people in South Africa need each other as much as de Klerk and Mandela. Mandela has referred to de Klerk as "a man of integrity" and de Klerk has said he can work with Mandela, "a man of peace." Each must deliver in order that the other can prove to his constituents that there are tangible benefits from their respective strategies. Professor Mervyn Frost, head of the Department of Politics at the University of Natal, maintains that it is this momentum which has unconsciously led to an emerging coalition between the NP and ANC, which are already beginning to share policymaking power in maintaining law and order, in township management, and in managing the state's transition.

Each has a vested interest in mutual cooperation in order to avoid having to deal with more radical, uncompromising opponents. The ANC, for example, has gone out of its way to allay the fears of whites who support the NP's reforms, and the NP has acknowledged that the ANC cannot simply abandon long-held positions on such issues as nationalization without fear of losing much of its support.

This incipient coalition does not mean, however, that past suspicion and hostility have disappeared. It is rather a reaffirmation of the old axiom that politics makes strange bedfellows; that, paradoxically, opponents can also be allies. Both sides are focusing on power and control; the white minority, aware that its exclusive rule is coming to an end, is doing all that it can to maintain as much of its power as possible while the black majority seeks to capture the political power which it has for so long been denied. Only negotiation will determine whether these are mutually exclusive goals or whether some formula based on democratic principles can worked out.

Most South Africans, black and white, now seem to agree that the end of apartheid will have to be negotiated, as will the system that replaces it. Who will be represented and how they will be chosen, what ground rules will govern the process and what is negotiable and what is not remain unanswered. While the ANC is quick to admit that it is not the sole representative of black political interests, it still favors a constituent assembly, no doubt assuming that in a free election to choose delegates it would receive majority support and thus enter into negotiations greatly strengthened. The NP, on the other hand, favors an all-parties conference which it feels would better serve minority interests now and offer stronger guarantees for whites and other minorities in the future.

Since the racial-ideological divisions are so deep and the future consequences of any action taken so far reaching, a one-time, winner-take-all negotiation seems unlikely. The risk of failure is too great. Negotiations are more likely to be successful in a protracted series of incremental deliberations which move from the least contentious to the most intractable issues.

Ideologues Threaten to Undermine Reform

While most white South Africans appear to have grudgingly accepted the inevita-

AP/Wide World Photos

bility of negotiating a new political arrangement with the black majority, the far right clings to the white supremacist ideology of the past, demanding either a return to orthodox apartheid or partition and the formation of a white Afrikaner state. They comprise a loosely knit group of cultural organizations, political parties, and vigilantes, and include such groups as the neo-Nazi Afrikaner Resistance Movement (AWB), the White Liberation Party, the Conservative Party, the World Apartheid Movement, and the White Wolves. Most have said they will refuse to participate in negotiations with the black majority, fearing that their non-negotiable right of white self-determination will be compromised.

A protest rally organized in late May to denounce de Klerk's reforms attracted less than the massive show of force the extremists had predicted. Nonetheless, the disruptive potential of even so small a minority within a minority should not be minimized since the "storm troopers" in their ranks are apparently well-armed and have already shown themselves capable of extreme, if sporadic, acts of violence. They blatantly threaten insurrection but suggest no remedies for the deteriorating economy. They engage in vigilante attacks on blacks but offer no program to stem the dramatic increase of white poverty due to the sanctions-induced recession.

Black ideologues on the left are similarly unwilling to negotiate. They doubt the government's commitment to real change and, in any event, refuse to recognize its legitimacy since they continue to regard whites as colonialists and foreigners. The Pan Africanist Congress (PAC) says it would enter talks only after the government agrees to transfer power to the "dispossessed," a totally unrealistic expectation. The PAC considers the real struggle to have just begun and will work to intensify it while hoping to attract support from those who are disaffected by the growing rapprochement between the ANC and the government.

Enduring Inequalities

An academic colleague writing from South Africa recently gave the following assessment of the situation there: "Maybe we are heading towards decency and perhaps even justice . . . the tough part is yet to come." What he was referring to is the fact that dismantling the structures of apartheid, while vitally necessary, will not be sufficient to overcome the enduring consequences of 300 years of racist laws and practices. South Africa is a wealthy country, but according to the "Second Carnegie Inquiry into Poverty and Development in Southern Africa," it has the most unequal distribution of wealth and income of any country in the world, and much of the misery of blacks is the result of deliberate government policies. That report, by Francis Wilson and Mamphela Ramphele, estimated that two-thirds of all black South Africans live in poverty and one-third of all black children are malnourished. Predictably, the unemployment rate among blacks is devastating, as high as 50% in some areas. It is common knowledge that the white government took steps beginning in the 1920s to eliminate white malnutrition through school meal programs and addressed unemployment by taking on the role of employer of last resort. Blacks understandably demand no less today.

From the moment it assumes power, a black majority government will be under great pressure to redress current inequalities in social spending: to stop spending four times as much per white pupil as per black pupil and to fill many of the thousands of empty white classrooms with blacks from overcrowded schools; to eliminate wage discrimination and differences in old age pensions currently based on race and to provide equal access to health care and unemployment benefits regardless of race.

Correcting current inequities will help to appease blacks' sense of injustice but unfortunately will do little to address the historic effects of apartheid. Filling all of the more than 7,000 empty classrooms in white schools with black students will provide a remedy for only one-fifth of the existing shortage. Giving blacks access to several thousand additional beds in previously whites-only hospitals will not begin to deal with the chronic malnutrition experienced by the rural black population. Years of apartheid prevented blacks from acquiring the skills and capital needed to compete in business, and they will not acquire them simply because restrictive apartheid policies are repealed. Furthermore, the annual population growth rate of 2½% will exacerbate an already desperate situation as the need for new schools, hospitals, and housing continues to expand even as a new government struggles to correct past deficiencies.

At the very least, an American-style affirmative action program is likely to be implemented. The cost of such a program is expected to be enormous, as much as $10 billion annually during a decade of transition, according to South African economist S. J. Terreblanche, and the prospects for generating the needed revenue internally or from an influx of foreign capital do not look promising.

Constitutional Alternatives

Under South Africa's present political system, local and provincial political authorities are subordinate to the central government. Within the central government, the white parliament is supreme. Lacking a bill of rights, individual liberties are subservient to parliamentary acts. Since judicial review does not exist, legislation by the central government cannot be overturned. Whites, who long ago created this central and only source of authority, exercise unrestricted monopoly power and are not accountable to the disenfranchised black majority who can change neither the law nor the lawmakers. It was the unrestricted and malevolent abuse of power which allowed the white minority to impose its unequal and unjust system of apartheid upon the black majority. Dramatic changes beginning in the last several years now promise an end to that system. What will replace it is the single most important issue facing South Africa today.

The National Party government and its principal rival, the ANC, have both declared themselves in favor of a nonracial democracy, but it would be naive to assume that they both have exactly the same thing in mind. While there appears to be agreement on fundamentals such as majority rule, protection of minority rights, political equality, and popular control of decision makers, there is no consensus over whether South Africa would be better served by a unitary or federal or consociational democracy. Should government operate according to simple majority rule or require extraordinary majorities? Is proportional representation preferable to the conventional single-member, winner-take-all constituency? The only certainty is that any proposed change which, in effect, preserves the status quo ante, much as the so-called constitutional reform of 1983 attempted to do, is destined to fail as is any scheme imposed by one group on all the others.

Demands by white separatists for a permanent partition of the country are likewise very unlikely to succeed. Such a plan would require massive relocations of people; boundary disputes would be extremely contentious, if not unresolvable. The separatists' vision of a white state which would comprise most of South Africa is opposed by blacks and by many moderate whites. A smaller, economically weaker alternative offers them only isolation and impoverishment.

The ANC has consistently proposed a multi-party democracy in a unitary state based on universal adult suffrage on common voting rolls. A bill of rights enforceable by the judiciary would ensure protection of cultural, language, and religious rights as well as freedom of the press, speech and association. The ANC maintains that political reform and economic reform are inextricably linked. Pallo Jordan, a member of the ANC's National Executive Committee, says that there is a need to break up the inordinate concentration of wealth currently in the hands of a tiny white minority through a degree of nationalization, but the ANC also recognizes the need to create opportunities for the entrepreneur. He claims this is not necessarily contradictory since most economic systems in the world today are mixed.

Whites seem less concerned about the concentration of wealth than the potential concentration of power in the hands of the black majority in a unitary state. It is not surprising, then, that whites emphasize the divisibility of sovereignty, i.e., that they favor decentralization of power to municipal and provincial authorities. In a federal system, the central or federal government is sovereign with respect to matters specifically entrusted to it (typically those affairs common to all the federating units) and the federating units are sovereign in their specific areas of jurisdiction. These different areas of sovereignty are spelled out in a written constitution which can only be amended with approval of the federating units.

Consociational democracy, like federalism, divides sovereignty amongst diverse communities of interest, but consociations delegate decision-making authority to separate units to the maximum extent possible. Furthermore, a minority veto guarantees that no unit can be outvoted at the central political level when its vital interests are at stake. Finally, the principle of proportionality in political representation, civil service appointments and the allocation of public funds is recognized. Black opposition groups certainly would not accept an arrangement whereby a democratic and non-racial South Africa would continue to be held hostage by a white minority veto. They believe that a strong central government, not a weak one, will be needed to promote national unity and enforce affirmative action.

What Lies Ahead?

Available evidence suggests that the prospects for democracy in South Africa in the near future are not particularly good. The fact is that only a small minority of the world's political systems are genuinely democratic, and most of those have a political culture characterized by tolerance for opposition, respect for the rule of law and a level of economic well-being that is largely absent from South Africa. In addition, both President F.W. de Klerk and ANC leader Nelson Mandela maintain that there is a well-orchestrated campaign to sabotage the government's efforts to end apartheid. Anti-apartheid groups allege that rogue elements in the security forces and white extremists have incited violence between rival members of the ANC and Inkatha in the black townships to destabilize the country and undermine the reform process.

Unrealistic expectations that cannot be met even by a post-apartheid government with more resources than the present one will be a source of instability and a threat to economic growth. In particular, affirmative action programs to compensate for extreme inequities in education, health care and housing will consume scarce capital resources, thus posing a difficult trade-off between redistribution and economic growth. Furthermore, according to economist S.J. Terreblanche, any policy which attempts to address the imbalance in public sector employment through accelerated Africanization at the expense of whites will likewise undermine stability unless it occurs during a period of high growth when enough alternative job opportunities are being created. This suggests further hard choices between state intervention and free market forces.

On the other hand, the very fact that people are even talking about affirmative action and other policy choices in a post-apartheid South Africa is cause for cautious optimism. Things that were considered non-negotiable as recently as 1989 were the subject of compromise in 1990. De Klerk's reform program moved ahead in September with the announcement that the governing National Party would henceforth be open to all races, a move no doubt calculated to attract black allies. Given their combined support, a formal coalition between the NP and ANC could govern effectively, leaving the Conservative Party, the Pan Africanist Congress and others in the role of opposition groups. Alternatively, if the federal option were to be chosen, these groups and others could find themselves part of the governing coalitions in one or more of the federating units. Of course, writing a democratic constitution, extending the franchise, and mandating elections are necessary conditions without being in and of themselves sufficient conditions for democracy. To have any long-term chance of survival, there must be a consensus on the democratic nature of political society. With decision-making somewhat decentralized and previously hostile groups given a new stake in the system, the seeds of a democratic political culture might be given a greater chance to take root and grow. It is worth noting, as Richard Sklar did in his 1987 article on developmental democracy in *Comparative Studies in Society and History*, that the principles which underlie constitutional democracy such as accountability, popular participation and the right to dissent, are rarely established in practice all at once. Democracy comes instead in increments; each increment becomes an incentive for the addition of another.

More on South Africa

Melvyn Frost, "Who Governs" in *Leadership-South Africa*, vol. 9, no. 3, 1990, pp. 101-104.

Richard Sklar, "Developmental Democracy" in *Comparative Studies in Society and History*, vol. 29, no. 4, October 1987, pp. 686-714.

Frederik van Zyl Slabbert, "From Domination to Democracy," in *Leadership – South Africa*, vol. 9, no. 4, 1990, pp. 66-76.

S. J. Terreblanche, "The Post-Apartheid Economy," in *Issue*, (African Studies Association), vol. xviii, no. 2, Summer 1990, pp. 14-23.

Contradictions will continue in South Africa. The question is whether black rage and white fear can be managed through a transition period of indeterminate length, during which all vestiges of racial discrimination are eliminated and full democratic rights and freedoms finally extended to all. ☐

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Reuters/Bettmann Newsphotos

Daniel E. Troy

Constitution-Writing in Central Europe

In advising newborn democracies, Americans learn as much as they teach

All over Eastern Europe, nations are throwing off Communist dictatorships and creating new democracies. This has led to a spate of constitution-writing which provides interesting opportunities for Americans. We can ask ourselves how we would structure a government were we starting from scratch, how much power we would give to local governments, how much power to the central or federal authority, what the role of a president or premier should be, and a myriad of other, fundamental questions of political theory.

In addition, in freeing themselves from their Communist past, Central European constitution-writers can liberate Americans from the partisanship burdening so much contemporary American constitutional debate. A recent conference on constitution-writing the author attended linked Czech and Slovak constitution writers with lawyers from all points across the American spectrum, from Harvard Law School Professor Charles Fried, Solicitor General during the Reagan administration, to his colleague Professor Laurence H. Tribe, generally considered the nation's foremost "liberal" constitutional law scholar. At one luncheon Professor Fried, who is often thought of as quite "conservative," chided his Harvard colleague Professor Tribe for testifying in favor of a bill banning flag-burning. (The bill Professor Tribe defended as constitutional was somewhat different from the bill Congress eventually passed, and Professor Tribe was "delighted" that the Congressional Act was ultimately declared unconstitutional.) Rita Klimova, ambassador to the United States from the Czech and Slovak Federative Republic, with wholly understandable confusion, said to Professor Tribe, "Let me get this straight: You are a 'conservative' and you," she continued, pointing to Professor Fried, "are a 'liberal,' right?"

This exchange proves more than the inadequacy of American political labels, especially when applied to the different legal philosophies currently dividing American lawyers. It also illustrates why a diverse group like the Committee on the Revision of the Czech and Slovak Constitution was able to get along famously. Democrats lunched with Republicans, advocates of judicial "activism" debated with champions of judicial "restraint," and supporters of the parliamentary systems advised champions of presidential systems. The group, which prepared papers and attended a conference sharing ideas about the proposed constitution, included former Republican Senator Charles McC. Mathias, former Democratic Congressman and now Judge Abner Mikva, former Secretary of Labor in the Ford administration William C. Coleman, and former Counsel to President Carter, Lloyd N. Cutler. Our camaraderie was due in no small part to the fact that, as Americans, we agree far more than we disagree about what should and should not be in a constitution. We all believe in separating powers vertically and horizontally, establishing an important role for the judiciary, and protecting minority rights.

Meeting in Salzburg and Prague, contemplating someone else's constitution, freed us from the barnacles blighting so many of our constitutional disputes. We Americans could consider fundamental value choices without focusing on an existing text; we could talk about what a constitution should say, rather than fighting about what it did and did not say. For example, we avoided debating whether our president can initiate hostilities with a foreign government in light of our Constitution's grant to Congress of the power to "declare war." (U.S. Const., Art. I, sec. 10.) Instead, we were able to confront the fundamental public policy choice of whether one man should be able to commit a country to war.

Respecting the Context

Of course, these questions cannot be considered in the abstract. Every country, every society, has its own political traditions a constitution must accommodate. It does little good to propose a wholly centralized government in a country such as the Czech and Slovak Federative Republic which, as the name suggests, is divided between two peoples – the Czechs and the Slovaks – at least one of which fiercely guards its sovereignty. (The Czech and Slovak Federative Republic is the official name of what was once called Czechoslovakia. I hope both Czechs and Slovaks – especially Slovaks – will pardon me if I occasionally revert to the old name, especially in using it as an adjective. The formulation "Czech and Slovak Federative Republic-built automobile," for example, is awkward, to say the least.) Yet Professor A.E. Dick Howard of Virginia

Law School, a man with considerable experience in drafting state constitutions, observed at our conference that a constitution cannot arise only out of a country's particular experience. For a constitution to be considered minimally acceptable by the civilized world, it must have certain "transcendental" characteristics, such as means for protecting what are now sometimes called "human rights."

Steering a course between the general and the particular is often very tricky, and requires an intimate knowledge of the country and culture which will be governed by the new constitution. For this reason, Americans can most often only advise those in other cultures. Beware of those claiming to be the "drafters" of another country's constitution. For the most part, constitution-drafting is an enterprise that is, of necessity, reserved for those citizens who are to live under that constitution.

Yet Americans have much to offer nascent Central European democracies. To restate the overstated, the United States has the most venerable written constitution in the world. For all of its problems, American democracy functions reasonably well, and continues to provide ever-increasing power to individuals previously denied a say in how they are governed. To offer the benefit of our experience, however, we must do what Americans (especially American lawyers) often do very badly. That is, we must *listen* to what the "client" wants, instead of recounting at length what we can do and what we have to sell.

Former Canadian Prime Minister Pierre Trudeau tellingly began our conference by posing that very question. Yet many of the conference's participants immediately ignored him, and launched into long and eloquent proposals for an idealized constitution protecting and extending almost every human and social right ever conceived of by man, woman and law professor. This prompted Pavel Rychetsky, then Procurator (Prosecutor) General of the Czech Republic and now a First Deputy Prime Minister, to remark: "I feel as if I am in an automobile showroom being shown Mercedes-Benzes when I can afford only a Skoda" – a small, cheap Czechoslovakian car.

Sobered, we began to listen. In this we were aided by a list of issues Mr. Rychetsky, a primary draftsman of the constitutional draft we were discussing, prepared shaping the next day's discussion concerning the role of the judiciary. He asked that we address challenges ranging from the proper jurisdiction of the courts over constitutional questions to seemingly nuts-and-bolts questions such as how much a judge should be paid.

Like our own Framers, Professor Rychetsky recognized both the need for directed debate and the intimate relationship between the profound and the mundane. He realized that only by paying judges enough to attract to the bench people commanding a society's respect can one commit to them questions important to that society. Yet he cautioned us before answering those particular questions to bear in mind that Czechoslovakian judges had traditionally been severely underpaid and vested with authority to decide little more than property disputes.

Constitution-drafters in Central Europe are thus almost always "conservative," in that they are often trying to "conserve" as much as possible from their past legal systems, the better to make the "fit" between the constitution they draft and the existing culture. Seeking to retain as much as possible from the previous constitution serves a number of goals. First, it fosters the perception – and perhaps the fact – of stability, always a desirable characteristic in a constitutional system. Second, it increases the possibility that the new constitution will tap-into the cultural and psychic investment that a people have in an existing constitutional system.

Striving to conserve rather than recreate also guards against the temptation to construct a Platonically perfect but utterly inappropriate document. At all times it must be recalled that constitutions are political documents, often the product of hard (and not very pretty) compromises. Constitutions, if they are to work, cannot be disquisitions on the ideal political system. Rather, they must both reflect and improve the character of the people they are to govern. It is therefore often most useful to begin with the existing constitution, however freighted it may be with baggage from the previous regime. The operative principle should be "if it ain't broke, don't fix it."

Still, whatever the existing constitution provides, there are certain issues almost any constitution-writer must confront. These are primarily fundamental questions of power. The concerns challenging Czech and Slovak constitution-writers can be put in the following categories: (1) structuring the legislative and the executive branches; (2) the role of the judiciary; (3) federalism; and (4) protecting individual liberties.

Other formulations are possible; the number of sub-topics under these broad categories almost infinite. We can here only begin to scratch the surface of the countless decisions the Czechs and Slovaks must make in writing their constitution. Americans stand to gain a fresh perspective on these decisions as the Czechs and Slovaks experiment with different formulations.

Structuring the Executive and Legislative Branches

Because the government of the Czech and Slovak Republic, like that of some other Central European countries, is a parliamentary system with a relatively weak president, the Czechs and Slovaks' primary challenge here is to decide how large a role a president will take. That will depend in part on how he or she is to be elected. As a practical matter, a president serving at the pleasure of the federal legislature – namely, one who is removable and serves no fixed term – may often be relatively weak.

Most presidents, even those elected and removable by the legislature, play some role in foreign relations. In some systems the president is supposed to communicate but not set foreign policy. In others, the president plays a substantial role in negotiating, ratifying and terminating treaties. Many constitutions also name the president as the commander-in-chief of the armed forces. Yet the meaning of that term is often unclear, as it remains in the United States. Can the president ever commit forces without the consent of the legislature? Can the legislature call back those troops once committed? Those who have followed our own debate about the Wars Powers Resolution will recognize that we have not yet resolved these questions ourselves.

The Czechs and Slovaks will also have to decide whether to assign a "legislative" role to the president. Should they empower the president to veto legislation? To propose bills? To call the legislature into session? To dismiss it? To keep it in session?

The Czechs and Slovaks also need to decide how much power they wish to give a president over administration. In the United States, the president is the chief executive, or "enforcer" of the laws. Prosecutors and administrators report to, and, in most cases, are removable by the president alone. (See *Myers v. United States*, 267 U.S. 52 (1926); *but see Morrison v. Olsen*, 108 S.Ct. 2597 (1988), and cases cited and discussed therein.) In the complex, modern state this role alone vests enormous power in a president. Even assuming that an administrative structure responsible to one person is most efficient, a constitutor must still consider whether the legislature should be able to override the president's decisions other than by enacting prospective, general legislation. (I am indebted to one of my constitutional law professors at Columbia Law School, Louis Lusky, for introducing me to the word "constitutors," which I have always preferred to the more weighted "framers." This is especially true when discussing those who are amending a constitution rather than drafting it from scratch.)

Focussing on the role of a head of state only, even vis-a-vis the legislature, though, is to examine just half the equation. The most difficult and divisive problems facing our own Framers concerned the make-up of the legislature. Some of these questions might better be considered under the rubric of federalism, for they have to do with what constituencies are to be represented with what power in the federal assembly. Leaving those issues aside still requires the constitutor to choose between the bicameral and unicameral legislature, and the relative authority of the two houses of a bicameral system.

These structural issues are among the most country-specific of all. A country with a tradition of a unicameral legislature can in all likelihood – and depending on other factors – establish a working, functioning constitutional democracy as successfully as a country with a bicameral legislature. It is in questions such as this one that Americans advising Central European constitutors need be most humble. To take two examples, Israel and Italy both have unicameral legislatures, and though neither may lead to the most stable governments, their brand of democracy is certainly vibrant. Moreover, compared with the other nations in the world, both have generally excellent human rights records.

Perhaps of more importance than the number of legislative bodies, but beyond the scope of this article, is the means of electing legislators, a subject again closely related to federalism. Electoral reform is, so far as I have been able to discern, generally discussed separately from constitution-writing, although the two are of course related. Our own system commits to the states the decision of who is to vote for members of Congress, and permits each house to be the judge of its own elections. (U.S. Const., Art. I, sec. 5.) The only requirement in the original Constitution was that the states, although not the federal government, act in accordance with the republican form of government clause. (U.S. Const., Art. IV, sec. 4.)

Our own experience with the push and pull over specific powers between the executive and legislative branches counsels in favor of more clearly setting out the powers of each of the respective branches than did our Framers. Central Europeans can benefit from our experience by grappling directly with lingering questions giving rise to, and dominating, our separation-of-powers jurisprudence. Pointing to our problems may be the best help we can provide.

The Role of the Judiciary

The Czechs and the Slovaks are still debating about whether to give their judiciary the power to overturn legislative acts it deems inconsistent with the dictates of the constitution. This is the fundamental question in creating a judiciary. Many things flow from vesting the judiciary with the power to overturn legislative acts. For one thing, as noted above, people of substantial reputation must inhabit the bench for the populace to accept so anti-democratic an exercise of power by judges. However, many Central European countries rely heavily on career judges. These judges ascend to the bench upon completing law school or some form of "judge school."

American-style judicial review is most probably incompatible with these kind of career judges. Imagine the ire of the American populace were the flag-burning statutes to have been declared unconstitutional by a panel of twenty-five year-olds fresh out of school. One of the primary reasons the American people accept determinations of constitutionality by our judges is that we respect the individuals as well as the institution. The two are intertwined: judges – and consequently courts – are respected because it is presumed that those on the bench are wise men and women enriched with years of experience in life and the law.

Of course, it is possible to avoid this particular problem by establishing a separate constitutional court consisting of highly respected individuals, while still retaining career judges for other courts. Yet constitutional courts have their own difficulties. They tend to consider constitutional questions in the abstract, free from the very real "cases or controversies" heard by our own unified judiciary. This may force them to confront constitutional questions without the benefit of a full factual inquiry. American courts have generally found factual exposition useful in both illuminating and narrowing issues. Confronting constitutional issues without benefit of this inquiry can make courts far too willing to invalidate legislative enactments on constitutional grounds. Too frequent use of the power of judicial review increases the chances of a court incurring the anger – and thus disobedience – of the thwarted majority. On the other hand, some Central European states, such as Austria, have experienced a degree of success with constitutional courts, so their potential usefulness should not be discounted so quickly.

The way the Czechs and Slovaks decide to select their judges will also directly affect the judiciary's ability to set aside the legislature's edicts. Directly electing judges for limited terms will diminish the popular perception that its decisions are non-democratic. On the other hand, electing judges also substantially diminishes the chances that the judges will protect the minority from a majority determined to run roughshod over the minority's rights. Judges can undoubtedly afford to be more courageous if they are appointed for life with set salaries. Of course, they can also be more irresponsible. Americans reflexively opposing limited judicial terms should consider this century's experience with seemingly-immortal "old men" illegitimately thwarting the majority's will.

Other, more mundane issues with no "right" answers are the number of judges, appeals, and courts. A final, important issue is the scope of what is known in the United States as "standing." Though often thought of as a technical and esoteric jurisdictional matter, the question of who may sue is directly related to the role of the courts in a political system. Put simply, the more people who can sue and the more generalized grievances they can bring to the courts, the more issues the courts will decide, and the more important will be those issues. A broad standing rule allows courts to decide more than narrow, concrete disputes between two parties about, say, a breach of contract or a fight over a property border. Instead, courts may become a quasi-legislature, addressing generalized complaints that might otherwise be brought to the legislature. Permitting one hiker to challenge a government sale of federal park property increases the likelihood of hikers battling the sale of that property in the courts instead of in the legislature. Similarly, allowing a person offended by seeing a crucifix on government property to challenge that crucifix in court makes it more likely that his or her first refuge will be a judge, not a legislature. Thus, the Czechs and Slovaks will need to consider the proper jurisdiction of the courts together with the role they desire for the court.

Federalism

For multi-ethnic countries such as the Czech and Slovak Federative Republic, the question of federalism poses the most difficult challenge. As in marriage, federation requires surrender of a fair amount of autonomy and independence. Right now, the Slovaks are not at all sure that they want to be married to the Czechs. As such, negotiating the "prenuptial agreement" setting the terms of their union is enormously problematic. Recent reports indicate that the Slovak Republic is contemplating establishing its own foreign ministry. Such a step would even further imperil the now seemingly-remote possibility of a strong central federation, insofar as federations have traditionally at a minimum presented a common face to the world.

Thus, the Czechs and Slovaks must first decide whether they want to federate and what they expect to get from the relationship. Apparently, for now, many Slovaks, in the words of the immortal Greta Garbo, "vant to be alone." The Slovaks evidently believe that the Czechs, who outnumber them by about two to one, have benefitted far more from their traditional federation than have they. For that reason, the initial draft of the new Czechoslovak constitution included in it a right to secede. Although we Americans naturally counseled against such a right, here again American humility is appropriate. Less than a century and a half ago, of course, we were unable to resolve the divisive issue of the right to secede without resorting to war.

Even laying to rest the matter of whether to federate, the question remains: on what terms? There are at least two major and related factors. The first is the degree of responsiveness of the federal legislature to the local units. The second is the power that is to be vested in the federal legislature. I think it is safe to say that the more responsive the federal legislature is in structure to local units, the more comfortable those local units will be surrendering authority to the federal body.

The current constitution of the Czech and Slovak Federative Republic effectively gives the Slovak minority a veto over almost all significant legislation. This should, at least in theory, increase Slovakian willingness to allow a federal legislature – over which they have a significant amount of control – to decide important questions such as how much they are to be taxed and how money is to be spent. That the Slovaks are resistant to federation even on those terms is powerful evidence of their disaffection.

Our own Senate represents a concession to a minority, the smaller states. Afraid of being swallowed and dominated by the big states, the smaller states held out for a co-equal (in some cases superior) body in which they would have parity with the larger states. Only after that "Great Compromise" was reached were the smaller states willing to allow the federal legislature to set duties and tariffs, issue a currency, decide questions of peace and war, protect patents and copyrights, and do those things necessary for a country to function as one unit.

Thus, the second major set of questions that needs to be addressed under the rubric of "federalism" concerns which powers are to be vested in the federal legislature as against those that are to be retained by the local legislatures. High on this list is which body shall have the power to tax, issue currency, conduct foreign relations, and decide questions of peace and war and citizenship. Our first attempt at a constitution fell apart because the Articles of Confederation did not give the federal legislature the power to impose taxes directly. This made the national government overly reliant on the state governments, some of which simply did not pay up.

Protection of Individual Liberties

Because of their experience with Communist repression, the Czechs and Slovaks may be tempted to focus almost exclusively on the protection of individual liberties in their new constitution. It should by now be apparent, however, that establishing a new constitution involves far more than that. We Americans focus on our own Bill of Rights because the structural parts of the constitution establishing our government work so well that we take them for granted. Americans often forget that the Bill of Rights was not a part of the original Constitution. James Madison, among others, opposed appending a Bill of Rights to the Constitution. He thought it dangerous to try to list all of the rights a people retained against their government. Although he eventually realized his error, Madison understood that a constitution with unworkable, unrealistic, and unattended structural provisions would probably not protect the individual liberties of its citizens, whatever its bill of rights contains.

Nonetheless, today a constitution should have a bill of rights. That list of rights can contain both positive and negative injunctions. Our own constitution primarily places restraints on what government can do: for example, it forbids Congress from limiting the rights to free speech or a free press, and outlaws preferences based on religion. Other constitutions guarantee their citizens affirmative rights such as the right to a job, or housing.

For a government affirmatively to undertake such obligations poses a number of problems. At least one difficulty with such affirmative obligations is that the government's inability to fulfill them can promote disrespect for the constitution. A constitution can then come to be viewed as a vehicle of empty promises. That disrespectful view can affect its negative as well as the positive commandments – the "thou shalt nots" as well as the "thou shalts."

Trying to compose a comprehensive list of protected individual liberties contains at least one additional hazard. That is, man is fallible, and can easily leave something out. As noted, this was James Madison's primary argument against a bill of rights: he was afraid that leaving something off the list would suggest that it was unprotected. For this reason the Czechs and Slovaks will need to consider how to protect rights not mentioned in the constitution. Liberal democratic states start from the assumption that the people are the source of all power, or sovereignty, some of which they grant to their government in a constitution. Thus, powers not expressly given to the government in the constitution are retained by the people; hence, they are unenumerated rights to prevent the government from acting beyond the scope of its granted powers. The Czechs and Slovaks will have to consider how to address the risk created by trying to list a series of rights without being comprehensive.

Conclusion

Constitution-advising in Central Europe requires that we set aside our (somewhat justified) arrogance and parochialism in constitutional matters and seek to provide the benefits of our experience in as help-

(continued on page 48)

Democracy

Human Nature and Democracy/Secondary

William R. Marcy

Focus

This two- to three-day lesson provides a philosophical inquiry into both human nature and the ways to perceive and "control" behavior. Students are encouraged not to form conclusions about human nature but rather to understand that societies organize their political systems according to beliefs about human nature.

Objectives

At the end of the lesson, students should be able to:

1. identify, analyze and evaluate at least three ways to perceive human nature;
2. investigate and evaluate proposals of authority and governmental organizations which vary with a society's perception of human nature; and
3. understand that human nature is complex and there is no "simple" answer to evaluating human values and social institutions.

Strategy

This lesson uses a position paper and class debate.

1. Distribute Handout 1, "What is the Nature of Human Beings?—An Inquiry." To focus their arguments, they should understand the definition used for good, evil and neutral. After the class has an understanding of the three positions, they should write a position paper explaining their reasoned opinions on the nature of humans. They should use historical evidence, ideas, and specific personal experiences in the papers.
2. Divide the class into three groups. Each should represent one of the positions. A class debate will enhance understanding of each position.
3. Distribute Handout 2, the "Proposition." Have students confirm, reject or synthesize the proposals concerning authority, government and human nature. Discuss the values and beliefs necessary for a prosperous democracy. How does the society and government of the United States conform to student queries and propositions? Why don't other societies share similar beliefs and structures?

Handout 1:
What is the Nature of Human Beings?

Question: Are people born good, evil or neutral?
Good people are those who have an unselfish desire to cooperate for the benefit of the common welfare.
Evil people are those who sacrifice the common welfare to greed and personal desire.
Neutral people are those who are born without instinctive behavior. They learn exclusively from their environment; their actions are good or evil as their experiences dictate.
Assumption: By nature, humans are rational and social beings. The members of each society determine the form and function of their authority and government by common beliefs of human nature. A society's view of human nature determines the use and abuse of power and the quality of life.

QUERY 1

Do people have a natural tendency to be good? If given a choice between being selfish or sharing the necessities of life with someone, they would share. They would respect the rights of others and would view survival as a cooperative effort rather than an individual one. The Golden Rule would apply: "Treat others in a way which you would like to be treated." Peace and harmony are the keys to success.

QUERY 2

Are people naturally born with an instinct for self-preservation that is so strong that they put their personal interest over the interests of the group? Life can only be maintained effectively by personal interest and gratification. To prosper, a person must take before some other greedy person snatches it from him. If given a choice of being self-serving or sharing the necessities of life, people do not share before their own needs are met. People will sacrifice the rights of others for their own personal well-being. Survival is seen as an individual effort rather than a cooperative one: "survival of the fittest" is the reality of life.

QUERY 3

Are people born with a "blank slate" and learn to be good or evil according to the dictates of their environment? Environmental factors, the actions of others and education determine human nature. If one is born in a negative environment among greedy people and with no opportunity for enlightened education, then people will become self-serving and evil. If people are born in a positive environment, among caring people and given an education that promotes an enlightened philosophy, then they will act accordingly. They do not have a tendency toward good or evil. People are born neutral and inherit no behaviors from their parents or ancestors.

Handout 2
What is the Nature of Human Beings? —A Proposition

PROPOSITION 1

If humans are born good, then the governing authority can be less strict and exercise less control over individual behavior. The survival of society and its members is secure due to the common interest of the people. The organization of government is not rigidly structured. Leaders can trust people to run their own lives in cooperation with others for the benefit of all. A utopian society could be planned and happiness achieved through the good intentions of the people.

PROPOSITION 2

If people are born evil, then the governing authority must be strict to control the actions of others. Authority must permeate every aspect of society to force compliance with laws. Individual prosperity and the survival of the society depends upon the effectiveness of governing leaders. Since people can't be trusted to cooperate for the benefit of all, they must be made to conform to government regulations. There needs to be many laws to control the actions of the people; penalties must be harsh to deter harmful behavior. The prosperity of society depends upon the strength and effectiveness of the government to lead and control the population.

PROPOSITION 3

If people behave according to their experiences and learn from their environment, then the ruling authority and its organization depend upon common traditions and customs to control the behavior of people. Education is encouraged because people are not born good, they *learn* to be good. Laws and punishments encourage people to understand and appreciate the implications of their actions on the good of society. Government authority and its organization rely on common values founded on long-established customs and traditions to maintain order and prosperity. Laws can be either strict or lenient depending upon: the physical and social environment, accepted traditions and common values and experiences. The good life is gained through education and truth discovered through reason.

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Democracy

The Final Right/Secondary

Julia Ann Gold

Objectives

1. Students will state the facts of the *Cruzan* case.
2. Students will extract and prioritize the arguments from the lower court decisions in the case.
3. Students will develop and write arguments in support of their position.
4. Students will conduct a moot court simulation, using arguments and questions they have formulated.

Time Needed

Two class periods.

Resources

Handouts 1 through 6; an attorney would be helpful to assist students to prepare for their moot court arguments, or to listen in on the arguments, and give students feedback.

Procedures

1. Pass out Handout 1, the facts of *Cruzan v. Missouri Department of Health*, decided by the U.S. Supreme Court on June 25, 1990. Either have a student read the facts out loud, or students may read it themselves. Then ask the following questions to check for understanding of the facts.
   - Why was the artificial feeding tube inserted?
   - What will happen if it is removed?
   - What are the parents of Nancy Cruzan asking the court to do? Why did they have to go to court?
   - What does the state hospital want to do?
2. Ask for a show of hands to indicate how many would rule in favor of the Cruzans, how many against. Do not discuss the case yet.
3. Tell students they will now prepare for and conduct a moot court argument to the U.S. Supreme Court on this case. Pass out Handout 2, descriptions of the Missouri trial court's and the Missouri Supreme Court's decisions in the case. Give students time to review the decisions. Ask them to think about which decision they agree with, and to prioritize the arguments listed by each court, from strongest to weakest. After students have reviewed Handout 2, and prioritized the arguments individually, ask them what are the issues in this case? Put another way, what must the Supreme Court decide?

   Students may need some help defining the issues. The U.S. Supreme Court issued five different opinions in the case, each of which saw the issues in a slightly different light. However, for purposes of this lesson, the major issues are 1) whether the state can require that evidence of Nancy's desire to take away life-sustaining equipment (the feeding tube) must be proved by clear and convincing evidence, such as in writing; and 2) whether Nancy's right to refuse medical treatment is outweighed by the state's interest in preserving life.

   Once determined, write the issues on the board.
4. Assign four to six students to be attorneys for the Cruzans (the Petitioners), and four to six students to be attorneys for the Missouri Department of Health (the Respondents). Divide the rest of the class into groups of four to six students to be Supreme Court Justices. (Alternatively, the class can be divided into groups of "P"s, "R"s, and "J"s – Petitioners, Respondents, and Justices – so that everyone can argue or be a Justice.)
5. Give the attorneys the instructions in Handout 3 about appellate arguments. Explain that attorneys for the Cruzans will be arguing *in favor* of terminating the artificial feeding, and will use some of the Missouri trial court's arguments, and any others they can come up with. Attorneys for the state hospital will be arguing *against* removing the feeding tube, and will use some of the arguments advanced by the Missouri Supreme Court, plus any additional ones they can think of. Give the Justices copies of Handout 4. *Note to teacher:* Handout 6 is a list of additional arguments for each side. Depending on the level of the class, you may want to give this to both sides to help them prepare for their arguments, if they are having difficulty. The handout can also be used by the teacher to suggest additional arguments while circulating around the room, assisting the groups while they prepare, or in debriefing after the arguments.
6. Allow the groups to meet for the rest of the class period to prepare their arguments and questions for the next class. Attorneys should brainstorm as a group their best arguments and put them in order, from strongest to

Handout 1: Facts of the Case

On the night of January 11, 1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The car flipped over, and the 25-year-old woman was discovered lying face down in a ditch, not breathing and without a detectable pulse. An emergency medical team arrived at the scene and was able to restore her breathing and heartbeat. Still unconscious, she was taken to a hospital. At the hospital, neurosurgeons said that she had suffered significant anoxia (an extended period of lack of oxygen to the brain). Permanent brain damage generally begins after six minutes without oxygen; it was estimated that Nancy Cruzan was without oxygen for 12 to 14 minutes.

Nancy remained in a coma for three weeks, then progressed to an unconscious state in which she could swallow. With the consent of her parents and then husband, doctors surgically implanted a tube directly into her stomach to more easily provide her with food and water. Since that time, she has never recovered consciousness, can no longer swallow, and can only take in food and water through the artificial feeding tube. She has been cared for in a state rehabilitation hospital since October 1983. The doctors say there is no chance she will recover.

Nancy's husband dissolved their marriage. Her parents were appointed guardians for her in 1984. Finally, in 1987, more than four years after the accident, Nancy's parents gave up hope that she would ever recover. They asked the state hospital, (which is operated by the Missouri Department of Health), to stop the artificial feeding. If the feeding is stopped, she will die. (The cost of Nancy's care, $130,000 per year, is paid for by the state of Missouri.) The hospital did not want to stop the feeding, and refused to do so without court approval. The Cruzans asked a Missouri trial court judge to order the hospital to stop the artificial feeding.

- Why was the artificial feeding tube inserted?
- What will happen if it is removed?
- What are the parents of Nancy Cruzan asking the court to do? Why did they have to go to court?
- What does the state hospital want to do?

weakest. The Justices should prepare questions as a group to ask the attorneys during oral argument.

7. At the end of class, tell attorney groups to select one person to make their argument to the Court (unless you have divided the class into "P"s, "R"s, and "J"s). The teacher can either ask for volunteers or select nine students to be Justices. Select one student to be timekeeper, and the Justices should select a Chief Justice to moderate.
8. The next day, tell those class members that do not have a role that they will be Observers. Give them a copy of Handout 5, which should be completed during the arguments.
9. Arrange the class so that the Justices are sitting in front of the room, with attorneys facing them. Allow five minutes for the Petitioner (the Cruzan's attorney), five minutes for the Respondent (the state hospital), and up to two minutes rebuttal time for the Petitioner.
10. Then give the Justices five minutes to confer, in the presence of the rest of the class. The Chief Justice should then announce their decision, with supporting reasons.
11. After the arguments, debrief by asking the following questions (from the Observers' form):
    - What were the strongest arguments presented by the Cruzans? Can you think of any good arguments they forgot?
    - What were the strongest arguments presented by the hospital? Can you think of any good arguments they forgot?
    - What questions from the Justices were helpful in understanding each side's argument? Were there other questions you would have asked?
    - Do you agree with the Justices' decision? Why or why not?
12. Tell the students that the U.S. Supreme Court, in a 5-4 decision, decided that the Missouri Supreme Court's decision should be upheld, and Nancy Cruzan's feeding tube may not be withdrawn.

The majority opinion, written by Justice Rehnquist, decided that Missouri may require clear and convincing evidence of an incompetent person's wish to withdraw life sustaining equipment. The Court was careful to draw the question narrowly, and stated it as "whether the United States Constitution prohibits Missouri" from applying a clear and convincing evidence standard to decide whether another person may make a decision for an incompetent person about whether to withdraw life sustaining equipment.

The Court assumed for the sake of argument that *competent* persons have a liberty interest, under the Due Process Clause of the Fourteenth Amendment, to refuse unwanted medical treatment.* The Court found that an *incompetent* person, however, does not have the same right because he or she cannot make a choice. The patient's right must be exercised by someone else – a surrogate. To assure that the surrogate acts according to the patient's will, the state of Missouri may require clear and convincing evidence of the patient's wishes, such as a formal written request.

The Court also said that the individual's liberty interest to refuse medical treatment must be weighed against the state's interest in the protection and preservation of human life. Since the state's interest in life is so great, it may apply the clear and convincing standard to assure the right decision is

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*The Court's reliance on the due process *liberty* interest rather than a right of *privacy* is important in terms of future decisions on the abortion issue. The right to an abortion before viability recognized in *Roe v. Wade* was based on a right of privacy, which the Court has limited in recent decisions, such as *Webster v. Reproductive Health Services*, the Court's 1989 decision that upheld a Missouri law banning abortions in public hospitals. The *Cruzan* decision contains arguments that are helpful to the "right to life" movement. The Missouri Supreme Court based its deference to the state's interest in preserving life on the Missouri abortion law considered in *Webster*.

made. Since a wrong decision not to cut off life support will result only in the status quo (leaving Nancy as she is), that is preferable to a wrong decision for terminating life support, which is irreversible (since she would be dead).

The Court also stated that in protecting human life, the state of Missouri may decide not to consider the "quality" of life that a particular individual may enjoy, and simply choose to balance "an *unqualified* interest in the preservation of human life . . . against the constitutionally protected interests of the individual."

Handout 2

THE MISSOURI TRIAL COURT'S DECISION

The Missouri trial court heard three days of testimony from Nancy's family, her doctors, a court-appointed guardian ad litem (the guardian appointed just for the court proceeding, to investigate and advise the court what he found to be in Nancy's best interests), and nursing staff at the center where she is being cared for.

After hearing all the testimony, the judge decided that Nancy was in a "persistent vegetative state" (despite some conflicting testimony from some of the nursing staff that Nancy had responded in a limited way to her environment). A persistent vegetative state means that she may *react reflexively* to sounds, movements and normally painful stimuli, but she cannot *feel* any pain or *sense* anybody or anything. The judge also ruled that she will never recover the ability to swallow; that she is a spastic quadriplegic with irreversible muscular and tendon damage to all four of her limbs; that her brain damage is irreversible, permanent, progressive and ongoing; her muscles are atrophying (wasting away due to lack of use); her arms and legs are contracting, and her fingernails sometimes cut into her wrists because her hands are bent inward. She could live for another 30 years in this condition, if food and water continue to be provided through the tube into her stomach.

After hearing testimony from Nancy's family and friends, the judge decided that, given her present condition, Nancy would not wish to continue with the artificial feeding. This was based on a serious conversation she had had with a roommate a year before the accident, when she told the friend that she did not want to live if she could not "live at least halfway normally." Other statements to family members suggested that she would not want to be maintained on life support equipment.

The trial court judge ruled that:

1. Giving food and water through a feeding tube is "medical treatment," because Nancy could not survive without it and the tube was surgically implanted.
2. Nancy's present existence is not God's will, but the will of man to forcefully feed her when she herself cannot swallow.
3. Based on the testimony of friends and family about statements she made before the accident, Nancy would not wish to continue her life in its present state.
4. Missouri law allows withdrawing of feeding tubes as long as no homicide or suicide occurs, no innocent third parties would be harmed, and good medical ethical standards are followed. None of these would prevent the removal of the tube in Nancy's case.
5. Nancy has a fundamental right of liberty, under the Missouri Constitution and the federal constitution to refuse or direct the withdrawal of "death prolonging procedures."
6. Since Nancy cannot speak for herself, her guardians have the authority to act in her behalf. To deny the guardians the authority to act in Nancy's behalf would deny Nancy equal protection under the law.

The court ruled that the guardians – Nancy's parents – had the authority to decide whether the feeding tube should be removed and directed the hospital to carry out their request to do so. The state appealed the case directly to the Missouri Supreme Court.

THE MISSOURI SUPREME COURT'S DECISION

The Missouri Supreme Court, by a vote of 4-3, reversed the trial court's decision. It based its decision on the following points:

1. Nancy is not terminally ill, because she could live another 30 years. We would be responsible for starving her to death if the feeding tube is disconnected. The state of Missouri has a duty to protect her life and the many others in Nancy's situation.
2. This is not a case of life or death, but *quality* of life or death. To allow a person to refuse treatment because they don't like the *quality* of their life is to approve of suicide. The court cannot choose suicide for Nancy Cruzan.
3. The state of Missouri has an "unqualified" interest in preserving life. Therefore, no one can make a choice to withdraw life support for an incompetent person (someone unable to make the decision for herself, like Nancy) unless there is *clear and convincing evidence* of the incompetent person's wishes, such as a formal, written document. The statements made by Nancy to family and friends are not sufficient.
4. The state of Missouri recognizes a right to refuse medical treatment, but it does not apply in this case because the continued feeding through the tube is not a burden to Nancy because she is not in pain, and Nancy's individual right to refuse treatment is outweighed by the state's unqualified interest in preserving life.

The Cruzans appealed the Missouri Supreme Court's decision to the U.S. Supreme Court. The Court issued its ruling on June 25, 1990.

- Which decision do you agree with? Rank the arguments in each decision from strongest to weakest.
- What are the issues in this case? Write two sentences stating what the Supreme Court will consider.

Handout 3: Instructions for Attorneys— Appellate Arguments

In your small groups, identify the legal arguments you will present to the Supreme Court. You will have seven minutes to make your arguments. If time allows, up to two minutes of rebuttal argument by the Petitioner may be allowed. The order of argument is Petitioner (Cruzans) first, Respondent (state hospital) second, with rebuttal only from the Petitioner.

Write a clear, brief statement of your position in this case.

Each group should consider what *facts* it might use to provide support, or prove, its arguments. Consider how those facts support your position.

Some tips on making a legal argument:

1. Begin your argument by stating what your position is and quickly summarizing the basis for that position.
2. Since legal conclusions (such as "There is sufficient evidence that Nancy would not have wanted to be artificially fed") must have a factual basis to support them, be sure that your arguments are based on the facts of the case.
3. Don't worry about "legalese" in your argument. Decide what your group wants to "win" in the case, what facts you feel support your goal, and argue accordingly.
4. Remember the time limitations. If you have many points you want to make, you may want to prioritize and emphasize in detail only the most important ones. Tell the court that your other points (perhaps listing them very quickly) have been covered in your written brief.

Handout 4:
Instructions for Supreme Court Justices

When preparing to hear oral arguments from attorneys, Justices review the briefs (written arguments) submitted by the parties, and prepare questions for the attorneys. Since you do not have the briefs, review the facts, and the lower court decisions. Think about what facts you don't understand, and what questions you want answered before you decide this very important case.

As a group, think of at least five questions to ask the attorneys during their arguments. Each Justice should prepare a list of questions, which will be turned in at the end of class.

During the arguments, feel free to interrupt the attorneys if you have questions; that's what the Supreme Court Justices do.

After the attorneys have argued, you will have five minutes to confer about your decision. The Chief Justice will moderate, making sure that each Justice has an opportunity to speak. One way to assure this is to take a poll, allowing each person to speak in turn. You can then vote. The Chief Justice will announce the decision of the Court.

Handout 5:
Questions for Observers

- What were the strongest arguments presented by the Cruzans? Can you think of any good arguments they did not make?
- What were the strongest arguments presented by the hospital? Can you think of any good arguments they did not make?
- What questions from Justices were helpful in understanding each side's argument? Were there other questions you would have asked?
- Do you agree with the Justices' decision? Why or why not?

Handout 6: Arguments for Attorneys

ATTORNEYS FOR THE CRUZANS

Consider the following points in making your arguments:

1. Nancy is going to remain a prisoner of advanced medical technology, perhaps for another 30 years. Before recent advances in medicine, she would have died the night of her accident. It is a violation of her right to refuse medical treatment to keep her alive by continuing to feed her through a tube into her stomach.
2. The right to be free from unwanted medical treatment is so important that it outweighs the state's interest in the preservation of life.
3. Nancy Cruzan clearly stated to friends and family that she did not want to live if she could not "live at least halfway normally."
4. The Supreme Court has recognized that a competent person (someone who is able to express his or her wishes) has the right to refuse medical treatment. Therefore, an incompetent person should also have that right, which must be expressed by another person, such as the guardian or family members.
5. The Court should consider the *quality* of life of the patient when balancing the interest of the individual against that of the state. We are not preserving her "life," but just her body.
6. If families think they might not be able to stop life support systems even after the patient has stopped responding, they will be reluctant to take advantage of all possible medical procedures. For example, a treatment that might save a life might not be started at all because the doctor or family is afraid they will find it difficult or impossible to stop the treatment, if it proves to be useless. This could result in lives lost that might have been saved.
7. Few people leave clear written instructions about whether they want to refuse medical treatment if they become incompetent. If the majority of persons' desires are to be considered, we must allow their wishes to be heard based on their statements to family and friends.

ATTORNEYS FOR THE HOSPITAL

Consider the following points in making your argument:

1. The wishes of Nancy Cruzan are unclear, so the hospital does not have the right to end her care.
2. Since Nancy's wishes are unclear, her parents as her guardians do not have the authority to decide on her behalf. Only the state has that right.
3. Since the state has a duty to protect human life, the Cruzans must show by clear and convincing evidence that Nancy would have chosen to end the feeding.
4. To remove the feeding tube would be to assist Nancy in starving to death, which would be the same as assisting her to commit suicide, a crime in Missouri.
5. Life is precious and should be preserved without regard to its quality. How can we say that Nancy's life as it is is not worth living or worthless?
6. Giving Nancy food and water through a tube is not medical treatment, but providing a basic necessity of life, essential to all of us. To withdraw the tube would be the same as killing Nancy by starving her.

Editor's note: For additional discussion of *Cruzan*, see page 39.)

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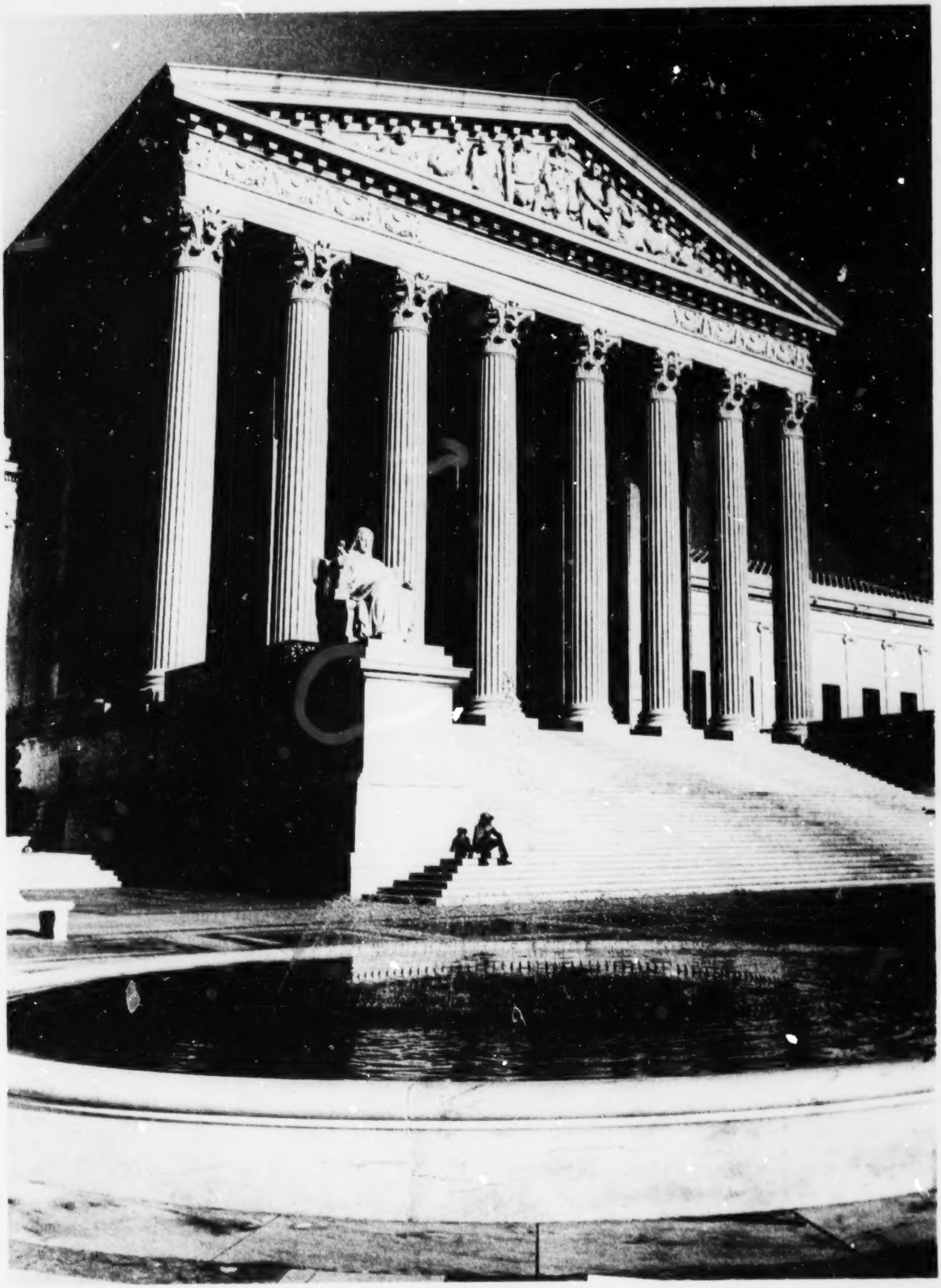

COURT BRIEFS

R. Nankivell, S. Welling, L. Bruin

Does a now incompetent person have an exercisable right to refuse medical treatment?

On June 25, 1990, the United States Supreme Court handed down its long-awaited decision in *Cruzan v. Director, Missouri Department of Health*, 58 U.S.L.W. 4916 (June 25, 1990). While in its narrowest, but most publicized sense, the decision denies permission to Nancy Cruzan's parents to withdraw the artificial feeding that keeps her alive, the case should be viewed in a broader context, as typifying the Court's continuing division on the controversial issue of whether there is a right to privacy, arising out of *Roe v. Wade*.

The Story of Nancy Cruzan

At about 1 a.m. on January 11, 1983, 25-year-old Nancy Cruzan was found by a state trooper lying in a ditch near her overturned car. The paramedics who arrived within minutes could find no signs of respiration or heartbeat, and began CPR. Under instructions from the hospital emergency room doctor, they then inserted a tube down her windpipe to gain complete control of her respiratory system, and began an intravenous drip. Breathing and a faint heartbeat were restored, and Nancy was taken by ambulance to the hospital.

Nancy's brain, however, had been without oxygen too long, a condition known as anoxia. It was later determined that her brain had already suffered permanent and irreversible damage. The upper part of Nancy's brain – the part which controls all thinking, feeling and seeing – had been destroyed. The lower part, which regulates breathing, blood pressure, heartbeat, and body reflexes, is, however, still functioning.

While the higher functions of Nancy's brain have ceased, her body could live on for perhaps another thirty years, provided it is supplied with nutrition and hydration. Clinically, Nancy is in "a persistent vegetative state."

Following the accident, Nancy remained in a coma for some three weeks, and then appeared to progress to an unconscious state. For a short while, she was able to take food by mouth. However, the doctors became concerned that she was not able to take enough by mouth to sustain her. They asked Nancy's father, and her then husband (they have since been divorced) for consent to the surgery necessary to insert a gastrostomy feeding t-tube into Nancy's stomach. At the time he agreed to the procedure, Nancy's father believed there was a chance that Nancy's condition might improve.

For years, Nancy's family clung to the faint hope that her condition might someday improve, but gradually the Cruzans came to accept that the person they knew as Nancy was gone.

In May 1987, more than four years after the accident, convinced that she would not wish to continue a mere biological existence lacking the ability to think or move, Nancy's parents asked the state rehabilitation center to stop all medical treatment. Both the hospital administrator and the probate court judge overseeing Nancy's guardianship told them they needed a court order to grant the request.

The trial court judge heard three days of testimony. Nancy's interests were represented by her parents (as her guardians) and, separately from her parents, by a court-appointed attorney acting as guardian ad litem (a guardian for the purpose of the trial). The family's petition was opposed by the State of Missouri.

At the trial, conflicting evidence was presented as to Nancy's condition. Her family said they had never seen any response from her since the accident. Members of the nursing staff, however, testified that when an individual speaks to Nancy, she responds by turning to that individual; that she is more responsive to some individuals (particularly those who spend more time with her) than she is to others; and that she cried when a Valentine's Day card was read to her, and shortly after visits by her family.

The expert medical evidence was also at odds. A noted neurologist concluded that all the responses exhibited by Nancy Cruzan were merely reflexive, and fully consistent with his opinion that she is in a persistent vegetative state. Two other neurologists, on the other hand, concluded that, while severely impaired, she is not in a persistent vegetative state because she is sensitive and responds, even if only in a limited way, to her environment.

Judicial History

Before reviewing the judicial history of *Cruzan*, a look at the history of this area of law, and how the law stood when the United States Supreme Court decided to review the Missouri Court decision, will help in understanding the context of the decision.

The original, landmark case was that of Karen Ann Quinlan in 1976. In circumstances very like those of Nancy Beth Cruzan and her family, Karen Quinlan's father obtained an order from the Supreme Court of New Jersey enabling him to have her disconnected from her artificial respirator.

In the ensuing fourteen years, state courts and legislatures have wrestled with similar cases. Until *Cruzan*, the Supreme Court declined to accept any case in this area of law.

A fairly clear consensus had developed in the various state court decisions. The Missouri Supreme Court in *Cruzan* described this consensus as "nearly unanimously . . . hav[ing] found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought."

The Missouri Supreme Court saw itself as deliberately rejecting that consensus. Between July and November 1988, the Missouri decision was one of three state high court decisions that restricted the right to refuse life-sustaining medical treatment, at least on behalf of an incompetent ward.

The other decisions were *Grant*, in which the Washington Supreme Court excluded artificial nutrition and hydration from the treatments capable of being withdrawn on behalf of an incompetent, and *O'Connor*, in which the New York Court of Appeals insisted that there be "clear and convincing" evidence of the wishes of the incompetent ward, and significantly tightened that evidentiary requirement.

Supporters of the *Quinlan* consensus were hopeful that the Supreme Court would affirm an overriding federal constitutional right. It was widely expected that the Court would resolve the major issues of legal principle.

In *Cruzan*, the trial court had the responsibility of overseeing the legal guardianship of Nancy Cruzan by her parents. Accepting the evidence of the family's medical experts over that of the hospital staff, it held that Nancy Cruzan is in a persistent vegetative state. It found, in addition, a constitutional right to refuse treatment in both the state and federal constitutions, and also a common law right to refuse unwanted medical treatment.

In the exercise of its supervisory power over the guardianship, the trial court authorized Nancy's parents to make the decision as to whether to refuse artificial nutrition and hydration or not.

The state appealed and the Missouri Supreme Court reversed, holding that Nancy had no such right to refuse artificial nutrition and hydration under the state constitution, or the common law of the State of Missouri. The court further held that the power of guardians under Missouri law is limited to the affirmative duty of assuring that their wards receive treatment, meaning that a guardian's power to consent to medical treatment does not include the power to withhold consent, or to order the withdrawal of treatment.

Under our federal system, the decision of a state high court is final in relation to all matters of state law subject only to that state law being held to violate rights under the United States Constitution.

Accordingly, three of the four bases of the trial court decision that were overruled by the Missouri Supreme Court were not subject to review by the United States Supreme Court. These were the state law matters of the Missouri State Constitution, guardians' powers under the Missouri State statute, and the common law right to refuse unwanted medical treatment.

All that remained was the fourth basis of decision: the individual right of privacy under the federal Constitution.

The Missouri Supreme Court questioned whether there was any federal constitutional right of privacy involved, but said that, if there were, it could be exercised on behalf of an incompetent only where there is a living will or "clear and convincing, inherently reliable evidence [of the incompetent's wishes]." It held that the evidence of Nancy Cruzan's wishes did not meet this standard.

Question of Interpretation

By a vote of 5-4, the Supreme Court affirmed the decision of the Missouri Supreme Court. The majority opinion, written by Justice Rehnquist, is notable more for what it does not say than for what it does. It does not state unequivocally whether there is, or is not, a constitutionally protected right to refuse life-sustaining medical treatment. The majority say merely that they "*think* the logic of the cases discussed above would embrace such a liberty interest" and "for the purposes of this case, we *assume* that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" (emphasis added).

The logic of the majority opinion is that, even if there were a constitutionally protected right, the "clear and convincing" evidence requirement imposed by the State of Missouri on the exercise of that right, and the judicial denial of Nancy Cruzan's petition, would not violate any such right. The Court, therefore, does not have to decide whether or not the right itself exists.

The ongoing conflict between strict and broad constitutional interpretation is reflected in the Supreme Court opinions in *Cruzan*. At one end of the spectrum, Justice Scalia writes that the federal courts have no business in this field, that there is no constitutional right at stake. In Justice Scalia's view, "the Constitution has nothing to say about the subject."

At the other end of the spectrum is Justice Brennan (now retired) who wrote for himself and for Justices Marshall and Blackmun. Although Justice Brennan speaks of "a fundamental individual liberty interest," rather than the right to "privacy" announced in *Roe v. Wade*, the two concepts are surely only a hair's breadth from one another.

One may speculate that the majority opinion's avoidance of the issue enabled Justices O'Connor and Scalia to join in that opinion, although their separate concurring opinions take wholly opposite positions (Justice O'Connor, that there clearly is a constitutionally protected liberty interest; Justice Scalia, that there clearly is not).

It is, to some extent, true to say that the Cruzan family was caught up in the wider ideological debate about constitutional philosophy and, in particular, the controversy over the scope of the right to "privacy" announced in *Roe v. Wade*.

However, both sides of the Supreme Court decision do examine the evidence and issues in this particular case. Justice Brennan cannot see any state interest that could outweigh the rights of an individual in Nancy Cruzan's position. According to Brennan, the "clear and convincing" evidence requirement, as explained by the Missouri Supreme Court and applied to the evidence in this case, is not only not likely to enhance the likelihood of an accurate determination in this respect, but is inconsistent with accuracy. He sees it as "improperly biased procedural obstacles imposed by the Missouri Supreme Court" resting "on the State's own interest in a particular substantive result."

The majority takes a contrary view. It points out that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment, and sees the Missouri evidentiary requirement as protecting the interests of the individual, as well as those of the state, in life.

Apart from the discussion of the substantive "right to die" issues, the United States Supreme Court decision in *Cruzan* is, in a very real sense, not a decision on the merits of that area of law. Rather, it is a decision on constitutional law, and on the extent to which the federal constitution operates to limit the right of individual states to decide what will be the law in their states.

As Chief Justice Rehnquist said, writing for the majority: "State courts have available to them for decision a number of sources – state constitutions, statutes, and common law – which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision that it did."

Just as Missouri is free to refuse to permit the withdrawal of artificial nutrition and hydration in this case, so other states are free to allow it in similar cases. Justice O'Connor emphasizes this in her concurring opinion: "Today, we decide only that one state's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the laboratory of the States . . . in the first instance."

Generally speaking, commentators have praised the *Cruzan* decision. The editorial columns of *The New York Times*, *The Chicago Tribune*, *The Christian Science Monitor*, and *The Washington Post* have described it as "bold yet prudent" (although harsh for the Cruzan family), "a monumental example of law adjusting to life," "prudent," and "sensitive," and "not unreasonable [in deciding] to move slowly and encourage the states to act." Almost universally, it has been hailed as announcing constitutional support for advance directives such as living wills and durable powers of attorney.

However, even Justice O'Connor, whose concurring opinion discusses advance directives in some detail, emphasizes that that issue is not decided. The view that "such a duty *may well* be constitutionally required" and the statement that "today's decision . . . *does not preclude* a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate" (emphases added) fall significantly short of saying that that is the law.

– Ross Nankivell

(*Editor's note:* See page 34 for a secondary school strategy based on *Cruzan*.)

Constitutional rights and drunk driving

In three decisions handed down this spring dealing with the rights of defendants in drunk driving cases the Court continued to be sharply divided over the extent of constitutional protection to be afforded those accused of criminal offenses.

The Fourth Amendment provides that in order to arrest someone, the police must have probable cause to believe that a crime has been committed and that the person to be arrested committed it. In 1964, the Supreme Court introduced a variation on this theme in *Terry v. Ohio*. *Terry* and its progeny allow police to temporarily seize and detain a person if they have an articulable and reasonable suspicion that criminal activity is afoot. The theory is that since a temporary seizure is less intrusive than an arrest, it can be justified on lesser grounds – reasonable suspicion rather than probable cause. To qualify for *Terry's* balancing approach, the state must have a significant interest in the police activity. The idea that police activity can be analyzed by balancing the extent of the intrusion to the individual against the state's interest in the police activity has come to dominate Fourth Amendment jurisprudence.

The Court used this balancing analysis in *Michigan Department of State Police v. Sitz*, No. 88-1897 (June 14, 1990). In *Sitz*, the Michigan police established a highway sobriety checkpoint program. They ran one test operation, consisting of a roadblock in Saginaw County between midnight and 1 a.m. One hundred twenty-five drivers were stopped and questioned for evidence of drunkenness; two were arrested.

Before the sobriety checkpoint program was put into effect statewide, a group of licensed Michigan drivers filed suit to enjoin the program and prohibit its implementation. After a trial to the court, the judge held that the program violated the Fourth Amendment and the Michigan Constitution. The Michigan Court of Appeals agreed that the program violated the Fourth Amendment. The state appealed to the U.S. Supreme Court.

The Court reversed, holding that the sobriety checkpoints did not violate the Fourth Amendment. The opinion of the Court began by noting that the correct analysis of this police activity was based on the balancing test rather than the traditional probable cause approach. Michigan conceded that a temporary seizure of the drivers occurred when they were stopped at the roadblock and questioned, so the critical question was whether the temporary seizure was reasonable.

To answer this question, the Court began by noting that the problems posed by drunk driving were huge, and that the state therefore has a significant interest in controlling it. Balanced against this interest, the intrusion to the individuals was slight: the duration of the stops was approximately 25 seconds, and the intensity of investigation required only that the drivers answer a few questions. The Court discounted the notion that the intrusion was significant because the roadblock would generate fear and surprise.

Finally, the Court noted that the "effectiveness" analysis relied on by the Michigan trial court to find the program unconstitutional was inappropriate. The trial court heard extensive testimony on sobriety roadblocks and concluded that they were not an effective method of controlling drunk driving. The Supreme Court noted that such empirical evidence and judgments were best left to other government officials, and should not be used in a court's analysis of constitutionality.

Five justices joined the opinion of the Court. Justice Blackmun concurred in the judgment, noting the shocking death toll on the nation's highways and, until recently, the lack of public concern over it. Three justices dissented. Justice Brennan, joined by Justice Marshall, agreed that balancing the state's interests against the intrusion to the individual was the correct analysis, but argued that allowing police to stop cars with no individualized suspicion at all was inconsistent with precedents. Justice Stevens also agreed that balancing was the proper analysis, but felt that the state's interest in sobriety checkpoints was overstated and the individual's interest in avoiding random, surprise seizures was not given sufficient weight.

One interesting point about *Sitz* is the Court's abandonment of the requirement that the state show a reasonable suspicion that individual drivers were involved in criminal activity (drunk driving). The balancing approach introduced in *Terry* permits a lesser intrusion on lesser grounds, but it does not dispense with individualized grounds altogether, as the Court did in *Sitz*. The significance of this decision lies in the Court's willingness to allow police to make temporary seizures, however minor, even when there is no individualized suspicion.

Incriminating Tapes

The Fifth Amendment provides that no person shall be compelled to be a witness against himself. If this privilege against self-incrimination is violated, the testimony elicited from the defendant cannot be used. In order for the privilege to apply, however, several conditions must be met. First, the privilege does not apply to real or physical evidence, but only to testimonial or communicative evidence. Second, the *Miranda* decision interprets the privilege to require that the defendant be advised of his right to remain silent at the pretrial stage, but only if the defendant is in custody and is being interrogated. These conditions were the focus of *Pennsylvania v. Muniz*, No. 89-213 (June 18, 1990).

Inocencio Muniz was stopped by a police officer on suspicion of drunk driving. After Muniz failed three field sobriety tests and otherwise appeared drunk, the officer arrested him and took him to the station. At the station, Muniz underwent various sobriety tests, which were videotaped. First, he was asked a series of questions, including his name, address, height, weight, eye color, date of birth and the current date. A final question was the date of his sixth birthday. Muniz responded correctly to these questions, except the last one. The videotape revealed that his speech was slurred and he lacked coordination.

Muniz was then taped taking the same three field sobriety tests he had taken on the highway. During these tests, he asked questions and made incriminating statements. Finally, the police asked Muniz to take a breathalyzer test. Muniz ultimately refused, but during the discussion he made additional incriminating remarks.

The trial court convicted Muniz of driving under the influence. The videotapes were admitted into evidence against him. He moved for a new trial, arguing that admission of this evidence violated the privilege against self-incrimination because he had not been advised of his *Miranda* rights. The trial court denied the motion. The Pennsylvania appellate court reversed, holding that all audio portions of the tapes should have been suppressed. The Pennsylvania Supreme Court denied review, and the state appealed to the Supreme Court.

As to the videotaping of the initial questions, the Court agreed that the slurring and lack of co-ordination evident from the tapes was not protected by the privilege as it was physical rather than testimonial evidence. As to the response to the sixth birthday question, five justices concluded it was testimonial and should be suppressed as a violation of *Miranda*, while four justices concluded it was admissible because it was not testimonial. Regarding the other seven questions posed to Muniz (name, address, height, weight, eye color, date of birth and the current date), eight justices agreed the responses were admissible but disagreed on the reason. Chief Justice Rehnquist and three other justices thought the responses were admissible because they were not testimonial; while Brennan and three other justices thought the responses were testimonial and were the product of interrogation but otherwise fell within an exception to *Miranda* for routine booking inquiries.

Finally, as to Muniz's statements during the three sobriety tests and his comments regarding the breathalyzer test, eight justices agreed that the statements were testimonial but were not a response to interrogation and were therefore admissible.

Obviously, the Court was badly split. As to the sixth birthday question, the Court voted 5 to 4 in favor of suppression. As to the seven other questions, although eight justices agreed that the responses were admissible, there is no new law. Five justices must join an opinion before it is an "opinion of the Court" and is considered law. Since the justices split 4 to 4 on the admissibility of the responses to the seven questions, there is no opinion of the Court, and, therefore, no law, on that issue.

The significance of *Muniz* can be summarized as follows. First, the Court is almost evenly divided over the question of whether *Miranda* includes an exception for routine administrative booking questions. This is a potentially large exception which is likely to become law if more justices hostile to *Miranda* are appointed. Second, the Court is in disagreement on the distinction between testimonial and physical evidence, a conflict that will continue until a majority coalesces.

Limits on Double Jeopardy

The double jeopardy clause of the Fifth Amendment provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." In *Blockburger v. U.S.*, 284 U.S. 299 (1932), the Court announced a test for applying the double jeopardy clause and determining whether a course of conduct violating two criminal statutes constitutes one or two offenses. The test is whether each criminal statute requires proof of an element the other does not. If this test is met, there are two separate offenses and both can be prosecuted without violating the double jeopardy clause. In *Grady v. Corbin*, No. 89-474 (May 29, 1990), the Court held that satisfying the *Blockburger* test was not the only requirement to pursue two prosecutions.

On October 3, 1987, Thomas Corbin drove his car across a double yellow line and hit two oncoming cars. Two victims were seriously injured; one died that evening. Corbin was given two traffic tickets, one for driving under the influence (his blood alcohol level was .19, nearly twice the legal limit) and one for failing to keep right of a yellow line. He pleaded guilty, was fined $360 and lost his drivers license for six months.

Later, Corbin was indicted for reckless manslaughter for the victim who died, reckless assault for the victim who was injured, and driving under the influence of alcohol. The state indicated that it intended to rely on his drunk driving and his crossing the yellow line as proof of recklessness.

Corbin moved to dismiss the felony charges on the basis of New York statutes and the double jeopardy clause. The trial court denied the motion and was upheld by the intermediate appellate court. New York's highest court, however, reversed, holding that the DUI charge was barred by state statutes and the homicide and assault charges were barred by the double jeopardy clause. The U.S. Supreme Court granted review to consider the double jeopardy issue.

In a 5 to 4 decision, the Court held that the double jeopardy clause bars a subsequent prosecution if, in the second prosecution, the government will prove conduct for which the defendant has already been prosecuted. This test is imposed in addition to the usual *Blockburger* test. In this case, the second set of charges did qualify as separate offenses under the *Blockburger* test because each contained elements the other did not. This meant that the traffic offenses of DUI and failing to keep right could be proved without necessarily proving death or injury; and the homicide and assault charges

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could be proved without necessarily proving driving under the influence or failing to keep right. The prosecution would thus not be barred by *Blockburger*.

The Court's decision, however, requires more than mere satisfaction of the *Blockburger* test. It holds that a subsequent prosecution cannot rely on conduct for which the defendant has already been prosecuted. The state had indicated it would rely on the drunk driving and the failing to keep right as proof of recklessness, so the prosecution was barred. The state could avoid the double jeopardy bar only by discarding the drunk driving and failing to keep right of the yellow line as proof of recklessness.

Four justices dissented. Justice Scalia disagreed with the contention that the "same offense" was involved merely because the state would prove conduct that was the basis of a previous charge. He wrote that he would retain the *Blockburger* test as the exclusive criterion for determining the applicability of the double jeopardy clause.

Grady is significant because in many cases the prosecution of federal crimes is based on separate state or federal offenses. Examples are the Racketeer-Influenced and Corrupt Organization Act (RICO) and the Travel Act. If the defendant has been prosecuted for such predicate offenses, prosecution of the subsequent crime may be barred under this new test. *—Sarah N. Welling*

Religious clubs may meet at public schools

The U.S. Supreme Court, in a divided decision, has ruled that public schools must allow religious clubs to meet on school grounds if the schools permit other extracurricular student groups to do so. In *Mergens v. Board of Education of Westside Community Schools*, 58 U.S.L.W. 4720 (1990), six justices agreed that the Westside Community Schools in Omaha, Nebraska violated the Equal Access Act by refusing to recognize a student prayer and Bible reading club. Six justices also concluded that the Equal Access Act does not violate the First Amendment prohibition against government establishment of religion. However, since these six justices could not agree on a rationale, there was no majority opinion on the Establishment Clause issue.

The Equal Access Act was enacted by Congress in 1984 to prohibit certain schools from denying equal access to student groups wishing to meet at school. Public secondary schools that receive federal funds and maintain a "limited open forum" cannot discriminate against student groups for religious, political, or philosophical reasons.

Under the act, a school has a "limited open forum" when it allows the opportunity for one or more noncurriculum related groups to meet on school grounds during noninstructional time. A school which permits only student groups directly related to the school curriculum to meet on school premises is not subject to the act, but, if a school permits any noncurriculum related group to meet at the school, the act applies. The statute does not define the phrase "noncurriculum related student group."

In 1985, Bridget Mergens asked Westside's principal to allow a Christian student group to meet at the school. She also asked that it be recognized as a student club, with the same privileges as the approximately 30 other extracurricular clubs recognized by the school, with one exception—the proposed club would not have a faculty sponsor.

School officials denied Mergens' request, stating that board of education policy required all clubs to have a faculty sponsor and that it had not created a limited open forum for student clubs. The school district also believed that permitting a religious club at the school would violate the Establishment Clause.

Eight justices ruled that Westside High School violated the Equal Access Act when it denied Mergens' request. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Blackmun, wrote the lead opinion. Justices Marshall and Brennan concurred in the judgment only.

In the Court's opinion, as expressed by Justice O'Connor, the obligation to provide equal access for all student groups is triggered by the Equal Access Act as soon as a school allows even one noncurriculum related group to meet on school premises. Although the act does not define "noncurriculum related student group," that term must be broadly interpreted to mean any student group that does not directly relate to the body of courses offered by the school. A student group is directly related to a school's curriculum only if one of four requirements is satisfied: (1) the subject matter of the group is actually taught or will soon be taught in a regularly offered course; (2) the subject matter of the group concerns the body of courses as a whole; (3) participation in the group is required for a particular course; or (4) participation in the group results in academic credit. Under this standard, whether a specific student group is curriculum related depends on the particular school's curriculum.

The Court cited several examples to illustrate its point. A French club would be directly related to the curriculum if French were taught as a regularly offered course or would be taught in the near future. A school's student government program generally would relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to courses offered by the school. Band would be directly related to the curriculum if it were required for a class or resulted in academic credit.

On the other hand, groups such as a chess club, stamp collecting club, or community service club would be "noncurriculum related student groups," unless the school could show that the group could satisfy one of the four requirements identified by the Court.

Applying this test to the 30 student clubs recognized by Westside High School, the Court specifically identified three clubs as being noncurriculum related. By allowing these student groups to meet, the school had created a limited open forum under the Equal Access Act. Having created a limited open forum, O'Connor continued, the school could not discriminate against the student group wishing to form a religious club.

Six justices also concluded that the Equal Access Act does not violate the First Amendment's Establishment Clause, but for different reasons. Justice O'Connor, writing on behalf of only four justices, used the 1971 *Lemon* precedent to determine that an equal access policy at the high school level does not amount to the establishment of religion. "We think," wrote O'Connor, "that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." Even though there might be a possibility of peer pressure, there is little risk of official government endorsement or coercion where no formal classroom activities are involved and school officials do not have an active role in the club.

While Justices Kennedy and Scalia agreed there was no violation of the Establishment Clause, their rationale was different. There was no violation, wrote Justice Kennedy, for two reasons. First, this was not a situation where government is directly benefiting religion so that it tends to establish a state religion. Second, the school could not coerce any student to participate in a religious activity because the club was voluntary.

Justices Marshall and Brennan, however, although agreeing that the Equal Access Act, as applied to Westside High, could survive the Establishment Clause challenge, were concerned about the potential threat of the school's endorsement of religion. When a school creates a limited open forum in which only a very small number of clubs promote religious activities, the school must disassociate itself from those activities. If a school has a variety of clubs with ideological or political orientations, a student likely will understand that permitting the clubs to meet at the school is not an endorsement. But when a school has a religious club, but no other political or ideological organizations, and the club announces meetings over the school's public address system and posts materials on its bulletin board, it may be more difficult for the student to understand that recognition is not an endorsement.

To satisfy the requirements of the concurring justices, Westside High would have to fully disassociate itself from the Christian club's religious speech and avoid any appearance of sponsoring or endorsing the club's goals.

In a dissenting opinion, Justice Stevens criticized the plurality opinion, saying that it "comes perilously close to an outright command to allow organized prayer" in the public schools. Congress could not really have intended to require every public high school that sponsors a scuba diving club or a chess club—without having formal classes in those subjects—to open its doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be, he wrote. He also predicted the Court's four-point list will be exceptionally difficult to apply, noting that activities such as cheerleading and pep clubs may be enough to create a limited open forum under the Court's criteria for triggering the Equal Access Act.

—Linda Bruin

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Crumbling Walls

(continued from page 8)

he was known.

The purpose of the question was to isolate him as a Jew. In Poland, said David Halberstam, a noted American journalist and author who reported the story in *The New York Times* of July 22, 1990, there are what are known as Polish names and Jewish names. Szcheter is a Jewish name. The questioner tried to bring to the fore the distinction in Poland between Poles and Jews.

Michnik responded: "Szechter is not my name. It is the name of my father. But, if you mean by that question, were my forefathers circumcised, the answer is yes." Michnik asked to be judged by the quality of his ideas, not the nature of his bloodline.

Yet, what happened to Michnik is not unusual. With what appeared to be a sense of resignation, Rabbi Ernest Neumann, head of the Jewish community in Timisoara, Romania, said in March 1990: "Anti-Semitism appears to be an incurable disease . . . [While the government is more sympathetic to Jews] . . . anti-Semites have more courage with the new freedom." That so-called courage manifested itself in statements at political meetings, slogans spray-painted on walls, and vandalism of the few open synagogues, including destruction of prayer books.

In the Soviet Union itself an ultranationalist group, Pamyat, calls for the death of Jews. In Russian *pamyat* means memory. Its members wear black shirts and use the fascist salute. They have indicated that lists are being prepared of those Jews marked for death. They have lauded the Nazi final solution—crimes against humanity for which several Nazis paid with their lives following trial. In January 1990, the Pamyat leader, Konstantin Smirnov-Ostashvili, led several of his members into the House of Writers, the main gathering place for Moscow authors. They routed those in attendance, shouting: "Kikes, go home to Israel. Your time is up! Now we will be masters of the country. . . ."

Several months after the incident, Smirnov-Ostashvili was charged under a new law of the Soviet Union with racial violence and promoting interethnic enmity. A three-month trial followed in Moscow City Court. Pamyat members crowded the courtroom. On October 12, 1990, the court, having found the defendant guilty of the charge of promoting interethnic enmity, imposed the sentence sought by the prosecutor: two years imprisonment under a strict regime. The maximum allowed by the law is a five-year sentence and a heavy fine.

The sentence is being appealed. His followers in the courtroom shouted: "Shame! Shame! Servants of Zionism! This is a Yiddish, Nazi verdict!" Though there were many police officers in the court, no move was made to stop the shouting, which came as the judge attempted to read the verdict. (See Frances X. Clines, "Soviets Jail Man for Anti-Semitic Threats," *The New York Times*, Oct. 13, 1990, at p. 3.)

The virulence of anti-Semitism as a cultural strain in Eastern Europe, which has heavy concentrations of Catholics, was recognized by Vatican officials as well as representatives of Jewish and Roman Catholic organizations from sixteen nations at a meeting in Prague during September 1990. Archbishop Edward I. Cassidy, head of the Vatican Commission on Catholic-Jewish Relations, said: "That anti-Semitism has found a place in Christian thought and practice calls for an act of tshuva [a Hebrew term for repentance]. . . [Anti-Semitism] is a sin against God and humanity. . . . One cannot be authentically Christian and engage in anti-Semitism. . . ."

To combat anti-Semitism, the meeting urged action at two levels. First, the meeting urged rapid translation and diffusion in Eastern Europe of the Second Vatican Council's statements on Catholic-Jewish relations, and the later declarations from Rome and Catholic authorities in Western Europe and the United States. These statements explain and emphasize the need for eliminating anti-Semitism. Under Communist governments, permission was denied to publish such statements. A result was the lack of hierarchical authority condemning what had become ingrained in much (though not all) of Eastern European culture.

Second, the meeting recommended "systematic efforts in Eastern Europe to eliminate religiously or racially divisive material from textbooks, to establish seminary courses and training programs to counter anti-Semitism, to defend religious liberty and to monitor outbreaks of anti-Semitism." In effect, the Church called upon the clergy to speak positively, just as they had in support of nationalism, in defense of religious freedom as an essential part of a democratic and moral system. (See Peter Steinfels, "Catholics and Jews Call for Effort to Halt East Europe Anti-Semitism," *The New York Times*, Sept. 6, 1990, at p. 1.)

Summary

Nationalism, not democracy, has been the popular force compelling change in Eastern European governments. While nationalism generally reflects popular will, democracy does not necessarily follow. And, where there is democracy, there may not always be protection of minority rights. In the final analysis, any particular expression of nationalism is a reflection of the culture of a people. The Soviet experience makes it clear that decades of official policy bent toward the elimination of national identity was not sufficiently powerful to overcome nationalism.

Indeed, international organizations can be seen as an expression of deep-seeded fears and hopes of specific nation-states. Looking at the European Community, why is it that France presses so firmly for more complete integration, both economically and politically, with the rest of Western Europe? Is it not at least in part rooted in a historic fear of a new German militancy? With European integration, the opportunity for such militancy is blunted.

Nationalism is a continuing, unpredictable, and powerful force. It is an essential part of a nation's culture, which also is in a constant state of change. It cannot be willed away. It must be recognized and channeled. George Brock, foreign editor of *The Times of London*, recently wrote:

> The European Community succeeds in its basic purpose not because national interests have been dissolved, but because the French national interest in defending the country against Germany can be most peacefully achieved in the larger economic unit. The grand plans for post-Cold War Europe will fail unless they acknowledge that there is no such thing as a permanent harmony between nations, but only a more or less effective balance of power that has to be frequently fine-tuned.
>
> As societies and economies evolve, nationalism may perhaps lay more stress on the preservation of social and cultural distinctiveness than the past emphasis – often a murderous one – on political independence. But whatever comes next, nationalism will surprise. Its power has been constantly underestimated.

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China

(continued from page 15)

PRC. Press reports of violence against women, including wife beating, purchase and sale of brides, abuse of female children and even female infanticide illustrate the persistent problems. The Chinese government has strongly condemned these practices and attempted to curb them, with limited success. Little use has been made, however, of legal mechanisms which might stem the traditional tolerance for abuse of women. Both Chinese and foreign commentators view the phenomenon as an unfortunate effect of economic and social changes set in motion by a decade of reform. Peasants seeking ways to make money in a more market-oriented economy, enjoying greater geographic mobility, are reported to be the prime offenders.

During much of the past year, China's ethnic minorities have protested their treatment, particularly in Tibet – despite the imposition of martial law in March 1989 – and in the far northwest province of Xinjiang. Their underlying resentment is that Han Chinese authorities, backed up by sizable contingents of People's Liberation Army forces, rule without regard for minority interests in China's so-called autonomous regions. Meaningful political autonomy, along with religious and cultural freedom, are the chief goals of Tibetan Buddhists and Xinjiang's Moslem Uighurs. Since last year's reaction to the pro-democracy movement, they sense that the drive to impose Chinese culture and majority values on them is being carried out with greater emphasis.

Despite the lifting of martial law in Tibet on May 1, 1990, international observers have noted little easing of Chinese repression there nor any improvement in the anti-Chinese attitudes of the local population. Diplomatic observers feel that the decision to lift martial law may have been aimed more at influencing world opinion, particularly in the United States.

In Xinjiang, where protests against Han Chinese dominance have been more sporadic than in Tibet, rioting broke out in April 1990, which greatly disturbed the Chinese leadership in Beijing. Affected by a nationality independence movement in Soviet Central Asia, some minority nationalities in Xinjiang began demonstrating and organizing small-scale mass rallies. These soon escalated into larger riots. Estimates of the troops needed to quell the rioting ranged as high as 200,000. Regional airports were closed to facilitate troop transfers, and foreign reporters were ordered to leave. One hundred people may have died. Chinese central government leaders have denounced the activities in Tibet and Xinjiang as separatism, fomented by hooligans and other interested in exploiting local instability.

Economic Freedoms

A resurgence of interest in independent labor unions was one of the by-products of the pro-democracy movement of 1989. In almost every major city in China, Workers' Autonomous Federations (WAF) were formed. The Beijing WAF claimed to represent over 100,000 workers from 40 industrial enterprises. WAF leaders sought the right to organize workers independent of the All-China Federation of Trade Unions, the only legal national labor organization, which operates under the close control of the Chinese Communist party. Other concerns expressed by the dissident workers were bureaucratic corruption, the large wage differentials between workers and managers, the lack of workplace democracy and poor industrial safety and working conditions. The alliance of these workers' associations with the student demonstrators is believed by many observers to have prompted the government to order its troops into Tiananmen Square. During the massacre, Beijing WAF members accounted for many of the casualties.

The International Response

The extensive evidence of Chinese violation of human rights and disregard for democratic values initiated international campaigns both to examine the nature and extent of China's abuses and to press for moderation, if not an end, to the suppression of pro-democracy forces and minority populations. In the forefront of these campaigns were the nongovernmental human rights organizations, such as Amnesty International and Asia Watch, which had previously detailed China's human rights record as part of their regular monitoring activities.

More significant in their impact were the decisions of other bodies which had ignored or remained silent about the human rights situation in China to join in the condemnation of the Beijing Massacre and to issue their own accounts. The most notable voice was that of a subcommission of the United Nations Human Rights Commission which voted in Geneva in August 1989 to have the full commission examine charges that China had brutally suppressed the pro-democracy movement in violation of the Universal Declaration of Human Rights. It also appealed for clemency for those arrested in connection with the demonstrations. China's companions on the list of human rights offenders prepared by the subcommittee were Iran, Indonesia, Guatemala, El Salvador, South Africa and Israel. Ultimately, the full commission refused to criticize China, merely authorizing a debate at its next annual meeting about China's human rights record. Still, the listing was significant as the first instance of a permanent member of the United Nations Security Council having been censured in a United Nations forum for its human rights performance and lack of democracy.

The criticism most threatening to China's interests came in the devastating report of the United States Department of State's Bureau of Human Rights and Humanitarian Affairs, contained in its annual *Country Reports on Human Rights Practices*. In a 24-page report, the State Department condemned the Chinese government for the Beijing Massacre, the killings and indiscriminate use of force in Tibet, and the severe restriction of virtually all internationally recognized human rights. The candid and highly unflattering picture presented in the State Department's report was all the more surprising in the light of the Bush administration's previous overtures to the Beijing government.

China's reaction was swift and vehement. It accused the United States of slander and distortion and accused the author of the report of "repeating lies and cliches about the 'Beijing Massacre' and 'nationwide suppression,' disregarding the truth." The Chinese ambassador to the United States, Zhu Qizhen, forwarded a protest to the State Department expressing the indignation of the Chinese government and people in reaction to the report. In the ensuing months, the real source of China's chagrin at the United States human rights report became evident. Critics of China's human rights record hoped to use the report as grounds for denying an extension of most-favored-nation trade status for China. Congress, frustrated with President Bush's China policy and angered at the continuing repression and anti-American rhetoric emanating from China, seemed ill disposed towards extending China's preferential trade status. Congress, however, showed little appetite for a showdown when President Bush extended China's status for another year this past May.

Domestic Maneuvers

The acrimonious debate on China policy between the executive and legislative branches of the United States government and in academic and journalistic circles was most surprising. President Bush's limited response in imposing sanctions, along with the secret and public trips of his high-level emissaries to China, were characterized—not solely by partisan opponents—as "kowtowing" to the Chinese leadership. Despite President Bush's promise that protections for Chinese nationals in the United States equivalent to those contained in congressional legislation he had vetoed would be enacted administratively, he was embarrassed into signing an executive order to that effect as a result of pressure from skeptical Republicans in Congress. The same day that President Bush made a statement on the anniversary of the June 4 killings, Senate Majority Leader George J. Mitchell accused the president of having ignored the anniversary and of helping China's rulers to rewrite history.

Among China specialists, government officials, and newspaper columnists, there was considerable controversy related to the presidential policy with respect to China and relations with China more generally. Distinguished experts praised the policy and were taken to task by critics. In a few cases, the condemnation was extremely harsh. Those who proposed maintaining a wide range of contacts with China ran the risk of being accused of lacking concern for democracy and human rights by those who advocated a hardline stance. Lost in the crossfire was any understanding that proponents of either policy wanted to preserve United States interests, including democratic values, notwithstanding their considerable disagreement about the best means of advancing them. The lingering effects of these concerns, rooted in issues of democracy and human rights, will likely be felt for years to come in the foreign policy arena.

On China's part, the controversy over human rights has also sparked a rather defensive rethinking of the role of human rights discourse in international relations. Academic and diplomatic specialists were marshalled in early 1990 to counter the allegations contained in the United Nations subcommission and State Department reports. Needless to say, they denounced the contents and defended the Chinese record. But they also were moved to distinguish a separate Chinese—or in some cases, socialist—position about democracy and human rights issues. Their claims fell into three categories: that a government's dealings with its own citizens are its "internal affair," which foreigners have no right to criticize; that democracy and human rights are always subject to limitations which governments may legitimately impose; and that nations with different social systems may choose to emphasize (or to curtail) certain democratic rights in keeping with the dictates of their ideologies.

Such arguments overlook important considerations. China's membership in the United Nations and its participation in international human rights agreements, not to mention its own criticism of other violators (i.e., South Africa and Israel), compel it to accept the legitimacy of international criticism. The permissible limits on certain civil rights – such as freedom of association, speech or the press – do not allow limitation of non-derogable fundamental human rights, such as the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading punishment, and the right to be free from arbitrary arrest. Finally, the developments over the past year in Eastern Europe, along with the votes against China at the Human Rights Commission by Hungary and Bulgaria, undercut claims of socialist exceptionalism in the field of democracy and human rights.

Conclusion

Now that more than a year has passed since China's human rights catastrophe of June 1989, Chinese leadership is providing conflicting signals about its future conduct. On the one hand, the welcome releases of hundreds of detainees have encouraged those who would believe either that democratic forces set in motion over a decade ago are proving resilient or that a combination of international pressure and diplomatic nudging are having an effect. On the other hand, other dissidents are reportedly still being held. This past June, Chinese security forces assaulted foreign reporters covering events marking the anniversary of the pro-democracy movement and campus protests. The direction in which China plans to move with respect to democracy and human rights remains uncertain, but the international significance of these issues has most definitely been assured.

As recent events in Eastern Europe have demonstrated, people who live in totalitarian societies such as China do not necessarily accept the lack of democracy and civil and political rights which have been the hallmark of socialist countries. Rather, they have long been unable to throw off the yoke of oppression which throughout China's history has come to be a fact of their everyday lives. Yet despite the omnipresent Communist Party apparatus and its many weapons of oppressive power, there are many subversive forces at work even in the most repressive nations. In family life, in some educational institutions, and in art and literary circles, many individuals are chipping away at the Party's dominance. The corruption of the Communist Party leaders has also provided a focus for popular disgust and is frequently attacked, although often obliquely through humor and sarcasm.

Notwithstanding the attempts of some well-meaning government officials to reform the Chinese system, it has become increasingly clear that genuine democracy can only come to the PRC when political pluralism and civil rights are restored. This will mean the demise of the Communist Party as the sole arbiter of orthodox political behavior. It will also make for greater openness in political discourse. Such a development will not only be a departure from previous PRC experience but would also be a major break with Chinese political tradition. The widespread pro-democracy movement of 1989 has demonstrated considerable support for such a change, but the official reaction makes the obstacles readily apparent.

Perhaps the most significant gap in China's body politic is the absence of a charismatic leader, inside or outside the current Party and government centers of power. Thus far, no Vaclav Havel, no Mikhail Gorbachev, has appeared on the Chinese scene to mobilize the inchoate dissatisfaction with China's current state. The "Gang of Elders" who have taken over cannot last; sickly octogenarians whose vision of political orthodoxy ill equips them to deal with current realities, they provide no hope of forward movement. Yet almost every important turning point in Chinese history previously has produced a strong leader, with initial popular support, who has moved China into the future. The Chinese people have come to expect such a figure. All who care about the development of democracy and the furtherance of human rights in China can only hope that they will not have long to wait. ☐

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Central Europe

(continued from page 32)

ful a form as possible. One way to do this is to ask questions to the end of providing guidance, rather than stating conclusions based on our often-inadequate information. This approach has an additional benefit. Although cut off from the Anglo-American legal tradition, many of the countries of Central Europe have a rich legal tradition. As the Minister of Justice of Czechoslovakia reportedly remarked to one well-meaning yet probably overweening American advisor, "This is not Namibia," referring to a new country lacking a constitutional tradition. Caution and tact in constitution-advising are as important as they are in advising on anything else. By posing pointed questions, Americans can point the way to positive results without seeming overbearing and omniscient. Put another way, no one likes a know-it-all.

By keeping an open mind, Americans can not only be more helpful, we can also, as President Bush recently said, "watch, and learn." Exploring the choices the Central Europeans make will help us revisit fundamentals by asking basic public policy questions instead of focusing unduly on the specific words our constitutors chose. Examining issues on that more fundamental level, and learning about the fate of particular constitutional provisions in different cultural contexts, will help us to distinguish what is peculiarly suited to our country and what works elsewhere as well. This will also shed light on what we think must be in a constitution for it to establish a moral order. That balance between what a specific culture requires and what morality demands is certainly a delicate one, but that delicate balance is, after all, what all good constitutions help us maintain. ☐

Daniel E. Troy is an attorney with the Washington, DC, firm of Wiley, Rein & Fielding, where he specializes in broadcast and constitutional law. He is a member of the Committee on the Revision of the Czech and Slovak Constitution, which recently held a constitutional conference in Prague. He was formerly in the Office of Legal Counsel in the U.S. Department of Justice, and was a law clerk for the Hon. Robert H. Bork.

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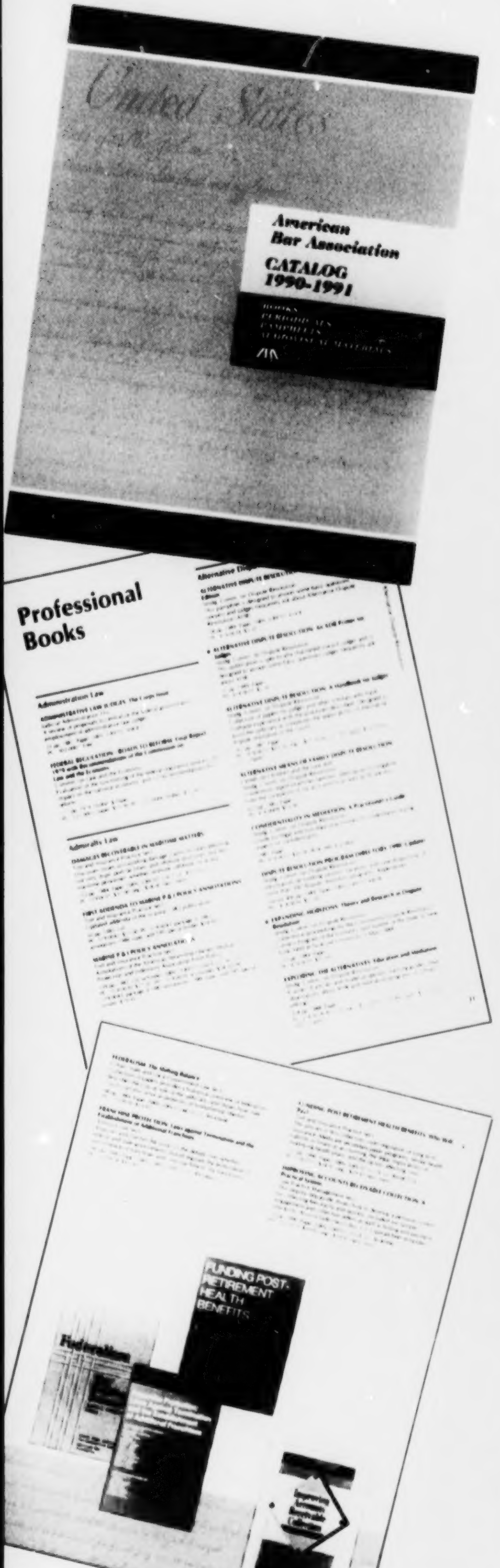

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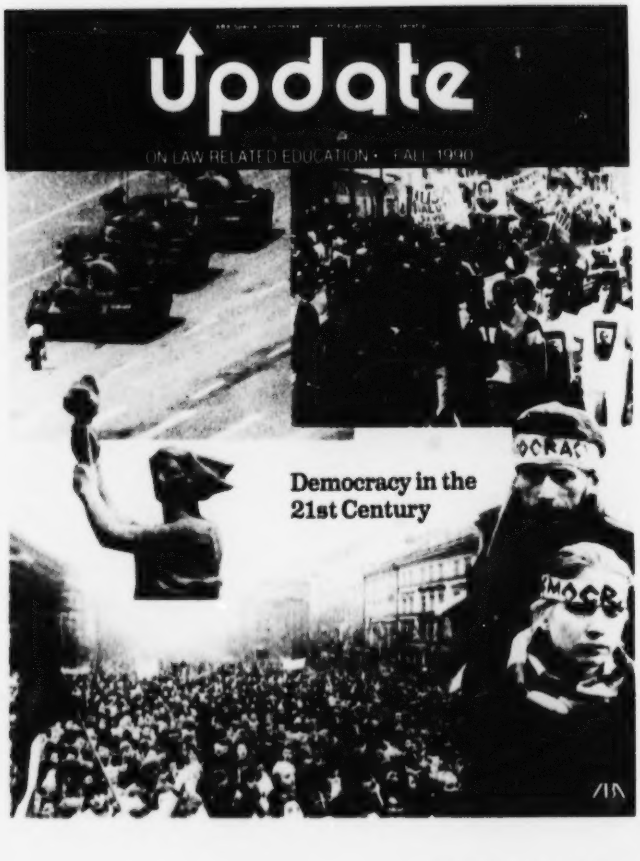
Update
ON LAW RELATED EDUCATION • FALL 1990
Democracy in the 21st Century
ABA

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2520

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ABA Special Committee on Youth Education for Citizenship

Update

ON LAW-RELATED EDUCATION • WINTER 1991

Freedom Has a Name

The Bill of Rights

SPECIAL LAW DAY ISSUE

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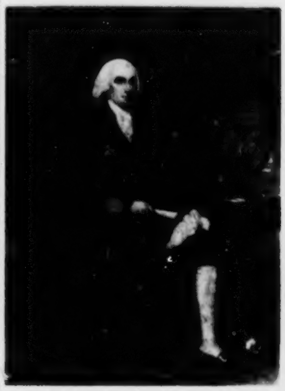
contents

Volume 15, No. 1, Winter 1991



3 **Rights and Liberties at Risk**
6 **Law Day is for Lawyers, Too**

SECONDARY SCHOOL STRATEGY

9 A Bill of Rights Assembly
13 **Thoughts on the Roots and Evolution of the Bill of Rights**

SECONDARY SCHOOL STRATEGY

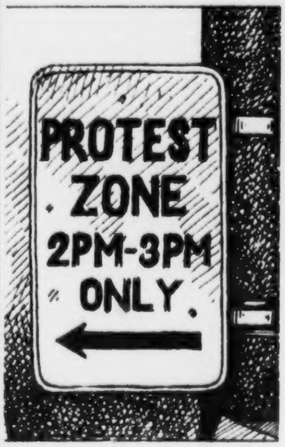
18 State v. Federal Rights

ELEMENTARY SCHOOL STRATEGY

20 A Talk Show from the Past

MIDDLE SCHOOL STRATEGY

27 The Right to Assemble



SECONDARY SCHOOL STRATEGY

29 A Basic Right

MIDDLE SCHOOL STRATEGY

31 Freedom, but with Limits
33 **Bill of Rights Resources**
39 **A National Sampler of Law Week Activities**

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The points of view or opinions expressed herein are not necessarily those of the Special Committee or the American Bar Association.

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opening statement

The 1991 Law Day theme, "Freedom Has a Name: The Bill of Rights," takes on a special meaning as we celebrate the bicentennial of the ratification of the Bill of Rights. This special Law Day issue focuses on the Bill of Rights and looks at its 200 years as the foundation of American democracy.

We begin on a somewhat troubling and yet hopeful note. In his article on page 3, John Patrick looks at the bleak picture painted by several recent surveys which indicate that large numbers of young people—the future citizens and leaders of our society—are ignorant of and apathetic towards the basic liberties that the Bill of Rights provides. His conclusion, however, is that there is still time to change these attitudes and he suggests some approaches that educators can employ to make teaching (and learning) about the Bill of Rights more meaningful for today's students.

"Thoughts on the Roots and Evolution of the Bill of Rights" is based on three papers presented at last summer's ABA Bill of Rights Institute for Teachers presented by the ABA Special Committee in Washington, DC. It takes a long view of the origins and development of the Bill of Rights and serves to remind us that while the Founding Fathers were inspired men of vision, they were realists and practical politicians as well.

Of the six classroom strategies in this issue, three were specially designed to complement this issue's special feature. At the centerspread, you'll find a reproduction of one of the award-winning posters developed in conjunction with the ABA's "Bill of Rights in Transit" public awareness campaign. Adjacent to the poster are elementary, middle and secondary level strategies that explore issues surrounding the right of citizens to peaceably assemble, a right that, as recent events have shown, provokes just as much controversy today as it did in the time of the suffragettes.

The variety, ingenuity and high level of involvement that have always characterized Law Day activities are vividly illustrated in the National Sampler of Law Week Activities that appears on pages 33 through 36. You'll also find in this issue a guide to Bill of Rights resources to aid in planning Bill of Rights activities throughout the year.

Upcoming issues of *Update* will continue this Bill of Rights emphasis. The focus of the spring issue is the Bill of Rights as it relates to the criminal justice system; in the fall, we'll look "Beyond the Bill of Rights" and ahead to the next 200 years.

As always, *Update* welcomes contributions from its readers. Send us your substantive articles, teaching strategies, comments, and suggestions. With your help, we can continue to be an important resource for those involved with law-related education.

—Jack Wolowiec

2523

Freedom Has a Name

John J. Patrick

Rights and Liberties at Risk

Widespread ignorance of the Bill of Rights presents a challenge to educators

Judge Learned Hand expressed an insight about constitutional rights that should forever guide the work of civic educators. He said, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it" (The *Spirit of Liberty* 1960, p. 190).

Constitutional rights and liberties are at risk among people who neither know nor value them, because they are not self-enforcing. Rather, preservation and enforcement of the Bill of Rights depends upon the civic education of each successive generation of Americans. These rights will prevail in the society only if they are embedded in the intellects and spirits of a significant number of people, who will publicly speak and act to sustain them.

Civic educators face the critical cyclical challenge of generating and renewing reasoned commitment to the Bill of Rights among each generation of Americans. The great importance of this challenge warrants great emphasis on the Bill of Rights in the curricula of schools. Is education about the Bill of Rights a high priority in elementary and secondary schools of the United States? Do American students graduate from high school with reasoned commitment to the civil liberties and rights of their constitutional democracy? Do they know enough about their legacy of liberty to maintain it, and perhaps improve upon it?

The Bill of Rights in the Curricula

The Bill of Rights appears to have a prominent place in the curricula of schools in the United States. Teaching and learning about constitutional rights are emphasized in goals and rationales of social studies textbooks and curriculum guides. The following statements from three sources – *the History-Social Science Framework for California Public Schools, the Essential Goals and Objectives for Social Studies Education in Michigan*, and the AFT's *Education for Democracy: Guidelines for Strengthening the of Democratic Values* – are typical examples of educational goals about constitutional rights:

- "This framework supports the frequent study and frequent discussion of the fundamental principles embodied in the United States Constitution and the Bill of Rights (California State Board of Education 1988, p. 6).
- [Students should know] "rights and liberties guaranteed in the United States Constitution" (Michigan State Board of Education 1987, p. 20).
- [C]itizens must know . . .the sources, the meanings, and the implications of the Declaration of Independence, the Constitution, the Federalist Papers, and the Bill of Rights" (Education for Democracy Project of the American Federation of Teachers 1987, p. 15).

In line with the preceding examples of educational goals, most Americans have studied the Bill of Rights in school at least four times: (1) in a fifth-grade American history course, (2) in a junior high or middle school American history course, (3) in a high school course in United States history, and (4) in a high school government or civics course. In addition, a growing number of students learn about Bill of Rights principles and issues through special units or elective courses in law-related education. These formal courses of study in history, civics, government, and law-related education expose students to ideas in the Bill of Rights, the document's origin and development, and its relevance to citizenship and government in the United States.

Despite these ample opportunities for learning about the Bill of Rights, many Americans in the past and present have failed to acquire or retain important knowledge and attitudes about their constitutional rights and liberties. Historian Michael Kammen (1986, pp. 336-386) has documented serious deficiencies of American adolescents and adults in knowledge and attitudes about constitutional rights from the 1940s through the mid-1980s, which he describes as a "persistent pattern of ignorance" (p. 343). Ac-

2524

cording to Kammen, Americans tend to be very proud of their heritage of civil liberties and rights, but this reverence is "more than offset by the reality of ignorance" (p. 3). Kammen's findings are corroborated by nationwide surveys and assessments conducted in recognition of the bicentennial of the United States Constitution (Hearst Report 1987; Quigley et al. 1987; Ravitch and Finn 1987).

A Lack of Knowledge

There are four major categories of deficiencies in the learning of Americans about the Bill of Rights:

- Ignorance of the substance and meaning of civil liberties and rights in the Constitution.
- Civic intolerance expressed in reluctance or refusal to apply constitutional liberties and rights to unpopular individuals or minority groups.
- Misunderstanding of the federal judiciary's role in protecting the constitutional rights of individuals.
- Inability to analyze, evaluate, and articulate well-reasoned positions on Bill of Rights issues.

Widespread ignorance of the Bill of Rights. A 1987 survey by the Hearst Corporation found that a majority of American adults did not know that the Bill of rights is "the first 10 amendments to the original Constitution" (p. 13). This finding is consistent with surveys in the 1940s and 1950s, which revealed that most Americans could not make a correct statement about any part of their Bill of Rights (Kammen 1986, pp. 340-343).

Different and more positive findings (in part) were reported by a 1987 study of high school students: most of them did know that "the Bill of Rights is the first ten amendments to the Constitution and that its purpose is to list and guarantee individual rights" (Quigley et al. 1987, p. 3). However, the students in this sample were misinformed about specific constitutional rights and ignorant of the meaning, history, and application of key concepts, such as due process of law, freedom of expression, and freedom of religion. This lack of knowledge among a national sample of high school students was consistent with recent findings about the ignorance of constitutional rights among adults (Hearst Report 1987) and other samples of adolescents (National Assessment of Educational Progress 1990; Ravitch and Finn 1987).

One notable exception to the prevailing ignorance of constitutional rights is the category of rights of an accused person, which most adolescents and adults appear to know quite well. Perhaps this reflects their attentiveness to popular prime-time television dramas more than effective teaching and learning in school (Hearst Report 1987, p. 29-31; National Assessment of Educational Progress 1990, p. 65).

The most disheartening finding reported in the dismal literature on surveys of knowledge about constitutional rights is Kammen's report (1986, p. 385) that "on the basis of surveys made in 1983-84 of high school seniors' perceptions of the Bill of Rights, authorities found their understanding of it to be 'very, very inadequate. The most startling and depressing finding in our polls is that standard civics or government courses don't increase students' sense of the Bill of Rights.'"

Reluctance or refusal to extend constitutional rights to certain unpopular individuals or minority groups. Public attitudes about constitutional rights are generally positive. It most citizens do not know very much about their Bill of Rights, they certainly revere it (Kammen 1986, p. 23-24). This reverence, however, has not always been linked with civic tolerance for the rights of unpopular persons or minorities. Numerous studies from the 1950s through the 1980s have confirmed this unfortunate finding: Public support for certain liberties and rights tends to decline markedly when they are applied to cases involving unpopular minority groups or persons (Elam 1984; McCloskey and Brill 1983; Patrick 1977).

The Purdue Youth Opinion Polls of the 1950s found that a large proportion of American high school students expressed authoritarian attitudes toward the Bill of Rights: they tended to oppose application of certain civil rights and liberties to black people, communists, atheists, and other minority groups or individuals they did not like (Remmers and Franklin 1963, pp. 61-72).

Adolescents of the 1980s were given the same statements about the Bill of Rights used in the 1950s Purdue polls. An even greater proportion of these 1980s teen-agers displayed authoritarian attitudes about certain constitutional rights than did the 1950s students. For example, a larger percentage of the 1980s students were willing to allow a police search without a warrant, to deny legal counsel to criminals, and to accept restrictions on freedom of expression of unorthodox religious ideas (Elam 1984).

It seems that many Americans lack understanding of a central concept of constitutional democracy: majority rule with minority rights. In a democracy the majority rules; but if the blessings of liberty are to be enjoyed fully by all members of the society, then the rights of minorities must be protected against the possibility of tyranny, including tyranny of the majority. Thus, the United States Constitution sets limits upon the power of the majority, acting through its representatives in the government, to oppress individuals and minority groups. The Bill of Rights is a set of constitutional limitations upon the power of majorities to deprive minorities of civil liberties and rights.

Supreme Court Justice Robert Jackson explained how the Bill of Rights protects minorities against tyranny of the majority: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections" (*West Virginia State Board of Education v. Barnette*, 1943).

The timeless truth of Justice Jackson's eloquent statement should be in the core of education for citizenship in our constitutional democracy. Students must learn more effectively than in the past that the Bill of Rights bars oppression of the few over the many and of the many over the few; that it is supposed to secure the liberties of individuals against tyranny by the majority and against tyranny by a minority.

Misconceptions about protection of constitutional rights by the federal judiciary. High school students and adults tend to misunderstand the role of federal judges in dealing with disputes about the meaning and application of constitutional rights in legal cases. In a 1987 study of high school students (Quigley et al. 1987, p. 5), most respondents revealed faulty conceptions about judicial review and an independent judiciary as bulwarks of constitutional rights against threats of tyranny, whether attempted by majorities or minorities, populist demagogues or elitist despots. Most of these students were unaware of the potential conflict between judicial review and majority rule, which may be occasioned by the Supreme Court's responsibility in particular cases for upholding the higher law of the Constitution against the tide of popular opinion.

Adolescents' misconceptions of the federal judiciary's responsibility for constitutional rights seem to be shared by more than half of the adult population of the United States (Hearst Report 1987, pp. 23-26). Kammen (1986, pp. 357-380) documents the long-standing public ambivalence to and misunderstanding of the Supreme Court's role in protecting constitutional rights of individuals against either the momentary or persistent will of antagonistic majorities.

It appears that improved teaching and learning in schools is needed about the federal judiciary's role in defining and protecting the constitutional rights of Americans and in maintaining constitutional limits on the exercise of power by the peoples' representatives in the legislative and executive branches of government. The Bill of Rights could be at risk in a society filled with individuals who neither know nor care about the relationships of judicial review and an independent judiciary to the protection of constitutional liberties and rights. The Bill of Rights is not self-enforcing and requires both a supportive public and effective machinery of government to implement it throughout the society.

Inability to engage in high-level thought and discussion of Bill of Rights issues. Most high school students seem to lack the ability needed to define, analyze, evaluate, and articulate positions on Bill of Rights issues in history and current events. A small minority of older adolescents appear to demonstrate competence in higher level cognitive operations associated with civic learning, even though research in cognitive development has documented the capacity of most 17- and 18-year olds to engage in higher level thought (Newmann 1988). Only six percent of the twelfth-grade students in the 1990 national assessment of learning in civics achieved the highest level of civic proficiency as defined by the National Assessment of Educational Progress (pp. 27-40).

Lack of knowledge is an obvious obstacle to defensible deliberation, discourse, and decisions about constitutional issues. If students cannot recognize and comprehend their rights in the United States Constitution, then they certainly will not be able to cogently reflect upon them. In their report on the 1986 national assessment of knowledge in history, Ravitch and Finn conclude: "[M]any of the most profound issues of contemporary society . . . have their origins and their defining events in the evolving drama of the Constitution. Yet our youngsters do not know enough about that drama, either in general or in specific terms, to reflect on or think critically about its meaning" (1987, p. 58).

Some Suggested Remedies

Deficiencies in learning about the Bill of Rights can be remedied by teachers who care deeply about preservation and enhancement of the American civic heritage. There are four obvious keys to improvement of teaching and learning about the Bill of Rights:

- Systematic and detailed coverage of Bill of Rights topics and issues in standard school courses in history, government/civics, and law-related education.
- Use of primary documents associated with controversies and decisions about Bill of Rights issues.
- Analysis and discussion of case studies and decisions about Bill of Rights issues.
- Examination and discussion of Bill of Rights issues in an open classroom climate.

Systematic and detailed coverage of the subject. Unless they carefully and substantially study Bill of Rights topics and issues, students will not learn them. This simple statement of truth is too often ignored in social studies textbooks and classrooms. The standard textbooks certainly *mention* ideas, issues, and legal decisions associated with the Bill of Rights, but the *mere mentioning* of ideas and facts is not sufficient to effective teaching and learning of them. Rather, the ideas in the Bill of Rights, such as freedom of speech and press, freedom of religion, due process of law, and so forth, must be woven deeply into the fabric of courses in the social studies at all levels of schooling. For example, Bill of Rights topics and issues must permeate secondary school courses in American history and government. Teachers must introduce these ideas and controversies about them in the opening sections of a course and then apply these core concepts to various topics, cases, and issues throughout the rest of the course of study.

Support for more extensive and detailed study of subject matter on the Bill of Rights is provided by the 1990 National Assessment of Educational Progress (p. 77): "Across the grades, there appears to be a positive relationship between students' average civics proficiency and the amount and frequency of instruction they received in social studies, civics, or American government." Furthermore, this study indicates a positive relationship between the amount of homework assigned and completed and higher levels of proficiency in civics.

Use of primary documents. Students are more likely to achieve higher levels of cognition about Bill of Rights topics and issues if they are taught to derive and use evidence in primary documents to answer questions and participate in classroom discussions. Close reading and analysis of primary sources develop skills in interpretive and critical reading and thinking. Application of data derived from this kind of inquiry to articulation of positions in essays and classroom discussions develops essential skills in communication.

By using primary sources in the classroom, students participate in historical inquiry. Through this cognitive process, they learn to challenge answers and marshal evidence to support or reject hypotheses. Thus, the classroom may become a lively forum for the application and development of cognitive process skills in reasoning and discourse.

What primary documents on Bill of Rights topics and issues belong in every secondary school history, government, or civics course? The core documents of the founding period in United States history certainly are the primary texts for study of civil liberties and rights: the Declaration of Independence (1776), the Virginia Declaration of Rights (1776), the Northwest Ordinance (1787), the Constitution of the United States of America (1787), letters on constitutional rights and liberties exchanged by Jefferson and Madison (December 20, 1787 – Jefferson to Madison and October 17, 1788 – Madison to Jefferson), selected *Federalist Papers* and Anti-Federalist essays (1787-1788), and Madison speech to Congress on "the great rights of mankind" (June 8, 1789).

In addition, students should examine excerpts from majority and dissenting opinions in landmark decisions of the Supreme Court, such as *Plessy v. Ferguson* (1896), *Brown v. Board of Education of Topeka* (1954), *Betts v. Brady* (1942), *Gideon v. Wainwright* (1963), and *Roe v. Wade* (1973). Finally, students should study primary sources associated with political controversies about rights and freedoms, such as events and issues associated with the Sedition Act of 1798,

(continued on page 44)

Photo courtesy Oklahoma Bar Association

Law Day is for Lawyers, Too

Law Day and LRE enrich the personal and professional lives of lawyers in a variety of ways

Each year, thousands of attorneys across the country put down their briefs, juggle their calendars and set aside time to take part in Law Day activities in their local schools and communities. Whether in a big city or a small town, each finds a special satisfaction in helping young people gain a better understanding of the law and its impact on their lives.

For the five lawyers you will read about in this article, Law Day and law-related education have provided experiences that enriched their lives in a number of ways, some purely professional, others uniquely personal.

* * *

While no one has exact numbers to cite as proof, it's probably safe to say that more than one lawyer has changed professions due in part to positive and rewarding experiences with LRE. One example is Oakland attorney Dale Brodsky, who found that dealing with children in a classroom setting "strengthened my resolve to leave the practice of law." Now beginning a program that will lead to a teaching credential, Brodsky first became involved with LRE about three years ago in connection with her work at the Northern California office of the American Civil Liberties Union.

Brodsky conducted a four-week-long series of classes for fifth and sixth graders at her son's public school in Oakland. "I really got to know some of them well. At age 10 and 11 they're incredible trial lawyers. . . . I think watching "L.A. Law" and other TV shows must have a lot to do" with their perception of how lawyers act and what goes on in a courtroom. The most rewarding aspect, she says, was helping students see the issues involved in various situations. "They showed that they were critical thinkers, understood moral dilemmas and could conduct their own balancing tests."

In her 13 years at the ACLU, Brodsky was involved civil rights litigation, primarily in the area of employment discrimination. "I didn't want to fight anymore. I wanted to focus on a different audience, make a bigger contribution to the development of ethics and value systems," she says. "I'm looking for a different kind of challenge. I don't expect teaching to be easy – in fact, many people have told me to expect the worst when going into a classroom" and argued against her decision to change careers.

Brodsky sees much value in using law as a means to help young people think about issues and to guide them in coming to their own decisions. She cautions that lawyers should not try to teach a rule or a value. "Lawyers should go in to a classroom to 'sell' the legal system not as it exists in reality but as it should exist in the best of all worlds."

* * *

Aaron Owada, assistant attorney general in the Washington State Department of Labor and Industries, first became involved with law-related education eight years ago as a third-year law student. His participation has steadily grown over the years. He now visits Tumwater High School in Olympia twice a week, serving as guest lecturer or instructor in front of a senior high civics class.

Owada is also very active in judging mock trials and continues to be impressed by the high level of involvement and commitment shown by many of the students. He sees his involvement as enhancing his participation in the community and particularly enjoys "seeing what's on students' minds, getting a feel for their concerns. It gives me a great sense of satisfaction."

Involvement with young people has helped Owada to develop better client relation skills and makes him feel more connected to the community as a whole. "If you can relate to a high school student you can relate better to members of a jury," he says. "When I'm explaining a particular point or issue to a jury, I just pretend I'm in front of a high school class."

Convinced that LRE is "absolutely beneficial," Owada is also active in getting other lawyers to participate. "I find it easy to get other lawyers involved. The easiest way is to take them out a few times so they can see how much fun it is." He advises attorneys to keep an open mind and not to underestimate young people. "Use everyday experiences that they can relate to . . . the message that you want to convey is basically that whether they like it or not, the legal system is going to be part of their lives and they better be prepared to deal with it."

* * *

For Cherie Howard, an attorney with the Bedford-Stuyvesant Legal Services Corporation in Brooklyn, Law Day involvement began with a phone call from the local school board requesting her help in setting up a Law Day essay contest. In a community plagued by a high drop out rate, delinquent behavior and drug abuse, she saw an opportunity to make a difference in the lives of young people.

Howard also saw involvement with the essay contest as a way of presenting students with positive role models by bringing minority attorneys to classrooms. She recruited other minority lawyers from the Brooklyn district attorney's office and the city law department and found them "eager to have a more positive involvement with students, particularly the assistant district attorneys whose contact with minority young people is very negative."

In working with the students, Howard was "pleasantly surprised by quality of their work. It was obvious that students spent a lot of time putting their presentations together." She was particularly pleased by the high level of interest shown by students in the elementary grades. This reinforced her belief that attempts to affect the attitude and behavior of young people should begin as early as possible, perhaps even as early as kindergarten, and that education about the law and our system of government should be integrated into the school curriculum.

Before coming to the legal services office, Howard worked as a municipal prosecutor in Ohio dealing primarily with felony cases. She left because she felt she "wasn't doing anything to reverse or really change the situation." She saw minority young people who were blocked from positive participation in society due to racism, unemployment and a general lack of opportunity. "As a minority," she adds, "I had some insight as to why young people were involved with the justice system, but after a while I began to see myself as an oppressor."

She sees a need to take a different tack in dealing with delinquent young people and again stresses the importance of presenting minority students with positive role models. "These students just don't have access to minority professionals . . . by bringing minority attorneys to classrooms we can show students that they can aspire to professional careers."

While funding cutbacks have caused her office to sharply reduce its school-related activities and concentrate its resources on its primary mission of providing essential legal services to the community, Howard is hopeful that she will have some success in locating funding from corporate sources or the local school district.

* * *

David Gaona is one of many lawyers who are very involved in mock trial programs. Gaona, a partner in the Phoenix office of the Tucson-based firm of DeConcini McDonald Brammer Yetwin & Lacy, has been Arizona's mock trial coordinator for the past five years. He shares with many other attorneys a high regard for the abilities of today's high school students. "I'm amazed at the knowledge of students . . . in some cases, they know as much as first year law students. Students are very aware of their rights with regard to issues such as search and seizure, for example. They are very aware of what their rights are in areas that interest them . . . their level of law-related knowledge in areas that affect their daily lives is very high."

Gaona sees many benefits for young people in LRE. "It builds their confidence and maturity . . . they become more skilled at articulating positions, analyzing problems and communicating their feelings in a logical manner." As a lawyer, Gaona finds that helping society produce better thinkers and communicators is rewarding. He's observed that today's high school students are "very aware, very bright . . . they're more confrontational and not afraid to ask questions." Lawyers dealing with young people today should be well prepared before they step into a classroom because they will find the experience "more challenging than they might expect."

Strongly committed to law-related education, Gaona is currently involved in efforts to establish an LRE program at Adobe Mountain, a school for high school age incarcerated youth.

* * *

Tom Moss is an LRE veteran who has been involved with Law Day activities for more than 20 years. A part-time prosecutor in Bingham County in southeast Idaho, Moss also spends a portion of his time in private practice in Blackfoot, the county seat.

Over the years, Moss has become a primary LRE resource in this community of nearly 14,000 by speaking to high school government classes in conjunction with Law Day; in addition, he coordinates a countywide effort to match lawyers with classrooms for Law Day activities.

His experiences with students over the years have caused him to feel strongly that by going to schools, lawyers can do much to improve students' perception of lawyers and the legal profession. "I have a good time and the students do too. I find the kids are warm and receptive to my being there . . . they look forward to my visits and are very disappointed when I can't visit on the day we had planned."

Several major crimes in the county in recent years seem to have sparked renewed interest in the law among students. Two years ago, for example, Moss was involved with five first degree murder cases. The cases generated a great deal of attention locally; Moss noted that students were among the most avid and faithful observers of the courtroom proceedings. He feels students are attracted to the drama and human interest that play such a large role in murder cases. "I think the students learn a great deal from observing such cases," Moss notes. "And after the trial they always ask their teacher to invite me to come to class so they can ask me questions about the case. They really like to know what goes on behind the scenes in such cases."

In comparing the students of 20 years ago with today's young people, Moss finds that students now are more aware of the law and its role in their lives. He is particularly impressed with the performance of students in connection with mock trial activities. "It's amazing how good they can become in a short period of time. I've seen some students who can take a case and put it together as well as some beginning lawyers." One of Moss's seven children is now in his second year of law school, primarily, Moss feels, due to his involvement with mock trials.

He observes that today's students have a "very good appreciation for our system . . . they see that the system works, that justice is done, that checks and balances are there to protect the rights of the accused while the rights of society are

(continued on page 46)

2529

Freedom Has a Name

A Bill of Rights Assembly/Secondary

M. Kenny and M. Reilley

Overview

This "Students and the Bill of Rights" assembly was developed by members of the community of Norwood, MA. It is designed to effectively involve students, police, faculty, administrators and other community resources in creating, producing and presenting an activity which celebrates the bicentennial of the Bill of Rights.

The assembly can easily be adapted to reflect your individual school's needs and concerns. For example, Supreme Court cases can be added or deleted depending on student and community interest. The cases dramatized here deal with issues such as freedom of the press, freedom of expression, search and seizure and sex discrimination, but any one could be replaced, for instance, by cases involving due process or racial discrimination. If the assembly needs to be shortened (the version presented here runs approximately 45 to 50 minutes) the number of Supreme Court cases presented can be reduced.

In Norwood, we took our own photographs to illustrate the Supreme Court narratives. Students can be used as photographers and can shoot in various community locations such as courtrooms, school athletic fields, and city hall. Other student contributions to the assembly can include writing the narratives; designing Bill of Rights posters to promote the assembly; writing essays for the student newspaper; writing, printing and distributing informational leaflets; and acting, narrating and videotaping the performance.

Our assembly was designed to be relevant, informative and fun. We hope it will spur your imagination and serve as a foundation to help you develop your own Bill of Rights assembly.

* * *

NARRATOR #1: Good morning. The title of this morning's assembly is "What If. . .?" You know, the familiar way most of us begin a question – as in:

What if you won the Lotto this week?

What would you do with the money?

or

What if there's a surprise quiz in your next class and you didn't do your homework? Will you flunk?

What if. . .? (PAUSE)

(Note of eclat)

In a sense, you might also call it –

(The following transpires while the narrator continues with speech.)

(Mr. Vice Principal and two police officers enter the auditorium near stage left. Mr. Vice Principal looks over the audience, sees the student he is obviously looking for, points toward him, walks up the aisle, stops next to row where student is seated, gestures the student to stand up and move into the aisle. Student is brought to stage left area where police officers are waiting. Police officers proceed to pat down student and place him under arrest. Student gestures and protests, but is handcuffed and walked out a side door.)

This is *your* life – or *your* life (pointing to audience) or *your* life – because we're going to be talking about actual situations. In fact, one may have happened to someone you know.

Of course, human nature being what it is, we'd all like to believe that all the great stuff will happen to us and all the worst will happen to someone else. In fact, most of the time, we count on it.

How many of you know CPR if someone you know stops breathing or the Heimlich maneuver if someone is choking?

How many of you know your civil rights? I mean, something beyond "You have the right to remain silent."

(Mr. Vice Principal comes to microphone and calls out names of four students to come and meet outside the auditorium.)

(Narrator looks bewildered – tries to talk to Mr. Vice Principal as he leaves but fails – turns to audience trying to recover composure.)

(One student in the audience rises and points to student being removed and says "Don't say anything.")

NARRATOR #1: Obviously, with an upsetting interruption like that, it is difficult to continue with an assembly. (PAUSE) It's amazing how everyone's heart starts beating faster when you're approached by a policeman or when you see the blue lights from a cruiser flashing in your rearview mirror while you're driving. Even if you know you haven't done anything wrong, what's the first thing you do? Hit the brakes and check the speedometer. I guess we're all nervous about authority.

Imagine what life would be like in a dictatorship – a police state where you can be picked up, held and imprisoned for no good reason at all.

(Mr. Vice Principal returns to the side door.)

NARRATOR #1: I see Mr. Vice Principal at the door. Since we all know that we probably won't get very far with this assembly until we know what's happened, maybe we can get (Reporter #1's name) to ask him for details.

Reporter #1: Mr. Vice Principal, I'm (name) from the (name of newspaper or TV station). We just witnessed a student being dragged from his seat, searched, arrested, and handcuffed. Can you please tell us the circumstances that led to this event?

MR. VICE PRINCIPAL: I received a call from Sergeant Brooks of the police department. He had strong suspicions that a student had a gun in his school locker and he asked me to do the search. When I searched the student's locker, I found a gun. This gave Sergeant Brooks reasonable cause to arrest and search the student in question.

REPORTER #1: Sir, it seems to me that this is a blatant violation of this student's rights. Would you care to comment on that?

MR. VICE PRINCIPAL: Of course, I am convinced that this that this was the appropriate course of action or I would never have proceeded.

REPORTER #1: I notice that we have some students who witnessed this incident. (Picks a student) What do *you* think? Is the school within its rights or have the student's rights been violated?

(Student answers and reporter picks another student)

REPORTER #1: And what do *you* think, Miss ________? Were the student's rights violated?

(Student answers. Reporter proceeds to a third student)

NARRATOR #2: Okay, *freeze*. (Reporter freezes in tracks) What do the rest of you think? What if. . .this had been you? Would your rights have been violated if this had happened to you? How should you behave if such a thing happens to you? Well, this is what the court decided.

(Student comes out and reads decision)

The court ruled that this search is illegal. The courts have repeatedly affirmed that police need probable cause to conduct a search such as this. School officials, on the other hand, need only have a reasonable suspicion and therefore need less "proof" than the police to conduct a search in school. In this instance, the police were using the school administration to do a search that the police would not be permitted to do legally.

NARRATOR #2: So, in summary, this search and seizure would have been illegal because the police were using the school administration to conduct a search that the police did not have enough "probable cause" to conduct themselves.

The courts have ruled that this is illegal and violates the Fourth Amendment's prohibition against "unreasonable searches and seizures."

But what if the circumstances surrounding this arrest were changed? Let's look at a second, but slightly different search that has occurred in schools. Would the outcome be the same? Here comes another reporter to interview Sergeant Brooks.

REPORTER #2: Sergeant Brooks, I'm (name) from (name of newspaper or TV station). Can you please tell us about the circumstances that led up to this event?

SGT. BROOKS: We had a reliable informant who had given us accurate information in other situations. We also had additional suspicions based on the student's activities. We filled out an affidavit a got a search warrant. We notified Mr. Principal of our intention to search. Then we came to the school, searched the locker and found a firearm. Mr. Vice Principal brought us to the assembly to identify the student and search his person for other evidence.

REPORTER #2: In this reporter's view, this student was the victim of police brutality and illegal search and seizure. Will you comment on that, please?

SGT. BROOKS: We followed the letter of the law. We only used as much force as was necessary.

REPORTER #2: (to student) What do you think? Was this search legal? (student answers and reporter moves on to another student)

REPORTER #2: This *is* school property. But didn't the student, by having a locker, have some expectation of privacy? (student answers)

NARRATOR #3: Okay, *freeze*. What do the rest of you think? What if this had been you? Would your rights have been violated under these circumstances and how should you behave if this happens to you? Well, this is what the court decided.

(Student comes forward and reads decision)

The courts have ruled that this type of search is legal. The police clearly established probable cause for the judge who issued the search warrant. A reliable informant with credible information has been judged to be adequate for establishing the probable cause required by the Fourth Amendment which states "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

NARRATOR #3: So, in summary, this search and seizure would have been legal because probable cause had been properly established and a valid search warrant lawfully issued. Now let's look at a third student search which involves still another set of circumstances.

(Reporter #3 has spotted teacher Mr. Faculty and is pursuing him for an interview)

REPORTER #3: Mr. Faculty, I'm (name) of (name of newspaper or TV station). I noticed you lurking in the corner since this incident began. Are you in any way connected with this event?

MR. FACULTY: I heard from a reliable, believable student that another student had a gun in his locker. I asked him if he would repeat this information to Mr. Vice Principal. He agreed to do so if his anonymity were guaranteed.

REPORTER #3: Mr. Vice Principal, how did you proceed?

MR. VICE PRINCIPAL: I had a meeting with the other school administrators and we decided that the potential danger a weapon could pose in the school justified a search. We searched the student and his locker but did not find a gun. However, we were still concerned enough about the potential danger to notify the police.

REPORTER #3: Sergeant Brooks, what happened next?

SGT. BROOKS: I came to the school after a call from Mr. Vice Principal. I searched the student and, finding no evidence, proceeded to search his locker. There, I found a denim jacket which was concealing a sawed-off shotgun and a shotgun shell.

REPORTER #3: Thank you, Sergeant Brooks. (Reporter picks a student) Miss, do you think this was a legal search?

NARRATOR #2: Okay, *freeze*. What if. . .this were you? Was it a legal search and how would you act if you were in similar circumstances? This is what the court said:

(Student comes forward and reads decision)

This search is legal. In the *Commonwealth v. Carey* case, the circumstances of a student search were similar to those just described. The Massachusetts Supreme Judicial Court ruled that school administrators are agents of the government whose actions are subject to Fourth Amendment protections. However, courts have often ruled that school lockers are held in joint custody by both the student and school officials who might retain a key or combination for the lock thereby reducing a student's claim to a high level of expectation of privacy. The lower the expectation of privacy the easier it is for agents of the government – in this case, school officials – to search. School administrators can further strengthen their ability to search a locker by printing such a search policy in the student handbook. In addition, the court ruled that administrators did not need probable cause to conduct a search. Rather the search need only be reasonable under the circumstances.

NARRATOR #2: In other words, this search was legal because the school administration had reasonable grounds to suspect there was a weapon in the locker. Additionally, the court ruled that the student's expectation of privacy for his locker was low since he held it in joint custody with the administration. The administration, therefore, was within its rights to call the police in to conduct the search.

(PAUSE)

NARRATOR #2: But what if it were you? How should you react in these situations? Let's ask an expert, Mr./Ms. Attorney-at-Law. What is the best advice you can give someone who has just been arrested?

LAWYER: First, don't struggle with the police. You'll only make matters worse by adding resisting arrest and assaulting a police officer to the charges.

Give your name, address and phone number to the police. Otherwise, keep quiet. Don't discuss your case with anyone at this point except your lawyer. Remember that if you can't afford a lawyer, the court will appoint one for you.

Police do *not* need to read you your rights upon arrest. So don't tell them the arrest is not valid because you haven't been Mirandaized – it probably is.

Police may search, photograph and fingerprint you. Do not resist.

Don't sign any statements about your case.

Call a trusted friend or relative as soon as possible.

If you have been arrested for a serious crime, ask your friend to get a lawyer for you.

Be sure to ask for receipts for any personal property that is taken from you.

Ask for a receipt for any cash bond or collateral you may have to post in order to be released.

Be sure to find out when you're due in court. Never be late or miss a court appearance as a warrant may be issued for your rearrest.

Do remember your rights, which include:

NARRATOR #3: You have the right to know what you are charged with.

NARRATOR #2: You have the right to a phone call – use it wisely.

NARRATOR #3: You have the right to remain silent.

NARRATOR #2: You have the right to an attorney.

NARRATOR #3: Be sure you completely understand all your rights.

NARRATOR #2: The situations we have dramatized here today are based on actual cases. However, as they say on TV, this was a reenactment. So please let's have a nice round of applause for our capable troupe of actors.

(Actors come on stage and take a bow)

NARRATOR #3: In the time we have left today, we'd like to cover some other topics that relate to the Bill of Rights besides search and seizure. The topics deal with issues that are relevant to students. They were chosen by you in a survey conducted earlier this year. The narratives that follow depict actual cases involving students and will show how the courts ruled on them.

(Narratives and slides follow)

STUDENT #1: My name is John Tinker. Three of my friends, my sister, and I were unconstitutionally suspended from school because we protested the Vietnam War. We thought the war was a terrible mistake and nobody was doing anything about it. We decided to wear black armbands to school as a symbol of our objection to the war. When the school administration heard of our plan, they adopted a policy saying that anyone who wore armbands would have to remove them. They said anyone who refused would be suspended from school until they returned without the armband. Despite the administration's ruling, my three friends, my sister and I still wore the black armbands to school. Though some students called us "pinko Commies" and traitors, no violence occurred. We continued to wear the armbands and were suspended. My parents were outraged by this decision. They felt that our right to freedom of speech was being ignored. So we decided to take the issue to court. We felt we had to do this because 1) our right to freedom of expression was being violated; 2) there was no violence and no disruption of classes; and 3) other students had worn insignias such as the Iron Cross and had not been suspended.

The Supreme Court heard our case and decided that the right to freedom of expression "does not end at the schoolhouse gate." They held that wearing armbands was a form of symbolic speech protected by the First Amendment. However, the Court also held that our right to free speech could be restricted when the school could show that our conduct would "materially and substantially disrupt" the educational process.

STUDENT #2: I won't be telling you my name because the circumstances of my case are embarrassing. At the time of my problems I was a 14-year-old freshman at a New Jersey high school. One afternoon a teacher walked past the bathroom and accused me of smoking. He sent me to the principal's office where, of course, I denied everything. I don't smoke. The vice principal questioned me for a while and then started rummaging through my purse. He first found a pack of cigarettes which gave him more reason to keep searching. He also found rolling papers, marijuana, a substantial amount of money, a list of kids who owed me money, and letters suggesting I was a drug dealer. With all this evidence against me, I was brought to juvenile court. There it was decided I was a drug dealer and a juvenile delinquent.

I appealed on the grounds that by searching my purse the vice principal had violated my Fourth Amendment rights against unreasonable searches and seizures. I contended that the evidence on which I was convicted was illegally used against me. When the case was taken to court, the state court which heard my case ruled the search of my purse had been unreasonable. I was pleased because this meant that the evidence obtained in the search could not be used against me in a court of law. Unfortunately, the school administration appealed to the U.S. Supreme Court which reversed the lower court's decision.

The Supreme Court said that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to searches conducted by public school officials, but a warrant is not required before a teacher or school administrator conducts a search of a pupil suspected of violating a school rule or criminal statute. Also probable cause is not required before a search is conducted, but a teacher must have "reasonable grounds" for suspecting that a search will turn up evidence that a student has violated the law or the rules of the school.

STUDENT #3: My name is Peggy Brendan. I am 17 years old and I attend St. Cloud High School in St. Cloud, Minnesota. In my school, there was no girls' tennis team so I asked the coach if I could join the boys' team. Despite the fact that I was ranked the best woman player in the district, he refused, saying that the Minnesota High School League had a rule stating that "Girls shall be prohibited from participating in the boys' interscholastic athletic program either as a member of the team or as a member of the girls' team playing the boys' team."

I felt that I had been denied equal protection and due process under the law, both rights provided by the Fourteenth Amendment. My family and I decided to sue. My case and another similar to it were tried together in a federal district court.

Many different points were brought out concerning this case. Here are a few of the points used against us: "On the average, men are taller than women. They are stronger than women in part because they have more muscle mass. Men have larger hearts than women and a greater capacity for deep breathing. This gives them the ability to utilize oxygen more efficiently." The school official spoke briefly about the rules that were made to keep girls from taking part in the boys' athletic program. He said these rules were made to prohibit unfair competition from the boys.

Our lawyer argued "These aren't average girls. They're outstanding athletes who have overcome any physical handicap in relation to boys. Their level of competence entitles them to compete with boys on an equal level.

Here is what the judge decided: "In this case, where there are no girls' programs provided in the sports at which these girls excel, they were prevented from participating in boys' interscholastic athletics on the basis of sex and sex alone." As a result, the rules were declared discriminatory, and I won the right to compete on the boys' tennis team.

STUDENT #4: I'm Cathy Kuhlmeier, a former student at Hazelwood East High School in Missouri and editor of our student newspaper, the *Spectrum*. At the end of the school year, we had prepared a six-page newspaper.

After we organized a meeting with the principal, I learned why he decided to delete the text. Apparently he felt that other students might be able to identify the pregnant girls which would violate their right to privacy. He also thought references to sexual activity and birth control were inappropriate for younger students. The article on divorce offended the principal because he thought it would be improper to publish the thoughts of the girl whose parents had divorced because her father had no chance to respond.

'However, although these objections may appear sound, the principal, by censoring our work, was guilty of an even greater crime. He infringed on my constitutional rights by disallowing my expression of ideas through freedom of the press. While it is true that I am a student under the principal's supervision, that supervision must have some limits. The principal has a higher authority to answer to besides that of the school code. In my mind, the rights guaranteed to *all* citizens under the Constitution outweigh the rules and regulations of any school.

I felt so strongly about this that I decided to bring the case to court. I lost in the district court, but won in the appeals court. The school board then appealed and won in the Supreme Court.

The Court rejected our claim that the school newspaper represented a "forum for public expression." The Court said that "school facilities only become a public forum when used indiscriminately by the general public." However, when the school reserves those facilities for use by the school, they may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

The other major reason the court gave was that the teen pregnancy article contained printed material "inappropriate for younger students."

The dissenting opinion, however, agreed that the greater issue was whether our freedom of expression was being abridged.

NARRATOR #1: (Closing) The cases you've heard today are not from a TV or movie script. They really happened to people your age. But these things didn't happen to *you*, did they? And you may think "That kind of stuff doesn't apply to *my* life here in ________. I don't need privacy rights here. That's all taken care of."

Well, you could be right. But before we leave, let's have a short pop-quiz on your right to privacy here in __________ . So –

What if:

The police pull your car over and want to search the back seat and the trunk – can they do that?

What if tomorrow morning one of your teachers wants to search your jacket pockets for drugs? Can she do that?

What if . . . in a "stamp out drugs" campaign, the police urge your parents to spot check your room for drugs on a regular basis? Is that legal?

What if, after a school dance, the police set up roadblocks on ________ Street, Route ________ , and ________ Parkway to check for alcohol? Can they do that?

Now, if you don't care about your privacy, the answers to these questions probably don't matter much to you. But in case you are interested, we'll give you a hint – some of these actions are *very* legal.

I mentioned at the beginning of this assembly that the appearance of a person in uniform or the flashing lights of a police car can be frightening.

In some other countries, the appearance of a uniform *can* be *terrifying* because there are no rules. A simple toast to freedom, a demonstration in the street, being seen with the "wrong" people, or talking to a foreigner can result in years of imprisonment or even death.

Here in *this* country, however, things are very different. There *are* rules. They're called the Bill of Rights. When you ask "What if?" you know that you can expect an answer – you'll know where you stand in the eyes of the law.

Know your rights, cherish them, and protect them – but never take them for granted. Thank you.

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Thoughts on the Roots and Evolution of the Bill of Rights

How conflicting interests, political expediency, and social change have shaped perceptions of the Bill of Rights over 200 years

Introduction

Today many Americans regard the Bill of Rights as the very essence of the United States Constitution. Indeed, the Bill of Rights is so integral to our democratic heritage that Secretary of State James Baker, in a statement explaining the administration's policy concerning aid to the nations of Eastern Europe, said that respect for those rights would be among the criteria—along with a market economy, protection of private property, free elections, and political parties—applied to such nations.

Yet, from a historical perspective, this centrality of the Bill of Rights seems oddly misplaced, especially since many prominent Founding Fathers either discounted the need for the Bill of Rights or rejected it outright as dangerous. James Madison and Alexander Hamilton, famed for their espousal of the nascent Constitution in *The Federalist Papers*, both rejected the ideological need for the Bill of Rights, as did George Washington and a host of other Founders.

Why then are we so enamored of the Bill of Rights today, and what separates our vision from that of the Framers of the Constitution? Can it be that the Framers did not respect such rights? Or that they did not think that liberty was important? Did they view rights—or the waiver thereof—differently than we do?

(Editor's note: This article is adapted from papers presented by Donald Robinson, Robert A. Goldwin and James Henretta at YEFC's 1990 Bill of Rights Institute for Teachers in Washington, DC)

Hamilton's Objections

Alexander Hamilton was thirty years old at the time of the Constitutional Convention. Widely known as the military secretary to General Washington and as a regimental commander at Yorktown, he returned to New York after the War of Independence and became a distinguished lawyer. He married into one of the city's richest and most powerful families and developed a reputation as a rising political thinker.

Although Hamilton attended the Constitutional Convention, he was not a seminal figure in the debates, mostly because his belief in a strong centralized government made him suspect in the eyes of his fellow delegates. However, he did play a crucial role in the adoption of the Constitution by tirelessly fighting for its ratification in New York, especially through his writing of over half of the papers appearing in *The Federalist*.

His objections to the need for a bill of rights are most concisely argued in *The Federalist* No. 84. One must remember when analyzing his arguments that he is in a very difficult situation, in a very close battle for ratification, and he must represent the case for the Constitution as strongly as possible. He had to make the argument that this Constitution, as it stood, was correct and safe, that it was a document that could be adopted.

Other states, including Massachusetts, had previously ratified the Constitution with the understanding that in due course a bill of rights or some other amendments would be added. So, in this context of fighting for ratification of the Constitution without further amendment, Hamilton makes five points against the possible inclusion of a bill of rights.

His first argument is a very direct one: rights already exist in the Constitution. Yes, he admits, these rights are not separated into a bill of rights, as they were in some of the state constitutions at that time, but there are rights in the text of the Constitution. Hamilton notes the specific reference to the writ of *habeas corpus*, which is the most fundamental of all rights—the right not to be held without a charge, the requirement that the government must give reason for arresting its citizens. Hamilton then notes the specific reference to trial by jury for all crimes. He mentions the limits on treason. For example, treason is defined as levying war or aiding and abetting the enemies of the country, and it must be proven by two witnesses to the same overt act—not opinions but overt acts – and the punishments are limited. Punishment for treason cannot extend to citizens' families, thereby limiting the arbitrary power of government to define treason and punish it in ways that are abusive of the rights of people.

Hamilton also refers to the protections against bills of attainder and *ex post facto laws*, as well as to protections against granting titles of nobility. But his basic point is that the most fundamental rights – *habeas corpus*, trial by jury, limitations on treason – are clearly evident in the Constitution. He then argues that the matter then becomes simply one of form – should these rights be listed in a separate bill of rights or interspersed into the text of the Constitution at appropriate points? – and he dismisses this as an unimportant question.

Hamilton's second argument is historical. He says that bills of rights do not belong in constitutions because they define the relationship between monarchs and subjects. He points out that this has been the history of bills of rights from the inception of the Magna Carta, against King John, to the Petition of Right, against Charles I, to the Declaration of Rights, which was demanded when William and Mary assumed the crown of England in 1688-89. Those documents define the rights of citizens in the face of claims of absolute authority on the part of monarchs. That is what a bill of rights is, says Hamilton.

By contrast, a constitution is a form of government made by the people and in which the people give to the government certain explicit powers and then exercise those powers by placing them in the hands of elected officials. Thus, a constitution is a form of government specifically for a republic and as such has no need for a bill of rights. The people will delegate power carefully to their chosen representatives and monitor them closely, and thus no need for a bill of rights exists. Hamilton closes: "[T]he people surrender nothing; and as they retain every thing they have no need of particular reservations."

Hamilton then argues that the powers of the federal government do not apply to personal and private matters. The powers of the federal government, he offers, are reserved to foreign affairs, defense, and the regulation of commerce. It is the several states that control matters of interpersonal relationships, matters such as crimes between persons. In those matters, the federal government has no power. Thus, what is the need for protection?

In his fourth argument, Hamilton suggests that a bill of rights may actually be dangerous. He argues that it could be dangerous because it implies that the federal government might have powers that have not explicitly been given to it. In discussing the proposed right of liberty of the press, Hamilton notes:

> [W]hy declare things that shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible defense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.

Hamilton here is ironically taking the position of strict discussion and proposing that if a bill of rights were adopted, then it will invite a loose construction, namely, that the government has powers that are not explicitly set forth in the Constitution. Obviously, he says, this implication should be avoided.

Hamilton's fifth and final argument is an important one. He contends that "the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights." Because the very fact of a constitution implies that the people are sovereign, that the people have created this government and have given it certain powers – and the implication of this argument is that there are no powers that are not given by the people – the Constitution itself must also be a bill of rights. The Constitution declares and specifies the political privileges of citizens in the structure and administration of government, says Hamilton, and it defines certain immunities and methods of proceeding for the citizens.

The very fact of the Constitution is itself a bill of rights. It proceeds from the fundamental assumption of a bill of rights, which is that the people are sovereign. The people declare what powers the government will have, and then the people themselves, by election, control the exercise of those powers. Hamilton believed, as did most of the other Framers, that in this sense the Constitution itself, "We the People of the United States, in Order to [achieve certain ends], do ordain and establish this Constitution for the United States of America," is the Bill of Rights, right there in the preamble.

How Valid Are Hamilton's Objections?

Now that we have listed Hamilton's objections, let us look at them more closely, although not in the order Hamilton offered them. Hamilton's third point – that the federal government's powers do not extend to matters that could threaten the rights of individuals – is clearly untenable. The federal government has the power to raise armies, the power to maintain order, the power to regulate commerce, and it has the power delineated under the necessary and proper clause as well. Clearly, the government would have powers that might threaten individual liberties, above and beyond those that the states have, so that argument cannot be taken seriously.

On the other hand, the proposition that rights are inherent in the text of the Constitution appears valid. Indeed, most of the fundamental liberties of the Anglo-Saxon tradition are included in the text of the Constitution. *Habeas corpus*, trial by jury, and the limitations on treason are three very fundamental rights, and it is entirely proper that they be included in the Constitution. In that sense the Constitution shows a great regard for liberty.

However, we must temper this respect for liberty by noting that the *habeas corpus* clause does contain the exception "*habeas corpus* shall not be suspended, *unless when in cases of rebellion or invasion the public safety may require it.*" (Emphasis added.) The very opportunity for suspending *habeas corpus* is a red flag and when there is talk of suspending *habeas corpus*, we had all better pay close attention.

As to the argument about the specification rights being dangerous because they apply a broad construction to the Constitution, that is included to appease the Jeffersonians, and really does not hold water. Hamilton himself knew better, and says so in the course of the argument, so we can disregard it.

However, we need to focus on the two remaining arguments. Let us address the idea that the Constitution is itself a bill of rights. This is profoundly true. At heart, it is finally the culture and the political process of a country that determine rights, not their specific inclusion in any document.

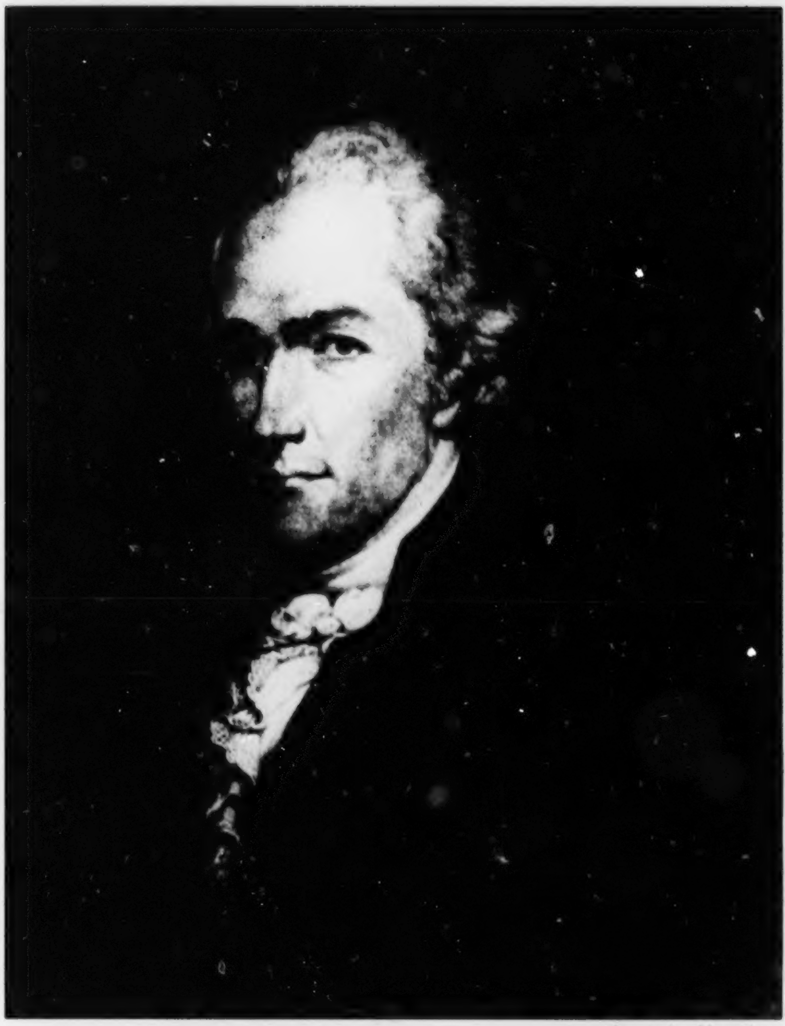
Through much of our history, many people have not enjoyed the rights listed in the Bill of Rights. Slavery existed when the Bill of Rights was written (and persisted for some sixty years thereafter), and it was the culture and the political process that allowed this to occur, and it was the maturation of the culture and political process that brought us to our present understanding of those rights. Indeed, the political process and political culture of this country ultimately guarantee liberty and those rights. Thus, although the Bill of Rights serves a useful—and important—function as a bulwark that advocates of rights can rely upon, the protection of those rights depends, in the final analysis, upon the political process of this country.

That brings us to Hamilton's final point, which is that a bill of rights does not belong in a constitution because a constitution is fundamentally republican or, we would say, democratic. Hamilton states that a constitution makes the people sovereign and ensures that the people remain sovereign through elections—and that is the final protection of rights. This argument is alarmingly incorrect. To say that there is no need for explicit protection of rights in a constitution because the people are sovereign and the people will not allow power to be exercised in a way that threatens rights is dangerously myopic. Democratic governments are just as capable of tyranny as monarchical governments. de Tocqueville's phrase, "the tyranny of the majority" comes to mind, as does Madison's admonition in *The Federalist* No. 51, when he discusses the dangers arising from majoritarian government—and the importance of constitutional protections against such a government.

Madison's Dilemma

Madison agreed with many of Hamilton's views, and he clearly indicated that he was opposed to a bill of rights early in the process of ratification in the State of Virginia. But, in comparison, he was more moderate in his views, and in the end became convinced that such a delineation of rights was necessary, and he even introduced it in Congress.

Popular theory has it that Madison was eventually persuaded to do so by Thomas Jefferson, who was then U.S. Minister to France and with whom Madison frequently corresponded. Yet Madison was never more than lukewarm in his support of the Bill of Rights, and he seems to have proposed it more as a matter of political expediency than as a deep-seated belief.


The Bettmann Archive

Alexander Hamilton

What were Madison's reservations about bill of rights? First, he thought they were ineffective. In contrast to Hamilton, Madison thought that the greatest danger to the liberty of the rights of the people, in any government, lay where the greatest power resided and, under the newly proposed form of government, the greatest power lay in the hands of the majority. Thus, if the majority were the greatest threat to liberty, then the question becomes, How do you restrain the majority, especially a bad majority, in a system where it rules? This was the problem that Madison grappled with, and it explains why he did not have confidence in bills of rights, or at least those currently codified under the state constitutions of the time. In an October 1788 letter to Jefferson, Madison states that

> experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been commited by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instant where it has been opposed to a popular current. . . .Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended . . . from acts in which the Government is the mere instrument of the major number of the Constituents.

Madison was not opposed to security for rights; he thought that bills of rights could not effectively secure those rights. When they are most needed, when a bad majority is most determined to violate the rights of the minority, bills of rights do not work. Thus what Madison was searching for was an efficacious way to restrain a bad majority.

In that same letter to Jefferson, Madison enumerated his other concerns about a bill of rights. First, like Hamilton, he felt that rights are well protected under the Constitution, and he persisted in that view, even after he proposed the Bill of

Rights before the House of Representatives. He noted that his proposals *only made explicit* the protections of rights that were already protected in the Constitution.

The second reservation about a bill of rights that Madison listed in his letter to Jefferson was that, if improperly done, the effort to protect rights might actually narrow them. For example, he argued, in many current state constitutions, freedom of religion is protected, but it becomes clear that that protection is meant to apply only to Christians, indeed only to Protestants, and despite such "freedoms" in almost every state, there were religious oaths required for state government service. Many excluded Jews, some excluded Catholics, and in some cases, the taking of a Trinitarian oath was required, so that excluded many other people. Thus, despite overriding protestations of general rights, the actual rights were much narrower.

Third, Madison argued that the federal structure established by the Constitution – characterized by the separation of powers – generally prevented the dangers of a dominant majority. In this way the structure of government is seen as the greatest security for rights.

However, rather than dwelling solely on his negative view of a bill of rights's ineffectiveness against the majority, Madison was also able to grasp its possible benefits. He made it clear to Jefferson that he was not going to stonewall on the question of a bill of rights, and that he was ready to show a willingness to include it if it could be done properly. His first argument is a powerful one. He noted that by incorporating general maxims of free government in the Constitution, they would have an educative, informative effect on the people. Madison developed this viewpoint to a greater degree in subsequent papers and speeches, and it becomes clear in the endorsement speech he made before Congress that one possible defense against a bad majority is to elevate before each and every citizen certain ideals that are held dear by the whole community, so that the majority will necessarily be thwarted if they try to abuse those ideals. As Madison observed:

> as [bills of rights] have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might otherwise be inclined

Thus, if there were to be a powerful consensus among the great numbers of the people, the whole community would have allegiance to those ideals and would not permit certain evils to be done. In the very words of the Bill of Rights, "Congress shall make no law . . ." against those rights that are enumerated."

Now, how can a base majority be stopped? By a conviction of the whole community that even if a majority wants to override those ideal rights, they will not be allowed to do so. This, then, is Madison's solution to the dilemma of majority power. And, of course, such a bill of rights would also have the salutary effect of restraining excesses of the government, if the threat to liberty originated therein. It is Madison's comfort with these ideas that probably allowed him to overcome his reservations about bills of rights and eventually led him to propose his amendments before the Congress – and thereby become known as "the Father of the Bill of Rights."

Madison the Politician

Yet can we assume that Madison merely convinced himself by these arguments that the Bill of Rights was necessary? If we consider the political lay of the land, a different conclusion regarding his motives begins to emerge.

We must remember that Madison had clearly gone on record as opposing a bill of rights early in the ratification process in Virginia, and it is only after ratification that he begins to speak less critically of it. In fact, it is during his closely contested campaign for election to the House of Representatives that he begins to disassociate himself from his former opinions. As he wrote to George Washington:

> It has been very industriously inculcated that I am dogmatically attached to the Constitution, in every clause, syllable, & letter, and therefore not a single amendment will be promoted by my vote . . . .This is the report most likely to affect the election . . . .

Here a new motive presents itself: political necessity. Madison was engaged in a very tight race with James Monroe, an Anti-Federalist, who tried to label Madison as a strictly anti-amendment candidate and thereby defeat him in Virginia, which had ratified the Constitution only after proposing several amendments for future consideration. Madison, in order to head off this attack, came out in favor of amendments. And, once elected, he acted to make good on his campaign promise.

What is interesting here is that, even as he proposed his amendments to Congress, his arguments for the Bill of Rights remain remarkably tepid. For example, Madison explains in a letter he wrote to a man named Peters, who was a Pennsylvania politician and a Federalist, why the Bill of Rights should be supported. Remember that this was at the height of the debate in Congress, so Madison must have thought it very important to write this letter at such a crucial juncture.

His first argument is that a constitutional provision in favor of essential rights is a thing "not improper" in itself. This type of double negative construction – not improper – characterized much of his language regarding a Bill of Rights, language that could hardly be described as enthusiastic. Madison then conceded that such a constitutional provision may be less necessary in a federal republic than in a monarchy. Nevertheless, it is in some degree rational in every government, since in every government power may oppress, and declarations on paper, though not an effectual restraint, are not without some influence. It is difficult to conceive of fainter praise than that, and that sums up his discussion of the intrinsic merits of the Bill of Rights.

After ticking off these intrinsic merits to the Bill of Rights, Madison offered six more reasons to support it:

1. Seven states that ratified the Constitution did so with a tacit understanding that such provisions would be pursued, and they would not have ratified otherwise. Thus, such amendments must be included as a matter of honor.
2. If congressional candidates in Virginia, like himself, had not taken a stand in the elections favoring the amendments, Virginia and other states would have been represented by Anti-Federalists instead of the Federalist representatives now in Congress. Thus a perception of political chicanery might ensue if amendments were not included.
3. If he had not proposed the amendments in Congress at the time he did, the Anti-Federalists would have done so within three days, and it would be preferable that the Federalists control the amendment process and that they be perceived of as having offered it willingly, rather than having it extorted from them.
4. Adopting his proposals would quash the opposition across the board. Additionally, it would undermine the calls already being heard for a Second Constitutional Convention, during which many amendments that could drastically alter the structure of government would undoubtedly be offered. By avoiding a second convention, the Fed-

eralists would preserve the current format of the Constitution.

5. If the Federalists offered the Bill of Rights, they would effectively neutralize it as a major issue in the elections for state legislatures—which were upcoming in the autumn of that year—and thus the Anti-Federalists would have less support, especially considering that state legislatures would elect the members of the federal Senate.
6. The amendments must be passed to ensure that North Carolina would ratify the Constitution. (North Carolina had refused to do so until the amendments were actually incorporated into the Constitution.)

Thus, although Madison does offer evidence of intrinsic ideology for the Bill of Rights, most of his reasons for its support are premised upon political expediency.

Controlling the Process

Madison's political maneuvering, however, was far from complete. As he had written, by offering the amendments, the Federalists could control their adoption. And this is exactly what Madison did. The whole substance of the Bill of Rights as they currently appear in the Constitution was included in Madison's initial list of proposed amendments. Some were accepted verbatim, others were modified, and some defeated. But no provision in the ten amendments was not included in some form in Madison's initial proposition. This is Madison's greatest legacy.

Despite repeated attempts by the Anti-Federalists to substantively alter the content of the Constitution, Madison and his allies held firm and included in the Bill of Rights only those rights that he felt were explicitly provided for in the text of the Constitution itself.

The Anti-Federalists clearly were dissatisfied with Madison's proposals, and bitterly complained that he had left out all the important points. What did they propose instead? In retrospect, their recommendations had nothing to do with rights as we currently understand them.

They proposed seventeen amendments, none of which made any progress in Congress. These included state controls over U.S. senators, limitations of the terms of the president and senators, state control over federal elections, a ban on direct taxation by the federal government, limitations on the federal judiciary, strengthening of state court jurisdiction, restoration of state powers to lay duties, limiting the president's role as commander-in-chief, limiting the president's dismissal powers, diminishing federal inferior courts, and using oaths of office as religious tests. Quite plainly, adoption of these amendments would have profoundly altered the structure of the Constitution.

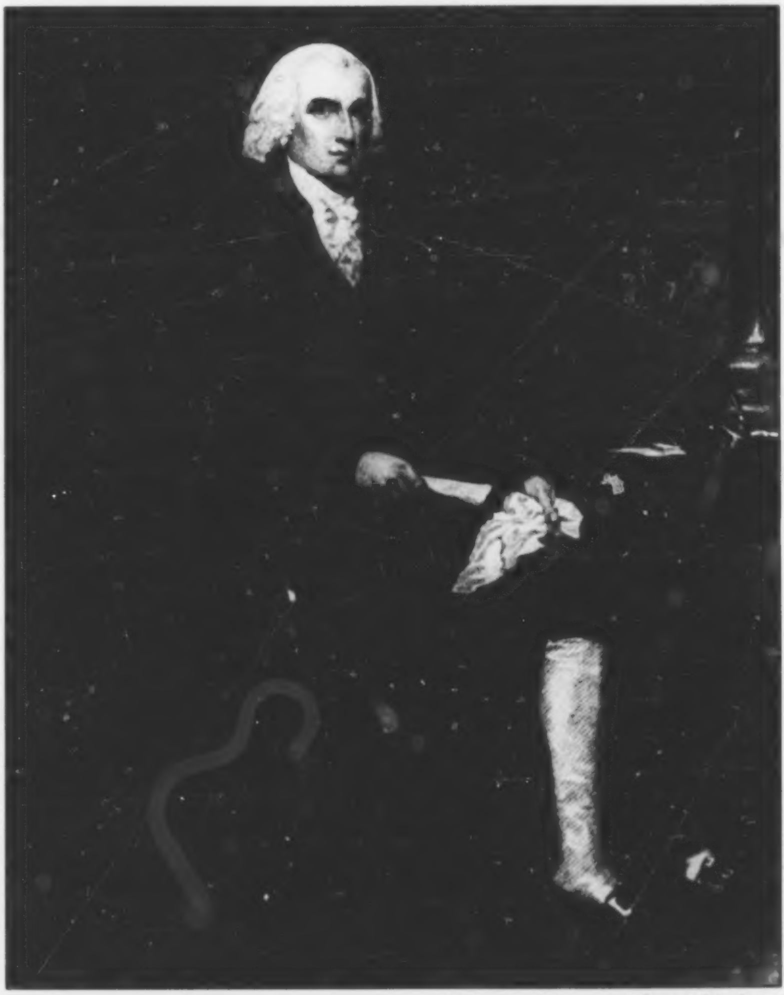
Madison's strategy was to separate those amendments that he was sure had no popular support, but only the support of the Anti-Federalist leaders, and to propose only those amendments that were demanded by the majority of the populace, namely, a list of individual rights that would guarantee the general well-being. As a consequence, his political maneuvering left the Anti-Federalist leaders without any followers.

The lesson to be learned is that the struggle over the Bill of Rights is more aptly characterized as a struggle over the structure of the government shaped by the Constitution. At heart, both the Federalists and Anti-Federalists agreed that the *most important aspect of securing rights is the structure of government.* They also agreed that the Bill of Rights did not change anything in the Constitution. Whether they were right or wrong from the modern perspective is moot. In the end, Madison's adroit political leadership did much to shape the Bill of Rights as we know it today.

The Maturation of the Bill of Rights and the Constitution

How was the very limited concept of rights held by the Founding Fathers transformed into our current sense, in which we feel that rights are guaranteed to us as individuals, and why is this sense the cornerstone of the modern American political order? To understand this maturation, we must consider the constitutional

(continued on page 43)



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James Madison

Freedom Has a Name

State v. Federal Rights/Secondary

Joseph L. Calpin

Background

The First Amendment of the United States Constitution provides that, "Congress shall make no laws . . . abridging the freedom of speech . . . ." Article I, section 8 of the Oregon Constitution provides that, "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Oregon is by no means unique in having such a "free speech" clause in its state constitution; each of the other 49 state constitutions contain such a clause. As this comparison illustrates, the language used frequently differs, thus giving rise to myriad interpretations from the highest courts of the individual states. The celebration of the Bill of Rights bicentennial offers an opportunity to explore some intriguing questions surrounding the relationship between the federal Bill of Rights and the rights enumerated in the constitutions of the various states.

During this century, the Fourteenth Amendment established the Bill of Rights guarantees as the minimum benchmark of a citizen's rights. State courts, while bound by this federally imposed minimum standard, have ruled in certain areas that state constitutional bills of rights provide a higher standard of rights and protections than does the federal Bill of Rights. This has led in recent years to an emerging trend by state courts to review both an individual state constitution as well as the United States Constitution in deciding the protections afforded its citizens.

In an article in the summer 1978 issue of *The Judge's Journal*, Charles G. Douglas outlines from a New Jersey case seven factors which might require a state constitution control instead of the United States Constitution. These factors are: "a) the text differs, b) the legislative history of the clause differs, c) state law holdings predate the federal change, d) there is a difference in state structure, e) the subject matter is of unique local interest, f) there is a countervailing state or local tradition, and/or g) public attitudes on the issue differ."

Former Oregon State Supreme Court Justice Hans A. Linde is nationally recognized as a leader in his use of the state constitution to decide cases. In the spring 1980 issue of the *University of Baltimore Law Review*, Linde wrote: "In my view, a state court should always consider its state constitution before the Federal Constitution. It owes its state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time."

Neither Linde nor others in the "states' first" group downplay the importance of the federal Constitution. They simply stress that ours is a federal system, one in which citizens have different levels of government with rights and protections that differ at each level. Written constitutions that listed the rights of citizens existed in the states before the federal Constitution. The Bill of Rights was added after the federal Constitution was adopted by the states in part to codify the rights of the citizens. Many of the Anti-Federalist arguments opposing ratification of the federal Constitution were based on its lack of these rights. A comprehensive examination of state constitutional protections as suggested by this lesson may well result in the discovery of a separate and distinct source of protections which, in some cases, may far exceed those provided by the federal Constitution.

Introduction

The Fourteenth Amendment creates a "floor" or minimum level of rights citizens of this country enjoy but what might the result be if you analyze your state's bill of rights along side the federal Bill of Rights? How are they the same? How do they differ? The focus of this activity is to have students compare the language, meaning, coverage, similarities, and differences in their state constitution's bill of rights and the federal Bill of Rights.

Objectives

1. Students will examine both their state's bill of rights and the federal Bill of Rights.
2. Students will examine the content of both and judge areas of strengths and weakness in each.
3. Students will understand the importance of proper word usage in written rights.
4. Students will analyze differences in the two documents.

Procedure

1. Distribute copies of your state constitution and the U.S. Constitution to each student.
2. Divide the class into small groups. Using the sample worksheet on page 19, have the groups fill in the top part by listing the sections/articles of the state bill of rights. (Note that most state constitutions are much longer than the federal Bill of Rights, so you may need more than one page of each in order to list all the items.)
3. Reassemble the entire class. Review the state bill of rights with the whole group and agree upon the issue/s of each section/article.
4. Return to the groups. As a group, have the students go through the chart and locate the point where the rights correspond. Have them mark an "S" where the language used to describe the rights is similar or "D" where it differs. Designate one student in each group to record, on a separate piece of paper, the areas where differences are noted.
5. Reassemble the class and review the chart and the lists.
6. If possible, work with a local attorney or LRE resource person to determine the strengths and weaknesses of your state constitution. Using this knowledge, ask students questions to determine why they think these strengths and weaknesses exist. The Oregon Constitution, for example, has a much broader free speech clause than does the federal Constitution. This is also true in the area of search and seizure. For this reason, people in Oregon file these types of cases in state court if possible.
7. If possible, invite an attorney to class after the chart exercise to further explain the range of rights citizens enjoy in our nation at both the state and federal level.

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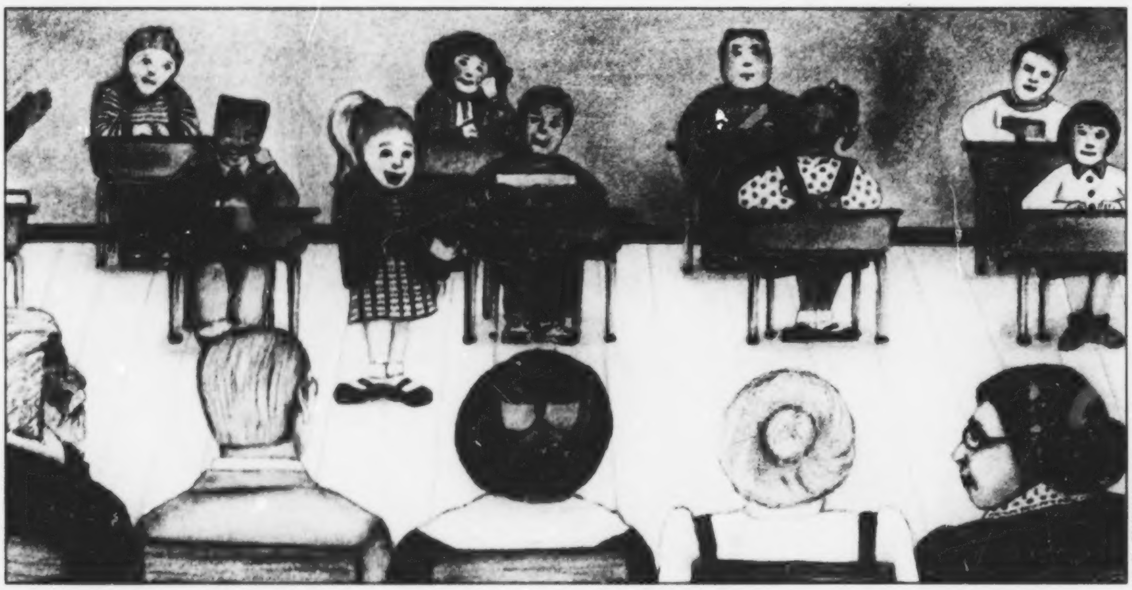
2539

U.S. Bill of Rights	**State Bill of Rights**				
1st Amendment					
establishment clause					
free exercise					
free speech					
free press					
assembly					
petition					
2nd Amendment					
bear arms					
3rd Amendment					
quartering					
4th Amendment					
search & seizure					
5th Amendment					
grand jury					
double jeopardy					
witness against oneself					
6th Amendment					
speedy trial					
public trial					
impartial jury					
exact charges					
7th Amendment					
trial by jury in civil cases					
8th Amendment					
excessive bail					
cruel & unusual punishment					
9th Amendment					
claim to other rights not stated					
10th Amendment					
powers reserved to state and to the people					

Freedom Has a Name

A Talk Show from the Past/Elementary

Arlene F. Gallagher



Holly Pribble

"We ask justice, we ask equality, we ask that all the civil and political rights that belong to citizens of the United States of America be guaranteed to us and our daughters forever."
–Susan B. Anthony, 1896

The right to vote is inextricably bound up with freedom of assembly, freedom of expression and freedom of the press. If you are able to vote but not able to gather with others to discuss issues and hear different viewpoints your vote is an uninformed one. If you are able to vote but are not allowed to seek information freely from the press and other sources, your vote is an uninformed one. An uninformed vote is likely to be guided by self interest and may be worse than no vote at all.

The battle for the Nineteenth Amendment which finally gave women the right to vote was also tied closely to the abolitionist movement. This activity for upper elementary grades is just a beginning to engage students in research and study of some of the key players in the women's movement.

Objective

This activity will introduce students to key players in the fight for women's suffrage. It will actively engage them in asking questions of these historical figures to hopefully whet their appetites for more information. It will also provide a model, the talk show format, for other historical study. This activity will only scratch the surface of a period of history. Teachers should feel free to add other historical figures and questions to flesh out the time period.

Time Needed

Allow for two hour periods on two consecutive days to complete this activity.

Day One: Assemble, Reassemble—The Right to Meet in Groups

The right to meet in groups, to discuss and debate common interests and concerns is a basic cornerstone of democracy. In countries where this right is curtailed citizens' participation in self-governance is seriously limited.

MATERIALS AND PREPARATION

A list of groups that students might belong to and a list of preferences related to their experiences.

PROCEDURE

Write the following phrase on the chalkboard:
"the right of the people to peaceably assemble"

Ask the students what this means. Point out that if the government could prevent people from meeting in groups they wouldn't be able to talk to each other about common interests and concerns. Explain that the class is going to play a game called "Assemble, Reassemble."

Start by designating two places in the room for students to go to depending on their decisions and a place in the middle of the room to represent the "right not to choose." Call out the list of groups and have students go to stand in the place of their choice. They may take a moment to say something about their choice or you can move quickly from one topic to another. Begin with very simple preferences and move to topics that require more thought. The more complex topics will lend themselves to discussions about how choices are made and the consequences of those choices. Designate additional places to stand as the number of choices increases.

Suggested Choices

summer or winter

walk in the mountains or walk by the ocean
baseball team, hockey team, chess team
reading, writing, drawing
bicycle riding, horseback riding, scuba diving
in favor of a leash law or opposed to a leash law
lowering the driving age to 14 or opposed to lowering it
Girl Scouts or Boy Scouts
add other topics representative of the students in your class

After students have assembled and reassembled conduct a discussion about the choices they made. What things did people have in common? How did it feel to exercise the right "not to choose"? Ask how it would feel not to be able to choose or not to be able to get together with people in groups. Explain that tomorrow the class is going to have a "talk show" with five famous Americans from history for whom the right to assemble was crucial.

There are brief profiles of the key players who should either be selected at random or by the teachers. These students will need to have copies of the profiles and of the questions to prepare themselves for the following day. Students who are selected to play these roles may wish to do additional research but it is not necessary to hold the talk show. Another way to do more in-depth study would be to divide the class into five groups, assigning one historical figure to each group to research which would require more time and instruction. The key player would be someone from the group who studied the historical figure. A student or the teacher can play the moderator, the talk show host.

Explain to the rest of the class that they will be the audience at the television studio and will be asking questions of the guests. Give them the names of the five guests and suggest that they might want to ask their parents what questions they would ask if they were attending such a historical talk show. Distribute the questions to the rest of the class. If you need more questions have the key players make them up. Tell the key players not to worry if they don't know an answer. They can stay "in character" by simply saying they choose not to answer or don't remember. These questions will serve as a research base for additional study.

Day Two

MODERATOR'S INTRODUCTION

Welcome to The ____________ Show. Today we have five distinguished guests from the past. All of these guests were involved in the fight for women's suffrage. . . .a goal that was achieved because in this country we have the right to peaceably assemble. The guests for today's show are: Elizabeth Cady Stanton, Lucretia Coffin Mott, Susan Brownell Anthony, Frederick Douglass, and Woodrow Wilson. Please raise your hand if you have a question and address it to the appropriate person.

PROFILES

ELIZABETH CADY STANTON (1815-1902)
Often called the "mother of the women's suffrage movement," she organized the Women's Rights Convention in 1848. She was the daughter of a leading lawyer in Johnstown, New York. After attending the new seminary in Troy that Emma Willard opened her formal education was over since there was no college that would accept women. In 1840 she married Henry Stanton, with whom she had seven children. They went to London on their honeymoon where her husband was a delegate to the world anti-slavery convention. Instead of sightseeing, as was expected of her, she attended the convention. She was surprised to find out that most of the talk was about women and how to keep them from taking part, rather than about slavery. A number of the delegates from America were women but the convention voted to have the women sit off in the galley or behind a curtain. It was at this convention that Elizabeth Cady Stanton met Lucretia Mott. Together they planned the women's rights convention.

LUCRETIA COFFIN MOTT (1793-1880)
One of the earliest advocates of equal rights for women, she was also a Quaker minister. Born in Nantucket, Massachusetts, she attended public school in Boston and a Quaker boarding school in Poughkeepsie, New York. In 1811 she married James Mott, a teacher in the school. When the Quakers split over the slavery question in 1827 she joined the antislavery Hicksites, led by Elias Hicks and helped found the American Anti-Slavery society in 1833. She attended an anti slavery convention in London in 1840 and, when the convention refused to seat women, she and Elizabeth Cady Stanton joined together to work for women's rights.

SUSAN BROWNELL ANTHONY (1820-1906)
Born in New York, her father was a successful businessman who was also a Quaker and supporter of good causes. In 1851 when he went to visit Elizabeth Cady Stanton he brought his daughter with him. That was the beginning of a strong relationship between two women dedicated to the rights of all women. Henry Steele Commanger has said: "Each one was a tower of strength; together they were like an army." Although they had much in common in their beliefs about justice they were quite different in other ways. Susan never married. She did much of the research for the cause; the facts and figures needed to present their arguments. Elizabeth did most of the public speaking, at least initially. However Susan was the one who took the step to vote. In 1872 she went to a voting booth in Rochester, New York along with sixteen other women and was arrested and fined $100 which she refused to pay. Apparently the judge did not have the nerve send her to jail. Susan was also the one who went out west to try to convince the new states to give voting rights to women. Wyoming was first in 1869 followed by Utah and then Colorado.

FREDERICK DOUGLASS (1817-1895)
Born a slave in Talbot County, Maryland Frederick Douglass escaped to become one of the foremost black abolitionists and civil rights leaders in the United states. After his escape to New York Douglass became an agent of the Massachusetts Anti-Slavery Society, lecturing to large assemblies at first about his experiences as a slave and later denouncing slavery as an institution. When he traveled he was sometimes attacked by those who were against the abolition of slavery and he often met with discrimination. He published an autobiography but so feared that it might lead to reenslavement that he fled to Great Britain where English Quakers raised enough money to purchase his freedom. Douglass was a strong supporter of women's rights. At the Seneca Falls convention organized by Elizabeth Cady Stanton and Lucretia Mott his support was crucial. When the leaders insisted that women should have all the rights that belong to citizens of the United States some members of the audience thought that demanding the right to vote was going

too far. At this point Douglass stood up and spoke strongly. He said that slavery was just as bad for women as it was for Negroes. He said that one way to end it was by giving everyone the vote.

WOODROW WILSON (1856–1924)

Born in Staunton, Virginia he spent his childhood in Augusta, Georgia. His father, to whom he was very close, was his only teacher until age 13. At 14 his family moved to Columbia, South Carolina and Tommy, his childhood name, began reading books on the science of government. He announced to his cousin that he had decided to become a statesman. Before realizing that goal he became President of Princeton University where he tried to make major academic and social reforms. He was successful with the former but unable to eliminate the social clubs which he believed represented money and special privilege. Wilson served as president from 1913 to 1921, an administration during which several Constitutional Amendments were passed, including the Nineteenth which established women's suffrage. People believe that his support for women's voting rights had a significant effect on the success of the movement. In 1917 the United States entered the First World War sending American troops to England in their war with the Germans.

QUESTIONS

For Elizabeth Cady Stanton:

Why were you called the "mother of the Women's Rights Convention"? How did you meet Lucretia Mott? What was happening in London when you went there on your honeymoon?

For Lucretia Coffin Mott:

What was the organization called the Hicksites? What happened at the convention in London that prevented you from speaking against slavery? Can you show us on the map where you were born?

For Susan Brownell Anthony:

How did you happen to meet Elizabeth Cady Stanton? Were you the same age as Mrs. Stanton? What was your difference in age? Were you a lot like Mrs. Stanton or were you very different? Why were you arrested and why weren't you sent to jail? Which states were the first ones to give voting rights to women? Can you point them out on the map?

For Frederick Douglass:

Where were you born and to which state did you escape? Would you please indicate these places on the map. What happened to you when you traveled around to speak against slavery? Why did you support the voting rights for women?

For Woodrow Wilson:

When did you decide that you were going to be a statesman and what influenced you in this decision? What changes did you try to make when you were President of Princeton University and were you successful? Was the country involved in a war during your administration?

Annotated Bibliography

Oneal, Zibby. (1990). *A Long Way to Go.* New York: Viking.

Set in 1917 this is the story of the fight for women's suffrage told from the point of view of an eight-year-old girl whose grandmother is active in the movement. Lila experiences the struggle touching her own family when her father says, "I vote for this family," and his mother reminds him that she knew him before he could talk! The grandmother gets arrested, to the embarrassment of her son, but Lila is able to join her grandmother in a march after she makes her own convincing speech to her father. This is an excellent book to raise questions about the right to assemble and the women's suffrage movement. It places the reader in the viewpoint of an eight-year-old girl which offers an interesting perspective; one with which other children will identify.

Hamilton, Virginia. (1988). *Anthony Burns: The Defeat and Triumph of a Fugitive Slave.* New York: Alfred A. Knopf.

Thousands of abolitionists saw Anthony Burns as a symbol of freedom imperiled. Many of those who supported him were also supporters of the fight for women's suffrage. This superb novel dramatically illustrates how disadvantaged a large segment of the population was because the Bill of Rights did not apply to them.

Meltzer, Milton. (1990). *The Bill of Rights: How We Got It and What It Means.* New York: T. Y. Crowell.

This award-winning author has done it again. Using everyday questions that engage the reader Meltzer traces the origins of the Bill of Rights and shows how these rights have been contested in the past 200 years. Without proselytizing he makes a very convincing case for need for an active citizenry to continue to protect these freedoms. A book for the upper elementary student and for young adults. Many adults unfamiliar with the origins of the Bill of Rights will enjoy Meltzer's clearly written book.

Rappaport, Doreen. (1987). *Trouble at the Mines.* New York: Harper and Row. Bantam-Skylark Paperback, 1990.

Set in Arnot, Pennsylvania in 1898 this is a story of protest and underlies the importance of the right to assemble. Mining is dangerous but the owners do not care about the bad conditions nor do they care that the miners' families have little money for either food or clothing. Two men lead the miners in a strike and a woman named "Mother" Jones has come to help them organize in this book for middle grade readers.

Zarnowski, Myra. (1990). *Learning About Biographies.* Published jointly by the National Council of Teachers of English and the National Council for the Social Studies. Available from NCTE at 1111 Kenyon Road, Urbana, IL, 61801.

This is one of the most exciting books for elementary teachers published in recent years. The author takes the reader through a step-by-step process that will have students writing biographies about historical figures with enthusiasm and detail. This book will make you want to become a biographer yourself.

(Note: "Assemble, Reassemble" is reprinted with permission from Education for Freedom: Lessons for Teaching the First Amendment by Arlene F. Gallagher with Laurel Singleton. Developed by the Social Science Consortium. Copyright First Amendment Congress, University of Colorado at Denver, Graduate School of Public Affairs, 1250 14th St., Suite 840, Denver, CO 80202.)

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Congreſs OF THE United States

begun and held at the City of New-York, on
Wednesday the Fourth of March, one thousand seven hundred and eighty nine

THE Conventions of a number of the States having at the time of their adopting the Constitution expreſsed a desire in order to prevent misconstruction or abuse of its powers that further declaratory and restrictive clauses should be added And as extending the ground of public confidence in the Government will best ensure the beneficent ends of its institution

RESOLVED by the Senate and House of Representatives of the United States of America in Congreſs aſsembled two thirds of both Houses concurring that the following Articles be proposed to the Legislatures of the several States as amendments to the Constitution of the United States all or any of which Articles when ratified by three fourths of the said Legislatures to be valid to all intents and purposes as part of the said Constitution viz.

ARTICLES in addition to and Amendment of the Constitution of the United States of America proposed by Congreſs and ratified by the Legislatures of the several States pursuant to the fifth Article of the original Constitution

Article the first After the first enumeration required by the first Article of the Constitution there shall be one Representative for every thirty thousand until the number shall amount to one hundred after which the proportion shall be so regulated by Congreſs that there shall be not leſs than one hundred Representatives nor leſs than one Representative for every forty thousand persons until the number of Representatives shall amount to two hundred after which the proportion shall be so regulated by Congreſs that there shall not be leſs than two hundred Representatives nor more than one Representative for every fifty thousand persons

Article the second No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened

Article the third Congreſs shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the preſs or the right of the people peaceably to aſsemble and to petition the Government for a redreſs of grievances

Article the fourth A well regulated militia being neceſsary to the security of a free State the right of the people to keep and bear arms shall not be infringed

Article the fifth No Soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in a manner to be prescribed by law

Article the sixth The right of the people to be secure in their persons houses papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall iſsue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized

Article the seventh No person shall be held to answer for a capital or otherwise infamous crime unleſs on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witneſs against himself nor be deprived of life liberty or property without due proceſs of law nor shall private property be taken for public use without just compensation

Article the eighth In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation to be confronted with the witneſses against him to have compulsory proceſs for obtaining witneſses in his favor and to have the aſsistance of counsel for his defence

Article the ninth In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law

Article the tenth Exceſsive bail shall not be required nor exceſsive fines imposed nor cruel and unusual punishments inflicted

Article the eleventh The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

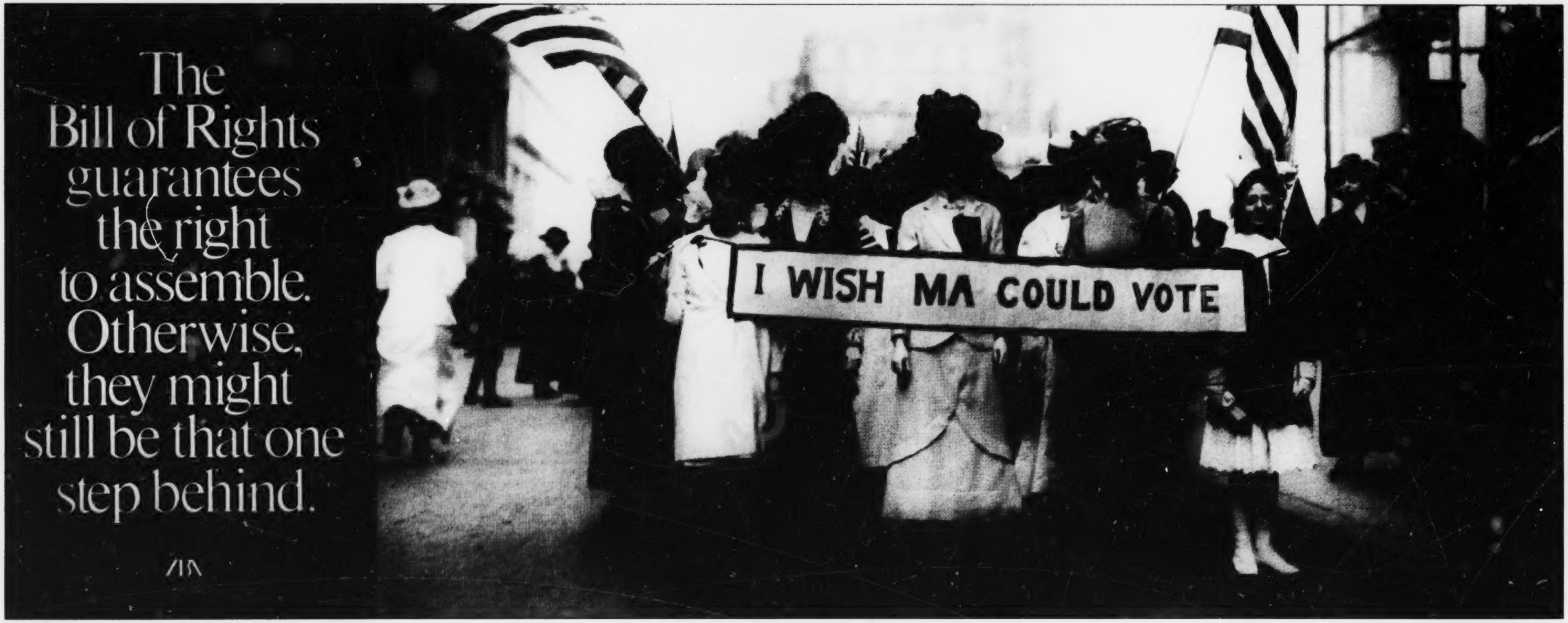
Article the twelfth The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people

Frederick Augustus Muhlenberg Speaker of the House of Representatives
John Adams, Vice President of the United States, and President of the Senate

ATTEST

John Beckley Clerk of the House of Representatives
Sam. A. Otis Secretary of the Senate

BEST COPY AVAILABLE


The
Bill of Rights
guarantees
the right
to assemble.
Otherwise,
they might
still be that one
step behind.
ABA
I WISH MA COULD VOTE

This poster is one of a series designed for the ABA's public service advertising campaign commemorating the Bill of Rights bicentennial. A full size (11" x 28") version of this poster, printed on heavy paper and suitable for framing, is available from the ABA for $4.95 each; specify PC#468-0030. The complete five poster set (PC#468-0035) is also available for $19.95. Shipping and handling charges apply to each purchase. To order or for more information, contact ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611; (312) 988-5555.

Freedom Has a Name

The Bill of Rights

Law Day U.S.A.

May 1

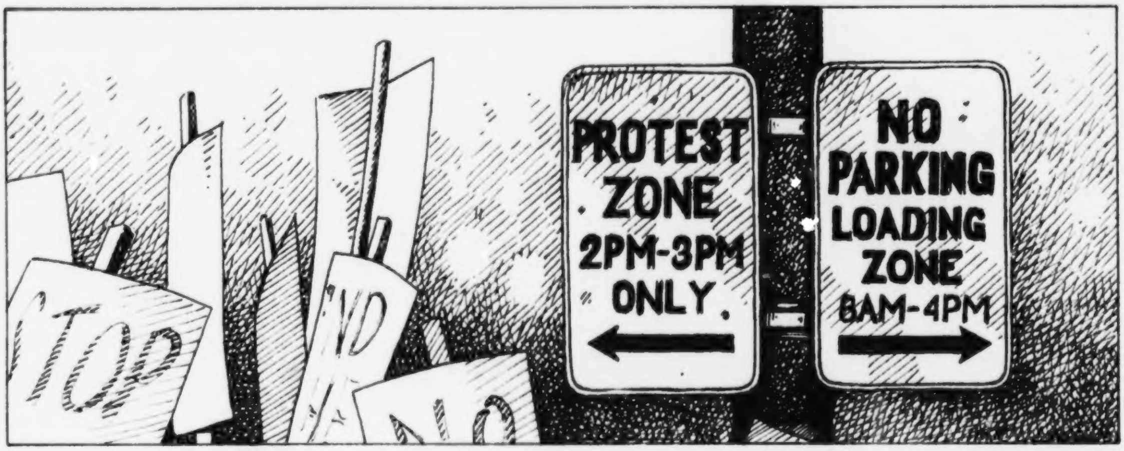
2547

American Bar Association ABA

Freedom Has a Name

The Right to Assemble/Middle

David T. Naylor



Tom Herzberg

Background

The right to assemble to voice grievances, to protest governmental policies and actions, or to otherwise communicate views on matters of local, regional or national interest is among the most basic of rights citizens enjoy in a democratic society. Practically speaking, the outdoor meeting or demonstration provides an accessible, inexpensive public forum for all citizens, especially those who advocate the most unpopular of causes or who have least of financial means. Yet, as former Supreme Court Justice Arthur Goldberg pointed out in the 1965 majority opinion in *Cox v. Louisiana* (379 U.S. 536), the First Amendment right of assembly is not absolute. He wrote:

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of anarchy.

In this and other decisions, our courts have made it clear that we do not have the constitutional right to assemble to demonstrate or otherwise air views whenever, wherever and however we choose. When regulations are narrowly drawn and fairly administered, our courts have upheld the right of government officials to regulate the time, place and manner – but not the content – of public meetings and demonstrations. The two lessons that follow suggest ways that the poster which appears at the center of this issue can be used as a catalyst to help middle level students understand and appreciate the importance of the right of assembly and the delicate balancing of individual and community interests it requires.

Day 1

1. Begin by displaying the ABA poster found in this issue "The Bill of Rights guarantees the right to assemble. . . ."
   a. Write "Observations" on one section of the chalkboard and "Inferences" on another.
   b. Elicit *observations* by asking students to describe what they see. List student responses under the "Observations" heading. Use literal level questions to prompt responses as needed (e.g., "What type of people [gender, age] are shown?"; "What are the people doing?"; "What are some of the people carrying [banner, flags]?").
   c. Next, have students draw *inferences* based on what is shown in the poster. Write those responses under the "Inferences" heading. As needed, use such prompting questions as "What's taking place?" (note gathering of women in the street, banner and its message); "Why are some of the women carrying American flags?"; and "When did this take place?" (note dress, man in uniform).
   d. Then have students draw on their prior knowledge (or refer to an American history textbook or other source) to answer such questions as: "What was the outcome of the women's sufferage movement?" (i.e., women obtained the right to vote); "How did women secure the right to vote?" (i.e., by constitutional amendment, the nineteenth, passed by Congress in 1918 and ratified in 1920).
2. Activate prior knowledge by having students think of situations that have led or could lead people to gather in public to protest or otherwise demonstrate in support of or in opposition to a particular cause (e.g., the outbreak of war in the Middle East; the opening of an abortion clinic; an upcoming election; a rally celebrating a victory in the Super Bowl). Write the responses on the board.
   a. Ask students to relate any personal, on-site experiences they have had, either as participants or observers, with group demonstrations, marches or meetings. Have them share with the class how they came to be involved, what they saw (what the group did, how the participants behaved, how the non-participants reacted) and how they felt about it.
   b. Divide the class into small groups of approximately four to six students each. Assign the students in each group to make a list of instances of group demonstrations they have seen (e.g., in person, on

television) or read about (e.g., in newspapers or books). For each instance, have group members specify the purpose of the demonstration, when it occurred (e.g., approximate year, day, and even time of day if known), where it occurred (e.g., park, street, public square), the form it took (e.g., march or rally), the people involved (e.g., size of group, type of people), and any problems that developed.

   c. Then have each group identify one entry from each category (i.e., subject, time, place, manner, people involved). List responses on the chalkboard and discuss them.

3. Display the following excerpt from the First Amendment: "Congress shall make no law. . .abridging. . .the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" on a poster, overhead or on the chalkboard. Clarify any unfamiliar words and briefly discuss the excerpt's meaning.

   a. Draw a balance scale on a large piece of newsprint. Place the phrase "The Right to Assemble" above it. Label one side "People's Need to Assemble" and the other "Community's Need to Restrict Assembly."

   b. Elicit and record reasons to support either side (e.g., "people's need": focus attention on cause or situation; make feelings known; inexpensive way to communicate views; "community's need": prevent excessive noise; ensure proper flow of traffic; keep people and property safe).

   c. Have students briefly discuss merits of the reasons presented, individually and overall.

What Would You Do?

A small group of white supremacists want to hold a rally in your community. Public officials fear the rally will give the town a bad name, promote racial hostility and lead to violence. You are the city manager. The group applies for a permit. You must decide what to do. Before making your decision, you consider the five possibilities listed below. Which will you choose? Why?

A. Tell the group the community opposes them and their ideas. Deny the permit. Arrest them if they try to meet without a permit.

B. Require the group to explain in writing what they believe, why they want to hold the rally, and what they plan to do at it. Then decide what to do.

C. Grant the permit. Treat the group as you would any other group that applies for a permit.

D. Grant the permit but require that the group post a $25,000 bond to cover any damages that they or others may cause as a result of the rally.

E. Grant the permit but charge the group for the extra police protection that will be needed and for the cost of cleaning up after the rally is over.

Day Two

1. Invite an attorney to class to share perspectives on restrictions and the right to freedom of assembly.

2. Display both the ABA poster and the balance scale chart. Begin by reviewing the previous day's lesson.

   a. Focus attention on the reasons listed on the chart supporting the people's need to assemble. Add more reasons if students identify them. Then do likewise for the community's need to restrict the right of assembly.

   b. Ask students to identify what restrictions, if any, they would support regarding "the right of the people peaceably to assemble. . . ." List them on a separate piece of newsprint.

3. Point out that courts have held that communities may regulate the right of assembly by requiring groups to obtain a permit for an outdoor public gathering, march, rally or demonstration.

   a. Use the exercise "What Would You Do?" to promote understanding of the relationship between the permit regulation and the right of assembly and to emphasize the need for evenhanded treatment when granting permits.

   b. Divide the students into small groups. Have each group decide what to do in this situation. Let each group share its decision.

   c. Along with the attorney, discuss the exercise and the reasoning students used for the decision they made. Explore reasons why most options except "C" would be unconstitutional restrictions on the right to assemble. Emphasize that communities may not deny permits because of the nature of the ideas a group espouses. If desired, relate this discussion to the controversy over the Skokie Nazi Party march which occurred in the late 1970s (see *Smith v. Collin*, 436 U.S. 953).

4. Have the attorney briefly point out that the courts have upheld the right of communities to regulate the time, place and manner of assembly.

   a. Ask the attorney to describe how the permit process operates in your community. Distribute copies of the application form used, if possible. Have the attorney describe the types of limitations on the right of assembly in your community regarding time, place and manner and the reasons for those restrictions.

   b. Extend the discussion by having students consider which places, if any, should be considered "off limits" for public rallies and demonstrations (e.g., courthouses, schools, fairgrounds, jails, military bases, shopping malls, airports). Have the attorney indicate what locations courts have ruled off limits and the reasoning they used for the restrictions. (Note: For a discussion of whether an ordinance banning picketing near private residences violated the Constitution, see pages 54-55 of the Winter 1989 issue of *Update* which treats the 1988 case of *Frisby v. Schultz*.)

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Freedom Has a Name

A Basic Right/Secondary

Leonne Lizotte

Introduction

The freedoms to assemble peaceably and to petition the government go hand in hand and are among our most basic and important liberties. They evolved as basic rights of Englishmen and were enjoyed by the American colonists up to a point. Interference with these rights was one of the causes of the American Revolution. As a result, the rights to assemble and to petition the government were fundamental rights included in the Bill of Rights. In 1789, when the first Congress under the Constitution was debating whether or not to include assembly and petition in the Bill of Rights, Rep. John Page of Virginia argued that if people could be deprived "of the power of assembly under any pretext whatsoever, they might be deprived of every other privilege" in the First Amendment.

In the 200 years following the adoption of the Bill of Rights, this freedom has been used as a means of expressing approval or disapproval of government actions. In a variety of ways and in many different forums, Americans have raised their voices and made their opinions known. Reactions to the expression of these rights have also varied. In some instances, the exercise of these liberties has led to court cases and contributed to the body of American case law.

The purpose of this lesson is to examine the origin of these freedoms and the reasons behind their inclusion in the Bill of Rights, the history of the freedoms in the 200 years since the adoption of the Bill of Rights, and, finally, the use of freedom of assembly as a means of communicating opinions to the government since the beginning of this country's involvement in the Persian Gulf crisis in August 1990. The lesson will ask students to consider the risks of a democratic government's interference with this type of freedom of expression, even in times of national crisis.

Time to Complete

Four to five class periods.

Goals

As a result of this lesson, students will be able to:

1. understand how the freedoms of assembly and petition evolved as one of the basic rights of Englishmen;
2. understand how Americans exercised these freedoms during the Colonial period;
3. understand the role that British interference with these freedoms played in bringing about the American Revolution;
4. express reasons for including freedom to assemble peaceably and petition the government in the Bill of Rights;
5. discuss knowledgeably how these rights were exercised in selected instances throughout the 200 years since the adoption of the Bill of Rights;
6. examine cases involving freedom of assembly in order to understand their disposition within the context of the times;
7. consider the risks posed by a democratic government's interference with freedom of assembly and petition, even in times of national crisis; and
8. evaluate the importance of allowing people to exercise the rights to assembly and petition during the recent Persian Gulf conflict.

Procedures

1. Identify the goals of the lesson and divide the class into groups to share the research of selected topics which will later be shared with the entire class (the topics are listed in Handouts 1, 2 and 3). Allow two class periods for an explanation of the project and research.
2. On Day 3, groups will reassemble. Before reporting to the class as a whole, each group will discuss its findings and select a spokesperson to deliver its report. Begin with groups reporting on the evolution of freedom of assembly and petition as the basic rights of Englishmen. Next, have students report on the use of and restrictions on these freedoms during the American Revolution. Finally, have students have students report on the development of these freedoms since 1791.
3. On Day 4, students will discuss the role of freedom of assembly and petition as it relates to the Gulf crisis, with particular emphasis on the congressional debate which preceded the vote authorizing the President to use force after January 15. Students should be prepared to discuss the reactions of pro- and anti-war protesters in their community and the legal, moral and constitutional implications of the protesters' actions. Students can discuss, debate, argue, and/or role play the issue to express their points of view.

Handout 1

Selected topics to research the evolution of freedom of assembly and petition as a basic right of Englishmen

1. The Magna Carta (1215)
2. Wat Tyler's Rebellion (1381); (see *The Bill of Rights in Action*, Vol. 5, No. 2, Fall 1988, available from the Constitutional Rights Foundation Chicago)
3. English Petition of Right (1628)
4. Charles I and the dissolution of Parliament
5. English Bill of Rights (1689)

Handout 2

Selected topics to research freedom of expression and petition during the Colonial Period

1. Virginia House of Burgesses (and other colonial legislatures)
2. New England town meetings
3. Boston Pamphlet of 1772
4. Stamp Act Congress (1765)
5. Coercive (Intolerable) Acts (1774)
6. First Continental Congress and the Declaration of Resolves (1774)
7. Second Continental Congress (1776)
8. The Declaration of Independence

Handout 3

Selected topics involving freedom of assembly and petition since 1791

1. Hartford Convention (1814-15)
2. William Lloyd Garrison and August 21, 1835 pro-slavery Boston meeting (see *The Bill of Rights in Action*, Vol. 5, No. 2, Fall 1988, available from the Constitutional Rights Foundation Chicago)
3. Abraham Lincoln and the Spot Resolution (Dec. 22, 1847)
4. First and Second Women's Rights Conventions (1848 and 1851)
5. Clement L. Vallandigham and the Copperheads (Civil War period)
6. *Robertson v. Baldwin*,
7. *Davis v. Massachusetts*, 167 U.S. 43 (1897)
8. *Gompers v. United States*,
9. *Abrams v. United States*, 250 U.S. 616 (1919)
10. *Whitney v. California*, 274 U.S. 357 (1927)
11. *Hague v. C.I.O.*, 59 S.Ct. 954 (1939)
12. *Thornhill v. Alabama*, 310 U.S. 88 (1940)
13. *Bridges v. California*, 314 U.S. 252 (1941)
14. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
15. *Thomas v. Collins*, 323 U.S. 516 (1945)
16. *Terminiello v. Chicago*, 337 U.S. 1 (1949)
17. *Kovacs v. Cooper*, 336 U.S. 77 (1949)
18. *Feiner v. New York*, 340 U.S. 315 (1951)
19. *Edwards v. South Carolina*, 83 S.Ct. 680 (1963)
20. *Adderly v. Florida*, 87 S.Ct. 242 (1966)
21. Dr. Martin Luther King, Jr. and the civil rights movement of the 1960s
22. Lunch counter sit-ins of the 1960s
23. Vietnam War protests
24. The incident at Kent State University (1970)
25. Mergens v. Board of Education of Westside Community Schools, 58 U.S.L.W. 4720 (1990)
26. "Can the Pro-War Consensus Survive?" and "Shooting the Messenger," *Time*, Feb. 18, 1991, pp. 32-34.
27. "It's a Grand Old (Politically Correct) Flag," *Time*, Feb. 25, 1991, p.55.

Leonne Lizotte is chair of the social studies department, Easthampton Public Schools, Easthampton, MA.

Freedom Has a Name

Bill of Rights Quizzes

1. During the ratification debate, which five states stipulated that a Bill of Rights must be added to the Constitution?
2. How many amendments were contained in the original bill of rights first proposed by the House and Senate?
3. Which was the first state to ratify the Bill of Rights?
4. At the time of its proposal, how many states were needed to ratify the Bill of Rights and make it part of the Constitution?
5. Which of the original 13 states did not ratify the Bill of Rights until 1939?
6. Which state ratified the Constitution just nine days before it ratified the Bill of Rights?
7. When was the Bill of Rights ratified by the necessary number of states?
8. One of the states ratifying the Bill of Rights was not one of the 13 original states. Which state was it?
9. Which of the Founding Fathers first opposed the addition of a Bill of Rights to the constitution but later supported it?
10. Who argued that the Constitution is in itself a bill of rights?

Answers: 1) Massachusetts, New Hampshire, Virginia, North Carolina and New York; 2) 12; 3) New Jersey; 4) 10; 5) Massachusetts, Georgia and Connecticut; 6) Rhode Island; 7) December 15, 1791; 8) Vermont; 9) James Madison; 10) Alexander Hamilton

Word Scramble

Unscramble these words related to the Bill of Rights. The answers appear below.

1. TOICRAFTAINI
2. RACHES DAN SUEZIRE
3. REEF HESPEC
4. AFIR RATIL
5. MEDFORE FO GREINOIL
6. MENANDSTEM
7. EDU SCROPES
8. THRIG OT ABER MARS
9. LENTICANEBIN
10. GIRTH OT ECOLUNS
11. REEF SOREXENPIS
12. SYSEBALM

Answers: 1) Ratification; 2) Search and Seizure; 3) Free Speech; 4) Fair Trial; 5) Freedom of Religion; 6) Amendments; 7) Due Process; 8) Right to Bear Arms; 9) Bicentennial; 10) Right to Counsel; 11) Free Expression; 12) Assembly

Freedom Has a Name

Freedom, But with Limits/Middle

Guy Thomas

Tom Herzberg

"We, the people." An eloquent beginning. But when that document was completed in 1787, I was not included. I felt somehow for many years that Washington and Hamilton just left me out by mistake. But through the process of amendment, interpretation and court decision, I have finally been included in "We, the people."
–Barbara Jordan

You hear about constitutional rights, free speech, and the free press. Every time I hear those words I say to myself, "That man is a Red, that man is a Communist." You never hear a real American talk like that.
–Frank Hague, Mayor of Jersey City, NJ, 1917–1947

Introduction

The expansion of rights over the past 125 years provides a natural theme for planning units on civil rights. Beginning with the Civil War Amendments and ending with the Twenty-Sixth Amendment of 1971, students can trace how the American polity has redefined itself in terms of race, gender and age. Through case studies we can lead students through the evolution of sophisticated criminal procedures or explore how freedom of speech became equated with freedom of expression.

Lest we run the risk of implying that the ever widening circle of citizenship was inevitable, it is necessary to explore the contraction of certain liberties that also occurred so that students understand the social and legal tensions requiring the courts' continuous interpretation of the Constitution. Thus, it is not simply an article in the Bill of Rights or other subsequent amendment that changes history; it is the political and social conflicts that arise when citizens expect the ideal of words to be matched by the reality of action.

Objectives

This activity provides a framework for students to:

- explore past expansion and contraction of rights;
- contrast past and present standards and practices with regard to the exercise of certain rights;
- identify current socio-political trends affecting civil liberties; and
- project some future restriction or expansion of currently accepted rights.

Procedure

1. Either in class discussion or in small groups working with a copy of the amendments, review with students the extension of voting rights beginning with the Fifteenth Amendment of 1870. Discuss what this has meant in political, social and legal terms. Introduce the idea that other rights have also undergone some evolution, e.g., freedom of speech.
2. Distribute Student Handout 1 to groups of three or four students. Have them read and discuss the case. You may ask each group to reach consensus on what the Supreme Court should decide. (The Court held that such expressive conduct was protected by the First Amendment. It found the conduct not disruptive to the educational program and held that the school district's rule had the effect of banning political speech.)
3. After developing the concept of freedom of expression as an extension of freedom of speech, distribute Student Handout 2. Have groups compare the two cases and develop possible decisions by the Court. (Although lower courts found in favor of Fraser, the Supreme Court held that the educational mission of schools carried an obligation to limit student speech and conduct that was obscene or disruptive to the school program.)
4. Obviously, there is not total and complete freedom of speech or expression. It is important to develop the concept of what is "harmful speech" or what type of speech/conduct represents a "clear and present danger" and that these standards have changed over the years.
5. Assign students to research individually or in pairs one of the following topics:
   - The Espionage Act of 1918;
   - Eugene Debs, (*Debs v. United States*, 1919);
   - The Flag Protection Act of 1989 and subsequent cases, (*Texas v. Johnson, United States v. Haggerty*, 1990)

- FCC restrictions on commercial speech (e.g., cigarette advertising);
- Relocation of Japanese-Americans during World War II;
- The "Red Scare" of the 1920s and 1950s;
- *Gideon v. Wainwright* (1963);
- *Miranda v. Arizona* (1966) and *Escobedo v. Illinois* (1964).

6. After completing their research, students can meet in groups to share information on their topics. Ask them to identify events and trends that prompted the restriction or expansion of rights. Ask groups to then identify current social trends or attitudes that might lead to some future restriction of rights (e.g., war, the war on drugs, economic disaster, etc.) and develop a scenario of events leading to their result. This can culminate in the production of some future document such as a history text, newspaper article or editorial, a court opinion or news broadcast.

Student Handout 2

Tinker v. Des Moines School District (1969)

In December 1965, a small group of Des Moines public school students and their families decided to express their opposition to U.S. involvement in Vietnam by wearing black armbands. The Tinker and the Eckhardt families had participated in similar protest activities before.

Des Moines school principals, aware of the plan, adopted a rule forbidding wearing the armbands during school hours. The policy was subsequently announced in school and the children of both families knew of the rule. They also knew that suspension was a consequence of disobeying the rule. On December 16 and 17, seven of the 18,000 students in Des Moines public schools wore black armbands.

The seven students attended classes as usual. There were no overt disruptions of classroom activity, no demonstrations, and no threats of violence. Outside of the classroom, however, a few angry remarks were directed at the students wearing the armbands. A mathematics teacher reported that his class had been practically "wrecked" by disputes involving Mary Beth Tinker.

That afternoon, the students were called into the principal's office and asked to remove the armbands. When they refused, they were suspended until they returned without the armbands. John Tinker, 15, and Mary Tinker, 13, were among the five students suspended. They returned to school after their planned period of protest but Mr. Tinker filed a complaint on behalf of his children based on the violation of their right to free expression. He requested a small amount of money as damages and asked that the children not be disciplined for their actions.

After the suspension, the school administration issued a statement listing the reasons for banning black armbands. It referred to a former student who had been killed in Vietnam with friends still in school. "If any kind of demonstration existed, it might evolve into something which would be hard to control." They stated that the policy was directed against the principle of demonstrations since "schools are no place for demonstrations," and "if students didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools." The policy was also influenced by the major controversy emerging over U.S. involvement in Vietnam.

Questions for Discussion

1. Should the wearing of armbands be considered a form of speech? Is it a form of expression?
2. If the protest had seriously disrupted school activities, what actions should be taken by the school administrators?
3. Should there be different limitations on freedom of expression depending on where it takes place or what form it takes?

Student Handout 2

Bethel School District v. Fraser (1987)

On April 26, 1983, Matthew Fraser, a student at Bethel High School in Spanaway, Washington, gave a speech at an assembly nominating a fellow student for a student body office. About 600 students, ranging in age from 14 to 17, were in attendance. During his speech, Fraser referred to the candidate in graphic and sexually explicit terms. Students reacted to the speech in a variety of ways; some screamed and yelled while others were embarrassed.

The next morning, Fraser was called into the assistant principal's office where he was told that his speech violated the school's disciplinary rule. The rule stated that "conduct which . . . substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." Fraser was given an opportunity to explain his reasons for giving the speech. He stated that he had intentionally used sexual inuendo in the speech. The principal then informed Fraser that he was suspended for three days and that his name would be removed from the list of candidates to speak at graduation.

Fraser contested his suspension through the district's grievance procedures. The hearing officer determined that the speech was lewd and obscene and upheld the suspension. He served two of the days and was allowed to return to school on the third day.

Fraser's father, as guardian for his son, filed suit in federal district court claiming that the school's disciplinary rule violated his son's First Amendment right to freedom of speech. Since the First Amendment applies to the states and the high school is funded by the state, it applies to the school as well. Fraser sought relief from the school's rule as well as monetary damages.

(Adapted from Robert B. Jackson, *Of Shoes & Ships & Sealing Wax*. Copyright © 1989 The Legal Foundation of Washington. Used with permission.)

Questions for Discussion

1. What types of speech should be protected?
2. Who should decide if an action "substantially interferes with the educational process" or if something is obscene?
3. Suppose a teacher or administrator read the speech ahead of time and simply prevented Fraser from delivering it? Would that be a violation of his constitutional rights?

Guy Thomas is a middle school teacher at Olympus NW School in Bellevue, WA.

2553

Bill of Rights Resources

New Bill of Rights Grants Competition Announced

During 1991-92 a newly formed Bill of Rights Education Collaborative will sponsor a number of special initiatives designed to enhance understanding of, and teaching about, constitutional rights.

Five different grants competitions are being offered, including three which will be directly administered by the Bill of Rights Education Collaborative: (1) mini grants for teachers; (2) short courses for teachers; and (3) state humanities council projects. In addition, the Collaborative is cooperating with the History Teaching Alliance to support HTA collaboratives and the National Council for the Social Studies to support inservice workshops for teachers.

The Collaborative is a joint venture of the American Historical Association and the American Political Science Association and is supported by The Pew Charitable Trusts.

Two competitions will be offered for the mini grants, state humanities council projects, and short courses. The application deadline for the final competition is August 15, 1991.

For a brochure describing the grants competitions, as well as additional information on eligibility requirements and application procedures, contact either of the Collaborative's co-directors: Sheilah Mann, Bill of Rights Education Collaborative/APSA, 1527 New Hampshire Avenue, NW, Washington, DC 20036, (202) 483-2512 or James B. Gardner, Bill of Rights Education Collaborative/AHA, 400 A Street, SE, Washington, DC 20003, (202) 544-2422.

To receive application guidelines and forms for the inservice workshop competitions, contact the National Council for the Social Studies, 3501 Newark Street, NW, Washington, DC 20016, (202) 966-7840.

First Amendment Congress to Distribute K-12 Curriculum

"Education for Freedom" is a new educational program being developed by the First Amendment Congress. The K-12 curriculum, to be distributed to the nation's schools in summer 1991, is designed to help educate students about their First Amendment rights. For information on "Education for Freedom" and other First Amendment educational programs and resources, contact the First Amendment Congress, University of Colorado at Denver, Graduate School of Public Affairs, 1250 14th Street, Suite 840, Denver, CO 80202, (303) 556-4522.

Bicentennial Commission Sponsors Programs for the Bill of Rights and Beyond

During 1991 the Commission on the Bicentennial of the U.S. Constitution enters the final phase of its five-year bicentennial commemoration.

It is serving as an important catalyst for Bill of Rights programs in schools and communities throughout the country. Among the national programs being sponsored by the Commission are the following:

National Bicentennial Competition on the Constitution and Bill of Rights. This Commission-sponsored national program is conducted by the Center for Civic Education and administered through the 435 congressional districts and the 5 trust territories. The Competition is based on a six-week course of instruction designed to educate young people about the history and principles of the Constitution and Bill of Rights. Supplementary curriculum materials are available at upper elementary, middle and high school grade levels. For information on the National Bicentennial Competition, contact the Center for Civic Education, 5146 Douglas Fir Road, Calabasas, CA 91302, (818) 340-9320.

The Constitution: Let's Talk About It. The Commission has developed packets of educational materials designed to help teachers and program leaders conduct discussion sessions in schools and community settings on the origins of the Constitution and Bill of Rights and their contemporary relevance for Americans. Included in the packet of materials are four discussion booklets – The Constitution Works: Our Nation's Charter Through Two Hundred Years, Human Rights Under the Constitution, The Spirit of the Constitution: Fundamental Principles, and Being an American: Citizenship and the Constitution Today; discussion leader outlines, and a 25-minute video dramatizing current constitutional issues. The Constitution: Let's Talk About It is available in two editions, one for general audiences and an abridged, easy-to-read version suitable for literacy and high school English-as-a-Second Language classes.

A limited number of sample packets are available for review. For information, contact the National Bicentennial Commission, Adult Education Programs, 808 Seventeenth Street, NW, Washington, DC 20006, (202) 653-1787.

Additional Programs and Resources. The Commission is also sponsoring many other programs for elementary and secondary students to commemorate the 1991 bicentennial of the Bill of Rights. These include National History Day 1991 (see accompanying description), a National Historical/Pictorial Map Contest, and a Daughters of the American Revolution (DAR) Essay Contest for high school juniors and seniors. In addition, the Commission continues to distribute educational materials for teachers and students, including skills handbooks for elementary and secondary schools produced in col-

Bill of Rights Resources

laboration with Scholastic, Inc., as well as pocket-sized copies of the U.S. Constitution and Bill of Rights.

For further information on available programs and materials, contact the Commission at the address or phone number noted above.

"Rights in History" Theme for National History Day 1991

During the 1990-91 school year the Commission on the Bicentennial of the U.S. Constitution and National History Day are cosponsoring academic competitions for middle and high school students on the theme, "Rights in History." The theme encourages students to consider the broad historical background to and context for the U.S. Bill of Rights. The National History Day program is designed to help students improve their understanding of history through the following project activities: essay writing, oratorical exercises, exhibit displays, and dramatic and media performances. Beginning with competitions at the local level, the program culminates in a national event for students at the University of Maryland in June 1991.

A booklet providing information on the 1991 program is available from National History Day, Case Western Reserve University, 11201 Euclid Avenue, Cleveland, OH 44106, (216) 421-8803.

ABA Launches Bill of Rights Public Service Ad Campaign

Recognizing that education begins with awareness, the American Bar Association's Commission on Public Understanding About the Law (PUAL) has launched a national public service campaign featuring a dramatic series of Bill of Rights advertisements. The ads were initially developed to appear in public transportation systems. Piloted in five cities in early 1990, the campaign is being expanded nationwide in 1991. For areas in which mass transit ads are not feasible, the ads may be presented through other outdoor media, such as billboards. *The Bill of Rights in Transit* campaign is designed to inform Americans about the important role the Bill of Rights plays in their daily lives.

The international communications firm of D'Arcy, Masius Benton & Bowles/Chicago (DMB&B) contributed creative services to help develop the ads. The Outdoor Advertising Group of Gannett Co., Inc. donated advertising space for the pilot campaign.

Poster versions of the advertisements are now available; one appears in reduced size in this issue. They can be displayed in both school and community settings, are printed on heavy poster stock and measure 11" x 28." Individual copies are $4.95 each; bulk rate discounts are also available. For further information on the poster series as well as the advertising campaign, contact the American Bar Association, PUAL, 541 N. Fairbanks Court, Chicago, IL 60611-3314, (312) 988-5742.

ABA/YEFC Plans Jaworski Symposium with Smithsonian

The ABA/YEFC and the Smithsonian Institution's Office of Elementary and Secondary Education are conducting a national symposium on teaching about the Constitution and Bill of Rights. The symposium will be held in Washington, DC in May 1991.

The objective of the symposium is to develop a plan of action to guide schools' efforts to educate elementary and secondary students about the Constitution and Bill of Rights into the 21st century. A publication highlighting conference deliberations and results will be produced in fall 1991.

Financial support for the symposium is being provided by the ABA's Leon Jaworski Fund for Public Service. This fund, which annually supports national public legal education conferences, honors the memory of Leon Jaworski, who established the YEFC Special Committee in 1971 during his tenure as president of the ABA.

For further information on the Jaworski Symposium, as well as other YEFC Bill of Rights bicentennial programs and resources, contact the American Bar Association, YEFC, 541 N. Fairbanks Court, Chicago, IL 60611-3314, (312) 988-5735.

Elementary Education Guide Explores Constitution and Bill of Rights Through Pledge of Allegiance

The New York State Bicentennial Commission has published a new elementary education citizenship guide based on the pledge of allegiance, *Living Together Constitutionally*. Edited by Stephen Schechter and Arlene Gallagher, the book is the result of a collaborative effort among the New York state bicentennial commission, state department of education, state bar LRE program, and the state alliance for arts education.

The Living Together Constitutionally elementary education guide teaches citizenship through children's literature and the arts. It is conceptually keyed to the pledge of allegiance to cover such basic themes as freedom, fairness, equality, and "sharing rights and responsibilities." Activities are included for both primary and intermediate levels.

Also included in the guide are overviews of supplementary participatory projects developed and prepared by both educators and students. Described are such projects as "Critical Choices Elementary Style," a town meeting program adapted for elementary students to engage them in debating and making constitutional choices involving their rights and responsibilities; and "Fundamentals of Freedom," which includes information on a variety of projects to help elementary students learn more about the concept of liberty.

Living Together Constitutionally is available for $3.00 per copy (includes shipping and handling) from the Council

Bill of Rights Resources

for Citizenship Education, Russell Sage College, Troy, NY 12180. All orders must be prepaid and checks made payable to Russell Sage College.

OAH to Publish Bill of Rights Essays for Classroom Use

A set of eleven lively original essays on protections embodied in the Constitution and Bill of Rights has been commissioned by the Organization of American Historians for classroom use. The publication is entitled *By and For the People: Constitutional Rights in American History*.

Edited by Kermit Hall from the University of Florida, *By and For the People* includes essays by leading constitutional scholars on such topics as freedom of the press, religious freedom, freedom of speech, the right of privacy, race and the Constitution, due process rights during and after trial, and women and the Constitution. The essays combine historical background pertinent to these fundamental rights with emphasis upon relevant contemporary controversies. Brief annotated bibliographies supplement each of the essays in the collection.

The collection of essays are designed for use in secondary social studies courses, including American history, American government, and for units on the Constitution and Bill of Rights. *By and For the People* will be available in March 1991 for $9.95 plus $2.00 for UPS delivery from Harlan Davidson, Inc., 3110 North Arlington Heights Road, Arlington Heights, IL 60004-1592, (708) 253-9720.

Bill of Rights Poster Exhibit Available

The Pennsylvania Humanities Council has developed *To Preserve These Rights*, a 12-panel exhibit on the Bill of Rights. Each panel focuses on a particular set of rights and includes text of relevant amendments, captions, photographs and quotations.

The poster exhibit comes with an 80-page user's guide, which includes essays keyed to the display, secondary school lesson plans, and print and audiovisual bibliographies.

To Preserve These Rights is available for $150.00 mounted on three freestanding kiosks of four panels each designed for display in schools, courthouses, libraries and other public spaces. The unmounted set of posters costs $100.00. Purchase cost for both mounted and unmounted sets includes shipping costs and the user's guide.

For further information on the exhibit, including how to order, contact the Pennsylvania Humanities Council, 320 Walnut Street, Suite 305, Philadelphia, PA 19106, (215) 925-1005.

Coloring Book Teaches Elementary Students About Bill of Rights

The American Legion has produced a new coloring book to help teach elementary students about the Bill of Rights. The book uses pictures and simplified sentences to teach younger students about fundamental Bill of Rights protections, including freedom of speech and the right to a fair trial. For a free sample, write National Americanism, Children and Youth Division, The American Legion, PO Box 1055, Indianapolis, IN 46206.

National Archives Produces New Bill of Rights Teaching Unit

The National Archives has produced a new teaching unit entitled "The Bill of Rights: Evolution of Personal Liberties." The unit is part of a continuing series of documentary-based packages designed to help students of U.S. history, government and economics develop historical understanding and improve their analytical skills. The unit includes 46 document reproductions, and suggested teaching activities, including student exercises and worksheets, as well as a timeline and annotated bibliography to aid further study.

The Bill of Rights teaching unit is available by sending a purchase order for $40.00 to SIRS, Inc., PO Box 2348, Boca Raton, FL 33427-2348 or calling (800) 327-0513 or (407) 994-0379 collect from Alaska and Florida. For a complete list of materials available from the National Archives, contact the Publications Services Branch (NEPS), National Archives, Washington, DC 20408, (202) 532-3174.

Anti-Defamation League Resource for Bill of Rights Teaching Materials

The Anti-Defamation League of B'nai B'rith (ADL) and the ERIC Clearinghouse for Social Studies/Social Science Education (ERIC/ChESS) are publishing *How to Teach the Bill of Rights*, a guide for secondary educators. Available in March 1991, the 96-page guide will include sections on teaching the Bill of Rights, and on the origins, civic principles and values, and current issues on the Bill of Rights, as well as a guide to teaching materials. John Patrick and Robert Leming of ERIC/ChESS edited the publication. The cost of the guide is $12.50, including shipping and handling.

The ADL has developed additional materials on the Bill of Rights, including a Bill of Rights Memo and Date Book. The calendar book is illustrated with Bill of Rights-related cartoons by political cartoonist Ya'akov Kirschen. It covers the period through December 1991 – the bicentennial of the ratification of the Bill of Rights. The memo and date book is available for $4.00 each plus $1.50 for shipping and handling. To order these materials (or for more information), contact the Anti-Defamation League, Marketing Department, 823 United Nations Plaza, New York, NY 10017, (212) 490-2525.

New Booklet on Bill of Rights for High School Students

The Wisconsin Bar Foundation and the League of Women Voters of Wisconsin have published a new booklet, *The Bill*

Bill of Rights Resources

of Rights: an Introduction. The 36-page illustrated booklet discusses the impact of the Bill of Rights and the rights guaranteed under each of the first ten amendments to the Constitution. It is designed to introduce the Bill of Rights to high school students, as well as the general public. The booklet is being distributed to high schools throughout Wisconsin. Within the state, it is available in bulk for postage and handling charges only. Outside Wisconsin, the booklet costs $1.00 per copy. For further information, contact the Wisconsin Bar Foundation, 402 W. Wilson Street, Madison, WI 53703, (608) 257-9569.

Teaching English via The Bill of Rights

The Constitutional Rights Foundation-Chicago is developing an eight-week curriculum on the Bill of Rights for intermediate and advanced English-as-a-Second Language students. The curriculum focuses on both historical and contemporary applications of the Bill of Rights. During spring 1991 the materials are being field tested in Los Angeles, New York, Miami and Chicago. The curriculum will be available for national dissemination in summer 1991. For further information, contact Sheila Brady, Constitutional Rights Foundation-Chicago, 407 South Dearborn Street, Suite 1700, Chicago, IL 60605, (312) 663-9057.

Teaching Materials on Women and the Constitution Available

The Carter Center of Emory University has developed a comprehensive curriculum program on women and the Constitution. The materials are based on a 1988 conference held at Emory University hosted by former first ladies Lady Bird Johnson, Pat Nixon, Betty Ford and Rosalynn Carter. The curriculum materials are suitable for high school students, as well as university students and the general public. Included are a history textbook on women and the Constitution, a guide for teachers, and scholarly papers presented at the conference, as well as transcripts of major speeches. The complete set of materials costs $42.80; individual components may also be purchased separately.

For further information, write The Carter Center of Emory University, Attn: Women and the Constitution, One Copenhill, Atlanta, GA or call (800) 367-3379 outside Georgia or (800) 222-6527 within the state.

ABA Videotapes Explore Bill of Rights in Action

The ABA's Commission on Public Understanding About the Law (PUAL) has produced a set of three innovative videotapes featuring mock school board and city council meetings on very real Bill of Rights issues communities across the nation are currently confronting. Each of the three *Bill of Rights in Action* programs considers two different scenarios set in the fictional town of Middleburg, USA.

Program titles are: The Right to Privacy (57 min., includes "AIDS in the Classroom" and "Drug Testing City Employees"); Equal Protection (33 min., includes "Juvenile Curfews" and "Public Housing Security"); and The First Amendment (34 min., includes "Underground Student Newspaper" and "Library Book Selection"). The videotape programs are accompanied by background legal memoranda and discussion questions on each constitutional issue. The scenarios have been purposefully designed to be open-ended in order to promote audience participation and further understanding of the constitutional principles involved.

The Bill of Rights in Action programs can be used effectively in either high school classroom or community settings. They provide an excellent means of stimulating debate on how rights and responsibilities are balanced under our constitutional system. Program packages are available for $35.00 each or $90.00 for the complete set plus $5.00 shipping and handling. To order, send prepayment to American Bar Association, Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611, or call (312) 988-5555.

Constitution Magazine Devoted to Bill of Rights

The winter 1991 issue of *Constitution*, a high-quality quarterly journal published by the Foundation for the U.S. Constitution, is devoted entirely to the Bill of Rights, in commemoration of its upcoming bicentennial. This special issue includes articles by leading constitutional scholars, a biographical picture essay entitled "Faces Behind the Bill of Rights," and an international exchange by government officials from the U.S. and Eastern Europe on contemporary constitution making in emerging democracies.

The issue features James Madison on the cover, as well as an article on Madison entitled "Inspired Expedient" by Stanford University historian Jack Rakove. Other articles include "Why We Have a Bill of Rights" by Leonard Levy; "Civil Liberties in the Technology Age" by Alan Westin and an excerpt from a forthcoming book entitled "The Right to Keep and Bear Arms" by Ellen Alderman and Caroline Kennedy. Concluding the issue is "The Amendment" featuring discussions between American and Eastern European government officials on the extent to which the U.S. Constitution and Bill of Rights are providing models to Eastern Europeans responding to the recent historic opportunities for national self-determination. This section is based on a recent international meeting held at Montpelier, the Virginia home of James Madison.

The Bill of Rights issue of *Constitution* is available for $10.00 per copy, including shipping and handling charges. To order, contact Foundation for the U.S. Constitution, 1271 Avenue of the Americas, Room 538, New York, NY 10020, (212) 522-5522.

More Reasons Why Update Is Your #1 Bill of Rights Resource (and Your #1 Value, Too!)

Interested in more helpful resources to plan programs on the Bill of Rights for elementary and secondary school students? Specially-priced packets of previous issues of *Update on Law-Related Education* are packed with information, filled with ready-to-use teaching strategies and are now a better value than ever! Order the packet that best fits your needs:

The Three-Issue Bill of Rights Packet

Three recent issues that offer informative substantive background articles and lively, easy-to-understand classroom activities for use with elementary, middle and high school students. This packet includes:

The Living Constitution (Fall 1988) (Includes highlights from the Smithsonian symposium "Afro-Americans and the Evolution of a Living Constitution")

The Rehnquist Court Comes of Age (Fall 1989)

Drugs, Law and Education (Spring 1989)

☐ **$9.00 (50% off the regular price) PC 497 0024**

The Ten-Issue Bill of Rights Packet

For only $1 more for each additional issue, you can order the ten-issue Bill of Rights packet. In addition to the magazines included in the three-issue packet, you'll receive:

We the People: The Evolving Constitution (Fall 1987)
Justice, Equality, and Property (Spring 1987)
Liberty and Power Under the Constitution (Winter 1987)
Play Fair! How Constitutions Preserve Freedom (Spring 1986)
Free Press in America (Fall 1985)
First Amendment Update (Spring 1985)
The Revolution in Search and Seizure (Winter 1985)

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The Constitutional Updates

These four specially prepared collections are drawn from the best of past *Updates*. Keyed to fundamental Bill of Rights concepts, each contains articles and strategies designed to improve students' understanding of the Constitution. Specify—

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A National Sampler of Law Week Activities

As this issue goes to press, many Law Day activities are still in the planning stages. While a complete listing of activities will not be possible, we have prepared this sampler to indicate the diversity and creativity which have traditionally characterized Law Day programs. We appreciate the cooperation of those whose activities are listed here and apologize to all whose programs could not be included because of time constraints.

ALABAMA

Efforts are being made to have TV spots on Law Week as well as movies reflecting themes of the Constitution and Bill of Rights (such as "Inherit the Wind") shown during Law Week.

ALASKA

Anchorage area state courts will again be open to the public for tours in recognition of Law Week. In addition, a high school essay contest on the Bill of Rights is planned. An awards banquet to honor contest winners will feature lawyers debating issues raised by the contest theme.

CALIFORNIA

The Constitutional Rights Foundation will sponsor its annual Law Day conference at the Los Angeles County Courthouse. Nearly 1,000 students will participate with lawyers in diverse workshops.

COLORADO

Many groups are expected to participate in this year's annual Law Day luncheon in Denver. Mock trial teams who participated in the Denver competition will be invited; students will sit with lawyers from sponsoring law firms. The firms will also sponsor an art and essay contest with the winners at each grade level honored at the luncheon. Children in kindergarten through fourth grade will draw a picture of themselves and their families enjoying freedom in America while children in grades five through eight will write short essays on the topic, "What Freedom of Speech Means to Me." Awards will also be given to members of the community, including the Outstanding Teacher of the Year.

CONNECTICUT

On May 1 the statewide mock trial competition will culminate in a face- off between the two finalists in Hartford. The winning team will advance to the regional competition in New York.

The Connecticut Bar Association will present Law Day awards recognizing outstanding achievement by local programs. Local bars will sponsor a variety of programs such as essay contests, Student Government Days (last year the Bristol Bar Association sponsored a program in which students were elected to offices in the city government and accompanied their counterpart city department head throughout a portion of Law Day), and debates on issues relating to students.

FLORIDA

The Florida Bar Foundation IOLTA Program and the U.S. Constitution Bicentennial Commission of Florida are providing funding for the use of the ABA's "Bill of Rights in Transit" poster series in three city bus systems (Jacksonville, Miami, and Tampa) as well as in 400 schools.

GEORGIA

The Georgia LRE Consortium, with assistance provided through a National Training and Dissemination Program mini-grant, will organize a mailing to 6,700 schools, courts, attorneys, and elected officials urging them to participate in Georgia LRE Week. The Consortium has enlisted the help of over 100 team members spread among 14 regions to conduct follow-up calls to schools in their areas to offer aid in planning activities, to promote LRE in their area with press releases, and to facilitate and promote observances. This also marks the first year that the first week of May has been officially recognized as Georgia LRE Week by both the Georgia General Assembly and the Governor.

HAWAII

The Young Lawyers Division of the Hawaii State Bar Association is funding an awards ceremony to recognize the students, attorneys, judges, and others who participated in the mock trial program. About 200 participants are anticipated at the ceremony which is cosponsored with the Hawaii State Bar Association and the Hawaii Department of Education.

IDAHO

Activities in Idaho will include essay contests at all grade levels, addresses by community resource people at school assemblies, and mini mock trials. Last year plans were made to have an attorney visit all fifth grade classrooms.

ILLINOIS

The Constitutional Rights Foundation Chicago is sponsoring separate morning conferences on the Bill of Rights for high school and eighth grade students at the Dirksen Federal Building. Both conferences will include a series of concurrent sessions on a variety of topics of interest to students. Nearly 300 high school students and over 100 eighth graders from throughout the Chicago area are expected to attend.

The Illinois State Bar Association, the Illinois State Board of Education, and the Constitutional Rights Foundation Chicago will continue to disseminate "The Law

Test" through the CRFC's spring newsletter. "The Law Test" is published every year to serve as a focal point for Law Day observances.

IOWA

The third annual full color Law Week poster drawn by *Des Moines Register* cartoonist Brian Duffy will again be distributed free to Iowa educators. For information, contact the Iowa Center for LRE at (515) 277-2124.

KANSAS

The Kansas State Bar is sponsoring a statewide Bill of Rights newspaper advertising campaign beginning two weeks before Law Day. The ads will focus on issues raised by each of the ten amendments.

KENTUCKY

A second annual statewide celebration cosponsored by the Supreme Court of Kentucky and the Kentucky Bar Association will be held on Law Day. The "Law Day Celebration and Swearing-in Ceremony" will take place at the State Capitol Building to be followed by a reception at the Capitol Rotunda.

LOUISIANA

The East Baton Rouge Bar Association, in collaboration with the East Baton Rouge Parish school district, will sponsor a day-long program at the Centroplex Convention Center. Planned activities include a naturalization ceremony for hundreds of new citizens, school choral performances, and break-out sessions on various LRE topics to be attended by students, a federal judge, bench and bar members, and local police. Approximately 1,500 students and community members are expected to participate in the program which is now in its fifth year.

MAINE

The second annual "Lawyers with Class" program will be cosponsored by the Maine Law-Related Education Program and the Maine State Bar Association. The program matches lawyers and judges with fifth through twelfth grade classes; last year 600 lawyers and judges volunteered their services and were matched with over 400 classes.

MARYLAND

The Maryland State Bar Association and the Maryland State Department of Education, cosponsors of the Citizenship Law-Related Education Program for the Schools of Maryland are overseeing numerous activities, including the statewide mock trial competition, mentor and internship programs and other law-related community service projects. The program enjoys a high level of attorney involvement; last year almost 300 lawyers visited middle and high schools in the Baltimore area.

MASSACHUSETTS

Massachusetts district courts have underway community-based essay and poster contests and mock trial competitions which will culminate on Law Day. Last year, 20 of 69 district courts participated.

On May 3, the Massachusetts Bar Association, The Gardiner Howland Shaw Foundation, the Massachusetts Sheriffs' Association, the Massachusetts Department of Education, and the Northeastern University College of Criminal Justice will cosponsor a conference on the juvenile justice system and violence. The day-long conference is expected to attract as many as 300 participants, including teachers, law enforcement personnel, lawyers, social workers, judges, youth, parents, and community members.

MICHIGAN

The Michigan Senate will hold a special Law Day session to recognize high school students representing Michigan in the National Bicentennial Competition on the Constitution and the Bill of Rights.

The Young Lawyers Division of the State Bar of Michigan will sponsor a public service announcement video contest open to all state high school students. The contest theme will be the Bill of Rights. Winning entries will be broadcast on television stations in the winner's local market during Law Week.

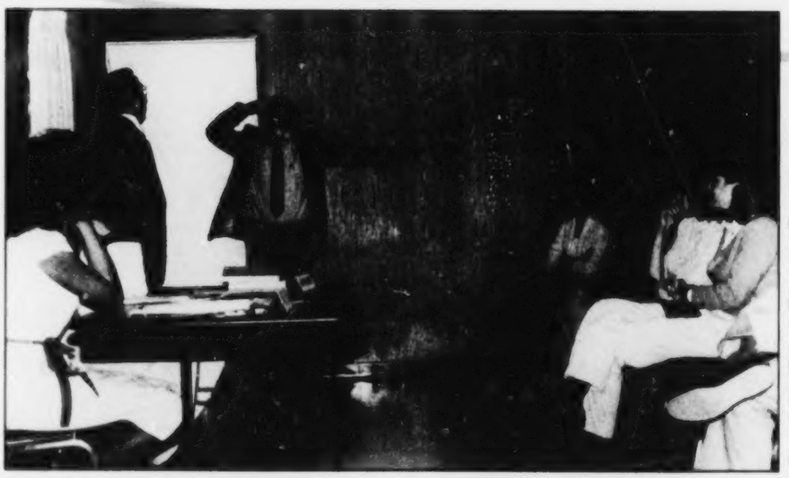
The Michigan Lawyers Auxiliary will continue its annual statewide essay contest for seventh through ninth graders. This year's contest theme is the Bill of Rights; winners will be honored at a Law Day luncheon at the new Michigan Historical Museum and Library in Lansing.

MISSISSIPPI

A new program, "A Lawyer in Every Mississippi Classroom" will be a highlight of Law Day activities in Mississippi. The program, sponsored by the Mississippi Law-Related Education Center and the Young Lawyers Division of the Mississippi State Bar in cooperation with the Mississippi Department of Education, will focus on putting lawyers in classrooms at all grade levels; more than 120 schools are expected to participate. In addition, local bars will hold essay contests, ceremonies, and banquets in honor of Law Week.

MISSOURI

The Young Lawyers Section of the Missouri Bar Association, in cooperation with the Missouri National Education Association, will hold the second annual Law Day Essay Contest. Open to all Missouri students in grades 4-5, 7-8, and 10-11, the contest asks participants to explain which freedom guaranteed by the Bill of



Oregon Law-Related Education Program

Rights is most important to them and why.

Winners will be honored during Law Week at The Missouri Bar enrollment luncheon in Jefferson City. Last year's contest involved over 200 schools with over 10,000 essays submitted from across the state. The Young Lawyers' Division of the American Bar Association selected the contest last year as one of the nation's three best Law Day programs. The Law Day Committee is also working to establish a new quiz contest for Missouri students to celebrate the Bill of Rights bicentennial. The winner of that contest will be awarded a trip to Washington, D.C.

NEBRASKA

The Nebraska State Bar Association provides small matching grants to local bar associations to fund Law Week activities including visits to schools by bar association members and legal paraprofessionals, poster competitions, mock trials, and visits to court houses, jails and law enforcement centers.

NEVADA

Activities planned for this year's observances include attorney participation in mock trials, with elementary level students considering the Goldilocks case while high secondary students focus on First Amendment cases.

NEW JERSEY

For the third year, the New Jersey State Bar Foundation is sponsoring "Law Fair 1991" for third through fifth grade students. The two-day event, scheduled for May 1-2, will feature two sessions per day and is expected to involve almost 400 students. A Bill of Rights exercise will be led by Hon. Richard S. Rebeck, Supreme Court Judge, Criminal Part, in Middlesex County. This event was a previous recipient of the ABA Law Day Award for a Model Law Day Program. In addition, the Young Lawyers Division of the state bar is sponsoring its second annual essay contest for junior and senior high school students. This year's theme is "The Bill of Rights: The Value of Freedom." Last year several hundred essays were received.

NEW MEXICO

The New Mexico Bar Foundation, the Albuquerque Bar Association, and the Albuquerque Lawyers Club are cosponsoring a Law Day poster contest for elementary through high school students. The theme is "The Bill of Rights: Freedom of Expression." Winning posters will be displayed at a Law Day luncheon for students, parents, and community members.

There are also plans to reproduce winning posters on billboards and on buses in the area.

NEW YORK

Project P.A.T.C.H. is planning its seventeenth annual Civil Law Moot Court Competition with 32 high school teams expected to compete this year.

NORTH CAROLINA

The Young Lawyers Division of the North Carolina Bar Association is sponsoring a moot court competition, an elementary school art contest, and a junior and senior high essay contest as part of its Law Day activities. The moot court competition is expected to involve 65 teams, with finalists competing on Law Day in the chambers of the state supreme court.

NORTH DAKOTA

Law Day observances in North Dakota will feature a continuation of last year's successful programs including mock trials in elementary through high school grades, attorney visits to the schools, tours for sixth graders through courtrooms in Bismarck, and high school essay contests.

OHIO

In Dayton, the Dayton Bar Association will be sponsoring poster and essay contests in area schools. In the Cleveland area, three different programs are planned to spur student interest in Law Day. The first is the student essay contest on the topic "What Freedom Means to Me." Winners in each of three divisions (elementary, junior high and high school) and their teachers will be honored guests at Law Day 1991 activities. Secondly, the Young Lawyers Section will sponsor a school visitation project involving presentations to more than 50 junior and senior high schools by teams of volunteers consisting of lawyers, a juvenile court representative, and a police officer. The third project is the Adopt-A-Class Program conducted in cooperation with the Cleveland Public Schools. The program involves lawyer and judge volunteers who will supplement the specially designed LRE curriculum by sharing their personal experience and knowledge with students. Special emphasis will be placed on the Bill of Rights this year.

OKLAHOMA

A 30-member Statewide Law Day Committee the Oklahoma Bar Association, in cooperation with the 77 Law Day chairs of each of the state's counties, have planned programs to impact and involve thousands of school children and adults throughout the state. Among the projects will be a two-hour prime time "Ask a Lawyer" program appearing throughout the state on public television. Several segments drawn from the show dealing with areas such as small claims, laws on teen use of alcohol, domestic violence-victim protective orders, buying a used car, and the role of the attorney, judge, and juror in our legal system will be made available, along with an instructional manual, to teachers for two-weeks' use. A Law Day Project Workbook has been compiled that lists hundreds of projects, mock trials, curricula for teachers, Law Day plays, and directions on how to develop activities such as courthouse tours and lawyer for a day programs. Statewide essay contests for junior and senior high school students and poster contests for elementary students will also be held.

OREGON

The Oregon State Bar Association and the Oregon Law-Related Education Program will cosponsor an all-day "Inside the Justice System" program for students in the Portland metropolitan area. Now in its eleventh year, the program attracted 1,400 students in 1990. The *Portland Business Today/Daily Journal of Commerce* sponsors the printing of recruitment programs. Most students are from area high schools, but some middle school students in the gifted program or in special classes also participate. Sixteen different break-out sessions will be held on topics such as homicide investigation, hate groups, and whether U.S. Supreme Court justices should be elected.

PENNSYLVANIA

Activities planned by Temple University's Law, Education and Participation Project (Temple-LEAP) is a Law-Related Education Conference scheduled for May 2 on the topic "Drugs, the Law, and the Schools" to be cosponsored with the Berks County Bar Association.

SOUTH CAROLINA

The many school activities focusing on Law Week will culminate this year at the Student Citizenship Conference to be held in Columbia. High school essay contest winners will be announced, poster contest winners will be honored, and 14 to 25 different break-out sessions will be conducted. Featured topics will include teen violence, search and seizure in the schools, racial tension, freedom of expression, mediation, and mock trial demonstrations. Participants are chosen on a first come, first-served basis. Every high school in the state receives a letter inviting 10 students per school to the conference. Of the 10, five are selected from among the school's top achievers with the remaining five coming from the alienated and non-participating segment of the student body. All students attending must make a presentation to their home school after returning from the conference. Last year's inaugural conference was attended by nearly 300 students.

TEXAS

While most local bars were still planning their programs at press time, they hope to duplicate last year's successful Law Day activities which included a "Call a Lawyer" program, scholarships awards for high school students, and a naturalization ceremony sponsored by the Houston Bar Association for approximately 1,500 new citizens.

UTAH

The Utah State Capitol in Salt Lake City will be the site of a Law Day awards ceremony and fair. An awards ceremony will honor students from the greater metropolitan area who participated in the judge for a day program, junior and senior high school mock trial winners, and high school essay contest winners. Law firm partnerships in the Mentor program will be honored, a dramatic presentation will be performed, the Liberty Bell Award will be given to a non-attorney in LRE, and the first annual Scott M. Matheson Award will be presented to an attorney or law firm. The cosponsors of the program are Utah Attorney General Paul Van Dam and the Utah State Bar Committee on LRE. Governor Norman Bangerter and members of the state judiciary will join the 400 participants who are expected to attend.

VERMONT

The Young Lawyers Section and the Public Education Committee of the Vermont Bar Association are sponsoring a statewide essay contest for grades five through eleven. Winners will be recognized at an awards ceremony to be held at the Superior Court House in Montpelier.

In Windham County, the Family Court is developing a curriculum for children whose parents have been or are currently going through divorce proceedings. One part of the plan brings children into court to explain the proceeding. An art contest for middle and high school students, to be judged on Law Day at the court house, is also planned.

Two new pilot programs and being developed in Chittenden and Rutland Counties. Ten volunteer lawyers and teachers are working to bring citizenship education into K-12 classrooms in each county. The goal is to have the programs in place in schools and courtrooms during Law Week.

WASHINGTON

This year's programs were being planned at press time. Among the highlights of last year's Law Day observances were a Fun Run with the Young Lawyers Division and the Law League. Two high schools in Whatcom County conducted mock trials of a small claims court.

WEST VIRGINIA

The West Virginia State Bar plans to build on its various year-round programs by providing Law Week information to county bar associations and young lawyers to encourage lawyer visits to schools. Mock trials will be featured in many local programs around the state as well.

WISCONSIN

The Wisconsin Bar Foundation, in cooperation with the League of Women Voters of Wisconsin, Inc., has published a new booklet entitled *The Bill of Rights: An Introduction*. Written by the noted constitutional scholar Professor Gordon Baldwin of the University of Wisconsin-Madison Law School, approximately 47,000 of the booklets have been distributed to high schools throughout the state. The Young Lawyers Division of the State Bar of Wisconsin is developing a discussion guide for attorneys to use in conjunction with the booklet when they visit classrooms on Law Day. Additional information on *The Bill of Rights: An Introduction* is available by calling Karen McNett at (608) 257-9569.

The Foundation is also working with the Wisconsin Bicentennial Committee, the State Bar of Wisconsin and the Wisconsin Department of Public Instruction to provide Bill of Rights-focused teacher training seminars at various University of Wisconsin campuses throughout the state during April and May.

(Compiled by Paula A. Nessel, Project Coordinator, National LRE Resource Center)

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Evolution

(continued from page 17)

and political revolutions that occurred during the nineteenth century. Interestingly enough, both these revolutions began at the state level, especially as regards constitutional change, and later spread nationally. Indeed, once they reached the national level, the political process had been ineluctably transformed from one where great power inured to the states to one where our national conscience completely outweighed loyalties to our state.

When discussing constitutional change in nineteenth century America, it is important to recall that people did not think solely in terms of the national Constitution, as we tend to do today. There were many state constitutions, most of them written between 1776 and 1780 in the aftermath of the Declaration of Independence. For all practical purposes, these constitutions were the most important American constitutions for the next 150 years because they affected everyone directly and had a much greater impact on daily life than the national Constitution. Furthermore, these constitutions changed much more often than the national Constitution, so we find that our constitutional tradition is a very malleable one. For example, the New York State Constitution was first written in 1777. It was later revised, rewritten entirely in 1821, 1846, 1893, again in 1938, and, most recently, in the 1970s. Therefore New York is now working under its sixth constitution, and this is the case in many other states as well. So when we think about the constitutional revolution that occurred in the nineteenth century, we must remember that we are discussing changes at the state level, changes that had a profound impact on citizens.

What dramatic change accounts for our preoccupation with rights today, and why we have become a rights conscious society? The answer can be found in the particular character of the revolution that took place. That nineteenth century revolution can best be described as classical liberalism. Classical liberalism exalts individual rights and diminishes the power of government. It posits that the market should govern economic transactions and that state intervention in government matters should be minimized.

Classical liberalism is also democratic. It declares that every person should have the right to vote and certain other personal rights, and this revolution has much to do, in an unusual way, with our preoccupation with rights today. In fact, it underlies the great revolution in rights during the 1960s, and without the classical liberal tradition, the civil and personal rights revolution that occurred in the 1960s and 1970s would not have been possible.

Every revolution requires a repudiation of something. The classical liberal revolution of the nineteenth century rejected the idea of government that the Framers had instituted. The Founding Fathers wanted to create a republican form of government. What does that mean? One tenet of republicanism is to abolish all titled nobility and/or monarchy. Rather, the government is in the hands of the people, and a popular sovereignty exists, where power ultimately resides with the people. That is what occurred during the republican revolution of 1776. It was a movement away from monarchy and aristocracy, and that was a very positive aspect of the republican revolution.

Yet we must question what is meant by the sovereignty of the people. How are we to define the "We the People of the United States" in the preamble of this republican-inspired Constitution? In the republican formulation, the people – those who make the decisions by exercising their right to vote – are defined only by their ownership of property. If you do not own property, you have no right to vote. Voting power does not inhere in the individual, it inheres in the property that he or she owns. (In fact, under the first New Jersey Constitution, property-owning women were allowed to vote solely because they owned property, whereas males who did not own property were not allowed to vote.) Thus we come to understand that the republican Constitution's foundation is property.

The second distinguishing characteristic of republicanism was a belief in activist government and a political economy in which government legislation and tax policy promoted private business by giving charters to corporations, such as aid to canal and railroad builders. The idea here was that the government should act positively to increase that wealth for the good of the entire society, so there is a collectivist sense to republicanism. These are the major components of the republican constitutional world. On the one hand, it wanted a powerful government, as Madison, Hamilton, and countless others espoused, and on the other, it wanted a controlled government. As Madison noted in *The Federalist* No. 51, "You must first enable the government to control the government to do things, and in the next place oblige it to control itself." You oblige it to control itself by giving power to property owners who had economic independence and who (in theory) would act virtuously for the good of the entire society.

This is the ideology overthrown in the nineteenth century by the classical liberal revolution, which had two phases. The first half of the century witnessed the political revolution, and the second half witnessed the legal codification of that revolution. The political revolution mostly took place at the state level. By 1850 ,for example, most of the original states had revised their constitutions to make them more democratic. This was done by redefining who "the People" were in terms of voting and the exercise of political power. No longer were property owners the sole enfranchised segment of the population. Instead, all free white adult males could vote, and in some northern states, so too could free blacks. Gradually, the franchise spread to the masses, even though women were denied the vote until 1920. In this way, the proposition of individual – as opposed to property – rights was born, an ideal that has carried down to us today. Obviously this has affected our nation profoundly and altered the original conception of the Framers of the Constitution and the Bill of Rights. And, to this day, we have yet to determine where to draw the line on the personal liberties that were opened up by this classical liberal revolution.

Laissez-Faire Constitutionalism

The legal counterpart to this political revolution surfaced after the Civil War, and it attacked the idea of positive, activist government. It was greatly affected by a movement called laissez-faire constitutionalism. One of laissez-faire's central premises is that taxpayers' dollars should not be used to subsidize private industries, as was often the case in the nineteenth century. For example, the Union Pacific Railroad was built because of extensive land grants from the government to the railroad in order to subsidize the development of the railroads across the nation.

Laissez-faire constitutionalism argued that the activist use of taxpayers' resources to subsidize development was patently unfair. At the same time, many corporations took advantage of laissez-faire to skirt state regulation of their operations, and to avoid fair taxation. However, in analyzing how rights have come to be seen as something guaranteed to people, laissez-faire constitutionalism is also a democratic movement. It is democratic because it attempts to protect the rights of ordinary taxpayers.

Justice Thomas M. Cooley of the Michigan Supreme Court, one of the leading jurists connected with laissez-faire, wrote a book in 1868 redefining the constitutional limitations of the states on their citizens. In it, he suggested that the states had no right to use taxes to subsidize "big business." Going further, in 1870 Justice Cooley struck down the use of local taxes to subsidize the railroad in *People v. Salem*.

Cooley understood how railroads came to be built. Often the railroad company would approach a town and demand tax subsidies to construct a depot in that town–thereby putting it on the economic map–and, if denied by one locality, it would simply approach another with the same proposition. Self-interest necessitated that towns accede to this economic blackmail. Cooley claimed that it was unconstitutional, and that it must stop because it is unfair to taxpayers. He noted: "When the state once enters upon the business of subsidies we shall not fail to discover that the strong and powerful interests are those most likely to control legislation and that the weaker will be taxed to enhance the profits of the stronger." Thus Cooley halted this form of taxation, and state constitutions were revised accordingly. Nine state constitutions that were revised between 1876 and 1912 contain a provision that all taxes shall be levied and collected for public purposes only.

Cooley based his opinion on the Ninth Amendment, which states: "The enumeration of rights in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." He interpreted this to mean that the taxpayers had a right to protection against use of their tax dollars for nonpublic purposes.

Laissez-faire constitutionalism also is characterized by a sudden shift of emphasis from the constitutional protection of property that is owned by individuals to a concern with individuals who own property. The best way to understand this shift is by reviewing several seminal New York cases, one of which was subsequently reversed by the U.S. Supreme Court. The first case, the *Jacobs* case of 1885, concerned the place where cigar makers could do their work. *Lockner*, which reached the Supreme Court in 1905, concerned the hours that bakers could work. In the *Lockner* case, the New York legislature had passed a law limiting bakers' work hours per week, ostensibly a state regulation in the interest of ordinary workers. The Supreme Court struck down that regulation as an infringement on an individual's liberty to make his or her own decisions regarding work.

Lockner is often considered a very conservative decision, and in a certain sense it is, because it could be interpreted by unscrupulous employers as allowing them to exploit their workers by making them work extreme hours. On the other hand, the rationale that the Supreme Court used to defend this reversal of the New York act is instructive, and it is derivative of the *Jacobs* decision, which addressed the issue of where cigar workers could work. Could they work in tenement houses? Liberty means the right to use one's faculties in all lawful ways to live and work where one will. All laws, therefore, that impair or trample on these rights infringe the fundamental rights of liberty, which are protected by the constitution, so a property right now comes to inhere in the individual just as voting rights had come to inhere in the individual.

There is an intrinsically democratic character to this thinking in its emphasis on individualism and in the notion that rights inhere in the individual rather than in his or her property. By the end of the nineteenth century, liberal democratic individualism was in full flower, thus laying the groundwork for further protection by the government of rights of free speech and of privacy. □

Liberties

(continued from page 5)

the Espionage Act of 1917, Senator Joseph McCarthy's investigations of "un-American activities" during the 1950s, and freedom of the press during the Vietnam War in the 1960s and 1970s.

Use of case studies about Bill of Rights issues. Case studies provide examples of Bill of Rights precedents and persistent issues that are vivid, dramatic, and instructive. Students tend to respond positively to lessons involving cases on constitutional issues. The case study method of teaching has been used successfully in various social studies curriculum projects from the 1960s through the 1980s (Oliver and Shaver 1966; Starr 1978; Patrick and Remy 1985). Many projects in law-related education have emphasized case studies in the classroom and have documented the instructional effectiveness of this strategy (Turner and Parisi 1984; Rodriguez 1989).

Successful use of case studies on constitutional issues involves the following procedures: (1) a review of background information to set a context for analysis of the issue and decision in the case; (2) statement and clarification of the question(s) and issue(s) in the case; and (3) examination and appraisal of alternative responses to the question(s) and issue(s), which include majority and dissenting opinions in the case.

Landmark cases in development of constitutional rights should be emphasized in the curriculum. For example, if the objective of instruction is to teach about the development in the twentieth century of freedom of speech and press, then the following Supreme Court cases, at least, should be examined and discussed in the classroom:

- Shenck v. United States (1919).
- Abrams v. United States (1919).
- Gitlow v. New York (1925).
- Near v. Minnesota (1931).
- DeJonge v. Oregon (1937).
- Dennis v. United States (1951).
- New York Times Company v. Sullivan (1964).
- Tinker v. Des Moines School District (1969).
- Brandenburg v. Ohio (1969).
- New York Times Company v. United States (1971).
- Texas v. Johnson (1989).

Examination and discussion of Bill of Rights issues in an open classroom climate. An open classroom climate is required for successful use of case studies to teach Bill of Rights issues. In an open classroom climate, students feel free and secure to express and examine ideas, even if they seem to be unconventional or unpopular. Furthermore, teachers in an open classroom regularly emphasize participation of students in discussions of controversial topics.

Various studies of learning through classroom discussions have indicated that students in open classroom climates tend to develop positive attitudes about Bill of Rights principles and values and high-level skills in cognition and communication (Leming 1985, pp. 162-163). These attitudes and skills, of course, are essentials of responsible citizenship in a constitutional democracy.

Active civic learning in an open classroom climate may also be associated with greater achievement of knowledge. Relatively few respondents in the recent national assessment in civics "reported that they had participated many times" in such classroom activities as mock trials, simulated congressional hearings, or open classroom discussion of constitutional issues. However, those who had done so (12 percent) "tended to perform better in the assessment than their peers who had occasionally or never participated in these activities" (National Assessment of Educational Progress 1990, pp. 83-85).

The obvious worth of active learning in open classroom climates has led some civic educators to an extreme emphasis on processes in teaching and a consequent neglect of core content that all students should learn, such as Bill of Rights topics and issues. However, research on teaching and learning appears to reject the extreme positions about the primacy in civic education of either process or content. Sound education on the Bill of Rights should involve continuous and systematic blending of important subject matter with warranted means for teaching and learning it, such as open classroom discussions of issues in case studies (Newmann 1988).

A Concluding Note

Thomas Jefferson and James Madison agreed with many other founders of the United States about the importance of civic education and its relationship to liberty. They recognized, as Judge Learned Hand did in the middle of the twentieth century, that a Bill of Rights could be no better than the people it was created to protect against abuses of their rights by despots.

Jefferson wrote to Madison (December 20, 1787): "Above all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty." And James Madison, too, affirmed his belief in civic education as the foundation for civil liberty. In an August 4, 1822 letter to William T. Barry, Madison wrote: "A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives. . . . What spectacle can be more edifying or more seasonable, than that of Liberty & Learning, each leaning on the other for their mutual & surest support?" Madison and Jefferson knew that their Constitution and Bill of Rights could be no stronger than the linkages of liberty and learning in the minds and hearts of the people. The bicentennial of the federal Bill of Rights in 1991 is a suitable occasion for American civic educators to renew and strengthen these linkages – the critical connections of civil liberty and common learning in the curricula of schools.

REFERENCES

California State Board of Education. *History-Social Science Framework for California Public Schools, K-12.* Sacramento: California State Board of Education, 1988. Education for Democracy Project. *Education for Democracy: A Statement of Principles.* Washington, DC: American Federation of Teachers, 1987.

Elam, Stanley M. "Anti-Democratic Attitudes of High School Students in the Orwell Year." *Phi Delta Kappan* 65 (January 1984): 327-332.

Hand, Learned. *The Spirit of Liberty.* New York: Alfred A. Knopf, 1960.

Hearst Report. *The American Public's Knowledge of the U.S. Constitution.* New York: The Hearst Corporation, 1987.

Jefferson, Thomas. "Letter to James Madison" (20 December 1787), in Michael Kammen, ed. *The Origins of the American Constitution: A Documentary History.* New York: Viking Penguin, Inc., 1986, 90-93.

Kammen, Michael. *A Machine That Would Go of Itself: The Constitution in American Culture.* New York: Alfred A. Knopf, 1986.

Leming, James S. "Research on Social Studies Curriculum and Instruction: Interventions and Outcomes in the Socio Moral Domain," in William B. Stanley, ed. *Review of Research in Social Studies Education, 1976-1983.* Washington, DC: National Council for the Social Studies, 1985.

Madison, James. "Letter to William T. Barry" (4 August 1822), in Marvin Meyers, ed. *The Mind of the Founder: Sources of the Political Thought of James Madison.* Hanover, NH: University Press of New England, 1981, 343-347.

McCloskey, Herbert, and Alida Brill. *Dimensions of Tolerance: What Americans Believe about Civil Liberties.* New York: Russell Sage Foundation, 1983.

Michigan State Board of Education. *Essential Objectives for Social Studies Education in Michigan, K-12.* Lansing: Michigan State Board of Education, 1987.

National Assessment of Educational Progress. *The Civics Report Card.* Princeton, NJ: Educational Testing Service, 1990.

Newmann, Fred M. *Higher Order Thinking in High School Social Studies.* Madison, WI: National Center on Effective Secondary Schools, 1988.

Patrick, John J. "Political Socialization and Political Education in Schools," in Stanley Allen Renshon, ed. *Handbook of Political Socialization: Theory and Research.* New York: The Free Press, 1977.

Patrick, John J., and Richard C. Remy. *Lessons on the Constitution.* Washington, DC: Project '87 of the American Historical Association and the American Political Science Association, 1985.

Ravitch, Diane, and Chester E. Finn, Jr. *What Do Our 17-Year-Olds Know: A Report on the First National Assessment of History and Literature.* New York: Harper & Row, 1987.

Remmers, H.H., and Richard D. Franklin. "Sweet Land of Liberty," in H.H. Remmers, ed. *Anti-Democratic Attitudes in American Schools.* Evanston, IL: Northwestern University Press, 1963.

Rodriguez, Kenneth. *Teacher Resource Manual for Law and Civics.* Albuquerque, NM: New Mexico Bar Foundation, 1989.

Starr, Isidore. *The Idea of Liberty: First Amendment Freedoms.* St. Paul, MN: West Publishing Co., 1978.

Turner, Mary Jane, and Lynn Parisi. *Law in the Classroom.* Boulder, CO: Social Science Education Consortium, 1984.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). ☐

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Law Day

(continued from page 8)

also taken into account." Moss is convinced that as a result of LRE, students come to see that the law and living in conformance with the standards of society is important.

His experiences with students and LRE over the years have served to change Moss's perceptions of young people. He points out that in Idaho, 18-year-olds can serve on juries. "In past years, I would have said 'No way – I don't want anyone under 30 on this jury.'" Recently, however, Moss has been willing to have more young people serve on juries; in one case, four jurors were less than two years out of high school. "My contact with young people in school convinces me that they can be trusted with the responsibility to make major decisions. In a capital case involving a serial killer, I had a young person serve as jury foreman . . . I have a lot more faith in young people coming out of our schools than I did in the past."

From his perspective as county prosecutor, Moss feels very comfortable with young people. "I used to have the opinion that young people were very defense-oriented." Today, he notes that more and more they "want to see the law upheld. They want to see people held accountable for their actions. This attitude is much more evident now than in the past. When I go into a classroom I often see students upset that a particular sentence wasn't stiff enough." Moss feels this attitude is probably more pronounced in a rural community like his where students tend to be closer to law enforcement personnel than they would be in an urban area.

Moss advises lawyers going into a classroom situation to "avoid the attitude that you can pull the wool over their eyes . . . the students will pick up on it. Just be genuine and don't pretend you know all the answers. Be open, honest and upfront. They'll respect you and you'll have more credibility."

* * *

(Note: The ABA Special Committee has prepared several publications dealing with lawyers and law-related education. Two of them are "Sure-Fire Presentations" and "Lawyers in the Classroom." For more information on these publications, write to: American Bar Association Special Committee on Youth Education for Citizenship, 541 N. Fairbanks Court, Chicago, IL 60611-3314 or call (312) 988-5735.)

Ten Tips for Lawyers

Connecticut attorney Leslie A. Williamson, Jr. has prepared a series of hints that attorneys may find helpful when they talk to students about the law and various legal issues.

1. *Know Your Subject*
   Obvious but extremely important to keep in mind. Spend some time reviewing your material before you set foot in the classroom. As the lawyers in this article point out, don't underestimate the breadth of students' knowledge; they are aware, informed and interested.
2. *Have a Plan but be Prepared to Vary from It*
   Know in advance what you are going to say and how you are going to say it. Develop a presentation outline. However, the more interest you generate, the more likely it is that you will get "off track." Don't be overly fearful of this, but don't get caught in the position where you find yourself unable to get back on track.
3. *Stress Responsibilities as well as Rights*
   You are a guest of the local school board. The role of your host is to provide students with an education. Your presentation will be integrated within the general goals of the board. Remember that you are in the school as a lawyer-educator, not as a student advocate. Your presentation should stress responsibilities as well as rights. Don't neglect to mention the responsibilities of the school board.
4. *Control the Classroom*
   Don't expect the teacher to control the class for you. When you step up in front of the class, you will be tested – both on your knowledge of the subject and on the way you manage the students. If a student misbehaves, do something – don't ignore it. Don't wait for the teacher to take control and don't be afraid to assert some authority.
5. *Talk with Students, Not at Them*
   You'll find that most students are interested in the law and will jump at the opportunity to engage in meaningful discussion. Give them that opportunity! While you may be tempted to spend the entire session lecturing, I strongly urge that you don't.
6. *Don't Act Like a Lawyer*
   Keep in mind that you are not addressing a judge but rather a group of students. Use language they can understand and take time to explain unfamiliar words or concepts.
7. *Don't "BS" the Students*
   If you know the answer to a question, give it. If not, don't be afraid to say so. As Tom Moss says in the accompanying article, don't try to "pull the wool over their eyes." They'll spot it in short order and your credibility will be destroyed in the process.
8. *Use Hypotheticals*
   Use examples to illustrate the points you are trying to make. Develop hypotheticals from your imagination or from recent court decisions, particularly those that have been extensively covered in the media.
9. *Watch the Time*
   While your presentation will undoubtedly be fascinating, the attention span of most students will parallel the class schedule. When the bell rings, they will want out – now! Know exactly how much time you will have and time your presentation beforehand.
10. *Work the Class and Work with the Teacher*
    Don't sit behind a desk or stand at a podium. Take a page out of Donahue's book – move around, interact – get every student involved. Before class, talk with the teacher to decide which material should be emphasized. Find out about the students' background, ask the teacher what they're especially interested in and learn what will be done with the subject matter after you leave.

(Adapted from YEFC's LRE Project Exchange "Sure-Fire Presentations")

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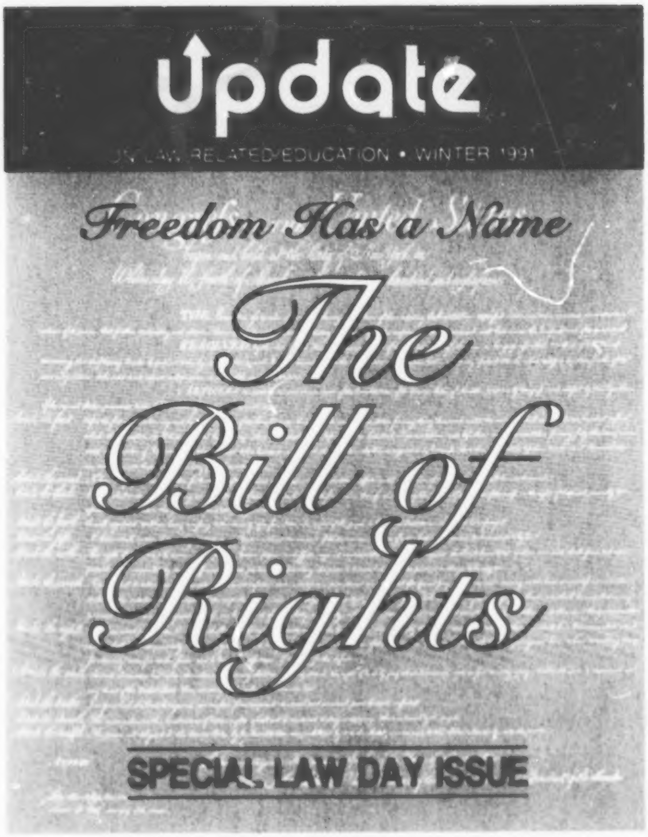

Update

ON LAW-RELATED EDUCATION • WINTER 1991

Freedom Has a Name

The Bill of Rights

SPECIAL LAW DAY ISSUE

Special Committee
on Youth Education
for Citizenship

American Bar Association

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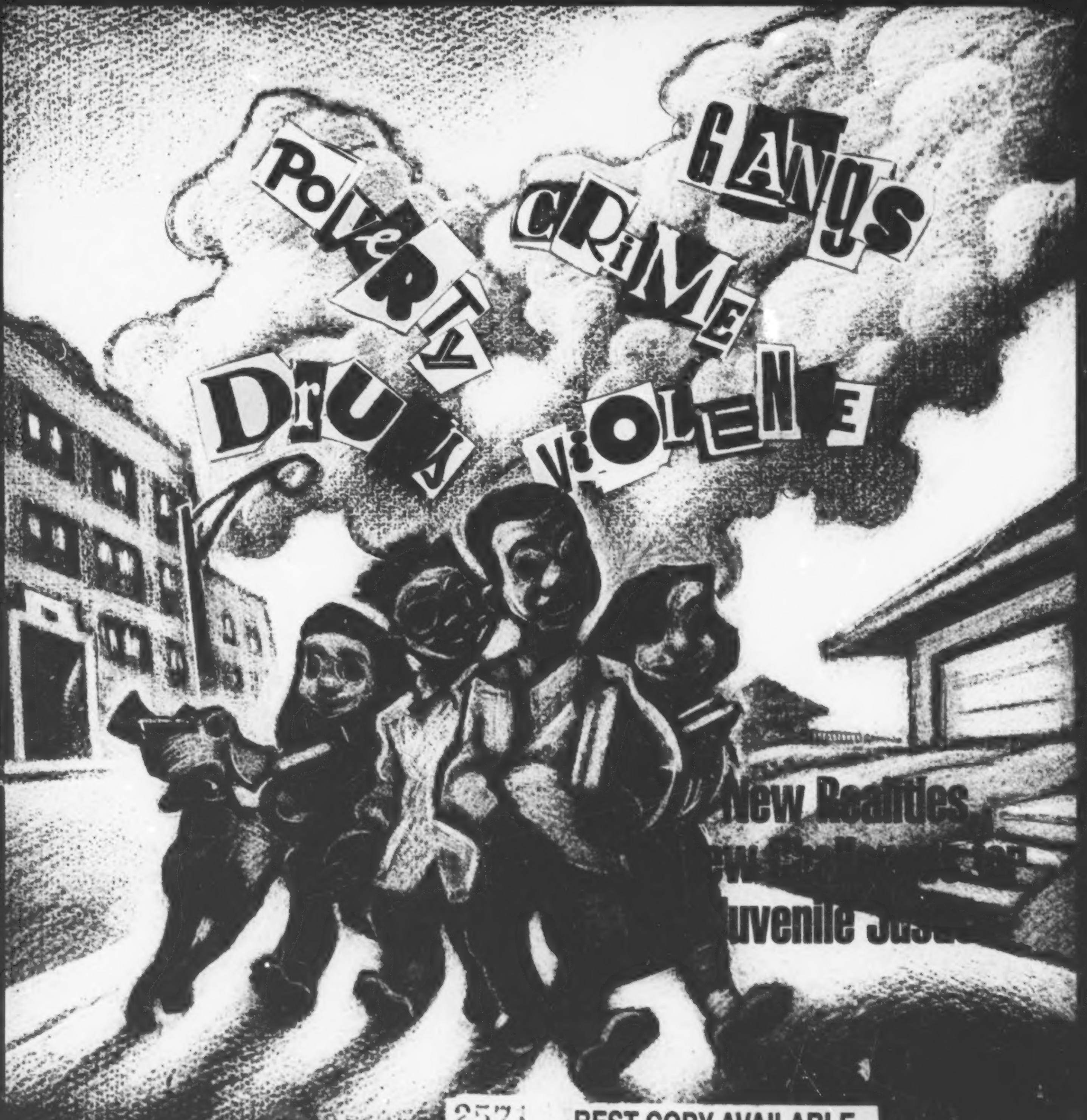
ABA Special Committee on Youth Education for Citizenship

update

ON LAW-RELATED EDUCATION • SPRING/SUMMER 1991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New Realities, New Challenges for Juvenile Justice

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opening statement

If you take another look at the cover, you'll see that this is *not* the fall issue, but rather the spring/summer issue. Due to an unfortunate series of circumstances, our production schedule grew longer and longer still until it finally became embarrassing. Please accept my apologies for this situation as well as my assurance that the fall issue is on track and should be in your hands in a matter of weeks. In the meantime, I hope you find that this issue was worth the wait.

In our cover story which begins on page 3, Louise Kiernan takes a hard look at the problems young people face today and the role of the juvenile justice system in coping with them. Growing up has never been easy, but the struggles of young people seem formidable indeed for what some observers have termed "a generation at-risk." A companion piece by Toronto attorney Paul Calarco provides an interesting contrast by examining juvenile justice from a Canadian perspective.

Recognizing that traditional approaches may not always work when young people are at odds with the law, Melinda Smith explores mediation as a tool which holds promise in addressing a variety of youth-related issues. She makes a persuasive argument for a more proactive approach which more fully involves the family and community in shaping the behavior of young people.

Does the Bill of Rights apply to children? Was it intended to? Should it? The evolving and controversial concept of "rights" as it applies (and doesn't apply) to young people serves as the focus of Joan Mahoney's article on page 13. While the courts have broadened the rights of children in some areas, she notes that when parents and schools face off against children, it's usually the parents and schools who win.

Our series of classroom strategies addressing Bill of Rights themes continues in this issue, focussing on freedom of religion. Another reproduction of one of the ABA's popular and thought-provoking posters (which can also be ordered in a larger version) appears in the center of this issue to complement the classroom activities.

Many of you consider classroom activities such as these to be at the heart of what this magazine is all about. We invite you to submit *your* strategies along with substantive articles, comments and suggestions. Future issues of *Update* will explore topics such as the environment, Native Americans, the courts, and America as a multicultural society. We want you to think of this as your magazine, a forum for your ideas and an outlet for your creative energies as we address these and other topics in coming issues.

Along these lines, we'll be in touch with many of you during the coming months to exchange ideas and look at ways in which *Update* can be improved to better serve your needs. We have some exciting plans for *Update*, and we need your help to make them a reality.

—Jack Wolowiec

contents

Volume 15, Number 2
Spring/Summer 1991

NEWS
DETECTIVE SUSPENDED

3 Juvenile Justice and the New Realities of Growing Up
7 Mediation and the Juvenile Offender

A STRATEGY FOR JUVENILE JUSTICE SETTINGS

11 Controlling Conflict
13 "We the Children"?

SECONDARY SCHOOL STRATEGIES

18 Crimebusters or "Rightsbusters"?
20 Gangs and the Fourth Amendment

AN ELEMENTARY SCHOOL STRATEGY

21 Rights and the "Common Good"

FREEDOM HAS A NAME: SPECIAL BILL OF RIGHTS STRATEGIES

27 Freedom of Religion and the Public Schools (Secondary)
33 The Nature of Religious Freedom (Middle)
35 Freedom and Tolerance (Elementary)

39 Court Briefs

Cover illustration by John Figler

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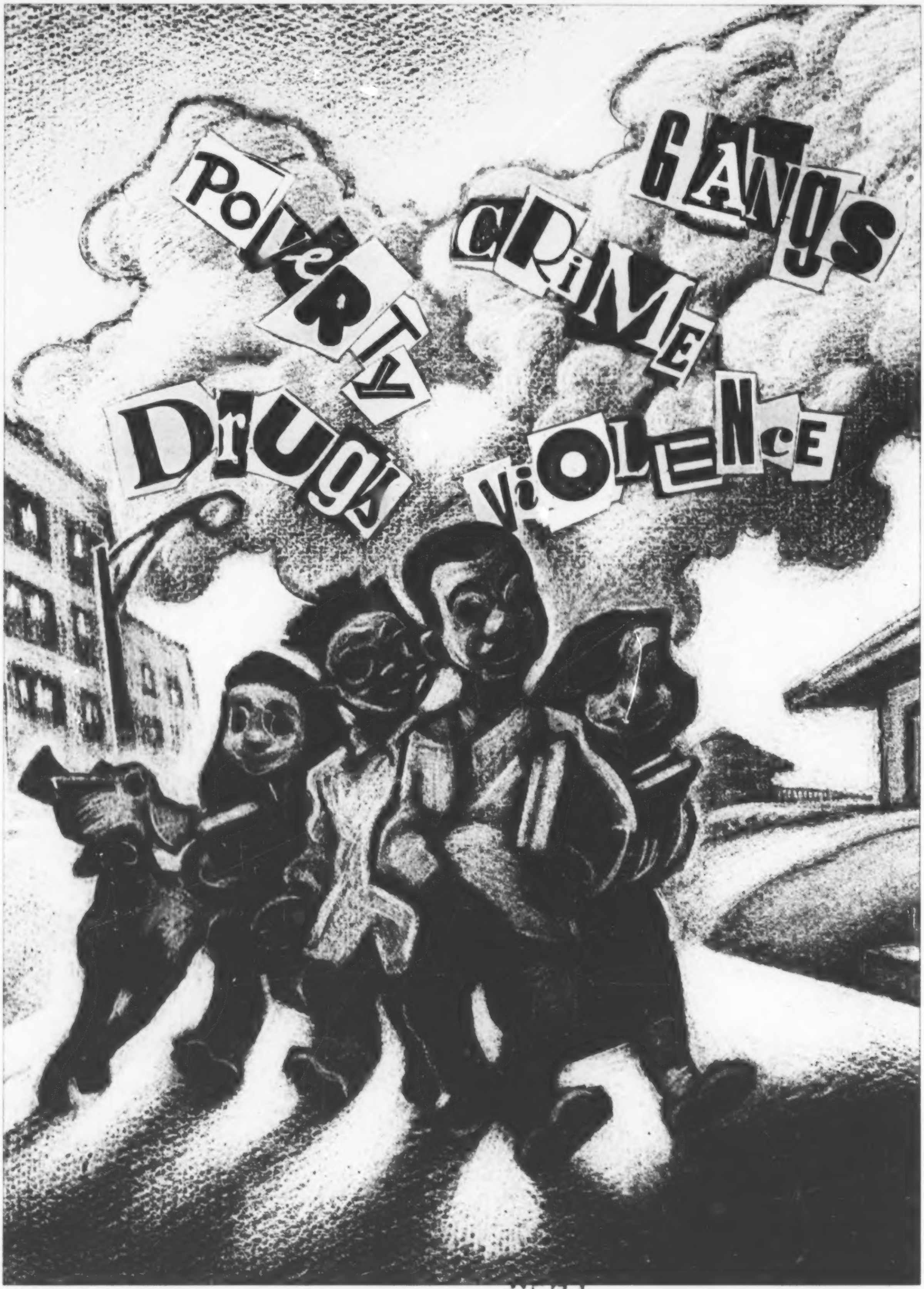
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2574

Louise Kiernan

Juvenile Justice and the New Realities of Growing Up

A beleaguered system struggles to cope

Bryan was 11 when he got arrested for breaking into an apartment to steal a Nintendo game, radio and pair of Adidas high-top sneakers. But his problems started long before that.

He lived with his mentally retarded mother, an aunt, her boyfriend and six other children in four dingy, sparsely furnished rooms. The aunt and her boyfriend spent most of their time snorting cocaine in the bedroom. Bryan's mother spent most of her public aid check on alcohol. Bryan slept in a corner on the floor, his clean clothes, when he had any, piled up beside him. No one made him go to school, so he usually didn't.

By the time he was found delinquent for stealing another child's toys, Bryan was, as one juvenile court official put it, "a kid who had absolutely nothing. A kid who just wanted to steal a little pleasure for himself."

More and more children involved in the nation's estimated 1.1 million juvenile delinquency cases each year are like Bryan. They are young, they are poor, they come from single-parent or no-parent families and they live surrounded by drugs, alcohol and violence. And, more likely than not, they will come back to court again and again.

The beleaguered juvenile justice system can't cope. What was originally envisioned as an avuncular institution that would steer wayward youths back onto the right path has instead become more like a second-class criminal court system, caught between trying to reform and treat the troubled children who pass through its doors—and unable to do either.

Toppling Dominoes

In Chicago, where the nation's first juvenile court was established in 1899, a probation officer compares the dilemma to a row of toppling dominoes. "This [juvenile court] is just one domino," said Mary Ann Stanfield. "You can't take one domino and say, 'See, now it's not falling.'

"You've got a kid picked up at 10 a.m. on a gun charge. Well, why was he picked up at 10 a.m.? Because he dropped out of school. Why did he drop out? Because he can't read. And why can't he read? No one ever made him go to school. Why is he carrying a gun? Because he's afraid of the gangs. A typical kid has already gone through so much by the time you get him."

For many of the children who end up in juvenile court, the dominoes begin falling as soon as they are born. About 20 percent of children in the United States grow up in poverty, a figure that has increased 50 percent since 1969, according to a 1990 report by the American Medical Association and the State Boards of Education.

There aren't any statistics to definitively link this poverty to juvenile crime, but those who work with delinquents see it every day. "Most or all of the children who come through my courtroom are indigent or poor," says David Ramirez, a juvenile court judge in Denver.

The grimness of poverty is usually compounded by the stress of what experts delicately describe as "dysfunctional families." What that means for these children is living with family members who abuse drugs or alcohol, beat them, ignore them or just don't know how to handle them.

Bryan lost two siblings to accidents—a fire and a car wreck—largely because his mother's limited mental abilities and alcoholism prevented her from adequately taking care of her children. Things didn't get much better when the pair moved in with Bryan's aunt. Her drug abuse made conditions at her home so bad that Bryan's probation officer finally reported him to the Illinois Department of Children and Family Services as a neglected child. She just wanted to get him placed in a shelter where he could at least sleep on a bed and eat three meals a day.

The problems of children such as Bryan aren't confined to the nation's inner cities. Suburban and rural areas fight similar battles.

"I do get a few lawyers' kids and doctors' kids—all the way up the line—but a significant amount do come from single-parent homes or families with a history of physical abuse or drug or alcohol abuse," said Juvenile Court Referee Larry Eisenhauer, whose jurisdiction covers Des Moines, Iowa, and surrounding Polk

County. "These are the same children I have seen before for abuse and neglect."

But these aren't the same children teachers see in class every day. There is a clear connection between poor school performance and delinquency.

One study shows that 57 percent of children whose first juvenile offense is truancy will return to the court system, according to Melissa Sickmund, senior research associate at the National Center for Juvenile Justice in Pittsburgh.

"If they're this young and not going to school, I think this tells you that something is wrong," she says.

As for Bryan, his probation officer describes his education as "practically no school at all." When he was 12 and should have been in the sixth grade, he didn't test above the first- or second-grade level in any subject.

"It goes back to his home situation," she says. "It wasn't conducive for him to wake himself up early, get himself dressed, make himself breakfast and get to school when no one cared if he did it or not."

Bryan also has learning disabilities, as do 70 percent of delinquents in training schools nationwide, according to a study cited by Debbie Willis, research associate with the Center for the Study of Youth Policy at the University of Michigan in Ann Arbor.

"We really don't know why," says David Fassler, an adolescent and child psychiatrist in Woburn, Massachusetts, whose general practice includes juvenile delinquents.

"It could be that children with learning disabilities have more problems in school and school becomes a negative experience for them," he says. "They may be less likely to have friends and less likely to do well."

Fassler says there could also be a connection to child abuse, if the learning disabilities result from physical injuries, or even a direct link between damage to the areas of the brain that control learning and those which control aggression.

Punishment, Not Help

Whatever the reasons, once the toppling dominos land a child on the doorsteps of juvenile court, he will find an institution that is no longer designed to help him, but, rather, to punish him. There is a continuing trend to reduce the jurisdiction of juvenile courts and to impose harsher penalties for the crimes that are tried there.

"I call it the 'adultrifcation' of the system," says Barry Krisberg, president of the National Council on Crime and Delinquency in San Francisco. "Treating more kids like adults."

Since 1978, legislatures in more than half the states have chipped away at the purview of juvenile court by passing laws that require juveniles accused of certain serious crimes be tried in adult criminal court.

In Illinois, teen-agers 15 and over who are accused of murder, criminal sexual assault or armed robbery with a firearm are automatically transferred to adult criminal court. Automatic transfers also exist for selling drugs or carrying guns near or in schools and drug offenses on public housing property.

Judges also have the discretion to transfer juveniles who are at least 13 years old and have been accused of an offense that would be considered criminal if committed by an adult.

Other states have similar laws. In New York, 16-year-olds are automatically tried in adult courts and children as young as 13 can be transferred there if accused of certain serious crimes. In Vermont, the age goes down to 10 and Montana, 12, according to a 1987 survey.

This didn't happen to Bryan because he was just 11, two years below Illinois' minimum transfer age, when his case came to court. It did happen to Robert, a 13-year-old Cook County, Illinois, boy accused of murder. He and a 16-year-old companion enticed a man into an alley to sell him cocaine. The older boy decided it would be easier to just rob the man and shoot him.

"(Robert) was charged with murder because he was there and because he helped cover it up," explains his probation officer. The juvenile court judge agreed to the prosecutor's request to transfer the boy to adult criminal court, and he is now awaiting trial while confined in the Cook County Juvenile Temporary Detention Center.

Sickmund cites a similar case in Florida, where another 13-year-old boy accused of murder faces a prison term of up to 17 years—incarceration until he is 30—because he is being tried in adult court.

Options and Flexibility

"People think that nothing will happen to him if he is tried in juvenile court," says Sickmund. "But juvenile court generally has more flexibility. In adult court, there's usually just fines, getting locked up or getting let go. There are more options in juvenile court."

But those options—counseling, community service and others—are shrinking as juvenile courts become more like adult courts.

It began in 1967, when the U.S. Supreme Court ruled in *In re Gault* that juveniles should receive many of the due process rights granted to adults including the right to counsel, right to cross-examine witnesses and the right of protection against self-incrimination.

"We moved away from 'let's get together to do what's best for this child' to an advocacy system where the juvenile's attorney uses those constitutional rights as he would for an adult criminal defendant," says Eisenhauer.

The juvenile courts have responded with more "adult" punishments, marked by an increase in detentions and commitments.

The national incarceration rate at juvenile detention centers jumped from 37 youths detained per 100,000 in the population in 1979 to 70 per 100,000 in 1989, according to the National Council on Crime and Delinquency. Commitment to youth training schools went from 81 per 100,000 youth in 1979 to 109 per 100,000 in 1989.

Among those children are a disproportionate number of minorities. "The largest volume of kids are still whites, but non-whites and minorities are over-represented, given their makeup in the population," Sickmund says.

From 1979 to 1989, the percentage of white youth in public juvenile facilities decreased by 15 percent, while the percentage of black youth jumped 73 percent and Latino youth, 97 percent.

Willis, at the Center for the Study of Youth Policy, sees another domino effect working here. "We're seeing a more punitive reaction to non-white kids," she says. "They [minorities] get arrested more often, which gives them a record, which influences the judge when he decides if a kid should be held in detention. By the time a kid reaches a training school, his record looks like he should be there."

Different Standards

Poor minority children are more likely to enter the court system than white children because they don't have the non-legal alternatives available to them as do more affluent families. If Bryan had been a middle-class suburban child who stole someone's Nintendo game and tennis shoes, his family might have quietly han-

(continued on page 6)

Juvenile Justice in Canada

Looking at how other systems address similar problems often provides valuable insights and possible solutions. The following article, which is excerpted from the Winter 1990 issue of Criminal Justice, *published by the ABA Section of Criminal Justice, describes the juvenile justice system in Canada and provides some understanding of how that nation addresses the problems of young people.*

With the passage of the Young Offenders Act in 1984, the juvenile justice system in Canada experienced its first major change in more than three quarters of a century. The Young Offenders Act (YOA) was designed to update, clarify, codify, and reorganize the entire approach to juvenile justice in Canada.

Prior to the proclamation of the YOA, young persons in conflict with the law were dealt with under the Juvenile Delinquents Act (JDA) passed by Parliament in 1907. That Act had for many years been recognized as inadequate to deal with the specific problems faced by young people. While the JDA did declare that young people who had committed offenses were not to be treated as criminals but rather as persons in need of guidance and rehabilitative direction, the JDA did not live up to this goal. The dispositions available to a sentencing court were essentially of a probationary nature. For more serious offenses, a child could be sent to training school. The maximum fine for an offense was $25.

By the mid-1940s, it was generally conceded that the JDA was not responsive to the needs of young people nor of society in general. Unfortunately, Parliament did not see fit to give priority to enacting a new law to deal with juveniles. This, coupled with bickering between the federal and provincial governments, led to numerous delays in formulating even the most basic approaches to how juveniles should be dealt with under any replacement legislation. After much controversy, the Young Offenders Act became law in 1984.

The YOA has brought juvenile justice in Canada into the last years of the twentieth century. The declared principles of this Act, contained in Section 3, recognize and declare that

> . . . while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behavior as adults, young persons who commit offenses should nonetheless bear responsibility for their contraventions,

and that

> . . . young persons who commit offenses require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance.

These are but two of eight declarations contained in the YOA, but they are perhaps the most central principles. Under the YOA young persons are no longer regarded as misguided children. They are members of a society and bear duties toward that society. At the same time, they have the rights and freedoms of all persons under the Canadian Charter of Rights and Freedoms, which is part of the Canadian Constitution, and the Canadian Bill of Rights (a federal law),as well as special rights under the YOA. The Act has taken major steps to balance the interests of society in protecting itself from illegal behavior, with the special needs of young people.

The Young Offenders Act also contains a major child welfare element. This is clearly disclosed by the declaration that young persons have special needs and require guidance and assistance and by the types of dispositions which are available under the YOA.

Every young person who is charged with an offense has the same rights as an adult, including the right to be informed promptly of the reasons for any arrest, the right to retain and instruct counsel without delay and to be informed of that right, and the right to have the validity of any detention determined by way of habeas corpus. Young persons, as all people in this country, have the right of life, liberty, and security of the person; rights against unreasonable search or seizure, arbitrary detention, or imprisonment; the right to be presumed innocent; the right not to be denied bail without just cause; and a variety of other rights.

However, under the Young Offenders Act, a person who has been charged with an offense has not only the right to counsel but also the right to have a court order that a lawyer be appointed and paid for by the government. Often in juvenile justice cases we see parents who do not understand nor wish to deal with the problems their child faces. Under this Act, where a parent has an interest that is in conflict with that of the young person, it is the duty of a judge to ensure that the young person is represented by counsel independent of the parents.

Similarly, there are special provisions to ensure that a young person does not improperly give up the right to remain silent. Before a statement can be used against a young person, it must be shown that not only was the statement voluntary in the strict sense, but the youngster had it clearly explained to him or her, in language appropriate to his or her age and understanding, that there is no obligation to give a statement, that any statement can be used in evidence, that the young person has the right to consult another person (including a lawyer), and that any statement given is required to be made in the presence of a person

(continued on page 46)

dled the matter before charges were filed, or police officers may have been more apt to give him a "station adjustment," an informal write-up for the offense.

Instead, it went to court and Bryan established a juvenile record which, if he gets into trouble again, could prompt a judge to give him a harsher punishment other than probation.

However, this trend is less evident in rural and suburban areas. University of Minnesota law professor Barry Feld conducted a recent study, published in the *Journal of Criminal Law and Criminology* that indicates juvenile courts outside urban areas are less formal and more lenient. In his examination of Minnesota's juvenile court system, Feld also found urban courts handled more serious offenses than suburban or rural courts and were more likely to detain juveniles.

However, Feld cautions against assuming that urban courts are stricter than their suburban and rural counterparts. Urban courts are more likely to have access to detention facilities, he points out, and thus, to use them. And because their caseload is heavier, courts in large cities may concentrate their efforts on more serious crimes.

"With substantially higher felony arrest rates," he writes, "police or other referral sources in cities may view shoplifting, under-aged drinking or vandalism as less important, relative to more serious violent and property crimes, than similar behaviors may appear in suburban and rural areas."

It's an assessment that Eisenhauer, whose jurisdiction covers both urban and suburban populations, agrees with. "They (non-urban) areas deal with those issues outside of court," he says. "The police officer knows dad and mom and takes the child home."

The movement toward a "get tough" stance is not wholly supported by statistics, despite the widespread public belief—responsible in part for the trend—that juvenile crime is rapidly escalating.

Good News, Bad News

The number of juvenile offenders grew by just one-half percent from 1987 to 1988, according to Sickmund. "Things are surprisingly stable," she says. "The story is that, overall, things aren't getting worse."

Things have gotten worse in a few areas. There are more violent crimes and more drug-related crimes. For example, drug possession and trafficking offenses jumped 10 percent from 1987 to 1988, and now make up about 7 percent of juvenile court cases, according to the National Center for Juvenile Justice.

The number of aggravated assault cases has continued to climb steadily over the past 25 years, moving from 60 arrests per 100,000 population in 1965 to 225 in 1989. However, violent crimes accounted for just 6 percent of the total caseload in 1988.

The single largest group of offenses, accounting for 59 percent of the total, continue to be some type of property crime—burglary, larceny, auto theft or arson.

What this means is that more children are being incarcerated, many times for less serious crimes, without their educational or emotional needs being met. "We pretend that this child lives in a vacuum," says Ramirez. "That his family problems don't count, that his education problems don't count. If the child does something, we just lock him up, often with no resources at all."

This movement has taken the system so far from its original mission that Ramirez, the juvenile court judge, doubts it can survive. "I think that in five years, juvenile court will not be around," he says. "Juvenile court was created 100 years ago to rehabilitate and treat juveniles and that still ought to be the mission of the courts. But we're not given the resources to do that."

Eisenhauer takes a less gloomy view but agrees that the juvenile system needs more help to get the job done. "I think the system could work if we had the resources," he says. "For example, we have a 14-year-old girl who needs to go to drug treatment, but we don't have treatment available, so she goes back home for three or four months to wait. We just need money to make those services available."

The juvenile court dilemma has spawned some innovative efforts to reform the system. Massachusetts and Utah led a rehabilitative movement in the 1970s by closing their large juvenile training schools. Programs were recommitted within three years, according to the *New York Times*.

A Role for LRE

In Iowa, for example, educators are involving delinquents in mock trials—as attorneys and judges, not just defendants. In 1985, the State Training School for Boys in Eldora began offering a law-related education program that includes mock trials, instruction in conflict resolution and discussion of life skills.

"Initially, the students sometimes think they already know the system because they've been involved in it, but they see there's a lot they don't know," says Timothy Buzzell, director of the Iowa Center for Law-Related Education. "They are participants in another way, not as perpetrators of crime, but as citizens."

One of the strongest aspects of the program is the emphasis on learning how to handle problems, says Buzzell.

"I think most of our students take with them good conflict resolution skills and they can apply those skills in confrontations they may encounter," he says.

Although the LRE center has not formally tracked the success of its program, Buzzell can point to some success stories, including one student who returned to his regular high school to find he could continue to take LRE courses there, too.

"He signed up for the class and is actively participating and his academics have improved," says Buzzell. "This class has given him something to identify with there."

Buzzell admits the LRE program may just be a small start but says it's an important one.

"We can change the youthful offender[s] by changing their thinking," he says. "How do we do that? I think one of the best ways is through education."

Educators in Los Angeles agree—with a twist. They hope to teach gang members by letting the gang members teach others. A program conducted by the Division of Juvenile Court and Community Schools of the Los Angeles County Office of Education sends juvenile offenders to work with severely handicapped students for two hours per day, helping to train, exercise and feed them.

"It really tends to transform them," says Ted Price, director of the division of juvenile court and community schools. "These kids have always been considered failures but this shows them that they're needed."

Price says the program seeks to redesign the system to fit the juvenile delinquent rather than thinking the delinquent should fit into the system. So far, it seems to be working. After six months, 70 percent of the offenders who went through the program had not returned to the court system, compared to 30 percent who served a traditional probation.

Other organizations have tried simi-

(continued on page 47)

JUVENILE JUSTICE

Melinda Smith

Mediation and the Juvenile Offender

New programs and approaches address the growing crisis of youth at-risk

The use of mediation continues to grow throughout the United States in response to widespread dissatisfaction with the adversarial process in resolving certain types of disputes. Over the past several years, mediation as an alternative means of conflict resolution for young people has achieved increased recognition as an effective tool in dealing with a variety of youth-related issues. Consider the following examples:

- At a middle school in a urban area known for gang violence, two boys are participating in a mediation conducted by two classmates. They are discussing a fight that took place in the hallway, apparently because one boy had "mad dogged" the other (i.e., gave him dirty looks to provoke him). The two boys are from rival gangs and have never even spoken to each other before this mediation.
- At a high school across town, a freshman girl is sitting in the counselor's office after having skipped school for an entire week. She ran away from home after a terrible fight with her parents and has been staying with a girlfriend. The counselor decides to refer the girl and her parents to a parent-child mediation program. In mediation the family will have an opportunity to talk about the fight, its causes, their feelings, and their needs. Volunteer mediators will help the family work out a concrete agreement about expectations and rules for daily living.
- In a conference room at a juvenile probation office, a young offender is sitting across from a woman whose house he had burglarized. They are participating in a victim-offender mediation conducted by volunteer mediators. The offender has just agreed to pay for neighborhood watch signs to be erected within a two-block radius of the woman's home.
- At a nearby juvenile correctional facility, another young offender is participating in a mediation training session with fifteen other offenders. They will become mediators who will attempt to resolve conflicts that occur between persons in their living units.

All of these activities are part of a continuum of prevention and intervention programs in mediation developed by the New Mexico Center for Dispute Resolution. These programs introduce conflict resolution skills and the mediation process to targeted children, youth, and families who could easily become or are already involved in the juvenile justice system. Similar programs have been developed across the country by scores of community mediation centers, which are applying mediation to an ever-widening range of interpersonal and community conflicts.

The mediation process allows people to resolve conflicts in a nonthreatening and nonpunitive atmosphere through the use of effective communication and problem-solving skills. Mediators are third-party neutrals who help people in a dispute express their points of view, vent their feelings, clarify needs and issues, and negotiate satisfactory agreements. Mediation models the positive expression and resolution of conflict.

The application of the mediation process to conflicts involving young persons holds great promise for several reasons. First, the juvenile justice system is not always the appropriate forum for resolving youth-related issues. Second, the process itself has tremendous teaching value for young people. Exposure to new methods of expression and resolution of conflict can build a foundation for life-long social and interpersonal skills.

The overall goals of these youth mediation programs are to:

- improve communication, problem-solving, and conflict resolution skills among youth and their families;
- enhance family functioning;
- improve school environments;
- prevent juvenile violence; and
- reduce community tension.

The programs reach youngsters in the environment of the home, the school, the community, the juvenile justice system, and youth corrections settings.

Why Are These Skills Needed?

Communication, conflict management, and cognitive problem-solving skills are essential for maintaining successful relationships in the home, school, workplace, and community at large. Yet insufficient emphasis is placed on teaching these skills in the school setting. Moreover, because of rising divorce rates and family dysfunction, the home environment cannot be counted on to impart these critical life skills.

Nowhere is the lack of these skills more apparent than in the juvenile offender population. It is well known that many juvenile offenders have cognitive skills deficits. They tend to be undersocialized and lack the values, attitudes, reasoning, and social skills that are required for positive social interaction. In their interpersonal relations, offenders often fail to recognize that an interpersonal problem exists or is likely to occur.

2579

Offenders often lack problem-solving skills and do not consider alternative solutions to problems. They have difficulty determining the best way to get what they want in their personal interactions. Instead, they often resort to impulsive, violent, illogical, and egocentric thinking and behavior.

Research indicates that teaching cognitive problem-solving, conflict resolution, and social skills in an educational setting can be highly effective in reducing recidivism among offenders who have committed violent or drug-related crimes. Dr. Robert Ross of the University of Ottawa has developed a problem-solving skills-based curriculum that has been used experimentally with probationers in Canada. He reports an 18.1 percent recidivism rate for offenders participating in the curriculum. This compares favorably with a 47.5 percent recidivism rate for a comparison group participating in a life skills curriculum and a 69.5 percent recidivism rate for offenders on regular probation.

Prevention and Intervention Program Models

The youth programs mentioned above range from programs that can be considered delinquency *prevention* programs, including school mediation and parent-child mediation, to *intervention* programs, which come into play after the juvenile has been involved in delinquent behavior. These include victim-juvenile offender mediation and mediation programs for juvenile corrections settings.

In examining these program models, we must view them from the perspective of effective juvenile justice policy. Ray Shonholtz, founder of San Francisco Community Boards Program, argues persuasively that the focus must be on community-based prevention programs. He states:

> The most important stage for service intervention is not after a criminal activity has taken place, but before it has been initiated or consummated. Any other beginning point will eschew the primary justice policy, encourage a dependency on professional justice services, increase youth incorrigibility and parent/community impotency. The conflictual needs of delinquency behavior of youth first appear in the context of the home, school or neighborhood. It is this context that is the real starting point for any comprehensive juvenile justice policy.

Viewed from this perspective, programs in school mediation and parent-child mediation are critical to prevention efforts in a comprehensive juvenile justice policy.

School Mediation

School mediation creates new norms of social interaction in the culture of the school. Physical fighting and violence become unacceptable methods of resolving disputes. At the elementary level, selected students can be trained in a simple mediation process and take turns patrolling the playground to offer their conflict resolution services to peers who are fighting. At the secondary level, student mediators can meet with disputants in a supervised private setting such as a counselor's office to help fellow students resolve differences. At both elementary and secondary levels, the conflict resolution curriculum can also be integrated into the ongoing classroom curriculum so that all students can increase their communication and problem-solving skills.

Hundreds of school mediation programs are now operating throughout the country. Evaluation studies, interviews, and anecdotes point to decreased violence in schools and enhanced conflict resolution skills among students trained as mediators. One Albuquerque elementary school principal commented: "We were having 100 to 150 fights every month on the playground before we started the program. By the end of the year, we were having maybe 10."

As testimony to the program's preventive potential, a school administrator in western New Mexico remarked: "A goal of our district has been the building of self-esteem. We feel that this program is an essential element of this process. There are very few preventive types of activities that society offers to 'at-risk' students. The mediation program is a preventive program."

In a survey of schools implementing mediation conducted by the New Mexico Department of Education, 66 principals evaluated the effectiveness of the program according to a range of observable behavioral criteria. The following table documents the age of those principals who rated the program as effective or highly effective

Criteria	Percentage
Increasing self-confidence	93%
Increasing problem solving	90%
Increasing self-esteem	88%
Developing leadership skills	87%
Increasing communication skills	86%
Reducing student violence	82%
Resolving school-based disputes	81%
Promoting active listening	81%
Changing attitudes about conflict	79%
Increasing ability to handle peer pressure	66%

Parent-Child Mediation

Bridging the gap between the schools, family, and the juvenile justice system is the parent-child mediation program model. It uses mediation as a method for resolving family conflicts involving children who are runaways, truants, and "incorrigibles." These adolescents are usually referred to as status offenders in the juvenile justice system. Their behavior would not be criminal as adults, and in most jurisdictions in the country it falls under the purview of the juvenile court or probation system. But we should remember that parent-child mediation does not exclusively apply to status offenders; it can work for families of convicted juvenile offenders as well.

The underlying assumption in parent-child mediation is that the court process is ineffective and inappropriate for status offenders. When these juveniles appear before a judge, they are typically admonished to obey curfew, mind their parents, and go to school, despite the fact that courts can do little to enforce these orders. Judges may order out-of-home placement for the children, but this is often counterproductive and fails to address the core of the problem. In essence, these cases only distract the system from more serious offenders.

The mediation model, on the other hand, focuses on the functioning of the entire family, not just the misbehavior of the adolescent. Mediation encourages structured negotiations about specific, concrete issues of family life. It is based on the premise that compliance with agreements pertaining to daily living increases trust between parents and children and facilitates negotiation on more important issues that may arise in the future. Families bring a wide variety of issues to the table, including school attendance and performance, curfew violations, social life, household chores, independence, privacy, sexual activity, and family interaction patterns. Trained volunteer mediators help family members to identify the issues, express their emotions, and work toward a concrete agreement that each family member feels is fair and realistic.

The program model was developed in Massachusetts in the late 1970s by the Children's Hearings Project of Cambridge Family and Children's Services.

and it has been replicated widely on the East Coast, and later throughout the country. According to a report by the Institute of Judicial Administration, there are over 60 such programs across the country. Indeed, the U.S. Department of Health and Human Services has recently started similar programs in nine states to further test the effectiveness of the process. Interestingly, some parent-child programs have developed as independent family assistance programs, but most have been added to the services of existing mediation agencies.

The program model is most effective when linked to a larger network of community resources and agencies that provide a continuum of care for adolescents and their families. Referral sources to mediation can go beyond court and probation officers to include teachers, school counselors, school detectives, police, youth shelter staff, youth corrections facility staff, and social workers. The mediation program workers, in turn, can refer families to other community services when they need them, for example, counseling or substance abuse treatment.

Is the mediation process working for families? Follow-up studies to the New Mexico program and others around the country have shown that family members often adhere to the mediated agreements. After participating in the process, one mother commented, "The agreement that we came up with has given my daughter and me something we can work together on." Another mother who mediated an agreement with her daughter after her release from a juvenile corrections facility said, "Mediation is a good foundation to start with, and something to build on."

Many families have also reported improved family functioning. They can manage anger better and communicate more effectively. A teenage boy commented on his relationship with his mother after mediation: "We don't yell and shout at each other now. We're able to talk about things better."

In a research study of the Cambridge program, over one-half of the families said they had changed the way that they handle conflict. Seventy percent of the family members said that there was less arguing and fighting after the mediation. When evaluating a program in Washington, D.C., 62 percent of the parents and 68 percent of the adolescents felt that problems had been solved through mediation. Over 75 percent of the families believed that mediation had made some difference in the family members' ability to get along.

Victim-Juvenile Offender Mediation

The most widespread use of mediation with delinquents in the juvenile justice system involves victim-offender mediation. Juvenile offenders meet their victims face to face to negotiate some form of compensation to the victim. Programs that employ this methodology are based on the premise that crimes are committed not only against the state but also against individuals. As such, they reinforce many of the cognitive and problem-solving skills that are the trademark of most mediation efforts.

In our Anglo-American system of justice, offenders are not held directly accountable for their actions against their victims. Because of this, offenders often fail to understand the human impact of their actions, especially the emotional repercussions of victimization. In fact, offenders themselves can feel victimized by the system and emerge from it rationalizing their delinquent behavior. In those few instances where restitution is even ordered, payment usually is a mechanical process devoid of any rehabilitative potential.

Victim-offender mediation draws on a restorative justice model by allowing the parties to discuss the offense, resolve feelings and issues about it, and negotiate an agreement acceptable to both parties. But most importantly, it allows victims to participate in a meaningful way in the criminal justice system. They can ask questions about the crimes, express emotions such as anxiety and anger, and negotiate some form of restitution with offenders. And this model even benefits the offender; they are held accountable for their actions in a more constructive and humane manner.

Victim-offender mediation has grown rapidly during the past decade. In 1978 only a handful of programs existed, mainly in the Midwest, with many initiated by the PACT Institute of Justice in Indiana. Now nearly 100 programs are functioning throughout the United States.

The mediation process, which is conducted by trained community volunteers, consists of three parts:

- discussion of the facts of the offense;
- discussion of the feelings of the victim and the offender about it and its impact on their lives; and
- negotiation of a restitution agreement that is acceptable to all parties.

For Further Reading

Sally Merry, *The Children's Hearings Project Research Findings*, The Children's Hearings Project, Cambridge, MA, 1985

Margaret Shaw and W. Patrick Phear, *Parent-Child Mediation Manual*, The Institute of Judicial Administration, Inc., New York, 1989

Robert Coates and John Gehm, *Victim Meets Offender: An Evaluation of Victim-Offender Reconciliation Programs*, PACT Institute of Justice, Michigan City, IN, 1985

Ray Shonholtz, "Juvenile Justice Is a Primary Community Responsibility," *Youth Policy*, Vol. 10, No. 11, 1988

Mark Umbreit, "Mediation of Victim-offender Conflict," *Journal of Dispute Resolution*, 1988

Melinda Smith, ed., *Youth Corrections Mediation Program: Book I, Managing Conflict: A Curriculum for Adolescents; Book II, Implementing Mediation in Youth Corrections Settings; Book III, Implementing Parent-Child Mediation in Youth Corrections Settings*, New Mexico Center for Dispute Resolution, 1989

Robert R. Ross, Elizabeth A. Fabiano, and Crystal D. Ewles, "Reasoning and Rehabilitation," *International Journal of Offender Therapy and Comparative Criminology*, 1985

Gerald J. Stahler, Joseph P. DuCette, and Edna Povich, "Using Mediation to Prevent Child Maltreatment: An Exploratory Study," *Family Relations*, July 1990

The victim and the offender can negotiate some type of service to the victim or to the community in addition to or in place of monetary restitution. Service to the victim can be directly related to the nature of the offense. For example, if the offender damaged the victim's property, the parties might negotiate repair of the property by the offender. If community service is negotiated, it can take the form of service to the victim's favorite charity or more traditional forms of service already established in the juvenile justice system.

The types of cases and the referral mechanisms vary across jurisdictions. The process has worked successfully with offenses such as commercial and residential burglary, larceny, DWI with personal injury or damage to property, criminal damage to property, assault, and battery. Cases can be referred after an admission of guilt and either prior to or after adjudication.

The interaction between the victim and offender can have a powerful emotional impact on both parties and can play a healing role in their lives. For example, a mediator recounted this positive experience resulting from a traumatic car accident:

> One of the most satisfying mediations I worked on revolved around a DWI accident.... Both the victim and offender were young women, about 17 and 20. The victim suffered injuries in the collision to her face that left scars, and she had been through two surgeries to mitigate the effects of the scarring.... The victim, understandably, still seethed with anger that she had no outlet for; the offender carried a lot of guilt, which contributed to her poor opinion of herself, and therefore to her substance abuse problems.... This mediation was about healing, not money or other restitution. The young women were able to come away feeling that they had resolved the emotional issues of the accident.

In the Albuquerque program, cases are referred by judges as part of the probation order or from the district attorney's office as part of a plea agreement. The process is voluntary for the offender as well as for the victim. If the offender does not choose to participate, he or she can pay restitution through already established procedures.

Surprisingly few defaults on restitution payments have occurred when the mediation process has been used. Interviews conducted with victims and offenders about their reactions to the mediation process have shown very high satisfaction levels in gaining settlement, closure, and a sense of fairness. Some evidence from programs in other jurisdictions in the country suggests that there is also rehabilitative potential for offenders. Research conducted on a program in Washington, D.C., demonstrated lower recidivism rates among offenders participating in the program.

Youth Corrections Mediation Programs

Bringing mediation and conflict resolution to youth incarcerated in correctional facilities is still in its infancy. Yet this segment of the juvenile population probably is most in need of the skills fostered by mediation. The New Mexico Center for Dispute Resolution has developed a three-component program that has been implemented at two facilities in New Mexico and one in Colorado. In California, the Community Boards Program has worked with several facilities of the California Youth Authority to initiate mediation. A youth facility in Iowa has implemented a conflict resolution curriculum in conjunction with a law-related education curriculum with the help of the National Institute for Citizen Education in the Law.

The New Mexico model was developed to change the institutional approach to handling internal conflict from a punitive one to one that used problem-solving methods. The program's goals are:

- to teach communication, conflict resolution, and problem-solving skills to staff and residents;
- to improve the quality of life in the facilities; and
- to ease the transition of youth from the corrections facility to the home environment.

The program consists of three components:

1. a conflict resolution curriculum that can be taught in academic or residential settings;
2. a mediation component that trains staff and residents to mediate conflicts at the facility before they escalate into incidents for which residents are sanctioned; and
3. a reintegration component that helps residents and their parents negotiate rules and expectations for daily living upon the residents' return home.

The mediation process is not intended to replace existing disciplinary policies and procedures but to supplement them. Residents who break the rules are given the opportunity to use mediation as an addition or alternative to existing disciplinary measures. For conflicts between residents, a team of two residents mediate the problem. For disputes between staff and residents, some facilities use a mediation team of an adult and a youth to resolve the dispute.

Like the school mediation model on which it is based, the program attempts to establish new norms for social conduct in the environment of the facility. By giving residents a model for positive expression and resolution of problems, juveniles can learn alternatives to violent and self-defeating behavior.

That serious juvenile offenders come from abusive or violent environments has been well documented. At one of the facilities in New Mexico, the Youth Diagnostic and Development Center (YDDC), officials estimate that more than 90 percent of the female population and more than 50 percent of the male population have experienced some form of child abuse. The anger management and problem-solving skills introduced through the program hopefully will be able to break the cycle of violence and abuse.

After four years of program implementation at YDDC, the benefits have been considerable. Julie, 16 years old and a trained resident mediator, says, "Learning mediation has helped me deal with anger in a positive way. I used the skills I learned when I had an argument with another resident about using my curling iron without my permission. I approached her with the "I" message. We problem-solved."

For 15-year-old Samika, being a mediator has meant higher self-esteem as well as learning different behavior choices. "Mediation has helped me realize that there are other methods of solving your problems than violence."

Another benefit of the program has been the positive change in the climate of the facility. Marty Mirabal, deputy superintendent at YDDC, has seen a reduced number of disciplinary problems, a decrease in staff time dealing directly with resident conflicts, and improved relations between staff and residents.

Preliminary findings of a research study of the New Mexico program show improvements in the behavior of youths trained as mediators. There was a 37 percent decrease in disciplinary infractions among mediators compared to a 12 percent reduction for youth who were not trained as mediators.

New Directions

A number of other applications of mediation and conflict resolution for juveniles prior to or during involvement in the juvenile justice system need to be investigated further.

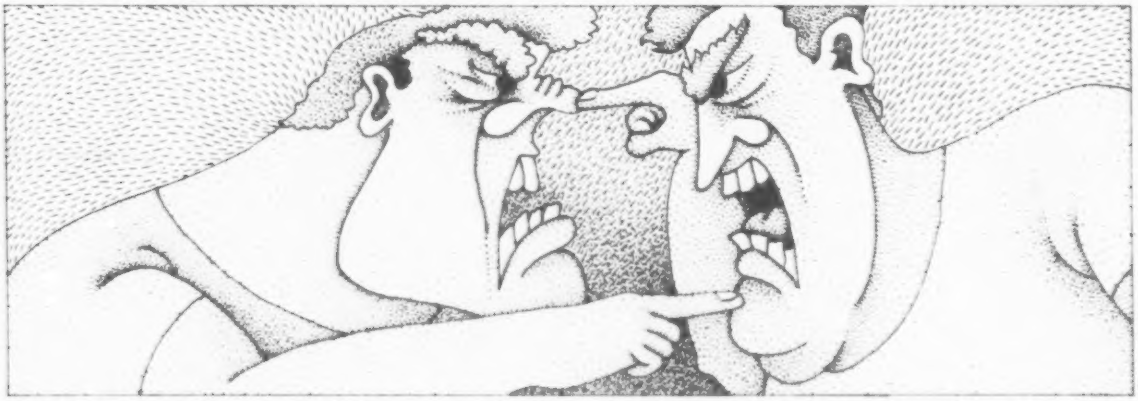
One exciting development in several communities is the mediation of gang-related disputes. In Albuquerque, conflict between three rival gangs at a middle school escalated to the point where the student body and staff feared for their safety. Guns and knives were confiscated daily, and older gang members from the

(continued on page 45)

Juvenile Justice

Controlling Conflict/Juvenile Justice Settings

Constitutional Rights Foundation



Dean Matthews

Overview

Designed to be used with students in juvenile justice settings, this lesson is about personal conflict resolution and provides an introduction to basic conflict resolution techniques. Students will learn how to identify their own "flashpoints," review techniques of "active listening," and practice selecting alternative solutions when conflicts develop. Students will work in small groups and role play different types of conflict situations to analyze alternatives.

Objectives

As a result of this lesson, students will learn to:

1. Identify issues that can lead to interpersonal confrontation;
2. Use basic techniques for active listening; and
3. Analyze and select alternative solutions to conflict.

Materials/Resources

- Sufficient copies of Handouts 1 through 4
- A chalkboard or flipchart to record student answers

Procedures

ACTIVITY 1: VOCABULARY

1. Reproduce a copy of Handout 1 for each member of the class.
2. Read each of the two words below and ask a student to read its definition. Make sure the class understands the meaning of the word and ask them to keep the words in mind as the lesson progresses.

The words are:

Flashpoint—any word, phrase or action that causes a confrontation with someone else.

Alternative—different options people have for solving problems or conflicts.

ACTIVITY 2: INTRODUCING THE LESSON

1. Review the objectives of the lesson with the class.
2. Review the following questions with the students. Write their answers on a chalkboard or flip chart.

- What are the most common conflicts you experience?
- Why do most of your conflicts happen?
- Where do most of your conflicts happen?
- With whom do you usually have conflicts?
- What are your flashpoints? What words or actions make you angry?

ACTIVITY 3: GENERATING ALTERNATIVES BRAINSTORMING ACTIVITY

1. Explain that an important step in controlling conflict is to work together to find possible solutions. A good technique for doing this is called brainstorming. With it, all participants come up with as many ideas as they can to resolve the problem.
2. Distribute "John and Abel" (Handout 2). Then ask: How would you describe the conflict between John and Abel?

When the conflict has been identified, explain that the class is going to brainstorm as many alternatives as possible for resolving the conflict. Tell students not to worry whether the ideas are good or bad at this point: the objective is to come up with as many as possible.

As suggestions are made, write them on the board. Encourage as many suggestions as possible. Examples might include: changing locker locations, John agreeing not to borrow things from Abel, agreeing to be more careful of one another's flashpoints, agreeing to let a third person help talk things over before they fight.

ACTIVITY 4: CHOOSING THE BEST SOLUTION

Explain that the second step in finding a solution is to pick the best idea. To do so, the idea must solve the problem and be acceptable to both sides. For each of the proposed solutions, ask: Will this idea end or lessen the conflict? How would John feel about the solution? How would Abel feel about the solution?

Based on these questions, ask the class to pick the best solution. If none are acceptable, ask the class to suggest additional solutions until the criteria are met.

ACTIVITY 5: GROUP ACTIVITY APPLYING THE PROCESS

Divide the class into groups of 3 to 5 students each. Distribute "Turn Off That Radio!" (Handout 3). Explain that each group should read the case, brainstorm possible solutions and pick the best one by answering the questions that follow the reading. To accomplish the task, appoint a group leader for each group. Explain that each group should work together to answer question #2. In addition, each group member is responsible for answering at least one additional question. Give the groups a reasonable amount of time to accomplish the task and monitor their progress. Then ask each group to propose its best solution.

Debriefing

Debrief the lesson by distributing and reviewing Handout 4, "Basic Steps in Conflict Management."

Handout 1

OVERVIEW

This is a lesson about personal conflict resolution. Conflict is a normal part of life. Big and small conflicts happen in our families, our schools, at work, and in our communities. Most of us see only two choices when conflict occurs: run or fight, what can be called "win-lose" alternatives. It is possible, however, to find other solutions to conflict, many of which are "win-win" alternatives, which allow both sides of a conflict to feel positive about its outcome. This lesson will help you better understand how to control conflict, rather than letting conflict control you.

FOR DISCUSSION

1. What are the most common conflicts you experience?
2. Why do most conflicts in your institution happen?
3. Where do most of your conflicts happen?
4. With whom do you usually have conflicts?
5. What are your flashpoints? What words or actions make you angry?

The following words are important for a better understanding of conflict resolution. Read them carefully and be prepared to discuss them.

Flashpoint—any word, phrase, or action that causes a confrontation with someone else.

Alternatives—different options people have for solving problems or conflicts.

Handout 2: John and Abel

John and Abel go to the same school and have lockers right next to each other. John often borrows from Abel—a book for class, a brush to comb his hair, a tape of a popular rap group, a pen or pencil. Very often, John forgets to return what he borrows unless Abel reminds him to do so. One day, after John borrows some gum, Abel tells him, "Don't be such a bum, man. Start bringing your own stuff to school."

John promises to do so, but a couple of days later he asks to borrow some notebook paper. Abel slams the door to his locker and shoves John, shouting, "I've had it with you, man! Quit bugging me! Don't ever ask me for anything again!" John lunges back at Abel, calls him an obscenity and punches him in the face. Before they can do anything else, a teacher steps in and breaks them up. Both boys are taken to the school office.

* * *

What are some possible solutions to the conflict?

Handout 3: Turn Off That Radio!

Mr. Tranh lives in a second floor apartment. He has lived there for sixteen years. He works at night at the post office and sleeps late in the morning. Three months ago, a young couple, the Roses, moved in next door to Mr. Tranh. Exon Rose is a guitar player for a heavy metal band. He loves to practice his guitar at home and play his radio late at night.

Mr. Tranh has complained to Mr. Rose several times about playing his guitar and keeping the radio on too loud. "I can't sleep with all that noise," Mr. Tranh told Exon. Rose promised to turn down the volume on his amplifier and his radio and apologized for the problem.

Late one night as Exon was playing his guitar along with some music from the radio, he heard a loud pounding on his door. When he answered, he found Mr. Tranh standing in his doorway holding a baseball bat. "If you don't shut off that music, I'm going to smash your equipment!" hollered Mr. Tranh. "Get out of my face, old man!" responded Exon. Before they could do anything more, the apartment manager and a neighbor came running up and separated the two men.

* * *

- What is the conflict between Mr. Tranh and Exon?
- What are some possible solutions to the conflict?
- Which of these solutions will end or lessen the conflict?
- Which of these solutions would be acceptable to Mr. Tranh?
- Which of these solutions would be acceptable to Exon?

Handout 4: Basic Steps in Conflict Management

1. Each person tries not to respond to his/her flashpoints.
2. People in conflict use active listening skills. Each person tells the other person what happened.
3. The people focus on the issue that is causing the problem—not on the people involved. What is the underlying problem? Identify the facts and issues. Parties listen to each other very carefully.
4. Each person thinks of possible solutions to the problem. Both people should think of as many solutions as possible. Do not try to decide whether or not they are good solutions immediately. Try to understand all the options.
5. Identify solutions which both people can accept. What is acceptable to both people? Remember to concentrate on the reality of the situation. Do not agree to something that is totally unrealistic.
6. Before leaving the other person be sure to repeat the main points of the agreement just to be sure that you both understand. Sometimes it is even a good idea to write down the agreement.
7. Remember to go back to the person and discuss the problem again if the agreement does not seem to be working.

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JUVENILE JUSTICE

Joan Mahoney

"We the Children"?

How the concept of "rights" has evolved and what it means for children and society

If one were to ask passersby on the street to identify a provision of the United States Constitution, nine out of ten people would probably refer to the Bill of Rights. Most Americans know the First and Fourth Amendments, and many are familiar with the right not to incriminate oneself, contained in the Fifth. Far fewer would mention the commerce clause, or the privileges and immunities clause, or the requirement that Congress establish a Supreme Court.

Nonetheless, the Bill of Rights was something of an afterthought. It was added four years after the Constitution was ratified, and many of the Framers of the Constitution were either indifferent or opposed to such an enumeration of rights. James Madison, for example, thought it unnecessary because the federal government had limited powers. He was also concerned that listing the rights that were protected would imply that those that were not included were unimportant, and he was not confident that the Framers could include *all* the individual rights worthy of consideration.

Despite Madison's concerns, some states had insisted during their constitutional ratification processes that some protection for individuals from possible oppression by the government would be added. So the Bill of Rights was drafted, ratified, and incorporated into the Constitution. The effect, however, was less significant than might have been expected.

First, almost from the beginning, the Bill of Rights was thought to apply only to the federal government, not to the states themselves. Obviously, this did not leave American citizens at the mercy of oppressive state governments because most states had their own declarations of rights, as well as state courts to enforce them. Some provided greater protection of individual liberties than did the federal Constitution, some less, and state citizens were free to amend their constitutions if they felt the need for greater freedom. Indeed, state constitutions have generally been amended or rewritten much more frequently than the federal Constitution.

Second, the Bill of Rights did not apply to blacks or women. The Supreme Court's 1857 *Dred Scott* decision clearly confirmed that blacks were not considered citizens and were therefore not entitled to the protections afforded by the body of the Constitution—which implicitly recognized slavery even though the word itself was avoided—or by the Bill of Rights. Nor did women have the right to vote. In fact, when the franchise was extended to blacks after the Civil War, women were again left out. Not until 1920, when the Nineteenth Amendment was added, were women entitled to vote. At the time that the Bill of Rights was ratified, married women could not own property or even enter into contracts. Nor could they sue or be sued in their own names.

Thus, when we ask whether the Bill of Rights applies to children, we must remember just how limited its coverage was in 1791 and for a long time thereafter. We must also remember that in the eighteenth century children were basically viewed as their parents' property, just as women were the property of their husbands. Obviously, it would have been inconceivable to even ask the question as to children's rights under the Constitution, much less to answer in the affirmative.

The Growth of Constitutional Rights

The concept of individual rights that are protected by the Constitution gained acceptance incrementally, not in leaps and bounds. In 1865, the Thirteenth Amendment, which prohibited slavery, was added to the Constitution after the end of the Civil War. Shortly thereafter, the Fourteenth Amendment, essentially establishing that all persons were citizens and providing for equal protection and due process of law, and the Fifteenth Amendment, giving blacks the vote, were ratified. Yet, because these amendments were narrowly construed by the Supreme Court and Congress showed little interest in protecting the newly freed slaves after Reconstruction was abandoned in 1876, they failed to have a great impact. Indeed, by approving the principle of "separate but equal" in *Plessy v. Ferguson*, the Supreme Court effectively negated the equal protection clause embodied in the Fourteenth Amendment.

Not until the twentieth century did the Supreme Court begin to interpret the Constitution more expansively, mainly by accepting the doctrine of "incorporation." This principle, which the Court gradually adopted between 1940 and 1970, was based on the understanding that the authors of the Fourteenth Amendment intended that it should apply some of the protections of the Bill of Rights to actions of state governments. As early as 1925, the Court intimated that a state law could be scrutinized under the First Amendment, although, in that instance, the state law was upheld. By 1970, it was beyond dispute that states were bound by the restrictions of the Fourth, Fifth, and Sixth Amendments.

Applying the Fourteenth Amendment to blacks in terms that were presumably intended by its authors essentially began in 1954 with *Brown v. Board of Education of Topeka* and the repudiation of the "separate but equal" doctrine. Following the rejection of segregated schools in *Brown*, the Court proceeded to strike down all state laws that provided for segregated public facilities.

Almost twenty years after *Brown*, the Court began to extend those rights enunciated in the Fourteenth Amendment to women, and during the 1970s and 1980s, many state laws and practices that discriminated against women were rejected, along with a number that were apparently intended to benefit women but that actually maintained stereotypical sex roles, such as alimony laws that awarded alimony to women but not men.

Thus, the extension of rights to those formerly unprotected is a recent phenomenon, and the broad definition of substantive rights that many of us take for granted is also fairly new. The expansion of rights in criminal procedures, as well as protections for the accused, occurred substantially after the decision that these rights applied to the states through the Fourteenth Amendment. Even the use of the First Amendment to preclude most government regulation of speech is based on decisions made by the Supreme Court in the second half of this century.

Applying Constitutional Rights to Juveniles

It should be clear, then, that when we inquire into the constitutional rights of children, we need not go back very far in our history to reach that concept's origins. As a rule, only after a substantive right has been developed to provide protection for adults will it even be considered to apply to juveniles. For example, only after the majority of the revolution in the rights of the accused had already taken place in the 1960s did the rights of juvenile defendants become an issue.

Juvenile courts had been developed in the early twentieth century to protect young people from the brutality of the adult criminal justice system, but by the mid-sixties, it became clear that the advances in the rights of adults had left young people behind. For example, when Gerald Gault was fifteen years old, he was taken into custody by juvenile authorities for allegedly making lewd telephone calls. He was then given a hearing before a juvenile court judge without the benefit of an attorney, and it was not clear whether his parents were actually notified before the hearing took place. The complaining witness was not present, and no record or transcript was made of the hearing.

Gault's parents' challenge to his sentence, committing him to a juvenile training school until he reached majority, was based on the argument that even if a juvenile hearing ought not exactly duplicate the trial of an adult, it should be considerably closer than the hearing that Gault was given. There ought to be written notice of the charges to the child and his parents, as well as notice of the child's right to be represented by an attorney. Children should also be entitled to exercise the privilege against self-incrimination, and the hearing should incorporate the basic requirements of due process.

The Supreme Court agreed with these arguments in their 1967 decision, thus leading to a basic restructuring of the juvenile justice system in America. The decision was strengthened three years later when the Court held in *In re Winship* that the same standard of proof—proof beyond a reasonable doubt—applies whether an adult is tried for what is defined as a crime or a juvenile is tried for an act, even if not labeled criminal, that may result in the child's confinement for a period of years.

The First Amendment, Free Speech, and Juveniles

Well before this concern with the rights of juveniles occurred, the Supreme Court had already upheld the right to free speech in the 1943 *Barnette* decision, involving school children who were Jehovah's Witnesses and who refused to participate in the flag salute. Three years earlier, the Court had sustained the validity of an identical rule, requiring that all teachers and pupils participate in the flag salute or face expulsion from school. While the plaintiffs in this case were motivated by religious conviction, the Court held that the Constitution prohibits any requirement that a person be compelled "to utter what is not in his mind," regardless of the reason for the refusal.

In the mid-sixties, local American Civil Liberties Union offices were continually responding to requests for assistance by young people who were being disciplined by their schools for a variety of offenses that might have involved First-Amendment-protected activity. Many of the cases involved hair length for boys—usually because it was too long—or skirt length for girls—usually because it was too short. Other cases involved student clubs or civil rights or anti-Vietnam War demonstrations.

In Des Moines, Iowa, a brother and sister who wore black armbands to school to symbolize their opposition to the Vietnam War were suspended. Two days earlier, in anticipation of the protest, school officials had adopted a rule forbidding the wearing of armbands for political protest. The Supreme Court upheld the right of the Tinker children and others to engage in symbolic speech, stating that, "It can hardly be argued that either students or teachers shed their constitutional rights to free expression at the schoolhouse gate." While public schools are not traditional forums for political speech, and therefore restrictions may be imposed to prevent "material and substantial interference with school work or discipline," a simple protest such as wearing armbands could not be prohibited.

In addition to protecting the First Amendment right of young people to express their political opinions, the Court has also restricted, at least to a degree, the power of school boards to deny young people access to books already in the school library. In the 1982 case of *Board of Education v. Pico*, the Supreme Court overruled the decision of a Long Island school board to remove books from its school libraries. All of the books were on a list circulated by a politically conservative parents' group. Although books cannot be *removed* based on their content, the Court conceded that the school board is free to add books to the library as it chooses.

More recently, the Court has taken a less expansive view of the rights of young people to free expression. In 1983, Matthew Fraser was suspended from school for three days and denied the opportunity to be a graduation speaker at the school's commencement exercises because he gave a speech at an assembly on behalf of a candidate for student government that contained "elaborate, graphic, and explicit sexual metaphor." In a 7-2 vote, the action of the school was upheld by the Court on the ground that the school has the right to punish speech that undermines the school's educational mission. The Court was careful to distinguish Fraser's actions from the political speech that was held to be protected in *Tinker*.

A less frivolous case reached the Court in 1988 concerning the censorship of the student newspaper by school officials. The newspaper produced by the journalism class at Hazelwood East High School had two articles in one issue that authorities disapproved of: one described the experiences of students who became pregnant, and the other described the impact of divorce on high school students. The principal deleted the two stories, and the student editors brought a lawsuit against the school.

The Supreme Court upheld the action of the principal, primarily on the ground that the production of the newspaper was part of the curriculum at the school and would therefore appear to carry the imprimatur of the administration. The Court again differentiated this case, where speech was carried out within the context of a class in a school-sponsored publication, from *Tinker*, where the students were clearly expressing their own personal views.

None of these cases resolve the hair and dress code issues that arose so frequently in the sixties and seem to be returning with equal vigor today. Whereas in the sixties young men wore their hair long, today they are likely to be suspended for wearing it too short. And while short skirts created problems in the sixties, today's teachers are concerned with Bart Simpson T-shirts. Clearly, if a student's hair style or clothing is so outrageous that it interferes with the educational process, it can be prohibited. Yet the degree of restrictiveness that can be applied by schools in their dress and hair codes without violating the First Amendment has not been definitively answered.

Outside of school, young people presumably have the same right to engage in speech that adults do. They are free to attend demonstrations or publish pamphlets championing whatever they choose. They may watch television and read the newspaper, thus giving them access to the same information available to adults. They do not, however, have the same right to have access to other forms of speech as adults. For example, in *FCC v. Pacifica Foundation*, the Supreme Court held that the Federal Communication Commission could discipline a radio station for broadcasting offensive speech at a time when children were likely to be listening. In other words, even though George Carlin's monologue entitled "The Seven Words You Can Never Say on Television" was not technically obscene and was acceptable for adults to be exposed to it over ther airwaves, it was not acceptable for children.

Similarly, some states do not allow young people access to the same books or magazines that adults are allowed to read, a restriction recently upheld by the Supreme Court when it refused to hear an appeal of a lower court decision prohibiting exposure of sexually explicit material in bookstores where children might be present. Correspondingly, even though the movie industry is not controlled by the government, it has imposed a code that prohibits juveniles from seeing certain movies altogether and seeing others only if accompanied by their parents. It is not quite the same thing as state censorship of "indecent" material, and therefore the First Amendment does not apply, but nonetheless, the freedom of young people to see the movies of their choice is clearly restricted.

Religious Rights under the First Amendment

Just as many of the free speech cases defining the rights of young people involve schools, so do many of the cases under the religion clauses of the First Amendment, that is, the free exercise clause and the establishment clause. Probably the most important establishment clause cases of recent times are the school prayer cases from the 1960s. In the *Schempp* cases, the Supreme Court held that starting the school day by reading from the Bible and reciting the Lord's Prayer violated the Constitution. Other cases restricted certain religious observances in schools, as well as limiting government aid to parochial schools.

More recently, the Court rejected a Louisiana law that forbade the teaching of evolution in public schools unless it was also accompanied by instruction in "creation science." In addition, an Alabama statute that required a moment of silence for meditation in all public schools was struck down on the ground that the law had clearly been enacted to encourage prayer in the schools rather than some permissible secular purpose.

On the other hand, in *Lynch v. Donnelly*, the Court upheld a public display of a creche—as part of a large Christmas display that also included Santa Claus, reindeer, and other animals—leading some legal observers to conclude that in the future the Court may be less strict in its application of the establishment clause. This speculation may be answered next year because the Court has agreed to hear a case involving the question of prayer at graduation exercises.

Whereas the establishment clause prohibits the government from assisting religion, the free exercise clause requires the government to make accommodations for individual religious practices or, at the very least, to refrain from interfering with religious expression. In *Wisconsin v. Yoder*, a group of Amish parents sought to exempt their children from the state compulsory school attendance law on the ground that their religious beliefs precluded sending children to school after the eighth grade. The Court upheld their argument, although Justice Douglas did suggest in his dissent that perhaps the Court should have asked the children whether they wished to continue to attend school.

Another issue that has created controversy recently has been the question of religious clubs in schools. In 1981 the Supreme Court determined that colleges and universities could not ban religious student organizations if they allowed other student groups to use their facilities, but the issue of these groups in high schools remained open until 1990, when the Court upheld the federal Equal Access Act. This statute provided that secondary schools that received federal funds and that provided for other student groups to meet could not prohibit groups based on the religious, political, or philosophical content of the speech at the meetings.

Searches and the Right to Due Process

Whereas the First Amendment protects the right to speak freely, to receive information, and to practice one's religion without interference by the government, the Fourth Amendment protects an individual's home and person from physical intrusion by the state. Specifically, the Fourth Amendment prohibits searches without warrants, except in extraordinary circumstances, and restricts the issuance of warrants to cases where probable cause for the search exists.

Distinguishing between juveniles and adults in terms of Fourth Amendment protection seems unnecessary since the concerns that give rise to distinctions regarding speech are not present. Nonetheless, the school setting again provides an exception to general constitutional principles.

In *New Jersey v. T.L.O.*, a student was discovered smoking in the lavatory in violation of school rules and was taken to the principal's office. When that student denied that activity, the assistant vice-principal demanded to see her purse. When he looked inside, he found cigarettes and cigarette rolling papers. He investigated further and found some marijuana, as well as materials implicating the student in drug dealing. When the state brought delinquency charges against her, she attempted to suppress the evidence on the grounds that the assistant vice-principal had no warrant for the search and the search did not fall within the exceptions to the warrant requirement.

The Supreme Court held that the Fourth Amendment applies to searches carried out by school personnel and, further, that schoolchildren have legitimate expectations of privacy. Nonetheless, because of the need of school authorities to maintain an environment in which learning can take place, school officials are not subject to the same restrictions in carrying out searches as other public officials. Rather, the legality depends on the reasonableness of the search, based on the totality of the circumstances in which it took place.

Not all violations of school rules, however, subject students to criminal penalties; in that sense, *T.L.O.* is an exception. Most violations result in penalties applied by the school itself, sometimes involving corporal punishment or suspension from school. This raises the question of the extent of power schools may exercise over young people consistent with the Constitution. If attending school is a constitutionally protected right, then presumably a student cannot be suspended without something like a trial to determine whether the suspension is reasonable.

In fact, attending school is only a partially protected right. On the one hand, if a state or city chooses to provide schools for its children, it cannot segregate those schools or operate them in a manner that violates the equal protection clause. That principle has been clear since *Brown v. Board of Education*. On the other hand, there is no requirement that schools be provided, and they may be funded in ways that fail to provide comparable educational experiences for students from different districts.

Once education is provided, however, it cannot be taken away without due process or procedures that ensure some degree of fairness. In *Goss v. Lopez*, a group of students in Ohio were suspended from school for up to ten days for misconduct. No hearing was held. The students sued the school district, arguing that they were entitled to a hearing before a suspension. The Supreme Court agreed, holding that the students were entitled to know the charges against them and to have an opportunity to answer those charges before they were deprived of the benefits of an education for ten days or more. While the hearing need not be as formal as a trial, it should involve more than a simple face-to-face conference about the charges, although that would be sufficient for a short-term suspension.

In cases in which a schoolteacher determines that corporal punishment is necessary, the young person involved is not entitled to a hearing. In *Ingraham v. Wright*, a group of pupils argued both that they were entitled to due process before corporal punishment was imposed and that such punishment violated the Eighth Amendment prohibition of cruel and unusual punishment. In that particular case, the teacher was required to consult with the principal before imposing corporal punishment, and the Court found that process sufficient to protect the students' due process rights. If the amount of punishment were excessive and the young person were injured, he or she would be able to bring an action under state law against the offending teacher, just as one could if assaulted by a stranger.

As to the cruel and unusual punishment claim, the Court held that the Eighth Amendment only applies to the criminal justice system. First, the Eighth Amendment was only intended to protect those who have been convicted of crimes. Further, it is necessary to protect prisoners because jails are relatively closed systems where there may be no protection from abuse except through the federal courts. Schools, on the other hand, are relatively open places where parents observe much of what goes on and can complain to the principal or the school board if punishment is excessive.

Closing Thoughts, and the Parental Aspects of the State

In some ways, then, the constitutional revolution of the twentieth century that has expanded both the scope and the coverage of individual rights has passed children by, and in others it has extended to them at least a semblance of the rights available to adults.

In the area of criminal procedures, juveniles who are tried as adults, usually because of the seriousness of the crime, are entitled to the same protections as those available to adult offenders. And even when children are tried in juvenile courts, the procedure today more closely resembles that of a regular trial than it did twenty or thirty years ago. Almost always will an attorney be present representing the defendant, as well as a representative of the state, and in cases in which there is a conflict between the interests of the juvenile and those of his or her parents, each party will have its own attorney.

When children are out in the world, walking down the street, for instance, or visiting the mall, their constitutional rights are essentially no different from those of adults. They are free to attend demonstrations, speak their minds, go to meetings, and be free of warrantless searches or unreasonable arrests. They may be subject to curfews that do not affect adults, although that issue has not been definitively settled. Nor do they have the same liberty to enter bookstores where sexually explicit material is sold or attend movies that adults would be allowed to see. They may not buy cigarettes until they reach a certain age or purchase liquor until they are twenty-one. But otherwise no clear distinction between children and adult rights seems to exist.

Once at school, however, children are not constitutionally equal to adults. They may not be expelled from school without a hearing, but they may be subjected to physical punishment. They may have their belongings searched based on reasonable suspicion, and they may be punished for speech and behavior that would be accepted in the outside world. They are entitled to be free of the state imposition of religion and entitled to express their own religious beliefs. If, however, a school should choose not to allow any extra-curricular student organizations, it would be permitted to ban student religious organizations as well.

Many of the rights that are sometimes thought of as children's rights are really the rights of parents rather than children. For example, it was the parents who wished to end their children's education in the *Yoder* case and, as Justice Douglas pointed out, no one asked the children if they wanted to go to school. Many of the exceptions to the First Amendment that are intended to protect children, such as prohibiting their entry into adult bookstores, are based primarily on enforcing parental interests, especially because no parent would be prohibited from purchasing explicit materials for their children if they so chose.

Even some of the early privacy cases that ultimately led the Court to strike down restrictions on contraception and abortion were based on the right of parents to make decisions for their children. In *Meyer v. Nebraska*, the state had prohibited teaching certain subjects in German, and in *Pierce v. Society of Sisters*, the state attempted to require that all children attend public school. Both statutes were rejected by the Supreme Court on the grounds that they interfered with the rights of parents to decide where their children went to school and what they would study.

The restrictions allowed on what otherwise would be First Amendment-protected speech in schools have to do not only with the need to maintain order and provide a positive educational environment, but also that the schools are acting *in loco parentis*—they take the place of parents as the enforcers of discipline during the time children are in their care.

Finally, although the Supreme Court has not yet overruled the decision in *Roe v. Wade* and therefore abortion is still legal for adults, it has allowed restrictions on access to abortion for minors. The Court struck down a Missouri statute, passed fairly soon after *Roe*, that would have required married women to obtain the consent of their husbands before they could undergo abortions. On the other hand, the Court recently upheld statutes from Ohio and Minnesota requiring young women to notify at least one parent before obtaining an abortion. The Court did, however, uphold the requirement that there be a judicial bypass procedure for women who felt they could not notify their parents, at least in cases where both parents must be notified. Nonetheless, girls must choose between telling their parents about their pregnancies and intent to have an abortion or must go to court and attempt to convince a judge either that they are old enough to make the decision or that the abortion would be in their best interests.

During the sixties, the Court seemed to be moving toward accepting young people, at least for some purposes, as having the same rights as adults. That no longer appears to be the case. Undoubtedly young people have certain constitutional rights, but when society must choose between the power of schools or of parents that conflicts with the rights of children, the school or the parents almost always win.

Some Significant Cases Involving the Rights of Juveniles

The Criminal Justice System Generally

- ***In re Gault*, 387 U.S. 1 (1967)**
- ***In re Winship*, 397 U.S. 358 (1970)**

First Amendment: Speech

- ***Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)**
- ***Board of Education v. Pico*, 457 U.S. 853 (1982)**
- ***Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)**
- ***Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988)**
- ***West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)**
- ***Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978)**

First Amendment: Religion: Establishment Clause

- ***School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)**

First Amendment: Religion: Free Exercise Clause

- ***Wisconsin v. Yoder*, 406 U.S. 205 (1972)**
- ***Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990)**

Fourth Amendment

- ***New Jersey v. T.L.O.*, 469 U.S. 325 (1985)**

Fourteenth Amendment: Procedural Due Process

- ***Goss v. Lopez*, 419 U.S. 565 (1975)**
- ***Ingraham v. Wright*, 430 U.S. 651 (1977)**

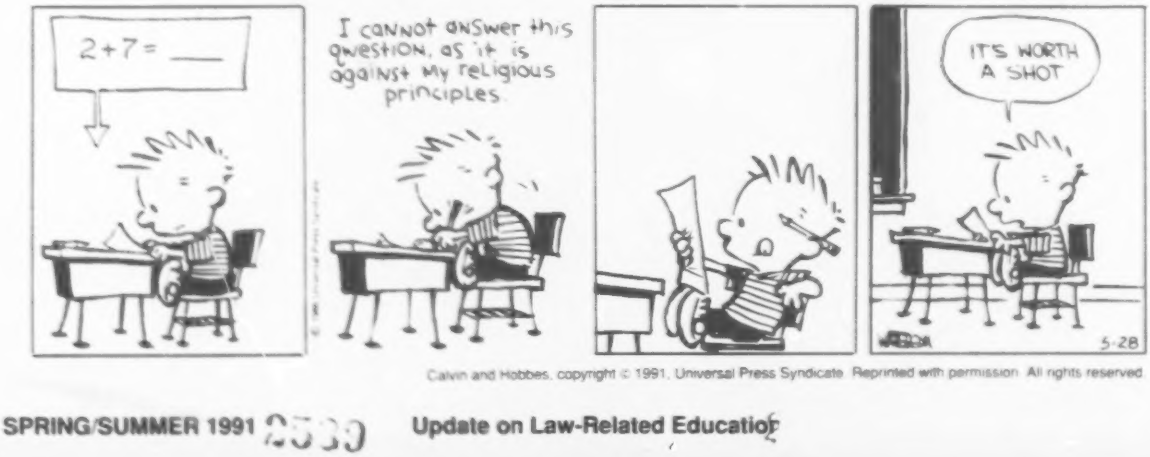
Fourteenth Amendment: Equal Protection

- ***Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)**

Joan Mahoney is a professor at the University of Missouri—Kansas City School of Law and is a member of the National Board of the American Civil Liberties Union.

Calvin and Hobbes

by Bill Watterson


2+7= ___
I cannot answer this question, as it is against my religious principles.
IT'S WORTH A SHOT
5-28

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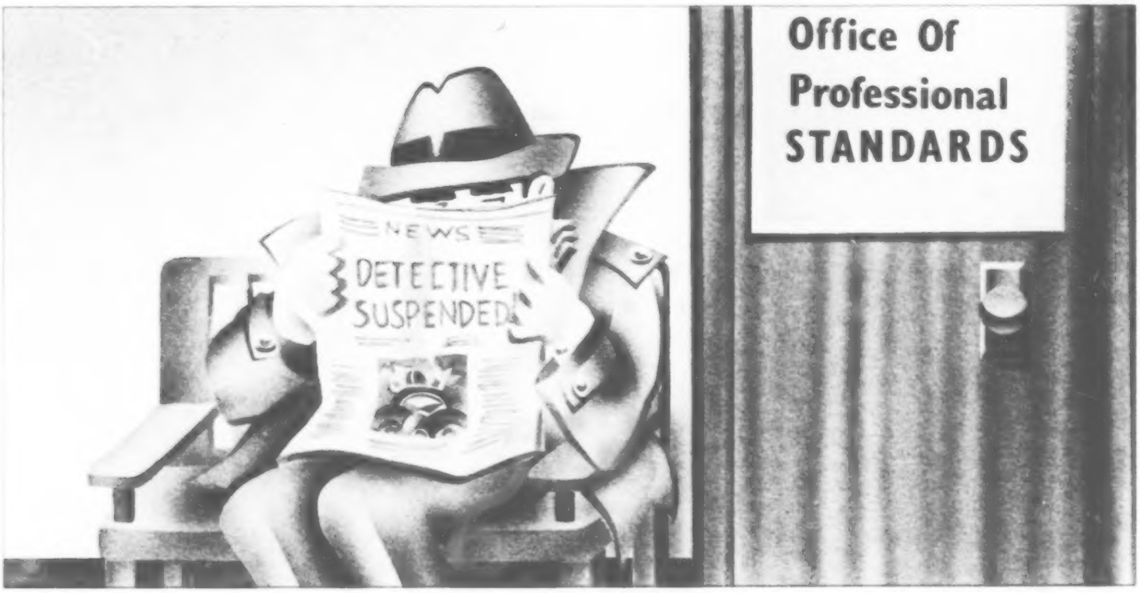
Juvenile Justice

Crimebusters or "Rightsbusters"?/Secondary

Rose Reissman



Tony Griff, with apologies to Chester Gould, Dick Locher and Tribune Media Services, Inc.

Background

Superman is always violating someone's civil rights. This disturbing realization suddenly occurred to me while watching an old Superman rerun. I recalled other episodes in which Superman broke into offices without a search warrant, went through the trash, used his X-ray vision to reconstruct and read messages and used unlawfully acquired information to bring the offender to "justice."

Is it possible that Superman, defender of "truth, justice and the American way," was really an arch violator of civil liberties? Was he a caped vigilante who violated Bill of Rights guarantees to subject individuals he considered criminals to his personal, private, prejudged system of justice?

Intrigued, I began a log which listed the title of Superman episodes and noted the various actions taken by him. It soon become obvious that Superman often showed a flagrant and continuing disregard for constitutional rights.

My list of unlawful citizen arrests, immediate jailings without formal charges, unwarranted searches and seizures, and other assorted abuses grew by leaps and bounds. In addition to Superman's deliberate and systematic pattern of behavior, I noted that his colleagues on the *Daily Planet*—as well as his friends on the Metropolis police force—appeared oblivious to his actions.

Likewise, a more critical viewing of the film "Dick Tracy" brought similar revelations. It was obvious that the Detective in the Yellow Trench Coat, despite high-tech gadgetry such as his two-way wrist TV, held some rather old-fashioned attitudes about law and order and constitutional protections. The film's depiction of the treatment received by a captured "felon" who is beaten and playfully tortured brought the issue clearly into focus. Superman, it seemed, was not alone in treating the Bill of Rights as if it was kryptonite.

Objective

The overall goal of this activity is to engage students in a critical thinking, fact gathering and problem solving analysis of civil liberties issues. Students will learn to synthesize data, identify and apply basic constitutional principles, and reach informed conclusions as they examine attitudes toward individual liberties and constitutional rights depicted in comic strips, on radio, television, and in motion pictures.

Resources

Student access to the following materials will aid in conducting this activity: Superman radio show tapes, available from Mind's Eye, Box 6727, San Francisco, CA 94101; the 1950s Superman television series, currently seen in many areas; the three recent Superman feature films; *The Dick Tracy Casebook: Favorite Adventures 1931-1990*, selected by Max Allan Collins and Dick Locher, (New York: St. Martin's Press, 1990); *Dime Detective*, Ron Goulant, (New York: Mysterious Press, 1989); *Ron Goulant's Great History of Comic Books*, (New York: Contemporary Press, 1986); *Dick Tracy—The Official Biography*, Jay Maeder (New York: Plume Books, 1990); the Dick Tracy serials and feature-length films of the 1940s, often available at video rental outlets or can be ordered from Metro Golden Memories, 5425 W. Addison St., Chicago, IL 60641; and the 1990 feature film "Dick Tracy." Each student should also have a copy of the Bill of Rights.

A Civil Liberties Worksheet

PROCEDURE

Divide the class into two groups. Instruct the first, which could be designated the "Then" or pre-*Miranda* group, to view or read the vintage Superman or Dick Tracy materials available and complete the worksheet (see the sample below); worksheets can be color-coded by character and era to identify them; an addition element, "Relevant Supreme Court Decisions," can be added if desired) for the episodes/strips reviewed. The second group, or the "Now" group, will follow the same procedure but will consider modern or post-*Miranda* materials. Later, reassemble the entire class and invite students to report on their findings. After individual reports, ask if anyone in the other group reviewed material which treated a similar fact situation and have students compare and contrast Superman/Tracy behavior.

Additional class discussion could consider the following questions: Do Superman's/Tracy's colleagues and police associates knowingly and willingly bend the law? How might Supreme Court rulings such as *Miranda* and *Terry* have affected the situation depicted in a given episode? In the case of Superman, do Jimmy Olsen and Lois Lane observe the ethical standards of journalism? What legal consequences might they face as a result of their actions? Conclude the class discussion by considering how society's attitudes toward civil liberties are reflected in (or may be shaped by) popular culture and how these attitudes have changed over time.

Other Activities

A number of approaches can be used to effectively combine student interest in modern media heroes with research and writing projects relating to individual liberties. Some examples include:

1. An evaluation of the constitutionality of methods by which reporters Lois Lane, Jimmy Olsen and Clark Kent obtained stories; this could be expanded to contrast journalistic ethics of the 40s and 50s with those of today.
2. Writing a critique of the police department procedures related to due process demonstrated in each episode.
3. Maintaining an ongoing review of the syndicated Superman or Dick Tracy comic strips to monitor their observance of civil liberties guidelines.
4. Writing items dealing with the rights of the accused for inclusion in class-written versions of Tracy's "Crimestoppers Textbook" which appears in many Sunday comic supplements.
5. Rewriting comic strips, radio, TV or film scripts to bring them into compliance with the constitutional limits imposed on police. These productions could be performed in class, in an auditorium or recorded in a radio show format.

Rose Reissman is an active CRADLE teacher in District 25, Flushing, NY.

SAMPLE WORKSHEET

	Episode A Title: _____ Date: _____	Episode B Title: _____ Date: _____	Episode C Title: _____ Date: _____
SITUATION			
ACTION			
RESULT			
REACTION OF OTHERS			
RELEVANT AMENDMENTS			
RIGHTS VIOLATED? HOW?			

2591

Juvenile Justice

Gangs and the Fourth Amendment/Secondary

Simone A. Donahue

Background

Educators and community and national leaders alike have become increasingly concerned with the prolific rise of gangs on the urban and suburban scene.

In the 50s and 60s, the popular image of gangs, as depicted in movies such as "The Blackboard Jungle" and "West Side Story," was one of urban youths from lower class backgrounds whose criminal activities were largely confined to petty vandalism, sporadic turf wars, fistfights, and an occasional death by a knife wound.

Today, gangs are found in a variety of locales, ranging from isolated rural areas to quiet suburbs to the mean streets of major urban centers. The explosive violence we read about daily, fueled largely by the drug epidemic and the easy availability of high-powered weapons, has led to demands for stronger law enforcement to control gang activities.

Objective

Students will examine the tension between the public's demand for safe streets and neighborhoods and the Fourth Amendment's guarantee of privacy for all citizens.

Time Needed

One class period

Procedure

Distribute copies of the Student Handout to the class. As the handout is being distributed, display the text of the Fourth Amendment using an overhead or the chalkboard. After reading the handout, the class can discuss the questions that follow.

For Further Reading

Patridge, Karen "A New Policy Sweeps Clean : An Analysis of the Constitutionality of the Los Angeles Police Department's Crackdown on Violent Street Gangs." *Western State Univ. Law Review* 16:267-68 (1988).

Schultz, Debra R. "The Right to be Let Alone" 4th Amendment Rights and Gang Violence. *Western State Univ. Law Review* 16:725-36 (1989).

Sibley, James Blake "Gang Violence: Response of the

Student Handout

Over the years, the courts have attempted to creatively protect the rights of the accused while responding to society's need to be safe and protected from criminal behavior. The average citizen and the gang member both seek equal protection and privacy under the Fourth Amendment.

In the 1961 case of *Mapp v. Ohio*, 367 U.S. 643, the Supreme Court ruled that evidence obtained by searches and seizures that violate the Fourth Amendment is not admissible in court. Seven years later, in *Terry v. Ohio*, 392 U.S. 1, the Court said that police can investigate the conduct of an individual whom a police officer reasonably concludes may be involved in criminal activity.

The ideas of probable cause and reasonable suspicion directly affect accused gang members. As far back as the 1925 case of *Carroll v. U.S.*, 267 U.S. 132, the Court ruled that it was reasonable and appropriate for law enforcement officers to consider the crime problem in a particular area as a factor, but not the only factor, as a probable cause to arrest a suspect.

In the 1967 California case of *People v. Sawyer*, 63 Cal. Rptr. 749, evidence of gang membership was held to be relevant in establishing motive for a crime. This decision was reaffirmed 11 years later by a federal court in *Clark v. O'Leary*, 852 F.2d 999 (7th Cir. 1988), which also made gang membership relevant to establish motive for a crime.

Gang affiliation or suspicion of gang affiliation is being used by police in deciding whether to frisk and detain suspects in the interests of public safety in certain high crime areas. Many gang members complain of harassment and object to their loss of privacy during these random searches. Since some courts accept gang affiliation and police knowledge of gang affairs as relevant factors in considering whether a police officer's actions were justified, the problem of balancing rights is increasingly being put before the courts to resolve. The question of gang rights versus community safety rights involves basic constitutional issues that touch the lives of all citizens.

Questions for Discussion

1. Government exists to maintain and preserve the social order for all citizens—to protect the life, liberty, and property of *all* individuals. In a high crime area noted for gang activity, is it reasonable to allow random pat downs or frisks by the police?
2. Do gang members' forfeit their Fourth Amendment rights simply because they belong to a gang, live in an area noted for violence and drug activity, or wear gang colors or insignia? Should they be stopped and frisked by police just for these "reasonable causes?"
3. Three recent films, "New Jack City," "Colors," and "Boyz 'N the Hood" are about gangs. What aspects of crime and violence were shown in these movies? What were the attitudes of the main characters towards individual rights? Were the civil rights of suspects violated by the police?
4. How can the possibility of abuses by the police be minimized? Where does "reasonable suspicion" stop and harrassment begin? Does the safety of the community as a whole ever justify a "little" harassment of an individual?

Criminal Justice System to the Growing Threat." *Criminal Justice Journal* 11:403-22 (1989).

Spergel, Irving A., David Curry, Ron Chance, Candice Kane, Ruth Ross, Alba Alexander, Edwina Simmons, and Sandra Oh, "Youth Gangs: Problem and Response Stage I: Assessment, May 1990." School of Social Service Administration, University of Chicago, U.S. Justice Department Cooperative Agreement. 87-JS-CX-K100.

Simone A. Donahue teaches in the Northeast Independent School District in San Antonio, TX.

Juvenile Justice

Rights and the "Common Good"/Elementary

Corine O'Donnell

Purpose

Using this lesson, teachers can help students to be critical readers and identify issues of right and wrong.

Objectives

This lesson will allow students to:

- become familiar with the First Amendment;
- identify constitutional issues in the story;
- identify moral issues;
- define "rights" and "responsibilities" and give examples of the rights and responsibilities of the people and animals in the story;
- identify various ways their lives are affected by laws;
- investigate community issues which are similar to those presented in the story;
- look at both sides of an issue before making a decision;
- appreciate the perspectives of the various characters in the story;
- find the location of the story on a U.S. map; and
- use geography skills to understand the human/environment connections.

Materials Needed

Tucker's Countryside by George Selden; available in paperback from Dell Publishers.

Procedure

1. Read the book to the class or use it in place of a basal text (if multiple copies are available) for a small group of students.
2. Have the students locate the geographic settings of the story (Connecticut and New York City) on the U.S. map.
3. Read the parts from chapters 2, 3, and 4 that describe the Old Meadow and ask students to draw the Old Meadow from those descriptions. Compare their maps with the map at the front of the book.
4. Divide the class into smaller groups to answer the following questions:
    - For what purpose was the Town Council going to use the Old Meadow?
    - Why were so many people moving into Hedley?
    - What does the expression "You can't fight City Hall" mean?
    - What do you think about Sam removing Bertha's spark plugs? Was it right? Why or why not?
5. Read the Bill of Rights to the class or assign the reading for cooperative learning groups.
6. Have groups of students identify the constitutional rights that were involved in the story (peaceable assembly, for example, as shown by the picket line and the holiday picnic). Ask students to bring to class newspaper articles and pictures that show picket lines and demonstrators and pose these questions:
    - Have, or will, things change because of these demonstrations?
    - What do you think should happen about the issues that brought on these demonstrations?
7. Discuss the pros and cons of the way the animals saved the Old Meadow (took the sign from the Hadley's attic, let the townspeople believe that the old farm house had belonged to the founder of the city).
8. Have the students role play the special meeting of the Town Council on Hedley Day. (The story does not give details, but the students can prepare a speech the chairman, Mr. Veasy, could have made to the council members suggesting that the Old Meadow become "a natural shrine in memory of the great pioneer.")

Debriefing

Have students discuss/debate the following questions:

- Could the Old Meadow have been saved in an "honest" way?
- What could have been done so that the animals did not have the townspeople believing a lie?
- What do you think about Tucker taking the glass jewelry from the attic?
- Do we always have to agree with the author's point of view in a story or a book? Give reasons and examples for your answer.
- Identify the rights and responsibilities of the animals and people in the story.
- How would you explain the "common good" in this story?

Additional Activity

Assign students to investigate the environmental issues posed in the story. Are similar issues being debated in their own community? What rights and responsibilities are involved? What arguments are being offered on both sides of the issues?

Corine O'Donnell teaches in the Jefferson County (Colorado) Public Schools.

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Congreſs OF THE United States

begun and held at the City of New-York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expreſsed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congreſs aſsembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congreſs, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Article the first ... After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congreſs, that there shall be not leſs than one hundred Representatives, nor leſs than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congreſs, that there shall not be leſs than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second ... No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Article the third ... Congreſs shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the preſs; or the right of the people peaceably to aſsemble, and to petition the Government for a redreſs of grievances.

Article the fourth ... A well regulated Militia, being neceſsary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article the fifth ... No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Article the sixth ... The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article the seventh ... No person shall be held to answer for a capital, or otherwise infamous crime, unleſs on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witneſs against himself, nor be deprived of life, liberty, or property, without due proceſs of law; nor shall private property be taken for public use without just compensation.

Article the eighth ... In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witneſses against him; to have compulsory proceſs for obtaining witneſses in his favor, and to have the Aſsistance of Counsel for his defence.

Article the ninth ... In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article the tenth ... Exceſsive bail shall not be required, nor exceſsive fines imposed, nor cruel and unusual punishments inflicted.

Article the eleventh ... The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth ... The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Frederick Augustus Muhlenberg Speaker of the House of Representatives.

ATTEST,

John Adams, Vice-President of the United States, and President of the Senate.

John Beckley, Clerk of the House of Representatives.
Sam. A. Otis Secretary of the Senate.

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The Bill of Rights guarantees religious freedom. Otherwise he wouldn't have a prayer.
ABA

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This poster is one of a series designed for the ABA's public service advertising campaign commemorating the Bill of Rights bicentennial. A full size (11" x 28") version of this poster, printed on heavy paper and suitable for framing, is available from the ABA for $4.95 each; specify PC#468-0030. The complete five poster set (PC#468-0035) is also available for $19.95. Shipping and handling charges apply to each purchase. To order or for more information, contact ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611; (312) 988-5555.

Freedom Has a Name

The Bill of Rights

2508

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Freedom Has a Name

Freedom of Religion and the Public Schools/Secondary

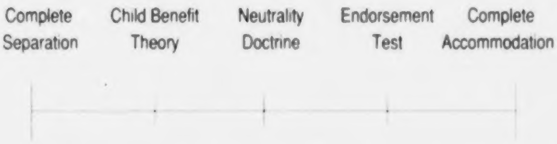
Mary Louise Williams

Rationale

1. To understand the concepts of free exercise and establishment.
2. To apply the concepts to important cases through five decades of historical change.
3. To analyze various guidelines used by the Court for determining violations of "Establishment."
4. To evaluate the present Supreme Court's decisions on the future of religion and public education.

Procedure

1. Give each student a copy of Student Handout 1. In the large group go over the material. This material provides students with concepts and information for the interactive lesson that follows.
2. Directions for the lesson activity: Organize the students into small groups of three to five. Give each student a copy of Student Handout 2. Each group gets a copy of Student Handout 3. Have them read the cases carefully and write their answers on the worksheet provided.
    a. Look at the date of the case. Think about the historical setting of the time in which the decision was being made. What was happening politically and socially? (You may wish to review the historical setting of each case with the entire group. Ask them to think of all the things happening in each decade both at home and abroad. For example: 1940—Battle of Britain and collapse of Europe, Lend-Lease, U.S. trying to stay out of war; 1943—U.S. at war in Pacific and North Africa, Hitler's domination of Europe; 1950s on—civil rights movement, women's movement, "hippie" movement, Vietnam and the Tet offensive, anti-war demonstrations, SDS, political climate of each decade, each president and his influence on the Court, etc.)
    b. Decide what the constitutional issue is. Is the case a "free exercise" issue, an issue of "establishment," or both?
    c. Come to a decision. Determine how the Supreme Court would rule in the case. Is the case a violation of the religion clauses of the Constitution? To determine if an "establishment" issue is a violation, use the guidelines, principles or "measuring sticks." Below is an example of a continuum that might be used on an overhead projector or blackboard to help explain the guidelines or principles. (Perhaps the students may wish to develop the continuum.)



    d. Each group should be able to explain its decisions and reasoning to the rest of the class.
3. In the large group have each small group give its decisions and reasonings.
4. Debriefing: The following questions can be used for a guide.
    a. How difficult was it to determine whether the issue was one of free exercise or establishment? Whether the legislation was in violation of the religion clauses?
    b. Did knowing the historical setting influence your decision in any way?
    c. Did the guidelines or principles help in determining violation of the Establishment Clause?
    d. Why do you think the Court has developed so many guidelines for determining violations of Establishment and so few for Free Exercise?
    e. Why has the Court kept revising its "measuring sticks"?
    f. In regard to the religion clauses and the public schools, what do you see as the Court's most difficult task?
    g. Judging from the principles in use in the last decade or so, what do you think will be the future of the "wall of separation of church and state" within the public schools?
    h. Knowing what you do about the Court decisions, what do you think should be the future of the "wall of separation of church and state" within the public schools?

(*Author's note:* I wish to acknowledge the generous contribution and guidance of Dr. Isidore Starr in the preparation of this activity, particularly two articles he wrote for this magazine, "Teetering on the Wall of Separation" (from which many of the ideas for the continuum are drawn) from the Winter 1979 issue and "My Pilgrimage to the Wall of Separation" which appeared in the Spring 1985 issue.)

Student Handout 1

BACKGROUND INFORMATION

We often hear the comment that the Supreme Court has "taken God out of the classroom." To know that this is not true, one need only be in a high school classroom during final exams to see pencils tightly clenched and heads briefly bowed. What has been taken out of the classroom is the intentional advancement of religion by the school and the community. In the last four decades there has been a reaffirming of "separation of church and state." To understand why the Supreme Court has ruled as it has, we need to first understand the references to religion in the Constitution which are a part of the basis for the decisions.

When the President is sworn into office, he takes the Presidential Oath found in Article II. He concludes the oath with "...so help me God," which, contrary to popular belief, is not written into the Constitution. It was an addition made by George Washington to the oath. The first reference is in Article VI, "...but no religious test shall ever be required as a qualification to any office or public trust under the United

States." Article VII makes a religious reference with "...in the year of our Lord...." The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof...." These are the only references to religion to be found in the Constitution.

SEPARATION OF CHURCH AND STATE

With such limited guidance from the Constitution, the Court often turns to the writings of the framers of the Constitution who expressed their positions on freedom of religion. Thomas Jefferson wrote:

> I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and state.
> (Letter to Danbury Baptist Association, 1802.)

Even one of the founders of the thirteen original colonies, Roger Williams of Rhode Island, had his belief in separation of church and state. He wrote,

> When they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day.
> (quoted from Perry Miller, *Roger Williams: His Contribution to the American Tradition* (New York: Atheneum, 1962) p. 98.)

To paraphrase Dr. Isidore Starr, constitutional scholar and mentor teacher, Williams wanted to separate the church from the influences of the secular world while Jefferson wanted to separate the public sector or state from the church so that each would remain free from the negative influences of the other. But both believed in "a wall of separation."

These positions have been reinterpreted over time as political and social attitudes have changed. Thus, one has to examine the historical framework in which decisions are made. As Justice Oliver Wendell Holmes said, "A page of history is worth a volume of logic." One needs to look to those pages of history to understand why a particular Court ruled as it did in the special times in which it existed.

We will be examining specific court cases that challenged the constitutionality of laws dealing with religion and the schools, the historical settings in which the Supreme Court's decisions were made. We will also concern ourselves with the First Amendment Religion Clauses and the Fourteenth Amendment Due Process Clause. According to several Supreme Court rulings, the Due Process Clause absorbs the Religion Clauses legally obligating the states to comply with them.

RESPECTING AN ESTABLISHMENT OF AND THE FREE EXERCISE OF RELIGION

> AMENDMENT I
> Congress shall make no law *respecting an establishment of religion* or *prohibiting the free exercise thereof.*
>
> AMENDMENT XIV
> ...nor shall any state deprive any person of life, liberty, or property without *due process of law;....*"

This Due Process Clause, as stated above, absorbs the Religion Clauses, legally binding the states to comply with them. Following is an excerpt from one of the Supreme Court decisions which determined this.

> The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislature of the states as incompetent as Congress to enact such laws.
> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

What is "free exercise"? No institution of the federal or state governments (which includes public schools) can in any manner interfere with an individual's right to believe or not to believe, the right to join a church or not join, the right to be an agnostic or an atheist.

What is "respecting an establishment of religion"? It sets up a wall of separation between church and state. The phrase "respecting an establishment of religion," has been interpreted by the Supreme Court to mean:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.
> *Everson v. Board of Education*, 330 U.S. 15 (1947).

In other words, no governmental institution of the nation or states (which includes public schools) can designate or establish a national church. Nor can the cause of religion or non-religion be advanced. Government must be neutral.

GUIDELINES FOR DETERMINING VIOLATIONS OF THE ESTABLISHMENT CLAUSE

The Supreme Court has created over the years several guidelines or "measuring sticks" by which it determines when legislation is in violation of the Establishment Clause. If one were to place them on a continuum from strict separation to accommodation, the guidelines would be as follows:

1. *Complete Separation of Church and State*. The Madison-Jefferson-Rutledge position is that the wall of separation is high and any accommodation, however insignificant it might seem, would be the beginning of a serious breach in the wall. Madison stated:

   > ...[I]t is proper to take alarm at the first experiment on our liberties.... Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christianity, in exclusion of all other Sects?.... Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us.
   > (from *Memorial and Remonstrance Against Religious Assessments*, (1785))

   Jefferson's position has already been quoted. Supreme Court Justice Wiley B. Rutledge wrote:

   > Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools.... In my opinion, both avenues were closed by the Constitution. Neither should be opened by this Court.
   > *Everson v. Board of Education*, 330 U.S. 15-16 (1947)

2. *Child Benefit Theory, 1930*. State aid of some kinds to private, parochial schools is permissible as long as it is a benefit to the child and not an aid to religion. (This theory has been used less often in the past two decades)
3. *The Neutrality Doctrine or the Lemon Test, 1971*. Gov-

ernment must be neutral and can neither aid nor hinder religion. A three-prong test helps to determine if a challenged piece of legislation is neutral and if the neutrality can be maintained. If the legislation or action fails any of the three parts or prongs, it is then in violation of the Establishment Clause.

   1. The legislative *purpose* must be secular (non-religious).
   2. The primary *effect* must not advance nor hinder religion.
   3. There must not be *excessive government entanglement* with religion.

4. *Endorsement Test, 1984.* The justices of the Supreme Court have not been happy with the Lemon Test, particularly Justice O'Connor, because they believe it does not take into consideration the intentions behind institutional endorsement or disapproval of religion. In an attempt to refine the earlier principle of primary purpose or effect, the court under this endorsement test examines the government's purpose and effect. Is the purpose of the government's legislation or action to endorse religion? Does its legislation or actions convey or attempt "to convey a message of endorsement that religion or a particular religious belief is favored or preferred"? If the answer to either question is yes, it violates the Establishment Clause. (M. Johnson, "School Prayer and the Constitution," Maryland L. Rev. 1018-1044, Fall 1989)
5. *Accommodation.* Church and state are in partnership in fostering good citizenship. Legislation can accommodate both church and state as long as it shows no preference for one religion over another. This includes the use of school facilities for religious purposes under certain conditions.

Student Handout 2

1. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). The local board of education of the public schools of Minersville, Pennsylvania, required both teachers and pupils to participate in saluting the national flag as part of a daily school exercise. The Gobitis family members were Jehovah's Witnesses for whom the Bible is the supreme authority and saluting the flag is forbidden by their religion. Lillian and William Gobitis, ages 12 and 10, were expelled from school for refusing to salute the flag. The Gobitis family sued, claiming that their right of religious freedom was violated under the Freedom of Religion Clause of the First Amendment.
2. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). The West Virginia Board of Education adopted a resolution making the salute to the flag "a regular part of the program of activities in the public schools." All teachers and pupils were required to participate. Failure to do so was considered insubordination or disobedience. Student disobedience could result in expulsion and possible prosecution for the parents or guardians. Again, Jehovah's Witnesses refused to obey the flag salute on the grounds that their religious beliefs forbade them to bow down or to serve "graven images" such as the flag. The children were expelled and state officials threatened to send the children to reformatories for juvenile delinquents. Their parents were prosecuted. The families filed suit saying that their freedom of religion had been violated.
3. *Engel v. Vitale*, 370 U.S. 421 (1962). The New York State Board of Regents adopted a brief prayer which was to be repeated voluntarily by students at the beginning of each school day. The prayer read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." The students who did not wish to participate could remain silent or leave the room. The parents of 10 students in New Hyde Park, N.Y. brought suit. They claimed that the prayer conflicted with their religious beliefs and practices and, thus, was a violation of their rights of religious freedom.
4. *School District of Abington Township v. Schempp; Murray v. Curlett*, 374 U.S. 203, 83 S.Ct. 1560 (1963); these two cases were considered together by the Supreme Court. The first case concerned a Pennsylvania statute requiring the reading of at least 10 verses from the Bible each day during the morning announcement time. It was broadcast into the classrooms through the intercom. This was followed by students joining in to recite the Lord's Prayer and the pledge to the flag. If parents requested that their students be excused, the students did not have to participate. The Schempp family held that certain literal Bible readings were against their religious beliefs as Unitarians and brought suit to stop the readings. The second case dealt with a suit filed by two atheists, Madelyn Murray and her son, William. Their position was that the daily religious exercise placed "a premium on belief as against non-belief and subjected their freedom of conscience to the rule of the majority." They asked that the readings be stopped because they violated their First Amendment right to not believe.
5. *Lemon v. Kurtzman*, 91 S.Ct. 2105 (1971). Because parochial schools were educating a significant number of students, several states passed laws authorizing salary supplements to teachers to be paid out of public school monies. A Pennsylvania law allowed reimbursement to non-public schools for salaries, instructional materials, and textbooks on the condition that the courses and materials were secular (non-religious) and similar to courses offered in the public school curriculum. It affected around 20% of the students in the state. The Rhode Island law allowed a salary supplement to non-public school teachers who were required to teach only secular subjects. This law benefited in effect only Roman Catholic schools.
6. *Stone v. Graham*, 101 S.Ct. 192 (1980). The Kentucky state legislature passed a law in 1978 requiring the placing of the Ten Commandments in public school classrooms. Copies posted were purchased with private contributions. At the bottom of each copy was the following: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the common law of the United States." The Kentucky law was challenged, and the case made its way to the Supreme Court.
7. *McLean v. The Arkansas Board of Education*, 723 F.2d 45 (1982). On March 19, 1981, the Governor of Arkansas signed into law the "Balanced Treatment for Creation-Science and Evolution-Science Act." Its essential mandate was stated in its first sentence: "Public schools within this State shall give balanced treatment to

Student Handout 3

WORKSHEET FOR CASE STUDY

	Historical Setting	**Constitutional Issue** Free Expression or Establishment?	Is it a **Violation** of the Religion Clause?	Your **Decision** and **Reasoning**
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				

creation-science and to evolution science." A suit was filed on May 27, 1981, in federal district court challenging the constitutionality of this act. How did the federal court rule?

8. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). Because of earlier rulings removing institutionalized prayer from the public schools, the state of Alabama chose to remedy this through three statutes. The first, passed in 1978, authorized a one-minute period of silence "for meditation" in all public schools. It was amended in 1981 authorizing a period of silence "for mediation or voluntary prayer," and a third in 1982 gave authority to the teacher to lead students who were willing to participate in a prayer, "Almighty God...the Creator and Supreme Judge of the world." All three laws were challenged by Ishmael Jaffree. His seven-year-old, the plaintiff had been led by the classroom teacher in "voluntary" prayer which was said outloud and in unison. Jaffree had repeatedly requested but without success that the "devotional services" be stopped. A suit was filed and the case made its way up to the Supreme Court.
9. *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987). Louisiana passed a law in 1981 mandating that schools teach creation science if they also taught evolution. The law defined creation science as "the scientific evidences for (creation or evolution) and inferences from those scientific evidences." It contained no overtly religious reference.
10. *Mergens v. Board of Education of Westside Community Schools*, 58 U.S.L.W. 4720 (1990). Congress passed the Equal Access Act in 1984. The purpose of the act was to keep schools from discriminating against student groups on the basis of religious, political, or philosophical reasons. The target for this law was the public school receiving federal funds and maintaining a "limited open forum." A school has a "limited open forum" as soon as it allows the school facilities to be used by one or more noncurriculum related groups during noninstructional time (outside of regular school hours). Student groups meeting for reasons related to school curriculum are not affected by this act. The Westside School System in Omaha, Nebraska, was sued when a student, Bridget Mergens, asked the principal to allow a Christian student group to meet at the school as an extracurricular club. The club was to be equal with the other clubs but would not have a faculty sponsor. School officials denied her request. The school said it had not created a "limited open forum" for student clubs, there was to be no faculty sponsor, and as a religious club it would violate the First Amendment Religion Clause. The case went before the Supreme Court.

Student Handout 4

THE DECISIONS

1. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (free exercise)
   The Supreme Court voted 8-1 to uphold the requirement to salute the flag. The Court said that freedom of religion is not absolute. Compromises may be necessary. Religious liberty may have to give way to political necessity and authority. But that authority cannot be used directly to promote or restrict religion. "Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of the law,...." However, the decision continues, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." To exempt the Gobitis children from the salute "might cause doubts in the mind of other children which would themselves weaken the effect of the exercise."
2. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (free exercise)
   By a 6-3 vote the Supreme Court reversed *Gobitis*. The majority opinion stated that the action of the local authorities in forcing the flag salute and pledge went beyond the constitutional limits of their power and "invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control...freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test...is the right to differ as to things that touch the heart of the existing order." The concluding words of Justice Robert A. Jackson have become some of the most quoted passages in constitutional law:

   > If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

3. *Engel v. Vitale*, 370 U.S. 421 (1962) (establishment)
   The Supreme Court, in a 6-1 ruling (two justices did not take part), struck down the compulsory prayer as a violation of the Establishment Clause. The essence of the majority opinion was that it was not the business of the Board of Regents or "...government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." Even though it was voluntary, it was still a violation. Justice Hugo Black wrote, "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."
4. *School District of Abington Township v. Schempp; Curray v. Curlett*, 374 U.S. 203, 83 S.Ct. 1560 (1963) (establishment and free exercise)
   The law was struck down by an 8-1 vote as a constitutional violation of both Religion Clauses. Justice Tom C. Clark wrote:

   > The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

   The question was raised that it had the effect of permiting a "religion of secularism" to be established. Justice Clark continued:

> We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the âBible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment....

5. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971) (establishment)
   Both laws were struck down by unanimous votes. Chief Justice Warren Burger wrote the opinion which established what is called the Neutrality Doctrine or the "*Lemon* Test." The three-prong test determines violations of the Establishment Clause. If the legislation fails any of the three parts, it is unconstitutional. Aid to parochial schools must have (1) secular legislative purpose, and (2) a primary effect that neither advances nor inhibits religion. (3) Nor must it foster an excessive government entanglement with religion.

6. *Stone v. Graham*, 101 S. Ct. 192 (1980) (establishment)
   A 5-4 majority decision held the law to be a violation of the Establishment Clause. In applying the *Lemon* guidelines the law failed on the first point. The majority opinion stated:

   > The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments is undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters,... Rather, the first part...concerns the religious duties of believers:...

   Mere posting does not serve an educational purpose. Instead, it might encourage students to think that the schools have come down on the side of religion; whereas, they must remain neutral. However, the Court did state, "[T]he Bible may constitutionally be used in appropriate study of history, civilization, ethics, comparative religion, or the like."

7. *McLean v. The Arkansas Board of Education*, 723 F.2d 45 (1982). (establishment)
   The act was overturned as an unconstitutional violation of the Establishment Clause. Using the test in *Lemon v. Kurtzman*, it failed each of the three tests. It was found that in evaluating the legislative purpose, the creationist movement is closely identified with the Fundamentalist view of the origin of earth and life, thus failing the first prong of the test. "Both the concepts and wording...convey an inescapable religiosity." The primary effect was found to be the promotion of Christianity, thus failing the second test. The Court stated that Creation Science does not fit the definition of scientific theory, and it "fails to fit the more general descriptions of 'what scientists think and what scientists do.'" It failed the final test as well because of unnecessary government entanglement. It would require State officials "...to monitor classroom discussions in order to uphold the Act's prohibition against religious instruction [and] will necessarily involve administration in questions concerning religion." The decision was from the United States District Court in Arkansas. It was not appealed.

8. *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985). (establishment)
   The Supreme Court struck down the 1981 statute providing for a moment of silence for "meditation or voluntary prayer" as a violation of the Establishment Clause. However, the Court did not rule against the 1978 one-minute period of silence "for meditation." By applying the *Lemon* test to the 1981 and 1982 statutes, they failed the *Lemon* test. The sponsor of the bill that had become public law had included a statement in the legislative record that clearly indicated that this was "an effort to return voluntary prayer" to the public schools. There was no evidence presented that it had any other than a religious purpose. The 1978 Alabama law, allowing for a moment of silence for "meditation," stands. At least 25 states have laws mandating moments of silence in public school classrooms. If any are found to have a religious rather than a secular purpose, upon challenge, they may very well be struck down.

9. *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987). (establishment)
   In a 7-2 decision, the Court ruled that Alabama's "balanced treatment" law lacked a clear secular purpose and violated the Establishment Clause:

   > The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The act violates the Establishment Clause because it seeks to employ the symbolic and financial support of the government to achieve a religious purpose.

10. *Mergens v. Board of Education of Westside Community Schools*, 58 U.S.L.W. 4720 (1990) (establishment)
    The Equal Access Act, it was concluded by the Court, did not violate the Establishment Clause and is constitutional. Therefore, in an 8-1 decision, the Court ruled that Westside High School had violated the Act by denying Mergen's request. As soon as a school allows even one noncurriculum related group to meet on the school premises during noninstructional time, the school has a "limited open forum." The school is then obligated to provide equal access to any "noncurriculum related student group" which makes such a request. For a student group to be related to the school's curriculum, it must satisfy one of four requirements set down by the Court: (1) the subject matter is actually taught or will soon be taught in a regularly offered course (an example would be a French or Latin Club); (2) the subject matter of the group concerns the body of courses as a whole; (3) participation in the group is required for a particular course (marching band, for example); or (4) participation in the group results in academic credit (orchestra or drama performances, etc.)

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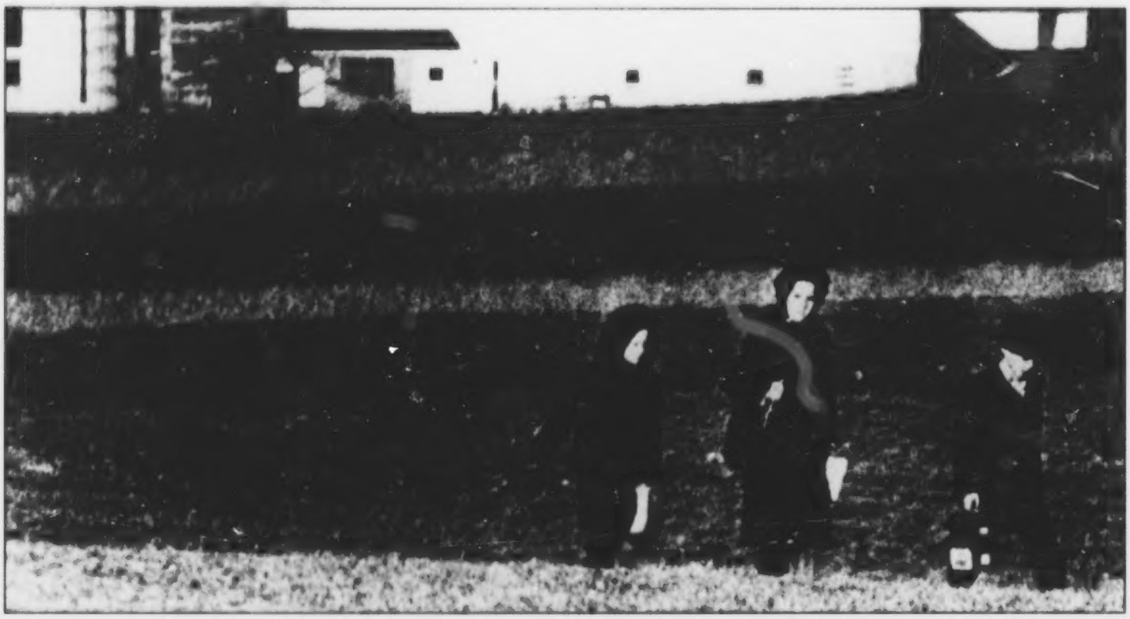
Freedom Has a Name

The Nature of Religious Freedom/Middle

David T. Naylor



UPI/Bettmann Newsphotos

Background

The quest for and appreciation of religious freedom have deed roots in the history of America. Religious intolerance and oppression have afflicted humankind for centuries before and since the founding of this country. Many people have come to our shores in search of religious freedom. Many others living here have enjoyed the sweet taste of its fruits. But America's experience with religious freedom has not been without its problems, struggles and costs. Periods of tension, conflict and coercion have had to be confronted and overcome.

Today, the First Amendment's guarantees of separation of church and state and religious freedom are among our most important and treasured rights. They have done much to promote religious diversity, understanding and independence. But the struggle is not yet over. These rights are not self-executing. Their realization depends heavily on an informed and committed people and an enlightened and courageous judiciary.

The poster found at the center of this issue provides an excellent opportunity for middle level students to begin a series of lessons reflecting on the meaning and importance of religious freedom. This lesson is intended to initiate such a unit. It uses the poster to aid students in exploring the nature of religious diversity and its implications. It is assumed that in subsequent lessons students will encounter specific historical and contemporaneous situations requiring the balancing of the rights and needs of individuals with those of the society at large. In this way, students will acquire a deeper understanding and appreciation of the First Amendment and how it guarantees religious freedom.

2605

Time to Complete

Two class periods

Day 1

1. Begin by having students examine the poster in this issue, "The Bill of Rights guarantees religious freedom... ."
   a. Display the poster in a prominent place in the room.
   b. Divide the class into groups of four students each. Assign the following roles to the students in each group:
   Communicator: Responsible for reporting the group's findings. Must check with others to ensure that what is to be said accurately reflects the group's views.
   Recorder: Responsible for writing down an accurate account of what was said in the group. Must check with others to ensure that all important points have been recorded.
   Manager: Responsible for ensuring that all members of the group understand what they need to do; also keeps each member involved and on task.
   Timer: Responsible for keeping the group aware of the amount of time available to complete a task.
   c. Give each group a photocopy of the poster. Instruct students to focus only on the pictorial portion of the poster. Ask them to identify what is depicted, including as much detail about the person and the scene as they can. Give students three (or five) minutes to do this.
   d. When groups finish, call on the "communicators" to share findings. Record responses on the chalkboard or newsprint. First have communicators identify what is specifically shown in the scene (e.g., a man wearing a

hat, with a beard, wearing dark clothing, two horses and two buggies, farmland). Next, have the communicators share inferences about the scene (e.g., an Amish man in a rural area).

2. Confirm that the scene depicts an Amish man. Then write or display the following unfinished statement: "When I think of the Amish, I think of...." Use this to explore what students know about the Amish.
   a. Keep students in their groups. Give the groups five to seven minutes to list as many responses to the statement as possible.
   b. Call on the communicators of the groups to share one or two responses. Record them on the chalkboard or newsprint.
   c. Briefly discuss student responses, giving individual students the opportunity to share any personal knowledge of or experience with the Amish.
   d. Analyze responses, pointing out how the responses could be clustered (e.g., responses about religion, dress, lifestyle, areas inhabited, beliefs). [Note: As an alternative, give the groups an additional three to five minutes to develop categories. Then have groups share their categories and the reasoning for them.]
   e. Conclude this sequence by discussing the Amish lifestyle, pointing out the integral role that Amish religious beliefs play in shaping their way of life (e.g., why they dress as they do, why they reject motor vehicles and rely instead on horse-drawn vehicles, why they do not use electricity).
3. Focus student attention on the nature and range of religious affiliations in the United States.
   a. With students still in their groups, give them five minutes to prepare a list of as many different religions and religious denominations found in the U.S. as they can. Have students circle those found in their community or area.
   b. When finished, call on the communicators of the groups to share a response. Record responses on the chalkboard or newsprint. Clarify and discuss responses. Highlight the number of different religious groups found in the area.
   c. Supplement student responses with numerical data to show the range and prevalence of religious groups in the United States. Use an almanac, newspaper or magazine report, or other source to obtain this information. (Note: A particularly interesting study is *The National Survey of Religious Identifications*, 1989-90 conducted by the City University of New York (CUNY) Graduate School and University Center. It is based on telephone interviews with 113,000 Americans and estimates how persons 18 or over identify their religious affiliation. The results of this study were reported by the Associated Press in April 1991 and were widely published in newspapers across the country; the box "Religious Affiliations" summarizes the results of the survey). Point out that while Americans are overwhelmingly Christian, there are many denominations within Christianity. Additionally, large numbers of Americans affiliate with various non-Christian religions (e.g., Judaism, Islam, Buddhism, Hinduism) or with no religion at all.

Religious Affiliations in the U.S.

Christian	**86.5%**
— Roman Catholic: 26.2%	
— Protestant: 60.3%	
Other religions	**4%**
No religion	**7.5%**
Refused to answer	**2%**

Source: The National Survey of Religious Identifications, 1989-90, CUNY Graduate School and University Center.

Day 2

1. Have students focus on the meaning of the printed portion of the poster.
   a. Write "similarities" on one side of the chalkboard and "differences" on another side.
   b. Within a large group format, ask students to indicate examples of similarities among the various religious groups found in the United States (e.g., many share the same holidays, believe in the Bible, and follow similar rituals, such as being baptized or repeating the Lord's Prayer). List responses in the "similarities" column.
   c. Next, ask students to indicate examples of differences among the various religious groups found in the United States (e.g., different holidays and holy days, different holy books or versions of the Bible, different religious leaders, different rules and rituals). List responses in the "differences" column.
   d. Direct student attention to the written part of the poster. Using a transparency or newsprint, display the following:

      "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."

      (From the majority opinion in the 1952 U.S. Supreme Court case of *Zorach v. Clauson*, written by Mr. Justice William O. Douglas.)

      Elicit student interpretations of the meaning of the words on the poster and this excerpt from a Supreme Court decision.
   e. Conclude by asking students to identify examples of religious freedom that people in the United States enjoy (e.g., to be religious or not, to choose which particular religion to join, to follow the practices of one's religion of choice). Have students speculate on how different things might be if the Constitution did not guarantee the freedom of religion.

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Freedom Has a Name

Freedom and Tolerance/Elementary

Arlene F. Gallagher

6th Grade Heritage Day

Holly Pribble

"We see things not as they are, but as we are."
— The Talmud

The First Amendment is about freedoms but, perhaps even more important, it is about tolerance of others enjoying their freedoms. We see things from our own perspective and when confronted with something quite different it is natural to think that the familiar way is right or correct. This applies to the food we eat as well as to religious beliefs. Learning about differences helps to develop toleration. The focus of this article is to suggest ways that elementary students can learn about different religions. Holidays are special opportunities to increase children's knowledge about other beliefs and to expose them to other customs. While schools may avoid celebrating those holidays that have strong religious overtones, it is difficult to find a holiday that does not have some religious origins. The first activity introduces the religion clauses in the First Amendment through holidays.

Holidays We Celebrate and Why

OBJECTIVE

This activity will have students analyze holidays that they celebrate and holidays that others celebrate while sorting them into categories of religious origin vs. non-religious origin.

PROCEDURE

Have the students brainstorm holidays that they celebrate in their families and holidays that are celebrated in the United States. The following thirty holidays may be used to supplement the brainstormed list.

New Year's Day
Chinese New Year
Martin Luther King Day
Lincoln's Birthday
St. Valentine's Day
Presidents' Day
Washington's Birthday
St. Patrick's Day
Palm Sunday
Good Friday
First Day of Passover
Easter Sunday
Orthodox Easter
Earth Day
Secretaries Day
Mother's Day
Memorial Day
Flag Day
Father's Day
Independence Day
Labor Day
First Day of Rosh Hashana
Yom Kippur
Columbus Day
Halloween
Election Day
Veterans Day
Thanksgiving Day
First Day of Hanukkah
Christmas Day
International Children's Day

Discuss the origin and meaning of each of these holidays briefly. The extensive bibliography will be helpful if the teacher or students don't have the information. Create a graph on the chalkboard with holidays on the left hand side and the students' names across the top. Have students fill in the boxes beside the holidays that they celebrate. Use the following questions to guide discussion.

- How does a holiday reflect what people think is important? Ask for specific examples.
- How would you feel if you were not permitted to celebrate a certain holiday that you have always recognized in your family?

Surveying the Community

OBJECTIVE

To have students make predictions about their community then gather data to test these hypothesis. Primary students can survey other classrooms while older students can survey their neighborhoods.

PROCEDURE

Choose one or more of the following questions. Ask your class to predict how they think most people will respond.

What is your favorite holiday?
Is this a holiday with religious origins or not?
How would you feel if the government made a law against your celebration of this day? What could you do about it?

Children's Literature and Activities on Freedom of Religion

All of the books listed below are currently in print. The grade levels indicated are not absolute because many books transcend categories. The allegorical quality of picture books makes them wonderful springboards for discussion by older students and young children love to hear books read aloud.

P=primary (grades 1, 2, 3)
I=intermediate (grades 4, 5, 6)
A=advanced (7, 8, 9)

Arrick, Fran. (1981) *Chernowitz*. New York: Bradbury. I & A

Bobby Cherno is tormented by an anti-Semitic bully in his class. Bobby has to wrestle with the problems of telling his parents, protecting himself, and his own desire for revenge. The theme of revenge as an unsatisfying and ineffective response to a bully.

Activity: Conduct a discussion about the difference between tattling and responsible reporting. Too often children do not report abusive treatment because they do not want to be labeled a tattletale. Make lists of incidents that fall under the tattling category and the responsible reporting category. Try to get the students to develop working definitions of each.

Blume, Judy. (1970) *Are You There, God? It's Me, Margaret*. New York: Bradbury. I

This is the story of a religion-conscious Margaret who has just moved to the suburbs. She joins a secret club of other girls in her class and must adhere to the rigid rules that they impose; peer group rules that are vitally important to children this age. Margaret is preoccupied with her physical maturation, and reaches a comfortable religious compromise.

Activity: Most fifth and sixth graders have probably read this book so teachers should have no trouble beginning a discussion about Margaret's secret club, the PTLs, and the rules imposed by it. Ask the children about secret clubs they have participated in, what the rules were, who was allowed to join. This discussion could be expanded into one about organizations that refuse to admit people on the basis of sex, race, religion, etc. When is this allowable? When is it inexcusable?

Clapp, Patricia. (1982). *The Witches Children: A Story of Salem*. New York: Lothrop, Lee & Shepard Books, 1982. Puffin Paperback, 1987. I & A

During the winter of 1692 a group of young girls begin to experience strange fits and visions. Some believe they have seen the devil and that they are being victimized by witches. This is the story of the witch-hunt trials in Salem, Massachusetts. There is no separation between church and state during this time.

Activity: Review the evidence that was permitted during the witchcraft trial. Find examples in the book of how that evidence was used to convict witches.

Cohen, Barbara. (1983). *Molly's Pilgrim*. New York: William Morrow Edition, 1983. Bantam Skylark Paperback Edition, 1990. P & I

Molly is teased by her classmates because of her imperfect English and old country ways. Her mother makes her a pilgrim doll dressed as a Russian peasant because she herself came to this country for religious freedom. When Molly brings the doll to school other students ridicule her until they learn about modern day pilgrims.

Activity: To celebrate the first paperback edition of this popular children's book, the publisher has produced an excellent teacher's guide with 18 activities such as the following:

"Help your students to make connections between *Molly's Pilgrim* and current events concerning modern-day pilgrims, for example, Vietnamese, Haitians, Russian Jews, Cubans, Koreans, Guatemalans, and others. Can they think of famous people, musicians, athletes, movie stars, or others, who may be considered modern-day pilgrims?" (from "A Teachers Guide to *Molly's Pilgrim*" by Barbara Brenner, available free of charge from Bantam Doubleday Dell, Education and Library Division LBW, 666 Fifth Avenue, New York, NY 10103)

Jones, Rebecca C. (1989). *The Believers*. New York: Knopf. YA

Eleven-year-old Tibby Tayler becomes involved with an unusual boy named Verl Milner and his warm, loving family. The Milners don't send their children to schools or doctors because they believe that prayer has the power to make miracles happen; they read only the Bible.

Activity: First have your students brainstorm a list of all of the religions they know. Then, using an almanac, have students make lists of the different religions in the world. The comparisons of the lists should be quite dramatic. Follow up this activity by making pie charts showing how many people in the world belong to different religions.

Yolen, Jane. (1981). *The Gift of Sarah Barker*. New York: Viking. A

In this story, religion governs all aspects of the character's behavior. There is no separation between governance and religion for members of the Shaker community in the late 1800s. This is also most unusual love story. Sarah and Abel are Shakers and because of this they are not allowed to speak or touch or even dream about one another.

Activity: The Shakers were a unique culture whose rules and customs provide a fascinating subject for older elementary children. Reconstruct the rules of Shaker life and discuss with the students how following these rules would change their lives.

Informational Books About Holidays and Religions

Adler, David. (1982). *A Picture Book of Passover*. New York: Holiday House. P & I

A simple and clear retelling of the Israelites' journey from slavery to freedom that includes the birth of Moses, the ten plagues, and the crossing of the Red Sea. Also included is a brief explanation of the Seder and other Passover holiday customs.

Bodker, Cecil. (1989). *Mary of Nazareth*. R&S Books, distributed by Farrar, Straus, & Giroux. New York. I

This story is told from the perspective of Mary and relates the events that bring her and Joseph to Bethlehem where the child, Jesus, is born. When they bring the generous gifts from the three wise men to the temple in Jerusalem they realize that their son is the one sought by King Herod.

Brown, Tricia. (1987). *Chinese New Year*. Photographs by Fran Ortiz. New York: Holt. P & I

The text and photographs depict the celebration of the Chinese New Year by Chinese Americans living in San Francisco's Chinatown.

Byran, Ashley. (1991). *All Night, All Day: A Child's*

First Book of African American Spirituals. Selected and illustrated by the author. New York: Atheneum. All ages

The color illustrations capture the spirit of these 20 spirituals selected from among the thousand that are known and sung by people in churches, schools, camps and clubs. A note at the end of the book provides some historical background.

Drucker, Malka. (1983). *Shabbat: A Peaceful Island*. Drawings by Brom Hoban. New York: Holiday House. I

Every Friday night, Jews anticipate sundown—the beginning of the Sabbath holiday. It is a time for rest, a kind of "peaceful island" in a busy week. The origins of the holiday, the customs celebrated in other countries as well as crafts, games and recipes are also included.

Eagle Walking Turtle. (1987). *Keepers of the Fire*. Santa Fe, New Mexico: Bear & Company. All ages

Inspired by the vision of Black Elk, an Oglala Sioux medicine man who lived at the turn of the century, this archetypal myth is about the journey of Blue Spotted Horse to the far ends of the earth to spread a message of peace and harmony.

Faber, Doris. (1991). *The Amish*. Illustrations by Michael Erkel. New York: Doubleday. I

This is an excellent treatment of the Amish people, their beliefs, their customs, and their interactions with non-Amish. The landmark Supreme Court case of 1972 which held 7-0 in favor of the Amish not having to send their children to public schools is very clearly presented including the background that led to the controversy.

Hoad, Abdul Latif Al. (1987). *Islam*. New York: The Bookwright Press. I

There are followers of Islam (Muslims) in almost every country in the world. They believe in Allah, one God, whose word was revealed to Muhammad, the Prophet, and preserved in the Koran. This book for young readers explains that Islam is a way of life in addition to being a belief. It is one in a series of books called Religions of the World. Other titles are: *Buddhism, Christianity, Judaism, Sikhism, and Hinduism*.

Obadiah. (1986). *I am a Rastafarian*. Photographs by Chris Fairclough. New York: Franklin Watts. P

Rastafari people can be found in many countries of the world although the movement first began in Jamaica in the 1920s. This small book covers the history, beliefs and practices of this religion in a way that makes it accessible to the young child. This is one of a series of titles in the My Heritage series that present religions to a young audience. Other titles are *I am an Anglican, I am a Buddhist, I am Greek Orthodox, I am a Hindu, I am a Jew, I am a Muslim, I am a Pentecostal, I am a Roman Catholic, I am a Sikh*.

Chaikin, Miriam. (1985). *Ask Another Question: The Story and Meaning of Passover*. Illustrated by Marvin Friedman. New York: Clarion. I & A

The Jewish holiday of Passover celebrates freedom for a group of people who have not always had it. For centuries they were subjected to slavery, prejudice and persecution. This book presents a vivid historical portrait of the first exodus when Moses led Jews from slavery to freedom along with a full description of the holiday.

Chaikin, Miriam. (1983). *Make Noise, Make Merry: The Story and Meaning of Purim*. Illustrated by Demi. New York: Clarion. I & A

This book is the story of how a government attempted to destroy a whole group of people because of their religion. Purim celebrates the rescue of the Jews of Persia (modern Iran) by the beloved and heroic Queen Ester in the fifth century B.C. While Purim is a minor Jewish holiday, it is the merriest and noisiest of the year.

Chaikin, Miriam. (1986). *Sound the Shofar*. Illustrated by Erika Weihs. New York: Clarion. I

Rosh Hashanah and Yom Kippur, the High Holy Days, mark the beginning of the year on the Jewish calendar. The main symbol of the holidays is the shofar, or ram's horn. It is sounded to announce the start of the new year and again ten days later to end the Yom Kippur fast.

Drucker, Malka. (1981). *Rosh Hashanah and Yom Kippur*. New York: Holiday House. I

The author covers the history, customs and meanings of these two High Holy Days, the most solemn days of the Jewish year. The book includes games, puzzles and crafts.

Giblin, James Cross. (1985). *The Truth About Santa Claus*. Illustrated with photographs and prints. New York: Crowell. I

There have been many variations on the Santa Claus theme, some religious and some non-religious. This book is rich with historical anecdotes as the author traces the centuries-long growth of this symbol of cheer and generosity.

Pettennuzzo, Brenda. (1986). *I am a Pentecostal*. New York: Franklin Watts. I

Text and photographs briefly explain the practices and beliefs of people who are members of the Pentecostal church. The book gives a view of an English family's daily life in addition to their religious practices.

Pettennuzzo, Brenda. (1986). *I am a Roman Catholic*. New York: Franklin Watts. I

Miriam, who is enrolled in a Catholic primary school and attends a Catholic church, explains the tenets and rituals of her faith. Photographs add to the book's appeal.

The Story of Hanukkah. (1989). Paintings by Ori Sherman, told by Amy Ehrlich. New York: Dial. P & I

This is the story of a people's courageous fight for religious freedom. In *The Four Questions*, (Dial, 1989) another book by the same author, Passover is explained with whimsical illustrations by Sharon Schwartz. Every year when Jewish families gather for the Passover holiday, the youngest child poses the question: Why is this night different from all other nights? This begins the Seder.

Winthrop, Elizabeth. (1985). *He is Risen: The Easter Story*. Illustrated by Charles Mikolaycak. New York: Holiday House. I

This is a retelling of the Last Supper, the trial, the crucifixion and the resurrection of Christ. It has been adapted from the Books of Matthew and Luke in the King James version of the Bible.

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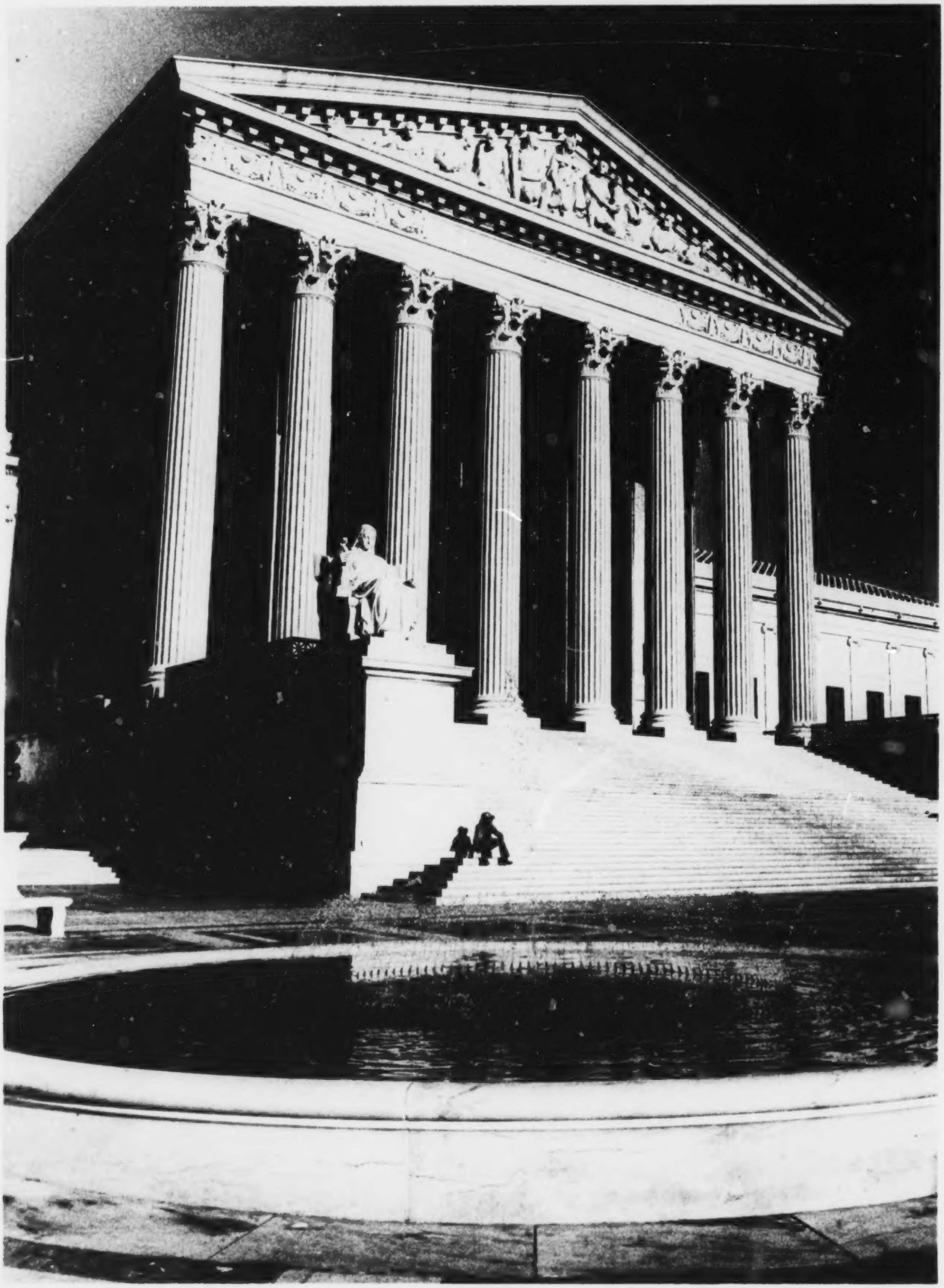

2610

COURT BRIEFS

D. Brodsky, L. Bruin, and S. Welling

Court upholds ban on sex discrimination

In a 9-0 decision, the Supreme Court earlier this year invalidated a so-called "fetal protection policy" which excluded all women from jobs involving exposure to lead in the manufacture of automobile batteries.

Hailed as one of the most important rulings to combat sex discrimination, in *United Automobile Workers of America v. Johnson Controls, Inc.*, 59 U.S.L.W. 4209, the generally conservative Court displayed a somewhat surprising willingness to adhere to precedents which have limited an employer's defenses. All nine justices concluded that the proper test for determining the validity of a fetal protection policy is whether the defendant can establish a narrowly-drawn, statutory bona fide occupational qualification (BFOQ) defense. Although four justices disagreed with the majority's far-reaching conclusions about the scope of the BFOQ defense and whether it can ever justify a sex-specific fetal protection policy, the BFOQ has, so far, survived this Court intact.

It is interesting to note that *Johnson Controls* was the first major case heard by David Souter, a Bush appointee and newest member of the court who voted with the majority. On the other hand, two other Reagan-Bush appointees, Anthony Kennedy and Antonin Scalia, while concurring in the majority's judgment, would have made it easier for employers to establish the defense. Given the breadth of the Court's holding and the division of the justices on key issues, this case will surely be fodder for court watchers interested in predicting the outcome of future controversial civil rights and abortion cases.

Background

Johnson Controls, Inc., based in Milwaukee, Wisconsin, manufactures automobile batteries. It operates 15 plants nationwide, including facilities in California, Illinois, Wisconsin, Vermont, Delaware, Florida, North Carolina, Kentucky, Michigan, Missouri, Oregon, Texas, and Ohio.

Lead oxide is a chief component of lead acid batteries, and occupational exposure to the element gives rise to a variety of known health problems. Harmful effects include fatigue and irritability at relatively low blood absorption levels, loss of consciousness and seizures at higher levels, and increased risks of heart attacks and strokes. Children experience longterm adverse effects from lead exposure at lower levels than adults and can present symptoms including fatigue, hyperactivity, irritability, and sudden behavioral changes. Newborn offspring of mothers whose blood levels are elevated during pregnancy have an increased risk of neurological damage because lead in the mother's blood passes to the fetus through the placenta.

From 1977 to 1982, Johnson Controls maintained a lead exposure policy consisting of a warning to employees that lead exposure was potentially dangerous to women who expected to become pregnant and also required that female employees who chose jobs exposing them to lead sign an "advised consent" form. This policy, therefore, did not prevent women from holding jobs in which they might be exposed to lead.

In 1982, the company established a fetal protection policy which excluded "all women who are pregnant or who are capable of bearing children" from all jobs involving lead exposure or jobs which could expose them to lead if they exercised bidding, bumping, transfer or promotion rights. To be exempted from the policy, women had to provide medical documentation verifying their inability to bear children.

Two years later, the union representing Johnson employees, the United Automobile Workers, filed a class action against Johnson Controls in Federal District Court for the Eastern District of Wisconsin. It contended that the policy was a violation of Title VII of the Civil Rights Act of 1964 which generally prohibits sex discrimination and the Pregnancy Discrimination Act (PDA), a 1978 amendment to Title VII which specifies that discrimination on the basis of pregnancy, childbirth and related medical conditions is a form of sex discrimination. Among the individual plaintiffs were a 50-year-old divorcee who had lost compensation when she was transferred out of a job exposing her to lead; a woman who had chosen to be sterilized to avoid losing her well-paying job; and a young man who had been denied a leave of absence from a lead-exposing job because he intended to become a father.

While claiming that its battery plants complied with standards set by the Occupational Health and Safety Administration and were safe for adults, the company contended that its sex-specific fetal protection policy was necessary because it was impossible to make lead-exposing jobs safe for fetuses whose tolerance levels are lower than adults'.

The plaintiffs, on the other hand, argued that lead exposure affects the offspring of both men and women who have been exposed to concentrations of lead, that the fetal protection policy impermissibly discriminates against women solely on the basis of their potential for becoming pregnant, and that women alone should not bear the economic burden of job loss or underemployment in low-paying, dead-end jobs. At the time, about a dozen other companies had similar sex-specific fetal protection policies in effect, and their opponents estimated that the employment opportunities of as many as 20 million women could be jeopardized if such policies were permitted.

The trial court granted summary judgment to Johnson Controls, deciding that no trial was necessary because the company had shown there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. Applying a "business necessity" defense, the court concluded that the fetus is more vulnerable to lower levels of lead exposure than adults and that the plaintiffs failed to establish an alternative policy which would protect the fetus. The trial court's ruling was consistent with two earlier decisions, *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) and *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), which had upheld fetal protection policies.

The Seventh Circuit affirmed the summary judgment. A 7-4 majority of the appeals court sitting *en banc*, held that the proper standard to apply in fetal protection cases was the business necessity defense, that Johnson Controls had prevailed under this defense on summary judgment, and that even if bona fide occupational qualification was the proper defense, Johnson Controls still was entitled to summary judgment.

A Three-Part Test

Following the reasoning of the Fourth and Eleventh Circuits, the Seventh Circuit applied a three-part test for determining whether the defense of business necessity is established: 1) whether there is a substantial health risk to the fetus; 2) whether transmission of the hazard to the fetus occurs only through women; and 3) whether there is a less discriminatory alternative which equally protects the fetus. The appellate court also noted that in light of the Supreme Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the burden of persuasion on each of the three elements of the business defense rests with the plaintiffs, and in this case they had failed. (For a discussion of *Wards Cove*, see the Winter 1990 issue of *Update*, pp. 23-24.)

Accordingly, the appellate court concluded that there was no dispute that lead is a health risk for fetuses. However, despite contrary expert evidence introduced by the plaintiffs, the court also found that evidence of risk from fathers' lead exposure was "at best, speculative and unconvincing." Finally, the court ruled that the plaintiffs had not established the existence of less discriminatory alternatives.

The Court's Decision

One of the most common reasons for the Supreme Court to agree to review a case, or to "grant certiorari," is to resolve a conflict among the Circuit Court of Appeals. In this instance, the Court granted certiorari to resolve an apparent conflict between the Seventh Circuit's secondary holding that Johnson Control's fetal protection policy was defensible as a BFOQ and the holdings of the Fourth and Eleventh Circuits that such policies could be justified by the business necessity defense. After the Supreme Court granted certiorari, the Sixth Circuit held that another employer's similar fetal protection policy violated Title VII, and a California state appellate court invalidated the same Johnson Controls fetal protection policy under California's own state civil rights law that was then under review by the United States Supreme Court.

Applying the BFOQ Defense

All nine justices reversed the Seventh Circuit's affirmance of summary judgment that Johnson Control's fetal protection policy was neutral on its face and supported by a defense of business necessity. They concluded that such policies explicitly discriminate against women on the basis of sex and, therefore, only proof of a BFOQ defense can justify the use of single-sex fetal protection policies. The 5-4 majority opinion was authored by Justice Blackmun and joined by Justices Marshall, Stevens, O'Connor, and Souter. Concurring in this result but disagreeing with the majority's construction of the defense, were Justices White, Rehnquist and Kennedy. Justice Scalia wrote a separate concurrence.

In support of the BFOQ defense, the Court first gave credence to evidence of the harmful effect of lead exposure on the male reproductive system and cited Johnson Controls for illegally discriminating on the basis of sex by requiring only women to produce proof of incapacity to reproduce. Second, the Court held that by applying the policy to "all women capable of bearing children," the company explicitly classified its employees on the basis of their potential for pregnancy. As a consequence, Johnson Controls' fetal protection policy directly violated the Pregnancy Discrimination Act in which Congress expressly provided that illegal sex discrimination includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions." Finally, the Court emphasized that the company's good intentions, or lack of a "malevolent motive" in adopting the policy did not convert a facially discriminatory policy into a neutral policy which could be defended by a showing of "business necessity" rather than as a BFOQ.

By way of explanation, under Title VII law, courts have long recognized two defenses which will excuse otherwise discriminatory employment practices. The first is the BFOQ which is applicable when the challenged employment practice is overtly discriminatory; that is, the employer's policy indisputably treats women differently from men. As created by statute, the BFOQ exception thus limits the situations in which discrimination is permissible to "certain instances where ...sex...is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." Section 703(e) of Title VII, 42 U.S.C. sec. 2000e-2(e).

To establish the defense, the employer has the burden of proving 1) that the qualification is related to the "essence of the business;" and 2) that all or substantially all members of a protected class are "unable to perform safely and efficiently the duties of the job involved." *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969). The defense has traditionally been held to be extremely narrow and difficult for an employer to establish. *See, Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985).

A "Business Necessity"

The second defense, known as "business necessity," has evolved since 1971, when the Supreme Court held in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that Title VII prohibits facially neutral employment policies which have a statistically disparate impact on a protected class. Upon proof of disparate impact, the burden of proof shifted to the employer to establish business necessity by showing that the discriminatory practices were demonstrably related to successful performance of the job.

Finally, the plaintiff could still prevail by showing the availability of less discriminatory alternative practices. In 1989, in *Wards Cove*, the Court significantly altered the previously-accepted *Griggs* standard by imposing on the plaintiff the entire burden of persuasion. Moreover, the Court retreated from its previous definition of business necessity and held that the employer need not produce evidence that the challenged practice was "essential" or "indispensable" to its business. It is now understood that the business necessity defense is, in the words of the Court, "more lenient for the employer than the statutory BFOQ defense." *Johnson Controls, supra*, at 4211.

It is worth noting here that one goal of the Civil Rights Act of 1990, as proposed by a wide array of civil rights groups and vetoed by President Bush, was to reverse *Wards Cove* and reinstate the *Griggs* standard; this provision is also contained in the proposed Civil Rights Act of 1991.

Thus, in terms of the parties' respective burdens of proof, it is significant that the Court unanimously concluded that fetal protection policies, such as that implemented by Johnson Controls, constitute overt sex discrimination and may be justified only by proof of the tough BFOQ defense.

Scope of the BFOQ

Having agreed upon this point of law, the Court then splintered on the question of the scope of the BFOQ defense. Justices White, Rehnquist and Kennedy concurred with the majority but adamantly disagreed with its narrow interpretation of the defense as failing to allow safety of the fetus to be taken into account and erroneously precluding all sex-specific fetal protection policies. Justice Scalia generally agreed with themajority's analysis, but suggested in a separate concurrence that increased costs to an employer could support a BFOQ defense.

Strictly construing the language of Section 703(e), the Court focused on Congress' use of the term "occupational" to modify the kind of qualification an employer may impose to justify otherwise illegal discrimination. The Court found additional support for narrowing the term to qualifications that affect an employee's ability to do the job in the Pregnancy Discrimination Act which expressly states "that women who are pregnant or potentially pregnant must be treated like others 'similar in their ability...to work.'" *Johnson Controls, supra*, at 4213.

Thus, in evaluating the legitimacy of a BFOQ, only the employee's ability to perform the job in question may be taken into account; since the essence of Johnson Controls' business was the manufacturing of batteries, the only permissible inquiry is whether females can make batteries as well as men. The Court found no evidence to support the argument that fertile women were less able to do the job in a less safe or efficient manner than were men.

Safety Considerations

The major point of disagreement between Justice Blackmun's majority and Justice White's concurrence was whether and to what extent safety risks may be used to establish a BFOQ defense. At the center of the debate were two earlier cases in which the Court held that the BFOQ defense could be based on safety concerns.

In *Dothard v. Rawlinson*, the Court upheld as a BFOQ the exclusion of women from "contact positions" at an all-male maximum security prison. Citing "rampant violence" and the "jungle atmosphere" that would result from the presence of women, the Court found sex to be a BFOQ because it was related to a guard's ability to perform the duty of maintaining prison security.

In *Western Airlines Inc. v. Criswell*, the Court affirmed the Ninth Circuit's holding that the BFOQ exception did not permit the mandatory termination of flight engineers at age 60. However, the Court ruled that safety concerns for the airplane passengers could support a BFOQ.

According to the *Johnson Controls* majority, these cases raised safety risks to third parties—prison inmates in *Dothard* and airline passengers in *Criswell*—who were indispensable to the particular businesses of maintaining prison security in one instance and safely transporting people to their destinations in the other. As such, the "third party safety considerations properly entered into the BFOQ analysis in Dothard and Criswell because they went to the core of the employee's job performance." *Johnson Controls, supra*, at 4213.

In contrast, the majority concluded that ensuring the safety of fetuses is not part of the "essence" of Johnson Control's business of battery manufacturing, even though concern for the risk of injury to future children might be of "deep social concern." Writing for the majority, Justice Blackmun was adamant in his rejection of Johnson Controls' professed moral and ethical concern for the welfare of the future generation: "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." Id. at 4214.

It is interesting to note that Justice Blackmun wrote the majority opinion in the 1973 *Roe v. Wade* decision, 410 U.S. 113, upholding a woman's right to have an abortion. Although focusing on governmental action in that case and concluding that there must be a balancing of interests, he expressed similar concerns regarding the right of privacy and the need for individuals to make their own life choices free from outside interference.

Tort Liability Discounted

The Court also ruled out an argument that sex-specific fetal protection policies could be justified by the increased risk of tort liability employers might face because of the prenatal injuries proximately caused by lead exposure. Instead, the majority suggested that an employer's compliance with Title VII and OSHA laws would in all likelihood preempt any state tort claim. Furthermore, the Court expressly reiterated its adherence to prior holdings that the additional cost of employing members of one sex does not provide an affirmative defense for discrimination. Even the majority, however, would not rule out a cost-based BFOQ in the event that additional costs would be so high as to threaten the survival of the employer's business. *Johnson Controls, supra* at 4215.

In a clear demonstration of judges' (and lawyers') ability to cite cases for entirely opposite propositions, Justice White relied on the same two cases cited by the majority, *Dothard* and *Criswell*, to support the concurring opinion that the BFOQ defense is broad enough to include considerations of cost and safety as justifications for the adoption of fetal protection policies.

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Some Questions for Discussion

Distribute copies of the Court's opinion in *Johnson Controls* along with copies of sections 701(k) (the Pregnancy Discrimination Act of 1978) and 703 (the provision which generally prohibits discrimination on basis of sex and other protected classes). Have the class consider the following questions:

1. **Would it make any difference to the majority if there were solid scientific studies showing that lead exposure does not affect the offspring of men? What does Justice Scalia say about this?**
2. **If Johnson Controls' fetal protection policy were rewritten to exclude only pregnant women, would the majority uphold the policy under a BFOQ defense? Would the White concurrence allow this kind of fetal protection policy?**
3. **Do you agree with the majority that safety factors like protecting the unborn from exposure to toxic substances is not part of the "essence" of the job of making batteries? Can you think of examples of jobs in which safety is part of its "essence?"**
4. **Do you see any signs of the justices' viewpoints, either pro-choice or anti-abortion, in this opinion? Give examples.**
5. **Which, if any, of the following do you think might result from this decision? Can you name any other benefits?**
    - **a) All workers' exposure to lead and other toxins might be reduced because employers will fear tort liability if they do not reduce the level of exposure.**
    - **b) Employers might be encouraged to use safer, nontoxic materials in manufacturing and to provide employees with breathing and other safety devices.**
    - **c) Employers might embark on broader educational campaigns to warn their employees of the dangers of toxins.**
    - **d) Higher paying jobs might be opened up to women.**

Based on such precedent, an employer should be able to meet the statutory requirements for establishing a BFOQ defense by showing that the avoidance of substantial safety risks is "inherently" part of an employee's ability to perform a job and part of an employer's "normal operation" of its business. "[O]n the facts of this case, for example, protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons *(Dothard)* or flying airplanes *(Criswell)*." *Id.* at 4217 (White concurring). Accordingly, safety to third parties, including fetuses, is part of the "'essence' of most if not all businesses," *Id.*, n. 5, and should be recognized as such for the purpose of establishing a BFOQ.

It was especially troubling to the concurring justices that under the majority's narrow interpretation of BFOQ, an employer could not exclude even pregnant women from a workplace which may be toxic to the unborn. They also took issue with the majority's overly-simplistic dismissal of the prospect of an employer's tort liability as a factor to be considered. In the opinion of the concurring justices, this is far from certain; since every state allows children born alive to recover for prenatal injuries caused by third parties, employers may indeed face liability for exposing the mother to lead during the course of her employment.

Despite their disagreement with the majority's narrow definition of the BFOQ defense, Justices White, Rehnquist, and Kennedy agreed that the decision of the court of appeals was in error and reversible for several reasons.

First, the lower court had failed to consider the level of risk avoidance which was part of the company's normal procedure and the extent to which fetal injury is likely to occur. If the risk avoidance levels under the fetal protection policy were substantially higher than those tolerated for its employees and customers, then the company could not prove a BFOQ.

Second, the fetal protection policy was overbroad because the company made no showing that all women are fertile regardless of age and that exclusion from jobs resulting in promotions to positions involving lead exposure were necessary to ensure the company's safe operation.

Third, the concurrence voted to reverse and remand the case because the company did not prove that the fetal protection policy was necessary to its normal operation, especially in light of the fact that it operated without such a policy until 1982.

The concurrence concluded with a criticism of the court of appeals for failing to properly consider evidence of the harmful effects of lead on males.

A Different View

In a brief but important separate concurrence, Justice Scalia voiced his general agreement with the majority's analysis but took the opportunity to emphasize certain points which he considered important. He noted that proof of the harmful effects of lead exposure on men is unnecessary to establish sex discrimination because treating women differently on account of pregnancy is *ipso facto* sex discrimination under the Pregnancy Discrimination Act. Moreover, in sharp contrast to the White concurrence, Justice Scalia emphasized that because of the PDA prohibition of discrimination on the basis of pregnancy, it would not matter if all pregnant women put their unborn children at risk by taking jobs involving lead exposure, just as it would not matter if no men did so. With respect to the question of an employer's tort liability, he noted that in this case Johnson Controls had made no such assertion.

Finally, and most important in terms of the ramifications of this case, Justice Scalia agreed with Justice White's concurrence that increased costs might very well support a BFOQ defense. If, indeed, an employer's incremental costs can be taken into account when determining the legitimacy of a BFOQ, then the defense will become much easier for an employer to establish.

In future cases, courts will inevitably be faced with the problem of where to draw the line between costs which may destroy the employer's business and costs which will merely burden it. To what extent this case's positive pronouncements survive the test of time will depend, in part, on where the Supreme Court draws this line.

—*Dale L. Brodsky*

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Equal protection and trial by jury

The right of a criminal defendant to be tried by a jury whose members are selected according to nondiscriminatory criteria was at issue before the Supreme Court once again in 1991.

Five years earlier, in *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court ruled that a black criminal defendant could challenge the exclusion of members of his or her own race from the jury. Last year, however, the Court ruled that a white defendant's right to an impartial jury was not violated when all African-American potential jurors were excluded from the jury. *Holland v. Illinois*, 110 S. Ct. 803 (1990); for a discussion of *Holland*, see the Spring 1990 issue of *Update*, p. 55.

The apparent inconsistency arose because Batson was decided as an equal protection question under the Fourteenth Amendment, while *Holland* came to the Court as a Sixth Amendment issue.

Like the defendant in *Holland*, Larry Joe Powers was white. Powers was convicted of two murders, attempted murder, and various firearms violations after he shot several people in a Columbus, Ohio home where he was a guest. He was sentenced to imprisonment for 53 years to life. During his trial, Powers, like Holland, objected to the exclusion of black jurors through the use of peremptory challenges.

During the process of selecting jurors from the pool that had been assembled for Powers' trial, the prosecutor used his peremptory challenges to eliminate 10 potential jurors from the panel. Seven of the 10 were African-Americans. Powers' lawyer objected when each of the seven was excused and asked the judge to compel the prosecutor to explain what nonracial reason existed for striking that venire person. All the objections were denied. Powers alleged race discrimination in the prosecution's use of peremptory challenges.

The Supreme Court, in *Powers v. Ohio*, 59 U.S.L.W. 4268 (1991), ruled in favor of Powers. The Court held that the exclusion of prospective jurors because of their race violated the "overriding command" of the Equal Protection Clause. A prosecutor's discriminatory use of peremptory challenges harms not only the excluded jurors, but also the community at large.

Justice Kennedy, writing on behalf of the seven-member majority, explained that jury service preserves the democratic element of the law and that, under the Civil Rights Act of 1875, jurors cannot be excluded from service on account of race, color, or previous condition of servitude.

Moreover, he continued, the Equal Protection Clause prohibits the use of peremptory challenges to exclude otherwise qualified and unbiased persons from the petit or trial jury solely because of their race since "race cannot be a proxy for determining juror bias or competence." Although an individual juror doesn't have the right to sit on any particular petit jury, he or she may not be excluded from sitting because of his or her race.

The majority also held that a white criminal defendant has standing, or the right to file a lawsuit, to challenge the exclusion of racial minorities from the trial jury. The defendant, regardless of whether he or she and the excluded jurors share the same race, may object to race-based exclusions of jurors effected through peremptory challenges. The fact that Powers' race differed from that of the excluded jurors was irrelevant to the issue of standing in these circumstances. The underlying rationale of the court majority was described by Justice Kennedy as follows:

> The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in those terms if the jury is chosen by unlawful means at the outset.

Justice Scalia and Chief Justice Rehnquist filed a dissenting opinion arguing that because Powers himself had not been denied equal protection, he could not challenge the denial of equal rights on behalf of the stricken African-American jurors. There is no Fourteenth Amendment violation, in the dissenters' view, as long as the defendant is not tried by a jury from which members of the defendant's own race have been intentionally excluded.

— Linda Bruin

Harmless errors and coerced confessions

When the Supreme Court handed down the decision in *Arizona v. Fulminante* (No. 89-839, March 26, 1991), it was greeted with widespread but largely uninformed criticism. The principal criticism was that the case opened the door to allow coerced confessions to be used against defendants. A closer look at the decision, however, indicates that it does not even arguably sanction the use of coerced confessions.

After defendant Oreste Fulminante's 11-year-old stepdaughter was murdered in Arizona, Fulminante left the state, was convicted of an unrelated federal crime and was put in federal prison in New York. He became friends with Anthony Sarivola, a fellow inmate and a paid FBI informant. Sarivola told Fulminante that he knew Fulminante was being treated roughly by the inmates because they thought he murdered a child. Sarivola offered Fulminante protection in exchange for the truth. Fulminante admitted that he had killed his stepdaughter and gave some details. After Fulminante was released six months later, he also confessed to Sarivola's wife.

Which Confession Is Admissible?

Fulminante was charged with murder in Arizona, and he moved to suppress his confessions to Sarivola and Sarivola's wife, arguing that the first confession was coerced, and the second confession was tainted by the first confession. The Arizona trial court allowed both confessions into evidence, and Fulminante was convicted and sentenced to death. On appeal, the Arizona Supreme Court reversed, concluding that the first confession was involuntary. The state appealed to the U.S. Supreme Court.

As to the second confession, the one made to Sarivola's wife, the Arizona Supreme Court allowed it into evidence on the theory that it was not tainted by any coercion involved with the first confession. This issue was not appealed, so the only question before the U.S. Supreme Court was the first confession.

Three Questions for the Court

In analyzing whether the confession should be excluded because it was involuntary, the Supreme Court confronted three questions. The first question was whether the confession was indeed coerced. The Due Process Clause of the Fourteenth Amendment prohibits using confessions which are coerced or involuntary. The standard for measuring coercion is whether the confession is voluntary under the totality of the circumstances. Here, the Court concluded that the confession to Sarivola was involuntary primarily because Fulminante offered the confession to avoid physical danger from the other inmates.

The second question is whether the harmless error doctrine applies to coerced confessions. The harmless error doctrine establishes that a conviction need not be reversed, even if it contains an error, if the error was not important for the result. This doctrine avoids invalidating trials for trivial, or "harmless," errors. The harmless error doctrine is sensible because it insures that cases are not resolved on technicalities, but its application to constitutional errors is controversial. The Court concluded that the harmless error doctrine could be applied to confessions determined to be involuntary under the due process clause. This was the controversial ruling in the case.

The third question was whether admission of the confession in this case qualified as harmless. For constitutional errors, the government must prove that the error (here, admission of the coerced confession) was harmless *beyond a reasonable doubt*. The Court concluded that the government had not proved that here, basically because there was little evidence of the defendant's guilt other than the confession.

The Court's decision reversed Fulminante's murder conviction. The state can retry him, without the coerced confession, if it chooses.

The Real Significance

The change in the law made by *Arizona v. Fulminante* should not be overestimated. Coerced confessions cannot be used; that has not changed. According to the law before *Fulminante*, if a coerced confession was mistakenly admitted, the harmless error doctrine did not apply and the conviction was automatically reversed. This was the result no matter how great the evidence of guilt. Even if evidence of guilt was overwhelming, the coerced confession meant the conviction was thrown out. Of course, the defendant did not necessarily go free. The state could retry the case without the confession. But the state did have to actually retry the defendant.

After the decision in *Fulminante*, if a coerced confession is mistakenly admitted and there is enough other evidence of guilt that the confession can be deemed harmless beyond a reasonable doubt, then the conviction is allowed to stand. In effect, the Court is willing to guess that a second jury, trying the case without the confession, would reach the same result and convict the defendant. The state would not have to actually retry the defendant.

All the decisions in this case were as close as possible. Each of the three issues was decided by a mere five justice majority, the minimum required for an opinion to have the force of law. And none of the three issues was decided by the same five justice majority. The decision is complicated by these shifting alliances on the three issues.

The impact of *Fulminante* is not as significant nor as horrible as some would suggest. Coerced confessions could not be used before; they cannot be used now. The only thing that has changed is the procedure for dealing with cases where a coerced confession has been wrongly admitted.

— *Sarah N. Welling*

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Mediation

(continued from page 10)

neighborhood often gathered near the school and threatened students as they left the school grounds. Mediators from the New Mexico Center for Dispute Resolution were enlisted to help mediate the dispute, which involved turf issues and complaints against the school administration. After three months of negotiations, the gangs signed an agreement that is still being honored two years later. Ongoing conflicts are now being handled through a mediation program in place at the school.

Another program currently being developed by the New Mexico Center is a program for violent adjudicated offenders as an alternative to incarceration. The program model consists of an intensive probation and surveillance component operated by the local juvenile probation office and an educational program for offenders and their parents. The curriculum will present skill-building exercises for offenders in communication, problem-solving, consequential thinking, conflict management, emotions management, critical reasoning, assertive communication, and negotiation skills. A parallel curriculum component will also be delivered to parents in an attempt to enhance the entire family's ability to interact in more effective and functional ways.

Mediation programs for youth hold great promise in responding to the critical needs of our communities. However, we must understand the absolute importance of prevention. Communities must share their resources to create a continuum of services that serve children and families *before* problems escalate to involvement in the juvenile justice system. We cannot continue to rely on institutions and professionals to intervene after the problems have become acute. We must be proactive in building citizen participation in response to family and community problems. Developing teams of volunteer community mediators is just one of many creative responses that can be brought to bear on the crisis of youth at risk.

As Ray Shonholtz so aptly observes, "By expanding juvenile justice policy to include the community's prevention and service roles, citizens are able to reclaim their historic function of exercising informal social control and modeling the values of an involved citizenry." ☐

Melinda Smith is Director of the New Mexico Center for Dispute Resolution.

2617

Canada

(continued from page 5)

consulted by the youngster (unless the youngster decides otherwise). If a youngster decides to waive his or her rights, that waiver must be in writing.

Dispositions and Transfers

Under the Young Offenders Act, a young person may be dealt with in one of two ways. The young person may proceed through regular trial channels or can apply to participate in the Alternative Measures Program that is in place in his or her province. This program is designed to divert young people away from the adult criminal justice system. It is used only where appropriate, having due regard to the needs of the young person and the interests of society. The young person must participate willingly in the program after being informed of all the options available, and he or she must admit guilt and accept responsibility for the offense. Youngsters participating in the Young Offenders Alternative Measures Program will, for example, write an essay, do community service work, or in some way repay society for their act while gaining some insight into why the act was not socially acceptable.

When the YOA was passed, eight provinces established Alternative Measures Programs. Ontario did not; it was not until the Ontario Court of Appeal heard the case of *Regina v. Sheldon S.*, (1988) 42 C.C.C. (3d) 41 (Ont. C.A.)) and ordered the Attorney General of Ontario to implement a young offenders program so that young persons in Ontario were treated as they would be in other provinces. (The only province in Canada that still does not have an Alternative Measures Program is Prince Edward Island, and that is simply because of economic constraints.)

The program established in Ontario is very restrictive. Only offenses that are punishable by a maximum of two years in jail, if committed by an adult, qualify for the program. The Ontario Court of Appeal upheld this restriction in *Regina v. S.G.* (1988) 46 C.C.C. (3d) 332 as being a proper exercise of the Attorney General's powers.

Thus, a young person may be treated very differently for the same offense in different provinces. For example, in Prince Edward Island, no Alternative Measures Program exists. In Alberta, a narrow range of offenses is covered. In Manitoba and Saskatchewan, violent offenses are excluded. In Quebec, however, a young person may seek alternative measures for even the most violent offenses, including murder, manslaughter, and arson.

After the young person has successfully completed the Alternative Measures Program, he or she returns to court, the court is informed that the program has been successfully completed, and the Crown then withdraws the charge or invites the Court to dismiss it.

Under the YOA, the range of sentences available to young people who proceed through regular channels ranges from a discharge, which is essentially a warning, to three years in secure custody (jail). Before making an adjudication—and before any adjudication is made which will send a young person to secure custody—a trial judge must consider a predisposition report prepared by a probation officer. Also, the judge has discretion to consider medical and psychological reports when determining the most appropriate disposition for the young person.

Young persons are subject to dispositions that can include fines of up to $1,000, restitution, probation, and open custody (incarceration in a group home). The range of sentences available under the YOA is far greater than what was available under the JDA. In addition, under the YOA a judge can order psychological, medical, and other reports to assist the court in determining how best to treat a young offender.

In the most serious cases involving persons at least fourteen years old when the offense was committed, it is possible to have the young person transferred to an ordinary court—an adult court—to be dealt with according to the law as it relates to persons eighteen and over. Such a transfer order can be made only after a special hearing and only if it is "in the interest of society" and due consideration is given to "the needs of the young person."

The application for transfer is not automatic, by any means. It is most frequently brought in murder cases, a crime which is punishable by life imprisonment in Canada in the case of an adult. However, transfers have been ordered for lesser offenses. A transfer is dependent upon numerous factors relating to the type of offense, the facts of the particular offense, the characteristics of the young person, and the ability to treat the young person in the Youth Court system.

Trials and Records

In the Youth Court, all trials proceed before a judge alone. Because the maximum penalty available under the Young Offenders Act is three years, secure custody and the Canadian Charter of Rights and Freedoms guarantees a jury trial only where the maximum punishment for an offense is imprisonment for five years or more, juries do not exist in cases in which young offenders are involved, unless there has been a transfer application. The same rules of evidence apply to youth courts as to adult courts, subject to certain special protections granted by the YOA.

Also, while young offenders' courts are open to the public, no report may be made that identifies the young person. For that reason, initials or a first name and last initial are used. This is to protect the young persons and to encourage their reintegration into society without the stigma of a criminal conviction haunting them in their later years. For that reason as well, the YOA provides a complex series of rules governing the destruction of criminal records and fingerprints. While a young person may be photographed and fingerprinted in the same manner as an adult, in practical terms this does not occur as often as with an adult. Records of court proceedings, photographs, and fingerprints are destroyed unless there is an order for preservation; the period after which the record is destroyed varies according to whether a young person is acquitted and the seriousness of the offense.

Reforms

Because the Young Offenders Act was so carefully drafted and because of court rulings and recent amendments, there is little call for major changes in the YOA itself. However, there are some areas of controversy. A person under the age of twelve cannot be charged with a criminal offence in Canada. The child under twelve must be dealt with according to provincial child welfare legislation. Police forces have called for a lowering of the age of criminal responsibility from twelve to ten. It is unlikely that such an amendment will be made as the YOA has proven itself to be capable of functioning well in conjunction with provincial legislation, and there is no true need to amend it to lower the age of criminal responsibility.

Another area of conflict involves restrictions on alternative measures programs, which have resulted in unequal treatment of young people in various parts of the country. Not every province deals with young people in a special Youth Court. In Ontario, for example, persons under age sixteen are tried by Family Court judges sitting as Youth Court judges. Sixteen- and seventeen-year-olds are tried by Criminal Division judges sitting as Youth Court judges. The Canadian Bar Association-Ontario has called for a unified and specialized Youth Court.

Many of the problems facing the American juvenile justice system no longer seem to exist in Canada, which has special rules to address issues such as confessions, diversion programs, as well as a strong system for rehabilitating young people who come into conflict with the law. One of the most controversial issues facing the American justice system, the execution of young people, was addressed long ago in Canada, which in 1976 abolished capital punishment for all crimes and offenders, regardless of age.

The Young Offenders Act is the product of many years of study and contributions from the courts, defense counsel, Crowns (Crown Attorneys who prosecute in the name of Her Majesty the Queen), psychologists, social workers, and other interested professionals. It represents a major step forward in juvenile justice in Canada. While no legislation can be better than the people who enforce and administer it, the YOA has proved to be a highly workable, sensitive, and responsible law.

—Paul Calarco

Paul Calarco is a barrister and solicitor in Toronto. His practice primarily involves defense work, but he also holds appointments from the federal and provincial governments as a parttime prosecutor.

New Realities

(continued from page 6)

larly innovative approaches. The Associated Marine Institutes, which operates in eight states, offers residential and day treatment programs which, depending upon the setting, combine education with marine, wilderness, farming and ranching activities. Only 19 percent of the youths who complete the program commit a new offense, according to the National Council on Crime and Delinquency (NCCD).

In Seattle, the Homebuilders Program provides families in crisis with short-term, intensive in-home counseling to provide them with basic skills and avert the need to remove children from the home. Originally geared toward child neglect and abuse cases, the program now handles delinquent youths as an alternative to placement. At least three-fourths of the families stayed together after one year, according to the NCCD.

But ideally, these services should be made available to families long before a crisis or a child arrives in court, experts concur.

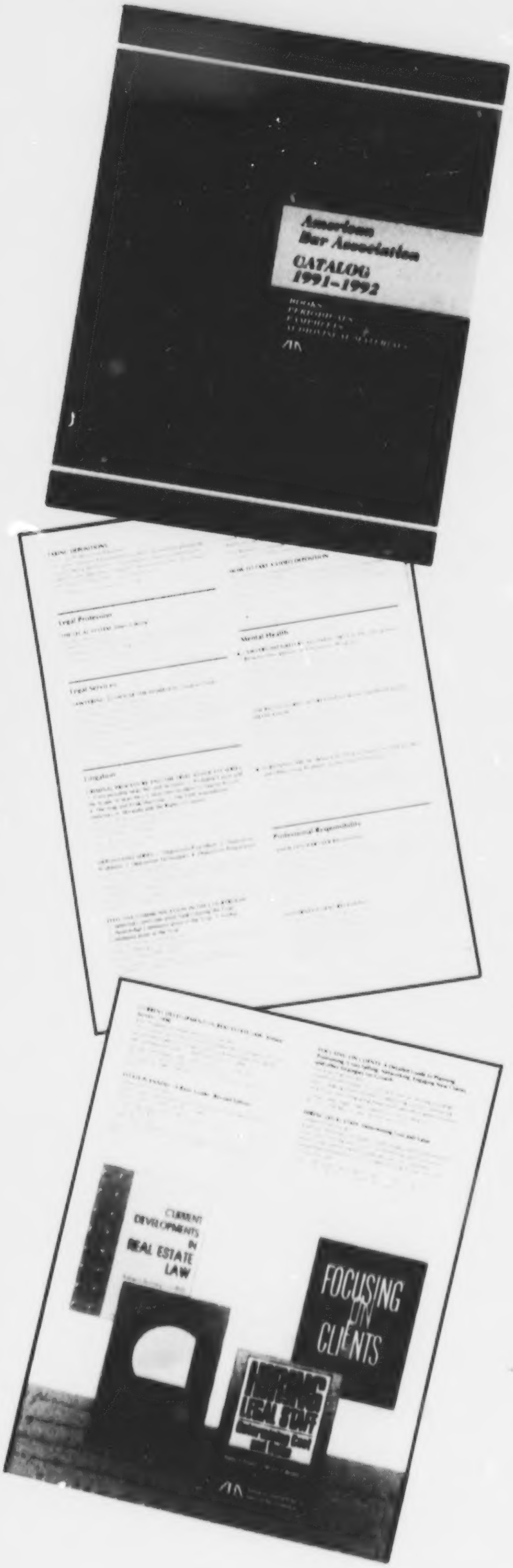
"I'm a big believer in early intervention," says Fassler. "We have to start way before children get into the juvenile justice system."

Most juvenile offenders, like Bryan, don't get help until they get in trouble. But Bryan's probation officer hopes nonetheless that the dominoes of poverty, neglect and crime may stop toppling in his life.

Living in a state home for neglected children, Bryan is getting regular meals, instruction and discipline for the first time in his life.

"It's a world he's never known," his probation officer says. "They're giving him things to be positive about. I can't say he's changed, but I can say I think he's happier now."

Louise Kiernan, a former reporter for The Leaf-Chronicle *in Clarksville, TN, is presently a graduate student at Northwestern University's Medill School of Journalism.*



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opening statement

In his famous dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan wrote: "Our constitution is colorblind, and neither knows nor tolerates classes among citizens. With respect to civil rights, all citizens are equal before the law."

Today, with the benefit of nearly 100 years of hindsight, and in the midst of a presidential election campaign that has reintroduced "Ku Klux Klan" to the political lexicon, it is understandable that for many Justice Harlan's noble words seem hollow, naive and even irrelevant.

The America of the late 20th century is a nation buffeted by waves of economic, cultural and social change. Fundamental principles are subject to new stresses and tensions. The concept of "equality" seems somehow devalued and corrupted, viewed cynically by those who treat it as a highly-charged political code word rather than a legitimate and achievable national objective.

In our nation's continuing struggle to make the goals of its founders a reality, the Civil War amendments loom large. This issue looks at their legacy and their lasting influence in shaping national policy.

As historian Herman Belz notes in the article beginning on page 3, "... it would not be an exaggeration to say that contemporary controversy over affirmative action and national civil rights policy is a dispute over the nature, purpose, and intent of the Civil War amendments." In Belz's view, the nature and purpose of the amendments is clear: they were written "... to preserve and extend the individual rights and liberties of all Americans, not simply those of the freed people."

The two other major articles, by William Robinson and Michael Middleton, focus on how the Supreme Court has interpreted these amendments over the past century and how they continue to influence the debate over the role of race in modern-day America. The teaching strategies in this issue are designed to help bring these issues into focus for students by using a variety of approaches to illustrate how the notion of equal protection has evolved—and continues to evolve—in our rapidly changing society.

A closing reminder: *Update* needs your help to make it a magazine that is of real value to you and your students. Share with us your articles, classroom activities, ideas, and suggestions. Coming issues will examine topics such as America as a multicultural society, literature and LRE, and law and the environment. And be watching soon for a special student edition addressing this year's Law Day theme "Struggle for Justice."

—Jack Wolowiec

contents

Volume 15, Number 3
Fall 1991

3 Equality Before the Law: The Civil War Amendments

7 Extending the Boundaries of Liberty

10 Race, Equality and the Fourteenth Amendment

SECONDARY SCHOOL STRATEGIES

12 Civil Rights and the Supreme Court

13 Fannie Lou Hamer and the Fourteenth Amendment

15 The Struggle for Equality

A MIDDLE SCHOOL STRATEGY

27 Different Treatment for Different Folks?

AN ELEMENTARY SCHOOL STRATEGY

29 Prejudice and Equality

39 Court Briefs

On the cover: *Top*—A number of prominent civil rights leaders, including the Rev. Martin Luther King, Jr., participated in the August 24, 1963 March on Washington. *Bottom*—An August 1958 photo of NAACP chief counsel Thurgood Marshall and a local NAACP official (seated to his right) with the six black students who integrated Central High School in Little Rock, Arkansas.

Photos courtesy UPI/Bettmann Newsphotos

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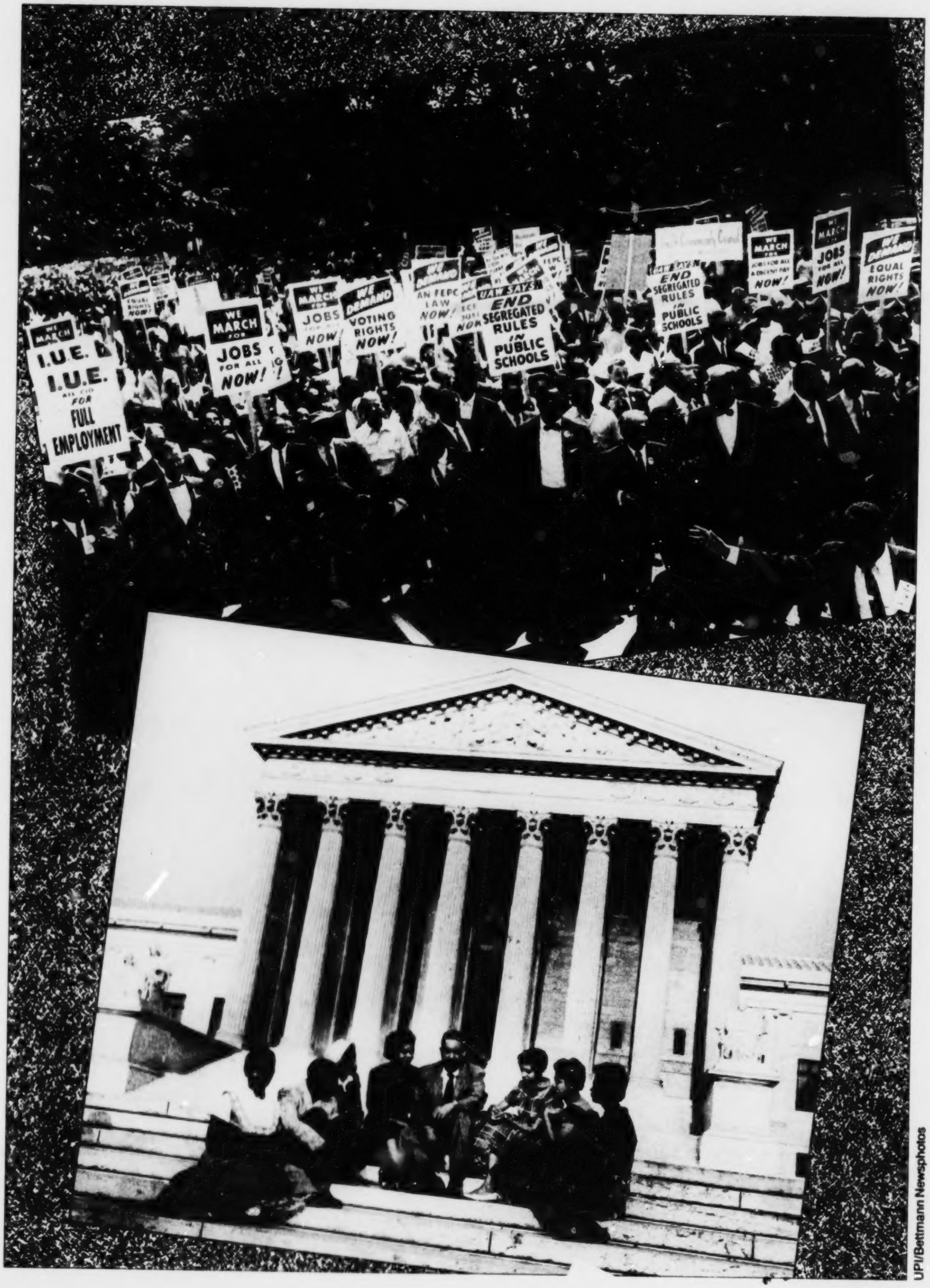
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Herman Belz

Equality Before the Law: The Civil War Amendments

Their role in "completing" the Constitution and expanding the concept of natural rights

The purpose of American constitutions has always been to protect the natural rights of individuals in the condition of civil liberty made possible by the principles and institutions of republican self government. From the beginning of the republic until the Civil War, state governments were principally concerned with the protection and regulation of civil rights and personal liberty. During the Civil War the federal government abolished slavery, for all practical purposes, and in the process assumed for the first time direct responsibility for protecting the civil liberty of individuals. Emancipation—perhaps the single greatest expansion of civil rights in modern history—required constitutional sanction and implementation. The Thirteenth, Fourteenth, and Fifteenth Amendments—adopted between 1865 and 1870—provided this sanction, recognizing and defining guarantees of civil, political, and individual rights as the basis of national policy. Intended as an extension of the principles of natural rights and civil liberty inherent in the original Constitution, these measures had important practical application in the Reconstruction period and, through legislative and judicial interpretation, have had a continuing impact on civil rights down to the present. Indeed it would not be an exaggeration to say that contemporary controversy over affirmative action and national civil rights policy is a dispute over the nature, purpose, and intent of the Civil War amendments.

Although reflection on the Constitution in this bicentennial season naturally focuses on the founding fathers, Supreme Court Justices William J. Brennan, Jr., and Thurgood Marshall—among other progressive voices—have urged consideration of Civil War-era constitution-makers. In truth the framers of the 1860s have a special claim to our attention, not only because the amendments they wrote have, to a considerable extent, shaped the structure of present-day politics and society but also because the amendments, in a philosophical sense, signified completion of the Constitution in accordance with the fundamental principles of the regime. As a contribution to the bicentennial commemoration, the following account seeks to evaluate the nature, intent, and continuing impact of the Civil War amendments on civil rights, a basic purpose of the founding that remains a central concern of American constitutionalism.

Liberty, Equality, and Consent

The civil rights story begins with the Declaration of Independence and with the assertion of the ideas of liberty, equality, and consent as the defining principles of American nationality. These principles introduced a liberal bias into American political life that made it relatively easy for adult white males to achieve legal and political equality in the period from 1776 to 1860. Contradicting the principles of the polity was the institution of slavery. Truly or properly understood, slavery always violated the natural rights principles on which republican institutions rested. In 1776, however, and in 1787 when the Constitution was written, this fact was not sufficiently understood, or if understood was not seen as the basis of action by a sufficient number of people to cause it to be expressed in American public law. Accordingly, slavery was tolerated—if not positively approved—under the Constitution.

By 1860, however, public opinion had changed in the northern half of the country, where slavery was widely regarded as a contradiction of liberty and equality and as a national issue that required action, at least the action of stopping the spread of the institution into the Western territories. This anti-slavery stand—the platform of the Republican Party in the election of 1860—provoked secession, which led to the Civil War. And in the course of fighting the war the federal government undertook military emancipation as a means of preserving the Union.

A Federal Problem?

Emancipation created a civil rights problem unlike any that had existed in the United States. Starting with the American Revolution, controversies had arisen at the state level concerning suffrage extension and political rights. Emancipation, by contrast, was a national issue that resulted from the action of the federal government. Accordingly, the civil rights problem was a national problem. But was it an issue that the national government could deal with exclusively? If the United States had been a unitary government like France or England, an affirmative answer to the question might have been possible. The federal system in America—the division of sovereignty between the states and the central government—suggested otherwise. From 1789 to 1860, the states were responsible for matters of civil rights and personal liberty. The ordinary rights that defined the condition of civil liberty existed as attributes of state rather than national citizenship. The question raised by emancipation was whether the federal division of sovereignty, which had not been applied to civil rights issues, would be extended to this area of public policy.

The consequence of emancipation, with respect to the condition of the approximately 4 million former slaves, was conceptualized as a *civil rights problem*. This means not only that there was perplexity and uncertainty in the situation but also that the relevant horizon within which the matter was considered was the liberal tradition of natural rights and individual liberty defined by the Declaration of Independence and the Constitution. Within this framework the federal government, which was responsible for emancipation, could conceivably assume exclusive power and responsibility for defining and protecting the rights of the freed slaves. A second option was for the federal government to assume partial or limited power and responsibility for upholding civil rights. A third option was for the federal government to withdraw from civil rights matters, allowing the states to resume their customary power in this sphere, with slavery abolished.

Two Substantive Issues

However federal-state relations might be adjusted, two substantive issues pervaded consideration of the civil rights question. The first concerned determination of the specific rights that would be conferred on the former slaves as citizens of the states or of the United Sates. The second was whether emancipated slaves and previously free Negroes—long defined as a separate class of the population—would continue to be regarded as an exceptional or distinct class for purposes of legislation and public policy, or be integrated into the legal and political order without distinction of color.

Emancipation undertaken for military reasons evolved into an incipient civil rights policy in 1864. The basis of this development was the liberal bias of American institutions: the tendency toward civil and political inclusiveness—irrespective of race or color—that was inherent in the universal principles of liberty, equality, and consent on which the regime was founded. Reinforcing it was the fact that Negroes, when accepted into military service, through their actions in defense of the Union, established a presumption in favor of their citizenship and civil rights. Supported in refugee camps or employed under Army auspices as laborers on abandoned plantations in the South, emancipated slaves gained a measure of security and personal liberty under the protection of the Freedmen's Bureau, created by Congress in 1865 as an agency in the War Department. This was, however, a temporary program. The first permanent enactment establishing national civil rights policy was the Thirteenth Amendment, recommended to the states by Congress in January 1865 and ratified in December of that year.

Unanswered Questions

Simple and straightforward as it appears in retrospect, the Thirteenth Amendment raised perplexing questions concerning its scope and effect. It was obvious that the prohibition of slavery was in some sense a guarantee of personal liberty. However, it was not self-evidently clear what specific civil rights were comprehended by or inherent in the condition of civil liberty. Some congressional supporters of the Thirteenth Amendment said it would confer basic civil rights on the freed slaves, by which they meant the right to own property, to make contracts, to initiate legal action—known generally as the rights of person and property. The sponsors of the amendment were uncertain or noncommittal on the question of how those rights would be secured, that is, whether the federal government or the state governments would enforce them. Section 2 of the Thirteenth Amendment gave Congress the power to enforce the prohibition of slavery by appropriate legislation. Did that mean Congress could legislate positively and directly against state officers and private individuals to prevent not only the reenslavement of blacks—should that be attempted—but also denial of their civil rights, whatever they might be determined to be? After the Southern states passed the restrictive Black Codes in 1865-66, many congressmen said the Thirteenth Amendment gave Congress this sweeping power. In framing and adopting the anti-slavery amendment, however, Republican lawmakers did not specify such an intention and understanding. On the contrary, they rejected a proposed abolition amendment that would have authorized Congress to legislate plenarily and directly to protect civil rights against both public and private discrimination. This measure was introduced by Senator Charles Sumner, stating that slavery was prohibited because "all persons are equal before the law" and conferring on Congress the "power to make all laws necessary and proper to carry this declaration into effect...."

A Question of Authority

Statements of purpose made by Republican congressmen in 1864-65 reflected the broad political aspirations behind the Thirteenth Amendment. Optimistically, and probably also evasively, in view of the almost certain conflicts likely to arise between state and federal authority in the disposition of the civil rights question, the framers of the amendment said that it would remove the cause of the war, eliminate slavery and race from American politics, reunite the nation, and close off possible peace negotiations in which slavery might be a discussable issue. More to the point in understanding the scope and intent of the Thirteenth Amendment, from the perspective of constitutional law, Republicans took a narrow view of slavery as chattelism, or property in man. This is an important fact that has implications for contemporary civil rights policy. Republicans did not define slavery in social terms as racial distinctions or discrimination, or refer to social discrimination as a "badge" or "incident" of slavery. At the same time, they expressed the belief that emancipated slaves would be citizens with basic rights of person and property.

Responding to the Black Codes

Events in 1865-66 forced Republican Reconstruction planners to clarify their thinking on the scope of civil rights and the means of implementing them in the federal system. The catalyst was the adoption of the Black Codes by Southern state legislatures, which fixed the status and rights of the freed people as an inferior class. To negate the Black Codes, Congress passed the Civil Rights Act of

1866, which made Negroes citizens of the United States and of the states in which they resided and said that U.S. citizens, irrespective of race or color, should have the same right in every state to make and enforce contracts, to sue, to be parties, to give evidence, to sell, lease, purchase, or inherit property, and generally to have the "full and equal benefit of all laws and proceedings for the security of person and property" as was enjoyed by white citizens.

Dividing Power

The Civil Rights Act was directed against the actions of state governments that deprived citizens of their rights. It provided that any person who, under color of law, statute, ordinance, regulation, or custom, deprived any inhabitant of rights secured by the act was guilty of a misdemeanor. National courts were given exclusive jurisdiction of offenses against the act, and cases that involved persons unable to enforce in state courts rights secured by the act could be removed to federal courts. The purpose of the act was to require the states to respect the civil rights of their Negro citizens. It was believed that if this could be done, private wrongs and discrimination against blacks could be prevented through enforcement of state laws for the protection of person and property. The Civil Rights Act thus provided for a division of power and responsibility over civil rights between the federal government and the states.

The only possible constitutional basis for the Civil Rights Act was the Thirteenth Amendment. However, even as Congress passed the measure, doubt persisted about the sufficiency of this basis for federal legislation reaching deeply into state jurisdictions, as the controversial bill did. This doubt formed the chief reason for including in the proposed Fourteenth Amendment—the main purpose of which was to settle the problem of political representation in the former Confederate states—a section defining citizenship and civil rights and congressional enforcement thereof.

Section 1 of the Fourteenth Amendment, reiterating the Civil Rights Act, declared that "all persons born or naturalized in the United States...are citizens of the United States and of the State wherein they reside." It provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And Section 5 gave Congress the "power to enforce, by appropriate legislation, the provisions of this article."

Lasting Impact and Controversy

The Fourteenth Amendment has had a far-reaching impact on civil rights, and its scope, purpose, and intent have accordingly been the subject of continuing controversy. In constitutional law the principal interpretive issue has been whether it was intended to stop the states from depriving individuals of civil rights, or also to prohibit private discrimination and denial of rights. Explaining the force and effect of the amendment in the Thirty-ninth Congress, Thaddeus Stevens, a reliable radical, said it meant that if a state distinguished between different classes of citizens in its laws, Congress could correct the discrimination and inequality. Stevens's observation indicates the key points essential for understanding the scope and intent of this all-important constitutional provision.

First, the Fourteenth Amendment was directed at state action, not private discrimination. The language of the amendment—the restrictions on the states plainly expressed in the words: "no State...shall abridge"—is evidence of this fact. Further evidence is the fact that in framing the measure Congress rejected a proposal that would have given it the power to "make all laws necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." This was considered too sweeping a grant of power that would have authorized Congress to pass primary and direct legislation prohibiting discrimination and regulating ordinary civil rights between private individuals. Under this centralizing proposal, Congress presumably would have displaced the states in civil rights matters, as several Republican congressmen pointed out. Seeking to protect civil rights without revolutionizing the federal system, Republican Reconstruction planners rejected it for the alternative of the state action approach embodied in the Fourteenth Amendment as ratified.

A Definition of "Rights"

The second key fact about the Fourteenth Amendment concerns the substantive meaning of the privileges and immunities, due process, and equal protection clauses of Section 1. The framers of the amendment regarded these generalities as covering language or as a caption for the rights specified in the recently enacted civil rights bill. The latter identified the particular rights Congress thought needed protection in order to overcome the Black Codes and fulfill the promise of emancipation. Designed to supply unquestionable constitutional authority for passing this or similar legislation, the Fourteenth Amendment was written in more general terms appropriate for a constitutional provision. It did not, however, express a new or expanded view of the rights deemed essential to civil liberty, different from that expressed in the Civil Rights Act. Civil rights meant the rights of person and property and legal equality. It did not refer to political rights or political equality, or to social acceptance or social equality which were dependent upon private taste and preference. It is nonetheless true that the language of the Fourteenth Amendment—more capacious than that of the Civil Rights Act—could be interpreted to give civil rights a different and wider meaning and application.

The rest of the civil rights story in the Reconstruction era can be told succinctly. When the Southern states rejected the proposed Fourteenth Amendment in 1866, political rights superseded civil rights as the dominant issue in this aspect of reconstruction policy. Accordingly, in the Reconstruction Act of 1867, Congress required the Southern states to adopt provisions for Negro suffrage in their reorganized constitutions and governments. In order to secure this reform Congress proposed the Fifteenth Amendment—ratified in 1870—guaranteeing a right not to be denied the right to vote on account of race, color, or previous condition of slavery. Between 1870 and 1875 Congress enacted several civil rights laws to enforce the Fourteenth and Fifteenth Amendments.

Enforcement and Interpretation

With constitutional amendments in place and civil rights statutes on the books, a two-fold process of enforcement and interpretation began. It is important to note that by this time the focus of the civil rights problem had shifted to private discrimination and violence, much of it perpetrated by the Ku Klux Klan and other organized terrorist groups. In other words, the main issue was not state action denying blacks' rights—unless, that is, state failure to protect civil rights in local communities was a form of state action that triggered federal intervention. This question was raised in congressional debate on civil rights bills in the early 1870s, and it became the central issue in the interpretation of the Fourteenth Amendment. Upon it depended the nature and extent of congressional legislative enforcement power and federal judicial remedial authority concerning civil rights violations.

The civil rights enforcement-and-interpretation problem in the 1870s had two aspects. The first concerned the political and administrative question of how hard the federal government would try to uphold the civil rights laws and constitutional amendments. Studies of Reconstruction show that the government was reasonably diligent and effective in enforcing civil rights in 1871-72, achieving considerable success in curbing the activities of the Ku Klux Klan. Subsequently, however, the effort lagged and became seriously deficient.

The second aspect of the civil rights story in the 1870s concerns judicial interpretation of the constitutionality of the civil rights laws and the meaning of the Thirteenth, Fourteenth, and Fifteenth Amendments. This is, of course, a vast subject which links the Civil War origins of civil rights policy to contemporary race relations in a direct way. Perhaps the best approach to the issue—and the approach favored by judges, lawyers and legal scholars involved in constitutional litigation in this area—is to consider the original intent of the Civil War amendments.

The Negro Freedom Theory

Original intent history and theory with respect to the war amendments has passed through four distinct phases, the first of which was the period of the 1870s and 1880s. In those years the Supreme Court held to the Negro freedom theory of the purpose and intent of the constitutional changes caused by the Civil War. It reached the following general conclusions concerning the scope and effect of the civil rights amendments and the relation of federal and state power in enforcing them:

- The Fourteenth Amendment prohibits state action, not private discrimination.
- State failure to protect civil rights can be considered a form of state action, but congressional legislation based on this assumption must specify that the private discrimination in question—permitted to occur because of the state's failure to supply protection—is racially motivated. Similarly, federal indictments prosecuting private individuals for civil rights violations must specify that the discrimination was on account of race.
- Congress can define and legislate against "badges" and "incidents" of slavery under the Thirteenth Amendment, although the refusal to admit blacks to a privately-owned place of public accommodation was not a badge of slavery, according to the Court's holding in the case in which this issue was raised.
- The rights of U.S. citizenship are relatively few in comparison with the numerous and abundant rights of state citizenship which, in a practical sense, describe the condition of civil liberty in republican society. Accordingly, the Fourteenth Amendment did not radically alter the federal-state relationship with respect to the substantive rights of citizenship.
- Blacks are not a separate and distinct class of the population, and state laws that on their face distinguish or exclude them—such as laws barring them from jury service—are unconstitutional.

From the perspective of the late twentieth century, the Supreme Court's assertion of the Negro freedom theory of the purpose of the Civil War amendments may appear hypocritical at best and dishonest at worst, since it did not prevent serious denial of black civil rights during and after Reconstruction. Considered in historical context, however, the Court's decisions in the civil rights area protected the freedom of the emancipated race while maintaining the essential principles of the constitutional order, especially the divided sovereignty of federalism. The Court prevented the total exclusion and denial of civil rights for blacks, an alternative desired by the more reactionary racist elements in Southern politics. And the justices rejected the conservative argument that the federal government lacked effective power in civil rights matters and must defer to the states. This was an accurate description of the practical state of affairs in the late nineteenth century, but the political branches—the electorate in the Northern states—not the Supreme Court, were responsible for the retreat from Reconstruction and vigorous civil rights enforcement.

The Conspiracy Theory of the 1880s

A second stage in original intent thinking about the Civil War amendments emerged in the 1880s and reflected the preoccupation of the nation with economic development. Its most characteristic expression was the conspiracy theory of the Fourteenth Amendment. Made famous by the progressive historian Charles A. Beard, this view held that the due process clause of the Fourteenth Amendment was intended to protect business corporations from state regulation. Fittingly and ironically, in an age of enterprise that saw the imposition of segregation and Negro disenfranchisement, the economic rights theory of the Fourteenth Amendment established a form of national protection of individual rights against state interference, consistent with the outlook of the framers of the Civil War amendments.

The economic interpretation of the Fourteenth Amendment—the source of substantive due process and other cardinal tenets of laissez-faire constitutionalism—lasted until 1937, when it was swept away in the constitutional revolution that inaugurated modern judicial liberalism. A parallel development in these years was judicial support of black civil rights claims in a few cases involving criminal procedure, voting rights, and segregation in higher education. This was perhaps not an entirely unrelated occurrence, for rejection of the conspiracy theory, which owed much to the historical researches of activist scholars sympathetic to Negro civil rights, implied restoration of the Negro freedom theory of the intent of the war amendments. These events signaled a new phase in judicial interpretation of the origin and impact of the civil rights amendments.

The Neo-Abolitionist Phase

The period from 1940 to 1968, comprehending the rise and eventual success of the civil rights movement in eliminating segregation from public policy, may be described as the neo-abolitionist phase of the original intent story with respect to the war amendments. Initiated by scholar-activists attempting to change public policy to achieve racial equality, a search for original intent was undertaken that led back to the abolitionist sources of the amendments. In this view, polemicists and abolitionist lawyers in the antebellum period were regarded as the real framers

(continued on page 45)

William L. Robinson

Extending the Boundaries of Liberty

How the Supreme Court has used the Fourteenth Amendment to shape the contours of individual rights

For me, the Fourteenth Amendement brings to mind a number of deep-seated, fundamental concepts—concepts such as equality, fairness, and due process—concepts that inspire strong feelings in each of us. When reflecting on such highly charged and emotional ideas, it quickly becomes apparent that you do not gain special insight or wisdom simply because you possess a law degree, because you have been admitted to the bar, or, indeed, because you happen to sit on the Supreme Court of the United States. These are concepts which strike a chord in each of us as they affect our lives in profoundly personal—and sometimes profoundly different—ways.

The Fourteenth Amendment has five sections, the most important of which is Section 1. It is a relatively short passage:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A number of important concepts are addressed in that passage and I will focus my attention on how the courts have dealt with a few of them.

First, the amendment uses the language "citizens of the United States and of the state wherein they reside." This is the first time that kind of terminology appears in the Constitution.

Citizenship was noted by the Court in a most important case dealing with the privileges and immunities clause. In fact, it was the first case in which the Court was called upon to construe this new Fourteenth Amendment. The Slaughterhouse Cases were decided in 1872, obviously just a few years after the passage of the amendment. In them, the Court gave relatively short shrift to the privileges and immunities clause.

The Louisiana legislature had passed a law establishing a monopoly for a slaughterhouse in a particular city. Anyone wanting to slaughter livestock was required to rent a part of that slaughterhouse and pay a fee to the owner. Not surprisingly, people brought a lawsuit claiming that the law deprived them of their rights, and one of their claims was that it violated their privileges and immunities under the Fourteenth Amendment.

The States Decide

The Court said that the privileges and immunities clause is designed to protect privileges and immunities within a state. The state decides what they are, and there are no separate privileges and immunities by virtue of being a U.S. citizen, with certain minor exceptions. In essence, privileges and immunities come from the state, and the Fourteenth Amendment offers no protection from what the state might do. Not surprisingly, after that decision, the privileges and immunities clause received relatively little use. Early on in the history of the Fourteenth Amendment, the privileges and immunities clause became essentially a dead issue.

A few years later, in 1883, the Court decided the Civil Rights Cases. In these cases, the Court held the Civil Rights Act of 1875 unconstitutional and said the Fourteenth Amendment did not give Congress authority to pass a law governing private conduct. Congress only had a right to pass legislation that would control the conduct of the states. Thereafter, the Fourteenth Amendment largely fell into disuse in questions of racial equality or the treatment of blacks, the then-newly-freed slaves, which was, of course, the primary purpose of the ratification of the amendment.

The Fourteenth Amendment did not fall into disuse generally, though. It became in the closing years of the 19th century a basis for commercial litigation. This was a period of tremendous business expansion in this country, resulting in much controversy over a state's right to enact laws concerning work hours or setting a minimum wage. Between 1900 and the middle 1930s, the Court routinely used the Fourteenth Amendment to invalidate such legislation and prohibited the states from passing legislation designed to protect their citizens from abuses occurring in the commercial world. The Court did so based on the notion that individuals have a personal right to contract and any efforts by the state to protect them violated that right.

There was, however, a dual line of decisions during this period. In some cases, the Court upheld protective legislation. When it did, it usually did so in response to what became known as a "Brandeis brief," so named because the briefs initially were written by Louis D. Brandeis, who later became a Supreme Court justice. In these briefs, Brandeis would carefully and in great detail describe the evils that the state was trying to correct by enacting the legislation in question. While on the whole this type of legislation was invalidated by the Court, some laws, in response to these Brandeis briefs, were upheld.

A Change in Direction

In the late 1930s, the Court stopped overturning such laws. The Court said that it had engaged in "substantive due process," in which it substituted its judgment for that of the state legislatures; that was improper. The Court suggested, however, that while it would not use substantive due process in mere commercial cases, when it came to fundamental rights, it might do so. In the ensuing years, the Court has indeed continued to consider legislation and rule on it on the basis of what I would characterize as the principles of substantive due process.

With regard to the due process clause, the Court in recent years has interpreted that clause in two ways. First, it has followed a procedural direction and said that well before the state can deprive someone of life, liberty, or property, the state must observe certain procedures. Basically, it must give notice of what it intends to do and give the person affected an opportunity to be heard. There has been a great deal of litigation over what is "adequate" notice and what is an "adequate" opportunity to be heard.

Rights or Privileges?

The Court has also gotten into some murky intellectual waters because of some of the doctrines or approaches it has taken to procedural due process. For example, there was a phase when the Court tried to identify a right to due process based on whether you were exercising a right or a merely a privilege. There have been innumerable technical distinctions involved in procedural due process.

The more important cases, and the ones that receive the most attention, are still those that involve substantive due process. This notion of substantive due process takes in human and individual rights, and implicates another controversy that ensued when the Court, in interpreting the Fourteenth Amendment, mapped the basic contours of our political or individual rights.

The question was whether, under the Fourteenth Amendment, an individual's rights were protected against actions of the states as well as the actions of the federal government. This essential question provoked one of the most stirring and beautiful debates in the history of the Court.

On the one hand, Justices Frankfurter and Harlan said that there was protection under the Fourteenth Amendment of fundamental rights and that the Court would selectively incorporate the Bill of Rights into the Fourteenth Amendment and make it applicable to the states, depending on whether the Court concluded that the right secured was a fundamental right.

On the other hand, Justices Douglas and Black, looking at the history of the Fourteenth Amendment as well as their judicial philosophy, argued that *all* rights secured by the Bill of Rights are indeed fundamental, are incorporated into the Fourteenth Amendment, and apply to the states by passage of the amendment. I am not convinced that their view ever commanded a full majority of the Court, but virtually all of the rights secured by the Bill of Rights have indeed been incorporated into the Fourteenth Amendment.

Sweeping Protections

As a result, the Fourteenth Amendment touches on virtually every area of American life. It gives some personal protection with respect to basic individual liberty against federal and state power, and in some instances, it imposes some restraint. The Fourteenth Amendment, however, is still broader than that. It has been relied upon by the Court to outlaw poll taxes and malapportionment. It has been relied upon to hold that the state cannot deny you a lawyer if you cannot afford one. In these instances—based on the equal protection clause—the Fourteenth Amendment has been given a breadth that is incredibly far-reaching. Few areas of our lives are untouched by it, and very little that a state might contemplate is beyond its reach.

Turning again to due process, a few of the most important substantive due process cases merit some brief mention. *Skinner v. Oklahoma* was an equal protection case in which the state of Oklahoma decided to sterilize habitual criminals. The Court said the state could not do that because the right to procreate is a fundamental right. Unless the state has a compelling interest, it cannot deny these habitual criminals their right to procreate solely based on their membership in a particular class of individuals.

Griswold v. Connecticut is a due process case in which the Court found that a husband and wife have a fundamental right to privacy. But where does this right originate? It comes, said the Court, from penumbrae that emanate from the First Amendment right to freedom of association and the Ninth Amendment, those rights reserved to the people. Absent a compelling interest, the state cannot deprive people of their fundamental rights, based on substantive principles of due process.

The *Roe v. Wade* Controversy

In these cases, of course, the Court laid the groundwork for the decision that is on the tips of everyone's tongues, *Roe v. Wade*, in which the Court again, invoking the principles of due process, held that the state cannot deprive a woman of her privacy right secured by the Ninth Amendment or her liberty right secured by the Fourteenth Amendment. The Court found the liberty right in the Fourteenth Amendment itself and applied it to the states.

The Court, of course, did point out that the state does have some interests and can protect them, for example, its interest in life or potential life. On that basis, the Court concluded, relying on medical testimony, that after the fetus becomes viable, the state has a sufficient interest in protecting the life—a Fourteenth Amendment principle—of the unborn child, and could impose regulations. The state also has an interest in the life of the mother and thus could impose regulations related to the abortion itself, but could not forbid it.

With *Roe*, the Court entered an area in which we all have very deep feelings. It relied not only on essential, basic principles of constitutional interpretation, an area where perhaps judges may have a more expertise, but it also factored in medical evidence and the opinions of doctors. In the process, the Court presents us with a dilemma. It has found that two competing interests come into play. While on the one hand there are the inter-

DEATH
LYNCHERS
EQUAL
NEGROES!
LYNCHERS
LYNCHERS

The Bettmann Archive

Protest at the White House, 1933

ests of the woman and her privacy right, if the child has a life, the child would have a Fourteenth Amendment right as well, a right that the state would legitimately be entitled to protect. The Court has defined where one right ends and the other begins by using the first trimester of pregnancy as a reference point, which, as some contend, is an awfully tight and technical basis upon which to rest our constitutional rights or liabilities.

I do not want to render an opinion as to whether *Roe v. Wade* was correctly decided. I would like to point out, however, that the Court, in engaging in this kind of constitutional analysis, was not doing anything new. Liberal and conservative courts alike have done so throughout our constitutional history.

I further suggest that the Court has an obligation to take on these tough questions, to pull its weight in deciding the major controversies that confront us. Attempts to characterize the Court's role as being judicial or legislative adds little to the ongoing debate. The Court has always rendered its decisions in a way that could be called legislating. The role of the Court and its method of analysis have been appropriate and consistent with our constitutional history, whether or not one agrees with the result.

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Michael A. Middleton

Race, Equality and the Fourteenth Amendment

A divided Supreme Court struggles to reconcile affirmative action with a "colorblind" Constitution

The meaning and intent underlying the Constitution and its amendments continue to arouse debate and controversy, and even the Supreme Court has difficulty explaining what those who wrote the constitutional provisions had in mind.

One question we continue to struggle with is what they meant by "equality." Where does this notion come from? What do the words *equal protection of the laws* mean in the Fourteenth Amendment? The area where the Court has been most active in interpreting these words is affirmative action.

The basic question is this: If every state is prohibited from denying any person within its jurisdiction the equal protection of the laws, when can a state—or, indeed, when can the federal government in light of the Fifth Amendment—treat citizens differently on the basis of race while remaining consistent with the concept of equal protection? When, if ever, can the government single you out because you are black or white and treat you differently merely on that basis, and how can such treatment be consistent with the concept of equality and equal protection?

In *Plessy v. Ferguson* in 1896, the Court did a fairly strange thing. While recognizing that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources, the Court found that the Fourteenth Amendment was not intended to abolish distinctions based on color. Further, the Fourteenth Amendment guarantee of equal protection could not have been intended to abolish distinctions based on color where the distinction was made through the exercise of reasonable legislative judgment and for the promotion of the public good. Only a few years after the ratification of the Fourteenth Amendment, the Court maintained that those who wrote and ratified it could not have meant that government cannot distinguish based on color, even where that distinction was made through the exercise of reasonable legislative judgment and for the public good.

In *Plessy*, the Court specifically applied that logic to a Louisiana statute requiring equal but separate railway cars for blacks and whites and held that it did not violate the Fourteenth Amendment. Why? This racial classification was reasonable in light of custom and tradition in Louisiana. It was not unreasonable to segregate the races, and the classification was designed to preserve public peace and order.

Justice Harlan vigorously dissented from that decision. "Our Constitution," he wrote, "is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." This, however, was clearly the minority view. The logic of the *Plessy* majority persisted for almost 60 years and indeed still has it proponents today.

Separate but Equal Rejected

In 1954, in *Brown v. Board of Education*, the Supreme Court seemed to reverse its *Plessy* logic. In *Brown*, the Court found that, even if the tangible aspects of the education provided to blacks and whites were equal, segregation in public schools rendered that education unequal, and separation denied children equal protection of the law. The Court held that the mere fact of the racial regulation amounted to a violation of equal protection and that any language in *Plessy* that suggested otherwise is hereby rejected.

It sounds as if the Court found that racial regulation violates equal protection. The *Brown* decision required that school systems end the practice of using race as a determining factor in school assignments in order for school systems to implement practices that did not rely on race.

In the late 1960s, after years of resistance because of the desegregation mandated by *Brown*, the Supreme Court held that federal courts could require the assignment of students on a racial basis to remedy the unconstitutional segregation of those students. On the one hand, in *Brown*, the Court said that the separation of children on the basis of race is a violation of equal protection. A decade later, after ordering that school systems ignore race in making assignments and because that order did not result in desegregation, the Court indicated race must be taken into account if schools were to be desegregated.

These differences pose a dilemma. How can the Court, which theoretically rejected *Plessy* and prohibited consideration of race in governmental decisionmaking, now justify the remedial consideration of race? How can the racial considerations inherent in today's affirmative action programs be justified? If the use of a racial classification by a government entity violates equal protection in the situation where that classification is used to deny opportunity to a minority group, does the use of a racial classification by that same entity also violate equal protection when it provides advantages to that minority group, and, therefore, denies opportunities to the majority? How does the Court address that dilemma?

A careful reading of *Brown* provides some insights in the Court's reasoning. In *Brown*, the Court rejected *Plessy* but did not in fact reverse it. Its finding of the equal protection violation in *Brown* was premised on the notion that the separation of citizens on the basis of race in public education rendered the education provided unequal. It was not based on the notion that any classifications of citizens based on race violated equal protection. In fact, the remedy for segregation that the Court developed in the late 1960s and early 1970s affirms the use of race in governmental decisionmaking as permissible and, in many situations, required by equal protection.

Balancing Conflicting Interests

The Court got to this point by its traditional and typical balancing. The Court determined that different treatment on the basis of race is consistent with equal protection by balancing the interest promoted by that classification against the harm done by that classification. Equal protection does not mean equal treatment in every circumstance. Equal protection means every citizen shall be treated as an equal. The treatment that one citizen gets is no different from the treatment that another citizen would get in that same situation.

Racial classifications are inherently suspect. The racial classification in the school cases serves the important governmental purpose and the compelling governmental interest of eliminating unconstitutional segregation in public schools to achieve equality. The harm done by those racial classifications includes the denial of local autonomy to school districts to operate segregated schools and the inconvenience to citizens accustomed to the status quo. If you balance the benefits of eliminating an unconstitutionally segregated system against the harm of inconvenience, clearly the benefit prevails and the classification is therefore permissible.

Interestingly, the balancing in *Brown* is no different from that in *Plessy*; the difference is the outcome. In *Plessy*, the Court found that racial segregation in public transportation did not violate equal protection because the governmental interest promoted by the segregation outweighed the harm. In *Brown*, the Court found that racial consideration to remedy segregation was permissible because the governmental interest in making the classification outweighed the harm. Any result, therefore, is possible, depending on what factors are considered and how much weight those making the judgment assign those factors.

Does equal protection mean equal treatment? Who knows? The Constitution is vague. Who can say with any precision what those who wrote equal protection of the law meant by that term? Since 1803, when John Marshall assumed the responsibility of the Supreme Court to be the final expositor of what the words of the Constitution meant, the Supreme Court has filled this role. It defines equality, and, historically, it has done so by balancing competing interests.

A "Colorblind" Constitution

There are those who argue, as Justice Harlan did, that in a racial context the Constitution is colorblind. The Constitution was colorblind then. The Constitution is colorblind today. All racial classifications are as impermissible now as they should have been in 1896 in *Plessy v. Ferguson*.

Others contend that this argument ignores the significance of race in American life. Race in this country has historically been used to identify groups of citizens for oppression and victimization. To suggest today that the same factor used to identify individuals for victimization cannot be used to identify them for recompense is, some argue, pure sophistry. As Justice Blackmun said in the *Bakke* case, to get beyond racism, one must take account of race—there is no other way.

A fine distinction can be made. Some say that the classification that should have been outlawed in *Plessy* operated to perpetuate the vestiges of slavery recently outlawed by the Thirteenth Amendment. It was an invidious racial classification. They argue that the racial classifications challenged today—the affirmative action classifications designed to promote Fourteenth Amendment goals of equality—are benign classifications. The distinction between the benign and the invidious justifies prohibiting some classifications as violative of equal protection, the invidious ones, but allows as benign other racial classifications as consistent with equal protection.

On the other side of that argument, however, is that what is benign to some is invidious to others. One man's trash is another man's treasure, so to speak, which gets us back to the argument that all racial classifications are to be abhorred. The difficulty that exists in understanding exactly what equal protection means, or understanding exactly when it might be appropriate for government to treat citizens differently on the basis of race, has plagued the Court from the day that the phrase *equal protection of law* was first written into the Fourteenth Amendment.

Some recent cases dealing with these issues are worthy of note. After *Wygant v. Board of Education*, a 1986 case, most people thought that the Court had come to a settled position on the meaning of equality and when race could legitimately be considered by government. From the analysis by Justice O'Connor in *Wygant*, it seemed that all members of the Court agreed that racial classifications were constitutionally permissible in some circumstances. The debate among the justices at that point was over what those circumstances were and was framed in terms of the level of scrutiny to which racial classifications should be put.

Applying a Strict Standard

The *Wygant* majority—Justices Powell, Burger, Rehnquist, O'Connor, and

(continued on page 47)

Equal Protection

From *Plessy* to *Brown*/Secondary Melvin Page, Kathryn Hawes, Robert Cox and Gloria Bonner

Background

The Supreme Court interprets the law in performing its role as the final arbiter of the "law of the land." Sometimes, however, its interpretations seem very different, indeed to change over time. How does the Court reach its decisions? Why does it sometimes seem to contradict itself? This activity will help students understand how this happens and how the Court may change its interpretation of the law with the passage of time.

Objectives

At the end of this activity, students will be able to:

1. Describe the facts and issues in two of the most important civil rights cases to come before the Supreme Court in the last 100 years—*Brown v. Board of Education* (1954) and *Plessy v. Ferguson* (1896).
2. Form and express opinions on the decisions made by the Court in these cases.
3. Explain how and why the Supreme Court, over time, changed its interpretation of civil rights.

Resources

- U.S. history or government text
- Copies of the Supreme Court briefs and decisions for each case, or summaries from legal texts
- The videocassette, "The Road to Brown," (available from California Newsreel, 149 Ninth St./420, San Francisco, CA 94103)
- The videocassettes "Supreme Court Decisions that Changed the Nation: *Plessy v. Ferguson*" and "Supreme Court Decisions that Changed the Nation: *Brown v. Board of Education*," Guidance Associates, 1986
- *Lessons on the Constitution: Supplements to High School Courses in American History, Government, and Civics* by John J. Patrick and Richard C. Remy (available from Social Science Education Consortium, 3300 Mitchell Lane, Boulder, CO 80301-2272)
- C. Vann Woodward, "The Case of the Louisiana Traveler" and Alfred H. Kelly, "The School Desegregation Case," both in *Quarrels that Have Shaped the Constitution*, rev. ed., John A. Garraty, ed. (New York: Harper & Row, 1987)

Issues and Questions

This activity may be used to address a wide variety of issues and questions with students. Some are listed below; others may be provided by instructors for students.

1. What rights are guaranteed by the Constitution and especially by the Fourteenth Amendment? Does our society's understanding of these rights change?
2. How did states and local governments challenge and limit these rights? What did citizens do to assert their civil rights in the face of such challenges?
3. What do we understand by the concept of equality? How does this relate to the concept of "separate but equal"?
4. What role does an understanding of social conditions as well as legal issues play in Supreme Court decisions?
5. How does the public gain an understanding of what happens at the Supreme Court? What is the role of the press in making the public aware of the Court's work?
6. How do Supreme Court decisions affect individuals? How do they affect society?

Procedures

1. Introduce, by lecture and/or assigned background reading (see the resource list on page 49 and the strategy found on pages 15-22), the evolving relationship between the Supreme Court and civil rights. Emphasize the factors of change and the importance of Court decisions to individual Americans.
2. Divide the class into six groups: four groups of four to six students to serve as attorneys in each case, with the rest of the class divided into two equal groups to act as justices for each case. Half of the class will focus on *Plessy v. Ferguson* with the other half considering *Brown v. Board of Education*.
3. Instruct the attorneys to study the facts of the case and the arguments presented by both sides. Assign one attorney group to each side of the cases. Individual members of the group will be responsible for a single argument or issue for their side. The group will then discuss the issues and prepare a "brief" of the best arguments, making clear and concise statements of the positions of the parties and listing two or three facts which support each argument.
4. Tell the justices to study the case (but *not* the original decisions) and discuss it as a group. They should ask themselves: What is not clear about the case? What additional information do they need? Have each justice prepare a list of at least three questions. The whole group of justices should then select from these a list of questions (with an equal number of questions for both sides).
5. Conduct a moot or mock court session for each case. Have each group of attorneys present their case, with the justices posing questions from their prepared lists, either after the individual arguments, or—as in actual practice before the Court—interrupting during the course of the arguments as appropriate. Within each group of attorneys, students who have studied the particular issue should respond for their group. (Note: Preparation for the moot court need not be elaborate. Simply arranging chairs or desks so that the justices face the class may be sufficient to provide an atmosphere in which the simulated court proceedings can take place; see page 49 for more information.)
6. Tell the students who have not been working on the particular case being argued that they will function as a body of journalists covering the court proceedings. Have each student file a news report on the arguments presented and the questions asked.
7. Have the justices meet as a group to discuss the arguments, vote, and, as a group, write short majority and minority opinions to support their votes. These should then be presented to the class.
8. Direct the groups of reporters to exchange their news

reports of the events they have witnessed. Likewise, have the groups of attorneys and justices exchange reports with their counterparts. The groups should then read the reports carefully and evaluate them in terms of their completeness and fairness in presenting the issues of the case as it was argued and decided within the moot court proceedings. Use the reports from each group to stimulate class discussion on how Supreme Court decisions are interpreted within our society.

Evaluation

Group evaluation should be based upon the moot court presentations: case presentations and answers to questions for attorneys, and questions asked and opinions for justices. Instructors might also choose to evaluate the process used by each group to reach its outcomes, as well as the study and review process used by each study group. Individual assessment should be based on the news report of the moot court sessions made by each student and a unit test (optional).

Melvin E. Page is Professor of History at East Tennessee State University, Johnson City, TN. Kathryn S. Hawes is Coordinator of Developmental Reading and Study Skills in the Department of Remedial and Developmental Studies at Memphis State University, Memphis, TN. Robert Cox is Associate Professor in the Social Sciences Department at Shelby State Community College, Memphis, TN. Gloria L. Bonner is Assistant Dean for Teacher Education Administrative Services, Middle Tennessee State University, Murfreesboro, TN. This activity is derived from the authors' experience as Fellows of the 1990 Tennessee Collaborative Academy.

Equal Protection

Fannie Lou Hamer and the Fourteenth Amendment/Secondary

Linda R. Monk and Charles R. Sass

Background

Although the Fourteenth Amendment promises "equal protection of the laws," that promise began to be fulfilled for black Americans only after the Supreme Court struck down segregated public schools in the 1954 case of *Brown v. Board of Education*. However, equal rights for blacks were not gained by court decisions alone. Thousands of people across the nation risked their lives—and some died—to make sure those court decisions were enforced. The civil rights movement is perhaps the best example in American history of citizens themselves enforcing a provision of the Constitution. Fannie Lou Hamer was not a plaintiff in any court decision, but as a civil rights worker she played an important role in securing "equal protection of the laws" for all Americans. By reading and discussing her story, students will gain a greater appreciation of the role of citizens in enforcing constitutional rights.

Objectives

In this lesson, students will:

- list and discuss the events and leaders of the civil rights movement of the 1960s;
- describe the efforts and accomplishments of Fannie Lou Hamer in advancing the cause of blacks in Mississippi and the nation;
- explain the relationship between the Fourteenth Amendment and the civil rights movement; and
- understand citizens' roles in enforcing constitutional rights.

Procedure

1. Begin by discussing the civil rights movement of the 1960s with your class. Remind students of the struggle of black Americans to gain the rights that had been denied them since Reconstruction. Discuss "Jim Crow" laws, school desegregation, Rosa Parks and the Montgomery bus boycott, lunch counter sit-ins, Dr. Martin Luther King, Jr., and the March on Washington, the Civil Rights Bill of 1964, and so forth.
2. Next, distribute the Student Handout and give students time to read the Fourteenth Amendment and the story of Fannie Lou Hamer. Students should write down their answers to the "Questions for Discussion" and be prepared to respond to those questions in class.
3. Discuss the Fourteenth Amendment and ask students what they think it means. Emphasize the importance of the amendment as it applied to the civil rights struggle. Then, ask students their feelings about the efforts of Fannie Lou Hamer. Contrast today's voter registration procedures with those of 1962. Conclude the discussion by asking students to respond to the "Questions for Discussion."

Optional Activity

This lesson can be expanded by organizing a role playing activity in which students portray characters in a voter registration office in Mississippi in 1962. Roles should include Hamer and several of her friends, one or two white voters who are seeking to register, members of the voter registration board, law enforcement officials, and so forth. Students should research their parts to plan what they might say or questions they might ask. Debrief by asking the class to express their feelings about what they just saw in the activity.

Additional Resources

For more activities and information on the Fourteenth Amendment and the civil rights movement, see the resource list on page 49.

Linda R. Monk and Charles R. Sass are on the academic publications staff at Close Up Publishing.

Student Handout

The Courage of Her Convictions: Fannie Lou Hamer

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

—Fourteenth Amendment (Section 1)

The youngest of 20 children of Mississippi sharecroppers, Fannie Lou Hamer (1917-1977) became a national leader of the civil rights movement. Her motto was, "I'm sick and tired of being sick and tired." In her autobiography, *To Praise Our Bridges*, Fannie Lou Hamer described when, at the age of 44, she first tried to register to vote:

> I . . . stayed on the plantation until 1962, when I went down to the courthouse in Indianola to register to vote. That happened because I went to a mass meeting one night.
>
> Until then I'd never heard of no mass meeting and I didn't know that a Negro could register and vote. . . . When [the civil rights workers] asked for those to raise their hands who'd go down to the courthouse the next day, I raised mine. Had it up high as I could get it. I guess if I'd had any sense I'd a-been a little scared, but what was the point of being scared. The only thing they could do to me was kill me and it seemed like they'd been trying to do that a little bit at a time ever since I could remember.

When she tried to register, Fannie Lou Hamer was forced to take a literacy test, in which she had to explain one of the 286 sections of the Mississippi state constitution. When whites took the test, they were often coached on their answers. Hamer failed the test, which asked about *de facto* laws. "I knowed as much about a *de facto* law as a horse knows about Christmas Day," she said later.

On the way home, police stopped the old school bus in which Hamer and others who had tried to register were riding. The police fined the driver $100 because the bus was "too yellow" and could be mistaken for a real school bus. The bus had often carried plantation workers without any trouble—until those same people wanted to vote.

When she returned home, Fannie Lou Hamer was forced to leave the plantation, and her husband was eventually fired. Hamer began to work as a civil rights organizer. As she said: "There was nothing they could do to me. They couldn't fire me, because I didn't have a job. They couldn't put me out of my house, because I didn't have one. There was nothing they could take from me any longer."

In 1963, Fannie Lou Hamer, on her third try, successfully registered to vote. She helped organize the Mississippi Freedom Democratic Party (MFDP) as an alternative to the all-white Mississippi Democratic Party. At the 1964 Democratic National Convention in Atlantic City, New Jersey, the MFDP sought to be seated as the official Democratic delegation from Mississippi.

Fannie Lou Hamer testified on national television. "If the Freedom Democratic Party is not seated now, I question America," she said. "Is this America, the land of the free and the home of the brave, where we have to sleep with our telephones off the hook because our lives be threatened daily, because we want to live as decent human beings in America?" Hamer also described beatings she had received for attending voter registration meetings. President Lyndon Johnson scheduled a news conference to interrupt Hamer's televised testimony because he feared it might endanger his chances for reelection.

Known for her powerful voice, Fannie Lou Hamer led the MFDP delegation in freedom songs on the convention floor. One reporter asked Hamer if she wanted equality with the white man. "No," she replied. "I don't want to go down that low. I want the true democracy that'll raise me and that white man up—raise America up." The MFDP delegates were not seated in 1964. But Fannie Lou Hamer ran for Congress in an MFDP counterelection to the regular Democratic primary. Although Hamer was not elected, the U.S. House of Representatives did investigate elections in Mississippi—and the federal courts eventually ruled them illegal. At the 1968 Democratic National Convention, Fannie Lou Hamer and her delegation from Mississippi were seated, to a standing ovation. From the cotton fields of Mississippi to the arena of national politics, Fannie Lou Hamer was sick and tired no more.

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Questions for Discussion

1. What did Fannie Lou Hamer mean by the following statements, and how did they motivate her actions?
   - "I'm sick and tired of being sick and tired."
   - "The only thing they could do to me was kill me and it seemed like they'd been trying to do that a little bit at a time ever since I could remember."
   - "There was nothing they could do to me. They couldn't fire me, because I didn't have a job. They couldn't put me out of my house, because I didn't have one. There was nothing they could take from me any longer."
2. How did Fannie Lou Hamer help achieve "equal protection of the laws" for all Americans?
3. The great American jurist, Learned Hand, once said: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it." What did Judge Hand mean? How would he have reacted to the story of Fannie Lou Hamer? What is the role of courts in enforcing constitutional rights? What is the role of citizens?

Equal Protection

The Struggle for Equality/Secondary **Mary Louise Williams**

UPI/Bettmann Newsphotos

Rationale

Americans have had three opportunities to deliberately create their own constitutional order based on what they perceived to be a just society. The first was the American Revolution and the subsequent ratification of the Constitution. The second was Reconstruction with the ratification of the Fourteenth Amendment. The third was the Second Reconstruction or the Civil Rights Movement of the mid-twentieth century testing the meaning of the Fourteenth Amendment. This lesson traces the legal evolution toward a just society from 1865 to 1965 through congressional acts and Supreme Court decisions from this period. Students, using bar graphs to quantitatively define their perceptions, will assess the advances toward (and retreats from) economic, political/legal, and social equality for black Americans.

Objectives

1. To understand the content of the Fourteenth Amendment
2. To interpret how congressional acts and Supreme Court decisions have either advanced or regressed equal rights for black Americans.
3. To assess causes for the retreat from and advances toward equality.
4. To evaluate the role of the Fourteenth Amendment in the struggle for equality.

Procedure

1. Prior to Class: Duplicate handouts. Prepare butcher paper or transparency as a master copy of the bar graph (Handout 3, page 21).
2. Introduction to the Lesson: Stimulate interest by asking the following questions:
   a. What does it mean to have rights? Are they different from privileges?
   b. What privileges or rights go with citizenship?
   c. What is the difference between civil rights and civil liberties?
   d. How were/are voter qualifications set? in the nineteenth century? in the twentieth? at present?
3. Divide the class into groups of three or more. Write on the board in three columns the following: "Brainstorm" and list your __________ (use the lists on the next page as a guide).

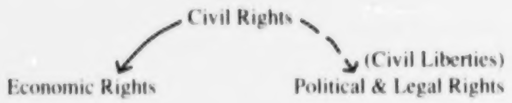
2639

Economic Rights	**Political & Legal Rights**	**Social Rights**
make contracts	give evidence	marry and intermarry
sue and be sued	sue and be sued	access to public accommodation
own real & personal property	hold public office	access to public transportation
protection of property	protection of person	free access to education
inherit	jury duty	worship where and when you please
buy and sell property	voting	

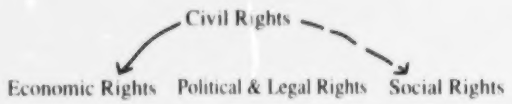
List and clarify the students' responses on the board.

4. Explain the following:
   Civil liberties have historically meant the Bill of Rights. Nowadays civil rights and civil liberties mean pretty much the same thing; they are used interchangeably. But in the 1860s the term "civil rights" had a different meaning. It meant basically one's economic pursuits. The protection was not only from other individuals but from the government as well. Political rights were not civil rights because they were considered to be privileges rather than rights. Social rights were a matter of personal taste and prejudice. No one considered it governmental business to be concerned with discrimination based on color, sex, etc. The Thirteenth Amendment really is the beginning of modern civil rights law and policy according to constitutional historian Herman Belz. Therefore, one can begin to see the development as it takes place in the twentieth century from its beginnings in the nineteenth:

19th Century



Mid-20th Century



5. Give each student Handout 1, the Student Background Information. Go over in class for understanding. Ask if the Thirteenth Amendment granted any rights. Point to the bar graph and explain that it did not. So there is no advance. Point out that the Civil Rights Act of 1866 has been done for them as an example. Go over and discuss whether they agree with the placement on the bar graph. Point out that it is subjective.

   Distribute Handout 2 (Primary Sources) and Handout 3 (Bar Graph). Explain that in their groups they will read the congressional acts or Supreme Court decisions. To which point on the bar graph was the economic, political/legal or social right extended because of that act or decision? After marking their graph they should be able to explain their placement. It means weighing the rights granted to the blacks against those which the students understand to be full rights or equality. Go over together in class coloring the master bar graph for comparison and discuss.

6. Debriefing: You will want to ask follow-up questions such as:
   a. What were the causes for the advances and retreats?
   b. Which of the areas of civil rights is basic to others?
   c. Which is seemingly the most difficult to obtain?
   d. How would you assess the role of the Fourteenth Amendment in achieving equality? Is the struggle for equality over?

REFERENCES

Belz, Herman. *Emancipation and Equal Rights.* (1978). New York: W.W. Norton & Co.

Cushman, Robert F. *Leading Constitutional Decisions,* 17th ed. (1987). Englewood Cliffs, New Jersey: Prentice-Hall, Inc.

Hyman, Harold M. and William M. Wiecek. *Equal Justice Under Law.* (1982). New York: Harper & Row.

Kelly, Alfred H., Winfred Harbison and Herman Belz. *The American Constitution,* 6th ed. rev. (1983). New York: W.W. Norton Co.

Liberman, Jethro K. *The Enduring Constitution, A Bicentennial Perspective.* (1987). New York: The West Publishing Co.

Olsen, Otto H., ed. *Reconstruction and Redemption in the South.* (1980). Baton Rouge: Louisiana State University Press.

Peck, Robert S. *We the People, The Constitution in American Life.* (1987). New York: Harry N. Abrams, Inc. in cooperation with KQED, Inc., and The American Bar Association.

Quarles, Benjamin. *The Negro in the Making of America.* (1964). New York: Collier Books.

Woodward, C. Vann. *The Strange Career of Jim Crow.* (1966). New York: Oxford University Press.

Student Handout 1

STUDENT BACKGROUND INFORMATION

The Civil War destroyed an old economic system in the United States based on Negro slavery. The Thirteenth Amendment had freed the slaves. It had not, however, given blacks citizenship or any defined rights. This would have to be done in order to provide real freedom. True freedom, according to constitutional historians Harold M. Hyman and William Wiecek, is legal protection of person, property and rights. Without rights and legal protection of those rights, the blacks would be free in name only.

The idealists and the Radical Republicans had hoped to transform the nation during Reconstruction into a just society. The question for them was how to best secure rights for the blacks and to protect these rights. They were concerned about the state governments because it was to state governments that most people looked for governmental functions and rights. Federal power had been interpreted narrowly so that Washington, D.C. seemed not

2610

only remote but unreliable. But, anything less than federal protection of rights would leave the blacks to the mercies of the states. They knew the southern states would attempt to re-enslave the blacks, if not legally then economically.

States also determined voter qualifications. Article I, Section 2 gave this power to the states. If a person was eligible to vote in state elections, then he was eligible to vote in federal elections. States had historically denied suffrage (the right to vote) and political participation in the early years to all but white, male property owners. As this changed to include more white males over 21, free blacks and women were still being excluded from the political process. When the Fourteenth Amendment was ratified in 1868, the Supreme Court then had the right to determine on the national level matters concerning citizenship. It made the federal government the source of citizenship as well as the states. The idealists believed they could use the federal laws to ensure the protection of the civil rights being granted to blacks and to protect their citizenship. But what was citizenship?

In 1868 it was unclear as to what was meant by citizenship. It is not totally clear today. Chief Justice Earl Warren once defined citizenship as "man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and here remains a stateless person disgraced and degraded in the eyes of his countrymen."

Through the Fourteenth Amendment, citizenship had been granted to the blacks. As a matter of fact, dual citizenship had been granted. As a citizen of both the state in which he lived and the nation, he enjoyed equal protection of the laws, immunities and privileges, and due process of law. And what about voting rights? Frederick Douglas felt that the minimum right for adequate protection was to have legal remedies through access to the courts and the voting booth. He shared this view with a number of others concerned about the ultimate withdrawal of federal troops from the South. As a result, the Fifteenth Amendment was ratified giving black men the right to vote. This granting of civil rights was the new congressional redefinition of a just society which included black men.

The promise of economic security and political equality was now in legal existence. The budding promise for a just society was unfolding. What happened? Why did it take the Second Reconstruction of the twentieth century before the emergence of true equality could begin? The following exercise will enable you to understand what happened in the struggle for a just society based on equality.

Student Handout 2

PRIMARY SOURCES—CONGRESSIONAL ACTS AND SUPREME COURT DECISIONS

1. AMENDMENT XIII (1865)

   SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
   SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

2. THE CIVIL RIGHTS ACT (April 9, 1866)
   Shortly after the Civil War was over several southern states, acknowledging the destruction of slavery within their borders, attempted to define what rights the newly freed blacks would have. As a result, several southern states passed what were called Black Codes. These codes were harsh, thinly disguised attempts to re-enslave the newly freed Negro. The Republican Congress passed a federal law to nullify these infamous "Black Codes." The result was the Civil Rights Act of 1866 which was an attempt to define the civil rights belonging to the newly freed blacks. Most of its provisions were written into the Fourteenth Amendment two years later.

   An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication
   BE IT ENACTED, that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same rights, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease,sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties to none other . . .

   The act went on to state that any person who tried to deprive the newly freed blacks of their rights would be charged with a misdemeanor, and if convicted, punished by a fine of not more than $1,000 or one year in jail or both. The case would be heard in the United States federal district courts.

3. AMENDMENT XIV (1868) (relevant section only)
   The Fourteenth Amendment "nationalized citizenship" which had previously been the domain of the states. States had up until this time defined who could be a citizen. It guaranteed "privileges and immunities," a process due its citizens, and it mentioned equality for the first time in the Constitution. Citizens were to be protected equally.

   SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

   AMENDMENT XV (1870)
   It soon became apparent that the Fourteenth Amendment was not going to secure the right to vote for the newly freed blacks, a right that Frederick Douglas had felt was the minimum for protecting other rights. Congress, therefore, attempted to remedy this with a constitutional amendment. In order to make the amendment *effective*, Congress also passed the "Enforcement Act" which sought to get rid of procedures and technicalities for registering and voting that would intimidate the blacks.

   SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
   SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

4. THE SLAUGHTER-HOUSE CASES, 16 Wallace 36 (1873)

A corrupt Louisiana legislature passed a bill in 1869 which established a monopoly for the Crescent City Stock Landing and Slaughterhouse Company. This meant that all livestock had to go through this company to be slaughtered and over a thousand butchers and livestock dealers were simply left out of the butchering business. The butchers and dealers filed suit under the Thirteenth Amendment prohibition of involuntary servitude and the Fourteenth Amendment privileges and immunities clause. The case went to the Supreme Court where, for the first time, "privileges and immunities" of U.S. citizens were defined. The Court stated that the Thirteenth Amendment protected former slaves but did not grant any more rights to the whites.

Decision:

> This court is thus called upon for the first time to give construction of these articles [Amendments 13, 14 and 15] . . . the one pervading purpose in them all . . . [is] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedman and citizen from the oppression of those who had formerly exercised unlimited dominion over him . . . . [T]here is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, ... Of the privileges and immunities of the citizen of the United States, and . . . of the citizen of the State it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter . . . are not intended to have an additional protection by this paragraph of the amendment.
>
> Was it the purpose of the Fourteenth Amendment . . . to transfer the security and protection of all the civil rights . . . from the States to the federal government? . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? . . . . [T]he effect is to fetter and degrade the state governments by subjecting them to the control of Congress . . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislature of the States which ratified them . . . . Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the federal government.

And what were these national rights?

> To come to the seat of government to assert any claim . . . to seek its protection . . . to demand the care and protection of the Federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government . . . .

In other words, neither the Thirteenth nor the Fourteenth Amendment could help the butchers because they were meant for the protection of the newly freed slave. The Fourteenth did not extend the butchers' rights as citizens; therefore, they would have to go back to state courts for remedy. As for protection of citizenship rights for blacks, since the states granted the political, social, and economic rights, the states would have to protect those rights. The federal government had no power to protect those. But the federal government could protect the rights of blacks while on the high seas!

5. THE CIVIL RIGHTS ACT (March 1, 1875)

> *An Act to protect all Citizens in their Civil and Legal Rights*
>
> Whereas, it is essential to just government, we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, or whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,
>
> BE IT ENACTED, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and to other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Any person who violated the law was subject to conviction of a misdemeanor which carried punishment of fine and or imprisonment. The federal district courts had jurisdiction to hear these cases.

6. UNITED STATES v. CRUIKSHANK, 92 U.S. 542 (1876)

Fraud and intimidation were used in the elections of 1872. The governorship of Louisiana was in question. Also, in Grant Parish, the Democrats and Republicans were contesting the sheriff's race. When President Grant recognized the Republican candidate as the winner, rifles were sent to the new governor to arm the Republican sheriff and his nearly all black followers. The all white supporters of the Democratic contender attacked the Colfax Courthouse where the Republicans were holding out. At least 69 black Republicans were killed in the rout; 20 of these were murdered the night after the battle.

Nine white men, among whom was a William B. Cruikshank, were put on trial for having violated the "Enforcement Act" which was passed in 1870 to make the voting rights guaranteed in the Fifteenth Amendment effective. It was charged that these white men had conspired to intimidate blacks to prevent them from exercising their constitutional rights. Four were convicted and the case went to the Supreme Court. In its decision, the Supreme Court dealt a serious blow to the effectiveness of the Fourteenth Amendment in protecting the citizenship rights of blacks.

Decision:

> [The Fourteenth Amendment] adds nothing to the rights of one citizen as against another. It simply furnishes an additional guarantee against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society . . . . The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been . . . .
>
> . . . . [I]t does not appear that it was their (Cruikshank and the three others) intent to interfere with any right granted or secured by the Constitution or law . . . although [w]e may suspect that "race" was the cause of the hostility; . . . .

So, the Fourteenth Amendment added no new civil rights, but it did prohibit the denial by the states of existing rights if you already had them. It was then left up to the states to prevent the denial of civil rights by individuals. And those individuals knew that state authorities couldn't or wouldn't interfere in their intimidation of black voters.

7. CIVIL RIGHTS CASES, 109 U.S. 3 (1883)

In 1877, federal troops were withdrawn from the South ending the regime of the carpetbaggers. It also was the beginning of the end of any political and social equality blacks had enjoyed during the period of Reconstruction. The South began to use intimidation and fear to recapture political control. Social equality had already been

2042

eroded through Jim Crow practices during the later Reconstruction period. The term "Jim Crow" had come to mean the practice of segregation of blacks. The term was thought to have come from a song performed by a minstrel. Whatever the origin, it meant separateness, segregation, a black's "place." During the 1880s, these practices were transformed into rigid codes which had the force of law behind them. It became racial ostracism sanctioned by law which extended to housing and jobs, churches and schools, eating and drinking, sports and play, public transportation, prisons and orphanages, hospitals, the armed forces, funeral homes and cemeteries.

Jim Crow also extended into the polling places where residence requirements, poll taxes, the ability to read and interpret sections of state constitutions, etc. became a means of denying voting rights to blacks. But would Jim Crow hold up against the Fourteenth Amendment and its protection of black citizenship rights? Only the Supreme Court could answer that. And, indeed the Court did in the following two cases – the Civil Rights Cases and *Plessy v. Ferguson.*

The Civil Rights Act of 1876 had not only struck down as unconstitutional any state law that discriminated but it attempted to get at private acts of discrimination. Six cases went before the Supreme Court to be heard together all involving black patrons. The first case involved a refusal of admission to the Grand Opera House in New York City. The others involved refusals to serve food, to rent hotel lodging, to be seated in the ladies car of a train and the dress circle of a San Francisco theater. In an 8-1 decision, the Supreme Court struck down as unconstitutional the most important parts of the Civil Rights Act of 1875. The Court could find nothing in the Thirteenth and Fourteenth Amendments to give authority to the act.

Decision:

> Rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws . . . .The wrongful act of an individual . . . is simply a private wrong, or a crime of that individual; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.

If one were discriminated against, one would have to go to the state for a correction of the wrong. The states had been the problem in the first place, which is why the Fourteenth Amendment was enacted.

> It would be running the slavery argument in the ground to make it apply to every act of discrimination which a person may see fit to make as to the guest he will entertain or as to the people he will take into his cab . . . .Mere discrimination on account of race or color was not regarded as badges of slavery . . . .On the whole we are of the opinion that no . . . authority for the passage of the law in question (the Civil Rights Act of 1876) can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned . . . .

Justice John Marshall Harlan delivered a dissenting opinion. He denied the lack of authority in the Thirteenth and Fourteenth Amendments.

> Exemption from race discrimination in respect of the civil rights which are fundamental in citizenship in a republican government is . . . a new right, created by the nation, with express power in Congress, by legislation, to enforce the constitutional provision from which it is derived.

He went on to stress that the states still have the same authority to define and regulate civil rights. But now its exercise is the subject of enforcement through the national government to make sure that exemption of citizens from discrimination is protected. Harlan referred to the Commerce Clause, leaving open a suggestion that would be taken up by a more determined people in a more determined time.

> Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the States . . . .I suggest, that it may become a pertinent inquiry whether Congress may in . . . its power to regulate commerce among the States enforce . . . equality of rights, without regard to race, color or previous condition of servitude . . . .

8. PLESSY v. FERGUSON, 163 U.S. 537 (1896)

Jim Crow laws spread rapidly through the South after 1887. The question was, were they constitutional because of Supreme Court interpretations of the meaning of the Thirteenth and Fourteenth Amendments? In 1891, the "Citizens' Committee to Test the Constitutionality of the Separate Car Law" formed in Louisiana. It was composed of a group of black citizens determined to test the Jim Crow laws, in particular the Jim Crow Car Act of 1890 which required "separate accommodations for the white and colored races" and prohibited either race from sitting in the seats of the other. Homer Plessy, who was one-eighth black and could pass for white, boarded the East Louisiana Railroad in New Orleans and sat down in the white-only coach. He refused to leave when asked to do so and was arrested and convicted of violating the Jim Crow Car Act. The case went to the Supreme Court. There the Court upheld not only the act but the idea that separate but equal was constitutional.

Decision:

> The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality or a co-mingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, ... [W]e cannot say that a law which authorized or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures . . . . [T]he underlying fallacy [is] in the assumption that the enforced separation of the two races stamps the colored race with the badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it . . . .If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals . . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

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Justice John Marshall Harlan dissented with one of the most quoted ideas in constitutional history:

> . . . these two amendments [Thirteenth and Fourteenth] if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship . . . . The white race deems itself to be the dominant race in this country . . . . But in the view of the Constitution, in the eye of the law, there is . . . no superior, dominant, ruling class of citizens . . . . Our constitution is colorblind, and neither knows nor tolerates classes among citizens. With respect to civil rights, all citizens are equal before the law.

9. THE CIVIL RIGHTS ACT OF 1964

As a result of Supreme Court decisions, such as the Civil Rights Cases of 1883 which gave support to Jim Crow laws, segregated society became fact in America. In 1896, *Plessy v. Ferguson* cemented the practice with its "separate but equal" decision. Therefore, there were separate schools, drinking fountains, waiting rooms, sections on trains and buses, graveyards, mortuaries, churches, even separate armies fighting common enemies in World War I and II. For all practical purposes, their economic, political/legal and social rights were non-existent. White America had forgotten blacks were even here. And when whites did remember, it was to participate in lynchings, acts of intimidation, humiliation, and degradation.

During the New Deal era, Eleanor and President Roosevelt took steps to force white America to remember its black citizens, the segment of the society hardest hit by the Depression. Blacks were appointed to senior government posts and relief was fairly apportioned to the one out of two unemployed black workers.

President Harry Truman made the first assault on civil rights issues with his Justice Department. It entered cases, filed by the NAACP (National Association for the Advancement of Colored People), as a "friend of the court." Truman forbade segregation in the military and ordered an end to racial discrimination in federal employment and government contracting.

The historic ending of school segregation came with *Brown v. Board of Education* in 1954. Blacks ended segregation on buses in Montgomery, Alabama, with a boycott. Student sit-ins at segregated lunch counters attacked segregation in public eating places. The University of Mississippi, traditionally a bastion of white supremacy, was forced to admit James Meredith, its first black student. Dr. Martin Luther King, Jr. led a peaceful march of a quarter of a million people to Washington, D.C., and spoke eloquently for the cause of black citizens. The date was August 1963. White America had become profoundly aware of black America.

But no major legislation dealing with civil rights had been enacted for over 82 years. In June 1963, President John F. Kennedy called on Congress to provide legislation to address all forms of individual discrimination. Its stated purpose was "to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations, . . . to enforce the provisions of the Fourteenth and Fifteenth Amendments, to regulate commerce among the several states . . . ."

President Kennedy was assassinated in November. President Johnson, returning from Dallas shortly after taking the oath of office, decided on Air Force One to go "all the way" on civil rights. Five days after the assassination, he told a joint session of Congress that passage of the Civil Rights Act would be the greatest tribute they could make to honor President Kennedy's memory. The Civil Rights Act of 1964, 78 Stat. 243, Pub.L. No. 88-352, was signed into law on July 2, 1964. Since Title II is the part of the act that was constitutionally challenged, that is the relevant part provided here.

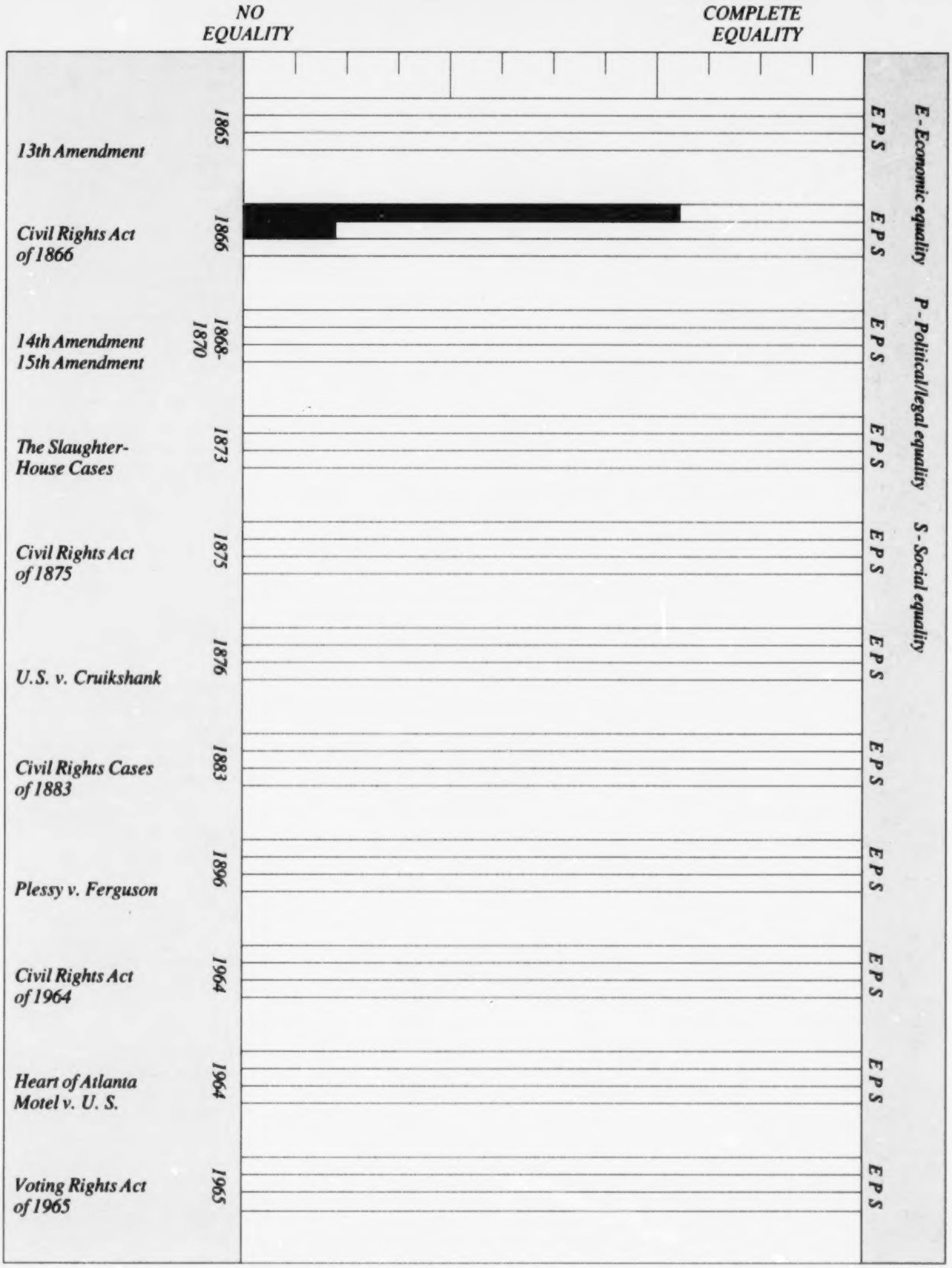
> SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, . . . which provides lodging to transient guests, other than an establishment . . . which contains not more than five rooms for rent . . . and which is actually occupied by the proprietor . . . as his residence;
>
> (2) any restaurant, cafeteria . . . ;
>
> (3) any motion picture house . . . ;
>
> (c) . . . "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State . . . .

10. THE HEART OF ATLANTA MOTEL v. THE UNITED STATES, 379 U.S. 241 (1964)

The appellant, the owner of a large motel in Atlanta, Georgia, sued to have Title II of the Civil Rights Act of 1964 struck down as unconstitutional. The owner restricted his clientele to white persons, three-fourths of whom were interstate travelers. He had 216 rooms available to transient guests and was conveniently located near two interstate highways and two state highways. There was national advertising to solicit business through national magazines and 50 billboards and highway signs within the state. Approximately 75% of the motel's registered guests were from out of state which included convention trade. The appellant maintained that Title II of the Act exceeded Congress' power to regulate commerce and thus violated the Commerce Clause under Article I, Section 8, clause 3; that the Act violated the Fifth Amendment by taking liberty and property without due process of law and just compensation; and that by having to rent available rooms to Negroes against his will, he was being subjected to involuntary servitude in violation of the Thirteenth Amendment.

Decision: The Supreme Court upheld Title II of the Civil Rights Act of 1964 as constitutional, a valid exercise of Congress' power under the Commerce Clause as applied to a place of public accommodation serving interstate travelers. It pointed out that the decision handed down in the civil rights cases of 1883 was not applicable because the "Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power." They determined that the test

Student Handout 3



Event	Year	Equality
13th Amendment	1865	E P S
Civil Rights Act of 1866	1866	E P S
14th Amendment *15th Amendment*	1868-1870	E P S
The Slaughter-House Cases	1873	E P S
Civil Rights Act of 1875	1875	E P S
U.S. v. Cruikshank	1876	E P S
Civil Rights Cases of 1883	1883	E P S
Plessy v. Ferguson	1896	E P S
Civil Rights Act of 1964	1964	E P S
Heart of Atlanta Motel v. U. S.	1964	E P S
Voting Rights Act of 1965	1965	E P S

2645

of the exercise of the power of Congress under the Commerce Clause is simply "whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest."

The Court then proceeded to prove that denying people accommodations in motels because of race fell under the definition in that of "approximately 20,000,000 Negroes in our country," many are able to, and do, travel among the states in automobiles.

Congress also considered this a "moral problem" as well. In a concurring opinion, Justice Goldberg pointed out that the purpose of the act was to solve the problem of "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollar and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues."

Through concurring opinions, the Thirteenth and Fourteenth Amendments were again focused upon as constitutional authority against discrimination. Justice Douglas stated, ". . .our decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person . . .to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate. . . ." In addition, it was pointed out that the Thirteenth Amendment was to be regarded as "additional authority" for the legislation.

Civil rights legislation dealing with individual discrimination had thus come full circle. The Fourteenth Amendment had once again become the constitutional centerpiece in the struggle for social equality.

11. THE VOTING RIGHTS ACT OF 1965

For over fifty years blacks in the South were denied access to what Frederick Douglas called the most minimum right – voting. Congress and the President tried to enact legislation during the 1950s and early 1960s that would force the South to give the vote to its black citizens. The Civil Rights Act of 1957 made it a federal offense to interfere with a citizen's right to vote in federal, state, or local elections. It didn't solve the problem. The Civil Rights Act of 1960 further strengthened the '57 law by allowing the federal government to sue states for failure to allow voter registration of blacks. Then Title I of the Civil Rights Act of 1964 made a sixth-grade education in English a basis for voter literacy. It was a means of attacking the literacy test southern states used to keep blacks from registering. The '64 law also threw out trivial reasons such as spelling errors for denying a person's registration. The same year the poll tax was targeted through the Twenty-Fourth Amendment to the Constitution, ratified January 23, 1964, which states:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The most important and most sweeping advance came when President Lyndon Johnson sent to Congress on March 17, 1965, a voting rights bill aimed at removing the rest of the obstacles to black voter registration and voting rights.

> *An Act to enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes.*
> BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, That: This Act shall be known as the "Voting Rights Act of 1965."
> SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Congress stated in the "Purpose of the Legislation" that the bill was

> designed primarily to enforce the Fifteenth Amendment to the Constitution of the United States and is also designed to enforce the Fourteenth Amendment and Article I, Section 4. To accomplish this . . . the bill (1) suspends the use of literacy and other tests in areas where . . . these tests and devices have been and are being used to deny the right to vote on account of race or color; (2) authorized the appointment of Federal examiners in such areas to register persons who are qualified; (3) empowers the Federal courts . . . to enforce the guarantees of the Fifteenth Amendment . . . (4) provides criminal penalties for intimidating, threatening, or coercing any person for voting or attempting to vote. Upon the basis of finding that poll taxes as a prerequisite to voting violate the Fourteenth and Fifteenth Amendments to the Constitution, the bill abolished the poll tax in any State or subdivision where it still exists.
>
> SEC. 4. (e) (1) Congress hereby declares that to secure the rights under the Fourteenth Amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

In the following 10 years literacy tests were permanently abolished. The number of black voters in the South increased by 2 million. The number of black elected officials increased from 100 to nearly 1,000. And these numbers have steadily increased since that time. Additional laws were passed that protected the voting rights of "language minorities." This means in some states bilingual elections are held where there are significant numbers of American Indians and Hispanics. In New Mexico, for example, election information is printed in both English and Spanish, and Navajo on their reservation.

The Fourteenth Amendment has been the basis for countless laws passed and legal challenges made in an ongoing struggle to define equality. Perhaps there is a good reason for this struggle. Is an understanding of equality fundamental to achieving a *just* society?

Mary Louise Williams is a staff member and education consultant for Project Crossroads, a non-profit education organization in Santa Fe, NM. She serves as a mentor teacher/education consultant for the Los Alamos Public Schools and is Chairman of the Advisory Council of the New Mexico Law-Related Education Project.

Congreſs OF THE United States

begun and held at the City of New-York, on
Wednesday the Fourth of March, one thousand seven hundred and eighty nine

THE Conventions of a number of the States having at the time of their adopting the Constitution, expreſsed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution

RESOLVED by the Senate and House of Representatives of the United States of America in Congreſs aſsembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congreſs, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Article the first ... After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congreſs, that there shall be not leſs than one hundred Representatives, nor leſs than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congreſs, that there shall not be leſs than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second ... No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Article the third ... Congreſs shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the preſs; or the right of the people peaceably to aſsemble, and to petition the Government for a redreſs of grievances.

Article the fourth ... A well regulated militia, being neceſsary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Article the fifth ... No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article the sixth ... The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article the seventh ... No person shall be held to answer for a capital, or otherwise infamous crime, unleſs on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witneſs against himself, nor be deprived of life, liberty, or property, without due proceſs of law; nor shall private property be taken for public use without just compensation.

Article the eighth ... In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witneſses against him; to have compulsory proceſs for obtaining witneſses in his favor, and to have the aſsistance of counsel for his defence.

Article the ninth ... In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article the tenth ... Exceſsive bail shall not be required, nor exceſsive fines imposed, nor cruel and unusual punishments inflicted.

Article the eleventh ... The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth ... The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ATTEST

Frederick Augustus Muhlenberg Speaker of the House of Representatives
John Adams, Vice President of the United States, and President of the Senate.

John Beckley, Clerk of the House of Representatives.
Sam. A. Otis Secretary of the Senate.

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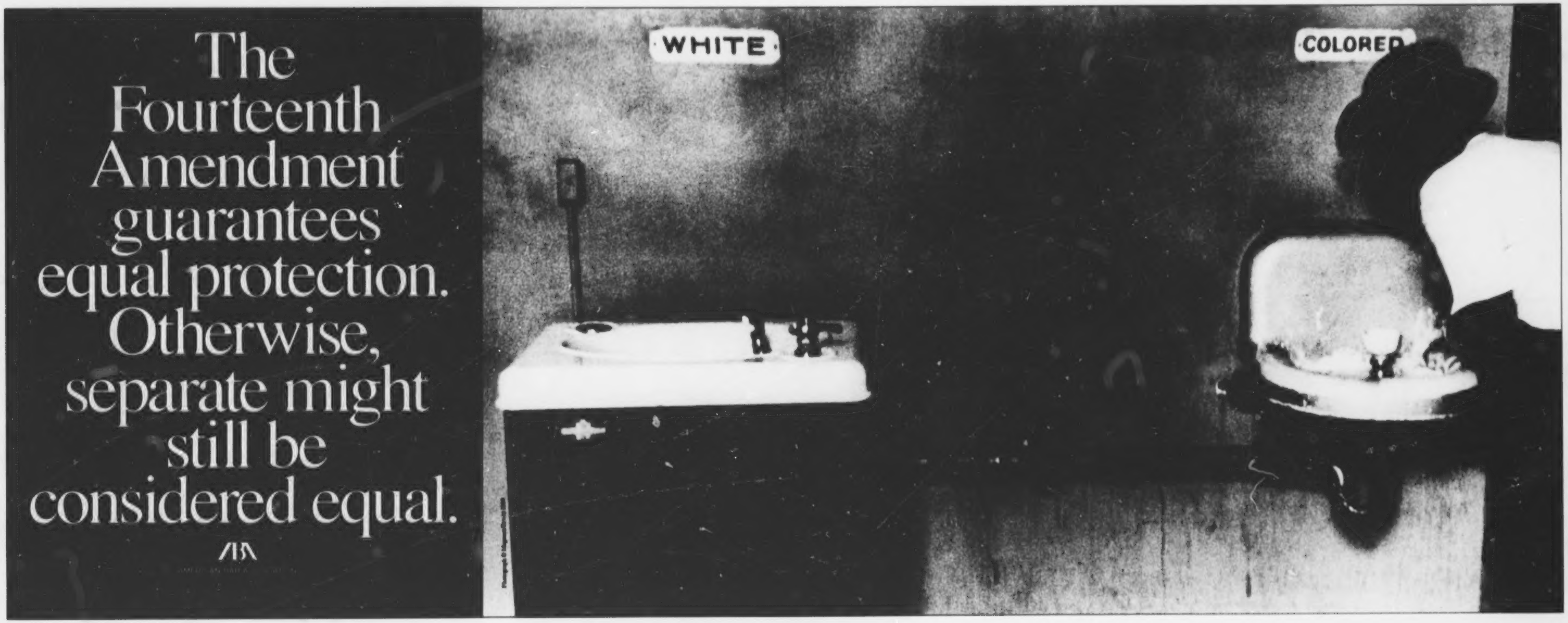
The Fourteenth Amendment guarantees equal protection. Otherwise, separate might still be considered equal.
ABA
WHITE
COLORED

This poster is one of a series designed for the ABA's public service advertising campaign commemorating the Bill of Rights bicentennial. A full size (11" x 28") version of this poster, printed on heavy paper and suitable for framing, is available from the ABA for $4.95 each; specify PC#468-0030. The complete five poster set (PC#468-0035) is also available for $19.95. Shipping and handling charges apply to each purchase. To order or for more information, contact ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611; (312) 988-5555.

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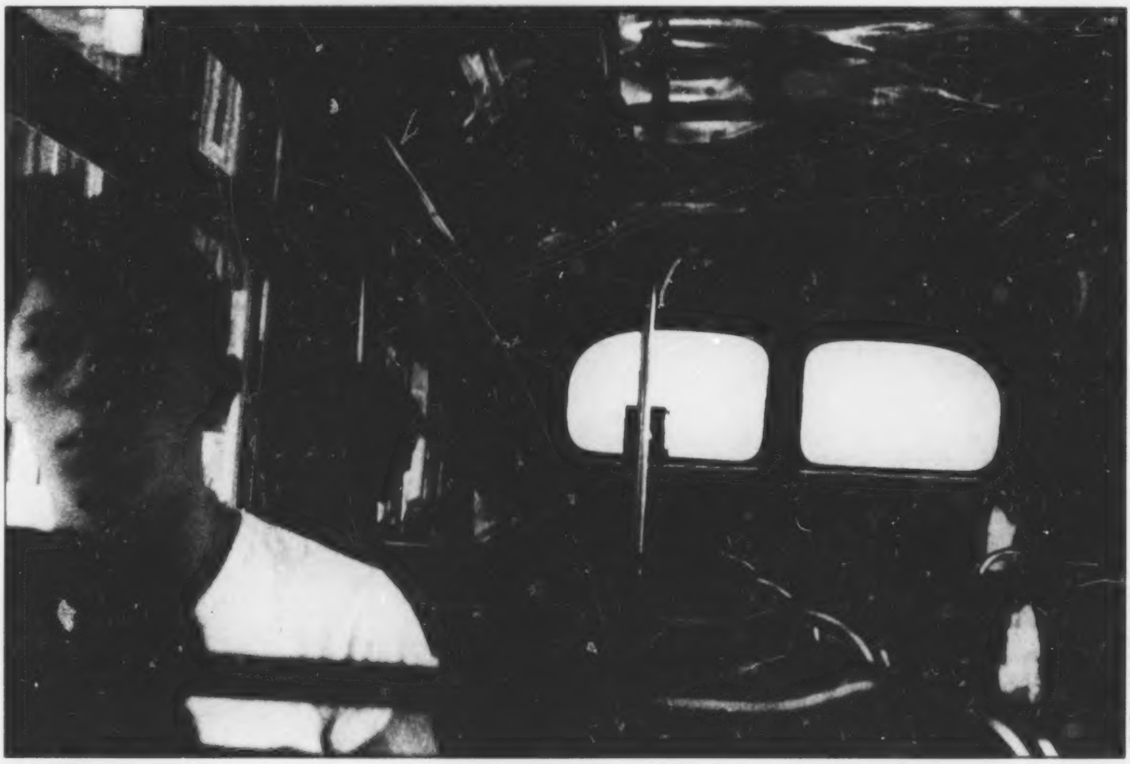
Equal Protection

Different Treatment for Different Folks?/Middle **David T. Naylor**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Background

The quest for equality is one of the salient themes of American history. The Declaration of Independence boldly asserts that "all men are created equal" but no such phrase appears in the Constitution of the United States. Neither the Constitution drafted in 1787 nor the Bill of Rights which was added in 1791 even include the word equality much less provide a specific guarantee of it. But, during the two centuries since then, much has changed. The heroic efforts of African-Americans, women, and others to throw off the shackles of law-sanctioned discrimination and segregation have helped to make the concept of equality a cornerstone of our legal system and more of a reality in the lives of all Americans.

The poster in this issue showing two drinking fountains, one labelled "white" and the other "colored," is a vivid reminder of just how recently law-sanctioned segregation was a fixture of American life. It is also a compelling reminder of how much of an anachronism this scene has become. In contrast to many parents and teachers, students in school today have not experienced *de jure* segregation. Many students are unfamiliar with such scenes and practices and the struggles which led to their abolition. Yet that knowledge is a vital part of understanding the growth and development of this country and its way of life. Students need to understand this part of our nation's history. It is too significant to ignore. The "separate fountains" poster is an appropriate vehicle for initiating such a unit.

An important question suggested by the poster is whether or not the Equal Protection Clause of the Fourteenth Amendment requires all people to be treated in the same manner. Many students (and adults) are likely to be under the impression that the Equal Protection Clause prohibits differential treatment. That impression, however, is incorrect. The clause does *not* require identical treatment for all persons in all situations. Legal distinctions are possible and even desirable, for in some circumstances treating all people the same is inherently unequal. Controversy occurs when persons allege they are being treated differently than others.

This sample lesson is intended to be an introductory lesson for a unit focusing on the concept of equal protection, the practice of differential treatment under law, and the legal tests that have been developed for determining if and when differential treatment violates the Equal Protection Clause of the Fourteenth Amendment. Teachers interested in developing this type of unit will find useful background information and teaching ideas in back issues of *Update*, especially the Fall 1988, Winter 1988, and Fall 1981 issues.

Procedure

1. Display the "separate fountains" poster in a prominent place in the room. Without identifying the source, post the following words from the Declaration of Independence beneath the poster: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."
2. Begin class by calling attention to the poster and asking questions related to the scene it depicts (e.g., What do you notice about this scene? Why are the two fountains so close together? What is the purpose of the signs above the fountains? Why would someone feel it was necessary to post these signs?)
3. Direct attention to the words from the Declaration of Independence that you have placed beneath the poster. Ask students first to identify the source of the words and then to suggest possible explanations accounting for the disparity between those words and the what is shown in the poster.
4. Explore differences between the Declaration of Independence and the Constitution of the United States (e.g., why each was written, when each was written, what each contains), especially the legal authority of each. Emphasize the difference between the moral force of the Declaration of Independence and the legal force of the Constitution of the United States.
5. Redirect student attention to the poster of the two fountains. Explain how the scene illustrates the "separate but equal" doctrine. Point out that racial segregation was constitutionally permissible under the "separate but equal" doctrine from 1896 to 1954. Since then, *de jure* racial segregation (i.e., under the sanction of law) has been unconstitutional. The scene depicted in the poster would not be legally permissible today.
6. Use a current newspaper article or situation dealing with a current equal protection situation to focus student attention on the question of whether the Constitution requires all people to be treated the same in similar situations. Discuss student reactions. Then distribute a copy of the exercise, "Is This Legal?", to each student. Explain what it is and how to complete it.
7. Tally student responses. Initiate discussion by selecting items where the most disagreement appears. Call on students to explain their positions.
8. Have students look at the items in the exercise. This time, ask them to identify the basis for differential treatment (e.g., gender, age, race, physical condition) used in each item. Record responses.
9. Divide students into groups. Give each group one of the categories used in the exercise for differential treatment. Have each group develop reasons for making the distinction on this basis.
10. Ask each group to share the reasons identified. Record them. Then have students compare and contrast the reasons given and why those reasons may be alike or different for the various categories.
11. Point out that our courts have developed a series of tests for determining when groups of people may be treated differently. Indicate that distinctions made on the basis of race, national origin or alien status or affecting groups with a history of unequal treatment are the most difficult to sustain.
12. Conclude by reviewing the main points covered in the lesson. Indicate that the next lesson will involve examples of differential treatment and how our courts have dealt with them (i.e., the tests used and examples of how they apply).

IS THIS LEGAL?

Instructions: Each of the following situations involves a rule or law requiring one group of people to be treated differently than another group. For each situation, circle "LEGAL" if you believe it is legally permitted or "ILLEGAL" if you believe the situation is not legally permitted. Be prepared to explain the reasons for your decisions.

LEGAL ILLEGAL 1. Setting a minimum age for purchasing cigarettes.

LEGAL ILLEGAL 2. Not letting girls play on the high school varsity football team.

LEGAL ILLEGAL 3. Forbidding smoking in public buildings and areas.

LEGAL ILLEGAL 4. Prohibiting women in the armed services from serving in combat.

LEGAL ILLEGAL 5. Establishing public elementary school classrooms that enroll only African-American boys. No others are permitted.

LEGAL ILLEGAL 6. Requiring nonresidents to pay higher tuition at state universities than residents of the state.

LEGAL ILLEGAL 7. Maintaining separate courts for young people and adults.

LEGAL ILLEGAL 8. Barring children with AIDS from attending the public schools.

LEGAL ILLEGAL 9. Hiring only teachers who are Republicans to teach in the local school district.

LEGAL ILLEGAL 10. Specifying that at least 25% of all city construction contracts be awarded to minority-owned and minority-run businesses.

LEGAL ILLEGAL 11. Not letting girls become boy scouts.

LEGAL ILLEGAL 12. Letting people who own houses pay less taxes than people who do not own houses.

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Equal Protection

Prejudice and Equality/Elementary **Arlene F. Gallagher**

COLORED
WAITING ROOM
INTRASTATE PASSENGERS

UPI/Bettmann Newsphotos

No government can prevent people from being prejudiced but the Fourteenth Amendment guarantees equal protection for persons within the jurisdiction of the United States. In this way, people are prevented from using the law to legitimize their prejudices. The purpose of this strategy is primarily to present a context for discussion and examination of prejudice and discrimination building to the Supreme Court's decision in *Brown v. Board of Education;* that separate could not be equal.

The vehicle chosen to accomplish these goals is children's literature for two reasons, one more noble than the other. In addition to offering a context, literature offers models of virtue, whether they be heroic models or models of quiet endurance. (Gardner, 1977). A second practical consideration is that teachers are searching for ways to use trade books as they put aside the basal readers which have dominated classrooms to the point that reading was driving the elementary school curriculum. More and more students are beginning to use the rich resource of literature to understand social studies themes and concepts. The following are some general activities that could apply to a variety of titles.

How to Use Children's Literature

GEOGRAPHY

Many of the stories take place in specific settings and what happens in the book simply could not have happened elsewhere. Setting then becomes inextricably tied up with the law. In these selections alone the following locations are pertinent: Mississippi, Kansas, New York, Georgia, Ohio, Pennsylvania, Alaska, and China. A map of the United States and of the world hung in the classroom and frequently used to indicate where the action is taking place will help to teach some geographic knowledge along with other social studies concepts.

JOURNAL WRITING

This is an excellent way to integrate writing with reading. For a single assignment, students could pretend that they are a character in a book that is being read and write a journal entry about how they feel or what they think might happen next. Or, students can choose a character and keep a journal for that character as they read a book.

GROUP JOURNALS

If a small group of students decides to read the same book they can each choose a character and write their journals from that character's viewpoint, periodically sharing their writings with the rest of the group.

DISCUSSIONS

It would be useful to have pre-discussions on several topics before using some of these books. How are people alike and different? When are differences important to know about? If you prejudge someone what does that mean? Who has lived in another part of the country or world where customs are different? How does it feel? What are ways that we can learn to feel more comfortable in different settings? How can we help others to do so?

When Separate Was Considered Equal

A short but poignant novel, *The Friendship* set in Mississippi in 1933, is the story of Mr. Tom Bee, an old black man who calls the white storekeeper, whom he has known all his life, by his first name. The storekeeper shoots Tom to save his pride in front of his other white friends. In *Mississippi Bridge*, also set in the 1930s, a 10-year-old white boy is upset by his father's bigotry and observes "separate but equal" daily on the buses. In *The Road to Memphis*, Cassie Logan is finishing high school in 1941 in Jackson, Mississippi. Cassie meets a man who has studied the law and in a few pages the author introduces two famous Supreme Court cases having to do with separate but equal and equal opportunity: Plessy v. Ferguson and *Missouri ex rel Gaines v. Canada*. Pages 142 to 147 cover this incident and would be a good excerpt to read aloud for discussion. When a black friend, sadistically teased by white boys, injures one of them with a tire iron, Cassie has to help him flee the state for his safety. On the trip to Memphis, Cassie starts to confront the unfairness of separate restrooms. When she and her friends stop at a gas station there is no ladies room for Negroes. She doesn't want to go "into the bushes" as the gas station attendant suggests. This is a dramatic scene that pulls the reader into the emotional life of this young high school girl trying to face the prejudice she has known all her life. Pages 177 through 180 cover this incident.

In 1947 the Brooklyn Dodgers went west to play the Cincinnati Reds, taking with them the first black man to play on a major league baseball team – Jackie Robinson. This man had endured hostility and abuse from opposing players, fans, and even some of his own teammates. Pee Wee Reese, the Dodger shortstop, publicly declared his support for Robinson in one of the most moving moments in sports history. *Teammates* tells the story of this event.

There is a chapter from the book *In the Year of the Boar and Jackie Robinson* called "I Pledge a Lesson to the Frog" that can be used very effectively as an excerpt. Shirley Temple Wong moves to Brooklyn from China. She speaks very little English and as a result one day at school she stands with her class and "pledges a lesson to the frog of the United States of America and to the wee puppet for witches' hands. One Asian, in the vestibule, with little tea and just rice for all." She has no friends until a miracle happens – baseball. In this chapter, her teacher tells the class about Jackie Robinson, grandson of a slave and the first Negro to play baseball in the major leagues. Using sports as a metaphor, Shirley's teacher gives the class a civics lesson on what it means to be a citizen of the United States. She brings out the idea of citizenship as a public office and how one individual can make a difference in our country. This chapter has been scripted in Readers Theatre (Gallagher, 1991).

Civil rights during the 1950s are brought to life for younger readers in *The Gold Cadillac*. The father of a black family living in Toledo, Ohio brings home a new gold Cadillac, something he has yearned for and is finally able to have. In spite of his neighbors' warnings, he drives his family to visit relatives in Mississippi where the family sees "COLORED NOT ALLOWED" signs for the first time. Predictably, but no less frightening because you expect it, white policemen are suspicious of a black man driving such a beautiful car and the father is arrested. This is the family's first encounter with ignorance and prejudice and it is all the more powerful because it is told from the point of view of the young daughter.

More than ten years after the 1954 decision of *Brown v. Board of Education* many schools were not racially integrated. In *Not Separate, Not Equal*, Malene Freeman is among the first six students from Pineridge, Georgia's "black elite" to integrate an all-white high school in 1965. By birth, she is the daughter of poor sharecroppers who died in a fire but her adoptive and well-to-do parents insist that she be one of the students to desegregate Pineridge High. The students are threatened and harassed until finally a malicious act sparks an explosive episode.

Being Different

A different physical appearance is often the basis for discrimination and prejudice and there are many books for young readers on this theme. *Helga High-Up* is a very tall giraffe loved by her parents who enjoyed looking up to her but when she is taunted by her classmates they learn that being tall has it advantages. *Tacky the Penguin* is also about the value of difference to a species. Tacky does not fit in with his sleek and graceful companions, but his odd behavior comes in handy when hunters come with maps and traps. Because he so unpenguinlike, he tricks the hunters into thinking there are no penguins around to be captured.

Two books that help young people to accept their own differences are *Elmer*, a story about a patchwork elephant who longs to look like other elephants and *Pingo the Plaid Panda*, about a panda who acts unfriendly toward some other pandas because he thinks they don't like him.

The Theme of Prejudice in Stories

One of the reasons prejudice is so powerful is that once you accept a stereotype of a particular group that thought shapes how you interact with a member of that group. This in turn influences the other person's behavior but the person with the prejudiced attitude cannot see how his or her prejudice shapes what he or she sees. (Senge, 1990)

Ralph and Alice are two rabbits in *Wanted: Warm, Furry Friend* who decide they don't like each other the minute they meet. They never speak but rather base their dislikes on appearances and behavior. When Ralph reads a personal advertisement in the newspaper seeking a "warm, furry friend" he responds not realizing it is Alice who placed the notice.

Ralph and Alice become friends through correspondence and when they finally meet the reader will be delighted with the outcome. This simple picture book illustrates an important reminder about people and the way we make judgments based on superficial attributes which often prevent us from getting to know the real person that isn't immediately visible.

A similar theme is presented in *Loudmouth George and the New Neighbors*. When a family of pigs moves next door, George the rabbit wants nothing to do with them. Harriet the dog tries to convince George to go with her to meet the new neighbors but George refuses arguing, "But pigs are dirty . . . they eat garbage. They're not like us at all." At first, George is disgusted when all of his friends go to play with the "smelly old pigs" but soon he finds himself all alone. He gives in and finds out they aren't so bad after all. When some cats move in George reacts with prejudice again but this time his stereotype is short-lived.

In *They're All Named Wildfire*, set in rural Pennsylvania a friendship grows between two girls who live beside each other in a duplex house. Jenny is white, Shanterey is black and quickly rejected by Jenny's friends. Jenny doesn't want to give up her friends and initially joins them in ostracizing Shanterey. It doesn't feel right and eventually she sides with Shanterey and they develop the closest kind of friendship possible. Their love of horses and their stand against the bigotry and racism of other children and adults draws them together. When she witnesses the rejection and cruelty of her former friends, Jenny realizes she would have been just like them if Shanterey hadn't moved right next door. This is a dramatic illustration of how it becomes impossible to treat people as stereotypes when we reduce our distance from them and get to know them as individuals. The language in the book is strong but appropriate.

Reprinted several times since it was named a Newbery Honor Book in 1932, *Calico Bush* is a classic pioneer story set in Maine during the winter of 1743. Maggie, orphaned shortly after her French family arrives in the New World, has promised to serve the Sargent family for six years in return for food, shelter and clothing. She is treated with suspicion because she is a "foreigner." She is taunted because of her French accent and ridiculed because she is only a bound out girl. However, the reader never feels pity for Marguerite Ledoux whose quiet self-containment and dignity is apparent. She draws comfort from the children in her care and from the friendship extended to her by a respected old woman in the community.

Another recently reprinted book, *The Terrible Things* is an allegory about animals who are, by selected characteristics, systematically eliminated from the forest while others do nothing to prevent it. It becomes clear fairly early that this is a metaphor for what happened during the Holocaust and can be used to stimulate discussion about how people have acted similarly.

The law has been used many times to discriminate against groups of people. Gypsies have long been the victim of prejudice as the reader learns in *Savina the Gypsy Dancer*, a story about tribal devotion and family loyalty but also about prejudice and the lengths to which powerful people will go to get what they want.

The only reason Savina's Gypsy tribe is welcome in the land of a harsh king is because of her magical dancing. However, her dancing may also be the cause of her people's ruin because she is so captivating that the king decides that she may be a threat to his power. When he tries to convince the Gypsies to leave Savina with him so he could keep an eye on her they refuse because they value their freedom and Savina says she would feel like a caged bird. They king decides that she must be surrendered to him and in attempting to get her he has the Gypsies' horses stolen. When this doesn't work, he has their tents ripped and finally their tools seized. Kalo, their chief, refuses to give in to the king and the tribe finds laws passed against them so that they cannot work – no coppersmithing or fortune-telling. Only Savina's dancing in villages they visit brings them money for food. When the soldiers finally close in on them it is Savina who saves the tribe by dancing and enchanting them so that they drop their weapons and dance with her until they fall to the ground exhausted, allowing the tribe to escape.

REFERENCES

Gallagher, Arlene. (1991). *Acting Together: Excerpts from Children's Literature on Themes from the Constitution.* Boulder, Colorado: Social Science Education Consortium, Inc.

Gardner, John. (1977). *On Moral Fiction.* New York: Basic Books, Inc., p.82.

Senge, Peter. (1990). *The Fifth Discipline: The Art and Practice of Learning Organization.* New York: Doubleday, p.241.

Selected Children's Literature

P = primary (grades 1, 2, 3)
I = intermediate (grades 4, 5, 6)
A = advanced (grades 7, 8, 9)

Bunting, Eve. (1989). *Terrible Things: An Allegory of the Holocaust.* Illustrated by Stephen Gammell. Philadelphia: Jewish Publication Society. I

Carlson, Nancy. (1983). *Loudmouth George.* New York: Carolrhoda Books Inc., 1983. Puffin Books, 1986. Reprinted 1987. P

Calmenson, Stephanie. (1990). *Wanted: Warm, Furry Friend.* New York: Macmillan, 1990. P

Field, Rachel. (1931). *Calico Bush.* Original wood engravings by Allen Lewis. New York: Macmillan. I

Golenback, Peter. (1990). *Teammates.* Illustrated by Paul Bacon. New York: Gulliver, HBJ. I

Leedy, Loreen. (1988). *Pingo the Plaid Panda.* New York: Holiday House. P

Lester, Helen. (1988). *Tacky the Penguin.* Illustrated by Lynn Munsinger. Boston: Houghton Mifflin. Paperback. P

Lord, Bette Bao. (1984). *In the Year of the Boar and Jackie Robinson.* New York: Harper. I

McKee, David. (1989). *Elmer.* New York: Lothrop. Paper ed., Mulberry. P

Sharmat, Marjorie Weiman. (1987). *Helga High-Up.* New York: Scholastic. P

Springer, Nancy. (1989). *They're All Named Wildfire.* New York: Atheneum. I & A

Taylor, Mildred. (1987). *The Friendship.* New York: Dial. I & A

Taylor, Mildred. (1987). *The Gold Cadillac.* New York: Dial. I & A

Taylor, Mildred. (1990). *Mississippi Bridge.* Illustrated by Max Ginsburg. New York: Dial. I & A

Taylor, Mildred. (1990). *The Road to Memphis.* New York: Dial. A

Tompert, Ann. (1991). *Savina the Gypsy Dancer.* Illustrated by Dennis Nolan. New York: Macmillan. I

Wilkinson, Brenda. (1987). *Not Separate, Not Equal.* New York: Harper and Row. I & A

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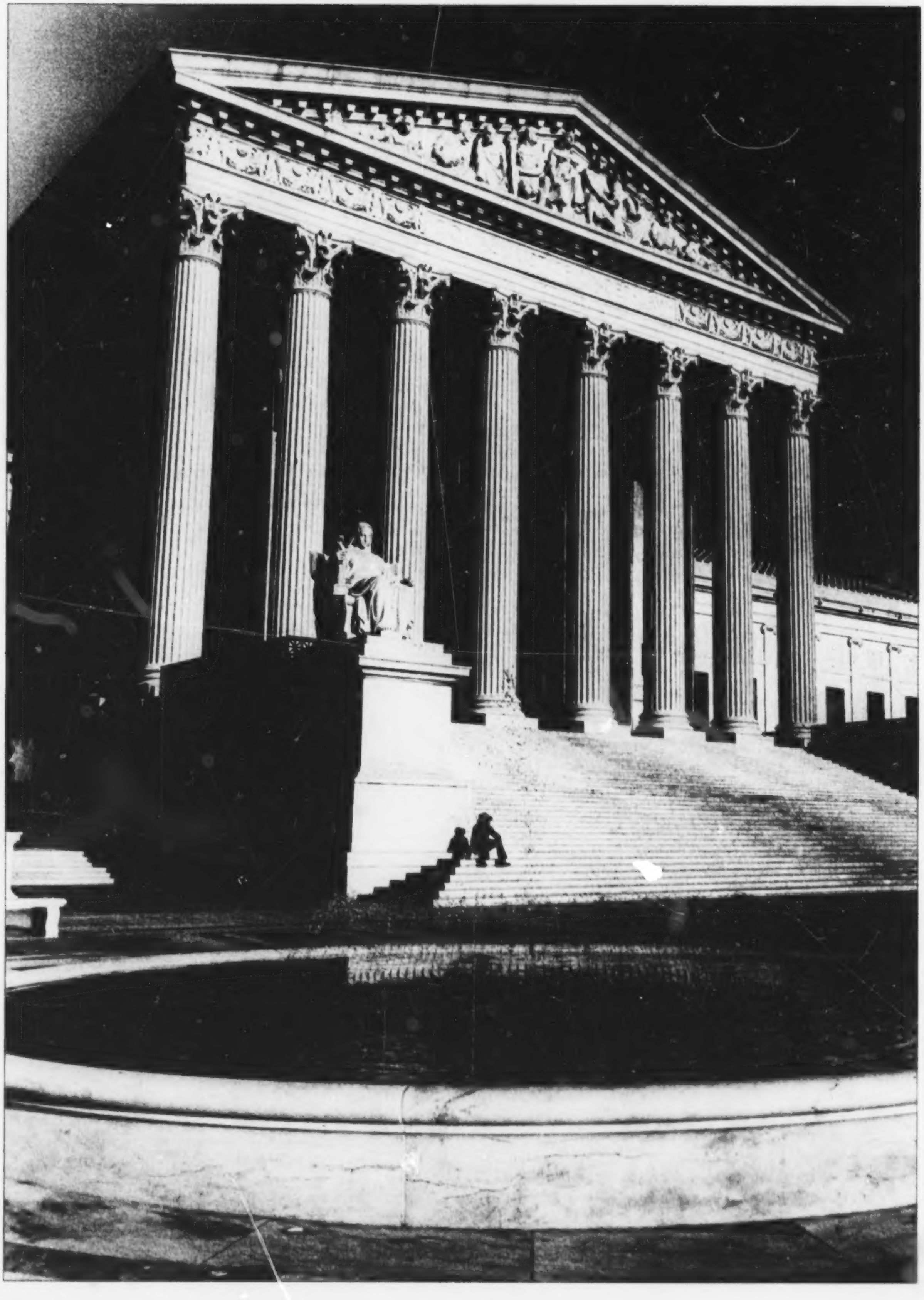

2656

Teree Foster, Diane Geraghty, and Paul Herbert

Supreme Court Potpourri

Can government "muzzle" family planning counsellors concerning health options available to pregnant women?

It is beyond question that the issues surrounding the nature and extent of control women should maintain over their reproductive capacity, as opposed to the nature and extent of permissible government regulation, is one of the most controversial issues of modern times. The controversy was initiated in 1973, when the United States Supreme Court decided, in *Roe v. Wade*, 410 U.S. 113 (1973), that the breadth of the Due Process Clause of the Fourteenth Amendment encompasses a woman's right to choose whether to bear a child she has conceived, or whether to seek an abortion.

Interests of those implicated in the woman's decision to seek an abortion often conflict. The pregnant woman has a fundamental right of reproductive choice; the fetus has an interest in life; and government has interests in safeguarding maternal health, and in protecting potential fetal life. In balancing these interests, the *Roe* Court adopted a trimester evaluation test for determining the permissibility of government regulation of abortion. In the first trimester, government could not interfere, through regulation, with the decision reached by a woman. In the second trimester, government could regulate to protect maternal health. In the third trimester, defined as beginning with "viability," the point at which the fetus is capable of surviving on its own, government could regulate to safeguard the potential life of the fetus, even if that regulation took the form of prohibiting abortions.

Since *Roe*, the Court has considered two types of abortion cases. The first variety deals with statutes or regulations implementing various restrictions on the fundamental right of choice that the Court articulated in *Roe*. The second type of case involves the question of access. Must government pay for abortions? Must doctors and hospitals perform abortions? While the Court has muddled the constitutional approach to case falling within the first category, even to the extent that many persons expect that the Court will overrule *Roe v. Wade* in the present term, the Court has been clear and consistent in addressing the second type of case. The fundamental right defined by *Roe* is a right of *choice*. Government bears no responsibility or obligation to subsidize that choice, or to assure that each woman has the means to effectuate that choice.

A new perspective on the abortion rights controversy arose in 1988, when regulations were promulgated by the Secretary of Health and Human Services to implement Title X of the Public Health Services Act. These regulations prohibit grant recipients from providing, within Title X programs, abortion-related services or counseling, or from referring clients to facilities that provide abortions. Last term, in *Rust v. Sullivan*, 111 S.Ct. 1759 (1991), a majority of the Court decided that these regulations do not violate either constitutionally-protected rights of free speech and privacy, or the statutory provisions of Title X.

Background

Title X of the Public Health Services Act, 42 U.S.C. 300 to 300a-41, authorizes the Secretary of Health and Human Services to make grants to public and private nonprofit entities for the purpose of establishing and operating family planning projects. Title X is the single largest source of federal funds allocated to family planning services, and has expanded access of low income women to health care and family planning services.

Statutory authority, Section 1008 of the Public Health Services Act, prohibits use of funds appropriated under Title X "in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. Title X funds had never been permitted to be used either to perform or to subsidize abortions. But from 1981 to 1988, administrative construction of this statutory authority permitted, and later required, Title X projects to provide information about, and referral for, abortions, including names and addresses of abortion clinics. The regulations also had no effect on activities funded by sources other than Title X, so that Title X grantee projects could continue to use private funds for whatever activities they chose, including furnishing of abortions.

Title X empowers the secretary to award grants "in accordance with such regulations as [he] may promulgate." 42 U.S.C. 300a-4(a). On February 2, 1988, the Secretary promulgated new regulations that constituted a radical departure from prior practice. The new regulations expressly prohibit those activities that "assist" a woman in obtaining an abortion. Specifically, the new regulations: (1) limit the activities of Title X grantee projects concerning counseling and referral for abortion; (2) mandate physical and financial separation of Title X projects from any prohibited activities; and (3) restrict advocacy by project grantees on abortion-related issues.

The validity of the new regulations was challenged by Dr. Irving Rust, a supervisor of a health care facility funded by Title X, and by New York state and city agencies that had distributed millions of Title X grant dollars to 37 agencies and provided technical and consultative services to Title X grantees in New York City. These plaintiffs alleged three grounds in support of their claim that the new regulations are invalid: (1) the new regulations violate the statutory mandate set forth in Section 1008, and are contrary to the congressional intent underlying Title X; (2) the new regulations violate the privacy rights of pregnant women; and (3) the new regulations infringe upon First Amendment rights of health care providers by curtailing their counseling and advocacy functions.

The federal district court granted summary judgment for the government and dismissed the complaints. The Second Circuit Court of Appeals affirmed, rejecting each of plaintiffs' claims. The appellate court held that the regulations were consistent with statutory language and legislative intent, did not impermissibly burden privacy rights of pregnant women, and did not infringe upon First Amendment rights of health care providers. On the last issue, the court noted that government could refuse to subsidize the exercise of fundamental rights, including speech, and held that the restrictions on counseling and advocacy were neutral, and did not constitute impermissible discrimination as to the content of particular speech.

The Arguments

The Supreme Court granted the petition for a writ of certiorari filed by Dr. Rust and the other petitioners. The petitioners argued that the challenged Title X regulations were invalid on a number of grounds. First, petitioners argued that the regulations are beyond the power of the secretary to issue, because they do violence to Congress' intent in enacting Title X. Congress' prohibition against using appropriate funds "in programs where abortion is a method of family planning," 42 U.S.C. 300a-6, should be construed to mean that abortions cannot be funded by Title X funds. The regulations, which go much further to affect counseling, referral and advocacy, are contrary to Congress' legislative intent.

Second, when government chooses to provide subsidies for certain activities, it cannot constitutionally demand that recipients adhere to any particular brand of orthodoxy. The challenged regulations impose upon health professionals and their patients a regulatory system that burdens the exercise of expression of a particular point of view concerning a controversial issue. The challenged regulations prohibit discussion concerning abortion in the context of counseling, referral and provision of accurate information concerning health care options to pregnant women. The regulations thus are an impermissible intrusion by government into the physician-patient relationship, and deprive women of information they need to determine an appropriate course of medical treatment.

Third, the regulations were attacked as arbitrary, because they were motivated by political considerations and not by health care issues or by any demonstrable change in circumstances. The language and policy of Title X demonstrate clearly that the statute was intended by Congress to provide health care access to women, and to prevent abortion being used as a substitute for contraception, not to forbid discussion concerning available health care options. Moreover, the physical and financial separation requirements is also contrary to congressional intent, which was to provide Title X services in an integrated context, coordinated with services of other health care providers.

Fourth, the counseling and referral bans interfere with a woman's privacy right to make a fully informed decision whether to terminate a pregnancy. The challenged regulations affirmatively mislead Title X patients and erect obstacles to the exercise of constitutional rights.

Finally, the challenged regulations suppress speech about abortion and require speech about prenatal care in the informed consent context. By prohibiting counseling, referral, and advocacy of abortion, the regulations are content-based, and constitute an impermissible First Amendment infringement of the rights of health care providers and their patients.

Respondent, Secretary Sullivan, argued for validation of the regulations on a number of grounds. First, the regulations at issue in this case are fully consistent with the language and history of Title X. The aim of Title X is to provide preventive family planning services. If a patient seeks information on post-pregnancy services, a Title X project grantee should inform her to seek aid elsewhere. Moreover, Congress intended Title X funds to be denied to projects that "encourage or promote abortion." The regulations are entirely consistent with that aim.

Second, the regulations do not burden the qualified right of privacy announced in *Roe v. Wade* to choose to have an abortion. Government cannot prohibit a woman from seeking an abortion during the first trimester of pregnancy, but government is not obligated to provide the means to facilitate the exercise of that right. The Constitution does not require that the government finance the dissemination of information concerning abortion. Nor do the regulations mislead pregnant women, because the regulations do not prevent project grantees from advising a client that she go elsewhere for post-pregnancy counseling and care.

Third, the regulations do not violate the First Amendment. Government can selectively fund programs that enhance certain activities that are in the public interest without funding activities that some private individuals choose to promote. In this case, government does provide federal subsidies for pre-pregnancy family planning and infertility services, but has declined to fund activities that "promote or encourage" abortion. The funding limitations do not prevent project grantees' employees or patients from advocating abortion or pursuing similar objective outside Title X.

By a vote of 5-4, a sharply divided Court upheld the challenged regulations

The Majority Opinion

Justice Rehnquist authored the opinion for the narrow majority. He first addressed the statutory construction issue, observing that section 1008's language, denying Title X funds to "programs where abortion is a method of family planning" is ambiguous, insofar as it does not specifically refer to counseling, referral or advocacy. The legislative history is similarly unenlightening. However, according to the statutory construction rules announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) if a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Here, Justice Rehnquist determined that ambiguous legislative history and statutory language required the Court to defer to a not-unreasonable construction by the Secretary of Health and Human Services.

Justice Rehnquist acknowledged another rule of statutory construction, that "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988). However, he determined that this statutory construction rule was unavailing to petitioners because, although the First and Fifth Amendment constitutional questions raised by petitioners are not without some persuasiveness, these issues do not raise constitutional questions of such a critical nature that the Court could assume that the regulations were beyond Congress' intent in enacting section 1008.

Concerning the First Amendment issue, Justice Rehnquist declared that the regulations which prohibit counseling, referral and providing information about abortion availability to patients do not impose a condition on fund recipients that they adhere to government's position in order to obtain government funds. In line with earlier Supreme Court cases, *Maher v. Roe*, 432 U.S. 464 (1977), government is not discriminating among contrasting viewpoints; instead, government is only deciding to grant money to programs that encourage childbirth and discourage abortion; encouraging childbirth is a permissible government interest. Recipients of Title X money do not have to conform their ideas or their speech to those approved by government. Instead, recipients were prevented from engaging in certain activities while on the job, and while being funded by government dollars.

Justice Rehnquist briefly addressed a contention raised by petitioners, that the regulations are invalid because the ban on abortion counseling or referral could imperil a patient's life, where pregnancy endangered the woman's life. He stated that counseling under these circumstances could not be considered "family planning," and would not be forbidden by the regulations or by section 1008 itself.

Finally, Justice Rehnquist found no constitutional defect in the regulations as an impermissible infringement on the *Roe* right of choice. Government has no constitutional duty to pay for an activity that is constitutionally protected, and can instead decide to allocate money to childbirth services, but not to abortion. Refusing to pay for abortions does not infringe or inhibit the woman's volitional right of choice.

The Dissents

Justice Blackmun authored a vigorous dissent, part I of which was joined by Justices Marshall, Stevens and O'Connor. In addressing the statutory construction issue, Justice Blackmun castigated the majority opinion as disingenuous, because it gives short shrift to the *DeBartolo* rule of statutory construction, that the Court must construe a statute as constitutional, if a reasonable construction allowing that result is feasible. Here, it would be reasonable to construe Congress's statute, section 1008, as disallowing funds only to provision of abortions. Thus, the regulations, under this construction, are overreaching and invalid as an excess of statutory authority by the Secretary of Health and Human Services. Thus, because the congressional enactment does not implicate any constitutional issues, the majority opinion is flawed in its eagerness to legitimize the constitutionality of the regulations on First and Fifth Amendment grounds.

Although Justice Blackmun finds the regulations defective, and censures the majority for not addressing the significant constitutional issues in this case, he goes on to criticize the majority's substantive holdings on the First and Fifth Amendment grounds. Justices Marshall and Stevens joined the remainder of the opinion; Justice O'Connor did not, because she maintained in her dissent that once it is determined that the regulations are an invalid exercise of the secretary's authority, no further constitutional pronouncements should be made.

Concerning the First Amendment, Justice Blackmun finds it preposterous to argue, as does the majority, that the regulations are not a content-based restriction on speech. Only speech concerning a particular topic—abortion—is affected. Moreover, the regulations dictate that a particular viewpoint be communicated; speech favorable to abortion is banned; anti-abortion speech is compelled. The gravest difficulty with the regulations is the intrusion into the patient-physician relationship that results. Patients place considerable trust in their doctors. The regulations forbid doctors from counseling and advising their patients according to the doctors' best judgment.

Concerning the Fifth Amendment privacy right, Justice Blackmun declared that the regulations constitute an affirmative, invidious burden on the fundamental right of choice mandated by *Roe*. The patient's inquiries about abortion are met with a disclaimer that abortion is not considered to be an appropriate method of family planning. The manifest message is that abortion is an improper medical option. Regardless of the patient's needs, regardless of the patient's choice, she is likely to forego exercise of her fundamental right of choice.

Justice Stevens submitted a dissent in which he finds that the language of section 1008 is not ambiguous, but was plainly intended by Congress to make pertinent family planning information readily available to the public. Congress did not intend to authorize censorship or suppression of information by any Title X grant recipient.

The Significance

The regulations propounded by the Secretary of Health and Human Services add another dimension to the national debate on the role of government in the abortion context. The Supreme Court, in a series of decisions spanning more than a dozen years, has articulated its position that government has no obligation to assure that its citizens have access to means for enforcing constitutional rights that might otherwise be foreclosed because they are too expensive. See, e.g., *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

This case is unique in that it presented the Court with an issue that is concerned substantially with speech rights to receive and communicate information, not with abortion rights. The conclusion of the majority is significant in two respects.

First, the Court's decision will be viewed as a pronouncement as significant to the privacy right of abortion as to the

First Amendment question it poses. The majority opinion does not quarrel with what it supposes Congress' viewpoint concerning abortion to be—that abortion is always an invalid medical option. By way of contrast, it is inconceivable that the Court would permit a restriction on counseling concerning other medical options to stand. For example, a regulation that prohibited doctors who counsel and advise breast cancer patients from mentioning mastectomy as an option would surely be stuck down as an impermissible infringement on the doctor's speech rights. But, abortion is different; it is not—in the view of the majority—a "legitimate" medical procedure. Thus, it appears that these five justices are irrevocably opposed to abortion and are ready to overturn *Roe* whenever a proper case presents itself.

Second, the decision could affect future funding decisions by the federal government in other controversial areas, such as the arts, education, and libraries. The Court set only the most tenuous of limits on its theme of "he who pays the piper can call the tune." The majority opinion paves the way for government to pick and choose among viewpoints for funding purposes, and thus coerce speech that it approves.

The *Rust v. Sullivan* decision has been widely debated by many legal scholars and members of Congress. Legislative attempts to overrule the majority opinion are likely to continue.

—*Teree E. Foster*

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Let the writer beware: the Court adopts a "truth in quoting" rule

The law has long recognized a cause of action for persons whose good name and reputation is wrongfully harmed by others. American libel law developed on a state-by-state basis until 1964, when the Supreme Court rendered its landmark decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That case held that First Amendment principles impose limits on a state's ability to provide redress for damage to reputation.

In creating a constitutional "breathing space" for speech, the Court recognized that uninhibited public discourse may be chilled if every untrue statement about another may result in a damage award against the speaker. In the years since the decision, the Supreme Court has repeatedly been asked by litigants to define the circumstances under which the First Amendment immunizes otherwise libelous speech. In a recent case of first impression, *Masson v. New Yorker Magazine, Inc.*, 501 U.S.___, 111 S.Ct. 2419, 115 L. Ed. 2d 447 (1991), the Court considered the degree to which the First Amendment permits writers to attribute quotes to a speaker knowing that the quote is not a verbatim report of the what the speaker actually said.

Background

The controversy in *Masson* began when psychoanalyst Jeffrey Masson was fired from his position as projects director of the Sigmund Freud Archives after publicly voicing reservations about Freudian psychology. Shortly thereafter author Janet Malcolm contacted Masson and proposed to write a profile of him and his relationship with the Archives. Masson agreed and Malcolm began a series of interviews with Masson and others, most or all of which were tape recorded. Malcolm's lengthy piece appeared in two installments in *The New Yorker* and later was published in book form by Alfred A. Knopf, Inc.

The portrait of Masson painted in Malcolm's article was not a flattering one. One reviewer wrote that Masson emerged as "a grandiose egotist—mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool." The reviewer noted that many of his negative impressions of Masson's character were based on quotes in the book attributed to Masson himself.

After the article and book were published, Masson sued Malcolm and her publishers in a libel action brought under California defamation law. In his suit, he alleged that several quotes contained in Malcolm's piece were defamatory and did not accurately reflect what he had said to the author during their interviews. Masson further alleged that Malcolm's publishers were aware of his concerns and that his request to correct errors in the text had been ignored. He denied Malcolm's contention that she had not tape recorded all of her interviews with him.

The federal district court in which Masson filed his action granted respondents' motion for summary judgment and dismissed the suit. The court found that the quoted passages were substantially accurate or that they represented a reasonable interpretation of statements which Masson had made. The court of appeals, with one dissent, affirmed the district court's dismissal of Masson's suit.

The court agreed with the district court that even if Malcolm knowingly altered Masson's statements, the substance of the quotes was essentially the same as statements which were memorialized on tape. The court also concluded that summary judgment was properly granted under the doctrine of "incremental harm." Applying this doctrine, the court found that any reputational harm to Masson which was attributable to allegedly libelous statements was nominal when measured against accurate quotes in the article which could have created a negative image of Masson in the mind of readers. A strongly worded dissent argued that the First Amendment does not protect the deliberate falsification of quotes.

The Court's Decision

The Supreme Court unanimously ruled that the district court and court of appeals erred in granting respondents' motion for summary judgment. In a decision authored by Justice Kennedy, the Court found that Masson's complaint presented a jury question as to whether non-verbatim quotes attributed to Masson differed materially in meaning from statements the analyst made during the tape recorded interview with the author.

The Disputed Quotes

Many of the quotes attributed to Masson in Malcolm's article were essentially identical to statements he made on tape. In the case of six quotes, however, language contained in the quotes did not appear in the interviews which the author tape recorded. Justice Kennedy's opinion in *Masson* included a complete description of each of the disputed quotes, together with relevant excerpts of conversations recorded by the author at the time of her interview with plaintiff.

The difference between disputed quotes contained in Malcolm's article and those on tape can be illustrated by reference to one example cited by the Court which related to Masson's description of how he, as projects director of the Sigmund Freud Archives, would change the residence of Sigmund Freud's daughter, Anna Freud, after her death. Malcolm's article attributed the following quote to Masson:

> It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black and white into color.

Tape recordings contained similar language with the exception of the quote referring to "sex, women, fun," and the reference to *The Wizard of Oz*. The substance of the quoted material in Malcolm's piece, however, was drawn from interviews which took place on more than one occasion. Malcolm's tapes revealed that the following conversation took place during one interview:

> [I]t is an incredible storehouse. I mean, the library, Freud's library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It's fascinating.

In an earlier interview Masson had described his reaction to a psychoanalyst he had met in London and plans involving the analyst and Maresfield Gardens:

> I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs] . . . going to really, we were going to live it up.

How Quotes Defame

The Court's decision in *Masson* is premised on the notion that quotation marks normally convey to a reader that material which appears in quotes represents a substantially verbatim account of a speaker's statement. According to the Court, the decision to quote a subject rather than paraphrase his or her words lends credibility to a writer's work because it suggests to readers that the work is based on "objective" information rather than on the writer's own impressions. The Court further suggested that a publication's reputation for factual accuracy may reinforce readers' perceptions that quoted material correctly reflects a speaker's own words.

In *Masson*, the Court discussed ways in which the use of quotation marks around words not spoken by a declarant may libel an individual. Justice Kennedy identified two principal means by which a wrongfully attributed quote can harm an individual's reputation.

First, the misquote may injure by attributing an untruthful factual assertion to a speaker. The Court gave the example of a public official who is intentionally misquoted as having said that he had been convicted of a serious crime when that was not the case.

Second, even if a statement attributed to a speaker is factually accurate, the quote may lead others to react negatively to that individual by virtue of the fact that the substance of the quote is attributed to the speaker. To illustrate this point, the Court opined that if John Lennon of the Beatles in fact had not said "[w]e're more popular than Jesus Christ now," attributing that statement to him could have seriously injured the group's reputation. According to the Court, self-disparaging remarks may be especially damaging because of the assumption that individuals normally do not portray themselves in an unflattering light unless that portrayal is true. Justice Kennedy acknowledged, however, that mere use of quotation marks around words does not always imply that the speaker said those words. A hypothetical conversation between two cartoon characters whose "comments" are enclosed in quotation marks, for example, would not lead a reasonable reader to assume that the character in fact spoke the quoted words or even that the conversation took place.

The "Material Change" Standard

The parties in *Masson* agreed that plaintiff was a public figure. A public figure is one who "occup[ies] positions of pervasive power and influence" or who voluntarily inserts himself or herself into a public controversy. Under *New York Times* and its progeny, a public figure who seeks to recover damages for libel must meet an "actual malice" standard. As Justice Kennedy emphasized, the concept of actual malice does not refer to false statements made with an evil intent, but instead refers to "publication of statements with knowledge of falsity or reckless disregard as to truth or falsity."

In the case of a public figure, the First Amendment protects otherwise libelous speech unless the plaintiff can prove actual malice by clear and convincing evidence.

In *Masson*, the Court for the first time provided a definition of falsity in the quotation context. Justice Kennedy began with an acknowledgement that any change in a speaker's verbatim quote technically makes the quoted language false. The Court recognized, however, that if the concept of falsity were read too narrowly, commonly accepted journalistic practices would have to be discarded. Journalists, for example, typically eliminate certain habits of speech such as "uh" for stylistic reasons, or correct grammatical mistakes. Although these changes represent deliberate alterations of a speaker's words, they are alterations of the sort that a speaker may reasonably be expected to welcome.

The Court also declined to accept plaintiff's suggestion that, with the exception of technical modifications, any knowing modification of a speaker's words constitutes falsity under the actual malice standard. Justice Kennedy reasoned that the line between alterations for grammatical and syntax reasons and efforts to make a quote coherent and readable is too fine to draw with any precision. Instead, the Court held that intentional changes in a speaker's statement constitutes falsity of the sort which lacks First Amendment protection only if "the alteration results in a material change in the meaning conveyed by the statement."

The Court reasoned that if a quote does not materially change the meaning of a speaker's intended statement, then the quote cannot be the source of injury to the speaker's reputation. Justice Kennedy explained that this standard captures the essence of libel law which is aimed at ensuring a remedy for individuals whose reputation is harmed by publication of false statements and does not require the court to develop a special falsity rule for quotations.

Justices White and Scalia disagreed with the majority's "material change" standard. In their view, a writer engages in a "knowing falsehood" when he or she knowingly or recklessly attributes to a speaker words which the writer knows the speaker did not utter. They suggested that a test for falsity which requires a showing of substantial change in the meaning of a statement improperly assigns courts a function which was intended to be left to juries. Justices White and Scalia argued that if a writer cannot remember a speaker's words or believes that communication would be enhanced by use of language other than that of the speaker, the appropriate practice would be to forego use of quotes and instead attempt to summarize the content of the speaker's message in the writer's own words. The justices noted, however, that even if an author misquotes language deliberately or with reckless disregard for the truth, a jury may still rule on behalf of the author if it finds that the false statements attributed to the plaintiff did not damage plaintiff's reputation under state libel law.

The "Rational Interpretation" Standard

Although a majority of the Court accepted the court of appeal's conclusion that a misquoted statement is not false for First Amendment purposes if it substantially conveys the same meaning as a speaker's actual words, it rejected that court's application of a "rational interpretation" standard to the quotes at issue in *Masson*. In its decision, the court of appeals had cited Supreme Court cases holding that the First Amendment protects a writer's interpretation of a speaker's statement if that interpretation is a reasonable one. In *Masson* the Court limited its prior holdings to situations where a writer purports to interpret a speaker's ambiguous statements. According to the Court, however, a writer's decision to enclose a subject's words in quotes acts as a signal to readers that the quoted language represents the speaker's own statement rather than the writer's interpretation of it. The Court reasoned that to apply the "rational interpretation" standard to quoted material would excessively immunize journalists and authors from liability for fabricated quotes and would ultimately undermine the credibility of the press.

The "Incremental Harm" Doctrine

The court of appeals also relied on the "incremental harm" doctrine in upholding the granting of Malcolm's motion for summary judgment. That doctrine, according to the court of appeals, "measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication." The Ninth Circuit concluded that in light of the many "provocative, bombastic statements" which were accurately attributed to Masson, additional harm caused by a manufactured quote referring to Masson as an "intellectual gigolo" was sufficiently minimal to render the altered quote nonactionable.

The Supreme Court, however, rejected any suggestion that the "incremental harm" doctrine relied on by the court of appeals is a constitutionally-compelled standard. The Court stated that use of an "incremental harm" doctrine in a libel action depends wholly on whether such a doctrine is recognized in a state's libel laws.

Summary Judgment

As is true in many libel cases, the issue in *Masson* was initially decided on a summary judgment motion. That motion permits a trial court in cases where there are no material issues of fact to decide whether, as a matter of law, a case should be dismissed. In making such a decision the court is required to make all reasonable inferences in favor of the party against whom the motion for summary judgment is made. In *Masson* that meant that when deciding whether the lower courts were correct in allowing Malcolm's motion, the Court was required to assume that Masson did not make statements attributed to him in the article if an equivalent statement did not appear on tape. The Court also was required to conclude that Malcolm's decision to enclose certain passages in quotes when the statements contained in those passages were not recorded was done knowingly or with reckless disregard for the truth.

Operating on that set of assumptions, Justice Kennedy proceeded to analyze each of the six quotes at issue before the Court to determine whether there was a material difference in meaning between the statements attributed to Masson in the article and statements recorded on tape. The Court found that differences in five of the six quotes created an issue of fact for the jury to decide.

With respect to the "sex, women, fun" quote cited earlier, for example, the Court concluded that Masson's primary discussion with Malcolm about Maresfield Gardens focused exclusively on the value of the source material included in the Freud Archives located there. Although Masson did refer to parties he hoped to have at Maresfield Gardens, and although he did make a comment about "pass[ing] women on to each other," the Court found that it was not clear whether those comments were linked and could be viewed by a jury as having a materially different meaning than the "sex, women, fun" quote which ultimately appeared as part of the Maresfield Gardens quote in Malcolm's piece.

The only quote which the Court found as a matter of law did not meet the falsity standard related to Masson's explanation of why, at one point in his life, he had changed his name back to his family's original name of Moussaieff and later had changed it to his middle name. The Court found that the explanation attributed to Masson in the text that "it sounded better" did not differ materially from his statement on tape that "he just liked" the name Moussaieff. Justices White and Scalia dissented from the majority's summary judgment decision with respect to the "it sounded better" quote on grounds that the "materially changed" standard incorrectly defines falsity in the case of intentionally or recklessly altered quotations.

With regard to the five quotes which the majority found raised an issue of fact for the jury, the Court remanded the case to the court of appeals for further proceedings. The Court directed that court to consider whether the district court erred in granting summary judgment for the magazine and publisher, an issue which the court of appeals had not considered initially because of its affirmance of the district court's decision to grant Malcolm's summary judgment motion.

The Significance

Ever since the Supreme Court first constitutionalized libel law in *New York Times v. Sullivan*, in its defamation cases it has sought to achieve a balance which, on the one hand, adequately preserves principles of free speech and press, and on the other hand permits redress for harm to a person's good name caused by the publication of false statements about the person. The Court's decision in *Masson* reflects its ongoing commitment to achieving that balance.

The Court's adoption of a "material change" standard for determining the falsity of deliberately altered quotes is an example of how the Court in the libel area has sought to develop standards aimed at providing some degree of editorial license for journalists and authors, while at the same time making it possible for plaintiffs to prove reputational harm. Under the "material harm" standard, writers are protected by the First Amendment even if they deliberately alter a speaker's verbatim words so long as the altered version of the quote does not substantially change what the speaker intended to convey by his or her choice of words. The "material change" standard, for example, permits writers to reorganize the sequencing of a speaker's comments in order to enhance their clarity and perhaps even their accuracy. It also concentrates on whether a quote is substantially true rather than on whether published material contains minor inaccuracies, an approach consistent with the common law defense of substantial truth in libel cases.

Although *Masson*'s "material change" standard guards against the threat that writers and the press will voluntarily censor themselves out of fear of liability for inaccurate quotations, the Court's opinion also sends a signal that the First Amendment does not immunize authors and journalists who manufacture quotes or edit a speaker's comments in a way that inaccurately portrays the speaker's meaning.

The Court's refusal to adopt a "rational interpretation" test for material which is placed in quotes means that writers cannot rely on an assumption that readers will understand that quoted material may not be a verbatim recording of what a speaker said. *Masson*'s clear message to writers is that a decision to use quotations as a narrative device must be accompanied by a commitment to reproduce a speaker's words in as accurate a form as possible. Modern technologies such as tape recorders and video cameras make this possible, thereby reducing the degree of protection which writers arguably need when required to reconstruct conversations from memory or from hastily written notes.

—Diane Geraghty

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"Victim impact" evidence and the significance of precedent

In the last week of its 1990-91 term, the Supreme Court decided the case of *Payne v. Tennessee*, 111 S.Ct. 2597 (June 27, 1991).

Purportedly about whether "victim impact" evidence may be considered by a jury in deciding whether to impose a death sentence, the case is perhaps even more important for what it says about the nature, the stability and the integrity of constitutional law itself and about the proper role of the Supreme Court in our scheme of government.

Background

On Saturday, June 27, 1987, Pervis Payne visited his girlfriend's apartment in suburban Memphis several times, anticipating her return from a visit to her mother, but found no one home. Meantime, he drove around town with a friend, drinking beer, injecting cocaine and reading a pornographic magazine. Around three in the afternoon, Payne returned to the apartment building and somehow entered 28-year-old Charisse Christopher's apartment across the hallway from his girlfriend's. Payne attempted to rape Charisse; when she resisted, he became violent. Her screams prompted neighbors to call the police.

The police arrived as Payne was leaving the apartment building "so covered with blood that he appeared to be sweating blood." Inside the apartment, the police found Charisse dead from 84 stab wounds. The murder weapon was a butcher knife. Blood covered the walls and floor throughout the unit. Lying beside Charisse on the floor of her kitchen were her two children. Two-year-old Lacie was also dead, but her three-year-old brother Nicholas was still alive despite several stab wounds, including one that penetrated his body from front to back. Nicholas was saved, after a transfusion of more than 100% of his normal blood volume.

On overwhelming evidence linking him to the crime, Payne was convicted of two counts of first degree murder and one count of assault with intent to commit first degree murder.

"Victim Impact" Evidence

The question then became: the death penalty or life without parole? This is decided by the jury at a separate proceeding after hearing further evidence and arguments of counsel.

At the sentencing hearing, the defense will invariably present background evidence purporting to "mitigate" the magnitude of the crime or the culpability of the killer. The jury is typically instructed that if this "mitigative" evidence outweighs the "aggravating" factors associated with the killing, they must impose a life sentence; if, on the other hand, the "aggravating" factors outweigh the "mitigating," they must impose a death sentence.

In reality, as candid lawyers will admit, the defense evidence is mainly aimed at "humanizing" the defendant and, if possible, even making him appear sympathetic or at least pathetic. This, obviously, will make it a little tougher for each juror to vote to condemn the defendant. There is nothing wrong with this under our system: Subtle psychological manipulation like this is part of virtually all advocacy and is the very essence of what trial lawyers do. (Lawyers are taught to refer to their own clients and witnesses as individual persons—Mr. Smith, Officer Jones—but to refer to the opponent's clients and witnesses in depersonalizing language—the defendant, the police. This is no more sinister than human nature itself: most of us eat bacon but few of us would slaughter a pig we raised as a pet.)

The jury in this case heard typical mitigative evidence. Payne's parents and his girlfriend told the jury that he met her at church, was a caring person, was devoted to children, did not drink or use drugs and that it was out of his character to have committed this crime. Also, a psychologist testified that Payne was "mentally handicapped" by a low IQ and was the most polite prisoner he had ever met. So far, a routine death penalty hearing.

What sets this case apart, though, is that the prosecution, when its turn came, did not confine itself to contradicting this defense evidence and presenting standard aggravating evidence of its own (such as the brutality of the killing). Rather, the prosecution additionally presented evidence and argument to the jury about the ongoing trauma suffered by Nicholas, the three-year-old survivor of the attack, and the emotional chaos the crime had visited on others close to Charisse and her children.

Charisse's mother, asked how the murder of her daughter and granddaughter had affected Nicholas, testified: "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie."

The prosecutor argued to the jury:

> Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister ... There is nothing you can do to ease the pain of any of the families involved in this case . . . . There is nothing you can do for [Charisse's parents], and that's a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something you can do for Nicholas. Somewhere down the road Nicholas is . . . going to want to know what happened . . . . He is going to want to know what kind of justice was done . . . . With your verdict, you will provide the answer . . . . You saw the videotape [of the crime scene] this morning. You saw what Nicholas will carry in his mind forever . . . . And there won't be anybody there—there won't be . . . Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby . . . . [The defendant's] attorney wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, the mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.

This is what the law calls "victim impact" evidence. It is increasingly coming into vogue as part of the "victims' rights" movement of the past decade or so. In recent years, Congress and most of the states have passed legislation either permitting or requiring that "victim impact" evidence be presented to the jury. (California's version, for instance, Penal Code section 1191.1, was passed by voter initiative in 1982.)

The jury sentenced Payne to death.

The Issues and Arguments

The question for the Supreme Court on appeal was whether a death sentence resulting from "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family violates the Eighth Amendment's prohibition against "cruel and unusual punishment."

On the one hand, the Supreme Court has repeatedly held that a death sentence may not be imposed *arbitrarily* or *capriciously*. It would be *arbitrary* if all killers, or if all killers of a certain category, such as multiple murderers, *automatically* received a death sentence; there would be no case-by-case discretion. At the other extreme, the death penalty would be *capricious* if it could be imposed or not based on the jury's uncontrolled judgment on a case-by-case basis; there would be too much discretion (which, not incidentally, could facilitate racial or other improper discrimination). Therefore, the Supreme Court has held that the ultimate penalty can be imposed only if the defendant is treated as a "uniquely individual human being" and under standards that focus on the "character of the [defendant] and the circumstances of the crime"; the sentence must be based on the defendant's "personal responsibility and moral guilt."

As such, it has been forcefully argued, whether the murder victim was a wonderful person or the opposite and whether his or her death wrought extreme and lasting grief among many people or instead went comparatively unlamented are considerations unlinked to the murderer's moral guilt and therefore prejudicial to him if considered by the jury. Should a death sentence turn, it is asked, on the fluke—the caprice—of whether the murder victim turns out to have been a much-loved country doctor versus the town drunk? If the defendant had no way of knowing at the time—and if the character of the victim was not part of the criminal act or motive—how is it relevant to *the defendant's* "character and . . . *the circumstances of the crime*"?

Further, even in a case where the killer knew the victim's background and therefore could anticipate the impact on loved ones, "victim impact" evidence, by diverting the jury's attention from the killer and the killing to the victim and the victim's family, could introduce improper considerations that might prompt a death sentence. For one thing, the jury's deliberation is more likely to stray from reason and become infected by emotion. For another, is one life "worth" more than another? Can we fairly place a defendant in the position of arguing that the victim was not as wonderful as the prosecution is making out? That his or her family are not suffering as much as they claim?

These, then, are the basic arguments against allowing "victim impact" evidence in capital cases. On the other hand, strong arguments have been made in favor of allowing such evidence.

In the first place, it has been questioned whether modern capital cases must be treated as a special category on this issue. From time out of mind, the *consequences* of one's criminal act, the "impact"—not just the act itself—have factored prominently in the sentence one receives. This is the *lex talionis* of the Old Testament: "An eye for an eye, a tooth for a tooth." Exodus 21:22-23. It is also why attempt is punished far more leniently than a consummated crime. "If," the Court observed, "a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." (There is no doubt that "victim impact" evidence is constitutional in *non-capital* cases. Indeed, it is explicitly incorporated into the definition of many crimes. For instance, California Penal Code section 593a makes it a felony to "spike" a tree to interfere with logging, and then goes on to provide: "Any person who [does so] and causes bodily injury to another person other than an accomplice shall . . . be punished by an additional prison term of three years.")

Further, it is argued that the human cost of a murder *is* a legitimate component of the defendant's personal "moral guilt." The jury needs to understand that a unique human life has been extinguished and the only effective way to show this is by furnishing a glimpse of the void that the murder has left behind. Otherwise, the defendant has killed only a faceless, fungible "victim." Where the trial process presents the victim as only an abstraction rather than a person, it distorts and artificially lessens the blameworthiness of the crime.

Finally, proponents of "victim impact" evidence point to the imbalance of permitting the defense to present the jury with any and all evidence about the defendant and his life and relationships while barring all evidence about the victim, his or her life and the relationships that the crime has ruptured.

These are the arguments supporting the constitutionality of "victim impact" evidence in capital cases.

The Court's Decision

By a 6-3 margin, in an opinion written by Chief Justice Rehnquist, the Supreme Court held that "victim impact" evidence is not unconstitutional under the Eighth Amendment. Payne's death sentence was affirmed, four years to the day after the crime. (It is always possible for a particular defendant to argue that the specific "victim impact" evidence in his case was so slanted or so voluminous or so inflammatory as to have been fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. Further, it remains improper under the Eighth Amendment for the prosecutor to introduce before a sentencing jury in a capital case the victim's family members' characterizations of or opinions about the defendant or about what sentence they want imposed. This is not "victim impact" evidence.)

The Chief Justice's opinion for the Court placed particular emphasis on the notion of evidentiary balance:

> Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality, and the defendant's attorney may argue that evidence to the jury . . . . [W]e now reject the view . . . that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted. We reaffirm the view expressed by Justice Cardozo . . . [that] "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

The chief justice also stressed his familiar theme of federalism:

> Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws . . . are of course subject to the overriding provisions of the United States Constitution. When the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process . . . . But . . . beyond these limitations . . . the Court has deferred to the State's choice of substantive factors relevant to the penalty determination . . . . The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . .

Justice O'Connor's concurring opinion highlighted how relatively small was the probable emotional effect of the "victim impact" evidence in this case, coming as it did on top of the unchallenged evidence of the very gruesome facts of the crime, including the videotape of the crime scene. She concluded:

> Murder is the ultimate act of depersonalization . . . . It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

Justice Scalia also concurred separately, characteristically pushing logic the furthest and conceding the least of all the justices to what might be called policy or political considerations. In his view, the Court's precedents requiring the admission of all "mitigative" evidence in a capital case are wrong and should be overturned. Further, he would permit "victim impact" evidence even if these precedents *were* overturned: "[The Constitution] permits the People to decide . . . what is a crime and what constitutes aggravation and mitigation of a crime." All of the six separate opinions in *Payne* (the Court's opinion plus three concurrences and two dissents) were fully joined in by at least one other justice except Justice Scalia's: On this issue, he stood alone.

Under Justice Scalia's view, a state could, if it chose, focus the sentencing hearing strictly on the crime itself: How brutal? What motive? Any remorse? Evidentiary excursions into the murderer's life and testimonials in his favor by family and friends would be banned as irrelevant and so would the same kind of evidence about the victim. Some would say such an approach makes more sense than our existing regime. In this light, it could be argued that "victim impact" evidence is essentially an irrational correction by the public of the initial irrationality by the Supreme Court (when it was still dominated by anti-death penalty activist justices in the 1970s) of declaring that the states *must* under the Eighth Amendment allow a defendant to introduce any and all mitigative evidence about his background.

Justice Souter in concurring made two basic points. First, every killer knows *in general* that his victim "is . . . a unique person, like himself, and . . . probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death . . . " and "[t]hat [this] foreseeability of the killing's consequences imbues them with direct moral relevance" even if *the specifics* of the victim's life were unknown to the killer. Second, precluding "victim impact" evidence is *unworkable* and *arbitrary*: *unworkable* because the jury hears or infers much of it during the guilt phase of the trial and can hardly "erase" it from their minds during the sentencing phase; *arbitrary* because two killers, otherwise identical, would be treated differently if one happened to learn some fact about the victim's life or loved ones just before the killing. Illustrating the latter point, Justice Souter hypothesized a killing witnessed, unbeknownst to the assailant, by the victim's teenage daughter. If the daughter was silent, "victim impact" evidence of her existence and of the effect on her of witnessing her father's murder would be "irrelevant" to the killer's "moral blameworthiness" and hence inadmissible. But if the daughter had yelled "Daddy, look out!" the "victim impact" evidence would be proper because it becomes part of the crime from the killer's point of view. Yet the difference has nothing to do with *the defendant or what he did*. Justice Souter thus turns the "arbitrariness" criticism of "victim impact" evidence around, contending that *excluding* such evidence would produce "arbitrary" results.

The Two Dissents

Justices Marshall and Stevens each filed a dissent. Both expressed concern that "victim impact" evidence not only will elevate emotion over reason but will open the door to prejudice. As Justice Stevens put it: "Evidence offered to prove [a victim's distinctive traits or circumstances] can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black."

Justice Stevens tackled head-on the majority's arguments in favor of "victim impact" evidence. There is no "imbalance" or unfairness, he contended, in allowing the defendant to introduce evidence about *himself* while precluding the prosecution from introducing evidence about the *victim* because "[t]he victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance." After all, Justice Stevens rightly observed: "[I]f a defendant, who had murdered a convenience store clerk in cold blood in the course of an armed robbery, offered evidence unknown to him at the time of the crime about the immoral character of the victim, all would recognize immediately that the evidence was irrelevant and inadmissible."

Justice Stevens argued further that, since it necessarily is applied *ad hoc* and *post hoc*, "victim impact" evidence is inherently "arbitrary and capricious" in violation of the "cruel and unusual punishment" proscription of the Eighth Amendment. By *ad hoc*, he meant that there are no standards that can guide a jury as to *how much* and *what kind of* "victim impact" evidence ought to sway them to vote for death over life imprisonment. By *post hoc*, he meant that "victim impact" evidence relates to circumstances and events *after* the defendant's act, hence beyond the defendant's control and for which he therefore should not be held responsible.

Finally, Justice Stevens attempted to turn Justice Souter's "foreseeability" argument around:

> Justice Souter argues that these ["victim impact"] harms are sufficiently foreseeable to hold the defendant accountable because "every defendant knows . . . that the life he will take . . . is that of a unique person ..." But every juror and trial judge knows this much as well . . . . The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support.

This argument perhaps misses the point. Many trial lawyers—certainly many prosecutors—will attest to the artificial and pressured environment of a death penalty adjudication, the weight of a judge's instructions limiting the jury's deliberations to *the defendant* and the typical jury's lack of experience and sophistication at the kind of task it faces in a death penalty case. Under these peculiar conditions, some would say, without the counterweight of specific evidence *about the victim*, the victim can easily become less a person than an abstraction, or at least less a person than is the defendant.

The Nature of Constitutional Law and the Role of the Judiciary

The truly striking feature of *Payne v. Tennessee*, however, is not the actual holding, but rather the fact that it represents a flat reversal of very recent Supreme Court precedent. This, in turn, sparked an extraordinarily heated and elaborate exchange among the justices over the nature of constitutional law and over the very integrity of the Court itself.

In 1987, the Supreme Court held in *Booth v. Maryland*, 108 S.Ct. 31, that "victim impact" evidence is *per se* violative of the Eighth Amendment. In 1989, the Court in *South Carolina v. Gathers*, 110 S.Ct. 24, rejected a challenge to *Booth* and indeed extended it to forbid not just "victim impact" *evidence* (i.e., testimony) but also prosecutorial *argument* to the jury along the same lines. Both cases were decided 5 to 4. Shortly after *Booth*, Justice Powell, part of the majority (in fact, the author), retired and was replaced by Justice Kennedy, who held the opposite view. *Gathers* reaffirmed *Booth*, however, because Justice White, a dissenter in *Booth*, switched sides, solely, as he explained, out of respect for *stare decisis*: He voted to uphold a decision he had voted against two years earlier because it was nonetheless the law of the land.

After *Gathers* but before *Payne*, Justice Brennan of the *Booth* majority (and the author of *Gathers*) retired and was replaced by Justice Souter, who held the opposite view. Hence, of the original five-member majority in *Booth*, only three remained at the time of *Payne* (and now only two, with Justice Marshall's retirement).

The Role of *Stare Decisis*

The importance of this aspect of *Payne* is underscored by the fact that the justices in their fairly lengthy opinions devote nearly as much space—and certainly more fervor—to the issue of *stare decisis* as to the actual issue before them, "victim impact" evidence. *Stare decisis* is the venerable but amorphous doctrine that animates the concept of "precedent": A court must be loyal to its previous decisions.

But how loyal? As with most legal doctrine, no one contends that *stare decisis* should or can be pushed to its logical extreme. If court decisions were *never* overturned, the *Brown v. Board of Education* desegregation decision could not have happened: The separate-but-equal regime of *Plessy v. Ferguson* would remain the law of the land. The crucial question, then, has always been: Under what circumstances may precedent be swept aside—what considerations properly override *stare decisis*?

Lately, though, owing to the increasing politicization of both constitutional adjudication and the judicial appointment process, an additional and more pressing question has intruded: Whose ox has been gored? The emergence of this question—or, at least, its new nakedness and ostensible legitimacy in what passes for constitutional discourse, since it arguably has always lurked in the background—is troubling: Courts in the Anglo-American tradition and under our constitutional scheme of government must be apolitical as a necessary condition of our very freedom.

As Alexander Hamilton wrote, the judiciary is "the least dangerous branch" of government as it has neither the power of the sword (like the executive) nor that of the purse (like the legislative). All a court has, as Justice Frankfurter put it nearly 30 years ago, is its "moral sanction"—its neutrality and integrity. If it throws that away, it has nothing and can no longer effectively serve its function in a democracy of keeping the game "square."

Principles and Politics

It is thus a vital question, of broad ramifications, whether *Payne* swept *Booth* and *Gathers* into the trash can *on a principled basis* and as an exceptional *judicial* act or instead was an exercise of *raw will* stemming only from personnel changes and hence presages routine and *political* departures from *stare decisis* across the full range of constitutional law.

Addressing this ticklish issue on behalf of the majority, the chief justice acknowledged that "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." He went on to observe, however, that "*[s]tare decisis* is not an inexorable command" and cited as examples 33 partial or total overrulings of precedent by the Supreme Court over the past 20 years. Chief Justice Rehnquist elaborated that *stare decisis* carries the least weight in cases like *Payne* that are (a) constitutional decisions (which, unlike statutory interpretations, are irremediable by ordinary political means, i.e., legislation, even if manifestly wrong or massively unpopular) and (b) merely procedural or evidentiary issues as opposed to property or contract rights, where reliance interests exist. Finally, and very significantly, the chief justice observed that *Booth* and *Gathers*, which he characterized as not merely wrong but "unworkable" and "badly reasoned," "were decided by the narrowest of margins [i.e., 5 votes to 4], over spirited dissents challenging the very underpinnings of those decisions" and "have been questioned by members of the Court in later decisions . . . ." Accordingly, *stare decisis* did not control and the reversal of precedent was appropriate.

Power versus Reason

The dissenters were unconvinced. Justice Marshall began: "Power, not reason, is the new currency of this Court's decisionmaking." Strong words, but only the warm-up:

> The overruling of one of this Court's precedents ought to be a matter of great moment . . . . Consequently, this Court has never departed from precedent without special justification . . . such justifications include the advent of subsequent changes or development in the law that undermine a decision's rationale, . . . the need to bring a decision into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . . The majority cannot seriously claim that *any* of these traditional bases for overruling a precedent applies to *Booth* or *Gathers* . . . . It takes little real detective work to discern just what *has* changed since this Court decided *Booth* and *Gathers*: this Court's own personnel.

Justice Marshall observed that under what he perceived as the majority's *new* criterion for setting aside *stare decisis*—"that a case . . . was decided . . . by a 5-4 margin 'over spirited dissent' the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court." He then offered an "endangered precedents list" of 17 cases decided over the past six years. The implications, to Justice Marshall, are profound and ominous:

> If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind . . . . Today's decision charts an unmistakable course . . . . [T]he overruling of *Booth* and *Gathers* is but a preview of an even broader and more far-reaching assault upon this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's "spirited dissents" will squander the authority and the legitimacy of this Court as a protector of the powerless.

For his part, Justice Stevens, though focusing principally on the "victim impact" issue, explicitly referred to the growing politicization of the Court when he concluded his separate dissent: "Today is a sad day for a great institution."

Justice Scalia's concurrence also thoughtfully addressed *stare decisis*. Citing Justice Marshall's own earlier writings to the ironic effect that *stare decisis* should yield to reasoned judgment and that adhering to a bad or unpopular decision damages respect for the courts and for the law more than overruling the decision would, Justice Scalia turned the political-will-versus-judicial-reason argument upside-down. Since *Booth* and *Gathers* were political conjurings with no true basis in the Constitution, he argued, and since they abruptly overturned settled practice reflecting a consensus of popular will, *they* were the real usurpations. *Payne* did no more than restore the *status quo*. Specifically answering Justice Marshall's contention that "[p]ower, not reason" is the Court's "new currency," Justice Scalia declared:

> In fact, quite to the contrary, what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes . . . . *[S]tare decisis* . . . is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts . . . . It was, I suggest, *Booth*, and not today's decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.

Were he to accept Justice Marshall's formulation that a precedent must be upheld absent some "special justification" for overruling it, Justice Scalia appears to deem it a "special justification" that the precedent is not just *wrong* but *atrocious*.

The Decline of Collegiality

Beginning around the 1960s—some would date it a decade earlier or later—collegiality on the Supreme Court began dramatically to disintegrate.

Until then, the Court consciously worked for institutional consensus, dissents were generally temperate, and separate concurrences were considered bad form, "showboating." The Court worked hard to avoid "plurality" decisions—which are not authoritative statements of law—and even 5 to 4 decisions were fairly rare.

Since then, the Court has done much to confirm the widening popular view of judges as essentially politicians with robes. Fractured decisions with multiple squabbling opinions that are difficult even for experts to decode are common. Plurality opinions are routine. Five to four decisions now abound. (Justice Marshall's "endangered precedents list" will doubtless be substantially augmented this term, as it is every year.)

Of course, in such circumstances, respect for precedent is diminished. Today's precedents manifestly are less worthy of respect that yesteryear's (though this does not immunize our polity against the damage that may ensue from *treating* them with less respect). If the Court continues to be openly self-disrepecting, can the public's view but follow?

—Paul B. Herbert

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Equality

(continued from page 6)

of the Thirteenth and Fourteenth Amendments. Premised on the assumption that the text of the Constitution does not change its meaning, and that its original intent can be discovered through historical research, the neo-abolitionist theory held that the purpose of the war amendments was to establish paramount national citizenship conferring universal liberty and equality under federal protection. It thus concluded that the framers of the amendments intended to revolutionize the federal system by giving the national government direct and plenary power to protect civil rights against both state and private discrimination.

High Expectations

The neo-abolitionist theory of the intent of the war amendments was developed outside the judiciary as an adjunct of the civil rights movement, with a view toward influencing the course of decisions in race relations cases. By the early 1950s a line of precedents upholding black civil rights claims within the separate-but-equal doctrine suggested that the overthrow of the doctrine was imminent. The neo-abolitionist view of the Fourteenth Amendment offered a possibly persuasive historical justification for accomplishing this end. Accordingly, expectations were high when, at the invitation of the Supreme Court itself, lawyers for the National Association for the Advancement of Colored People argued in the school desegregation case in 1953 that segregation in public education violated the original intent of the Fourteenth Amendment. The justices were unpersuaded by the historical argument, however, preferring to base their decision on sociological and psychological grounds explaining the injurious effect of segregation on black children. Nevertheless, the neo-abolitionist view of the war amendments began to gain popular acceptance. Revisionist accounts of Reconstruction history in the 1950s and 1960s interpreted the motives of Reconstruction policymakers in a liberal humanitarian light, helping establish historical continuity between the purposes of the war amendments and contemporary civil rights advances. As the civil rights movement achieved political success with the enactment of civil rights laws in 1964-65, moreover, original intent thinking in relation to the amendments, conspicuously rejected in *Brown v. Board of Education* received recognition in Supreme Court opinions.

A Promise Fulfilled

From a historical standpoint it would be accurate to say that the overthrow of legal segregation and racial discrimination in the 1960s in a general sense fulfilled the promise of the Fourteenth Amendment, at long last reflecting the full impact of the Civil War on civil rights. What might be called the original intent imperative in American constitutional law, however, impelled civil rights advocates and liberal justices to seek explicit acceptance of the neo-abolitionist theory of the purpose of the war amendments by the Supreme Court.

Partial acceptance of the theory came in 1964 in *Bell v. Maryland*, the potentially landmark sit-in case in which the Supreme Court was asked to decide whether private discrimination by a restaurant owner was legal, or whether blacks had a constitutional right to nondiscriminatory service. The case offered the justices an opportunity to settle one of the central questions in the controversy over civil rights: the scope of state action under the Fourteenth Amendment in relation to the individual right of association, or the nature and extent of private discrimination. In an anticlimactic decision, the Court avoided the issue by remanding the case to the state court for reconsideration, in light of a recently adopted state public accommodations law. Several justices, however, took up the original intent question in concurring opinions. They held generally that the right of equal access to public accommodations was inherent in the historic purpose of the Civil War amendments and was an attribute of national citizenship.

In *Jones v. Alfred H. Mayer Co.*, an open housing case of 1968, the Supreme Court gave full acceptance to the neo-abolitionist view of the original intent of the war amendments. The right of a black couple to buy property in a housing development, the Court decided, was protected against private discrimination under the Civil Rights Act of 1866, in accordance with the intent of the authors of the statute. In other words, the law was not intended to contain a state action limitation as previous decisions and interpretation had held. The Supreme Court further concluded that the Civil Rights Act of 1866 was constitutional under the Thirteenth Amendment, not the Fourteenth Amendment, as one might have expected the Court to say. In the opinion of the Court, the framers of the Thirteenth Amendment intended to destroy all discriminations in civil rights against blacks, and to give Congress the power "to determine what are the badges and incidents of slavery" and to eliminate them.

A Shift to Affirmative Action

Jones marks the fourth phase of historical theorizing about the original intent of the war amendments. It coincides, significantly, with the shift from equal opportunity to race-conscious affirmative action as the central theme in national civil rights policy. Avoiding the complications and restraints on federal power that had developed over the years in Fourteenth Amendment jurisprudence concerning state action and private discrimination, the Court in *Jones* went back to the basic slavery-versus-freedom dichotomy posed by the Thirteenth Amendment. It provided a novel, if not dubious, set of historical conclusions—or perhaps fictions—about Thirteenth Amendment original intent that theoretically could justify preferential treatment toward blacks as an exceptional class.

Eliminating the "Badges and Incidents"

The Court's decision in the 1968 open housing case may be thought of as symbolic of the demand for historical justice that is used to support affirmative action policy. Congress has not used the power conferred upon it in *Jones*, and in a legal sense the Thirteenth Amendment power to define the badges and incidents of slavery is not necessary to legislate affirmative action preferences; congressional spending and commerce powers, long sanctioned by judicial decision for just about any conceivable federal purpose, provide ample authority. Yet the Thirteenth Amendment approach is more satisfying, morally and psychologically. And in a political and social sense—and perhaps also in a strict constitutional sense, in view of the Supreme Court's approval of minority preference in *Johnson v. Transportation Agency of Santa Clara Country*, as justified by past societal discrimination—affirmative action implicitly rests on a Thirteenth Amendment rationale. The reasoning behind it is that all discrimination against blacks and all differences between whites and blacks are the result of societal racism and discrimination that signify the continuation of slavery in another form. In its weak form permitting and in its strong form requiring preferential treatment on the grounds of race, affirmative action is in effect justified as necessary to complete the abolition of slavery and guarantee universal freedom and equality, in accordance with the original intent of the Thirteenth Amendment. It is not an inconsiderable thing, finally, that the Supreme Court has written into constitutional law an extraordinary grant of legislative power which, given the proper configuration of political forces—as in a "rainbow coalition" government—could undertake sweeping redistributionalist social policies under the stated purpose of defining and eliminating the badges and incidents of slavery.

We may say that the Civil War has had profound civil rights consequences, the changing and sometimes uncertain nature of which continue to be felt in our own time. The greatest impact occurred with the change from slavery to freedom for 4 million black men and women during the war. Yet this has not always been recognized. Charles Beard called emancipation the greatest sequestration of property in history, and among neo-progressive historians there has been a tendency to discount the significance of formal freedom in affecting the actual conditions of black life, on the ground that civil rights without economic redistribution are not meaningful or that true racial equality was not achieved during Reconstruction. This is a shortsighted and unhistorical view that underestimates the absolute value of personal freedom and civil liberty. In truth the Civil War amendments, embodying the basic regime principles of liberty, equality, and consent, carried out the civil rights revolution signified by the abolition of slavery and made it permanent. It is all too true that the letter and spirit of civil rights law were unfulfilled during and after Reconstruction, and remained so until the enactment and successful implementation of the civil rights acts of 1964 and 1965. This means that the application of the equal rights principle was incomplete, however, not that it was inherently flawed or defective.

The War's Enduring Legacy

While historically the impact of the Civil War on civil rights has fluctuated with changing interpretations of the purpose and intent of the war amendments, in a philosophical sense the legacy of the conflict is more enduring and less problematic. It consists in the principle of equality before the law that guided the framing of the war amendments and formed the basis of national civil rights policy. Equality in civil rights was intended to be racially impartial and color-blind. The purpose of the framers of the 1860s was to make the freed slaves American citizens and to confer on them ordinary civil rights, not a special right of Negro freedom and equality as supporters of affirmative action have contended. American slavery had been racial slavery: American freedom was therefore racially qualified, not in principle but in a historically positivistic sense. The purpose and intent of the Civil War amendments were to remove this racial stigma from republican civil liberty.

"I may not know much about the Constitution, but I certainly know what I like."

Drawing by Bernard Schoenbaum; © 1991 The New Yorker Magazine, Inc

In a practical sense, of course, the equal rights policy, affirmed in the civil rights laws and amendments, operated mainly for the benefit of blacks. Indeed any post-emancipation policy, whether racially impartial or treating blacks as an exceptional class—as was proposed and rejected when Congress created the Freedmen's Bureau in 1865—could be looked on as preferential in its actual effect. The question is whether the nature, purpose, and principles of civil rights policy are to be derived from the facts of relative historical context and situation, or defined by the formal standards and provisions of the war amendments and civil rights laws expressing the idea of equal rights for individuals without distinction of color.

Conclusion

Context and circumstance are obviously relevant to policymaking and political action. Common sense tells us, however, that changing historical circumstances and relative social conditions can never be the source of the fixed principles and standards on which constitutional government and the rule of law depend. Republican government in America rests on the universal principles of natural rights expressed in the Declaration of Independence. The Constitution embodied these principles in institutional forms, procedures, and substantive provisions, and the Civil War amendments extended them throughout the nation. Although the framers of those amendments were concerned in a practical way with the status and rights of the emancipated slaves, they were writing a constitution to preserve and extend the individual rights and liberties of all Americans, not simply those of the freed people. This view of the nature and purpose of the war amendments stands out most clearly in the historical record. Whether it will remain the basis of national policy is the central issue we face in the continuing controversy over civil rights in American society.

Herman Belz is a professor of history at the University of Maryland, College Park, MD. This article is reprinted with permission from The Center Magazine, *Vol. 20, No. 6, Nov.-Dec. 1987, published by the Center for the Study of Democratic Institutions. © 1987 The Center Magazine.*

Classifications

(continued from page 11)

White—wrote a series of concurring opinions that distinguished different points without coming to a consensus on everything. A plurality concluded that all racial classifications were inherently suspect and subject to strict scrutiny. To survive strict scrutiny, the classification must be justified by a compelling governmental interest, and the means chosen to effect that governmental interest must be narrowly tailored to achieve the goal. Racial classification may be permissible only as long as it is narrowly tailored to achieve its purpose and has minimal side effects on innocent people.

Justice Marshall, joined by Justices Brennan and Blackmun, dissented from that decision and argued for a much less exacting standard of review for benign racial classifications. In their view, if the classification is substantially related to the achievement of important governmental objectives, then it is permissible. The minority of the Court made the distinction between benign classification and invidious classification. While that was a minority view, it was clear that whatever standard of review was applied to these racial classifications, everyone agreed that remedying past discrimination was a sufficiently weighty governmental concern to justify racial classification. If the entity classifying people on the basis of race was doing so to overcome an earlier detriment based on race, that was a compelling governmental interest for the purposes of strict scrutiny and clearly was an important goal for that lower level of review.

In 1989, the Court revisited this question in *City of Richmond v. J.A. Croson Co.* (*Editor's note: For a detailed treatment of this case, see the Winter 1990 issue of* Update, *pp. 24-26*). By this time, Justice Powell had retired and Justices Scalia and Kennedy had joined the Court. They joined with Justices O'Connor, Rehnquist, and White to conclude that even benign classifications are subject to strict scrutiny. The Court said, as I alluded to before, that the distinction between the benign and the invidious makes no sense because what is benign to one is invidious to another. Whenever government classifies people and treats them differently based on race, the Court will look at that activity with strict scrutiny and that activity will comport with equal protection only if there is a compelling governmental interest narrowly tailored to achieved that goal.

In *City of Richmond*, because the city had not presented evidence of past discrimination, the Court concluded there was no factual predicate to justify the racial classification and rejected Richmond's set-aside program as inconsistent with equal protection.

Retreat from Affirmative Action?

Justices Marshall, Brennan, and Blackmun, in a fiery dissent, said that the majority's approach was a deliberate and giant step backward in the Court's affirmative action jurisprudence. These three justices called again for an intermediate level of scrutiny for benign classifications. Justices Blackmun and Brennan went so far as to say that the Court struck down remedial efforts of the former capital of the Confederacy as though discrimination had never existed in this country. After *City of Richmond*, Court watchers agreed and understood that this new conservative majority had taken over and that affirmative action was dead. The Court intended to look at every race-conscious activity of every governmental entity, scrutinize it strictly, and reject it.

One surprise, though, was the Court's decision in the 1990 case of *Metro Broadcasting Company v. Federal Communications Commission*. Justice Brennan wrote the majority opinion with Justices White, Marshall, Blackmun, and Stevens concurring. In this case, the Court adopted the lesser standard of review for racial classification, unusual is that this racial classification was imposed by Congress and not a by a state and was not even remedial. The Court did not suggest that that this classification was trying to overcome prior discrimination. The governmental interest served by this classification was to achieve broadcast diversity. In short, the FCC and Congress had implemented policies that would allow the FCC to grant preferences in assigning new licenses to minority enterprises. The FCC also had a policy that, if a licenseholder was about to have its license revoked or at least taken to a revocation hearing, the licenseholder could avoid that by quickly transferring his license to a minority enterprise, but could not transfer it to anyone else.

The Court said, with a majority of Justices Brennan, White, Marshall, Blackmun, and Stevens, that benign racial classifications mandated by Congress, even if not remedial, are constitutionally permissible as long as they serve important government objectives and are substantially related.

The Court distinguished *City of Richmond*'s adoption of strict scrutiny for all classifications on the ground that *Metro Broadcasting* involved Congress and not a municipality. Justices O'Connor, Rehnquist, Scalia, and Kennedy dissented as harshly as Justices Brennan, Marshall, and Blackmun did in *City of Richmond*.

When Race Is a Valid Concern

Even today, after all these years and after all this haranguing by conservatives and liberals, the Court still is not clear on what equal protection is and when dissimilar treatment of people based on race is permissible.

It is unlikely that consideration of race in governmental decisionmaking will be viewed by the Court as inconsistent with equality, because the Court has said that such consideration is consistent with equal protection under certain circumstances. The justices all agree that under certain circumstances, where there is a compelling interest and narrow tailoring, a government may consider race. It is likely that strict scrutiny will be applied even to benign classifications. I suspect that *Metro Broadcasting* is a fluke, although we may have reason to believe that it is not.

We can understand government's desire to achieve positive results in society, and we can understand the government's recognition of race as a significant factor in American life. We can probably understand government's desire to regulate our interactions in a way that will make life better for us all. My question, though, goes beyond that: If we assume that equality should, in an ideal world, mean equal treatment for everyone, if we assume that in such a world, equality would mean no consideration of race, will we ever get to a point where the Court can legitimately say that race is insignificant and that equal protection means equal protection? If we do ever get to that point, how will we know it?

Michael A. Middleton is professor of law at the University of Missouri School of Law, Columbia, MO where he specializes in employment discrimination and criminal law. This article is adapted from Professor Middleton's remarks at the ABA Bill of Rights Institute for Teachers held at American University in Washington in the summer of 1990.

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The Civil War Amendments: Select Resources

Additional Reading for Students

Prepared by Arlene F. Gallagher

This selection of titles offers background and understanding of the need for the Civil War amendments. While the books listed are for advanced readers (grades 7 and above), it is important to remember that many books cross levels and the designation is only for the reader's convenience.

Crane, Stephen. *The Red Badge of Courage*. (New York: Penguin, 1987). The classic story of a young boy's account of Civil War experiences.

Heidish, Marcy. *A Woman Called Moses*. (Boston: Houghton Mifflin, 1976). A novel based on the life of Harriet Tubman, black heroine of the Underground Railroad. An adult novel, parts of which could be read aloud to students.

Hooks, William H. *Circle of Fire*. (New York: Atheneum, 1982). In North Carolina in 1936, an eleven-year-old white boy and his two best friends who are black stumble onto a Ku Klux Klan plot to attack a band of Gypsies.

Hamilton, Virginia. *Anthony Burns: The Defeat and Triumph of a Fugitive Slave*. (New York: Knopf, 1988). Set at a time when antislavery feeling was at a fever pitch in the North, the case of Anthony Burns literally rocked Boston. The hearings triggered massive riots and thousands of troops were called in by an administration sympathetic to the fugitive slave laws. Burns' story will help the reader understand the background to the Civil War and the resulting amendments to the Constitution.

Meltzer, Milton. *The Bill of Rights: How We Got It and What It Means*. (New York: Crowell). This book traces the history of the Bill of Rights back to England in 1215. He draws the reader in by presenting possible scenarios that would happen without these protections. This fine book sets the groundwork for an examination of the Civil War amendments.

Additional Resources

"The Fateful Decade: From Little Rock to the Civil Rights Bill," videocassette, available from Films for the Humanities and Sciences, P.O. Box 2053, Princeton, NJ 08543•2053; (800) 257-5126.

"We Shall Overcome – A History of the Civil Rights Movement," videocassette, available from Knowledge Unlimited, P.O. Box 52, Madison, WI 53701•0052; (800) 356-2303.

"The Civil War and Reconstruction," a multimedia unit for the Macintosh, available from Scholastic Software, 2931 E. McCarty St., P.O. Box 7502, Jefferson City, MO 65102•9968; (800) 541-5513.

"Eyes on the Prize," a multi-part videotape series on the civil rights movement, available from PBS Video, 1320 Braddock Place, Alexandria, VA 22314•1698; (800) 424-7963.

The following books are companions to the "Eyes on the Prize" series:

Hampton, Henry and Fayer, Steve. *Voices of Freedom: An Oral History of the Civil Rights Movement from the 1950s through the 1980s*. (New York: Bantam Books, 1990)

Williams, Juan. *Eyes on the Prize: America's Civil Rights Years 1954•1965*. (New York: Viking Books, 1987)

The following materials are available from Close Up Publishing, 44 Canal Center Plaza, Alexandria, VA 22314 (800) 765-3131:

The Bill of Rights: A User's Guide. This book traces the historical evolution of the Bill of Rights and the Fourteenth Amendment. It also outlines major developments in constitutional law under each amendment and tells the stories of the people behind the cases. *The Bill of Rights Teacher's Guide*, which accompanies the book, is also available.

"Democracy and Rights: One Citizen's Challenge." This videotape depicts the struggle in 1957 of Ernest Green, the first black student to graduate from Central High School in Little Rock, Arkansas. An instructor's guide is also available.

The Civil Rights Act of 1991

Following months of controversy and debate, on November 21, 1991, President Bush signed into law the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

As set forth in Section 3, the purposes of the act are: "(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.); and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection for victims of discrimination."

An additional provision of the act is contained in title II, referred to as the "Glass Ceiling Act of 1991." This title establishes a federal Glass Ceiling Commission chaired by the Secretary of Labor "to focus greater attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decision-making positions in business" and "to promote work force diversity." The commission is to report its findings and recommendations in early 1993.

The act also addresses a statutory loophole by extending protection of the Civil Rights Act of 1964 to employees of the Senate.

More About Moot Courts

The Fall 1989 issue of *Update* is devoted to the Supreme Court and contains practical information on how to conduct a moot court simulation in the classroom. Copies are available for $6 each from American Bar Association Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611.

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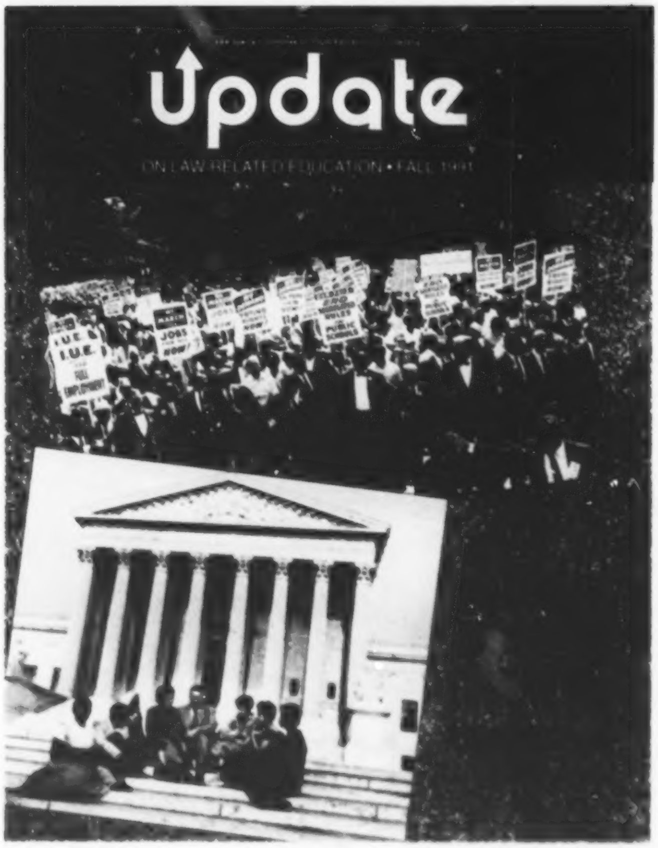
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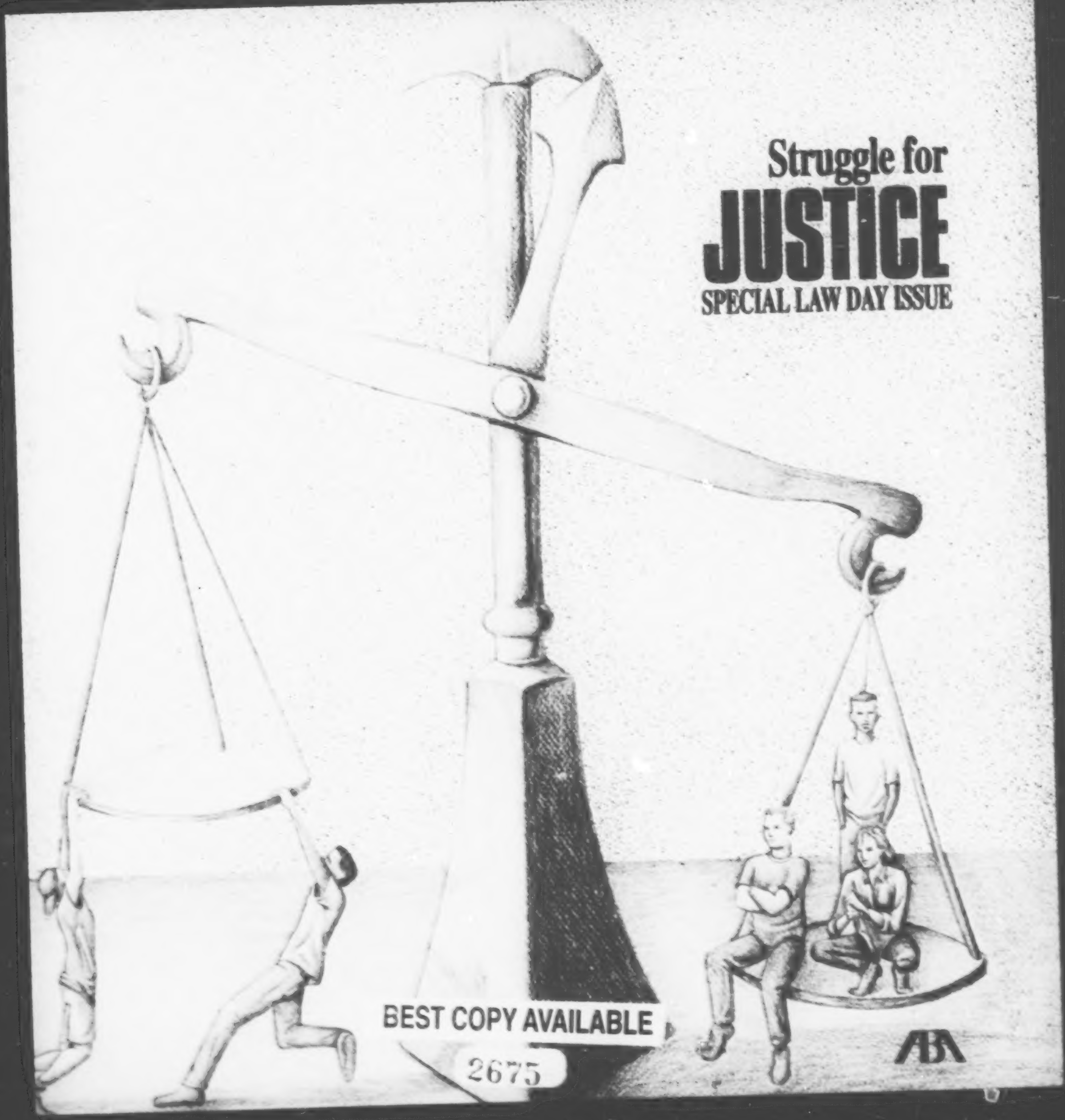

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Copies of "A More Perfect Union" are available for $25, which includes shipping, handling and a copy of the 12-page presenter's guide. To order or for more information, contact the National Law-Related Education Resource Center, ABA/YEFC, 541 N. Fairbanks Ct., 15th Floor, Chicago, IL 60611-3314; (312) 988-5735; fax (312) 988-5032. (All orders must be prepaid.)

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contents

Volume 16, Number 1
Winter 1992

3 **Thoughts on Teaching About Justice**

4 **Frontier "Justice" Versus the Rule of Law**

A SECONDARY SCHOOL STRATEGY

9 Justice and Intolerance

11 **What Justice Means to Young People**

12 **. . . But What If You Have No House?**

SECONDARY SCHOOL STRATEGIES

17 Current Issues and Distributive Justice

19 Cultures in Conflict: Using Procedural Justice

26 **A National Sampler of Law Day Activities**

On the cover: This issue's cover was created by Joe Castillo, a senior at Lane Technical High School in Chicago. Joe's contribution was made possible through the efforts of the Marwen Foundation, a not-for-profit organization in Chicago which brings free art education, career development, and college planning to underserved young people ages 5 through 19, helping them visualize their futures through art.

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The points of view or opinions expressed herein are not necessarily those of the Special Committee or the American Bar Association.

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opening statement

You'll find something new and—we hope—exciting and useful in the center of this issue. It's the premiere issue of a special student edition of *Update* designed to engage, entertain and enlighten young people about the various issues they face in today's fast-moving and ever-changing society. It will be an annual feature included with each Law Day edition; copies are also available separately for student use, with special discounts available for bulk orders—please contact us for details.

Many consider the concept of justice to be too subjective and perhaps too controversial to treat effectively and meaningfully in a classroom setting. Yet, justice is, as Isidore Starr notes in this issue's lead article, "a powerful idea that runs through our art, literature, and customs." How does one make this powerful idea come to life for today's young people? One way, Isidore suggests, is to use the humanities to establish an historical context for the study of an idea which is central—and essential—to law-related education.

Following Isidore's article, Frank Kopecky uses two appalling episodes from our country's past to show how fragile the rule of law can be when raw emotions override tolerance and respect. The thought-provoking activity following the article provides a solid foundation for student examination of the various civil liberties issues which surround the dissemination of a minority point of view which many would consider "politically incorrect" if not offensive and abhorrent.

Few would argue with the statement that in many respects today's students seem to be the most tested, surveyed, and studied in history. Their progress in math and science are followed closely as predictors of the nation's future as technological superpower. We know somewhat less, however, about how they feel about justice. While not presented as conclusive, a survey of young peoples' attitudes on justice and justice-related topics reported on by Peg Rider-Hankins on page 11 provides some insights that you may find surprising and hopeful. I encourage you to contact Peg for more information about the survey; she can also provide you with copies should you wish to use the survey as a class exercise.

Homelessness is an issue that seems to be of particular concern to young people. In her article on page 12, Suzin Glickman explores a central and evolving controversy surrounding this growing national problem—the applicability of Fourth Amendment protections to the homeless. Does a person who lives in a cardboard box enjoy the same constitutional protections as one who lives in what we conventionally define as a "home"? What do the courts consider to be a home? What are the rights of the homeless when they spend the night in a shelter? What expectation of privacy are people entitled to in different settings, such as a hotel or boarding house? This is an area of the law that is by no means settled and one that can provide fertile ground for a discussion of justice that has special relevance to young people today.

Finally, please take a few moments to complete and return the Reader Survey found at the back of this issue. Your responses, together with an editorial advisory board now being planned, will help us as we develop the significantly expanded *Update* publications package that will make its debut this fall.

—*Jack Wolowiec*

STRUGGLE FOR JUSTICE

Isidore Starr

Thoughts on Teaching About Justice

Creative use of the humanities can spark student interest in an important concept

Justice is a powerful idea that runs through our art, literature, and customs. As such, it offers many opportunities for creative teaching. Edmund Cahn has noted that justice is "a word of magic evocation," which troubles our thoughts, arouses our emotions, and stimulates our glands. The Holocaust, torture of the innocent, execution of an innocent man or woman, or the incarceration of political prisoners in insane asylums generally evokes either silent anguish or cries of "Unfair!" and "Unjust!" It is our sense of injustice, says Cahn, which forces us to try to define the idea of justice, and it is this sense of justice and injustice which coalesces us into programmatic crusades for reform.

Past and Present

Children are confronted with the idea of justice in the concrete form of fairness in treatment and in the abstract form of due process of law in the school and community. Our contemporary views of justice can have little meaning to the young unless they are introduced to those customs of the past which were designed to separate the innocent from the guilty. The medieval ordeals by fire, water, and battle, as well as the ingenious instruments of torture which have bloodied the soil of history down to the present day, offer opportunities for comparing what was, with what is, and with what ought to be.

There are episodes in ancient, medieval, and modern history which are useful in examining with students the relationship between power, justice, and law. For example, what can we learn about the values of Babylonian society and the nature of justice from a study of some of the provisions of Hammurabi's Code of Laws? What does a reading of the Ten Commandments tell us about the values of ancient Hebrew society? In early colonial Massachusetts, "a stubborn and rebellious son of sufficient understanding, sixteen years of age" who was disobedient to his parents could be put to death. This, too, tells us a great deal about moral values and legal enactments and the sense of justice in some societies. Each episode or example calls for inquiry about explanations, as well as supported critical judgement.

The comparative study of punishment carries with it value systems relating to human dignity. Socrates drinking hemlock, a witch burned at the stake or hanged, branding and mutilation, pillory, stocks, the dunking stool, prisons, and capital punishment by electricity, shooting, or drugs—these examples are both gruesome and instructive.

Symbol and Drama

Turning to contemporary society, the Pledge of Allegiance and the Preamble to the Constitution mention justice, but the term is not defined with any degree of precision. It is reasonable to infer that the Fourth, Fifth, Sixth, and Eighth Amendments of the Bill of Rights convert abstract justice to procedural justice. The judicial process or procedure that is due any person accused of a crime is converted to a series of principles designated as due process of law. To avoid laundry-listing these great rights, I offer a schema for presenting due process of law. If we conceive the courtroom as a theater, then we can involve students in the quest for the script, the props, the title of the drama, the starring roles, the subordinate players, the audience, and the press. If the dramatis personae do not assume the roles mandated by legal tradition, the morality play can easily become an immorality farce. The corrupt or prejudiced judge, the bribed juror, the perjured witness, or the incompetent counsel or prosecutor tilts the scales toward injustice.

The symbol of justice, the goddess with the scales and the sword or book, has had an interesting history. Originally without blindfold, she was free to observe the human comedy and to sift the guilty from the innocent. Corrupt justice in the Middle Ages led some jesters to blindfold her—to show to all the world that the goddess was blind to justice. In later centuries the blindfold was interpreted to mean that justice was impartial because the goddess was not interested in the color, religion, or wealth of the accused. With the racial revolution the blindfold has been removed so that the poor and the disadvantaged in our society can stand before the goddess and demand

(continued on page 28)

Frank Kopecky

Frontier "Justice" Versus the Rule of Law

Two cases of intolerance in mid-19th century America illustrate the role of the Bill of Rights

Introduction

Elijah Lovejoy, a newspaper editor and Presbyterian minister, was murdered by a mob in Alton, Illinois in November 1837. Joseph Smith, founder of the Mormon religion, was murdered by a mob in Carthage, Illinois in June 1844. These incidents, which took place on the Illinois prairie within seven years and 150 miles of each other, are two of the more striking examples of intolerance in our nation's history. Both men are remembered today as martyrs for the cause of civil liberties, their lives and deaths serving as reminders of how important civil rights are in our society and the need for constant vigilance to protect them.

Civil liberties have not been won easily. Throughout history, there has been a constant struggle to protect the individual. Along the way there have been victories as well as some defeats; we must learn from both. Over 200 hundred years ago, Thomas Jefferson wrote that "All men are created equal." A civil war was fought and many political and legal battles have been waged in the succeeding years to determine what that language means. Many additional struggles will no doubt occur. Let us hope that by reading about—and learning from—the past we can learn to tolerate differences and find ways to resolve our disputes through political and legal processes.

What follows is the story of two men who were similar in many ways. Both were religious and were willing to die for what they believed in. Both men held their views so strongly that they were intolerant of others who did not share them. Both were willing to actively seek political change. They were willing to advance positions which were unpopular in their communities and put them clearly in the political minority. The combination of religious conviction, strongly held controversial views and political activism guaranteed conflict with their neighbors in the political majority.

The Geography and People

Illinois was a rough place in the 1830s and 1840s. Much of the northern part of the state had not been settled and Indians were still common. Chicago was but a small trading community on the shores of Lake Michigan. The Mississippi River marked the edge of the frontier, and St. Louis was truly the gateway city for points to the west. River travel was the most convenient means of transportation and the communities along the rivers were the primary population centers.

Alton, located about 20 miles north of St. Louis near the point where the Missouri River from the west and the Illinois River from the northeast join the Mississippi, was a rapidly growing commercial center. About 175 miles upstream on the Mississippi in Hancock County, the Mormons founded the community of Nauvoo with Carthage as the county seat. The settlers of the upper Mississippi were a rough lot. The level of education was low. Most of them had migrated from the mountain region of the south or from the Ohio River region. Life on the frontier was difficult, and keeping a roof over one's head and food on the table was about all that could be expected.

Rights in Conflict

These stories are also about the Bill of Rights. The right to a jury and the right to bear arms play an important part in both incidents. Although many persons witnessed the murders of Lovejoy and Smith, no one was ever convicted of murder. In both cases, juries returned verdicts of not guilty. Was the right to a jury abused? Smith was disliked because of his religious beliefs and growing political power; Lovejoy because he advocated the abolition of slavery. Ironically, Lovejoy was killed defending his printing press from being destroyed by a mob. Smith was killed while being held in jail essentially for causing the destruction of a printing press. Finally, the use of the militia plays a role in both cases. On the frontier, without the benefit of an organized police department, men exercised their right to bear arms to protect their property and to enforce the law as they saw fit.

In those early years of our history, people were more willing to use violence to resolve their disputes. And, perhaps, men were less tolerant and open minded as well. In both of these incidents, the long, dark shadow of prejudice can be clearly seen. Perhaps the most important lesson to be learned from these two cases is just how fragile a safeguard the Bill of Rights is. The minority is protected by the Bill of Rights only as long as the majority is willing to recognize the importance of these rights as safeguards. If the Bill of Rights and the rule of law are to prevail, the majority must be willing to tolerate different opinions and different views.

Answering a Call

Elijah Lovejoy first arrived in St. Louis in 1827, the 25-year-old son of a New England minister. Answering a call to the religious life, he worked in St. Louis as a teacher and as a part-time editor of a newspaper. In 1831, he returned to the East and earned a divinity degree from Princeton University. Two years later, he was back in St. Louis as a part-time Presbyterian minister and the editor of a religious paper, the *St. Louis Observer*. The stage was set for the events which followed.

The Observer, although a religious paper, carried a wide variety of articles. In it, Lovejoy lashed out at gambling, drinking and the use of tobacco, and more and more he attacked the institution of slavery. *The Observer* was itself no model of tolerance, freely criticizing other religious groups, particularly Roman Catholics and Baptists. Missouri was a slave state, with St. Louis serving as a center for the buying and selling of slaves. Lovejoy became increasingly convinced that slavery was morally wrong, and articles on slavery began to appear in his paper with increasing frequency. The paper did receive some threats, but by and large was successful and Lovejoy, while not wealthy, was able to support himself. He married and had a child.

Lovejoy Speaks Out

By 1836, the *Observer* had become closely identified with the cause of abolition. In April of that year, a slave was accused of a gruesome murder and was lynched by a mob. Lovejoy wrote an editorial criticizing mob justice and slavery in general. When the grand jury failed to indict anyone for the lynching, he printed another strongly worded editorial. This was too much for the citizens of Missouri. A mob assembled and smashed the *Observer*'s printing press, throwing the pieces in the Mississippi. Lovejoy had been contemplating moving his paper to the free soil state of Illinois for several months. The destruction of his press and the increasing number of threats on his life persuaded him to move on. The future, he would learn, was not to be brighter on the Illinois side of the river.

Trouble in Alton

Lovejoy and his family arrived in Alton in July 1836. A bustling city, Alton was one of the largest in Illinois at the time and many thought that it would surpass St. Louis as a commercial center. Alton's citizens, however, as Lovejoy would soon find out, were no more open minded on the subject of slavery.

While Illinois was a free state, there was a great deal of sympathy for slavery and prejudice against blacks. Illinois initially was settled from the south. Many Illinoisans had their roots in slave states, migrating down the Ohio and up the Mississippi. There was little sympathy for abolition in the state; in 1822, a proposition to amend the state constitution to allow slavery was defeated by only a small margin. During this period, Illinois had closer commercial and cultural ties with Missouri and other slave states along the Mississippi than with the eastern states.

Lovejoy's reputation as an abolitionist preceded him. Arriving in Alton on a Sunday, he left his printing press and equipment on the dock that evening. During the night, a group of men smashed the press and threw it into the river. This was the second press Lovejoy had lost in this manner, and there were more to follow.

Undaunted, Lovejoy met with a group of religious and business leaders who agreed to give his newspaper financial support. It was agreed that the paper would be a general religious newspaper and that the abolition of slavery would not be emphasized. Lovejoy insisted, however, that he would not shy away from articles on slavery if they seemed appropriate. A new press had arrived, and for several months the newspaper prospered. Slavery was not a dominant topic in the paper, but Lovejoy could not stay away from the topic for too long. He began to plan the formation of an anti-slavery society with his friend Edward Beecher, the founder of Illinois College, and articles on slavery began to appear more frequently.

Abolitionist Activism

On July 4, 1837, he published articles pointing out the hypocrisy of celebrating freedom while slavery existed and calling for the creation of an Illinois Anti-Slavery Society. The year 1837 was difficult for many. There had been a financial crisis, and many were unemployed in Alton and elsewhere. Lovejoy's articles attacking American values and slavery spurred a mob to action. His offices were broken into, and, for the third time, his press was destroyed. Lovejoy, however, only became more determined to exercise his right to publish his views and speak out. He and his backers soon ordered a new press.

While awaiting its arrival, Lovejoy helped organize a local anti-slavery society. A meeting of the society was held in Alton. Since the meeting was open to all citizens, the pro-slavery forces attended in greater numbers than the abolitionists, preventing the meeting from passing resolutions against slavery. Usher Linder, the attorney general of the state, attended and made several speeches critical of Lovejoy. The meeting further increased tensions in the community and reinforced the view that Lovejoy was a trouble maker.

When the new press arrived in September, it was immediately placed in a warehouse for protection. Mayor Krum of Alton assured Lovejoy that the press would be protected and a group of citizens was deputized to guard it. Nevertheless, later that night a mob assembled. The deputies put up token resistance, and Lovejoy's fourth press was destroyed. Lovejoy and his supporters resolved to fight on and ordered yet another press.

Battle at the Warehouse

The new press arrived on November 7, 1837 at three in the morning. For several days, groups of armed men had been hanging around the dock looking for the press and threatening violence. Lovejoy and his allies were determined to protect it with their lives if necessary. When the press arrived, it was moved to the warehouse of Winthrop Gilman. Gilman, a local businessman, believed strongly in the freedom of the press, and, along with Lovejoy, asked Mayor Krum to form a militia to protect the press. The mayor refused to lead such a militia but authorized its creation. About 30 men were assembled to protect the press.

Because the press arrived in the middle of the night, there was no immediate opposition. In fact, the town was peaceful for most of the day, but by evening a large group began to assemble. The group had been drinking and was armed. From time to time shots were fired in the air. Lovejoy and about 10 others inside the warehouse were armed and determined to protect the press. Prominent Alton citizens were also at the scene, and at various points during the evening they went into the warehouse to persuade the defenders to give up the press.

There is conflicting evidence as to exactly what happened next, but the mob approached the warehouse and demanded that the press be surrendered. Shots were exchanged, and one member of the mob was killed. It is not clear who fired the first shot. The mob retreated for a short time but returned determined to burn out the defenders. On their second attempt to start a fire, they succeeded in placing a ladder against the building and setting the roof on fire. Lovejoy went outside to put out the fire and was shot four times. He staggered to the building and died. The remaining defenders soon fled for their lives. The mob entered the warehouse, put out the fire and systematically destroyed the press, heaving its mangled parts into the swirling currents of the Mississippi.

Two Trials, Two Acquittals

Shortly after Lovejoy's murder, two criminal trials were held. The city of Alton tried Winthrop Gilman and the other men who attempted to protect the press for causing a riot by using excessive force to protect the press. Also, several members of the mob were charged with what amounted to criminal damage to property. Surprisingly, no trial for murder was ever held. Gilman was tried first, with Usher Linder, attorney general of the state, assisting in the prosecution. A not guilty verdict was returned by the jury. Shortly thereafter, the case against the mob members also ended in a not guilty verdict. Interestingly, Linder served as one of the defense counsel.

Issues and Aftermath

Reading the record of these trials, one is struck by how little the witnesses could remember or knew of what went on during the attack on the warehouse. The city needed a trial to clear the air and at least salvage the appearance of the rule of law. Yet it is evident that neither the witnesses nor the jury were driven to convict.

In order to convict in a criminal case, there must be proof beyond a reasonable doubt; without clear testimony from witnesses, the jury could not convict. While it might seem strange that the defenders of the press were charged with a crime, the law which has evolved does not allow an individual to use deadly force to protect property. Gilman and the other defendants successfully argued that they not only were protecting their property but their lives. Furthermore, they contended that they were acting as a militia and that the use of force was authorized by law. These arguments plus the conflicting evidence concerning which group fired the first shot apparently convinced the jury to return a not guilty verdict.

* * *

Joseph Smith's New Religion

Along with his brother, Hyrum, Joseph Smith was murdered at the jail in Carthage, Illinois. Their murders and the events which preceded them form an important part in the history of the Mormon religion in this country.

Joseph Smith founded Mormonism in New York State in the 1820s and was its first Prophet. The faith spread rapidly in the 1830s, drawing most of its members from northern states or from England. This fact served to set them apart from the typical settler of Illinois who at the time came from southern regions.

Mormonism differed from traditional Christian religions in several ways. Mormons believed in a second coming of Christ, and they adopted a communal life style. Their community and governing structure revolved around their religion. Some of their members believed in polygamous marriages—a marriage with more than one wife. These unconventional religious beliefs combined with their tendency to vote as a solid bloc often put them at odds with their more traditional Christian neighbors. To make matters worse in the eyes of their neighbors, they were an industrious people and were often economically prosperous.

In Search of a Settlement

Although they were growing as a religion, Mormons were having difficulty finding a permanent home. There were Mormon settlements in New York and Ohio as well as a developing settlement near Independence, Missouri which the Mormons planned to develop as their religious headquarters. However, intolerance of their religious beliefs and their willingness to convert Indians and free blacks to Mormonism led to increasing strife. In the winter of 1838-39 they were driven out of Missouri and sought refuge in Hancock County, Illinois. The Illinois legislature granted them a charter for their new settlement, Nauvoo. The considerable independence granted the Mormons by the charter only added to the resentment felt by the non-Mormon population of the county.

By 1844, the Mormon population of Nauvoo and the surrounding area had swelled to over 20,000, making it one of the largest communities in Illinois. Construction of a large temple was moving forward. The Mormons had become the dominant political force in Hancock County. They also had some influence on the state level as well, with political leaders in the state vying to control the solid bloc of Mormon votes. This success bred resentment, and the Mormons were soon to discover that Illinoisans were no more tolerant toward their religion than were the Missourians a few years earlier.

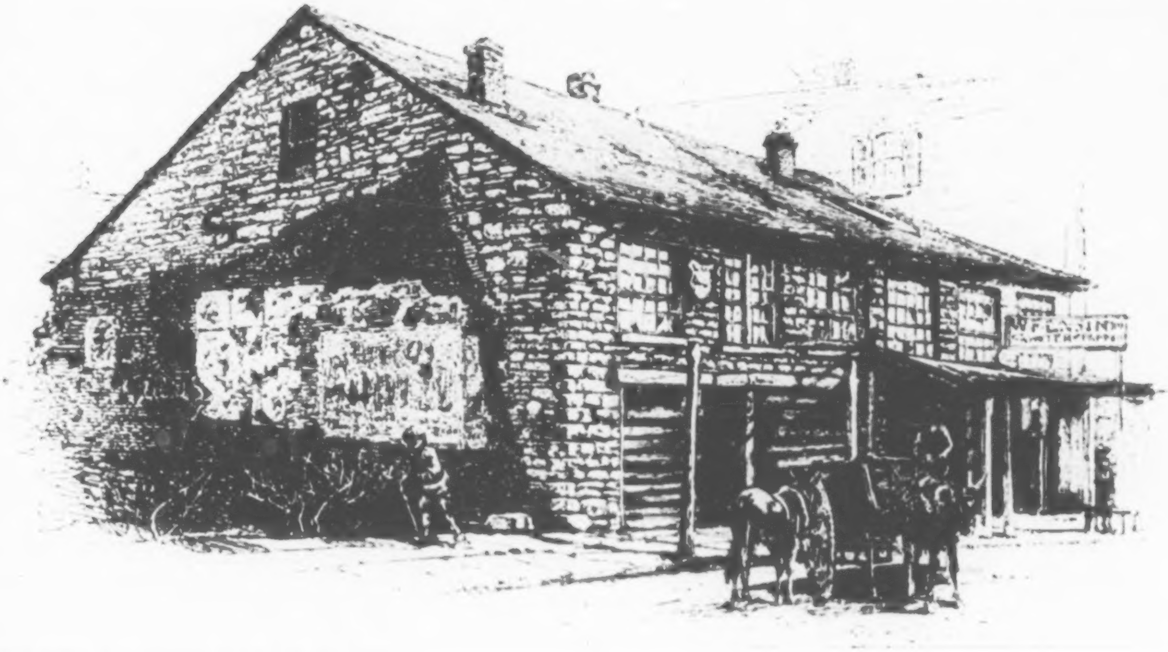
Wielding Political Power

By 1844, tensions were high and Hancock County found itself divided into two armed camps: the Mormons centered at Nauvoo in the northern part of the county and the original settlers located at Warsaw on the Mississippi River in the southwest and in Carthage, the county seat to the southeast. Both sides had militia units. Mormon-backed candidates had easily won in the latest countywide elections. The newspaper in Warsaw constantly printed articles attacking the Mormons for their religious belief and accusing them of becoming a law unto themselves. Missouri officials wanted to serve legal papers on several of the Mormon leaders, but were prevented from doing so by a decision of the Illinois Supreme Court. The original settlers saw this decision as yet another example of the undue political power of the Mormons.

The Mormons, however, were not as unified as the original settlers believed. A group of individuals within the Mormon community was forming to challenge the leadership of Joseph Smith. On June 7, they published the first edition of the *Nauvoo Expositor*. In it, they challenged Smith's political and religious views. The city council of Nauvoo, after lengthy debate and, with the urging of Smith—who was also the mayor—voted to have the *Expositor* declared a nuisance and destroy its press. The Nauvoo militia was dispatched to the *Expositor*'s office and smashed the paper's printing press. The original settlers now had further evidence that Smith and the Mormons felt that they were above the law. They were determined to prosecute Smith for the destruction of the press.

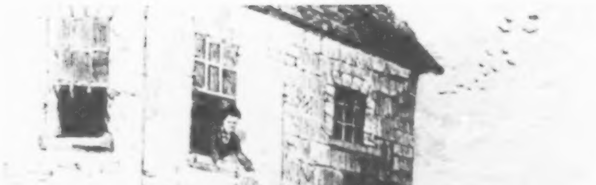
Surrender and Arrest

In Carthage, arrest warrants were issued for Joseph and Hyrum Smith for their role in the destruction of the press. The militia in Carthage and Warsaw were assembled to serve the warrants. The militia assembled in Nauvoo to keep the warrants from being served. A state of war was rapidly developing. The governor of Illinois, Thomas Ford, arrived on the scene with the state militia. He served as a peacemaker and eventually persuaded Smith to turn himself in and face the charges. Smith feared that if he went to Carthage he would be killed by a mob. The governor assured Smith he would be



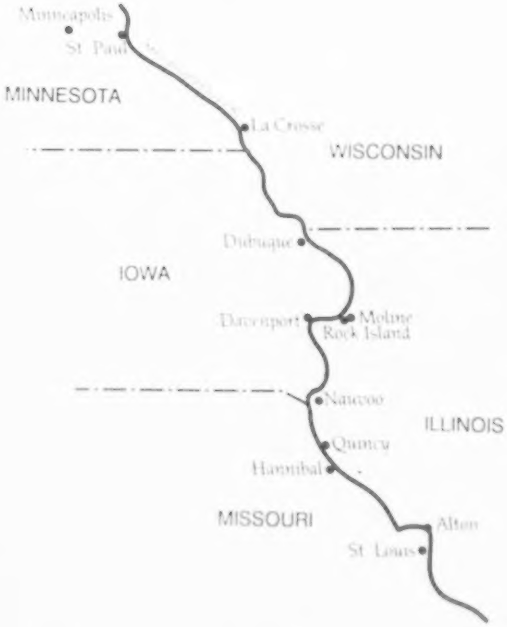
Illinois State Historical Library

Elijah Lovejoy's printing office in Alton



The Bettmann Archive

The death of Joseph Smith



Minneapolis
St. Paul
MINNESOTA
La Crosse
WISCONSIN
Dubuque
IOWA
Davenport
Moline
Rock Island
Nauvoo
ILLINOIS
Quincy
Hannibal
MISSOURI
Alton
St. Louis

protected and Smith, along with his brother Hyrum, agreed to surrender to the civil authorities in Carthage.

Joseph and Hyrum Smith arrived in Carthage on June 24, 1844. The magistrate presiding in Carthage at the time did not have the authority to release them on bond, and they were therefore held in jail until a circuit judge arrived who could hear their request for bail. Because they feared for their lives, the Smiths were allowed to keep revolvers with them in the jail.

Governor Ford convinced most of the Hancock County militia units to disband and, thinking that the situation had sufficiently calmed, dismissed much of the state militia. But on June 27 a group of militia men from Warsaw marched on Carthage intent on the murder of Joseph and Hyrum Smith. Awaiting them at the jail was a group of Carthage militia men with orders to guard the Smiths.

All According to Plan

The evidence of what transpired at the jail that afternoon indicates that both the attack and the limited defense were prearranged. The Warsaw men attacked the jail in daylight. The guards returned the fire, but none of their bullets struck the attackers; the guards then fled. A large group of militia men camped only a few hundred yards from the jail were able to reach the jail, but only after the Smiths had been fatally shot and the attackers long gone. The only real defense of the jail was undertaken by Joseph and Hyrum Smith and two of their friends who were with them.

For Additional Reading

- Simon, Paul. *Lovejoy: A Martyr to Freedom*. (St. Louis, MO: Concordia Publishing, 1964)
- Dillon, Merton. *Elijah Lovejoy, Abolitionist*. (Urbana, IL: University of Illinois Press, 1961)
- Lincoln, William. *Alton Trials*. (New York: Arno Press, reprinted 1970)
- Brodie, Fawn. *No Man Knows My History: The Life of Joseph Smith*. (New York: Alfred A. Knopf, Inc., 1966)
- Oaks, Dallin and Hill, M. *Carthage Conspiracy*. (Urbana: University of Illinois Press, 1975)
- McRae, Joseph and McRae, E. *The Liberty and Carthage Jails*. (Salt Lake City: Utah Printing Co., 1954)

No one was ever convicted in connection with the murders, and, despite the fact that many prominent men from the Warsaw community were part of the mob that attacked the jail, no one was able to identify any of the attackers. Only the handful of Mormons at the scene were willing to identify any of the attackers, and unfortunately, they were unable to make positive identifications.

Cries for Justice

Two men had been murdered while being held in custody, with the governor himself guaranteeing their safety. The Mormon community was angered by the events. Someone had to be brought to justice. A grand jury was assembled, and an indictment was issued against nine men. Five were arrested and stood trial; the other four apparently fled and were never heard from again. The five who stood trial were prominent men in the Warsaw community. One was the editor of the paper who had written numerous inflammatory articles attacking the Mormons.

After considerable legal maneuvering in which the original jury was dismissed and a new one assembled, the trial began in May 1845. The new jury was made up of fewer Mormons and more of the original settlers, making it more likely that a not guilty verdict would be returned.

The trial lasted several days, which was quite lengthy by the standards of the day. The prosecution had a difficult time finding witnesses who could positively identify the accused. It seems that the attackers had darkened their faces with gunpowder so successfully that no one could recognize them. In addition, the witnesses who did identify the accused were discredited by skillful cross-examination. The prosecution was also hampered by the refusal of many of the Mormon witnesses to participate in the trial. By this time, the Mormon leadership had given up on justice in Illinois. It dropped plans to develop a settlement in the state and planned a move west to Utah.

After hearing the evidence, the jury quickly returned a verdict of not guilty. The trial was over but the violence in Hancock County was not. Perhaps encouraged by the failure to bring to justice the killers of Joseph and Hyrum Smith, settlers attacked many of the outlying Mormon communities. The state militia was called out once again, but peace never returned until the majority of the Mormons moved to Utah. This period of intolerance toward the Mormons is a shameful part of the history of Illinois and of the nation.

Conclusion

The murders of Lovejoy and the Smiths are two of the most tragic events in our nation's history. In both instances intolerance came to the forefront. Mob rule rather than reason prevailed. These mobs were not made up solely of ruffians and troublemakers; some of the leaders of the community participated in their organization, while the newspapers of the day encouraged the attacks.

The importance of the First Amendment rights of speech, religion, and press are well documented in these incidents. The Second Amendment, however, while it played a leading role in both incidents, does not appear in a favorable light. When citizens feel compelled to organize militia and rely on their own weapons, the rule of law is clearly at risk. Was the role of the Second Amendment in these cases one we should feel proud of? Was it one that the Founding Fathers would have approved of or could have envisioned?

Initially, one may also conclude that the jury system guaranteed by the Sixth Amendment failed to meet the challenge in these circumstances, but, after reviewing the evidence which was presented to the juries in both cases, it is difficult to fault the juries for failing to convict. In fact, the whole governing system failed. What these cases strikingly illustrate is what can happen—and what *did* happen—when society sets aside the rule of law.

If any good resulted from these murders, it must be in the knowledge that Elijah Lovejoy and Joseph Smith are remembered today while their attackers have vanished with the passage of time. Both men became martyrs to the cause for which they died. The Mormons eventually found their Zion in Utah, where they prospered, and are now a recognized and accepted religious group in our country. Slavery was abolished within 30 years of Lovejoy's death and to this day his memory and the *Alton Observer* serve as a beacon for those who defend freedom of the press.

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Struggle for Justice

Justice and Intolerance/Secondary

Frank Kopecky

Objectives

At the end of this lesson, students will have:

1. A better understanding of the importance of civil liberties and the need to protect minority rights.
2. Knowledge of two important episodes in our nation's history.
3. Increased understanding of the meaning of the Bill of Rights, particularly the First Amendment rights to free speech and religion, the Second Amendment right to bear arms and the Sixth Amendment right to a jury trial.
4. Developed a framework for comparing modern legal practice and attitudes towards the Bill of Rights with past practices and attitudes.

Materials Required

Copies of the article "Frontier 'Justice' Versus the Rule of Law" and copies of the Student Handout for each student.

Procedure

1. Distribute copies of "Frontier 'Justice' Versus the Rule of Law" as assigned reading.
2. To stimulate student thinking and as preparation for the activity to follow, present for general discussion the questions listed below.
3. Divide the class into three groups and distribute copies of the Student Handout to each student. One group will represent the defense, one the state, and the third group will act as Supreme Court justices.
4. Instruct the students to familiarize themselves with the facts of the case as well as the arguments for each side. Each student acting as Supreme Court justice should examine the facts of the hypothetical case and be prepared to ask additional questions if they are unclear on any of the points presented.
5. Tell each group to prepare a brief listing their best arguments and select three group members to serve as attorneys who will present their case to the Court. Tell the attorneys that arguments will be limited to a total of 10 minutes per side.
6. Have the attorneys present their cases. Remind the Justices that they may interrupt the arguments to ask questions or save their questions for the end of each argument.
7. Instruct the Justices to meet as a group to consider the merits of the arguments presented, to vote, and to write a brief opinion supporting its decision. Justices opposing the majority opinion may write individual dissents if they wish, while those who agree with part but not all of the majority opinion may prepare concurring opinions.
8. Have the Court announce its decision to the class and read the opinions prepared.
9. Follow up by conducting the "What If..." exercise.

Discussion Questions

1. What are the similarities between the Lovejoy case and the Smith case? What are the differences?
2. What Bill of Rights issues are involved in these cases? What amendments contain these rights?
3. What role does the militia play in these cases? Would a modern professional police department have made a difference?
4. What made the people in Alton and Hancock County angry? Was it pure prejudice or were there economic and other reasons?
5. Why is freedom of the press important?
6. If a jury refuses to convict in the face of clear evidence of guilt, is this evidence that the jury system is a failure?
7. How could the government officials have responded to bring about a better result? Can government function if feelings of prejudice and intolerance are too deep?
8. If these events were to occur today, what would happen? Would modern Americans be willing to destroy printing presses and murder individuals because of their beliefs?

Using Local Legal History

Law-related education material often focuses on U. S. Supreme Court cases and congressional activities. While these cases and laws attract the most attention, they are far removed from the day to day lives of our students. To help students become more involved with LRE, we need to bring it closer to home. One way to do this is by encouraging students to discover and study local legal history.

Within 100 miles of virtually any place in the United States something of legal significance must have occurred; one need only know where to look and who to seek out. Local court houses are gold mines of historical information. Local historical societies and local newspaper archives can be explored. Senior lawyers and judges in the community can be interviewed. Oral histories of persons involved in legal disputes and the legal system can be collected by students.

I happen to live in Springfield, Illinois, which is the state capital and the hometown of Abraham Lincoln. Lincoln legal material and legend abounds, and the state capital has attracted considerable legal activity, but there is much more. In the 1870s, the Grange was active in the surrounding countryside, and later the United Mine Workers and others took their struggle for justice to area courts.

The civil rights movement can trace many of its roots back to Springfield legal history as well. The National Association for the Advancement of Colored People was formed following a race riot in Springfield in 1908, local schools were desegregated under court order in the 1960s and the form of city government was changed in the 1980s as a result of a suit filed under the Voting Rights Act. There are undoubtedly other important civil and criminal cases which could be studied. Every court house in every county contains an endless supply of student activities that can bring students a local perspective on history and the law.

2685

Student Handout:

A Hypothetical Case—The State v. Elton Loveless

THE FACTS

Prairie State University is located in an industrial city in the Midwest. Times have been tough. Unemployment is high and there has been a large increase in the amount spent for welfare and social services in the community. The community is almost 50% black and whites fear that they will lose their political power. There have been several racial incidents both on the campus and in the community.

Elton Loveless is the editor and publisher of a white supremacist student newspaper, *The Expositor*. *The Expositor* has run several articles critical of blacks and other minorities. Threats of violence against the paper have been made. At least two demonstrations have been held outside the dorm where *The Expositor* was published. Police intervention was required to disperse the demonstrators.

The state in which the university is located has a criminal statute which makes it a crime to publish articles which unduly demean an individual or group because of its race, gender, religion, ethnic origin, or sexual preference. Loveless publishes an article in which he depicts blacks as interested only in welfare handouts from government and further accuses the local government of giving in to black demands in order to control their votes. In his article he uses racial slurs.

Shortly after this article is published a mob attacks *The Expositor* office and destroys the equipment on which the paper was published. The police who arrive several minutes after the incident can find no one who can identify any members of the mob. Loveless, however, is arrested for inciting a riot and for publishing hate material. The inciting a riot charge is dropped, but he is convicted for publishing hate material. Loveless appeals the conviction.

ARGUMENTS FOR THE DEFENSE

The First Amendment guarantees every American the right to his or her own views no matter how offensive they may be. The First Amendment right to speech and to a free press restricts the state as well as the federal government from interfering with free speech. Free speech and a free press are essential in a democratic society. Our revolution was fought to guarantee a free society. We must allow interference with free speech only under the most extreme circumstances. No such circumstances can be found in this case.

While Loveless' newspaper was vile, and it printed many articles that do not belong in civilized discussions, the way to deal with such material is to ignore it or to answer it. Bad ideas must be stopped with good ideas not by suppression of the right to speak. Loveless had the right to publish what he wanted and the government had the duty to protect the press so that the publishing could go forward. Furthermore, the statute itself is vague. Statutes which limit free speech must be more precise to meet constitutional standards. The statute is unconstitutional and the conviction is reversed.

ARGUMENTS FOR THE STATE

America as a nation has advanced beyond the rough and tumble days of a frontier society. As a nation made up of many diverse groups, we must find ways to build tolerance and understanding. A law that regulates hate speech is a reasonable method of implementing a sound government policy. Free speech is not an absolute value. It has to be balanced against other interests in society. Furthermore, there was no prior restraint of the press. Loveless was not prohibited from publishing. He is only being held accountable for the words he wrote.

When Loveless published his paper he was fully aware of the tension that existed in the community. He knew that violence was likely to result. The inflammatory language in fact resulted in a riot. For years there has been a "fighting words" exception to protected free speech. Additionally, many years ago, Justice Oliver Wendell Holmes wrote an opinion in which he said, "No man has a right to yell fire in a crowded theater." The law is constitutional and the conviction should stand. The article Loveless published was the journalistic equivalent of fighting words or yelling fire in a crowded theater.

A "What if" Exercise

One of the interesting activities that can be conducted with legal case material is to change the facts slightly and discuss whether that would change the results. Following Lovejoy's murder, Winthrop Gilman was charged with encouraging a riot. What if two facts were changed. First, what if it is the 1990's instead of the 1830's and, second, what if it is clear that the first shots were fired from *inside* the building?

Assume an armed group assembles who peaceably, but assertively, demands the surrender of the press. Under this set of facts could Gilman and the other defendants be tried for murder if they began the shooting?

What do you think?

Could the jury decide that protecting the First Amendment justified using deadly force?

Peg Rider-Hankins

What Justice Means to Young People

A survey of students presents a varied mosaic of their attitudes and opinions

In the midst of the ongoing national debate concerning the many issues that affect young people, issues such as academic performance, delinquency, gangs, drug and alcohol abuse, there is a common but understandable tendency to make sweeping (and often unfounded) generalizations about young people.

Many of these generalizations relate to what could be termed "justice" issues. With the benefit of age, wisdom, and experience, most adults have a radically different set of ideas and expectations about justice than do young people. While most of us view justice through a set of lenses we are constantly polishing and refocusing, we sometimes fail to recognize that young people are engaging in the same process.

To gain some insight into how this process works for young people today, we developed and distributed a survey dealing with the topic of justice and justice-related issues. We asked students in grades eight through twelve to tell us what justice means to them, to give examples of people or groups that have struggled for justice, to tell how they deal with unjust situations, and what they would do to make their communities more just places in which to live. We heard from more than 230 students in six schools: Anderson High School and eighth grade and Occupational Work Experience (OWE) from Turpin High School in suburban Cincinnati, Ohio; Central High School in Cheyenne, Wyoming; the juvenile detention school in Camden, New Jersey; two high schools in Chicago, Illinois, Roberto Clemente High School and Kenwood Academy, and the eighth grade of Walt Disney Magnet School, also in Chicago.

When asked which words they would use to describe justice, the most common responses included equality and fairness in rights, opportunities, and treatment, and right overcoming wrong. The second most frequent image of justice was the legal system: the people who work in it—police, judges, lawyers, court staff; the legal processes—arrest, trials, sentencing, police protection; and the documents and symbols—Constitution, Bill of Rights, flag, Pledge of Allegiance. An eighth grade student at the Walt Disney Magnet School in Chicago expressed her view of our legal system this way: "Even though lots of people criticize it and say it's unfair, they try their best. Even though at first they're not right, they change when they see what is right." The personal freedoms that we enjoy—speech, religion, assembly—and protecting those freedoms followed in frequency of mention, followed by appropriate punishment for breaking the law.

About one in ten students felt that there is no justice in our country. They cited examples from the past such as the Salem witch trials and slavery and also from the present, such as the Rodney King incident, corruption in the courts, and mistreatment of the poor and racial minorities. A Turpin High School OWE student observed that the justice system was "created to protect the people but sometimes opposes the peoples' wants." Interestingly, only one student in a detention center considered the system unjust. Another youth at the center stated that justice is "the good side in the struggle of right and wrong."

Those Who Struggle

Students identified the African-American struggle to break the chains of slavery, segregation, and discrimination as the struggle they see as most important. A Turpin High School eighth grade student described the method many have used to gain justice in society: "Some picket and get arrested to try to improve things." The next most frequently mentioned group striving for justice was women. Also frequently mentioned were those involved in the legal system—defendants in trials, victims of crime and their families, the courts and police, and those who are wrongly accused and convicted. Other ethnic groups and immigrants were mentioned frequently as well.

A wide variety of individuals striving for justice were mentioned only once or twice but are nonetheless interesting to note because they represent perspectives that indicates a degree of thoughtfulness and maturity that we might find surprising: the disabled, colonists, musicians whose copyrights have been violated,

(continued on page 28)

STRUGGLE FOR JUSTICE

"The Right of the People to be secure in their...houses...against unreasonable searches and seizures, shall not be violated..."

The Fourth Amendment to the Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This article examines the question of whether a homeless individual, staying in a shelter for homeless persons should be afforded the same Fourth Amendment protections as if he or she were living in his or her own home. This is a complex issue because a homeless shelter is not exactly like a home, but neither is it a public space. It has many characteristics of a private home, as well as characteristics of a hotel or a rooming house. A homeless shelter, therefore, has attributes which overlap these areas. We will examine what the law says about each of these different types of dwellings, as well as other factors which are important in coming to grips with this difficult question.

The conflict is between society's wish and need for effective law enforcement and the individual's right to be free from governmental intrusion. Courts are currently examining cases that address whether a homeless shelter should be considered one's home for the purpose of determining whether searches and seizures are lawfully conducted. At this writing, there is no definitive court decision that answers this question about homeless shelters.

To understand how the Fourth Amendment evolved and why it was included in the Bill of Rights, it is necessary to place the document in historical perspective. Prior to the American Revolution, the colonists were subject to writs or decrees known as the Writs of Assistance. These writs allowed custom officials to "...enter and go into any house, shop cellar, warehouse or room or other place, and in the case of resistance to break open doors, chests, trunks, and other packages there to seize and from thence to bring, or any kinds of goods or merchandise whatsoever, prohibited and uncustomed." Douglas H. Lasdon, *Beyond the Quagmire: The Fourth Amendment Rights of Residents of Private Shelters For the Homeless*, Vol. III Hum. Rts. Annual: 389 (1986), *quoting* 13-17 *Charles* II c. II, c. 11 __ IV, V. *see also Payton v. N.Y.*, 445 U.S. 573 n.21 (1980).

Obviously, such a writ has no recognizable rights of privacy, and the framers of the Constitution believed the right to privacy was so important that it was included as one of the first ten amendments to the Constitution. The language of the Fourth Amendment is very different from that contained in the Writs of Assistance. Over the years, the interpretation of the Fourth Amendment by the courts has reflected the struggle between an individual's right to be free from governmental intrusion and society's need for effective law enforcement. An individual's desire for privacy is often in direct conflict with the need to control crime.

One aspect of the Fourth Amendment which most people are familiar with is the provision that requires police to have a warrant to search a house. In order to obtain a warrant, probable cause is required. A warrant is issued by an impartial magistrate because entering a person's home is a "grave decision." *Payton*, 445 U.S. at 602. Of course, the law regarding the Fourth Amendment is much more complex and there are exceptions to the rule. A particular police practice is judged by balancing its intrusion into a person's protected Fourth Amendment area of privacy against the promotion of legitimate governmental interests, such as effective law enforcement. *Higbie v. Texas*, 780 S.W.2d 228, 233 (Tex. Crim. App. 1989), *citing Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Basic Questions

When contemplating whether a space can be searched, the questions that must be asked are whether the space is a public place or a private place and whether there is probable cause to carry out a search. Case law tells us that what one exposes to the public can be searched without a warrant. For example, displaying an object in plain view on the front porch of one's home may give rise to an allowable search. However, a public place, which one seeks to preserve as private, such as a telephone booth, cannot be searched without a warrant. Words spoken into a pay telephone are not considered open to the public, even though pay phones are accessible to all. The police cannot listen to your conversation without a warrant, because you do not expect that what you are saying would be disseminated to the world. The Fourth Amendment's aim is to protect people, not places. *Katz v. United States*, 389 U.S. 347, 352. To search a private place, then, the police must have a warrant.

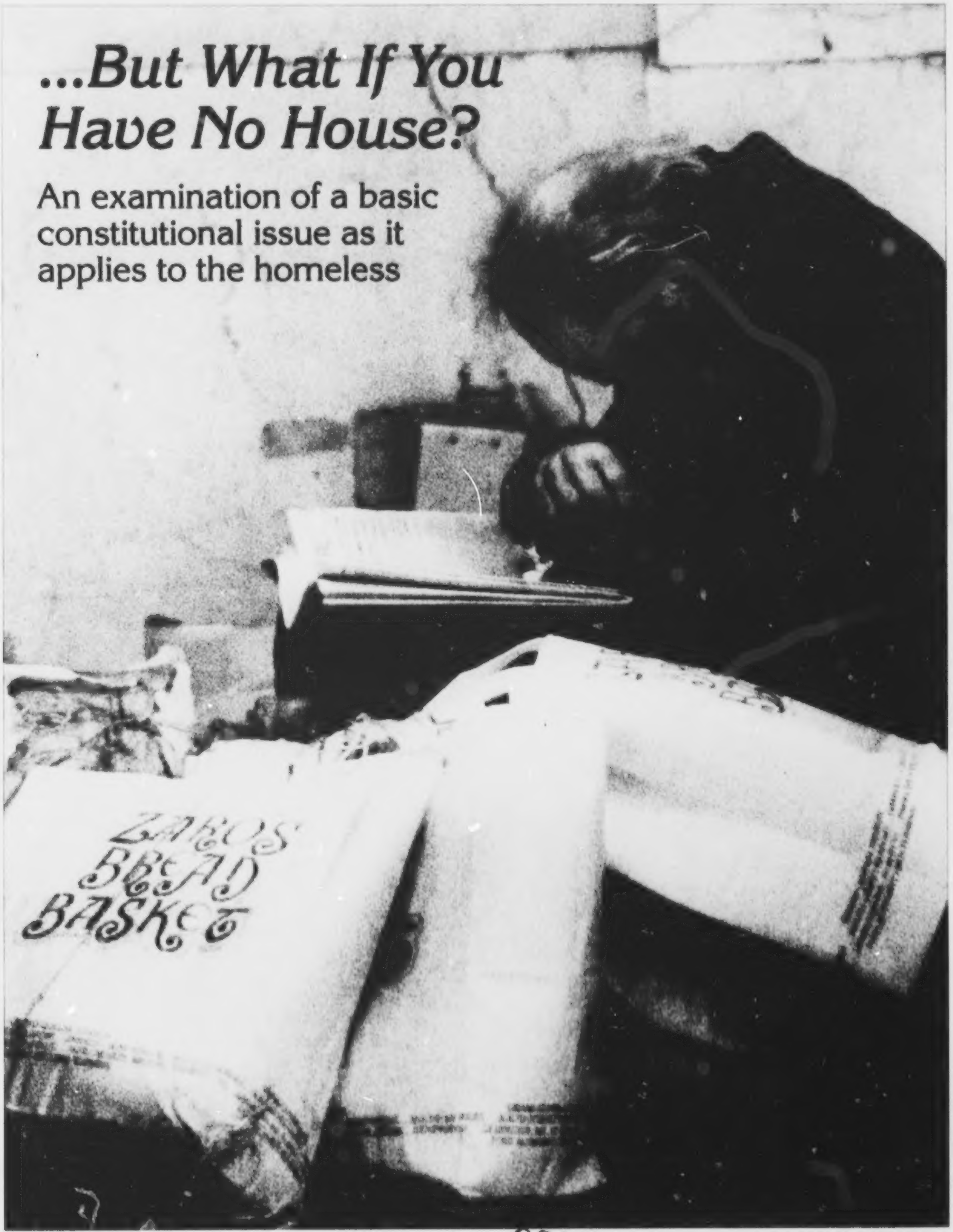
Exceptions to the search warrant requirement include consent for the search or exigent (emergency) circumstances. Consent requires that the suspect give the police permission to search him or herself and/or the house. Exigent circumstances requires that at least one of the following conditions be met: (1) a government agent (the police) believes there is a significant danger to life or property; (2) there is a danger of allowing the escape of a suspect; or (3) a belief that there would be destruction of evidence of a crime.

A search performed by police either with an arrest warrant or due to exigent circumstances is restricted to a cursory

Suzin Glickman

...But What If You Have No House?

An examination of a basic constitutional issue as it applies to the homeless



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search of the premises for potential accomplices, allies and evidence in plain view. The search can include areas which are in a suspects' or allies' immediate reach. This includes drawers, bags and places in plain view. Permissibility of such searches is grounded in concern for the safety of the law enforcement officials as well as preventing the destruction of evidence. However, these restrictions prohibit police from searching everywhere and, therefore, protect the individual's privacy to some extent.

To summarize this aspect of the Fourth Amendment: the home should be free from unreasonable government intrusion. Searches within a home are presumed to be unreasonable without a warrant or without one of the exceptions (exigent circumstances or consent.) "The zone of privacy is no where more clear than in the home." *Payton*, 445 U.S. at 589. That is why an impartial magistrate is required to procure a warrant, because entering a home is a serious matter.

The Issue of Standing

Most people are less familiar with legal proceedings bearing on the question of whether a search was properly conducted. When such a question arises, it is first necessary to determine whether the suspect has *standing* to object to the court about the search and seizure procedure. Often, a defendant will move to have evidence that was seized excluded from a criminal trial claiming that the evidence was improperly seized. When this occurs, the other side may then argue that the defendant has no standing to make such a motion.

Basically, standing means that a defendant may move to exclude evidence only if "his or her own constitutional rights were violated. The defendant has no right to exclude evidence just because somebody's rights were violated." Lasdon, *Beyond the Quagmire*, Vol. III Human Rights Annual, 389, 398-99 (1986). The issue of standing is especially relevant when searches and seizures occur at homeless shelters. Often shelter officials or shelter residents observe what they believe to be an objectionable search or seizure by police in their shelter, but they themselves were not subjected to the search or seizure. In court, these individuals would probably not have standing and, therefore, could not object to the violation of someone else's constitutional rights.

Is a Shelter a Home?

To determine the lawfulness of a search, we should first discuss the attributes of a homeless shelter; consider its similarities and differences to houses and other dwellings; and examine what the courts have said about searches and seizures in these areas. Also addressed will be questions about who can give consent to searches and seizures in these types of dwellings.

As we have seen, a home enjoys the special privacy protection of the Fourth Amendment. *Payton*, 445 U.S. at 589. A home is a dwelling place which an individual considers as such and where he or she can carry on activities which are natural in such a place—eating, sleeping, doing laundry, entertaining, etc. A shelter is an institution that is providing temporary housing. The services a shelter offers are similar to those you would find in a traditional home: food, clothing, shelter, laundry and some attention to health needs. When a homeless individual takes up residence in a shelter, he or she considers it to be "home" during the time they stay there.

A distinction between a home and a homeless shelter is that, unlike a home, a shelter has both private places and areas that are quasi-public spaces. Because so many people in homeless shelters are *not* in a relationship with one another, there are usually common areas such as hallways, a lobby or reception area to receive visitors, etc. These spaces do not exist in a traditional home. In order to determine if a homeless shelter meets the criteria for a home, it is helpful and instructive to look at how the law treats other dwellings.

Rental Homes

One does not have to own the home to be protected by the Fourth Amendment; there are privacy rights in a rented home. A landlord cannot consent to a search of a tenant's premises whether the landlord lives on the premises or simply leases the property. In this situation, the dweller is more than an overnight guest in someone else's home. The property is clearly his/her home. *Stoner v. California*, 376 U.S. 483 (1964) (reh. den.); *Chapman v. United States*, 365 U.S. 610 (1961).

Abandoned Houses

Do people loitering in and about an abandoned house have the same expectation of privacy as in a home? No, an abandoned house is not private, unless it has many of the attributes of a home. It has to have, for example, more than a couch, a television set and a plate of food. *Commonwealth v. Cameron*, 561 A.2d. 783, 784 (Pa. Super. Ct. 1989). Police are not required to have a warrant to enter a vacant house. If people are coming or going from an abandoned house, they do not have an expectation of privacy in such a structure and can be searched without a warrant. *Cameron*, id. at 786, *citing In Re Eckert*, 500 A.2d 1201, 1204 (1978).

Tents

Tents are another type of non-traditional habitat and often provide temporary housing. They pose a good test for Fourth Amendment protections. Does a person staying in a tent have the same expectation of privacy as in a home? Case law tells us there is a reasonable expectation of privacy in tents and that tents are protected from warrantless searches just as if they were homes. If a tent has the attributes of a dwelling place, it is protected as a home, even if it is erected on someone else's land. *Cameron*, 561 A.2d at 786 *citing Kelly v. State*, 245 S.E.2d. 872 (1978). A homeless shelter is certainly a more permanent structure than a tent at a campsite.

Makeshift Shelters

A recent case in Connecticut involved a homeless man who made a cardboard box located under a highway bridge his home. Because he was a suspect in a crime, the police searched his duffle bag inside the box. Was this a legal search? The court ruled that it was not, that the police could not search his duffle bag or cardboard house because the man had a reasonable expectation of privacy in his closed cardboard house, which he considered to be his home. *State v. Mooney*, 588 A.2d. 145 (Conn. 1991), cert. den., 112 S.Ct. 330 (1991).

Houseguests

On occasion, some homeless individuals are fortunate enough to have a friend allow them to stay at their house rather than going to a shelter. Does a houseguest have the same right of privacy when staying at someone else's home? Some case law has held that if a host and his or her homeless guest expect that the guest will remain on the premises for an indefinite period of time, and the host and the homeless person behave as if the house were their home, then the host's home will be considered the guest's home for search and seizure purposes. *People v. White*, 512 N.E.2d 677 (1987).

In other cases, courts have ruled that even an overnight guest has an expectation of privacy. A person can have a "legally sufficient interest in a place other than his home so that the Fourth Amendment protects him from unreasonable governmental intrusion." *Minnesota v. Olson*, 110 S.Ct. 1684, 1688 (1990) *quoting Rakas v. Illinois*, 439 U.S. 128, 141-42 (1978). Since a host would respect a guest's privacy, even without a possessory property interest in the premises, it is reasonable for an overnight guest to have an expectation of privacy in the home of another. *Olson*, 110 S.Ct. at 1685. Therefore, a homeless person has privacy rights when staying in someone else's home.

Consent of a Third Party

Can the host or another third party, such as a spouse or girlfriend, give permission to search a home? A spouse, a significant other or a roommate can permit searches of what is a shared area. *People v. Henricks*, 158 A.2d 715 (N.Y. App. Div. 1990) In other words, they may consent to a search of areas which are shared because they possess common authority over these parts of the premises. Their consent is valid against an absent nonconsenting party. The key in this instance is mutual use of property and joint access or control to the property and the items inside the house. *United States v. Matlock*, 415 U.S. 164 (1974); *see also*, *Henricks*, 158 A.2d 715 (1990); *People v. Gilman*, 522 N.Y.S.2d. 360 (N.Y. App. Div. 1987).

The School Search Analogy

Can someone operating a shelter give permission to search a resident's room? In some ways, shelter officials are similar to public school principals. There is a significant difference, however, if residents of shelters are adults as compared to youths in schools. Also, differences arise if the shelter is privately operated as opposed to a publicly operated establishment such as a public school.

The case law addressing searches and seizures of students in public schools indicates that the principal of the school is responsible for, and has a duty to maintain, order and discipline and to protect the health, welfare and safety of all the students in the school. It can be argued that officials at a homeless shelter have a similar duty. What if, for example, a shelter official believes that a resident is in possession of weapons, drugs, or dangerous items and wants to conduct a search of the premises because he or she believes that the safety of other residents may be in jeopardy? Fourth Amendment protections apply to searches by government officials. The constitutional prohibition against warrantless searches applies where there is governmental (state) action and therefore an official at a privately operated shelter may search the premises of the shelter if he or she is acting in a nongovernmental role. Often, however, this role is not clear cut.

Some shelters are privately operated, but the building they occupy is owned by the city. Some shelters are privately operated, but receive government funds as well. In these situations, the question of whether a shelter official may search a resident's room becomes difficult to answer and would be an issue for a court to decide. If the shelter official, in a private facility, has keys to all the rooms in the shelter and the residents know that shelter officials have access to all the rooms, then residents have a diminished expectation of privacy and their rooms may be searched. However, a shelter official is not permitted to search the resident's possessions, for example, a suitcase which is in the room. Such possessions are protected, as is a search of the resident himself. If it is believed the resident possesses a weapon, then the court would support a search. This is similar to the standard applied in a public school setting.

Hotel Guests

We have seen how some courts have ruled in privacy situations where there is a relationship between the host and the guest, and between residents in a dwelling. What is the expectation of privacy, if any, of overnight guests where no such relationship or friendship exists?

Guests in a hotel have no relationship with their host other than a business one. Unlike a home, a hotel has hallways and a lobby area which are shared by all guests and therefore have an element of a public space to them. Not all of the areas, like hallways, are completely open to the public; they are for registered guests only. These are known as quasi-public spaces. In these areas, there is less of an expectation of privacy and, depending on the actual situation, courts have afforded Fourth Amendment protections to defendants in common areas. *People v. Williams*, 29 A.D. 2nd. 274 (1965). Courts treat a hotel room as if it were your home. *State v. Arnold*, 475 S. 2d. 301 (Fla. Dist. Ct. App. 1985). A hotel clerk (or manager, etc.) cannot give permission to the police to search a guest's room. The clerk cannot waive a guest's rights; only the guest can do so.

Boarding Houses

Boarding houses are very similar to both hotels and shelters. A search of boarders' rooms in a boarding house is impermissible without a warrant. However, exigent circumstances, such as hearing someone crying for help, might allow entry into a boarder's room with management's cooperation. *McDonald v. United States*, 335 U.S. 451 (1948). If the police believe an emergency exists, they have an obligation to assist those in distress. *State v. Gallman*, 19 N.Y.2d 389 (1967). As one example, suppose that a night manager calls the police to make a complaint about noise, allows the police into the boarding house and the police discover drugs. Rooming houses are deemed to be the same as hotels for the purpose of determining the legality of entry by landlords or agents. Therefore, the night manager cannot consent to a search of a boarder's room, just as the desk clerk of a hotel could not.

As in a hotel, a boarder's expectation of privacy is less, if any at all, in the common areas of the boarding house. However, this is an arguable point, under Fourth Amendment law. The boarder has the burden of proof to show that he had an expectation of privacy in the common area of the boarding house. *Bryant v. United States*, D.C. App. No. 90-988; *citing*, *United States v. Booth*, 455 A.2d 1351 (D.C. 1983) at 1353; also *citing Lewis v. United States*, 594 A. 2d 542, 545 (D.C. 1991); and *citing*, *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980). Thus, it is not necessary to have a personal relationship with your host in order to have an expectation of privacy on their premises.

Business Premises

Business premises are clearly not homes, but are they entitled to Fourth Amendment protections? A shelter takes people in as residents, yet is not really open to the public. One must register to stay there or to visit someone who is staying at the shelter. Should a shelter be considered a business? If it were considered a business premise, would it be entitled to the same privacy rights as if it were a home? A business premise, like a hotel, is subject to search only by warrant. Similarly, courts have ruled that day care providers are not subject to warrantless inspections of day care centers. Lasdon, *Beyond the Quagmire*, Vol. III Human Rts. Annual at 411.

It seems arguable that shelters should not be subject to warrantless inspections. Courts have ruled, however, that the Immigration and Naturalization Service can conduct warrantless searches on business premises to search for illegal aliens.

2691

Therefore, if shelters are considered a business premise, they may be subject to such searches.

Additionally, some government officials argue that fugitives who might reside in a shelter constitute exigent circumstances because they may easily flee or disappear. Also, using the same arguments, a warrant to search a homeless shelter might be approved more easily if apprehending fugitives gives rise to probable cause for a warrant. In either case, homeless shelters are easily accessible to government officials resulting in the possible infringement of privacy rights of the shelter residents. If the police believe that a fugitive is in a particular shelter, they should obtain an arrest warrant for that suspect and a search warrant for the shelter. Such a warrant would not allow for searches of other residents. Even with such a solution, however, other problems are apparent.

If shelters have dormitory style rooms in which unrelated people share a living space, the question arises as to how freely the police can search these areas. Only those personally affected by the search would have standing and could object to such a search. For example, if the police have a warrant for A, known to be in a shelter, and while apprehending A in a dormitory style room, they observe B, who happens to be a fugitive. Additionally, if contraband (illegal goods) are in the plain view of the police, but not necessarily belonging to A, they too, may be seized.

Search warrants are required where a person has an expectation of privacy. While a resident may consider the dormitory room to be his or her home, it can be argued that there is less of an expectation of privacy in such a room because it is shared.

It seems, from what we have seen so far, that residents in a homeless shelter have an expectation of privacy while they take up residence in the shelter. If homeless shelters are considered home, this would allow Fourth Amendment protection for the residents. Because of the large number of residents living in shared rooms in homeless shelters, even searches by police under a court obtained warrant might result in subjecting residents, not named on the warrant, to searches. Such searches may violate residents' rights of privacy, if the shelter were considered their home. However, this might also subject a shelter to searches on a regular basis. Obviously, this is an issue of ongoing concern to both residents and operators of homeless shelters.

A New Standard?

The Fourth Amendment protects individuals from searches and seizures by the government, not by private individuals. The police cannot ask someone to search and seize something for them; if they did, the evidence would be excluded at the criminal trial. Whether in your own home, a hotel room, or at the home of another, individuals have an expectation of privacy when they seek shelter.

The police or other government agents cannot search a third party's home without an individual warrant, unless the search falls under one of the exceptions to the warrant rule. If the police are looking for A, and they have a warrant for his arrest, but A is in B's house, the police must get a warrant to search B's house in order to go in after A. B's rights must to be protected. If the police were allowed to search B's house, there is the danger of police abuse because they could go to all the houses of a suspect's friends and search them on the pretense of looking for the suspect. *Steagald v. United States*, 451 U.S. 204, 215, *citing Lankford v. Galston*, 364 F.2d 197 (4th Cir. 1966).

Chief Justice Rehnquist, in his dissent of *Steagald*, would allow government agents to enter a third party's premises with an arrest warrant for a suspect and no search warrant for the premises. He reasoned that a dwelling could become a suspect's home for Fourth Amendment purposes after only a short period of time and thus a warrant would not be necessary. We have addressed similar situations in the discussion of overnight guests. In those cases, however, a warrant for the host's home was required. Justice Rehnquist wrote: "If a suspect has been living in a particular dwelling for a few days, it could be considered his home for Fourth Amendment purposes, even if the premises is owned by a third party and others are living there.... In such a case, the police could enter the premises with only an arrest warrant." Lasdon, *Beyond the Quagmire*, Vol. III, Human Rts. Annual at 410; *citing Steagald v. United States*, 451 U.S. 204, 230-231 (1981).

If this dissent were the opinion of the majority of the Supreme Court, it would be the law of the land, and allow police much easier access to the inside of shelters. This is an important concern in homeless shelters. When government officials enter a shelter looking for two fugitives and search the living quarters of all the residents in search of the fugitives and any other fugitives they might find, are Fourth Amendment rights being violated? A case of this sort is currently pending before the District Court of the District of Columbia (and has inspired the author to write this article). In an analogous case, the courts have ruled it improper for the police to search 300 houses looking for two fugitives and disallowed any evidence obtained during these searches. *Lankford v. Galston*, 364 F.2d 197, 4th Cir. (1966).

Conclusion

The Supreme Court has never explicitly defined what constitutes a home. An examination of the Court's decisions, however, leads us to believe the definition is elastic and that most of the dwellings described here have been afforded constitutional protections of the Fourth Amendment.

Many of us take for granted that we have a place we can go to that we call "home." While in our homes, we expect to enjoy privacy without government intrusion, a right spelled out clearly by the Fourth Amendment of the Constitution. Just because one does not have a home, or calls a place home which does not correspond to our traditional image of a home, does not mean that that person loses his or her privacy rights or has less of an expectation of privacy than we do. Indeed, our history tells us that we have endured a long struggle to change the definition of our inalienable rights of life, liberty and the pursuit of happiness.

The Judeo-Christian doctrines of "love thy neighbor as thyself" and "do unto others as you would have them do unto you" gives one another perspective when contemplating the issues addressed in this article. As Douglas Lasdon remarks in his law review article cited previously, "We all must recognize that what is important to us, like our privacy and security, is important to others, including those who are homeless." ☐

Suzin Glickman is an attorney and teacher. She is currently Director of Public Education for the American Civil Liberties Union of the National Capitol Area.

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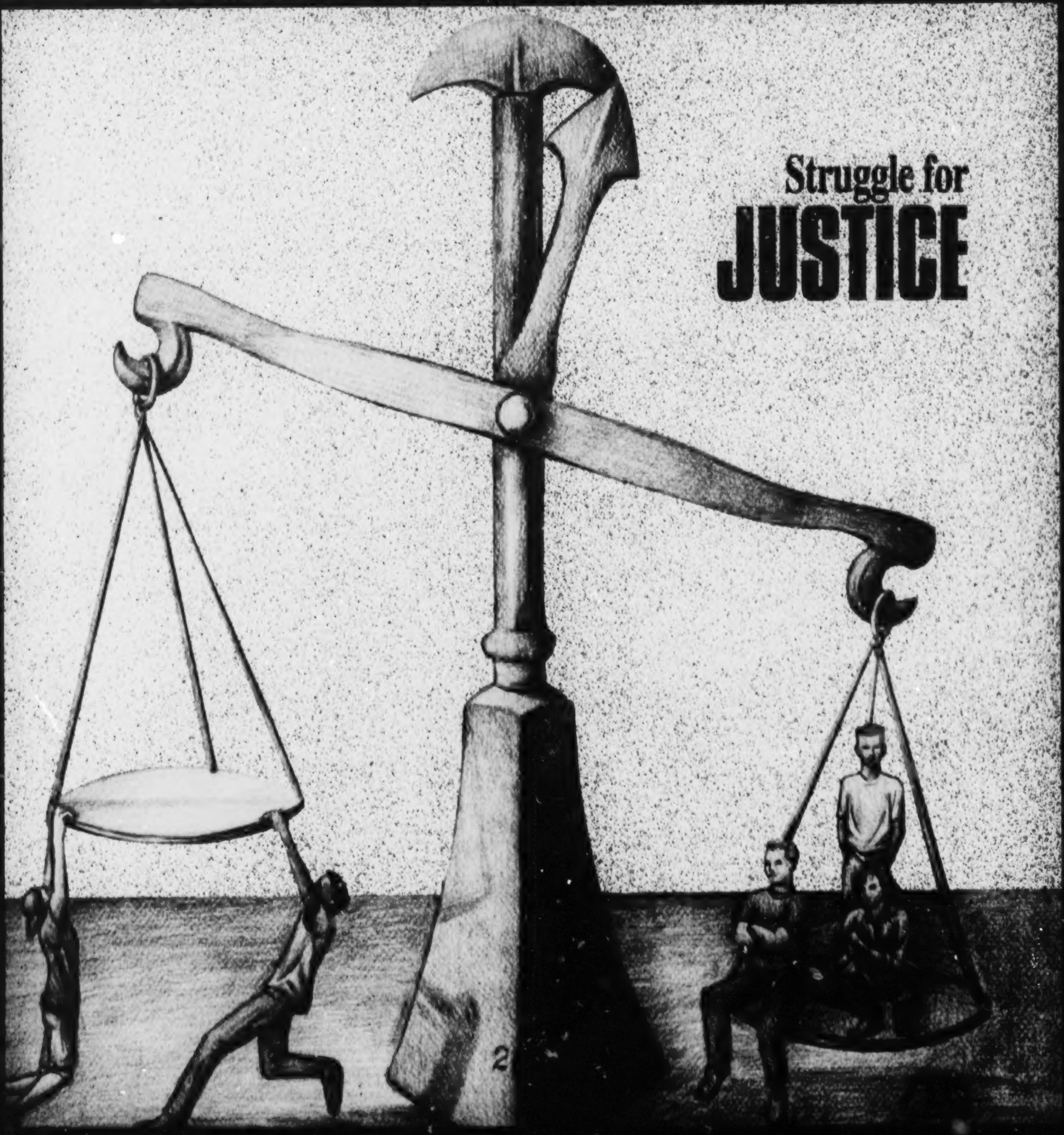
ABA Special Committee on Youth Education for Citizenship

Update

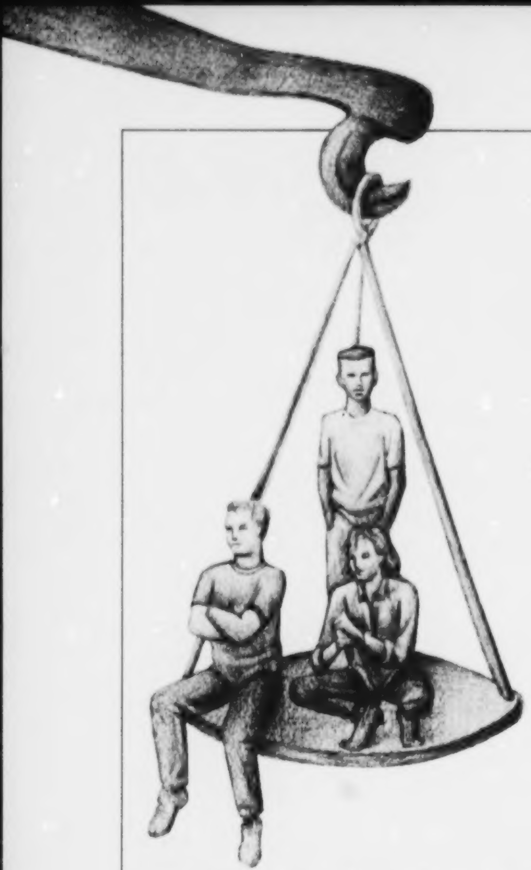
ON LAW-RELATED EDUCATION • STUDENT EDITION NO.1



Struggle for JUSTICE

Struggle for
JUSTICE

A STUDENT EDITION OF UPDATE
ON LAW-RELATED EDUCATION



what's inside

1 **Do-it-Yourself Justice**
When students solve their own problems, they learn to listen better and get along better too

2 **Justice: The Big Picture**
What "justice" has meant to different people, at different times and in different places

4 **How's Your Legal Vocabulary?**
Take this quiz to check your knowledge of legal terms

5 **The Bill of Rights Rap**
Sing this song
That's what you should do
Cause it'll explain
The Bill of Rights to you!

6 **Disorder in the Court**
Put on your detective's hat and see how many legal lunacies you can spot in this courtroom scene

8 **Eric's Excellent IDea**
Find out why a picture can be worth a thousand words—and cause a thousand problems

13 **A Crossword Puzzle**
Do them across
Do them down
Get them all
And take the crown!

Three Chicago students helped to produce this magazine. Joe Castillo, a senior at Lane Technical High School, drew the illustration on the cover. The court scene on pages 6 and 7 was drawn by Regin Ingloria, also a senior at Lane Tech, and the comic strip was illustrated by Roger Hines, a junior at St. Joseph High School. Their work appears here through the efforts of the Marwen Foundation, a not-for-profit organization in Chicago which brings free art education, career development, and college planning to young people ages 5 through 19.

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2691

Do-it-Yourself JUSTICE

Susie and Jamie have been arguing for months about the locker they share. Each thinks the other is taking more than her half of the locker. One day at lunch, Susie got so mad she threw an apple at Jamie and hit her in the head.

After Jodi and Jack had dated a few times, Jodi told him she didn't want to see him anymore. Jack became very upset about this and after class one afternoon, he started screaming and threatening Jodi in the school's main lobby.

In most schools, these students would be sent to the assistant principal's office for disciplinary action. But for Susie, Janie, Jodi and Jack, the result was a little different. That's because their high school has what's called a peer mediation program. Peer mediation is a way that students deal with their own problems instead of having a principal or other adult decide who is right and who is wrong. Students trained in this problem-solving process work with their peers—other students—to work out a solution that everyone can live with. Blame isn't the issue; the idea is to find ways to improve relationships between students and to help everyone get along a little better. And because students help work out the solution, there's a better chance they can make it work.

Besides staying out of the assistant principal's office, peer mediation can help in other ways, too. It can help you communicate and listen better. You'll see that conflict is a natural part of life that you can deal with in a positive way. You'll feel better about yourself as a person knowing that you can take charge of solving your own problems. Peer mediation will help you develop creative problem-solving skills. You'll learn that the way to handle problems is not to avoid dealing with them but to find a way to compromise in a win-win situation that benefits everyone. Justice, the legal system and the democratic process will become more meaningful, too. The problem-solving skills you learn at school will also help you cope with the family and personal problems that everyone faces as they grow up. But, most important, you'll be better able to deal with the challenges of adult life in a world made up of different people with other points of view.

What kinds of students can be student mediators? All kinds! Students with good grades and students with not-so-good grades, the jocks and the cheerleaders, as well as the nerds. But whatever group or crowd they come from, student mediators share some things in common—like the ability to communicate well with others, to influence and lead through their words and actions, and being good at "thinking on their feet."

As student mediators are being trained, these skills are sharpened so they can be used in a more organized manner. During training, mediators learn that the first step—and sometimes the most difficult—is to get the two sides to respect the process and lay down the ground rules that must be followed. It's also important that both sides feel safe and comfortable knowing that the mediator has no personal interest in the outcome and that whatever is said will not be passed on to anyone else. For some students, learning how to build this feeling of confidence and trust is the most satisfying part of the training process, while for others learning to see beyond the dispute—to find out what the *real* problem is—is the most valuable.

After their training, student mediators are prepared to deal with all sorts of problems, including boyfriend-girlfriend disagreements, "near" fights, name-calling and rumor-spreading; turf issues; disputes over books and other property; and trouble in the cafeteria or gym. Student mediators do not deal with weapons, physical violence, and alcohol and other drug offenses.

Students themselves can ask for mediation or they can be referred by teachers, counselors, assistant principals, coaches, or their parents. Both students involved in the problem must agree to take part and to abide by the agreement that will be worked out.

A typical mediation session works like this: At an agreed-upon time and place, the students having the conflict, the student mediator, and an observer sit down to meet. The observer's job is to take notes and provide information or help if the mediator asks for it. The mediator begins the session by making an opening statement which lays down the ground rules and makes clear that no one will leave the room a "loser"; both sides will be given the opportunity to "save face." Each student then gives his or her side of the story. After hearing both sides of the problem, the mediator then helps the students to forge an agreement that says exactly what each student will do. When an agreement is reached, the mediator puts it down it writing, and has the students sign it and shake hands. The mediator checks from time to time to be sure that both students are abiding by the agreement.

Now that you know a little about peer mediation, how would you deal with the two situations described at the beginning of this story if *you* were a student mediator? Here's how Joslyn Collins and Michael White, two student mediators at Rich Central High School in Park Forest, Illinois, said they might handle these situations.

In the dispute between Susie and Jamie, they would start by asking each student to respect the other's space. While Jamie may have been wrong in taking too much room in the locker, Susie should have been more mature in her response. Setting an imaginary boundary in the locker, with each girl keeping to her half, would be one way to solve the problem. In the case of Jodi and Jack, Jack should be told to accept that his relationship with Jodi is over and that he must respect her wishes.

These are just two examples of the kinds of problems that student mediators help solve every day in schools in nearly every state in the country, as well as in Canada, Europe, South Africa—and even the Commonwealth of Independent States.

Ask your student government representative, teacher, counselor, or other school official how you can be part of—or help set up—a student mediation program in your school.

JUSTICE:

The Big Picture

"Living well and beautifully and justly are all one thing."
—*Socrates (470-399 B.C.)*

"Injustice anywhere is a threat to justice everywhere."
—*Martin Luther King, Jr (1929-1968)*

"Extreme justice is extreme injustice."
—*Cicero (106-43 B.C.)*

"Respect for another's rights is peace."
—*Benito Juarez (1806-1872)*

Which of the thoughts on justice do you agree with? Which do you disagree with? Why?

If you had to choose one and only one of the statements to define justice, which one would it be?

Are any of these statements less true today than when they were made? Are any more true? Why?

Does the basic idea behind the word "justice" seem to change from place to place? How?

2696

“Justice is the set and constant purpose which gives to every man his due.”

—Justinian I (483-565)

“No person can recognize or realize his or her own humanity except by recognizing it in others and so cooperating for its realization by each and all.”

—Mikhail Bakunin (1814-1876)

“Deal with others as thou wouldst thyself be dealt by. Do nothing to thy neighbor which thou wouldst not have him do to thee hereafter.”

—The Mahabharata (350 B.C.)

“Whenever a separation is made between liberty and justice, neither, in my opinion, is safe.”

—Edmund Burke (1729-1797)

“Eye for eye, tooth for tooth, hand for hand, foot for foot.”

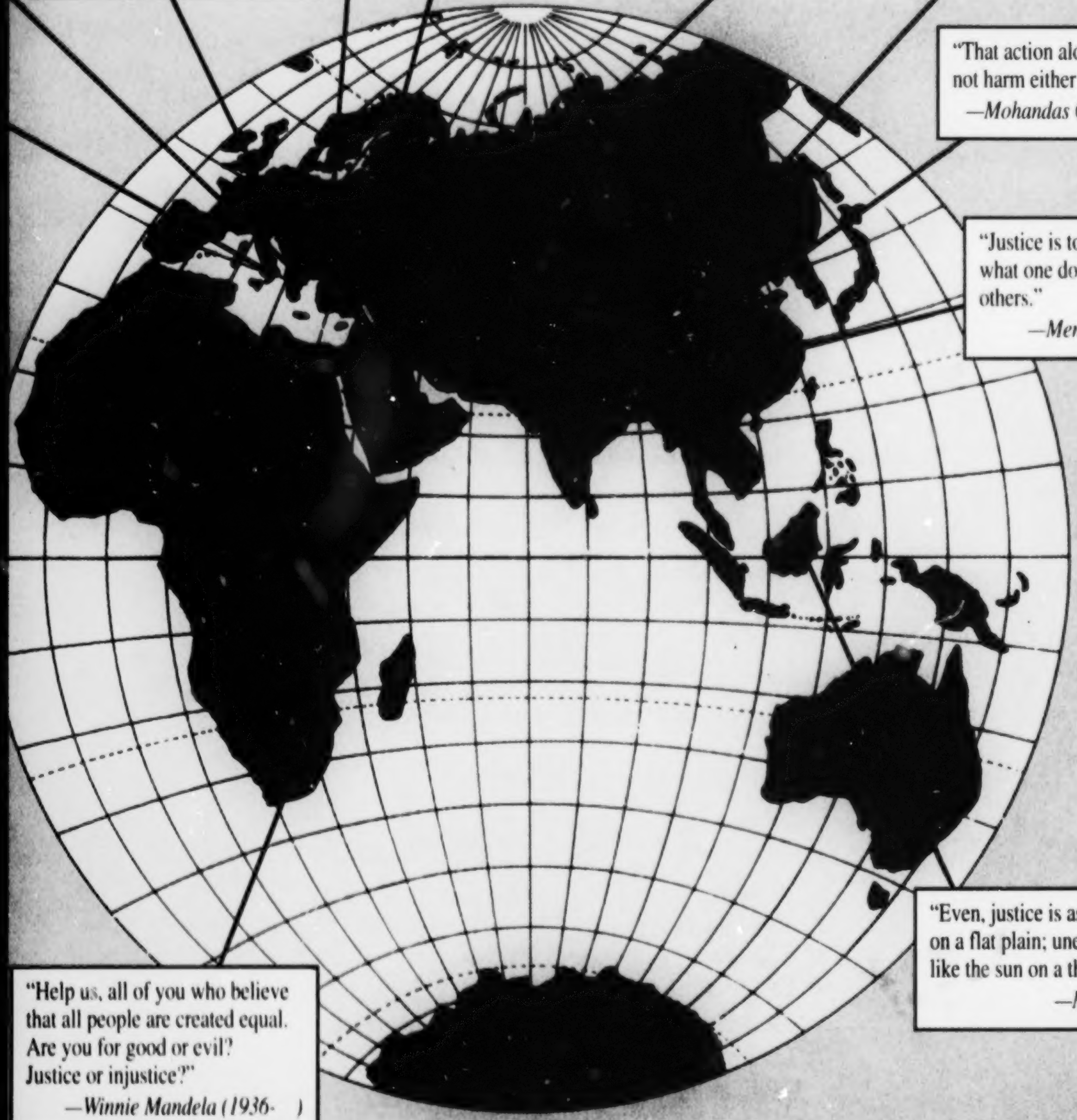
—The Book of Exodus

“That action alone is just that does not harm either party to a dispute.”

—Mohandas Gandhi (1869-1948)

“Justice is to extend proficiently what one does so as to affect others.”

—Mencius (372-289 B.C.)



“Help us, all of you who believe that all people are created equal. Are you for good or evil? Justice or injustice?”

—Winnie Mandela (1936-)

“Even, justice is as the sun on a flat plain; uneven, it strikes like the sun on a thicket.”

—Malay proverb

2697

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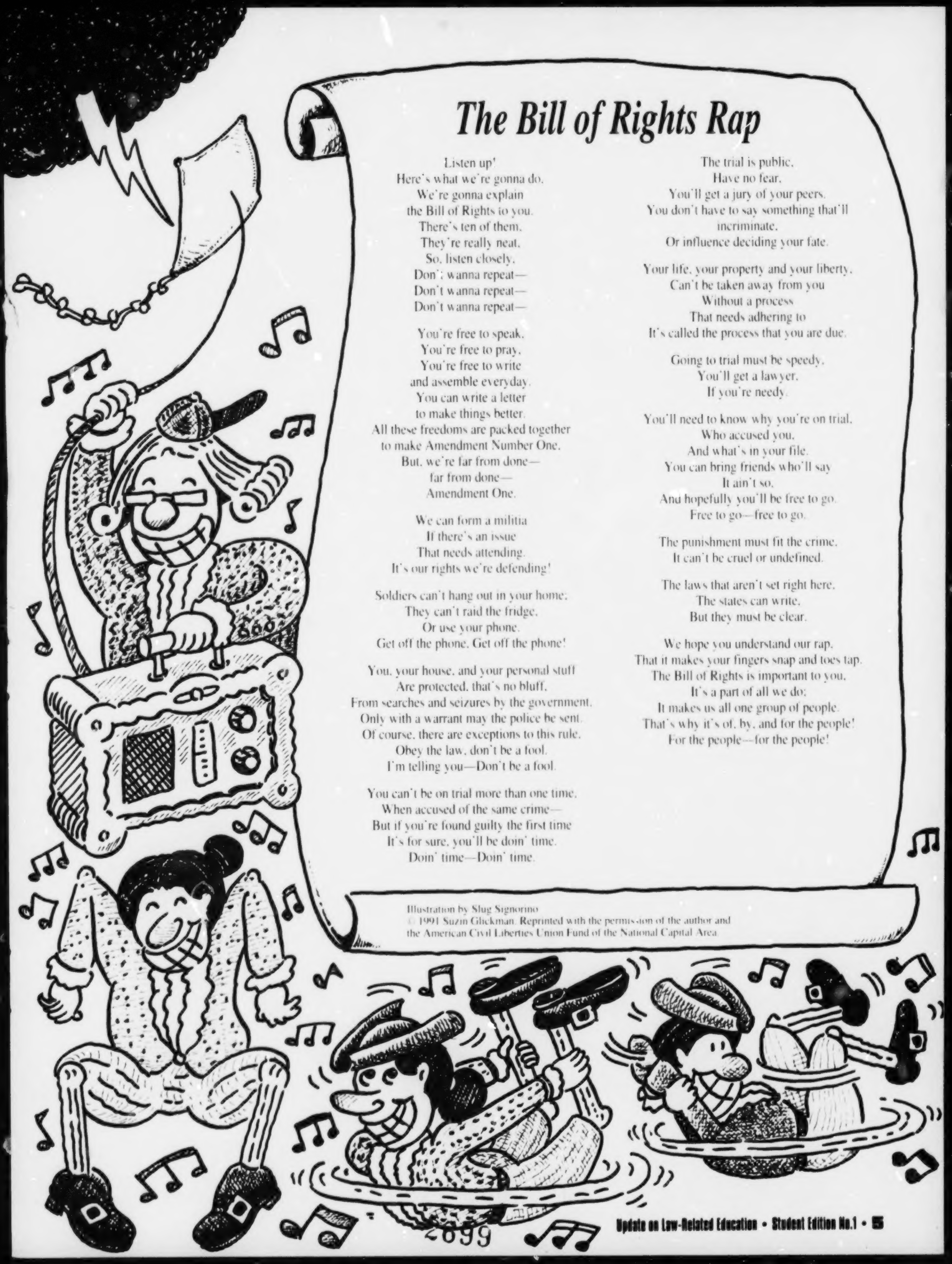
How's Your Legal
VOCABULARY?

Match these definitions with the words in the list at the bottom of the page.

1. An accusation by a grand jury charging a person with a crime.
2. The reduction of a sentence, as from death to life imprisonment.
3. An order issued by a judge for a person's arrest.
4. A notice to a defendant that he or she has been sued and is required to appear in court.
5. Legal ownership of property.
6. A local law adopted by a municipality.
7. Published words or pictures that falsely and maliciously defame a person.
8. A form of alternative dispute resolution in which the parties bring their dispute to a neutral third party, who helps them agree on a settlement.
9. A judicial order directing a person to do something.
10. An agreement by attorneys on both sides about some aspect of a case.
11. One who dies without leaving a will.
12. The final disposition of a lawsuit.
13. A list of cases to be heard by a court.
14. The rule preventing illegally obtained evidence to be used in a trial.
15. A writ summoning persons to court to act as jurors.
16. Evidence not within the personal knowledge of the witness but relayed to the witness by a third party.
17. The testimony of a witness taken under oath in preparation for a trial.
18. A criminal offense considered less serious than a felony.
19. A threat to inflict injury with an apparent ability to do so.
20. An application for a rule or order, made to a court or judge.

a. Liable
b. Docket
c. Summons
d. Deposition
e. Venire
f. Tort
g. Discovery
h. Misdemeanor
i. Affidavit
j. Indictment
k. Writ
l. Stipulation
m. Assault
n. Service
o. Bench warrant
p. Mediation
q. Commutation
r. Exclusionary rule
s. Felony
t. Hearsay
u. Ordinance
v. Judgment
w. Intestate
x. Libel
y. Motion
z. Title



The Bill of Rights Rap

Listen up!
Here's what we're gonna do.
We're gonna explain
the Bill of Rights to you.
There's ten of them.
They're really neat.
So, listen closely.
Don't wanna repeat—
Don't wanna repeat—
Don't wanna repeat—

You're free to speak.
You're free to pray,
You're free to write
and assemble everyday.
You can write a letter
to make things better.
All these freedoms are packed together
to make Amendment Number One.
But, we're far from done—
far from done—
Amendment One.

We can form a militia
If there's an issue
That needs attending.
It's our rights we're defending!

Soldiers can't hang out in your home;
They can't raid the fridge,
Or use your phone.
Get off the phone. Get off the phone!

You, your house, and your personal stuff
Are protected, that's no bluff,
From searches and seizures by the government.
Only with a warrant may the police be sent.
Of course, there are exceptions to this rule.
Obey the law, don't be a fool.
I'm telling you—Don't be a fool.

You can't be on trial more than one time,
When accused of the same crime—
But if you're found guilty the first time
It's for sure, you'll be doin' time.
Doin' time—Doin' time.

The trial is public,
Have no fear,
You'll get a jury of your peers.
You don't have to say something that'll
incriminate,
Or influence deciding your fate.

Your life, your property and your liberty,
Can't be taken away from you
Without a process
That needs adhering to
It's called the process that you are due.

Going to trial must be speedy,
You'll get a lawyer,
If you're needy.

You'll need to know why you're on trial,
Who accused you,
And what's in your file.
You can bring friends who'll say
It ain't so,
And hopefully you'll be free to go.
Free to go—free to go.

The punishment must fit the crime,
It can't be cruel or undefined.

The laws that aren't set right here,
The states can write,
But they must be clear.

We hope you understand our rap,
That it makes your fingers snap and toes tap.
The Bill of Rights is important to you,
It's a part of all we do;
It makes us all one group of people.
That's why it's of, by, and for the people!
For the people—for the people!

Illustration by Slug Signorino

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Disorder in the Court

How many strange or unusual things can you find in this scene?

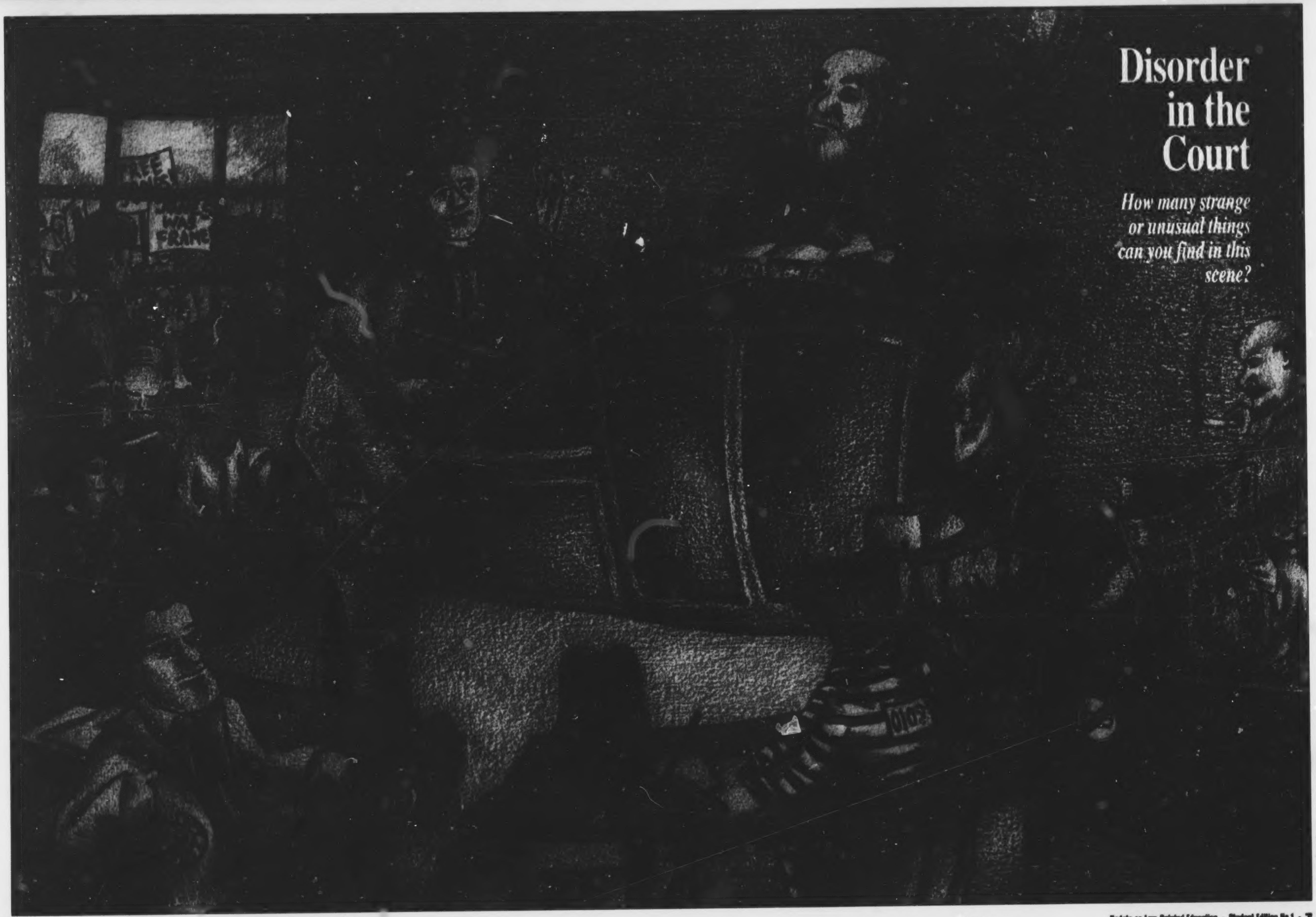
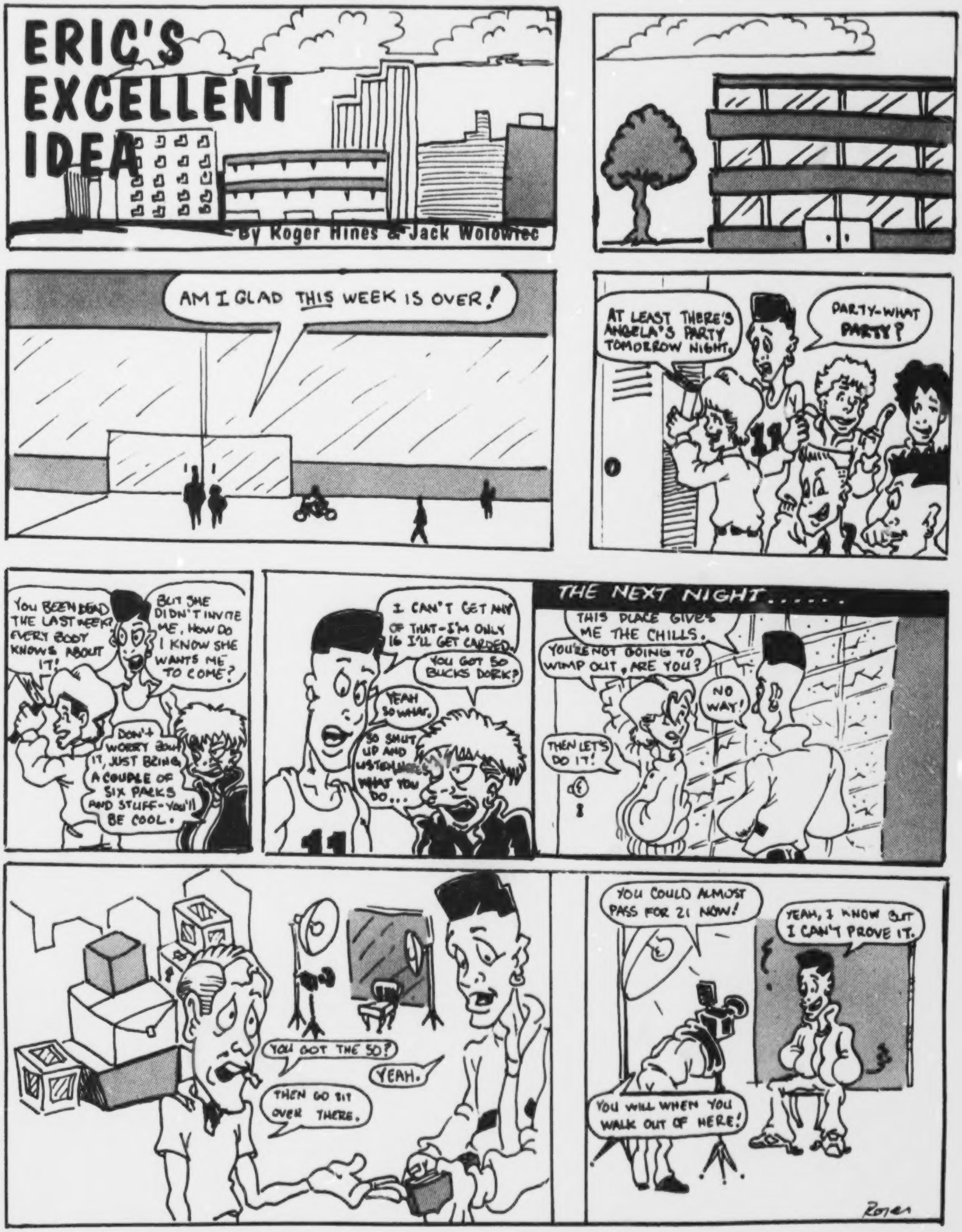
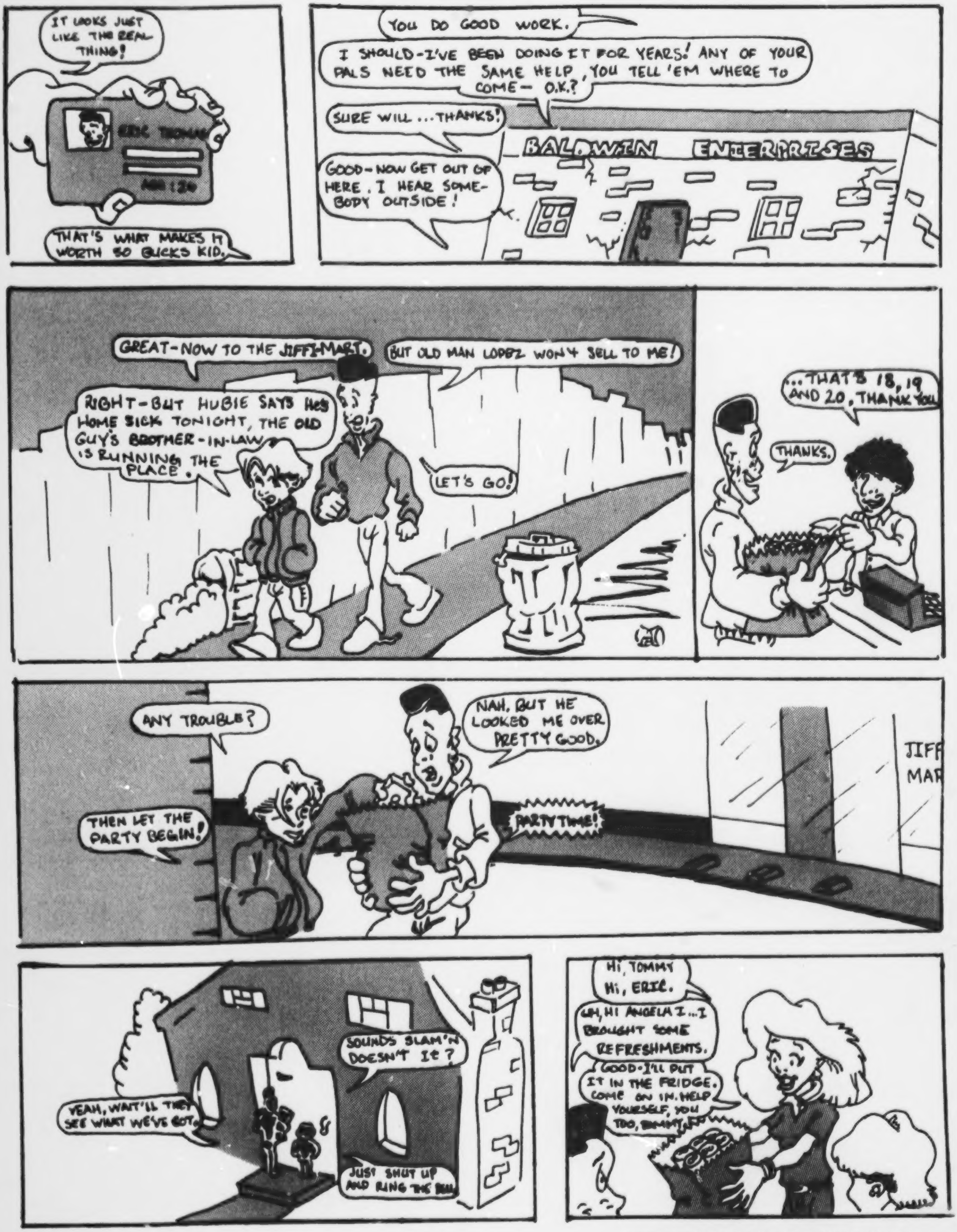


Illustration by Regin Ingloria

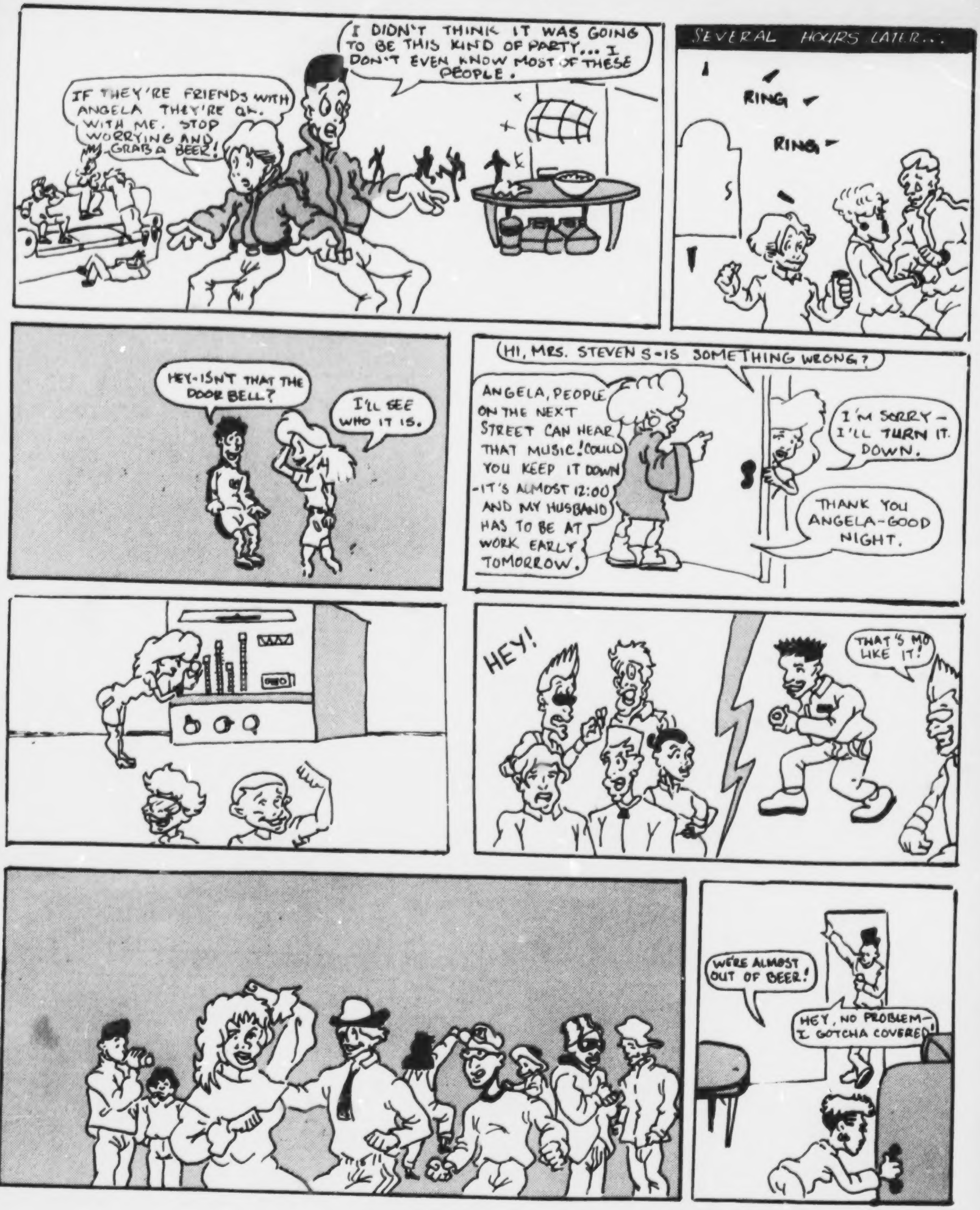
ERIC'S EXCELLENT IDEA

By Roger Hines & Jack Wolowiec


AM I GLAD THIS WEEK IS OVER!
AT LEAST THERE'S ANGELA'S PARTY TOMORROW NIGHT.
PARTY-WHAT PARTY?
YOU BEEN DEAD THE LAST WEEK? EVERY BODY KNOWS ABOUT IT!
BUT SHE DIDN'T INVITE ME, HOW DO I KNOW SHE WANTS ME TO COME?
DON'T WORRY BOUT IT, JUST BRING A COUPLE OF SIX PACKS AND STUFF - YOU'LL BE COOL.
I CAN'T GET ANY OF THAT - I'M ONLY 16 I'LL GET CARDED.
YOU GOT 50 BUCKS DORK?
YEAH SO WHAT.
SO SHUT UP AND LISTEN HERE'S WHAT YOU DO...
THE NEXT NIGHT......
THIS PLACE GIVES ME THE CHILLS.
YOU'RE NOT GOING TO WIMP OUT, ARE YOU?
NO WAY!
THEN LET'S DO IT!
YOU GOT THE 50?
YEAH.
THEN GO SIT OVER THERE.
YOU COULD ALMOST PASS FOR 21 NOW!
YEAH, I KNOW BUT I CAN'T PROVE IT.
YOU WILL WHEN YOU WALK OUT OF HERE!
Roger


IT LOOKS JUST LIKE THE REAL THING!
ERIC THOMAS
THAT'S WHAT MAKES IT WORTH SO BUCKS KID.
YOU DO GOOD WORK.
I SHOULD-I'VE BEEN DOING IT FOR YEARS! ANY OF YOUR PALS NEED THE SAME HELP, YOU TELL 'EM WHERE TO COME- O.K.?
SURE WILL ... THANKS!
GOOD-NOW GET OUT OF HERE. I HEAR SOMEBODY OUTSIDE!
BALDWIN ENTERPRISES
GREAT-NOW TO THE JIFFI-MART.
BUT OLD MAN LOPEZ WON'T SELL TO ME!
RIGHT-BUT HUBIE SAYS HE'S HOME SICK TONIGHT, THE OLD GUY'S BROTHER-IN-LAW IS RUNNING THE PLACE.
LET'S GO!
...THAT'S 18, 19 AND 20, THANK YOU
THANKS.
ANY TROUBLE?
NAH, BUT HE LOOKED ME OVER PRETTY GOOD.
THEN LET THE PARTY BEGIN!
PARTY TIME!
JIFF MAR
SOUNDS SLAM'N DOESN'T IT?
YEAH, WAIT'LL THEY SEE WHAT WE'VE GOT.
JUST SHUT UP AND RING THE BELL
HI, TOMMY HI, ERIC.
UH, HI ANGELA I...I BROUGHT SOME REFRESHMENTS.
GOOD-I'LL PUT IT IN THE FRIDGE. COME ON IN. HELP YOURSELF, YOU TOO, TOMMY.

2703


I DIDN'T THINK IT WAS GOING TO BE THIS KIND OF PARTY... I DON'T EVEN KNOW MOST OF THESE PEOPLE.
IF THEY'RE FRIENDS WITH ANGELA THEY'RE OK. WITH ME. STOP WORRYING AND GRAB A BEER!
SEVERAL HOURS LATER...
RING
RING
HEY-ISN'T THAT THE DOOR BELL?
I'LL SEE WHO IT IS.
HI, MRS. STEVENS-IS SOMETHING WRONG?
ANGELA, PEOPLE ON THE NEXT STREET CAN HEAR THAT MUSIC! COULD YOU KEEP IT DOWN -IT'S ALMOST 12:00 AND MY HUSBAND HAS TO BE AT WORK EARLY TOMORROW.
I'M SORRY - I'LL TURN IT DOWN.
THANK YOU ANGELA-GOOD NIGHT.
HEY!
THAT'S MO LIKE IT!
WE'RE ALMOST OUT OF BEER!
HEY, NO PROBLEM- I GOTCHA COVERED!

2704

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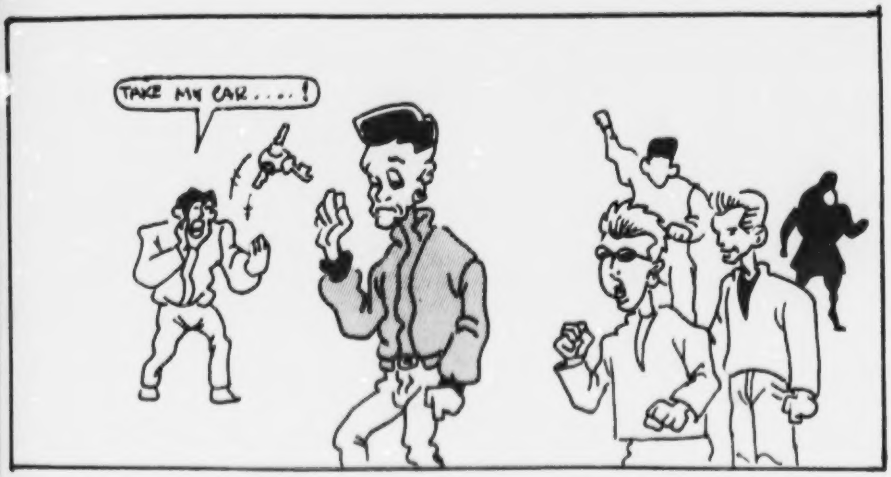
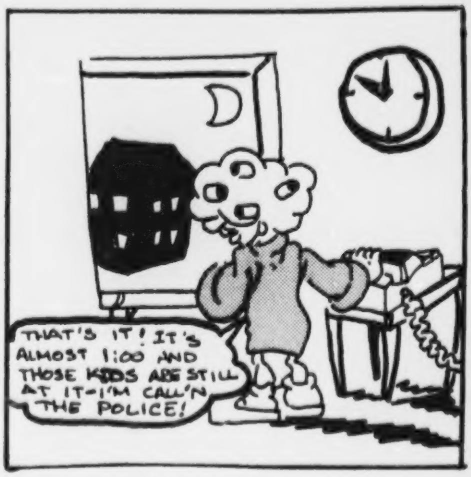
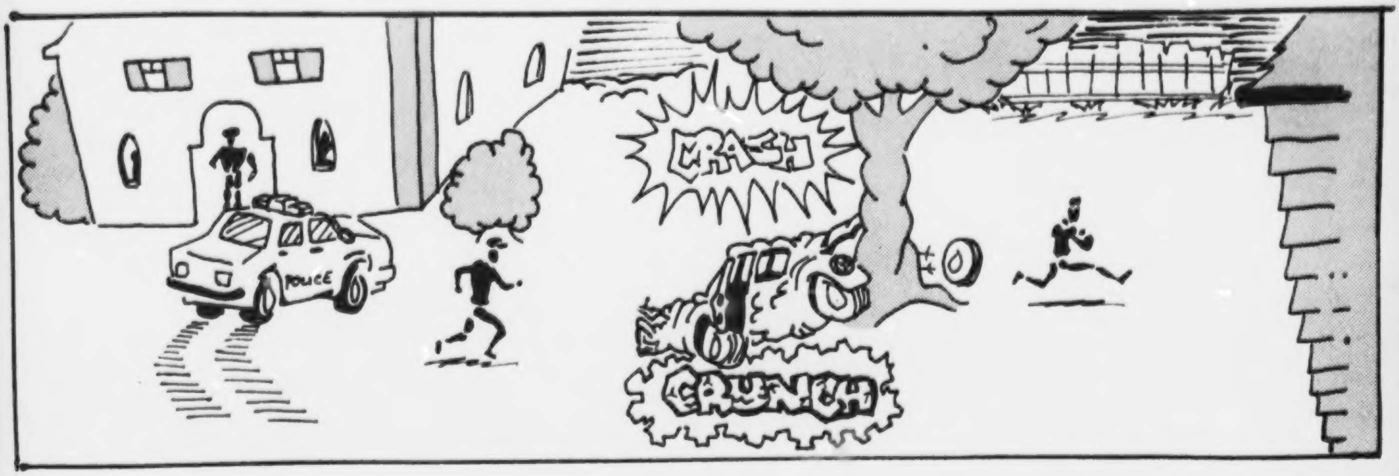
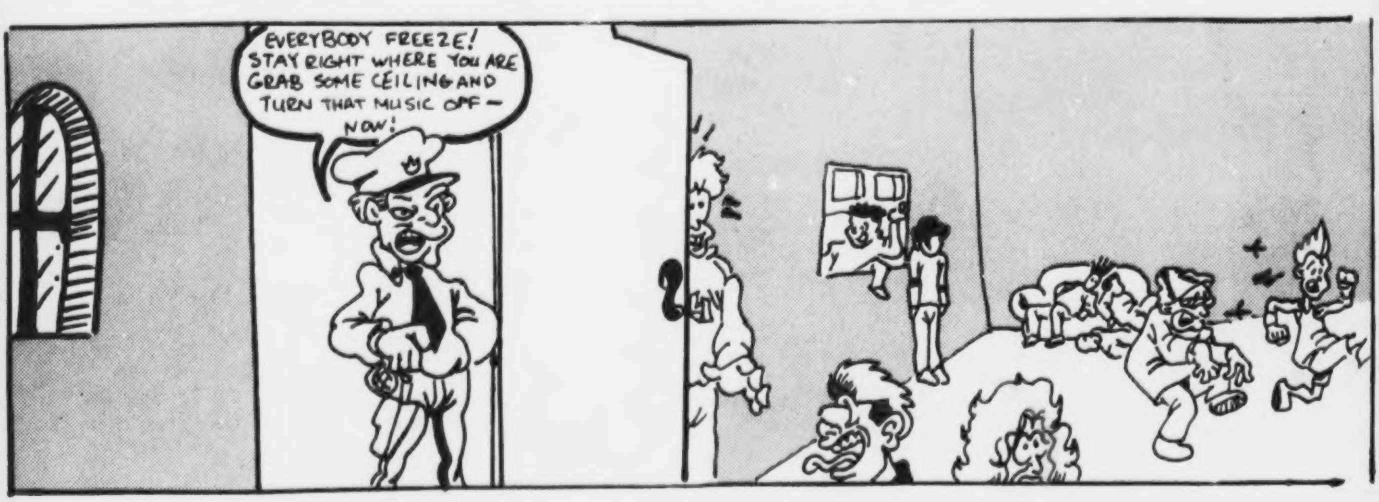
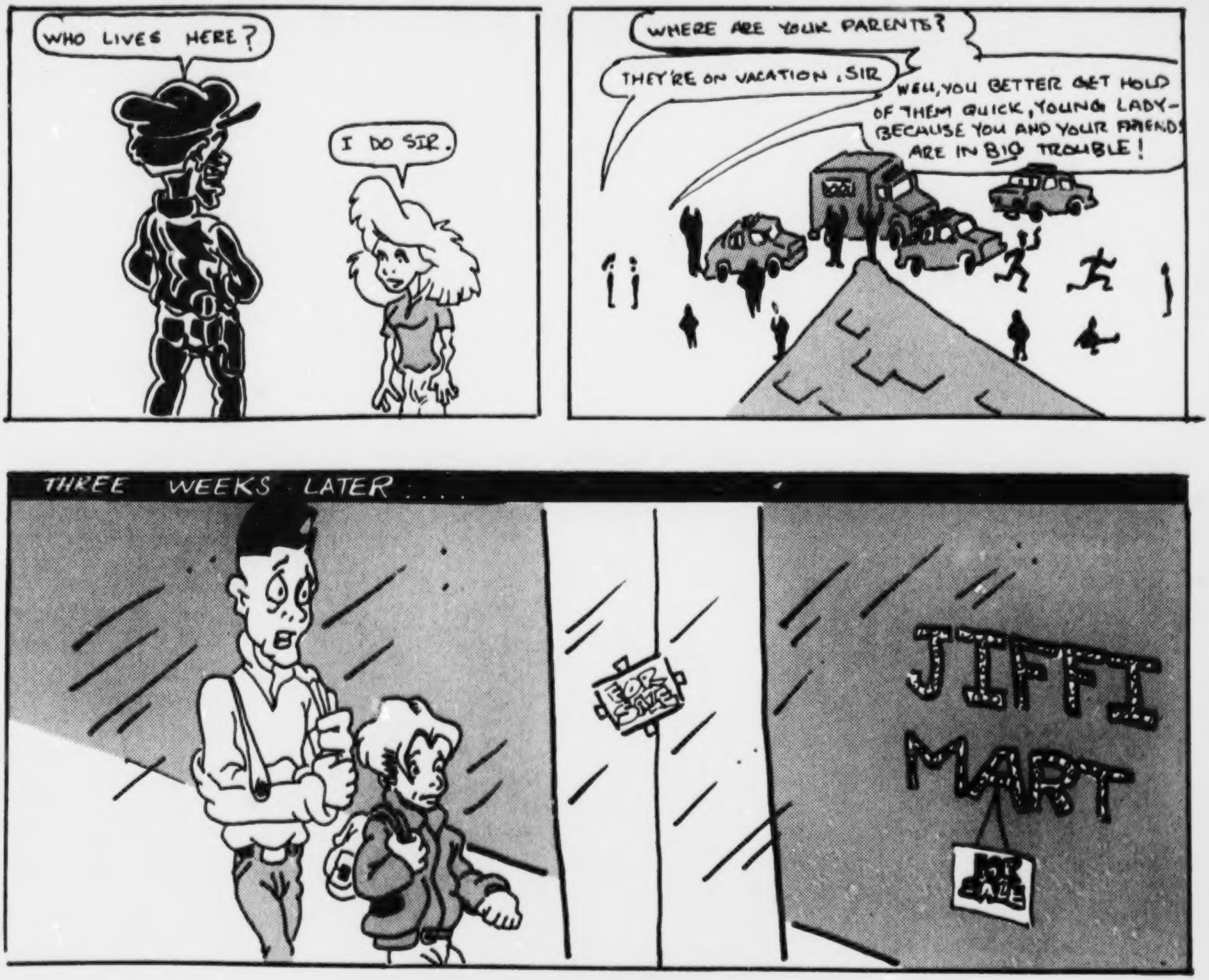
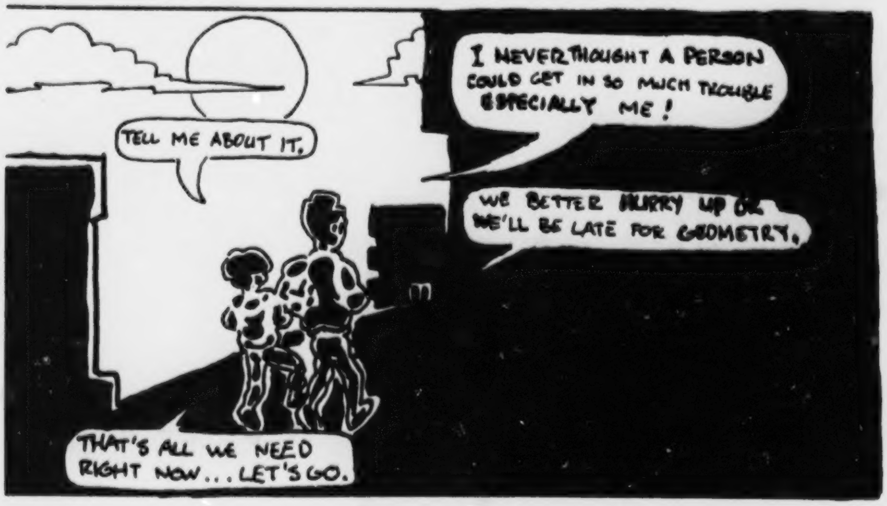

TAKE MY CAR....!


THAT'S IT! IT'S ALMOST 1:00 AND THOSE KIDS ARE STILL AT IT—I'M CALL'N THE POLICE!


CRASH
POLICE
CRUNCH


EVERYBODY FREEZE! STAY RIGHT WHERE YOU ARE GRAB SOME CEILING AND TURN THAT MUSIC OFF — NOW!

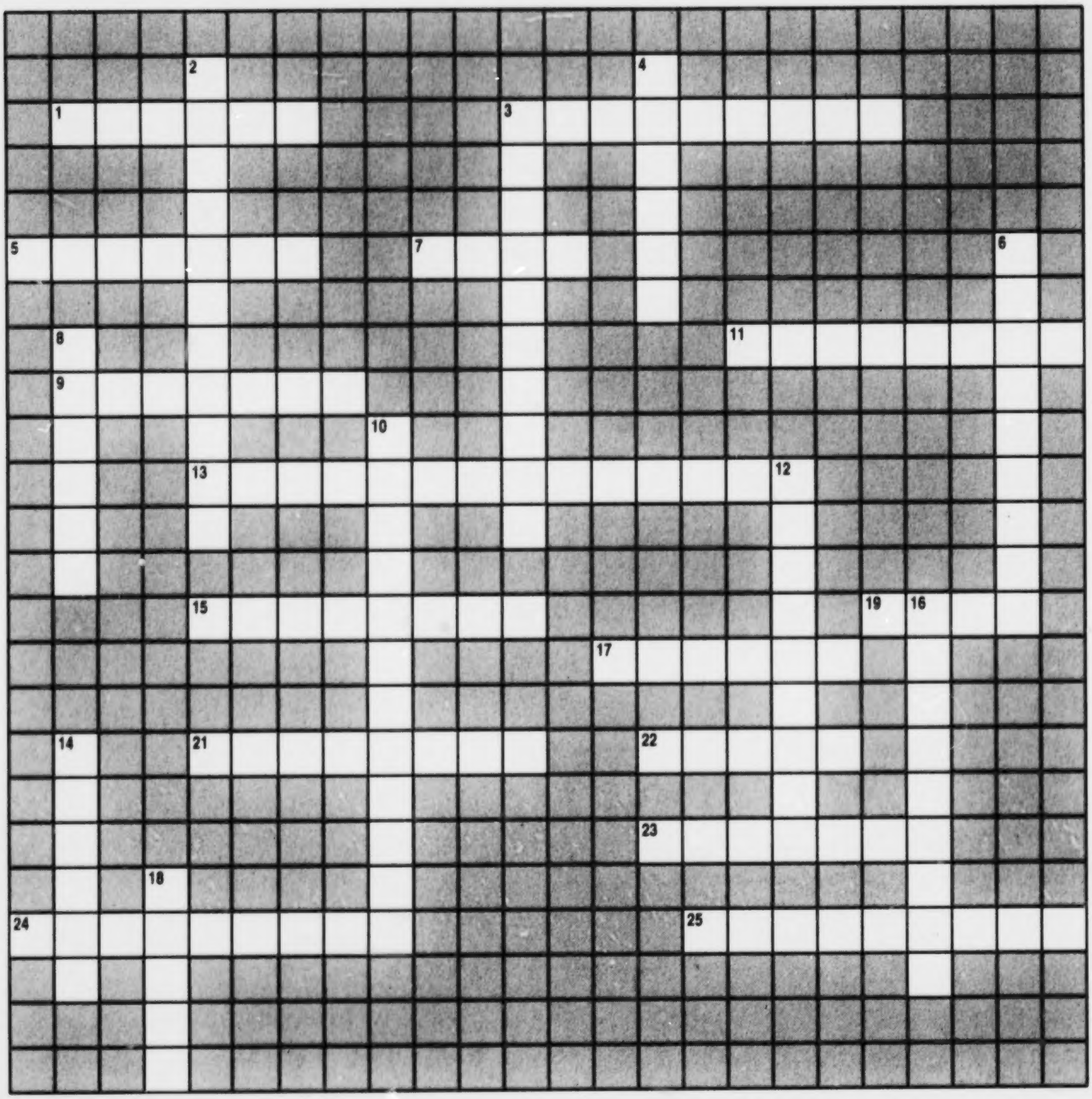

WHO LIVES HERE?
I DO SIR.
WHERE ARE YOUR PARENTS?
THEY'RE ON VACATION, SIR.
WELL, YOU BETTER GET HOLD OF THEM QUICK, YOUNG LADY– BECAUSE YOU AND YOUR FRIENDS ARE IN BIG TROUBLE!
THREE WEEKS LATER....
FOR SALE
JIFFI MART
FOR SALE


I NEVER THOUGHT A PERSON COULD GET IN SO MUCH TROUBLE ESPECIALLY ME!
TELL ME ABOUT IT.
WE BETTER HURRY UP OR WE'LL BE LATE FOR GEOMETRY.
THAT'S ALL WE NEED RIGHT NOW... LET'S GO.

What do you think happened to Eric? To Angela? What laws were broken? By whom?

Could Angela's parents have gotten into trouble even though they weren't at the party?

What are some of the long-term consequences of what happened?



Across

1. Take no note of
3. A way to solve problems
5. One who observes
7. A legal action
9. Neutral third party
11. To bring about by force or threat
13. Merely suggestive
15. A judgment by a court
17. To take into custody
19. Leave quickly
21. Argue for
22. Fact-finding process
23. Not legal
24. Broken rule
25. A type of holding

Down

2. Result of
3. One type of judicial officer
4. Stop, look, and __________
6. To carry on a legal proceeding
8. Make cold
10. Something that a court must have
12. What they do in Congress
14. Injured party
16. Responsibility for
18. To choose

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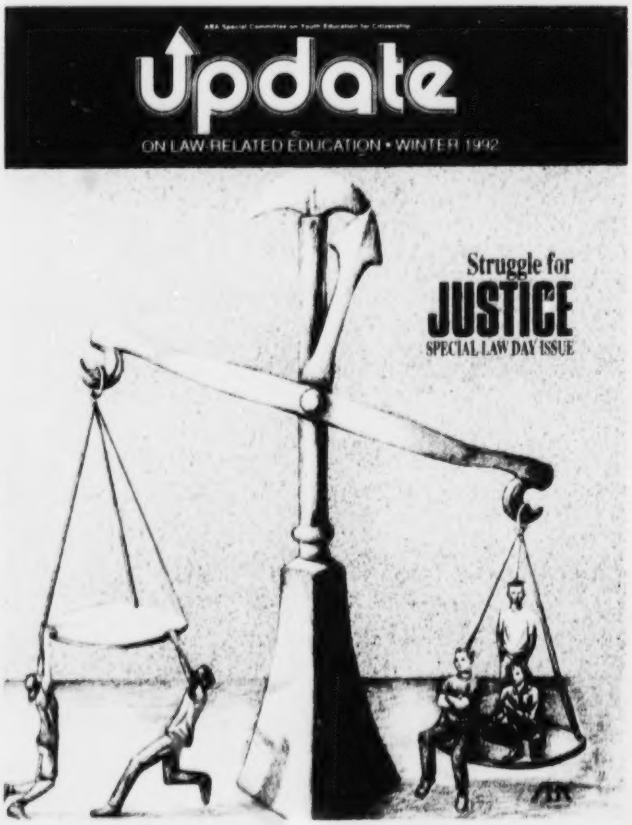
ABA Special Committee on Youth Education for Citizenship
Update
ON LAW-RELATED EDUCATION • WINTER 1992
Struggle for
JUSTICE
SPECIAL LAW DAY ISSUE
ABA

Special Committee
on Youth Education
for Citizenship

ABA American Bar Association

2708

Struggle for Justice

Current Issues and Distributive Justice/Secondary

Lorenca Consuelo Rosal

Introduction

When most people are asked to give an example of an issue of justice, they usually think of criminal justice problems, such as unfair or inadequate procedures used by the police or other government officials, or corrective justice issues such as the use of the death penalty.

Nevertheless, most of the justice issues which affect average Americans involve questions of *distributive justice*, or fairness in the way things are distributed among individuals and groups. The things distributed might be *benefits*, such as positions in an entering freshman college class, job promotions, or medical benefits. On the other hand, what is distributed might be *burdens* such as taxes, required military service, or extra homework.

In this activity, students will have the opportunity to discuss a contemporary issue of distributive justice and be introduced to a set of intellectual tools which will be helpful in analyzing such issues and in developing reasoned opinions about them.

Objectives

At the conclusion of this activity, students should be able to:

- define what is meant by distributive justice;
- give examples of issues of distributive justice;
- analyze an issue of distributive justice using a set of intellectual tools designed for that purpose; and
- develop and express a reasoned opinion about an issue of distributive justice.

Procedure

1. Introduce students to the activity by sharing with them the information in the above Introduction. Ask them to give examples of benefits and burdens they have received, for example, grades or household chores. Do they think these benefits were given or distributed fairly? Then ask for examples of times they have distributed something, for example, choosing someone to be on a team or deciding how much friends should contribute to help pay for a party. How did they decide on a fair distribution of the benefits or burdens?
2. Explain to the class that they will take part in an activity in which they will discuss a current issue of distributive justice. Distribute Handout 1 and have students read about and briefly discuss the procedure they will follow to complete the activity. Then divide the class into small groups to prepare for the hearing on the proposed amendment.
3. Instruct each group to work together to complete Handout 2. This study chart will help students analyze the issue and clarify their thinking about it. After each group has completed the chart, assign each the task of speaking for or against the amendment. Group members should work together to develop the most cogent arguments to support the position assigned to them. (If completing this activity in more than one class period, you may wish students to do additional research to augment their arguments.) A recorder should make a list of the group's best arguments with spokespersons selected to present them.
4. Reconvene the class and choose a chairperson or act in that capacity yourself. (You may wish to invite a community resource person, such as a staff member from your local congressional office or a state legislator, to participate in this activity and serve as chairperson of the hearing.) The chairperson should be prepared to question each side to stimulate discussion of the issue.
5. Call the meeting to order and ask spokespersons from each group to present their arguments for or against the proposed amendment. After the presentations, other group members who have not yet spoken should be allowed to rebut the arguments of their opponents and answer questions about the issue posed by the chair.
6. Conclude the discussion and call the question. At this point, students should vote according to their own personal views which may differ from those they were assigned to advocate during the hearing. Does the amendment pass by a two-thirds vote?
7. Complete the activity by conducting a debriefing discussion. (See questions below.) If you have invited a community member to participate, have the guest present his or her views on the issue. Finally, you may wish to assign students some of the suggested reinforcement activities.

Student Handout 1:

DO ALL AMERICANS DESERVE A MINIMUM STANDARD OF LIVING?

In 1991, we celebrated the 200th anniversary of our Bill of Rights, the first ten amendments to the Constitution. These amendments protect the rights most of us think of as fundamental—the right to freely express ourselves, to worship or not as we choose, and a series of rights designed to promote justice by, for example, prohibiting the government from illegally searching and seizing people and their property, holding secret trials, or denying them due process of law in other ways.

During his third term in office, President Franklin Delano Roosevelt proposed an additional or new bill of rights designed to "give security and prosperity [to all]... regardless of station, race, or creed." This "economic bill of rights" went far beyond anything conceived by the Founders of our nation. Among the rights this "second Bill of Rights" would have protected would be the "right" to food, clothing, recreation, decent homes, economic protection from unemployment, a good education, and a job that paid adequate wages.

Today, nearly 50 years later, many of these proposals are still being debated. For example, do all Americans deserve a guaranteed standard of living? Some delegates of a mock constitutional convention held in 1987 in Philadelphia thought so. They proposed a constitutional amendment which would guarantee all adult Americans a job at or above the minimum wage.

If you had been one of the delegates at that convention, would you have supported that proposal? If you were a member of Congress would you introduce such a proposed amendment? Work in groups to analyze this idea and to present your views at a simulated constitutional convention hearing on this proposal. A study chart is provided to help you. Note that the questions on the chart can also be used to analyze other issues of distributive justice.

What do you think?
What is your personal opinion on this issue and what reasons can you give to justify your position?

Debriefing Questions

1. What important interests and values are raised by the issue of a guaranteed minimum standard of living?
2. What is your position on this issue of distributive justice and why?
3. Do you think that a constitutional amendment is the best way to address the problem of distributive justice raised in this activity? Are there any other ways in which it might be addressed?
4. What could you do to promote your views and achieve your goals on distributive justice issues such as this?

Using and Reviewing the Activity

1. Assign each student a study partner to research the issue of guaranteed health benefits for all Americans. Afterwards, have them write a pair of editorials for and against guaranteeing this benefit. The editorials can be read to the class and followed by a discussion.
2. Have students view a television show or film which raises issues of distributive justice and write a review of it. Have them explain what benefit or burden is being distributed and the fundamental values and important interests which they think should be considered before coming to a decision about such issues.
3. Instruct the class to collect clippings, cartoons, and photographs on issues of distributive justice currently in the news and post them on a bulletin board.
4. Have your class sponsor a forum on a contemporary issue of distributive justice with an impact on students, such as the availability of federally-funded college loans or mandatory national service. Assign research on the topic and invite knowledgeable members of your community to participate in the forum. You may wish to ask a member of the local press to serve as chair of the event. Select a panel of students to question the guests and invite questions from the audience as well.

Lorenca Consuelo Rosal is a staff member of the Center for Civic Education in Calabasas, California. This activity is adapted with permission from Justice, *part of the revised Law in a Free Society program developed by the Center.* *© 1990 Center for Civic Education.*

Student Handout 2: Distributive Justice Study Chart

DISTRIBUTIVE JUSTICE STUDY CHART

Question	Answer
1. What benefit or burden would be distributed?	
2. Who would receive the benefit or burden?	
3. How are the people who would receive the benefit or burden similar or different in terms of: a. their *need* for what is being distributed? b. their *capacity* or ability to use what is being distributed? c. their *desert* or the degree they deserve to have what is being distributed?	
4. What other *fundamental values,* besides distributive justice, should be considered before making a decision in this case? For example, equality, compassion, or human dignity?	
5. What other *important interests* should be considered before making a decision in this case? For example, the cost of providing the benefit, the impact on the country's economy, efficiency, or human resources?	
6. What arguments could you make *for* the proposed distribution?	
7. What arguments could you make *against* the proposed distribution?	

2710

Struggle for Justice

Cultures in Conflict: Using Procedural Justice/Secondary

Social Science Education Consortium

Author's Note: In 1990, the Social Science Education Consortium (SSEC) in Boulder, Colorado, was funded by the U.S. Department of Education to conduct a one-year statewide program to develop, test, and train teachers in an innovative approach to law-related education that integrates the teaching of law and culture. Designed to address the needs of a state and school population of ever-increasing ethnic and cultural diversity, the program focused on materials, strategies, teacher training, and community partnerships for teaching law-related education through an exploration of law and culture in the United States and three societies strongly represented in Colorado's population: Mexico, Japan, and Southeast Asia (Hmong). These cultures were selected to provide students with an appreciation of the wide range of legal traditions represented in U.S. residents.

The project, directed by SSEC staff members Barbara Miller and Lynn Parisi, resulted in a set of three units consisting of 17 lessons. The materials were field tested by secondary social studies teachers in eight Colorado school districts and were further reviewed by an eight-person advisory board consisting of legal experts and multicultural education specialists. The complete three-unit curriculum will be published by SSEC in late spring 1992; for more information, contact SSEC, 3300 Mitchell Lane, Suite 240, Boulder, CO 80302-2272; (303) 492-8154.

The lesson reprinted here focuses on U.S. law from a cross-cultural perspective. Through a case study, students consider legal and social dilemmas that can be created when the legal and/or cultural traditions of two countries collide. The lesson revolves around the case of a Japanese woman living in the United States who, by following a traditional Japanese ritual, violates U.S. law and faces trial for murder. Through a mock hearing, students focus on a very real dilemma in the United States today: whether differing cultural values and norms constitute a defense for breaking the law. Students analyze the tension in and challenge to our legal and justice systems of enforcing a standard of behavior while still respecting the cultural diversity that is a hallmark of this country.

The mock hearing is based on an actual case in the California courts in the 1980s. However, it is important for teachers and students alike to note that this lesson is not intended as an examination or analysis of cultural values and practices, but rather as a consideration of the roles and responsibilities of our judicial system. The hearing revolves around a unique case and should not be inferred to reflect common or widespread practices by Japanese in Japan or in the United States.

Introduction

Increasingly in our pluralistic society, the U.S. justice system is challenged to determine just solutions to social and legal problems in which immigrants or ethnic Americans have broken the law because they followed their own cultural traditions or the legal traditions of their native countries. Such cases raise fundamental questions of procedural justice: What type of information can and should be gathered to make just decisions? To what extent should cultural background be considered in determining guilt or innocence?

In this activity, a mock preliminary hearing in a murder trial with a cultural component, students analyze and present arguments for and against the use of a "cultural defense." They then apply a set of analytic tools to reach a decision on whether the use of a cultural defense in a criminal trial furthers or undermines the goals of procedural justice.

Objectives

At the end of this lesson, students will be able to:

1. Define the goals of procedural justice and analyze a culturally-focused issue of procedural justice.
2. Recognize social and cultural traditions and norms as factors that influence an individual's or group's perceptions of acceptable and/or legal behavior.
3. Appreciate the cultural context from which laws in one country may be unknowingly broken by representatives from different cultural or national groups.
4. Consider the arguments for and against a "cultural defense" for illegal acts.
5. Debate the degree to which our judicial system can and should accommodate cultural differences and still effectively preserve the values and norms of society as a whole.

Time Needed

Allow two class periods to complete this activity.

Materials Required

Copies of Student Handouts 1 and 2 for all students; enough copies of each version of Student Handout 3 (a, b, and c) for one-third of the students.

Procedure

1. Introduce the activity by asking students to articulate the purposes of law—to establish and preserve order within a society, to institutionalize accepted norms of behavior, etc. How do a society's cultural and religious values influence the laws it establishes? Ask students to consider laws that have derived from the Judeo-Christian religious tradition (e.g., the Ten Commandments), as well as laws that institutionalize social or cultural norms (e.g., laws protecting private property, laws related to dress, behavior, sanitation).
2. Explain that just as laws are derived to protect and enforce social customs and values, they vary across countries and cultures. For example, laws against drinking may be very strict in religious societies, but lax or even nonexistent in other societies. Laws protecting property may be very strong in a country like the United States, which values individual rights and private property, but very weak in societies that emphasize the social whole over the individual, or public or common ownership over private ownership.

Tools for Determining Procedural Justice

At issue: *Should testimony that supports a "cultural defense" for a serious crime be allowed?*

Tool #1: Identify the information sought or decision to be made:

A. What information is being sought?	
B. What decision is being made?	

Tool #2: Evaluate the procedures used to gather information or make a decision:

A. Does the procedure increase or decrease the chance that all information necessary for making a wise and just decision is obtained?	
B. Does the procedure ensure that the information gathered is reliable?	
C. Is the procedure predictable and flexible enough to promote justice?	

Tool #3: Consider competing values and interests. Does the procedure protect or endanger important values and interests of our society?

A. What values, goals, or standards of our society and/or legal systems would be promoted by this procedure?	
B. What values, goals, or standards of our society and/or legal system would be endangered by this procedure?	

2712

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3. Ask students to consider the situation of a newcomer to the United States, who may break laws with which he or she is unfamiliar because similar laws do not operate in his/her native country. In our increasingly pluralistic society, do we have a responsibility to respect cultural differences at the expense of law? Is it our responsibility to strictly and uniformly enforce the law? How should we balance two conflicting interests represented by our society's laws and our society's cultural diversity?
4. Distribute Student Handout 1. The first part defines procedural justice and its goals. Explain that procedural justice refers to the fairness with which information is gathered to determine innocence or guilt. In a family argument, procedural justice might mean that parents make sure to hear all sides of the story before deciding that one child is at fault. In a criminal trial, procedural justice means all information that might influence a decision is fairly gathered and heard before a decision is made. It means that the court assures that both sides of a case are heard and that the interests and rights of both sides are protected through the testimony presented.
5. Turn to the second portion of Student Handout 1, a chart of "Tools for Determining Procedural Justice." Explain that the questions on this sheet provide useful guidelines for deciding whether a procedure will promote a fair or just decision. Review the questions with the students. You may choose to have students apply the questions quickly to a hypothetical situation to see how they can be used. Explain that students will be applying these "tools" as they consider how to fairly collect information and make a decision on a criminal trial with an important cultural component.
6. Distribute Student Handout 2 and read the case of Mrs. Kimura aloud with the class. How was Mrs. Kimura's culture a factor in her crime? Why would it be important to Mrs. Kimura's defense to emphasize her cultural traditions? Explain that in this activity, students will consider the notion of the cultural defense as an issue of procedural justice. Students will take one of three positions in deciding whether a cultural defense should be allowed in this criminal trial; that is, whether such a defense satisfies the three goals of procedural justice:
   - Increases the chances that all information necessary for making wise and just decisions is gathered.
   - Ensures the wise and just use of information in making decisions.
   - Protects individual rights and societal welfare.
7. Divide the class into three groups:
   - Group one will argue for the use of the cultural defense. Within this group, have students work in three pairs to prepare arguments for each of the three roles outlined in Student Handout 3a.
   - Group two will argue against allowing a cultural defense. Within this group, have students work in three pairs to prepare arguments for each of the three roles outlined on Student Handout 3b.
   - The third group of students will take the roles of judges hearing arguments for both sides; this group makes the final decision on whether to allow the cultural defense. Students in this group should review all the arguments presented in order to prepare for their role, as described in Student Handout 3c.
8. Allow one class period for students to review and analyze arguments and prepare their speeches for the hearing.
9. Conduct the mock hearing. One student representing each role should present a two- to three-minute speech to the judges, presenting the strongest arguments in support of their positions. Judges should be instructed to take notes of the best arguments they hear. At the conclusion of testimony, judges will meet to complete the "Tools for Determining Procedural Justice" chart, based on the arguments they have heard. They will then present their decision and the reasons for it to the class.
10. Students may want to know the real outcome of this case, which is based upon an actual case in California in 1984. In that case, a similar hearing was conducted to determine whether to allow a cultural defense for Mrs. Kimura. The defense attorney in the case was not in favor of a cultural defense because he felt it was too risky for his client. By mutual decision of the judge and attorneys representing both sides, the court chose not to hear a cultural defense in the case. Ultimately, that decision became a moot point because the case was plea-bargained from first degree murder to manslaughter. Mrs. Kimura received a five-year suspended sentence with mandatory psychiatric counseling.

Student Handout 1
What is Procedural Justice?

Procedural justice has been called "the keystone of liberty" and "the heart of the law." Procedural justice refers to:

- the fairness of the ways information is gathered and
- the fairness of the ways decisions are made.

It does not refer to the fairness of the decisions themselves.

Respect for procedural justice is often a key indicator of a democratic political system. It has been said that the degree of procedural justice in a society is a good measure of the degree of freedom in that society, and of that society's respect for human dignity and other basic human rights.

The goals of procedural justice are to:

- Increase the chances that all information necessary for making wise and just decisions is gathered.
- Ensure the wise and just use of the information in making decisions.
- Protect the right to privacy, human dignity, and freedom.

(Reprinted with permission from *Justice: Law in a Free Society Series Level VI* (Calabasas, CA: Center for Civic Education, 1990) p. 108.)

Student Handout 2
The Case

On January 20, 1984, Fumiko Kimura, a Los Angeles resident, received a call from a Japanese-American woman claiming to have been Mr. Kimura's mistress for the past three years. The mistress wanted to end the affair honestly by telling Mrs. Kimura all about it.

Nine days later, on January 29, Mrs. Kimura walked into the ocean carrying her six-month-old daughter and four-year-old son. She attempted to drown herself and her two children. Two teenagers spotted three bodies floating in the

UPI/Bettmann Newsphotos

Fumiko Kimura

water and went to their rescue. Mrs. Kimura was saved, but her two children died.

When questioned by police, Mrs. Kimura explained that the realization of her husband's infidelity had brought shame and humiliation on her and her entire family because it meant she had failed as a wife. In Japanese culture, suicide is considered an honorable way to rid the family of the shame caused by such a failure. Thus, Mrs. Kimura had chosen to commit a Japanese ritual known as parent-child suicide, or *oyako-shinjo*. According to Japanese culture, children are considered an extension of the mother, not separate individuals. Thus, to commit suicide the mother must kill not only herself but her extensions, the children. To leave the children behind would make them the target of contempt by society.

Mrs. Kimura has been charged with two counts of first-degree murder under California law. She faces a possible death sentence if convicted.

The Issue of Procedural Justice

The issue of Mrs. Kimura's cultural background and customs has raised controversial questions concerning how to fairly try her case. The defense attorney representing Mrs. Kimura has petitioned the judge in the case to allow him to present a cultural defense for Mrs. Kimura. In building a cultural defense, the defense attorney would argue that culture should be the key factor in determining Mrs. Kimura's guilt or innocence. A cultural defense would be based on the principle that if an act is not a crime in the accused's native culture, then the accused has no awareness of having broken a law or committed a crime. The accused's culture becomes an excuse for the crime.

The judge must decide whether a cultural defense, which has never been used before in a criminal case, will serve or undermine the goals of procedural justice. He has called a hearing to consider the issue. The defense attorney, whose job is to protect the rights of the accused, will be allowed to present an argument in favor of allowing a cultural defense. He is allowed to call in two experts to support his position. The prosecutor, whose job is to protect the general welfare of society, will present an argument opposing the use of a cultural defense. She also will be allowed to call two experts to support her position. Based on the arguments presented, the judge will make a ruling on whether to allow a cultural defense in this case

2714

Student Handout 3a

Role #1:
John Klein, Defense Attorney

As defense attorney, your primary interest is in getting your client acquitted. You feel the cultural defense may be the best way to achieve this end.

Review the arguments provided in this handout in support of the cultural defense. From all the arguments presented, select the ones you feel will best support your request that the judge allow a cultural defense in this case. Remember that, as a lawyer, you should base your position on the issue of procedural justice for your client. You will also want to cite arguments based on legal philosophy and legal precedent established through comparable cases. Prepare a two to three-minute position statement to present to the judge at the preliminary hearing.

Role #2:
Susan Fine, Social Worker

As a social worker specializing in helping new immigrants adapt to the United States, you are often called to testify as an "expert witness" in cases involving immigrants' conflicts with our laws. In these cases, you are called upon to explain the cultural background of the person on trial and make a case for leniency in sentencing. From your experience, you believe strongly that consideration of cultural background is essential if some immigrants are to get a fair trial.

Review the arguments in support of a cultural defense provided in this handout. Select arguments you believe will best reflect your position as a social worker in favor of the cultural defense. Prepare a two to three-minute position statement to present to the judge at the preliminary hearing for the Kimura case.

Role #3:
Linda Kamakura, Japanese-American Petitioner

As a representative of over 1,000 Japanese-Americans in Los Angeles who signed a petition in support of Mrs. Kimura, you have been asked to speak on behalf of a cultural defense at the preliminary hearing of the Kimura case.

You strongly believe that Mrs. Kimura is a product of her culture and that she followed the customs of her culture in her parent-child suicide attempt, just as she had followed the customs of her culture in all other aspects of her life. Because Mrs. Kimura is Japanese, the only humane and fair legal procedure would be to try and sentence her according to Japanese law, even though the act occurred in the United States.

Review the arguments for the cultural defense presented in this handout. From all the arguments provided, select the ones you think best reflect your position in support of the cultural defense. Prepare a two to three-minute position statement to present to the judge at the preliminary hearing.

Arguments Supporting the Use of a Cultural Defense in Criminal Cases

- If the court refuses to allow a cultural defense, it might be perceived as evidence of disdain for an ethnic minority's cultural values. When an ethnic group's cultural values are ignored by the mainstream society, that group may become alienated from the majority culture. That alienation could, in turn, give rise to hostility and ethnic conflicts that would significantly disrupt the social order.
- If the court repudiates the cultural defense, it takes the chance of sending out a broad message that an ethnic group must trade in its cultural values for that of the mainstream society if it is to be accepted as equal by the majority. A social or judicial system that punishes a person for following his or her culture is making a pretty clear statement that society considers the culture to be inferior.
- By judging each person according to the standards of his or her native culture, the court could preserve the values of that culture and thus help to maintain a culturally diverse society, which is a hallmark of the United States.
- By absorbing cultural elements from a broad spectrum of ethnic groups, American culture has remained dynamic and creative, continually growing as it weaves threads of various immigrant groups into its social fabric.
- American society and the legal system it has developed are committed to equality. Equality means not only equality of individuals but equality of ethnic groups. If we are to insure equality of ethnic groups, then we must respect each group's right to be different. The majority cannot be allowed to penalize a minority group simply because it is different. The cultural defense insures that minority ethnic groups are treated fairly and equally before the law, that they are not penalized just for being different.
- The cultural defense should be as basic to the U.S. justice system as commitment to cultural pluralism is to our society. The cultural defense helps maintain diversity of cultural identities in this country by protecting important ethnic values.
- Mrs. Kimura was a traditional Japanese woman and must be understood as such. She embraced all Japanese traditions. She even kept her house Japanese style, although she lived in California 14 years. The Kimuras slept on futons and left their shoes by the front door. Mrs. Kimura bathed Mr. Kimura's feet each night before he went to bed. Mrs. Kimura's response to her husband's unfaithfulness made as much sense in her culture as the way she kept her house. Her acts must be judged in that context.
- In Japan, the practice of mother-child suicide is illegal, but it is not uncommon. It happens perhaps once a day and does not receive much attention. In Japan, such a case might be dismissed before going to trial. If it did go to trial, the charge would be manslaughter rather than murder. The defendant would be treated with benevolence and compassion because that is the philosophy of the Japanese judicial system. The court would strongly consider Mrs. Kimura's pain and humiliation. It would probably give her a suspended sentence.

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- The "ignorance of the law is no excuse" view is unfair because it requires foreigners to conform to the majority's standards and values. The result is that the values of the foreign culture, which enrich American life, are lost.
- The cultural defense recognizes the importance of the individual. Respect for individuals and their personal customs is an integral part of the human rights philosophy on which the United States was founded. For immigrants to be forced to deny their original culture means they must deny their identity and lose their self-esteem.
- A main issue in determining procedural justice is fairness to the defendant. If we are to insure this fairness to defendants of other cultures, we must allow a cultural defense.
- The validity of the cultural defense within our judicial system is founded in our country's commitment to the principles of individual justice. The American criminal justice system is committed to securing justice for individuals. In the context of criminal law, the ultimate aimof this principle of individual justice is to tailor punishment to fit the degree of a person's culpability.
- The cultural defense has an analogy in the battered spouse defense. If our courts accept a history of spousal abuse as a mitigating factor in a murder, then why not accept cultural history?
- Treating people raised in a foreign culture differently should not be viewed as an exercise in favoritism, but rather as an expression of our nation's commitment to and exercise of principles of fairness.
- It is essential to understand the particulars of this case. In Japan, a mother who kills herself and leaves the children behind would be criticized far more harshly than a mother who also takes the lives of her children. Growing up motherless, the products of a failed marriage, would make the children outcasts for life. To understand parent-child suicide, one must understand the Japanese sense of family as an extension of self and the seriousness of the shame a failed marriage brings to a traditional Japanese.

Student Handout 3b

Role #4:
Melinda Gonzales, Prosecuting Attorney

As prosecuting attorney, your job is to protect society and uphold its standards. You are very conscious of the public sentiment and tragic circumstances of this case. However, as a prosecutor in Los Angeles, you are also extremely sensitive to the fact that there are literally hundreds of ethnic and cultural groups in your jurisdiction, all with unique customs and traditions. The courts have to set a standard of equality, fairness, and objectivity for all. From a purely legal standpoint, you are concerned with how establishing a precedent for using a cultural defense might tie your hands in prosecuting any case involving an accused from a minority culture. How would standards of law and order be affected?

Review the arguments opposing the cultural defense presented in this handout. From all the arguments cited, select those that you think best reflect your position as a prosecuting attorney opposing the cultural defense. Keep in mind that your position should revolve around the issue of procedural justice as it protects the values and interests of society at large. Prepare a two to three-minute position statement to present to the judge at the preliminary hearing on this matter.

Role #5:
Paul Chun, Asian-American Lawyers Association

Being from an Asian-American minority group, you are sensitive to the cultural dimensions of the Kimura case. Yet, you still think it would be a mistake if the judge were to allow a cultural defense in this case. Your opinion is that the cultural defense conflicts with the fundamental principle of equal justice. Because it essentially boils down to special treatment for some immigrant groups, the cultural defense would perpetuate and emphasize the differentness of these groups. The special treatment would cause ill-feeling and social prejudice against these groups.

Review the arguments opposing the cultural defense provided in this handout. From all the arguments presented, select several that you think best support your position opposing the cultural defense. Prepare a two to three-minute position statement to present to the judge at the preliminary hearing on the Kimura case.

Role #6:
Lee Winston, Legal Historian, University of California at Berkeley

As a historian of the U.S. legal system, you are opposed to the use of a cultural defense in criminal trials because you think it flies in the face of our legal philosophy and practice over the past century.

Review the arguments opposing the cultural defense presented in this handout. From all the arguments cited, select several that you think best reflect your concerns as a legal historian. Prepare a two to three-minute position statement to present to the judge at the preliminary hearing for the Kimura case.

Student Handout 3c
Role #7: The Judge

You are the judge presiding over the Kimura murder case. The defense attorney representing Mrs. Kimura has requested that he be allowed to base his case for Mrs. Kimura's innocence on an unprecedented strategy—a cultural defense. This request has raised an important question of procedural justice. On the one hand, can the accused receive a fair trial if she is not allowed to emphasize the role her culture played in motivating her actions? On the other hand, will the interests of society be served and protected if such testimony provides the excuse for a serious crime?

You have called a preliminary hearing to rule on this issue. You have invited the defense attorney, prosecuting attorney, and two experts representing each side to present arguments on this issue. You will then decide whether to let the defense attorney use the cultural defense.

To prepare for your role, you should review and be familiar with the range of arguments for and against the cultural defense. You should also think of questions you might want to ask the lawyers and experts to clarify the issue.

Arguments Against Allowing a Cultural Defense in Criminal Cases

- Preservation of the social order is perhaps the highest aim of the legal system. To preserve order, societies must lay down and adhere to a set of laws that requires obedience of all members of the society regardless of individual factors. Accepting a cultural defense in criminal trials would completely undermine the universality of the law and, thus, ultimately damage the social order.
- Every society operates on minimal standards of conduct to which every member of society must conform. If we begin to make exceptions for one group, there will be no end to exceptions and the very foundation of our system will fall apart.
- A fundamental principle of law in this country is that "ignorance is no excuse for noncompliance." This principle sets the standard for an objective, rational legal system.
- It is of great importance that the administration of the law be uniform. Law must be administered without respect to person. It would be dangerous, as well as unjust, to introduce into general practice an exception to the law in favor of foreigners.
- Murder is a most serious crime in this country. Its seriousness cannot and should not be lightened by considering legal or cultural standards from other countries.
- You are treading on shaky ground when you decide something based on a cultural tradition because our society is made up of so many different cultures. You have to draw the line somewhere. People have chosen to live here and they must abide by the laws or we will have anarchy.
- Accepting cultural factors as a legitimate excuse for a criminal activity would create a specially privileged segment of the population. This privileged group would be able to rely on an excuse that the majority of the population could not use. It would give them an unfair advantage. It would set up an inequality of groups before the law, which is contrary to our whole legal system.
- The cultural defense would create an unfair exception to criminal law for newcomers by allowing their ignorance of U.S. law to be an excuse for acts that long-term residents of the United States would be subject to criminal liability for, despite their possible ignorance.
- If we establish a precedent of a cultural defense in criminal trials, we raise the question of who can use it and who cannot. Are all immigrant groups allowed to use it, even if they come from cultures quite similar to ours? Can they use it no matter how long they have been in this country, or only if they have been here less than a certain amount of time six months, a year, five years? Where is the cutoff?
- Mrs. Kimura had lived in California 14 years when she tried to commit suicide. Certainly that is enough time to be familiar with and responsible to our laws. Even if the cultural defense were valid, this case should not qualify because Mrs. Kimura really could not be considered to be a recent immigrant.
- If the precedent of the cultural defense is established, the American justice system will have trouble maintaining the deterrent effect of criminal law on immigrant groups. The use of the cultural defense would remove all incentive for foreigners to learn our laws. By rejecting the cultural defense and not allowing it in our courts, we will be encouraging immigrants to adapt more quickly to their new homeland. We will, in effect, aid them in their general assimilation into United States society.
- Our laws concerning murder uphold and protect a fundamental value in our society—the sanctity of human life. This cannot be undermined for any reason.
- Cultural background should not exonerate the accused from guilt but, rather, establish a case for leniency in sentencing. This is a far preferable procedure because it avoids the precedent of the cultural defense.
- The cultural defense is tantamount to saying to everyone of Japanese heritage that it is okay to go out and kill your children, when it is not!
- In criminal cases, we must consider two things: whether there was intent to commit a crime, and the degree to which the crime was harmful to society as a whole. The problem with allowing a cultural defense is that it focuses all attention on the first consideration—the accused's state of mind—and presents the case that a crime was not committed because the accused did not know it was a crime. Unfortunately, such a defense sacrifices the second consideration—the welfare and protection of society as a whole. In a case as serious as the murder of one's children, our justice system cannot underemphasize the harmfulness of this crime to society as a whole.
- In 1857, Secretary of State Daniel Webster established a protocol against the cultural defense by saying, "Every foreigner residing in a country is as much bound to obey its laws as native citizens." This standard is as valid and just today as it was then.
- The cultural defense is a dangerous idea. It exposes the U.S. justice system to patriarchal values from abroad—values that are often detrimental to women and children, who were often treated as second-class citizens in the countries they left behind. The cultural defense, rather than providing for justice, may really be inhumane, allowing women and children of minority cultures to continue to be victimized in their new homes. The cultural defense may contribute to the perpetuation of unjust behavior and stereotypes.

2717

A National Sampler of Law Day Activities

As this issue goes to press, many Law Day activities are still in the planning stages. While a complete listing of activities will not be possible, we again this year prepared a sampler to give some idea of the diversity and creativity which are hallmarks of Law Day events. We appreciate the cooperation of those whose activities are listed here and apologize to those whose programs could not be listed due to time constraints.

ALABAMA

The Alabama Center for Law and Civic Education is working with local bar associations to use the video "We Dare Defend Our Rights" and accompanying study guide in classrooms. The video is about Alabamians who have played important roles in Bill of Rights issues such as desegregation, poll tax, the right to treatment for the mentally ill, and school prayer. The state bar association is promoting 30 second public service announcements featuring prominent Alabama attorneys.

ALASKA

The state bar is sponsoring a special call-in, interactive television program between Senator Ted Stevens and students, who will have been provided with study materials prior to the program. Other activities will include a series of mock trials at 10-15 sites leading up to Law Day.

ARIZONA

Arizona plans an awards rally, with school bands, at the State Supreme Court to honor the winners of the annual Law Day poster contest.

CALIFORNIA

The Constitutional Rights Foundation will sponsor a statewide mock trial competition. The Citizenship and LRE Center will be sponsoring "Talk to Your Judges" programs at schools and "Meet Your Judges" programs at community forums.

DELAWARE

The state bar association will sponsor "Lawyers in the Classrooms" programs and a host a luncheon honoring the winner of the Liberty Bell Award, presented to salute a lawyer for achievement in community service.

DISTRICT OF COLUMBIA

Planned activities include a "Student Bill of Rights Conference" on community empowerment and volunteerism co-sponsored by the District of Columbia Center for Citizen Education in the Law and the Points of Light Foundation. Four hundred students from the District's public, private, and parochial schools will participate in workshops on the First and Fourth Amendments and on how the law touches young people in everyday life. The conference will be supported by a grant from the U.S. Bicentennial Commission. The Bar Association of the District of Columbia will be sending lawyers into classrooms to talk with students about Law Day and what lawyers do.

GEORGIA

A network of regional LRE coordinators are working to promote and encourage activities during Law-Related Education Week. Informational packets about the week will be mailed to attorneys, justice system personnel, and schools. In several Atlanta suburbs, lawyers will be teaching three classes on the State v. Goldilocks prior to Law Day. On Law Day, after an assembly featuring the mock trial, lawyers will discuss the trial with individual classes.

HAWAII

The state bar is sponsoring "Lawyer in the Classroom" presentations on all the islands. There will be "Meet a Lawyer" Clinics at shopping centers where volunteer lawyers will discuss legal issues with shoppers. Fishing tournaments for lawyers, students, members of scout troops and soccer teams, and fishing celebrities will be also be held, as will statewide mock trials.

INDIANA

The governor and the mayor of Indianapolis are proclaiming May 1 statewide and citywide Law Day. The Indiana Center for LRE, the state bar association, and the Children's Museum are working together on activities at the museum. There will be an actual court hearing held at the museum in addition to courtroom demonstrations on situations at school involving the freedom of speech and search and seizure. The state bar is also making programs and a mock trial based on their video "Alcohol and Automobiles" available to local bar associations.

IOWA

The Young Lawyers Division of the Iowa State Bar Association is hosting a free People's Law School at Drake University with 30 minute segments addressing family law, the court system, small claims court, living trusts and wills.

2718

MAINE

The state bar association is providing information packets "Lawyers with Class" to be used to supplement current social studies units. The packets include question and answer sessions, suggested class activities, and lesson plans.

MICHIGAN

The state bar and the Michigan Lawyers Auxiliary are cosponsoring an essay contest on "Struggle for Justice" and an awards luncheon for the winners featuring an address by the chief justice of the state supreme court. The Saginaw County Bar Association will sponsor a Legal Career Opportunities Day for youth to explore legal careers as court reporters, police officers, probation/parole officers, legal secretary, in addition to lawyers. The Legal Secretaries Association will host a luncheon for young people as well.

MISSOURI

The state bar association will celebrate Law Week by sponsoring a statewide call-in for free legal advice and "Lawyer in the Classroom" activities. At least 200 lawyers will teach high school students an LRE lesson based on "Stepping Out," a booklet which describes the legal rights and responsibilities of young adults in Missouri. The bar will also sponsor a citizenship seminar for teachers and will honor the winner of the annual award for excellence in citizenship education.

NEVADA

The state bar's Young Lawyer Division will hold a Community Question and Answer session in a local shopping mall. Elementary school students will view the videotape *State v. Goldilocks*, followed by discussion with the attorneys. Mock trial demonstrations at high schools will also be featured.

NEW JERSEY

Law Day plans in New Jersey include a Law Fair program for elementary students featuring Bill of Rights exercises, discussions led by lawyers and judges and an award to mock trial winners.

NEW YORK

The New York State Bar Association and Project P.A.T.C.H. are cosponsoring a civil law moot court competition. They will also participate in the annual Law Day ceremony with the state supreme court.

NORTH CAROLINA

The state bar will host a moot court competition, Law Day award luncheon and a program honoring the winners of the essay and poster contests and the winner of the Liberty Bell competition for outstanding community service.

OKLAHOMA

Law Day 1992 in Oklahoma will include statewide video, essay, and poster contests. Awards will be given during the "Ask a Lawyer" Law Day television program which will be carried by public television. The winning posters will be exhibited in an Oklahoma City museum.

OREGON

The state bar and Portland State University will co-host a Law Day conference. An estimated 800 to 1,000 high students will participate in workshops that include topics such as Music and Offensive Parts Prohibited, Living with AIDS, Girls and Guys—Double Standards, From Here to Paternity: Condoms and Conundrums, Student Job Rights, Sacred Sites vs. Property Rights, The Right to Hate, Abuse within the Family, and Federal and State Prosecution.

PENNSYLVANIA

The Westmoreland County Bar and the Temple University Law, Education and Participation (Temple-LEAP) Program at Temple University School of Law will co-host an LRE conference "Teaching Law to Kids," which will include a drug problem scenario, aggravated vehicular/driving under the influence mock trial, a demonstration lessons on child labor, family law, Bill of Rights, and a Lawyer/Doctor Education Team presentation. In Philadelphia, students will visit the federal courthouse for a series of seminars on law issues sponsored by the Young Lawyers Division and Temple-LEAP. Later, teams from the statewide mock trial competition will reenact the trial. Also planned is be a Lawyer/Doctor Education Team presentation or a Lawyer in the Classroom presentation in elementary schools.

RHODE ISLAND

High school students will participate in a day-long Law Day conference at the University of Rhode Island which will feature workshops and speakers on the Struggle for Justice theme. They will also view and critique videos produced by their peers dealing with the theme Struggle for Justice and select a winning entry.

SOUTH CAROLINA

Activities in South Carolina will include a student citizenship conference at the South Carolina State Museum. Two hundred high school students representing a cross-section of students will participate in seminars on date rape, driving, sexual harassment, pregnancy, the technology of criminal investigation, and "How to Get Into Trouble Without Even Trying."

VIRGINIA

At two regional shopping malls, the children's play "The Big Bad Wolf v. Curly Pig" will be presented. In addition, there will be "Ask a Lawyer" booths plus educational displays on topics such as the Americans with Disabilities Act, gay rights, and the Bill of Rights.

WEST VIRGINIA

The Young Lawyers Division will provide an all-day lawyer information service and a "Lawyer in the Classroom" in every classroom in the state. Presentations will be adapted from the state bar's booklet "Coming of Age" and will also include activities from the Lawyer/Doctor Education Team Project.

(Compiled by Peg Rider-Hankins, Project Coordinator, ABA Special Committee on Youth Education for Citizenship.)

Teaching

(continued from page 3)

her intervention through the balancing of the scales.

Since the adversary system is our way of seeking the truth in the forum of justice, it is desirable that the scales be equalized. Landmark rulings of the Supreme Court in this area can be translated as evidence of sensitivity to the need for counsel for the poor, protection against unreasonable searches and seizures, and insistence that police refrain from coercing confessions. Such famous English maxims as "A man's house is his castle" and "A person is innocent until proven guilty beyond a reasonable doubt" can serve as entry points to study of the nature of criminal justice in this country.

Classroom Ideas

The mock trial offers teachers and students the opportunity to apply previously acquired knowledge about due process of law to an historic or contemporary issue. The witchcraft trials and the famous cases of Roger Williams, Anne Hutchinson, or Peter Zenger offer scripts for student involvement in the judicial process. The meshing of skills and knowledge often results in appreciation of the strengths and weaknesses of our system.

Our system of due process of law can be evaluated on various levels by comparison with other methods designed to settle disputes. The blood feud, the duel, "the law of the jungle," retaliation, and the Eskimo song duel have been used to achieve justice in some societies. Each has its rationale, and each has played a role in the clarification of procedural justice.

The evolution of the idea of juvenile justice from harsh codes to the juvenile courts today is an important part of the story of justice. Certainly, the young ought to be introduced to the due process of juvenile hearings and the alternative ways of disposing of such cases. Combining this subject with that of the mushrooming wave of juvenile crime offers ways of exploring the causes of crime and procedures for confronting this serious contemporary development both in the schools and in society at large.

For students, as well as for adults, the police represent power, authority, and justice. Meetings with police, role playing of problems confronting police, and trips to police stations and police academies can give students a realistic picture of the nature of the police officers' responsibilities. Such experiences may result in empathy, instead of vilification or apotheosis, and may bring each of the parties closer to an understanding of the other in the quest to clarify the meaning of justice on the streets, as well as in the courts.

Isidore Starr, widely recognized as the father of law-related education, is a member of the ABA Special Committee on Youth Education for Citizenship. Previous versions of this article appeared in Daring to Dream: Law and the Humanities for Elementary Schools *(Chicago: American Bar Association, 1980) and* Education for Responsible Citizenship: The Report of the National Task Force on Citizenship Education, *cosponsored by the Danforth Foundation and the Institute for Development of Educational Activities, Inc., the educational affiliate of the Charles F. Kettering Foundation. It was published by McGraw-Hill in 1977.*

Young People

(continued from page 11)

AIDS victims, homosexuals, young children in jail, ex-convicts who are trying to go straight, and religious figures such as Mother Theresa. A student at Kenwood Academy took a comprehensive view, listing "people dying for their race and culture...Also the student council fighting so we as students can have a say in the rules that are made for our school."

Improving the Community

When asked "How can you make your community a more just place in which to live?" four out of five of the students were able to personalize the question and suggested activities in which they could become personally involved: promoting causes such as teen centers, safe sex, and more jobs; taking an active role in neighborhood watch and other community programs; cleaning up their neighborhoods; and getting involved politically by circulating petitions, writing letters to public officials, and attending council meetings.

The second most frequent response was to practice good citizenship skills—obeying the law, reporting lawbreakers, avoiding gang involvement, being fair and respectful to others, and getting a good education. A Wyoming student replied: "Stop stereotyping and stop discriminating against people who are a different race of heritage than I am." Unfortunately, 17% felt powerless to have any impact on their community, and half of those were eighth graders who attend some of the best schools in their community.

The effect of living in Chicago with its widespread gang violence was very obvious in the Disney eighth graders' view that getting rid of gangs, criminals, and drug dealers would make their community a more just place in which to live. A student at Kenwood Academy advocated "working with cooperative kids in my age group, planning to help elders with groceries or other errands; influencing other kids that are involved or could be involved in gangs that killing each other is not the right way to go and then find the right route together.

Coping with Injustice

When confronted with an unjust situation, an overwhelming and encouraging nine out of ten students said they would deal with it in a positive way, by facing it and trying to solve it by talking the problem out. Others would ask someone such as a parent, school staff, or police for help. A student at Roberto Clemente High replied "I will tell my parents, police, my teacher or counselor to help me out." Only 13% said they would ignore the situation and an equal number felt they would respond in an inappropriate way, such as by arguing, fighting, or becoming overly emotional. An Anderson High School student replied: "I take the straight, honest path, no matter how hard it is, because after the situations I've been in I know honesty is the only way to achieve justice." A Disney Magnet School student says "I struggle until I achieve what I'm fighting for like I'm doing now to get though school."

While the results of our survey do not allow us to reach any hard and fast conclusions about how young people view justice, we believe it can serve to focus needed attention on student values. To find out more about the survey, contact Peg Rider-Hankins, ABA Special Committee on Youth Education for Citizenship, 541 N. Fairbanks, Chicago, IL 60611-3314; (312) 988-5735.

Peg Rider-Hankins is a Project Coordinator for the ABA Special Committee on Youth Education for Citizenship.

2720

Struggle for Justice: A Student Survey

May 1 is observed as Law Day. This year's theme is "Struggle for Justice." Each year the American Bar Association Special Committee on Youth Education for Citizenship will publish a student edition of its magazine *Update on Law-Related Education*, which has articles and activities about the legal system and legal process in the United States. One of the articles will be on young people's views of justice and how people struggle to achieve it. We are asking you to participate in the survey by completing this questionnaire.

1. When you hear the word *justice*, what do you think of?

2. Give some examples of how people have struggled, and continue to struggle, to achieve justice.

3. What can you do to make your community a more just place in which to live?

4. What do you do when you are faced with an unjust situation?

Thank you for answering our questions.

Answer Key for Student Edition

"How's Your Legal Vocabulary?"

1-j; 2-q; 3-o; 4-c; 5-z; 6-u; 7-x; 8-p; 9-k; 10-l; 11-w; 12-v; 13-b; 14-r; 15-e; 16-t; 17-d; 18-h; 19-m; 20-y.

"Disorder in the Court"

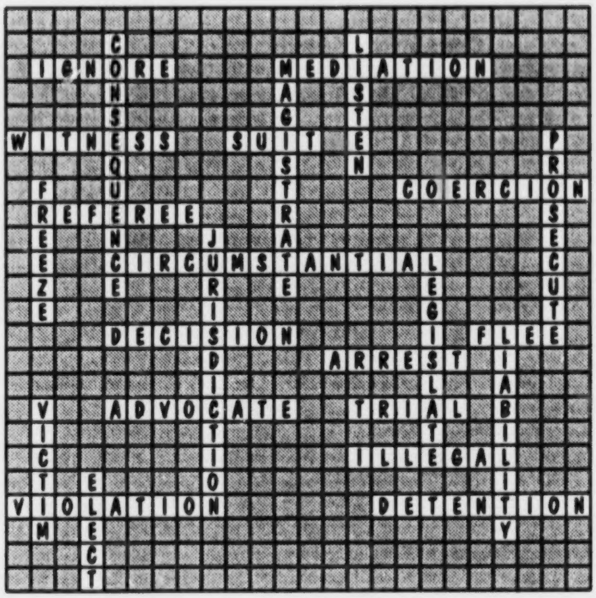
Some things in the courtroom scene that might be "unusual" include:

1. *The witness is raising his left hand while taking the oath.* While it is customary to raise the right hand when taking an oath, this would probably be considered a "harmless error," since it is not serious enough to affect the outcome of the trial. What is important is that the witness "solemnly affirm" that the testimony he or she will give is truthful.
2. *While taking the oath, the witness swears on a copy of the Koran, not the Bible.* Witnesses in many states are not required to take an oath at all, on the Bible or otherwise. In some, they need only solemnly affirm that their testimony will be truthful. (*Question:* If this witness were Muslim, would he be allowed to swear on the Koran? Could he if he were Christian? Atheist?)
3. *One of the jurors appears to be visually impaired.* People who are visually impaired or even blind *can* serve on juries; they cannot be excluded simply because of their impairment.
4. *A child is on the jury.* All states require that jurors be at least 18 years old.
5. *Through an open window, the jury can see and hear a noisy demonstration on the sidewalk outside the courtroom.*
6. *A spectator in the courtroom is reading a newspaper with an inflammatory headline.*
7. *The defendant is wearing a prison uniform.*
   Jurors must be unbiased and fair in considering the evidence presented at trial. When they are exposed to situations such as those described in numbers 6, 7 and 8, they might "prejudge" the case before they hear all the facts. Attorneys for either side could make a motion for a mistrial (a trial that is ended and declared void before the jury returns a verdict) as the demonstration, the newspaper, and the appearance of the defendant in prison clothing might unfairly influence the jurors.
8. *One juror is asleep.*
9. *A spectator is smoking a cigarette despite the "no smoking" sign posted in the courtroom.*
10. *The court recorder's machine is not plugged in.* With the exception of a small number of special courts, court proceedings must be "recorded" in some manner. Some courts use audio or video tape to make this record while others use the more traditional stenographic method shown here. If the record is not complete (as it might be in this case with the machine being uplugged), the attorneys could agree or "stipulate" as to what occurred during the period which was not recorded. If they cannot reach an agreement, a mistrial could result. A complete and accurate record of the court proceedings is also very important should either of the parties decide to appeal the verdict.
11. *One of the lawyers is wearing a button that says "REELECT HART" in Judge Hart's courtroom.* While it is inappropriate, there is no ethical rule which prohibits an attorney arguing a case from wearing such a button in the courtroom. The judge, however, might "recuse" (remove himself) from the case if he felt he could not be impartial, and the opposing attorney would probably raise an objection, claiming that the button might unfairly influence the judge. (*Question:* If the attorney wearing the button was required to remove it, could he claim that his right to free speech was being violated?)
12. *The judge's bench has two gavels.*

"Eric's Excellent IDea"

While laws vary in different states and communities, here's what might have happened because of Eric's "excellent" idea:

- The police charged Eric with the illegal purchase and possession of alcohol and cigarettes, driving while intoxicated (or driving under the influence), reckless driving, driving while not wearing a seat belt, malicious destruction of property, violating the curfew for minors, possession of a fraudulent drivers license, and attempting to elude police. Tommy, Angela and the others at the party were charged with underage drinking and possession of open flasks (open bottles and cans). Underage party guests were also charged with violating the curfew.
- Angela's parents had to cut short their vacation to get her released from police custody. Because their state holds parents responsible for what goes on at their house even when they are not present, Angela's parents were charged with contributing to the delinquency of minors. They might also be sued by those who were injured or had their property damaged as a result of the party.
- Because a minor (Eric) was able to buy liquor at his Jiffi Mart, Mr. Lopez's license to sell liquor was suspended and his insurance company canceled his policy. Other insurance companies offered him coverage, but he would have to pay premiums many times higher than before. Mr. Lopez cannot afford to pay this much for insurance, so he was forced to fire Eric's friend Hubie (who worked at the store part-time) and put the store up for sale. When he crashed the car, Eric broke his arm in three places, causing him to be dropped from the varsity basketball team and possibly losing a chance for a college sports scholarship.



Update Reader Survey

Please take a few minutes to complete this questionnaire. Your responses will help us serve you better as we plan for future issues of *Update.*

For each of the following statements, please indicate your agreement or disagreement with each by circling a number from 1 (for "Strongly Agree") through 6 (for "Strongly Disagree"); please circle one number for each statement.

		Strongly Agree					Strongly Disagree
1.	*Update* is easy to read.	1	2	3	4	5	6
2.	*Update*'s format is readily usable.	1	2	3	4	5	6
3.	*Update*'s content is too "legalistic."	1	2	3	4	5	6
4.	*Update* is accurate and unbiased.	1	2	3	4	5	6
5.	*Update* is a source of (circle all that apply)	new ideas	legal information		current issues		teaching strategies
6.	*Update* is more useful than other educational publications I read.	1	2	3	4	5	6
7.	"Court Briefs" is an informative feature.	1	2	3	4	5	6
8.	I provide copies of substantive articles for my students.	1	2	3	4	5	6
9.	I use *Update* as a source of teaching strategies.	1	2	3	4	5	6
10.	I use *Update* as a reference.	1	2	3	4	5	6
11.	I use *Update* (circle one)	Daily	Weekly	Monthly		Occasionally	Never
12.	I would like to see more substantive articles.	1	2	3	4	5	6
13.	*Update* should provide coverage of state court decisions.	1	2	3	4	5	6

14. I am a

______ teacher, grades 1-6
______ teacher, grades 7-9
______ teacher, grades 10-12
______ university professor
______ lawyer
______ judge
______ juvenile justice professional
______ other (please specify)

15. I teach ____ .
(subject area)

(continued on the other side)

16. Other educational publications I read are:

17. How did you hear about *Update*?

____ another teacher
____ conference/seminar
____ mailing
____ bar association
____librarian

18. I like *Update* because

19. I wish *Update*

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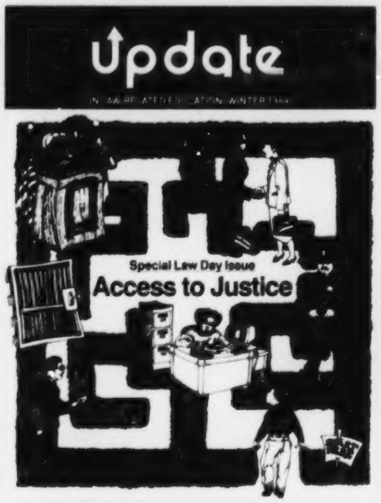

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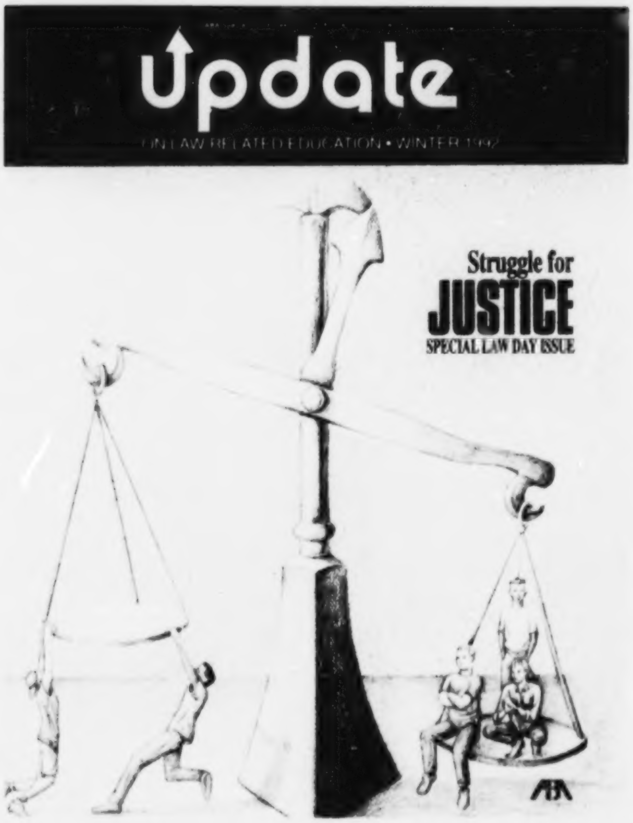
Update
ON LAW RELATED EDUCATION • WINTER 1992
Struggle for
JUSTICE
SPECIAL LAW DAY ISSUE
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2726

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ABA Special Committee on Youth Education for Citizenship

Update

ON LAW-RELATED EDUCATION • SPRING/SUMMER 1992

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The Challenge of Diversity

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contents

Volume 16, Number 2
Spring/Summer1992

3 **An American Challenge: Diversity at the Crossroads**

5 **Finding a Place for Pluralism in the Schools: The Paradigms of Religion and Race**

9 **What Should I Tell My Children Who Are Black?**

13 **Ships in the Night: American Law and the Latino Community**

16 **Justice, Community and Differences: The Challenge from Indian Country**

TEACHING STRATEGIES

20 Tribal Sovereignty Past and Present

22 Indian Issues and Party Platforms

24 Working Toward Justice in Diversity

28 Developing a Class Proposal on Diversity

31 Exploring *U.S. v. Hirabayashi*

37 **Court Briefs**

50 **Resources on Diversity**

Several of the murals reproduced in this issue appear through the courtesy of the Social and Public Art Resource Center (SPARC), a non-profit, artist-run multicultural arts center based in Venice, California. SPARC is committed to enhancing the visibility of work which reflects the lives and concerns of America's diverse ethnic populations, women, working people, youth and the elderly. For more information about SPARC, write: Social and Public Art Resource Center, 685 Venice Blvd., Venice, CA 90291-4897. Photos of the murals provided courtesy of Gerald F. Condit.

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice, the Special Committee on Youth Education for Citizenship, the American Bar Association, or the Social and Public Art Resource Center.

A one-year subscription to *Update* is $18.00. For subscription and back issue information, contact American Bar Association, 541 N. Fairbanks Court, Chicago, IL 60611; (312) 988-5735.

opening statement

Melting pot, stew, quilt—whatever the metaphor one chooses to represent the diversity of the American experience—there seems to be a growing sense in some quarters that something is amiss in the kitchen, that the fabric of our multicultural and multiethnic society is becoming frayed, worn and stretched to the breaking point.

New tensions grow and old ones are magnified as old majorities become new minorities. Economic pressures increase as new workers compete with old as well as with each other in an employment market that is becoming more demanding and skills-intensive. School systems struggle to deal with burgeoning enrollments in a time of growing anti-tax sentiment. These tensions are finding expression on local, state and national political agendas in a number of ways: the so-called Robin Hood school financing plans, English-as-official-language proposals and changes in immigration policy are just some examples of issues rooted in concerns about diversity.

Many issues relating to diversity were explored at this year's National Law-Related Education Leadership Seminar held in Indianapolis this past January. In large part, this issue is based on that seminar, which had as its theme "Diversity at the Crossroads: Can Americans Meet the Challenge?"

This issue is also a "first" of sorts for *Update*. It is the first issue of the magazine to be guest-edited, in this case by George S. Perry, Jr., ABA/YEFC Assistant Staff Director. George served as seminar coordinator in Indianapolis and is particularly well suited to the task of bringing together a broad spectrum of thought to address this complex topic. I thank George both for his efforts in coordinating a memorable and thought-provoking seminar and for his role in putting this issue together; see his article on the opposite page for more background on the seminar and an introduction to the first four articles in this issue which are based on papers presented in Indianapolis.

There are more "firsts" that *Update* readers can look forward to in the coming months. The fall issue, which will deal with law from an international perspective, will premiere a new and more reader-friendly look for *Update*. A companion publication, *Update on the Courts*, will also make its debut in the fall as part of a new publications package, *Update Plus;* see page 35 for more details.

We also plan to establish an editorial advisory board for *Update* to map out future issue topics and help set overall editorial direction. If you are interested, or wish to make a recommendation, please feel free to contact me for more information.

—Jack Wolowiec

George S. Perry, Jr.

An American Challenge: Diversity at the Crossroads

An introduction to this issue and reflections on the role of LRE in informing the national debate

Five hundred years ago, Christopher Columbus set out on a voyage which sparked continuous interaction between the peoples of western Europe and the Americas. During the past five centuries, we, or our ancestors, have arrived here, some free, others not, to affect and be affected by, those already here as well as those who followed. The ways in which these various peoples have interacted has had a significant impact upon the development of both our individual and collective identities.

It may be a coincidence that, in the year of the Columbian Quincentenary, the national debate on our individual and national identities, and particularly the role of education in defining our national identity, has received significant attention. I think that it is not a coincidence. Columbus symbolizes our individual searches for a better place, an ideal world. I think that we, especially we educators, are trying to learn from Columbus's experience. Someone has described Columbus as a person who did not know where he was going; did not know where he was when he arrived; and could not tell anyone where he had been when he returned. There are important lessons to be learned from his example.

We should possess a vision for the contributions education can make to our national voyage. We should establish milestones for our journey in order to measure our progress. And we should share our experiences about our voyage. Our greatest impact on this voyage may be our commitment to maintaining an informed debate on our national identity.

What LRE Can Do

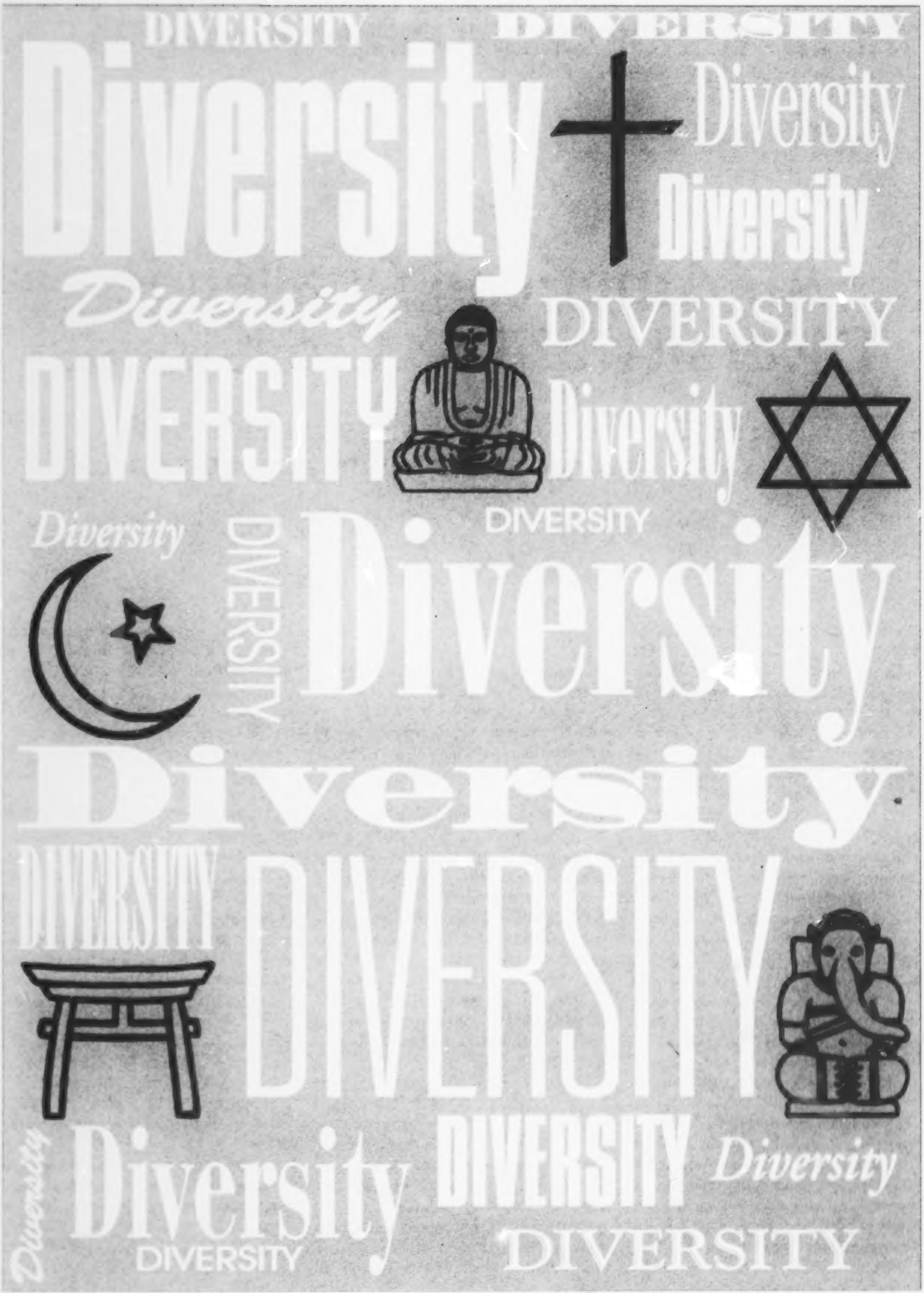
Law-related education can make a significant contribution to the debate about our national and individual identities. The law serves as a vehicle for analyzing and resolving the conflict and tension that occurs when people with different perspectives interact. Educators can cite examples of how legal concepts have evolved and been applied to dynamic situations; how the law has succeeded (and how it has failed) in resolving conflict; and how collective and individual action may affect change.

The 1992 National Law-Related Education Leadership Seminar was devoted to furthering the informed debate on these issues. The seminar's theme was "Diversity at the Crossroads: Can Americans Meet the Challenge?" The four articles that follow are adapted from the plenary session presentations made at the seminar. These presentations provoked the seminar participants to reexamine their beliefs on controversial issues, with each offering a different perspective and approach to understanding diversity. Some focused heavily on advocating a position, some on analyzing trends; all raised questions about how well our society, based on the rule of law, addresses issues of diversity.

In her analysis of court interpretations on the acceptability of including religion and race within schools, Rachel Moran focuses on ways that the law views diversity. She suggests that courts have determined religion to be a private matter and one that should remain outside of the public domain. However, there continues to be significant pressure to bring religion into schools, and the line of separation between church and state is shifting. Professor Moran examines the use of public schools to address racial discrimination and looks at court action during the last three decades which has placed race in schools as part of the public domain. She concludes with a discussion of the recent trend to move race out of the public domain.

Is our perspective accurate? Pat Browne argues that the influence and contributions of Africans and African Americans are absent from the history taught in elementary and secondary schools, an absence which is a barrier to

(continued on page 45)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THE CHALLENGE OF DIVERSITY

Rachel F. Moran

Finding a Place for Pluralism in the Schools: The Paradigms of Religion and Race

Why an official policy of religious neutrality may not be equivalent to colorblindness

In the July 8, 1991 issue of *Time*, Garry Wills, an author and historian, noted that:

> One of the proudest things we have in our tradition is pluralism. Separation of church and state, which lays the groundwork for this tolerance of diversity, is a peculiarly American concept. The battle about what to teach is over. America has always been a study of different cultures operating on one continent. You have the French colonial exercise in Canada, the British colonial exercise here, and the Spanish colonials in the lower part of the hemisphere. What's happening now is that things that have been accepted in academic history are filtering down into the elementary schools and have become part of a political fight.

Although I agree with several of Wills' observations, I must take issue with some of his fundamental assumptions. One useful point that Wills makes is that pluralism is not new. In fact, pluralism has been a feature of the American scene since the nation's founding, despite the unfortunate tendency among a number of commentators to portray today's dilemmas over racial and ethnic difference as wholly unprecedented. Religious diversity was an issue that had to be confronted directly during the earliest years of our country's development. Eventually, the First Amendment was promulgated to protect religious minorities by forcing the State to adopt a neutral stance toward diverse faiths. Our nation's experience with religious difference can provide insights into the current controversy over racial and ethnic difference, as Wills suggests.

However, contrary to Wills' assertion, the separation of Church and State may not provide a completely satisfactory foundation for analyzing the State's role in addressing racial and ethnic diversity. I will show that because of our country's distinctive experiences with religion and race, an official policy of religious neutrality may not be equivalent to a commitment to colorblindness. Historically, the separation of Church and State has been designed to foster pluralism, while colorblindness has been associated with integration and assimilation of people of different races and ethnicities. A broad public commitment to religious neutrality thus enhances the survival of minority faiths; narrow interpretations of State sponsorship tend to privilege majoritarian creeds.

By contrast, an expansive government commitment to assimilation of various races and ethnicities imperils minority groups' distinctive ways of life. Circumscribing the scope of the State's obligation to address norms of racial and ethnic equality is unlikely to alleviate the concerns of traditionally disadvantaged minorities. Rather, these groups will demand governmental initiatives that preserve racial and ethnic diversity. Wills' failure to appreciate the limitations of analogizing religion to race and ethnicity may explain why he too optimistically concludes that "[t]he battle over what to teach is over." In fact, that battle promises to continue for a considerable time to come.

Defining Pluralism

Before explaining why I differ from Wills, I first want to address the problem of defining pluralism. The term is often used in very different ways. Wills, for example, describes pluralism as residing in "the French colonial exercise in Canada, the British colonial exercise here, and the Spanish colonials in the lower part of the hemisphere." His remarks suggest that each sector of the American continent has had a unique historical experience and accordingly has developed a distinctive culture. More central to educational policymaking in the United States, however, has been the country's internal diversity, which stems from a complex mix of groups with distinctive ways of life. Even though certain characteristics, such as race, ethnicity, and religion, have been singled out for special attention in the debate over pluralism, other factors like language, class, and culture also contribute to a sense of difference. The importance of particular characteristics in defining personal identity in a pluralistic society can vary over time. For example, regional differences were key to a federalist conception of pluralism; with a highly mobile population that garners much of its information from mass media, local ties have declined in importance. In light of the richness and fluidity of pluralist conceptions, lawyers and educators may not approach each form of difference in the same way, nor should they.

This country's approach to religious diversity demonstrates that even with an explicit constitutional commitment to tolerance, the government often wavers in defining the separation of Church and State. The relations between Church and State are rooted in the First Amendment, which provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." By prohibiting State support of or discrimination against particular creeds, the amendment prevents the State from preferring religion over irreligion or one faith over another. Effectively, then, religion is "privatized." That is, faith is a personal matter, deserving of neither public approbation nor blame.

Public schools, as instruments of the State, are required to observe this neutrality toward religion. The challenge for educators is to keep private matters of faith out of public instruction without discriminating against religion. This delicate balance has been struck with guidance from the federal courts. Until recently, the courts have employed a three-pronged test set forth in *Lemon v. Kurtzman* to determine whether a school's practices impermissibly advance or retard religion. Under this test, a practice is appropriate only if: (1) the State acts with a secular purpose; (2) the impact of its action neither advances nor inhibits religion; and (3) the action does not foster excessive State entanglement with religion.

The "Moment of Silence"

The *Lemon* test has been used by the Supreme Court to strike down prayer in public schools. Judicial efforts to keep religious exercises out of the schools have met with considerable resistance, which has prompted creative efforts to allow for voluntary, rather than mandatory, devotional observances in the classroom. Perhaps one of the best examples of this phenomenon is the "moment of silence" statute, which permits students to gather their thoughts during a brief period set aside for meditation during the school day. The Supreme Court in *Wallace v. Jaffree* has indicated in dictum that these statutes are constitutionally acceptable on their face if the legislature has acted with a secular purpose. The statute will not plainly promote or retard religion, and its enforcement will not unduly entangle the State in religious affairs. The moment of silence is consistent with the First Amendment's requirements because in the Court's view, the unobtrusive, voluntary nature of any religious observance renders it a private act of faith, even if it takes place in the classroom.

Consequently, moment of silence statutes will have to be challenged on a case-by-case basis. Litigants will be required to show that the moment of silence in a particular school has a religious impact that converts it from a private act of faith into a public enactment of certain religious beliefs. The testimony in *Walter v. West Virginia*, a federal district court decision, provides insight into the sort of proof that will be required. In that trial, an 11-year-old Jewish student described how he was treated by classmates when he read a book during the moment of silence:

> Q. [Although nothing happened in the homeroom or in the first period, did anything happen to you in the second period?]
> A. Well, in second period, which was science, our teacher left the room ... and one of the people who was in my homeroom turned around and asked me why I had been reading a book during the moment of silence. And I told him that I didn't have to pray then and I didn't want to and then he told me that I should be praying all the time and then he said something to the effect that if I prayed all the time, maybe I could go to heaven with all the Christians when Jesus came for the second time instead of, as he put it, going down with all the other Jews.
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> • • •
>
> Q. Did anyone else participate in the conversation?
> A. Yes. There was another person who, this first boy told another boy that the Jews only used the Old Testament and they didn't use the New Testament and this other boy thought that it was really stupid... [T]hen the second boy said something to the effect that, why was he even trying to talk to me because the Jews weren't worth saving because they had killed Christ and that was about the end of it.
> Q. Okay. Did you, did you talk with your teacher?
> A. No, I didn't.
> Q. Any reason that you didn't or—
> A. Well, I was afraid that the teacher either wouldn't listen or if the teacher did listen, there would be a big issue made out of it and I would be in the limelight for the wrong reasons and I was afraid that I could have a lot of bad publicity...

As this excerpt makes clear, the case-by-case showing of religious impact is extremely costly. First, litigants must invest in suing each school and gathering evidence of its abuses. Second, students must endure these abuses to demonstrate a religious impact and then have the courage to "be in the limelight for the wrong reasons" by chronicling their experience in a federal court. By discounting the dangers of peer pressure from students of majoritarian faiths, the Supreme Court's approach to moment of silence statutes places a significant burden on children of minority faiths to become watchdogs of First Amendment freedoms.

Challenging the Curriculum

In addition to pressing for ritual observances like the moment of silence, religious groups have repeatedly challenged the public school curriculum. Typically, these groups have alleged that the schools' instructional materials devalue their religion by teaching inconsistent precepts. The most prominent example is the debate over whether courses that present the theory of evolution should be balanced with treatments of creation science. So far, the Supreme Court has been unreceptive to statutes that mandate creationism as a counterweight to evolutionary theory, striking down such a law in *Edwards v. Aguillard* on the ground that the provision had a religious purpose. Yet, because the Court has indicated that statutes that mandate scientific critiques of evolution in biology classes would pass constitutional muster, creationists have renewed their efforts by contending that their work conforms to norms of good science and has been unfairly derided by evolutionists.

Other significant debates about the content of moral education in the curriculum co-exist with this high-profile battle over evolution and creationism. Parents consistently state that they would like the schools to undertake more moral education than they presently do. Yet, this demand sparks concern that State-sponsored moral instruction implicitly devalues religion. In *Smith v. Board of School Commissioners of Mobile County*, an Alabama court of appeals confronted the claim that 44 state-approved texts elevated a "religion of secular humanism" above the complaining parents' faith. One home economics book, for instance, advised students to follow these steps in reaching a decision: "(1) Define the problem; (2) Establish your goals; (3) List your goals in order of importance; (4) Look for resources; (5) Study the alternatives; (6) Make a decision; (7) Carry out the decision; (8) Evaluate the results of your decision." The parents were concerned that the list did not include prayer as a decisionmaking technique. The court of appeals rejected the parents' challenge on the ground that this book as well as others like it conveyed the permissible secular message that the State endorsed independent thought, tolerance, self-respect, maturity, self-reliance, and logical decisionmaking as part of good citizenship.

How to Draw the Line?

Although the claims in the *Smith* case may appear extreme, the argument raises important questions about how the public schools should draw the line between religious and moral instruction. Moreover, if public educational institutions take on increasing responsibility for the socialization of children, concern may grow about the potential for the curriculum, however well intended, to displace family values—at least where parents find themselves at odds with majoritarian norms.

In response to these parental fears, the schools have accommodated dissenting parents by permitting them to remove their children from potentially offensive courses, such as sex education. The choice to participate in the instructional process thus is privatized, and the child with a minority perspective bears the burden of self-identifying, opting out of the class, and perhaps enduring the curiosity or hostility of peers.

Recently, the Supreme Court has become increasingly receptive to permitting a religious presence in the schools. For example, in *Board of Education of Westside Community Schools v. Mergens*, the Court upheld the constitutionality of the Equal Access Act, a federal law designed to allow religious clubs to meet on high school property during non-instructional time so long as other extracurricular clubs had that opportunity. Congress and the Court limited the role of faculty and staff in the religious clubs to avoid an appearance of school endorsement. The meetings thereby became private get-togethers, rather than public school events. Enforcing these limits on permissible State involvement in sectarian club activities undoubtedly will prove a challenging, case-by-case task for school administrators and lawyers.

Under the *Lemon* test, the Court has been able to uphold statutes that import ritual observances like moments of silence and extracurricular activities like devotional clubs into the schools. However, a number of Justices have chafed at the test's strictures. The Court is therefore considering doing away with the *Lemon* standard and substituting a norm that would lead to even more flexible treatment of religion in the schools.

Weisman v. Lee has provided the Court with an opportunity to reevaluate *Lemon*. The Justices are reviewing a Jewish parent's First Amendment challenge to a non-denominational prayer at a high school commencement. Weisman contends that the prayer violates *Lemon* because it has a religious purpose and effect and in any event entangles the State in religious affairs when school officials review the prayer to ensure that it is non- denominational. The school district is defending the prayer on the ground that it, like legislative benedictions, has become so traditional that it has lost its deeply religious significance.

Alternative Tests

The oral argument in *Weisman* indicates that two alternatives to the *Lemon* test are being considered by the Court. On the one hand, the "endorsement" test suggested by Justice O'Connor would examine whether a reasonable person would conclude that the State's action endorsed religion. Thus, if Weisman reasonably concluded that the commencement prayer promoted religion, rather than simply served as a traditional ritual, he would prevail. On the other hand, the "coercion" test proffered by Justice Kennedy would turn on whether the State's action had a proselytizing effect. Under this standard, Weisman would win only if he could show that the prayer forced him to participate in a religious ceremony.

By loosening *Lemon*'s constraints, either standard will make it more likely that religion finds its way back into the schools—at least in ritual and extracurricular activities if not in the core curriculum itself. In doing so, the Court will benefit majority religions well-positioned to take advantage of public resources, such as school time and facilities, to promote private devotional exercises. Minority religions, on the other hand, will bear a greater burden of documenting abuses, such as discrimination by classmates, faculty, and staff, that hinder their private religious beliefs and practices.

As this brief exposition shows, the separation of Church and State is by no means the fixed star in our constitutional constellation that Wills' quote suggests. Rather, the battle over the role of religion in the schools persists. As the line between public support and private faith shifts, so too may the tolerance for diverse creeds.

Colorblindness or Colorconsciousness?

In marked contrast to the debate over the scope of religious neutrality, the current controversy surrounding race and ethnicity in the schools turns on whether to adopt a norm of colorblindness or one of color consciousness to remedy past discrimination and promote positive race relations. In dealing with issues of race and ethnicity, the schools derive their primary constitutional guidance from the Fourteenth Amendment's mandate that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Courts have attempted to implement this requirement by ordering school officials to refrain from intentional discrimination that deprives a child of equal educational opportunity on the basis of race or ethnicity.

This anti-discrimination principle is not designed to promote racial and ethnic pluralism but to advance racial and ethnic equality. The anti-discrimination principle is not logically inconsistent with pluralism; after all, racial and ethnic groups could retain distinctive ways of life while enjoying equal access to education. However, beginning with *Brown v. Board of*

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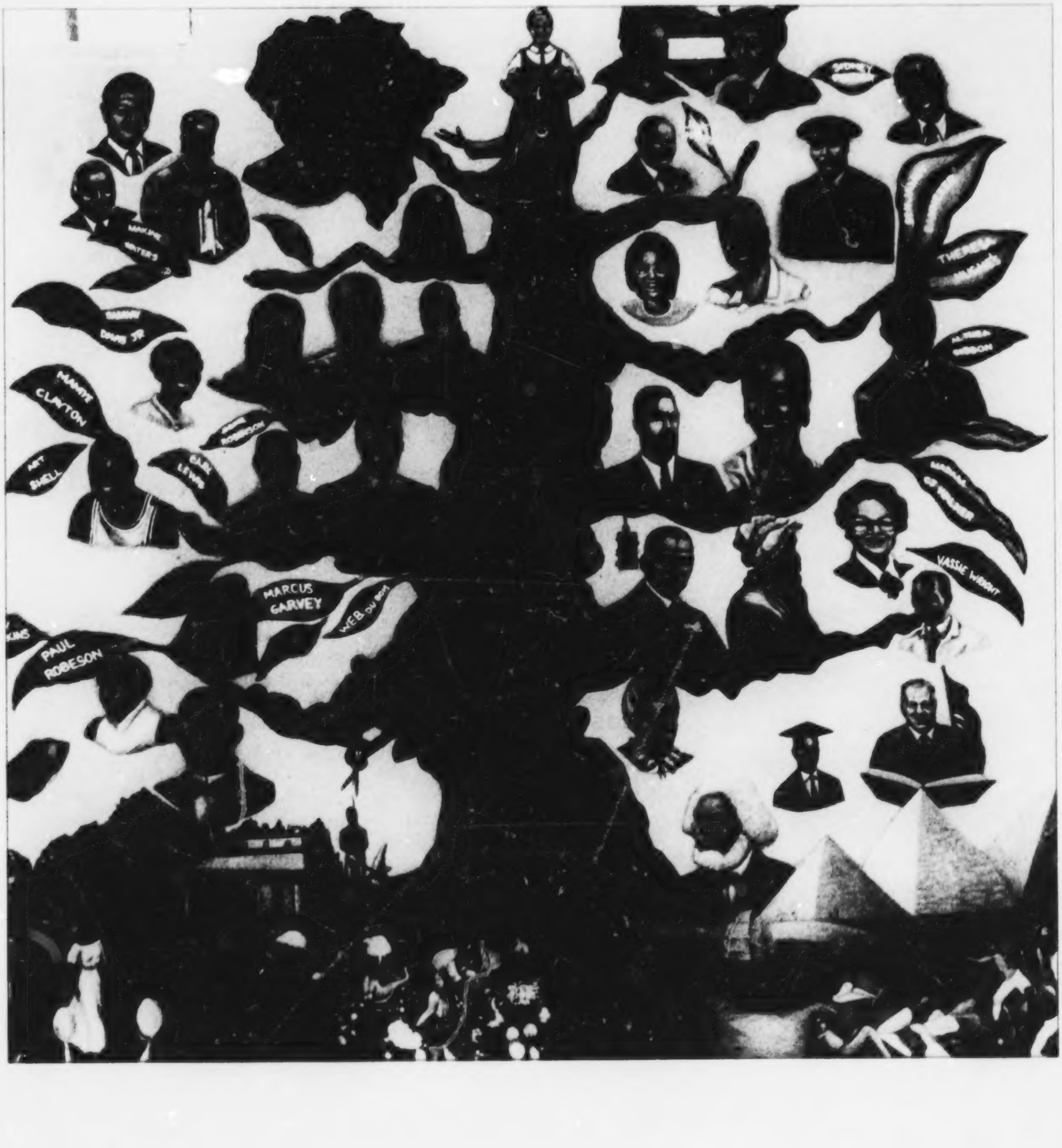
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MARCUS
GARVEY
WEB DU BOIS
PAUL
ROBESON

"Black Seeds," by Shaw Park Muralists, courtesy SPARC; photo by Gerald F. Condit.

THE CHALLENGE OF DIVERSITY

Pat A. Browne

What Should I Tell My Children Who Are Black?

An understanding of history by teachers as well as students is vital in establishing self-esteem

The poem on the following page was written by Margaret Burroughs, founder of the DuSable African American History Museum in Chicago. Its title—"What Shall I Tell My Children Who Are Black?"—is also the theme of my remarks.

History must reflect the influence and contributions of all people if it is to be accurate and balanced. As Dr. Wade Nobles, Professor of Black Studies at San Francisco State University, said, "If the curriculum does not serve as a mirror for children, the ability of the curriculum to stimulate their desire to learn is weakened." For example, African American history includes the rich heritage of Africa but it is rarely taught this way because, first of all, you can't teach what you don't know. Lack of knowledge and the continuing use of traditional approaches to teaching are a large part of the problem that exists in the schools when teaching African American children.

Our children need to understand the continuity of their past, and the achievements of their people to have a vision of their future. Attempts to dichotomize us into colonized Africans and then as captured slaves is a distortion that keeps us from seeing the continuity of our development in the same way we are continuously allowed to view the continuity of European development. In an article entitled, "Why Black History is Important to You," Lerone Bennett says, "History is everything. It is everywhere. History to us is what water is to fish. We are immersed in it up to our necks and we cannot get out of it no matter what we say or do. It is a living library which provides a script of roles and models to which we can aspire. By telling us who we are, history tells us what we can do. By telling us where we have been, history tells us where we can go."

How Racism is Enforced

I'm often accused of being a racist when I speak on this subject, which is all the time with my every waking breath. This always offers me the opportunity to help people understand that at this point in time, people of color cannot be racist. Prejudiced, yes; but racist, no. You see, a racist is someone who feels superior to all other groups. And not only do they believe this, they benefit from this belief and are able to enforce it through the power accessed to them in this society. This racism has been historically enforced through the process of education, or miseducation, as Dr. Carter G. Woodson terms it in his book *The Miseducation of the Negro.*

It is also enforced in teacher training institutions that only teach prospective teachers from the construct of Western civilization. They fail to have prospective and practicing educators understand the behavior styles of African American children and the conflicts that result between the home culture and the expectations of the school. This is one of the main reasons why disproportionate numbers of young African American males are decaying in special education classes. This syndrome starts around the third or fourth grade, then escalates. When you're treated like you're dumb and unable to achieve, you start to believe that you're dumb and unable to achieve. Children are not who they think they are. Children are not who we think they are. Children are who they think we think they are.

Historically, this racism has been enforced by keeping our history out of the textbooks, perpetuating the myth that African Americans—the descendants of Africans—have contributed little or nothing to the welfare or well being of this country. In fact, we now can see that we have contributed more than most, not only to the development and the industry of this country, but to the development of world civilization as well.

Popular culture encourages this racism through its depiction of characters such as Tarzan the Apeman. Children think that if they travel to Africa they will actually see people swinging through trees because that's the image that has been projected—uncivilized and all jungle. I tell them that I have been to Africa three times, and not once have I seen anyone swinging through the trees. This racism has also been reinforced by casting Elizabeth Taylor as Cleopatra, and by taking Egypt out of Africa.

I am not—I cannot—be a racist. I am, however, a seeker of truth, and I believe that all children deserve to learn the truth and that educators are obligated to learn

"Literacy," by Roderick Sykes, courtesy SPARC; photo by Gerald F. Condit.

What shall I tell my children who are black
Of what it means to be a captive in this dark skin?
What shall I tell my dear one, fruit of my womb,
Of how beautiful they are when everywhere they turn
They are faced with the abhorrence of everything that is black.
The night is black and so is the bogeyman.
Villains are black with black hearts.
A black cow gives no milk.
A black hen lays no eggs.
Bad news comes bordered in black, mourning clothes black,
Storm clouds, black and devil's food is black....
What shall I tell my dear ones raised in a white world
A place where white has been made to represent
All that is good and pure and fine and decent,
Where clouds are white and dolls, and heaven
Surely is a white, white place with angels
Robed in white, and cotton candy and ice cream
And mild and ruffled Sunday dresses
And dream houses and long sleek Cadillacs
And angel's food is white...all, all...white.

What can I say therefore, when my child comes home
In tears because a playmate has called him black, big-lipped, flat-nosed
And nappy headed? What will he think
When I dry his tears and whisper, "Yes, that's true but no
Less beautiful and dear."

How shall I lift up his head, get him to square
His shoulders, look his adversaries in the eye,
Confident in the knowledge of his worth, serene
Under his sable skin and proud of his own beauty.

What can I do to give her strength that she may
Come through life's adversities as a whole human
Being unwrapped and human in a world of biased
Laws and inhuman practices, that he might

Survive. And survive he must! For who knows?
Perhaps this black child here bears the genius
To discover the cure for...cancer or to chart
The course for exploration of the universe.
So, he must survive for the good of all humanity.
He must and will survive.

I have drunk deeply of late from the fountain of
My black culture, sat at the knee and learned
From Mother Africa, discovered the truth of my heritage,
The truth, so often obscured and omitted
And I find I have much to say to my black children.

I will lift up their heads in proud blackness
With the story of their fathers and their fathers' fathers.
And I shall take them into a way back time of
Kings and Queens who ruled the Nile, and measured the
Stars and discovered the law of mathematics.
Upon whose backs have been built the wealth of two continents.

I will tell him this and more,
and his heritage shall be his weapon and his armor;
will make him strong enough to win any battle he may face.
And since this story is often obscured I must sacrifice to find it for my children, even as I sacrifice to feed, clothe, and shelter them.
So this I will do for them if I love them
None will do it for me. I must find the truth of heritage for myself and pass it on to them.
In years to come I believe because
I have armed then with the truth,
My children and their children's children will venerate me.
For it's truth that will make us free!

the truth and teach it to children.

To this end, the Indianapolis Public Schools have implemented a curriculum in African American history and a year-long program—*year-long*, not February long, but year-long. Dr. Victor Smith, Supervisor of Social Studies for the Indianapolis Public Schools, is the mainstay of the program and the reason why it has achieved the success that it has. We work closely here in Indianapolis to build character, positive self-esteem, teaching children the truth so that we can counteract the madness that tells African American children that there is something wrong with being black, that there is certainly something wrong with being descendants of Africans.

Self-Image and Self-Esteem

Fifty years ago, Dr. Kenneth Sharp developed an experiment to explore the self-esteem of African American children. It involved two dolls which were identical except for skin color. One was black, the other white. The children were asked to pick the doll that was the prettiest, the smartest, and the cleanest. In almost every case, African American children picked the doll that was the farthest from their image—they picked the white doll. But even sadder is that a little over a year ago, the same experiment was duplicated for the documentary "Black in White America" and the results were exactly the same as they were 50 years ago.

This is happening because everything tells our children that there's something wrong with them. Everyone has a homeland but us. There is no place called "Negroland," no place called "Coloredland." Our homeland is Africa, but when we tell our children this, they say "Don't call me African." And they say that because of the image of Africa that has been perpetuated through the media and textbooks.

In 1926, a man named Dr. Carter G. Woodson decided to do something about the absence of this history in the schools. He proposed celebrating black history for one week in February. At that time, it was called Negro History Week and was the only time during the school year that teachers taught and students learned about people with black skin. It is now called African American History Month. What is sad is that it is even necessary to designate a special time to learn something that should be taught year-round and included in *every, every, every subject area.* It's not enough to put together a program to tell students about selected African Americans during the shortest month of the year and portray them as out of the ordinary.

The Issue is Truth

Our children are taught that the history of African Americans starts with slavery when, in fact, we were the first humans on this earth. Children must be taught the truth. You see, the issue isn't who did what first or when. The issue is teaching children the truth. Our children must understand that the history books have lied.

To remedy this, Dr. Na'im Akbar emphasizes the need to engage in corrective learning. All children must understand the kinds of fallacies which state on page one that the origin of civilization was along the Nile Valley, while on page two they jump ahead 20,000 years to the Greeks, leaving out everything in between that deals with African history.

All children need to know that the Renaissance didn't just "happen" in Europe. It was triggered by black people—the Moors—who came from Northern Africa. These Africans brought civilization to Spain and it spread from there across Southern Europe to give enlightenment to the Renaissance. Children need to know that Einstein's theories were based upon formulations laid down by ancient workers on the continent of Africa long before the Greeks even understood what civilization was all about.

Children should know that the pyramids standing in the middle of the Egyptian desert were put there by Africans whose knowledge of engineering, science, architecture and the human make up was so well synchronized that just by going into the structure, a healing influence was present and human intelligence could be advanced just by exposure to the energy under the dome of the pyramids. Imhotep, the true father of medicine, was the chief architect for the first stone pyramid, called the step pyramid.

Of the pyramids, those at Giza are the largest and I was there this past summer and saw them with my own eyes. One, named after Pharaoh Kufu, is 48 stories high and 755 feet wide. It was built with over 2,300,000 stones each weighing three tons. Yet we still read articles in magazines claiming that ancient aliens came from outer space to build the pyramids. When people tell me that I say "Well, that's all right. If they were ancient aliens, they sure were African ancient aliens."

Taken Out of Africa

Yes, Virginia, Egypt *is* in Africa, although the textbooks and media continue to say Egypt is located in the Middle East. It continuously amazes me. They took a whole country, moved it out of the continent and put it somewhere else. Children need to know that Africans developed the first system of writing and communication called hieroglyphics by the Greeks and *medew netcher* by the Africans, which means divine speech. The ancient Africans, my ancestors, were master ship and boat builders; in fact, they were sailing to the Americas long before Columbus was born. Read Dr. Ivan Van Sertima's book *They Came Before Columbus*, or Dr. Jan Carew's *Fulcrums of Change*. Astronomy was developed by Africans along the Nile Valley. Through careful study of the stars, they created the calendar of 12 months and 365 days before history was even recorded. Children need to know that the first paper called papyrus was developed by Africans.

One of the first universities, one that I walked in the ruins of this past summer, was called Ipet Isut located at Karnak. It was established by Africans and Greeks who sent their young men there to learn from the African priests. Children need to know that our history does not start on the plantation in America. It starts in Africa with the first civilization.

A Rich History in America

The history of black people in Africa is just as overwhelming as the history of black people after we were brought to this country. It was these brilliant African Americans who invented such things as the lawnmower, the oil filter, the refrigerator, the fountain pen, the automatic traffic signal, the pencil sharpener, the ironing board, the gas mask, the guitar and flute, the player piano, the elevator, the fire extinguisher, the bicycle frame, the air conditioning unit, the railway signal, the machine to repair your shoes, the baby carriage, the golf tee, the refrigerated truck, the letter box, the design for spoons, the dustpan, the switching device for railroads, the clothes dryer, the telephone transmitter, the street sprinkler, the device for embossing photographs, the corn planter, the curtain rod, the wagon, the phonograph, the cash register, the mass production of the drug cortisone, and so many other things that we still use in our communities today.

We learned in school that Thomas Edison invented the light bulb. But what we didn't learn was that Lewis Latimer, an African American, developed the carbon filament that makes the light bulb stay on. We learned that Alexander Graham Bell invented the telephone. But what we didn't learn is that Lewis Latimer drew the patent plans for the telephone, and that Granville T. Woods, another African American, improved the transmitter that made it possible for sound to travel over the phone. It is important to note that both Edison and Bell acknowledged their partnership with these African Americans. But the historians and the textbook writers took out the information dealing with African Americans in order that white superiority could be reinforced.

Obstacles in the Classroom

Let's now consider why it is important for children to have this kind of informa-

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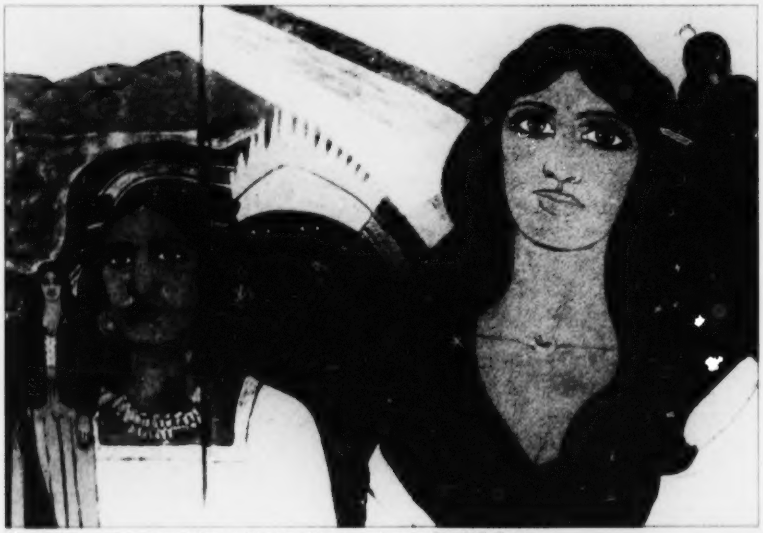
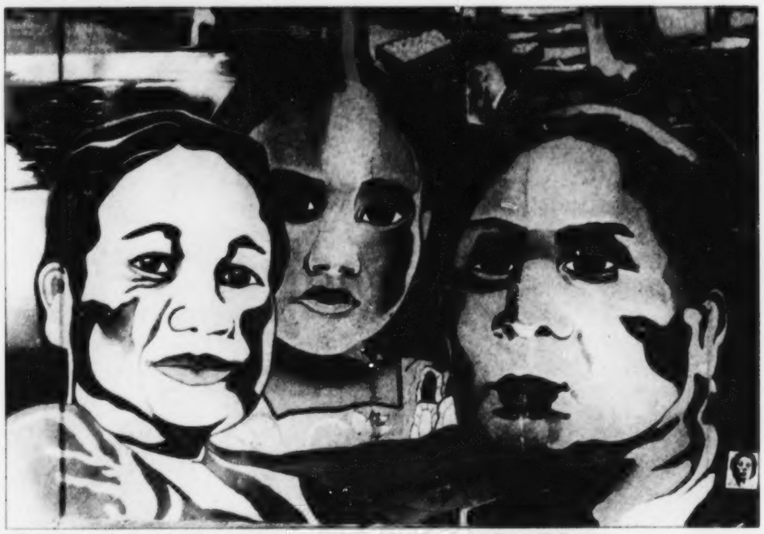
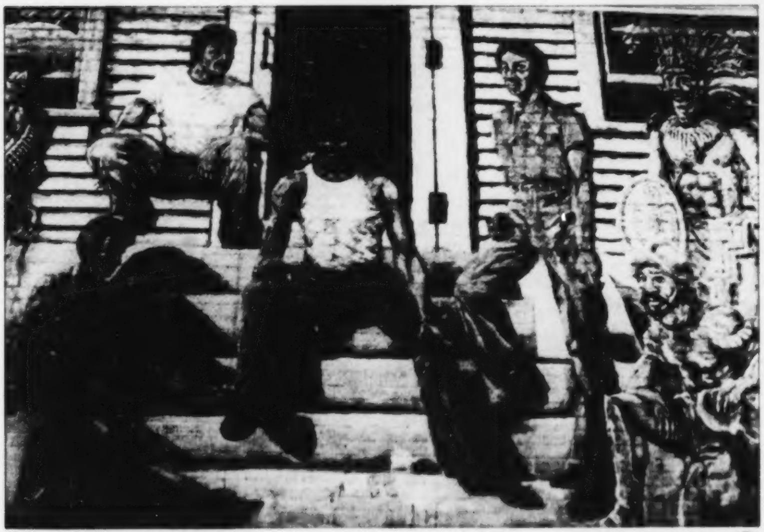


Mural at Stoner Recreational Center, West Los Angeles; photo by **Gerald F. Condit**



"Celebration of Diversity," by Francisco Letelier, courtesy SPARC; photo by Gerald F. Condit



Mural at Gardens Housing Project, East Los Angeles, photo by Gerald F. Condit

2739

THE CHALLENGE OF DIVERSITY

Daniel Ramirez

Ships in the Night: American Law and the Latino Community

Thoughts on the Latino experience and the American dream

My charge is one that is seemingly impossible: to describe the experience of Hispanic Americans. Let me begin, however, with this introductory caveat: The Hispanic American community is as diverse as the foods we eat (brown *frijoles refritos* in San Diego, red *habichuelas* in the South Bronx, and black *moros y cristianos* in Miami), as distinctive as our places of worship (serene Our Lady of Guadalupe parishes, and noisy *"Aleluya"* Pentecostal barrio churches), as different as the schools we attend (Penn State and the State Pen), as dichotomized as the thoughts we think (Chicano liberation theologians and Cuban expatriates with Fidel on their anticommunist minds) and as divided as the vocations we choose (determined union organizers, committed school teachers, or—*Dios, ayúdanos*—smooth Republican politicos).

In other words, there is no monolith here. There is heterogeneity, nuance, and wonderful—although at times baffling—variety. Thus, I will confine my description mostly to that part of the U. S. Latino community that I know best, the Mid, North, and Southwestern variety, the *mexicano*, the Mexican American, the Chicano. You will not be absolved, however, in the space of these brief remarks from the responsibility, or rather, the delight, of crossing the tracks and seeking out the many other Latino communities that dot the American landscape. They are there to be encountered, engaged and enfranchised: *salvadoreños* in Washington, D. C., *guatemaltecos* in Los Angeles, *cubanos* in Georgia, *puerto riqueños* in Boston, *nicaraguenses* in San Francisco, *dominicanos* in New York, *mexicanos* in Tennessee, Kansas and Alaska, Chicanos in Utah . . . and plenty more on the way!

One more caveat: I will not bemoan hunger pangs of memory—we were fully nourished at our mother and father's table and altar. Neither will this be a clarion call out of the barrio—for there still thrives a community that nurtures its children and prayerfully dispatches guardian angels and *virgenes* to accompany them as they peregrinate through the wider society, and welcomes them back again with open arms and hearty feasts. Finally, I will not bare a schizophrenic breast. Those of us who assert a Chicano identity affirm a dynamic, multilayered *synthesis*, not a hyphenation. To the oftposed question, "Well, are you Mexican or are you American?" I offer Chicana poet Bernice Zamora's oblique response:

So Not to be Mottled

You insult me
When you say I'm
Schizophrenic.
My divisions are
Infinite.[1]

If you were to join a Chicano family reunion, you would meet someone like Cipriana, our feisty grandmother, a *colonia* organizer, parish matriarch, perennial fundraiser, and diehard Viva Kennedy Democrat, who couldn't be driven past San Clemente without letting loose a quite un-Christian invective against Richard Nixon and his crowd.

Nana Cipri singlehandedly sparred with the school board over segregation in the 1930s and even dragged the hapless monsignor in front of the San Diego bishop when the affluent Del Mar parish tried to close down her poor but beloved St. Leo's Mission, built and maintained in the Eden Gardens *colonia* with thousands of *tamales* and *fiestas*.

Nana Cipri would rub your hand with her own age-spotted one, ask your name, and tell you (several times over) about eloping, like a *"paloma volando,"* with her sweetheart, Salvador, from her strict, possessive parents' home on Christmas night, 1926, about punching racism—literally—out of a fellow kitchen worker at Camp Pendleton during World War II, and about her recent fall in the bathtub (it was actually 15 years ago) which she blames for her slipping memory.

After you've told Nana your name for the fifth time, a merciful relative would pull you away from your polite predicament, and serve you a plate of chicken *mole* next to Tio Eliseo, the taciturn World War II vet who contracted malaria during combat in the Phillipine jungle, but from whom we have to coax the war stories.

Following a few cursory pleasantries with Tio *Poy*, the more garrulous Maggie would come by to offer you seconds, and tell you about her happy marriage to her high school sweetheart, Louie, an ambitious, self-taught gardener-turned-construction contractor, who eventually took her and her eight children 400 miles away from her mother, sisters and *comadres*. With Louie gone (a heart attack on the job at age 51), she looks forward to inexpensive Sunday phone calls to her siblings and *comadres* to catch up on the *colonia's* transitions and gossip, which often eclipse the happenings on her beloved "All My Children."

The assemblage would include a Vietnam vet-turned-campus firebrand-turned-Sacramento bureaucrat, as well as an Operation Rescue sympathizer; two Apostolic ministers as well as a couple of paroled felons; a pacifist and an Air Force recruiter. Tio Cuco and Tia Sally would begin to strum a guitar duo and regale you with Budweiser-soaked *corridos* about *ferias, flores, ingratas and cabrones.* (Family members have been in and out of Yale and in and out of jail; in and out of marriage and in and out of the closet.) Tia Simona would serve you some dessert and tell you about her Little Joe y la Familia collection, while young Jonathan could belt out a black gospel solo gravelly and funky enough to raise the roof off any Sanctified church. Finally, you would meet the inlaws: Filipinas, Chicanos, Nicaraguans, amorphous hybrids, and a gringa or two.

In short, the Latino family *is* the American family. Plenty of nuances, abundant idiosyncracies, loads of defects, but most of all—and this is our particular strength—bountiful welcoming embraces, *abrazos.* So make yourselves comfortable, sip some coffee, nibble a *tamal* or two (oh, heck, take three! Maggie made 'em), and listen to a few stories about a pueblo, a people whose history is replete with visions, parables, feasts, dreams and *cuentos.*

* * *

Now there is another, parallel history that we must consider here: American law, the pedagogy of which you are about. If we can imagine two roughly parallel lines, one above the other, I would propose that the top one represents the history and development of American (Anglo-Saxon) law, which, as a result of the military conquest of what is now the southwestern U.S., was imposed on lands and people who derived their notion of law and its functionality from distinct Indian and Spanish sources.

This superimposed line is defined by square measurements, litigious commerce, and policy forged by the struggle between powerful political actors and interest groups. The bottom line, representing the history of the community, of *los de abajo,* is measured in the graceful way that it flows around natural topography, and is best seen in the many acts and *teatros* being lived out in the homes and churches. It is music and poetry. It is *relational* and *communal.* The two lines often cross one another, and it is at these points of intersection that much conflict is in evidence. The encounters have been variously fraught with misunderstanding, ignorance, shameful chicanery, and even death.

Roots of Disillusionment

Consider the first instance of intersection, the Treaty of Guadalupe-Hidalgo.

The historical antecedents of Spaniards and Mexicans in the Southwest, of course, stretch back to the 16th century. However, since the 1848 Mexican American War and the Treaty of Guadalupe-Hidalgo in which Mexico was forced to cede its remaining northern provinces to its expansive "good neighbor" to the north, the presence of Mexicans in the occupied territories became one increasingly on the periphery of the region's economy and politics.

The political emasculation of Chicanos was accomplished mainly through the expropriation of their land, the basis for economic and political power. This theft was wrought through both legal and extralegal means, a combination of onerous legislation, litigative skullduggery, homesteading, squatting, posse violence, and mob lynching. By the 1880s, the linguistically disadvantaged Chicanos were relatively landless (except in New Mexico). Once landless, they were politically powerless.

The language of legal and political conquest was, of course, English, which many of the Mexicans unsuccessfully tried to master in defense of their homes and livelihoods. It was a doomed endeavor. One of the last Californio state senators, Don Pablo de la Guerra, captured the melancholy state of affairs in a despondent letter to a friend, in which he confessed to a preference for Spanish, "the language of God, which I understand tolerably as I intend to become a saint one of these days and to speak with Him." English, on the other hand, "the idiom of birds, I do not know . . . with such a perfection as I have neither beak nor wings, things ... I believe inherent to every Yankee ....[2]

Stripped of Power

Their territorial castration complete, Mexicans were left at the mercy of nativist political parties, both Democratic and Republican, who combined the exclusionary tactics employed against blacks in the South with gerrymandering practices in order to nullify Chicano political power and representation well into the 20th century.

American law and jurisprudence had provided scant succor; rather it had abetted their calamity. Disillusioned by the caprice of *gringo justice,*[1] many individuals, like Joaquin Murrieta and Tiburcio Vasquez in California and the Gorras Blancas in New Mexico, opted for extralegal resistance, taking up arms in valiant struggle against the onslaught of the new order. Others opted for common delinquency. Still others found solace and strength in a folk Catholicism unfathomable even to their own church's new hierarchy.

* * *

Now for a cuento. Our paternal grandmother, Maria Mendoza, is revered in the central Mexican village of Rancho Los Magallanes, in the mango-laden hills above the hicktown of Pénjamo, Guanajuato (there is a Mexican equivalent of the country song, "Okie from Muskogee"—it's about Pénjamo). An epidemic in the early years of the century wiped out her entire family, leaving several nephews and nieces orphaned. Barely in her teens herself, Maria gathered the brood and sheltered them through the onslaught of the Mexican Revolution.

As the decade of revolutionary turmoil subsided, Nana Maria took up an offer of marriage that had arrived in the mail from Hilario Ramirez, an Irapuato, Guanajuato native, Del Mar resident, railworker, farmworker, and general hellraiser. With her two-year-old lovechild, Eliseo, in tow, the short, dark 22-year-old Indian woman journeyed to El Paso to meet her betrothed.

Somewhere between the justice of the peace and the immigration office, Hilario thought he'd come clean about his relationship with another woman in San Diego. When he produced the proof that Maria had demanded (a letter), she promptly threw it on the floor, stomped on it, and set it afire, declaring, "Desde hoy y en adelante, *yo* soy tu esposa!" ("From now on, *I* am your wife!")—all this in the presence of baffled immigration agents.

So began the tumultuous (and later harmonious) union between our Nana Maria and Tata Layo. (I had the opportunity to finally visit the *rancho* 20 years after Nana's death, and was accorded a princely welcome by the elders of the village, the very same children that the saintly Maria had saved.)

* * *

The second historical point of intersection between our two lines centers around U.S. immigration law and policy, which have fluctuated in response to the needs, both real and imagined, of U.S. industry and politics.

The xenophobic Chinese Exclusion Act of 1882, and the Immigration Act of 1924 curtailed immigration from Asia and Europe, respectively. Although the act of 1917 prohibited the entry of illiterate aliens over 16 years of age, U.S. industry and agriculture, demonstrated the strength of their political muscle with the passage of waivers for Mexican immigrants. This "self-serving manipulation of immigration law," as Gilbert Cadena has characterized it,[4] filled the developing labor vacuum with 500,000 Mexican during the 1920s, who joined the hundreds of thousands of Mexicans who had fled the Revolution's turmoil.

Search for a Scapegoat

The onset of the Great Depression prompted nativists to look for a scapegoat for the harsh economic vicissitudes wracking the nation. (Are you listening, Governor Wilson?) As labor and agriculture squared off in congressional debates over restrictionism, federal authorities began to spearhead efforts to rid the country of undesirable immigrants.

Although significant numbers of Mexicans, taking stock of their bleak economic prospects, had already begun heading southward in 1929, in 1931 the Secretary of Labor commissioned agents in the department's Bureau of Immigration to carry out raids in private homes and public places. The raids, accompanying scare tactics (abetted by the press), and subsequent (dis)information campaigns precipitated a mass repatriation (both forced and voluntary) of Mexicans and Mexican Americans southward to Mexico. Abraham Hoffman has supplied the most authoritative figures on this little-known exodus in Chicano history:

1929	79,419
1930	70,127
1931	138,519
1932	77,453
1933	33,574
1934	23,943
1935	15,368
1936	11,599
1937	8,037
TOTAL	458,039[5]

Laborers, Not Settlers

The United States did not welcome Mexican immigration again until the manpower demands of World War II precipitated a labor shortage in the country's agricultural industry. In 1942, the U.S. and Mexican governments instituted the Bracero Program to meet U.S. agriculture's demands for a plentiful, but pliable workforce. Nearly 2 million Mexicans were thus contracted and brought into California alone under the program's auspices from 1942 to 1960.[6]

In 1947 a previously lax but newly emboldened Border Patrol began to clamp down on undocumented aliens in response to domestic political pressures over an oversupply of Mexican labor and an anticipated recession. A series of well-publicized raids throughout the Southwest netted a total of 193,657 apprehensions in 1947, 217,555 in 1948, leading up to 543,538 in 1952. The harshest crackdown took place, however, in 1954. As part of the notorious "Operation Wetback," agents of federal, state, county and municipal authorities were all mobilized to assist the Border Patrol in repelling a Mexican "invasion." Their pooled efforts netted 1,075,168 apprehensions of Mexican "illegals."[7]

Julian Samora has placed the fluctuating nature of U.S. immigration policy enforcement in its broader historical context. Comparing the 1.5 million legally immigrated Mexicans (for the 100 years leading up to 1971) with the 5 million Mexicans imported as temporary *braceros* (from 1942 to 1968) and the 5.6 million Mexicans apprehended (from 1924 to 1969), Samora suggests that the balance betrays:

> . . . the evolution of an immigration policy that may best be understood as an extensive farm labor program—an efficient policy representing a consistent desire for Mexicans as laborers rather than as settlers.[8]

Faced with official caprice, Mexicans and Chicanos have historically opted for the intuitive ethic of the Good Samaritan, and not the legalistic caution of the Pharisee. Consider, for example, this cuento of a recent incident in California's Central Valley.

A surprise Wednesday afternoon workplace raid by immigration agents netted a Latino Pentecostal congregation's youth auxiliary president and a companion. The congregation's consternation was owing to the timing of the events; the youth president was scheduled to preach in the Friday evening *culto de jovenes*, and the companion was to have led the service. The liturgical and sermon duties were hastily reassigned to the pastor's niece and son, respectively.

Meanwhile, a leader of the *dorcas*, the women's auxiliary, prepared a plan to rescue the deported *hermanitos*. Funds were raised. A car was dispatched to the U.S.-Mexico border, complete with guardian angels. Discreet phone signals were arranged. Contact was made with the young men in Tijuana. Prayers were offered on their behalf. In short, an efficient church-run *coyote* operation restored the lost sheep to the congregation in time for the Sunday night evangelistic service, much to the *hermanos'* joy.

A Higher Law at Work

This incident, repeated thousands of times over, exemplifies the two operative notions of law at play here. In the top line, immigration policy and law is determined by the fair outcome of interplay between political interests and then executed by bureaucrats. From the community's perspective below, however, the legislative outcome is stacked in favor of the powerful and enforced by capricious bureaucrats.

For many Mexicans and Chicanos, the southwestern U.S. and northern Mexico continue to constitute a "single cultural province" of Aztlan one within which the ancient Chichimecas and Aztecs wandered in search of eagles and serpents, and one in which their descendants still migrate. When U.S. law would raise legal and barbed barriers to divide a people historically united through blood, language, music, hardship, and faith, a higher law calls for a social ethic built on brother and sisterhood and a *de facto* biblical hospitality towards the sojourner that transcends national borders, and pays scant regard to *de jure* distinctions of legal residency status. Again, our poets give voice to our resolve:

On Living in Aztlan
by Bernice Zamora

We come and we go
But within limits
Fixed by a law
Which is not ours;

We have in common
The experience of love.[9]

Perhaps the most conflictual point of intersection between our two lines—one which occurs on a daily basis—centers around education and its flip or down-

(continued on page 48)

Justice, Community and Differences: The Challenge from Indian Country

Seeing differences as worthy of honor and respect requires education and understanding

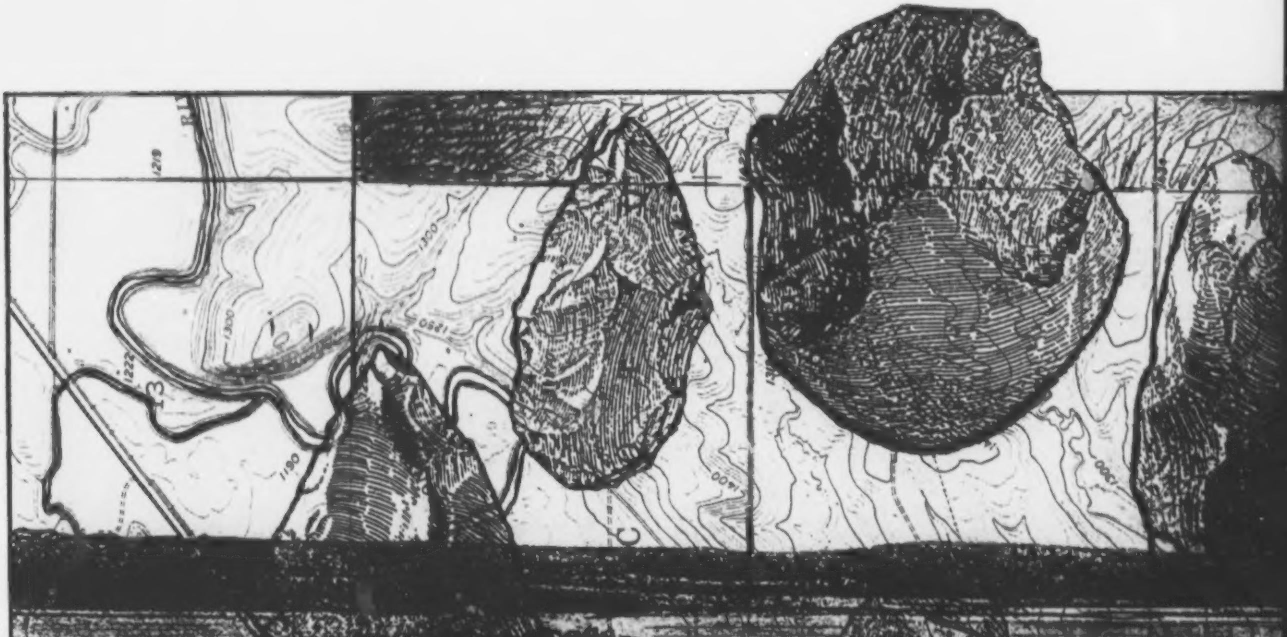


Illustration by Lester Doré, reprinted with permission from the March-April 1992 edition of *The Heartland Journal*.

3743

Frank R. Pommersheim

With the perspective of one who comes from Indian country, I would like to explore three basic themes that bear on the challenge of diversity. First, the issue of tribal sovereignty; second, developing an understanding of how we think about and approach the notion of difference; and lastly, and I think this is particularly important for people who actually work in states with significant Indian populations, the issue of reconciliation.

If someone were to ask "How many sovereigns exist in this country?" most of us would immediately answer two, the federal government and the states. Period. Case closed. Well, that answer happens to be wrong, because there are basically three sovereigns within our constitutional system. The third sovereign, of course, is the Indian tribes or the Indian nations.

It is important for all of us engaged in the educational enterprise to make sure that this very basic point becomes the cornerstone of any educational programs for Native Americans as well as for non-Native Americans. For many reasons, it is absolutely critical for non-Indian people to learn that tribes have recognized sovereignty.

One of the problems, of course, is that the constitutional dimensions and parameters of tribal sovereignty are not always clear. It is not always possible to define the nature of tribal sovereignty in any particular dispute. What is important is that all the citizens in this country, Indian and non-Indian alike, realize that tribal sovereignty exists, because without this realization all our concerns for Native Americans, for tribes and for Indian nations fall by the wayside. Indian nations and Indian people have to then spend so much of their time struggling to convince people that they really are sovereign before even getting to the issue in dispute. Much energy—and, arguably, needless energy—is expended in convincing people at the local, state and national level that tribes really do have sovereignty. Until that is overcome, it can be very, very difficult for Native Americans and tribes to take their rightful place within our constitutional democracy.

One bonafide question people often ask is "Where does tribal sovereignty come from?" You might read the Constitution and say, "Well, where is it?" Well, as far as I can tell, in at least two places. The first is in Article I, Section 8, referred to as the Indian Commerce Clause, which recognizes that Congress has a right to regulate trade between the states, foreign nations and Indian tribes.

Tribal Sovereignty Recognized

While not being very definitive, this is recognition—in the Constitution—that Indian tribes are sovereign. The tribes are not quite foreign nations, because the expression "foreign nation" is also used, but they are apparently not states because the term "Indian tribe" is used as well as the word "state". Thus, there is a kind of special sovereign recognition of Indian tribes within the Constitution.

Unfortunately, both Congress and particularly the Supreme Court have been very unclear over the past 200 years in specifying the nature of tribal sovereignty, yet it is very definitely mentioned in the Constitution.

The second source of tribal sovereignty arises from the concept of treaties. This is particularly important in 1992, the 500th anniversary of the arrival of Columbus in the Americas. Incidently, I don't quite understand why we celebrate the voyage of someone who was lost and didn't know where he was. The commonly-held perspective on this event is that Columbus is "discovering" something; the view is from his ship. In my opinion, this is the wrong emphasis. What we ought to be concerned with is how the landing looked to the people who were already here. This is not history as it is generally taught, and it's not necessarily pleasant.

What happened when Columbus and his European followers came to this country and found people here? Despite the accounts given in our conventional history books which claim that this was a virgin territory, this was not really the case. Obviously, it is easier to steal something if you say that no one was here. But if you accept that there *were* people here when Columbus arrived, then you must also look at how those people were dealt with. The indigenous people of America were dealt with in different ways. One was simply to kill them and take their land—steal it and expropriate it. I don't mean that as an exaggeration; it is simply a fact.

But it is also true that in the Western legal tradition we profess a commitment to the rule of law, and try, as a general rule, to deal with people in a lawful, legal manner, not simply to steal what belongs to others.

The legal device that was used in dealing with indigenous people, at least in some cases, was the notion of a treaty. This is important because implicit in a treaty is a recognition of sovereignty. That is, you don't make a treaty with a group that is not a nation, a group that lacks nationhood status. Therefore, the principle of sovereignty, besides residing in the Constitution's Indian Commerce Clause, also resides in the practice of having made over 400 treaties with various Indian groups in this country.

Supreme Law of the Land?

First and foremost, treaties are premised on an acceptance of the sovereignty of the people you are treating with. Once a treaty is signed, the Supremacy Clause of the Constitution states that treaties are the supreme law of the land. So, with these 400-some treaties, backed up by the Supremacy Clause, one might conclude that the Indian tribes ought to be on solid footing, legally speaking.

However, one of the trends that developed in our legal system over time, particularly with regard to Native Americans and their tribal sovereignty, is a real schizophrenic view of what tribal sovereignty is. On one hand is the sovereignty recognized in treaties, backed up by the Supremacy Clause which recognizes treaties as the supreme law of the land. But, on the other hand, there are decisions by the Supreme Court that recognize—and continue to recognize to this day—the unilateral right of Congress to abrogate treaties. It is very hard to see how these two different approaches can be reconciled, but this is just one of the tensions and ambiguities—a very harmful destabilizing ambiguity—that we are faced with in Indian law.

In thinking about Indian tribes and their rights, sovereignty is an absolute bedrock principle. The greatest number of problems concerning tribal sovereignty today generally involve the extent of authority that Indian tribes have over non-Indian people who live, reside and own property on reservations.

One thing that surprises people (at least it surprised me when I first came to Indian country), is the discovery that reservations are not strictly for Indian people and that non-Indian people live and own property there as well. When disputes arise between Indians and non-Indians, the central issue is frequently the extent of tribal authority over non-Indians and their property. Of course, non-Indians, by definition, aren't Indians. They don't participate directly in the political life of a tribe; they can't run for office and they can't vote. In recent years, at least in the last 30 to 40 years or so, there has been a tremendous resurgence of claims of tribal sovereignty as tribes seek to assert their authority over non-Indians and their property. It is often these claims establish the parameters for the various issues which arise in Indian country.

One might think that the Democratic and Republican parties would concern themselves with these issues. This is not the case, at least not in South Dakota. Indian political issues play no role whatsoever in the formal political life of the state in terms of the major political parties.

If a question arises in South Dakota on an issue that relates to Indians, no one asks "What is the Democratic position?" or "What is the Republican position?" There are no positions. Why? One might argue that there is a history of racism, and that is a small part of the answer. But the larger reason is that most of the people involved in major party politics have little knowledge of these issues and don't want to talk about them. This is one example of why there is a tremendous need for education on these foundational issues. An educated citizenry is essential if these issues are to take their rightful place in the official educational, legal, and political discourse within the state.

Looking at Difference

My second theme which, I think, is related to the first, centers on the whole notion of "difference." This notion is explored in Martha Minow's stimulating and insightful book *Making All the Difference*, which I highly recommend. When dealing with reservations, tribal sovereignty, and Indian people, just as with other groups in our society, the whole question of "difference" arises. Even today there are people who ask "Why do Indians stay on the reservation?" Many Indians on reservations—at least in South Dakota—are impoverished and face a variety of social problems. Why do they stay? Why don't they join the mainstream where there is more opportunity?

Most Native Americans don't want to leave the reservation. They have pride in their own language, culture and homeland. For them, a "homeland" is not merely a physical place but a spiritual and emotional reality that nourishes them individually and collectively. These are differences that are important for us to understand and respect.

Often in the law, we take the laudable view that differences are stigmatizing and harmful. We see the stigma of difference, and we march forward under the banner of the Equal Protection and Due Process Clauses to eradicate it. This attempt to erase the stigma of difference is a very positive thrust within our legal system. But part of our understanding is missing, because while there is the stigma of difference, there is also the pride of difference, a distinction that, in my view, is important to learn and know.

The stigma of difference is to be eradicated; that, I think, is something we can all agree on. But I also think that some of us, particularly those of us who are from the majoritarian society—and particularly majoritarian white males—must realize that there is also a pride of difference. We need to understand where that pride of difference comes from and how to recognize it.

The Pride of Difference

Understanding the distinction between the stigma of difference and the pride of difference is really a critical issue: to try to understand when there is a stigma of difference, when Indian people are being discriminated against and when that stigma ought to be crushed. But we also should be sensitive to recognizing and nourishing that pride of difference and not crushing it, either inadvertently or advertently. Pride of difference, after all, is what a pluralistic society is all about.

It is important to encourage in our programs and in our students, particularly in these times, which economically and otherwise are very constricting, to welcome differences, to celebrate differences, to approach them, because by doing so we can find something to learn and something to celebrate. In these times we seem to be moving in other directions, because, I think, we fear difference and are threatened by it. We feel comfortable only if people are like us. That is dangerous, and simply impossible in a society like our ours, with its tradition of pluralism—we just don't have a uniform society.

We must encourage programs that help our students learn to respect difference and honor difference. If they don't, the future doesn't augur very well. In a global context, people want their differences respected. They say "We are different from you and we want you to respect that. We can get along. We can be friends both individually and as nations—but you must respect us." Respect is just not going to be forthcoming if your goal is to make people over in your own image. A great deal of space is required if people are to take on their individual and social identities. Part of what we think is important in this country is the notion of choice, that people should have the right to choose how they identify themselves and what kind of differences they want to take on. But in constructing and viewing that society, it is important that we see these differences as worthy of our respect and honor.

My final theme is one that is important in Indian country itself, and that is reconciliation. In South Dakota two years ago, the governor officially proclaimed a year of reconciliation between Indian and non-Indian people. This was seen as a very positive kind of action, that is until one peeled away some of the layers and examined the real meaning. Does reconciliation mean that we should shake hands with Indian people and go to powwows and other such events? Well, that's fine, but if that's as far as it goes, it is too superficial.

Confronting History

Reconciliation is about confronting history, and in the context of Indian and non-Indian relationships the history is not a very pleasant one. It is not simply a case of looking back through history and saying "Well, that's in the past." One hears that refrain quite often—"Oh, that happened a long time ago." But history is *not* in the past—it's right here, right next to us. It's our shadow and it's always with us. We can't just think about these things in a linear fashion because history isn't linear. Mistakes made in the past, unless we actively try to understand and undo them, will continue to distort the present.

For example, in South Dakota there is a beautiful area in the western part of the state called the Black Hills. The Black Hills, *Paha Sapa* as they are called by the Lakota, are part of the traditional Lakota homeland, recognized and preserved in the Fort Laramie Treaty of 1868. Shortly after the treaty was signed, General George Custer led a scientific expedition in the Hills and discovered gold. Of course, whenever people from Europe discover gold they seem to lose all control of their rational faculties. As a result of Custer's discovery, people poured into the Black Hills to prospect for gold. It wasn't their land but they came just the same.

Given the treaty, the federal government said "Well, we'll negotiate a new treaty and see if the Lakota people will cede the Black Hills to the United States. We'll try to buy it from them. That's fair enough." When the officials arrived from Washington to negotiate, the Lakota people said, "No, we don't want to sell this land. It is a sacred part of our landscape."

A normal reaction would be to reply "Okay, that's the end of it. We can't buy it because they won't sell it." But that's now how the federal government responded to the Lakota; it just took the land. Congress simply passed a unilateral act in violation of the Fort Laramie Treaty and confiscated 7.7 million acres in the Black Hills—just stole it outright. Now, how can you deal with a situation like that? How can you put things right?

From the very beginning the Lakota people wanted to make things right. Unfortunately, in 1877 Indian tribes didn't have standing to sue the United States government. They had to wait until 1920 for a special jurisdictional act which authorized their lawsuit. This lawsuit languished in the courts for 60 years before it finally reached the Supreme Court in 1980. The Court concluded that the government did take the land, but could have done so anyway because under the power of eminent domain, the government has the authority to take private property for public use. The only problem was that the government forgot to pay for it back in 1877, so the Court ordered the government to pay for the land, more than 100 years later.

What the Lakota Want

For the Lakota people, however, the important issue is return of the land, not compensation for its confiscation. The federal legal system has never authorized or ordered the return of confiscated land to an Indian tribe. Congress has done so occasionally but the courts never have. The Lakota people refuse to accept the money from the 1980 judgement—it is still sitting in banks back in Washington earning interest. The Lakota say "We do want the money, but we want the money *plus* the land. And until we get the land we're not going to take the money, because we know that once we take the money, we'll never get the land."

Much of the 7.7 million acres is owned by individual non-Indians; some is owned by state, county and local governments. The Lakota don't want that land back; all they want is the land still owned by the federal government, about 1.2 million acres. "Just give us back the land the federal government still owns," the Lakota say, "turn it over to us in a thoughtful way, and non-Indian owned land will not be affected."

One would think that the Lakota offer provides an incredible opportunity to right this historical wrong. Usually when historical wrongs happen there is little chance to correct them. This situation presents a tremendous challenge to our commitment to justice. In South Dakota, however, there's overwhelming opposition to the Lakota proposal. The governor, both houses of the state legislature, two United States senators and the one congressman all oppose it. Even those who consider themselves sympathetic to Indian issues and concerns are opposed to any Black Hills settlement. For many people, this is an issue that seems very difficult to discuss.

Again, the problem is twofold. One is that some people can't believe this very, very brief synoptic history that I've given. They say "What? I never learned that." One of the aspects of education which again manifests itself very often in the context of education about Indian issues is that not only do we sometimes fail to teach basic facts to create a knowledge base, but we have such an investment in education that education certifies a certain version of history as authentic. If you didn't learn about the Black Hills issue, if you didn't learn about tribal government, not only do you lack that knowledge base, but when it is introduced to you as an adult you see it as inauthentic as well.

Marginalized in History

As a result, the tribes must struggle against this situation, a situation which marginalizes them in the educational process. It's very difficult to capture authenticity when you've been marginalized. Often, tribes are not even marginalized; they are just out of the picture entirely. Being on the margin indicates that you're actually on some border. In many cases, Native Americans in history have not even been inside the schoolhouse at all.

Even when significant numbers of Indian people are not present in a particular location, these issues are of absolutely critical importance. For better or for worse, many of these issues will be determined at the federal level, and, therefore, citizens around the country need to be informed about issues involving Native Americans. I don't think it's acceptable to say "Well, we don't have any Indian people or tribes in our state so it's not important." It *is* just as important.

There are three important suggestions relating to reconciliation that I would like to leave with you. One is to listen. This seems to be very difficult for non-Indian people to do. We like to fill space. We like to talk, to have some sort of buzz

(continued on page 45)

2746

The Challenge of Diversity

Tribal Sovereignty Past and Present/Secondary

Gayle Mertz

Objectives

1. Students will become acquainted with a basic definition of tribal sovereignty.
2. Students will analyze and evaluate the fairness of actions and formal decisions which have contributed to definitions of tribal sovereignty.
3. Students will apply legal and historical concepts of tribal sovereignty to contemporary issues.

Suggested Grade Level

Ninth through twelfth grades

Introduction

Tribal sovereignty is an elusive and complex concept. It is also at the core of conflict between Indians and non-Indians. This lesson introduces the concept, and identifies some of the inconsistencies in definitions that have been applied throughout history. The background information provided below compliments the article by Frank Pommersheim which appears elsewhere in this issue. The article and the background information are critical parts of this activity.

Background Information

The definition of tribal sovereignty depends upon who is defining it, and when and where it is being defined. Webster defines sovereignty as "supreme excellence or an example of it; a supreme power over a body politic; freedom from external control, or an autonomous state." When Indian tribes first encountered Europeans they were sovereign; they conducted their own affairs and depended on no outside power to define or legitimize their governments. Colonial powers, operating with absolute sovereignty, did not challenge the right of Indians to regulate their own internal affairs and entered into government to government treaties with the tribes.

Later, when this nation was being formed, political theorists developed a theoretical foundation for sovereignty in a federalist system where power by definition was shared. Thomas Jefferson stated that sovereignty in an absolute sense was "an idea belonging to the other side of the Atlantic." In this new system, neither the states nor the federal government had absolute power. This change in perspective was applied to Indian tribes as well.

Chief Justice Marshall penned three important Supreme Court decisions which established that (1) Indian tribes were sovereign before European contact and (2) some sovereign powers were restricted after the United States was established.

Johnson v. McIntosh (1823)
In this decision, the Court ruled that the tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished" and restricted the tribes' rights to transfer land freely. Following this decision, land could only be transferred to European nations, and later to the United States.

Cherokee Nation v. Georgia (1831)
In a case brought by the Cherokee nation, the Court was asked to restrain the state of Georgia from executing state laws which would "annihilate the Cherokees as a political society, and...seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties.... " In his opinion, Chief Justice Marshall wrote: "Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated by foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations...."

Worcester v. Georgia (1832)
In his opinion, Chief Justice Marshall discussed tribal powers both before and after contact with European nations. Before contact, "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.... The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power." Ruling for the Cherokee nations, he continued: "...the original rights of the tribes continued, except those abridged by the United States."

These three cases established the foundations of Indian tribal sovereignty, and subsequent decisions have applied them to specific situations. Several notable decisions include (1) a prohibition on tribes exercising criminal jurisdiction over non-Indians; (2) a decision affirming civil jurisdiction over non-Indians; (3) prohibitions on selling alcohol on reservations; and (4) authority to sponsor gaming on reservations.

Some of the fundamental sovereign powers that have been recognized by federal law and retained by Indian tribes include:

- power to establish their own form of government;
- power to define who is eligible for tribal membership;
- power to legislate substantive civil and criminal laws;
- power to regulate land use and levy taxes;
- power to create a tribal police force;
- power to administer justice through tribal courts;
- power to exclude persons from the reservation; and
- power to charter and regulate private corporations.

Procedure

1. Introduce students to the concept of tribal sovereignty by discussing the article by Frank Pommersheim in this issue and the information above.

2747

CHART OF CRIMINAL JURISDICTION IN INDIAN COUNTRY BY PARTIES AND CRIMES

Crime by Parties	Statutory Jurisdiction	Authority
a. Crimes by Indians against Indians:		
i. "Major" crimes	Federal or tribal (concurrent)	18 U.S.C.A. §1153
ii. Other crimes	Tribal (exclusive)	
b. Crimes by Indians against non-Indians:		
i. "Major" crimes	Federal or tribal (concurrent)	18 U.S.C.A. §1153
ii. Other crimes	Federal or tribal (concurrent)	18 U.S.C.A. §1152
c. Crimes by Indians without Victims:	Tribal (exclusive)	
d. Crimes by non-Indians against Indians:	Federal (exclusive)	18 U.S.C.A. §1152
e. Crimes by non-Indians against non-Indians:	State (exclusive)	
f. Crimes by non-Indians without Victims:	State (exclusive)	

Notes:
i. This chart does not reflect federal crimes applicable to all persons in all places, such as theft from the mails or treason.
ii. This chart does not apply to Indian country over which the state has taken jurisdiction pursuant to Public Law 280, 18 U.S.C.A. §1162.

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2. Ask students to identify key elements of tribal sovereignty and make a list on the chalkboard, adding new ideas to the list as the class discussion continues.
3. Be sure to explain to students that tribal sovereignty is very difficult to define, and that it is even more difficult to predict how the concept will be applied by a judge, a Bureau of Indian Affairs administrator, or the United States Congress. Direct them to the portion of Professor Pommersheim's article which contains the following observation: "...constitutional dimensions and parameters of tribal sovereignty are not always clear. It is not always possible to define the nature of tribal sovereignty in any particular dispute." Explain to students that despite this difficulty, they will attempt to apply tenets of sovereignty to a situation recently argued in the United States Senate.
4. Provide students with copies of the following chart that categorizes criminal jurisdiction in Indian country.
5. Read or distribute the student handout.
6. Divide the class into groups of three or four students each and have them discuss the situation described in the handout. Then ask them to apply the landmark Supreme Court decisions and the class's list of the elements of sovereignty to the bill introduced in Congress. Ask each group to prepare a statement explaining why this is, or is not a sovereignty issue. Each group should then present their statement to the entire class. This might be followed by further discussion or debate.
7. Once the discussion or debate has concluded, tell the students that the bill did not pass in 1989 but was reintroduced as the Violent Crime Control Act of 1991. The new bill included the provision allowing Indian tribes to decide whether the death penalty should apply to them. During debate and political bargaining, the provision was dropped. Once again, Senator Inouye submitted the provision as an amendment to the crime bill, but before the amendment was adopted Senator Thurmond attempted to withhold the option from tribes located in states that have a death penalty. Speaking in opposition to Senator Thurmond's position, Senator Domenici of New Mexico made the following statement: "Either the Indian tribes are sovereign or they are not sovereign. As the Thurmond amendment tries to do, we cannot say they are not sovereign in some states—those that have capital punishment—(and) sovereign in the remainder of states." Senator Thurmond's proposed amendment failed by a vote of 29-69.

Student Handout

Senator Thurmond of South Carolina introduced the Federal Death Penalty Act of 1989. The bill, if passed, would provide the federal death penalty for a number of crimes: espionage, treason, attempt to assassinate the president, killing a foreign official or bank robbery resulting in death, and first degree murder.

In 1988, there were no federal prosecutions for espionage, treason, attempt to assassinate the president, killing a foreign official, or bank robbery resulting in death. However, an average of some 85 first degree murder cases are heard in federal court each year. In 1988, 62% of these cases involved murders committed on Indian lands, and nearly 78% of those convicted of homicide in federal court in a sixteen-month period were American Indians and Alaska Natives.

Senator Inouye of Hawaii introduced an amendment to Senator Thurmond's bill to protect Indians from the disproportionate impact of a federal death penalty. While recognizing that the federal government has jurisdiction over Indians who commit major crimes on Indian land, Senator Inouye's amendment allowed tribes to decide whether to apply capital punishment as a penalty for first degree murder committed on their reservations. He said that the amendment would protect the sovereign interests of Indian tribes, and allow them to decide, just as the states do, which penalties shall apply to particular crimes.

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2746

The Challenge of Diversity

Indian Issues and Party Platforms/Secondary

Gayle Mertz

Objectives

1. Students will learn about and apply principles and procedures of developing a political party platform.
2. Students will research, assess, and define political issues of particular interest to members of Indian communities living within the United States borders.
3. Students will formulate the above issues into political platform statements.

Suggested Grade Levels

Ninth through twelfth grades

Materials

Copies of political platforms and articles about contemporary Indian issues.

Background

Indians and the political process. According to 1990 census figures, 1,959,234 individuals living in the United States identify themselves as American Indians or Alaska Natives. (This figure is considered by many to be considerably lower than the actual number of Indians living in the U.S.) There are currently 510 federally-recognized tribes in the United States. The term "federally-recognized" means a tribe or group that has a special legal relationship to the United States government and its agent, the BIA (Bureau of Indian Affairs). Some Indian tribes and groups do not have federally-recognized status, but are state-recognized.

Indians are United States citizens. In 1924, Congress granted citizenship to all Indians born within the territorial limits of the United States. Prior to that date about two-thirds of the Indian population was granted citizenship through treaty agreements, statutes, naturalization proceedings, and by serving in the armed forces during World War I and receiving an honorable discharge.

Indians have the same right to vote and run for office as any other citizen of the United States. These rights, however, have only been affirmed in the past several decades. In 1948, the Arizona Supreme Court declared unconstitutional disenfranchising interpretations of the state constitution and paved the way for Indians to vote in most states. It wasn't until 1953 that a Utah state law that barred Indians living on reservations from voting was overturned, and, in 1954, Indians in Maine who were not then federally recognized were given the right to vote. Most recently, New Mexico extended the right to vote to Indians in 1962. Indians can vote in federal, state, local, and tribal elections. Each tribe has the right to establish its own determination of who is eligible for tribal membership and voting privileges.

Indians have been elected and appointed to offices at all levels of government. At the federal level, Charles Curtis, a member of the Kaw tribe served as Vice President of the United States under President Herbert Hoover; Ben Reifel, a Sioux from South Dakota, served for five terms in the U.S. House of Representatives; and Ben Nighthorse Campbell, a member of the Northern Cheyenne Tribe of Montana, is currently serving his third term representing the Third District of Colorado in the U.S. House of Representatives. Numerous Indians have served, and are currently holding elective office in state and local governments across the nation.

Political platforms. In preparation for an election, political parties and/or candidates prepare statements which identify key issues that will be debated in the upcoming election, and articulate their policies and positions on these issues. The process of developing a platform for a political party differs from place to place, but usually begins with a small committee creating a draft platform that is then reviewed and revised by party members in their town, city, county, or other jurisdictional area; and then is advanced to a county, district, or state convention for further scrutiny and revision at that level.

Political platforms usually include broad philosophical statements (i.e., "The Democratic Party is committed to providing everyone with an opportunity to achieve economic success. Individuals have the responsibility to take that opportunity and realize their own potential...." (Boulder County, Colorado, Democratic Party platform, 1992) and statements (or planks) addressing very specific local, or national issues (i.e., "...In reaffirming human rights and liberties, we urge repeal of the amendment to the Colorado constitution establishing English as the state's official language...." (Boulder County, Colorado, Democratic Party platform, 1992.) Political platforms are discussed, debated, revised and adopted at party conventions. During this presidential election year, each major party will adopt a platform at its national convention. Prior to the national conventions, local branches of political parties will adopt their own platforms. The platforms form a foundation of principles that will be supported by candidates representing each political party.

Despite the fact that Indians are part of the electorate, and sometimes hold office and represent U.S. citizens, "Indian issues" are rarely if ever included in the platforms of political parties, or of candidates running for office. A brief mention of "Native Americans" was made in the 1988 national Democratic Party platform. "...We...believe that the voting rights of all minorities should be protected, the recent surge in hate violence and negative stereotyping combatted, the discriminatory English-only pressure groups resisted, our treaty commitments with Native Americans enforced by culturally sensitive officials, and the lingering effects of past discrimination eliminated by affirmative action...."

While developing this lesson, I informally asked several Indian friends what Indian issues they would like to see addressed in a political party platform. First and foremost their answers focused on Indian sovereignty, i.e., "Recognize tribal sovereignty and recognize that there are sovereign nations within this country." Other suggestions included: "Develop an educational process to educate people about what tribal sovereignty is"; "Honor all treaties as originally written"; "insure religious freedom, including access to religious sites"; "recognize and address the devastating effects of Indian alcoholism and the prevalence of

Indian fetal alcohol syndrome"; and "recognize Indians as government entities as well as racial groups."

Procedure

1. Discuss background material and the article by Frank Pommersheim, which is printed elsewhere in this issue, with the class.
2. Brainstorm, and record a class list of local and national Indian issues that students are aware of. If students are not aware of issues a few contemporary issues that can be raised for discussion include:

Hunting and Fishing Rights

Hunting for subsistence purposes is common among reservation Indians, and the courts have protected their right to hunt and fish on the reservation without state interference. The courts have generally protected the right to hunt and fish at "usual and accustomed grounds" off the reservation as well but the custom of doing so has resulted in conflict with non-Indians who hunt and fish.

Reservation Gaming, or Gambling

Until recently, reservation gaming was regulated solely by tribes. Federal and state laws were considered unenforceable on reservations. Tribes often voluntarily negotiated the size and scope of their gaming operations with state officials. Several states are now attempting to enforce state law on Indian lands. While court cases appealing state action are pending, tension and conflict is increasing. Some tribes use the income derived from gaming to provide education, health care, and housing for tribal members.

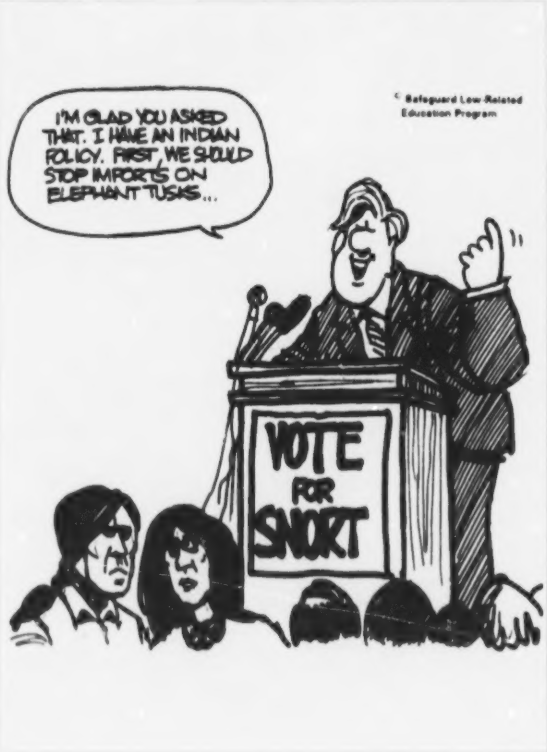
Reservation Mineral Leasing

Indian reservations contain nearly five percent of the proven reserves of U.S. oil and gas, 30 percent of the strippable low-sulfur coal and 50 to 60 percent of the uranium within U.S. boundaries. This gives a small segment of the population control of a large portion of the nation's energy resources. Courts have ruled that Indians have the right to control and lease minerals on their land and are exempt from paying state mineral taxes. The question of whether Indian nations must comply with federal clean air standards associated with mineral extraction has not been settled.

Return of Human Remains and Sacred Objects

Many museums and private collectors own and often display Indian skulls, skeletal remains, and sacred artifacts. Indian nations are demanding that all such items be returned to the tribes. Owners of these items often insist that they have paid for the items and that they are theirs to keep and use as they see fit.

3. Ask students to contact the offices of political parties, or candidates and request copies of platforms and campaign literature, or provide these materials for them.
4. Have students to survey friends or family members to determine the extent of their knowledge about Indian issues and what new issues and information about the issues can be added to the class list. Library research may be part of this step if time permits.
5. Lead a class discussion in which students compare the official platforms and the issues they are aware of. Are Indian issues reflected in the platforms? Are Indian issues different than issues facing the general public or other special interest groups? Why are these issues included or excluded? Would candidates gain or loose support if they paid more attention to Indian issues? Would the public understand—or care about—these issues?


I'M GLAD YOU ASKED THAT. I HAVE AN INDIAN POLICY. FIRST, WE SHOULD STOP IMPORTS ON ELEPHANT TUSKS...
VOTE FOR SNORT

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6. Divide the class into small groups and tell them that each group represents a political district. Give each group a copy of an adopted party platform and a selection of articles about Indian issues (both local and national if possible). Ask each group to revise the platform to address "Indian issues" either as separate issues, or to rewrite existing planks to better address the concerns of Indian people.
7. Conduct a mock political convention in which each group presents and defends its new planks, allow groups to negotiate compromise planks, or add and delete planks. Discuss the fairness, appropriateness and viability of the new platform.
8. If possible, invite a candidate, or elected official to appear before the class to discuss, and comment on the class platform.

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The Challenge of Diversity

Working Toward Justice in Diversity/Middle

Constitutional Rights Foundation Chicago

Background

Many educators are striving to help students to understand, appreciate, and benefit from our increasingly diverse school population. One of their underlying concerns is to avoid the ugly effects of prejudice and resulting discrimination against people of other races, many of whom are recent immigrants to this country. These people are already battling to learn a new language and a new culture; societal discrimination would result in greater alienation, a waste of talent, and increased social conflict.

Many recent immigrants themselves come from countries where populations have been homogenous for generations. Here they, too, are learning to live with people from all parts of the globe in a society whose ideals include tolerance and equality for all.

How to help native-born and immigrant students understand U.S. political life and the rights we all share is taken up in *It's Yours: the Bill of Rights*, a new student text published by the Constitutional Rights Foundation Chicago. The book's lessons are designed to facilitate understanding between students from different ethnic groups. The following lesson, using cooperative learning activities, is adapted from Unit 6, which deals with equality under law. The lesson can be divided to span several class periods and fits well into a unit on the Constitution or in a U.S. history unit on the civil rights movement.

Objectives

As a result of this lesson, students will:

Content

1. Identify examples of fair and unfair discrimination and support decisions with reasons;
2. Review civil rights laws; and
3. Identify the civil rights law that applies to a problem situation.

Language

4. Read for detail and support reasons in writing working in a cooperative group; and
5. Demonstrate understanding by giving an oral explanation of a group decision.

Part 1: Discrimination

Procedures

1. Duplicate Student Handout 1 and give to students.
2. Use the opening questions to assess students' opinions on a variety of discrimination issues.
   a. You can ask what makes a difference in how people are treated? Age? Occupation? Nationality? Income? Sex? Try to get students to give examples from their own experience, as well as that of their families or friends.
   b. You can put student contributions on the board quickly as they talk. After some discussion, try to pull out the types of discrimination that affect basic civil rights and the right to equality of opportunity in this country.
   c. If the term "discrimination" doesn't come up, you can introduce it and have students help you define it. Bring out the fact that while some kinds of discrimination might be necessary, other kinds are unfair.
   d. Finally, ask what they know about the rules in this country about unfair discrimination. What kind of protection can we get from the laws? This should help you assess their level of knowledge. Tell them this lesson will look at what the laws say about equality today.
   e. Although this lesson will present gains in equality of rights in the United States, in no way should it suggest that injurious discrimination does not exist today. If your class includes immigrant or minority students, they have often experienced this first-hand; women and girls, gays and lesbians, the disabled continue to agitate for greater rights. Students should feel free to express their ideas. Reading of changes that have come about in the past may give them ideas about how they would like to shape the future.
3. Read the introduction to the discrimination activity with the students. Amplify if they have questions. Government does classify people for legitimate interests of society. For example, children are not allowed to drive motor vehicles.
4. Have students do the exercise on discrimination in pairs. They should answer the questions and try to come to a shared decision. If members of a pair differ, each should have a reason for his/her decision. Students must determine if the discrimination is reasonable or unreasonable. Is there a logical basis for the action, or does it deny equality of opportunity? If necessary, students can complete this exercise for homework.

Part 2: Civil Rights Laws

Procedure

1. Distribute copies of Student Handout 2 to the class. Begin with the "Before You Read" question so students recognize the changes that have taken place since the days of segregation. Have them name as many places as possible where people of all races now mingle.
2. Do the reading with the class to see how greater integration came about. Again, you can augment this section with your experiences, pictures, videos. You can tell students that while *disabled* is now the preferred term for people with disabilities, they will also find the word *handicapped* used.
3. Give students copies of Student Handout 3, "Each One Teach One." Do the activity to teach students the important civil rights laws. You can put each law on a file card and distribute a law to each student. (An alternative would be to have two students work together to learn a law.) Instruct students to learn the laws first. Answer any questions they may have. Then have students move around to teach their laws to other students and learn laws from them. Remind students to question the person they are teaching to be sure he or she understands. Give them a time limit. When the time is up, have students

return to their seats and ask them to tell two of the laws they learned.

Part 3: Applying Civil Rights Laws

Procedure

Review the civil rights laws studied previously. Then divide students into groups, distribute copies of Student Handout 4, "Can They Do This?" and review instructions for the activity. There are five situations. Circulate and give help to groups as needed. Depending on your class, you can ask a student from each group to summarize the problem and give the two-sentence decision, or you can do a "jig-saw." To do this, have students in each group count off from one to the total number of students in the group. Then have all the "ones" form a group, the "twos," etc. Since students in the new groups will have worked on different situations, each can now teach the group about their particular problem situation and explain how a civil rights law does or doesn't apply to the case. When you use the jig-saw, all students hear all situations and the applicable laws, and all have an opportunity to make a short oral presentation.

Additional Activities

1. Have some students research local government human rights departments, private rights organizations, and state or city human rights laws. States and cities sometimes go further than the national government in extending such rights.
2. Ask students to think about what they have studied in this lesson. Have them give their own opinions by completing the sentences below. Tell them to give as much information as possible to explain their answers.

I was surprised to learn that...
I think my family and/or friends should know that...
A question I would like to ask is...

Answer Key

For Part 1: In terms of U.S. law, number 1 reflects the driving experience of this group even though some males under 25 do not have accidents. The law does not forbid this discrimination. Number 2 is not legal under the Civil Rights Law of 1964 which forbids discrimination by national origin. The 1986 Immigration Reform and Control Act also has an anti-discrimination provision that includes employers not already covered by federal laws. Number 3 is obviously reasonable since good vision is necessary to operate an airplane safely and efficiently. Number 4 is legal. An owner can refuse to rent or sell to persons who do not have the income to pay the monthly rent or mortgage payments.

For Part 3: (1) 1. "Equal pay for equal work for men and women." Ann and Joe do essentially the same work even though their titles are different. The Equal Pay Act of 1963 requires equal pay when the work is equal even if different job titles are given.

(2) 9. "No discrimination in schools (sports, teachers, college loans, etc.)." This is part of the Civil Rights Act of 1964 (amended in 1972). Since these laws are summarized rather generally for students, choosing item 4, "No discrimination by race, color, religion, sex or national origin by state and local governments and public schools and universities" is also logical. Title IX of the Education Act Amendments of 1972 requires school athletic programs to accommodate both sexes, although spending equal money on men's and women's sports is not required.

(3) 6. "No discrimination by race, color, religion or national origin in selling or renting most houses and apartments." It is true that landlords and sellers can require that a person have sufficient income to pay and good references. However, under the Fair Housing Act, landlords may not discriminate against people in the categories listed ("protected categories") if a housing unit is over four units. The 1968 Act was amended in 1988 to include families with children as well as the disabled in the protected categories. Restricting housing to a certain group is only allowed for the elderly.

(4) This example does not violate any of the civil rights laws; it is possible to specify an age of maturity, and 21 is an accepted measure.

(5) 4. "No discrimination by race, color, religion, sex or national origin by state and local governments and public schools and universities." This example is modeled on an actual Supreme Court case, *Keyes v. Denver School District # 1,* (1973).

Student Handout 1: Working Toward Justice in Diversity

The United States is sometimes called the land of equality—a place where people are treated in the same way, a place where people have an equal chance to succeed. Think about what you have seen in this country. Would you say that all people are treated the same? Always? Sometimes? Is it ever all right to treat people differently?

Discrimination: Right or Wrong?

Discrimination means to treat some people differently from others. Sometimes there is a good reason for discrimination. Would you want 10-year-old children to drive cars? Other times discrimination hurts people. Which of the following examples of discrimination do you think are reasonable? Which examples would you want to change? Why?

1. Men under 25 years old have more car accidents than other people. They must pay more for car insurance.
2. Jones Candy Factory will not hire anyone with a foreign accent.
3. Alta Airlines will not hire a pilot who is blind.
4. Lee wants to rent a five-room apartment in Rosedale. The owner will not rent to Lee because Lee has no job and no money.

These examples show that it is not always easy to decide if discrimination is fair or unfair. When discrimination denies people equal opportunity for jobs and schools, it is unfair. History tells us there has been a long struggle for equal rights and fair treatment.

Student Handout 2: Civil Rights Laws

Before you read:

What are some places in your town where you see people of different races together?

* * *

The Fourteenth Amendment forbids race discrimination by state and local governments. But before the 1960s, privately owned facilities like factories, hotels, and restaurants did not have to serve or hire blacks or other minorities if they didn't want to. Discrimination was not against the law on "private property."

African-Americans wanted new laws to stop all discrimination. They wanted the right to have jobs that paid well, to live in any community, and to go to any hotel or restaurant. Other Americans agreed and worked with blacks to fight racism. Together they asked people to sign petitions and write letters to Congress. They organized protest marches of thousands of people. Often the marchers were attacked by police or by white people who didn't want blacks to have equal rights.

Sometimes people wouldn't follow segregation rules that they thought were unjust. For example, blacks would sit down in a restaurant for whites only and ask to be served. Often the owner called the police, who took the protesters to jail for civil disobedience.

Many Groups Wanted Equal Rights

Were African-Americans the only group that protested discrimination? No. Women, disabled people, Latinos, Native Americans, older people, and other minority groups also organized and demanded equal rights.

Because of this pressure for change, Congress began to pass civil rights laws in the 1960s. These laws said facilities that serve people, like restaurants and hotels, must be integrated. Private employers and businesses could not discriminate unfairly against women and minorities.

For example, an employer could not say, "This is my factory. I don't want to hire people of color, so I won't."

Student Handout 3: Each One Teach One

Your teacher will give one of these civil rights laws to you. You will learn one law and then teach it to other students. Listen to be sure other people learned your law. You will also let other students teach you a law. At the end of this activity, be ready to tell about two laws you learned from someone else.

Here are some of the most important parts of today's federal civil rights laws:

1. Equal pay for equal work for men and women.
2. No discrimination by race, color, religion or national origin in public places (hotels, restaurants, theaters, etc.).
3. Disabled people have the right to jobs, education, and business services.
4. No discrimination by race, color, religion, sex or national origin by state and local governments, public schools, and universities.
5. No discrimination by race, color, sex or national origin in programs that receive money from the federal government.
6. No discrimination by race, color, religion or national origin in selling or renting most houses and apartments.
7. Disabled children have a right to a good education.
8. No discrimination against people over 40 years old by businesses with 20 or more employees.
9. No discrimination by sex in schools (sports, teachers, college loans, etc.).
10. No discrimination by race, color, sex, religion or national origin in employment by businesses with more than 15 employees or by labor unions.

If these laws are not obeyed, people can complain to a government agency or sometimes take a case to court.

Student Handout 4: Can They Do This?

In small groups, discuss one of the problems given below.

- First, read the problem. Everyone can help with vocabulary words. Be sure everyone understands the problem.
- Read the civil rights laws listed in Student Handout 3 to see if one of them applies to this problem.
- As a group, write two sentences telling why you think the school or company is, or is not, violating the law. Each person in the group should copy the sentences.
- Be ready to explain the problem and read your group's decision to the class.

1. Ann Lewis and Joe Harris work for Mason Bank in the loan office. They have the same education and work experience. They both have good work evaluations. Ann writes reports, gives information on the phone, and organizes files for her supervisor. Her job title is Junior Secretary. She is paid $19,000 a year. Joe writes reports, gives information on the phone, and organizes the files for his supervisor. His job title is Assistant to the Supervisor. The bank pays Joe $22,000 a year. Does this violate the law?
2. Forest High School is a small public school with 200 students. The school does not have much money for their sports program. John Williams, the principal, wants to spend the money on football, basketball and baseball teams for the boys. If he does this, he won't have money for any girls' teams. Mr. Williams says the boys need to have the teams. Colleges will pay tuition for boys who are very good at sports. Colleges don't pay for many girls who are good at sports. Mr. Williams says it's better to use the money for the boys' teams. Does this violate the law?
3. Luis Garcia and his wife own a building with 10 apartments. One of the apartments is for rent. All the other tenants are Latino, and they feel like a big family. They want Luis to keep the building all Latino. One day, Sam Jung, an immigrant from Korea, comes to see the apartment. He wants the apartment because it is close to his work. Luis doesn't know what to say to him. Then he tells Sam Jung that he rented the apartment to somebody else. "What I told Mr. Jung wasn't true, and I feel bad. But I can't rent to a Korean family," Luis tells his wife that night. "The other families wouldn't like it. Anyway, can't I decide? It's my building." Does this violate the law?
4. Southeast Electric Company has a fair hiring policy. They hire men and women and members of minority groups. But an employee must be 21 years old to work in the Control Room. Southeast says that the Control Room is dangerous. A person must know a lot about the computer and electrical systems and be very mature and responsible. Peter is 20 years old and has three years of experience working with computer and electrical systems at Southeast. His supervisor says Peter is very good at his work. The supervisor says Peter knows how to do the work in the Control Room. Peter says that Southeast's rule discriminates against him. Is Southeast Electric Company violating the law?

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Resources for Teaching about Elections

VOTE

EDUCATE OUR FUTURE VOTERS

National
Law-Related
Education
Resource
Center

Special Committee
on Youth Education
for Citizenship

ABA

TEACHING KITS

Title:	**Vote about It**
Grade Level:	**Secondary**
Contents:	**Materials are designed to encourage high school students to register and vote. Included in the package are: a guide for teachers with reproducible work sheets; wall chart showing voting regulations in 50 states; wall map showing 1988 state-by-state voter participation; Vote about It poster and stickers.**
Cost:	Free
Order From:	Vote America Foundation, 1200 19th St., N.W., Suite 606, Washington DC 20036, 202/659-4595

CURRICULA

Title:	**First Vote: A Teaching Unit on Registration and Voting**
Grade Level:	12th
Contents:	Lessons address the topics: attitudes toward voting, preparing for adulthood, becoming a contributing member of society, more people in America get the right to vote, and what do you care about it? The sixth lesson includes information about registering to vote and actual registration for those eligible.
Cost:	Free
Order From:	People for the American Way, 2000 M Street, N.W., Suite 400, Washington D.C. 20036, 202/467-4999

Title:	**KIDS VOTING**
Grade Level:	K-12
Contents:	**This licensed program is a 50/50 cooperation between the school system and the community. The KIDS VOTING curriculum is taught at all grade levels and students accompany their parents to polling places to cast special ballots on election day. Licensees receive implementation manuals, curricula for all grades (1,300 pages) and on-site consulting.**
Cost:	Licensing fee plus about $1.50 per child, about 35% raised in cash and the remainder in-kind (e.g. printing).
Information:	KIDS VOTING, Marilyn Evans, President, 398 S. Mill Avenue, Suite 304, Tempe, AZ 85281, 602/921-3727

Title:	**Taking Part: An Elementary Curriculum in the Participation Series (Revised Edition)**
Grade Level:	K-6
Contents:	Activities explore many forms of democratic participation and empowerment, explain simple decision-making models and introduce the electoral process; 43 pages.
Cost:	**$15.00 nonmembers, $13.50 members; volume discounts available; add 10% of total for shipping and handling**
Order From:	**Educators for Social Responsibility, 23 Garden St., Cambridge, MA 02138, 800/370-2515**

Title: **Making History: A Social Studies Curriculum in the Participation Series**
Grade Level: 7-12
Contents: Activities explore the meaning of empowerment, both in the community and in the nation at large. Students review case studies of community action, learn about various models for decision making and discuss strategies for creating change; 90 pages.
Cost: $15.00 nonmembers, $13.50 members; volume discounts available; add 10% of total for shipping and handling
Order From: Educators for Social Responsibility, 23 Garden St., Cambridge, MA 02138, 800/370-2515

Title: **Teaching Presidential Elections**
Grade Level: 9-12
Contents: This 10-page booklet teaches about the nominating process, how to distinguish between the popular and the electoral vote and how to evaluate the candidates.
Cost: $5.95 plus $1.50 for shipping and handling
Order From: Close Up Publishing, 44 Canal Center Plaza, Alexandria, VA 22314, 800/765-3131

ACTIVITY BOOKS

Title: **The "Elections Books 1992" Series**
Grade Level: K-1, "We Choose Our President,"#21569, 16 pages; 2-3, "How We Elect a President,"#21669, 24 pages; 4-6, "Electing the President," #21869, 32 pages; 7-9, "Path to the White House," #21969, 32 pages
Contents: History of U.S. political parties and elections; the caucuses and primaries; who can vote; campaign planning; responsibilities of the president; qualifications for office; the electoral college. Activities include: comprehension quizzes; vocabulary quizzes; mock elections; poll-taking; fun facts about U.S. presidents; tracking elections.
Cost: $2.25 each
Order From: Customer Service, Weekly Reader Skills Books, 4343 Equity Drive, Columbus, OH 43216, 800/446-3355

Title: **You've Got the Power**
Grade Level: Secondary
Contents: A 30-page guidebook of activities for schools and classes to teach about the election. "The Birthday Card," a birthday card with a greeting welcoming 18-year-olds to participation in the election process and sized for containing a state election registration form.
Cost: Free; quantities limited.
Order From: California Secretary of State, Elections Division, Attn: John Mott-Smith, 1230 J Street, Rm. 232, Sacramento, CA 695814, 916/945-0820

PAMPHLETS

Title: **How to Judge a Candidate (#818)**
Grade Level: Secondary
Contents: Seven steps on how to evaluate a political candidate. Also included are sections entitled "See through distortion techniques" and "Evaluate candidates' use of television," as well as a "Candidate Report Card" for the student to complete.
Cost: $.75 each (quantity discounts available) plus $1 shipping and handling
Order From: League of Women Voters, 1730 M. Street, N.W., Washington DC, 20036, 202/429-1965

Title: **How to Watch a Debate (#819)**
Grade Level: Secondary
Contents: Subheadings include "Candidate Debates: A Behind the Scenes Look," "Impact of Debates;" and "Rate the Debate." Suggested activities also included.
Cost: $.75 each (quantity discounts available) plus $1 shipping and handling
Order From: League of Women Voters, 1730 M. Street, N.W., Washington DC, 20036, 202/429-1965

Title: **Getting Out the Vote: A Guide for Running Registration and Voting Drives (#424)**
Grade Level: Voting-age students
Contents: A 16-page booklet explaining how to run a voter registration and "get out the vote" drive.
Cost: $1.25 each (quantity discounts available) plus $1 shipping and handling
Order From: League of Women Voters, 1730 M Street, N.W., Washington DC, 20036, 202/429-1965

Title: **A Citizen's Gameplan for Watching the 1992 Presidential Debates**
Grade Level: Secondary and adult
Contents: Activities for before, during, and after the presidential debates including a presidential scorecard for rating the debates. Co-sponsored by the League of Women Voters.
Cost: Free
Order From: Debate America, Attention: Eric Rosen, 5310 North Bluemont Drive, Arlington, VA 22203, 703/524-2793

COMPUTER SOFTWARE

Title: **Presidents/The Medalists**
Systems: Apple and MS-DOS, 5 1/4" and 3 1/2"
Grade Level: 6-7
Contents: Facts about U.S. presidents with follow-up drill.
Cost: $49.95
Order From: Hartley Courseware, 133 Bridge Street, Dimondale, MI 48821, 800/247-1380

Title: **The Voting Machine**
Systems: Apple
Grade Level: All grades
Contents: Use an Apple computer as an electronic poll taker; record-keeping features enable analysis of voting results and data
Cost: $59.95
Order From: Hartley Courseware, 133 Bridge Street, Dimondale, MI 48821, 800/247-1380

SIMULATIONS

Title: **Delegate: A Simulation of a National Political Party Convention**
Grade Level: 7-9
Contents: Students are divided into five groups, from radical to reactionary, which work to build the platform and to select the nominee by bargaining and compromising with the various candidates.
Cost: $20
Order From: Interact, P.O. Box 997, Lakeside, CA 92040, 619/448-1477

Title: **Electors: A Simulation of the Electoral College Process**
Grade Level: 7-9
Contents: Students play roles of the two major party candidates and the chairs of each state's electors. Features playing roles of the 1824 election, which resulted in a deadlock resolved in the House of Representatives.
Cost: $23
Order From: Interact, P.O. Box 997, Lakeside, CA 92040, 619/448-1477

Title: **Votes: A Simulation of Organizing and Running a Political Campaign**
Grade Level: 7-9
Contents: Candidates, staff and voters all play a role in this simulation. Committee members determine issue positions, disperse funds and make decisions.
Cost: $20
Order From: Interact, P.O. Box 997, Lakeside, CA 92040, 619/448-1477

VIDEOS

Title: **First Tuesday**
Grade Level: 8th and up
Contents: A futuristic story in which a group of students set out to reinstate voting, which had been eliminated in the U.S. due to apathy.
Length: 20 minutes
Cost: $20
Order From: San Diego Registrar of Voters, Attention: Vicki Chappell, 5201 Ruffin Rd., Suite I, San Diego, CA 92105, 619/694-3403

Title: **First Vote**
Grade Level: 12th
Contents: A collage of on-the-street interviews, teen discussion, and historical sequences addressing the responsibilities of being an adult, the importance of voting, the enfranchisement of minorities and young people, and the impact of young people's participation in changing their communities.
Length: 12 minutes
Cost: Variable
Order From: People for the American Way, Sanford Horwitt, Director of the Citizen Participation Project, 200 M Street, NW, Suite 400, Washington DC 20036, 202/467-4999

Title: **Your Vote**
Grade Level: Middle through secondary
Contents: History of the right to vote in America, reviewing the development of universal suffrage, highlighting the people and events that won the vote for African Americans, women, Native Americans, and 18-year-olds.
Length: 27 minutes
Cost: $30 includes copy of the Teaching Guide and Display Poster; quantity discounts available.
Order From: Taft Institute, 420 Lexington Ave., Suite 2601, New York, NY 10170, 212/682-1530

BOOKS

Title: **Choosing the President 1992: A Citizen's Guide to the Electoral Process**
Grade Level: Secondary and adult
Contents: A 160-page book by the League of Women Voters of California Education Fund. It analyzes the workings of political parties; campaign finance systems; convention delegate selection; party conventions; campaign techniques, strategies and costs; voter behavior; and the electoral process.
Cost: $9.95 paperback; $15.95 hardcover prepaid (shipping & handling included); quantity discounts available.
Order From: Lyons & Burford, Publishers, 31 W. 21st St., New York, NY 10010, 212/620-9580

Title: **Electing a President: The Markle Commission Research on Campaign '88**
Grade Level: Secondary and adult
Contents: This book by Bruce Buchanan reports the findings of the Markle Commission on the Media and the Electorate 1988 study of geographic and demographic factors in citizen participation in the election. (See listing of "The Markle Commission on the Media and the Electorate: Key Findings" and "Recommendations.")
Cost: $27.95 plus shipping and handling
Order From: University of Texas Press, P.O. Box 7819, Austin, TX 78713-7819, 800/252-3206

Titles: **The Markle Commission on the Media and the Electorate: Key Findings; The Markle Commission on the Media and the Electorate: Recommendations**
Grade Level: Secondary and adult
Contents: These two publications are brief reports of the key findings and recommendations resulting from the 1988 study by the Markle Commission on the Media and the Electorate on the geographic and demographic factors in citizen participation in the election. (See listing of *Electing a President: The Markle Commission Research on Campaign '88*)
Cost: Free in limited quantities
Order From: The Markle Foundation, 75 Rockefeller Plaza, Suite 1800, New York, NY 10010

Title: **Survey of Innovative Voter Registration Programs Across the USA**
Grade Level: Secondary and adult
Contents: A 30-page manual listing programs in every state and the District of Columbia.
Cost: Free
Order From: American Bar Association Standing Committee on Election Law, 1800 M Street, NW, Washington, DC 20036, 202/331-2294

DISCUSSION PROGRAMS

Titles: **Election Year Discussion Set**
Grade Level: Secondary and adult
Contents: The Public Talk Series programs present three or four non-partisan, balanced positions or policy options on each of four election year issues: health care, the economy, welfare and U.S. foreign policy. They are intended to provide a framework for small group discussions. The set includes a participant's booklet (for photocopying and distribution) and a leader's guide which highlights suggestions for involving elected officials and candidates for office in a wrap-up of the discussion.
Cost: $5.00
Order From: Study Circles Resource Center, P.O. Box 203, Pomfret, CT 06258, 203/928-2616

MAGAZINES

Title: ***Instructor*** May-June 1992 issue
Grade Level: K-8
Contents: Article, "Plan-Ahead Guide to Fall '92," is a focus and resource guide for teaching about the '92 election, the Columbus quincentenary, and the International Space Year.
Cost: $3.00 by check paid to *Instructor* magazine.
Order From: *Instructor* Magazine, Scholastic Inc., P.O. Box 2700, Monroe, OH 45050-2700

Title: ***Update on Law-Related Education*** Fall 1988 issue, "The Living Constitution"
Grade Level: K-12
Contents: This issue contains teaching strategies about voting and voting rights for middle and secondary level students and an article about why young people do not vote.
Cost: $6.00 for 1 copy, $4 for 2-9 copies, $3 each for 10-24 copies, $2.50 each for 25 or more copies, plus $3.95 postage and handling.
Order From: American Bar Association/YEFC, 541 N. Fairbanks Ct., 15th Fl., Chicago, IL 60611-3314, 312/988-5735

NEWSMEDIA RESOURCES

Title: **ANPA Foundation's 1992 Election Supplement**
Grade Level: Middle school, but includes suggestions for adapting to other grade levels
Contents: A 12-page tabloid outlining lesson plans for classroom activities involving the use of newspapers to study national, state and local elections.
Cost: To be determined
Order From: Contact your local newspaper's Newspaper in Education (NIE) coordinator.

Title: ***Newsweek* 1992 Election Handbook**
Grade Level: Secondary
Contents: The 27-page handbook contains articles on all aspects of the presidential election as well as reader activities.
Cost: Free with purchase of the *Newsweek* Social Studies Program
Order From: *Newsweek* Education Department, 444 Madison Ave., New York, NY 10022, 800/526-2595

Title: **USA Decision: The Power of Each Voice**
Grade Level: Secondary
Contents: The Classline Today Teaching Plan, a curriculum guide, student supplements, and Path to the Presidency poster accompany subscriptions to *USA Today* newspapers in the USA Today Classline Series. The curriculum guide addresses themes of responsibilities of citizenship, the election process, and election issues. The student supplement guides students through the decision-making process required of responsible voters.
Cost: Varies according to length of subscription.
Order From: Call 800/USA-0001 to be referred to appropriate regional office of *USA Today*.

For additional information about civic education, contact:

National Law-Related Education Resource Center
Special Committee on Youth Education for Citizenship
American Bar Association
541 N. Fairbanks Court
Chicago, IL 60611-3314
(312) 988-5735

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The Challenge of Diversity

Developing a Class Proposal on Diversity/Middle-Secondary

Lorenca Rosal

Background

Although not as boldly proclaimed in the historic American creed as freedom and equality, diversity has marked American society ever since the first arrival of Europeans. At the beginning of colonization a small number of fairly homogeneous groups arrived, each marked by a common language, religion, national origin, and ethnic makeup. But the number of groups soon began to increase and proliferated enormously during the nineteenth and twentieth centuries.

As millions of immigrants poured into the United States in the nineteenth century, the differences between established Americans and the new arrivals tended to arouse suspicion, prejudice, and outright persecution, including violence. Gradually, the positive contributions of diversity and pluralism were recognized, adding to the list of celebrated achievements of American democracy.

How to reap the cultural and intellectual benefits of pluralism while preserving common American political values has been a persistent problem in American society. It requires striking a balance between unity and diversity—between a commitment to the unifying values of political cohesion and the common identity of citizenship and the cultural enrichment that emerges from plural beliefs, ideas, and loyalties.

It is helpful to remember that the conflicts stemming from diversity in American society, serious though they often are, are far less marked than the racial, ethnic and religious animosities in much of the world. The ideals of pluralism and the practices of diverse cultures in the United States are causes for hope that the tensions between political unity and ethnic diversity, between public order and personal freedom, can be sufficiently balanced to maintain the welfare of American constitutional government. The achievement of this balance, however, requires an understanding of the contributions and values of pluralism as well as the problems and burdens.

Effective civic education can foster a consciousness of national identity within the differences that diversity implies. Key elements of this education are knowledge of the democratic values and principles that animate American political institutions and a solid grounding in the nation's history—warts and all. Americans need to know that their past is at once the story of a favored and successful people as well as a history that is troubled and tragic. These institutions and this past are the heritage of Americans of all races and cultural groups. Uninstructed or falsely instructed, they are disinherited. But wisely instructed, they can hardly escape the realization that they share both a common identity and destiny.

Objectives

At the conclusion of this lesson, students should be able to:

1. Describe issues of diversity which they think are important.
2. Identify fundamental values and important interests to consider when addressing issues of diversity.
3. Develop and express reasoned opinions on issues of diversity in schools.
4. Design a plan or policy to promote a better understanding of and appreciation for diversity and to combat problems arising from diversity

Preparation

In this lesson, which will take more than one class period, students will read and discuss diversity in general and examine issues of diversity in school settings. Prior to class, make copies of the student handouts for distribution. As a result of discussion and analysis, students will design a plan or proposal to promote a better understanding of and appreciation for diversity and to combat problems arising from diversity in school. Students are encouraged to present their plans or proposals to the rest of the school population and to the community. You may wish to invite community members who deal with issues related to diversity to participate in this process. Guests might include members of your school board or administration, religious leaders, attorneys, youth counsellors, juvenile officers, social workers or judges.

Procedure

1. *Introduce the Lesson.* Write the word "diversity" on the chalkboard or poster paper. Ask students to offer definitions for and synonyms of the word. Use their suggestions to create a working definition. (*Webster's New Collegiate Dictionary* defines diversity as difference and offers the word "variety" as a synonym.) Then ask students for examples of the types of diversity which exist in our society. Jot down their ideas for reference.
2. *Identify issues of diversity.* Distribute Student Handout 1. Have the class read and discuss the text using the "What do you think?" questions to facilitate discussion. Make a note of the diversity issues your students believe are most immediate and the values and interests they think most important to consider when addressing these issues. You may wish to assign students the task of collecting clippings on these topics to be used as research for other activities, to create bulletin boards, or as the basis for a learning center on diversity in the classroom or school library.
3. *Examine issues of diversity in school settings.* Distribute Student Handout 2 and divide the class into small heterogeneous groups to complete the exercise. Have students read and discuss the text using the "What do you think?" questions as a guide. Each student in the group should take the responsibility to contribute at least one recommendation to the group plan or policy. A recorder and spokesperson should be chosen by the group to take notes on the discussion and present the recommendations to the rest of the class. You may wish to travel between groups to monitor progress. If you choose to simulate a school board meeting as a vehicle for students to share their ideas, select a student from each group to play the roles of school board members. A community guest or

your school principal might be asked to serve as chair. The chair should open the meeting and state the issue to be discussed, i.e., what policies can be instituted to promote a better appreciation of diversity and to minimize and combat problems related to it. Citizens attending the meeting should present their recommendations for discussion. Afterwards, board members might vote on the recommendations or take them under advisement. The meeting should then be adjourned.

4. *Create a class plan to address issues of diversity at school.* Distribute Student Handout 3 and use it to assist students in further evaluating their recommendations. Work with the class to consider each of the points on the checklist and to add other points as necessary. Students should then work to create a class plan based on the recommendations made by each small group. You then may wish to discuss presenting the plan to others as indicated on the handout. Such a presentation is an excellent way to encourage students to share what they have learned with others and to motivate them to take an active role in their community. Additional ideas for reviewing and reinforcing the lesson complete the third handout.

Student Handout 1: Reading and Discussion

The diversity of the American people is unique among nations. Americans differ from each other in many ways. They live in distinct regions, each of which retains its own speech and intonation, mores and customs, even its own cuisine. Americans differ in age, in education and occupation, in religious belief, in wealth and lifestyle, in skills, capacities, interests, and in other ways too numerous to mention.

These and other sources of American diversity are not the topics of this lesson, however. Instead, you will be taking a look at some of the concerns raised by the ethnic and racial diversity of the American people since that aspect of diversity has become an increasingly common source of public discussion and controversy.

Many of these issues have focussed on education. Should the content of school curriculum be multicultural and, if so, to what degree? Should racial integration in schools be pursued aggressively as a matter of public policy? Should faculty more accurately reflect the multiracial and ethnic makeup of the population at large? How should racial and ethnic incidents in school settings be addressed?

These are just some of the educational issues related to diversity that you will be facing as students and as citizens in the years ahead.

What Do You Think?

Share and justify your ideas and opinions about the following questions:

1. Which issue of diversity do you think is most critical to address in our country today?
2. What issues of diversity in school settings are foremost in your community?
3. What fundamental values, such as justice, equality and human dignity, might these issues involve?
4. What important interests, such as the common good, efficiency and resources, should be considered when discussing such issues?

Student Handout 2: Examining an Issue of Diversity

Work in small groups to complete this exercise. Read the following information and then work cooperatively to develop a policy or plan that

(1) addresses conflicts arising from diversity; and
(2) promotes a better understanding and appreciation of the benefits of diversity.

Each student in your group should contribute at least one idea. The "What Do You Think?" questions listed below are designed to help stimulate your thinking and group discussion. Have a recorder make a list of your policy recommendations. Then select a group spokesperson to share them with the rest of the class. One way to do this is by simulating a school board meeting in which you discuss and vote on the different policy recommendations.

What policy would you develop to address the issue of diversity?

Although a 1992 survey of high school students shows growing appreciation of diversity and a breaking down of social barriers between races and ethnic groups, incidents have occurred in many schools which reflect conflict among students along racial, ethnic and religious lines. For example, swastikas have been drawn on lockers and some students have made disparaging and insulting remarks to those who differ from them.

As a result, administrators and student governments have attempted to promote a better understanding between ethnic and racial groups by various means. They have also tried to develop policies to address problems which have arisen and to prevent incidents of racial and ethnic conflict before they occur.

To promote better understanding, for instance, some schools have held educational forums in which the accomplishments and contributions of various groups in our society are presented. To address problems arising from diversity, some schools have instituted "speech codes." These rules governing expression are designed to prevent statements and comments about race, sex, religion, and ethnic background that might be viewed as offensive by some individuals and groups. The goal is to discourage prejudice and create a more comfortable learning environment for all students.

Unfortunately, some of these rules designed to eliminate conflict have stirred up controversy themselves. For example, some claim that speech codes deny freedom of expression. It is clear that the debate over how to promote a better understanding and appreciation of diversity and how to combat intolerance and bigotry in school settings and in the society at large will continue to be a volatile issue in the years ahead.

What Do You Think?

1. What can be done in schools to promote a better understanding between different racial, ethnic, religious, and other groups?
2. What can be done in schools to combat and prevent incidents of intolerance and bigotry?
3. What fundamental values and important interests should be considered when designing policies to achieve these goals?

Evaluation Checklist

Would your plan:	Yes	No	Explain Your Answer
• protect students from incidents of intolerance and bigotry			
• prevent such incidents from occurring			
• lead to discovery of such incidents			
• help educate those involved in order to deter them from further participating in such incidents in the future			
• compensate those who have been wronged or injured in some way			
• safeguard basic constitutional and other legal rights			
• promote a better understanding of problems stemming from diversity			
• lead to a better appreciation of our common history, principles, and values			
• emphasize the benefits which can come from diversity			

Student Handout 3: Evaluating Your Recommendations

After presenting your recommendations, you may wish to use the following checklist to evaluate them. Feel free to add other considerations to the list. You then may wish to pool your ideas in order to create a final plan for combatting and preventing conflicts which might arise from diversity in your school.

Talk to your teacher about the possibility of presenting your proposal to members of your student government, school administration and community. You might arrange to attend a PTA, school board or community meeting. Following the presentation, a forum might be held to discus your ideas and how students might work with the community to promote a better understanding of and appreciation for diversity on and off campus.

Using the Lesson

1. What can young people do to help promote better understanding between different groups in our society? To prevent and combat problems arising from diversity? Write your ideas in a journal entry or a letter to the editor of your school or local newspaper.
2. Work with a group of classmates to select an issue of diversity different from the one discussed in this lesson, for example, preferential treatment programs or immigration policies. Research the issue and then present a debate on it for the rest of your class. Each debate team should make a five minute formal presentation. Other members of each team should be allowed two minutes to rebut the arguments of their opponents. You may wish to invite community guests who are knowledgeable on the topic you choose to serve as debate judges.
3. Make a video or audio public service announcement to help promote understanding and appreciation of differences and to combat bigotry and intolerance. The PSAs should be 60 or 30 seconds long. Contact your local radio and television stations for information on broadcasting your productions.

Lorenca Consuelo Rosal is a staff member of the Center for Civic Education in Calabasas, California. This activity has been designed from various curricular materials developed by the Center including With Liberty and Justice for All, *a secondary student text on the Constitution and Bill of Rights, and* Exercises in Participation, *a series of lesson booklets designed to motivate and enable young people to enjoy the rights and accept the responsibilities of living in a free society. The core of the readings on diversity are adapted from* CIVITAS, *a collaborative project of the Center for Civic Education and the Council for the Advancement of Citizenship. For additional lesson plans and curricula programs, please write the Center for Civic Education, 5146 Douglas Fir Drive, Calabasas, CA 91302.*

The Challenge of Diversity

Exploring U.S. v. Hirabayashi/Secondary

Julia Ann Gold

Objectives

1. Students will place the order of events in the case of *United States v. Hirabayashi* on a time line.
2. Students will identify the arguments put forward by Hirabayashi and the U.S. government at his trial.
3. Students will analyze the actions of the judge and jury, and the outcome of the case.
4. Students will consider current and future implications of the decision.

Time Needed

Two or three class periods

Resources

Student Handouts 1 through 4; "A Personal Matter," a 30-minute videotape about Gordon Hirabayashi has been produced by the Constitution Project, P.O Box 1787, Portland, OR 97207. Call (503) 224-6722 for information on how to order.

Background for the Teacher

February 19, 1992 marked the 50th anniversary of the signing of Executive Order 9066, which authorized military commanders to exclude persons from vast areas of the western United States during World War II. Gordon Hirabayashi, a college student at the time, was one of a very few Japanese-Americans who challenged the military orders all the way to the U.S. Supreme Court. While the Supreme Court upheld the military orders in 1943, Hirabayashi's conviction was vacated in 1987 by the Ninth Circuit Court of Appeals, under an unusual legal proceeding called *coram nobis*.

After the war, Gordon Hirabayashi went on to complete his education and became a professor of sociology at the University of Alberta, in Edmonton, Canada. He is presently retired, as Professor Emeritus, and spends much of his time speaking and educating others about his experiences. He is a strong believer in the U.S. Constitution, and has stated that "It was not the Constitution that failed me, but those who were supposed to uphold it."

The video "A Personal Matter" is an excellent introduction to this lesson.

(*Editor's note:* Additional background information on the Hirabayashi case and the relocation and internment of Japanese-Americans can be found in the Spring 1990 issue of *Update*. The issue contains a secondary level classroom activity, excerpts from testimony to the Commission on Wartime Relocation and Internment of Civilians and a bibliography.)

Procedure

1. Pass out Student Handout 1, and ask students to read the background information about the case.
2. Pass out Student Handout 2 (time line) and ask the students to work in pairs to place the events in chronological order on the time line. Review the sequence of events with the entire class.
3. Review the charges against Hirabayashi. He was charged with two counts, or two crimes:
   Violation of Public Proclamation Number 3:
   Public Proclamation Number 3 established a curfew period and provided that all persons of Japanese ancestry must remain within their place of residence between the hours of 8:00 p.m. and 6:00 a.m.
   Violation of Civilian Exclusion Order Number 57: Civilian Exclusion Order Number 57 required persons of Japanese ancestry in a specific area (including the University District where Hirabayashi lived) to report to a Civil Control Station in Seattle between the hours of 8:00 a.m. and 5:00 p.m. on May 11 or 12, 1942.
   Remind students that the government had the burden to prove these charges beyond a reasonable doubt.
4. Discuss the arguments that both the government and Hirabayashi made at trial. To win its case for violation of the exclusion order, the government was only required to show that Hirabayashi did not report to the Civilian Control Station on May 11 or May 12, 1942. To win its case for violation of the curfew order, the government was only required to prove that he violated the curfew, by staying out between 8:00 p.m. and 6 a.m. Hirabayashi argued that he was a loyal American citizen, and that his constitutional rights, specifically his Fifth Amendment right to due process, were violated by the issuance of the orders. He stated that the orders discriminated against him because he was of Japanese ancestry.
5. Discuss with students both arguments, and the reasoning for each side's position. Ask students, in small groups, to decide how they would decide this case if they were the jury. Alternatively, you may ask students to make mock arguments to panels of judges or a jury. Tell students that a jury is bound to apply the law as given to them by the judge, but in some cases a jury could choose to "nullify" the law by disregarding the judge's instructions. [This is called "jury nullification," and is not expressly approved by most courts; in this exercise, however, it allows the students more room to argue.]
6. Ask students to read Student Handout 3. Review and discuss the U.S. Supreme Court decisions and the *coram nobis* petitions discussed in the handout.
7. As a final activity, ask students to complete Student Handout 4, an opinion poll, and discuss.

Student Handout 1: Background Information

Japanese began to immigrate to the U.S. in the late 1800s, to replace Chinese laborers who were excluded after the Chinese Exclusion Act was passed by Congress in 1882. Asian aliens were prohibited from becoming naturalized U.S. citizens, and by 1913, limits had been placed on the ability of Japanese to own land (the Webb Act). Finally, in 1924, the Immigration Exclusion Act was passed by Congress, barring all immigration by Japanese to the U.S.

In early 1942, the United States was at war with Japan, following the surprise attack on Pearl Harbor on December

7, 1941. Almost immediately, the Japanese went on to attack Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands. Many people feared Japanese air raids and invasion of the West Coast by Japanese forces. Attitudes toward Japanese-Americans went from relative tolerance to hostility. For example, Henry McLemore, a syndicated columnist wrote in his January 29, 1942 column in the *San Francisco Examiner*:

> I am for the immediate removal of every Japanese on the West Coast to a point deep in the interior.... I don't mean a nice part of the interior either. Herd 'em up, pack 'em off and give 'em the inside room in the badlands.... Personally, I hate the Japanese. And that goes for all of them.

Other newspapers carried reports of subversive activities by Japanese aliens and Japanese American citizens living on the West Coast of the United States. The *Washington Post*, on February 17, 1942, carried a column by Walter Lippmann, the nation's most prestigious political commentator, under the headline:

> THE FIFTH COLUMN ON THE COAST
>
> It is a fact that communication takes place between the enemy at sea and enemy agents on land....
>
> [The fact that since] the outbreak of the Japanese war there has been no important sabotage on the Pacific Coast...is a sign that the blow is well-organized and that it is held back until it can be struck with maximum effect....
>
> Nobody's constitutional rights include the right to reside and do business on a battlefield.... And nobody ought to be on a battlefield who has no good reason for being there. There is plenty of room elsewhere for him to exercise his rights.

Reacting to public pressure, and relying on the advice of the War Department that military necessity required it, President Franklin D. Roosevelt issued Executive Order 9066 on February 19, 1942.

Roosevelt signed Public Law 503 on March 21, 1942, making it a crime to violate any of the orders that military commanders prescribed. Lt. General John L. DeWitt, appointed Military Commander of the Western Defense Command on February 20, 1942, began immediately to issue orders pursuant to Executive Order 9066.

These orders included Public Proclamation No. 3 issued March 24, 1942, ordering all persons of Japanese ancestry, both aliens and Japanese American citizens, within certain military areas, to remain in their homes between the hours of 8:00 p.m. and 6:00 a.m. This is referred to as the "curfew order."

DeWitt also issued a series of "exclusion orders," ordering all persons of Japanese ancestry to leave their homes and report to assembly centers. They were then transported to internment camps.

Gordon Hirabayashi was a student at the University of Washington in the spring of 1942, when the curfew and exclusion orders were issued. Born in Washington State, Hirabayashi attended public schools, where he was a Boy Scout. Later, at the university, Hirabayashi was active in the YMCA and the Society of Friends, or Quakers. His parents were both born in Japan and came to the U.S. as teenagers.

Hirabayashi decided to defy the orders by remaining in the library to study after 8 p.m., and by refusing to comply with the Exclusion Order requiring him to report on May 11 or 12, 1942 because:

> It was my feeling at that time, that having been born here and educated and having the culture of an American citizen, that I should be given the privileges of a citizen—that a citizen should not be denied such privileges because of his descent. I expressed my thoughts that I had a right to stay.

Hirabayashi turned himself in to the FBI on May 16, 1942. The FBI charged him with a violation of the Exclusion Order, and placed him in jail, where he remained until his trial. Hirabayashi admitted to defying the curfew order as well, and was charged with a second count.

The case was tried on October 20, 1942, before a jury and Judge Lloyd L. Black, in Seattle, Washington. The judge instructed the jury that both orders were valid and enforceable, and that they were to find as matters of fact that Hirabayashi was of Japanese ancestry and therefore subject to the orders, that he had violated the curfew, and that he failed to report for evacuation. Based on these findings, the judge instructed the jury to find Hirabayashi guilty. The jury returned in 10 minutes with a finding of guilty on both counts.

At sentencing the next day, the judge took the five months that Hirabayashi had already spent in the King County Jail into account, and sentenced him to 30 days on each count, to be served consecutively. Hirabayashi then asked if he could serve a longer sentence—90 days—because he had found that if his sentence were at least 90 days, he would be allowed to serve the sentence outside a prison, in a roadcamp. The judge agreed, and changed the sentence to 90 days for each count, to be served concurrently (at the same time). Hirabayashi and his lawyers agreed, not realizing that the U.S. Supreme Court would use the concurrent sentences to avoid ruling on the constitutionality of the exclusion order, and rule only on the curfew order, considered to be less obtrusive, and therefore more "justifiable.

Hirabayashi's was the first case the Supreme Court heard regarding the constitutionality of the military orders issued pursuant to Executive Order 9066. Hirabayashi's lawyers argued that Congress unconstitutionally delegated its legislative power to the military by authorizing DeWitt to issue the orders, and that the due process clause of the Fifth Amendment prohibited the discrimination against citizens of Japanese descent. Since Hirabayashi was a loyal citizen, he should be treated as an individual. He was being deprived of his life, liberty and property without due process of law.

The government argued that the military commander, DeWitt, had authority from Congress and the President, and that there was no time, due to the imminent danger of air raids and invasion by Japanese forces, to determine the loyalty of individual Japanese citizens.

The Supreme Court issued a unanimous ruling, affirming Hirabayashi's conviction, and upholding the government's action. The Court chose to address only the curfew order, because the trial judge had made the sentences on the two convictions concurrent. The Court found that under the war powers given to the President and Congress in Articles I and II of the Constitution, the President and Congress have wide discretion to determine the nature and extent of the danger during war, and how to resist it. The Court concluded that there was a "substantial basis" for the action taken, citing information about how Japanese had not assimilated into the white population, how Japanese children attended Japanese language schools believed to be sources of Japanese nationalistic propaganda, and how many Japanese American citizens were actually citizens of Japan as well, since Japan allowed dual citizenship.

The Court then turned to the discrimination argument, and began by pointing out that the Fifth Amendment does not contain an equal protection clause, such as found in the Fourteenth Amendment. (The Equal Protection Clause of the Fourteenth Amendment is the amendment cited today in discrimination cases (along with many specific laws that prohibit discrimination). However, the Fourteenth Amendment, as written, only applied to actions by the states. At the time of Hirabayashi's trial, the Fourteenth Amendment's "equal protection" clause had not been formally "incorporated" into the Fifth Amendment, and therefore was not applicable to the federal government.)

After stating that distinctions between citizens solely because of their race are "odious to a free people whose institutions are founded upon the doctrine of equality," and that discrimination based on race alone would be insupportable, "were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas," the Court concluded that:

> The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.

Three other Japanese-Americans challenged Executive Order 9066 all the way to the Supreme Court. Those cases can be classified into three categories, based on the Court's treatment of the issues in its decisions:

Challenge of the Curfew Orders
Hirabayashi v. U.S., 320 U.S. 81 (decided June 21, 1943), and *Yasui v. U.S.*, 320 U.S. 115 (decided June 21, 1943) were both unanimous decisions, in which the Court upheld the constitutionality of the curfew order, as applied to Gordon Hirabayashi and Minoru Yasui.

Challenge of the Exclusion Orders
In *Korematsu v. U.S.*, 323 U.S. 214 (decided Dec. 18, 1944), the Court, in a 6-3 decision, relied on the *Hirabayashi* case, and affirmed the conviction of Korematsu, upholding the constitutionality of the exclusion orders, as applied to Korematsu. Doing another sidestep, the Court also avoided ruling on the issue whether it would be constitutional to *detain* Korematsu, concededly a loyal citizen, in one of the camps, since there was no evidence that he would have been sent to a camp, had he reported to an assembly center. Justice Roberts, one of the dissenters, along with Justices Murphy and Jackson, characterized the exclusion orders as "imprisonment in a concentration camp, based on ancestry."

Challenge of the Detention
Ex Parte Endo, 323 U.S. 283 (decided Dec. 18, 1944), was a habeas corpus challenge by Mitsuye Endo in which the Court, in a unanimous decision, found that Endo, as a loyal citizen, could not be legally detained in a camp. The day before the *Endo* case was decided, the government announced that the camps would close.

Student Handout 2
Time Line

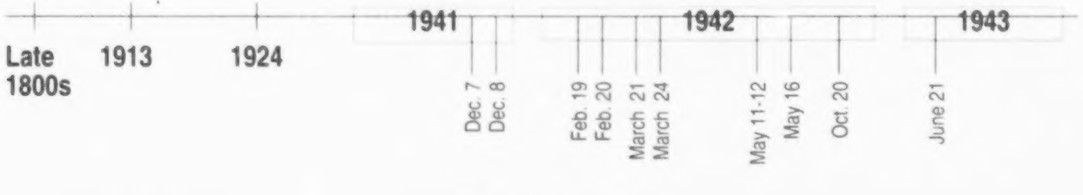
Place the letter of each item where the event would appear on the time line below.

A. The United States declares war on Japan.
B. Gordon Hirabayashi fails to report to the U.S. Civil Control Station.
C. Japanese are encouraged to immigrate to the western United States.
D. President Franklin Roosevelt signs Executive Order 9066.
E. U.S. Supreme Court upholds Gordon Hirabayashi's conviction.
F. Judge Lloyd Black presides at the jury trial of Gordon Hirabayashi.
G. The Webb Act passed, denying Japanese born in Japan the right to own land in the U.S.
H. Japanese planes bomb Pearl Harbor.
I. Gordon Hirabayashi reports to the FBI and is charged with violating the law.
J. Lt. General DeWitt is appointed Military Commander to carry out evacuations in the Western Defense Command.
K. The U.S. enacts the Immigration Exclusion Act, which closes all immigration to the U.S. from Japan.
L. Lt. General DeWitt declares a curfew for all persons of Japanese ancestry.
M. President Franklin Roosevelt signs Public Law 503, which makes a knowing violation of the DeWitt's orders a crime.

Student Handout 3
The Aftermath

Since the Supreme Court decisions, the United States has reexamined its treatment of Japanese-Americans during World War II. In 1976, President Ford rescinded Executive

Time Line



Order 9066; four years later, Congress repealed Public Law 503 and created the Commission on Wartime Relocation and Internment of Civilians.

From July to December 1981, the Commission conducted hearings on the internment and, in December 1982, issued its report, *Personal Justice Denied*, which concluded that "a grave injustice" had been committed against Japanese-Americans.

In 1985, Gordon Hirabayashi sought to overturn his convictions, using an unusual legal proceeding called *coram nobis*. The evidence at his second trial consisted of documents found at the National Archives, and others obtained under a Freedom of Information Act request that showed that during the appeal to the Supreme Court in 1943, government lawyers had intentionally withheld from the courts important intelligence reports and other evidence that showed that the "military necessity" for the internment was less dire than the government claimed.

For example, the government lawyers had claimed that there was no time to determine the loyalty of individual Japanese-Americans. The evidence uncovered, however, revealed that the military commanders had decided that it would be impossible to determine loyalty of the Japanese, *regardless* of the time factor.

The judge at Hirabayashi's second trial set aside the conviction on Count I, the exclusion order, but not Count II, the curfew order. Both sides appealed, and the Ninth Circuit Court of Appeals set aside both convictions. Finally, in 1987, Gordon Hirabayashi's struggle to clear his name was over.

In August 1988, Congress passed a statute that provides compensation, up to a maximum of $20,000 per individual, for Japanese-Americans and resident aliens who were living as of August 10, 1988 and who were confined, held in custody, relocated or otherwise deprived of property or liberty as a result of Executive Order 9066.

Student Handout 4: An Opinion Poll–How Far Can the Government Go?

Directions: Read the following statements and place the letter that most closely corresponds with your opinion in the lefthand blank. SA (strongly agree), A (agree), U (undecided), D (disagree), SD (strongly disagree).

____ 1. The U.S. is at war with Norway. There have been threats of terrorism against Americans, and reports that Norwegians in the U.S. are planning terrorist attacks in major American cities. The U.S. government should be able to require all Norwegian aliens in the United States to report to the government for questioning.

____ 2. The U.S. is at war with Paraguay. There have been terrorist attacks on American citizens living in Los Angeles, allegedly led by Paraguayans. The government should be able to require all American citizens of Paraguayan descent living in the Los Angeles area to report to the FBI for questioning.

____ 3. The U.S. is at war with Pakistan. An American passenger plane was destroyed by a terrorist bomb, killing 250 people. Airline officials in the U.S. should have the right to stop and question anyone boarding an airplane who looks like a Pakistani.

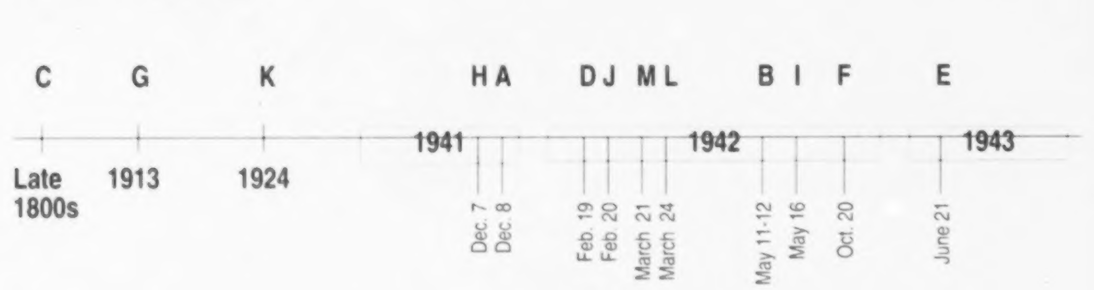
____ 4. Both homosexual men and drug addicts with AIDS should be forcibly quarantined (kept in isolation from all other people) until the AIDS epidemic is controlled. This would be for their own protection, as well as the safety of the public.

____ 5. It is the year 1997. The drug problem in the U.S. has reached epidemic proportions. Crack dealers are on every street corner, and crack houses have taken over large areas in many American cities. The President has issued an Executive Order, declaring the situation a national emergency and authorizing the National Guard to round up dealers and users within areas to be determined by commanders of the National Guard and put them in prison. This should be allowed.

____ 6. Crime involving teenagers in the early morning hours has been on the rise in a large urban area. In order to protect teens from being victims of crime, and to control roving gangs of teens, a curfew should be enacted by the County Council. The curfew would require that everyone 16 years old and under be off the streets between the hours of 11:00 p.m. and 6:00 a.m.

Julia Ann Gold is an attorney and Deputy Director of the Institute for Citizen Education in the Law at the University of Puget Sound School of Law, Tacoma, WA. The concept for the time line activity was contributed by Tarry Lindquist. Funding for the development of this activity was provided by the Commission on the Bicentennial of the U.S. Constitution.

Time Line Answer Key



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COURT BRIEFS

Kevin R. Johnson and Alan Raphael

Supreme Court Potpourri

Court restricts ability of immigrants to obtain political asylum

Before 1980, the United States generally only admitted "refugees" fleeing communist countries, such as Cuba, and would not admit persons fleeing nations, even those with authoritarian governments such as Haiti, on good terms with the United States government. Seeking to implement a more ideologically neutral and humanitarian refugee policy, Congress passed the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. It provides that immigrants from foreign countries who establish a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion" may be entitled to asylum in the United States. Apart from aspirations, Congress passed the Act to bring the United States into compliance with treaties the nation entered into and to halt the President from using refugee admissions to further the President's foreign policy goals.

Since passage of the Refugee Act in 1980, thousands of persons fleeing the violence and warfare of Central America have sought asylum in this country. There have been widespread reports of political persecution by the governments, and guerrillas seeking to overthrow those governments, in El Salvador and Guatemala. Some government officials, including some at the highest levels of the Immigration and Naturalization Service and the Department of State, have claimed that Central Americans generally come to the United States to work and make a better living. Those officials contend that the Refugee Act does not provide relief for "economic refugees." In addition, they sometimes argue that, if the United States opens its doors to all Central Americans fleeing the poor and violent conditions so prevalent in their homelands, a "flood" of millions of refugees will come to the United States, taking jobs from American citizens and draining the country's resources.

The Supreme Court has only decided a few cases involving the interpretation and application of the Refugee Act. In the most recent, *Immigration and Naturalization Service v. Elias-Zacarias*, 112 S. Ct. 812 (1992), the Court narrowly interpreted the phrase "persecution on account of . . . political opinion." By so doing, the Court denied asylum to a Guatemalan who feared persecution by leftist guerrillas seeking to overthrow the government. The guerrillas threatened him if he refused to join their forces.

The Supreme Court's decision in the Elias-Zacarias case is an important indicator of how the Court currently views the protections of the Refugee Act, how the Executive Branch will interpret and apply the Act in the future, and how the lower courts will review the Executive Branch's asylum decisions in later cases.

The Facts and Arguments

Masked and armed with machine guns, two guerrillas came to the home of 18-year old Jairo Jonathan Elias-Zacarias in Guatemala. When Elias-Zacarias refused to join their forces, the guerrillas told him to "think it [over] well" and promised to return. Elias-Zacarias would not join the guerrillas' forces. In his own words, "if you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family." Fearing that the guerrillas would return to kill him, Elias-Zacarias fled the country. Later, the guerrillas did in fact return to his family's home on two separate occasions seeking Elias-Zacarias by name.

The violent political turmoil in Central America, particularly Guatemala and El Salvador, is not seriously disputed. The Department of State acknowledges that the leftist guerrillas in Guatemala engage in forced recruitment and that the Guatemalan government has been known to kill, torture, or "disappear" persons suspected—"[w]hether supported by fact or merely spurious information"—of sympathizing with the guerrillas. Department of State, 102d Cong., 1st Sess., *Country Reports on Human Rights Practices for 1990* 631, 632, 639 (Joint Comm. Print 1991).

Asylum claims often are processed initially by an administrative agency in the Executive Branch. The immigration court hears evidence on the claims and the unsuccessful party may appeal the ruling to the Board of Immigration Appeals (BIA). Both the immigration court and the BIA denied Elias-Zacarias's claim for asylum. His next avenue of appeal was a federal court, the Court of Appeals for the Ninth Circuit.

The Ninth Circuit rejected the BIA's conclusion that Elias-Zacarias lacked a "well-founded fear of persecution on account of . . . political opinion." The court reasoned that, by refusing to join the guerrillas, Elias-Zacarias expressed a political opinion and that the guerrillas obviously had a political motive in attempting to force him with the threat of death to join their army. Together, this, in the Ninth Circuit's view, amounted to political persecution.

The Immigration and Naturalization Service (INS) appealed to the Supreme Court. In arguments to the Court, the INS claimed that Elias-Zacarias failed to show that the guerrillas persecuted him for any political views that *he* held, but rather simply wanted him to join so that they could field an army. In other words, the guerrillas did not care what Elias-Zacarias's particular views were; they just wanted another soldier. The INS argued that, under those facts, Elias-Zacarias failed to establish "persecution on account of . . . political opinion" as required by the Refugee Act.

The INS previously had prevailed in convincing at least one court of appeals to adopt a stringent "on account of" requirement that it advocated in *INS v. Elias-Zacarias*. In *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), the Fifth Circuit affirmed the BIA's denial of asylum to a Salvadoran woman who was raped and forced to watch her uncle and cousins killed for their political activities. The facts of *Campos-Guardado* show the harsh results that the INS's interpretation of the Refugee Act sometimes has:

> Ms. Campos testified about incidents of violence in El Salvador . . . . [When visiting her uncle, the chairman of a local agricultural cooperative formed as a result of controversial land reform], an older woman and two young men with rifles arrived and knocked down the door. They dragged Ms. Campos, her uncle, a male cousin and three female cousins to the rim of the farm's waste pit. They tied all the victims' hands and feet and gagged the women. Forcing the women to watch, they hacked the flesh from the men's bodies with machetes, finally shooting them to death. The male attackers then raped the women, including Ms. Campos, while the woman who accompanied the attackers shouted political slogans. The assailants cut the victims loose, threatening to kill them unless they fled immediately. They ran and were taken to a hospital in San Salvador. Ms. Campos suffered a nervous breakdown and had to remain in the hospital for 15 days. . . . [When she later visited her home], two young men arrived at the door. . . . Ms. Campos immediately recognized one of them as one of her assailants. [H]e later sought her out several times and threatened to kill her and her family if she revealed his identity.

Under those facts, Ms. Campos, in the in the Fifth Circuit's eyes, failed to establish "persecution on account of . . . political opinion" and therefore was not eligible for asylum.

The Majority Opinion

The Supreme Court, in an opinion by Justice Antonin Scalia, reversed and held that the Ninth Circuit should not have reversed the BIA's decision that Elias-Zacarias was not eligible for asylum. Justice Scalia wrote for the majority of six members of the Court, which included Chief Justice Rehnquist and Justices White, Kennedy, Souter and Thomas. The narrow question framed by the Court was "whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes 'persecution on account of . . . political opinion.'" The Court's answer was an unequivocal no.

The Court reviewed the BIA's findings of fact to determine whether the Board's conclusion that Elias-Zacarias failed to establish a well-founded fear of persecution on account of political opinion was supported by "substantial evidence." The Court interpreted the substantial evidence standard to mean that the BIA's decision "can be reversed only if the evidence presented by Elias-Zacarias was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." To justify reversal, the evidence must "compel" the conclusion "that Elias-Zacarias had a well-founded fear that the guerrillas would persecute him *because of* . . . political opinion." (emphasis in original). The gist of this language is that courts reviewing the decisions of the BIA generally should not reverse, but rather should defer to, the agency's judgment.

The Court rejected the Ninth Circuit's conclusion that resistance to the conscription efforts of a guerrilla organization necessarily constitutes "persecution on account of . . . political opinion." In so doing, the Court disagreed with the proposition that, by refusing to join, the person necessarily expressed a political opinion. Justice Scalia speculated that even a person who agrees with the guerrillas' political agenda might refuse to join their army "for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few."

The Court expressed skepticism about the proposition that refusal to join a political faction in the midst of ongoing hostilities, ever might constitute a political opinion. Rather, the decision to remain neutral under those circumstances, to Justice Scalia, may be based on "indifference, indecisiveness and risk-averseness." The Court, however, expressly did not decide the question. *See* 112 S. Ct. at 816 ("[W]e need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion."). It instead found that Elias-Zacarias failed to establish a well-founded fear of persecution on account of political opinion "with the degree of clarity necessary" to justify reversal of the BIA's decision.

Importantly, the Court found that the record failed to establish that Elias-Zacarias had any political reasons for resisting the guerrillas' attempt to conscript him. He instead simply feared that the Guatemalan government would retaliate against him and his family if he joined. Nor, assuming the relevance of such evidence, was there any suggestion in the record that the guerrillas erroneously attributed any political reasons to Elias-Zacarias's refusal to join. There was no evidence that the guerrillas thought that Elias-Zacarias supported the government or was their enemy.

The Court found insignificant the fact that the guerrillas acted with an obviously political motive—to field an army for the purpose of overthrowing the government—in seeking to recruit Elias-Zacarias. In the Court's words, "[i]n construing statutes, we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" The Court did not look at the Refugee Act's voluminous legislative history or consider the humanitarian and other purposes of Congress in passing the law.

Looking exclusively at the language of the statute, the Court found that

> [t]he ordinary meaning of the phrase "persecution on account of . . . political opinion" . . . , is persecution on account of the *victim's* political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion.

Consequently, the Court held that the "generalized 'political' motive" of the guerrillas was insufficient to satisfy the "persecution on account of . . . political opinion" requirement. Rather, the asylum applicant must establish that the persecutor had a particular motive to persecute the applicant because of his or her political views. In establishing that motive, the Court suggested flexibility in the evidentiary requirements. Elias-Zacarias and those similarly situated need not present "direct proof of his persecutor's motives." Instead, "he must provide some evidence of it, direct or *circumstantial*." (emphasis added).

In conclusion, the Court stressed the limited scope of judicial review of BIA decisions: "to obtain judicial reversal of the BIA's determination, [an asylum applicant] must show that the evidence he presented was *so compelling that no reasonable factfinder could fail to find the requisite fear of persecution*." (emphasis added). Because Elias-Zacarias failed to satisfy that formidable burden, the Court reversed the Ninth Circuit's decision.

The Dissent

Justice John Paul Stevens, joined by Justices Blackmun and O'Connor, dissented. He stated bluntly that Elias-Zacarias faced "a well-founded fear that he will be harmed, if not killed, if he returns to Guatemala." The only issue in dispute was whether Elias-Zacarias would be persecuted "on account of . . . political opinion." Because that was a legal, not factual, question concerning the interpretation of the Refugee Act, Justice Stevens would look more carefully than the majority at the BIA's decision.

Justice Stevens disagreed with Justice Scalia's suggestion that refusal to join the guerrillas failed to constitute a political opinion. He quoted extensively from one of the Ninth Circuit's first major asylum decisions, *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985), which held that the affirmative expression of neutrality in the midst of a civil war in some circumstances constitutes a political opinion. In contrast to the majority's approach, he defined political opinion broadly to include negative ("staying home on election day, . . . refusing to take an oath of allegiance, or . . . refusing to step forward at an induction center") as well as affirmative conduct. "Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect." The majority's approach, to Justice Stevens, was a "narrow, grudging construction of the concept of political opinion." Justice Stevens read the record as showing that Elias-Zacarias expressed support for the government and antipathy for the guerrillas.

According to Justice Stevens, "any doubts concerning the political character of an alien's refusal to take arms against a legitimate government [should be resolved] in favor of the alien." In previous decisions, because of the harsh impact of deportation, the Supreme Court had resolved ambiguities in the immigration laws in favor of the immigrant. Justice Stevens suggested that, in this case, the majority was interpreting an ambiguity in the Refugee Act against the immigrant.

Justice Stevens further argued that the guerrillas' threat was "persecution on account of . . . political opinion" under the Refugee Act. Quoting from the Ninth Circuit's opinion in *Bolanos-Hernandez*:

> [i]t does not matter to the persecutors what the individual's motivation is. The guerrillas . . . do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution on account of that overt manifestation is persecution because of a political opinion.

To Justice Stevens, "the statute does not require that an applicant for asylum prove exactly why his persecutors would act against him; it only requires him to show that he has a 'well-founded fear of persecution on account of political opinion.'" To Justice Stevens, because Elias-Zacarias expressed a political opinion and the guerrillas threatened to harm him unless he changed that opinion, he was eligible for asylum.

Tone of the Opinion

In response to the Supreme Court's decision, some commentators observed that, by literally interpreting the language of the Refugee Act, the Court seemed insensitive to the plight of Elias-Zacarias and the many others like him who have fled war-torn Central America. In past decisions, the Court had given the benefit of the doubt to the immigrant in interpreting the immigration laws. In *Elias-Zacarias*, the Court seemed to interpret an ambiguity against the asylum-applicant. It was not seriously disputed that Elias-Zacarias faced a well-founded fear of persecution if deported to Guatemala. The only question was the motive behind the guerrillas' threatened persecution. Many persons flee Central America without evidence or any type of clear understanding why they are being persecuted. They simply fear for their lives.

Despite the persecution that Elias-Zacarias might encounter if deported to Guatemala, Justice Scalia seemed to exhibit a certain callousness toward the real life harms feared by asylum applicants and the life and liberty interests at stake. For example, he belittled those fears by speculating that Elias-Zacarias may simply have resisted recruitment for "fear of combat, or desire to remain with one's family and friends, or desire to earn a better living in civilian life." There was no evidence in the record supporting that speculation. Similarly, Justice Scalia did not acknowledge the problems of proof facing many asylum-seekers, who often have fled their native lands in great haste.

The Persecutor's Motive

In the ordinary asylum case, the evidentiary burden on Central Americans asylum applicants, who often have fled their homeland with little more than the clothes on their back, is great. It is quite difficult to provide direct, or even circumstantial, evidence of the intent of not infrequently irrational persecutors, who for obvious reasons, are short on words and rarely state their true intent. Moreover, persecutors may engage in mass terror and persecution with little regard for the political views of any individual. For example, the communist government in Kampuchea, previously Cambodia, in the 1970s and 1980s perpetrated mass, sometimes indiscriminate, human rights violations by killing, torturing and subjecting many citizens to forced hard labor. See *Amnesty International, Kampuchea: Political Imprisonment and Torture* 16-18 (1987).

Not infrequently, the only evidence of persecution that an asylum applicant has is his or her testimony about the events that caused the person to flee the country. Few records would tend to show that the persecutors singled out a particular person, such as Elias-Zacarias, for persecution because of his or her political views. Guerrillas or governments rarely make such evil purposes so explicit. Nor would a rational person tell a potential persecutor like the guerrillas that he or she opposes their political agenda, conduct that might be tantamount to suicide.

Although not recognizing the evidentiary difficulties facing asylum applicants, the Court disclaimed the need for *direct* evidence of the persecutor's motive and made it clear that *circumstantial* evidence might suffice. In other words, the applicant can present evidence that allows reasonable inferences to be drawn about a persecutor's intent, rather than an express statement from the persecutors saying that they intend to persecute the applicant because of his or her views.

As fact-finders do in other areas of the law in evaluating a person's state of mind, immigration judges should weigh the totality of the circumstances in deciding whether reasonable inferences may be made about the persecutor's intent. Reports from reputable human rights organizations that, for example, guerrilla organizations persecute those who refuse service in their forces because they impute certain political views to them, such as that they are government sympathizers, may provide such circumstantial evidence. Other evidence, such as whether one's views are well-known in the community or are attributed to certain persons for some reason (such as government employment, see *Aguilera-Cota v. INS*, 914 F.2d 1375, 1379-80 (9th Cir. 1990), or former military service, see *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990)), also might permit reasonable inferences about a persecutor's intent.

Circumstantial evidence of the sort described was not in the record before the Supreme Court in *Elias-Zacarias*. In future asylum cases, an important issue will be precisely what type of circumstantial evidence may be used to establish a persecutor's motive.

Moreover, the Court's requirement that the asylum applicant provide some proof of the persecutor's motive should not be taken to the extreme. Obviously, not every Jew in Nazi Germany should be forced to bear the extraordinary burden of establishing that the Nazi government singled out that particular individual for persecution. The most egregious persecutors unfortunately may target entire classes of people, not individuals, for persecution. INS regulations acknowledge that possibility and do not require an applicant to prove that he or she has been singled out for persecution if it can be shown that there is a pattern and practice of persecution of similarly situated persons. See 8 C.F.R. _ 208.13(b)(2)(i)(A) (1991). The INS's reasonable regulation shows the impropriety of an extreme reading of the Supreme Court's decision in *INS v. Elias-Zacarias*.

The Troubling Dicta

There is much discussion in *Elias-Zacarias* that is dicta. Dicta is language and speculation unnecessary to the Court's decision. Although a Supreme Court *decision* is binding authority on the lower courts, the lower courts are not bound to follow the *dicta* in the Court's opinion. What is a necessary ingredient of a decision and what is dicta often is a fine line. Although many will speculate how the Court might decide some of the issues discussed briefly in dicta in *Elias-Zacarias*, the Court did not squarely decide any of them. In future asylum cases, lawyers representing asylum applicants will resist INS attempts to make too much out of the dicta. On the other hand, INS attorneys will argue that the discussion in *Elias-Zacarias* is a good indicator of how the Court will decide the question in the future and that the lower courts should rule in accordance with the dicta.

Here is a discussion of some of the dicta in *Elias-Zacarias* that probably will be argued about in future asylum cases.

Neutrality as a Political Opinion. As discussed earlier, the Court in *Elias-Zacarias* suggested that a person who seeks to remain neutral in the midst of a civil war has not expressed a political opinion. However, as the Court itself acknowledged, such speculation was unnecessary to its holding. The dicta in no way disturbs the well-established lower court authority, *see, e.g., Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984), that in certain circumstances neutrality may constitute a political opinion for asylum purposes. A primary example is the refusal to join a guerrilla organization, coupled with the applicant's opinion that he or she does not support the aims of the guerrillas or the government and seeks to remain neutral.

The Supreme Court addressed a record with little evidence that Elias-Zacarias held a political opinion of any sort. In fact, Elias-Zacarias was not asked in the immigration court whether he had any political opinions, whether he had any political reasons for not joining the guerrillas, or whether he had ever been active politically in any way. The Court's dicta that neutrality is not a political opinion therefore should be read with the record before the Court in mind.

In the future, attorneys probably will ask the questions that were not asked of Elias-Zacarias. Attorneys probably should be careful to submit evidence (presumably the applicant's testimony) showing that the applicant had some type of political opinion, even if "only" neutrality, and made a conscious decision to act on that opinion in some way.

Eliciting political views from an asylum applicant may be difficult in some instances in which the applicant has been conditioned by circumstances in his or her native land to disavow the holding of any political views. In some violently charged political climates, to state a political view is to open oneself up to persecution. Nonetheless, the attorney will need to work with the client to be forthright about his or her political views.

In sum, at least for the time being, affirmative evidence of a desire to remain neutral and refusal to join a political organization, should be sufficient to satisfy the political opinion requirement of the Refugee Act. Because of the dicta in the Court's opinion in *INS v. Elias-Zacarias*, attorneys for the INS and asylum applicants almost certainly will argue about this point in future cases.

Imputed Political Opinion. Lower courts have recognized a theory known as the imputed political opinion doctrine. *See, e.g., Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985). Under that doctrine, when persecutors for some reason impute a political opinion to an asylum-applicant—erroneously or not—based on the views of relatives, friends or the like and threaten to persecute the applicant for holding those views, that may constitute "persecution on account of . . . political opinion." For example, a government may assume that a person is a guerrilla sympathizer because his brother or sister is a guerrilla. If that government attributes or imputes a political opinion to a person because of his sibling's political activities and persecutes that person, the lower courts have held that person may establish "persecution on account of . . . political opinion" and thus is eligible for asylum.

The Supreme Court in *INS v. Elias-Zacarias* suggested in dicta that the erroneous imputation of a political opinion to Elias-Zacarias by the guerrillas might not satisfy the "persecution on account of . . . political opinion" requirement. That, however, obviously was not necessary or central to the Court's holding. There was no evidence in the record that the guerrillas imputed any political opinion to Elias-Zacarias.

In the future, the INS may argue that the Court's decision suggests that it will reject the imputed political opinion doctrine in the future. Attorneys for asylum applicants who seek to rely on the doctrine will claim that the lower court authority is undisturbed by the Supreme

Court's dicta. The Supreme Court's dicta thus will spawn future litigation on this point.

Deference to the BIA. In discussing the substantial evidence standard of review, the Court in *Elias-Zacarias* used language that might be read to suggest that courts should be extremely deferential in the review of Board of Immigration Appeals decisions and should rarely reverse them. This question often is of critical importance in determining the success of an appeal. Generally speaking, the closer a court scrutinizes an agency decision, the more likely it will reverse that decision.

Despite using broad language, the Court in *Elias-Zacarias* did not purport to change the substantial evidence standard of review applicable to BIA fact findings. See Immigration & Nationality Act _ 106(a)(4), 8 U.S.C. _ 1105a(a)(4) (1988). That standard allows the court to reverse only if the findings are not supported by substantial evidence. Although using language suggesting great deference to the agency's factfindings, the Court did not remotely suggest that the courts should rubber-stamp BIA decisions without carefully reviewing the record. That would constitute an abdication of the Judiciary's responsibility under the Constitution. Reviewing courts cannot defer to the Board's fact findings unless supported by substantial evidence, not conjecture or speculation.

In addition, the *legal* interpretations of agencies generally have been subject to more demanding scrutiny by reviewing courts than agency *fact-findings*. This traces back to the Supreme Court's seminal decision in 1803 in *Marbury v. Madison*, 5 U.S. (1 Cranch) 1327, 177 that emphasized that "[i]t is, emphatically, the province and duty of the judicial department to say what the law is." As discussed previously, the Court reviewed the question in *Elias-Zacarias* as a fact finding justifying deferential review, not a legal conclusion requiring more careful scrutiny. (Recall that there was a dispute on this point between Justices Scalia and Stevens.). After *Elias-Zacarias*, the courts must review the record and ensure that the BIA's legal conclusions are consistent with the Refugee Act.

The Supreme Court's discussion about the standard of review will raise recurring arguments in future appeals by asylum applicants to the federal court of appeals. The INS, which often prevails before the BIA, will argue that the Supreme Court in *Elias-Zacarias* made it clear that BIA decisions almost never should be reversed. Attorneys with asylum appeals will emphasize the limits of the decision in this regard.

Disturbing Signals

Although limited to the particular facts before the Court, the *Elias-Zacarias* decision sends some disturbing messages to the lower courts, the agencies that administer and interpret the immigration laws, attorneys representing asylum applicants, and the immigrant community in general.

Plain Meaning Statutory Interpretation. The Supreme Court in *Elias-Zacarias* literally interpreted the Refugee Act of 1980 without regard to the purposes of the statute (particularly the humanitarian purposes behind the refugee provisions), the voluminous legislative history, and the international law that Congress sought to bring the United States into compliance with through passage of the Act. These are all sources that the Court previously looked to in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), in finding that the well-founded fear of persecution standard for asylum was to be more leniently interpreted than the INS advocated. Although the Supreme Court in *Elias-Zacarias* in no way suggested that it was disturbing the holding of *Cardoza-Fonseca* in any way, the Court's approach to the Refugee Act does seem to be somewhat inconsistent with it.

In *Elias-Zacarias*, the plain meaning approach allowed the Court to ignore the humanitarian purposes behind Congress's passage of the Refugee Act of 1980. The Act also was designed to bring the United States into compliance with its obligations under international law, specifically a treaty that the United States agreed to in 1967, the United Nations Protocol Relating to the Status of Refugees. International law suggests that the motives of the perpetrators of persecution should be liberally interpreted for civilians fleeing civil wars. The Court did not consider this international law in deciding the case.

Justice Scalia's "plain meaning" approach to the interpretation of statutes is in some ways simple: look to the text of the statute and no further. The approach, however, is problematic when applied to the Refugee Act. Besides the rich legislative history and the Refugee Act's international law roots, the statute is filled with delegations of discretion to the Attorney General. Absent looking beyond the language of the statute, the immigration laws as a whole appear to afford a free reign to the INS to do as it pleases. That reading, however, is contrary to clear congressional intent.

More generally, the Supreme Court has been more likely in recent years to look only at the plain meaning language of a statute in its interpretation. This is referred to as the plain meaning approach to statutory interpretation. One justification for the plain meaning approach is that legislative history, such as reports of congressional committees and debates on the floor of Congress, may be manipulated to say things designed to influence the courts to interpret a statute in a way not intended by some members of Congress who voted for the law. Supreme Court Justices appointed by Presidents Reagan and Bush generally adhere to the plain meaning approach and it currently appears to be the dominant mode for interpreting all of the laws passed by Congress. The Court's plain meaning interpretation in *Elias-Zacarias* thus appears to be consistent with larger developments in the Court's jurisprudence.

A few Justices, such as Justice Stevens in *Elias-Zacarias*, oppose the plain meaning approach and claim that the Court should consider all trustworthy sources in interpreting language of a statute. Although some legislative history may be untrustworthy, not all of it is. More importantly, these Justices claim that the meaning of the language in many laws passed by Congress is far from plain but can only be interpreted in light of the particular statute's purposes and legislative history.

The proper method for interpreting the laws passed by Congress probably will be an on-going issue of dispute on the Supreme Court.

Deference to Administrative Agencies. In each of five cases decided in 1991 and 1992, the Supreme Court accepted the Executive Branch's argument, and rejected the immigrant's claim for relief. Because the Court does not accept many cases for review, for the Court to decide five immigration cases in so short a period is unprecedented. From the five decisions, it is apparent that this Supreme Court is ready and willing to defer to the Executive Branch's judgment in the immigration realm.

The opinion in *Elias-Zacarias* includes language that, if taken literally, suggests that the lower courts should almost never disturb the asylum decisions of the Board of Immigration Appeals. The INS may play that language up for all its is worth. Indeed, apparently buoyed by the Court's series of immigration decisions, the Executive Branch embarked on an extraordinary program in which asylum-seekers fleeing Haiti were apprehended on the open seas, detained in Cuba, and returned to Haiti. Similarly, in the few months since the Court's decision in *Elias-Zacarias*, the lower courts already appear more inclined to defer to the BIA's decisions.

In endorsing deference to the BIA, the Court ignored the frequent accusations by many observers that the Executive Branch appears biased in its treatment of asylum applicants. For example, while the Executive Branch traditionally has classified those who flee Haiti as "economic refugees" ineligible for relief, similarly situated persons from Cuba often are immediately treated as "political refugees" eligible for asylum. United States foreign policy may explain some of the disparate treatment. While Cuba, with its communist government traditionally has been classified as an enemy of the United States, Haiti generally has been treated as a friendly nation. The appearance of bias in BIA decisions counsels against deference to those decisions and militates in favor of careful judicial review.

The need for careful judicial review is particularly apparent in light of the fact that an asylum-applicant's life and liberty is at stake in an asylum case. If the applicant loses because of an error by the immigration court or the BIA, he or she may be deported to a country to face persecution or, bluntly put, torture, imprisonment, or death. Courts must review BIA decisions to minimize the chance of errors with such harmful and horrible consequences.

Once again, the Court's emphasis on deference in *INS v. Elias-Zacarias* is consistent with larger trends in the Court's decisions. The Court appears today to not want to disturb the decisions of administrative agencies in the Executive Branch, which are viewed by some as the policy experts. In addition, if people do not agree with agency decisions, they can use the democratic process and elect another President who will appoint better administrators. Of course, this is easier said than done. Most people, it appears, do not vote for a President based on who the candidate will appoint to head various agencies, particularly an agency such as the INS with which most registered voters have few dealings. Moreover, unless naturalized, immigrants do not have the right to vote. Asylum applicants obviously cannot vote for a candidate for President who will appoint more sympathetic or fair members to the Board of Immigration Appeals or the INS.

The Supreme Court did not make any distinctions like this in its decision in *INS v. Elias-Zacarias*. To the Court, all agency decisions—whether it be the rates that interstate truckers may charge or whether an applicant fearing political persecution is entitled to asylum—are entitled to deference and rarely should be reversed.

Conclusion

In terms of asylum law, *Elias-Zacarias* in reality tells us very little. The only true holding of the case is that Jairo Elias-Zacarias failed to provide enough evidence establishing a "well-founded fear of persecution on account of . . . political opinion." Although the Court suggests some disturbing answers to a number of questions, it nonetheless leaves those questions unanswered. The Court emphasized the narrow question before it and expressly declined to decide anything any further. Nonetheless, the dicta in the Court's decision undoubtedly will result in considerable litigation and argument in future asylum cases.

Reading between the lines, the Supreme Court in *Elias-Zacarias* seems willing to read the asylum provisions of the Refugee Act like all other statutes in a plain meaning fashion and to defer to the judgments of the INS and the BIA, just as it generally defers to the decisions of most other administrative agencies. In the end, this Court does not seem particularly sympathetic to the life and liberty interests of immigrants who have fled violence in their homelands. □

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Does entrapment decision set new rule or affirm settled law?

In a five to four decision, the Supreme Court earlier this year reversed the conviction of a Nebraska farmer who ordered child pornography after federal government agents had made him the target for over two years of numerous government mailings designed to encourage him to violate federal law. As a result of the Court's conclusion that Keith Jacobson was entrapped as a matter of law, it reversed his conviction. The decision appears to be based on interpretation of federal law, rather than upon constitutional principles. A majority of the Court claims that it is merely implementing a long settled and narrow legal standard regarding entrapment and denies the assertion of the dissenters that the decision changed the entrapment doctrine or announced any new rule.

Facts of the Case

A police search in 1984 of a California bookstore disclosed Keith Jacobson's name on the store mailing list, which indicated that a few months earlier Jacobson had ordered two magazines that contained photographs of nude adolescent boys as well as a brochure listing other stores that sold sexually explicit magazines. At the time Jacobson ordered these magazines, sale or possession of them was legal. Postal inspectors and agents of the customs service initiated undercover operations which eventually led to Jacobson's ordering child pornography material in 1987.

Jacobson, a 57-year-old resident of Newman Grove, Nebraska, lives on a farm, supports his elderly parents, was a decorated veteran of the Korean War, and had no prior criminal record. Jacobson was charged in federal district court and convicted of one count of receiving through the mail sexually explicit material depicting a minor, in violation of 18 U.S.C. 2252(a)(2), and sentenced to two years' probation and 250 hours community service. Jacobson appealed his conviction to the United States Court of

Appeals for the Eighth Circuit, which initially reversed his conviction. *United States v. Jacobson*, 893 F.2d 999 (8th Cir. 1990). Subsequently, the court of appeals reheard the appeal *en banc*, vacated the panel's decision, and affirmed the conviction. *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990). The United States Supreme Court granted certiorari on the question of whether the facts of this case demonstrated that Jacobson had been entrapped as a matter of law and therefore should have been acquitted.

The Postal Inspection Service began its undercover operation in January 1985, by sending Jacobson a letter from a fictitious organization called the American Hedonist Society (AHS) as well as a membership application that included a survey on sexual attitudes. Jacobson applied for membership in this society, paid the $4 membership fee, and noted in response to a question on the survey that he enjoyed material on pre-teen sex. The Postal Inspector then responded by sending Jacobson a letter from another fictitious organization, Midland Data Research (MDR). MDR was described as a firm seeking to hear from people who are interested in sexual matters involving youths. Jacobson promptly replied by writing on the bottom of the MDR letter: "Please feel free to send me more information. I am interested in teenage sexuality. Please keep my name confidential." This response caused the Postal Inspector to send a letter from another bogus organization, the Heartland Institute for a New Tomorrow (HINT), to which Jacobson replied.

The Customs Service learned from the Postal Inspection Service of Jacobson's purchase of books from the San Francisco bookstore and his declared preference for material on pre-teen sex. Customs then joined an investigation of Jacobson and in March of 1987 sent him a brochure from a fictitious Canadian company called Produit Outaouais. The brochure was patterned after genuine child pornography brochures and advertised photographs of "young boys in sex action fun." Jacobson ordered photographs from Produit Outaouais and sent a check and accompanying note, but no photographs were delivered from this company.

The same month Jacobson answered a letter from the Far Eastern Trading Company, Ltd., another front for the Postal Inspection Service's undercover operation, which indicated that its materials involved child pornography. In response to Jacobson's request for more information about Far Eastern, in May 1987, the Postal Inspector sent him a catalogue offering child pornography in the form of video tapes and magazines. The catalogues were assembled from child pornography seized in other investigations. Petitioner ordered a magazine entitled Boys Who Love Boys, a Danish publication described as follows: "eleven year old and fourteen year old boys get it on in every way possible—oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Boys Who Love Boys was the subject of a controlled delivery that resulted in Jacobson's arrest on June 16, 1987.

In his defense, Jacobson asserted that he had been entrapped as a matter of law because there was no evidence that he was predisposed to commit the charged offence. He also argued that the length and nature of the government's investigation of him were outrageous and should bar his conviction. He asserted that the government may not properly direct an undercover investigation toward a person unless it has reason to suspect the person of illegal conduct.

The initial appellate court decision reversing Jacobson's conviction held that "reasonable suspicion based on articulable facts is a threshold limitation on the authority of government agents to target an individual for an undercover sting operation." Upon rehearing, the appellate court concluded that Jacobson did not have a constitutional right to be free from investigation, so that the initiation of the investigation did not violate his right to due process.

The appellate court concluded that the government did not need to have reasonable suspicion before beginning an investigation of Jacobson and further found that the government conduct was not outrageous, because the government simply mailed surveys, letters, and catalogues to a man who voluntary responded to them. The Eighth Circuit rejected Jacobson's claim that he had been entrapped as a matter of law, holding that the jury was justified in finding Jacobson to be predisposed to committing the crime and that the postal inspectors merely "provided [him] the opportunities to purchase child pornography and renewed their efforts from time to time as [Jacobson] responded to their solicitations."

One of the dissenting opinions in the court of appeals criticized the government action in this case as follows: "Had the postal service left Jacobson alone, he would have, on the basis of his past life, continued to be a law-abiding man, caring for his parents, farming his land, and minding his own business. Now he stands disgraced in his home and his community with no visible gain to the Postal Service in the important fight against the sexual exploitation of children." 916 F.2d at 471 (Heaney, J. dissenting).

Undercover Operations

Federal and state law enforcement officials make substantial use of undercover operations in order to detect persons who are involved in the commission of crimes. Most of these operations relate to so called "victimless" crimes, in which no individual is likely to complain to the police of a violation of the law. The most common crimes for which undercover operations are essential relate to illegal sales of drugs and official corruption.

Such types of crimes rarely can be discovered and prosecuted except through undercover operations; because this society views the suppression of illegal drug trade and the achievement of honest government as substantial public goals, a great deal of public money is spent every year to uncover and prosecute such crimes. Undercover operations result in tens of thousands of criminal charges in the United States every year. Such operations have in recent years included several celebrated cases, such as the drug related charges against auto maker John Z. Delorean and Washington's mayor Marion Barry, and the Operation Abscam cases which resulted in the conviction of several members of Congress for receiving or seeking bribes to influence their official action.

Congress has decided to combat child pornography by making its production and distribution illegal, and by making it illegal to receive it. Rarely will government investigators know who is receiving such material unless it engages in an undercover operation.

Entrapment Defined

The government in an undercover operation may well provide an opportunity for a person to commit a crime. What the government can not do is to "originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute." *U.S. v. Jacobson*, 60 U.S. Law Week at 4309. This is the principle of entrapment, which, if shown, constitutes a defense to a criminal charge. Claims of entrapment are not made frequently and do not succeed often because entrapment is recognized as "a relatively limited defense." *United States v. Russell*, 411 U.S. 423, 435 (1973).

A valid entrapment defense requires proof of two related elements: government inducement of the crime, and a lack of predisposition of the part of the defendant to engage in the criminal conduct. *Mathews v. United States*, 485 U.S. 58, 62-63 (1988). Entrapment is not shown merely by demonstrating that government agents afforded the person the opportunity or facilities to commit a crime, but rather requires that government conduct created "a substantial risk that an offense would be committed by a person other than one ready to commit it." *United States v. Johnson*, 872 F.2d 612, 620 (5th Cir. 1989). Even if the government engaged in conduct constituting inducement, a defendant does not show entrapment as a matter of law if "criminal conduct was due to his own readiness and not to the persuasion of government agents." *United States v. Sherman*, 356 U.S. 369, 376-77 (1958).

Government officials initially learned about Keith Jacobson as a result of his purchasing materials lawfully from a bookstore in California. Because of the nature of the materials he purchased, the postal inspectors who had obtained his name made many contacts by mail with Mr. Jacobson. At no point did government officials contact him in person or over the telephone. Although Keith Jacobson might never have ordered child pornography or otherwise come to posses it absent communications from the government, it is clear that Keith Jacobson voluntarily chose to respond to almost every one of the contacts from the government over a two year period. As suggested by the brief of the United States, "petitioner could have rid himself of any of the undercover communications at any time he chose with no more effort than a trip to the trash can."

Before the Supreme Court, Jacobson's attorney argued three main points: 1) the defense of entrapment requires proof of government inducement of the crime and a lack of predisposition on the part of the defendant to engage in the criminal conduct; 2) predisposition is not proved by showing the defendant's desire to look at child pornography; rather, it must be shown that the defendant was predisposed to obtain such material through the mail. The decision to make Jacobson a focus of an undercover operation violated guidelines established by postal authorities and the Department of Justice; and 3) government inducement to commit a crime was shown in this case because Jacobson was not, absent the government action, ready to commit the crime.

Arguing for the United States, the Solicitor General countered with the following points: 1) Jacobson was not entrapped as a matter of law as a result of the government's investigation; 2) this case does not show that overbearing government inducement caused an innocent person to break the law; and 3) the investigation of Jacobson did not violate internal guidelines of the government regulating undercover investigations; even if the guidelines were violated, that would not demonstrate entrapment as a matter of law.

The Court's Decision

Justice White, joined by four other Justices, reversed Jacobson's conviction, holding that "as a matter of law [the government] failed to establish the petitioner was independently predisposed to commit the crime for which he was arrested ...." 60 U.S. Law Week at 4308. The Court recognized the evil of child pornography, the difficulty that law enforcement has in combatting it, and the appropriateness and necessity of using undercover agents to enforce the law. Neither side in the case contested the fact that the government had induced Jacobson to commit the crime. The sole issue was whether the government met its burden of proving that Jacobson was predisposed to violate the law. According to Justice White, the government was required to prove beyond a reasonable doubt Jacobson's predisposition "prior to first being approached by government agents." *Id.* at 4309. Justice White asserted that this standard has been applied by federal courts for 60 years and disputed the dissent's claim that this standard is an innovation in entrapment law.

According to the majority, although Jacobson was predisposed to violate the law when he finally ordered the child pornography in May 1987, the government was responsible for creating that predisposition as a result of the more than two years of repeated mailings and communications from government agents and fictitious organizations. Justice White referred at length to matters that relate to freedom of speech and communication. He pointed out that the initial information about Jacobson came from his going to a book store and purchasing legal publications and that several of the mailings to him discussed individual rights or referred to sexual freedom, freedom of choice, and censorship.

Accordingly, the Court found insufficient proof that Jacobson would have violated the law absent the government encouragement to him to do so and concluded that the conviction should be reversed because Jacobson was "an otherwise law abiding citizen who if left to his own devices, likely would never have run afoul of the law ...." *Id.* at 4311.

The Dissent

Joined by three other justices, Justice O'Connor wrote the dissenting opinion. She stressed that Jacobson was twice offered the opportunity to buy child pornography through the mail and, in both instances, placed his orders. She found no evidence that the government had coaxed, threatened, or persuaded him to violate the law. Further, she noted that because he never had been contacted face-to-face, the pressure to submit to government persuasion was insubstantial. Justice O'Connor concluded that the jury had been reasonable in inferring that Jacobson was predisposed to commit the crime of possessing child pornography and claimed that the majority opinion "introduced a new requirement that government sting operations have reasonable suspicion of illegal activity before contacting a suspect." *Id.* at 4311.

The dissent criticized the Court majority for, in her view, failing to use the proper standard on appeal, that of viewing evidence in the light most favorable to the government and of drawing all reasonable inferences in the government's favor. In Justice O'Connor's view, "[i]t was surely reasonable for the jury to infer that Mr. Jacobson was predisposed beyond a reasonable doubt, even if other inferences from the evidence were also possible." *Id.* at 4312.

The Decision's Significance

Obviously, the decision is of significance to Mr. Jacobson; he no longer has a criminal conviction and he is not required to serve probation or provide community service. His reputation in his community is certainly harmed and his sexual orientation as a gay man, which he had never communicated to the people of his community prior to his arrest, is now well known.

Federal courts will be required in coming years to interpret the meaning and scope of the *Jacobson* decision in future cases in which entrapment is raised as a defense. Because the Supreme Court never spoke of due process or any other constitutional provision, it may well be that the *Jacobson* decision will only affect federal courts.

Nothing in the *Jacobson* decision will affect the ability of government agents to engage in undercover operations, although it is possible that some of those operations may not lead to criminal convictions. In the overwhelming bulk of cases, a defendant who willingly violates the law after the government provides an opportunity to do so will be found to be predisposed to break the law despite the absence of any proof that the defendant ever previously violated that law or expressed a willingness to do so. It appears that Justice O'Connor, in her dissent, has engaged in a common practice of dissenters of exaggerating the effect of a decision with which she did not agree. It is of course possible that her dissent is correct in viewing *Jacobson* as having modified prior law regarding entrapment. If that is true, entrapment will nevertheless remain a difficult defense to prove although its scope may have been slightly broadened by the court's decision. □

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Challenge

(continued from page 3)

the development of positive self-esteem in African American students. She cites the objectives of the Indianapolis Public Schools' multicultural education program as an example of approaches that respond to a need and should be replicated elsewhere.

What is the "American Experience?" Daniel Ramirez's colorful description of the diverse, expanding Hispanic community in the United States (focusing on the Chicano) is interspersed among his analysis of the intersection between American law, with its roots in Anglo-Saxon tradition, and Chicano culture and history. This blending of people and history offers a striking commentary on the constant conflict between Hispanic and non-Hispanic cultures and the failure of laws and political and educational policies to mitigate these conflicts.

The strained relationship between the Native American people and non-Native Americans offers an illustration of the failure of law to protect the rights of groups from the interests of the majority. Frank Pommersheim explores of the legal origins of tribal sovereignty within the United States Consitution and the complex issues of rights in direct conflict. He examines difference, urging the eradication of the stigma of difference and the nourishing of the pride of difference. Professor Pommersheim calls for an increased understanding of the history of Native Americans within the elementary and secondary school curriculum. In addition, he asks for individual action to support the resolution of long-standing legal conflicts.

I am grateful to these authors for their presentations at the seminar as well as their efforts in preparing these articles. These articles question foundational thinking and challenge us to contribute in the redesigning of our national identity.

I also wish to express my thanks to those educators who contributed the classroom activities contained in this issue. Their efforts illustrate how law-related education can illuminate some of the hidden and shadowy areas of our nation's past while helping students address diversity in a thoughtful and insightful manner.

We hope that this issue of *Update* helps to inform discussions about multicultural issues in schools and the ways that law-related education offers a framework for further examination of the critical questions of where we have been, where we are and where we are going. □

George S. Perry, Jr. is Guest Editor of this issue and is Assistant Staff Director, ABA Special Committee on Youth Education for Citizenship.

Indian Country

(continued from page 19)

going on. But we don't particularly want to listen. Just consider your own everyday conversations and you'll understand what I mean. When we say "I understand what you're saying" or "Sure, I know where you're coming from" we are actually communicating the exact opposite because we're not bothering to listen to that person.

Listening—and Understanding

For Indians, being listened to and really being understood are extremely important. We have to keep in mind that they are often coming from a very different place than the place that we're in. It is essential to know where they're coming from historically, culturally and socially.

What do they have to bring to this process? For example, Native Americans have a very different view of history, a very different view of the meaning of the land. The land is not just something to be exploited for profit. Many Indian people regard the land as sacred. Listening is important, as is its corollary, to learn. Non-Indians, and non-Indian educators in particular, must be committed to learning. Sometimes as adults, as busy people, it's hard to commit ourselves to learning this. But, on another level, it's not understandable or acceptable because people—if they really are serious—must commit themselves.

My last suggestion is to act. It is not enough simply to gain knowledge; you have to be willing to act on it as well, whether in your family, your community, your church, or your workplace. You must be willing to talk about these issues. Because there is a certain amount of risk in talking about issues that are unpleasant or unpopular, many times we just let it go by. For Indian people and for their future—for the future of all of us, really—we can't let it go by.

From discussions with my friends in Indian country, I sense that that's what they want—they want to *see*. Why? It is because Indian people are very good at watching. They have heard much over the years, many words spoken both privately and publicly by those who profess to be committed to their issues. For Indian people, actions are much more important than words, and they watch very carefully what people are actually doing.

It is incumbent upon us, if we are committed to justice and to righting the wrongs of history, to act. Not to act recklessly or heedlessly, but to act in concert with Indian people in a relationship that acknowledges differences and views them as worthy of honor and respect. □

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Religion and Race

(continued from page 7)

Education, the Supreme Court has focused on using equal protection law to justify school integration. Courts have used color-conscious pupil assignments to achieve integration, but these measures have been interim ones limited to rectifying past instances of intentional discrimination. The lodestar of integrationism has been a colorblind ideal, which renders race or ethnicity irrelevant because children have shared a common school experience. Often implemented in ways that reflect a preference for white, middle-class values, integration initiatives have been linked to assimilation of racial and ethnic minorities to dominant mores.

Now, the Supreme Court is reconsidering the utility of race-conscious pupil assignments. Recently, the Court has suggested that long-running desegregation lawsuits may be brought to an end. In part, the Court's position could be nothing more than a concession to the changing demographics of urban school districts. White flight to the suburbs has left many core city school systems with predominantly minority student bodies and few options for meaningful desegregation. Moreover, the Court's support for desegregation as an educational remedy may have waned as educators continue to debate its utility in improving academic achievement and race relations.

The Court's Rationale

Whatever the *realpolitik* behind its position, the Court's stated rationale for terminating desegregation cases, even if one-race schools result, is highly revealing. The Court has suggested in *Board of Education of Oklahoma City Public Schools v. Dowell* and *Freeman v. Pitts* that after a substantial period of court-ordered desegregation, the reappearance of one-race schools can be attributed to private decisionmaking and economics. Corrective justice has been done, and people should be free to decide on their own whether to live in racially isolated or integrated neighborhoods, constrained only by personal finances. The State can ignore resegregation of the schools under a colorblind policy because race is appropriately privatized now. Here, then, the Court's deference to private preferences undercuts the schools' role in promoting integration without substituting an alternative public vision of positive racial and ethnic relations.

Race, Ethnicity and the Curriculum

A similar battle is being waged over the role of race and ethnicity in the school curriculum. The Department of Education has pressed for educational excellence through a common curriculum that emphasizes academic skills. Higher standards, longer school hours, and stiffer discipline are deemed key to achievement. This approach relies on purportedly neutral, meritocratic principles that benefit all students, regardless of race or ethnicity, by focusing on shared technical objectives rather than personal differences.

Advocates of multicultural education counter that excellence can not be achieved by ignoring race and ethnicity. Rather, these characteristics must be addressed directly in the public school curriculum to maximize achievement, especially for minority students, and to promote racial tolerance and understanding. For these reformers, a purportedly colorblind, classical education is simply the watchword for instructional practices that privilege already advantaged racial and ethnic groups by adopting their values as universal and objective, rather than relative and culture-bound. In these advocates' view, only a color-conscious, multicultural curriculum can yield both educational equity and excellence.

The educational choice movement represents the purest form of privatization. This movement seeks to empower parents to foster their private values, by giving them the financial leverage to choose alternatives to the traditional public school. Armed with state-supplied vouchers, parents can select educational institutions that reinforce their religion, language, and cultural heritage, for example. Voucher proponents do not mourn the passing of the common school that draws together children from all walks of life. Such schools should survive only if parents are willing to spend their vouchers on them. Thus, the values of school socialization are wholly privatized. If racial or ethnic segregation results, the key inquiry is whether the separation is freely chosen, the same approach adopted by the Supreme Court in *Dowell* and *Pitts*.

Tolerance or Oppression?

Clearly, it is dangerous to draw overly simplistic parallels between religious neutrality and colorblindness when addressing concerns about pluralism in the schools. In the area of religion, the Constitution has expressly embraced pluralism by requiring neutrality. In the area of race, however, the Supreme Court has preferred assimilation through integration and socialization to a colorblind ideal. Race-consciousness has been considered an interim measure to rectify a caste system, rather than a device to foster racial and ethnic pluralism. Still, racial and ethnic differences seem remarkably resilient in the face of the Court's reform initiatives. Given the vitality of diverse racial and ethnic identities, the pressing question for educators is whether the invocation of colorblind, meritocratic principles will be perceived as an act of tolerance that permits pluralism to flourish or an act of oppression that denies pluralism's very existence.

Given the rapidly changing demographics of school districts, the answer to this question can not be left to the flip of a coin. My own sense is that no single or simple answer can be given. Rather, school administrators and teachers working closely with parents, students, and community representatives must forge innovative solutions to the role of race and ethnicity in the schools. School personnel can not await panaceas and pronouncements from on high. Instead, battle-weary and underfunded educators must struggle to build a provisional consensus about the significance of race and ethnicity, even as national leaders retreat from this enterprise into the rhetoric of privatization.

Contrary to Wills' assertion, then, the battle over what to teach is not over because policymakers, educators, parents, students, and community representatives understand our country's proud tradition of pluralism differently. In the area of religion, there is disagreement about the scope of the State's obligation to promote tolerance through a restrained neutrality. In the area of race, there is argument about the need for color-conscious affirmations of diversity, rather than colorblind impartiality. Perhaps the peculiarly American phenomenon that Wills overlooks is the principled consensus on non-discrimination and the perpetual political fight over how to achieve it in a dynamic, pluralistic society with limited government.

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My Children

(continued from page 11)

tion. Dr. Geneva Gay, professor of education at the University of Washington in Seattle, says that what we must understand that many of the instructional procedures used by students stem from a set of cultural values, orientations and perceptions that differ radically from those of people of color. (Notice that I did not say "minority." I do not like that word. I said people of color.) We can't continue to view a student's home environment or social status as an excuse for poor achievement. We must seek, instead, to understand the real importance of the classroom environment and our own instructional focus and get on with the business of creating classroom environments and school learning projects that promote high esteem.

Problems develop between educators and African American students and other students of color on issues of cultural values, the expectations of the students and what are considered the normal procedures of teaching and learning. When we don't know anything about the culture of our students, what we do is impose our own values on them, values which, in many cases, differ radically from those of the students. Because they don't know what else to do, teachers often thrust this on students and that's where the difficulties arise.

Too many of us—and this includes some African American educators who don't know from whence they came—are still unaware of the areas of conflict between the culture of the schools and that of students raised in cultures other than white. This may cause us to misinterpret the behavior of these students and classify them as discipline problems. This occurs because the teacher does not understand the culture of that child.

A Self-Fulfilling Prophecy

Nor do we as teachers fully understand that negative attitudes toward our culture can affect our own instructional behavior and the academic performance of our students. Some teachers form opinions about the academic abilities of children of color, particularly African American students, based on the problems these students experience with the procedures of teaching and learning. A self-fulfilling prophecy is set in motion as teachers expect these students to fail regardless of their academic potential. Unconsciously, they adjust their own behavior in ways that will fulfill their expectations.

In 1954, Abraham Maslow proposed a hierarchy of human needs. According to Maslow, basic needs and psychological needs must be satisfied—needs such as food, water, safety, affection and self-esteem—before a person is able to progress to the third level.

This is where learning and the need to fulfill one's own potential occurs. Maslow further said that failure to attain a feeling of basic security, social acceptance, or self-esteem can produce pathological discomfort and maladjustment that may be almost as debilitating as physical starvation. If we subscribe to Maslow's thinking, we must face the fact that as educators we are as much in the business of mental health as we are in the business of instruction.

What Indianapolis is Doing

At this point, I'd like to provide a bit of background about our program in the Indianapolis Public Schools (IPS). We are the largest urban school system in Indiana, with about 48,000 students and 85 school sites. Fifty-two percent of our students are African American; .08% are Latino. In 1979, before the school commissioners approved the policy on the teaching and learning of African American history, in conjunction with this policy, an ongoing plan was developed to address the following issues:

1) the deliberate omission, distortion and suppression of information about African people, their culture, and their contributions to the development of world civilization;

2) the low self-esteem and lack of motivation among our children;

3) the resistance of educators to examining what they had been taught about the history of the world and why it was taught to them this way; and

4) the resistance of educators to trying different teaching techniques and explore ways to combine the cultural orientation of the child with the cultural norms and instructional strategies of the school. In 1987, IPS funded and staffed the Office of African American History and Multicultural Education. We are also developing a museum of African American history, to be located in the gym of one of our junior high schools.

The obstacles to the fulfillment of this program are great. First, the public schools are designed to uphold and reinforce the political, cultural, and intellectual superiority of the European value system. Challenges to the European-controlled knowledge base also means confronting the natural order of things. A kindergarten through grade 12 curriculum was developed, piloted and distributed, and a comprehensive staff development plan designed and implemented. IPS has received much recognition because of our efforts to move educators to the point where they feel comfortable with instilling pride and self-respect in all students. We also try to move them to the point where they can recognize each child as a unique and productive individual who brings to the classroom their own culture, their own behavior style, and their own needs for acceptance and positive self-esteem.

I will end with a poem, since I began with one. It was written some years ago by an anonymous poet and goes like this:

They are in our classroom.
But they did not choose to be there.
They didn't choose this school and they
didn't choose us as their teachers.
They didn't select their mother's income,
their father's absence or their living
conditions.
They didn't choose to confound our pet
curriculum or pet teaching prescriptions.
They didn't choose to value different
things than us.
Or to speak in a different, albeit more
colorful, idiom.
They just didn't choose.
They can't smile nicely when their world
tells them to feel anger.
Nor can they frown away warmth and
fair play.
For their masks are not like ours.
They could never comprehend the gap
that separates their mercurial moods
from our pale, practiced rightness.
They didn't decide one day to shape their
noses, their brows or their mouths into
forms that trigger our discomfort and
disdain.
They don't know that they won't learn if
we don't think they can learn.
Or that our eyes and voices limit their
circle of friends.
They don't realize how much their future
depends on us.
They just don't know.

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Ships in the Night

(continued from page 15)

side, delinquency and criminality. The two most ubiquitous agents of superimposed American law in the Latino community are the school and the police, both of which evidence a mixed record when it comes to delivering the American dream.

Reinforcing Separation

The natural tendency of marginalized Mexicans to seek refuge and anonymity within segregated barrios and colonias was happily reinforced by local political and economic elites, who replicated and strengthened the segregation by placing inferior schools within the barrios. Local-based funding policies assured the inequitable distribution of resources, even to this day. My parents attended a one-room schoolhouse in the Eden Gardens *colonia* of Del Mar, California, until the eighth grade, and did not meet the children of the more affluent surrounding north San Diego County communities until they all ended up together at San Dieguito High School. (You can imagine what a crosscultural challenge that was.) And still today, in spite of court decisions (like *Serrano*) against inequitable funding, and with the non-majoritarian strictures of Proposition 13-type laws, the chasm remains.

Our newly incorporated city of East Palo Alto is separated from Palo Alto by a meandering creek. It might as well be an ocean. In few other places does the "help" live so close to yet so far from the manor. Paly High students drive to school along the same lanes that take Stanford faculty and staff (many of them their parents) to work. The high school and university campuses straddle El Camino Real.

East Palo Alto students, on the other hand, lost their high school years ago, and are now bused to high schools in the adjoining communities of Redwood City, San Carlos, and, if they're lucky, to Menlo-Atherton, where at least a few ambitious ones, like 17-year-old Perla Paredes, a plucky young Jalisco immigrant who can't take "no" for an answer, can commandeer a college prep education. But still, I cannot help but notice the abandoned Ravenswood High School across the street from where I live. Its boards and tall fences now seek to keep out those who the school system failed to keep in. Ironically, part of the brick building is now used as a temporary "substation" for EPA's beleaguered police force.

Insidious Warfare

On the day that Stanford held its Martin Luther King observance, a 14-year-old was shot to death in East Palo Alto in a shooting spree that seriously wounded three other young students. It was all that Consuelo, my student worker (another of the ambitious Menlo-Atherton students) could talk about when she came to work. She had heard the gunfight the night before, and got the full story when the cops showed up at her high school to shadow and protect some students. But you know, there is a more insidious warfare occurring in our schools. Chicana poet Lorna Dee Cervantes writes about it in her

Poem for the Young White
Man Who Asked Me
How I, An Intelligent,
Well-Bred Person, Could Believe
in the War Between Races

. . . there are snipers in the schools
(I know you don't believe this.
You think this is nothing
but faddish exaggeration. But they
are not shooting at you.)

I'm marked by the color of my skin

The bullets are discrete and designed
to kill slowly

They are aiming at my children
These are facts.
Let me show you my wounds: my
stumbling mind, my
"excuse me" tongue, and this
nagging preoccupation
with the feeling of not being good
enough

The bullets bury deeper than logic.

Thus, educational success becomes the art of dodging bullets, beginning with the linguistic ones that seek to divorce the immigrants' children from their parents through inadequate (if any) bilingual education. If the educators are successful in creating a monolingual English-speaking student, they soon discover, when the inevitable adolescent rebellion (and possible delinquency) surface, that they have undermined the authority of valuable would-be allies, namely immigrant or Spanish-speaking parents whose language, customs and livelihoods have become the objects of their assimilating childrens' scorn. In this schoolyard massacre, Chicano students have not been told that high civilization had experienced centuries of cyclical apogee in this hemisphere before the particular Northern European version docked at Plymouth Rock. The victims have been sprayed with unequivocal myths about New World discoveries, Manifest Destiny and frontier heroism, unaware that among the defenders of the Alamo were Juan Abamillo, Juan Antonio Badill, Gregorio Esparza and his 12-year-old son, Henry, Antonio Fuentes, Juan Seguin and Calba Fugua, all *tejanos*, who, chafing under central Mexican rule, had cast their lot with a provincial rebellion.

Perhaps the most pernicious projectile that was shot my way was at the hands of an overworked 10th grade counselor, who, guided only by my skin color and surname (my academic records were delayed) assigned me to auto shop and elementary math. Always deferential to authority, I did not realize until midsemester the reason why all the challenge had gone out of learning—complex algebraic functions had devolved into simple checkbook balances. Luckily, a visionary father had seen the "tracking" bullet lodge, and helped me to extract it by continuing to push me, as he had done since my childhood, to "go for the top bananas."

With a change of counselor and classes, I began to muscle my way into a college prep curriculum. But years later, when I visited California high schools as a Yale student recruiter, I met the same type of counselor, the one who thought it best not to waste my time with "non-college-bound" (i.e., Chicano and black students). It was then that I realized how potentially mortal and life-determining was the wound I had survived. Unfortunately, the bullets are still flying.

Cervantes' metaphor brings us to the intersection between the law and the community around issues of delinquency and criminality. I recently visited a juvenile court in Salinas, California, to intercede for a bright, but misdirected young man I know. As I surveyed the scene (long-suffering mothers, silent fathers, squirming siblings), I turned to my minister cousin and angrily pined for the day when I would see this many brown faces crammed into the waiting room of the Stanford admissions office. Poet Abelardo Delgado expresses his anger in more lyrical but jarring terms:

Stupid America

stupid america, see that chicano
with a big knife
in his steady hand
he doesn't want to knife you
he wants to sit on a bench
and carve christ figures
but you won't let him
stupid america, hear that chicano
shouting curses on the street
he is a poet
without paper and pencil
and since he cannot write
he will explode
stupid america, remember that chicanito
flunking math and english
he is the picasso
of your western states
but he will die
with one thousand masterpieces
hanging only from his mind[11]

The final point of intersection is closely tied to education: the community's struggle for education rights and reform, for civic and voting rights, and for equitable political representation. It is at this intersection that the community has acceded to, or, rather, adopted the preset rules of the legal game, with tremendous results in the past several years.

Since the late 1960s, the quixotic Reies Lopez Tijerina has been charging against windmills in a quest for the return of Spanish and Mexican-era communal land grants in New Mexico. In more recent years, the more pragmatic but still idealistic Joaquin Avila (among the first Yale Chicano graduates, by the way) has been on a crusade up and down the length of California dismantling municipal, county and school board power structures by successfully challenging at-large elections in court. His successes are real and tangible: Watsonville, San Jose, Los Angeles County. Through his earlier leadership of the Mexican Legal Defense and Education Fund in Texas, that state's Latino population has seen its number of elected officials increase manyfold. MALDEF and other Latino groups are predicting that their vigilance over redistricting efforts will yield a net increase of six Latino congresspersons, from the current 9 to 15. And if the 3 million newly legalized residents who benefited from the amnesty provisions of the 1986 Immigration and Reform Control Act follow through to full naturalization and civic participation, perhaps then the slumbering Latino electoral giant will be roused to play pivotal roles in key states like California, Texas, Florida, New York and Illinois. Perhaps. Until then, that dismal state of affairs, taxation without representation, will continue.

In my state, for example, 51% of the adult Latino population is locked out of meaningful political participation because they are not citizens. These are taxpaying workers, parents, renters, consumers, and homeowners, yet they have no voice in deliberations that will decide their children's educational, economic, and social future, which future, like it or not, is inextricably tied to that of California and the nation.

The question bears asking and begs a response: How long can the democratic polity survive this political apartheid and remain truly democratic? Not much longer, I think. At the very least, we should give serious consideration to enfranchising this community at the local and school board levels.

Much Work Still to be Done

The worthy, laudable and selfless efforts of Avila and other committed leaders and organizations notwithstanding, there remains much pedagogical and empowering work to do. Redistricting efforts are important, but there is no guarantee that in the end they will not merely create opportunities for brown-skinned politicians every bit as power-deluded as the current light-skinned ones. The corruption of power knows no color line. In different circumstances, the Keating "Five" could just as well have been the Keating "Cinco."

It is at city hall and the local school board, in superior and municipal court, in the immigration office and in juvenile hall where this community needs to be enfranchised. But as you go about this task, I would remind you, again, of that bottom line. I believe the pedagogical mission would be made easier if we took a fresh look at the community, and read the data anew. Then, with a dose of humility, and an openness to dialogical education, we would understand that the pueblo's vision of the law as communitarian, relational and functional is a much needed reminder that man and woman were not created for the law, but that the law, like the Sabbath, was created for human beings. Also, the community's ethic of refuge and hospitality would remind us that the law must be met and kissed by mercy if it is to remain truly humane and effective.

* * *

There is one final bonus you will gain as you balance a pedagogical role with a sociological one. Whenever you visit the Latino family, you are guaranteed a generous plate of food. My favorite is *menudo*, the breakfast of champions, the perfect antidote for a hangover, and the almost sacramental meal on New Year's Eve in Aleluya churches. The soup is a blend of Old and New World ingredients: tripe, hominy, chile, oregano, onion and lemons. A gastronomical feast that even gringos enjoy.

As we discard the melting pot as an inadequate metaphor for the American experience and character, perhaps we can substitute *menudo* in its place, or, just as appropriate, the chicken soup that mothers and grandmothers everywhere know how to prepare; the ingredients remain distinguishable one from each other, but combine their medicinal properties to heal the body politic.

The next time you make some chicken soup, however, be sure to toss in a good-sized California chili pepper. It'll make all the difference ....

Notes

1. Bernice Zamora and Jose Antonio Burciaga, *Restless Serpents* (Menlo Park, CA: Diseños Literarios, 1976).
2. Quoted in Leonard Pitt, *The Decline of the Californios. A Social History of the Spanish Speaking Californios, 1846-1890* (Berkeley, CA: University of California Press, 1966).
3. Sociologist Alfredo Mirandé has attempted a theoretical explication of this in *Gringo Justice* (Notre Dame, IN: University of Notre Dame Press, 1987).
4. Gilberto Cardenas, "United States Immigration Policy Toward Mexicans: An Historical Perspective," 2 *Chicano Law Review*, 66-70, 1975, p. 68.
5. Abraham Hoffman, *Unwanted Mexican Americans in the Great Depression: Repatriation Pressures, 1929-1939* (Tucson, AZ: University of Arizona Press, 1974), p. 32.
6. Ernesto Galarza, *Farm Workers and Agri-Business in California, 1947-1960* (Notre Dame, IN: University of Notre Dame Press, 1977), p. 32.
7. Julian Samora, *Los Mojados: The Wetback Story* (Notre Dame, IN: University of Notre Dame Press, 1971), p. 46.
8. Id. at 57.
9. Zamora and Burciaga, supra note 1, at 17.
10. Lorna Dee Cervantes, *Emplumada* (Pittsburgh, PA: University of Pittsburgh Press, 1981).
11. Reprinted in Carlota Cárdenas de Dwyer, ed., *Chicano Voices* (Boston, MA: Houghton Miflin Company, 1975).

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Resources

There are hundreds of resources available to teachers interested in gaining additional insights into our national diversity. The following list was compiled by our authors and through the information contained in the National Law-Related Education Resource Center. It is by no means exhaustive and you will discover some of these resources to be more useful than others. The Resource Center welcomes other materials and program descriptions to expand its database.

African Americans

ben-Jochannan, Yosef, *Africa: Mother of West Civilization*, (Black Classic Press, 1971)

Bennett, Lerone, Jr., *Before the Mayflower*, (Johnson Publ. Inc., 1962)

Bernal, Martin, *Black Athena*, (Rutgers Univ. Press, 1987)

Diop, Cheik Anta, *The African Origin of Civilization*, (Lawrence Hill & Co., 1974)

Davidson, Basil, *The Lost Cities of Africa*, (Atlantic/Little Brown, 1970)

DeGraft-Johnson, J.C., *African Glory*, (George M. Mcleod, 1954)

DuBois, W.E.B., *The Souls of Black Folk*, Signet (New York, 1969) (First published 1903).

DuBois, W.E.B., *The World and Africa*, (International Publ., 1946)

Douglass, Fredrick, *Life and Time of Fredrick Douglass*, (Macmillan Co., 1892)

Hillard, Asa G. III, et al. editors, *Infusion of African and African American Content in the School Curriculum: Proceedings of the First National Conference, October 1989*, Southern Education Foundation Inc., 135 Auburn Avenue, Atlanta, GA 30303

Jackson, John G., *Introduction to African Origin of Civilization*, (Citadel Press, 1970)

Jackson, John G., *Man, God and Civilization*, (Citadel Press, 1972)

James, George G.M., *Stolen Legacy*, (Philosophical Library, 1934)

Kush, Indus Khamit, *What They Never Told You in History Class*, (Luxorr Publications, 1983)

Mac Ritchie, David, *Ancient & Modern Britons* (2 vols.), (Keegan Paul, Trench, 1884)

Massey, Gerald, *Ancient Egypt: The Light of the World*, (Health Research, 1907)

Massey, Gerald, *The Book of the Beginnings*, (2 vols.), (Health Research, 1881)

Rogers, J.A., *From Superman To Man*, (Helga M. Rogers, 1971)

Rogers, J.A., *World's Great Men of Color* (2 vols.), (Helga M. Rogers, 1946)

Van Sertima, Ivan, (ed.) *African Presence in Early Europe*, (Transaction Publishers, 1985)

Van Sertima, Ivan, (ed.) *Great African Thinkers-C.A. Diop*, (Transaction Publishers, 1986)

Volney, Count C.F., *The Ruins of Empires*, (Tastee Pattie Corp., 1802)

Williams, Chancellor, *The Destruction of Black Civilization*, (Third World Press, 1967)

Williams, Juan, *Eyes on the Prize*, (Penguin Books, 1987)

Woodson, Carter G., *Mis-education of the Negro*, (Assoc. Publishers, Inc., 1933)

Woodson, Carter G., *The Negro in Our History*, (Assoc. Publishers Inc., 1922)

Journal of Negro Education, Box 311, Howard University, Washington, D.C. 20059

National Alliance of Black School Educators, 2816 Georgia Ave., NW, Washington, D.C. 20001

Conflict Resolution

Educators for Social Responsibility, 23 Garden St., Cambridge, MA 02138

History

Broken Moon Press, P.O. Box 24585, Seattle, WA 98124-0585 (206) 548-1340

Network of Educators on Central America, 118 22nd St., NW, Washington, DC 20037 (202) 429-0137

Rethinking Columbus, Rethinking Schools, 1001 E. Keefe Ave., Milwaukee, WI 53212 (414) 964-9646

We Dare Defend Our Rights videotape and teachers guide. The Alabama Center for Law and Civic Education, Cumberland Law School, 800 Lakeshore Drive, Birmingham, AL 35229

Latino

ASPIRA Association, Inc., 1112 16th St., NW, Suite 340, Washington, D.C. 20036

Center for Latino Research, DePaul University, 2323 North Seminary Ave., Chicago, IL 60614

Cuban American National Council, Inc., 300 SW 12 Ave., 3rd Floor, Miami, FL 33130

Hispanic Policy Development Project, Inc., 250 Park Ave. South, Suite 5000A, New York, NY 10003

Mexican-American Legal Defense and Educational Fund, 733 15th St., NW, Washington, D.C. 20005

National Council of La Raza, 810 1st St., NE, 3rd Floor, Washington, D.C. 20002

Multicultural Education

Banks, J.A and C.A. McGee Banks, eds., *Multicultural Education: Issues and Perspectives*, Allyn and Bacon, Inc. (Needham, Mass., 1989).

"Whose Culture?" *Educational Leadership*, Dec.1991/Jan.1992 issue, the Journal of the Association for Supervision and Curriculum Development, 1250 N. Pitt St., Alexandria, VA 22314-1403.

NCSTAR (North Carolina Students Teach and Reach), People for the American Way in North Carolina, P.O. Box 27333, Raleigh, NC 27611

Native Americans

Allen, Paula Gunn, Ed., *Spider Woman's Granddaughters* (1989)

Brown, Epes Joseph, *The Spiritual Legacy of the American Indian* (1989)

Cornell, Evan S., *Son of the Morning Star: Custer and the Little Bighorn*, (Harper Collins, 1984)

Crow Dog, Mary and Erdoes, Richard, *Lakota Woman*, (Grove Weidenfeld, 1990)

Deloria, Vine, Jr., *God is Red* (1973)

Deloria, Vine, Jr., & Clifford Lytle, *The Nations Within* (1984)

Erdrich, Louise, *Love Medicine* (1984)

Minow, Martha, *Making All the Difference* (1990)

Neihardt, John, *Black Elk Speaks* (1932)

Pommersheim, Frank, "The Reservation as Place: A South Dakota Essay" 34 *South Dakota Law Review 246* (1989)

Welch, James, *The Indian Lawyer* (1990)

American Indian Institute, P.O. Box 1388, Bozeman, MT 59715

Americans for Indian Opportunity, 3508 Garfield St., NW, Washington, D.C. 20007

Indian Law Resource Center, 601 E St., SE, Washington, D.C. 20003

Indian Treaty Rights, 59 E. Van Buren St., Ste. 2418, Chicago, IL 60605

Indigenous Thought, Committee for American Indian History, 6802 SW 13th St., Gainesville, FL 32608

Indigenous Woman, Indigenous Women's Network, Box 174, Lake Elmo, MN 55042

National Congress of American Indians, 900 Pennsylvania Ave., SE, Washington, D.C. 20003

National Indian Education Association, 1819 H St., NW, Suite 800, Washington, D.C. 20006

Native Nations Magazine, 175 5th Ave., Suite 2245, New York, NY 10010

Northwest Indian Quarterly, 300 Caldwell Hall, Cornell University, Ithaca, NY 14853

Women of All Red Nations (WARN), American Indian Center, 1630 W. Wilson Ave., Chicago, IL 60640

Prejudice Reduction

Facing History and Ourselves National Foundation, Inc., 25 Kennard Rd., Brookline, MA 02146

Teaching Tolerance Magazine, 400 Washington Ave., Montgomery, AL 36104

A World of Difference, Anti-Defamation League of B'nai B'rith, 823 United Nations Plaza, New York, NY 10017

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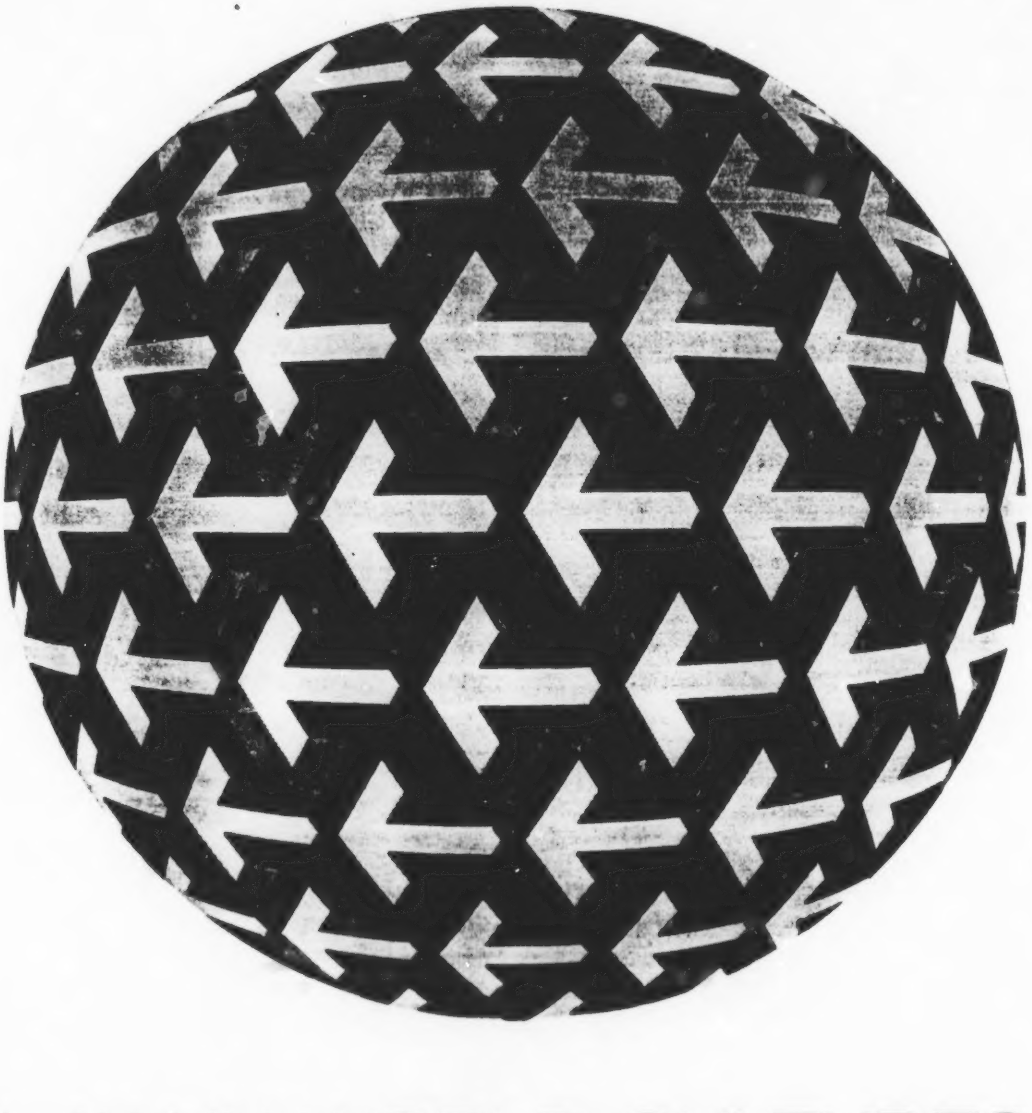

LAW IN WORLD CULTURES

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Opening Statement

In the last issue of this magazine, we explored how issues of diversity in late 20th century America present both challenges and opportunities. This issue builds on some of those same themes, by providing global perspectives on law to help us better understand a diverse world rich in traditions, experiences, and cultures.

The moving spirit that shaped and directed this issue came from its guest editor, Howard Kaplan, ABA/YEFC Assistant Staff Director. Howard's interest in issues relating to law in a world of diverse cultures and traditions can be felt in the pages that follow. I am certain you will appreciate, as I do, the thoughtful contribution this issue makes to bringing clarity and understanding to the complex issues surrounding the role law plays in the diverse corners of our planet.

Readers familiar with Update will also notice our new look. We hope you are impressed by the clean, contemporary and energetic design of the magazine. Most of the changes in this issue are visual, intended to make the magazine more "reader friendly." Over the next few issues, we plan on introducing new features, as well. Let us know what you think of our new design.

Our next issue will be devoted to the 1993 Law Day theme, "Justice for All - All for Justice." It will examine such issues as victim's rights, policing, legal services, and societal attitudes about justice. We hope it will challenge you and your students to reflect critically on the responsibility of all citizens to insure "justice for all" in our society.

Jack Wolowiec

Contents

Volume 16, Number 3
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2 **A Preface to Law in World Cultures**
Howard Kaplan

3 **An Introduction to Legal Traditions Around the World**
Susan Adair Dwyer-Schick

5 **World Studies Through a Comparative Constitutional Prism**
Donald Robinson

8 **Islamic Law in the Modern World**
Gregory C. Kozlowski

12 TEACHING STRATEGY
Legal and Cultural Diversity:
The Challenging Case of India (Courts and Council)
Peggy Mueller

21 **A Criminal Case in the Chinese Courts**
James V. Feinerman

28 **A Constitution for a United Germany: The Basic Law**
Ralf Roedel

34 TEACHING STRATEGY
Nationalism and Rights in the New Europe
Adrian Chan

40 TEACHING STRATEGY
An African Perspective on Human Rights
David Shiman

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2788

A Preface to "Law in World Cultures"

Howard Kaplan

The theme of this issue of *Update* is "Law in World Cultures." Through the prism of law and culture studies, we move beyond the American frontier to examine legal systems and legal traditions from around the world. In extending our "jurisdiction" to world cultures, we especially emphasize how comparative perspectives can help us to better understand the role of law in different societies. A hallmark of effective law-related education is that learning is facilitated by moving from the known to the unknown, or the familiar to the unfamiliar—and back again. In this context, the words of Samuel Butler might serve as a guide: "Though analogy is often misleading, it is the least misleading thing we have." So, in studying "law in world cultures," we must consider both commonalities and differences between our own and other legal cultures.

Through this issue we hope to challenge readers to alter and expand their frames of reference for "law-related education." As you will discover, we have included multiple points of departure in this issue, designed to illuminate our more usual American perspective on law, culture and society. We do not focus, however, on international law, the law governing relations between nations. Rather, we focus on law in "foreign" cultures and societies.

Our approach to the subject of "law in world cultures" is both multidisciplinary and interdisciplinary. We incorporate various disciplines, approaches and subject areas, including comparative law/legal studies/constitutionalism, (legal) anthropology, legal history, cross-cultural studies, and "foreign law." I believe that there are a number of compelling rationales for the inclusion of comparative legal studies in LRE.

First, comparative study of foreign legal cultures is a logical extension of, and complement to, examination of law, legal processes and legal institutions in multicultural American society. World cultures have not developed in vacuums. In fact, they have had intersecting trajectories. This is especially true in the United States, a nation composed of many cultural ties and traditions. For these reasons, comparative study fosters tolerance and understanding of others.

Second, comparative legal studies inform and challenge students by providing them with perspectives on, and insight into, our own society and legal culture. Students learn more about themselves and their society through examination of the rules—and the implicit or explicit values, beliefs, and dispositions expressed by and through them—of peoples in other cultures. This enables them to better understand how laws actually regulate practices and function within our own society, in relation to our own fundamental values and social conditions.

Third, comparative legal studies help promote understanding of "difference," of law as culture. In a 1983 issue of *Intercom* magazine (103), Charlotte Anderson noted, "Law reflects the collective values of a people while directing their individual lives. We gain considerable insight into the foundation as well as the texture of a society through a study of its law."

Fourth, studies of other legal traditions and legal systems help counter ethnocentrism. Is "law" a universal value? How does it translate across cultures?

Fifth, comparative legal studies can enrich students' understanding of the relationship between law, on the one hand, and social continuity and change, on the other. Does the capacity of law as a means of promoting social continuity or as an instrument for effecting social change vary from culture to culture? How?

Finally, comparative legal studies affirms, reinforces, and extends the interdisciplinary and multidisciplinary orientation of law-related education. As legal anthropologist Lawrence Rosen has remarked, "[T]he significance of rules and procedures is seen to reside in their capacity to operate as systems whose constituent features are far more extensive and interrelated than our own disciplinary divisions may embrace" (The *Anthropology of Justice*, p. xiv).

Inside This Issue

Reflecting this issue's multidisciplinary and interdisciplinary approaches, the backgrounds of, and perspectives offered by, our contributors are particularly diverse. Included are the following five essays:

Comparative legal studies scholar Susan Adair Dwyer-Schick offers "An Introduction to Legal Traditions Around the World." She classifies the world's primary legal traditions within various "families" of law and considers how law-related problems can be studied crossculturally.

In "World Studies Through a Comparative Constitutional Prism," political scientist Donald Robinson makes the case for comparative constitutionalism as a means to better understand recent social and political changes around the world. He then examines modern Japan as a comparative case study in the forms and evolution of constitutional government.

Historian Gregory Kozlowski emphasizes convergences between Euro-American and Islamic legal traditions over the past 40 years in "Islamic Law in the Modern World." His essay underscores how laws in all societies must be understood within cultural contexts: "As cultures must constantly adapt themselves to each new generation, so law must change even in those societies which seem totally given over to tradition."

We catch a glimpse of the contemporary Chinese court system at work through the expert eyes of legal scholar James Feinerman. In "A Criminal Case in the Chinese Courts," he also provides an overview of China's modern legal tradition and current court system.

Attorney (Rechtsanwalt) Ralf Roedel shares his knowledge of his country's constitution and considers the impact of reunification and other contemporary developments on German culture, politics and society in "A Constitution for a United Germany: The Basic Law."

Also featured in this issue are three extended teaching strategies on "Law in World Cultures," accompanied by student handouts and essential legal documents:

In "Legal and Cultural Diversity: The Challenging Case of India (Courts and Councils)," Peggy Mueller draws on two audiovisual resources to produce a series of instructional activities designed to give students an opportunity to consider how ancient community and village traditions have influenced legal practice and social codes in contemporary India.

"Nationalism and Rights in the New Europe" includes teaching strategies to help students learn about problems and issues facing contemporary Europe concerning ethnic nationalism, identity, and individual and collective rights—and to compare them with similar issues in the United States.

David Shiman presents "An African Perspective on Human Rights," a comparative instructional activity which challenges students to understand the human rights perspectives in the African Charter on Human and People's Rights and the U.N. Universal Declaration of Human Rights, and to analyze their similarities and differences.

Completing the essays and teaching strategies in this issue are accompanying bibliographies and references, as well as an annotated listing of resource organizations.

Howard Kaplan is Assistant Staff Director, American Bar Association Special Committee on Youth Education for Citizenship.

An Introduction to Legal Traditions Around the World

Susan Adair Dwyer-Schick

Beginning Questions

How should we begin to understand "law around the world"? What questions should we ask first?—What might legal systems look like in different cultures? Is it possible to identify legal constants in different societies? What kinds of cultural, political, and historical differences are associated with significant distinctions among legal systems of societies that we might want to examine?

What is the value of studying different legal systems comparatively? What should be the scope and the purpose of our comparison? Specifically, what legal systems should we include in our comparison? What methodologies are appropriate for that comparison?

One way to start a comparative study is to focus on those problems or disputes which seem to be common to various legal traditions. In this way we concern ourselves with what has sometimes been called "law in action" or "law as a problem-solving mechanism." Such an approach focuses on what is dynamic, rather than static, in a society and its associated legal tradition. Moreover, it offers teachers an opportunity to have students think about "how" and "why" it is that specific social issues or problems are addressed differently in different cultures. For instance, a problem or dispute that one society might resolve through the legal system might be handled by the administrative bureaucracy or religious hierarchy in others.

Susan Adair Dwyer-Shick is Assistant Professor of Legal Studies at Pacific Lutheran University of Tacoma, Washington.

Families of Law

As a way of organizing studies of law "around the world," it is helpful to consider grouping legal traditions within various "families" of law. A "legal tradition" is a set of deeply-rooted, historically-conditioned attitudes about the nature of the law. Fundamentally, the "legal tradition" suggests the role law plays in a particular society and polity, i.e., the proper organization and operation of the legal system and how the law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the law and the legal process to its cultural context. In short, the legal tradition puts a society's legal system into cultural perspective.

Legal traditions have typically been classified according to several different "families." These categories group together legal systems which have important historical and structural commonalities. To help explain these commonalities, we can classify the varieties of legal traditions according to the following "families":

- common law;
- civil law;
- socialist law;
- religious law.

Common-Law Tradition. "Common law" refers to the body of law which derives from usage and custom, or from the judgments and decrees of courts which recognize, interpret, and enforce such usages and customs. In the common-law tradition, "judge-made law" refers to law established by judicial precedent and decisions, rather than law derived from legislature-enacted statutes or administrative regulations. *Stare decisis* (Latin, "to adhere to decided cases") is a policy of common-law courts to ordinarily stand by precedents, unless there is a showing of good cause to rule otherwise. In its specific historical usage, common law originated from the unwritten law of England. Spread by English colonization, common law has become the principal basis of the procedure and the substance of the legal systems for nearly a third of the world's population. In addition to the United Kingdom, other countries within the common-law tradition include Australia, Canada, India, New Zealand, the Republic of Ireland, and, of course, the United States.

Civil-Law Tradition: The "civil-law tradition*" derives from the law of the Roman empire, especially as codified by the Emperor Justinian in the sixth century in the *Corpus Jurus Civilis*. Roman law treatises have a distinctive vocabulary and style, insofar as they codified Roman judicial decisions and the principles of jurisprudence elicited from them. More generally, "civil law" refers to systematic codifications of "statutory law," i.e., laws enacted by legislative bodies under constitutional authority, by prescribed means, and in certain forms. Statutes become the "law of the land," governing conduct within their scope or jurisdiction. Modern civil-law codifications include

(continued on page 50)

In an entirely separate usage, the term "civil law" is also commonly used to distinguish that part of the law concerned with noncriminal matters in common-law jurisdictions, including the United States.

General Douglas MacArthur and Emperor Hirohito at the U.S. Embassy in Tokyo, September 1947. (Photo courtesy U.S. Army/General Douglas MacArthur Memorial.)

World Studies Through a Comparative Constitutional Prism

Donald Robinson

Introduction

This article is divided into two principal parts. The first discusses the importance of understanding democratic developments around the world by comparative studies of constitutions. It includes an overview of the two principal constitutional models of governance, the presidential and the parliamentary. After this brief background discussion of comparative constitutionalism, the article provides a case study in constitutional development, that of Japan during the post-World War II American Occupation.

Constitutional Democracy Around the World

Recent events at home and around the world underline the necessity and value of understanding constitutions comparatively. Abroad, we see the nations of Central and Eastern Europe, having shaken off the Soviet yoke, struggling to establish responsible governments. The challenge of moving from state-managed to free markets and of coping with ancient ethnic hatreds is daunting. Yet, people in that region earnestly desire to set democracy on secure constitutional foundations.

In Latin America, too, the demand for democracy is building, from Argentina and Brazil to Colombia and Venezuela. With so much of the region mired in poverty, progress is uneven, but it is spurred by a strong commitment from leaders in the legal and religious communities, among others.

In Africa, leaders face similar problems, against even greater odds. Yet social forces are building even there in favor of democratic constitutionalism. South African blacks are better organized and have more astute leaders than ever, and whites, under the bite of sanctions, are showing more realism. Meanwhile, in Kenya, Mozambique, Angola and Nigeria, groups that support constitutional government are strengthened by the growing realization in the West that the success of foreign aid programs depends on effective, accountable governance among recipient countries.

We used to think that foreign aid came before reform, because democracy cannot work where people are desperately poor. Donor nations and foundations are beginning to realize, however, that aid given to a corrupt regime never reaches the people. If we cannot help these nations to improve their governance, we cannot help them at all.

Asking Comparative Constitutional Questions

Meanwhile, Americans are also reexamining the structure of our government and beginning to see the value of thinking about constitutional questions through a comparative framework. Since 1986, at least, when the Democrats recaptured control of the United States Senate, our divided national government has been floundering, unable to cope with a lingering recession or spur the economy to greater competitiveness in the international arena. Participation in our elections is shockingly low by world standards and still shrinking, reflecting a loss of popular confidence. At the same time, our judicial processes have become dangerously politicized by quarrels over abortion and environmental protection—so also have the courts of the European Community, particularly those in Germany and Ireland.

To this catalogue of pressing constitutional issues, we need to include the growing presence of trans-national bodies. Did President Bush make proper use of the United Nations in the conduct of the Persian Gulf War in 1991? What should the international community do in a crisis like that in what once was the Federal Republic of Yugoslavia? Can the European Community's court at Brussels provide a venue for those who believe that their own nation's highest courts have failed to treat them justly? What power exists to enforce the decrees of such courts?

(continued on next page)

Donald Robinson is Professor of Government at Smith College, Northampton, MA and is a member of YEFC's Advisory Commission.

Constitutional Models of Governance

There is a tendency among lawyers, and for citizens generally in a culture so dominated by a lawyerly mentality, to assume that constitutionalism boils down to rights and the ability of an independent judiciary to enforce rights. Thus, celebrations of the bicentennial of the Constitution in 1987 often focused on the Bill of Rights, even though the Constitution as ratified in 1789 had no Bill of Rights.

Our experience as a constitutional democracy has taught us—and no one would now dispute it—that rights and independent courts are indeed fundamental to constitutional democracy. We also need to remind ourselves, however, that the first two jobs of constitutional framers are to (1) establish a government to administer the public business (what Locke called the "executive") and (2) provide a representative assembly to make laws (the "legislative"). This order, incidentally, was reversed by the American framers in the text of the Constitution they produced. I do not mean to quarrel with that sense of priority, only to insist that the adm-inistration of the government and the representation of the people are equally fundamental to constitutional democracy.

> **Presidential government... seems to work best where the political culture is relatively consensual.**

There are two models for relating these two functions. Choosing one of these models is the most basic task of constitutional framers. The presidential model separates the branches by dividing the processes by which political leaders are elected, and by prohibiting the same people from serving in both. The parliamentary model fuses them, by requiring the administration (the cabinet) to gain and keep the confidence of a majority of the representatives and, ordinarily, by drawing the top executives from among the representatives.

The presidential model is actually older, having made its debut in the American constitution of 1787. The parliamentary model developed in Britain during the nineteenth century and spread rapidly throughout the Commonwealth and in Europe. It serves well as a means of constitutionalizing monarchies. The models have sometimes been blended, as in France today, under the Fifth Republic. A separately elected president has certain constitutionally-defined powers, such as foreign and security affairs, as well as extraordinary powers to submit national questions to a popular referendum; routine government is committed to a cabinet responsible to parliament.

Presidential governments ordinarily have fixed terms, whereas parliamentary elections are held at the call of the prime minister, or whenever the cabinet loses the confidence of parliament. Political parties are essential to both forms. In parliamentary governments, the leading party, or coalition of leading parties, chooses the government. In presidential governments, the executive and the legislative assembly are separately chosen. Sometimes they come from opposed parties, leading to "divided" government.

The strength of presidential government lies in its openness to fresh departures (e.g., Abraham Lincoln, Franklin Delano Roosevelt, and Ronald Reagan) and in its checks and balances. Its weakness is a tendency to confrontation and stalemate between the branches. In countries other than the United States where it has been tried, particularly in Latin America, it has shown a propensity to lapse into dictatorship. It seems to work best where the political culture is relatively consensual.

Modern Japan as Case Study of Constitutional Government

In studying the forms and evolution of constitutional government, there is no more fascinating comparison for Americans than the Japanese case. Why is this so? For one thing, Japan, at least formally, displays a pure British model of parliamentary democracy. It has no popularly elected chief executive, only a ceremonial monarch, the emperor. Its government is a cabinet, led by a prime minister chosen by the assembly, called the Diet.

What is fascinating for Americans are the special links between the two countries. When Japan was pried loose of its isolation in the mid-19th century, it was an American fleet, led by Commodore Matthew Perry, which delivered the world's ultimatum. Americans had nothing to do with the framing of the Meiji Constitution, promulgated in 1890. It was a purely Japanese product, inspired, to a limited extent, by Prussian and British models. However, Americans had plenty to do with its successor, the 1946 Constitution, developed during the American Occupation. This constitution is still in effect, unamended, nearly a half century later. How was this constitution written? It was, in fact, drafted by a committee of 17 Americans, on assignment from the Supreme Commander, General Douglas MacArthur, during one breathtaking week in early February 1946.

Why such haste? From the time Japan formally surrendered in September 1945, through January 1946, everyone assumed that the Japanese would revise their own constitution. Indeed, the Japanese assumed that minor amendments to the then-existing Meiji Constitution would be enough. In early February, however, MacArthur suddenly lost patience. There seem to have been several reasons for this. One was that he would soon be answerable to a Far Eastern Commission, composed of representatives of many nations, including the Soviet Union. MacArthur was convinced that the emperor should remain on his throne, so that he could bless the changes the Americans had in mind for Japan. Several of America's erstwhile allies were meanwhile insisting that the emperor be hauled into court and tried as a war criminal. MacArthur therefore decided to act quickly, while he was still responsible only to the United States. A second factor was that elections were scheduled for spring 1946 in Japan. MacArthur thought that candidates should commit themselves to governmental reforms, including the new constitution, in that campaign.

The precipitating cause of MacArthur's sudden decision to set his staff to work on the framing process was a "scoop" by one of Japan's leading newspapers: a draft of the reforms being prepared by the Japanese commission. The leaked materials convinced the Americans that they could not expect sufficiently radical reforms from the cautious, tradition-bound men who had been put in charge of revision by the Japanese cabinet.

So, MacArthur put his own people to work—17 of them, only two or three of whom spoke any Japanese, none of whom had deep understanding of the evolution of constitutional traditions in Japan. In fact, the chairman of the group, Colonel Charles Kades, had known nothing at all about Japan when he was first assigned to the Governmental Affairs section of the Occupation. A Harvard-educated lawyer, his military training was in restoring essential civil functions in the wake of a conquering army. He was given six days to complete the draft of a new constitution for Japan.

By happy chance, Colonel Kades is a neighbor of mine now, and we have often talked about this remarkable period in his life. I have been curious about why a committee of Americans, in effect writing on a blank slate, chose to prescribe for Japan a parliamentary government, rather than one of separated powers. He does not remember any discussion of this point among his fellow drafters, several of whom were lawyers like himself. The essential point was that General MacArthur wanted to retain the emperor, for reasons stated earlier, and that seemed to require some form of constitutional monarchy.

One crucial feature of the American doctrine of checks and balances did find its way into the Japanese version: an independent judiciary, with powers of judicial review. Such judicial power is problematic for parliamentary governments. Britain has never adopted it—for one thing, it lacks a written constitution to serve as a standard for judges—and only after World War II have continental European countries begun to incorporate a form of authoritative judicial interpretation of the Constitution. In Japan, the power is clearly set forth in the Constitution, though it has been slow to develop in practice. (We should remember that the power of judicial review was not asserted in the United States until 1803, and not used for a second time until 1857!)

One of the most striking features of the Japanese Constitution to an American eye is its equal-rights clause for women.

One of the most striking features of the Japanese Constitution to an American eye is its equal-rights clause for women. Why did Americans put one there, when we did not have one ourselves—and still don't? Furthermore, how did this happen under a conservative person like General MacArthur?

The prime mover, it seems, was Beate Sirota (now Mrs. Joseph Gordon, of New York City). She was, in 1946, a 22-year-old recent college graduate who had grown up in Tokyo, the child of an Austrian emigre who was a well-known concert pianist. She had been sent to serve with the Occupation because of her fluency in Japanese, even a rarer skill for an American in those days than it is now. She was assigned to Kades's staff, and by him to the subgroup that drafted the clauses on human rights.

Beate Sirota proceeded as any good liberal-arts-educated person would. She went to libraries in Tokyo and looked up the bills of rights in various existing constitutions. In the Scandinavian constitutions, she found clauses guaranteeing equal rights to women. First she persuaded the fellow members of her subgroup, two lawyers, that these clauses would be useful in fostering the democratization of Japanese family and social structure. Together they persuaded a skeptical Colonel Kades that such a clause belonged in a Constitution. The toughest part was getting the Japanese to accept it, but here, it seems, newly enfranchised Japanese women played a crucial role in protecting the innovation against the initial hostility of political leaders.

Reluctantly, the Japanese cabinet agreed that the American draft should be presented to the nation by the emperor as the government's proposal, and so it was done. In fact, despite the awkwardness of the document's language as translated from English into Japanese, Japanese journalists and politicians for many years maintained the fiction that the new Constitution was a Japanese product. It was ratified by the Diet with few dissenting votes, most of them cast by Communist Party members, and it went into effect on May 3, 1947. The anniversary is still celebrated in Japan as Constitution Day.

(continued on page 48)

Law in World Cultures

Islamic Law in the Modern World

Gregory C. Kozlowski

Introduction

All that most Americans know about Islamic law is that thieves lose their hands and adulterers get stoned to death. Those images chill the blood, but convey very little about the nature of Islamic law and the role it plays in the lives of the world's one billion Muslims. By way of comparison, a Muslim watching American television might well assume that anyone charged with murder in this country has to be innocent, since the defense lawyers invariably prove that someone else committed the crime.

Many scholars and journalists emphasize the vast differences which exist between Islamic and Euro-American law. This article will illustrate the many ways in which those seemingly disparate systems have converged over the past forty years. The changes which have occurred in more recent times must be seen against the background of the long history of Islamic law.

Historical Background

Between the years 632 A.D. and 732 A.D., the Muslim world expanded to include Spain on the west, India on the east, the Caspian Sea to the north, and the Java Sea to the South. The centuries which followed brought even more of the globe within the compass of the Islamic faith. In legal terms, this meant that diversity was part of the Islamic law from the beginning. Just as the lawyers of the old Roman Empire held that, "*Usus et conventio vincunt legem* (Usage and custom overcome the written law)," Muslim scholars accepted, in practice if not in theory, the importance of local norms. They were able to tolerate practices which did not directly depart from the Holy Qur'an or the authoritative example of the Prophet (the sunna).

The situation which existed in the Muslim world during those centuries resembled that of Europe during the Middle Ages. Local authorities, both secular and ecclesiastical—the lord of the manor, the bishop or his archdeacon—were most important in determining what the law was and the way it was applied. Enormous diversity existed between regions, even in a relatively compact country such as England. In that country, a law which was above regional variations—a "common law"—emerged very slowly. The development of that system was tied very closely to the emergence of a central government and a professional class of nonecclesiastical legal specialists.

Although the pace of change was uneven, as Europe's various bureaucratized states established themselves, they tended to create uniform national codes. They also sought to create judicial hierarchies which applied those rules in a system of courts tied to a national government. The famous Napoleonic Code was in many areas of Europe the first attempt to eliminate the influence of local traditions in favor of a uniform, bureaucratically-administered, body of law. Close-knit village communities often resisted attempts to incorporate them into a cosmopolitan legal system. For example, as late as the early years of the 20th century, French peasants still included in their litanies the plea "From Justice, Oh Lord! Deliver us."

Max Weber, who was himself trained as a lawyer, became the thinker whose view of legal history most influenced subsequent generations of historians, social scientists and lawyers. In Weber's vocabulary, bureaucratization meant a rationalizing of the law. That represented an evolutionary improvement over other legal systems which rested on, according to Weber, purely personal considerations, such as the character of the judge and his individual assessments of the merits of any given case. Islamic law looked very irrational by those standards. Weber coined the phrase, "Qadi justice," to describe a system without formal procedure or fixed statute, in which a Muslim judge—a Qadi—was free to use his own standards. Weber's exotic image of "The Qadi under the palm tree dispensing justice," entered the vocabulary of Euro-American judges. It even appeared in the judicial opinions of legal luminaries such as Felix Frankfurter in *Terminiello v. Chicago*.

Weber's influence is obvious in the work of many Euro-American students of Islamic law. Joseph Schacht, for example, held that Islamic law was arbitrary and static, incapable of internally inspire change. The work of contemporary scholars, such as Lawrence Rosen,

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has done much to change those impressions, to provide a much more complex understanding of how laws, not only in Islamic societies, but also in our own, are part of culture. As cultures must constantly adapt themselves to each new generation, so law must change even in those societies which seem totally given over to tradition.

For the Islamic world, the most significant developments over the past century have mirrored those which influenced the present character of Euro-American legal systems. The resemblance stems, in part, from the influence exercised by European imperialism. Britain, France, the Netherlands and Russia/the USSR directly controlled large portions of Muslim Asia and Africa. In some cases, they installed their own legal codes with little concern for Muslim tradition. At other times, they claimed to be simply applying Muslim law, but in practice their courts created a hybrid which more closely resembled European, not Islamic, traditions.

Even in those areas which were not colonized, such as Iran and the Ottoman empire, the impact of European legal traditions was pervasive. By the middle of the 19th century, the Ottomans were moving toward the wholesale adaptation of European-style statutes and courts. The Turkish revolution of the 1920s completed a process which was nearly a century old, and the constitution Iran drafted following its 1906 revolution was basically a copy of that of Belgium.

Islamic Law in the Post-Colonial Era

When the former colonies of the Muslim world gained their independence, they generally retained whatever legal system their imperial masters had established. Many countries such as Egypt and Syria have gone so far as to codify Islamic law and place its administration solely in hands of professional lawyers trained, for the most part, in modern universities, not traditional religious academies. Thus, the same kinds of change which have characterized the development of Euro-American law have occurred throughout much of the Islamic world. Even those Muslims regarded as "anti-Western" have not objected to the process of codification or the organization of courts so much as to certain particular legal trends—the expansion of women's rights to divorce their husbands, for example, which they consider mere imitation of the West's characteristic lack of concern for family values.

...the same kinds of change which have characterized the development of Euro-American law have occurred throughout much of the Islamic world.

Status of Islamic Law in Pakistan and India

With these general ideas in mind, we can turn to several examples of the status of Islamic law in a number of Muslim countries. Pakistan, which was created when the British left South Asia in 1947, provides an interesting case study of the complexities inherent in applying Islamic law in a newly independent country. Initially, Pakistan retained, almost entirely, the legal system the British had created during the nearly two centuries of their colonial rule. Most legal matters, whether criminal and civil, were governed by a series of codes written during the 19th century. The British had abandoned Islamic criminal law early on, and employed a code of evidence modeled on their own practice, not that of Muslims. Contracts and commercial paper were also governed by English traditions. Muslim law was restricted to matters such as marriage and inheritance. Even in these areas, the precedents established by the British-style courts were much more significant than any notions derived from Islamic practice.

British influence also extended to the organization and etiquette of the courts. A hierarchical line of appeal existed among local courts, high courts and a supreme court, with the latter replacing the Privy Council as the chief appellate body. Pakistani lawyers and judges appeared in court in white duck trousers, gowns and tab collars; wigs were retained only for formal portraits. Advocates addressed justices as "My Lord," and their colleagues as "My learned friend." Arguments were conducted in English and most statutes were referred to in their English versions. Lawyers and judges trained in post-graduate law schools in Pakistan whose syllabi were dictated by British practice. A fair number of those on the bench and bar were "England trained."

Since 1947, Pakistanis have been engaged in a lengthy debate over what it means to be an "Islamic Republic." Governments made a few token gestures, such as the creation of an advisory council of religious scholars (*ulama*) who were to abrogate any laws which violated Islamic standards, which were supposed to fulfill the demands of the faith. However, the courts and the laws generally operated along the lines described above.

The military regime headed by General Zia ul-Haq began to alter the situation after 1977. A pious man, General Zia was sympathetic to demands made by his Saudi Arabian financial backers that Pakistan's legal system should more closely reflect the Saudis' puritanical approach to Islam. He created a special series of Islamic law (*shariah*) courts. In practice, the judges who sat on them and the lawyers practicing before them were not Muslim scholars, but members of the bar who had either learned enough *shariah* to pass as

(continued on next page)

ulama or were inspired by their personal convictions to become involved in the mission of these courts.

Implementing the physical punishments (*hudud*) dictated for offenses such as drinking alcohol, fornication and theft has exemplified the problems involved in making Islamic law workable in a society accustomed to the common law protections afforded accused criminals. Flogging, as a punishment for drinking or sexual immorality has occurred, and women accused of the latter offense seem to have suffered in disproportionate numbers. The practice of amputating the hands or feet of thieves has been instructive in its application. When members of the older, British-style legal establishment objected to the cutting off of extremities with a sword in public view, the government compromised, allowing that any amputations would be performed surgically in a hospital while the victim was anesthetized. The result is that while lower courts have decreed the punishment, they have been overruled by appellate bodies, and no convicted thief has lost a limb.

In today's Pakistan, two legal systems exist uneasily side by side.

In today's Pakistan, two legal systems exist uneasily side by side. They are not truly meshed and a certain amount of tension exists between them. Individuals who take a case to one branch can appeal to the other if they are unhappy with the outcome, thus making the legal process both time consuming and costly; it also makes initiating civil litigation against a personal enemy a favorite method of harassment.

Farmers and lower class city dwellers, not surprisingly, make special efforts to avoid involvement with any branch of the courts. When conflicts arise, they may seek various informal methods of adjudication and consult with, for example, the headmen of their villages or the senior members of their own extended families. These individuals usually possess a good bit of knowledge of the customary law of their own family, tribe or region. Aggrieved parties may also seek out a revered religious figure to obtain a religiously sanctioned "opinion (*fatwa*)," concerning the appropriate "Islamic" method of settling disputes. This person may be a religious scholar, but he (rarely she) may also be the head of a local mystical (Sufi) brotherhood or a custodian of a local shrine. Although such people may lack formal training in Islamic law, they do have a sense of how to resolve the ordinary conflicts of daily life. Matters most frequently brought before them include disagreements between spouses or parents and children as well as disputes over inheritance.

Headmen and religious scholars are usually interested in finding some sort of amicable compromise between the parties. Often, this may be as simple as letting the disputants have their say—letting them vent their anger. With time, opponents may forget about the source of the argument and resume their normal relations. This approach only seems to work, however, when the value of the property involved is small or the sense of injury slight. When these two factors are considerable, however, resort to the government courts becomes inevitable. The attraction of the government courts, in both the British-style and *shariah* branches, is their adversarial approach to justice. They take time and money, but in the end somebody wins.

The situation of Muslims living in neighboring India is similarly complex and more than a little ambiguous. India is professedly a secular state, and the majority of the judges and lawyers who work in its courts are not Muslims. Yet, they undertake to apply Islamic law to Muslims in all matters involving personal status: marriage, divorce, inheritance. The problems inherent in this arrangement came to the fore in the case of Shah Banu which was decided by India's Supreme Court in 1985.

Shah Banu was an elderly woman whose husband divorced her after many years of interfamily squabbling over a piece of land. She went to the secular courts and was awarded alimony under a provision of the Code of Criminal Procedure designed to prevent female vagrancy by forcing husbands to support divorced wives. A strict reading of Islamic law does not require a husband to support an ex-wife beyond a year—the time necessary to ascertain that she was not pregnant with his child. This personal dispute soon developed into a national political debacle in which the issue became not Islamic law, but the political status of Muslims in modern India.

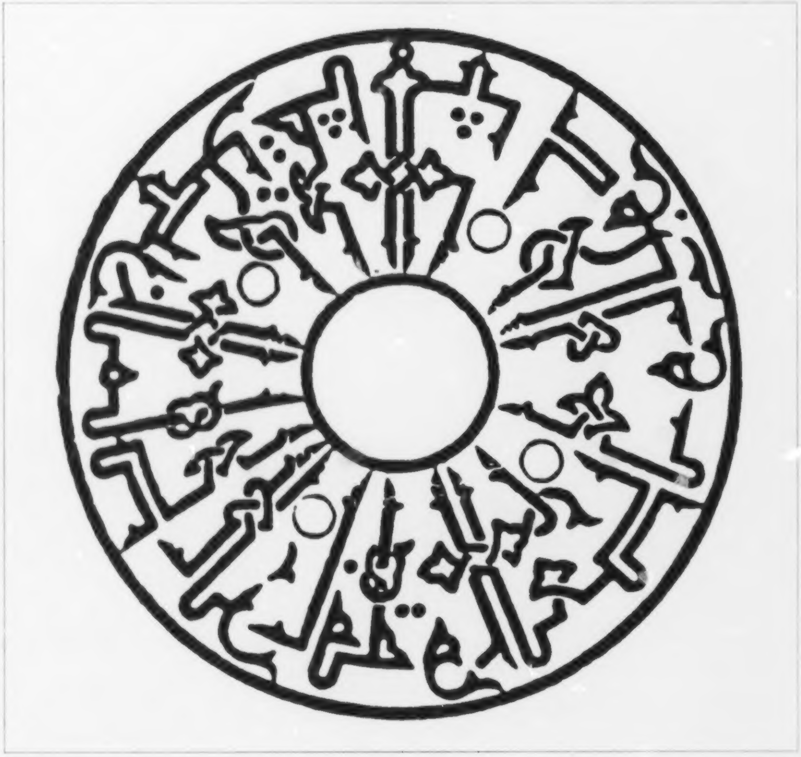
Notable conflicts such as this underscored the situation of the 120 million Muslims living in the non-Islamic state of India. The inevitable adjustments which both the government and the Muslim minority must make over the next few decades will tell us much about the changing role of Islamic law.

Islamic Law Elsewhere in the Muslim World

In contrast to densely populated countries such as India and Pakistan, which have elaborate, bureaucratic governments, are states with small populations and relatively informal governmental structures. In Saudi Arabia, for example, where the impact of Arabia's tribal heritage is still strong, the family of the country's founder, Abdul Aziz Ibn Saud has many personal connections to the Arab populace. As a result of Abdul Aziz's 300 sons marrying into most of the leading families of the various tribes, individuals involved in an argument are likely to seek a resolution by tapping into the network of patron-client relations established by these marriage alliances. A system of Islamic courts does exist, but comes into play primarily in criminal matters. It is from these courts' strict application of the Islamic law's physical punishments that most Euro-Americans get the impression that Muslims favor amputation, beheading and stoning. Even in conservative Saudi Arabia these penalties are rarely imposed, and they have largely disappeared in most other Muslim countries as well.

In a recent work on the practice of Islamic law in Morocco, legal anthropologist Lawrence Rosen provided insights into the social dimensions which underlie any legal system, but most particularly that of Morocco. Moroccan society is highly individualistic, with each individual constantly negotiating a series of contractual relationships which, in effect, reorder society on an almost daily basis. As in most cultures, these values and assumptions are implicit. In traditional Moroccan society, they were the unstated foundation of the operation of the Qadis' courts. In that context, the role of the court was not really to decide issues in a clear-cut manner, but rather to restore the individuals engaged in a dispute to their normal status as negotiators of their own social reality.

In modern Morocco, however, the Qadis are finding their role increasingly restricted. Law codes and national courts are gaining control over more and more disputes. As new job opportunities, education and increased mobility become more commonplace, the populace finds itself cut off from its local roots. Growing numbers of Moroccans no longer spend their entire lives in the circumscribed environment of neighborhood, family and tribe. They live and work among "strangers," that is to say, people who do not share the common ties of locality and blood. Given these changes, national courts and the law of the nation by necessity acquire a much larger role in dispute settlement.



Eighteenth-century calligraphy in Kufic style. The inscription reads: "Three Things reinforce rule: mercy, justice and goodness."

As the case of Morocco illustrates, many forces beyond the control of Islamic ideology are at work in the Muslim world. A rapidly expanding population, a larger proportion of educated men and women, the growth of cities and the continuing existence of nation-states whose interaction with non-Muslim governments inevitably involves them in a system of international law formulated largely along Euro-American lines set the context in which Islamic law operates in the here and now.

Islamic Law, Fundamentalism and Reform

Europeans and Americans often hear about Islamic fundamentalists and their demands for the strict enforcement of the holy law. Invariably, these movements are more complex than the manner in which they are depicted in the media, both electronic and print. Fundamentalists are often attempting to grapple with the kinds of social, political and economic change described above. Many so-called fundamentalists are not traditional religious scholars and have, at best, limited knowledge of the texts of Islamic law. For example, the leadership of the Islamic Salvation Front, which won elections in Algeria—only to be suppressed by the military—was composed mainly of men trained as engineers, scientists and economists. What they advocated, in their demands for a "return" to strict Islamic law, amounted to little more than the prohibition of alcohol, the veiling of women (as well as the curtailing of their public roles in society), and a generalized call for economic justice. Each of those demands was more symbolic than practical. Drinking

(*continued on page 48*)

Teaching Strategy

Legal and Cultural Diversity: The Challenging Case of India (Courts and Council)

Peggy Mueller

This lesson provides a series of activities which explore some broad but vital connections between culture and law in Asia. Specifically, it gives students an opportunity to consider how ancient community and village traditions have influenced legal practice and social codes in contemporary India. It is timely and appropriate for us in our own multicultural and democratic society to examine the India model. While India does have a constitutional democracy which provides a uniform legal system, it is also an extremely diverse society which has a strong and ancient tradition of local governance and differing social codes. Reconciling group identity and traditional mores with individual rights and a national code as defined by the Constitution is a serious challenge which India has been facing since Independence in 1947. One of the most important themes of the 4,000-year history of the South Asian subcontinent, has, in fact, been the challenge of assimilating and absorbing radically diverse peoples and ideas and at the same time maintaining a distinct identity as a nation amidst that diversity.

These activities can be conducted in any order, depending on the needs of the group of students. For example, teachers may wish to begin with the "What If?" activity in order to generate interest in local community dispute resolution on a topic which might be of interest to students. Some students may not need to read the background material on India, while others may need a guided discussion and review of this history.

The material for these activities is drawn from two audiovisual resources on India. "Courts and Councils: Dispute Settlement In India" is a documentary film which is now available on videocassette. "Passages to India" is a series of audio programs on a variety of topics. While it is not necessary to have the video or audiocassettes for these lessons, the video would certainly help students to visualize the Nandiwallas and Indian courts, and the audio programs would help them to hear and imagine better the Indian cultural contexts. Information on how to obtain these materials may be found on pages 19-20.

Objectives

As a result of this lesson, students will:

- Learn about a traditional approach to dispute resolution which has been customary in Indian villages and which is still used by some groups;
- Compare the *panchayat* (community council) system with the more contemporary court system instituted by the India Constitution;
- Generate debate about ways to resolve the tension between the dual goals of achieving individual equality under the Constitution and preserving traditional cultures and customs; and
- Experience and analyze the use of a community model for dispute resolution as an alternative to the court system.

Procedures

1. Gaining Perspective Consciousness

a. Divide students into small groups or pairs and have them draw a diagram or flow chart on newsprint which shows their conception of HOW civil and criminal disputes are resolved in our court system (Who decides? Who helps? By what standards do they decide? By what process?)

b. Next, instruct each group to brainstorm and list on a second sheet of newsprint some values and beliefs which undergird and are evident in that court system. Hang up all the sheets, and have students read and discuss their conceptions briefly with the entire class.

c. Read or have students read the following quotes and discuss what students know of *Asian* world views and how they might affect legal issues.

> Westerners should recognize that Asian countries, with their diverse social and political institutions, tend to place less emphasis on the importance of law in society than do Western nations...they have not assimilated the Western legal culture. For instance, the concept of supremacy of law is not prevalent in all Asian societies.
>
> ... The differences between the legal principles of Asian

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and Western nations is not explainable merely in terms of constitutions, statutes or court decisions, but one must also consider the different cultural contexts in which these legal principles function. (Kim, pp. 93-94)

Questions for Discussion

1. How does our judicial system (process and laws) reflect specific values and beliefs?
2. Are those values/beliefs consistently held by all citizens of this nation?
3. What happens when values and beliefs of some communities differ and the judicial system is applied to a dispute? Cite examples in American history.

2. India's Context: Maintaining Diversity and Achieving Unity

a. Introduce the case of India as an extremely diverse society and one which has had to deal with the challenge of accommodating a variety of deep-seated values and customs. Explain that this series of activities is going to explore some cultural perspectives that influence legal issues and practice in one country of Asia which has multicultural concerns similar to ours. (Use map on page 17 to show the diversity of languages).

b. Tell students to read Student Handouts 1 and 2 to gain perspective on the Indian judicial options and on some of the diverse traditions and viewpoints which that system must serve. To follow a cooperative learning model and save time, have students pair up and share responsibility for reading and teaching a partner the key ideas in their reading.

c. Instruct each pair to come up with the following:
   - ways the community council system differs from the Western-style court system
   - one way in which the case of India seems like and one way in which it seems unlike that of the U.S. in terms of dealing with diversity (religious, urban/rural, age, race, language) in the judicial system.

3. Cases of Community Dispute Resolution: Panchayat in Action

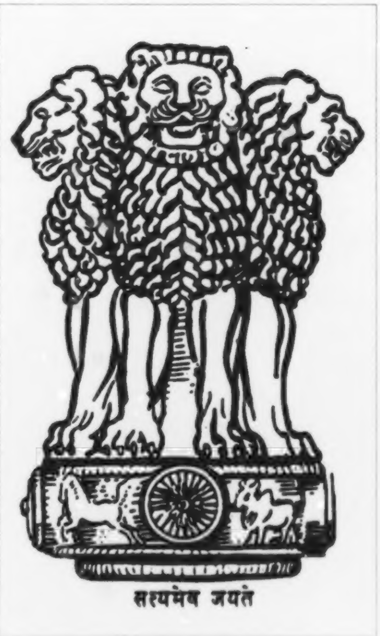
Have students read aloud some cases of community disputes which are resolved outside of the court system in a traditional *panchayat* in one community and in an adapted *panchayat* in a rural village (Student Handout 3). These scenarios can be presented as dramatic readings or roleplays to enhance students' understanding of the judicial process. Follow the structures of *panchayat* as described in Student Handout 1.

Questions for Discussion

- How do disputes seem to be resolved in these cases? What is valued? Who decides?
- How might the outcomes be different if these disputes were taken to the district court? (Refer to Student Handouts 1 and 2 for contrasting values and procedures of courts and councils)

4. The Constitution and Communal Tradition

Divide students into two groups. Have one side prepare an argument in favor of the Indian court system while the other prepares an argument in favor of community decisionmaking via *panchayat* councils which might vary from region to region and group to group. (Students could also complete a writing assignment individually or in pairs which presents such a debate.) Distribute Student Handout 4. Students might also research the Indian Constitution to find provisions which support their arguments. An alternate "side" of the debate can argue in favor of maintaining more than one system (courts *and* councils). (You can decide whether to make the reference point of the debate India and/or the United States.)



The state emblem of India.

5. What If Community Councils Were Used Here? Enacting a Panchayat

Have students generate a list (hypothetical or real) of local (school or community) concerns or conflicts which require resolution. Form a *panchayat* and hold a forum in which those concerns can be presented and resolved. Try to follow the same rules and community-oriented values of the *panchayat* as demonstrated by the Nandiwallas and a village *nyaya panchayat*.

Have students either discuss or write about what might happen if conflicts in their local communities or schools were resolved within the community in a communal public fashion and with an emphasis on community responsibility, as with the Nandiwallas. (Who would make the decisions? How would this process affect the court system in their community? What kind of cases would be conducive to such a decisionmaking process? How might this process help to resolve or increase cultural conflict?)

Legal and Cultural Diversity *continued*

Student Handout 1

India: Courts and Panchayat Councils

India is the largest democracy in the world. It is also one of the most diverse countries in the world, containing over 700 million people who represent hundreds of cultures, languages and religions. As an independent nation since 1947, India has been struggling with the challenge of maintaining diversity and unity. One area of governance which has proved to be a great challenge is that of creating a judicial system which takes into account the diverse village, tribal and urban traditions of this extraordinarily varied and complex society.

Historically, India has been the home of many legal traditions which represent various religious perspectives and world views. The most obvious and dominant influences have been the Hindu, Muslim and British traditions. As political power changed hands over the centuries, the subcontinent altered its legal practices, but the older traditions and world views were never totally supplanted. As a result, contemporary Indian law is an attempt to create a uniform and unified structure which must coexist with diverse practices. India is a nation of citizens bound by the uniform laws of the state, but it is also a network of families, castes* and villages who govern themselves in part by traditional social codes. These codes are based on the sanctity of the group structure and the duty of its members. Hence, though the national and state court system prevails, there are other traditions of dispute resolution which have remained.

Panchayat Councils

One of the most deeply rooted and oldest traditions in India is the caste and local tribunal system. The *panchayat* (literally, a council of five elders) was a community council headed by elders whose authority derived from their caste and its position within the village. Though the Constitution created a unified, hierarchical judiciary (clearly reflecting the British common law system), there has been an attempt to recreate the "traditional" justice system in the form of informal village courts—*nyaya panchayat* (literally, new councils). The *nyaya panchayat* was intended to be a synthesis of India's traditional panchayat councils and the British courts of law.

Though the majority of Indians take their disputes to the system of state courts, there are still some tightly-knit caste groups who use the traditional *panchayat* system of justice. One such caste is the Nandiwallas. The Nandiwallas are a nomadic caste of bull trainers and traders. They wander in small bands in the State of Maharashtra (northwest India) performing with their bulls. Every three years they gather at a place chosen by their ancestors, conduct religious ceremonies, arrange marriages and settle their disputes.

Review this scenario and characteristics of a typical *panchayat* in the Nandiwalla community:

- Kinsmen and friends gather to discuss cases that need to be brought before the council.
- A skilled speaker (big man, leader) must present the case, so he is briefed on the facts.
- The people are called to the gathering. They form a huge circle. People take sides in the dispute and sit across from one another, responding vocally in a spirited rivalry. The group hears the facts and then decides.
- The speech is highly stylized. Attention is focused on the spokesperson, not on the disputants. To hold the floor, the speaker must gain a response from across the circle. Those opposite will echo his phrases, almost as a chorus. Usually disagreement is not voiced until the speech ends.
- Argument will escalate only to a certain point. Then there is a call for conciliation.
- The headman always sits at the top of the circle and a guru (respected teacher) is close by. The headman makes statements and consults with the other leaders. If there is a fine for an offense, the guru suggests an amount. Typically, the agreed-upon fine is lowered, through compromise.
- Compromise is the name of the game and is necessary for the group to remain together. Unresolved conflict can splinter the caste.
- Serious offenses are given high fines and the offender is said to be "tied in a knot." But committing any offense is viewed as polluting the group, which puts one out of the caste. To pay the fine is to be reinstated. The most serious disputes are those which threaten the foundations of the caste.
- Normally, disputes are not treated in isolation. The problem at hand may be related to a number of incidents that must be resolved before a final solution can be reached.

Where the caste has the power to enforce it, this process of dispute settlement by consensus continues to exist today, mainly in rural India. Adaptations of this model (*nyaya panchayat*) were created after Independence and use some of the same processes of community forums. Through these forums, respected elders facilitate the settlement, encouraging both parties to settle their disputes without going to court, and relying on the power and input of the local community. The *nyaya panchayat* is a village council without the caste and a court without the legal professional. *Nyaya panchayats* have dwindled in number in the last few years. One reason for this is that the council of elders usually work on a voluntary basis. In addition, their decisions have no weight in the court system. Nonetheless, the *nyaya panchayat* remains an ideal.

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*Derived from a Portuguese term, caste simply means "breed, race, kind." More broadly, it is a birth-determined group, where marriage is generally sanctioned only within one's group. Castes and subcastes are organized hierarchically in a socio-economic system from the most ritually "pure" to those considered most "polluted." When referring to specific subcastes or groups the term "jati" is more accurately used. (From: "India: A Teacher's Guide," p. 14)

Courts

For the majority of Indians, caste is less important than it is for the Nandiwallas. The law that concerns most Indians is that of the state, the law that is the same from Delhi to the remote districts. This law is based on the Constitution. The district courts are the grassroots courts, the lowest rungs of the hierarchy. They provide most of the nation's people with their point of access to the law. Some characteristics of this court system which have been inspired by the British common law and the colonial rule of law are listed here:

- The court process is extremely complex and requires all sorts of experts to help people through the process. It is highly impersonal and confusing.
- The key figure in the system is the lawyer, the person capable of framing a complaint in the language of the court. Lawyers are masters of language, the special language of law itself, as well as the scripts in which it may appear. There are a great number of lawyers in India (the number of practicing lawyers is second only to that of the United States, internationally).
- All legal procedure is conducted in Hindi, India's national language—even though there are 15 major official languages and hundreds more spoken throughout the country.
- There is an enormous amount of litigation and people can appear every day at court for months hoping their case will be heard. Litigation is often referred to by the Hindi word meaning "ill-health."
- A judgement is designed to be free from community opinion. Claims are isolated cases and treated independently from other offenses or family offenses. The system is adversarial, and there is no call for consensus. One party must win; one must lose.
- The system is based on the Constitution with an emphasis on individual rights and equality.

(Adapted from script and guide of "Courts and Councils: Dispute Settlement in India," Ron Hess, J. Elder and Robert M. Hayden, 1981.)

Student Handout 2

India: A Kaleidoscope of Cultures

> We are an old race, or rather an odd mixture of many races, and our racial memories go back to the dawn of history.
> —Jawharlal Nehru

Ask an Indian what is important to know about India and inevitably the concept of diversity comes up. This handout presents, in capsule form, some data about that diversity of life and people, including information on some of the most powerful socio-political forces of India's history. As you read this material, consider ways these factors might affect India's attempt to devise an effective system of justice for the whole country.

The Cultural Diversity Factor

Language

India is home to 15 major national languages and more than 200 minor languages. Even the alphabets can vary from one language to another.

Religion

Nearly all the world's major religions exist in India. This means that there are varying philosophies and ethics originating from different faiths: Hinduism, Islam, Christianity, Sikhism, Buddhism, Jainism, Zoroastrianism, Judaism, and many others.

Socioeconomic Development

India is one of the most striking examples of the 21st century juxtaposed with the ancient world. The majority of people reside in villages, but some of the largest urban populations in the world are in Indian cities. India is a world-class technological leader with modern skyscrapers, space research, and nuclear power plants. At the same time, it is a traditional agricultural society where bullock carts with wooden wheels and thatched huts are not uncommon.

Diversity of Legal Tradition—A Timeline of Continuity and Change

There have been four major legal traditions in Indian history: Hindu, Muslim, British and Independent India. Each of the first three dominated India for centuries, leaving enduring marks. All of these traditions are present in contemporary Indian law. This is a long and complex story, but it must be known to understand the current legal challenges in India. Read about these concepts and historical forces in order to understand the roots of these concerns.

(continued on next page)

Legal and Cultural Diversity *continued*

From the Hindu Tradition (Earliest beginning to about 1200 A.D.)

DHARMA (sacred duty)

This concept refers to the moral order that sustains the cosmos, society and the individual .... Derived from a Sanskrit form meaning, "that which sustains," within Hindu culture it generally means religiously ordained duty, that is, the code of conduct appropriate to each group in the hierarchically ordered Hindu society. Theoretically, *right and wrong are not absolute* in this system; practically, right and wrong are decided according to the categories of social rank, kinship, and stage of life. (Barbara Stoler Miller in *The Bhagavad-Gita: Krishna's Counsel in Time of War.* (New York: Bantam Classic Books, 1986, p. 3)

IDENTITY

The individual is part of a larger cosmic order .... Indian values emanate from a cosmic world view in which the individual is seen, and readily sees himself or herself, as part of the whole, dependent on others and committed to the larger social welfare, rather than to individual desires. This perception is translated into regional, caste, village, and family commitments. To maintain order, all parts of the whole have specific functions, hence *dharma*, or duty to act appropriately as regards one's station in life and position on the road through life. Integral to this holistic view of self is an understanding of time as cyclical. (From "Articulating Values," by Carol Hansen. *In India: A Teacher's Guide.* New York: Asia Society, 1985, pp. 66-8)

LOCAL LAW

Every aggregate of people (castes, trading guilds, artisan guilds, families, sects, villages) was entitled to formulate and apply its own customs and conventions—all of which should be governed by the law of *dharma* (the science of right conduct). No central power could pronounce binding law or unify the system. (From *Encyclopedia of Asian History*, Volume 2, Ainslie T. Embree, ed. (New York: Charles Scribner's Sons, 1988.))

From the Muslim Tradition: (1200-1700)

SHARI'A (Islamic Law)

Royal courts during the Moghal period exercised jurisdiction over whole regions in criminal and commercial affairs. Though Hindu legal customs were allowed to remain in civil and family matters, the Islamic community introduced a new set of principles of "right conduct." Both standards coexisted for centuries.

From the British Colonial Period: (1700-1900s)

ANGLICIZED LAW

Legal affairs became gradually standardized and operated within a hierarchal court system according to British law. While allowances were made for religious and traditional customs in "personal" areas such as caste, marriage and inheritance, traditional judicial systems declined and more cases flooded the British district courts, minimizing the practice of traditional village and caste councils.

From the period of Independent India: (1947-present)

CONSTITUTIONAL LAW (1950)

The Constitution of India created a unified, hierarchical judiciary, headed by a supreme court. *Nyaya panchayats* were created to resurrect "traditional" justice in the form of village courts. New concepts introduced by the Constitution included the following:

- Constitutionalism
- Fundamental rights of individual citizens
- Law as an instrument of social change (outlawing untouchability, supporting compensatory discrimination and instituting uniform codes in personal law)

(Adapted from: *Encyclopedia of Asian History*, Ainslie T. Embree, ed. (New York: Charles Scribner's Sons, 1988.))

Student Handout 3

Council Cases

A Nandiwalla Panchayat (Two Cases)

Crier: Justice! Justice again!
All should come...
All should come to the
panchayat!
(A circle begins to form at the center of camp.)

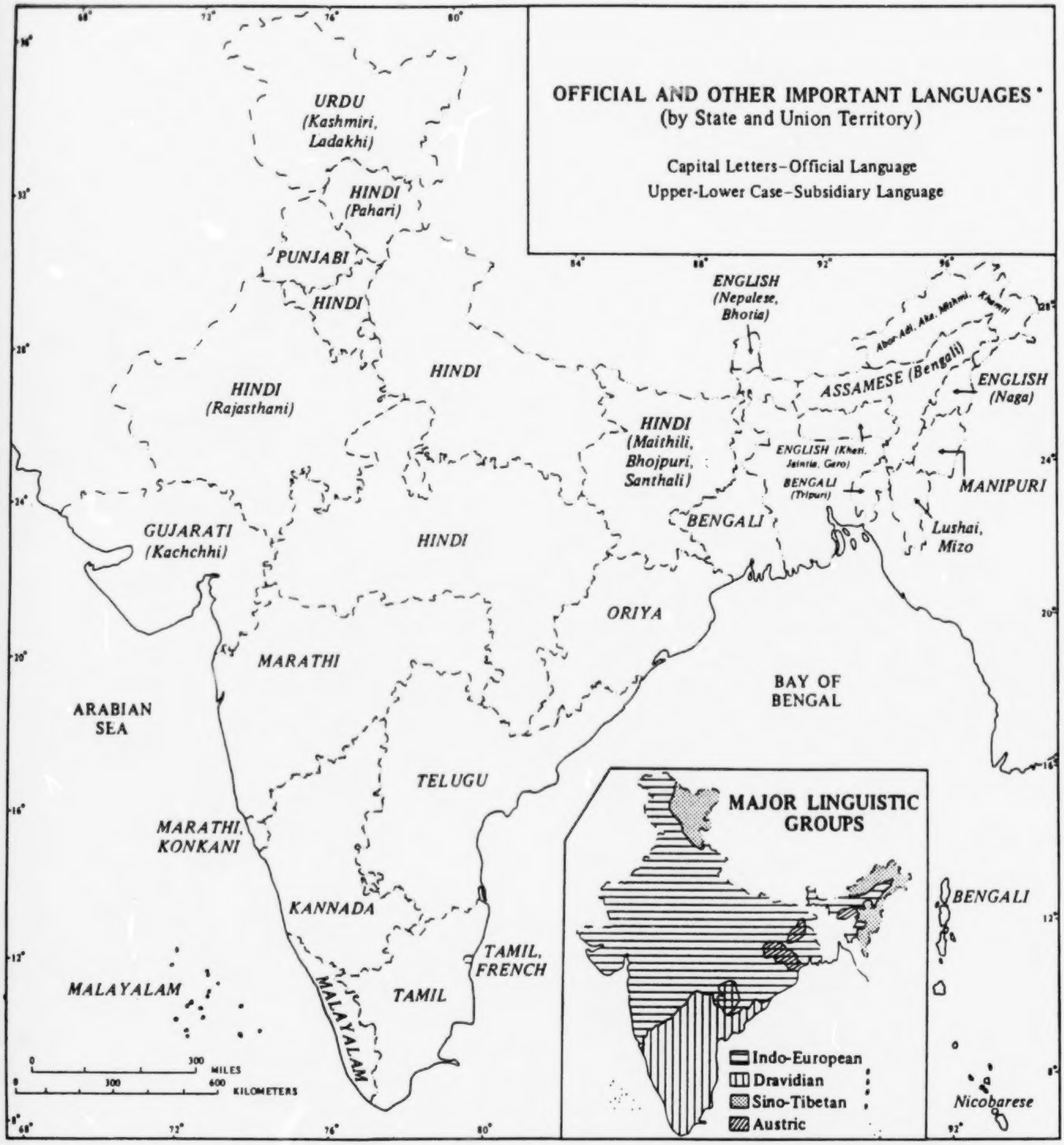
The first case: A man was drunk and made a fool of the Nandiwallas in public. He is brought before the council. The debate is brief, because the case is clear.

Headman: If we tell him and he doesn't listen, we will have an outcasteing. Like we tie the nose of an ox, one must listen to caste. Does he listen?
Group: No!
Headman: Does he go on disobeying or obeying?
Group: Disobeying!
Headman: He goes with the wrong people ... (The offense is a minor one, and the matter is now turned over to the Guru.)
Guru: I fine him 150!
Another Elder: 150! I declare 50!
Elder: I declare 25!

The drunk is fined 25 rupees, a low amount the Nandiwallas refer to as a "slap."

(continued on page 18)

Linguistic Map of India


OFFICIAL AND OTHER IMPORTANT LANGUAGES *
(by State and Union Territory)
Capital Letters–Official Language
Upper-Lower Case–Subsidiary Language
URDU (Kashmiri, Ladakhi)
HINDI (Pahari)
PUNJABI
HINDI
HINDI
HINDI (Rajasthani)
GUJARATI (Kachchhi)
HINDI
HINDI (Maithili, Bhojpuri, Santhali)
ENGLISH (Nepalese, Bhotia)
Abor-Adi, Aka, Mishmi, Khamti
ASSAMESE (Bengali)
ENGLISH (Naga)
ENGLISH (Khasi, Jaintia, Garo)
BENGALI (Tripuri)
MANIPURI
Lushai, Mizo
BENGALI
ORIYA
MARATHI
ARABIAN SEA
BAY OF BENGAL
TELUGU
MARATHI, KONKANI
KANNADA
TAMIL, FRENCH
TAMIL
MALAYALAM
MALAYALAM
BENGALI
Nicobarese
0 300 MILES
0 300 600 KILOMETERS
MAJOR LINGUISTIC GROUPS
Indo-European
Dravidian
Sino-Tibetan
Austric
68° 72° 76° 80° 84° 88° 92° 96°
36° 32° 28° 24° 20° 16° 12° 8°

* From *India in Maps*, by Ashok Dutt, S. P. Chatterjee, and M. Margaret Geib (Dubuque, Iowa: Kendall/Hunt, 1976).

Legal and Cultural Diversity *continued*

The second case: Years ago, a man was fined by the *panchayat.* He didn't pay. He left with his family to join a splinter group. In time, he died and his son married into that group. Now, the son wishes to rejoin this group of Nandiwallas, because the splinter group is failing.

Speaker: He left our village and went there. He planted a tree ... But is the tree growing?
Group: No!
Speaker: Does it wither?
Group: It withers!
Speaker: Was the custom improper or proper?
Group: Improper!
Speaker: If they get the knot, is it good?
Group: It is good!
Speaker: And also a small fine?
Group: Good!
Speaker: The girl came and there was a marriage feast. They all ate in a line...

There is no disagreement regarding the facts of the case as these are generally known. The question is, in order to be reinstated, must the son pay only for his marriage with a woman from outside the caste, or is he responsible for his father's fine, as well?

Speaker: It's a pollution offense! Pollution! Let us fine him and make him the son of the caste!
Opposite Speaker: The offense of the past cannot be ignored! For this, 300 rupees—a large fine! Tie the knot! It's finished!
Leader: (Gives call for conciliation after argument escalates only to a certain point.) Was this approved by all or by one?
Group: By all!
Leader: Did he obey? Did he listen?
Group: No!
Leader: Is he bound by justice?
Group: He is bound!

The man is charged with a heavy fine, a solution suitable to both parties.

Leader: To me, you are all equal. No one is superior to another. If a man commits even a trivial offense, he must pay a fine, suffer a slap ... Where will such a man go? He will come under our roof. And when he does ... we will wash away his pollution.

A Village Nyaya Panchayat

The case: Two men appear before the village council (a teacher acts as judge). He has been appointed to the post from among a body of elected civil officials.

Judge: Give us your testimony, but first please repeat: I will tell the whole truth, God give me strength.
Villager: Your Lordship, when I went out to my fields ... I was inspecting them, and I found Ramji cutting my crop, my fodder—the grain had dried up. I said, "What are you doing?" Some men nearby asked what was wrong and I said, "Look, my crop ..." After that they convinced him to leave.
Ramji: I wouldn't call it such a serious offense...I mean, it wasn't grain .... I've tried to make him understand. Men from the village have tried.
Villager: He won't listen, Your Lordship. What can I say? The petition has been filed ...
Judge: Talk it over. We would like it if you could settle it between yourselves.
Villager: Yes, of course.
Judge: Compromise is best, but if it's not possible, then bring your witnesses. The Court will take their testimony. A summons will be issued. And whatever needs to be done next, the Court will do ....

(The scripts in handout 3 have been adapted from: *Courts and Councils: Dispute Settlement in India,* Ron Hess, writer and director; guide preparation by Joseph W. Elder and Robert M. Hayden. University of Wisconsin, 1981.)

Student Handout 4

Thoughts, Documents, Perspectives

When India achieved independence in 1947, there was much debate about how to unify the country and keep its diverse groups of people culturally intact. These quotations that follow present some perspectives on that debate, especially as it applies to a system of justice for all. Read these quotes—some from yesterday, some from today—to gain a better understanding of the arguments. Read and use these documents and the other handouts in this lesson to construct a position in the debate on cultural diversity and unity in legal practice.

* * *

Which court is better—this court or the State courts? I haven't stepped into those courts, so I don't know...But they can make truth into falsehood. And if you go to a lawyer and give enough money—falsehood can be made into truth. Do we have enough money to step onto those premises? Here, if someone commits an offense, we fine him. Do not quarrel and do not go to the courts.

—Nandiwalla Panchayat leader

When two men quarrel they should not go to a law-court...the profession [of law] teaches immorality....The [lawyer's] duty is to side with their clients and to find out ways and arguments in favour of the clients....The lawyers, therefore, will....advance quarrels instead of repressing them. It is wrong to consider that courts are established for the benefit of the people....If people were to settle their own quarrels, a third party would not be able to exercise any authority over them...without lawyers courts could not have been established or conducted and without [courts] the English could not rule.

—Mohandas Gandhi

Dr. B.R. Ambedkar, born into an untouchable caste, saw in British law an avenue for release from communal tyranny. He used it as a powerful national level tool in outlawing discrimination on the basis of caste.

If democracy is to live up to its principle of one man, one value, the laws of the Constitution should not only prescribe the shape and form of the political structure but also must prescribe the shape and form of the economic structure of society.

—Dr. B.R. Ambedkar

The judicial system is by far the most significant and important instrument in preserving democracy and the rule of law, and everyone in the country realizes its great importance, and therefore, the minds of people here are exercised considerably over increasing the effectiveness of the system, and to see that it delivers what I would call Social Justice.

—Supreme Court Justice
Bhagawati

Deal with others as thou wouldst thyself be dealt by. Do nothing to thy neighbor which thou wouldst not have him do to thee hereafter.

—The Mahabharata (Great
Sanskrit Epic, composed
between 400 BCE and 400 CE)

That action alone is just that does not harm either party to a dispute.

—Mohandas Gandhi

In India, things never do really change. What one imagines is change has always been there in the past, and if it comes in the future, if there is a change in the future, it becomes absorbed into the past. I think in India what one notices is the inclusiveness of life, how everything is included and becomes absorbed in the same pattern that has always existed.

—Anita Desai (from the audio
program: "The Presence of the
Past," Passages to India)

References

Elder, Joseph W. and Robert M. Hayden, *Film Guide to Courts and Councils: Dispute Settlement in India.* (Madison, WI: University of Wisconsin, 1981.)

Produced by Michael Camerini and James MacDonald, written and directed by Ron Hess, this 16 mm documentary film is now available on videocassette. Thirty minutes long, it explores in documentary footage the procedures of *panchayat* and court systems in India. The guide contains a complete script and several background articles by Robert M. Hayden. Available from: Distribution Office, South Asian Area Center, 1242 Van Hise Hall, University of Wisconsin-Madison, Madison, WI 53706, 608/262-3012.

Embree, Anslie T., editor in chief. *Encyclopedia of Asian History.* (New York: Charles Scribner's Sons, 1988.)

An invaluable reference for every school and classroom. "Here in one reference work is the full sweep of Asian history, geography, politics, art, religion, philosophy, law and literature. Written clearly enough for general readers and with the depth and detail students and scholars demand, this is an indispensable guide to what we must know about Asia" (Datus Smith, Jr., project editor). The sections on law for each region are comprehensive, concise and clear.

Hunt, Arnold D. and Robert B. Crotty, *Ethics of World Religions.* (St. Paul, MN: Greenhaven Press, Inc. 1978.)

This small book provides a clear presentation of the ethical systems embodied in world religions. It focuses on the way the major faiths answer questions such as

Legal and Cultural Diversity *continued*

"Who am I?" and "What does it mean to be human?" Provides substantial thought-provoking background for understanding Asian cultures.

Hollick, Julian Crandall (audio producer) and Marilyn Turkovich (curriculum guide). *Passages to India.* (Littleton, MS: Independent Broadcasting Associates, Inc. 1991.)

Passages to India is based on a public radio series produced in India from 1986-89. The series consists of 10 one-hour programs. Materials used in the instructional activities for "Legal and Cultural Diversity: the Challenging Case of India (Courts and Councils)" were drawn from the curriculum guide for Program One: A Kaleidoscope of Cultures, Program Two: The Presence of the Past, and Program Four: Biryani and Plum Pudding. There are several other particularly useful programs in the series, including one titled "Praneshacharya's Dilemma" (on the tensions and contradictions between individual and community roles in contemporary India). Available from Independent Broadcasting Associates, 111 King St., Littleton, MA 01460-1527, 508/486-9180)

Kim, Chin. "Asian Law and Comparative Legal Studies: A Proposed Curriculum Design," Boston College International and Comparative Law Review, Vol. 5, No. 1, Winter, 1982 pp. 91-126

Schwartz, Debra, editor. "India: A Teacher's Guide." Focus on Asian Studies Special Issue, No. 1. (New York: The Asia Society, Fall 1985.)

This special issue of *Focus on Asian Studies* was developed by a team of scholars and teachers as a guide for introducing key concepts about Indian history and culture. It presents background essays and activities which explore concepts relevant to the discussion about law and culture in India (e.g., identity with the group, Hindu concepts of reality, Hindu values, and personal decisionmaking in marriage).

The peacock, India's national bird.

Additional Resources on Asian Law and Culture

Miller, Barbara, Lynn Parisi, et al., *Teaching About Law and Cultures: Japan, Southeast Asia (Hmong), and Mexico.* (Boulder, Colorado: Social Science Education Consortium, Inc., 1992.)

This excellent resource is available fall 1992. It provides a rationale for teaching about law and culture which supports the multicultural and the global education needs of our society. Three cultures are explored in depth through essays and well-crafted activities for classroom learning. Many case studies are provided which give students the opportunity to experience the viewpoints of societies and cultures other than their own. The Japan and Hmong chapters of the book provide additional insights into the concept of community identity and responsibility which are suggested in the activities on India in this issue of *Update.*

Spice V Classroom Teachers, (writers) and Hardin, Julia P. and Richard G. Moulden, (editors), *We the People of the World...Special Programs in Citizenship Education: Comparative Legal Systems.* (Winston Salem, NC: Center for Research and Development in Law-Related Education, 1991.)

Includes lessons produced by teachers who participated in a 1990 summer institute devoted to learning about different cultures and laws. Some lessons compare legal systems of various countries, some challenge preconceptions of other countries, and others compare constitutions. Asia-related lessons are available on a few topics (Marriage law of PRC, government of Japan) and the appendix contains excerpts from the Indian Constitution. Available from the Center for Research and Development in Law-Related Education, Wake Forest University School of Law, P.O. Box 7206, Winston-Salem NC 27109, 919/759-5972.

Law in
World Cultures

A Criminal Case in the Chinese Courts

James V. Feinerman

Introduction

This article describes a Chinese criminal case which the author observed as a member of a delegation of the American Bar Association which visited the People's Republic of China in March 1991. Based on previous personal experiences of the author and written descriptions of other criminal trials by numerous Chinese and foreign observers, it is fair to say that this case is representative of the Chinese criminal justice system today. Following a brief introduction to the Chinese legal tradition and China's current legal system, the balance of the article details the trial and provides a glimpse of the Chinese courts in action.

Legal Traditions in Modern China

The Chinese are well known for their antipathy towards litigation. A traditional Chinese saying encapsulates this view: "It is better to walk into the mouth of a tiger than to enter a court of law." Even in modern times, this attitude has persisted. Most Chinese citizens look at the law with a mixture of fear and disdain. Involvement with the law brings trouble, and the governmental use of law is generally coercive and harsh. For the first three decades after the founding of the People's Republic of China (PRC) in 1949, the Communist regime in power in China showed little interest in developing China's legal system. Of course, trials were used in criminal justice, and a basic set of laws was created. In civil matters, China had no prospect of reaching the levels of litigiousness common in the United States or even other developed (but less legally confrontational) societies. Since the late 1970s, however, law has become increasingly significant. There has been a marked increase in the volume of criminal cases and the attention paid to them. Most importantly, in the early 1980s, the first attempts since 1949 were made to produce a codification for criminal law and proceedings. Undoubtedly, the availability of such a set of rules bespeaks a significant change in attitudes towards such activity.

It is better to walk into the mouth of a tiger than to enter a court of law.

Many—though by no means all—of the institutions of a modern legal system were imported to the PRC during the 1950s, while China was under the influence of the Soviet Union. These institutions, however, were never very firmly entrenched. A political campaign against "Rightists" in 1957 effectively ended the early experiments with legalization and branded lawyers and others involved with the nascent legal system as enemies of the dictatorship of the proletariat. It was perhaps unsurprising that initial attempts to build a legal system in the PRC met with little success. Pre-modern China had never regarded the formal institutions of law very highly. In fact, the legal system was perceived as penal in nature and harsh in operation. Civil disputes of a noncommercial nature were likely to be resolved by conciliation, compromise or more formal mediation within the relevant social group—family, clan, or village. Merchant and craft guilds would settle commercial disputes involving their members according to rules internally adopted by each unit. Publicly available written procedural law was scarce. Civil matters were subject to procedures which were largely determined by custom and usage. It would not be an exaggeration to say that before the 20th century, there were no public, generally applicable rules of trial procedure.

After the founding of the PRC in 1949, legal development proceeded rather slowly. Although specific legislation was introduced to outlaw counterrevolution and corruption in the early 1950s, the basic codes of a formal legal system were circulated only in draft form among a small circle of legal educators, government officials and other specialists. These draft codes were largely derivative of Soviet models, since this was the dominant influence on all aspects of Chinese life during the first decade after the founding of the PRC. The further development of these codes beyond the early drafts was, however, arrested by the outbreak of the AntiRightist Movement in 1957, which discredited both the emerging legal profession and formal legal institutions as "rightist" and bourgeois. Until the disorder engendered by the Great Proletarian Cultural Revolution ended with the arrest of the Gang of Four in 1976, the prevailing official lawlessness made any return to legalism unlikely. Jiang Qing, Mao's wife, used to boast that she and her leftist colleagues were, "without law and without heaven," two indications of their revolutionary fervor. With the ascendancy of Deng

(continued on next page)

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Xiaoping in the late 1970s and the historic shifts in Chinese policy announced by the Third Plenum of the Eleventh Communist Party Congress in December 1978, the path was cleared for the drafting and implementation of new codes. China was now committed to modernization and opening to the outside world.

On January 1, 1980, the PRC's first criminal procedure law came into effect. This was not the first attempt to codify rules for judicial or quasijudicial procedure—that occurred with the publication in 1954 of rules for people's mediation committees, successors to the revolutionary mediation committees. These mediation committees were, however, not "courts" in any usual sense. Instead, they empowered nonprofessional citizens to dispose of relatively minor disputes in their neighborhood or village, sparing Party officials, government officials and public security organs the burden of resolving unimportant cases. The committee membership was small, usually elected by residents' representatives, and accepting of the dominant ideology. Procedures were simple and informal. Moreover, in the 1950s, the Security Administration and Punishment Act was promulgated. This act empowered the police to resolve minor criminal cases and to administer criminal penalties. Despite the establishment of people's courts by additional legislation, pursuant to Article 7380 of the 1954 PRC Constitution, no procedural rules were subsequently published for criminal cases. Thus, the new criminal procedure law established the first official criminal courts in modern China.

All judicial power in China resides in the Supreme People's Court.

Overview of China's Formal Legal System

China's present court system follows a common model. At the top is the Supreme People's Court of the PRC. In descending order come the local people's courts of various provinces and municipalities, comprising higher people's courts, intermediate people's courts and basic people's courts. As in many other civil-law countries, the PRC also maintains a system of special people's courts with jurisdiction over designated subject matter, such as the military and maritime affairs. These special courts are also hierarchically organized with regional jurisdiction at the lower levels.

The Supreme People's Court is the highest judicial organ of the Chinese state. Although its work is largely appellate, it can handle major criminal cases of national importance, as well as civil and economic disputes and administrative questions which have "nationwide consequences." The bulk of its cases are appeals from judgments and orders of the higher people's courts and protests lodged by the Supreme People's Procuratorate, the prosecutorial arm of the state government which also has oversight responsibility for the justice system. The Supreme People's Court is also authorized under the PRC Constitution to render advisory opinions, both generally and in relation to specific applications of Chinese law in judicial proceedings.

As is the case with the lower-level courts, the Supreme People's Court is divided into "chambers" with subject matter specialties: two criminal divisions, a civil division, an economic division and divisions for administrative law matters, communications and transport appeals, and complaints and petitions. Also housed at the Supreme People's Court are executive offices such as the general office, the judicial administrative office, the personnel department and the research department for the entire PRC court system.

All judicial power in China resides in the Supreme People's Court. The president of the Supreme People's Court has supervisory responsibility for the rest of the judiciary and lower-level courts in the PRC. The constitution and the organic law of the people's courts provide for a four-level court system. The courts of first instance—local people's courts—handle criminal, civil, economic and administrative cases. Cases may be appealed to (or, in some cases, originate in) the intermediate people's courts at the prefectural level, the high people's courts at the provincial level and the Supreme People's Court at the national level. One appeal of right is permitted, usually to the next higher court from that in which the case begins. Special people's courts, with a hierarchy parallel to courts of general jurisdiction, exist for the military and for cases involving forestry, transport and maritime matters.

Like the Supreme People's Court, a Supreme People's Procuratorate headed by a procurator-general has been established pursuant to the Constitution and an organic law for people's procuratorates. A hierarchy identical to that of the courts exists, from local people's procuratorates up to the Supreme People's Procuratorate at the national level. There are also special procuratorates. The procuratorate not only acts as prosecutor of all criminal cases in China's legal system, but also provides supervision of China's public security apparatus (police) and of other operations of the Chinese government, including the judicial system. In many ways, the procuratorate incorporates many of the functions of the traditional censorate in imperial China. They prosecute criminal cases, conduct investigations along with the police and the courts, review the actions of the police and approve arrests, and supervise execution of c[illegible] judgments and the administration of prisons and other places of detention. At the same time, they are expected to protect citizens' rights to complain against state officials who break the law and to investigate violations of citizens' rights. The procuratorates also administer reporting centers to receive citizens' accusations, reports and appeals.

Criminal cases of first instance in the PRC are tried by collegial panels of one judge and two lay assessors, although simple civil cases can be tried to a single judge. The lay assessors perform much the same function as the American jury, providing the opportunity for ordinary citizens to become involved in the criminal justice process and to advance prevailing community standards. Each member of the panel has an equal vote in the decision, so it is theoretically possible for the two lay assessors to "outvote" the full-time judge. Appeals are tried to a collegial panel, which may be composed of three, five or seven judges, all of whom are full-time. The president of a court or chief judge of a division appoints the presiding judge of any panel, although the president or chief judge will act as presiding judge when he himself sits on a panel. A simple majority decides any case, but minority opinions are entered into the record of trials and appeals.

There is little judicial independence in actual practice, despite assurances of the PRC constitution and the organic law of the people's courts.

Other courts likely to be involved in criminal appeals cases in the PRC include the High People's Courts, of which there are 30 throughout China. These include one for each province, autonomous region or municipality directly under the Central Government, and the Intermediate People's Courts. The bulk of the work for the High People's Courts comes from appeals and protests lodged against judgments and orders of the intermediate people's courts and protests by the people's procuratorates, according to rules of judicial supervision. They also supervise the administration of justice by people's courts at lower levels. The Intermediate People's Courts are established at the level of prefectures, cities and other large population groupings in China. At the end of the 1980s, there were between 350 and 400 of these courts in China. Appeals from the courts of first instance usually go to the Intermediate People's Courts.

Under Chinese criminal and civil procedure and court organization laws, judicial committees are established at all levels with presidents, chief judges and other experienced judicial personnel. Committee members analyze and discuss "major and difficult cases and other matters relating to judicial work."* According to the Supreme People's Court, the judicial committee exercises "collective leadership" over the court's judicial activities, and its decisions with respect to specific cases "will be executed by the collegial panel without fail." Yet these committees also provide the vehicles whereby the Chinese Communist Party (CCP) exercises its control over the judiciary. Members of committees who are Communist Party members and who belong to parallel or "shadow" CCP organs enforce CCP dominance and keep the courts in line. Due to this influence, there is little judicial independence in actual practice, despite assurances of the PRC constitution and the organic law of the people's courts.

A Chinese Criminal Trial Observed

The criminal trial I attended was held on the afternoon of Thursday, March 22, 1991 in the Basic Level People's Court, in the Chongwenmen District of Beijing, China's capital city. The courtroom was a fairly large-sized auditorium with a raised dais in the front center for the panel of judges, with a boxed in space on the right side for defense attorneys and a similar space on the left side for the prosecutor.

When our delegation entered the courtroom, only the secretary of the court, wearing a blue uniform, was visible. She was soon joined by two prosecutors in green army-style uniforms and two defense counselors, one of whom was wearing a gray "Mao suit" and the other a charcoal-colored Western business suit. Finally, the proceedings began when the three judges entered the courtroom, along with the secretary who returned to the courtroom after leaving to bring in the panel. Members of the panel wore blue uniforms with red and gold trim, similar in style to the prosecutors' uniforms. The chief judge ordered that the defendant be brought in. He was escorted by two officers in green uniforms with gloves.

The defendant was an 18-year-old contract worker in the Donglaishun Restaurant, a popular Beijing dining place famous for its Mongolian hotpot. His name was Liu Yingbin, of Han nationality and a native of Beijing. He was charged with theft. The defendant wore a gray jacket and olive drab trousers. These did not appear to be prison garb or a uniform of any kind.

At the start of the proceedings, the defendant was told that he had the right to challenge membership of the tribunal and to ask any or all of them to withdraw (or, as we would say in the United States, to "recuse" themselves). He offered no objections to the panel. The defendant was also told that he had a right to a defense counsel to advance legal arguments on his behalf. There were, in fact, two defense counsel—only one of whom ever spoke—in the defense counsels' box. The judges appeared to be quite young, but the

(continued on page 25)

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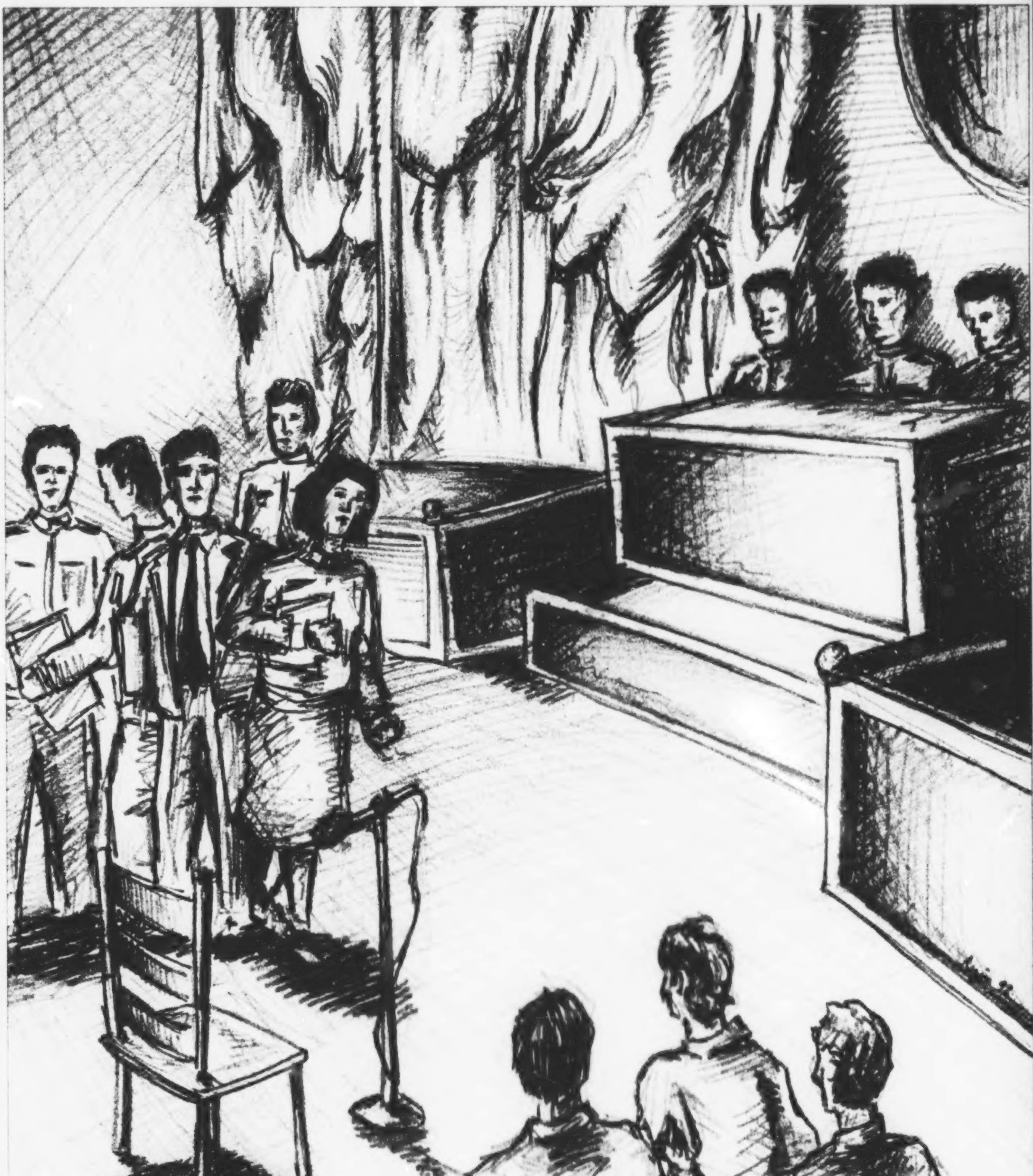
*For a somewhat more sinister view of what the work of Chinese judicial committees really involves, see Liu, "'Judicial Review' in China: A Comparative Perspective," 14 Rev. Socialist L. 241 (1988) (suggesting that the sole purpose of "review" of cases in the PRC is to impose the Communist Party's policy on lower courts).



delegation's translator, Qian Yi, thought they were anywhere from 35 to 40 years old. The courtroom was cold, with windows open despite the wintry weather. Behind the bench was a backdrop of draperies, with a hanging seal of the PRC centered directly over the bench where the judicial panel sat in the front of the courtroom. The seal was spotlighted. There were about 60 chairs in the back of the courtroom behind a railing dividing the court officials from the public. In the front row, where the delegation was seated, there were arm chairs. The rows further back had folding chairs with slip covers.

The judges appeared to be quite young... anywhere from 35 to 40 years old.

The charges were read by the prosecutor, beginning with the first offense of theft. The defendant had forced open a drawer in a desk at the financial office in the restaurant where he worked and stolen a sum of cash from the drawer. He was also charged with stealing a purse from one of the restaurant's customers, in which there was some cash and a valuable item (later revealed to be a beeper/pager, worth over 1000 RMB).* The defendant confessed, according to the prosecutor, very shortly after the theft from the restaurant's financial office drawer was committed on October 26, 1990. For reasons never fully explained, he was not formally arrested or detained by the police until December of 1990.

The chief judge asked the defendant if he could "reflect on the charges as contained in the indictment." The defendant recounted the events of October 26, 1990 with some help as to the details from a previously prepared statement he had made for the court. He said that he had been looking for some cigarettes, which led him to the drawer. He broke the lock and was surprised to find so much cash there. He took three 50 RMB notes. From this point on, all the questioning with respect to the facts of the case came from the judges. After a few perfunctory questions, the judges asked the defense counsel if they had any response. The defense counsel did not disagree with the facts as they had been stated thus far in court. Next, one of the lay assessors began to read witness testimony, which must have been previously given to the court, about the second offense. At the conclusion of the statement, it was noted that the testimony read by this judge was taken in early March 1991. (At this point, a photographer in a green uniform began photographing the proceedings, including the delegation and the rest of the audience. The court secretary had notified the audience at the outset that no photography or other "disturbances" would be permitted. Members of the delegation took no photographs.)

The defendant was given a chance to present his own story in court. In his testimony, the defendant said that, on September 29, 1990, he was working in the restaurant. A woman customer left her purse on a chair. When he saw the purse, he wanted to take it. He noted that the restaurant's customers often "forgot" their personal property. The defendant said he took one 50 RMB note, as well as a one-RMB and a five-RMB bill from this purse. He explained that, "I wanted to have some easy money; that was my habit." The prosecutor then read from a deposition of the defendant, taken in January 1991. The prosecutor said there was some discrepancy between the deposition and the testimony given to the court. The defense counsel asked whether the defendant intended to confirm his deposition by this testimony. He said that he did.

At this point, a witness was brought in and seated in a chair near the prosecutors' bench. The chief judge told her that all witnesses with information regarding crimes must provide that information to the court. The witness was allowed to sit during her testimony. The defendant had to stand during his. While she testified, the defendant continued to stand, facing the prosecutors, judges and defense counsel. The witness was revealed to be the woman who "lost" her purse—according to her testimony, the defendant took it when she wasn't looking. She was about 40, with short hair and wore a loden coat. She also testified that, in addition to the cash in her purse, there was a beeper/pager in it at the time she lost it. The defendant was then questioned. He said that he spent the cash he took on food and drink and asked a friend to sell the beeper/pager for him. At this point, the judges produced a purse and wallet and gave them to a guard to show to the witness. She identified them as belonging to her. She testified that the beeper/pager was worth approximately 1000 RMB. She was then excused. The chief judge asked if the defense had any disagreement as to these facts. There was none. The court announced that this brought to a conclusion the finding of facts. It was then announced that the time for "litigation" (in Chinese, *bianhu* or "argument") had begun. The defendant was then seated.

Bianhu in a Chinese Criminal Trial

The prosecutor began by arguing that the defendant intended to steal because he originally wanted to take cigarettes:

> He took property from its rightful owners for himself and for others. He did this without any permission. His intention was to take "easy money." He stole this money. He used a pair of pliers to pry open the drawer and took the

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*1000 RMB equaled about US $175 at 1991 exchange rates (US $1 = 5.71 RMB).

> cash. In the second instance, he took a customer's purse when she didn't notice it. He has full responsibility for having committed these crimes. He is a mature adult. He caused great damage and infringed both the rights of others and the state's interests. We have conducted a full investigation and reached these conclusions. He often took food from the restaurant where he worked; then, emboldened, he directly stole the cash and snatched a customer's purse. To date his conduct has damaged both others' property and the interests of the state and individuals. His activities have caused disturbances among all the staff members of his unit. Also, their business operations had to be temporarily suspended. Defendant's work unit, the restaurant, is open to the public. Many customers come to this restaurant for their meals. In socialist countries, a customer having lunch in a restaurant has a right to be protected from having her *personal* property taken. You have damaged the reputation of the entire unit.

During the prosecutor's argument, the defendant was looking down and forward towards the judicial bench, not at the prosecutor. The prosecutor then read from a piece of paper:

> Our criminal law punishes economic crime severely. We are in a time of economic reconstruction. We must strictly protect state and citizens' economic welfare. Defendant has admitted to stealing cash and taking advantage of others. For your own self-interest, you injured the interests of others. You have no regard for law and public order. You always want to take advantage of others. With respect to admission of these faults, your attitude has generally been honest. Before the chief judge agreed to prosecution, I petitioned him to take notice that the defendant confessed his crimes to the Public Security Bureau [the police] voluntarily. That is regarded as "voluntary surrender" [which would ordinarily lead to mitigation of the sentence].

At this point, the defendant spoke. He stated, "I committed a serious mistake injuring both people and the state. I am ready for the punishment of the court." The defense lawyer wearing the Western suit then read from his prepared statement:

The defendant stood and said, "I have committed serious crimes damaging the state."

> We interviewed the defendant before coming here to court. There is no disagreement about the facts as brought out at trial. Yet, the defendant confessed his crimes voluntarily to the Public Security Bureau. He confessed to the restaurant manager first and then went to the Public Security Bureau to confess. The restaurant manager has confirmed these facts. If a defendant voluntarily presents facts of his criminal activities, he has surrendered voluntarily and made the investigation easier. In return for his confession, his sentence should be lightened, reduced or mitigated. Moreover, the defendant returned the stolen goods. He's only an 18-year-old boy. He is remorseful for what he did. In this case, the defendant confessed honestly and returned the fruits of his crime. Please take into account his extreme youth and the fact that this is the first time he has committed such crimes.

With that statement, the chief judge declared the trial concluded. He asked for any final statement by the defendant. The defendant stood and said, "I have committed serious crimes damaging the state. I am sorry and wish to express my remorse to the victims. Because of me, the reputation of my whole unit was damaged. I used to be sluggish, greedy, willing to take advantage of others. I hope that the court will give me a chance to become a new person." The defendant was led out by guards.

A ten-minute recess was declared. The delegation was led to a room filled with large armchairs and served refreshments by a woman in an official court uniform. Another uniformed man remained in the room with the delegation. Two other uniformed men—the chief judge of the criminal court and the director of judicial policy research for the court—also joined the delegation. They apologized that the chief judge of the district couldn't be there that day, as he had a meeting and couldn't attend the trial.

After this short break, the defendant was brought back in and the delegation returned to the courtroom. The judges were then seated in full uniform, which included wearing their hats. The chief judge stood and recounted the charges and facts, beginning with the statement that "robbery is stealing." He continued, "We think the defendant disregarded the law and his conduct has disregarded the legitimate rights of others and of the state. He deserves punishment." The judge then cited the arguments of defense counsel in favor of mitigation and said, "To safeguard individual and state interests and, in accordance with the criminal law, we must deal severely with crimes of robbery and stealing. The defendant is sentenced to six months' imprisonment and must return the stolen goods to their rightful owners." With that, the chief judge sat down. The defendant and counsel were notified that an appeal was possible within a prescribed time limit. The court promised to provide a trial record to the defendant within five days.

In addition to the ABA delegation, about 20 people were in the audience. It appeared that the defendant's family was not in attendance. Most of the people in the audience were the defendant's fellow workers. After the trial, the delegation went down to look at the official court bulletin board. Notice of this trial was not in evidence there, even though legally notification of the time and place of every criminal trial must be posted three days before the date of the trial.

Reuters/Bettmann photo

In this 1990 photo, a Chinese student attempts to enter a Beijing middle court building in an effort to obtain an open trial for pro-democracy leader Wang Juntao.

The Trial in Comparative Perspective

To help put this description in comparative perspective, I will offer a few concluding remarks about the trial. First of all, the trial proceedings were in themselves quite simple and brief. Altogether, the whole event lasted less than two hours. Second, much of the procedure was conducted by the judges. In a common-law court, the judge acts more as an umpire and would leave the lawyers for the two sides much more in control. Third, the defense lawyers never contested their client's guilt or the charges against him. Rather, they conceded guilt and immediately raised arguments in mitigation of his inevitable sentence (e.g., first offense, youth, restitution of the stolen property). Fourth, the sentence was quite reasonable by international standards for the crime committed. In the United States, such a minor offense might have only resulted in probation or a suspended sentence, but the short prison sentence is well within the guidelines for a misdemeanor.

One remaining question which might puzzle an American reader of this account needs to be answered. Why should a defendant who has already admitted his guilt before the trial begins be tried? In the United States, such a defendant would merely make his plea of guilty and then be sentenced, usually with some reduction in the length of his sentence for having spared the state the nuisance and expense of a trial. This process, in a version known to many legal experts and lay viewers of television crime dramas as "plea bargaining," is an important means of disposing of criminal cases in the United States. Yet in China, and in many other civil-law countries, the criminal trial proceeds even where guilt is admitted. There are several reasons for this. Most importantly, it forces the government, in every criminal case, to prove its case by bringing all evidence of criminal activity to light. In addition, it provides an opportunity for the totality of circumstances, including mitigating evidence favorable to the defendant, to be presented. Finally, it serves an important educational function for those in attendance at the trial, as well as the defendant's family, coworkers and neighbors. In a developing legal order such as that of the PRC, this may be a paramount consideration. As the justice system is expanded and more trials are held, ordinary citizens learn about the legal rules and procedures which govern their behavior. These lessons are an important part of the civic education of the Chinese people and, the leadership hopes, may ultimately have an effect in reducing the crime rate. The future of Chinese criminal justice rests on these assumptions. Only experience will let us know if they have calculated correctly.

Law in
World Cultures

A Constitution for a United Germany: The Basic Law

Ralf Roedel

Development of Present German Constitution

The attention of the world, including that of our friends in the United States, is increasingly being focused on Germany today, as we undergo the sometimes painful process of reunification. Studying the constitution of a foreign nation provides much insight into that nation. If the constitution is very old, like that of Great Britain, you will learn much about the long-term history and traditions of that country. Germany's constitution, however, has existed only since 1949. For this reason, studying the German constitution tells us more about our recent history and present-day culture, politics and society.

After World War II, Germany had a constitution that did not fit the new post-war era. The then-existing constitution was the "Weimarer Reichsverfassung," which had been

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misused by the Nazis. In 1949 Germany developed a new constitution, the Basic Law (Grundgesetz). Since October 3, 1990, the constitution of the Federal Republic of (West) Germany has been valid in East Germany, as well. Although the German constitution is relatively new, it has been changed more than 30 times. The most important changes concern the military and military action. In 1956 the Basic Law was amended to allow for the foundation of the army (until that year there had been no German armed troops after World War II) and, in 1968, additional rules were inserted concerning warfare.

At the present time, important discussions are underway in Germany regarding future changes to the Basic Law in connection with the development of the European Community and with respect to reunification.

Structure of the Basic Law

The Basic Law, less than 100 pages in length, includes 146 articles divided into 11 sections (see accompanying box of excerpted articles on pp. 31-33 in this issue). Section 1 treats human rights issues. It includes provisions regarding the principle of equality before the law, freedom of worship, and the right of free speech. The second part lays out regulations between Germany as a whole and the 16 Laender in the federal republic. Succeeding parts of the Basic Law treat the function and responsibilities of the superior organs of the government and how federal legislation is to be passed. At the end of the constitution are regulations regarding the administration of justice, the system of public finances, and rules in the event of war.

West German Interior Minister Wolfgang Schauble (seated on the left) and East German State Secretary Gunter Krause sign the contract on German reunification on August 31, 1990 in East Berlin. (Reuters/Bettmann photo)

The Basic Law and the German Legal "Division of Labor"

As with most of the nations of Europe, the German legal system is grounded in the civil-law tradition (see definition on page 3 in this issue). This context is critical to understanding the role the Basic Law plays within the German legal system—its function, status, and, most importantly, jurisdiction. In civil-law countries (most of Western Europe and Latin America), a fundamental distinction is often made between public law and private law. Among the categories of private law is "civil law." In Germany, this part of the civil law derives from the Civil Code (Buergerliches Gesetzbuch). The codification of this law dates to 1896. Much of it derives from the Roman *jus civile* and the civil law of the particular German states. It became effective in Germany on January 1, 1900. It includes such "civil law" as the law of contracts, torts, property, succession, and domestic relations. Other areas of "private law" not covered by the Civil Code in Germany include commercial law and the law of patents and copyrights.

The German legal system is grounded in the civil-law tradition.

"Public law," on the other hand, includes administrative law, criminal law, and constitutional law. Corresponding to these distinctions in the law is the organization of the court system in Germany. The Federal Constitutional Court (Bundesverfassungsgericht)—and those of the individual Laender—have jurisdiction over constitutional matters (see Article 92 on page 33). There are some important differences between the newer Constitutional Court and other German courts, including the Supreme Court (Bundesgerichtshof), the highest "ordinary court," responsible for civil and criminal matters not involving constitutional disputes. Dissenting opinions in decisions by the Constitutional Court are noted publicly, unlike in other courts, where the "rule of unanimity" applies. Also, there is no judge-made law in other German courts (*stare decisis*) as in the Constitutional Court, which has the power to void statutes as unconstitutional.

The classification of law into public and private in Germany is important, but is not quite as fundamental as it once was. However, it still retains great practical significance within the German legal system. Even so, there has been some blurring of this distinction—for instance, in the development of "hybrid" categories of private/public law, such as labor law (labor-management disputes, union contracts, industrial codes). Originally handled as matters of private law, this area of the law in Germany is now handled by labor courts (Arbeitsgerichte).

Another area of overlap in the German legal division of labor concerns individual rights and other constitutional provisions in the Basic Law, which might seem to conflict with the codifed civil law. In fact, the Basic Law plays an important role in the interpretation of the Civil Code. This can be illustrated through the following three examples: Article 3 of the Basic Law provides for equality before the law. There is a rule in the Civil Code regarding giving employees notice of termination. It allows for a different period of notice for blue- and white-collar workers, respectively. In 1990 the Federal Constitutional Court decided that this rule was unconstitutional. As a result, the legal period of notice is now the same for blue- and white-collar workers. The determining factor in this decision was the principle of equality before the law. A second example concerns property rights. Article 14 of the German constitution

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grants the right of private property as a fundamental human right. No provision of the Civil Code may be interpreted to deny anyone this fundamental right. The final example concerns the violation of one's person. Article 2 of the Basic Law contains the following provision:

> Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.

In the past, the German Civil Code did not provide tort liability for such a violation. As a fundamental human right, however, tort claims in this area can be made without changing the Civil Code. For instance, this rights provision serves as a guarantee for the protection of personal data (invasion of privacy). If an institution wrongfully collects or disseminates personal information on someone, that individual has constitutional grounds to bring a civil suit for compensation. These examples demonstrate that all the rules and regulations of the German legal system must be interpreted in accordance with the Basic Law.

The Basic Law and Social Change in Germany

In recent years, there have been a number of significant changes in German law, resulting from interpretations of the provisions in the Basic Law. Many others are currently under discussion. For instance, over the past 15 to 20 years, there have been a number of changes in the area of family law. Most of these changes are based on Article 3 (the principle of equality before the law) and Article 6 (the right of marriage and family) of the Basic Law. The principal impetus for these changes is a new understanding of women's position in society.

There is also a very important discussion occurring in Germany today which concerns another provision of the Basic Law, Article 16, which grants, among other rights, the right of political asylum ("Persons persecuted on political grounds shall enjoy the right of asylum."). To understand this discussion, some background is necessary. The number of foreigners seeking asylum in Germany has increased dramatically in the last few years—an estimated 500,000 in 1992. Traditionally, most of those seeking asylum have come from Africa and Asia, but, recently, more and more are from Eastern Europe. For many years the political asylum provision has been interpreted very liberally—all people requesting asylum on political grounds must be granted entry into Germany, housed and provided with a living allowance until their case can be settled. Currently, approximately 90 percent of these asylum-seekers are being deported once their cases are settled, since their reasons for wishing to enter Germany are economic, rather than political. However, because there have been so many people seeking asylum, the backlog of cases means that many of them remain in Germany, at government expense, until their cases are resolved. These claims take an average of 13 months to settle. There are already several million foreign workers in Germany (resident aliens from such countries as Turkey, Italy, and Spain). In the past, Germany has not had immigration quotas.

For many years the political asylum provision has been interpreted very liberally.

Some Germans are concerned that the right of asylum will be restricted in an inappropriate way, simply for financial reasons, as the current liberal entry policy is a very expensive one. Recently, the governing coalition, led by Chancellor Kohl, proposed a constitutional amendment establishing specific criteria for the granting of asylum. Following the 1951 Geneva Convention on Refugees, it includes justified fear of persecution because of nationality, religion, race, belonging to a social group, or holding political convictions as criteria for granting asylum. This issue is a very controversial one among Germans. Personally, I believe that any restrictions in the asylum law solely for financial reasons would be very regrettable, as Germany is still one of the richest countries in the world. Our recent history demands a liberal attitude towards human rights.

The development of the Common Market of the European Community, especially beginning in 1993, will result perhaps in a strengthening of German federalism. As a result of reunification, Germany now has 16 states (there were 11 in West Germany). These Laender are, more or less, autonomous with respect to the state as a whole (Bundesrepublik Deutschland). For example, Bavaria and Saxonia are called "Freistaat," i.e., free (independent) states. In connection with the Common Market, a number of responsibilities will be transferred from the single state to Brussels, the future capital of Europe. There is more and more resistance against this trend towards European integration—what some refer to as "Eurocratism." In 1992 in Maastricht, Netherlands, the leaders of the European Community agreed to new rules about liberalization within the EC. Denmark refused to agree to these new rules in a referendum, and a subsequent referendum on European unity in France was ratified by a very narrow margin. While most Europeans want a unified market because of its economic benefits, not all are willing to pay the price for it.

Another area of possible changes in the German constitution is related to the civil war in the former Federal Republic of Yugoslavia. Under the Basic Law, German troops can be deployed in foreign countries only

(continued on page 49)

Excerpts from the *Basic Law of the Federal Republic of Germany* and *Unification Treaty of 1990*

(Note: The following translations are from *Constitutions of the Countries of the World*, eds. Albert P. Blaustein and Gisbert H. Flanz, Binder VI, Federal Republic of Germany, Constitutional Text as of February 1991, Chronology 1986-1991 & Bibliographical Note by Gisbert H. Flanz; Dobbs Ferry, New York: Oceana Publications, August 1991.)

Preamble

Conscious of their responsibility before God and men, animated by the resolve to serve world peace as an equal partner in a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law.

The Germans in the [17] Laender ... have achieved the unity and freedom of Germany in free self-determination. This Basic Law is thus valid for the entire German people.

Article 1 (Protection of human dignity)

(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

Article 2 (Rights of liberty)

(1) Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.

(2) Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law.

Article 3 (Equality before the law)

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights.

(3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.

Article 5 (Freedom of expression)

(1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcast and films are guaranteed. There shall be no censorship.

(2) These rights are limited by the provisions of the general laws, the provisions of the law for the protection of youth, and by the right to inviolability of personal honour.

(3) Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.

Article 6 (Marriage, family, illegitimate children)

(1) Marriage and family shall enjoy the special protection of the state.

(2) The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavours in this respect.

(3) Children may not be separated from their families against the will of the persons entitled to bring them up, except pursuant to a law, if those so entitled fail or the children are otherwise threatened with neglect.

(4) Every mother shall be entitled to the protection and care of the community.

Historical Background of the Basic Law

The historical origins of the Basic Law—the constitution of the Federal Republic of Germany—can be traced directly to the end of World War II, the Allied occupation, and the beginnings of the Cold War. After the defeat of the Nazis in 1945, occupied Germany was divided into four zones under the authority of the four principal victorious Allied powers—the United States, Great Britain, France, and the Soviet Union. As a result of tensions from the incipient Cold War, the four occupying powers, meeting at the December 1947 London Conference, were unable to agree on a common plan for restoration of sovereignty and rights of self-government to occupied Germany. This breakdown resulted, therefore, in the establishment of two Germanys, West and East, the Federal Republic and the Democratic Republic, comprising, respectively, the merged three zones under American, British and French control on the one hand, and Soviet control, on the other. Berlin, situated in the territory of East Germany, was similarly divided into West and East.

In September 1948 a Constitutional Commission was assembled, composed of representatives of the constituent *Laender* (states) of West Germany, constitutional experts, and other public figures, to draft a new German constitution. On May 8, 1949, a final draft of the constitution, the Basic Law (Grundgesetz), was ratified by the Parliamentary Council. Shortly thereafter, the Federal Republic of Germany was proclaimed. Remaining controls by the occupying powers were gradually eased until, on May 5, 1955, the Federal Republic of Germany became fully independent. The status of West Berlin, however, remained complex. The occupying powers did not recognize its full constitutional and political integration into the FRG, although acknowledging its status as a German *Land* (state).

German Unification Treaty of 1990

In July 1990 constitutional experts from West and East Germany met in East Berlin to draft a treaty for the constitutional and political unification of Germany (the *Einigungsvertrang*). The 45 article-long treaty was subsequently ratified by the required two-thirds vote of the West German *Bundestag* and the East German *Volkskammer*. October 3, 1990 was proclaimed the official "day of German unity." The constitutional "portal" for German reunification and integration was Article 23 of the Basic Law. Under this provision of the original 1949 constitution, the jurisdiction of the Basic Law was left unsettled. As first ratified, the Basic Law would apply at once in the West German Laender but, nonetheless, "it shall be put into force in other parts of Germany on their accession." In 1956, the provision was used to extend the Basic Law to the Saarland, integrating this state into the German Federation. This precedent was followed in 1990, enabling the five traditional Laender of East Germany to constitutionally "reunite" with the *Laender* of the Federal Republic of Germany. Through the Unification Treaty, Article 23 of the Basic Law was abrogated, no longer being necessary.

—*Howard Kaplan*

(5) Illegitimate children shall be provided by legislation with the same opportunities for their physical and spiritual development and their place in society as are enjoyed by legitimate children.

Article 7 (Education)

(1) The entire educational system shall be under the supervision of the state.

(2) The persons entitled to bring up a child shall have the right to decide whether it shall receive religious instruction.

Article 14 (Property, right of inheritance, expropriation)

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.

(2) Property imposes duties. Its use should also serve the public weal.

(3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

Article 16 (Deprivation of citizenship, extradition, right of asylum)

(1) No one may be deprived of his German citizenship. Loss of citizenship may arise only pursuant to a law, and against the will of the person affected only if such person does not thereby become stateless.

(2) No German may be extradited to a foreign country. Persons persecuted on political grounds shall enjoy the right of asylum.

II. The Federation and the Constituent States (Laender)

Article 20 (Basic principles of the Constitution—Right to resist)

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive and judicial organs.

(3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.

(4) All Germans shall have the right to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible. [added 1968]

Article 92 (Court organization)

Judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Laender.

Article 102 (Abolition of capital punishment)

Capital punishment shall be abolished.

Article 116 (Definition of "German," Regranting of citizenship)

(1) Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock or as the spouse or descendent of such person.

(2) Former German citizens who, between 20 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial, or religious grounds, and their descendents, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they have established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.

Article 143 (Deviations from the Basic Law)

(1) Law in the territory specified in Article 3 of the Unification Treaty may deviate from provisions of this Basic Law at the latest until 31 December 1992 insofar and as long as, owing to the different conditions, no complete accommodation to the Order of the Basic Law can be achieved. Deviations must not be violate Article 19(2) and must be compatible with the principles specified in Article 79(3).

(2) Deviations from Sections II, VIIIa, IX, X and XI are admissible, at the latest, until 31 December 1995.

(3) Not withstanding paragraphs 1 and 2 [above], Article 41 of the Unification Treaty and the Rules for its implementation shall remain valid, as they stipulate, that interference with ownership in the territory specified in Article 3 of this treaty cannot be made reversible. [Article 143 added 1990]

Article 144 (Ratification of the Basic Law)

(1) This Basic Law shall require ratification by the representative assemblies of two-thirds of the German Laender in which it is for the time being to apply.

Article 146

This Basic Law, which is valid for the entire German people following the achievement of unity and freedom, shall cease to be in force on the day a constitution comes into effect, which was adopted by a free decision of the German people. [added 1990]

Article 5 of the German Unification Treaty of 1990

The Governments of the two Contracting Parties recommend to the legislative bodies of the united Germany that within two years they should deal with the questions regarding amendments or additions to the Basic Law as raised in connection with German unification, in particular:

> with regard to the relationship between the Federation and the Laender in accordance with the Joint Resolution of the Minister-Presidents of 5 July 1990;
>
> with regard to the possibility of restructuring the Berlin/Brandenburg area in derogation of the provisions of Article 29 of the Basic Law by way of an agreement between the Laender concerned;
>
> with considerations on introducing state objectives into the Basic Law; and
>
> with the question of applying Article 146 of the Basic Law and of holding a referendum in this context.

Teaching Strategy

Nationalism and Rights in the New Europe

(This teaching strategy has been adapted from "The New Europe," a forthcoming curriculum unit for grades 9-12 by Adrian Chan, Stanford Program on International and Cross-Cultural Education (SPICE) and the Center for Russian and Eastern European Studies.)

Adrian Chan

Objectives

As a result of this activity, students will:

- learn about the problems and issues currently facing the "New Europe," including those concerning ethnic nationalism, identity, individual and collective rights;
- understand how rights sometimes come into conflict with one another, such as competing rights to (ethnic) national self-determination, or individual vs. collective rights;
- imagine what the map of Europe will look like in the 21st century; and
- compare issues of nationalism and rights in Europe with those confronting the United States.

Grade Level

This lesson is suitable for students in grades 11 and 12.

Time Needed

Four class periods plus additional time for preparation and research should be allowed.

Materials

Universal Declaration of Human Rights, Bill of Rights to the U.S. Constitution, German Basic Law and other European constitutions (excerpts), current newspapers and newsmagazines

Nationalism and Identity

Introduction

Nationalism is among the most controversial issues facing Europeans. When communist governments were first overturned at the end of the 1980s, differences of opinion emerged over prospects for Europe's future. Was Eastern Europe at last "free of captivity," proof of democracy's successful rise within Europe? Or, was it in danger of falling apart at the hands of nationalist parties? To understand nationalism and its role in Europe, students need to think about how people identify with their countries.

Procedures

In this brief introduction to nationalism, students look at how people define their identities, taking into account their relationships to other nations. You might wish to go through this activity yourself, in order to better understand the process.

1. Ask students to write down five items (people, places, ideas, etc.) that represent their national identity (or the country they identify with most). Students might list concepts (freedom, democracy, rights), objects (the flag, statue of liberty), etc. Next, ask students to draw five concentric circles on a sheet of paper like a target—this will be their "identity circle." Now ask students to brainstorm and write down five things that are most important to them (e.g., family, friends, job, home, etc.). They should then write these inside each circle, with the most important in the center, then moving to the outside circle in order of decreasing importance.
2. Divide the class into small groups and ask students to share their identity circles and national identity lists with each other in their groups. Encourage them to discuss how they established their priorities, both for the national identity lists and for the identity circles. Ask them to produce a "national identity circle" that represents their national identity.
3. In discussing nationalism with students, point out that "nations" are not to be confused with "states" (nation-states, countries). A nation is a group of people who share a common history, tradition, and language. For example, Native American tribes are considered nations, as are many groups in Africa, even in the absence of a state structure,

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Adrian Chan was Director of SPICE's The New Europe Project.

sovereign status, or internationally-recognized state borders.

In the United States, however, we often think of nationalism and national identity differently than other peoples around the world—as more connected to our "nation-state," rather than constituent "nations" or ethnic groups. There are several reasons for this. First, "American" civic identity is not, in itself, defined by belonging to a particular ethnic group or groups. So, our sense of (American) national identity is not always tied to our ethnic identities at all—and certainly not to a single ethnic identification. Second, Americans are collectively descended from many different ethnic groups. As a result, our senses of national and ethnic identity are often quite distinct, even if still related (e.g., our "hyphenated" ethnic groups— German-Americans, Asian-Americans, African-Americans, Serbian-Americans). These allegiances may sometimes be in conflict (e.g., ties to the "old country" vs. assimilation), but, among many Americans, they have often also been mutually reinforcing.

In Eastern Europe, many nationalities (nations) were divided when state borders were drawn to establish new countries in the 20th century. Others were artificially brought together. For example, since World War II, many Hungarians have been cut off from Hungary and live in present-day Romania, while Czechs and Slovaks were combined after World War I to create Czechoslovakia.

4. To "debrief" the activity, draw an empty identity circle on the board and discuss what students put inside it. Did many students have similar priorities, or was the range very diverse? What kinds of issues were generally important to them? Were they similar or different than those which they included in their national identity lists? Ask students if they think their parents or guardians would probably have had the same priorities. Grandparents?
5. Next, draw a national identity circle on the board. Ask students similar questions to those raised for the identity circle discussion. Did any of them "identify" primarily with a nation other than the United States (refer to discussion of American nationalism in item 3 above)? If yes, ask why. If no, ask them if they know of anyone living in the United States who might identify with another nation. Discuss responses with students.
6. Many students probably will have two very different lists (national identity and identity circles), especially in certain areas of the United States. There might also be great differences among the students in your class. Introduce the term "heterogeneous." In many countries of Eastern Europe, serious conflicts have arisen between different ethnic groups. Many Eastern European students would have two very similar lists, showing that they strongly identify with their nations. Since the fall of communism, nationalism has at times provided a convenient vehicle for expressing one's identity. Ask students to suggest reasons to explain why, in some parts of the world, diversity causes conflict. Do they have suggestions for how these conflicts might be resolved?

Nationalism and Rights

Introduction

In a 1991 essay on the former Soviet Union, scholar Paul Goble noted:

> Increasingly in Soviet society, two sets of rights are coming into conflict: the individual rights of citizens and the collective right of nationality groups to self-determination... in defending [individual] rights ... we may find ourselves sometimes allied with those who want to deny ethnic groups the right to choose their own destiny. It will not be easy to balance those rights ....
> (*Cornell International Law Journal*, March 1991)

Although the Soviet Union *per se* no longer exists, the issues raised by Goble remain relevant in the former communist-dominated countries of Eastern Europe and Russia. For good and bad, some see the end of communist control of Eastern Europe societies as opening a "Pandora's box" of oppressed and repressed nationalities and individuals. As a result, potential exists for various competing claims to "rights" to come into conflict. In addition to the individual vs. collective rights conflict noted by Goble in the passage above, they also include competing collective rights claims (i.e., national rights of different ethnic groups to self-rule). We often define (constitutional) democracy not just as majority rule, but also as a government of laws in which rights of individuals and minorities are protected. In practice, these two essential principles of constitutional democracy can come into conflict, as in the emerging democracies of Eastern Europe.

Procedures

1. Lead the class in a background discussion of the issues of nationalism and rights, including conflicts of rights, outlined above. You might wish to invite a lawyer to your class to help with this discussion, particularly one knowledgeable about constitutional law, international law, and/or human rights issues. Suggest different ways in which rights can come into conflict. Ask students to provide examples from their own experience or knowledge in which rights of different individuals or groups have been in conflict. Also note that as "rights" are framed in general and sometimes abstract language, people often disagree as to what they mean in practice or how they apply in different contexts. Provide students with examples, such as the following

(continued on next page)

Nationalism and Rights *continued*

and then ask them if they can think of other similar cases:

> Article 15 of the U.N. Universal Declaration of Human Rights states, "Everyone has the right to a nationality."
>
> The Second Amendment of the U.S. Constitution states "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

Moreover, explain to students that "rights" may not be meaningful without effective remedies and enforcement mechanisms. Ask students how they think this issue applies to the two examples noted above. Do effective remedies exist? If not, what would they be?

2. Divide the class into small groups of three to five students. Distribute copies of the Universal Declaration of Human Rights, excerpts from the German *Basic Law* (see pp. 45 and pp. 31 in this issue) and, if you wish, excerpts from other European constitutions, to different groups. Many of the countries of Eastern Europe have drafted new constitutions in recent years. Also make sure each group has a copy of the Bill of Rights to the U.S. Constitution. If you have invited a lawyer to the class, she or he may wish to circulate among the groups to answer any substantive questions they might have.

   Ask groups to review their two documents (U.S. Bill of Rights and Universal Declaration/European constitution), considering the following questions:

   (a) Are there statements of national or other group/collective rights (such as states' rights) in the documents? If so, provide one example, if possible, and write down a brief explanation of what it means.

   (b) Are there statements of "individual" rights? If so, identify one from each document. Write down brief explanations.

   (c) Are there any rights statements which you are not sure are either (clearly) individual or group protections? Which ones?

   (d) Can you identify any potential conflicts of rights (e.g., free press vs. fair trial rights in the Bill of Rights) within particular documents? If so, write down, in the form of a question, the issues involved.

   (e) Can you identify one right from each document which you think may be variously interpreted or applied (you may use those already elicited from previous questions)? Write down two different interpretations/applications of these rights (e.g., the Second Amendment guarantees individuals the right to possess firearms or, alternatively, the Second Amendment guarantees states the right to muster militias, such as the National Guard).

   (f) Finally, see if they can find one right in each document with a provision for remedies or enforcement (e.g., the Nineteenth Amendment on women's suffrage asserts, "Congress shall have power to enforce this Article by appropriate legislation."). If so, do you think the enforcement/remedy is sufficient? Why or why not?

3. Ask groups to report briefly on their answers to the questions. If you have invited a lawyer to your class, she or he may wish to help answer questions, comment on the discussion, and help with debriefing the activity. What similarities and differences did the groups find between the two documents they studied? What about those among the documents different groups studied (based on group reports)? In debriefing the discussion, you might wish to discuss the following:

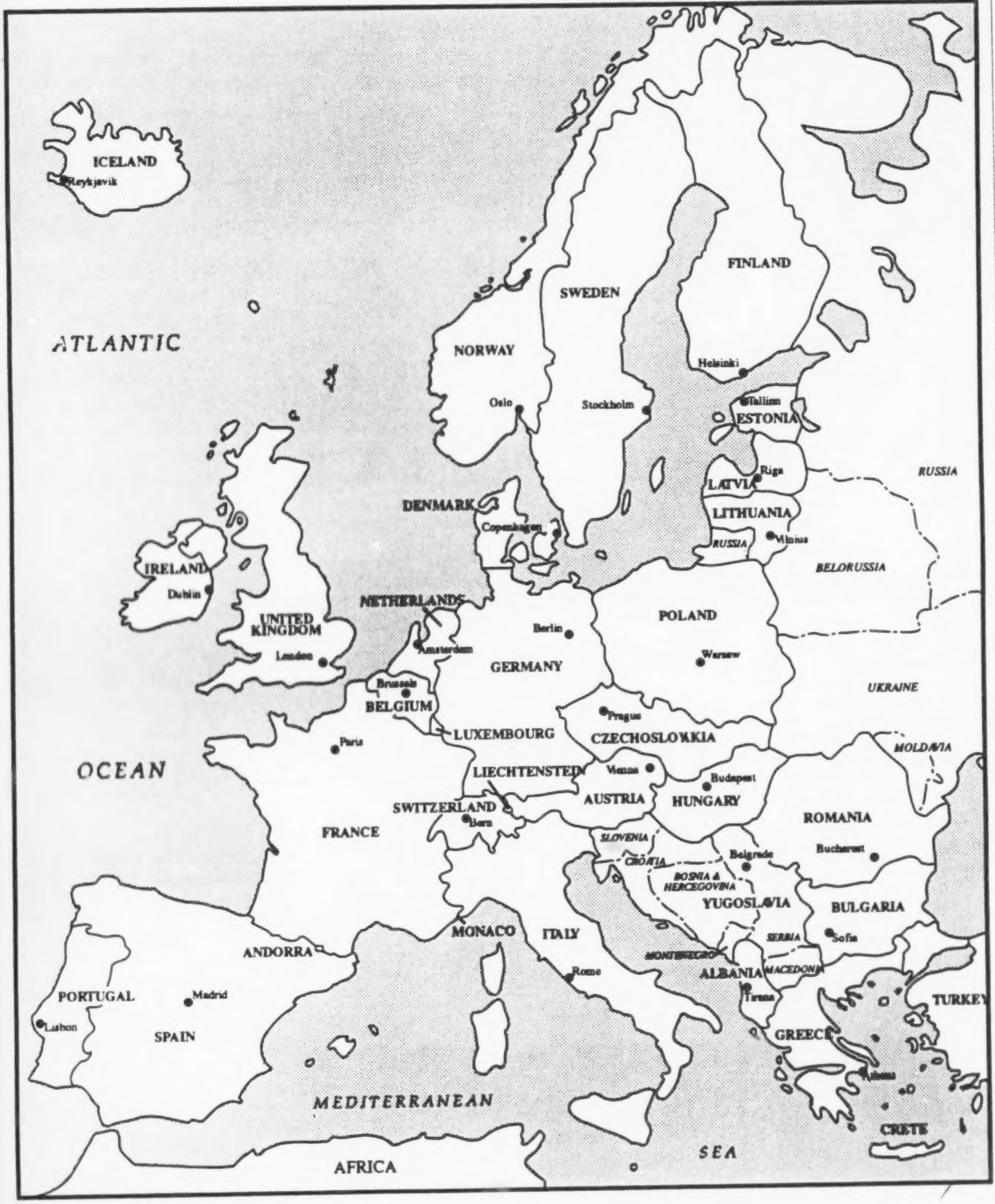
   (a) What relative emphasis have various national constitutions placed on individual and collective rights, respectively?;

   (b) Have the United States or Western European constitutions served as significant models for new constitutions drafted in Eastern Europe? In what ways?;

   (c) How have remedies and enforcement of rights provisions in United States and European constitutions, as well as United Nations documents, been established? How effective have they been?, and

   (d) Is federalism (a means of sharing political power among constituent parts and the whole) a good solution to the majority rule-minority rights problem in multiethnic, multinational states? What are its disadvantages? Advantages? (You might wish to provide background on federalism. In the United States, it refers to the "more perfect union" envisioned by the framers, embodying the reciprocal concepts of unity in diversity and diversity in unity (*E Pluribus Unum*). Other federal states include Germany, Canada and, until

(continued on page 38)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UKRAINE
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Copenhagen
IRELAND
Dublin
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Berlin
POLAND
Warsaw
Prague
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TURKEY
MONACO
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Rome
ANDORRA
PORTUGAL
Lisbon
SPAIN
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MEDITERRANEAN
SEA
AFRICA

Nationalism and Rights *continued*

recently, the former Soviet Union and Federal Republic of Yugoslavia.) How are the systems of government in the United States and other federal states similar? Different?

Nationalism and the Map of New Europe

Part 1: Symbol Map of Europe

Introduction

In this activity, students will become more familiar with issues of nationalism and rights in the New Europe, since the fall of communist governments in Eastern Europe in the late 1980s. They will do this by engaging in activities to represent the "New Europe" on outline maps of today and, also, imagining the map of Europe in the year 2000. Students will be asked to glean the meaning of words and images, and distill their key themes and concepts into statements or questions. After students have identified major themes and ideas, they will represent them with map symbols.

Procedures

1. Divide the class into groups of three to five students. Distribute copies of current newspaper or newsmagazine articles (as well as those from the last few years since the fall of communism in Eastern Europe) which treat issues of nationalism and/or rights in this region. Alternatively, you may wish to assign this step as small group research projects for students. Note that many current and historical events might be relevant to these issues (e.g., immigration, ethnic tensions, military conflicts, human rights abuses, free expression, censorship, constitutional revision, new legislation, court cases, voting). Each group should receive copies of the same handouts; ideally, each group should also receive different handouts (so that they will be able to share information with other groups).
2. Assign each group the task of writing three to five questions or statements raised by the issues on the handout page. For instance, a statement might be "Czechoslovakia ceased being a single country after 1992." A question might be "What can we do about human rights abuses in the former Federal Republic of Yugoslavia." Each student in the group should write down the statements and questions that the group comes up with together.
3. Ask students to work together to create map symbols (at least two per group), which will be used on a large map of Europe to indicate these problems or issues. For example, flags could be used to represent different nationalities, a figure with suitcases for immigration, an exploding bomb for interethnic warfare, a ballot box for elections, a book or television monitor for free expression (or, with a diagonal line running across these symbols for censorship), etc. To stimulate their imaginations, you might wish to provide your students with examples of symbols in newspapers, magazines, or books. Each symbol should be simple enough so that students will be able to either copy or redraw it later. Ask students to write a very brief explanation of each symbol's meaning. They should keep these copies for a subsequent activity.
4. Ask students to share their statements/questions and symbols with the whole class. Write the statements and questions on the board. You might also ask for volunteers to show their symbols or draw them on the board. Ask students to provide supporting evidence for their group's statements, questions and symbols from the handouts. Elicit comments and discussion from other students. You may wish to use this activity to learn more about what you wish to emphasize in the unit you are teaching on Eastern Europe, nationalism, human rights, etc.

Part 2: Mapping the New Europe of the Year 2000

Introduction

Students, in groups of three to five, draw the borders of the countries on the European continent as they would imagine them in the year 2000. This activity would work best as a concluding exercise to a unit of study on (Eastern) Europe. You may, however, wish to adapt or limit it, depending upon the preparation or background of your students. For instance, you might limit the outline map only to Eastern Europe, although incorporating the rest of Europe into the activity certainly enriches it. Before conducting this activity, you may want to assign groups of students to research different countries or regions of Europe and, then, place them in *different* small groups, so that they will each have their "experts" to contribute to the development of the new map. For additional background, you might also wish to include activities and handout materials from the Stanford Program on International and Cross-Cultural Education's (SPICE) New Europe curriculum project, from which the "Nationalism and Rights in New Europe" activities have been adapted. Moreover, you might want to provide students with 20th century historical maps of Europe, such as those before and after the two world wars, as well as a contemporary one.

Procedures

1. Divide the class into new groups of three to five students each. Students should have the symbols they made in Part 1. Ask students to draw the political borders of the countries of Europe in the year 2000 onto a large outline map. Explain that the borders may or may not be the same as they are today—it is up to them to discuss and decide where to draw them.
2. When students have drawn the map, they are to indicate where the issue depicted by their symbols are important. For instance, they might wish to place a symbol indicating ethnic conflict over an area where they think current problems may continue, or future ones arise. Tell students that they should draw, paste or tape their symbols onto the map so that they represent the issues facing different parts of Europe. You might also ask them to provide a key or legend. Have students write their names in one corner of the map. Each group should be prepared to explain its map to the rest of the class. Students should also feel free to change some of Europe's internal borders to reflect changes they think might occur.
3. List the following questions on the board. These are to be used to help students focus on relevant issues and problems, while they are making their maps.
   Focus questions:
   (a) Where have the internal political boundaries of Europe been drawn?
   (b) Is Europe unified or divided? How? Do physical barriers, such as walls, divide any parts of Europe?
   (c) Where does "Europe" begin and end?
   (d) Are wars being fought anywhere? If so, are they the result of interethnic conflicts?
   (e) Have new state constitutions been drafted or existing ones significantly amended? Where? What are their key provisions?
   (f) Are there human rights abuses in Europe? Where?
   (g) Are all ethnic groups/nationalities politically and constitutionally "self-determined"? Which are not?
   (h) Are federal systems of governance in place in Europe (whole and/or parts)?
4. Before the activity ends, ask students to present their maps to the rest of the class. Each group should explain why it chose to represent the map of 21st century Europe the way it did. Students should also discuss the application of their symbols to particular contexts.
5. You might wish to ask students to apply some of the above exercises to an American context, by way of comparison. For instance, you might want them to imagine how, as a "multiethnic federal state," the United States might be politically reconfigured so that each constituent part (i.e., the states) might be composed of different ethnic group majorities (as in some European countries). What would the consequences of such a rearrangement be? Would they be good or bad? How so? Would this also depend on the means used to reach the desired ends? Why? Might the "reconfiguration" be achieved by changing boundaries of political units, or would it be necessary for people to literally move from one place to another? Would such "ethnic" representation work better in European, rather than American, contexts? (You might wish to point out that, in the former Soviet Union, a "rearrangement policy" was implemented by Josef Stalin and his successors which literally compelled millions of people to move from one part of the Soviet Union to another. The result was great loss of life, social dislocation, and an enduring legacy of problems for post-Soviet society. You might also wish to note, however, that, in the United States, policies have been established, in some cases, to encourage greater political representation by historically underrepresented (minority) groups. Examples include apportionment plans developed for U.S. congressional districts to insure that they are composed of Hispanic or African-American majorities, even if requiring "gerrymandering.")
6. As a follow up to, or in conjunction with, these activities, you may wish to assign students to write research papers on specific issues related to nationalism and rights in Europe.

For More Information

Two back issues of *Update* contain additional substantive articles and classroom activities relevant to the theme of this issue.

The Fall 1990 issue, "Democracy in the 21st Century," includes an article by Daniel J. Baum focusing on the cultural conflicts that confront Eastern Europe. The article considers issues such as the cultural impact of authoritarian rule, press freedom and language rights.

James Feinerman's article, "Prospects for Democracy in the People's Republic of China," provides worthwhile context and background for his article appearing elsewhere in this issue.

Articles in the Fall 1980 issue on teaching global law by Margaret Branson and Linda Wojtan outline ways in which teachers can bring a global perspective on law and culture to their classrooms.

Copies of these issues are available for $8 each; to order, send a check, payable to the American Bar Association, to: ABA/YEFC, 541 N. Fairbanks Ct., 15th Floor, Chicago, IL 60611-3314.

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Teaching Strategy

An African Perspective on Human Rights

David Shiman

There is a growing global commitment to the idea of universal human rights and great similarity among the human rights documents that have been generated in different parts of the world. However, not all people in the world interpret the concept of human rights in the same way. This activity challenges students to understand the perspective on human rights found in the African Charter on Human and People's Rights and to compare and contrast it with that found in the United Nations Universal Declaration of Human Rights (UDHR). This activity will appear in Shiman, David, Teaching Human Rights: Issues of Justice in a Global Age. Denver: Center for Teaching International Relations, University of Denver, 1992 (2nd ed).

As a result of this activity, students will:

- understand the basic tenets of two human rights documents;
- analyze the similarities and differences in the perspectives on human rights found in the two documents;
- understand some of the reasons Africans included the rights of self-determination and development in their charter; and
- make comparisons between African and Native American problems with European settler/colonizers.

Grade Level

This activity is suitable for students in grades 9 through 12.

Time Needed

Three to five class periods, but divisible into self-contained units.

Materials

"Universal Declaration of Human Rights," (UDHR)
"African Charter on Human and People's Rights"

David Shiman is a Professor of Education at the University of Vermont. He served as Coordinator of Amnesty International USA's National Steering Committee on Human Rights Education from 1989-92.

Procedures

This activity will be most successful if students have previous knowledge of the UDHR and have some understanding of African development issues.

1. Begin this activity by pointing out that there are regional documents which reaffirm and expand on the principles found in the United Nations Universal Declaration of Human Rights (signed December 10, 1948). These include the following: the European Convention on Human Rights signed by the Council of Europe in 1950; the American Convention on Human Rights signed by the Organization of American States in 1969; and the African Charter on Human and People's Rights approved by the Organization of African Unity in 1981.

   These documents are similar, but not identical. Each reflects the history, cultural traditions, ideologies, and political and economic structures of the nations which wrote it. The Universal Declaration, for example, was conceived and written principally by North Americans and Europeans who asserted its universality. Understanding how nations in different regions of the world interpret and expand on these rights enables us to gain insight into their particular cultural and historical experiences.
2. Distribute the "Universal Declaration of Human Rights" and the "African Charter on Human and People's Rights" to students.
3. Have students read the preamble to each document. Ask them the following questions:

   In what ways are the preambles similar (for example, with respect to themes, vision, structure)?

   What concerns are addressed in the African Charter's preamble, but not in that of the UDHR's (for instance, the right to development, elimination of colonialism, neocolonialism, apartheid, Zionism, dismantling foreign military bases, and all forms of discrimination)? What do these differences say about the differing values of those who wrote the documents?

   To what is the UDHR referring when it speaks of "barbarous acts which have outraged the conscience of mankind"?

   To which foreign powers do you think the African Charter is referring in the preamble? Note: Focus discussion on the clause beginning with "Conscious. . ."
4. Divide the class into small groups of four or five students each. Assign several articles from the African Charter to each group of students and have them identify which rights asserted in these articles are also in the Universal

Declaration. Have them note any similarities and differences in the way the same rights are described in the two documents.

Next, as a class, identify those rights found only in the African Charter, and consider the following questions:

Why do you think the African Charter includes "people's" as well as "human" rights, whereas the Universal Declaration does not? How might these differences reflect different cultural values? (Note: Discuss the communal nature of most African societies and point out that the UDHR emerges from Western individualistic traditions.)

Why is there considerable treatment of duties and responsibilities in the African Charter, but almost no mention of these in the Universal Declaration? Might this difference reflect different cultural values? (Note: Relate to cultural emphases on communitarian and individualistic values.) (Suggestion: If possible, invite an African to discuss this cultural emphasis with your students.)

Might "people's rights" and "human rights" be in conflict? Might they be mutually reinforcing?

5. Move into an examination of the following rights found in the African Charter:

   Article 20: Right to existence and self-determination.

   Article 21: Right to dispose of own wealth and resources.

   Article 22: Right to development.

   Use the following questions to help guide discussion, or organize students' research efforts:

   Why do you think Articles 20-22 are found in the African Charter, whereas there is nothing comparable in the UDHR?

   How might these articles reflect the drafters' view of their past history, particularly colonialism? How might they reflect an African concern with neocolonialism?

   Which groups might Africans describe as oppressed peoples on their continent?

   What do you think it means for Africans to have the "right to develop"? Do you think African countries are able to exercise this right?

   In asserting this right to development, does the African Charter focus more on group (i.e. people/community) or, individual, rights?

   Do you think there are certain rights found in the African Charter which should be added to the UDHR? Or to the U.S. Constitution? Why? What do you think would be the consequences of adding these rights?

6. Conclude this activity by relating these rights concerns back to an American context. Begin by pointing out to students that there are indigenous groups of people in the United States who have made claims and assertions similar to those found in Article 20-22 of the African Charter.

   Have students conduct research to compare African and Native American experiences with those of European settlers/colonizers. (Note: Instruct them to look for differences, as well as similarities, between these different experiences.)

   Have students conclude their research by attempting to create a Native American "Human and People's Rights" statement. What might it look like? (Note: The draft document of the United Nations Declaration on the Rights of Indigenous Peoples might also be useful in this context.) You might wish to invite native peoples to your class to discuss their problems, issues and concerns with students before asking them to draft such a document.

Perspectives on Human Rights

Student Handout 1

African Charter on Human and Peoples' Rights

Preamble

The African States members of the Organization of African Unity, parties to the present Convention entitled "African Charter on Human and Peoples' Rights";

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa to co-ordinate and intensity their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand that fundamental human rights stem from the attributes of human beings, which justifies their international protection and, on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay a particular mention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa the peoples of which are still struggling for their dignity and genuine independence and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions, and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

PART 1: RIGHTS AND DUTIES

CHAPTER I

Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or and other opinion, national and social origin, fortune, birth or other status.

Article 3

(1) Every individual shall be equal before the law.

(2) Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6
Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law in particular, no one may be arbitrarily arrested or detained.

Article 7
(1) Every individual shall have the right to have his cause heard. This comprises:
  (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
  (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
  (c) the right to defense, including the right to be defended by counsel of his choice;
  (d) the right to be tried within a reasonable time by an impartial court or tribunal.
(2) No one may be condemned for an act or omission which did not constitute a legally punishable offense at the time it was committed. No penalty may be inflicted for an offense for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8
Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9
(1) Every individual shall have the right to receive information.
(2) Every individual shall have the right to express and disseminate his opinions within the law.

Article 10
(1) Every individual shall have the right to free association provided that he abides by the law.
(2) Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11
Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12
(1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
(2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
(3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
(4) A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
(5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13
(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the law.
(2) Every citizen shall have the right of equal access to public service of his country.
(3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14
The right to property shall be guaranteed. Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16
(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
(2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17
(1) Every individual shall have the right to education.
(2) Every individual may freely take part in the cultural life of his community.
(3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18
(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.
(2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
(3) The State shall ensure the elimination of every discrimination against women and also ensure

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Perspectives on Human Rights *continued*

the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

(4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

(1) All people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

(2) Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

(3) All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

(2) In case of spoilation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

(3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

(4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

(5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

(2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 23

(1) All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

(2) For the purpose of strengthening peace, solidarity and friendly relations, States parties to the resent charter shall ensure that:

 (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; and

 (b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

CHAPTER II

Duties

Article 27

(1) Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

(2) The rights and freedoms of each individual shall be exercised with due regard to the rights of others,

collective security, morality and common interest.

Article 28
Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29
The individual shall also have the duty:

(1) To preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to maintain them in case of need;
(2) To serve his national community by placing his physical and intellectual abilities at its service;
(3) Not to compromise the security of the State whose national or resident he is;
(4) To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
(5) To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law;
(6) To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
(7) To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
(8) To contribute to the best of his abilities, at all times and at all levels to the promotion and achievement of African unity.

PARTS II AND III

Note: The remainder of this document deals primarily with the establishment of a Commission on Human and Peoples' Rights and the manner in which it will operate.
Adopted by the Organization of African Unity, Nairobi, Kenya, 1981.

United Nations Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
Whereas Member States pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now Therefore,
THE GENERAL ASSEMBLY proclaims

THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measure, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member State themselves and among the peoples of territories under their jurisdiction.

Article 1
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent trust, non-self-governing or under any other limitation of sovereignty.

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Perspectives on Human Rights *continued*

Article 3
Everyone has the right to life, liberty and security of person.

Article 4
No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6
Everyone has the right to recognition everywhere as a person before the law.

Article 7
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9
No one shall be subjected to arbitrary arrest, detention or exile.

Article 10
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11
(1) Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.
(2) No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

Article 12
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13
(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14
(1) Everyone has the right to seek and enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15
(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16
(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

Article 18
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20
(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interest.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

December 10, 1948

Constitutional Prism

(continued from page 7)

What is perhaps most fascinating in this "case study" of constitutional drafting is how the Japanese have converted this foreign-made framework into a thoroughly and distinctly Japanese organism. This happened partly because the framers of 1946 paid so little attention to bureaucracy. Being thoroughly American, they hardly imagined that bureaucracy deserved constitutional notice. Being military men, they had only admiration for the efficiency and effectiveness of Japanese bureaucrats. As a consequence, powerful ministries like that of International Trade and Industry (MITI) persisted from the 1920s and 1930s through the reforms of the 1940s virtually unaltered.

The traumatic experiences of the 1930s and 1940s have produced profound and durable changes in Japan. Most significantly, its culture has been demilitarized. Article IX, the famed anti-war clause, enjoys solid popular support across the political spectrum. But there are continuities, too. Japan is still a great puzzle to the West, an absolutely fascinating study in assimilation, adaptation, and cultural survival.

Conclusion

It is a great impoverishment to study a constitution in isolation. We learn by comparison. Proceeding this way, we not only inform ourselves about those with whom we share this small and interwoven planet, but we discover ways to improve our own governance. In a competitive and interdependent world, we cannot afford to neglect this approach any longer.

Bibliography

Inoue, Kyoko. *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Making* (Chicago: University of Chicago Press, 1991).

Kades, Charles. "The American Role in Revising Japan's Imperial Constitution," *Political Science Quarterly*, Vol. 104, No. 2 (1989), pp. 215-47.

Pharr, Susan. *Losing Face: Status Politics in Japan* (Berkeley: University of California Press, 1990).

Pharr, Susan. "The Politics of Women's Rights," in Robert E. Ward and Sakamoto Yoshikazu, eds., *Democratizing Japan: The Allied Occupation* (Honolulu: University of Hawaii Press, 1987), pp. 221-52.

Islamic Law

(continued from page 11)

alcohol and the promiscuous mixing of males and females appear socially destructive to many reformers who in this sense resemble very closely American politicians who proclaim their adherence to "family values."

Would-be Islamic reformers are often so immersed in the symbols of their creed that lose sight of the practicalities attendant to their implementation. In many ways, the suppression of the Islamic Salvation Front in Algeria was unfortunate. Had the Front taken power, its attempts to implement a strictly Islamic program would have been interesting to observe. Since reformers are often in opposition to established parties and states, they have had few reasons to work out their agenda in the real world.

A recent incident in Pakistan illustrates the conflict between ideology and practice. A strict reading of the Holy Qur'an reveals that all forms of interest are forbidden. Since the earliest days of Muslim history, various methods of avoiding that prohibition have been employed. Most simply, it can be described as "profit-sharing" rather than interest. In 1992, the Chief Shariah Court of Pakistan ruled that the country's entire banking system was contrary to Islam, as it allowed both the charging and drawing of interest. The implications of the ruling were enormous. For example, it enjoined the government to stop paying interest on its national debt. Moreover, in an economy based heavily on the remittance by Pakistanis living or working abroad of dollars, pounds and Saudi rials into interest-bearing accounts in Pakistan's banks, this order would have created domestic, as well as international, financial chaos. The court has made its ruling; no one, however, has made the slightest attempt to enforce it.

The Iranian revolution of 1978-79 became for Europeans and Americans the prime example of an Islamic state. For several years afterward, network newscasts and newspapers were filled with horror stories about people being stoned as adulterers or shot as drug dealers. What was not reported was that these events shocked and hurt many Muslims as well. News accounts of these events failed to convey the realities of Islamic law or a post-revolutionary society. For example, according to the standards of evidence of Islamic law, individuals can be convicted and executed for adultery only if there are witnesses—three adult Muslim males or six adult Muslim females—to the actual penetration; mere suspicion does not suffice. Obviously, the strict standards of Islamic law were not at work in these widely-publicized events. In reality, what the media reported on was the settling of personal scores involving those who had been victims during the reign of the Pahlavi Shahs and those who had been their victimizers.

Diversity of Muslim World Key to Understanding

Any understanding of Islamic law in the modern world must rest on an awareness of the immense diversity which exists among Muslims themselves. The Muslim world must, in current terms, include the United

States, which has 6 million Muslim residents, as well as Britain and France, which also have large Muslim populations. The Muslim world includes some of the world's wealthiest countries—Saudi Arabia, with a per capita income of $8,000—as well as some of the poorest, such as Bangladesh, with a mere $400 per person per year. Compact, relatively homogeneous, places such as Abu Dhabi are lumped together in the Euro-American mind with Egypt, Pakistan or the many Muslim countries of Africa which are ethnically and culturally polyform. In the midst of all this diversity, the institutions which most resemble each other are those of the nation-state. In legal terms, that means national courts and national laws. While the average Euro-American and Muslim may be attracted or repelled by that reality, the days in which community-centered, locally-based systems of law were common in both "the West" and the Muslim world seem to be gone, perhaps forever.

Bibliography

Heer, Nicholas (ed.), *Islamic Law and Jurisprudence*. (Seattle: University of Washington Press, 1990).

Kozlowski, Gregory C., *Muslim Endowments and Society in British India*. (Cambridge: Cambridge University Press, 1985).

__________________, "Muslim Personal Law and Political Identity in Independent India," in *Religion and Law in Independent India*. R.D. Baird, ed., (New Delhi: Manoharlal, forthcoming).

____________________, "Shah Banu's Case, Britain's Legal Legacy and Muslim Politics in Modern India," in *Law and Society in India*. Y. Malik and D. Vajpeyi, eds., (Delhi: Chanakya, 1990), 88-111.

Messick, Brinkley, "Kissing Hands and Knees: Hegemony and Hierarchy in Shari'a Discourse," in *Law and Society Review*, 22/4 (1988), 637-659.

________________, "The Mufti, The Text and The World: Legal Interpretation in Yemen," in *Man*, (N.S.) 21 (1986), 102-119.

Powers, David, "*Fatwas* as Sources for Legal and Social History: A Dispute Over Endowment Revenues from Fourteenth Century Fez," in *Al-Qantara*, XI/2 (1990), 295-340.

Roff, William, "Whence Cometh the Law? Dog Saliva in Kalantan, 1937," in *Shari at and Ambiguity in South Asian Islam*, K. Ewing, ed., (Berkeley: University of California Press, 1988), 25-43.

Rosen, Lawrence. *The Anthropology of Justice: Law as Culture in Islamic Society*. (Cambridge: Cambridge University Press, 1989).

Schacht, Joseph. *Introduction to Islamic Law*. (Oxford: Oxford University Press, 1964).

Weber, Max. *Max Weber on Law in Economy and Society*. (New York: Simon and Schuster, 1967).

The Basic Law

(continued from page 30)

for rescue operations. The Bundestag however, is considering amending the Basic Law to make armed actions possible—such as in Yugoslavia—in cases where they will be needed only for a short period of time. These changes are very controversial—it is important to recall that German troops fought in Bosnia and Serbia under the Nazi regime during World War II. I do not think, however, that this should be an excuse for refusing to assume responsibility in the conflict in what once was Yugoslavia.

As a result of reunification, Germany has also reclaimed sovereignty in certain areas which have been restricted since World War II. For instance, until reunification Germany was not allowed to possess nuclear weapons. Although there have been nuclear weapons deployed on West German soil for many years, they have been under the control of American troops. Many Germans, however, are increasingly willing to support bans on nuclear, biological and chemical weapons in Germany. This is very desirable, but, nevertheless, might have dangerous consequences.

The Impact of Reunification on the Basic Law

The most important constitutional issues currently being discussed in Germany, in fact, concern reunification. In the 1990 treaty signed by the governments of the former West and East Germany, a number of constitutional problems were left unresolved in order to expedite the process of reunification. Subsequently, it was agreed that they would be settled by 1996, with necessary modifications to be made in the Basic Law. I will discuss below some of the most important changes likely to occur.

Referendum and Direct Democracy. In 1990, Article 146 was added to the Basic Law. It states: "This Basic Law, which is valid for the entire German people following the achievement of unity and freedom, shall cease to be in force on the day a constitution comes into effect, which was adopted by a free decision of the German people." In conjunction with this article, the Unification Treaty referred to "the question of applying Article 146 of the Basic Law and of holding a referendum in this context." In addition to referendums on important constitutional issues, another result of this provision might be to enable political action groups to take part more readily in political discussions and decisions. Many politicians are opposed to these changes, fearing, I believe, a loss of power. Many German citizens, however, are very anxious to

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see how these changes will work in practice.

Strengthening of federalism. As noted earlier, responsibilities will be transferred from the constituent German states to Brussels, in conjunction with the Common Market. It won't be easy to realize both targets—strengthening Germany federalism and European integration.

Human Rights. The Bundestag is considering adding the following human rights provisions to the Basic Law:

- right to a clean environment;
- right to labor;
- right to education and culture;
- right to housing; and
- right to health.

The desire for a provision concerning the right to housing results from a growing housing shortage in Germany. It is a matter of some controversy as to whether these rights can acquire practical importance and application. I believe that the German government is committed to working on the above-mentioned targets. Nevertheless, some might argue that adding these abstract, difficult-to-attain provisions as "human rights" to the Basic Law makes them nothing more than "paper rights."

Other planned constitutional changes concern the following:

- improvement of the protection of ethnic and cultural minorities;
- right of resident aliens to vote in district elections;
- improvement of women's rights; and
- improvement of workers' participation.

I think these rights are very likely to soon acquire much practical importance. Further down the road, there might be changes in severe prison sentences for criminal offenses, including life imprisonment (there is no death penalty in Germany—Article 102 of the Basic Law states, "Capital punishment shall be abolished.") and a revision of the laws governing relations between church and state.

I hope that my overview of the Basic Law, including discussion of some of the most important planned constitutional changes, provides you with a better understanding of some of the current issues involving Germany's constitution. In turn, understanding the Basic Law provides insight into contemporary German government and society—and where we are heading over the next several years.

Author's note: I would like to thank Mr. Uwe Kuehnel, the personal assistant to my local member of parliament, for providing me with up-to-date information about constitutional reforms.

Legal Traditions

(continued from page 3)

include the French Civil Code or "Code Napoleon" of the early nineteenth century, and the German Civil Code of the late nineteenth century. In addition to France and Germany, other contemporary countries within the Roman-derived civil-law tradition include most Western European (except Scandinavian) and South American countries. Due to Louisiana's historical roots as a French colony, it is the one American state within the civil-law tradition.

Socialist-Law Tradition: In state-socialist countries, "socialist law" is the body of law that provides for the social, economic, and political transformation of a society. The historical mission of socialist law is to advance civil society towards communism—the most advanced stage of socialism. Although some legal scholars classify socialist law within the civil-law tradition, others see it as an autonomous legal tradition. Whereas civil- and common-law systems are rooted in the Judeo-Christian tradition, socialist law is anchored in the tenets of Marx and Lenin, best reflected in the leading role assigned to the Communist Party within the legal system. Until the 1990s, the Union of Soviet Socialist Republics was the preeminent model for this tradition, with Eastern Europe providing examples of smaller states which adapted and developed their own forms of socialist-law systems. Today, the People's Republic of China and Cuba remain as examples within this tradition.

Religious Legal Traditions. Traditionally, "religious" legal traditions do not make sharp distinctions between the sacred and the secular, unlike the "secular" common-law, civil-law, and socialist-law traditions. This shorthand term has sometimes been used to classify the diverse legal traditions historically grounded in the religions of Islam, Christianity, Judaism, and Hinduism. "Canon law" is most often used, historically, to refer to the law of "Christendom" (Europe) through the Reformation. It continues to play a fundamental role in governing the Roman Catholic Church. Traditional Islamic law, *Shariah*, is a significant force in the modern Muslim world (for a discussion of "Islamic Law in the Modern World," see the article by Gregory Kozlowski beginning on page 8).

While these classifications are helpful, it is important, however, not to regard them too strictly. In practice, there are not always such clearcut distinctions or mutually exclusive categories among different traditions as might be apparent from the classifications. Indeed, a given legal tradition might have elements drawn from more than one "family." For instance, in Washington State, where I live, the law governing the distribution of property of a married couple facing divorce or the death of one spouse owes more to the laws of neighboring California (and, by extension, of civil-law Spain, which once governed it) than it does to those of nearby Oregon (and, so, of common-law England). Other examples are provided by such highly industrialized and urbanized countries as Great Britain and Germany, which often find similar solutions to nearly identical legal problems of crime or contracts, even though they are classifed within different legal traditions—common law and civil law, respectively.

These two examples suggest that there may be both deep-rooted historical conditions responsible for "overlap" between legal traditions (such as in the case of Louisiana), as well as more modern trends at work. In fact, many comparative legal scholars have commented on the increasing "convergence" among legal traditions, due to the action of long-term worldwide economic and historical forces, accelerating global interdependence, and crosscultural borrowings.

Teaching Law Comparatively

A careful study of a single legal tradition can yield valuable insights. However, through the systematic exploration of a variety of legal traditions, students can discover for themselves what could be particular rather than essential, and changeable rather than permanent among laws (and the values and beliefs underlying them) comprising legal systems. Although my experience in teaching comparative legal studies is in universities, I believe that it can be instructive and useful for secondary education. In teaching college undergraduate classes in comparative legal systems, I start by briefly introducing the history, theory, and methodology of comparative study, along with its associated pitfalls and detractors. For instance, I explain that since comparison inevitably requires the use of categories, we have to begin with some form of "functional equivalents" to ensure that we are trying to talk about the same things. Still, I also emphasize that, while I have borrowed terms and categories from comparative legal commentators, I have further adapted these borrowings for my purposes. Moreover, I explain that, even among scholars, there is no unanimity as to accepted categories.

Consequently, I encourage students to be wary themselves of being misled by the similarity of terms and legal concepts or by the outward appearances and resemblances of legal problems, institutions or participants. In short, I try to foster a cautious appreciation for the issues being studied, so that we can examine, on the one hand, the data, and, on the other hand, its organization. I then move students to consider a further dichotomy—that between the categories "we" as observers use to describe, organize and analyze, and what "they" as participants in a legal tradition would likely use if, as "insiders," they were called upon to explain what was going on to "outsiders." In this way, I introduce students to some other important concepts in the social sciences, including cultural relativism and ethnocentrism, as well as to experience more familiar—if not any better understood—phenomena such as racism and sexism.

Finally, I define "comparative law" in the following way: the systematic study of the legal rules and procedures of two or more legal systems. Such comparative study, I emphasize, requires intercultural comparison and cross-disciplinary work, as well as an examination of each country's laws in political, cultural, social, historical, and economical context. Studying the ways in which people from other legal traditions define and solve legal problems can lead to new ways of looking at or understanding such problems within our own country. Scholars who describe and analyze domestic and foreign law with this in mind are typically called "comparativists."

Problems-Approach to Legal Studies

By taking a problems-oriented approach to crosscultural legal studies, we can learn much about our own and other cultures. Comparing and contrasting socially significant law-related problems with their "functional equivalents" in different legal systems provides insights into the rules, processes, and institutions of different cultures, and how participants might resolve their problems within these varying contexts. Of course, in teaching about our own legal system and others, any number of issues could be posed as problems. For example, in *Law in Radically Different Cultures*, a comparative law casebook, this approach is used to consider crosscultural problems framed around legal issues related to property, contract, criminal law, and population planning (John Barton, et al. *Law in Radically Different Cultures* West Publishing Co., 1983, pp. 738-949).

To illustrate how this approach might work, let us briefly consider the issue of population or family planning.* This overtly value-laden topic presents some of the most difficult and sensitive—yet potentially interesting and educational—issues of any crosscultural law-related problem that might be explored. The material on page 53 presents "Law and Social Values: An Exercise in Population Planning." It includes a "Fact Pattern" which you can distribute to students as a springboard for discussion and comparative study. There are two broad questions raised by this law-related problem which I think are especially important for students to explore.

First, how are values and laws, on the one hand, and the limitations of laws and the associated legal system, on the other, interrelated within different cultural contexts? For example, as when Congress enacted the Comstock Laws in the nineteenth century, values have decidedly shaped the law in the United States. By contrast, in China, the central government has succeeded in integrating a population-control norm into a public morality that, in a Confucian manner, integrates custom and law. Another example of ways in which values and laws are interrelated is provided by contemporary Egypt. In Egypt, where the tie between Islam and the state is particularly strong, the government has sometimes used its moral authority to shape the preaching of those who contribute to the public's values. Finally, the limitations of law appear starkly in the population-planning problem, which is exemplified, on the one hand, by the ineffectiveness of many population-control efforts and the widespread disobedience of laws against abortion and, on the other hand, by the Western rights theories that the law uses to limit itself.

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* *Adapted from Law in Radically Different Cultures.*

Second, how are the problems and mechanisms of legal change illuminated by a focus on population planning and the formulation of public policy within a particular nation's legal system? Some might argue that legal change can be effective in a value-laden area only if it follows, rather than impels, broader social change. Although this hypothesis appears somewhat questionable when applied to China, it is more useful when applied to many other societies—for example, the United States and Egypt. The mechanisms of change are quite complex. For instance, we might wonder why has "liberalization" in the area of population planning been addressed through judicial, rather than legislative or ministerial, means in some societies, including our own (e.g., the landmark Court cases of *Griswold v. Connecticut and Roe v. Wade*), more than others?

The topic of population planning raises some of the most obviously value-laden problems which could be presented within a discussion of comparative legal traditions. Any discussion of it, however, is necessarily incomplete and evolving. Possible issues to be considered are as current and relevant as those included in today's newspapers and newsmagazines.

Many other issues could be studied through a problems approach to legal studies. A comparative approach to any of these issues or problems could focus on the following: (1) the cultural beliefs, values, and dispositions underlying attitudes towards the issues or problem being examined; (2) the relationship between the law and these underlying attitudes; and (3) the process of legal change as it relates to broader changes and trends within the societies being compared. The value of such an approach is that it helps students to better understand not only other cultures and peoples, but their own culture, and themselves, as well.

BIBLIOGRAPHY

Richard L. Abel, ed. *The Politics of Informal Justice, Vol. 1: The American Experience; Vol. 2: Comparative Studies.* New York: Academic Press, Inc., 1981.

Michael C. Alexander. *Trials in the Late Roman Republic, 149 BC to 50 BC.* Toronto: University of Toronto Press, 1990.

Sybille Bedford. *As It Was: Pleasures, Landscapes and Justice.* London: Sinclair-Stevenson, Ltd., 1990.

John Barton, *et al. Law in Radically Different Cultures.* St. Paul, Minn.: West Publishing Co., 1983.

Noel Coulson. *A History of Islamic Law.* Edinburgh: Edinburgh University Press, 1969.

Rene David & John E. C. Brierley. *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law.* New York: The Free Press, A Division of Macmillan Publishing Co., Inc., 1978.

Norbert Ehrenfreund & Lawrence Treat. *You're the Jury: Solve Twelve Real-Life Court Cases Along with the Juries Who Decided Them.* New York: Henry Holt and Co., 1992.

Henry W. Ehrmann. *Comparative Legal Cultures.* Englewood Cliffs, N.J.: Prentice Hall, Inc., 1976.

Lon L. Fuller. *Anatomy of the Law.* New York: Frederick A. Praeger, 1968.

Bryan A. Garner, ed. *A Dictionary of Modern Legal Usage.* Oxford: Oxford University Press, 1987.

Mary Ann Glendon, Michael W. Gordon, & Christopher Osakwe. *Comparative Legal Traditions In a Nutshell.* St. Paul, Minn.: West Publishing Co., 1982.

Mary Ann Glendon, Michael W. Gordon, & Christopher Osakwe, eds. *Comparative Legal Traditions: Text, Materials and Cases on the Civil Law, Common Law and Socialist Law Traditions, with Special Reference to French, West German, English and Soviet Law.* St. Paul, Minn.: West Publishing Co., 1985.

Enid Hall. *Mahkama! Studies in the Egyptian Legal System: Courts and Crimes, Law and Society.* London: Ithaca Press, 1979.

Peter Irons. *The Courage of Their Convictions: Sixteen Americans who Fought Their Way to the Supreme Court.* New York: The Free Press, A Division of Macmillan, Inc., 1988.

Alan N. Katz, ed. *Legal Traditions and Systems: An International Handbook.* New York: Greenwood Press, 1986.

Victor H. Li. *Law Without Lawyers, A Comparative View of Law in China and the United States.* Stanford: Stanford Alumni Association, 1977.

David M. Walker, ed. *The Oxford Companion to Law.* Oxford: Clarendon Press, 1980.

Alan Watson. *The Making of the Civil Law.* Cambridge: Harvard University Press, 1981.

Alan Watson. *Roman Law & Comparative Law.* Athens: The University of Georgia Press, 1991.

Law and Social Values: An Exercise in Population Planning

For Students

Assume you are an expert in comparative legal studies. Using a comparative approach (comparing and contrasting), discuss the issues that you see raised by the Fact Pattern below. You should be as specific as possible and provide examples to support your comments and analyses. You should consider the following issues, in relation to both China (as expressed by the Fact Pattern) and the United States:

(1) the cultural beliefs, values, and dispositions underlying attitudes towards population-control technologies;

(2) the relationship between the law and these underlying attitudes; and

(3) the process of legal change as it relates to broader changes and trends within the society.

FACT PATTERN

Hsu and Wana were recently married. Hsu is twenty-five years old, holds a degree from a vocational high school, and works on an assembly line in a local factory. Wana is twenty-three years old, holds a B.S. (with highest honors) from a respected women's college, and teaches mathematics in an elementary school in the community where she grew up. Since the death of H's two brothers a few years ago, Hsu has provided comfort to his six very young sisters and his aging parents. Wana is an only child. She has been much loved and cared for by her parents, who are teachers at the local two-year college. Both sets of parents are pleased about the young people's marriage, especially since they have been able to arrange for the young couple to live and work within a few doors of their own apartments. All four parents cannot wait for their first grandson to arrive! Hsu openly shares their hopes; Wana, however, has other ideas.

Although Hsu and Wana are comfortable enough on their two salaries, they are also aware that their parents are not getting any younger. Concern over how to provide for them, and Hsu's young sisters, if his parents should die, has caused some tension in the couple's otherwise happy new marriage. The subject of their having children has also caused tension. On the one hand, Hsu wants a son—perhaps two or three!—and a daughter, as well. Wana, on the other hand, wants to wait to begin their family until she becomes principal of her elementary school, which she hopes will happen in about seven years. In addition to wanting to wait to have children, she believes that a single child, whether a girl or a boy, is all she wants.

Shortly before Hsu and Wana got married, a new Family Planning Clinic (FPC) opened in the local medical center, just a short bus ride from Hsu and Wana's neighborhood. A few weeks before their marriage, Hsu and Wana took a bus to the FPC, talked with a family planning specialist, and received the most up-to-date contraception information. A few days before their wedding, Wana returned to the FPC, this time alone and against Hsu's wishes, and was fitted with a contraceptive device by a nurse. Neither Hsu nor either of their parents knew about Wana's return visit to the FPC or about her birth control precautions. Much to Wana's surprise, the contraceptive device failed, and she became pregnant within a few months.

In desperation, Wana confides to Hsu about her use of contraception and her unplanned pregnancy. She also wonders whether she should have an abortion. Hsu is adamant: "No abortion! I want a son!" He then proudly announces the coming birth to the prospective grandparents, all the neighbors, his fellow factory workers, and the principal at Wana's school. Wana is simply beside herself: "What am I going to do now?"

Upset over these circumstances, Wana acccidentally falls on her way out of her apartment, seriously hurting herself. The FPC doctor meets with Hsu and Wana's parents and informs them that her injuries have caused severe complications. He suggests that, due to the risks to her health, she may not be able to continue her pregnancy. Fortunately, they learn that they do not need to make this decision, as Wana's condition improves. She carries her baby to term, delivering a health daughter.

Wana is relieved that her new daughter is healthy, but she continues to be ambivalent about having a child at this point in her life. Hsu is disappointed in not having had a son. Their parents are split on whether to hold a party to celebrate the arrival of their granddaughter.

For Teachers

To help students consider the questions and issues raised by this exercise/Fact Pattern, you might wish to assign them to conduct relevant research projects. In addition to the discussion in *Law in Radically Different Cultures*, other helpful background information is included in resources cited in the bibliography accompanying this article, as well as other articles and cited references in this issue of *Update* (including James Feinerman's).

You might also wish students to consider how population planning is addressed within other legal cultures. If possible, it would also be very helpful to invite an expert in comparative law, family law, and/or China to serve as a resource for class discussion. Students should be encouraged to apply appropriate statutory, administrative, customary, religious, provincial, constitutional, and case law to the relevant facts presented in this problem. You might also wish to consider how further detail or modifications in the Fact Pattern would change students' analyses, inferences or conclusions.

Relevant Resource Organizations

American Association for the Comparative Study of Law
c/o Hon. Edward D. Re
U.S. Court of International Trade
One Federal Plaza
New York, NY 10007
212/264-2800

Promotes comparative study of law and understanding of foreign legal systems. Members are 55 American law schools. Co-publishes *American Journal of Comparative Law* (quarterly).

American Federation of Teachers
International Affairs Dept.
555 New Jersey Avenue, NW
Washington, DC 20001
202/879-4448

Conducts Education for Democracy/International project, in association with Educational Excellence Network and Freedom House. Teaching materials on Eastern Europe available.

American Foreign Law Association
c/o Richard Lutringer
President
Whitman and Ransom
200 Park Avenue
New York, NY 10166

Members are attorneys, jurists and legal scholars concerned with issues in foreign, comparative and international law. Sponsors educational programs; maintains non-governmental organization (NGO) status with United Nations. Co-publishes *American Journal of Comparative Law*.

American Forum for Global Perspectives in Education
45 John Street, Ste. 908
New York, NY 10038
212/732-8606

Publishes curriculum, offers technical assistance to teachers and serves as clearinghouse of information and materials on global education. Disseminates back issues of *Intercom* magazine, including issue 100, "Through the Legal Looking Glass: Reflections of Peoples and Cultures."

Amnesty International USA
National Steering Committee on Human Rights Education
322 Eighth Avenue
New York, NY 10001
212/807-8400

Publishes *Human Rights Education: The Fourth R*, free newsletter for teachers available by joining AIUSA's Educators' Network.

Arab World and Islamic Resources (AWAIR)
Audrey Shabbas, Exec. Dir.
2095 Rose Street, Suite 4
Berkeley, CA 94709
510/704-0517
Peacenet: awair@igc.apc.org

Maintains AWAIR Resource Center; publishes *Middle East Resources*, a free newsletter for social studies educators and K-12 curricula and ancillary materials on Arab world and Islam, including *The Kingdom of Justice: Stories from the Life of Umar* (middle grades, book/audiocassette).

Association for Asian Studies
One Lane Hall
Ann Arbor, MI 48109
313/665-2490

Focus on scholarly study of Asia. Maintains committee on Asian law. Eight regional organizations affiliated with AAS, including Mid-Atlantic Region Association of Asian Studies, which provides outreach support for elementary and secondary teachers (Syedur Rahman, Exec. Sec'y, MAR/AAS, Pennsylvania State Univ., Dept. of Public Admin., 203-F Burrowes Building, University Park, PA 16802, 814/865-2536).

Center for Teaching International Relations
Martha Ezzard, Director
Graduate School of International Studies
University of Denver
Denver, CO 80208
800/967-2847

Develops publications for teachers in global and area studies (Japan, Africa, Russia), human rights, etc. Distributes up-to-date international maps. Conducts model programs for teachers and students.

Close Up Foundation
44 Canal Center Plaza
Alexandria, VA 22314
800/765-3131

International relations program includes student seminars, teacher institutes, curriculum and current issues resource publications.

ERIC/Clearinghouse for Social Studies/Social Science Education
2805 E. Tenth Street
Bloomington, IN 47405
812/855-3838
FAX 812/855-0455

Comprehensive educational database covers materials on international education, global studies, history, geography, and other social studies topics.

Stanford Program on International and Cross-Cultural Education (SPICE)
Littlefield Center, Room 14
300 Lasuen Street
Stanford University
Stanford, CA 94305-5013
415/723-1114

Develops interactive, interdisciplinary teaching materials and provides teacher training on variety of international and cross-cultural topics (Africa, China, Japan, Latin America, Eastern and Western Europe).

Social Science Education Consortium
3300 Mitchell Lane, Suite 240
Boulder, CO 80301-2272
303/492-8154

Produces curriculum materials on law and multiculturalism, area cultural studies (Japan, Korea, Russia), and global studies.

National Geographic Society
Geography Education Program
17th and M Streets
Washington, DC 20036
202/775-6701

Geography Education Program produces variety of curriculum on world geography; national network of state geographic alliance coordinators.

National Clearinghouse for U.S.-Japan Studies
Social Studies Development Center/East Asian Studies Center
Indiana University
2805 East Tenth St., Suite 120
Bloomington, IN 47408-2698
812/855-3838

Operates clearinghouse of educational resources on Japanese culture and society and U.S.-Japan relations. Provides free newsletter, *SHINBUN-USA*, and also conducts workshops for teachers.

National Council for the Social Studies
3501 Newark St., NW
Washington, DC 20016
202/966-7840

Publishes *Social Education*, a monthly magazine for social studies educators, which occasionally focuses on international themes and topics.

Oceana Publications
75 Main Street
Dobbs Ferry, NY 10522
914/693-1320

Major publisher of international and foreign law documents and other resource materials, including *Constitutions of the Countries of the World*.

Middle East Outreach Council
Sandra Batmangelich, President
Center for Middle Eastern Studies
University of Chicago
Chicago, IL 60637
312/702-8298

Develops teaching resources, conducts workshops, seminars and conferences, and publishes newsletter for pre-collegiate and collegiate educators to increase public knowledge about the lands, cultures, and peoples of the Middle East.

Additional Background Readings

Arruch, K., P.W. Black & J.A. Scimecca eds. *Conflict Resolution: Cross-cultural Perspectives*, Greenwood Press, 1991.

Beer, Lawrence Ward. *Freedom of Expression in Japan: A Study in Comparative Law, Politics, and Society*, Kodansha International Ltd., 1984.

Breuer-Carias, Allan R. *Judicial Review in Comparative Law*, Cambridge University Press, 1989.

Buxbaum, Richard and Ferenc Madl, eds. *International Encyclopedia of Comparative Law*, J.C.B. Mohr, 1989.

Cappellitti, Mauro. *The Judicial Process in Comparative Perspective*, Oxford University Press, 1989.

Conley, John M. and William M. O'Barr. *Rules versus Relationships: The Ethnography of Legal Discourse*, University of Chicago Press, 1990.

Geertz, Clifford. "Local Knowledge: Fact and Law in Comparative Perspective," in *Local Knowledge: Further Essays in Interpretive Anthropology*, Basic Books, 1983.

Greenberg, Douglas, Stanley Katz and Steven Wheatley, eds. *Constitutionalism and Democracy*, Oxford University Press, 1992.

Henkin, Louis and Albert Rosenthal, eds. *Constitutionalism and Rights: the Influence of the United States Constitution Abroad*, Columbia University Press, 1990.

Howard, A.E. Dick. *Democracy's Dawn: A Directory of American Initiatives on Constitutionalism, Democracy, and the Rule of Law in Central and Eastern Europe*, University Press of Virginia, 1991.

Just, Peter. "Review Essay: History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law," *Law and Society Review*, Vol. 26, No. 2, 1992.

Modern Legal Systems Cyclopedia, William S. Hein and Co., Buffalo, New York, 1988.

Moore, Sally Falk. *Law as Process: An Anthropological Approach*, Routledge and Kegan Paul, 1978.

Nader, Laura ed. *Law in Culture and Society*, Aldine, 1969.

Nader, Laura and Harry F. Todd eds. *The Disputing Process: Law in Ten Societies*, Columbia University Press, 1978.

Post, Robert ed. *Law and the Order of Culture*, University of California Press, 1991.

Roberts, Simon. *Order and Dispute: An Introduction to Legal Anthropology*, Penguin Books, 1979.

Shklar, Judith N. *Legalism*. Cambridge: Harvard University Press, 1954.

Starr, June and Jane F. Collier eds. *History and Power in the Study of Law: New Directions in Legal Anthropology*, Cornell University Press, 1989.

Terrill, Richard J. *World Criminal Justice Systems*, Anderson, 1988.

Tushnet, Mark ed. *Comparative Constitutional Federalism: Europe and America*, Greenwood Press, 1990.

Zander, Michael. *Cases and Materials on the English Legal System*. London: Weidenfeld and Nicolson, 1980, 3rd ed.

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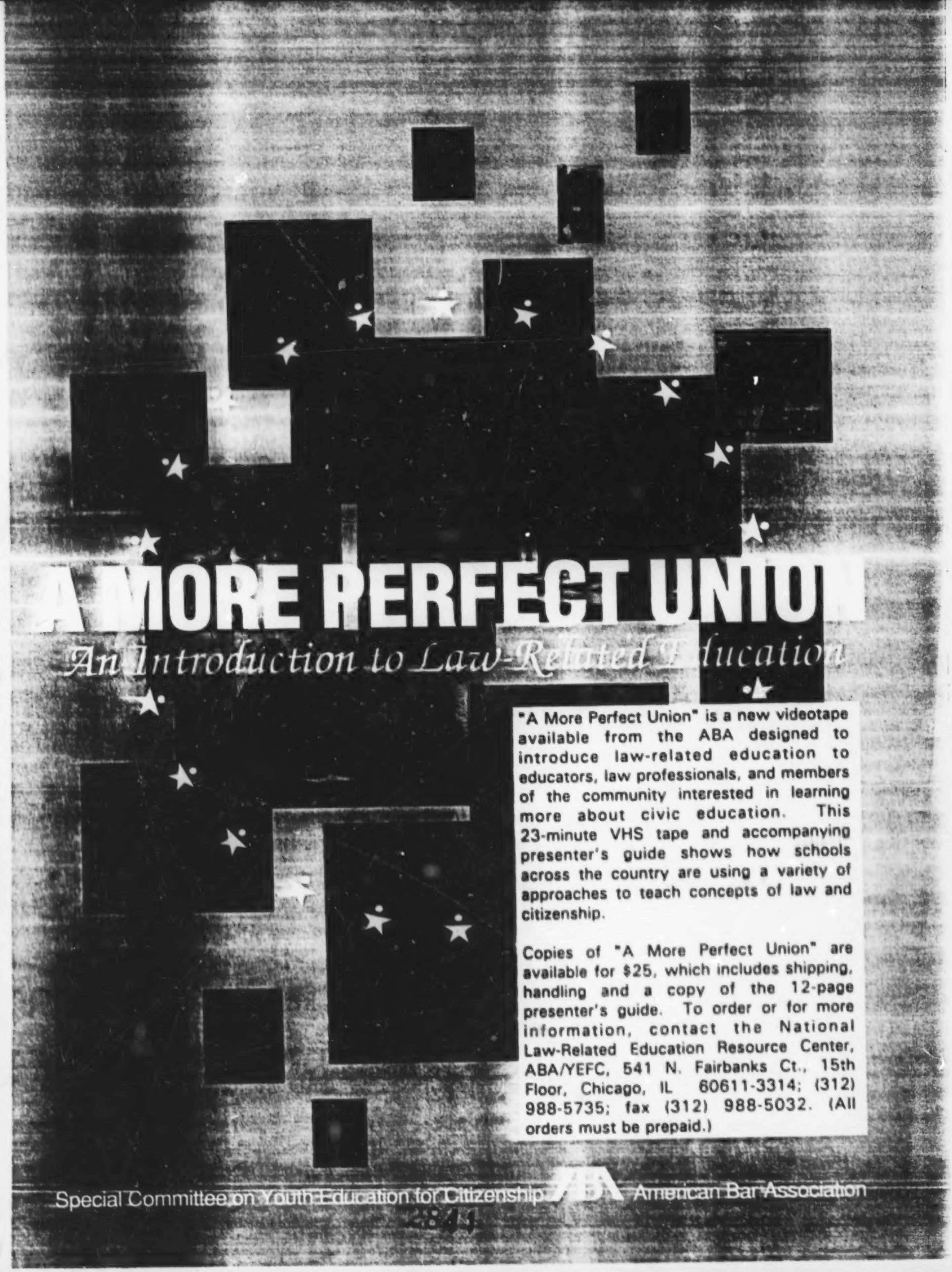

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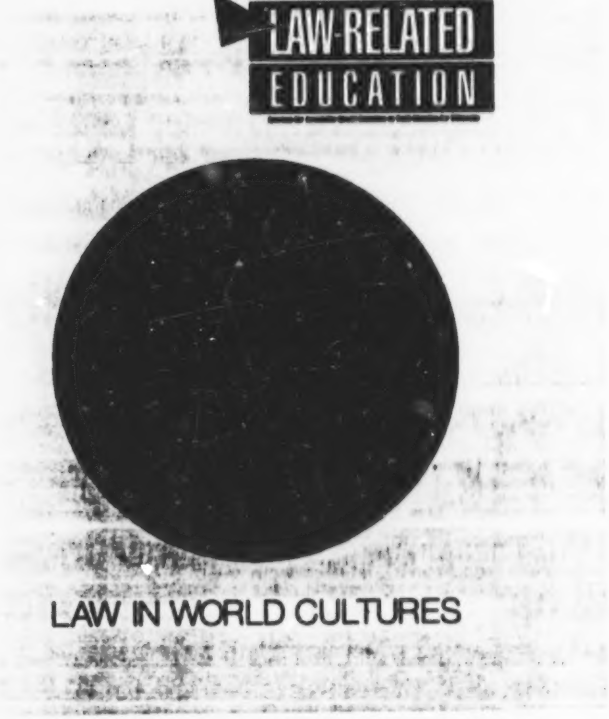

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